



ODHE Advanced Resolution Officer Training



Bricker & Eckler
ATTORNEYS AT LAW

Disclaimers

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

- We are not giving you legal advice. Consult with your legal counsel regarding how best to address a specific situation.
- Use the chat function to ask general questions and hypotheticals.
- This training is not being recorded, but we will provide you with a packet of the training materials to post on your websites for Title IX compliance.

Presentation Rules

- Questions are encouraged!
- “For the sake of argument...”
- Be aware of your own responses and experiences
- Follow-up with someone if you have questions and concerns
- Take breaks as needed

Posting These Training Materials?

- Yes!
- Your Title IX Coordinator is required by 34 C.F.R. §106.45(b)(10)(i)(D) to post materials to train Title IX personnel on its website
- We know this and will make this packet available to your institution to post electronically



Additional information available at:



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



Find us on **Twitter** at
@BrickerHigherEd

Topics

- Review of scenario and hypotheticals
 - Observe a mock informal resolution
 - How to work with the parties to identify their wants, needs, and areas of compromise
- How to work with the parties to reach a mutually beneficial plan forward
 - Documenting and maintaining plans

Aspirational Agenda

All times EST/EDT

A little more detail on timing

Advanced Training

9:00-10:00 Best Practices and Considerations

10:00-10:15 Break

10:15-11:00 Live Informal Resolution Scenario

11:00-11:30 Writing an Agreement and Related Considerations





Informal Resolution: Best Practices

Informal Resolution Officer Goals

Help parties find ways to **move forward** at your institution (for as long as their time together is before they graduate) with **equal access to educational opportunities**

Resolution Framework

(1) Separate the People and the Issues.

- Understand the other's experiences
- Identify misconceptions
- Allow for the communication of emotions

(2) Focus on interests.

- "Your position is something you have decided upon. Your interests are what caused you to so decide." [Fisher & Ury, *Getting to Yes*, 3d. p. 42]
- Parties need to share interests with one another

(3) Generate Options to address interests.

- Best alternative to a negotiated agreement?
- Brainstorm as many options as possible...

(4) What are the Objective Measures of outcomes?

What could our process look like?

Prompt Timeframe

(1) The recipient (your institution) should decide what “prompt” timeframe to set to resolve the informal resolution.

Remember: An informal resolution could move back to the formal process if it does not succeed, so consider this in setting a timeframe.



Prompt Timeframe

Considerations:

- Stop the clock for exams or breaks-so that students are not required to participate during exams or breaks or have that time count against resolving
- Have the ability to extend timeframe if close to resolving but need a few extra days.

What could the process look like?

(2) The informal resolution officer should contact each party individually to initiate the process.

Consideration: Does the recipient want a timeframe within which the informal resolution officer contacts the parties?

What could the process look like?

(3) Select setup or setups:

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

What could the process look like?

Setup

- Through email?
- Through Zoom?



What could the process look like?

Setup

Considerations:

- Each matter is different, so providing multiple manners to conduct a resolution may be helpful to provide the parties
- Should the parties be in a room together?

What could the process look like?

Setup

Considerations:

- Should the parties communicate directly with each other?
- Are there attorneys or parents involved?
- What setup will help the parties best reach a resolution?

What could the process look like?

Setup -Example

Both parties are near graduation, very emotional about the situation, and very far apart on what they believe occurred.

- Perhaps the parties do not need to see each other to come to a resolution to get through the rest of school in a mutually agreeable way...



What could the process look like?

Setup -Example

The parties were close friends before the incident and you (the informal resolution officer) believe they could resolve the matter if they could each understand the other's perspective.

- Perhaps meeting in person would best help them resolve.

What could the process look like?

Setup

Consideration on discretion of setup:

- Providing the informal resolution officer with the decision on how to structure the setup.
- Providing the parties with input or decision.
- Providing the informal resolution officer with discretion to consider input from parties.

What could the process look like?

(3) Finding out what the parties want or need to resolve the matter.

- Meet with each party individually to find out what they:
 - State they want
 - State they need

Determine what the interests are behind the position...

What could the process look like?

Are willing to accept as a resolution.



Are not willing to accept.

Note: these all may shift during the process as they learn more information from the other party during the resolution process.

What could the process look like?

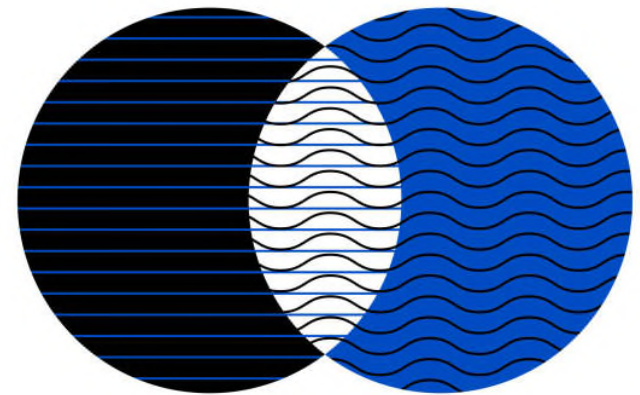
Finding out what the parties want.

Example: A complainant may tell you they want the respondent to admit wrongdoing. However, the complainant may be willing to accept that respondent sees the underlying interaction differently but apologizes for the resulting harm to the complainant.

What could the process look like?

(4) Identify any overlap between what the parties want, need, or are willing to accept.

Note: There could be no overlap.



What could the process look like?

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

What could the process look like?

Supportive Measures as a Solution (1)

Supportive measures to consider:

- Alternative schedules
- Individual study
- Online alternatives to courses
- Counseling



What could the process look like?

Supportive Measures as a Solution (2)

- Safety escort for one or both parties
- Reassignment of seating
- Reassignment of housing
- Individualized Title IX training
- Apologies



What could the process look like?

(6) How to get the parties to work towards a solution:

- May require back and forth by the informal resolution officer
- May require reality checking: the alternative to resolution will be the formal process
- May require some time from the parties to reset their expectations

What could the process look like?

- **Hypo**: Both students agree, after a lengthy resolution process, that the Respondent will accept disciplinary probation for a reported sexual assault. Your policy articulates a minimum sanction of suspension.
- **How does your institution proceed?**

What could the process look like?

Reality checking

- **Reality checking: a helpful tool, but be cautious**
- It may be helpful to remind one or both parties:

The limitation of informal resolution requires agreement to complete

That the alternative may be a return to the formal process

That they can control the outcome in the informal process, but not the formal process

BUT... be careful to remain neutral and not push a party to do something the party does not really want to do

What could the process look like?

Reality checking

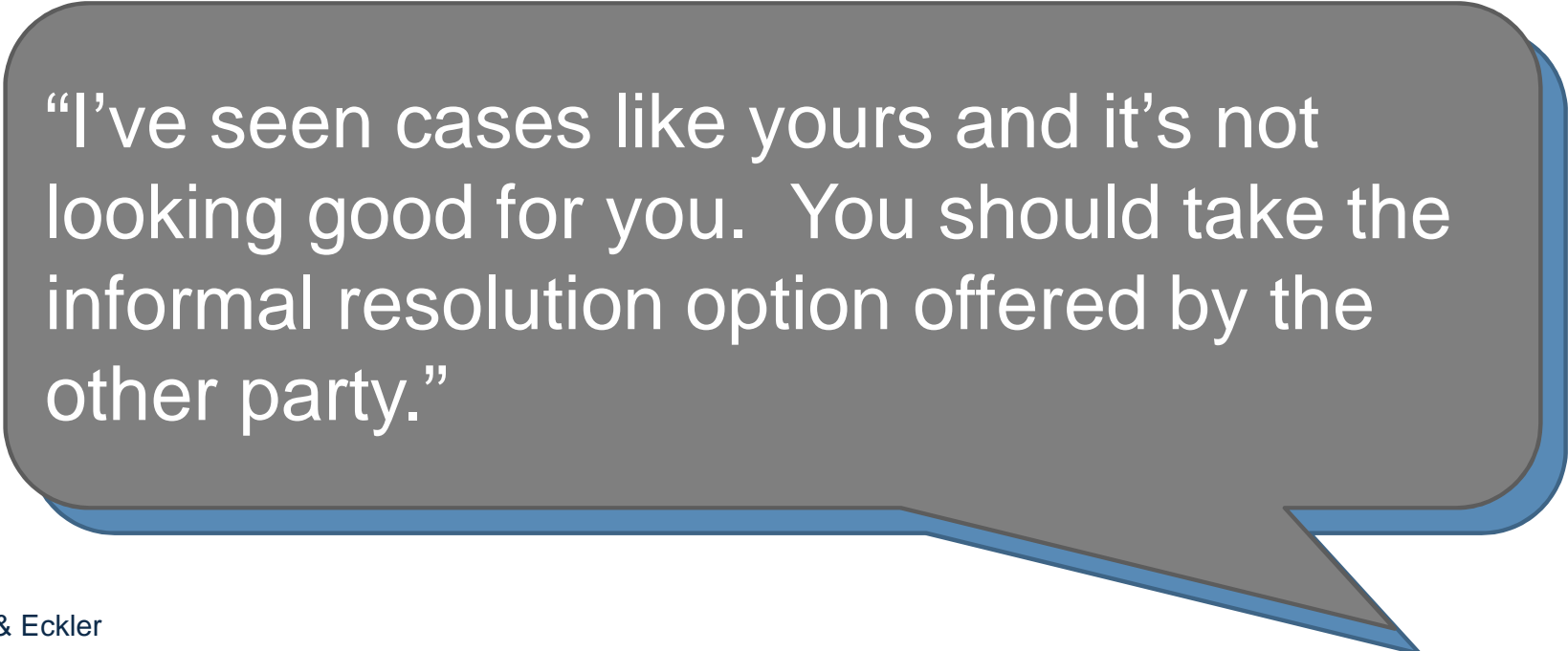
Example of a **neutral** reality check:

“If this goes back to the formal process, you will not have control over the outcome, and it is a possibility that a decision-maker could find you in violation of policy.”

What could the process look like?

Reality checking

Example of a **biased/pushy** reality check:

A dark gray speech bubble with a blue outline and a blue shadow. The bubble has a tail pointing towards the bottom right. Inside the bubble, the text is white and reads: "I've seen cases like yours and it's not looking good for you. You should take the informal resolution option offered by the other party."

“I’ve seen cases like yours and it’s not looking good for you. You should take the informal resolution option offered by the other party.”

What could the process look like?

(6) Resolution agreements

- If the parties reach a resolution, document the terms.
- Have both parties review the terms.
- Have both parties sign the agreement.



What could the process look like?

Resolution Agreements

Considerations:

- Include in an agreement a way for the parties to revisit terms if there is change.
- Include any confidentiality provisions (and any consequences for violating those provisions).
- Provide each party with a copy of the agreement.
- Maintain a copy of the agreement in the Title IX office pursuant to the Regulations for seven years

What could the process look like?

If the resolution is not successful:

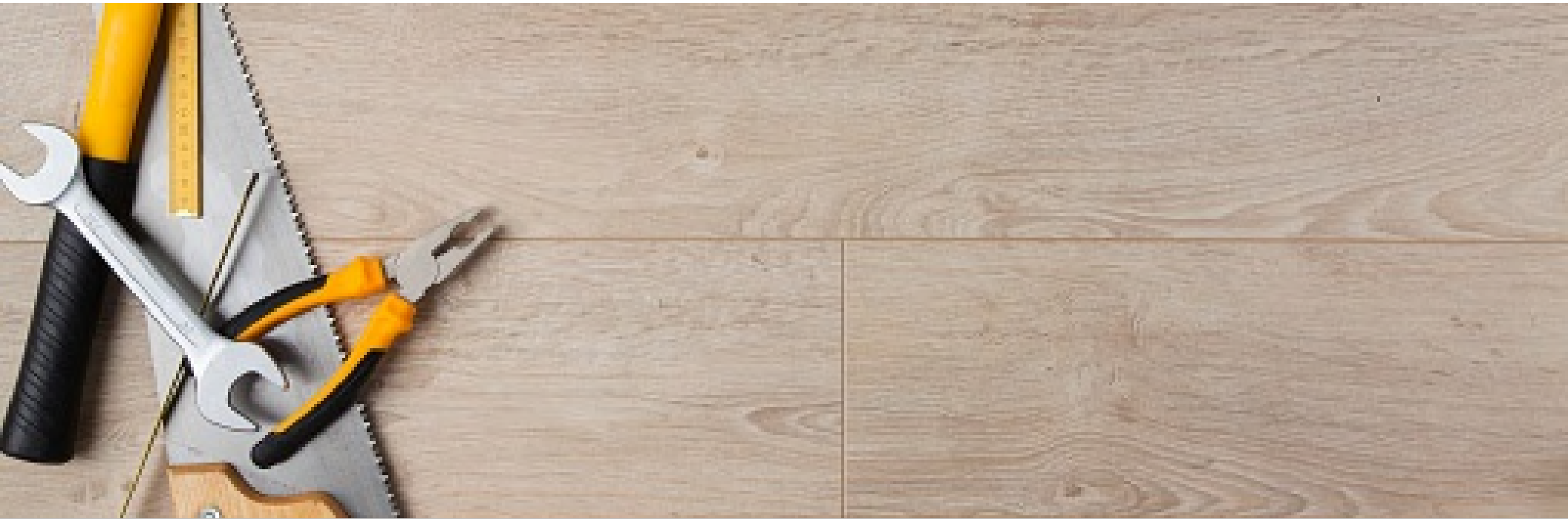
- Maintain any records of the process and it's result for seven years.



Informal Resolution: Scenario Review



Informal Resolution: Live Example



Informal Resolution: Toolbox/Checklist

Script of overview of process

As you saw in our live scenario, a script is helpful to ensure:

- ✓ You approach each facilitation consistently
- ✓ Overview of your process
- ✓ Don't forget anything you needed to say

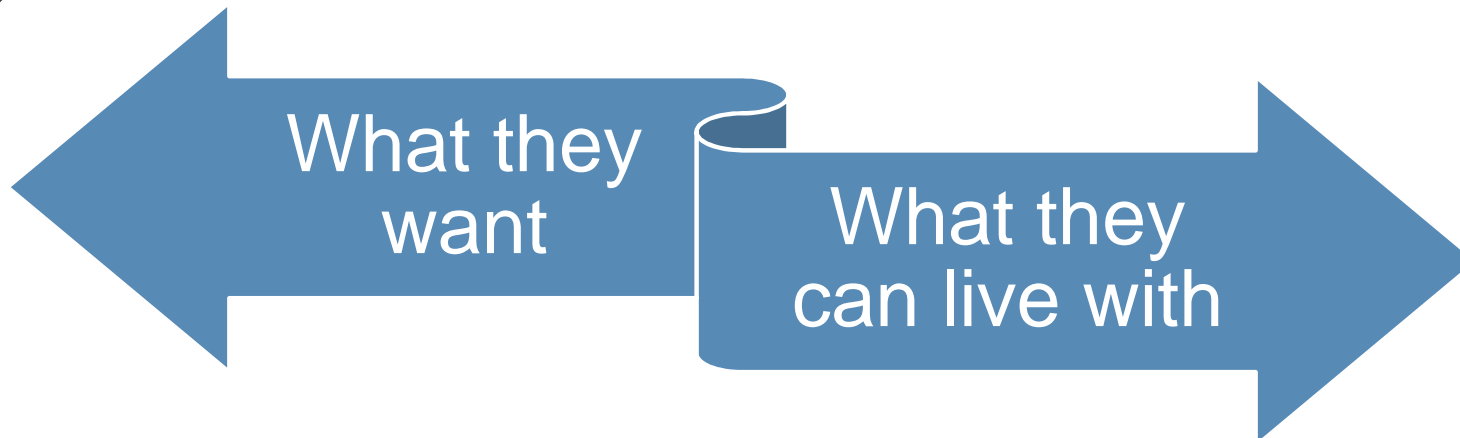
Make sure each party feels heard

Whether you include this in your script, this is not only a step of the process, but a tool to empower the parties to:

- ✓ Identify what is important to them
- ✓ Identify what they may be able to be flexible on
- ✓ Feel like they are engaging in and trusting the process

Identify what each party wants

Regardless of the type of resolution process, ensure that you identify with each party:

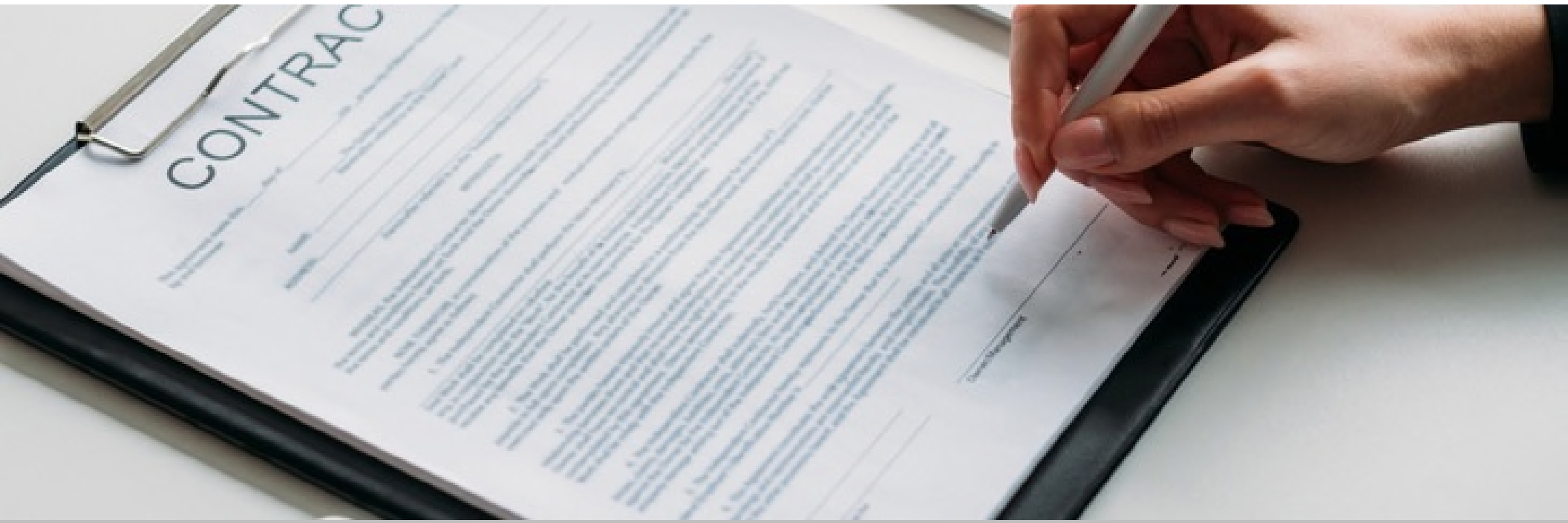


Have a list of your institution's supportive measures available

Be ready to easily provide each party with a list of supportive measures and other ideas that may help them think about moving forward

Have a form or template for resolution agreements

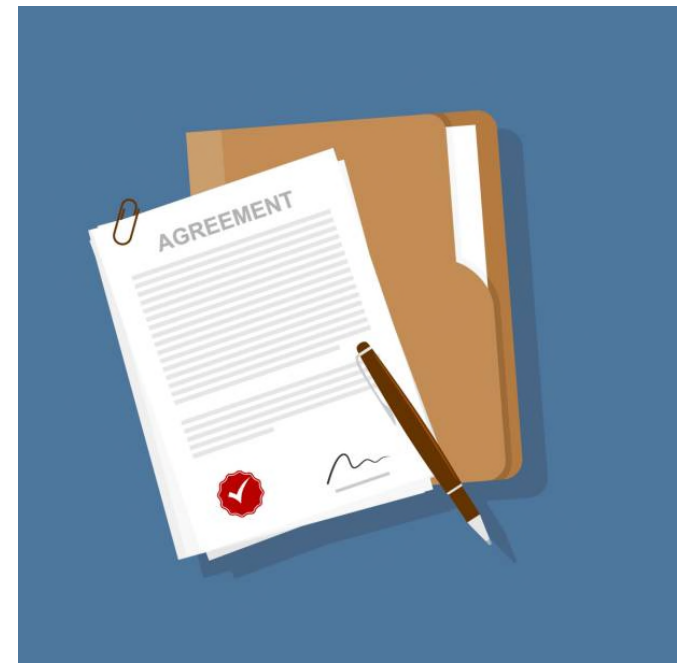
- If the parties agree, you will want to be able to quickly pull together an agreement.
- Having a form or template easily accessible that you can add the provisions to is more likely to allow you to have the parties sign that day—you don't want your delay to make the agreement fall apart



The Agreement

Why have it in writing? (1)

- While some jurisdictions will not allow any discussions or documents from mediation to be relied upon outside of mediation, many do allow a carve out for final agreements to be the only memorialization of the mediation.



Why have it in writing? (2)

- It is important to have the terms of any agreement in writing, in case there are later disagreements.
- Documentation of the agreement is important if DOE reviews the informal resolutions.
- What about confidentiality? (next slide)

What about confidentiality?

- The terms of the agreement should be on a need-to-know basis.
- The agreement itself should include penalties for a party or recipient from publishing or sharing the agreement.
- Agreements relating to students are student records protected by FERPA; kept in student file



What about confidentiality?

- For **employees**, these may have different considerations and may be public record, depending on your jurisdiction.
- May be contained in a separate file personnel file.



The problem with “gag” orders or non - disparagement agreements.

Could be contrary to:

```
graph TD; A[Could be contrary to:] --- B[The First Amendment if a public institution]; A --- C[Academic freedom if faculty member]; A --- D[Public records laws in your jurisdiction];
```

The First
Amendment if a
public institution

Academic
freedom if
faculty member

Public records
laws in your
jurisdiction

The problem with “gag” orders or non - disparagement agreements.

What happens if a party breaks the order?

What if it's years later?

What if it's a conversation with a family member vs. journalist?

What if it seems like the institution is trying to bury information?

How will you enforce it?

What any agreement (or form or template) should include (1)

1. Names of any parties, representatives, and informal resolution officer
2. The specific terms of the agreement, with as much specificity as possible for each term.

What any agreement (or form or template) should include (2)

3. General description of the process that led the parties to the resolution.
4. Specifically that the process was *instead* of a formal process, that it was agreed to by both parties voluntarily and in writing.

What any agreement (or form or template) should include (3)

5. Acknowledgement of all the terms in the agreement by the parties and the consequences of signing.
6. How to resolve any future disputes arising out of the underlying facts of the agreement or the agreement itself.
7. Who to contact with questions or concerns about the agreement.

What any agreement (or form or template) should include (4)

8. Future periods of checking on how the agreement is going?



Pros

- Helps the institution monitor the situation



Cons

- May be poking a sleeping bear



Questions?

Additional information available at:



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