



# HIGHER EDUCATION LEVEL TWO: TITLE IX DECISION-MAKER TRAINING

**Advanced Title IX Decision-Maker Training**

**FEBRUARY 25, 2021**

**MARCH 18, 2021**



**Bricker & Eckler**  
ATTORNEYS AT LAW

# Presenters - Erin



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# Presenters - Jessica



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# Disclaimers

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## *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 is designed to assist attendees who have already completed their Title IX Regulations-required training for decision-makers with more hypotheticals and practice running a live hearing. \*This training does not cover annual Clery training or institution-specific grievance procedures, policies, or technology.
- Use the chat function to ask general questions and hypotheticals.
- This training is not being recorded, but we will provide you with a packet of the training materials to post on your websites for Title IX compliance.

# Presentation Rules

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## *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

# Aspirational Agenda

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1:00-1:30	Overview of Scenario/Investigation Report
1:30-2:30	Relevancy refresher
2:30-2:45	Presentation to model
2:45-3:00	Break and join small group
3:00-3:45	Practice in small groups
3:45-4:00	Break
4:00-4:15	Debrief what learned in small groups
4:15-5:00	Overview of Script Checklist and Refresher of Tools for Decision Maker

# 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.



# **Review of Investigation Report**



# Relevancy Refresher



# Relevancy Refresher

(1 of 10)



- 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.”**

# Relevancy Refresher

(2 of 10)



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.

# Relevancy Refresher

(3 of 10)



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

- Does this help me in deciding if a fact is highly probable to be true?
- Does it make it more or less probable?
- Why or why not?

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

# Relevancy Refresher

(4 of 10)



- 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.

# Relevancy Refresher

(5 of 10)



*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)]

# Relevancy Refresher

(6 of 10)



*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)

# Relevancy Refresher

(7 of 10)



*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)]



# Relevancy Refresher

(8 of 10)



*What is NOT relevant:*

No improper inference from a party or witness electing not to participate in cross-examination.

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

# Relevancy Refresher

(9 of 10)



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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

Discuss with your legal counsel and Title IX Coordinator.

# Relevancy Refresher

(10 of 10)



## When 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)

# Relevancy Refresher

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## Decorum

Relevant questions must not be abusive and enforcement of decorum must be applied evenhandedly. Where the substance of a question is relevant, but the manner of the question is “harassing, intimidating, or abusive (for example, the advisor yells, screams, or physically ‘leans in’ to the witness’s personal space).” (Preamble 30331)

The decision maker may remove any advisor, party, or witness who does not comply with expectations of decorum. (Preamble 30320)

**Relevancy  
Refresher: Practice  
Making Relevancy  
Determinations**

# Relevancy Determination Hypotheticals

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

# Relevancy Determination Hypotheticals Disclaimer

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*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

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*Question from Anders (Roger's advisor) to Cassie*

*Cassie, did Roger tell you he wanted you to touch his penis?*

# Practice Hypothetical #2

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*Question from Felicia (Cassie's advisor) to Roger*

*Roger, you didn't ask Cassie if she wanted to have sex, did you?*

# Practice Hypothetical #3

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*Question from Anders (Roger's advisor) to Cassie*

*Cassie, you'd agree that it seems difficult to have sex as you've described?*

# Practice Hypothetical #4

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*Question from Anders (Roger's advisor) to Rogers*

*Roger, could you have physically had sex with Cassie in the way she described it?*

# Practice Hypothetical #5

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*Question from Anders (Roger's advisor) to Cassie*

*Cassie, you've had sex with other men  
you met at parties, right?*

# Practice Hypothetical #6

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*Question from Felicia (Cassie's advisor) to Roger*

*Roger, you've had sex with other women you met at parties, right?*

# Practice Hypothetical #7

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*Question from Anders (Roger's advisor) to Cassie*

*Cassie, could you have had sex with someone else that night too?*

# Practice Hypothetical #8

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*Question from Anders (Roger's advisor) to Cassie*

*Cassie, you didn't provide your rape kit results because they were inconclusive, correct?*



# Practice Hypothetical #9

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*Question from Felicia (Cassie's advisor) to Roger*

*Roger, I got your counseling records right here from a friend, can you read aloud your statement here?*

# Practice Hypothetical #10

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*Question from Felicia (Cassie's advisor) to Cassie.*

*Cassie, you brought your counseling records today, correct?*

# Practice Hypothetical #11

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*Question from Anders (Roger's advisor) to Cassie*

*Cassie, did you tell Felicia during break that you thought today was not going well for you?*

# Practice Hypothetical #12

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*Question from Felicia (Cassie's advisor) to Roger*

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

# Practice Hypothetical #13

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*Question from Felicia (Cassie's advisor) to Roger*

*Roger, did you tell your counselor you raped Cassie?*

# Practice Hypothetical #14

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*Question from Felicia (Cassie's advisor) to Cassie*

*Cassie, are you willing to tell us what your doctor diagnoses you with?*

# **Decision-Maker Hearing Practice**

# **Debrief Practice in Large Group**



# **Hearing Scripts and Toolkit Refresher**

# Hearing Script Checklist (1 of 6)

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- Introduction
  - Identify parties and advisors
  - Identify specific allegations and policy violations
  - Identify specific elements of each policy violation
  - 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
    - Right not to answer a question, but know that their statements and answers to questions cannot be considered by decision-maker
    - Expectation of truthful statements and reminder of any student/faculty/staff conduct violations for false statements

# Hearing Script Checklist (2 of 6)

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## 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 6)

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## 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 6)

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## 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 6)

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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



# Refresher on Decision-Making Tools

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

**Questions?**



# Additional information available at:

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**Title IX Resource Center** at [www.bricker.com/titleix](http://www.bricker.com/titleix)

**Free upcoming webinars** at [www.bricker.com/events](http://www.bricker.com/events)

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