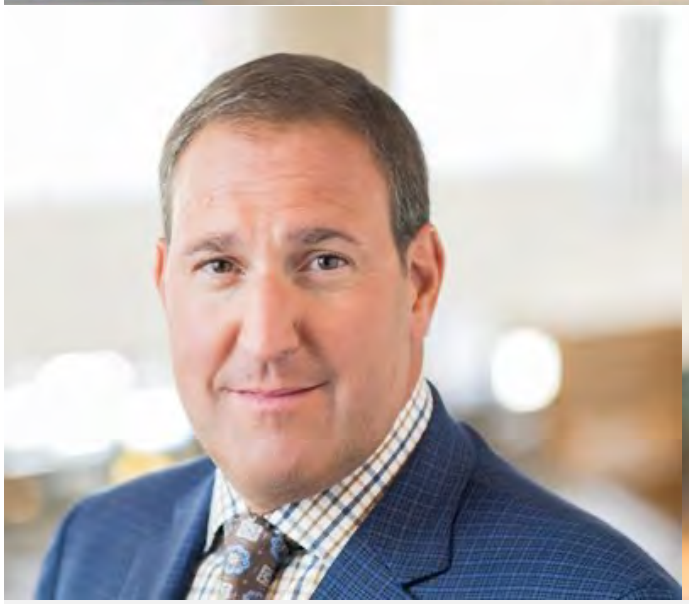
# 2020 TITLE IX ADVISOR TRAINING & CERTIFICATION COURSE

2020 Regs Rapid Response R3

# Your Faculty



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# Overview

- 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

# Title IX

*"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.


# Training

- 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.

# 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

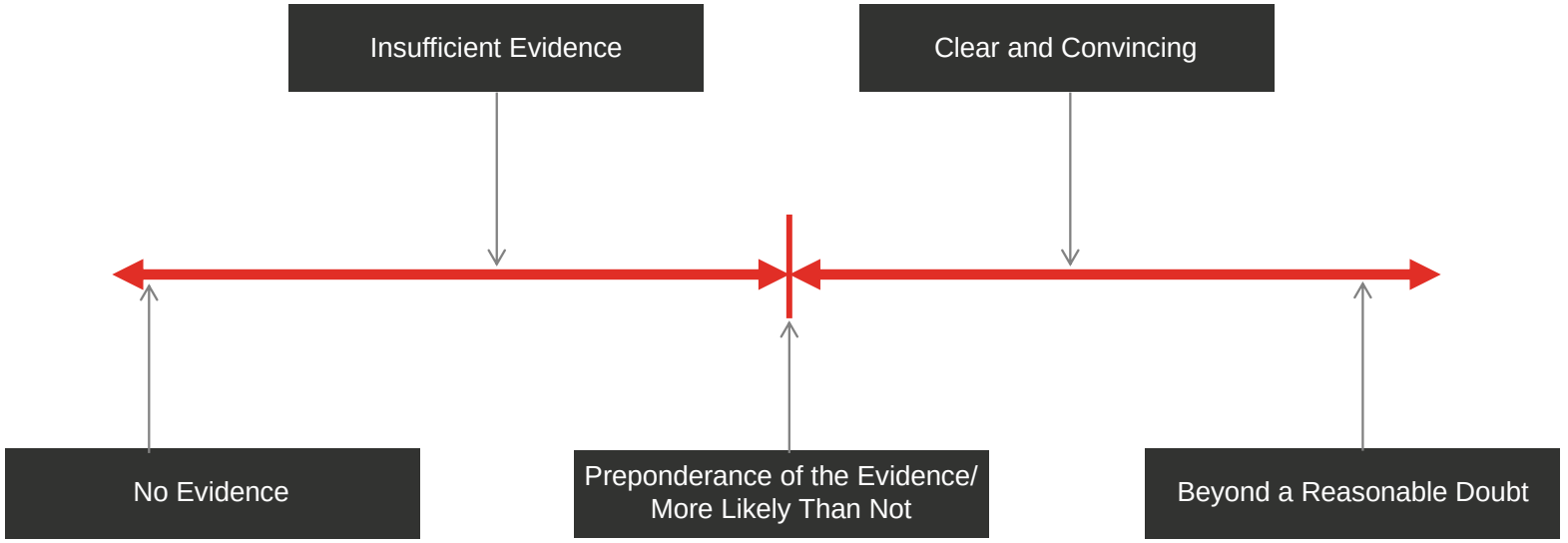
- The recipient must describe the range of possible disciplinary sanctions and remedies or list the possible disciplinary sanctions and remedies that the recipient may implement following any determination of responsibility.
  - Mirrors Clery Act language

# 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

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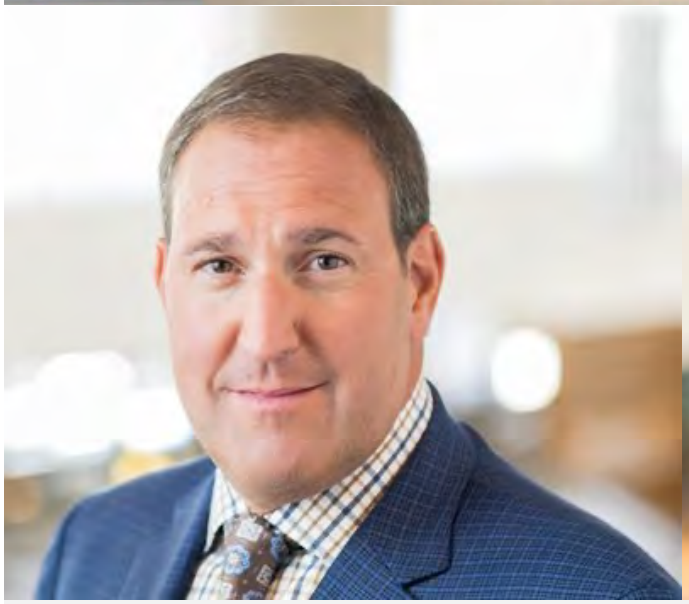

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# THE ADVISOR'S ROLE PRIOR TO THE HEARING

# Pre-Hearing Steps

- For most colleges and schools, the steps in the pre-hearing resolution process include:
  - Intake/Formal Complaint
  - Notice of Allegation/Investigation
  - Initial/Dismissal Assessment
  - Investigation
  - Informal Resolution (potentially)
  - Post-investigation report/evidence review
  - Pre-hearing matters

# Intake to Investigation

- The advisor may accompany their advisee to any intake meetings. The institution can conduct intake without an advisor present if the party assents.
- The advisor can and should help their advisee to understand the details of the Notice of Investigation and Allegations (NOIA)
- During the initial assessment (a formal or informal step in the process), the parties may wish to advocate for or against dismissal, and their advisors can help them to frame their arguments, and their appeals of any dismissal decisions with which they disagree.

# Investigation

- ❑The advisor may accompany the party to all investigation interviews
- ❑There should be clear institutional rules on the role of the advisor during the investigation
- ❑The advisor is permitted to interact with (and coach) their advisee, but may otherwise be treated as a “potted plant” with respect to their role in the interview
- ❑Clarify with investigators whether you need to take a break or sidebar with your advisee or can speak directly to them during the interview.
- ❑Clarify whether the Advisor can address the investigators, and under what circumstances.

# Investigation Report

- The investigators will write an investigation report appropriately summarizing the investigation and all relevant evidence obtained.
  - OCR has created a two-step vetting process for review of the evidence and the report.
  - This is intended to allow the parties and advisors to comment on the report prior to finalization and then to prepare for the hearing with the report in hand in advance.

# Party Access to Evidence/Report

- Prior to completion of the investigation report, the recipient will send to each party and the party's advisor, if any, all evidence obtained that is **directly related** to the complaint, to review in an electronic format or a hard copy, including the evidence upon which the recipient does not intend to rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence whether obtained from a party or other source.
  - Give the parties at least 10 days to submit a meaningful written response, which the investigator will consider prior to completion of the investigation report.
  - Whether included as relevant in the investigation report or not, make all such evidence subject to the parties' inspection and review available at any hearing to give each party equal opportunity to refer to such evidence during the hearing, including for purposes of cross-examination.

# Pre-Hearing Interactions with the Investigator(s)

- During the 10-day period where the report is being finalized, the advisee and Advisor may:
  - Suggest new witnesses
  - Suggestion additional questions to be asked of parties or witnesses
  - Comment on the evidence
  - Offer new evidence
  - Challenge investigator determinations of what is relevant (evidence to be considered by the Decision-maker versus what is directly related (evidence not to be considered by the Decision-maker)

# Final Investigation Report

- The recipient will then finalize an investigation report that fairly summarizes relevant evidence and, at least 10 days prior to a hearing (if a hearing is required or otherwise provided) or other time of determination regarding responsibility, send to each party and the party's advisor, if any, the investigation report in an electronic format or a hard copy, for their review and written response.
- This right of access for the advisor to the investigation report is direct and unencumbered (though an NDA can be required)

# Pre-Hearing Interactions with the Panel, Chair, or Decision-maker

- Although not explicitly required or even mentioned in the Title IX regulations, the Chair or Decision-maker may conduct pre-hearing meetings for each party (in writing, or in person)
- Pre-hearing meetings can provide an opportunity to:
  - Answer questions the parties and advisors have about the hearing and its procedures.
  - Clarify expectations regarding logistics, decorum, and technology (when applicable).
  - Clarify expectations regarding the limited role of advisors.
  - Discern whether parties intend to ask questions of any or all witnesses (in order to evaluate which witnesses should be invited to attend the hearing), or whether a party intends not to testify at the hearing
  - The Chair or Decision-maker can invite parties to submit questions in advance, but this is not required
  - The Chair or Decision-maker may try to discern any conflicts of interest/vet recusal requests.
  - The Chair or Decision-maker may seek to understand any questions regarding relevance of evidence or questions and may make pre-hearing rulings.

# Informal Resolution

- Informal resolution, that does not involve a full investigation and adjudication, may be offered at any time prior to reaching a determination regarding responsibility, as long as:
  - Policy does not require informal resolution participation as a condition of enrollment or continuing enrollment, or employment or continuing employment, or enjoyment of any other right, waiver of the right to an investigation and adjudication of formal complaints of sexual harassment consistent with this section.

# Informal Resolution

- Policy may not require the parties to participate in an informal resolution process under this section and may not offer an informal resolution process unless a formal complaint is filed.

- Recipient must obtain the parties' voluntary, written consent to the informal resolution process; and

- Recipient may not offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student.

# Requirements of Informal Resolution Options

- The parties receive a written notice disclosing:
  - The allegations
  - The requirements of the informal resolution process including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations
  - At any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint
  - Any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared.
- If informal resolution is successful, it can avoid a hearing. If not, the hearing will usually proceed unless there is a dismissal.


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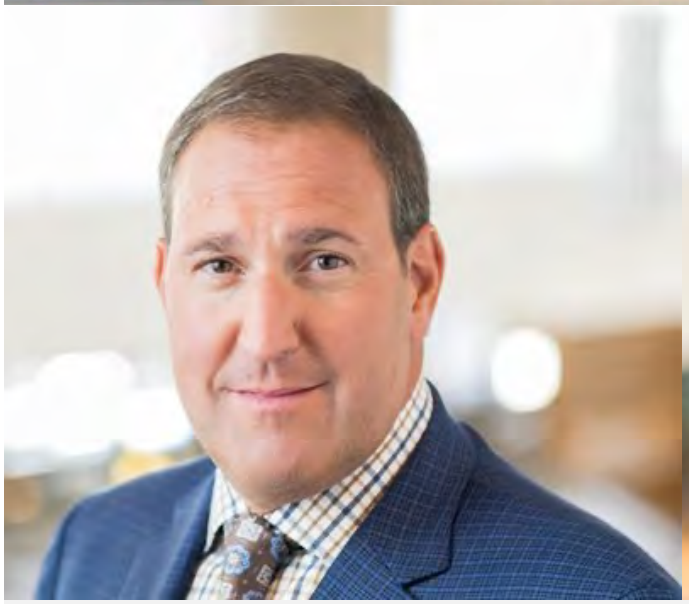
# Your Faculty



## Brett A. Sokolow, J.D.

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# THE ADVISOR'S ROLE AT THE HEARING

# Live Hearings

- Postsecondary institutions (IHEs) must provide for a live hearing.
- At the live hearing, the decision-maker(s) must permit each party's advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility.
  - Only relevant cross-examination and other questions may be asked of a party or witness.
  - Before a complainant, respondent, or witness answers a cross-examination or other question, the decision-maker(s) must first determine whether the question is relevant and explain any decision to exclude a question as not relevant.

# Provision of an Advisor

- If a party does not have an advisor of choice present at the live hearing, the recipient must provide without fee or charge to that party, an advisor of the recipient's choice, who may be, but is not required to be, an attorney, to conduct cross-examination on behalf of that party.
- The advisee and Advisor can prepare strategy for the hearing, collaborate to prepare questions, devise and rehearse opening statements, closing statements, impact statements, etc.
- They can prepare witnesses, including expert witnesses, prepare exhibits, and visuals.
- Advisors should be aware of any institutional policies or procedures that may limit the last-minute introduction of evidence at the hearing, rather than through the investigation.

# Hearing Technology

- At the request of either party, the recipient must provide for the live hearing to occur with the parties located in separate rooms with technology enabling the decision-maker(s) and parties to simultaneously see and hear the party or the witness answering questions. Hearings may be conduct with all parties physically present in the same geographic location or, at the recipient's discretion, any or all parties, witnesses, and other participants may appear at the live hearing virtually, with technology enabling participants simultaneously to see and hear each other.
- The recipient must create an audio or audiovisual recording, or transcript, of any live hearing and make it available to the parties for inspection and review.

# Questioning & Cross-Examination

- The live hearing requirement for higher education allows the parties to ask (direct and) cross-examination questions of the other party and all witnesses through their advisor.
- Such cross-examination must be conducted directly, orally, and in real time by the party's advisor and never by a party personally.
- The Chair or Decision-maker must permit relevant questions and follow-up questions, including those challenging credibility.
- You may want to explain why you think a question is relevant or will lead to a relevant answer but be clear that the rules permit you to do so.
- Once you pose a question, the Chair or Decision-maker must first determine whether a question is relevant and direct party to answer.
  - Must explain any decision to exclude a question as not relevant.
- The determine of relevance by the Chair or Decision-maker is final, pending appeal.

# Questioning & Cross-Examination

- If a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement (during the investigation or hearing) of that party or witness in reaching a determination regarding responsibility.
- All witnesses must testify live for their statements to be admissible. This would include police officers, nurses, doctors, experts, the investigator, etc.
  - The regulations are unclear as to whether this would be true of questions from the panel versus those posed by advisors during cross-examination.
- The decision-maker(s) cannot draw an inference about the determination regarding responsibility based **solely** on a party's or witness's absence from the live hearing or refusal to answer cross-examination or other questions.
- Your advisee could choose to appear, choose not to appear, choose to appear and answer all questions, or choose to appear and answer some but not all questions.
- If your advisee needs a witness's testimony or evidence, you need to make sure the witness attends the hearing and is willing to answer the questions that are posed.

# Questioning & Cross-Examination

- So, how many questions should you be prepared to ask?
- Our advice is to ask each witness (through direct examination or cross-examination) about every significant statement they have made (use the investigation report and interview transcripts as a roadmap).
- The Title IX regulations are unclear about whether the advisor needs to ask each witness about one thing, or everything.
- Given that the regulations are confusing on this point, we think you need to be well-prepared to be thorough.

# Questioning & Cross-Examination

- ❑Work with your advisee so that you know what to ask of each witness, and what your advisee wants you to ask.
- ❑Stick to what is relevant, which means the evidence would tend to prove or disprove an issue in the complaint.
- ❑Expect that the panel or decision-maker may ask many questions as well, and that it may do so before you have a chance to. If so, the Chair or decision-maker may rule your question is not allowed, if all it does is duplicate a previously-asked question.
- ❑Thus, you need to keep track of what is asked and be prepared to explain why your question is relevant or may produce a different answer than was provided already.

# Questioning & Cross-Examination

- ❑Be respectful. Ask direct questions. Don't try intimidation tactics. They will likely backfire.
- ❑We suggest you don't get too tricky, either, for the same reasons.
- ❑You may want to remain seated while questioning. A hearing is not a courtroom.
- ❑Try to respect the rules and boundaries of the process, even if you don't agree with them (unless they violate the regulations).
- ❑Remember to pause after your question to allow the Chair/Decision-maker to determine the relevance of your question.
- ❑Avoid multi-part or confusing questions.

# Questioning & Cross-Examination

- When your advisee is being questioned, be supportive. If they are uncomfortable or emotional, you can ask for a break.
- If a question is abusive, ask the Chair or Decision-maker to rule on it.
- If you think your advisee has not understood the question, ask the Chair/Decision-maker for it to be repeated or clarified, or repeat it for your advisee.
  - Thus, you need to pay close attention to the question being asked.
- Prep your advisee that it may be helpful to pause before answering, pose the question again to themselves in their head, make sure they understand what is being asked, compose their thoughts in response, and then answer.
- If your advisee wants to pause to discuss a question or answer with you, they can do so, and you can also make a request to pause or confer before they answer.

# Questioning & Cross-Examination

- What will happen if you refuse to conduct cross-examination? The institution will replace you with an advisor who will do so.
- What if your advisee won't cooperate with you? You need to get up to speed on the complaint as best you can, and make sure you have reviewed the investigation report thoroughly. You are then on your own. You must conduct cross-examination for your advisee, even if they don't cooperate with you.
- Only engage in discussion with the Chair or Decision-maker about relevance if they invite your opinion on a question or evidence. This practice may or may not be permitted by institutional hearing rules.
- Don't argue with the Chair or Decision-maker if they determine your question or evidence is not relevant, unless they invite you to. You should reserve those arguments for appeal.

# Prior Sexual History

- Questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, unless:
  - such questions and evidence about the complainant's prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or
  - the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the Respondent and are offered to prove consent.

# Formal Resolution for K-12 Schools and Other Recipients

- Elementary and secondary schools, and other recipients that are not postsecondary institutions (e.g., scouting organizations), may, but need not, provide for a hearing (some already have to under state, board or, district rules, and will continue to do so).

- With or without a hearing, after the recipient has sent the investigation report to the parties pursuant to paragraph (b)(5)(vii) of this section and before reaching a determination regarding responsibility, the decision-maker(s) must afford each party the opportunity to submit written, relevant questions that a party wants asked of any party or witness, provide each party with the answers, and allow for additional, limited follow-up questions from each party.

# Determination of Responsibility

- After the close of all evidence, the hearing officer(s) will deliberate, determine responsibility and issue a written determination applying the standard of evidence.
  - A detailed Notice of Outcome will be prepared and provided to the parties simultaneously.
  - The determination regarding responsibility becomes final either on the date that the recipient provides the parties with the written determination of the result of the appeal, if an appeal is filed, or if an appeal is not filed, the date on which an appeal would no longer be considered timely.

# Written Determinations

- The written determination regarding responsibility includes the following:
  - Sections of the policy alleged to have been violated
  - A description of the procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held
  - Statement of and rationale for the result as to each specific allegation
    - Should include findings of fact supporting the determination and conclusions regarding the application of the policy to the facts
  - Sanctions imposed on Respondent
  - Any remedies provided to the Complainant designed to restore or preserve access to the education program or activity
  - When the outcome is considered final, and any changes that can occur prior to finalization
  - Procedures and bases for any appeal


# Contact Information

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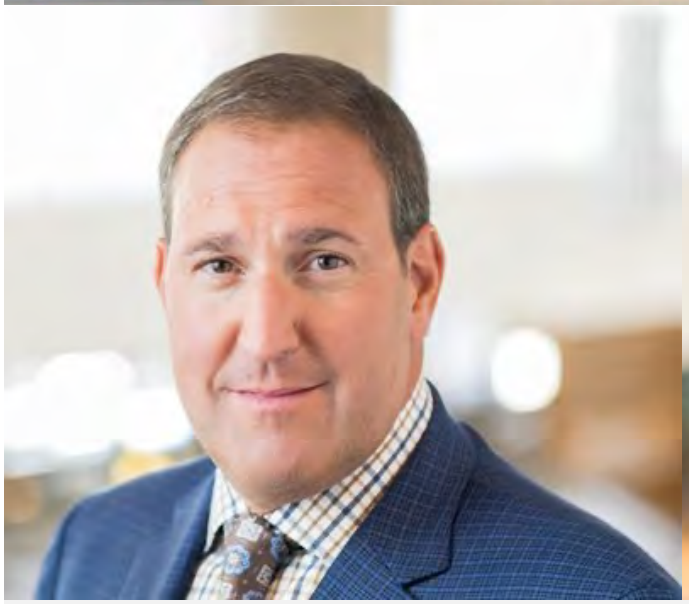
# 2020 TITLE IX ADVISOR TRAINING & CERTIFICATION COURSE

2020 Regs Rapid Response R3

# Your Faculty



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# THE ADVISOR'S ROLE POST-HEARING

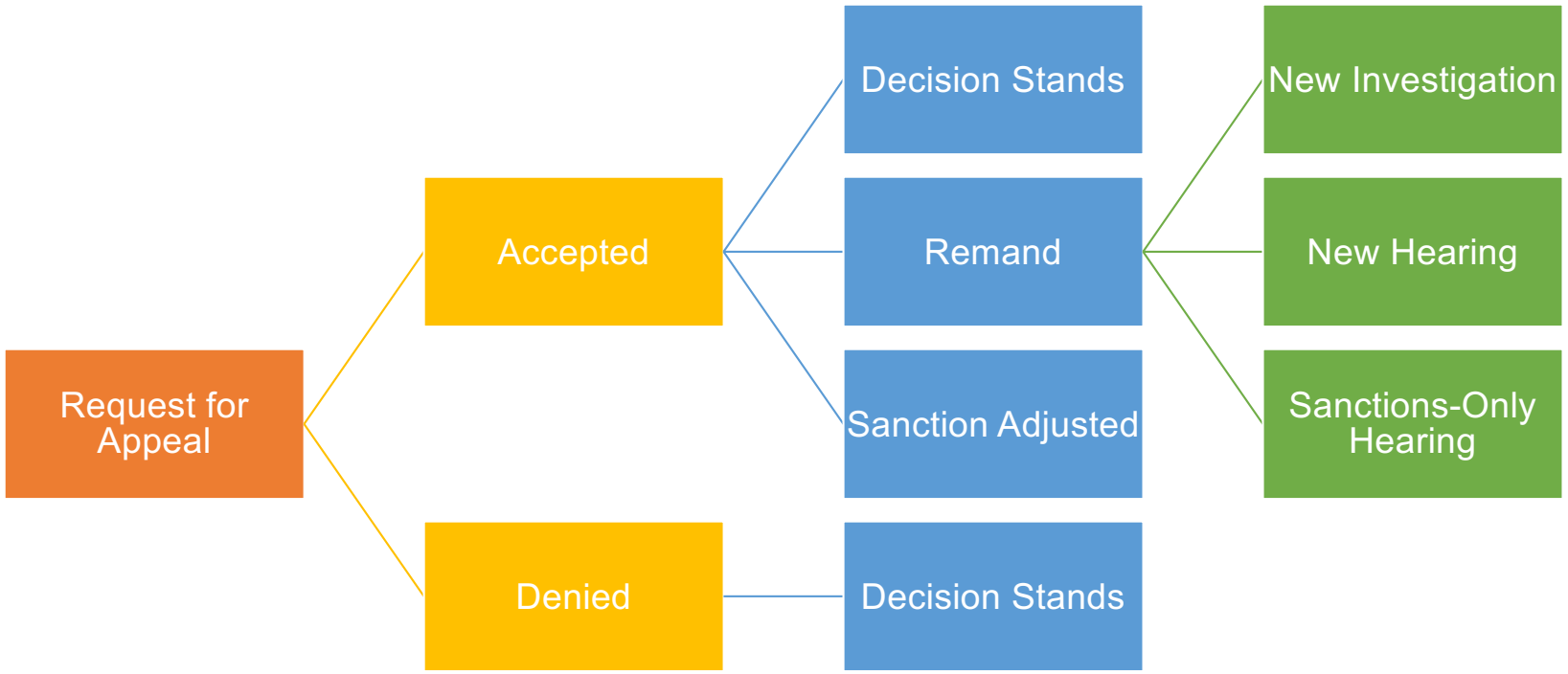
# Appeals

- The recipient must offer all parties an appeal from a determination regarding responsibility, and from a recipient's dismissal of a formal complaint or any allegations therein, on the following bases:
  - Procedural irregularity that affected the outcome of the matter
  - New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; and
  - The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter
  - Other additional bases (sanction?), as long as applied to the parties, equitably.

# Appeals

- ❑The recipient must notify the other party in writing when an appeal is filed and implement appeal procedures equally for all parties.
- ❑Ensure that the decision-maker(s) for the appeal is not the same person as the decision-maker(s) that reached the determination regarding responsibility or dismissal, the investigator(s), or the Title IX Coordinator.
- ❑Give the parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome.

# Appeals



# Neutrality, Conflict of Interest, and Objectivity

- Institutional officials must objectively evaluate all relevant evidence – including both inculpatory and exculpatory evidence – and determine credibility without respect to a person's status as a complainant, respondent, or witness.

- The recipient must implement an evaluative/vetting process to ensure that the Title IX Coordinator, investigator, decision-maker, or any person designated by a recipient to facilitate an informal resolution process does not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent.


# Bias

- Among the most significant problems that can arise from a process under Title IX
- Bias can exist when any variable improperly influences a finding and/or sanction
- There are many forms of bias and prejudice that can impact decisions and sanctions:
  - Pre-determined outcome
  - Partisan approach by investigators in questioning, findings, or report
  - Partisan approach by hearing board members in questioning, findings, or sanction
  - Intervention by senior-level institutional officials
  - Not staying in your lane
  - Improper application of institutional procedures
  - Improper application of institutional policies
  - Confirmation bias
  - Implicit bias
  - Animus of any kind

# Conflict of Interest

- Conflicts of interest are expressly prohibited in the 2020 Title IX regulations.
- Types of conflicts:
  - Wearing too many hats in the process
  - Legal counsel as investigator or decision-maker
  - Decision-makers who are not impartial
  - Biased training materials; reliance on sex stereotypes
- Conflicts of interest can be situational or positional
  - Simply knowing a student or an employee is typically not sufficient to create a conflict of interest if objectivity not compromised.
  - Also, having disciplined a student or employee previously is often not enough to create a conflict of interest.

# Bias

- Advisors should be prepared to recognize and raise issues of bias
- During the investigation, raise issues of bias with the Title IX Coordinator
- If bias appears at the hearing, request a sidebar to raise it with the Chair or Decision-maker.
- If it cannot be addressed at the hearing, it can be addressed as part of the appeal.
- Pay careful attention to recusal procedures and how to request recusal by a participant in the process on the basis of bias or conflict of interest
- Conflicted or biased administrators should know to recuse themselves
- Questions about bias of an investigator or witness can be asked at the hearing, if relevant

# Record Keeping

- The recipient must maintain for a period of seven years records of –
  - Each sexual harassment investigation including any determination regarding responsibility.
  - Any audio or audiovisual recording or transcript required under paragraph (b)(6)(i) of this section
  - Any disciplinary sanctions imposed on the respondent
  - Any remedies provided to the complainant designed to restore or preserve equal access to the recipient's education program or activity
  - Any appeal and the result therefrom
  - Any informal resolution and the result therefrom

# Record Keeping

- All materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process
- Records of any actions, including any supportive measures, taken in response to a report or formal complaint of sexual harassment.
  - In each instance, document the basis for the conclusion that recipient's response was not deliberately indifferent
  - Document that recipient has taken measures designed to restore or preserve equal access to the recipient's education program or activity
  - If a recipient does not provide a complainant with supportive measures, then the recipient must document the reasons why such a response was not clearly unreasonable in light of the known circumstances.
  - The documentation of certain bases or measures does not limit the recipient in the future from providing additional explanations or detailing additional measures taken.

# Training Records

- The recipient must make all materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process publicly available on its website, or if the recipient does not maintain a website, the recipient must make these materials available upon request for inspection by members of the public.
  - The most recent materials used to train the Title IX Team should be posted.
  - While seven year of materials need to be maintained, only most recent need to be posted.
  - This requirement is not retroactive, so seven years starts August 14, 2020.

# Retaliation

- The recipient must implement a policy that no recipient or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title IX, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under Title IX.

- Retaliation also includes intimidation, threats, coercion, or discrimination, including charges against an individual for code of conduct violations that do not involve sex discrimination or sexual harassment, but arise out of the same facts or circumstances as a report or complaint of sex discrimination, or a report or formal complaint of sexual harassment, *for the purpose of interfering with any right or privilege secured by Title IX.*

# Retaliation

- Complaints alleging retaliation may be filed according to the grievance procedures for sex discrimination required to be adopted under § 106.8(c).
- The exercise of rights protected under the First Amendment does not constitute retaliation.
- Charging an individual with a code of conduct violation for making a materially false statement in bad faith in the course of a grievance proceeding does not constitute retaliation as long as a policy recognizes that determination regarding responsibility, alone, is not sufficient to conclude that any party made a materially false statement in bad faith.

# "Confidentiality"

- The Recipient must maintain the confidentiality of the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness, except as may be permitted by the FERPA statute, 20 U.S.C. 1232g, or FERPA regulations, 34 CFR part 99, or as required by law, or to carry out the purposes of 34 CFR part 106, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder.
- As a result, the recipient may ask all advisors to sign NDAs regarding the resolution process and any materials shared with advisors.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# STUDY GUIDE:
# ADVISING THE REPORTING PARTY

## 20-Minutes-to... *Trained*


**PRESENTED BY:**

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Please note this information has not been updated for the 2020 Regulations.

atIXa
Association of Title IX Administrators


# 20-Minutes-to…*Trained*:
# Advising the Reporting Party
## Table of Contents



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# 20-Minutes-to…*Trained*:
# Advising the Reporting Party
## Learning Outcomes

- Participants will understand that appropriate intake reporting is crucial to the "stop, prevent, and remedy" mandate under Title IX.
- Participants will be able to assess the physical environment used for intake reports to optimize security and comfort and eliminate distractions or obstacles to effective communication.
- Participants will recognize how the timing of the report impacts assessments of safety, application of remedies, and availability of resolution options.
- Participants will be able to explain to the reporting party how jurisdictional, policy, and process implications of different types of reported misconduct affect resolution options.
- Participants will be able to recognize the impact of trauma on a reporting party's ability or willingness to communicate.


# 20-Minutes-to…*Trained*:
# Advising the Reporting Party
## Discussion Questions

- When a reporting party comes to an intake meeting, what are their primary concerns? How does the intake process address those concerns? Do they change based on who the reporting party is (student, faculty, staff, etc.)?
- What should be the first level of analysis for the interviewer? Does that analysis change based on the length of time since the alleged misconduct occurred?
- How many different resolution processes are there? Which types of misconduct are covered by each process? Are they different based on the individual's status (student, faculty, staff, etc.)? How does that impact advice to the reporting party?
- A reporting party that cannot provide a complete account should be supported but should not be allowed to make a formal allegation. True or False? Why?
- How does potential trauma impact the reporting party? How should the intake process appropriately anticipate traumatic impact?


# 20-Minutes-to…*Trained*:
# Advising the Reporting Party
## Case Studies

### Anne

Anne Chen, a student at Citron College, was an ardent basketball fan. Last term, she attended a basketball game with a group of friends. At the game, she met three young men who were fraternity brothers. Anne had friendly conversations with the men, who shared a container of rum and coke with her.

The young men invited Anne and her friends back to their fraternity house for a post-game party and to talk about the "big win," but her friends declined. Anne decided to go with the young men. The party lasted for hours, and a considerable amount of alcohol was consumed by everyone, including Anne.

Anne eventually accompanied the three men to their upper floor room for further conversation, and to listen to music. She continued to drink alcohol there and became so intoxicated that she occasionally "passed out" for several minutes at a time. Anne contends that she was raped by the three men while she was not fully conscious.

Anne left the fraternity house early in the morning to return to her dorm. She did not call the police or seek medical attention. Ten days later, she described the incident to a friend, who convinced her to file a report with the Dean of Student's Office at the college.

Anne indicated she does not want to testify at the conduct hearing if it means that she will have to confront the three men, but she is willing to submit a written statement.

### Jeremy

Jeremy is struggling with some of the writings for his Spanish Literature course and seeks out Professor Sanchez during her office hours. Jeremy took a previous course from Professor Sanchez and performed well, though the current course is more difficult. After guiding Jeremy through his concerns, Professor Sanchez gets up and closes the door to her office. She then sits down next to Jeremy and proceeds to tell him about a special comparative literature project that she would like him to be part of.

During their conversation, she compliments his work and places her hand over his, indicating that she really hopes he will agree to be part of the project. Pleased and a little excited, he readily agrees. Professor Sanchez

tells him the project group will be meeting at her house the following evening. She also notes that he should stay after the group leaves so they can discuss his long---term goals of getting into graduate school and how she can be of help in the process.

Jeremy arrives at Professor Sanchez's house and the group of four students and the professor meet for about an hour. Jeremy notices that Professor Sanchez makes prolonged eye contact with him, and she goes out of her way to compliment him throughout the evening. Once the other group members leave, Professor Sanchez draws close to him. She tells him that he has remarkable potential and she wants to see him do well in her course, but she needs something from him in return. She leans in to kiss him. The two ultimately begin a sexual relationship.

Jeremy and Professor Sanchez meet a few times a week, typically at her house, and engage in sexual intercourse. Occasionally, they engage in sex in her office after hours as well. They spend a weekend in Miami together. With regularity, the two send each other naked pictures of themselves and involve themselves in daily sexting.

**NOTE**: If you want to challenge your team's internal perceptions, make Professor Sanchez a male and/or make Jeremy a female. If you want to test knowledge of consensual relationships policies at your institution, change the academic relationship between Professor Sanchez and Jeremy so that Professor Sanchez does not directly impact Jeremy's grades.

## Academic Accommodations for Reporting Party

A female student reported and made a formal complaint regarding dating violence. Upon initial inquiry, the male student provided information that indicated that the female student may have engaged in conduct that would also be a violation of our policy. Both were noticed that the totality of the conduct of both parties would be investigated.

Both students were provided support and resources. The female student was offered support and resources which included that we made contact with a faculty member to arrange some accommodations on the student's behalf — including that she be given an extension for certain assignments. The class is a "reader" and the student was accomplishing the bulk of the course load remotely while completing an internship.

The accommodation required follow up from the female student directly with the faculty member to work out specific arrangements. The faculty member was extremely amenable and spoke once with the student to alter some deadlines but then the female student never followed up with the faculty member and never turned in or completed the assignments. I am meeting with the female student today to discuss her transition back to the campus (she just completed her internship) and just learned yesterday from the faculty member that the female student has fallen behind considerably in the class where the accommodation was requested, including that she has not contacted the faculty member since late February. This class is the one class she takes with the male student, including that they shared a book that he purchased and then did not allow her to use following the incident that prompted the complaint.

The student is slated to graduate this semester. The faculty member does not believe the student can possibly complete the required coursework in time given how far she has fallen behind. We are prepared to offer the typical accommodations such as an incomplete — ability to withdraw from the class etc. However, should we be doing something more? It seems clear that the issues that are the basis of the complaint have led to this

downward spiral but does it matter that we set the stage for this student to succeed in this class and she did not follow through with communication to the faculty member?


# 20-Minutes-to…*Trained*:
# Advising the Reporting Party
## Case Studies Question & Answer

### Anne

For Discussion:

- What are the first steps of the institution's response to this report?
  - Anne should know that the institution will assist in reporting to campus and/or local police.
  - Anne should be advised of available medical and mental health providers and offered support with contacting, scheduling, or transportation (if appropriate).
  - Assess for Clery reportability based on the location of the fraternity house.
  - Anne should be offered any other reasonable support measures.
  - Anne should be advised of the next steps under policy, including contacting witnesses and the responding parties and disclosing information including her name.
- What policy and/or process applies to the reported misconduct? Does the institution have jurisdiction to enforce the reported potential violations? On what grounds?
  - The allegations describe sexual misconduct, likely prohibited by the institution's sexual misconduct policy or discrimination/harassment policy.
  - The parties are all students, implicating the Student Code of Conduct.
  - The institution does not have Title IX-mandated jurisdiction but may extend discretionary jurisdiction over the allegations to address the on-campus effects.
  - Jurisdiction and policy application will be further informed by collecting information regarding the discriminatory effect (if any) of the conduct on Anne.
- How does Anne's demeanor affect your assessment of her physical safety? What other elements contribute to your assessment?
  - The timing of the report is close to the timing of the alleged misconduct, suggesting the need for supportive measures may be greater.
  - Anne does not appear to display urgency or outward signs of trauma. She did not report to police or seek medical attention. She did not initially seek on-campus resolution. She may be in shock or scared to report. Assessment by a medical professional and assurances of the institution's commitment to her safety/security/privacy are advisable.

- The reported circumstances do not suggest an imminent threat to Anne or the campus community. Unless state/local law mandates a timely warning, the circumstances do not appear to justify one.

- What are Anne's options under institutional policy? What should she be aware of?
  - Anne may ask the institution to formally resolve the allegations under the appropriate sexual misconduct resolution procedures.
  - Anne may request informal resolution pending the Title IX Coordinator's approval.
  - Anne may request administrative resolution through the use of no contact orders and campus/class/residence reassignment.
  - Anne's hesitance to engage in a possible hearing should be assessed. Is she afraid of the confrontation? Does she not want formal resolution? Is she aware her written statement will be shared with the responding parties if she chooses to move ahead with formal resolution?
  - Anne should be advised of the institution's commitment to privacy, a small circle of informed administrators during formal/informal resolution, and the institution's prohibition of retaliation.
- What other steps should you consider?
  - Campus policy, IFC bylaws, and/or the fraternity's national chapter bylaws may address allegations of sexual misconduct or alcohol consumption at fraternity houses.
  - There may be some policy implications to possessing, consuming, and providing alcohol at university athletic events.
  - Anne has not yet described an impact that indicates discriminatory effect. More information is needed.

## Jeremy

For Discussion:

- What are the first steps of the institution's response to this report?
  - Jeremy should understand the institution's obligation to act and commitment to protect his safety and privacy, including nonretaliation.
  - Jeremy should understand the allegation will be shared with Prof. Sanchez, including his identity.
  - If available, Jeremy should provide documentary evidence of the conversations with Prof. Sanchez.
  - In the immediate interval, Jeremy should be excused from attending class and offered on-campus counseling and other support.
- What policy and/or process applies to this report?
  - Consensual relationships.
  - Sexual misconduct ("she needs something from him in return").
  - Faculty Code of Ethical Standards.
- What additional information from Jeremy would help assess the situation?
  - Appears at first blush to be consensual.
  - Power imbalance may negate or strain consent.
  - Prof. Sanchez made a quid pro quo offer.

    - Encourage conversation regarding Jeremy's level of perceived consent or perceived coercion.
- What interim measures would you take? Would the additional information from Jeremy help inform those interim measures?
    - The allegation appears plausible and provides enough specificity to consider placing Prof. Sanchez on paid administrative leave.
    - Jeremy may be moved to another section of the class, continue under a substitute faculty in the same class, or allowed to drop without penalty based in part on his preference and part on the university's ability to provide alternative arrangements.

## Academic Accommodations for Reporting Party

For Discussion:

- We are prepared to offer the typical accommodations such as an incomplete — ability to withdraw from the class etc. However, should we be doing something more?
    - The Title IX Coordinator could speak with the professor about paths to completion, particularly here where the professor did not advise the Coordinator that the student had fallen behind.
    - If the student can withdraw from the class, a tuition waiver for the course should also be considered.
    - The Coordinator should determine whether the student needs the course to graduate. If so, the student could walk in graduation but retake the course over the summer.
- It seems clear that the issues that are the basis of the complaint have led to this downward spiral, but does it matter that we set the stage for this student to succeed in this class and she did not follow through with communication to the faculty member?
    - Sure. However, where reasonable accommodations can still be made and are in the best interest of the student, we can continue to offer support.
    - The faculty member also did not follow up to indicate the student may have been struggling.
    - Even when academic accommodations are made, we should continue to assess whether the accommodations have been effective.

# ATIXA VAWA SECTION 304-COMPLIANT PROCESS ADVISOR MODEL LANGUAGE

## OVERVIEW OF LEGAL RIGHTS AND ADVISOR-RELATED ISSUES

Effective March 7th, 2014, participants in campus resolution processes for stalking, domestic violence, dating violence and sexual assault have a federally-guaranteed right to an "advisor of their choice" to accompany them throughout all steps of the campus resolution process. Here are some key points to understand about this change:

- The law is in effect now. The Department of Education (DOEd) is tolling enforcement until July 2015, but expects campuses to make a good faith efforts to comply until then. Denying access to an advisor of their choice is not a good faith effort.
- In July 2015, failure to fully accord this right becomes a fineable offence under the Clery Act, enforceable by the DOEd. The Clery Act does not create a private right of action to sue to enforce this right, but some courts have already done so.
- The law is broad enough to afford access to any advisor, including a parent, sister, roommate or attorney.
- The law provides the right to one advisor, only, but a campus can allow more than one.
- The law provides this right to all parties (complainants and respondents), but not to witnesses.
- The law provides this right to both student and employee parties.
- The law affords the right to an advisor in all phases of the process, including all intake meetings, interviews, hearings and appeals.
- The law permits campuses to limit the role of the advisor.
- Special rules that distinguish attorneys from other non-attorney advisors are not recommended.
- It will be difficult to justify allowing advisors for only the four behaviors covered by VAWA Section 304 (sexual assault, dating violence, domestic violence, stalking), but not for all behaviors covered by Title IX (sexual harassment, sex/gender-based bullying, hazing and other forms of sex/gender-based discrimination).
- Once the right to an advisor is afforded to students and employees, it will be difficult to justify why that right applies to some behaviors and not others. Many campuses will therefore want to implement this right across resolution processes more broadly than VAWA Section 304 contemplates.
    - Not doing so could give rise to Equal Protection lawsuits against public universities.
- A right to an advisor is afforded in campus stalking allegations, whether or not the stalking is related to sex/gender.

- Unless a campus prefers a broader role for an advisor, the advisor is only present to guide their advisee, not to represent them, speak for them, or play an active role of any kind in the process.
    - Advisors should be permitted to speak with their advisee as necessary, privately or during campus meetings to fully perform their advising role.
- A campus is not required to provide a student or employee with an advisor, only to allow the student or employee to select one.
    - This will give rise to cases where one party has access to an attorney and another does not.
    - Campuses are not required and should not force either party to utilize an "assigned" advisor- the law guarantees an advisor of the party's choosing.
    - Relatedly, Title IX does not require institutions to provide the same type of advisor to both parties, merely that the parties have the option to have an advisor.
- Many campuses are wisely choosing to train a pool of campus advisors who can be offered to the parties. The parties are not obligated to choose campus advisors, and may choose advisors who are not a part of the campus community.
    - Students should execute FERPA consents as appropriate to allow the campus to communicate with an advisor, if desired.
    - Campuses should develop clear rules on disclosure of education and/or employment records to advisors, and the obligations of advisors to maintain the confidentiality/privacy of those records.
- If an advisor quits, is disqualified, or is removed for interference with the process, policy should clarify how (or if) a substitute will be afforded.
- If a party selects an advisor who does not wish to serve as an advisor, the law does not obligate them to serve.
- Policy should clarify that certain individuals are disqualified from serving as advisors, including administrators over the process, anyone in the administration who supervises a participant in the process as an employee, any witness, anyone who is being strategically chosen to deprive another party of their likely advisor, etc.
- Universities should resist the urge to automatically ante up their legal counsel simply because one party or both parties of the resolution process elect to be advised by attorneys. Increasing the legalistic and/or adversarial nature of campus proceedings is not advisable, unless there is a compelling reason for the university to choose to have its counsel present.

**ATIXA Position Statement on the Need for Victim Advocates on College Campuses**

*Founded in 2011, ATIXA is the nation's only membership association dedicated solely to compliance with Title IX and the support of our more than 4,000 administrator members who hold Title IX responsibilities in schools and colleges. ATIXA is the leading provider of Title IX training and certification, having certified more than 2,500 Title IX Coordinators and more than 5,000 Title IX investigators since 2011. ATIXA releases position statements on matters of import to our members and the field, as authorized by the ATIXA Board of Advisors. For more information, visit www.atixa.org.*

This statement affirms ATIXA's strong position endorsing the need to provide free and confidential support and advocacy to college students and employees who have experienced sexual assault, sexual harassment, or other gender-based or sex-based harassment or violence. ATIXA encourages every college and university to provide a designated, trained Victim Advocate who is exempt from the duty to report sexual misconduct to the college or to law enforcement.

Students and employees who experience sexual assault, sexual harassment, or other gender-based or sex-based harassment or violence often experience trauma and significant disruption to their lives. Research from the Bureau of Justice Statistics (BJS) and several recent studies show that the majority of rapes and sexual assaults are not reported to the police[1] and we see a similar trend in reporting to colleges. Reporting rates are not correlating to the prevalence of sexual harassment and violence on college campuses.

Although formal reporting to the college can be empowering and healing for some individuals, many will choose to not report. ATIXA supports the right of the victim/survivor to maintain autonomy in making this choice, recognizing that how and when a person heals from a traumatizing event is highly individualized. In those cases, the Victim Advocate can play an important role in providing emotional support and assistance with navigating school or work.

For individuals who do consider reporting, the myriad reporting options and available processes can be confusing, stressful, time-consuming, and unpredictable, and in some cases individuals may distrust the ability of their own institution to equitably, impartially, and effectively address a report. In those cases, a

[1] Rennison, C.M. *Rape and Sexual Assault: Reporting to Police and Medical Attention, 1992–2000.* Washington, DC: U.S. Department of Justice, Bureau of Justice Statistics, August 2002, NCJ 194530.

Victim Advocate is an essential conduit for information about options while still allowing for autonomy.[2] Advocates are able to provide support as victims/survivors decide upon and navigate through these options.

When students or employees do report to the college, the role of the Victim Advocate is crucial, both in allowing the personnel resolving the report to maintain impartiality and in providing emotional support and assistance to the reporting party. Our experience from over 20 years of work in the field clearly shows that in the vast majority of cases, the college's resolution process is optimized for victims/survivors when a trained, confidential Victim Advocate is involved, regardless of the ultimate outcome of the process. The Victim Advocate can offer not only emotional support, but can also advocate on behalf of the victim/survivor's needs. Their role strengthens the ability of the Title IX Coordinator or Investigator to be both present and equitable in their job duties.

Pending federal legislation addresses the role of the Victim Advocate in a college's response to a report. The Survivor Outreach and Support on Campus Act (S.O.S. Campus Act) would require colleges receiving federal funding to appoint a confidential, independent advocate to assist victims/survivors of sexual assault. The advocate would help to facilitate and provide options for access to medical care and forensic exams, to ensure victims/survivors are aware of their options for reporting sexual assault to law enforcement, to help victims/survivors connect with counseling and crisis intervention services, and to guide victims/survivors who have reported being sexually assaulted through the disciplinary process.

The legislation would require that the advocate be appointed based on experience and a demonstrated ability to effectively provide sexual assault victim/survivor services. Importantly, the legislation provides that the advocate represents the interests of the victim/survivor even when in conflict with the institution, and contains a provision that the advocate may not be retaliated against by the institution for doing so. ATIXA supports this aspect of the legislation and calls on colleges and universities to voluntarily provide this resource now, well before it is legally mandated, because it is the right thing to do.

A second piece of legislation, the Campus Accountability and Safety Act (CASA), would extend the designation of confidential advisors to cases of alleged sexual harassment, domestic violence, dating violence, sexual assault, and stalking. ATIXA recommends that colleges and universities extend confidentiality to Victim Advocates as permitted under current federal guidance, to allow them to perform their responsibilities freely and to remove the burden of being the sole confidential reporting option from licensed counselors and medical providers. ATIXA supports this aspect of the CASA legislation, as well, to the extent that it would not require mandated reporting by advocates.

ATIXA strongly encourages Congress and colleges to create a clear delineation between the role of the advocate and the role of the investigator. Advocates should have no institutional role in the investigation

[2] Research also establishes that victims/survivors who work with an advocate experience less distress, are less likely to experience certain negative outcomes (such as self-blame, guilt, and depression), and are less reluctant to seek further help, such as medical care or assistance from law enforcement. (Campbell, 2006; Wasco et al., 1999).

except to support and advocate for the victim/survivor. ATIXA also calls on colleges and universities to recognize that process advisors and Victim Advocates serve different functions, though a victim/survivor may choose to use their Victim Advocate as their advisor. In any case, victims/survivors should have access to a Victim Advocate irrespective of their choice of process advisor. Using one should not preclude access to the other.

Many colleges have resisted providing victim advocacy based on a misunderstanding that doing so would obligate them to provide an advocate for an individual accused of sexual misconduct as well. Although the reauthorization of the Violence Against Women Act (VAWA - 2013) requires that all parties have the same opportunities to have others present at any institutional disciplinary meeting or proceeding, and to have the same opportunity to be accompanied by an advisor of their choosing, nothing in the law or in the concept of equity would require colleges to provide an advocate to the individual accused of misconduct. Rather, equity requires that an advocate be provided regardless of the gender of the victim/survivor.

Victim Advocates should not be tasked with the responsibility of serving responding parties based on the potential for conflict of interest, as well as safety and confidentiality concerns. While the law does not mandate that colleges provide an advocate for the accused party, honoring the equal dignity of all members of the college community suggests that accused individuals would benefit from advice and guidance as well.

ATIXA strongly supports the provision of a Victim Advocate to any student or employee who has experienced gender-based or sex-based harassment or violence. Institutions such as the University of Colorado Boulder and the University of California Santa Barbara are good examples of successful in-house victim advocacy centers, and colleges with more limited resources may provide these services through the creation of a cooperative agreement or MOU with a local victim advocacy agency. Local agencies should be trained in institutional processes and procedures, though many colleges will ultimately be best served by hiring one or more employees to serve as advocates for the campus community.

*Ratified and adopted by the ATIXA Advisory Board, August 10th, 2015.*

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**ATIXA Tip of the Week**
**Newsletter**
**May 8th, 2014**

## Advocates and Advisers

*Part 1 of a two-part series*

**Authored by Saundra K. Schuster, Esq., ATIXA Advisory Board Member**

Our clients frequently ask, "What is the role of a sexual assault advocate in relation to our grievance process?" In response, we ask, "What are they trained to do?". If we are relying on them to serve as advisers during our institutional grievance processes, we should be training them accordingly.

Let's begin with reviewing the role of a sexual assault advocate. Too often this role is viewed as an individual whose sole role is "advocating" for the victim and advising them in the course of the institution's grievance proceedings much in the way that an attorney advocates for a client. While this may be part of a sexual advocate's role, it is not the primary one and is often not one for which they are adequately trained. Institutions should recognize that sexual assault advocates and sexual assault grievance procedure advisers do not fulfill the same function and meet very different needs.

Sexual assault advocates are trained, oftentimes through extensive certification and licensure, to provide emotional support, to assist in healing, and to provide guidance in understanding trauma. Support is key to assisting a victim of sexual misconduct in understanding the degrees of anger, guilt, fear and mistrust that they experience. A sexual assault advocate is a steadying, guiding force in the midst of a tumultuous sea.

Sexual assault grievance procedure advisers, however, use their knowledge and training on an institution's policies and procedures to help guide parties through the myriad of policies, procedures, meeting, hearings and appeals. This function requires a very different skill-set and an array of additional training. Often institutions assume that sexual assault advocates already know how to perform this function, but often that assumption is incorrect.

Victims often develop a unique, trusting bond with their advocates; accordingly, victims often want those advocates to serve as their sexual assault grievance process advisor. This is both understandable and expected. With that in mind, institutions should thoroughly and annually train their campus' advocates in all institutional grievance policies, procedures and protocols.

Next week we address a related question: "If we provide sexual assault advocates and advisers for a complainant, must we do the same for the accused individual in order to honor the concept of equity?"

**ATIXA Tip of the Week**
**Newsletter**
**September 17th, 2015**

## Allowing an Advisor of Choice

**Authored by Daniel C. Swinton, J.D., Ed.D., Senior Associate Executive Director, ATIXA**

**What are the requirements regarding allowing an "advisor of choice" for cases of sexual assault, relationship violence and stalking? What about other violations of policy, such as sexual harassment?**

The requirement stems from the amendments to Clery made by VAWA Section 304. The requirement to allow an "advisor of their choice" is for "allegation[s] of dating violence, domestic violence, sexual assault, or stalking". Specifically the language reads, *"(iii) Provide the accuser and the accused with the same opportunities to have others present during any institutional disciplinary proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice. (iv) Not limit the choice of advisor or presence for either the accuser or the accused in any meeting or institutional disciplinary proceeding; however, the institution 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."*

That said, I would recommend allowing an advisor of their choice for all disciplinary issues – why carve out one segment of issues when they so often overlap with other violations and issues. Sometimes we do not know prior to conducting an investigation whether issues are one type of violation or the other. If you begin an investigation without allowing an advisor of their choice, then realize it is necessary halfway through, you have significantly breached your own policies. Over the last few years, I have not seen carve-outs for these four issues (Domestic Violence, Dating Violence, Stalking and Sexual Assault) work well - especially because there are often conflicting definitions between federal and state laws and institutional policies. These are also complex cases that often overlap with other areas such as alcohol, drugs, vandalism, theft, etc. so we are rendering findings on those allegations using a different process than on allegations that do not cross into one of the four crimes.

# STUDY GUIDE:
# ADVISING THE RESPONDING PARTY

# 20-Minutes-to... *Trained*

## PRESENTED BY:


- Patricia M. Hamill, Esq., Chair, Title IX, Due Process & Campus Discipline, Conrad O'Brien, PC
- Lorie Dakessian, Esq., Vie-Chair, Title IX, Due Process & Campus Discipline, Conrad O'Brien, PC


Please note this information has not been updated for the 2020 Regulations.

atIXa
Association of Title IX Administrators


# 20-Minutes-to…*Trained*:
# Advising the Responding Party
## Table of Contents


# 20-Minutes-to…*Trained*:
# Advising the Responding Party
## Learning Outcomes

- Participants will appreciate that equity in the resolution process demands that responding parties have rights to know the allegations, the identity of the reporting party.
- Participants will understand that the responding party has the right to review and respond to all evidence used in a determination of responsibility.
- Participants will be able to describe to a responding party the various stages of possible resolution processes.
- Participants will be able to appreciate the impact of trauma and other risk-averse reactions resulting from an allegation of sexual misconduct.
- Participants will commit to adequate communication with the responding party and transparency through the resolution process.


# 20-Minutes-to…*Trained*:
# Advising the Responding Party
## Discussion Questions

- When a responding party is notified of sexual misconduct allegations, what are their primary concerns? How does the intake process address those concerns? Does intake change based on the identity of the responding party (student, faculty, staff)?
- What types of supportive measures should be available to a responding party?
- When may the responding party engage an internal or external advisor of their choosing? What is the advisor's role in the process? Are there limits or important caveats to the advisor's role?
- How is an advisor's role different from the institution's mandate to resolve sexual misconduct allegations? How should training for internal advisors, or meetings with outside advisors, anticipate and compliment the advisor's role.
- What information and/or activity will best prepare the advisor to provide the best possible support and guidance to the responding party?


# 20-Minutes-to…*Trained*:
# Advising the Responding Party
## Case Studies

### Don & Carla

Don and Carla became friends as first-year students, and one night they went out for dinner and drinks. Carla was quite tipsy, and Don wanted to make sure she arrived at her apartment safely, so he accompanied her to her door. Carla asked Don if he would like to come in to see how she had decorated. Don eagerly agreed. They sat on the couch and talked about how much fun they had that evening, and how glad they both were to get to know each other better. Carla told Don how easy it was to feel comfortable with him. Don was delighted to hear this and put his arms around Carla and kissed her. She eagerly kissed him back. They continued to kiss and touch, and Don gently pushed Carla back on the couch. Carla said, "I think things are going too fast." Don replied, "We won't do anything you are not comfortable with."

The two continued kissing with increasing passion. Don, tentative at first, began to unbutton Carla's blouse. She brushed his hand aside but continued kissing him. A short time later, he reached under her blouse and fondled her breast. Carla did not stop him. Don told Carla, "I really want to make love to you." Carla did not respond. Don took this as consent and proceeded to remove Carla's panties (she was fully clothed otherwise). They had intercourse. Don cuddled Carla, who cuddled back but did not say a word. Since it was getting late and Carla was so quiet, Don gave her a kiss, told her he'd call her, and left. In the following days, Carla refused to take Don's calls and did not respond to his text messages.

Several weeks later, Carla attended a sexual violence prevention program and felt that she had experienced the same type of behavior as described in the case study presented there. She went her advisor to ask what she should do. They called the campus police and subsequently met with a female officer. The officer reluctantly told Carla that since several weeks had passed, there would be no evidence that would support pressing criminal charges, but she encouraged Carla to file a complaint with the campus conduct officer. Carla met with the assistant dean and made a formal complaint.


# 20-Minutes-to…*Trained*:
# Advising the Responding Party
## Case Studies Question & Answer

### Don & Carla

For Discussion:

- Carla wishes to proceed with the institution's resolution procedure. What information does Don have a right to at this point?
  - Don should receive a notice of allegation requesting an initial interview with investigators.
  - The notice should inform Don sufficiently such that he can respond to the allegations.
  - Don should be notified that he has the right to an advisor of his choosing. A pre-interview meeting with the advisor should be offered to orient the advisor to the process.
  - Don should receive copies of the policy alleged violated and the procedures used for resolution.
- How much of the allegation should be shared with Don before/during the initial interview? Why?
  - Don should get, at the very least, a description of the allegations with enough detail to allow him to address the specific circumstances.
  - A simple description of the portion of the policy alleged to be violated is not sufficient.
  - Due process mandates that Don be able to adequately defend himself and meaningfully participate in the initial interview and subsequent opportunities to participate in the process.
- Does Don have a right to an advisor at the initial interview? What is the advisor's role during the interview?
  - Yes, Don has a right to an advisor of his choosing accompanying him to the initial interview and all subsequent proceedings that Don can participate in.
  - The advisor's role is dictated by institutional policy. Typically, advisors are allowed to confer with the party during proceedings or step out of the room with the party when appropriate. However, advisors are not usually allowed to speak on behalf of the party or participate in lieu of the party. Advisors may be allowed to speak to investigators and other administrators outside formal interviews or hearings.
- How would you describe the process to Don? When will he have opportunities to participate in the process?
  - Outline the major stages of the investigation and decision-making process.
  - Identify major stages in the process with a rough timeline and a note that the timing may change and communication to all parties will take place if/when the timeline changes.

- Don will have the opportunity to make statements, provide witnesses, and submit evidence during the resolution proceeding. Don will receive copies of party and witness statements to review and comment. He may submit questions to be posed to other parties and witnesses, may review their answers, and submit follow-up questions.
- Don will have the opportunity to review the final investigation file/report and comment on it.
- Don may attend and participate as appropriate in any meeting.


# ATIXA VAWA SECTION 304-COMPLIANT PROCESS ADVISOR MODEL LANGUAGE

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- Once the right to an advisor is afforded to students and employees, it will be difficult to justify why that right applies to some behaviors and not others. Many campuses will therefore want to implement this right across resolution processes more broadly than VAWA Section 304 contemplates.
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- Unless a campus prefers a broader role for an advisor, the advisor is only present to guide their advisee, not to represent them, speak for them, or play an active role of any kind in the process.
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    - Relatedly, Title IX does not require institutions to provide the same type of advisor to both parties, merely that the parties have the option to have an advisor.
- Many campuses are wisely choosing to train a pool of campus advisors who can be offered to the parties. The parties are not obligated to choose campus advisors, and may choose advisors who are not a part of the campus community.
    - Students should execute FERPA consents as appropriate to allow the campus to communicate with an advisor, if desired.
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- Universities should resist the urge to automatically ante up their legal counsel simply because one party or both parties of the resolution process elect to be advised by attorneys. Increasing the legalistic and/or adversarial nature of campus proceedings is not advisable, unless there is a compelling reason for the university to choose to have its counsel present.

**ATIXA Position Statement on the Free Speech Rights of Individuals Involved in Sexual Misconduct Proceedings**

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ATIXA issues this position statement to express its significant concerns regarding the inappropriate practice by colleges and universities of either explicitly or implicitly silencing parties – and their advisors - involved in campus sexual misconduct proceedings. Through our leadership in the field, we have witnessed a continued use of gag orders and related policy provisions that seek to silence these individuals. This practice is troubling because it fails to respect the free speech rights of the parties and their advisors and runs contrary to regulations and guidance put forth by both the U.S. Department of Education (ED) and the National Labor Relations Board.

Despite the current prevalence of such confidentiality pledges or gag orders, Federal Student Aid (FSA), an office of the U.S. Department of Education has made clear that such methods of silencing parties are not acceptable. On July 16, 2004, FSA instructed Georgetown University to discontinue use of a policy which required students reporting sexual assault to sign non-disclosure agreements in order to learn the outcome of their hearings.[1] Georgetown's policy prohibited those who refused to sign the agreements from receiving conduct outcomes and sanction information related to their reports. FSA clarified that this policy is impermissible: colleges and universities "cannot require an alleged sexual assault victim to execute a non-disclosure agreement as a pre-condition to accessing judicial proceeding outcomes and sanction information under the Clery Act."[2]

The National Labor Relations Board (NLRB) has issued similar denouncements of this type of policy. In a June 26, 2015 decision, the NLRB found that an employer's practice of instructing sexual harassment investigation interviewees to refrain from discussing matters pertaining to the investigation was unlawful.[3] The NLRB determined that employees have the right to "discuss discipline or ongoing disciplinary investigations involving

[1] Federal Student Aid, U.S. Dep't of Educ. (16 July 2004), FSA LETTER TO GEORGETOWN UNIVERSITY (acknowledging "open issues of genuine confusion in the higher education community" with regard to dissemination of campus judicial proceeding outcomes), available at: https://studentaid.ed.gov/sa/sites/default/files/fsawg/datacenter/cleryact/georgetownuniversity/GUFPRD07162004.PDF.

[2] *Id.* at 2.

[3] National Labor Relations Board (June 26, 2015), Banner Health System d/b/a Banner Estrella Medical Center, 28-CA-023438; 362 NLRB No. 137, available at: https://www.nlrb.gov/cases-decisions/weekly-summaries-decisions/summary-nlrb-decisions-fo-week-june-22-26-2015.

themselves or coworkers." Although employers may be able to present specific, exceptional circumstances which necessitate privacy, the NLRB decision establishes the presumption that such confidentiality provisions are unlawful.

While couched in a different context, in a September 22, 2016 Advice Memorandum, the NLRB held that previously-existing Northwestern University's rules controlling football players' speech were unlawful and mandated that the University provide the players with significantly more freedom of expression.[4] The NLRB noted that the players must be allowed to post on social media, discuss matters of their personal health and safety, and speak with members of the media.

The ability to discuss and critique the resolution process as it unfolds is an essential right of the parties to Title IX and related resolution proceedings. ATIXA firmly believes in robust free speech protections, especially in the context of higher education, and is deeply concerned with the prevalence of policies and/or practices aimed at limiting these protections and rights of the parties – or their advisors – involved in civil rights resolution proceedings. It is ironic to lose one's civil rights by engaging in a process designed to protect and defend them.

While trepidation regarding sensitive communications is understandable, and schools must maintain the privacy of resolution proceedings, schools goes too far when they gag the parties from sharing their experiences, their truths, or even their critique of the resolution process. ATIXA is aware of cases in which the overzealous use of confidentiality provisions has prevented students from accessing advisors and hiring attorneys. Privacy, as envisioned by OCR,[5] is something that must be maintained by the institution, not imposed upon the parties. As ATIXA's mission is to continue to improve upon the manner in which sexual misconduct is addressed in higher education, ATIXA exhorts our members to maintain the highest standards of practice and we encourage our members to desist from utilizing any such speech-constraining policies or practices in their sexual misconduct proceedings.

ATIXA is also mindful of the larger society in which schools and colleges operate, and the impact that #MeToo is having both within schools and without. More and more often, confidentiality agreements seeking to bind parties are becoming disfavored, controversial, and subject to litigation, especially when wielded by the powerful to silence the powerless.

*This position statement has been ratified by the ATIXA Board of Advisors, June 1st, 2018.*

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[4] National Labor Relations Board (September 22, 2016), Advice Memorandum re: Northwestern University, 13-CA-157467, available at: https://www.scribd.com/document/327182409/NLRB-Advice-Memorandum-Northwestern-University-Football.

[5] OCR refers to Title IX "confidentiality", but there is no independent or statutory source for this protection in Title IX. As such, when OCR talks about "confidentiality," it seems to be referencing or even bootstrapping external sources of privacy protections, rather than asserting something inherent in Title IX. "Confidentiality" then in the OCR sense is not a legal status, and no privilege attaches. While confidentiality is a highly protected status under law subject only to court-made and statutory exceptions, privacy is a lower level of protection allowing internal sharing on a need-to-know basis and under whatever exceptions are created by applicable privacy protections. Thus, OCR seems to have incorporated the privacy imposed by statutes like FERPA and state employee record privacy laws, which are the only sources for such protections in law.

**ATIXA Tip of the Week**
**May 15th, 2014**

## Advocates and Advisers

*Part 2 of a two-part series*

**Authored by Saundra K. Schuster, Esq., ATIXA Advisory Board Member**

As a follow-up to last week's Tip of the Week on Sexual Assault Advocates and victims' grievance process advisers, we turn to another frequently asked question, "If we provide sexual assault advocates and advisers for a complainant, must we do the same for the accused individual in order to honor the concept of equity?"

The answer is no, institutions are not under an obligation to provide advisers for both parties. However, in the spirit of equity, we encourage institutions to train a group of potential advisers who can be used by both complainant and respondent. Institutions who desire to provide advisory support to parties in a sexual misconduct matter should ensure that those advisers are thoroughly trained.

A student's adviser during the grievance process needs to provide the most knowledgeable and comprehensive information to the individual they are advising. Accordingly, sexual misconduct advisers should be thoroughly trained in all relevant institutional policies and procedures, the grievance process and the adjudication and appeal processes. Training content for advisers should reflect the categories delineated in the column "Level A" within the ATIXA Title IX/SaVE Act Prevention & Training Checklist. We would further encourage institutions to train sexual assault advocates in accordance with, at a minimum, Level B content, though Level A would give them a slightly more comprehensive understanding of the institutional policies and procedures.

**ATIXA Tip of the Week**
**September 17th, 2015**

## Allowing an Advisor of Choice

**Authored by Daniel C. Swinton, J.D., Ed.D., Senior Associate Executive Director, ATIXA**

**What are the requirements regarding allowing an "advisor of choice" for cases of sexual assault, relationship violence and stalking? What about other violations of policy, such as sexual harassment?**

The requirement stems from the amendments to Clery made by VAWA Section 304. The requirement to allow an "advisor of their choice" is for "allegation[s] of dating violence, domestic violence, sexual assault, or stalking". Specifically the language reads, *"(iii) Provide the accuser and the accused with the same opportunities to have others present during any institutional disciplinary proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice. (iv) Not limit the choice of advisor or presence for either the accuser or the accused in any meeting or institutional disciplinary proceeding; however, the institution 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."*

That said, I would recommend allowing an advisor of their choice for all disciplinary issues – why carve out one segment of issues when they so often overlap with other violations and issues. Sometimes we do not know prior to conducting an investigation whether issues are one type of violation or the other. If you begin an investigation without allowing an advisor of their choice, then realize it is necessary halfway through, you have significantly breached your own policies. Over the last few years, I have not seen carve-outs for these four issues (Domestic Violence, Dating Violence, Stalking and Sexual Assault) work well - especially because there are often conflicting definitions between federal and state laws and institutional policies. These are also complex cases that often overlap with other areas such as alcohol, drugs, vandalism, theft, etc. so we are rendering findings on those allegations using a different process than on allegations that do not cross into one of the four crimes.

**ATIXA Tip of the Week**
**April 20th, 2017**

## Providing Advocates to Respondents

***Authored by Brett A. Sokolow, J.D., Executive Director, ATIXA***

**Should schools provide advocates to Respondents?**

I hope we do not get into this business. There is no recognized body of knowledge on how to be a "respondent advocate." That's really the role of a process advisor or attorney, not an advocate. If your employee takes on advocacy, and the respondent "loses," your institution and your advocate will become a target of frequent litigation. And, they'll argue that your advocate was there to distract them from getting an attorney, which they really should have had. I'm all for process advisors, but I don't think advocates make sense. I've had some lousy experiences lately with respondent advocates giving very bad advice, misstating policy, and corruptly telling students things to help the college, not the student. It has left a bad taste in my mouth.

In my experience, most people with advocacy training won't want to work on behalf of a responding party. In terms of helping the responding party process emotions, that's what the counseling center is for. The issue is that most institutions only allow one advisor, so if a student has an attorney and an advocate, they have to choose which one they want in the room. Of course, they can have as many advisors outside the room as they want. If you are going to do this, you'll need to address confidentiality and duty to warn, and you'll need to provide high-quality training, and on-going professional development.

Don't fall into the equity trap on this. If you offer an advocate for all victims/survivors, regardless of gender, you are doing all you need to be doing to satisfy Title IX.

# THE 2017 NCHERM GROUP WHITEPAPER

## DUE PROCESS AND THE SEX POLICE

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The NCHERM Group, LLC
Systems level solutions for safer schools and campuses

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# I. Introduction

We started out writing our annual whitepaper, and it turned into a book: The ATIXA Playbook. We expect that The Playbook will become your essential "how to" guide for ensuring that the resolution of sexual misconduct allegations at your college is done right. The NCHERM Group has typically focused our annual whitepaper on topics where gaps exist in the field so that we can accurately identify a weakness, and provide the practical advice that begins to move the field toward filling the gap with stronger practices. We have focused in the past on topics such as incident response and investigation, as well as the unique sociology of addressing intimate partner violence in a college environment. This year, the Whitepaper excerpts two sections of The ATIXA Playbook. The first is focused on advanced application of consent concepts to ensure that colleges don't turn into the sex police. The second focuses on ensuring due process specific to sexual misconduct procedures, but has universal applicability to all forms of college conduct proceedings.

Some pockets in higher education have twisted the 2011 OCR Dear Colleague Letter and Title IX into a license to subvert due process and to become the sex police. The ATIXA Playbook and this Whitepaper push back strongly against both of those trends in terms of best practices. By design, the models of proof provided in The ATIXA Playbook address the substantive due process of making a reliable determination, and we include below a critical checklist tool for you on substantive and procedural due process. Our concerns around procedural due process are so significant that they continue to be a top priority in our trainings. In 2017, we'll be offering a series of due process-specific trainings and tracks, to bolster the due process elements of our training curricula that have always been part of our emphasis.

If you need an extensive written guide, the Foundation for Individual Rights in Education's (FIRE) Guide to Due Process and Campus Justice says what needs to be said about this topic.[6] It is free and available online. Why re-invent the wheel? Where we depart with FIRE is that FIRE seeks to expand college due process and push it well beyond what the courts have required. We like college due process just the way it is, because we believe the protections that courts currently afford within college processes are well-balanced against the educational and developmental aims of the college conduct process. We believe higher education can acquit fairness without higher standards of proof, actual cross-examination, and full-on, adversarial hearings presented by attorneys.[7]

Ultimately, you will determine whether FIRE's vision of expanded due process becomes the law of our land. The field is losing case after case in federal court on what should be very basic due process protections. Never before have colleges been losing more cases than they are winning, but that is the trend as we write this. The courts are not expanding due process yet, but are insisting that colleges provide the full measure of college-based due process that has been required over almost 60 years of litigation by students. Now, OCR is adding pressure by holding colleges accountable for due process failures under Title IX. And, some courts are willing to hold private colleges to elevated procedural fairness, as if they were public universities. That backdrop means we all need to sharpen our games, or the courts and Congress may sharpen them for us.

Why are we systemically failing to protect the rights of all students? FIRE took a shot at higher education on January 19th, 2017, calling administrators amateurs in addressing sexual violence.[8] If you resent that

[6] https://www.thefire.org/fire-guides/fires-guide-to-due-process-and-campus-justice/fires-guide-to-due-process-and-fair-procedure-on-campus-full-text/

[7] We do agree with FIRE that definitions of hostile environment sexual harassment should be more rigorous, and ATIXA's model policy has long-used the rigorous definition from the Supreme Court's decision in Davis v. Monroe County Bd. of Educ., 526 U.S. 629 (1999).

[8] https://www.thefire.org/law-enforcement-involvement-key-to-protecting-students-from-sexual-assault/

characterization, we need to stop resembling it. Sharpen the qualifications of those at your colleges who are the custodians of due process and advance the level of training that is afforded to them. Read recent decisions involving George Mason University, James Madison University, and Brandeis University[9] to realize how far we still need to come in this field. Don't be fooled by the fact that higher education wins some of these lawsuits, as the law favors institutions. The bar on due process lawsuits is high, and courts have been deferential to college disciplinary decisions, though that historical deference is eroding as judges lose patience with skewed college proceedings.

Now, higher education needs to start winning because of its excellence and because it is highly respectful of student rights. If being a custodian of due process is a mid-level management role on colleges, that does not mean it has to be a mid-level institutional priority. The courts can't expand due process if case after case shows judges that higher education is exceeding the due process floor set by federal law. We critique FIRE for its failure to advocate for the civil rights of victims, but FIRE is right about this. Our goal is to help the field fulfill the current mandates of law, and move out of the current cycle of tempting courts to turn college resolutions into exact replicas of the criminal justice process.

Taking a different approach than we have is past Whitepapers, we've chosen to illustrate our points about consent with two case studies, offered below. The content of the case studies and discussion is not for the faint-hearted, but neither is this subject matter.

## Are You the Sex Police?

One of the reasons we prioritized re-issuing and updating the NCHERM Group's 2005 Whitepaper in the form of the 2017 ATIXA Whitepaper this year is to provide further corrective direction as higher education continues to veer off-course in its resolutions of college sexual violence allegations. The NCHERM Group is widely credited with helping to popularize and institutionalize consent-based policies in higher education. As such, we have a responsibility to the field to make sure that this body of knowledge is used correctly, and to continue our thought-leadership on the ways that consent is applied in theory and practice. As usual, we'll be blunt.

Some of you have become the sex police.

Maybe you wound up in this role as the result of political pressures – real or imagined – that make you feel like you need to be policing student sexual mores. Or, for some of you, you took the 2011 DCL as a license to become the sex police that you always wanted to be. Or, maybe it has been a gradual and inadvertent shift for you. For whatever reason, if you have become the sex police, we want you to know that The NCHERM Group condemns what you are doing in the strongest possible terms and entreats you to change your thinking and your practices. Our tone in this section reflects the gravity and import of the situation.

Sex policing isn't working for you. The field is being hammered by an unprecedented wave of litigation, and higher education is losing! Do you remember the days when judges were deferential to the internal disciplinary decisions of college administrators? If those days are rapidly receding or are gone, you have to ask yourselves what role you have played in that. If you are the sex police, your overzealousness to impose sexual correctness is causing a backlash that is going to set back the entire consent movement. It is imperative that

[9] http://ia801309.us.archive.org/2/items/gov.uscourts.vaed.314481/gov.uscourts.vaed.314481.92.0.pdf; http://www.vawd.uscourts.gov/OPINIONS/DILLON/5.15cv35doevalger.3.31.16.pdf; https://www.documentcloud.org/documents/2799157-John-Doe-v-Brandeis-University-3-31-2016-Ruling.html

you self-correct and find a golden mean or middle path on this issue. You are sowing the seeds of your own destruction. We've been beating this drum since 2012, and we will get progressively louder and louder until you get it. If you persist, you will touch off a new wave of due process protections in the courts and in Congress, which will once again skew the playing field for victims and those who are accused – a playing field some of us have worked our entire careers to level. You don't want that because it will deeply inhibit your ability to spread the sexual correctness to which you are so very wedded. So, stop it. Now.

If you don't know what we mean by sex policing, it's happening on two levels: the substantive and the procedural. Procedurally, responding parties need to be accorded the full measure of their rights. The courts are starting to smack colleges down left and right when due process corners are cut, bias is in play, and politics motivate the imposition of corrupt outcomes. You need to get your procedural houses in order, because no one is served when the court overturns your decision, especially you, so why drive toward an outcome that won't be sustained by the scrutiny of the courts?[10] We want you to suspend and expel those who commit sexual violence at colleges. This has been a central theme of our work for almost 20 years. But, we need you to do it by the book.

If the preponderance of the evidence standard of proof is a fairly minimal standard on the continuum of proof, we need you to apply it with steadfast rigor. Preponderance is an on/off switch. You're either over 50% with the evidence you have found, or you're at 50% or under. Play it straight and keep your thumb off the scale. The NCHERM Group's Managing Partner, Daniel Swinton, says it best when he trains on Title IX: "If you picture the scales of justice, with evidence on either side, the Title IX Coordinator is the post in the middle, holding up the scales. The upright neutrality of the post allows the scale to tip, but does not cause it to do so. The evidence does, and nothing else should."

For those of you who relish being the sex police, we don't respect what you are doing. Your thumb is on the scale, and if you intend to keep it there, we beseech you to at least be intellectually honest about it. Your students should know that you intend to examine their sexual decisions under a microscope. Your applicants should know that when choosing a college, you err on the side of caution and kick accused students out even if the evidence is uncertain. They should know you aren't just victim-centered, you are victim-favoring. Perhaps many students will like that. They will seek your college out because of your bias. But, for those that don't, the truth in advertising will help them to choose a college that values fairness and equity, if that is their preference. It's ours.

The rest of you have your thumbs on the scale inadvertently. Some of you stumbled into sex policing and simply need some perspective to realize you've gone too far. You are willing to self-correct, and we are eager to help you. We want you to be victim-centered. Every college should be. But, being victim-centered is different than being victim-favoring, and we recognize and honor that you are intent upon learning how to find the correct balance and upon affording equal dignity to every student, regardless of their role in your resolution process. You're our kind of administrator, so keep reading – this section is for you!

That brings us to the second form of sex policing, which is substantive. Put simply, you are misunderstanding or misapplying the rules. "Affirmative consent" policies are the norm now on colleges, and they are a boon to the cause of equity, but they need to be used correctly or the entire concept will get a bad name. Consent is clear permission for sex by word or action. It's an elegant concept that is simple to capture in policy, but

[10] And we'll note, as we have since day one, that the offending colleges being slapped the hardest by the courts are not those who have shifted to the civil rights model, but those who still cling to using the traditional student conduct process to resolve allegations of civil rights discrimination.

difficult to apply in practice. We can't change that for you. Human interactions are messy, confusing, and illogical. That includes sexual interactions. You should be struggling to apply the consent rules at your college. You should be wrestling with them, challenging your understandings, and trying to find the right balance between being the sex police and allowing free reign for abusive sexual practices. Some of you are off track because you are applying a utopian lens to consent. You consciously or unconsciously want sex to be ideal, every time. Get over that. Sex is rarely ideal, especially for those 18-24 in age. Having less-than-ideal sex is unfortunate, but probably universal at some point for all people who are sexually active. We have to be able to separate less-than-ideal sexual experiences from those that are sexually transgressive of our rules. How?

To do so, we must understand that consent is imperfect in both theory and practice. It wasn't meant as a perfect construct, but as a better construct than the force and resistance-based policies that defined sex offenses a generation ago. Because consent is an imperfect construct, applying it with rote literality will not produce good results. Consent is meant to be applied in context, not in a vacuum that assumes all students are equal and all sexual events have parity to all other sexual events. Our consent rules need to be malleable to account for the vagaries of the human experience, and we need to be flexible enough to allow for the fact that human communication and interaction are imperfect. Late adolescence can teach people how to become sexual beings, but we can't expect that students arrive at college fully equipped to think and act as mature, respectful sexual partners. They will fumble a bit. They will fail to make each sexual interaction ideal. They will not live up to our standards or theirs. So, should we discipline them for that developmental failure? We should impose our discipline for abusive transgressions, those actions according to OCR that have a discriminatory effect on the basis of sex or gender. Rudeness, insensitivity to one's partner, having underdeveloped communication skills – these are behaviors that need to be corrected by appropriate intervention – but only the sex police believe they need to be disciplined[11].

In being sensitive to our own tendencies to want to be the sex police, we also need to consider that issue of intent. Should we give someone a break if they transgress against another student, but didn't intend to do so? No, of course not. But, intent is much more complex than just the simple question of whether someone meant to transgress against another person's sexual boundary. At this point in our understanding of consent theory, we'd say that intent is an aggravating factor, for sure. If you have the intent to violate someone, that heightens the abusiveness of the act. But, lacking the intent can mean a lot of different things, depending on context. It can mean carelessness, recklessness, naïveté, drunkenness, and many other things which may equate to a violation of policy, or might not. It's not fair to say that the lack of intent means someone didn't violate the rules, but we need to become better at reading the context to know more precisely what the lack of intent means to our ultimate determination of an allegation.

To help us get there, we posit that you should look at consent more as transactional and contextual, meaning that we view the entire sexual interaction and the context of the larger relationship. We contrast that to an approach that is more particularized and occurrence-based, where finders-of-fact tend to hyper-focus on each touch within a sexual interaction and ignore the larger context of the relationship. There are always exceptions, but you will be best served by evaluating consent based on the perspective of a reasonable person who is viewing the totality of the circumstances. That means we look at the whole relationship or interaction (the transaction), not just one time that someone might have touched someone else problematically (the occurrence). And, we ask how a reasonable person would view the situation, and whether through that lens the behavior does or does not cross the line. Two case studies will demonstrate the reasonable person

[11] It is important to note that some may self-define as survivors based on such experiences and are entitled to access support services, even if not policy processes.

concept and the transaction concept. Approach them as if they are a Facebook™ quiz that lets you figure out your sex policing tendencies on a scale of 1 to 100.

### *a) CASE STUDY #1 – LIZ AND NEVEAH*

Liz and Neveah are roommates on your campus. Liz is a virgin and identifies as straight. Neveah identifies as sexually fluid, and is very sexually experienced compared to Liz. One night after they have gone to bed, Liz heard Neveah masturbating along with the sound of a vibrator. The next day, Liz asked Neveah about it, and Neveah was very open with her, explaining that she has a "Bunny" which she described as a vibrator designed to allow her to penetrate herself while simultaneously stimulating her clitoris to climax. She was not apologetic or embarrassed that Liz overheard her masturbating, and asked Liz if she masturbates. Liz shyly said no and Neveah offered to teach her how if she is interested. She asked if Liz wants to see the Bunny. Liz seemed curious, so Neveah took it out and showed it to Liz. Liz immediately said she could never use it because she was diagnosed with vaginal hypoplasia, meaning a very narrow vaginal canal, and that the Bunny would never fit.

Neveah, sensing Liz's growing interest, told her that she can use the Bunny on Liz if Liz would like, and go very gently with it to ensure that it doesn't hurt. Alternately, she told Liz she can just use the Bunny's "ears" on Liz, without penetrating her, if it's too tight. Liz said she'll think about it, and Neveah could see the flush on Liz's face and how excited she was. Later that night, Neveah was more open about her masturbation and started to use the Bunny on herself while Liz was watching from across the room. She then asked Liz if Liz wants to try it. Liz agreed, but asked Neveah to show her how to do it, the first time. Neveah cleaned the Bunny, lubricated it, and slowly penetrated Liz with it. She asked Liz to tell her if it is painful at any point. Neveah began to use the Bunny on Liz, and Liz flinched in pain, telling Neveah to go slower. Neveah slowed down, and soon Liz was uncomfortable again. Neveah shifted the position of the Bunny and Liz became more comfortable. Neveah used the Bunny on Liz until she climaxed. Neveah tells Liz, "if you liked that, you should feel my tongue on you next time." Liz smiled, and they go to bed.

The next night, Neveah again offers to use the Bunny on Liz. Liz agrees, but is immediately uncomfortable with the sensation of penetration by the vibrator. Neveah repositions it several times, but can't find a comfortable position for Liz. Liz tells Neveah to stop because she is sore from the night before. Neveah stops penetrating Liz, and uses the "ears" of the Bunny to stimulate Liz without penetrating her. While doing so, Neveah also uses her tongue to bring Liz to climax, and Liz presses her hands against Neveah's head as she does this. Afterward, Neveah asked Liz to use the Bunny on her, which Liz did. The women kissed and spent the night in the same bed.

The next night, Neveah climbed into bed with Liz, and began to perform oral sex on her. She told Liz she had lubed the Bunny and it was ready for her. Liz agreed and then allowed herself to be penetrated by the Bunny, and while it was still uncomfortable, it was less so than the night before. At one point, Liz cried out in pain, and Neveah repositioned the Bunny for greater comfort. Liz then seemed to get more into it, was arching her back and moaning with pleasure, and Neveah continued. Neveah also slapped Liz on the buttocks several times as they engaged in sexual contact. As Neveah continued with the Bunny, Liz called out in pain again, saying, "No. Stop." Neveah withdrew the Bunny slightly and eased up on the speed settings of the vibrator. She repositioned the Bunny again to ensure Liz's comfort, and penetrated her gently once again, but Liz pushed her hand away, making her stop, crying that she was just too tight for it. They went to bed.

The next day, Liz was talking with Burke, a woman on the hall who identifies as lesbian. Burke asked Liz if Neveah had turned her into a "lez" yet. Liz pretended not to understand, and Burke said, "She'll groom you

and the next thing you know, she'll turn you into a rug muncher." Liz suddenly realized that that was Neveah's plan to seduce her all along. She became very uncomfortable with Neveah as a roommate, someone she thought was trying to help her become more sexually comfortable as a friend, but who was really coming on to her as a girlfriend. Liz went back to her room and told Neveah how uncomfortable she was, and that all sexual contact needed to end. Neveah, who had perceived her encounters with Liz as a budding romance, was shocked, but agreed to keep things platonic.

The more Liz thought about it, the more upset she became. She felt betrayed by her roommate. Three days later, she went to the Title IX office and reported what happened. Neveah was notified of three alleged offenses: Non-Consensual Sexual Contact for performing cunnilingus on Liz without consent during the second encounter; Non-Consensual Sexual Intercourse for continuing to penetrate Liz with the Bunny during the third encounter after Liz said, "No. Stop"; and intimate partner violence, for slapping Liz on the buttocks during sex without consent.

### (1) Discussion

STOP HERE. It's time to analyze this fact-pattern and develop a gut check on what you think. Does your gut tell you that each of these behaviors does, technically, violate your consent policy? Many people would say so. But, take a step back and look at the totality of their interactions. Answer these questions:

- Does the totality of the evidence suggest an abusive series of encounters?
- Do you have evidence that Neveah was trying to groom Liz or sway her sexual orientation?
- Do you have evidence that Neveah intended to discriminate against Liz or cause her a hostile environment on the basis of sex?
- What assumptions did you make about Liz's allegations?
- Do you have evidence that Neveah meant to transgress Liz's sexual boundaries?
- What do you think Neveah's responses to these allegations would be?

Neveah was shocked by the allegations. She realized that Burke might be interested in Liz, and was poisoning their budding relationship. She insisted that she had been incredibly respectful of Liz, not abusive. Neveah said that she constantly checked in with Liz during sex, repositioned the Bunny to ensure Liz's comfort, and stopped when asked. She said she did not realize that Liz wanted her to stop that last time, thinking that like previous times, Liz meant she just needed to adjust the Bunny. Once she realized that Liz really meant stop, she stopped right away, and had only penetrated her once after she said to stop, to adjust the vibrator. So, is this a misunderstanding or a sex offense?

If you determined that this is sexual misconduct, you're confusing Liz's discomfort with her own sexual experimentation with a non-consensual sexual experience. Please understand that it is the unanimous consensus of all eight authors of this *Playbook* that Neveah should be found *not* in violation of the sexual misconduct policy. Maybe Neveah did seduce Liz. That's not against policy. Maybe Neveah did want Liz to explore her sexuality or sexual orientation. That's not uncommon in college, and as long as it isn't coercive, that isn't sexual misconduct. But, you might be thinking, don't Neveah's behaviors meet the definitions of sexual misconduct and intimate partner violence? Don't you have to stop when someone tells you to stop in the middle of sexual intercourse? Don't we teach our students that? Don't we tell them you can't touch someone sexually without getting permission first? We don't want our students slapping each other during sex, do we?

Becoming the sex police can be a little insidious, creeping up on us without our even realizing we are propagating an orthodoxy of sexual correctness. It's true that Liz told Neveah to stop during the third interaction, and that Neveah did not stop. If a male student kept thrusting when his female partner told him to stop, would we look at this differently? The ATIXA model policy says that if your partner withdraws consent, you must stop in a reasonably immediate time. That is what Neveah did. One additional thrust of the vibrator was not meant to be abusive, but to try to make Liz more comfortable, and she stopped within several seconds of understanding what Liz really wanted. Thus, the context is what matters here. At first, Neveah was not clear whether Liz was telling Neveah to stop, or communicating that she was uncomfortable with the position of the Bunny. Liz is saying now that she wanted Neveah to stop, and maybe that is true, but Neveah was thinking about the second sexual interaction, and how she had to position the Bunny carefully so that it did not hurt Liz, just as she had done earlier in the third sexual interaction as well. She thought she could reposition it similarly during the third interaction when Liz said stop, to increase Liz's comfort and make sure it hurt less. Was this a reasonable interpretation by Neveah? Yes, Neveah's interpretation was reasonable when considered in the context of the totality of the circumstances surrounding their interactions.

Did she have reason to believe that Liz really wanted her to stop penetrating her entirely, or that she just wanted Neveah to be more gentle or to reposition the vibrator? If Neveah moved the Bunny and was then more gentle with it as the result of Liz's objection, wasn't she trying to make her partner more comfortable? How is that discriminatory? Doesn't no mean no, though? Well, during the second encounter, when Liz said stop, it meant a need to re-position. Isn't it reasonable to think the same context applied to the third encounter? After all, Neveah was clear that, after she tried to reposition the Bunny during the third encounter and Liz was still in pain, she needed to stop and she did. We can't chalk this up to a miscommunication about what Liz wanted, but Neveah's interpretation of the situation is reasonable given the totality of the circumstances.

Yes, but what about the oral sex during the second encounter? Taken together with what happened in the third encounter, doesn't the totality of the evidence show that Neveah was pushing Liz past her boundaries? I hope we can agree that when Neveah was using the Bunny's ears on Liz, and then began to use her tongue, Neveah did not have Liz's clear permission to do so. That was not consent, and most people can respect the distinction between agreeing to stimulation by an object and the use of someone's tongue. Permission for one does not imply permission for the other. To understand why this isn't sexual misconduct, you need to understand the concept of ratification, which means retroactive consent demonstrated after the fact. This happens in sex ALL THE TIME, though we don't account for it in our policies. Liz continued to have sexual interactions and want sexual interactions with Neveah after the oral sex. They had oral sex a second time. Liz pressed Neveah's head toward her as Neveah performed cunnilingus. That ratifies it after the fact, even if Neveah didn't strictly ask for consent when she first did it.

Not objecting to something is not the same thing as ratification, so be careful not to confuse those two things. While it's entirely possible that Liz was comfortable with a friend teaching her how to use a sex toy, but wholly uncomfortable with engaging in sexual activity directly with another female without the sex toy as a buffer, that's not the evidence we have here. Should Neveah have asked first? Sure. But, is it a sex offense that she didn't? Not in this context. Failing to object is passive. Ratification is an active participation subsequent to an encounter that began without clear consent.

Well, what about the butt slapping, then? *Fifty Shades of Grey* was a movie that made more than half a billion dollars at the box office in 2015. Light bondage and practices drawn from the BDSM world have gone mainstream. Again, context is everything. Was Neveah trying to abuse her partner? No. Should she have asked first? Sure, but to call a few slaps on the butt during sex a form of intimate partner violence is to water down

what intimate partner violence is to the point of meaninglessness. ***If everything is discrimination, then discrimination means nothing*.** Many of our students are influenced by mainstream erotic and even hardcore pornography. You can't assume you can treat your partner the way it is depicted on screen, but we need to take into account that for many of our students, if they have learned their sexual mores from pornography, this is an opportunity to re-socialize them, educationally, in respectful sexual patterns. What they think is normative is potentially going to be different than our sexual norms.

A second case study will challenge us to apply the reasonable person lens.[12]

### *b) CASE STUDY #2 – WES AND TAMEKA*

Tameka was flirting with Harris at the party. She told him if he agreed to date her, she would hook up with him that night. He told her he wasn't the dating type. Later, friends saw Tameka flirting with another student, Wes. The friends also testified that they saw Tameka and Wes walking hand-in-hand away from the party toward her residence hall. Surveillance video from the hall cameras shows that the two entered her residence hall at 11:14pm and proceeded to the common lounge, which was empty. While there is no audio, the video showed the two kissing, and then showed Tameka on top of Wes while he was lying on the couch. The video showed that she was grinding on him as he fondled her breasts, first over and then under her shirt. At one point, her breasts were clearly exposed on camera. They were on the couch for 23 minutes. The video then shows them getting up, and Tameka leading Wes down the hall by the hand. Their stories diverge at this point.

Tameka stated that she was going to see Wes out, but had to go to the bathroom. She stopped at her room on the way out. She let him into her room to wait and asked him to be quiet because her roommate was sleeping. She went into the bathroom and said that after she used the bathroom, he pushed his way inside the door and closed it behind him, before she had a chance to put her pants back on. She said that he then told her she couldn't leave him hanging, referring to their activity in the common lounge. He asked her for a handjob, and she agreed. He took off his shorts. She proceeded to rub his penis with her hand. He then asked her for a blowjob, but she said no, and continued with the handjob. As she gave him the handjob, he fondled her breasts and they kissed. He then began to rub between her legs and she allowed this and continued the handjob. He then penetrated her with his finger. She moved his hand away, stopped rubbing his penis, and told him he needed to leave. His account differed considerably.

Wes said that while on the couch in the common room, he suggested they go to her room and continue things more privately. She told him that her roommate was there and would be asleep at that hour. She then suggested they could go in her bathroom. They agreed, got up from the couch and she led him by the hand to her room, reminding him they needed to be quiet because her roommate would be asleep. They entered the room, and then went into the adjoining bathroom. There, she took off his shorts and hers and began to give him a handjob. He asked for a blowjob, but she said no and continued to rub his penis. During the handjob, they kissed and he fondled her breasts. He then began to rub her between her legs and she continued the handjob and was making moaning sounds. He teased her that she needed to be quiet or she'd wake her roommate. He then penetrated her vagina with his finger, and she immediately moved his hand away from her. She continued the handjob until he climaxed. Video shows that she escorted him from the residence hall at 12:24am, shows that she held the door open for him as he exited, and that they kissed as he left.

[12] Some people think it's important to debate the reasonable person standard. We do not. OCR says it's the reasonable member of a college community. For our purposes, we always interpret the standard to be a reasonable person in the same or similar circumstances, so it is contextual.

At 10:04am the next day, Tameka texted Wes, asking him how she should refer to their "couple status" when she told her roommate about the night before. At 10:18am, Wes texted her that he felt really guilty about what they did the night before because he had a girlfriend. He told Tameka that she was really nice, but that she needed to stay in the friend zone and that he hoped he hadn't led her on. When she got the text, she immediately removed him from her contacts and blocked him on social media. She told her roommate that she needed to find someone who was ready for a serious relationship, and that the night before with Wes had been a mistake. Wes told his roommate that he felt bad that he had led her on.

By that evening, rumors were circulating that Wes had assaulted Tameka. He heard the rumors from a friend and decided he needed to address them. He texted Tameka at 8:40pm, "Please tell people I didn't rape you. Some people are spreading a rumor." She texted back at 8:42pm, "but u did rape me. Don't contact me again." The next morning, Wes went to the dean to address these rumors because he wanted to be clear that he had not raped Tameka. When he recounted to the dean what had happened, and concluded that they hadn't even had sex, so he couldn't have raped her, the dean informed him that it sounded from the story like he might have raped her. Wes was placed on interim suspension and an investigation was initiated. Wes tried to file a counter-claim that the handjob was not consensual, but the Title IX Coordinator decided it was retaliatory and did not take it forward.

### (1) Discussion

STOP HERE. Do you agree with this dean? Is she a steadfast protector of student welfare, or a card-carrying member of the sex police? If you consider the totality of the circumstances, there is a clear subtext to the allegations, right? Tameka was looking for a relationship. She rejected Harris when all he wanted was a hookup. She then attempted a relationship with Wes, but wound up being used by him and feeling rejected. That rejection could have been motivation to tell people that Wes assaulted her (she later filed a formal allegation and participated in the investigation), but that only addresses her motivation to report, and not the underlying question of whether what she was reporting was a violation policy. Are we troubled by the fact that she did not consider it sexual misconduct that morning, and came out of the interaction thinking that they were dating? Sure. It goes to her credibility. For some people, though, the reality of victimization takes a while to dawn on them, whether out of shock, denial, or a failure to self-identify. When that is the reason for delay, it is not a credibility concern.

You might think that Wes described a situation to the dean that is arguably sexual misconduct, regardless of Tameka's motivation to report it, right? Let's break it down. Wes and Tameka agreed that the sexual activity on the couch was consensual. But, what about the sexual activity in the bathroom? She performed the handjob voluntarily. It wasn't coerced or forced. Thus, she consented to it. Whether he consented to being touched is a question we will address shortly. Their kissing was mutual, according to both of them, and she did not raise the fondling of her breasts as an issue. However, if you are a literalist about consent, he did fondle her breasts without consent. You can make a ratification argument here, though, because he didn't ask to fondle her breasts in the common room, either, but she participated when he did. There is an interesting question, too, about whether her consent to fondling her breasts earlier in the common room remained valid ten minutes later in the bathroom. We would say it did. And, we would argue that he had consent to touching her vulva and fondling her genital area by ratification. In the course of a sexual transaction, she permitted him to touch her, and continued to touch him as she did so, without objection. That's ratification. So, the only remaining question is whether his act to penetrate her with his finger was without consent. We believe a reasonable person would believe that act was consensual. How can this be? He penetrated her without asking, and her response clearly shows she did not welcome his penetration.

The construct of consent in sexual interactions is governed by policies, but as we noted above, it is not a perfect construct, in the sense that theory and practice do not fully align. Policies require clear actions or words indicating permission. So, if you think about it, there is no way to kiss someone without asking first, if you take the concept of consent literally. If I move in to kiss someone, I cannot know the conduct is agreed to unless I ask, because even if they move in to kiss me, they cannot know I am consenting unless they ask. So, rather than strictly adhering to such rigidity, we allow some non-verbal, unspoken rules to govern our sexual interactions. Many of us move in for a kiss, mutually, on the basis of context, without asking. And, in certain circumstances, consent can be assumed; for example, if you kiss me, I can kiss you back. I don't have to ask or clarify that. I am not expected to simply passively receive the kiss. The "clear words or action" part of the policy takes over from there. We can kiss, but what happens next has to be the result of agreement by word or conduct, if the interaction is to escalate sexually. Think of it as being akin to levelling up in a video game. Once you unlock a level, you are free to explore that level, but you can't move on to the next level until you unlock the achievement for that level (in this case, by having clear consent).

If a female student is voluntarily stroking a male student's penis, he is within the bounds of consent to reciprocate by touching her vulva and using his fingers to penetrate her vagina. This is really no different – in terms of reciprocity – than if a woman begins to stroke a man's chest, and he responds by fondling her breasts. It is artificial in the extreme to expect verbal requests in such a context, "I see that you are touching my pecs…does that mean I can caress your breast? If so, left, right, or both? And, is that your left or my left?" That's not how sexual communication works, as noted in describing the kiss, above. Consent is designed to allow such reciprocation without resorting to asking, **but** clarifying communication **is** required if one or both of the partners wish to elevate or progress the level of sexual interaction. If the partners are now caressing each others' chests, and one wants to touch the genitals of the other, that cannot be assumed to be okay, based on the sexual activity already taking place. To move to genital contact, there again must be communication that establishes consent. Consent theory supports this. Some acts are mutual, others require additional communication and clarification.

When a female student is voluntarily giving a male student a hand job, and he reciprocates by touching and fingering her vulva and vagina, if she denies having consented to being touched/penetrated solely because he didn't ask, we would say that a preponderance of evidence shows that they engaged in mutually consensual fondling of each other's genitals. To conclude otherwise would require that the male partner to say something like, "I see your hand is on my penis, may I now place my hand between your legs?"

That is not how sexual communication occurs, and it is not how consent policies were intended to function. To see the logic of this, take it to its extreme. Imagine that sexual intercourse is taking place. The female partner raises her hips on her male partner's penis. When she does, he hesitates, and says, "May I thrust my penis in response?" If the female partner says "yes," he may thrust back. How many times? Once? Many times? Does he need to clarify that, or is it assumed once they are having intercourse that thrusting is going to occur, positions may be changed, and there will likely be an ejaculation as a result? It is assumed, but according to policy, it's really not explicitly agreed to, is it?

Some of you will make a distinction with Wes and Tameka out of the fact that the sex acts weren't really mutual. They fondled each other's genitals, but she was penetrated and he was not. To that, we say that is a distinction that arises solely from anatomy, but it is no more invasive to a man to have a non-consensual handjob than it is to a woman to be fingered without consent. A man can be subject to sexual misconduct without being penetrated, so we need to stay focused on the video game metaphor. What Tameka did to Wes and what Wes did to Tameka each occurred on the same level of the game. No one upped the level without asking, and Wes respected her instruction to stop when he did something that went beyond her boundaries.

This does not make him in violation of policy. That's what a reasonable person would say. I can fondle you if you are fondling me; I don't have to ask you. For anyone who wishes to insist that he is in violation of policy, we require you to be consistent. If your purist approach to consent demands that you find him in violation of policy for penetrating her, then you must also be willing to find her in violation for giving him a handjob without his consent. If that is your preferred approach, we think you are being absurd, but at least you will keep the legal profession gainfully employed for many years to come.

As you can now see, a consent policy is viable in theory, but can become absurd in practice if taken to an extreme. You are the guardians of applying the reasonable person standard to these interactions. We know this challenges an orthodoxy that may be widely accepted in the field, but the question is whether we are trying to govern every nuance of sex as if we are the sex police, or whether we are trying to establish reasonable rules to regulate inherently ambiguous human behavior in a way that minimizes the risk of harm to those involved? If you need a litmus test for whether you have become the sex police, ask yourself whether the college-age version of you would hate what you have become. If so, let's recalibrate. One way to do so is to refocus and rededicate ourselves to due process and protecting the rights of ALL students.

There are some readers who might perceive this publication to be less victim-centered than our previous body of work. We'd suggest that perception is only accurate in comparison to the tone of our past work, which was needed at the time we wrote it, to catalyze an important shift needed in the field at that time. Now, the tone of this publication is appropriate to the environment in which we are writing today. As times change, our guidance has to as well. We intend this publication to build on the strong foundation of victim-centered (not victim-favoring) work we have done, rather than to weaken it. With a solid history of writing about and advancing those procedural protections for victims/survivors, we can now also see the need to ensure those protections are just as strong for responding parties.

The overall tone of this *Playbook* is about striking the right balance between student rights, with the understanding that being off-balance in the long-run isn't good for victims/survivors or for those accused. There are always unintended consequences to showing favoritism. If a college is known to be biased toward responding parties, this can chill the willingness of victims/survivors to report. If a college is known to be biased toward reporting parties, a victim/survivor's sense of safety or justice based on the campus outcome in the short run may be quickly compromised by a court order or lawsuit reinstating the responding party, giving her a Pyrrhic victory, at best. What is needed for all of our students is a balanced process that centers on their respective rights while showing favoritism to neither. Not only is that best, it is required by law.

Title IX Coordinators write to us, worried that their annual summaries show that they are finding no violation of policy 60% of the time in their total case decisions. They feel like somehow that is wrong, or not as it should be, as if there is some proper ratio of findings that we are supposed to be reaching. We wrote in 2014 of our concerns with the types of allegations being made on college campuses (https://www.ncherm.org/wordpress/wp-content/uploads/2012/01/An-Open-Letter-from-The-NCHERM-Group.pdf), but that is inevitable. With all the training and education being directed at students, more are coming forward, and that education brings allegations of all kinds out of the woodwork, some based strongly in fact, others that are baseless, and most that are somewhere in between.

That 2014 Open Letter took issue with growing imbalance in the field, and we fear three years later that it is taking far too long for higher education to self-correct. This Whitepaper roadmaps what that self-correction should look like. We hope that our readers do not see the rights of the parties as a zero sum game, where protecting one requires compromising the other. Responding parties should want their colleges to provide strong victim services, and reporting parties should insist that the full measure of due process be accorded to

those who are being accused. We believe – strongly – that colleges can and should provide the full measure of student rights and accord equal dignity to all parties to an allegation of sexual misconduct.

## Due Process Commitment

We've been thinking about ways to advance the commitment of the field to due process, and since administrators are always asking students to sign pledges as a symbol of prevention, we came up the idea for this oath or commitment statement as a pledge you can make to prevent due process violations in your conduct or resolution process. Maybe you'll frame it and hang it on your wall?

### 2. The NCHERM Group Statement of Commitment to Due Process Protections

"As a college administrator, you have my commitment to your due process rights. Specifically, I commit to the following ten assurances…

1. I promise to provide you with a neutral, unbiased, impartial, and objective decision on whether your behavior(s) violates college policy.
2. I commit to understanding and owning my own biases and to check them at the door.
3. I promise to recuse myself from the process should I identify a conflict-of-interest, or should a conflict be brought to my attention.
4. I promise to follow college procedures without material deviation.
5. I promise to honor your humanity and the equal dignity of all participants in the conduct process, and to conduct the process with as much transparency as I can.
6. I commit that I will not find you in violation of college policy unless a preponderance of the evidence establishes that a violation occurred.
7. I promise that the college has the burden of proving whether you violated policy or not; that burden is not on either party.
8. I commit to afford equitable procedural protections to all parties to an allegation of misconduct.
9. I promise not to prejudge the allegations that have been made, and to reserve judgment until all evidence has been gathered.
10. I commit to sufficient annual training and professional development to assure the competence of my role.

## Due Process Checklist

Below, we've crafted a practical checklist of due process protections that should be afforded by every college. If you are intrigued by this content, please attend one of our upcoming due process trainings[13] to learn more about how to operationalize these ideas.

- ☐ Right to notice of investigation that includes a reasonable description of the allegations
- ☐ Right to access to an advisor of your choice throughout the process
- ☐ Right to the least restrictive terms necessary if interim suspension is implemented, and a right to challenge the imposition of the interim suspension
- ☐ Right to uninfringed due process rights, as detailed in the college's procedures, if subject to interim actions
- ☐ Right to clear notice of the policies allegedly violated if and when the formal allegation is to be made
- ☐ Right to clear notice of any hearing in advance, if there is to be a hearing
- ☐ Right to receive COPIES of all reports and access to other documents/evidence that will be used in the determination, reasonably prior to the determination (these may be provided in redacted form)
- ☐ Right to suggest witnesses to be questioned, and to suggest questions to be asked of them (excluding solely character witnesses)
- ☐ Right to decision-makers and a decision free of demonstrated bias/conflict of interest (and advance notice of who those decision-makers will be)
- ☐ Right to clear policies and well-defined procedures that comply with state and federal mandates
- ☐ Right to a process free of (sex/gender/protected class etc.) discrimination
- ☐ Right to an investigation interview conducted with the same procedural protections as a hearing would be (because the interview is an administrative hearing)
- ☐ Right to a fundamentally fair process (essential fairness)
- ☐ Right to know, fully and fairly defend all of the allegations, and respond to all evidence, on the record
- ☐ Right to a copy of the investigation report prior to its finalization or prior to the hearing (if there is one)
- ☐ Right to know the identity of the reporting party and all witnesses (unless there is a significant safety concern or the identity of witnesses is irrelevant)
- ☐ Right to regular updates on the status of the investigation/resolution process
- ☐ Right to clear timelines for resolution
- ☐ Right to have procedures followed without material deviation
- ☐ Right to a process that conforms to all pertinent legal mandates and applicable industry standards
- ☐ Right to have only relevant past history/record considered as evidence
- ☐ The right to have the burden of proving a violation of policy borne by the college
- ☐ Right to the privacy of the resolution/conduct process to the extent of and in line with the protections and exceptions provided under state and federal law
- ☐ Right to a finding that is based on the preponderance of the evidence
- ☐ Right to a finding that is neither arbitrary nor capricious
- ☐ Right to be timely informed of meetings with each party, either before or reasonably soon thereafter (unless doing so would fundamentally alter or hamper the investigation strategy)
- ☐ Right to sanctions that are proportionate with the severity of the violation and the cumulative conduct record of the responding party
- ☐ Right to the outcome/final determination of the process in writing as per VAWA §304
- ☐ Right to a detailed rationale for the finding/sanctions

[13] https://atixa.org/events/training-and-certification/

- Right to an appeal on limited, clearly identified grounds
- Right to competent and trained investigators and decision-makers
- Right to a written enumeration of these rights

## The Wesley College OCR Determination

OCR's Wesley College resolution is an important harbinger of the increased focus on due process that we can expect from Washington, D.C., going forward. For those of you who need deeper insight into the transformative OCR ruling on the Wesley College investigation, here is a brief overview. First, this is only one of three OCR letters to address the issue of due process (Minot State[14] and Christian Brothers[15] being the other two) but the most direct letter we have that makes the case for Title IX-derived due process rights at a private college.

Whether OCR sees Title IX as an independent source of these rights, or is simply reflecting on rights OCR believes are otherwise legally protected which OCR should be enforcing, this decision is notable as more and more courts seem to be affording due process rights (or the equivalent) to students enrolled in private colleges, including recent decisions at the University of Southern California[16] and Brandeis University.[17]

Second, and perhaps more important, OCR defied expectations in issuing a letter than seems broader in protective scope than many anticipated. OCR signaled in 2016 that it intended to issue resolutions protecting the rights of accused students, but the big question was how far would OCR go? Would OCR protect men from discrimination on the basis of sex, as it must under Title IX, or would OCR take the further step of determining that responding parties have rights under Title IX, whether they are men or not. OCR chose the latter, bolder, and broader approach.

The question of whether responding parties have independent rights under Title IX, or rights only as men who may experience discrimination, is important, as OCR has couched this as an equity issue, not an explicit issue of sex-based discrimination. Maybe OCR sees those as the same thing, but if OCR meant to issue a narrowly tailored resolution, they could have done so. OCR did not, but it also didn't give us significant explanation for the source or basis of these rights. If this body of knowledge evolves as OCR issues more resolution letters, we'll be sure to keep you abreast as they do. This is a revolutionary approach for OCR that changes the entire fabric of Title IX enforcement and fully reflects the idea that Title IX focuses on equity for both parties, not just the reporting party.

## Conclusion

Many of you have been on a journey with us for almost 20 years. What a ride! Together, we are reshaping sexual conduct at colleges toward healthier and more respectful norms. Many in our field act out of a sense of obligation or to satisfy a compliance mandate, but we all can operate from our higher selves, better angels, or whatever you wish to call it. To do so, you have to be willing to accept constructive criticism and decide how you want to let it impact you. In this Whitepaper, we've been tough critics of some of you in the field. We hope you see it as constructive criticism. We're not inherently critical of higher education. We'd say nothing

[14] https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/05142061-a.pdf
[15] https://www.ncherm.org/documents/80-ChristianBrothersUniversity-04032043.pdf
[16] http://cases.justia.com/california/court-of-appeal/2016-b262917.pdf?ts=1459881022
[17] https://www.documentcloud.org/documents/2799157-John-Doe-v-Brandeis-University-3-31-2016-Ruling.html

but glowing things if you deserved nothing but glowing things. Instead, we are agents of change and we know you are on an evolutionary path as professionals. Our role is to provoke you, to challenge you, and to call you to do better when we know you can. If we're successful, we speed and smooth your evolutionary path, helping you to grow as professionals, and become more successful practitioners. If this Whitepaper helps you to do so in any way, we will count it a success.