



MIAMI OF OHIO ADVISOR TRAINING

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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



Training Requirements

The new Title IX regulations require training for:

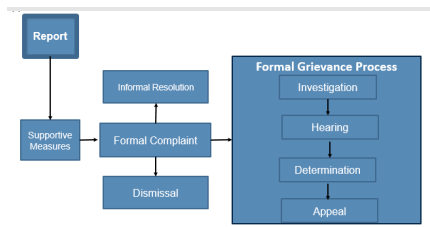
- Title IX Coordinators
- Investigators
- Decision-Makers
- Informal Resolution Officers
- Appeals Officers

Under the new Title IX regulations, **there are NO training requirements for advisors** in the grievance process.

Advisors Must be Included in Hearing



Hearing Process



Overview of the Process: Hearings



- Must provide a live, cross-examination hearing
- Parties must have an **advisor** and the recipient must provide an advisor for a party if the party does not have one
- **Advisors** ask **only relevant cross-examination questions**—no party-on-party questioning
- May be virtual, but must be recorded or transcribed

Overview of the Process: Determinations 1 of 3



- Decision-maker (not Title IX Coordinator or investigator) must issue a written determination regarding responsibility
- Must include
 - Allegations
 - Procedural steps taken from receipt of formal complaint

**Overview of the Process:
Determinations 2 of 3**



- Findings of fact
- Conclusions
- Statement of and rationale for each result of each allegation, including determination of responsibility and any disciplinary imposition and whether remedies designed to restore or preserve access to educational program or activity will provided to complainant

**Overview of the Process:
Determinations 3 of 3**



- Procedures and bases for appeal by both parties
- Provide written determination to parties simultaneously

**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?

Reg's Live Cross-Examination: Theory 1 of 2



- 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)

Reg's Live Cross-Examination: Theory 2 of 2



- 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)

**Reg's 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

**ISSUES OF RELEVANCY:
Not Rules of Evidence**

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?

- o "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 – 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)

Other Considerations



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

Cross Tools: What are the goals of cross-examination?



- Obtain **factual admissions** helpful to your party's case.
- **Corroborate the testimony** of your party's witnesses.
- Minimize the other party's case by **impeachment of witness** being questioned.
- Minimize the other party's case by **impeachment of other witnesses** through the witnesses being questioned.
- Reduce **confusion and seek truth**.

Cross Tools: Impeachment 1 of 5



- Bias: (a) lay witnesses and (b) experts.
- Relationships (friendship and romantic)
- Experts: getting paid for testimony
 - You charge fees based on an hourly rate?
 - You were paid to produce a written report?
 - Based on this report, you're testifying today?
 - You're charging money for each hour you're here?

Cross Tools: Impeachment 2 of 5



- Perception and Recall
 - What is the witness's perception of the facts?
 - Has Time impacted recall or ability to remember clearly?
 - How many times has the witnesses talked to the other party about this case?
 - Was there anything that impacts the person's physical or mental ability to perceive or recall facts accurately?
 - Is the expert limited by the information provided to inform the expert report?
 - Does the witness form a conclusion without knowing certain information?

Cross Tools: Impeachment 3 of 5



- Example: Intoxication level information from witness.
 - You did not see the consumption, or keep track of how long the party was consuming alcohol?
 - You did not measure the alcohol poured by ____ or the party?
 - Your statements are based on information provided by others? the other party?
 - Party's statements were made after they had been drinking alcohol (consuming other drugs, etc)?

Remember: The person is not speaking from personal knowledge.

Cross Tools: Impeachment 4 of 5



- Inconsistency in statements
 - If a fact was very important, why is the hearing the first time it has come up?
 - What possible reasons might the witness have for changing their testimony?
 - Did a witness receive coaching from the party or others between making one statement and another?
 - Has the witness's perspective or motive changed between statements?
 - Does changing this fact help the other party's case?

Cross Tools: Impeachment 5 of 5



- Lack of Corroborating Evidence
 - Example: Missing receipts...
 - You testified that you were drinking with the Complainant on the night of the incident?
 - You testified that you paid for the alcohol?
 - You paid with your credit card?
 - But you did not provide the receipt to the investigator?
 - You didn't even provide access to your credit card statement?

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, you 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)

Tips for Advocating for Your Party

Advocating for your party in the Hearing 1 of 8



Preparation

- Review the entire investigation hearing report
- Review all evidence (some may have non-relevant evidence also—know if you disagree with any relevancy determinations made by the investigator)
- Meet with your party to review what your party thinks and wants
- Discuss strategy

Advocating for your party in the Hearing 2 of 8



Preparation

- Realize that your party may want to take a more aggressive approach – If you are not comfortable with the approach, discuss it with the party and check to see if you can advise your party
- Discuss the expectations of decorum vs. the expectations of questioning the other party and witness

Advocating for your party in the Hearing 3 of 8



Preparation

- Determine who your witnesses are and whether your party thinks they will show up to the hearing
- Be careful of the line between asking a party to participate and explain the importance of their statements vs. coercing a party to participate who has the right not to participate

Advocating for your party in the Hearing 4 of 8



Preparation

- Consider a script
 - List each allegation and policy definition/elements for the policy violation (e.g., sexual assault—know which definition and what must be met to show sexual assault under the policy)
 - Standard of review: this can be helpful to have written out so that you can support relevancy determinations for your questions to show why relevant

Advocating for your party in the Hearing 5 of 8



Preparation

- Consider a script
 - List your questions you plan to ask for your party for each other party and witness AND be prepared to answer why each is relevant
 - Have a list of relevancy definitions to refer to if they come up
 - Rape shield law and two exceptions
 - Privileged information in your jurisdiction
 - Language on treatment records

Advocating for your party in the Hearing 6 of 8



The Hearing

- Ask one question at a time and wait for the Decision-Maker to determine if it is relevant
- If the Decision-Maker has a question about why the question is relevant, be prepared to answer that question (see preparation)
- Be respectful of the process so that you can effectively ask your party's questions – if you think you or someone else is becoming too heated, ask for a break to regroup

Advocating for your party in the Hearing 7 of 8



The Hearing

- Be aware that the other advisor may not be as prepared as you are and the decision-maker has a duty to ask questions the advisor does not—this doesn't mean the decision-maker is biased or trying to help the other side – you may not like it, but it's a requirement for the decision-maker

**Advocating for your party
in the Hearing 8 of 8**



Post-hearing

- The decision-maker will issue a decision to both parties at the same time.
- Under the regulations, the advisor is not required to have any further role in the process (this may be especially true if the advisor is appointed by the institution)
- Other advisors (attorney or parent), may choose to work with the party to appeal on the bases listed in the decision



Questions
