

Scott D. Schneider, Attorney
Paige Duggins Clay, Attorney

INFORMAL RESOLUTIONS IN TITLE IX



Agenda



Know Our Why



Rendering unto Caesar: Complying With The Legal Requirements



Green, Yellow, or Red Light: Is IR Right For This Situation?



Communications with Parties & Ensuring Voluntary Participation



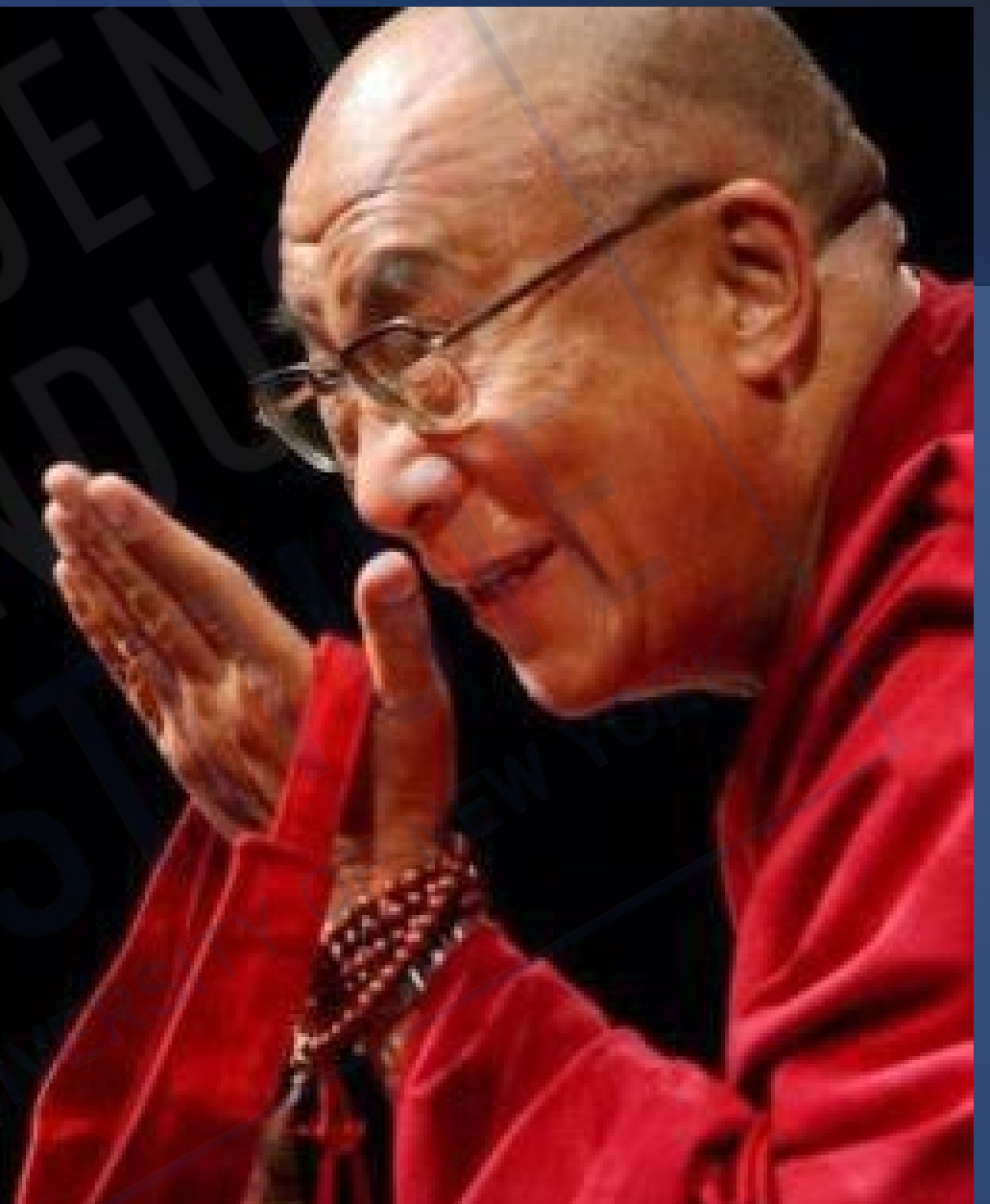
Types of Informal Resolution



Step-By-Step Guidelines

The planet does not need more successful people. The planet desperately needs more peacemakers, healers, restorers, storytellers and lovers of all kinds.

~ *Dalai Lama*



First Principles: Overarching Duty

Prevent/Remedy Sex Discrimination!

1. Supportive measures
2. Equitable treatment
3. Respond to known acts of sexual harassment in a manner that is not “clearly unreasonable”

Hypo: Your president has asked you to explain to her why the university’s response to a report of sex harassment was not clearly unreasonable.

➤ *What facts would you want to be able to cite?*

ACRONYM



What Are The Shortcomings of Investigation/Adjudication?



For Reconciliation

Andrew W. McThenia
Thomas L. Shaffer†

Professor Owen Fiss, in his recent comment, *Against Settlement*,¹ weighs in against the Alternative Dispute Resolution (ADR) movement. He brings to the discussion his often stated preference for adjudication, which he views as “a tribute to our inventiveness,”² to be encouraged because it is a forum for the articulation of important public values. Fiss argues that the entire movement for alternatives to litigation is misplaced. He understands that the movement’s claim to legitimacy turns on the inefficiency of the legal system and on popular dissatisfaction with law as a means for maintaining order,³ and he challenges this claim.

Fiss attacks a straw man. In our view, the models he has created for argument in other circumstances⁴ have become mechanisms of self-deception not only for him but for most of those who write about alternatives to litigation. His understanding that the plea of ADR advocates is based on efficiency reduces the entire question to one of procedures. Fiss’s argument rests on the faith that justice—and he uses the word—is usually something people get from the government. He comes close to arguing that the branch of government that resolves disputes, the courts, is the principal source of justice in fragmented modern American society.⁵

Fiss’s view that the claims of ADR advocates arise from a popular dis-

The Law (Now): Informal Resolution & Regulations

“[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 (*7 years);
- (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**.

Break That Down

- An *optional* institutional alternative (should, when, how, & by whom)
- Guidance paperwork (how does process work & consequences of participating in the process)
- Voluntary *for both sides* (how to assess & demonstrate)



How is the current administration thinking about Informal Resolution?

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

In The Courts

- Very few reported cases analyzing informal resolution practices
- Federal courts have been reluctant to allow deliberate indifference claims based on an institution's use of an informal resolution process in general
- Key issues: voluntariness, timeliness, and remedies/enforcement
- Communicate with parties about status (where are we)
- If the institution follows policies and procedures, courts appear to be reluctant to second-guess the decision or outcome.



Hypothetical 1

- Complainant and Respondent are good friends and attended a party together where they both drank a lot of alcohol
- They left the party together and went back to Respondent's residence hall
- While in Respondent's room, they had what drunken Respondent believed was consensual intercourse
- The next day, Complainant texted Respondent that Complainant was upset and hurt because Respondent took advantage of her when she was too intoxicated to consent
- Complainant decided to report Respondent to the Title IX Coordinator

Threshold Question: Should Informal Resolution Even Be An Option?

- The Easy “No”: allegations that an employee sexually harassed a student
 - Important 1: know your state laws as well (*e.g.*, Maryland)
 - Important 2: keep on top of developing case law
- More Complicated: **Are there situations where informal resolution would be not appropriate (or “clearly unreasonable”)?**
- One potential guidepost: if allegations are true, would it be appropriate for accused to remain on campus (on-going threat to campus community → gravity of the alleged offense, repeat offender, risk of repeating, weapons, minor victim, etc.)

Back to Hypothetical

- **What are the reasons why IR should be an option?**
- **Should not be an option?**
- Complainant and Respondent are good friends and attended a party together where they both drank a lot of alcohol
- They left the party together and went back to Respondent's residence hall
- While in Respondent's room, they had what drunken Respondent believed was consensual intercourse
- The next day, Complainant texted Respondent that Complainant was upset and hurt because Respondent took advantage of her when she was too intoxicated to consent
- Complainant decided to report Respondent to the Title IX Coordinator

Three Suggested Best Practices

1. Clear policy language is important -- Make sure the policy reflects (a) who needs to consent to an informal resolution and (b) **what factors** university officials will consider
2. Show your work -- document your analysis
3. Monitor for consistent application and implicit bias (*i.e.*, similar fact patterns should be handled consistently)
 - The benefit of blanket rules





A Couple of Complicated Scenarios: What To Do?

- Significant allegations but complainant does not want to go through investigation/adjudication process
- Significant allegations but you know there are proof issues & have a hunch end result will be unfavorable

You Say Yes! Now to Complainant

- Discuss options with Complainant
 - Explain the IR process in writing
 - Form document that satisfies regulatory requirements → Have a non-lawyer human being read this for clarity
 - If Complainant says “no,” that’s a wrap
1. What do you say about IR?
 2. What are pros & cons to mention?
 3. What should you avoid?
 4. Timing?
 5. What are some of the questions you may get from the Complainant?

Basics: Supportive Measures

So, so important!

- In general: non-disciplinary, non-punitive support and accommodations designed to preserve access to education programs and activities & without unreasonably burdening the other party
 - Examples?
 - To issue NCO or not?



Complainant Say Yes! Now to Respondent

- Discuss options with Respondent
- Explain the IR process in writing
 - Form document that satisfies regulatory requirements → Have a non-lawyer human being read this for clarity
- If Respondent says “no,” that’s a wrap

1. What do you say about IR?
2. What are pros & cons to mention?
3. What should you avoid?
4. Timing?
5. What are some of the questions you may get from the Respondent?

*Can this be used against me in a subsequent proceeding?
Sent to subsequent schools?
Part of education record?*

How Do We Ensure Voluntary Participation (As Much As Possible)?

1. Clear communications (can't stress this enough)
 2. Be timely, but don't rush
 3. Require parties to sign a clear Participation Agreement
 4. Periodic check-ins and monitoring (Who? How?)
 5. Reiterate where appropriate that either party can stop the process
- What would be a red flag about a party's voluntary participation?
 - **Rule** → when in reasonable doubt, put concern on table/stop the process
 - Show your work (again – sorry)
 - What if...once you're done, a party objects that they didn't, in fact, voluntarily participate?

Hypothetical 2

Jesse, sophomore walk-on, accuses the captain and All-Conference power forward, Toni, of sexual harassment after Toni kisses Jesse in a hotel room during an in-season basketball away game.

At the intake meeting, in August (outside of basketball season), Jesse explains that Jesse will never informally resolve this issue. Jesse files a Formal Complaint, and proper notices have been sent to the parties and support measures are in place. The day after the basketball season starts, while the investigation is underway, Jesse decides that Jesse wants to proceed informally. Toni is “totally on board.”

You are asked to assess the propriety of utilizing informal resolution:

- 1. What issues from the facts above do you want to figure out/dig into more?**
- 2. How?**
- 3. What questions will you raise with Jesse?**
- 4. What questions will you raise with Toni?**
- 5. What are the red flags?**

Types of Informal Resolution



ADMINISTRATIVE
ADJUDICATION



FACILITATED
CONVERSATIONS



RESTORATIVE
JUSTICE



MEDIATION

Mediation



What Makes A Good Mediator?

- Reasonable participants 😊
- Ability to establish rapport
- **Listening** for Understanding
- Establishing trust (what can I share?)
- Soliciting what parties want & setting expectations
- Creativity

EFFECTS OF ACTIVE LISTENING, REFORMULATION AND IMITATION ON MEDIATOR SUCCESS: PRELIMINARY RESULTS

Jacques Fischer-Lokou¹, *Université de Bretagne-Sud*
Lubomir Lamy, *Université Paris-Descartes*
Nicolas Guéguen, *Université de Bretagne-Sud*
Alexandre Dubarry, *Université de Bretagne-Sud*

Abstract

An experiment with 212 students (100 men, 112 women; M age = 18.3 yr, SD = 0.9) was carried out to compare the effect of four techniques used by mediators on the number of agreements contracted by negotiators. Under experimental conditions, mediators were asked either to rephrase (reformulate) negotiators' words or to imitate them or to show active listening behavior, or finally, to use a free technique. More agreements were reached in the active listening condition than in both free and rephrase conditions. Furthermore, mediators in the active listening condition were perceived, by the negotiators, as more efficient than mediators using other techniques, although there was no significant difference observed between the active listening and imitation conditions.

Four Items For Preparation Of Mediator

Reasonable summary of report
and status

Background information on
parties and advisors

Information for assessment of
potential conflicts

Summary of concerns raised (if
any) in screening process

Suggested Process Steps

1. Send an introductory communication outlining process and scheduling meetings
2. Meet with complainant (listen primarily & get a sense of remedies sought)
3. Meet with respondent (listen primarily & get a sense of willingness to address harm)
4. Assess and craft next steps

Other Considerations

- Some mediations begin with both sides in the room together sharing account – I'm generally not a fan
- Is in person preferable for party meetings?
- Can advisors be helpful or harmful? How to engage?

On Rapport Building: Thin Slicing

- People quickly reach “macro” conclusions (pleasant, kind, hostile, creepy, competent) based on “micro” traits (smiling, eye contact, open-handed gestures, fidgeting, stiff posture, facing another direction)
- What is macro impression we are trying to communicate and what are nonverbal micro cues that can get us there?

Acting on impulse

Ever felt that people are a bit quick to judge? That's because we are. Research shows we make up our minds about someone in a matter of seconds - and what's more, we're surprisingly good at it. Rosie Ifould explores the consequences of our snap decision-making



Finding out you share the same name can create a sense of affection Photograph: Guardian

Some General Question Possibilities

- “I’ve read the materials in this matter and am familiar with the report, is there anything else you think is important to share with me?”
- “Can you walk me through what you would like to achieve through this process?”
- “Are there things you are willing to do remedy the harm Complainant has expressed?”

Hypothetical 3

In initial meeting with Complainant, Complainant says, “this process will be a failure to me if Respondent is not expelled.”

- **Q1: How do you respond to that?**
- **Q2: At what point do you shut things down?**

Hypothetical 4

- Complainant has accused Respondent of hostile environment sexual harassment.
- Respondent admits to the alleged conduct but asserts it “wasn’t that bad” and “won’t do anything to fix this because Complainant is being ridiculous.”
- Complainant alleges being so affected by the conduct that Complainant stopped attending their shared science class.
- Complainant requests an on-going no contact order, educational sessions for Respondent, and that Respondent be restricted from the current shared science class and any other upper-level science courses Complainant enrolls in in the future.

1. **What are some follow-up questions you may have for Complainant?**
2. **Respondent?**
3. **Are you willing to encourage Respondent to move off position?**
4. **If so, how?**

How Long Should Process Take?

- From regulations: “reasonably prompt” with extensions for “good cause” with written notice to parties
- Practical 1: comply with institutional policy
- Practical 2: I worry when I’m past 21 days from receiving file
 - Is there a reasonable basis for resolution?
 - Is it worth setting a firm deadline for a response?
 - Ensure parties and IX Coordinator are apprised of where things stand



Return to Hypothetical 1

- Complainant and Respondent are good friends and attended a party together where they both drank a lot of alcohol
- They left the party together and went back to Respondent's residence hall
- While in Respondent's room, they had what drunken Respondent believed was consensual intercourse
- The next day, Complainant texted Respondent that Complainant was mad because Respondent took advantage of her when she was too intoxicated to consent
- Complainant decided to report Respondent to the Title IX Coordinator

Q1: What are some possible terms for resolution?

Q2: What is role of Title IX Coordinator prior to finalizing agreement?

Some Outcome Examples

- Administrative accommodations such as adjusting class schedules, changing sections, etc.
- Apologies
- Voluntary educational, mentoring, or coaching sessions
- Relocation or removal from a residence hall or other on-campus housing
- Verbal cautions/warnings
- Training
- Collaborative agreements on behavioral or institutional changes
- No on-going contact
- Voluntary withdrawal from university ***



Agreement

- Explanation/background regarding formal complaint, allegations, and implicated polic(ies)
- Notice that this is lieu of a formal finding of a violation or no violation of policy (emphasizing voluntariness)
- Description of what has been agreed upon
- What will occur moving forward including violations of informal resolution agreement
- Future allegations of misconduct against respondent arising out of same facts as underlying complaint (reopening result?)



Agreement

- Future discipline of respondent
- Confidentiality
- Explicit notice that each party is agreeable to these outcomes
- Notice regarding institution's commitment to campus free from discrimination and harassment and anti-retaliation language
- Signatures and dates for the parties, as well as Title IX Coordinator

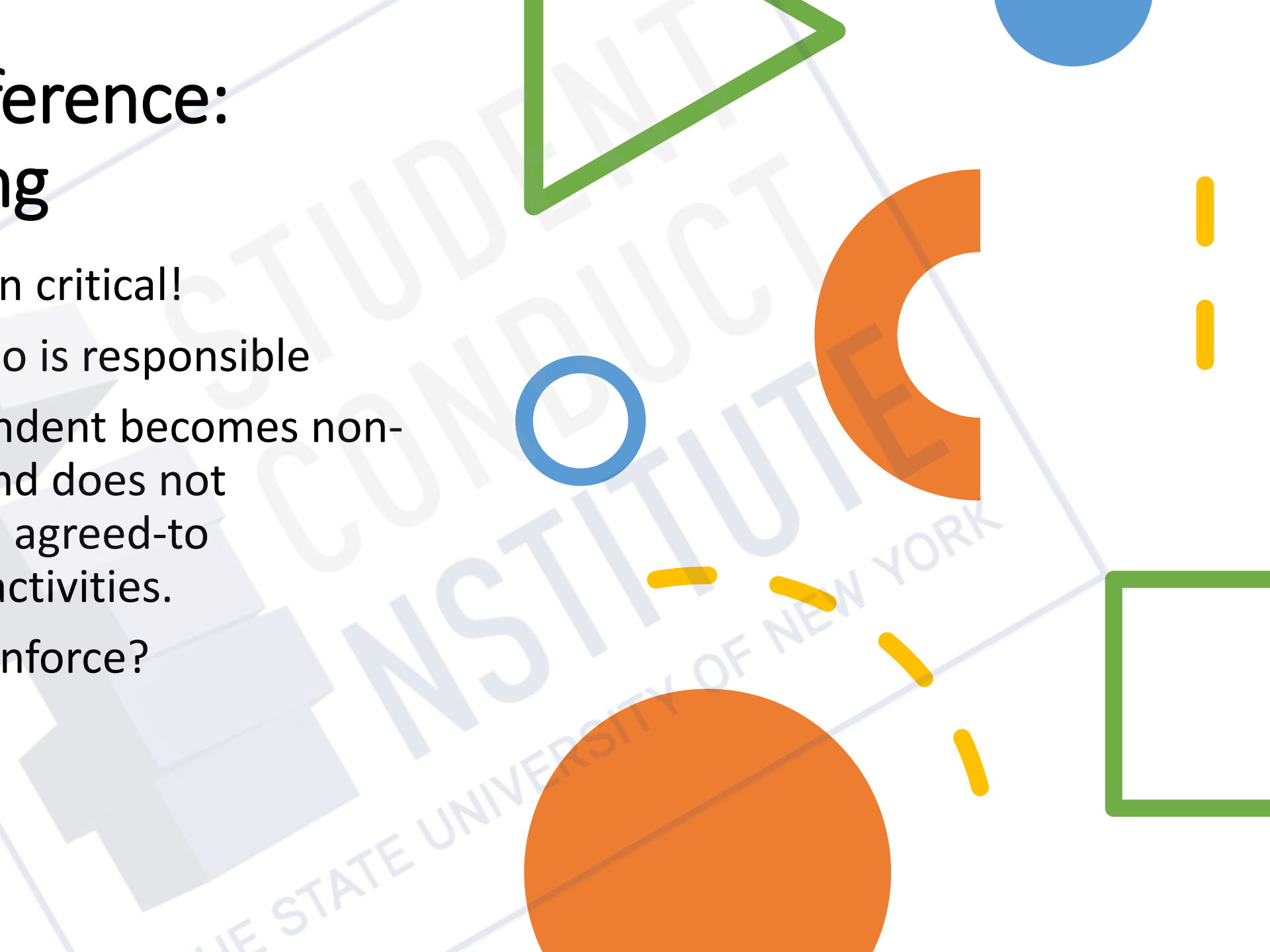



Example Confidentiality Language in Agreements

“I agree that to the extent permitted by law, I will not use information obtained and utilized during informal resolution in any other institutional process (including investigative resolution under the Policy if informal resolution does not result in an agreement) or legal proceeding, though information documented and/or shared during informal resolution could be subpoenaed by law enforcement if a criminal investigation or civil suit is initiated.”

Post-Conference: Monitoring

- This is mission critical!
- Clarity on who is responsible
- Hypo: Respondent becomes non-responsive and does not participate in agreed-to educational activities.
- How do we enforce?



A dark, starry night sky over a snowy mountain landscape. In the foreground, a wooden cabin is visible on the left. The mountains are covered in snow and partially illuminated by a light source, creating a contrast with the dark sky. The overall mood is quiet and contemplative.

**I'm so tired of being
tired. Sure as night will
follow day most things I
worry about will never happen
anyway.**

Tom Petty

No Celebration?

- Either party may withdraw their consent to participate in informal resolution at any time before a resolution has been finalized.
- Advise Title IX Coordinator
- Document process ended

