



TITLE IX AGREEMENT- BASED RESOLUTIONS

Kateeka Harris
2024 Regulations

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MEET YOUR FACILITATOR

Kateeka Harris



Kateeka J. Harris has nearly two decades of experience in higher education at four year and two-year colleges and universities including Title IX compliance, student conduct, multicultural program administration, and undergraduate admissions. Kateeka is a nationally recognized expert in Student Conduct and Title IX Administration and has held leadership positions within the Association for Student Conduct Administration, including President. Kateeka received her Master of Arts in Higher Education from Slippery Rock University and anticipates receiving her Doctor of Educational Leadership from Texas Wesleyan University next year.

ABOUT US

Vision

We exist to create safe and equitable work and educational environments.

Mission

To bring systemic change to how school districts and institutions of higher education address their Clery Act & Title IX obligations.

Core Values

- Responsive Partnership
- Innovation
- Accountability
- Transformation
- Integrity

- **Injunction status**
- **Pending litigation**
- **What's next?**



AGENDA

● Title IX
Regulations, Definitions, Scope

● Agreement-Based Resolution
Requirements and types

● Impartiality
Avoiding bias, prejudgment

● Getting Started
Initial Steps & Considerations

● Conducting the ABR
Options & Considerations

● Reaching a Resolution

● Documentation
Recordkeeping

● Implementation
Strategies for Success

**WHAT ARE YOU
HOPING TO GET FROM
THIS TRAINING?**



TITLE IX

Regulations, Definitions, Scope

01

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Title IX of the Education Amendments Act of 1972

"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 (1972).



Schools have a duty to promptly and effectively end any sex discrimination in its education program or activity, prevent its recurrence, and remedy its effects.



The History of Title IX

A Timeline



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2024 Regs: Applicability Overview



Type of Conduct



Scope

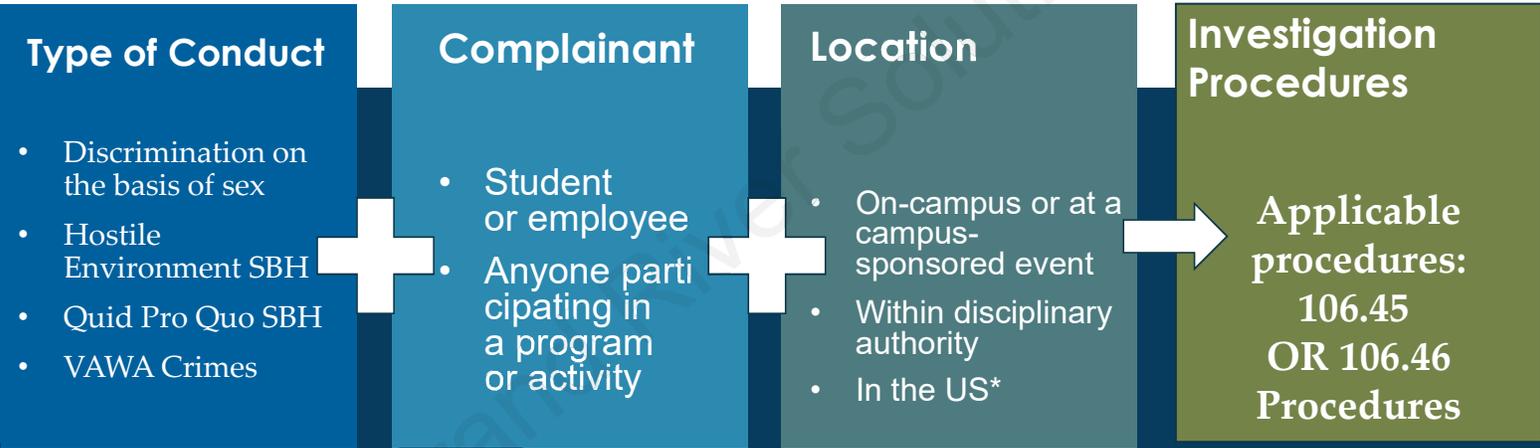


Geography



Complainant

FROM INTAKE TO INVESTIGATION (POST-AUGUST 2024)



RESOLUTION OPTIONS

Support- Based Only

No procedures



Informal or Agreement- Based Resolution

Voluntary



Grievance Procedures

All
requirements of
106.45 or 106.46

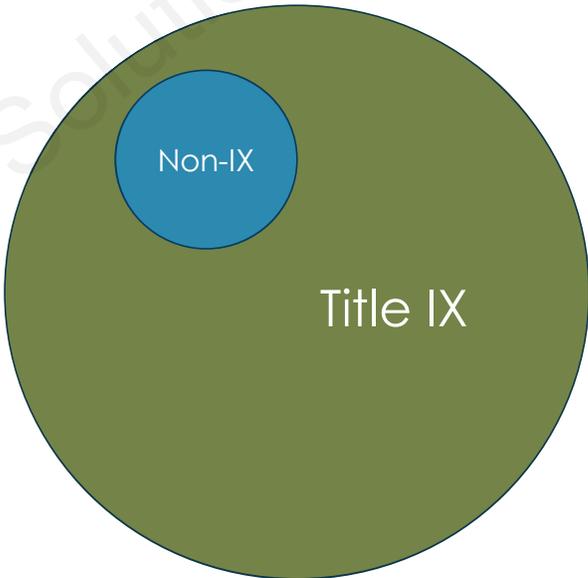


WHICH POLICY APPLIES?

2020



2024



PROHIBITED CONDUCT



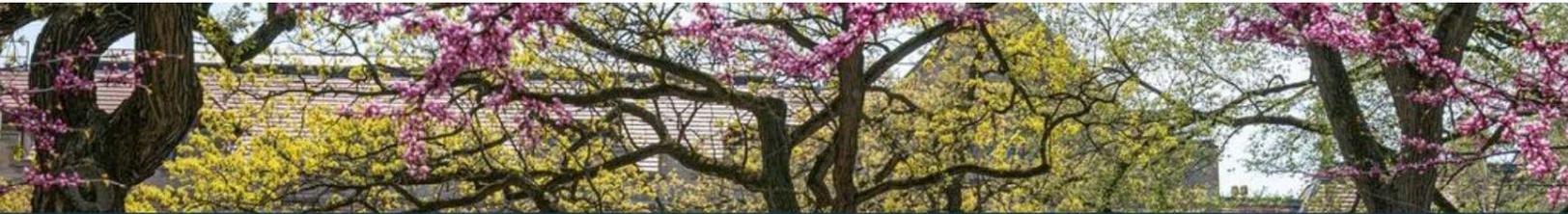
WHAT IS COVERED BY 2024 TITLE IX?

- **All** sex discrimination – this is an umbrella term
- Not only sexual harassment (2020 amendments only addressed sexual harassment)



DEFINITIONS – WHAT IS SEX DISCRIMINATION?

- **Discrimination on the basis of sex** includes discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity.



DEFINITIONS: SEX DISCRIMINATION – "SEX STEREOTYPING"

Preamble: "fixed or generalized expectations regarding a person's aptitudes, behavior, self-presentation, or other attributes based on sex."



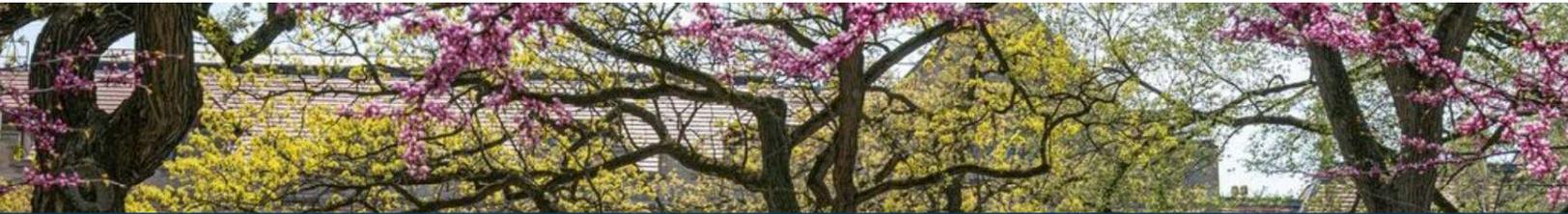
DEFINITIONS: SEX DISCRIMINATION – "SEX CHARACTERISTICS"?

The Preamble defines "sex characteristics" as "physiological sex-based characteristics."

Sex discrimination based on a person's physiological sex characteristics may include discrimination based on a person's anatomy, hormones, and chromosomes associated with male or female bodies.

ED states Title IX also covers discrimination based on (undefined) "intersex" traits [It adopts this term instead of "differences of sex development"].

ED identifies that "inappropriate disclosure of medical information about a student's intersex traits could constitute prohibited discrimination based on sex characteristics."



LGBTQIA+

Preamble:

Price Waterhouse/Oncale/Bostock and Title VII → Title IX Regulations

Sex stereotypes → to treat differently on basis of sexual orientation/gender identity is to discriminate on the basis of sex

“Indeed, Bostock’s reasoning dictates that, even assuming that ‘sex’ refers to ‘biological distinctions between male and female,’ discrimination against a person because they are gay or transgender is, in part, discrimination on the basis of sex.”

§106.10: “Discrimination on the basis of sex includes discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity.”

DE MINIMIS TEST



De Minimis test for sex-separated programs/activities:

- Otherwise permissible sex separation is consistent with Title IX as long as it is carried out in a manner that does not impose more than de minimis harm.
- Examples: locker and bathrooms; appearance codes
- Denying a transgender student "access to a sex-separate facility or activity consistent with that student's gender identity" would be more than a de minimis harm

DEFINITIONS – WHAT IS SEX-BASED HARASSMENT?

- Sex-based harassment is a form of sex discrimination and means sexual harassment, and other harassment *on the basis of sex, that is:*
 - Hostile environment sexual harassment
 - Quid Pro Quo
 - Domestic violence, dating violence, sexual assault, and stalking

HOSTILE ENVIRONMENT SEX-BASED HARASSMENT HAS 5 COMPONENTS

- The conduct is
- (1) unwelcome,
- (2) sex-based,
- (3) subjectively and objectively offensive, and
- (4) so severe or pervasive
- (5) that it results in a limitation of or denial of a person's ability to participate in or benefit from the education program or activity.



Must have all 5 above!

HOSTILE ENVIRONMENT SEX-BASED HARASSMENT FACTORS TO CONSIDER IN DECISION-MAKING

- (1) the degree to which the conduct affected the complainant's ability to access the recipient's education program or activity;
- (2) the type, frequency and duration of the conduct;
- (3) the parties' ages, roles within the recipient's education program or activity, previous interactions, and other factors about each party that may be relevant to evaluating the effects of the conduct;
- (4) the location of the conduct and the context in which the conduct occurred; and
- (5) other sex-based harassment in the recipient's education program or activity.

FIRST AMENDMENT BALANCING

- "One stray remark" is not "pervasive"
- A statement "of one's point of view on an issue of debate and with which another person disagrees, even strongly so, is not the kind or degree of conduct that implicates the regulations."
- But "sex-based conduct that occurs on multiple occasions and is so persistent that, for example, it limits another student's ability to complete assigned coursework at the student's typical level of performance" might meet the standard.
- ED encourages consultation with "settled components of Title VII sexual harassment law" for guidance on the meaning of "severe or pervasive"

QUID PRO QUO

- "An employee, **agent, or other person authorized by the recipient to provide an aid, benefit, or service under the recipient's education program or activity** explicitly or impliedly conditioning the provision of such an aid, benefit, or service on a person's participation in unwelcome sexual conduct"



“SPECIFIC OFFENSES” (VAWA)

Specific offenses defined by the Violence Against Women Act's amendments to the Clery Act



DATING VIOLENCE

The term dating violence means “violence committed by a person—

- A. who is or has been in a social relationship of a romantic or intimate nature with the victim;
- B. the existence of such a relationship shall be determined based on the reporting party's statement and with consideration of:
 - I. The length of the relationship;
 - II. The type of relationship; and
 - III. The frequency of interaction between the persons involved in the relationship”

DOMESTIC VIOLENCE

The term domestic violence is a “felony or misdemeanor crimes of violence committed

- A. by a current or former spouse of the victim,
- B. by a person with whom the victim shares a child in common,
- C. by a person who is cohabitating with, or has cohabitated with, the victim as a spouse or intimate partner,
- D. by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction in which the violence occurred, or
- E. by any other person against an adult or youth victim who is protected from that person’s acts under the domestic or family violence laws of the jurisdiction in which the crime of violence occurred.”

SEXUAL ASSAULT

Sexual Assault includes Rape, Sodomy, Sexual Assault With an Object, Fondling, Incest, and Statutory Rape.

These definitions come from the FBI.

SEX OFFENSES

A. Rape — The 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 the consent of the victim.

B. Sodomy — Oral or anal sexual intercourse with another person, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity.

C. Sexual Assault With an Object — The use of an object or instrument to unlawfully penetrate, however slightly, the genital or anal opening of the body of another person, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity.

SEX OFFENSES

D. Fondling — The touching of the private body parts of another person for the purpose of sexual gratification, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental incapacity.

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

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

STALKING

- Title IX stalking is on the basis of sex, and “engaging in a course of conduct directed at a specific person that would cause a reasonable person to—
 - A. fear for the person’s safety or the safety of others; or
 - B. suffer substantial emotional distress.”



REPORTING & NOTICE OBLIGATIONS

- All employees (except confidential employees) must notify the Title IX Coordinator if they have information that may reasonably constitute sex discrimination.
- Confidential employees must let disclosing people know that they are confidential, and share the Coordinator's contact information and how they could support reporting parties with supportive measures and information about options.

NOTICE OBLIGATIONS

If a **student** directly informs any employee of their own pregnancy, the employee must:

- Provide the Title IX coordinator's contact information, and
- Tell the person that the coordinator can coordinate specific actions to prevent sex discrimination and ensure the student's equal access to the recipient's education program or activity.

No reporting to the Coordinator required. No recordkeeping required.

ALTERNATIVE RESOLUTION

Requirements and types

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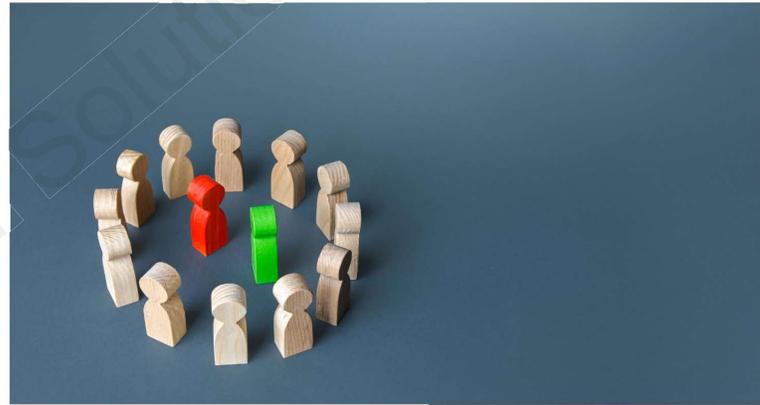
TRAINING REQUIREMENTS

All facilitators of an agreement-based resolution process must be trained upon their hiring or change in position resulting in them taking on this role, and every year thereafter, on:

- The institution's obligation to address sex discrimination in its program and activity
- The scope of conduct constituting sex discrimination, including the definition of sex-based harassment
- All applicable notification and information requirements
- How to serve impartially, including by avoiding conflicts of interest and bias
- The rules and practices associated with the recipient's informal resolution process
- This training cannot rely on sex stereotypes

AGREEMENT-BASED RESOLUTION

- Institutions have the option to offer an agreement-based resolution; it is not required
- Institutions may decide on a case-by-case basis which matters are eligible for agreement-based resolution
- They do not need to give a reason in writing for not allowing a case to go to IR
- In a change from the 2020 Title IX Final Rule, instances of alleged employee sex-based harassment against a **postsecondary** student **can** be eligible for agreement-based resolution.



TYPES OF AGREEMENT-BASED RESOLUTIONS

- In the preamble, the Department gives institutions discretion to choose the option best for their educational community
- The Department identifies the following as non-exclusive possibilities for postsecondary institutions:
 - Mediation
 - Restorative justice
 - Transformative justice

Agreement-based resolution requires its own notice to the parties and must include:

- The allegations
- The right to withdraw from ABR and begin or resume the formal process
- That IR precludes the formal process once it is completed
- The potential terms that can be offered in an ABR, and that those terms only bind the parties
- What information the recipient will maintain and whether and how the recipient could disclose such information for use in grievance procedures under § 106.45, and if applicable § 106.46, if grievance procedures are initiated or resumed.

Agreement-based Resolution: Required Notice

- The parties must give voluntary consent to the agreement-based resolution process
- May not require participation in the process as a condition of employment or enrollment
- May be entered into at any time in the process, prior to reaching a determination regarding responsibility
- May be stopped at any time prior to determination regarding responsibility

Agreement-Based Resolution

HIGHLIGHTS FROM THE 2024 FINAL RULE

- Must identify persons designated to facilitate agreement-based resolution processes.
- Facilitator cannot be same person as investigator or decision maker.
- ABR processes must be reasonably prompt.
- Options for ABR resolution processes should be included with notice of allegations.
- Potential "terms" are defined
- Must keep records regarding the facilitation of an ABR process.



POTENTIAL TERMS OF AGREEMENT-BASED RESOLUTION

Under the 2024 Final Rule, potential terms of an ABR agreement may include, but are not limited to:

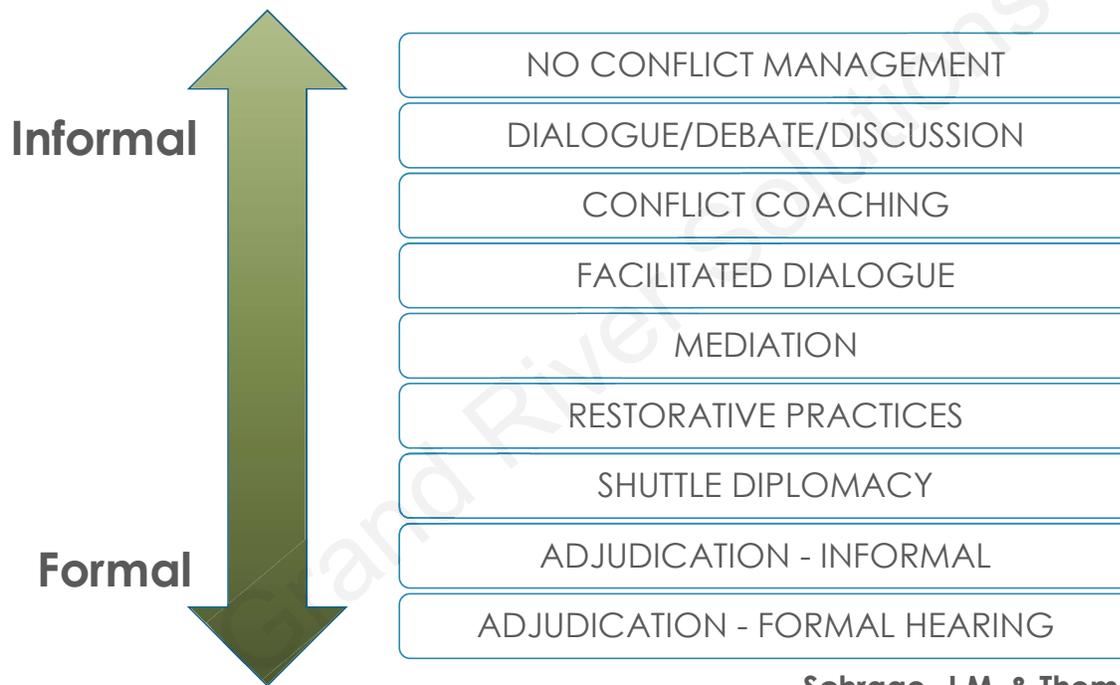
- Restrictions on contact; and
- Restrictions on the respondent's participation in one or more of the recipient's programs or activities or attendance at specific events
- "Nothing in § 106.44(k) prohibits a recipient from offering an ABR process in which a respondent may accept responsibility or accountability for sex discrimination or harm caused."
- Note: a party's admission of responsibility "is not a determination whether sex discrimination occurred" - that can **only** be found through the formal grievance process



WHAT CAN ABR LOOK LIKE?

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TYPES OF CONFLICT RESOLUTION



Schrage, J.M. & Thomas, M.C (2008)

WHAT WORKS BEST?

- | Mediation
- | Shuttle Diplomacy
- | Restorative Practices
- | Informal Adjudication



MEDIATION

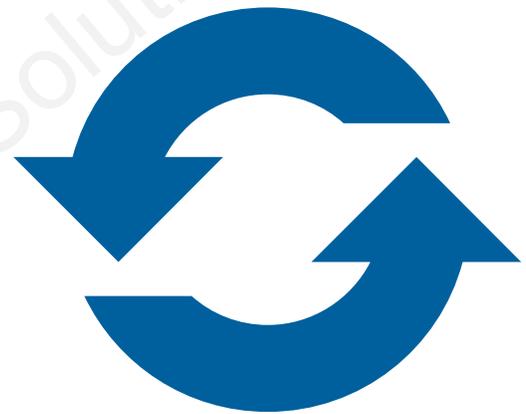
“Mediation is a process in which a neutral third party (mediator) helps the parties communicate with one another in an attempt to reach an agreement that is acceptable to everyone. Mediation is a forward-looking process in that it encourages the participants to focus on their current and future needs and interests rather than focusing on fault and blame for past actions. Mediation differs from a court proceeding in that the parties maintain control of their dispute. The decision-making power in mediation lies with the parties, not with the mediator.”

-Harris County TX Dispute Resolution Center



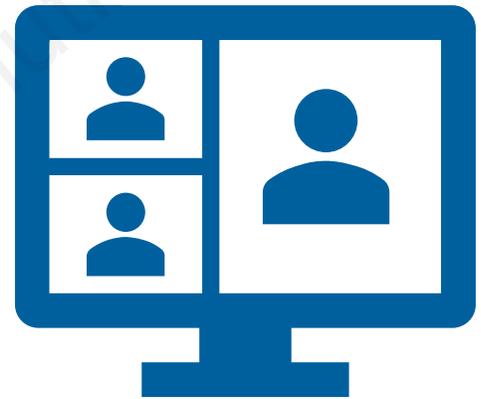
RESTORATIVE PRACTICES

Restorative practices focus on the respondent taking accountability and repairing harm they have caused. Restorative practices are community based and provides space for all of the parties involved to come together to restore trust and build or rebuild community.



SHUTTLE DIPLOMACY

Shuttle diplomacy is a form of mediation that does not require the parties to interact directly with each other. An agreement is negotiated by a facilitator or mediator working with one party at a time to reach an agreed upon resolution.



INFORMAL ADJUDICATION

Informal adjudication is an administrative decision made in accordance with processes established by the institution. While the parties are largely responsible for suggesting outcomes and actions in other forms of informal resolution, in informal adjudication, the facilitator may lead by suggesting outcomes for the parties to consider.



IMPARTIALITY

Avoiding bias, prejudice, and conflicts of interest

03



WHAT CONSTITUTES BIAS?

Conduct a fact-specific, objective inquiry based in common sense to determine bias.

This Includes:

- Decision-making that is grounded in stereotypes
- Different treatment based on a person's sex or other protected characteristic
- A decision based on something other than the facts

IMPERMISSIBLE BIAS

Making a decision, determination, or finding that is based on something other than the evidence and specific facts of the case.

CONFLICT OF INTEREST



SECTION 106.44(K)(4)

Any person designated to facilitate an informal resolution process must not have a conflict of interest or bias:

- For or against complaints or respondents generally, or
- An individual complainant or respondent



SECTION 106.45(b)(1)(iii)

“Title IX Coordinator, investigator, decision maker, or **facilitator of informal resolution** must receive training on...how to serve **impartially**, including **avoiding prejudice** of the facts at issue, **conflict of interest**, and **bias**. This training material **may not rely on sex stereotypes** and **must promote impartial investigations and adjudications** of formal complaints of sexual harassment.”

GETTING STARTED

Initial Steps & Considerations

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INITIAL STEPS

- Discussion of Goals
- Draft Process
- Managing Staffing & Training
- Develop Templates
- Recordkeeping
- Assessment and Evaluation





GOALS

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GOALS FOR INFORMATION RESOLUTION PROCESSES



- ✓ Neutral/Impartial Process
- ✓ Trauma Informed
- ✓ Meets the Needs of the Parties
- ✓ Clear and Transparent
- ✓ Empowerment of Parties
- ✓ Resolution Focused

REMINDERS ABOUT INFORMAL RESOLUTIONS

- As a best practice, any information shared or gained during the informal resolution process should not be used against either party should the matter return to the formal process.
- Informal resolutions typically do not result in a formal finding of violation.
- Any agreed upon outcomes are typically not considered sanctions.
- The Title IX Coordinator is responsible for determining when an informal resolution is appropriate.
- An agreement between the parties ends the matter.
- Informal resolution agreements are not able to be appealed.



DRAFTING PROCESS

- Process should be clear and transparent
- Provides for appropriate due process under the regulations
- Provides flexibility to choose the method of resolution that best suits the parties and the situation at hand
- Complements existing investigation or grievance process
- Includes details about record keeping and confidentiality



STAFFING CONSIDERATIONS

- Informal Resolution facilitators need to be trained
 - In some states, mediators need to be trained but do not need to be certified.
 - In others, mediators need to be certified.
- Facilitators cannot be the investigator or decision maker
- Confidentiality is key
- Internal vs. External





CONSIDERING OUTCOMES

TEMPLATES



- Informal Resolution specific templates should include:
 - Notice of Informal Resolution
 - Informal Resolution Agreement
- Investigation or Grievance procedures templates should also be include information on Informal Resolution options, including:
 - Notice of Allegations
 - Notice of Investigation
 - Notice of Hearing (if applicable)

ASSESSMENT

Consider assessing:

- Number of cases that enter ABR process
- Number of cases that exit ABR process
- Kinds of agreed upon outcomes
- Type of process used (mediation, shuttle negotiation, etc.)
- Overall party satisfaction with resolution process
- Compliance with resolution agreements



CONDUCTING THE ABR

Initial Steps & Requirements

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HOW TO PROCEED?

Support-Based Only

No formal process



Informal or Agreement-Based

Signed agreement;
Voluntary;
What records?

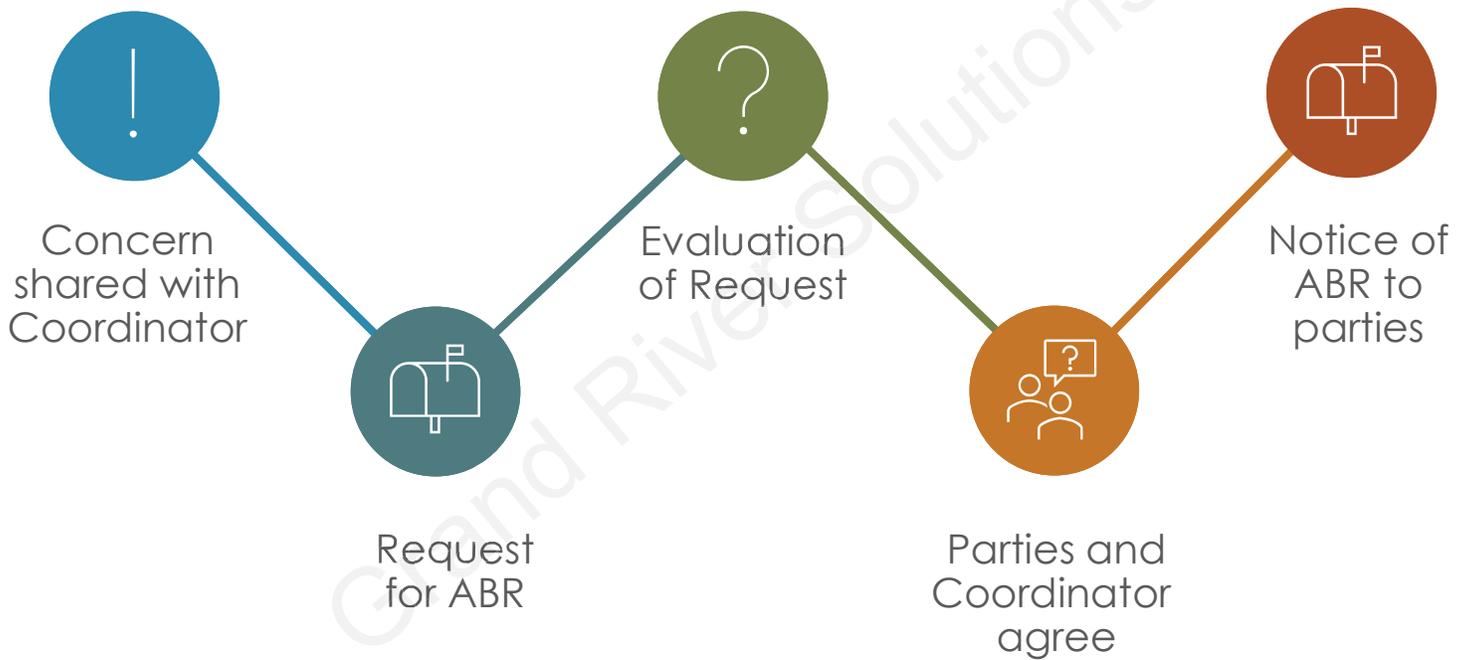


Grievance Procedures/ Investigation

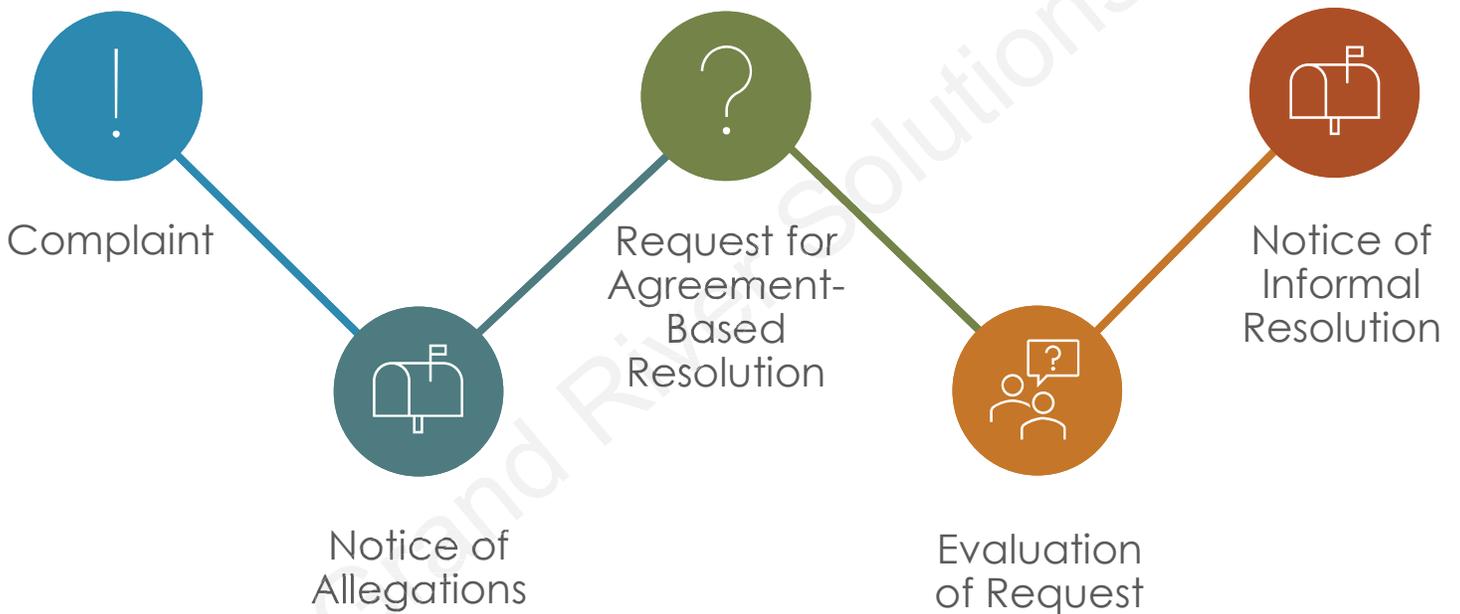
All requirements of 106.45 or 106.46



STARTING WITH AGREEMENT-BASED RESOLUTION



ANOTHER ROUTE TO AGREEMENT-BASED RESOLUTION



EVALUATING ABR REQUESTS

Is ABR appropriate?

- Considerations:
 - The emotional state of the parties
 - Do the parties hold equal power?
 - Are both parties willing to engage meaningfully in the process?



PROCESS PARTICIPANTS



THE PARTICIPANTS: THE PARTIES

Complainant

An individual who is alleged to have experienced conduct that could constitute sex discrimination.

Respondent

An individual who has been reported to be the perpetrator of conduct that could constitute sex discrimination.

THE PARTICIPANTS: ADVISORS

- Can be anyone, including a lawyer, a parent, a friend, and a witness
- No particular training or experience required (institution appointed advisors should be trained)
- Can accompany their advisees at all meetings and interviews
- Advisors should help the Parties prepare for each meeting and are expected to advise ethically, with integrity, and in good faith
- May not speak on behalf of their advisee or otherwise participate, except that the advisor will conduct cross examination at a hearing
- Advisors are expected to advise their advisees without disrupting proceedings



THE PARTICIPANTS: ADVISORS

An Advisor who oversteps their role as defined by the policy should be warned once. If the Advisor continues to disrupt or otherwise fails to respect the limits of the Advisor role, the meeting may be ended, or other appropriate measures implemented. Subsequently, the Title IX Coordinator has the ability determine how to address the Advisor's non-compliance and future role.



THE PARTICIPANTS: THE FACILITATOR

- Manages logistics of process
- Communicates with parties
- Coordinates with and updates Title IX Coordinator
- Attempts to facilitate an agreed resolution
- Documents process and decisions





DOES THE
FACILITATOR NEED
ACCESS TO THE
CASE FILE?

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REACHING A RESOLUTION

Options & Considerations

06



PREPARING FOR RESOLUTION

Individual meetings with each party and their advisor to discuss:

- Process
- Timeline
- Party's goals in the process
- Available types of resolution and comfort level with each
- Expectations of all participants
- Setting for resolution
 - *In person*
 - *Video conference*
 - *Asynchronous*



PARTY GOALS

- Why is understanding these goals important?
- What are some approaches to determining the goals each party has?



UNDERSTANDING PARTY GOALS

- Why did they decide to participate in ABR?
- In an ideal world, what is their desired outcome?
- What are their non-negotiables?
- Where are they willing to compromise?
- What level of interaction with the other party do they want?
- What do they need to feel comfortable with the resolution?

REMINDER:

Notice to the parties must state institutional policy on whether and how information from ABR may be used in grievance procedures, if grievance procedures are initiated (or resumed)



CONFLICT STYLES

The key difference between conflict styles is the priority each individual places on agenda vs. relationship.

Agenda: Each party has their own individual agenda or goals going into a conflict, which includes how much they are willing to push for what they want.

Relationship: Each party has their own personal perception of the current state of the relationship with the other party and their desired future relationship, if any.

CHOOSING A RESOLUTION FORMAT

- | Mediation
- | Shuttle Diplomacy
- | Restorative Practices
- | Adjudication Informal

POSSIBLE SETTINGS



In Person:

Process is conducted in person with all parties present, though not necessarily in the same room.



Teleconference:

Process is conducted remotely; parties may or may not meet with each other



Asynchronous:

Facilitator meets with each part individually, at different times.

SETTING CONSIDERATIONS

- Parties' desire for interaction
- Safety
- Physical location of the parties
- Physical environment if in person
- Timeline required by process
- Timeline desired by the parties



EXPECTATIONS

Setting expectations for behavior during the ABR process is crucial for a smooth, efficient process.

Your institution's hearing rules of decorum are a good place to start.

Treat everyone with respect.

Speak only at approved times in process.

Redisclosure of materials is prohibited.

Abusive conduct is prohibited.

Role of advisor is limited & must not disrupt the process.

KEY INGREDIENTS TO A RESOLUTION

Written

Clear

Specific

Stated Deadlines

Enforceable

State any process for
foreseeable revisions

WHEN TO CALL IT

- Either party decides to withdraw from the process.
- One or both parties is unresponsive.
- One or both parties is not participating in good faith.
- There is a non-negotiable sticking point for either party.
- The institution cannot support/approve the agreed resolution.

DOCUMENTATION

Recordkeeping

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ELEMENTS OF A RESOLUTION AGREEMENT

- Identities of participants
- Procedural overview of matter
- Reference to appropriate policy
- Terms of the resolution
- Information on record retention
- Prohibition against retaliation
- Statement of agreement
- Signatures



RECORDKEEPING AND ABR

- **The institution must maintain for a period of seven years records of:**
 - For each complaint of sex discrimination, records documenting the informal resolution process under § 106.44(k) or the grievance procedures under § 106.45, and if applicable § 106.46, and the resulting outcome.
 - . . .
 - All materials used to provide training [as required by these rules]. A recipient must make these training materials available upon request for inspection by members of the public.

OTHER ABR PROCESS RECORDS

- Request for ABR
- Notice of denial of request (if appropriate)
- Written agreement of parties to participate
- Notice of ABR
- Agreement; or
- Notice of end of informal process and return to the investigation process.



IMPLEMENTATION

Strategies for Success

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CONSIDERATIONS

- What information is confidential?
- Recordkeeping
- What ABR process(es) will you use?
- Who will conduct informal resolution? Remember the required training.
- What are the possible outcomes?
- Compliance with outcomes



POSSIBLE OUTCOMES OF ABR

No-contact directives

Apology/Reflective Writing

Coaching or Training

Agreements to stay away from certain classes or activities

Facilitated dialogue

Agreement to withdraw/transfer/re sign.

PRACTICAL APPLICATION - QUINN

“Casey and I have been friends for a few weeks. On Friday night, we were hanging out alone in my room, watching a movie. We started to make out, and I was ok with that. After making out for a while, Casey started touching me down there. Then Casey tried to have sex with me. Casey knew that I didn’t want to have sex but kept trying anyway. Casey was being really coercive, and so I just went along with it. Casey raped me and I want Casey to be held accountable.”

PRACTICAL APPLICATION - BARRI

“When I got to the party, I was already lit. I kept letting Marc get me drinks anyway. At some point, I just kinda don’t remember anything. And then I woke up in Marc's bed and it was morning. I had all my clothes on, but I know someone had sex with me. I could feel it. I just wanted to go, so I did. Before I left Marc woke up and tried to talk to me but I wasn’t hearing it. He looked guilty and I could tell he felt bad.”

PRACTICAL APPLICATION - COLIN

“Pat and I have been together for about a month and have been intimate for the last two weeks. We went out with my friends on Friday night and Pat got really drunk. At some point we ran into my ex and Pat was really jealous, so we left. When we got back to my place, I thought things were fine. We started hooking up and all of a sudden Pat's mood changed. Pat got really aggressive and choked me. He was so angry and I was so scared.”

COMPLIMENTARY SUBSCRIPTION



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CONNECT**

A place to
communicate
share
educate
learn

for HIGHER EDUCATION
PROFESSIONALS working in
Title IX, Equity & Clery

THANK YOU!

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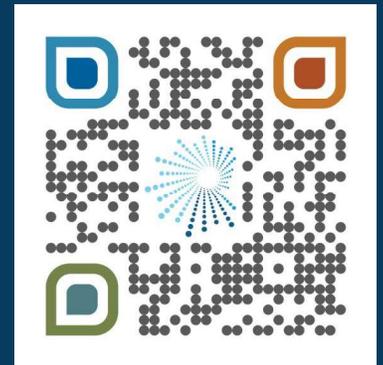


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Your Opinion Is Invaluable!



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