



New Title IX Rules and Regulations

Facilitators

Presented by:
Rob Eichelbaum
July 30, 2020

EICHELBAUM WARDELL
HANSEN POWELL & MUÑOZ, P.C.

AUSTIN

4201 W. Parmer Lane, Suite A-100
Austin, TX 78727
(512) 476-9944

D/FW METROPLEX

5801 Tennyson Parkway, Suite 360
Plano, TX 75024
(972) 377-7900

www.edlaw.com | (800) 488-9045 | information@edlaw.com

BEING THE FACILITATOR

CREATING AN INFORMAL RESOLUTION PROCEDURE IN
ELEMENTARY AND SECONDARY SCHOOLS IN ACCORDANCE WITH
FINAL RULE IMPLEMENTATION OF TITLE IX AMENDMENTS



PRESENTED BY: ROB EICHELBAUM

© 2020

1

BEING THE FACILITATOR

- “FOR SUCCESS IN THE 21ST CENTURY, NO MATTER WHAT TYPE OF CAREER PATH YOU CHOOSE, WHETHER IT IS VERBAL OR WRITTEN, OVERT OR DISCREET, SCIENTIFIC OR ARTISTIC, COMMUNICATION CONNECTS PEOPLE AND IS A FUNDAMENTAL ASPECT OF EVERYTHING WE DO.” (UT AUSTIN INFO SESSION FOR PROSPECTIVE STUDENTS)
- THERE IS A TIME AND PLACE FOR ACCUSATIONS AND CHALLENGES, AND FOR FORMAL DISCIPLINARY PROCEEDINGS.
- THERE IS ALSO OPPORTUNITY TO USE FACILITATION / MEDIATION TO BRING PARTIES TOGETHER AND TO SOLVE CONFLICT.

That is our focus for this session.

2

BEING THE FACILITATOR

PRACTICAL RECOMMENDATION #1

THE PURPOSE OF THIS PRESENTATION IS TO INTRODUCE §106.45 (B)(9) WHICH PROVIDES FOR INFORMAL RESOLUTION TO FORMAL COMPLAINTS OF SEXUAL HARASSMENT.

INFORMAL RESOLUTION CAN BE USED IN MANY OTHER CIRCUMSTANCES:

- STUDENT / STUDENT CONFLICT INCLUDING BULLYING
- DISCIPLINARY PROCEEDINGS
- FACULTY DISPUTES
- PARENT / TEACHER CONFLICTS

3

THE NEW REGULATIONS

IE – WHAT GOT US HERE

- THE DEPARTMENT OF EDUCATION AMENDED THE REGULATIONS GOVERNING CAMPUS SEXUAL ASSAULT UNDER TITLE IX
- NEW REGULATIONS ARE EFFECTIVE AUGUST 14, 2020
- THESE REGULATIONS APPLY TO ELEMENTARY AND SECONDARY SCHOOLS AS WELL AS POSTSECONDARY INSTITUTIONS



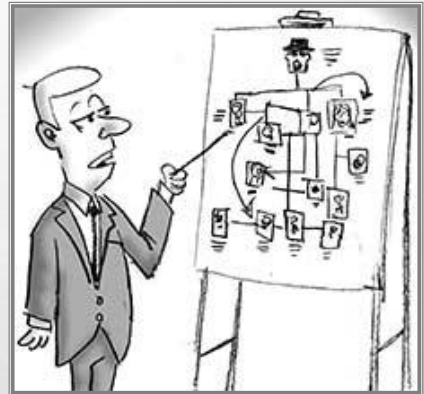
* Elementary and secondary school means a local educational agency (LEA), as defined in the Elementary and Secondary Education Act of 1965, as amended by The Every Student Succeeds Act, a preschool, or a private elementary or secondary school.

4

NEW RESPONSIBILITIES

§ 106.8 DESIGNATION OF COORDINATOR, DISSEMINATION OF POLICY, AND ADOPTION OF GRIEVANCE PROCEDURES.

(C) ADOPTION OF GRIEVANCE PROCEDURES. **A RECIPIENT MUST ADOPT AND PUBLISH GRIEVANCE PROCEDURES THAT PROVIDE FOR THE PROMPT AND EQUITABLE RESOLUTION OF STUDENT AND EMPLOYEE COMPLAINTS ALLEGING ANY ACTION THAT WOULD BE PROHIBITED BY THIS PART AND A GRIEVANCE PROCESS THAT COMPLIES WITH § 106.45 FOR FORMAL COMPLAINTS AS DEFINED IN § 106.30.** A RECIPIENT MUST PROVIDE TO PERSONS ENTITLED TO A NOTIFICATION UNDER PARAGRAPH (A) OF THIS SECTION NOTICE OF THE RECIPIENT'S GRIEVANCE PROCEDURES AND GRIEVANCE PROCESS, INCLUDING HOW TO REPORT OR FILE A COMPLAINT OF SEX DISCRIMINATION, HOW TO REPORT OR FILE A FORMAL COMPLAINT OF SEXUAL HARASSMENT, AND HOW THE RECIPIENT WILL RESPOND.



5

NEW RESPONSIBILITIES

(II) FOR RECIPIENTS THAT ARE ELEMENTARY AND SECONDARY SCHOOLS, AND OTHER RECIPIENTS THAT ARE NOT POSTSECONDARY INSTITUTIONS, **THE RECIPIENT'S GRIEVANCE PROCESS MAY, BUT NEED NOT, PROVIDE FOR A HEARING.** WITH OR WITHOUT A HEARING, AFTER THE RECIPIENT HAS SENT THE INVESTIGATIVE REPORT TO THE PARTIES PURSUANT TO PARAGRAPH (B)(5)(VII) OF THIS SECTION AND BEFORE REACHING A DETERMINATION REGARDING RESPONSIBILITY, THE DECISION-MAKER(S) MUST AFFORD EACH PARTY THE OPPORTUNITY TO SUBMIT WRITTEN, RELEVANT QUESTIONS THAT A PARTY WANTS ASKED OF ANY PARTY OR WITNESS, PROVIDE EACH PARTY WITH THE ANSWERS, AND ALLOW FOR ADDITIONAL, LIMITED FOLLOW-UP QUESTIONS FROM EACH PARTY. WITH OR WITHOUT A HEARING, QUESTIONS AND EVIDENCE ABOUT THE COMPLAINANT'S SEXUAL PREDISPOSITION OR PRIOR SEXUAL BEHAVIOR ARE NOT RELEVANT, UNLESS SUCH QUESTIONS AND EVIDENCE ABOUT THE COMPLAINANT'S PRIOR SEXUAL BEHAVIOR ARE OFFERED TO PROVE THAT SOMEONE OTHER THAN THE RESPONDENT COMMITTED THE CONDUCT ALLEGED BY THE COMPLAINANT, OR IF THE QUESTIONS AND EVIDENCE CONCERN SPECIFIC INCIDENTS OF THE COMPLAINANT'S PRIOR SEXUAL BEHAVIOR WITH RESPECT TO THE RESPONDENT AND ARE OFFERED TO PROVE CONSENT. THE DECISION-MAKER(S) MUST EXPLAIN TO THE PARTY PROPOSING THE QUESTIONS ANY DECISION TO EXCLUDE A QUESTION AS NOT RELEVANT.

Recommendation: Choose not to include a hearing in your process!

6

NEW RESPONSIBILITIES

Hearings Requirement

AT THE LIVE HEARING, THE DECISION-MAKER(S) MUST PERMIT EACH PARTY'S ADVISOR TO ASK THE OTHER PARTY AND ANY WITNESSES ALL RELEVANT QUESTIONS AND FOLLOW-UP QUESTIONS, INCLUDING THOSE CHALLENGING CREDIBILITY. SUCH CROSS-EXAMINATION AT THE LIVE HEARING MUST BE CONDUCTED DIRECTLY, ORALLY, AND IN REAL TIME BY THE PARTY'S ADVISOR OF CHOICE AND NEVER BY A PARTY PERSONALLY, NOTWITHSTANDING THE DISCRETION OF THE RECIPIENT UNDER PARAGRAPH (B)(5)(IV) OF THIS SECTION TO OTHERWISE RESTRICT THE EXTENT TO WHICH ADVISORS MAY PARTICIPATE IN THE PROCEEDINGS. AT THE REQUEST OF EITHER PARTY, THE RECIPIENT MUST PROVIDE FOR THE LIVE HEARING TO OCCUR WITH THE PARTIES LOCATED IN SEPARATE ROOMS WITH TECHNOLOGY ENABLING THE DECISION-MAKER(S) AND PARTIES TO SIMULTANEOUSLY SEE AND HEAR THE PARTY OR THE WITNESS ANSWERING QUESTIONS.



7

NEW RESPONSIBILITIES

(II) FOR RECIPIENTS THAT ARE ELEMENTARY AND SECONDARY SCHOOLS, AND OTHER RECIPIENTS THAT ARE NOT POSTSECONDARY INSTITUTIONS, THE RECIPIENT'S GRIEVANCE PROCESS MAY, BUT NEED NOT, PROVIDE FOR A HEARING. **WITH OR WITHOUT A HEARING**, AFTER THE RECIPIENT HAS SENT THE INVESTIGATIVE REPORT TO THE PARTIES PURSUANT TO PARAGRAPH (B)(5)(VII) OF THIS SECTION AND BEFORE REACHING A DETERMINATION REGARDING RESPONSIBILITY, **THE DECISION-MAKER(S) MUST AFFORD EACH PARTY THE OPPORTUNITY TO SUBMIT WRITTEN, RELEVANT QUESTIONS THAT A PARTY WANTS ASKED OF ANY PARTY OR WITNESS, PROVIDE EACH PARTY WITH THE ANSWERS, AND ALLOW FOR ADDITIONAL, LIMITED FOLLOW-UP QUESTIONS FROM EACH PARTY.** WITH OR WITHOUT A HEARING, QUESTIONS AND EVIDENCE ABOUT THE COMPLAINANT'S SEXUAL PREDISPOSITION OR PRIOR SEXUAL BEHAVIOR ARE NOT RELEVANT, UNLESS SUCH QUESTIONS AND EVIDENCE ABOUT THE COMPLAINANT'S PRIOR SEXUAL BEHAVIOR ARE OFFERED TO PROVE THAT SOMEONE OTHER THAN THE RESPONDENT COMMITTED THE CONDUCT ALLEGED BY THE COMPLAINANT, OR IF THE QUESTIONS AND EVIDENCE CONCERN SPECIFIC INCIDENTS OF THE COMPLAINANT'S PRIOR SEXUAL BEHAVIOR WITH RESPECT TO THE RESPONDENT AND ARE OFFERED TO PROVE CONSENT. THE DECISION-MAKER(S) MUST EXPLAIN TO THE PARTY PROPOSING THE QUESTIONS ANY DECISION TO EXCLUDE A QUESTION AS NOT RELEVANT.

8

NEW OPTIONS

§ 106.45 (b)(9) provides for informal resolution to complaints of sexual harassment consistent with this section.

9

THE POTENTIAL FOR INFORMAL RESOLUTION



Sally (Respondent)



Lucy (Witness)




Charlie Brown



Linus (Complainant)

10



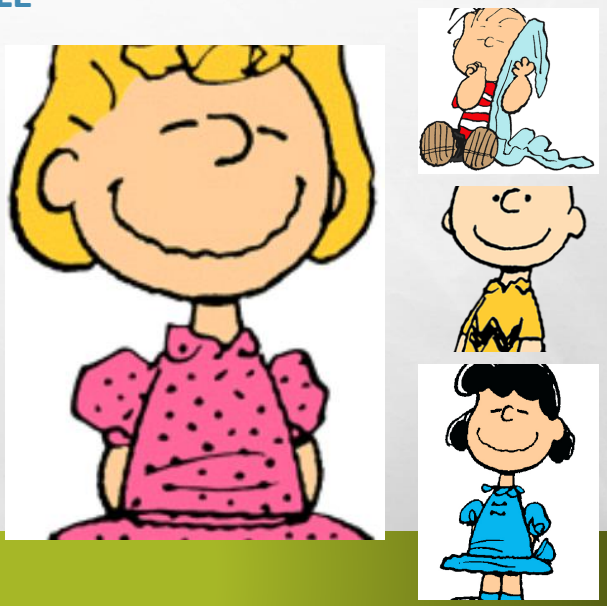
INFORMAL RESOLUTION EXAMPLE

THE FOUR STUDENTS ATTEND THE SAME ELEMENTARY SCHOOL. ONE DAY LINUS REPORTED TO HIS TEACHER THAT SALLY HAS BEEN TRYING TO KISS HIM DURING RECESS. LUCY WITNESSED SALLY CHASING LINUS AND TOLD HIM HE WOULD GET COOTIES IF SALLY WERE TO ACTUALLY KISS HIM. THE TEACHER SENT LINUS TO THE OFFICE TO TALK TO THE COUNSELOR, WHO ASKED IF LINUS WANTED TO BE KISSED BY SALLY. WHEN LINUS SAID NO, THE COUNSELOR DECIDED TO INITIATE A FORMAL COMPLAINT.

11

INFORMAL RESOLUTION EXAMPLE

- A FORMAL GRIEVANCE PROCEEDING (EVEN ONE THAT DOES NOT INCLUDE A HEARING) WOULD REQUIRE SALLY AND LINUS TO ANSWER QUESTIONS REGARDING THE INCIDENT AND PLACE THEM IN AN ADVERSARIAL POSITION.
- THE TITLE IX INVESTIGATOR COULD INTERVIEW LUCY AND PERHAPS OTHER STUDENTS AND PRESENT A REPORT TO THE DECISION MAKER WHO WOULD THEN HAVE TO SUBMIT A WRITTEN REPORT DETERMINING WHETHER SALLY WAS INNOCENT OR GUILTY OF SEXUAL HARASSMENT.
- UNDER THE TRADITIONAL FORMAL GRIEVANCE PROCEEDING, SALLY COULD FACE DISCIPLINARY ACTIONS FOR HER BEHAVIOR.



12

- INFORMAL RESOLUTION PRESENTS AN OPPORTUNITY TO BRING SALLY AND LINUS TOGETHER TO WORK TOGETHER IN A COLLABORATIVE FORM.
- THE FACILITATOR CAN ASK LINUS WHAT HIS GOALS ARE FOR THIS PROCESS. INFORMAL RESOLUTION ALLOWS THE FACILITATOR TO EXPLORE PARTIES' INTERESTS.
- THE FACILITATOR CAN EXPLAIN TO SALLY THAT HER BEHAVIOR WAS INAPPROPRIATE AND ASK THAT SALLY APOLOGIZE WITHOUT A DETERMINATION OF GUILT.
- THE PARTIES COULD WORK TOWARD A RESOLUTION THAT INCLUDES CLASSROOM EDUCATION OR OTHER PROGRAMS THAT BENEFIT NOT ONLY THE PARTICIPANTS BUT THE ENTIRE SCHOOL COMMUNITY.

INFORMAL RESOLUTION EXAMPLE



13

NEW OPTIONS - LIMITATIONS

§ 106.45 (B)(9) INFORMAL RESOLUTION. A RECIPIENT 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 CONSISTENT WITH THIS SECTION. SIMILARLY, A RECIPIENT MAY NOT REQUIRE THE PARTIES TO PARTICIPATE IN AN INFORMAL RESOLUTION PROCESS UNDER THIS SECTION AND MAY NOT OFFER AN INFORMAL RESOLUTION PROCESS UNLESS A FORMAL COMPLAINT IS FILED. HOWEVER, AT ANY TIME PRIOR TO REACHING A DETERMINATION REGARDING RESPONSIBILITY THE RECIPIENT MAY FACILITATE AN INFORMAL RESOLUTION PROCESS, SUCH AS MEDIATION, THAT DOES NOT INVOLVE A FULL INVESTIGATION AND ADJUDICATION, PROVIDED THAT THE RECIPIENT –



14

NEW OPTIONS - LIMITATIONS

(I) PROVIDES TO THE PARTIES A 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;

(II) OBTAINS THE PARTIES' VOLUNTARY, WRITTEN CONSENT TO THE INFORMAL RESOLUTION PROCESS; AND

(III) **DOES NOT OFFER OR FACILITATE AN INFORMAL RESOLUTION PROCESS TO RESOLVE ALLEGATIONS THAT AN EMPLOYEE SEXUALLY HARASSED A STUDENT.**



15

NEW OPTIONS

- In other words, there are times where a Claimant or Respondent will say no to Informal Resolution, and the recipient must have a formal resolution process in place.
- Additionally, there are times (specifically, when there has not been a formal complaint filed or where the allegation is that an employee sexually harassed a student) where Informal Resolution is prohibited.
- However, there are many situations where parties, if they agree to participate, may find Informal Resolution beneficial.

16

RECOMMENDATIONS



FORMAL PROCEEDING THAT MEETS
THE REQUIREMENTS BUT DOES
NOT INCLUDE A HEARING



INSTITUTIONALIZE AND PROVIDE
AN INFORMAL DISPUTE
RESOLUTION PROCESS

17

CREATING THE INFORMAL PROCESS

Title IX provides no explicit definition of informal resolution

The Department believes an explicit definition of “informal resolution” in the final regulations is unnecessary. Informal resolution may encompass a broad range of conflict resolution strategies, including, but not limited to, arbitration, mediation, or restorative justice. Defining this concept may have the unintended effect of limiting parties’ freedom to choose the resolution option that is best for them, and recipient flexibility to craft resolution processes that serve the unique educational needs of their communities. (Comments Page 1370).

18

CREATING THE INFORMAL PROCESS IMPORTANT DEFINITIONS

- **INFORMAL RESOLUTION** a/k/a Alternative Dispute Resolution – An Umbrella term that incorporates anything that is not formal resolution
- **NEGOTIATION** – a form of informal resolution where the parties (with or without their Advisors) get together to directly attempt to resolve their dispute.
- **FACILITATOR** – A third party neutral, pursuant to the final rules herein, that can participate in the informal resolution process and on behalf of the recipient (school) establish the rules directions for the informal process.
- **RESTORATIVE JUSTICE** – A truncated process where the parties begin with the Respondent admits to wrongdoing and the parties with the assistance of the third party neutral work to find resolution and redress the harm.

19

CREATING THE INFORMAL PROCESS IMPORTANT DEFINITIONS

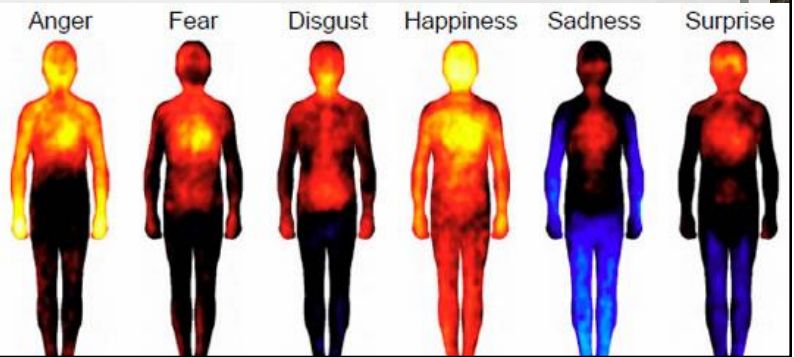
- **ARBITRATION** – a form of informal resolution where the parties present their side of a dispute to an impartial third party who listens to the arguments and then presents an opinion or ruling as to the outcome of the dispute. The main difference between Arbitration and a formal proceeding is that the parties and / or the facilitator can establish separate, individualized rules that control the Arbitration, which include limitations on examination of witnesses, presentation of discovery and application of rules of evidence.
- **MEDIATION** – Informal resolution where the parties meet with a third party neutral who facilitates the meeting and preserves equity in the process but does not provide an opinion as to the outcome of the dispute. The mediator promotes settlement and understanding, however, it is up to the parties if they wish to reach an agreement.

20

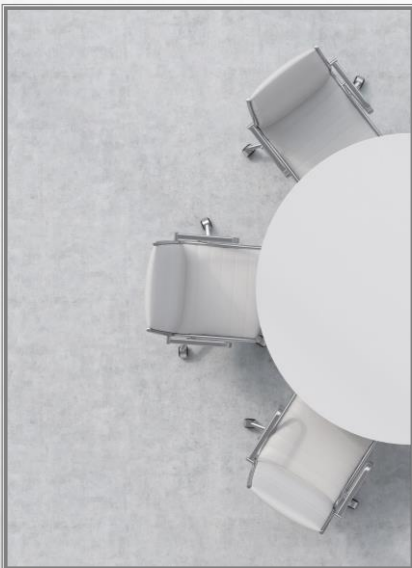
THESE STUDENTS OFTEN SAID: 'I DON'T WANT THE RESPONDENT TO BE PUNISHED; I JUST WANT THEM TO REALIZE HOW BAD THIS EVENT WAS FOR ME.' STUDENTS FULLY PREPARED TO CONFESS, APOLOGIZE, AND TAKE THEIR SANCTION WERE SOMETIMES GROUND THROUGH THE FORMAL PROCESS FOR NO GOOD REASON. ADDITIONALLY, OFTEN BOTH PARTIES WOULD HAVE PREFERRED INFORMAL RESOLUTION; A RULE THAT PUSHED THEM TO ADOPT AN ADVERSARIAL POSTURE VIS A VIS EACH OTHER MEANT THAT THE CONFLICT PERSISTED, AND EVEN ESCALATED, WHEN IT COULD HAVE BEEN SETTLED" (COMMENTS AT PAGE 1363).



CREATING THE INFORMAL PROCESS



21



CREATING THE INFORMAL PROCESS

- START WITH THE END IN MIND: WHAT ARE THE PARTIES TRYING TO ACCOMPLISH? DO YOU NEED A DETERMINATION OF FAULT? DO REMEDIES POTENTIALLY INCLUDE A PUNITIVE PHASE? IN SOME CASES THE PARTIES MAY SIMPLY WANT RESOLUTION OF THE COMPLAINT OR EVEN WORK TOGETHER TO USE THE EXPERIENCE AS A "TEACHABLE MOMENT" FOR EVERYONE.
- WHO IS GOING TO PARTICIPATE? ARE THE PARTIES ALLOWED TO HAVE ADVISORS PRESENT? ATTORNEY'S PRESENT? ARE THE PARENTS ALWAYS REQUIRED TO BE PRESENT? ARE WITNESSES GOING TO BE ALLOWED TO PARTICIPATE?
- CAN THE FACILITATOR COMMUNICATE PRIVATELY WITH EACH SIDE?
- WILL THERE BE AN OFFICIAL RECORD MADE OF THE INFORMAL RESOLUTION MEETING? WILL PARTIES BE ALLOWED TO TAKE NOTES? IS THE CONFERENCE PROTECTED BY RULES OF CONFIDENTIALITY?

22

TECHNOLOGY AND THE INFORMAL PROCESS

BENEFITS OF A ZOOM FACILITATION

- PARTIES MAY FEEL MORE COMFORTABLE PARTICIPATING IN SEPARATE ROOMS
- FLEXIBILITY IN SCHEDULING THE SESSION

CONCERNS OF A ZOOM FACILITATION

- PRIVACY / SECURITY – SEE WHO IS PARTICIPATING
- RECORDING OF THE SESSION
- TECHNOLOGY FAILURES



23

CREATING THE INFORMAL PROCESS

CONFIDENTIALITY

- I ENCOURAGE THE RECIPIENTS TO ESTABLISH RULES MAKING THE INFORMAL PROCESS CONFIDENTIAL
- THIS ENCOURAGES THE PARTIES TO OPEN UP AND SHARE INFORMATION IN THE FACILITATION THEY MIGHT NOT OTHERWISE BE WILLING TO SHARE.
- THE FACILITATOR SHOULD KNOW IN ADVANCE IF THEY CAN BE CALLED TO TESTIFY OR REQUIRED TO PROVIDE A REPORT TO INVESTIGATOR OR DECISION MAKER.
- IF FOR SOME REASON THE SESSION IS NOT COMPLETELY CONFIDENTIAL MAKE SURE YOU HAVE COVERED ALL OF YOUR BASES REGARDING FERPA, HIPAA, OR OTHER LAWS THAT REQUIRE PROTECTION OF CONFIDENTIAL INFORMATION.



24

I recommend instituting a mediation process. It offers the greatest amount of flexibility in terms of settlement and has the highest satisfaction rate of any form of informal resolution. It creates an informal environment which may encourage reporting and participation. It encourages parties to work together as opposed to in an adversarial process. It does not require a determination of guilt or fault in order to create a resolution.

I recommend the process be conducted without a formal record and with the ability for the mediator to conduct private sessions with the parties. I recommend the process be conducted in a confidential manner without the creation of a formal record. I would prohibit parties from bringing recording devices to the mediation and limit the participants at the mediation to the Claimant and Respondent (and parents/ guardians) as appropriate.

YOU MUST INCLUDE
Informal Resolution can only be offered if a formal complaint has been filed.

Informal Resolution Process does not prevent parties from pursuing a formal grievance if mediation is unsuccessful. Both parties must agree to participate in the Informal Resolution Process. Parties must be notified of the right to end the informal process at any time. It is up to the Recipient whether Facilitators may be called to testify, so confirm with your written rules .

RECOMMENDATIONS



The Facilitator should establish written, uniform rules for the Informal Process.

If the party does not like the rules, the parties can opt into the formal process established.

25

BEING THE FACILITATOR

TRAINING REQUIREMENTS

§106.45(B)(1)(III) STATES THAT AN INSTITUTION MUST:

ENSURE THAT TITLE IX COORDINATORS, INVESTIGATORS, DECISION-MAKERS, AND ANY PERSON WHO FACILITATES AN INFORMAL RESOLUTION PROCESS, RECEIVE TRAINING ON THE DEFINITION OF SEXUAL HARASSMENT IN §106.30, THE SCOPE OF THE RECIPIENT'S EDUCATION PROGRAM OR ACTIVITY, HOW TO CONDUCT AN INVESTIGATION AND GRIEVANCE PROCESS INCLUDING HEARINGS, APPEALS, AND INFORMAL RESOLUTION PROCESSES, AS APPLICABLE, AND HOW TO SERVE IMPARTIALLY, INCLUDING BY AVOIDING PREJUDGMENT OF THE FACTS AT ISSUE, CONFLICTS OF INTEREST, AND BIAS.

26

THERE ARE NO FORMAL TRAINING REQUIREMENTS

THE FORM AND LENGTH OF TRAINING HAS BEEN LEFT TO THE DISCRETION OF THE INDIVIDUAL INSTITUTION.

WHILE THERE ARE NO TRAINING REQUIREMENTS, THERE ARE TRAINING RESTRICTIONS.

THE TRAINING PROGRAMS MUST NOT CONTAIN:

1. ANY TRAINING THAT RELIES ON SEX STEREOTYPES.

A. PERSONNEL TO MAKE DECISIONS ON THE BASIS OF THE INDIVIDUALIZED FACTS AT ISSUE AND NOT ON STEREOTYPICAL NOTIONS OF WHAT "MEN" OR "WOMEN" DO OR DO NOT DO.

2. STATUS BASED JUDGMENTS ABOUT CREDIBILITY.

A. THE DEPARTMENT SPECIFICALLY CAUTIONS AGAINST A TRAINING APPROACH THAT ENCOURAGES TITLE IX PERSONNEL TO INITIALLY BELIEVE ONE PARTY OVER THE OTHER.

B. THE DEPARTMENT EMPHASIZES WHILE BOTH PARTIES SHOULD BE TREATED WITH EQUAL DIGNITY AND MUST NOT BE PREJUDGED.

C. THE DEPARTMENT CAUTIONS AGAINST TRAINING MATERIALS THAT PROMOTE THE APPLICATION OF "PROFILES" OR "PREDICTIVE BEHAVIORS" TO PARTICULAR CASES.

TRAINING REQUIREMENTS

27

BEING THE FACILITATOR ATTORNEY MEDIATOR QUALIFICATIONS

TEXAS CIVIL PRACTICE AND REMEDIES CODE TRAINING REQUIREMENTS TO SERVE AS A COURT-APPOINTED MEDIATOR (IMPARTIAL THIRD PARTY) IN GENERAL CIVIL CASES.

§154.052 (A) EXCEPT AS PROVIDED BY SUBSECTIONS (B) AND (C), TO QUALIFY FOR AN APPOINTMENT AS AN IMPARTIAL THIRD PARTY UNDER THIS SUBCHAPTER A PERSON MUST HAVE COMPLETED A MINIMUM OF 40 CLASSROOM HOURS OF TRAINING IN DISPUTE RESOLUTION TECHNIQUES IN A COURSE CONDUCTED BY AN ALTERNATIVE DISPUTE RESOLUTION SYSTEM OR OTHER DISPUTE RESOLUTION ORGANIZATION APPROVED BY THE COURT MAKING THE APPOINTMENT.

28

THE NEW REGULATIONS

- THE REGULATIONS ARE INTENDED TO ADDRESS SEXUAL HARASSMENT AS A FORM OF SEX DISCRIMINATION
- SEXUAL HARASSMENT MEANS CONDUCT ON THE BASIS OF SEX THAT SATISFIES ONE OR MORE OF THE FOLLOWING:
 - (1) AN EMPLOYEE OF THE RECIPIENT CONDITIONING THE PROVISION OF AN AID, BENEFIT, OR SERVICE OF THE RECIPIENT ON AN INDIVIDUAL'S PARTICIPATION IN UNWELCOME SEXUAL CONDUCT;
 - (2) 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; OR
 - (3) "SEXUAL ASSAULT" AS DEFINED IN 20 U.S.C. 1092(F)(6)(A)(V), "DATING VIOLENCE" AS DEFINED IN 34 U.S.C. 12291(A)(10), "DOMESTIC VIOLENCE" AS DEFINED IN 34 U.S.C. 12291(A)(8), OR "STALKING" AS DEFINED IN 34 U.S.C. 12291(A)(30).

29

§ 106.30 DEFINITIONS - OTHER IMPORTANT TERMS TO KNOW

- ACTUAL KNOWLEDGE MEANS NOTICE OF SEXUAL HARASSMENT OR ALLEGATIONS OF SEXUAL HARASSMENT TO A RECIPIENT'S TITLE IX COORDINATOR OR ANY OFFICIAL OF THE RECIPIENT WHO HAS AUTHORITY TO INSTITUTE CORRECTIVE MEASURES ON BEHALF OF THE RECIPIENT, OR TO ANY EMPLOYEE OF AN ELEMENTARY AND SECONDARY SCHOOL. * THINK CLERY ACT REQUIREMENTS
- COMPLAINANT MEANS AN INDIVIDUAL WHO IS ALLEGED TO BE THE VICTIM OF CONDUCT THAT COULD CONSTITUTE SEXUAL HARASSMENT.
- RESPONDENT MEANS AN INDIVIDUAL WHO HAS BEEN REPORTED TO BE THE PERPETRATOR OF CONDUCT THAT COULD CONSTITUTE SEXUAL HARASSMENT.
- FORMAL COMPLAINT MEANS A DOCUMENT FILED BY A COMPLAINANT OR SIGNED BY THE TITLE IX COORDINATOR ALLEGING SEXUAL HARASSMENT AGAINST A RESPONDENT AND REQUESTING THAT THE RECIPIENT INVESTIGATE THE ALLEGATION OF SEXUAL HARASSMENT.

30

INFORMAL RESOLUTION



A THIRD PARTY, CALLED THE FACILITATOR, BRINGS THE PARTIES TOGETHER TO CLEAR UP MISUNDERSTANDINGS, FIND OUT CONCERNS, AND REACH RESOLUTION.



THE FACILITATOR EXPLAINS TO THE PARTIES THAT INFORMAL RESOLUTION IS NOT ADVERSARIAL AND DOES NOT REQUIRE A "WINNER" AND "LOSER"



INFORMAL RESOLUTION FOCUSES ON THE ISSUES AND HELPS THE PARTIES FIND RESOLUTION.



The Facilitation Process

BEING THE FACILITATOR RAPPORT BUILDING

- WHEN A PARTY ATTENDS A MEDIATION THEY WANT TO "TELL THEIR STORY."
- SOMETIMES THEY DON'T KNOW WHERE TO START AND THEY BEGIN TO RAMBLE.
- OTHER TIMES, THE STORY IS EDITED OR COACHED BY WELL MEANING ATTORNEYS.



33

BEING THE FACILITATOR

RAPPORT BUILDING



Building Rapport allows you to hear the story.



Find out their true interests vs. their positions.



Look for important messages and hidden meanings.

34

BUILDING RAPPORT

Start Simply

Get the parties to talk about subjects that are non-controversial and easy for them to discuss.

Have the parties share their likes and dislikes.

Listen Closely

Have the parties do the majority of the talking by asking open-ended questions.

Use follow up questions, like "Tell me more" or "Please explain"

Pay close attention to the word selection of the parties.

Acknowledge

Show the students you have been listening by confirming their statements and using their language

Pick appropriate times to encourage further exchange by demonstrating reciprocity.

35

PRESENTATION BY: ROB EICHELBAUM

- OWNER OF SAN ANTONIO MEDIATION – OVER 6,000 MEDIATIONS CONDUCTED
- BENEFIT REVIEW OFFICER WITH TEXAS DEPARTMENT OF INSURANCE
- ADJUNCT PROFESSOR, ST. MARY'S UNIVERSITY SCHOOL OF LAW
- SAN ANTONIO BAR ASSOCIATION – ADR SECTION PRESIDENT (2019 – PRESENT)
- NATIVE TEXAN – BORN AND RAISED IN SAN ANTONIO
- LOVE – TRAVEL, FOOD SAMPLING, AND GAMBLING
- FEARS – SHARKS!!!
- FORMER VIA BUPPET



36

BEING THE FACILITATOR AVOIDING PREJUDGMENT



Words have very specific meaning to an individual.

Often, our understanding of a word is different from the person using it.

How do you deal with a party who says, "I just want to be treated fairly" or "I don't think the other side is being reasonable."

37



Ocean

AVOIDING PREJUDGMENT

38

AVOIDING BIAS



Just like Ballroom Dancing, being a good Facilitator is all about maintaining frame.

- When parties try to distance from the Facilitator, the Facilitator should point out items (from Rapport) that they have in common and show that you are not prejudice to the party or to the parties' position.
- When parties try to forge a common bond or affirm relationship with the Facilitator for the purpose of creating undue influence, the Facilitator must distance and remind the party that the Facilitator is there in a neutral capacity.

39

TACTICS

PARTIES WILL ATTEMPT TO ADJUST THE OUTCOME BY USING POWER, PERSUASION, AND PASSION.

- **POWER – I CAN FORCE YOU TO DO SOMETHING BY MY POSITION OF AUTHORITY.**
- **PERSUASION – I CAN CONVINCEN YOU TO DO SOMETHING BECAUSE OF LOGIC, PRECEDENCE OR OTHER REASON.**
- **PASSION – I CAN GET YOU TO REACT AND DO SOMETHING FOR ME BY EMOTION.**

40

THE INFLUENCE OF TACTICS

THE ICE CREAM STORY

THINK BACK TO WHEN YOU WERE A CHILD AND YOU WANTED SOMETHING (SAY ICE CREAM). AS A YOUNG CHILD, YOU COULDN'T EXERCISE ALTERNATIVES.

IE- YOU COULDN'T GO TO THE STORE AND BUY YOUR OWN ICE CREAM.

SO, YOU HAD TO RELY ON THE OPTION OF ASKING (MOM OR DAD) FOR ICE CREAM. WHAT IF THEY SAID "NO"?



41



WHEN A PERSON DOES NOT HAVE GOOD ALTERNATIVES OR GOOD OPTIONS, THAT PERSON FEELS A LACK OF CONTROL AND ACTS OUT ACCORDINGLY.

1. GET ANGRY / EMOTIONAL!
2. MAKE THREATS!
3. ASK SOMEONE ELSE!
4. TRY TO RENEGOTIATE!
5. PLACE BLAME!
6. MANY, MANY OTHERS!

42

FACILITATOR RESPONSE TO TACTICS

Don't Argue with parties who momentarily feel helpless.
And don't judge or condemn them for their outbursts.
Remain impartial – that's your job!

1

Remember why parties are using them – they have lost control!

2

Don't lose focus on the original issue, even if the party attacks you.

3

Respond in the Objective ... Not the Subjective

4

If possible, help the party understand the consequences of his/her action.

5

Let the party create solutions. You are helping the party regain process control.

43

BEING THE FACILITATOR – CONCLUSION

- NEW REGULATIONS EFFECTIVE AUGUST 14, 2020
- A RECIPIENT MUST ADOPT AND PUBLISH GRIEVANCE PROCEDURES THAT PROVIDE FOR THE PROMPT AND EQUITABLE RESOLUTION OF STUDENT AND EMPLOYEE COMPLAINTS ALLEGING ANY ACTION THAT WOULD BE PROHIBITED BY THIS PART AND A GRIEVANCE PROCESS THAT COMPLIES WITH § 106.45 FOR FORMAL COMPLAINTS AS DEFINED IN § 106.30.
- FOR RECIPIENTS THAT ARE ELEMENTARY AND SECONDARY SCHOOLS, AND OTHER RECIPIENTS THAT ARE NOT POSTSECONDARY INSTITUTIONS, THE RECIPIENT'S GRIEVANCE PROCESS MAY, BUT NEED NOT, PROVIDE FOR A HEARING.
- § 106.45 (B)(9) PROVIDES FOR INFORMAL RESOLUTION TO COMPLAINTS OF SEXUAL HARASSMENT CONSISTENT WITH THIS SECTION.
- TITLE IX PROVIDES NO EXPLICIT DEFINITION OF INFORMAL RESOLUTION

Thank You

44



Any
Questions?

Being the Facilitator