



Fagen Friedman & Fulfroost LLP

# 2020 Title IX Regulations: Informal Resolution Facilitators Training



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# Ask Questions



# What is Informal Resolution (IR)?

- Informal method to settle formal complaints of Title IX Sexual Harassment
- Can be offered
- Must be offered consistently



# When Can Informal Resolution be Offered?

- Can only be used when formal complaint has been filed
- Cannot be used in cases of employee-on-student harassment
- Can only be used if each party has given informed, written consent (cannot ever be required, indirectly or directly)





# Old Rules vs. New Rules

- Discouraged by OCR before
- Allowed in 2017 (but did not prohibit in cases involving employee sexual harassment of a student)
- Now allowed but only where formal complaint is filed and not in cases involving employee-on-student misconduct



# WHY ALLOW INFORMAL RESOLUTION?





When is Informal Resolution Useful?

Underlying Facts are Uncontested



# Robin's Report

- Robin and Cameron are freshman.
- Cameron told Robin that another student, a senior, Parker, was sending Cameron inappropriate messages.





# Robin's Report

- Robin encouraged Cameron to report, but Cameron refused.
- Peyton, another student, and Robin were at a party last weekend. Peyton told Robin, Peyton also receiving inappropriate messages from Parker.



# Robin's Report

- Because this seemed like a pattern, Robin reported it.
- The messages began with requests for dates but evolved into name calling (slut, skank), rambling comments about “obvious” desire for Parker, and incessant requests for connection.
- Cameron and Peyton are not interested in filing a formal complaint.



## **Your institution offers face-to-face restorative justice. Can this be done with Cameron?**

- Yes, because the new Title IX regs now clearly allow informal resolution**
- Yes, as long as the facilitator has been trained on Title IX**
- No, because Cameron has not filed a formal complaint**
- No, because sexual harassment cannot be addressed through informal resolution**



# Formal Complaint

- Written notice to all known parties
  - Grievance process
  - Allegations
  - Respondent presumed not responsible
  - Right to advisor
  - Right to inspect/review evidence
  - Notice of provision on false statements
  - Informal resolution process, if offered



# Types of Informal Resolution

- Restorative Justice
- Mediation
- Consider: Face to Face?



# Who Should Serve as an IRF?

- Trained Facilitator
- Neutral Party/Impartial/Unbiased
  - No conflicts of interest
- No prejudgment of case
- We do not recommend the IRF be involved in the investigation



# Bias, Conflicts of Interest, and Other Fairness Concerns

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# Standard

- The Department of Education declined to define “bias,” “conflict of interest,” “prejudice”
- The Department encourages application of an objective (whether a reasonable person would believe bias exists), common sense approach to evaluating whether a particular person serving in a Title IX role is biased, exercising caution not to apply generalizations that might unreasonably conclude that bias exists....





# Conflict of Interest

- Flexibility to choose informal resolution facilitator
- Can use a school employee
- Can use an individual with a history of working in certain fields
- Caution against using generalizations to identify conflict of interest



# Pre-Judgment

Tips for avoiding pre-judgment of facts:

- Each case is fact-specific
- Keep an open mind
- Listen to facts presented
- You are not an advocate for either party, even if you believe one is right



# Sex Stereotypes

- Must not rely on sex stereotypes such as:
  - Women are “asking for it” based on actions or clothing
  - Men cannot be sexually assaulted
  - Women only decide they were assaulted after the fact due to regret or embarrassment
  - Men are more likely to be sexual aggressors
- Consider intersection of sex stereotypes with race, ability, sexuality, and gender identity



**Title IX Coordinator signed the Formal Complaint and is acting as informal resolution facilitator.**

**Is that a conflict of interest?**

**Yes**

**No**



**You attend the same barre class as Parker. Is that a conflict of interest?**

**Yes**

**No**



**You have a history of working as a victim advocate. Is that a conflict of interest?**

**Yes**

**No**



**You are the ADA compliance officer.  
Is that a conflict of interest?**

**Yes**

**No**




**You have had training on trauma informed interviewing practices. Does that create bias or the risk of pre-judgement?**

**Yes**

**No**





A hand is holding a white envelope against a grey background. A large green arrow points from the right towards the envelope. A semi-transparent white circle is overlaid on the left side of the envelope, containing text and a list of items.

## Required & Recommended Notices

- **Notice of allegations + existence of IR process**
- **Offer of informal resolution (with impacts of participation)**
- **Notice of end of informal resolution without agreement**
- **Notice of successful informal resolution**



# Notices – Informal Resolution

## Informal Resolution Process

Offer of Title IX  
Informal  
Resolution  
Process

Notice of Closure  
of Title IX Informal  
Resolution  
Process



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## **Notice of Impact of Participation in Informal Resolution Process**

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- Option to withdraw and return to investigation process before resolution
- Neither party can ask for investigation to resume after resolution
- Records will be maintained for 7 years
- Confidentiality and privacy implications



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# Confidentiality of Informal Resolution Process

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- Can informal resolution facilitator be a witness in a later investigation?
- Can facts be used in a later investigation?
- Is the process confidential?

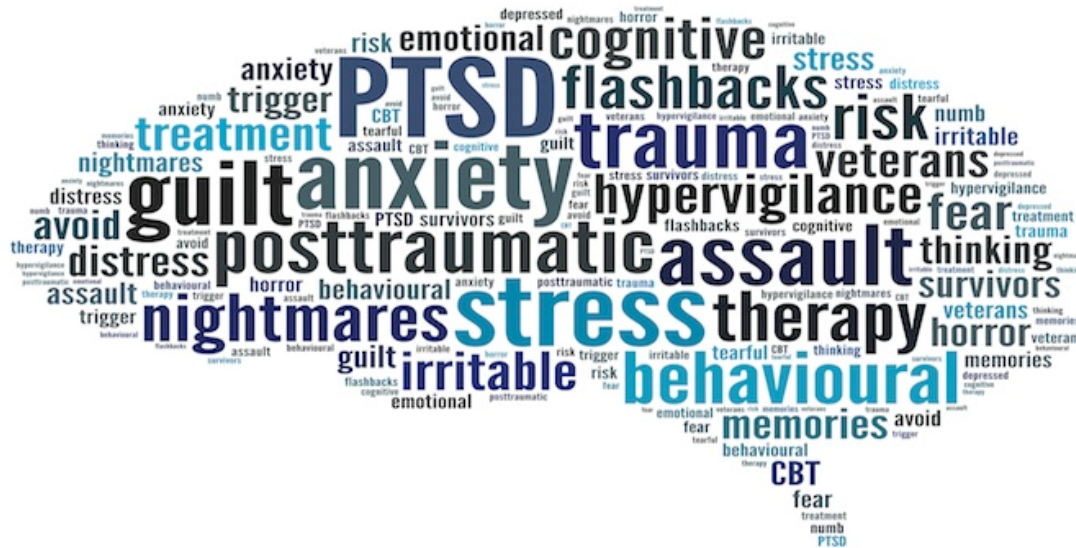


# The Mediation Process

- Introductions
- Information Collection
- Problem Identification
- Brainstorming Solutions
- Brokering the Deal
- Agreement



# Potential Trauma for CP and RP



# Emotions

- Silence is ok
- Empathy is ok (within reason/neutral) – “I can tell this is hard” “I’m sorry this is difficult”
- Allow breaks
- Remember equality not equity is goal for processes



# Introductions

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# Introduction

- Explain your role
- Participation is completely voluntary
  - Either party can end IR any time before a resolution agreement is signed
  - After resolution is reached, investigation cannot resume
- Provide copies of procedure



# Introduction

- Explain confidentiality and privacy implications of participating in IR
  - Used in investigation?
  - IRF as investigation witness?
- Outline IR Procedures
  - Expected duration
  - Opening statements?
  - Prohibit interruptions
  - Meet individually



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# Example Introduction

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# Brainstorming Solutions

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# Brainstorming Ideas

- Don't shut down ideas
- Write down all ideas
- Suggest, but don't advocate
- Discuss pros/cons and possibility of solution working



# Brainstorming Ideas

- “What solution would allow you to feel comfortable settling the complaint?”
- “If the other party were to offer  $x$ , would you be willing to offer anything in return?”
- If a party refuses to make further offers, ask questions to understand why



**What types of solutions  
might you brainstorm for  
Cameron, Peyton, and  
Parker?**



# Length of Informal Resolution

- Will vary depending on complexity
- 20 days is a reasonable time, but extensions will be warranted in many cases
- Try to obtain agreement to extensions from all parties
- Keep the Title IX Coordinator apprised of progress







# Outcome of IR



## **Cameron and Parker reach an agreement in informal resolution. Can the Title IX process ever recommence?**

- Yes, if Parker fails to comply with the terms**
- Yes, but only for allegations not resolved in informal resolution**
- No, because you can only recommence an investigation before a resolution is reached**



# Role of Institution If Agreement Reached

- Agreement is between the parties; institution is not a party
- IR Facilitator can:
  - Act as intermediary
  - Make suggestions, evaluations
  - Help with drafting document





# Recordkeeping



# Recordkeeping

Must maintain the following for 7 years:

- Sexual harassment investigation documents, including:
  - Determination regarding responsibility
  - Recordings or transcripts of live hearing
  - Disciplinary sanctions imposed on Respondent
  - Remedies provided to Complainant
- Appeal and result
- Informal resolution and result
- Actions taken in response to a report of sexual harassment
- Actions taken in response to a formal complaint of sexual harassment



# Recordkeeping

Responses to formal and informal complaints and actions taken in response should include:

- The basis for the school's conclusion that its response was not deliberately indifferent
- Documentation that it has taken measures designed to restore or preserve equal access to the school's education program or activity
- Supportive measures or if no supportive measures are provided, document the reasons why such a response was not clearly unreasonable in light of the known circumstances



# QUESTIONS?





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