An Informal Occasion: Maximizing Informal Resolution in Title IX Cases

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ECR SOLUTIONS
education civil rights

1

Reminders!

- To post or not to post?
- This is a training on Federal Law
- This is not legal advice
- Keep it hypothetical
- Ask questions
- Have fun!

2

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Required Faciliator Training (2024 Rule)

In this training:

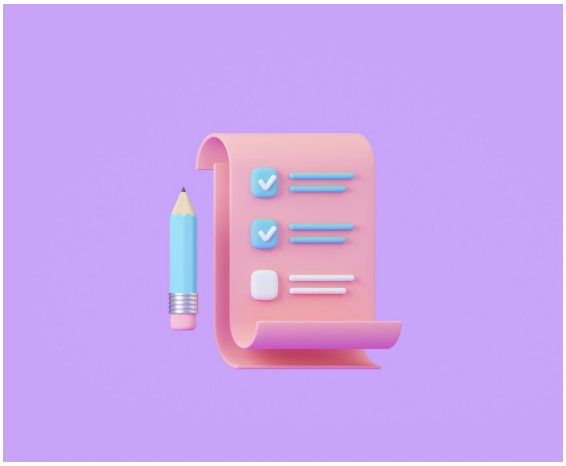
- The rules and practices associated with the informal resolution process
- How to serve impartially, including by avoiding conflicts of interest and bias

→ ***All other required training covered in the first two sessions*

3

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



4

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What is Informal Resolution?

5

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

6

Potential Benefits

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



7

Informal Resolution Rules

8

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

9

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

10

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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)

11

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.



12

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Whose opinion prevails?



15

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

16

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.

17

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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%

18

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Should you offer informal resolution?

Yes, if both parties agree — 0%

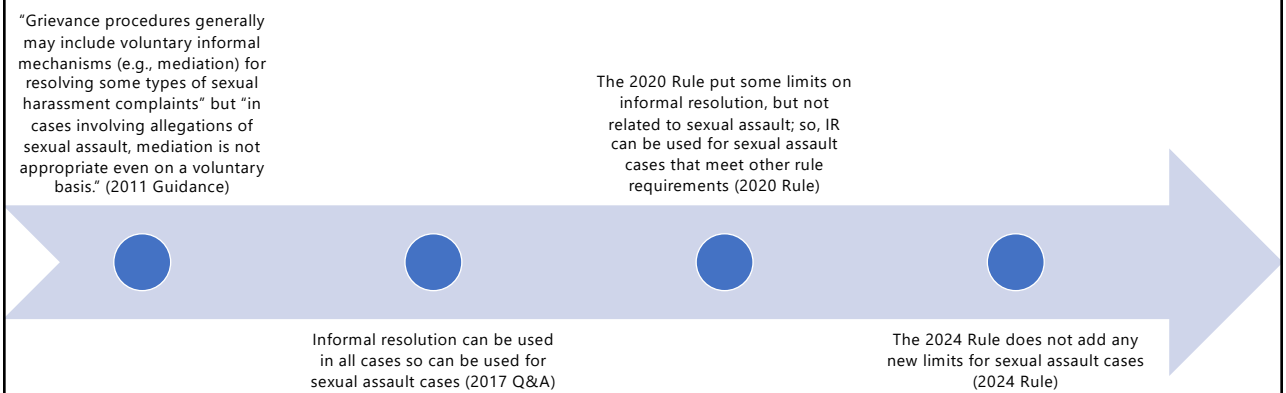
Yes, if the institution chooses to offer informal resolution for sexual assault cases ✓ — 0%

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%

20

The History of Sexual Assault and IR



21

Circumstances to Consider

- Sexual Assault
- Domestic Violence
- Dating Violence
  Stalking



22

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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%

24

Scenario



A student in Mr. Reed's class reports that the teacher regularly makes comments that are denigrating to students of one sex in class, making the student uncomfortable.

25

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Should you offer informal resolution?

Yes, if requested and both parties agree — 0%

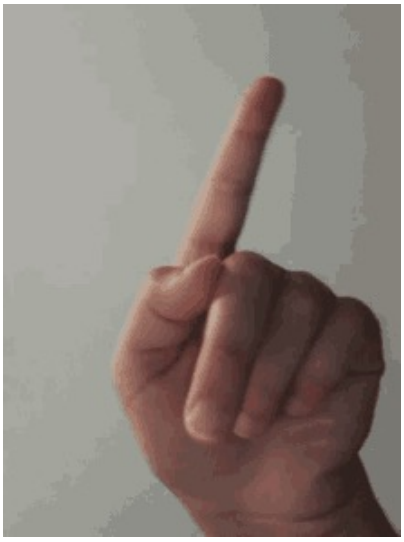
Yes, if the institution chooses to offer informal resolution for cases involving employee-on-student harsasment — 0%

No, because the case involves employee-on-student harassment — 0%

27

2020 Rule

May not offer informal resolution if an employee is the respondent



28

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



29

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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

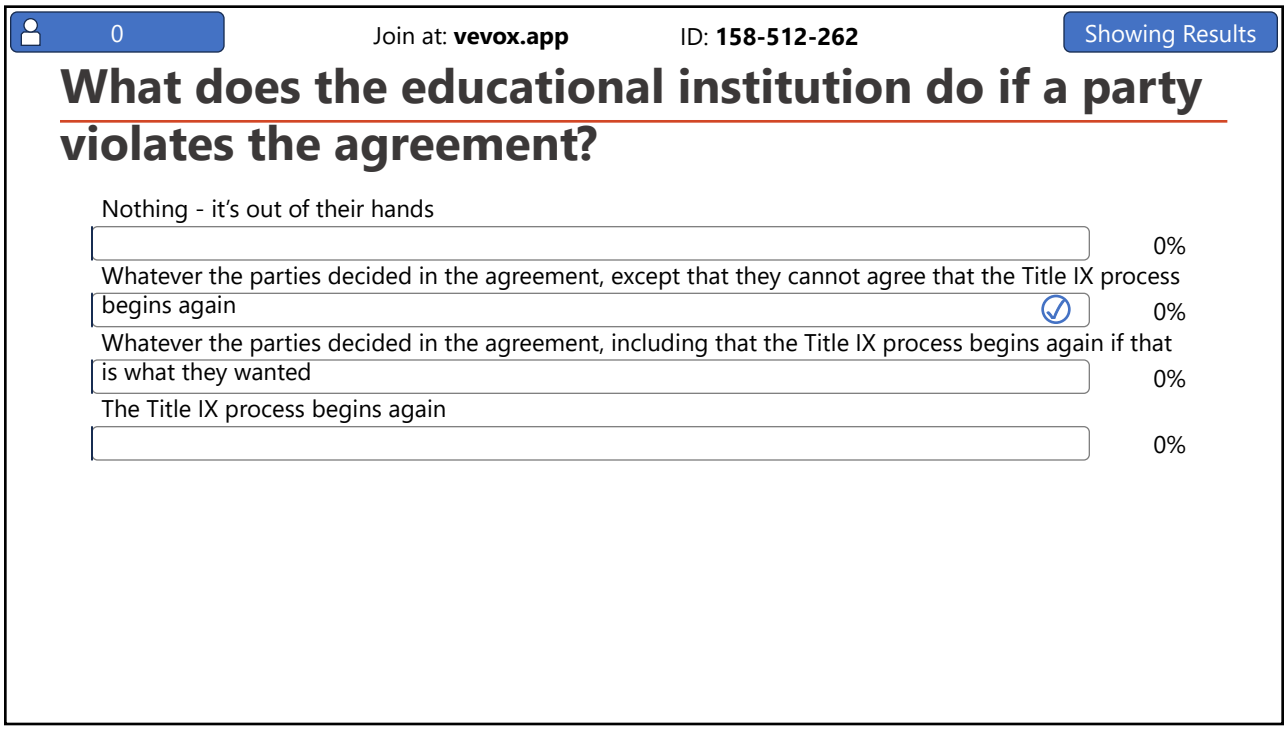
30

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	2024 Rule
Under the 2020 Rule, the notice must be in writing	Under the 2024 Rule, the notice need not be in writing

31



33

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

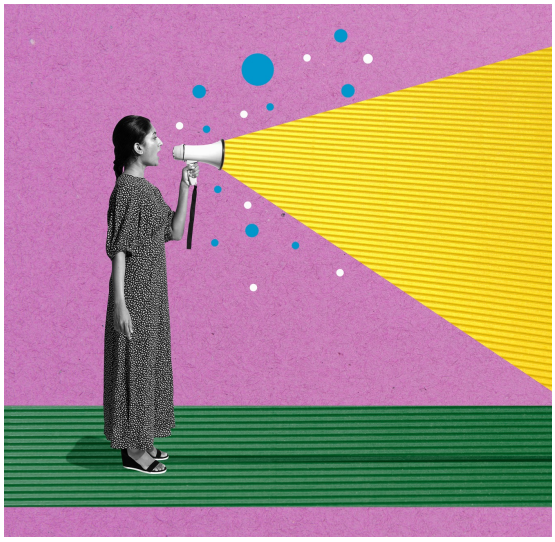
2024 Rule

- 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

34

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



35

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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%

37



38

Steps in a Successful Informal Resolution

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

39

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

40

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I support face-to-face informal resolution in sexual harassment cases

Yes, in all cases 0%

Yes, but not in cases involving sexual assault or violence 0%

No 0%

Unsure 0%

42

Identify the Facilitator

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



43

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

44

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

45

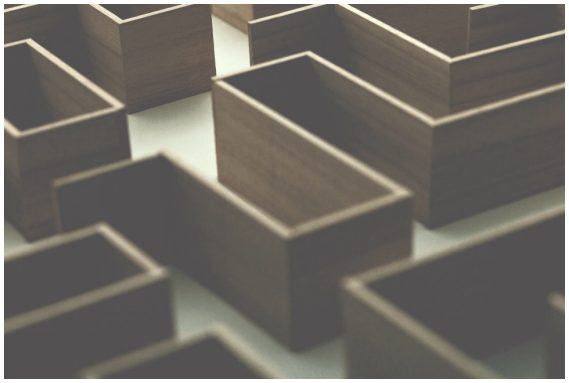
Prepare

- 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 informal resolution, 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



46

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

47

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

48

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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 to show attentiveness and encourage elaboration "Tell me more about" "What did it look like when…."
- Physical mirroring – wait two seconds to avoid mimicking

49

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."

50

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



51

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

52

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

53

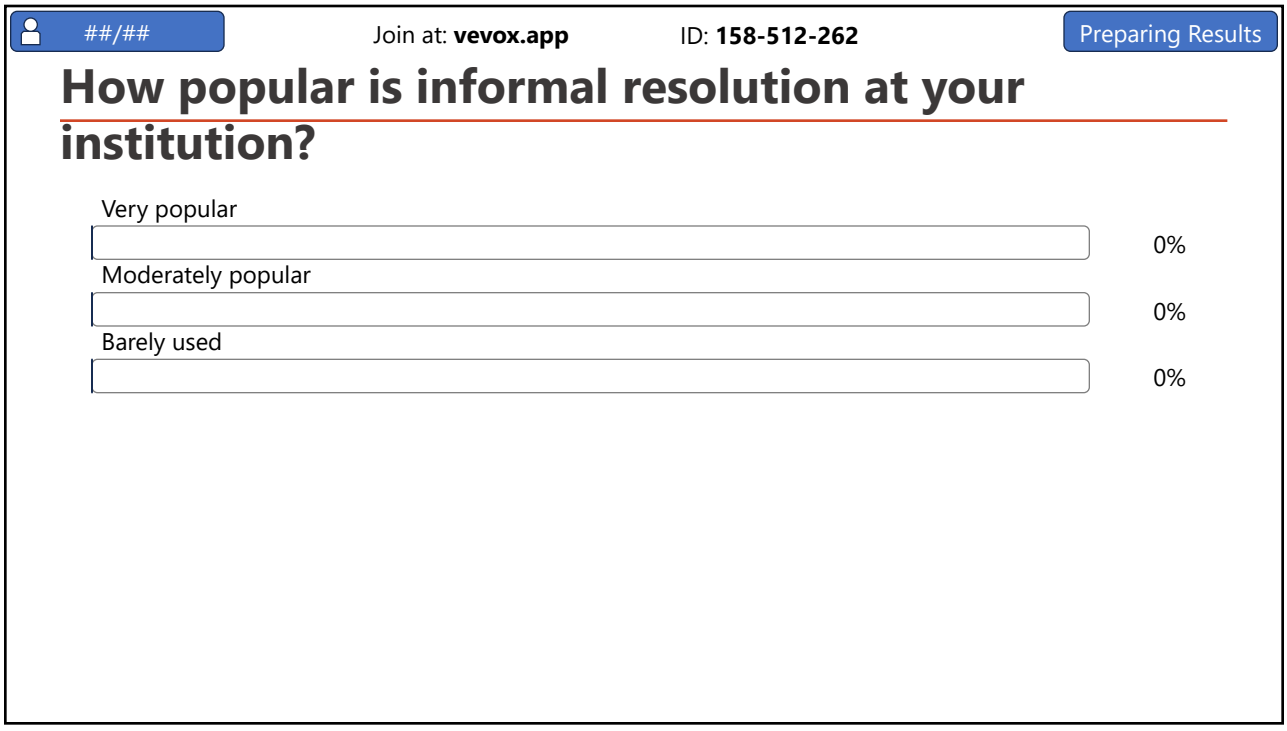
Enforcement

- 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

54


Popularity of Informal Resolution

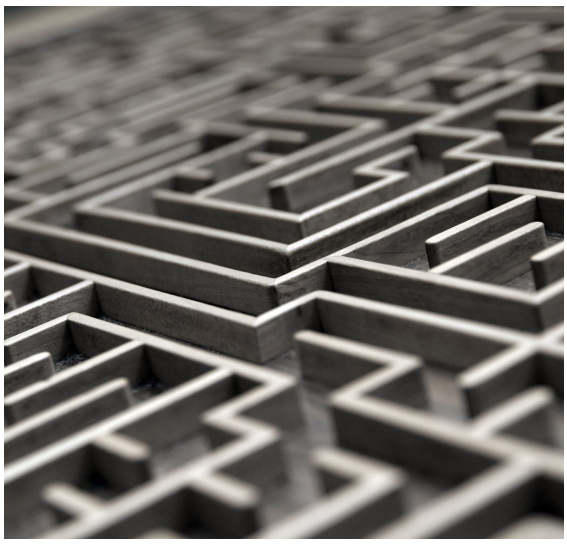
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How popular is informal resolution at your institution?
Very popular
0%
Moderately popular
0%
Barely used
0%

57

Barriers to Use

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



58

59

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

59

Overcoming Barriers



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

60

Questions



61