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Informal Resolution as a Solution for Title IX Cases

WEBINAR LOGISTICS



All participants are **MUTED** upon entry of the webinar



Submit all questions in the **Q&A BOX**



This presentation is **RECORDED** and will be distributed after the webinar

MEET THE PRESENTERS



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INFORMAL RESOLUTION

A mutual and voluntary agreement between the parties involved in an allegation of sexual harassment or other sexual misconduct.

- Powerful Title IX tool
 - Allows parties a say in outcome
 - Can avoid cross-examination and hearing
 - Saves time and resources
 - So why isn't every case resolved informally?

PROS OF INFORMAL RESOLUTION

- Saves time and resources
- Avoids legal fees for the institution and parties
- Trauma informed
- Student centered
- Allows parties to have a say in the final outcome
- Can avoid cross-examination and hearings
- Avoids protracted formal process
- Reduces stress

CONS OF INFORMAL RESOLUTION

- Parties feel that they don't get their day in court
 - Allegations like sexual assault, dating violence and stalking punished with a slap on the wrist
- Parties forgo hearing
- Parties don't like to communicate with each other

HISTORY OF INFORMAL RESOLUTION

Before 2020 Regulations

- Not required as part of Title IX process
- Some schools offered a non-mediation based informal resolution process
- Earlier guidance from the Department of Education noted that mediation was not appropriate in cases involving allegations of sexual assault

CURRENT REGULATIONS

34 CFR § 106.45(b)(9)

- An institution may offer informal resolution for parties once a formal complaint with the school is filed
- Three requirements for entering into IR process
- Institution must:
 - Provide the parties with written notice
 - Obtain parties' voluntary consent to entering IR process
 - Refrain from facilitating or offering IR process that is related to an employee's sexual harassment of student

ANTICIPATED CHANGES

Moving the IR process language from §106.45(b)(9) to §106.44(k)

- §106.44(k)(1) would “specify that a institution may offer an informal resolution process at any time prior to determining whether sex discrimination occurred” (except for when an employee engages in sex discrimination toward a student). 87 Fed. Reg. 132, at 41453
- Department seeks to remove the formal complaint requirement for initiating IR process. 87 Fed. Reg. 132, at 41455
- “Provide notice and ensure that the facilitator for the informal resolution process is not the same as the investigator or decision maker for grievance procedures involving the same information reported or complaint.” Id.
- Department proposes adding potential terms that could be included in an IR process as added guidance.

INFORMAL RESOLUTION IS VOLUNTARY

Requirements

- Regulations provide: “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.” 34 CFR § 106.45(b)(9)
- What does this mean to you?

INFORMAL RESOLUTION IS VOLUNTARY

Institutions cannot require that parties engage in informal resolution

- Translation:
 - Institution cannot force students or employers to waive their right to a formal investigation
 - Institution cannot force students or employers to participate in informal resolution
 - Informal resolution is voluntary

OFFERING INFORMAL RESOLUTION

Notice must disclose:

“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.”

34 CFR § 106.45(b)(9)(i)

OFFERING INFORMAL RESOLUTION

Title IX – must offer informal resolution

- Other sexual harassment and misconduct policies are not required to offer informal resolution
- Informal resolution leads to different available remedies based on jurisdiction
- Can be confusing to parties
- Many institutions offer informal resolution for both policies
 - Those that do not may rely on earlier guidance that informal resolution is inappropriate for certain allegations

PRACTICAL ADVICE

- How best to present the option
 - When?
 - By whom?
- Notifying parties and advisors in writing of IR procedures
 - Best practices for whether the parties should sign the notice

Case study:

- Disgruntled TIXC who prohibited party from seeking informal resolution

REVISIT THE WELL

Parties may initially decline informal resolution

- Many decisions for parties to make when they first report and are put on notice of allegations
- Consider building in reminders about Informal Resolution at various points during process

Case study:

- Various cases that resolved informally after 1-2 years

COMMUNICATING WITH ADVISORS/ADVOCATES

- Best Practices
 - Inequality between advisors/advocates (attorney versus friend/family member) and how best to handle
- Friends or foes?
- Dealing with difficult advisors/advocates and personalities
- Using advisors/advocates to aid the Informal Resolution process

NITTY GRITTY OF REACHING A RESOLUTION

Options for who guides the process

- Parties/Advisors in the driver's seat
- TIXC as the go-between
- Another neutral option
- Case studies from all options

Sanctions

- How to respond to sanctions suggested by parties/advisors
- Whether school should suggest certain sanctions
- Restorative justice options
- What these options look like
- How to implement

NITTY GRITTY OF REACHING A RESOLUTION

Creative Out-of-Box Sanctions

Payments

- Medical expenses
- Legal fees
- Others

NITTY GRITTY OF REACHING A RESOLUTION

Supportive measures? YES!

- Always available to parties, formal **AND** informal
- Examples of supportive measures:
 - Counseling
 - No Contact Orders
 - Deadline extensions / changes to work or class schedules
 - Increased security/campus escort services

Practice tip:

- Make it clear in the Notice of Allegations that parties will receive supportive measures, no matter what option they choose

INFORMAL RESOLUTION AGREEMENT

- How criminal charges could affect a resolution
- Written resolution
 - K-12
 - Colleges and universities
- Best practices for who drafts the resolution agreement

INFORMAL RESOLUTION AGREEMENT

- Terms to be included
- Confidentiality
- Dismissing complaints with or without prejudice
- No contact orders/agreements
 - While enrolled or formally connected with school
 - What happens after graduation or during a separation from school?
- School's role in reviewing and approving it
 - Best practices for who approves and executes

INFORMAL RESOLUTION AGREEMENT

Facilitator

- Who will be facilitating it?
- Anyone it should not be?
- Practice tips

INFORMAL RESOLUTION AGREEMENT

Types of informal resolution

- Facilitated Dialogue
- Restorative Circle
- Negotiated Agreement

INFORMAL RESOLUTION AGREEMENT

Specifics to include:

- What the parties have agreed to
- A consequence that may apply if parties do not abide by terms
- What the student records will indicate
 - Any further allegations of misconduct
 - Student conduct / employee discipline
 - Background check
- List of people the outcome will be shared with

INFORMAL RESOLUTION AGREEMENT

Specifics to include:

- Any other terms agreed to (confidentiality, non-disparagement, no contact agreements, *etc.*)
- Acknowledgment that parties entered into terms voluntarily
- No appeal rights
- No formal process once signed

INFORMAL RESOLUTION AGREEMENT

Practice tip:

- Send a case closure letter to both parties once Agreement fully executed

Case studies

Other settlement documents sometimes used with Informal Resolution Agreement:

- Memorandum of Understanding
- Mutual Agreement of Settlement and Release

UNSUCCESSFUL ATTEMPT TO REACH AGREEMENT

Unsuccessful attempt at informal resolution/returning to formal process

- Regulations provide “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 with respect to the formal complaint.” 34 CFR § 106.45(b)(9)(i)
- Best practice: Advise parties in writing of return to formal process
- Effects of statements made during informal resolution
 - Can they be considered in a subsequent investigation under formal process?

Questions?



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