


HUSCH BLACKWELL




Informal Resolution Training for Student Misconduct and Title IX Incidents on your Campus

August 17, 2021

1



Presenters



Scott Schneider
Partner
Education Practice Group, Austin
Husch Blackwell LLP
Scott.schneider@huschblackwell.com

Aleks O. Rushing
Senior Associate
Education Practice Group, St. Louis
Husch Blackwell LLP
aleks.rushing@huschblackwell.com

Paige Duggins-Clay
Associate
Education Practice Group, Austin
Husch Blackwell LLP
Paige.duggins-clay@huschblackwell.com

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

2



<https://wordinfo.info/results/misnomer>

informal [in-fawr-muhl] SHOW IPA 🔊 ☆

See synonyms for: **informal / informally** on [Thesaurus.com](https://www.thesaurus.com)

adjective

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

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

3

The Need For More Options

Traditional investigative/adjudicative processes can often be incompatible with needs of harmed parties:

- 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.



4



How Can IR Minimize/Mitigate Trauma?

- “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/>

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

5



Agenda

- **Background**
 - Title IX Regulatory Requirements & OCR Guidance
 - Legal Considerations & Case Study
- **Practical Considerations for All Informal Resolutions**
 - Conflict of Interest/Bias
 - Documentation
 - Assessing Voluntary Participation
 - Minimizing/Managing Trauma
 - Memorializing & Enforcing Final Resolution Agreements
- **Hypothetical Informal Resolution Scenarios**
- **Restorative Justice as a Method of Informal Resolution**
- **Practical Considerations for Implementation and Policy Development**

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

6

H-B

.....

Overview: Title IX Regulations & OCR Guidance



HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

7



8

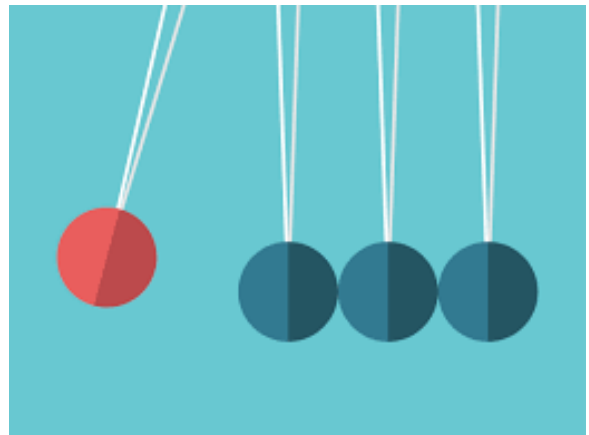


Big Picture

- Final rule effective on August 14, 2020
- Set the standard for administrative enforcement
- Does not (necessarily) alter standards for lawsuits seeking money damages for violation of Title IX
- Likely necessitated changes in your institution’s policies, procedures, and practices
- Recognized use of informal resolution for complaints of SH, including sexual assault

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP



HUSCH BLACKWELL

© 2021 Husch Blackwell LLP



What's Next?

- Legal challenges seeking to enjoin regulations largely unsuccessful**
- Changes are likely but wholesale rescission is not
- ED is currently engaged in a “comprehensive review” of Title IX regulations
- Any changes likely will not take effect until 2022-23 academic year at the earliest

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

11

- 2020 Amendments (regulations effective 8.1.2020) remain in effect pending ED further review
- Nothing in the 2020 Amendments prohibits schools from addressing sexual misconduct that does not meet the 2020 definition of sexual harassment in their codes of conduct
- But (as expressly stated in the Q&A) OCR does not enforce school codes of conduct

OCR Guidance: July 2021 Q&A

XIV. Informal Resolution

Question 58: May a school offer an informal resolution process, including restorative justice or mediation, as a way to resolve a sexual harassment complaint?

Answer 58: Yes. The 2020 amendments state that a school is not required to offer an informal resolution process but may facilitate an informal resolution process at any time prior to reaching a determination regarding responsibility, subject to certain conditions.¹⁹² A school is not permitted to offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student.¹⁹³

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

12



Insights from July 2021 Q&A

- **Discretion** to offer informal resolution process is limited by a school's obligation to ensure that facilitators are **free of conflicts** and trained to serve **impartially**
 - E.g., restorative justice facilitators should be "well-trained in effective process"
- May use **trauma-informed techniques** during informal resolution
- The term "informal process" remains undefined to allow a school the **discretion** to adopt whatever process best serves the needs of its community



HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

13



Insights from July 2021 Q&A

- Expressly notes that **restorative justice** may be an option
- Amendments do not require that the parties interact directly with each other as part of an informal resolution process
- Schools may exercise **discretion** to make fact-specific determinations about whether to offer informal resolution in response to a complaint



HUSCH BLACKWELL

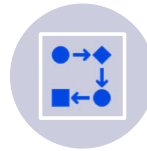
© 2021 Husch Blackwell LLP

14

Title IX Informal Resolution: Key Regulatory Requirements



A formal complaint must first have been filed and written notice given to the parties



The parties must be apprised in writing of how the informal resolution process will work and the consequences of participating in it



The parties must voluntarily agree to participate in writing



The parties must be allowed to withdraw from informal resolution up until the point it is final

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

15

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
- ✓ May **not** offer an informal resolution process **unless a formal complaint is filed**

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

16

Reminder: Title IX Regs Only Apply to “SH” in “EP/A”

Conduct on the basis of sex that is:

Quid Pro Quo Harassment

Hostile Environment Harassment

Sexual Assault

Relationship Violence

Stalking

Sexual Harassment

Education program / activities

• ED: All operations

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

17

THE DAILY CALIFORNIAN

2 UCLA graduate students settle sex harassment suit



JINTAK HAN/DAILY BRUIN/COURTESY

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


HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

18

Rewind: Title IX 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.”

 truncated

/ˈtrɛŋɡ kəˈdeɪd/

adjective

shortened in duration or extent.
"his truncated career"

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

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

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

19

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.”

Court denied UCLA’s MTD

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

20

H-B

Good News For Schools

Very Few Successful
Deliberate Indifference
Claims Based on Informal
Resolution
Process/Outcome

"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 . . .'"


"[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."

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

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP






HUSCH BLACKWELL

Practical Considerations for All Informal Resolutions

23



Practical Considerations: Overview

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

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

24



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

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

25

Conflict of Interest, Bias, & Training

Title IX Requirements

➤ **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.”

➤ **Training:** “[T]he definition of sexual harassment in § 106.30, the scope of the recipient’s education program or activity, . . . informal resolution processes, as applicable, and *how to serve impartially*, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias. . . .”

[34 C.F.R. § 106.45(b)(1)(iii)]

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

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

26

H-B
H-B

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?

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

27

H-B
H-B

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?

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

28



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 must 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

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

29



Question

What “soft skills” should we look for in IR Facilitators?

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

30



“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 at our institution?



HUSCH BLACKWELL

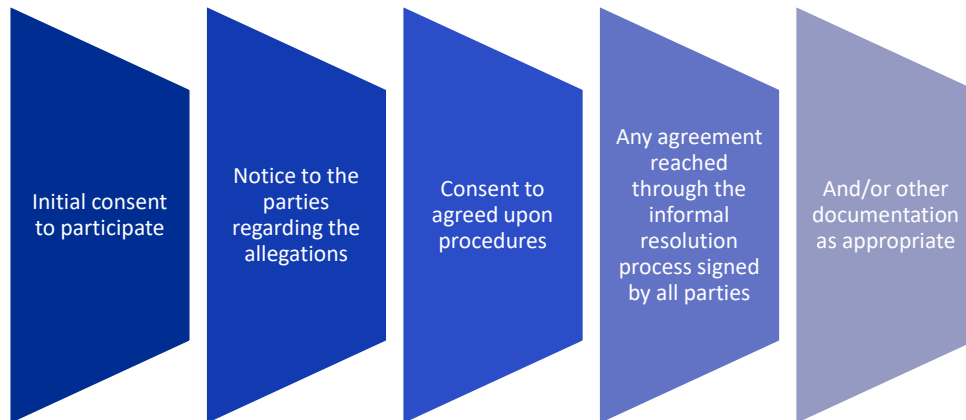
© 2021 Husch Blackwell LLP

31



How should we document informal resolution?

As appropriate to each matter:



HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

32

H-B

Title IX: Required Written Notice

- Identity of parties involved (if known)
- Specific section of institution’s policies that have allegedly been violated
- Alleged conduct constituting misconduct
- Date and location of alleged incident
- Information about right to advisor
- Sufficient time for Respondent to prepare a response prior to any formal interviews or process
- *Recommended:* Background information regarding informal resolution process

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

33

**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.”

Implications for Potential / Concurrent Legal Proceedings?

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?

- MOU with local prosecutor?
- Civil litigation waiver?
- Mutual confidentiality agreement?
- State privilege or confidentiality law?
- FRE 408?

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

34



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.
- If the complainant's or respondent's circumstances change, they may request a supplemental agreement. It should be up to the Title IX Coordinator to determine whether it is appropriate to proceed (e.g., Changes to an academic program that conflict with a term of an agreement).

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

35



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



HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

36



Is an Informal Resolution Final?

- Generally, yes – Most informal resolutions will result in an agreement that resolves the allegations in a definitive and final way
- A party cannot demand an investigation and hearing of the same conduct that has been resolved through informal resolution
- Exception exists if terms of the informal resolution are not final (i.e., contingent) and contemplate a potential return to the formal process

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

37



How Do We Ensure Participation is Voluntary?


- Educate the parties and the community about informal resolution options
- Provide Notice of Rights & Options, such as:
 - Whether and when the process can be terminated (*IX regs require*)
 - Whether information shared can be used in subsequent conduct matters
 - How IR differs from formal investigation and adjudication
 - Whether the process involves face-to-face interaction
 - Potential Outcomes/Consequences (*IX regs require*)
- Practice Tip: Participation contingent on successful completion of preparatory meetings
- Require parties to sign a Participation Agreement (*IX regs require*)
- Frequent check-ins and monitoring
- When in doubt, err on side of caution

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

38

H-B



Reflect

- What kinds of questions might we ask a complainant to assess whether they are participating voluntarily?
- What kinds of questions might we ask a respondent?
- What other “red flags” might make a case incompatible for informal resolution?

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

39

H-B

Informal Resolution is Not for All Situations

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 the 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.
- **Practice Tip:** Establish & Memorialize process for *Initial Assessment* of all potential informal resolution cases.

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

40



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?

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

41



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?

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

42



Initial Assessment Hypo 3

Title IX Coordinator has walk-in appointment with Complainant, who describes alleged conduct constituting sexual assault due to incapacitation under the Title IX policy. The alleged incident occurred after a long night of drinking, which rendered the Complainant incapacitated. No element of force was involved. 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?
- If not, do you have any concerns re offering IR under these facts?
- Assuming that Complainant is interested in IR, how will you assess Respondent’s potential for participation?

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP



HUSCH BLACKWELL

Informal Resolution Models



Question

- What are some methods of informal resolution?

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

45

What are some examples of informal resolution?

Educational Conversation**

Mediation

Administrative Adjudication

Restorative Justice

*Settlement with the involvement of attorneys

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

46



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

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

47



Hypothetical

Title IX Coordinator receives formal complaint alleging sexual harassment.

Student-Athlete Complainant alleges that Student-Athlete Respondent repeatedly “love taps” Student-Athlete Complainant on the buttocks during practices and games.

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

48



Initial Assessment

- Based on the information provided in the complaint, does this meet the definition of “sexual harassment?” If not, should we dismiss?
- What information will you review? **PRIOR DISCIPLINARY RECORDS**
- What questions will you ask Student-Athlete Complainant in the initial intake meeting to assess appropriateness for IR referral?
- If we proceed, do you have any concerns re offering IR under these facts?
- How would your assessment change if the Assistant Coach was the Respondent?

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

49



Hypo 1: Additional Information

Complainant: “I felt embarrassed and uncomfortable with R touching my bottom because he always called me ‘sweetheart’ or ‘honey’ while slapping me. When I told him to stop, R told me to ‘man up’ and ‘stop acting like a little girl.’ R has also made comments about my private parts in the locker room which are humiliating. I get really nervous around R and have not been playing well. I recently lost my recent starting spot because of the anxiety this is causing me.”

Respondent: “I admit that I slapped Complainant’s butt during practice and games. Sometimes I tease him about his ‘junk,’ but I do that to everybody. I did not do anything to hurt or harass Complainant, I just wanted to motivate him to play harder and didn’t think it was inappropriate. I’ve seen others slap teammates and make goofy comments – its just a part of being a guy on the team.”

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

50



What potential policy violations are at issue?

Sexual Harassment – Hostile Environment

Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient’s education program or activity.

Sexual Assault – Fondling

Touching of the private body parts of another person for the purpose of sexual gratification, without the consent of the victim, including instances where the victim is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity.

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

51



Mediations: Practical Considerations

- What are the disputed issues?
- Is there additional information/evidence we need to gather?
- Is a joint session appropriate?
- What are potential outcomes?

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

52



Initial Meeting with Complainant

1. Listen!
2. What are your goals in this process?
3. Explore possible resolution options
4. Explain next steps
5. Reiterate that they can stop process at any time

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

53



Initial Meeting with Complainant

- “I want this inappropriate behavior to stop.”
- “I want Respondent to understand that this is disgusting behavior.”
- “I don’t want any contact with Respondent.”
- “I want Respondent to be removed from the football team.”

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

54



Initial Meeting with Respondent

1. Get other side of the story
2. What are your goals in this process?
3. Explore possible resolution options
4. Explain next steps
5. Reiterate that they can stop process at any time

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

55



Initial Meeting with Respondent

- “Under no circumstances am I leaving the football team.”
- “Complainant needs to grow up. I didn’t do anything wrong.”
- “Why am I being singled out – everyone else does this?”
- “Complainant is just picking on me because I’m black.”
- “The real reason Complainant isn’t starting is because he sucks.”

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

56

H-B

What are Potential Resolutions?

- Important: Do we have “buy-in” from internal stakeholders on proposed resolution (people need to be empowered to say “no”)?
- Discipline? Lesser conduct offense?
- “No contact” order? How would we enforce?
- Agreement to stop harassing practices?
- Removal from team?
- Educational conversation/training? What would we discuss? Who would handle?
- Do we involve the coach in the resolution?

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

57

H-B

When Is It Appropriate to Stop Process?



HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

58

H-B

Finalizing the Resolution

- Share with both parties and attempt to get acceptance
- What elements are in the final written agreement?
- How do we ensure the Title IX Coordinator receives information/documentation about outcomes?
- Should we consider additional remedial/preventative measures (e.g., climate assessment, targeted training)?
- Will this be a part of Respondent's "disciplinary record"?

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

59



60



Application in Non-Title IX Scenarios

How can we apply IR to other conduct scenarios outside of Title IX?

- What process do you have in place for that (if any)?
- What office(s) operate(s) that process?
- What are the similarities to how it is resolved under Title IX?
- What are the differences to how it is resolved under Title IX?

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

61



HUSCH BLACKWELL

Restorative Justice as a Response to Misconduct

62

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?



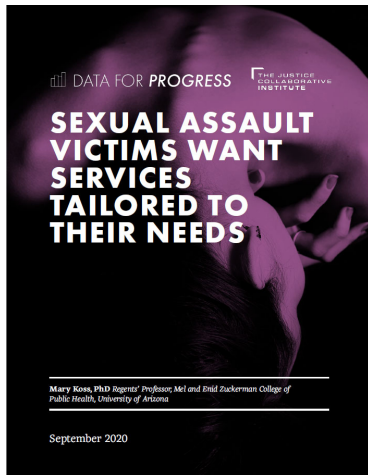
Restorative Justice Process:

- What is the harm?
- Who is responsible?
- What can they do to repair the harm?
- How can we rebuild trust?

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

63



Studies that have observed the use of restorative justice in sexual assault contexts provide a set of guidelines that center the rights of victims and minimize trauma. First, participation in restorative justice should always be voluntary and include family and community members. No victim of sexual violence should be compelled to engage in restorative justice nor should the process be tied to criminal prosecution. Second, the process should be victim-centered. Thirdly, programs should offer validation and vindication for victims, with a focus on repairing harm to the victim, their loved ones, and the broader community. Finally, restorative justice should involve accountability.

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

64

H-B

Mediation vs. Restorative Justice

Mediation

- No guided or structured preparation
- Immediate Parties only
- Shared responsibility/no obligation to necessarily accept responsibility
- Solution: Compromise

Restorative Justice

- Substantial Preparation
- Community & Institutional Participation
- Acceptance of Responsibility of Harm
- Trauma-informed safeguards
- Focus on Repairing Relationships & Restoring Trust

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

65

H-B

Understanding “Harm”

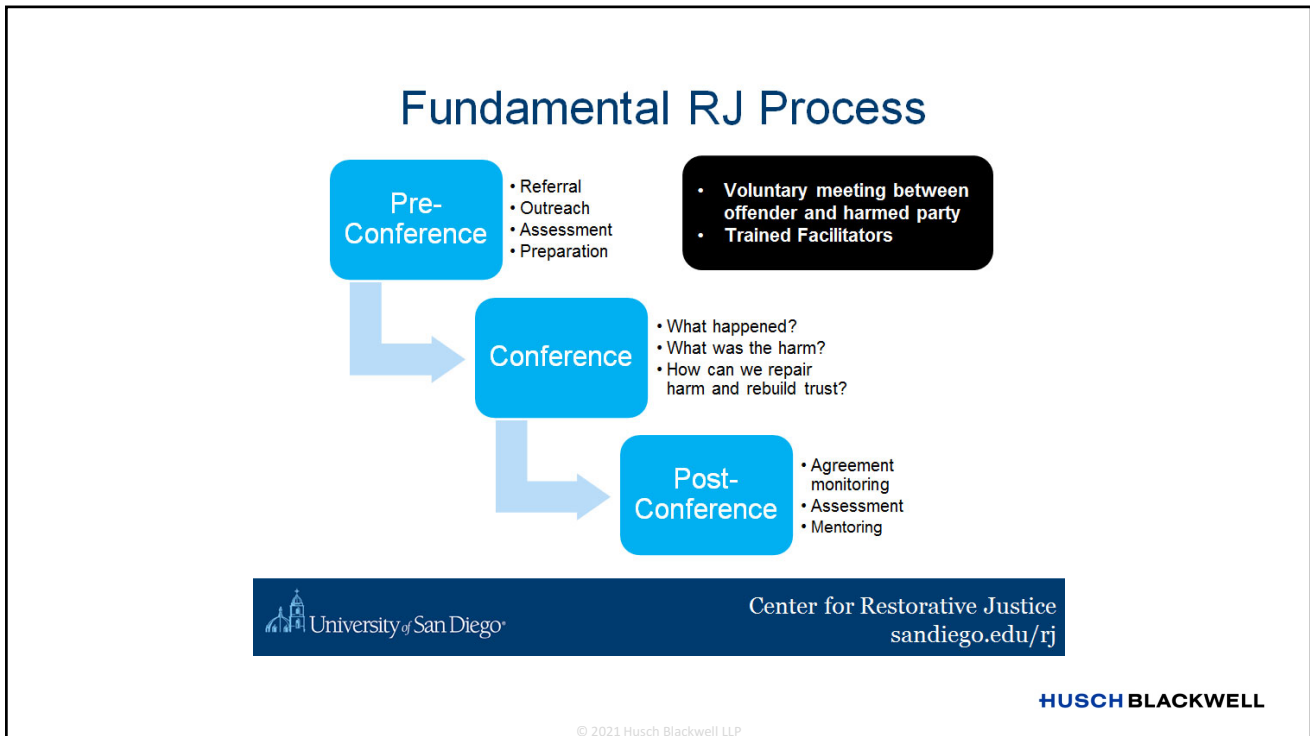
Discussion Questions:

- How is “harm” different from a policy “violation”?
- What kinds of harms may a victim/survivor describe?
- Are there types of harms that are not typically memorialized in a Code of Conduct/Title IX policy?

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

66



67

How can we utilize a restorative framework in our informal resolution process?

- Complainant and Respondent are sophomores at Great University.
- Complainant and Respondent meet at a party hosted by Respondent’s (on-campus) fraternity house.
- Complainant and Respondent dance at the party, exchange contact information, and agree to hang out again. Over the next several weeks, Complainant and Respondent become good friends.
- Respondent repeatedly asks Complainant to go out “on dates” and says he wants to take the relationship to the next level. Complainant likes Respondent a lot but is not sure whether she is ready for a serious relationship yet.

HUSCH BLACKWELL

68

Hypothetical #3 (cont.)

- Respondent invites Complainant to a Mardi Gras-themed party at his fraternity house.
- Complainant arrives at the party with several friends. Complainant leaves her things (including her keys) in another fraternity member's bedroom, which is locked for safekeeping. Complainant and Respondent eventually meet up and begin talking and dancing.
- Complainant and Respondent each drink several cups of the fraternity's homemade "Hurricane" punch. Later in the evening, Complainant notices that she is beginning to feel tired and dizzy and decides its time to call it a night.
- Complainant looks around but cannot find her friends. She calls and texts her friends and realizes they have already collected their things and left. Complainant does not know the fraternity member whose room her belongings were left in. Complainant turns to Respondent for help.

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

69

Hypothetical #3 (cont.)

- Respondent, who is also feeling quite tipsy, says he cannot find the fraternity member to unlock the room with Complainant's belongings. Respondent observes it is late and invites Complainant to sleep in his room until the morning, when they can get her things. Complainant agrees but tells Respondent she very tired and doesn't want "any funny business."
- Complainant and Respondent get into Respondent's bed. Respondent initially pulls Complainant into an embrace to "cuddle," but shortly thereafter begins touching Complainant's breasts and hips. Complainant pushes Respondent's hands away. Respondent then attempts to kiss Complainant's mouth, but she turns away.
- Respondent pulls Complainant closer and begins rubbing his hips against Complainant. Complainant can feel that Respondent has an erection. Respondent then grabs Complainant's hand and places it over his erection, moving Complainant's hand in a sexual manner. Respondent then requests Complainant to perform oral sex, which causes Complainant to begin crying.
- Startled, Respondent ceases activity, and the parties are silent. When Respondent wakes up, Complainant is gone. Complainant blocks Respondent on her phone and social media and avoids him on campus. Respondent believes the encounter was a "bad hook up," and doesn't think about the encounter until he receives a notice of complaint from the University's Title IX Office 6 weeks later.

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

70



Initial Assessment

- Does the alleged conduct fall within Title IX policy jurisdiction? If not, does the alleged conduct fall within a Code of Conduct/Discrimination/Sexual Misconduct Policy?
- Potential policy violations?
- What resolution options are available under our policy?
- What questions will you ask Complainant in initial interview to understand goals and present options?

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

71

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/>

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

72



Hypo – Add'l Facts from Intake Meeting with Complainant

- Complainant states that she experiences anxiety and fear whenever she sees Respondent and goes out of her way to avoid him on campus.
- Complainant says she has nightmares about the incident and “just wants to feel safe.”
- Complainant is sad to have lost her friendship with Respondent, which has also made other mutual friendships awkward and distant. Complainant is also angry at Respondent’s behavior and lack of respect.
- Complainant does not want to participate in a hearing or be cross-examined. Complainant also wants Respondent to “learn a lesson,” but is not sure she wants to “be the reason Respondent gets expelled.”

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

73



Pre-Conference: Generally

- Preparation of Parties and any other participants
 - Support persons/advocates
 - Institutional representatives
- Rapport/trust building with facilitator
- Hear the story
 - ✓ Allow parties to share with limited interruption, if possible. If necessary, use open-ended questions to encourage sharing.
(see next slide)
 - ✓ Open-ended questions
 - ✓ Listen for red flags that would make the case inappropriate for conference (denial of responsibility, issues of mental health, willingness to engage)
 - ✓ Help parties practice responding to what they will be asked during the conference
- Engage support person/advocate to gain additional insight of the impact/harm of the misconduct

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

74

H-B

Pre-Conference: Preparatory Questions for Harmed Party

How would you ordinarily prepare for an initial investigative interview with C?

How should your approach change in a restorative process, where the goal is to identify and address harm?

What's different/missing from this list compared to a traditional investigative interview outline?

What sort of responses would be "red flags" for terminating an IR/RJ process?

- What happened?
- What impact did this incident have on you?
- What was the hardest thing about this?
- If the person responsible were here, what would you like to say to them or ask them?
- Is there anything that could be done right now that would help meet your needs?
- Are there things in this community that permit/encourage incidents like this to happen that you would like to see addressed?
- What would you like to see Respondent do to repair the harm they have caused you?
- What concerns do you have about participating in this process?

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

75

H-B

Pre-Conference: Preparatory Questions for Offending Party

How would you ordinarily prepare for an initial investigative interview with R?

How should your approach change in a restorative process, where the goal is to encourage R to accept responsibility?

What's different/missing from this list compared to a traditional investigative interview outline?

What sort of responses would be "red flags" for terminating an IR/RJ process?

- What happened from your perspective?
- At the time of the incident, what were you thinking about?
- What have you thought about since the incident?
- What impact has this incident had on you?
- Who else has been impacted? How?
- What do you think you could have done differently?
- What can you do to make things right?
- How can we rebuild trust?
- Are there things in this community that permit/encourage incidents like this to happen that you would like to see addressed?
- What concerns do you have about participating in this process?

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

76

Example

"I started talking with him, I think about what I wanted and that I **didn't want a formal proceeding**. I didn't want a verdict handed down. I wanted something to come out of it. I wanted it to be discussion and I wanted to decide with Sameer what the results were going to be . . . It was a **powerful feeling** to feel that I was not just crazy. And that he also knew that it had been wrong."

"I was **terrified** that I assaulted her. I was terrified that I'd hurt her in this way. I was terrified of myself. Because if this was true and I did assault her then what did that make me?"

I was terrified of being found out. I was terrified of being sent to jail. I was terrified of all the consequences that come with sexual assault and rape and I didn't have anybody that I was like who I could tell because like . . . how do I say, 'Hi. I think I think I assaulted and raped somebody, but I'm not entirely sure.'"

21 || A SURVIVOR AND HER PERPETRATOR FIND JUSTICE

12/3/2018



Sameer met Anwen freshman year. He was into her, and they started seeing each other. Then one night, after a fraternity party, Sameer convinced Anwen to come home with him – which is when he coerced her into sexual activity. Their senior year, Anwen invited Sameer into a process of restorative justice.

<http://www.reckonings.show/episodes/21>

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

77



Identifying & Preparing Support Persons/Advocates

- ❖ **Contrast:**
 - Who often serves as an “advisor” in a traditional conduct process/mediation? What does that advisor’s participation look like under regs/policy?
 - What characteristics would you want in a support person/advocate role for a restorative justice conference?
- ❖ **Prepare:**
 - What are the parties’ needs for support in the process?
 - Are there components of the story that the support person is well-positioned to tell? (e.g., Impact of the conduct on victim? Observations of remorse/responsibility by offender?)
 - Has the support person identified particular needs/obligations for resolution?
- ❖ **Consider:** Would an institutional representative be appropriate in the conference? Who might be potential participants in this case?

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

78



RJ Conference: Goals

For Complainant:

- Create opportunity to share account and impact in trauma-informed way
- Identify and understand the way an incident of sexual misconduct impacted the Complainant in order to meaningfully redress the harm

For Respondent:

- Create opportunity and incentive for acceptance of responsibility
- Provide opportunity for understanding, education, and growth

For Institution:

- Ensure Complainant’s continued access to EP&A
- Address misconduct in a meaningful way
- Identify opportunities for community/cultural change

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

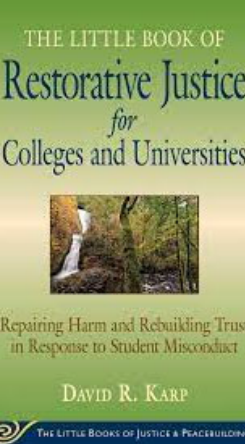
79

H-B

RJ: Conference: Facilitator’s Role

- Facilitate storytelling by all participants (set the stage; consider using a script)
- Monitor and respond to indications that process is unduly traumatic or becomes involuntary (often with assistance of co-facilitator)
- Identify and list harms
- Brainstorm solutions
- Outline resolution agreement with input from parties

.....



HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

80



Conference: The Significance of “Storytelling”

Back to our Hypo:

- What details do you think **Complainant** will share about the incident that you may not ordinarily capture in a traditional conduct process?
- What details do you think **Respondent** will share about the incident that you may not ordinarily capture in a traditional conduct process?
- What details might a **support person/advocate** share about the incident?

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

81



Conference: How Do We Facilitate “Acceptance of Responsibility”?

- How does the structure of a RJ conference facilitate accountability versus a traditional I/A?
- What “admissions” or acknowledgements might a Respondent make in the context of a RJ conference that would not come out in a traditional I/A?
- How do we address concerns about confidentiality/liability?

“[A]ccountability involves facing up to what one has done. It means encouraging offenders to understand the impact of their behavior—the harms they have done—and urging them to take steps to put things right as much as possible.”

-Howard Zehr

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

82

H-B

Conference: Identifying Harms, Needs, and Obligations (Hypo)

Harms? _____

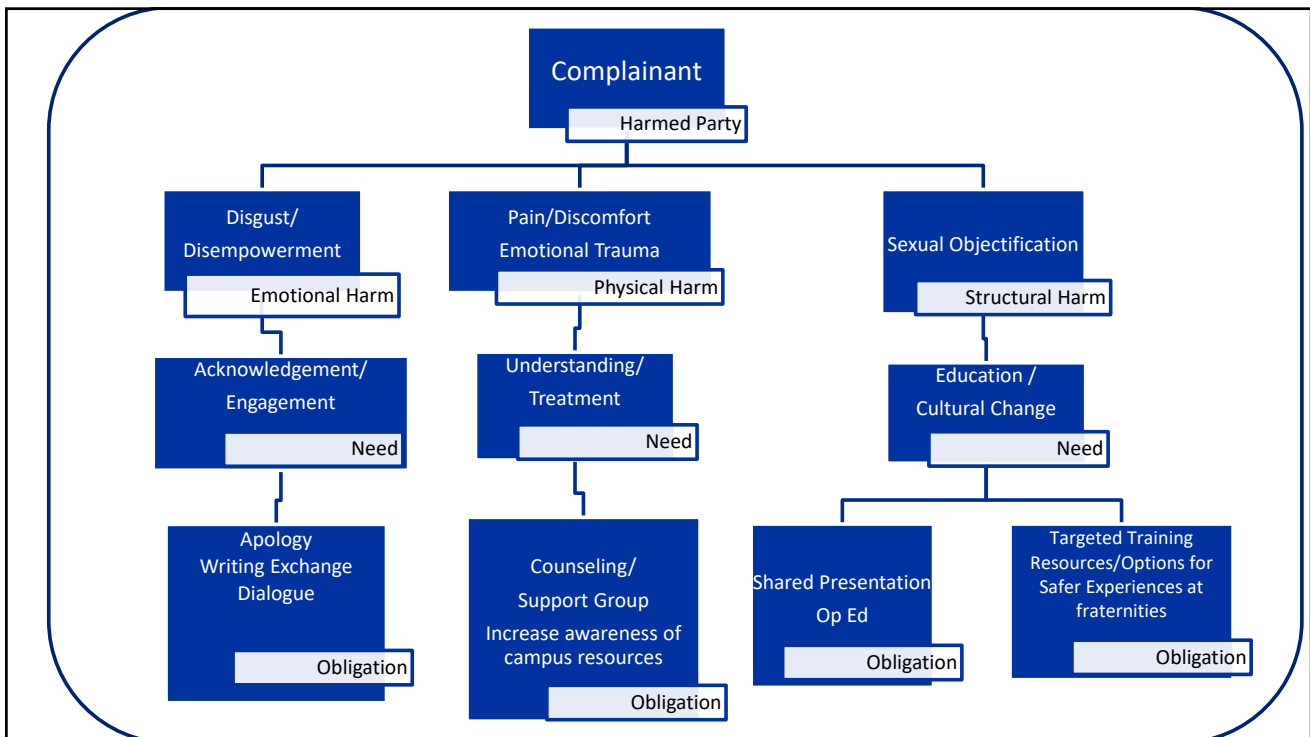
Needs? _____

Obligations? _____

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

83



84



Post-Conference: Monitoring

- Hypo: Respondent becomes non-responsive and does not participate in agreed-to educational activities.
- How do we enforce?



HUSCH BLACKWELL

© 2021 Husch Blackwell LLP


85



HUSCH BLACKWELL


Practical Considerations for Implementation and Policy Development

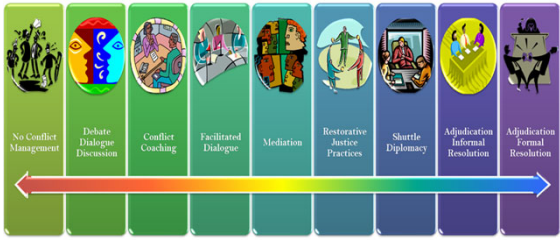
86



- “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.

<https://oscr.umich.edu/>





© 2021 Husch Blackwell LLP

87

Alternative Resolution for Cases involving Student Respondent


“Alternative resolution is a voluntary process within The College of New Jersey’s Sexual Harassment, Misconduct, & Discrimination Policy that is grounded in Restorative Justice and allows a Respondent in a Prohibited Conduct case to accept responsibility for their behavior and/or potential Harm. By fully participating in this process the Respondent will not be charged with a violation of College Policy. The alternative resolution process is designed to eliminate the Prohibited Conduct, prevent its recurrence, and remedy its effects in a manner that meets the needs of the Reporter, and attempts to repair harm caused, while still maintaining the safety of the overall campus community.”


<https://titleix.tcnj.edu/alternative-resolution/>

TCNJ Staff Labor:


(Average Hours/Case Formal Hearing vs RJ (Indirect))

Process	Hearing	RJ
Meetings with Reporter	7	6
Meetings with Respondent	7	7
Meetings with Witnesses	7	0
Documentation/Report	14	2
Hearing/Appeal	6	0
Email Communications	34	10
TOTAL	75	25






Center for Restorative Justice
sandiego.edu/rj



© 2021 Husch Blackwell LLP

88

 University of Colorado Boulder

Office of Institutional Equity and Compliance


What is the Educational Resolution Process?

The educational process provides a remedies-based approach specific to the circumstances of the incident, but does not make a determination as to whether a policy has been violated. This process does not involve a written report. This approach allows the university to tailor responses to the unique facts and circumstances of an incident, particularly in cases where there is not a broader threat to individual or campus safety. In these cases, OIEC may do one or more of the following when appropriate:

- Determine supportive measures available to the complainant that do not punish or penalize the person accused of the misconduct.
- Provide a remedies-based resolution tailored to the circumstances that helps prevent the behavior from continuing and does not punish or penalize the person accused of the misconduct.
- Provide targeted and/or broad-based educational programs or training.
- If the respondent is a student, OIEC may notify [Student Conduct and Conflict Resolution](#).

<https://www.colorado.edu/oiec/reporting-resolutions/what-happens-when-report-made/formal-educational-resolution-process>

<https://www.colorado.edu/sccr/student-conduct>

 University of Colorado Boulder

Student Conduct & Conflict Resolution

DIVISION OF STUDENT AFFAIRS

About Us
Student Conduct
Restorative Justice
Honor Code
Conflict Resolution

The informal resolution process is intended as a form of alternative dispute resolution, is voluntary, primarily educational in nature, not an adjudication of the allegations, not considered a disciplinary process, and instead will result a written agreement with the responding student. Because SCCR does not consider the informal resolution process to be a disciplinary process, it will not result in a disciplinary conduct record or file. Informal resolutions will never result in sanctions such as suspension or expulsion.

The first step in either process is initiated by the conduct officer issuing a written Student Conduct Notice to the responding student, which prompts the responding student to schedule a meeting or attend a scheduled meeting with the conduct officer as outlined in the notice.

a. Informal Resolution
This process may generally include, but is not limited to, a meeting with a conduct officer, completion of the agreement, and/or participation in the Restorative Justice program as is referenced in Section H.5.

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

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.

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

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 in writing 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.

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

91

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.

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

92

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.

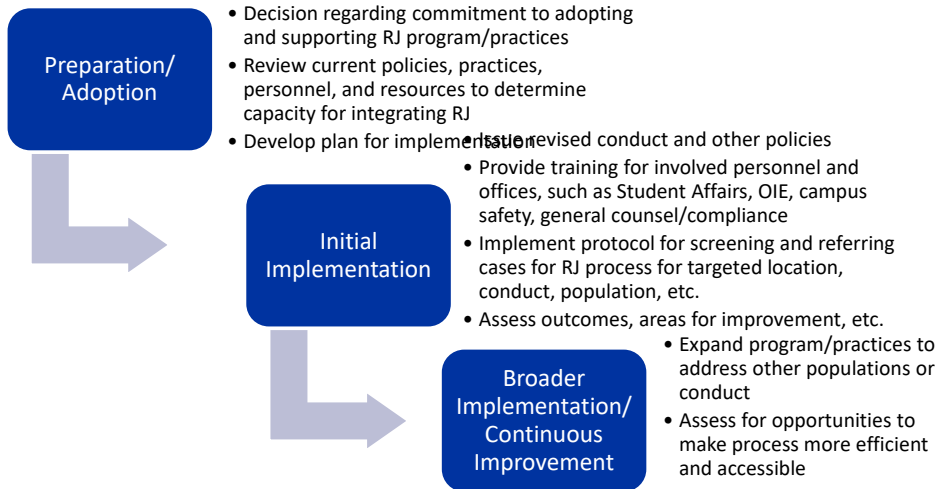
HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

93



RJ Implementation on Your Campus



HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

94



© 2021 Husch Blackwell LLP