Unpacking the Advisor of Choice Requirements Under the Clery Act and the 2020 Title IX Regulations

SPRING 2021

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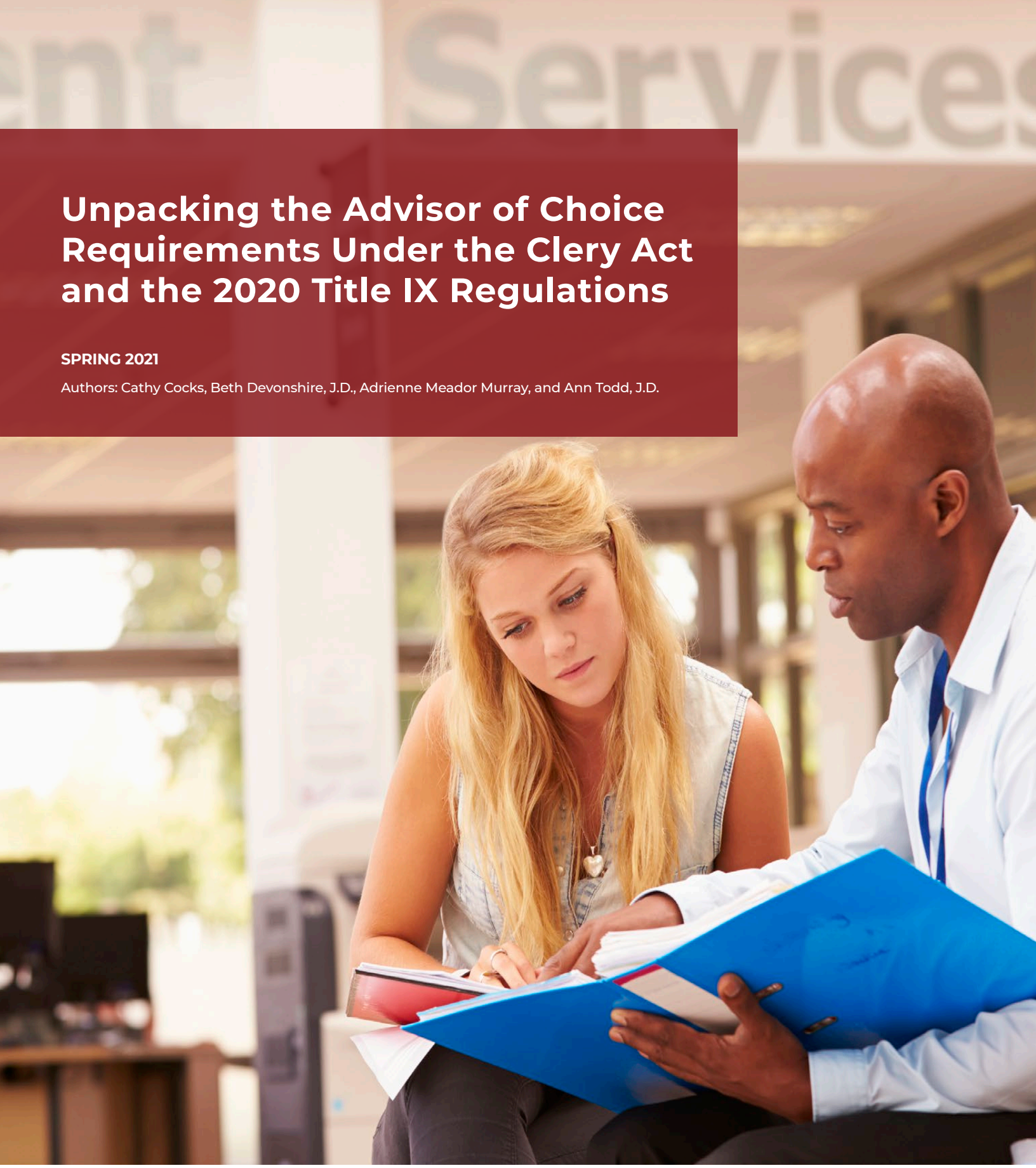

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All postsecondary student conduct proceedings, including those addressing sexual misconduct, are not analogous to criminal or civil court proceedings. Their purpose and design are intentionally different. Student conduct proceedings are educational in nature and meant to resolve behavioral conflicts within the campus community.

Allowing students, most often respondents,1 to bring an advisor to such proceedings is not a new concept. Institutions have long recognized the need for students to have support and guidance throughout the student conduct process. For the most part, institutions have enjoyed autonomy to decide whether to allow an advisor to be an active participant or to limit the advisor's participation to a private consultation with their student. However, the 2020 Title IX regulations ushered in a new era of the role of advisors in sexual misconduct proceedings conducted under the auspices of Title IX (i.e., those addressing Dating Violence, Domestic Violence, Sexual Assault, and Stalking offenses). This whitepaper will explore the overlapping requirements of advisors in cases of Dating Violence, Domestic Violence, Sexual Assault, and Stalking in the context of the Clery Act when the Title IX Regulations also apply.

History of Advisors

Historically, the allowance of a passive advisor was more common for public institutions given possible due process requirements. Courts have consistently ruled that for non-criminal disciplinary proceedings, institutions could limit the level of involvement of the advisor. For example, the Eleventh Circuit found that procedural due process is met at a public institution "in which an attorney was allowed 'to advise his clients during the hearing, but he was not permitted to participate in the proceedings.'"[2] A few states (e.g., North Carolina, North Dakota, and Arkansas) have passed laws allowing for students to be actively represented by an attorney in a public institution's student conduct proceeding.

Though institutional conduct codes have traditionally been written to allow advisor rights for respondents, amendments made to the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (hereafter, the "Clery Act") over the years have required postsecondary institutions to afford a complainant certain rights, specifically in sexual violence cases. The 1992 Campus Sexual Assault Victims' Bill of Rights Act required higher education institutions to provide alleged sexual assault victims "the same right to legal assistance, or ability to have others present, in any campus disciplinary proceeding that the institution permits to the accused."[3] This was expanded by the Violence Against Women Reauthorization Act of 2013 (VAWA) which amended the Clery Act to include the following provisions for both parties:

- "Provide the accuser and the accused with the same opportunities to have others present during any institutional disciplinary proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice.
- Not limit the choice of advisor or presence for either the accuser or the accused in any meeting or institutional disciplinary proceeding; however, the institution may establish restrictions regarding the extent to which the advisor may participate in the proceedings, as long as the restrictions apply equally to both parties."[4]

In requiring the opportunity to have an advisor of choice while allowing the institution to determine an advisor's participation, the Clery Act struck a balance between allowing an institution to determine its own procedures for managing alleged sexual violence policy violations and ensuring that the processes were equitable for both parties. In the preamble to VAWA, the U.S. Department of Education (ED) gave clear deference to institutions to set their own rules regarding advisor participation, from limiting any active role to allowing institutions to let the advisor serve as a proxy or even attend meetings in their advisee's stead.[5] The only requirements established for the role of the advisor under the Clery Act are to allow anyone to serve in the capacity, even an attorney, and that they be permitted to attend any meeting or proceeding in which the party is required to be present.

Title IX of the Education Amendments of 1972 (hereafter, "Title IX") requires a "prompt and equitable resolution of complaints of discrimination on the basis of sex."[6] The 2011 "Dear Colleague Letter: Sexual Violence," now rescinded, provided this guidance on advisors:

> ***While OCR does not require schools to permit parties to have lawyers at any stage of the proceedings, if a school chooses to allow the parties to have their lawyers participate in the proceedings, it must do so equally for both parties. Additionally, any school-imposed restrictions on the ability of lawyers to speak or otherwise participate in the proceedings should apply equally.***[7]

In May 2020, the Secretary of ED amended the regulations and significantly changed how advisors are utilized in campus Title IX proceedings. The Title IX regulations expand well past allowing for an advisor of choice to attend meetings. The new regulations require institutions to provide the advisor with the investigative report and evidence, independent of the student, and require an advisor (either their own or one provided by the institution) be present at a live hearing to conduct mandated cross-examination.[8]

The role of the advisor has now been codified in the 2020 Title IX regulations and a careful examination of the impact of this is needed.

Function of an Advisor

The formal resolution process under Title IX can be broken into three stages: investigation, live hearing, and appeal. The function of the advisor is likely to change depending on the stage of the process and who is serving in the role.

INVESTIGATION

Complainants and Respondents must be offered the right to have an advisor of choice present. The institution can meet with parties without an advisor as long as the right was previously extended. A school is not required to provide an advisor for this purpose nor is there any participation requirement.

LIVE HEARING

Complainants and respondents must have an advisor present for the sole purpose of cross examination. If the parties do not have an advisor, the school must appoint an advisor, again, for the sole purpose of conducting cross examination. If the school appoints an advisor, the party loses the option of selection. There is no equity requirement-a school may issue anyone of their choosing. Unlike other personnel in the Title IX process, the law does not require this person to be trained.

APPEALS

If you require the parties to be present for the appeal, the right to an advisor of choice present again extends. A school is not required to provide an advisor for this purpose nor is there any participation requirement.

The investigation stage covers the time subsequent to the incident until the live hearing, including intake, investigative meetings, and pre-hearing meetings. Per the Title IX regulations, institutions are required to allow a party to bring an advisor to attend any of these meetings but are not required to provide an advisor during this timeframe.[9] Institutions may also impose limits on the role of the advisor in those meetings, as long as those restrictions are equally applied.[10]

While institutions may offer institution-provided advisors during the investigation stage, parties cannot be required to choose from an advisor proffered by the school. Instead, parties are able to select an "advisor of their choice" which can include attorneys, family members, friends, and even witnesses to the incident. Even if an institution offers institution-provided advisors, they may be more likely to play a limited role in preparing the parties than those who have been independently retained by the party, particularly during the investigation stage.

For example, attorneys hired by a party may be more likely to attend all pre-hearing meetings, play a more active role in the investigation process (by helping to procure information), and draft written responses to investigation reports. Institutions may be reluctant to have their advisors play such an active role, as many of them are volunteers who may not wish to assume these responsibilities. While there is no requirement that institution-provided advisors perform any function beyond asking the questions provided by their party on cross, institutions should educate their communities regarding these expectations.

Finally, the 2020 Title IX Regulations require that advisors be sent "evidence subject to inspection and review"[11] and the "investigation report."[12] As the regulations do not require an institution provide an advisor prior to the live hearing, a party may choose to provide their own, or the institution may decide to provide an advisor earlier than required by the regulations.

The role of the advisor changes substantially during the hearing phase. The Title IX Regulations require advisors "to conduct cross-examination on behalf of that party" during the live hearing.[13] The Preamble clarifies that an "advisor is not required to perform any function beyond relaying a party's desired questions to the other party and witnesses."[14] The parties and witnesses must answer all questions deemed relevant by a decision-maker. Relevant questions are those which help determine if something is more or less true. A complainants' past sexual history and privileged information is not deemed relevant unless it falls under one of the exceptions noted in the regulations. If a party does not answer all of these questions, the decision-maker is not allowed to rely on any prior statements in making their determination regarding responsibility. Additionally, decision-makers may also ask the parties and witnesses questions and will be allowed to rely on prior statements if the party does not answer relevant questions. Therefore, it is imperative for advisors to understand participation requirements, relevancy determinations, and any additional institutional rules. Finally, if a party does not have an advisor, the institution "must provide" that party an advisor for purposes of conducting cross-examination.[15] This would include last-minute appointments such as when a party's advisor fails to arrive or is removed for being disruptive.

The difference between institution-provided advisors and party-provided advisors may be even more pronounced during the hearing stage. For example, privately-retained advisors who are being compensated by their advisee are more likely to actively prepare

their party for the hearing, to draft questions to be used at the hearing, and strategically use the rules surrounding relevancy and participation to their party's advantage. Institutions may not require that the institution-provided advisor meet with their advisee before the hearing and may only expect the advisor to relay questions the party has drafted during the live hearing. Institution-provided advisors may be limited to knowing and following the rules, as opposed to party-provided advisors who have a vested interest in a positive outcome for their party.

The appeals stage, once again, changes the role of the advisor. The Title IX Regulations require that institutions provide both parties the ability to appeal determinations regarding responsibility; however, the Regulations are silent as to the role of the advisor at this stage, and do not require that advisors be included on the written determination to the parties. Nevertheless, if the institutional policy requires additional meetings to occur after a determination of responsibility, the parties must be allowed to bring an advisor of their choice to these meetings. While the appeals process at most institutions does not result in additional meetings or hearings, it is imperative to remember that the role of the advisor must still be accounted for during the appeal.

As we saw above, the functions of institution-provided advisors in the appeals process may be vastly different than the role for those that have been privately retained. Many private advisors will continue to play an active role throughout the entirety of the process, including the drafting of appeals, whereas institution-provided advisors are less likely to play a role in the appeal.

Equity in the Process

Institutions have been allowing student parties to have an "advisor" in some capacity for years. The Clery Act mandated it in 2014, but many public institutions have allowed advisors prior to 2014, albeit sometimes limiting who can serve as an advisor. With the option of attorneys as advisors comes issues of equity and power differentials. In our experience, the student most likely to be represented by counsel is the respondent. Complainants may be less likely to be represented, and if they bring an advisor, it is most often a friend or victim advocate.

Beyond the power differentials between the parties, legal representation in student conduct proceedings also have equity considerations. Students with the means to hire an attorney may be more likely to have legal representation than students who do not.

Even as institutions recognize the barriers to equity in the process, they may not have the resources to address it. Compare two institutions that we advise. School A, a small, elite, four-year residential college, has paid external advisors, all local lawyers, for any student that does not have their own advisor of choice. The school offers these advisors at the beginning of the process, allowing legal representation for all three stages of the Title IX resolution process.

School B, on the other hand, a mid-sized institution, does not have the same financial resources. The school does not offer advisors until the day of the hearing. The institution utilizes volunteer employee advisors who are current staff members. If one party hires an attorney to serve as an advisor throughout the process and the other party has a volunteer staff member that steps in the day of the hearing, the Regulations have been followed, but in terms of equity within the process, School B will have clear disparities in the experience and resources their students have access to. For instance, a privately paid for advisor is more likely to accompany their party to all related meetings, including investigatory meetings, and while they do not play an active role in those meetings, they are more likely to offer legal advice and help the party prepare for the meeting. At the conclusion of the investigative stage, the legal advisor is more likely to play an active role in responding to the report and recommending changes. At the hearing stage, the legal advisor is more likely to meet with their party ahead of time to prepare them for cross examination and to draft questions to be asked of the other party (and to prepare a defense for their client). Finally, in the appeal stage, they are more likely to draft "the written statement in support of or challenging the outcome."[16] This statement is not intended to be an endorsement of counsel (as we have seen numerous complaints in which attorneys did more harm than good for their party). However, the devotion of time and energy provided by external counsel certainly creates a distinctly different experience – and sometimes an advantage – relative to an advisor appointed only for the live hearing.

It is important to note that having an attorney as an advisor does not necessarily correspond to better representation or support. These are not criminal or civil court proceedings and having a law degree does not mean that they understand institutional policies and procedures. As institutions are managing educational, administrative processes, the adversarial nature of the legal profession may actually be a detriment to the student.

Institutional Decisions Regarding Advisors

The Title IX Regulations have two primary mandates to institutions regarding advisors: 1) that institutions allow both parties to have an advisor of their choice through the full process and 2) that the institution provide an advisor at the hearing for anyone that does not have one. From here, institutions need to make their own choices including who the institution-appointed person is and when the institution-appointed person joins the process.

Regarding the "who", it should be stressed that the Regulations do not require that the advisor be an attorney. Training for a team of advisors, even those that are faculty and staff volunteers, may result in an excellent pool of advisors that are qualified to serve in the advisor capacity. Institutions should look to volunteers and, during the training, should assess whether the volunteers have the skill set and temperament to serve as effective advisors. As part of the training, institutions should consider conducting a mock hearing that provides skills practice for decision-makers and advisors.

We are aware of institutions who have outsourced the role of the advisor to law firms and legal clinics. Similarly, law schools which offer legal clinics have been tapped to serve in this capacity. There are some challenges associated with this approach, such as providing access for both complainants and respondents and potential conflicts of interest with the institution. Institutions that philosophically agree with a more legalistic approach may look to provide quasi-legal representation by the advisors. Law schools, particularly those with legal clinics that provide pro bono services, may be a great source for advisors. One challenge to this is that some clinics only consider representation of the complainant to meet the mission of the clinic. Institutions must then determine how to provide equitable representation for the respondent.

The second decision an institution needs to make is when to offer the institution-appointed advisor. If a student has hired their own advisor, the representation is likely going to happen from the beginning of the investigation stage. With the exception of institutions located in a state that allows active legal representation throughout any disciplinary process, institutions can (and should) limit the ability of the

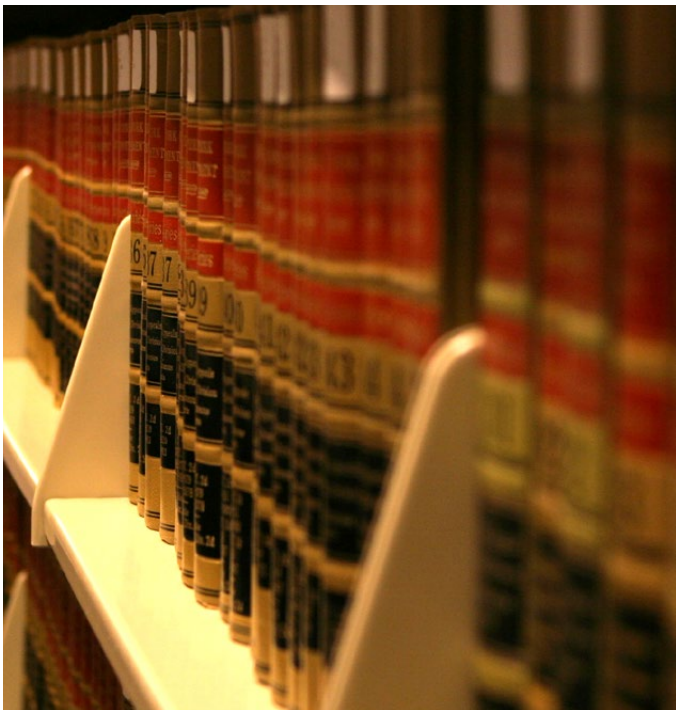
advisor to "participate" in the investigation stage. That said, both complainants and respondents may need support and guidance throughout the process (from intake through resolution.) Institutions would be wise to encourage the parties to consult with their advisor of choice in an on-going manner and certainly well before the live hearing stage of the process.

Under the old Title IX guidance, institutions often referred to those serving in the role as a "support person" to further clarify their limited participation in the process.

> ***One model that institutions can consider is offering a "support person" who is tasked with supporting the party throughout the process such as attending meetings and the hearing, but who does not play an active role. As this role is intended to be different from the advisor who is charged with conducting cross-examination at the hearing, faculty and staff may be more willing to volunteer in this capacity. Using this model, institutions can then consider offering an additional person at the hearing to conduct cross-examination. This may be a more cost-effective method, limiting the expense of external representation to a shorter time frame, while still providing a consistent support person throughout.***

Advisors: The Road Ahead and Related Case Law

Much speculation has already been given as to what the Biden-Harris Administration will propose regarding the role of advisors. As discussed above, current Title IX Regulations provide that the advisor will conduct cross-examination of the parties and witnesses. However, the details of how cross-examination will be conducted is spelled-out in the preamble to the Regulations rather than the Regulations themselves. While the rulemaking process may take more than a year to implement changes to the Regulations, the preamble may change more quickly. In fact, the U.S. Department of Education's April 6, 2021 letter to students, educators, and other stakeholders indicates that a forthcoming Q&A will provide "additional clarity about how OCR interprets schools' existing obligations under the 2020 amendments" and will be issued in the coming months.[17] The Administration, including Acting Assistant Secretary Suzanne Goldberg, has been vocal in their opposition of requiring cross-examination in campus sexual misconduct hearings.[18] However, it remains to be seen how this opposition will play out during the anticipated Rulemaking process.



In addition to the Regulations, institutions must be mindful of the corresponding case law regarding cross-examination and the role of the advisor. Specifically, the Sixth Circuit, in *Doe v. Baum,* stated that public institutions "must give the accused student or his agent an opportunity to cross-examine the accuser and adverse witnesses in the presence of a neutral fact-finder."[19] However, this same circuit in *Doe v. Michigan State University*[20] states "we did not detail exactly what form of cross-examination is required, beyond its being in person and in front of the fact finder." Public institutions in the Sixth Circuit must adhere to the standards set out in these two cases, but the case law does suggest latitude in who conducts the cross-examination.

Additionally, two other circuits have addressed cross-examination in the hearing process. The First Circuit, in *Haidak v. UMass Amherst,* rejected the standard set out in Baum and stated that public institutions need only provide "some opportunity for real-time cross-examination, even if only through a hearing panel."[21] Additionally, the First Circuit held that private institutions in Massachusetts could still use a single investigator model, as Massachusetts has not stated that "basic fairness" requires quasi-cross-examination as provided for in Haidak.[22] Conversely, the Third Circuit, in *Doe v. University of the Sciences,* held that a fair and equitable process at a private institution required an opportunity to cross-examine all parties and witnesses, but did not "attempt to prescribe the exact method by which a college or university must implement these procedures."[23] Again, institutions must be aware of the existing case law within their respective circuits if the forthcoming Q&A provide for greater flexibility.

Closing: Top Ten Advisor Considerations for Institutions

As one can see, the Clery Act and new Title IX Regulations both use the term "advisor," but the function of the advisor and the rules surrounding the advisor's interaction with institutional representatives (and their party) differ depending on what stage of the process the case is in. As consultants that assist institution of higher education with these issues, we offer our top ten key takeaways for institutions regarding the advisor requirement under the Clery Act and Title IX Regulations.

1. An advisor of choice can be anyone of the party's choosing, including a witness in the complaint. Consider putting limits in the institutional policy to prohibit a witness from being present for any portion of the complainant or respondent testimony to limit this from occurring. Alternatively, your institution may have to rethink interview order in your investigation to allow the witness-advisor to be interviewed prior to the complainant or respondent (depending on which party the advisor is also a witness-advisor for.)

2. Your institution can conduct intake and an investigative interview with a party without an advisor being present. The parties have the right to have an advisor, if they choose, but having an advisor present is not a requirement, so long as you have afforded the right prior to the scheduled meeting.

3. Employee complainants and respondents are also entitled to an advisor of choice. Our team routinely sees institutions extend pre-hearing rights only to student complainants and respondents but forget that the Clery Act and Title IX also extends to employees. Also, if you have a union that allows representation, you should inquire as to whether or not a party would have the right to a union representative ***and*** an advisor if they are not the same. There is no requirement that institutions allow for multiple advisors, therefore, parties may have to choose between their union representative serving as their advisor or their attorney serving as their advisor. Institutions should make sure that their policy (and union contracts) spell this out.

4. Non-Title IX cases that are involve cases of Dating Violence, Domestic Violence, Sexual Assault and Stalking still have the right to an advisor of choice under the Clery Act. Institutions manage cases that do not meet the jurisdictional or definitional threshold for Title IX in different ways, including referring the case to the standard student conduct (or HR) process. Nevertheless, institutions must ensure all Clery-required institutional disciplinary proceedings are followed for both Title IX and non-Title cases, including the right to an advisor of choice.

5. Institutions do not have to hire attorneys. Your institution can choose to hire an attorney for a party, but in no way does Title IX or the Clery Act require you to do so. Equity is an issue in sexual misconduct complaints. This will always be a challenge with which institutions struggle. Paying for an attorney from the moment the complaint is filed for either or both parties is not required by law. There also needs to be an institutional discussion about the overall philosophy of actively engaging attorneys in these proceedings when not required to do so.

6. During the investigation stage, your institution can control/restrict the role of the advisor so long as the restrictions are equally applied (assuming no state law or institutional policy says otherwise). Ensure you have provided written notification to advisors regarding their role at this stage of the process. Additionally, while institutions are not required to change the meeting times to accommodate an advisor's schedule, it is a best practice to allow for reasonable scheduling modifications to satisfy the requirements regarding an "advisor of choice."

7. During the live hearing stage, you cannot restrict the role of the advisor, but cross-examination does not have to be "cross." Consider a pre-hearing meeting with the parties and their advisors to explain rules of decorum and institutional expectations for addressing parties in the live hearing. The advisor's role in the live hearing is to ask the questions of the other party that their party wishes to be asked. Nothing more and nothing less. A school-provided advisor is in no way tasked with providing a "defense" for their party or to serve as a litigator.

8. Title IX Regulations mandate advisors and they are to be provided access to their advisee's education records. While not required, it might be wise to consider having students fill out FERPA waivers to confirm students have authorized the institution to share this information and help track information regarding with whom this information is being shared.

9. During the appeal stage, it is up to the institution to determine the role of the advisor. While there is no requirement that institutions provide advisors with written determinations, they should still determine if this information will be provided directly to the advisor or only to the parties. Similarly, determine the allowances for the advisor during the appeal process. Again, it is vital to explain these different functions and expectations to your community.

10. A disability-related accommodation under ADA or 504 is not a replacement for an advisor. (This is also true for parties who require interpretative services.) This means that if you have an accommodation for a disability whereby one (or both) of the parties needs a person (doctor, therapist, ASL interpreter, etc.) they then receive an accommodation as well as an advisor of choice. Additionally, there is no equity requirement with accommodations under 504 or ADA – just because one party has an accommodation person and an advisor does not mean both parties automatically get two people.

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[1] The authors use the term "respondent" to mean a student accused of behavioral misconduct in the college and university setting.

[2] Nash v. Auburn Univ., 812 F.2d 655, 658, 11th Cir. 1987, as referenced in Stoner, Edward N, and John Wesley Lowery. "Navigating Past The 'Spirit of Insubordination': A Twenty-First Century Model Student Conduct Code." Journal of College and University Law, vol. 31, no. 1, 2004, pp. 1–78.

[3] Higher Education Amendments of 1992 (Public Law: 102-325, section 486(c))

[4] 34 CFR § 668.46 (k)(2)(iii) and (iv)

[5] U.S. Department of Education, Federal Register 62773-62774 (vol 79, no 202 October 20, 2014) Violence Against Women Act, Rules and Regulation

[6] Title IX of The Education Amendments of 1972, 20 U.S.C. A§ 1681 Et.

[7] U.S. Department of Education Office for Civil Rights, "2011 Dear Colleague Letter," April 4, 2011, https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf

[8] 34 CFR § 106.45(b)(6)(i)

[9] 34 CFR § 106.45(b)(5)(iv)

[10] 34 CFR § 106.45(b)(5)(iv)

[11] 34 CFR § 106.45(b)(5)(vi)

[12] 34 CFR § 106.45(b)(5)(vii)

[13] 34 CFR § 106.45(b)(6)

[14] U.S. Department of Education, Federal Register, (Vol. 85, No. 97 / May 19, 2020), Rules and Regulations, 30341

[15] 34 CFR § 106.45(b)(6)

[16] 34 CFR § 106.45(b)(8)(iii)(D)

[17] U.S. Department of Education, Letter to Students, Educators, and other Stakeholders re Executive Order 14021Notice of Language Assistance, April 6, 2021, https://www2.ed.gov/about/offices/list/ocr/correspondence/stakeholders/20210406-titleix-eo-14021.pdf

[18] Suzanne B. Goldberg, "Keep Cross-Examination out of College Sexual-Assault Cases," The Chronicle of Higher Education, January 10, 2019. https://www.chronicle.com/article/keep-cross-examination-out-of-college-sexual-assault-cases/?cid2=gen_login_refresh&cid=gen_sign_in

[19] Doe v. Baum, 903 F.3d 575 (6th Cir. 2018)

[20] Doe v. Michigan State University, No. 20-1043 (6th Cir. 2021)

[21] Haidak v. University of Massachusetts-Amherst, No. 18-1248 (1st Cir. 2019)

[22] Doe v. Trustees of Boston College, No. 19-1871 (1st Cir. 2019)

[23] Doe v. University of the Sciences, No. 19-2966 (3rd Cir. 2020)