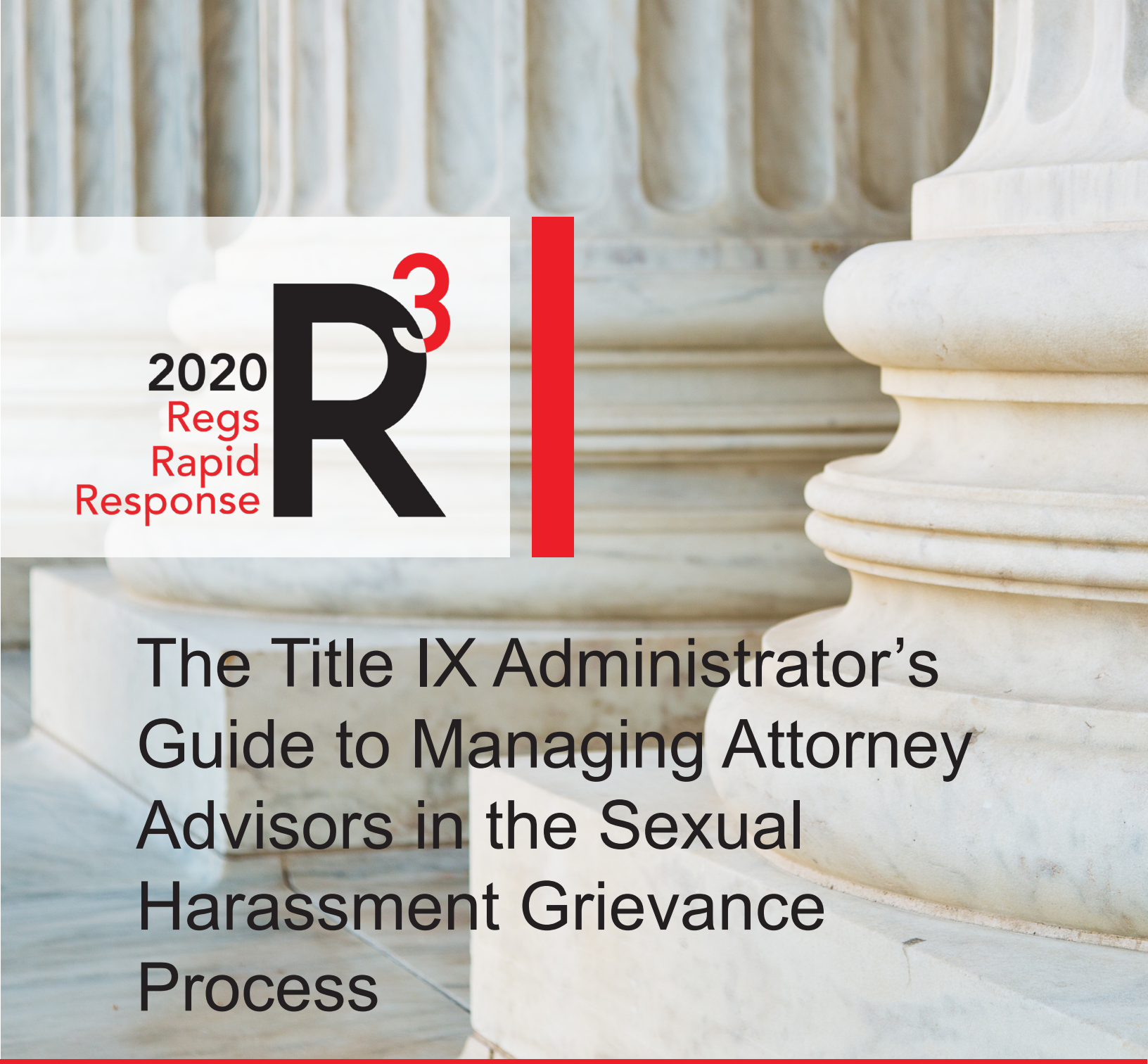

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The Title IX Administrator's Guide to Managing Attorney Advisors in the Sexual Harassment Grievance Process

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Administrator's Guide to Managing Attorney Advisors in the Sexual Harassment Grievance Process

Introduction

We've entered a brave new world since 2014, when VAWA §304 first permitted students and employees at colleges and universities to be advised in campus sexual misconduct (sexual violence, dating violence, domestic violence, and stalking) proceedings by attorneys.

The Title IX regulations issued by the Office for Civil Rights (OCR) on May 6, 2020, and which are effective and enforceable August 14, 2020, have doubled down on the right to an advisor, extending the right to an advisor who may be an attorney in two significant ways. First, the right to an advisor who may be an attorney now applies to the resolution of allegations of sexual harassment[1], in addition to sexual violence, dating violence, domestic violence, and stalking. Second, the right to an advisor now applies to all parties involved in the grievance process used to resolve a formal complaint of sexual harassment (including sexual assault, dating violence, domestic violence, and stalking) at the K-12 level. Although administrators in higher education have largely become accustomed to the presence of attorney advisors in their resolution processes, this may be new territory for some elementary and secondary schools. Fear not, we are here to help administrators manage this process smoothly.

Historically, administrators in higher ed have seen a zero-sum game where the more legalistic the grievance process is, the less educational and developmental it can be. We hear from administrators frequently that attorneys try to intimidate them, and that some succeed. We hear that some administrators immediately refer contentious attorneys to their own legal counsel, but this is usually only a temporary fix. Based on an increased focus on due process protections by courts and by OCR, we think attorneys are here to stay, and that school and college administrators are going to have to learn to include them in the grievance process. We hope this guide assists administrators at all levels to co-exist with parties' attorneys without being burned, and at the very least, helps administrators to effectively manage an increasingly contentious and adversarial process.

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

The Role of Attorneys in the Title IX Process

To effectively manage attorney involvement in the Title IX process, we must first understand the role they play. On March 7, 2013, the Violence Against Women Reauthorization Act (VAWA) codified into federal law the requirement that colleges and universities must allow individuals (students and employees) involved in the resolution process for allegations of sexual violence, dating violence, domestic violence, and stalking to bring "an advisor of their choice" with them to any proceeding or related meeting[2]. The Title IX regulations issued by OCR in May of 2020 provide that any party involved in the grievance process used to resolve formal complaints of sexual harassment is entitled to have an advisor, who may be an attorney, accompany the party to any related meeting or proceeding. The definition of "sexual harassment" contained in the regulations makes it clear that this right applies to grievance procedures related to allegations of sexual assault, dating violence, domestic violence, and stalking as well as to reports of sexual harassment.

The Title IX regulations echo the "advisor of choice" language that originated with VAWA §304 , specifying that the "advisor of choice" may be an attorney. While any party may select an attorney as an advisor, we have most often seen attorneys serve as advisors for respondents. This is largely because the Title IX administrative process often entails some form of hearing, which is a version of an adversarial adjudictory process where the underlying conduct(s) at issue might also implicate criminal conduct. Accordingly, respondents who had the financial means to do so tended to enlist the guidance of criminal defense attorneys. Now, they can engage Title IX defense attorneys, as that cottage industry has become more commonplace. The Title IX regulations have mandated hearings for colleges and universities, and made hearings optional for elementary and secondary schools, though many already hold them, at least for suspensions and expulsions.

Attorneys who serve as advisors often have an understanding of evidence and investigations rooted in the criminal or civil law context; they are sometimes less familiar with the administrative resolution processes employed by educational institutions.

[2] 20 U.S.C. 1092(f)(8)(B)(iv)(II) states that "the accuser and the accused are entitled to the same opportunities to have others present during an institutional disciplinary proceeding, including the opportunity to be accompanied to any related meeting or proceeding by an advisor of their choice."

The Role of Attorneys in the Title IX Process - cont.

This is important for two reasons: they view the process and the procedure through a significantly different lens than administrators, do, and they likely have studied the relevant policies and procedures in depth. As a result, they are rarely shy about questioning how some procedural element works and highlighting any deviation from the articulated process.

Given the 2020 regulatory changes, the right to an advisor who may be an attorney will now be front and center in the grievance process. Written notice of allegations delivered to the parties upon receipt of a formal complaint of sexual harassment must now contain information about the right to an advisor who may be an attorney. ATIXA recommends that any party who opts to proceed without an advisor be counseled specifically of the need to find one, and/or assisted in identifying an advisor from the recipient's community. Some recipients will want to maintain a pool of trained advisors, or a list of local pro bono or reduced-cost attorneys. Parties who wish to proceed without an advisor need to know that they cannot take the grievance process to a hearing without one, and that the university will appoint one for them if they cannot find one. They do not have to have that advisor accompany or advise them throughout the process, but they must conduct cross-examination for the party at the hearing, if the party wishes cross-examination to be conducted. A party could decide, strategically, not to have another party or witness cross-examined, or an advisor might simply ask a party or witness, "do you have anything beyond your statement to the investigator to share today," and that would be sufficient. While thorough cross-examination might be helpful, it is not required, and the decision-maker or panel always has the opportunity to ask questions that an advisor might fail or chose not to pose.

Thus, advisors, and attorney advisors will become more commonplace in higher education than they were before the regulations, and we expect to see more complainants invoke their right to bring an attorney advisor to meetings and hearings than we did previously. Notably, the Title IX regulations specify that where parents or guardians have a legal right to act on behalf of a student, for example in the K-12 setting, a parent may accompany their child through the grievance process in addition to an advisor of the party's choice. Thus, administrators of the Title IX process at the elementary and secondary school level could be meeting with the student, the student's parent, and an attorney advisor.

Understanding the Attorney's Perspective

Attorneys are accustomed to zealously representing and speaking on behalf of their clients. That is consistent with both their training and their ethical responsibilities. Their role is to identify and gather information that supports their clients' position, which may entail actively trying to undermine, stymie, and even discredit anyone who can harm their client, including the "opposing" party and the school or college. Administrators must first understand that perspective if they are to have any success in seeing attorneys as essential guardians of the rights of their clients rather than as combatants. While many administrators would prefer not to have attorneys in the process, or have at best mixed feelings about them, that position would likely change in a heartbeat if that administrator were suddenly accused of serious sexual misconduct, themselves.

If it helps to frame it this way, consider that the attorney is hired to protect the rights of their clients, and administrators are also required by law to protect the rights of their clients. In a sense, administrators have the same goal, though administrators may not always agree fully on what rights apply, how they should be applied, how extensively the laws afford protections, and when those protections should be provided. The attorney will see their role as the watchdog to make sure administrators don't step out of line or fail to do what they are required to, and the soundest ground is for administrators to deploy mad skills that give the attorneys confidence in administrative competence. Administrators still probably are not going to be the lawyer or judge the attorneys would prefer to have presiding over the process, but they will expect administrators to be able to perform the skills that the Title IX regulations require. Generally, parties' attorneys tend to see administrators as rigid bureaucrats who throw their limited power around like petty tyrants. So, a key question is whether an administrator wants to reinforce that perception, or disabuse them of it? They will chafe at rigid bureaucracy, as they are often expert problem-solvers who find the process can get in the way of their ability to resolve their client's problem. At the same time, they really don't want to antagonize administrators, hoping that their client is looked on favorably and with goodwill, which they don't want to squander without cause. Mutual respect can be earned, but it often doesn't start from there.

When attorneys resort to their default adversarial, often combative position, they can hamper the process and may even inadvertently work against the interests of their client. Be clear, however, that the regulations do not permit recipients to have a bias against any particular party, even if their attorneys do everything in their power to antagonize Title IX administrators.

Understanding the Attorney's Perspective - cont.

However, attorney advisors can be of tremendous value to both their client and to the Title IX process. Because attorneys are well-versed in identifying and evaluating relevant evidence, they can assist their client in coherently conveying their position and relevant details in an interview, and in identifying and providing evidence in support of that position.

The Title IX regulations are clear that all parties have the right to provide inculpatory and exculpatory evidence, and an attorney advisor may be able to access some of that evidence more readily than a school or college administrator. The new regulations give the parties a wide berth to identify and bring evidence forward, including expert evidence. Maybe doing so will seem to interfere with the investigation, but they have no idea if administrators know what they are doing as an investigator, and administrators cannot stop them from gathering evidence that helps them to prove their case. Attorneys also are trained to read and comprehend complicated laws, regulations, and policies, making them well-suited to explaining the relevant policies to their client and ensuring their client understands the various steps of the process, especially given how complex OCR has now made the Title IX resolution process.

So how do we put attorneys in the best position to potentially help both their client and the Title IX process? Start with a having a sound policy on advisor roles. Both VAWA and the Title IX regulations allow schools and colleges to place reasonable limitations on the nature of the advisor's role in the process, provided that these limitations are equitably established and implemented for all parties' advisors. An example of this type of limitation might be that advisors are not to speak on behalf of their client or disrupt meetings, hearings, or other proceedings that are part of the Title IX process. If they so choose, however, schools and colleges may allow attorneys to actively represent and speak on behalf of their client throughout the process, and in some states, this is already required by law.

There is one important exception to the ability of a school or college to limit the participation of an advisor: the Title IX regulations require that any cross-examination of a party or witness that occurs at a post-investigation hearing must be conducted by a party's advisor.

Understanding the Attorney's Perspective - cont.

In fact, OCR requires that if a party does not have an advisor present at the hearing, the school or college must provide an advisor of the school or college's choice to conduct cross-examination on behalf of that party[3]. That advisor cannot refuse to do so, though a party can refuse to cooperate with this advisor, and if so, forfeits the opportunity for cross-examination. Of course, hearings are optional at the K-12 level under the Title IX regulations, but for any hearings that do occur, advisors may be actively participating in the cross-examination portion of that hearing by asking questions, depending on state rules. Aside from this cross-examination exception, schools and colleges remain free to limit the extent of participation of advisors (but not their presence or ability to advise their advisee), though rendering them impotent and unhelpful to their client serves no one well. Importantly, the parameters of an advisor's participation in the process, as well as the consequences for failing to respect these parameters, need to be expressly outlined in the school's policy.

Making an attorney sit in the corner like the proverbial potted plant is not a recipe for success. The goal in limiting attorney involvement is often to prevent them from giving evidence because administrators want to hear directly from their client, not the lawyer. However, attorneys should otherwise be fully able to confer with their client and consult with administrators, as long as it does not become disruptive. Treating them like a barely-tolerated annoyance is likely to impede their ability to represent their client to the best of their ability. Treat them with respect, dignity, and fairness, as they are basically an extension of their client. Offer them coffee and a quiet place to meet with their client. Don't stick them in a cold, damp room in the basement, even if they deserve it. When they go low, administrators go high.

In addition to sound policy, administrators need to set the tone of the proceedings. If possible, communicate with attorney advisors prior to any scheduled meeting or hearing to reiterate and emphasize appropriate participation and expectations for decorum, answer any questions the attorney has about the process, and begin establishing rapport.

[3] The Title IX regulations specify that although a party may not "fire" an assigned advisor during the hearing, if a party "correctly asserts" that an assigned advisor is refusing to conduct cross-exam on the party's behalf, the school or college must provide the party with an advisor to perform that function, whether that means counseling the assigned advisor to perform that function or stopping the hearing to assign a different advisor.

Understanding the Attorney's Perspective - cont.

Taking the time to go over procedures and distinguish the campus process from more formal legal proceedings will prime the impending interview, meeting, or hearing for success. While a phone or video call will suffice, allotting 10-15 minutes or so prior to a scheduled meeting to speak with the attorney in person usually yields the best results. Have a copy of the policies on hand, be open to questions, and be willing to explain why limitations on participation are in place (e.g., "This is a party-centric process and it's important that I hear directly from them.")[4].

Generally, attorneys who understand the boundaries clearly will be more likely to respect them. Explain that if the attorney would like to confer with their client in private at any point during the meeting, interview, or hearing, they can step out of the room to do so. Administrators should do the same for all advisors. While restricting an attorney advisor to being a potted plant in the room may sound appealing, doing so may well engender distrust, frustration, and potentially lead to non-participation from the client. In a tactful manner, emphasize to the advisors that interviews are not depositions, that formal rules of evidence do not apply, and that the school or college works hard to avoid an adversarial tone. Establishing expectations early in the process in a respectful manner helps to both avoid potential interruptions during interviews and mitigate the risk of a hearing being derailed by a disruptive attorney advisor. Too often administrators make the issue one of control and power over the process when administrators are, in fact, stewards of the process who shepherd it to ensure fairness, rather than to flex whatever authority they wield.

[4] Of course, many of us have had cases where – for a variety of reasons – a party is exceptionally inarticulate. In such cases, even perhaps as a reasonable accommodation in the event of disability, administrators can make exceptions that allow for advisors to clarify what their party's testimony may mean.

Communications

As much as administrators might like the Title IX process to be entirely party-driven, the reality is that attorney advisors will likely have substantial input into any communication, especially written, between their client and investigators/administrators. In fact, it is fairly common for attorney advisors to draft, on behalf of their client: email communications, written statements for the investigation, written responses to the investigation report, opening and closing statements, impact statements, and appeals. This practice has become pretty standard and is perfectly allowable.

One area where attorney advisors may have a heavy hand in communications is the submission of written questions and responses that occurs during the K-12 grievance process. The Title X regulations specify that for elementary and secondary schools, with or without a hearing, after the investigation report has been sent to the parties, each party must have an opportunity to submit written, relevant questions to be asked of any party or witness. Each party must then be provided with the answers, and additional, limited follow-up questions.

The decision maker will thus be making determinations about the relevance of submitted questions, and attorney advisors may challenge those determinations. Importantly, when the challenge is related to sexual history, the regulations specify that evidence of the complainant's past sexual behavior or predisposition is explicitly and categorically not relevant except for two limited exceptions: 1) when offered to prove that someone other than the respondent committed the conduct alleged, or 2) when it concerns specific incidents of the complainant's sexual behavior with respect to the respondent and is offered to prove consent. The rule applies to both higher education and K-12 processes. Outside of these two exceptions, decision-makers are on solid footing to disallow evidence or questions focused on the complainant's sexual history, and need not be intimidated by the attorney advisor who argues otherwise.

Parties may request that all communications regarding the process be sent directly to their attorney advisor. Alternatively, after an initial notice of allegations is sent to a respondent, administrators may be contacted directly by an attorney who claims they represent a party. In either case, the next step is for administrators to meet with or send an email to the party requesting confirmation that the specific attorney is, in fact, serving as their advisor.

Communications - cont.

After the party has confirmed the attorney's role, administrators should copy the attorney advisor on communications. This maintains the party-centric model and also signals to the attorney that administrators are not intentionally trying to make it difficult for them, thus helping to build rapport and facilitate cooperation. An engaged attorney advisor can often be very helpful, but we want to avoid attorneys try to take over and run every step of the process. While attorneys pointing out mistakes can raise administrative hackles, it is better for them to do so during the process where mistakes can be corrected, rather than raising them later as the substance of a lawsuit that could cost hundreds of thousands of dollars.

The Title IX regulations specify two instances when the school or college must share information directly with an advisor, if a party has an advisor, unless the party whom that advisor represents requests otherwise. First, prior to completion of an investigation report, the school or college must send to each party and that party's advisor, if any, all directly-related evidence. The parties then have an opportunity to submit a written response. Next, at least ten days prior to a hearing or other time of determination of responsibility (for K-12 schools without a hearing), the school or college must send to each party and the party's advisor, if any, the investigative report for their review and written response. With these requirements, OCR is clearly signaling that advisors cannot be put to the side. Importantly, the Title IX regulations specify that schools and colleges may require advisors to use the evidence and investigation report only for purposes of the grievance process, may require that they not further disseminate or disclose these materials, and may even require a non-disclosure agreement.

Meetings

The Title IX grievance process typically involves multiple meetings, including an initial intake meeting, investigative interviews, follow-up interviews, and a formal hearing in front of an administrator or panel. While recipients should encourage -- and must allow -- parties to be accompanied by an advisor in all of these meetings, scheduling conflicts are a common struggle with attorney advisors, who often ask for extensions or to reschedule meetings. While it is understandable that attorneys are busy, and it is a good practice to be somewhat flexible, administrators are neither obligated to, nor should they delay the process to accommodate attorneys' schedules or to allow them to try to run out the clock on the end of a semester or graduation.

The Title IX regulations specify that a school or college may temporarily delay its grievance process or extend time frames in a limited manner for good cause, which includes the absence of a party's advisor. However, the regulations also state that a respondent, other party, witness, or advisor cannot indefinitely delay a grievance process by refusing to cooperate. If an attorney is asking for a delay of more than a week, it is certainly acceptable to ask the party if there is another person who could serve as their advisor, even temporarily. Allowing an advisor to weigh in by phone or video call of some kind is also workable. Remember that the Title IX regulations emphasize that the advisor must be of the party's choosing, and allowing some flexibility to accommodate a chosen advisor will be necessary.

One common area of concern is the sharing of the investigation report. In the past, concerns about the privacy of the information in the report led some colleges to require the parties and their advisors to review the report in person. Those days are over. The Title IX regulations specify that on the two occasions that the evidence and the draft investigation report must be shared with the party and the party's advisor, that information must be "sent…in an electronic format or hard copy." There are several ways privacy concerns can still be addressed, from emailing a password-protected PDF document, to using an online document-sharing service that allows for restricting the recipient's ability to save, print, copy, or share the document, often with the additional option to set the amount of time the link to the document is available. Many colleges have provided a copy the draft investigation report to the parties for some time now, taking steps to protect privacy by removing personal identifiers and using initials or similar designations in the report (W1, W2, etc.) and providing the party with a separate "key" to those identities.

Meetings - cont.

That practice is still wise. Remember, though, that due process requires that the parties know the identities of anyone providing information in the investigation in almost all cases, and any attorney advisor will be interested in this information as they anticipate the determination phase of the grievance process.

Regardless of how the document is shared, the process of reviewing the investigation report may well result in a dispute with an attorney advisor. While the parties should already be aware, and have been provided an opportunity to respond to the evidence collected during the investigation, this may be the parties' (and the advisors') first opportunity to review all the evidence organized in one place. In addition, although the investigators should not be making determinations related to credibility in the report, they may point out inconsistences and note where corroborating evidence may or may not exist.

As they are accustomed to doing in the practice of law, attorney advisors may object to the contents of the draft investigation report. Because the Title IX regulations allow the parties 10 days to submit a written response to their review of evidence (which the investigator must consider prior to sending the party and advisor the investigation report) any information which was submitted by a party but which does not appear in the report may raise the eyebrows of attorney advisors. Administrators/investigators should anticipate this and be prepared to explain their rationales for why certain evidence was relevant and included and why other evidence was excluded. The Title IX regulations repeatedly emphasize the rights of the parties to provide evidence, so any exclusion of submitted evidence must have a clear and documented relevance rationale, and the parties will still be able to review excluded evidence or evidence that will not be relied on in the report, as that must be provided to them as well. Investigators may also be queried or cross-examined about this at a hearing.

Attorney advisors may try to insist that character evidence be included, such as their client's upstanding reputation or notable academic/athletic achievements. All such evidence must be relevant or it need not be included in the report. Often, attorneys make compelling cases for why evidence that seems to be character evidence speaks instead to a substantive issue, or should be admitted to counter character evidence that has been submitted that is not favorable to their client. If administrators are unsure of how to assess admissibility of this type of evidence, consult legal counsel before making the judgment call about excluding the evidence or witnesses a party seeks to offer.

Meetings - cont.

If the attorney advisor brings up a valid challenge related to an investigation, be willing to consider the challenge. If an attorney advisor points out evidentiary gaps in the investigation, identifies relevant witnesses not previously identified or interviewed, or suggests that additional questions should be posed to the other party or the witnesses, be open to reviewing those concerns. Ultimately, many of these elements will heighten the fairness of the process, which is the ultimate goal. Keeping the level of surprise in the investigation report down to a minimum, by being more transparent about evidence, applicable policies, and the process itself, is a great technique for managing these expectations and avoiding the attorney feeling like they have to do an administrator's job for them because of the extent of errors or omissions in the report.

While a sound investigation will prevent most issues, we are all human, and overlooking an issue or making a mistake is possible. If administrators are not sure of the correct response when an attorney advisor raises their concern(s), discuss the issue with the Title IX Coordinator, Deputy Coordinator, and/or legal counsel get back to them. If administrators are confident that the challenge lacks merit or does not need to be further considered, explain and document the rationale for this decision. The parties should already have been informed early in the process that the investigator determines the content of the investigation report, and that an appellate process is available after a determination is made by a hearing panel or other decision-maker. Reminding an attorney advisor of this may help to alleviate the tension.

Recognize that part of an advisor's role is to ensure that their client is treated fairly and equitably, and part of that responsibility is to ensure that the investigation is thorough and reliable. Be attentive to challenges at this stage. This approach will not only foster a more positive, collegial, and trusting relationship with advisors, it is not uncommon for attorney advisors to correctly identify procedural errors and/or evidentiary or material deficiencies in the investigation during the process, which provides administrators the opportunity to address and rectify errors before they become grounds for a lawsuit.

Contentiousness

Whether in a preliminary meeting, a formal interview, or during a hearing, it is ultimately the administrator's responsibility to control the specific proceeding and the process in general. This starts with explaining the policies and establishing expectations early on, but can become more difficult when trying to actually enforce those policies and maintain those expectations. Attorneys are comfortable with confrontation, willing to argue their point, and accustomed to escalating situations. Attorneys will often tell administrators that they are wrong, that a policy is illegal, that certain procedures present a violation of due process, or may even threaten a lawsuit. While some of this antagonism can be mitigated by taking the steps outlined above, in some instances it simply cannot be avoided. Not all lawyers are good lawyers, or smart lawyers. Some like to throw gasoline on everything, light it, and see what is left standing. The bad ones want to try to change the process, and the good ones know that line of argument will get them nowhere.

One area of significant concern surrounds the potential for advisors, and particularly attorney-advisors, to conduct cross-examination in a hearing in a manner that is intimidating, traumatizing, or harassing. Remember that the Title IX regulations require that a party has the right to cross-examine other parties and witnesses through their advisor at the hearing, which is mandatory in higher education and optional for K-12. The regulations have attempted to address these concerns by requiring that each question posed must be considered by the decision-maker to determine its relevance before it is answered. The decision-maker may exclude questions that are irrelevant. The Title IX regulations also provide that the school or college may fairly deem repetition of the same question to be irrelevant. Outside of the advisor asking cross-examination questions, the school or college remains free to limit the role of the advisor in the hearing, so long as it is done equitably. Schools or colleges that permit advisors to take a more active role in the hearing will be wise to establish the parameters of that role and ensure everyone is on the same page in advance of the hearing to avoid contentious situations.

So how should administrators/investigators address attorney advisors if and when they become combative? Always remain calm and professional, even when tensions flare. Never become part of the escalation – many attorneys expect that reaction and are used to that antagonism. Always look for ways to deescalate the situation. Remain steadfast if there are areas on which administrators cannot compromise, but show flexibility if it does not compromise the essential integrity of the process. If an attorney advisor becomes disruptive during an interview or a hearing, kindly remind them of the policies regarding advisor participation and expectations for proper decorum.

Contentiousness - cont.

The Title IX regulations allow schools and colleges the flexibility to "adopt rules of decorum" that prohibit questioning in an "abusive, intimidating, or disrespectful manner." Share those rules with advisors early on. Warning an advisor who fails to abide by the rules is a good first step. However, if a party's advisor of choice refuses to comply with these rules of decorum or is truly disruptive to the process, administrators can adjourn, reschedule, remonstrate, or otherwise attempt to reassert a civil and non-adversarial tone. It can be helpful to implore the party to rein in their advisor, and remind a party if the school's conduct code would be able to hold them accountable for the misconduct of their advisor. As a last resort, and assuming administrators have cleared this with legal counsel, the party may be required to choose a different advisor, or the school or college may provide that party with an advisor to conduct cross-examination. If an abusive attorney needs to be escorted out by security or campus police, do so, after fair warning. Formal hearings will likely have a particular individual in charge of maintaining order, often a panel chair or facilitating administrator. Whoever holds that position needs to have the requisite training, ability, and willingness to step in and assert order if confrontations by the attorney advisor(s) arise.

Administrators may feel overwhelmed, be terrified of attorney-based confrontation, and want to default to having the school or college's own legal counsel to be present to address any issues raised by attorneys during interviews or hearings. This is not ATIXA's recommended practice. First, placing a college, district, or school attorney in the room can heighten the adversarialism with the party and their attorney. Remember that administrators are facilitating the process, rather than being partisan. This is not "you versus them," even if the party's attorney makes it feel that way. Second, while the college or school legal counsel will likely be more comfortable interacting with a party's attorney advisor, there are conflict of interest and independence issues that may arise. Having the college or school attorney actively engaged in the process may help administrators feel better, but ultimately may create more problems than it solves.

One of the best ways to resolve a contentious or antagonistic relationship with a party's attorney advisor is to ensure administrators are treating their client with dignity and respect while providing the client with needed academic, work, or mental health support and resources throughout the process. Schools and colleges should also use caution with supportive measures that negatively impact any party's ability to complete their coursework, be on-campus, or be involved in various extra-curricular and co-curricular activities.

Contentiousness - cont.

Attorneys will typically challenge many of these actions, particularly those a school or college puts into place without providing sufficient due process, a clear rationale, and having narrowly tailored the restrictions to the circumstances. Also, simply asking the party in each interview how they are doing and whether or what resources the school or college can provide can defuse a lot of contention and antagonism by attorney advisors.

Interference

At times, attorney involvement in the process can feel like interference. Attorneys have been known to conduct their own investigations, hire private investigators, arrange for their client to take a lie detector test, and otherwise take actions that feel like they are treading on the school or college's investigatory prerogative. But, just as police have a right to investigate, so do private citizens and entities. Schools and colleges don't have a monopoly on investigations, and should understand that the parties will often engage in some outside fact-finding. Usually, they'll bring what they find to administrators, because they believe it will help them in the process. There is really nothing administrators can do to stop this, and no reason that they should, unless abuse of the process is truly taking place.

If the evidence is relevant, try to verify the information to the extent possible, provide the other party the opportunity to review and respond to it, and include it in the investigation report with, if necessary, investigator annotation on the limits to what is known about the additional evidence and the existence of any known contradictory and/or corroborating evidence. If evidence is destroyed, or witnesses are tampered with, or collusion is taking place, don't hesitate to hold the party/client accountable in the process for the acts of their attorney advisor, assuming a clear policy so permits. Additionally, filing a complaint with the state bar association for unethical conduct by the attorney may be appropriate. In our experience, however, such a possibility is rare as attorneys are usually well-trained in the ethics and limits of their profession. They will be doggedly partisan, but rarely dishonest or corrupt.

Interference - cont.

Combative attorneys may try to interfere in the process by raising issues of alleged bias by Title IX team members, or by asserting counter-claims. When an issue of bias is raised about a Title IX team member, that member cannot be the one to address it. Hand that assertion off to a neutral and objective third party to assess and determine whether there is a bias or conflict that merits recusal. Where counter-claims are asserted, follow the process and use due diligence to be certain they are not being alleged for retaliatory purposes. Administrators should not allow themselves to become instruments by which the retaliatory intent of another is accomplished.

Attorneys for the Complainant

Administrators may encounter with increasing frequency complainants who enlist an attorney as their advisor. Sometimes the attorney is a relative or family friend, but more complainants are specifically seeking out attorney advisors when, for instance, the school or college has a reputation for mishandling reported incidents to the detriment of complainants. There are a number of advocacy organizations nationwide that specialize in victim's legal rights, and their involvement may become more common (the same is true with respondents, as a number of go-to firms have come on to the scene) in school and college cases.

An attorney advisor for a complainant will function in much the same way as a respondent's attorney, assisting their client in conveying their position, identifying and presenting favorable evidence, and generally ensuring that their client gets a fair shake in the Title IX process. While nearly all of what we've said above -- including an attorney's training and aptitudes, potentially contentious disposition, and willingness to challenge procedures and evidentiary decisions -- applies to all attorney advisors, there can be a few nuances based on who the attorney represents.

Attorneys for the Complainant - cont.

Attorneys who work with complainants will likely be far more attentive to how their clients are treated throughout the process from a trauma perspective, with particular sensitivity to initial intake response, provision of appropriate supportive measures, tone of questioning, failure to deploy trauma-informed investigative techniques, and concerns about victim-blaming language or dismissive responses from investigators/administrators during meetings or interviews. Complainant advisors will likely understand the nature of Title IX liability under the *Davis*[5] case and will have an eye out for anything that looks or smells like deliberate indifference or that shows that administrators aren't taking the allegations seriously. When the respondent is a high-profile athlete, tenured faculty member, or other influential campus community member, not only are administrators more likely to see a complainant bring an attorney advisor, but that attorney will likely scrutinize every administrative decision and will be actively looking for any evidence of bias.

Of course, these are exactly the types of concerns administrators might expect a complainant's advisor to point out. Competent administrators/investigators will be scrupulous during initial intake, will avoid victim-blaming language and dismissiveness, will avoid gendered assumptions, will be attentive to even a perception of bias, and will provide the complainant with needed supportive measures throughout the process. One final consideration is that complainants may have been initially working with a victim's advocate (even one employed by the school or college), and then decide to engage an attorney. They may request that both be permitted to advise them (one for emotional support, and one for legal advice), so administrators will need to decide how many advisors are allowed in the room at once. And, administrators must provide the same opportunities for all parties. If administrators are not inclined to allow two advisors in the room during a meeting, interview, or hearing, parties may have one advisor support them at a time, rotating in different parts of the process, or have one just outside the door during breaks, etc.

5 Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 640 (1999).

Internal/Institution-appointed Advisor risk mitigation checklist:

- ☐ Encourage the parties to choose their own advisors (even attorneys)
- ☐ See if you can find ways to fund external attorneys for this role. That would be much better from a risk management perspective than using any institutional employee
- ☐ Choose institutionally-appointed advisors carefully, and don't limit their role to cross-examination
- ☐ Arrange for an alternate advisor to be in the wings at a hearing, in case a substitution is needed
- ☐ Pre-hearing, get assurances that the advisor is prepared to question
- ☐ Vet institutionally-appointed advisors for conflicts
- ☐ Train advisors well on questioning, crafting opening statements, closing statements, impact statements, and appeal requests
- ☐ Train advisors to know and understand your various processes
- ☐ Train advisors on the regulations and evidence rules
- ☐ Provide advisors with guidance materials (including ATIXA's Advisor Guide and Advisor Certification Course)
- ☐ Make sure advisors are covered by institutional insurance in this role, and that job descriptions are revised, if necessary
- ☐ Provide advisors with a clear, written role description
- ☐ Train advisors when to decline an invitation to advise, based on role or positional conflicts
- ☐ Empower advisors to be aligned with the interests of their party, regardless of the removal of this provision from the final 2020 Title IX regulations (their divided loyalty is a basis to sue them and your institution)
- ☐ Declare that during an advisor role, advisors are excused from mandated reporter responsibilities, and may keep the "confidence" of their advisee; this also means they cannot be questioned at the hearing on disclosures parties have made to them in their advisor capacity.
- ☐ Develop an ethics statement for the advisor role
- ☐ Make sure to release advisors from other employment duties as necessary to ensure they have enough time to devote to being a dedicated advisor
- ☐ Shield them from the rest of the Title IX Team while they are advising a party (create effective firewalls)

Conclusion

Attorneys are not sworn adversaries, but they are capable of losing faith in administrative skills or processes, disrupting investigations, and undermining the process if managed ineffectively. If treated with respect and transparency, they can be highly effective, uniquely qualified advisors, and even allies in Title IX processes. Frustration and tensions can result from misunderstanding, miscommunication, fear on the part of administrators, desire of the school or college to completely control all aspects of a process, and/or a lack of information shared from the school or college to the party. Get to know the advisors a little during the process and take an interest in their practices. Administrators might learn something very interesting (e.g.: who is footing the bill, if the attorney is working pro bono, if the attorney is a political activist, or related to the client, etc.).

If there are local attorneys who regularly appear in school or colleges processes, have coffee with them outside the context of an actual case. Establish rapport and common ground. Where conflicts arise, attempting to clarify the attorney advisor's confusion and answering questions will serve administrators well. If an attorney threatens litigation, try to ascertain what the basis for that lawsuit would be. Don't ever invite them to sue the school or college or arrogantly assert that the school has attorneys, too. As noted above, their concerns might serve as an indication that perhaps something was missed, or a procedure wasn't followed correctly. By being deliberate and receptive, administrators can increase the potential to be able to work constructively with attorney advisors to ensure a thorough, reliable, impartial, and equitable grievance process.

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