Advisor Resource Guide

for Title IX Investigations and Hearings

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INTRODUCTION

Advisors are central to Title IX proceedings, helping students maneuver a technically complicated and emotionally challenging process. This guide will help advisors for both respondents and complainants and their advisees move through the process in an informed way. It covers each stage of the process, from the filing of the complaint to the investigation, hearing, and appeal.

TITLE IX VS. INSTITUTIONAL CODE OF CONDUCT

Advisors may be asked to work with students who are navigating the institution's Title IX grievance process. But the investigation and adjudication may also be handled through the institution's code of conduct if the allegations are outside the scope of Title IX. It's critical to understand the difference.

Title IX of the Education Amendments of 1972 prohibits sex discrimination in education, including sexual misconduct. In 2020, the U.S. Department of Education finalized regulations ("Title IX Final Rules" or "Final Rules") that require campuses follow a certain process to investigate and address alleged misconduct that meets the following criteria:

1. Took place in the United States
2. Occurred within an institution's "program or activity"; and
3. Was one or more of the following:
    - An employee conditioning educational benefits on participation in unwelcome sexual conduct;
    - Unwelcome conduct that a reasonable person would determine is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the educational institution's education program or activity; or
    - Sexual assault, dating violence, domestic violence, or stalking as defined under federal law.

This guide outlines the required procedures for investigating and remediating conduct under these Title IX rules, as well as your role during this process.

Where the allegations fall outside this Title IX jurisdiction, an institution may still address them within a separate section of their institutional code of conduct. The proceedings under an institution's code may look very similar or very different from the process under Title IX, but both should be outlined clearly in the institution's policies.

For more information on Title IX jurisdiction under the 2020 Final Rules, you may reference the 2020 **Joint Guidance on Federal Title IX Regulations** at: system.suny.edu/sci/tix2020.

NOTE

Throughout this Guide, we use the terms **"advisees," "students"** and **"parties"** to refer to the individual you are serving as an advisor for. Institutions may also use their own terminology.

STAGES OF THE TITLE IX PROCESS

1

AN INCIDENT IS REPORTED

Here, the institution will focus on any crisis response and safety planning needs as well as providing supportive measures as appropriate.

2

GRIEVANCE PROCESS IS INITIATED

The institution will begin an investigation upon the filing of a formal complaint by the complainant (or in rare cases, by the Title IX Coordinator). All parties have the right to an advisor of choice beginning at this stage.

3

INVESTIGATION & PRE-HEARING PREPARATION

At this stage, the institution will be conducting an investigation as well as preparing for a possible hearing.

4

THE HEARING

At the hearing, advisors are tasked with conducting cross-examination on behalf of their advisees though their participation may be otherwise limited.

5

THE APPEAL PROCESS

Appeals must be offered to both of the parties under the Title IX Final Rules (1) if the complaint is dismissed, and (2) after a determination regarding responsibility.

6

DECISION IMPLEMENTATION

At this stage, the institution implements sanctions against the respondent and other remedies for the complainant, if any, and provides supportive measures as appropriate.

WHO MAY SERVE AS AN ADVISOR

Parties have the right to an advisor of choice, meaning that anyone may serve as an advisor, so long as they are able to comply with the institution's rules and guidelines. In practice, an advisor could be a friend or relative, a volunteer or employee of an advocacy center, or an attorney.

SOME CONSIDERATIONS:

- Advisors are not prohibited from being a witness in the matter, but in general this is not advisable for a variety of reasons; for one, when that advisor testifies as a witness, a second advisor would have to join the hearing to cross-examine that advisor.
- Parents often consider serving as advisors. Before making this choice, both students and their parents should be sure they are comfortable with the level of specificity around sexual activities discussed during the grievance process.

CONFLICTS OF INTEREST

The conflict of interest and bias rules that apply to officials in Title IX proceedings do not apply to advisors. This means that an advisor is not prohibited from having a conflict of interest or bias in favor of or against complainants or respondents generally, or in favor or against the parties to the particular case.

Take care, however, when institutional employees serve as advisors. Under the 2020 Title IX Final Rules, an advisor for a complainant or respondent is disqualified from serving as a Title IX Coordinator, investigator, decision-maker, or facilitator of an informal resolution process in that same case.

SUGGESTED TRAINING FOR ADVISORS

Advisors are not required to have any training, legal or otherwise, to fulfill the role. We do advise that anyone working as an advisor read and understand the institution's Title IX Grievance Policy and understand that institution's rules of decorum for live hearings. Additionally, there are some skills and practices that will assist you in your role. We have outlined those in the coming pages.

2 THE ROLE OF THE ADVISOR

THE TWO MAIN FUNCTIONS OF AN ADVISOR

Advisors have two major roles, which may be performed by the same person, or performed by two or more individuals on behalf of the advisee, depending on campus policy.

1

Serve as a support person for the parties and perform advising throughout the grievance process.

2

Conduct cross-examination should the matter proceed to a hearing.

Under some institutional policies, appointed advisors will *only* serve in this second role. If that is the case for you, please focus on ***Section 5: Cross-Examination and Relevance***, and refer to your institution's policy to determine the expected limits of your role beyond asking questions provided to you by your advisee.

In either role, advisors are not meant to be "zealous advocates" for their advisees, as may be the case for attorneys in legal proceedings under your state's legal ethics rules.

THE ROLE OF THE ADVISOR AS A SUPPORT PERSON

With their advisees' permission, advisors guide students through each stage of the conduct process, including:

Preparing students for meetings and hearings.

Reviewing the Investigative Report before the hearing.

Accompanying students to meetings and hearings the students are eligible or required to attend.

Reviewing and editing any document that their advisee has prepared, which will be submitted during the Title IX process or read during the hearing.

Reviewing and inspecting all evidence that is directly related to the allegations during the investigative process.

Advisors also provide emotional support to their advisees by building rapport and helping their advisee navigate a real-world situation with impactful consequences for all involved. This support may include:

Lending a calming, reassuring ear.

Developing a comfort plan (***See page 19, Creating a Comfort Plan***).

Actively listening to students as they process information and prepare to participate in the process.

Helping to create a calendar of dates to work on documents together.

Support should be as individualized as the student, and should capitalize on the advisor's skill set. For more information on how to provide comprehensive emotional support for your advisee, ***see Page 11, Trauma Informed Practice.***

LIMITS ON THE ADVISOR ROLE

Institutions may set reasonable rules for an advisor's role, including:

- Limiting their ability to speak to investigators during investigatory interviews or pre-hearing meetings.
- Limiting their ability to advocate for their advisee regarding a specific position.

Some describe these restrictions as the **"potted plant" rule**, but however the policy is structured, the advisor may always be a **"supportive potted plant"** for their advisee by:

- Speaking privately with their advisee during a break of a pre-hearing meeting, investigatory interview, or hearing.
- Using a "breakout room" during a virtual interview or pre-hearing meeting to speak with their advisee.

These reasonable limitations often apply to an advisor's participation at a hearing as well, except that institutions cannot limit the advisor's ability to ask relevant cross-examination questions during the live hearing. Rules of Decorum for advisors during the hearing are further specified under ***Section 4: The Hearing***.

At many academic institutions, the cross-examination phase will be the only time the advisor is permitted to directly participate during the grievance process.

COMMUNICATIONS WITH UNIVERSITY OFFICIALS

Most academic institutions expect that the parties to the grievance process, rather than the advisors, will communicate with Title IX investigators and Coordinators. For example, they expect the students to send e-mails to the Title IX investigators themselves, rather than through their advisor. Unlike in the criminal justice process, there is no legal requirement that institutions direct communications to a party through their advisor.

Unless the institution has a strict **"potted plant" rule**, advisors can usually ask investigators to clarify questions they find unclear, and can discuss scheduling with investigators. But, in general, the advisee will raise any substantive questions and comments.

CONFIDENTIALITY

Advisors may build relationships of trust and candor with their advisees as confidential resources. When they hold this responsibility, they should not have any parallel duties to report misconduct to their institution; for example, any mandated reporter duties that would ordinarily apply as part of their employment would not operate within their advisor role. Keep in mind, however, that advisors who do not have a legal privilege under their state's law (e.g., attorney-client; pastoral; counselor; physician acting within that privileged role) may not be able to maintain the confidentiality of an advisee's disclosures outside the campus process, such as in a civil or criminal court. You may consider asking the institution its policies regarding the confidentiality of your communications and notes should civil or criminal court proceedings follow a campus adjudication.

CONSIDERATIONS FOR ADVISORS' PROFESSIONAL OR ETHICAL OBLIGATIONS

Your advisee may disclose information to you that raises professional or ethical concerns. Here are some possible scenarios and strategies for resolving them. As always, consider whether any advisor agreement you have signed with the institution governs your response, and if you have any questions about your obligations in the space, consult with the institution.

- **If you believe your advisee is intentionally making materially false statements:** Remind them of campus policies prohibiting them from doing so and the penalties of additional charges. If you are an attorney serving in this role, consider your professional ethical duties as well.

- **If your advisee discloses situations that may have constituted sexual misconduct:** Your duty to disclose that information will depend on whether or not you are an employee of the institution, and whether as an employee your institution or the law requires you to report potential sexual misconduct. Before serving as an advisor, be sure to obtain clarity from your institution on this point and to communicate that to your advisee.
- **If you are uncomfortable continuing to serve as an advisor:** You may recuse yourself from participating at any time. The student may select another advisor, or the campus will appoint an advisor for the cross-examination portion.
- **Your advisee may determine that they no longer seek your representation or advisement:** It is not uncommon for advisees to cut-off communication with their advisor without notice. In the event that your advisee does not answer your calls and messages, it is best to let the Title IX Office know that you can longer provide advisement under the circumstances.

APPLICATION OF PRIVACY LAWS

Title IX require institutions to keep confidential the identity of complainants, respondents, and witnesses to a sexual harassment report, investigation, or adjudication, except under narrow circumstances defined under **Title IX** and the **Family Educational Rights and Privacy Act (FERPA)**. Advisors should familiarize themselves with these privacy rules before engaging in the Title IX Grievance Process. The same rules prohibiting the parties from sharing confidential information also bind their advisors. These rules should be communicated to parties (and preferably to advisors as well) by the institution.

TRAUMA-INFORMED PRACTICE

The evolving research on the neurobiology of trauma teaches us that traumatic incidents impact individuals differently. At a minimum, advisors should have background knowledge in the impact of trauma on those involved in an incident of sexual harassment or violence. We encourage advisors to learn more about this topic and how it may impact memory formation and communication related to an incident.

PRACTICE TIPS

- **Participation in this process is often a stressful experience for parties.** During hearings and interviews, be on the lookout for signs that your advisee may be in distress. Signs can include a lack of eye contact, heavy or labored breathing, wringing of hands, rocking back and forth, an inability to sit still, a glazed or blank look, or changes in speech (i.e. disrupted or interrupted speech, garbled speech, or speaking at a much faster pace). If you suspect your advisee may be in distress, make sure to ask for a break and consult with your advisee.
- **Explain to your advisee that they may take breaks when needed.** No party will be penalized or suffer a negative inference from their decision to take multiple breaks during an interview or hearing.

PRACTICING CULTURAL COMPETENCE

Advisors should strive to practice cultural competence in all aspects of the campus process. **Cultural competence** is the capacity to effectively communicate and connect with individuals with lived experiences different than your own. It is more than just the mere recognition that differences exist across cultures and communities. It requires an introspective and honest assessment of your own world-view and a willingness to identify and challenge your own assumptions and biases.

This is especially critical when working closely with advisees who are members of marginalized communities, including BIPOC (Black, Indigenous, and People of Color) and LGBTQIA+ (Lesbian, Gay, Bisexual, Transgender, Queer, Intersex, and Asexual) individuals. A commitment to integrating cultural competence into your advisor role should be present at the outset.

Don't assume you know the gender identity or sexual orientation of your advisee or the individuals in their lives.

Consider using gender-neutral language: for example, using the term **"partner"** instead of boyfriend or girlfriend.

Consider starting the meeting by stating your **pronouns**, which may help to make your advisee comfortable sharing theirs.

Check any assumptions you might have before asking your advisee a question, and couple that question with an explanation.

For example, you may be working with an advisee who disclosed to you that they experienced physical abuse at the hands of an intimate partner. Your initial assumption, based on your world-view and lived experiences, might be that your advisee must have or should have reported the abuse to the police or campus security.

This is a moment to practice cultural competence in recognizing that there may be many reasons why an individual may not view law enforcement as a pathway to safety and justice.

Since, as the advisor in the case, it would be helpful for you to know whether or not a formal report was made, consider using this framework to ask the question:

> *Thank you for telling me that. I'd like to ask if you ever made a formal report to anyone about this incident. Let me be clear that I am not asking that question because I think you should or should not have done so. I am merely asking as it might be helpful information for me to know later in the case while we try to identify potential sources for evidence.*

SELF-CARE

Advisors themselves may need emotional support. You may find yourself emotionally invested with your student's case, and that can have secondary impact. Advisors may feel the need to share their own feelings and reactions to the situation. Remember, advisors may not share confidential information related to the case. The best option in this scenario is for the advisor to seek out a confidential resource, such as a counselor or spiritual advisor, to communicate their feelings and reactions.

It is important to be self-aware as this process has the potential to raise personal triggers for you as an advisor. You may find this work particularly challenging if you are participating as an advisor when you have been a victim of sexual trauma. It is not necessary to disclose your trauma to anyone in this process, nor is it a trauma-informed practice to disclose unless there is a specific reason to do so in your role as an advisor. We mention this issue here only to encourage reflection on the difficulties that may arise in this space. Personal experience may make you an excellent advisor, drawing on relatable experiences you may have had. However it may be too difficult to manage your own processing while helping an advisee navigate this experience.

RESOURCES FOR SUPPORT

- **U.S. National Domestic Violence Hotline** at **1-800-799-7233**, a project of the National Network to End Domestic Violence | nnedv.org
- **U.S. National Sexual Assault Hotline** at **1-800-656-HOPE (4673)**, a project of the Rape, Abuse & Incest National Network
- Local resources via the educational institution's website, which should list support resources both on campus and in the community. For SUNY and other schools in New York, much of this information is available via **SUNY SAVR** at response.suny.edu

SUNY sexual assault & violence response SAVR response.suny.edu

RETALIATION

Conduct aimed at intimidating, threatening, coercing, or discriminating against any individual for the purpose of interfering with any right or privilege secured by Title IX is strictly prohibited, pursuant to **34 C.F.R. §106.71**. This prohibition is designed to encourage safe and equitable participation in the process for complainants, respondents, and witnesses.

If you believe someone is attempting to interfere with the Title IX process through their communications with your advisee, you should work with your advisee to raise the concern immediately to appropriate institutional officials. The institution can put further measures, which may include additional charges, in place to ensure that behavior ceases and does not continue in another form.

3

PRE-HEARING PREPARATIONS

SUPPORTIVE MEASURES

Upon receiving a report of gender-based misconduct, an institution will first offer supportive measures to the complainant. If a respondent is notified of allegations pending against them, they will also be offered supportive measures.

Supportive measures may include adjustments to the student's academic, housing, and work schedules. Parties may also seek a **no contact order** that prevents communication between the complainant and respondent.

These measures are designed to support parties in having equal and safe access to an institution's available programs and activities. They are not intended to be punitive and should be individualized in nature, depending on a party's specific needs or circumstances.

In situations where a party's physical safety is at risk, they may seek an emergency removal of the threatening individual. Advisors may discuss with their advisee whether they believe such safety measures are needed to ensure ongoing access to educational programs and activities.

As you begin to work with your advisee, discuss the possibility of available supportive measures. You may assist your advisee in contacting the Title IX office to set up a meeting to discuss these measures.

Remember that advisees should have an opportunity to request any supportive measure be reviewed, reconsidered or appealed. If you and your advisee determine that an administrative action put in place to maintain the status quo during proceedings places an undue burden, as the advisor you can help the student with a written request for modification. Refer to the institution's policy to determine the specific method or process the student is directed to follow to submit these requests.

PRACTICE TIP

While some supportive measures such as **no contact orders** may be applied automatically depending on campus policy, other safety measures, such as emergency removal, are only imposed at the institution's discretion. Consider assisting your advisee in developing a safety plan and connecting with a gender-violence organization that may be able to assist your advisee where appropriate. The institution should have provided to your student lists of resources on and off-campus and many also list this information on their websites.

FILING OF FORMAL COMPLAINTS

Under the Title IX Final Rules, institutions may only begin a Title IX grievance investigation once a formal complaint has been filed.

A **formal complaint** is a written or electronic submission from the complainant with a signature or other indication of an intent to begin the grievance process.

Only individuals who are currently participating or attempting to participate in programs of the institution, such as a student, employee, or applicant, may file a formal complaint.

DISMISSAL OF FORMAL COMPLAINTS

The Title IX Final Rules require that institutions dismiss complaints from the Title IX process when the alleged conduct would fall outside of the institution's Title IX jurisdiction or is not Title IX-covered conduct. ***See Section One: Title IX vs. Institutional Code of Conduct.***

The Title IX Final Rules *allow* institutions to dismiss complaints from the Title IX process when the complainant withdraws all or part of their complaint, when the respondent is no longer affiliated with the institution, or when "the specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination."

When a complaint is dismissed, the institution may still continue an investigation under a separate, non-Title IX, process if this option is outlined in the institution's policy.

What if your advisee disagrees with the dismissal? Either party has the right to appeal the dismissal. ***See Section Six: Appeals.*** Determine with your advisee if they would like to appeal, and on what grounds, and pay attention to any timelines for filing an appeal outlined in the institution's policies.

INFORMAL RESOLUTIONS

Under the Title IX Final Rules, institutions may offer an **"informal resolution"** process as an alternative to the formal investigation and adjudication. Each institution's informal resolution offerings will differ, but they all must follow these requirements under the Rules:

- Informal resolution may *not* be offered in cases where the respondent is an employee.
- For other cases, it may only be offered after a formal complaint is filed and before a determination of responsibility.
- It may only begin upon written agreement of each party and the Title IX Coordinator.
- Any party may withdraw from the informal resolution process at any time prior to a final resolution. If this happens, the case will move back to the formal process.

Your role as an advisor during an informal resolution process will depend largely on the institution's specific procedures, which should be outlined in the institutional policies and provided to your advisee. Generally, you serve an important role in helping a student understand their rights in each process, what rights and options they may waive by entering an informal process, and how their participation in the process impacts any participation in a future formal campus adjudication or court proceeding.

THE INVESTIGATION

1 NOTICE OF ALLEGATIONS

After the filing of a formal complaint, **and before any investigatory meeting or interview with the parties**, the institution will provide the **Notice of Allegations** to all parties. This Notice must indicate the allegations of sexual harassment, the names of the parties, and information regarding the parties' rights during the grievance or conduct process, including the right to an advisor.

Then, the investigator will set up times to interview each party. The parties must be allowed to have their advisor present during the interview, but the institution may apply the "potted plant" rule or other reasonable restrictions on participation. The parties must have "sufficient" time to prepare for the interview, and the advisor should work with their advisee to prepare them. Check the institution's policies to see if any specific timeframes govern this step.

2 PREPARING YOUR ADVISEE FOR INVESTIGATIVE INTERVIEWS

KNOW BEFORE YOU GO:

Whenever possible, do not let your advisee enter any situation without a clear understanding of what they might expect to experience. This helps them feel more in control of the process. Some key things to explain to your advisee include:

- **That the initial interview with investigators could be long.** Often, investigators will block off approximately 1-2 hours for an initial interview. Talk with your advisee about their comfort level with this length of time and discuss whether they have any specific objections to it, and be prepared to raise such objections with the investigators at the start of the interview.
- **That "initial interview" does not mean the only interview.** It is not uncommon for a party to be interviewed multiple times by investigators during the pre-hearing stage. This could be for many reasons, including that investigators, during the course of the process, came into possession of information or evidence that spurred further questions for your advisee. Requests for additional interviews are not indicative of the investigator's having any particular impression of the situation.
- **That the investigator's questions may feel personal, private, and invasive.** Make sure the advisee understands that the investigators are not asking these questions to make the advisee feel uncomfortable, even though that might be a natural reaction during the interview, but rather so they can get as much relevant and helpful information as possible to assist them in their investigation. Let your advisee know that, in a Title IX case, the information obtained in the interview will be included in an Investigative Report, which will be provided to the hearing decision-maker, so it is really helpful to have the clearest and most complete picture.

PRACTICE THE INTERVIEW:

Your advisee's answers in an interview should be in their own words. However, prior to the initial interview, consider doing a practice interview with your advisee so they can get comfortable with the experience of being asked and answering questions about what is likely a very personal and sensitive subject.

Generate a list of questions about the case and review them with your advisee before the initial interview. This exercise serves two functions at once: It helps you get acquainted with the specific details and facts, while also helping your advisee anticipate similar questions the investigator may ask them.

Whenever possible, suggest your advisee not use conclusory statements or phrases. It is a better practice to use action or descriptive statements, because certain phrases can mean different things to different people.

EXAMPLE

"We hung out at the party."

This is an example of a conclusory statement that may not enable investigators to be able to view the full picture of what actually occurred.

Consider instead helping your advisee use action statements to describe what actions happened.

"We were talking at first with a group, but then we ended up alone. We took 2 or 3 shots and then we started playing flip cup. We played about 2 games before we decided to leave the party together."

PRACTICE TIP

One way to help an advisee develop descriptive statements is to have them **think of their narrative as a script or screenplay** and to think of the investigators as actors tasked with acting out a re-creation of the incident. This helps advisees frame their narrative in terms of specific actions, specific words, and a description of the environment and surroundings.

Always remind your advisee that if they are asked a question that they know the answer to, they should answer! Conversely, if your advisee is asked a question that they do not know the answer to or do not remember, it is okay to say "I don't know", rather than to guess.

Consider **"flashbulb memory."**

Imagine you were asked the question, "where were you at the exact moment when you found out about the tragic events of September 11th?" You might be able to answer this question without guessing because the moment sticks out to you; you can visualize the scene clearly in your mind.

But what if you were asked a follow-up question about what you did later that day, after you had heard the news? Unlike the flashbulb memory, the moment when you first heard the news, you might not be able to visualize these events that took place later in the day with as much clarity (or any at all). You might think you know what you did, but, the key word there is "think." In short, you may not be one hundred percent sure about what you did later in the day, like you were one hundred percent sure where you were when you initially found out the news.

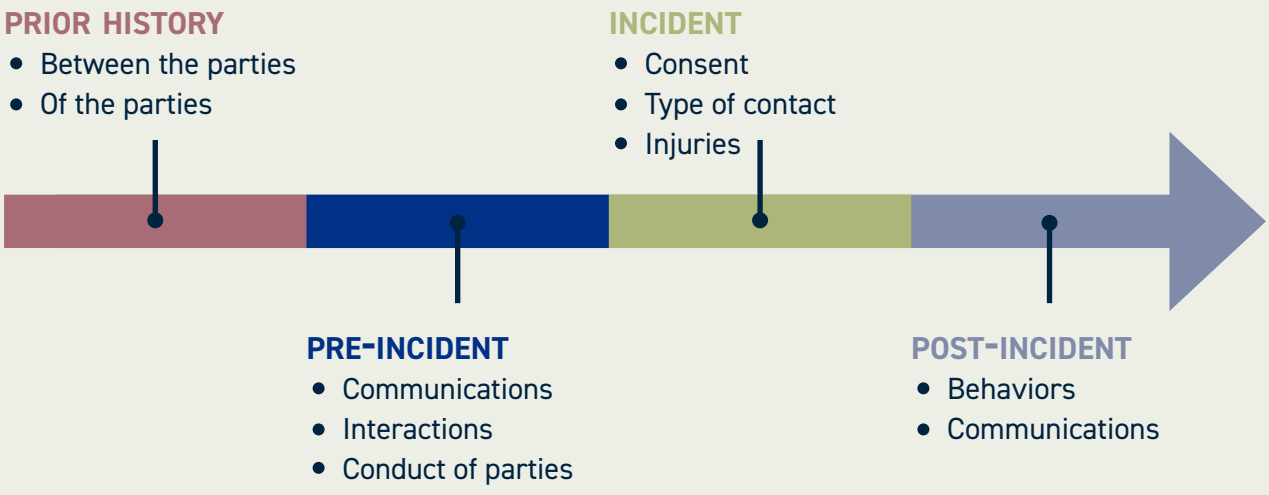
The former is a question you know the answer to, but the latter is one that, to avoid guessing (and thus, giving information you are not positive is one hundred percent truthful), you may want to consider saying "I don't know" or "I don't remember."

Be comprehensive in your questioning. While it is extremely important to focus on the incident being reported, an investigator may also ask questions about events leading up to the incident and the aftermath.

CREATE A TIMELINE:

During the pre-interview prep session, it is great to take notes while your advisee is answering questions and organize them into a timeline.

The timeline allows your advisee to organize their thoughts chronologically, and add in other evidence that might be relevant to that portion of the narrative. For example, they may add in the content of a text message from the day after the incident, in the timeline, under the notes section about the day after the incident.



Make sure to review any preliminary statements that your advisee may have provided to the Title IX Office, which may have occurred before you became involved. Compare any preliminary statements to your prep notes for inconsistencies, omissions, and areas in need of clarification or expansion. Before you provide any evidence to Title IX investigators, you, as the advisor, should review it first and discuss its relevance, purpose, and meaning with your advisee.

CREATE AN AGENDA:

During their Title IX interview, your advisee may want to clarify their preliminary statements or ask questions about the process. So in advance of the interview, you can help them create an **interview "Agenda."** Make sure that everything you want addressed with the investigators is on that list, so nothing gets forgotten. Also include any **Comfort Plans** on the Agenda.

CREATE A COMFORT PLAN:

A **"Comfort Plan"** refers to how your advisee can prepare for the interview (or hearing) by creating a comfortable environment for themselves. Discuss with your advisee what sort of preparation they might need to help them feel the most comfortable on that day, and add the Comfort Plan to the top of the Agenda so you both remember it.

Examples of items on the plan could include:

Location

If your advisee is participating in the interview (or hearing) virtually, consider where, physically, they are going to be. If they are home, where would they be most comfortable, but also have a considerable amount of privacy? If they are on campus, discuss whether they would prefer a private study room (and, if so, make sure to reserve in advance) or would prefer to be in their residence.

Scheduled Breaks

No matter how much you have emphasized the importance of taking breaks with your advisee, it is not uncommon for them to forget to ask for one during the interview. Consider, ahead of time, setting up some scheduled breaks at specific times or after specific content and putting them in the Agenda so your advisee remembers. Make sure your Agenda emphasizes that they should ask for a break if they are feeling low in energy and wish to have a snack.

Hydration and Energy

Interviews (and hearings) can be lengthy and may even be scheduled during lunch hours. If they are held in-person, your advisee should bring water and some small snacks. If they are participating virtually, your advisee should make sure to have small snacks available to have during breaks and have water with them. Having a glass of water nearby (and drinking from it!) might help your advisee remain focused and calm while being questioned.

Comfort Items

Ask your advisee whether they can bring any items that will help them feel more comfortable, like a favorite sweater. Some advisees are aided by holding items during questioning, like stress balls, grounding stones, or even rubber bands that they can roll into balls in between their hands. Set a reminder to make sure they have the items during the interview or hearing.

4 COMPILING AND PRESERVING THE EVIDENCE & CREATING A SUGGESTED WITNESS LIST

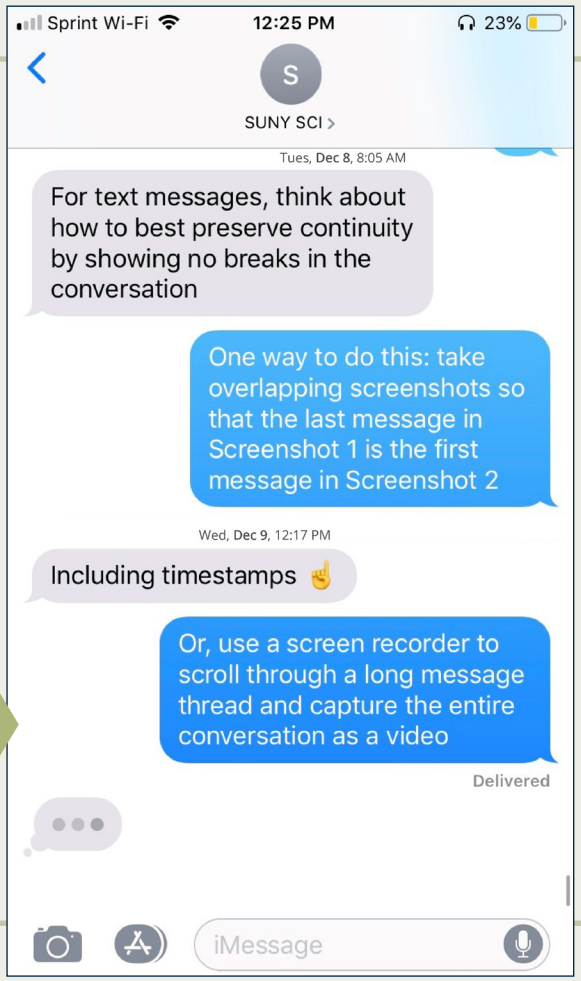
While it is *not* required for a party to support their testimony with corroborating evidence, it can help decision-makers determine whether a violation occurred and is often given considerable weight. Here are some suggestions when considering submitting tangible evidence or proposing third-party witnesses.

Tangible Evidence:

If your advisee mentions something that could be a tangible piece of evidence, like a text message or e-mail, ask if they still have it in their possession.

- **Think outside the box!** If your advisee mentions that they took an Uber or Lyft on the night of the incident, see if they still have the electronic receipt.
- Generally, you should suggest to your advisee that digital evidence be stored on a **USB or external hard drive**, rather than just on their phones.
- If your advisee has any physical evidence, advise them to **photograph it**.
- If your advisee has any physical injuries, advise them to **photograph the injuries**, on multiple days following the incident, if applicable. Bruising may not show up until at least a day after an incident takes place and often changes colors over several days.
- Streamline the process by collecting as much evidence as possible before the initial interview.

Make sure to **preserve digital evidence** like text messages, e-mails, social media posts, and photographs. Consider reaching out to the Title IX Coordinator to work with them to capture evidence in the institution's preferred method for the investigatory record.



Suggested Witness List:

If your advisee mentions a person during their narrative, jot down their name and any contact information your advisee has for them. This will become the draft outline of your suggested witness list that your advisee will eventually submit to the Title IX investigators. Before submitting that list, however, it is crucial to go over each potential witness, evaluate their value and relevance to the investigation, and narrow if needed. Speak with your advisee about who this individual is and how they are involved in the incident, if at all.

WITNESS TYPES:

Direct Witnesses: Witnesses who have first-hand knowledge of an incident or fact are the most important witnesses whose statements will be given the most weight. By contrast, statements by a witness whose knowledge is based on second-hand or indirect sources, like hearing about what happened through a third-party, will usually have less weight.

Character Witnesses: In Title IX cases, parties are allowed to introduce character witnesses, but most institutions' hearing decision-makers will afford minimal weight to any non-factual character testimony of any witness.

Expert Witnesses: Parties are allowed, but certainly not required, to introduce expert witnesses in Title IX cases. Expert witnesses are individuals whose participation is intended to provide insight on a contested issue due to their special expertise on that topic. Before your advisee decides to introduce an expert witness, consider what knowledge they have and be prepared to have that expertise explained and challenged. And consider what issue the witness' expertise would help them provide relevant and helpful testimony on. Be aware that hearing decision-makers may afford little weight to any expert testimony not directed to the specific facts in the case.

A direct witness might be someone who was present at a party that occurred hours before the alleged policy violation and observed the parties interacting, or someone who observed either party the morning after the alleged incident.

⚠ CAUTION

Polygraph Examiners: Parties are allowed to introduce polygraph evidence ("lie detector" tests) in Title IX cases, but these tests are outside of standard use in academic and non-academic conduct processes. As with character witnesses, most institutions' investigators and hearing decision-makers will afford minimal weight to this evidence.

4 PARTICIPATING IN THE INTERVIEW

Remember your Role: In the interview, your job is to support your advisee, not to serve as a zealous advocate or make an argument on their behalf. Most educational institutions will not allow you to speak during interviews, except perhaps to ask the investigators to clarify or rephrase a question that you think is vague or confusing, or to ask for a break. This is why the advisor role is often described as a **"supportive potted plant."** Always consult the specific institution's policy or speak with the Title IX Office to learn any institution-specific rules regarding decorum and the function of an advisor during an interview.

Take Notes: During the interview with the Title IX investigator, you can help your advisee by taking notes on a notepad or on a laptop.

Check off your Agenda Items: If you created an Agenda, continue to refer back to it and mark off when specific items are addressed. Use breaks to review uncompleted items with your advisee.

Pump the Breaks: As the advisor, you may request a break if you think your advisee needs one, especially if you observe them exhibiting signs of distress. For more information on recognizing distress, check out the practice tip under ***Trauma-Informed Practice, page 11***.

PRACTICE TIP

If you generated a document as a result of your prep session, like a timeline, it can be helpful to take notes of the Title IX interview directly in that document. You can then follow along with your advisee as they provide answers to the questions during the interview. This will also allow you to identify any facts that your advisee may have forgotten to include while providing their narrative to investigators, which you can discuss with them during a break. *Consider writing or typing in a different color to differentiate these notes from others.*

5 SUBMITTING EVIDENCE AND SUGGESTED WITNESS LIST

All parties have the same opportunity to present witnesses and evidence in a Title IX proceeding. Be sure to ask the Title IX Office how they expect evidence to be submitted, such as through e-mail or a cloud storage platform.

Once your advisee has finalized their witness list, it is generally a good idea for your advisee to let any potential witnesses know that members of the Title IX Office may be reaching out to speak with them. It is advisable to let the Title IX investigators know, before contacting these individuals, that your advisee will be doing this.

- Encourage your advisee to reach out to any potential witness by text message or e-mail, rather than verbally, so that there is no discrepancy in the information relayed to the potential witness.
- Advisees should not include details about the investigation when contacting potential witnesses.

EXAMPLE

Hi {Name}, Hope you are well. I just wanted to let you know that I am involved in a Title IX investigation and as part of that investigation, the Title IX Office may contact you. Due to privacy concerns and the confidential nature of the investigation, I unfortunately can't provide any more details. Thank you!

As an advisor, **it's critical to follow deadlines for submitting evidence or suggested witnesses**. If your advisee requires a deadline extension, make sure to check the policy for any specifics on when those requests need to be submitted. For example, many policies state that requests for extensions must be submitted no later than 5 business days prior to deadline.

6 SUBMITTING EXPLANATORY DOCUMENTS

When submitting evidence to the Title IX investigator, you may want to speak with your advisee about attaching an explanatory document for some of your evidence. This can be especially helpful when submitting electronic evidence, such as lengthy text message threads or screenshots of call logs. These documents can provide useful context, background information, or summaries of the evidence to the investigator.

- **Photographs:** Consider submitting an explanatory document with the photograph describing what is depicted in the image.
- **Text messages:** Consider submitting an explanatory document that provides the meaning and context for the text, which may not be immediately apparent to outside viewers.

PRACTICE TIP

When you are submitting a number of relevant text messages, you may consider submitting a **"Key Text Summary,"** which identifies the most relevant and important text messages to the investigator. If possible, arrange the Summary in chronological order, making sure to include the date and time of the text message. Additionally, include, next to the identified text, any explanatory information you'd like to provide about that text.

EXAMPLE

"1/5/20 at 3:40 P.M.: I texted my friend {Name} 'I can't believe what happened last night.' I was referring to the incident from the night before. I didn't give any more detail at that time, because after I texted Jordan, I got nervous that I shouldn't be talking about what happened with anyone else."

Before submitting an explanatory document, make sure to check with the Title IX Office to make sure such documents are permissible and, if so, whether there are any specific parameters for them. Note that the other party has access to anything you submit, including explanatory documents, in advance of the hearing.

PRACTICE TIP

Advisees should be the author of any documents. As an advisor, you may assist your advisee in preparing the document, reviewing and editing the document, making suggestions, or identifying any areas in need of clarification.

7 EVIDENCE REVIEW

After helping their advisee submit evidence and statements, the advisor will aid the advisee in inspecting and reviewing the investigative file. The parties must have an equal opportunity to inspect and review the evidence obtained through the investigation and meaningfully respond to it before the investigation ends. Under the Title IX Rules, the parties have at least ten days to inspect and review the evidence and submit a written response to the investigator. The investigator will consider the parties' written responses before completing the Investigative Report.

PRACTICE TIP

Depending on institutional policy, you and your advisee may be asked to sign a **non-disclosure agreement** governing access to the investigative file. When considering such agreements, keep in mind that they cannot prohibit your advisee from generally discussing the allegations under investigation with a parent, friend, or other source of emotional support, or with an advocacy organization. But they may clarify that the advisee may not discuss information that does not consist of the allegations under investigation, including evidence related to the allegations that has been collected and exchanged between the parties and their advisors during the investigation, or the Investigative Report summarizing relevant evidence sent to the parties and their advisors. These agreements often make the advisee responsible for their advisor's adherence to the agreement, so if you violate the agreement, your actions may negatively impact your advisee and could result in sanctions against them.

Evidence that will be available for inspection and review by the parties will be any evidence that is directly related to the allegations raised in the Formal Complaint. It will include any:

1. **Evidence that is relevant**, even if that evidence does not end up being relied upon by the institution in making a determination regarding responsibility;
2. **Inculpatory or exculpatory evidence** (evidence that tends to prove or disprove the allegations) that is directly related to the allegations, whether obtained from a party or other source.

Each institution will set a policy for sharing the investigative file through an electronic format or a hard copy.

PRACTICE TIPS

- The investigative file may contain materials that you and your advisee have never seen before. Make sure to check first with the institution's Title IX or Student Conduct Office to find out if there are any restrictions with respect to the materials, like a prohibition on printing and saving individual files.
- Make sure you and your advisee take detailed notes while reviewing the evidence. Bring a timeline of notes from your prep sessions and the Title IX interview with you when reviewing the evidence.

8 INVESTIGATIVE REPORT

Once the evidence review period has passed, the institution's investigator must produce an **Investigative Report**.

The Investigative Report consists of all relevant materials related to the case, including summaries of interviews with parties and witnesses, and a description of evidence collected.

With the advisor's help, the advisee will have at least ten days to review a draft of the Investigative Report and submit a response. The purpose of this response is to clarify and expand on any details contained within the Investigative Report. Depending on the institution, there may be more than one round of reviews of the drafts of the Investigative Report, and therefore more than one opportunity to submit a response. Make sure to check with the institution's policy and Title IX Office regarding this process, including how many rounds of review and response are offered and any expected deadlines for the process.

Additionally, after reviewing the Investigation Report, speak with your advisee about whether there are additional witnesses you would like the Title IX Office to contact.

4 THE HEARING

OVERVIEW OF A TITLE IX GRIEVANCE HEARING

In a Title IX Grievance Hearing, the burden is on the institution to determine whether sufficient proof exists to find the respondent responsible for the alleged violation, and not on either party to prove or disprove the allegations.

Typically, the decision-maker, which may be a single hearing officer or a hearing panel, must determine responsibility by a ***preponderance of the evidence***, meaning that it is "more likely than not" that the respondent is responsible. Your institution may instead use a ***clear and convincing evidence*** standard: Be sure to check institutional policies for the standard of evidence.

For the hearing, all evidence acquired during the investigation should be available to the decision-maker and all parties to give the parties equal opportunity to refer to it as needed.

A typical hearing will begin with the individual running the hearing outlining the purpose of the hearing, the rights of the parties, the expectations for all participants (including any decorum rules), a recitation of the alleged violations, and an opportunity for the respondent to enter a claim. Hearings generally also include opening and closing statements by the parties, and opportunities for the decision-maker

to ask questions of the parties and any witnesses. The order and process of these items should be outlined in the institution's policies and procedures and explained to your advisee.

While the details of institutional processes may vary, one piece of the hearing that *must* occur is the opportunity for cross-examination of parties and any witnesses by each party's advisor. If a party does not have an advisor, the institution must provide someone to act as their advisor for the purpose of asking cross-examination questions.

DECORUM AND RULES REGARDING PARTICIPATION

Each institution may adopt their own **Rules of Decorum**. These rules dictate the expectations the institution has for hearing participants, including advisors, witnesses, and parties.

Examples of conduct that may violate the Rules of Decorum include asking non-relevant questions, asking questions that include accusations or attacking language, using profanity, screaming or yelling, interrupting participants, and engaging in other behavior that a reasonable person would see as intended to intimidate a participant or disrupt the process.

Before participating in a hearing, consult the institution's Rules of Decorum and review them with your advisee.

If a hearing chair or decision-maker concludes that the Rules of Decorum have been broken, they may, in their discretion, take action. Action may take many forms depending on the policy's terms, including discouraging or admonishing participants, issuing a penalty to a participant, and pausing or adjourning the proceeding.

Policies often warn that if a hearing chair or decision-maker concludes that an advisor has violated the Rules of Decorum, they may, in their discretion, remove the advisor from the proceeding. The impacted party will have an opportunity to replace the removed advisor or the institution will provide a replacement advisor for the purpose of conducting cross-examination at the hearing.

In your role as an advisor, if you believe a hearing participant has violated the Rules of Decorum, you should make the hearing chair and/or decision-maker aware. Each institution may have their own preference of how they would like to be notified of potential violations.

PRACTICE TIPS

An advisee will be negatively impacted if their advisor is removed from the hearing for repeatedly running afoul of the Rules of Decorum. A substitute advisor may not have time to develop a rapport with the advisee or build a complete understanding of the case. This outcome is likely to add stress to an already difficult situation for the advisee.

Prior to the hearing, ask the appropriate official what the best method is for alerting the decision-maker of a potential violation of the Rules of Decorum.

PREPARING ADVISEES FOR THE HEARING

Create a Digest: Prior to the hearing, consider condensing the notes you have accumulated throughout the investigation, plus the summaries of witness interviews, into short digests. These digests may be easier to review during hearing breaks than the comprehensive set of notes, which you should also bring along for reference, or the entire Investigative Report.

It is helpful to create a digest for each potential witness (including the opposite party to your advisee) and for your advisee's own testimony. Include any relevant evidence corroborating their narrative. Additionally, include potential cross-examination questions (or identify areas your advisee may be crossed on) at the bottom. Leave space to add notes during the hearing. During testimony, check off points as they are addressed. Utilize breaks to discuss points that were missed and develop additional cross-examination questions that might be appropriate.

Aim for each digest to be only one page in length. **Remember:** The hearing is not a time to recite every fact gathered in the investigation, because the decision-maker will already have the Investigative Report.

Sample Digest of Advisee Narrative:

Use short chapter headings that signify important events in the narrative

Coffee at Oren's

- Discussed meeting up before the party
- Hands touching

Party at Green Court

- 2-3 beers + 2 mixed drinks with vodka (over 2 hours)
- Tripped on staircase -- seen by Pat
- Kissing in kitchen
- Uber to Galway dorm at 11:30 P.M. (***don't have receipt***)

Include a list of important facts about the event

Cross reference to relevant evidence (tangible evidence or witess testimony), where appropriate.

Entering Galway Dorm

- Signed log-in book @ 11:47 P.M. (photograph @ Appendix C, page 72) - signature mostly legible, slightly slanted
- Campus Security D.P (page 30-32) - wobbly but awake, texting, and giggling [***no memory of seeing D.P!***]
- 11:48 P.M. - Leaning against wall waiting for elevator (video surveillance clip @ Appendix D)
- 1:50 P.M. Text to Ryan: iz hapn' (screenshot @ Appx E, Page 74)

Areas for Cross/Cross Questions:

Include page numbers that correspond to where the information appears in the Investigative Report for quick reference.

PRACTICE TIP

Consider creating a shorter timeline, listing only important dates, so they can be referred to quickly if needed.

Review your Agenda and Comfort Plan: Prepare for the hearing with the same techniques you used for the pre-hearing interviews, such as making Agendas and Comfort Plans *(see page 19)*, and building-in scheduled breaks. Consider whether the Title IX policy includes accommodations for requests that parties not be in the same room and consult with your advisee about their preference.

PRACTICE TIP

If you are attending an in-person hearing, consider bringing small snacks for your advisee.

What to Bring: Make sure to bring all of the notes you have compiled, including a copy of the Investigative Report, and a copy of the policy governing the hearing. And bring any materials needed for taking notes during the hearing.

HEARING PROCESS

Introductory Statements and Charges: Usually, at the hearing's start, a decision-maker, which may be the hearing official or the chairperson of the hearing panel (or similar official), will introduce themselves and the parties, describe the purpose of the hearing, reinforce any rules of decorum and privacy governing the process, describe the parties' due process or fair process rights, and then indicate the charges. The respondent will be asked whether they claim to be in violation or not in violation of the charges.

Opening Remarks: Next, some institutions allow each party to make a **brief** opening remark. As an advisor, you should work with your advisee on what they would like to say. The purpose of this statement is to raise any key points your advisee would like the decision-maker to think about as they review the relevant evidence and testimony.

Not all campuses allow for opening remarks. If they do, consider whether the policies restrict their length and content. For example, an institution may allow a party to deliver an opening remark, but may not allow that remark to contain any language describing how the incident, aftermath, and investigation has affected the party. Those comments would generally be reserved for an impact statement at the close of the hearing.

PRACTICE TIPS

There should not be any surprises during the introductory statements and presentation of the charges. All of these rules and charges should have been shared with you and your advisee before the hearing.

If something seems off-script, let your advisee know so they can raise the issue. For example, if you notice that the decision-maker is not recording the proceeding, fix the problem before the hearing is underway.

Institutions generally notify the parties of who is participating in the hearing at a pre-hearing conference so they can raise bias or conflict of interest concerns then. But if the notification of participants does not occur until the hearing's start, then raise any bias issues at this time.

We strongly encourage advisees to prepare a thoughtful, pre-written statement. It helps students to not be distracted by the process and focus on their organized thoughts.

Examination by Panel: After opening remarks, the decision-maker will usually ask questions of the parties and witnesses. Rather than have a prosecutor present a case against a respondent, institutions generally task the decision-maker with asking the parties and witnesses questions building on the evidence compiled in the Investigative Report.

The purpose of this inquiry is not to build a case for or against any party, but to determine if a violation of the Title IX Policy and/or Code of Conduct has occurred as alleged in the Notice of Allegations.

Cross-Examination by Advisors: Once the decision-maker has the opportunity to ask questions of a party or witness, the advisors will each be afforded the chance to cross-examine them. The Title IX regulations set strict parameters on how cross-examination may be performed, and advisors should not assume that courtroom rules of evidence will apply in this forum.

Closing Remarks or Impact Statements: After testimony, some institutions also allow parties to present closing remarks. Generally, institutions will allow parties to use impact language explaining how the incident, aftermath, and investigation has affected the party. Check whether institutional policy requires the party to personally deliver the closing remarks, or permits the advisor to make this statement.

As this is a student-centered and educational process, it is advisable that students be the authors of their own impact statements. As an advisor, you may assist your advisee in preparing the statement, reviewing it, making suggestions, and identifying areas to clarify.

TYPES OF EVIDENCE USED AT THE HEARING

The types of evidence that may be introduced at a hearing usually fall into one of three categories: **Direct Evidence, Corroborating Evidence,** or **Circumstantial Evidence**. Evidence refers to both tangible materials, like documents, and to witness testimony.

Direct Evidence:

First-hand observations and evidence of the incident or its surrounding circumstances are direct evidence. This evidence is often given considerable weight at a hearing. This includes:

- Direct statements from the parties. For example:
  - A witness who provides testimony that they walked into a room at the party and observed the respondent engaging in sexual activity with the complainant, who was unresponsive, not moving, and had their eyes closed.
  - A witness who provides testimony that they did three shots of vodka with the parties.

Corroborating Evidence:

Statements or tangible materials that tend to confirm direct evidence regarding the incident may serve as corroborating evidence. This may include:

- Video evidence
- Text message threads
- Security Footage
- Swipe Card Records
- Business Records
- Medical Records

Circumstantial Evidence:

Statements or tangible materials that rely on an inference to connect it to a conclusion of fact. The weight that the decision-maker gives to circumstantial evidence will vary greatly depending on the surrounding evidence.

- Example: Investigators may obtain photographs of the scene of the alleged sexual assault which show several empty vodka bottles and overturned Solo cups. The presence of these items may be suggestive, though not determinative, of the parties' level of intoxication.

5 CROSS-EXAMINATION AND RELEVANCE

INTRODUCTION

Cross-examination is required. The Title IX Final Rule requires that a postsecondary institution's grievance process must provide for a live hearing with cross-examination. The Final Rule is also clear that at the live hearing, the cross-examination questions must be asked by the party's advisor and never by a party personally.

A party may decide not to ask their advisor to conduct cross-examination of the other party or any witness, though this is generally not advised, as the advisee gives up their chance to highlight testimony that may bolster their narrative, or raise questions about evidence that casts doubt on their testimony.

Purpose of Cross-Examination: The purpose of cross-examination during the hearing is not to cover every topic, question, or piece of evidence in the case. At this point in the process, all parties will have had the opportunity to provide evidence as well as review and comment on all of the evidence that has been gathered. In addition, the decision-maker has had the ability to ask direct questions of the witness. Rather than repeat every fact in these case materials, use cross-examination to highlight important facts, especially those that corroborate your advisee's narrative. The Investigative Report may be lengthy, so use this opportunity to focus the decision-makers on the most critical points.

PREPARING TO CROSS-EXAMINE PARTIES & WITNESSES

Under the Title IX Final Rules, the primary (and sometimes only) job of the advisor is to conduct cross-examination on their advisee's behalf. This task requires significant preparatory work to know what questions to ask and ensure they meet the rules of relevance and decorum. Prior to the hearing, you should speak with your advisee about the cross-examination process and what your role is in it.

Compiling Potential Questions: During prep sessions with your advisee, brainstorm questions you plan to ask each individual at the hearing. Some institutions will actually require you to submit questions before the hearing, which makes this step even more critical. Institutions make this request so that they can anticipate their relevance rulings in advance.

Remember that even when the institution requests questions in advance, you may ask additional questions to the ones on the submitted list at the hearing. Also, you are not required to ask all of the questions on your submitted list.

Building a Strategy: Cross-examination is your opportunity to test the credibility of a particular witness who is providing testimony. When thinking about credibility, consider how you determine in your everyday life if someone is providing you with truthful or accurate information. You might ask questions about:

- **The presence or absence of inconsistent statements**
- **A motive to deceive (or lack of one)**
- **Conflicts of interest and bias (or lack of one)**
- **Whether the witness has received (or not received) a benefit.**

Basic Cross-Examination Approach: For those unfamiliar or intimidated by the prospect of conducting cross-examination, here some are ordinary guideposts for framing your questioning.

Obtain and confirm helpful information from the witness	*"You were at the party at 9:30 pm? And you stated to the investigators that you observed the complainant at that time and they appeared to be sober? What made you think that?"*
If the witness does not have helpful information, then ask questions to limit the witness' importance	*"You left the party after thirty minutes? At around 10 pm? So you did not actually see how the complainant was acting at around midnight?"*
Address potential bias	*"You know the respondent from Debate Team? Would you say you are good friends?"*

CHALLENGING THE CREDIBILITY OF A WITNESS: THINK ABOUT THE THREE C'S

When you've spotted a credibility issue, it helps to plan a line of questioning that can elicit the testimony you need to bring this issue to the decision-maker's attention. Here is a tried-and-tested strategy for challenging a witness' credibility.

What Cross-Examination Isn't:
A chance to harangue or badger a witness or call them a liar.

1 **Confirm:**

When you have identified aspects of a witness' testimony that may lack credibility, such as an inconsistency between the statements given to the investigator and their hearing testimony, ask the witness to reiterate their prior statement.

"This morning, you told the hearing officer that the complainant 'did not seem intoxicated" at the party, correct? In fact, you told the hearing officer that the complainant 'seemed fine,' correct?"

2 **Compare:**

Ask the witness to identify the occasion of the prior inconsistent statement, and emphasize the circumstances of that prior statement.

For example, if the circumstances suggest that the earlier statement is more credible than the one given at the hearing, ask the witness to reflect on those circumstances.

"But this not the first time you've been asked to describe the complainant's condition at the party, correct? In fact, you spoke to the investigator just two days after the party, correct? And at that time, just two days after the party, you told the Title IX investigator that the complainant was 'acting unusually' and 'stumbling' at the party, correct?"

3 **Confront:**

Ask questions that confront the witness with their inconsistent statement respectfully. Through questioning, suggest possible reasons why the witness may have changed their testimony.

"So, from the time of your interview with the investigator until today's hearing, your description of the complainant's condition at the party has gone from 'acting unusually' and 'stumbling' to 'seemed fine,' correct? Now, we can agree that between your interview with the investigator and today's hearing, you and the respondent have spoken many times, right? And that's because respondent is your roommate and good friend, right? And you don't want to see anything bad happen to the respondent, right?"

PRACTICE TIPS

- Make sure to have the ability to write down questions as you think of them and speak with your advisee before asking a question that you hadn't agreed upon originally.
- Ask all of your questions in a neutral and non-aggressive manner. Again, these proceedings are not meant to be like a trial in criminal or civil court; don't expect a "gotcha" moment to happen during any witness's testimony. The cross-examination portion of the hearing is not an excuse to abandon the rules of decorum, ask demeaning, non-relevant, or rude questions, or to treat any party or witness with hostility.
- If, as part of your questioning, you are referring to a specific page of the Investigative Report or document in the case file, provide the page number or name of the document so the decision-maker can reference appropriately.
- You may also ask a witness to clarify statements they made to investigators or that appear in evidence, like text messages. For example, while speaking to an investigator, a witness might describe a party's demeanor as "shady," "weird," or "not forthcoming." Those words, while descriptive, may have different meanings to different individuals. If the investigator did not follow up on what the witness meant by the description, consider using cross-examination as a chance to ask.

IDENTIFYING AREAS OF CORROBORATION

As discussed above, most Title IX cases are governed by the "preponderance of the evidence" (more likely than not) standard. As such, identifying and highlighting evidence that tends to corroborate your advisee's narrative can be helpful, although it is not required for the decision-maker to be able to reach a finding regarding responsibility. If some piece of corroborating evidence can be best highlighted through another witness, rather than your advisee, consider highlighting it through your cross-examination questions.

- **Witness Testimony:** Brainstorm with your advisee if there are any witnesses who may have knowledge of the incident, such as an outcry witness who spoke to one of the parties immediately after the incident. If so, consider highlighting the corroborating facts in your cross-examination questions of that witness.
- **Digital Evidence:** Brainstorm with your advisee if there are text messages or social media posts (and any incorporated metadata) that corroborate their narrative. For example, in a case alleging sexual activity that occurred while one party could not give consent due to alcohol consumption, are there text messages sent by the complainant to another party, at or near the time of the incident, that are riddled with misspellings and/or grammatical errors? Or were the text messages written in complete sentences with proper punctuation?

RELEVANCE

The last step before crafting your cross-examination questions is ensuring that they will meet the standard of **"relevance"** defined within the Title IX Final Rules. Any question asked by an advisor has to be evaluated for its "relevance" by the decision-maker. Relevance in a Title IX hearing does not always fit within the rules commonly used in a courtroom, so advisors should not assume that their experience as trial attorneys will translate easily into this framework.

Determining Relevance: The U.S. Department of Education expects institutions to apply the **"plain and ordinary meaning"** of relevance in their determinations. Determinations should be made on a question-by-question basis, looking narrowly at whether the question seeks information that will aid the decision-maker in making the underlying determination.

Determinations should *not* be based on:

- Who asked the question, their possible (or clearly stated) motives, who the question is directed to, or the tone or style used to ask about the fact
- In whole or in part upon the sex or gender of the party for whom it is asked or to whom it is asked
- Status as complainant or respondent, or past status as complainant or respondent
- Organizations of which they are a member
- Any other protected class covered by federal or state law (e.g. race, sexual orientation, disability)

Much of the content within these hearings may be considered sensitive and embarrassing by parties or advisors. However, relevant questions need to be considered even if a party or advisor believes the danger of unfair prejudice substantially outweighs their probative value. Only irrelevant questions, including about the complainant's prior sexual history (detailed below), may be excluded.

Relevant Questions:

Ask whether the facts material to the allegations under investigation are more or less likely to be true.

Irrelevant Questions:

Are generally not directly related to the allegations. Things may be interesting or surprising but not be relevant.

QUESTIONS THAT ARE IRRELEVANT UNDER THE FINAL RULES:

Question about Complainant's Prior Sexual Behavior or Sexual Predisposition

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
- If 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. **34 C.F.R. § 106.45(6)(i)**.

Question regarding Privileged Information

Questions that constitute, or seek disclosure of, information protected under a legally-recognized privilege are irrelevant. **34 C.F.R. § 106.45(1)(x)**. Depending on your state, individuals with legal privilege may include medical providers (physician, dentist, podiatrist, chiropractor, nurse), psychologists, clergy, rape crisis counselors, and social workers. (**New York's "laws of privilege"** are listed within **CPLR Article 45**; Each state has its own rules around privilege).

Questions about Undisclosed Medical Records

Questions that call for information about any party's medical, psychological, and similar records are irrelevant unless the party has given voluntary, written consent. **85 Fed. Reg. 30026, 30294 (May 19, 2020)**.

Duplicative Questions

If an advisor repeats a question the advisor already asked, it may be ruled irrelevant. **85 Fed. Reg. 30026, 30331 (May 19, 2020)**.

PREPARING YOUR ADVISEE TO BE QUESTIONED

Besides preparing a list of questions to ask others during the cross-examination portion, and making sure they are **"relevant,"** you also want to prepare your advisee for cross-examination. It is completely normal for advisees to be nervous about this portion of the hearing, which is why preparation is key!

From the beginning of the process, starting with the investigation stage, you should be identifying potential areas where your advisee may be scrutinized. Imagine that you were advising the other party: what questions would you want to ask your advisee? What questions did you have when first hearing their narrative? Consider also the credibility factors discussed above.

PRACTICE TIP

The U.S. Department of Education has strictly interpreted the Title IX Rules to require parties and witnesses to answer all relevant questions posed by advisors. Remind your advisee that their obligation here is to answer all questions truthfully, and if they don't know the answer to the question, they can simply say **"I don't know"** or **"I don't recall."**

STRATEGIES TO PREPARE YOUR ADVISEE FOR QUESTIONING

Practicing Cross-Examination: Advisees usually benefit from a mock cross-examination before the hearing where they can hear the questions you anticipate they will be asked. This practice will help steel them for questioning that, in many cases, will leave them feeling upset, uncomfortable, or attacked. Preparation can help lessen the stress of cross-examination.

- **Remind your advisee that cross-examination is required for Title IX hearings.** Although the questions might feel personal, the process is not. All parties and witnesses will be questioned.
- **To this end, reinforce that it will not be to your advisee's benefit to answer the questions in an aggressive or uncooperative manner.** If your advisee starts to feel agitated or angry during the questioning, they should ask for a break so they can decompress and recharge.
- **Speak with your advisee about how they will manage stress during cross-examination**. Refer to your Comfort Plan *(see page 19)*. The goal is for your advisee to remain focused and calm under questioning. Remind your advisee that they can take breaks and that the decision-maker will not draw any negative inference from the choice to take multiple breaks.
- **Make sure you are watching your advisee for signs of distress** (See, *Trauma-Informed Practices, page 11*) and ask for a break if you think your advisee might be exhibiting any of them.
- **Encourage your advisee to take a breath pause before answering a question.** This will allow your advisee a moment to organize their thoughts and to make sure they heard and understood the question correctly; they should not feel pressured to answer immediately.
- **Let your advisee know that if they are asked a question they did not understand, they can absolutely ask for clarification.** Additionally, they can ask for a break to discuss the question with you.

Handling Inconsistent Statements: Make sure to review and compare all of your advisee's statements about the incident, including: preliminary reports, statements to university police/public safety, interviews with Title IX investigators, text messages, and statements to third parties. It is not uncommon for your advisee's narratives to be slightly different at various points, but expect these variations to be fodder for cross-examination.

- **Speak with your advisee about the differences or inconsistencies and why they may have happened.** For example, your advisee may have omitted certain facts when talking to Friend A, but told a much more detailed version to Friend B, because they are closer to Friend B than Friend A (or knew that Friend A was friendly with the opposing party).
- **When you identify a potential inconsistency, consider whether this is a material or minor inconsistency.** This will help in identifying which "inconsistencies" you should focus on.
    - An example of a material inconsistency you should focus on might be that your advisee told the investigators during their first interview that the incident took place in their residence hall, but told their friend, the day after the incident, that it took place at the opposing party's residence hall.
    - By contrast, a minor or collateral inconsistency might be that your advisee told investigators that on the night of the incident they were wearing a red shirt, but a photograph taken of them on the night of the incident reveals they were actually wearing a green shirt.

Considering Motive to Deceive: Is there a possible argument that your advisee (or a witness identified by your advisee) has a motive to deceive or has received some sort of benefit, as a result of this investigation?

Let's be clear: just because someone *could* make an argument that a motive to lie or benefit exists, doesn't mean that this is true or that it had any effect on your advisee's ability to be truthful. That said, **if you were able to identify it, it is likely someone else will be able to as well.**

- **Speak with your advisee about these potential motives and perceived benefits.** Explore with them what, if any, effect they actually had on their life. The answer may simply be none.
- **Consider when these issues may have become relevant, as timing can be important.**

6 AFTER THE HEARING

DETERMINATION REGARDING RESPONSIBILITY

Under the Title IX Final Rules, after a hearing, the institution must provide a determination regarding responsibility to all parties simultaneously. This should include:

- A description of the procedural steps taken by the institution;
- For each allegation:
  - A description of the allegation
  - The findings of fact
  - Conclusions regarding the application of the institution's policy to the facts, and
  - The rationale for the determination regarding responsibility, any sanctions, and any remedies provided to the complainant;
- The procedures for appeal

ASSISTING YOUR ADVISEE IN UNDERSTANDING THE OUTCOME

Review the **Determination letter** carefully with your advisee. Do they know what, if anything, is required of them? Do they want to seek other protective measures?

Make sure they understand that the implementation of sanctions and any changes to existing supportive measures will not take place until the completion of any appeal process, or when the period for filing appeals has expired.

The Determination letter will also indicate what sanctions will be imposed on the respondent and what ongoing remedies will be provided to the complainant, along with a rationale for those sanctions and remedies. The sanction rationale may consider the respondent's prior conduct

record, if any, and the gravity of the harm. Generally, the decision-maker will only consider the respondent's prior conduct record *after* the responsibility determination is made.

One important purpose of this detailed Determination letter is to allow the parties sufficient information necessary to decide whether and how to appeal the outcome. Do they want to appeal and know how to? Pay close attention to the appeals timeline provided in the Determination letter.

APPEALS

The Title IX Final Rules guarantee each party the right to appeal the dismissal of a formal complaint and also to appeal the determination regarding responsibility within a specific timeframe, which should be outlined in the institution's policy and detailed in the written Determination letter.

For all institutions, certain rules will apply:

- The Appeals decision-maker may be one person or a panel, but it cannot be any investigator, decision-maker, or Title IX Coordinator previously involved in the case.
- Appeals can only be made on the specific grounds provided in the Grievance Process. The Final Rules requires that these grounds include:
    1. Procedural error impacting the outcome
    2. New evidence not reasonably available at the time of the determination that could affect the outcome, and
    3. A conflict of interest or bias of the Title IX Coordinator, investigator, or decision-maker that affected the outcome.
    - The institution may also include other grounds for appeal of a determination in their policy, such as disproportionate sanction and unsupported conclusion.
- Institutions must notify the other party in writing when either party files an appeal, and implement the procedures equally for all parties.
- All parties must be given a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome.

At this point, your advisee will need to decide if they want to appeal the decision under one or more of the grounds outlined in the institution's code. If they do, they will need to follow the institution's procedures for filing an appeal. You can help your advisee prepare any necessary statements and documents for their appeal.

Regardless of whether your advisee choses to appeal, they will be notified if the other party choses to appeal, and may generally provide a statement on the appeal during that process. After the conclusion of the appeal, the institution will issue a written decision describing the result of the appeal and the rationale for the result to both parties simultaneously.

PRACTICE TIPS

- Remember, appeals are generally not a re-hearing of the original case, but instead a process for reconsideration of the decision within a specified ground. Help your student frame an appeal that speaks to the provided grounds.
- Keep an eye on the timeline for appeals provided by the institution because the determination will generally become final if not appealed within the requisite timeline. This timeline is on one set clock for both parties. If one party decides to appeal seven days into a ten day timeline, the other party still has three days remaining to decide whether to appeal as well, rather than ten.

CHECKLIST

Initial Meetings & Preparing for the Investigation

	TO DO	NOTES & REFERENCE	GUIDING DATE
☐	Meet with student several times to understand nuances of case and agree to serve as advisor.	Select dates to meet; Consider privacy at location.	
☐	Complete review of Title IX grievance policy.		
☐	Complete any required FERPA paperwork with institution.		Before any meetings or correspondence with institution.
☐	Discuss Supportive Measures necessary to maintain status quo during conduct proceedings.		
☐	Confirm Notice of Allegations was received. Do not submit to interviews without receipt of this notice.		
☐	Confirm Advisee understands Supportive Measures and seek review of measures if necessary.		
☐	Preliminary Meeting with Campus Official to understand campus policy and process.		

Notes

Investigation

TO DO	NOTES & REFERENCE	GUIDING DATE
☐ Determine due dates for submitting evidence and for submitting witness lists.		
☐ Gather Evidence (Digital/Physical) • Prepare cover sheet for text exchanges if necessary. • Organize and submit physical evidence by required date.		Due to Campus Official on: _____
☐ Gather Witness Information.	Consider prioritizing those with: • First hand knowledge. • Corroborating knowledge. • All others including character or specialized as allowed. Organize & submit witness list by the required date.	List due to Campus Official on: _____
☐ Confirm there are no conflicts of interest or objections to anyone serving as a decision-maker at the hearing.		
☐ Review Evidence & Witness List (You have 10 days).	Received on _____ Email campus official when review is completed, identifying any comments, objections, or concerns.	10 days from receipt: _____
☐ Review Investigative Report (You have 10 days).	Received on _____ Email campus official when review is completed, identifying any comments, objections, or concerns.	10 days from receipt: _____

Notes

Preparing for the Hearing

	TO DO	NOTES & REFERENCE	GUIDING DATE
☐	Begin generating initial brainstorm list of outstanding questions for the other party and witnesses.	Create an editable doc with the student.	
☐	Work with Advisee to Draft Opening Statement.	Create an editable doc with the student.	
☐	Prepare Cross-Examination Questions (you are able to add questions during the hearing).		
☐	Assist in Preparing a Closing Statement.		
☐	Assist in Preparing an Impact Statement.		
☐	Confirm details of hearing date/time/location.		
☐	Confirm technology requirements for participation during hearing.		
☐	Advise student of hearing decorum requirements, appropriate attire, etc.		
☐	Develop a safety plan with the student.	*See page 15.*	

Notes

During the Hearing

	TO DO	NOTES & REFERENCE	GUIDING DATE
☐	Accompany student to hearing.	Plan to arrive early and confirm you have all necessary materials.	
☐	Participate in Cross-Examination.	*See Section 5: Cross-examination and Relevance.*	
☐	Support student throughout the hearing.	Ask for breaks when necessary.	

Notes

Post-Hearing

	TO DO	NOTES & REFERENCE	GUIDING DATE
☐	Review outcome determination with the student.		
☐	Support student through the preparation and submission of any appeal or statement of support related to final determination.	Check campus policy on due date (ex: 10 days from receipt of outcome).	

Notes

Notes