



2020 TITLE IX ADVISOR TRAINING &
CERTIFICATION COURSE



Your Faculty



Brett A. Sokolow, J.D.

Chair of the Board of Directors, TNG
President, ATIXA



Sandra Schuster, J.D.

Partner, TNG
Advisory Board, ATIXA



W. Scott Lewis, J.D.

Partner, TNG
Advisory Board, ATIXA

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

“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving federal financial assistance.”



Overview of Advisor Rights and Roles in Title IX Proceedings

Advisor of Choice

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

Advisor of Choice

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



What is the Role of the Advisor?

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

Institution-Appointed Advisor

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

Who Can Serve as an Advisor?

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

What is Expected of the Advisor?

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

Risks to Being an Advisor?

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

The Advisor in K-12 Settings

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

Limitations on the Role of the Attorney-Advisor

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

Limitations on the Role of the Attorney-Advisor

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

The Rights of the Advisee

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

Who's Who in the Title IX Process?

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

Supportive Measures

Previously referred to by OCR as “interim measures”

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

Supportive Measures

☐ Supportive measures may include:

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

Supportive Measures

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

Response to Sexual Harassment

- ☐ The recipient must respond promptly in a manner that is not deliberately indifferent to actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States
 - ☐ Education program or activity means locations, events, or circumstances over which the recipient exercises substantial control over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.

Response to Sexual Harassment

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

Emergency Removal

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

Employee Administrative Leave

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

Training Minimums

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

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



2020 Regs Rapid Response ³R Promptness

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

Sanctions

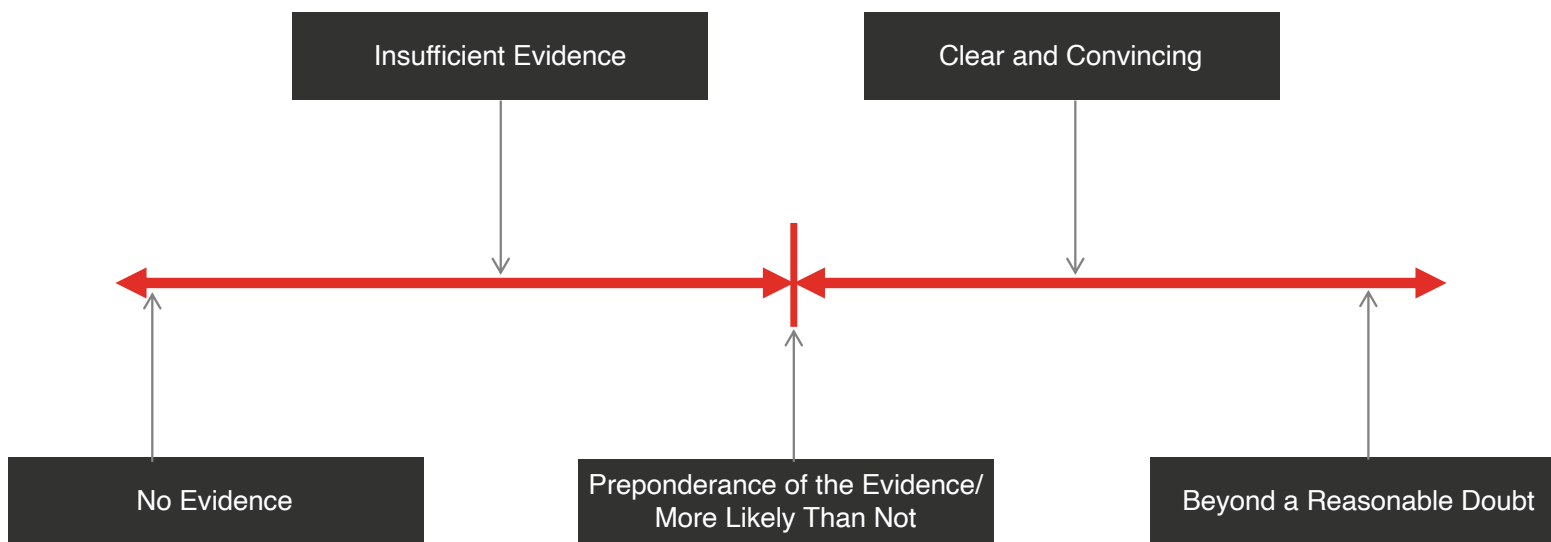
- ☐ The recipient must describe the range of possible disciplinary sanctions and remedies or list the possible disciplinary sanctions and remedies that the recipient may implement following any determination of responsibility.
 - ☐ Mirrors Clery Act language

Standard of Proof

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

Understanding Evidence Thresholds

EVIDENTIARY STANDARDS



Privileged Information

☐ Permission required for:

- Records made or maintained by a:
 - Physician
 - Psychiatrist
 - Psychologist
- Questions or evidence that seek disclosure of information protected under a legally recognized privilege must not be asked without permission.
 - This is complex in practice because you won't know to ask for permission unless you ask about the records first.

Notice to Parties

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

Notice to Parties

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

Mandatory Dismissal (Four Grounds)

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

Discretionary or Permissive Dismissal

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

Notice of Dismissal

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

Consolidation of Formal Complaints

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

Fairness and Due Process

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



Contact Information

Brett A. Sokolow, J.D.

brett.sokolow@atixa.org

W. Scott Lewis, J.D.

scott.lewis@tngconsulting.com

Saundra K. Schuster, J.D.

Saundra.schuster@tngconsulting.com



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