

Campus PRISM Project Brief

Distinguishing Campus Restorative Justice from Mediation

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In this brief, we distinguish between mediation and restorative justice. At this time, the Department of Education's Office for Civil Rights (OCR) has not provided guidance about the use of RJ for sexual and gender-based misconduct. However, in the 2011 Dear Colleague Letter, OCR briefly discusses informal resolution options and describes mediation in a way that can be confused with restorative justice. This stipulation has had a chilling effect on the application of RJ for sexual and gender-based misconduct.

Grievance procedures generally may include voluntary informal mechanisms (e.g., mediation) for resolving some types of sexual harassment complaints. OCR has frequently advised recipients, however, that it is improper for a student who complains of harassment to be required to work out the problem directly with the alleged perpetrator, and certainly not without appropriate involvement by the school (e.g., participation by a trained counselor, a trained mediator, or, if appropriate, a teacher or administrator). In addition, as stated in the 2001 Guidance, the complainant must be notified of the right to end the informal process at any time and begin the formal stage of the complaint process. Moreover, in cases involving allegations of sexual assault, mediation is not appropriate even on a voluntary basis. OCR recommends that recipients clarify in their grievance procedures that mediation will not be used to resolve sexual assault complaints.¹

What is mediation?

Mediation encompasses a broad field of practice, but it is commonly defined as an “informal process in which a neutral third party with no power to impose a resolution helps the disputing parties try to reach a mutually acceptable settlement.”² Mediation is often used as a form of “alternative dispute resolution” in administrative law. Courts may refer cases, such as divorce or small claims, to mediation with the hope that the parties can resolve the dispute instead of going to trial. On campuses, peer mediation (with trained students as mediators) is sometimes used to resolve student conflicts such as roommate disputes.

What is campus restorative justice?

RJ also includes a broad range of practice, but it is commonly defined as a “process to involve, to the extent possible, those who have a stake in a specific offense and to collectively identify and address harms, needs, and obligations, in order to heal and put things as right as possible.”³ Restorative justice on college campuses is a “non-adversarial approach to addressing offensive behavior that seeks to identify and repair harm and rebuild trust through facilitated dialogue. It

¹ U.S. Department of Education, Office for Civil Rights. (April 4, 2011). *Dear colleague letter: Sexual violence background, summary, and fast facts*, p.8

² Bush, R.A.B, & Folger, J.P. (1994). *The promise of mediation*. San Francisco: Jossey-Bass. P.2

³ Zehr, H. (2002). *The little book of restorative justice*. Intercourse, PA: Good Books. P.37.

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includes a variety of practices, including prevention circles, response conferences, and reintegration circles, designed to empower harmed parties and strengthen offenders' social ties and accountability to the community."⁴

How are mediation and restorative justice similar?

1. Use of the Word "Mediation." Some restorative practices use the term "mediation," such as victim-offender mediation.⁵ This was once common in the U.S. and is still common in Europe. Today, in order to distinguish victim-offender mediation (VOM) from civil mediation practices commonly used in American courts and community dispute resolution centers, VOM is more typically described as victim-offender dialogue (VOD). The practical boundaries between VOD and restorative conferencing are blurring, but typically, VOD is a method used to facilitate dialogues between harmed parties and prisoners in cases of serious violence. The goal of such dialogues is primarily for healing, since sentencing decisions have already been made. RJ conferencing is often used on college campuses as a method to arrive at sanctioning decisions.
2. Trained Facilitation. Mediation and RJ dialogues make use of trained facilitators. Typically, mediators and RJ facilitators receive 20-40 hours of initial training, followed by a supervised apprenticeship. However, the content of facilitator training for mediation and RJ is quite different. Mediators are trained to assist parties in high conflict and, often, chaotic discourse, which may unfold in unpredictable ways. RJ facilitators guide parties through a much more structured, predictable, and transparent process. Facilitator training for Title IX cases would include pre-conference preparation and assessment, trauma-informed care, issues of power and privilege, and collaboration with various campus resources to ensure participants' needs are addressed through the process.⁶
3. Empowerment of Participants. Mediation and RJ dialogues prioritize participant empowerment. Parties in a mediation come to a mutually-acceptable agreement; participant in RJ develop a plan that addresses the harm. Unlike arbitration or other hearing models where a neutral authority determines sanctions, in both mediation and RJ, it is the participants themselves who brainstorm and decide on what they believe to be the best course of action to resolve the complaint. In some Campus RJ models, these agreements are final and, in others, the agreements are used as a recommendation to inform the administration's final determination.

How are mediation and restorative justice different?

1. Acceptance of Responsibility. RJ conferencing is used when an accused student acknowledges engaging in the harmful behavior (although they may not grasp the full impact) and commits to taking responsibility for the misconduct and its resulting harms.

⁴ Karp, D.R., Shackford-Bradley, J., Wilson, R.J. & Williamsen, K.M. 2016. *Campus PRISM: A Report on Promoting Restorative Initiatives for Sexual Misconduct on College Campuses*. Saratoga Springs, NY: Skidmore College Project on Restorative Justice. P.11.

⁵ Umbreit, M. S., & Armour, M. P. (Eds.) (2011). *Restorative justice dialogue: An essential guide for research and practice*. New York, NY: Springer.

⁶ Koss, M.P., Wilgus, J., & Williamsen, K.M. (2014). Campus sexual misconduct: Restorative justice approaches to enhance compliance with Title IX guidance. *Trauma, Violence, & Abuse*, 15, 242 - 258.

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Mediation does not require that a party take responsibility for their role in the conflict. Such a requirement is antithetical to the ideals and practice of mediation. Acceptance of responsibility is a primary determinant for referral to RJ and is essential for preventing adversarial confrontation and victim-blaming.

2. Preconference Preparation. Unlike mediation, RJ facilitators meet extensively with participants during the preparation process to assess whether the case should include a face-to-face dialogue and to prepare participants in advance of the dialogue. To decide whether the case will go to a RJ dialogue, facilitators assess *risk of revictimization* and *ensure safety*, whether participants feel *pressure or coercion to participate* and if the participants' *goals are in alignment* with RJ.
3. Strategies to Mitigate Power Imbalances and Manipulation. Although some mediation models have been specifically designed to offset power imbalances, mediation has been criticized for creating a forum in which offenders might attempt to revictimize survivors through coercive or manipulative language and undermine the explicit goal of survivor empowerment.⁷ Although it cannot eliminate all risk of revictimization, RJ is distinctive in its guidelines and practical strategies to create a safe and noncoercive environment.⁸ An important example of this is the addition of support people to the dialogue who play an active role in the process both in supporting the victim, and in confronting the offender with their conduct. Another example is the use of victim surrogates to help offenders understand the harm without engaging in a face-to-face dialogue with their direct victim. This attention to victim safety and well-being has led to high victim satisfaction rates for RJ participation.⁹
4. Role of the Institution. In Title IX cases, institutions have important obligations to ensure community safety and improve campus climate. Such interests are not likely to be represented through mediation, but are central to an overall restorative approach. Representatives of the institution would address harm to the campus community, assess and reduce risk of re-offense, and publicly communicate the institution's strong disapproval of sexual misconduct. Additionally, institutional representation is important for examining how the institution can take action to improve the safety and well-being of its students, faculty and staff in ways that go beyond the particular obligations and abilities of participants in any one RJ case. This attention to addressing institutional policy and culture is central to an RJ approach, but unlikely to be considered in mediation.

⁷ Presser, L., & Gaarder, E. (2000). Can restorative justice reduce battering? Some preliminary considerations. *Social Justice*, 27(1), 175-195.

⁸ Presser, L., & Hamilton, C. A. (2006). The micropolitics of victim-offender mediation. *Sociological Inquiry*, 76(3), 316-342.

⁹ Strang, H., Sherman, L.W., Mayo-Wilson, E., Woods, D., & Ariel, B. (2013). Restorative justice conferencing using face-to-face meetings of offenders and victims: Effects on offender recidivism and victim satisfaction: A systematic review. *Campbell Systematic Reviews* 2013:12 DOI: 10.4073/csr.2013.12