ODHE Basic Resolution Officer Training

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ATTORNEYS AT LAW

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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.
- 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.

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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?

- 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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Additional information available at:

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

Find us on **Twitter** at
@BrickerHigherEd

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Required Training for Informal Resolution Officers

COVER ELSEWHERE

- Jurisdiction
- Definitions of Sexual Harassment
- Avoiding sex and other stereotypes
- The grievance process for your specific institution*

TODAY

- How to serve **impartially**, including ***avoiding:***
  - Bias
  - Conflict of Interest
  - Prejudgment of fact

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Topics

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

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Aspirational Agenda

All times EST/EDT

A little more detail on timing

Basic Training

9:00-10:00	Impartiality, avoiding bias, conflict of interest, and prejudgment of fact
10:00-10:15	Break
10:15-11:30	Informal Resolution: Theory and Practice

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

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

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**.

-- Preamble 30053

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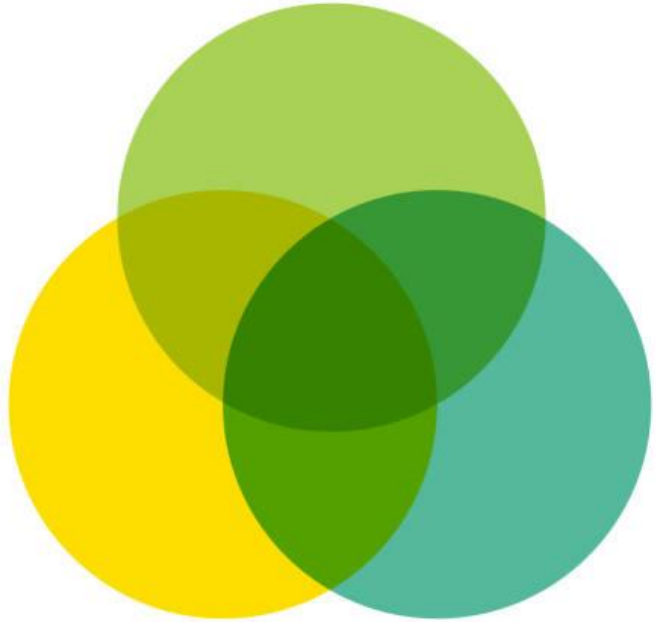
Impartiality & Avoiding Bias, Conflict of Interest & Prejudgment of Facts (2)

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



-- Preamble 30249-30257; 30496

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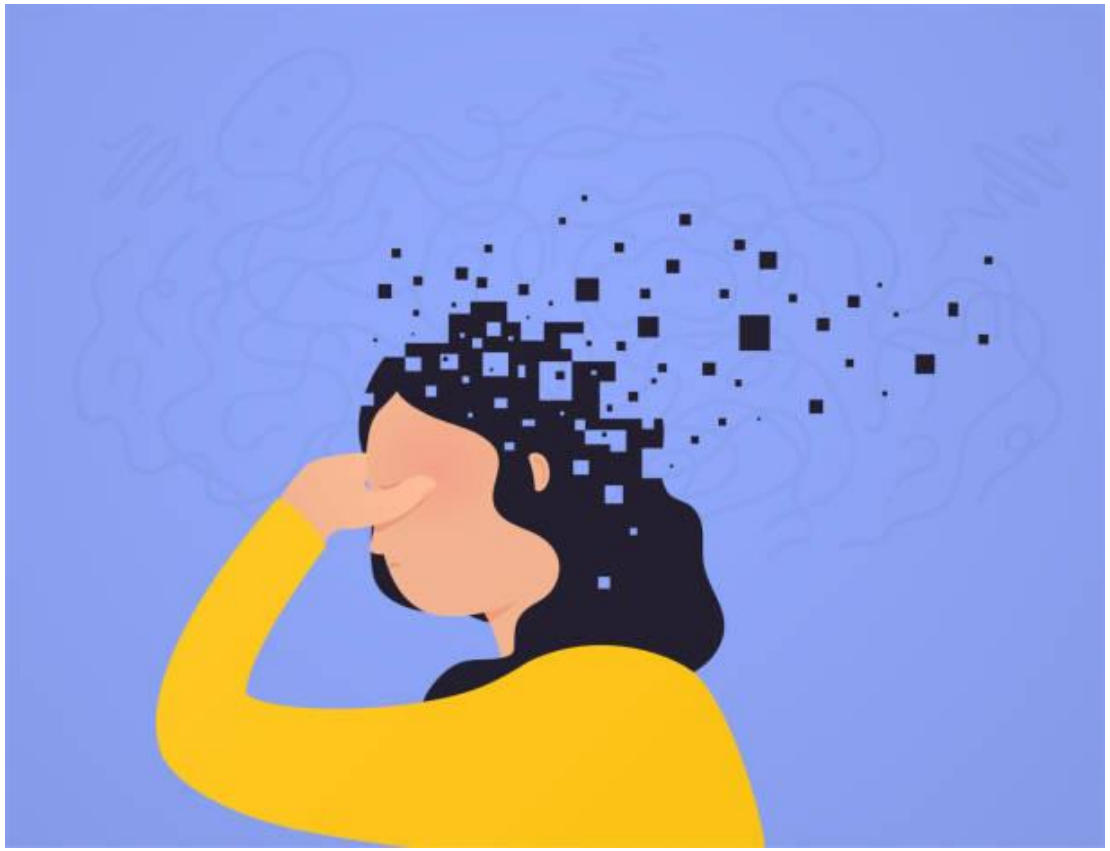
Impartiality

- 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]* (30323)



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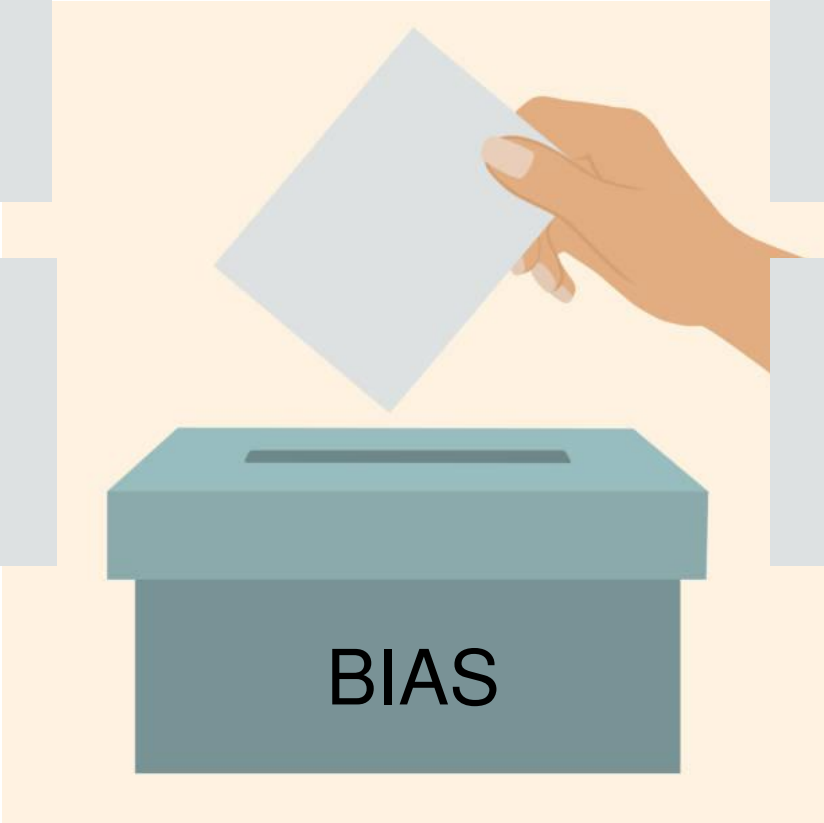
Bias: Concerns raised in comments in preamble

Neutrality of paid staff in Title IX positions

Institutional history and “cover ups”



Tweets and public comments

Identifying as a feminist

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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”

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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 (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)

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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)

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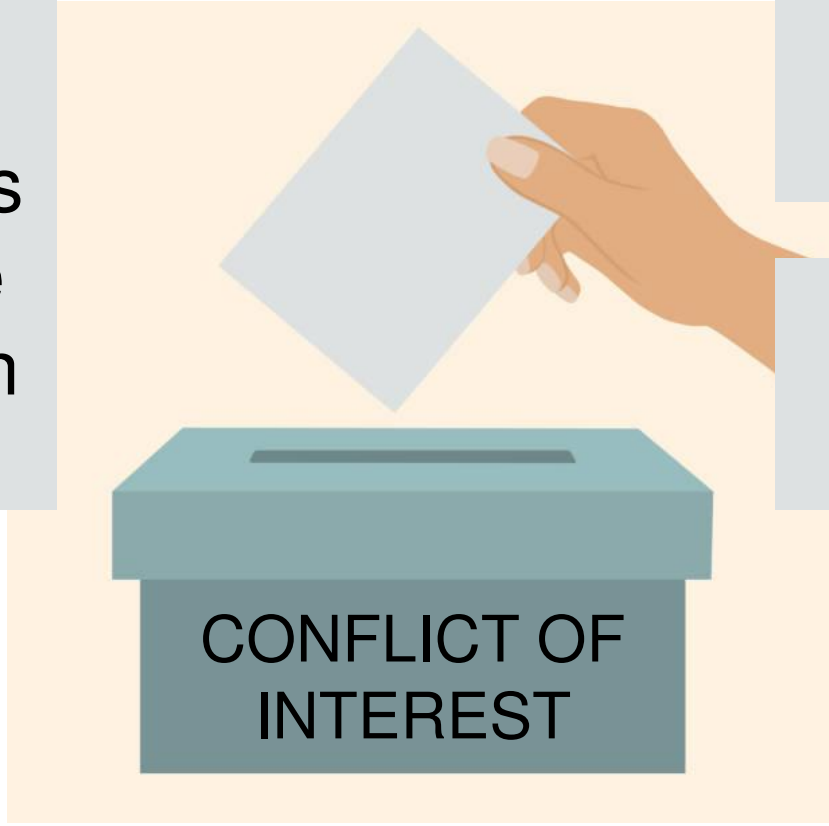
Bias: Objective Rules and Discretion

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

Conflict of Interest: Concerns raised in comments in preamble

Financial and reputational interests of Title IX employee aligns with institution



Past advocacy for a respondent's group

Past advocacy for a survivor's group

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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)

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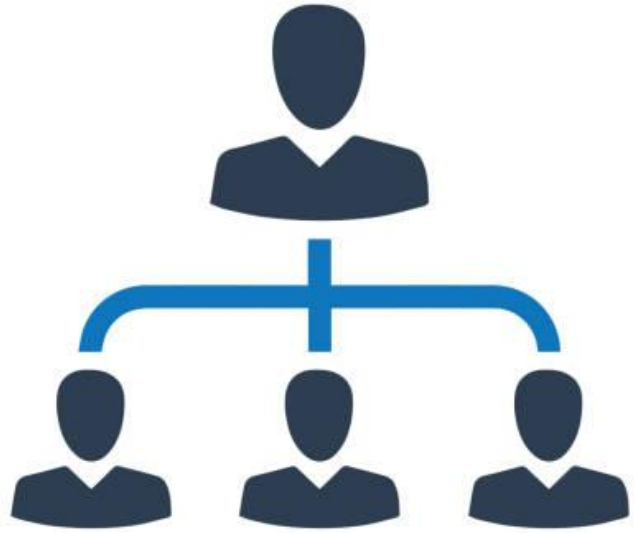
Preamble Discussion on Bias and Conflict of Interest

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

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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)

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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

(30252)

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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." (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);
- 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.)

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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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Hypotheticals

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

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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 who will receive training to facilitate Title IX informal resolution.

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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?

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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?

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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?

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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.

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

- 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 sexual 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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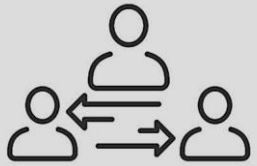
What does this mean?

The regulations don't provide more detail on what this means. BUT… the 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.
- Jurisdiction may require specific training to be a “mediator.”

Mediation (3)

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.

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Mediation (4)

Written agreement?

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

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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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Mediation (6)

- 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.

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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)

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State Laws*

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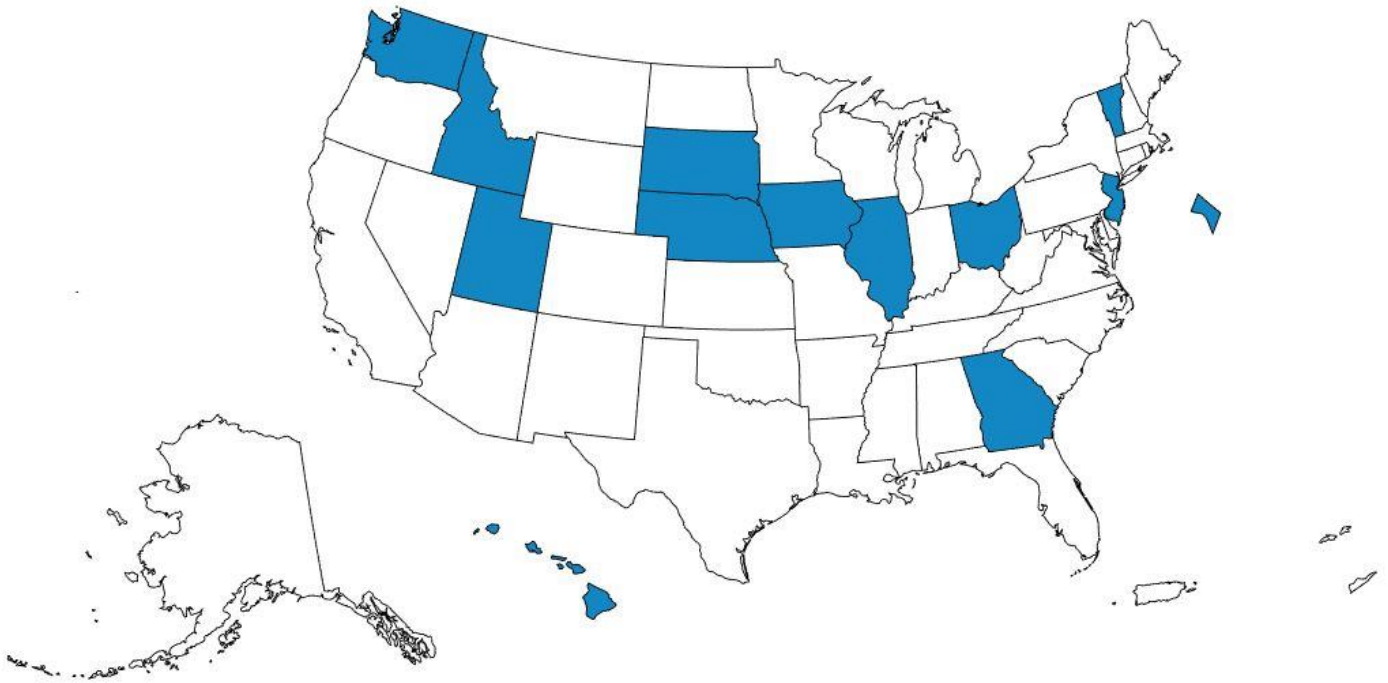
Alternative Dispute Resolution

Map | Bill List | Summary | Enactment History



Enactment Map ● Enacted

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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*

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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

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

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

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.

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

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

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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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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.

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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 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.
- 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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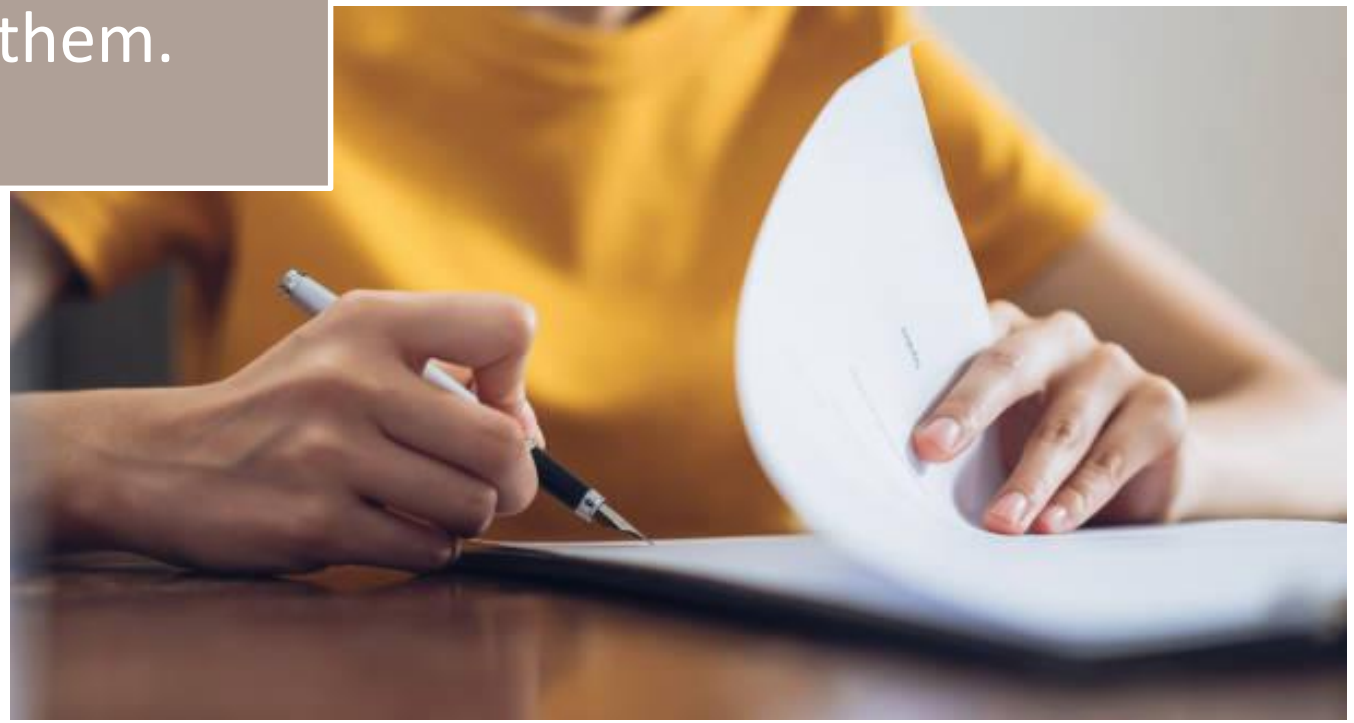
If agreement reached…

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…

- 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.

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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 it will go back to formal process by deadline.
- May choose to offer further mediation on the dispute of it the parties think it would be helpful.

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