



# **Association of Family and Conciliation Courts**

## **Guidelines for Child Protection Mediation**

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# Guidelines for Child Protection Mediation

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# Guidelines for Child Protection Mediation

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Disclaimer: The statements made in this document are those of the authors and do not necessarily reflect the official positions of the contributing organizations.

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# Guidelines for Child Protection Mediation

## Section 1: Introduction

### 1.1 What is Child Protection Mediation?

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Child protection mediation (CPM) is a collaborative problem solving process involving an impartial and neutral person who facilitates constructive negotiation and communication among parents, lawyers, child protection professionals, and possibly others, in an effort to reach a consensus regarding how to resolve issues of concern when children are alleged to be abused, neglected or abandoned. The child's voice in the decision making process is essential and is typically presented either directly by the child or by other means, such as by an advocate for the child.

CPM encourages constructive communication and information sharing and fosters an environment where genuine engagement and agreement is possible. As a consensual decision making process, no agreement can be reached unless all the involved parties agree. In addition to reaching important decisions regarding children and families, CPM can lead to a greater sense of teamwork and a greater understanding and ownership of resulting agreements by all involved.

### 1.2 Benefits of Child Protection Mediation

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Today, the use of CPM is widely recognized as an invaluable service by child welfare stakeholders throughout North America and in many other parts of the world. Numerous research and evaluation efforts have confirmed that CPM programs, once instituted, produce noteworthy benefits. A recent review of the research in the field<sup>1</sup> indicates that CPM:

- Is highly rated by participants, with both families and professionals perceiving the process to be fair and believing they had an opportunity to have their concerns heard by others;
- Produces a high level of settlements, with 60 to 80 percent of mediated cases reaching full agreements and another 10 to 20 percent reaching partial agreements;
- Can expedite permanency by resolving or reducing the contested issues;
- Is effective at all stages of case processing from the filing of the petition through an adoption;
- Helps to engage parents, with 70 to 80 percent of the professionals who work with families in the child protection system reporting that parents were more involved in case planning when mediation was used;
- Helps to engage extended families, with studies showing that programs typically invite extended family and friends to participate whenever the parties believe their participation would be useful;
- Effectively addresses problems that are rarely dealt with in a court hearing including communication issues among the mediation parties;
- Reduces case processing time, with a number of studies suggesting that mediation helps families achieve permanency in less time;
- Encourages greater parental compliance, as shown by reduced number of contested review hearings, and generally better performance on the treatment plan;
- Saves courts and agencies money and staff time, with evidence that mediation can help the system to reduce the length of time a child spends in foster care and to meet legislated time frames for case processing;

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<sup>1</sup> Portions of this section were adapted from "What We Know Now: Findings from Dependency Mediation Research" by Nancy Thoennes, Family Court Review, (2009).vol. 47. 21-37.

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- Often results in mediated treatment plans that contain more services for children than do non-mediated plans;
- Results in greater use of kinship care than in non-mediated cases in some studies.

In addition to the above reported research, judges frequently have noted the benefits of CPM. For example, Judge Leonard Edwards, Past President of the National Council of Juvenile and Family Court Judges, wrote “ CPM should be an integral part of every juvenile dependency court in the nation. From a judicial perspective it accomplishes a number of goals. Mediation saves court time; it produces better, more detailed, nuanced, and longer-lasting results than litigated cases; it creates a problem-solving atmosphere in the court environment (an atmosphere that better serves all parties); it engages the parents in the decision making process, thus making it more likely that they will follow any plan that they have helped draft; it reduces the time children remain in temporary care; and, finally, it shortens the time to permanency.”<sup>2</sup>

### 1.3 History and Mission

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CPM programs have developed gradually on a community by community basis as an alternative to traditional litigation. Early proponents of CPM were frustrated with the slow pace and adversarial nature of litigation and were looking for a better, more timely and collaborative decision making process.

In 1995, the National Council of Juvenile and Family Court Judges (NCJFCJ) published Resource Guidelines: Improving Court Practice in Child Abuse and Neglect Cases<sup>3</sup> which included a discussion of the benefits of CPM and recommendations for implementation of court connected CPM programs in the United States. The American Bar Association subsequently endorsed and decided to “encourage support for...and implementation of the Resource Guidelines.”

In Canada, the use of CPM and other collaborative decision making processes was encouraged by the enactment of statutory provisions in child protection legislation in many jurisdictions. In British Columbia, the current provincial legislation, which greatly influenced the use of CPM, was proclaimed in 1996. It includes principles and provisions for mediation and other dispute resolution processes. This led to building a strong infrastructure, which brought together legal and child welfare professionals. Since then, similar statutory provisions have been enacted in many other provinces across Canada.

In 1997, the United States Congress passed the Adoption and Safe Families Act (ASFA). The Act, ensuing federal regulations, and other federal legislation, such as the Fostering Connections to Success and Increasing Adoptions Act of 2008, made child safety and permanency the primary focus of the law. New requirements emphasized more timely permanency decision making, relative care, increased judicial oversight and expanded foster parents' rights. When implementing ASFA, many jurisdictions developed CPM programs to aid the child welfare agencies and courts in meeting the new requirements and improving outcomes for families. These Guidelines reflect the collective wisdom and experience of successful CPM practitioners and programs throughout North America and important CPM research, and builds upon the federal laws and recommendations included in NCJFCJ's 1995 Resource Guidelines. The goals of these CPM Guidelines are to:

- Articulate the principles and philosophy that guide effective CPM;
- Provide program developers and managers with a template for creating and evaluating successful programs;
- Offer a standard that can be taken to funders, court systems, child welfare agencies, legislators, and others to promote high quality services;

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<sup>2</sup> Edwards, L, Child Protection Mediation: A 25 Year Perspective, Family Court Review, Vol. 47 No. 1, January 2009 p. 77.

<sup>3</sup> Resource Guidelines Improving Court Practice in Child Abuse and Neglect Cases, NCJFCJ 1995. Approved by the NCJFCJ Officers and Board of Trustees January 1995.

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- Help judges, social workers, lawyers, mediators and other professionals evaluate their approach to CPM and improve their skills and programs.

While CPM programs operate in a variety of diverse settings which may require slightly different operational approaches, these Guidelines are intended to apply across the numerous and distinctive legal, cultural and institutional frameworks in North America.

CPM programs can be organized and conducted in many different ways and still be effective provided they adhere to the highest standards of practice and ensure that children and victims of domestic violence are protected, families are empowered and effectively engaged, and professionals collaboratively and meaningfully engage with one another and the children and families they seek to protect.

### 1.4 How the Guidelines Were Developed

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These Guidelines were developed by the Child Welfare Collaborative Decision Making Network. The Network operates with the support and guidance of a number of organizations including the Association of Family and Conciliation Courts (AFCC), the American Humane Association (AHA), and the Werner Institute of Creighton University.

The Network grew out of a number of Think Tanks on Collaborative Decision Making in Child Welfare, which have met annually since 2007 in conjunction with the AFCC annual meeting. It became clear during these discussions that the establishment of a more formal process that reflected the three decades of experience and the research on CPM would be the best foundation for these Guidelines. A Guidelines Work Group, consisting of mediation program managers, mediators, researchers, mediation trainers, policy experts, child protection experts, and professional organization representatives from the United States and Canada drafted an initial set of proposed Guidelines and invited broad input from child protection, judicial, mediation and other experts. These Guidelines were then revised to reflect many of the constructive ideas and feedback received during the public comment period.

## Section 2: Philosophy

Core values inherent in child welfare practice are reflected in the philosophical underpinnings of child protection mediation:

- The safety, permanency, and the well-being of children are paramount;
- Genuine and sustained engagement of families in their child protection cases is promoted by involving families as full participants in the discussions and decisions that affect their futures;
- Families are of critical importance to children and should be involved in making decisions about them;
- Whenever it is possible and safe, the best place for children to be is with their families;
- The child's "voice" is essential in child protection decision making;
- Cooperative relationships and collaborative decision making best suit the resolution of most child protection concerns and should be promoted and sustained throughout the child protection system in ways that transcend formal mediation and other decision making forums;
- The inherent disparity in power among parties in child protection can be managed, and fair, voluntary and informed decision making promoted, when discussions are facilitated by impartial, competent mediators who are independent of the case. It is essential to prepare participants to understand and be effective in mediation;
- Timely resolution of disputes benefits all involved.



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## Section 3: Guiding Principles

Collaborative decision making should be promoted throughout the entire child protection process. CPM provides invaluable assistance to the collaborative process by providing a constructive forum for the timely resolution of issues in a manner that best protects children while also promoting increased cooperation among the stakeholders. CPM has the potential to assure that families participate in the decision making process with child protection professionals in a manner that enables all voices including the child's voice to be heard and promotes the safety and the well-being of the child. In order to promote best practices,

CPM should adhere to the following seven principles:

### **3.1 An Inclusive Process:**

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CPM should actively engage family members and child protection professionals to meaningfully participate in collaborative problem solving. Parents should safely participate in every aspect of CPM. When it is safe and appropriate, the child should also be given the opportunity to meaningfully participate in CPM, and in all cases there should be others present who can discuss and present the child's interests, desires and perspectives so that the child's "voice" will be heard in every mediation.

The participation of extended family, friends, and others may also play an important role in decision making and their participation may be essential if they will be impacted by decisions being made in mediation or are needed to implement any agreements reached in mediation.

CPM should be conducted with appropriate and reasonable accommodations for individuals with disabilities. Mediators and other mediation participants should seek to enhance each individual's capacity to effectively participate in mediation.

Respect, appreciation, and understanding of cultural, racial, religious, socioeconomic and other issues of diversity should be promoted in all aspects of the CPM process.

### **3.2 A Collaborative Process:**

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CPM should be conducted in a manner that promotes constructive and open communication among the mediation participants and encourages participants to effectively address the needs of children and families in a collaborative manner. Through respectful dialogue and problem solving, mediation participants can find mutually acceptable solutions while at the same time improving the capacity of the family and professionals to constructively work together.

### **3.3 A Timely Process:**

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CPM needs to occur in a timely manner to encourage early engagement and collaborative problem solving, promote timely problem resolution, and ensure that CPM does not delay the progression of a case through the child protection legal system.

### **3.4 A Safe Process:**

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CPM must not compromise the safety of participants or non-participants who may be affected by the mediation process or outcome before, during or after the mediation session.

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### **3.5 A Confidential Process:**

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Confidentiality is essential to the integrity and effectiveness of the CPM process so that parties feel free to speak openly with others. Participants need to understand the limits of confidentiality and privilege that may exist so they can make informed decisions regarding the extent to which they will communicate openly in mediation.

### **3.6 An Ethical Process:**

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CPM should be conducted in accordance with widely accepted standards of professional conduct for mediators that address all ethical issues including, but not limited to the following:

- Empowerment and Self-Determination of All Mediation Participants;
- Voluntary Nature of Mediation;
- Impartiality and Neutrality of the Mediator;
- Confidentiality of Mediation Communications;
- Mediator Avoidance of Conflicts of Interests;
- Mediator Competence.

### **3.7 A Supported Quality Process:**

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Leaders at the highest levels of court systems and child welfare stakeholder groups should be engaged in the development, implementation, evaluation and promotion of CPM and actively support quality CPM practice. Programs should ensure that competent and adequately trained mediators conduct CPM sessions. CPM programs should work to enhance child protection stakeholder understanding, capacity and utilization of collaborative problem solving methods and should maintain meaningful process and outcome evaluation procedures in order to improve program effectiveness and increase participant satisfaction.

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## Section 4: Program Development, Design and Operation

Planning, designing and operating a successful CPM program is a challenging task that involves bringing together the various child protection stakeholders, obtaining judicial support, funding, and, in some cases, fostering a paradigm shift that creates greater collaboration between the stakeholders and parents and a commitment by all to better include families in the decision making process.

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### 4.1 Planning the Program

CPM program planning should be a collaborative process that addresses the needs of program stakeholders and values their input. Designers should begin by identifying the various stakeholders essential to setting up an effective program. The make-up of stakeholder groups often includes:

- Child protection agency administrators;
- Case workers (representing the child welfare authority) and their legal counsel;
- Domestic violence experts;
- Attorneys representing children, parents and other parties to the litigation;
- Guardians ad litem (GALs) or others representing the children;
- Court Appointed Special Advocates (CASAs);
- Native American, Aboriginal or other tribal representatives;
- Mediators and mediation experts; and
- The judiciary.

Those who might assist a stakeholder group include parents, foster parents and youth from the community being served, as well as individuals and organizations representing bar associations, universities, national child protection or professional development organizations and groups representing mental health, substance abuse issues and/or developmental disabilities.

#### Convening the Planning Group

Typically, the court, the child protection agency, or a private agency takes on the role of convening the planning group. Using a neutral facilitator from outside the group to conduct meetings can be helpful to promote collaboration and, to some extent, model the mediation process for the stakeholders. Once assembled, the stakeholder group should review and consider evidence based research and evaluation, literature and reports that document lessons learned from other programs. It is also helpful to hear from professionals having experience with established CPM programs in other localities.

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### 4.2 Program Design and Operation

Every planning group and/or program manager will likely need to address certain design and basic operations issues, which are identified in this section.

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#### 4.2.1 Program Start-Up

CPM may be fully instituted or started as a pilot project. A pilot provides an opportunity to test the effectiveness and viability of CPM in a jurisdiction before a significant amount of time and money are expended or when there is the initial resistance and opposition to a full program. Another advantage to a pilot program is that program design, protocol, and forms can be tested and modified as needed before the full program is launched.

Ideally, CPM programs should not be launched before the involved judges, attorneys and case workers participate in an orientation meeting lead by a professional mediation trainer. In addition to explaining the details of the pilot and the protocol, the training agenda should include: an introduction to mediation; an introduction to CPM; strategies to optimize the CPM experience for everyone involved; and a discussion of practical and ethical issues. To help the trainees envision themselves in mediation, a video or live

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demonstration of a CPM session should also be presented. In addition, involving judges, child protection workers and attorneys from a jurisdiction with a successful CPM program can help to address any concerns that individual stakeholders may have concerning CPM or their role in CPM.

### 4.2.2 Program Location

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Where a program is housed will depend on many variables. The location of the program is not nearly as important as whether the participants perceive the location as an accessible, neutral and safe place and perceive CPM as a beneficial alternative to the options available through traditional litigation. CPM programs are currently housed in a variety of locations, including community dispute resolution centers, state or provincial court administration offices, child welfare agencies, child welfare legal offices, private mediator offices, courts, universities, and attorney general or justice services offices. Each option has unique advantages but also may carry specific disadvantages.

### 4.2.3 Program Administration

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CPM programs require a clear organizational structure and a program manager who will oversee the day-to-day operation, quality control, ongoing program development and public relations. Ideally, the manager should be a trained mediator who mediates as needed, but is allotted sufficient time to perform program management duties. This individual should also be the program's liaison to the judiciary and other stakeholders, and should maintain ongoing contact with the key stakeholders.

### 4.2.4 Cases and Timing of Referrals

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The vast majority of child protection cases are appropriate for mediation at every stage of the case. Family violence/abuse, mental illness, substance abuse and other considerations may impact how the session will be structured, whether or not safety precautions should be put in place, what will be discussed, and who will be at the table, but they do not necessarily preclude mediation. Examples of cases which may be inappropriate for mediation include those involving family violence where the safety of the participants or others will be significantly endangered; where there may be an overwhelming imbalance of power between the perpetrator and the victim or those cases where the capacity of a party to meaningfully participate in mediation may be severely limited due to mental illness or substance abuse. With careful and ongoing safety screening and assessment and proper accommodation in mediation, most cases can be suitable for mediation. Participation in mediation will not remove a case from the docket or the court's jurisdiction. The goal of mediation of child protection cases is to expedite the process to enable a child to reach permanency sooner and to increase meaningful understanding and engagement between the parties. The interplay between mediation and the court process is more a "both/and" relationship rather than an "either/or" relationship. There is a strong role for the court in reviewing mediation settlement agreements and ensuring the judge is comfortable with all the components of the agreement regardless of the stage of the case in which mediation is used.

CPM is very effective in the early stages of the case and should be considered even when the legal issues seem simple for counsel to resolve. Stakeholders report that cases go more smoothly when everyone has had an opportunity to hear the same information and come together early in the process, especially related to services. However, court statistics show that CPM can be beneficial at any stage of a case. Child protection issues generally vary according to the stage of a child protection case. At each stage, the actual issues for discussion will be identified by the mediation participants, by the court or both. The names of the stages provided below are intended as generic references with the understanding that exact names and practices may vary considerably from jurisdiction to jurisdiction.

#### Pre-Petition

Mediation may be used prior to filing a court petition to address how a child can remain in the care of the family with specific services and safety plans. Such a referral at the preventive stages could be part of an effort to avoid a court petition altogether by resolving the problems early on. Early use of CPM is an opportunity for professionals and the family to meet with an impartial person in a confidential and neutral environment, where, within the framework of the allegations and issues, the family's strengths can be identified in the spirit of designing change and making better decisions for the children in the future. Mediation conducted early encourages family engagement, collaborative decision making, and a team

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approach to handling child protection cases. The referral source in pre-petition cases is often the child protection agency rather than the court or attorneys and the agreement is shared with the referral source, but not the court, since there is not an open court case at this stage.

### **Emergency Removal**

Sometimes circumstances brought to the attention of the child protection system result in the immediate need to remove children from their parents to ensure their safety.

As with pre-petition cases, use of CPM at the removal stage is an opportunity to gain understanding, utilize the family's strengths to make important changes, and identify and access needed services early on. CPM at this time also provides an opportunity to consider extended family members, friends, community members, and neighbors who could provide potential placement options for the child and possibly serve as resources for assisting the family or supervising visitation. When children are not or cannot be placed with family or friends, early CPM allows the parents and temporary caregivers to meet in a safe and balanced setting where they can begin to foster a strong working relationship built upon respect, understanding, cooperation, and mutual concern for the child.

### **Preliminary Hearing**

In this stage, the parents are provided an opportunity to respond to the allegations of abuse, neglect or abandonment. If the parents do not consent to the allegations of abuse, neglect or abandonment, the case then proceeds to an adjudicatory hearing where the court will determine whether child abuse or neglect has occurred and whether the court therefore has jurisdiction in the case to intervene on behalf of the child. As the issues at this stage are similar to the subsequent Adjudicatory and Dispositional Stages below, a more detailed discussion of the issues appropriate for CPM is provided immediately below.

### **Adjudication and Disposition**

The Adjudicatory and Dispositional phases of a case focus on whether there will be a judicial determination of child abuse or neglect and, if the adjudication confirms that child abuse and neglect has occurred, a court adopted case plan. CPM at these stages provides an alternative to contested litigation and offers a collaborative process to reach agreement about whether the child may have been or is at significant risk of becoming abused, neglected or abandoned. In addition, dispositional issues such as placement decisions and evaluations, treatment, and services for the child or parents can be addressed. Parties may also discuss whether or not the child can return home soon, and if not, how the issues that brought the family to court can be ameliorated in a timely manner. CPM can help to engage the family and to assist in crafting customized service plans that are more family and case specific. Case plans can be drafted during the session or at a later date.

### **Permanency Planning**

CPM at the permanency stage is an opportunity for a comprehensive discussion about the permanency goals available, how to support the goals, time frames for achieving the goals and their impact on the family's future. Additional topics may include, but are not limited to, transition planning for youth aging out of care, maintaining important relationships, and identifying community services available after the case is closed.

### **Termination of Parental Rights/Relinquishment**

CPM at this stage of the case is a forum in which this difficult subject can be explored in depth in a frank and deliberate manner. The topics addressed can include what a trial might look like, what the probable outcome might be, the impact a contested and adversarial trial could have on important family relationships and whether voluntary relinquishment would minimize that impact, whether the parent(s) are likely to make a meaningful effort to remedy their problems at this late stage, and what other options are available.

Some jurisdictions allow open adoption whereby potential adoptive and birth families may enter into contracts for post-adoption contact. In jurisdictions without open adoption, informal agreements between the families related to continued contact following termination or relinquishment are still possible, though

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not legally enforceable. Consequently, in those instances, it is important that parents fully understand the difference between a promise and a binding legal contract.

### Status Review Hearings

Status review hearings, as well as an array of other conferences and meetings, occur throughout the pendency of the case and can often be facilitated by the mediation process. For example, mediation provides an opportunity to gain understanding at review stages while the family is still receiving reunification services. Often disputes/differences arise between the child protection professionals and the family members regarding numerous issues, such as whether programs that have been completed will suffice for some similar case plan components, whether the case plan needs to be modified, visitation issues, placement concerns, whether reasonable efforts have been made or whether there has been sufficient compliance/progress to now return the child to a parent with services in place. Post-termination cases can also benefit from mediation when adoption is pending but the case is not progressing due to misunderstandings between the adoptive parents and the adoption agency, or the case is “stuck” due to an administrative barrier.

### Adoption

Discussions in CPM can include pre-and post-adoption challenges, contested adoptions between two or more competing potential adoptive families, the need for post adoption services, a potential adoption disruption, and whether some degree of open adoption is possible. Adoption laws vary by jurisdiction. Therefore, any program planning to mediate adoption cases should become familiar with their jurisdiction’s statutes and practices.

#### 4.2.5 Participants

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As CPM is an inclusive process, programs should consider protocols and practices that support participation not only by parties to the litigation, but also by others involved with the family. These collateral participants often bring important resources and information to the discussion that may assist with finding solutions and options. The court may determine who is invited or ordered to participate in a CPM session. While parties may be ordered to appear at mediation by the court they are not required to reach an agreement. Other people who are important to the family may also participate with the consent of the mediation participants. CPM is most beneficial when everyone necessary to resolve the issues meaningfully and safely participates and contributes constructively. All parties must receive information about the mediation process and be free to make an informed decision about their own participation.

CPM programs differ as to whether participation in mediation is voluntary, according to who is mandated to attend and who can be invited. Typically, parents, their attorneys, the child’s representative and the child protection agency representative(s) and their attorneys participate in CPM. Although some programs discourage attorney participation, participants should have the opportunity to have an attorney present during mediation, and when parties have attorneys; their counsel should be provided notice of the CPM regardless of their intention to attend. Others who frequently attend CPM include, but are not limited to extended family members, foster parents, therapists, direct services providers, domestic violence advocates, cultural liaisons, spiritual advisors, friends, and significant others. Increasingly programs are recognizing the value of including affected children in CPM discussions.

In some jurisdictions, tribal and Aboriginal representatives are considered parties to the litigation. Regardless of party status, tribal and Aboriginal representatives can help support cultural traditions in the mediation process. They can also help with planning and bring cultural and community resources into play as well as provide support to the child and family.

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### 4.2.6 Roles of the Participants

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#### Roles of Parents

The full and active engagement of parents is an essential element of the mediation process. In mediation, parents are given the opportunity to collaborate in the decision making process concerning their children and their families. Through their active participation in mediation, they can learn about and discuss the issues that brought the family to the attention of the CPS system. Most importantly, they can express their own needs and those of their child as well as their desired outcomes for themselves and their children.

Some of the benefits of actively involving and empowering parents in CPM include the following:

- Increase the exchange of information among the CPM participants;
- Improve the quality of the agreement due to greater input from all CPM participants;
- Reinforce the parents' role by providing them with the opportunity to contribute to the efforts to find a solution;
- Increase the parent's sense of ownership and understanding of the agreement;
- Increase the parental compliance with the agreement;
- Reduce conflict between the parents, care providers and foster parents and professionals and increase the group's ability to work effectively as a team; and
- Increase the parent's confidence in the child protection process.

#### Role of Parent's Attorney

Attorneys for the parents are responsible for preparing their clients prior to the mediation session, counseling and advising them before, during and after mediation, and, at times, advocating on behalf of their clients. Their role also includes helping parents understand their situation and their legal rights, consider all their options and understand the legal consequences of any agreement reached in mediation. Attorneys for victims of domestic violence should alert mediators prior to the session so appropriate accommodations can be provided to allow the victim to participate in a safe and productive manner. When the parents have or are likely to have competing interests, parents should have separate attorneys.

#### Role of the Child Protective Services Representative

Typically the representative from the child protection agency is responsible for identifying and presenting the agency's understanding of the family's problems and concerns about the child and family. The representative should be prepared to briefly summarize efforts made to prevent a child's placement and to propose possible interventions and services that may address the concerns that made placement necessary. Additionally the representative should be able to clearly articulate the agency's overall plan for how to achieve safety, stability and permanency for the child. For CPM to be most effective, the representative should have full authority to negotiate and settle any issues that arise within the mediation.

#### Role of the Agency's Attorney or Attorney for State/Province

The agency representative and the attorney for the agency or state/province both typically participate in CPM. The attorney optimally meets with the case worker prior to the mediation to discuss the case and the agency's concerns. The attorney presents the legal issues in the case and represents the legal interest of the agency or the state/province during mediation. The attorney helps the case worker understand legal consequences of any decisions made at mediation, including any agreement they may enter into as a result of the mediation.

#### Role of Guardian Ad Litem or Court Appointed Special Advocate

Jurisdictions differ as to who represents the child's interest in a child protection case and when this individual is appointed. In any case, an individual advocating for the child's best interest should participate in CPM. Some jurisdictions rely on a guardian ad litem (GAL) who gathers information regarding the child's life prior to mediation and participates in the decision regarding the child's

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## Guidelines for Child Protection Mediation

participation in mediation. During mediation, the GAL presents information that is pertinent to the child's case, including information about removal and placement, and often makes recommendations believed to address the child's best interests. In some jurisdictions, Court Appointed Special Advocate (CASA) volunteers are appointed by the judge to watch over and advocate for the child. If appointed, CASA volunteers should participate in CPM to provide information about the family, the child and the child's situation, that informs the discussion and helps with decision making.

### **Role of Attorney for Child**

In some jurisdictions the child may be represented by an attorney who advocates for the child's wishes. This attorney should assist in determining if the child should participate in CPM. If the child participates, the attorney should meet with and prepare the child prior to, and counsel and advise the child during the session. The attorney can support the child's participation and assist the child to articulate his/her wants and needs, including but not limited to any services, visitation or placement options. If the child does not participate in CPM, the attorney should be the child's "voice" and articulate his/her wants and needs. Whether the child participates or not, during CPM the attorney presents and frames the legal issues on behalf of the child and safeguards the child's legal interests. The attorney is also responsible for helping the child to understand and consider what their options and legal rights are before, during and after CPM. This includes counseling the child as to the consequences of any decisions made during the session, including any agreement reached.

### **Role of the Child**

CPM programs should specify who will decide whether and how a child may participate in the process. Factors to be weighed in such a determination include the child's wishes, the child's age and developmental capacity, and child protective factors, including the nature of the allegations in the case. There should be a meaningful inquiry to determine if the child understands mediation and if the child wants to participate. This discussion should occur between the child and the child's attorney, GAL or CASA, or other appropriate support person prior to mediation. Whoever meets with the child before mediation should elicit the child's preferences in a developmentally appropriate manner. A child should not attend a mediation session with an alleged perpetrator in cases where the confrontation is determined to be harmful to the child.

If a child expresses an interest in participation, the mediator should work with the child's legal representative to determine the child's capacity to actively and safely participate in the mediation. If a child does not wish to participate or it is determined that the child should not participate in person, alternative methods for ensuring the child's "voice" is present may be utilized. For example the child could be allowed to appear by video or teleconference, to write a letter to be read at the mediation and/or to express their concerns to their attorney, GAL, or CASA, who can then relay their concerns directly in mediation.

### **Role of Other Participants**

Other CPM participants may include foster parents, extended family, adoptive parents, support persons, tribal representatives, therapists, etc. Some of these participants may also elect to bring attorneys to assist them in mediation. Their role in mediation will be determined by the nature of the case and reason for their participation in mediation. If CPM communications are confidential by law or rule, the participation of non-party participants will likely require the permission of the mediation parties as non-party participants would be able to hear otherwise confidential communications. Non-party participants would be bound by the same confidentiality laws and rules that apply to other mediation participants, and would be required to sign the agreement to mediate if one is utilized. Unless non-party participants are agreeing to be bound in some way by the agreement, consent by non-party participants likely will not be needed in order for the parties to reach a mediation settlement agreement.



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## Guidelines for Child Protection Mediation

### 4.2.7 Time Allotted for Mediation

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A key element of mediation, distinguishing it from both formal court hearings and mandated court conferences, is that discussions can proceed slowly, giving people an opportunity to ask questions, absorb information, and then process and react to the unfolding conversation. A clear protocol should be established to determine who will set the time for mediations and how they will be scheduled. Some programs may set a basic time frame for sessions such as two or three hours and then adjust it depending on the specifics of the case, the number of people involved, or whether or not attorneys will be present. Other program designs may allow for greater flexibility in order to be responsive to local practices or needs. Time constraints, cost considerations, and other pressures exist in all systems. However, courts, child protection agencies, attorneys and others need to allow sufficient time for the mediation to succeed.

The program and individual mediators may need to resist or defuse pressure to conduct mediations quickly or shorten the sessions. It diminishes the effectiveness of the mediation when these vital interactions are compressed or truncated. To the extent possible, parties should decide for themselves when their conversation is concluded, reflecting the underlying principle of mediation which supports self-determination and requires that the mediation process be responsive to the needs of the participants.

### 4.2.8 Mediation Communication Privilege/Confidentiality

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Confidentiality is essential to the integrity and effectiveness of the mediation process. In CPM, confidentiality helps to create a forum in which parents may safely and openly discuss and consider alternatives for their children and themselves, as well as any pending legal issues. Lawyers, agency representatives, and other professionals are also able to more freely share and discuss their concerns including possibly the allegations of child maltreatment, concerns for the children or parents, etc.

Mediators should conduct CPM consistent with ethical standards governing the confidentiality of mediation communications in their jurisdiction. Prior to or at the beginning of the mediation, mediators should inform participants of the extent to which mediation communications are confidential and/or privileged in a manner clear to all participants. Mediators should be knowledgeable of the limits of mediation confidentiality protections and explain carefully that there are exceptions to mediation confidentiality.

An agreement to mediate may be utilized to address confidentiality and privilege. The agreement should be written in plain language and mediators should discuss these provisions with participants prior to or at the beginning of mediation and obtain each participant's informed written consent. The confidentiality requirements of CPM should not limit the ability of the mediator and mediation participants to report new allegations of child abuse or neglect that may be disclosed in mediation.

If mediators conduct private sessions with a mediation participant or with fewer than all participants, the confidentiality of the private sessions must be maintained by the mediator unless the disclosing participant agrees otherwise. While this additional confidentiality protection requires the mediator to not disclose mediation communications to another mediation participant not attending the private session, it should not prevent the mediator from reporting new allegations of abuse or neglect which are revealed to the mediator in a private session. Mediators should make sure that mediation participants understand the limits of the confidentiality of the private session as well as the joint sessions.

Mediators should inform their program manager promptly if they are subpoenaed to testify in court or to disclose documents related to mediation. Mediators should consult legal counsel in responding to subpoenas that may require disclosure of information that relates to or arises out of the mediation process. Unless ordered otherwise by the court, mediators should honor all commitments made to the mediation participants concerning confidentiality.

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## **Guidelines for Child Protection Mediation**

### **4.2.9 Mediator Assignment and Selection and Co-Mediation**

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Ideally, the pool of potential mediators should reflect the diversity of the population they serve. In addition, a program should have the capacity to provide mediators with specific characteristics or skills when appropriate for a particular case. For example, a mediator who has experience working with children and adolescents may be able to engage them more easily and be better able to help them participate effectively in the mediation process. Other cases where mental health issues are prominent can benefit from having mediators who are knowledgeable and comfortable working with this population.

Some CPM programs utilize one mediator while others utilize a co-mediation model. The decision to use a single mediator or a team may ultimately be made because of economic or resources considerations. Using a single mediator is obviously more cost effective and allows coverage of more cases. A co-mediator model allows greater diversity in terms of age, gender or ethnicity, expertise and competencies and permits each mediator to assume complementary roles in mediation.

### **4.2.10 Agreements and Reporting Outcomes of Child Protection Mediation**

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Programs and their stakeholders must decide if, when and how to report outcomes of CPM sessions, and what information should be disclosed. Because the court may be required to take further action in the case, a judge may order or expect that the outcomes of CPM will be reported to the court regardless of whether an agreement is reached. Generally, CPM programs may advise the court regarding who attended mediation and whether a full or partial agreement has been reached or if the mediation has been adjourned and rescheduled for another session. Mediators should not provide any comments or make recommendations to the court as that practice will discourage frank and open communication in mediation. Moreover, the practice likely may violate mediator standards of practice as well as jurisdictional mediation confidentiality protections. It is also important that the mediator adhere to the ethical practice of mediation and neither offer nor be perceived as offering legal advice regarding discussions in mediation or potential agreements.

#### **Writing and Enforcing Agreements**

Programs need to consider many operational issues in designing their agreement process. Who will write the agreement, who will submit the agreement, and what the format of the agreement will be, all need to be decided. Many programs have the mediator write up the agreement during or after the session. Other programs designate one of the attorneys to draft the agreement. CPM programs should be careful that the designation of one individual to draft agreements does not compromise the impartiality or neutrality of the CPM program in substance or in appearance.

In some instances mediated agreements will be subject to the approval of the court. When deciding who will be responsible for presenting an agreement to the court, the mediation program or one of the parties, much will depend on whether cases will go before the judge immediately after the conclusion of the mediation session. If the program or the court requires the parties in CPM to physically sign the agreement before it is submitted, then parties must either be willing to wait for it to be completed after a session or return to the program for signing.

Programs and their stakeholders should decide whether agreements may be written in the parties' own language or must use particular legal terminology required by the Court. To the extent possible, agreements should be written in plain understandable language. All participants' obligations should be included in clear terms, and when possible, specific timeframes for compliance to the extent determined by the parties.

When participants reach an agreement in mediation, mediators should encourage them to consider signing a written agreement that reflects their oral agreement. Mediators should encourage parties to consider whether an oral agreement will be enforceable at all or to the same extent as a written agreement given the confidential nature of mediation.

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## Guidelines for Child Protection Mediation

Under some circumstances such as in the case of open adoptions in some jurisdictions, mediation participants may reach a voluntary agreement that may not be enforceable in whole or in part. Mediators should support the self-determination of mediation participants who choose to agree to such settlements and encourage discussions concerning the extent to which the agreement may or may not be enforceable.

### 4.2.11 Program Funding and Institutionalization

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The source of funding for CPM programs is critical to the long term stability and success of the programs. Some sources include revenue from court fees or other common fees or line items in the court or child protection agency budget, at the state, provincial, county or local level. Because these cases often involve indigent parties, CPM programs should not be expected to be self sustaining through the collection of fees for service.

Court rules and legislation mandating the use of CPM are helpful, but they are not a definitive means to sustainability. The survival of CPM depends upon it being institutionalized into the basic framework of the child protection and/or court systems. It is the responsibility of program staff to help the judiciary, lawyers, case workers and other stakeholders understand that CPM offers the family and child protection stakeholders a positive, empowering, constructive and confidential experience that is unavailable in most other forums. Committed, invested stakeholders are strong and effective allies and their continuing support is essential to program success.

### 4.2.12 Mediator Recruitment and Training

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Mediators who conduct CPM must be developed through targeted, deliberate recruitment, training and supervision. Individual mediators must possess or be capable of acquiring and maintaining the skills, knowledge, ethics and qualities that are necessary to serve as a mediator for highly complex, legal, and emotionally laden disputes involving children, their families and child protection professionals.

#### Recruitment

It is important that mediators possess strong communication skills, education or experience in the helping professions and/or legal systems, be culturally responsive and meaningfully represent the diversity of the population who they will serve. CPM mediators frequently have prior experience as mediators in other areas or have backgrounds in other dispute resolution processes or methods. They may be attorneys, mental health professionals, or other qualified professionals.

#### Standards of Practice

CPM mediators should be governed by ethical principles and standards of professional conduct endorsed by most national mediation organizations (such as the Model Standards of Practice for Family and Divorce Mediation endorsed by the Association of Family and Conciliation Courts, The Family Law Section of the American Bar Association and other national organizations or the Model Standards of Conduct for Mediators endorsed by the Association for Conflict Resolution, American Bar Association and American Arbitration Association) or court approved mediation principles and standards. In some cases there may be jurisdiction specific mediation standards or other professional association standards such as the National Association of Social Workers (NASW) Standards of Practice for Social Work Mediators. Mediators should strive to comply with all applicable standards.

#### Training Requirements

Child protection mediators should be required to complete at least 40 hours of CPM training. CPM Training should be conducted by highly experienced mediator trainers. Training should include both didactic and experiential learning in multi-party mediation. Final selection of mediators should be contingent on successful completion of training and mediation observation.

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## Guidelines for Child Protection Mediation

CPM training for mediators should include the following:

- Conflict Resolution Concepts in CPM;
- Court Process in CPM;
- Mediation Process and Techniques in CPM;
- Communication Skills in CPM;
- Standards of Conduct/Ethics for Mediators in CPM;
- Treatment Options and Community Resources in CPM;
- Diversity Issues in CPM;
- Family Dynamics, Child Development and Psychological Issues in CPM;
- Domestic Violence Issues in CPM;
- Working with Multiple Parties in CPM;
- Issues Concerning the Needs of Children in the Context of Child Protection Proceedings;
- Child Protection Laws;
- Role of Parties and Participants in CPM.

There should be minimum requirements for continuing education and professional development for child protection mediators. CPM mediators should receive periodic updates on changes to laws, court rules and child welfare agency policies and practices. Additionally, CPM mediators should be encouraged to take advanced training in mediation ethics and mediation skills.

### **Mentoring and Supervision**

New mediators should have the opportunity to observe or co-mediate with more experienced practitioners. Programs should create a skill building system of coaching and critiquing new CPM mediators as well as an established standardized practice for assessing mediator skills on an ongoing basis.

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# Guidelines for Child Protection Mediation

## Section 5: Conducting Child Protection Mediation

There are a number of issues that the mediator and program manager must consider before and during mediation sessions.

### 5.1 The Role of the CPM Mediator

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The mediator's role is to create an atmosphere that empowers the mediation participants to meaningfully engage in a safe communication and problem-solving process and make informed and voluntary decisions. The mediator typically begins by explaining the mediation process to the participants and ensuring that they understand the process and the extent to which mediation communications may be confidential or privileged. The mediator encourages the parties to identify what issues they wish to discuss, exchange information, identify the options and alternatives available to resolve the issue, and then negotiate and decide which solution is acceptable to all the mediation parties. The mediator strives to be impartial to all participants and neutral to the outcome and does not decide any aspect of the issues for the parties. The mediator may help to structure the mediation process by suggesting an agenda, meeting at times privately with different mediation participants during the session, asking questions, etc. in order to promote an effective mediation process. If the mediator believes the case may not be suitable for mediation, the mediator may adjourn or terminate the mediation session.

### 5.2 Conducting CPM in a Culturally Appropriate Manner

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CPM brings together people from a rich diversity of backgrounds and cultures. Respect for heritage, ethnicity, race, religion, spiritual beliefs, traditions, customs, socioeconomic status, education, gender, gender identity, sexual orientation, age, and many other social characteristics should be at the heart of every CPM program. Furthermore, it is well documented that many cultural groups are overrepresented in the child welfare system, and it is essential that CPM programs are culturally responsive. Cultural responsiveness should be reflected throughout the program in its principles, goals, operations, standards, hiring, professional development, service delivery and practice.

It is essential for mediators and others in the program to show a genuine appreciation and respect for the culture of the CPM participants. Mediators should be sensitive to the norms regarding power structure, gender, role, child rearing and decision making that may impact the mediation and outcome while at the same time ensuring that all parties can meaningfully participate in mediation. Mediators should strive to become aware of, and remediate to the extent possible, their own implicit biases that may adversely affect their ability to mediate cases.<sup>4</sup>

### 5.3 Use of Language Interpreters

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When there are language differences, mediators should consider the need for both oral interpretation of communications during the session and for written translation of documents. Neutral and impartial interpreters should be brought in to assist with the mediation process, even if the mediator is bilingual. It is recommended that interpreters not be otherwise involved in the case, and where possible, should be assigned to the case by the court or other managing entity so programs, as well as the individual requiring interpretation, can verify their competence. The interpreters should fully understand the extent to which mediation communications are confidential.

Mediators should promote a process where only one individual is talking at a time to enable adequate interpretation. Consideration should also be given as to where the interpreter will be seated in the mediation to most effectively assist the process. Mediators should prepare the interpreter for CPM and convey to the interpreter that it is a confidential process intended to assist everyone to better understand

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<sup>4</sup> Miller, N.B. & Maze, C.L. (2010) *Right from the Start: The CCC Preliminary Protective Hearing Benchcard*, National Council of Juvenile and Family Court Judges.

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## Guidelines for Child Protection Mediation

each other. It is very important that the participants understand the interpreter and that all communications must be interpreted. An inquiry should be made as to whether the interpreter may require a brief break to ensure the interpreter's ongoing effectiveness and accuracy. In some cases, consideration should be given as to whether more than one interpreter would aid the process. Subsequent to the session, mediators should work with the parties and the interpreter to determine the process for writing the agreement; whether the agreement will be in English only or both English and the parties' native language; and who will translate the agreement.

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### 5.4 Mediation: Safety and Capacity

CPM sessions are structured and conducted so as to address safety and capacity concerns, provide appropriate accommodation, and promote engagement of individuals with diminished capacity and/or disabilities. This notwithstanding, if an individual is unable to exercise self-determination, or if another impediment to mediation exists that cannot be remedied, a case may need to be excluded from mediation. Mediators should continue the safety and capacity assessment process throughout the course of mediation.

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#### 5.4.1 Safety Considerations

CPM programs should develop clear protocols that are designed to protect everyone's safety. When screening for safety concerns, programs should seek to identify what, if any, accommodations can be offered to enable an individual to participate or whether mediation should take place. Consideration should be given to where CPM sessions can be safely conducted. When mediation is conducted in less secure facilities, assessment protocols may need to be more comprehensive.

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#### 5.4.2 Family Violence

Despite a high correlation between child maltreatment and domestic violence,<sup>5</sup> the existence of family violence in child protection cases does not necessarily preclude CPM. However, mediation is not appropriate when a mediation party is unable to safely advocate for his or her needs and interests or anyone's safety may be endangered as a result of mediation. Victim empowerment is a key principle in effective handling of family violence cases. Therefore, considerations should be given as to whether participation in mediation will put the victim or others at risk before, during or after the conclusion of the session(s). Prior to CPM, program staff may contact the professionals on the case, or review court records, case worker records, etc. to determine if safety concerns exist. Programs should also utilize individual pre-mediation questionnaires and/or private in-person or telephone intake interviews specifically intended to assess safety concerns. Determining whether CPM can be safely conducted when family violence exists is reliant upon a careful, case by case appraisal.

When evaluating the impact of family violence, it is important to look at more than physical abuse. Coercive and controlling behavior inhibits the opportunity for self-determination by all participants. When a mediator deems a case with family violence appropriate for mediation, the session(s) should be configured to maximize safety. The victim and perpetrator may use different entrances and be kept in separate rooms, or have separate sessions scheduled on different days. Or, one or more mediation parties may be included in the session via phone or teleconference. Other modifications may also be considered to enhance safety protections and to ensure that the parties can safely participate in every aspect of the mediation. Still, there may be circumstances where a victim feels unsafe or unable to exercise self-determination notwithstanding accommodations or modifications. In such an instance, the victim should have an opportunity to opt-out of mediation at any stage of the process.

CPM mediators should be competent in best practices and the latest research related to family violence. Moreover, they need to be skilled at knowing when and how to encourage a family violence victim to

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<sup>5</sup> Edleson, J.L. (1999). The overlap between child maltreatment and woman battering. *Violence Against Women*, 5, 134-154.

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## Guidelines for Child Protection Mediation

Speak up in mediation without endangering the safety of the victim or anyone else. Some techniques to achieve this goal include the following:

- Careful screening of cases;
- Meeting in a “safe” facility;
- Keeping the victim and perpetrator in separate meeting rooms;
- Utilizing a co-mediation model;
- Allowing the victim to bring a support person.

In addressing family violence concerns, the mediator should always adhere to recognized standards of professional conduct for mediators. In the event that family violence concerns increase and the mediator can no longer comply with these standards, the mediator should terminate mediation and take appropriate action to protect the safety of all involved.

### 5.4.3 Capacity

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The mediator should assess whether a person is able to meaningfully participate and exercise self-determination and informed decision making on his or her own behalf as well as the mediator's ability to accommodate the participation and engagement of all participants. A determination of incapacity need not preclude a person from participating in mediation, as it may be possible to include a court appointed guardian, surrogate or other advocate to provide support for the incapacitated person. In addition, some forms of incapacity may be resolved if mediation is adjourned and rescheduled for a later session. Some factors to consider when determining a party's ability to exercise self-determination and meaningfully participate in mediation include whether he or she is able to understand the dispute, the facts relevant to the dispute, assess consequences to alternatives, freely make decisions, understand the mediation process, and be motivated to seek a positive outcome.

## 5.5 Power Imbalances

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### 5.5.1 Nature of the Imbalances

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In addition to the power imbalance that exists between a perpetrator and a family violence victim, there are often real or perceived imbalances of power between the state or province and the family. The mediator should promote a process that enables everyone to meaningfully participate in mediation and exercise self-determination in a balanced manner.

### 5.5.2 Strategies to Address the Power Imbalance between the Parents and the Child Welfare Agency

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Power imbalances are best addressed by providing the parents with an equal opportunity to actively and meaningfully participate in mediation. As such, mediators should strive to:

- Educate parents and all mediation participants prior to mediation concerning CPM;
- Include the parents from the beginning;
- Begin the mediation in a way that empowers the parents and builds trust in the process;
- Make the language of the mediation understandable to all participants;
- Treat all parties impartially and not favor any mediation participants;
- Respect the parent's right to disagree with the professionals and to seek court intervention instead of resolving the issues in mediation.

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## Guidelines for Child Protection Mediation

### 5.6 Maintaining Impartiality and Neutrality and Avoiding Conflicts of Interest

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Mediators are ethically bound to be impartial to the mediation participants and neutral to the agreements reached in mediation. Mediators should maintain impartiality and neutrality throughout the mediation process and are obligated to assist all involved mediation participants. Due to these considerations, some professionals, such as child protection agency employees, should not be mediators in these cases.

Mediators should disclose potential conflicts of interest as soon as a mediator becomes aware of a conflict. If the mediation parties agree to continue the process after a mediator discloses a conflict, the mediator may continue to mediate if the conflict of interest does not compromise the impartiality and neutrality of the mediator. When there is a clear or undisclosed conflict of interest, a mediator should decline to mediate or withdraw if mediation has begun. Mediators should not create a conflict of interest during the mediation. A mediator should not provide any services to a party that is not directly related to the mediation process before, during or after the mediation.

### 5.7 Participant Preparation

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CPM programs should strive to educate mediation participants about CPM prior to the mediation session. Whenever possible, program-specific print and/or audiovisual CPM information should be developed and distributed to all mediation participants. Programs could also host pre-mediation meetings to help prepare participants for mediation. In addition, CPM programs should regularly conduct ongoing mediation training for child protection system stakeholders.

Preparing families is particularly important and challenging. While mediation is a forum familiar to the professionals, it is likely foreign to families and foster parents who may feel intimidated and incapable of participating in a meaningful manner. Having someone thoroughly familiar with the mediation process prepare them to participate can be very helpful. It's critical that the family participants have an opportunity to receive information and have their questions answered so that they understand the process (roles, extent and limitations of confidentiality, extent to which participation may be voluntary, etc.) and feel capable of participating. Whether the mediator does this or the program has someone else specifically assigned to this role, it is essential to the process.

In addition, at the beginning of mediation mediators should explain the following to mediation participants:

- The CPM process;
- The role of the mediator;
- The anticipated length of time of the mediation;
- The extent and limits of confidentiality;
- The extent to which the process is voluntary;
- The consensual nature of mediation;
- What will happen if agreements are reached; and
- What will happen if agreements are not reached.

### 5.8 Roles and Responsibilities of the Mediator: Conducting the Session

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The mediator must maintain a neutral and impartial posture toward the participants and the issues in the mediation and model effective interpersonal communication and collaborative conflict resolution. As such, the mediator helps all CPM participants to establish their own working agenda, and becomes a role model for respecting to differing perspectives and collaborative problem solving.

The mediator also must recognize when partial agreements are reached and check to be sure that the necessary mediation parties are in agreement. When agreements occur, the mediator should keep clear notes and be ready to accurately and fairly summarize them for the parties during the mediation.



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## Guidelines for Child Protection Mediation

### 5.9 Concluding Mediation

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The mediator plays an important role at the end of the mediation by helping the parties to clarify and memorialize any final agreements. While the mediator need not write the agreement, the mediator should do so if requested by the parties. While mediators generally may serve as a scribe and record the agreement reached by the parties, mediators should be mindful of jurisdictional rules governing the unauthorized or unethical practice of law and the extent to which it may or may not impact the role of the mediator in recording agreements reached in mediation. The decision to assign the role of writing the agreement to someone other than the mediator should be made by the mediation participants so the mediator does not appear biased.

When a mediation session does not result in a whole or partial agreement, the mediator should acknowledge any constructive efforts the parties have made and encourage them to continue to strive to find common ground in the future. The mediator may also ask the parties if they wish to discuss how they will proceed to resolve the dispute after mediation and, if permitted, may offer to assist the parties in the future should there be interest and willingness to return to mediation later.

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# Guidelines for Child Protection Mediation

## Section 6: Monitoring and Evaluation

### 6.1 Program Monitoring

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It is extremely helpful to have a data collection mechanism in place before the program is launched. During the design phase, it is useful to think through the type of information that will be gathered for routine program monitoring, and, if relevant, the information needed for a full evaluation. It is also helpful to periodically review the collected data to determine what, if any, changes are necessary for improving the program.

Program monitoring should provide basic information that will allow program managers to assess how well the CPM program is meeting the needs of families and stakeholders. If possible, consideration should be given to creating a simple automated management information system to record basic information about cases and outcomes. Programs will have to consider what type of information they will be asked to routinely produce (e.g., for annual reports) before deciding what information to collect. It is likely that the system should note the participants' names and contact information, the mediator, the dates of mediation, how long the session lasted, who appeared for mediation and the outcome of the session. In addition, CPM programs should consider collecting confidential satisfaction surveys from mediation participants and maintain summaries of satisfaction surveys separate and apart from specific case information to insure the confidentiality of mediation sessions.

### 6.2 Program Evaluation

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A detailed evaluation can be used to address more complex questions about the process and its strengths and weaknesses. Such an evaluation might include collecting data to answer questions related to compliance with agreements, how agreements reached through the program differ from non-mediated agreements, or if there were certain types of cases where there were a lower percentage of agreements were reached. These questions will generally require the development of a comparison group, because at least some of the questions will need to examine the results of mediated cases and non-mediated cases. If the evaluation is longitudinal, the data will not be available immediately and this may mean reviewing court or agency documents or conducting interviews months or years after the mediation.

## Section 7: Other Collaborative Decision Making Methods

Many child welfare and court systems employ a range of decision making processes from traditional approaches to those that are increasingly collaborative and involve children, their caregivers, extended family systems and others. In addition to CPM, other collaborative decision making processes include, but are not limited to: family group decision making, family group conferences, family case planning conferences, team decision making, integrated case management, and family team conferences.

A variety of approaches can help better meet the diverse needs of a wider range of families at all stages of their involvement in the child protection system. Multiple models may allow the family and professionals or the court to select the resolution method that best addresses the circumstances of the case.

While many communities are implementing multiple collaborative decision making processes, there is little research or literature on how to best coordinate these approaches. Having an array of decision making approaches presents both challenges and opportunities and identifying what strategies should be used to optimize their success can be quite challenging. Some steps include the following:

- Communities can conduct a survey of the various collaborative planning and decision making methods used in their area. At a minimum, multiple systems, including courts, child welfare, domestic violence, and mental health, should be surveyed.

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## Guidelines for Child Protection Mediation

- Stakeholders should exchange information concerning the strengths and weaknesses of various identified methods.
- Decision makers can map how these decision making processes can complement rather than compete with one another. Discussions around referral processes, policies, service agents, organization structures, and research/evaluation findings could help to create a framework for better coordinating these methods.
- Stakeholders should articulate through written literature and presentations how these processes fit together. For example, how each model works, how referral processes work, what models are used at specific points in the legal continuum and how referrals can be made between the different processes. These materials should identify through policies, training, and protocols, each model's potential and clarify that they add value to and create a continuum of collaborative decision making methods.
- Stakeholders should conduct a continuous quality improvement process to periodically review the interface of the decision making processes, and make alterations as needed. Communities could bring together representatives from the agencies that play a significant role in these processes to review cases and discuss improvement mechanisms, model fidelity, and referral processes between the approaches, etc.

### Section 8: Conclusion

Whenever possible, child protection agencies and courts should promote collaborative decision making opportunities including CPM before litigation or agency-based solutions are imposed on families. As reported in the Child Welfare Information Gateway published by the U.S. Department of Health and Human Services, "When families are part of the decision making process and have a say in developing plans that affect them and their children, they are more likely to be invested in the plans and more likely to commit to achieving objectives and complying with treatment that meets their individual needs."<sup>6</sup>

CPM is a proven collaborative decision making process which holds the potential to better engage families; improve working relationships between families; foster parents and professionals; produce high levels of settlements at all stages; save judicial time; promote more timely resolution of cases; and improve parental compliance with case plan tasks in a cost efficient manner that is highly rated by both families and professionals. In some studies there is also evidence that CPM has resulted in increased placement in relative care and decreased placement in non-relative foster care when compared to litigation.

In addition to assisting in the resolution of child protection disputes, the NCJFCJ also points out that "The mediation process itself can also serve as a model for future nonviolent and constructive problem solving and conflict resolution."<sup>7</sup> As such there are other potential benefits to CPM including the potential to improve the overall quality of child protection services and promote more constructive conflict resolution by both families and child protection professionals.

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<sup>6</sup> [www.childwelfare.gov/pubs/f\\_fam\\_engagement/](http://www.childwelfare.gov/pubs/f_fam_engagement/)

<sup>7</sup> Resource Guidelines Improving Court Practice in Child Abuse and Neglect Cases, NCJFCJ 1995, Approved by the NCJFCJ Officers and Board of Trustees January 1995, p. 135.

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# Guidelines for Child Protection Mediation

## Section 9: Glossary of Terms

### A

**Active efforts:** An action that is required of the state in caring for an Indian child, mandated under ICWA. It refers to an effort more intense than the legal term "reasonable efforts". Active efforts applies to providing remedial and rehabilitative services to the family prior to the removal of an Indian child from his or her parent or Indian custodian, and/or an intensive effort to reunify an Indian child with his or her parent or Indian custodian.

**Adjudicatory Hearing:** A hearing where the court determines whether the allegations in a petition have been proven; fact-finding hearing. Also known as a Jurisdictional Hearing.

**Aging out:** Refers to youth who will no longer be eligible to remain in foster care because of their age, generally 18-2.

**ASFA (US Law):** Adoption and Safe Families Act. Federal law establishing requirements for finding permanent homes for children in foster care.

**Attorney for the Child:** An attorney appointed to represent the wishes and interests of a child. (see Law Guardian and guardian ad litem).

### C

**CASA:** Court Appointed Special Advocates: Trained community volunteers appointed by the court, who perform different functions in different jurisdictions including collecting information for the court or representing the best interests of a child.

**Caseworker:** An employee of a child welfare, social service agency, department, or ministry responsible for working with families in need of assistance. Caseworkers can but need not be social workers.

**Confidentiality in CPM:** Communications, be they oral, written or non-verbal, made during mediation are held in confidence and not disclosed to anyone outside the mediation unless all parties agree to such disclosure or the disclosure is permitted or mandated by the terms of the mediation confidentiality agreement, law, or order of the court.

**Collaboration:** A cooperative and non-competitive method of working together to resolve conflicts or problems in a manner that maximizes the extent to which concerns of all parties are best addressed.

**Conflict of Interest:** In CPM, a conflict of interest may include circumstances where the relationship between the mediator and the mediation participants or the subject matter of the dispute compromises or appears to compromise the mediator's impartiality or neutrality.

### D

**Disposition:** The outcome of a case; a hearing where the court decides whether a child remains in or returns home and what services the family needs.

### E

**Emergency Removal Hearing:** (Shelter Care Hearing): Hearing to determine whether children can return home when child protection agency has done an emergency removal based on children being at imminent risk. Also known as Temporary Custody Hearing.

**Empowerment:** In the context of CPM, empowerment refers to the process whereby mediation participants are provided the opportunity and encouraged to actively participate in the communication and negotiations inherent in mediation.

### F

**Family Violence:** A pattern of assaultive and coercive behaviors that operate at a variety of levels - physical, psychological, emotional, financial, or sexual – that one person uses against another person. The pattern of behaviors is neither impulsive nor "out of control", but is purposeful and instrumental in order

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## Guidelines for Child Protection Mediation

to gain compliance or control.<sup>8</sup> As used in this document, the term “family violence” includes domestic and intimate partner violence.

**Finding:** A court's determination of fact.

**Foster care:** A temporary placement of a child outside of their home with a family or in another setting, under the authority of an authorized agency or the child protection system.

### G

**Guardian ad litem (GAL):** Generally, a person who speaks on behalf of someone who is not able to speak for him/herself. In some jurisdictions, a GAL is an advocate for the child and works to promote the child's best interests. The GAL may or may not be an attorney. (See Law Guardian and Attorney for Child)

### I

**ICWA (US Law):** The Indian Child Welfare Act. A US Law enacted in 1978 that sets out requirements for state courts handling of child protection cases where an Indian child is or is eligible to be a member of a federally recognized tribe. The intent of ICWA is to "protect the best interests of Indian children and to promote the stability and security of Indian tribes and families". ICWA establishes requirements for US state courts with respect to tribal authorities, the requirements include notifying tribes of proceeding, the right of a tribe to intervene, minimum evidentiary requirements for placement of Native American children in foster care, use of expert testimony in making such determinations, the active efforts that must be made to avoid placement and toward reunification, and placement preferences. (See also Indian Custodian)

**Indian custodian:** As defined in the *Indian Child Welfare Act (ICWA)*, an Indian custodian is “any *Indian* person who has legal custody of an *Indian child* under tribal law or custom or under State law or to whom temporary physical care, custody, and control has been transferred by the parent of such *child* [italics added]” (U.S.C. Title 25).

**Impartiality:** Includes freedom from favoritism or bias in word, action, or appearance.

### K

**Kinship (foster) care:** Foster care placement with a non-parent family member.

### L

**Law Guardian:** In some jurisdictions, an attorney who represents the child. (See Attorney for the child and Guardian ad Litem.)

### M

**Mandated Reporter:** Certain professionals who are required to report child abuse or suspected maltreatment of children to a central authority.

**Mediation:** Mediation is a confidential and informal process whereby a neutral and impartial third person encourages communication and negotiation and facilitates the resolution of a dispute or problem without prescribing what it should be. It is a non-adversarial process intended to help disputing parties reach a mutually acceptable agreement.

**Mediator:** An impartial and neutral third party who facilitates communication and negotiation among individuals or groups engaged in a dispute or involved in a relationship where problems, grievances and/or difficulties could arise in the future, by employing various techniques that help the individuals communicate and explore the potential for reaching a mutually acceptable agreement.

### N

**Neglect:** Generally, when a child's physical, mental or emotional condition has been impaired or placed in imminent risk of being impaired due to failure by a parent or other person legally responsible for a child to provide adequate care, food, shelter or supervision.

**Neutrality:** A disengagement from the outcome or decision made by the mediation participants.

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<sup>8</sup> Hon. Jerry J. Bowles et al., National Council of Juvenile and Family Court Judges, *A Judicial Guide to Child Safety in Custody Cases* at 8 (2008).

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### O

**Open Adoption:** Adoptive families and birth parents enter into contracts for contact between birth parents and child following adoption. Types of agreement and enforceability varies by jurisdiction.

### P

**Parties:** Named participants in the legal proceeding.

**Permanency Goals:** Under ASFA, the options for children in foster care 1) Return to parent 2) termination of parental rights and placement for adoption 3) referral for or transfer of legal guardianship 4) permanency placement with a fit and willing relative or 5) placement in another planned permanent living arrangement with a connection to an adult willing to be a permanent resource to the child.

**Permanency Hearing:** A hearing required under ASFA to review details and status of a child protection case and to determine appropriate permanency plan and goal.

**Placement:** When a child is placed by the court in the custody of the commissioner of the child protection agency or other child welfare official, to reside out of the home in foster care or in another institutional setting. Sometimes a child can be "placed directly" with a relative who will provide free care for the duration of the case.

**Privilege in CPM:** A right in certain jurisdictions and under certain circumstances for an individual to refuse to testify or otherwise disclose information obtained during mediation or to block other mediation participants from making such disclosures in court.

**Program Manager:** An individual who oversees quality control and the day to day operation of a CPM program. Also known as: director, administrator, coordinator, supervisor, etc.

### R

**Reasonable Efforts:** Actions taken by a child welfare agency to prevent or eliminate the need to remove a child from home or to make it possible for a child to return home safely.

**Relinquishment:** See Surrender.

**Removal:** Action taken by child protection agency to remove child from home or care of parents when there is risk of imminent harm to the child.

**Respondent:** Defendant; the parent against whom a child protection case is brought.

### S

**Self Determination:** The state in which individuals feel free to express their thoughts, opinions and desires, and make personal choices and informed decisions without undue external pressure or influence.

**Service Plan:** Requirements established by the child protection agency and authorized by the court which parent must complete to address issues which brought the family's case to court; required services to address needs of parent and children.

**Shelter Care Hearing:** See "Emergency Removal Hearing".

**Surrender:** Legal proceeding in which parent voluntarily and permanently gives up rights to the care and custody of a child. Procedures vary by jurisdiction. Some jurisdictions permit surrenders to be conditioned on adoption by certain people.

### T

**Temporary Custody Hearing:** See "Emergency Removal Hearing" .

**Termination of Parental Rights (TPR):** Legal proceeding to permanently end a parent's right to care and custody, and even contact with a child. With certain exceptions, under ASFA, required to be filed if child has been in foster care for 15 out of 22 months.

**Transition Planning:** Educational, vocational, housing and life skills planning done by the agency and youth to prepare the young person for when they age out of the foster care system; also includes identifying people who will be permanent adult connections for youths.

**Tribe or ICWA Tribal Representative:** In cases involving an Indian child within ICWA jurisdiction the tribe may elect to intervene and participate as a party. The tribe may be represented by legal counsel or

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## Guidelines for Child Protection Mediation

other representative. The Indian child's tribe has a discreet interest in any proceeding. In addition to the health, safety and welfare of the child, the tribe's interests include the survival of Indian and tribal culture. Tribal representatives may represent interests in tribal integrity, the cultural and social standards of the tribal community and the concept of extended family as they relate to the Indian child.

### V

**Voluntary Placement:** Agreement between a parent and the child protection agency for a child to be placed temporarily out of the home in the care and custody of the agency; agreements are for limited period of time during which parent must plan to resume care of the child or face court proceedings that could include termination of their rights.

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