  
**Alternative Dispute Resolution in Higher Education**  
  
Holiday Hart McKiernan  
Senior Vice President and General Counsel  
Lumina Foundation for Education

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**BACKGROUND:**

- Goal: to provide a high level overview of what we mean by alternative dispute resolution
- Arbitration
- Mediation
- Historical context

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**ARBITRATION:**

- Binding
- Options available
- Process

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**MEDIATION**

- Neutral 3<sup>rd</sup> party – negotiating a settlement
- Voluntary – non-binding
- Cooperative approach (not adversarial)
- Format of mediation

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**ADR in HIGHER EDUCATION:**

- Tenure
- Student issues
- Other conflicts

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**TENURE ISSUES:**

- Academic freedom
- Peer review – experts
- Faculty ombudsman

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**STUDENT ISSUES & OTHER CONFLICTS:**

- University structure for resolution
- Ombudsman
- When not wise to use ADR

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**Concluding comments**

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**Alternative Dispute Resolution in  
Higher Education**

Lucy Croft, Ed.D.  
Assistant Vice President for Student Affairs  
University of North Florida

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## Definition & Origin of an Ombudsman

- Representative assigned by a large organization or a government to investigate citizen complaints and suggest solutions. An ombudsman's office was established by the Swedish constitution of 1809. The idea soon spread to other Scandinavian countries and later to New Zealand, Britain, Germany, Israel, and some states or provinces in the U.S., Australia, and Canada. An ombudsman's responsibility is to receive and investigate complaints and to serve as an independent and impartial arbiter in recommending what may be done to satisfy the complainant or in explaining why no action is necessary. Ombudsmen are now used in universities, corporations, municipalities, and institutions such as hospitals. *Britannica Concise Encyclopedia: <http://www.answers.com/topic/ombudsman>*

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### International Ombudsman Association

## Code of Ethics ETHICAL PRINCIPLES

- INDEPENDENCE**
  - The Ombudsman is independent in structure, function, and appearance to the highest degree possible within the organization.
- NEUTRALITY AND IMPARTIALITY**
  - The Ombudsman, as a designated neutral, remains unaligned and impartial. The Ombudsman does not engage in any situation which could create a conflict of interest.
- CONFIDENTIALITY**
  - The Ombudsman holds all communications with those seeking assistance in strict confidence, and does not disclose confidential communications unless given permission to do so. The only exception to this privilege of confidentiality is where there appears to be imminent risk of serious harm.
- INFORMALITY**
  - The Ombudsman, as an informal resource, does not participate in any formal adjudicative or administrative procedure related to concerns brought to his/her attention.

*International Ombudsman Association - <http://www.ombudsassociation.org/ethics/>*

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## UNF Student Ombudsman

- The Office of the Student Ombudsman provides all UNF students with a safe, confidential place to bring questions and concerns about University rules, policies, or procedures. The Ombudsman assists students by considering all sides of an issue in an impartial and objective way, and then advises on how to best resolve the problems.

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### Skills of a Student Ombudsman

- Listening
- Knowledge of University Policies
- Fact Finding
- Facilitation
- Analytical and Critical thinking
- Collaboration
- Mediation
- Patience

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### What does a Student Ombudsman do?

- There is no typical day
- Remains Objective
- Proponent of Change
- Collaborates
- Advises on how to navigate the University system most effectively
- Mentors
- Informal Investigator
- Helps to resolve problems

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### What does a Student Ombudsman NOT do?

- Supersede the authority of other University officials or faculty
- Changes policy
- Engage in any activity that might be perceived by others as advocacy for any individual
- Participate in any formal hearing or grievance process
- Conduct formal investigations
- Provide legal advice or represent the student in a legal matter

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## Issues Faced by Student Ombudsman

- Medical Withdrawal
  - Physical Health
  - Mental Health
- Financial
  - Financial Aid
  - Fees
  - Personal
- Faculty Relationships
- Academic Concerns

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## Professional Association

### International Ombudsman Association:

<http://www.ombudsassociation.org/>  
390 Amwell Road, Suite 403\*  
Hillsborough, NJ 08844-4693  
Tel: 1+908-359-0246  
Fax: 1+908-842-0376  
Email: [info@ombudsassociation.org](mailto:info@ombudsassociation.org)

- Set of 6 Booklets:
- Neutrality
- Options, Functions and Skills
- The Ombuds Confidentiality Privilege
- Reprisal, Retaliation and Redress
- Dealing with the Fear and Violence
- Why an Organizational Ombudsman?



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## 30<sup>th</sup> National Conference for Law & Higher Education

**Tim Birtwistle**

Professor Law and Policy of Higher  
Education and Jean Monnet Chair  
Leeds Law School  
Leeds Metropolitan University

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Jurisdiction parallels (USA/England):

- Meaning of ADR
- Types of ADR:
  - Arbitration (usually legally binding)
  - Mediation (a voluntary “walk into and walk away” process)
  - Early intervention (prevention is better than cure)
  - Ombuds functions (numerous types)

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Improving Dispute Resolution

**The project is funded by the Higher Education Funding Council for England's Leadership, Governance and Management Fund**

The Project aim is to find out what is happening in the sector, to encourage the sharing of experience and good practice and to work with HEIs to design practical guidelines for the creation and use of a range of alternative methods of dispute resolution. It works within the framework of the Quality Assurance Agency (QAA) amongst others.

**There are three linked purposes:**

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- A. To determine HEIs' experience with mediation and other forms of alternative dispute resolution
- B. To discuss with HEIs ways of identifying disputes which are suitable for mediation:

1. Typology of disputes
2. Saving costs
3. The role of an in-house Ombudsman
4. The role of the unions and the role of their legal advisers
5. Disputes involving students
6. The international dimension

- C. To work with HEIs to develop training needs assessments for mediation

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**The project has as its focus mediation which is largely the same throughout the world**

- Leaves control of the outcomes in the hands of the parties
- Can be used at any stage of a dispute and tried more than once if it does not resolve the dispute at the outset
- Concentrates on the 'interests' of the parties and not who is in the right, so there does not have to be a loser

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**How does mediation protect the right to a fair hearing?**

- Mediation happens in a 'safe place'. It is normally agreed in advance that nothing which comes to light during the discussion will be used by either side in any subsequent proceedings without everyone's agreement.
- The 'inequality of arms' between the parties (student and an institution or staff) largely disappears because the aim is a voluntary agreement.
- When support and advice is given in connection with adversarial procedures the 'pastoral' sometimes slides into the 'judicial'. Since there is no 'judgment' in mediation but only an 'agreement' this is much less likely to be a problem.

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**Is mediation outside the law then?**

- Mediation is voluntary and consensual, so a wider range of resolutions are possible than could be reached through litigation.
- From the complainant's point of view, mediation may be a route to a much better outcome because it allows creative and imaginative solutions and not just the ones allowed by the formal procedures.
- BUT the parties cannot agree to anything which would be
  - Against the law
  - In breach of the HEIs statutes and regulations
  - Unfair to other parties

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**How to be timelier still**

- Prevention is better than cure
- If a dispute begins, deal with it as quickly as possible, ideally by mutual agreement
- If it has to be dealt with through formal procedures, engage QAA Principles 5 and 6 on timeliness, which should include taking appropriate action without delay:

5. The clear design of institutions' complaints and appeals procedures enable them to be conducted in a timely, fair and reasonable manner, and having regard to any applicable law.

6. Institutions ensure that appropriate action is taken following a complaint or an appeal.

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**The language of disputes:**

- Grievance
- "Them"
- Appeals
- Disciplinary hearings
- "Winning"
- Vexatious
- "Day in court"

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- Serial complainant
  - Statutory rules
  - Employment law (in Europe a big issue)
  - Ombudsman:
    - "post box"
    - "signpost"
    - "dispute mediation" etc
- Around this area there is a lack of clarity regarding terminology

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**Lessons from the United States**

- Our USA project partners have developed a system for Georgia which puts the emphasis on practical problem-solving rather than procedural correctness.
- Is this an either-or choice? Can we have the best of both worlds?
- Have clear routes for dealing with complaints and appeals which students do not need to be afraid to use (engages QAA principles 1- 4 )
- Establish principles which will underpin the fair resolution of other kinds of dispute (engages QAA principle 13)

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For details on what the project is doing and its findings to date visit:

<http://www.staffs.ac.uk/idr>

Or contact:

[t.birtwistle@leedsmet.ac.uk](mailto:t.birtwistle@leedsmet.ac.uk)

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