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Title IX Informal Resolution Training

September 6, 2023

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Housekeeping



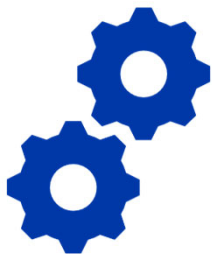
- Recording is not permitted
- Slides will be provided by email after the training concludes
- Check Zoom name
- Let's discuss! Raise hand, use chat, or just jump in
 - In hypotheticals
- Other breaks—take individually as needed
- Context
- If have technical problems, please alert Andrea Reid immediately

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Breakout Groups

Group Scenarios



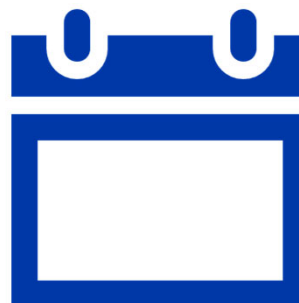
- Scenarios discussed in Breakout Groups
- Introduce yourselves and select a spokesperson
- Scenario and questions for each Group
- Scenario will be posted in the Chat Box
- Presenters will ask Breakout Groups to provide responses
- Cameras on for breakouts

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Agenda

- Title IX Foundations and Institutional Response
- Title IX Regulations and Informal Resolution
- Caselaw Review
- Advising Parties of Resolution Options
- Choosing a Method of Informal Resolution
- Role of the Facilitator and Questioning Parties
- Drafting and Enforcing Agreements



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Module 1: Title IX Foundation 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.”

34 C.F.R. § 106.31



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Who does Title IX apply to?

- Entities that receive federal financial assistance, including colleges and universities that participate in Title IV funding
 - Not individual persons
 - But institutions are required to adopt policies and procedures to implement Title IX that *do* apply to individual persons

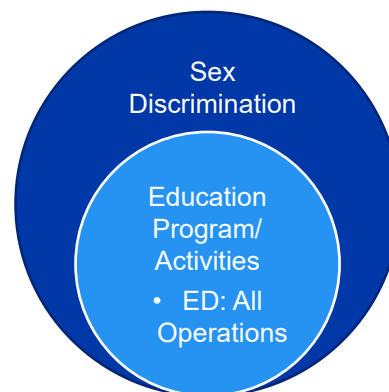


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What sex discrimination does Title IX apply to?

- Title IX applies to sex discrimination in the “education program or activity” of a federal funding recipient
 - Title IX defines “education program or activity” to include the “operations” of educational institutions
- Title IX does not apply to private conduct occurring in private location that is not part of education program/activity



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What are examples of education programs and activities?




| | | | |
|---|--|-----------------------------------|--------------------------------------|
| Admissions | Hiring | Workplace | Academic instruction |
| Residence life | Amenities on campus | Sports teams | Work-study |
| Games, concerts, and speeches on-campus | Off-campus trips or experiences organized by the institution | Sponsored organization activities | Anything else that happens on-campus |

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Does Title IX apply to off-campus sexual harassment?

| | | |
|--|---|---|
|  <p>Yes, <u>if</u> the conduct at issue occurs in the context of an education program or activity</p> |  <p>Yes, <u>if</u> the conduct at issue occurs in a house owned or controlled by an officially-recognized Greek organization or other student organization</p> |  <p>No, if it occurs in a private location and is not part of an institution's education program or activity</p> |
|--|---|---|

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Example (included in EP&A)



- In the fall athletic season, a student-athlete is sexually assaulted by an athletic trainer during a team trip for an away competition.

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Example (excluded from EP&A)



- During winter break, members of a Greek Organization plan an informal gathering at a local bar. Following the bar party, a group of students goes to student's off-campus apartment. While at the apartment, one student sexually assaults the other student.

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Does Title IX apply to sexual harassment in other countries?

- No – the Department of Education interprets Title IX to apply only within the geographic boundaries of the United States
- Other countries may have laws that govern sexual harassment



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What other policies might apply?

- Institutions are free to use
 - Student code of conduct
 - Faculty/employee handbooks
 - Other policies
- to address sexual harassment that does not occur in an education program or activity

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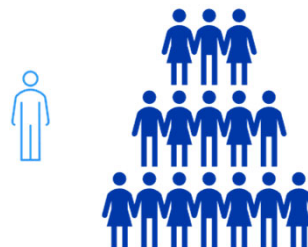
Additional Legal Considerations

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Title VII of the Civil Rights Act of 1964

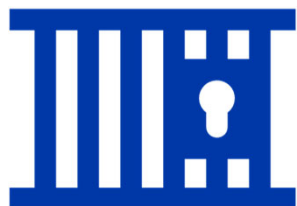
- Prohibits discrimination in employment (private and public) based on:
 - Race
 - Color
 - Religion
 - National Origin
 - Sex



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The Clery Act



- A federal law requiring institutions to collect and publish statistics for certain crimes reported to have occurred on the university's "Clery Geography" (i.e., occurring on campus, on public property within or immediately adjacent to campus, and on other non-campus university property), for the purpose of informing current and prospective students, faculty or staff.

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Violence Against Women Reauthorization Act of 2013 (VAWA)

Codification of Title IX principles

Sexual misconduct policy

Statements of rights and options

Support persons

Training

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Applicable disabilities statutes



- The Americans With Disabilities Act
- Section 504 of the Rehabilitation Act

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FERPA

- Sexual harassment cases should be treated as confidential by the institution, with information only shared as necessary to effectuate the policy
- Records containing identifying information on students are subject to FERPA analysis
- The Title IX regulation contains an express preemption, permitting FERPA-protected material to be used as required by Title IX itself



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Political and Regulatory Updates

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Political Update – “Sex”

Mar. 8, 2021 Executive Order

- Guaranteeing an Educational Environment Free from Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity
- Authorizes the Secretary of Education to take additional action to enforce this policy

June 16, 2021 Guidance

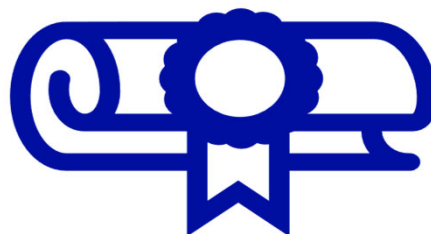
- Department of Education says Title IX prohibits discrimination based on sexual orientation and gender identity

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Regulatory Update

- On June 23, 2022, the Department of Education released its Title IX Notice of Proposed Rulemaking
- 700-plus pages, responds to changes in Title IX regulations imposed in August 2020
- 60 days for public comments
- Initially anticipated in May 2023, but delayed until October 2023



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Institutional Policies and Procedures

- Institutional policies address:
 - Scope
 - Jurisdiction
 - Definitions of prohibited conduct
 - Grievance procedures
- Always consult institutional policies – every time!

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What is sexual harassment?

Conduct on the Basis of Sex that is:

Quid
Pro Quo
Harassment

Hostile
Environment
Harassment

Sexual
Assault

Relationship
Violence

Stalking

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What is quid pro quo?

- **Title IX-Designated**
- An employee of the institution conditions the provision of some aid, benefit, or service on another person’s participation in unwelcome sexual conduct
 - Often arises in the employment context or where an employee holds a position of authority over a student

This

That

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Example of quid pro quo

- Manager tells subordinate employee that subordinate will not get a raise this year unless subordinate performs sexual favors for manager. Subordinate is in a relationship with another individual and has no interest in performing sexual favors for manager.



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What is hostile environment?

- Unwelcome conduct determined by a reasonable person to be so severe, pervasive, *and* objectively offensive that it effectively denies a person equal access to the recipient's education program or activity.



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How do we determine if a hostile environment exists?

- Consider all the facts and circumstances, such as:
 - The type of misconduct
 - The frequency of the misconduct
 - Where the misconduct occurs
 - Whether a power differential exists, etc.
- From the perspective of a reasonable person

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Example of hostile environment

- Student A repeatedly gropes Student B's buttocks when the two are in the elevator of the library. Student B has no romantic interest in Student A and has told Student A to stop. But Student B persists, causing Student A to use the stairs instead of the elevator and to avoid Student A in other areas of library and campus buildings.

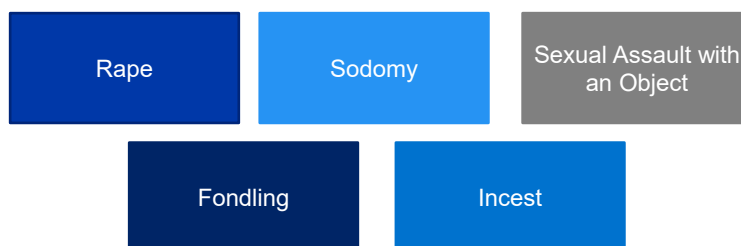


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What is sexual assault?

- Title IX regulations define “sexual assault” as incorporating the following classes of conduct:



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What is consent?

- Policy definition – read it carefully
- Words or actions that a reasonable person in the respondent’s perspective would understand as agreement to engage in the sexual conduct at issue
- A person who is incapacitated is not capable of giving consent
- Consent cannot be procured by coercion
- Be aware of minimum age of consent

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What is incapacity?

- Incapacity refers to a state where a person does not appreciate the nature or fact of sexual activity due to the effect of drugs or alcohol consumption, medical condition or disability, or due to a state of unconsciousness or sleep.



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Does Title IX also prohibit retaliation?

- Yes – “No recipient or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title IX or this part, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing” under the institution’s policy

(34 C.F.R. § 106.71)

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Retaliation

- Material . . .
- Adverse action . . .
- Taken against someone . . .
- Because . . .
- They engaged in protected activity

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Example of retaliation

Groundskeeper testifies at hearing in support of Office Worker's complaint of sexual harassment against Manager. After institution finds that Manager sexually harassed Office Worker, Manager demotes Groundskeeper to punish Groundskeeper for testifying against Manager.

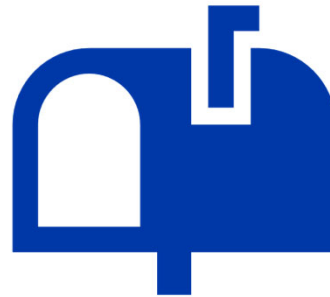


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How does an institution get notice of sexual harassment?

- Sexual harassment response is triggered when institution has “actual knowledge” of potential sexual harassment.



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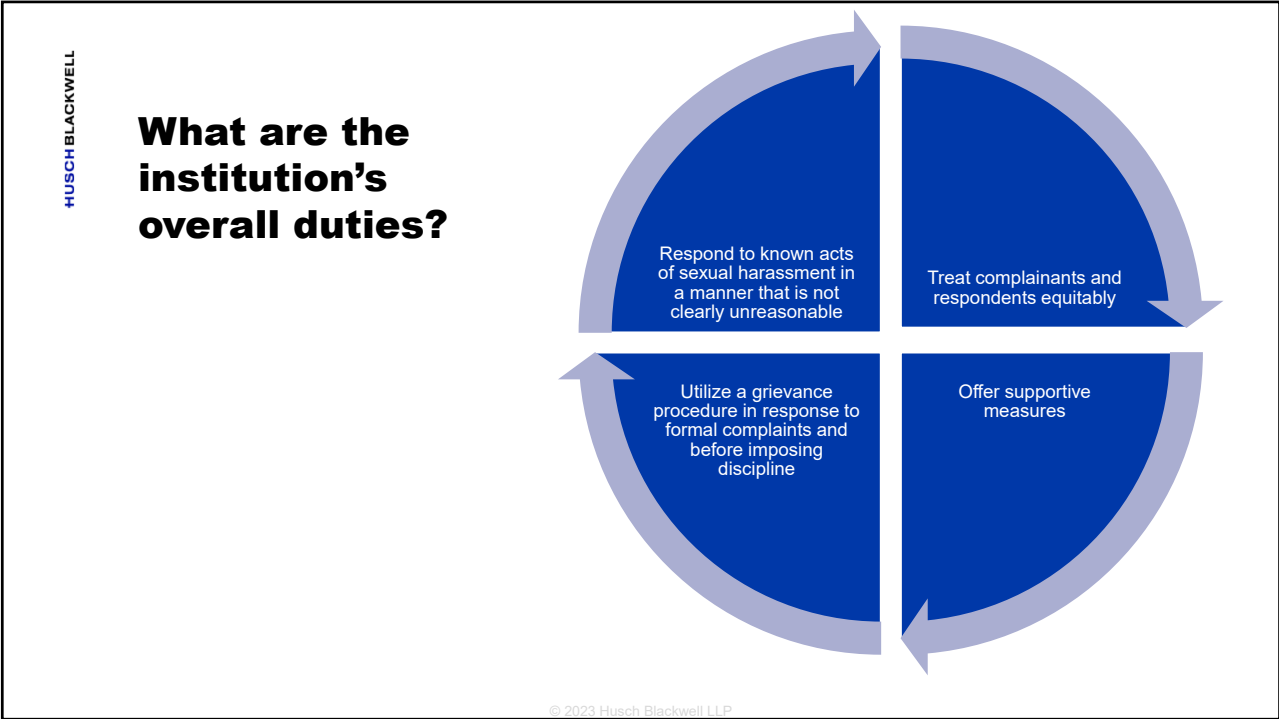
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What is “Actual Knowledge”?

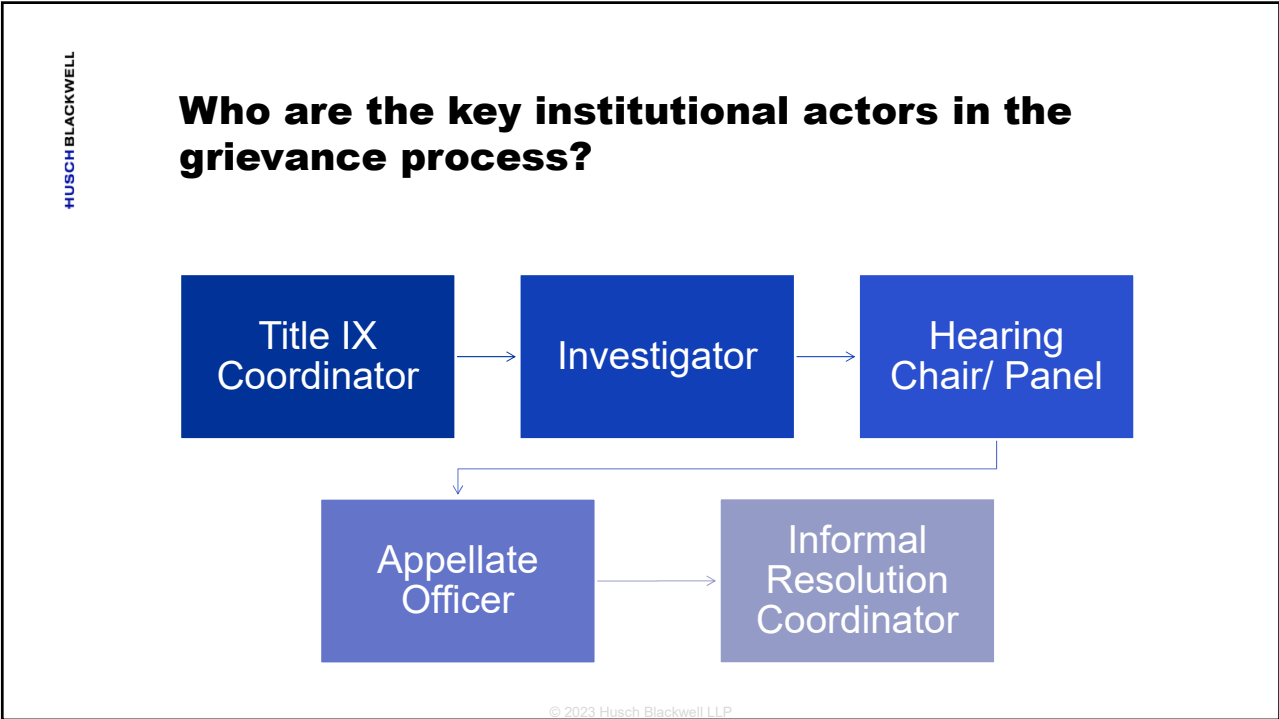
- “Actual knowledge” occurs when
 - An institutional official, with authority to take corrective action
 - Observes or receives a report
 - Of sexual harassment occurring in the institution’s education programs and activities

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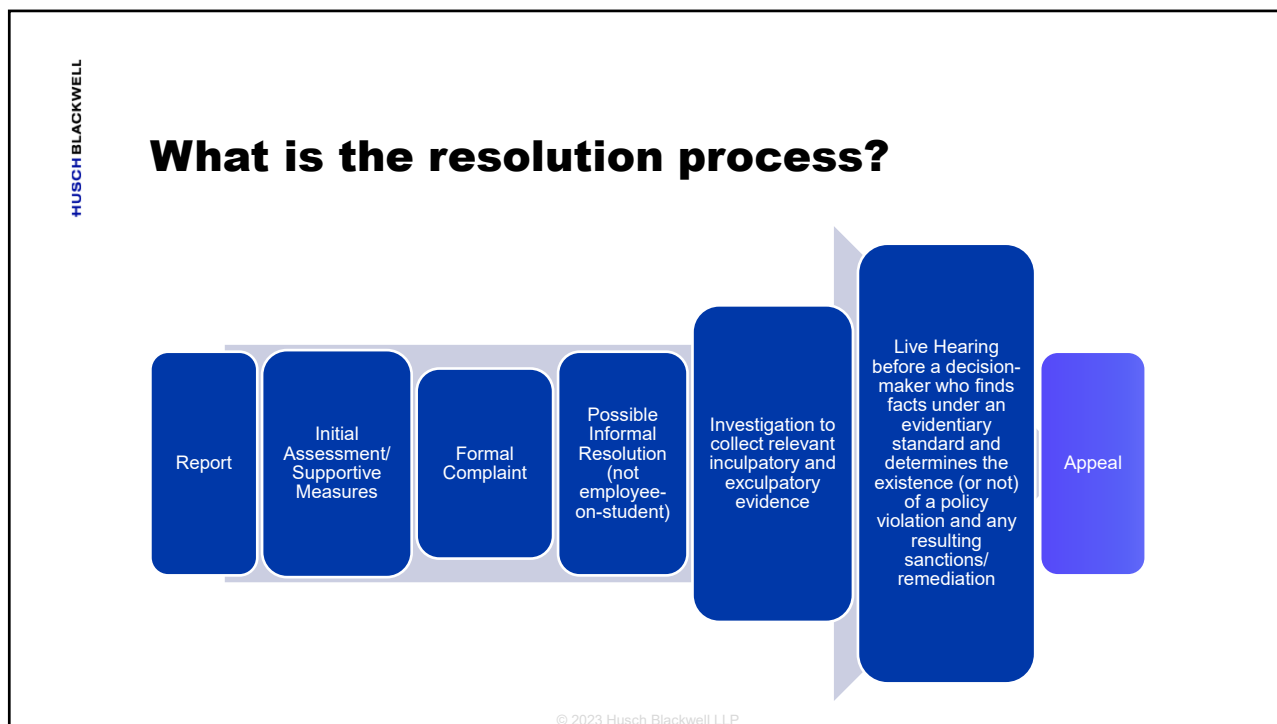
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What is a formal complaint?

Signed in writing

From the alleged victim or the Title IX Coordinator

Alleging sexual harassment

Indicating desire to initiate the grievance process (i.e., investigation and hearing)

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When may the Title IX Coordinator file a formal complaint?

- Typically, when there is an important institutional interest in adjudicating a report irrespective of the alleged victim's wishes
- Typically involves serious misconduct, repeated misconduct, or misconduct by employees
- If alleged victim does not wish to file a formal complaint, Title IX Coordinator's decision to do so must not be clearly unreasonable

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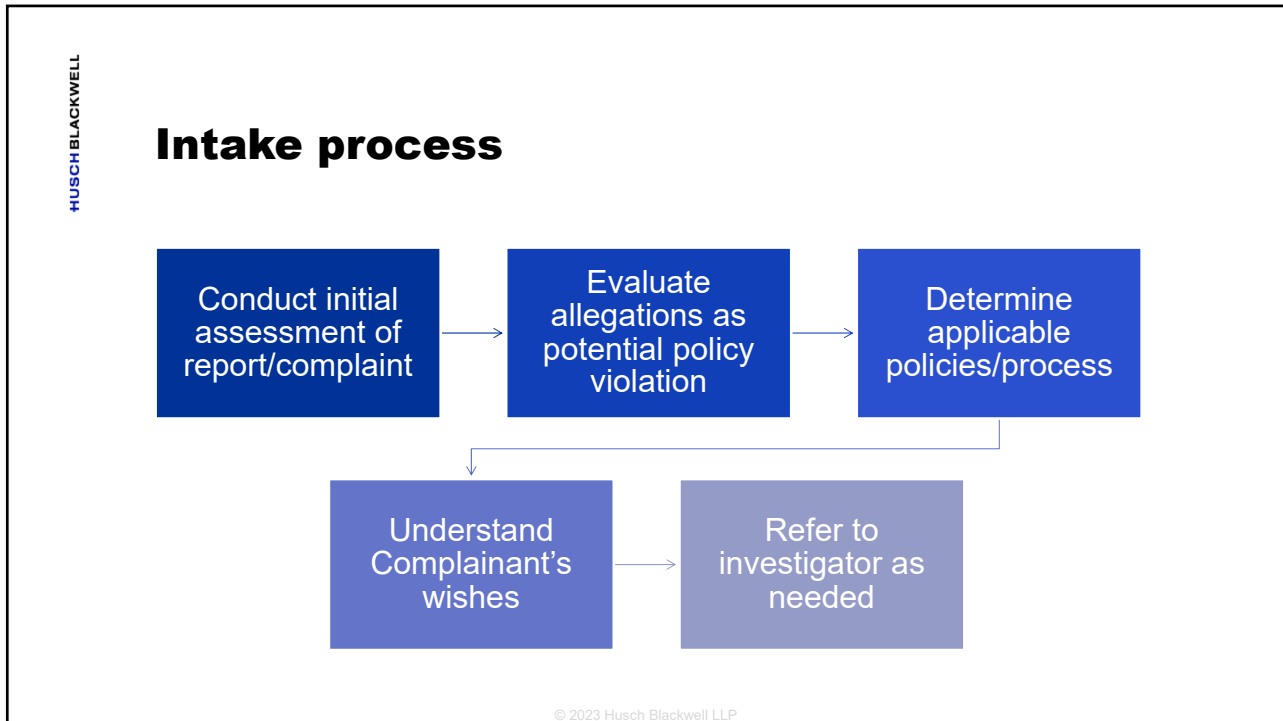
Example of Title IX Coordinator Formal Complaint

- Two female students, who do not know one another, each separately report they were sexually assaulted by a male student. Both female students suspect they were drugged. Neither female student wishes to file a formal complaint, but each has indicated they will cooperate with an investigation if the Title IX Coordinator files a formal complaint.

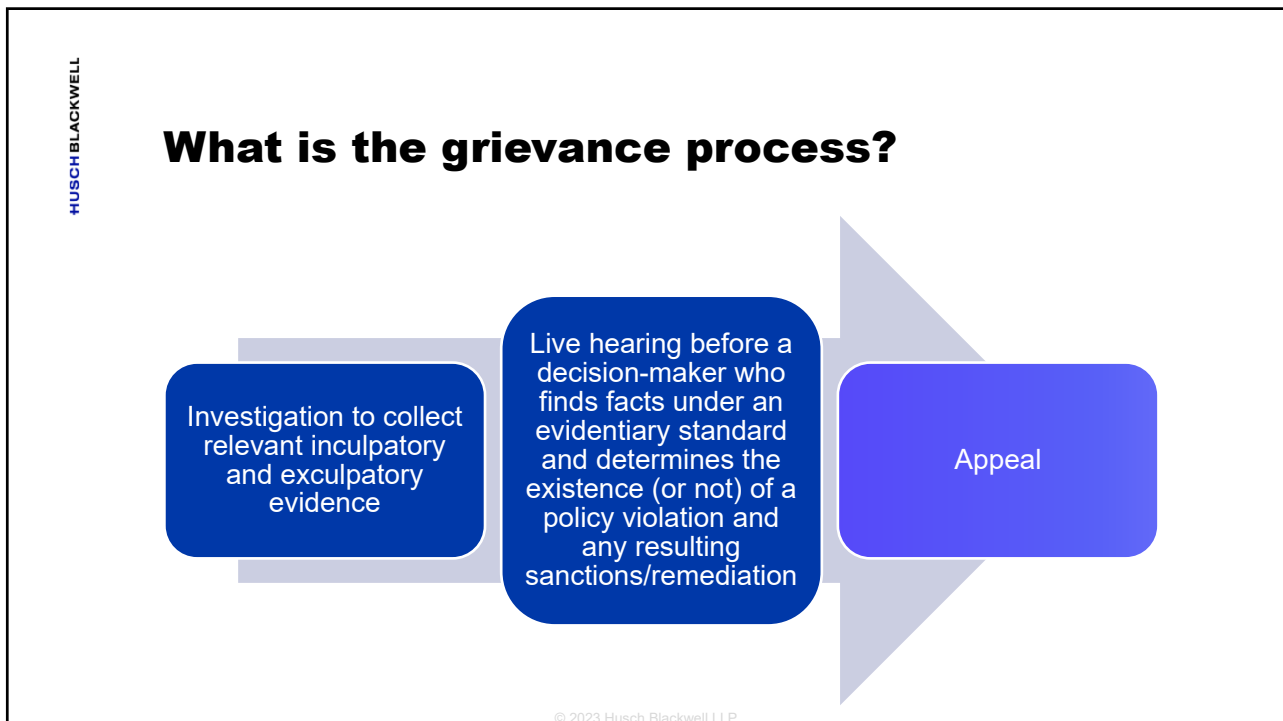


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What general principles govern the grievance process?

- Equitable treatment of complainants and respondents
- No stereotypes based on a party's status as complainant or respondent
- Presumption respondent did not violate policy *unless and until* a determination is made after hearing
- Conflict and bias-free institutional participants

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How long does a grievance process take?

- There is no firm deadline, and the length of the grievance process varies depending on a variety of factors
- Institution must be reasonably prompt, advise parties of timelines for particular phases of the process, and notify parties of extensions of timelines and the reasons for the same



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Module 2: Title IX Regulations and Informal Resolution

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Informal Resolution and Title IX Regulations

- “[A]t **any time prior to reaching a determination** regarding responsibility the recipient may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication, provided that the recipient . . .”
 - (i) Provides to the parties a **written notice** disclosing: the **allegations**, the **requirements of the informal resolution process** including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations,
 - provided, however, that at **any time prior to agreeing to a resolution**, any party has the **right to withdraw** from the informal resolution process and resume the grievance process with respect to the formal complaint, and
- any **consequences** resulting from participating in the informal resolution process, including the records that will be maintained or could be shared;
- (ii) Obtains the parties’ **voluntary, written consent** to the informal resolution process; and
- (iii) Does **not** offer or facilitate an informal resolution process to resolve allegations that an **employee sexually harassed a student**.

[34 C.F.R. § 106.45(b)(9)]

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OCR: Q&A on the Title IX Regulations on Sexual Harassment (July 2021)

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XIV. Informal Resolution

Question 58: May a school offer an informal resolution process, including restorative justice or mediation, as a way to resolve a sexual harassment complaint?

Answer 58: Yes. The 2020 amendments state that a school is not required to offer an informal resolution process but may facilitate an informal resolution process at any time prior to reaching a determination regarding responsibility, subject to certain conditions.¹⁹² A school is not permitted to offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student.¹⁹³

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Informal Resolution in Q&A

- Discretion to offer informal resolution process is limited by a school's obligation to ensure that facilitators are free of conflicts and trained to serve impartially
 - E.g., restorative justice facilitators should be "well-trained in effective process"
- May use trauma-informed techniques during informal resolution

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Informal Resolution in Q&A

- The term "informal process" remains undefined to allow a school the discretion to adopt whatever process best serves the needs of its community.
- Expressly notes that restorative justice may be an option.
- Amendments do not require that the parties interact directly with each other as part of an informal resolution process.
- Schools may exercise discretion to make fact-specific determinations about whether to offer informal resolution in response to a complaint.

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2020 Title IX Regulations

- Training materials for individuals conducting informal resolutions must
 - Address the definition of sexual harassment
 - Clarify the entire Title IX process at the institution
 - Address avoiding bias and conflict of interest
 - Not rely on sex stereotypes

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2020 Title IX Regulations

In order to offer informal resolution:

- A formal complaint must be filed
- Parties receive written notice covering the requirements of the process, the right to withdraw at any time, and a list of possible consequences
- Parties must provide voluntary, written consent
- The complaint cannot allege that an **employee** sexually harassed a **student**



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2020 Title IX Regulations

Institutions must maintain records surrounding informal resolution procedures and their outcomes for **7 years**.

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Proposed Changes to the Regulations

Availability of Informal Resolution:

- 2020 Regulations: Do not permit a recipient to offer an informal resolution process unless a formal complaint has been filed.
- Proposed Regulations: Permit informal resolution in the absence of a formal complaint.



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Proposed Changes to the Regulations

Informal Resolution Facilitator Requirements

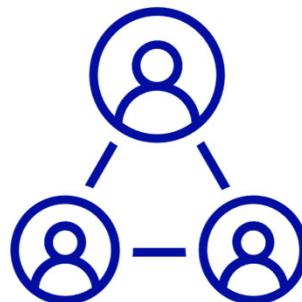
- 2020 Regulations: Do not distinguish between who may conduct an informal resolution versus a formal investigation.
- Proposed Regulations: Prohibit the investigator from also facilitating an informal resolution.

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What is informal resolution?

A voluntary process to resolve formal complaints of sexual harassment through a mechanism other than the default investigation and hearing.



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What are the key concepts of informal resolution?



A formal complaint must first have been filed and written notice given to the parties



The parties must be apprised in writing of how the informal resolution process will work and the consequences of participating in it



The parties must voluntarily agree to participate in writing



The parties must be allowed to withdraw from informal resolution up until the point it is final

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What are the limitations?

- Informal resolution cannot be used where an employee is accused of sexually harassing a student
- Informal resolution cannot be used in the absence of a formal complaint
- Institution cannot require persons to consent to informal resolution as a condition of employment or enrollment



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Consider state law limitations

Maryland state law prohibits informal resolution when the alleged misconduct involves **sexual assault** or **sexual coercion**. MD. CODE ANN. EDUC. § 11-601 (West 2019).



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Consider Implications if Minors Involved

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

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34 C.F.R. § 106.45(b)(1)(iii) Conflict of Interest, Bias, & Training

Chat Questions:

- Where do you currently house your informal resolution officers?
 - How do we identify staff members who are well-qualified/positioned to take on the IR role?
 - Who is responsible for identifying conflicts of interest and bias?
- **Conflict of Interest/Bias:** Require that any individual designated by a recipient as a Title IX Coordinator, investigator, decision-maker, or any person designated by a recipient to facilitate an informal resolution process, not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent.
 - **Training:** A recipient must ensure that Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, receive training on the definition of sexual harassment in § 106.30, the scope of the recipient's education program or activity, how to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, as applicable, and how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias. . . .
 - Any materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, must not rely on sex stereotypes and must promote impartial investigations and adjudications of formal complaints of sexual harassment;

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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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Example: Conflict of interest

Student Math files a formal complaint of sexual harassment against Student Chemistry. One of the hearing panel members selected is Student Chemistry's faculty advisor who has previously written letters of recommendation for Student Chemistry's application to graduate school in which faculty advisor wrote that Student Chemistry is "honest to a fault."



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Example: Conflict of interest



- An administrator accuses an employee of an office supply vendor of sexual harassment; matter is investigated. Institution assigns a hearing panel member whose spouse is employed as a manager for the office supply vendor and who directly supervises the accused employee.

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Example: Bias

A graduate student in the sociology department who is chosen to serve on a hearing panel has written an article on studies related to the incidence of false reports of sexual assaults. The graduate student organized an open forum to discuss issues related to sexual assault and said, “False reports of rape are extremely rare. I firmly believe that every complainant should be believed.”



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Example: Bias

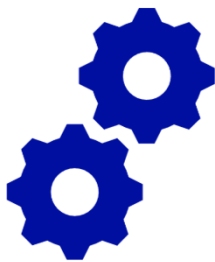


Investigator assigned to investigate a formal complaint of sexual assault has repeatedly told colleagues that the investigator believes most complainants just “regret that they got drunk.” Investigator tells a co-investigator: “I just don’t think it’s ever fair to hold anyone responsible when both parties are drinking.”

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Group Scenario



TA is beginning TA's last semester as an undergraduate senior studying biology. TA has worked as a TA for Biology professor for a total of four semesters. Past semesters have been "okay" according to the TA, but TA has reported to the Title IX Coordinator that, over winter break during a meeting to prepare for the semester, Biology professor groped TA's genitals in professor's office and suggested that professor and TA should have some fun during TA's last semester. During TA's report, despite saying things had been okay in past semesters, TA also reported being "uncomfortable" during past semesters and disclosed several sexually-charged comments made by professor. TA also reported that, in talking about the course, professor referred to incidents of plagiarism in the fall semester, but he said he did not review or turn in all the incidents because it was too time-consuming to check all the suspected papers, plus some of the suspected students were his best students.

TA is counting on professor for letters of recommendation and is concerned about the impact of not serving as TA for TA's final spring semester course because it is a course directly related to TA's graduate school focus. Professor has been teaching at the institution for 22 years. Professor has a letter of reprimand in his file related to a prior consensual relationship with student three years ago that violated the consensual relationships policy.

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Questions



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Module 3: Legal Parameters and Caselaw

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Legal Issues

- **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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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 through the University of California San Francisco School of Medicine.
- Plaintiff reported the harassment to the UCSF Title IX officer. Plaintiff was removed from his harasser's lab and placed in a new office to complete his clerkship; however, 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, among other claims, that UCSF "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]." Nonetheless, because the University offered ***Plaintiff some supportive measures***, the court concluded that his allegations were insufficient to support a deliberate indifference claim.
- The court noted that "Plaintiff's allegations that UCSF mishandled his report of sexual misconduct, inadequately disciplined [the doctor], and took inadequate steps to protect him from [the doctor] are insufficient to demonstrate that UCSF responded with deliberate indifference."

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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 universities 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)

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.***"

"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."

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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.

- MOU with local prosecutor?
- Civil litigation waiver?
- Mutual confidentiality agreement?
- State privilege or confidentiality law?
- FRE 408?

NEB. REV. STAT. § 25-2914.01
 "No admission, confession, or incriminating information obtained from a juvenile in the course of any restorative justice program . . . shall be admitted into evidence against such juvenile, except as rebuttal or impeachment evidence, in any future adjudication hearing under the Nebraska Juvenile Code or in any criminal proceeding."

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Module 4: Advising Parties of Resolution Options

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How do we tell the parties about an investigation?

- Institution must provide the parties written notice of a formal complaint that includes sufficient details about the “who, what, when, where, and how” before investigating



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What else does the notice need to say?

- Written notice must also include:
 - Statement of presumption respondent is not responsible unless and until a determination is made at the end of the process
 - That parties have the right to an advisor of their choice
 - That parties have the right to inspect and review evidence
 - Any prohibition on providing knowingly false statements or information

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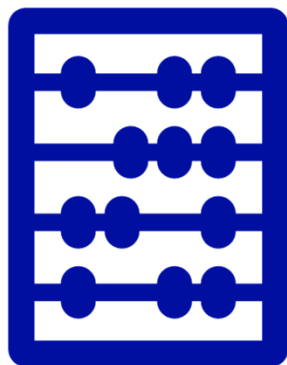
Written Notice of Allegations

- Identity of parties involved (if known)
- Specific section of institution's policies that have allegedly been violated
- Alleged conduct constituting misconduct
- Date and location of alleged incident
- Sufficient time for Respondent to prepare a response prior to any formal interviews or process
- Background information regarding informal resolution process

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What are considerations around whether informal resolution is appropriate?



- Nature of the alleged offense
- Any ongoing threat of harm or safety to the campus community (e.g., use of a weapon)
- Any past findings regarding respondent
- Status of the parties
- Good faith participation of the parties

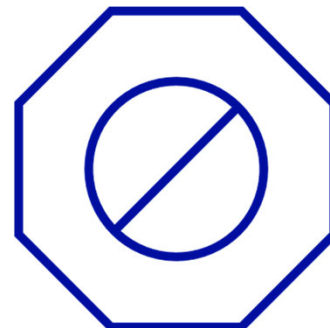
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Informal Resolution is Not for All Situations

Factors to consider:

- The nature of the alleged offense
- Whether there is an ongoing threat of harm or safety to the campus community (e.g., use of a weapon)
- Whether the alleged respondent is a repeat offender
- Whether the person alleged to have caused the harm is participating in good faith

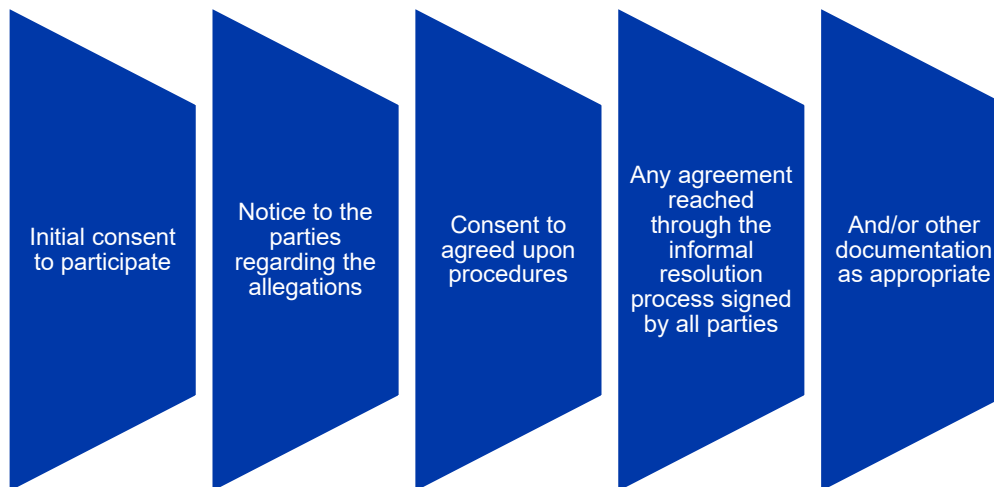


Question for Discussion: Should traditional investigative/adjudicative processes be used when an accused student *denies* responsibility?

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How should we document informal resolution?

As appropriate to each matter:



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Informal Resolution Process

- Sample process for informal resolution:
 - Informal Resolution Facilitator holds an initial process 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 is approved by the Title IX Coordinator.
- The informal resolution process can be terminated at any time by the Title IX Coordinator, the complainant, or the respondent

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Supportive measures and IR

- 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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What are supportive measures?





- Non-disciplinary, non-punitive supports and accommodations designed to preserve access to education programs and activities
- Reasonably available without fee or charge
- Without unreasonably burdening the other party

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Examples of supportive measures


 Counseling


 Academic accommodations

 Housing accommodations

 Security escorts or transportation arrangements

 Leave of absence

 Increased security or monitoring

 Modified work schedules

 Mutual no-contact order where implicated by facts

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Example: Reasonable supportive measure

History student in History 101 reports that another student, also in History 101, sexually assaulted History student two weeks ago. History student is uncertain whether to file a formal complaint but wants assistance transferring to a different section of History 101.



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Example: Unreasonable supportive measure



Employee in maintenance department accuses supervisor of sexual harassment by way of making sexualized jokes and remarks. Employee requests to be on indefinite paid leave for the remaining six months of the academic year. Employee could easily be reassigned to work under a different supervisor in a different part of campus.

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Can supportive measures affect the respondent?

- **Yes**, but cannot create an unreasonable burden
- Cannot be a form of *de facto* discipline
- Supportive measures are not a substitute for the investigation and hearing process

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Example: Unreasonable burden



Student Worker accuses Colleague of sexual harassment. Institution imposes proximity restriction that prohibits Worker and Colleague from being within 200 meters of each other pending investigation and hearing.

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Example: Disciplinary supportive measure

In-State Student accuses Out-of-State Student of sexual assault. In-State requests as a support measure that Out-of-State be removed from all shared classes and prohibited from being on campus after 5:00 pm.



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Are supportive measures confidential?



- Generally, yes
- Only shared to the extent necessary to effectuate the purpose of the supportive measure
- Only shared with institutional employees who have a legitimate need to know

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Who is responsible for supportive measures?

- Title IX Coordinator is responsible for “coordinating the effective implementation”
- May be delegated with appropriate oversight
- Typically, a collaborative effort involving more than one institutional office or department

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34 C.F.R. § 106.45(b)(2)(9) Voluntary Participation

“A recipient **may not** require as a **condition** of

- enrollment or continuing enrollment,
- or employment or continuing employment,
- or enjoyment of any other right,
- waiver of the right to an investigation and adjudication of formal complaints of sexual harassment consistent with this section.

Similarly, a recipient **may not** require the parties to participate in an informal resolution process under this section and **may not** offer an informal resolution process **unless a formal complaint is filed.**”

- Q: How will we ensure/document that participation is voluntary?

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How Do We Ensure Participation is Voluntary?

- Educate the parties and the community about informal resolution options
- Provide Notice of Rights & Options, such as:
 - Whether and when the process can be terminated
 - Whether information shared can be used in subsequent conduct matters
 - How IR differs from formal investigation and adjudication
 - Whether the process involves face-to-face interaction
- Participation contingent on successful completion of preparatory meetings
- Require parties to sign a Participation Agreement
- Frequent check-ins and monitoring
- Allow parties time to make determinations about proceeding with informal process

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Group Scenario



Ali, sophomore walk-on, accuses the captain and All-Conference power forward, Toni, of sexual harassment after Toni kisses Jesse in a hotel room during an in-season basketball away game.

At the intake meeting, in August (outside of basketball season), Jesse explains that Jesse will never informally resolve this issue. Jesse files a Formal Complaint, and proper notices have been sent to the parties and support measures are in place. The day after the basketball season starts, while the investigation is underway, Jesse decides that Jesse wants to proceed informally. Toni is “totally on board.”

You are brought in to lead the informal resolution discussions.

1. What issues from the facts above do you want to figure out/dig into more?
2. What questions will you raise with Jesse?
3. What questions will you raise with Toni?
4. Who (if anyone) will you talk to while the informal resolution process is underway?

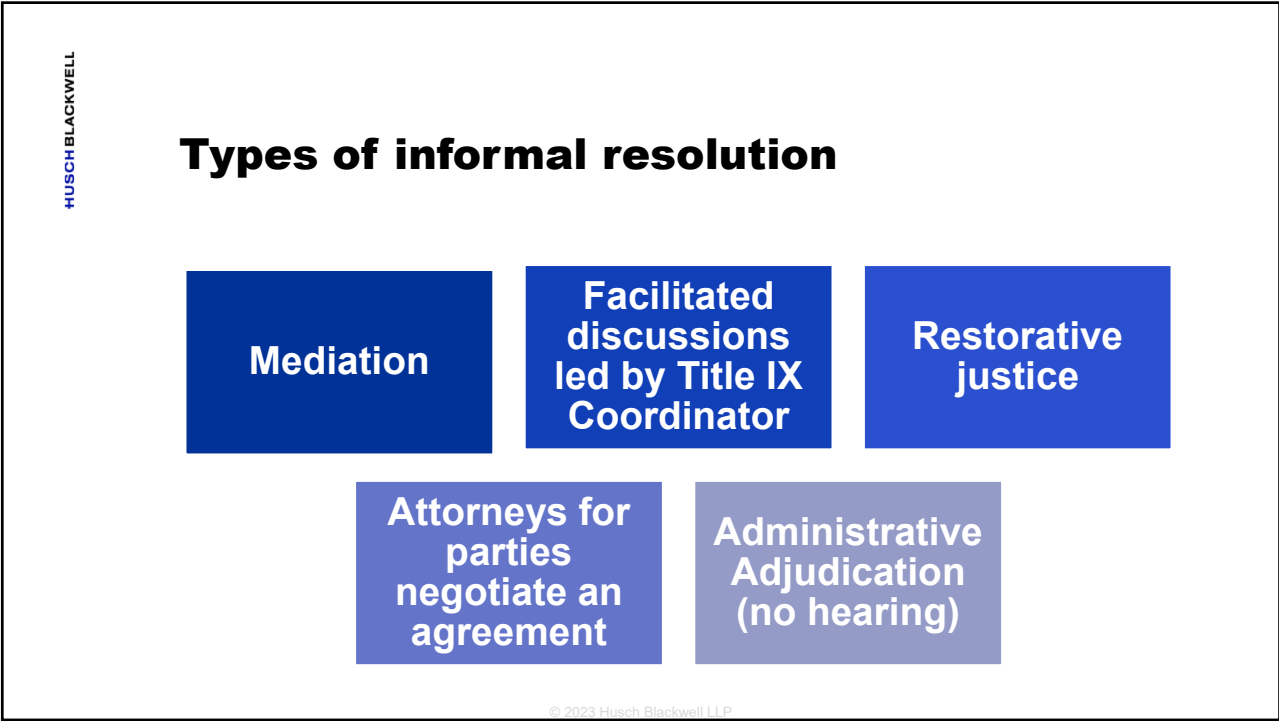
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Module 5: Choosing a Method of Informal Resolution

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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 Title IX Coordinator

- 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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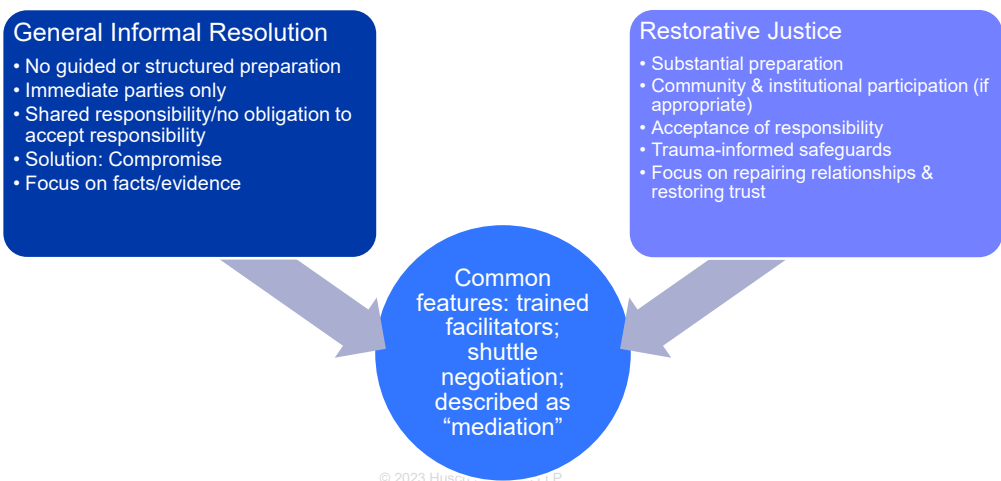
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What is restorative justice?

- “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

How does restorative justice compare to general informal resolution?



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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Sample Administrative Adjudication Policy Language

1. **Administrative Adjudication (Optional)** In lieu of the hearing process, the parties may consent to have a Formal Complaint resolved by administrative adjudication as a form of informal resolution. Administrative adjudication is voluntary and must be consented to in writing by both parties and approved by the Title IX Coordinator. At any time prior to the issuance of the administrative officer's determination, a party has the right to withdraw from administrative adjudication and request a live hearing.
2. If administrative adjudication is selected, the Title IX Coordinator will appoint an administrative officer. The Title IX Coordinator will see that the administrative officer is provided a copy of the investigation report and a copy of all the evidence transmitted to the parties by the investigator.
3. The administrative officer will promptly send written notice to the parties notifying the parties of the administrative officer's appointment; setting a deadline for the parties to submit any written response to the investigation report; and setting a date and time for each party to meet with the administrative officer separately. The administrative officer's meetings with the parties will not be held any earlier than ten (10) days from the date of transmittal of the written notice specified in this paragraph.
4. A party's written response to the investigation report must include:
 1. To the extent the party disagrees with the investigation report, any argument or commentary regarding such disagreement;
 2. Any argument that a particular piece or class of evidence should be categorically excluded from consideration at the hearing based on privilege, relevancy, the prohibition on the use of sexual history, or for any other reason;
 3. Argument regarding whether any of the allegations in the Formal Complaint are supported by a preponderance of the evidence; and
 4. Argument regarding whether any of the allegations in the Formal Complaint constitute Sexual Harassment.
5. After reviewing the parties' written responses, the administrative officer will meet separately with each party to provide the party with an opportunity make any oral argument or commentary the party wishes to make and for the administrative officer to ask questions concerning the party's written response, the investigative report, and/or the evidence collected during the investigation.
6. After meeting with each party, the administrative officer will objectively evaluate all relevant evidence, including both inculpatory and exculpatory evidence and ensure that any credibility determinations made are not based on a person's status as a Complainant, Respondent, or witness. The administrative officer will take care to exclude from consideration any evidence that the administrative officer determines should be ruled inadmissible based on the objections and arguments raised by the parties in their respective written responses to the investigation report. The administrative officer will resolve disputed facts using a preponderance of the evidence (i.e., "more likely than not") standard and reach a determination regarding whether the facts that are supported by a preponderance of the evidence constitute one or more violations of the policy as alleged in the Formal Complaint.
7. Thereafter, the administrative officer will consult with any University official and the Title IX Coordinator and will prepare and transmit a written decision, which shall serve as a resolution for purposes of informal resolution.
8. Transmittal of the administrative officer's written determination concludes the administrative adjudication, subject to any right of appeal.
9. Although the length of each administrative adjudication will vary depending on the totality of the circumstances, the University strives to issue the administrative officer's written determination within twenty-one (21) days of the transmittal of the initiating written notice

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Hypothetical—what process is this?

- Informal Resolution Coordinator 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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34 C.F.R. § 106.45(b)(1)(v) Grievance Process Requirements

Include **reasonably prompt time frames** for conclusion of the grievance process, including reasonably prompt time frames for filing and resolving appeals **and informal resolution processes** if the recipient offers informal resolution processes, and a process that allows for the temporary delay of the grievance process or the limited extension of time frames for **good cause** with written notice to the complainant and the respondent of the delay or extension and the reasons for the action.



Good cause may include considerations such as the absence of a party, a party's advisor, or a witness; concurrent law enforcement activity; or the need for language assistance or accommodation of disabilities

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

| | |
|-------------|---|
| Support | <ul style="list-style-type: none"> • Provide personal support to the party throughout |
| Preparation | <ul style="list-style-type: none"> • Help the party prepare for meetings and interviews |
| Presence | <ul style="list-style-type: none"> • Be present with the party during meetings and interviews |
| Review | <ul style="list-style-type: none"> • 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 | <ul style="list-style-type: none"> • Advisor cannot inhibit communication between the institution and party |
| Disrupt | <ul style="list-style-type: none"> • Advisor cannot disrupt meetings and interviews |
| Argue | <ul style="list-style-type: none"> • Advisor is not permitted to argue with the investigator/informal resolution facilitator |
| Evidence | <ul style="list-style-type: none"> • 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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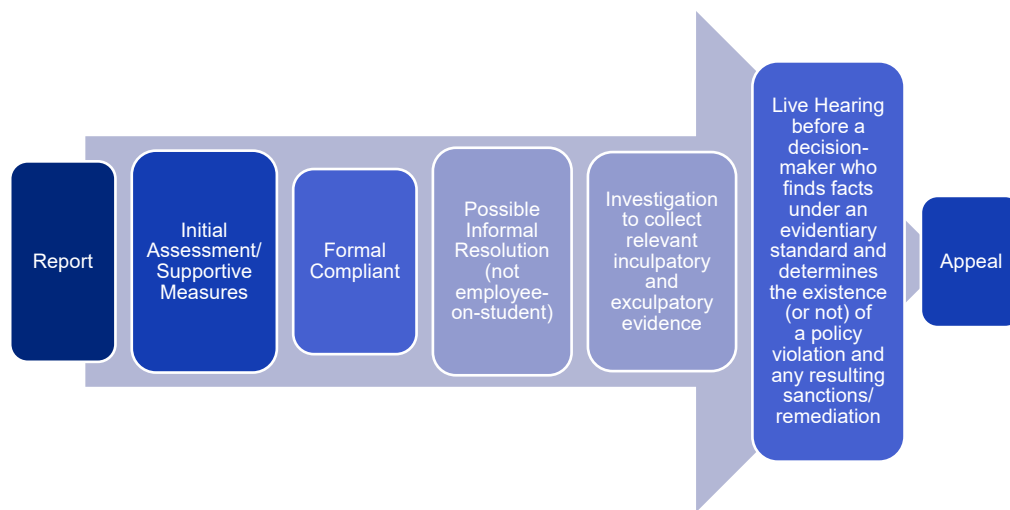
Re-Starting Formal Process

- 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 Formal 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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Restarting Formal Process



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Hypothetical – Restarting Formal Process

- Complainant alleges that Respondent told sexually charged and hurtful jokes, in Complainant's view, every other day during RA training for a few months. After a formal complaint is filed and then both parties agree to informal resolution. They each met with the Deputy Title IX Coordinator to discuss what they wanted/needed to resolve this matter. Complainant wants Respondent to attend in-person training and write a paper on what Respondent has learned about sexually offensive jokes to show Respondent has learned from this experience. Respondent refuses to ever attend in-person training but is willing to listen to virtual training only.

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Interplay with Campus Mediation Programs

- Questions for discussion:
 - Does your institution have a campus mediation program or ombuds program?
 - Have you used such programs to facilitate an informal resolution under Title IX?
 - What issues did this raise?
 - How did you address issues related to confidentiality and implementation?

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Module 6: Role of the Facilitator and Questioning Parties

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Who facilitates an informal resolution?

- Any suitably qualified and trained person may facilitate informal resolution, including the Title IX Coordinator
- Facilitator can be a third-party mediator or alternative dispute resolution specialist
- Default rules on conflicts of interest and bias apply

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What are some general principles about communications?

| | |
|---------|--|
| Timing | <ul style="list-style-type: none"> • Communicate as soon as reasonably possible within a given process |
| Setting | <ul style="list-style-type: none"> • Choose an appropriate setting and method of communication |
| Role | <ul style="list-style-type: none"> • Maintain role and understand the role of others involved |
| Prepare | <ul style="list-style-type: none"> • 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 IR 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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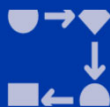
Remember overall purpose

- 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



“Can you 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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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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Example – Discussion

- Complainant has accused Respondent of hostile environment sexual 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 on-going 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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Example – Discussion

- You are serving as the facilitator for an informal resolution. The Complainant tells you that he wants an on-going no contact order for the duration of the three years he plans to be at the University. You ask the Complainant how he would feel if he saw the Respondent in passing at a campus event. The Complainant says, "I don't know."



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For Discussion

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

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How do we approach trauma in a Title IX case?

- 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 case
- 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
 - What word can you make out of the letters of “LISTEN” that is an essential skill for effecting communication?
 - 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

- 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.
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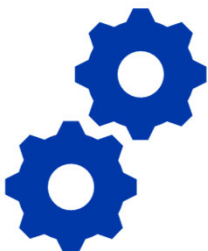
Active Listening

- 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.
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Group Scenario



Student A has filed a Formal Complaint against Student B alleging sexual assault three years ago when the two students were freshmen. Although Student A has filed the formal complaint, Student A is concerned about retaliation from Student B’s friends if the complaint goes through an investigation and hearing process and Student A has requested informal resolution. Student A wants Student B to be restricted from the University chorus that Student A and Student B are both actively involved in, and Student A wants Student B to pay for counseling Student A has received since the alleged sexual assault occurred. You begin to consider these requests, when an attorney contacts you a week later, on behalf of Student A and communicates that Student A is now demanding tuition remission for the semester when the sexual assault occurred (Student A failed several courses that semester), and that Student B be dismissed from the College.

Put yourself in the position of the Title IX Coordinator, and discuss the following:

- What questions do you have for Complainant about the initial request? How might your inquiry result in different requested remedies that you propose to the Respondent?
- Discuss the next steps in communicating with the Respondent. How do you anticipate the Respondent may respond?
- Discuss the issues related to the communication from the attorney. What are your next steps?

Questions?



Module 7: Drafting and Enforcing Agreements

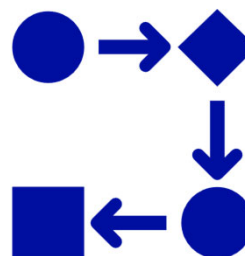
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Informal Resolution Agreement

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



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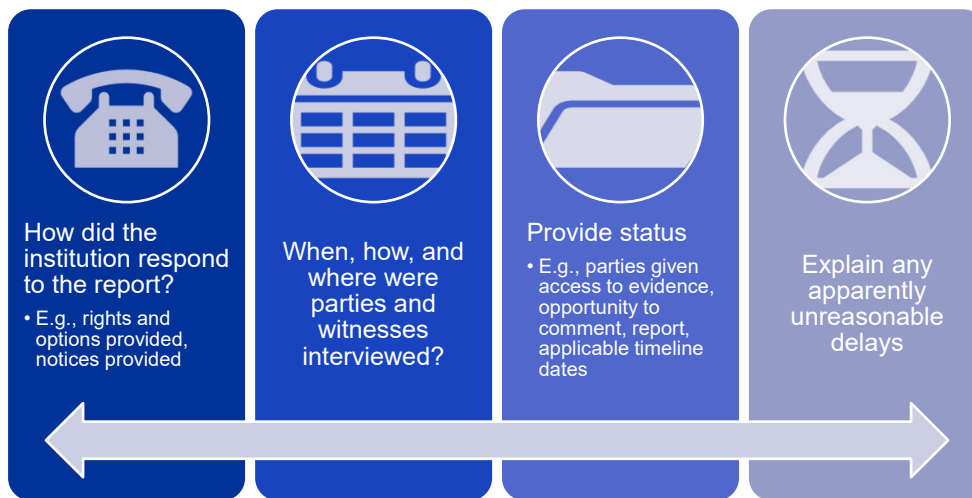
Informal Resolution Agreement Cont.

- Key Elements
 - Explanation/background regarding formal 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
- 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/extra-curriculars)
 - Identity of decider if questions arise

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Post-Conference: Monitoring

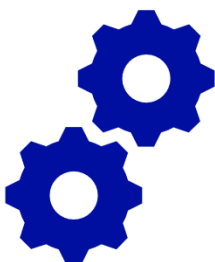
- Hypo: Respondent becomes non-responsive and does not participate in agreed-to educational activities.
- How do we enforce?



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Group Scenario



Taylor and Alex are both Resident Advisors in the largest 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 Netflix. Taylor begins rubbing Alex's back and moves to Alex's 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 Formal 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 she wants to proceed informally because she does not want her 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, Pat, and digitally penetrates Pat. Pat reports to the Title IX Coordinator that Taylor and Pat were watching tv, Alex began rubbing Pat's back and thighs (which Pat says Pat consented to), but then Taylor digitally penetrated Pat without Pat's consent. Pat does not know about Alex's allegations, Formal Complaint, or Informal Resolution.

Questions:

1. You are the Title IX Coordinator, do you permit Informal Resolution, why or why not?
2. Let's assume you deny Pat's request for informal resolution, how do you tell Pat while maintaining confidentiality? How do you document that conversation?
3. Let's assume you approve Pat's request for informal resolution, how does this prior Formal 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 Formal Complaint by Pat?

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Questions?




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Wrap Up

- Follow policies
- Ensure fairness
- Document
- Seek assistance when needed



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