Informal Resolution Boot Camp
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Bricker&Eckler ATTORNEYS AT LAW

Disclaimer

- We are not giving you legal advice.
- Consult with competent legal counsel regarding how best to address a specific situation.
- Use chat function to ask general questions and hypotheticals.
- Samples are being provided, but should be reviewed for compliance with your policy and considered in light of particular situations before adoption and use.

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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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Quick Polls

1. Has your institution successfully conducted an informal resolution since the new regulations went into effect?
2. Have you personally assisted with conducting an informal resolution since the new regulations went into effect?
3. Does your institution already have informal resolution procedures?

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Agenda

- Informal Resolution – A Brief History and Our "Why"
- What the Regulations and Preamble Say (not much)
- Informal Resolution and Title VII
- Structuring Your Program
- Obtaining Voluntary Consent (including sample)
- Conducting Informal Resolution (including brainstorm sheet)
- Reaching an Agreement (including sample)

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Yes, you may post these slides

- Your Title IX Coordinator is required by 34 C.F.R. 106.45(b)(10)(i)(D) to post on your website the materials used to train Title IX personnel.
- All of the guidance documents and regulations referred to in this presentation can be found at www.bricker.com/titleix.

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A Brief History of Informal Resolution

What is informal resolution?

- A process by which two parties enter into an agreement to resolve a formal complaint of Title IX Sexual Harassment.

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Informal Resolution – 2001 Guidance

- Discussed an avenue for "informal action" with both parties' agreement
- "Not appropriate for a student who is complaining of harassment to be required to work out the problem directly with the individual alleged to be harassing him or her, and certainly not without appropriate involvement by the school (e.g., participation by a counselor, trained mediator, or, if appropriate, a teacher or administrator)."

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2001 Guidance (continued)

- Complainant [but not Respondent?] must be notified of the right to end the process at any time.
- "In some cases, such as alleged sexual assaults, mediation will not be appropriate even on a voluntary bases."
- Footnote 109: Not required to have a procedure for resolving informal complaints, but you must address them, especially where there is evidence of more potential complainants.

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Informal Resolution – 2011 DCL

- Again, restated: Complainant [but not Respondent?] must be notified of the right to end the informal process at any time.
- "[I]n cases involving allegations of sexual assault, mediation is not appropriate even on a voluntary basis. OCR recommends that recipients clarify in their grievance procedures that mediation will not be used to resolve sexual assault complaints."

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Informal Resolution – 2014 Q&A

- Nothing of note

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Informal Resolution – 2017 Q&A

- Parties may agree to participate "after receiving a full disclosure of the allegations and their options for formal resolution"
- School can determine whether the particular complaint is appropriate for such a process

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Why Offer It?

- Parties may be more satisfied with an outcome they can control themselves
- Parties can tailor solutions to their needs
- May reach a resolution more quickly
- Less adversarial than the investigation/adjudication process in the regulations (per Preamble at 30098 FN 463)

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Current Regulations (and Preamble)

Key Regulation: 106.45(b)(9)

- Can/will you offer informal resolution?
- What boundaries apply to who can participate?
- What notice must be provided to the parties?
- What is required in terms of consent?

Will You Offer Informal Resolution?

- Can **not** offer it in cases involving allegations of an employee sexually harassing a student
- Otherwise, you "may" offer it at any time prior to reaching a determination
- How do you decide when to offer it and when not to offer?
  - Consider memorializing some factors to consider in your policy or procedures.

Can't Require Informal Resolution

- Can **not** require parties to participate in informal resolution
- Can **not** require students or employees to **waive their right** to investigation and adjudication of a formal complaint as a condition of becoming or continuing as a student or employee.
- Can **not offer** informal resolution until there is a formal complaint

Written Notice to the Parties

- Must include:
  - Allegations
  - Requirements of the informal resolution process (precludes formal complaint from same allegations)
  - Party may withdraw from process at any time prior to resolution
  - Consequences of participation, including what records will be maintained/shared

Consent

- Must obtain the parties' **voluntary written consent** to initiate informal complaint process
- Regulations do not require use of a particular form for this consent
- Consent can be provided electronically if your institution chooses to accept electronic consent

Training Requirements

- Must train facilitators of informal resolution in:
  - Definition of sexual harassment in the regulations
  - Scope of your education program or activity
  - How to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, as applicable
  - How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias

See 34 C.F.R. 106.45(b)(1)(iii).

Informal Resolution and Title VII

Title VII Generally

- 29 C.F.R. 1604.11 defines sexual harassment as "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature" where:
  - "Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment;
  - "Submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or
  - "Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."

Required Response?

- Once your institution is "on notice" of sexual harassment, it must investigate and correct the sexual harassment (see EEOC Guidance N-915-050, March 19, 1990)
- But what about informal resolution? Does that count as addressing the harassment?

Structuring Your Program

Remember Your Ethic of Care

- What we do for one, we do for the other.
- The process must be truly voluntary.
- We cannot make a finding of responsibility without going through the formal process.

Finding Your Facilitators

- Skill set:
  - Good listener
  - Open-minded
  - Solves problems creatively
  - Has ability to fit it into their schedule
  - Knows options on your campus

Consider your options

- Title IX team members not otherwise assigned to the case
- Ombudsperson
- Human Resources staff with conflict resolution training
- Residence Life professionals
- Student Affairs professionals
- Legal clinic/law professors
- Local alumni lawyers (pro bono project?)

Types of Informal Resolution

- Shuttle diplomacy*
- Mediation
- Restorative justice
- Other conflict resolution procedures available on your campus

Mediation

- Specifically listed in the Preamble, but not defined.
- "Mediation" may have a specific legal meaning in your jurisdiction that invokes certain requirements
  - May require specific training for mediators in your jurisdiction (e.g. lawyer, certification)
- Typically involves a third-party facilitating the resolution of a dispute between the parties

State Laws

- Uniform Mediation Act (Ohio – R.C. 2710.01-2710.10)
  - Defines "Mediation" as "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" as an "individual who conducts a mediation."
  - QUALIFICATIONS? (No conflicts of interest; disclosure of same; disclose qualifications upon request)
  - You may be mediating if:
    - you agree that mediation communications are privileged; or
    - the parties use someone who calls themselves a "mediator"

State Laws (continued)

- 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 Preamble refers to restorative justice as an option for informal resolution, but does not define it.
- Usually aims to repair harm done to crime victims through facilitation, but will vary from program to program.

Restorative Justice (continued)

- Example: school-based, non-punitive interventions to bring students and staff together to discuss differences and conflicts, often in a group setting
- Other RJ programs require as one of their key elements that respondents admit responsibility and make amends. (Is this consistent with the Regs?)

Your Current Program?

- Does it require one or both parties to admit responsibility?
- Does it allow the full range of options that informal resolution under Title IX contemplates (sanctions, supportive measures, restrictions on access)?

Where Does The Process Live?

- No requirement as to "who" does it
- Title IX Coordinator must maintain records for 7 years
- Need to have good connectivity with Title IX Office

Consent

How can you obtain consent?

- Must be in writing
- Consider providing written notice to the parties at the outset of the case and include a consent form
- Parties don't always consent right away, but this way they'll have the information up front
- Must be voluntary. No force/coercion (of course).

Considerations (1 of 2)

- Are you tying it back to the formal complaint so it is clear what will be resolved?
- Will the Title IX Coordinator "sign off" on the agreement?
- How will you handle a violation of the agreement?
- What if the violation is a continuation of the problematic behavior that was reported?

Considerations (2 of 2)

- If no agreement is reached, can the parties use information exchanged during IR as evidence in the formal process?
- Will you make the process confidential so that parties may not share information outside the process?
- What information will be communicated back to the Title IX Coordinator?

Conducting Informal Resolution

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 the 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 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?

What can be easily offered?

- No-contact orders
- Separate residences
- Arrangements regarding classes, dining halls, workout rooms, athletic facilities, and student organizations
- Counseling
- Discipline
- See brainstorm sheet and modify as appropriate for your campus

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…

- 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

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

Informal Resolution: Best Practices

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**

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

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
- Remember: you can continue past the timeframe if the parties agree to do so, but you may want to get your formal process going in the meantime

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

Determine Setup

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

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?

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?

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

Identify Overlap

Identify any overlap between what the parties:

- Want
- Need
- Are willing to accept

Support to Parties

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

Note: supportive measures offered by the institution to one party don't have to be part of the agreement between the parties.

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

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

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

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"

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."

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

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

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

Script of Overview of Process

A script is helpful to ensure:

- You (and every other facilitator) approach each facilitation consistently
- Overview of your process
- Don't forget anything you needed to say

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

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

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

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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- Work with legal counsel on something appropriate for your institution

TIXC Coordinator Check-Ins

- 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

Small Group Discussions

- Meet in breakout rooms to discuss hypothetical situations (in packet).
- What are some ways to solve the problems that you might propose?

Documenting Agreement

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

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 OCR reviews the informal resolutions

What About Confidentiality?

- 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

What About Confidentiality?

- For employees, these may have different considerations. If you are a public institution, they may be a public record
- May be contained in a separate file from the employee's personnel file unless state law provides otherwise.

The Problem with "Gag" Orders or Non-Disparagement Agreements

- Could be contrary to the First Amendment (for public entities)
- Could be contrary to academic freedom if it involves teaching staff
- Could be contrary to public records laws (for public entities)
- Is it consistent with your institution's values?

The Problem with "Gag" Orders or Non-Disparagement Agreements

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?

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 and the consequences of signing

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

Review of Sample Agreement

- Every agreement should be different.
- Consult with legal counsel regarding an appropriate template, and to help with drafting particular terms.

Final Tips

- Prepare policy and templates
- Make parties feel heard

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