

JUST HOW IMPARTIAL IS NEUTRAL?

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WHY IS NEUTRALITY OF INTEREST TO YOU?

Getting to know you
Getting to know the presenters

WHAT DOES NEUTRALITY MEAN?
DOES IT MEAN IMPARTIALITY?

IDEA AND NEUTRALITY

- Mediation-34CFR300.506
- Facilitation of IEP Team Meeting
- Facilitation of Resolution Meeting-34CFR300.510

- ▶ 34CFR300.506 Mediation
 - ▶ Mediator is to be qualified and impartial-300.506(b)(1)(iii)
 - ▶ Impartial is defined 300.506(c):
 - ▶ Not an employee of SEA/ LEA
 - ▶ Not having a personal or professional interest conflicting with the mediator's objectivity.

- ▶ How does the court address neutrality?

CEATS, INC. V. CONTINENTAL AIRLINES, INC.

THE COURT DISCUSSES:

What duty does a neutral have to disclose dealings with the parties involved in the IEP team meeting, or in a facilitated Resolution session?

- ▶ Risk of injustice to the parties
- ▶ Would the risk of injustice apply in other cases
- ▶ Risk of undermining the public's confidence in the process

▶ Confidentiality is critical to the mediation process because it promotes the free flow of information that may result in the settlement of a dispute.

- ▶ Ceats, Inc.

▶ What are the implications for:
▶ Mediation, or
▶ Facilitation?

IS THERE A DIFFERENCE?

- ▶ IDEA Mediation is confidential-300.506(b)(8)
 - ▶ OSEP Q/A Memorandum Question A-9 61 IDELR 232
- A Resolution Session is not necessarily intended to be confidential
 - ▶ Question D-17 61 IDELR 232

WHAT STANDARDS OF PRACTICE SHOULD APPLY TO A SPECIAL EDUCATION NEUTRAL?

- ▶ Mediator Standards?
- ▶ Facilitator Standards?
- ▶ Court imposed Standards-CEATS?

- ▶ (A) "full disclosure of any known relationship with the parties or counsel that may give the effect or give the appearance of affecting the mediators neutrality" should be made.
 - ▶ CEATS Inc.

IS NEUTRALITY A FUNCTION OF STANDARDS OF PRACTICE OR THE PERCEPTION OF THE PARTIES?

Are Self represented parents perception of neutrality different than lawyered up school Districts might have?

DOES THE NEUTRAL'S INTEREST IN OR KNOWLEDGE OF IDEA COMPLIANCE EFFECT THE OBLIGATION OF THE NEUTRAL TO MAKE DISCLOSURES?

► Is 300.506(c)(1)(ii) problematic "*(c) Impartiality of mediator. (1) An individual who serves as a mediator under this part— (i) May not be an employee of the SEA or the LEA that is involved in the education or care of the child; and (ii) Must not have a personal or professional interest that conflicts with the person's objectivity. (2) A person who otherwise qualifies as a mediator is not an employee of an LEA or State agency described under § 300.228 solely because he or she is paid by the agency to serve as a mediator.*"

► If a mediator is to have no personal or profession interest that conflicts with a persons objectivity does making disclosures about prior dispute resolution work in district really matter?

IMPARTIALITY

- ▶ A mediator shall conduct a mediation in an impartial manner and avoid conduct that gives the appearance of partiality.
- ▶ A mediator should not act with partiality or prejudice based on any participants personal characteristics, background, values, and beliefs, or performance at a mediation or any other reason.

Model Standards of Conduct for Mediators, 2005 American Bar Association

A mediator shall disclose as soon as practicable, all actual and potential conflicts of interest that are reasonably known to the mediator and could reasonably be seen as raising a question about the mediators impartiality.

After disclosure, if all parties agree, the mediator may proceed with the mediation.

ABA Model Standards of Conduct for Mediators

A FACILITATOR CREATES AND SUSTAINS A PARTICIPATORY ENVIRONMENT BY:

- ▶ Managing group conflict.
- ▶ Help Individuals identify and review underlying assumptions,
- ▶ Recognize conflict and its role within group learning,
- ▶ Provide self environment for conflict to surface,
- ▶ Manage group disruptive behavior, and
- ▶ Support the group through resolution of conflict.

International Association of Facilitators Core Facilitator Competencies

Mediators avoid actual, potential or perceived conflicts of interest that can arise from a mediator's involvement with the subject matter of the controversy or the participants, whether past or present, that reasonably raise a question about the mediators impartial regard.

Oregon Mediation Association Core Standards of Mediation Practice 2005

How might a ADR contractor disclose prior experience in a school district?

WHAT IF THE PRIOR EXPERIENCE WAS AS A STATE COMPLAINT INVESTIGATOR?

The SEA should have sufficient interest in ensuring that mediators are seen as impartial persons so that the parties to the disputes will be willing to use mediation to resolve those disputes.

- ▶ Response to comments. Section 300.506(c)(1)(ii)
- ▶ 71 FR 46696

▶ Any effect on the process because of potential lack of confidentiality?
▶ Would a facilitated RS be different than an facilitated IEP Team Meeting?

Prior experience:
▶ 1st-name basis with staff
▶ Findings of non-compliance
▶ Multiple ADR roles in district

HOW DOES DISCLOSURE TO PARENT IMPACT NEUTRALITY?

▶ What is the detail of the disclosure?
▶ Do I indicate that I heard a due process hearing and ruled against the District?
▶ Do I indicate that I recently conducted a complaint investigation and found that the District was not compliant and ordered a corrective action plan?

How does the ADR contractor maintain neutrality?

FREQUENT ADR WORK IN A DISTRICT?

FAMILIAR WITH OTHER CONTRACTOR'S WORK IN THE SAME DISTRICT.

Districts respond differently

DISTRICT A SEES YOU AS NEUTRAL AND COMPETENT.

DISTRICT B BELIEVES YOUR KNOWLEDGE OF THEIR PRIOR NON-COMPLIANCE CREATES A BIAS.

▶ Do the parties have the opportunity to shop for the right mediator?

▶ Question A-9 61 IDELR 232

▶ 71 FR 46695

▶ Comments re 300.506(b)(3)(ii)

Parent responses

PARENT A DOES NOT SEE ANY IMPLICATION.

PARENT B DOES NOT UNDERSTAND YOUR ROLE.

PARENT C WANTS AN ADVOCATE.

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