



2020 TITLE IX ADVISOR TRAINING &
CERTIFICATION COURSE

Your Faculty



Brett A. Sokolow, J.D.

Chair of the Board of Directors, TNG
President, ATIXA



Sandra Schuster, J.D.

Partner, TNG
Advisory Board, ATIXA



W. Scott Lewis, J.D.

Partner, TNG
Advisory Board, ATIXA

- ❑ Module One – Overview of Advisor Rights and Roles in Title IX Proceedings
- ❑ Module Two – The Advisor’s Role Pre-Hearing
- ❑ Module Three – The Advisor’s Role at the Hearing
- ❑ Module Four – The Advisor’s Role Post-Hearing

“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 educational program or activity receiving federal financial assistance.”



Overview of Advisor Rights and Roles in Title IX Proceedings

Advisor of Choice

- The recipient must provide the parties with the same opportunities to have others present during any grievance proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice, who may be, but is not required to be, an attorney.
- The recipient may not limit the choice or presence of advisor for either the complainant or respondent in any meeting or grievance proceeding.
 - Recipients don't have to provide attorneys or equivalently talented advisors to one party just because the other party has one.
- The recipient can regulate the extent to which the advisor may participate in the proceedings, as long as the restrictions apply equally to all parties.

Advisor of Choice

- ❑ The Title IX regulations overlap with similar provisions in VAWA Section 304, though those provisions do not address sexual harassment whereas the Title IX regulations do (and also address sexual assault, dating violence, domestic violence, and stalking).
- ❑ The Title IX process sets up a potential dual advising system:
 - ❑ The Advisor of choice OR
 - ❑ This advisor is chosen by the party and entitled to accompany the party to all meetings, interviews, hearings, etc.
 - ❑ The Institution-Appointed Advisor
 - ❑ Applies only to postsecondary. This advisor may accompany the party throughout the entire resolution process, but the institution may limit this advisor to hearing participation only and will usually only appoint this advisor if the party has not chosen one by the time of the hearing.

What is the Role of the Advisor?

- The Advisor can accompany the advisee through all phases of the resolution process and explain the process
- The Advisor can help the advisee to decide about whether to file a formal complaint
- The Advisor can help the advisee think through strategy, such as questions of whether to seek or cooperate with informal resolution
- The Advisor can prepare the advisee to respond to questions during the investigation, even rehearsing beforehand
- The Advisor can help the advisee determine what evidence to share during an interview
- The Advisor can help the advisee with accessing supportive measures, community resources, and advocacy
- The Advisor can help the advisee to review and comment on the investigation report
- The Advisor can help the advisee with family issues
- The Advisor can help the advisee to advocate for the inclusion or exclusion of evidence from the process
- The Advisor can help the advisee to prepare for the hearing (documentation, opening statements, closing statements, impact statements, etc), and will conduct cross-examination at the hearing
- The Advisor can help the advisee to frame the appeal and prepare appeal documentation

Institution-Appointed Advisor

- Your advisee isn't your "client"
- Privilege likely won't attach
- If you are also an institutional mandated reporter, what happens if your employer asks you to disclose information that has been shared with you by your advisee?
- What are you going to do if your advisee asks you to do something you consider unethical, such as mislead or conceal evidence?
- You need an ethical code or strong personal/professional integrity to guide you.
- You can be called by the other party as a witness and asked about what you know.
- You may not like your advisee.
- You may not believe in your advisee's cause.
- You are not required to be aligned with your advisee, but if you aren't, friction can result.

Who Can Serve as an Advisor?

- Friends, family, roommates, faculty members, college or school staff members, attorneys, etc.
- Institutional rules will determine if a party can have more than one advisor
 - Comes up in union representation cases, or when a party wants an advisor and an emotional support person
 - In K-12, the parties get an advisor and the right to also have parents/guardians participate.
- If more than one advisor is not permitted at a time, you can switch off with the second advisor, or the advisee can have one advisor outside the meeting, and one inside with them.
- If more than one advisor is permitted, all who advise a party must be advisors, not victim advocates or other roles. Of course, an advocate can function as an advisor.
- You can't be an advisor on both sides of the same complaint
- An advisor must be eligible and available, meaning that institutional or school employees can refuse serving as an advisor for any reason, and should definitely do so if it would place them in the position of a conflict of interest or commitment.

What is Expected of the Advisor?

- Advise with integrity
- Follow any applicable professional ethics
- Get trained
- Learn the applicable policies and procedures
- Understand your role thoroughly and when you don't know something you need to know, figure out how to find the answer or who to ask
- Get to know the Title IX Team, if you can, and establish a good rapport
- Be timely, professional, and organized
- Don't try to unnecessarily delay the process. The institution may delay a week or two to accommodate your schedule, but they don't have to, and many institutions won't allow an unreasonable delay, or an attempt to run out the clock.
- Help your advisee to sift and organize the evidence, develop a witness list, and identify any necessary expert sources or expert witnesses.

Risks to Being an Advisor?

- You and your advisee may not agree on strategy
- Your advisee doesn't have to listen to you
- Your advisee can fire you
- Your advisee can refuse to cooperate with you
- Your advisee can sue you (something like an ineffective assistance argument)
 - If you are an institutionally-appointed advisor, make sure your employer covers you in this role with insurance and indemnity
- Your role as an advisor may be seen as political, if you are also an institutional employee. Will you only work with Complainants? Only with Respondents? With both?

The Advisor in K-12 Settings

- ❑ The K-12 advisor has much the same role as the postsecondary advisor, except that many schools and districts grant the advisor the right to present evidence on behalf of their advisee, especially when that advisee is very young.
- ❑ The K-12 process may not include a live hearing, but there will still be a decision-making step, and the advisor can assist with the written questions and answers that are exchanged between the parties and the decision-maker. The key is to ensure that your advisee has the opportunity to be heard by the decision-maker (in writing).
- ❑ Some K-12 schools and districts have live hearings but may or may not provide the opportunity to cross-examine. Title IX regulatory requirements do not impose a cross-examination mandate even if the school provides for a live hearing. State law or board policy may do so, and/or define the role of the advisor in the process.

Limitations on the Role of the Attorney-Advisor

- ❑ As noted above, parties can select someone to advise them who is an attorney
- ❑ The attorney-advisor does not have full representation rights in most college resolution processes. This means you may be limited in being able to speak and act on behalf of your advisee in college proceedings. You are to advise, not to give evidence.
 - ❑ See North Carolina and North Dakota state laws for notable exceptions.
- ❑ Different colleges and schools use different rules governing advisors, and this can even vary from investigator to investigator, and hearing to hearing, so be sure to clarify your boundaries with the officials with whom you'll be meeting and interacting. Some may grant you more latitude than others, or more than institutional policies appear on paper to permit.
- ❑ If you serve as both an advisor and have a role as a witness in the matter, you may wind up limiting the efficacy of your testimony as a witness because the hearing decision-maker may discount your credibility based on your dual roles.

Limitations on the Role of the Attorney-Advisor

- While the need and right for an attorney-advisor may seem to you as plain as the nose on your face, this role is fairly new for most colleges (2015) and schools (2020, or before per many state and board policies)
- Some administrators tend to view the advisory role less like a federal right and more like a (sometimes barely) tolerated nuisance.
- Some administrators resent the federal interference that has interjected attorneys into their educational (and by-design, non-adversarial) disciplinary proceedings.
- Some administrators are intimidated by attorney-advisors.
- Some administrators will punish your client if your advocacy is too zealous, if you are too pushy, if you offend them, or you push back against their procedurally-established boundaries.
 - This isn't right, but it's real, and we are being real with you.
 - Some colleges permit the party to be disciplined for the transgressions of their advisor – Beware and avoid disrupting the process
- If a no-contact order is put in place between your advisee and the opposing party, that no-contact order may extend to third-parties acting on behalf of the parties – meaning that the advisor for the Respondent cannot communicate with the advisor for the Complainant, and vice versa.
 - Sometimes, a limited exception can be obtained from the Title IX Coordinator in advance of any such communication.

The Rights of the Advisee

- Let's get you up to speed on the 2020 Title IX Regulations, and the many substantive rights they confer on your advisee(s).
- You need to be familiar with these rights to help assure that your advisee receives them, and you need to be prepared to advocate for your advisee to receive them if the college or school falls short.
- The regulations were issued in May of 2020, taking effect August 14th, 2020, and are enforceable by the Department of Education (OCR) and the courts.
- The regulations are prospective only, and do not apply retroactively.
- The regulations pre-empt state or local laws or rulings that directly conflict with Title IX.

Who's Who in the Title IX Process?

- The Title IX Coordinator – an official responsible for the recipient’s compliance with Title IX. Not a substantive Decision-maker on whether policy was violated. May have a role in emergency removals, supportive measures, informal resolution, and/or dismissal decisions.
- The investigator(s) – employees/contractors who gather evidence and compile an investigation report
- Deputy Title IX Coordinator(s) – administrators who assist and support the Title IX office.
- Hearing Officer(s) – The Decision-maker at the hearing, or a panel (usually 3), and/or a Chair (who is usually a voting member of the panel)
 - The Hearing Officer(s) renders a finding/determination, any sanctions, and any recommended remedies.
- The Hearing Facilitator or Case Manager – an administrator who serves to run the logistics of the hearing (recording, technology, witness timing, copying/distributing materials, etc.).
 - May be the Title IX Coordinator or a deputy
- Appeal Officer(s) – The person or panel who Chairs and/or decides the appeal of the hearing or dismissal
- Advisors – you. Each party is allowed an advisor. Witnesses, typically, are not allowed to have advisors
- The Title IX Team – a pool of individuals who may serve in the roles identified above

Supportive Measures

Previously referred to by OCR as “interim measures”

- Supportive measures are non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed.
- Such measures are designed to restore or preserve equal access to the recipient’s education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the recipient’s educational environment, or deter sexual harassment.

Supportive Measures

☐ Supportive measures may include:

- Referral to counseling, medical, and/or other health services
- Referral to the Employee Assistance Program
- Visa and immigration assistance
- Student financial aid counseling
- Education to the community or community subgroup
- Altering campus housing situation
- Altering work arrangements for employees or student-employees
- Safety planning
- Providing campus escorts
- Providing transportation accommodations
- Implementing contact limitations (no contact orders) between the parties
- Academic support, extensions of deadlines, or other course-related adjustments
- Trespass, Persona Non Grata, or Be On the Lookout (BOLO) orders
- Timely warnings
- Class schedule modifications, withdrawals, or leaves of absence
- Increased security and monitoring of certain areas of the campus
- Etc.

Supportive Measures

- The recipient must maintain as “confidential” any supportive measures provided to the complainant or respondent, to the extent that maintaining such confidentiality would not impair the ability of the recipient to provide the supportive measures.
- The Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures.
- Supportive measures don’t actually have to be provided equitably between the parties, but hopefully the institution will strive to do so.

Response to Sexual Harassment

- ❑ The recipient must respond promptly in a manner that is not deliberately indifferent to actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States
 - ❑ Education program or activity means locations, events, or circumstances over which the recipient exercises 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.

Response to Sexual Harassment

- The Title IX Coordinator must promptly contact the complainant to discuss the availability of supportive measures as defined in § 106.30.
 - Consider the complainant's wishes with respect to supportive measures
 - Inform the complainant of the availability of supportive measures with or without the filing of a formal complaint
 - Explain to the complainant the process for filing a formal complaint.

Emergency Removal

- A recipient may remove a student respondent from the recipient's education program or activity on an emergency basis, only after:
 - Undertaking an individualized safety and risk analysis, and
 - Determining if an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal, and
 - Providing the respondent with notice and an opportunity to challenge the decision immediately following the removal while respecting all rights under the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act of 1973, or the Americans with Disabilities Act, as applicable.

Employee Administrative Leave

- A recipient may place a non-student employee respondent on administrative leave during the pendency of a grievance process under existing procedures, without modifying any rights provided under Section 504 of the Rehabilitation Act of 1973 or the Americans with Disabilities Act.

Training Minimums

- Recipient must train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, as applicable, on:
 - The definition of sexual harassment in § 106.30
 - How to apply definitions used by the recipient with respect to consent (or the absence or negation of consent) consistently, impartially, and in accordance with the other provisions of § 106.45.
 - The scope of the recipient's education program or activity
 - How to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes
 - How to serve impartially, by avoiding prejudgment of the facts at issue, conflicts of interest, and bias
 - Any technology to be used at a live hearing
 - Issues of relevance of questions and evidence
 - Issues of relevance to create an investigative report that fairly summarizes relevant evidence.

- Recipient must ensure that any materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, must not rely on sex stereotypes and must promote impartial investigations and adjudications of formal complaints of sexual harassment.
- You should ask to review these materials (they have to be posted publicly on the institutional/school/district website) and address any concerns that arise.

Promptness

- ❑ A recipient must provide reasonably prompt time frames for conclusion of the grievance process, including:
 - ❑ Reasonably prompt time frames for filing and resolving appeals and informal resolution processes if the recipient offers informal resolution processes, and
 - ❑ A process that allows for the temporary delay of the grievance process or the limited extension of time frames for good cause with written notice to the complainant and the respondent of the delay or extension and the reasons for the action.
 - ❑ Good cause may include considerations such as the absence of a party, a party's advisor, or a witness; concurrent law enforcement activity; or the need for language assistance or accommodation of disabilities.

Sanctions

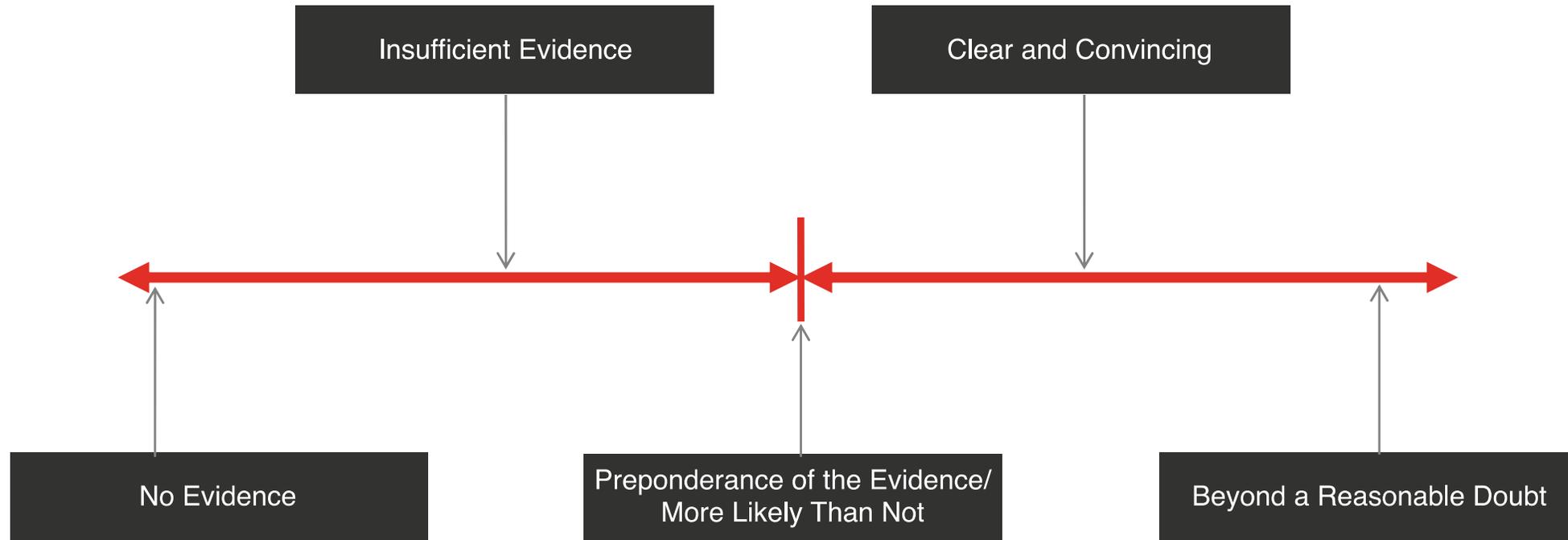
- The recipient must describe the range of possible disciplinary sanctions and remedies or list the possible disciplinary sanctions and remedies that the recipient may implement following any determination of responsibility.
 - Mirrors Clery Act language

Standard of Proof

- ❑ Clear and convincing evidence: It is highly probable that policy was violated.
 - ❑ Highly and substantially more likely to be true than untrue; the fact finder must be convinced that the contention is highly probable.
 - ❑ 65% 75% 85% – part of the lack of clarity with this standard is there is no real consensus on how to quantify it.
- ❑ Preponderance of the evidence: “More likely than not.”
 - ❑ The only equitable standard
 - ❑ 50.1% (50% plus a feather)
 - ❑ The “tipped scale”

Understanding Evidence Thresholds

EVIDENTIARY STANDARDS



Privileged Information

□ Permission required for:

- Records made or maintained by a:

- Physician
- Psychiatrist
- Psychologist

- Questions or evidence that seek disclosure of information protected under a legally recognized privilege must not be asked without permission.

- This is complex in practice because you won't know to ask for permission unless you ask about the records first.

Notice to Parties

- ❑ Upon receipt of a formal complaint indicating that the complainant wants a formal investigation, the recipient must provide the following written notice to the parties who are known:
 - ❑ Notice of the recipient's grievance process that complies with this section, including any informal resolution process.
 - ❑ Notice of the allegations of sexual harassment potentially constituting sexual harassment as defined in § 106.30, including sufficient details known at the time and with sufficient time to prepare a response before any initial interview, including.
 - ❑ The identities of the parties involved in the incident, if known
 - ❑ The conduct allegedly constituting sexual harassment under § 106.30
 - ❑ The date and location of the alleged incident, if known
 - ❑ A statement that the respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the grievance process

Notice to Parties

- Inform the parties that they may have an advisor of their choice, who may be, but is not required to be, an attorney, under paragraph (b)(5)(iv) of this section, and may inspect and review evidence under paragraph (b)(5)(vi) of this section
- Inform the parties of any provision in the recipient's code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process
- Provide notice of any additional allegations added after the initial notice to the parties whose identities are known.

Mandatory Dismissal (Four Grounds)

- If the conduct alleged in the formal complaint would not constitute sexual harassment as defined in § 106.30 even if proved, and/or
- If the conduct did not occur in the recipient's education program or activity, or
- If the conduct did not occur against a person in the United States, or
- If at the time of filing a formal complaint, a complainant is not participating in or attempting to participate in the education program or activity of the recipient.

Discretionary or Permissive Dismissal

- The Recipient may consider dismissing a complaint if at any time during the investigation or hearing:
 - A complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the formal complaint or any allegations therein; and/or
 - The respondent is no longer enrolled or employed by the recipient; and/or
 - Specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein.

Notice of Dismissal

- Upon a required or permitted dismissal, promptly send written notice of the dismissal and reason(s) therefor simultaneously to the parties.
- Dismissal is appealable (see appeal procedures below)
- Recipients may reinstate the complaint under another provision of the recipient's code of conduct or other applicable resolution procedures.

Consolidation of Formal Complaints

- A recipient may consolidate formal complaints as to allegations of sexual harassment against more than one respondent, or by more than one complainant against one or more respondents, or by one party against the other party, where the allegations of sexual harassment arise out of the same facts or circumstances.
 - This requires clear policy/protocols.
 - Consider how this practice may impact your advisee.

Fairness and Due Process

- The recipient must ensure that the burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rest on the recipient and not on the parties.
- Provide an equal opportunity for the parties to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence.
- The recipient cannot restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence.

THE ADVISOR'S ROLE PRIOR TO THE HEARING

Pre-Hearing Steps

- For most colleges and schools, the steps in the pre-hearing resolution process include:
 - Intake/Formal Complaint
 - Notice of Allegation/Investigation
 - Initial/Dismissal Assessment
 - Investigation
 - Informal Resolution (potentially)
 - Post-investigation report/evidence review
 - Pre-hearing matters

Intake to Investigation

- The advisor may accompany their advisee to any intake meetings. The institution can conduct intake without an advisor present if the party assents.
- The advisor can and should help their advisee to understand the details of the Notice of Investigation and Allegations (NOIA)
- During the initial assessment (a formal or informal step in the process), the parties may wish to advocate for or against dismissal, and their advisors can help them to frame their arguments, and their appeals of any dismissal decisions with which they disagree.

Investigation

- The advisor may accompany the party to all investigation interviews
- There should be clear institutional rules on the role of the advisor during the investigation
- The advisor is permitted to interact with (and coach) their advisee, but may otherwise be treated as a “potted plant” with respect to their role in the interview
- Clarify with investigators whether you need to take a break or sidebar with your advisee or can speak directly to them during the interview.
- Clarify whether the Advisor can address the investigators, and under what circumstances.

Investigation Report

- ❑ The investigators will write an investigation report appropriately summarizing the investigation and all relevant evidence obtained.
 - ❑ OCR has created a two-step vetting process for review of the evidence and the report.
 - ❑ This is intended to allow the parties and advisors to comment on the report prior to finalization and then to prepare for the hearing with the report in hand in advance.

Party Access to Evidence/Report

- ❑ Prior to completion of the investigation report, the recipient will send to each party and the party's advisor, if any, all evidence obtained that is **directly related** to the complaint, to review in an electronic format or a hard copy, including the evidence upon which the recipient does not intend to rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence whether obtained from a party or other source.
 - ❑ Give the parties at least 10 days to submit a meaningful written response, which the investigator will consider prior to completion of the investigation report.
 - ❑ Whether included as relevant in the investigation report or not, make all such evidence subject to the parties' inspection and review available at any hearing to give each party equal opportunity to refer to such evidence during the hearing, including for purposes of cross-examination.

Pre-Hearing Interactions with the Investigator(s)

- During the 10-day period where the report is being finalized, the advisee and Advisor may:
 - Suggest new witnesses
 - Suggestion additional questions to be asked of parties or witnesses
 - Comment on the evidence
 - Offer new evidence
 - Challenge investigator determinations of what is relevant (evidence to be considered by the Decision-maker versus what is directly related (evidence not to be considered by the Decision-maker)

Final Investigation Report

- The recipient will then finalize an investigation report that fairly summarizes relevant evidence and, at least 10 days prior to a hearing (if a hearing is required or otherwise provided) or other time of determination regarding responsibility, send to each party and the party's advisor, if any, the investigation report in an electronic format or a hard copy, for their review and written response.
- This right of access for the advisor to the investigation report is direct and unencumbered (though an NDA can be required)

Pre-Hearing Interactions with the Panel, Chair, or Decision-maker

- Although not explicitly required or even mentioned in the Title IX regulations, the Chair or Decision-maker may conduct pre-hearing meetings for each party (in writing, or in person)
- Pre-hearing meetings can provide an opportunity to:
 - Answer questions the parties and advisors have about the hearing and its procedures.
 - Clarify expectations regarding logistics, decorum, and technology (when applicable).
 - Clarify expectations regarding the limited role of advisors.
 - Discern whether parties intend to ask questions of any or all witnesses (in order to evaluate which witnesses should be invited to attend the hearing), or whether a party intends not to testify at the hearing
 - The Chair or Decision-maker can invite parties to submit questions in advance, but this is not required
 - The Chair or Decision-maker may try to discern any conflicts of interest/vet recusal requests.
 - The Chair or Decision-maker may seek to understand any questions regarding relevance of evidence or questions and may make pre-hearing rulings.

Informal Resolution

- ❑ Informal resolution, that does not involve a full investigation and adjudication, may be offered at any time prior to reaching a determination regarding responsibility, as long as:
 - ❑ Policy does not require informal resolution participation as a condition of enrollment or continuing enrollment, or employment or continuing employment, or enjoyment of any other right, waiver of the right to an investigation and adjudication of formal complaints of sexual harassment consistent with this section.

Informal Resolution

- Policy may not require the parties to participate in an informal resolution process under this section and may not offer an informal resolution process unless a formal complaint is filed.
- Recipient must obtain the parties' voluntary, written consent to the informal resolution process; and
- Recipient may not offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student.

Requirements of Informal Resolution Options

- The parties receive a written notice disclosing:
 - The allegations
 - The requirements of the informal resolution process including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations
 - 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.
- If informal resolution is successful, it can avoid a hearing. If not, the hearing will usually proceed unless there is a dismissal.

THE ADVISOR'S ROLE AT THE HEARING

- Postsecondary institutions (IHEs) must provide for a live hearing.
- At the live hearing, the decision-maker(s) must permit each party's advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility.
 - Only relevant cross-examination and other questions may be asked of a party or witness.
 - Before a complainant, respondent, or witness answers a cross-examination or other question, the decision-maker(s) must first determine whether the question is relevant and explain any decision to exclude a question as not relevant.

Provision of an Advisor

- If a party does not have an advisor of choice present at the live hearing, the recipient must provide without fee or charge to that party, an advisor of the recipient's choice, who may be, but is not required to be, an attorney, to conduct cross-examination on behalf of that party.
- The advisee and Advisor can prepare strategy for the hearing, collaborate to prepare questions, devise and rehearse opening statements, closing statements, impact statements, etc.
- They can prepare witnesses, including expert witnesses, prepare exhibits, and visuals.
- Advisors should be aware of any institutional policies or procedures that may limit the last-minute introduction of evidence at the hearing, rather than through the investigation.

Hearing Technology

- ❑ At the request of either party, the recipient must provide for the live hearing to occur with the parties located in separate rooms with technology enabling the decision-maker(s) and parties to simultaneously see and hear the party or the witness answering questions. Hearings may be conducted with all parties physically present in the same geographic location or, at the recipient's discretion, any or all parties, witnesses, and other participants may appear at the live hearing virtually, with technology enabling participants simultaneously to see and hear each other.
- ❑ The recipient must create an audio or audiovisual recording, or transcript, of any live hearing and make it available to the parties for inspection and review.

Questioning & Cross-Examination

- The live hearing requirement for higher education allows the parties to ask (direct and) cross-examination questions of the other party and all witnesses through their advisor.
- Such cross-examination must be conducted directly, orally, and in real time by the party's advisor and never by a party personally.
- The Chair or Decision-maker must permit relevant questions and follow-up questions, including those challenging credibility.
- You may want to explain why you think a question is relevant or will lead to a relevant answer but be clear that the rules permit you to do so.
- Once you pose a question, the Chair or Decision-maker must first determine whether a question is relevant and direct party to answer.
 - Must explain any decision to exclude a question as not relevant.
- The determine of relevance by the Chair or Decision-maker is final, pending appeal.

Questioning & Cross-Examination

- If a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement (during the investigation or hearing) of that party or witness in reaching a determination regarding responsibility.
- All witnesses must testify live for their statements to be admissible. This would include police officers, nurses, doctors, experts, the investigator, etc.
 - The regulations are unclear as to whether this would be true of questions from the panel versus those posed by advisors during cross-examination.
- The decision-maker(s) cannot draw an inference about the determination regarding responsibility based **solely** on a party's or witness's absence from the live hearing or refusal to answer cross-examination or other questions.
- Your advisee could choose to appear, choose not to appear, choose to appear and answer all questions, or choose to appear and answer some but not all questions.
- If your advisee needs a witness's testimony or evidence, you need to make sure the witness attends the hearing and is willing to answer the questions that are posed.

Questioning & Cross-Examination

- So, how many questions should you be prepared to ask?
- Our advice is to ask each witness (through direct examination or cross-examination) about every significant statement they have made (use the investigation report and interview transcripts as a roadmap).
- The Title IX regulations are unclear about whether the advisor needs to ask each witness about one thing, or everything.
- Given that the regulations are confusing on this point, we think you need to be well-prepared to be thorough.

Questioning & Cross-Examination

- Work with your advisee so that you know what to ask of each witness, and what your advisee wants you to ask.
- Stick to what is relevant, which means the evidence would tend to prove or disprove an issue in the complaint.
- Expect that the panel or decision-maker may ask many questions as well, and that it may do so before you have a chance to. If so, the Chair or decision-maker may rule your question is not allowed, if all it does is duplicate a previously-asked question.
- Thus, you need to keep track of what is asked and be prepared to explain why your question is relevant or may produce a different answer than was provided already.

Questioning & Cross-Examination

- Be respectful. Ask direct questions. Don't try intimidation tactics. They will likely backfire.
- We suggest you don't get too tricky, either, for the same reasons.
- You may want to remain seated while questioning. A hearing is not a courtroom.
- Try to respect the rules and boundaries of the process, even if you don't agree with them (unless they violate the regulations).
- Remember to pause after your question to allow the Chair/Decision-maker to determine the relevance of your question.
- Avoid multi-part or confusing questions.

Questioning & Cross-Examination

- When your advisee is being questioned, be supportive. If they are uncomfortable or emotional, you can ask for a break.
- If a question is abusive, ask the Chair or Decision-maker to rule on it.
- If you think your advisee has not understood the question, ask the Chair/Decision-maker for it to be repeated or clarified, or repeat it for your advisee.
 - Thus, you need to pay close attention to the question being asked.
- Prep your advisee that it may be helpful to pause before answering, pose the question again to themselves in their head, make sure they understand what is being asked, compose their thoughts in response, and then answer.
- If your advisee wants to pause to discuss a question or answer with you, they can do so, and you can also make a request to pause or confer before they answer.

Questioning & Cross-Examination

- What will happen if you refuse to conduct cross-examination? The institution will replace you with an advisor who will do so.
- What if your advisee won't cooperate with you? You need to get up to speed on the complaint as best you can, and make sure you have reviewed the investigation report thoroughly. You are then on your own. You must conduct cross-examination for your advisee, even if they don't cooperate with you.
- Only engage in discussion with the Chair or Decision-maker about relevance if they invite your opinion on a question or evidence. This practice may or may not be permitted by institutional hearing rules.
- Don't argue with the Chair or Decision-maker if they determine your question or evidence is not relevant, unless they invite you to. You should reserve those arguments for appeal.

Prior Sexual History

- ❑ Questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, unless:
 - ❑ such questions and evidence about the complainant's prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or
 - ❑ the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the Respondent and are offered to prove consent.

Formal Resolution for K-12 Schools and Other Recipients

- Elementary and secondary schools, and other recipients that are not postsecondary institutions (e.g., scouting organizations), may, but need not, provide for a hearing (some already have to under state, board or, district rules, and will continue to do so).
- With or without a hearing, after the recipient has sent the investigation report to the parties pursuant to paragraph (b)(5)(vii) of this section and before reaching a determination regarding responsibility, the decision-maker(s) must afford each party the opportunity to submit written, relevant questions that a party wants asked of any party or witness, provide each party with the answers, and allow for additional, limited follow-up questions from each party.

Determination of Responsibility

- ❑ After the close of all evidence, the hearing officer(s) will deliberate, determine responsibility and issue a written determination applying the standard of evidence.
 - ❑ A detailed Notice of Outcome will be prepared and provided to the parties simultaneously.
 - ❑ The determination regarding responsibility becomes final either on the date that the recipient provides the parties with the written determination of the result of the appeal, if an appeal is filed, or if an appeal is not filed, the date on which an appeal would no longer be considered timely.

Written Determinations

- The written determination regarding responsibility includes the following:
 - Sections of the policy alleged to have been violated
 - A description of the procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held
 - Statement of and rationale for the result as to each specific allegation
 - Should include findings of fact supporting the determination and conclusions regarding the application of the policy to the facts
 - Sanctions imposed on Respondent
 - Any remedies provided to the Complainant designed to restore or preserve access to the education program or activity
 - When the outcome is considered final, and any changes that can occur prior to finalization
 - Procedures and bases for any appeal

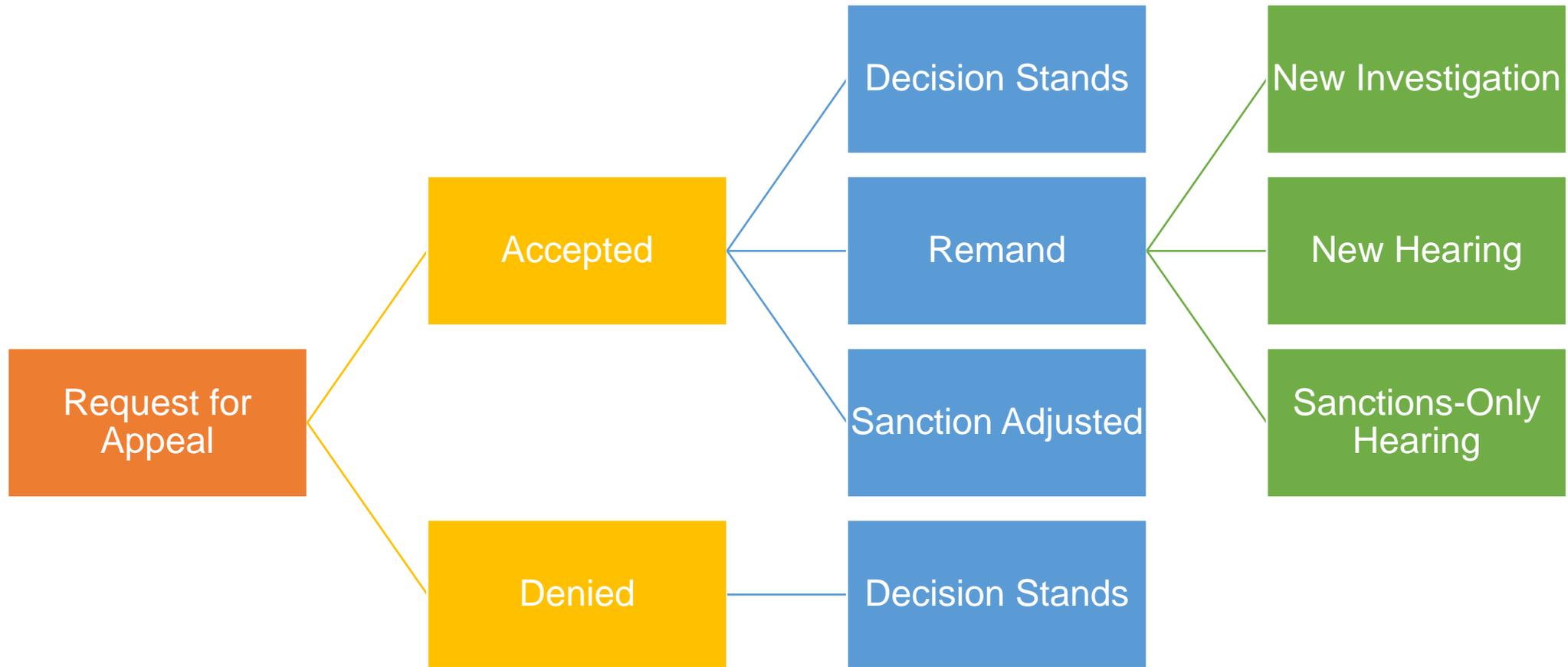
THE ADVISOR'S ROLE POST-HEARING

- ❑ The recipient must offer all parties an appeal from a determination regarding responsibility, and from a recipient’s dismissal of a formal complaint or any allegations therein, on the following bases:
 - ❑ Procedural irregularity that affected the outcome of the matter
 - ❑ 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
 - ❑ 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
 - ❑ Other additional bases (sanction?), as long as applied to the parties, equitably.

Appeals

- The recipient must notify the other party in writing when an appeal is filed and implement appeal procedures equally for all parties.
- Ensure that the decision-maker(s) for the appeal is not the same person as the decision-maker(s) that reached the determination regarding responsibility or dismissal, the investigator(s), or the Title IX Coordinator.
- Give the parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome.

Appeals



Neutrality, Conflict of Interest, and Objectivity

- ❑ Institutional officials must objectively evaluate all relevant evidence – including both inculpatory and exculpatory evidence – and determine credibility without respect to a person’s status as a complainant, respondent, or witness.
- ❑ The recipient must implement an evaluative/vetting process to ensure that the Title IX Coordinator, investigator, decision-maker, or any person designated by a recipient to facilitate an informal resolution process does not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent.

- Among the most significant problems that can arise from a process under Title IX
- Bias can exist when any variable improperly influences a finding and/or sanction
- There are many forms of bias and prejudice that can impact decisions and sanctions:
 - Pre-determined outcome
 - Partisan approach by investigators in questioning, findings, or report
 - Partisan approach by hearing board members in questioning, findings, or sanction
 - Intervention by senior-level institutional officials
 - Not staying in your lane
 - Improper application of institutional procedures
 - Improper application of institutional policies
 - Confirmation bias
 - Implicit bias
 - Animus of any kind

Conflict of Interest

- Conflicts of interest are expressly prohibited in the 2020 Title IX regulations.
- Types of conflicts:
 - Wearing too many hats in the process
 - Legal counsel as investigator or decision-maker
 - Decision-makers who are not impartial
 - Biased training materials; reliance on sex stereotypes
- Conflicts of interest can be situational or positional
 - Simply knowing a student or an employee is typically not sufficient to create a conflict of interest if objectivity not compromised.
 - Also, having disciplined a student or employee previously is often not enough to create a conflict of interest.

- Advisors should be prepared to recognize and raise issues of bias
- During the investigation, raise issues of bias with the Title IX Coordinator
- If bias appears at the hearing, request a sidebar to raise it with the Chair or Decision-maker.
- If it cannot be addressed at the hearing, it can be addressed as part of the appeal.
- Pay careful attention to recusal procedures and how to request recusal by a participant in the process on the basis of bias or conflict of interest
- Conflicted or biased administrators should know to recuse themselves
- Questions about bias of an investigator or witness can be asked at the hearing, if relevant

Record Keeping

- The recipient must maintain for a period of seven years records of –
 - Each sexual harassment investigation including any determination regarding responsibility.
 - Any audio or audiovisual recording or transcript required under paragraph (b)(6)(i) of this section
 - Any disciplinary sanctions imposed on the respondent
 - Any remedies provided to the complainant designed to restore or preserve equal access to the recipient's education program or activity
 - Any appeal and the result therefrom
 - Any informal resolution and the result therefrom

Record Keeping

- All materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process
- Records of any actions, including any supportive measures, taken in response to a report or formal complaint of sexual harassment.
 - In each instance, document the basis for the conclusion that recipient's response was not deliberately indifferent
 - Document that recipient has taken measures designed to restore or preserve equal access to the recipient's education program or activity
 - If a recipient does not provide a complainant with supportive measures, then the recipient must document the reasons why such a response was not clearly unreasonable in light of the known circumstances.
 - The documentation of certain bases or measures does not limit the recipient in the future from providing additional explanations or detailing additional measures taken.

Training Records

- The recipient must make all materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process publicly available on its website, or if the recipient does not maintain a website, the recipient must make these materials available upon request for inspection by members of the public.
 - The most recent materials used to train the Title IX Team should be posted.
 - While seven year of materials need to be maintained, only most recent need to be posted.
 - This requirement is not retroactive, so seven years starts August 14, 2020.

Retaliation

- ❑ The recipient must implement a policy that no recipient or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title IX, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under Title IX.
- ❑ Retaliation also includes intimidation, threats, coercion, or discrimination, including charges against an individual for code of conduct violations that do not involve sex discrimination or sexual harassment, but arise out of the same facts or circumstances as a report or complaint of sex discrimination, or a report or formal complaint of sexual harassment, *for the purpose of interfering with any right or privilege secured by Title IX.*

Retaliation

- Complaints alleging retaliation may be filed according to the grievance procedures for sex discrimination required to be adopted under § 106.8(c).
- The exercise of rights protected under the First Amendment does not constitute retaliation.
- Charging an individual with a code of conduct violation for making a materially false statement in bad faith in the course of a grievance proceeding does not constitute retaliation as long as a policy recognizes that determination regarding responsibility, alone, is not sufficient to conclude that any party made a materially false statement in bad faith.

“Confidentiality”

- The Recipient must maintain the confidentiality of the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness, except as may be permitted by the FERPA statute, 20 U.S.C. 1232g, or FERPA regulations, 34 CFR part 99, or as required by law, or to carry out the purposes of 34 CFR part 106, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder.
- As a result, the recipient may ask all advisors to sign NDAs regarding the resolution process and any materials shared with advisors.



Contact Information

Brett A. Sokolow, J.D.

brett.sokolow@atixa.org

W. Scott Lewis, J.D.

scott.lewis@tngconsulting.com

Sandra K. Schuster, J.D.

Sandra.schuster@tngconsulting.com

LIMITED LICENSE AND COPYRIGHT. By purchasing, and/or receiving, and/or using ATIXA materials, you agree to accept this limited license and become a licensee of proprietary and copyrighted ATIXA-owned materials. The licensee accepts all terms and conditions of this license and agrees to abide by all provisions. No other rights are provided, and all other rights are reserved. These materials are proprietary and are licensed to the licensee only, for its use. This license permits the licensee to use the materials personally and/or internally to the licensee's organization for training purposes, only.

These materials may be used to train Title IX personnel, and thus are subject to 34 CFR Part 106.45(b)(10), requiring all training materials to be posted publicly on a website. No public display, sharing, or publication of these materials by a licensee/purchaser is permitted by ATIXA.

You are not authorized to copy or adapt these materials without explicit written permission from ATIXA. No one may remove this license language from any version of ATIXA materials. Licensees will receive a link to their materials from ATIXA. That link, and that link only, may be posted to the licensee's website for purposes of permitting public access of the materials for review/inspection, only.

Should any licensee post or permit someone to post these materials to a public website outside of the authorized materials link, ATIXA will send a letter instructing the licensee to immediately remove the content from the public website upon penalty of copyright violation. These materials may not be used for any commercial purpose except by ATIXA.