

Level 3
Title IX Decision-Maker
Training



Bricker & Eckler
ATTORNEYS AT LAW

Presenters - Jessica



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Disclaimers



We can't help ourselves. We're lawyers.

- We are not giving you legal advice. Consult with your legal counsel regarding how best to address a specific situation.
- This training does not cover all of the basic subjects required for TIX Coordinators, institution-specific grievance procedures, policies, or technology.
- Use the chat function to ask general questions and hypotheticals.
- This training is not being recorded, however we will provide you with a packet of the training materials to post on your websites for Title IX compliance.

Presentation Rules



Questions are encouraged

- “For the sake of argument...” questions help to challenge the group, consider other perspectives, and move the conversation forward
- Be aware of your own responses and experiences
- Follow-up with someone if you have any questions or concerns
- Take breaks as needed

Posting these Training Materials?

YES – Post away!

- The “recipient” is required by §106.45(b)(10)(i)(D) to post materials used to train Title IX personnel on its website
- We know this and will make this packet available to you electronically to post.



Training Requirements for All Title IX Team Members



Remember, this is an advanced training...

- Definition of sexual harassment
 - Scope of the institution's program or activity
 - How to conduct an investigation and grievance process, including hearings, appeals, and informal resolution processes, as applicable, under YOUR policy
- How to serve impartially
 - Avoiding prejudgment of the facts
 - Conflicts of interest
 - Bias (use reasonable person/ "common sense" approach)
 - Not relying on sex stereotypes

Additional Training Requirements for Decision-Makers



- Technology to be used at a live hearing
- Issues of relevance of questions and evidence
 - Including rape shield provisions in §106.45(b)(6)

Aspirational Agenda



- 1:00-2:00 Review of Relevance for Decision-Makers
- 2:00-2:45 Tools for Decision Makers
- 2:45-3:00 Review of Scenario/Investigation Report
- 3:00-3:30 Break & Prepare for Practice Session (Draft DM questions, Anticipate Questions from Advisors)
- 3:30-4:15 Practice session
- 4:15-4:30 Debrief of Practice Session
- 4:30-5:00 Title IX Updates

What is Relevant?



Review of Relevance

(1 of 9)



- Regulations do not define “relevant,” but tells us what is not relevant
- Per *Regulations* 34 C.F.R. 106. 45(b)(6)(i):
 - “Only relevant cross-examination and other questions may be asked of a party or witness.”
 - “**Before a complainant, respondent, or witness answers** a cross-examination or other question, **the decision-maker must first determine whether the question is relevant** and explain any decision to exclude a question as not relevant.”

Review of Relevance

(2 of 9)



Under the **preponderance of the evidence/clear and convincing** standard:

- Does this help me in deciding if there was more likely than not a violation/highly probable to be a violation?
- Does it make it more or less likely/does it make it highly probable?
- Why or why not?

If it doesn't move this dial: likely not relevant.

Review of Relevance

(3 of 9)



- 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).” (Preamble, p. 30331)
- A recipient may not adopt rules excluding certain types of relevant evidence (Preamble, p. 30294)
- May not adopt Rules of Evidence.

Review of Relevance

(4 of 9)



What is NOT relevant:

Questions and evidence about the **complainant's sexual predisposition or prior sexual behavior** are not relevant, **UNLESS**

- 1) Such questions and evidence about the complainant's prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or
- 2) If the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent.

[34 C.F.R. 106.45(b)(6)(i)]

What is NOT relevant:

Information **protected by a legal privilege**

[34 C.F.R. 106.45(b)(1)(x)]

This will vary state-by-state, so check with your legal counsel.

Most common in this context are:

- a) Attorney-client privilege
- b) Doctor-patient/counselor-patient
- c) Fifth Amendment/right not to incriminate self (not really applicable in this venue, but sometimes raised and cannot force to answer questions)

What is NOT relevant:

A party's **treatment records** (absent voluntary written waiver by the party)

[34 C.F.R. 106.45(b)(5)(i)]

- As a decision-maker – LOOK for that written waiver in the materials provided to you

Review of Relevance

(7 of 9)



What is NOT relevant:

No improper inference from a party or witness **declining to participate** in cross-examination.

[34 C.F.R. 106.45(b)(6)(i)]

Review of Relevance

(8 of 9)



- Consideration of past statements of a party or witness that does not answer questions on cross-examination.
 - Preamble
 - Open Source and September 4, 2020 Q&A
 - *VRLC* and August 24, 2021 OCR guidance letter

Discuss with your legal counsel and Title IX Coordinator.

Review of Relevance

(9 of 9)



If you maintain the prohibition AND the statement IS the sexual harassment...

When it constitutes the sexual harassment, it is not the Respondent's "statement" as used in 34 C.F.R. 106.45(b)(6)(i), because the verbal conduct constitutes part or all of the allegations of sexual harassment itself.

<https://www2.ed.gov/about/offices/list/ocr/blog/index.html> (May 22, 2020 blog post)

Submission to Cross-Examination

- Aug. 2020 regs prohibited consideration of statements from parties/witnesses if not subjected to cross-examination (34 CFR 106.45(b)(6)(i))
- Sept. 4, 2020 Q&A clarified that failure to answer one question was a failure to submit to cross-examination

“Arbitrary & Capricious”

- Mass. Federal decision vacated regulation requiring submission to cross-examination for consideration of statements (*VRLC v. Cardona*, June 28, 2021)
- August 24, 2021 letter providing guidance that, pursuant to *VRLC* decision, OCR will “immediately cease enforcement” of this specific provision in 34 CFR 106.45(b)(b)(i)

*****Work with legal counsel to assess risk*****

- Pending cases
- Breach of contract concerns
- On appeal
 - Texas has been permitted to appeal this decision, along with several individuals who have an interest in the outcome

Decorum During Hearings



- Relevant questions must not be abusive
- Enforcement of decorum must be applied evenhandedly
- “...where 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.” (Preamble, 30331)
- The decision maker may remove any advisor, party, or witness who does not comply with expectations of decorum. (Preamble 30320)

LET'S
DO THIS

**Practice Making
Relevance
Determination**



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Relevance 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?”

Relevance 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 is so, what types of additional information would you need to make a relevance determination?

Relevance 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



Question from Respondent's Advisor to Complainant:

Since you can't remember your conversations with Michael that night, it is possible that you asked him to make love to you, right?

Practice Hypothetical #2



Question from Complainant's Advisor to Respondent:

Since you acknowledged that you “pushed too hard before,” it makes sense that you pushed too hard on April 3rd, doesn't it?*

*Referring to March 4, 2021 text message

Practice Hypothetical #3



Question from Respondent's Advisor to Complainant:

You never went to the hospital for a SANE exam, did you?

Practice Hypothetical #4



Question from Complainant's Advisor to Respondent:

Prior girlfriends have told you that you pushed too hard sexually, haven't they?

Practice Hypothetical #5



Question from Respondent's Advisor to Complainant:

Tessa, I understand that now you want to wait until you are married to have sex, but you're aren't a virgin, are you?

Practice Hypothetical #6



Question from Complainant's Advisor to Respondent:

Michael, you're not a virgin, are you?

Practice Hypothetical #7



Question from Complainant's Advisor to Complainant:*

Tessa, you brought your counseling records today, correct?

*Questioning of a party by their own advisor is not required by the regulations, and may not be part of your process.

Practice Hypothetical #8



Question from Respondent's Advisor to Complainant:

Tessa, did you tell your advisor (who is not an attorney) during break that you thought today was not going well for you?

Practice Hypothetical #9



Question from Complainant's Advisor to Respondent:

Michael, did you tell your attorney during break that you thought today was not going well for you?

Tools for Title IX Decision-Makers



Decision-Making Tools

- Pre-hearing conference
- Use of scripts
- Use of breaks
- Call to TIX Coordinator or designee
- Remember that relevance determinations are not the same as weight of evidence (the two-roles of the decision maker)
 1. Run the hearing and make relevance determinations
 2. Write the decision and weigh the evidence in the record

Hearing Script Checklist (1 of 5)



- Introduction
 - Identify parties and advisors
 - Identify specific allegations and policy violations
 - Identify standard of proof and presumption of no violation
 - Identify order of questioning of parties and witnesses
 - Identify rights and responsibilities for each party and have them agree to understanding and agreeing to the rights and responsibilities
 - Consequences for failing to answer a question (weight versus exclusion)
 - Expectation of truthful statements and reminder of any student/faculty/staff conduct violations for false statements

Hearing Script Checklist (2 of 5)



Introduction (continued)

- Use of breaks
 - Explain that you will provide breaks as needed and that a party, witness or advisor may request a break at any time
 - You may call a break at any time
 - You have a duty and responsibility to question parties and witnesses to ensure the questions you need answered are addressed

Hearing Script Checklist (3 of 5)



Introduction (continued)

- Decorum
 - Explain that you have a duty to run a truth-seeking hearing and you expect the parties, advisors, and witnesses to respect those rules.
 - Identify that decorum includes: not yelling, screaming, harassing, or intimidating a party or witness
 - Explain that you retain the discretion to remove a person who does not comport with your expectations of decorum

Hearing Script Checklist (4 of 5)



Introduction (continued)

- Expectation for Advisors
 - Explain that, in addition to the expectations of decorum, advisors are expected to:
 - ask only relevant question
 - Speak only when the decision maker has provided an opportunity for them to ask questions or asked the advisor a question
 - No other comments or arguments from advisors are tolerated and will be considered an issue of decorum

Hearing Script Checklist (5 of 5)



Throughout the hearing

- Before the questioning of each party, consider restating rights and responsibilities of a party answering questions
- Before the questioning of each witness, read the rights and responsibilities for each witness and confirm on the records that they understand and will comply with the rights and responsibilities



Review of Tasker/Murphy Investigation Report

Things to Note

- Reported that Respondent engaged in Title IX Sexual Assault on April 3, 2021
- Incapacitation
 - What information does the decision-maker need?
 - What questions are the advisors likely to ask?

Opportunities to Practice

Questioning of Tessa

- DM questioning of Tessa
- Relevance determinations for cross-exam of Tessa by Michael's advisor

Questioning of Michael

- DM questioning of Michael
- Relevance determination fro cross-exam of Michael by Tessa's advisor



practice...
practice...
practice...

**Break & Preparation for
Practice Session**



Decision-Maker Hearing Practice and Debrief



**What's
new?**

Recent Title IX Updates

Summer 2021 Title IX Updates



Two Major Updates:

- **Q&A:** July 20, 2021 Q & A on the Title IX Regulations on Sexual Harassment
 - <https://www2.ed.gov/about/offices/list/ocr/docs/202107-qa-titleix.pdf>
- ***VRLC v. Cardona*** and August 24, 2021 Letter to Students, Educators, and other Stakeholders re: VLRC v. Cardona (see prior slides on this subject)
 - Decisions issued on July 28, 2021 and Aug. 10, 2021
 - www2.ed.gov/about/offices/list/ocr/docs/202108-titleix-VRLC.pdf

Q&A #13 – Appropriate Standard



Question 13:

What is the appropriate standard for evaluating alleged sexual harassment that occurred before the 2020 amendments took effect?

Q.13 Background



- August 5, 2020 Blog Post – “The Rule does not apply to schools’ responses to sexual harassment that allegedly occurred prior to August 14, 2020. The Department will only enforce the Rule as to sexual harassment that allegedly occurred on or after August 14, 2020. With respect to sexual harassment that allegedly occurred prior to August 14, 2020, OCR will judge the school’s Title IX compliance against the Title IX statute and the Title IX regulations in place at the time that the alleged sexual harassment occurred.”

Doe v. Rensselaer Polytechnic



- 2020 WL 6118492 (Oct. 16, 2020)
- Not retroactive enforcement to require regs to be used for hearings occurring after August 14, 2020
- Blog post is not an “authoritative statement” entitled to deference
- Court not willing to let disciplinary proceedings continue unless parties agree to use new procedure

Back to Q.13 (9 mos. after *RPA*)



- “[A] school must follow the requirements of the Title IX statute and the regulations that were in place at the time of the alleged incident.”
- 2020 amendments do not apply to SH occurring before August 14, 2020, even where the complaint is filed after that date
- Our question: is this meant to include *procedures* as well as *substance*?

Q&A #24 – Formal Complaints



Question 24:

If a complainant has not filed a formal complaint and is not participating in or attempting to participate in the school's education program or activity, may the school's Title IX Coordinator file a formal complaint?

- YES – it may be a violation if the Title IX Coordinator *does not do so*
- Example in the Answer:
 - Actual knowledge of a pattern of alleged SH by a perpetrator in a position of authority

Q&A – “Put simply...”



Per the most recent guidance:

“Put simply, there are circumstances when a Title IX Coordinator may need to sign a formal complaint that obligates the school to initiate an investigation regardless of the complainant’s relationship with the school or interest in participating in the Title IX grievance process.”

Q&A – Support Persons? (1 of 2)



In previous trainings...

- Advised that support persons were not permitted in hearings based on Preamble
- “The sensitivity and high stakes of a Title IX sexual harassment grievance process weigh in favor of protecting the confidentiality of the identity and parties to the extent feasible (unless otherwise required by law), and the Department thus declines to authorize that parties may be accompanied to a live hearing by persons other than the parties’ advisors, or other persons for reasons ‘required by law’...” (Preamble, p. 30339)

Q&A – Support Persons? (2 of 2)



Example Language in July 20, 221 Q&A (p. 46)

- Example Policy 2: The decision-maker will discuss measures available to protect the well-being of parties and witnesses at the hearing. These may include, for example, use of lived names and pronouns during the hearing, including names appearing on a screen; **a party's right to have their support person available to them at all times during the hearing (in addition to their advisor)**; and a hearing participant's ability to request a break during the hearing, except when a question is pending. (Emphasis added).

VRLC Reminder



Submission to Cross-Examination

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Questions?

Additional information available at:

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

Free upcoming webinars at www.bricker.com/events

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