

Title IX Informal Resolution Training

July 27, 2023



Meet Our Team



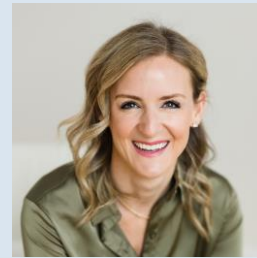
Sean Somermeyer
Partner



Carl Crosby Lehmann
Partner



Mary Dunnewold
Partner



Nina Harris
Director



Kari Hohn
Director

Ballast Offerings

1

Drafting & Updating

Policy and process development and review

2

Training

Legally compliant Title IX and non-discrimination trainings tailored to individuals' roles and knowledge base

3

Investigators, Alternative Resolution Facilitators, & Decision-makers

Trained, skilled, experienced, and practical

4

Interim Roles

Interim services to fill gaps in various Title IX positions

5

Advice & Coaching

Legal and non-legal advising

Ballast Philosophy & Approach



Collaborative partnerships that honor institutional knowledge and values



Practical solutions that are compliant and make sense for your specific institution and community



Reasonable and fair pricing that acknowledges the financial constraints institutions are facing



First-hand experience and understanding from individuals who have previously worked within higher education institutions

Agenda

- Legal overview and required training
 - Definitions
- Informal Resolution process overview
 - What has happened already?
 - Role of the Facilitator
- Pre-process logistics
- Conducting an Informal Resolution process
- Wrapping up the process



Legal Overview

“

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance.

”

20 U.S.C. § 1681

Title IX Basics

Prohibits gender discrimination in education programs and activities

Applies to students, employees, volunteers, etc.

Includes sexual harassment

Essential Compliance Elements

Institutions must:

- Respond promptly in a manner that is not “deliberately indifferent”
- Investigate formal complaints
- Follow and publish the grievance process outlined in the regulations
- Take action to *stop the harassment, prevent the recurrence, and remedy the effects*
- Designate a Title IX Coordinator
- Publish a Notice of Nondiscrimination
- Disseminate a policy prohibiting sex discrimination
- Offer supportive measures
- Conduct training for Title IX personnel and those with heightened responsibilities
- Train students and employees



Sexual harassment = conduct on the basis of sex

Quid Pro Quo

- Employee conditions an outcome on an individual's participation in unwelcome sexual conduct

Hostile Environment

- Unwelcome conduct that is so severe, pervasive, and objectively offensive that it denies a person equal access to a program or activity

VAWA Crimes

- Sexual assault
- Dating Violence
- Domestic Violence
- Stalking

The Clery Act and the Violence Against Women Act (VAWA)

Clery

- Consumer protection law
- Institutions must provide accurate, timely, and complete information on specific types of crimes that occur on or adjacent to campus, including sexual assault
- Clery Act violations come with significant fines
- Policy, procedure, prevention, and training requirements for
 - Dating violence
 - Domestic violence
 - Stalking
 - Sexual assault
- Requires Annual Security Report including institution's policies and crime statistics

VAWA

Institutions must:

- Prohibit sexual assault, dating violence, domestic violence, and stalking
- Provide clear definitions for the above misconduct and for consent
- Incorporate training and prevention programs for administrators, students, and employees



Training Mandates

Definitions

- Sexual harassment
- Education program or activity

Other

- Institutional policies and procedures
- Any technology for live hearings
- Training materials must be posted on institution's website and maintained for seven years
- Training cannot rely on sex stereotypes

Concepts

- Conducting an impartial investigation and hearing process
 - ... While protecting the safety of complainants and promoting accountability
- Serving impartially, without bias, and without conflicts of interest
- Relevance regarding questions, evidence, and the investigation report
- Dynamics of sexual assault, dating violence, dating violence, and stalking



What about FERPA?

- Right to know what records exist
- Right to dispute accuracy
- Right to control access
 - Legitimate educational interest
 - Reporting Party can know determination
 - Disciplinary sanctions when found responsible for sexual misconduct
- VAWA trumps FERPA

Definitions



Sexual harassment =

conduct on the basis of sex that satisfies at least one of the following:

Quid Pro Quo

- Employee conditions an outcome on an individual's participation in unwelcome sexual conduct

Hostile Environment

- Unwelcome conduct that is so severe, pervasive, and objectively offensive that it denies a person equal access to a program or activity

VAWA Crimes

- Sexual assault
- Dating Violence
- Domestic Violence
- Stalking

Hostile Environment Considerations

- Perspective of a “reasonable person” (consider age, abilities, positions of authority, etc.)
- Is it “severe, pervasive, *and* objectively offensive”?
- Does the conduct deny “equal access”? Does not need to be a total or complete loss of access, but *equal*?
- Consider the type of misconduct, how often it happened, where it took place, etc.



Examples of Sexual Harassment

- Unwelcome sexual flirtations, advances, touches, or propositions
- Verbal abuse of a sexual nature
- Requests for sexual favors
- Recording video or photographs of a sexual nature without consent
- Cyber harassment
- Punishing or threatening to take adverse action against a subordinate or student for refusing to comply with sexual demands

Sexual Assault

Any sexual act directed against another person, without the consent of that person, including instances where the individual is incapable of giving consent.

Rape: Penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without their consent, including instances where they are incapable of giving consent because of age or temporary or permanent mental or physical incapacity.

Fondling: The touching of the private body parts of another person (buttocks, groin, breasts) for the purpose of sexual gratification, forcibly and/or against that person's will (non-consensually), or not forcibly or against the person's will in instances where the Complainant is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity.

Incest: sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law



Sexual Assault contd.

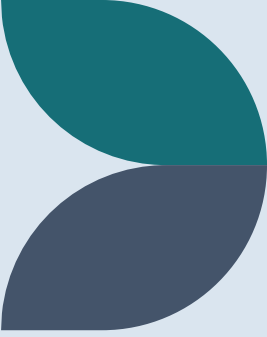
Any sexual act directed against another person, without the consent of that person, including instances where the individual is incapable of giving consent.

Statutory Rape: Nonforcible sexual intercourse with a person who is under the statutory age of consent

Sexual assault with an object: The use of an object or instrument to penetrate, however slightly, the genital or anal opening of the body of another person, forcibly and/or against that person's will (non-consensually) or not forcibly or against the person's will in instances where the Complainant is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity.

Sodomy: Oral or anal sexual intercourse with another person, forcibly and/or against that person's will (non-consensually), or not forcibly or against the person's will in instances where the Complainant is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity





Consent

Institutions are not required to maintain a particular definition of consent; however, they should include a definition in their policy.

Consent is words or overt actions by a person clearly and affirmatively communicating a freely-given, present agreement to engage in a particular form of sexual contact.

Incapacitation

- An individual's physical and/or mental inability to make informed, rational judgments
- Incapacitated individuals cannot give consent to sexual contact
- Intoxication vs. Incapacitation
- Examples include: sleep, unconsciousness, or intermittent consciousness
- Signs include: slurred speech, difficulty walking, vomiting
- May also exist due to mental or developmental disability
- **Frequent decision point for adjudicators:** *1) Was the complainant incapacitated; and 2) did or should the respondent (or a reasonable person) know/have known?*

Dating Violence

Violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the Complainant. The existence of such a relationship shall be determined based on the Complainant's statement and with consideration of the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.

- Dating violence includes, but is not limited to, sexual or physical abuse or the threat of such abuse.
- Dating violence does not include acts covered under the definition of domestic violence.

Domestic Violence

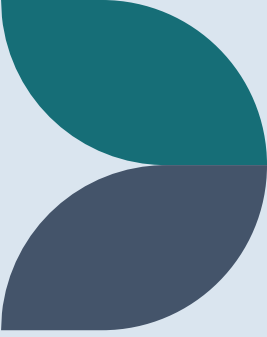
A felony or misdemeanor crime of violence committed:

- By a current or former spouse or intimate partner of the Complainant;
- By a person with whom the Complainant shares a child in common;
- By a person who is cohabitating with, or has cohabitated with, the Complainant as a spouse or intimate partner;
- By a person similarly situated to a spouse of the Complainant under domestic or family violence laws;
- By any other person against an adult or youth Complainant who is protected from that person's acts under domestic or family violence laws.

Stalking

Engaging in a course of conduct directed at a specific person that would cause a reasonable person to fear for their safety or the safety of others; or suffer substantial emotional distress.

Course of conduct means **two or more acts**, including, but not limited to, acts in which the stalker directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person's property.



Sexual exploitation

A form of sexual harassment that involves one or more of the following behaviors committed for any purpose, including sexual arousal or gratification, financial gain, or other personal benefit:

- taking sexual advantage of another person without consent;
- taking advantage of another's sexuality; or
- extending the bounds of consensual sexual contact without the knowledge of the other individual.

What are some examples of sexual exploitation?

Retaliation

Any intimidation, threats, coercion, or discrimination against any individual because the individual has made a report, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing.

Education Program or Activity under Title IX

What does it mean?

- Locations, events, or circumstances...
- On or off campus...
- Over which the institution exercises substantial control over the context in which the harassment took place.

Additional requirements:

- Must have occurred within the United States.
- Includes conduct that occurred in any building owned or controlled by an officially recognized student organization.
- Institution must also have exercised substantial control over the responding party.



Parties' relationship with the institution

Reporting Party

Must be participating or attempting to participate in the institution's education program or activity at the time of filing a Formal Complaint.

**Broad interpretation of "participating or attempting to participate in"*

Responding Party

An institution's ability to take disciplinary action under Title IX is limited when the Responding Party is not affiliated with the institution.

**But... should still consider appropriate action steps to facilitate reporting party's participation in education programs and activities.*

What about a reporting party from outside the institution who reports against a current student or employee?



A Note about Sex-Based Discrimination

Discrimination based on sex or gender (i.e., adverse or preferential treatment based on someone's sex, gender identity, sexual orientation, etc.) is still prohibited under Title IX; however, institutions are not obligated to implement all the same Grievance Process requirements as stated in the regulations in order to address and/or investigate those types of concerns.

What happened prior to the Informal Resolution Process?



Initial Conversation with a Reporting Party

Process Options:

- Law enforcement report
- Grievance Process
 - Informal Process
- Taking time to decide what to do next, if anything
- Potential for TIXC Formal Complaint
- Preservation of evidence

Supportive Measures:

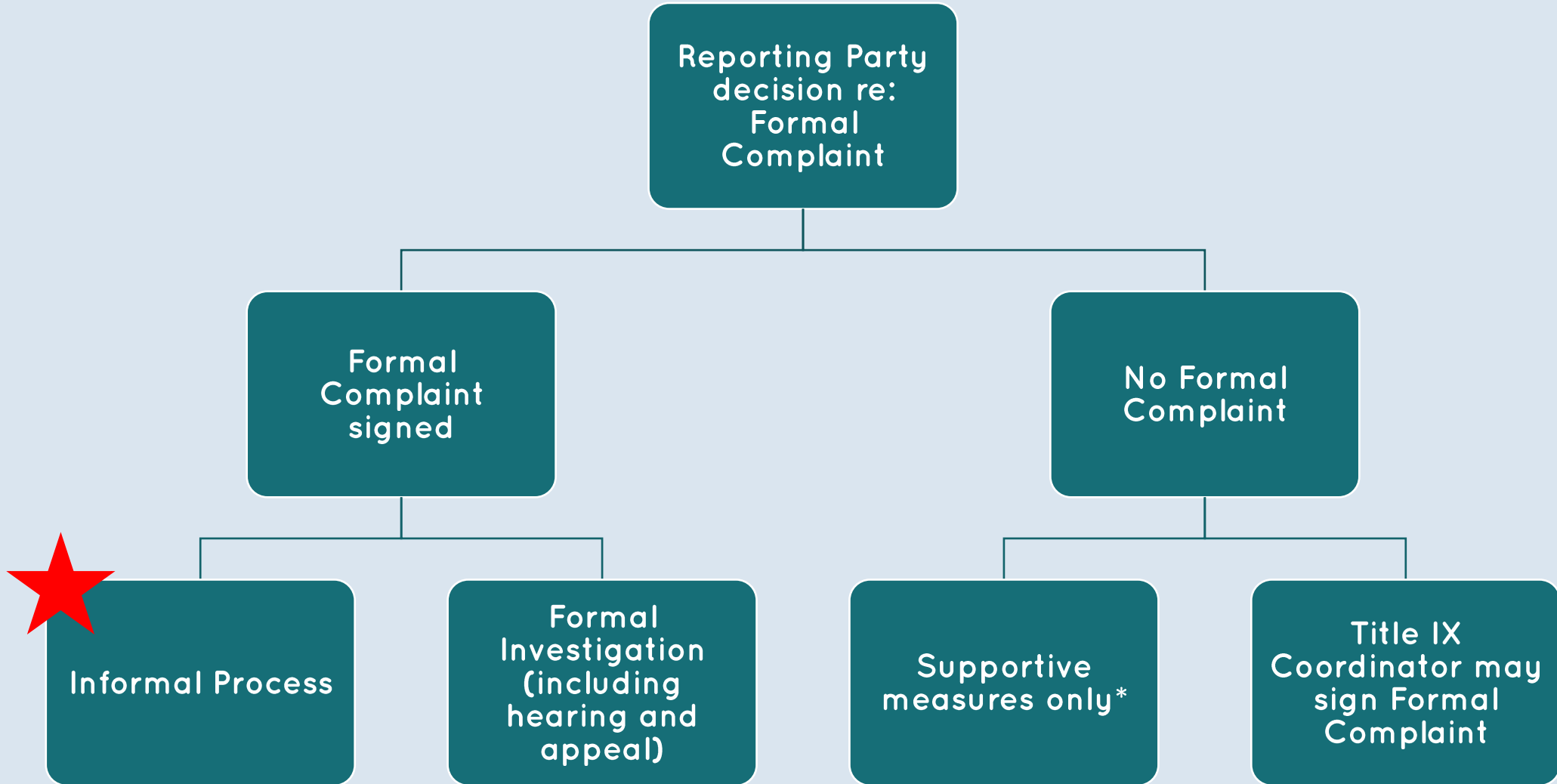
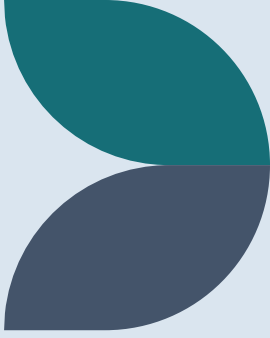
- Cannot be punitive
- No-contact directives
- Accommodations for housing, classes, etc.
- Confidential resources
- Community resources
- Campus security escorts
- Etc.

**Access to these resources is not contingent upon moving forward with a formal complaint*

Next steps for TIXC:

- Does the reported incident fall within the scope of your policy? If so, which process would apply?
- Notify others at the institution who need to know?
- Timely warning?
- Emergency removal?
- TIXC Formal Complaint if reporting party declines Grievance Process?





Starting the Grievance Process

Formal Complaint initiated by Reporting Party

- Can initiate at any time
- Requests an investigation
- Must be signed and in writing, but can be on paper or electronic (i.e., via email)

Formal Complaint initiated by TIXC

Consider:

- Egregiousness of allegations?
- Use of weapon?
- Risk? Threat?
- Availability of evidence?
- Discuss with Deputies or Title IX Team
- If proceeding, notify reporting party



Notice of Allegations

- Notice of grievance process and the informal process
- Information about the allegations known at the time (names, conduct constituting sexual harassment, date and location of incident)
- Responding party presumed not responsible, and that the determination of responsibility occurs at conclusion of the process
- Rights of parties to an advisor, to review evidence, etc.
- Any code of conduct provision prohibiting knowingly making false statements/submitting false information
- Provide with sufficient time for parties to prepare a response
- Includes information about the Informal Resolution process option
- **If additional allegations arise during the process, provide an amended or additional notice to both parties*

Notice of Allegations contd.

Beyond the allegations, Notices must include information specific to the Informal Process including:

- 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
- 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
- any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared.

Advisors

- Advisors assist parties throughout the process; can be attorneys, advocates, friends, family members, mentors, etc.
- Parties have the right to an advisor of their choice
- Advisors may attend meetings and interviews with the party, including meetings related to the Informal Resolution Process
- Consider incorporating Advisor Guidelines and expectations
- What if an advisor is being overtly disruptive or not adhering to your Advisor Guidelines?

Informal Process Overview



Informal Process

Title IX Requirements

- Must be voluntary; parties must provide written consent to participate
- Formal complaint required
- Allowed at any time prior to final decision being made
- Title IX Coordinator has discretion
- Unavailable when responding party is an employee and reporting party is a student

Various approaches

- Alternative resolution (i.e., restorative justice, dialogue facilitation, etc.)
- Shuttle diplomacy or negotiation
- Responding party does not need to accept responsibility to access informal process, but that can be written into your policy if desired

When should an Informal Process happen?

When CAN'T you utilize an Informal Process?



What is Mediation?

- ❖ A process where the parties meet with an impartial and neutral person who assists them in the negotiation of their differences.
- ❖ Mediation leaves the decision power totally and strictly with the parties.
- ❖ The mediator does not decide what is "fair" or "right," does not assess blame nor render an opinion on the merits or chances of success if the matter is investigated.
- ❖ The mediator acts as a catalyst between opposing interests attempting to bring them together by defining issues and eliminating obstacles to communication, while moderating and guiding the process to avoid confrontation and ill will.

Modified from JAMS

Pros and Cons

Pros

- Quick
- Low/No confrontation
- Parties in control
- Parties feel heard
- Focus on resolution; not conflict
- Less resources and risk

Cons

- Coercive?
- Doesn't hold perpetrators accountable?
- Lack of due process?
- Puts community at risk?
- Party changes mind?



Informal Process Considerations for the Title IX Coordinator

- Does completing an informal process mean that the reporting party can no longer resume/initiate the investigation process?
- What records will be maintained, and with whom could they be shared?
- What outcome is necessary to stop, prevent, and address effects of the harassment?
- What types of allegations are more/less appropriate for informal resolution?
- Consider the parties and whether this type of resolution could truly be successful.
- What if the allegation is especially egregious – is informal resolution still an option?

Your Role as a Facilitator



Facilitator role

- Remain impartial
- Do not need to know all the details of the reported incident
- Explain to parties their rights and the limitations of the process
- Attempt to determine agreeable outcomes for both/all parties
- You are not an advisor and it is not within your scope to consider either party's interests
- Refrain from judgment or opinions about the validity of a matter
- Avoid conflicts of interest and bias



Conflicts of Interest



Biases *for* or *against* reporting or responding parties individually or generally



A material connection to the parties, witnesses, or issues that would cause a reasonable person to question partiality



Immediately disclose any potential conflicts of interest to the Title IX Coordinator



Conflicts of interest may be raised on appeal



Incorporate an avenue for parties to raise potential conflicts of interest early in the process

Avoiding Bias

Bias = tendency to like or dislike; may involve stereotypes

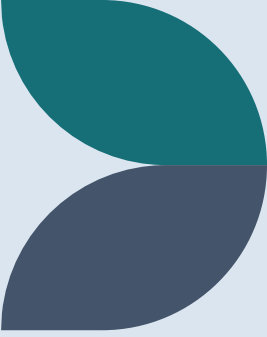
Might be implicit

Avoid prejudgment of the facts

Frequent implicit biases

- Race
- Gender
- Gender identity
- Gender expression
- Sexual orientation
- Religion
- National origin
- Ethnicity
- Age
- Disability
- Marital status
- Veteran status





Conflict, or not?

- Complainant is a star athlete and her coach is a member of the panel pool.
- Respondent worked with one of the decision-makers on a potential conduct violation.
- Susan, the investigator, majored in Women and Gender Studies as an undergrad.
- Complainant is an Econ major, and one of the decision-makers is an Econ professor.

Pre-process Logistics



Pre-Process Goals

- Explain Process to parties
- Opportunity to ask questions and make informed decisions
- Institution weighs in on whether to permit Informal Resolution
- Make necessary preparations



Explaining the Process

- Meet with parties separately
- Explain purpose and logistics
 - Not an investigation
 - Either party can discontinue the process
 - Binding only if agreement reached / never imposed
 - Permitted to have an advisor
 - Identify mediator and discuss bias / conflict issues
- Support process without selling



Prepare for Questions

How long will this take?

What do most people do?

Why aren't you punishing him?

Why would I do this when I didn't do anything wrong?

Do I need a lawyer?

Will it look bad if I don't agree?

Will we be in the same room?



Institutional Review

- Must have formal complaint first
- May not follow determination of responsibility
- Cannot mediate matters involving student and employee
- Create record to refute “deliberate indifference”
- Assess potential impact on community



Important Question...

What information will be documented and could potentially be shared through an informal resolution process? Parties will want to know the answer to this...



Conducting an Informal Resolution Process



Initial Conversation

- Meet with parties separately
- Confirm no concerns about bias / conflict of interest
- Discuss Facilitator's role in process
- Recommend having an advisor
- Not an investigation / feel free to share information (can that be shared later?)
- Remind of option to discontinue and impacts of that decision
- Answer questions



Facilitator Strategies

- Be an active listener
- Remain impartial / neutral
 - As to what happened
 - As to terms of resolution
- Seek to understand not only the “what” but the “why” before asking what parties want
- Be realistic about options
- Don’t push an outcome
- Use email to summarize and document



Take your time

- Explain this may take multiple meetings / let time be on your side (within reason)
- Keep moving and keep parties invested in process
- Want informed and voluntary agreement



What does “prompt” mean?



Regs require reasonably prompt timeframes



Temporary delays for “good cause” are ok, as long as they’re accompanied with written notice of the delay to the parties



Incorporate grievance process timeframes into your policy, but build in opportunity for discretion (case complexity, law enforcement investigation, breaks, etc.)



Consider incorporating weekly updates to the parties

Potential Terms of Resolution

- Suspension
- No contact order
- Nondisparagement
- Change in classes (now and future)
- Change in residence hall (now and future)
- Withdrawal from athletics team or co-curricular activities
- Reimburse expenses
- Boundary counseling and other mental health or addictions services
- No further action or investigation
- No admission of responsibility
- Agreement not to sue
- Impact of not following terms



Next Steps: When does it end?

- Keep going with process or...
- Declare impasse or...
- Either party may bow out or...
- Agreement reached.



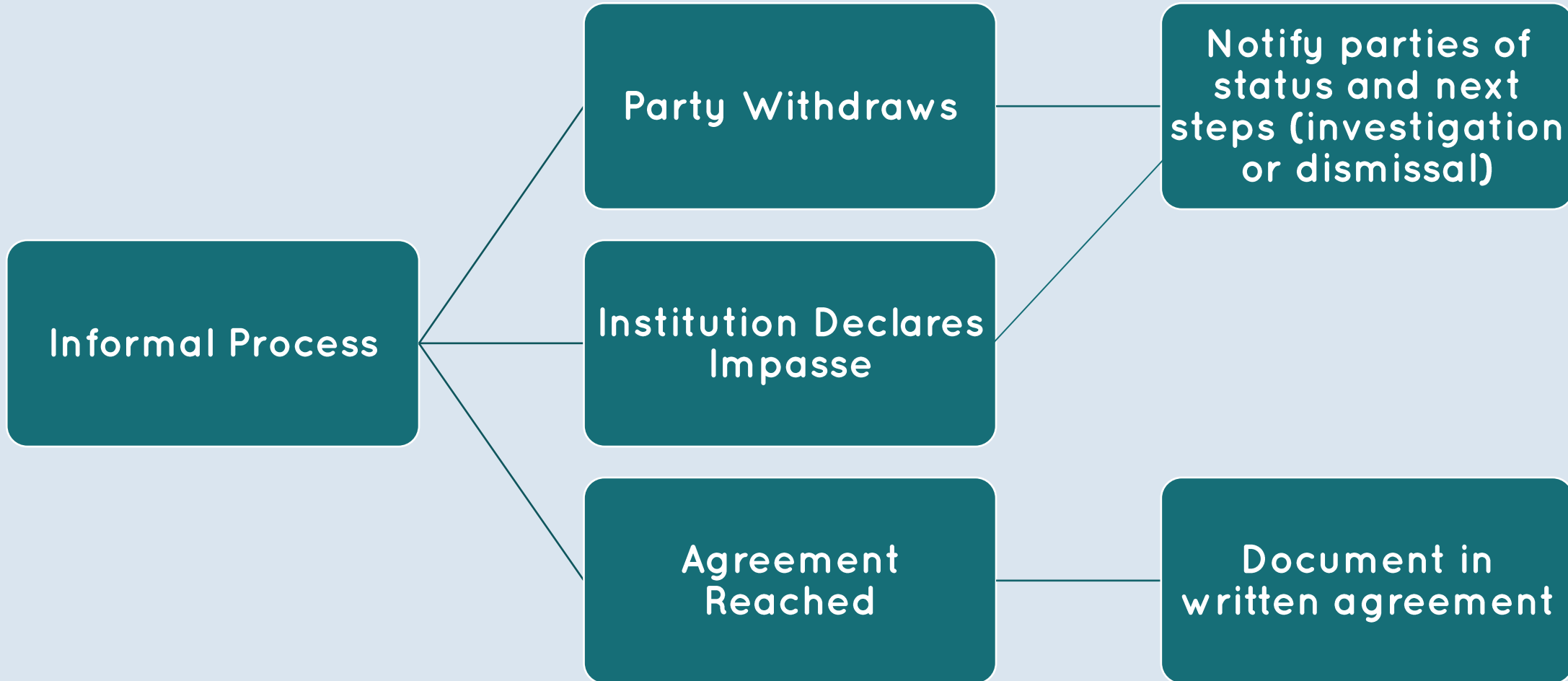
Collaboration with Title IX Coordinator

- How often should you provide status updates to the Title IX Coordinator?
- What are some reasons why you might need to get the Coordinator's input or involvement?
- Should you confer with the Coordinator prior to finalizing the agreement?



Wrapping up the Process





Documenting Mediated Settlement

- Summary of process / voluntary & not an investigation
- Reviewed and approved by institution
- Identified facilitator / opportunity to raise conflicts/bias concerns
- Details about the terms of the agreement
- Facilitator has no duty to advise of rights or protect rights
- Agreement is binding and may adversely impact parties' rights
- Impact of noncompliance (separate disciplinary process and/or nullification of agreement)



What next?

The Facilitator's job is done!

Consider what notes/documentation you should share with the Coordinator for recordkeeping purposes.

Title IX Coordinator will be responsible for maintenance of the agreement and ensuring its terms are upheld.

If you have any feedback about how the process went or areas for improvement next time, consider sharing those with the Coordinator.

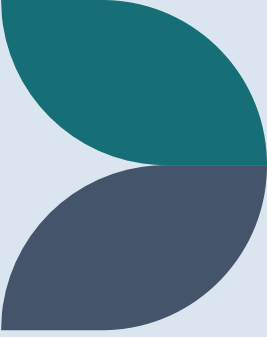
Recordkeeping

Records must be retained for at least **seven years.**



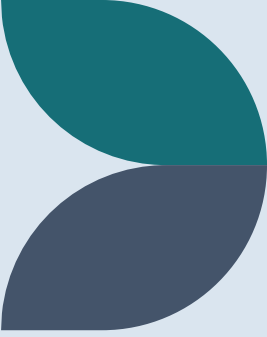
Records to maintain:

- Any informal resolution and the outcome of the process
- Training materials for decision-makers, investigators, Title IX Coordinators/Deputies, and informal resolution facilitators
- Post training materials on website



Impact of Proposed Regs on Informal Resolution

- Clarification of student/employee status
- More flexibility regarding Facilitator training
- Formal Complaint requirement gone – can access the Informal process more easily



Discussion

Examples of successful informal resolution processes?

Examples of unsuccessful informal resolution processes?

- What went wrong?
- Lessons learned?

Q & A



ballast@somsull.com



www.somsull.com/ballast