

Informal Resolution Training

James Madison University

October 29 and 30, 2025

Kylie E. Stryffeler

kstryffeler@incompliance.com

Laura G. Anthony

lanthony@incompliance.com



Disclaimers



- We are not giving you legal advice
- Consult with your legal counsel regarding how best to address a specific situation
- Feel free to ask general questions and hypotheticals
- Hypos are not based on specific cases. Similarities are coincidental.

Presentation Rules



- Questions are encouraged!
- “For the sake of argument...”
- Be aware of your own responses and experiences
- Follow-up with someone if you have questions and concerns
- Take breaks as needed

Posting These Training Materials?



- Your Title IX Coordinator is required by the 2020 regulations 34 C.F.R. §106.45(b)(10)(i)(D) to post materials to train Title IX personnel on its website
- We know this and will make this packet available to your institution to post electronically

Training Requirements (Clery)



- From the Clery regulations:
- Proceedings (including informal resolution) involving sexual assault, dating violence, domestic violence, and stalking must –
 - “Be conducted by officials who, at minimum, **receive annual training on the issues related to dating violence, domestic violence, sexual assault, and stalking, and on how to conduct an investigation and hearing process that protects the safety of victims and promotes accountability**”
- We will discuss safety for all parties – not just victims – and our community.

Training Requirements (Title IX)(1)



- “A recipient must ensure that
 - Title IX Coordinators,
 - investigators,
 - decision-makers, and
 - any person who facilitates an informal resolution process...”

Training Requirements (Title IX)(2)



- “...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 process, as applicable**, and
 - how to serve **impartially**, including
 - avoiding prejudgment of the facts at issue,
 - [avoiding] conflicts of interest, and
 - [avoiding] bias.”

Topics



- Definitions of Sexual Harassment in 106.30
 - Scope of Education Program or Activity
 - How to conduct a grievance process
 - Issues related to Dating/Domestic Violence, Stalking, Sexual Assault
 - Impartiality, avoiding bias, conflict of interest, and prejudgment of fact
 - Informal resolution theory
 - Observe a mock informal resolution
- How to work with the parties to identify their wants, needs, and areas of compromise
 - How to work with the parties to reach a mutually beneficial plan forward
 - Documenting and maintaining plans

Definitions Under 106.30

Title IX Sexual Harassment

- 3 Classifications



- [Sexual harassment](#) means conduct on the basis of sex that satisfies one or more of the following:
 - [[Quid pro quo](#)] An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;
 - [[Unwelcome conduct](#)] Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity; or
 - [[Clery crimes](#)] Sexual assault, dating violence, domestic violence, or stalking

Sexual Assault

- Sexual assault is defined as “an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation”
- Appendix A (Clery) includes definitions from the FBI’s Summary Reporting System (SRS), which was phased out effective December 31, 2020. The FBI now uses *NIBRS*.
- The Policy must include in its definition the conduct not permitted by NIBRS, but can be worded differently.

Sexual Assault Types



- Forcible:
 - Rape
 - Sodomy*
 - Sexual Assault with an Object*
 - Fondling*
- Non-forcible
 - Statutory rape
 - Incest

*NIBRS Update 2025

NEW: A Note on NIBRS



- The NIBRS User Manual was updated on June 23, 2025.
- Key Updates:
 - “Fondling” → “Criminal Sexual Contact” (see, pp. 8, 73)
 - “Rape” reverted to prior definition under SRS (see, pp. 72-73)(Next slide)
 - “Sexual Assault with an object” + “Sodomy” now counted as part of “Rape” definition. (see, pp. 72-73)

Sexual Assault: Rape



NIBRS Update 2025: “Penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, or by a sex-related object. This definition also includes instances in which the victim is incapable of giving consent because of temporary or permanent mental or physical incapacity (including due to the influence of drugs or alcohol) or because of age. Physical resistance is not required on the part of the victim to demonstrate lack of consent.”

Sexual Assault: Fondling



NIBRS Update 2025:

The intentional touching of the clothed or unclothed body parts without consent of the victim for the purpose of sexual degradation, sexual gratification, or sexual humiliation.

The forced touching by the victim of the actor's clothed or unclothed body parts, without consent of the victim for the purpose of sexual degradation, sexual gratification, or sexual humiliation.

This offense includes instances where the victim is incapable of giving consent because of age or incapacity due to temporary or permanent mental or physical impairment or intoxication for the purpose of sexual degradation, sexual gratification, or sexual humiliation.

Old: The touching of the **private body parts** of another person **for the purpose of sexual gratification**, without the consent of the victim, including instances where the victim is unable to give consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity.

Sexual Harassment: Dating Violence



“**Dating Violence**” means **violence** committed by a person **on the basis of sex** who **is or has been in a romantic or intimate relationship with the complainant**. The existence of such a romantic or intimate relationship is determined by the length of the relationship, the type of relationship, and the frequency of interactions between the individuals involved in the relationship.

Sexual Harassment: Domestic Violence



“Domestic violence” is felony or misdemeanor crime committed on the basis of sex by:

- A current or former spouse or intimate partner of the complainant;
- A person with whom the complainant shares a child in common;
- A person who is cohabitating with, or has cohabitated with, the complainant as a spouse or intimate partner;
- A person similarly situated to a spouse of the victim under the domestic/family violence laws of the jurisdiction;
- Any other person against an adult or youth victim who is protected from that person’s acts under the domestic/family violence laws of the jurisdiction

Sexual Harassment: Stalking

“Stalking” is engaging in a course of conduct directed at a specific person on the basis of sex that would cause a reasonable person with similar characteristics under similar circumstances to:

- Fear for the person’s safety or the safety of others; or
- Suffer substantial emotional distress.

As mentioned before, to qualify under Title IX, it must be sex-based stalking.
(30172 fn. 772)

- EEO/Non-Discrimination
 - Policy 1302 – Equal Opportunity and Non-Discrimination
 - Policy 1324 - Discrimination and Retaliation Complaint Procedures (Other than Title IX Sexual Harassment (Policy 1346) and Sexual Misconduct (Policy 1340))
- Sexual Misconduct/Harassment
 - Policy 1340 – Sexual Misconduct Policy
 - Policy 1346 – Title IX Sexual Harassment

Title IX Sexual Harassment (1346)



- Sexual Assault (including: Rape, fondling, incest, statutory rape)
- Sexual Harassment (including: Quid pro quo, unwelcome conduct, and sexual assault, dating violence, domestic violence, stalking)
- Retaliation

Sexual Misconduct (Policy 1340)



- Sexual Assault (including: Rape, fondling, incest, statutory rape)
- Sexual Harassment (including: Quid pro quo, unwelcome conduct, and sexual assault, dating violence, domestic violence, stalking)
- Non-consensual sexual relationships
- Sexual exploitation
- Sexual violence
- Retaliation

OEO Policy – Prohibited Conduct



- Discrimination
- Harassment (including hostile environment and term or condition)
- Retaliation

Harassment (1324)



- Harassment Conduct based upon a person's protected characteristic that is so sufficiently severe, persistent, or pervasive, and objectively offensive that it interferes with the person's work or academic performance or participation in university activities or creates a working or learning environment that a reasonable person would find hostile, threatening, or intimidating. The conduct can include oral, written, graphic, physical or other conduct. Harassment may also include behavior directed toward stereotypical notions of how a person in a protected classification should appear or behave, or a failure to conform to stereotypes. Harassment is prohibited in the following situations:
 1. Term or condition of employment or education. This type of harassment occurs when the terms or conditions of employment, educational benefits, academic grades or opportunities, living environment or participation in a university activity are conditioned upon, either explicitly or implicitly, submission to or rejection of unwelcome conduct, or such submission or rejection is a factor in decisions affecting that individual's employment, education, living environment, or participation in a university program or activity.
 2. Hostile environment. This type of harassment occurs when the actions of another create a hostile environment, as defined herein.

Hostile Environment (1324)

- A hostile environment is created by oral, written, graphic, physical, or other conduct that is sufficiently severe, persistent, or pervasive, or objectively offensive that it interferes with, limits or denies the ability of a person to participate in or benefit from the institution's educational programs, services, opportunities, or activities or the individual's employment access, benefits or opportunities. Mere subjective offensiveness is not enough to create a hostile environment. In determining whether conduct is severe, persistent or pervasive, and thus creates a hostile environment, the following factors will be considered: (a) the degree to which the conduct affected one or more individuals' education or employment; (b) the nature, scope, frequency, duration, and location of the incident(s); (c) the identity, number, and relationships of persons involved; (d) the perspective of a "reasonable person" in the same situation as the person subjected to the conduct, and (e) the nature of higher education. A hostile environment for a member of the university community can be created by the actions of an employee, a student, an affiliate or a visitor.

Discrimination



Inequitable treatment that conditions any element of a person's employment, enrollment as a student, receipt of student financial aid, or participation in university activities on that person's Protected Characteristics in violation of applicable law. Discrimination also includes denial of a reasonable accommodation for a disability. As used in this policy, discrimination includes harassment and hostile environment

Retaliation



Intimidation, interference, threats, coercion, or discrimination against any individual for the purpose of interfering with any right or privilege under this policy, or because the individual has made a report or complaint, or has participated or refused to participate in any manner under this policy.

Retaliation also includes bringing charges against an individual for policy violations that do not involve discrimination or retaliation, but arise out of the same facts or circumstances as a report or complaint of discrimination or retaliation, or a report or complaint of discrimination or retaliation, for the purpose of interfering with any right or privilege under this policy

Education Program or Activity

Jurisdiction for TIX Sexual Harassment



- “**Education program or activity**”
- “includes **locations, events, or circumstances** over which the recipient exercised **substantial control** over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution. “
§106.30(a)

Education Program or Activity Examples



- Locations, events, or circumstances with substantial control
 - the easy ones:
- Residence halls
- Classrooms
- Dining halls

Not an Education Program or Activity



- Locations, events, or circumstances without substantial control:
 - Anything outside of the United States;
 - Privately-owned off campus apartments and residences that do not otherwise fall under the control of the postsecondary institution (example: privately owned apartment complex not run by a student organization)

Substantial Control?

- Depends on fact-analysis under “substantial control”:
 - Conventions in the United States?
 - Holiday party for an academic department?
 - Professor has students over to house?

Jurisdiction and *Mandatory* Dismissal (Title IX)



- “... then the recipient must dismiss the formal complaint with regard to that conduct for purposes of sexual harassment under title IX or this part; such a dismissal does not preclude action under another provision of the recipient’s code of conduct.”

Mandatory Dismissal & Exit Ramps



-
- Although you may be required to dismiss a Formal Complaint
 - Doesn't preclude the institution from taking action under other policies
 - Know your exit ramps
 - Examples:
 - Human Resources
 - Student Conduct
 - Provost's Office

Discretionary Dismissal (Title IX)



- Dismissal of a formal complaint per §106.45(b)(3)(ii)
- “The recipient may dismiss the formal complaint or any allegations therein, if at the time during the investigation or hearing:
 - A complainant notifies the TIXC in writing that the complainant would like to withdraw the formal complaint or any allegations therein;
 - The respondent is no longer enrolled or employed by the recipient; or
 - Specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein.

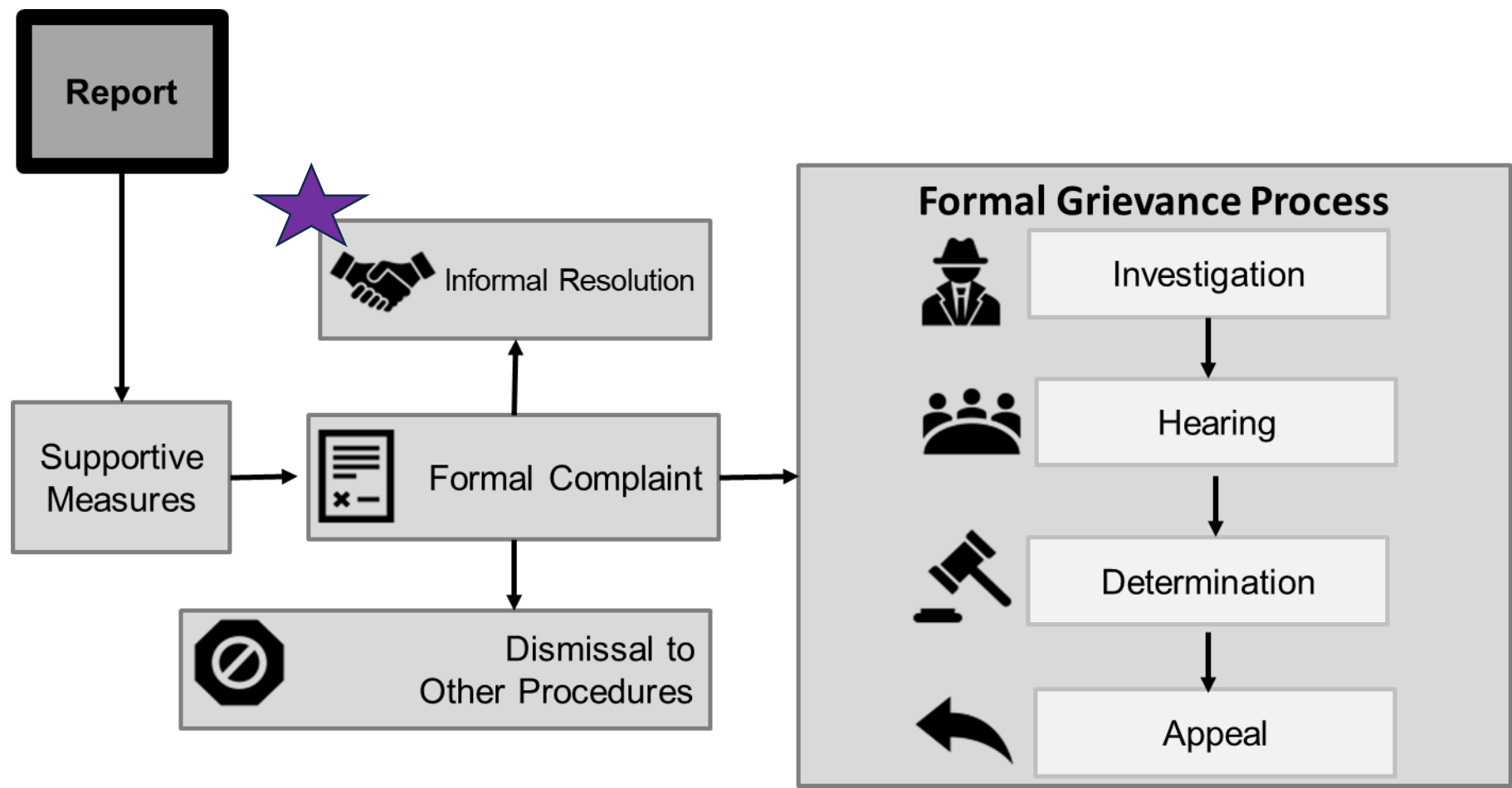
Dismissal Notice & Timing



- 34 CFR § 106.45(b)(3)(iii)
- Must promptly send written **notice** of dismissal/**reasons** simultaneously to the parties

The Process

Overview of the Process - 2020



Clery Cases: Procedural Protections



- Must define the standard of evidence you will use to make determinations (e.g. preponderance of the evidence)
- Must maintain as confidential any supportive/protective measures provided to the complainant (except as necessary to provide those measures)
- Each party can bring an advisor of choice to any related meeting or proceeding, but school may limit participation
- Protective measures must be provided if victim requests and they are reasonably available
- Must provide complainant with written explanation of rights and options

Clery Cases: Notice to Complainant



- Must provide complainant with written information about:
 - Importance of preserving evidence
 - How and to whom offense should be reported
 - Options about involving law enforcement and school authorities
 - Victim's rights and institution's responsibilities for protection orders, "no contact" orders, etc.

Clery Cases: Notice to Complainant (2)



- Must provide complainant with written information about:
 - Existing counseling, health, mental health, victim advocacy, legal assistance, visa and immigration assistance, student financial aid, and other services available for victims, both within the institution and the community
 - Options for, available assistance in, and how to request changes to academic, living, transportation, and working situations or protective measures
- What about the Respondent in our scenario?
 - Both parties get notice, information about policies, procedures, rights, and supportive measures.

Clery Cases: Transparency



- Must complete within reasonably prompt timeframes
- Must follow a policy that is transparent for both parties
- Must provide timely notice of meetings a party is expected to attend
- Must provide timely and equal access to information that will be used in proceedings
- Proceedings must be conducted by officials without conflict of interest or bias for or against either party

Clery Cases: Simultaneous Notice



- Must provide simultaneous written notice to both parties of:
 - Results of any institutional disciplinary proceeding
 - Procedures to appeal (if available)
 - Any change to the result
 - When such results become final
- Providing this notice does not violate FERPA.

Party Options



- Parties may have an advisor of choice from the very first meeting/conversation
- Parties are both offered supportive measures.
- Both parties are offered informal resolution, if it is appropriate.
- Parties are both provided with instructions about retaliation.

Party Participation



- Parties may each separately decide whether to participate in the process and if so, to what extent.
 - Interview?
 - Written statement?
 - Written questions/answers?
 - Submission of evidence/witness lists/questions?

Investigation Report



- Investigators:
 - Conduct interviews of all available, relevant witnesses who are willing to participate
 - Gather relevant evidence
 - 2020 – Prepare evidence for review and response (often including a draft report) – 10 days

Finalizing Report



- Investigators:
 - Conduct any follow-up deemed necessary
 - Incorporate responses and additional evidence into report
 - Finalize report
- 2020 Reg- Parties/advisors have 10 business days before it goes to hearing

Hearing

- Pre-hearing conferences can be held with each party/advisor to review procedures, determine witnesses, and address any evidentiary issues
- Hearing panel holds the hearing
- Relevant questions only asked through the Advisors
- Decorum standards must be adhered to
- In making the decision, the Panel can generally use:
 - Hearing testimony
 - Investigative report/attachments
 - Other new, relevant evidence if permitted at the hearing
- 2020 Reg: Live hearing with cross-examination by advisors

Final Decision



- Decision-maker issues written final decision, including:
 - Determination
 - Rationale
 - Evidence used or not relied upon
 - Credibility assessments
 - Any sanctions
- Parties receive simultaneous written notice of outcome

Sanctions



- Holding parties accountable also includes sanctioning appropriately where the policy has been violated
- Be consistent in sanctioning similar conduct under similar circumstances
- Factors to consider:
 - the Complainant?
 - Prior discipline for similar conduct by others (remember to look outside Title IX conduct)
 - Respondent's disciplinary history
 - Harm to or impact on the complainant/community
 - Severity of the behavior (e.g. injury, weapon)
 - Acceptance of responsibility
 - Mitigating/aggravating circumstances
 - Ability of the Respondent to conform behavior to expectations going forward
 - Deterring future behavior
 - Remedy to Complainant?

Informal Resolution



- VOLUNTARY PROCESS – written consent from both parties.
- Available only if a formal complaint is filed. Must provide notice.
- Available at any time prior to reaching a determination.
- Cannot require informal resolution as a condition of enrollment/employment/any other right.
- NOT available to resolve complaints of sexual harassment involving a student complainant and employee respondent.
- Can take many forms – mediation, restorative justice, something else?

JMU Policy/Process (Informal Resolution)



- Title IX/Sexual Misconduct: Under either [Policy 1340](#) or [Policy 1346](#) then: “Alternative Resolution”
- EO: Policy 1324: [Policy: https://www.jmu.edu/jmu-policy/policies/1324.shtml](https://www.jmu.edu/jmu-policy/policies/1324.shtml)
 - Section 6.4: “Initial attempts to resolve complaints at the lowest level through the relevant administrative structure of the employment unit or academic unit are encouraged”
 - One on One Communications – Not required, but encouraged when the Complainant believes it could be productive and here are no concerns of harm
 - Facilitation Assistance of a Third Party – consultation with OEO is required before engaging in facilitated resolution
 - Interventions – e.g. broad educational programming approved by OEO
 - Remedies – Similar to Interventions, and must be approved by OEO to ensure alignment with JMU policy/goals of OEO

Appeals

- Three Grounds for Appeal
 1. New Evidence not reasonably available at time of determination that **could** affect the outcome
 2. Procedural error that **affected** the outcome
 3. Bias/Conflict of Interest that **affected** the outcome

Being Impartial and Avoiding Bias, Conflict of Interest, and Prejudgment of Facts

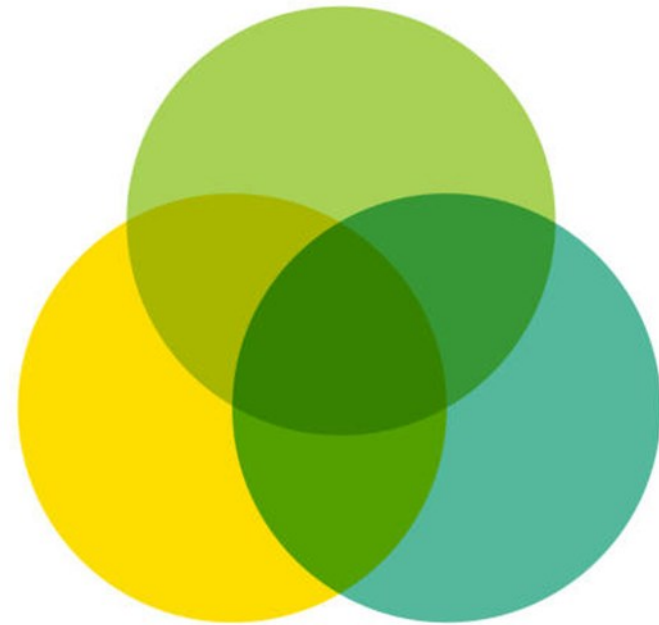
Impartiality & Avoiding Bias, Conflict of Interest & Prejudgment of Facts (1)



- The regulations require that **informal resolution** officers (and Title IX Coordinators, investigators, decision-makers, and appeals officer)
 - be free from **conflict of interest, bias,** and
 - be trained **to serve impartially** and **without prejudging facts.**

Impartiality & Avoiding Bias, Conflict of Interest and Prejudgment of Facts (2)

- We will discuss each of these individually and provide examples, but some of the factors for each overlap.
- For example, being impartial is greatly aided by not prejudging facts.

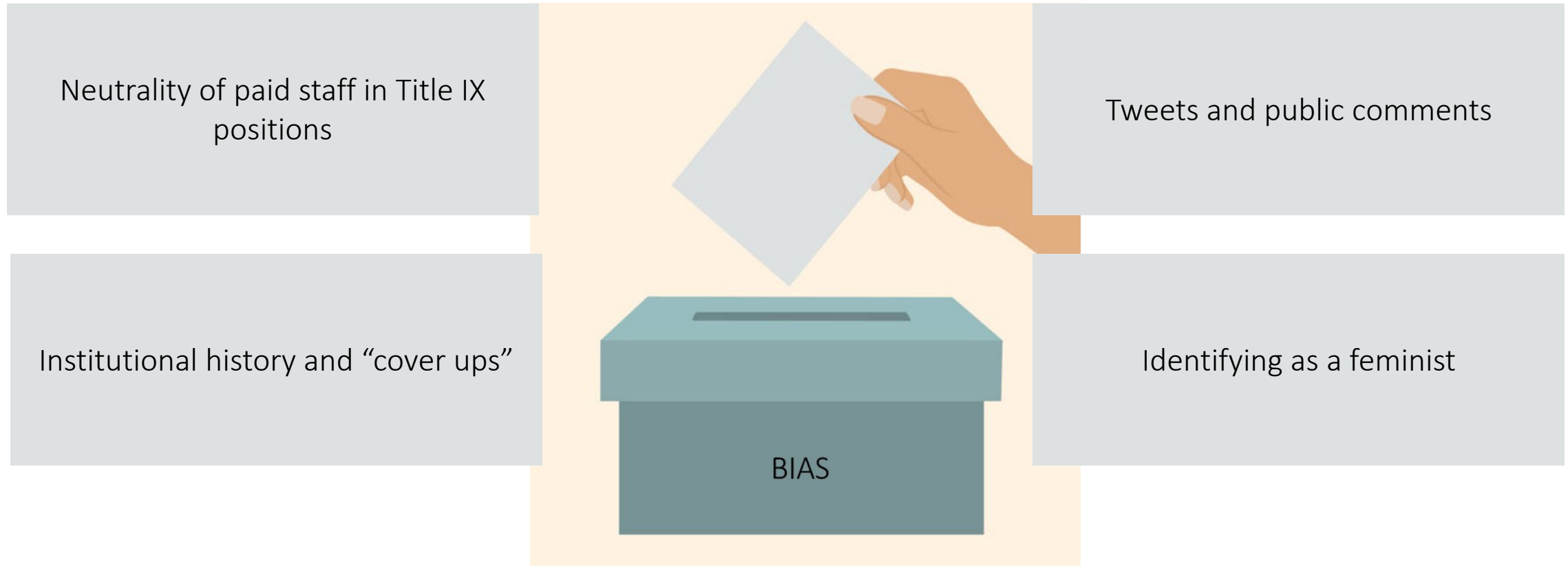


Impartiality

- Be neutral
- Do not be partial to a complainant or a respondent, or complainants and respondents generally
- Do not judge: memory is fallible *[and judging is contrary to your neutral role]*



Bias: Concerns raised in comments in 2020 preamble...



Perceived v. Actual Bias



- Both can lead to the same perception
- On appeal of decisions, the Department requires the bias to have affected the outcome of the matter

Bias: Objective Rules and Discretion

(1 of 2)



- “[R]ecipients *should* have objective rules for determining when an adjudicator (or Title IX Coordinator, investigator, or person who facilitates an informal resolution) is biased, and the Department leaves recipients discretion to decide how best to implement the prohibition on conflicts of interest and bias...” (2020 Regulations Preamble at 30250)

Bias: Objective Rules and Discretion

(2 of 2)



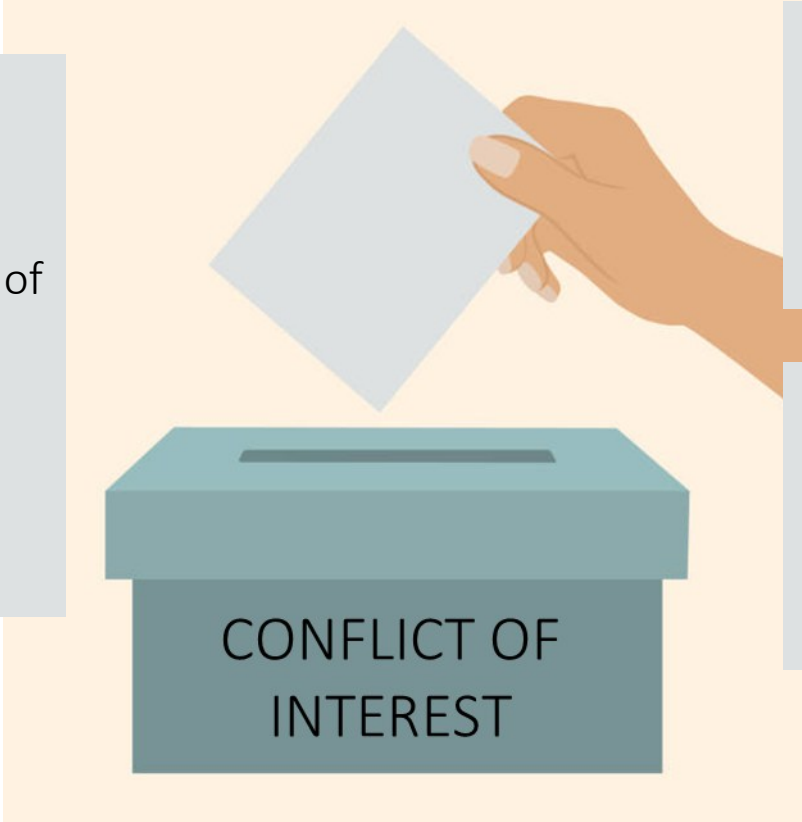
- **Mandatory**: Basis for appeal of decision-maker's determination.
- **Discretionary**: Recipients have the discretion to have a process to raise bias during the investigation.

Conflict of Interest: Concerns raised in comments in 2020 preamble...

Financial and reputational interests of Title IX employee aligns with institution

Past advocacy for a respondent's group

Past advocacy for a survivor's group



CONFLICT OF INTEREST

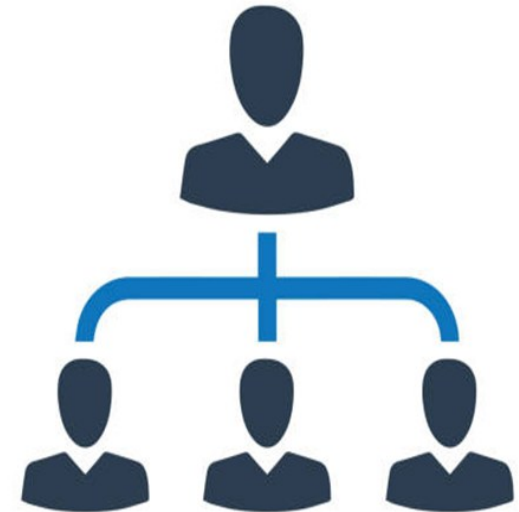
Preamble Discussion on Bias and Conflict of Interest (1 of 3)



- Final regulations “leave recipients flexibility to use their own employees, or to outsource Title IX investigation and adjudication functions, and the Department encourages recipients to pursue alternatives to the inherent difficulties that arise when a recipient’s own employees are expected to perform functions free from conflicts of interest and bias.” (2020 Regulations Preamble 30251)

Preamble Discussion on Bias and Conflict of Interest (2 of 3)

- No *per se* prohibited conflicts of interest in using employees or administrative staff
 - including supervisory hierarchies (but see portion about decision-makers and Title IX Coordinator as supervisor)
- No *per se* violations for conflict of interest or bias for professional experiences or affiliations of decision-makers and other roles in the grievance process



Preamble Discussion on Bias and Conflict of Interest (3 of 3)



- Example: it is not a *per se* bias or conflict of interest to hire professionals with histories of working in the field of sexual violence (2020 Regs at 30252)
- Cautions against using generalizations to identify bias and conflict of interest and instead recommends using a reasonable-person test to determine whether bias exists.

Example of Unreasonable Conclusion that Bias Exists



- “[F]or example, **assuming** that all self-professed **feminists**, or self-described **survivors**, are biased against men, or that a **male** is incapable of being sensitive to women, or that prior work as a **victim advocate**, or as a **defense attorney**, renders the person biased for or against complainants or respondents” is **unreasonable** (2020 Regs at 30252)

Training, Bias, and Past Professional Experience



- This required training (that you are sitting in right now) can help protect against disqualifying someone with prior professional experience
- (2020 Regs at 30252)

Department: Review of Outcomes Alone Does Not Show Bias



- ⚠ Cautioned parties and recipients from concluding bias or possible bias “based solely on the outcomes of grievance processes decided under the final regulations.”

Why? The “mere fact that a certain number of outcomes result in determinations of responsibility, or non-responsibility, does not necessarily indicate bias.” (2020 Regs at 30252)

Examples of Bias



- An informal resolution officer has a relationship with one party but not the other (for example, the resolution officer also served as an RA for one party and they have a close relationship);
- An informal resolution facilitator starts with the presumption that all Complainants are liars
- An informal resolution facilitator starts with the presumption that all Respondents are perpetrators

Avoiding Prejudgment of Facts at Issue



- A good way to ensure impartiality and avoid bias:
 - Keep an open mind and actively listen
 - Each case is unique and different

Hypothetical Scenario



- Scenario for the next several hypotheticals:
- You work in your institution's student conduct office. Your duties include investigating and overseeing student conduct matters, which includes mediation of student conduct issues that involve two or more students. Your institution's Title IX Coordinator has identified you as a person who will receive training to facilitate Title IX informal resolution.
- Thinking about how to move forward with some issues of impartiality, conflict of interest and bias (perceived or actual)

Hypothetical 1

- You receive an informal resolution request from the Title IX Office. In reviewing the request, you recognize the name of Complainant as a student from an unrelated student conduct matter you handled. The matter involved a fight between the Complainant and roommate two years ago. You do not remember how it resolved or recall much more about the Complainant.
- **What should you do?**

Hypothetical 2

- Your institution's student conduct office, Title IX office, and Greek life office meet weekly to discuss student issues and potential issues. In these meetings, you discuss specific students by name for continuity of care for students and to ensure everyone is on the same page. Now, one of the students discussed is going to be a participant in your informal resolution.
- **What should you do?**

Hypothetical 3

- Back to a scenario raised earlier, you are now in student conduct, but you used to work as an RA, or resident advisor, in one of the residence halls. You are handed an informal resolution to facilitate and you realize that the Respondent used to live in your residence hall when the Respondent was a first year. You really like the Respondent and consider Respondent a great person.
- **Conflict of interest/bias?**

Informal Resolution: The Theory and Practice

Informal Resolution: Reasons parties may prefer it to formal resolution

- Parties to disputes may be more satisfied with outcomes they reach themselves
- They can control the outcome
- They have efficacy to tailor solutions to their needs

Informal Resolution and Autonomy



- The option of informal resolution supports autonomy of the complainant **on how to proceed** if they file a formal complaint.
 - 2020 Preamble 30086, 30089

Less Adversarial Resolution



“Informal resolution may present a way to resolve sexual harassment allegations **in a less adversarial manner**” than the grievance process

- 2020 Preamble 30098 FN 463

It Bears Repeating

What you do for one, you do for the other.



When: Threshold

- **Only** available to the parties **if** a **formal complaint** is filed.

When: Termination



- Available at any time prior to reaching a determination.

Caution in Approach (1)

- A recipient may NOT require informal resolution
- As a condition of enrollment or continuing enrollment
- As a condition of employment or continuing employment



Caution in Approach (2)

- A recipient may NOT require informal resolution
- As a condition of enjoyment of *any other right*
- The waiver of the right to an investigation and adjudication of formal complaints of sex discrimination/harassment



Caution in Approach (3)

- A recipient may NOT require informal resolution

This is a voluntary process for both (or all) parties!



Caution in Approach (4)

- Be careful NOT to:
 - Pressure either or any party to participate



What does this mean?

- The regulations don't provide more detail on what this means. BUT... the 2020 preamble:
 - **Mediation**
 - **Restorative justice** (30098 FN. 463)

Mediation (1)

- The regulations don't provide more detail on what this means.
- “Mediation” may have legal meaning in your jurisdiction that invokes certain requirements.
- Virginia Code Title 8.01, Chapter 21.2

Mediation (2)

- There are many definitions of mediation out there, but OCR anticipates a **third-party** (the informal resolution officer) **facilitated resolution** of a dispute between parties.

Mediation (3)

- Written agreement?
- Yes – the parties' agreement should be documented in writing and saved for 7 years.



Mediation (4)

- What is a resolution of the dispute
 - Do parties need to reach an agreement about what occurred between them?
 - Is it sufficient to find a way to move forward so both parties can have equal access to educational opportunities?

Mediation (5)

- Some jurisdictions consider “mediation” communications as privileged and confidential from disclosure in court or under public records disclosure (if public).
- Some jurisdictions may not have any decisive law on mediation.

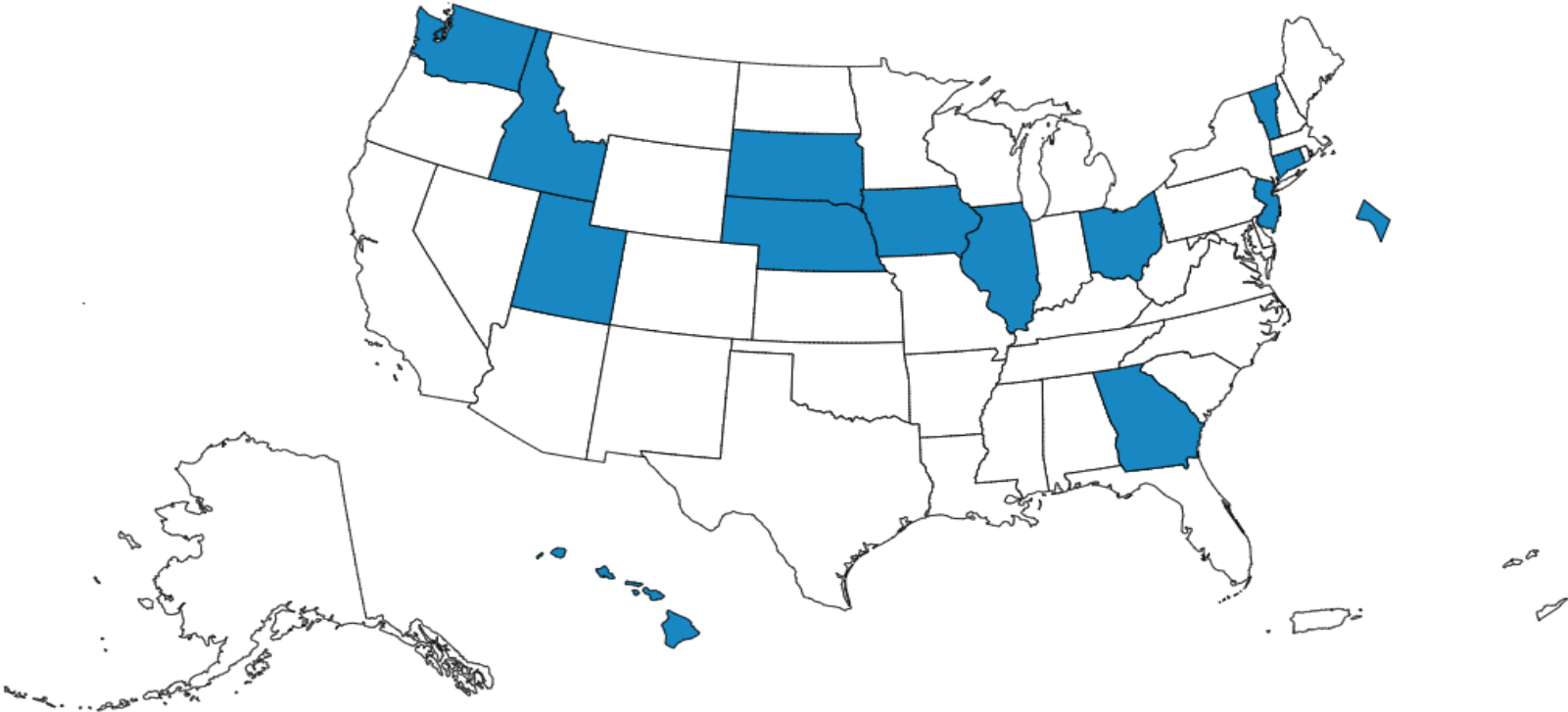
State Laws and the Uniform Mediation Act



2001 | Mediation Act
Alternative Dispute Resolution

Copilot

Map	Bill List	Summary	Enactment History
-----	-----------	---------	-------------------



Enactment Map • Enacted

State Laws – Work with Counsel



- What statutory protections are there for mediation?
- Are Mediation Communications protected as Privileged? What exceptions are there for child abuse, felony reporting, etc.)
- Can the parties be accompanied by an attorney?
 - Consider Advisor of Choice TIX/Clery requirements...

- The Regulations also do not define “restorative justice.”
- Usually aims to repair harm done to crime victims through facilitation, but will vary from program to program.

Restorative Justice Example

(1 of 2)

- One example of “restorative justice” is a system of school-based, non-punitive interventions, in which students are brought together with staff to discuss differences and conflicts, often in a group setting.



Restorative Justice Example

(2 of 2)



- But other restorative justice programs require as one of their key elements that “offenders” admit responsibility and make amends.
- Squared with the regs?
- “Nothing in the final regulations prevents recipients from facilitating informal resolution processes, including what commenters referred to as restorative justice processes, within the confines of § 106.45(b)(9).” 30488

Restorative Justice Reminders



- Remember:

- 1) What we do for one we do for the other.

- 2) Recipient cannot make *a finding of responsibility* without a grievance process.

Can we use our pre-existing mediation or restorative justice program? (1)

- What we do for one we do for the other.
- Does your current program require one or both parties to admit responsibility?
- What does that look like?

Can we use our pre-existing mediation or restorative justice program? (2)



- **Discipline-like sanctions?**
- Does your program provide only supportive measures as ways for the parties to work together?
- Does your program provide any measures that may be disciplinary or prevent one party from accessing educational opportunities?
- Under the 2020 regulations, discipline can be issued if both parties agree.

Can we use our pre-existing mediation or restorative justice program? (3)

- **Access to educational opportunities.**
- Does your program maintain (equal) access for both parties to educational opportunities?

What should our program look like if we have never had an informal process?

- We will discuss best practices for a generic process that complies with the Regulations.
- These best practices may also be used to test pre-existing mediation and restorative justice programs for compliance.

Informal Resolution: How to Facilitate a Resolution with Basic Principles



Initial consideration: Separation of the parties

- When issues are very emotional, as they often are in Title IX/EO disputes, keeping parties separate during the facilitating may be the best way for the parties to move forward.



- “Shuttle Diplomacy”

Overview of the process with the parties

- Whether beginning together or separately, the facilitator should begin by providing an overview with the parties of the expectations and process for the resolution.

Provide opportunity for each party to tell their story

- Whether beginning together or separately, the facilitator should provide space for each party to tell their “story” and present their perspective on the underlying dispute.
- If haven’t separated at this point, separate parties after this point.

Determine what each party wants

- Often referred to as the “**WIFM**” – what’s in it for me?
- Ask each party what they want out of the process.
- Ask each party what they want from the other party.
- Make a list of each WIFM and try to identify the top three for each party.
- Go through the list with the party.
- Be clear with each party what you can share from the list with the other party.

Questions Facilitator May Ask of a Party



- What would make you feel safe?
- What do you want your day on campus to look like after this?
- What could the institution do to make you feel safer?
- What could the other party do to make you feel safer?
- What do you need and what do you want, and are those different?
- What could you live with?

Have ready a list of supportive measures that can be easily offered

- New residence hall assignments.
- Adjusting course schedules.
- Online alternatives for courses.
- Escorts to classes.
- Counseling.
- Training.



Review the WIFMs for each party and look for overlap

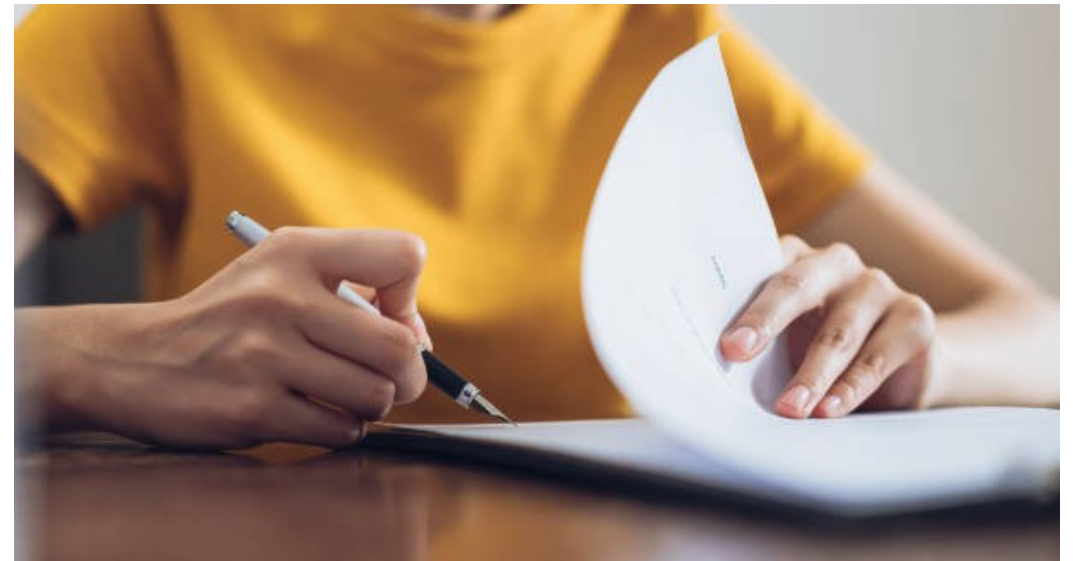
- Sometimes the parties want a lot of the same things.
- Sometimes the parties do not have any overlap.
- Identify with each party what they may be willing to share with the other party and that sharing may help resolve.

Go back and forth until a resolution agreement can be reached

- This may not happen. Not everyone can reach a resolution agreement in every case.
- Make sure you can get both parties to agree to the same terms and then make sure you have their agreement.

If agreement reached... (1 of 2)

- Write it out then.
- Have the parties sign them.
- Try to finish it before the parties leave so it doesn't fall apart.



If agreement reached... (2 of 2)

- Parties may want time to think about the resolution—this will be up to the institution on how to proceed.
- May provide a certain deadline by which to **have** signed.
- May provide certain provision that the informal process will end by deadline.
- May choose to offer further resolution on the dispute if the parties think it would be helpful.

If no agreement reached...may choose a similar process as for agreement

- Parties may want time to think about the resolution—this will be up to the institution on how to proceed.
- May provide a certain deadline by which to have signed.
- May provide certain provision that the informal process will end by deadline.
- May choose to offer further mediation on the dispute of it the parties think it would be helpful.

Informal Resolution: Best Practices

Informal Resolution Officer Goals



- Help parties find ways to **move forward** at your institution (for as long as their time together is before they graduate) with **equal access to educational opportunities**

Resolution Framework (1 of 2)



1. Separate the People and the Issues.

- Understand the other's experiences
- Identify misconceptions
- Allow for the communication of emotions

2. Focus on interests.

- “Your position is something you have decided upon. Your interests are what caused you to so decide.” [Fisher & Ury, *Getting to Yes*, 3d. p. 42]
- Parties need to share interests with one another

Resolution Framework (2 of 2)



3. Generate Options to address interests.

- Best alternative to a negotiated agreement?
- Brainstorm as many options as possible...

4. What are the Objective Measures of outcomes?

What could our process look like?

Prompt Timeframe

1. The recipient (your institution) should decide what “prompt” timeframe to set to resolve the informal resolution.
- Remember: An informal resolution could move into an investigative/adjudicative process if it does not succeed, so consider this in setting a timeframe.



Prompt Timeframe

- Considerations:
- Stop the clock for exams, vacations, or breaks so that students/employees are not required to participate during exams or breaks or have that time count against resolving disputes
- Have the ability to extend timeframe if close to resolving but need a few extra days.

What could the process look like?

Initiate the Process

2. The informal resolution officer should contact each party individually to initiate the process.
- Consideration: Does the recipient want a timeframe within which the informal resolution officer contacts the parties?

What could the process look like? Setup

3. Select setup or setups:

- In person in same room?
- In person but in separate rooms with informal resolution officer going between (sometimes called shuttle mediation)?

What could the process look like? Setup Format

- Through email?
- Through Zoom?



What could the process look like? Setup Considerations



- Considerations:
- Each matter is different, so providing multiple manners to conduct a resolution may be helpful to provide the parties
- Should the parties be in a room together?
- Should the parties communicate directly with each other?
- Are there attorneys or parents involved?
- What setup will help the parties best reach a resolution?

What could the process look like? Setup

Example 1



- The parties were close colleagues before the incident and you (the informal resolution officer) believe they could resolve the matter if they could each understand the other's perspective.
- Perhaps meeting in person would best help them resolve.

What could the process look like? Setup

Example 2

- Both parties have a fraught history together, and their current roles are distinct. They are very far apart on what they believe occurred.
- Perhaps the parties do not need to see each other to come to a resolution to get through in a mutually agreeable way...

What could the process look like? Setup

Discretion

- Consideration on discretion of setup:
- Providing the informal resolution officer with the decision on how to structure the setup.
- Providing the parties with input or decision.
- Providing the informal resolution officer with discretion to consider input from parties.

What could the process look like? Wants & Needs (1 of 2)



4. Finding out what the parties want or need to resolve the matter.
 - Meet with each party individually to find out what they:
 - State they want
 - State they need
 - *Determine what the **interests** are behind the position...*

What could the process look like? Wants & Needs (2 of 2)

Are willing to
accept as a
resolution.



Are not willing to
accept.

- **Note:** these all may shift during the process as they learn more information from the other party during the resolution process.

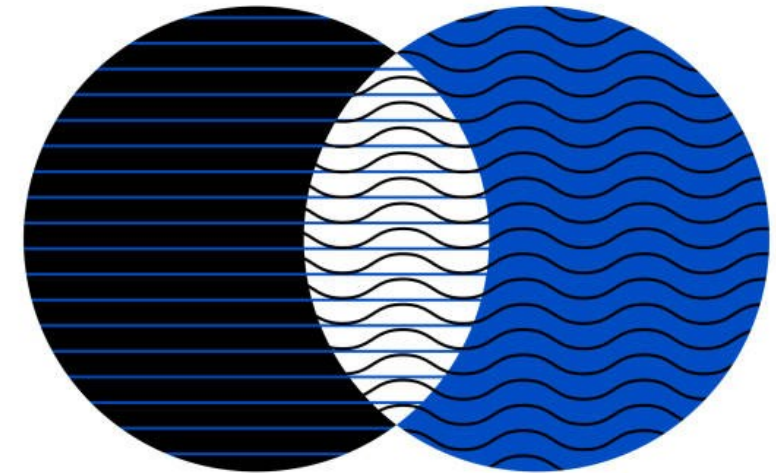
What could the process look like?

Finding out what the parties want.

- Example:
- A complainant may tell you they want the respondent to admit wrongdoing.
- However, the complainant may be willing to accept that respondent sees the underlying interaction differently but apologizes for the resulting harm to the complainant.

What could the process look like? Overlap

- What could the process look like? Overlap



What could the process look like?

Supportive Measures



5. Identify supportive measures you could propose to the parties individually that also protect their individual access to educational/employment activities.

What could the process look like?

Supportive Measures as a Solution (1)

- Supportive measures to consider:
 - Alternative schedules
 - Alternative supervision
 - Modified duties/work locations
 - Online alternatives
 - Counseling



What could the process look like?

Supportive Measures as a Solution (2)

- Safety escort for one or both parties
- Reassignment of seating/desk spaces
- Reassignment of duties
- Individualized Title IX/EO training



What about apology letters?

- What are the pros?
- What are the cons?



What could the process look like?

Solution

6. How to get the parties to work towards a solution:
- May require back and forth by the informal resolution officer
 - May require reality checking: the alternative to resolution will be the formal process
 - May require some time from the parties to reset their expectations

What could the process look like?

Reality checking

- Reality checking: a helpful tool, but be cautious
- It may be helpful to remind one or both parties:
 - The limitation of informal resolution requires agreement to complete
 - That the alternative may be a more formal process
 - That they can control the outcome in the informal process, but not a formal process

BUT... be careful to remain neutral and not push a party to do something the party does not really want to do

What could the process look like?

Reality checking – biased

- Example of a **biased/pushy** reality check:

“I’ve seen cases like yours and it’s not looking good for you. You should take the informal resolution option offered by the other party.”

What could the process look like?

Reality checking – neutral



- Example of a **neutral** reality check:

“If this goes back to the formal process, you will not have control over the outcome, and it is a possibility that a decision-maker could find you in violation of policy.”

What could the process look like?

Resolution agreements

7. Resolution agreements

- If the parties reach a resolution, document the terms.
- Have both parties review the terms.
- Have both parties sign the agreement.

What could the process look like?

Resolution Agreements Considerations



Considerations:

- Include in an agreement a way for the parties to revisit terms if there is change.
- Include any confidentiality provisions (and any consequences for violating those provisions).
- Provide each party with a copy of the agreement.
- Maintain a copy of the agreement in the Title IX office pursuant to the Regulations for seven years
- Similarly, keep a copy for EO purposes

What could the process look like?

Resolution Agreement fails

If the resolution is not successful:

- Maintain any records of the process and its result for seven years.



Informal Resolution: Live Example



Informal Resolution: Toolbox/Checklist

Script of overview of process

As you saw in our live scenario, a script is helpful to ensure:

- ✓ You approach each facilitation consistently
- ✓ Overview of your process
- ✓ Don't forget anything you needed to say

Make sure each party feels heard

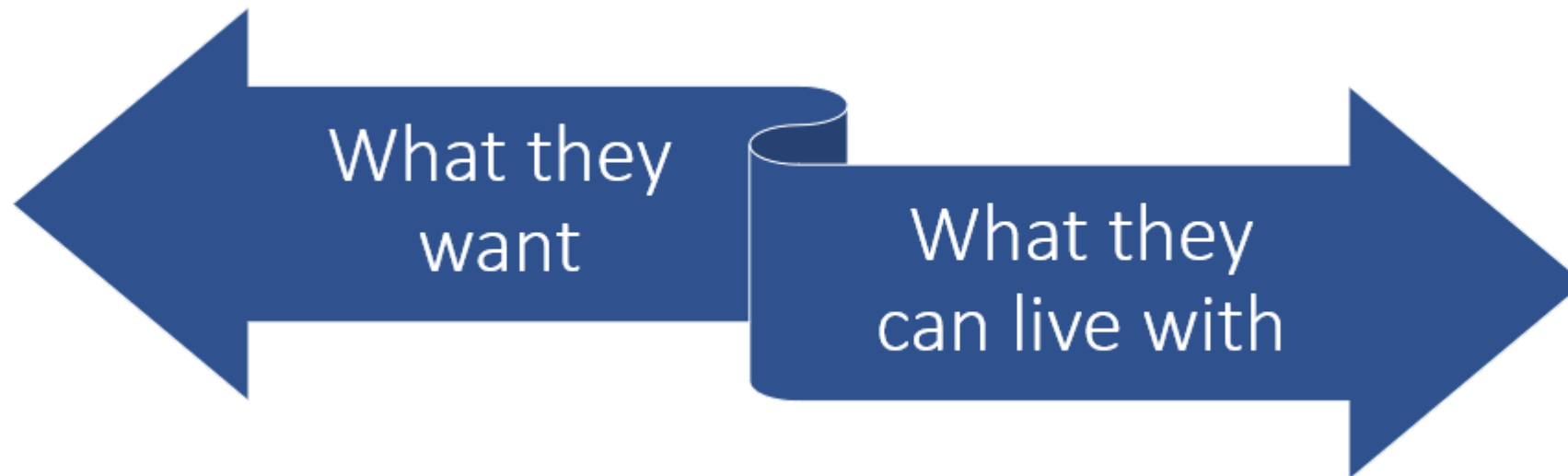


Whether you include this in your script, this is not only a step of the process, but a tool to empower the parties to:

- ✓ Identify what is important to them
- ✓ Identify what they may be able to be flexible on
- ✓ Feel like they are engaging in and trusting the process

Identify what each party wants

Regardless of the type of resolution process, ensure that you identify with each party:



Have a list of your institution's supportive measures available



Be ready to easily provide each party with a list of supportive measures and other ideas that may help them think about moving forward

Have a form or template for resolution agreements



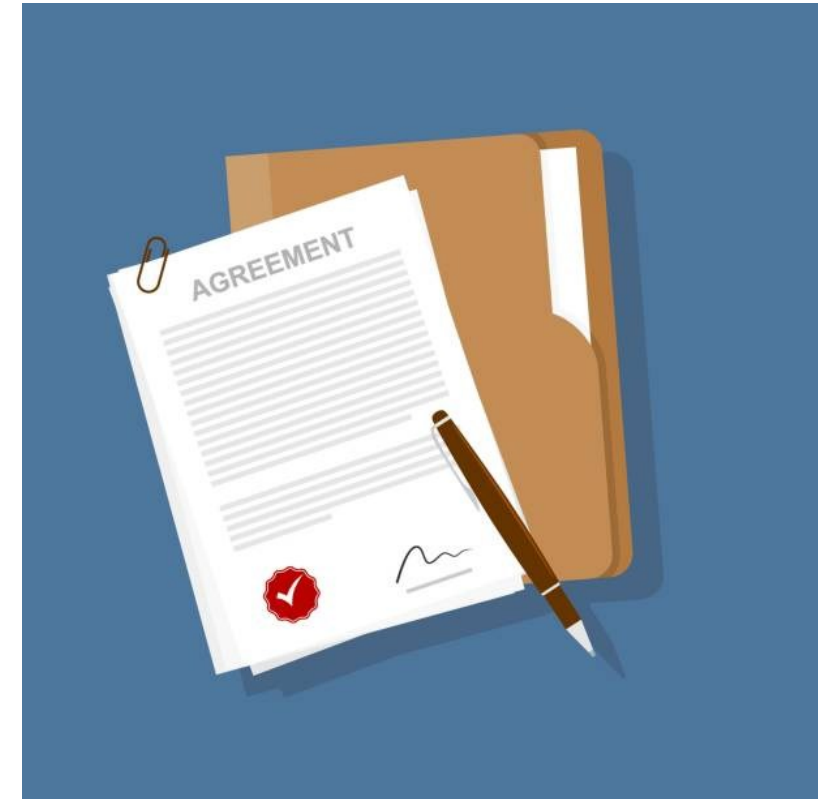
If the parties agree, you will want to be able to quickly pull together an agreement.

Having a form or template easily accessible that you can add the provisions to is more likely to allow you to have the parties sign that day—you don't want your delay to make the agreement fall apart

The Agreement

Why have it in writing? (1)

While some jurisdictions will not allow any discussions or documents from mediation to be relied upon outside of mediation, many do allow a carve out for final agreements to be the only memorialization of the mediation.



Why have it in writing? (2)

It is important to have the terms of any agreement in writing, in case there are later disagreements.

Documentation of the agreement is important if OCR reviews the informal resolutions.

What about confidentiality? (next slide)

What about confidentiality?

- The terms of the agreement should be on a need-to-know basis.
- The agreement itself should include penalties for a party or recipient from publishing or sharing the agreement.
- Agreements relating to students are student records protected by FERPA; kept in student file

What about confidentiality? Employees

- For employees, these may have different considerations and may be public record, depending on your jurisdiction.
- May be contained in a separate file personnel file.



The problem with “gag” orders or non - disparagement agreements (1 of 2)

- Could be contrary to:
 - The First Amendment if a public institution
 - Academic freedom if faculty member
 - Public records laws in your jurisdiction

The problem with “gag” orders or non - disparagement agreements (2 of 2)

- What happens if a party breaks the order?
- What if it's years later?
- What if it's a conversation with a family member vs. journalist?
- What if it seems like the institution is trying to bury information?
- How will you enforce it?

What any agreement (or form or template) should include (1)

1. Names of any parties, representatives, and informal resolution officer
2. The specific terms of the agreement, with as much specificity as possible for each term.

What any agreement (or form or template) should include (2)

3. General description of the process that led the parties to the resolution.
4. Specifically, that the process was *instead* of a formal process, that it was agreed to by both parties voluntarily and in writing.

What any agreement (or form or template) should include (3)

5. Acknowledgement of all the terms in the agreement by the parties and the **consequences** of signing.
6. How to resolve any future disputes arising out of the underlying facts of the agreement or the agreement itself.
7. Who to contact with questions or concerns about the agreement.

What any agreement (or form or template) should include (4)

8. Future periods of checking on how the agreement is going?



Pros

- Helps the institution monitor the situation



Cons

- May be poking a sleeping bear



Questions?

Want more?
Additional information available at:



Title IX Resource Center at
www.brickergraydon.com/titleix

Thank You

