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Mediation for Title IX cases: A significant benefit

Mediation, neutral facilitation programs and restorative justice in higher education disputes involving Title IX and sexual misconduct

By Jane Cutler Greenspan

The Department of Education Office for Civil Rights issued new Title IX regulations effective August 14, 2020. These new regulations permit other methods of dispute resolution including mediation with expert mediators who are trained and experienced not only as mediators, but also as knowledgeable facilitators, trained in Title IX, who can effectuate a resolution of the case that empowers the student to engage in that resolution process. Thus, mediation would not only resolve the matter but would enhance the school's educational mission as well. Since early this year, the world has had to adapt to the challenges of a pandemic where video mediations are the new norm. JAMS (the organization formerly known as Judicial Arbitration and Mediation Services) has successfully conducted these mediations through videoconferencing from the onset, and are proud to be leaders on this front.

Given that none of us have a crystal ball, it would be a poor use of time to attempt to infer how the upcoming presidential election will affect these new regulations given the fact that President-elect Joe Biden spearheaded the enforcement of Title IX under the Obama

administration, which opposed the use of mediation in resolving student complaints of sexual assault. Certainly, there is no guarantee that the U.S. Department of Education's approach to Title IX enforcement will remain static. Leadership in developing standards and norms in this area may have to come from colleges and universities themselves.

Mediation is a particularly valuable asset in achieving restorative justice, which emphasizes repairing the harm caused by criminal behavior, and thus is well worth exploring. The focus is on examining the victim's lived experience in a setting that involves some kind of community, rather than just two warring parties, and constructing a plan for recompense and healing, as well as prevention of future harm.

In some jurisdictions, district attorneys have implemented these



Jane Cutler Greenspan,
JAMS mediator and
arbitrator

types of programs with some success. The approach has been especially promising in cases of sexual misconduct in which the victim and accused are peers (as opposed to scenarios in which the two are very different in age, power, social status, etc.). Though this may be counterintuitive, corporate America has already been using mediation in conflict resolution that offers many of these features. The current administration's pivot to a greater openness to mediation actually affords college campuses greater flexibility, and they should look to other contexts in which mediation has proved to work very well.

When we think of mediation in the context of the business world, we might imagine contract disputes, dissolutions of partnerships, or other seemingly minor conflicts. In fact, anytime people are involved, emotions are part of the landscape. A failed joint business venture may strain friendships and put incredible stress on the marriages and personal lives of the once-optimistic business partners. Mediation may be the answer in those types of cases precisely because emotions are running hot and may be keeping the parties from seeing each side of the case objectively.

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—#highered op-ed from
Hon. Jane Cutler Greenspan (Ret.)



Similarly, in student on student cases, the value of mediation in which the decision-making power rests with the students can be invaluable and does more to enhance the school's educational mission than where the decision rests with a third party—no matter how neutral and unbiased. Experienced mediators would know how to make upset and angry students feel heard. Frequently it is the need to be heard that is the most crucial desire of the student who feels victimized or the student who feels wrongly accused. This need to be heard is a necessary prerequisite for resolution in nearly all disputes. Further the win/lose aspect of an investigation and hearing is hardly helpful for students where there is so much "gray" rather than clear right and wrong.

Mediation and facilitation programs can provide access to lawyers and retired judges who have years of experience in sexual violence cases as well as have incredible institutional knowledge to bring to bear in these difficult cases of alleged student-on-student sexual as-

sault and misconduct. Colleges and universities don't want simply to replicate the criminal justice system, and they shouldn't. That system is undergoing deep, fundamental change right now, and it has evolved over the centuries to serve needs arising from the U.S. Constitution, state constitutions, and the realities of both of the extreme coerciveness of arrest and incarceration and the broad range of anti-social acts it is meant to address and prevent. Its due process norms deserve deep respect, and can be informative, but in most other aspects it is too different a system, serving radically different masters and goals, to be a successful model for on-campus Title IX assault and misconduct adjudications.

Some district attorneys have begun using restorative justice models in which the prosecutor holds all the cards and there is no true neutral. This model has, as its backdrop, the grim realities of the criminal justice system—the prosecutor essentially says to the defendant, "Impress me in the restorative justice program or else." Because defendants have no "right" to anything other than conventional court proceedings, the coerciveness of this aspect of restorative justice programs is not often examined closely. Colleges and universities would be better served by a restorative justice model that has greater flexibility and is led by an experienced neutral, such as a lawyer or retired judge who has no affiliation with the school or the students involved. The more flexible a justice-seeking program is, the more crucial it is to have experienced leadership to ensure that this level of flexibility doesn't simply lead the parties astray, leaving them "in the woods" emotionally, further from feeling as if their perspectives have been heard and considered.

Experienced mediators can also help by being cognizant that college students are usually young adults and not grown adults. The university must take the position of able facilitator, helping all students to understand their own experiences and reconciling it with the experiences of their student peers. Experienced mediators can help guide and design the "community" involvement portion of a restorative justice program without the risk of losing control.

While experienced neutrals would still need the assistance of administrators with regard to a school's culture, policies, resources and academic requirements, the skill and expertise that the neutral brings offers short-term success, but also achieves lasting impact because the students feel they have been heard and have had some power in the decision making affecting their lives.

Furthermore, it is worth noting that our tax dollars have already paid for decades of training and experience in dealing with interpersonal assaults. Retired judges can draw on that for the benefit of universities and their students. It is a powerful subsidy, one that all campuses should consider.

Hon. Jane Cutler Greenspan (Ret.) is a JAMS neutral, based in Philadelphia. She routinely serves as an arbitrator and mediator in complex commercial, labor, financial and business disputes, as well as an adjudicator in a number of higher education Title IX cases. **UB**