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Informal Resolution in Light of the New Title IX Regulations

Heartland Campus Safety Summit



Presenter

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Agenda

- **Background**
 - Title IX Regulations
 - Informal Resolution Generally
 - Difference Between Informal Resolution and Restorative Justice
- **Policies and Practice of Implementation of Informal Resolution**
- **Best Practices/Issues to Consider**

The logo consists of a large, white, stylized letter 'B' on a blue background. The 'B' is composed of three main parts: a top section with two rounded, vertical openings, a middle vertical bar, and a bottom section with a horizontal bar and a vertical stem extending downwards.

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Background

The logo for Husch Blackwell, consisting of a stylized white 'H' on a blue background. The top bar of the 'H' is split into two rounded shapes, and the vertical stems are also split into two shapes each, creating a unique, modern monogram.

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Title IX Regulations

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Title IX Regulations

- Culmination of rulemaking process began in November 2018
 - 105,000 + comments received regarding proposed federal regulations – rumors have flown for the past year
- Final regulations released on May 6, 2020
 - 2,000+ pages of commentary
- Final rule is effective August 14, 2020
 - Has the force of a federal regulation
 - Compliance with the rule is mandatory, not advisory, as with Dear Colleague Letters





What will the regulation do?

- Set the standard for administrative enforcement of Title IX
- Will not alter standards for lawsuits seeking money damages for violation of Title IX
- Likely necessitated changes in your institution's Sexual Harassment/Sexual Misconduct/Title IX policy, procedures, and practices



34 C.F.R. § 106.45(b)(9)

Informal Resolution

“[A]t **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 . . .”

- (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;

❖ **See TX Transcript Notation and Information sharing Requirements**
- (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**.



Written Notice of Allegations

- 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
- Sufficient time for Respondent to prepare a response prior to any formal interviews or process
- Background information regarding informal resolution process

34 C.F.R. § 106.45(b)(1)(iii)

Conflict of Interest, Bias, & Training

- **Conflict of Interest/Bias:** Require that any individual designated by a recipient as a Title IX Coordinator, investigator, decision-maker, or any person designated by a recipient to facilitate an informal resolution process, not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent.
- **Training:** A recipient 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 prejudice of the facts at issue, conflicts of interest, and bias. . . .
- Any materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, must not rely on sex stereotypes and must promote impartial investigations and adjudications of formal complaints of sexual harassment;



34 C.F.R. § 106.45(b)(1)(v) Grievance Process Requirements

Include **reasonably prompt time frames** for conclusion of the grievance process, including reasonably prompt time frames for filing and resolving appeals **and informal resolution processes** if the recipient offers informal resolution processes, and a process that allows for the temporary delay of the grievance process or the 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.

Good cause may include considerations such as the absence of a party, a party's advisor, or a witness; concurrent law enforcement activity; or the need for language assistance or accommodation of disabilities;





34 C.F.R. § 106.45(b)(2)(9)

Voluntary Participation

“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.**”



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
 - 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
- Participation contingent on successful completion of preparatory meetings
- Require parties to sign a Participation Agreement
- Frequent check-ins and monitoring



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 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 *should* be used when an accused student *denies* responsibility.

Remember: Traditional investigative/adjudicative processes *must* be used an employee is accused of sexually harassing a student



Training

- Training required for all institutional participants in the process, including informal resolution facilitators/mediators
 - Training must be non-biased and not rely on stereotypes
 - Training for institutional participants in a given case must be retained for seven years
 - Training documents must be posted on institution's website



Important Note

- ***An informal resolution process does not delay an institution's duty to conduct a prompt investigation of a complaint***

The logo for Husch Blackwell is a vertical stack of four white, stylized symbols on a blue background. From top to bottom: a stylized 'B', a vertical bar, a stylized 'H', and a stylized 'W'.

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Informal Resolution

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What is informal resolution?

- Informal Resolution is a voluntary process to resolve formal complaints of sexual harassment through a mechanism other than the default investigation and hearing.
- Typically has the effect of suspending any default investigation and hearing process



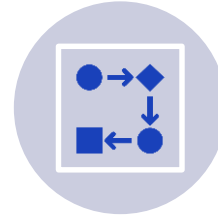
Informal Resolution

- Permissible only after a formal complaint is filed
 - Parties must provide voluntary, written consent after receiving detailed notice of allegations and explanation of informal resolution process
 - Cannot compel students to agree to informal resolution as a condition of enrollment
 - Never permitted where accusation is that employee sexually harassed a student
- May result in higher use of informal resolution
- If informal resolution fails or appears futile, institution should promptly resume default investigation and hearing process

What are the key concepts of informal resolution?



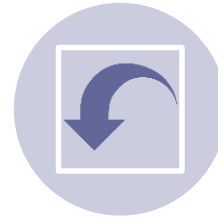
A Formal Complaint must first have been filed and written notice given to the parties



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



What are the limitations?

- Informal resolution cannot be used where an employee is accused of sexually harassing a student
- Informal resolution cannot be used in the absence of a Formal Complaint
- Institution cannot require persons to consent to informal resolution as a condition of employment or enrollment





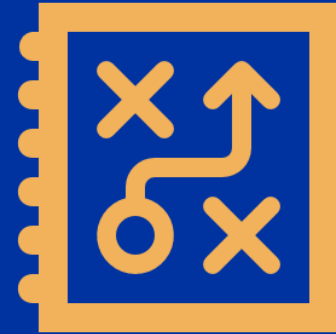
Example (impermissible)

Student files a formal complaint accusing a faculty member of offering to give student better grades in exchange for sexual favors. Faculty member proposes to informally resolve the complaint by apologizing for a “bad joke” and having a colleague grade student’s work product. Student indicates they are amenable to the faculty member’s proposal.



How would the prior example be resolved?

- Investigation and hearing process would resume
- If student withdraws complaint, or refuses to participate, institution might elect to dismiss complaint
- But Title IX Coordinator might also elect to file formal complaint and cause the issue to be adjudicated fully





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

Example

Informal resolution indicates that, in lieu of investigation and hearing, respondent will apologize for respondent's misconduct and attend counseling, but should respondent sexually harass complainant again, complainant will be free to file a formal complaint encompassing the entire range of sexual harassment.





How is an informal resolution documented?

- Agreements should be well-documented by the informal resolution facilitator
- Ideally, parties will sign the agreement or provide some other form of written confirmation
- Formal settlement agreements are typically not required unless they are resolving legal claims that have been asserted



What are some examples of informal resolution?

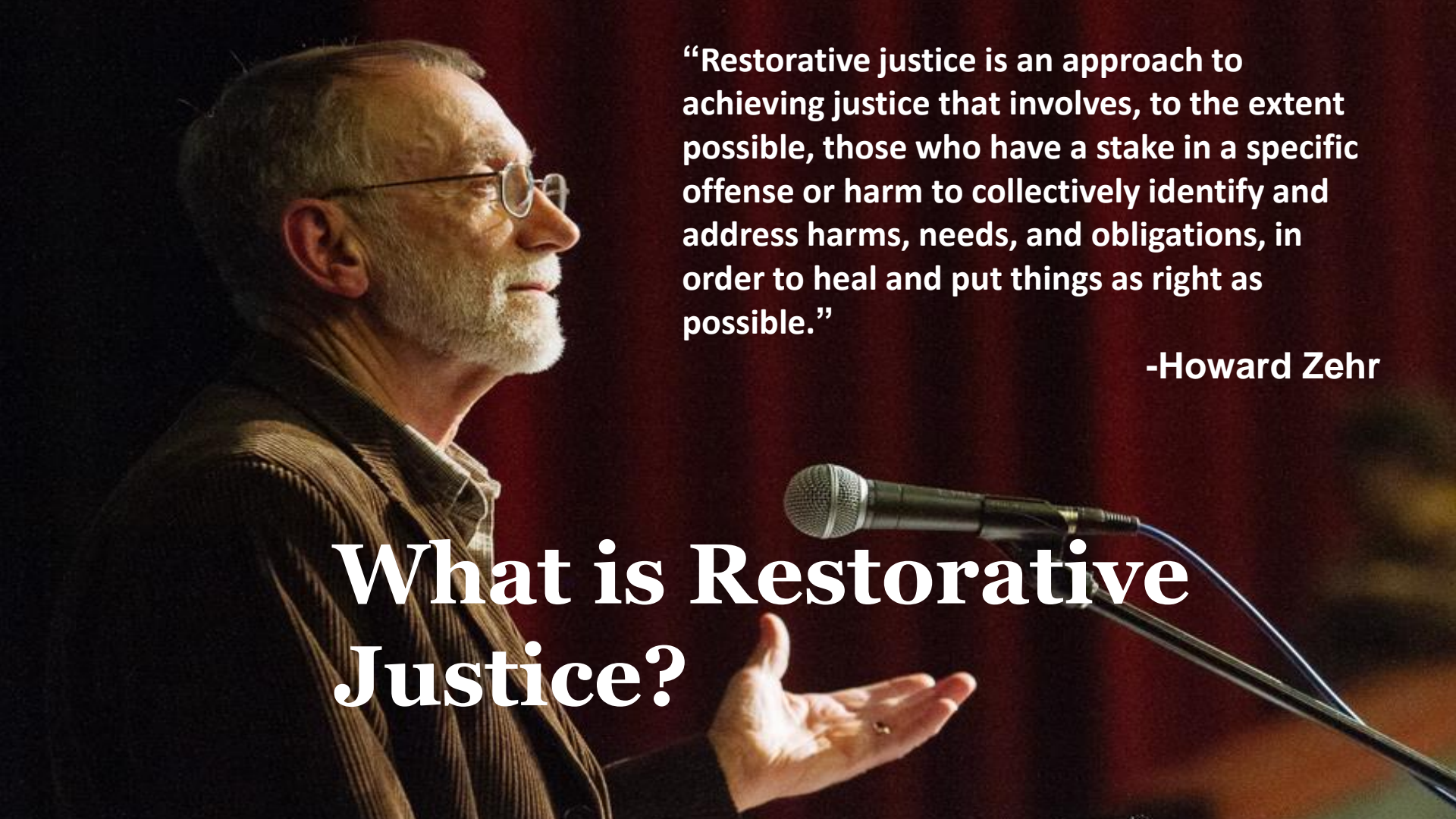
Facilitated exchange of resolution offers

Mediation

Arbitration

Restorative justice

Settlement with the involvement of attorneys

A photograph of Howard Zehr, an older man with glasses and a beard, speaking at a microphone. He is wearing a dark jacket over a collared shirt. His right hand is raised in a gesture. The background is dark and out of focus.

“Restorative justice is an approach to achieving justice that involves, to the extent possible, those who have a stake in a specific offense or harm to collectively identify and address harms, needs, and obligations, in order to heal and put things as right as possible.”

-Howard Zehr

What is Restorative Justice?



Four Principles of Restorative Justice

- Restorative Justice is a specific type/format of informal resolution that has four key principles:
 1. Process provides a space for inclusive decision-making, inviting offenders, survivors, and community members to articulate the harms experienced and their needs
 2. Active accountability: the offender must take responsibility and make amends for the actions he/she took
 3. The offender must repair the harm created; the question asked is “how can the survivor and the community be restored?” rather than “how can the offender be punished?”
 4. Focus is on rebuilding trust and creating an environment in which the harmed parties can be safe again

RJ is focused on repairing harm.

The cornerstone of the conduct process 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?

General Informal Resolution v. Restorative Justice



TIME

Sexual Assault Survivor to Betsy DeVos: Mediation Is Not a Viable Resolution

- “I am deeply worried that allowing mediation as a resolution to all forms of sexual violence at schools’ discretion will result in schools pressuring survivors to participate.”
- “Survivors of sexual violence should not be asked to compromise, self-reflect or reconcile relationships with someone that assaulted them.”
- “[M]ediation perpetuates the myth that sexual assault is simply a misunderstanding between two people, rather than what is really is: a violent abuse of power.”



The logo for Husch Blackwell, consisting of a stylized white 'B' above a vertical bar, and a stylized white 'H' below it, all on a blue background.

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Policies and Practice of Implementation of Informal Resolution



Initiation of Informal Resolution

- Either the complainant or respondent can request informal resolution but remember that participation must be voluntary from all parties.
 - **Practice tip: ensure voluntary consent is confirmed in writing**
- Must provide notice to the parties disclosing the allegations and the requirements of the informal resolution process.
- During the pendency of the informal resolution process, either party may withdraw their consent.



Informal Resolution Process

- Sample process for informal resolution:
 - Informal Resolution Facilitator holds an initial process meeting with each party to discuss the resolution process and communicate their rights
 - Each party is asked to submit written requests that provide details regarding the remedies they are seeking. These requests are shared with the other party.
 - The Facilitator again meets with each party to identify and facilitate areas of agreement.
 - Agreements reached as part of the informal resolution process is approved by the Title IX Coordinator
- The informal resolution process can be terminated at any time by the Title IX Coordinator, the complainant, or the respondent



Outcomes

- Informal resolution does not typically result in sanctions, and allows for more creative resolutions
- 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.
 - Eg. Changes to an academic program that conflict with a term of an agreement.

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**Best
Practices/Issues to
Consider**



When should informal resolution be available?

- Informal resolution may not be the right choice depending on various factors. Think about these questions when determining whether to allow for informal resolution
 - Has there been any prior offenses? Is there a pattern of conduct?
 - Have there been multiple complaints about the same incident?
 - Is the complainant or respondent a university employee or faculty member, as opposed to another student?
 - What are the potential sanctions for the alleged conduct if formal resolution was utilized?
 - What is the risk if there is a failure to comply with a No Contact Director, or a Civil No Contact Order?
- Allow for the Title IX Coordinator to make the initial determination as to whether informal resolution is appropriate
- **Remember:** Traditional investigative/adjudicative processes should be used when an accused student *denies* responsibility



Documentation

- Documentation is key at every step of the way!
 - Initial consent to participate
 - Notice to the parties regarding the allegations
 - Any agreement reached through the informal resolution process should be documented in writing, and signed by all the parties involved



Legal Issues

- Very few reported cases analyzing informal resolution practices.
- Federal courts have been resistant to allowing deliberate indifference claims based on an institution's use of an informal resolution process in general.
- Key issue is **voluntariness**.
- If the institution follows (or makes a good-faith attempt to follow) its policies and procedures, courts appear to be reluctant to second-guess the decision or outcome.



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

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.”

Takla – cont'd

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



Karasek v. Regents of the Univ. of California (N.D. Cal. 2016)

“In arguing that she has made a sufficient showing of deliberate indifference, Karasek asserts that the University improperly used an informal resolution process to address her complaint”

- “[A]t no time during the entire pendency of the early resolution process was [she] allowed to participate in any investigatory or disciplinary process.”
- “During the entire pendency of the investigatory and disciplinary process, Respondent was ‘allowed to remain on campus, unrestricted,’ creating a sexually hostile environment”
- Karasek was not contacted during the entire pendency of the informal resolution process and was not given an opportunity either to present her claim at a disciplinary hearing or to appeal the University’s disciplinary decision.”

Court granted UC’S MTD:
“[E]ven assuming that a school’s violation of its own sexual harassment policy is relevant to the deliberate indifference analysis, **Karasek identifies no way in which the University’s use of an early resolution process to address her complaint was in violation of University policy.**”



Karasek (9th Cir. 2020)

- “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 Commins’s complaint informally without allowing Commins 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 Commins reported her assault, UC moved quickly to suspend her assailant, and UC imposed fairly stringent sanctions upon resolution of Commins’s complaint. We may disagree with UC’s handling of Commins’s complaint, but that does not suffice for Title IX liability.”

956 F.3d 1093, 1108–10 (9th Cir. 2020) (citing *Davis*, 526 U.S. at 648).

Burtner v. Hiram College (N.D. Ohio 1998)

- “[B]efore the plaintiff left for graduate school in New York, she and the other female student signed off on an informal grievance procedure. [Respondent] also signed off on the procedure which found that he had violated the school’s sexual harassment policy.”
- “Even if Plaintiff Burtner could establish actual notice in this case, she cannot show that Defendant Hiram College was deliberately indifferent to her situation after it received her complaint.”





Hayut v. S.U.N.Y. (2nd Cir. 2003)

- “That the [university administrators] also sought to address the matter informally does not suggest any attempt to stymie more formal measures, as the grievance procedures for the SUNY defendants permit concurrent informal complaint processes.”
- **Affirmed SJ in University’s favor:** “We, therefore, find that, on the undisputed facts of this case, no reasonable jury could conclude that the response by the individual defendants, on behalf of the SUNY defendants, exhibited deliberate indifference. It follows that there is no evidence supporting Title IX liability against the SUNY defendants.”



Implications for Potential Legal Proceedings?

Many students charged with sexual or other misconduct that implicates criminal justice issues may be reluctant to participate without assurances that their admissions of causing harm won't be used against them.

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

Federal Rule of Evidence 408
Evidence of the following is not admissible—on behalf of any party—either disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction:

...
(2) conduct or a statement made during compromise negotiations about the claim"

NEB. REV. STAT. § 25-2914.01
"No admission, confession, or incriminating information obtained from a juvenile in the course of any restorative justice program . . . shall be admitted into evidence against such juvenile, except as rebuttal or impeachment evidence, in any future adjudication hearing under the Nebraska Juvenile Code or in any criminal proceeding."



Questions and Follow-Up

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