



Title IX Higher Ed Level 2

Resolution Officer Training



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Disclaimers

We can't help ourselves. We're lawyers.

- We are not giving legal advice. Consult with your legal counsel regarding how best to address a specific situation.
- This training (along with Level 1), satisfies both annual Clery training and the topics required by the Title IX regulations. *NOT institution-specific grievance procedures, policies, or technology.
- Use the chat function to ask general questions and hypotheticals.
- This training is not being recorded, but you will get a packet of the training materials to post on your websites for Title IX compliance.

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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

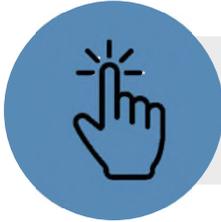
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Posting These Training Materials?

- 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

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Additional information available at:



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

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Topics

- Impartiality, avoiding bias, conflict of interest, and prejudgment of fact
 - Informal resolution theory
 - Review of scenario and hypotheticals
 - 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

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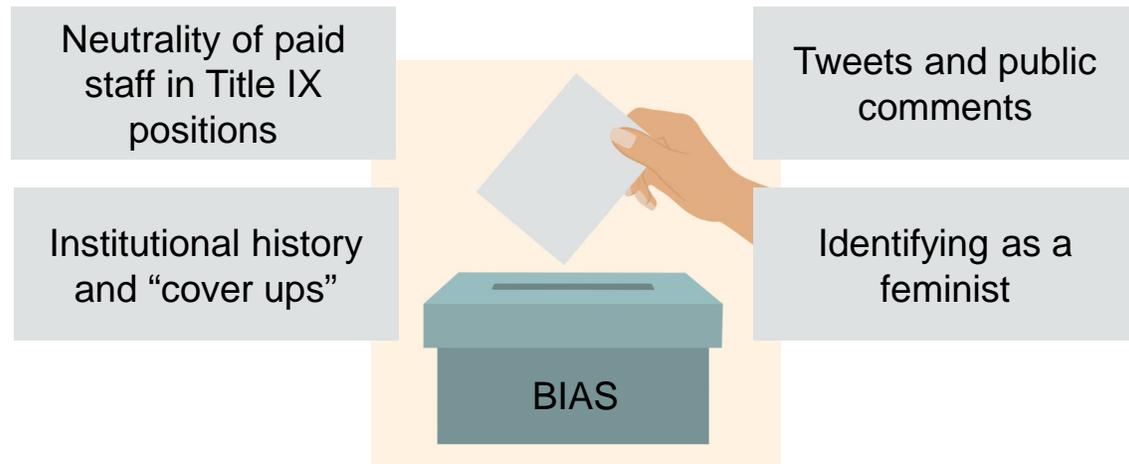
Impartiality & Avoiding Bias, Conflict of Interest & Prejudgment of Facts (1)

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.**

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



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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

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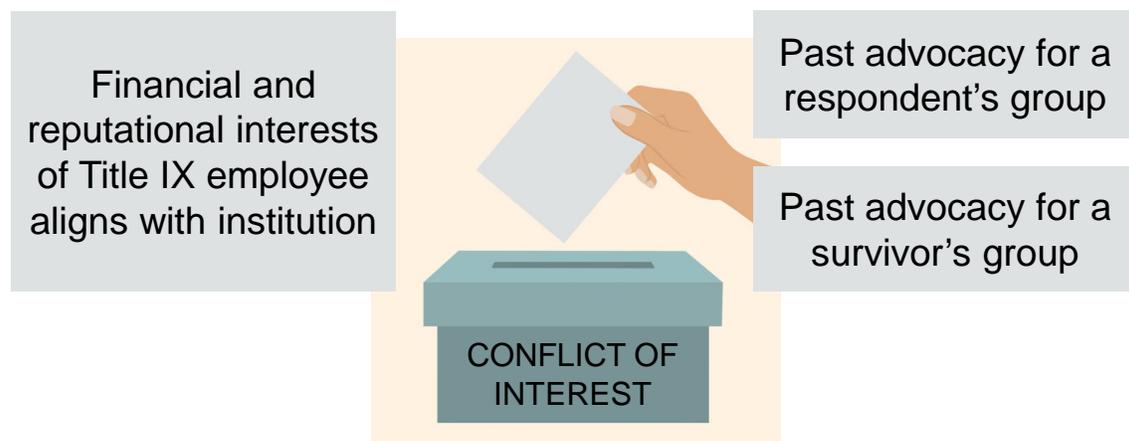
Bias: Objective Rules and Discretion (1 of 2)

“[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)

Carroll University policy charges Title IX Coordinator with resolving conflicts of interest.

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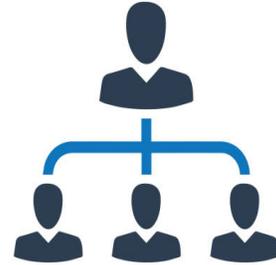
Conflict of Interest: Concerns raised in comments in 2020 preamble...



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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



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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)

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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

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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

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Informal Resolution: The Theory and Practice

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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

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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

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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

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It Bears Repeating

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



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When: Threshold

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

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When: Termination

Available at any time prior to reaching a determination.

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Caution in Approach (1)



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Caution in Approach (2)

A recipient may **NOT** require informal resolution

- As a condition of enrollment or continuing enrollment
- As a condition of employment or continuing employment



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Caution in Approach (3)

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



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Caution in Approach (4)

A recipient may **NOT** require informal resolution

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



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Caution in Approach (5)

Be careful **NOT** to:

Pressure either or any party to participate



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What can the Recipient Offer?

An “informal resolution process, such as mediation, that **does not involve** a full investigation and adjudication”

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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)

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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.

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Mediation (2)

- For example, in Ohio (where we live), the Ohio Supreme Court and state law have provisions governing mediation and a Uniform Mediation Act.
- **Wisconsin** is **not** a UMA state, but has laws governing mediation.
- Your jurisdiction may require specific training to be a “mediator.”



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Mediation (3)

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.

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Mediation (4)

Written agreement?

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



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Mediation (5)

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?

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Restorative Justice

- 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.

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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.



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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.

(Is this consistent with the Regs?)

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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.

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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?

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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.

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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?

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Informal Resolution: How to Facilitate a Resolution with Basic Principles

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Initial consideration: Separation of the parties



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



“Shuttle Diplomacy”

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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.

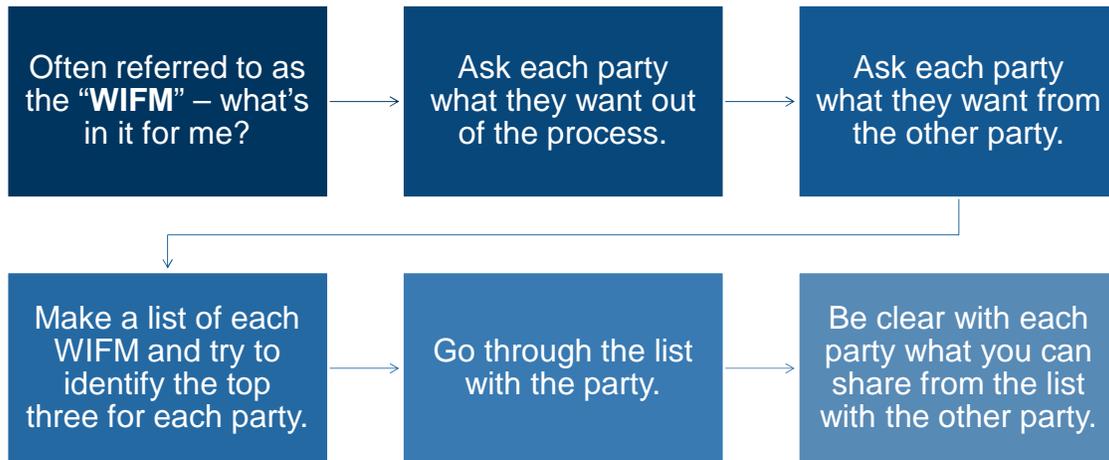
44

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.

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Determine what each party wants



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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?

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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.



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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.

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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.

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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.



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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.

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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.

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Informal Resolution: Best Practices

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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**

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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

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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?

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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.



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Prompt Timeframe

Considerations:

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

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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?

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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)?

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What could the process look like? Setup Format

- Through email?
- Through Zoom?



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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?

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What could the process look like? Setup Example 1

Both parties are near graduation, very emotional about the situation, and 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 the rest of school in a mutually agreeable way...



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What could the process look like? Setup Example 2

The parties were close friends 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.

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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.

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

(3) 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...

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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.

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What could the process look like? Finding out what the parties want.

Example:

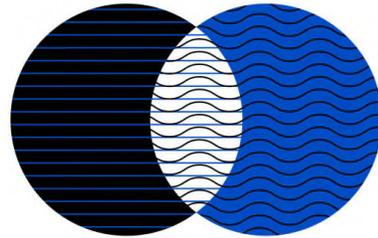
- A complainant may tell you they want the respondent to admit wrongdoing.
- However, the complainant may be willing to accept that respondent sees the underlying interaction differently but apologizes for the resulting harm to the complainant.

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What could the process look like? Overlap

(4) Identify any overlap between what the parties want, need, or are willing to accept.

Note: There could be no overlap



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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 activities.

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What could the process look like? Supportive Measures as a Solution (1)

Supportive measures to consider:

- Alternative schedules
- Individual study
- Online alternatives to courses
- Counseling



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What could the process look like? Supportive Measures as a Solution (2)

- Safety escort for one or both parties
- Reassignment of seating
- Reassignment of housing
- Individualized Title IX training



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What about apology letters?

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



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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

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What could the process look like? Solution example

- **Hypo:** Both students agree, after a lengthy resolution process, that the Respondent will accept disciplinary probation for a reported sexual assault. Your policy articulates a minimum sanction of suspension.
- **How does your institution proceed?**

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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

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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.”

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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.”

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What could the process look like? Resolution agreements

(6) Resolution agreements

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



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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

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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.

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Informal Resolution: Scenario Review

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Informal Resolution: Live Example

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Informal Resolution: Toolbox/Checklist

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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

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Make sure each party feels heard

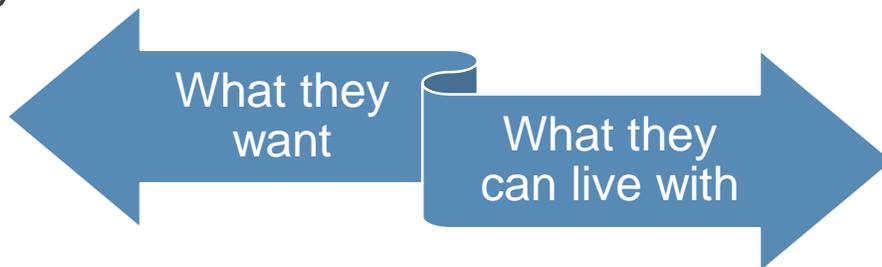
Whether you include this in your script, this is not only a step of the process, but a tool to empower the parties to:

- ✓ 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

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Identify what each party wants

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



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Have a list of your institution's supportive measures available

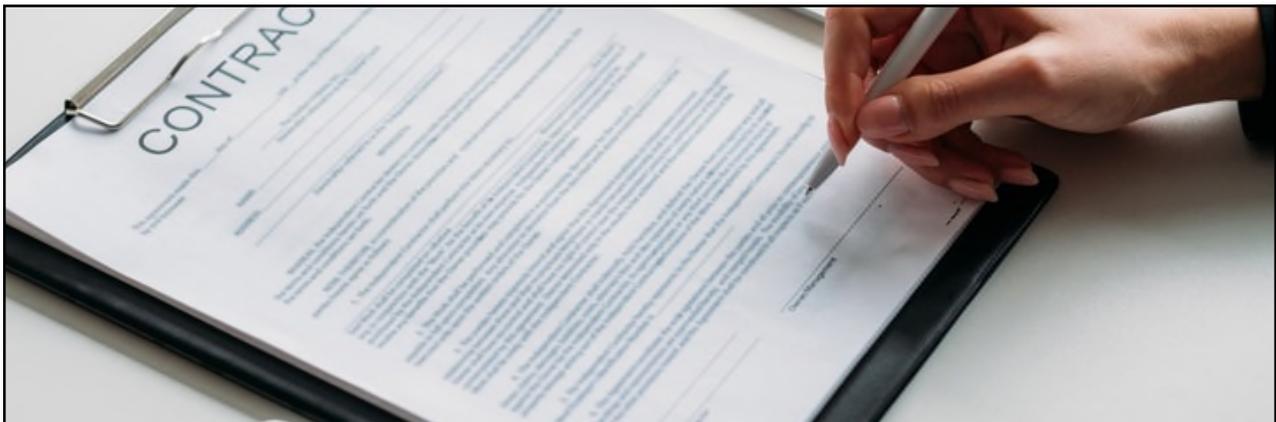
Be ready to easily provide each party with a list of supportive measures and other ideas that may help them think about moving forward

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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

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The Agreement

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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.



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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)

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What about confidentiality?

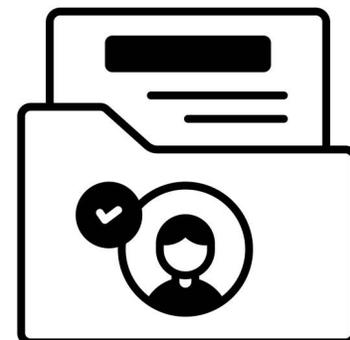
- The terms of the agreement should be on a need-to-know basis.
- The agreement itself should include penalties for a party or recipient from publishing or sharing the agreement.
- Agreements relating to students are student records protected by FERPA; kept in student file



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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.



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



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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?

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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.

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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.

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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.

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

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

 Pros	 Cons
<ul style="list-style-type: none">• Helps the institution monitor the situation	<ul style="list-style-type: none">• May be poking a sleeping bear

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Questions?

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**Want more?
Additional information available at:**



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

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