

STUDENT CONDUCT INSTITUTE
THE STATE UNIVERSITY OF NEW YORK

# LIVE @ DISTANCE: Restorative Justice in Higher Education

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# I Am Paige. I Am Scott. We Are Lawyers!






# Training Goals

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|---|---|
| Understand | Understand what restorative justice is and its application in Title IX informal resolution |
| Understand | Understand the components of a restorative conference and the elements of a resolution agreement |
| Apply | Apply restorative justice process in a hypothetical case study |
| Assess | Assess and explore best practices for setting up and staffing RJ programs |

# Perspective

- Investigation/adjudication is a system designed by lawyers (to serve lawyers?)
- Deep, universal dissatisfaction with the investigation/adjudication model
- No appetite for return to mishmash of informal practices
- Is there an alternative to the investigation/adjudication model which is **rigorous** and **educational** role of colleges and universities?
- Much discussion about restorative justice but little understanding of how to implement a thoughtful program
- **<u>Chat Question:</u> Other reasons for your interest in exploring RJ?**

# 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?



# Compliance Requirements

# Big Picture

1. Written notice
2. **Voluntary** and **timely** process
3. No conflict of interest
4. Facilitated by appropriately trained personnel
5. Know limits



# Written Notice: 34 C.F.R. § 106.45(b)(9)

"[A]t **any time prior to reaching a determination** regarding responsibility the recipient may facilitate an informal resolution process . . . 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;

(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***.

# Voluntary Participation: 34 C.F.R. § 106.45(b)(2)(9)

"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 Voluntary Participation?

- **Educate** the participants about informal resolution options
- Provide **Notice of Rights & Options**, such as:
  - ✓ Whether the process will involve a face-to-face interaction
  - ✓ 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
- Participation contingent on successful completion of preparatory (**pre-conference**) meetings
- Require parties to sign a **Participation Agreement** memorializing initial assessment process
- Frequent check-ins and monitoring

# Timing: 34 C.F.R. § 106.45(b)(1)(v)

- 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.
- **Question:** How long does this process typically take?



# Conflict of Interest, Bias, & Training: 34 C.F.R. § 106.45(b)(1)(iii)

- **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 prejudgment 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;

**Chat Questions:**

- Where do you currently house your informal resolution officers?
- How do we identify staff members who are well-qualified/positioned to take on the IR role?

# Informal Resolution is Not for All Cases.

**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.

How do we assess "Nature of Alleged Offense"?

- Behaviors (what kind of behavior, multiple times, escalating over time, etc.)
- Cognitive and developmental understanding (age, disability, etc.)
- Motivations/Intention (premeditated, "attempt" violation, etc.)
- Tactics (persistence, incapacitation, violence, etc.)

# 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?

# 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?

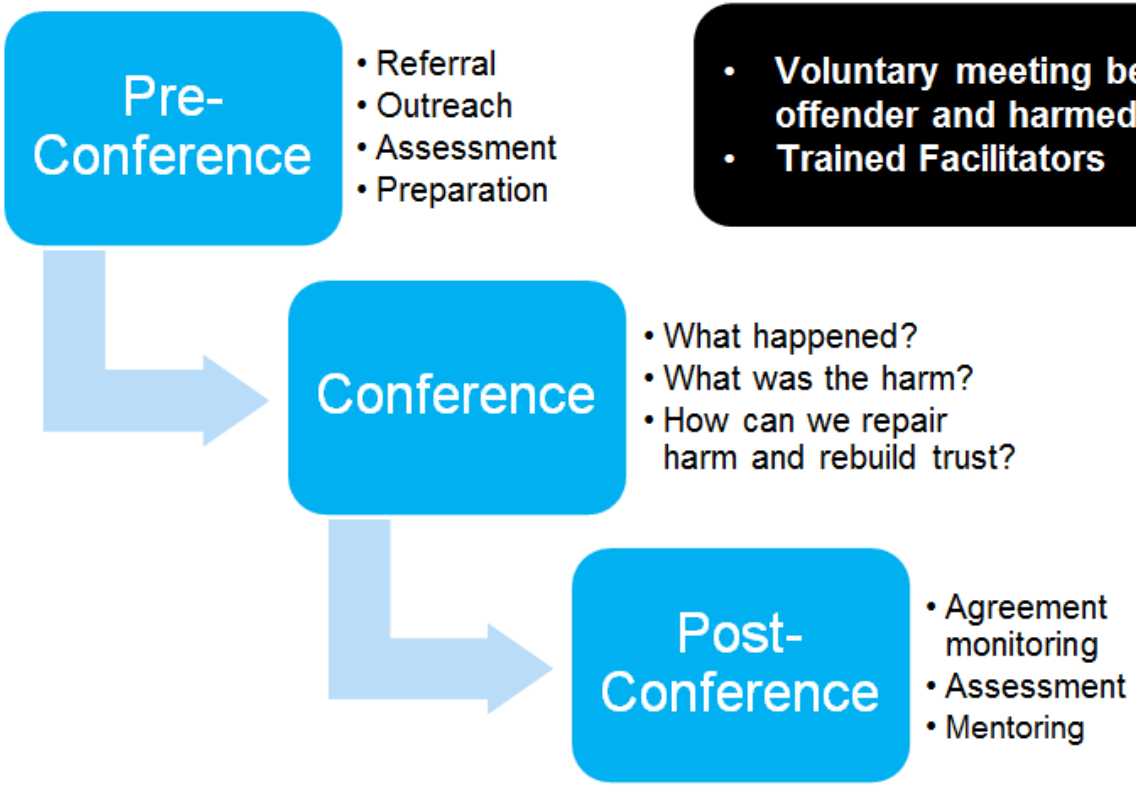
# Initial Assessment Hypo 3

Title IX Coordinator has walk-in appointment with Complainant, who describes alleged conduct constituting sexual assault under the Title IX policy. The alleged incident occurred after a long night of drinking, which rendered the Complainant incapacitated. 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?

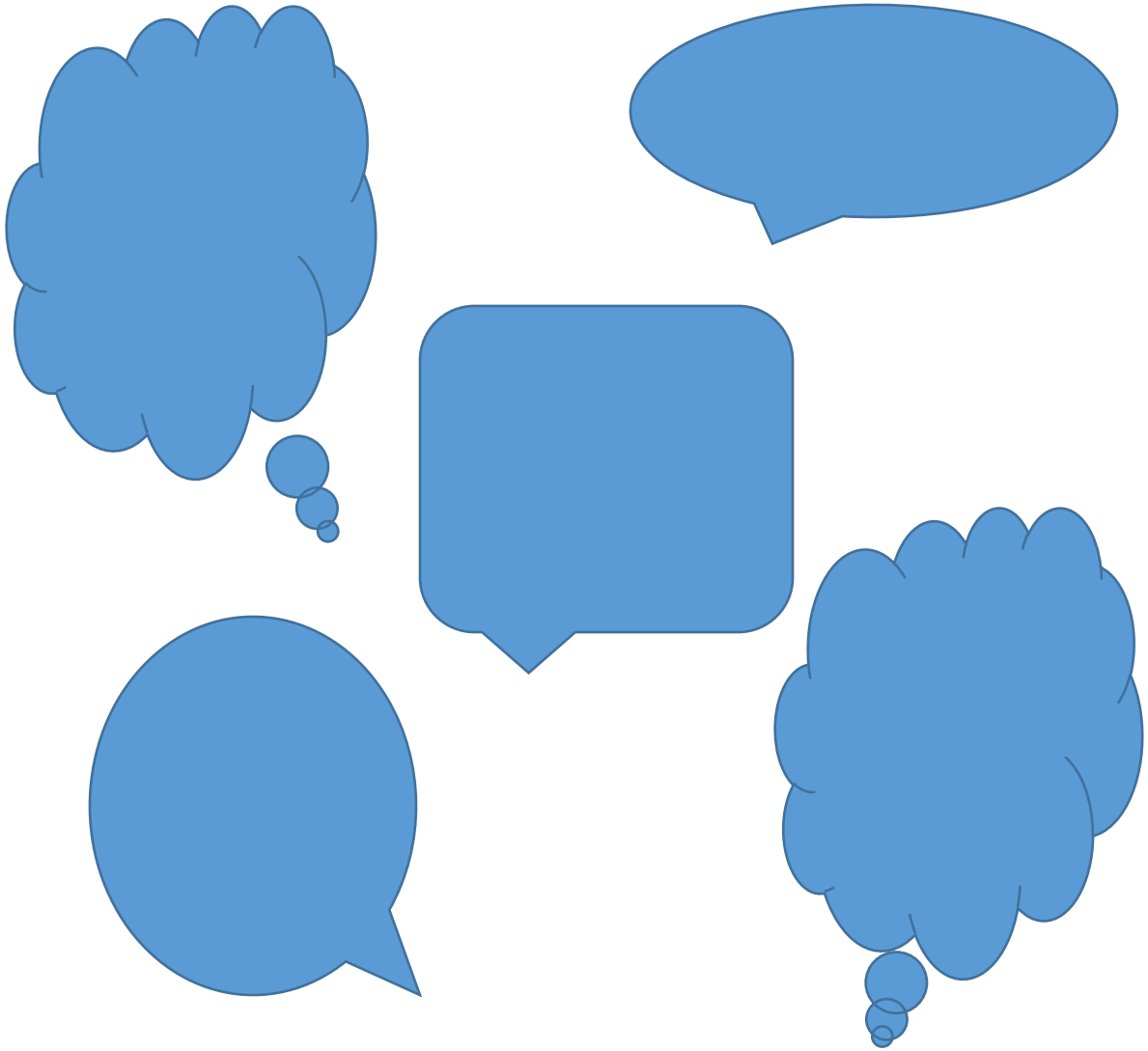
# Fundamental RJ Process



# 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?



# Hypothetical

- 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.

# Hypothetical (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.

# Hypothetical (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.

# 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?

# Initial Assessment (cont.)

- 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."

- **Will you offer IR for this case?**
- **What factors weigh in favor/against?**
- **What facts suggest this case might be appropriate for restorative justice (as opposed to other forms of IR)?**

- Desires of the complainant/harmed party
- 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

# 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

# Facilitator's Role

- Conduct intake/pre-conference in consultation with Title IX Coordinator
- Facilitate storytelling by all participants
- Identify and list harms
- Brainstorm solutions
- Prepare resolution agreement with input from parties

# 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?

# 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?

# Pre-Conferencing: 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?

# Day 1 Recap & Questions

