

# Advising the Advisors:

## Training On-Campus Staff and Faculty to Serve as Advisors in DV/SAS Cases

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# Today's Presenter

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# VRLC's Lens

October 5, 2021

## Assessing the Evolving Impact of Victim Rights Law Center et al v. Cardona on College and University Title IX Procedures

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### HIGHER EDUCATION LAW Report

PUBLISHED BY THE  
Higher Education Law Practice Group of **BOND SCHOENECK & KING** ATTORNEYS

It has been over two months since the federal District Court's July 28, 2021 decision in *Victim Rights Law Center et al v. Cardona* vacating the section of the United States Department of Education's 2020 Title IX Final Rule that precluded postsecondary institutions from considering any statement made by a party or witness who does not submit to cross examination at a live adjudicatory hearing. Since the decision, institutions have sought to assess its impact on their processes for adjudicating allegations of sexual harassment, including the possibility of changes to eliminate this preclusion requirement

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# Accompanying Materials





This is a train-the-trainer presentation



Take back to your campus & adapt for your community and pool of advisors



Content to be customized based on your policies

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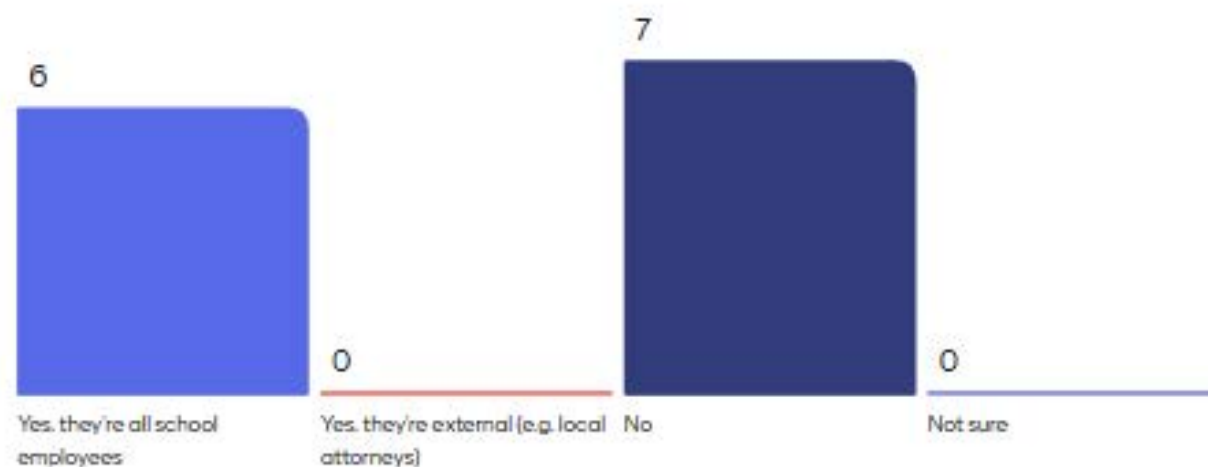
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Menti

Advisor session



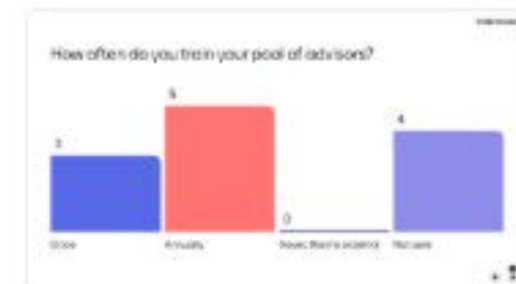
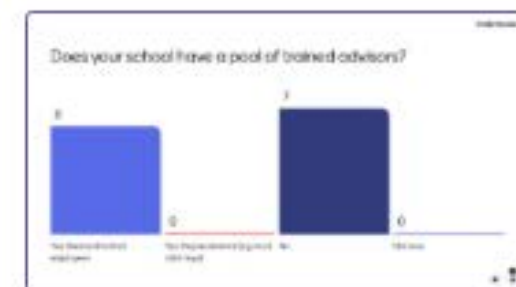
Does your school have a pool of trained advisors?



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# Recruiting Advisors



Conflict of interest analysis is different.



Consider folks who are committed but would not make good decision-makers or hearing panelists.



Consider the ways in which certain people may create inaccessible resources.



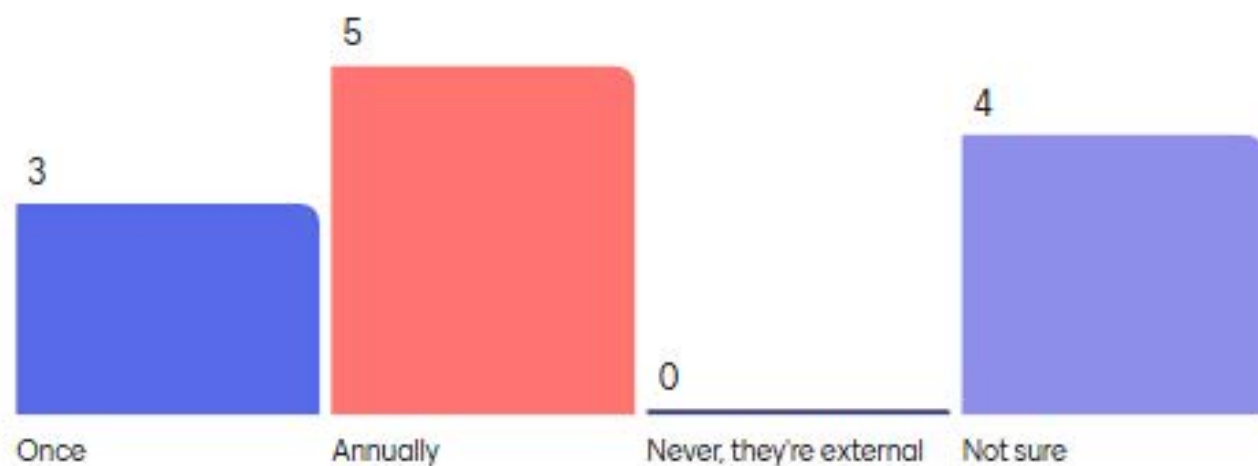
Think outside of your student-facing roles.

# Additional Considerations for Selecting Advisors

- Advisors may cross-examine the other party and witnesses.
- Role of advisor is not confidential.
- We do **NOT** recommend that confidential advocates or counselors serve as advisors due to the privacy implications.

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How often do you train your pool of advisors?



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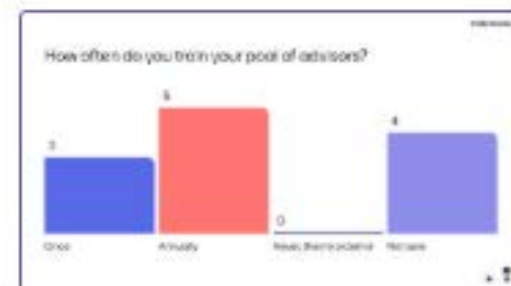
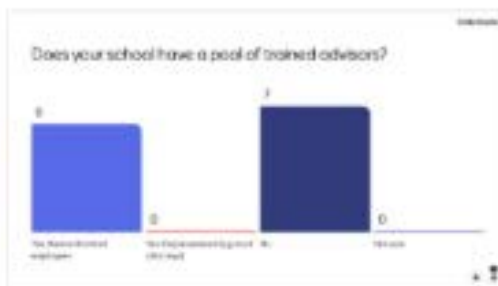
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# Session Objectives

- Identify the skills required to be an effective advisor in cases of domestic violence, dating violence, sexual assault and stalking;
- Understand the institution's informal resolution and formal grievance process;
- Identify strategies for effective advocacy.

# History of the Advisor Role: The Clery Act



Required institutions to provide parties opportunity to have an **advisor of choice**.

Institutions still able to limit the role of advisor.

Typically, advisors were:

- Able to attend proceedings, but not participate
- Not allowed to directly engage the other party
- Able to request a break or ask procedural questions

# Overview of Advisors in Campus Processes

01

Parties have right to advisor of their choice.

02

Advisors may - but do not have to - be an attorney.

03

Institutions may restrict advisor participation as long as restrictions are equally applied.

04

Not governed by strict conflict of interest rules.

# The Advisor Role



Guide



Advocate



Representative



Support  
Person



# **Understand our Policy:** *Advisor Role*

What does the policy/policies  
say about advisor role?



# **Understand our Policy:** **Types of cases**

Sexual Assault  
Dating Violence  
Domestic Violence  
Stalking  
Sexual Harassment

# Purpose of the Process

- Separate from the criminal process.
- Determine whether a policy violation occurred.
- If so, determine an outcome that restores the reporting party's access to education while reducing the likelihood of future harm.

# Overview of the Process

Formal Complaint

Investigation Phase

- Initial party interviews
- Witness interviews
- Follow-up party interviews/Evidence review

Report

Hearing

Outcome

Appeal

# Roles in Resolution Process

|                      |                                                                                                                                  |
|----------------------|----------------------------------------------------------------------------------------------------------------------------------|
| Title IX Coordinator | Neutral, oversees the process, can also serve as investigator. May not be decision-maker.                                        |
| Investigator         | Fact-finder, gathers information & summarizes relevant information into report. May not be decision-maker.                       |
| Decision-Maker       | Evaluates evidence, determines relevance of questions/info at hearing, renders decision on responsibility. Can be more than one. |
| Appeal Officer       | Designated to review the investigative record and appeal arguments.                                                              |

|             |                                                             |
|-------------|-------------------------------------------------------------|
| Complainant | Alleged victim of DDVSAS.                                   |
| Respondent  | Alleged perpetrator of DDVSAS.                              |
| Witness     | Individual with relevant information about the incident(s). |

# Meeting the Advisee

- Build Rapport
- Ask about safety concerns (ongoing)
- Establish role – Advisee empowerment

# Strategies for Effective Advising

- ❑ Review procedures with the student so they understand how information is shared throughout the investigation.
- ❑ Review relevant amnesty language.
- ❑ Walk advisee through process, including investigation, hearing, evidence submission, questioning.

# **Safety Planning Conversation**

Ongoing conversation

Understand the differences between the university and criminal process

Identify safety needs

Understand options for this advisee population (student, staff, faculty)



# Formal Complaint

# Advising At Complaint Stage

- Focus on incident(s) of sexual harassment and sexual misconduct
- Be succinct

# Complaint should:

- ✓ Answer the who, what, when, where test.
- ✓ Offer TIXC ability to determine whether and which policy applies.
- ✓ Request that the school investigate the complaint.

# Investigation

# Investigation: What to Expect

*<Insert the investigative process as outlined in your policy here>*

## EXAMPLE:

Investigator(s) assigned. (Note whether internal or external.)

Interviews with the Complainant and Respondent, evidence collection, witness lists.

Interviews of witnesses.

Follow-up interviews of Complainant and Respondent.

Evidence Review with 10 days for each party to respond in writing.

Draft investigative report with 10 days for each party to respond in writing.

Final investigative report issued at least 10 days before a hearing.

# Investigation: What to expect

- Standard of evidence
- Burden of proof rests with the institution
- Must resolve allegations promptly and accurately under a predictable, fair grievance process

# Investigation: What to expect

- Parties have equal opportunity to submit evidence and witnesses.
- Investigators gather facts through interviews and summarize in a report; a different form of testimony.

# Relevance

Generally **not** relevant:

- Complainant's past sexual history
- Complainant's sexual predisposition (e.g.: "they are queer and obviously hypersexual.")

But information may be deemed relevant if it is:

- ✓ "offered to prove that someone other than the respondent committed the conduct alleged" or is
- ✓ concerning specific incidents of the complainant's prior sexual behavior with the respondent and is offered to prove consent.

# Investigation: Strategies for Effective Advising

- ❑ **Inform** advisee that all information disclosed to the investigator will be disclosed to the other party prior to a hearing.
- ❑ **Discuss** with advisee the evidence they have prior to submission. Discuss impact of sharing confidential information.

# Investigation: Strategies for Effective Advising, cont.

- ❑ **Prepare** advisee for interviews in anticipation of cross-examination (if applicable). Thoroughly explain credibility and consistency.
- ❑ **Assist** in identifying witnesses and responding to evidence. Be strategic and careful in your evaluation.

# Hearing: What to expect

- Can be virtual
- Rules of decorum
- Advisors may cross-examine (if applicable).

# The Hearing: What to Expect

*<Insert the hearing structure as outlined in your policy. For instance:>*

Three-person decision-making panel, including a Chair, oversees the hearing.

Hearing process/structure:

- 1) Opening Statements
- 2) Questions for the Complainant by panel and Complainant advisor
- 3) Cross-Examination of the Complainant
- 4) Questions for the Respondent by panel and Respondent advisor
- 5) Cross-Examination of Respondent
- 6) Questions for witnesses
- 7) Each party's cross-examination of witnesses
- 8) Closing Statements
- 9) Panel Deliberations

# Rules of Decorum

- The hearing chair is responsible for enforcing the rules of decorum.
- If the rules are violated, the hearing chair will pause the proceeding or suspend it temporarily depending on the violation and the impact.
- Parties and Advisors will be provided with an exhaustive list of the rules of decorum in advance of the hearing and will have the opportunity to ask any questions.
  - If applicable, indicate where in the policy the Rules of Decorum may be found.

# Cross-Examination

- Cross-examination is procedural safeguard designed to test veracity.
- Cross-examination must be:
  - ✓ Live, Direct, Oral, Done by Advisors
  - ✓ All questions are subject to relevance/admissibility determination by decision-maker
  - ✓ Irrelevant or impermissible evidence will be excluded and not permitted to be inquired about.

# **Reminder:** **Relevance!**

- Relevance applies to information gleaned at hearing as well.
- If questions are related to past sexual history or sexual predisposition of the Complainant, the question will generally not be allowed.

# Hearing: Strategies for Effective Advising

- ❑ **Strategize** with advisee about mode of communicating during hearing, if virtual.
- ❑ **Work** with advisee to prepare opening and closing statements and questions for other party and witnesses ahead of time but be prepared to rework questions and closing statement during hearing in light of information shared.

# Hearing: Strategies for Effective Advising

- ❑ **Advisors must understand relevance.**
- ❑ **Advocate** for breaks when you and your advisee need them.
- ❑ **Get questions answered by thinking through the best way to ask them.**

# Appeals

# Grounds for Appeal

<Insert the grounds for appeal outlined in your policy>

- 1) Procedural irregularity;
- 2) New evidence not reasonably available at the time the determination regarding responsibility was made that could affect the outcome;
- 3) Bias for or against the parties by process personnel

# Appeal: *What to Expect*

*<Insert the appeal process as outlined in your policy. For instance:>*

Appeal decision-maker: <insert here>

Appeal is submitted within X days to <the designated appeal officer>.

Other party has X days to submit appeal response.

Designated appeal officer reviews the investigative record and appeal.

Upon conclusion of review, appeal officer will render a decision within X days in writing to both parties.

# **Advisor Responsibilities: Appeal**

- ✓ May advise through appeals.
- ✓ Understand grounds for appeal in the policy.
- ✓ Carefully review the record and incorporate details into the appeal/appeal response.
- ✓ Be prepared to identify the “new” in “new evidence.”

# Tips from Advising: Lessons Learned & Common Themes

- Communications with students are complicated and can be hard to understand. *Simplify your sample letters and emails.*
- Transparency throughout the adjudication process wanes.
- It is often not clear what evidence/information the other party will receive and when.
- Be honest about timeframes/length of the process.
- Pre-hearing meetings are an underutilized tool.

# Evaluation / Evaluación

Your feedback is important.  
Please take a moment to  
provide us with some feedback  
about this session using the  
session evaluation. Thank you!

Su opinión es importante. Por  
favor, dedique un momento  
para enviarnos sus comentarios  
sobre la presentación utilizando  
la sesión de evaluación.  
¡Gracias!



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