STUDY GUIDE:
INFORMAL RESOLUTIONS

20-Minutes-to... *Trained*

PRESENTED BY:

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20-Minutes-to…*Trained*:
Informal Resolutions
Learning Outcomes

- Participants will understand the different types of informal resolution and be able to determine when informal resolution is appropriate.
- Participants will understand that informal resolution complies with OCR's requirement to "stop the harassment," "prevent the recurrence," and to "remediate the impact."
- Participants will be able to define mediation and understand when mediation will be an appropriate resolution.
- Participants will be able to explain that the advantages of informal resolution include allowing for a timely response to the conduct, can be less traumatizing, provide for more empowerment for the parties, and saves resources for the institution.
- Participants will understand why informal resolution is not appropriate for severe conduct (especially as a response to sexual violence).

20-Minutes-to…*Trained*:
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Discussion Questions

- Why might parties favor informal resolution? What benefits does it have for the institution? What impacts can it have for the community?
- In what circumstances would informal resolution not be appropriate? Why?
- What are the different types of informal resolution? How does the purpose of mediation differ from the purpose of restorative justice?
- Who at your institution could serve as a mediator? What background and experience should they have? What training would be appropriate?
- What are some of the drawbacks to having an informal resolution? What processes can be put into place to mitigate the drawbacks? Who would be responsible for putting these measures into place?

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Case Studies

Amy and Billy

Amy and Billy are both students. Amy has filed a complaint about Billy for touching her sexually both in and out of class. Specifically:

- He grabbed her on the butt in the hallway and in class as she was sitting down.
- He has given her "shoulder massages" in class (he sits behind her).
- While they were out with a group, he repeatedly touched her on the buttocks.
- While out with groups at parties, he will come up behind her and press himself against her and/or put his arms around her and hug her from behind without consent.
- When they were alone, he kissed her without consent, and touched her repeatedly on her breasts without her consent. This has happened twice.

They have a mutual group of friends that they spend a lot of time with. Amy shares with you that she told Professor Smith about these behaviors in October (it is now December), and that Professor Smith had been "working with her and Billy to mediate this" but the behaviors had not changed and now she is fed up.

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Case Studies Question & Answer

Amy and Billy

For Discussion:

- Would an informal resolution be appropriate in this case? Why or why not?
  - The conduct should be evaluated for seriousness. While some of the non-consensual touching is low level, other incidents are more serious.
  - The conduct has also taken place over a considerable amount of time.
  - Professor Smith has attempted to intervene but Amy reports that his efforts have been unsuccessful.
  - Amy and Billy are friends and they share a close mutual friend group. An informal resolution may allow them to continue to be friends.
- What follow up should take place with Professor Smith?
  - Professor Smith should be interviewed to determine what efforts he has taken with the parties.
  - It should be determined whether Professor Smith has any formal training for mediation. If Professor Smith is not a mediator for the school, he may be interested in getting trained.
  - The Title IX Coordinator should compare the reports Professor Smith has received versus what Amy has reported.
  - If Professor Smith is a responsible employee, the Coordinator should inquire why Professor Smith failed to report the incidents to the Title IX Coordinator.
- What would the benefits of mediation be for these parties? What about restorative justice?
  - Mediation would allow the parties to come together to create a response that they both agree with.
  - Mediation would not require that Billy take responsibility for his actions.
  - Restorative justice would allow the parties to find ways to repair the damage the behavior has caused.
  - Restorative justice would also allow the parties to focus on their own needs and how the other can help address those needs.

- Amy could share with Billy how the behavior made her feel and Billy could seek to understand the impact of the incidents on Amy.

ATIXA Tip of the Week
June 5th, 2014

Informal Administrative Resolution

Tip of the Week authored by W. Scott Lewis, J.D., ATIXA Advisory Board

Recently, a client who has adopted the ATIXA Model Policy, raised an interesting question in regards to language. The client issued the following statement:

> ***The language of our appeal policy says "In the event that an accused individual accepts the findings of the investigation, those findings cannot be appealed." In the ATIXA Model Policy, the language states, "Present the findings to the accused student, who may accept the findings, accept the findings in part and reject them in part, or may reject all findings. Where the accused student is found not responsible for the alleged violation(s), the investigation should be closed.***

The question raised, is this an equitable approach? What if the complaining party does not agree with the investigator's findings?

This is what I call the "Informal Administrative Resolution (IAR)." At that gatekeeping time, there are several possible outcomes:

1. Case closed for insufficient or no evidence.

   EQUITY: To let this go forward when no reasonable person could find the accused (R) responsible would be victimizing the accused - on the basis of gender, as this is assumed as the basis of the entire complaint. There is no appeal from the IAR, and the Dean of Students/Deputy Title IX Coordinator and/or the Title IX Coordinator review it.

2. Investigation determines a reasonable person COULD (or presumably may not – these are the middle ground cases; the hard ones) possibly find R responsible for some of the allegations.
   R can accept responsibility in full, and accept the sanctions. No hearing, no appeal for either party.

   NOTE 1: Complainant (C) does not determine the outcomes; to allow C to force a hearing here gives the impression that C controls the sanctioning parameters.
   NOTE 2: This is typically when the Investigation/Investigator has found *very sufficient* or *overwhelming* evidence.
   NOTE 3: There is no appeal from this any more than there would be a way to get to the Court of Appeals from a plea bargain or settlement agreement. If R changes his/her mind in a "cooling off" period permitted by the school, then R is really just asking for a hearing.

3. R can accept responsibility in full, but reject the sanctions. Then there is a "sanctions only" hearing.

4. R can accept responsibility in part, presumably rejecting the sanctions. Then there is a "full" hearing ONLY on the allegations that the Investigation/Investigator thought a reasonable person MIGHT find R responsible/that R rejected.

Appeals are only from "Formal Hearings," that may be completed by a WELL-TRAINED Administrator or a WELL-TRAINED Panel.

ATIXA Tip of the Week
September 6th, 2018

Informal Resolutions

By Rick T. Olshak, M.S., Director, Title IX Compliance, Office of General Counsel, Texas A&M University System, Affiliated Consultant, The NCHERM Group, Advisory Board Member, ATIXA

The 2017 Interim Guidance from OCR provides for informal resolution (including mediation) provided that all parties are willing participants. Further, the leaked guidance provided by the New York Times suggests that OCR will continue to allow for its use. So many Title IX Coordinators may now be asking themselves, "should my campus be employing mediation and other forms of dispute resolution to address Title IX complaints?"

As ATIXA President Brett A. Sokolow, J.D. noted in his preliminary thoughts on the leaked guidance, more data is needed before we can reach an informed judgment on all of the possible applications of mediation. As an experienced mediator and trainer of mediators, I will offer that I find mediation to have broad applicability in lower level cases of sexual harassment, short of sex-based violence and/or nonconsensual sexual penetration. Mediation, while not a panacea, is an excellent process for addressing both relationship and behavioral issues in a structured setting provided parties are entering into the process in good faith. However, this belief also stipulates that any mediation program be thoughtfully constructed and the mediators appropriately trained, not just to facilitate the mediation process, but also to address issues such as cultural differences, power imbalances, and safety planning. My own past practice in working with mediation programs across the nation is that too often administrators saw these programs as a quick fix to reducing caseload (it will have the opposite effect) and taking the heat off of hot-button campus issues (again, the opposite is true), while also believing that mediation programs can operate on a minimum resource allocation, attaching responsibility for such programs on people already working full-time jobs.

Given my experience in these areas, I am dubious about claiming that mediation will be a smashing success to remedy any conduct issues on campus, let alone our most sensitive. Further, I have served as a mediator in the court, community, and university settings, and have mediated cases involving relationship violence. As a result of my own experiences in these areas, I am entirely unconvinced that colleges and universities have the capacity to mediate cases involving sex-based violence and/or nonconsensual sexual penetration. My objection to this practice is threefold.

First, mediation does not require a party to assume responsibility for their behaviors. As a result, mediation would be a very attractive option to a respondent seeking to avoid accountability for their actions. The potential net effect of this would be universities retaining individuals who have committed these acts and found a university-sanctioned means for avoiding accountability for them. Beyond any legal argument of foreseeability is the moral argument that our programs and practices should be doing no harm to members of our community, but that is exactly what this practice might invite. The potential abuse of mediation by perpetrators of these acts makes this practice far too risky for me to find comfort.

Second, while some reporting parties may wish for mediation, many others do not, and some initially seek mediation and later regret the decision. Still others may find themselves coerced into mediation sessions,

either by the responding party, or by an institution looking to make a problem go away with a minimum amount of attention. Any benefits of mediation in these cases, in my point of view, can be duplicated in other informal practices without the same potential for abuse and misuse.

Third, my earlier point on program development and mediator training is another deterrent to utilizing mediation in our most serious cases. As a mediator, I have had over a hundred hours of training as a mediator, have mediated many cases, and have trained approximately a thousand mediators. And with all of this experience, even I blanch when presented with the idea of mediating cases involving sex-based violence and nonconsensual penetration. Mediation is a highly specialized skill set requiring significant training to mediate even the most basic cases, and my experience demonstrates repeated program failures on that front. On what basis are we to believe that universities are prepared to equip their programs and mediators with the necessary training and expertise to be successful in these most egregious cases? How are we to train volunteer faculty and staff, and possibly even students, to resolve these cases without doing harm to the parties and any other members of our communities? Successfully addressing this requires far more attention and resource allocation than I have found most universities are prepared to give.

Barring OCR's misguided guidance on this topic, mediating these cases is not the answer we seek. But another practice hold more promise. Restorative justice (RJ) holds the potential of not only providing a safe space for reporting parties to communicate their feelings and the effects of the actions committed upon them, but also maintaining accountability for behaviors that violate community standards and potentially put other members of the community at risk.

There is a great deal of discussion taking place around restorative justice and sexual misconduct. In most cases, I would side with experts such as David Karp, Mary Koss, and others in stating that RJ holds great promise in this area because it engages and empowers both the reporting and responding parties, requires an acceptance of responsibility on the part of the respondent, and ultimately holds the respondent accountable for their actions. Early research on RJ in the student conduct setting offers that the restorative process provides higher satisfaction to the parties than traditional adjudication, and may even contribute to reduced recidivism.

Where I will depart from some of my colleagues in restorative justice however, is that in cases involving sex-based and/or nonconsensual sexual penetration, there is still the potential for abuse, particularly where it comes to respondents being able to minimize their level of accountability for their actions. It is not hard for me to imagine a situation where a respondent pressures a reporting party into probation for an offense that would otherwise result in an expulsion, and the moral and legal foreseeability issue is again at the forefront.

I see two potential means for addressing this concern. The first is the obvious consideration of facilitator training. Facilitators of sex-based violence and/or nonconsensual sexual penetration cases would need to receive training on a host of areas to be able to successfully navigate these cases. My second means for addressing this is more controversial within RJ circles, but important to consider; in cases involving sex-based violence and/or nonconsensual penetration, the university should be a party to the process as well as its facilitator, and should ultimately have to concur with the imposition of any sanction that addresses the relationship between the respondent and the institution (e.g., reprimand, probation, suspension, expulsion).

While this proposal may aggravate some in the RJ community who believe that the outcomes should be entirely directed by the parties, my perspective as both a Title IX and conflict resolution professional is that, in this age of compliance, we must do all we can to ensure that our processes enable and empower our parties

rather than stifle them, while also protecting the broader interests of the university. To do anything short of this only invites further criticism and scrutiny.