

What to Expect When You are Facilitating

HOW TO FACILITATE A TITLE IX CLAIM
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2020 TEXAS TITLE IX ADMINISTRATOR CONFERENCE
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TITLE IX FACILITATION - AUTHORIZATION

§ 106.45(b)(9): Informal Resolutions

• 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 –

TITLE IX FACILITATION - LIMITATIONS

§ 106.45(b)(9): Informal Resolutions

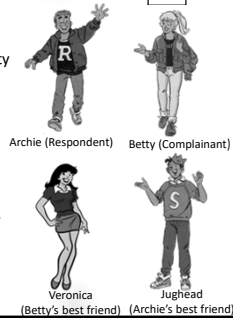
- (i) Provides to the parties a written notice disclosing: the allegations, the requirements of the informal resolution process including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations, provided, however, that at any time prior 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.

FACILITATION EXERCISE - FACT PATTERN

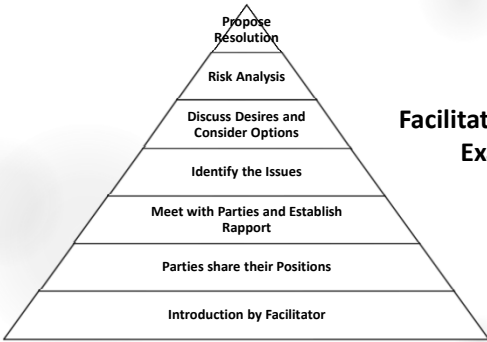
Betty and Archie have been dating for about 4 months. For the last week, Archie has been sending Betty texts asking that she send him some sexy (topless) pictures. Betty has declined so far, but Archie has been relentless, stating that "you said you loved me."

Veronica overheard Archie tell Jughead that he would share the pictures (just with him) as soon as he gets them. Veronica told Betty and convinced her to tell one of her teachers, who immediately reported the situation to the Title IX Coordinator.

Betty agreed to sign the formal complaint but immediately requested an informal session and Archie agreed.



Facilitation Process Example



What to Expect When You are Facilitating

CHALLENGE 1

- ▶ Parties will be reluctant to begin the Facilitation.

WHY ?

- ▶ Title IX cases deal with sexual harassment, gender identification, relationships, and other subjects that students do NOT want to discuss with adults (Facilitators)
- ▶ Students may not understand the facilitation process.

WHAT TO DO...

- ▶ Facilitator should begin by presenting an opening statement and explain the facilitation process.

FACILITATION – OPENING STATEMENT

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



THE FACILITATION IS CONFIDENTIAL AND EACH PARTY WILL HAVE THE OPPORTUNITY TO DISCUSS THIS MATTER WITH THE FACILITATOR IN PRIVATE.

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.

FORMAL GRIEVANCE PRECEEDING VS. FACILITATION

- ▶ INVESTIGATION THAT INCLUDES A DETERMINATION OF GUILT
- ▶ REQUIRES OPPORTUNITY FOR CROSS-EXAMINATION OF PARTIES VIA WRITTEN QUESTIONS
- ▶ FINAL REPORT MUST INCLUDE DISCIPLINARY ACTION
- ▶ DOES NOT REQUIRE A DETERMINATION OF GUILT
- ▶ PARTIES ARE NOT NECESSARILY ADVERSARIAL
- ▶ PARTIES WORK TOWARD RESOLUTION THAT IS MUTUALLY BENEFICIAL



What to Expect When You are Facilitating

CHALLENGE 2

- ▶ Parties will not want to talk about the conflict.

WHY ?

- ▶ They may be embarrassed by the sensitive topic.
- ▶ Even though it is a facilitation, students may be afraid they are being judged on their comments and behaviors.

WHAT TO DO...

- ▶ Facilitator should build rapport prior to addressing the conflict.
- ▶ Facilitator should ask open ended questions and follow-up that encourages communication.

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.

Building Rapport – Facilitator Talks to Archie



If the first question from the Facilitator is "Why did you ask Betty to take topless pictures?" you can expect Archie to become either confrontational or non-responsive.

Instead, the Facilitator says, "I'd like to get to know you a little better. What do you like to do after school?" This question is simple and does not threaten Archie.

Archie replies, "I like going to the diner with my friends. I like eating cheeseburgers."

Facilitator follows up, "Tell me more about the diner."

Archie responds, "I like seeing my friends. The diner is awesome! It has these cool, red leather booths and steel tables. The staff all wear blue jerseys and there is a bright colored jukebox. The cheeseburgers are always perfect. The buns are golden brown, and the French fries come out in this plastic basket."

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Building Rapport – Facilitator Talks to Archie



When we talk freely and openly (building rapport) we are less guarded and share more information than we realize.

Archie's responses indicate the importance of his friends in his life.

This could be an important fact later as we discuss the circumstances that lead to the Complaint. Would it surprise you to discover that Archie was feeling pressured by his friends to ask Betty for the pictures?

Look for repetitive phrases that indicate a person's interests or things that are important to the person.

- Friendship
- Family
- Value
- Religion
- Adventure

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Building Rapport – Understanding Processing

People comprehend information through three main learning types - auditory, visual, and kinesthetic.

Moreover, each person has a preferred learning style that resonates most clearly. When engaged in informal discussion, we demonstrate our preferred learning style by our selection of words and phrases as well as by identifying certain details.



Auditory – Comprehends via listening.

Will use words & phrases related to talking "I hear" or "She said"

Will reference sounds instead of images. "I like going to the beach to listen to the waves crashing along the shore."



Visual – Processes information better when they can see it.

Selects words related to images and visual cues "Did you see the way she looked at me?"

Paint visual pictures using colors and textures.



Kinesthetic – Understand best by actually doing.

Tactile words and phrases "I feel" or "He did..."

Describe movement in their stories (often with lots of non-verbal motion). "I like to dip the fries in ketchup."

Building Rapport – Facilitator Talks to Betty

Your turn to practice

- Facilitator : “I’d like to get to know you a little better. What do you like to do when you’re not at school?”
- Betty: “I like to travel with my family. Last summer we went on an amazing rafting trip. We flew through the rapids and slept under the stars. It was great.”
- Facilitator: “Sounds like a fun time. Tell me more.”
- Betty: “I was with my parents and my sister. I was a little scared at first but by the second day I really enjoyed feeling the rapids crash into my face as we went forward. The guide was really cool. She showed me how to make this cool bracelet and we went on a hike through the canyons and discovered this big cave. At night we made dinner and S’mores. I would toast the marshmallow and when you put it on the graham cracker the chocolate would melt all over.”



Building Rapport – Facilitator Talks to Betty

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Building Rapport – Facilitator Talks to Betty

Initial Hypothesis about Betty?

- ▶ Family is important
- ▶ Likes adventure / trying new things
- ▶ Kinesthetic Processor

Follow up Question:

“What are some of your favorite activities at school?”

Betty: “I like dance team. I like working on the routines. I also like Chemistry. The labs are fun.”



Building Rapport - Time Reference

Just like each person has a preferred learning style, we all have a preference to relate conversation to a time reference.

Go out to dinner and have a conversation about the food.

- ▶ Example 1 – The Salmon is delicious. It reminds me of the time we ate on the Pier in Seattle. That was a fun vacation. I would really like to go back to visit the Pacific Northwest.
- ▶ Example 2 – Look over there. That chicken dish they are bringing out looks delicious. I can't wait to come back and order that next time.

Building Rapport - Linear vs Circular Conversation

- ▶ Witness 1 – I was on my way to work. I work for Ace Hardware. It's a good job and I enjoy my co-workers; my boss can be demanding, but I understand because he says his father was always demanding of him. I was talking to my daughter about school, which was nice because she is 14 and she doesn't always want to talk to me about things that are important to her. I was telling her that I thought she should try out for the main role in the school play when I looked up and noticed that the red car, which I really like and hope to one day own a red car because red is my favorite color. Anyway, the red car crossed to the left to avoid hitting a kitten. I feel bad for the drivers but thank goodness they didn't hit that kitten. It may be a stray, but that kitten may also belong to some child and that child would be devastated to come home from school and find out that her kitten had been injured.



- ▶ Witness 2 – The red car crossed lanes and hit the grey car.

Building Rapport - Conclusion



We build Rapport not only to help the Facilitator understand the parties but also to allow the Facilitator to serve as a Translator between the participants.

- ▶ Visual learners have a hard time understanding Kinesthetic processors
- ▶ Future tense thinkers may not appreciate Past tense thinkers
- ▶ Circular Speakers may assume Linear Talkers are not interested in the conversation or are trying to hide something.

What to Expect When You are Facilitating

CHALLENGE 3

- ▶ Parties will use vague, subjective language to talk about issues and propose resolution.

WHY ?

- ▶ They rely on subjective reasoning and don't realize words may have different meanings.
- ▶ It is easier to advocate a position from the subjective as opposed to the objective.

WHAT TO DO...

- ▶ Facilitator should remove bias and allow students to look at language without pre-conceived notions. Parties should agree on use of terms or definitions.
- ▶ Facilitator should affirm subjective feelings and argue objective positions.

JAWS



Ocean

SUBJECTIVE REASONING

Subjective Reasoning - Understanding Word Selection

If we have different feelings for a word like "OCEAN", think how different our interpretation of words that are more nuanced could be.

- ▶ Respect
- ▶ Fairness
- ▶ Overreacting
- ▶ Emotional
- ▶ Judgmental

Subjective Reasoning - Understanding Word Selection

1. Ask for clarification. Your understanding of a word may not be the same as the other participants.
2. Set aside your opinion or feelings. The conflict belongs to the parties and it is their perception that matters.
3. Allow the parties to discuss subjective feelings to vent and process information but use objective facts to look for common interests and points for possible resolution.

Subjective Reasoning – Facilitator Talks to Betty



Ask for clarification. Your understanding of a word may not be the same as the other participants.

Betty: I like Archie, but his texts make me feel uncomfortable.

Facilitator: How so?

Betty: You know His request for pictures seem inappropriate.

Facilitator: I know what I think is and is not appropriate, but why don't you explain to me why you think the request is inappropriate.

Subjective Reasoning – Facilitator Talks to Archie

Set aside your opinion or feelings. The conflict belongs to the parties and it is their perception that matters.

Archie: Betty is being such a prude. Just because I asked her for some sexy pictures, she has blown this whole thing out of proportion.

Facilitator: Your request may not seem unreasonable to you, but do you understand why Betty might find it offensive?

Archie: My friends talk about swapping pics all the time and I wasn't going to post them on the internet or anything. I think Betty is being oversensitive.

Facilitator: Perhaps your friends are comfortable taking pictures. You know each of us reacts differently to things. Have you ever been in a situation where other people are comfortable with something that made you uncomfortable. What if Betty feels that way about taking pics?



Subjective Reasoning



Allow the parties to discuss subjective feelings to vent and process information but use objective facts to look for common interests and points for possible resolution.

There is NO reason to debate whether or not Archie's request made Betty uncomfortable or even if it is reasonable (according to Archie).

The question is whether this constitutes sexual harassment or is a violation of Title IX or other school rules.



Subjective vs. Objective Discussion The Movie Test

▶ Ask someone what is their favorite movie and why?

- ▶ The answers you get are often: The acting is good. It's a great story. I love the subject. It makes me happy. I've always loved that movie.
- ▶ Now try arguing with that person and convincing them that they are wrong with their selection. GOOD LUCK.

▶ Ask someone what the best movie is and why?

- ▶ How do we judge the best movie? Oscar nominations? Film critics? Ticket sales?
- ▶ It is easy to debate and discuss these standards. Ticket prices are higher. Some film critics are better than others.



What to Expect When You are Facilitating

CHALLENGE 4

- ▶ Parties will be reluctant to present possible solutions to a conflict.

WHY ?

- ▶ Students have not considered possible solutions to the conflict.
- ▶ Students are afraid that offering solutions will be an admission of guilt.
- ▶ Students generally are risk taking, focusing on the immediate results versus long term consequences.

WHAT TO DO...

- ▶ Facilitator should work with students to brainstorm possible settlement options and individually help participants review their BATNA.
- ▶ Facilitator should apply Risk Analysis with students to determine conflict resolution.

Types of Resolutions Available

- ▶ **Determinations of Responsibility**
 - ▶ Finding that a party was guilty of inappropriate behavior.
- ▶ **Disciplinary Measures**
 - ▶ Notation in School Record
 - ▶ Removal from Extracurricular Activities / Events
 - ▶ Suspension / Expulsion
- ▶ **Non-Disciplinary Measures**
 - ▶ Apology (Written or Verbal)
 - ▶ Retraction
 - ▶ Change in Behavior / Procedures
 - ▶ Education Programs for Parties and/or entire School.
- ▶ **Supportive Measures (non-disciplinary and non-punitive)**
 - ▶ Counseling
 - ▶ Course Modifications
 - ▶ Campus Escort Services
 - ▶ Mutual Restrictions on Contact

Facilitation - BATNA



Alternatives are acts you can do unilaterally.



Options require the agreement and/or assistance of another party.

BATNA* - Best Alternative to a Negotiated Agreement

Facilitation - BATNA



Example
I'm thirsty!



Alternatives
I can get a glass of water
I can go to the store and buy a soda



Options
Can I have a glass of water?
While you are out, can you pick me up something to drink?

BATNA – Facilitator Talks to Betty



Facilitator: What do you think is the best way to handle this situation?

Betty: I want Archie to stop asking me for disgusting pictures.

Facilitator: That is an option. Of course, that requires Archie to agree. Are there any alternatives – things you can do regardless of Archie's choices?

Betty: I can refuse to give him pictures I don't want to take.

Facilitator: Is this something you can agree to do even if it has consequences (i.e. – breaking up with Archie)?

Betty: I am going to stand up for myself and not give into pressure.

Risk Analysis – Facilitator Talks to Archie



Facilitator: Betty (with permission) has told me that no matter how often you ask, she is not going to send you pictures that she does not feel comfortable taking. What is your reaction to that?

Archie: Whatever.

Facilitator: Do you still want to date Betty now that she has made this decision?

Archie: Yes, I like her. I just wanted the pictures because some of the guys were calling me out and saying I couldn't get them.

Facilitator: Let's look down the road – say two months from now. How do you think you would feel if Betty did send you a picture but somehow someone else got a hold of it and then shared it around school? How would Betty feel?

Facilitator: Now let's consider another option. If you would like to still date Betty and show her you have feelings for her, what can you do?

Risk Analysis – Facilitator Talks to Archie



Sometimes Risk Analysis is more concrete and deals with the process itself

Facilitator: Betty is pretty upset right now. If we do not resolve this situation today, what happens next with this Title IX claim?

Archie: I don't know

Facilitator: Explain to Archie the formal grievance process. Is this something you want to go through?

Facilitation Exercise - Conclusion

Archie: Look. I want this to be over. I didn't mean to upset Betty and I'm sorry. Can we just finish this and move forward? That's what I'd like to see happen."

- ▶ Facilitator – Archie is a Linear communicator, future tense and visual processor.



Facilitation Exercise - Conclusion

- ▶ Facilitator – Betty is a Circular communicator, past tense and kinesthetic learner.

Facilitator: From what you've explained to me you still want to maintain your relationship with Archie and build upon what you have had in the past. However, it is also important to you that Archie learn to respect you and not ask you again for pictures that you do not want to take. Archie has shared with me that he understands how you feel and is sorry for his previous request for inappropriate pictures. Does having Archie apologize to you and also promise to not ask for pictures in the future make you feel more comfortable and help you to move on from the past in a way that you feel both safe and confident to talk to Archie if he accidentally returns to his previous behaviors and asks you to do something with which you are not comfortable?"



Facilitation Exercise - Conclusion

Facilitator: Archie, Betty still has feelings for you. However, she would like you to apologize for asking for photos and also agree not to pressure her anymore about photos, or anything else that she may not want to do. Are you willing to agree to this?

- ▶ Facilitator – Proposal to be evaluated based upon objective criteria and risk analysis.



Facilitation Exercise - Conclusion

Facilitator: I am glad the two of you were able to work things out and are satisfied with the outcome.

You have given me an idea to prepare a school assembly to address the pressures of dating and explain the dangers of providing online pictures that could somehow be accessed by others.

I hope everything works out OK for you. I am here if either the two of you ever need to talk.

- Facilitator – Verifies terms of the resolution and congratulates the parties on a successful facilitation.



