



## Resolution Officer Training

with Laura Anthony and Kate Davis



**Bricker & Eckler**  
ATTORNEYS AT LAW

# Disclaimers

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

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- 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.
- Use the chat function to ask questions.

# Our Presenter: Laura G. Anthony

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Laura has been an education attorney for over 22 years, and helps K-12 and higher education institutions comply with their civil rights responsibilities, including those under Title IX. She has experience conducting impartial investigations and assists clients with related policy development and training.



# **Laura's Recent Trainings Include:**

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- **New Title IX Regulations: Hot Takes for K12 Webinar** (May 2020)
- **Civil Rights Compliance Update** (Feb 2020, Oct 2019, Aug 2019)
- **Title IX/Civil Rights Investigator Training – District and ESC in-services** (Jan 2020, Nov 2019, Oct 2019, Sept 2019, Aug 2019, March 2019, Dec 2018, Oct 2018, Sept 2018, Aug 2018, June 2018, May 2018, Jan 2018)
- **Proposed Title IX Regulations: Hot Takes for K12 Webinar** (Dec 2018)

# Our Presenter: Kate V. Davis

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Kate Davis is an attorney with over 16 years of experience representing educational and other public institutions. Kate frequently partners with K-12 and higher education institutions on a variety of issues, including civil rights and Title IX issues. She has conducted independent investigations for public entities and assists clients with policy revision and training.



# **Kate's Recent Trainings Include:**

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- **New Title IX Regulations: Hot Takes for K-12** (May 2020)
- **K-12 Title IX/Civil Rights Investigator and Coordinator Training** (Jan 2020)
- **Changing Standards: Is Preponderance Right for Your Campus?** (Feb 2019)
- **K-12 Title IX and Sexual Harassment Investigations** (Oct 2018, Feb 2019)
- **Title IX for K-12 Staff and Administrators** (Aug 2018)

# Posting These Training Materials?

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- 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

# Required Training for Informal Resolution Officers

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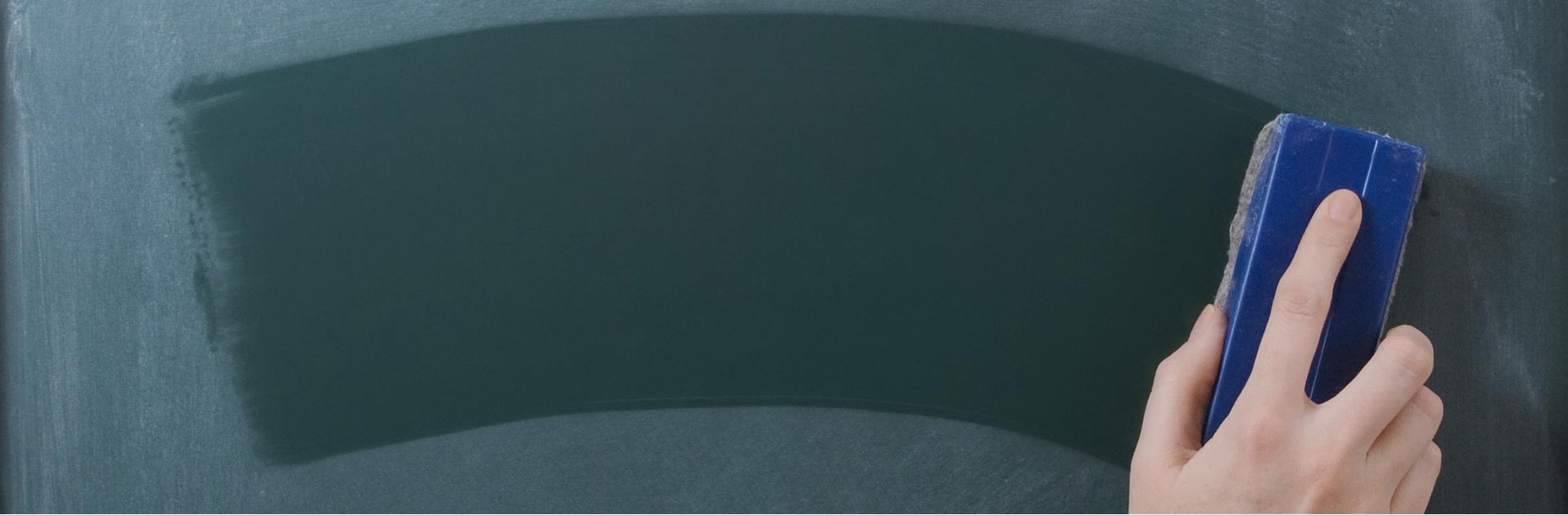
- Jurisdiction (Level 1)
- Definitions of Sexual Harassment (Level 1)
- How to serve *impartially*, including *avoiding*
  - Bias
  - Conflict of Interest
  - Prejudgment of fact
- Avoiding sex and other stereotypes (Level 1)
- The grievance process



# Agenda for Today

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- Impartiality, avoiding bias, conflict of interest, and prejudice 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



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

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

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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)

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

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- 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)

# Impartiality

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- 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)

# **Bias: Concerns raised in comments in preamble**

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

# How the Department Tried to Prevent Bias

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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)

# Bias: Objective Rules and Discretion

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“[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)



# Bias: Objective Rules and Discretion

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- **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

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- 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

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- 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)

# Training, Bias, and Past Professional Experience

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This required training (that you are sitting in right now) can help protect against disqualifying someone with prior professional experience

(85 Fed. Reg. 30252)

# Examples of Bias

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- 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.)

# Avoiding Prejudgment of Facts at Issue

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A good way to ensure impartiality and avoid bias:

- Keep an open mind and actively listen
- Each case is unique and different

# Hypotheticals

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

# Hypothetical

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## 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



# Hypothetical 1

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- 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?**



## **Informal Resolution: The Theory and Practice**

# **Informal Resolution: Reasons Parties May Prefer It to Formal Resolution**

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- 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

# Less Adversarial Resolution

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“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)

# When: Threshold

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

# When: Termination

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

# Caution in Approach

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A school district may **NOT** require:

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

# Caution in Approach

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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



# Caution in Approach

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A school district may **NOT** require:

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

# What Can It Be Offered?

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

# What Does This Mean?

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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)

# Mediation

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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

# Mediation

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

# Ohio Law – Uniform Mediation Act

(ORC §2710.01-.10)

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- **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

# Mediation or, Perhaps Better – Facilitated Resolution

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- 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

# Facilitated Resolution

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Written agreement required?

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



# Facilitated Resolution

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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?

# Restorative Justice

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- 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.

# Restorative Justice Example

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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

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## 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

# Restorative Justice

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The goal must be to ensure that the process preserves (equal) access for both parties to educational opportunities.



## **Informal Resolution: How to Facilitate a Resolution with Basic Principles**

# Initial Consideration: Separation of the Parties

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- 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

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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

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- 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

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- 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

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- 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?

# Have Ready a List of Supportive Measures That Can Be Easily Offered

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

# Review the WIFMs for Each Party and Look for Overlap

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- 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

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- 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...

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- 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...

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- 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 if the parties think it would be helpful





## Informal Resolution: Best Practices

# Informal Resolution Officer Goals

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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**

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

# Prompt Timeframe Considerations

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- 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

# Contact the Parties

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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

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

# Setup Considerations

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- 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

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- 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

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## 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

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Identify any overlap between what the parties:

- Want
- Need
- Are willing to accept

# Support to Parties

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

# Work the Process

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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

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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

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**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

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## 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?

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## 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

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- 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

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- 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

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- 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



## Informal Resolution: Scenario Review



## Informal Resolution: Live Example



# Informal Resolution: Toolbox/Checklist

# Script of Overview of Process

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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

# Make Sure Each Party Feels Heard

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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

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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**

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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

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- 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



# Documenting Agreement

# Why Document Agreement in Writing?

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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?

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- 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

# What About Confidentiality?

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- 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

# What About Confidentiality?

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- 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



# The Problem with “Gag” Orders or Non-Disparagement Agreements

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- 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

# The Problem with “Gag” Orders or Non-Disparagement Agreements

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## 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

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- 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

# What Any Resolution Documentation Should Include

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- 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

# Final Thoughts

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- 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



Questions?

# Bricker's Title IX Toolkit Coming Soon!

## Model Sexual Harassment Intake Form

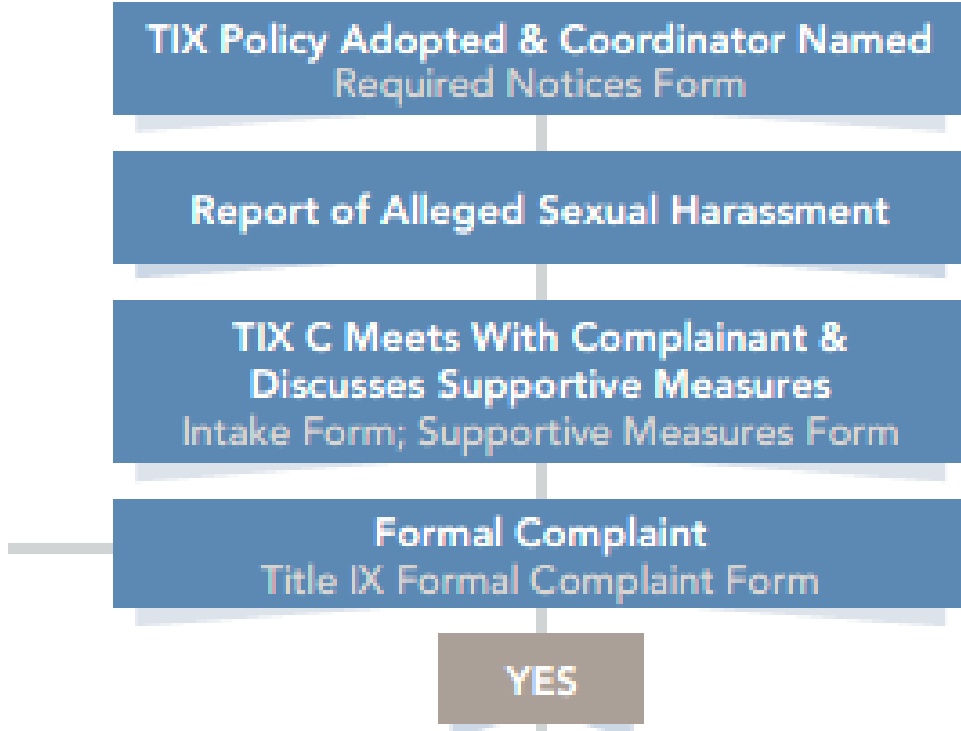
Employee Completing Intake: \_\_\_\_\_  
First Name Last Name Po

Complainant(s): [complete and attach an intake form for each Complainant]

- Name: \_\_\_\_\_  
First Name Last Name
- Student: Age \_\_\_\_\_ Grade in school \_\_\_\_\_
- Employee: Position \_\_\_\_\_ Building \_\_\_\_\_
- Contact Information (and parent/guardian contact information if minor student)  
\_\_\_\_\_  
\_\_\_\_\_

Person(s) Reporting [if different from Complainant(s)]:  
\_\_\_\_\_  
First Name Last Name

# Title IX Flowchart



# Upcoming K-12 Trainings

Register at: [www.bricker.com/events](http://www.bricker.com/events)

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## Level 1

- General Title IX Training: Sep 22

## Level 2 (All 9:00-11:30am)

- TIX Coordinator/Administrator Training: Oct 1
- TIX Investigator Training: Sep 24
- TIX Decision-Maker Training: Sep 22, Sep 25, Sep 28, Oct 2
- TIX Report Writing for Investigators/Decision-Makers: Sep 24, Oct 1
- TIX Informal Resolution Training (**NEW**): Sep 25



Additional information  
available at:

**Title IX Resource Center**  
at [www.bricker.com/titleix](http://www.bricker.com/titleix)

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