



Title IX Higher Ed Level 2

Advisor Training



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Disclaimer



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 satisfies both annual Clery training and the generally applicable topics required by the Final Title IX regulations. *This training does not cover 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



- Seriously – 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

Additional Information



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



Find us on **Twitter** at
@BrickerHigherEd

Aspirational Agenda



All times EST/EDT

Day 1

2:00-3:15 Introduction, Advisor's Role in the Grievance Process

3:15-3:30 Break

3:30-5:00 Relevance and Relevancy Hypotheticals

Day 2

2:00-3:00 Live Cross Examination Hearing

3:00-3:30 Debrief of Live Cross Examination Hearing

3:30-3:45 Break

3:45-5:00 Hearing/Objectively Evaluating Evidence/Written Decision



Training Requirements



The Title IX regulations require training for:

Title IX
Coordinators

Investigators

Decision-
Makers

Informal
Resolution
Officers

Appeals
Officers

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

Training Requirements for Title IX Officials



Generally, the Title IX regulations require training of an institution's Title IX officials on:

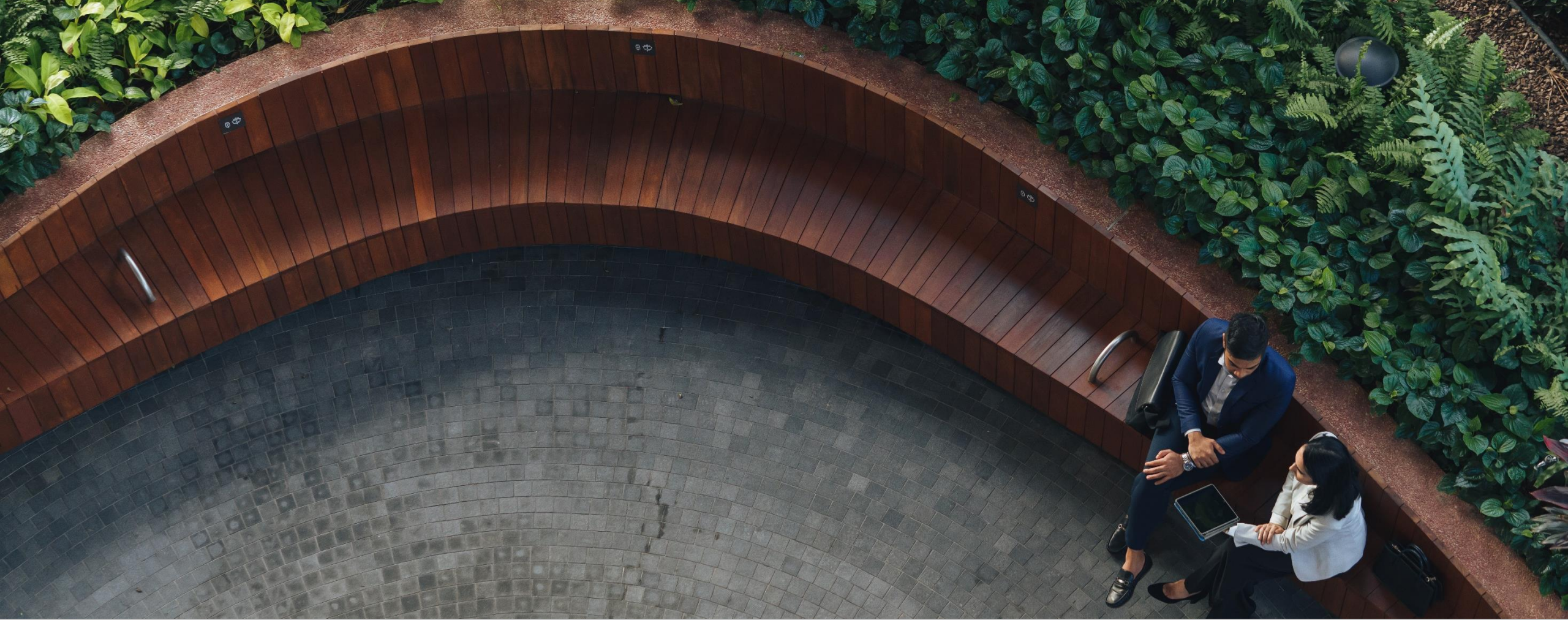
- Jurisdiction: understanding “the scope of the recipient’s education program or activity”
- Definitions of “sexual harassment” under the Title IX regulations
- How to serve impartially, without bias, free from conflict of interest, and without prejudgment of the facts
- Their individual roles in the process

What's Going On?



BUT...It helps the party and the process if an **advisor** understands:

- Title IX jurisdiction (Level 1)
- Title IX definitions of sexual harassment (Level 1)
- The grievance process
- The roles of the Title IX officials in the grievance process
- The hearing and the **advisor's** role in the hearing
- The bases for appeal

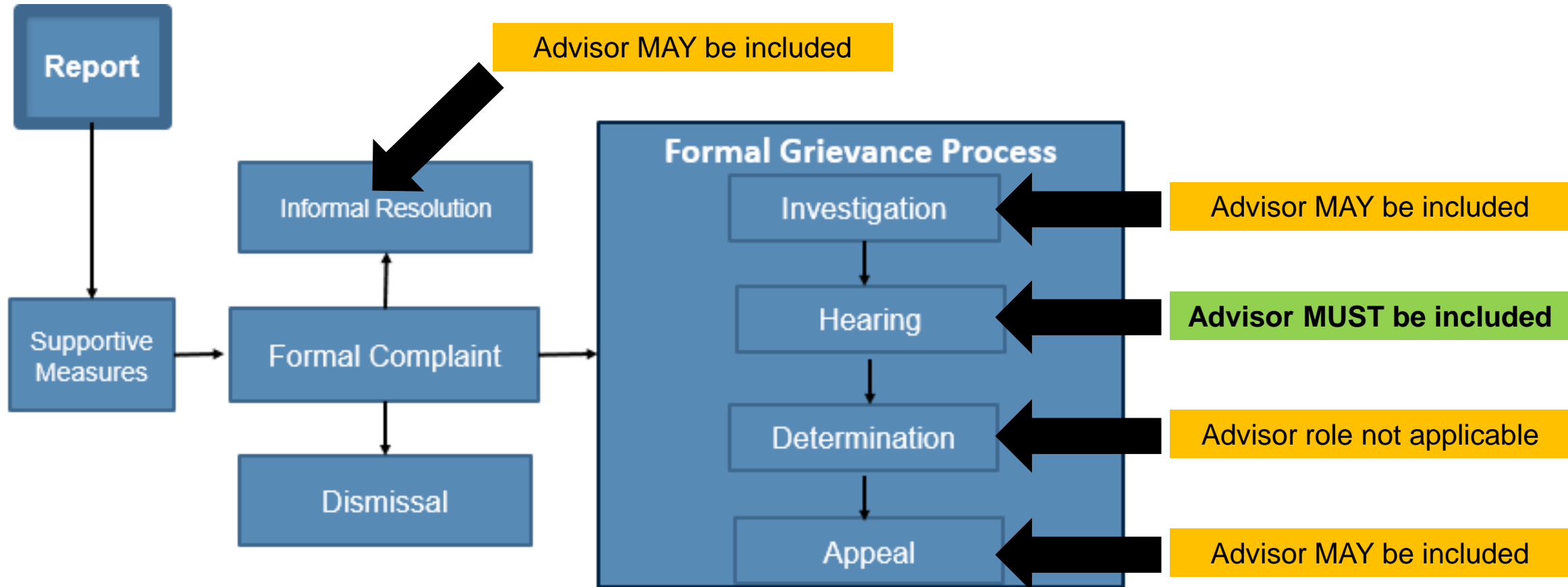


Understanding the Grievance Process and the Advisor's Role



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Overview of the Process



Overview of the Process: Investigation (1 of 3)



Advisor MAY be included

- Only if a formal complaint
- Burden of proof and evidence gathering rests with recipient
- Cannot access, require, disclose, or consider treatment records of a party without that party's voluntary, written consent
- Provide equal opportunity for parties to present witnesses (fact and expert) and evidence (inculpatory and exculpatory)
- Not restrict ability of either party to discuss or gather and present **relevant** evidence
- Provide parties same opportunities to have others present during the grievance process, including **advisor** of choice

Overview of the Process:

Investigation (2 of 3)



Advisor MAY be included

- Provide written notice of date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings with sufficient time to prepare
 - **Advisors** may be asked by the party to prepare for investigative interviews, sit in on investigative interviews, review interview summaries
- Provide both parties equal opportunity to inspect and review any evidence obtained in the investigation – recipient must send to party and party's **advisor** with at least 10 days to submit a written response before completion of investigation report
 - **Advisors** may be asked by the party to review the report and help formulate a response

Overview of the Process: Investigation (3 of 3)



Advisor MAY be included

- Recipient must make all such evidence subject to inspection and review at any hearing
- Create an investigation report at least 10 days before a hearing that fairly summarizes the **relevant** evidence and send to each party and party's **advisor**

Overview of the Process: Hearings



Advisor **MUST** be included

- 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
- **This will be our focus today.**

Overview of the Process: Determinations



Advisor role not applicable

- 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

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

Procedures and bases
for appeal by both
parties

Provide written
determination to parties
simultaneously

Overview of the Process: Appeals (1 of 2)



Advisor MAY be included

- Recipient must offer to both parties the following bases of appeal:
 1. Procedural irregularity that affected outcome
 2. New evidence not reasonably available at the time regarding responsibility or dismissal that could affect outcome
 3. Conflict of interest or bias by the Title IX Coordinator, investigator, and/or decision-maker that affected the outcome

Overview of the Process:

Appeals (2 of 2)



Advisor MAY be included

- The decision-maker for the appeal cannot be the same decision-maker from the hearing, or the Title IX Coordinator or investigator
- **Must provide both parties a reasonable, equal opportunity to submit a written statement in support of or challenging the determination**
 - **Advisor** may be asked by the party to be involved in writing the appeal
- Must issue a written decision describing the result of the appeal and rationale and provide the decision simultaneously to the parties

Overview of the Process: Informal Resolution



Advisor MAY be included

- At any time prior to the determination regarding responsibility, the recipient may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication
- Recipient cannot require this and also cannot offer unless a formal complaint is filed
- Recipient can offer informal resolution if:
 1. Provides written notice to the parties
 2. Obtains the parties' voluntary, written consent to the informal process
 3. Does not offer for employee sexual harassment of a student

Overview of the Process: Retaliation



- Neither recipient nor any other person may retaliate against an individual for purpose of interfering with any right or privilege secured by Title IX or because made a report or complaint, or participated or refused to participate in the process

Overview of the Process: Confidentiality



Recipient must keep confidential the identity of any individual who has made a report or complaint of sex discrimination, including any individual who made a report, any complainant, any alleged perpetrator, any respondent, and any witness, unless required by law, permitted by FERPA, or for the purposes of carrying out Regulations grievance process.

CONFIDENTIAL



Understanding the Roles of Title IX Officials



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The Title IX Officials



Title IX
Coordinator

Investigator

Decision
Maker

Title IX Coordinator

Title IX
Coordinator

Oversees procedural integrity

- Oversees the whole process and helps to ensure the written process and the as applied process are the same
- Often is the person who ensures the investigators, decision-makers, informal resolution officers and appeals officers are properly trained
- **Often is the person who ensures advisors are available for hearings**
- Makes decisions on new issues that arise to keep them in compliance with the policy



Title IX Coordinator – Intake Process (1 of 2)

Title IX
Coordinator

For **advisor** purposes, should understand the intake process (so you know if it was done correctly).

- Title IX Coordinator (or deputy) will receive a report (this may also come in through another individual with the ability to give sanctions) Title IX Coordinator will provide supportive measures to a Complainant
- Title IX Coordinator will determine if the report falls within the “education program or activity” of the institution If not, Title IX Coordinator **MUST** dismiss from Title IX process

Title IX Coordinator – Intake Process (2 of 2)

Title IX
Coordinator

When a Title IX Coordinator may elect to sign and issue a formal complaint without a complainant:

- Complainant has not yet been identified or cannot be identified, but evidence indicates that sexual harassment took place within the institution's jurisdiction (e.g., video, multiple student reports, anonymous social media allegations)

Title IX Coordinator Summary

Title IX
Coordinator

For **advisor** purposes, must understand that the Title IX Coordinator:

- Often is the person who selects and assigns a specific investigator, decision-maker, and appeals officer to a matter
- May be the person who supervises the Title IX Office
- May be the investigator

The Investigator's Roles

Investigator



The **GATHERER** of all relevant evidence.



The **ORGANIZER** of all relevant evidence.

- Does not make a determination on the facts
- Determines some level of whether evidence is relevant.

The Decision-Maker's Role

Decision
Maker

Make relevancy determinations...before any question at the live cross-examination hearing can be answered

Run an orderly and truth-seeking live cross-examination hearing

Write a decision: apply the policy, use standard of review, and evaluate **relevant** evidence still in the record after the hearing



The Decision-Maker's Role & the Advisor

Decision
Maker

- The **advisor** will interact most with the decision-maker during the grievance process.
- The live cross-examination hearing is where the **advisor** has the most active role.





Live Cross-Examination: Theory and Practice



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Cross Examination



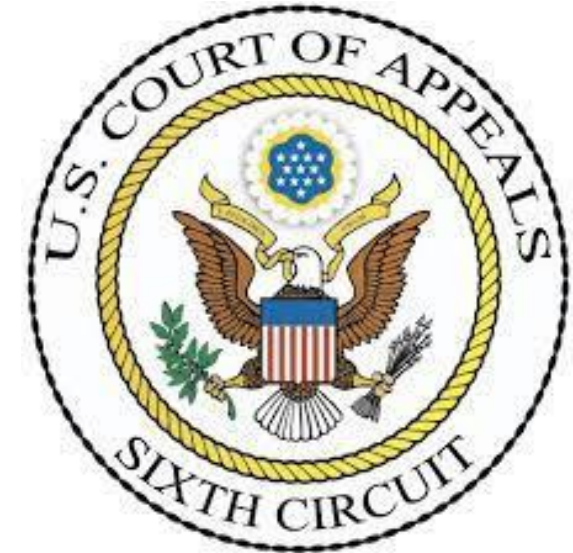
Traditionally, cross examination questions are those that try to elicit “yes” or “no” answers, not explanations.

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)

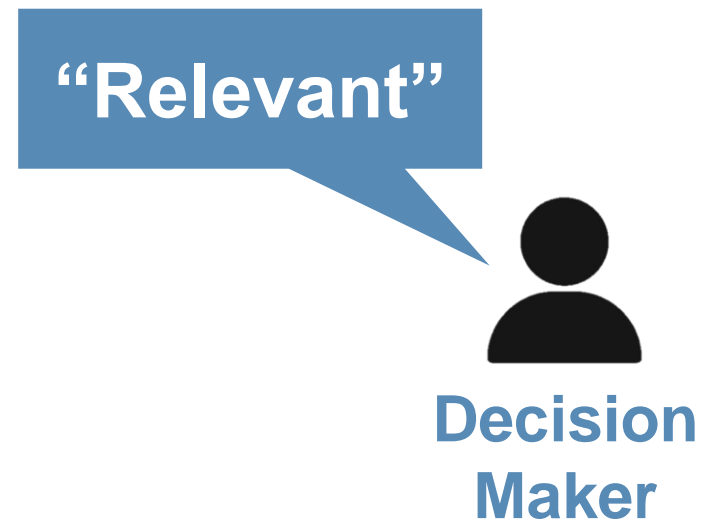


In this process:

- 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



Questioning by the Decision-Maker (1 of 2)



Decision maker is NEUTRAL. And should ask neutral questions.

“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)

Questioning by the Decision-Maker (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)

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: Delineate whether the party or witness is speaking from personal knowledge.

Cross Tools: Impeachment (4 of 5)



- **Inconsistency in statements** (only happens if you interview the parties or witnesses multiple time)
 - 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?





Issues of Relevancy



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Relevancy (1 of 2)



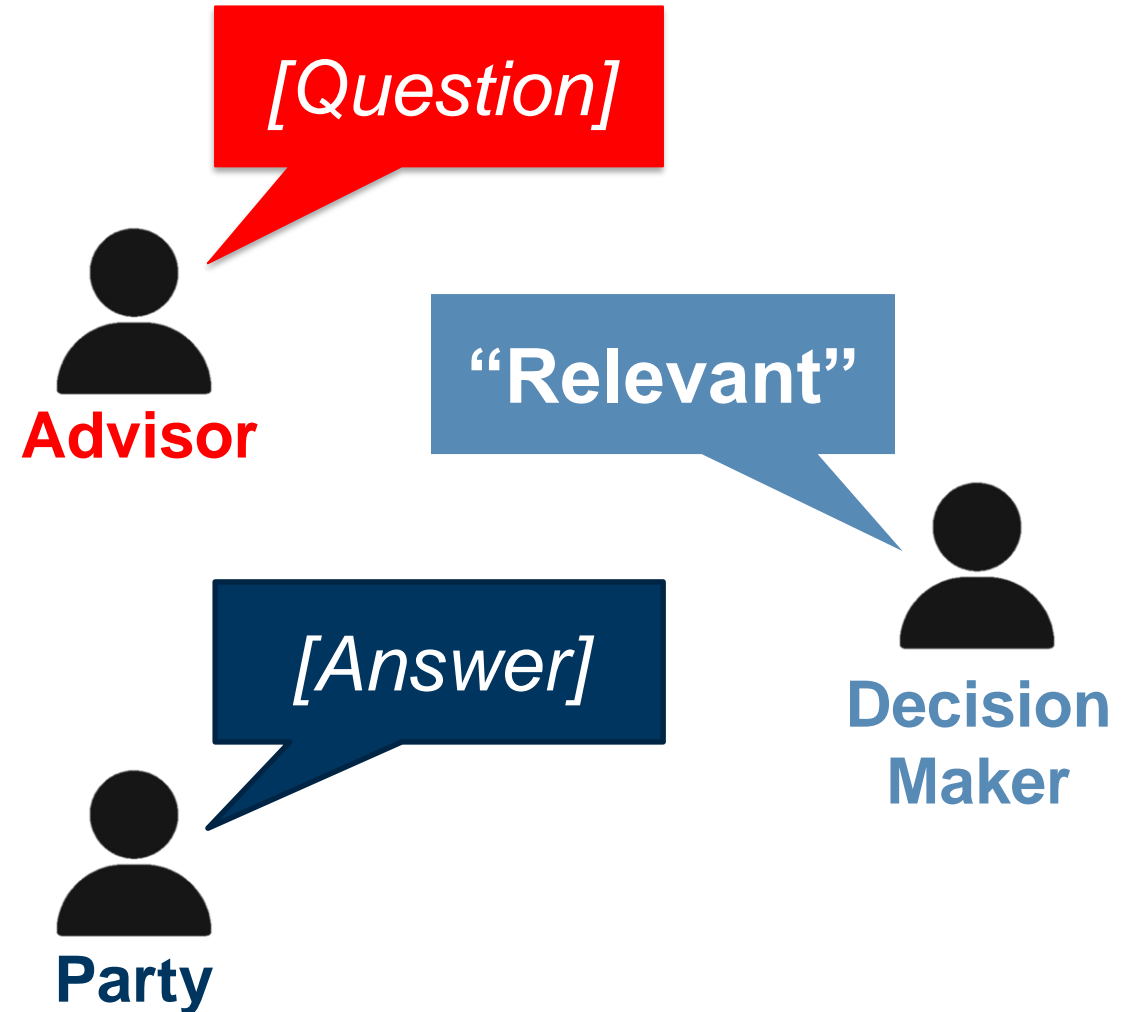
- Per 34 C.F.R. 106. 45(b)(6)(i):

“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? (1 of 3)



The regulations don't really tell us directly.
But, it may include evidence that is:

**“
probative of any material fact
concerning the allegations
”**

- Preamble, 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)
”

- Preamble, 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)

FACT: _____



LESS LIKELY

MORE LIKELY

Relevance and Weight of 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)



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

- The Rules of Evidence do **NOT** apply and **CANNOT** apply



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

- 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)



This means:

✘ 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)



Relevancy: Not Relevant

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

**Party's
medical/treatment
records**

*(unless voluntary
written consent)*



**Information
protected by a
legally
recognized
privilege**



**Complainant's
sexual
behavior**

*(except for two
exceptions)*



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)

- Preamble identifies medical and treatment records.
- 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: Rape Shield Provision & Complainant



- 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.



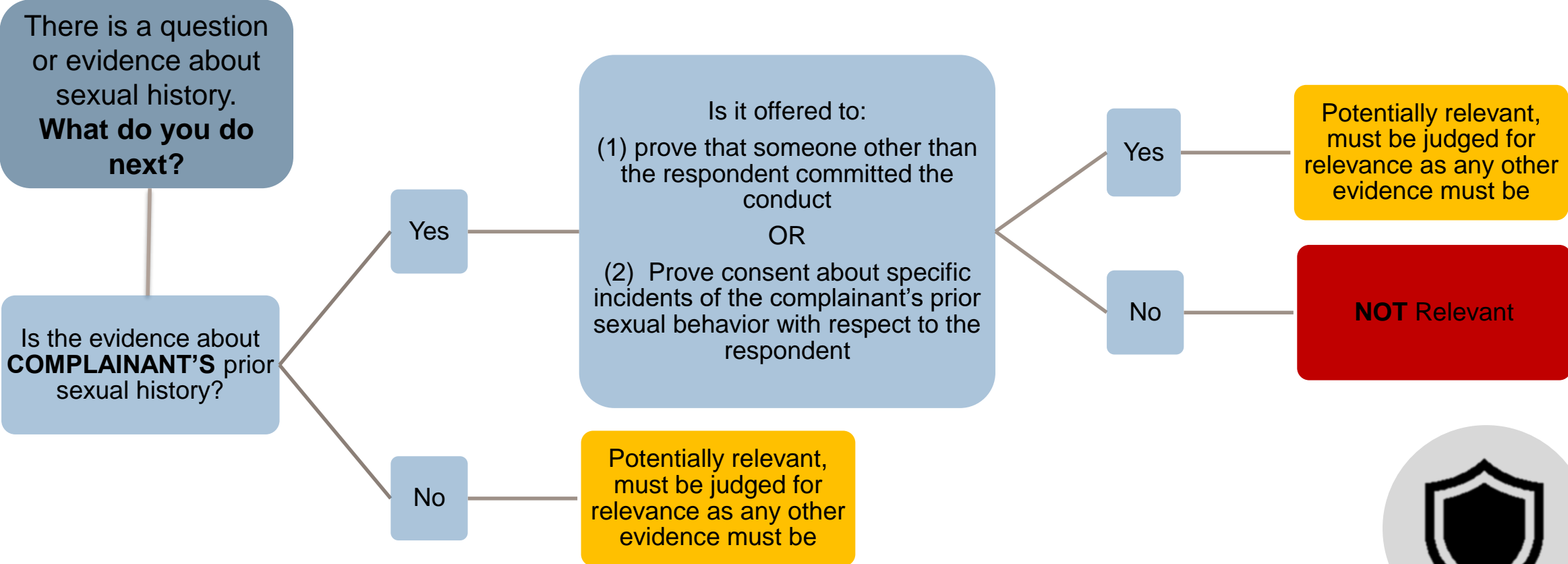
Relevancy: Rape Shield Provision & Respondent



- 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.**”
- **Guidance from Sept. 2021 Q&A: no parties sexual history usually relevant**



Rape Shield Provision Flowchart



Relevancy: Improper Inference



Party does not want to participate at the hearing?

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

Relevancy: When Parties or Witnesses Do Not Participate (1 of 3)



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: When Parties or Witnesses Do Not Participate (2 of 3)



- Massachusetts federal decision vacating regulation requiring submission to cross-examination for consideration of statements (*Victim Rights Law Center et al v. Cardona*, June 28, 2021) (pending appeal and stayed pending DOE's rulemaking of TIX)
- August 24, 2021 DCL providing guidance that, pursuant Victim Right Law Center, will "immediately cease enforcement" of 34 CFR 106(b)(6)(i)
 - May now consider statements not subject to cross-examination



Relevancy: When Parties or Witnesses Do Not Participate (3 of 3)



“[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: Other Considerations



What about sex stereotyping questions?

What about questions by advisor about why a party isn't participating?

What about decorum?

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

Relevancy Determination Hypotheticals



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Hypothetical 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.

Relevancy Determination Hypotheticals (1 of 2)



- Okay, are these questions **relevant for you to ask at the hearing?**
 - You are the **advisor** who has been handed information from the Title IX Coordinator.
- 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?

- What is the **fact** this question is trying to prove?
- Is this question **probative** about the material fact?
 - 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 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.

Hypothetical Report

Reporter Name: Charlie Chun

Received: January 10, 2023 at 9:12 A.M.

Intake Format: Compliance System Report

Parties Identified: Charlie Chun and Rook Ryan

Narrative: Rook sexually assaulted me early in the morning of January 5, 2023. Rook STALKED me too, they contacted me after I told them to STOP. I even blocked them, and they showed up outside of my dorm and aggressively approached me. So, I had to act in self-defense to get away from them. I retreated to my room and hid in there for several days, which made me miss class. Here is a screenshot of a Snapchat conversation with my roommate Wendy and Rook. Rook is a PREDATOR!!!!



Notices of Allegations

January 10, 2023

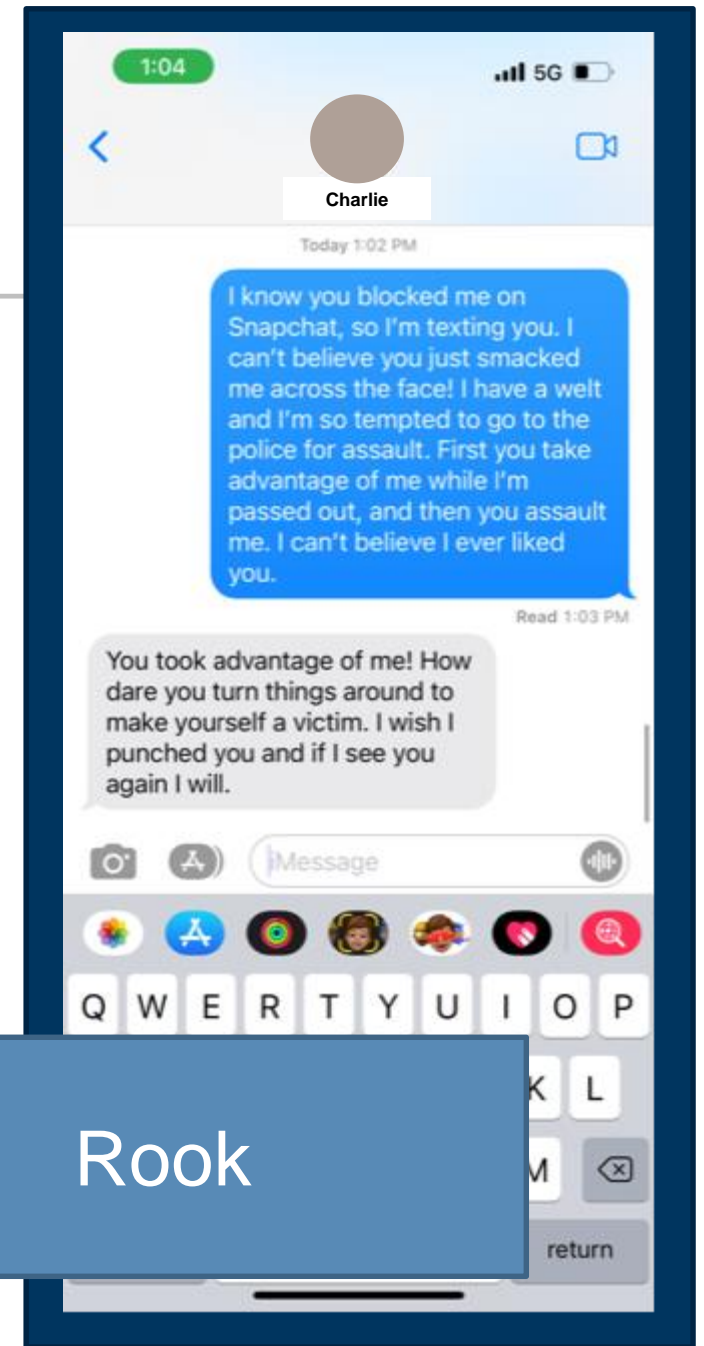
Title IX Office sent Notices of Allegations to the parties that Charlie had filed a formal complaint that Rook engaged in prohibited conduct that could violate Title IX for sexual harassment and stalking and that the Title IX Office was initiating an investigation



Hypothetical Report #2

January 11, 2023

After receiving the Notice of Allegations, Rook came to the Title IX Office and filed a formal complaint against Charlie alleging that she engaged in prohibited conduct under Title IX for sexual harassment and dating violence

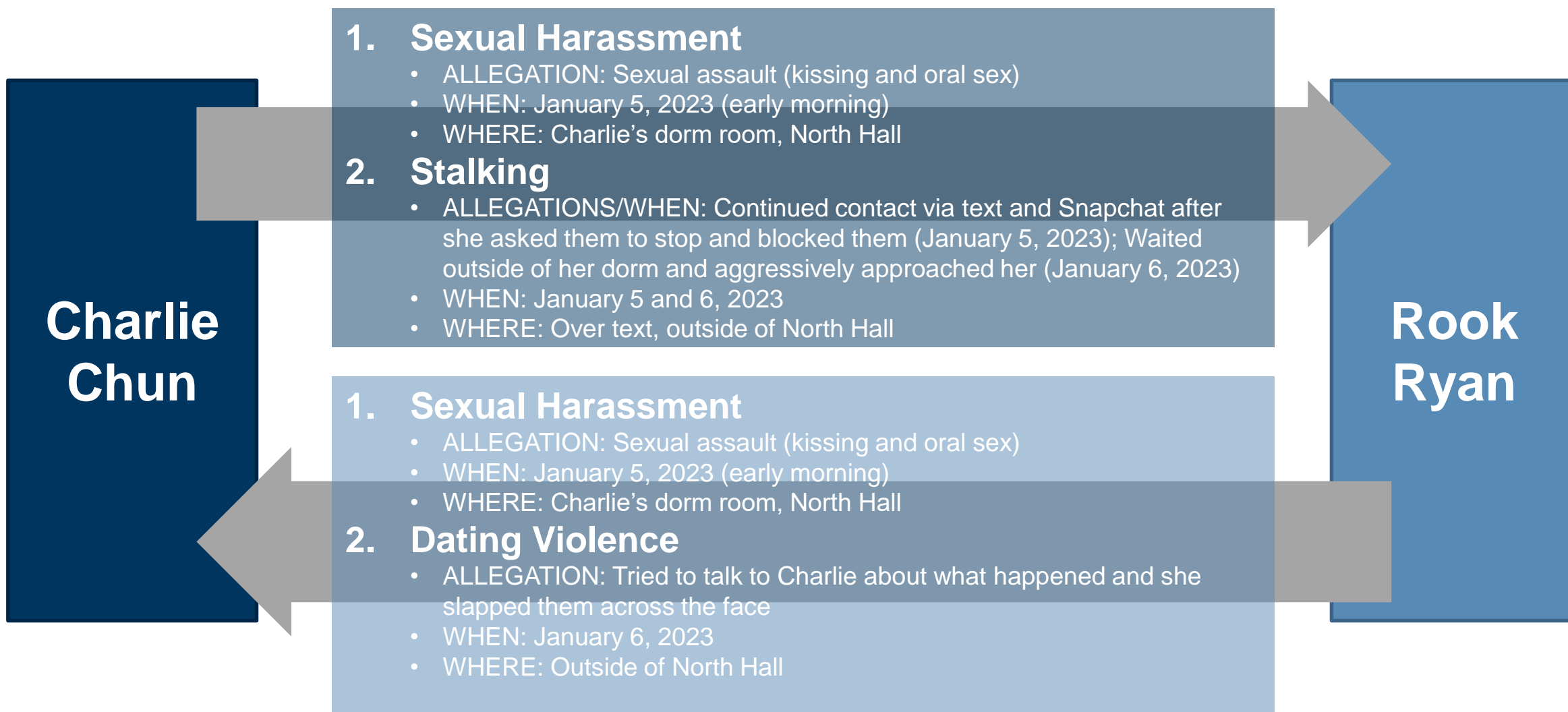


Charlie

1. Sexual Harassment
2. Dating Violence

Rook

Summary of Allegations



Practice Hypothetical #1



“Charlie, isn’t it true that you had slept with a lot of other people before dating Rook?”

Is this **relevant**?

Practice Hypothetical #2



“Rook, isn’t it true that you had never slept with anyone before Charlie?”

Is this **relevant**?

Practice Hypothetical #3



“Charlie, isn’t it possible that you wanted to have sex that night but were too drunk to remember?”

Is this **relevant**?

Practice Hypothetical #4



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

Is this **relevant**?

Practice Hypothetical #5



“Rook, did you tell your counselor that Charlie was unresponsive during sex during the alleged incident?”

Is this **relevant**?

Practice Hypothetical #6



“Charlie, isn’t it true you took off Rook’s clothing during the sexual encounter?”

Is this **relevant**?

Practice Hypothetical #7



“Rook, isn’t it true you began sexual contact with Charlie while she was asleep?”

Is this **relevant**?

Practice Hypothetical #8



“Charlie, isn’t it true you had hit Rook before January 6, 2022?”

Is this **relevant**?

Practice Hypothetical #9



“Rook, if you were as drunk you just stated you were, isn’t it possible you initiated sexual contact with Charlie while she was asleep?”

Is this **relevant**?

Practice Hypothetical #10



“Charlie, if you were sexually assaulted, why didn’t you go to the police right away?”

Is this **relevant**?

Practice Hypothetical #11



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

Is this **relevant**?

Practice Hypothetical #12



“Charlie, you had sex with someone else the following night, didn’t you?”

Is this **relevant**?

Practice Hypothetical #13



“Rook, why didn’t you go to the Title IX Office instead of confronting Charlie?”

Is this **relevant**?



The Hearing



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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



- 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."
 - 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) **BUT July 2021 Q&A allows for support persons for the parties**
- “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



Audio Visual

The Hearing Order

- 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: Ruling on Relevancy



- 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 Revisions



- “[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)

Decorum (1 of 5)

The preamble 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.



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)



Understanding the Bases for Appeal



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Understanding the Bases for Appeal



As an **advisor**, these can inform your approach at the hearing – especially regarding relevancy determinations that you disagree with as the **advisor**.

- Whether you are involved at the appeal level or not (again, regulations only require appointed **advisor** during the hearing process) - will need to think about how to set up those relevancy challenges for appeal while in the hearing

Three Bases for Appeal



Required

1. Procedural Irregularity

2. New Evidence

3. Conflict of Interest or Bias

Your institution can add to this – so check your policy!

Bases for appeal: Procedural Irregularity



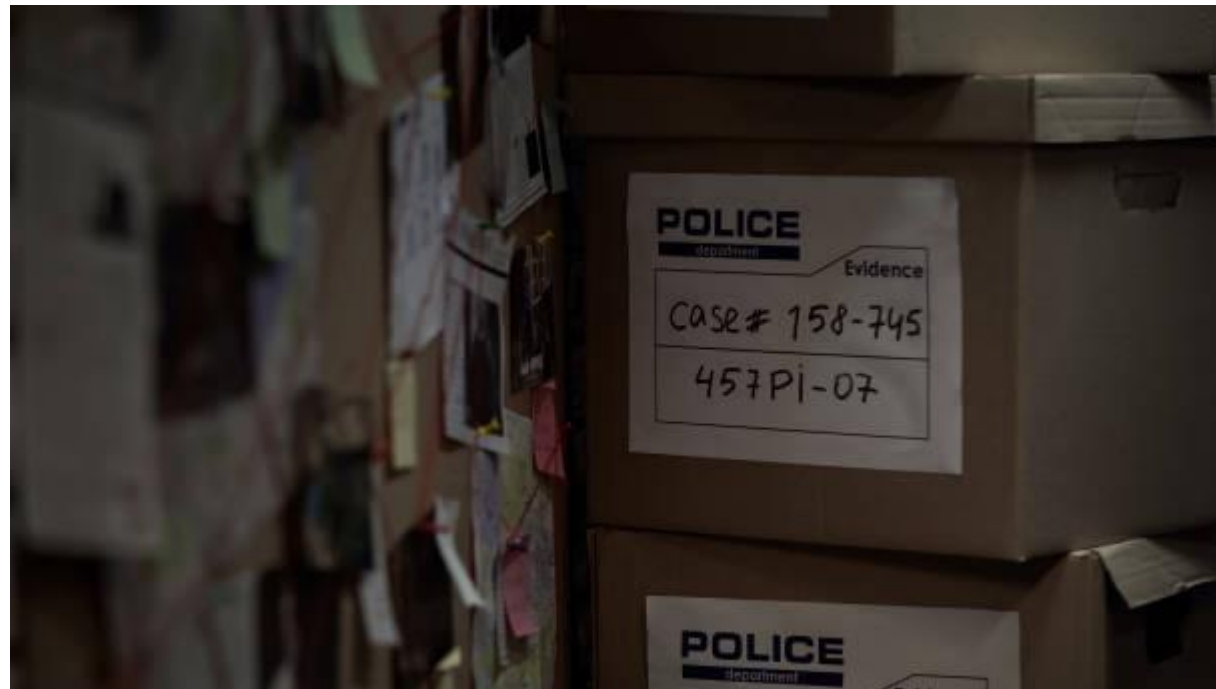
1. **Procedural irregularity** that affected the outcome of the matter
→ Does the process in policy align with process as applied?

What you need to know to answer this question:

- The process in your specific policy (to the extent it adds to the detailed process in the Regulations)
- The Title IX Coordinator's role
- The Investigator's role
- The Decision-Maker's role (relevancy determinations)
- How to determine if any deviation from the process actually affected the outcome

Bases for appeal: New Evidence

2. **New evidence** that was *not reasonably available* at the time the determination regarding responsibility or dismissal was made, *that could affect the outcome* of the matter



Bases for appeal: Conflict of Interest or Bias (1 of 2)



3. **Conflict of interest or bias** against a party by the Title IX Coordinator, investigator(s) or decision maker(s) that affected the outcome of the matter

This will require the appeals officer to be able to make determinations on bias and conflict of interest, usually on peers and understand the case to know if any bias or conflict of interest would impact the outcome of the matter

Bases for appeal: Conflict of Interest or Bias (2 of 2)



- How do you make these determinations of conflict of interest or bias, especially with coworkers or supervisors?
- How do you determine if this actually affected the outcome?

Bases for appeal: Dealer's Choice



-
4. **Any other bases the recipient establishes** provided it is equally available or applies equally to both parties.
- This will require the appeals officer to understand the institution's specific bases for appeals.
 - Many institutions provide a basis for appeal for arbitrary and capricious outcomes or sanctions not proportionate to the findings



Tips for Advocating for Your Party



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Advocating for your party in the Hearing: Preparation (1 of 5)

- 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: Preparation (2 of 5)



- 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: Preparation (3 of 5)



- 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: Preparation (4 of 5)



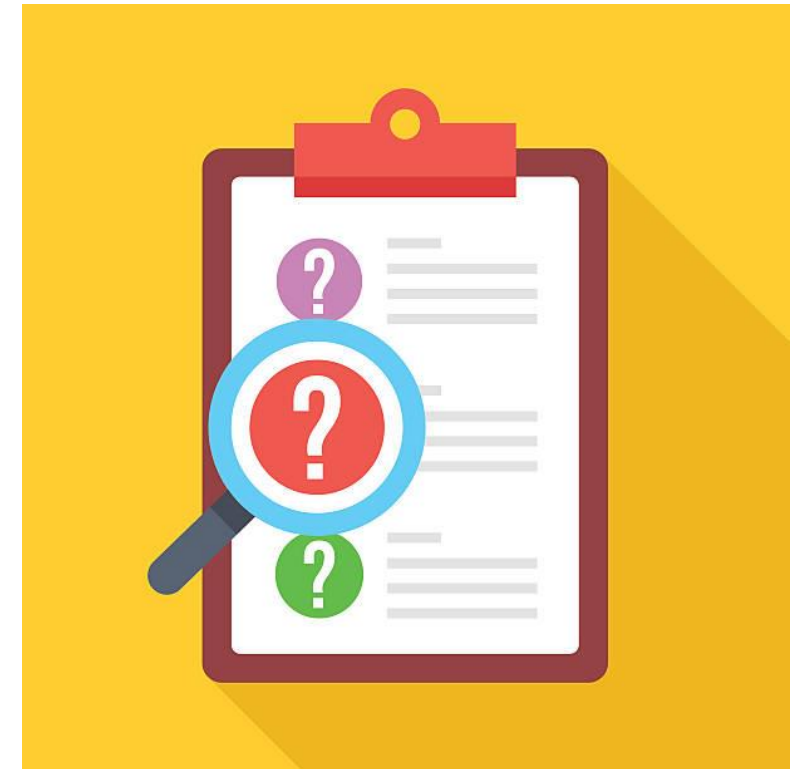
Consider a script

- 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: Preparation (5 of 5)

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: The Hearing (1 of 2)

- 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: The Hearing (2 of 2)



- 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: 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?



Thank you for attending!



Title IX Resource Center at
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