

# 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



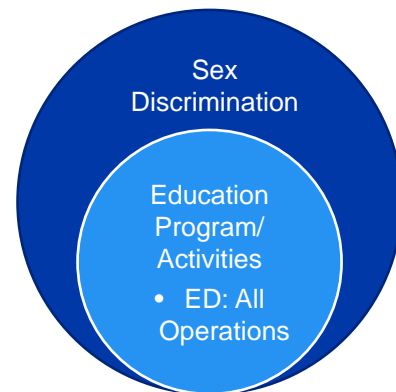
## Who does Title IX apply to?

- 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



## 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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## Does Title IX apply to sexual harassment in other countries?

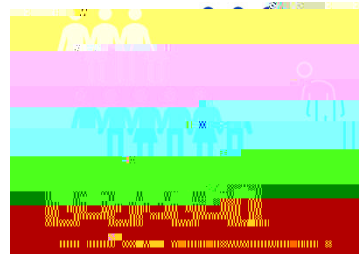
- No – the Department of Education interprets Title IX to apply only within the geographic boundaries?

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## Additional Legal Considerations

## Title VII of the Civil Rights Act of 1964

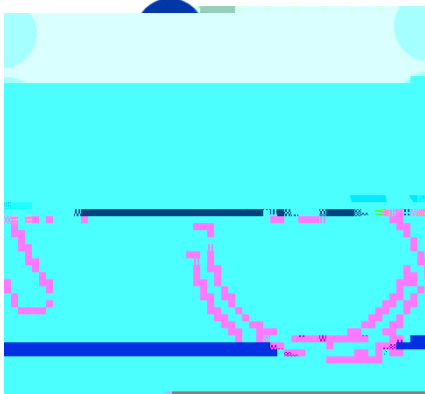
- Prohibits discrimination in employment (private and public) based on:
  - Race
  - Color
  - Religion
  - National Origin
  - Sex







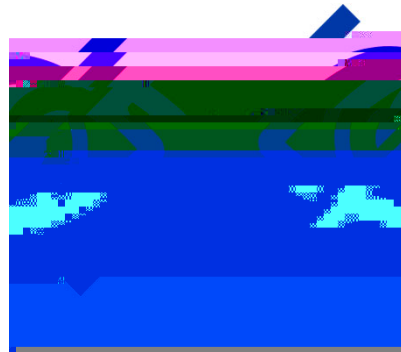
## Applicable disabilities statutes



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

## 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

## 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



## What is sexual harassment?

Conduct on the Basis of Sex that is:

Quid Pro Quo Harassment

Hostile Environment Harassment

Sexual Assault

Relationship Violence

Stalking

## 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













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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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## 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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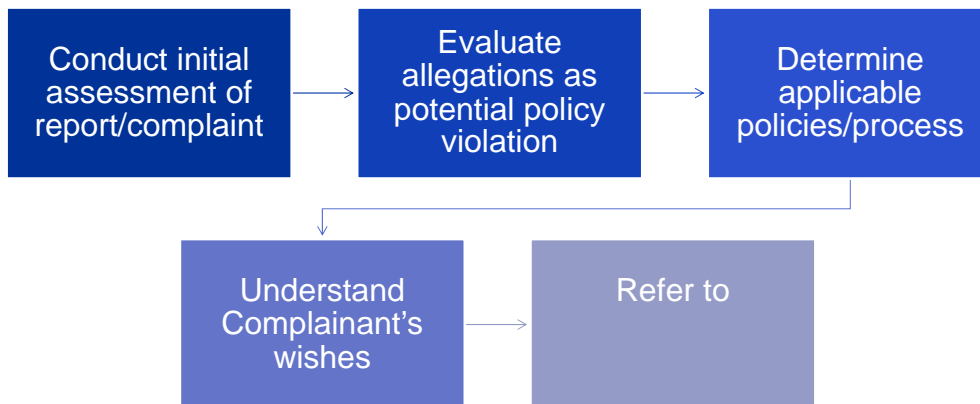
What are the institution's overall duties?







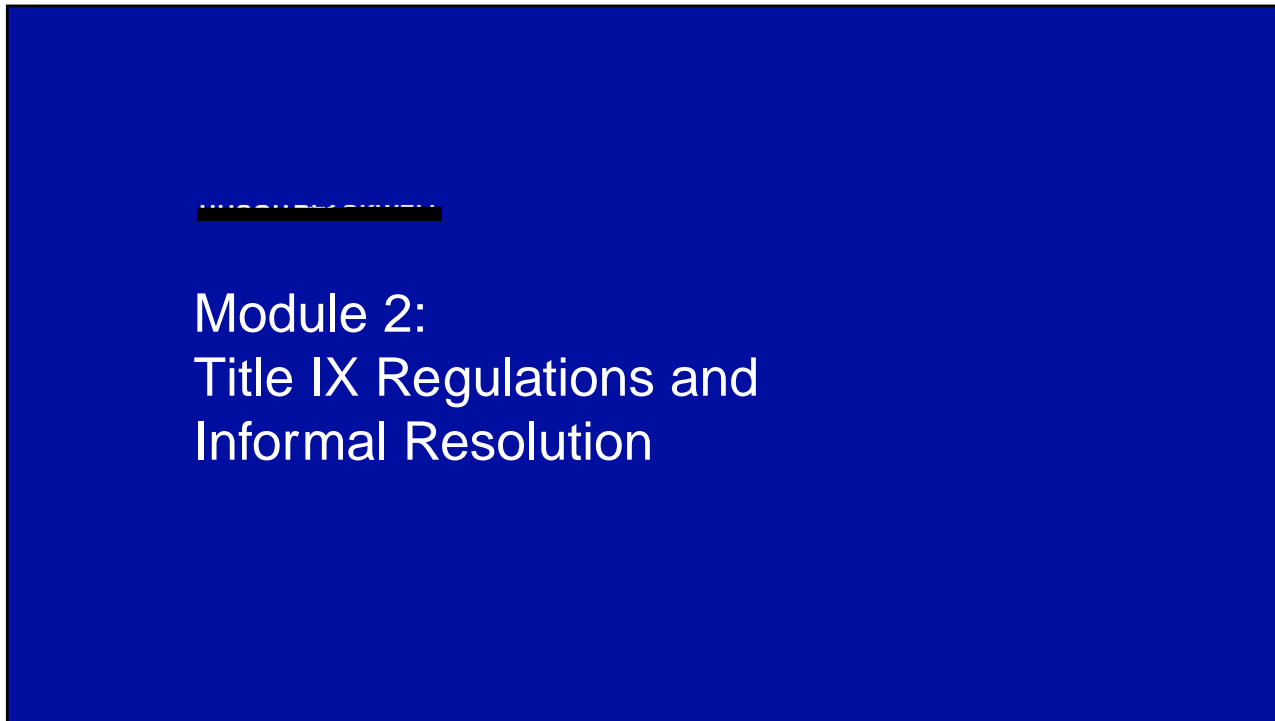
## Intake process



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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 **such aluponsi5.8(i)1141.8127m/lm1a6l4 (l0a660 Tv**

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

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### XIV. Informal Resolution

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**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.<sup>192</sup> A school is not permitted to offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student.<sup>193</sup>

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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

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

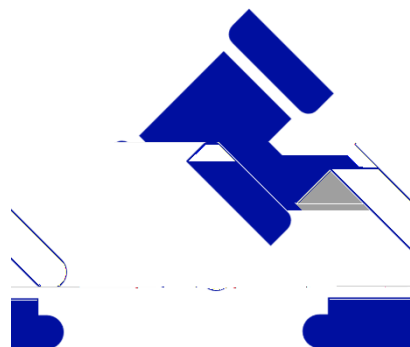
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## Proposed Changes to the Regulations

### 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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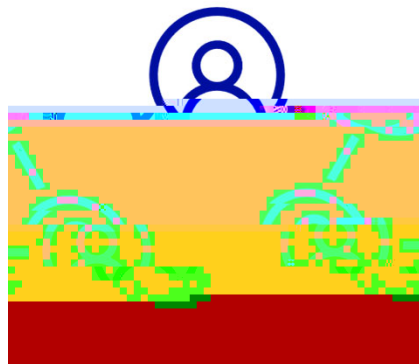
## Proposed Changes to the Regulations

### 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.

## What is informal resolution?

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



## 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

## 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









## 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.

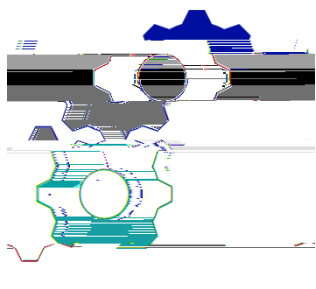
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## Example: Bias

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

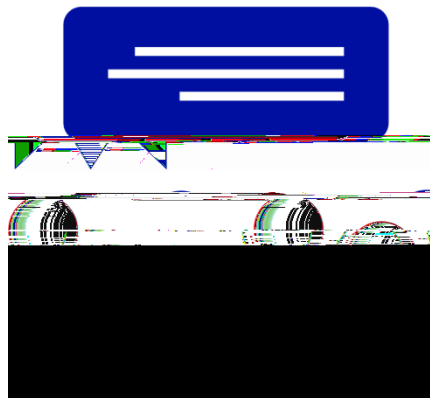
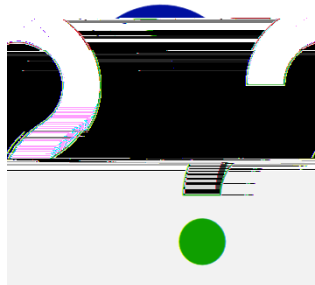
## Group Scenario



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.

## Questions





*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.

*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

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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



*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





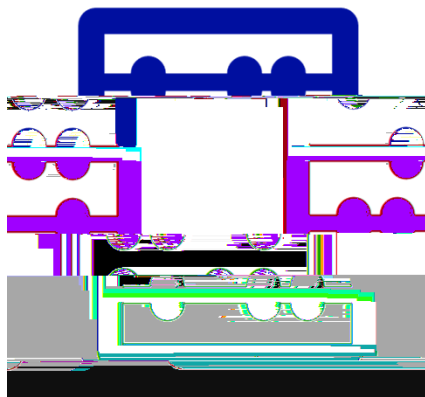
## Written Notice of Allegations

- 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

## 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

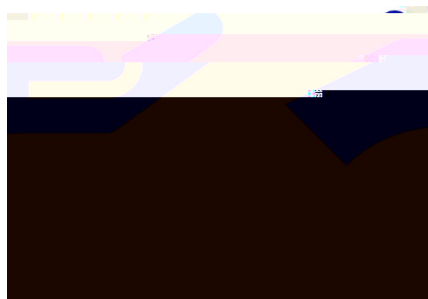
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## Supportive measures and IR

- Supportive measures may become agreed-to terms in informal resolution agreements
- Ensure clarity
- Ensure ability to enforce
- Consider how to address aspect

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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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## 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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## Module 5: Choosing a Method of Informal Resolution

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### Types of informal resolution

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**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.

## Facilitated Discussions Led by Title IX Coordinator

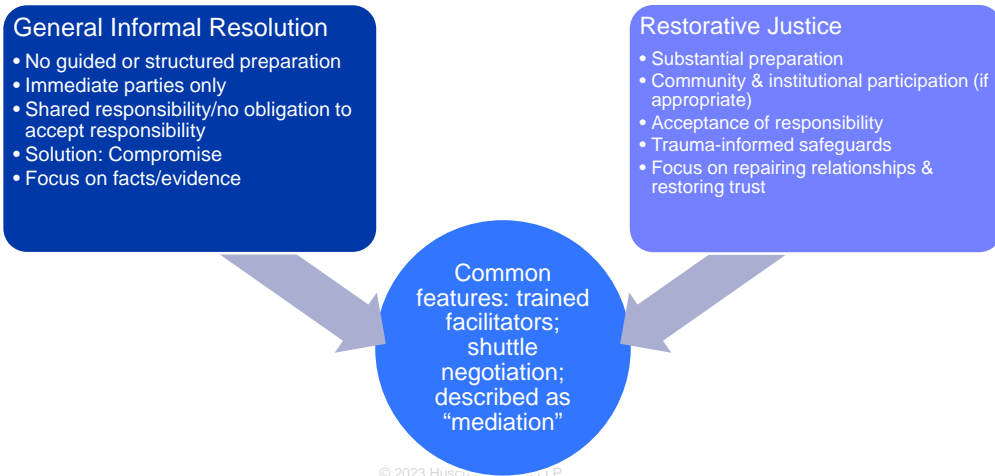
- Lots of permutations of this process
  - In-person v. virtual
  - Same room v. not same room
  - Live v. not live
  - Email v. Other

## 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.”

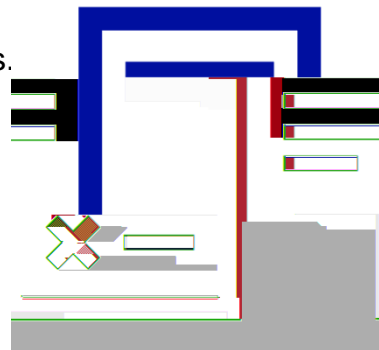
-Howard Zehr

## 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



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

## Inhibit

- Advisor cannot inhibit communication between the institution and party
- Advisor cannot disrupt meetings and interviews

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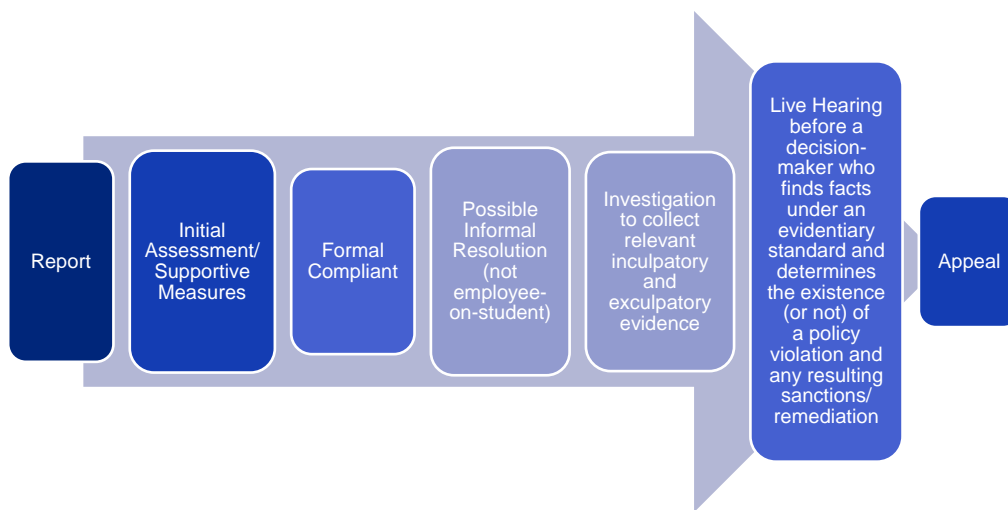
## Re-Starting Formal Process

- 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

## 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"> <li>Communicate as soon as reasonably possible within a given process</li> </ul>
Setting	<ul style="list-style-type: none"> <li>Choose an appropriate setting and method of communication</li> </ul>
Role	<ul style="list-style-type: none"> <li>Maintain role and understand the role of others involved</li> </ul>
Prepare	<ul style="list-style-type: none"> <li>Anticipate questions that you will be asked and have responses ready</li> </ul>

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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





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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

## 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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## 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.
- 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.
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## Module 7: Drafting and Enforcing Agreements

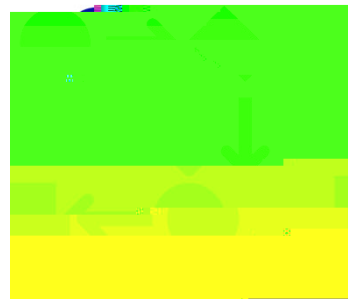
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### Informal Resolution Agreement

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- 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



How did the institution respond to the report?

- E.g., rights and options provided, notices provided

When, how, and where were parties and

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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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## 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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