

COUNCIL FOR EDUCATION POLICY RESEARCH AND IMPROVEMENT

**University Contracts
Mediation/Renegotiation/Cancellation**

At CEPRI's August meeting, staff was directed to give the Council suggestions related to mediation at the September 10 meeting. In addition, subsequent to the August meeting, university representatives suggested combining mediation, renegotiation, and cancellation.

The American Arbitration Association has provided the following questions and answers to define and explain mediation¹:

What is mediation?

Mediation is a process whereby a neutral person, the mediator, assists the parties in reaching a mutually acceptable resolution to their dispute. The mediator does not have the authority to make a binding decision, unlike arbitration, where the arbitrator renders a decision that is final and binding.

Why use mediation if we have already negotiated and were unable to settle?

A mediator can bring a new perspective to the proceedings. Through the mediator's own knowledge of the subject matter, he or she can assist parties in exploring alternatives that they might not have previously considered.

What are some of the advantages of mediation?

- Parties are directly engaged in the negotiation of the settlement.
- The mediator, as a neutral third party, can view the dispute objectively and can assist the parties in exploring alternatives which they might not have considered on their own.
- As mediation can be scheduled at an early stage in the dispute, a settlement can be reached much more quickly than in litigation.
- Parties generally save money through reduced legal costs and less staff time.
- Mediators have been carefully chosen for their knowledge and experience. Attorneys and nonattorneys from many professions, all of whom have received extensive training, serve on the AAA's roster of mediators.
- Parties enhance the likelihood of continuing their business relationship
- Creative solutions or accommodations to special needs of the parties can become a part of the settlement.
- Information disclosed at a mediation may not be divulged as evidence in any arbitral, judicial or other proceeding.

¹ American Arbitration Association, "AAA Mediation Questions and Answers," <http://www.adr.org>, August 29, 2003.

COUNCIL FOR EDUCATION POLICY RESEARCH AND IMPROVEMENT

**University Contracts
Mediation/Renegotiation/Cancellation**

Options for Consideration:

1. The contract could require the parties to use the mediation services provided by the American Arbitration Association (AAA), or a similar organization, if internal discussions were unsuccessful. There is a cost associated with this type arrangement. AAA provided the following explanation of expenses involved in the use of its mediation services:²

The nonrefundable case set-up fee is \$325 per party. In addition, the parties are responsible for compensating the mediator at his or her published rate, for conference and study time (hourly or per diem).

All expenses are generally borne equally by the parties. The parties may adjust this arrangement by agreement.

Before the commencement of the mediation, the AAA shall estimate anticipated total expenses. Each party shall pay its portion of that amount as per the agreed upon arrangement. When the mediation has terminated, the AAA shall render an accounting and return any unexpended balance to the parties.

The advantage of using AAA is that it has a set of rules already established for mediation and its mediators would be impartial.

2. What happens, though, if no mediation agreement can be reached? In that case, the options would be:

a. If mediation is tried, but no agreement can be reached, the contract could be cancelled or renegotiated:

Cancellation: If it were to be cancelled, rather than renegotiated, the contract would need to specify whether the cancellation would be effective immediately or at the end of the fiscal year. There would also need to be an understanding of what would happen when it's cancelled – would the university be able to continue charging the fees it was able to charge with the tuition flexibility given to them in the contract? Would they lose the ability to increase fees? What alternative funding methodology would the Board of Governors use for requesting funds for the university? Would performance expectations change?

Renegotiation: If the contract is renegotiated, when would the changes go into effect – immediately or at the beginning of the next fiscal year?

² Ibid.

COUNCIL FOR EDUCATION POLICY RESEARCH AND IMPROVEMENT

**University Contracts
Mediation/Renegotiation/Cancellation**

3. What if one party wants to renegotiate, rather than mediate? Counsel to the Office of Legislative Services has indicated that there is no need to mention renegotiation in the contract – the ability to renegotiate is inherent in any contract.

STAFF RECOMMENDATION: Either party should be able to: (1) Request mediation; (2) Request renegotiation; (3) Cancel the contract. The Board of Governors, with input from all eleven universities, should develop procedures for all three actions. These procedures would be incorporated by reference in all contracts.