

Facilitating Title IX Informal Resolution


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DILIGENCE, LLC

Know More.

CONGRATULATIONS!

- You've been selected to serve as a facilitator/mediator in the informal resolution process
 - because you have the temperament, experience and training to do a good job
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OBJECTIVES


- ▶ Review relevant CFR provisions
 - ▶ Mediation 101
 - ▶ Resolution possibilities
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C.F.R. §106.45


- ▶ Basic Requirements for Barton College Facilitators:
 - ▶ No conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent. 106.45(b)(1)(iii)
 - ▶ Trained on . . . how to conduct [a] grievance process including . . . informal resolution processes, as applicable, and how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias. 106.45(b)(1)(iii)

INFORMAL RESOLUTION

AKA MEDIATION

- ▶ Not required, but if offered, then
 - ▶ Written notice of allegations and the process
 - ▶ Written consent required
 - ▶ Consent may be withdrawn at any time
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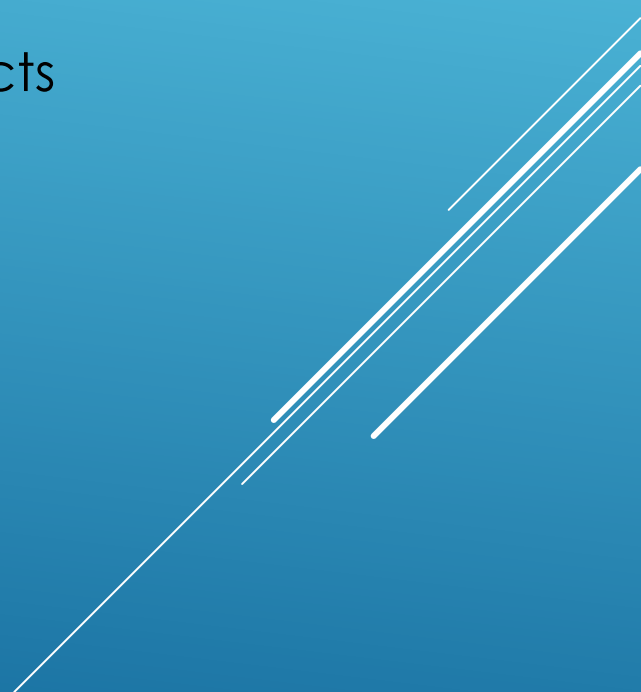
BASIC PRINCIPLES OF MEDIATION

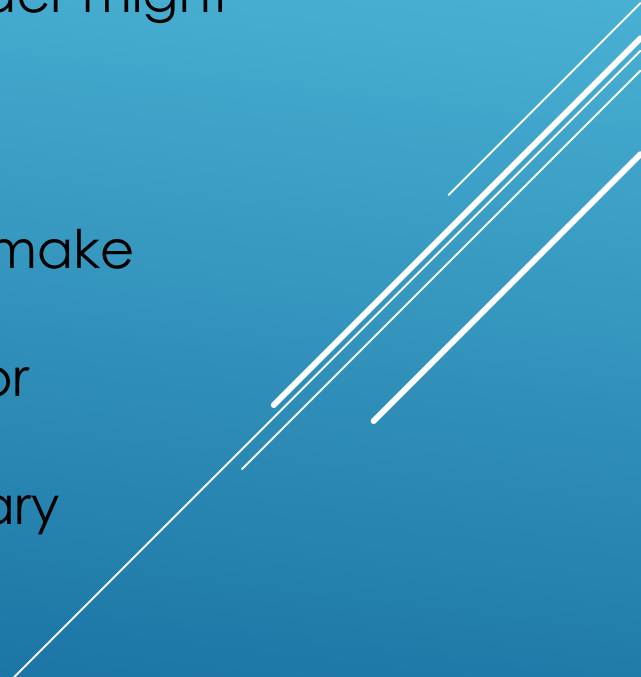
- ▶ Acceptability of mediation - the parties are willing to engage in the process
 - ▶ Impartiality of mediator – no relationship with the parties
 - ▶ Neutrality of mediator – unbiased and neutral toward contested issues, potential outcomes and agreements
 - ▶ No authority to make a binding decision – only the parties are the decision makers
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SCHOOLS OF MEDIATION


- ▶ Process-Focused
 - ▶ The mediator assists the process – facilitative role
 - ▶ Substance and content left to the parties
- ▶ Relationship Focused
 - ▶ Focus on procedures to improve mutual understanding, address psychological and relational issues, manage and work through emotions, improve interactions, promote positive and respectful relationships between parties
 - ▶ Divorce and family disputes
 - ▶ **Restorative Justice and Victim-Offender**
- ▶ Substantively Focused
 - ▶ Mediator provides substantive assessment of issues in dispute or advice to parties
- ▶ They are not mutually exclusive!
- ▶ Which one might be best for your informal resolution?

RESTORATIVE JUSTICE & VICTIM-OFFENDER


- ▶ Focus on addressing and improving relationships between victims, offenders, and their communities and resolving conflicts related to anti-social behavior
 - ▶ A process where persons affected
 - ▶ discuss how they have been affected and
 - ▶ decide what should be done to repair the harm
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- Common components include:
 - Voluntary participation in a face-to-face encounter
 - All parties sharing how the event affected them, its aftermath, and consequences
 - Opportunity for questions and clarification of parties' views, identification of victim's needs, discussion how the offender might make amends
 - Presentation of proposals or offers
 - Discussion and modification of offers
 - Acceptance and agreement on proposed measures to make amends
 - Formal written agreement signed by parties and mediator
 - Process to confirm the agreement
 - Implementation plan and monitoring process, as necessary
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Common outcomes include:


- Greater understanding by all parties of what occurred and why
 - Offenders acknowledge and take responsibility for what happened and resulting harm
 - Offenders make apologies or other tangible/intangible exchanges to redress harms
 - Letter of apology
 - Fines or other monetary payments
 - Performing in-kind services for victim or community-service organization
 - Participating in education or treatment program to address behavioral issues
 - Paying restitution, compensation to victim
 - Reintegrating offender back into community
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SIX STEPS IN GENERIC MEDIATION


1. Introductory remarks
 2. Statement of “facts” by the parties
 3. Information gathering time
 4. Identification of the problems
 5. Bargaining and generating options, and
 6. Reaching an agreement (maybe).
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1. INTRODUCTORY REMARKS

MY STANDARD OPENING

- ▶ Voluntary
 - ▶ Consensual
 - ▶ Confidentiality & Exceptions
 - ▶ Neutral and Impartial
 - ▶ Your parties are separated so you get to do this twice
 - ▶ Do it verbally, face to face, do not rely on writings
 - ▶ **Establish rapport – one of the most important factors in effective mediation**
 - ▶ Gauge their reaction, emotional state
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DEVELOPING RAPPORT

- ▶ Research indicates the qualities of mediators most desired by parties in a dispute include:
 - ▶ Activities by mediators that reinforce parties' beliefs that mediator has attributes that will enable relating to them and assisting them
 - ▶ Mediator's personal style, manner of speech, dress, social background, attentive and respectful listening and behavior
 - ▶ The social stage of an interview
 - ▶ Open, warm, intelligent and interested
 - ▶ Informal conversation on non-controversial topics
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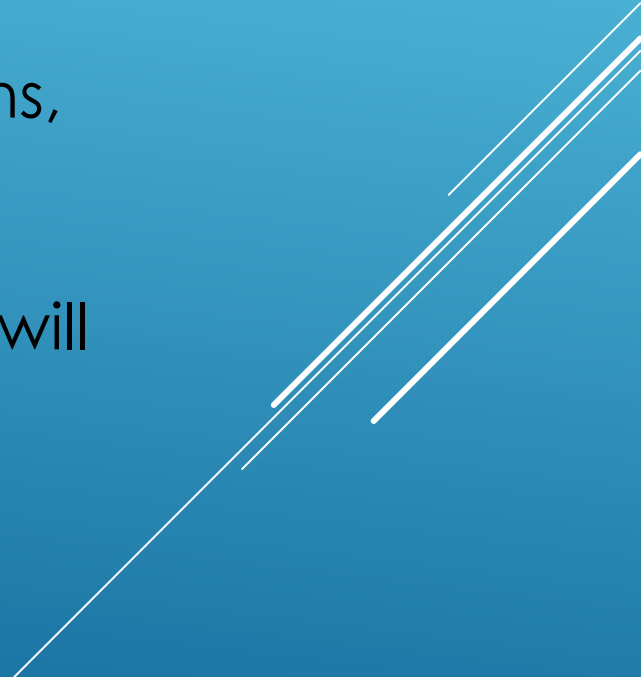
2. STATEMENT OF THE PROBLEM BY THE PARTIES

- ▶ Under Barton's policies, the parties are separated
- ▶ Who goes first?
 - ▶ Typically, the Complainant
 - ▶ But can be the Respondent
- ▶ Do they have to verbalize the problem – in other words, repeat the incident?
 - ▶ No, participation is voluntary, and that includes whether to talk
 - ▶ But it could help you assess where and how to focus your attention later


3. INFORMATION GATHERING

- ▶ You are asking probing questions, but it's a fine line
- ▶ Not an interrogation
- ▶ Not cross-examination
- ▶ You are trying to understand their core concerns & get them focused
- ▶ Patience is a virtue – getting off track is ok but eventually needs correction
- ▶ Frankly, I ask questions to help them see possible weaknesses in their position/case and identify vulnerabilities
- ▶ Always framed as a question, not an assertion
 - ▶ “What is your understanding of ...?”
 - ▶ Generally, do not correct a misstatement (remember, neutral & impartial)


Strategies to get parties talking to provide needed information include:

- Explaining the importance of the information to the process
 - Stressing the need to hear all views
 - Explaining the benefits of full participation
 - Demonstrating positive interest in parties' concerns, problems, viewpoints (without endorsing them – remember neutrality!)
 - Providing hope (not guarantee) that the process will address parties' concerns
- 


INTERVIEWING SKILLS

- ▶ Be conscious of body language – theirs and yours
 - ▶ Reflective listening vs active listening
 - ▶ Framing and re-framing
 - ▶ Open ended questions vs closed ended vs either/or
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INFORMATION GATHERING

- ▶ I would tell the parties their answers to these questions are confidential and won't be conveyed to the other side
 - ▶ What result would you like to see?
 - ▶ If you can't get that result, is there a second choice? A third choice?
 - ▶ What would it take to get this behind you and move on?
 - ▶ What are you willing to do to resolve this?
 - ▶ How important to you to get this resolved without a formal hearing?
- 


4. IDENTIFICATION OF THE PROBLEMS

- ▶ This is primarily **your** exercise for planning the way forward, not the parties
 - ▶ You assess where you can best help them focus on the relevant problem(s)/core concerns
 - ▶ Separating the wheat from the chaff
 - ▶ Prioritize your efforts
 - ▶ Start with easy problem(s)
 - ▶ Momentum helps with the bigger ones
 - ▶ Once you've decided, you're ready to move them into bargaining stage
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5. BARGAINING & GENERATING OPTIONS

AKA “SHUTTLE DIPLOMACY”

- ▶ You are the honest broker conveying offers/counter-offers
 - ▶ You do not reject/critique/endorse
- ▶ Bargaining is not arguing over facts
 - ▶ If the parties are arguing over facts,
 - ▶ Tell them they are never going to agree on all the facts
 - ▶ Remind them the purpose of informal resolution is to find solutions
 - ▶ Ask whether they want to work on solutions


- ▶ Bargaining is not arguing about positions
 - ▶ Do not react to emotional outbursts
 - ▶ The classic high demand and low/no offer scenario
 - ▶ “The only way to find out if the other side is willing to move is for you to make a move”
 - ▶ That means compromise
 - ▶ Unless and until the parties have run out of ideas, you do not offer any alternative solutions
 - ▶ But if they have run out of ideas, try to get them to think of those alternatives
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6. REACHING AGREEMENT


SOME POSSIBLE RESOLUTIONS

- ▶ Permanent No Contact Agreement
- ▶ Alter classes schedules
- ▶ Alter extra-curricular activities
- ▶ Counseling sessions
- ▶ Exchange impact statements
- ▶ Education sessions (alcohol, consent, Title IX, etc.)
- ▶ Bi-weekly or monthly check-ins with Title IX Coordinator
- ▶ Restriction from participating in certain clubs, organizations, sports teams, events
- ▶ Community Service
- ▶ Written Apology
- ▶ Move to off-campus housing
- ▶ Restrictions/limitations on access to campus property
- ▶ Voluntarily withdrawal from College
- ▶ Fines/Restitution

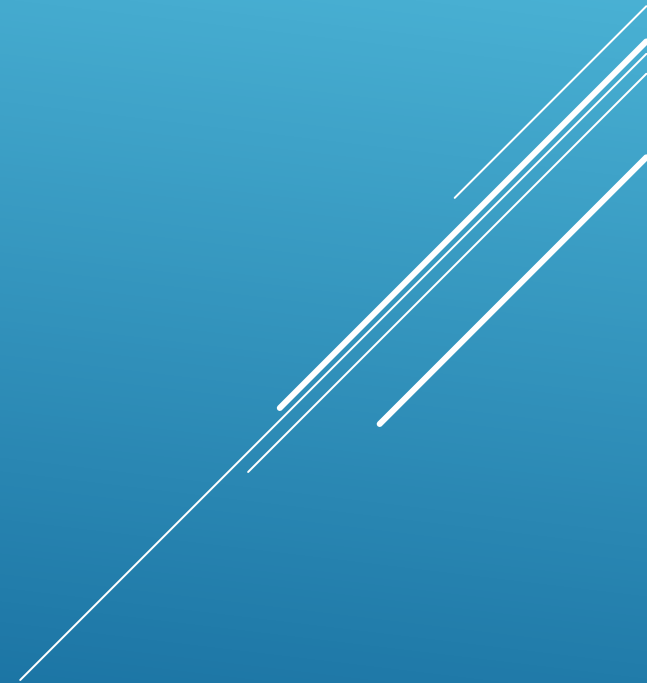
OBSERVATIONS

- ▶ The perception of neutrality and impartiality is paramount
 - ▶ Their participation is voluntary
 - ▶ You can't force an agreement
 - ▶ You can lead a horse to water, but you can't make it drink
 - ▶ I deal with mature adults who often can't get beyond their emotions to make sound business decisions – you'll be working with young adults
 - ▶ It's not your job to try to make an agreement better
 - ▶ It's ok to "impasse"
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SUGGESTED READING

- ▶ “Getting To Yes; Negotiating Agreement Without Giving In” Revised Edition, 2011, Roger Fisher and William Ury, Penguin Books, \$8.69 at Amazon Books
 - ▶ Your parties may not have read it, but if attorneys are involved, they probably have read it
 - ▶ “The Mediation Process: Practical Strategies for Resolving Conflict” 4th Edition, Christopher W. Moore, Boston Treasure Chest,
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What Scenarios Do You Expect?



Questions?

