Best Practices for Title IX Informal Resolution

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Hello!

https://wordinfo.info/results/misnomer

informal [in-**fawr**-m*uh*l] SHOW IPA

See synonyms for: informal / informally on Thesaurus.com

adjective

1. without formality or ceremony; casual:
   an informal visit.
2. not according to the prescribed, official, or customary way or manner; irregular; unofficial:
   informal proceedings.

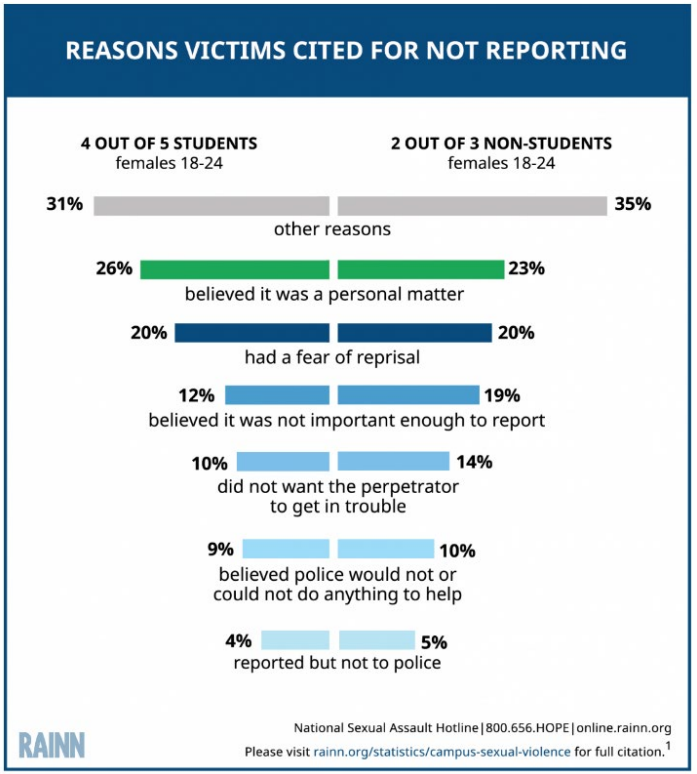
Big Picture

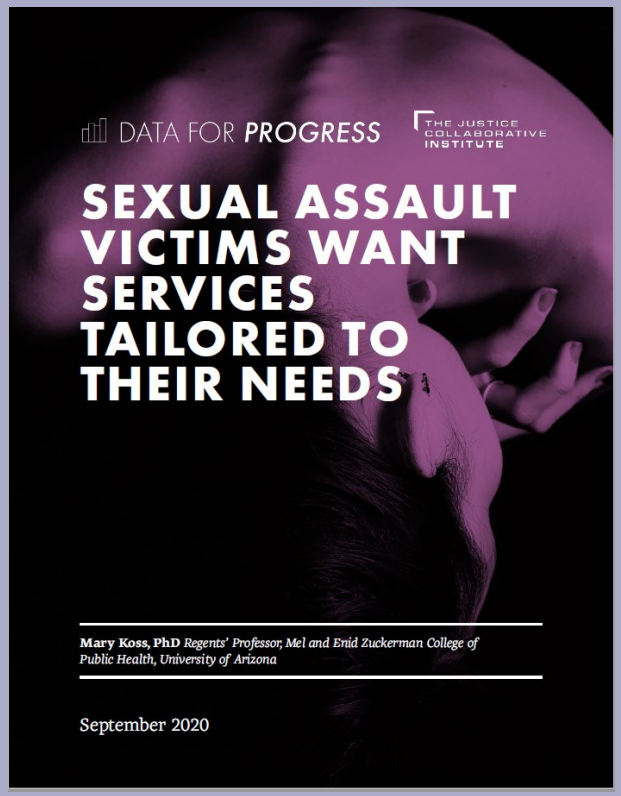
- Investigation/adjudication is a system designed by lawyers (to serve lawyers?)
- Deep, universal dissatisfaction with the investigation/adjudication model
- No appetite for return to mishmash of informal practices
- Is there an alternative to the investigation/adjudication model which is **rigorous** and **educational** role of colleges and universities?
- Much discussion about restorative justice but need for understanding of how to implement a thoughtful program

Title IX: The Need For More Options

Traditional investigative/adjudicative processes can often be incompatible with needs of victims/survivors:

- Long and intrusive investigation and decision process
- Potential for re-traumatization in a variety of different forms
- Confrontation and Cross-examination
- Reluctance to expose offender to severe disciplinary sanctions
- Concerns about confidentiality, maintaining personal and social relationships, etc.





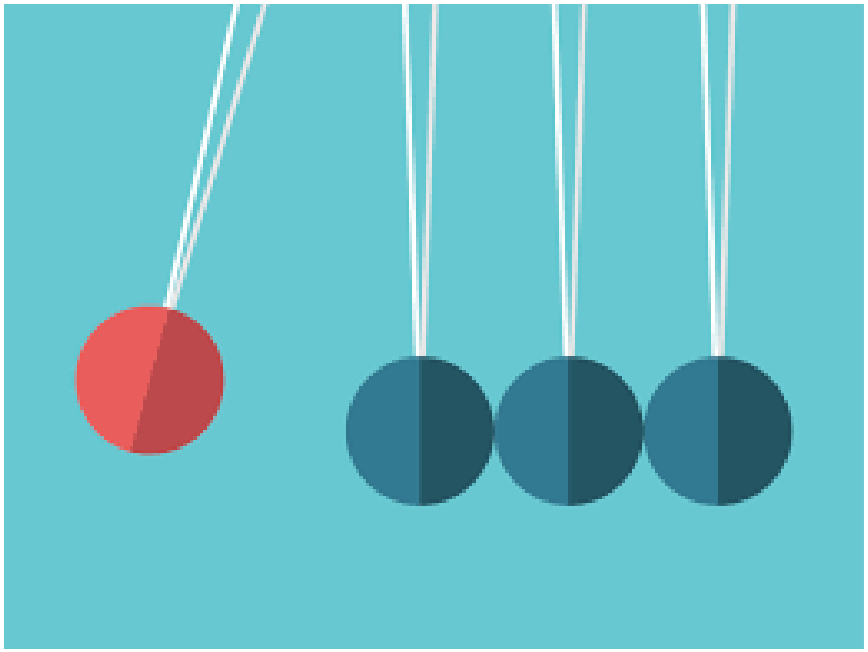
- "By offering victim-centered methods of accountability, like restorative justice, communities can both decrease reliance on policing and create a system where victims' voices are placed center stage, where they can feel comfortable asking for what they need without fear of negative repercussions."
- "Most victims, if asked, want a process that both prevents future harms and meets their needs, such as retaining control and protecting themselves from more trauma."

https://theappeal.org/the-lab/report/sexual-assault-victims-want-services-tailored-to-their-needs/

What are some examples of informal resolution?

- Educational Conversation**
- Mediation
- Administrative Adjudication
- Restorative Justice
- *Settlement with the involvement of attorneys

Title IX Compliance Requirements



2022 Regs Largely Consistent on IR

- Institution discretion/flexibility in offering and options
- Continued obligations to provide written notice of allegations, process/options, and rights
- Institution may choose not to offer informal resolution where there is a risk of future harm to others
- Protections for information/documents obtained through IR process
- No formal findings of responsibility/sanctions
- Facilitator must be different than investigator/decisionmaker

Compliance: Big Picture

1. Written notice, including rights and options
2. **Voluntary** and **timely** process
3. No conflict of interest
4. Facilitated by appropriately trained personnel
5. Know limits

Title IX Informal Resolution: Express Limitations

- ✓ May **not** offer or facilitate an informal resolution process to resolve allegations that an **employee sexually harassed a student**
- ✓ 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
- ✓ May **not** require the parties to participate in an informal resolution process

THE DAILY CALIFORNIAN

2 UCLA graduate students settle sex harassment suit

https://www.dailycal.org/2016/09/14/2-ucla-graduate-students-settle-sex-harassment-suit/

Rewind: Informal Resolution 5 Common Mishaps

1. "UCLA handled Takla's report through what appears to be a **truncated process** called 'Early Resolution,' rather than a formal hearing . . . even though [the administrator] learned through her investigation that **[Respondent] had previously harassed another** graduate student and two junior professors. **This was in violation of UCLA's own Title IX policy, which prohibits the use of Early Resolution in cases that involve multiple complaints of sexual misconduct**."
2. Administrator "**discouraged** Takla from filing a written request for a formal investigation, stating that [Respondent's] peers may well side with him and that Early Resolution would be faster and more efficient."

Takla v. Regents of the University of California (C.D. Cal. 2015)

truncated

/ˈtrəNGˌkādəd/

adjective

shortened in duration or extent.
"his truncated career"

- without its top or end section.
"a truncated pyramid"

5 Common Mishaps (cont.)

3. "Takla requested a formal investigative report after the conclusion of Early Resolution, but was told that **no formal documentation or report existed** because the matter was handled through Early Resolution. This too was **in violation of UCLA's own policy**, which states that Early Resolution efforts should be documented."
4. "UCLA took **nine months** to investigate Takla's report but did not make any findings at the conclusion of its investigation, **again in violation of UCLA's policy**."
5. "UCLA **did not inform Takla of the outcome** of Early Resolution or whether Piterberg was sanctioned for his conduct."

The Good News

- Very Few Successful Deliberate Indifference Claims Based on Informal Resolution Process/Outcome
- "[T]he decision to resolve [Complainant's] complaint informally without allowing [Complainant] 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 [Complainant] reported her assault, UC moved quickly to suspend her assailant, and UC imposed fairly stringent sanctions upon resolution of [Complainant's] complaint. We may disagree with UC's handling of [Complainant's] complaint, but that does not suffice for Title IX liability."
- "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 . . . .'"

Karasek v. Regents of the Univ. of California, 956 F.3d 1093, 1108–10 (9th Cir. 2020) (citing *Davis*, 526 U.S. at 648)

Practical Considerations

1. Facilitator's Role & Qualifications
   - Conflict of Interest/Bias
   - Soft Skills
   - Training
2. Prompt Resolutions
3. Documentation
   - Written Notice for Title IX Claims
   - Notice of Rights & Options
   - Consent/Participation Agreements
   - Final Resolution Agreement
4. Voluntary Participation
   - Red Flags
   - Initial Assessment of IR Requests

What is a Facilitator's Role?

- Varies with matter/policy
- E.g.,
  - Conduct intake in consultation with Title IX official
  - Provide notices
  - Develop agreed-upon process
  - Maybe interview witnesses, collect documents
  - Facilitate storytelling by all participants
  - Identify and list harms
  - Brainstorm solutions
  - Prepare resolution agreement with input from parties

Avoiding Conflict of Interest & Bias

Conflict of Interest:

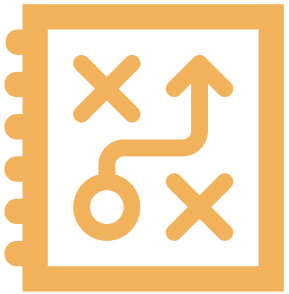
A material connection to a dispute, the parties involved, or a witness, such that a reasonable person would question the individual's ability to be impartial

- **Conflict of Interest/Bias**: Facilitator may "not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent."

- May be based on prior relationship; professional interest; financial interest; prior involvement in a matter; or nature of position

Conflict of Interest?

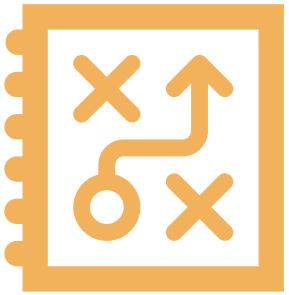
College has a well-regarded Office of Victim Services. Staff Counselor receives complaint and provides support and resources to Complainant. Complainant requests Counselor to facilitate informal resolution between Complainant and Respondent.



- May the Counselor serve as facilitator?

Conflict of Interest?

After assessing internal capacity, College determines that instructors in the School of Social Work have appropriate skills and training to facilitate conflict resolution. One of the instructors has published a paper on the use of trauma-informed practices in resolving sex misconduct complaints, including statistics of incident prevalence which show that male students are the primary perpetrators of sexual violence.



- May the instructor serve as a facilitator for a Title IX informal resolution?

Who is Responsible for Identifying Conflicts of Interest / Bias?

- Title IX Coordinator or designee oversees grievance process and must address known or reported conflicts of interest/bias
- Institution should also permit parties to raise concerns of conflicts of interest and bias
- Individual institutional actors should self-police conflicts of interest and self-identify bias

"Reasonably Prompt"

- Title IX Regs require "**reasonably prompt time frames**" for conclusion of the grievance process, including informal resolution processes.
- Temporary delay or 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
- Timeliness is key for all effective IR, not just sexual harassment

- What is a presumptively appropriate time from start to finish?
- How do we monitor and ensure prompt responses?

How Do We Document Our Process?

- Notice to the parties regarding the allegations
- Signed, written consent to participate
- Final Resolution Agreement (signed by all parties)
- Other Documentation as Appropriate

  (E.g., mutual confidentiality agreements, no contact orders)

How Do We Ensure Voluntary Participation?

- **Educate** the participants about informal resolution options
- Provide **Notice of Rights & Options**, such as:
  - ✓ Whether the process will involve a face-to-face interaction
  - ✓ 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
- Participation contingent on successful completion of preparatory meetings
- Require parties to sign a **Participation Agreement** memorializing initial assessment process
- Frequent check-ins and monitoring

Implications for Potential / Concurrent Legal Proceedings?

NEB. REV. STAT. § 25-2914.01(1)

"Any verbal, written, or electronic communication made in or in connection with matters referred to a restorative justice program which relates to the controversy or dispute undergoing restorative justice and agreements resulting from the restorative justice program, whether made to the restorative justice facilitator, the staff of an approved center, a party, or any other person attending the restorative justice program, shall be confidential and privileged."

Many students charged with misconduct that implicates criminal justice issues may be reluctant to participate in IR without assurances that their statements won't be used against them. How do we mitigate?

- 2022 regs offer protection within institutional processes
- MOU with local prosecutor?
- Civil litigation waiver?
- Mutual confidentiality agreement?
- State privilege or confidentiality law?
- FRE 408?

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Informal Resolution is Not for All Cases.

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 alleged respondent is a repeat offender
- Whether the person alleged to have caused the harm is participating in good faith

Remember: Traditional investigative/ adjudicative processes *must* be used when an employee is accused of sexually harassing a student.

How do we assess "Nature of Alleged Offense"?

- Behaviors (what kind of behavior, multiple times, escalating over time, etc.)
- Cognitive and developmental understanding (age, disability, etc.)
- Motivations/Intention (premeditated, "attempt" violation, etc.)
- Tactics (persistence, incapacitation, violence, etc.)

Initial Assessment Hypo 1

Title IX Coordinator receives formal complaint alleging sexual harassment. Complaint alleges that Respondent Student repeatedly "catcalls" and uses sexually suggestive innuendo in comments to Complainant, repeatedly and publicly comments on Complainant's body and attractiveness, and sends Complainant unwelcome and inappropriate messages via social media.

- What questions will you ask Complainant in the initial intake meeting to assess appropriateness for IR referral?
- Do you have any concerns re offering IR under these facts?
- How would your assessment change if you have records that this is not the first time Respondent has engaged in the alleged misconduct?

Initial Assessment Hypo 2

Title IX Coordinator receives a report from a third party re concerns of dating violence between Complainant and Respondent.

Title IX Coordinator schedules initial outreach meeting with Complainant to offer support and resources. During the meeting TIXC observes bruising on Complainant's chest and neck and a slight limp.

Complainant states they will not participate in a formal complaint process and requests informal resolution options. Respondent is also willing to participate in informal process.

- Do you have any concerns re offering IR under these facts?
- If you determine IR is inappropriate, how will you proceed?

Initial Assessment Hypo 3

Title IX Coordinator has walk-in appointment with Complainant, who describes alleged conduct constituting sexual assault under the Title IX policy. The alleged incident occurred after a long night of drinking, which rendered Complainant incapacitated. Prior to the incident, Complainant had a close relationship with Respondent, and Complainant expresses disappointment and anger that Respondent "took advantage" of their trusting relationship.

Complainant is seeking support and resources and expresses reluctance to file a formal complaint. Complainant states that they "do not want to ruin" Respondent's life but wants them to understand what they did was wrong and prevent it from happening again.

- Do you have a blanket policy barring IR in cases of alleged sexual assault? If so, should we reassess?
- Do you have any concerns re offering IR/RJ under these facts?
- Assuming that Complainant is interested in IR/RJ, how will you assess Respondent's potential for participation?

Outcomes

- Informal resolution allows for resolutions more consistent with educational enterprise
- 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.

Final Informal Resolution Agreement

Potential elements of final resolution agreement include:

- Procedural Background
- Statement of Responsibility?
- Sanctions, educational requirements, and other remediation measures
- Confidentiality agreement/limitations
- Consequences for breach

**Must enforce

Mediation Steps Summary

1. Basic fact-finding (not a full-blown investigation)
2. Is this appropriate for mediation (*e.g.*, campus safety, voluntary)? *all relevant internal stakeholders should agree
3. Issue agreement to mediate to both parties
4. Meeting with complainant to discuss process & possible resolution (process is confidential, explore possible resolution options)
5. Meeting with respondent to discuss process & possible resolution
6. Consider joint session (take lead of parties here)
7. Formulate possible resolution in consultation with internal stakeholders (needs to satisfy institutional prerogatives) & share with parties
8. If parties accept, memorialize in writing

Restorative Justice

How a Radical New Approach to Dealing With Sexual Assaults May Heal Trauma

A philosophy called restorative justice allows survivors to have their pain heard, and is an opportunity for the person who caused the harm to be accountable for their actions.

BY GINNY GRAVES Aug 6, 2021

"When an assailant is charged with a crime, the first thing they're told is to deny guilt — which is exactly the opposite of what many survivors want," says Ackerman, a rape survivor herself. "They want acknowledgment that a crime was committed. Many want an apology. They want to tell their own stories and ask questions about why the assault happened. And they want to be reassured that the person who caused the harm understands the suffering they caused — and that they will never commit a sexual assault again."

https://www.goodhousekeeping.com/life/a37234704/restorative-justice/

Focus: Repairing Harm

Cornerstone of RJ is the recognition of harm—not the violation of a rule.

Traditional Conduct Process:

What rule was violated?

Is there enough evidence to support a finding of responsibility?

How should we punish the offender?

Did we follow our policy?

Restorative Justice Process:

What is the harm?

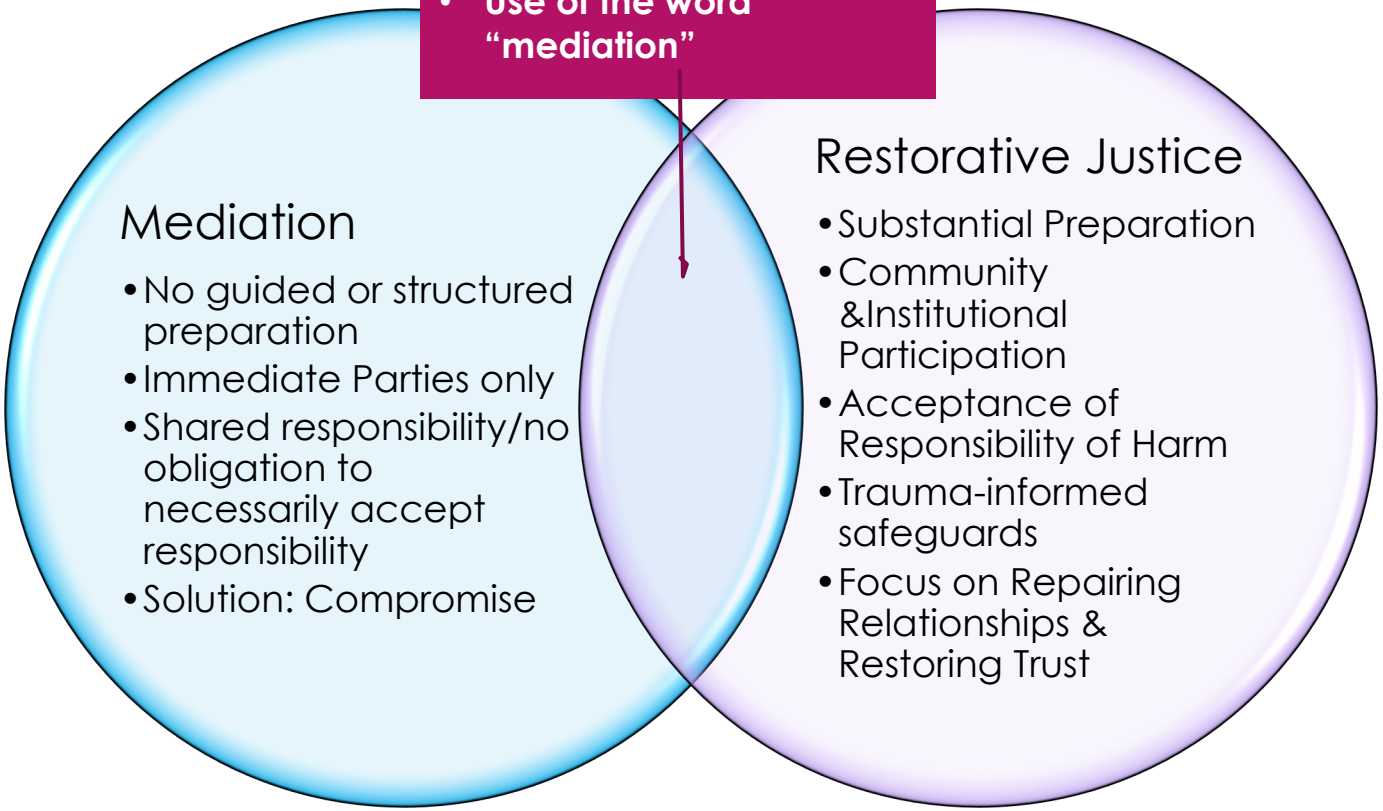
Who is responsible?

What can they do to repair the harm?

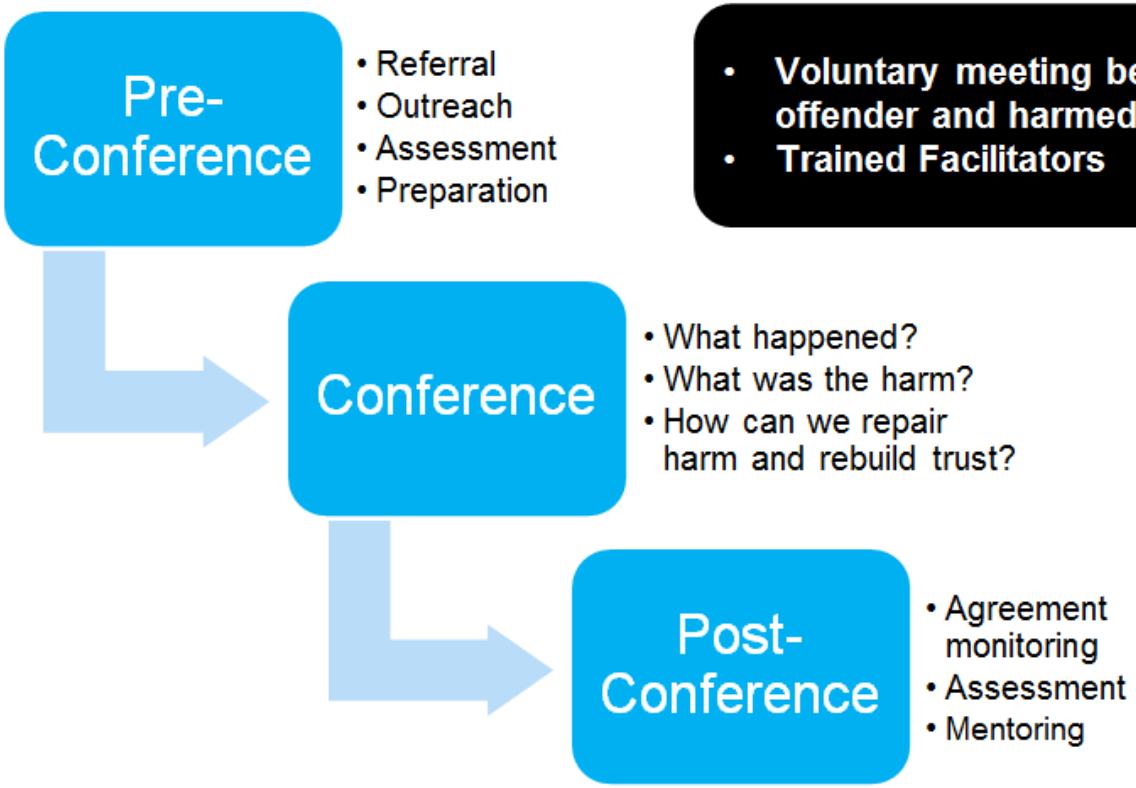
How can we rebuild trust?

Mediation vs. Restorative Justice

- **Trained Facilitators**
- **Shuttle Negotiation**
- **Use of the word "mediation"**

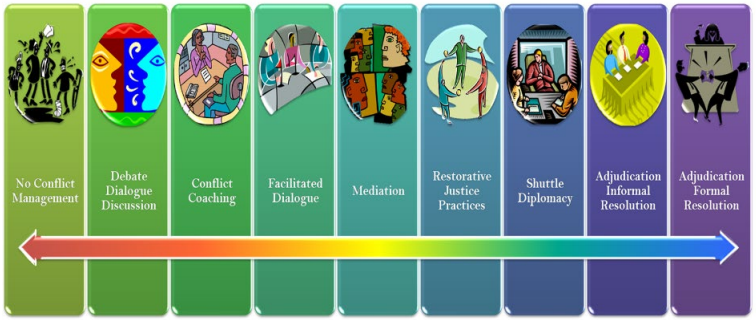


Fundamental RJ Process



STUDENT LIFE
OFFICE OF STUDENT CONFLICT RESOLUTION
UNIVERSITY OF MICHIGAN

- "Adaptable" Conflict Resolution
  - Need consent of both parties and University must determine the matter is appropriate for a restorative approach
  - May be used in lieu of or during an investigation
- Office of Student Conflict Resolution
  - Dedicated solely to informal resolutions of student conflict
  - "Pathways" include shuttle negotiation, facilitated dialogue, restorative justice circles, conflict coaching, etc.
- Shuttle Negotiation
- Social Justice Mediation
- Facilitated Dialogue
- Conflict Coaching



https://oscr.umich.edu/

Sample Policy 1 from Q&A

Informal resolution is available only after a formal complaint has been filed, prior to a determination of responsibility, and if the complainant and respondent voluntarily consent to the process in writing. Informal resolution is not available in cases in which an employee is alleged to have sexually harassed a student.

Informal resolution may involve agreement to pursue individual or community remedies, including targeted or broad-based educational programming or training; supported direct conversation or interaction with the respondent; mediation; indirect action by the Title IX Coordinator; and other forms of resolution that can be tailored to the needs of the parties.

With the voluntary consent of the parties, informal resolution may be used to agree upon disciplinary sanctions. Disciplinary action will only be imposed against a respondent where there is a sufficient factual foundation and both the complainant and the respondent have agreed to forego the additional procedures set forth in this school's policy and accept an agreed upon sanction.

Any person who facilitates an informal resolution will be trained and free from conflicts of interest or bias for or against either party.

Sample Policy 2 from Q&A

The informal resolution process is only available where the complainant has filed a formal sexual harassment complaint that involves parties of the same status (e.g., student-student or employee-employee) and the parties voluntarily request in writing to resolve the formal complaint through the informal resolution process. Within five workdays of receiving a written request to start the informal resolution process, the school will appoint an official to facilitate an effective and appropriate resolution. The Title IX Coordinator may serve as the facilitator. Within five workdays of such appointment, the parties may identify to the Title IX Coordinator inwriting any potential conflict of interest or bias posed by such facilitator to the matter. The Title IX Coordinator will consider the information and appoint another facilitator if a material conflict of interest or bias exists.

The facilitator will request a written statement from the parties to be submitted within 10 workdays. Each party may request that witnesses are interviewed, but the school shall not conduct a full investigation as part of the informal resolution process. The facilitator will hold a meeting(s) with the parties and coordinate the informal resolution measures. Each party may have one advisor of their choice during the meeting, but the advisor may not speak on the party's behalf. The informal resolution process should be completed within 30 workdays in most cases, unless good cause exists to extend the time. The parties will be notified in writing and given the reason for the delay and an estimated time of completion.

Sample Policy 2 from Q&A (cont.)

Any resolution of a formal complaint through the informal resolution process must address the concerns of the complainant and the responsibility of the school to address alleged violations of its policy, while also respecting the due process rights of the respondent. Informal resolution process remedies include mandatory training, reflective writing assignment, counseling, written counseling memorandum by an employee's supervisor, suspension, termination, or expulsion, or other methods designed to restore or preserve equal access to the school's education programs or activities.

At the conclusion of meetings, interviews, and the receipt of statements, the facilitator will write an informal resolution report and provide the parties with the informal resolution report simultaneously. At any time prior to resolving a formal complaint through the informal resolution process, either party may withdraw in writing from the informal resolution process and resume or begin the formal resolution process.

Sample Policy 3 from Q&A

The Title IX Coordinator will determine whether it is appropriate to offer the parties informal resolution in lieu of a formal investigation of the complaint. In the event that the Title IX Coordinator determines that informal resolution is appropriate, the parties will be provided 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. Both parties must provide voluntary, written consent to the informal resolution process.

Questions?