



Mediation:

Choosing an empowering path forward.

With Mediator Josh Kershenbaum, Esq.

Senior Counsel for Alternative Dispute Resolution - The Law Offices of Jennifer J. Riley –
www.JJRLawFirm.com – (215) 283-5080 – Josh@JJRLawFirm.com

A few quick notes...

- This webinar is for information purposes only.
- Nothing in this webinar is legal advice.
- I am not your attorney. Only rely on your attorney for legal advice.



A little about me...

- **Mediator and Collaborative Attorney**
- **Trained at Harvard Mediation Program, Good Shepherd Mediation Program, and Mosten Guthrie Academy**
- **Trainer of Mediators, attorneys and other professionals nationwide**
- **Former Public School Teacher**
- **Former Special Education Attorney**
- **20+ years experience working with families in educational and legal settings**
- **Personal and professional experience with divorce and Mediation.**



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Goals

To understand **the educational and legal contexts** in which these disputes occur

To understand the most common **shared/competing interests** of parties in these disputes

To learn **practical approaches** to helping parties understand interests and alternatives

To learn how to help parties **find enduring solutions**

To understand the role of **emotions** in these disputes and how to channel them.

Educational & Legal Context

There is no fundamental/constitutional right to an education in the United States.

Children have some educational rights only because:

States choose to make it a right under their constitutions
(and once it's a right, they may not discriminate)

Congress chooses to offer some money to states for education
(and if states take it, they must follow federal law)

Congress and States have enacted some educational laws

Educational & Legal Context

In the past...

Most children had FEW educational rights,
while some had NONE
(this was very *bad*)

Today...

Most children still have FEW educational rights,
while some have a LOT
(this is very *complicated*)

Complicated is better than bad
(but it's still *not good*)

Educational & Legal Context

Our Hearts:

All children are special and have the right to achieve their potential.

Our Laws:

Certain students with **certain** needs have **certain** rights.

(and yet it's all so *uncertain*)

Educational & Legal Context

Our Hearts:
Laws protect everyone.

Our Laws:
A few laws offer some protection to
some students.

(because without these laws, some children got less than nothing)

Educational
& Legal
Context

Our Hearts:
Students have rights!

Our Laws:
Only if they are eligible!

Educational & Legal Context

Federal Laws

Individuals with Disabilities in Education Act (IDEA)

Section 504 of the Rehabilitation Act of 1973 (504)

Pennsylvania Laws:

22 Pa. Code Chapters 14 and 15

(Yes, there are others, but they don't matter much for today)

Educational & Legal Context

Who is eligible?

IDEA/Chapter 14

K-12 public school students who fit into at least one of IDEA's disability categories.

and

Require “specially designed instruction” because of it.

Section 504/Chapter 15

All public school students who are disabled per Social Security's definition.

Educational & Legal Context

IDEA/504: Very different definitions of disability

IDEA/Chapter 14

Intellectual Disability

Hearing Impairment (including deafness)

Speech or Language Impairment

Visual Impairment (including blindness),

Emotional Disturbance

Orthopedic Impairment

Autism

Traumatic Brain Injury

Other Health Impairment (includes ADD/ADHD)

Specific Learning Disability

Deaf-Blindness

Multiple Disabilities

Developmental Delay (Chapter 14)

Section 504/Chapter 15

Impairment that substantially limits a major life activity (extremely broad)

Educational & Legal Context

IDEA's All-Important "Second Prong"

"...and who, by reason thereof, needs special education and related services."

"Special Education" = "Specially Designed Instruction"

"Specially Designed Instruction"

Adapting, as **appropriate** to the needs of an eligible child, the **content, methodology, or delivery of instruction**—

- To address the **unique needs** that result from the child's disability; and
- To **ensure access** to the general curriculum, so that the child can meet the State's **general educational standards**.

Educational & Legal Context

What are they eligible for?

IDEA/Chapter 14

FAPE: Free and Appropriate Public Education

Specially Designed Instruction (SDI) in the Least Restrictive Environment (LRE)

Related Services (PT, OT, ST, Transportation, etc.)

Individualized Education Plan (IEP)

Positive Behavioral Support Plan

Protections related to suspension/expulsion/change of placement

Possible private school placements at District's expense

Section 504/Chapter 15

Equal access

Accommodations

Educational & Legal Context

IDEA/Chapter 14

FAPE: **Free and Appropriate Public Education**

34 CFR §300.17

FAPE means special education and related services that

- (a) Are provided at public expense, under public supervision and direction, and without charge;
- (b) Meet the standards of the SEA;
- (c) Include an **appropriate** preschool, elementary school, or secondary school education in the State involved; and
- (d) Are provided in conformity with an IEP

Educational & Legal Context



IDEA/Chapter 14

FAPE: **Free and Appropriate Public Education**

U.S. Supreme Court: Endrew F. (2017)

IEP must be:

“**reasonably** calculated to enable a child to make progress **appropriate** in light of the child’s circumstances.”

“Not de minimis”

Educational & Legal Context



IDEA/Chapter 14

LRE: Least Restrictive Environment 34 CFR 300.114

To the maximum extent **appropriate**, children with disabilities are educated with children who are nondisabled; and

Special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved **satisfactorily**.

Educational & Legal Context

IDEA/Chapter 14

34 CFR § 300.517 Attorneys' fees

A court may award **reasonable** attorneys' fees to the **prevailing** party.

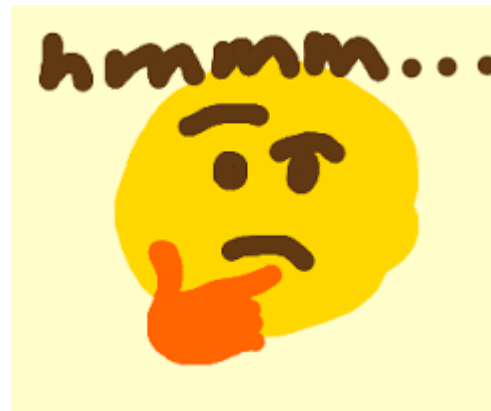


Educational & Legal Context

IDEA/Chapter 14

Timelines

Timelines for Evaluations, Reevaluations, and IEPs must be reasonable.



Educational & Legal Context



IDEA/Chapter 14 Definition of “Emotional Disturbance”

A condition exhibiting one or more of the following characteristics over a **long period of time** and to a **marked degree** that adversely affects a child’s educational performance:

An inability to learn that cannot be explained by intellectual, sensory, or health factors.

An inability to build or maintain **satisfactory** interpersonal relationships with peers and teachers.

Inappropriate types of behavior or feelings under **normal** circumstances.

A general pervasive mood of unhappiness or depression.

A tendency to develop physical symptoms or fears associated with personal or school problems.

Emotional disturbance includes schizophrenia. The term does **not** apply to children who are **socially maladjusted**, unless it is determined that they have an emotional disturbance.

Educational & Legal Context



IDEA/Chapter 14

Is the program/placement
appropriate?

It must be:

Individualized
Based on child's unique needs
Not "de minimis"

Appropriate in light of the child's circumstances

Yet, it does NOT have to:


Enable the child to maximize her/his potential

Educational
& Legal
Context



Reasonable
Appropriate
Meaningful
Satisfactory
Marked degree
Prevailing

Nothing about this is CERTAIN!



Legal Uncertainty Creates “Fault Lines”

What are Fault Lines?

Cracks in the legal framework that create opportunities for conflict/blame.

Conflicts arise where the rules are weakest.

An explosive situation

Subjective/Vague Legal Standards

High Stakes

Vulnerable Children, Frightened Parents

Underfunded Districts

High Emotions

High Stress

High Cost

Information & Power Imbalance



Swirl of Powerful Emotions

Fear

Anger

Mistrust

Frustration

Confusion/Doubt

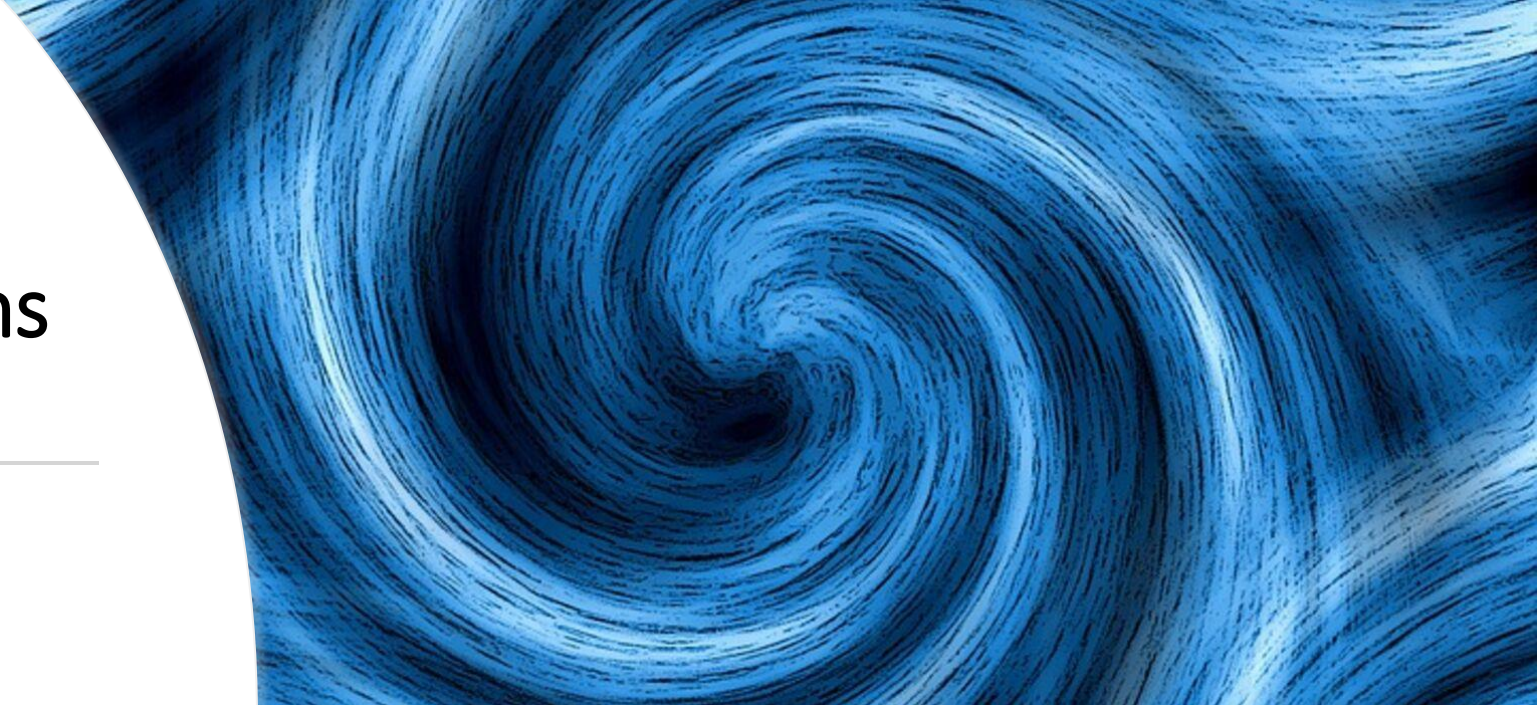
Sadness/Grief

Disappointment

Betrayal

Isolation

Hopelessness / Helplessness



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Most common disputes.

Eligibility: *Are they qualified for an IEP?*

- Do they fit into one of the 14 IDEA boxes?
- Do they require SDI as a result?
- IEP vs. 504
- Evaluation Disputes (IEE?)

Program: *Is their IEP “appropriate”?*

- SDI and Related Services
- Goals
- Progress
- Evaluation Disputes (IEE?)

Placement: *Where should they go to school?*

- Continuum of placements (LRE)
 - Regular classroom (with or without aide)
 - Special classroom (part-time, full-time)
 - Approved Private School
 - Out of District
 - Residential
 - Home
- Evaluation Disputes (IEE?)



It's not a coincidence.

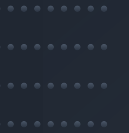
Eligibility, **Program**, and **Placement** are the three pillars of FAPE

And all three pillars are on the Fault Lines of:

What is “appropriate”

What is “reasonable”

What is “meaningful”



Parents

District



Reasonable

Appropriate⁺



Inappropriate

Unreasonable

**Not
meaningful!**

Meaningful!



FAPE ARDY!

The high-stakes game of “who knows best”?



I'll take "Appropriate" for \$800, Alex.

There are reasons for mistrust.





FAPE vs. TAPE

(They can't talk about it.)



Dispute Resolution Options

Informal meeting

IEP meeting (Facilitated or regular)

ODR Mediation (with or without lawyers)

Private Mediation (with or without lawyers)

Evaluative Conciliation Conference (ECC)

Due Process Hearing



Due Process Hearings are VERY...

Expensive

Public

Risky/Uncertain

Tedious

Inefficient

Traumatic

Damaging to relationships

Subject to appeal

Limited to only a few “remedies”

Zero-Sum



Mediation Spans the Fault Lines

Take control of uncertainty
Far fewer constraints on options
Confidentiality promotes openness
Preserve ongoing relationships



Mediation is a voluntary, collaborative, confidential process by which people who are in conflict resolve their disputes peacefully, with help from a skillful, neutral, conflict resolution professional.

The Four Pillars of Mediation



Voluntary
Confidential
Party-Driven
Mediator Neutrality

Your Mediation is Voluntary





Your Mediation is
Confidential



**What happens in Mediation, stays in
Mediation
Inadmissible in court
Your Mediator cannot testify**

Your Mediator is Neutral



By Frits Ahlefeldt



BOTH
Parties
Drive the
Process

Parties take control of uncertainty by focusing on specific interests, not vague terms.

What is
“appropriate”?

What are your
interests and
alternatives?



Parties take control of uncertainty by being the decision maker.

Step right up
and try your
luck!



Thanks. We
got this!



Confidentiality makes it safer to talk.



Far Fewer Constraints on Options



- Compensatory Education
- Tuition Reimbursement
- Eligibility for IEP

(Fun fact: Hearing Officers don't award legal fees!)



- **Almost anything!**

Build bridges instead of burning them.



**“If there is magic in mediation, it’s
in the artful alchemy of separating
interests from positions.”**

- Me

“The most effective mediators are more than just masters of this art; they are skillful teachers of the parties, who are the real artists of their agreements.”

- Me



What are Positions?



Positions are
binary.

They invite
“Yes” or “No.”

(Mostly “No!”)



Positions are limiting.

There is only one way
to satisfy them.



Positions are **clues**,
masquerading as
requirements.

(Let them **guide**, but not **drive**.)

Positional bargaining ...

inefficient



produces
**unwise
agreements**

**damages
relationships**



The problem:

Without help, most fight for their **positions**.



The promise:

With help, everyone can meet their **interests**.

Positional bargaining





What are interests?



Interests

WHY

positions

Positions →

Interests →



Positions = Wants

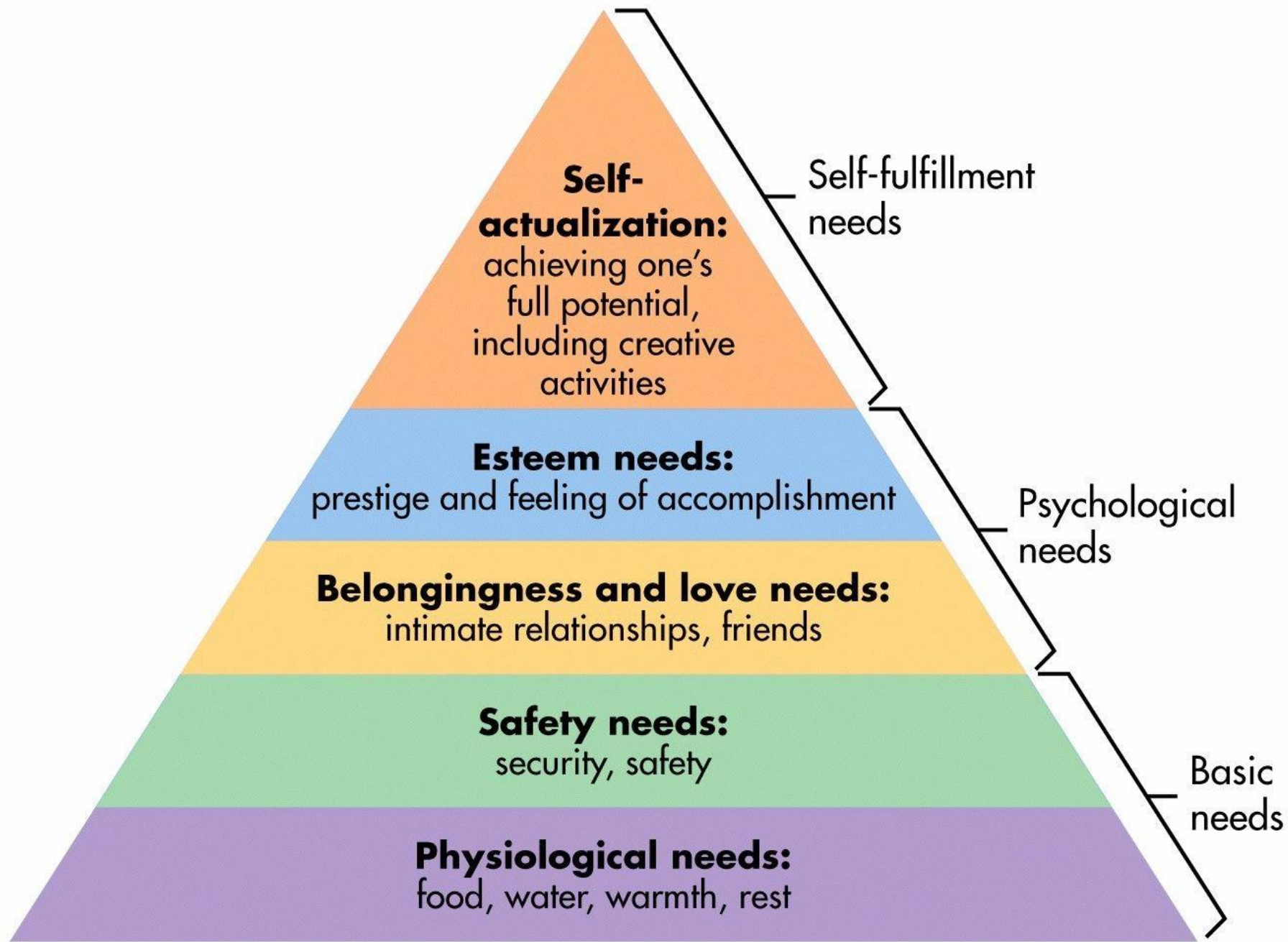
Interests = Needs



**“Interests
motivate people;
they are the silent
movers behind the
hubbub of
positions.”**

**“Your position is something
you have decided upon.
Your interests are what
caused you to so decide.”***

***Getting to Yes, p. 41**



Interests are...



NOT NEGOTIABLE

Nobody will ever (freely) sacrifice a true interest.



Interests
can be met
in many
ways.



Interests are
springboards
to
possibilities.

Let's Play!
"Interest
or
Position?"



People create
resolutions with
possibilities, not
compromises.



Myth:

What matters most
is compromise.

Fact:

Nobody
compromises on
what matters most.

The Mediator's challenge:

Teach people
what interests are
without telling people
what their interests are.





**How do we
do it?**

**We use our
Superpower!**



Curiosity!

Teach/Lead by example.



Ask “Why?”



And keep asking until “why” stops makes sense.

Ask:

**“What’s so
important about
this to you?”**



Ask:
**“What are
your concerns
about this?”**

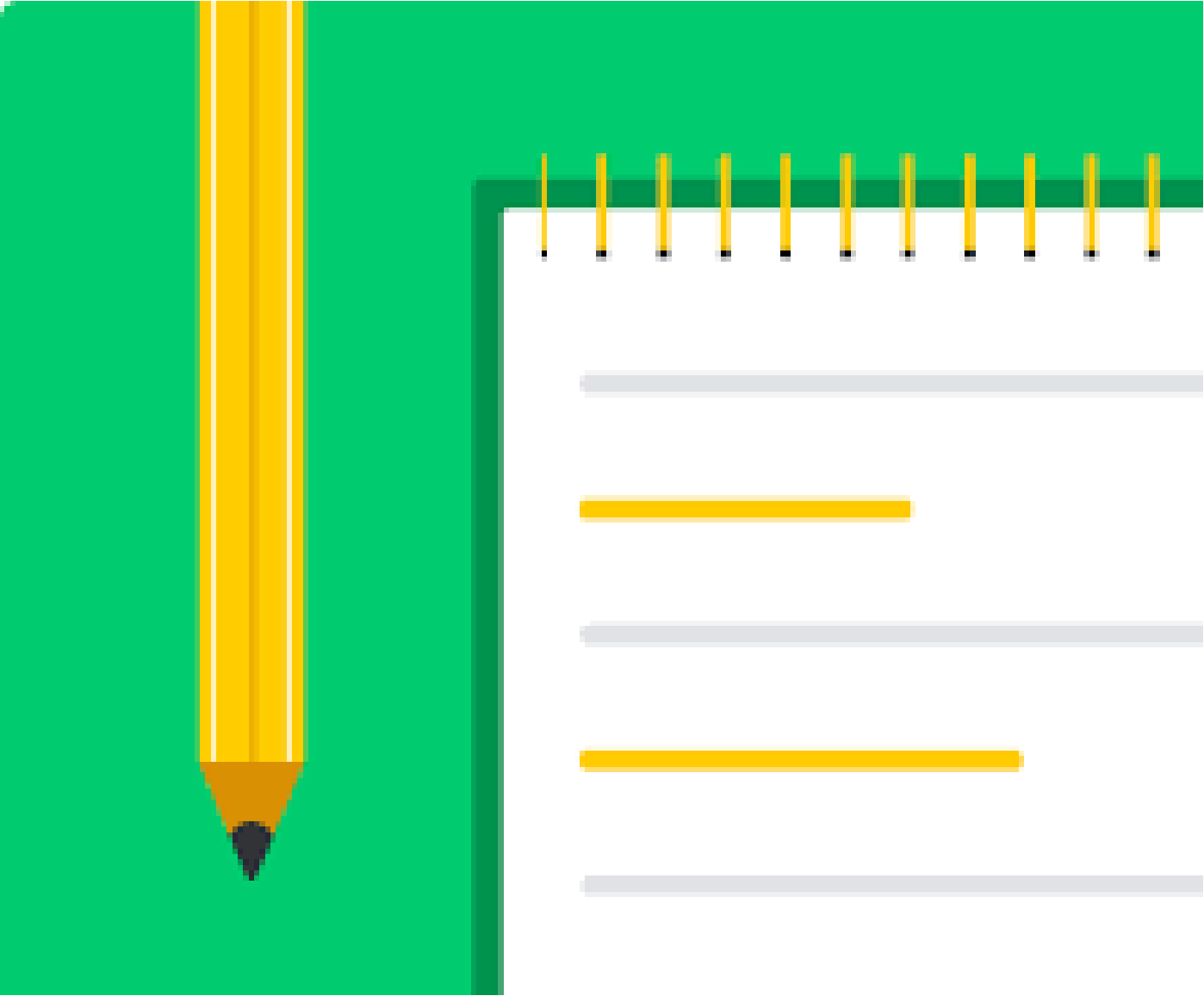


Then...

**Write them
down.**



Revise freely.



Redirect/Focus on their interests



**Interests are the “checklist” for a
final agreement!**



**Make an
actual
checklist!**



Include the
interests in the
agreement.

A “good” agreement



is one that
meets
everyone’s
interests.

Competing and Shared Interests

(in no particular order)



Parents

- Child's education
- Child's safety
- Harmony at home
- Family financial security
- Respect
- Relationship with school
- Fairness

Legal fees?

LEA

- Child's education
- Child's safety
- Needs of staff
- Needs of other students
- Budget/Financial
- Precedent
- Legal compliance
- Relationship with Child/Parents
- Respect



Options!

- Changes to IEP
- Reevaluation (District or IEE)
- Change of placement
- Compensatory education fund
- Outside consultant
- Parent-LEA communication plan
- Tolling agreement
- In-lieu-of-FAPE (private school placement)
- Waiver/Release
- Confidentiality
- Apology
- Meeting Facilitation
- Interim Agreement

The Incredible Power of Interim Agreements



Tolling Agreement: Pause the clock on the Statute of Limitations.

Interim Waiver/Partial Release: Agreement not to sue for a type of damage or about certain facts.

Agreement to adjust timelines: Parents consent to give District more time.

Dismissal without prejudice: Complaint is withdrawn but may be refiled.

Referee Agreement: Agreement to use third-party evaluator or consultant.

Stay-Put: Agreement to freeze the placement for a period of time, without prejudice to either party.

Mediation vs. Litigation

Mediation is...

Cost-Effective

Efficient

Confidential

Risk-Free

Party-Driven

Win-Win

Litigation is...

Expensive

Inefficient

Public

Risky

Court-Driven

Zero-Sum (often
Lose-Lose)

Working with consulting attorneys



**Your Mediator is NOT your attorney.
Your Mediator CANNOT give you
legal advice.**

You WILL have legal questions.

**You should both consult with
attorneys during your Mediation.**

**Find attorneys who will respect your
Mediation process.**



Summary

Get educated.

Identify “Fault Lines.”

Leverage the power of mediation.

Allow **openness**

Focus on **interests**

Value **control over uncertainty**

Options, options, options!

Be creative!

Consider **interim agreements**

Recognize and honor emotions.

Discussion Time!



How I can help.

Mediation - Consulting Services - Meeting Facilitation
Collaborative Law Matters - Continuing Education

Josh Kershenbaum

josh@jjrlawfirm.com

(215) 283-5080