ATIXA Guide to Effective Advising in Formal Title IX Proceedings

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with thanks to the ATIXA Publications Committee

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> "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, and not limit the choice of advisor or presence 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." -- *2020 OCR Title IX Regulations*

This Guide has been updated on November 11, 2022, in accordance with *Victims Rights Law Center v. Cardona.*

Lesson One: Overview of The Advisor Role

Since 2014, colleges and universities have been obligated by federal law to provide parties with the opportunity to have an advisor of their choice accompany them, dating violence, domestic violence, and stalking. Similarly, many K-12 schools are accustomed to parents, guardians, or even attorneys accompanying students throughout the resolution process, in a supportive or advisory capacity, at least in suspension/expulsion-level proceedings.

Historically, many schools[1] have struggled with how to appropriately engage with advisors involved in the resolution process, and advisors have struggled with how to best fulfill their role. As of August 2020, Title IX regulations from the Department of Education's Office for Civil Rights (OCR) have significantly reshaped the role of the advisor. The expanded role for advisors in school and college resolution processes further complicates what was already a challenging situation for administrators overseeing the process and for advisors trying to discern how best to support their advisees.

This guide is intended to assist you in understanding the scope of your role. This guide will help you decide whether you should serve as advisor and, if so, how best to fulfill your duties, regardless of whether you are advising a complainant or a respondent. Lesson Two includes historical and background information about Title IX regulations. Lesson Three provides practical considerations for advisors navigating this important role.

If you are asked to serve as an advisor to a student or employee who is a party in a Title IX-related resolution process, you may have some questions about what this means. Do you serve as an advocate? Do you serve as a support person? Is the person who asked you to serve as their advisor the complainant? The respondent? A counter-claiming party (thus both)? What are you supposed to be doing to advise them? Does this role require merely moral support, or procedural expertise, or even legal training? Who is involved in the resolution process? Can you refuse a request to serve as an advisor? (yes!). These are all valid questions that we will answer in this guide. To begin, the following descriptions of roles in the process are offered to help clarify the lay of the land.

TERMINOLOGY

Complainant - Schools typically refer to the party who is the alleged victim of unwelcome conduct as the complainant, regardless of whether or not that individual reported the incident or situation themselves. There may be more than one complainant involved in any case, and nothing prohibits multiple complainants from sharing the same advisor, though this is not advisable as it could create issues of divided loyalty or conflicts of interest that would serve as a later basis for internal appeal, OCR investigation, and/or civil litigation.

Respondent - Schools typically refer to the party who is accused of misconduct as the respondent. There may be more than one respondent involved in any case, and nothing prohibits multiple respondents from sharing the same advisor, though this is not advisable as it could create issues of divided loyalty or conflicts of interest that would serve as a later basis for internal appeal, OCR investigation, and/or civil litigation.

Advisor - Generally, an individual who assists an advisee in navigating the school's formal and/or informal resolution process. An advisor typically is familiar with institutional policies and procedures and assists the party with respect to the resolution process. OCR regulations, state law, case law, institutional policy, and the wishes of the advisee will define the parameters of the advisor's role in a particular case. An advisor may have been chosen by the advisee or appointed by the school. An advisor could be an attorney or an advocate by background and training, but when serving as an advisor, they will need to adjust to the specific expectations of the advisor role. To be clear, parties are only permitted someone in the role of an "advisor" to accompany them in the process, regardless of whether that person has a background as an advocate, friend, relative, criminal defense lawyer,

[1] "Schools" is used generically to refer to K-12 schools, colleges, and universities.

emotional supporter, etc. There are no particular advisor qualifications, and a school cannot deny a party their "advisor" of choice.

Support Person - Generally, an individual who provides a party with moral and emotional support. A support person may or may not have a formal role in the resolution process. Some schools will permit parties to have both an advisor and a support person accompany them during any meetings or hearings, but since the Title IX regulations state that the only people allowed to accompany parties in the process are their advisors, anyone accompanying a party will have to serve in an advisory role, even if they are also serving as an advocate, support person or union representative (aka, a process advisor and a support advisor). Witnesses (unlike parties) in Title IX-covered proceedings may only have an advisor present at the discretion of the school or as permitted by institutional policy or a collective bargaining agreement.

Victim's Advocate - An individual who provides moral and emotional support but also issue-specific advocacy and has the specialized training and credentials of a victim's advocate. An advocate may be based on campus or in the community and may serve as an advisor or may work behind the scenes to advocate for their client.

Title IX Coordinator – An individual employed by the school or school district who has authority over and responsibility for Title IX matters within the school. The Coordinator is not a decision-maker on whether policy has been violated but may make some preliminary decisions in the resolution process. Some schools have more than one Title IX Coordinator or have designated Title IX deputies or designees who serve at the direction of the Title IX Coordinator.

Investigator – An individual who conducts an administrative investigation into alleged policy violations. They may be an employee of the school or may be hired by the school to conduct investigations, typically from external law or private investigation firms. At some schools, the Title IX Coordinator also serves as the investigator. Some schools may deploy an investigative team consisting of more than one investigator. This role is not a substantive decision-maker on whether policy was violated and may or may not make recommended findings as part of the investigation report or process. If they do, those recommendations are not binding on the decision-maker.

Hearing Officer, Decision-maker, or Hearing Panel – Individuals who are a part of the school community (although some schools do engage external third-party neutrals) who are trained to make substantive decisions on the evidence and/or conduct school-based hearings subsequent to an investigation. The hearing officer, decision-maker, or hearing panel makes a determination regarding alleged policy violations and is considered the "decision-maker" having responsibility for findings, sanctioning, and remedies. Hearing panels often have a designated chair.

Appeal Officer, Appeal Decision-maker, or Appeal Panel - Individuals who are a part of the school community (although some schools do engage external third-party neutrals) who are trained to review cases for error upon the request of a party following determinations regarding alleged policy violations. Appeals are required under the 2020 Title IX regulations on at least three grounds (procedural error, new evidence, bias) and must be available equitably to all parties.

ADVISOR SELECTION PROCESS

An advisor may be a friend, mentor, family member, attorney, advocate, or any other individual a party chooses. A party may choose an advisor from inside or outside the school community. Some schools leave it completely up to the parties to identify and select the person who they want to serve as their advisor, while other schools may provide a pool of trained individuals from which a party may select an advisor. When the latter approach is used, a party is not required to select someone from the pool. Similarly, an individual is not required to be a part

of the pool in order to serve as an advisor. A complainant or respondent may choose anyone to serve as their advisor as long as the advisor is *eligible and available*. Eligible means that the advisor is not conflicted out of the process in some way.[2] Available means the advisor is willing and able to take on the advising task.

Under certain circumstances, a school may appoint an advisor for a party. This should occur under limited circumstances, as parties should be afforded the opportunity to select an advisor of their choice. However, this will occur: 1) when the institution is required to provide an advisor under federal, state, or local law; or 2) for institutions of higher education, when a hearing occurs, and one or more parties fails to arrange for an advisor to attend the hearing.

The 2020 Title IX regulations delegate some questioning duties ("cross-examination") to advisors during a hearing for institutions of higher education, so a party who does not have an advisor for earlier phases of the resolution process will need one for the hearing, or may switch from their chosen advisor (who may be untrained) to an institution-appointed advisor for the hearing, if they prefer to have an advisor trained in the role at that point in the process. If you are appointed as an advisor solely to conduct questioning during a hearing, it is important that you are trained to do so, in order to help your advisee, navigate this part of the resolution process.

The 2020 Title IX regulations set a minimum requirement (a procedural floor) for the role of the advisor at the hearing, viewing that responsibility as really just posing the questions that are suggested or requested by the advisee, as a means to buffer the effect of the parties posing questions directly to each other. But, many advisors, especially attorneys, will not merely be repeating the words of their advisees, but will be actively helping them to craft strategy, draft questions, frame arguments, sequence questions, and draft opening, closing, and/or impact statements.

If you are an advisor of choice, you'll likely be present for more than the hearing, as you will have the ability to be present for all phases/meetings in the process, including intake, investigation, pre-hearing, hearing, and appeals. An institution-appointed advisor is only required by federal law during the hearing phase of the process, but many colleges and universities furnish institutional advisors for the entirety of the resolution process.[3] Really, this creates three possible advisor frameworks: 1) the independent advisor chosen by the party; 2) the advisor selected by the party from an institutional trained pool; or 3) the trained advisor appointed from the institutional pool and chosen by the institution. Again, the third type is only used when the party does not have and/or cannot find an advisor willing or able to conduct cross-examination for the hearing.

CONSIDERATIONS FOR ADVISOR SELECTION/QUALIFICATION

While we stated above that an advisor can be anyone, practically speaking, an advisor should be *eligible* and *available*. If you are asked or appointed to serve as an advisor, you may wish to review some considerations to ensure that you will be able to serve effectively. This determination may involve you meeting with the individual who has requested that you serve as an advisor and/or you making a determination about whether you are able to serve in a useful manner.[4] You will also want to determine who the other party is, who the witnesses may be, and/or who the involved administrators are, to ensure that you do not have problematic conflicts or relationships that could later lead your advisee to claim that you served them negligently in your advisory role.

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[2] A supervisor should not take on an advising role for a supervisee, for example.

[3] The requirement to appoint advisors only applies to higher education and does not apply to K-12 settings though a district can decide to do so voluntarily.

[4] For Title IX issues arising in the K-12 educational setting, it is anticipated that a parent or guardian will often be involved in the process of selecting an advisor and determining the scope of the advisor's duties. Parents/guardians are permitted to be involved in K-12 resolution proceedings in addition to an advisor.

Although there is no particular legal requirement that an advisor be objective or impartial, there is always a concern with institution-appointed advisors about divided loyalties. If you think it will be difficult to serve your advisee well while also being an institutional employee and fulfilling those duties, you should reject the request to serve as an advisor. Following are some questions to consider as you make the decision to serve (or not) as an advisor. Lesson Four explores each question further.

1. Are you also a witness?
2. Do you have time and bandwidth to prepare and serve as an advisor?
3. Do you have personal biases, feelings, and/or opinions that may interfere with your role?
4. Do you have any conflicts of interest?
5. What is the anticipated scope of your role?
6. Is the subject matter comfortable for you?
7. Should you serve as an advisor for your child?
8. Are you a mandated reporter?

We'd also note here that good advisors understand policy. They are familiar with the definitions of offenses that the school applies, and conversant with concepts like *quid pro quo*, hostile environment, protected classes, sex v. gender, sex stereotypes, consent, incapacity v. intoxication, coercion, retaliation, pervasiveness, objectively offensive, etc. If this is an area where you could benefit from deeper insight, a number of resources from ATIXA may be helpful, including *ATIXA's Comprehensive Regulations Implementation Guide*, *The ATIXA Playbook*, and ATIXA's 20-Minutes-to… *Trained* online topical series. All of these are available to ATIXA members at www.atixa.org.

FIRST DUTIES OF THE ADVISOR

The scope of an advisor's role can vary and is primarily dependent upon what the advisee wants, how much guidance the advisee needs, any applicable state law, and any limitations on the role of the advisor that are imposed by the school. If you will be serving as an advisor in any capacity, it is critical that you understand the school's resolution process. Resolution processes are not uniform among schools; the process at one school may vary significantly from the process at another school. Moreover, schools generally review and revise their policies every few years, following the release of significant guidance from OCR and/or upon changes in case law, so the policy that applies this semester may look different than the policy that applied last semester. Regardless of the institution's process, there are a few early matters for the Advisor to address.

Know the Applicable Policies and Procedures. Be sure your advisee has the most updated version of policies and procedures. Hopefully that is the version the school has posted online, but beware that it may be out-of-date, or that different versions may be posted in different areas of the school's website. When you're unsure what version applies, clarify immediately with the Title IX Coordinator or other appropriate administrator.

You'll also want to clarify what policy applies if there is a delay in reporting of the allegation, because policy may have changed between the time of the incident and the time of the report. The 2020 Title IX regulations are not retroactive, and their applicability is based upon the date of the incident. Incidents before August 14, 2020, are subject to one set of policies/procedures (which may no longer be published on the school's website), and post-August 14, 2020 incidents are subject to the policies and procedures required by the 2020 Title IX regulations. Generally speaking, most complainants will want pre-regulations policies and procedures to apply, if possible, and most respondents will want post-regulations policies and procedures to apply. As noted, the hybrid where pre-regulations policies (definitions of offenses, etc.), but post-regulations procedures are applied to incidents that happened before August 14, 2020, but are reported or resolved after August 14, 2020, will be the most common approach.

Establish a Single Point of Contact. When serving as an external advisor, ask for a single point-of-contact within the institution or school. This is easier said than done, as most schools have a four-phase process: intake – investigation – hearing – appeal, and while each phase is connected to the others, there are usually different administrators in charge of each phase. Often, the Title IX Coordinator will serve as the connective thread, but more schools, especially larger institutions, may have a case manager or facilitator of some kind who ensures the flow of each phase of the process and that each phase connects smoothly to the others.

Understand Interim Suspension or Emergency Removal Procedures. As part of the advisor role during intake, a student advisee may be subject to emergency removal under the Title IX policy, or interim suspension/restrictions under other applicable policies. You will need to help them understand this process and prepare to respond to it. Under Title IX, there is a very high bar for emergency removal, including from classes, housing, campus activities, athletics, etc. Lesson Five describes a typical emergency removal process.

Jurisdiction. Advisors should take the time to review and digest the 2020 Title IX regulations. The rules themselves are only fifteen pages but are sophisticated, complex, and sometimes confusing. One such area is jurisdiction – when Title IX applies and when it doesn't. Lesson Six focuses on understanding jurisdiction.

SERVING AS AN ADVISOR

Once you have agreed to serve as an advisor, your advisee should notify the school promptly with your contact information. This is an ideal time for the advisee to submit a signed release authorizing the school to share information with you, and to request that you be copied on communications with your advisee. Pay attention to any policy-based expectations for your advisee to update the school if a change in advisors is made.

The next several pages provide an overview of a typical Title IX process and the activities of the participants. We have included suggestions for advisors in some areas that may be less intuitive for the advisor. Lesson Seven includes our "Topical Deep Dive" which provides more in-depth explanations and commentary about key phases of the process and important interactions with participants and third parties.

In general, the process at the majority of schools will involve the following steps:

- Receipt, review, and/or evaluation of a complaint,[5] allegations, or notice by the Title IX Coordinator or designee.
- Intake for parties with respect to initial actions, resources, and supportive measures.
- Initial assessment by the Title IX Coordinator concerning formal or informal resolution options, emergency removal, dismissals, etc. Advisors for the parties may want to use this initial assessment period to seek for dismissal of the allegations, if warranted, per the criteria above.
- Written notice of investigation and allegation(s) (NOIA) to the parties for cases proceeding through the formal resolution process. The NOIA must be *fairly detailed*, per the 2020 Title IX regulations, and should be delivered to the parties upon receipt of a formal complaint.
    - The 2020 Title IX regulations require schools to provide notice to the respondent with specificity. If your advisee does not receive sufficient notice, help them raise that concern with school officials.
- Investigation comprised of interviews and evidence gathering (school may engage external investigators for this purpose).

[5] Under the 2020 Title IX regulations, the formal resolution process (Process A) can only be initiated by a formal complaint by the complainant or signed by the Title IX Coordinator. If notice is received that is not a formal complaint, the Coordinator will work with the complainant/advisor to file the formal complaint appropriately. A formal complaint would also be needed to initiate informal resolution under Process A.

- Your advisee will be asked to give a statement, respond to questions, provide and suggest evidence, identify witnesses, and suggest questions to be asked of witnesses/parties.
    - Parties and witnesses are not obligated to participate in the investigation, and it may be strategic for them to opt not to answer investigation questions or attend investigation interviews.
    - Many advisors will want advisees to attend interviews, even if they won't be answering questions, to learn as much as about the complaint and evidence as possible.
    - Be clear on institutional procedures which may prohibit introduction of evidence at the hearing, that was not introduced during the investigation, to avoid last minute surprises at the hearing.
- Creation of an investigation report.
- Party/advisor review of evidence/review of report.
    - The 2020 Title IX regulations require the evidence to be shared with the parties for review and comment (either in paper or electronic form) and their advisors at least 10 days prior to finalization of the investigation report.
- Decision-making phase, including the submission of written questions for the other party and for witnesses (at the elementary and secondary education level).
- Live hearing including cross-examination (at the postsecondary education level and commonly for suspension/expulsion level offenses at the secondary level).
- Findings/determination of responsibility/sanctions assessed for violations.
- Notification of outcome/sanctions/remedies, in writing.
- Appeal (if either party chooses to do so).
- Notice of final outcome, in writing.

An advisor may be asked to perform a variety of duties throughout the resolution process. The following list, though not exhaustive, provides examples of duties that should be discussed with your potential advisee:

- Help your advisee to understand institutional policies and procedures. If you are an attorney, you may be expecting due process protections to apply as they do in court. Under school and college processes, some level of procedural fairness or due process may be required, but when the process is governed by Title IX, the applicable protections are those within the 2020 regulations, which are a unique set of rights that are distinct from constitutional due process.

- Help your advisee to understand in general terms how a school's resolution process differs from criminal and judicial processes, and especially when law enforcement is investigating, too. This is discussed further in the section entitled *Concurrent Criminal Investigation/Proceedings* in Lesson Nine. Individuals who are not trained legal professionals should be careful not to offer legal advice.

- Be aware of any alternative/informal resolution options the school may offer and discuss these with your advisee. Examples include mediation and restorative justice practices.
    - Informal resolutions are permitted by the regulations at any stage of the process. If your advisee is open to an informal option, that should be communicated promptly to the Title IX Coordinator.
    - Respondents may prefer to wait until the end of the investigation to see what the evidence shows before indicating a willingness to resolve informally.
    - Undertaking informal resolution requires the voluntary assent of all parties, including the Title IX Coordinator.
    - Within the framework of informal resolution, some schools may be open to the option of a respondent self-sanctioning by accepting voluntary restrictions or removal from school. This

may be preferred by a respondent in terms of sanction (e.g., a suspension rather than an expulsion), and/or their reportability to transfer institutions, graduate schools, etc.
    - Within the framework for informal resolution, some schools may be open to the possibility of a negotiated resolution, where the parties' advisors work out terms that are acceptable to all parties and the school (often with input from the Title IX Coordinator or general counsel) to avoid a formal resolution process.

- Prepare your advisee for all meetings, interviews, and hearings, which should all occur with advanced written notice.

- Parties are also entitled to know (via advance written notice, if possible) about all meetings scheduled between the school and the other party or parties.
- Accompany your advisee to all meetings, interviews, and hearings. Meetings may be with the Title IX Coordinator, the Title IX Investigator or team, and/or the decision-maker or chair.

- If a meeting is offered to review procedures with an administrator, both you and your advisee should accept the offer and go to this meeting. Ask a lot of questions about the process to make sure it really works the same way it is described on paper. Clarify gray areas of the procedures. Take copious, dated, written notes of important points discussed during the meeting.

- Advisors should carefully consider whether their advisee should file a counterclaim, in other words, a formal complaint filed against the other party on the basis of some form of sexual harassment. Sometimes, a counterclaim is warranted, and other times it can be seen by school officials as an attempt at retaliation. Ensure that any counterclaim is grounded in evidence and made in good faith. Clarify how the school will address a counterclaim procedurally. It may be addressed wholly separately from, or in conjunction with, the underlying claim. This is a strategy that can really backfire, so consider it carefully. It is most valuable when charges are not pursued equitably, as in cases where both parties are physically abusive to each other, but only one party is charged.
- Serve as a liaison between institutional staff and your advisee. Note that a school may limit what level of direct communication it will have with you and what information it shares with you. Your advisee may/should sign a release allowing the school to communicate with you to facilitate information sharing.

- The 2020 Title IX regulations permit the school to condition sharing information with an advisor on the advisor's willingness to sign a non-disclosure agreement (NDA). If you don't sign one, the school may limit what it shares with you, but the party may share the same information with you that the school would. No restrictions on sharing (gag orders, non-disclosures, confidentiality provisions) can be placed by the school on the parties themselves, who are entitled to engage in whatever independent fact-gathering they wish.

- Assist your advisee in presenting information clearly during any interviews conducted as a part of the Title IX investigation. You may have limited ability to directly assist during an interview, but you may have more input on written submissions that the advisee provides to Title IX administrators, and you certainly can help to prepare your advisee prior to the meeting. Be clear what the protocol is for communication with your advisee during the meeting. Most schools follow some variation on the "potted plant" rule (during interviews, not during the hearing), leaving you with no opportunity to address the proceedings, but will permit some way for you to engage with your advisee. This may be directly, but more likely will be through the sharing of notes or by taking a break. Be clear about how you

will signal to your advisee if they need to clarify something, give a problematic answer, or should confer with you first before answering. Take breaks if you need to.
    - You want to clarify in advance what modes of communication are permitted. Rarely, advisors are afforded a more active role in the interview and may present evidence on behalf of their advisee. If this is permitted, you want to be clear on that in advance and be prepared to do so, accordingly.
    - Sometimes, it may be better for the investigators to hear from your advisee directly; just because the advisor *can* present evidence doesn't necessarily mean that you should do so. This can be a valuable learning and empowerment experience for your advisee, and credibility is often best assessed directly.
    - If hearings are conducted remotely or virtually, plan a way for you to communicate with your advisee (text, email, etc.) if you are not physically present with them. Avoid using the chat function on any virtual platform, as the school or computer program may record it.
- Help your advisee to identify the names of witnesses and lines of questioning that are relevant to the issues at hand and present this information to the investigator or investigative team.
    - Have contact information for all witnesses already written down and list your witnesses in priority order based on the significance of what they may know. If you are unsure whether to name someone as a witness, or unclear what they may know about the incident, you and your advisee should discuss this in advance of the interview.
    - In some cases, there may be value in reaching out to the potential witness to see if they have information to share, but in other cases that approach may backfire, and school officials may get the impression that the witness was tainted/influenced by this conversation. So be strategic in terms of who/what is discussed between your advisee and potential witnesses.

- Help your advisee review any interviewer notes made of their interview and respond as appropriate. You may be asked to help your advisee confirm that the information they expressed during the interview or submitted to the investigator or investigative team is accurately reflected in the interview notes or accurately transcribed from a recording. If your advisee is not invited to review notes, have your advisee request an opportunity to do so. You may also want to take notes during the interview, if permitted.

- If your advisee is asked for permission to record the interview, permission should not be unreasonably withheld.

- Do not record the interview unless you have explicit permission from the interviewers, and recording is permitted by policy. If the school records the interview, you may request access to a copy of the recording (and the school has up to 45 days but must grant that request, if your advisee is a student).

- Help your advisee to identify, gather, review, organize, and present any evidence they may wish to submit. This could include photographs, screen shots, text messages, receipts, snapchats, recordings, etc. Have them properly order any text threads and annotate (without alteration) anything that could cause confusion.

- The investigators will want to see originals when possible, not screenshots, so make sure your advisee brings to the interview any device(s) that contains evidence. Make sure your advisee does not alter or omit any evidence, as this will likely be quickly discovered and would be very harmful to their credibility.
    - Note that your role is not to form a legal opinion on the sufficiency of any evidence. Rather, you should be helping your advisee organize the information in a coherent manner for submission to the school.

    - The school may follow the rule of completeness, meaning it will not accept partial or redacted records. If so, you and your advisee should be prepared to share the complete record.
    - Help your advisee to review the investigation report and case file documents and respond as needed. The school may permit minor editing suggestions for accuracy or clarity. They may also accept comments, critique, suggestions for further investigation (more witnesses, other questions to ask), and/or ask you to comment and respond to the comments/responses of the other party/parties.

- Help your advisee identify gaps in the investigation and suggest additional relevant questions or areas of focus. You may be able to do this interactively with the investigator(s) prior to completion of the draft investigation report. If that is permissible, it is preferable to waiting until the draft report is completed.

- In a K-12 matter, submit written questions to be asked of the other party and of witnesses if an informal hearing or decision-making step is part of the process.[6] The decision-maker should allow some exchange of questions and answers between the parties, and should ensure that all relevant evidence is in the record before making a decision.

- Your advisee has the right not to attend or participate in any or all steps in the process, but you want to discuss with them how non-participation will affect the process. It may depend on whether the standard of proof is preponderance of the evidence or clear and convincing evidence (schools may choose either but must use it consistently). If a respondent does not participate, a complaint has been made in good faith, and the complainant is found to be credible, the respondent will likely be found in violation under a preponderance of the evidence standard if they provide no evidence to contest what is in the record. This may be less likely with the higher standard of clear and convincing evidence, or where the complainant is not credible. Non-participation rarely works to a respondent's advantage in the institutional process. Nonparticipation, however, may sometimes be advisable if the respondent is trying to avoid testifying because of a concurrent criminal matter.
- If you are advising the complainant, and they do not attend the hearing, the respondent is likely to be found not in violation if credibility is at issue. This can result in a dismissal of the complaint for many schools.

- In a postsecondary context, you should expect to attend any hearing that your advisee attends and conduct cross-examination of the other party and any witnesses during the hearing.[7] You may be expected to conduct some direct examination as well, so seek clarity on this prior to the hearing. This is discussed further in the section entitled *Conducting Cross-Examination* in Lesson Eight.

- If you are advising a respondent, remind your advisee that Title IX administrators may expect your advisee to reflect on their choices and demonstrate awareness of the impact their choices have on others, beyond just responding to the allegations. That doesn't mean they should admit something they didn't do, or apologize, but some administrators may be looking for the respondent's sense of contrition, acknowledgement of harm, learning from mistakes, etc.

[6] The 2020 Title IX regulations allow, but do not require, elementary and secondary schools to hold a live hearing as a part of their resolution procedures. If no hearing is held, each party must have the opportunity to conduct questioning of other parties and witnesses by submitting written questions to a decision-maker.

[7] The 2020 Title IX regulations require postsecondary schools to provide a live hearing with the opportunity to conduct cross-examination as a part of their resolution procedures.

- Accountability and/or acknowledging harm is important, depending on factual circumstances, and is different from admitting to misconduct, if your advisee is hoping to mitigate the severity of sanctions.

- Assist your advisee in understanding any determinations made by the school's decision- makers.

- Assist your advisee in preparing an impact statement or a statement regarding aggravating or mitigating factors for consideration regarding any sanctions that may be imposed following a determination. Clarify in advance when/how/if such a statement can be submitted to the school.

- Assist your advisee in submitting a request for an appeal, if warranted.

- Assist your advisee in paying attention to deadlines throughout the process.

- Be a listening ear when your advisee needs to talk or vent. It is likely that your advisee will have moments when they use you as a sounding board. This does not require you to become a counselor or psychologist. However, you should be willing to be present, show empathy, and listen.

- Be aware of referral sources for your advisee. Given your interaction with your advisee, you may be alerted to behaviors and/or comments that indicate that your advisee is in need of assistance beyond what you can provide. For instance, your advisee may express depressive and/or suicidal thoughts, you may suspect abuse is occurring at home, or you may become concerned about your advisee's use of drugs or alcohol, significant weight fluctuations, sleep disturbances, etc. When this occurs, know that it is not your job to "fix" the problem. However, you should be aware of referral sources within the school and the community where your advisee can seek assistance.

- Keep an eye open for procedural errors and biases as the resolution process unfolds and contact the Title IX Coordinator or other appropriate administrator as warranted to raise your concerns. This communication should occur in a professional, non-accusatory manner. We have seen many cases of bias, both conscious and implicit, and misuse of trauma informed methodologies, that results in unfairness to a party. If you encounter anything that jeopardizes the fairness the school owes to your advisee, immediately document it and raise it with appropriate school officials. Hopefully they will be responsive, but if not, your advisee will be able to raise the issue on appeal, and ultimately to OCR or the courts if the outcome is disputed.

- Be aware of any supportive measures put into place by the school during the pendency of the resolution process. For example, the school may direct that the parties not have any contact with each other, maintain a physical separation, and/or may exclude a party from certain areas of campus or from the entire campus, change class assignments or housing, and/or may reassign an employee or place an employee on paid leave. When these supportive measures are implemented, you should work with your advisee to review the specifics of the interim remedies and seek clarification of any uncertain terms. If the interim remedies seem unnecessary or overly broad, your advisee can request that the school review them. The 2020 Title IX regulations prohibit supportive measures that unduly burden or penalize a party who has not been found in violation of policy.

- While supportive measures are in place, you should advise your advisee to steadfastly follow them, as a student or employee can face separate consequences for failing to follow the directions of institutional officials. If your advisee is subject to breaches of supportive measures, or they are insufficient, your advisee should promptly bring that to the attention of appropriate officials.

- Ensure that your advisee is aware of what constitutes retaliation and knows that retaliatory actions should be reported promptly to school officials. Retaliation includes materially adverse action taken against someone (party, witness, advisor) because of their involvement in protected activity (participating in a resolution process, protesting discrimination, etc.)

- Observe whether the resolution process is sufficiently trauma informed. For example, if victim-blaming questions are posed to your advisee, or questions are gratuitously re-triggering or insensitive, you may want to intervene and contact the Title IX Coordinator.

- Pay special attention to any applicable rules of evidence. For example, the regulations require restriction on the admissibility of sexual predisposition and past sexual history evidence. Ensure that advisors and advisees abide by such restrictions or clarify them if the parameters are unclear.

- Remember that all parties should be treated with respect and seriousness by the school. If the other party is powerful and influential at the school and your advisee is not, you may need to take extra steps to ensure that your advisee is treated equitably.

- Unless a no-contact order prohibits it, the parties' advisors may contact and communicate with each other. Ensure that your advisee is aware of and approves of such communication. It could be seen as harassing for an advisor to contact the other party, and it is not recommended.

- Remind your advisee that they should not lie, collude with potential witnesses, or destroy evidence. Title IX investigators and investigative teams are adept at identifying these behaviors, and students and employees can face separate consequences within the school for tampering with the resolution process or for knowingly providing false information. It also can damage and detract from your advisee's credibility in other phases of the process.

- At times a respondent may consider withdrawing from a school for a variety of reasons. If withdrawal is being considered, you need to be very clear about what actions the school will take upon withdrawal. Does that stop the process? Does the process continue? Can your advisee withdraw but still participate? What records are kept? Does the school notate transcripts? When and how? What will the school say in a disciplinary clearance request if your advisee makes a transfer application to another school? If your advisee withdraws but the resolution process continues, what sanctions can/will the school impose if there is a finding that policy has been violated?

- The school must allow you and your advisee to identify and provide any evidence that is relevant to the complaint, including expert testimony. Is an expert needed? If so, does the school identify experts and/or are the parties expected to do so? If your advisee would benefit from offering expert sources of information, you should help your advisee to identify campus-based or other experts who can inform the investigation and final determination. This may include polygraph evidence and the testimony of a polygraph expert or the administrator of the test, experts on incapacity, drugs, medical forensics, technology, etc.

- The 2020 Title IX regulations require schools to share all evidence with the parties, even if that evidence will not be admitted or relied upon in the resolution process. Advisors should make sure to advocate for their advisees to receive the full measure of information the federal regulations require.

- The 2020 Title IX regulations grant the parties the right to copies of the evidence/reports available in the resolution process, prior to a final determination.

CONCLUSION

The role of an advisor in a school's Title IX resolution proceedings has expanded significantly as a result of court decisions and changes in institutional policy. Now, the 2020 Title IX regulations have significantly altered the role of the advisor by extending the right to an advisor to the elementary and secondary education levels and by expanding the role of the advisor to active participation in the process at all educational levels.

As an advisor, it is crucial that you understand how to best meet the needs of your advisee and conduct yourself professionally and competently. If you have questions that are not addressed by this guide, you should consult with ATIXA or the school's Title IX Coordinator for clarification in order to best fulfill your role as advisor.

Lesson Two: Title IX History and Background

Title IX of the Education Amendments of 1972 ("Title IX") provides that "no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance."[8] Title IX protects both students and employees, applies to all levels of federally-funded education, and encompasses various forms of sex or gender-based discrimination including sexual harassment, sexual assault -- and when sex-based -- domestic violence, dating violence, and stalking. Title IX requires that schools respond appropriately to allegations of discrimination and harassment. Schools have developed resolution procedures, which ultimately result in a determination of whether or not a violation of school policy has occurred and, if so, what remedies appropriately address the issue and prevent its recurrence.

At the elementary and secondary education levels, resolution procedures often involve an investigation conducted by school administrators that results in a determination through an informal, paper-based decision-making process. The same level of informality may also pertain to employee resolutions, especially those in which the respondent is an at-will employee. At the postsecondary education level, resolution procedures often involve an investigation followed by a live hearing conducted by school administrators[9] who make a determination. This level of formality may also apply to campus, school, or district employees in some states, and to primary and secondary level students facing suspension/expulsion-level proceedings. Appeal opportunities are required by law, and under certain conditions, schools may also offer the option of informal resolutions rather than formal grievance proceedings.

In 2013, the Violence Against Women Act (VAWA) Reauthorization codified into federal law the requirement that colleges and universities administering a resolution process for allegations of sexual assault, dating violence, domestic violence, and stalking must allow "the accuser and the accused" to be accompanied by an advisor of their choice at any proceeding or related meeting.[10] These protections, included in what is known as VAWA Section 304,[11] took effect in 2014, and have been enforceable by the U.S. Department of Education (ED) since 2015.

Under VAWA, the advisor is defined to include an advisor of the party's choice. Schools can establish restrictions regarding the extent to which an advisor may participate in the proceedings as long as those restrictions apply equally to all parties. However, schools are not permitted to limit who a party can choose as advisor. Advisory rights under VAWA extend to both employees and students.

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[8] 20 U.S.C. § 1681; 34 C.F.R. Part 106.

[9] Or external, third-party neutrals.

[10] 20 U.S.C. § 1092(f)(8)(B)(iv)(II).

[11] And codified as an amendment to the federal Clery Act.

The 2020 Title IX regulations incorporate the VAWA advisory rights and widen the VAWA protections to include sexual harassment which is covered by Title IX but not by VAWA. Thus, VAWA covers the "Big Four" offenses (sexual assault, dating violence, domestic violence, and stalking), and Title IX covers the "Big Five" (sexual harassment, sexual assault, dating violence, domestic violence, and stalking).

Functionally, most colleges and universities applied VAWA's advisor rights to all Title IX-covered offenses following the reauthorization of VAWA in 2013, so these protections likely were extended beyond the Big Four to other forms of sex discrimination covered by college policy (e.g., sexual exploitation, sexualized bullying, disparate treatment, gender expression/identity discrimination, retaliation, etc.). Any right to an advisor that is provided beyond the Big Five offenses is offered by a college without a legal mandate to do so.

The 2020 Title IX regulations significantly alter the role of the advisor by applying it to the elementary and secondary education levels, which VAWA did not, and by expanding the role of the advisor at all educational levels to a degree of active participation in the process, beyond merely accompanying one's advisee to meetings. Thus, the often-cited model of the advisor as nothing more than a potted plant in the corner of the room is now dead.[12] Although the final regulations do not require the advisor to be aligned with the interests of their advisee (an early 2018 draft of the regulations did), the parties will often look for this quality in the advisor they select. This guide will also discuss the implications of partisanship and conflicts of interest in the advisor role in later lessons.

Lesson Three: Practical Considerations for Advisors

Historically, there have been significant clashes between school officials administering the Title IX resolution process and some advisors. Prospective advisors should be aware of this history because you will need to effectively safeguard your advisee's best interests without unnecessarily creating conflict with the school officials who administer the process and ultimately make decisions that impact your advisee. Although most administrators will not allow a difficult advisor to negatively reflect on their advisee, they are human, and some advisees will suffer for the failings of their advisors. Respect and cooperation are generally a two-way street in these proceedings.

It will be up to you as an advisor to decide if you want to be cooperative and assist the school in conducting a thorough, neutral, and reliable process. Instead, you might feel that being adversarial is the only way to safeguard the rights of your advisee, but we have found over many years that school and college administrators are more responsive to rational persuasion and are more likely to retreat from adversarial interactions. You may be looking for a partner with whom to negotiate, or a problem-solver, but the administrator most likely does not view their role that way. You may or may not get more traction by reaching out to the school's legal counsel with such entreaties.

Advisors will also be faced with an occasionally perplexing conundrum. The school administrator is the guardian of the integrity of the school's resolution process and sees themselves as such. However, just as we know that judges can deviate from rules in court, school administrators also deviate from their own procedures, perhaps with surprising frequency. Advisors must watch for this phenomenon closely, but with an awareness that administrators can be defensive about having deviations pointed out. Political skills will come in handy to highlight concerns without seeming to place blame or point fingers. Based on long experience, we suggest that you raise the issue with administrators in the same tone and fashion you'd raise it with a judge. They will often self-correct if given the chance and the ability to save face.

[12] In some states, state law and case law also shape the role of the advisor.

We share this history because we believe you can be an effective advisor and simultaneously create a positive relationship with school officials administering a Title IX process, and it is important that you try to do so for several reasons. For example, although the 2020 Title IX regulations expand the role of the advisor, especially in the postsecondary education context, there will be many areas in which schools retain discretion over how accommodating they may be to an advisor. Schools may agree to copy an advisor on communications with a party or may elect to communicate with the party only. This can be important, especially when resolution procedures include important deadlines for responses. Schools also have no obligation to work around your schedule but may be more willing to do so if they find you to be cordial and professional. Of course, any rights extended to one party must be extended to the other, but inevitably there will be areas in which the school can make it easier or harder for an advisor to do their job. Try to start off on the right foot and stay there.

For those readers who are non-attorney advisors, or parties considering using non-attorney advisors, we have a few suggestions. Although financial factors may play a role, non-attorney advisors should seriously consider whether to serve as an advisor for a party who would be better served by having an attorney. Do you understand complex proceedings? Do you know how to advise your advisee on the implications of their campus testimony for any criminal proceeding that may parallel the school or campus resolution process?[13] Do you know enough about technology, forensics, social media, expert witnesses, and/or other issues that can impact evidence in order to give your advisee the benefits they would otherwise have with a knowledgeable, well-experienced attorney? How will you match up against the other party's advisor, especially if they are an experienced attorney?

We are not suggesting that every party who participates in this process needs a lawyer, but many do, and it will not serve their best interests to choose an advisor who does not have the requisite skill and insight. Sometimes, parties are more comfortable having an advisor who can provide moral and/or emotional support, and value that above legal advice. This is understandable, and it is worth clarifying the school rules. Sometimes, a party can be accompanied by both a support advisor (advocate) and a process advisor (if the school permits more than one) or can switch off between them for various types of meetings, interviews, and hearings.

It is also worth noting that a school can only govern who a party has in the room with them for meetings with school officials. Schools cannot control who or how many advisors a party has to assist, advise, and support them outside of their interactions with school officials. An advocate can hold their client's hand right to the door of the office, and then hand off to an advisor. Also, nothing stops an advisee from alternating advisors in different meetings, or from switching advisors mid-process, or even during meetings.

Non-attorney advisors have largely been successful in acting in the best interests of their advisees but have also been challenged for being too deferential to administrative colleagues and not sufficiently willing to fight for their advisees in the face of administrative incompetence or corruption. The right balance between collegiality and challenge can be hard for any advisor to achieve.

Advocates serving as advisors have been valued for their insights on support, resources, and navigating various systems, but can sometimes fall short of the process acumen needed or fail to deliver cross-examination with the precision that an attorney might. If you're an advocate who wants to serve as a process advisor, it is worth investing in professional development to both broaden and deepen your skill sets.

Under the 2020 Title IX regulations, the overall resolution process may feel unbalanced to complainants, given the regulations' strong emphasis on due process and procedural formality. Perhaps an advocate's sensibility,

[13] Short answer: all campus or school proceeding records are fairly easily subpoenaed and admissible in a subsequent criminal proceeding. Thus, a respondent's admission of a campus violation could result in a criminal conviction, as well.

rather than that of a gladiator attorney-advisor, may be helpful toward offsetting so many of the aspects of the formal resolution process that could be damaging, traumatizing, and/or inhospitable to complainants.

Regardless of what type of advisor you are, we hope you will be able to create a positive dynamic with Title IX administrators while still effectively advising your advisee. Extend simple courtesies, strike a civil or collegial tone, and display a respectful manner. Be on time for meetings. Take time to establish a rapport with Title IX administrators. Ask questions if procedures are unclear but take the time to read and try to understand them first.

When your role requires you to push back on the school's procedures, do so in a manner that recognizes that the person implementing the procedures may not be the person who crafted them and may have no authority to deviate from them. Title IX administrators have a duty to provide a process that is thorough, neutral, and reliable, and most take that duty very seriously. Showing them that you respect the process and its goals can ultimately benefit both you and your advisee.

Lesson Four: Questions Related to Advisor Selection/Qualification

1. Are you also a witness?

If you are asked to serve as an advisor in a resolution process, and you have reason to believe that you will be serving as a witness to provide evidence about the incident known to you separate from an advisor role, it is not recommended that you also serve as an advisor given the potential for bias and conflict of interest. Put simply, the decision-makers may discount your testimony when they see that you are also an advisor, because they may see your role as an advisor as a partisan role, and that may lead the decision-makers to conclude that you are also a partisan witness. However, if a party is adamant about having you serve as both their advisor and as a witness, you may do so, though it is unclear who would cross-examine you as a witness at the hearing. Will you question yourself? Does the party you are advising need a temporary or second advisor to step in for questioning when you are giving testimony as a witness? If you are unsure, you may wish to consult the Title IX Coordinator or hearing chair for clarity.

2. Do you have time and bandwidth to prepare and serve as an advisor?

An effective advisor is one who has taken the time to prepare to serve in this role and who has the time to serve as needed. Although there are no formal preparation requirements, it is important for an advisor to take some minimal steps to prepare, such as reviewing institutional policy and procedures. Furthermore, depending on the scope of the advisor's role in a particular case, advising can be time-consuming. Preparing for and attending meetings with your advisee can easily extend beyond 10 hours, with additional time spent preparing for and attending a hearing and preparing an appeal, if a decision is appealed. As a guide, simple cases that do not go to hearings may require 8-10 hours of time and 15-20 hours if the case is complex. With a hearing and appeal, 20-25 hours is not uncommon for a simple case, with complex cases requiring 30-40 hours or more. If you will be the advisor for the hearing only, expect 6-12 hours unless the case is particularly complex or lengthy. For cases in which the advisor advises for an informal resolution, we've seen as few as five hours and as many as 25.

There is no set time frame for the institutional resolution process to be completed, but the process generally unfolds over a period of two to three weeks to possibly months. For a complex case, anticipate the pre-investigation period to take up to ten days, for the investigation to take up to 60, the hearing another 30 to

prepare and schedule, and the appeal another 15-30. In total, 3-6 months is not unheard of, especially if a school is bogged down with many complaints at once and is short-staffed. Schools are not required to schedule around a particular advisor's availability, and if you have conflicting obligations, this can be an important consideration. If you are an employee of the school, you should check with your supervisor to see if some duties can be reassigned or temporarily suspended so you can serve as an advisor. If you don't have the time and capacity to serve as an internal or external advisor, you should refuse the role.

3. *Do you have personal biases, feelings, and/or opinions that may interfere with your role?*

Advisors are human, and it is inevitable that you will have some personal biases, feelings, or opinions that may surface throughout the process. Maybe the bias relates to the subject matter, or perhaps it relates to cultural bias, racial bias, gender bias, etc. Prior to agreeing to serve as an advisor, you should take time to evaluate whether you can put aside your biases and any personal feelings about the alleged behavior that may interfere with your ability to advise well. For instance, if you have strong beliefs against people engaging in premarital sex, you may want to consider whether you can be an effective advisor to a party who states they engaged in consensual intercourse outside of marriage. If you have strong feelings about drug use, you may want to consider whether you can be an effective advisor in a case in which drugs are a significant issue. Remember, your primary job is to assist the party throughout the process.

An inability to be aligned with your advisee could cause them to fire you as an advisor and/or to assert that your advising was ineffective. A failure to advise with reasonable care could result in liability for an advisor, or for an advisor's employer, such as a college or university. Although no such claim has yet proven viable in court, such claims have already been attempted, and how much traction they will gain will only be known as future litigation unfolds. Institutional-appointed or employed advisors will want to seek reassurance from your employer that the advisor role is part of your job description, is a role covered by your employment scope, is eligible to be covered by institutional insurance, and will be defended by institutional or insurance defense counsel.

Your role is not to force your point of view or perspective onto your advisee, and you are not there to make your advisee do what you think they should do. Therefore, you must be willing to recognize any personal biases, feelings, and/or opinions and check them at the door so they do not negatively impact the work you are doing for your advisee. Otherwise, your advisee may sense judgment on your part and may react by withholding information from you that you need to have in order to advise effectively. You have to put your advisee's priorities above your own. If you do not believe you can effectively address your personal biases, feelings, and/or opinions, it is okay to decline to serve as an advisor. You actually will do more good for the party if you decline to serve as opposed to continuing to work with an advisee when you have unchecked biases, feelings, and/or opinions that may run counter to the advisee's best interests.

In a role with no real written rules, we have to anticipate what courts might expect, and what actions will be most likely to demonstrate reasonable care on your part. Although some level of alignment with your advisee will be expected by them, you should also be candid with your advisee. If you think your advisee would be better served by withdrawing from school rather than contesting allegations, for example, you should be forthcoming with your advice. If your advisee asks how they did after an interview, don't sugarcoat it. If they made cogent arguments, let them know. If it's clear that it's time to fall on the sword, that may also be advice they need to hear, even if it is hard to hear. Blind loyalty is not the expectation, and although you may want to help your advisee "win," you also want to advise them about what may be in their short and/or long-term best interests, which may not result in "winning," but instead preserve their mental health, move forward with their life in a constructive way, and/or let go of expectations of unlikely favorable outcomes.

The 2020 Title IX regulations make it fairly easy and painless for a respondent to withdraw from college with little to no penalty if allegations are made[14]. Advisors must know what the institutional policies are on transcript notation and dean's (disciplinary) clearance letters, which are commonplace in the process to transfer admission to another school. Although transferring may seem like an unfair result if a respondent did nothing wrong, it may also be the path of least stress and least resistance given the risk of being found in violation of policy, which could result in suspension, expulsion, termination, OCR complaints, and/or litigation. It is also important to factor in the possibility that the respondent may be facing, or could face, a criminal prosecution for the same behavior that is underlying the campus complaint.

The same considerations can be true for complainants who are trying to assess whether to go through a process that feels like a mini-criminal proceeding. The process may be frustrating, seem long and drawn-out, and can distract from their academic progress and/or success. In contrast, a transfer or leave of absence from college may be less impactful emotionally and/or physically than the stress of seeing the process through to completion. Or, perhaps an informal resolution would be more palatable, and produce a result that allows the complainant to feel safe and protects them from an ongoing hostile environment. Then again, it may be cathartic and healing for a complainant to "have their day in court," and if they need that closure, you can help to advise and guide them toward the formal process, accordingly. Many complainants may understandably want to complete the formal grievance process out of a desire to help prevent future harm to other potential victims. In fact, you may also be advising them as to their options to pursue an external criminal complaint, as well.

4. *Do you have any conflicts of interest?*

Upon speaking with your potential advisee, determine whether you have any conflicts of interest that would preclude you from effectively serving as an advisor. Some examples of potential conflicts of interest include having a current or former relationship (e.g., personal, familial, professional, business) with a party, witness, or a school official involved in the resolution process, being privy to confidential information related to the matter, or having a previous agreement to serve as an advisor to another party in the same matter or who has an interest in the matter. If you are an external attorney advisor, you will of course want to make sure that your firm is not conflicted or representing the other party in the matter, or that any ongoing legal work you may be doing for the school or college does not create a conflict or ethical conundrum.

If you identify a potential conflict of interest, efforts should be made to determine whether the conflict can be resolved. For instance, knowing another party who is involved in the matter is not in and of itself a conflict of interest. If you know the other party from casual interactions around school and have not had substantive interaction with them, that may not necessarily cause a conflict of interest. However, if you are a professor and either party is a current student in your class, that degree of interaction may pose a conflict that cannot be resolved. If you are an employee of the school and the allegations involve a colleague, supervisor, or high-level administrator, it is important to consider whether you will feel conflicted or pressured about serving as an advisor to either party. Will you have a role in administering sanctions later, if the party is found in violation? If so, can you also serve as the advisor, or will there be an actual or perceived conflict based on the role you may need to play subsequent to the resolution?

Another form of conflict is an ethical conflict. Although your advisee will want you to be aligned with them, you are not expected to lie for them, encourage them to lie, or allow them to give testimony you know to be a lie without confronting them about the implications of doing so. You can, of course, help them to frame the facts in the light most positive for their position, but that's different than misleading, omitting, and lying, which an ethical

[14] Though some state laws may erect barriers.

advisor should oppose. Alignment is tricky, because advisors appointed by the institution or district will likely have divided loyalties, by definition.

Federal regulations may require schools to provide advisors, but that does not make it a best practice to have an advisor internal to the organization which is deciding the advisee's fate. If you are aligned with your advisee, but also have ethical responsibilities as a professional and to your employer, how will you deal with a situation in which you know your advisee is lying? An outside advisor must grapple with their own ethics, but it is likely unethical for an internal advisor to fail to bring this deceit to light, unless the kinds of policy/confidentiality protections discussed in question #8 below, are in place. If you bring them to light, then you are not aligned with your advisee, which is again why we raise the concern that the 2020 Title IX regulations may be placing internal advisors in untenable positions. We can't resolve that issue, but we feel obligated to raise it for your consideration, especially given the possibility that a failure of an institutional employee who serves as an advisor to disclose deceit by an advisee could amount to a Due Process deprivation, as noted in the Ohio State case referenced below.

5. *What is the anticipated scope of your role?*

ATIXA recommends that you meet with your potential advisee to determine what role they would like for you to assume. Remember that generally, an advisor will act in the best interests of their advisee to assist in navigating the school's resolution process by conveying the advisee's position, helping the advisee identify and present evidence, and working to ensure that the resolution process is equitable and fair. Whether the school permits you the ability to advocate directly with their officials on behalf of your advisee or whether you have to do it through your advisee will vary from school to school based on the rules they adopt. You will also likely face situations the rules don't cover, where an institutional or school administrator tells you what you can or cannot do without citation, and you'll need to decide how much you want to let improvised or unwritten rules govern your practice.

The scope of your specific role will be based on what the particular advisee needs and wants and any limitations on the role that are imposed by the institution or by law. You will need to assess whether you can serve, and are willing to serve, in that role on those terms. As an example, advisors at the postsecondary education level will likely be asked to cross-examine the other party (and witnesses) in a live setting before a decision-maker. You should consider whether or not you are comfortable with this task, skilled at this, emotionally ready for this, and are able to do so in a way that enhances rather than detracts from your advisee's cause.

Furthermore, you should remain open to the fact that the resolution process can be dynamic, and an advisee's needs and wants may evolve as the process unfolds. When this occurs, you should clarify the scope of your role with your advisee and reassess whether you are able to continue to serve as an advisor. If you do not believe you can effectively take on the role the advisee is requesting, it is perfectly okay to decline to serve in this revised role, though you should avoid resigning from an advisory role mid-case without a strongly compelling justification to do so.[15]

6. Is the subject matter comfortable for you?

Title IX covers conduct that can be difficult for some people to discuss. In particular, issues of sexual misconduct, domestic/dating violence, stalking, etc., can trigger strong reactions or a degree of discomfort that may impede your ability to advise. It is important to consult with your advisee about the nature of the allegations in order to determine whether you will be able to discuss the allegations openly and rationally. If you cannot discuss graphic details about sexual activity, you may not be an effective advisor in a sexual misconduct case. If your past lived

[15] Attorney advisors should, of course, follow all applicable ethics rules in representing their clients.

experience or any history as a participant in a similar matter could impede your ability to advise effectively , it is better to decline to serve and avoid possible harm to yourself and to the advisee. If you proceed despite your own past experiences or history, make sure to engage in appropriate self-care and respect boundaries. Your advisee's case is not your opportunity for personal redemption or closure.

7. Should you serve as an advisor for your own child?

Nothing prohibits a parent or guardian from assuming the role of advisor to their child, and it is understandable that some parents (or guardians) will want to step in and do everything they can to assist their child who is a party. Only you and your child can assess whether this is a good idea or not. In our experience, parents and guardians should take heed that children may not disclose some information if they are afraid they will face consequences at home or risk disappointing their family. For example, a child may lie to parents or guardians about their history of sexting or sending explicit photos, or may not be truthful about how many sexual partners they have had. Therefore, if you are a parent or guardian serving as an advisor to your child, it is important that you have a discussion about the need for transparency in order to effectively advise your child-advisee. Similarly, we have seen parents lose objectivity and/or composure in their interactions with school and college officials, as well as opposing parties and their advisors. Parents will want to consider whether they can maintain the requisite emotional control and act with a "cool head" before deciding to become their child's advisor. Of course, a parental role is expected with very young children, and a reminder of what we stated above, that in K-12 environments, parents and advisors are permitted throughout the process, so a parent may, but does not have to, serve in an advisor role.

8. Are you a mandated reporter?

If so, how does that impact the advising role? Does your institution permit you to maintain your interactions with your advisee as confidential, or would your mandated reporting duties still pertain to information the advisee shared with you during the advisee relationship? Does your institution protect you from being called as a witness at the hearing to answer questions about what your advisee has shared with you? If not, you need to be careful or reconsider accepting the advisor role. Your institution may give you reasonable assurances of confidentiality and at least temporary relief from your mandated reporter role for information you learn from your advisee[16]. Still, be forewarned that if you are not a lawyer in an attorney-client relationship, anything your advisee tells you can be subpoenaed in external legal proceedings. And, of course, attorney advisors who are engaged as legal counsel have various duties to their clients that are imposed by state law, ethics rules, and applicable codes of professional responsibility.

Lesson Five: Understanding Emergency Removal

The school must make an individualized assessment of whether the respondent is an immediate threat to the physical health or safety of any member of the school community. If so, they can be removed. They then have a right to ask the Title IX Coordinator or other appropriate administrator for a prompt, informal show cause meeting to provide evidence for why the removal or restrictions should be modified or lifted. Typically, they would want to show they are not an immediate threat. If they are deemed to be, the restrictions will remain in place. If not, they will be reinstated.

[16] But see *John Doe v. Ohio State University,* which raised a genuine issue of whether concealment by an advisor may have deprived respondent of Due Process (as a failure of the right to cross-examination). https://www.leagle.com/decision/infdco20180424e85

Often, schools or colleges will use their behavioral intervention or threat assessment teams to conduct the individualized assessment, and those teams may subject the respondent to a Violence Risk Assessment (VRA). The respondent will be expected to cooperate with the process and may face action under the student code of conduct if they do not. To defend against an immediate threat finding, an advisor may want to suggest that their advisee commission an external expert VRA by an objective assessor. This may help the school to reconsider its own assessment of immediate threat, but a viable alternative argument may be that by the time of the show cause meeting, the heat of the moment has passed, and the respondent is no longer an immediate threat.

If the school is proceeding outside of its Title IX policy, lower standards for interim suspension will likely apply, and those will typically be defined in the student or employee handbooks. The same is true for employee respondents, who are not subject to the regulatory emergency removal protections. For public entities, suspensions of students for up to 10 days can occur with minimal due process, but for longer time periods, fairness or due process necessitates more process protections. For advisors to respondents, the goal should be to have the restriction lifted, but if not, to work to mitigate the effect of the restriction or suspension on the respondent's academic progress.

Lesson Six: Understanding Jurisdiction

First, you need to know whether the school considers your advisee's case to be a "Title IX" case, meaning that it is governed by Title IX. There are four possibilities that you should be aware of:

1. The complaint falls within Title IX AND is covered by the 2020 Title IX regulations
2. The complaint falls within Title IX but is not covered by the 2020 Title IX regulations
3. The complaint falls within VAWA Section 304 (this could be an overlay with 1 or 2, above, or a stand-alone status)
4. The complaint does not fall within Title IX or VAWA Section 304

This topic is made complex by the fact that there are numerous and intersecting federal (and sometimes state, but those are not addressed here) requirements. Then, we must add to the complexity that each school has both mandatory and discretionary jurisdiction over complaints. That means that in some cases, law requires action by the school using certain policies and procedures (mandatory), and in other cases the school may choose to act (discretionary), and if it does, can define its own policies and procedures for doing so. Finally, to fully grasp these concepts, you need to know that multiple policies and procedures may apply.

As shorthand, we call the procedures that comply with the 2020 Title IX regulations (34 C.F.R. Section106.45) "Process A" and whatever alternate process a school may use to resolve complaints outside of Process A we term "Process B." Process B could be one or more processes, including the student conduct process, employee conduct process, or a civil rights process that is compliant with Title IX and VAWA Section 304, but which is not the process described by 2020 Title IX regulations. Some institutions will opt to only have one process ("Process A") and may choose to route all cases through that process, even if the case does not technically meet the jurisdictional requirements of Title IX.

Processes A and B cannot both be simultaneously applied. The regulations mandate that if both can apply, Process A must be applied, not B. Thus, if A applies, B cannot. Further the regulations specify that Process B cannot be used to make an end-run if Process A applies, regardless of what process each party might prefer to use. For a school to choose B when Process A applies is actionable as a form of retaliation against the respondent.

Let's take each of the four possibilities in turn and see if we can unpack this:

1. *The complaint falls within Title IX AND is covered by the 2020 Title IX regulations*

The complaint will fall in this category when it is one of the Big Five offenses (sexual harassment, sexual assault, dating violence, domestic violence, stalking) discussed above (if proven) AND the conduct:

- Happened in the United States;
- Occurred where the school controls the context of the incident (a school program or property, typically);
- Occurred where the school has jurisdiction over the respondent as a student or employee; and
- Happened to a complainant who at the time of the complaint was participating in or attempting to participate in the school's educational program.

These jurisdictional requirements are spelled out by the 2020 Title IX regulations and are rigid. If any of these requirements fails to be met, the school is required to dismiss the complaint under Title IX. More in a bit on what happens if there is a dismissal. If these requirements are met, jurisdiction under the school's Process A is mandated.

2. *The complaint falls within Title IX but is not covered by the 2020 Title IX regulations*

The complaint will fall in this category if it does not involve a Big Five offense, but the allegations pertain to sex discrimination more broadly (as in disparate treatment, e.g., discrimination against a pregnant student), to forms of sexual orientation discrimination, and forms of gender identity/expression discrimination based on sex stereotypes. If such a complaint is filed under Title IX, the regulations require this to be dismissed (it is not Big Five). It can be then addressed under Process A or B (remember, some schools only have a Process A), but most likely Process B. If there is no formal complaint, it can be routed directly to Process A or B without dismissal.

3. *The complaint falls within VAWA Section 304 (this could be an overlay with 1 or 2, above, or a stand-alone status)*

The complaint will fall in this category if it is not within the Title IX jurisdiction above, or is dismissed, but still involves a Big Four offense. In this case, jurisdiction is mandatory under VAWA, and the complaint can be then addressed under Process A or B, but most likely Process B.

4. *The complaint does not fall within Title IX or VAWA Section 304*

Finally, when the complaint falls outside both Title IX and VAWA Section 304, there is no mandatory jurisdiction. If the school acts, it will act with discretionary jurisdiction. The complaint can then be addressed under Process A or B, but most likely Process B.

The last procedural mechanism to understand is dismissal. The school **must** dismiss a formal complaint or any allegations therein if, at any time during the investigation or hearing, it is determined that:

- The conduct alleged in the formal complaint would not constitute one of the Big Five as defined above, even if proven; and/or
- The conduct did not occur in an educational program or activity controlled by the school (including buildings or property controlled by recognized student organizations), and/or the school does not have control of the respondent; and/or
- The conduct did not occur against a person in the United States; and/or

- At the time of filing a formal complaint, a complainant was not participating in or attempting to participate in the education program or activity of the recipient.[17]

Then there are three (3) permissive dismissal provisions. The school **may** dismiss a formal complaint or any allegations therein if, at any time during the investigation or hearing:

- A complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the formal complaint or any allegations therein; or the respondent is no longer enrolled at or employed by the recipient; or specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein.

Upon any dismissal, the school must promptly send written notice of the dismissal and the rationale for doing so to the parties simultaneously. This dismissal decision is appealable by any party under the school's procedures for appeal. The effect of a dismissal (mandatory or discretionary) is either (1) that consideration of the complaint is complete and final, or (2) that the school reinstates it, usually within Process B. For advisors, understanding these mechanisms can be helpful when explaining them to your advisee, but don't hesitate to call on the Title IX Coordinator for explanation when it's hard to track.

Further, advisors may be called upon to help determine if their advisee wants a complaint reinstated, or even under what process it should be filed in the first place. When dismissed, advisors should be able to advise their parties on whether they want to appeal (for example, a complainant may be pleased by a Process A dismissal as they would prefer Process B, whereas the respondent may feel the opposite), and should clarify with the school how dismissal appeals work. Can only decisions to dismiss be appealed, or may the parties also appeal decisions not to do so? Your advisee may want a dismissal and be aggrieved that a Title IX Coordinator has decided not to dismiss. Can that be appealed under the current institutional procedures?

Lesson Seven: Topical Deep Dive

REVIEWING THE SCHOOL'S POLICIES AND PROCEDURES

You should be familiar with all applicable policies and procedures, which may include Student Codes of Conduct, Honor Codes, collective bargaining agreements, handbooks, and employment contracts, in addition to published official institutional policies and procedures. These should be identified clearly in the NOIA, but some schools have several processes listed in multiple publications or websites. Sometimes, multiple policies could arguably apply, or seemingly conflict with each other. As you are reviewing this information, it is suggested that you take notes of any questions or areas of concern you may have and then seek clarification from the school's Title IX Coordinator.

REVIEWING INSTITUTIONAL GUIDELINES FOR ADVISORS

Schools may implement guidelines that govern the nature and scope of an advisor's role in the resolution process and the consequences for failing to adhere to stated parameters. Such guidelines should be equally applicable to all advisors, whether you advise the complainant or the respondent, and whether or not you are an attorney. To advise effectively, you must take time to familiarize yourself with any existing guidelines. Some schools provide a written document outlining the role of the advisor. Although the guidelines of each institution will vary, there are some best practice guidelines that many institutions implement:

- Advisors may be restricted from addressing school officials in meetings or interviews unless invited to do so.

[17] Unless this complaint is one initiated by the Title IX Coordinator themselves because of a serious risk to the school or campus community.

- The parties are typically expected to ask and respond to questions on their own behalf throughout the investigation phase of the resolution process. Thus, advisors should not make a presentation or act as a representative for their advisee and should not speak on behalf of the advisee to an investigator or investigative team unless explicitly requested and/or permitted. Advisors who are lawyers should note this is a significant deviation from the role and services a lawyer typically provides on behalf of their client.

- Similar expectations exist for hearings, except that during a hearing proceeding, it is anticipated that the advisor will conduct cross-examination on behalf of the advisee, as described in the section *Conducting Cross-Examination* below.[18] Cross-examination questioning, however, is the only role that the federal regulations mandate the advisor to play in the hearing. Advisors are usually not permitted to make opening or closing statements, or arguments, or objections, or to answer questions for their advisee, unless institutional policy explicitly permits a more expansive role than federal regulations. The regulations set a floor.
    - Schools can permit a broader role, but most do not, though some states have required a broader role for attorney advisors by state statute, such as in North Carolina and North Dakota.
    - Similarly, state Administrative Procedure Acts may prescribe a more active role for legal counsel that may be applicable to schools that are public, and hence considered state agencies.
    - When any state law or institutional policy permits advisors to fully represent their advisees in resolution proceedings, including all meetings, interviews, and hearings, the institution may still prefer to hear from the parties directly. In this instance, the parties are entitled to submit evidence that is provided by their advisor/attorney. This is a strategic decision and may impact how decision-makers assess credibility.

- Advisors should be able to consult with their advisee quietly by passing notes during any meeting, interview, or hearing, as long as this does not disrupt the process. School officials generally will permit some whispering or soft conversation between advisors and advisees, as long as it does not become disruptive. For longer or more involved discussions, advisors and advisees should ask for breaks to step out of meetings to allow for private consultation.

- Whether the school will permit texting or other exchanges between advisor and advisee should be clarified in advance, though if a school intends to prohibit such exchanges, that should be expressed in policy. Advisors may want to contest any restrictions that interfere with their ability to give or their advisee's ability to receive their advice. For example, if the advisee has more than one advisor, but only one is allowed in the hearing room, will an advisor or advisee be able to communicate from inside the hearing room to those outside and, if so, how?

- Advisors should refrain from interfering with the institution's investigation and resolution. Any advisor who steps out of the expectations for their role typically will be warned. If the advisor continues to disrupt or otherwise fails to respect the limits of the advisor role, the school will take steps to limit the interference and/or disruption. Options may include charging the advisee for the misconduct of their advisor under an applicable code of conduct, and/or charging them for failing to control their advisor. School officials may also cancel or postpone meetings in which an advisor is acting out or failing to abide by the rules of decorum. School officials may encourage advisees to choose a different advisor or offer to appoint one.
    - It remains unclear in the regulations whether a school may remove an advisor entirely. Let's hope it never gets to that point, as the poor behavior of an advisor may reflect badly upon the advisee, and you don't want school officials to be influenced by their dislike for a party or their advisor with respect to

[18] Some schools may allow advisees or advisors to make opening or closing remarks during a hearing.

their interpretation of the evidence. Although the regulations prohibit school officials from being biased against a party (or complainants or respondents in general), nothing says they have to like the parties.[19]

- If an advisor intends to conduct a "shadow" or private investigation, consider the impact that may have on your advisee and how school officials may react to such interference. It is one thing to engage in due diligence to identify if someone will serve as a witness for your advisee or has evidence to share; it is entirely another to interview them at length before school officials have the opportunity to do so. Schools may view this as an interference in their process However, if a school refuses to obtain evidence or interview witnesses you have identified, you may find it strategically valuable to do so yourself, after the school has refused the opportunity. If you are going to conduct your own parallel investigation, we suggest you be up front about that with administrators and be fully forthcoming in your willingness to share whatever you (or the private investigators you engage) may discover.

- You may be involved in a situation where a parallel criminal investigation is taking place, arising from the misconduct upon which the complaint is based. In such a situation, expect schools to offer supportive measures to the parties, but they may otherwise hold off to some degree on their internal processes to allow for the law enforcement investigation to get underway. Some K-12 schools are rather deferential to police, and will likely follow law enforcement requests on when and how to proceed. Colleges may be less deferential, offering to hold off on key interviews until the evidence gathering phase of the law enforcement process is complete. Know that police may make information available to school or college officials once they have obtained it, but for police evidence to be admissible in a college hearing, the officers who collected it, or the witnesses they collected it from, would likely have to be willing to testify at the school's hearing. For college or school officials to share information with external police, they would typically expect a subpoena unless a health or safety emergency was present. Many campuses have memoranda of understanding (MOUs) with local police regarding the details of cooperation, non-interference, information sharing, etc.

- The 2020 Title IX regulations require the school to provide supportive measures to the complainant. Of course, a school cannot and should not reasonably refuse to provide a respondent with services and resources it provides to any other student or employee, but there is no legally required equity of service that insists that any specific supportive measure that is provided to the complainant must also be provided to the respondent, as well. Any supportive measure implemented cannot unduly burden the other party. Common supportive measures for complaints are listed below, and advisors can be essential in helping parties to advocate for these supports, resources, and protections.

- Complainants have the right to be informed by the Title IX Coordinator of available assistance in changing academic, living, and/or working situations after an alleged incident of discrimination, harassment, and/or retaliation, if such changes are reasonably available. No formal report, or investigation, either campus or criminal, must occur before this option is available. Such actions may include, but are not limited to:
  - Relocating an on-campus student's housing to a different on-campus location
  - Assistance from staff in completing the relocation
  - Changing an employee's work environment (e.g., reporting structure, office/workspace relocation)
  - No contact orders/restrictions
  - Transportation accommodations

[19] Please keep in mind that much of the guidance offered here assumes that you are operating within Process A. If Process B governs, and the 2020 Title IX regulations don't apply, the school is free to limit or impose whatever restrictions on advisors it wishes, subject only to advisor rights that could be applicable to Process B under VAWA Section 304, state law, or those provided voluntarily by institutional policy. VAWA rights include an advisor of choice for the Big Four offenses and require that each party's advisor be treated equitably with respect to rights and restrictions.

- Visa/immigration assistance
- Arranging to dissolve a housing contract and provide a pro-rated refund
- Exam, paper, and/or assignment rescheduling or coordination and communication with faculty regarding flexibility with academic obligations
- Receiving an incomplete or withdrawal from class (may be retroactive)
- Transferring class sections
- Temporary withdrawal/leave of absence (may be retroactive)
- Campus safety escorts
- Alternative course completion options.

- Advisors should be flexible and able to adjust their schedules to allow them to attend planned meetings, for which advance notice should always be afforded. Although Title IX administrators typically do not alter scheduled meetings to accommodate an advisor's inability to attend, they may make reasonable provisions to allow an advisor who cannot attend in person to attend a meeting by telephone, video conferencing, or other similar technologies as may be convenient and available. Delays of perhaps 7-10 days might be permitted prior to an interview to give a party time to find an advisor, but the resolution process must be prompt, and school officials know that historically advisors have found many ways to try to run out the clock to the end of a term or until graduation. They aren't likely to tolerate much more than a week delay of any phase of the process to accommodate an advisor's schedule and the fact that you have to teach, be in court, or have a vacation scheduled is unlikely to have much sway with them.

ADVISING IN THE INVESTIGATION PHASE

As previously discussed, the investigator(s) will typically want to hear from the party themselves, and your role during the investigation may be confined to preparing for the interview, attending the interview, assisting your advisee with written submissions, assisting your advisee in identifying witnesses and suggesting relevant lines of questioning, and reviewing interview notes and the draft investigation report with your advisee. Coaching your advisee is expected, but it's also important for the party not to sound like a lawyer. There may be a better way to phrase an answer but substituting your words for theirs may not come off as authentic. Taking your advisee through a simulated Q&A before the interview may help them to gain comfort with the subject matter. As long-time investigators, we'd be remiss not to note how common it is for a party to be simply unintelligible, incoherent (especially those who are students), nervous, or not particularly articulate during interviews. Help them to prepare to ensure their answers will be verbal, cohesive, responsive, and clear.

As an advisor, you may find it valuable to counsel your advisee to not answer questions. Before doing so, make sure you are clear on the implications. Will your advisee answer some questions, but not all? If they won't answer a question, they should be prepared for that in advance, and coached on how they will invoke their right/decision not to respond. They should also know the answer to the question of why they are choosing not to answer. If they will not respond to any questions, they need to be ready for the question, "Are there any questions you will answer, or will you agree to respond to written questions?" Generally, refusing to answer may not help to exonerate a respondent, so invoking a right not to do so should almost always be for the purpose of avoiding an answer that could be seen as an admission in a later criminal trial. Their decisions during the investigation should be influenced by their strategy for the hearing. It may make very little sense to answer investigation questions but then refuse to testify at the hearing, for example, or vice-versa. This will be clearer when the rules on cross-examination are explained below.

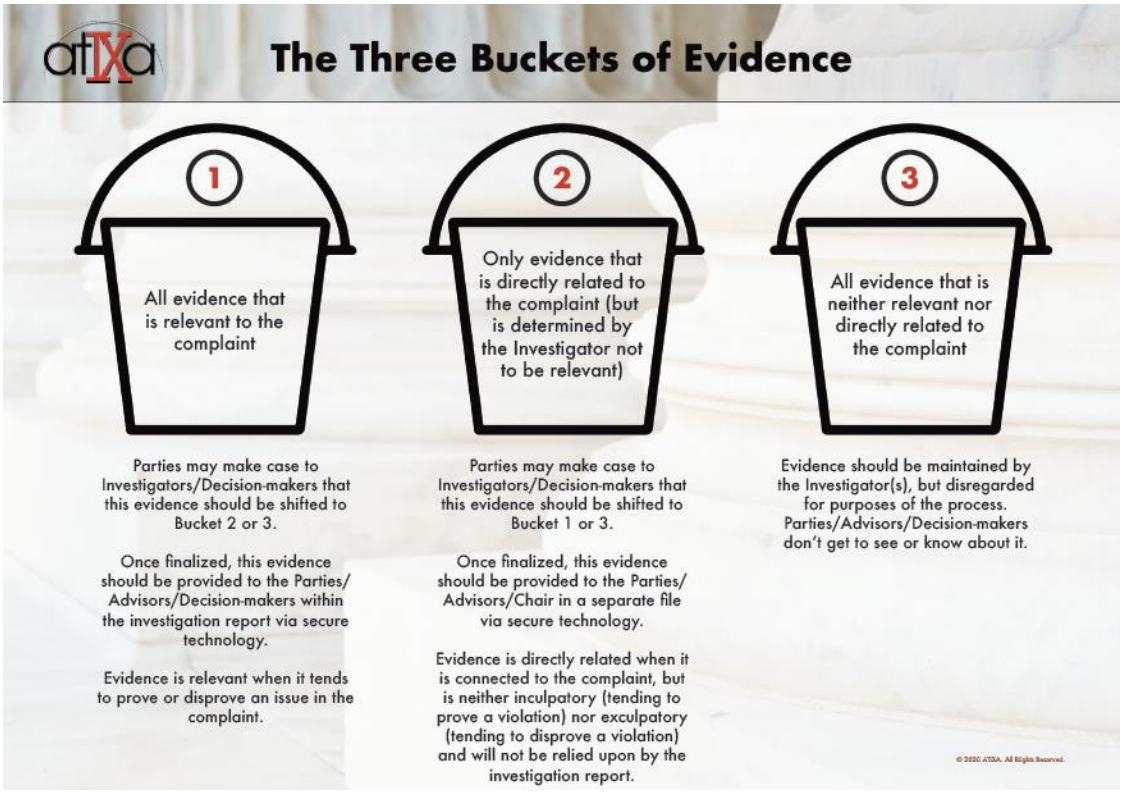
The investigation report is a document that summarizes the information gathered during the investigation, typically with case file documents incorporated or attached as appendices. In some cases, the report may include findings of fact, recommended findings, or other analysis of policy and/or credibility. At the K-12 level, the investigation report will usually be forwarded to a decision-maker. At the postsecondary education level, the

report will usually be forwarded to the decision-maker for the hearing phase of the resolution process. As an advisor, you should review the report and underlying documents with your advisee. You'll have two different opportunities to do so. Note that the report may have names and other identifying information redacted, but your advisee should have sufficient information to fully understand the identities of individuals who appear under pseudonyms in the report. Anonymous witnesses are not permitted. If you cannot discern this information from a redacted investigation report, you should ask for clarity in the form of a report key or list of witness names.

The school will offer your advisee an opportunity to respond to the investigation report. Typically, this is an opportunity for your advisee to point out evidentiary gaps and suggest questions that were not asked, but which are relevant. Note that schools generally will not consider irrelevant evidence of character or questions related to the parties' sexual history, except in limited circumstances.

Some advisors attempt to game the system, coaching their advisees to withhold testimony during the interview phase, or only providing it once they have seen the written draft report. Schools frown on such antics, and some even have rules prohibiting later admission of information in a hearing if it was known and could have been shared earlier during the investigation phase of the process. We encourage you to play it straight, offering evidence during the appropriate phase of the process.

The evidence review process occurs in two phases, per the regulations. In the first phase, the investigators share two "buckets" of evidence with the parties and their advisors once the evidence is gathered. Depending on institutional preference, the evidence can be delivered in one of two ways: 1) two relatively unfiltered/unsorted files (buckets), one of which contains the evidence the investigators determine is relevant, and the other containing the evidence that is not relevant but is directly related, or 2) the draft investigation report containing relevant evidence and a separate file of directly related evidence. Hopefully, the school prefers the second variation, as it organizes the evidence rather than leaving it raw and without structure or organization. The graphic below helps to clarify, as the regulations do not define the terms "relevant" or "directly related."



Once this content is delivered to the parties and advisors, a minimum 10-day window of review begins. Your role at this point is to review and comment:

- Sort/organize the evidence, if unsorted
- Note any errors
- Note any questions that should be asked by the investigator(s)
- Suggest additional witnesses or evidence that should be obtained
- Argue for or against any findings or recommendations made
- Raise any issues of bias or conflict of interest that must be addressed
- Make the case that the draft report incorrectly contains directly related evidence, and should not.
- Make the case that evidence considered by the investigator(s) to be directly related should instead be incorporated into the report as relevant.

By the end of the 10-day window, the investigator(s) will then receive all of this feedback (likely in writing) and finalize the report. They are not bound by your assertions or arguments, but should consider them, and update and revise the report based on the feedback. They may also exchange the comments between the parties for further review and comment, and the investigator(s) may add comment of their own to the final report that is responsive to the issues raised by the parties and advisors. The investigators' report is meant to suggest preliminarily to the decision-maker what evidence is to be relied upon (Bucket #1, the report) versus evidence that should not be relied upon (Buckets #2 and #3) in reaching a final determination. Bucket #3 is really just an extraneous discard pile of information that has no bearing on the complaint at all.

Although the investigators are supposed to sift the two buckets as best they can at the end of this period, the ultimate categorization of evidence is up to the decision-maker. The investigator(s) may, therefore, punt on some tough calls, leaving it to the decision-maker to resolve at the hearing (or better, at the pre-hearing).

Once the final report is completed, it is then re-circulated to the parties and their advisors, as are the contents of Bucket #2. Thereafter, the parties will receive notice for the hearing, and a minimum 10-day pre-hearing period begins, again during which review and comment on Buckets #1 and #2 are permitted, but now those comments are made to the decision-maker or hearing chair, rather than the investigator(s). The regulations do not specify whether this review and comment should be submitted pre-hearing or at the hearing, but hopefully the institutional procedures will specify. If not, be sure to ask.

REQUESTING A MEETING WITH THE TITLE IX COORDINATOR/INVESTIGATORS/DECISION-MAKER/CHAIR

As an advisor, you may be given an opportunity to meet with the school officials conducting interviews or meetings in advance of these interviews or meetings, at the school's discretion. If school officials do not offer a meeting, you may request one. This is a good opportunity to show that your approach is collaborative and not adversarial. During this pre-meeting, school officials should outline their expectations regarding the role of the advisor, and you should take this time to clarify any questions regarding your role and the process itself. Ask if there are any written guidelines on the advisor's role and seek clarification on the limits on your role. Following this meeting, you should speak with your advisee to reaffirm your ability and commitment to work within the scope of the institutionally-defined role.

Depending on how the college structures its resolution process, there may be an opportunity to meet with decision-makers in advance of the hearing. This is often a chance to address hearing logistics, to pre-screen any questions you are planning to ask at the hearing (if you want them to be pre-screened), to obtain pre-hearing rulings that may be made, and to make any last arguments about evidence you'd like to see admitted or excluded from the hearing. If the school does not try to address such questions pre-hearing, you and your advisee will have a chance to address each of these items at the hearing itself.

PREPARING FOR THE HEARING

Hearings are optional in K-12 schools under the regulations but are typically required for out-of-school suspensions and expulsions in many districts, based upon state law and/or district policy. Higher education institutions must provide a live hearing where all parties can see and hear each other; hearings may be held virtually at the request of either party.

Adequate hearing preparation is absolutely critical. Preparation can involve a fair amount of document review, writing, organizing, and strategizing. You should be prepared to work with your advisee to perform these tasks, which may include drafting opening and closing statements.

If you or your advisee need a private location to participate remotely in the hearing or need technology assistance to be able to participate effectively, let the Title IX Coordinator or decision-maker know in advance of the hearing. Similarly, if you or your advisee will need interpreters, assistive devices, and/or disability-related accommodations, let the Title IX Coordinator or decision-maker know well in advance.

Prior to the hearing, your advisee will receive a witness list. Cross-check that list against the witness list in the investigation report to ensure there are no last-minute surprise witnesses added. Also, check to see if any witnesses who gave evidence during the investigation are not listed on the hearing witness list. That may mean that they are not available or cannot participate in the hearing, and you may not need to prepare to question them.

Finally, you'll be given the identities of the decision-maker(s) in advance. Please work with your advisee to raise any concerns regarding bias or a conflict of interest with the decision-maker(s) or Title IX Coordinator prior to the hearing. The institution likely has a process for recusal and appointment of alternates already in place. Waiting to raise these issues until the last-minute, or at the hearing, will only serve to delay the process. Expect to be asked to demonstrate the bias or explain the conflict of interest with evidence or persuasive logic. Typically, decision-makers are not removed solely on the perception of a bias or conflict. .

UNDERSTANDING THE HEARING FORMAT

The term "decision-maker" generally refers to the individual or individuals who ultimately make the determination as to whether or not a policy violation occurred. Pursuant to the 2020 Title IX regulations, the decision-maker cannot be the same person as the Title IX Coordinator, or investigator(s), or anyone previously involved in the process as a substantive decision-maker of any kind. Practically speaking, most colleges and universities will designate employees to serve as decision-makers, though they may also engage external third-party neutral decision-makers. The hearing may feature a single decision-maker or a hearing panel, sometimes with a designated chair. You should review the institution's process to know what to expect in this regard. The role of the advisor will generally be the same regardless of this structure.

Some schools will have all of the involved individuals together in one room akin to a traditional face-to-face hearing. Other schools may use separate rooms, using virtual meeting technology that enables the decision-maker and parties to simultaneously see and hear each other during questioning. Typically, a hearing may last a portion of a day or a full day. Depending on the complexity of the allegations and the number of individuals involved, it is possible that a hearing may extend beyond a single day.

PREPARING INITIAL QUESTIONS FOR PARTIES AND WITNESSES

As part of the formal hearing process, the parties, through their advisors, will have an opportunity to pose questions to the other party and witnesses. This is referred to as cross-examination, which is discussed in greater detail in Lesson Eight below entitled *Conducting Cross-Examination.* The investigation report and case file documents your advisee receives should aid you in working with your advisee to draft potentially relevant

questions you may want to ask the other party and witnesses during the hearing. The decision-maker or chair will rule on the relevancy of the questions you pose, so keep them succinct, relevant, and flowing in a logical order. You may be asked to submit your questions in advance of the hearing for pre-approval. You don't have to, but this can be both efficient and helpful.

DRAFTING IMPACT/MITIGATION STATEMENTS

Some institutions allow the parties to submit an impact or mitigation statement to be used in determining any sanctions if the respondent is found responsible for a violation. An impact statement is prepared by the complainant and outlines the impact that the conduct had on them and any additional information they would like the decision-maker to consider in implementing the appropriate sanctions to remediate the impact and prevent recurrence.

A mitigation statement can be prepared by a respondent that outlines their explanation for engaging in the prohibited conduct, notes any factors that led to the conduct and should mitigate the severity of the sanctions, and includes any additional information they would like the decision-maker to consider in issuing sanctions. The impact and mitigation statements are typically only reviewed once a finding of responsibility has been made, but the decision-maker may solicit them to be prepared and submitted pre-hearing, or at the beginning of the hearing. Be sure to be clear on this timeline so that you can help your advisee draft a statement that is ready for timely submission. Depending upon the school's process, parties may be advised of the finding the same day as the hearing. Therefore, advisors should ensure that their advisees have these statements ready to read or submit on the day of the hearing. They are most commonly submitted in writing rather than offered live.

DURING THE HEARING

Historically, the resolution process was not designed to be adversarial. However, recent court decisions along with the 2020 Title IX regulations have moved most schools' processes closer to an adversarial model. . Thus, an advisor will need to perform some functions that are more adversarial in nature. The advisor will play a key role as questioner in the hearing, as the style of questioning is indirect, meaning that the parties don't question each other. All questions are posed by the decision-maker or the advisors. Even the advisor questioning is indirect. You will pose the question, the chair or decision-maker will decide on the relevance of the question and state their rationale, and then it will be answered by the party or witness.

Outside of this questioning role, an advisor is typically not able to directly address the other party or the decision-maker. The school wants to hear from your advisee, not you. However, you should be actively listening to the statements of the parties and witnesses during the hearing, while noting questions to address during cross-examination. This should include questions that will help to emphasize evidence that is favorable to your advisee's position, and questions that elicit evidence that helps to refute points that are detrimental to your advisee's position.

Given the nature of these hearings, it can be unclear what questioning is direct examination (typically, friendly questions of a sympathetic or neutral witness) and what is cross-examination (more adversarial questions of a potential opponent or hostile witness). Be sure to ask about this before the hearing, and clarify whether you will only conduct cross-examination (of the other party and witnesses), or will be expected to conduct some form of direct examination (of your advisee) as well. Typically, direct examination is led by the decision-maker, but that may not be a role exclusive to them.

During the hearing you should be seated next to your advisee (unless participating remotely) as there may be times when you will need to confer. Expect to be asked to remain seated as you pose your questions. During the hearing, you may need to play a support or comfort role for your advisee. Your advisee may experience the various emotions that come along with being a party within the process, having to talk about what occurred,

being questioned, and having to listen to others talk about what occurred. Not surprisingly, this is oftentimes traumatic and stressful for all those involved. As an advisor, it may be necessary for you to help your advisee manage their emotions during the hearing. For some advisors, it may be difficult to balance this role while remaining actively engaged in the hearing.

Advisors may request brief breaks in the hearing as necessary to allow advisees to compose themselves or to discuss the proceedings; these may be granted at the discretion of the decision-maker or hearing chair. Additionally, advisors may experience vicarious trauma, but need to compartmentalize. During the hearing, you need to be 100% there for your advisee. Your own self-care can and should come later. Plan to bring beverages, snacks, tissues, spare batteries, chargers, and anything else you or your advisee may need at the hearing. The hearing must be recorded (audio or video) by the institution, so there is no need for you to do so.

If you will have exhibits, handouts, sections of the investigation report you wish to reference or show to a witness or the decision-maker, plan to have those ready in advance, plan to have sufficient copies for those who need them, and a way to screen share the content, if the hearing is virtual. Prepare with any expert witnesses to be sure they have whatever exhibits, materials, or reports they need, in advance as well, though all of that information should be in the investigation report already, if it was deemed relevant. For some schools, the decision-maker, chair, or hearing facilitator will take care of this preparation step if you indicate to them what you will want or need to have at the hearing.

Just a reminder that if you spring last-minute evidence or witnesses at the hearing, this will not curry favor with the decision-maker. They may inquire as to why the evidence was not offered during the investigation, whether it could have been, and how it is fair to allow it at the last-minute. Usually, the decision-maker will allow the evidence if all parties assent, but if not, the decision-maker has the authority to reset the process back (at least in part) to the investigation so that the investigator can assess relevance and the report can reflect this inclusion. This would also likely reset the two 10-day periods of review and comment, potentially setting the process back by a month, though an expedited review might be possible. It is also possible that the hearing could continue except for that last-minute evidence, which could be sent back to be subject to investigation.

POST-HEARING

Depending upon the process in place at the school, the finding regarding responsibility may or may not be shared with the parties immediately at the conclusion of the hearing. Increasingly, institutions are moving toward providing this information to the parties subsequent to the hearing. Regardless of when the outcome is shared, you should be prepared to help your advisee manage their emotions should the outcome be undesired or unanticipated. Outcome letters must include a detailed rationale, so it may be helpful to review the letter with your advisee and help them to understand the reasoning underlying the determination. If it's unclear, push the school to be more specific. In addition, you should have some knowledge of the school's appeal process, as you may need to assist your advisee in filing an appeal within the required timeframe, which may only be a matter of days, should your advisee desire to do so. You may also need to assist your advisee with responding to an appeal request by the other party.

WORKING WITH OTHER SUPPORT PERSONS (E.G., ADVOCATE, REPRESENTATIVE, PARENT/GUARDIAN)

As noted above, you may be working with another advisor, or other support people, within and/or external to interviews and hearings. You may have to manage very involved parents or guardians, or a student's mother's corporate lawyer who wants to micro-manage your advisor role. Unionized employees are likely entitled to have a union representative present in addition to an advisor. You'll need to learn to work together, divide responsibilities, and share the advising load collaboratively.

There may be times when your role as an advisor may conflict with the role of other support persons that may be involved in the process. For instance, the goal of a union representative may be to act in the best interests of employees overall. Or you may encounter a parent or guardian who has strong personal feelings about their child's alleged behavior which may cause that parent to act or respond in a way that may not be in the student's best interest as it relates to the school's process. Thus, it is important for an advisor to recognize when these divergent interests exist and to maintain a focus on working to support their advisee throughout the process.

Lesson Eight: Conducting Cross-Examination

Strictly speaking, all evidence is admissible, meaning that the decision-maker can hear it and know it. But only relevant evidence can be relied upon. Thus, the decision-maker must disregard all other evidence introduced into the process that is not relevant. They usually make it known at some point in the pre-hearing, hearing, or post-hearing, in terms of disclosing to the parties what evidence the decision relied upon. This vetting process is intuitive when you consider that the decision-maker determines what is relevant, and to determine that, they need to know the evidence that is not relevant too, so that they have a comparator. There is no real way to shield the decision-maker from knowing things they should not consider. Decision-makers should have the discipline not to be influenced by evidence which should not influence them.

Evidence related to the complainant's sexual predisposition is never relevant, and the complainant's past sexual history is only relevant in two very narrow circumstances: if introduced to show that the wrong person is accused, or sexual history with the respondent is offered to prove consent with the respondent. It does not matter which party seeks to introduce the evidence, or if a witness does; advisors must be cautious not to use the questioning process to solicit evidence that would violate this federal rule. This rule does not protect the respondent in the same way as it does the complainant. As such, complaints of pattern behaviors by the respondent may be considered.

THE CROSS-EXAMINATION PROCESS

ATIXA has outlined the following manner in which cross-examination is likely to take place:

- There really is only one rule of evidence. If the evidence or testimony is relevant, it will be relied upon. If not, it will not be. The chair, decision-maker, or panel will decide what is/is not relevant. Once relevant, the decision-maker will give weight to the evidence or testimony based on its credibility.

- The investigator(s) should appear as a witness at the hearing and may be questioned and subjected to cross-examination by the decision-maker and advisors.

- Each party, through their advisor, can question all other parties and witnesses; the decision-maker can also question all parties and witnesses and will probably do so before the advisors do. This means that many subsequent advisor questions may be disallowed as unduly repetitive, and thus irrelevant.

- All questions can be posed verbally, subject to interjection by the decision-maker or chair, who may consult with the school's legal counsel on questions of relevance. Alternatively, the school may offer you the option to submit questions in writing, either prior to and/or during the hearing. The decision-maker or chair may rule on all questions, may rule only on those that are irrelevant, and/or may offer an explanation of their decision (why something is or is not relevant), on the record. They may ask advisors why a question is or is not relevant but will be unlikely to entertain argument from advisors based on their ruling, once they have made it. You'll have to take it up on appeal if you disagree.
    - All questions should be permitted by the decision-maker or chair unless they are:
        - Abusive (thus irrelevant)

        - Irrelevant
        - Confusing (these are allowed, they just need to be rephrased for clarity)
        - Multi-part or compound (these are allowed, they just need to be rephrased for clarity)
        - Unduly repetitive (thus irrelevant)

- The decision-maker or chair will vet all questions and either:
    - Direct the witness or party to answer the question as posed;
    - Direct the witness or party not to answer the question as posed, and explain why; or
    - Rephrase the question and direct the witness or party to answer the question as rephrased or ask the questioner to rephrase the question based on the articulated concerns of the decision-maker or chair.

- Questions by the parties, advisors, or witnesses posed to the decision-maker will only be answered at the sole discretion of the decision-maker or chair, including any questions/concerns regarding bias, qualifications, or training.

- As advisor, you should not expect to be able to vet or voir dire the decision-maker or panel at the hearing but will be expected to raise any concerns about a decision-maker prior to the hearing.

- You should have already raised any concerns about bias or conflict of interest prior to the hearing; however, if you have concerns about the decision-maker that only arise during the hearing, you should state them for the record and if you are not satisfied with the response, you should raise those issues with the Title IX Coordinator.

TYPES OF QUESTIONS TO ASK DURING CROSS EXAMINATION

The purpose of cross-examination is to highlight points that support your advisee's position and challenge points that do not support your advisee's position. You can solicit this type of information by the types of questions you ask.

Generally, during cross-examination, you may want to ask leading questions; these are closed-ended questions that require a "yes" or "no" response or which suggest the preferred answer in the question itself. The goal of closed-ended questioning is to get the party to give the answer you intend to evoke. Thus, this type of questioning is beneficial when trying to refute information that does not support your advisee. This style of questioning can also be helpful when trying to highlight inconsistencies in statements.

When questioning your advisee or a favorable witness, you may ask open-ended questions designed to elicit more of a narrative response. However, by doing so, you run the risk of the party or witness disclosing additional information that may or may not be favorable to your advisee. As they teach in law school, it is best to avoid any question to which you don't already know the answer, unless you're willing to accept the risk that comes with doing so. If it appears the opposing party is poorly prepared, you may open your questioning more. But if they're well-prepared, they'll be ready for you, and you'll learn quickly to put yourself on a tighter leash. Typically, you want to advise your advisee to pause before answering questions, to make sure they understand the question (repeat it in their head before answering), answer succinctly, don't volunteer information, and answer the question that is asked, and nothing more. If any question is unclear, they should ask for clarification before responding. Again, a reminder they need to pause and let the decision-maker or chair rule on the question before answering it.

Questions designed to elicit character evidence may not be relevant during the hearing and character witnesses may be offered, but again their testimony must be relevant to be relied upon. Then again, maybe you want the

decision-maker to hear certain testimony, in the hopes they can't unhear it, even though they are not supposed to rely on it. Questions regarding character may be more relevant to sanctioning, and you might make that argument for their relevance on that basis. Questions regarding the parties' or witnesses' mental health or disability will only be relied upon if relevant, and you should be careful about using this kind of evidence abusively. If you feel this is a necessary line of inquiry, we suggest that you clear it with the decision-maker or chair well in advance.

The decision-maker retains discretion to determine the ordering of the steps of the hearing, likely working from a pre-established script. You should request a copy of the school's script or order of hearing testimony, but generally it will look something like this:

(1) Presentation of Formal Allegations and Final Investigation Report by Investigator(s).

(2) When the Investigator(s) has finished presenting the Investigation Report, the Chair leads the portion of the Hearing in which the Investigator(s) serves as witness.

Chair: *This is the information-gathering portion of the hearing. All questions are to be directed to the Investigator(s). It is the responsibility of the Investigator to answer all questions.*

- *Do members of the Panel have questions for the Investigator(s)? Please direct them to the Investigator.*
- *Would the Complainant's advisor like to ask any questions of the Investigator(s)?*
- *Would the Respondent's advisor like to ask any questions of the Investigator(s)?*
- *Ask each (Panel, Complainant, Respondent) whether there are any additional or follow-up questions before dismissing the Investigator(s).*

(3) The Chair next facilitates the questioning of the parties at the hearing.

- *Complainant gives any opening statement they may wish to present.*
- *Do members of the Panel have questions for the Complainant?*
  - *First question: "Do you intend to answer all questions posed to you here today?"*
- *Does the Respondent's advisor have questions for the Complainant? (Questions are subject to a relevance determination by the Chair.)*
- *Does the Complainant's advisor have questions for the Complainant? (Questions are subject to a relevance determination by the Chair.)*
- *Does the Panel have any additional or follow-up questions for the Complainant?*
- *Do the advisors have any additional or follow-up questions for the Complainant?*
- *Respondent gives any opening statement they may wish to present.*
- *Do members of the Panel have questions for the Respondent?*
  - *First question: "Do you intend to answer all questions posed to you here today?"*
- *Does the Complainant's advisor have questions for the Respondent? (Questions are subject to a relevance determination by the Chair.)*
- *Does the Respondent's advisor have questions for the Respondent? (Questions are subject to a relevance determination by the Chair.)*
- *Does the Panel have any additional or follow-up questions for the Respondent?*
- *Do the advisors have any additional or follow-up questions for the Respondent?*

(4) The Chair next facilitates the questioning of any witnesses at the hearing (call each witness in turn, usually beginning with Complainant's witnesses, then Respondent's, then any neutral witnesses or neutral expert witnesses).

- *Do members of the Panel have questions for the Witness?*
  - *First question: "Do you intend to answer all questions posed to you here today?"*
- *Does the Complainant's advisor have questions for the Witness? (Questions are subject to a relevance determination by the Chair.)*
- *Does the Respondent's advisor have questions for the Witness? (Questions are subject to a relevance determination by the Chair.)*
- *Does the Panel have any additional or follow-up questions?*
- *Do the advisors have any additional or follow-up questions?*
- REPEAT with remaining witnesses.

Final Statements:

- *Do members of the Panel have any additional questions for the Complainant, the Respondent?*
- *Does the Complainant have a closing statement? [Note: not an impact statement]*
- *Does the Respondent have a closing statement?*

(5) The committee moves to deliberate.

- The regulations provide that no inference can be drawn by the decision-maker solely from a party's or witness's refusal to submit to cross-examination, but as we noted above, refusal to answer often does not work out well for the party who chooses not to answer, usually for reasons other than inferences drawn. There will just be a lack of evidence or a lack of rebuttal to evidence. Also keep in mind that while the regulations expect the decision-maker to disregard evidence that can't be relied upon, and they should disregard it, it's also very hard to "unring a bell" once evidence is shared or known.

- There is some confusion in the regulations about appointing advisors when a party's advisor refuses to conduct cross-examination. To clarify this, an institution would only appoint an advisor for a party when the party wants the advisor to conduct cross-examination but the advisor refuses to do so or won't ask questions the party wants posed. In that case, the party can select a new advisor, or the college can appoint one. However, if the party and the advisor determine as a matter of strategy that they do not want to conduct cross-examination of some or all parties/witnesses, that is their right, and there is no need to replace that advisor.

- When a party refuses to cooperate with their advisor, this could result in the party forfeiting their opportunity for cross-examination.

- Typically, advisors will want to thoroughly question parties and witnesses, but this is not required. It would be enough, for example, to ask a party or witness only one question, to the effect of, "Is there any information contained in your statement in the investigation report that you wish to elaborate on, clarify, or correct?"

Lesson Nine: Concurrent Criminal Proceedings

In some instances, a concurrent criminal investigation or prosecution will overlap with the school's resolution process. This is particularly true within the K-12 education setting where all suspected child sex abuse cases are

likely required to be reported to law enforcement and/or a state child welfare agency. It is important to note that the school's resolution process is completely separate from any criminal or administrative agency process that may be taking place. Advisors should be mindful that if a concurrent investigation has uncovered evidence that would likely be material to determining responsibility, and that evidence will be released in a specific timeframe, the institution may reasonably extend the timeframe of its resolution process to incorporate that evidence.

A school may have an agreement (MOU) with local law enforcement whereby information is shared between them. In this case, you and your advisee will get to see the information provided to the school as part of the case materials. Also, nothing prohibits a party from requesting information directly from local law enforcement. This may be especially helpful when the school does not have access to this information. You may need to help your advisee wade through this information and determine what, if any, evidence they may want to use as part of the school's resolution process.

Furthermore, if a respondent is convicted in a criminal proceeding, that does not mean they will be found responsible at the conclusion of the school process, and an acquittal does not mean they will be found not responsible at the conclusion of the school process. Because different rules and standards of proof apply within the education context, the school's determination may be different than a determination by a district attorney's office or a court.