From
LABOR LOOKOUT

CONQUERING THE FEAR OF MEDIATION

If you or your board are relatively new to the negotiations process, you are prone to catch a common affliction of novice negotiators: fear of mediation. Left unchecked, this seemingly benign phobia can bring a regretful and untimely end to a board's otherwise well-planned bargaining goals.

Fear of mediation, like other human fears, grows in the dark and is frequently fed by a lack of information and concurrent faulty assumptions. Yet, boards that are ready to face their fears and to reexamine their unfounded preconceptions can become well prepared: to understand the role of mediation in the total context of bargaining; to embrace, rather than avoid, mediation as a barbaining strategy, and to become far more effective in achieving their bargaining goals.

Facing the Fear Board members with little bargaining experience tend to be afraid and suspicious of mediation. Their limited experience often leads to a misinterpretation of the bargaining process and the function of mediation. They mistakenly believe that mediation is a signal of the board team's failure to effectively bargain the terms of a new contracts. They fear that entering mediation will create a bargaining crisis that will disrupt the district, the community and their ongoing relationship with their unions. They incorrectly assume that after the board team has dropped the ball, the mediator will usurp the board's authority to negotiate and the board will lose control over the terms of a settlement. And finally, they are also convinced that the mediator's solution will favor and support the union's position and damage the district's interest.

Driven by an eagerness to prevent the perceived problems of mediation, board teams can rush the process and concede too early in bargaining. They become easy preys to the strategies of their associations' veteran bargaining teams who, well-aware of boards' common fears, routinely use threats of declaring impasse and invoking mediation as a means of exacting concessions from the board. Board teams who are determined to avoid mediation tend to respond by proposing unfortunate, premature compromises that damage their ability to achieve, or even come close to, their bargaining goals. However, an early recognition of the problems and an appropriate dose of factual information can dispel the impediment and strengthen your board's effectiveness at the bargaining table.

Facing the Facts: The Mediation Process Invoking mediation is not a signal of the board's failure to negotiate effectively. Rather, mediation is a formal phase of the collective bargaining process that is recognized in virtually all labor laws as a possible and necessary step in negotiating contracts. Within its legal framework, mediation is intended to be a tool to reach a negotiated settlement. In other words, mediation is an accepted procedure that can be used to facilitate the conclusion of negotiations.

In fact, approximately 50 percent of school districts negotiating teachers' contracts have traditionally gone through the mediation process. Mediation is a routine, accepted and indeed a frequently expected aspect of the negotiations process. Mediation does not become a district crisis unless an unprepared board accepts the union's rhetoric or allows the community to be misled into thinking that the board is refusing to negotiate in good faith or that negotiations have broken down.

Mediation does not signal the end of negotiations between the board and the union. During mediation, these two parties continue to exchange information, reassess their positions and consider possibilities of resolving their differences. In fact, the give-and-take of bargaining may intensify during mediation as the parties come close to fashioning a mutually acceptable agreement. Mediation, however, affects the way in which the parties communicate. Instead of talking directly to each other, the parties bargain through the mediator. Yet under the law, the mediator's presence cannot, and does not, supplant or displace the parties' authority to agree to a settlement.

Facing the Facts: What the Mediator Cannot Do The mediator does not have the authority to impose a settlement. The mediator's only role is to facilitate the parties' ability to reach their own mutual agreement. To that end, the mediator will use a variety of techniques to influence the parties to move to a point that may resolve their differences.[1] However, mediators cannot force either party

[1] For a full discussion of the mediator's techniques, please see the article "Mediation" in *The Negotiations Advisor Online*, an NJSBA subscription service.

to concede on any issue, nor can they dictate the terms of the settlement. In other words, at all stages of school district bargaining, the settlement continues to belong to the parties and remains dependent upon each party's own readiness, willingness and ability to agree.

Facing the Facts: What the Mediator Can Do For You Mediators' techniques are designed to bridge the gap between the parties' bargaining positions and their ultimate willingness to agree. In that task, mediators frequently stress the realistic possibility of an achievable settlement and rely heavily on what is happening in other districts. Recent settlements and demonstrated bargaining trends are used by the mediator to deflate extreme or unrealistic positions. Mediators can be unrelenting in highlighting the cost of continued disagreement and the foolishness of hanging on to "pie-in-the sky" positions that fly against current trends. In other words, mediators will bring a healthy dose of "reality" into your bargaining room.

A number of years ago, school districts' bargaining trends might have disadvantaged boards during mediation. However, the "realities" of the recent environment have changed: political and economic forces have impelled a focus on reducing the costs of public education and a lack of sympathy for teachers' unions positions. Further, recent teachers' settlements, marked by significant and meaningful board achievements, have changed the environment to one that is favorable to boards of education. Therefore a mediator can be instrumental in convincing unions that all school settlements are increasingly marked by additional teacher work time and cost containments measures. Skilled at the art of persuasion, mediators can frequently be successful in moving even the most entrenched union team to a reluctant recognition of what is currently achievable. Experienced at resolving bargaining conflicts, mediators can suggest creative and novel approaches that did not occur to either party but that can elicit their mutual support of a tentative agreement.

In addition, the presence of a mediator may be absolutely necessary to the union membership's acceptance of a tentative package. While months of negotiations may have convinced the union team of current realities and their need to accept some modifications in traditional terms and conditions of employment proposed by the board, the rank and file membership may still be looking to a new settlement that will improve, or at least preserve, their current contractual benefits. The membership's knowledge that their team worked hard and long to represent their interests and that a neutral third-party firmly believed that the tentative agreement was the best that could be expected at this point in time may be essential in obtaining the membership's ratification vote for a contract that would otherwise be deemed to be an unacceptable "give-back."

Facing the Mediator Boards can expect that mediators will also use their conflict resolution techniques on the board team. Team members must be prepared to hear the mediator's assessment of "reality." At the same time, however, the board team must remember that the mediator's only responsibility is to get a settlement. The mediator will not be concerned about the terms of the settlement or its effect on the district's administration. Rather, the ability of the district to fund the settlement, to manage its schools effectively and to meet its educational and operational goals remains the exclusive concern of the board team.

During mediation, the board team will continue to protect the district's interests by using the same techniques used in face-to-face negotiations. Clear identification and communication of district needs, slow and incremental movement, and a realization that problems created by a series of past negotiation cannot be completely eliminated in one round of bargaining remain essential productive negotiations approaches. Given the time pressures that can sometimes be created during the "final" mediation session, it is also crucial that the board team maintains its commitment to not agree to any settlement whose terms and implications are not fully considered and understood. Using these well-proven bargaining techniques during mediation will assure that the board remains in control of the process and the settlement.

Overcoming the Fear Facing the facts can help bards to overcome their fear of mediation and to accept the process as a viable negotiations strategy. Understanding that mediation is an available tool that the board can use to achieve settlement can help boards to pace their movement and to achieve the best possible settlement. Rather than abandoning their goals, or offering premature compromises in response to union threats or to unchanging posturing at the bargaining table, boards know that mediation may lead to a softening of the union's opposition to change. Rather than perceiving mediation as their failure to negotiate effectively, boards that understand the process know that invoking mediation at the appropriate time is an effective bargain strategy that can preserve and support the board's ability to move towards beneficial contract changes. And finally, boards that understand mediation know that they remain in control of the settlement, and that they, and not the mediator, are responsible for the terms of their settlement.