

An Informal Occasion: Maximizing Informal Resolution in Title IX Cases

Title IX Conference:
Higher Ed & K-12 Training
July 23-24, 2024



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**BOISE STATE
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Your Presenters



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Director of Civil
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Agenda

- What is Informal Resolution?
- 2020 and 2024 Title IX Rules for Informal Resolution
- Practical Skills for Informal Resolution
- How to Maximize Benefits of Informal Resolution



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Enter the session ID: **158-512-262**

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My role in informal resolution is

Supervisor (T9C, Deputy, etc.)

0%

Faciliator

0%

Support for Faciliators

0%

Party Attorney

0%

Other Party Advisor

0%



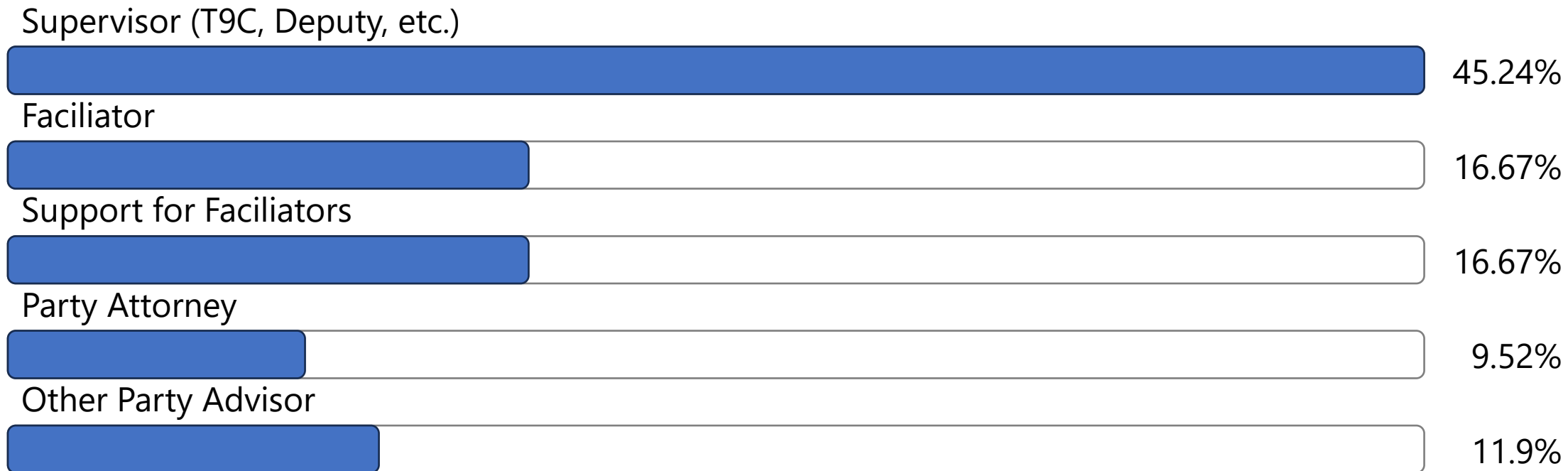
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My role in informal resolution is



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What is Informal Resolution?

What is Informal Resolution?

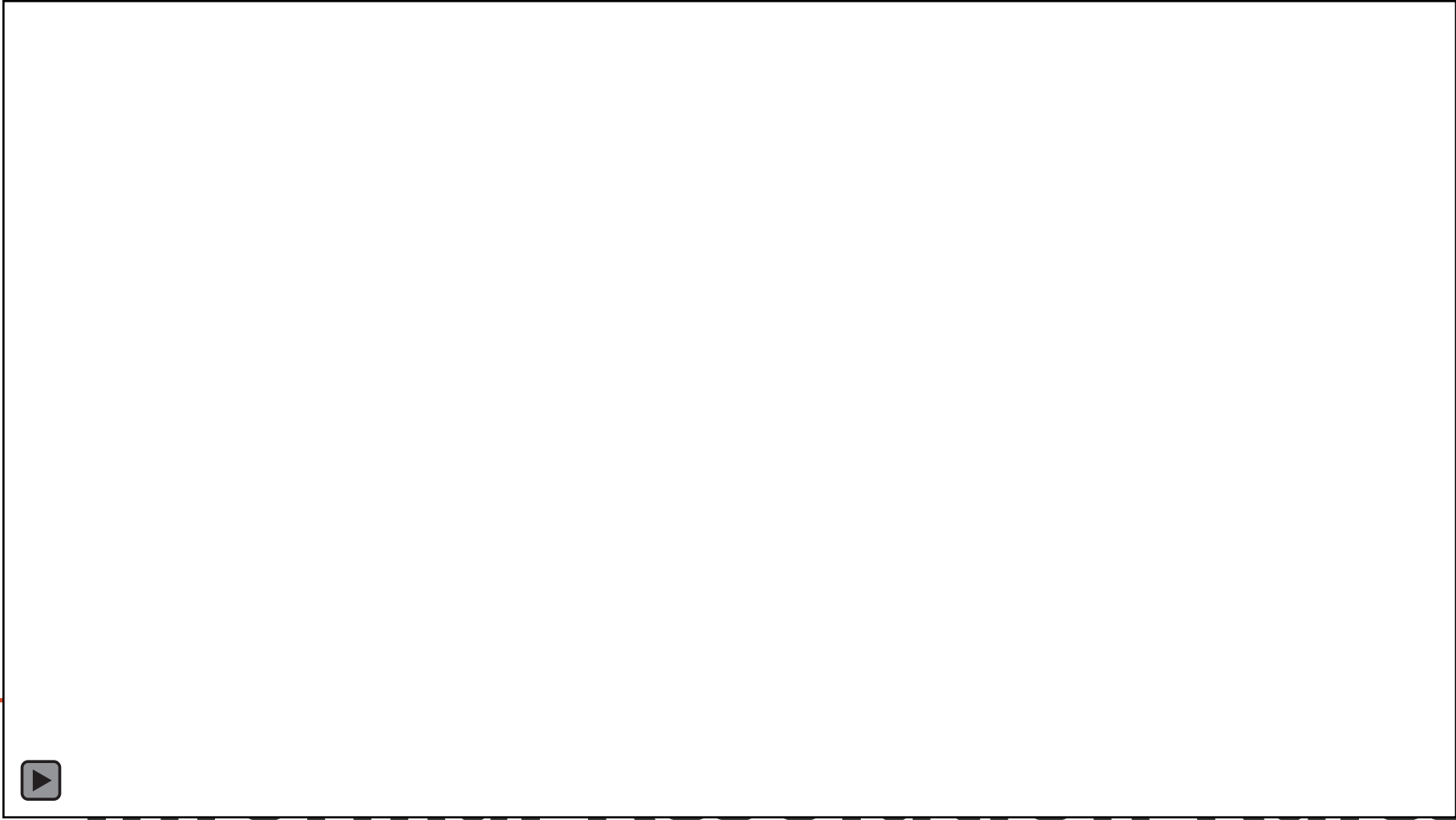


- A voluntary, structured interaction between complainant(s) and respondent(s) to resolve the Title IX allegations without an investigation, hearing, or appeal
- In practice, typically an informal problem-solving conversation facilitated by an experienced third party who is outside the problem
- Uses a voluntary, consensus-based approach

Potential Benefits

- Flexibility
- Timeliness
- Cost-Effectiveness
- Empowerment
- Increased Confidentiality
- No Cross-Examination
- Restorative Nature
- Relationship Preservation
- Reduced Retaliation Risk
- Mutual Agreement (Not Zero Sum)





Informal Resolution (2020 & 2024 Rules)

- Schools can but are not required to offer informal resolution
- Informal resolution facilitators must be trained on specific topics
- IR facilitators must not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent

Informal Resolution (2020 & 2024 Rules)

- Can be offered at any time prior to a determination of whether prohibited conduct occurred
- If a formal process has begun, it can pause during the informal resolution; you would return to the formal process if IR is not successful
- There must be reasonable timeframes for informal resolution (must be in grievance procedures under 2024 Rule) with possibility to extend for good cause with written notice to the parties
- Before agreeing to a resolution, any party has the right to withdraw from the informal resolution process and to initiate or resume the formal grievance procedures

Informal Resolution (2020 & 2024 Rules)

- Informal resolution must be entirely voluntary, and cannot be explicitly or implicitly required; parties cannot be required or pressured into participation
- 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
- All parties must give voluntary, informed consent (parents/guardians of minor parties, too)

Scenario

You reach out to a minor student Complainant and their parents as the first step in your informal resolution process. You introduce yourself, describe the process, and ask if they have any questions. They have none. After the phone call ends, the Complainant emails you the following:

I don't really want to do this; my parents are making me. The Respondent deserves to be expelled and I know that can only happen if there is an investigation.





Whose opinion prevails?

The minor student

0%

The minor student's parent

0%

The educational institution decides

0%



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Whose opinion prevails?



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Informal Resolution Differences

2020 Rule

- A formal complaint must be filed/signed before informal resolution can be offered
- Informal resolution facilitator can do multiple roles (e.g., Coordinator, Investigator, Decision-maker)

2024 Rule

- No complaint must be made/initiated to offer informal resolution
- Informal resolution facilitator cannot be Investigator or Decisionmaker

Scenario



Students Casey and Ryan were formerly dating. Casey reports that Ryan sexually assaulted Casey on campus during the relationship. Ryan says that all conduct between the couple was consensual. Both parties have expressed interest in informal resolution.



Should you offer informal resolution?

Yes, if both parties agree

0%

Yes, if the institution chooses to offer informal resolution for sexual assault cases

0%

No, the institution should not use informal resolution for cases involving sexual assault because of the risk of retraumatization

0%

No, the institution cannot use informal resolution for cases involving sexual assault under Title IX

0%

The History of Sexual Assault and IR

"Grievance procedures generally may include voluntary informal mechanisms (e.g., mediation) for resolving some types of sexual harassment complaints" but "in cases involving allegations of sexual assault, mediation is not appropriate even on a voluntary basis." (2011 Guidance)

The 2020 Rule put some limits on informal resolution, but not related to sexual assault; so, IR can be used for sexual assault cases that meet other rule requirements (2020 Rule)

Informal resolution can be used in all cases so can be used for sexual assault cases (2017 Q&A)

The 2024 Rule does not add any new limits for sexual assault cases (2024 Rule)

Circumstances to Consider

- Sexual Assault
- Domestic Violence
- Dating Violence
Stalking





My institution offers informal resolution....

For all allowed cases

0%

For all allowed cases other than sexual misconduct

0%

For all allowed cases with our limitations

0%

For no cases

0%

I'm not sure

0%



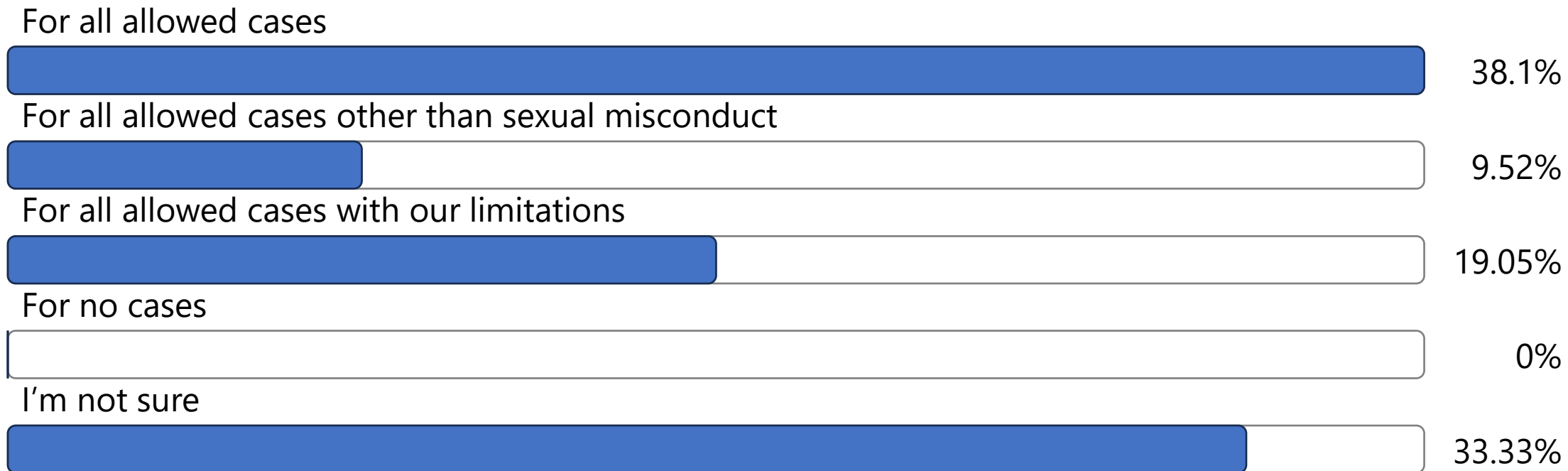
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My institution offers informal resolution....



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Scenario



Cleo is a student in Mr. Reed's class and reports that the professor regularly makes comments that are denigrating to students of one sex in class, making Cleo uncomfortable. The conduct allegedly occurred during the spring semester of 2024 but is just now being reported.



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Question slide

Should you offer informal resolution?

Yes, if requested and both parties agree

0%

Yes, if the institution chooses to offer informal resolution for cases involving employee-on-student

harsasment

0%

No, because the case involves employee-on-student harassment

0%



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Showing Results

Should you offer informal resolution?

Yes, if requested and both parties agree

0%

Yes, if the institution chooses to offer informal resolution for cases involving employee-on-student harassment

0%

No, because the case involves employee-on-student harassment



0%

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2020 Rule

May not offer informal resolution if an employee is the respondent



Other Circumstances to Consider

- Other situations involving power imbalances
- Severity of possible sanction (suspension or expulsion/termination)
- Nature or severity of the alleged conduct
- Whether there is an ongoing risk of harm
- Whether the Respondent is a repeat accused
- Whether the parties will participate in good faith
- Whether the parties will comply with terms in good faith



So, When to Offer IR?



- **2020 Rule:** Cannot offer without a formal complaint or in cases involving employee-on-student harassment
- **2024 Rule:** Cannot offer in cases involving employee-on-student harassment in K-12 or if it would violate federal or state law
- **The institution decides in all other cases**
- Best practice is to include information about situations where IR will not be offered in grievance procedures
- Steps should be taken to avoid discriminatory application of discretion

Notice & Consent (2020 & 2024 Rules)

- The educational institution can offer IR *or* either party can request it
- Before commencing IR, the institution must provide notice of the process and obtain consent

2020 Rule

Under the 2020 Rule, the notice must be in writing

2024 Rule

Under the 2024 Rule, the notice must be in writing only for complaints of sex-based harassment involving student complainants or student respondents at postsecondary institutions.



What does the educational institution do if a party violates the agreement?

Nothing - it's out of their hands

0%

Whatever the parties decided in the agreement, except that they cannot agree that the Title IX process begins again

0%

Whatever the parties decided in the agreement, including that the Title IX process begins again if that is what they wanted

0%

The Title IX process begins again

0%



What does the educational institution do if a party violates the agreement?

Nothing - it's out of their hands



Whatever the parties decided in the agreement, except that they cannot agree that the Title IX process



Whatever the parties decided in the agreement, including that the Title IX process begins again if that



The Title IX process begins again



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IR Notice Contents

2020 Rule

- Allegations
- Requirements of the process, including:
 - Circumstances when IR precludes resuming a formal complaint arising from the same allegations
 - Right to withdraw and resume the grievance process at any time before agreeing to a resolution
- Any consequences resulting from participating in IR, including the records that will be maintained or could be shared

2024 Rule

- Allegations
- Requirements of the process
- That, prior to agreeing to a resolution, any party has the right to withdraw and initiate or resume the grievance procedures
- That the parties agreement to a resolution precludes initiating or resuming grievance procedures arising from the same allegations
- The potential terms that may be requested, including notice that an agreement is binding only on the parties
- What information the educational institution will maintain and whether and how it could disclose such information in grievance procedures, if initiated or resumed

Scenario

After suggesting IR, a party asks if the information shared during the process will make its way back to the investigation and decision-making process should informal resolution fails





Can information from the IR be used in the formal grievance process if it is initiated or resumed?

No, all information in IR must be maintained as confidential

0%

No, as long as the parties agree that it is confidential

0%

No, if the educational institution's policy or procedures say it is confidential

0%

Yes, the educational institution cannot guarantee confidentiality in IR

0%



Can information from the IR be used in the formal grievance process if it is initiated or resumed?

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Yes, the educational institution cannot guarantee confidentiality in IR



RESULTS SLIDE

A background image of a stone staircase with a blue color overlay. The steps are made of light-colored stone and are arranged in a curved pattern. The blue overlay is a gradient that is darker at the top and bottom edges and lighter in the center, where the text is located.

Steps in a Successful IR

Steps in a Successful Informal Resolution

- Identify the Process
- Identify the Facilitator
- Preparation
- Facilitate Resolution
- Assist with Memorializing Agreement
- Enforcement

Identify the Process

- Can be “mediation” or other informal process (e.g., facilitated communication between the parties)
- May or may not include in-person meetings between the facilitator and each party or between the facilitator and all parties
- Consider how advisors, support persons, and others will participate and how to ensure confidentiality/privacy
- Consider length of time needed and use natural time limits (lunch, end of the business day)
- Take care to ensure the parties are comfortable with and in any environment chosen



I support face-to-face mediation in sexual harassment cases

Yes, in all cases

0%

Yes, but not in cases involving sexual assault or violence

0%

No

0%

Unsure

0%



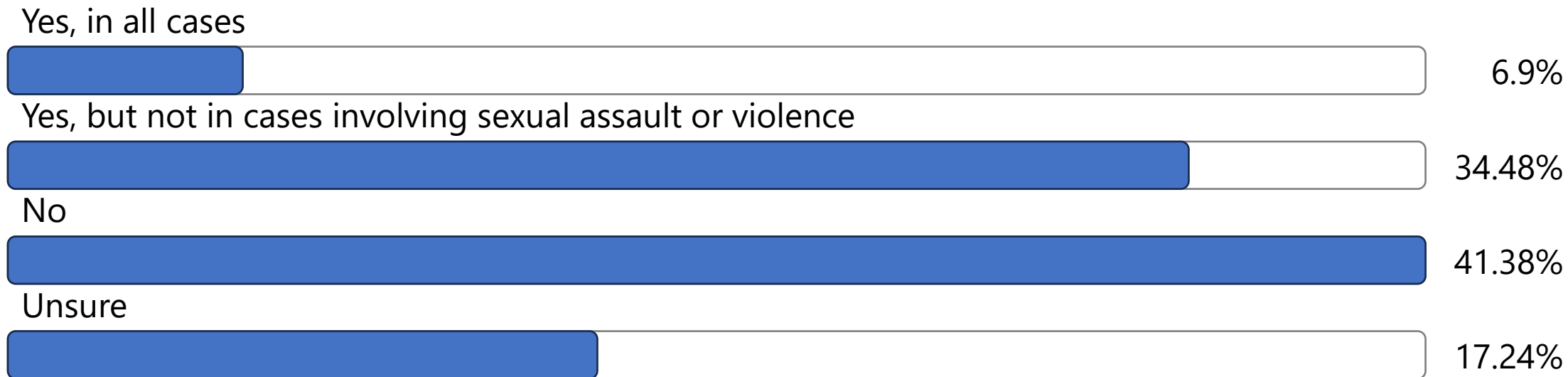
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I support face-to-face mediation in sexual harassment cases



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Identify the Facilitator

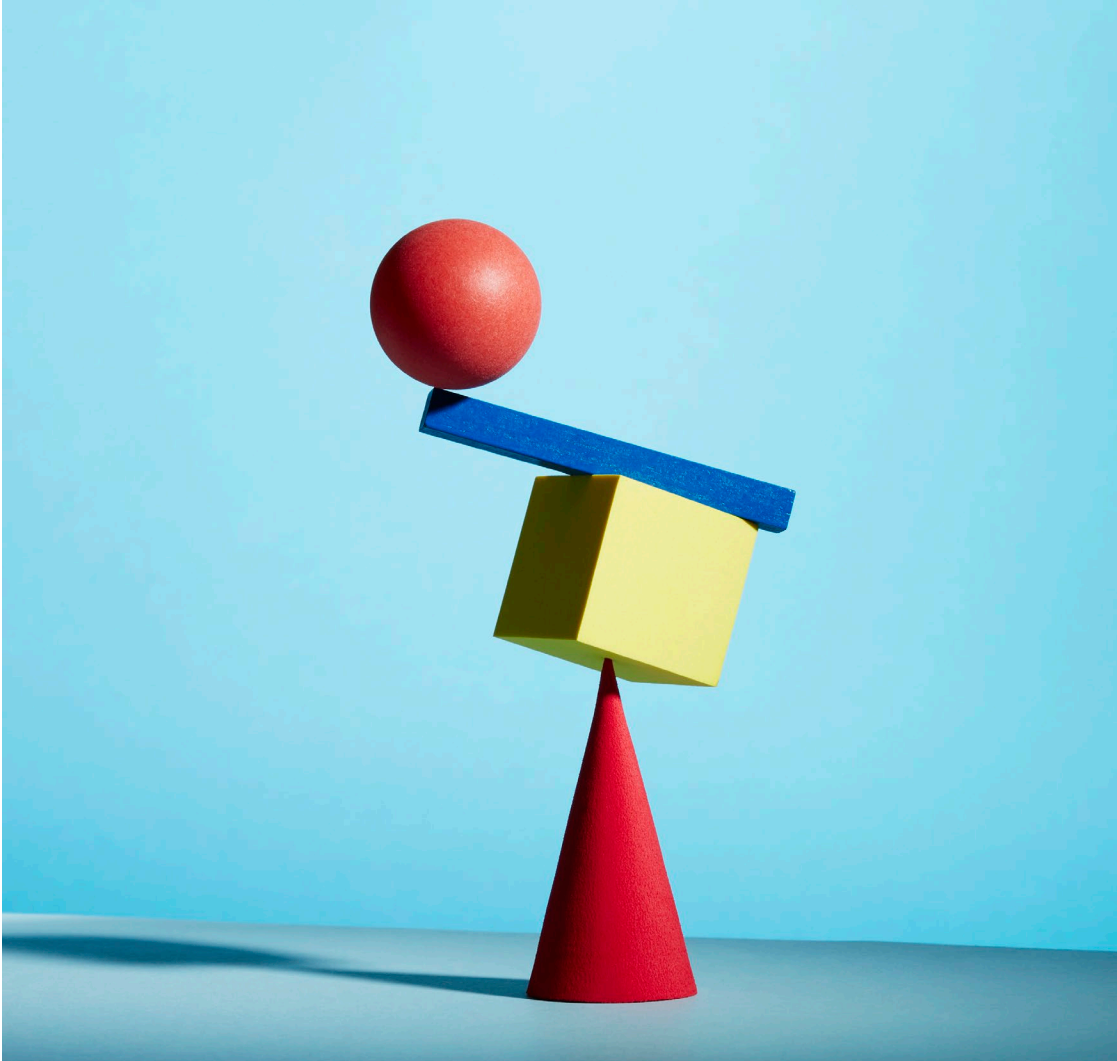
- Training & Expertise
- Experience with Informal Resolutions
- Knowledge of Institutional Policies & Procedures
- Impartiality
- Communication Skills
- Confidentiality & Discretion



Serving Impartially

- Informal resolution facilitators are in a unique role
- The IR facilitator is not a judge or arbitrator who decides the issues for the parties; instead, the IR facilitator helps the parties define the issues, identify solutions, and memorialize their agreement
- Although they are required to be impartial and not have conflicts of interest, IR facilitators are perhaps more properly known as “omnipartial” (on both parties’ sides at the same time) than “impartial”
- The IR facilitator is not practicing law or psychology but may provide insight from the law or psychology to help parties reach an agreement

Tips: Serving Impartially



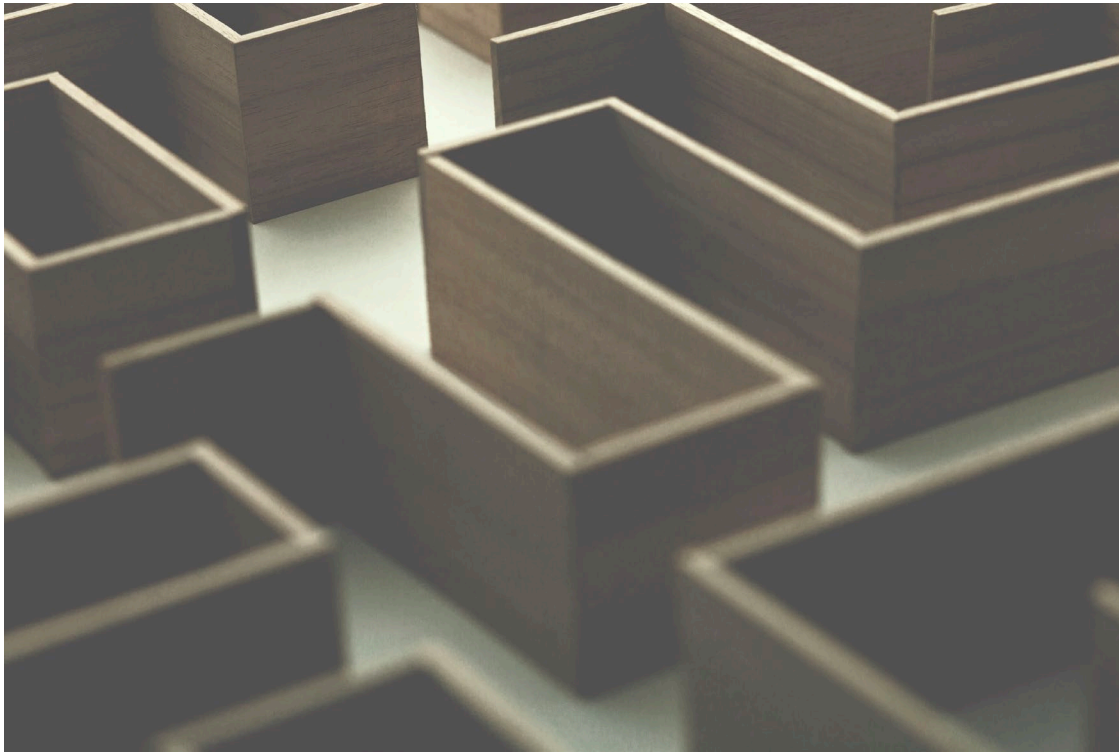
- Treat parties equally at all times
- Commit to aiding all parties equally
- Consider culture, disability, communications needs, etc.
- Avoid accusatory language/placing blame on any party during discussions
- Do not invest emotionally
- Stay objective; focus on facts
- Do not consider external factors

Prepare

- Introductory communications to the parties
 - Consider having parties, advisors, and support persons read, sign, and return written information regarding the process and ground rules
- Review relevant information and evidence prior to mediation, but do not predetermine the outcome
 - Bring relevant documents to IR meetings
- Considering asking parties to submit information
- Prepare questions and brainstorm potential institutional representatives who may need to be involved



Facilitate Resolution



- Introductions, Ground Rules, and Clear Goals
- Opportunity to Be Heard
 - Active Listening
 - Mirroring
 - Sympathy
- Creative Problem Solving
 - Position Sharing
 - Solution-Focused Questioning
 - Brainstorming
 - Emotional Processing
 - Collaborative Negotiation
 - Impasse Resolution

Introductions, Ground Rules, and Goals

Introduction

- Welcome and Purpose
- Confidentiality & Voluntariness
- Clarification of Role

Ground Rules

- Openness to Resolution
- Willingness to Listen
- Honesty & Openness
- Confidentiality
- Focus on the Present & Future

Goals

- Understand All Perspectives
- Identify Common Interest
- Develop Mutually Agreeable Solutions
- Create a Clear Agreement
- Ensure Follow-Up and Enforcement

Hearing Parties' Stories – Active Listening

- Start with open ended questions: "Why are we here?" "Tell me about" "Help me understand"
- Recognize and verbalize the party's emotions without agreeing with them – "Am I hearing you correctly that you are feeling...?" "It seems like..." "It sounds like...."
- Sympathy comments are ok: "I can tell this is hard for you" "I'm sorry this is difficult"
- Summarize key points of the party's narrative to ensure clarity and show understanding
- Use the final three words of a person's statement in you follow up questions to show attentiveness and encourage elaboration "Tell me more about" "What did it look like when...."
- Physical mirroring – wait two seconds to avoid mimicking

Solution-Focused Question Examples

- Again, start open ended: “What do you think would help resolve this issue?”
- Use “who, what, when, where, why, and how” to gather more information and promote discussion
- Avoid yes/no questions, which can stifle conversation
- Encourage parties to offer solutions rather than dictating solutions; this fosters ownership of the resolution
- “Have you ever been in a similar situation? How did you successfully deal with it?”
- “You mentioned you had concerns about contact with the other party at [example]. Let’s think hypothetically about what that might look like and what guardrails we could put in place to avoid it.”

Brainstorming

- Use “what if” questions to generate ideas
- Be prepared to offer options, but take care not to exert pressure
- Break down issues into “bite sized” pieces and focus on resolving those smaller issues, gradually building towards a comprehensive resolution
- Highlight consensus to gain momentum



Impasse Resolution

- The fact that there is an impasse is often much less important than the reason for the impasse
- Ask questions to understand the “why”; not just ““The other party offered [explain], what is your response?” but “Why is that your response”
- Turn the tables: “What terms would help you reach a resolution in this case?”
- Offer options if helpful: “I want to provide some options to consider, but these are just suggestions to help get/keep the conversation going”
- Convey optimism
- Encourage parties to focus on resolution and not act defensively
- Avoid “rehashing” events if unhelpful

Assist with Memorializing Agreement

- Use a solid template with common terms (no contact agreement, confidentiality, anti-retaliation, school responsibility for enforcement, etc.)
- Involve necessary institutional representatives on agreements that require use of the educational institution's resources (e.g., enforcement, counseling, training)
- Ensure parties are clear on all agreed points to avoid misunderstandings or lack of accountability

If parties cannot reach mutual agreement, proceed with formal Grievance Process

Enforcement

- Ensure that the agreement is documented clearly and comprehensively
- Define specific, measurable, achievable, relevant, and time-bound (SMART) terms within the agreement
- Clearly outline the educational institution's role in the enforcement process as agreed by the parties
- Identify which school officials are responsible for monitoring compliance and what actions they will take if the agreement terms are not met and ensure those officials understand their roles and responsibilities
- Consider whether support may be needed to help parties meet their obligations and offer to help address difficulties they may encounter
- Encourage parties to communicate openly with the Title IX Coordinator about any issues with complying or with the other party's compliance with the agreement
- Keep detailed records of compliance efforts, issues encountered, and steps taken in response



Popularity of Informal Resolution



How popular is informal resolution at your institution?

Very popular

0%

Moderately popular

0%

Barely used

0%



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Very popular



0%

Moderately popular



0%

Barely used

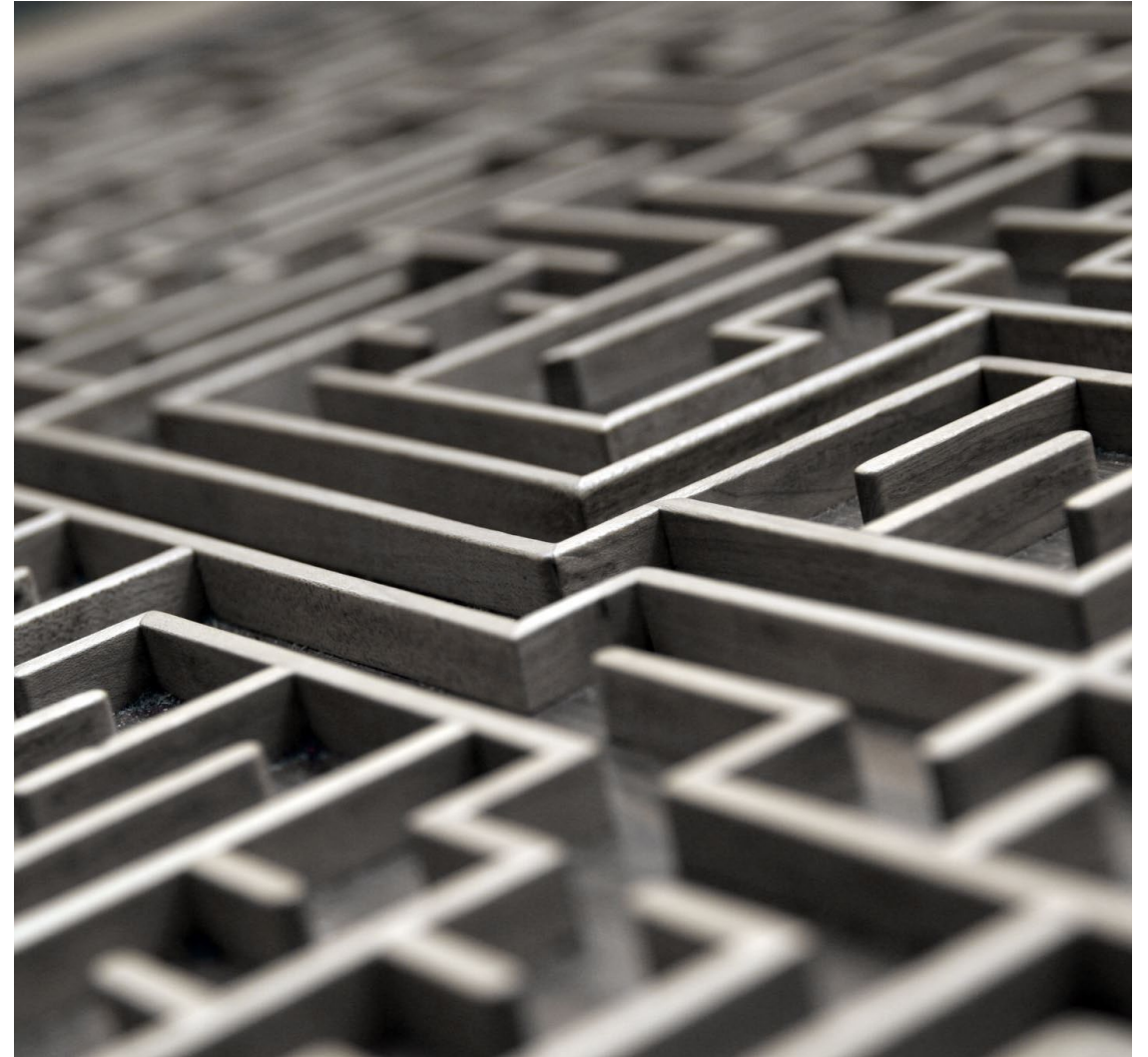


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Barriers to Use

- Lack of Awareness
- Lack of Information □ Intimidation
- Fear of Retaliation
- Lack of Trust in Effectiveness
- Emotional Readiness



Trauma & Informal Resolution

Trauma Concerns

Informal Resolution can force parties into a situation that is re-traumatizing

Potential Benefits

Informal Resolution can promote:

- Empowerment
- Recognition
- Resolution

Overcoming Barriers



- Awareness Campaigns
- Information Sessions
- Confidentiality Assurances
- Share Success Metrics
- Emotional Support
- Highlight Anti-Retaliation Protections

Questions

