



Title IX Investigations

Trainer: Dr. Mike Davis
Equity Consulting, LLC

A quote from Brett Sokolow

- “... we need relief from these 2020 rules, but schools and colleges also need time to implement the new regulations and get good at complying with them.”
- **This training will be on the 2020 Regulations:** But the new regulations, effective August 1, 2024, were just released on Friday, April 19.
- **At the end of this training we will discuss the major changes as they apply to investigators.**

Welcome to the Pressure Cooker

- The rules seem to always be changing.
- The rules are hard to comply with.
- The rules might stay the same but be changed by a court in ways you aren't aware of.
- The rules are debated always.
- You will be blamed for things out of your control.
- Scrutiny never feels good to anyone, ever.



Some initial points about investigations...



- **The investigator has to be neutral.** This is sometimes a difficult position to be in, particularly when meeting with someone who wants and desires an empathetic ear to explicitly personal experiences.
- The investigator only conducts an investigation after an initial clearance by the Title IX Coordinator that it is possible that sexual harassment occurred. Meaning: **you will only ever investigate cases that could indeed be harassment.**

Some initial points about investigations...

- The investigator will assemble two actual items: an “evidence file” and an “investigative report.” Both of these items will be picked over carefully by the parties, their advisors, possibly their loved ones and friends, and of course, in the hearing after the investigation. The contents of these two items are highly sensitive.
- Also open to fair criticism: what doesn't exist in the evidence file or investigative report?
 - Why did you not interview a specific person?
 - Why did you not check some specific camera footage?
 - Why did you not get a record of text messages?
 - Why did you not consult prior student conduct records?

So what is the summation of the investigator's role?



You are in the hot seat: furnishing and uncovering the actionable **INFORMATION** in a situation that has high stakes to all parties involved. And you don't get to take a conclusory position on any of it.

The investigator's toolkit...

- The actual “formal complaint” filed by the complainant in the case.
- The “report” initially received by the Title IX Coordinator.
- The “notice of investigation” that has been sent out by the Title IX Coordinator.
- Physical notepad. Recording device. Recording agreement forms.
- A physical calendar or reconstructed timeline.
- A transcription service such as Rev.com (the most popular) or other.
- Other investigators (if the team investigation approach is utilized).
- Your Title IX Coordinator.
- Your General Counsel.
- Most importantly: COLLECT, COLLECT, COLLECT.

The Investigator Mentality

- What would a detective do? What pathway would you go down if you wanted to challenge the facts from another direction?
- You are an investigator. Not a Dean of Students, not a Residence Hall Director, not an Associate Professor...in this moment, you are an investigator, not an empath, not a counselor, not a friend, and not a confidant.
- Interact with grace and curiosity, but draw a line.

Preparing Subjects for your Questions



- “I am going to ask you some sensitive questions about sensitive subjects.”
- “Your participation is voluntary.”
- “I might ask questions to gain a sense of context, and sometimes you might not fully understand why I am asking.”

§ 106.30 has a mandatory definition

- (i) An employee conditioning educational benefits on participation in unwelcome sexual conduct (i.e., quid pro quo);
- (ii) Unwelcome conduct that a reasonable person would determine is so severe, pervasive, **and** objectively offensive that it effectively denies a person equal access to the educational institution's education program or activity; or
- (iii) Sexual assault (as defined in the Clery Act), or dating violence, domestic violence, or stalking as defined in the Violence Against Women Act (VAWA).



A High Bar for what counts as harassment.

- “...serious incidents that jeopardize equal educational access exceed the threshold and are actionable.”

A “very” high bar?

- “Title IX is concerned with sex discrimination in an education program or activity” and “does not stand as a Federal civility code that requires [educational institutions] to prohibit every instance of unwelcome or undesirable behavior.”

Quid Pro Quo Harassment

- (i) An employee conditioning educational benefits on participation in **unwelcome** sexual conduct (i.e., quid pro quo);
- “Unwelcome” is looked at in a subjective manner that takes into account whether the complainant sees the conduct as unwelcome.
- Can be expressly communicated, or implied from the circumstances.

Hostile Environment: *Severe, Pervasive, and Objectively Offensive*

(ii) Unwelcome conduct that a reasonable person would determine is so severe, pervasive, **and** objectively offensive that it **effectively denies a person equal access** to the educational institution's education program or activity;

- “...must be evaluated in light of the known circumstances and depend on the facts of each situation, but must be determined **from the perspective of a reasonable person standing in the shoes of the complainant.**” 85 Fed. Reg. 30156

IMPORTANT NOTE FOR INVESTIGATORS OF A POSSIBLE HOSTILE ENVIRONMENT



- Keep notes on severity, pervasiveness, and objective offensiveness.
- Keep notes on welcomeness or unwelcomeness.
- Are your notes weak on one of the these key areas? If they look weak, what further avenues can you explore to give more context on one of those areas?
 - “How did that make you feel?”
 - “How did you describe it to a friend?”
 - “How did it affect your relationship with them?”

Dating Violence, Domestic Violence, Sexual Assault, and Stalking

- These are defined in policy using the mandatory Clery Act definitions from the 2014 regulations.
- No “severe, pervasive, and/or objectively offensive” analysis is needed – only a determination of whether the definitions are met.
- Even a single instance of sexual assault can be a violation.
- Definition of consent is highly important in these cases.

What is Sexual Assault?

- **Rape:** The penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim.
- **Sex Offenses:** Any sexual act directed against another person, without the consent of the victim, including instances where the victim is incapable of giving consent.
 - **Fondling**—The touching of the private body parts of another person for the purpose of sexual gratification, without the consent of the victim, including instances where the victim is incapable of giving consent because of age or temporary or permanent mental incapacity.
 - **Incest**—Sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law.
 - **Statutory Rape**—Sexual intercourse with a person who is under the statutory age of consent.

What is Domestic Violence?

- A felony or misdemeanor **crime** of violence committed:
 - By a current or former spouse or intimate partner of the victim;
 - By a person with whom the victim shares a child in common;
 - By a person who is cohabitating with, or has cohabitated with, the victim as a spouse or intimate partner;
 - By a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction in which the crime of violence occurred;
 - By any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of the jurisdiction in which the crime of violence occurred.

What is Dating Violence?

- Violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim.
- The existence of such a relationship shall be determined based on the reporting party's statement and with consideration of the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.
- Dating violence includes, but is not limited to, sexual or physical abuse or the threat of such abuse. Dating violence does not include acts covered under the definition of domestic violence.

What is Stalking?

- Engaging in a course of conduct directed at a specific person that would cause a reasonable person to fear for his/ her safety or the safety of others; or suffer substantial emotional distress.

Retaliation under Title IX

- The University **nor any 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.
- 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 constitutes retaliation.

Retaliation: main point

- The nexus between adverse action and retaliatory motive is crucial.

Conflict of Interest, Bias, and Neutrality

- §106.45(b)(1)(iii) requires training on: “...how to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, as applicable, and how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias.

Conflict of Interest

- Exists when the investigator or hearing decisionmaker knows one of the parties or witnesses as a friend, family member, or in another capacity that
 - Affects their neutrality or ability to be nonprejudicial.
 - Tends to cause them to give undue deference toward complainant or respondent.

Conflict of Interest

- Before every case ask yourself this question honestly:
- Do I feel full latitude to perform this investigation as diligently, transparently, and completely as possible without undue deference to any involved party?

Then, what is bias?

- Conflict of interest is situational: such as not wanting to disparage a supervisor, for fear of employment or career related consequences.
- Bias is more about deference or animosity based in having *class favor* for a person, or resentment toward a person due to their *category or class*
- Bias is any inclination, preconception, or other “lean” that favors or disfavors a party.

Prejudgment of the Facts at Issue

- Sometimes an investigator or decision-maker may learn information about the case that causes them to prejudge a party, or make unreasonable and uninformed determinations about the facts.
- This is especially the case when an official cannot separate specific facts from **sweeping generalizations and stereotypes.**
- Example: A hearing panelist was one themselves falsely accused of misconduct and is unreasonably skeptical of any complaining party.
- Example: A hearing panelist hears that a person had 5 beers, and since the panelist always feels drunk after 5 beers, automatically assumes everyone who has 5 beers is incapable of effective consent to sex.

Presumption of not-responsible, for the Respondent

- It is a REQUIREMENT of Title IX Regulations that investigators and hearing decision-makers maintain an understanding that the Respondent is presumed not-responsible for misconduct until all the evidence has been collected and analyzed, and a hearing has ended, and deliberations have begun.
- If you cannot maintain this understanding, you should not serve as a Title IX official.

Presumption of not-responsible, for the Respondent

- Respondents should not have to prove their innocence and do not have such a burden.

Relevance of evidence and Rape Shield Protections

Evidence Relevance

- The Department of Education encourages institutions to apply the “plain and ordinary meaning” of relevance in their determinations. 85 Fed. Reg. 30026, 30304.

Evidence Relevance

- **Relevant information will aid the decision-maker in making the underlying determination of whether an event/conduct did or did not occur. So long as it achieves this end, even background and contextual information may indeed be relevant.**
- Both **inculpatory** and **exculpatory** evidence is relevant.

RAPE SHIELD RELEVANCE ISSUE

- 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.
- 34 C.F.R. §106.45(6)(i).

Privileged Information

- Questions that constitute, or seek disclosure of, information protected under a legally-recognized privilege are automatically irrelevant. 34 C.F.R. § 106.45(1)(x).

Some Insight into Investigations

List of Notice Requirements

- The letter of notification must include the following and take place **PRIOR TO ANY INVESTIGATIVE MEETING OF ANY KIND:**

[§106.45(b)(2)(B)]:

- Statement that respondent is presumed not responsible and that a determination of responsibility is made at the conclusion of the grievance process
- Inform parties they may have an advisor of their choice, who may be an attorney
- Inform parties they may inspect and review evidence.
- Inform parties of any provision in policy/code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process.
- Written notice of the date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings, with sufficient time for the party to participate.

Supplemental Notice

- If the investigation uncovers additional allegations which were not included in the initial notice, must provide notice of the additional allegations to the involved parties whose identities are known. §106.45(b)(2)(ii)

- The burden is now clearly on the institution to compile evidence.
 - Never, EVER, characterize the complainant in a way that makes it sound like evidence production is their burden. It is an institutional burden, and any evidence coming from the Complainant is merely requested from them by the institution.

Evidence Gathering

- Must provide an equal opportunity for the parties to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence. §106.45(b)(5)(ii)
- Cannot restrict the parties' ability to discuss the allegations being investigated. §106.45(b)(5)(iii)

Evidence Review

- Both parties must have an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations, including the evidence upon which the institution does not intend to rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence, whether obtained from a party or other source. § 106.45(b)(3)(vi)
 - Inculpatory – evidence that tends to show Respondent is responsible
 - Exculpatory – evidence that tends to show Respondent is not responsible
- Investigator should not screen out evidence the investigator does not believe is relevant. 85 Fed. Reg. 30304

Sharing the Evidence for Review by the Parties

- **Large production before the investigative report is issued**
 - Before the investigator issues their report, the parties must have at least ten days to review “any” relevant information “**directly related** to the allegations raised in a formal complaint” gathered by the investigators, including both inculpatory and exculpatory evidence. At the end of that ten day period, the parties have the right to submit a **written response**.
- **More narrow production**
 - 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**.

Investigation Report

- Investigator/s Names
- Purpose of Report
- Summary of Investigation Process
- Involved Parties
- Incident Specifics
 - Date of Incident
 - Date of Report
 - Location
- Background Information
- Reported Information
- Consent Chart
- Review of Supporting Materials
- Alleged Violations
- Information about Interactions (credibility assessment)

Reported Information

Reported from Complainant	Reported from Respondent
Prior to Date Party	
<ul style="list-style-type: none"> Jane Snapchatted John and said “Hey there is a date party, do you want to come?” John arrived at Jane’s apartment around 10 pm. Jane offered John a beer and gave it to him while she continued to get ready. 	<ul style="list-style-type: none"> Jane asked John to come to her date party after their student organization meeting. John arrived at Jane’s apartment around 9pm. Jane gave John a beer, he was never asked if he wanted a beer.
On the Bus to the Date Party	
<ul style="list-style-type: none"> Jane expressed the bus was full so Jane lapped John on the bus ride to the date party. John was signing her songs that were playing on the bus. Jane defined John was doing this in a sexual nature. 	<ul style="list-style-type: none"> John provided video of Jane lapping on the bus. John shared that he sat with his legs close together because he was not comfortable with the lapping situation.
<p>Witness, Jill</p> <ul style="list-style-type: none"> Jill confirmed that Jane and John were on the same bus as her and she saw them lapping. Jill did not report seeing anything that would make her think either of them were uncomfortable. 	
After Date Party	

Consent Chart

	Complainant's Account	Respondent's Account
What sexual contact occurred?	Touching of her breasts by John. Touching of her vagina by John.	Making out. Touching of Jane's vagina.
What sexual contact was not consensual?	Jane reports no sexual contact was consensual.	The making out was mutual. John reports he thought he had consent from Jane so the contact was consensual.
Who is the initiator of the sexual contact?	Jane reports John was the initiator of the sexual contact.	Jane came into his room and took her top off. He is not sure how the making out started.
How was consent given or not given?	Jane reports she never gave consent.	John reports the making out was mutual and Jane participated in the kissing. Jane took off her shirt an action of consent.
Level of incapacitation	Jane reported consuming not a full solo cup of vodka with a mix, jello shots, and a little bit of dark liquor – one to two shots. Jane defines she went to sleep and that her body was in and out of consciousness.	John defines he was drunk. He consumed 10-15 shots of vodka, whiskey, and Baileys he also had a couple of beers. Consumed alcohol to the point where parts of the night he does not remember.
Knowledge of level of incapacitation	Jane defined John was very intoxicated.	John knew that Jane has a least one shot to drink and maybe took shots with other people.

What Role Does the Investigator Play in an Eventual Hearing?

- The investigator is the key witness at any hearing
- The investigation report is admitted as evidence
- Other witnesses can be called, or the investigation may summarize their testimony
- The investigator can attest to credibility, call attention to discrepancies, and arrange for expert sources of information, as needed

Final Thoughts on the 2020 Regulations

- Keep in mind victim safety is paramount throughout the process of any Civil Rights investigation and/or hearing. The presumption of non-responsibility for the respondent does NOT prevent the University from implementing supportive measures for the complainant, who may very well be a victim of a crime. Therefore: supportive measures can include measures that promote that person's safety throughout the investigation and hearing.
- Moving from one residence hall to another.
- Assistance in connecting them with law enforcement, or the DA's office.
- Measures to keep complainant separate from respondent, such as enrollment in different classes, or strict enforcement of no-contact orders.
- Hearings designed to reduce interaction while preserving the "live hearing" and "cross examination" regulatory rights.
- Panic buttons.
- Reinforcement of Amnesty Policy for witnesses, etc.

Informal Resolution

- Mediation
- Negotiation
- Agreement-Based Resolution (separate from Mediated or Negotiated)
- Often useful when parties are not interested in hearings and formalities and merely want safety and finality.
- Crucially: Complainant, Respondent, and INSTITUTION must agree.

Now let's talk about the NEW 2024 Regulations

It is a Topsy Turvey World Out There

- <https://www2.ed.gov/about/offices/list/ocr/docs/t9-unofficial-final-rule-2024.pdf>
- They have not been published in the Federal Register yet.

Changed the Training Requirements

- Mandates training for all employees on:
 -) The recipient's obligation to address sex discrimination in its education program or activity.
 -) The scope of conduct that constitutes sex discrimination under Title IX and this part, including the definition of sex-based harassment

Training for investigators, coordinators, and informal resolution facilitators largely remains unchanged.

A lot of language on including students with pregnancy or family obligations

- The recipient must make reasonable modifications to the recipient's policies, practices, or procedures as necessary to prevent sex discrimination and ensure equal access to the recipient's education program or activity. Each reasonable modification must be based on the student's individualized needs.

Pregnancy

- Reasonable modifications may include, but are not limited to, breaks during class to express breast milk, breastfeed, or attend to health needs associated with pregnancy or related conditions, including eating, drinking, or using the restroom; intermittent absences to attend medical appointments; access to online or homebound education; changes in schedule or course sequence; extensions of time for coursework and rescheduling of tests and examinations; allowing a student to sit or stand, or carry or keep water nearby; counseling; changes in physical space or supplies (for example, access to a larger desk or a footrest); elevator access; or other changes to policies, practices, or procedures.

Pregnancy

- The recipient must allow the student to voluntarily take a leave of absence from the recipient's education program or activity to cover, at minimum, the period of time deemed medically necessary by the student's licensed healthcare provider. To the extent that a student qualifies for leave under a leave policy maintained by a recipient that allows a greater period of time than the medically necessary period, the recipient must permit the student to take voluntary leave under that policy instead if the student so chooses. When the student returns to the recipient's education program or activity, the student must be reinstated to the academic status and, as practicable, to the extracurricular status that the student held when the voluntary leave began.

Pregnancy

- The recipient must ensure that the student can access a lactation space, which must be a space other than a bathroom, that is clean, shielded from view, free from intrusion from others, and may be used by a student for expressing breast milk or breastfeeding as needed.

A new “barrier analysis” requirement...

- A recipient must require its Title IX Coordinator to monitor the recipient’s education program or activity for barriers to reporting information about conduct that reasonably may constitute sex discrimination take steps reasonably calculated to address such barriers.

Who is now a “mandatory reporter”?

- Any employee who is not a confidential employee and who either has authority to institute corrective measures on behalf of the recipient or has responsibility for administrative leadership, teaching, or advising in the recipient’s education program or activity to notify the Title IX Coordinator when the employee has information about conduct that reasonably may constitute sex discrimination under Title IX.
- For all other non confidential employees they have a choice! They can either notify the Title IX Coordinator ...or... “Provide the contact information of the Title IX Coordinator and information about how to make a complaint of sex discrimination to any person who provides the employee with information about conduct that reasonably may constitute sex discrimination under Title IX.”
- The actual complainant is exempt from mandatory reporting.

No longer have to produce an evidence file...

“A recipient must provide an equal opportunity to access either the relevant and not otherwise impermissible evidence, or an accurate description of this evidence.”

An Additional Privacy Rule

- “A recipient must take reasonable steps to prevent and address the parties’ unauthorized disclosure of information and evidence obtained solely through the grievance procedures.”

Live hearings no longer required.

- “...Allow each party to propose such questions that the party wants asked of any party or witness and have those questions asked by the investigator or decisionmaker during one or more individual meetings, including follow-up meetings, with a party or witness.”
- “Provide each party with an audio or audiovisual recording or transcript with enough time for the party to have a reasonable opportunity to propose follow-up questions.”

Changes to live hearings, if you keep them...

- “Allow each party to propose such questions that the party wants asked of any party or witness and have those questions asked by the decisionmaker...”
- Or you can allow advisors to ask questions...

Investigative report no longer mandatory.

- “...option to provide the parties with an equal opportunity to access the relevant and not otherwise impermissible evidence or a written investigative report that accurately summarizes the evidence...”

New Definition of Hostile Environment Sexual Harassment...

- Unwelcome sex-based conduct that, based on the totality of the circumstances, is **subjectively and objectively offensive and is so severe or pervasive that** it limits or denies a person's ability to participate in or benefit from the recipient's education program or activity.
- A LOWER BAR....

Expanded Definition of Educational Program or Activity

- “A recipient has an obligation to address a sex based hostile environment under its education program or activity, even when some conduct alleged to be contributing to the hostile environment occurred outside the recipient’s education program or activity or outside the United States.”

Expanded Definition of “sex based”

- Now explicitly includes a nexus with
 - Pregnant or parenting
 - Sexual Orientation
 - Gender Identity

“single investigator” model now allowed

- Investigator can now also be the decision-maker, with or without a hearing.
- “The decisionmaker may be the same person as the Title IX Coordinator or investigator...”

Keeps advisors...

- “...Must provide the parties with the same opportunities to be accompanied to any 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 the advisor for the complainant or respondent in any meeting or proceeding; however, the postsecondary institution may establish restrictions regarding the extent to which the advisor may participate in the grievance procedures, as long as the restrictions apply equally to the parties...”

Allows Institutions to prohibit expert witnesses

- “[Each College] Has discretion to determine whether the parties may present expert witnesses as long as the determination applies equally to the parties.”

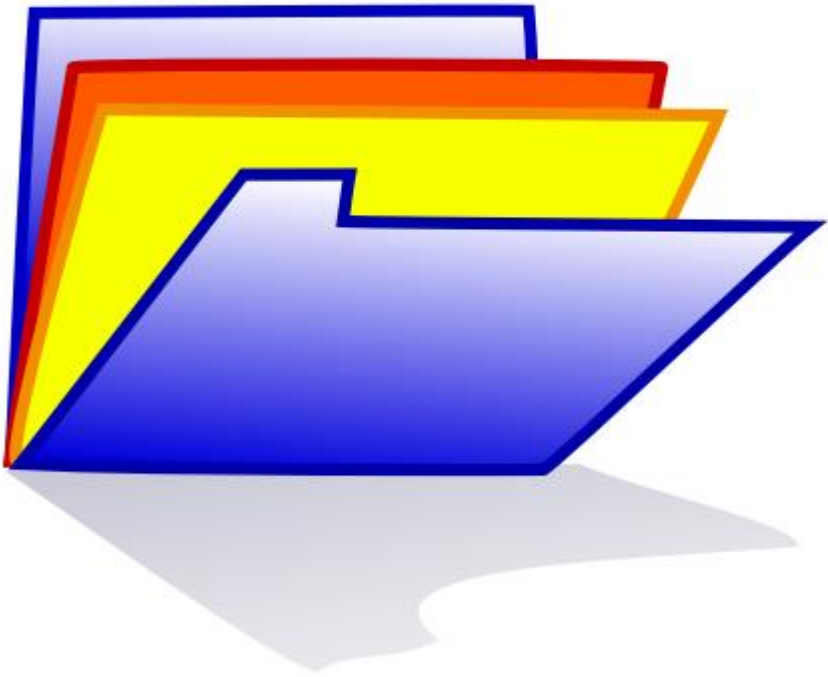


Title IX Advisors

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As always, start from the regulations:

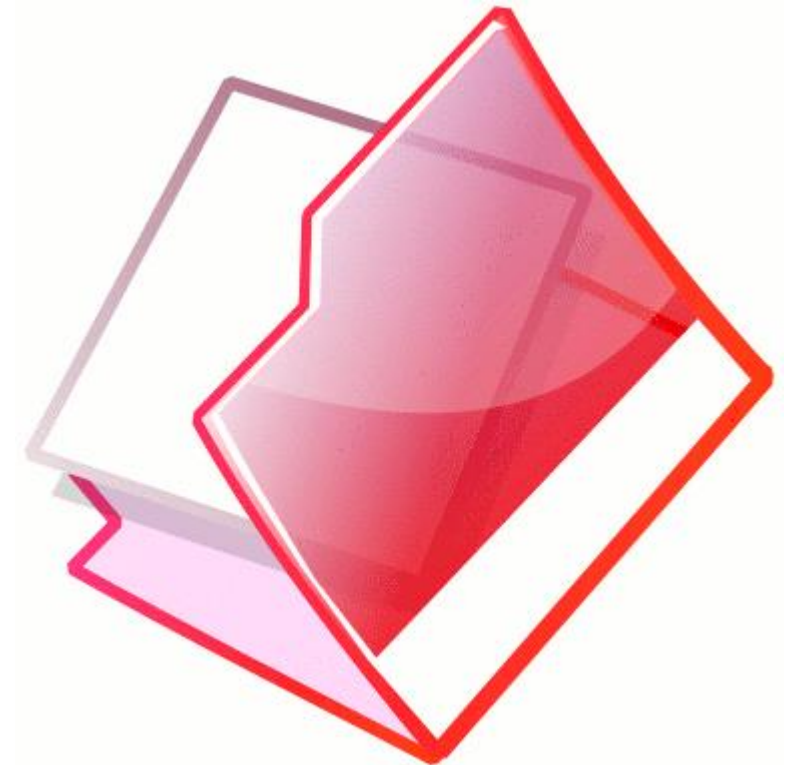
- “Provide the parties with the same opportunities to have others present during any grievance proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the **advisor of their choice**, who may be, but is not required to be, an attorney, and **not limit the choice 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.”

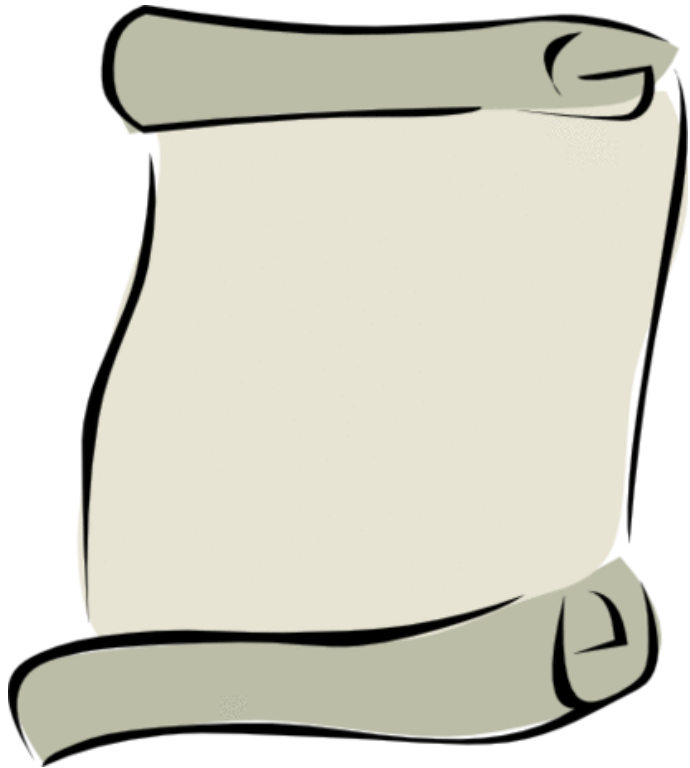
Sit down with your party to review the documents, which may be voluminous

- “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?

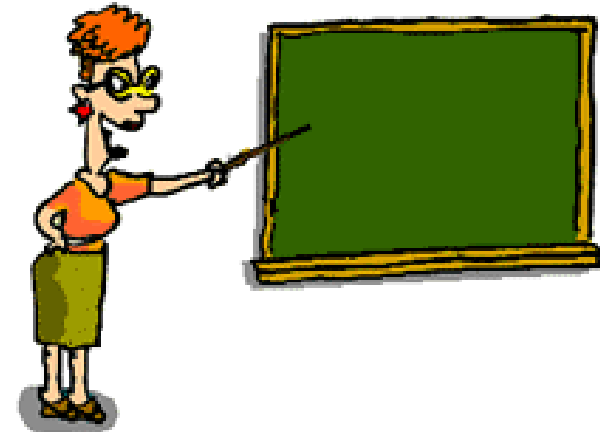
- The “initial interview” does not mean the only interview. It is not uncommon for a party to be interviewed multiple times by investigators during the pre-hearing stage. This could be for many reasons, including that investigators, during the course of the process, came into possession of information 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. Explain jargon.
- “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 (not just for advisors)

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 (not just for advisors)

- 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? (FIVE C's)

- 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.

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?