

# Informal Resolution of Title IX Complaints: Mediation & Arbitration

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# Common forms of Informal Resolution (ADR)

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## THE ALTERNATIVE DISPUTE RESOLUTION CONTINUUM



A THIRD PARTY NEUTRAL IS INVOLVED  
PROCESS IS (IN THEORY) DECIDED BY PARTIES  
OUTCOME IS DECIDED BY ARBITRATOR

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# Most common Alternative Dispute Resolution processes



# Title IX Informal Resolution Requirements

- ▶ Voluntary
- ▶ Consent in writing
- ▶ Not available: Employee sexual harassment of student
- ▶ Timing:
  - ▶ May be conducted before full investigation
  - ▶ Must be conducted:
    - ▶ After complaint filed
    - ▶ Before adjudication completed
- ▶ Party may withdraw from mediation and pursue grievance process

# Mediator/Facilitator Requirements

- ▶ Mediators required to have 8 hours of training(Section 106.45(b)(1)(iii)
  - ▶ Same as Title IX Coordinators, Investigators, Decision Makers
- ▶ Mediator Disclosure - free from Conflicts of Interest and Bias

# What is Mediation

- ▶ Process of assisted negotiation in which a neutral person helps people reach agreement.
- ▶ Mediator:
  - ▶ Impartial third party
  - ▶ No decision making authority
- ▶ Consensual
- ▶ Informal
- ▶ Confidential process
- ▶ Parties are the decision makers

# What is Arbitration

- ▶ Neutral person acts like a judge
- ▶ Reviews evidence (testimony & documents)
- ▶ Applies the facts to the law
- ▶ Decides outcome
- ▶ Confidential process guided by arbitration agreement of the parties and applicable rules

# Restorative Justice

## Focus on Repairing the Harm





# Benefits of Mediation

- ▶ Parties determine outcome
- ▶ Resolution can be creative
- ▶ Faster
- ▶ Cheaper
- ▶ Result can be confidential

# Mediation: 3 Legged Stool

- ▶ Cost
- ▶ Time and Timing
- ▶ Risk



# Overview of Mediation Process

- ▶ Initial Caucus with each party
- ▶ Joint sessions (Optional)
  - ▶ Meet and Greet; or
  - ▶ Description of claims/defenses
    - ▶ Not an Opening Statement to a jury
    - ▶ Opportunity for Apology/Acknowledgment
- ▶ Shuttle diplomacy
- ▶ If resolved: Mediated Settlement Agreement

# Mediation preparation

## It takes time

- ▶ Attorney: Mediator Brief/Position Paper
- ▶ Client: prepare for what to expect, process, timeframe
- ▶ Explain strengths and weaknesses to client
- ▶ Plan starting and ending point
- ▶ Prepare Litigation Budget and Risk Assessment
- ▶ Be open to the PROCESS

# Before Mediation

- ▶ **Who should attend from your side?**  
Decision makers?
  - ▶ If decision maker is not available in person, communicate via video conference or telephone
- ▶ **Who should not attend?**

# Before Mediation

- ▶ Come to mediation with authority
- ▶ Think about the alternatives if no settlement [BATNA]
- ▶ Provide Mediator with position paper

# During Mediation

- ▶ How to deal with the problem client and/or attorney?
- ▶ Dealing with the Complainant and/or attorney who do not understand the case issues?
- ▶ Dealing with the Respondent and/or attorney who do not appreciate the case issues?
- ▶ Give the mediator a “heads up” about the issue & solicit her/his assistance/suggestions

## During Mediation

- ▶ When to have an opening joint session, when only a “meet and greet” or none?
- ▶ Mediators can use a “controlled agenda” (more than “meet & greet” but less than full-blown opening)
- ▶ Mediation is fluid. Be flexible & creative.
- ▶ Beware of Backward Steps



## During Mediation

- ▶ Recognizing the drama taking place in the Complainant's caucus
- ▶ Recognizing the drama taking place in the Respondent's caucus
- ▶ Recognizing the school's concerns regarding the Complainant, Respondent, School Code of Conduct, reputation, publicity
- ▶ When to move fast and when to move slowly. When is it closing time.

# During Mediation

- ▶ The power of apology.
- ▶ The difference between an acknowledgement and apology and when to use each.

# During Mediation

- ▶ What does your offer/demand mean (give rationale)
- ▶ Mediator Proposals
- ▶ Use mediation to strengthen relationship between school and students

# Using the Mediator

- ▶ Using (but not abusing) the mediator
  - ▶ Truth telling
  - ▶ Holding back
  - ▶ Ask Mediator for his/her opinion or suggestions. Use as sounding board

# If No Settlement: Soft Landing



# Questions

