

Select Education Group

In-Depth Training for Title IX Advisors and Advocates

August 14, 2020

Presented by Amy K. Dickerson

FRANCZEK



Ask Questions



What is the first word you think of when you think of a Title IX "advisor"



Which of these is NEW under the Title IX regulations

Complainants and recipients can have an advisor with them during Title IX interviews

Parties can choose who serves as an advisor

Institutions must provide advisors for parties during Title IX hearings

Schools can place reasonable limits on advisors

All of the above

Advisors – the Rules

- Parties can have advisor of choice
- Advisor can attend all interviews, hearings, and other meetings (no other party can attend hearings unless required by law)

Advisors – the Rules

- Advisor conducts live cross-examination for the advisor's party at the hearing
- Advisor must be provided by institution at no cost if party does not have one

All members of the school's Title IX Team, including advisors, must be unbiased, may not have any conflict of interest, and may not prejudge the facts.

True

False



Who should be advisor?

(c) Franczek P.C. 2020. Not legal advice. Subject to limited license; see final page.

Who Can Serve as an Advisor

- Can be a parent, attorney, family member, friend, even a witness
- Can be a school employee
- Best practice is to provide a pool to choose from



Who should not be advisor?

(c) Franczek P.C. 2020. Not legal advice. Subject to limited license; see final page.

process?

Written notice of the right to select an advisor of choice when an investigation is opened

Written notice to the advisor of any meeting or interview during an investigation

Copies of all evidence directly related to the allegations at the end of the investigation 10 days before the investigative report is finalized

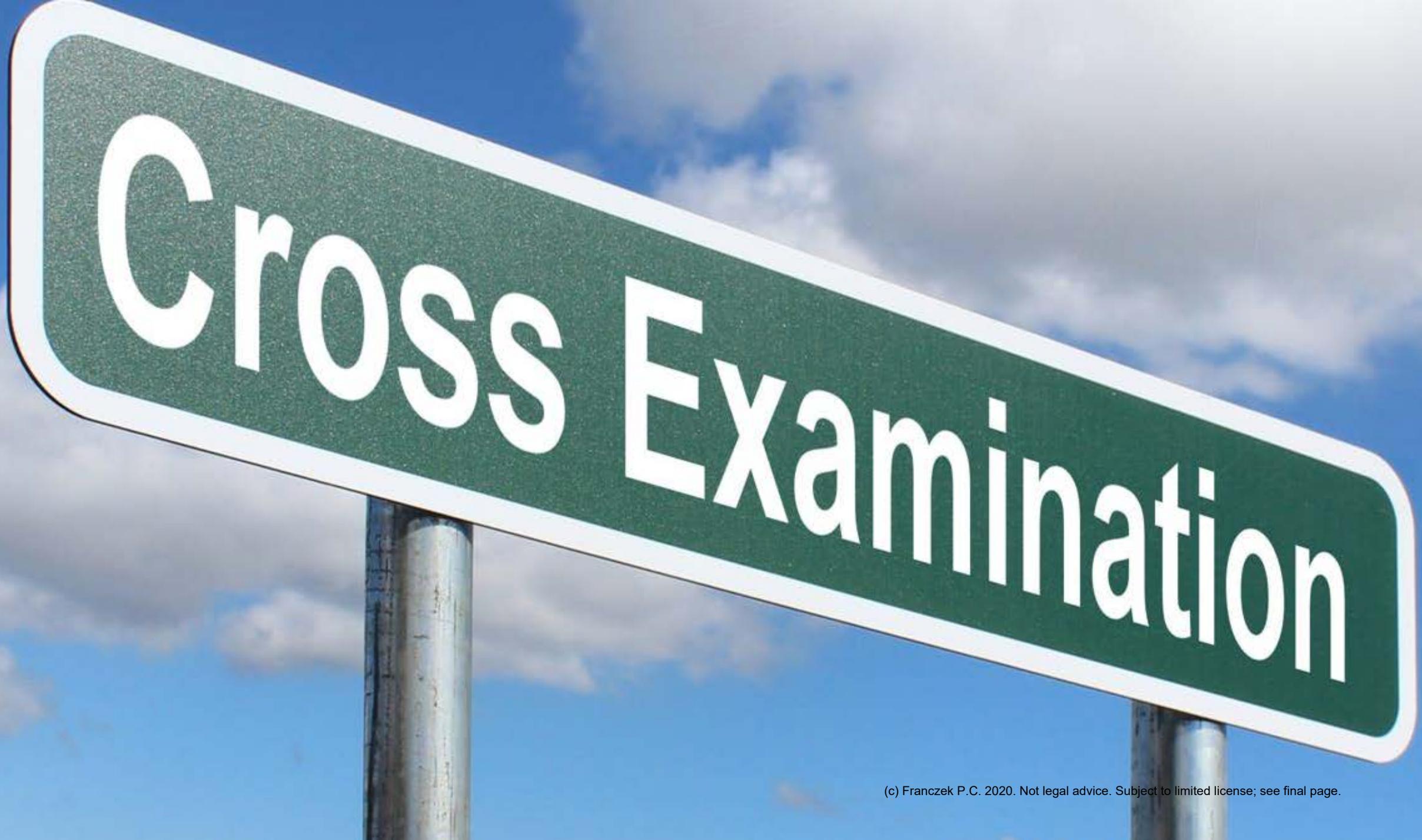
A copy of the other party's response to directly related evidence along with the final investigative report at least 10 days before the hearing

A copy of the written determination after the hearing

Start the presentation to see live content. For screen share software, share the entire screen. Get help at pollev.com/app

Advisor Notices

- The evidence subject to inspection and review in an electronic format or a hard copy with 10 days to submit a written response
- Investigative report at least 10 days prior to a hearing



Cross Examination

Important part of truth seeking partly because of live, in-the-moment nature and because conducted by someone whose purposes is to advance one side's perspective

Cross Examination

- Not for the protection only of respondents
- Both parties' advisors may direct decisionmaker's attention to implausibility, inconsistency, unreliability, ulterior motives, lack of credibility

Cross Examination Rules

- Must be conducted by the advisor
- Advisor asks questions and follow-up questions
- Directly, orally, and in real time
- May be in separate rooms (party request, institution choice)

Cross Examination Rules

- Advisor can appear even if party does not appear
- If advisor *and* party do not appear, a recipient-provided advisor must still cross-examine the other appearing party and witnesses

Cross Examination Tips

- Leading questions – elicit a “yes” or “no” answer
- Try to only ask necessary questions
- Try to only ask questions to which you already know the answer

Cross Examination Tips

Leading questions

- "Isn't it true that..."
- "...correct?"
- Or just state the fact, without any question words. "The Respondent did not force you?" Wait for, "Yes."

Cross Examination Tips

- Only include one fact per question
- Including too many facts or issues can be confusing and allow the witness an “out”

What is the most important goal of cross-examination

To make the witness look bad

To point out weaknesses in the witness's account

To bolster your party's account

Cross Examination Tips

- New, Known Facts
- Concession on Known Facts
- Errors in Direct Testimony
- Neutralizing Direct Testimony
- Impeachment
- Attack Credibility

Cross Examination Tips

Impeachment

- Verify the document first
- Point out and confirm statement in document
- Compare to previous testimony and confirm contradiction

As an advisor, I must cross-examine every other party and witness

True

False

Cross Examination Tips

Witnesses you might not cross-examine

- The witness did not hurt your party's position
- The witness is certain to just repeat the same answers as on direct

The witness will not answer your "yes" or "no" question. What should you do?

Interrupt the witness and demand that the witness answer the question "yes" or "no"

Rephrase the question

Repeat the same question

Respond with hostility

None of the above



Cross Examination Plan



If you do not know where
you are going, every road
will get you nowhere

Henry A. Kissinger

Cross Examination Preparation

- Review all directly related evidence and party responses
- Review the investigation report
- Talk to your party about witnesses personalities

Cross Examination Preparation

- Prepare an outline (but plan to vary if needed)
- Use documents and other evidence, especially to impeach
- Listen carefully during direct questioning

Cross Examining Experts

- Make the expert your own
- Challenge facts and conclusions
- Attack qualifications, preparation, bias
- Impeach with your expert or literature

Relevance

- Makes something more or less likely to be true
- Exceptions
 - Sexual behavior
 - Legal privilege
 - Treatment records

Rape Shield Law

- Excludes evidence of Complainant's sexual behavior or predisposition
- Two narrow exceptions
 - Someone other than RP committed the conduct
 - CP and RP conduct to show consent
- Does not apply to Respondent

Treatment Records

- Can't access, consider, disclose, or use records
- Made by a physician, psychologist, or other recognized professional
- Which are made and maintained in connection with the provision of treatment,
- Unless the party gives voluntary, written consent

Legally Privileged Information

- Cannot use questions or evidence that seek disclosure of legally privileged information, unless waived
- Consider:
 - Attorney-client communication
 - Privilege against self-incrimination
 - Confessions to a clergy member or religious figure
 - Spousal privilege
 - Confidentiality and trade secrets

"But you typically have sex after drinking at parties, don't you?"

Yes

No

"Isn't it true that you have had sex with the Respondent after partying together?"

Yes

No

"But you were so drunk that you can't be positive whether you had sex with the Respondent, can you?"

Yes

No

"Isn't it true that you called the Complainant the next day to see if the Complainant was okay?"

Yes

No

"You texted the Complainant the night before, saying you wanted to hook up with her?"

Yes

No

Can We Talk About That?

- School not required to allow debate from advisors
- School not required to provide after-hearing explanation (but can, e.g., to revise)

Advisor Decorum

- Essential function is not to embarrass, blame, humiliate, or emotionally berate
- Essential function is to give the decisionmaker the fullest view possible of the relevant evidence

Advisor Rules

- Institution can set rules of participation, decorum (must be same for both parties)
- Review any advisor agreement carefully
- Self-control is significant



Limitations on Advisor

(c) Franczek P.C. 2020. Not legal advice. Subject to limited license; see final page.

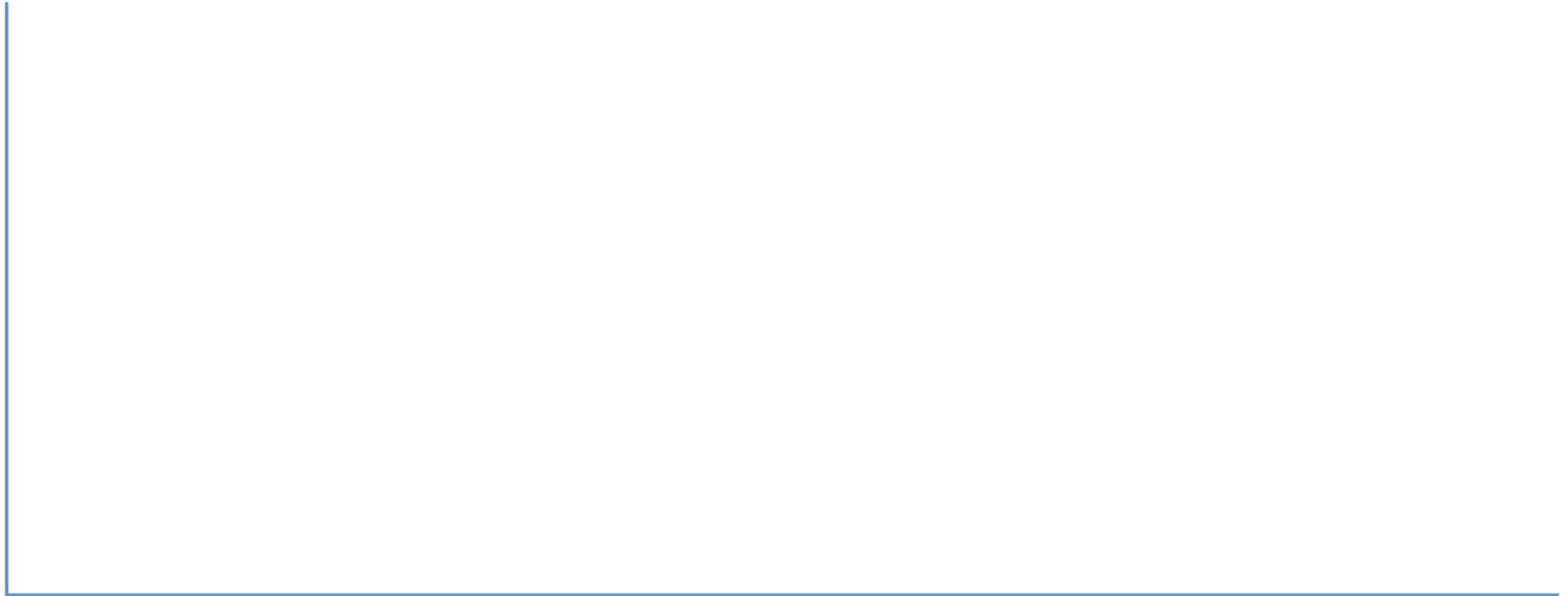
accepted
rules. noun
set of ex
princi

Disruptive Advisors

Skill of Advisors

SEXUAL HARASSMENT
complaint form

My unavailability for a meeting, hearing, or other process can be "good cause" for delaying the Title IX process



True

False

QUESTIONS



© Franczek P.C. 2020. These materials are not legal advice. These materials are subject to a LIMITED LICENSE AND COPYRIGHT. These materials are proprietary and are owned and copyrighted by Franczek P.C. As training materials used to train Title IX personnel, these materials must be posted publicly by any organization or entity that purchased training for its Title IX personnel using these materials on that organization or entity's website or, if it has no website, must be made available by any such organization or entity for inspection and review at its offices. Accordingly, Franczek P.C. has granted a LIMITED LICENSE to the organization or entity that lawfully purchased training using these materials (the "LICENSEE") to post these materials on its website or otherwise make them available as required by 34 C.F.R. 106.45(B)(10). The LICENSEE and any party who in any way receives and/or uses these materials agree to accept all terms and conditions and to abide by all provisions of this LIMITED LICENSE. Only the LICENSEE may post these materials on its website, and the materials may be posted only for purposes of review/inspection by the public; they may not be displayed, posted, shared, published, or used for any other purpose. Franczek P.C. does not authorize any other public display, sharing, posting, or publication of these materials by the LICENSEE or any other party and does not authorize any use whatsoever by any party other than the LICENSEE. No party, including the LICENSEE, is authorized to copy, adapt, or otherwise use these materials without explicit written permission from Franczek P.C. No party, including the LICENSEE, is authorized to remove this LIMITED LICENSE AND COPYRIGHT language from any version of these materials or any copy thereof. Should any party, including the LICENSEE, display, post, share, publish, or otherwise use these materials in any manner other than that authorized by this LIMITED LICENSE, Franczek P.C. will exercise all available legal rights and seek all available legal remedies including, but not limited to, directing the party to immediately remove any improperly posted content, cease and desist any unauthorized use, and compensate Franczek P.C. for any unauthorized use to the extent authorized by copyright and other law. These materials may not be used by any party, including the LICENSEE, for any commercial purpose unless expressly authorized in writing by Franczek P.C. No other rights are provided, and all other rights are reserved.