

What is 'mediation'?

In mediation (sometimes known as conciliation) a neutral facilitator, appointed jointly by the parties, provides a safe place for the parties to seek a solution on a 'without prejudice' basis. The parties retain control. This is a voluntary process and it does not compromise the rights of the parties in any way: one or other of them can terminate the mediation process at any stage, they can later attempt mediation again, or they can proceed to litigation. Mediation may fail; usually it leads to a settlement or to an agreement which becomes binding when the parties formally record their agreement and sign a settlement document.

The advantages of mediation

- Mediation can be attempted at any stage of a dispute. It can save a HEI years of senior administrators' time and heavy legal costs; it can spare a student or HEI employee years of stress and wasted opportunity. If a dispute has already been running for a long time and has reached the stage of resort to independent review, there is no reason why there should not still be the possibility of recourse to mediation in the interests of achieving a speedy resolution. There has been extensive successful use of 'campus mediation' in the US: as discussed in William C. Warters, *Mediation in the Campus Community: designing and managing effective programs* (Jossey-Bass Publishers, San Francisco, 2000).
- Mediation has a very high success rate.
- Mediation is cheap and quick, and the parties remain in control of both cost and outcome.
- Solutions that go beyond the remedies available through the new HE Ombuds or the courts can be arrived at by mediation.
- Mediation provides a route to 'a win-win solution' in which the institution and the student or member of staff can save face. It can help with the situation where a student or member of staff has an obsessive grievance because it gives parties the psychological benefits of their 'day in court', an opportunity to vent feelings and say what they want, and generally 'to clear the air'. All in total confidence and 'without prejudice'.
- Mediation does not compromise the position of either party if it fails and litigation or some other dispute resolution route is pursued.
- Mediation takes place on a 'without prejudice' basis, which means that the discussion and any documents cannot be used or referred to in subsequent proceedings. A mediator regards himself/herself as bound by a duty of confidentiality to each party both during and after the mediation.

Appointment of a mediator

The mediator is a joint choice of the parties. The OxCHEPS Mediation Service web-site will list its approved mediators and give a brief indication of their qualifications and relevant experience. Legal qualification is not necessarily required, but OxCHEPS mediators who are not lawyers are required to equip

themselves with a basic knowledge of those areas of the law which are relevant to HE disputes: administrative law; contract/consumer law; employment law; intellectual property law; data protection law... (See Palfreyman & Warner, 'Higher Education Law', Jordans, second edition 2002 – as updated on-line elsewhere on the OxCHEPS web-site and as supported by a 'Law Casebook', again at this site; and also Evans & Gill, 'Universities & Students: a guide to rights, responsibilities & practical remedies', Kogan Page/The Times Higher Education Supplement, 2001: *plus* Farrington, 'The Law of Higher Education', Butterworths, second edition 1998; and Hyams, 'Law of Education', Sweet & Maxwell, 1998.)

Disputes in HE have features peculiarly their own. OxCHEPS Mediation Service mediators are drawn from current and recently retired HE academics, research scientists, and administrators, and from the legal profession, particularly specialists in education law. Every effort will be made to match the expertise of the mediator to the features of the dispute as identified by the parties when completing the 'Arranging an OxCHEPS mediation' Form | [View](#) |.

Pre-mediation agreement

It is usual for the parties to sign a pre-mediation agreement in which they undertake to use their best endeavours to arrive at a settlement or an agreement, warrant that those present at the mediation will have authority to settle, that they accept that the mediation will be without prejudice, and that nothing said and no document created in and for the purposes of the mediation can be used in any future proceedings. Provisions about the confidentiality of heads of agreement are usual but may be modified according to the wishes of the parties. Special considerations apply in universities because of the protection of academic freedom of speech under the Education Reform Act 1988, s.202, and the policy of the Higher Education Funding Council for England in discouraging secrecy about severance payments.

The mediation process, step by step...

Requirements:

A venue is needed, including more than one room so that there can be discussion with the parties separately. Seating arrangements should be decided with reference to the parties' wishes, and with regard to the desirability of avoiding confrontational positions as far as possible, particularly where the parties are unequal in position and resources. The parties may be represented or enter mediation in person; if represented, they may choose to accompany their representatives or allow them to act on their behalf. It may be advisable for HEIs to avoid bringing solicitors and barristers to mediation in the interests of allowing the maximum room for creative problem-solving.

Party preparation:

It is helpful, if in preparation for mediation, each party -

- Outlines briefly the subject-matter of the mediation from its point of view (normally using as a basis the brief statement provided already to OxCHEPS in the application form).

- Identifies its maximum and minimum requirements, and any lateral or 'creative' solution which suggests itself (and especially which it may not have been possible to consider in the context of litigation or threatened litigation).
- Briefly lists the key facts helpful to its case and those it considers to be likely to be raised by the other side, with provisional responses.
- Lists the issues in the case relevant to settlement.
- Plans its own provisional strategy for the mediation.
- Potential problems with third party liabilities should if possible be identified at this stage, so as to avoid the mediation failing because of implications for parties not present. Such prospective parties should be invited to take part in the mediation process at an appropriate stage.
- It is not usually necessary to provide the mediator with the papers in the case but a brief statement along the lines above may, by agreement between the parties, be provided for the mediator and even, if the parties wish, exchanged by the parties in advance.

The opening of the mediation:

The mediator begins by explaining his/her role and the process of mediation. He/she should cover the following points, making it clear that the parties can have confidence in the mediator and that mediation creates a 'safe place' in which the parties can and should be frank:-

- The mediator's name, qualifications, relevant experience and a reminder that the parties have jointly agreed to appoint him.
- The mediator's independence, impartiality and objectivity.
- Reassurance that mediation is usually successful (as encouragement to the parties), and emphasis on the importance of their taking the attempt seriously and using their best endeavours to arrive at an agreement.
- Invitation to each party (or each of those present) to introduce himself or herself and explain his or her role in the mediation.
- Request that each party's representatives confirm which of them has the necessary authority to reach a settlement.
- Brief explanation of what mediation means and its place in the range of dispute resolution options (ADR), emphasising that in mediation the parties are seeking the assistance of an independent neutral person to act as a go-between or honest broker to help them agree a solution.
- Reminder that mediation is an entirely voluntary process, and that the parties can leave at any time and do not commit themselves in any way unless they choose to.
- Reminder that, because this is an attempt to negotiate a settlement of the dispute, everything that is said or happens is 'without prejudice', and so cannot be used in any subsequent proceedings. Reminder that

reference cannot be made in any future hearing to anything said in the course of the mediation or any documents produced for the purpose of attempting mediation.

- Reminder that, if the mediation fails, the parties go out with the rights they came in with.

The mediator then asks each party to give a brief outline of the dispute as he or she sees it. If there is a professional representative (say, a lawyer or a trade union official), the mediator will encourage the represented party also to respond in person and to join in the discussion, so as to elicit the real wishes of the individual concerned. The mediator asks the parties not to interrupt each other at this stage, emphasising that there will be plenty of time later to pick up any points they want to make.

Rules and conduct of the discussions in the private meetings:

The mediator then suggests that he/she should speak to each party privately and separately in turn (shuttle-diplomacy), usually beginning with the student or employee as the, as it were, claimant:-

- He (or she, but for ease of reading only 'he' used hereafter) explains that he will go backwards and forwards between the parties to clarify points and explore possibilities until he thinks there the basis for an agreement.
- He explains that he may suggest that the parties come together from time to time if it seems appropriate, and that he will in any case ask them to come back into the same room at the point where it seems that an agreement can be reached.
- He explains that no significance is to be attached to which party he speaks to first or how long he spends with each party. That will just depend on the way things develop.
- He stresses that it is essential that the parties speak frankly and candidly to the mediator in these sessions.
- He declares any previous knowledge he may have of either party. He assures the parties that he has no personal involvement in any settlement they may reach.
- He gives a solemn undertaking that anything the parties tell the mediator in the private sessions will be treated in complete confidence, and that he will not disclose anything one party tells him tell me to the other party without that party's express and explicit approval.
- He undertakes to tear up any notes he takes in front of the parties at the end of the mediation.
- He undertakes not voluntarily to take part in any future action which may take place between the parties on the matters in issue in the mediation.

The pattern of the private and joint meetings:

The mediator will normally begin with a fairly brief session with each side, seeking to establish trust and get a sense of the 'real issues' and the room for movement. He will summarise what has been said at the end of each session and more often if appropriate. He will be careful to establish which of the things he has been told he may mention to the other party or take forward with the other party. He will be non-directive in meetings but attempt to get the parties thinking constructively, creatively and pragmatically; and he may sow the seeds of ways forward in their minds, making suggestions.

Joint sessions at intervals can be helpful in enabling the parties to take stock together. The mediator should use them to help the parties organise in their minds the emerging information and the progress achieved. The mediator will seek to manage any personality clash adroitly through his use of private and joint meetings.

Common reasons for deadlock in the course of mediation:

It is not unusual for a mediation to reach a 'crisis point', but that can, if properly handled, prove to be the turning point when the parties face the consequences of the failure of the mediation and decide to make it work. It can be the moment when parties who have entered mediation to please the courts or for the look of the thing become seriously engaged.

Common reasons for deadlock are that:

- Parties have entrenched positions.
- One party wants something impossible for the other to agree to (for example, existing HEI policy makes movement difficult on a material point in the case).
- Parties make excessive demands so that compromise is difficult.
- Tempers have frayed.

Breaking deadlock:

In the interests of breaking deadlock, the mediator may:

- Refuse to continue if he believes the parties are not seriously trying to reach an agreement. This may become more common a situation because the courts will now impose costs penalties if a party refuses to attempt mediation.
- 'Test reality' with the parties and help each party understand how strong the other's position really is; deflate extreme claims and extreme positions.
- Encourage the parties to consider an alternative way of resolving the matter so as to move away from the deadlock.
- Remind the parties of the expense and uncertainty of continuing with the litigation if the mediation fails.
- Go back to suggestions for alternative solutions already made and look at them again in the light of discussion since.

- Suggest everyone takes a break.
- Encourage the parties to think creatively about solutions, reminding them that if the mediation fails they face expense and uncertainty.

Mediator behaviour checklist:

The role of the mediator is to facilitate. The mediator has no authority to impose a solution. His role is to assist the attempts of the parties to discover a basis for agreement. It is crucial that, at the outset, the mediator establishes with the parties: what the dispute is about; how it arose; why it has not been possible to negotiate a settlement; and what the parties really want. He ensures that the parties have a clear understanding of their own respective positions and of one another's positions, and seeks to avoid confusion and misunderstanding. The mediator establishes the priorities of each party. He looks for areas of common ground. He encourages the parties to look at aspects or areas of potential agreement or compromise not previously considered. He may be able to suggest face-saving devices. The mediator can use a certain amount of pressure to get the parties to agree by reminding them of the expense and uncertainty of continuing with litigation. He can 'test reality' with the parties. The mediator's control of expressions of emotion by the parties should allow some brief periods of 'flare-up' at the discretion of the mediator. He seeks to prevent loss of face by helping the parties to see a proposal in a positive light and not as a climb-down. The mediator helps the parties to 'own' ideas which emerge in private sessions. He saves the parties from boxing themselves into a corner. He keeps things moving and helps the parties keep to the point.

Heads of agreement:

Once a basis for agreement has been arrived at, with the parties together in the same room as the mediator, it is helpful to draft heads of agreement. In a straightforward case, it may be possible for the final settlement to be drafted and signed on the spot, with the drafting usually done by a solicitor or barrister representing one of the parties, but cases involving HEIs are likely to be more complex. The use of heads of agreement enables the process of drafting to go forward after the mediation is completed. The mediator should check that each point is agreed and unambiguously stated, and that each party has a copy of the text as written down in the final joint meeting. If the settlement is to be finalised at the mediation, the person having authority on behalf of each party should sign it. This is not necessary if the mediation is to end with the formulation of heads of agreement retained by the parties in identical copies.

The arbitration options at the end of the mediation process:

The enforceability of an agreement normally depends upon the law of contract, for a signed settlement is a contract. The mediator should ask the parties whether they wish to convert the agreement into a consent award. This involves formally appointing the mediator as arbitrator. There will then be additional costs which should be identified and agreed. The mediator should provide a form of appointment for the appointment of the mediator as arbitrator and the parties should sign a consent to his appointment. The parties should initial the draft agreement. The mediator acting as arbitrator signs and dates the typed consent award and has it witnessed, and a copy is then sent to each of the parties. The

consent order is now enforceable through the courts like any other arbitration decision.

The palette of Alternative Dispute Resolution options

In addition to mediation, ADR includes other options:

In **negotiation**, the parties proceed adversarially to try to settle the dispute without a neutral facilitator/mediator. This can be expensive and protracted, and it often involves mounting costs until a settlement is reached at the door of the court.

In **executive hearing or mini-trial**, a representative or senior manager of each party, who has not previously been involved in the dispute, form a panel with an independent neutral person agreed by the parties in the chair. The parties, typically legally represented, present their cases and the panel proposes a settlement. This is unlikely to be suitable for use in a dispute between a student or member of staff and a HEI because of the inherent real, or at least perceived, inequality of the parties. It is also time-consuming and expensive.

In **early expert evaluation**, the parties agree to ask an expert to investigate and report on their dispute and they agree to abide by the expert's opinion. This has the drawback that the parties must hand over control.

Adjudication, expert determination, and arbitration are all processes in which the parties give up control of the outcome in the same way as happens in litigation, although the Arbitration Act provides for appeal against the arbitrator's decision.

(For an academic discussion of ADR, see Palmer & Roberts, 1998, 'Dispute Processes', Butterworths; Moore, 2003, 'The Mediation Process', Jossey-Bass/Wiley; and also Chapter 27 of Palfreyman & Warner, 'Higher Education Law'. On the court's recommendation (indeed, virtual requirement) for ADR to be tried prior to litigation, or even during it, and the risk of 'uncomfortable costs consequences' for any party refusing to participate in ADR or to do so conscientiously and seriously, see *Dunnett v Railtrack* [2002] 1 WLR 2434, as since applied in, for example, *Royal Bank of Canada v Secretary of State for Defence* [2003] EWHC 1841 (Ch), HC01C0280, 14/5/03. Here the courts are simply putting into practice the 1999 Woolf reforms of civil procedures, which encourage ADR and also accord it 'without prejudice' legal privilege: *Unilever plc v The Proctor & Gamble Co* [2000] 1 WLR 2436, CA.)