



## **ATIXA VAWA SECTION 304-COMPLIANT PROCESS ADVISOR MODEL LANGUAGE**

### **OVERVIEW OF LEGAL RIGHTS AND ADVISOR-RELATED ISSUES**

Effective March 7<sup>th</sup>, 2014, participants in campus resolution processes for stalking, domestic violence, dating violence and sexual assault have a federally-guaranteed right to an “advisor of their choice” to accompany them throughout all steps of the campus resolution process. Here are some key points to understand about this change:

- The law is in effect now. The Department of Education (DOEd) is tolling enforcement until July 2015, but expects campuses to make good faith efforts to comply until then. Denying access to an advisor of their choice is not a good faith effort.
- In July 2015, failure to fully accord this right becomes a fineable offense under the Clery Act, enforceable by the DOEd.
- The Clery Act does not create a private right of action to sue to enforce this right, but some courts have already done so.
- The law is broad enough to afford access to any advisor, including a parent, sister, roommate or attorney.
- The law provides the right to one advisor, only, but a campus can allow more than one.
- The law provides this right to all parties (complainants and respondents), but not to witnesses.
- The law provides this right to both student and employee parties.
- The law affords the right to an advisor in all phases of the process, including all intake meetings, interviews, hearings and appeals.
- The law permits campuses to limit the role of the advisor.
- Special rules that distinguish attorneys from other non-attorney advisors are not recommended.
- It will be difficult to justify allowing advisors for only the four behaviors covered by VAWA Section 304 (sexual assault, dating violence, domestic violence, stalking), but not for all behaviors covered by Title IX (sexual harassment, sex/gender-based bullying, hazing, and other forms of sex/gender-based discrimination).
- Once the right to an advisor is afforded to students and employees, it will be difficult to justify why that right applies to some behaviors and not others. Many campuses will therefore want to implement this right across resolution processes more broadly than VAWA Section 304 contemplates.
  - Not doing so could give rise to Equal Protection lawsuits against public universities.
- A right to an advisor is afforded in campus stalking allegations, whether or not the stalking is related to sex/gender.
- Unless a campus prefers a broader role for an advisor, the advisor is only present to guide their advisee, not to represent them, speak for them, or play an active role of any kind in the process.

- Advisors should be permitted to speak with their advisee as necessary, privately or during campus meetings to fully perform their advising role.
- A campus is not required to provide a student or employee with an advisor, only to allow the student or employee to select one.
  - This will give rise to cases where one party has access to an attorney and another does not.
  - Campuses are not required and should not force either party to utilize an “assigned” advisor – the law guarantees an advisor of the party’s choosing.
  - Relatedly, Title IX does not require institutions to provide the same type of advisor to both parties, merely that the parties have the option to have an advisor
- Many campuses are wisely choosing to train a pool of campus advisors who can be offered to the parties. The parties are not obligated to choose campus advisors, and may choose advisors who are not a part of the campus community.
  - Students should execute FERPA consents as appropriate to allow the campus to communicate with an advisor, if desired.
  - Campuses should develop clear rules on disclosure of education and/or employment records to advisors, and the obligations of advisors to maintain the confidentiality/privacy of those records.
- If an advisor quits, is disqualified, or is removed for interference with the process, policy should clarify how (or if) a substitute will be afforded.
- If a party selects an advisor who does not wish to serve as an advisor, the law does not obligate them to serve.
- Policy should clarify that certain individuals are disqualified from serving as advisors, including administrators over the process, anyone in the administration who supervises a participant in the process as an employee, any witness, anyone who is being strategically chosen to deprive another party of their likely advisor, etc.
- Universities should resist the urge to automatically ante up their legal counsel simply because one party or both parties to a resolution process elect to be advised by attorneys. Increasing the legalistic and/or adversarial nature of campus proceedings is not advisable, unless there is a compelling reason for the university to choose to have its counsel present.

## MODEL POLICY LANGUAGE

All parties are entitled to an advisor of their choosing to guide and accompany them throughout the campus resolution process. The advisor may be a friend, mentor, family member, attorney or any other supporter a party chooses to advise them. The university maintains a pool of trained (non-attorney) advisors who are available to the parties. The parties may choose advisors from outside the pool, or outside the campus community, but those advisors may not have the same level of insight and training on the campus process as do those trained by the university. Outside advisors are not eligible to be trained by the university.

The parties are entitled to be accompanied by their advisor in all meetings and interviews at which the party is entitled to be present, including intake, interviews, hearings and appeals. Advisors should help their advisees prepare for each meeting, and are expected to advise ethically, with integrity and in good faith. The university cannot guarantee equal advisory rights, meaning that if one party selects an advisor who is an attorney, but the other party does not, or cannot afford an attorney, the university is not obligated to provide one. However, the university maintains a listing of local attorneys who may offer their services pro bono. Additionally, accused individuals may wish to contact organizations such as:

- FACE (<http://www.facecampusequality.org>)
- SAVE (<http://www.saveservices.org>),

Complainants may wish to contact organizations such as:

- The Victim Rights Law Center (<http://www.victimrights.org>), or the
- The National Center for Victims of Crime (<http://www.victimsofcrime.org>), which maintains the Crime Victim's Bar Association.

All advisors are subject to the same campus rules, whether they are attorneys or not. Advisors may not address campus officials in a meeting, interview or hearing unless invited to. Advisors may confer quietly with their advisees as necessary, as long as they do not disrupt the process. For longer or more involved discussions, the parties and their advisors should ask for breaks or step out of meetings to allow for private conversation. Advisors will typically be given an opportunity to meet in advance of any interview or hearing with the administrative officials conducting that interview or meeting. This pre-meeting will allow advisors to clarify any questions they may have, and allows the university an opportunity to clarify the role the advisor is expected to take. Advisors are expected to refrain from interference with the university investigation and resolution. Any advisor who steps out of their role in any meeting under the campus resolution process will be warned once and only once. If the advisor continues to disrupt or otherwise fails to respect the limits of the advisor role, the advisor will be asked to leave the meeting. When an advisor is removed from a meeting, that meeting will typically continue without the advisor present. Subsequently, the Title IX Coordinator or a deputy will determine whether the advisor may be reinstated, may be replaced by a different advisor, or whether the party will forfeit the right to an advisor for the remainder of the process.

The university expects that the parties will wish to share documentation related to the allegations with their advisors. The university provides a consent form that authorizes such sharing. The parties must complete this form before the university is able to share records with an advisor. Advisors are expected to maintain the privacy of the records shared with them. These records may not be shared with 3<sup>rd</sup> parties, disclosed publicly, or used for purposes not explicitly authorized by the university. The university may seek to restrict the role of any advisor who does not respect the sensitive nature of the process or who fails to abide by the university's privacy expectations.

The university expects an advisor to adjust their schedule to allow them to attend university meetings when scheduled. The university does not typically change scheduled meetings to accommodate an advisor's inability to attend. The university will, however make provisions to allow an advisor who cannot attend in person to attend a meeting by telephone, video and/or virtual meeting technologies as may be convenient and available.

A party may elect to change advisors during the process, and is not locked into using the same advisor throughout.

Where an employee is a member of a union and entitled to a union representative in the process, that employee may be accompanied by the union representative as their advisor or may choose an advisor in addition to their union representative.

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