

Advisors in the Title IX System

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Who is your presenter?

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Title IX (Under Final Rule §106.45(b)(1)(iii))

| Training Topic | the definition of sexual harassment in §106.30 | the scope of the recipient's education program or activity | how to conduct an investigation and grievance process, including: | | | how to serve impartially, including: | | | Technology | when questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, as set forth in §106.45 (b)(6) | to create an investigative report that fairly summarizes relevant evidence | |
|--|---|--|---|---------------------|-------------------------------|---|--------------------------------|-------------------------|------------|---|--|-------------------------|
| | | | hearings | appeals | informal resolution processes | by avoiding prejudgment of the facts at issue | conflicts of interest | bias | | | | |
| Where Applicable | Elementary | ✓ | ✓ | Optional* | ✓ | ✓ | ✓ | ✓ | ✓ | - | ✓ | ✓ |
| | Secondary | ✓ | ✓ | Optional* | ✓ | ✓ | ✓ | ✓ | ✓ | - | ✓ | ✓ |
| | Post-Secondary | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ |
| Who receives the training | Title IX Coordinators | ✓ | ✓ | - | - | If TIXC is facilitator | ✓ | ✓ | ✓ | - | - | If TIXC is investigator |
| | Investigators | ✓ | ✓ | - | - | - | ✓ | ✓ | ✓ | - | - | ✓ |
| | Decision-makers | ✓ | ✓ | ✓ | ✓ | - | ✓ | ✓ | ✓ | ✓ | ✓ | - |
| | person who facilitates an informal resolution process | ✓ | ✓ | - | - | ✓ | ✓ | ✓ | ✓ | - | - | - |
| Relevant Portion(s) of Preamble <i>See, 85 Fed. Reg. 30026 (May 19, 2020)</i> | 30036-38, 30139-77. | 30194-212, 30255. | 30311-67. | 30275-77, 30395-99. | 30399-408. | 30247, 30252, 30254, 30258, 30264. | 30100, 30250, 30252, 30367-70. | 30084, 30248, 30250-52. | 303 | 30098, 30105, 30221, 30235, 30247-49, 30291, 30293-94, 30303-07, 30319, 30331, 30337, 30343, 30349, 30351-54. | 30248, 30304-08, 30310, 30349, 30353-54. | |

*Hearings are optional for both Elementary and Secondary schools. However, with or without a hearing, decision-makers must provide an opportunity for the parties to submit written questions they wish to be asked of witnesses, receive answers, and submit any written follow-up questions. Final Rule § 106.45(b)(6)(ii).

As always, start from the regulations:

- “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, and **not limit the choice or presence of advisor** for either the complainant or respondent in **any meeting or grievance proceeding**; however, the **recipient may establish restrictions** regarding the extent to which the advisor may participate in the proceedings, as long as the restrictions apply equally to both parties.”

- “Prior to completion of the investigative report, the recipient must send to each party and the party’s advisor, if any, the evidence subject to inspection and review in an electronic format or a hard copy, and the parties must have at least 10 days to submit a written response, which the investigator will consider prior to completion of the investigative report.”

- “Create an investigative report that fairly summarizes relevant evidence and, at least 10 days prior to a hearing (if a hearing is required under this section or otherwise provided) or other time of determination regarding responsibility, send to each party and the party’s advisor, if any, the investigative report in an electronic format or a hard copy, for their review and written response.”

- “If a party does not have an advisor 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.”

Finding CONTEXT from the PREAMBLE

- “We share commenters’ beliefs that this provision will make the grievance process substantially **more thorough and fairer** and that the resulting outcomes will be **more reliable**. The Department recognizes the high stakes for all parties involved in sexual misconduct proceedings under Title IX, and that the outcomes of these cases can carry potentially life-altering consequences, and thus believes every party should have the right to seek **advice** and **assistance** from an advisor of the party’s choice.”

- “Advisors, for example, may be friends, family members, attorneys, or other individuals with whom the party has a trusted relationship.”
- “Because the grievance process occurs in an educational setting and does not require court appearances or detailed legal knowledge, the Department believes that assisting a party to a grievance process is best viewed not as practicing law, but rather as providing **advocacy services** to a complainant or respondent.”

- “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. Such cross-examination at the live hearing must be conducted directly, orally, and in real time by the party’s advisor of choice and never by a party personally.”

Cross Examination prohibitions from regs:

- “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.”

Cross Examination prohibitions from regs:

- 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 if 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.

What does an ADVISOR do in this system?

1. They learn from their advisee.
2. They make sure their advisee understands institutional policy.
3. They attend investigative meetings with their advisee.
4. They review evidence and investigative reports.
5. They ensure CX question advisee wants asked, are asked.
6. They identify policy deviations and flag them.

Institution-Provided Advisors

- Maintain a professional relationship.
- Maintain composure.
- Remember to stop and explain.
- Speak to their advisee privately when needed.
- Do not deviate from policy, even if the advisee wishes to.
- Maintain confidentiality.
- **DO NOT ADVISE ON MATTERS OUTSIDE THE INSTITUTIONAL TITLE IX SYSTEM.**

Investigation Phase

- Never, EVER, EVER attend an investigative meeting with your advisee before meeting with them separately.
- Do not permit outside individuals (parents, etc.) influence your role – you advise only one person.
- Take notes. Keep notes. And when all has ended, destroy notes.

- You must remember that you are not a decision-maker. It is not your duty to draw conclusions, and your advisee cannot require you to profess your agreement with them.
- It is not your duty or obligation to tell your advisee “I agree you have been victimized” or “I agree you have been falsely accused.”

What should you expect?

- The initial interview with investigators could be long. Often, investigators will block off approximately 1-2 hours for an initial interview. Talk with your advisee about their comfort level with this length of time and discuss whether they have any specific objections to it, and be prepared to raise such objections with the investigators at the start of the interview.

What should you expect?

- The “initial interview” does not mean the only interview. It is not uncommon for a party to be interviewed multiple times by investigators during the pre-hearing stage. This could be for many reasons, including that investigators, during the course of the process, came into possession of information or evidence that spurred further questions for your advisee. Requests for additional interviews are not indicative of the investigator’s having any particular impression of the situation.

What should you expect?

- The investigator's questions may feel personal, private, and invasive. Make sure the advisee understands that the investigators are not asking these questions to make the advisee feel uncomfortable, even though that might be a natural reaction during the interview, but rather so they can get as much relevant and helpful information as possible to assist them in their investigation. Let your advisee know that, in a Title IX case, the information obtained in the interview will be included in an Investigative Report, which will be provided to the hearing decision-maker, so it is really helpful to have the clearest and most complete picture.

Coaching

- To “coach” does not mean to tell your advisee what to say. It merely means to offer tips on how to communicate in the unique setting of an investigation so that they can be understood by the investigator and ultimately the decision makers as well.

Coaching?

- Coach your advisee to be clear, specific/precise, and to avoid vagueness.
- “We hung out at the party.”
- “We were talking at first with a group, but then we ended up alone. We took 2 or 3 shots and then we started playing flip cup. We played about 2 games before we decided to leave the party together.”

Coaching

- Have the advisee pretend they are taking what happened and turning it into a dramatization. If others were asked to re-create the incident, would they have enough information to do so?

Linear Approach to Events is Crucial

- Parties often tell their story in a non-linear fashion, jumping from “hot points” in the story. But they need to understand that background and baseline information is important to understand context.
- Questions may be much more relevant than they appear at first glance...even the “what were you wearing” question, which may appear at first to be judgmental, can be highly useful information in some situations.

Linear Approach to Events is Crucial

- Have your advisee create a timeline of events, or help them assemble one.
- Always submit a written document to the investigator. This is not just a best practice, it is also an important form of self-advocacy for the party so that they can avoid being misunderstood. Verbal statements are notoriously difficult to document in detail the same way as a written statement.

Linear Approach to Events is Crucial

- Aftermath of an incident is highly relevant. Sexual harassment has a severity and pervasiveness element in decision-making analysis. How can the decision maker determine severity if they are not made aware of post-incident counseling? About outcry witnesses? About close-in-time attestations to third parties?
- Be expansive and specific in your proposed witness list.
- Find and download (make sharable) information that is in digital format. Suggest camera angles that may be relevant.

Take notes

- Bring to any interview the notes you prepared when you met with your advisee.
- Take notes about the interview, including notation of the questions asked.
- After the interview ask yourself, did the investigator fail to ask any crucial or relevant or valuable questions that would help my advisee communicate their side of the case?

It might sometimes be your job to “pump the brakes.”

- Pay close attention to your advisee and their needs, because everyone else in the room may have other objectives.

Supplementary Evidence

- When submitting photos, videos, or copies of text messages be extremely clear with identifying and explanatory notes that accompany those pieces of evidence.
- Was it a direct message or posted publicly? Who was the audience? What was the time and date?

Hearing Phase

Preponderance Standard Required

- Use language the advisee understands
 - 50.1%
 - “More likely than not”
 - The “tipped scale”
 - Try NOT to use just the term “preponderance of the evidence” - it is not common language.

Live Hearings are Required

- Institutions must provide for a live hearing to determine responsibility. § 106.45(b)(6)(i)
- Live hearing includes virtual hearings, as long as the parties can see and hear each other. § 106.45(b)(6)(i)
- Institution **must create** an audio or audiovisual recording, or transcript, of any live hearing and make it available to the parties for inspection and review. § 106.45(b)(6)(i)

Hearings

- Carl Albert State College is allowed to adopt rules governing the procedural aspects of hearing. 85 Fed. Reg. 30361
- Considerations:
 - Can parties make opening or closing statements?
 - Process for making objections to the relevance of questions and evidence?
 - Institution is allowed to have a rule that does, or does not, give parties or advisors the right to discuss relevancy with the decision-maker during the hearing. 85 Fed. Reg. 30343
 - Reasonable time limitations on a hearing?
 - Rules of decorum of participants and advisors

Best Practices

- 1. Opening and Closing Statements do not typically take long, and serve great value in ensuring the parties feel sufficiently heard.
- 2. Be very clear about rules of decorum. Pass out a list of ten rules that are common sense and enforceable.
- 3. Maintain structure, rigor, and dignity. DO NOT allow the hearing to become informal under any circumstances: when this happens the participants have less likelihood to feel the situation is being handled with professionalism and seriousness.
- 4. Do not hesitate to order a recess if needed.
- 5. The hearing chair has a lot of authority.

Hearings

- Each party's advisor must be permitted to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility. § 106.45(b)(6)(i)
 - Parties **are not** allowed to cross-examine each other or witnesses. Must be done by an advisor or not at all.
- Cross-examination must be done orally and in real time by the advisor. § 106.45(b)(6)(i)
- Only **relevant** cross-examination and other questions may be asked of a party or witness. § 106.45(b)(6)(i)
- Before a party 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. § 106.45(b)(6)(i)
 - **Cannot require written submission of questions before the hearing.** 85 Fed. Reg. 30335

Decision-Maker Independence

- The decision maker cannot be the Title IX Coordinator or the investigator(s). § 106.45(b)(7).
- The decision maker is “under an obligation to objectively evaluate all relevant evidence both inculpatory and exculpatory, and must therefore independently reach a determination regarding responsibility without giving deference to the investigative report.” 85 Fed. Reg. 30314.
- The decision maker has “the right and responsibility to ask questions and elicit information from parties and witnesses on the decision-maker’s own initiative to aid the decision-maker in obtaining relevant evidence...and the parties have equal rights to present evidence in front of the decision-maker so the decision-maker has the benefit of perceiving each party’s unique perspectives about the evidence.” 85 Fed. Reg. 30331

Determining Responsibility

- Content of Determination of Responsibility:
 - Must be in writing. § 106.45(b)(7)(i)
 - Identify the allegations potentially constituting sexual harassment. § 106.45(b)(7)(ii)
 - Describe 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. § 106.45(b)(7)(ii)
 - Findings of fact supporting the determination. § 106.45(b)(7)(ii)
 - Conclusions regarding the application of the institution's code of conduct to the facts. § 106.45(b)(7)(ii)
 - A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions the institution imposes on the respondent, and whether remedies designed to restore or preserve equal access to the institution's education program or activity will be provided by the institution to the complainant. § 106.45(b)(7)(ii)
 - The procedures and permissible bases for the complainant and respondent to appeal. § 106.45(b)(7)(ii)
 - The parties must be notified simultaneously. § 106.45(b)(7)(iii)

Hearing Tips

- Know who the expected witnesses will be and prepare questions in advance. Take advantage of live questions, but be careful not to prejudice the decision makers by asking inane questions, “scoring cheap points” through humiliating low value questions, and especially avoid phrasing of questions that is calculated to “get under ones skin.”
- Badgering is usually prohibited by decorum policies, but it is a notoriously vague and ill defined term.

Hearing Tips

- Some conversation about alcohol and blood alcohol level.
- You cannot rely exclusively on a BAC calculator.
- Drunkenness is not the same thing as lack of capacity to effectively consent, necessarily.

Hearing Tips

- If your advisee has not prepared opening and closing statements, then you will be at a disadvantage. While poise may not be important, effective communication is paramount.
- Do not end any questioning phase without asking your advisee if they have any final questions they want to be asked.

Ethical issues in CX

- Issues may arise when your advisee wants a question asked that you think is an **unethical question**. You can be clear to the decision makers that you are asking the question on behalf of the advisee, but you should communicate the question verbatim in some form to the hearing panel for their relevancy determination **NO MATTER WHAT**.
- This is your job.

Some words about evidence.

- Do not use phrases like “direct evidence” or “circumstantial evidence” or “corroborating evidence” as they only serve to confuse, and almost everyone gets the terms wrong anyway!
- All information is evidence. Not all evidence is relevant.

What is the PURPOSE OF cx?

- Highlight discrepancies.
- Highlight lack of memory, or faulty memory.
- Highlight allegiances and alliances that go toward bias.
- Any other illustrative matter that goes to the facts, or toward credibility, or toward veracity, or toward knowledge.
- Compare, confirm, confront, corroborate, clarify.

The Hard Part: how to train your advisee to be “grilled” (that’s how it will feel)

- Reinforce that this is NORMAL and EXPECTED. Reinforce this from the beginning, and keep reinforcing it to the end.
- Reinforce that it will not be to your advisee’s benefit to answer the questions in an aggressive or uncooperative manner. If your advisee starts to feel agitated or angry during the questioning, they should ask for a break so they can decompress and recharge.

Expecting Probing Questions

- Let your advisee know that if they are asked a question they did not understand, they can absolutely ask for clarification. Additionally, they can ask for a break to discuss the question with you.
- They reserve the right not to answer a question, but should seriously consider the ramifications of failing to answer or failing to fully answer a relevant question.
- Be prepared to explain inconsistencies that become identified. BE HONEST about why an inconsistency arose.

Determinations should not be based on:

- Who asked the question, their possible (or clearly stated) motives, who the question is directed to, or the tone or style used to ask about the fact
- In whole or in part upon the sex or gender of the party for whom it is asked or to whom it is asked
- Status as complainant or respondent, or past status as complainant or respondent
- Organizations of which they are a member
- Any other protected class covered by federal or state law (e.g. race, sexual orientation, disability)

- “You were at the party at 9:30 pm? And you stated to the investigators that you observed the complainant at that time and they appeared to be sober? What made you think that?”
- “You left the party after thirty minutes? At around 10 pm? So you did not actually see how the complainant was acting at around midnight?”
- “You know the respondent from Debate Team? Would you say you are good friends?”

Sanctioning

- Regulations do not set out sanctions that should be imposed when a respondent is found responsible. 85 Fed. Reg. 30394
- DOE specifically declined to mandate suspension or expulsion – “recipients deserve flexibility to design sanctions that best reflect the needs and values of the recipient’s educational mission and community.” 85 Fed. Reg. 30407
- “Nothing in these final regulations precludes a recipient from adopting a zero tolerance policy.” 85 Fed. Reg. 30383
- “[t]he final regulations do not preclude a recipient from imposing student discipline as a part of an ‘educational purpose’ that may differ from the purpose for which a recipient imposes employee discipline.” 85 Fed. Reg. 30377

Sanctioning: you must stay consistent with University practice

Consult with your Student Conduct Officer or others to determine proportionality with other similar cases. THIS IS FINE.

Your broad latitude should be tempered against norms of your institution. Review past cases if needed.

Sanctions should remediate the barrier to access

- Treat complainants and respondents equitably by providing remedies to a complainant where a determination of responsibility for sexual harassment has been made. § 106.45(b)(1)(i)
- Remedies must be designed to restore or preserve equal access to the recipient's education program or activity. Remedies may include the same individualized services described...as 'supportive measures'; however, remedies need not be non-disciplinary or non-punitive and need not avoid burdening the respondent. § 106.45(b)(1)(i)
- The Title IX Coordinator is responsible for implementing remedies. § 106.45(b)(7)(iv)
- When the final determination has indicated that remedies will be provided, the complainant can then communicate separately with the Title IX Coordinator to discuss what remedies are appropriate. 85 Fed. Reg. 30392
 - Remedies that do not directly affect the respondent must not be disclosed to the respondent. 85 Fed. Reg. 30425

Do not:

- May not give a student Complainant/Respondent legal advice.
- May not answer questions regarding the subject matter of an investigation.
- May not speak on a student Complainant/Respondent's behalf during meetings, interviews, or hearings.

- Institutions usually expect that the parties to the grievance process, rather than the advisors, will communicate with Title IX investigators and Coordinators. For example, they expect the students to send e-mails to the Title IX investigators themselves, rather than through their advisor. Unlike in the criminal justice process, there is no legal requirement that institutions direct communications to a party through their advisor.

Potted plant rule?

- Advisors can usually ask investigators to clarify questions they find unclear, and can discuss scheduling with investigators. But, in general, the advisee will raise any substantive questions and comments. Some institutions require advisors to not participate substantively. Some go so far as to make the advisor silent toward anyone but the advisee.

Confidentiality

- Advisors may build relationships of trust and candor with their advisees as confidential resources. When they hold this responsibility, they should not have any parallel duties to report misconduct to their institution. If reporting is mandatory, consider an official or unofficial sanctuary or safe harbor rule. (Many schools call this amnesty).

Confidentiality

- Keep in mind, however, that advisors who do not have a legal privilege under their state's law (e.g., attorney-client; pastoral; counselor; physician acting within that privileged role) may not be able to maintain the confidentiality of an advisee's disclosures outside the campus process, such as in a civil or criminal court.

What about ethics in your role?

- If you believe your advisee is intentionally making materially false statements: Remind them of campus policies prohibiting them from doing so and the penalties of additional charges. If you are an attorney serving in this role, consider your professional ethical duties as well.
- If your advisee discloses situations that may have constituted sexual misconduct: Your duty to disclose that information will depend on whether or not you are an employee of the institution, and whether as an employee your institution or the law requires you to report potential sexual misconduct.

What about ethics in your role?

- Your advisee may determine that they no longer seek your representation or advisement: It is not uncommon for advisees to cut-off communication with their advisor without notice. In the event that your advisee does not answer your calls and messages, it is best to let the Title IX Coordinator know.

Distress; Panic; “checking out”

- Participation in this process is often a stressful experience for parties. During hearings and interviews, be on the lookout for signs that your advisee may be in distress. Signs can include a lack of eye contact, heavy or labored breathing, wringing of hands, rocking back and forth, an inability to sit still, a glazed or blank look, or changes in speech (i.e. disrupted or interrupted speech, garbled speech, or speaking at a much faster pace). If you suspect your advisee may be in distress, make sure to ask for a break and consult with your advisee.

Cultural Competence

- Cultural competence is the capacity to effectively communicate and connect with individuals with lived experiences different than your own. It is more than just the mere recognition that differences exist across cultures and communities.
- Students enrolled at our institutions today have a different sexual culture than you might be accustomed to, and you may be surprised by how social norms have evolved. **It is crucial not to express this surprise with your advisee.**

Professionalization: control your words and biases. Your advisee is not like you.

- Consider using neutral language: for example, using the term “partner” instead of boyfriend or girlfriend, at least until you can mirror your advisee’s terminology. In some cases you may not find it professional to mirror their terminology.
- Recognize that there may be many reasons why an individual may not view law enforcement as a pathway to safety and justice. This may also mean they do not trust campus authorities of any kind, at least not fully. **This is normal.**

Professionalization: control your words and biases. Your advisee is not like you.

- You may learn information that is personally affecting, and upsetting.
- Secondary trauma can be fleeting or severe, but can be especially problematic if you have suffered from abuse or sexual violence in the past.
- PRACTICE SELF CARE.

Informal Resolutions

- In an informal resolution you may be asked to advise an advisee in a mediation, negotiation, or agreement based resolution instead of a full investigation and hearing process.
- This process is not defined with much texture in the regulations, other than it must be formed with consent of the parties and the institution, and any failure to consent to the agreement results in reverting back to formal investigation.

Questions?