

A stylized map of New York State in shades of green, positioned behind the main title text.

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Developing a path to employment for New Yorkers with disabilities

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Medicaid Infrastructure Grant (MIG) Brief

Assessing the Effectiveness of New York
State Mediation Programs for People with
Disabilities:

Recommendations for Improvements

March 2011

Prepared by the Legal Research Team of the Burton
Blatt Institute at Syracuse University[♦]



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Cornell University
ILR School
Employment and Disability Institute

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Assessing the Effectiveness of New York State Mediation Programs for People with Disabilities: Recommendations for Improvements

Introduction	1
I. Overview of Mediation in New York State	2
A. Mediation Service Providers	3
B. Mediator Licensing and Training	4
C. Court Appointed and Court Ordered Mediation.....	5
II. Analysis of Key New York Mediation Practices.....	6
A. Vocational and Educational Services For Individuals With Disabilities.....	6
B. Mediation In State Employment	13
C. The New York State Human Rights Law	15
III. Alternate Models and Practices	20
A. Key bridge Foundation.....	20
B. Equal Employment Opportunity Commission.....	21
C. Worker’s Compensation	23
D. Models in Other States.....	24
IV. Challenges and Opportunities	26
A. Mediator Qualifications and Conduct.....	26
B. Recommendations	28
Conclusion	30

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Introduction

Mediation is a cooperative settlement process of dispute resolution in which a neutral third party assists in making practical, legally guided decisions to resolve differences between parties in order to reach a mutually agreeable resolution.¹ It is a form of Alternative Dispute Resolution (ADR), a collection of processes used to resolve disputes informally and confidentially.² ADR generally is a way to resolve issues without the litigation process, and most of the time it is a voluntary process.³ However, sometimes parties commit in advance to ADR before they encounter a problem (as in a contractual dispute resolution clause) and are then obligated to go through the process.⁴ Potential benefits of mediation include faster results and lower cost than litigation, and greater emphasis on mutually agreeable and self-directed solutions.⁵

The impartial mediator has no decision-making authority; his or her goal is to facilitate communication between individual parties so that they can settle the dispute themselves. Participation in mediation does not constitute an admission of any violation of the law and it can often resolve the dispute more quickly and inexpensively than investigation or litigation.⁶

New York State (NYS) agencies at the Department level frequently use mediation with the general public. For example, the NYS Department of Education uses mediation for special education disputes.⁷ Every individual resident of the state of New York can use mediation to settle disputes through a Community Dispute Resolution Center (CDRC).

¹ Central N.Y. Mediation Services, Mediation and Conflict Resolution FAQ in Central NY, <http://www.cnymediation.com/mediation-FAQ.htm> (last visited Dec. 2, 2010).

² Ctr. for Disease Control, What Is ADR?, <http://www.cdc.gov/od/adr/about.htm> (last visited Dec. 2, 2010).

³ *Id.*

⁴ The Corporate Partnering Internship, Mediation and Arbitration, <http://www.corporate-partnering.com/adr.htm> (last visited Dec. 2, 2010).

⁵ Equal Emp. Opportunity Comm. et al., *Questions and Answers for Parties to Mediation: Mediation and the Americans with Disabilities Act* (Mar. 2006), available at <http://www.eeoc.gov/eeoc/mediation/ada-parties.cfm> (last visited Feb. 2, 2011).

⁶ *Id.*

⁷ VESID, Special Education Mediation: Real Solutions Where Everyone Wins (2001), available at <http://www.p12.nysed.gov/specialed/publications/policy/mediationbook.htm> (last visited Feb. 2, 2011)

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2 New York Makes Work Pay

Mediation specific to disability can be beneficial for the reasons mediation is generally beneficial, such as reduced time and cost involved in resolution. In addition, the ability to tailor the outcome to meet the individual needs of the parties is particularly useful in disability-related cases. However, it can also be more or less effective or appropriate depending on whether it is adequately tailored to the needs and context of people with disabilities. In constructing this analysis, we first propose that an effective disability mediation program will involve mediators: a) with comprehensive training in mediation strategies generally, and disability issues specifically; b) possessing sensitivity to imbalances in power between people with and without disabilities; c) having experience with disability issues; and d) having tangible success in providing dispute resolution to people with disabilities, based on rates of utilization, mutually agreeable or equitable outcomes, and expressed consumer satisfaction. The ensuing discussion will review models in New York State, with attention to where existing programs and procedures do or do not conform to these goals.

This paper reviews and analyzes the primary mediation resources that affect or serve individuals with disabilities in New York State, with an emphasis on employment issues. Part I provides a general overview of mediation programs relevant to the State of New York. Part II analyses the prime three areas mediation is utilized in New York, that is, by the vocational rehabilitation system, by state agencies and their employees, and under the New York State Human Rights Law. In Part III we present alternate models for consideration as may benefit New York State. Part IV discusses the challenges and opportunities for improving mediation services in the context of disability and employment for New York State including recommendations for more effective and widely available mediation services.

I. Overview of Mediation in New York State

The ultimate goal of mediation is to reach a solution that is satisfactory to both parties. The mediation process commonly involves six phases (or steps) in order to reach such a solution. These are: 1) introductory remarks, 2) statement of the problem by parties, 3) information gathering, 4) problem identification, 5) bargaining and generating options, and 6) reaching an

agreement.⁸ During the introductory phase, meetings take place in a controlled setting so neither party is threatened.⁹ The mediator sets the ground rules so that meetings run smoothly and to ensure that parties do not interrupt one another.¹⁰ In the second phase, the mediator asks the parties open-ended questions to understand emotions behind the dispute.¹¹ In the third phase, the mediator attempts to find common goals between parties, or issues that can be settled first.¹² In the bargaining phase, many mediators use a caucus in which each party can voice goals or underlying fears; this also may be accomplished in private confidential meetings.¹³ Mediation can more rapidly produce a settlement to the dispute, which often is more cost effective and satisfactory to the parties.¹⁴ Furthermore, it can improve the relationship between the parties and generally results in a higher compliance and implementation rate because the agreement is more narrowly tailored to the needs of the parties.¹⁵

A. Mediation Service Providers

Mediation services in New York often are provided by Community Dispute Resolution Centers (CDRCs) located in every county throughout the state.¹⁶ CDRCs are independent, non-profit organizations funded by the Community Dispute Resolution Centers Program under the New York State Unified Court System Office of Alternative Dispute Resolution and Court Improvement Programs (ADRCIP).¹⁷ In the 2008-2009 fiscal year CDRCs were funded 39% by local revenue and 61% by the Unified Court System.¹⁸ The federal government contributed \$78,395.¹⁹ CDRCs provide mediation and ADR services to various agencies including the New York State Department of Health, the New York State Division of Housing and Community

⁸ Jessica S. Stepp, *How Does the Mediation Process Work?*, Feb. 2003, <http://www.mediate.com/articles/steppJ.cfm>.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ James Wall, John Stark, & Rhetta Standifer, *Mediation: A Current Review and Theory Development* 45 J. CONFLICT RESOLUTION 370, 381 (2001).

¹⁵ *Id.* at 381-82.

¹⁶ N.Y. State Unified Court Sys. Cmty. Dispute Resolution Ctrs. Program Annual Report 2008-2009, at 4 (2009), available at http://www.courts.state.ny.us/ip/adr/Publications/Annual_Reports/AR08-09.pdf.

¹⁷ *Id.*

¹⁸ *Id.* at 29.

¹⁹ *Id.* at 28.

4 New York Makes Work Pay

Renewal, the New York State Board of Elections, and the New York State Attorney General's Office.²⁰

The ADRCIP selects organizations that will provide CDRC services every five years based upon an organization's resources, quality and range of mediation services, diversity of mediators, and ability to educate the public and establish a diverse and consistent base of referral agencies.²¹ One issue not explicitly addressed by ADRCIP in regard to its goal that mediators reflect both cultural diversity and the demographics represented by their communities²² is whether the diversity goal includes individuals with disabilities. Mediation is provided by trained mediators at local CDRCs. The New York State Dispute Resolution Association (NYSdra), an independent and nonprofit organization, also conducts mediation for disputes in various fields, including special education and early intervention services for children with disabilities. In both cases, mediation is voluntary and free to parents; if they are dissatisfied with the outcome they can move on to an impartial hearing as designated by law in their due process rights. Mediators come from local CDRCs.

B. Mediator Licensing and Training

There are no state regulations or licensing requirements for mediation professionals,²³ although numerous private organizations offer training programs. New York has a large network of mediator organizations that provide forums for discussion, training opportunities and some voluntary accreditation systems. These organizations include NYSDRA, the New York State Council on Divorce Mediation, the Safe Horizon Training Institute, and the Greater New York Chapter of the Association for Conflict Resolution among others.²⁴

At CDRCs, mediators complete training programs consisting of 30 hours of initial training and an apprenticeship, and must satisfy specific caseload and professional development

²⁰ NYSDRA, Consumer Programs, <http://www.nysdra.org/consumer/consumer.aspx> (last visited Feb. 2, 2011).

²¹ N.Y. State Unified Court Sys. Cmty. Dispute Resolution Ctrs. Program Annual Report 2008-2009, *supra* note 16, at 30-31.

²² N.Y. State Unified Court Sys. Cmty. Dispute Resolution Ctrs. Program Annual Report 2008-2009, *supra* note 16, at 15.

²³ Mediation Training Inst., State Requirements for Mediators, <http://www.mediationworks.com/medcert3/staterequirements.htm> (last visited Dec. 2, 2010).

²⁴ N.Y. City Bar Ass'n Comm. on ADR, Report on Mediator Quality (2006), available at <http://www.nycbar.org/pdf/report/Mediator%20Quality%20Report%20Final%20%20June%2027.pdf>.

requirements in order to maintain their certification status.²⁵ Mediators are generally local volunteers. The ADRCIP has a goal that mediators reflect both cultural diversity and the demographics represented by their respective communities.²⁶

NYSDRA certification requires no formal education degree and 40 hours training of which a minimum of 12 will be interactive exercises and supervised mediation role-plays. Certification is valid for a three-year period from the date on which it is conferred. To maintain certification, mediators must provide (1) evidence of continuing professional education in accordance with current continuing education requirements, (2) evidence of twelve mediations conducted within the three-year certification period (at least three mediations conducted within the last year), and (3) a self reflective response to the results from the Voluntary Consumer Quality Surveys completed by clients throughout the three-year certification period.²⁷ Besides NYSDRA and other similar private organizations, training in mediation is available through community mediation programs and continuing education programs at colleges and universities.

C. Court Appointed and Court Ordered Mediation

Mediators are brought into disputes both before disputes have escalated to the level of litigation and when appointed by a judge. New York requires training for court-associated mediators, and many private mediators specialize in certain dispute resolution topics, such as divorce or family law.²⁸ In July 2008 New York established statewide guidelines for the qualifications and training of mediators on court rosters.²⁹ The guidelines for court-appointed mediators require at least 24 hours of training in basic mediation skills and at least 16 hours of additional training in specific mediation techniques in the types of cases referred to

25 N.Y. State Unified Court Sys. Cmty. Dispute Resolution Ctrs. Program Annual Report 2008-2009, *supra* note 16, at 20.

26 *Id.* at 15.

27 Kenneth Handin et al., New York State Dispute Resolution Association, Inc. Mediator Certification Program (Draft March 2004), available at http://www.nysdra.org/events/certification/cert_draft.pdf.

28 See Cmty. Disputes Resolution Ctrs. Program, New York State United Court System, *available at* <http://www.courts.state.ny.us/ip/adr/Publications/Brochures/cdrp.pdf>; *see also* <http://www.mediate.com/NewYork/> (providing a directory of private mediators with each attorney's specialization and certifications),

29 Joel Stashenko, *Court Establishes First Statewide Guidelines for Mediators, Neutral Evaluators* New York Law Journal (Jul. 24, 2008), *available at* <http://www.law.com/jsp/article.jsp?id=1202423217617>.

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them.³⁰ Mediators on these rosters are often lawyers, and although nothing in the New York State rules exempts non-attorneys from acting as mediators, the guidelines also require continuing legal education of at least six hours every two years.³¹ Mediators often become specialists in particular areas such as family mediation, ADA mediation or managing workplace conflict.³² Some areas of specialization require advanced certification programs that are different from the basic mediation training or years of expertise.

II. Analysis of Key New York Mediation Practices

CDRCs handled 21,436 mediation cases in New York in the 2008-2009 fiscal year.³³ According to data collected by New York State Unified Court System's Office of Internal Audit, the cost for each case "conciliated, mediated or arbitrated" was \$433.00 and the cost per individual served was \$90.00.³⁴ Seventy-six (76%) percent of these cases resulted in an agreement or final decision.³⁵ The low cost and high success rate highlight two complementary benefits of mediation in dispute resolution: economy and effectiveness. Despite these benefits, mediation appears to be underutilized in New York's disability-related systems.

A. Vocational and Educational Services For Individuals With Disabilities

The Vocational and Educational Services for Individuals with Disabilities (VESID) mediation process endeavors to resolve disputes arising when an applicant for or recipient of VESID services wishes to appeal a decision that affects the provision of services. VESID was established by the New York State Board of Regents as a component of the University of the State of New York, an entity broadly comprising institutions, organizations, and agencies offering various public and private services.³⁶ VESID services encompass assisting students in

³⁰ *Id.*

³¹ *Id.*

³² Melissa Broderick et. al, *ADA Mediation Guidelines*, CARDOZO J. CONFLICT RESOL., (2000) , available at <http://www.cardozojcr.com/ada.html>; see also ADA Mediation Articles, <http://www.mediate.com/adamediation/> (last visited Jan. 14, 2011); Equal Emp. Opportunity Comm., Questions and Answers for Parties to Mediation, *supra* note 5.

³³ N.Y. State Unified Court Sys. Cmty. Dispute Resolution Ctrs. Program Statistical Supplement 2008-2009, at 19 (2009), available at http://www.courts.state.ny.us/ip/adr/Publications/Statistical_Supplement/SS08-09.pdf.

³⁴ N.Y. State Unified Court Sys. Cmty. Dispute Resolution Ctrs. Program Annual Report 2008-2009, *supra* note 16, at 30-31.

³⁵ *Id.*

³⁶ N.Y. State Educ. Dep't Bd. of Regents, <http://www.regents.nysed.gov/> (last visited Feb. 2, 2011).

transitioning to adult services, and providing vocational rehabilitation, independent living and employment services to individuals with disabilities.³⁷ The mediation process is offered as an option when an individual wishes to appeal a VESID decision such as a denial of services or a finding that a previously eligible individual is no longer eligible to receive VESID services.³⁸ It is a voluntary process and does not preclude the individual from pursuing other forms of relief or resolution if the outcome is not favorable to the individual.³⁹

1. Legal Authority for VESID Mediation

The Rehabilitation Act of 1973 governs VESID services. The Rehabilitation Act requires that each state create mediation and impartial hearings procedures for review of vocational rehabilitation agency decisions that affect applicants and eligible individuals.⁴⁰ It outlines notification, timing, and evidence rights elaborated in the Rehabilitation Act Amendments of 1998, amending regulations governing State Vocational Rehabilitation Services Programs.⁴¹

The Rehabilitation Act requires state agencies to provide a timely review of any decision regarding an applicant or eligible individual's receipt or denial of services if the individual is dissatisfied with the decision.⁴² VESID must provide notification of the right to obtain review of determinations, the right to pursue mediation, and the availability of the client assistance program.⁴³ Additionally, the Rehabilitation Act includes a timing requirement, and a provision that procedures under this section must afford eligible individuals or their representatives an opportunity to present evidence during mediation and impartial hearings, and to be represented by counsel or an advocate selected by the eligible individual.⁴⁴ Finally, the Rehabilitation Act requires that mediation procedures ensure participation is voluntary, that the use of mediation does not impede or delay resolution of the dispute by other means, and

³⁷ N.Y. State Educ. Dep't, Vocational Rehabilitation, <http://www.vesid.nysed.gov/> (last visited Feb. 2, 2011).

³⁸ VESID: Rights and Responsibilities-Expectations, <http://www.acces.nysed.gov/vr/do/expectations.htm> (last visited Feb. 2, 2011).

³⁹ *Id.*

⁴⁰ Rehabilitation Act §102(c), 29 U.S.C. § 722 (2006).

⁴¹ *Id.*; 34 C.F.R. § 361.57 (2009) (Amending regulations governing State Vocational Rehabilitation Services Program in accordance with Rehabilitation Act Amendments of 1998).

⁴² 34 C.F.R. § 361.57(a) .

⁴³ *Id.* § 361.57(b).

⁴⁴ *Id.*

8 New York Makes Work Pay

that either party can terminate the mediation at any point in the process and may proceed with an impartial hearing.⁴⁵

New York State Regulation §247.2 sets forth the requirements for VESID mediations.⁴⁶ They do not differ substantially from the federal requirements.⁴⁷ The regulation does require that the mediator be trained in mediation and also be knowledgeable in the laws of vocational rehabilitation.⁴⁸

2. Funding and Costs of VESID Mediation

Mediation provided by VESID is paid for by the New York State Education Department.⁴⁹ Federal regulations provide that mediation costs associated with a vocational rehabilitation program are included in the program's administrative costs.⁵⁰ The state must pay the costs of the mediation process, at no cost to the participant,⁵¹ although the state has no obligation to pay for representation if the eligible individual elects to employ counsel or an advocate.⁵²

3. The VESID Mediation Process

VESID's Due Process procedures exist as guidelines for staff members and do not establish "procedural or substantive rights for any individual or group."⁵³ The policies and procedures are available to the public and posted online as a resource along with memos and relevant documents.⁵⁴ The procedure section (105.00P) contains pertinent information relating to the mediation process. For example, VESID's Due Process Procedure provides that a written request for mediation should be treated as a formal request for a hearing and that the

⁴⁵ *Id.* § 361.57(d)(2).

⁴⁶ VESID: Regulation §247, (2003), *available at* http://www.vesid.nysed.gov/current_provider_information/vocational_rehabilitation/NYS_regulations/part_247.htm#administrative_review_mediation_and_impartial_hearing.

⁴⁷ 34 C.F.R. § 361.57.

⁴⁸ VESID: Regulation §247.3, *available at* http://www.vesid.nysed.gov/current_provider_information/vocational_rehabilitation/NYS_regulations/part_247.htm#administrative_review_and_mediation (2003).

⁴⁹ NYS DRA, Vocational Rehabilitation, <http://www.nysdra.org/consumer/vocational.aspx> (last visited Feb. 2, 2011).

⁵⁰ 34 C.F.R. § 361.5(b)(2)(xiii) (2009).

⁵¹ NYS DRA, Vocational Rehabilitation, *supra* note 49.

⁵² 34 C.F.R. § 361.57(d)(5).

⁵³ *Id.*

⁵⁴ VESID, Policies and Procedures Manual, *available at* http://www.vesid.nysed.gov/current_provider_information/vocational_rehabilitation/policies_procedures/000_index.htm (last visited Sept. 13, 2010).

hearing must be scheduled within sixty days of the receipt of the request unless the individual specifically requests that the hearing be delayed until after the mediation.⁵⁵ VESID is required to present mediation as an option “at all points of dispute.”⁵⁶

VESID’s Due Process Policy (105.00) provides applicants and eligible individuals with the opportunity for a review of any dissatisfactory decision regarding services by either Administrative Review, Mediation, Impartial Hearing, or a combination thereof.⁵⁷ The stated goal of mediation is to reach a “mutually agreeable solution” before a formal impartial hearing.⁵⁸ VESID procedures as framed are intended to encourage and assist individuals to participate actively, advise them of their rights and procedures of each method of dispute resolution, and inform them of the Client Assistance Program (CAP) at various prescribed stages in the process.⁵⁹

CAP is a federal program authorized by the Rehabilitation Act and overseen by the United States Department of Education Rehabilitation Services Administration (RSA),⁶⁰ which provides grants to vocational rehabilitation programs nationwide.⁶¹ The purpose of the program is to advise individuals with disabilities about available services under the Americans with Disabilities Act (ADA) and the Rehabilitation Act.⁶² The New York State CAP is a federally and state funded network of advocates who provide individuals with disabilities training and services to assist them in achieving and maintaining employment goals.⁶³ The CAP program is administered by the NYS Commission on Quality of Care and is available to all VESID recipients and applicants.⁶⁴ In VESID mediation, CAP provides advocates who negotiate with VESID to

⁵⁵ VESID:105:00P Due Process Procedure, http://www.vesid.nysed.gov/current_provider_information/vocational_rehabilitation/policies_procedures/0105_due_process/procedure.htm#Mediation (last visited Sept. 13, 2010).

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ U.S. Dep’t. of Educ., Client Assistance Program, <http://www2.ed.gov/programs/rsacap/index.html> (last visited Oct. 25, 2010).

⁶¹ Office of Special Educ. & Rehab. Servs. (OSERS), Rehab. Servs. Admin. (RSA), <http://www2.ed.gov/about/offices/list/osers/rsa/index.html> (last visited Oct. 25, 2010).

⁶² U.S. Dep’t. of Educ., *supra* note 60.

⁶³ VESID: NYS Client Assistance Program (CAP), <http://www.vesid.nysed.gov/do/cap.htm> (last visited Oct. 25, 2010).

⁶⁴ *Id.*

10 New York Makes Work Pay

resolve initial complaints and assist in the mediation process.⁶⁵ If the preceding steps are unsuccessful and an individual chooses to pursue an impartial hearing or legal action, CAP may represent the individual.⁶⁶

Before requesting due process, the individual undergoes an Initial Review with a supervisory staff member, during which he or she presents his or her issue, the factors involved, and a request for the desired remedy, which the staff member decides immediately.⁶⁷ If the individual is dissatisfied with the decision, the staff member describes the options for Administrative Review, Mediation, and Informal Hearing.⁶⁸ An individual must request a due process review within 90 days of a decision or action he or she wishes to appeal.⁶⁹ Parties may present evidence supporting their positions. However, since mediation focuses on agreeable resolution rather than the “right” and “wrong” party, there is less emphasis on fact finding or weighing of evidence.⁷⁰ Rather, through a factual, legal, and policy discussion of the dispute in context, the mediator facilitates a discussion intended to result in a mutually satisfactory outcome.⁷¹

Each party must have a clear understanding of all terms of the agreement, which the mediator writes and both parties sign before the close of mediation.⁷² The agreement must be implemented within 20 days.⁷³ Parties sign a confidentiality agreement prior to the commencement of mediation and discussions in mediation may be admissible in an impartial hearing or civil proceeding.⁷⁴ Participants in any of the due process methods available are eligible for the following support services from VESID: an interpreter fluent in the individual’s dominant language or mode of communication, transportation “by the least expensive carrier necessary for an individual to attend” a mediation or hearing, and no cost to complainants for the mediation session.⁷⁵

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ VESID:105.00 Due Process Policy, *supra* note 55Error! Bookmark not defined..

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ VESID:105.00 Due Process Policy, *supra* note 55

⁷⁴ *Id.*

⁷⁵ *Id.*

4. VESID Mediation Service Providers

NYS DRA has a contract with VESID to resolve disputes arising when eligible individuals or applicants for vocational rehabilitation services wish to challenge a decision VESID has made regarding his or her application or receipt of services.⁷⁶ Mediation services are provided to VESID participants by local CDRCs throughout the state of New York.⁷⁷ In addition to the standards and requirements applicable to all mediators, VESID mediators must not be an employee of VESID or of a vocational program doing business with VESID, or “have any personal or financial interest that would conflict with his or her objectivity.”⁷⁸

5. Use and Effectiveness of VESID Mediation

As in all mediations, the primary goal of the mediator is to facilitate an agreement to which both parties are amenable by focusing on the parties’ interests rather than their desired outcomes, or resolving the disparities between the alternative outcomes by constructing an outcome that serves the underlying needs of both parties.⁷⁹ In the VESID system, this minimizes the possibility that the individual pursuing an appeal will be denied a favorable outcome because of the nature of a hearing’s strict “all or nothing” decision regarding a denial of services.

However, data suggest that the number of VESID participants formally utilizing the mediation process is small. Federal regulations require the director of each designated State unit to submit annually to RSA the number of mediations conducted with corresponding data to be included in an annual report to Congress under section 13 of the Rehabilitation Act.⁸⁰ The New York State Unified Court System *Community Dispute Resolution Centers Program Statistical Supplement* for the 2008-2009 fiscal year reports five VESID cases out of 2,312 Public Welfare and Benefit cases served by CDRCs and eleven individuals with disabilities served out of a total of 5,100 in that category.⁸¹ In addition, of the five cases, only two were

⁷⁶ NYS DRA, Vocational Rehabilitation, *supra* note 49.

⁷⁷ *Id.*

⁷⁸ VESID:105.00 Due Process Policy, *supra* note Error! Bookmark not defined.

⁷⁹ New York Practice Series - Commercial Litigation in New York State Courts, Chapter 46. Alternative Dispute Resolution. 4 N.Y.Prac., Com. Litig. in New York State Courts § 46:5 (2d ed.).

⁸⁰ 34 C.F.R. § 361.57(k) (2009).

⁸¹ N.Y. State Unified Court Sys., *supra* note 33Error! Bookmark not defined., at 11.

resolved; among the other cases one or more parties withdrew before resolution could be established.⁸²

The Annual Review Report for VESID for the fiscal year 2008 provides some information about VESID's appeal outcomes.⁸³ Of decisions made in formal reviews, only one was made in the individual's favor, a decrease of two from the previous year, while 17 were in favor of the agency, an increase of seven.⁸⁴ In contrast, mediation outcomes are not disclosed, but 15 mediation issues were numbered by type, while 79 disputes resulted in an impartial hearing request.⁸⁵ This suggests that mediation is available but is not as widely used as the alternative methods for appealing VESID decisions. It also suggests that the currently utilized methods often do not result in favorable outcomes for individuals requesting decision appeals.

One possible disincentive for pursuing mediation may lie in VESID's policy of automatically initiating an impartial hearing when an individual requests mediation. The fact that an impartial hearing will necessarily be scheduled may discourage those considering mediation from selecting it as the main means of dispute resolution. Mediation may seem unnecessary or burdensome if it is to be followed by a second means of resolution. It also assumes that the mediation will not resolve the dispute. Mediation should be treated as an entirely distinct dispute resolution choice, separate from impartial hearing. The two differ greatly in process, tone, and often in outcome. Considering the general success of mediation under CDRCs in resolving disputes, heavier usage of mediation by VESID may yield positive outcomes for individuals appealing VESID decisions, and lower costs and reduced delay for VESID.

In sum, VESID offers a mediation process for individuals to appeal VESID decisions. The policies and procedures of VESID's mediation services are governed by the Rehabilitation Act and related state regulations. Statistical data for New York agencies suggests that mediation provides economic benefits, effective and satisfactory resolutions, and timely outcomes for participants and for the state. However, data indicate that VESID does not widely use

⁸² *Id.* at 28.

⁸³ Rehab. Servs. Admin., Annual Review Report: Vocational and Educational Services for Individuals with Disabilities, tbls. 25 & 26 (2008), *available at* <http://rsa.ed.gov/view.cfm?rsaform=ARR&state=NY&fy=2008&grant=H126A080047#sec02>.

⁸⁴ *Id.*

⁸⁵ *Id.* at tbl. 26.

mediation services. Because of the general benefits of mediation, it likely will be advantageous for VESID to increase usage of mediation in resolving disputes. Improvements in VESID's policy, such as removal of the simultaneous impartial hearing initiation and the prior initial review, may result in greater usage of mediation. These alterations potentially may impact individuals appealing VESID decisions in a substantial manner and utilize less time and economic resources than a formal hearing. The overall benefits of the mediation process make exploring options to increase usage worthwhile.

B. Mediation In State Employment

Generally, state employees may submit employment discrimination complaints to the New York State Division of Human Rights, as discussed later in the section on the Human Rights Law. The New York State Public Employment Relations Board (PERB) also provides dispute resolution - though not typical mediation - for grievances and labor disputes between the state and its employees.⁸⁶ PERB conducts voluntary mediation/arbitration for grievances upon agreement of the parties to arbitrate for an administrative fee of \$50 per party.⁸⁷ "[I]n some instances, after arbitration and fact-finding have been unsuccessful, the Director may determine that additional assistance should be provided to the parties, in which case a conciliator is assigned."⁸⁸ However, PERB does not usually provide full mediation services. The combined mediation/arbitration approach generally results in a binding decision made by an arbitrator; the possibility that the outcome will not be satisfactory for an employee with a disability may be higher than with typical mediation, which requires a mutually agreed upon outcome.

Another avenue of mediation is available to the employees of an entity receiving federal financial assistance under the Workforce Investment Act (WIA).⁸⁹ The New York State Department of Labor ("NYSDOL"), authorized to enforce and implement the WIA using federal funds,⁹⁰ reviews employment discrimination claims under the act and makes voluntary

⁸⁶ N.Y. Civ. Serv. Law § 200 ("Creating a public employment relations board to assist in resolving disputes between public employees and public employers").

⁸⁷ N.Y. State Pub. Emp. Relations Bd., Voluntary Grievance Arbitration: Staff Grievance Med-Arb , <http://www.perb.state.ny.us/Vga.asp> (last visited October 27, 2010).

⁸⁸ N.Y. State Pub. Emp. Relations Bd., Impasse Procedures, <http://www.perb.state.ny.us/imp.asp> (last visited Nov. 19, 2010).

⁸⁹ 29 U.S.C. § 2938 (2006).

⁹⁰ *Id.* § 2941; N.Y. Lab. Law § 850 (McKinney 2010).

mediation available to the parties through NYSDRA.⁹¹ Persons eligible to file a complaint and receive mediation with the NYSDOL under the WIA include a broad range of beneficiaries, not exclusively state employees. However, one target population includes employees of NYSDOL.⁹²

The United States Department of Labor has published regulations that define the receipt of Title 1 WIA funds very broadly to include non-monetary assistance, such as training or support services.⁹³ For example, Title I funds are distributed through the DOL to non-profit/community organizations for training and education.⁹⁴ Other covered programs include: NYSDOL's Skills, Training, and Education Program (STEP) grants, NYSDOL's Emerging and Transitional Worker Training grants, and vocational programs teaching English as a second language, among others.⁹⁵ NYSDOL has contracted with NYSDRA to provide mediation services for employers of these programs.⁹⁶ To use this program, a complaint first must be filed with an Equal Opportunity Officer with a request for mediation.⁹⁷

Cases that qualify for mediation include those involving "disciplinary actions, appraisal/evaluations, promotion/selection, harassment complaints, performance-based actions, and reasonable accommodation."⁹⁸ After a complaint is filed, the Equal Employment Officer will refer the parties to a regional CDRC.⁹⁹ Upon consent of both parties, the mediator

⁹¹ N.Y. State Dept. of Labor, Mediate Workforce Investment Act Discrimination Complaints, *available at* <http://www.labor.state.ny.us/agencyinfo/moa/pdf/element8/NYSDOL%20Mediation%20Brochure.pdf> (last visited Sept. 23, 2010).

⁹² NYSDRA, Labor Mediation, <http://www.nysdra.org/consumer/labormediate.aspx> (last visited Feb. 2, 2011).

⁹³ 29 C.F.R. § 37.4 (2009).

⁹⁴ N.Y. State Dept of Labor, New York State Workforce Development System 2008 Annual Report 5, *available at* http://www.doleta.gov/performance/results/AnnualReports/PY2008/NY_Annual_Report_2008.pdf (last visited Sept. 23, 2010).

⁹⁵ *Id.* at 16-19.

⁹⁶ NYSDRA, Labor Mediation, *supra* note 92.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ NYSDRA, Find a CDRC, <http://www.nysdra.org/consumer/findcdrc.aspx>. ("[A] Community Dispute Resolution Center (CDRC) is a nonprofit organization that provides a variety of services, including mediation, conciliation, group facilitation, arbitration and education. These centers are located throughout New York State and offer services to all 62 counties.")

will conduct one or more mediation sessions within 60 days of the complainant's election for mediation.¹⁰⁰

C. The New York State Human Rights Law

The primary New York State statute that enables legal action for discrimination based on disability is the New York State Human Rights Law ("HRL").¹⁰¹ The statute has established the New York Division of Human Rights ("Division"), a body responsible for investigating a range of complaints involving discrimination in employment, housing, public entities and public accommodations, based on protected characteristics, including disability.¹⁰² The HRL is enforced almost exclusively by the Division - private citizens bring claims in state court less frequently than they are handled by the Division.

In regard to mediation practices, the HRL provides that "[i]f in the judgment of the division the circumstances so warrant, it may, at any time after the filing of the complaint, endeavor to eliminate such unlawful discriminatory practice by conference, conciliation and persuasion."¹⁰³ The Division does not have distinct staffing or structures devoted to mediation exclusively.¹⁰⁴ However, Division investigative and prosecutorial staff members frequently conduct conciliation at various stages of the complaint process.

Despite the lack of funding, the Division has developed a partnership over the past 10 years with the CUNY School of Law at the Division's Lower Manhattan Office.¹⁰⁵ The mediation process is voluntary and if the parties agree to it, the director of the Law School mediation clinic conducts the mediation with law clinic students acting as second chairs. The Division staff has observed that complaints that involve a failure to provide reasonable accommodations are the most amenable to mediation.¹⁰⁶ Limitations of the CUNY Clinic

¹⁰⁰ NYSDRA, Labor Mediation, *supra* note 92. See also Workforce Development System Technical Advisory #02-6, including attachments, at <http://www.labor.state.ny.us/workforcenypartners//ta/ta02-6.htm> (providing a full description of how New York handles discrimination complaints brought under the WIA published by NYSDOL).

¹⁰¹ N.Y. Exec. Law § 290(1) (McKinney 2010).

¹⁰² *Id.*

¹⁰³ N.Y. EXEC. LAW § 297(3)(a).

¹⁰⁴ Interview with John Herrion, Director of Director of Disability Rights in the New York State Division of Human Rights, (9/10/10) [hereinafter "Herrion Interview 1"].

¹⁰⁵ Interview with Jyll Townes, Deputy Commissioner for Regional Affairs in the New York State Division of Human Rights, (9/10/10) [hereinafter "Townes Interview"].

¹⁰⁶ *Id.*

include only one trained mediator on staff, and a relatively low participation rate among eligible complainants.¹⁰⁷ The mediation clinic is one model of alternative dispute resolution employed by the Division of Human Rights, but is not well resourced enough to fully meet the needs of New York state citizens.

1. Division Process

Although a formal mediation structure has not been fully implemented in the Division, the Human Rights Law does provide for conciliation,¹⁰⁸ a practice similar to mediation. A key difference between the two is that in conciliation, the conciliator will often meet with parties separately in order to attempt to secure concessions and settle the dispute. There is less emphasis on dialogue or conflict resolution directly between the parties, and the conciliator is less neutral, often playing a key role in proposing specific solutions, rather than simply mediating between the parties. Conciliation is a strategy the Division may elect to use to attempt resolution of a particular complaint.¹⁰⁹ The conciliation process may be commenced any time after a particular complaint is filed; however, it is usually undertaken after the conclusion of the investigation phase. Any agreement reached must include a promise from the employer to end the discriminatory acts at issue.¹¹⁰ Such an agreement can include separate provision(s) intended to remedy the harm caused by the discrimination.¹¹¹ The Division is required to issue a written order to the parties confirming that they must comply with the terms of the agreed upon resolution.¹¹² The Division will then investigate within one year of the written order to ensure compliance with the terms, and impose up to one year of jail time and/or a \$500 fine to enforce them.¹¹³ A hearing usually is conducted at the Division offices after unsuccessful conciliation or if conciliation has not been attempted. The Division may opt to dismiss a complaint on the basis of “administrative inconvenience,” meaning that for any reason, the case would be particularly difficult for the Division to pursue further.¹¹⁴

¹⁰⁷ Correspondence with Leon Dimaya, Regional Director, Lower Manhattan Office of the Division of Human Rights (2/10/11).

¹⁰⁸ N.Y. EXEC. LAW § 297(3)(a) (2010).

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² N.Y. EXEC. LAW § 297(3)(b).

¹¹³ *Id.* §§ 297(7) & 299.

¹¹⁴ *Id.* § 297(3)(c).

Investigators address complaints and may attempt to settle the complaint through conciliation during the course of the investigation. Most commonly, conciliation takes place after the initial investigation, if the investigator determines that the case has merit and can proceed to a hearing. The most recently published Annual Report from the Division for 2007-08 stated that 24% of Division complaints filed are found to have probable cause.¹¹⁵ Before proceeding with a hearing, where it appears to be a viable option, the investigator may encourage the parties to engage in conciliation.¹¹⁶ If conciliation at that stage fails, cases usually proceed to a hearing.

The Division is designed to operate as a party with an interest in “vindicating the human rights of New Yorkers,”¹¹⁷ including elimination and prevention of discrimination in employment.¹¹⁸ The Division attorney acts on behalf of the state to vindicate the complainant’s human rights, but not as the complainant’s attorney. This is because the Division was designed as an alternative to the court system. Therefore, parties do not need a lawyer to file a complaint or to participate in the hearing process. A member of the Division staff will assist complainants throughout the hearing process without charge.¹¹⁹ Additionally, if the complainant wishes and has the means, they can hire outside counsel at any point. Once probable cause has been found (and in some cases before it has been found), the settlement process is usually an option.

After finding probable cause and before the public hearing the Division often suggests a pre-hearing settlement conference with an Administrative Law Judge (“ALJ”) presiding. In this type of conference the ALJ often steps into the unofficial role of the mediator. Pre-hearing settlement conferences are scheduled for most cases, however ALJs are not always available. The conferences are completely voluntary.¹²⁰ There are no notes or records kept of the conferences, only that a conference was scheduled and that it resulted in a settlement or that it did not.¹²¹

¹¹⁵ N.Y. State Div. of Human Rights, 2007/2008 Annual Report, http://www.dhr.state.ny.us/pdf/annualreport_2007-08.pdf (last visited Nov. 19, 2010).

¹¹⁶ N.Y. EXEC. LAW §297(3)(a) (McKinney 2009).

¹¹⁷ N.Y. State Div. of Human Rights, www.dhr.state.ny.us (last visited Feb. 2, 2011).

¹¹⁸ N.Y. EXEC. LAW § 290(3) (McKinney 2010).

¹¹⁹ N.Y. State Div. of Human Rights, *supra*, note 117.

¹²⁰ Correspondence with Roberto Chavez, Human Rights Expert I, New York State Division of Human Rights (Sept. 16, 2010, 2:42 PM), (on file with BBI).

¹²¹ *Id.*

Funding for mediation by the Division is, therefore, built into the overarching cost of staffing the investigative and prosecutorial branches. For this reason, specific resources for mediation may be limited wherever the overall demand for investigation exceeds existing staffing.

One advantage of organizing mediation resources through investigative and prosecutorial staff involves familiarity with the nuances of the complaint, as compared, for instance, with an outside arbitrator or mediation program. The Division has a strong organizational interest in using conciliation where possible, because it conserves limited resources that would otherwise be expended on proceeding with a full hearing. One potential drawback, however, lies in the diffuse responsibilities of investigators and prosecutors, who may not be as intensely trained or as experienced in successful mediation strategies, as professionals who engage in conflict resolution more exclusively. In addition, the status of the Division as a potential party in any legal action or resolution may reduce the neutrality and trustworthiness of a investigator/mediator, thus reducing his or her effectiveness as a neutral mediator.

Outside of the Division, mediation of a complaint arising under the HRL may take place through the State court system, specifically the state ADR program. However, as noted, most mediation falling under the state statute is located within the processes of the Division.

The Division has approximately 200 staff, and approximately 85% of its cases are employment claims. There is not a discrete disability rights division responsible for mediation, investigation, or prosecution. Currently, the Division does not hire outside mediators, and most complainants cannot afford to hire professionally trained mediators. Most complainants do not have or cannot afford outside representation or private mediators.

2. Empirical Data on Mediation within the Division

In the 2009-2010 fiscal year, the Division received 6,666 claims in total, all of which required investigation. 1502 of those contained a disability-related claim, as the sole or one of several causes of action.¹²²

Of disability-specific claims heard, 11% received probable cause determinations, allowing the complainant to proceed further.¹²³ An additional 17% of disability claims were resolved in the

¹²² N.Y. State Div. of Human Rights, Annual Report Fiscal Years 2008-2010 (Dec. 2010), *available at* Dhr.state.ny.us/pdf/nysdhr-annual-report-fy08-09-10.pdf

investigative phase through settlement. Of the remaining 72% of disability claims, 14% were dismissed, and 58% received a finding of no probable cause. Of the 11% which had not been settled and received the green light for a hearing, two-thirds were ultimately settled before or during the hearing process, 12% were dismissed before trial, and 25% proceeded to a hearing without settlement. Outcomes of this latter group usually (88%) are for the defendant, and only 12% for complainants.

The approximately 200 disability employment cases resolved by the Division in fiscal year 2009-2010 resulted in \$358,683 in monetary awards to complainants (\$254,450 via settlement during the investigation phase, and an additional \$54,233 via hearings).¹²⁴ In 50 cases, complainants received a benefit.¹²⁵ In 31 instances, complainants received an offer of employment, and another 23 received improved employment conditions.¹²⁶ In 2 instances, complainants received a disability accommodation. Remedies provided by the Division are largely comparable to the EEOC, with the exception that monetary awards through the EEOC are on average substantially higher than those awarded through the Division; of 4,244 complainants who received a merit resolution, the EEOC awarded \$67.8 million in fiscal year 2009-2010.¹²⁷ Specifically, damages at the national level were on average, 9 times higher when weighed proportionate to the number of complainants.

Although the statutory deadline for completing investigations is 180 days, in practice, the median time for investigation and determination is 244 days.¹²⁸ Thus, the Division appears effective at resolving disability complaints without hearing. However, there is a need to improve the speed of resolution as well as, possibly, the amount of relief obtained for complainants. Mediation could serve those interests.

3. Proposed Legislation: The Morelle Bill¹²⁹

In 2009, New York Assemblyman Morelle sponsored a bill that would add a provision to section 297 of the HRL, requiring the commissioner of the Division to create a management and

¹²³ Correspondence with Division of Human Rights (Aug. 3, 2010) (on file with BBI).

¹²⁴ Correspondence with Division of Human Rights (Sept. 14, 2010) (on file with BBI).

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ Equal Emp. Opportunity Comm., Charges, *supra*. note Error! Bookmark not defined..

¹²⁸ *Id.*

¹²⁹ Bill No. 5293, Assem., 231st Reg. Leg. Sess. (NY 2009).

training plan, including a professional mediation unit.¹³⁰ The professional mediation unit “shall be comprised of mediators who have at least five years of non-division experience in discrimination mediation, who have demonstrated success in such efforts, and who have successfully completed discrimination mediation training programs.”¹³¹ Assemblyman Morelle plans to reintroduce the bill in 2011.¹³²

III. Alternate Models and Practices

Other disability-related systems make greater use of mediation. Some examples are discussed below.

A. Key Bridge Foundation

The Key Bridge Foundation mediates complaints under Title II (public entities) and Title III (private entities) of the Americans with Disabilities Act (ADA) under the ADA Mediation Program established by the Department of Justice.¹³³ The Department of Justice suggests that the most appropriate cases for mediation involve “barrier removal or program accessibility, modification of policies, and effective communication.”¹³⁴ In 1994, the Department of Justice awarded the Key Bridge Foundation with the contract to conduct the ADA mediation program.¹³⁵ In fiscal year 2008, the Key Bridge Foundation received \$900,000 specifically to administer the ADA Mediation Program.¹³⁶ The Key Bridge Foundation trains professional mediators knowledgeable about the legal requirements of the ADA.¹³⁷ The Department of Justice refers appropriate ADA cases to Key Bridge mediators, at no cost to the parties.¹³⁸ Currently, there are over 400 mediators trained and available on Key Bridge’s

¹³⁰ Bill No. 5293, § 1-a(f); N.Y. Exec. Laws. §§ 292, 297 (McKinney 2010).

¹³¹ Bill No. 5293, § 1-a(f).

¹³² Communication with Rebecca A. Merrill, Legislative Assistant, Office of Assemblyman Joseph D. Morelle (Feb. 2, 2011) (on file with BBI).

¹³³ ENFORCING THE ADA: A STATUS REPORT FROM THE DEPARTMENT OF JUSTICE OCTOBER - DECEMBER 2009, at 9, available at <http://www.ada.gov/octdec09.pdf> (last visited Feb. 14, 2011); Department of Justice, *ADA Mediation Program*, <http://www.ada.gov/mediate.htm>.

¹³⁴ Department of Justice, *ADA Mediation Program*, <http://www.ada.gov/mediate.htm>.

¹³⁵ See Key Bridge Foundation, *ADA Mediation Facts*, http://www.keybridge.org/ADA/ADA_Facts.htm.

¹³⁶ *Contracts to Key Bridge Foundation for Education & Research (FY 2008)*, OMB Watch, <http://www.fedspending.org> retrieved Feb. 10, 2011.

¹³⁷ ENFORCING THE ADA: A STATUS REPORT FROM THE DEPARTMENT OF JUSTICE OCTOBER - DECEMBER 2009, at 9, available at <http://www.ada.gov/octdec09.pdf> (last visited Feb. 14, 2011).

¹³⁸ Department of Justice, *ADA Mediation Program*, <http://www.ada.gov/mediate.htm>.

national roster,¹³⁹ and they have conducted over 1000 successful mediations through Key Bridge for the ADA mediation program.¹⁴⁰ Around 83% of ADA Mediation Program mediations conducted by Key Bridge Foundation mediators are successful, demonstrating the apparent effectiveness of the training program.¹⁴¹

According to their *Practice Standards for ADA Mediators* Key Bridge requires mediators to adhere to standards of confidentiality and impartiality, have knowledge of the law, provide accommodations, and ensure the accessibility of mediation sessions. ADA mediation training by the Key Bridge Foundation includes a 40 hour basic mediation course, "role-plays and demonstrations of disputes," advanced mediation skills programs, and ADA specific courses.¹⁴² Furthermore, Key Bridge provides "standards of conduct for ADA Mediation at Key Bridge Foundation" focused specifically on providing guidance for the mediation of ADA Title II and Title III complaints, excluding employment.¹⁴³

B. Equal Employment Opportunity Commission

The EEOC developed a mediation program in the early 1990s in an attempt to more quickly and efficiently handle their caseload. Mediation is a voluntary process for 'B' cases (i.e., those determined to have strong suspicion of discrimination and need of further investigation during initial EEOC assessment). During intake, the EEOC officer asks if the charging party would like to pursue mediation. If the charging party agrees, then the respondent is informed of the charge as well as the possibility of mediation. The standard EEOC investigation is essentially paused while mediation occurs. The mediation is conducted by EEOC staff mediators. However, the mediation is confidential and kept completely apart from the investigation. No confidential information revealed during mediation is available to the

¹³⁹ ENFORCING THE ADA: A STATUS REPORT FROM THE DEPARTMENT OF JUSTICE OCTOBER - DECEMBER 2009, at 9, available at <http://www.ada.gov/octdec09.pdf> (last visited Feb. 14, 2011).

¹⁴⁰ Key Bridge Foundation, *ADA Mediation Facts*, http://www.keybridge.org/ADA/ADA_Facts.htm.

¹⁴¹ Key Bridge Foundation, *Questions commonly asked about the US DOJ ADA Mediation Program*, http://www.keybridge.org/ADA/ADA_faq.htm.

¹⁴² Carrie G. Donald & John D. Ralston, *Training Day: Mediation of ADA Disputes*, 57(3) DISPUTE RESOLUTION JOURNAL 56, 60 (2002); see also Key Bridge Foundation, *Mediation Course Descriptions*, http://www.keybridge.org/basic_mediation_class_description.htm.

¹⁴³ Key Bridge Foundation, *Standards of Conduct for ADA Mediation at Key Bridge Foundation*, http://www.keybridge.org/ADA/ADA_KBF_practice_standards_mediators.htm.

To learn more go to <http://www.nymakesworkpay.org>

investigation.¹⁴⁴ If the mediation is not successful in reaching a resolution, parties can continue to pursue alternative means of resolution, including litigation.

According to a study conducted in 2000, participants in EEOC mediations are highly satisfied with the process. Over 90% of subjects in the study (both charging parties and respondents) were satisfied with the process overall. Even when parties were not satisfied with the outcome of the mediation, they rated the process highly as a whole—especially in terms of understanding the process, prompt scheduling of the mediation, fairness of the mediator, and the opportunity to have their voice heard.¹⁴⁵ The high ratings of respondents who did not feel fully satisfied with the outcome suggests that EEOC mediators managed to mitigate the emotions and frustrations involved with conflict to gain the respect of the parties and adequately determine a resolution.

A 2001 study that surveyed mediators rather than participating parties found sources for improvement in the mediation process that dovetail with EEOC recommendations for successful mediation. These recommendations include an improvement of pre-mediation activities, such as improved screening of candidates that may benefit from mediation and further ensuring that parties understand the process and how to prepare for it. The report found that if a respondent has legal counsel, it is very detrimental for the charging party to lack legal counsel, no matter the attempts of the mediator to level the playing field.¹⁴⁶

EEOC has compiled a comprehensive list for mediators about accessibility and accommodations in the mediation process. The list covers a basic introduction to accessibility and how to accommodate people with disabilities in the mediation process - an essential step to facilitating the kind of dispute resolution at the heart of mediation.¹⁴⁷ The EEOC also provides an explanation of rights to persons in mediation who seek accommodations.¹⁴⁸

¹⁴⁴ *Id.*; Equal Emp. Opportunity Comm., *An Evaluation of the Equal Employment Opportunity Commission Mediation Program*, at pt. IV (Sept. 20, 2000), <http://www.eeoc.gov/eeoc/mediation/report/chapter4.html> (last visited Feb. 2, 2011).

¹⁴⁵ E. Patrick McDermott, et al. *An Evaluation of the EEOC Mediation Program*. (Sept. 2000). <http://www.eeoc.gov/eeoc/mediation/report/chapter8.html> (last visited Sept. 10, 2010).

¹⁴⁶ *Id.*

¹⁴⁷ Equal Emp. Opportunity Comm. et al., *Questions and Answers for Mediation Providers: Mediation and the ADA*, <http://www.eeoc.gov/eeoc/mediation/ada-mediators.cfm> (last visited Sept. 10, 2010).

¹⁴⁸ *Id.*

In Fiscal Year 2009, 11,692 mediations were conducted across types of discrimination, by the EEOC.¹⁴⁹ 8,498, or 72.7% resulted in a mutually agreeable resolution, with monetary benefits in the amount of \$121.6 million, received by 7,512 persons.¹⁵⁰ 986 persons received other non-monetary benefits.¹⁵¹ Specific to disability discrimination complaints, 10.6% (n = 2597) of all complaints received in 2010 were resolved through settlement, often involving alternative dispute resolution.¹⁵²

Comparing the Key Bridge and EEOC procedures and guidelines, the root of these “best practices” seems to be in understanding the more subtle forms of conflict that can arise between various parties and facilitating discussion as a means to resolution without litigation. Crucial to resolving ADA disputes are the pains taken in EEOC and Key Bridge mediation processes to educate mediators about disability and ensure the mediation process is accessible to all. One difference between the two programs relates to the location of the mediation program. The EEOC maintains its mediation program in-house; mediators are employed directly by the EEOC. Key Bridge, in contrast, utilizes a private referral network. Currently, no empirical data is available specifically on comparative outcomes or satisfaction associated with private vs. governmental mediators. One advantage of the former is that mediators may be or be perceived as more objective, since they are not involved in the agency investigation process. The high satisfaction rates associated with the EEOC mediation program do suggest that in-house staffing can be comparable or more effective, whether due to system in-house training or monitoring, or comprehensive service delivery between investigation and mediation components.

C. Worker’s Compensation

The New York State Worker’s Compensation Board provides conciliation for claims that are accepted by the insurance carrier, but have unresolved issues.¹⁵³ The stated purpose of conciliation for worker’s compensation claims is “[t]o address claims in a more expeditious

¹⁴⁹ EEOC Mediation Statistics FY 1999 through FY 2009, http://www.eeoc.gov/eeoc/mediation/mediation_stats.cfm

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² ADA Charges FY 1997- FY 2010, <http://www.eeoc.gov/eeoc/statistics/enforcement/ada-charges.cfm>

¹⁵³ N.Y. State Workers Comp. Bd., Claimant’s Guide to the Conciliation Process, Form CD-11, *available at* <http://www.wcb.state.ny.us/content/main/forms/cb11.pdf>.

To learn more go to <http://www.nymakesworkpay.org>

and informal manner, and to provide a mechanism for such claims to be processed without undue controversy.”¹⁵⁴ Senior Board attorneys are assigned to act as conciliators, and if no agreement is reached between the parties at a conciliation meeting, the case may be prepared to go before an ALJ.¹⁵⁵

D. Models in Other States

1. Mediation in State Vocational Rehabilitation Programs

On a whole, mediation practices in state Vocational Rehabilitation programs parallel mediation in New York’s VESID program in structure, policy and practice. This is largely due to the fact that the programs are established and governed by the federal Rehabilitation Act. Unique programs are reviewed below.

i. *California*

Under California’s administrative code, an individual has one year to appeal a decision regarding the provision or denial of vocational rehabilitation services.¹⁵⁶ Mediation may be, but does not have to be, requested at the same time a request for a fair hearing is filed.¹⁵⁷ This contrasts with practices utilized by VESID. Mediation will not delay a fair hearing unless both parties consent to a continuation.¹⁵⁸ California’s allowance of one year in which to file for mediation as opposed to 60 days, for example, is more lenient and allows greater participation for individuals with disabilities who may be unable to file immediately because of disability related restrictions.

2. Mediation resources for state employees

i. *Kentucky*

¹⁵⁴ N.Y. State Workers Comp. Bd. Rules & Regulations, § 312.1 McK.Consol.Laws, Book 64 App.

¹⁵⁵ N.Y. State Workers Comp. Bd, Claimant’s Guide, *supra* note 153.

¹⁵⁶ 9 Cal. Admin. Code § 7353.6 (West 2011).

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

Kentucky employs a centralized mediation program for all employees of the executive branch, through the Kentucky Employee Mediation Program (KEMP).¹⁵⁹ If the dispute involves an entire workgroup, the Workplace Resolution Group can conduct the mediation.¹⁶⁰ KEMP provides mediation for any grievable issue, including employment discrimination, ADA and FMLA disputes.¹⁶¹ This structure helps ensure that mediation practices are more consistent and widely known across state agencies.

ii. *South Carolina*

Employees of the state of South Carolina may request mediation from State Employee/Employer Alternative Dispute Resolution system created under the State Employee Grievance Procedure Act.¹⁶² Mediators are selected from a “Statewide Mediators Pool”, with membership in this pool consisting of “individuals from various state agencies who have been nominated by their agency directors; have a background in human resources; complete a course in mediation theory and skills; and agree to attend yearly training to enhance their mediation skills.”¹⁶³

iii. *Other States*

Colorado and Nevada also have voluntary and free mediation programs available to all state employees for any type of grievance upon request.¹⁶⁴ Many other states have public employee labor relations boards with mediation procedures, without specifically providing mediation grievances arising outside of the labor relations/collective bargaining process.

¹⁵⁹ Ky. Personnel Cabinet, Workforce Relations Branch, *Kentucky Employee Mediation Program*, <http://personnel.ky.gov/emprel/kemp/> (last visited Feb. 2, 2011).

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² State Employee Grievance Procedure Act (South Carolina), Art. 5, §8-17-310, *available at* <http://www.jobs.sc.gov/OHR/employee/OHR-griev-act.phtm>.

¹⁶³ S.C. Office of Human Res.s, *State Employee/Employer Alternative Dispute Resolution*, <http://www.jobs.sc.gov/OHR/employer/OHR-state-adr.phtm>.

¹⁶⁴ Colo. Dep’t of Pers. & Admin., *Mediation*, <http://www.colorado.gov/cs/Satellite/DPA-EO/DEO/1214905947289>; State of Nev. Dep’t of Pers., *State of Nevada Employee Mediation Policy*, <http://dop.nv.gov/PolicyforMediation.pdf>.

3. Human Rights Mediation Statutes

i. Connecticut

Under Connecticut's human rights law, the Commission on Human Rights and Opportunities will notify the complainant and the respondent involved in a discriminatory employment practice dispute of the availability of either mediation or binding arbitration.¹⁶⁵ Both parties sign an agreement stating their intentions to enter into ADR, the type of ADR they will employ, and the company that will provide ADR services.¹⁶⁶ The parties in dispute are responsible for all mediation costs.¹⁶⁷ Although the cost of mediation is a disadvantage for many parties, the basic model of offering more than one ADR option to parties is in contrast to the NYS Human Rights Division, which provides for conciliation by staff only, excepting in one locale (lower Manhattan).

IV. Challenges and Opportunities

A. Mediator Qualifications and Conduct

The issue of mediator credentialing remains controversial as it involves the difficulties of defining the goals of mediation, the goals of mediation programs, and the fundamental knowledge, skills and abilities a mediator should have in addition to the numerous types of mediation programs across the United States.¹⁶⁸ Completion requirements for programs vary as there is no consensus on how much training is essential before a mediator can be declared competent and equipped to deal with the many diverse situations in which mediation is utilized.

Mediators' skills can be crucial to a quality outcome in mediation proceedings. The American Bar Association (ABA) 2002 Taskforce report on dispute resolution concluded that although there is no single, clear consensus on the knowledge, skills, abilities, and other attributes needed to perform effectively as a mediator, the Hewlett-NIDR Test Design Project provides a generally accepted description of a mediator's tasks. It consists of gathering background

¹⁶⁵ Conn. Gen. Stat. Ann. § 46a-83b(a) (West 2010).

¹⁶⁶ *Id.* § 46a-83b(b).

¹⁶⁷ *Id.* § 46a-83b(e).

¹⁶⁸ Judy Filner et. al. *ABA Section of Dispute Resolution; Report on Mediator Credentialing and Quality Assurance* (Oct. 2002), available at http://www.abanet.org/dispute/taksforce_report_2003.pdf.

information; facilitating communication; communicating information to others; analyzing information; facilitating agreement; managing cases; and helping document any agreement by the parties.¹⁶⁹

The ABA has developed guidelines on both the conduct and preferred qualifications of mediators working under the aegis of the organization. For instance, the ABA's Revised *Model Standards of Conduct for Mediators* (2005) establish a standard of care for mediators,¹⁷⁰ and the American Arbitration Association and the Association for Conflict Resolution have adopted the standards. The *Model Standards*, in significant part, address self-determination, impartiality, conflicts of interest, competence, confidentiality, advertising and solicitation.

Furthermore, the ABA contends that continued training for mediators is critical to success.¹⁷¹ They provide that a mediator should attend educational programs and related activities to maintain and enhance the mediator's knowledge and skills related to mediation. The ABA recommends that a mediator should not act in a mediation capacity in addition to acting as a lawyer to the same client. The role of a mediator differs substantially from other professional roles. Mixing the role of a mediator and the role of another profession is problematic and thus, a mediator should distinguish between the roles. A mediator may, however, provide information that the mediator is qualified by training or experience to provide.¹⁷²

The 2002 ABA Taskforce report concluded it is useful to assess the quality of mediation training programs in terms of the "hurdles" that mediators must clear in order to engage in practice and the amount of "maintenance" or professional development required to enhance their skills over time. High hurdle/ high maintenance programs might yield greater credibility, but effective enforcement would require significant bureaucracy and might lead to a decrease in diversity. They would also likely reduce responsiveness to the particular needs of clients by promoting a certain style.¹⁷³ High hurdle/low maintenance programs, on the other hand, place too much emphasis on initial barriers to entry, blocking people with unique skills

¹⁶⁹ Am. Bar Ass'n, Report on Mediator Credentialing and Quality Assurance 13 (2002), http://www.abanet.org/dispute/taksforce_report_2003.pdf

¹⁷⁰ Am. Bar Ass'n, Model Standards of Conduct for Mediators 3 (2005), *available at* <http://www.abanet.org/dispute/news/ModelStandardsofConductforMediatorsfinal05.pdf>.

¹⁷¹ Lee Jay Berman, *Economic Recovery Resources from the ABA Section of Dispute Resolution Recession Advice for Mediators*, <http://www.abanet.org/dispute/economicrecovery/recession.html>.

¹⁷² Am. Bar Ass'n, *supra* note 170, at 7.

¹⁷³ *Id.* at 36.

and narrowing the field through rigid requirements, while underemphasizing continued training. Low hurdle/ low maintenance programs, while yielding diversity, place high emphasis on ‘contacts’ and reduce attention to the value of continued improvement of skills as well as offering limited quality assurance.¹⁷⁴

The report recommends *low hurdle/high maintenance programs*, which yield high mediator skill levels and effective enforcement, though they require structure to provide a support system for mediators and a long-term commitment to, and by, each mediator which raises practicality concerns for a statewide system. The report asserts that effective support structures addressing individual mediator developmental needs, could provide substantial credibility for the dispute resolution field.¹⁷⁵

The report emphasizes that mediator credentialing should reflect a strong commitment to quality practice.¹⁷⁶ The ABA recommends using training programs as the primary means of obtaining qualified mediators, in lieu of an established form of accreditation as is the practice of numerous state court programs.¹⁷⁷ This may be the most flexible model at our disposal to improve the quality of mediation practice.

The 40-Hour Family Mediation Training program, for instance, designed by the ABA in conjunction with the Boston Law Collaborative, LLC, features multiple opportunities to role-play as a mediator over the course of their five-day training. They cover topics as varied as Domestic Violence Screening, the Psychological Impact of Divorce, Working with Challenging Personalities, Gender and Diversity Issues, and Mediation in the Age of Technology, though nothing specific to disability discrimination.¹⁷⁸

B. Recommendations

1. The New York Dispute Resolution Authority

- Mediator training for disability cases should balance the need for low barriers to participation (to attract diverse and volunteer mediators) with the necessity of insuring

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 39.

¹⁷⁶ *Id.* at 2, 4, 5, 11 & 12.

¹⁷⁷ *Id.* at 24-26.

¹⁷⁸ Am. Bar Ass’n, 40-Hour Family Mediation Training, *available at* <http://www.abanet.org/family/events/mediation10.shtml> (last visited Feb. 2, 2011).

that mediators are in fact familiar enough with disability issues, law, and employment dynamics to be effective in disability-related mediation. The current NYSDRA certification requirements do not require training in disability-specific dispute resolution. One solution may involve creating a discrete disability certification program for NYSDRA mediators, including more comprehensive training for disability-specific mediation. Disability-trained mediators may then be specifically directed to relevant disputes, without overburdening training requirements for mediators in the rest of the system.

2. VESID Mediation System

- Require that NYSDRA or any other contracting mediators who will handle disability cases be trained in disability rights, independent living, and vocational rehabilitation principles and laws. In addition to initial orientation and training, periodic continuing education in these areas should be mandatory for mediators working with VESID. Require that participating mediators receive orientation on accessibility in the mediation process, and access to any support staff needed to ensure accessible participation (such as interpreters).
- Parties pursuing complaints against the VESID system should be required to participate in one meeting with a mediator, prior to an impartial hearing, provided that mediation can be achieved without delaying a hearing. Parties must be able to leave mediation freely, so that it remains voluntary.

3. New York State Employment

- Develop a State-wide Public Employment Mediation System: Currently, mediation in New York State Employment is limited to programs within specific entities, such as the Department of Labor, and/or operates through NYSDRA, and/or is limited to the courts. Comprehensive tracking and organization of mediation state-wide will potentially help reveal areas where repeated complaints may be better resolved through policy reform, as well as through mediation. In addition, a state-wide mediation system will streamline systemic training in disability-specific employment issues, relevant to ADR. A statewide system may also facilitate increased use of mediation and corresponding reduction in use of more expensive administrative and litigation processes. State-wide monitoring

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30 New York Makes Work Pay

and organization may operate as a partnership between the Civil Service Commission and NYSDRA, or be housed within state government solely.

- Require that NYSDRA or any other contracting mediators who will handle disability cases are trained in disability rights principles and laws. In addition to initial orientation and training, periodic continuing education in these areas should be mandatory for mediators working with New York State. Require that participating mediators receive orientation on accessibility in the mediation process, and access to any support staff needed to ensure accessible participation (such as interpreters).

4. New York State Human Rights Law

- Establish a Mediation Program: The New York Human Rights Division presently routinely employs conciliation in many cases. While conciliation is certainly one option that workers with disabilities should be able to access, a conciliator often takes the lead in proposing or driving solutions in order to resolve complaints. In some cases, mediation would better serve the interests of workers with disabilities, in ensuring that the parties are able to fully explore mutually agreeable solutions, with the support of an entirely neutral party. This can be particularly important in reasonable accommodation disputes, where the solution often needs to be very individualized, and may not be anticipated by a conciliator/third party. Unlike a conciliator, a mediator does not have a stake in advancing any particular solution. Participating mediators must be trained in disability rights principles and laws with mandatory continuing education. A program using mediation could improve outcomes and reduce case processing time, allowing the Division to meet its 180-day timeline for more cases.
- Require that participating mediators receive orientation on accessibility in the mediation process, and access to any support staff needed to ensure accessible participation (such as interpreters).

Conclusion

Mediation programs in New York currently constitute a critical resource, particularly for low-income individuals with disabilities who face economic or disability-based obstacles to other forms of legal action. However, mediation and related forms of alternative dispute resolution in New York state agencies and legal systems must be improved on at least two fronts. First,

mediators must be trained and sensitized to working with people with disabilities and must be familiar with fundamentals of disability law. Second, mediation programs must be substantially expanded in order to meet the prospective demand within vocational rehabilitation, and public and private employment. In addition, empirical research is needed in order to assess the effectiveness of existing mediation resources within New York, and to identify barriers to participation and where applicable, reasons for low rates of participation. Better tracking of disability related mediations and surveying of participants will enable development of successful, accessible mediation resources, to the benefit of New Yorkers with disabilities.

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