Title IX K-12 Training

Level 2: Informal Resolution Officer Training

with Kate V. Davis and Katy W. Osborn

Bricker Graydon Wyatt

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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 the generally applicable topics required by the Final Title IX regulations. *This training does not cover institution-specific grievance procedures, policies, or technology.
- Feel free to submit questions

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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

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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**
- Avoiding sex and other stereotypes (Level 1)
- The grievance process

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Agenda for Today

- Grievance Process and Investigations
- Impartiality, avoiding bias, conflict of interest, and prejudgment of facts
- 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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Grievance Process and Investigations

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Basic Requirements for Formal Grievance Process
§ 106.45(b)(1) (1 of 2)

- Treating complainants and respondents equitably
- No conflict of interest or bias; trained staff
- Remedies designed to restore or preserve equal access to District's education program or activity
- Objective evaluation of all relevant evidence and credibility determinations
- Presumption that respondent is not responsible for alleged conduct; no sanctions until process is complete

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Basic Requirements for Formal Grievance Process
§ 106.45(b)(1) (2 of 2)

- Reasonably prompt timeframes for filing and resolving appeals and informal resolution processes
- Providing a list, or describing a range, of possible disciplinary sanctions and remedies
- Describing standard of evidence to be used to determine responsibility
- Describing procedures and permissible bases for appeal
- Describing range of available supportive measures

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Grievance Procedure Initial Steps: How did we get here?

- Formal Complaint: Triggers Grievance Process
- Written Notice to Parties
  - Summary of allegations/time to prepare response
  - Parties' right to advisor
  - Parties' right to inspect/review evidence
  - Advise of code of conduct prohibiting false statements
  - Presumption that Respondent is not responsible
  - Must be supplemented if additional allegations arise

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Grievance Procedures: Informal Resolution

- Optional (if your policy allows and if appropriate)
- Written notice
- Only after Formal Complaint
- Must have consent; may not be mandatory
- Consent may be withdrawn prior to reaching agreement
- Cannot be used for Student-C v. Employee-R
- Stops Grievance Process
- If agreement reached, cannot return to Grievance Process

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Grievance Procedures: Investigation (1 of 2)

- Burden of proof and burden of gathering evidence is on recipient
- Written notice to parties of any hearings/interviews/meetings
- Equal opportunity to have others present including advisor of choice
- Equal opportunity to present witnesses
- May not prohibit parties from discussing allegations or gathering/presenting evidence

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Grievance Procedures: Investigation (2 of 2)

- Allow parties to inspect/review evidence
  - 10 days to submit response
- Prepare investigative report that fairly summarizes relevant evidence
- Allow parties to review report
  - 10 days to submit response

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Grievance Procedures: Decision Maker

- Consider any response submitted
- Parties submit questions of parties/witnesses
- Hearing (optional for K-12)
- Issue written determination of responsibility
- Must allow for appeal (new decision maker)

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

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Impartiality and Avoiding Bias, Conflict of Interest and Prejudgment of Facts (1 of 2)

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**

(85 Fed. Reg. 30053)

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Impartiality and Avoiding Bias, Conflict of Interest and Prejudgment of Facts (2 of 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 pre-judging facts.

(85 Fed. Reg. 30249-30257; 30496)

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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] (85 Fed. Reg. 30323)

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Bias: Concerns raised in comments in preamble

- Neutrality of paid staff in Title IX positions
- Tweets and public comments
- Identifying as a feminist

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How the Department Tried to Prevent Bias

No single-investigator model (34 C.F.R. 106.45(b)(7)(i)):

- Decision-maker must not have been the same person who served as the Title IX Coordinator or investigator (85 Fed. Reg. 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 (85 Fed. Reg. 30370)
- The institution may consider external or internal investigator or decision-maker (85 Fed. Reg. 30370)

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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**…" (85 Fed. Reg. 30250)

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Bias: Objective Rules and Discretion (2 of 2)

- **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).

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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

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Preamble Discussion on Bias and Conflict of Interest

- No *per se* prohibited conflicts of interest in using employees or administrative staff
- 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

(85 Fed. Reg. 30352-30353)

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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

(85 Fed. Reg. 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 serves as a Coach 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 a meeting to discuss student discipline data, or in passing while at work, etc.)

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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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Hypothetical (1 of 3)

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

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Hypothetical (2 of 3)

Scenario:

- You work as a principal in your school district
- Your duties include investigating and overseeing student code of conduct violations
- The District's Title IX Coordinator has identified you as a person to receive training to facilitate Title IX informal resolution

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Hypothetical (3 of 3)

- You receive an informal resolution request from the Title IX Coordinator
- In reviewing the request, you recognize the name of Complainant as a student from an unrelated student conduct matter you handled last year
- The matter involved a fight between the Complainant and a teammate
- You do not remember how it resolved or recall much more about the Complainant

What should you do?

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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 the ability to tailor solutions to their needs

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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 investigation and adjudication procedures that comprise the 106.45 grievance process."

(85 Fed. Reg. 30098 FN 463)

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When: Threshold

- **Only** available to the parties **if** a ***formal complaint*** is filed
- **Never** available to resolve allegations that an employee sexual harassed a student

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When: Termination

Available at ***any time*** **prior to** reaching a **determination**

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Caution in Approach (1 of 3)

A school district may **NOT** require:

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

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Caution in Approach (2 of 3)

A school district 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

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Caution in Approach (3 of 3)

A school district may **NOT** require:

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

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What Can Be Offered?

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 preamble gives examples of the processes, such as:

- Mediation
- Restorative justice (85 Fed. Reg. 30098 FN. 463)

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Mediation (1 of 2)

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

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

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Mediation (2 of 2)

- In Ohio, the Supreme Court and state law have provisions governing mediation and a Uniform Mediation Act
- See, ORC 2710.01 through 2710.10

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Ohio Law – Uniform Mediation Act (ORC §2710.01-.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"
- **Defines "Mediation Party"** – a person "whose agreement is necessary to resolve the dispute"
- The Act provides that if the mediation is conducted by a primary or secondary school ***and*** the all of the parties are students (i.e., peer mediations) the Act does ***not*** apply
- As long as a parent is involved in the process, or the mediation is between adult District employees, the Act does apply

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Mediation or, Perhaps Better–Facilitated Resolution

- There are many definitions of mediation out there, but the TIX Regulations anticipate a **third-party** (the informal resolution officer) **facilitated resolution** of a dispute between parties
- Facilitated Resolution is what you will be doing

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Facilitated Resolution (1 of 2)

Written agreement required?

- Regulations are silent about whether required.
- But – other provisions require ***documentation*** of the grievance process from formal complaint to resolution

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Facilitated Resolution (2 of 2)

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 (1 of 3)

- The Regulations do not define "restorative justice."
- Usually aims to repair harm done to victims or relationships through facilitation, but will vary from program to program.

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Restorative Justice Example

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 (2 of 3)

Remember:

1) What we do for one we do for the other
2) Recipient cannot make *a finding of responsibility* without completing the formal grievance procedure

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Restorative Justice (3 of 3)

The goal must be to ensure that the process preserves (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

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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

- 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

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Questions Facilitator May Ask of a Party

- What would make you feel safe?
- What do you want your day at school to look like after this?
- What could the school 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

- Adjusting course schedules
- Online alternatives for courses
- Increased adult supervision
- Counseling
- Training
- Apology letters (not necessarily admitting wrongdoing, but acknowledging feelings)

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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…

- Document it in some fashion
- Have the parties sign that the documentation accurately reflects their understanding
- Try to finish it before the parties leave so it doesn't fall apart

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If No Agreement Reached…

- Parties may want time to think about the resolution – this will be up to the school 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 facilitated resolution 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** (for as long as their time together is before they graduate) with **equal access to educational opportunities**

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What Should Our Process Look Like? Requires a Prompt Timeframe

The recipient (the school) should decide what "prompt" timeframe to set to resolve the informal resolution

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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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Contact the Parties

The informal resolution officer should contact each party individually to initiate and explain the process.

A written notice shall be provided disclosing:

- The allegations
- The informal resolution process requirements
- Any consequences

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Determine Setup

- 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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Setup Considerations

- Each matter is different, so providing multiple methods for conducting a resolution may be helpful
- Should the parties communicate directly with each other?
- Are there attorneys or parents involved?

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Assess Needs & Wants

- Meet with each party individually to find out:
  - What they **want**
  - What they **need**
- What are they willing to accept as a resolution?
- What are they not willing to accept?

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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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Identify Overlap

Identify any overlap between what the parties:

- Want
- Need
- Are willing to accept

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Support to Parties

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

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Work the Process

Identify 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

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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
- 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

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Reality Checking – Caution

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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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 there is a possibility that a decision-maker could find you in violation of policy"

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Reality Checking – Bias?

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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Resolution Documentation

- If the parties reach a resolution, memorialize the terms
- Have both parties review the terms
- Have both parties acknowledge the terms of the resolution document
- If it involves minor students, have the parents sign document

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Resolution Documentation 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

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Recordkeeping

- Maintain a copy of documentation in the Title IX office for seven years
- 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

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:

- What they want
- What they can live with

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Have a List of 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/Template for Documenting the Resolution Agreed Upon

- If the parties agree, you will want to be able to quickly pull together a document detailing the terms of resolution
- Having a form or template easily accessible that you can add the provisions to is more likely to allow you to have the parties agree that day – you don't want your delay to be the reason an agreement falls apart

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Documenting Agreement

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Why Document Agreement in Writing?

While some jurisdictions will not allow discussions or documents from mediation to be relied upon outside of mediation, many do allow a carve out for a written agreement (signed by the parties) as final memorialization of an agreement

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Why Document The Resolution In Writing?

- Important to have the terms of any resolution agreed upon in writing, in case of later disagreements
- Documentation is important if DOE reviews the informal resolutions

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What About Confidentiality? (1 of 2)

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

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What About Confidentiality? (2 of 2)

- For employees, these may have different considerations and more than likely are a public record
- May be contained in a separate file from the employee's personnel file

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The Problem with "Gag" Orders or Non-Disparagement Agreements (1 of 2)

- Could be contrary to the First Amendment
- Could be contrary to academic freedom if it involves teaching staff
- Could be contrary to public records laws

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The Problem with "Gag" Orders or Non-Disparagement Agreements (2 of 2)

What happens if a party breaks the order?

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

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What Resolution Documentation Should Include

- Names of any parties, representatives, and informal resolution officer
- The specific terms of agreement, with as much specificity as possible
- Acknowledgement of all the terms by signature of the parties (parents) and the consequences of signing

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What Any Resolution Documentation Should Include

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

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Final Thoughts

- Share with parties that the TIX Coordinator will check in on how the resolution is going
- **Pros**: Helps the school monitor the effectiveness of the solution
- **Cons**: Might poke a sleeping bear

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Questions?

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Kate V. Davis
kdavis@bricker.com
937.535.3902

Katy W. Osborn
kosborn@bricker.com
937.535.3905

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