Informal Resolution of Title IX Complaints: Mediation & Arbitration

June 11, 2020

Robert D. Litz
Common forms of Informal Resolution (ADR)

THE ALTERNATIVE DISPUTE RESOLUTION CONTINUUM

- negotiation
- mediation
- med-arb
- arbitration
- adjudication

A THIRD PARTY NEUTRAL IS INVOLVED
PROCESS IS (IN THEORY) DECIDED BY PARTIES
OUTCOME IS DECIDED BY ARBITRATOR
Most common Alternative Dispute Resolution processes
What is Mediation

- Process of assisted negotiation in which a neutral person helps people reach agreement.
- Mediator: Impartial third party
- 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
- Can be confidential
Mediation: 3 Legged Stool

- Cost
- Time
- Risk
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]
During Mediation

- How to deal with the problem client and/or attorney?
- Dealing with the Complainant’s attorney who does not understand the case issues?
- Dealing with the Respondent’s attorney who does 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 decisions 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 difference between an **acknowledgement** and **apology** and when to use each.
- The power of apology.
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