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## Mediation is Making an Impact on College Campuses

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**M**ediation is playing an increasingly larger role in helping colleges manage serious campus disputes—particularly in Title IX-related matters. Using “neutrals”—paralance in the legal field for mediators—more often is being propelled by industry choice, not legal mandate.

Higher education finds itself today in a highly regulated and litigious culture—where debate abounds regarding dispute resolution processes for colleges. The culture wars over dispute resolution models in higher education threaten to undermine the autonomy of the field. This situation is also highly dynamic; it is almost impossible to predict what might happen in Title IX regulation. Many institutions are confused about which models of dispute resolution are, and will remain, legally compliant. The U.S. Department of Education has changed course several times on preferred dispute resolution models—and may very well do so again. Several courts around the country have ruled on college discipline systems—with various, and at times inconsistent, decrees on fundamental fairness and due process. However, amidst the confusion, one trend seems clear: Colleges are being mandated to use more formalized adjudicatory

processes. College “court,” for better or worse, is emerging. But will a trend toward mandated formal adjudicatory models in higher education propel other models—perhaps ones higher education chooses for itself?

### Integrating ADR Into the Process

Our extensive experience with actual court systems leads us to believe the answer will be yes. The legal system itself now depends heavily on alternative dispute resolution (ADR)—which includes mediation. Individuals with serious disputes often want, need and even deserve ADR. ADR gained widespread acceptance a generation ago for the simple reason that not everything can, or should, go to court or be subject to adversarial or overly formal processes. What happened in the legal system is now happening on campuses: Colleges are relying on alternative forms of dispute resolution of their own devise—educational equivalents of ADR that, as we advocate, will benefit immensely from being integrated with received wisdom regarding ADR from the legal field.

Consider as a prime example the recent evolution of Title IX compliance work. Individuals impacted by sex discrimination often actively seek to avoid formalized adjudicatory

processes; they instead desire (even demand) outcomes and interventions that colleges sometimes struggle to offer—meaningful long-term resolutions, truth (not posturing in a hearing), healing, social justice, apologies, creative remedies and, yes, learning. Every Title IX coordinator has interviewed students who do not wish to attend hearings or invoke sanctions. To some students, being forced into a formal, adversarial hearing seems like a sanction in and of itself. Moreover, the use of no-contact arrangements is now ubiquitous in Title IX work—often dominating the time and energy of Title IX administrators. Consider also that many well-trained and dedicated dispute resolution specialists on campuses—members of the Association for Student Conduct Administration, Title IX investigators, etc.—are lamenting that the educational function of student discipline is now floundering in a tide of adversarial, legalistic formalisms. Litigation is replacing education—law over learning.

Struggling to maintain autonomy in the face of external regulation and find sustainable solutions, colleges need help. We recommend self-help for higher education—combining existing and functional dispute resolution practices on campus with proven

mediation techniques and experienced neutral mediators.

### **The Need for Experienced Neutrals**

The spread of mediation in higher education will be facilitated by the cadre of trained and experienced neutrals available to integrate with the higher education industry. College mediation practices can have access to lawyers and retired judges with extensive experience—some in sexual violence matters in other contexts, such as criminal justice or in the business world. The point is not to replicate other systems or simply parachute neutrals into higher education. Colleges and universities will not want to replicate the criminal justice system, which serves different goals and itself is undergoing deep and fundamental change (and has struggled with issues of social justice, including dealing with acquaintance sexual violence). Mediation, by its very nature, is not uniform and must adapt to and serve the environment in which it operates. Experience in business or criminal court mediation provides useful training for mediators; much of what mediators learn in one context is transferrable to other situations. Uniquely, mediation in the higher education context must be driven by learning and educational outcomes. A proposed model developed with academia at its forefront could involve internal school resources, e.g., counselors, advisors, etc., serving as the first step to work with the parties involved, and the second step could introduce external professionally trained mediators who understand the nuances of school campuses and the reported policy violations that occur there. Experienced neutrals will be population sensitive, recognizing, for example, that traditional-aged college students are at a critical stage of development.

The resources to integrate mediation into higher education are already available. Entities experienced in dispute resolution system design, such as JAMS, are available to work with higher education in developing sustainable and facilitative dispute resolution models for the colleges of the future. Colleges have the opportunity to enlist retired judges, for example, whose expertise has been developed by tax dollars. A pioneer in the field of ADR, the late Harvard professor Roger Fisher, might have implored us to “get to yes” with experienced mediators, as opposed to “getting to no” with adversarial processes.

### **Modern Solutions to Historical Problems**

The rise of mediation in higher education will not herald the arrival of an exogenous force. Higher education neutrals must connect their knowledge and experience with dispute resolution trends from within higher educa-

tion. College administrators have recently made significant strides to make historical college discipline codes more responsive to the modern demands of social justice and more respectful of students in conflict with others or with the institution itself. Institutional efforts at implementing restorative justice models and using educational conferences, however, have struggled to gain legal traction in court and with regulators. Yet restorative justice techniques have great potential for higher education institutions—working with individuals’ lived experiences, healing and focusing upon community building and reclamation.

Restorative justice techniques were borrowed from the legal system, where they have shown promise in difficult-to-resolve matters—for example, those involving sexual

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misconduct among acquaintances. Combining college restorative justice practices with mediation and trained higher education neutrals offers the potential for even more promising outcomes. (Some prosecutors in criminal justice systems use a form of restorative justice, but there is a coercive aspect to implementation in this context. Prosecutors can use restorative justice as leverage over criminal defendants—i.e., participate or go to jail. Colleges, however, are at liberty to divorce restorative justice practices from a prosecutorial or adversarial function—and instead connect such practices with educational functions.)

Many colleges also use educational conferences as a point of contact with students in conflict with the institution or others, but as valuable as they may be, proponents of highly legalistic and adversarial systems of dispute resolution are inclined to view these conferences as defective hearings—not valuable educational interventions where trained educators in the role of facilitators explore how students may learn to make better decisions or resolve conflicts as active agents in the resolution process. Restorative justice practices and educational conferences capture many, if not all, of the significant features of modern mediation. On its own, higher education has been charting a path toward what we see as an evolving form of mediation. It’s time to take the next step and inte-

grate good work on campus with skills and skilled professionals in the ADR field.

A recent court decision on due process extolled the virtue of cross-examination as a tool to find the truth; in the educational context, the greatest tool to uncover the truth may be building trust. There are unusual matters where hope for trust and learning are gone. There will be times when formal adjudicative processes will be necessary and appropriate, when individuals have so transgressed our educational community norms that educational opportunities have ceased and there is nothing to mediate. But the majority of conflict on campuses occupies other spaces where learning and healing opportunities are often present.

### **Stepping Along the Right Path Forward**

Our colleges deserve dispute resolution processes suited to our industry, ones that we have created. Mediation offers a path forward, building on the very instincts of educators to create facilitative, not adversarial, learning environments. Enter experienced third-party neutrals, those unaffiliated with the school, whom would be able to not only foster trust among the parties, but also between the parties and the school by virtue of the very fact that they aren’t a member of administration. Seasoned external and skillful mediators brought to campus for their dispute resolution expertise alleviates perceptions of bias and provides safeguards against potential overburdening of faculty and staff. It is time for a common sense idea to enter the cultural dialogue in higher education. We can often work things out with a little help from others, but when we can’t, there is always the court system to fall back on.

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