

OSPA Virtual Fall Summit 2020

Title IX Compliance Certification Training: Informal Resolution Training

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Presented by Jackie Gharapour Wernz, Partner

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1

Your Host

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2



3

Remember Your “Basic Training”

- Definition of Title IX Sexual Harassment
- Scope of Education Program/Activity

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What is Informal Resolution?

- Informal method to settle formal complaints of Title IX Sexual Harassment
- Can be offered
- Must be offered consistently

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Types of Informal Resolution

- Restorative Justice
- Mediation/Facilitated Dialogue
 - Face to face
 - "Shuttle diplomacy"

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Robin's Report

- Robin, a freshman, said a friend, Cameron, also a freshman, told Robin that another student, a senior, Parker, had been sending inappropriate email messages to Cameron.

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Robin's Report

Robin encouraged Cameron to report, but Cameron refused

Robin was talking to another student, Peyton, at a party last weekend. Peyton reported also receiving inappropriate messages from Parker.

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Robin's Report

- Because this seemed like a pattern, Robin felt the need to report.
- The emails began with requests for dates but evolved into name calling (slut, skank), rambling comments about the recipient's "obvious" desire for Parker, and incessant requests for connection.
- Cameron and Peyton are not interested in filing a formal complaint.

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**Your school district offers face-to-face restorative justice.
Can you use this with Cameron, Peyton, and Parker?**

Yes, because the restorative justice policy clearly allows informal resolution.
Yes, as long as the perpetrator has been harmed.
No, because Cameron and Parker have not filed a formal complaint.
No, because sexual harassment cannot be addressed through informal resolution.

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Old Rules vs. New Rules

- Discouraged by OCR before
- Allowed in 2017 (but did not prohibit in cases involving employee sexual harassment of a student)
- Now allowed but only where formal complaint is filed and not in cases involving employee-on-student misconduct

11

When Can IR be Offered?

- Can only be used when formal complaint has been filed
- Cannot be used in cases of employee-on-student harassment
- Can only be used if each party has given informed, written consent (cannot ever be required, indirectly or directly)

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WHY ALLOW IR?

13



When is IR most useful?

No Competing Factual Narratives

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Cameron and Peyton file a complaint against Parker. Should Informal Resolution be allowed?

Yes

No

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Who Should Serve as an IRF?

- Trained Facilitator
- Neutral Party/Impartial/Unbiased
- No prejudgment of case
- We do not recommend the IRF be involved in the investigation

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Standard

- Declined to define "bias," "conflict of interest," "prejudge"
- The Department encourages recipients to apply an objective (whether a reasonable person would believe bias exists), common sense approach to evaluating whether a particular person serving in a Title IX role is biased, exercising caution not to apply generalizations that might unreasonably conclude that bias exists....

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You signed the Formal Complaint as Title IX Coordinator or designee. Is that a conflict of interest?

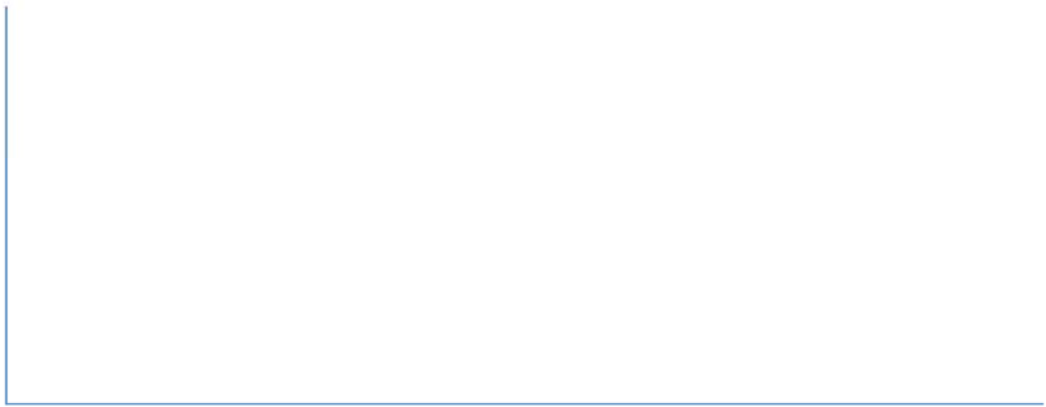
Yes

No

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You attend the same church as Parker. Is that a conflict of interest?

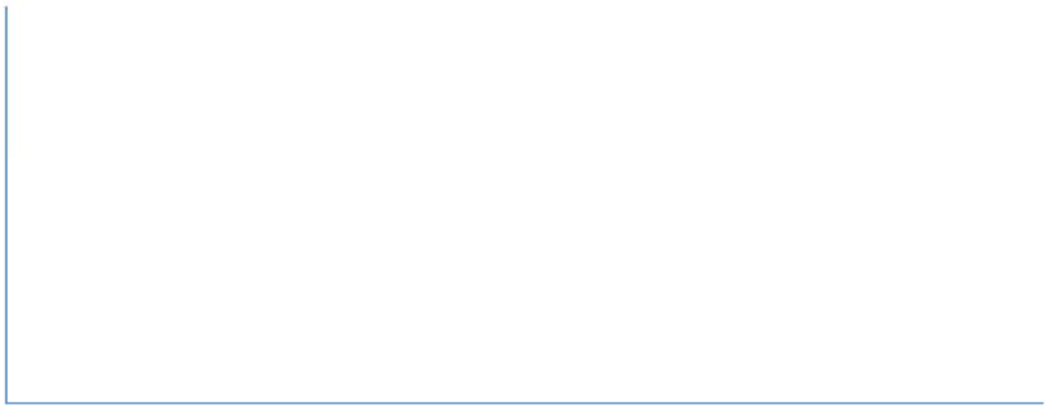


Yes No

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You have a history of working as a victim advocate. Is that a conflict of interest?

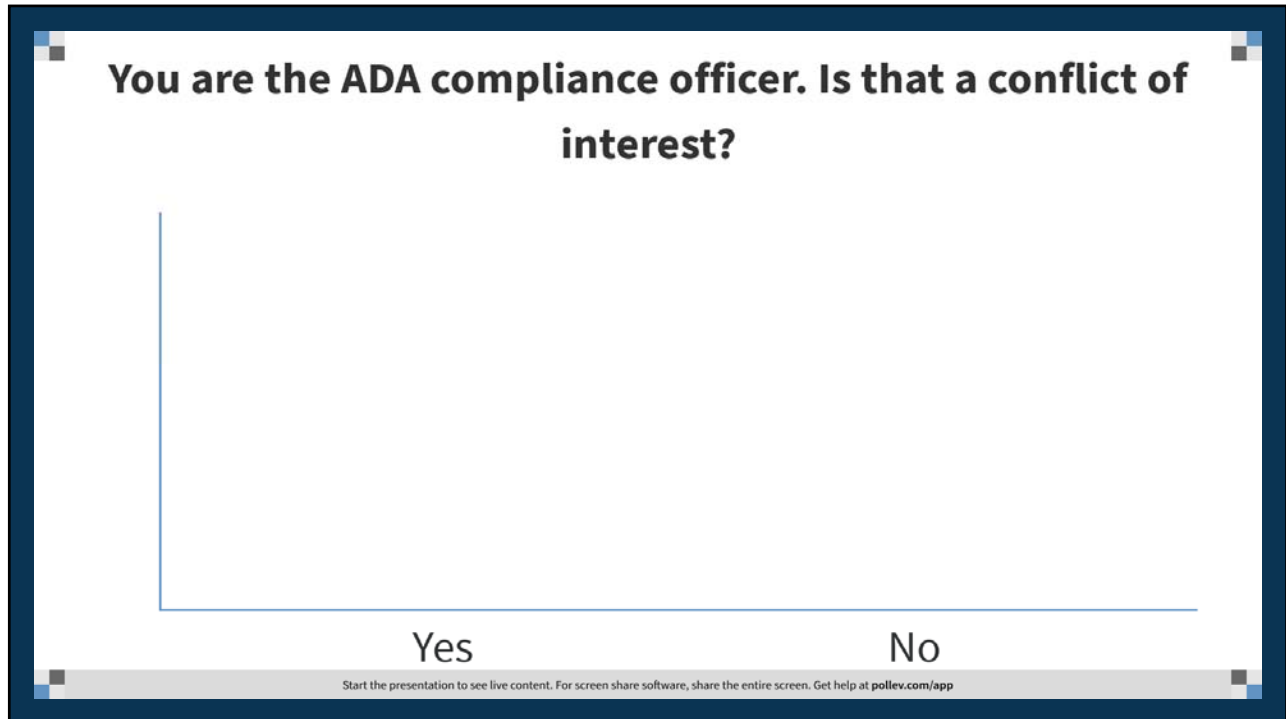


Yes No

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You are the ADA compliance officer. Is that a conflict of interest?

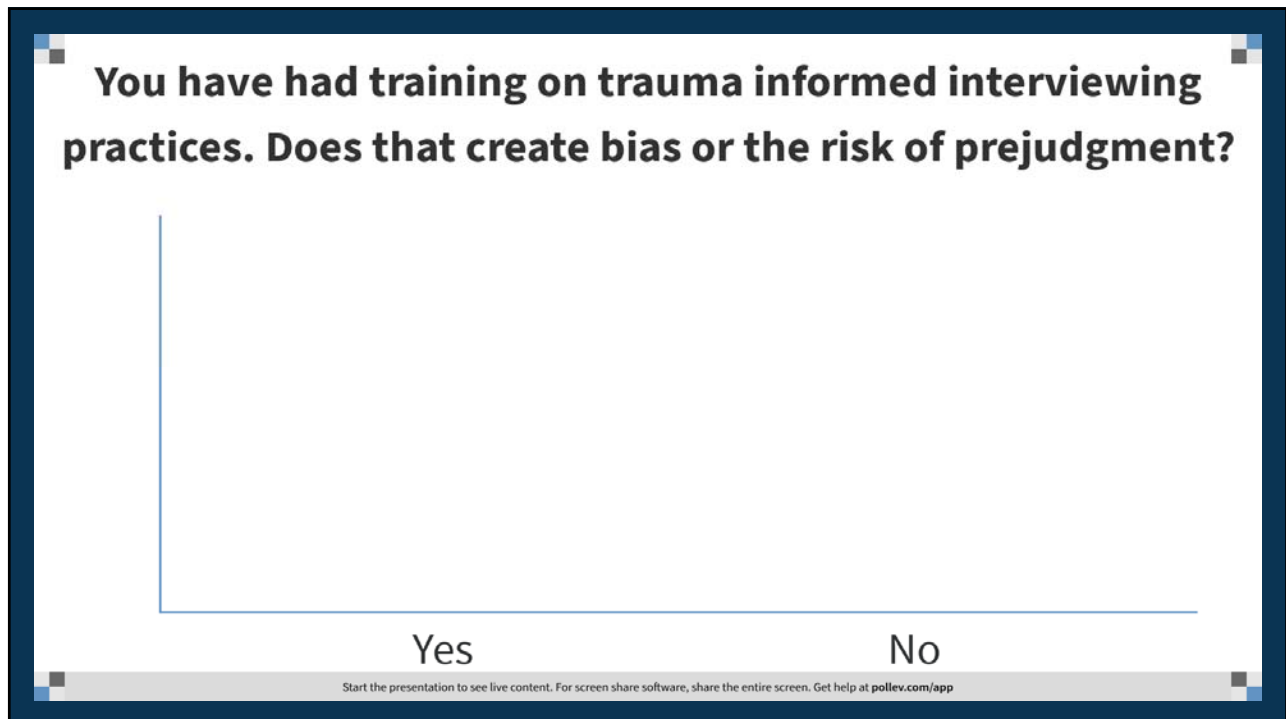


Yes No

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You have had training on trauma informed interviewing practices. Does that create bias or the risk of prejudgment?



Yes No

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Conflict of Interest

- Flexibility to choose informal resolution facilitator
- Can use a school employee
- Can use an individual with a history of working in certain fields
- Caution against using generalizations to identify conflict of interest

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Pre-Judgment

Tips for avoiding pre-judgment of facts:

- Each case is fact-specific
- Keep an open mind
- Listen to facts presented
- You are not an advocate for either party, even if you believe one is right

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Sex Stereotypes

- Must not rely on sex stereotypes such as:
 - Women are “asking for it” based on actions or clothing
 - Men cannot be sexually assaulted
 - Women only decide they were assaulted after the fact due to regret or embarrassment
 - Men are more likely to be sexual aggressors
- Consider intersection of sex stereotypes with race, ability, sexuality, and gender identity

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Required & Recommended Notices

- Notice of allegations + existence of IR process
- Offer of informal resolution (with impacts of participation)
- Notice of end of informal resolution without agreement
- Notice of successful informal resolution

26

Forms/Notices

Informal Resolution Process

Offer of Title IX
Informal Resolution
Process
(Franczek Notice 5(a))

Notice of Closure of
Title IX Informal
Resolution Process
(Franczek Notice 5(b))

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Notice of Impacts of Participation in IR Process

- Can withdraw and return to investigation process before resolution
- Neither party can ask for investigation to resume after resolution
- Records will be maintained for 7 years
- Other impacts of participation

28

Other Impacts of IR Process

- Can IR give information against the parties in a later investigation?
- Can facts be used against the parties in a later investigation?

29

The Mediation Process

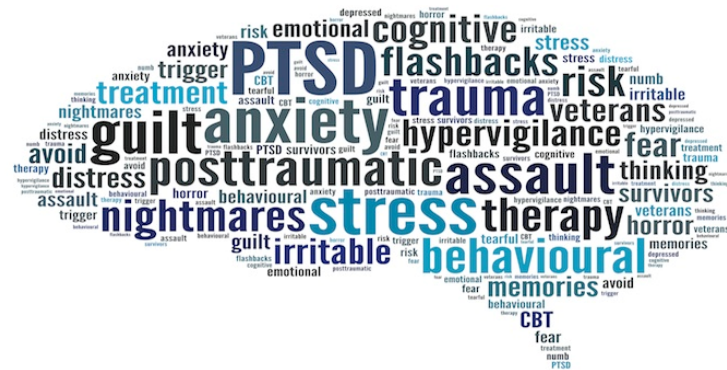
- Preparation
- Introductions
- Information Collection
- Problem Identification
- Brainstorming Solutions
- Brokering the Deal
- Agreement

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Potential Trauma for CP and RP



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Trauma and Informal Resolution

Empowerment

Recognition

Resolution

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Emotions

- Silence is ok
- Sympathy is ok (within reason/neutral) – “I can tell this is hard” “I’m sorry this is difficult”
- Allow breaks
- Remember equality not equity is goal for processes

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Preparation

34

Preparation

- Appropriateness of IR
 - Under Title IX
 - Readiness of parties
- Background information
 - Complaint and related documentation
 - Ask parties for background documentation
- Select location/method
- Advisor participation/guidelines

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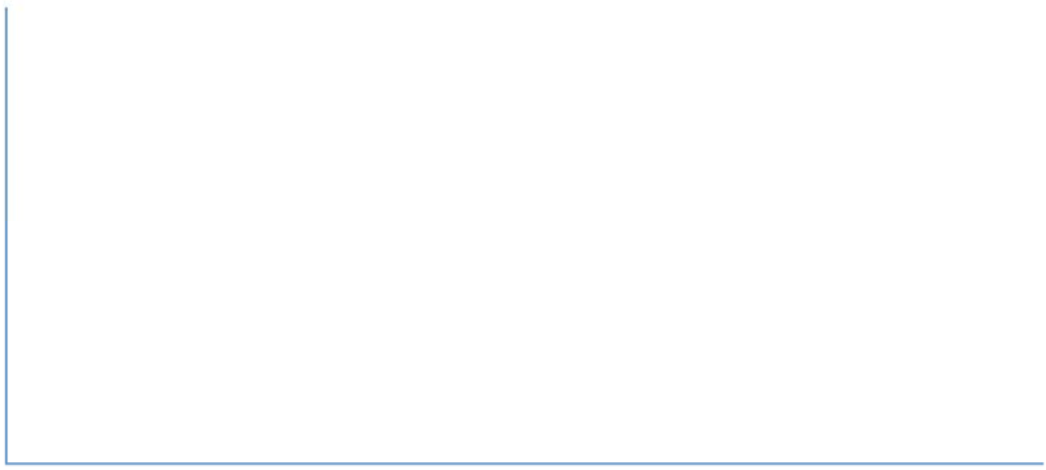
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Introductions

36

Critique a Mediation: Introduction Content

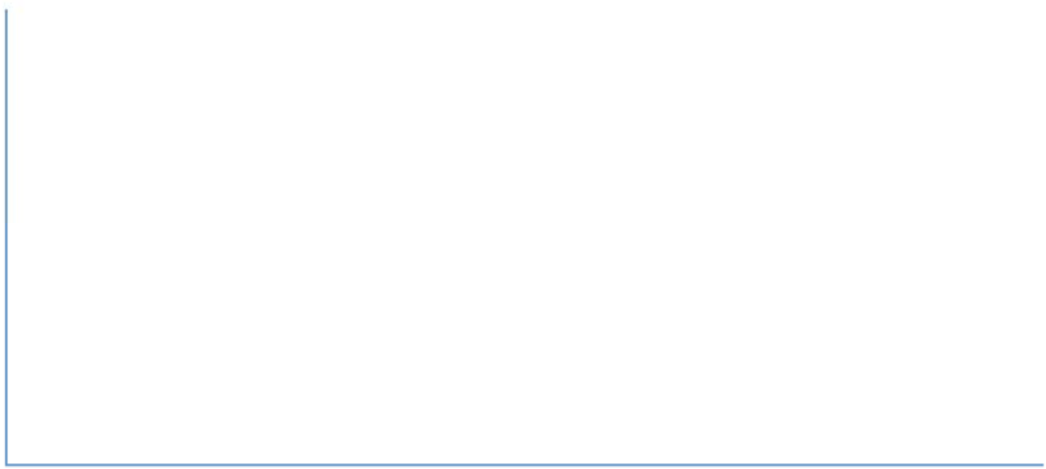


Good Not Good

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Critique a Mediation: Delivery of Introduction



Good Not Good

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Information Collection

39

Information Collection

- Why are we here?
- Tell me more about....
- Help me understand....

****remember your trauma-sensitive approach**

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Brainstorming Solutions

41

Brainstorming Ideas

- Don't shut down ideas
- Write down all ideas
- Suggest, but don't advocate
- Discuss pros/cons and possibility of solution working

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Brainstorming Ideas

- "What solution would allow you to feel comfortable settling the complaint?"
- "If the other party were to offer x , would you be willing to offer anything in return?"
- If a party refuses to make further offers, ask questions to understand why

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What types of solutions might you brainstorm for Cameron and Parker?

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Length of Informal Resolution

- Will vary depending on complexity
- 20 days is a reasonable time, but extensions will be warranted in many cases
- Try to obtain agreement to extensions from all parties
- Keep the Title IX Coordinator apprised of progress

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Brokering the Deal

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Brokering a Deal

- Empathy
- Honesty
- Trustworthiness
- Tenacity

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Cameron and Parker reach an agreement in informal resolution. Can the Title IX process ever recommenced?

Yes, if Parker fails to comply with the terms

Yes, but only for allegations not resolved in informal resolution

No, because you can only recommence an investigation before a resolution is reached

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Role of Institution If Agreement Reached

- Agreement is between the parties; institution is not a party
- IR Facilitator can:
 - Act as intermediary
 - Make suggestions, evaluations
 - Help with drafting document

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51



52

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