



# New Title IX Rules and Regulations

## Advisors

Presented by:  
Dennis J. Eichelbaum  
July 30, 2020

**EICHELBAUM WARDELL**  
HANSEN POWELL & MUÑOZ, P.C.

---

**AUSTIN**

4201 W. Parmer Lane, Suite A-100  
Austin, TX 78727  
(512) 476-9944

**D/FW METROPLEX**

5801 Tennyson Parkway, Suite 360  
Plano, TX 75024  
(972) 377-7900

[www.edlaw.com](http://www.edlaw.com) | (800) 488-9045 | [information@edlaw.com](mailto:information@edlaw.com)



# New Title IX Rules and Regulations

Advisors




EICHELBAUM WARDELL  
HANSEN POWELL & MUÑOZ, P.C.

July 30, 2020

1

# Advisor 101

How to be a Title IX Advisor



Are student Advisors more than a “potted plant?”

2

## Disclaimer

*These materials are intended to assist school officials in understanding and implementing the new Title IX regulations promulgated by the United States Department of Education that take effective August 14, 2020 and are not a substitute for specific legal advice from the school district's counsel. While we will attempt to thoroughly address the new grievance procedure requirements, it is not possible to include discussion of every aspect in this presentation. Thus, this information must be understood as a tool for addressing the latest requirements, rather than an exhaustive statement on legal obligations. Changes will, no doubt, be periodically incorporated into these materials, as school officials begin to implement this entirely novel process.*

3

## ADVISORS

- **The role of advisors will depend largely on whether the district allows live hearings as part of its grievance process.**
- **Each school district must establish parameters for the role of an advisor (e.g., attend, observe, not answer for a student).**
- **Students/parents/employees select their advisors.**

4

## Who Can Be an Advisor?

- Advisors are any individual who can assist in the investigation and grievance process
- Advisors may be an adult of the party's choosing
  - This may be a parent
  - This may be an attorney

5

## What Can an Advisor Do?

- An advisor may accompany the party to an investigator interview or other related meeting
- They may represent the party in a live hearing if the District allows such a hearing
- They may help prepare a case to present to an investigator on the party's behalf

6

*When do Advisors come into play?*  
**Investigative Report**

- Prior to completion of the investigation report, the investigator must send an electronic or hard copy of the relevant evidence to the parties and the parties' advisors, if any.
- The parties must be provided at least 10 days to submit a written response that the investigator must consider before completing the investigative report.

7

*When do Advisors come into play?*  
**Determination of Responsibility**

Before the decision maker determines responsibility (i.e., whether the respondent engaged in sexual harassment), the decision maker must afford each party the opportunity to submit written, relevant questions that party wants asked of any party or witness, provide each party with the answers, and allow for additional, limited follow-up questions from each party.

8

## *When do Advisors come into play?* Questions for the parties

With or without a hearing, 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 are offered to prove consent.

9

## Remember

- The Advisor should have sufficient copies of any record intended to be presented as evidence or presented to a witness.
- Advisors should be ready with necessary technology to make any planned presentations.
- Do not pretend to be a lawyer, and do not let the person you are advising think you are a lawyer (unless you are a lawyer). Your job is to assist and coach them through the process, help them ask the right questions, and to make sure they are provided with a fair process.

10

# Preparing Witnesses

---

11

## Example Players

Betty (complainant)



Veronica (Betty's best friend)



Reggie (other kid in school)



Archie (respondent)



Jughead (Archie's best friend)

12

## Preparing Witnesses – How to Answer Questions

- The most important thing to teach witnesses is to remind them to only answer the question being asked.
- **Example: Do you know the time?**
  - The answer is “yes” or “no”
  - You do not need to answer with the time.
- Listen closely to what is being asked and do your best to answer. If you do not understand, ask the person to rephrase their question.

13

## Preparing Witnesses – Discretion

- If your witnesses have agreed to testify, remind them what sort of proceeding this is. Title IX is a sensitive topic.
- Under **NO CIRCUMSTANCES** may a witness put on social media what is going on during the proceeding. Instruct your witness that they are not to publish anything before, during, or after regarding the proceeding.
- Remind witnesses that they should not discuss this with other friends or other witnesses.
- Remind witnesses that this is a serious matter and there is to be no joking around.

14



## Preparing Witnesses - Clothing

- Instruct witnesses to dress appropriately when coming in to testify.
- They do not need to be in professional attire but ask them to dress appropriately in long enough hem lines, high enough necklines, and no holes in jeans.
- Instruct your witnesses that they may not bring a cell phone into the room where they are testifying.
- Do not let your witnesses chew gum while testifying.

15

## How to Examine Witnesses

---

16

## Examining Witnesses - Preparation

- You should prepare your questions ahead of time, and make sure you have enough questions to fully flesh out the reason why each witness is testifying. Questions are usually sequential to tell a story.
- Feel free to practice with your witness ahead of the hearing or give the witness your questions in advance. You are working together with your witnesses.
- Practice in front of a family member or a mirror.

17

## Examining Witnesses - Questions

- When examining your witness, you should ask open ended questions.
  - Example: “Explain what happened the night of the party.”
  - Example: “Where did the incident take place?”
- You cannot testify for the witness.
  - Example: “Tell me more about why Archie disgusts you.”

18

## Listen

- Listen carefully to the questions and the answers given to the questions.
- Many lawyers focus on their next question while the witness answers a question; always listen to the answer.
- The answer may give you new questions
- The answer may not respond to the question, and you may need to follow up and get an answer to the question you asked.

19

## Examining Witnesses – Tone and Speed

- There's no need to rush your questioning. Take your time.
- Be polite and respectful to your witnesses. If they do not answer in the way you wanted, feel free to rephrase the question or ask another to make sure the witness addresses your point.
- Remember that it's difficult to testify: if a witness gets nervous or has a hard time expressing themselves you need to be understanding and to ask questions to calm them down.

20

# **Cross Examination 101**

---

21

## **Cross Examination – Preparation (Hearings)**

- You need to prepare for cross-examination equally or more than the amount you prepare for direct examination.
- While a witness is testifying, take notes on questions you may have because of what they just said. Sometimes the best cross-examination questions you didn't prepare for ahead of time.
- Research the witnesses. Be prepared to have some idea of what they'll testify about so you aren't taken by surprise.

22

## Cross Examination - Questioning

- During *cross examination* you may ask leading questions.
  - Example: “You’ve had a crush on Archie for a long time now, haven’t you?”
  - Example: “You haven’t liked Betty since she beat you out for the spot in Josie and the Pussycats, have you?”
- You still cannot testify for the witness.

23

## Cross Examination - Tone

- Even though you are asking leading questions, you should not treat opposing party’s witnesses in a hostile or disrespectful manner.
- Be patient when waiting for a witness to answer your questions. Silence does not need to be filled.
- In a hearing you may object to a witness’s answer if you believe it didn’t answer your question by saying, “Objection, non-responsive.”

24

# The Rules of Evidence

---

25

## Hearsay

- Hearsay is an out of court statement offered to prove the truth of the matter asserted.
  - The statement was originally said not during this proceeding
  - You're only mentioning the statement to prove it was true
- Hearsay is **not** allowed
- There are exceptions to hearsay that make statements that were said out of court offered for the truth of the matter asserted allowed.

26

## Hearsay Exception – Admission by a Party Opponent

- You may offer an opposing party’s prior statement (even one made outside of the court room)
- Example: as Archie’s advocate you can offer as evidence that the day after the party where Betty claims Archie assaulted her, Betty texted Veronica that she and Archie hooked up consensually.
- Example: as Betty’s advocate, you can offer that right after the incident Archie told Betty “Tell anyone and I’ll do this again.”

27

## Hearsay Exception – Statement Made for Medical Diagnosis or Treatment

- If a victim offers evidence regarding statements they made in furtherance of seeking medical treatment these are allowed.
- Example: Betty can offer the results of a rape kit
- Example: Betty can offer evidence of the notes taken by a scribe while she was in her doctor’s office describing the bruising she claims was from a sexual assault.
- Example: Betty’s medical provider can come in and testify to her visit.

28

## Hearsay Exception – Then-Existing Mental, Emotional, or Physical Condition

- A statement of the declarant's then-existing state of mind or emotional, sensory, or physical condition.
- Example: Archie can say that at the party where Betty alleges an assault occurred, that he was drunk and cannot remember anything.
- Example: Betty can say that during the alleged assault, she remembers that her assailant smelled like Axe Body Spray and his breath smelled like root beer.
- Example: Betty can say that after the assault both her arms were bruised, and she remembers being unable to raise them above her head on her own.

29

## Reputation or Opinion Evidence

- Witnesses being questioned **cannot** offer testimony about another person's reputation, or offer the witness's opinion of another person
- Example: Veronica can't come as a witness and talk about how Betty is known on the cheerleading team as being promiscuous. Veronica also cannot say that she believes Archie is creepy and probably did assault Betty.
- The only exception to this is if the Accused *first* testifies about their own good character. Then you can cross-examine and offer evidence of specific instances to contradict their good character. But not before.
- Example: If Archie first says he is known at school for being a nice guy who would never hurt anyone. Then you may ask Archie if it's true that he once got into a fist fight with Reggie in the cafeteria.

30



## Rumors, etc.



Objectionable Hearsay:

Example: Jughead: “I heard a rumor on Betty has been messing around.”

Example: Veronica: I saw on Snapchat a picture of Archie and Betty together.

Example: Reggie: “I heard it from a friend who heard it from a friend who heard it from a friend they’ve been messing around.”

31

## Business Records

- Records kept during the every-day course of business may be offered under the “Business Records Exception”
  - A great example would be attendance records at school. This may be offered to show your victim did not come to school for a week after the incident, or your accused was in class during fifth period when the alleged incident occurred.
  - Another business record may be a police report.
- Remember FERPA-protected documents may be limited – like grades would be irrelevant and are not allowed.

32

## Sex-Offense Evidence

- You **cannot** offer evidence to prove that a victim engaged in other sexual behavior
- You also **cannot** offer evidence to prove a victim's sexual predisposition
- Example: You cannot offer evidence through Jughead that Betty has had sex with all five members of the debate team this school year.
- Example: You cannot offer as evidence a note Betty passed in class one day that says she thinks Archie is cute.

33

## Sex-Offense Evidence

- You can offer evidence that the accused party committed any other sexual assault.
- If you plan to offer this evidence, you **must** disclose this to the accused and their advisor at least 15 days before your proceeding.

34

# Questions?

CONTACT US



**EICHELBAUM WARDELL**  
HANSEN POWELL & MUÑOZ, P.C.

[www.edlaw.com](http://www.edlaw.com)

(800) 488-9045

[information@edlaw.com](mailto:information@edlaw.com)