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Title IX Informal Resolution Training


August 6, 2024

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Presenters



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Housekeeping

Training based on Title IX regulation effective August 1, 2024 and 2020
Regulations for conduct that occurred pre-August 1, 2024

Our slides summarize key elements of the regulations

Title IX practitioners should review the regulations in detail, including all its parts and especially those parts concerning informal resolution

Title IX practitioners should monitor court decisions that may alter implementation deadline for all or some portions

Hypotheticals are fictitious; to ensure realism, some use fact patterns and language that are graphic and challenging

No recording and recording is not permitted, but there will be several poll questions and breakout sessions – please participate!

We will note breaks throughout

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Agenda (1 of 2)

Title IX Foundations and Institutional Response

Title IX Regulations and Informal Resolution

Supportive Measures

Avoiding Conflicts of Interest and Bias

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Agenda (2 of 2)

Caselaw Review

Advising Parties of Resolution Options and Choosing a Method of Informal Resolution

Role of the Facilitator

Drafting and Enforcing Agreements

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Title IX Foundations and Institutional Response

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What is Title IX?

“[N]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance. . . .”

20 U.S.C. § 1681



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Where are the Title IX regulations?

- 34 C.F.R. (“Code of Federal Regulations”) Part 106
- Contains dozens of different Title IX regulations, including those that govern appointment of a Title IX Coordinator, publication of institution policies, and requirements pertaining to grievance procedures
- August 2020 regulation amended multiple elements of Part 106 and added new ones

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How does the Department enforce Title IX regulations?



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- Largely a complaint-initiated investigation and resolution process led by the Office for Civil Rights (“OCR”)
- OCR has authority to force compliance through various tools including resolution agreements or initiation of proceedings to revoke financial aid eligibility (last resort)

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What is the “new” Title IX regulation?

- Effective August 1, 2024, a series of revisions to Part 106 that address several issues, including:
 - The scope of sex discrimination and sex-based harassment covered by Title IX
 - The procedures and requirements for addressing complaints of sex discrimination and sex-based harassment
 - Specific content on accommodating pregnancy and pregnancy related conditions

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When does the new regulation take effect?

- August 1, 2024
- Those portions of the regulation that govern response to specific instances of sex discrimination and sex-based harassment apply only to incidents that allegedly occurred on or after August 1, 2024
- Earlier incidents are governed by regulations that were in place at the time the misconduct allegedly occurred

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Practical Point

Institutions must keep an archive copy of their policies and procedures created in 2020 and apply relevant provisions of those policies and procedures to “transition” cases that are reported after August 1, 2024, but where the alleged incident of misconduct occurred before August 1, 2024.

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Could the courts block the regulation?

- Numerous lawsuits across the country filed by multiple states, interest groups, and private persons seeking to block all or part of the regulations



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What is the programmatic scope of the new regulation?

- All sex discrimination and sex-based harassment occurring under an institution's education program or activity in the United States



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What is included in education program or activity?

- Any operation of the institution, regardless of location
- Buildings owned or controlled by the institution
- Conduct that is subject to the institution's disciplinary authority
- The exercise of institution power or authority by employees and agents regardless of location

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What does the new Title IX regulation apply to?

- Any school that receives federal funds and operates an education program
- The regulation has some differing requirements for K-12 institutions and "post-secondary" institutions



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Does the new regulation require training?

- All Title IX “team” members must be trained initially and annually on their respective roles and duties in the Title IX process
- All employees must be trained initially upon hiring and annually on prohibited conduct and mandatory reporting/information sharing requirements
- Informal resolution facilitators
 - Training on the rules and practices of the institution’s informal resolution process
 - Training on how to serve impartially, including avoiding conflicts of interest and bias



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What misconduct does the Title IX regulation address?

- Sex discrimination
 - Sex-based harassment



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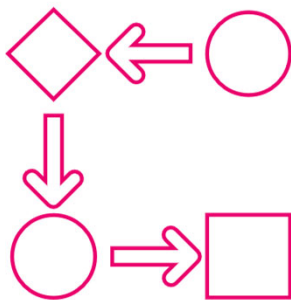
What does the Title IX regulation include in the concept of “sex”?

- Assigned sex at birth
- “Biological” sex
- Sex stereotypes
- Sex characteristics
- Pregnancy and pregnancy-related conditions
- Sexual orientation
- Gender identity

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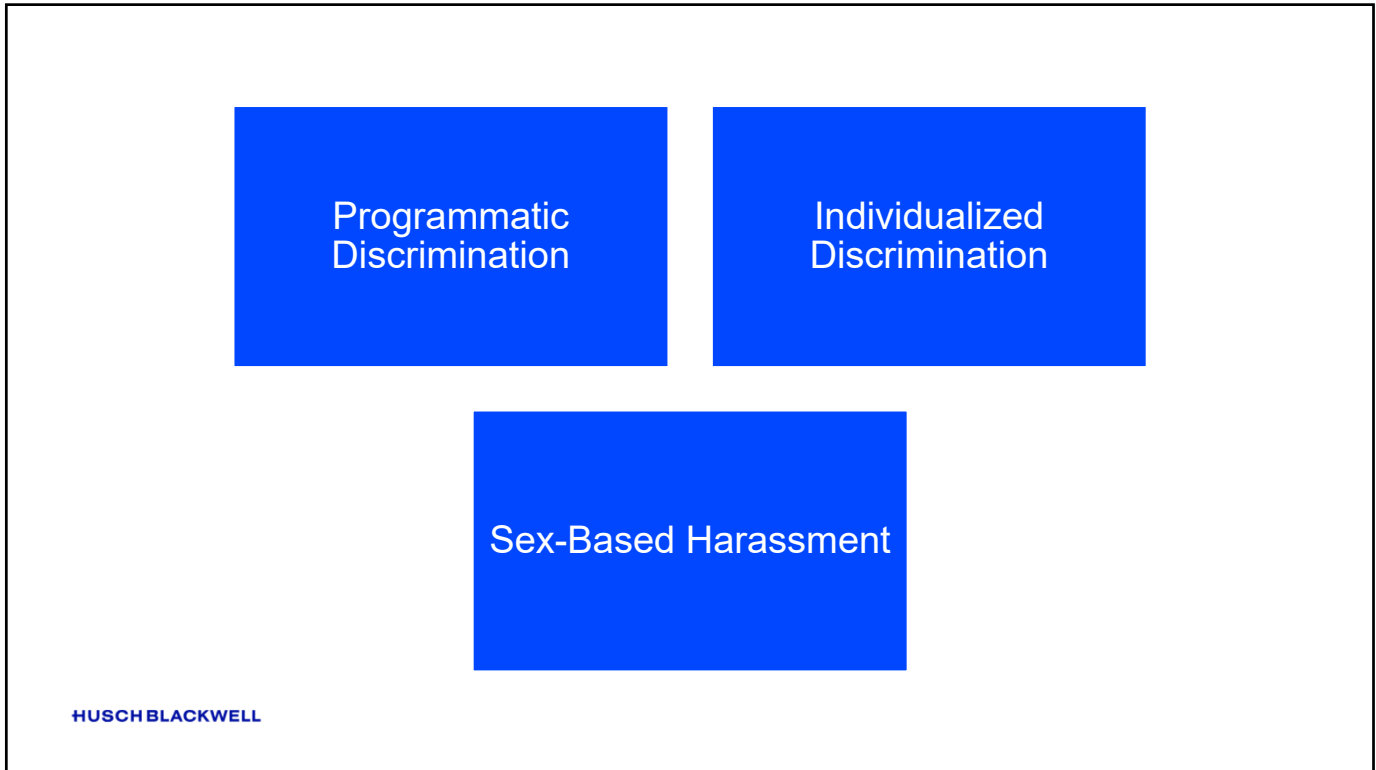
What is sex discrimination?



- Adverse treatment of a person on the basis of sex
- Limits or excludes the person from participating in the institution’s education program or activity or denies or limits the benefits thereof

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What is programmatic discrimination?

- Where discrimination occurs in a systematic way due to a institution policy or practice
- Programmatic discrimination adversely affects persons as a group or by category, rather than by individualized decision
- Programmatic discrimination is usually *not* attributed to an individual perpetrator (i.e., “respondent”)

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Example

A school provides brand new facilities, luxury travel, unlimited food, new equipment and new uniforms for most men's sports teams. Women's teams have outdated facilities, ride in old vans, eat per-diem, use old equipment and old uniforms.

This may constitute programmatic discrimination under the new Title IX regulations.

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What is individualized discrimination?

- A particular decision is made, or particular action taken, that results in adverse treatment of a particular person that limits or excludes them from participation or denies or limits benefits
- Typically, individualized discrimination has an identifiable "respondent" who makes the discriminatory decision



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Example

A supervisor has interviewed one male candidate and one female candidate for an open position. The supervisor prefers working with men because the supervisor believes women can be “catty” and “emotional.” The supervisor decides to hire the man, and not the woman, *because of his stereotypical beliefs about women.*

This is likely individualized discrimination under the new Title IX regulations.

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What about separation based on gender identity?

- A policy or practice that prevents a person from participating consistent with the person’s gender identity subjects a person to more than *de minimis* harm and is discriminatory
- Unless the separation is specifically permitted by Title IX or the regulation

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What is sex-based harassment?



- Conduct that is sexual in nature or on the basis of sex
- And that constitutes:
 - Quid pro quo harassment
 - Hostile environment harassment
 - Certain specific offenses

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What's the difference between sexual conduct and conduct that is on the basis of sex?

- “Sexual” means the conduct itself has a sexual nature
- “On the basis of sex” means the conduct is targeted at a person because of their sex

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Example

Jean repeatedly leers at Calvin's genitals, makes crass sexual jokes to Calvin, and propositions Calvin to engage in sexual activity. Calvin is not receptive to any of this and has repeatedly told Jean to stop.

This is an example of sexual conduct.

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Example

Calvin repeatedly tells jokes to Jean about how women are "stupid," mocks Jean's own mental ability as a woman in front of others, and makes incessant, mocking comments to Jean about cooking, cleaning, and raising babies.

This is an example of conduct on the basis of sex.

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What are the different categories of sex-based harassment?

Quid Pro Quo
Harassment

Hostile Environment
Harassment

Sexual Assault

Domestic Violence

Dating Violence

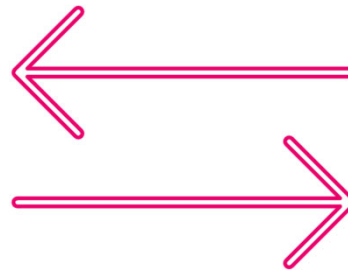
Stalking

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What is quid pro quo harassment?

An employee, agent, or other person authorized by the recipient to provide an aid, benefit, or service under the recipient's education program or activity explicitly or impliedly conditioning the provision of such an aid, benefit, or service on a person's participation in unwelcome sexual conduct.



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Example

A member of the school's coaching staff offers to secure a student's acceptance to a school sports team if the student agrees to perform sexual favors the student would otherwise not want to perform.

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What is hostile environment harassment?



Unwelcome, sex-based conduct that, based on the totality of circumstances, is subjectively and objectively offensive and is so severe or pervasive that it limits or denies a person's ability to participate in or benefit from the recipient's education program or activity (*i.e.*, creates a hostile environment).

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What factors do we consider in determining a hostile environment?

- The degree to which the conduct affected the complainant's ability to access
- Type
- Frequency
- Duration
- Parties' ages
- Parties' roles and other factors about each party
- Previous interactions
- Location of the conduct and context
- Other sex-based harassment at the institution

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What's the difference between a report and a complaint?

- A report is information about potential sex discrimination or sex-based harassment
- A complaint is an oral or written request to investigate and determine alleged sex discrimination or sex-based harassment

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Who can make a report?

Anyone.

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Which employees must report to the Title IX Coordinator?

- All non-confidential employees at K-12 institutions
- In higher education, all non-confidential:
 - Employees with authority to institute corrective measures
 - Administrators
 - Faculty and other teachers
 - Advisors

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What triggers the reporting obligation?

- Information about conduct that reasonably may constitute sex discrimination or sex-based harassment
- This is significantly less than a preponderance (*i.e.*, “likely”) standard

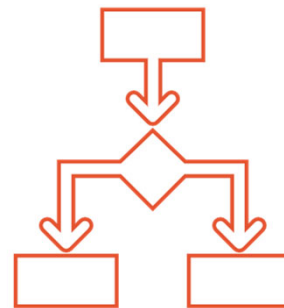


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What about non-confidential employees who are not mandatory reporters?

- They must
 - Make a report to the Title IX Coordinator, or
 - Provide contact information for the Title IX Coordinator, and information about how to make a complaint to anyone who provides information about conduct that reasonably could be sex discrimination or sex-based harassment



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What is retaliation?

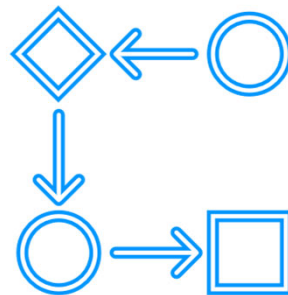
Intimidation, threats, coercion, or discrimination against any person by the recipient, a student, or an employee or other person authorized by the recipient to provide aid, benefit or service under the recipient's education program or activity, for the purpose of interfering with any right or privilege secured by Title IX [or the Title IX regulation], or because the person has reported information, made a complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under [the Title IX regulation]

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Must an institution have grievance procedures?

- An institution must adopt, publish, and implement grievance procedures
- For the prompt and equitable resolution of complaints
- Alleging any action prohibited by Title IX



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What are the general principles of grievance procedures?

- Prompt and equitable
- Published in writing
- Administered by persons free of conflicts of interest and bias
- Presumption respondent not responsible until a determination is made
- Reasonable steps to protect privacy
- An objective evaluation of all relevant and not otherwise-impermissible evidence
- Credibility determinations not based on a party's status

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What does the grievance process look like?



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What are the two grievance processes?

- General grievance process in § 160.45
- Minimum grievance process that applies to
- All sex discrimination and sex-based harassment except that covered by *46
- Augmented grievance process in § 160.46
- Applies additional requirements to cases with
- Sex-based harassment involving a college or university student as a complainant or respondent

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What does the new regulation say about pregnancy?

- Discrimination and harassment based on pregnancy and related conditions is “sex” discrimination and sex-based harassment
- Institutions have a duty to provide certain accommodations to persons with pregnancy and related conditions



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Are there reporting obligations for the needs of pregnant students?

- When student informs employee of student's pregnancy or related condition
- Employee must promptly provide student with Title IX Coordinator's contact information and inform student of Title IX Coordinator's ability to prevent sex discrimination and ensure equal access



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Conduct that Allegedly
Occurred Prior to August 1,
2024

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Key Differences in the 2020 Regulations

- 2020 regulations only refer to “sexual harassment,” but new policies use the term “sex-based harassment” and “sex discrimination”
- Different definitions for quid pro quo harassment and hostile environment harassment
- 2020 regulations require a Formal Complaint

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Key Differences in the 2020 Regulations cont.

- 2020 regulations do not require institution to respond to sexual harassment that occurred outside the scope of the institution’s education program or activity, or outside of the U.S.
- Informal resolution cannot be offered in the absence of a Formal Complaint
- No requirement to appeal supportive measures decisions

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Key Differences in the 2020 Regulations cont.

- 2020 regulations contemplate live hearings with cross-examination
- 2020 regulations do not require employees to provide a student with options if they learn about a student's pregnancy or related condition

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Break Time

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Title IX Regulations and Informal Resolution

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What is informal resolution?

- An alternative process to the grievance procedure for resolving a complaint of sex discrimination or sex-based harassment
- It is a voluntary process used in lieu of the default investigation and hearing



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When can it be used?



- Any time prior to a final determination under a grievance process
 - Practical Note: Unless the accusation is that an employee engaged in sex-based harassment of a K-12 student or informal resolution would conflict with federal, state, or local law

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Impermissible Example

A teacher liaison to a high school student club is accused of fondling two members of the student club. The students alleged the fondling occurred at the student organization club's hotel after the teacher had been drinking in the bar. The student members request to have an informal resolution because they believe the teacher has a drinking problem and should seek treatment. They do not want the teacher to be terminated.

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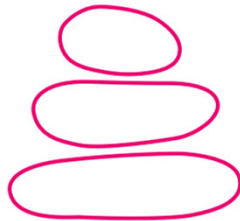
What are the procedural predicates for informal resolution?

- Must be at least a report of sex discrimination or sex-based harassment
- Institution must determine it is appropriate to offer informal resolution
- Parties must voluntarily consent after receiving notice with certain required elements

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How does the institution consider whether informal resolution is appropriate?



- Institution may, but is not required, to offer informal resolution
- Must consider whether the alleged conduct would present a future risk of harm to others
- Additional factors may be considered

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What other factors may guide institution decision?

- Severity and nature of the conduct
- Pattern of misconduct
- Likelihood dismissal would be a sanction under grievance procedure if misconduct found
- How long process has already lasted
- Publicity
- Potential effect on campus climate
- Desires of the parties
- Ability of the parties to abide by a resolution
- Likelihood a resolution will result

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What are some potential terms of informal resolution?

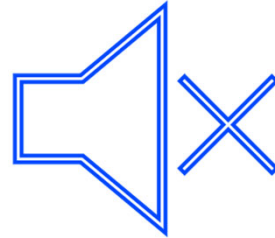
- Restrictions on contact
- Restrictions on a respondent's participation in certain activities or events
- Training or education
- Withdrawal or resignation
- Apology
- Negotiated action or sanctions
- Others?

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Is information shared during informal resolution confidential?

- Institution may elect to make information shared during informal resolution confidential in the event resolution fails and grievance procedures resume
- Institution may prohibit informal resolution coordinator from serving as a witness in grievance procedures
- The parameters must be disclosed to the parties in the notice



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Who oversees the informal resolution?

- An informal resolution facilitator will carry out the process
- Cannot be the investigator *in the same case*
- Cannot be the decision-maker *in the same case*

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Informal resolution process

- Sample process:
 - Informal resolution facilitator holds an initial meeting with each party to discuss the resolution process and communicate their rights
 - Each party is asked to submit written requests that provide details regarding the remedies they are seeking. These requests are shared with the other party.
 - The facilitator again meets with each party to identify and facilitate areas of agreement
 - Agreements reached as part of the informal resolution process are approved by the Title IX Coordinator
- Note: the informal resolution process can be terminated at any time by the Title IX Coordinator, the complainant, or respondent

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How are informal resolutions documented?

- Informal resolution agreements should be reduced to writing with all essential terms
- Parties should sign, and institution should give written approval

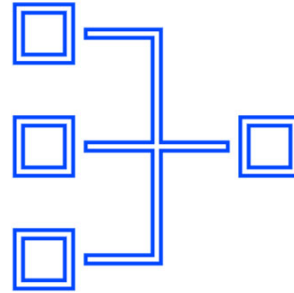


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What happens if someone doesn't abide by an informal resolution?

- Regulation states that completed informal resolution forecloses grievance process for the allegations resolved
- Consequences for failure to comply should be addressed in the resolution



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Implications if Minors are Involved

- Be mindful of the following:
 - Straightforward and age-appropriate language
 - Discussions in a safe, private place
 - Rapport building during each phase with all institutional participants
 - Documentation is critical (e.g., parental consent and involvement)

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Questions for Discussion

Angela accuses Kristy of kissing Angela without her consent when Angela was intoxicated. During an informal resolution, Kristy candidly admits to the Title IX Coordinator, “I should have known better than to kiss her like that. But I just didn’t think about it at the time. I’d like to apologize.” Informal resolution fails and the grievance procedures resume.

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Group Scenario Discussion Questions

- 1. How would your institution handle Kristy’s admission?**
- 2. In your view, should Kristy’s admission be confidential, or should Angela be able to introduce the admission as evidence to the decision-maker?**
- 3. Let’s assume your institution requires informal resolution statements to be confidential. If Angela somehow learns of the admission and then disclosed Kristy’s admission after informal resolution ended, how should the institution respond?**

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Supportive Measures

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What are supportive measures?

- Individualized measures
- Offered as appropriate
- As reasonably available
- Without unreasonably burdening a party
- Not for punitive or disciplinary reasons
- Without fee or charge
- To restore or preserve access
- Or provide support during the grievance process or informal resolution

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What are examples of supportive measures?

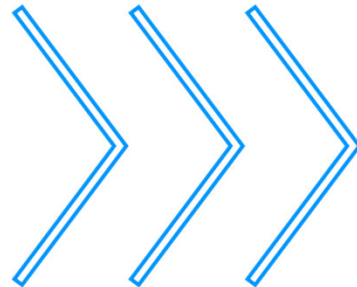
-  Counseling
-  Academic accommodations
-  Housing accommodations
-  Security escorts
-  Leave of absence
-  Increased security or monitoring
-  Modified work schedules
-  Mutual no-contact order if implicated by facts

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When are supportive measures offered?

- For the alleged victim, promptly after receiving a report
- For the alleged perpetrator, when grievance procedures or informal resolution are initiated



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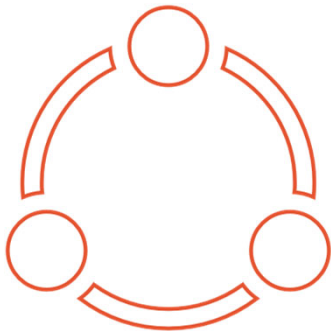
Supportive measures

- Supportive measures may become agreed-to terms in informal resolution agreements
- Ensure clarity
- Ensure ability to enforce
- Consider how to address aspects of an agreement that are beyond the institution's enforcement authority

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May an institution terminate supportive measures?



- An institution may modify or terminate supportive measures “as appropriate” at the conclusion of grievance procedures or informal resolution
- Or a recipient may continue them beyond that point

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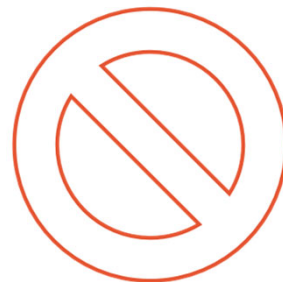
Avoiding Conflicts of Interest and Bias

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What is a conflict of interest?

- When an individual has a material connection to a dispute, or the parties involved, such that a reasonable person would question the individual's ability to be impartial
- May be based on prior or existing relationships, professional interest, financial interest, prior involvement, and/or nature of position



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Examples of Conflicts

The informal resolution facilitator babysat for the complainant when the complainant was a child and is still close with the complainant's family.

A deputy title ix coordinator previously wrote a glowing letter of recommendation for the respondent.

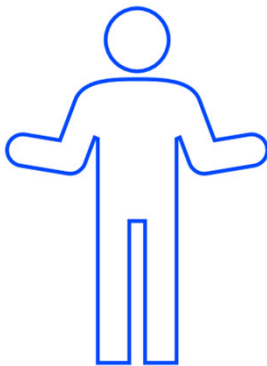
An appeal officer in a case previously supervised the complainant and recommended her termination for performance reasons.

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What is bias?



- A prejudice, predisposition, or inclination in favor of or against a thing or person
- Team members must be free of bias against complainants or respondents generally, or a specific complainant or respondent

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Example of Bias

An informal resolution facilitator assigned to a sexual assault case also serves on the board of a local sexual assault advocacy organization. The organization recently announced a new campaign supporting sexual assault victims titled: “Believe them all.” As a board member, the informal resolution facilitator voted to approve the campaign. The informal resolution facilitator holds the personal belief that persons who report sexual assault should be believed unless objective evidence proves their allegations to be false.

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Example of Bias

An appeal officer (a faculty member) previously had the complainant as a student. As a student, the complainant was frequently absent from the faculty member’s class, which prompted the faculty member to send the student an email accusing the student of having a poor work ethic and threatening to fail the student. The email included the following: “I am singularly unimpressed with your performance. You are, without question, one of the laziest and least attentive students I have had in my career. I fear your future is bleak.”

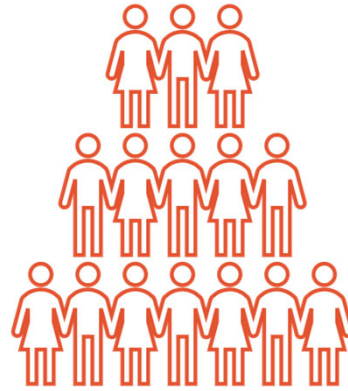
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What are stereotypes?

A form of bias that operates as a preconceived, generalized, and sometimes inaccurate belief about a person based on their membership in a group or some other characteristic.



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Examples of Impermissible Stereotypes

Members of sports teams always lie for each other.

Women who wear tight dresses and go to parties are looking to hook up.

Men are always the aggressors in a sexual encounter.

Transpeople are looking to draw attention to themselves.

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Questions for Discussion

You are a faculty member at University and you have been appointed as an Informal Resolution Facilitator for a Title IX matter involving Claire and Daniel. Claire has accused Daniel of stalking. Two years ago, Daniel was a student in one of your courses. He received an A in the course and was a good student, but his demeanor made you uncomfortable. On one occasion, you even texted another faculty member that you thought Daniel was “creepy.”

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Group Scenario Discussion Questions

1. Do you have a conflict of interest or bias in this case? Why or why not?
2. If you believe you have a conflict of interest or bias, what should your next steps be?

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Legal Considerations

- Very few reported cases analyzing informal resolution practices
- Federal courts have been resistant to allowing deliberate indifference claims based on an institution's use of an informal resolution process in general
- Key issues are voluntariness, timeliness, and remedies/enforcement
- If the institution follows (or makes a good-faith attempt to follow) its policies and procedures, courts appear to be reluctant to second-guess the decision or outcome

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Ware v. The Univ. of Vt. & State Agric. Coll. (D. Vt. March 7, 2024)

- Ware alleged that her ex-boyfriend, a "star" member of the men's basketball team, sexually assaulted her twice during their relationship and once after they broke up.
- Despite initially requesting the formal resolution process, Ware alleged that the University proceeded to pressure her into the informal resolution process.
- Ware ultimately agreed to informal resolution and was dissatisfied with the resolution.
- Held: Ware plausibly alleged that the university engaged in adverse action when it improperly pressured her into selecting information resolution of her sexual assault complaint.
 - Denied defendants' motion to dismiss on this count.

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Doe v. Oberlin Coll. (6th Cir. Feb. 14, 2023)

- Oberlin's Title IX policy give the college's Title IX team the ability to initially assess complaint determine if informal or formal resolution is best, but all parties involved must still voluntarily consent to informal resolution and can request to end information resolution at any time.
- A female student (Jane Roe) notified the college's Title IX office in December 2019 that two encounters with a male student (John Doe) amounted to sexual misconduct, but requested the office not notify Doe of the allegations.
- Doe was not notified of the allegations until February 2020 and was forced to hire a private investigator to learn the nature of the allegations against him.
 - Though she had initially sought to resolve the matter through informal resolution, this prompted Roe to file a formal complaint.

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Doe v. Oberlin Coll. (6th Cir. Feb. 14, 2023)

- Doe sued the college for due process, Title IX, and other state law claims
- The court affirmed dismissal of his claims because:
 - The private college was not a state actor and
 - His Title IX claims were mooted by the fact that Doe was ultimately exonerated by the investigation while the lawsuit was pending.

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Takla v. Regents of the University of California (C.D. Cal. 2015) - Facts

- Plaintiff was sexually harassed by the doctor who was supervising his family medicine clerkship
- Plaintiff reported the harassment to the University's Title IX officer.
 - Plaintiff was removed from his harasser's lab and placed in a new office to complete his clerkship;
 - His PTSD from the harassment prevented him from doing so.
 - The University also provided Plaintiff with therapy, but his therapist "berated Plaintiff, indicating that the sexual harassment he had experienced at the Kapla Clinic was somehow 'brought on by' or 'invited by' Plaintiff."
- The Title IX investigation was conducted informally rather than through a formal investigation model.
- Plaintiff did not receive periodic updates and the university never clarified where the procedures stood.

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Takla v. Regents of the University of California (C.D. Cal. 2015) - Claims

- Plaintiff sued under a ***Title IX theory of deliberate indifference***.
 - He alleged that the University "failed to conduct its investigation with 'clarity, fairness, or timeliness' [and] to give him periodic updates on the complaint process."
 - The court determined that it was "unclear whether UCSF's investigation ever reached a conclusion as to whether [the doctor] violated the sexual misconduct policy or whether it simply determined that it 'did not have jurisdiction' over [the doctor]."
 - Because the University offered ***Plaintiff some supportive measures***, the court concluded that his allegations were insufficient to support a deliberate indifference claim.

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Takla v. Regents of the University of California (C.D. Cal. 2015) - Takeaways

- Informal resolutions should still meet **transparency standards** and **keep parties aware of the progress** of the investigations.
- Even when institutions fail to meet transparency standards, they may not be liable under Title IX so long as they offer Plaintiff some supportive services.

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Karasek v. Regents of the Univ. of California (N.D. Cal. 2016)

“In arguing that she has made a sufficient showing of deliberate indifference, Karasek asserts that the University **improperly used an informal resolution process to address her complaint.** . . .”

- “[A]t no time during the entire pendency of the early resolution process was [she] allowed to participate in any investigatory or disciplinary process.”
- “During the entire pendency of the investigatory and disciplinary process, Respondent was ‘allowed to remain on campus, unrestricted, creating a sexually hostile environment. . . .’”
- Karasek was **not contacted during the entire pendency of the informal resolution process** and **was not given an opportunity either to present her claim** at a disciplinary hearing or to appeal the University’s disciplinary decision.”
- **Court granted UC’S MTD:**
“[E]ven assuming that a school’s violation of its own sexual harassment policy is relevant to the deliberate indifference analysis, **Karasek identifies no way in which the University’s use of an early resolution process to address her complaint was in violation of University policy.**”

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Karasek (9th Cir. 2020)

- “We might have handled the situation differently, but the Supreme Court has instructed us to **‘refrain from second guessing the disciplinary decisions made by school administrators’** unless those decisions were ‘clearly unreasonable. . . .’”
- “[T]he decision to resolve Commins’s complaint informally without allowing Commins to testify or present evidence is troubling, given the context and nature of her assault. . . . Despite these shortcomings, however, UC’s response did not exhibit deliberate indifference. After Commins reported her assault, UC moved quickly to suspend her assailant, and UC imposed fairly stringent sanctions upon resolution of Commins’s complaint. **We may disagree with UC’s handling of Commins’s complaint, but that does not suffice for Title IX liability.**”

956 F.3d 1093, 1108–10 (9th Cir. 2020) (citing *Davis*, 526 U.S. at 648).

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Doe v. Harvard University (D.Mass. 2020) - Facts

- Plaintiff was a student at Harvard. He was accused of violating the University’s Title IX policy after engaging in sexual conduct with another student while she was incapacitated.
- The woman filed a Title IX complaint. At some point during the proceedings, both the **complainant and respondent agreed they would like to pursue an informal resolution agreement.**
- Harvard’s policy permitted informal resolution only when there was “agreement of the Complainant and the Respondent and the approval of the Title IX Officer.”
- The **Title IX officer did not approve the request for informal resolution**, “stating that denial of the request was **based on the severity of the alleged harassment** and the potential risk for others in the Harvard community”

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Doe v. Harvard University (D.Mass. 2020) - Claims

- Plaintiff's relevant claims were for breach of contract and racial discrimination.
- Plaintiff alleged that Harvard breached its contract which allowed for informal resolution, but the court held that **Harvard had not breached its contract** because "Plaintiff knew based on the language of the policy that he did not have a right to informal resolution merely because he asked for it."
 - The court **dismissed Plaintiff's breach of contract claim** (related to the informal resolution).
- Plaintiff alleged racial discrimination when Harvard denied his and Complainant's request for informal resolution because he alleged that the **University had permitted informal resolution in other Title IX cases when the parties were White**.
 - The court **denied the University's motion to dismiss regarding this claim**.

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Doe v. Harvard University (D.Mass. 2020) - Takeaways

- Clear policy language is important.
 - Make sure the policy reflects who needs to consent to an informal resolution and what factors university officials should consider.
- Just because a policy permits the intervention of a Title IX officer does not mean that the officer can act in a discriminatory manner.
 - By listing clearly what factors should be considered, instances of discrimination can be reduced/avoided.

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Implications for Potential / Concurrent Legal Proceedings?

Many students charged with sexual or other misconduct that implicates criminal justice issues may be reluctant to participate in informal resolution without assurances that their admissions of causing harm won't be used against them. Consider:

- MOU with local prosecutor?
- Civil litigation waiver?
- Mutual confidentiality agreement?
- State privilege or confidentiality law?

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Advising Parties of Resolution Options and Choosing an Informal Resolution Method

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How do we inform parties about an informal resolution?

- Informal resolution may be offered after the institution receives information about conduct that reasonably may constitute sex discrimination, or when a complaint of sex discrimination is made
- Parties must voluntarily consent to participate in informal resolution
- Parties must be given notice of the informal resolution

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What are the elements of the required notice to the parties?

- The allegations
- The requirements of the informal resolution process
- Each party may withdraw prior to a resolution and return the case to grievance procedures
- Agreement to a resolution would preclude grievance procedures for the same allegations
- Potential terms, including that a resolution is binding only on the parties
- What information will be maintained and how it may (or may not) be used if grievance procedures are resumed

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Must the notice be in writing?



- Notice should be in writing for all cases, but
 - *Regulation only requires the notice to be in writing for higher education cases*

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Types of informal resolution



Mediation



Facilitated discussions led by Title IX Coordinator



Restorative justice



Attorneys for parties negotiate an agreement



Administrative Adjudication (no hearing)

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Mediation

- Generally means a process wherein the parties meet with a mutually selected impartial and neutral person who assists them in the negotiation of their differences.
- Some institutions view this as a discussion led by Title IX Coordinator but could be any facilitator that is properly trained.

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Facilitated Discussions Led by Informal Resolution Facilitator

- Lots of permutations of this process
 - In-person v. virtual
 - Same room v. not same room
 - Live v. not live
 - Email v. Other

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What is restorative justice?

- “Restorative justice is an approach to achieving justice that involves, to the extent possible, those who have a stake in a specific offense or harm to collectively identify and address harms, needs, and obligations, in order to heal and put things as right as possible.”

-Howard Zehr

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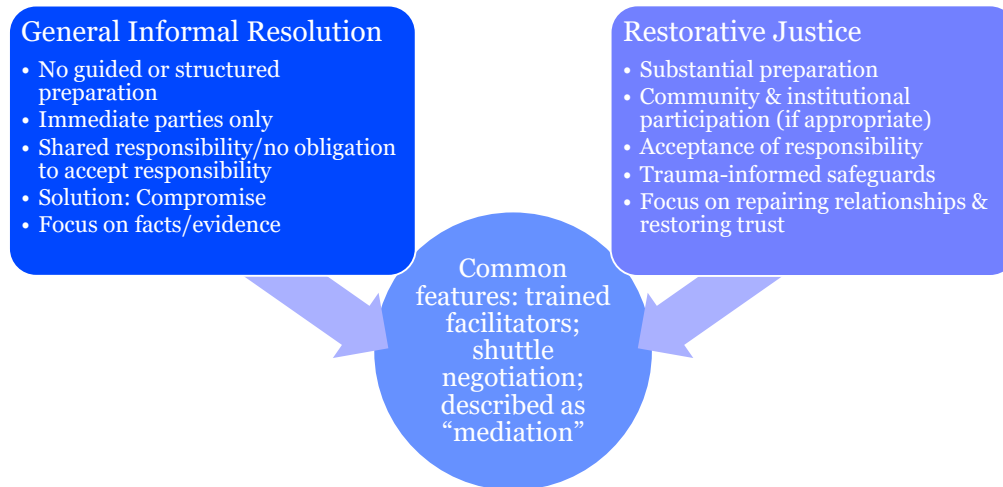
Restorative Justice – Traditional Discipline v. Restorative Justice

- Traditional discipline asks:
 - What rules have been broken?
 - Who did it?
 - What do they deserve?
- Restorative justice asks:
 - Who has been hurt?
 - What are their needs?
 - Who has the responsibility to make things right to restore relationships?

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How does restorative justice compare to general informal resolution?



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Restorative Justice in the 2024 Title IX Regulations

- ED doesn't explicitly reference restorative justice in the regulations
- In preamble, ED noted that it provides grants that may be used to implement programs such as restorative justice
- ED stated that the restorative justice process is “more complex” but recognized the potential benefits of restorative justice practices

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Attorneys for Parties Negotiate an Agreement

- Very formal—similar to settlement negotiations.
- Both parties' advisors are attorneys.
- More common since 2020 regulations.
- Focus is on language in the agreement.

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Administrative Adjudication

- In lieu of hearing process.
- Similar to old process utilized by many institutions before 2020 regulations.
- May be covered explicitly in policy.

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Example —what process is this? (Poll to Follow)

Informal Resolution Facilitator meets with parties individually and both agree to participate in informal resolution. They decide to meet in person and go over what measures would be reasonable for the alleged conduct (training, paper, and learning modules). Respondent does not want to admit to conduct or discuss harms that respondent caused to plaintiff. Both parties agree to the terms and sign the informal resolution agreement.

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Re-Starting Formal Process

- Either party may withdraw their consent to participate in informal resolution at any time before a resolution has been finalized.
- Typical Timeframe: Absent extension by the Title IX Coordinator, any informal resolution process must be completed within twenty-one (21) days. If an informal resolution process does not result in a resolution within twenty-one (21) days, and absent an extension, abeyance, or other contrary ruling by the Title IX Coordinator, the informal resolution process will be deemed terminated, and the Complaint will be resolved pursuant to the investigation and adjudication procedures. The Title IX Coordinator may adjust any time periods or deadlines in the investigation and/or adjudication process that were suspended due to the informal resolution.

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What is the role of an advisor during the investigation and informal resolution?



Support

Provide personal support to the party throughout



Preparation

Help the party prepare for meetings and interviews



Presence

Be present with the party during meetings and interviews



Review

Assist the party in reviewing materials prior to the close of the process

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What must an advisor not do during the investigation and informal resolution?



Inhibit

Advisor cannot inhibit communication between the institution and party



Disrupt

Advisor cannot disrupt meetings and interviews



Argue

Advisor is not permitted to argue with the investigator/informal resolution facilitator



Evidence

Advisor does not present evidence or "make a case"

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What if the advisor breaks the rules?

- An advisor who violates the rules may be excluded from further participation
- The institution may pause the relevant interaction to allow the party to select a new advisor

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Questions for Discussion

Complainant alleges that Respondent made inappropriate and sexual comments about Complainant's appearance almost every single day while they were in class together last semester. Complainant does not want to file a Complaint, but Complainant is interested in informal resolution. Both Complainant and Respondent agree to informal resolution and meet separately with the Informal Resolution Facilitator to discuss what they want and need to resolve this matter. Complainant wants Respondent to write Complainant an apology letter, attend a day-long training about Title IX issues, and receive counseling from the school's counselor(s) once a week for the next 3 months. Respondent refuses to write an apology letter, but he agrees to attend a half-day training on Title IX issues, and will attend counseling once a month for the next 3 months.

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Group Scenario Discussion Questions

1. **As Informal Resolution Facilitator, how would you handle this situation?**
2. **What would you say to Complainant regarding Respondent's position? What would you say to Respondent?**
3. **At what point would you consider terminating the informal resolution process?**

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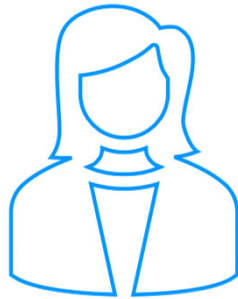
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Role of the Facilitator

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Who manages the informal resolution?



- Informal resolution facilitator
- Cannot be the investigator or decision-maker
- Must be free of conflicts and bias, and appropriately trained on duties and policy provisions

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What are some general principles about communications?

Timing	• Communicate as soon as reasonably possible within a given process
Setting	• Choose an appropriate setting and method of communication
Role	• Maintain role and understand the role of others involved
Prepare	• Anticipate questions that you will be asked and have responses ready

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What is a facilitator's role?

- **Varies with matter/policy**
 - Develop agreed-upon process
 - Maybe interview witnesses, collect documents
 - Facilitate storytelling by all participants
 - Identify and list harms
 - Brainstorm solutions
 - Question parties about interests and requested terms
 - Prepare resolution agreement with input from parties

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When might I be asking questions in an informal resolution?

- To assess whether informal resolution is appropriate
- To make determinations about which method will be used
- To gather information about requested terms
- To gather responses from parties about requested terms and explore other options
- To establish that parties understand the process

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How do I know what questions to ask?

- Will vary depending on role and point in the process
- Evaluate your role in the process
- Assess where the parties are in the process and what still needs to be determined to reach a resolution
- REMEMBER: You are not investigating what occurred.

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How do I know what questions to ask?

Review your role and consider what questions you need to ask to ensure parties understand the process

Review any proposed terms and consider follow-up questions you have for each party

Consider facts that would help determine whether a particular term can be implemented

Focus on expressed interests of the parties and focus on what additional information you need to understand interests

Consider questions that will help to reach agreement

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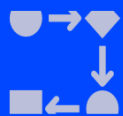
Remember overall purpose

- To gather information about how the parties feel and what they are seeking from the process
- To manage their expectations about the process
- To determine what lines of inquiry are necessary to reach an agreement about terms that will be included
- To explore follow-up questions to reach consensus about terms

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Examples of Questions



“Please walk me through what you hope to achieve through this process?”



“In your own words, tell me what you are requesting through this process.”



“Can you tell me your response to the other party’s proposed terms?”

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Example – Discussion

Complainant has accused Respondent of hostile environment harassment. Respondent admits to the alleged conduct, but asserts it “wasn’t that bad.” Complainant alleges being so affected by the conduct that Complainant stopped attending their shared science class. Complainant requests an ongoing mutual no contact order, educational sessions for Respondent, and that Respondent be restricted from the current shared science class and any other upper-level science courses Complainant enrolls in in the future.

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Example Questions

For Complainant

Tell me about your major and proposed course enrollment for the future. Have you and the Respondent had other courses together in the past?

What kind of educational sessions are you requesting for the Respondent?

For Respondent

Tell me about your participation in current science course work. What are your academic plans as they relate to science courses?

Tell me about training or educational sessions you’ve received related to sexual harassment. What were those trainings like?

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Questions for Discussion

You are serving as the facilitator for an informal resolution. The Complainant tells you that Complainant wants a mutual no contact order with Respondent for the duration of the two years Complainant will be at the College. You ask the Complainant how Complainant would feel if Complainant saw the Respondent in passing at a campus event. The Complainant says, “I don’t think I would care. But I’m not sure.”

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Group Scenario Discussion Questions

1. What follow-up questions might you ask the Complainant in order to propose specific terms of an on-going no contact order?
2. What terms would you propose for the no contact order?

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How do we approach trauma in a Title IX case and informal resolution?

- Balance
 - “Trauma-informed investigation techniques that bleed over into ... bias detract from the fundamental tenets of fairness and impartiality that are [key to] disciplinary proceedings.”
 - Candace Jackson, Acting Asst. Secretary of ED
(2017)

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When does trauma affect a person?

- Not in every matter
- Never *assume* anyone participating has suffered any trauma
- Trauma may arise before, during, or after alleged Title IX misconduct, and may impact an individual’s response during proceedings
- Not just complainant

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Possible trauma impact

- People who have suffered trauma may, but may not, experience any or a mix of the following:

Flashbacks

Delayed recollection

Inability to concentrate

Non-linear recollection

Self-blame

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Active Listening

- Active listening – “the most effective tool that exists for demonstrating understanding and reducing misunderstanding” Gerald Goodman, The Talk Book
- When engaging active listening skills, you will hear both factual content, and the feeling accompanying that content

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Active Listening

- What is required for effective listening
 - Create a listening environment
 - Physical environment
 - Internal environment

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Active Listening

- Why listen?
 - To gain information, perspectives, and to understand emotions.
 - To encourage speaker.
 - To build rapport.
- Why listen actively?
 - To facilitate communication.
 - To diffuse emotions.
 - To translate content.
 - To insure accuracy.
 - Adapted with permission from “Essentials of Active Listening” –
Written by Dean of University of Missouri Kansas City Law School

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Active Listening

- Feedback Loops
 - Paraphrase factual content
 - To check your understanding of the ideas, information, or suggestions of others, state the speaker's idea in your own words or give an example that shows what you think the speaker is talking about.
 - Adapted with permission from “Essentials of Active Listening” – Written by Dean of University of Missouri Kansas City Law School

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Questions for Discussion

Taylor and Alex are both Resident Advisors in the smallest dorm on-campus and are attending mandatory summer RA training. The two sat together the entire training, ate lunch with a group of fellow RAs, laughed throughout the training, and made some physical non-sexual contact throughout the day (e.g., high fives, fist pumps, etc.).

After an RA training in the summer, the two return back to Taylor's room and are watching a show on Peacock. Taylor begins rubbing Alex's shoulders and moves to Alex's upper thigh and buttocks. Taylor proceeds to digitally penetrate Alex. Alex does not know what to do and remains frozen. After the interaction, Alex reports to the Title IX Coordinator and prepares a Complaint. After Alex's two RA friends are notified that the investigator wants to meet with them regarding the investigation as potential witnesses, Alex decides Alex wants to proceed informally because Alex does not want Alex's friends involved. Taylor wanted to proceed with Informal Resolution from the beginning. The two exchange their positions via the Informal Resolution Coordinator and both sign the Informal Resolution Agreement.

The following summer, during the same RA training, Taylor goes back to another fellow RAs room, Jesse, and digitally penetrates Jesse. Jesse reports to the Title IX Coordinator that Taylor and Jesse were watching tv, Alex began rubbing Jesse's back and thighs (which Jesse says Jesse consented to), but then Taylor digitally penetrated Jesse without Jesse's consent. Jesse does not know about Alex's allegations, Complaint, or Informal Resolution.

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Group Scenario Discussion Questions

1. You are the Title IX Coordinator, do you permit Informal Resolution, why or why not?
2. Let's assume you deny Jesse's request for informal resolution, how do you tell Jesse while maintaining confidentiality? How do you document that conversation?
3. Let's assume you approve Jesse's request for informal resolution, how does this prior Complaint influence your approval/recommendations for terms? How do you document this?
4. What terms of the original informal resolution agreement do you want to review to determine your next steps with this Complaint by Jesse?

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Break Time

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Informal Resolution Agreement

- Items to Reference in Drafting:
 - Agreement to Participate
 - Complaint
 - Policy/procedures documents
 - Rights and options
 - Sanctioning guidelines
 - Prior informal resolution agreements
 - Supportive measures

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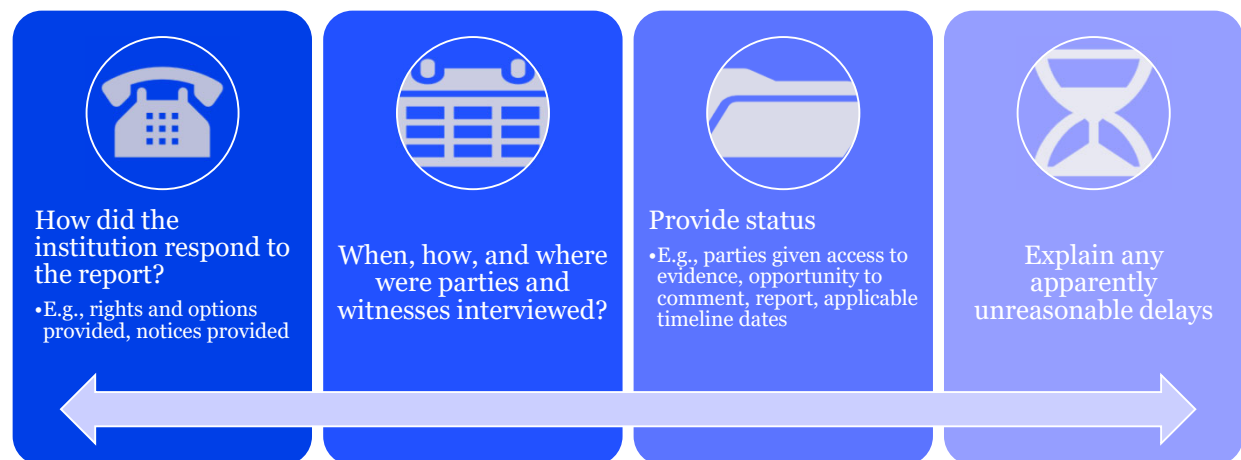
Informal Resolution Agreement Cont.

- Key Elements
 - Explanation/background regarding complaint, allegations, and implicated polic(ies)
 - Notice that this is lieu of a formal finding of a violation or no violation of policy (emphasizing voluntariness)
 - Description of what has been agreed upon
 - What will occur moving forward including violations of informal resolution agreement
 - Future allegations of misconduct against respondent arising out of same facts as underlying complaint
 - Future discipline of respondent
- Explicit notice that each party is agreeable to these outcomes
- Notice regarding institution's commitment to campus free from discrimination and harassment and anti-retaliation language
- Signatures and dates for the parties, as well as Title IX Coordinator

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History of the Case



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Informal Resolution Agreement Language Tips

- Use objective terms
 - “Complainant” and “respondent” rather than “victim” and “perpetrator”
 - Reference potential “violation of policy” not “guilt” or violation of “law”
- Do not include speculation
- Do not include irrelevant points and discussion
- Be thoughtful about pronouns
- Avoid vague phrasing like “had sex”

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Outcomes

- Informal resolution does not typically result in sanctions, and allows for more creative resolutions
- Examples:
 - Administrative accommodations such as adjusting class schedules, changing sections, etc.
 - Voluntary educational, mentoring, or coaching sessions
 - Relocation or removal from a residence hall or other on-campus housing
 - Verbal cautions/warnings
 - Collaborative agreements on behavioral or institutional changes
 - Other non-disciplinary interventions

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Outcomes cont.

- Once an agreement is reached and signed, the complainant and respondent are bound by its terms. Failure to comply with the signed agreement may result in disciplinary action.
- If the complainant's or respondent's circumstances change, they may request a supplemental agreement. It should be up to the Title IX Coordinator to determine whether it is appropriate to proceed.
 - E.g., Changes to an academic program that conflict with a term of an agreement.

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Can a case that is resolved informally be “reopened”?

- It depends upon the terms of the informal resolution
- Title IX Coordinator should ensure that any informal resolution clearly resolves this question

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Is an informal resolution final?

- Generally, yes – Most informal resolutions will result in an agreement that resolves the allegations in a definitive and final way
- A party cannot demand an investigation and hearing of the same conduct that has been resolved through informal resolution
- Exception exists if terms of the informal resolution are not final (i.e., contingent) and contemplate a potential return to the formal process

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Confidentiality

- Be prepared to address questions about who the agreement will be shared with
 - Generally, those with a need to know to implement the agreement
 - But, there may be additional confidentiality provisions agreed to by the parties
- Confidentiality provisions in agreements
 - Example language

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Example confidentiality language in agreements

- I agree that to the extent permitted by law, I will not use information obtained and utilized during informal resolution in any other institutional process (including investigative resolution under the Policy if informal resolution does not result in an agreement) or legal proceeding, though information documented and/or shared during informal resolution could be subpoenaed by law enforcement if a criminal investigation or civil suit is initiated

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What issues can arise after drafting?

- Common problems:
 - Ambiguity in voluntariness
 - Lack of clear explanation (and written record) of sanctions
 - Failure to address expectations for returning students and/or employees following disciplinary action (e.g., participation in athletics/extracurriculars)
 - Identity of decider if questions arise

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Questions for Discussion

Complainant alleged that Respondent engaged in Hostile Environment Harassment, but both parties have agreed to informal resolution. Complainant wants Respondent to complete multiple training courses on Title IX issues, attend counseling every week for a month, and she wants a mutual no-contact order that also prohibits them from being in the same areas as each other when it is not necessary. Respondent agrees to those terms, except he will only attend counseling twice in a month, and he will only agree to 2 Title IX trainings. You inform Complainant of Respondent's position, and she has asked that you draft up an Informal Resolution Agreement so she can see if she will agree to the terms.

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Group Scenario Discussion Questions

Using the terms proposed by Complainant and Respondent's counter-offer, prepare an Informal Resolution Agreement for Complainant to review.

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