

Building Skills to Successfully Mediate Title IX Sexual Harassment Cases

Welcome & Faculty Introductions



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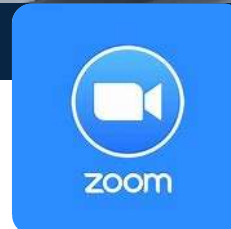
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RESOURCES

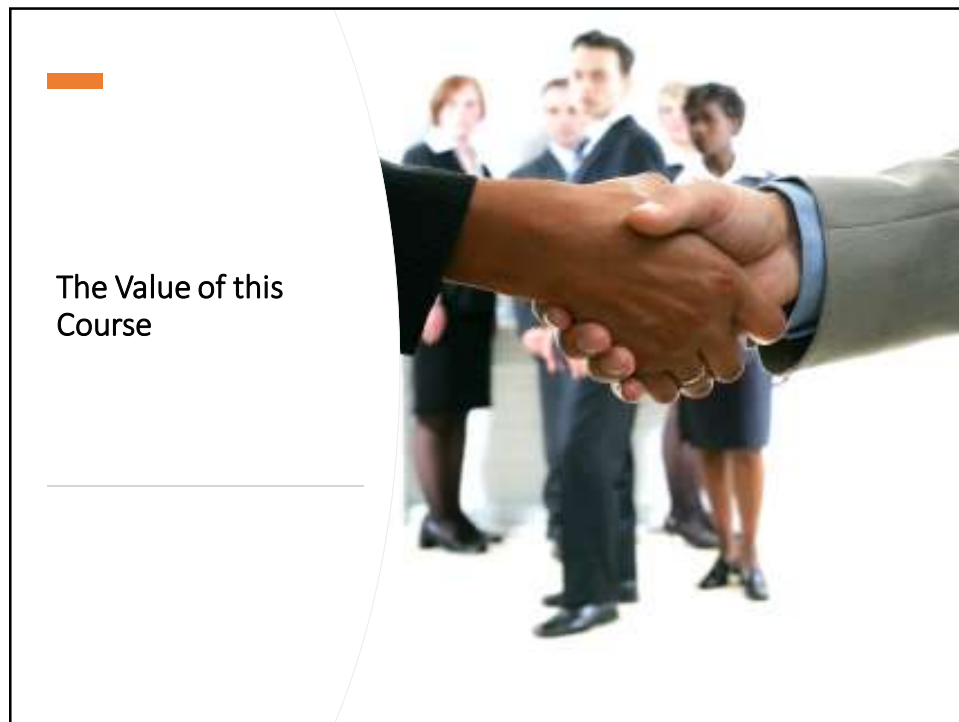
Welcome to Zoom and its features:

- A. Mics (keep muted please)
- B. Camera (option to keep on or off)
- C. Gallery vs. Speaker View
- D. Participant List with Emoji's
- E. Chat Box
 - Use whenever you need it to ask questions or respond
 - Look here for downloadable files during the presentation
 - Option to send private messages to each other or host
 - Chats will be transcribed (not private ones)
- F. Close windows (e.g., polls)
- G. Recording (except during breaks or in small groups)
- H. Changing your name option (hover over your name, select "more" then "rename" to change your name)

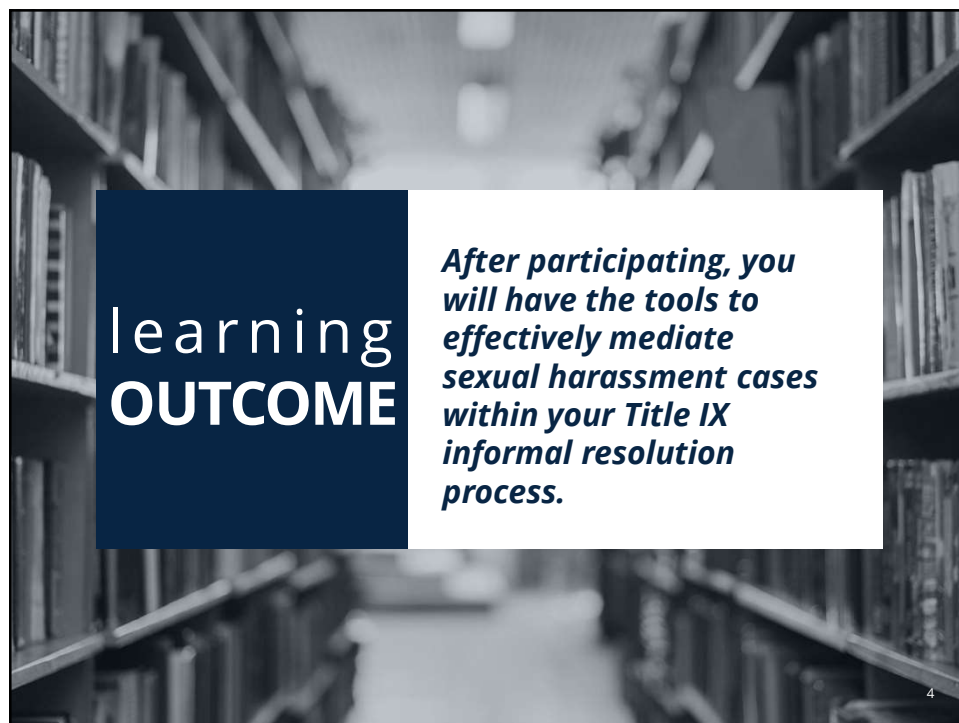


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Disclaimer

The information provided in this training does not, and is not intended to, constitute legal advice; instead, all information, content, and materials available during this training are for training and general informational purposes only.

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AGENDA

November 9, 2021

1. Informal Resolution Overview
2. Mediation in the Context of Title IX and Pre-Mediation Prep
3. Role of the Mediator As the Communicator
4. The Mediation – Critical Steps & Considerations
5. The Mediation – Fundamental Skills
6. Day One Q&A

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AGENDA

November 10, 2021

7. The Mediation – Party Proposals & Ethical Considerations
8. Preparing the Agreement
9. Failure to Reach Agreement
10. Preparing for Mock Mediation
11. Module 1: Setting the Scene & Messaging
12. Module 2: Dealing with Party Advisors and Saving the Mediation
13. Mock Mediation Debrief & Final Q&A

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Meet Your Expert Faculty



Cara Hardin, J.D.
Title IX Deputy Coordinator
 Marquette University
cara.hardin@marquette.edu




Hon. Sanford M. Brook (Ret.)
Mediator and Arbitrator
 Judicial Arbitrator Group
sbrook@jaginc.com



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#1

Title IX & The Informal Resolution Process

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CHAT



What do you think are the personality and communication strengths of a good informal resolution facilitator?

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Mediator Personality & Communication Strengths

Personality Strengths

Tolerant
Thoughtful
Practical
Collaborative
Respectful
Empathetic
Intuitive
Self-Aware
Creative
Non-Judgmental
Open-Minded
Credible

Communication Strengths

Characterize but don't criticize
Clarity
Emotional control
Simplicity trumps complexity
Facts are foundation to persuasion
Eye contact
Relaxed tone
Avoid negative body language
Avoid negative verbal reactions
Avoid negative facial expressions

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Title IX

Title IX

"No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."

Title IX of the Education Amendments of 1972

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Title IX Coverage

Sex-Based Discrimination

Inequitable or differing treatment based on sex, sexual orientation, or gender identity in all areas of institutional access.

Retaliation

Sexual Harassment

- Quid Pro Quo
- Hostile Environment
- Sexual Assault
- Dating/Domestic Violence
- Stalking

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2020 Regulations: Notable Changes

Notable changes within the 2020 Final Regulations:

- Provides a uniform definition of "sexual harassment."
- Specification of how educational institutions must respond to sexual harassment.
- Clarifies jurisdictional reach to U.S.-based institution education programs or activities.
- Requires a live-hearing with cross-examination to adjudicate a formal complaint alleging sexual harassment.
- Allows for informal resolution of formal complaints by mediation.

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RESOURCES

2020 Title IX Amendments 34 C.F.R. 106

- **Preamble and Regulations**
<https://www2.ed.gov/about/offices/list/ocr/docs/titleix-regs-unofficial.pdf>
 - Preamble section on informal resolution at p. 1363
 - Regulations at p. 2008
 - Regulations section on informal resolution at p. 2028

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Informal Resolution Under The 2020 Amendments

Informal resolution is permissible in lieu of the investigatory and/or hearing process. 34 CFR 106.45(b)(9).

- After a formal complaint is filed.
- When the Title IX Coordinator deems informal resolution appropriate.
- When the parties give voluntary, informed, written consent to attempt informal resolution.

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Informal Resolution Under The 2020 Amendments (con't)

➤ Limitations:

- Schools cannot offer or facilitate informal resolution to resolve allegations that an employee sexually harassed a student.
- Schools cannot require or pressure the parties into an informal resolution process.
- The informal resolution process must have reasonably prompt timeframes.

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Written Notice

Institution MUST provide written notice to the parties disclosing the:

- Allegations. §106.45(b)(9)(i)
- Discussion about the availability of informal resolution. §106.45(b)(A)

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Written Notice: Requirements

- Requirements of the informal resolution process. §106.45(b)(2)(i)
 - Voluntary participation; without coercion. §106.45(b)(2)(ii)
 - The circumstances that preclude the parties from resuming a formal complaint. §106.45(b)(9)(i)
 - Can withdrawal any time before resolution agreement reached.
 - Facilitation by neutral, objective and trained facilitator. §106.45(b)(1)(iii)

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Written Notice: Participation Consequences

- Consequences from participation in informal process.
 - The records that will be maintained or that could be or could not be shared. §106.45(b)(10).
 - Records relating to informal resolutions and the result thereof must be maintained for at least seven (7) years. §106.45(b)(10)
 - If a resolution is reached, the Formal Complaint concludes, and Parties abide by terms of resolution.
 - If a resolution is not reached, the Formal Complaint returns to the formal Grievance Process.

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Written Notice: Range of Conflict Resolution Strategies

- The types of informal resolution processes available under the policy. §106.45(b)(2)(i).
 - Informal resolution may encompass a broad range of conflict resolution strategies, including but not limited to:
 - Remedies-based resolution
 - Respondent accepts responsibility
 - Mediation
 - Restorative justice
 - Arbitration

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Written Notice: Other recommendations

➤ *Recommended additional written disclosures:*

- Whether there is confidentiality within the informal resolution process.
- Whether facilitator will be called as a witness in the formal grievance process if informal resolution fails.
- Facilitator's right to end the mediation for good reason.
- Title IX Coordinator may reject any agreed-upon resolution if it is unreasonable or inequitable.
- Right to appeal?

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Appeal

Informal resolution agreements may or may not be subject to appeal.

- On the one hand, §106.45(b)(8) states that recipients must offer both parties an appeal from determinations regarding responsibility, or from a recipient's dismissal of a formal complaint or any allegations contained in a formal complaint.
- But, *Preamble* states, "Importantly, the final regulations require recipients to offer both parties an appeals process to help mitigate risks such as procedural irregularity and investigator, decision-maker, or informal resolution facilitator bias." *Preamble*, p.1374 (Federal Register version)

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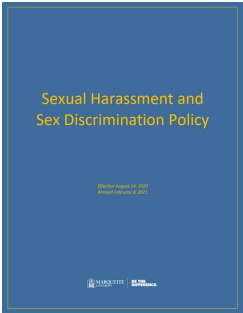
What are the reasons a party would want to challenge a resolution agreement after the fact?

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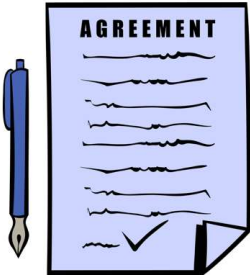
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Key Documents Relating to the Informal Resolution Process

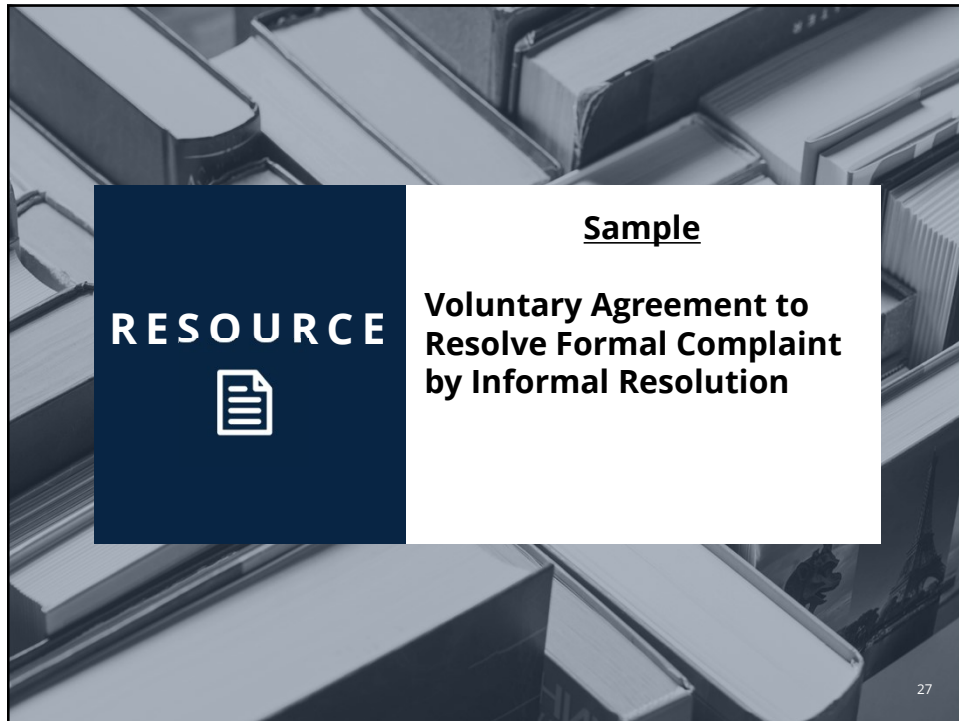


- Institution's policy against sexual harassment and sex discrimination
- Notice of Allegations
- Voluntary Agreement to Resolve Formal Complaint by Informal Resolution



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Informal Resolution by Mediation



- A process where the parties negotiate an outcome with the help of an unbiased, neutral third party → Mediator/Facilitator.
- Compromise is integral to the process.
- No admission of responsibility required.

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The Facilitator's Role

- Ensures an equitable and fair process.
- Serves as a “neutral”
- Allows each party to feel empowered and heard.
- Encourages and guides meaningful dialogue between the parties towards an amicable resolution.
- Helps uncover the parties’ underlying needs and interests.
- Has no authority to render a resolution - only the parties do.

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Free of Bias/Conflict of Interest

Facilitators of informal resolution MUST:

- Facilitate impartially (independent, neutral and objective)
 - No conflicts of interest. §106.45(b)(1)(iii).
 - No bias for or against complainants or respondents generally or an individual Complainant or Respondent. §106.45(b)(1)(iii).
 - Avoid prejudgment of the facts at issue. §106.45(b)(1)(iii)

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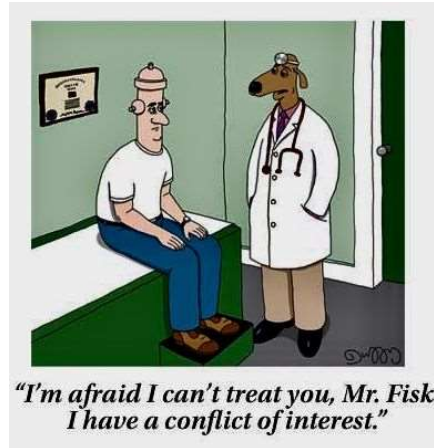


Impartiality

➤ Mediator must serve impartially by avoiding:

- Prejudgment of the facts at issue
- Conflicts of interest
- Bias

§106.45(b)(1)(iii).



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CHAT

What are some examples of potential facilitator conflicts of interest?

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Bias free

➤ A mediator must not have:

- A bias for or against complainants or respondents generally or an individual Complainant or Respondent. §106.45(b)(1)(iii).

Bias, generally:

- Stereotypes => Experiences
- Prejudices => Automatic thoughts about how we feel
- Discrimination => Actions

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Required Facilitator Qualifications

Mediators MUST undergo "robust" training on:

- The §106.30 definitions of sexual harassment. §106.45(b)(1)(iii)
 - The 2020 Amendments define sexual harassment broadly to include any of three types of misconduct based on sex.
 - All three types of misconduct jeopardize the equal access to education that Title IX is designed to protect.

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Title IX Sexual Harassment (§106.30)

Sexual Harassment is conduct based on sex that satisfies one or more of the following:

- Quid Pro Quo harassment. 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.
- Hostile environment harassment. "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 school's education program or activity."
- "Sexual assault," "dating violence," "domestic violence," or "stalking" as those terms are defined under the Clery Act and VAWA.

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RESOURCES

OCR Sexual Harassment Definition

- **OCR Blog Entry 20201007:**
<https://www2.ed.gov/about/offices/list/ocr/blog/20201007.html>
- **Q&A on the Title IX Regulations (July 2021)**
<https://www2.ed.gov/about/offices/list/ocr/docs/202107-qa-titleix.pdf>

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Facilitator Training Qualifications

- The scope of the institution's program or activity.
§106.45(b)(1)(iii)

Locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs.

Also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.

- How to conduct the chosen method of informal resolution. §106.45(b)(1)(iii)

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Training Qualifications (continued)

- The §106.45 formal grievance process.
 - Investigatory Process
 - Hearing Process
 - Appeal Process
- Rape shield protections
- The institution's policy against sexual harassment, including the definitions of:
 - Consent
 - Incapacitation
 - Retaliation

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CHAT

Why is it important for the facilitator to know the sexual harassment definitions and the grievance process?

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Title IX Sexual Harassment Cases and Informal Resolution

Case amenability to informal resolution is dictated by the institution's policy.

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Sexual Harassment Cases Generally Conducive to Informal Resolution

Cases *generally* amenable to Informal Resolution:

- Hostile environment sexual harassment cases between employees or between students where little to no power differential.

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Sexual Harassment Cases Generally Conducive to Informal Resolution - EXAMPLES

- Lower-level sexual assault cases.*
- Sexual assault cases resulting from miscommunication.*
- Dating/domestic violence cases where mutual harm is alleged.*
- Stalking potentially connected to a mental health or personality disorder.

*

Sexual/dating/domestic violence cases are the most challenging to informally resolve due to the nature and intimacy of the harm and the power imbalances often associated with these offenses. Accordingly, proceed with caution.

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Sexual Harassment Cases Generally Not Conducive to Informal Resolution

Cases *generally not* amenable to Informal Resolution:

➤ Alleged offenses involving:

- Physical or threatened violence,
- Predation,
- Intimidation,
- A dangerous pattern of conduct, or
- Where the power differential between the parties, under the circumstances, could exacerbate the harm.

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QUESTIONS?

ACADEMIC
IMPRESSIONS

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#2

Mediation in the Context of Title IX and Pre-Mediation Prep

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The “Collaborative Process”

Mediation as a “collaborative process”



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Mediation – The participants

Participants within the Informal Resolution Process:

- The Complainant(s)
- The Respondent(s)
- The Facilitator
- Advisors (maybe)

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Mediation – The Characteristics

As a reminder:

- Voluntariness
- Informed consent to participate
- Impartiality of facilitator
- Party control over outcome

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Mediation – The Types

- *Facilitative* - conducted by third-party neutral with no authority to propose a solution or opine on issues.
- *Evaluative* - conducted by third-party neutral who may give opinions and propose solutions.
- *Title IX Hybrid* – facilitative with measured evaluation and proposal of solutions.

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Pre- Mediation Communication

Contact with the Parties

- Email or call to set up pre-mediation conference
- Pre-mediation conference
 - 2-3 days before mediation
 - Mediator = Complainant
 - Mediator = Respondent
- Memorialize all contact

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Pre-Mediation Conference

Do

- Introduce yourself
- Get to know the party
- Explore comfort/discomfort
- Explain role – neutral facilitator
- Explain compromise is often a part of the process
- Discuss freedom to withdrawal from the process

Do

- Explain process
- Explore the goal
- Explain option and role of advisor
- Explain confidentiality
- Explain that party has a voice in the outcome
- Invitation to share substance

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Exploring feelings and thoughts

➤ Exploring feelings and thoughts...

- Try to understand the parties' motivation to participate in the informal resolution process.
- *"How would you feel if we are unable to reach an agreement?"*
- *"What is the best result for you?"*
- *"If you couldn't achieve the best result, what will you need to feel comfortable about resolving this complaint?"*

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Inviting Substance?

➤ Discretionary to invite substance regarding the allegations...

- *"Here are the materials I've reviewed before speaking with you..."*
- *"Is there any additional information you wish to share with me that you believe would be helpful to resolving the formal complaint?"*

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Pre-Mediation Communication with Parties

Don't

- Pre-judge issues
- Predict outcome
- Discuss conversations with other party

Don't

- Sound rigid, managerial, controlling
- Evaluate claims of either party
- Discuss what other observers/witnesses say
- Overload

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ACTIVITY

Pre-mediation session

1. Introduction
2. Get to know party
3. Discuss process
4. Discuss goal
5. Concerns/fears

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Pre-Mediation - Preparation

- Read materials (NOIA, voluntary agreement to participate, policy)
- If possible, outline strong facts and weak facts for Complainant
- Determine how to structure mediation
- If possible, determine expectation of parties
- If facilitator is not the Title IX Coordinator, Title IX Coordinator may have helpful information about resolution options

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Pre-Mediation - Evaluation

- What are the undisputed facts?
- The human element
 - Who, if either, do the facts favor?

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Pre-Mediation – Framing the Issues

- What are the issues?
- Determine if there are issues outside of the Complaint and Respondent.
- Do the parties see the issues differently?

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Pre-Mediation – Focusing on Objectives

- Where might compromise be achieved?
- What are the respective party objectives?
- What might the ultimate agreement look like?

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Creating the environment



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Avoid Joint Sessions with Parties?

- Mediation historical perspective on joint caucus
- Dynamic of parties meeting in joint caucus
- Will it ever be appropriate to bring the parties together in a joint caucus?

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Creating the Physical Environment

- The venue
 - Ensures privacy/confidentiality
 - Is not intimidating
 - Comfortably accommodates multiple participants
 - Not a busy place
- The rooms
 - Sufficiently separated from one another
 - Large enough to be comfortable
 - Extra room necessary
- Administrative
 - Computer, copier, etc.

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Creating the Virtual Environment

- Structure the start
 - Parties to join at different times
 - Discuss the success of virtual mediation
- Explore:
 - Is anybody with or intending to be with party
 - Need to get comfortable with technology
- The pragmatics
 - Get cell numbers from all participants
 - No recording by anybody
 - Insist on live video
 - Clarity of visual image

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Pre-Mediation - Strategy

- Who do I talk to first?
- What will I address in the first session with each of the parties?
 - Undisputed facts
 - Non-threatening issues
 - Confirming objective(s) of each party
 - The parties' ideal outcome
- When and how will I address the more sensitive facts?

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Pre-Mediation Preparation Essential

- Preparation pre-mediation is essential
 - Anxiety
 - Relief
 - *"I want to go."*
- Alternative results

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CHAT

Mediation preparation

What are your reactions and additional recommendations?

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Role of the Mediator as the Communicator & Negotiator

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Personality & Communication Strengths

Personality Strengths

Tolerant
 Thoughtful
 Practical
 Collaborative
 Respectful
 Empathetic
 Intuitive
 Self-Aware
 Creative
 Non-Judgmental
 Open-Minded
 Credible

Communication Strengths

Characterize but don't criticize
 Clarity
 Emotional control
 Simplicity trumps complexity
 Facts are foundation to persuasion
 Eye contact
 Relaxed tone
 Avoid negative body language
 Avoid negative verbal reactions
 Avoid negative facial expressions

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Facilitator: Communicator and Neutral

- Empathetic listening
- Paraphrase and summarize
 - *"I want to make sure I understand, it is rare for you to drink in excess."*
 - *"You were embarrassed to tell your roommate."*
- Validate
 - *"Not wanting to tell someone else is not unusual. It happens all the time."*

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Communicator and Neutral (con't)

- Avoid negativity
 - *"He/She/They doesn't/don't understand the seriousness of what he/she has done."*
- Participatory empowerment
 - *"What would you like me to tell him/her/them about how you are feeling?"*
 - *"What do you want me to say to him/her/them about the fear you continue to have?"*

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Facilitator: Negotiator

➤ Subtle opinions

- *"I know you don't want to agree to these restrictions but if we don't reach an agreement, you risk more severe restrictions imposed by others."*
- *"These particular facts may not be helpful to you..."*
- *"I believe he/she/they are/is both remorseful and embarrassed."*

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CHAT

Based upon your experience, going into mediation...

What might be Complainant's perspective?

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A presentation slide with a background of overlapping grey paper-like shapes. A dark blue rectangle on the left contains the word "CHAT" in white, with two white speech bubble icons below it. To the right, a white rectangle contains the text "Based upon your experience, going into mediation..." and "What might be Respondent's perspective?".

CHAT

Based upon your experience, going into mediation...

What might be Respondent's perspective?

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A dark blue presentation slide. In the top right corner is the "ai ACADEMIC IMPRESSIONS" logo. On the left, a vertical orange bar is next to a large white "#4". Below this, the text "The Mediation – Critical Steps and Considerations" is written in white.

ai ACADEMIC IMPRESSIONS

#4

The Mediation – Critical Steps and Considerations

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The Mediation

- Pre-mediation conference done.
 - Got to know each party
 - Established credibility
 - Have a good idea of the facts.
 - May suspect or know the parties' desired outcome.
- Ready to mediate.

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Beginning the mediation

- Meet with one party.... Then the other
 - Re-establish connection
 - Discuss any outstanding questions from pre-mediation
 - Remind parties of the purpose of the mediation
 - Re-introduce the process and expectations for the mediation.

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Shaping the Issues for Parties

- Share what you understand the issues to be.
- Probing whether we can achieve an "agreed" outcome.
- Session is not whether complainant can prove her/his/their allegations.
- Facts are important.

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Searching for Shared Values

- Subtly probe
 - Do each hope an agreement can be reached?
 - If agreement reached, what if any relationship will exist with the other party?
 - Are there underlying interests?
 - What are goals for the future?

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Establishing Credibility

- The mediator
- The process
- The agreement

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Maintaining Confidence

- It is a process, not an event.
- Patience is key.
- Report where progress is being made.
- Sharing positive aspects of what you have heard and observed.

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Party Advisors

- Advisors:
 - - Victim advocates, parents, roommates, friends, school employees, or lawyers
- Role can be restrictive
- A role of support and collaboration
- Aider v. barrier
 - Using an advisor to benefit the process
 - Handling the challenge

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Fact exploration

- Inviting a narrative to elicit perspective...
 - Encourages party to open-up, vent, and articulate.
 - Allows story to be told.
 - Rarely a need for interrogation on the who, what, when, where, why, how, describe, explain, tell...
 - Understand relationship between the parties.
 - Obtain enough facts to assess strengths and weaknesses of the case.

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Fact exploration techniques

- General exploration questions:
 - *"What [more] would you like me to know, if anything, about what happened."*
 - Make sure to use open-ended questions: *"Please explain..." "Would you describe..."*
 - What does each party believe to be the other party's perspective on what happened.
 - Understand the parties' motivation to participate in the informal resolution process.

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Fact exploration techniques (cont')

- Probing questions.
 - Asking for additional facts if needed to evaluate case strengths/weaknesses.
 - Exploring feelings, opinions, thoughts...
 - *"How would you feel if we are unable to reach an agreement?"*
 - *"What is the best result for you today?"*
 - *"If you couldn't achieve the best result, what will you need to feel comfortable about resolving this complaint?"*
 - A guide to persuasive discussions with the other party.

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Subtle Persuasion Techniques

- Moving the parties toward the goal.
 - *"Do you think it will be more comfortable for you to move off campus?"*
- Suggesting possible outcome.
 - *"I'm not sure they will agree to move off-campus, but you may get them to move to another dorm and give up access to your dorm."*

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The Facts as Additional Subtle Persuasion

- Addressing factual strengths
- Addressing factual weaknesses
- Addressing contested facts

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