Effective Questioning Techniques for Title IX Hearings

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Our Objectives Today

- Understand hearing objectives for decision-makers versus advisors
- Review the relevancy standard in the regulations
- Discuss different types of questioning styles and when each is appropriate
- Abide by decorum standards while asking difficult questions
- Strategize regarding questioning goals, and evolve that strategy based on a witness’s response
Quick Disclaimer

- Advisors who are lawyers may approach hearings differently.
- This training is meant to assist institutional-appointed advisors who are not licensed attorneys, but may be helpful for attorneys also.

Audience Poll #1

What is your role?

A. Title IX Coordinator
B. Decision-Maker (Hearing Officer/Panel Member)
C. Investigator
D. Student Conduct
E. Advisor
F. Other
Audience Poll #2

What is your experience level with Title IX hearings since August 14, 2020?

A. Have seen many  
B. Have seen one or two  
C. Have never seen one

There are Two Types of Questioners

- Decision-Makers  
- Advisors for the Parties

The ultimate goal is the same: to get the best evidence out on the table for the Decision-Maker to consider.
Decision-Makers: Your Role

- Ask questions to ensure you have all the information you need to make a good decision.
- Make relevancy rulings after each question asked by an advisor.

Advisors: Your Role

- Ask relevant questions designed to highlight your party’s perspective on the situation.
- Complainant’s advisor: Help the decision-maker see that all of the elements of the alleged violation are present.
- Respondent’s advisor: Help the decision-maker see that at least some of the elements are not present.
Relevancy is the Touchstone

- There are no “rules of evidence” in a Title IX hearing.
- Relevancy is not defined in the regulations, but the regulations do list things that are not permissible evidence.
- Preamble to the 2020 regulations say that relevant evidence is “probative of any material fact concerning the allegations.” (page 30343)

What Isn’t Relevant (1 of 2)

- Privileged information without waiver of that privilege
- Medical/psychological records without written consent for inclusion in the case file
What Isn’t Relevant (2 of 2)

- Questions and evidence about the complainant’s sexual predisposition or prior sexual behavior, unless:
  - Offered to prove that someone other than the respondent committed the conduct alleged; or
  - 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

No Similar Respondent Protection

- What about a respondent’s sexual predisposition or prior sexual behavior?
  - Subject to the relevancy test like any other evidence.
  - Look for policy language on “prior conduct” or “pattern” behavior?
Relevancy Determinations

- Decision-Makers must orally state, after every advisor question, whether the question is relevant
  - If it isn’t, I recommend you discuss it with the advisor. Sometimes questions can be reformulated or narrowed to be relevant.

Basis for Choosing Questions

- What are the elements of a policy violation?
- What facts are disputed?
- What facts are undisputed?
- What inconsistencies do I need to explore as a decision-maker, or highlight as an advisor?
- What is the crux of the case?
A Note for our Lawyer Friends

- Everything in the investigation file or hearing packet is considered to be admitted at the hearing on direct.
- You don’t need to lay an extensive foundation – just enough so everyone can understand what you’re talking about.

Example Policy Language: Elements of Sexual Harassment

- Unwelcome Conduct Sexual Harassment must include all:
  - Unwelcome conduct
  - On the basis of sex
  - Severe
  - Pervasive
  - Objectively Offensive
  - Effectively denies a person equal access to the recipient’s education program/activity
Agreement on the Elements?

- Do both parties agree on any of the elements?
- Do the parties disagree on any of the elements?
  - Where the parties disagree, is one side’s version questionable?
  - Can one party’s version be corroborated by other evidence?
- If impact is an element, is there sufficient information in the record to demonstrate the required impact on the complainant?

Open-Ended Questions: Examples

- “Tell me more about…”
- “What happened next? And then what happened?”
- “If I were a camera in the room, what would I see?”
- “Can you describe for me…”
Open-Ended Questions: When to Use

- Use when the investigative report does not have enough detail for you to compare statements from different parties/witnesses
- Use when you want to get a sense of how the person describes an event

Closed-Ended Questions: Examples

- “Were you at the restaurant by 9:00?”
- “Did you kiss them back?”
- “Were you feeling the effects of alcohol at that point?”
Closed-Ended Questions: When to Use

- Confirm undisputed facts on the record
- Get a solid answer, especially on yes/no questions relating to the elements of a case
- Clarify where statements are ambiguous, vague, or wandering
- We’ll take about closed-ended questions to address certain topics shortly.

Challenging Questions: Examples

- “You said X, then said not X.” Consider a spectrum of potential follow up questions -
  - “Help me understand why…” (neutral – good for HO)
  - “Which is true?” (suggestion that one is false)
  - “Which is not true?” (accusation that one is false)
Challenging Questions: More Examples

- “Would it surprise you to learn...?”
- “Witness X said this. Do you agree?”
- “Witness X said this. Is Witness X lying?”
- “Can you help me understand how it could be the case that...”

Challenging Questions: When to Use

- Information is contradictory
- Someone may be lying or giving incomplete facts in a misleading manner
- A description is implausible on its face
Specific Details: Decision-Maker Preface

- To maintain neutrality, it may be helpful for the hearing officer to preface certain questions with an explanation as to why they are important:
  - Alcohol/drug use – for an incapacitation analysis or to determine effects on memory
  - Consent – because very specific information about movements and communications must be analyzed
  - Dress – because who took what off may be relevant to consent

Specific Details: Verbal Consent

- “What did you say to them and what did they say to you?”
- “Did they ask you if you wanted to…”
- “Did they ask you if it was OK to…”
- “Did they make any sounds during…? How would you describe those sounds?”
- “Did you discuss the sexual activity beforehand? Afterwards?”
Specific Details: Non-Verbal Consent

- “Who took off whose clothes?”
- “How was their body positioned? How was yours positioned? Where was their body’s weight?”
- “Where were they touching you at that point? Where were their hands? Where were their legs?”
- “Were they kissing you at this point? Were you kissing them?”

Specific Details: Alcohol Intake

- “How much did you have to drink?”
- “Which size solo cup were you using? How many fingers of alcohol were poured?”
- “Did you finish the cup/bottle?”
- “Did anyone else drink from the same container?”
Specific Details: Intoxication Level

- “Were you experiencing any effects of the alcohol at this point? What were they?”
- “Did you need help walking? Could you stand without leaning on something or someone?”
- “Could the person navigate the stairs? Did they know where they were going?”
- “Was the person coherent? Did they seem to understand what was going on?”

Specific Details: Drug Use

- “Did you use any illegal drugs that evening that may have affected your cognitive abilities to perceive what was happening?”
- “Did you use any legal drugs that may have affected your cognitive abilities to perceive what was happening?”
  - Anything make you sleepy?
  - Anything you aren’t permitted to mix with alcohol?
Hearing Decorum

- Each institution may have its own decorum rules. Check the policy/procedures.
- Typical rules:
  - Don’t be repetitive
  - Don’t be harassing or raise your voice
  - Don’t use personal insults or be hostile

Hearing Decorum: Don’t Be a Jerk

- When advisors are jerks, it adds stress to the situation for the parties (including your own party). There is always a better way to ask a question – even pointedly – without being a jerk.
- Decision-Makers have the authority to remove advisors from the hearing if they are not abiding by decorum rules or are being disruptive.
Coming Prepared

- As you write your questions, include page numbers so that the exhibits can be pulled up on the screen.
- There is no need to read exhibits into the record; questions should be more than “Can you please read from…”
- Advisors should make sure they attend pre-hearing conferences (if offered) so they have the best information on what to expect.

Opening and Closing Statements

- Not every institution permits these. Check the policy/procedures.
- Tips:
  - Opening statements might highlight the elements you want to focus on, the credibility concerns you believe exists, and the things you believe you can prove.
  - Closing statements are helpful when they point out discrepancies on key elements.
Next Title IX Webinar

- August 18th, 3:00 ET – Proposed Title IX Regulations

See [www.InnovativeEducators.org/pages/events](http://www.InnovativeEducators.org/pages/events) for upcoming training!

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