

Mediation and Title IX

By: Brett A. Sokolow, JD

Mediation continues to be a Title IX issue of contention. In April, the University of Virginia published its newly revised sexual assault and sexual misconduct policies and procedures. Gary Pavela quickly wrote in the *ASJA Law & Policy Report* that UVa.'s new policies are likely to be seen as a national model. While that may prove to be true, I am reticent to jump to that conclusion prematurely. Let me state that I am very impressed with UVa.'s efforts, and those who know me know that I do not praise policies frequently. But, I believe that in order for a policy to be considered a national model, it must be tested and proven over time. UVa. is still testing its new policies, and tentatively exploring how they will fit. The clothes look great on the rack, but now it is time to try them on. I expect that refinements and modifications will occur. Before you jump on the bandwagon, give it a little time. The test of a model is not just whether well-respected authorities endorse it, but how it withstands the rigors of application. After all, I seem to recall Gary endorsing Harvard's 2003 policy changes as a welcome paradigm, only to see Harvard beat a hasty retreat on allegations that its revisions violated Title IX. That is why I am not going to write about UVa.'s changes yet. It is premature. What I am going to write about today is something UVa. did not change substantially--its approach to mediation.

In 2000, the Department of Education's Office for Civil Rights (OCR) released revised Guidance for schools on Title IX as it pertains to sexual harassment. In this Guidance, OCR reiterated a position that mediation was an appropriate response for many sexual harassment claims, but that for sexual assault, mediation was not likely to be an appropriate response. Colleges just shrugged. The OCR Guidance does not have the force of law. The Guidance did not prohibit mediation, it just said it was unlikely to be an appropriate response. So, how seriously should we take this advice? Well, maybe it would help to know that the Department of Justice, which oversees dozens of campus grantees in the Violence Against Women Campus grants program, requires grantees to sign a contract agreeing that they will not use mediation to address campus sexual assault. Maybe it would help to know that the US Departments of Education and Justice, in investigating colleges, have repeatedly found mediation of sexual assaults to be a problematic practice. Maybe it would help to know that I advise all of my clients against mediation of sexual assault as a primary, advertised option [I have no objections to informal responses, such as structured resolutions. I also believe that mediation can be a useful secondary response, after the college has employed appropriate informal or formal responses].

So, it was with some surprise that against this backdrop of widespread disapproval that I noted that UVa.'s revised policies did not abandon mediation. Instead, they reiterated that mediation is a viable and useful primary option. Is it? I understand UVa.'s reasoning for maintaining mediation as an option. Gary Pavela's commentary about it was that since we really don't understand why OCR discourages mediation, we ought to continue to consider it and explore appropriate application of mediation. I don't agree,

and I think I understand why OCR and Justice frown on mediation as a problematic practice. At least, here are my reasons for frowning on mediation as the sole institutional response to sexual violence:

1. Mediation is rarely an effective remedy for violent conduct;
2. Mediation can put colleges on notice of foreseeable harm, without providing an acceptable mechanism for protection of the community;
3. Mediation subtly steers victims to informal rather than formal options;
4. Mediation agreements are behavioral contracts, which can be seen to create an assumed duty on the part of the college or university;
5. Mediation sends a message that sexual assault is a misunderstanding to be worked out by better communication skills;
6. Mediation is often done without adequate threat assessment;
7. Mediation puts the VICTIM in the position of deciding how and if college policies will be enforced.
8. Mediation allows some colleges to push sexual assault under the rug, and to discourage the victim from pursuing criminal prosecution.

Let me be very clear about something—these are global concerns, and are not specific to UVa. or any one college. **IN FACT, I AM SURE THAT UVa. DOES NOT USE MEDIATION TO PUSH VICTIMS INTO INFORMAL RATHER THAN FORMAL RESPONSES.** That does not mean that other colleges are blameless, and so my hope is that a cogent discussion of why mediation can be problematic will be influential to campuses in forming future procedural options. Here is a discussion of each of my objections listed above.

1. Mediation is rarely an effective remedy for violent conduct. Mediation is not a therapeutic session on anger management or a class on higher-order conflict resolution skills. Mediation (when it works) is a monitored airing of grievances, producing at best potential consensus, or a brokering of a truce with terms to which the parties agree. It is a marvelous process for allowing those who have experienced sexual harassment (non-physical) to let the party they believe has harassed them know what conduct they consider problematic, why it is offensive or unwelcome, and what course of action they need in order to feel comfortable again. Often, an apology and an agreement about changed behaviors ensue. That is why mediation works so well. UVa. argues that this is the reason it offers mediation. The only times that the parties to sexual assault complaints ever come out with a sense of satisfaction with the process is when mediation is used. For low level sexual conduct, I can see this point. If your hallmate repeatedly rubs your shoulders and embraces you a little too closely, mediation can help them to understand and end this course of conduct. But, where someone callously ignores your rights and has sexual intercourse with you without your consent, or forces you, I challenge whether mediation can remedy the underlying behavioral patterns that allow those who commit sexual assault to convince themselves that their actions are permissible. Male privilege does not simply melt when a woman confronts a man about how his actions impacted her. If anything, it teaches those who behave this way how to modify their conduct so as to

more effectively fly under the radar screen and avoid being caught in the future. The literature is not at all supportive of the therapeutic efficacy of rehabilitation on those who commit sexual assault. If experienced therapists with years of education and experience cannot change this behavior, what makes us think one quick mediated session between the parties to a sexual interaction gone bad will be more effective?

2. Mediation can put colleges on notice of foreseeable harm, without providing an acceptable mechanism for protection of the community. Someone acts violently. We get sued. Our best defense is that the violence was not foreseeable to us, and therefore we owed no duty to the victim. But, once the college becomes party to mediation of a sexual assault, it becomes very difficult for the college to argue that any future assault was not foreseeable. Mediation can put us on notice. Are we comfortable relying on voluntary compliance with the mediated agreement as a safeguard for our community? I'm not.
3. Mediation subtly steers victims to informal rather than formal options. Anyone who has worked with victims knows there is a tendency among many victims to choose the least formal and authoritative course of action from those available. The less formal an option, the more victims will gravitate toward it. This tendency is fed in part by self-blame, fear of re-victimization, and a desire for secrecy. Anger often comes later for victims who may be experiencing shock or denial. At first, they are really seeking acknowledgement from the perpetrator that s/he understands why what s/he did was wrong. They really want an apology. I acknowledge that, but would prefer that an apology accompany a restorative justice process, or a mediation that takes place AFTER the formal response or structured resolution from the college or university.
4. Mediation agreements are behavioral contracts, which can be seen to create an assumed duty on the part of the college or university. Mediation agreements often include no-contact limitations, changes of residential living arrangements, and other terms and conditions negotiated by the parties. The college acts as neutral facilitator, and creates the agreement, which is signed by the parties. While this agreement can be seen as a contract between the parties, colleges are (often unintentionally) parties to the agreement as well. Why? They create and retain the agreement as an educational record, and the college is the primary enforcement mechanism if the agreement is violated. Behavioral contracts are useful tools, but the best practice is to limit them to situations that do not involve potential harm to self or others.
5. Mediation sends a message that sexual assault is a misunderstanding to be worked out by better communication skills. This helps to reinforce a victim's perception that they did something wrong, possibly by miscommunicating their intentions. I acknowledge that SOME sexual assaults are reasonably seen as the result of poor communication, or someone ignoring the clear communication of their partner (which is not miscommunication and is not reasonable.). Sending the message that a sexual assault is a miscommunication also minimizes the perception of violation by the accused student, letting him off the hook, or allowing him to think that he got away with something. It may reinforce a desire for continued or repeat perpetration, if the censure is so painless. The only reason to work out a miscommunication is if for some reason the victim desires to continue in a relationship or friendship with the

accused student. Again, this can be better addressed by structured resolution processes, or mediations that occur after a formal response.

6. Mediation is often done without adequate threat assessment. Sometimes, we jump to the conclusion that a conflict is amenable to mediation because it seems to lack evidence of violence or malice. But, maybe the victim isn't telling us about the violent aspects of the incident. Maybe she is minimizing it. Maybe we are looking to violence as a sign of predation, rather than seeing that someone who serially assaults drunk women at parties is the true predator on a college campus. Maybe the accused student has a pattern of incidents that we either miss or do not check files on. Where I am not sure if mediation is appropriate, I recommend assessing the accused student to determine whether violent, predatory or pattern behavior is indicated.
7. Mediation puts the VICTIM in the position of deciding how and if college policies will be enforced. Suppose that in the course of a mediation, an accused student admits to a violent rape. The victim then demands an apology and asks that the accused student volunteer for the local crisis center. He agrees. Is that all you are going to do? The victim's desires for consequences are unreasonable. Where is your institutional voice? If he admitted to the same conduct in a hearing, what would your sanctions be? Suspension? Expulsion? Why would you allow for a different response via mediation, just because the victim wanted it? I know I keep writing the same thing into successive articles, but I really want to emphasize that Title IX requires us to remedy a situation like this, and not just to the victim's satisfaction. The law requires us to do three things when we know that sexual assault has taken place:
 - a. Bring the conduct to an end;
 - b. Act to reasonably prevent its reoccurrence
 - c. Restore the victim, as best we can, to her pre-deprivation status by remedying the effects of the discrimination on her.
8. Mediation allows some colleges to push sexual assault under the rug, and to discourage the victim from pursuing criminal prosecution. This is not true for most colleges, but it is true for some. Such conduct by college administrators is unethical and illegal. It comes from a misplaced desire to protect the college above protecting the rights and well-being of our students. I really believe that colleges exist for students, and not the other way around. We serve them. Hopefully, this article will help us to serve them better.

All information offered is the opinion of the author, and is not given as legal advice. Reliance on this information is at the sole risk of the reader.

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