

March 2023 Title IX Alternative Resolutions Training

Slide 1:

Grand River Solutions
Title IX Alternative Resolutions
Martha Compton | March 2023

Slide 2:

Martha Compton she/her/hers
Director of Strategic Partnerships and Client Relations
Meet Your Facilitator

Martha consults and trains nationally on Title IX and student conduct and has previously served as a technical trainer for Department of Justice VAWA campus grantees. Martha is a former President of the Association for Student Conduct Administration, has been a faculty member for ASCA's Gehring Academy, and was part of the core team that developed ASCA's Sexual Misconduct Institute. A student conduct professional for over 20 years, Martha is also a former dean of students and has extensive experience in residence life, behavior intervention, emergency services, orientation, leadership, and working with student organizations.

Slide 3:

About Us

Vision – We exist to help create safe and equitable work and educational environments.

Mission – Bring systemic change to how school districts and institutions of higher education address their Clery Act and Title IX obligations.

Core Values – Responsive Partnership, Innovation, Accountability, Transformation, Integrity

Slide 4:

Agenda

1. Title IX – Regulations, Definitions, Scope
2. Informal Resolution – Requirements and types
3. Impartiality – Avoiding bias, prejudgement
4. Getting Started – Initial Steps & Considerations
5. Conducting the IR – Options & Considerations
6. Reaching a Resolution
7. Documentation – Recordkeeping
8. Implementation – Strategies for Success

Slide 5:

Title IX
Regulations, Definitions, Scope

Slide 6:

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."

Slide 7:

Education Program or Activity

For the purpose of this section, §§ 106.30, and 106.45, "education program or activity" includes locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.

Slide 8:

Title IX Applies to All Forms of Sex Discrimination:

Sexual Harassment

Achievement Awards

Athletics

Benefits

Financial Aid

Leaves of absence and re-entry policies

Opportunities to join groups

Pay rates

Recruitment

Retention Rates

Safety

Screening Exams

Sign-on Bonuses

Student and Employee Benefits

Thesis Approvals

Vocational or College Counseling

Research opportunities

Slide 9:

The History of Title IX – A Timeline

1972 – TIX is Passed

1979 – Cannon v University of Chicago

1992: Franklin v Gwinnett

1998: Gebser v Lago Vista

1999: Davis v Monroe

2001: Revised Sexual Harassment Guidance

2011: Dear Colleague Letter ("DCL")

2014: Q&A

2016: DCL on Transgender Students

2017: 2011 DCL guidance & 2016 DCL on Transgender Students Rescinded

2018: DCL and Q&A
2020: 2020 Regulations
2020: Withdrawal of 2001 Guidance
2020: Q&A

Slide 10:

The Title IX Regulations - Sexual Harassment Only

1. Narrows the definition of sexual harassment;
2. Narrows the scope of the institution's educational program or activity;
3. Narrows eligibility to file a complaint;
4. Develops procedural requirements for the investigation and adjudication of sexual harassment complaints, only

Slide 11:

Definitions

Recipient: The recipient of federal funds; the institution/school/college

Complainant: An individual who is alleged to be the victim of conduct that could constitute sexual harassment.

Respondent: An individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.

Slide 12:

Sexual Harassment: Section 106.30

Sexual harassment means conduct on the basis of sex that satisfies one or more of the following:

- (1) An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;
 - (2) Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity;
- or
- (3) "Sexual assault" as defined in 20 U.S.C. 1092(f)(6)(A)(v), "dating violence" as defined in 34 U.S.C. 12291(a)(10), "domestic violence" as defined in 34 U.S.C. 12291(a)(8), or "stalking" as defined in 34 U.S.C. 12291(a)(30).

Slide 13:

Covered Geography

Includes locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.

On campus or in a building owned or controlled

Off-campus incident that occurs as part of the institution's operations

Institution exercised substantial control over the respondent and the context of alleged sexual harassment that occurred off-campus pursuant to §106.44(a); or

the incident of sexual harassment occurs at an off-campus building owned or controlled by a student organization officially recognized by a postsecondary institution

Slide 14:

Not Covered

Off campus conduct, even if it has an impact on the educational program or activity;

Conduct that occurs outside of the United States.

Slide 15:

Covered Individuals - Eligibility for Title IX's Protections

"At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed."

34 C.F.R. §106.30

Applicant

Accepted/Hired

Enrolled/Employed

Slide 16:

Title IX Application Post May 2020 Regulations

Type of Conduct

- Hostile Environment Sexual Harassment
- Quid Pro Quo
- Sexual Assault
- Dating/Domestic Violence
- Stalking

Ed Program or Activity

- On campus
- Campus Program, Activity, Building, and
- In the United States Ed Program or Activity

Required Identity

- Complainant is participating or attempting to participate in the Ed Program or activity

Apply 106.45 Procedures

Required Response: Section 106.45 Procedures

Slide 17:

Conduct Falling Outside the Scope of Title IX

- Apply other institutional policies and procedures

- Ensure that those policies and procedures are compliant with VAWA/Clery, and other intersecting federal and state laws

Title IX

Sexual Harassment Abroad

Quid Pro Quo Between Students

Severe or Pervasive, Only

Off-Campus Sexual Assault

Slide 18:

Actual Notice - A Narrowed Scope of Institutional Responsibility

Institution must respond when it has:

“Actual knowledge” - When “an official of the recipient who has authority to institute corrective measures” has notice, e.g., Title IX Coordinator

of “sexual harassment” (as newly defined)

that occurred within the school’s “education program or activity”

“includes locations, events, or circumstances over which the recipient exercised substantial control” over the respondent and the context in which the sexual harassment occurred

Fact-specific inquiry focused on control, sponsorship, applicable rules, etc.

against a “person in the United States” (so, not in study abroad context)

Slide 19:

Initial Response Requirements

Receipt of Report

Outreach/Response from the Title IX Coordinator

Support Measures, whether or not Formal Complaint is filed

How to file

Options for Resolution

Slide 20:

Procedural Requirements for Investigations

Notice to both parties

Equal opportunity to present evidence

An advisor of choice

Written notification of meetings, etc., and sufficient time to prepare

Opportunity to review all evidence and 10 days to submit a written response to the evidence prior to completion of the report

Report summarizing relevant evidence and 10-day review of report prior to hearing

Slide 21:

Procedural Requirements for Hearings

Must be live, but can be conducted remotely

Cannot compel participation of parties or witnesses

Standard of proof used may be preponderance of the evidence or clear and convincing; standard must be the same for student and employee matters

Cross-examination must be permitted and must be conducted by advisor of choice or provided by the institution

Decision maker determines relevancy of questions and evidence offered

Written decision must be issued that includes finding and sanction

Slide 22:

Grounds for Appeal

(A) Procedural irregularity that affected the outcome of the matter;

(B) New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; and/or

(C) The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter.

Slide 23:

Other Requirements of the Regulations

Designation of a Title IX Coordinator

Dissemination of Policy

Separation of Responsibilities

Training and posting of training

Impartiality

Record Keeping

Slide 24:

Alternative Resolution

Requirements and types

Slide 25:

Training Requirements

Title IX coordinators, investigators, decision-makers, and “any person who facilitates an informal process” must receive training on:

The definition of sexual harassment in the regulations

The scope of the institution’s education program or activity

How to conduct an investigation and grievance process

How to serve impartially

Any technology to be used at a live hearing

Training materials must be made publicly available on website

Training materials “must not rely on sex stereotypes” and must be maintained for seven years.

Slide 26:

Report

- Notice to institution that prohibited conduct may have occurred
- Can be submitted by anyone
- Requires prompt outreach and response

Formal Complaint

- Notice to institution that the impacted party wants the school to take action on a report
- Can only be submitted by the party themselves or the Title IX Coordinator
- Requires review under Title IX

Slide 27:

Grievance Procedures

Formal Complaint – Informal resolution may be offered only ***after*** a formal complaint has been filed.

Notice of Allegations – Upon receipt of a formal complaint, the Title IX Coordinator or designee must issue a notice of allegations.

Slide 28:

Informal Resolution

- Institutions have the option to offer an informal resolution; it is not required
- Institutions may decide on a case-by-case basis which matters are eligible for informal resolution; except
- Instances of alleged employee sexual harassment against a student are never eligible for informal resolution.

Slide 29:

Informal Resolution

Informal resolution requires its own notice to the parties and must include:

- The allegations
- The requirements of the informal process
- Rights of parties to withdraw from the informal process at any time and return to the formal grievance process
- Any consequences of participation in informal process, including records that may be maintained or could be shared

Slide 30:

Informal Resolution

- The parties must voluntarily agree in writing to the informal 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

Slide 31:

Highlights from the final rule

- Must identify persons designated to facilitate informal resolution processes.
- Informal resolution processes must be reasonably prompt.
- Options for informal resolution processes should be included with notice of allegations.
- Informal resolution processes must be voluntary and can only be offered if a formal complaint is filed.
- Must keep records regarding the facilitation of an informal resolution process.
- Facilitators must be trained

Slide 32:

Q&A on the Title IX Regulations on Sexual Harassment (July 20, 2021)

Question 58: May a school offer an informal resolution process, including restorative justice or mediation, as a way to resolve a sexual harassment complaint?

Answer 58: Yes. The 2020 amendments state that a school is not required to offer an informal resolution process but may facilitate an informal resolution process at any time prior to reaching a determination regarding responsibility, subject to certain conditions.¹⁹² A school is not permitted to offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student.

The 2020 amendments explain that they leave the term “informal process” undefined to allow a school the discretion to adopt whatever process best serves the needs of its community.¹⁹⁴ The amendments do not require that the parties interact directly with each other as part of an informal resolution process; mediations are often conducted with the parties in separate rooms and the mediator conversing with each party separately. The parties’ participation in mediation or restorative justice, if offered, should remain a decision for each individual party to make in a particular case, and neither party should be pressured to participate in the process. Schools may exercise discretion to make fact-specific

determinations about whether to offer informal resolution in response to a complaint. The Department will not require the parties to attempt mediation in its enforcement of Title IX.

Slide 33:

Q&A on the Title IX Regulations on Sexual Harassment (July 20, 2021)

Question 59: If a school chooses to offer an informal resolution process, are there any requirements under Title IX?

Answer 59: Yes. If a school chooses to offer an informal process, the 2020 amendments require that the school obtains the complainant's and the respondent's voluntary, written consent before using any kind of "informal resolution" process, such as mediation or restorative justice. With the parties' consent, schools have the freedom to allow the parties to choose an informal resolution mechanism that best suits their needs. If those needs change, however, the 2020 amendments also make clear that either party may withdraw from the informal resolution process and resume the formal grievance process at any time prior to agreeing to a resolution.

A school's discretion to offer an informal resolution process is also limited by the school's obligation to ensure that all persons who facilitate informal resolutions are free from conflicts of interest and bias and are trained to serve impartially without prejudging the facts at issue. For example, 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.

Slide 34:

What can informal resolution look like?

Slide 35:

Types of Conflict Resolution

NO CONFLICT MANAGEMENT

DIALOGUE/DEBATE/DISCUSSION

CONFLICT COACHING

FACILITATED DIALOGUE

MEDIATION

RESTORATIVE PRACTICES

SHUTTLE DIPLOMACY

ADJUDICATION - INFORMAL

ADJUDICATION - FORMAL HEARING

Slide: 36:

What works best?

Mediation

Restorative Practices

Shuttle Diplomacy

Informal Adjudication

Slide 37:

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.”

Slide 38:

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.

Slide 39:

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.

Slide 40:

Informal Adjudication

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

Slide 41:

Impartiality

Voiding bias, prejudice, and conflicts of interest

Slide 42:

Impartiality

Avoiding Prejudgment and Bias

“The Department’s interest in ensuring impartial Title IX proceedings that avoid prejudice of the facts at issue necessitates a broad prohibition on sex stereotypes so that decisions are made on the basis of individualized facts and not on stereotypical notions of what “men” or “women” do or do not do.” 85 Fed. Reg. 30254 (May 19, 2020).

Slide 43:

Section 106.45(b)(1)(iii)

The grievance process must require that any individual designated by the recipient as Title IX Coordinator, investigator, decision maker, or facilitator of informal resolution not have a conflict of interest or bias:

For or against complainants or respondents generally, or

An individual complainant or respondent

Slide 44:

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.”

Slide 45:

Impartiality

Avoiding Prejudgment and Bias

Do not rely on cultural “rape myths”

Do not rely on cultural stereotypes about how men or women purportedly behave

Do not rely on gender-specific research data or theories to decide or make inferences of relevance or credibility in particular cases

Recognize that anyone, regardless of sex, gender, gender identity or sexual orientation, can be a victim or perpetrator of sexual assault or other violence

Avoid any perception of bias in favor of or against complainants or respondents generally

Employ interview and investigation approaches that demonstrate a commitment to impartiality

Slide 46:

Impartiality

Avoiding Bias

Department also rejected commenters' arguments that individuals should be disqualified from serving as investigators because of past personal or professional experience

"Department encourages [schools] to apply an objective (whether a reasonable person would believe bias exists), common sense approach to evaluating whether a particular person serving in a Title IX role is biased" WHILE

"exercising caution not to apply generalizations that might unreasonably conclude that bias exists (for example, assuming that all self-professed feminists, or self-described survivors, are biased against men, or that a male is incapable of being sensitive to women, or that prior work as a victim advocate, or as a defense attorney, renders the person biased for or against complainants or respondents"

Slide 47:

Impartiality

Avoiding Conflicts of Interest

Commenters argued that investigators and hearing officers employed by schools have an "inherent conflict of interest" because of their affiliation with the school, so Department should require investigations and hearings to be conducted by external contractors

Department noted that some of those commenters argued that this resulted in bias against complainants, and some argued that this resulted in bias against respondents

Department's response: Department's authority is over schools, not individual investigators and other personnel, so Department will focus on holding school's responsible for impartial end result of process, without labeling certain administrative relationships as per se involving conflicts of interest

Slide 48:

Getting Started

Initial Steps & Considerations

Slide 49:

Initial Steps

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

Slide 50:

Goals

Slide 51:

Goals for Information Resolution Processes

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

Slide 52:

Reminders about Informal Resolutions

- Any information shared or gained during the informal resolution process may 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

Slide 53:

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 formal grievance process
- Includes details about record keeping and confidentiality

Slide 54:

Policy Statement Examples

The Department of Education provides a number of example policy statements on Page 53 and 54 of its July 20, 2021 Q&A on the Title IX Regulations on Sexual Harassment:

<https://www2.ed.gov/about/offices/list/ocr/docs/202107-qa-titleix.pdf>

Slide 55:

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

Slide 56:

Considering Outcomes

Slide 57:

Templates

- Informal Resolution specific templates should include:
 - Notice of Informal Resolution
 - Agreement to Participate
 - Final Resolution Agreement

- Formal Resolution process templates should also be include information on Informal Resolution options, including:

- Notice of Allegations
- Notice of Investigation
- Notice of Hearing

Slide 58:

Assessment

Consider assessing:

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

Slide 59:

Conducting the Informal Resolution

Initial Steps & Requirements

Slide 60:

Initial Steps

Formal Complaint

Notice of Allegations

Request for Informal Resolution

Evaluation of Request

Notice of Informal Resolution

Slide 61:

Evaluating IR Requests

- Is an Informal Resolution permitted?
 - Reminder: If the respondent is an employee and the complainant is a student, IR is not permitted by the Final Rule

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

Slide 62:

Process Participants

Slide 63:

The Participants

The Parties

Complainant

An individual who is alleged to be the victim of conduct that could constitute sexual harassment.

Respondent

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

Slide 64:

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

Slide 65:

The Participants

Advisors: Prohibited Behavior

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.

Slide 66:

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

Slide 67:

Does the Facilitator Need Access to the Case File?

Slide 68:

Reaching a Resolution

Options & Considerations

Slide 69:

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

Slide 70:

Party Goals

Why is understanding these goals important?

What are some approaches to determining the goals each party has?

Slide 71:

Understanding Party Goals

- Why did they decide to participate in an informal resolution process?
- 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?

Slide 72:

Reminder:

Any information shared or gained during the informal resolution process typically may not be used against either party should the matter return to the formal process.

Slide 73:

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.

Slide 74:

Choosing a Resolution Format

Mediation

Restorative Practices

Shuttle Diplomacy

Adjudication Informal

Slide 75:

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.

Slide 76:

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

Slide 77:

Expectations

Setting expectations for behavior during the IR 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.

Slide 78:

Key Ingredients To a Resolution

Written

Clear

Specific

Stated Deadlines

Enforceable

State any process for foreseeable revisions

Slide 79:

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.

Slide 80:

Documentation

Recordkeeping

Slide 81:

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

Slide 82:

Recordkeeping

The institution must maintain for a period of seven years records of:

- Each sexual harassment investigation including
 - any determination regarding responsibility and any audio or audiovisual recording or transcript of any live hearing
 - any disciplinary sanctions imposed on the respondent, and any remedies provided to the complainant designed to restore or preserve equal access to the institution's education program or activity;
- Any appeal and the result therefrom;
- Any informal resolution and the result therefrom; and
- All materials used to train Title IX Coordinators, investigators, decision makers, and any person who facilitates an informal resolution process.

- The institution must make these training materials publicly available on its website, or if the institution does not maintain a website, the institution must make these materials available upon request for inspection by members of the public.

Slide 83:

Other IR Process Records

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

Slide 84:

Implementation

Strategies for success

Slide 85:

Considerations

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

Slide 86:

Possible Outcomes of Informal Resolution

No-contact directives

Apology/Reflective Writing

Coaching or Training

Agreements to stay away from certain classes or activities

Facilitated dialogue

Agreement to withdraw/transfer/resign.

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