



WHITE & STORY<sup>LLC</sup>

ATTORNEYS AT LAW

INFORMAL RESOLUTION PROCESS  
TRAINING – TITLE IX

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## TODAY'S GUIDE

- Title IX Overview, Briefly
- Who knew about “it”? - Notice
- What is “sexual harassment” under Title IX? Where can it happen? First steps and support?
- Title IX Grievance Process
- and Investigations, Generally
- Let's Talk About the Informal Resolution Process
  - Prejudgment, Conflicts of Interest, and Bias
  - Conducting the Process – Need to Know Stuff

## INFORMAL RESOLUTION PROCESS (IRP) REQUIREMENTS

Individuals who facilitate an informal resolution process must receive training on:

- the definition of sexual harassment contained in § 106.30 and the scope of the recipient's education program or activity;
- how to conduct informal resolution processes; and
- how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, or bias.

## WHAT ARE WE TALKING ABOUT?



## WHAT ARE WE TALKING ABOUT?

Title IX of the Education Amendments of 1972 prohibits discrimination on the basis of sex in education programs and activities and employment.

- Covers not only equity in athletic programming but all forms of discrimination based on sex.
- Protects students and employees.
- Applies to all institutions that receive federal financial assistance, either directly or indirectly.
- Enforced by the Office of Civil Rights.

## WHAT ARE WE TALKING ABOUT?

- As an educational professional, you may potentially handle staff on staff issues and/or staff on student issues.
- Title IX is instructive, but there are other options, including utilizing the institution's employee and student codes of conduct/policies.
- This presentation will not address any specific institution policies, procedures, or Title IX activity. This is a general overview, in particular, of the informal resolution process.
- If you have specific questions, you should consult your attorney.

## FIRST THINGS FIRST – NOTICE

- Schools must respond whenever any employee has notice of sexual harassment, including allegations of sexual harassment.
- Notice to the Title IX Coordinator or to an official with authority to institute corrective measures on the recipient's behalf, charges a school with **actual knowledge** and triggers response obligations.

## DEFINITION OF SEXUAL HARASSMENT

- The rule defines sexual harassment broadly to include any of three types of misconduct on the basis of sex, all of which jeopardize the equal access to education that Title IX is designed to protect:
  - *Quid pro quo* definition;
  - *Davis* definition; and
  - Clery Act and VAWA definition.



## QUID PRO QUO

- *Quid Pro Quo*: Offering a benefit in exchange for unwelcome sexual conduct.
  - Note that only a school employee can commit this type of sexual harassment.
- *Quid Pro Quo* harassment is not evaluated for severity, pervasiveness, offensiveness, or denial of equal educational access because such misconduct is sufficiently serious to deprive a person of equal access.

## DAVIS DEFINITION

- *Davis* definition:
  - Unwelcome conduct (determined by a reasonable person to be) so severe *and* pervasive *and* objectively offensive conduct that effectively denies a person equal access to a school's education program or activity.
- Where unwelcome sex-based conduct consists of speech or expressive conduct, schools must balance Title IX enforcement with respect for free speech and academic freedom under the First Amendment.

## CLERY ACT AND VIOLENCE AGAINST WOMAN ACT (VAWA)

- Clery Act
  - Any instance of sexual assault.
- VAWA
  - Dating violence, domestic violence, or stalking.
- Clery Act/VAWA offenses are not evaluated for severity, pervasiveness, offensiveness, or denial of equal educational access because such misconduct is sufficiently serious to deprive a person of equal access.



## SEXUAL HARASSMENT “OCCURRING IN A SCHOOL’S EDUCATION PROGRAM OR ACTIVITY” AND “IN THE USA”

- Schools must respond when sexual harassment occurs in the school’s education program or activity, against a person in the United States
- Education program or activity includes:
  - Locations, events, or circumstances over which the school exercises substantial control over both the respondent and the context in which the sexual harassment occurs; and
  - All education program or activities, whether on-campus or off-campus.

## TITLE IX COORDINATOR

- Schools are required to designate at least one person as the “Title IX Coordinator.”
- Administrator with significant authority and wide-ranging responsibilities.
- Some institutions will allocate part-time responsibilities to the Coordinator. Others will dedicate a full-time position as recently recommended by OCR.
- To alleviate the burden on one administrator, institutions should consider identifying multiple deputy coordinators.

## TITLE IX COORDINATOR: ROLES AND RESPONSIBILITIES

- Creator & Implementor of Appropriate Policy
- Navigating First Amendment Protections
- Point Person for Reports & Complaints
- Contact for Government Inquiries
- Oversight of Prompt & Equitable Grievance Procedures
- Coordinate Overlap of Various Student & Employee Grievance Processes
- Oversight of Informal Resolution Processes
- Supervisor of Investigations

## TITLE IX ESSENTIAL COMPLIANCE ELEMENTS

Once an official with authority has actual notice of sexual harassment/sexual misconduct, the institution must:

- Take immediate and appropriate steps to investigate what occurred.
- Take prompt and effective action to:
  - Stop the harassment;
  - Prevent the recurrence; and
  - Remedy the effects.

NOTE: This is regardless of whether the Complainant makes a formal complaint or asks the institution to take action.

## SCHOOL'S MANDATORY RESPONSE OBLIGATIONS

- A school must respond ***promptly*** to Title IX sexual harassment in a manner that is not deliberately indifferent, which means in a way that is not clearly unreasonable in light of the known circumstances.
- **The timeliness requirement includes the informal resolution process.**
- Title IX Coordinator **must** provide the following information to the individual:
  - The availability of supportive measures;
  - The right to file a formal complaint; AND
  - How to file a formal complaint.



## SUPPORTIVE MEASURES

- Non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, without fee or charge, to the complainant or respondent, before or after the filing of a formal complaint OR where no formal complaint has been filed.
- Such measures are designed to restore or preserve access to the recipient's education program or activity, without unreasonably burdening the other party; protect the safety of all parties and the recipient's educational environment; and deter sexual harassment.
- Supportive measures may include: counseling, course-related adjustments, modifications of work or class schedules, campus escort services, increased security and monitoring of certain areas of campus, and mutual restrictions on contact between the parties.

## GRIEVANCE PROCESS: GENERAL REQUIREMENTS

### Treat parties equitably.

- The school's grievance process must treat complainants and respondents equitably by providing remedies to a complainant if a respondent is found responsible, and by following the prescribed grievance process imposing discipline on a respondent.
- The remedies for a complainant have to be designed to restore or preserve equal access to the school's education program or activity.
- Unlike supportive measures in place with or without a grievance process pending, a complainant's remedies CAN be punitive or disciplinary against the respondent.

## GRIEVANCE PROCESS: GENERAL REQUIREMENTS

### Objective Evaluation of Evidence.

- The school's grievance process must ensure an objective evaluation of all relevant evidence – including inculpatory and exculpatory evidence.
- Credibility determinations cannot be made on the basis of a person's status as a complainant, respondent, or witness.

## GRIEVANCE PROCESS: GENERAL REQUIREMENTS

### Training; No Conflicts of Interest.

- The individuals involved in the process – Title IX Coordinator; investigators; decision-makers; or facilitators of informal, voluntary resolution efforts – must not have any bias or conflict of interest.
- These individuals must also be trained. The materials used to train Title IX personnel cannot rely on sex stereotypes, must promote impartial investigations and adjudications, and must be posted on each school's website (and if a school does not maintain a website, make them available for public inspection upon request).

## GRIEVANCE PROCESS: GENERAL REQUIREMENTS

### Presumption of Innocence.

- Under the school's grievance procedures, the respondent must be presumed not responsible, so that any finding of responsibility only comes at the conclusion of a grievance process.

## GRIEVANCE PROCESS: GENERAL REQUIREMENTS

### Reasonably Prompt Time Frames.

- The grievance process must include reasonably prompt time frames for resolving complaints of sexual harassment.
- Temporary delays are permitted only for good cause.
  - Good cause can include law enforcement activities, the absence of a party or witness, the absence of a party's advisor of choice, or the need to provide language assistance or accommodation of disabilities.

## GRIEVANCE PROCESS: GENERAL REQUIREMENTS

### Description of Range of Outcomes.

- The grievance process must describe or list the range of possible remedies and disciplinary sanctions that could occur following a determination of responsibility.



## GRIEVANCE PROCESS: GENERAL REQUIREMENTS

### Description of Range of Supportive Measures.

- The school's grievance process must describe the range of supportive measures available to complainants and respondents.



## GRIEVANCE PROCESS: GENERAL REQUIREMENTS

- A school's grievance process **cannot** itself discriminate against a complainant or a respondent on the basis of sex.
- Practices must apply equally to both complainants and respondent – either of which can be male or female – and cannot discriminate as between men and women, notably with respect to credibility determinations.

## GRIEVANCE PROCESS: GENERAL REQUIREMENTS

- Written Notice to the Parties
  - When the school begins an investigation, it has to provide the parties with written notice of certain information.
  - It has to give notice to the parties of the school's grievance process, which must comply with the terms (Treat Parties Equitably – Privileges).
  - It also has to include whether there is an opportunity to engage in informal resolution. Schools do not have to offer informal resolution processes, but if they choose to, it is important that they are mentioned in this initial notice.
    - \*\*Schools must not offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student\*\*

# GRIEVANCE PROCESS: GENERAL REQUIREMENTS

## Details of Written Notice:

1. The actual allegations and facts that would constitute sexual harassment.
  - Who, date and location, alleged misconduct that constitutes sexual harassment
2. The presumption of innocence.
3. A statement that the parties are entitled to adviser of their choice.
  - Can be attorney but doesn't have to be.
4. A statement that the parties can request to inspect and review certain evidence.
5. Information regarding the code of conduct and false statements (if this exists).
  - Satisfactory notice has to be provided to the parties before ANY initial interview with the respondent occurs AND has to give the parties sufficient time for a respondent to prepare before an initial interview.

# INVESTIGATIONS

## Gathering Evidence: Schools and Parties.

- The school must investigate the allegations in any formal complaint and send written notice to both parties (complainants and respondents) of the allegations **upon receipt** of a formal complaint.
- The Final Rule protects the privacy of a party's medical, psychological, and similar treatment records by stating that schools cannot access or use such records unless the school obtains the party's voluntary, written consent to do so.

# INVESTIGATIONS

During the grievance process and when investigating:

- The burden of gathering evidence and burden of proof must remain on schools, not on the parties.
- Schools must provide equal opportunity for the parties to present fact and expert witnesses and other inculpatory and exculpatory evidence.
- Schools must not restrict the ability of the parties to discuss the allegations or gather evidence (e.g., no “gag orders”).
- Parties must have the same opportunity to select an advisor of the party’s choice who may be, but need not be, an attorney.
- Schools must send *written notice* of any investigative interviews, meetings, or hearings.

# INVESTIGATIONS

- Schools must send the parties, and their advisors, *evidence directly related to the allegations*, in *electronic format or hard copy*, with **at least 10 days** for the parties to inspect, review, and respond to the evidence.
- Schools must send the parties, and their advisors, an *investigative report* that fairly summarizes relevant evidence, in *electronic format or hard copy*, with **at least 10 days** for the parties to respond.
- Schools must dismiss allegations of conduct that do not meet the Final Rule's definition of sexual harassment or did not occur in a school's education program or activity against a person in the U.S. *Such dismissal is only for Title IX purposes and does not preclude the school from addressing the conduct in any manner the school deems appropriate.\*\**

## INVESTIGATIONS

- Schools **may**, in their discretion, dismiss a formal complaint or allegations therein if the complainant informs the Title IX Coordinator in writing that the complainant desires to withdraw the formal complaint or allegations therein, if the respondent is no longer enrolled or employed by the school, or if specific circumstances prevent the school from gathering sufficient evidence to reach a determination.
- Schools **must** give the parties written notice of a dismissal (mandatory or discretionary) and the reasons for the dismissal.
- Schools **may**, in their discretion, consolidate formal complaints where the allegations arise out of the same facts.

## DECISION-MAKING: OBJECTIVE AND UNBIASED

- The school's decision-maker needs to objectively evaluate the relevant evidence and reach conclusions about whether the respondent is responsible for the alleged sexual harassment.
- A school's decision-maker needs to use independent judgment, so the decision-maker cannot be the same person as the investigator OR Title IX Coordinator.



## DECISION-MAKING: OBJECTIVE AND UNBIASED

Who are the decision-makers?

- Decision-makers must be free from conflicts of interest or bias for or against complainants or respondents and must receive special training about how to be impartial and how to decide what evidence is relevant.
- The decision-maker will weigh the relevant evidence and decide whether it meets the school's standard of evidence for sexual harassment allegations.

# WRITTEN DETERMINATION

After the evidence has been weighed, the determination must be written. It must include:

- The portion of the school's policies that was violated.
- A description of the procedural steps that were taken by the school on the way to getting to that point.
- A finding of facts section.
- A section that draws conclusions after applying the facts to the portion of the school's policy that applies.
- A statement and rationale for the ultimate determination of responsibility.
- Any disciplinary sanctions that the school will impose on the respondent, and state whether the school will provide remedies to the complainant.
- A statement and rationale for any remedies for the complainant, addressing how those remedies will restore or preserve equal access.
- A statement of the recipient's procedures, a statement that the parties have a right to appeal the initial determination regarding responsibility, and the permissible bases for appeal.

## WRITTEN DETERMINATION

### After the Decision:

- The written determination must be sent ***simultaneously*** to the parties along with information about how to file an appeal.
- The school has discretion to set deadlines for when an appeal must be filed, bearing in mind the obligation to conclude the entire grievance process and bring resolution to the situation for both parties within a reasonably prompt time frame.
- The Title IX Coordinator is responsible for carrying out the remedies contained in the written decision.

# RECORDKEEPING

This duty extends for 7 years, and includes several categories of documents:

- Records of a school's investigation;
- Records of any appeal and the materials associated with an appeal;
- Records of any informal resolution process;
- All materials used to train Title IX Coordinators, Investigators, Decision-Makers, and any person who facilitates an informal resolution;
- Records of supportive measures that they took in response to a report or complaint of sexual harassment.

## OTHER THOUGHTS TO CHEW ON

- Confidentiality considerations.
- Retaliation is prohibited.
- First Amendment rights and protections.
- Equal access to evidence and information.

## IRP REQUIREMENTS

- Individuals who facilitate an informal resolution process must receive training on:
  - ✓ the definition of sexual harassment contained in § 106.30 and the scope of the recipient's education program or activity;
  - how to conduct informal resolution processes; and
  - how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, or bias.

## LET'S TALK ABOUT THE IRP

- A school may not, under any circumstance, require a student or employee to waive the right to an investigation and adjudication of formal complaints under Title IX.
- Similarly, a school may not require the parties to participate in the informal resolution of a formal complaint or even offer an informal resolution process unless a formal complaint is filed.

## LET'S TALK ABOUT THE INFORMAL RESOLUTION PROCESS (IRP)

- At any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution and to resume the formal complaint process.
- Informal resolution is not available to resolve allegations that an employee sexually harassed a student.



## LET'S TALK ABOUT THE INFORMAL RESOLUTION PROCESS (IRP)

At any time prior to reaching a final determination, a school may facilitate an informal resolution that does not involve a full investigation and adjudication, provided that the school provides the parties a written notice disclosing:

- (1) the allegations;
- (2) the requirements of the informal resolution process;
- (3) the circumstances under which it precludes the parties from resuming a formal complaint arising from the same facts;
- (4) any other consequences of participating in the informal resolution process; and
- (5) the records that will be maintained or could be shared.

Obtains the parties' voluntary, written consent to the informal resolution.

## LET'S TALK ABOUT THE INFORMAL RESOLUTION PROCESS (IRP)

- What are the pros and cons of informal resolution?
  - Pros: shorter overall timeframe (if successful), simplified process, finality for the parties, control of outcome, greater flexibility, remedies and sanctions personalized for the situation, increased compliance.
  - Cons: delays process if unsuccessful, less process and safeguards, avoidance of consequences.

## WHEN IRP APPLIES FOR TITLE IX ISSUES

- Relies on the voluntary participation of both parties. Therefore, you are not permitted to allow information resolution as a default process.
- Must be appropriate.
- Both parties must agree.
- A formal complaint must be filed.
  - § 106.45(b)(9)
- Again, it cannot be offered to resolve complaints alleging that an employee harassed a student.
- Note: a party may withdraw from information resolution at any time and resume the formal grievance process.

## IRP REQUIREMENTS

You must provide a written notice disclosing the consequences of participating, including but not limited to:

- Disclosure of records or documents that could be shared;
- Disclosure of records or documents that will be maintained; and
- Provide facilitators who are free from conflicts of interest and bias and who are trained to serve impartially.

## IRP POLICY CONSIDERATIONS

Example Policy 1: Informal resolution is available only after a formal complaint has been filed, prior to a determination of responsibility, and if the complainant and respondent voluntarily consent to the process in writing. Informal resolution is not available in cases in which an employee is alleged to have sexually harassed a student. Informal resolution may involve agreement to pursue individual or community remedies, including targeted or broad-based educational programming or training; supported direct conversation or interaction with the respondent; mediation; indirect action by the Title IX Coordinator; and other forms of resolution that can be tailored to the needs of the parties. With the voluntary consent of the parties, informal resolution may be used to agree upon disciplinary sanctions. Disciplinary action will only be imposed against a respondent where there is a sufficient factual foundation and both the complainant and the respondent have agreed to forego the additional procedures set forth in this school's policy and accept an agreed upon sanction. Any person who facilitates an informal resolution will be trained and free from conflicts of interest or bias for or against either party.

# IRP POLICY CONSIDERATIONS

Example Policy 2: The informal resolution process is only available where the complainant has filed a formal sexual harassment complaint that involves parties of the same status (e.g., student-student or employee-employee) and the parties voluntarily request in writing to resolve the formal complaint through the informal resolution process. Within **five workdays** of receiving a written request to start the informal resolution process, the school will appoint an official to facilitate an effective and appropriate resolution. The Title IX Coordinator may serve as the facilitator. Within five workdays of such appointment, the parties may identify to the Title IX Coordinator in writing any potential conflict of interest or bias posed by such facilitator to the matter. The Title IX Coordinator will consider the information and appoint another facilitator if a material conflict of interest or bias exists. The facilitator will request a written statement from the parties to be submitted within 10 workdays. Each party may request that witnesses are interviewed, but the school shall not conduct a full investigation as part of the informal resolution process. The facilitator will hold a meeting(s) with the parties and coordinate the informal resolution measures. Each party may have one advisor of their choice during the meeting, but the advisor may not speak on the party's behalf. The informal resolution process should be completed within 30 workdays in most cases, unless good cause exists to extend the time. The parties will be notified in writing and given the reason for the delay and an estimated time of completion. Any resolution of a formal complaint through the informal resolution process must address the concerns of the complainant and the responsibility of the school to address alleged violations of its policy, while also respecting the due process rights of the respondent. **Informal resolution process remedies include** mandatory training, reflective writing assignment, counseling, written counseling memorandum by an employee's supervisor, suspension, termination, or expulsion, or other methods designed to restore or preserve equal access to the school's education programs or activities. At the conclusion of meetings, interviews, and the receipt of statements, the facilitator will write an informal resolution report and provide the parties with the informal resolution report simultaneously. At any time prior to resolving a formal complaint through the informal resolution process, either party may withdraw in writing from the informal resolution process and resume or begin the formal resolution process.

## IRP POLICY CONSIDERATIONS

Example Policy 3: The Title IX Coordinator will determine whether it is appropriate to offer the parties informal resolution in lieu of a formal investigation of the complaint. In the event that the Title IX Coordinator determines that informal resolution is appropriate, the parties will be provided written notice disclosing: the allegations, the requirements of the informal resolution process including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations, provided, however, that at any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint, and any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared. Both parties must provide voluntary, written consent to the informal resolution process.

## IS IRP RIGHT FOR YOUR SITUATION?

The Title IX Coordinator may look to multiple factors to assess whether Informal Resolution is appropriate or to determine which form of Informal Resolution may be most successful for the parties.

Need to ensure there is adequate time to invest in Informal Resolution (resources, staff, etc.) before committing to the undertaking. No time or staff? Outsource it. Schools are not required to offer an informal resolution process.



# IS IRP RIGHT FOR YOUR SITUATION?

## Considerations:

- Amenability of the parties to Informal Resolution
- Likelihood of potential resolution, taking into account any power dynamics between the parties
- Motivation of the parties to participate
- Civility of the parties
- Cleared violence risk assessment/ongoing risk analysis
- Whether an emergency removal is needed
- Skill of the Informal Resolution facilitator with the type of complaint
- Complexity of the complaint
- Emotional investment/intelligence of the parties
- Rationality of the parties
- Goals of the parties

## IS IRP RIGHT FOR YOUR SITUATION?

IRP should consider the sensitive nature of various allegations, including sexual harassment.

A school cannot require parties to:

1. Confront one another;
2. Meet in the same room; and/or
3. Work things out without a neutral third-party facilitator.



## IS IRP RIGHT FOR YOUR SITUATION?

What about a case that involves alleged violence?

Dating violence oftentimes involves a power struggle wherein one party has or had control over another. It would be difficult to reach a resolution that would overcome that major challenge.

## THE PROCESS

- ATIXA (American Title IX Administrators) has framed a process for Informal Resolution that includes:
  - A response based on supportive measures;
  - A response based on a Respondent accepting responsibility; and/or
  - A response based on alternative resolution, which could include various approaches and facilitation of dialogue.
- Alternative resolution approaches like mediation, restorative practices, transformative justice, etc., are likely to be used more often by colleges and universities.
- ATIXA does not endorse these approaches as better or worse than other formal or informal approaches.

# MEDIATION AND RESTORATIVE JUSTICE

Mediation – a trained, neutral third party helps two or more parties resolve a dispute. Mutual agreement of the parties to settle a dispute through compromise.

- Purpose is not to find fault.
- Does not require an admission of guilty or responsibility.
- Requires participants to agree to work together to develop a resolution.

Restorative Justice – an evidence-based practice used to reduce expulsions, suspensions, and disciplinary referrals. Focuses on righting a wrong, ensuring accountability, repairing damage, and mending relationships. Note: schools that choose to offer restorative justice as a means of an informal resolution should ensure that the restorative justice facilitators are well-trained in effective processes. A school may use trauma-informed techniques during the informal resolution process.

# MEDIATION

- Although not defined by the regs, it is a process by which a neutral third party facilitates the resolution of conflict between two or more parties.
- Facilitators must be qualified and impartial.
- Decision making authority rests at all times with the parties.
- The parties should have clear and sufficient information so that they can make informed decisions.
- A facilitator assists in the clarification of interests and exploration of alternatives.
- They do not make decisions for the parties.
- Their role is to raise questions for consideration by the parties including questions of fairness and feasibility of resolution options.

## RESTORATIVE JUSTICE

- Although not defined by the regs, it usually aims to repair harm done to victims or relationships through facilitation but will vary from program to program.
- Could include a system of institution-based, non-punitive interventions, in which students are brought together with trained staff to discuss differences and conflicts, often in a group setting.
- Goal is to ensure that the process preserves equal access for both parties to educational opportunities.

# ARBITRATION

Must be facilitated by an attained, neutral party. Provides for a trial-like format:

- Evidence is presented;
- Witnesses are called; and
- Arguments are made.

An arbitrator has the authority to make decisions over both parties without their consent and issues a written decision, which is final.



# PICTURES ARE HELPFUL

## INFORMAL RESOLUTION

### RESOLUTION THROUGH TITLE IX PROGRAMS AND GENDER EQUITY



### RESTORATIVE RESOLUTIONS THROUGH CONFLICT RESOLUTION SERVICES



★ = Confidentiality applies. Conflict Resolution professionals exempt from Responsible Employee reporting requirement.

← If, at any point, parties choose not to proceed further or Conflict Resolution Services determines Restorative Resolution is no longer appropriate, the case will be referred back to Title IX to resume the complaint process.

## THE ROLE OF THE FACILITATOR

- Your goal is to assist parties to reach an agreement on their terms and help the parties find a way to move forward with equal access to educational opportunities. You should remain compassionate and neutral, do not take sides or make assumptions. You should help the parties discuss potential resolution terms.
- Consider utilizing an opening script to ensure:
  - Approach is consistent;
  - Overview of the process is provided; and
  - All necessary points are covered.
- Empower the parties to engage and trust in the process by feeling heard.

## BEFORE CONDUCTING MEDIATION

Contact the parties separately at the outset to initiate the process. They must be informed in writing of:

- The allegations;
- The informal resolution process requirements;
- Their ability to withdraw;
- Provisions of confidentiality; and
- Any consequences.

## NEED TO KNOW

Provide the parties with guidance before the mediation starts. This might include information such as the following:

- Confirm that the parties understand the process and what mediation includes;
- Encourage everyone to be honest about their wishes (and the allegations, of course);
- Inquire about needs and possible accommodations to ensure a smooth process;
- Establish ground rules (i.e., if a party becomes disrespectful or violent, the mediation terminates; each party has an opportunity to speak without interruption; etc.);
- Review possible outcomes and solutions that may be achieved through mediation;
- Manage expectations early and upfront – tell people they may not get all of their hearts' desires.

## THE BEGINNING STAGES...

Consider the needs/wishes of the parties.

- Will this occur in person?
- Via zoom?
- In the same room?
- In separate/breakout rooms (i.e. caucus)?
- Do they wish to communicate directly to one another?
- Do they have an advisor/parent/witness/attorney/etc. present?
- Should you provide parties with a chance to make opening statements?

# OPENING STATEMENT



## CONSIDERATIONS FOR THE ACTUAL DAY OF MEDIATION

- Shuttle diplomacy could be considered at the beginning. Truly consider meeting with the parties separately, first, to judge viability of togetherness.
- Begin by providing an overview of the expectations of the parties and process for resolution. (Introductions, rules, possible outcomes).
- Allow each party (whether together or separate) to provide their narrative and perspective of the underlying issues.
- Separation of parties, especially considering emotions and/or factual disputes.
- Ask open-ended questions to get the best results.

## UTILIZE SEPARATION TO LEARN...

- What do they want out of the process and from the other party?
- What would make you feel safe?
- What do you want your days at school to look like after this resolution?
- 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 versus what do you want? Are they different?
- What could you live with? What are you unwilling to accept?



## UTILIZE SEPARATION TO LEARN...

- Confirm primary (or top three) for each party.
- Clarify with each party what you will share with the other party or what they are willing to share with the other party. It may not be everything they've discussed with you. Trust is crucial.
- Go through the lists to attempt to identify any areas of overlap, if any.
- This may require multiple trips between parties until a resolution can be reached.
- Once reached, ensure both parties understand the terms and have agreed to the same terms.

## WHEN AN AGREEMENT IS REACHED

- Document the terms of the agreement while you are still with the parties – it's important to be quick and efficient once the agreement is made.
- Ensure the parties review the document and specific terms, make changes as necessary.
- The parties must sign the document to confirm that it accurately reflects their understanding of the agreement.
- Consider including:
  - Confidentiality provisions\* (and related consequences for violation); and/or
  - Consequences for failure to adhere to the agreement.
- Provide a copy for approval to the appropriate school official.
- Once approved, ensure each party and the Title IX Coordinator receive a copy.

## WHEN AN AGREEMENT IS REACHED

- Consider giving the parties time to consider the proposed resolution(s).
- Helpful to set a deadline for this consideration period.
- Reverting to the formal process can be the default outcome if a resolution is not reached by the deadline set.
- Can continue to facilitate discussion if parties believe a resolution can be reached.
- Maintain any records of the process and its results.
- Neutrally remind parties:
  - The limitations of the informal resolution process (requires both parties to agree in order to complete).
  - They can revert to the formal grievance process at any time/if unsuccessful.
  - They have more control over the informal resolution process.

## \*CONFIDENTIALITY PROVISIONS

- Terms of the resolution should only be on a need-to-know basis
- Can include penalties for either party sharing or publishing the agreement
- Reminder that student records are subject to FERPA
- Gag orders are best to avoid (first amendment, academic freedom, PRR considerations)
- How will violations be enforced?
- What if the violation occurs years after they've left the institution?
- Is there a distinction between a family member, partner therapist and a blog, journalist, or other media?
- Will it appear as though the institution is attempting to conceal information?

# POTENTIAL RESOLUTIONS

Important: Do we have “buy-in” from internal stakeholders on proposed resolution (people need to be empowered to say “no”)?

- Apology?
- Restitution?
- Discipline? Lesser conduct offense?
- “No contact” order? How would we enforce?
- Agreement to stop harassing practices?
- Removal from team/class?
- Educational conversation/training? What would we discuss? Who would handle?
- Do we involve the coach/employee/teacher in the resolution?

## IRP REQUIREMENTS

Individuals who facilitate an informal resolution process must receive training on:

- ✓ the definition of sexual harassment contained in § 106.30 and the scope of the recipient's education program or activity;
- ✓ how to conduct informal resolution processes; and
- how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, or bias.

## SERVICE

- To serve as a facilitator, you need to be:
  - Impartial;
  - Free of prejudice; and
  - Free from bias.

## IMPARTIALITY

- Facilitators must not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent.
- Facilitators must objectively evaluate all relevant evidence—including both inculpatory and exculpatory evidence.



# IMPARTIALITY

What does it mean for a facilitator to have bias or a conflict of interest?

- Avoid prejudgment of facts at issue.
- Avoid inferences based on party status.
- Avoid sex stereotypes. How can an institution ensure that its investigator remains free of bias and conflict of interest?
- Ensure adequate training and understanding of bias and conflict of interest.
- Encourage/do not penalize facilitator for disclosing bias or conflict of interest.

# PREJUDGMENT

Prejudgment – you’ll find a variety of definitions:

- an attitude, belief, or impression formed in advance of actual experience of something to pass judgment prematurely or without sufficient reflection or investigation
- a judgment reached before the evidence is available

Neither Complainants nor Respondents should be met with prejudice throughout the process.

# PREJUDGMENT

When might prejudgment occur?

When allegations involve:

- Sexual conduct;
- Sexual history;
- Drugs, and/or alcohol use; and
- Sex stereotypes also often lead to prejudgment.

# PREJUDGMENT

How do you avoid prejudging facts?

- Keep an open mind by fighting the urge to react, closing yourself off, avoiding speculation, getting comfortable in uncomfortable situations.
- Wait to hear all facts.
- Seek additional facts, witnesses, evidence, etc. to help the process.

# PREJUDGMENT

**CAUTION!** Check your assumptions in situations involving:

- sexual assault;
- drugs or alcohol use; and/or
- same sex or non-binary parties.

## CONFLICTS OF INTEREST

When should (or does) a COI disqualify you from a role? Consider the following questions:

If my colleagues became aware of the conflict, how would I feel/react?

If the media became aware of the conflict, how would I (or they) feel/react?

If I saw someone else with the same potential conflict, how would I feel/react? Would I think they should be barred from participating?

If the conflict was made known to the other party, how would I (or they) feel/react?

# CONFLICTS OF INTEREST

## Actual Conflict

- Circumstances exist which would reasonably prevent you from objectively and competently participating in the informal resolution process including imposing sanctions, remedies, or supportive measures for either party.
- If you have an actual conflict, you should recuse yourself.

## Appearance of Conflict

- Circumstances exist that would cause a reasonable person with knowledge of those circumstances to believe that you have an actual conflict.
- If you have the appearance of conflict, probably recuse yourself.

# BIAS

A bias is:

- A tendency, inclination, or prejudice toward/against someone or something;
- Attitudes that affect our understanding, actions, and decisions;
- Mental shortcuts that may result in prejudgments, which could result in improper decisions or potentially discriminatory practices.



# BIAS

A bias may be based on:

- Stereotypes;
- Gender;
- Race; and/or
- Sexual orientation.

# IMPLICIT BIAS

## Commonly associated implicit biases:

- Skin color;
- Gender;
- Age; and/or
- LGBTQA/Transgender status.

## Other characteristics less commonly associated implicit biases:

- Height and weight;
- Introversion and extroversion;
- Marital and parental status;
- Disability status;
- Accents, or international cultural differences;
- College or hometown;
- Volunteer activities; and/or
- Body modifications/manner of dress.

# IMPLICIT BIAS



## BIAS

“[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)

## IRP REQUIREMENTS

Individuals who facilitate an informal resolution process must receive training on:

- ✓ the definition of sexual harassment contained in § 106.30 and the scope of the recipient's education program or activity;
- ✓ how to conduct informal resolution processes; and
- ✓ how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, or bias.

SO ME PUT IN WORK, WORK, WORK,  
WORK, WORK, WORK

Let's see what you learned today and how we can apply it in the real world...

Let's do our ABC's – A, B, C, D, E, F (Repeat)...You get the picture. We have three groups.



# WHIP IT REAL GOOD – GROUPS A AND B



# (WO)MEN AT WORK – GROUPS C AND D





WORKING 5 TO 9, MAKING SOMETHING OF  
YOUR OWN NOW—  
GROUPS E AND F



## WHIP IT REAL GOOD – GROUPS A AND B

Felicia was recently appointed Wonderful School's Title IX Coordinator and was also told that she will serve as the Informal Resolutions Facilitator should those needs arise under Title IX. Felicia is jam up. That is, she is very good at her job as Wonderful School's Human Resources Director. Felicia has worked very hard to achieve that role at an early age, even surpassing more tenured, eh hem seasoned, folks at Wonderful School. Felicia is really great connecting with the students, in part because of her age, but also because she "gets on their level". Felicia has often been seen taking students for coffee, treating them to lunch, and, on occasion, going "out" with the girls to the local pub for pint night. Felicia's first major Title IX matter involves a seventy-three-year-old professor – Darla, and Josh, a student who is twenty. Josh filed a formal Title IX complaint, alleging that Darla approached him from behind multiple times, rubbed his shoulders, and told him (as she blew her sweet, minty breath into his ear) that she would "rub his grades in an upward trajectory if he would rub her down [there]." Both Darla and Josh voluntarily agreed to engage in mediation; however, when Felicia called Darla to discuss the parameters and initial overview of the process, Darla became quiet, got defensive, and told Felicia that she was not comfortable with Darla handling this matter due to her "lack of experience" and personal knowledge that Darla favored students over staff. In fact, Darla told Felicia that she overheard one of her comrades complaining that Felicia had students "in and out of her office" when she should have been meeting with staff during the benefits enrollment period. Josh is unaware this conversation took place between Darla and Felicia.

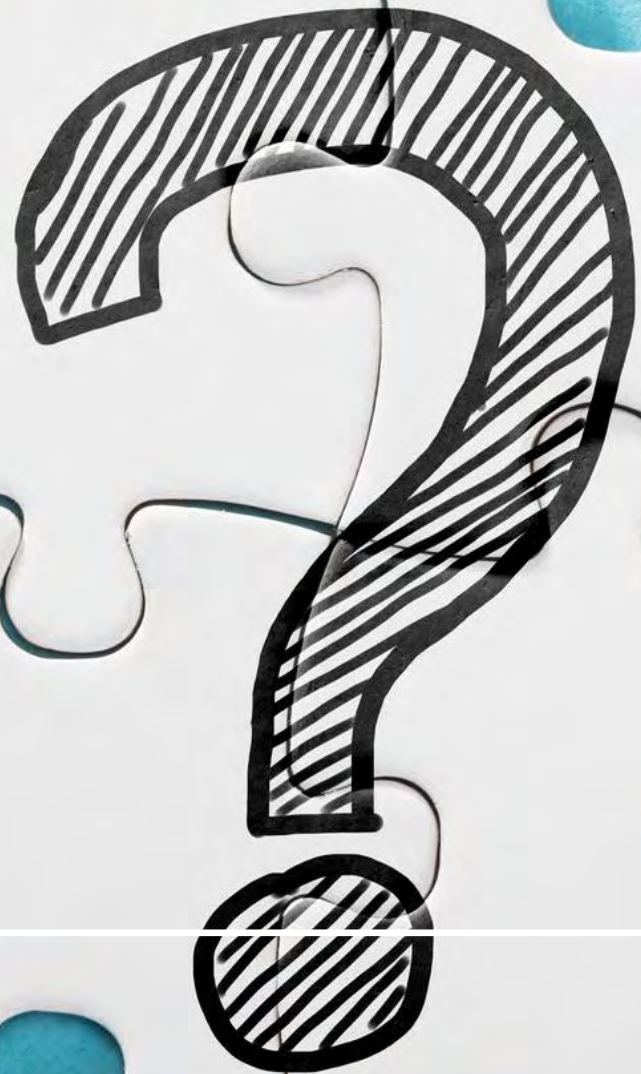
## (WO)MEN AT WORK – GROUPS C AND D

You are assigned your first matter concerning Title IX. Your role is to serve as the Title IX Informal Resolution Facilitator. During the debrief with your boss before beginning the process, you learn the following facts: Ashley (a student) alleges in her formal complaint that Antonio (a professor) invited all of his students to office hours for assistance. Ashley took advantage of that time with Antonio and met with him four or five times about assignments. After their fifth meeting, Ashley admits that she developed a crush on Antonio and invited him to dinner at her apartment. The two had dinner and parted without issue. Subsequently, this relationship blossomed into a full-on romantic relationship, during which time Ashley had multiple, consensual sexual encounters with Antonio. However, Ashley got bored with Antonio and broke off their courtship to date one of her classmates. Thereafter, Ashley noticed that Antonio called her multiple times, followed her in her car, left her suspicious packages, and begin waiting by her apartment building for her when she was entering and exiting her place. She filed a police report, but the cops did not do anything. She feels like Antonio is stalking her, and she just wants him to stop, especially since she finished his class two semesters ago. You are told that both parties want to resolve this through mediation. Ashley is even prepared to meet in person with Antonio to close this chapter in her college career.

## WORKING 5 TO 9, MAKING SOMETHING OF YOUR OWN NOW— GROUPS E AND F

You are the mediator and are presented with the following facts: Warren and Carmen are both students enrolled at UW in University. Carmen verbally reported to her Department Lead that Warren has sent her sexually explicit emails (assume they meet the definition of sexual harassment provided by Title IX). She wants to move forward and seek a resolution right away. You convene the mediation and determine that, because Carmen is visibly upset, that you should break into caucus immediately. During caucus with Warren, he tells you that he did, indeed, send the emails to Carmen and that he would do it again because he is madly in love with her. He asks you not to share that he loves her because he can't bear another rejection from her. He also tells you that there is no way he will ever apologize to her because his communications were sent with love; however, he loosely agrees that he will not talk to her ever again (or send her correspondence). You shuttle over to Carmen, tell her that Warren is apologetic but cares for her deeply, and tell her that you think he will agree to a three-year no contact order. Carmen becomes emotional again, sobbing uncontrollably, but you urge her to press on. After another twelve-minute crying spell, she blows her nose and says that she will agree to a no contact order on the condition that, if Warren breaks it, he will surrender to the local police for arrest. You quickly draft an agreement, memorializing these terms. When you show it to Warren, he becomes irate, telling you that he will not submit to the police. You calm him down, after fifteen minutes, and basically tell him that if he does not sign the agreement that Carmen will press charges anyway. Feeling threatened, Warren acquiesces.





QUESTIONS?