

# 2024 Title IX Training Module: Informal Resolution Facilitators

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# Navigating the Informal Resolution Process

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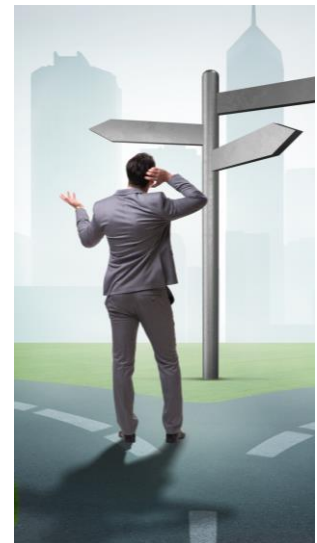
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## What is the Informal Resolution (IR) Process All About?

The regulations provide discretion to offer informal resolution in some circumstances

- This process is **optional** in the regulations
- May be **offered at any time** between when a complaint is filed and a determination of whether sex discrimination has occurred
  - Sometimes parties who initially said **no** change their minds – which is OK!
- Need to include this in board policy to make it available to parties



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## Informal Resolution: A Quick History

- Prior to 2020 regs, informal resolution was not required, and many schools did not offer it
  - Feds issued guidance that mediation was not appropriate for Title IX cases, which made schools a little leery of using it
  - Also, there were issues with availability of appropriately trained staff
- The ED specifically included informal resolution in 2020 regs
  - May officially be offered **after** a formal complaint has been filed
  - Overturned prior ED guidance that prohibited informal resolution for sexual assault
- 2024 regs bolstered the process
  - Expanded to permit informal resolution when the school discovers an act which might constitute sex discrimination, even if a complaint has not been filed
  - **For the time being, 2020 still regulations apply. You can only use informal resolution if a formal complaint has been filed!**

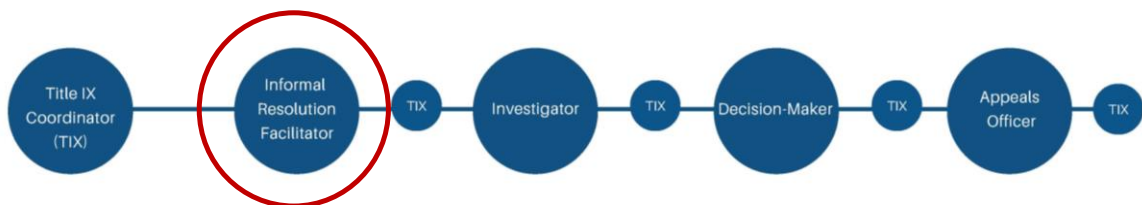
## What is the IR Process?

- Purpose is to provide all parties (complainant(s) & respondent) with a chance to resolve issues together in an amicable way
- Per 20 & 24 regs, this is a **voluntary** process – if one party does not agree to participate, or elects to end it, the process stops!
  - Regulations prohibit districts from requiring or pressuring participation
  - May not require waiver of the right to an investigation and determination of the complaint as a condition of enrollment or continuing enrollment, employment or continuing employment, or exercise of any right.

## IR Begins (and Maybe Ends) with the Title IX Coordinator

- After the Title IX Coordinator receives a complaint, they are expected to discuss the informal resolution process if it is **available** -per board policy and it is **appropriate**
  - **Title IX Coordinator** is responsible for deciding when it is appropriate!
- Per both 20 & 24 federal regs:
  - MAY NOT use informal resolution if an employee is the respondent and a student is the complainant
  - Should not offer it if the process would conflict with state or federal law
  - IR is not appropriate when the district determines the conduct would present a future risk of harm

## The Title IX Line-Up



## Title IX Coordinator Stays Involved Throughout

- Title IX Coordinator is still expected to provide supportive measures during this process **to all involved**
- Also responsible for **supervising** the process throughout



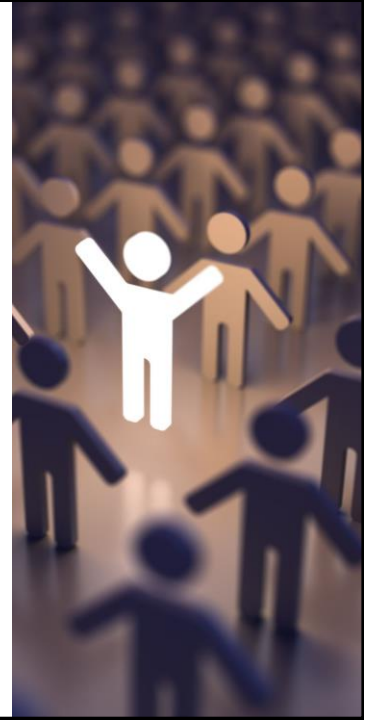
## When is IR Appropriate?

- Behavior is not serious in nature
- Discipline is not a likely outcome
- There is an openness to discuss and an opportunity to reach mutual understanding
- Everyone agrees to participate!



## Why Would the Parties Agree to IR Anyway?

- Want to avoid the formal process and control the outcome
- Want a quicker resolution
- There is a good chance that the process will:
  - Stop the behavior;
  - Clear the air;
  - Develop a mutual understanding;
  - Remedy the harm; and
  - Ultimately prevent future acts of discrimination!



## Meet Your Host: The Facilitator

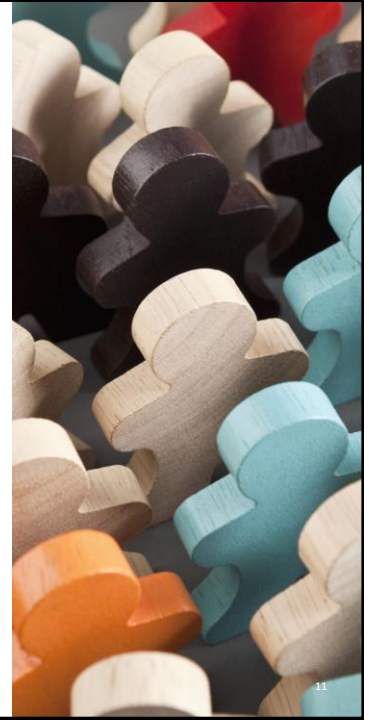
- Guides the informal resolution process between participants
- Facilitators may not have any other role in the process, so that they can remain neutral
- Like other roles, must ensure that the facilitators have no bias for or against any participant
- Facilitators should be trained to do their jobs, and also trained to identify and avoid conflicts of interest!



## Facilitator Training Requirements

Same as Title IX Coordinator

1. Definition of sexual harassment
2. Scope of the district's education program or activity
3. The district's grievance process
4. How to serve impartially



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## 1. Definitions of Sexual Harassment

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## 2020 Sex-Based Harassment

Quid pro quo harassment- Conditions the provision of an aid, benefit or service on an individual's participation in unwelcome sexual conduct

Specific offenses: sexual assault, dating violence, stalking, domestic violence

Hostile environment harassment- Conduct that is determined by a reasonable person to be:

1. Unwelcome
2. Severe,
3. Pervasive
4. Objectively offensive
5. That it **effectively denies** a person's ability to participate in or benefit from the educational program or activity.

## 2024 Sex-Based Harassment:

Quid pro quo harassment- Unwelcome conduct by an employee, agent, or other person offering aid, benefit, or service under the educational programs or activities of the entity while explicitly or implicitly conditioning the same on participation in unwelcome sexual conduct

Specific offenses: sexual assault, dating violence, stalking, domestic violence

Hostile environment harassment- Conduct that is:

1. Unwelcome
2. Sex-based
3. Subjectively **and** objectively offensive
4. So severe **or** pervasive
5. That it **limits or denies** a person's ability to participate in or benefit from the educational program or activity.



## Comparing the Changes on Hostile Environment

### ■ On Hold 2024:

- Unwelcome sex-based conduct that based on totality of circumstances is subjectively **and** objectively offensive **and** is so severe **or** pervasive it **limits or denies** a person's ability to participate in or benefit from the educational program or activity.

### ■ 2020 – ongoing pending court action:

- Unwelcome sex-based conduct must be “so severe, pervasive **and** objectively offensive” that it **effectively denies** access to or participation in education programs or activities.

## 2. Scope of the District's Education Program or Activity

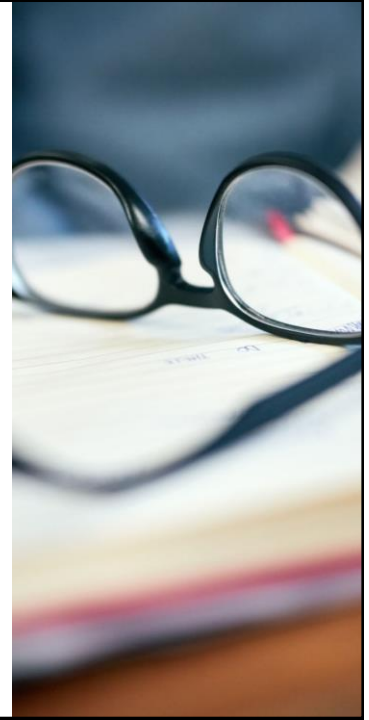
## Scope of Educational Program or Activity

- The 2020 regulations only apply to sex discrimination occurring against a person in the United States and that discrimination is a part of the educational program or activity.
  - On school grounds or situations over which the school exercises “substantial control.”
  - Fact specific analysis to review the allegations and whether the discrimination is on school property, during a school activity, has a nexus to school, etc.
- Note: the 2024 regulations not in effect in Ohio, amended the scope to administer Title IX in educational programs and activities now includes conduct that occurs off campus and even outside the U.S. Under the 2024 regulations, the question would have been “whether the recipient has disciplinary authority over the respondent’s conduct in the context in which it occurred.”

## 3. The District's Grievance Process

## Conducting the Investigation and Grievance Process

- Title IX Coordinator responsible for receiving:
  - Reports of conduct that could meet the definition of sex discrimination or harassment
  - Formal complaints of sex discrimination or harassment
- Remember – Actual knowledge occurs when notice is received by an official of the school who has the authority to institute corrective measures or an employee of the school.
  - It is not only when the Title IX Coordinator receives notice.



## Conducting the Investigation and Grievance Process

- Actual knowledge means that the school is now required to:
  - Respond promptly in a manner that is not deliberately indifferent.
  - Treat complainant and respondent equitably by offering supporting measures.
  - Following the grievance process before disciplinary sanctions are imposed.

## Conducting the Investigation and Grievance Process



### **Actual knowledge is communicated to the Title IX Coordinator resulting in the following required actions:**

Title IX Coordinator promptly contacts the complainant with information regarding supportive measures.

Discusses the options of supportive measures with the complainant, including they are available with or without a formal complaint.

Explains the formal complaint process to the complainant.



**Best Practice:** memorialize this conversation in writing, email, etc. and include a copy of the school's policy

## Supportive Measures

- Defined as:
  - “individualized services reasonably available that are nonpunitive, non-disciplinary, and not unreasonably burdensome to the other party while designed to ensure equal educational access, protect safety, or deter sexual harassment.”
  - Examples: changing classes, stay away orders, different schedules, assigning buses, guidance counselor access, checking in regularly, etc., etc.



## Supportive Measures

- 2024 regulations further defined “supportive measures” to state that supportive measures:
  - May vary depending on what the recipient deems to be reasonably available.
  - Must not unreasonably burden either party.
  - Must be designed to protect the safety of the parties or provide support during the recipient’s grievance procedures or informal resolution process.
  - Not imposed for punitive or disciplinary reasons.
  - May modify, terminate, or continue supportive measures at the end of the grievance procedure or informal resolution process.
  - If modified or terminated, must provide a timely opportunity to complainant/respondent to challenge the decision with an impartial employee.
  - Must not be the employee who made the decision.
  - If there is a material change in circumstances, complainants/respondents may seek a modification of supportive measures.

## Conducting the Investigation and Grievance Process

- Formal complaint is filed. This is permitted to be verbal or written at any time.
- **Consider informal resolution, if appropriate, cannot be required.**
  - **Never appropriate when a staff member is the respondent.**
- Title IX Coordinator can offer informal resolution to the complainant provided the parties involved are provided with written notice of the allegations, the requirements of the informal resolution, and the ability for either party to withdraw from the informal resolution process at any time.
  - Must have voluntary written consent.

## 4. Serving Impartially

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### Facilitators (and Everyone Else) Must Serve Impartially

- Serving impartially means avoiding prejudgment of the facts at issue, conflicts of interest, and bias.
- Prejudgment of the facts means that Title IX staff should not assume they know what happened in a case even if there are 'signs' suggesting truth or falsity during the process.
- Prejudgment may be based on sex or other stereotypes.
  - Examples: female alleging harassment but is not crying/displaying emotion when describing events of harassment so maybe she is lying. Male unable to maintain eye contact while discussing allegations indicates untruthfulness.

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## Bias and You

- Being unbiased requires an objective approach that does not prejudge or have a preference for the complainant or the respondent, or the characteristics of the parties.
- Must evaluate the facts without bias. Do not start with believing the complainant.
- Bias could include stereotypes about students or staff based on sex, race, etc., or other characteristics.
- If you think there is a basis upon which you could be accused of bias, disclose before the investigation (investigator) or rendering a decision (decision maker).
- Remember, your role is to gather and summarize evidence relevant to the claim, not to judge the allegations.

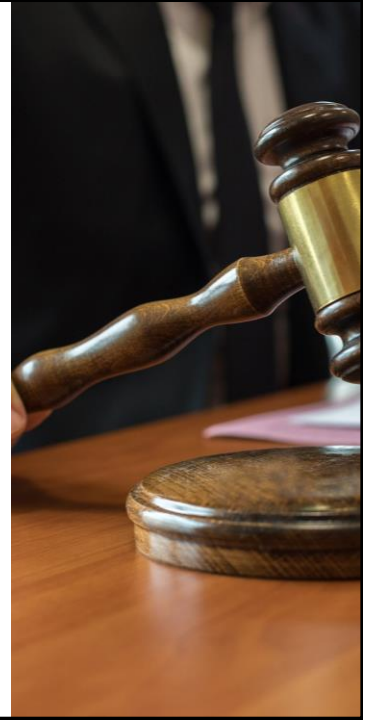
## Conflict of Interest

- There are no specific examples of a conflict of interest in the regulations; this is left to the discretion of the school district.
- Conflict of interest:
  - When a personal interest or relationship might interfere with a school employee's ability to act neutrally on a complaint regarding a staff member, student, or other person.
  - When a person working on a particular matter may not be impartial due to the circumstances or persons involved. Conflicts may be:
    - » **Direct** (actual issue between personal interests/relationships and official responsibilities),
    - » **Perceived** (someone might believe there is a conflict) or
    - » **Potential** (conflict could develop).
  - Disclose potential conflicts before serving on the matter. The district can always get someone else to avoid a claim of conflict or bias.



## Conflict of Interest

- A conflict of interest could be present if:
  - The Title IX staff demonstrates preference for or against complainants or respondents generally, or
  - Title IX staff has a conflict with a particular complainant or respondent
  - Examples: assuming everything a complainant says is true, or scrutinizing factual inconsistencies or errors of respondents more closely as this would be inconsistent with prohibition on prejudging the facts, conflict of interest, or bias.
- One of the bases for an appeal of a decision-maker's decision is that a conflict of interest or bias affected the decision.



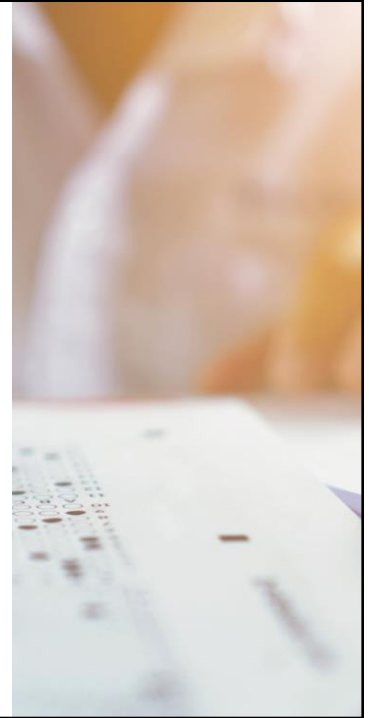
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Let's Do This!

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## The IR Process Step by Step

1. Title IX Coordinator determines that IR is appropriate and provides written notice, which should contain:
  - **Summary of allegations;**
  - **Description of the process;**
  - **Right to withdraw** from the process at any time;
  - **Notice that upon resolution the parties cannot initiate/resume grievance** concerning the same allegations;
  - **Potential terms** that may be requested/included; and
  - What **information and records will be maintained** and who can access them.
2. Title IX Coordinator obtains **voluntary** written consent from parties



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## The IR Process Step by Step

3. Title IX Coordinator notifies Facilitator, who reaches out to all parties
4. Facilitator determines how to conduct IR that is appropriate (on a case-by-case basis)
  - Do parties meet in the same room together, or separately?
  - Do discussions occur at the same time, or at separate times?
  - Who will accompany the parties during any meetings or discussions?
  - Where will meetings be held (separate rooms in the same building, neutral location, in person or virtual, etc.), and what needs to be provided to facilitate participation (technology needs, supplies, environmental needs, supports for disability-related barriers, etc.)

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## The IR Process Step by Step

5. Facilitator conducts IR with parties
6. As an outcome, the parties either:
  - Reach a resolution, which is documented in a formal written agreement that is signed and binding on all parties; or
  - Do not reach agreement, and the grievance process continues
7. Communicate with the Title IX Coordinator



## The Facilitator has Some Real Power

- If the Facilitator determines that any party is acting in bad faith, the Facilitator has the power to end the process
- Facilitators stay in contact with Title IX Coordinators throughout and may recommend intervention as needed
- Facilitators may seek support in other ways from the District to access resources, facilities, etc.

## What Skills Should a Good Facilitator Have?

- Likely to be viewed as a neutral party
- Has the ability to connect well with both parties
- Is knowledgeable about what resources and options a District has at its disposal to support and reach resolution
  - Money
  - Training
  - Changes to the environment, such as class or job reassignments
  - Internal staff who are available to support next steps
- Knows when to walk away (and when to run!)
- Is able to draft agreements that are understandable and are possible to implement.

## Internal vs. External Facilitators

- Title IX Coordinators should have authority to decide when to use a facilitator from outside the district
- Why might they appoint someone from outside the organization?
  - Actual or appearance of bias for internal staff
  - Earn confidence of neutrality
  - Lack of time and availability for internal staff
  - Staff are not sufficiently trained
  - Concerns with dynamics of parties who are involved

## Tools in a Facilitator's Toolbox

- ☐ Know who is coming to the table, and talk with them in advance (if possible) to learn about any fears, concerns, expectations, etc., explain process, and discuss rules
- ☐ Engage in active and respectful listening
- ☐ Present and consistently implement solid ground rules at the onset and throughout
- ☐ Pay attention to time

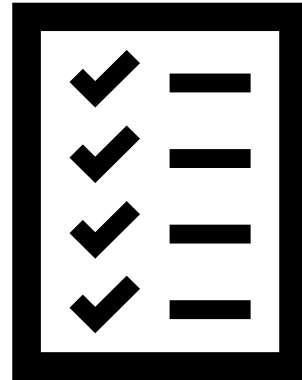


## Tools in a Facilitator's Toolbox

- ☐ Encourage reluctant participants, and “rein in” overzealous ones
- ☐ Have a good awareness of the tone and energy in the room
- ☐ Know thoughtful ways to redirect unproductive/unprofessional conversations and behavior
- ☐ Help participants get beyond the past and focus on the future
- ☐ Take careful notes

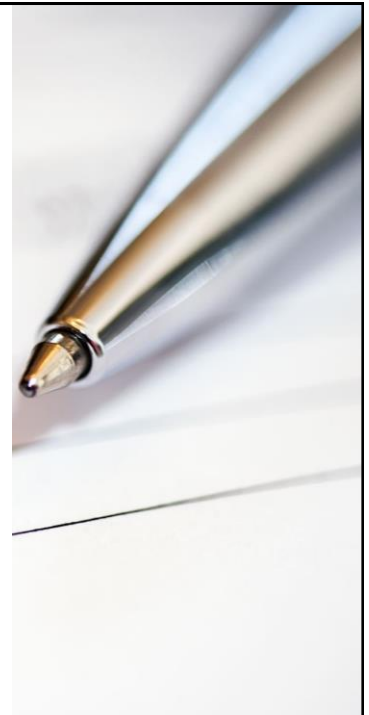
## Tools in a Facilitator's Toolbox

- ☐ Don't lose track of good ideas
- ☐ Know when to take a break
- ☐ Be ready to separate people as needed
- ☐ Don't take things personally
- ☐ Diligently follow up



## Written Resolution Agreements

- Should have a template for this to ensure consistency
- Key parts:
  - Names of complainant(s), respondent
  - Name of facilitator
  - Recognition that IR process and agreement are entered into voluntarily
  - Statement of confidentiality (to the extent permitted by law)
  - Summary of agreed-upon terms
  - Recognition that agreement is not appealable, and ends the investigation process
  - Summary of what happens if a party does not fulfill the bargain
  - Signatures with dates



## Written Resolution Agreements

- Opportunities for solutions are limited only by your imagination . . . and the laws . . . and the confines of reality
- Facilitators should consult with Title IX Coordinator to ensure agreement is realistic and can be implemented with fidelity

## Quick Note on IR Record Keeping

- District (Title IX Coordinator) must maintain records documenting the informal resolution process for **7 years** (or potentially longer if required by the district's records retention schedule)
- Remember that these records should be maintained confidentially, whether stored electronically and/or in a printed file







## Questions?

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