

October 2022 Advisor Training

Adapted from "What Advisors Need to Know About Their Role in Penn State University Title IX Hearings" (Jeffrey Nolan, Holland & Knight, 08.31.21)



Topics for discussion

- Basis for advisor role
- Developing and working with the investigative record
- Special evidentiary issues
- Hearing process framework
- Advisor role at the hearing
- Hearing preparation
- After the hearing
- Confidentiality considerations
- Other complainant advisor and respondent advisor considerations
- Scenario
- Q & A



Basis for the advisor role

- Role is grounded in regulations and internal policy
- Each party is entitled to be accompanied by an advisor of choice
- This person may, but need not be, an attorney
 - Consider: conflict of interest
- Until the hearing, "the potted plant"
- The value of the role pre-hearing
 - Supportive measures
 - Retaliation
 - Informal resolution
 - Meetings (initial / intake, investigative, pre-hearing, other)



Basis for the advisor role (cont.)

- Advisor role in hearing shaped by May 2020 Title IX Regulations
 - Changes anticipated 2023
- All recipient institutions (public and private) must hold live hearings in Title IX Sexual Harassment cases
- Hearings must include opportunity for cross-examination of parties and witnesses *by advisors*
 - Must be conducted directly, orally, and in real time by the party's advisor (again, of choice—but, each party *must* have an advisor present)



Developing and working with the investigative record

- Each party has the right to participate in the investigation (or not!)
 - Give a statement
 - Provide evidence
 - Provide the names of witnesses
 - Review and respond to the investigative report, including all directly related and relevant evidence
 - Role of the advisor during this process?



Developing and working with the investigative record (cont.)

“Directly Related” Evidence

- 2020 Title IX regulations require that parties have equal opportunity to inspect and review evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint
- This includes evidence upon which the school does not intend to rely in reaching a determination regarding responsibility



Developing and working with the investigative record (cont.)

“Directly Related” Evidence (cont.)

- Term is broader than “all relevant evidence” as otherwise used in Title IX regulations, and “any information that will be used during informal and formal disciplinary meetings and hearings” as used in Clery Act
- Intended to promote transparency and allow parties to object to investigator’s conclusion that certain evidence is not relevant



Developing and working with the investigative record (cont.)

“Relevant” Evidence

- Investigative reports must “summarize relevant evidence,” with relevance having its “plain and ordinary meaning.”
- See, e.g., Federal Rule of Evidence 401: “Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.”



Developing and working with the investigative record (cont.)

“Relevant” Evidence (cont.)

- Parties have the right to argue upon review of “directly related” evidence that certain information not included in investigative report is relevant and should be given more weight
 - Take advantage of the opportunities for review!



Special evidentiary issues

- Questions and evidence about the Complainant's sexual predisposition or prior sexual behavior are not relevant, unless offered to prove that someone other than the Respondent committed the conduct alleged, or if specific incidents of the Complainant's prior behavior with the Respondent are offered to prove consent.
- Information protected under a legally recognized privilege (physician, MH professional, attorney) is not considered unless the information is relevant and the person holding the privilege has waived it.



Special evidentiary issues (cont.)

- The hearing panel will not draw an inference about responsibility based solely on a party or witness's absence from the live hearing or refusal to answer cross-examination or other questions.
 - Practically speaking, what does it mean when a party does not appear at a hearing? A witness?



Hearing process framework

- Read and know AD85 (and AD91, as applicable)
- Understand definitions of prohibited conduct—you're helping your advisee show that the elements have or have not been met
- Check before new cases to ensure no changes have been made
- All hearings follow the same roadmap



Hearing process framework (cont.)

Hearing Roadmap

- Introduction of hearing panel chair and recording expectations
- Review of confidentiality expectations
- Introduction of hearing panel, parties, advisors, and others present
- Review of the role of advisors (quietly advising, consulting during breaks, cross examination) and emphasis on rules of decorum
- Review of rule of chair, including assessing relevance of evidence
 - Remind your advisee to wait to answer!
- Review of evidentiary standard (preponderance of the evidence)
- Review of procedural steps following the hearing



Hearing process framework (cont.)

Hearing Roadmap (cont.)

- Parties affirm they will provide truthful and accurate information and that they understand false and misleading statements can be a policy violation
- Opportunity for complainant and respondent to speak: "[E]xplain, in your own words, what happened during the incident(s) in question. Your statement must be limited to the specific reported incidents as stated in the Notice of Allegations."
 - Followed by cross examination by the hearing panel, then by the other party's advisor
- Then, witness testimony and cross examination of each witness



Hearing process framework (cont.)

Hearing Roadmap (cont.)

- Opportunity for complainant and respondent to speak again:

"(1) Is there any information that was presented in the hearing that you did not have the opportunity to address?"

"(2) Is there any information you submitted prior to the hearing that you believe is relevant but was not introduced or discussed in the hearing?"

- Concluding remarks (if any)



Advisor role at the hearing

- The advisor does not participate in the hearing except for the limited purpose of conducting cross-examination on behalf of that party, plus quietly advising the party and consulting during breaks
 - Consider what this looks like over Zoom
- If a party does not have an advisor of their choice present at a hearing, the University will, without fee or charge to the party, provide an advisor of the University's choice – for the sole and limited purpose of conducting cross-examination on behalf of that party



Advisor role at the hearing (cont.)

Rules of Decorum (abridged)

1. Questions must be conveyed in a neutral, respectful tone.
2. Use the name and gender used by each person.
3. No party may act abusively or disrespectfully.
4. While an Advisor may be an attorney, no zealous advocacy.
5. The Advisor may not yell, scream, badger, or physically "lean in."



Advisor role at the hearing (cont.)

Rules of Decorum (abridged) (cont.)

6. The Advisor may not use profanity or make irrelevant ad hominem attacks. Questions are investigative and may not include accusations within the text.

7. The Advisor may not ask repetitive questions. When the Chair says a question has been asked and answered or is otherwise not relevant, the Advisor must move on.

8. Take no action at the hearing to intimidate a person into not participating in the process or meaningfully modifying their participation in the process.

Remember: there IS a warning and removal process



Hearing preparation

- Start during the investigation phase!
- Logistics
- Opening / closing
- Cross-examination
- Witnesses
- Decorum



After the hearing

- Consideration statements
- Appeals



Confidentiality considerations

- Investigative process
- Investigative report and other materials
- Prehearing conference
- Hearings
- Post-hearing materials
- Link to retaliation (AD67)



Other complainant and respondent advisor considerations

Preamble to 2020 Title IX regulations:

- “[S]ex bias is a unique risk in...sexual harassment allegations...and application of sex stereotypes and biases may too easily become a part of [a] decisionmaking process.”
- “[F]air adversarial procedures...will prevent and reduce sex bias...and better ensure that recipients provide remedies to victims of sexual harassment.”



Other complainant and respondent advisor considerations (cont.)

- “[C]ross-examination equally benefits complainants and respondents...[Both parties] deserve equal rights to fully participate in the proceeding. This ensures that the decisionmaker observes each party’s view, perspective, opinion, belief, and recollection....”
- “[A]ny person can be a complainant, and any person can be a respondent, regardless of a person’s race, sexual orientation, gender identity, or other personal characteristic, and each party, in every case, deserves the opportunity to promote and advocate for the party’s unique interests.”



Scenario 1

- Complainant Cameron reported that they were sexually assaulted by Respondent Ren in a campus residence hall on October 31.
- Specifically, Cameron elaborated during their interview that while they had been “talking” with Ren on and off for a couple of months before October 31st and everything had been “fine,” Cameron had a “lot to drink” at a Halloween party on the night in question, to the point where they had no memory of “large chunks” of the evening.



Scenario 1 (cont.)

- Cameron remembered kissing Ren and removing Ren's clothing, and knew from how they felt physically the next day that sexual penetration had occurred, but other details about the sexual contact were "fuzzy."
- Cameron described it as a "major blackout/brownout" situation.
- Cameron had no recollection of saying that they consented to sexual penetration by Ren.
- Cameron felt that if they did not recall consenting, then the penetration must have been a sexual assault.



Scenario 1 (cont.)

- When interviewed, Ren pointed out that they had “hooked up” with Cameron several times prior to October 31st, that alcohol had been involved on each prior occasion, and that Cameron seemed “no worse off” on October 31st than any of the other times they hooked up.
- Ren said Cameron was in a typically “goofy, tipsy space” just before they hooked up, but that Cameron engaged physically and actively in all of the sexual contact, including the sexual penetration, just as they had on prior occasions.
- Ren suggested that Cameron’s report of assault was retaliation for Ren’s “ghosting” Cameron soon after Halloween.



Scenario 1 (cont.)

For advisors to Complainant Cameron:

- Cameron wants to know: 1) why Ren thought it was okay to take advantage of them when they were obviously “hammered” and “out of it” and 2) how Ren could explain “ghosting” them on social media if not because of guilt
- How, if at all, would you translate Cameron’s questions into “relevant” questions that can be asked at the hearing, within the bounds of University procedures?



Scenario 1 (cont.)

For advisors to Respondent Ren:

- Ren wants to know: 1) how could Cameron claim they were “blackout drunk” if they remembered kissing Ren and taking Ren's clothes off and 2) what did Cameron expect to happen after kissing Ren and taking their clothes off, given the parties’ prior hook up experiences
- How, if at all, would you translate Ren’s questions into “relevant” questions that can be asked at the hearing, within the bounds of University procedures?



Q & A

