

The Advisor's Role in the Title IX Grievance Process

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Top 5 Tasks to Complete as a Title IX Advisor



Clarify which Grievance Process will Take Place

Was a formal complaint filed to start the Title IX Grievance Process?

Does the school use an alternate complaint resolution process for non-Title IX sexual harassment or sexual misconduct?



Review the School's Sexual Harassment Policy

Do you fully understand the procedures?

Are you familiar with your party's rights under Title IX & under the School's policy?



Review the School's Expectations of the Advisor

Schools may establish guidelines regarding the advisor's role in the Title IX process. These are typically provided by the Title IX Coordinator. If they are not provided, ask the Title IX Coordinator to direct you to this resource.

In some cases, the Title IX Investigators may only permit advisors to speak when directly asked a question during the interviews. Some schools may even prohibit advisors from speaking during the interviews. This guideline is often implemented to encourage parties to share their perspectives in their own words. You'll need to explain this to your party.



Communicate with your party

Meet with your party prior to any meeting or interview to understand their perspective, concerns, etc. You will want to discuss the following:

- Where are they in the Title IX process?
- Have they met with the Title IX Coordinator?
- Have they been interviewed by the Title IX Investigator?

You will also want to take this opportunity to set expectations, boundaries, and establish how your party would like information to be shared.

Be sure to keep in communication with your party throughout the process. Remember that your support for your party doesn't need to end when the Title IX process does. Stay in touch with them after the grievance process is complete.



Communicate with The Title IX Coordinator

Ask questions about the Title IX Grievance Process. The Title IX Coordinator will not only have an understanding of Title IX, but the school's own policies and procedures as well.

You may be asked to review & sign Non-Disclosure, Confidentiality and/or FERPA agreements.

Additionally, you may be asked to review & sign waivers allowing the school to copy you on emails sent to the party (notices of interviews, meetings, hearings, etc.), if available.

Be sure to keep your party informed about the agreements you've signed or are being asked to sign so you can both know what is expected.

Advisor's Guide to the Investigative Process



Once the Title IX Coordinator disseminates the Notice of Allegations to the parties, the case moves to the investigation stage. Advisors often enter the process just before the investigation, and they play an especially important role when it comes to reviewing the Investigation File, the Investigative Report, and providing written responses regarding relevance.

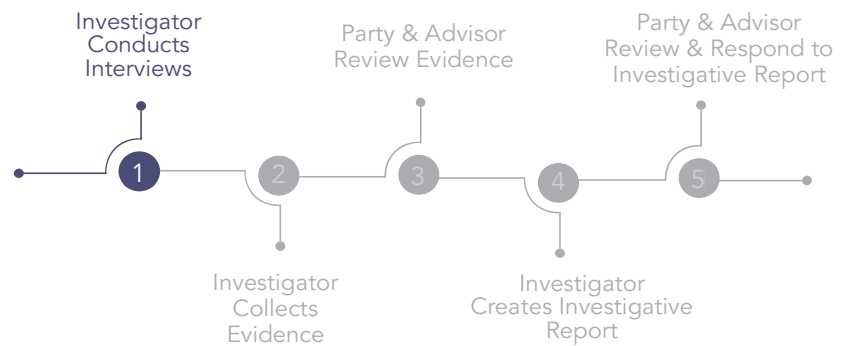
Elements of the Investigation Process



Investigative Interviews

Preparing for the Interview

As an Advisor, you are allowed to accompany your party to the investigative interviews, but you are not required to do so. As such, it is important to talk to your party beforehand to confirm whether or not they would like you to attend the interviews with them.



The Title IX Coordinator will issue an invitation to both parties to interview. Title IX requires that parties must receive this invitation with sufficient time to prepare to participate in the interview. This invitation should include the following;

- ▶ Date & Time of Interview
- ▶ Location of Interview
- ▶ Participants, including the name & title of the Title IX investigator
- ▶ Purpose of the Interview



Advisor Tip: If you or your party foresee a conflict of interest or a potential bias on the part of an investigator involved in the investigation, review the process outlined in the sexual harassment policy for reviewing conflict of interest or bias. Notify the Title IX Coordinator immediately in writing before participating in an interview.

To help prepare your party for the interview you will want to:

- ▶ Review potential questions that may arise in the investigative interview
- ▶ Ask about and listen to your party's story
- ▶ Provide feedback to your story (particularly if asked)
- ▶ Mention that you may not be permitted to speak during the interview
 - Be sure to review any school guidance regarding Advisors' participation in interviews

During the Interview

If the school does not provide guidance to Advisors regarding participation in investigative interviews, the investigator may do so. Regardless of whether the school or investigator has put forth a specific policy, remember that it is important to let your party speak. Advisors should not speak on behalf of their party or interrupt the proceedings.

However, it is important to notice if your party is struggling during the interview or if they may need support. Check to see if they need a break or to get a drink of water. You can ask your party if they need to clarify something that they said as long as you ensure that you are in no way coaching your party.

Additionally, if you or your party feel that the investigation should be concluded and resumed at another time, you may want to raise this with the investigator.

Evidence Collection

Rights of the Parties

The Investigator's role and responsibility is to collect and compile evidence for the Investigation File and ultimately the Investigative Report.

Under Title IX, both the Complainant and Respondent must have an equal opportunity to:

- ▶ Present witnesses
 - Including fact or expert witnesses
- ▶ Gather & present evidence
 - Both inculpatory & exculpatory
- ▶ Discuss the allegations under investigation



Burden of Proof

Unlike in criminal or civil cases, in Title IX cases, the burden of gathering evidence sufficient to reach a determination lies with the school, not the parties or their advisors. Remember that Advisors are not prosecutors nor defense attorneys.

Prohibited Evidence

The school cannot access, consider, disclose, or use treatment records made or maintained by a physician, psychiatrist, psychologist, or other recognized professional acting in this capacity unless the party voluntarily submits written consent for the school to use such records.

Reviewing the Investigative File

The Investigation File

Title IX Investigator must provide both parties & their advisors an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in the formal complaint. Title IX Solutions calls this information the “Investigation File”, but some schools may call it the “Preliminary Investigative Report.”



The Investigation File includes:

- ▶ Evidence that the school does not intend to rely upon in reaching a determination regarding responsibility
- ▶ Inculpatory and exculpatory evidence

Reviewing the Investigation File

Advisors should carefully inspect the Investigation File within the time frame provided by the school, which must be at least 10 days. Advisors and parties have the opportunity to provide a written response to the Investigation File within that same timeframe.

Remember that all evidence must be made available to the parties, but not all evidence may be “relevant.” Reviewing the investigation file provides you and your party the opportunity to argue if certain evidence is relevant or not.

The opportunity to review the Investigation File is important not only because it provides the chance for parties to respond regarding relevance, but because parties must know that evidence exists in order to argue that it has been withheld in the process.

Questions to Ask Yourself When Reviewing the Investigative File

?

Does the file contain evidence of past sexual misconduct?

?

Is there evidence of consent?

?

Is there evidence of past behavior? Does this evidence directly relate to the allegations or is is character evidence?

?

Were all relevant witnesses interviewed?

?

Were all documents submitted and considered?

Relevant vs. Directly Related Evidence

Directly related evidence is a broader term that describes all evidence directly related to the allegations. All directly related evidence is included in the Investigation File. Only relevant evidence, however, is included in the Investigative Report.

The Investigative Report

The Investigative Report

The Investigator creates the Investigative Report to fairly summarize relevant evidence. In doing so, they will consider the parties' (and advisors') responses to the Investigation File.

If hearing is required, the Investigator must send the report to the parties and advisors at least 10 days prior to the hearing. If hearing is not required, the Investigator must send the report to the parties and advisors at least 10 days prior to the determination of responsibility.



Reviewing the Investigative Report

Parties (and their Advisors) have an equal opportunity to review the Investigative Report.

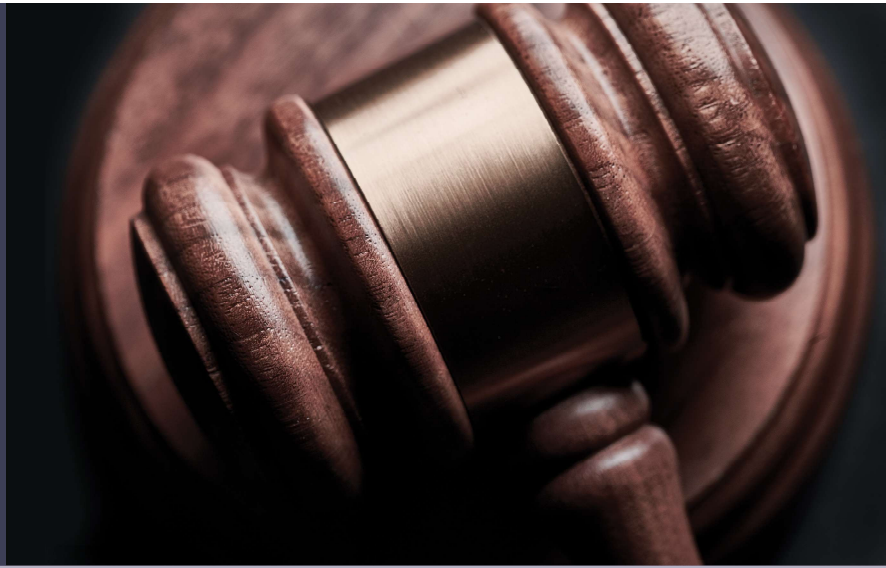
If a party disagrees with an Investigator's determination about relevance and what is included in the Investigative Report, the party can make that argument in the party's written response. The party can also raise those objections to the Decision-Maker during a hearing.



What is never relevant under Title IX?

- ▶ Evidence about a Complainant's sexual predisposition
- ▶ Evidence about a Complainant's prior sexual behavior, except when:
 - Questions & evidence are offered to prove someone other than Respondent committed alleged conduct; or
 - Questions & evidence concern specific incidents of the Complainant's prior sexual behavior with respect to the Respondent are offered to prove consent.

Live Hearing & Cross-Examination at Postsecondary Institutions



After the investigation is complete and the parties have had the opportunity to review the Investigation File and Investigative Report, the parties and their Advisors will be asked to attend the hearing. Advisors are required to accompany the party to the hearing and only advisors may conduct cross-examination of witnesses and the other party.

Invitation to the Hearing

The invitation to the Hearing is sent to the party several days before the scheduled hearing so that your party has sufficient time to prepare to participate in the hearing.

- ▶ Date & Time of Hearing
- ▶ Location of Hearing
- ▶ Participants, including the name & title of the Title IX Decision-Maker
- ▶ Purpose of the Hearing



Advisor Tip: If you or your party foresee a conflict of interest or a potential bias on the part of the Decision-Maker named in the invitation, review the process outlined in the sexual harassment policy for reporting conflict of interest or bias. Notify the Title IX Coordinator immediately in writing before participating in the hearing.

What to Expect

For postsecondary institutions, the Title IX Grievance Process must include a live hearing which must be live, either in-person or virtual.. The Title IX Coordinator and/or Decision-Maker may circulate procedural rules or guidelines & Rules of Decorum.

Review the school's policy and note if a pre-hearing meeting is part of the Title IX grievance process and find out if you are you required or invited to prepare a pre-hearing brief for the Decision-Maker prior to or during the pre-hearing meeting.



Advisor Tip: If you do not receive Rules of Decorum or Hearing Guidelines, ask the Title IX Coordinator for this information.

Rights of Your Party

At the request of either party, the school must allow the live hearing to take place with the parties located in separate rooms, using technology to allow the Decision-Maker & parties to simultaneously see & hear cross-examination. Similarly, the hearing may be conducted with all parties physically present in the same geographic location or, at the school's discretion, any or all parties, witnesses, and other participants may appear at the live hearing virtually, with technology enabling participants simultaneously to see and hear each other

A recording (audio or audiovisual) or a transcript of the hearing will be made available to the parties for their inspection & review.

Each party has the right to cross-examine the other party & witnesses, but cross-examination must be conducted by the advisor.

Cross-Examination

Who conducts cross-examination?

Advisors are permitted to question witnesses & the other party. If a party does not have an advisor present, the school must provide an advisor without fee or charge to the party. The advisor will be of the school's choice. Parties themselves may not conduct cross-examination.

Why is cross-examination included in the grievance process?

Cross-examination provides an opportunity to establish facts and/or challenge credibility of witnesses and parties

How will cross-examination be conducted?

Cross-examination must take place directly, orally, and in real time by the party's advisor. Only relevant questions may be asked of a party or witness, and the Decision-Maker will determine the relevancy of questions before the party or witness answers. Decisions to exclude a question as irrelevant will be explained.

What if a party or witness does not submit to cross-examination?

Title IX states that a Decision-Maker cannot rely on any statement from a party or witness in reaching a determination regarding responsibility if that individual does not submit to cross-examination.

However, the Decision-Maker cannot draw an inference about the determination based solely on the individual's absence from the hearing or refusal to answer questions.

Do I have to cross-examine witnesses and the other party?

Title IX provides the "opportunity" for each party (through the Advisor) to conduct cross-examination. However, cross-examination is not required.

Additionally, Advisors are not required to conduct cross-examination "to the fullest extent possible." If a party chooses not to conduct cross-examination or chooses to ask some but not every possible cross-examination question of another party or witness, that other party or witness cannot be said to have submitted or not submitted to cross-examination. So, the Decision-Maker is NOT precluded from relying on that party's or witness's statements.

While cross-examination is not required, parties and witnesses cannot select which questions to answer during cross-examination. Refusal to answer one question is considered refusal to submit to cross-examination, and that person's statements cannot be relied upon by the Decision-Maker.

Post-Hearing Impact Statements

Some schools invite the parties to submit written statements to the Decision-Maker after the hearing. These are known as post-hearing impact statements.



Advisor Tip: Review the school's policy to find out if this an option for your party. If it is, note when the statement should be submitted to the Decision-Maker. Then, review the expectations of the Advisor to understand your role in this process. Drafting the impact statement will likely be the responsibility of the party, but they may ask you to proofread their statement.

Tips to Help Your Party Prepare for the Hearing

1

Ensure that your party understands when and where the hearing is taking place.

2

Relay all information about the format of the hearing to your party.

3

Discuss potential questions that may be asked of your party & help prepare responses.

4

Explain their right to submit or not submit to cross-examination & the consequences of each.

Primary and Secondary Institutions



Determination of Responsibility

At elementary and secondary institutions, the Title IX process may, but is not required to, include a hearing. With or without a hearing, the school must send the investigative report to the parties to review & respond. Before reaching a determination of responsibility, the Decision-Maker must:

- ▶ Provide each party the opportunity to submit written, relevant questions that a party wants asked of any party or witness
- ▶ Location of Hearing
- ▶ Provide each party with the answers
- ▶ Allow for additional, limited follow-up questions from each party.

What is never relevant under Title IX?

- ▶ Evidence about a Complainant's sexual predisposition
- ▶ Evidence about a Complainant's prior sexual behavior, except when:
 - Questions & evidence are offered to prove someone other than Respondent committed alleged conduct; or
 - Questions & evidence concern specific incidents of the Complainant's prior sexual behavior with respect to the Respondent are offered to prove consent.

After the final determination regarding responsibility is issued, the parties have the right to an appeal.

Determination of Responsibility & Appeals



Determination of Responsibility

At the conclusion of the hearing (if any) the Decision-Maker must issue a determination regarding responsibility by applying the standard of evidence referenced in the school's policy.

Under Title IX, the decision must be provided to the parties simultaneously. If an appeal is not filed, determination is final when submission of an appeal is no longer considered timely. If an appeal is filed, determination is final when the determination in response to the appeal is issued. Title IX Coordinator is responsible for effective implementation of remedies.

The determination must include the following:

- ▶ Identification of the allegations potentially constituting sexual harassment
- ▶ A description of the procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held
- ▶ Findings of fact supporting the determination
- ▶ Conclusions regarding the application of the school's code of conduct to the facts
- ▶ A statement of, and rationale for, the result of each allegation, including:
 - A determination regarding responsibility
 - Any disciplinary sanctions the school imposes on the Respondent
 - Whether remedies designed to restore or preserve equal access to the school's education program or activity will be provided by the school to the complainant
 - The school's procedures and permissible bases for the complainant and respondent to appeal

After a Determination of Responsibility

After the determination of responsibility has been issued, Advisors should read through it, confirm that it contains all necessary information, and consider if the determination should be appealed.

Step 1: Review the Determination & Consider the Bases for Appeal:

- ▶ Procedural irregularity that affected the outcome of the matter;
- ▶ New evidence that was not reasonably available at the time the determination regarding responsibility was made, that could affect the outcome of the matter; and
- ▶ The Title IX Coordinator, investigator, or decision-maker had a conflict of interest or bias for or against Complainants or Respondents generally or the individual Complainant or Respondent that affected the outcome of the matter.
- ▶ Additional bases of appeal provided in the school's policy

Step 2: Ask your party if they want to appeal the determination

If your party does not wish to appeal the determination, ask yourself the following questions:

- ▶ Has the Title IX coordinator communicated with your party to explain how sanctions or remedies will be implemented?
- ▶ Has the other party appealed? If so, you and your party may need to respond.

Right to Appeal

Both parties have the opportunity to appeal the determination of responsibility. Be sure to refer to the school's policy to learn about how to file an appeal. Parties are often required to submit a written appeal to the Title IX Coordinator within a specific number of days following the issuance of the written determination.

If an appeal is filed, the school will notify the other party in writing, implement appellate procedure for both parties equally, and give parties a reasonable, equal opportunity to submit a written statement. The Appellate Decision-Maker will review the appeal, the other party's response (if any), and other case information and issue a written decision to the parties. Then, Title IX Grievance Process is complete

Sanctions & Appeals

After the conclusion of the grievance process, check on your party. You may want to ask them if the sanctions been clearly explained & issued, and if the remedies in place.

Optional Elements of The Title IX Process



Informal Resolution

Title IX permits Informal Resolution as long as both parties participate voluntarily. Schools must Informal resolution cannot be required as a condition of enrollment, continuing enrollment, employment, or continuing employment, and a school cannot require the parties to participate. Additionally, a school may not offer informal resolution unless a formal complaint is filed.

Schools cannot offer or facilitate an informal resolution process to resolve allegations that an employee sexual harassed a student.

- ▶ Informal resolution may be facilitated at any time after the formal complaint is filed and prior
- ▶ to reaching a determination regarding responsibility
The school must obtain the parties' voluntary, written consent to the process.
- ▶ The school must provide written notice including the following:
 - The allegations;
 - Requirements of the informal resolution process;
 - Preclusion from resuming a formal complaint arising from the same allegations;
 - Right to withdraw from the informal resolution process prior to agreeing to a resolution and resume the grievance process; and
 - Consequences resulting from participating in the process (records).

Dismissal of a Formal Complaint

Schools are required to investigate the allegations in a formal complaint. However, the investigation may uncover new information about the incident.

Under Title IX, a school must dismiss the formal complaint of sexual harassment under Title IX if at any point during the investigation or hearing process it is determined that the alleged conduct:

- ▶ Would not constitute sexual harassment under Title IX, even if proven;
- ▶ Did not occur in a school education program or activity; or
- ▶ Did not occur against a person in the United States.

A school may dismiss the formal complaint of sexual harassment under Title IX if at any point during the investigation or hearing process the following occurs:

- ▶ The Complainant notifies the Title IX Coordinator in writing that they would like to withdraw the formal complaint;
- ▶ The Respondent is no longer enrolled or employed by the school; or
- ▶ Specific circumstances prevent the school from gathering evidence sufficient to reach a determination.

If a complaint is dismissed, the dismissal must contain specific information, such as the statement of dismissal, reason(s) for dismissal, alternate complaint resolution procedures (if applicable), and a statement that each party has the right to appeal.

How to Respond to the Dismissal as an Advisor

In the case that your party's case is dismissed, be sure to communicate with your party. You will want to ask:

- ▶ If your party is a Complainant, did they request the dismissal?
- ▶ Would they like to appeal the dismissal? On what basis?
- ▶ Would they like the incident to be addressed under a different school policy?
- ▶ Would they still like supportive measures?

Contact the Title IX Coordinator to better understand the dismissal, if necessary.

Consolidation of Formal Complaints

Consolidation occurs when the allegations of sexual harassment arise out of the same facts of circumstances. The Title IX Coordinator may consolidate formal complaints for allegations of sexual harassment against more than one respondent, by more than one complainant against one or more respondents, or by one party against another party.