

2022 Advisor Training for Illinois Community College Title IX Consortium

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Agenda

- 1) Title IX Sexual Harassment Grievance Process and Role of Advisor
- 2) Appointment of Advisor
- 3) Preparing for the Hearing
- 4) Hearing Procedures
- 5) Cross Examination, Relevance and Other Evidentiary Issues
- 6) Post-Hearing Procedures

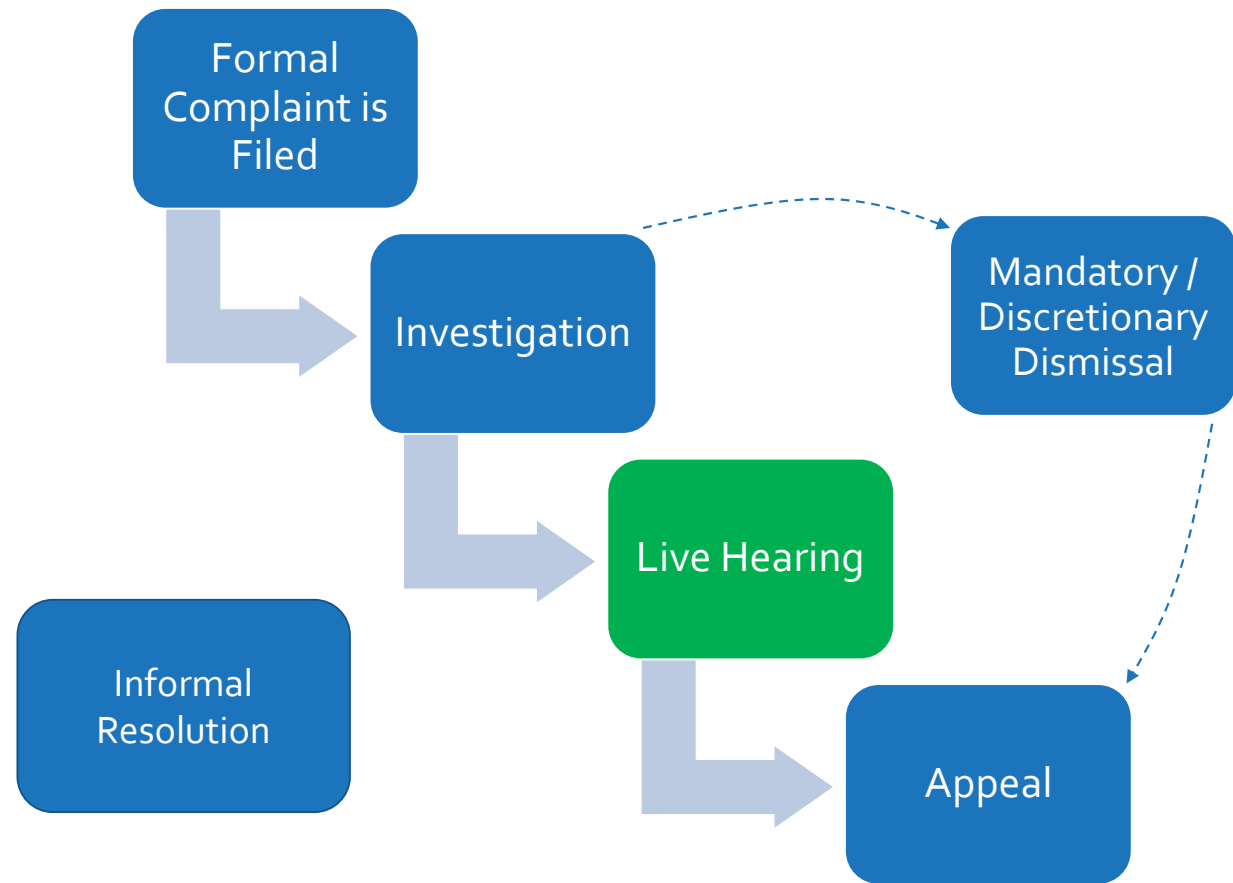
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Title IX Sexual Harassment Grievance Process and Role of Advisor

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Overview of Grievance Process



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Hearing Requirement

- The 2020 Title IX Regulations require that a post-secondary institution's Title IX sexual harassment grievance process must include a live hearing.
- At the live hearing, each party must be accompanied by an advisor.
- The decision-maker/hearing officer must permit each party's advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility.

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Who Can Serve as an Advisor?

- A family member/friend
- An attorney
- Any other individual the party chooses



...but what if a party does not have an advisor?

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Appointment of Advisor

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Advisor Appointment Requirement

- Per the 2020 Title IX Regulations, if a party does not have an advisor to conduct cross-examination at the live hearing, the institution must provide, without fee or charge to that party, an advisor of the institution's choice, to conduct cross-examination for that party.

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Consortium Appointment Process

Party notifies Title IX Coordinator that they do not have an advisor to conduct cross-examination during the hearing.

Title IX Coordinator contacts Chair of Consortium to request appointment of an advisor.

Chair of Consortium appoints advisor and provides advisor with contact information for their advisee and the Title IX Coordinator.

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Conflicts of Interest

- If an advisor self-identifies a conflict of interest, they should notify the Consortium Chair as soon as possible so that a substitution can be made.



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Appointment of Advisor – Hypothetical



- Wanda files a formal Title IX sexual harassment complaint against her supervisor. Wanda finds out that the Respondent has hired a well-known criminal defense attorney to serve as his advisor at the live hearing. Wanda requests that the college appoint an advisor on her behalf, and asks that the appointed advisor either be a licensed attorney or have a background in criminal justice. The college is a member of the Consortium.
- How should the college and Consortium handle Wanda's request?

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Preparing for the Hearing

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Preparing for the Hearing

- Review your institution's Title IX/Sex-Based Misconduct Policy and Procedures
- Review relevant records, including:
 - Formal complaint
 - Initial notice of allegations
 - Investigation report
 - Parties' written responses to the investigation report
- Schedule a time to meet with advisee in advance of the hearing

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A Quick Note on Student Privacy...

- Advisors must comply with FERPA's student privacy and confidentiality requirements.
 - FERPA permits disclosure of education records and information therein to officials within the institution who have "legitimate educational interests" in the records/information.
 - FERPA permits an institution to outsource institutional services or functions that involve the disclosure of education records to a contractor, consultant, volunteer, or other third party, provided that certain criteria are met.

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Preparing for the Hearing – Meet with Advisee



- Review hearing procedures and discuss advisor's role
- Review relevant records and list of witnesses to be presented at hearing
- Identify key areas of questioning for opposing party and any witness to be questioned
- Work with advisee to develop outline of questions for opposing party and any witnesses

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Other Tips for Hearing Preparation

- Review all relevant evidence closely
- Create a timeline or outline of events, including a list of witnesses who may be called to testify
- Create a checklist of issues to be proven/disproven, noting evidence gathered relative to each allegation
- Identify information that may be missing or holes in the opposing party's story
- Identify any information that may be contradictory to what the opposing party or witness reported during the investigation
- Consider potential bias or conflicts of interest of opposing party and/or witnesses
- Attend any scheduled pre-hearing meeting/conference with the hearing officer, other advisor, and/or parties
- Keep in mind that only relevant questions will be permitted (more on this later)

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Hearing Procedures

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Hearing Participants

- Hearing participants should include:
 - Hearing Officer
 - Complainant
 - Complainant's advisor
 - Respondent
 - Respondent's advisor
 - Title IX Coordinator
 - Investigator
 - Witnesses, if requested to attend by either party
 - Court reporter, if using one

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Hearing Procedures



- 1) Hearing Officer will go “on the record”
 - Title IX Regulations require that an institution create an audio or audiovisual recording, or transcript of any live hearing and make it available to the parties for inspection and review.
 - 2) Hearing Officer Introduction
 - 3) Identification of Individuals Present
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Hearing Procedures

- 4) Preliminary review of hearing procedures by Hearing Officer. Hearing Officer will:
- Explain how the hearing will progress from start to finish.
 - Review expectations regarding behavior and being respectful of all individuals present.
 - Review role of the advisor and expectations regarding advisors' conduct and remind parties that they may not cross-examine each other directly.
 - Explain procedures for presenting documents – ensure that copies are provided to the Hearing Officer and opposing party for review.
 - Remind parties that only relevant questions may be asked, and explain process for how relevancy determinations will be made (i.e., the answering party/witness should pause before answering each question so the Hearing Officer may interject if question is deemed not relevant).

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Hearing Procedures



5) Complainant's presentation

- "Direct" testimony by complainant
- Cross-examination of complainant by respondent's advisor
- "Direct" testimony by complainant's invited witnesses
- Cross-examination of complainant's witnesses by respondent's advisor

6) Respondent's presentation

- "Direct" testimony by respondent
- Cross-examination of respondent by complainant's advisor
- "Direct" testimony by respondent's invited witnesses
- Cross-examination of any witnesses presented by respondent by complainant's advisor

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Hearing Procedures

- 7) Questioning by Hearing Officer
 - May occur after each party or witness testifies, or at the end after all parties and witnesses have testified.
- 8) Brief closing statements by parties
 - Complainant's closing statement
 - Respondent's closing statement
- 9) Hearing officer concludes the hearing and goes "off the record."

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Live Hearing Q&A

- Q: May the parties' advisors cross-examine the Investigator about his/her investigation report or the investigation process?



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Live Hearing Q&A

- Q: Is the advisor required to ensure that the potential witnesses identified by the advisee appear at the live hearing?

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Live Hearing Q&A

- May a decision-maker consider statements made by a party or witness who does not submit to cross-examination?

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Hypothetical

- You are serving as an advisor for Suzy (Respondent) who has been accused of sexual harassment by another student, Robert (Complainant). During the hearing, Robert's advisor begins arguing with Suzy about her responses, repeatedly asking questions that have already been answered, and raising his voice at her. You feel his conduct is becoming overly aggressive. You have raised objections, which the hearing officer acknowledged, but the advisor continues engaging in the same conduct.
- How do you respond?

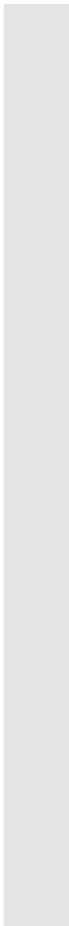

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Hypothetical

- After Suzy's testimony wraps, Robert's advisor announces that Robert is calling a witness who is not listed in the investigation report and was not on the list of witnesses provided to Suzy prior to the hearing.
- Is this witness's testimony permissible? What options does Suzy have to respond?

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Cross Examination, Relevance and Other Evidentiary Issues

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Preponderance of the Evidence Standard

- “More likely than not”
- Whether the facts supporting the allegations have greater weight/strength than the facts presented in denial of the allegations
- If 50/50, no violation

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Types of Evidence

Direct
Evidence

Corroborating
Evidence

Circumstantial
Evidence

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Issues for Determination

- 1) Does the testimony and/or evidence presented establish that the alleged conduct occurred?

Relevant Factors:	
Admission or denial by the Respondent	Witness corroboration
Physical evidence (i.e. photographs, video footage)	Prior consistent (or inconsistent) statements by parties and witnesses
Post-incident conduct of the parties	Credibility of parties and witnesses

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Issues for Determination

- 2) Does the conduct constitute Title IX sexual harassment (or a Preventing Sexual Violence in Higher Education Act offense)?
- Title IX sexual harassment includes:
 - Quid pro quo harassment by a college employee
 - Unwelcome conduct that a reasonable person would find so severe, pervasive and objectively offensive that it denies a person equal educational access
 - Any instance of sexual assault, dating violence, domestic violence or stalking (as defined in Clery Act/VAWA)
 - Sexual violence includes physical sexual acts attempted or perpetrated against a person's will or when a person is incapable of giving consent, including but not limited to rape, sexual assault, sexual battery, sexual abuse and sexual coercion.

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Issues for Determination

-
-
- 3) If the answers to questions 1 and 2 are “yes,” hearing officer must determine what sanctions and/or remedies are appropriate



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Relevance – Rape Shield Protections

- Questions and evidence about the Complainant's sexual predisposition or prior sexual behavior are not relevant, unless:
 - Offered to prove the someone other than the Respondent committed the conduct alleged; or
 - Are offered to prove consent

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Questioning Credibility



- Identify gaps in the opposing party's witness recollection and supporting evidence
- When questioning a party or witness' credibility:
 1. Confirm – Ask the party to reiterate their prior statement
 2. Compare – Compare to prior statements or prior evidence provided by the party/witness
 3. Confront – Ask questions to confront the inconsistencies

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Other Relevance Issues

Evidence Excluded:

- Lines of questioning that are not relevant to the underlying allegations
- Redundant questions/questions that pertain to facts already established
- Any party's medical, mental health or similar records (unless the party has consented in writing to such)

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Objections

Relevance

Harassing/arguing
with the witness

Asked and
answered

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Hypothetical

- You are serving as an advisor for Respondent Tom (student athlete) whom Complainant Sharon (employee) alleges sexually harassed her over a four-month period while she was working as a manager for the College's basketball team. During the pre-hearing meeting, Tom tells you that Sharon has had relationships with several other student athletes and wants you to question Sharon about these relationships. How do you respond?
- During the hearing, while you are questioning Sharon, Tom pulls you aside and tells you that he heard Sharon has falsely accused other student athletes of sexual harassment. He wants you to ask her about these prior accusations. How do you respond?

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Hypothetical

- You have been assigned to serve as an advisor for Bill. Bill is alleging that his Physics Instructor, Jamie has sexually harassed him throughout the course of the semester. During your pre-hearing meeting with Bill, he tells you that he is traumatized by the sexual harassment, scared of Jamie and does not want to participate in the hearing.
- How would you advise Bill? What options does Bill have?

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Post-Hearing Procedures

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Record-Keeping



- Any records generated or maintained by the advisor should be returned to the college's Title IX Coordinator.
- Consult with the college's Title IX Coordinator regarding any other specific record-keeping procedures.

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Hypothetical

- Following Bill's live hearing, the decision-maker determines that Jamie is not responsible for the alleged conduct. Bill contacts you to let you know that he received the decision and disagrees. He would like to appeal and wants your help. How should you respond?

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Hypothetical

- Several months after Bill's Title IX hearing, you receive a subpoena from an attorney representing Jamie demanding "any and all materials in your possession from the Title IX hearing" and "any and all communications regarding the Title IX complaint, investigation and/or hearing." How should you respond?

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Questions?



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