NASPA
Student Affairs Administrators in Higher Education

TRAINING MATERIALS

Facilitating Fair and Effective Informal Resolution Processes Under Title IX

Fall 2020

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NASPA
Student Affairs Administrators in Higher Education

Facilitating Fair and Effective Informal Resolution Processes Under Title IX

Module 1: Introduction and Overview

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What are the regulatory requirements regarding "informal resolution" under Title IX?

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From the Commentary…

Informal resolution may present a way to resolve sexual harassment allegations in a less adversarial manner than the investigation and adjudication procedures that comprise the § 106.45 grievance process.

Department of Education, *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 85 Fed. Reg. 30026 (May 19, 2020) (final rule) (online at www.govinfo.gov/content/pkg/FR-2020-05-19/pdf/2020-10512.pdf) at 30098.

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From the commentary…

The Department believes an explicit definition of "informal resolution" in the final regulations is unnecessary. Informal resolution may encompass a broad range of conflict resolution strategies, including, but not limited to, arbitration, mediation, or restorative justice. Defining this concept may have the unintended effect of limiting parties' freedom to choose the resolution option that is best for them, and recipient flexibility to craft resolution processes that serve the unique educational needs of their communities.

Id. at 30401.

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§ 106.45(b)(9) *Informal resolution.*

A recipient may not require as a condition of enrollment or continuing enrollment, or employment or continuing employment, or enjoyment of any other right, waiver of the right to an investigation and adjudication of formal complaints of sexual harassment consistent with this section.

[A] recipient may not require the parties to participate in an informal resolution process under this section and may not offer an informal resolution process unless a formal complaint is filed.

(emphasis added)

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§ 106.45(b)(9) Cont'd

[A]t any time prior to reaching a determination regarding responsibility the recipient may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication . . .

(emphasis added)

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§ 106.45(b)(9)(i) (Written Notice)

Parties must be provided written notice that outlines

- ***The allegations***
- ***The requirements of the informal resolution process including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations, provided, however, that at any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint***
- *any* ***consequences resulting from participating in the informal resolution process****, including the records that will be maintained or could be shared*

(emphasis and bullets added)

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§ 106.45(b)(9)(ii-iii)

(ii) ***Obtains the parties' voluntary, written consent to the informal resolution process****; and*

(iii) ***Does not offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student.***

(emphasis added)

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From the commentary…

Because informal resolution is only an option, and is never required, under the final regulations, the Department does not believe that § 106.45(b)(9) presents conflict with other Federal or State laws or practices concerning resolution of sexual harassment allegations through mediation or other alternative dispute resolution processes.

Id. at 30404.

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Points on Informal Resolution

- The new regulations don't require it, but informal resolution is allowed.
- A formal complaint must be filed before any informal resolution process can begin.
- Both parties must voluntarily agree to informal resolution (written consent required). [No coercion or undue influence.]
- No "informed" consent standard as such, other than information required by regulations.
- Parties do not have to be in the same room…often, they are not.
- Equitable implementation by trained personnel

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Points on Informal Resolution

- Should you offer it?
  - Pros/Cons
  - Increased complainant autonomy
  - Training of personnel is required under the new regulations
- Who should implement?
- What type of training is needed?
  - Mediation? Arbitration? Restorative justice?
- When can't we use informal resolution?
  →When the allegation is that an employee sexually harassed a student.
- Does this option provide for more opportunities for "educational" interventions?
- What does this look like in practice?

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What types of informal resolution exist?
What are the range of options available to institutions?

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Informal Resolution Options

- Educational Conferences
- Mediation (Neutral, Facilitative, Collaborative)
- Med-Arb (Mediation and Arbitration, Non-Binding Arbitration)
- Restorative Justice
- Collaborative Law Model

[Each of these will be discussed more in-depth in the next module.]

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Important Considerations

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Who can implement informal resolutions on your campus?

- Title IX Coordinator
- Dean of Students
- Student Conduct
- Campus Ombudsperson
- Outside Entity/Third Party/Trained Mediators
- Other options….

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When is it inappropriate to use informal resolution processes?

§ 106.45(b)(9)(iii) ***[N]ot offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student.***

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Important Questions

- Who are "impacted Individuals" under Title IX?
- How do informal processes support culture and climate work on campus?
- How do informal processes relate to other, more formalized processes such as bias and incident response processes?
- Budget impacts/size and nature of an institution?
- What are the intersections among advisors, investigators and decision-makers?

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What type of training and skills do informal resolution tasked personnel need?

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Training Mandates Specific to the New Regulations

"Schools must ensure that Title IX personnel [Title IX Coordinator, any investigator, any decision-maker, and **any person who facilities an informal resolution (such as mediation)] receive training as follows**:

- On Title IX's definition of "sexual harassment"
- On the scope of the school's education program or activity
- On how to conduct an investigation and grievance process
- On how to serve impartially, including by avoiding prejudgment of the facts at issue
- On how to avoid conflicts of interest and bias
- Decision-makers must receive training on any technology to be used at a live hearing, and on issues of relevance of questions and evidence, including when questions and evidence about a complainant's sexual predisposition or prior sexual behavior are not relevant
- Investigators must receive training on issues of relevance to create an investigative report that fairly summarizes relevant evidence"

U.S. Dept. of Educ. Office for Civil Rights, Blog (May 18, 2020), https://www2.ed.gov/about/offices/list/ocr/blog/20200518.html

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Posting Training Materials to Your Website

"All materials used to train Title IX personnel:

- Must not rely on sex stereotypes,
- Must promote impartial investigations and adjudications of formal complaints of sexual harassment,
- Must be maintained by the school for at least 7 years,
- Must be publicly available on the school's website; if the school does not maintain a website the school must make the training materials available upon request for inspection by members of the public."

"Schools must publish training materials that are up to date and reflect the latest training provided to Title IX personnel."

"If a school's current training materials are copyrighted or otherwise protected as proprietary business information (for example, by an outside consultant), the school still must comply with the Title IX Rule. **This may mean that the school has to secure permission from the copyright holder to publish the training materials on the school's website**."

U.S. Dept. of Educ. Office for Civil Rights, Blog (May 18, 2020), https://www2.ed.gov/about/offices/list/ocr/blog/20200518.html (emphasis added).

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Title IX's definition of "sexual harassment"

[Three-Prong Test]

Sexual harassment means conduct on the basis of sex that satisfies one or more of the following:

(1) An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;

*(2) Unwelcome conduct determined by a **reasonable person** to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity; or*

(3) "Sexual assault" as defined in 20 U.S.C. 1092(f)(6)(A)(v), "dating violence" as defined in 34 U.S.C. 12291(a)(10), "domestic violence" as defined in 34 U.S.C. 12291(a)(8), or "stalking" as defined in 34 U.S.C. 12291(a)(30).

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§106.44(a) *General response to sexual harassment.*

A recipient with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States, must respond promptly in a manner that is not deliberately indifferent. . . .
"education program or activity" includes locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.

What does your campus policy state specifically regarding the *scope* of "education programs or activities?"

(emphasis added)

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Example of "Scope" in a Policy

This policy applies to ABC University students, employees, and third-parties located within the United States both on and off campus, as well as in the digital realm. Off-campus coverage of this policy is limited to incidents that occur on employee-led trips, at internship or service learning sites, and college-owned properties (including buildings operated by Registered Student Organizations), or in any context where the University exercised substantial control over both alleged harassers and the context in which the alleged harassment occurred.

Scope will be specific to an institution.

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Desirable skills and knowledge bases

- Active listening skills (e.g. paying attention, withholding judgment, reflecting, clarifying, paraphrasing, and summarizing.)
- Legal training
- Prior ADR experience
- Operational knowledge and experience in higher education
- Comfortable with TIX subject matter
- Bias/Implicit bias training
- Knowledge regarding campus policies/cultures
- Understanding of relevant objective standards

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Cross-training

- Cross-train with other disciplines
- Build credentials
- Other NASPA training programs
- Education Credentials
- Training in ADR in other contexts (e.g. Family Court)
- Other civil rights metrics
- Read, read, and read some more

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Never Claim to Have More Skills or Expertise Than You Actually Have

- "Ultra Vires"
  - Latin meaning act without authority or literally beyond powers. This term is frequently used in business and agency law (the Doctrine of Ultra Vires). An ultra virus act occurs when one commits an act that is beyond the powers or purpose of an individual and/or organization. (https://dictionary.thelaw.com/ultra-vires/)
- "Intra Vires"
  - An act is said to be intra vires ("within the power") of a person or organization when it is within the scope of their powers or authority. It is the opposite of ultra vires. (https://dictionary.thelaw.com/intra-vires/)
- Mental Health Providers, Lawyers, Trained/Certified Mediators are professional trades that require specialized training and are often regulated by federal and/or state requirements, professional organizations, and individual institutions.

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Bias, Conflicts of Interest, Impartiality, etc.

All Title IX personnel, including those implementing and/or facilitating informal resolution processes, should serve in their roles impartially.

All Title IX personnel should avoid:

- *prejudgment of facts*
- *prejudice*
- *conflicts of interest*
- *bias*
- *sex stereotypes*

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Additional Resources

- **American Bar Association (ABA) Section of Dispute Resolution**
  - *Preparing for Family Mediation* (https://www.americanbar.org/content/dam/aba/images/dispute_resolution/Mediation_Guide_Family.pdf)
- **Mediate.com Mediate University**
  - Basic 40-hour Mediation: This training which satisfies most state and court basic mediation requirements. It is approved for 40 hours of continuing mediation credit in Washington state and 40 hours of CLE credit in California--and reciprocally in many other states. Upon completion of the course, the participant will receive a Certificate of Completion. (https://www.mediateuniversity.com)
- **JAMS Solutions for Higher Education**
  - Title IX Hearing Officers & Mediators | Staff & Faculty Dispute Resolution & Prevention | ADR Training & System Design (https://www.jamsadr.com/solutions)
- **MWI.org**
  - All of MWI's Forty-Hour Mediation Training Programs (both the weekday and weekends/weeknights options) are currently being offered online and live via Zoom. (https://www.mwi.org/mediation-training/)
- **American Psychological Association (APA)**
  - Ensuring that investigations of campus sexual misconduct are reflective of psychological science: APA helped draft, and has endorsed, legislation that would minimize re-traumatization from campus sexual misconduct investigations. Date created: September 4, 2020 (https://www.apa.org/search)
- **Etc.**

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Conclusion

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Final thoughts…

- Flexibility
- "Tuning"
- Stay within skill set
- How "formal" is your "informal" process?
- Language/What will you call your process?
- What are some lessons learned from analogous fields?

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Thank you!

Assessment to follow…

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Student Affairs Administrators in Higher Education

Facilitating Fair and Effective Informal Resolution Processes Under Title IX

Module 2: Developing Informal Processes for Your Campus

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From the commentary accompanying the new Title IX regulations…

The Department believes an explicit definition of "informal resolution" in the final regulations is unnecessary. ***Informal resolution may encompass a broad range of conflict resolution strategies, including, but not limited to, arbitration, mediation, or restorative justice.*** *Defining this concept may have the unintended effect of limiting parties' freedom to choose the resolution option that is best for them, and* ***recipient flexibility to craft resolution processes that serve the unique educational needs of their communities****.*

Department of Education, *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 85 Fed. Reg. 30026 (May 19, 2020) (final rule) (online at www.govinfo.gov/content/pkg/FR-2020-05-19/pdf/2020-10512.pdf) at 30401 (emphasis added).

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A Closer Look at Specific Ways to Facilitate Effective Informal Resolutions

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Informal Resolution Options

- Educational Conferences
- Mediation (Neutral, Facilitative, Collaborative)
- Med-Arb (Mediation and Arbitration, Non-Binding Arbitration)
- Restorative Justice
- Collaborative Law Model

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Educational Conferences

- Concept in *Beyond Discipline* (2009)
- Can be called by a student, RSO, staff or faculty member
- Opportunity to have a conversation about anything
- How could ed conferences be adapted for Title IX?
- How campuses utilize educational conferences: Two examples

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Univ. of Central Missouri

"Conduct Educators" and "Educational Conferences"

"The primary tool of the Conduct Educator is the opportunity for an "Educational Conference" with the student. When the University becomes aware of a student who may not be meeting the expectations of good decision-making (usually through an academic alert from faculty, public safety report, or housing report), then the student will be contacted (generally by email) to schedule an Educational Conference."

Univ. of Central Missouri, *UCM Student Handbook: Your Guide to Good Decision-Making*, at 9.

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Univ. of Central Missouri Cont'd

"An Educational Conference might also be required if university personnel identify a pattern of behaviors or decisions that illustrate poor decision-making or potential risk. A student may also request an Educational Conference if there is a concern they would like to discuss. An Educational Conference may also be required in order to help UCM staff prevent a foreseeable negative event. For example, if staff become aware that students have planned a large and potentially risky party, those students might be required to meet with a Conduct Educator to discuss how they plan to manage that event and minimize the risk to attendees.

The Educational Conference should be viewed as an opportunity for a student to clarify their decision-making process and, in the case of poor judgment, take responsibility for correcting that error. The Educational Conference is designed to be a civil but critical examination of the student's decision-making process and direct discussion of choices the student has made. This process is only effective if a student participates openly, respectfully and honestly. Deception and incivility reduce the ability of the Conduct Educator to assist the student in evaluating the educational purposefulness of their choices and will not be tolerated."

Univ. of Central Missouri, *UCM Student Handbook: Your Guide to Good Decision-Making*, at 10.

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Tulane University

"The educational conference is an important instructional tool at Tulane University, and students and student organizations should expect to participate in this process. When the University becomes aware of a student who may not be meeting the core values and expectations of a Tulane University student and/or may have violated Tulane Code Rules (excluding sexual assault), the Office of Student Conduct or their designee, often Residence Life or Campus Life, can choose to resolve this concern through an educational conference instead of the more formal resolution process.

The educational conference is an opportunity for a student or organization to discuss critical decisions and options or to take responsibility for correcting any error in judgment. The educational conference may feature critical examination of a student's or organization's decision-making and a discussion of choices the student or organization has made. It is also proactive, allowing staff to speak with students about worrisome patterns of behavior or to prevent foreseeable negative outcomes, like discussions of risk management for events. It can also be an opportunity for students to share concern for other members of the community, to discover resources, to seek mentorship and guidance, and so on."

Tulane Univ., *Code of Student Conduct*, at 8 – 9.

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Tulane University Cont'd

"There are many potential outcomes in an educational conference. In some situations, a student or organization may be asked to agree to a learning action plan. A learning action plan may feature some of the consequences outlined in the section of this Code designated "Consequences," other than suspension or expulsion or revocation of recognition of a group. It is the responsibility of the student to complete this learning action plan in the manner and timeframe determined by the conduct officer.

Sometimes during an educational conference it becomes clear that a situation would be better addressed through a more formal process, such as an administrative hearing, student hearing panel or investigation. The conduct officer has the discretion to end the educational conference in lieu of these other processes."

Tulane Univ., *Code of Student Conduct*, at 9.

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What is arbitration?

- *The submission of a dispute to an unbiased third person designated by the parties to the controversy, who agree in advance to comply with the award—a decision to be issues after a hearing at which both parties have an opportunity to be heard.*
- *Arbitration is a well-established and widely used means to end disputes. It is one of several kinds of Alternative Dispute Resolution which provide parties to a controversy with a choice other than litigation. Unlike litigation, arbitration takes place out of court: the two sides select an impartial third party, known as an arbitrator; agree in advance to comply with the arbitrator's award; and then participate in a hearing at which both sides can present evidence and testimony. The arbitrator's decision is usually final and courts rarely reexamine it.*
- *Arbitration can be voluntary or required.* [Except on a college campus, for Title IX purposes, informal resolution cannot be required.]

https://legal-dictionary.thefreedictionary.com/arbitration

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What is mediation?

Mediation, as used in law, is a form of alternative dispute resolution resolving disputes between two or more parties with concrete effects. Typically, a third party, the mediator, assists the parties to negotiate a settlement. Disputants may mediate disputes in a variety of domains, such as commercial, legal, diplomatic, workplace, community, and family matters.

"Neutrals"

Campus "Ombudsperson"?

https://en.wikipedia.org/wiki/Mediation

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What is mediation? Cont'd

Mediation is a dynamic, structured, interactive process where an impartial third party assists disputing parties in resolving conflict through the use of specialized communication and negotiation techniques. All participants in mediation are encouraged to actively participate in the process. Mediation is a "party-centered" process in that it is focused primarily upon the needs, rights, and interests of the parties.

https://en.wikipedia.org/wiki/Mediation

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What is mediation? Cont'd

The mediator uses a wide variety of techniques to guide the process in a constructive direction and to help the parties find their optimal solution. A mediator is facilitative in that she/he manages the interaction between parties and facilitates open communication. Mediation is also evaluative in that the mediator analyzes issues and relevant norms ("reality-testing"), while refraining from providing prescriptive advice to the parties (e.g., "You should do... .").

https://en.wikipedia.org/wiki/Mediation

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What is mediation? Cont'd

The term "mediation" broadly refers to any instance in which a third party helps others reach an agreement. More specifically, mediation has a structure, timetable, and dynamics that "ordinary" negotiation lacks. The process is private and confidential, possibly enforced by law. Participation is typically voluntary. The mediator acts as a neutral third party and facilitates rather than directs the process. Mediation is becoming a more peaceful and internationally accepted solution to end the conflict. Mediation can be used to resolve disputes of any magnitude.

https://en.wikipedia.org/wiki/Mediation

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What is mediation? Cont'd

Mediators use various techniques to open, or improve, dialogue and empathy between disputants, aiming to help the parties reach an agreement. Much depends on the mediator's skill and training. As the practice gained popularity, training programs, certifications, and licensing followed, which produced trained and professional mediators committed to the discipline.

- JAMS
- American Arbitration Association (AAA)
- American Bar Association, ADR Section
- Association for Conflict Resolution (ACR)
- CPR Institute for Dispute Resolution
- National Association for Community Mediation

https://en.wikipedia.org/wiki/Mediation

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What is med-arb?

A form of arbitration in which the arbitrators starts as a mediator but in the event of a failure of mediation, the arbitrator imposes a binding decision.

Duhaime's Law Dictionary, *Med-Arb Definition*, http://www.duhaime.org/LegalDictionary/M/MedArb.aspx.

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Med-arb Cont'd

"[T]he essence of *med-arb* is to allow a softer mediation process to occur first thus taking every opportunity of achieving a resolution to a dispute which is not imposed and to which each party to the dispute subscribes voluntarily.

In this initial phase, the presiding neutral third-party acts as a mediator and coaches or encourages the parties towards a settlement taking into account the information received from both at a mediation hearing.

Med/arb motivates the participants at the mediation given the shadow of the hammer of *med/arb*: the transformation, if mediation fails, of the process to arbitration. At that point, the presiding officer, now sitting as an arbitrator and no longer as a mediator, is enabled to proceed as if the hearing was one of arbitration and to impose a resolution, a final and binding award, generally relying on the information presented during the mediation hearing."

Duhaime's Law Dictionary, *Med-Arb Definition*, http://www.duhaime.org/LegalDictionary/M/MedArb.aspx.

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What is restorative justice?

A restorative justice program aims to get offenders to take responsibility for their actions, to understand the harm they have caused, to give them an opportunity to redeem themselves and to discourage them from causing further harm. For victims, its goal is to give them an active role in the process and to reduce feelings of anxiety and powerlessness. Restorative justice is founded on an alternative theory to the traditional methods of justice, which often focus on retribution. However, restorative justice programs can complement traditional methods.

Academic assessment of restorative justice is positive. Most studies suggest it makes offenders less likely to reoffend. A 2007 study also found that it had the highest rate of victim satisfaction and offender accountability of any method of justice. Its use has seen worldwide growth since the 1990s. Restorative justice inspired and is part of the wider study of restorative practices.

https://en.wikipedia.org/wiki/Restorative_justice
(internal citations omitted)

How can it be used in Title IX/sexual misconduct?

Koss MP, Wilgus JK, Williamsen KM. Campus Sexual Misconduct: Restorative Justice Approaches to Enhance Compliance With Title IX Guidance. *Trauma Violence Abuse*. 2014;15(3):242-257. doi:10.1177/1524838014521500

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Restorative Justice

Theories about its effectiveness include:

- *The offender has to learn about the harm they have caused to their victim, making it hard for them to justify their behavior.*
- *It offers a chance to discuss moral development to offenders who may have had little of it in their life.*
- *Offenders are more likely to view their punishment as legitimate.*
- *The programs tend to avoid shaming and stigmatizing the offender.*

Many restorative justice systems, especially victim-offender mediation and family group conferencing, require participants to sign a confidentiality agreement. These agreements usually state that conference discussions will not be disclosed to nonparticipants. The rationale for confidentiality is that it promotes open and honest communication.

https://en.wikipedia.org/wiki/Restorative_justice
(internal citation omitted)

51

From the commentary accompanying the new Title IX regulations…

With respect to the implications of restorative justice and the recipient reaching a determination regarding responsibility, the Department acknowledges that generally ***a critical feature of restorative justice is that the respondent admits responsibility at the start of the process. However, this admission of responsibility does not necessarily mean the recipient has also reached that determination, and participation in restorative justice as a type of informal resolution must be a voluntary decision on the part of the respondent.***

Id. at 30406 (emphasis added).

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From the commentary accompanying the new Title IX regulations…

Therefore, the language limiting the availability of an informal resolution process only to a time period before there is a determination of responsibility does not prevent a recipient from using the process of restorative justice under § 106.45(b)(9), and ***a recipient has discretion under this provision to specify the circumstances under which a respondent's admission of responsibility while participating in a restorative justice model would, or would not, be used in an adjudication if either party withdraws from the informal process and resumes the formal grievance process.***

Id. at 30406 (emphasis added).

53

From the commentary accompanying the new Title IX regulations…

Similarly, ***a recipient could use a restorative justice model after a determination of responsibility finds a respondent responsible****; nothing in the final regulations dictates the form of disciplinary sanction a recipient may or must impose on a respondent.*

Id. at 30406 (emphasis added).

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Restorative Justice Resources Cited in the Commentary to the New Title IX Regulations

Clare McGlynn et al., "I just wanted him to hear me": Sexual violence and the possibilities of restorative justice, 39 Journal of L. & Society 2 (2012).

Katherine Mangan, Why More Colleges Are Trying Restorative Justice in Sex Assault Cases, Chronicle of Higher Education (Sept. 17, 2018).

Kerry Cardoza, Students Push for Restorative Approaches to Campus Sexual Assault, Truthout (Jun. 30, 2018).

Howard Zehr, The Little Book of Restorative Justice (Good Books 2002).

David R. Karp et al., Campus Prism: A Report On Promoting Restorative Initiatives For Sexual Misconduct On College Campuses, Skidmore College Project on Restorative Justice (2016).

Margo Kaplan, Restorative Justice and Campus Sexual Misconduct, 89 emp. L. Rev. 701, 715 (2017).

Id. at 30406 n.1518.

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Restorative Justice vs. Mediation

Mediation

- Dispute doesn't necessarily have to cause a harm, can be just a disagreement
- One party doesn't have to admit wrongdoing/ parties are treated as moral equals
- Focuses on coming to an agreement
- settlement-driven
- Not necessarily focused on emotional needs of the parties

Restorative Justice

- A party has been harmed/ victimization has occurred
- The offending party must admit to wrongdoing before the process begins
- Focuses on reparations and looks to improve future behavior
- dialogue-driven
- Very focused on the emotional needs of the victim/victim empowerment

Brooles & McDonough, *The Differences Between Mediation and Restorative Justice/Practice*, https://nsu.gov.au/sites/default/files/3/Mediation_versus_Restorative_Practice.pdf.

Restorative Justice Victoria, *How is Restorative Justice Different than Mediation*, http://www.rjvictoria.com/ufaq/18-how-is-restorative-justice-different-than-mediation/

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Collaborative Law Model (A Team Approach)

- According to *Black's Law Dictionary*, collaborative law is a dispute-resolution method by which parties and their attorneys settle disputes using **nonadversarial techniques** to reach a binding agreement.
- Collaborative law is a method **well-suited for settling highly emotional cases** such as business partnership dissolutions, wrongful discharge claims, and family law cases.
- In a Collaborative case, clients work with a team of collaboratively trained professionals with the goal of reaching an out-of-court agreement. The team includes two attorneys, a coach/facilitator, and as needed, a financial neutral, child specialist and other professional experts. Each of these team members has a role in the Collaborative process which is described further below:

https://massclc.org/collaborativepros

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Collaborative Law Model Cont'd

- The Collaborative Attorney: represents the client's interests, taking into account the other party's interests as a whole; Refrains from using adversarial techniques; Educates the client about legal issues; Works effectively with the other attorney and coach/facilitator to create a structure and environment that maximizes agreement potential
- The Collaborative Coach / Facilitator: Serves as a neutral focused on managing process, client behavior, and emotions; Provides expert advice on the psychology of the circumstances; Identifies and reinforces effective communication between parties; Intervenes to contain and manage conflict; Educates the attorneys about the parties' communication dynamics
- Other Professionals: During the Collaborative process, the parties may choose to engage other **neutral** professionals to assist with specific areas that require their unique expertise (e.g. well-trained public safety liaison, trauma specialist/counselor, academic support specialist, etc.)

https://massclc.org/collaborativepros

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Developing and Planning an Informal Process

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How will you identify your process(es)?

- Name
- Description
- Demonstrations?
- Personnel
- Relationship to Title IX Policy/Articulation
- Think about the "complaint" requirement
- Desirable or simply available?

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What are the goals and desirable outcomes associated with your informal process(es)?

- Should an institution even have a goal or desirable outcome—pure v. perfect procedural justice?
- Long term/short term goals/outcomes
- More durable resolution
- Satisfy stakeholder interests
- Non-participating stakeholders/shapeholders
- Transparency?

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What forms of informal resolution will you choose?

- Institutional choice…how will this occur and when?
- The choice of one vs. multiple modalities
- Resources, training and being realistic
- Setting measurable institutional goals/ objective evaluation of selection
- Ask counsel: legal implications for specific campus
- Never utilize trial by ordeal; beware of toxic positivity and forced facilitation

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Who will facilitate the development of new or existing informal process(es)?

- Evaluate personnel assets and needs
- Beware of conscription
- Develop a leadership plan for creating new processes with ownership
- Don't outrun your logistics
- Talk with counsel and insurers

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Who will participate in informal process?

- Develop rules and guidelines for participation
- Authority of informal resolution personnel to expand or contract participation?
- Think about role of lawyers and legal counsel
- Families, friends… and advocates?
- Experts and "witnesses"?
- Adding "neutrals"?

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What will you handle in-house and what might, or benefit from, the assistance of external assistance?

- Complexity of issues and number of parties
- Resources
- Objectivity, conflict of interest, impartiality issues
- Expertise and experience needed
- Cost
- Culture assessment

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What legal considerations exist?

- Talk to counsel.
- Laws regulating arbitration?
- Licensing requirements in some states?
- Restorative Justice (admitting responsibility)
- Confidentiality

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Confidentiality Considerations

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Confidentiality & Informal Processes (DOE)

The Department appreciates the concerns raised by some commenters that the confidential nature of informal resolutions may mean that the broader educational community is unaware of the risks posed by a perpetrator; however, the final regulations impose robust disclosure requirements on recipients to ensure that parties are fully aware of the consequences of choosing informal resolution, including the records that will be maintained or that could or could not be shared, and ***the possibility of confidentiality requirements as a condition of entering a final agreement.***

Id. at 30404 (emphasis added).

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Confidentiality & DOE (Cont'd)

We believe as a fundamental principle that parties and individual recipients are in the best position to determine the conflict resolution process that works for them; for example, ***a recipient may determine that confidentiality restrictions promote mutually beneficial resolutions between parties and encourage complainants to report, or may determine that the benefits of keeping informal resolution outcomes confidential are outweighed by the need for the educational community to have information about the number or type of sexual harassment incidents being resolved.***

Id. at 30404 (internal citation omitted, emphasis added).

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Confidentiality & DOE (Cont'd)

The recipient's determination about the confidentiality of informal resolutions may be influenced by the model(s) of informal resolution a recipient chooses to offer; for example, a mediation model may result in a mutually agreed upon resolution to the situation without the respondent admitting responsibility, while a restorative justice model may reach a mutual resolution that involves the respondent admitting responsibility. *The final regulations permit recipients to consider such aspects of informal resolution processes and decide to offer, or not offer, such processes, but require the recipient to inform the parties of the nature and consequences of any such informal resolution processes.*

Id. at 30404 (emphasis added).

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Where are examples of informal resolution processes in practice?

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Examples in the Field

- Princeton University
  - Comprehensive website
  - Explicitly states it is not a restorative justice model
  - https://sexualmisconductinvestigations.princeton.edu/informal-resolution-process
- UNC Greensboro
  - Flowchart
  - "The goal of the process is to develop a written agreement between the parties documenting the resolution of the incident."
  - https://titleix.wp.uncg.edu/informal-resolution-process/

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Thank you!

Assessment to follow…

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NASPA
Student Affairs Administrators in Higher Education

Facilitating Fair and Effective Informal Resolution Processes Under Title IX

Module 3: Foundational Basics for Facilitating Resolutions

Peter Lake
Professor of Law, Charles A. Dana Chair, and Director of the Center for Excellence in Higher Education Law and Policy
Stetson University College of Law

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Associate of The Registry, CPR Distinguished Neutrals, MWI, Inc., and Umass Justice Bridge

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Foundational Basics

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A Review of A.D.R.

- "Alternative" Dispute Resolution
- "Appropriate" Dispute Resolution

- —*formal methodology* used to provide parties a process that *feels informal*
- As a facilitator you are not winging it.

- A.D.R. is Pandora's Box—The more I learn, the more I realize how much more there is to learn.
- (E.g. Harvard PON, JAMs, MWI, Inc., AAA, CPR Neutrals, Mediate.com, American Bar Association, hundreds of law school courses and LLMs, hundreds of graduate school programs, etc.)

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The A.D.R. Continuum

- Negotiation →
- Mediation →
  - Neutral
  - Facilitative
  - Conciliator
- Med-Arb →
- Formal Process or Litigation.

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Dispute Resolution

- Whether for mediation, collaborative model, or restorative justice process, ALL based on helping the parties NEGOTIATE.

- To what end? An agreement.
  - Avoids a winner/loser outcome
  - Parties are generally more satisfied with outcomes and process
  - Addresses the reality that the parties remain in proximity, at least to some extent, of each other

- So what does effective negotiation look like and how can we help parties get there?

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Negotiation

- "Negotiation can be defined as back-and-forth communication designed to reach an agreement between two or more parties with some **interests** that are shared and others that may conflict or simply be different."
  - (*Getting to Yes: Negotiating Agreement Without Giving In* (2nd ed.), R. Fisher, W. Uri, and B. Patton (1991))
- "A party's basic needs, wants, and motivations are commonly referred to as **interests**. . . . People negotiate because they are hoping to satisfy their interests *better through an agreement than they could otherwise*."
  - (*The Handbook of Dispute Resolution*, M. Moffitt & R. Bordone (2005) *Chapter Eighteen: Negotiation*, B. Patton)

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Negotiation (continued)

- "Interests are not the same as the **positions** or **demands** that people typically stake out and argue for in negotiation." (Id.)
- There are underlying **interests** to every **position** and **demand**!
- We can:
  - Cautiously Use Root Cause Analysis (Asking 3, 5 or More Whys)
  - Understand and Respond to Parties' Conflict Styles
  - Remind Parties' of Their B.A.T.N.A.s
  - Facilitate the Conversation & Guide the Process

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The Theory of Asking "Why?"

Three, Five, or More Times

In behavioral *psychology* we are using **techniques** to get a person **to tell us the** underlying factor(s) of a specific position they hold.

https://medium.com/@kiyanadunlock/root-cause-analysis-psychology-vs-iterating-through-hashes-programming-62798df1bc03

I think it might help [name of other party] understand your position better if you could talk about WHY you believe this / feel this way.

Can you tell us a bit more about WHY [insert answer] is important to you?

I hear how important [insert answer] is for you, can you say a bit more about WHY it matters so much or how knowing this might help us move forward?

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Best Alternative To a Negotiated Agreement

BATNA

Parties end up *". . . better through an agreement than they could otherwise."* *The Handbook of Dispute Resolution*, M. Moffitt & R. Bordone (2005) *Chapter Eighteen: Negotiation*, B. Patton

BATNAs are the parties' "walkaway" alternatives.

We should remind parties why we are here, why they chose to participate—to try and find a better outcome than they could otherwise find through an alternative process.

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Conflict Styles

Thomas-Kilmann Conflict Mode Instrument (TKI)

TKI assessment identifies a person's preferred conflict-handling style and provides detailed information about how they can use the five different modes effectively:
(1) Avoiding, (2) Accommodating, (3) Compromising, (4) Collaborating, and (5) Competing.

The TKI model demonstrates that these differing behaviors are just different modes of communicating.

(1) Avoiding: "Leaving Well Enough Alone"
(2) Accommodating: "Closure Through Self-Sacrifice"
(3) Compromising: "Splitting the Difference"
(4) Collaborating: "Two Heads Are Better Than One"
(5) Competing: "I Know Best"

https://www.usgs.gov/about/organization/science-support/human-capital/thomas-kilmann-conflict-mode-instrument-tki

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TKI Conflict Styles (Continued)

(1) Avoiding: Appropriate when the issue is trivial, the relationship is not important, time is short. Inappropriate when the relationship is important, negative feelings will linger, parties would benefit from a productive confrontation.

(2) Accommodating: Appropriate when a party doesn't care much about the issue, seeking harmony or credit, and a party realizes they are wrong. Inappropriate when a party is likely to harbor resentment and there is an opportunity to collaborate.

(3) Compromising: Appropriate when cooperation is important but time is limited, finding a solution is better than a stalemate, and efforts to collaborate are not met with reciprocal effort Inappropriate when finding a more creative solution.

(4) Collaborating: Appropriate when issues, relationship, and a mutually beneficial outcome is important and parties are reasonable about their hopes. Inappropriate when time is short, issues are unimportant, the goals of one party are unjustifiable, and the relationship is of secondary or no importance.

(5) Competing: Appropriate when an emergency looms or a party is actually right. Inappropriate when collaboration has not yet been attempted, buy-in from others is important, and long-term gains are a priority.

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Mediation Requirements

- Mediation as problem-solving requires three things:
  - A willingness on the part of all the relevant stakeholders to work together to resolve the problem or deal with the situation;
  - The availability of a trusted "neutral" with sufficient knowledge and skill to manage difficult conversations; and
  - An agreement on procedural ground rules (i.e., confidentiality, timetable, agenda, good faith effort, etc.).

https://www.pon.harvard.edu/daily/mediation/mediation-as-problem-solving/

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How Mediation Works

- Planning and the Preliminary Meetings
  - Before mediation begins, the mediator helps the parties decide when and where to meet, for how long, and who will be there. The mediator also conducts a preliminary meeting with each party separately.
- Mediator's Introduction
  - With the parties gathered together in the same room, the mediator introduces the participants, outlines the mediation process, lays out the ground rules, answers questions, and emphasizes the goal for the mediation—to reach an agreement.
- Opening Remarks by Parties
  - Following the mediator's introduction, each side is given an opportunity to present its view of the dispute without interruption. In addition, they may also take time to vent their feelings.

https://www.pon.harvard.edu/daily/mediation/how-does-mediation-work/

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How Mediation Works Cont'd

- Joint Discussion
  - After each side presents its opening remarks, the mediator and the parties are free to ask questions with the goal of arriving at a better understanding of each party's needs and concerns.
- Caucuses
  - If emotions run high during a joint session, the mediator might split the sides into separate rooms for private meetings.
- Facilitated Negotiation
  - At this point, it's time to begin formulating ideas and proposals that meet each party's core interests.
- Closing and Follow Up
  - If the parties reach consensus, the mediator will outline the terms and may write up a draft agreement.

https://www.pon.harvard.edu/daily/mediation/how-does-mediation-work/

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Important Steps

- Preparation
- Understanding the conflict(s)
- Defining points of agreement and dispute
- Identifying objective standards and interests
- Creating options
- Developing a resolution, including an agreement

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Planning and the Preliminary Meetings

- In most cases, the mediator will meet with the parties and/or their representatives prior to the joint mediation session.
- The initial meeting provides:
  - An explanation of the mediation process;
  - An opportunity to build rapport with the parties by encouraging them to discuss issues, which might affect the likelihood of reaching an agreement;
  - An appropriate time for parties to discuss concerns they have and to ask the mediator questions.
  - (E.g. What are you hoping for in this mediation? What are your interests and how do they rank in importance? What do you think are the other party's interests? What questions do you have? Concerns?)

https://www.jamsadr.com/mediation-guide

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Mediator's Introduction

- Welcome
- Overview of the Process and Role of the Mediator
- Voluntariness of Mediation
- Confidentiality of Mediation
- Neutrality and Impartiality of Mediation
- Structure of this Mediation Session
- Answer Questions and Confirm Participation

www.mwi.org (adapted)

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Opening Remarks by Parties

- Each party is given an opportunity to present their view of the dispute without interruption. In addition, they may also take time to vent their feelings.
- The mediator may need to help a party present what they view to be the facts and the desired outcome.
- The mediator may need to instruct parties to not interrupt, reassure parties that they will be given a chance to speak without interruption, and remind parties that there will be time to ask questions of each other in the next phase of the mediation process.

https://www.pon.harvard.edu/daily/mediation/how-does-mediation-work/
https://www.pon.harvard.edu/daily/mediation/navigating-the-mediation-process/

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Joint Discussion

- Because disputing sides often have difficulty listening to each other, mediators act like translators, repeating back what they have heard and asking for clarification when necessary.
- If parties reach an impasse, mediators diagnose the obstacles that lie in their path and work to get the discussion back on track.
- A mediator helps the parties by facilitating communication, promoting understanding, and guiding parties away from positions, and even options, until interests are fully communicated and ideally heard.
- Mediators should be patient in this phase of the mediation. The goal is for the parties to understand each others' interests before moving into idea generation and option analysis.

https://www.pon.harvard.edu/daily/mediation/how-does-mediation-work/
https://www.jamsadr.com/mediation-guide

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Caucuses

- Caucuses, or separating the parties into separate rooms for private meetings, is a great tool to use when emotions are running high, when there is an impasse, or when the mediator needs to discuss something with one of the parties in private. The caucus can also be used to generate ideas in the Negotiation Phase of the mediation session.
- Often, but not always, the mediator discusses with each side what information discussed in caucus will remain confidential and that which the party wants shared. The promise of confidentiality can encourage parties to share new information about their interests and concerns.
- Mediators should keep track of and balance the amount of time spent with each party and keep each party informed. (E.g. I will spend approximately 10 minutes with each of you. If I need to go longer, I will come tell you.)

https://www.pon.harvard.edu/daily/mediation/how-does-mediation-work/

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Facilitated Negotiation

- This is the idea generation and option analysis phase of the mediation session.
- The mediator can lead the negotiation with all parties in the same room, or can engage in "shuttle diplomacy," moving back and forth between the parties, gathering ideas, proposals, and counterproposals.
- The mediator will sometimes need to remind parties of their BATNA and discuss its pros and cons and the likely result if an agreement cannot be reached.

https://www.pon.harvard.edu/daily/mediation/how-does-mediation-work/
https://www.jamsadr.com/mediation-guide

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Closing and Follow Up

- If the parties reach consensus, the mediator will outline the terms and may write up a draft agreement.
- If the parties do not reach an agreement, the mediator will sum up where the session left off and engage in a discussion about alternatives (e.g. another session or an alternative form of dispute resolution).

https://www.pon.harvard.edu/daily/mediation/how-does-mediation-work/

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Who can help?
What about "break-downs" where an agreement cannot be reached?

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Planning for Problems

- When self help is an appropriate response?
- When you need assistance, but it can wait?
- When immediate assistance is necessary?
- Returning to the mediation table?
- When a formal process may be your BATNA (best alternative to a negotiated agreement)?

- What about:
  - Confidentiality?
  - Mediator ethics?
  - Dealing with difficult behaviors?

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Managing "new" information—warnings and other related issues

- Actual notice or violations in transit
- Signs of coercion
- Being "worked
- Good faith
- The clown handkerchief problem
- Intersectionality//transposing one issue into another
- Smoking gun revelations

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Mediation & Confidentiality: State Statutes and Campus Policies

Consider state medical privacy laws and educational record rules—consult counsel

Be aware of mandatory and permissive disclosure rules—example Texas reporting laws or Sandusky laws

Confidentiality vs. Discoverability vs. Testimonial Privileges

Records and record keeping—need to know?

Implementation and confidentiality

Drafting of agreements=advice of counsel

Penalties for disclosure?

Tuning and respecting campus policy

"The coconut telegraph"=Jimmy Buffett

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Mediator Ethics Guidelines

(1) Ensure that all parties are informed about the mediator's role, the nature of the mediation process, and the terms of the agreement—if one is reached.

(2) Protect the voluntary participation of each party.

(3) Be competent to mediate the particular matter.

(4) Maintain neutrality and the perception of neutrality, and conduct the process impartially.

(5) Refrain from providing legal advice or guaranteeing results.

(6) Withdraw under certain circumstances (e.g. lack of informed consent, conflict of interest, use of mediation for inappropriate purpose, procedural or substantive unfairness)

https://www.jamsadr.com/mediation-guide

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Monitoring Informal Resolutions/Planning for Potential Issues Post-Resolution

- Managing no-contact orders/agreements
- Case management functions, if any
- Options for self-help, reporting and/or enforcement
- Returning to informal resolution

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Return to the A.D.R. Continuum

Med-Arb

A hybrid mediation-arbitration approach called *med-arb* combines the benefits of both techniques. Parties first attempt to collaborate on an agreement with the help of a mediator. If the mediation ends in impasse, or if issues remain unresolved, the parties can then move to arbitration. The mediator can assume the role of arbitrator (if qualified) and render a binding decision, or an arbitrator can take over the case after consulting with the mediator.

https://www.pon.harvard.edu/daily/mediation/deciding-on-arbitration-vs-mediation-try-combining-them/

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About Our Upcoming Live Session

- Practice, Practice, Practice
- Shadow and be shadowed
- Co-facilitation / Co-mediation
- Register for a 40-Hour training
- Consider who else can mediate…
- See you soon!

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Thank you!

Assessment to follow…

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NASPA
Student Affairs Administrators in Higher Education

Facilitating Fair and Effective Informal Resolution Processes Under Title IX

Live Virtual Session

Peter Lake
Professor of Law, Charles A. Dana Chair, and Director of the Center for Excellence in Higher Education Law and Policy
Stetson University College of Law

Kristine Goodwin M.Ed., J.D.
Associate of The Registry, CPR Distinguished Neutrals, MWI, Inc., and Umass Justice Bridge

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Housekeeping Items…

- We are taking attendance, so please make sure your name appears as a participant.
- Scenarios were emailed this morning. Please let us know via chat if you did not receive them.
- Please send any and all questions directly to Kristine Goodwin via chat.
  - We will not read your name.
  - We will stay slightly past the end time if needed to answer questions but if you need to leave at the exact ending time, that's ok.
- REMINDER--This session is NOT being recorded.

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What we hope to accomplish today…

- Brief Review of Issues Discussed in the Modules with Q&A
- Highlight of Select Issues
- Mediator Introduction and Scenario #1 Demonstration
- Scenarios #2 - #4 in Breakout Groups
- Open Time for Questions and Answers

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Brief Review of Issues Discussed in the Modules

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Points on Informal Resolution

- The new regulations don't require it, but informal resolution is allowed.
- A formal complaint must be filed before any informal resolution process can begin.
- Both parties must voluntarily agree to informal resolution (written consent required). [No coercion or undue influence.]
- No "informed" consent standard as such, other than information required by regulations.
- Parties do not have to be in the same room…often, they are not.
- Equitable implementation by trained personnel.
- Dept. of Education gives flexibility for institutions to create informal processes that work for them.

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From the commentary accompanying the new Title IX regulations…

The Department believes an explicit definition of "informal resolution" in the final regulations is unnecessary. ***Informal resolution may encompass a broad range of conflict resolution strategies, including, but not limited to, arbitration, mediation, or restorative justice.*** *Defining this concept may have the unintended effect of limiting parties' freedom to choose the resolution option that is best for them, and* ***recipient flexibility to craft resolution processes that serve the unique educational needs of their communities****.*

Department of Education, *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 85 Fed. Reg. 30026 (May 19, 2020) (final rule) (online at www.govinfo.gov/content/pkg/FR-2020-05-19/pdf/2020-10512.pdf) at 30401 (emphasis added).

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Informal Resolution Options

- Educational Conferences
- Mediation (Neutral, Facilitative, Collaborative)
- Med-Arb (Mediation and Arbitration, Non-Binding Arbitration)
- Restorative Justice
- Collaborative Law Model

[We will focus on mediation in our scenarios.]

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Mediation Requirements

- Mediation as problem-solving requires three things:
  - A willingness on the part of all the relevant stakeholders to work together to resolve the problem or deal with the situation;
  - The availability of a trusted "neutral" with sufficient knowledge and skill to manage difficult conversations; and
  - An agreement on procedural ground rules (i.e., confidentiality, timetable, agenda, good faith effort, etc.).

https://www.pon.harvard.edu/daily/mediation/mediation-as-problem-solving/

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Best Alternative To a Negotiated Agreement *BATNA*

- Parties end up *". . . better through an agreement than they could otherwise."* *The Handbook of Dispute Resolution*, M. Moffitt & R. Bordone (2005) *Chapter Eighteen: Negotiation*, B. Patton
- BATNAs are the parties' "walkaway" alternatives.
- We should remind parties why we are here, why they chose to participate—to try and find a better outcome than they could otherwise find through an alternative process.

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Questions on Information from the Video Modules?

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Special Issue Highlight:
Informal Resolution and Possible Impact of the 2020 Election on Title IX Regulations

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2020 Election: Potential Impacts on Informal Resolution?

- Will new DOE favor or disfavor informal resolution? Forms of informal resolution? Transparency and fairness issues…..
- Regulations: the law until they are not. But what of commentary and the return of guidance?
- How might court cases influence the future of informal resolution?
- Priorities and timing of new administration

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Special Issue Highlight:
What Types of Disputes Can You Address?

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What Types of Disputes Can You Address Informally?

REMEMBER…

- A formal complaint must be filed before offering informal resolution.
- A recipient cannot require parties to participate in informal resolution—participation must be voluntary.
- A recipient should use "good judgment" to ensure informal resolution is appropriate in each situation.

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What Types of Disputes Can You Address Informally?

- Student <- ->Student
- Staff/Faculty <-->Staff/Faculty
- Student harasses staff/faculty
- ***Never*** when staff/faculty harasses student
- What are some nuances when dealing with each permutation?
- When if ever are multi-party disputes not appropriate or unsuited for informal resolution
- Can 'issues' be sent into informal resolution as opposed to entire matters?

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Special Issue Highlight:
Advisors in Informal Process

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The Role of Advisors in Informal Processes

- Will advisors participate in informal process? Only certain types of "advisors"? Prohibition on attorneys?
- If advisors can participate, how?
- *[W]e decline to mandate that the parties confer with an advisor before entering an informal resolution process, or to mandate that recipients provide the parties with advisors before entering an informal resolution process.* *Id.* at 30402.
- Remember: the Department of Education gives flexibility to institutions to create informal processes that serve their needs.

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Special Issue Highlight: Confidentiality

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*Section 106.45(b)(9)(i) provides that t**he written notice given to both parties before entering an informal resolution process must indicate what records would be maintained or could be shared in that process.** Importantly, **records that could potentially be kept confidential could include the written notice itself, which would not become a public record. The Department leaves it to the discretion of recipients to make these determinations.** The Department believes this requirement effectively puts both parties on notice as to the confidentiality and privacy implications of participating in informal resolution. **Recipients remain free to exercise their judgment in determining the confidentiality parameters of the informal resolution process they offer to parties.***

Id. at 30402.

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Special Issue Highlight: "Consequences" or "Sanctions" in Informal Resolution

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[A]n informal resolution process, in which the parties voluntarily participate, may end in an agreement under which the respondent agrees to a disciplinary sanction or other adverse consequence, without the recipient completing a grievance process, under § 106.45(b)(9).

Id. at 30059 n.286.

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*Informal resolutions may reach agreements between the parties, facilitated by the recipient, that include [supportive] measures but that also **could include disciplinary measures**, while providing finality for both parties in terms of resolving allegations raised in a formal complaint of sexual harassment. **Because an informal resolution may result in disciplinary or punitive measures agreed to by a respondent**, we have revised § 106.45(b)(9) to expressly state that a recipient may not offer informal resolution unless a formal complaint is filed. This ensures that the parties understand the allegations at issue and the right to have the allegations resolved through the formal grievance process, and the right to voluntarily consent to participate in informal resolution.*

Id. at 30401.

126

Mediation does not bar imposition of penalties.

E.g., Rajib Chanda, Mediating University Sexual Assault Cases, 6 Harv. Negotiation L. Rev. 265, 301 (2001) (defining mediation as "a process through which two or more disputing parties negotiate a voluntary settlement with the help of a 'third party' (the mediator) who typically has no stake in the outcome" and stressing that this "does not impose a 'win-win' requirement, nor does it bar penalties. A party can 'lose' or be penalized; mediation only requires that the loss or penalty is agreed to by both parties—in a sexual assault case, 'agreements . . . may include reconciliation, restitution for the victim, rehabilitation for whoever needs it, and the acceptance of responsibility by the offender.'")

Id. at 30406 n.1519 (emphasis added).

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What can be an outcome?

- "Disciplinary sanction"
- "Consequence"
- "Outcome"
- Due process? Informal resolution consequences will be/will not be on student record?
- What is discipline and what is not?
  - Counseling?
  - Continuation of supportive measures?
- Consult counsel

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Princeton University Example

Do respondents face discipline as a result of the informal resolution process? Can a respondent's participation in the informal resolution process be considered in future disciplinary proceedings?

Under this process, there will be no disciplinary action taken against a respondent, and the resolution will not appear on the respondent's disciplinary record. In addition, if a formal complaint is filed against the respondent in as subsequent matter under the Title IX Sexual Harassment policy or the University Sexual Misconduct policy, the respondent's participation in a prior informal resolution process will not be considered relevant and will not be taken into account in the resolution of the subsequent complaint.

https://sexualmisconductinvestigations.princeton.edu/informal-resolution-process

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Agreements = Contracts

The Department ***expects informal resolution agreements to be treated as contracts; the parties remain free to negotiate the terms of the agreement and, once entered into, it may become binding according to its terms.***

Id. at 30405.

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What part does the institution play?

- None?
- Institution (Title IX coordinator or decision-maker or designee) signs off on agreement parameters?
- Institution manages "contract" agreed to under informal resolution processes?
- Institution "enforces" agreement?
- Institution implements sanctions?
- Mediators act on behalf of the institution?

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Expulsion as a Result of Informal Process?

The Department believes that the robust disclosure requirements of § 106.45(b)(9), the requirement that both parties provide voluntary written consent to informal resolution, and the explicit right of either party to withdraw from the informal resolution process at any time prior to agreeing to the resolution (which may or may not include expulsion of the respondent), will adequately protect the respondent's interest in a fair process before the sanction of expulsion is imposed. Accordingly, ***the Department believes that prohibiting recipients from using informal resolution where it results in expulsion is unnecessary; if expulsion is the sanction proposed as part of an informal resolution process, that result can only occur if both parties agree to the resolution.***

Id. at 30407.

132

Expulsion Cont'd

If a respondent, for example, does not believe that expulsion is appropriate then the respondent can withdraw from the informal resolution process and resume the formal grievance process under which the recipient must complete a fair investigation and adjudication, render a determination regarding responsibility, and only then decide on any disciplinary sanction.

Id. at 30407.

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Special Issue Highlight: Legal Liability

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With respect to recipients' ***potential legal liability where the respondent acknowledges commission of Title IX sexual harassment (or other violation of recipient's policy) during an informal resolution process, yet the agreement reached allows the respondent to remain on campus and the respondent commits Title IX sexual harassment (or violates the recipient's policy) again, the Department believes that recipients should have the flexibility and discretion to determine under what circumstances respondents should be suspended or expelled from campus as a disciplinary sanction, whether that follows from an informal resolution or after a determination of responsibility under the formal grievance process.***

Id. at 30407.

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Federal courts have considered a recipient's duty not to be deliberately indifferent by exposing potential victims to repeat misconduct of a respondent, when considering what sanctions to impose against a particular respondent. The Department declines to adopt a rule that would mandate suspension or expulsion as the only appropriate sanction following a determination of responsibility against a respondent; recipients deserve flexibility to design sanctions that best reflect the needs and values of the recipient's educational mission and community, and that most appropriately address the unique circumstances of each case. ***While Federal courts have found recipients to be deliberately indifferent where the recipient failed to take measures to avoid subjecting students to discrimination in light of known circumstances that included a respondent's prior sexual misconduct, courts have also emphasized that the deliberate indifference standard is not intended to imply that a school must suspend or expel every respondent found responsible for sexual harassment.***

Id. at 30407.

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Special Issue Highlight: Bias, Impartiality, Etc.

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All who implement informal processes should serve in their roles impartially.

All Title IX personnel should avoid

- *prejudgment of facts*
- *prejudice*
- *conflicts of interest*
- *bias*
- *sex stereotypes*

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Remember, you have no "side" other than the integrity of the process.

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Mediator's Introduction and Scenario #1 Demonstration

WE NEED 4 VOLUNTEERS!

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Mediator's Introduction

- Welcome
- Overview of the Process and Role of the Mediator
- Voluntariness of Mediation
- Confidentiality of Mediation
- Neutrality and Impartiality of Mediation
- Structure of this Mediation Session
- Answer Questions and Confirm Participation

www.mwi.org (adapted)

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How Mediation Works

- Planning and the Preliminary Meetings
  - Before mediation begins, the mediator helps the parties decide when and where to meet, for how long, and who will be there. The mediator also conducts a preliminary meeting with each party separately.
- Mediator's Introduction
  - With the parties gathered together in the same room, the mediator introduces the participants, outlines the mediation process, lays out the ground rules, answers questions, and emphasizes the goal for the mediation—to reach an agreement.
- Opening Remarks by Parties
  - Following the mediator's introduction, each side is given an opportunity to present its view of the dispute without interruption. In addition, they may also take time to vent their feelings.

https://www.pon.harvard.edu/daily/mediation/how-does-mediation-work/

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How Mediation Works Cont'd

- Joint Discussion
  - After each side presents its opening remarks, the mediator and the parties are free to ask questions with the goal of arriving at a better understanding of each party's needs and concerns.
- Caucuses
  - If emotions run high during a joint session, the mediator might split the sides into separate rooms for private meetings.
- Facilitated Negotiation
  - At this point, it's time to begin formulating ideas and proposals that meet each party's core interests.
- Closing and Follow Up
  - If the parties reach consensus, the mediator will outline the terms and may write up a draft agreement.

https://www.pon.harvard.edu/daily/mediation/how-does-mediation-work/

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It's Your Turn!
Scenarios #2 – #4 in Breakout Groups

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Breakout Groups

- We're going to take a 15-minute break before starting the scenarios in the breakout groups.
  - Please jot down some words regarding your mediator's introduction.
  - Please review the scenarios if you have not already.
- You will be placed into a random breakout group with about 4-6 other people.
- Please make sure you are unmuted and video is on.

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Scenarios #2 - #4

- Take about 75 minutes in your group to work through Scenarios 2 – 4. You can do them in any order.
- Remember:
  - Group of 4—Two Co-Mediators, One Complainant, One Respondent
  - Group of 5—One Mediator, One Complainant, One Respondent, One Complainant Advisor, One Respondent Advisor
  - Group of 6—Two Co-Mediators, One Complainant, One Respondent, One Complainant Advisor, One Respondent Advisor
- Mediators should practice their introductions.
- **Please rotate positions so everyone has a chance to play all the roles.**
- If you don't have enough time to work through all the scenarios, that's okay.

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Questions following the scenarios?

Thank you!

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NASPA
Student Affairs Administrators in Higher Education

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Live Session Handouts

Peter Lake
Professor of Law, Charles A. Dana Chair, and Director of the Center for Excellence in Higher Education Law and Policy
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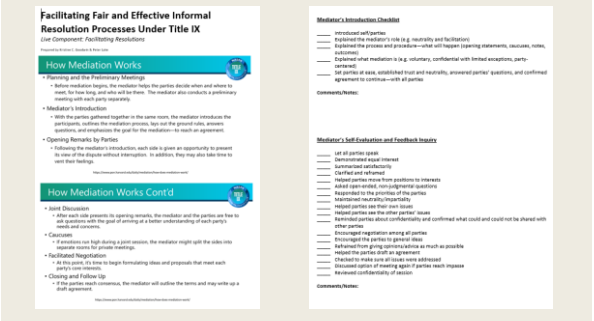

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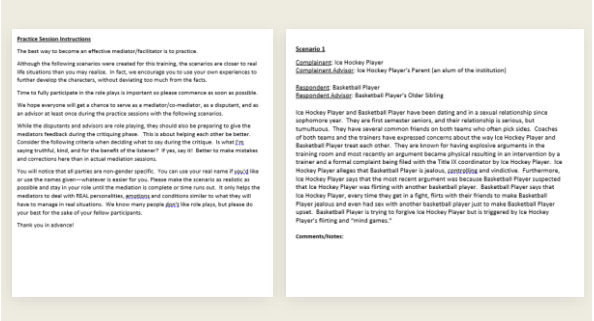

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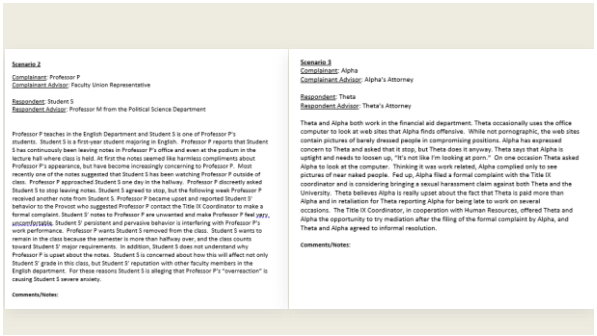

Scenario 2

Complainant: Professor P
Complainant Advisor: Faculty Union Representative

Respondent: Student S
Respondent Advisor: Professor M from the Political Science Department

Professor P teaches in the English Department and Student S is one of Professor P's students. Student S is a first-year student majoring in English. Professor P reports that Student S has continuously been leaving notes in Professor P's office and even at the podium in the lecture hall where class is held. At first the notes seemed like harmless compliments about Professor P's appearance, but have become increasingly concerning to Professor P. Most recently one of the notes suggested that Student S has been watching Professor P outside of class. Professor P approached Student S one day in the hallway. Professor P discreetly asked Student S to stop leaving notes. Student S agreed to stop, but the following week Professor P received another note from Student S. Professor P became upset and reported Student S' behavior to the Provost who suggested Professor P contact the Title IX Coordinator to make a formal complaint. Student S' notes to Professor P are unwanted and make Professor P feel very uncomfortable. Student S' persistent and pervasive behavior is interfering with Professor P's work performance. Professor P wants Student S removed from the class. Student S wants to remain in the class because the semester is more than halfway over, and the class counts toward Student S' major requirements. In addition, Student S does not understand why Professor P is upset about the notes. Student S is concerned about how this will affect not only Student S' grade in this class, but Student S' reputation with other faculty members in the English department. For these reasons Student S is alleging that Professor P's "overreaction" is causing Student S severe anxiety.

Comments/Notes:

Scenario 3
Complainant: Alpha
Complainant Advisor: Alpha's Attorney

Respondent: Theta
Respondent Advisor: Theta's Attorney

Theta and Alpha both work in the financial aid department. Theta occasionally uses the office computer to look at web sites that Alpha finds offensive. While not pornographic, the web sites contain pictures of barely dressed people in compromising positions. Alpha has expressed concern to Theta and asked that it stop, but Theta does it anyway. Theta says that Alpha is uptight and needs to loosen up, "It's not like I'm looking at porn." On one occasion Theta asked Alpha to look at the computer. Thinking it was work related, Alpha complied only to see pictures of near naked people. Fed up, Alpha filed a formal complaint with the Title IX coordinator and is considering bringing a sexual harassment claim against both Theta and the University. Theta believes Alpha is really upset about the fact that Theta is paid more than Alpha and in retaliation for Theta reporting Alpha for being late to work on several occasions. The Title IX Coordinator, in cooperation with Human Resources, offered Theta and Alpha the opportunity to try mediation after the filing of the formal complaint by Alpha, and Theta and Alpha agreed to informal resolution.

Comments/Notes:

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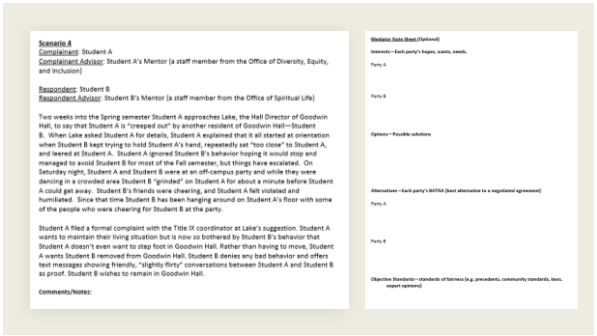

Scenario 4
Complainant: Student A
Complainant Advisor: Student A's Mentor (a staff member from the Office of Diversity, Equity, and Inclusion)

Respondent: Student B
Respondent Advisor: Student B's Mentor (a staff member from the Office of Spiritual Life)

Two weeks into the Spring semester Student A approaches Lake, the Hall Director of Goodwin Hall, to say that Student A is "creeped out" by another resident of Goodwin Hall—Student B. When Lake asked Student A for details, Student A explained that it all started at orientation when Student B kept trying to hold Student A's hand, repeatedly sat "too close" to Student A, and leered at Student A. Student A ignored Student B's behavior hoping it would stop and managed to avoid Student B for most of the Fall semester, but things have escalated. On Saturday night, Student A and Student B were at an off-campus party and while they were dancing in a crowded area Student B "grinded" on Student A for about a minute before Student A could get away. Student B's friends were cheering, and Student A felt violated and humiliated. Since that time Student B has been hanging around on Student A's floor with some of the people who were cheering for Student B at the party.

Student A filed a formal complaint with the Title IX coordinator at Lake's suggestion. Student A wants to maintain their living situation but is now so bothered by Student B's behavior that Student A doesn't even want to step foot in Goodwin Hall. Rather than having to move, Student A wants Student B removed from Goodwin Hall. Student B denies any bad behavior and offers text messages showing friendly, "slightly flirty" conversations between Student A and Student B as proof. Student B wishes to remain in Goodwin Hall.

Comments/Notes:

Mediator Note Sheet (Optional)

Interests—Each party's hopes, wants, needs.

Party A:

Party B:

Options—Possible solutions

Alternatives—Each party's BATNA (best alternative to a negotiated agreement)

Party A:

Party B:

Objective Standards—standards of fairness (e.g. precedents, community standards, laws, expert opinions)

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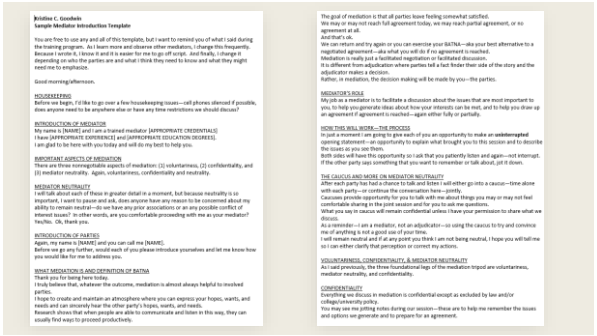

Kristine C. Goodwin
Sample Mediator Introduction Template

You are free to use any and all of this template, but I want to remind you of what I said during the training program. As I learn more and observe other mediators, I change this frequently. Because I wrote it, I know it and it is easier for me to go off script. And finally, I change it depending on who the parties are and what I think they need to know and what they might need me to emphasize.

Good morning/afternoon.

HOUSEKEEPING
Before we begin, I'd like to go over a few housekeeping issues—cell phones silenced if possible, does anyone need to be anywhere else or have any time restrictions we should discuss?

INTRODUCTION OF MEDIATOR
My name is [NAME] and I am a trained mediator [APPROPRIATE CREDENTIALS]
I have [APPROPRIATE EXPERIENCE] and [APPROPRIATE EDUCATION DEGREES].
I am glad to be here with you today and will do my best to help you.

IMPORTANT ASPECTS OF MEDIATION
There are three nonnegotiable aspects of mediation: (1) voluntariness, (2) confidentiality, and (3) mediator neutrality. Again, voluntariness, confidentiality and neutrality.

MEDIATOR NEUTRALITY
I will talk about each of these in greater detail in a moment, but because neutrality is so important, I want to pause and ask, does anyone have any reason to be concerned about my ability to remain neutral—do we have any prior associations or an any possible conflict of interest issues? In other words, are you comfortable proceeding with me as your mediator? Yes/No. Ok, thank you.

INTRODUCTION OF PARTIES
Again, my name is [NAME] and you can call me [NAME].
Before we go any further, would each of you please introduce yourselves and let me know how you would like for me to address you.

WHAT MEDIATION IS AND DEFINITION OF BATNA
Thank you for being here today.
I truly believe that, whatever the outcome, mediation is almost always helpful to involved parties.
I hope to create and maintain an atmosphere where you can express your hopes, wants, and needs and can sincerely hear the other party's hopes, wants, and needs.
Research shows that when people are able to communicate and listen in this way, they can usually find ways to proceed productively.

The goal of mediation is that all parties leave feeling somewhat satisfied.
We may or may not reach full agreement today, we may reach partial agreement, or no agreement at all.
And that's ok.
We can return and try again or you can exercise your BATNA—aka your best alternative to a negotiated agreement—aka what you will do if no agreement is reached.
Mediation is really just a facilitated negotiation or facilitated discussion.
It is different from adjudication where parties tell a fact finder their side of the story and the adjudicator makes a decision.
Rather, in mediation, the decision making will be made by you—the parties.

MEDIATOR'S ROLE
My job as a mediator is to facilitate a discussion about the issues that are most important to you, to help you generate ideas about how your interests can be met, and to help you draw up an agreement if agreement is reached—again either fully or partially.

HOW THIS WILL WORK—THE PROCESS
In just a moment I am going to give each of you an opportunity to make an **uninterrupted** opening statement—an opportunity to explain what brought you to this session and to describe the issues as you see them.
Both sides will have this opportunity so I ask that you patiently listen and again—not interrupt. If the other party says something that you want to remember or talk about, jot it down.

THE CAUCUS AND MORE ON MEDIATOR NEUTRALITY
After each party has had a chance to talk and listen I will either go into a caucus—time alone with each party—or continue the conversation here—jointly.
Caucuses provide opportunity for you to talk with me about things you may or may not feel comfortable sharing in the joint session and for you to ask me questions.
What you say in caucus will remain confidential unless I have your permission to share what we discuss.
As a reminder—I am a mediator, not an adjudicator—so using the caucus to try and convince me of anything is not a good use of your time.
I will remain neutral and if at any point you think I am not being neutral, I hope you will tell me so I can either clarify that perception or correct my actions.

VOLUNTARINESS, CONFIDENTIALITY, & MEDIATOR NEUTRALITY
As I said previously, the three foundational legs of the mediation tripod are voluntariness, mediator neutrality, and confidentiality.

CONFIDENTIALITY
Everything we discuss in mediation is confidential except as excluded by law and/or college/university policy.
You may see me jotting notes during our session—these are to help me remember the issues and options we generate and to prepare for an agreement.

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I will destroy these notes immediately after our session ends.
I will not share information unless required by law and even then I would resist until forced to do otherwise.
Again, exceptions to the general rule that mediation is a confidential process are limited.
Do you agree to the confidentiality requirements of mediation? Yes/No. Any questions?

VOLUNTARINESS
Finally, voluntariness—May I assume that you came here today voluntarily? Yes/No.
If at any point you no longer want to participate, please let me know in caucus so we can discuss your alternatives.
It is important that you are here willingly and knowingly and if that changes at any point—again please let me know.
Do you have any questions?
Are you willing to continue? Yes/No.
Thank you.

TRANSITION TO ALLOWING THE PARTIES TO GIVE OPENING STATEMENTS
A standard practice is to begin with the complainant—is that ok with each of you? Yes/No
Please explain what brought you to this session, including what you hope mediation will accomplish, and describe the issues as you see them.

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