



SESSION 5: BEST PRACTICES IN INFORMAL RESOLUTION

Title IX Required Training for “Informal Resolution Facilitator”

Must receive training on:

1. The definition of sexual harassment in the new Title IX regulations (above)
2. The scope of the recipient’s education program or activity (above)
3. **How to conduct an informal resolution process;**
4. How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias (above)
5. Training must not rely on sex stereotypes (above)
6. Training must promote the impartial investigation and adjudication of formal complaints of sexual harassment (above)

NOTE: Training materials must be maintained for 7 years and posted on school website



Background: Title IX Policy and Regulations

- 2001 Policy: “In some cases, such as alleged sexual assaults, mediation will not be appropriate even on a voluntary basis.”
- 2011 Policy: “[I]n cases involving sexual assault, mediation , is not appropriate even on a voluntary basis.”
- 2017 Policy: “If all parties voluntarily agree to participate in an informal resolution that does not involve a full investigation and adjudication after receiving a full disclosure of the allegations and their options for formal resolution and if a school determines that the particular Title IX complaint is appropriate for such a process, the school may facilitate an informal resolution, including mediation, to assist the parties in reaching a voluntary resolution.
- 2020 Regulations: Informal resolution permitted except to resolve allegations that an employee sexually harassed a student.



Preamble to the Title IX Regulations

- Informal resolution “empowers the parties by offering alternative conflict resolution systems that may serve their unique needs and provides greater flexibility to recipients in serving their educational communities.”
- “Permitting informal resolution is an appropriate policy development subject to the limitations and restrictions in the final regulations.”
- Provides “recipients an avenue for using the disciplinary process to educate and change behavior in a way that the adversarial formal grievance process might not, in situations where both parties voluntarily agree to participate.”



Informal Resolution,

34 C.F.R. § 106.45(b)(9)

- Must not be used to resolve allegations that an employee sexually harassed a student
- Must not require a waiver of the right to an investigation and adjudication of formal complaints of sexual harassment as a condition of enrollment, continuing enrollment, employment, continuing employment, or enjoyment of any other right.
- Voluntary:
 - Must not require the parties to participate in an informal resolution process.
 - Must obtain the parties' voluntary, written consent to the informal resolution process and provide written notice (as required)
- Timing:
 - Must not offer an informal resolution process unless a formal complaint is filed.
 - May facilitate an informal resolution process at any time prior to reaching a determination regarding responsibility

NEW TITLE IX REGULATIONS – INFORMAL RESOLUTION

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Informal Resolution,

34 C.F.R. § 106.45(b)(9)

Written notice to the parties must be provided and disclose:

1. the allegations,
2. 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
3. any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared.

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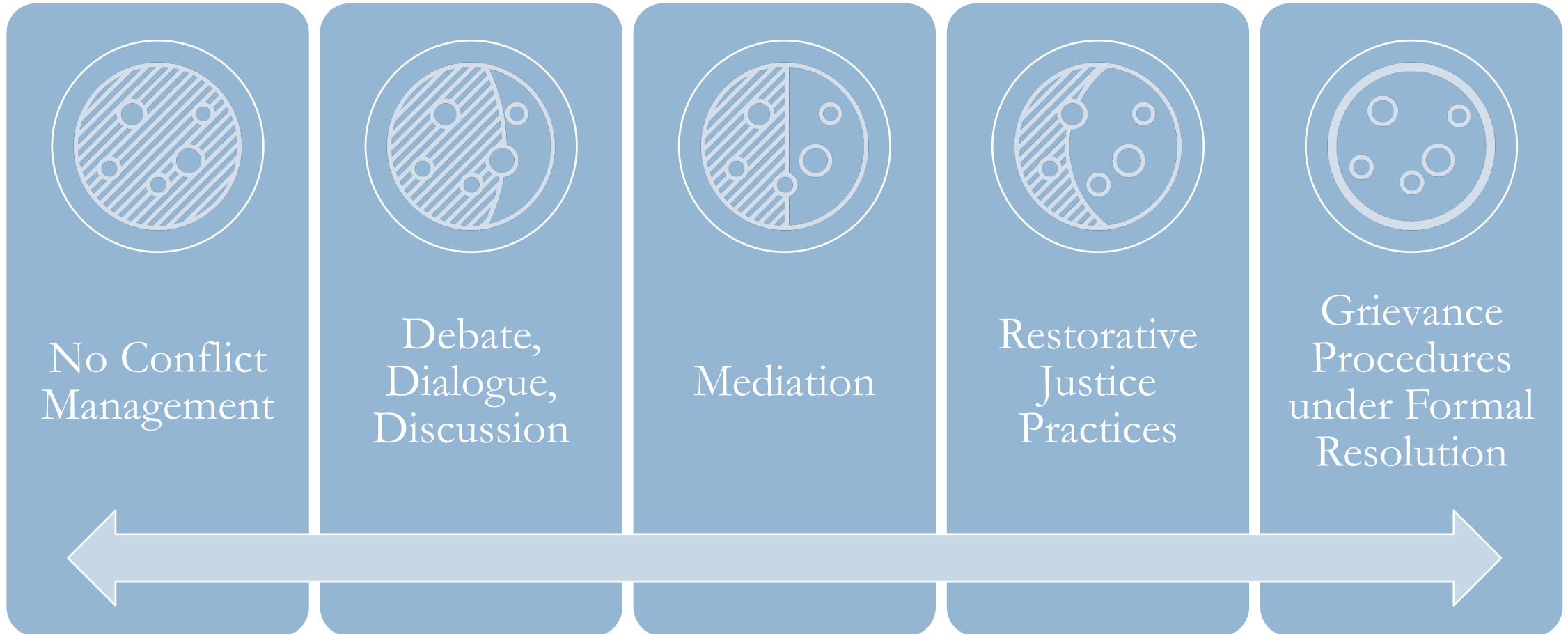
Qualifications of an Informal Resolution Facilitator

1. Trained as required by new Title IX regulations
2. Expertise and experience with informal resolution techniques
3. Cannot be the same person(s) as the Investigator or Decision-Maker
4. No conflict of interest
5. No bias for or against complainants or respondents generally
6. No bias for or against an individual complainant or respondent
7. Can be an external facilitator



Note: Advisors are permitted to participate in the informal resolution process.

Spectrum of Conflict Resolution



Advantages of Informal Resolution Process

- Great control to the parties
- Offers complainants an option other than full investigation
- Respondent may prefer expedited process and be prepared to confess, apologize, get sanctioned
- Avoids adversarial posture of formal process
- Shortens timeframe of Title IX process in many cases
- Frees resources if case resolved informally and more quickly than formal investigation and adjudication process
- Made several changes to address potential risks
- Increased compliance with outcomes
- More customized remedies



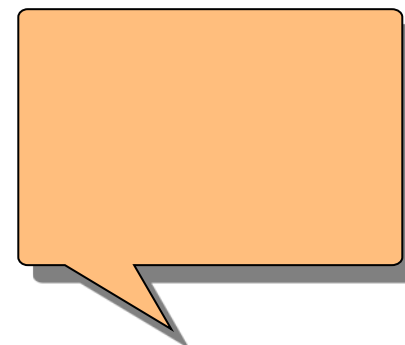
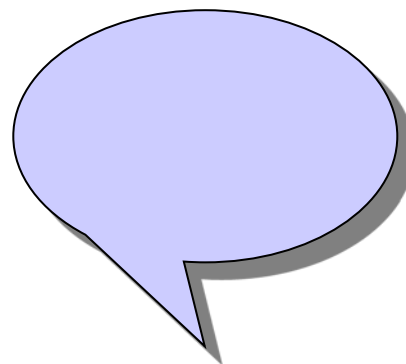
Considerations relating to Confidentiality

- Important the parties are fully aware of the consequences of participation – that the records relating to informal resolution will be maintained for seven years and records that may or may not be shared
- Title IX Regulations do not include any limitation on the use of confidentiality provisions in an informal resolution agreement (e.g., as a condition of final agreement)
 - Preamble: *“We believe as a fundamental principle that parties and individual recipients are in the best position to determine the conflict resolution process that works for them; for example, a recipient may determine that confidentiality restrictions promote mutually beneficial resolutions between parties and encourage complainants to report, or may determine that the benefits of keeping informal resolution outcomes confidential are outweighed by the need for the educational community to have information about the number or type of sexual harassment incidents being resolved.”*
- Information from informal resolution process cannot be used in any subsequent disciplinary process



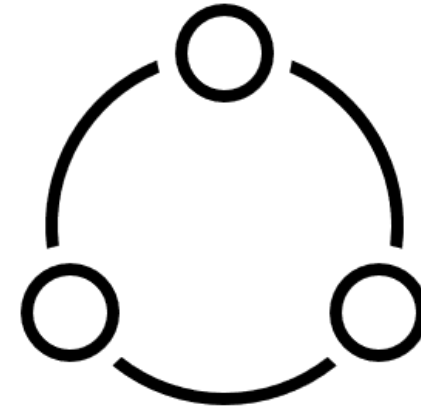
Types of Informal Resolution (non-exhaustive)

- Mediation
- Facilitated Dialogue
- Restorative Justice
- Circle of Support and Accountability



The Mediation Process

- Mediator's Opening Remarks
- Opening Statements by Parties/Counsel
- Parties Share Perspectives
- Parties Identify Issues
- Parties Generate and Evaluate Options
- Caucuses Taken as Necessary
- Parties Negotiate to Arrive at Mutually Agreeable Resolution
- Mediator Drafts Memo that Captures What Parties Agreed Upon



Principles of Mediation

- Empower Participants
 - Providing opportunity for dialogue between parties
 - Immediate Parties Only
- Trained Personnel in Mediation
 - Mediator's Role is a True Neutral
- No Blame
- Limited Safeguards
 - Question of confidentiality
- Focus on Shared Interests
- Seek Mutually Satisfying Resolutions



Facilitated Dialogue

A structured and facilitated conversation between two or more individuals, most often the Complainant, the Respondent, and/or other community members. The focus is often on providing a space for voices to be heard and perspectives to be shared. Depending on stated interests, the participants may sometimes work towards the development of a shared agreement, although working towards an agreement is not always the intended outcome.



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Principles of Restorative Justice

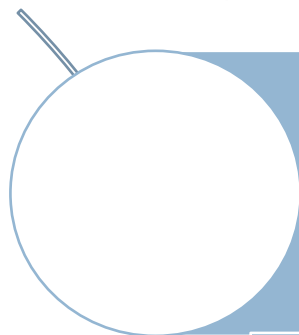
- Acceptance of responsibility
- Focus on repairing the harm caused
- Empower participants: the people most affected by the incident should be able to participate in its resolution
- Providing opportunities for dialogue between parties
- Community and institutional stakeholder participation
- Trauma-informed safeguards



From the
Preamble:

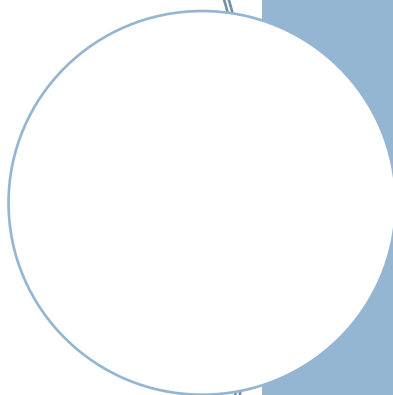
A school could use a restorative justice model after a determination of responsibility finds a respondent responsible.

The Restorative Justice Process



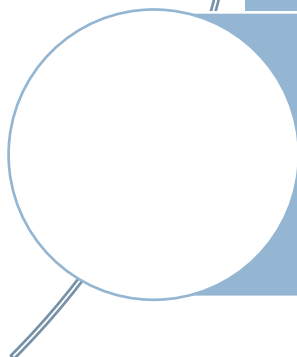
Preconference

- Voluntary, complainant-driven
- Preparation and assessment of objectives



Conference

- What happened from your perspective?
- What have you thought about since?
- What harm was caused? What was the impact?
- How can the harm be addressed?
- How can trust be restored?



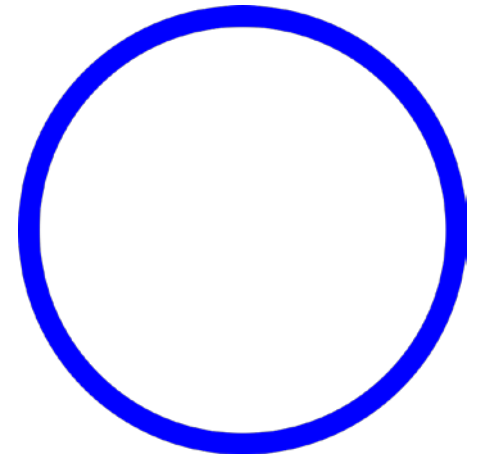
Post-conference

- - Support for respondent and supervision

Circle of Support and Accountability

A facilitated interaction between the Respondent and University faculty and/or staff designed to provide accountability, structured support, and the development of a learning plan. The focus is to balance support and accountability for an individual who has acknowledged their obligation to repair harm and willingness to engage in an educational process. This model does not require participation from the Complainant.

-- University of Michigan



Possible Follow-up Measures

- Alcohol education
- Regular meeting with appropriate University official or office
- Extension of no contact order
- Restriction from participation in specific clubs and/or organizations
- Restriction for participation in particular events
- Completion of an educational plan
- Counselling sessions



Recordkeeping

School must maintain for a period of seven years records of –

1. Each sexual harassment investigation including any determination regarding responsibility and any audio or audiovisual recording or transcript, any disciplinary sanctions imposed on the respondent, and any remedies provided to the complainant designed to restore or preserve equal access to the school's education program or activity;
2. Any appeal and the result therefrom;
3. Any informal resolution and the result therefrom; and
4. All materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process. A school must make these training materials publicly available on its website, or if the school does not maintain a website the school must make these materials available upon request for inspection by members of the public.





QUESTIONS?

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