



Resolution Officer Training

with Josh Nolan and Melissa Carleton



Our Presenter: Josh Nolan

jnolan@bricker.com | 216.523.5485

Twitter- @JoshDNolan



Our Presenter: Melissa Carleton

mcarleton@bricker.com | 614.227.4846

Twitter- @MCarletonOhio



Disclaimers

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

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

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?

- Yes!
- Your Title IX Coordinator is required by 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

Additional information available at:

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

Find us on Twitter at @BrickerHigherEd



Required Training for Informal Resolution Officers

- Jurisdiction (Level 1)
- Definitions of Sexual Harassment (Level 1)
- How to serve **impartially**, including **avoiding**
 - Bias
 - Conflict of Interest
 - Prejudgment of fact

Required Training for Informal resolution Officers

- Avoiding sex and other stereotypes (Level 1)
- The grievance process for your specific institution* (will need to complete in-house)

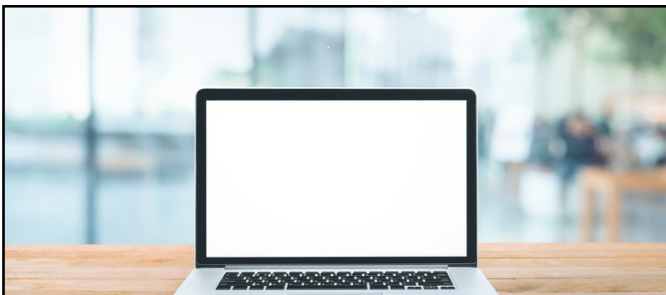
Topics

- 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

Aspirational Agenda

A little more detail on timing

- 9:00-10:30 Impartiality, avoiding bias, conflict of interest, and prejudgment of fact
- 10:30-10:45 Break
- 10:45-12:00 Informal Resolution: Theory and Practice
- 12:00-12:30 Lunch Break
- 12:30-2:00 Best Practices and Considerations
- 2:00-2:15 Break
- 2:15-3:15 Live Informal Resolution Scenario
- 3:15-3:30 Break
- 3:30-5:00 Writing an Agreement and Related Considerations



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

Impartiality and Avoiding Bias, Conflict of Interest and Prejudgment of Facts

Section 106.45 **requires** 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.**

(30053)

Impartiality and Avoiding Bias, Conflict of Interest and Prejudgment of Facts

- 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 pre-judging facts.

(30249-30257; 30496)

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] (30323)

Bias: Concerns raised in comments in preamble

- Neutrality of paid staff in Title IX positions
- Institutional history and “cover ups”
- Tweets and public comments
- Identifying as a feminist

Perceived v. Actual Bias

- Both can lead to the same perception (30252)
- On appeal of decisions, the Department requires the bias “that could affect the outcome of the matter”

How the Department tried to prevent bias

- No single-investigator model (34 C.F.R. 106.45(b)(7)(i)):
- Decision-maker (or makers if a panel) must not have been the same person who served as the Title IX Coordinator or investigator (30367)
 - Separating the roles protects both parties because the decision-maker may not have improperly gleaned information from the investigation that isn't relevant that an investigator might (30370)
 - The institution may consider external or internal investigator or decision-maker (30370)

Bias: Objective Rules and Discretion

“[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...**” (30250)

Bias: Objective Rules and Discretion

- **Discretionary:** Recipients have the discretion to have a process to raise bias during the investigation.
- **Mandatory:** Basis for appeal of decision-maker’s determination per 34 C.F.R. 106.45(b)(8)(i)(C).

Conflict of Interest: Concerns raised in comments in preamble

- Financial and reputational interests of Title IX employee aligns with institution
- Past advocacy for a survivor’s group
- Past advocacy for a respondent’s group

Preamble Discussion on Bias and Conflict of Interest

- 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.” (30251)

Preamble Discussion on Bias and Conflict of Interest

- 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
- (30352-30353)

Preamble Discussion on Bias and Conflict of Interest

- 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 (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** (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 (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.”
- Explained: the “mere fact that a certain number of outcomes result in determinations of responsibility, or non-responsibility, does not necessarily indicate bias.” (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);
- Information “gleaned” by the investigator is shared with the informal resolution officer outside the investigation report (in meetings to discuss pending cases, in passing while at work, etc.)

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

Hypotheticals

Thinking about how to move forward with some issues of impartiality, conflict of interest and bias (perceived or actual).

Hypotheticals

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 to receiving training to facilitate Title IX informal resolution.

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 files a formal complaint.

(30086, 30089)

Seven horizontal lines for notes.

Less Adversarial Resolution

“Informal resolution may present a way to resolve sexual harassment allegations in a less adversarial manner than the investigation and adjudication procedures that comprise the 106.45 grievance process.”

(30098 FN 463)

Seven horizontal lines for notes.

It Bears Repeating

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



Seven horizontal lines for notes.

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



Caution in Approach

A recipient may **NOT** require

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



Caution in Approach

A recipient may **NOT** require

- As a condition of enjoyment of *any other right*
- The waiver of the right to an investigation and adjudication of formal complaints of sexual harassment



Caution in Approach

A recipient may **NOT** require

- The parties to participate in an informal resolution process
- **This is a voluntary process for both (or all) parties!**



Caution in Approach

Be careful **NOT** to:

Pressure either or any party to participate



What can the Recipient Offer?

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

What does this mean?

The regulations don't provide more detail on what this means. BUT... the preamble:

- Mediation
- Restorative justice (30098 FN. 463)

Mediation

The regulations don't provide more detail on what this means.

- "Mediation" may have legal meaning in your jurisdiction that invokes certain requirements.

Mediation

- For example, in Ohio (where we live), the Ohio Supreme Court and state law have provisions governing mediation and a Uniform Mediation Act.
- Jurisdiction may require specific training to be a "mediator."

Mediation

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

Mediation

Written agreement?

- Silent about whether required.
- Other provisions require documentation of the grievance process from formal resolution to resolution

Mediation

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

- 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*

- **Uniform Mediation Act** (Ohio – R.C. 2710.01-2710.10)
 - Defines "Mediation" → "any process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute."
 - Defines "Mediator" → an "individual who conducts a mediation."
 - QUALIFICATIONS? (No conflicts of interest; disclosure of same; disclose qualifications upon request)

State Laws

What statutory protections are there for mediation?

- Mediation Communications are protected as Privileged (with Exceptions: child abuse, felony reporting, etc.)
- Parties can be accompanied by an attorney (even if waived by the parties in an agreement)
 - Consider Advisor of Choice VAWA requirements...

NOTE: THE PARTIES CAN AGREE IN WRITING TO WAIVE SOME OF THESE PROTECTIONS

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.

Restorative Justice Example

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

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?)

Restorative Justice

Remember:

- 1) What we do for one we do for the other.
- 2) Recipient cannot make a *finding of responsibility* without a live cross-examination hearing.

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

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?
- Is that going to be consistent with the new Regulations?

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

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?
- Preamble states that "mediation" can result in expulsion because the parties can agree to that outcome.

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

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 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.
- Apology letters (not necessarily admitting wrongdoing, but acknowledging feelings).

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...

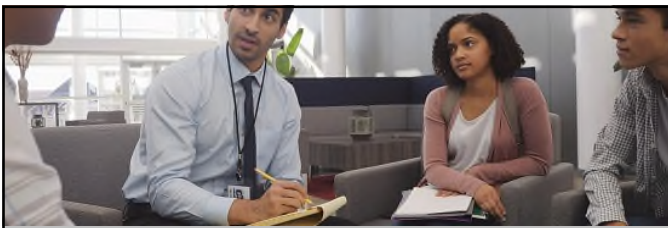
- Write it out then.
- Have the parties sign then.
- Try to finish it before the parties leave so it doesn't fall apart.

If agreement reached...

- 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 it will go back to formal process 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 it will go back to formal process by deadline.
- May choose to offer further mediation on the dispute if 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) 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

(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 back to the formal process if it does not succeed, so consider this in setting a timeframe.

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.

What could the process look like?

(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?

(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

- Through email?
- Through Zoom?

What could the process look like?
Setup

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?

What could the process look like?
Setup

Considerations:

- 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

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...

What could the process look like?
Setup -Example

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.

What could the process look like?
Setup

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?

(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...

What could the process look like?

- 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 wrong doing. 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?

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

Note: There could be no overlap.

What could the process look like?

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

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

Supportive measures to consider:

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

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

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

What could the process look like?

(5) 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

What could the process look like?

- May require some time from the parties to reset their expectations.

What could the process look like?

- **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?**

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
- It may be helpful to remind one or both parties that the alternative may be a return to the formal process

What could the process look like?
Reality checking

- It may be helpful to remind one or both parties that they can control the outcome in the informal process, but not the formal process

What could the process look like?
Reality checking

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

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?
Reality checking

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?

(6) 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:

- Include in an agreement a way for the parties to revisit terms if there is change.

Example: What worked for one academic year may not work for the next.

What could the process look like?
Resolution Agreements

Considerations:

- Include any confidentiality provisions for the informal resolution process and agreement in the text of the agreement (and any consequences for violating those provisions).
- Provide each party with a copy of the agreement.

What could the process look like?
Resolution Agreements

Considerations:

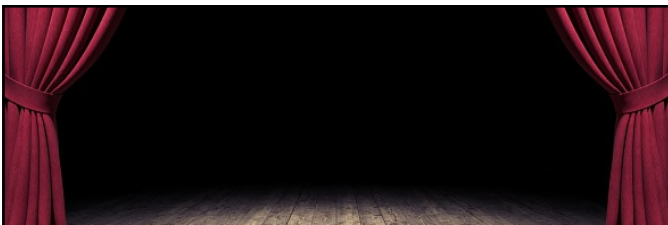
- Maintain a copy of the agreement in the Title IX office pursuant to the Regulations for seven years.

What could the process look like?

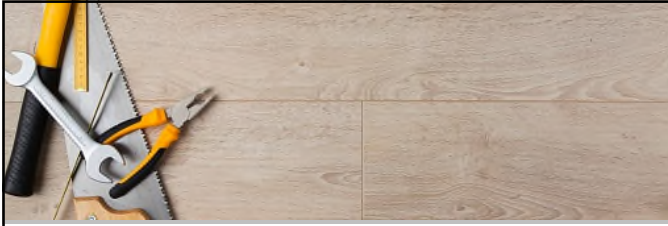
If the resolution is not successful:
Maintain any records of the process and it's result for seven years.



Informal Resolution: Scenario Review



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:

1. You approach each facilitation consistently
2. Overview of your process
3. 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:

1. Identify what is important to them
2. Identify what they may be able to be flexible on
3. 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:

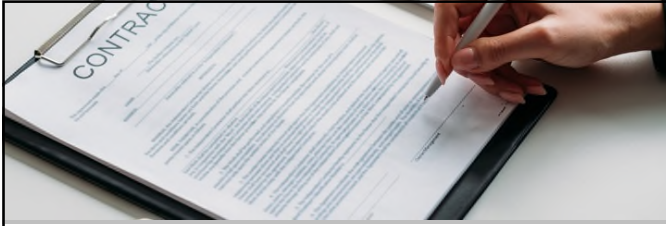
1. What they want
2. What they can live with

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 commit the agreement in writing?

- 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 commit the agreement in writing?

- 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 DOE 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?

- 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.

- Could be contrary to the First Amendment if a public institution
- Could be contrary to academic freedom if faculty member
- Could be contrary to public records laws in your jurisdiction

The problem with "gag" orders or non-disparagement agreements.

- 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

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

What any agreement (or form or template) should include

- General description of the process that led the parties to the resolution.
- 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

- Acknowledgement of all the terms in the agreement by the parties and the consequences of signing.

What any agreement (or form or template) should include

- How to resolve any future disputes arising out of the underlying facts of the agreement or the agreement itself.
- Who to contact with questions or concerns about the agreement.

What any agreement (or form or template) should include

- Future periods of checking on how the agreement is going?
- Pros: helps the institution monitor the situation
- Cons: may be poking a sleeping bear
