



Title IX Training

Walsh University October 16, 2020



Bricker & Eckler
ATTORNEYS AT LAW

Presentation Rules

- Questions are encouraged!
- “For the sake of argument...”
- Be aware of your own responses and experiences
- Follow-up with someone if you have questions and concerns
- Take breaks as needed

Required Training for Investigators

- Definition of Sexual Harassment (Level 1)
- Scope of Institution's Education Program or Activity (Level 1)
- How to conduct an Investigation
- Steps of the Grievance Process (Level 1)
- Serving Impartially and without Bias
- Issues of Relevance

Topics

- Change in role of investigators
 - Bias and conflicts of interest
 - Relevancy
- Investigative Techniques
 - Mock Interview
 - Writing a report
 - Takeaways



Being Impartial and Avoiding Bias, Conflict of Interest, and Prejudgment of Facts

Impartiality and Avoiding Bias, Conflict of Interest and Prejudgment of Facts 1 of 2

Section 106.45 **requires** that investigators (and Title IX Coordinators, decision-makers, informal resolution officers and appeals officers)

- be free from **conflict of interest, bias,** and
- be trained **to serve impartially** and **without prejudging facts.**

(30053)

Impartiality and Avoiding Bias, Conflict of Interest and Prejudgment of Facts 2 of 2

- We will discuss each of these individually and provide examples, but some of the factors for each overlap.
- For example, being impartial is greatly aided by not pre-judging facts.

(30249-30257; 30496)

Impartiality

- Be neutral
- Do not be partial to a complainant or a respondent, or complainants and respondents generally
- Do not judge: memory is fallible [and it's contrary to your neutral role] (30323)

Bias: Concerns raised in comments in preamble

- Neutrality of paid staff in Title IX positions
- Institutional history and “cover ups”
- Tweets and public comments
- Identifying as a feminist

Perceived v. Actual Bias

- Both can lead to the same perception (30252)
- On appeal of decisions, the Department requires the bias “that could affect the outcome of the matter”

How the Department tried to prevent bias

No single-investigator model (34 C.F.R. 106.45(b)(7)(i)):

- Decision-maker (or makers if a panel) must not have been the same person who served as the Title IX Coordinator or investigator (30367)
- Separating the roles protects both parties because the decision-maker may not have improperly gleaned information from the investigation that isn't relevant that an investigator might (30370)
- The institution may consider external or internal investigator or decision-maker (30370)

Bias: Objective Rules and Discretion 1 of 2

“[R]ecipients *should* have objective rules for determining when an adjudicator (or Title IX Coordinator, investigator, or person who facilitates an informal resolution) is biased, and the Department leaves recipients discretion to decide how best to implement the prohibition on conflicts of interest and bias...” (30250)

Bias: Objective Rules and Discretion 2 of 2

- **Discretionary**: Recipients have the discretion to have a process to raise bias during the investigation.
- **Mandatory**: Basis for appeal of decision-maker's determination per 34 C.F.R. 106.45(b)(8)(i)(C).

Conflict of Interest: Concerns raised in comments in preamble

- Financial and reputational interests of Title IX employee aligns with institution
- Past advocacy for a survivor's group
- Past advocacy for a respondent's group

Preamble Discussion on Bias and Conflict of Interest 1 of 3

- Final regulations “leave recipients flexibility to use their own employees, or to outsource Title IX investigation and adjudication functions, and the Department encourages recipients to pursue alternatives to the inherent difficulties that arise when a recipient’s own employees are expected to perform functions free from conflicts of interest and bias.” (30251)

Preamble Discussion on Bias and Conflict of Interest 2 of 3

- No *per se* prohibited conflicts of interest in using employees or administrative staff
 - including supervisory hierarchies (but see portion about decision-makers and Title IX Coordinator as supervisor)
- No *per se* violations for conflict of interest or bias for professional experiences or affiliations of decision-makers and other roles in the grievance process

(30352-30353)

Preamble Discussion on Bias and Conflict of Interest 3 of 3

- Example: it is **not** a *per se* bias or conflict of interest to hire professionals with histories of working in the field of sexual violence (30252)
- Cautions against using generalizations to identify bias and conflict of interest and instead **recommends** using a **reasonable-person test** to determine whether bias exists.

Example of Unreasonable Conclusion that Bias Exists

- “[F]or example, **assuming** that all self-professed **feminists**, or self-described **survivors**, are biased against men, or that a **male** is incapable of being sensitive to women, or that prior work as a **victim advocate**, or as a **defense attorney**, renders the person biased for or against complainants or respondents” is **unreasonable** (30252)

Training, Bias, and Past Professional Experience

This required training (that you are sitting in right now) can help protect against disqualifying someone with prior professional experience

(30252)

Department: Review of Outcomes Alone Does Not Show Bias

- Cautioned parties and recipients from concluding bias or possible bias “based solely on the outcomes of grievance processes decided under the final regulations.”
- Explained: the “mere fact that a certain number of outcomes result in determinations of responsibility, or non-responsibility, does not necessarily indicate bias.” (30252)

Examples of Bias

- An investigator used to supervise one of the parties;
- Information “gleaned” by the investigator is shared with the decision-maker outside the investigation report (in meetings to discuss pending cases, in passing while at work, etc.)

Avoiding Prejudgment of Facts at Issue

A good way to ensure impartiality and avoid bias:

- Keep an open mind and actively listen
- Each case is unique and different

Hypotheticals 1 of 2

Thinking about how to move forward with some issues of impartiality, conflict of interest and bias (perceived or actual).

Hypotheticals 2 of 2

Scenario for the next several hypotheticals:

You are an investigator for your Tile IX Office. You have just been handed a formal complaint to investigate. An initial review did not identify you as having any conflict of interest or bias. But you will need to assess the following situations based on additional information you have.

Hypothetical 1

You review the report and realize that the name of one of the parties seems familiar to you from a past and unrelated investigation. You don't have any real memory of the case or any thoughts you have of that party, but you realize that could change when you meet the party.

What should you do?

Hypothetical 2

Your institution's student conduct office, Title IX office, and Greek life office meet weekly to discuss student issues and potential issues. In these meetings, you discuss specific students by name for continuity of care for students and to ensure everyone is on the same page. As a result, you have heard other employees discuss the parties in the case handed to you and some of it seemed to indicate that the Complainant may be dramatic.

What should you do?

Hypothetical 3

The formal complaint you are handed includes a former coworker from the Title IX Office who now works in a different office at the institution. You do not like this former coworker. You do not know the other party involved.

What should you do?

Hypothetical 4

During your investigation, the Respondent's attorney accuses you of bias because of your former work as a victim advocate.

What should you do?

The Bottom Line

Be Human & Be a Blank Slate



Changes to the investigator's role



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No single-investigator model

- The role of investigator and decision-maker MUST be separate.
- The investigator does not make decisions to help prevent bias of information the investigator may have “gleaned” from the investigation process that is otherwise not relevant to the decision.

The investigation and report will consider more information

- The investigator has the burden of asking the parties for and collecting all relevant evidence.
- Relevant may be institution-determined, but we will discuss it further later today.
- Parties have the right to present fact and expert witnesses.
- Issues of relevancy will often not be made until the decision-maker is involved (after your involvement).

The Investigator's Roles

1. The gatherer of all relevant evidence.
2. The organizer of all relevant evidence.



Issues of Relevance

What is Relevant? 1 of 3

The new regulations don't really tell us directly.

The preamble discussion indicates that it may include: evidence that is “probative of any material fact concerning the allegations.”

(30343)

What is Relevant? 2 of 3

The preamble also tells us:

“evidence pertinent to proving whether **facts material to the allegations** under investigation are **more or less likely to be true** (*i.e.*, on what is relevant)” (30294)

What is Relevant? 3 of 3

Does this question, topic, evidence help **move the dial** under the standard of evidence?

- **Preponderance of the evidence**: a fact is more likely than not to be true (30373 fn. 1409)
- **Clear and convincing**: a fact is highly probable to be true (30373 fn. 1409)

Issues of Relevancy (NOT Rules of Evidence) 1 of 2

- The Rules of Evidence do **NOT** apply and **CANNOT** apply
- “The Department appreciates the opportunity to clarify here that the final regulations **do not allow a recipient to impose rules of evidence that result in the exclusion of relevant evidence**; the decision-maker must consider relevant evidence and must not consider irrelevant evidence.” (30336-37)

This means: 1 of 2

- Cannot exclude redundant evidence
- Cannot exclude character evidence
- Cannot exclude hearsay
- Cannot exclude evidence where the probative value is substantially outweighed by the danger of unfair prejudice (30294)

This means: 2 of 2

- Cannot rely on a statement against a party interest (30345)
- Cannot rely on a statement of deceased party (30348)

Issues of Relevancy (NOT Rules of Evidence) 2 of 2

“[A] **recipient** may **not** adopt rules **excluding** certain types of **relevant evidence** (e.g., **lie detector test results**, or rape kits) where the type of evidence is not either deemed “not relevant” (as is, for instance, evidence concerning a complainant’s prior sexual history) or otherwise barred for use under 106.45 (as is, for instance, information protected by a legally recognized privilege).”

Issues of Relevancy: What isn't relevant?

- Information protected by a legally recognized privilege
- Party's medical, psychological, and similar records unless voluntary written consent
- Party or witness statements that have not been subjected to cross-examination at a live hearing

Relevancy: Medical treatment and Investigations

Section 106.45(b)(5)(i): when investigating a formal complaint, recipient:

- “[C]annot access, consider, disclose, or otherwise use a party’s records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional’s or paraprofessional’s capacity, or assisting in that capacity, and which are made and maintained in connection with the provision of treatment to the party, **unless the recipient obtains that party’s voluntary, written consent to do so for a grievance process under this section.**”

Relevancy: Legally Privileged Information

Section 106.45(b)(1)(x):

- A **recipient's** grievance process **must...not require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of,** information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege.

Relevancy: Legally Privileged Information – What does this include?

- Preamble identifies medical and treatment records.
- Jurisdiction-dependent
 - Attorney-client communications
 - Implicating oneself in a crime
 - Confessions to a clergy member or other religious figures
 - Spousal testimony in criminal matters
 - Some confidentiality/trade secrets

Issues of Relevancy: What isn't relevant? – Rape Shield Provision

- Evidence about complainant's prior sexual history (must exclude) unless such questions/ evidence:
 - are offered to prove that someone other than the respondent committed the conduct, or
 - if the questions/evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent.

Issues of Relevancy: What isn't relevant? – Rape Shield Provision

- Rape shield protections do not apply to Respondents
- “The Department reiterates that the rape shield language . . . does not pertain to the sexual predisposition or sexual behavior of respondents, so **evidence of a pattern** of inappropriate behavior by an alleged harasser must be judged for relevance as any other evidence must be.”

Additional information for the Investigator regarding relevancy

- There are more considerations for decision-makers regarding relevancy that are not an issue for investigators.
- Of note, if a party or witness's statement is not subject to cross-examination at the hearing, the decision-maker cannot consider that statement

Retaliation

When parties elect not to participate, a recipient cannot retaliate against them (30322)

- It is the right of any party or witness not to participate in the investigation

Relevancy and the Investigator

The gatherer of all relevant evidence

- Recipient must ensure that “all *relevant* questions and evidence are admitted and considered (though varying weight or credibility may of course be given to particular evidence by the decision-maker).” (30331)

Relevancy and the Investigation and Report 1 of 2

“The requirement for **recipients** to **summarize** and evaluate **relevant evidence**, and specification of certain types of evidence that must be deemed not relevant or are otherwise inadmissible in a grievance process pursuant to section 106.45, appropriately direct **recipients** to **focus investigations** and adjudications **on evidence pertinent to proving whether facts material to the allegations under investigation are more or less likely to be true** (i.e., on that is relevant.)” (30294)

Relevancy and the Investigation and Report 2 of 2

- 1) The gatherer of all relevant evidence.
- 2) The organizer of all relevant evidence.

practice...

practice...

practice...

Relevancy Hypotheticals for the Investigator

Relevancy Hypotheticals

Disclaimer: The following hypotheticals are not based on any actual cases we have handled or of which we are aware. Any similarities to actual cases are coincidental.

Relevancy Hypotheticals: Scenario Review

- The following hypotheticals are all based upon the scenario we provided in advance of today. We will go through it together now before we go through the hypotheticals.
- You are the investigator who has been handed this information from the Title IX Coordinator.

Hypothetical Compliance System Report

Compliance System Report

Reporter Name: Anonymous

Received: January 23, 2020 at 11:43 P.M.

Intake Format: Email

Parties Identified	<ul style="list-style-type: none">● Riley Roberts● Cameron Clawson
Narrative	<ul style="list-style-type: none">● Riley Roberts is a PREDATOR!!!! Riley posted a video having sex with their ex, Cameron Clawson, as revenge for their ex breaking up with them. It's all over their Snapchat story and even in an online forum for a class both Riley and Cameron have together. You must do something...Cameron is distraught and talking about suicide!

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Parties Identified: Riley Roberts and Cameron Clawson

Narrative: Riley Roberts is a PREDATOR!!!! Riley posted a video having sex with their ex, Cameron Clawson, a revenge for their ex breaking up with them. It's all over their Snapchat story and even in an online forum for a class both Riley and Cameron have together. You must do something...Cameron is distraught and talking about suicide!

Hypothetical One

You sit down to interview Cameron. Cameron tells you that she heard that after she broke up with Riley, Riley assaulted several other people. Cameron identified a couple of these other people for you to interview about Riley's sexual history.

Is this relevant?

Hypothetical Two

In your interview with Riley, Riley tells you that they have hired an expert witness who will provide a report stating that there is no way that Riley could have sexually assaulted Cameron.

Is this relevant?

Hypothetical Three

In your interview with Cameron, Cameron disclosed to you that they have proof that they have post-traumatic stress disorder from Riley's actions. Cameron states that they have medical treatment records to prove this, but does not want to provide them to you.

Is this relevant?

Hypothetical Four

In your interview with Cameron, Cameron mentions that before she started dating Riley, she heard that Riley was nearly expelled from high school for threatening a teacher with physical violence.

Is this relevant?

Hypothetical Five

Assume for this hypothetical only that Riley alleges a counterclaim of sexual assault for the night in question against Cameron. Riley states that Cameron cheated on him and may have sexually assaulted two other witnesses who Riley identifies.

Is the information from those witnesses relevant?

Hypothetical Six

In your interview with Cameron, Cameron tells you that they have consulted with a psychic who is willing to state that Cameron was sexually assaulted by Riley.

Is this relevant?

Hypothetical Seven

In your interview with Riley, Riley tells you that they have been unable to sleep since Cameron filed the report and would like to provide treatment records to support the effects of Cameron's report on Riley. Riley is willing to sign a waiver.

Is this relevant?



Introduction to Investigative Techniques

Initial Review

- Review notes and information collected by the Title IX Coordinator
- Review Notices to Complainant and Respondent
- Review Policy/Code of Conduct
- Define Scope of Investigation
 - What elements do you think will be disputed?
 - Agreed upon?

Begin Evidence List

- If there is a criminal investigation, work with law enforcement to collect and preserve evidence

Types of evidence

- Electronic communications
- Security information

- Pictures, videos, audio
- Police reports
- Personnel files
- Prior complaints against respondent

Begin Witness List

- If there is a criminal investigation, work with law enforcement to ensure permission to question witnesses
- Who should be included?
- Who should NOT be included?
- In what order should the witnesses be interviewed?
- Be flexible

Craft Questions for Each Witness

- Refer to the policy
- Consider what information they are likely to have related to each element
- Consider what information they are likely to have that may assist the decision-maker in determining credibility
- Be flexible

Organizing for the Interview

- What should you have with you?
 - Intake Report
 - Written notice with allegations
 - Investigation log
 - Investigation notes cover sheet
 - Pre-prepared questions
 - Evidence you may need to reference or show witness
 - Policy or Handbook

Note-taking Tips

- Use predictable symbols in the margin to easily skim during the interview:
 - ? ← Follow-up questions
 - * ← Potential evidence
 - **W** ← Potential witness
- Try to record exact quotes when possible
- Interview notes are now required to be produced as part of the record

Remember: The gatherer of relevant evidence

- To ensure burden of proof and burden of gathering evidence is not on the parties (106.45(b)(5)(i))
- To provide an equal opportunity for the parties to present witnesses, including fact and expert witnesses, and other inculpatory or exculpatory evidence (106.45(b)(5)(ii))
- Not restrict the ability of either party to discuss the allegations under investigation or to gather or present relevant evidence (106.45(b)(5)(iii))

Setting Up the Interview 1 of 2

- Identify yourself, your role, and a general outline of what you're investigating
- Consider requesting the TIX Coordinator check in with those who fail to respond or refuse to participate
- Don't give up on the interview till you've tried at least 3 times, in at least 2 different methods

Setting Up the Interview 2 of 2

You must now provide any party whose participation you seek, with written notice (email) with “sufficient” time to prepare:

- Date
- Time
- Location
- Participants
- Purpose of interview or meeting

(106.45(b)(5)(v))

Set the Stage

- Make introductions
- Be hospitable
- Give overview of why they are being interviewed
- Explain retaliation policy
- Invite questions

Begin Broadly

- Elicit a monologue about the incident
 - What happened earlier that day before the incident?
 - What happened with regard to the incident?
 - What happened next?

Freeze Frames

- Ask the witness to “freeze” on the moment and describe details
 - What could they see? Feel? Smell? Taste? Hear?
 - Where was the other person? How were they positioned?
 - Where were you? How positioned?
 - What did you say to the other person? Them to you?
 - Describe other person’s tone, demeanor, body language

Ask Follow-Up Questions

- Re-review your notes
- Re-review the elements of each charge
 - Have you elicited all of the information this witness might have about each element?
 - Do you have an understanding of how the witness obtained the information they shared?

Credibility

- Gather facts to assist **decision-maker**
- Ask questions to test memory
- Identify where the witness may corroborate or contradict their testimony, or other witnesses, and physical evidence
- Be sensitive to potential trauma experienced by witnesses

When Consent is at Issue

- Consider the wording and tone of your questions
- Utilize “freeze frame” strategy
- Ask questions about what happened to determine whether there was unspoken consent
- Ask questions to identify whether alcohol/drugs may have played a role regarding consent

Closing the Interview

- Closing questions
- Request copies of all evidence potentially available to the witness
- Discuss confidentiality - but do not prohibit a party from discussing allegations
- Inform the witness of next steps and how to reach you

After the Witness Leaves 1 of 2

- Update investigation log
- Review notes, make corrections/clarifications
- Update witness list
- Update list of evidence to be obtained
- Write down questions to ask other witnesses
- Consider whether appropriate to send email

After the Witness Leaves 2 of 2

- Consider whether there are additional allegations that you need to bring to the Title IX Coordinator
- Ensure you are not leaving the burden of proof on any party or witness alone (106.45(b)(5)(i))

Physical Evidence

- Follow up on anything identified during interviews
- Is law enforcement involved? Could they be?
- Ensure physical evidence is in a secure location and documented in the investigation log

What about advisors or support persons in interviews?

Must provide parties the same opportunity to be accompanied by the advisor of their choice

- Nothing in the preamble prohibits support persons in the interview process (this is different at the hearing)
- Allowed to limit participation of advisor in process
- Whatever rules your institution selects, apply them equally to both parties

(106.45(b)(5)(iv))

Inspection and Review of Evidence

Provide ALL Evidence to both parties and advisors

- Include everything related to allegations, even if you don't expect decision-maker to rely on it
- Allow 10 days to review
- Allow written response
- Follow up where necessary
- Consider responses when preparing report

(106.45(b)(5)(vi))

Create Investigative Report

- Summarize **facts**
- No determination
- Provide to parties and advisors
- Allow 10 days to review prior to hearing
- We will discuss report writing later today



Writing the Report

Remember: The organizer of all relevant evidence. 1 of 2

- Your second role, after gathering all relevant evidence, is to organize all relevant evidence for the parties and the decision-maker.
- Here are some tools for how to best organize all the relevant evidence.

Remember: The organizer of all relevant evidence. 2 of 2

The new Regulations provide that the investigator must create a report that:

- Fairly summarizes relevant evidence

(106.45(b)(5)(vii))

What does this mean?

Start with the basic information

Identify with just factual information:

- Complainant
- Respondent
- Investigator
- Witnesses
 - Perhaps organize by fact v. expert witnesses or by party whom requested the witness

Consider general organization

Natural and neutral organization suggestions:

- Chronological order
- By topic or allegation
 - Perhaps by chronology within each topic or allegation
- By chronology of how the information came in to the investigation
- By witness summary

Explain how organized

Explain your structure. Example:

“The information in this report is a summary of the facts as agreed upon by the parties and the witnesses. Where there is a difference in the accounts, it is noted in the report. For the sake of clarity, the report is organized chronologically and by subject matter when appropriate.”

Other basic information to include

- Basic description of charges
- How did the complaint make its way to an investigation?
- Witnesses Interviewed
- Witnesses Not Interviewed (and why)
- The procedure followed, step-by-step
- Any procedural anomalies that need explained?

Identification of witness sign-off

If this is your practice:

“Each person interviewed was provided with a written copy of a summary of their interview, and was given an opportunity to provide feedback and approve the accuracy of the summary.”

- Did everyone do so?

A statement regarding relevant evidence

“All relevant information gathered during the course of the investigation has been included in this report.”

- Identify if you thought something was not relevant and why – consider still including in attachment for decision-maker
- Provide a table or list of all relevant evidence gathered and attach that evidence

Identify and include all alleged policy violations

- Definition of prohibited conduct alleged from applicable policy
- Related definitions as appropriate (e.g. consent, incapacitation) or any code of conduct included if done together
- Include verbatim, in entirety

Give an overview of evidence collected

and

**Attach as appendices any statements and
important evidence**

Be helpful to reviewers – keep it transparent 1 of 2

Citations to the record – always

- Be helpful for your fact-finders!

Hearing packet or exhibits – helpful to number the pages sequentially for easy citation

Be helpful to reviewers – keep it transparent 2 of 2

- Insert into the report screenshots of text messages and pictures where relevant
- If information is attached but not referred to in a summary, may want to drop a footnote explaining why not

What not to include in report (but note requested and why not included) 1 of 3

The specific type of evidence deemed not relevant in the Regulations:

- Information protected by a legally recognized privilege
- Party's medical, psychological, and similar records unless voluntary written consent
- Rape Shield protection for Complainant

What not to include in report (but note requested and why not included) 2 of 3

If evidence is requested by a party and/or you determine it is not relevant, always explain that it was requested and why you determined it was not relevant.

What not to include in report (but note requested and why not included) 3 of 3

If you determined evidence was not relevant because of matters outside of the specific reasons identified in the regulations—i.e. because you did not think it was probative of material fact—explain and consider attaching in an Appendix

Helpful synthesis

If you can, synthesize the information from multiple parties and witnesses

Where the stories diverge:

- “Information from [Complainant]”
- “Information from [Respondent]”

Summary of Information 1 of 2

Don't forget to summarize impact on complainant if the charges require consideration as an element

- “The investigator notes that this incident and the process may have had an impact on [Respondent]. However, to determine whether sexual harassment occurred, the hearing panel will be required to review the impact of the reported behavior on [Complainant]. This is the reason that the information here focuses solely on [Complainant].”

Summary of Information 2 of 2

Undisputed Facts

- Series of numbered sentences

Disputed Facts

- Series of numbered sentences

Make sure you have facts for each element of each charge



Bad vs. neutral and clear writing examples

Writing examples

Disclaimer: The following hypotheticals are not based on any actual cases we have handled or of which we are aware. Any similarities to actual cases are coincidental.

Example 1

Bad example: Complainant was very believable when they said they had been attacked by Respondent.

Neutral and clear correction: Complainant stated they were attacked by Respondent on Saturday. Complainant provided the names of witnesses and contact information for those witnesses.

Example 2

Bad example: Complainant stated that she didn't think she had witnessed anything, but that I should check with her.

Neutral and clear correction: Complainant stated that Complainant did not believe that her roommate, Rebecca, had witnessed anything. Complainant asked the investigator to follow up with Rebecca to verify what, if anything, Rebecca witnessed.

Example 3

Bad example: Respondent seemed nervous at the interview and wasn't consistent with the information.

Neutral and clear correction: Respondent provided the following information at the interview: that Respondent was at the party from 7-8, that Respondent was not at the party at 7:30, and that Respondent may not have been at the party.

Example 4

Bad example: Respondent requested that I follow up with her roommate, but I did not because the evidence seemed redundant.

Neutral and clear correction: Respondent requested the investigator follow up with her roommate. The investigator scheduled an interview with the roommate to follow up on any additional information the roommate may have. The roommate's account of events at the interview, provided in Exhibit C, is consistent with Respondent's statement regarding the time period between 12 and 2 on the date of the allegation. The roommate was not present outside of that time frame and had no additional information.

Training Requirements for Decision Makers



Specifically, the new Title IX regulations require training of decision-makers on the following, which we will be discussing throughout this training in 106.45(b)(1)(iii):

- Jurisdiction: understanding “the scope of the recipient’s education program or activity” (Level1)
- Definitions of “sexual harassment” under the new Title IX regulations (Level1)
- How to conduct a live cross-examining hearing. (30320)

Training Requirements 1 of 5



- How to serve impartially, including by avoiding prejudgment of the facts at issue, bias and conflicts of interest
 - Avoiding stereotypes (Level 1 and review here)
- Training on any technology to be used at a live hearing*
- The grievance process for the decision-maker's institution*

Training Requirements 2 of 5



- **Relevance** determinations (not Rules of Evidence)
 - knowing and applying remaining requirements and other specific exclusions from the Regulations
 - Rape shield law and its two narrow exceptions
 - legally privileged information absent voluntary written waiver of party holding privilege
 - *must make a relevancy determination before each question can be answered* (30324)

Training Requirements 3 of 5



- How to objectively evaluate all relevant evidence, including inculpatory and exculpatory and make decisions on relevancy (30320)
 - Inculpatory: evidence that tends to prove the violation of a policy
 - Exculpatory: evidence that tends to exonerate the accused

Training Requirements 4 of 5



- That a decision-maker cannot draw inferences about failure to appear or answer questions in live cross-examination hearing
- How to determine weight , persuasiveness, and/or credibility in an objective evaluation

Training Requirements 5 of 5



Under Clery Act, must receive annual training on:

- Issues related to sexual assault, domestic violence, dating violence, stalking (Level 1)
- How to conduct an investigation and hearing process that protects the safety of victims and promotes accountability (Level 1 and today)

Examples of Bias



- Situations where a decision-maker has already heard from a witness or party in a prior case and has made a credibility determination re: that person;
- Situations where information “gleaned” by the investigator is shared with the decision-maker outside the investigation report (in meetings to discuss pending cases, in passing while at work, etc.)

Avoiding Pre-Judgment of Facts at Issue



A good way to avoid bias and ensure impartiality:
avoiding prejudgment of facts

Remember:

- **Keep an open mind** as a decision-maker and actively listen to all the facts presented as subjected to cross-examination
- If a party or witness does not submit to cross-examination, may not be able to consider statements in the record
- Each case is unique and different

Being impartial: Avoiding Sex Stereotypes



Decision-makers are trained to avoid bias and sex stereotypes—

- “such that even if a cross-examination question impermissibly relies on **bias or sex stereotypes** while attempting to challenge a party’s plausibility, credibility, reliability, or consistency,
- it is the trained decision-maker, and not the party advisor asking a question,
- who determines whether the question is relevant if it is relevant, then evaluates the question and any resulting testimony in order to reach a determination on responsibility” (30325)

LIVE CROSS-EXAMINATION: Theory and Practice

Cross Examination



Traditionally, cross examination questions are those that try to elicit “yes” or “no” answers, not explanations.

Examples:

- You were at the party that night, weren't you?
- You'd agree with me that you had three beers, wouldn't you?
- You didn't call an Uber, did you?

Live Cross-Examination: Theory 1 of 3



- Essential for truth seeking (30313)
- Provides opportunity of both parties to test “consistency, accuracy, memory, and credibility so that the decision-maker can better assess whether a [party’s] narrative should be believed” (30315)

Live Cross-Examination: Theory 2 of 3



- Provides parties with the opportunity to “direct the decision-maker’s attention to implausibility, inconsistency, unreliability, ulterior motives, and lack of credibility” in the other party’s statements. (30330)
- Promotes transparency and equal access (30389)

Live Cross-Examination: Theory 3 of 3



According to the Department, the process in 106.45 best achieves the purposes of:

- (1) effectuating Title IX's non-discrimination mandate by ensuring **fair, reliable outcomes** viewed as **legitimate** in resolution of formal complaints of sexual harassment so that victims receive remedies
- (2) **reducing and preventing sex bias** from affecting outcomes; and
- (3) ensuring that Title IX regulations are consistent with **constitutional due process and fundamental fairness**
(30327)

Live Cross-Examination: How it should look



“[C]onducting cross-examination consists simply of posing questions intended to advance the asking party’s perspective with respect to the specific allegation at issue.” (30319)

Live Cross-Examination: Regulations

1 of 2



In this process:

- Decision-maker must permit each party's advisor to ask the other party and any witnesses **all relevant** questions and follow-up questions, including those challenging **credibility**
- Must be conducted directly, orally, and in real time by the party's advisor, but never party personally
- Only relevant cross-examination and other questions may be asked of a party or witness

Live Cross-Examination: Regulations

2 of 2



- Before a party or witness may answer a question, the decision-maker must first determine whether the question is relevant and explain the reason if not relevant
- Must audio record, audio-video record or provide a transcript of the hearing

Role of Decision-Maker/questioning by 1 of 2



The preamble discussion provides some additional information on protecting neutrality of the **decision-maker**:

“To the extent that a party wants the other party questioned in an adversarial manner in order to further the asking party’s views and interests, that questioning is conducted by the party’s own advisor, and not by the recipient. Thus, no complainant (or respondent) need feel as though the recipient is “taking sides” or otherwise engaging in cross-examination to make a complainant feel as though the recipient is blaming or disbelieving the complainant.” (30316)

Role of Decision-Maker/questioning by 2 of 2



So take that into consideration if eliciting questions:

- “[O]n the decision-maker’s initiative [can] ask questions and elicit testimony from parties and witnesses,
- as part of the recipient’s **burden** to reach a determination regarding responsibility based on objective evaluation of all relevant evidence including inculpatory and exculpatory evidence.
- Thus , the skill of a party’s advisor is not the only factor in bringing evidence to light for a decision-maker’s consideration.” (30332)

Confidentiality



- 106.71 requires recipients to keep party and witness identities confidential except as permitted by law or FERPA, and as needed to conduct an investigation or hearing (30316)
- Prevents anyone in addition to the advisor to attend the hearing with the party, unless otherwise required by law (30339)

Reminders 1 of 3



- Individual cases are not about statistics
- Decision in every case must be based on preponderance of evidence or clear and convincing evidence presented
- Cannot fill in evidentiary gaps with statistics, personal beliefs or information about trauma
- Process must be fair and impartial to each party
- Institution may proceed without active involvement of one or both parties; base conclusions on impartial view of evidence presented

Reminders 2 of 3



- **Withhold pre-judgment:** The parties may not act as you expect them to
- Be aware of your own biases as well as those of the complainant, respondent, and witnesses
- Let the available facts and standard of proof guide your role in overseeing the live cross-examination hearing, not unfair victim-blaming or societal/personal biases

Reminders 3 of 3



- Burden of gathering the evidence on the recipient, not the parties (30333)
- should be an issue with investigation, but might be something you see as the decision-maker

ISSUES OF RELEVANCY: Not Rules of Evidence

Relevancy 1 of 2



- Per 34 C.F.R. 106. 45(b)(6)(i):
 - “Only **relevant** cross-examination and other questions may be asked of a party or witness.”

“[C]ross examination **must focus only on questions that are relevant to the allegations in dispute.**” (30319)

Relevancy 2 of 2



Party or witness cannot answer a question until the decision-maker determines whether it is relevant.

- Requires decision-makers to make “on the spot” determinations and explain the “why” if a question or evidence is not relevant (30343)

What is Relevant?



Decisions regarding relevancy do not have to be lengthy or complicated:

“... it is sufficient... to explain that a question is irrelevant because it calls for prior sexual behavior information without meeting one of the two exceptions, or because the question asks about a detail that is not **probative** of any **material fact** concerning the **allegations**.” (30343)

Not Governed by Rules of Evidence 1 of 2



The Rules of Evidence do NOT apply and CANNOT apply

“[T]he decision-maker’s only evidentiary threshold for admissibility or exclusion of questions and evidence is not whether it would then still be excluded under the myriad of other evidentiary rules and exceptions that apply under, for example, the Federal Rules of Evidence.” (30343)

Not Governed by Rules of Evidence 2 of 2



Examples:

- No reliance of statement against a party interest (30345)
- No reliance on statement of deceased party (30348)
- A recipient may not adopt a rule excluding relevant evidence whose **probative value is substantially outweighed by the danger of unfair prejudice** (30294)

Relevancy



Recipient must ensure that “all *relevant* questions and evidence are admitted and considered (though varying weight or credibility may of course be given to particular evidence by the decision-maker).” (30331)

- A recipient may not adopt rules excluding certain types of relevant evidence (**lie detector** or rape kits) where that type of evidence is not labeled irrelevant in the regulations (e.g., sexual history) or otherwise barred for use under 106.56 (privileged) and must allow fact and **expert witnesses**. (30294)

Relevancy: Not Relevant



The Department has determined that recipients must consider relevant evidence with the following exceptions:

- (1) Complainant's sexual behavior (except for two narrow exceptions)
- (2) information protected by a legal privilege
- (3) party's treatment records (absent voluntary written waiver by the party) (30337)

Relevancy: Regulations' Rape Shield Law-Complainants



- According to 34 C.F.R. 106. 45(b)(6)(i), Cross-examination **must exclude** evidence of the Complainant's "sexual behavior or predisposition"
UNLESS
 - its use is to prove that someone other than the Respondent committed the conduct, OR
 - it concerns specific incidents of the complainant's sexual behavior with respect to the respondent and is offered to prove consent

Relevancy: Regulations' Rape Shield Law - Respondents



- Rape shield protections **do not apply to Respondents**
- “The Department reiterates that the rape shield language . . . does not pertain to the sexual predisposition or sexual behavior of respondents, so **evidence of a pattern** of inappropriate behavior by an alleged harasser must be judged for relevance as any other evidence must be.”

Relevancy: Treatment Records



“[C]annot access, consider, disclose, or otherwise use a party’s records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional’s or paraprofessional’s capacity, or assisting in that capacity, and **which are made and maintained in connection with the provision of treatment to the party, unless the recipient obtains that party’s voluntary, written consent** to do so for a grievance process under this section.”

Section 106.45(b)(5)(i) (see also 30317).

Relevancy: Legally Privileged Information

1 of 2



Section 106.45(b)(1)(x):

A recipient's grievance process *must...not require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of*, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege.

Relevancy: Legally Privileged Information

2 of 2



Other typical privileges recognized across jurisdictions but with variations (will want to **involve your legal counsel for definitions in your jurisdiction**):

- Attorney-client communications
- Implicating oneself in a crime
- Confessions to a clergy member or other religious figures
- Spousal testimony in criminal matters
- Some confidentiality/trade secrets

Relevancy: Improper Inference



When parties do not participate:

- “If a party or witness does not submit to cross-examination at the live hearing...the decision-maker(s) cannot draw an inference about the determination regarding responsibility **based solely** on a party’s or witness’s absence from the live hearing or refusal to answer cross-examination or other questions.” 34 C.F.R. 106.45(b)(6)(i).

Relevancy: No Reliance on Prior Statements



When parties elect not to participate, a recipient cannot retaliate against them (30322)

What if a party or witness gave a statement during the investigation but is not participating in cross-examination?

- “Must not rely on any **statement** of that party or witness in reaching a determination”

Relevancy: No Reliance on Prior Statements - Theory



If parties do not testify about their own statement and submit to cross-examination, **the decision-maker will not have the appropriate context for the statement**, which is why the decision-maker cannot consider that party's statement.

(30349)

Relevancy: When Parties or Witnesses Do Not Participate



The preamble recognizes that there are many reasons a party or witness may not elect not to participate in the live cross-examination hearing or answer a question or set of questions

- The decision-maker cannot make inferences from non-participation or compel participation (retaliation) (30322)
- Relevant questioning by advisor along these lines?

Relevancy: No Reliance on Prior Statements 1 of 4



“[A] party’s advisor may appear and conduct cross-examination **even when the party whom they are advising does not appear.**” (30346)

“Similarly, where one party does not appear and that party’s advisor does not appear, **a recipient-provided advisor must still cross-examine the other, appearing party,** resulting in consideration of the appearing party’s statements (without any inference being drawn based on the non-appearance).” (30346)

Relevancy: No Reliance on Prior Statements 2 of 4



Third party cross-examination of what a non-appearing party stated **does not count** as statements tested on cross-examination. (30347)
(provides examples of family and friends showing up on behalf of the non-appearing party)

“[A] rule of non-reliance on untested statements is more likely to lead to reliable outcomes than a rule of reliance on untested statements.” (30347)

Relevancy: No Reliance on Prior Statements 3 of 4



When statement IS the sexual harassment...

“Thus, a respondent’s alleged verbal conduct, that itself constitutes the sexual harassment at issue, is not the respondent’s “statement” as that word is used in § 106.45(b)(6)(i), because the verbal conduct does not constitute the making of a factual assertion to prove or disprove the allegations of sexual harassment; instead, the verbal conduct constitutes part or all of the underlying allegation of sexual harassment itself.”

- If you don’t already follow the blog, add it to your favorites bar: <https://www2.ed.gov/about/offices/list/ocr/blog/index.html> (May 22, 2020 blog post)

Relevancy: No Reliance on Prior Statements 4 of 4



“[E]ven though the refusing party’s statement cannot be considered, the decision-maker may reach a determination based on the remaining evidence so long as no inference is drawn based on the party or witness’s absence from the hearing or refusal to answer cross-examination (or other) questions.” (30322)

Example: “[W]here a complainant refuses to answer cross-examination questions but video evidence exists showing the underlying incident, a decision-maker may still consider the available evidence and make a determination” (30328)

Relevancy: No Reliance on Prior Statements- Examples



- But, if a party or witness does not submit to cross examination and makes a statement in a video, cannot consider that statement in the video to reach a decision on responsibility (30346)
- Remember: No rules of evidence can be imported

Relevancy: No Reliance on Prior Statements – SANE and Police Reports



- This expressly means no statements in police reports, no SANE reports, medical reports, or other documents to the extent they contain statements of parties or witnesses who do not submit to cross examination(30349)
- If non-cross-examined statements are intertwined with statements tested by cross-examination, can only consider those that have been cross-examined (30349)

Issues of Relevancy



“[D]oes not prescribe rules governing how admissible, relevant evidence must be evaluated for weight or credibility by recipient’s decision-maker, and recipients thus have discretion to adopt and apply rules in that regard, so long as such rules do not conflict with 106.45 and apply equally to both parties.” (30294)

BUT

“[I]f a recipient trains Title IX personnel to evaluate, credit, or assign weight to types of relevant, admissible evidence, that topic will be reflected in the recipient’s training materials.” (30293)

Other Considerations



- What about sex stereotyping questions?
- What about questions by advisor about why a party isn't participating?
- What about decorum?

Decorum 1 of 5



The preamble to the Title IX Regulations contains many discussions of an institution's discretion to set rules to maintain decorum throughout hearings and to remove non-complying advisors, parties, or witnesses.

Note: In our experience, we have seen decorum issues more commonly with advisors than parties...and have seen this equally on both sides. This is more likely to be an issue when family members serve as advisors, because, understandably, these can be emotional matters.

Decorum 2 of 5



“Recipients may adopt rules that govern the conduct and decorum of participants at live hearings so long as such rules comply with these final regulations and apply equally to both parties...These final regulations aim to ensure that the truth-seeking value and function of cross-examination applies for the benefit of both parties while minimizing the discomfort or traumatic impact of answer questions about sexual harassment.”
(30315)

Decorum 3 of 5



“[W]here the **substance of a question is relevant**, but the manner in which an advisor attempts to ask the question is **harassing, intimidating, or abusive (for example, the advisor yells, screams, or physically ‘leans in’ to the witness’s personal space)**, the recipient may appropriately, evenhandedly enforce rules of decorum that require relevant questions to be asked in a respectful, non-abusive manner.”
(30331)

Decorum 4 of 5



“The Department acknowledges that predictions of harsh, aggressive, victim-blaming cross-examination may dissuade complainants from pursuing a formal complaint out of fear of undergoing questioning that could be perceived as interrogation. However, recipients retain discretion under the final regulations to educate a recipient’s community about what cross-examination during a Title IX grievance process will look like, including developing rules and practices (that apply equally to both parties) to oversee cross-examination to ensure that questioning is relevant, respectful, and non-abusive.” (30316 see also 30315; 30340)

Decorum 5 of 5



- “[T]he essential function of cross-examination is **not to embarrass, blame, humiliate, or emotionally berate a party**, but rather to ask questions that probe a party’s narrative in order to give the decision-maker the fullest view possible of the evidence relevant to the allegations at issue.” (30319)
- Nothing in this rule prevents recipient from enforcing decorum rules in the hearing and “the recipient may require the party to use a different advisor” if the advisor does not comply and may provide a different advisor to conduct cross examination on behalf of that party (30320)

Practice Making Relevancy Determinations

Relevancy Determination Hypotheticals 1 of 2



Okay, decision-maker, is this question relevant?

For practice, we will pose these in cross-examination format. As discussed before, the traditional cross-examination style is aimed at eliciting a short response, or a “yes” or “no,” as opposed to open-ended question which could seek a narrative (longer) response.

For example, instead of, “How old are you?” the question would be, “You’re 21 years old, aren’t you?”

Relevancy Determination

Hypotheticals 2 of 2



For each practice hypothetical, ask yourself:

Is this question relevant or seeking relevant information?

- Why or why not?
- Does the answer to this depend on additional information?
- If it so, what types of additional information would you need to make a relevancy determination?

Relevancy Determination Hypotheticals Disclaimer



Disclaimer: The following hypotheticals are not based on any actual cases we have handled or of which we are aware. Any similarities to actual cases are coincidental.

Practice Hypothetical #1



“Cameron, texted Riley the week before telling Riley that you wanted to have sex with them, didn’t you?”

Practice Hypothetical #2



“Cameron, isn’t it true you usually have sex with Riley while intoxicated?”

Practice Hypothetical #3



“Riley, did your attorney tell you not to answer that question?”

Practice Hypothetical #4



“Riley, did your counselor tell you that you have anger issues?”

Practice Hypothetical #5



“Cameron, you didn’t see who was allegedly sexually assaulting you during the alleged attack, did you?”

Practice Hypothetical #6



“Cameron, are you choosing not to answer my questions because you lied to investigators?”

Practice Hypothetical #7



“Riley, you’re not answering my questions because you don’t want criminal implications, right?”

Practice Hypothetical #8



“Cameron, isn’t it true you asked Riley to put on a condom before what you now claim is a sexual assault?”

Practice Hypothetical #9



“Riley, have you tested positive for sexually-transmitted diseases?”

Practice Hypothetical #10



“Riley, isn’t it true you texted Cameron the next day to see if Cameron was mad at you?”

Practice Hypothetical #11



“Cameron, if you were as drunk you just stated you were, you can’t even be sure whether you had sex with Riley or, say, Wyatt, can you?”

Practice Hypothetical #12



“Cameron, did a doctor diagnose you with anxiety?”

Practice Hypothetical #13



“Riley, isn’t it true you tried to kill yourself the next day because you knew you did something wrong?”

Practice Hypothetical #14



“Cameron, you’ve had sex with Riley after drinking before, though, haven’t you?”

Practice Hypothetical #15



“Cameron, you could be wrong about that timeline, right?”

Practice Hypothetical #16



“Riley, this isn’t the only Title IX complaint against you right now, is it?”

Practice Hypothetical #17



“Cameron, you had consensual sex with Riley the next night, didn’t you?”

Practice Hypothetical #18



“Riley, didn’t the police question you for three hours about your assault of Cameron?”

Practice Hypothetical #19



“Cameron, your witness, Wyatt, didn’t even show up today, right?”

Practice Hypothetical #20



“Riley, you’re even paying for a criminal defense attorney instead of a free advisor, right?”

The Hearing

The Setup



- Can have in one room if a party doesn't request separate rooms and recipient chooses to do so.
- Separate rooms with technology allowing live cross examination at the request of either party
- “At recipient’s discretion, can allow any or all participants to participate in the live hearing virtually” (30332, see also 30333, 30346) explaining 106.45(b)(6)(i)

Process 1 of 2



- Discretion to provide opportunity for opening or closing statements
- Discretion to provide direct questioning (open-ended, non-cross questions)
- Cross-examination must to be done by the party's "advisor of choice and never by a party personally."

Process 2 of 2



- An advisor of choice may be an attorney or a parent (or witness) (30319)
- Discretion to require advisors to be “potted plants” outside of their roles cross-examining parties and witnesses. (30312)

Advisors 1 of 3



If a party does not have an advisor present at the live hearing, the recipient **must provide** without fee or charge to that party, an advisor **of the recipient's choice**, who may be, but is not required to be, an attorney, to conduct cross-examination on behalf of that party.
(106.45(b)(6)(i) and preamble 30339)

Advisors 2 of 3



- Advisors do not require Title IX Training, however a recipient may train its own employees whom the recipient chooses to appoint as party advisors (30342)
- A party cannot “fire” an appointed advisor (30342)
- “But, if the party correctly asserts that the assigned advisor is refusing to ‘conduct cross-examination on the party’s behalf’ then the recipient is obligated to provide the party an advisor to perform that function, whether counseling the advisor to perform the role or stopping the hearing to assign a different advisor” (30342)

Advisors 3 of 3



- Regulations permit a recipient to adopt rules that (applied equally) do or do not give parties or advisors the right to discuss relevance determinations with the decision-maker during the hearing. (30343)
- “If a recipient believes that arguments about a relevance determination during a hearing would unnecessarily protract the hearing or become uncomfortable for parties, the recipient may adopt a rule that prevents parties and advisors from challenging the relevance determination (after receiving the decision-maker’s explanation) during the hearing.” (30343)

Advisors: But Other Support People?



- Not in the hearing, unless required by law (30339)
- “These confidentiality obligations may affect a recipient’s ability to offer parties a recipient-provided advisor to conduct cross-examination in addition to allowing the parties’ advisors of choice to appear at the hearing.”
- ADA accommodations-required by law
- CBA require advisor and attorney?

Recording the Hearing



- Now required to be audio, audio visual, or in transcript form
- Decision-makers have to know how to use any technology you have

The Hearing



- Order of questioning parties and witnesses – not in regulations
 - Consider time restraints on witnesses
 - Questioning of Complainant
 - Questioning of Respondent

Questioning by the Decision-Maker 1 of 2



- The neutrality of the decision-maker role is and the role of the advisor to ask adversarial questions, protects the decision-maker from having to be neutral while also taking on an adversarial role (30330)
- “[P]recisely because the recipient must provide a neutral, impartial decision-maker, the function of adversarial questioning must be undertaken by persons who owe no duty of impartiality to the parties” (30330)

Questioning by the Decision-Maker 2 of 2



- BUT “the decision-maker has the right and responsibility to ask questions and elicit information from parties and witnesses on the decision-makers own initiative to aid the decision-maker in obtaining relevant evidence both inculpatory and exculpatory, and the parties also have equal rights to present evidence in front of the decision-maker so the decision-maker has the benefit of perceiving each party’s unique perspective about the evidence.” (30331)

The Hearing 1 of 3



- Ruling on relevancy between every question and answer by a witness or party
 - Assumption that all questions are relevant unless decision-maker otherwise states irrelevant? Risky.
 - Set expectation that party or witness cannot answer question before decision-maker decides if relevant.
 - Pros: helps diffuse any overly aggressive or abusive questions/resets tone
 - Cons: may lengthen hearing

The Hearing 2 of 3



- “[N]othing in the final regulations precludes a recipient from adopting a rule that the decision-maker will, for example, send to the parties after the hearing any revisions to the decision-maker’s explanation that was provided during the hearing.” (30343)

The Hearing 3 of 3



- Confidentiality appears to preclude support persons other than the advisor from participating in the live-cross examination hearing
 - Perhaps allow support person to meet in waiting rooms or before and after hearing
 - Consistent with providing supportive services to both parties – hearings can be very stressful for both parties

Hearing Toolbox

Hearing Toolbox: Prehearing Conference



- Pre-hearing conference – helps inform parties and set expectations – have one separate with each party and the party’s advisor
- Provides opportunity to address issues common to both parties:
 - Parties and their representatives will often not understand the process: help educate and answer questions (again, know your institution’s grievance process)
 - Jurisdictional challenges: perhaps less of an issue with new jurisdictional terms—many issues were related to off-campus extension of jurisdiction (may tell advisor that you will provide the opportunity for advisor to state on the record at the hearing)

Hearing Toolbox: the Pre-Hearing Conference



- Parties may want to add evidence and witnesses that were not in the investigation for the first time at the hearing (perhaps outside of the process).

Hearing Toolbox: Use of a Script



- Responsible for running an orderly and fair hearing.
- A script can serve as a checklist of everything the decision-maker wants to cover and a cheat sheet for reminders of allegations, alleged policy violations, and elements of the alleged policy violations
- Helps ensure rights, responsibilities, and expectations are set
- Helps provide consistency between one hearing and the another
- Helps provide transparency
- Can even have a separate one for prehearings

Hearing Toolbox: Decorum



- Evaluating each question for relevancy before a party or witness can answer can help set the tone
- Remind parties about expectations of decorum

Hearing Toolbox: Breaks



- Preamble discusses the use of breaks to allow parties to recover from panic attacks or emotional questioning
- Also helpful to reset tone and reduce emotion and tension
- Can use to review policy and procedures to address relevancy issues that arise

Hearing Toolbox: Questions



- Do you have the information you need on each element to be able to evaluate the claims?
- Consider neutral phrasing of questions:
 - “In the report you said... Help me understand...”
 - “You stated... Tell me more about that.”
 - “Could you give more information about what happened before/after...”

Hearing Toolbox: Considerations for Panels



Hearing panel:

- Identify one person on the panel to make relevancy rulings
- Identify one person to draft the decision (for review of other panel members)
- Determine how panel members will ask questions (e.g., will only one person ask the questions or will panelists take turns?)

**Objectively Evaluating
Evidence and
Resolving Credibility
Disputes**

Objectively Evaluating Relevant Evidence



- As addressed in the preamble and discussed earlier, the decision-maker should evaluate:
- “consistency, accuracy, memory, and credibility” (30315)
- “implausibility, inconsistency, unreliability, ulterior motives, and lack of credibility” (030330)
- Standard of proof and using it to guide decision

Standard of Proof



- Standard of Evidence: Preponderance of the Evidence or Clear & Convincing
- Must use same standard for formal Title IX complaints against both students and employees (including faculty) for all policies and procedures with adjudication for sexual harassment complaints (e.g., union grievance procedures, faculty conduct)
- Must begin with a presumption of no violation by Respondent.

Making credibility decisions



The preamble discussion includes the following additional information on credibility:

- “Studies demonstrate that inconsistency is correlated with deception” (30321)
- Credibility decisions consider “plausibility and consistency” (30322)

Resolving Disputes 1 of 4



OCR 2001 Guidance recommends considering the following when resolving the conflict:

- Statements by any witnesses to the alleged incident (Regs: only when subjected to cross-examination)
- Evidence about the relative credibility of the complainant/respondent
 - The level of detail and consistency of each person's account should be compared in an attempt to determine who is telling the truth
 - Is corroborative evidence lacking where it should logically exist?

Resolving Disputes 2 of 4



OCR 2001 Guidance recommends considering the following when resolving the conflict and consistent with Regulations:

- Evidence of the complainant's reaction or behavior after the alleged harassment
 - Were there witnesses who saw that the complainant was upset?
 - Changes in behaviors? Work-related? School? Concerns from friends and family? Avoiding certain places?
 - May not manifest until later

Resolving Disputes 3 of 4



OCR 2001 Guidance recommends considering the following when resolving the conflict and consistent with Regulations:

- Evidence about whether the complainant filed the complaint or took other action to protest the conduct soon after the alleged incident occurred
 - But: failure to immediately complain may merely reflect a fear of retaliation, a fear that the complainant may not be believed, etc. rather than that the alleged harassment did not occur

Resolving Disputes 4 of 4



OCR 2001 Guidance recommends considering the following when resolving the conflict:

- Other contemporaneous evidence:
 - Did the complainant write about the conduct and reaction to it soon after it occurred (e.g. in a diary, email, blog, social media post)?
 - Did the student tell others (friends, parents) about the conduct and their reaction soon after it occurred?
- **Again, only if subjected to cross-examination**

#1 Keep An Open Mind



- Keep an open mind until all statements have been tested at the live hearing
- Don't come to any judgment, opinion, conclusion or belief about any aspect of this matter until you've reviewed or heard all of the evidence AND consider only the evidence that can remain (statements in the record might have to be removed from consideration if not tested in live-hearing)

#2 Sound, Reasoned Decision



- You must render a sound, reasoned decision on every charge
- You must determine the facts in this case based on the information presented
- You must determine what evidence to believe, the importance of the evidence, and the conclusions to draw from that evidence

#3 Consider All/Only Evidence



- You must make a decision based solely on the relevant evidence obtained in this matter and only statements in the record that have been tested in cross-examination
- You may consider nothing but this evidence

#4 Be Reasonable and Impartial

- You must be impartial when considering evidence and weighing the credibility of parties and witnesses
- You should not be swayed by prejudice, sympathy, or a personal view that you may have of the claim or any party
- Identify any actual or perceived conflict of interest

#5 Weight of Evidence 1 of 2



- The quality of evidence is not determined by the volume of evidence or the number of witnesses or exhibits.
- It is the weight of the evidence, or its strength in tending to prove the issue at stake that is important.
- You must evaluate the evidence as a whole based on your own judgment.

#5 Weight of Evidence 2 of 2



- Decision-makers who are trained to perform that role means that the same well-trained decision-maker will determine the weight or credibility to be given to each piece of evidence, and how to assign weight (30331)

Weight of Evidence Example



The preamble provides in the discussion:

“[W]here a cross-examination question or piece of evidence is relevant, but concerns a party’s character or prior bad acts, under the final regulations **the decision-maker cannot exclude or refuse to consider the relevant evidence, but may proceed to objectively evaluate that relevant evidence by analyzing whether that evidence warrants a high or low level weight or credibility**, so long as the decision-maker’s evaluation treats both parties equally **by not, for instance, automatically assigning higher weight to exculpatory character evidence than to inculpatory character evidence.**”

(30337)

#6 Evaluate Witness Credibility 1 of 3



- You must give the testimony and information of each party or witness the degree of importance you reasonably believe it is entitled to receive.
- Identify all conflicts and attempt to resolve those conflicts and determine where the truth (standard or review/proof) lies.

#6 Evaluate Witness Credibility 2 of 3



- Consider the reasonableness or unreasonableness, or probability or improbability, of the testimony.
- Does the witness have any motive?
- Is there any bias?

#6 Evaluate Witness Credibility 3 of 3



- Credibility is determined fact by fact, not witness by witness
 - The most earnest and honest witness may share information that turns out not to be true

#7 Draw Reasonable Inferences



- Inferences are sometimes called “circumstantial evidence.”
- It is the evidence that you infer from direct evidence that you reviewed during the course of reviewing the evidence.
- Inferences only as warranted and reasonable and not due to decision to opt out of cross-examination or questioning.

#8 Standard of Evidence 1 of 2



Use the your standard of evidence as defined by your policy when evaluating whether someone is responsible for each policy violation and ALWAYS start with presumption of no violation.

- Preponderance of the evidence: a fact is more likely than not to be true (30373 fn. 1409)
- Clear and convincing: a fact is highly probable to be true (30373 fn. 1409)

#8 Standard of Evidence 2 of 2



- Look to all the evidence in total, and make judgments about the weight and credibility, and then determine whether or not the burden has been met.
- Any time you make a decision, use your standard of evidence

#9 Don't Consider Impact



- Don't consider the potential impact of your decision on either party when determining if the charges have been proven.
- Focus only on the charge or charges brought in the case and whether the evidence presented to you is sufficient to persuade you that the respondent is responsible for the charges.
- **Do not consider the impact of your decision.**

The Written Decision

Resolving Disputes



- FACT FINDING PROCESS

- ONE

- List undisputed facts – what do parties agree on? = **findings of fact**
- List disputed facts – what do parties disagree on?

- TWO

- What undisputed facts address each element?
- What disputed facts must be resolved for each element?

- THREE

- Weigh the evidence for each **relevant** disputed fact
- Resolve disputed facts = **findings of fact**

Written Determination in 106.45(b)(7)(ii) 1 of 9



Written determination must include:

- Identification of the allegations potentially constituting sexual harassment;
- A description of the procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence; and hearings held;

Written Determination in 106.45(b)(7)(ii) 2 of 9



Include key elements of any potential policy violation so parties have a complete understanding of the process and information considered by the recipient to reach its decision (30391) – should “match up” with decision (30391)

Written Determination in 106.45(b)(7)(ii) 3 of 9



Purpose of key elements of procedural steps
“so the parties have a thorough
understanding of the investigative process
and information considered by the recipient
in reaching conclusions.” (30389)

Written Determination in 106.45(b)(7)(ii)

4 of 9



- A statement of, and rationale for, the results as to each allegation, including determination regarding responsibility, any disciplinary sanctions the recipient imposes on the respondent, and whether remedies designed to restore or preserve equal access to the recipient's education program or activity will be provided by the recipient to the complainant; and

Written Determination in 106.45(b)(7)(ii)

5 of 9



- Statement of rationale: requiring recipients to describe, in writing, conclusions (and reasons for those conclusions) will help prevent confusion about how and why a recipient reaches determinations regarding responsibility (30389)
- The requirement of “Transparent descriptions of the steps taken in an investigation and explanations of the reasons why objective evaluation of the evidence supports findings of facts and conclusions of facts” helps prevent injection of bias (30389)

Written Determination in 106.45(b)(7)(ii)

6 of 9



- Institution's procedures and permissible bases for complainant and respondent to appeal
- Provided to both parties in writing contemporaneously (106.45(b)(7)(ii))

Written Determination in 106.45(b)(7)(ii)

7 of 9



- Receiving decision simultaneously will ensure both parties have relevant information about the resolution of the allegations

Written Determination in 106.45(b)(7)(ii)

8 of 9



Reference to code of conduct not prohibited:

“Recipients retain discretion to also refer to in the written determination to any provision of the recipient’s own code of conduct that prohibits conduct meeting the [Title IX definition] of sexual harassment; however” the final regulations apply to recipient’s response to Title IX portion only.
(30389)

Written Determination in 106.45(b)(7)(ii)

9 of 9



The preamble discussion notes that it does not “expressly require the written determination to address evaluation of contradictory facts, exculpatory evidence, all evidence presented at a hearing, or how credibility assessments were reached, because the decision-maker is obligated to objectively evaluate all relevant evidence, including inculpatory and exculpatory evidence (and to avoid credibility inferences based on a person’s status as a complainant, respondent, or witness.”

Note: Consider including these anyway for a more thorough determination.

Goals



- Be consistent in terminology
- Be clear as to the source of information.
Compare:
 - “Bob stated that this happened.”
 - “This happened.”

Unambiguous



- Could someone unfamiliar with the incident pick up the decision and understand what happened?
- Make no assumptions that the reader will understand certain aspects of the community
- Write for a judge and jury to understand with no prior background

Relevancy.



- Include any decisions made that exclude information as not relevant and the explanation given in hearing
- Check to ensure that your report does not contain any information you are prohibited from including?

Sensitive



- Will the parties feel heard?
- Will the parties feel blamed?
- Will the parties feel vilified?
- Will the tone otherwise inflame the parties unnecessarily?
- Maintain neutral, evidence-driven tone.

Empathetic



- Maintain a non-judgmental tone
- Stay away from charged words of advocacy:
 - Clearly/obviously
 - Innocent/guilty
 - Victim/perpetrator
- Watch your adjectives and adverbs – unless they are in a quote
- Recognize the impact of your words

Specific



- Set the scene visually (will help identify inconsistencies in stories)
- Use quotation marks carefully
- Include details to the level that you can thoroughly understand what it looked like
- Be careful of pronoun usage so that we always know who is saying or doing what

Questions?

**INFORMAL
RESOLUTION
OFFICER**

Avoiding Prejudgment of Facts at Issue

A good way to ensure impartiality and avoid bias:

- Keep an open mind and actively listen
- Each case is unique and different

Hypotheticals 1 of 2

Thinking about how to move forward with some issues of impartiality, conflict of interest and bias (perceived or actual).

Hypotheticals 2 of 2

Scenario for the next several hypotheticals:

You work in your institution's student conduct office. Your duties include investigating and overseeing student conduct matters, which includes mediation of student conduct issues that involve two or more students. Your institution's Title IX Coordinator has identified you as a person who will receive training to facilitate Title IX informal resolution.

Hypothetical 1

You receive an informal resolution request from the Title IX Office. In reviewing the request, you recognize the name of Complainant as a student from an unrelated student conduct matter you handled. The matter involved a fight between the Complainant and roommate two years ago. You do not remember how it resolved or recall much more about the Complainant.

What should you do?

Hypothetical 2

Your institution's student conduct office, Title IX office, and Greek life office meet weekly to discuss student issues and potential issues. In these meetings, you discuss specific students by name for continuity of care for students and to ensure everyone is on the same page. Now, one of the students discussed is going to be a participant in your informal resolution.

What should you do?

Hypothetical 3

Back to a scenario raised earlier, you are now in student conduct, but you used to work as an RA, or resident advisor, in one of the residence halls. You are handed an informal resolution to facilitate and you realize that the Respondent used to live in your residence hall when the Respondent was a first year. You really like the Respondent and consider Respondent a great person.

Conflict of interest/bias?

Informal Resolution: The Theory and Practice

Informal Resolution: reasons parties may prefer it to formal resolution

- Parties to disputes may be more satisfied with outcomes they reach themselves
- They can control the outcome
- They have efficacy to tailor solutions to their needs

Informal Resolution and Autonomy

The option of informal resolution supports autonomy of the complainant **on how to proceed** they file a formal complaint.

(30086, 30089)

Less Adversarial Resolution

“Informal resolution may present a way to resolve sexual harassment allegations **in a less adversarial manner** than the investigation and adjudication procedures that comprise the 106.45 grievance process.”

(30098 FN 463)

It Bears Repeating

**What you do for one,
you do for the other.**



When: Threshold

Only available to the parties
if a **formal complaint** is filed.

When: Termination

Available at *any time* prior to
reaching a determination.

Caution in Approach 1 of 5



Caution in Approach 2 of 5

A recipient may NOT require informal resolution

- As a condition of enrollment or continuing enrollment
- As a condition of employment or continuing employment

Caution in Approach 3 of 5

- A recipient may **NOT** require informal resolution
- As a condition of enjoyment of *any other right*
 - The waiver of the right to an investigation and adjudication of formal complaints of sexual harassment

Caution in Approach 4 of 5

A recipient may NOT require informal resolution

- This is a voluntary process for both (or all) parties!

Caution in Approach 5 of 5

Be careful NOT to:

Pressure either or any party to participate

What can the Recipient Offer?

An “informal resolution process, such as mediation, that does not involve a full investigation and adjudication”

What does this mean?

The regulations don't provide more detail on what this means. BUT... the preamble:

- Mediation
- Restorative justice (30098 FN. 463)

Mediation 1 of 6

The regulations don't provide more detail on what this means.

- “Mediation” may have legal meaning in your jurisdiction that invokes certain requirements.

Mediation 2 of 6

- For example, in Ohio (where we live), the Ohio Supreme Court and state law have provisions governing mediation and a Uniform Mediation Act.
- Jurisdiction may require specific training to be a “mediator.”

Mediation 3 of 6

There are many definitions of mediation out there, but the Regulations anticipate a **third-party** (the informal resolution officer) **facilitated resolution** of a dispute between parties.

Mediation 4 of 6

Written agreement?

- Silent about whether required.
- Other provisions require documentation of the grievance process from formal resolution to resolution

Mediation 5 of 6

What is a resolution of the dispute?

- Do parties need to reach an agreement about what occurred between them?
- Is it sufficient to find a way to move forward so both parties can have equal access to educational opportunities?

Mediation 6 of 6

- Some jurisdictions consider “mediation” communications as privileged and confidential from disclosure in court or under public records disclosure (if public).
- Some jurisdictions may not have any decisive law on mediation.

State Laws*

- Uniform Mediation Act (Ohio – R.C. 2710.01-2710.10)
 - Defines “Mediation” □ “any process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute.”
 - Defines “Mediator” □ an “individual who conducts a mediation.”
 - QUALIFICATIONS? (No conflicts of interest; disclosure of same; disclose qualifications upon request)

State Laws

- What statutory protections are there for mediation?
- Mediation Communications are protected as Privileged (with Exceptions: child abuse, felony reporting, etc.)
- Parties can be accompanied by an attorney (even if waived by the parties in an agreement)
- Consider Advisor of Choice VAWA requirements...
- **NOTE: THE PARTIES CAN AGREE IN WRITING TO WAIVE SOME OF THESE PROTECTIONS**

Restorative Justice

- The Regulations also do not define “restorative justice.”
- Usually aims to repair harm done to crime victims through facilitation, but will vary from program to program.

Restorative Justice Example 1 of 2

One example of “restorative justice” is a system of school-based, non-punitive interventions, in which students are brought together with staff to discuss differences and conflicts, often in a group setting.

Restorative Justice Example 2 of 2

But other restorative justice programs require as one of their key elements that “offenders” admit responsibility and make amends.

(Is this consistent with the Regs?)

Restorative Justice.

Remember:

- 1) What we do for one we do for the other.
- 2) Recipient cannot make *a finding of responsibility* without a live cross-examination hearing.

Can we use our pre-existing mediation or restorative justice program? 1 of 3

What we do for one we do for the other.

- Does your current program require one or both parties to admit responsibility?
- What does that look like?
- Is that going to be consistent with the new Regulations?

Can we use our pre-existing mediation or restorative justice program? 2 of 3

Discipline-like sanctions?

- Does your program provide only supportive measures as ways for the parties to work together?
- Does your program provide any measures that may be disciplinary or prevent one party from accessing educational opportunities?
- Preamble states that “mediation” can result in expulsion because the parties can agree to that outcome.

Can we use out pre-existing mediation or restorative justice program? 3 of 3

Access to educational opportunities.

- Does your program maintain (equal) access for both parties to educational opportunities?

What should our program look like if we have never had an informal process?

- We will discuss best practices for a generic process that complies with the Regulations.
- These best practices may also be used to test pre-existing mediation and restorative justice programs for compliance.

Informal Resolution: Best Practices

Informal Resolution Officer Goals

Help parties find ways to **move forward** at your institution (for as long as their time together is before they graduate) with **equal access to educational opportunities**

Resolution Framework

(1) Separate the People and the Issues.

- Understand the other's experiences
- Identify misconceptions
- Allow for the communication of emotions

(2) Focus on interests.

- "Your position is something you have decided upon. Your interests are what caused you to so decide." [Fisher & Ury, *Getting to Yes*, 3d. p. 42]
- Parties need to share interests with one another

(3) Generate Options to address interests.

- ✓ best alternative to a negotiated agreement?
- ✓ Brainstorm as many options as possible...

(4) What are the Objective Measures of outcomes?

Informal Resolution: Toolbox/Checklist

Script of overview of process

A script is helpful to ensure:

1. You approach each facilitation consistently
2. Overview of your process
3. Don't forget anything you needed to say

Make sure each party feels heard

Whether you include this in your script, this is not only a step of the process, but a tool to empower the parties to:

1. Identify what is important to them
2. Identify what they may be able to be flexible on
3. Feel like they are engaging in and trusting the process

Identify what each party wants

Regardless of the type of resolution process, ensure that you identify with each party:

1. What they want
2. What they can live with

Have a list of your institution's supportive measures available

Be ready to easily provide each party with a list of supportive measures and other ideas that may help them think about moving forward

Have a form or template for resolution agreements

- If the parties agree, you will want to be able to quickly pull together an agreement.
- Having a form or template easily accessible that you can add the provisions to is more likely to allow you to have the parties sign that day—you don't want your delay to make the agreement fall apart

The Agreement

Why commit the agreement in writing?

1 of 2

- While some jurisdictions will not allow any discussions or documents from mediation to be relied upon outside of mediation, many do allow a carve out for final agreements to be the only memorialization of the mediation.

Why commit the agreement in writing?

2 of 2

- It is important to have the terms of any agreement in writing, in case there are later disagreements.
- Documentation of the agreement is important if DOE reviews the informal resolutions.
- What about confidentiality? (next slide)

What about confidentiality? 1 of 2

- The terms of the agreement should be on a need-to-know basis.
- The agreement itself should include penalties for a party or recipient from publishing or sharing the agreement.
- Agreements relating to students are student records protected by FERPA; kept in student file

What about confidentiality? 2 of 2

- For employees, these may have different considerations and may be public record, depending on your jurisdiction.
- May be contained in a separate file personnel file.

The problem with “gag” orders or non - disparagement agreements. 1 of 2

- Could be contrary to the First Amendment if a public institution
- Could be contrary to academic freedom if faculty member
- Could be contrary to public records laws in your jurisdiction

The problem with “gag” orders or non - disparagement agreements. 2 of 2

- What happens if a party breaks the order?
- What if it's years later?
- What if it's a conversation with a family member vs. journalist?
- What if it seems like the institution is trying to bury information?
- How will you enforce it?

What any agreement (or form or template) should include 1 of 5

- Names of any parties, representatives, and informal resolution officer
- The specific terms of the agreement, with as much specificity as possible for each term.

What any agreement (or form or template) should include 2 of 5

- General description of the process that led the parties to the resolution.
- Specifically that the process was *instead* of a formal process, that it was agreed to by both parties voluntarily and in writing.

What any agreement (or form or template) should include 3 of 5

- Acknowledgement of all the terms in the agreement by the parties and the consequences of signing.

What any agreement (or form or template) should include 4 of 5

- How to resolve any future disputes arising out of the underlying facts of the agreement or the agreement itself.
- Who to contact with questions or concerns about the agreement.

What any agreement (or form or template) should include 5 of 5

- Future periods of checking on how the agreement is going?
- Pros: helps the institution monitor the situation
- Cons: may be poking a sleeping bear

Questions?

Thank you for attending!

Remember – additional information available at:

Title IX Resource Center at www.bricker.com/titleix

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