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RELEVANCE IN TITLE IX HEARINGS

- What is a Relevant Question?
- Relevance and Decorum
- What is an Irrelevant Question?

SKILLS PRACTICE

Scenario: Sexual Assault After an On-Campus Event

Cross-Examination of the Parties

Cross-Examination of Witnesses

Conclusion

What is a Relevant Question?



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What is a Relevant Question?

Introduction

This module covers how you decide if a cross-examination question asked in a Title IX hearing is relevant.

Under the Title IX Final Rules, any question posed by the parties' advisors must be evaluated for "relevance" by the hearing officer. According to the Final Rules:



"Only relevant cross-examination and other questions may be asked of a party or witness. Before a complainant, respondent, or witness answers a crossexamination or other question, the decision-maker(s) must first determine whether the question is relevant and explain any decision to exclude a question as not relevant."

C.F.R. §106.45(b)(6)(i)

So as a hearing decision-maker, your task will be to **make this determination** and **explain your reasoning** to the parties. Our goal here is for you to become familiar with these rules and develop strategies for applying them in practice.

As you get more comfortable with the rules, we hope you will feel prepared for questions you might not have expected going into the hearing. And that you'll also be prepared to know when you may need to pause a hearing to work through a relevance decision in the grey areas of the Title IX Final Rules.

Know Your Process

Before we jump into the rules, let's talk about when we make the **relevance determination**. Colleges and universities are using several approaches.

Some are requiring the parties to submit a **list of proposed cross-examination questions** before the hearing at a pre-hearing conference so that the hearing decision-makers can review the questions ahead of time and make their determination.

Others wait until the **hearing itself** to make the relevance determination, and will make the decision as each cross-examination is asked.

Either approach appears to be permitted under the Final Rules, although if you use the prehearing review process, you will also need to give the parties the **chance to ask further questions** that come up during the hearing. Those questions would then be judged for relevance on-the-spot.

What is a Relevant Question?

The Department of Education encourages institutions to apply the **"plain and ordinary meaning"** of relevance in their determinations. 85 Fed. Reg. 30026, 30304 (May 19, 2020). Basically, a question is relevant if it tends to make a fact at issue **more or less likely to be true.** Id. at 30294. A question not directly related to the allegations will generally be irrelevant.

You should use **common sense** here. Advisors may ask about interesting or surprising things that have nothing to do with the case, and so are not relevant.

Relevance decisions should be made on a question-by-question basis, looking narrowly at whether the question seeks information that will **aid the decision-maker** in making the underlying determination.

The relevance decision should **not** be based on who asked the question, their possible (or clearly stated) motives, who the question is directed to, or the tone or style used to ask about the fact.

Relevance decisions should **not** be based upon the following:

- the sex or gender of the party for whom it is asked or to whom it is asked,
- either party's status as complainant or respondent,
- either party's past status as complainant or respondent,
- any organizations of which either party is or has been a member,
- or any other protected class covered by federal or state law, such as race, sexual orientation, or disability.

What if the question concerns sensitive or embarrassing issues?

Much of the content within these hearings may be considered sensitive or embarrassing by parties or advisors. However, relevant questions need to be considered even if a party finds them uncomfortable to answer. Only **irrelevant** questions (detailed below), including about the complainant's prior sexual history, may be excluded. We suggest talking about this issue with students in your pre-hearing preparations for the hearing.

Ultimately this does open the door to less trauma-informed approaches to questioning. One way to **avoid re-traumatization** is to maintain clear rules of decorum in the manner questions are asked. We'll go over those rules of decorum now.

What if I make a mistake?

You may discover that allowing a question to be asked results in the **disclosure of "irrelevant" information**, such as a Complainant's prior sexual history with someone other than the Respondent. In that case, you can direct the decision-maker to **disregard** that irrelevant information and strike it from consideration in their decision.

If a party insists that an irrelevant question should have been allowed, they can **appeal** that ruling through the appeals process. Under the Title IX Final Rules, colleges and universities must allow parties to appeal based on "[p]rocedural irregularity that affected the outcome of the matter." 34 C.F.R. §106.45(b)(8). An incorrect relevance ruling would likely be a ground appropriate for appeal based on procedural error.

Still, even if a party disagrees with a relevance ruling, an appeal may only be granted if it "affected the outcome of the matter." Generally, it will be hard for a party to show that their inability to ask a question would have **changed the outcome** if other evidence supported the hearing decision-maker's findings.

CONTINUE

Relevance and Decorum

Decorum

Title IX hearings are **not civil or criminal proceedings** and are not designed to mimic formal trial proceedings. They are primarily **educational** in nature. The U.S. Department of Education describes the Title IX in the Final Rule as "purposefully designed…to allow recipients to retain flexibility to adopt rules of decorum that **prohibit** any party advisor or decision-maker from questioning witnesses in an abusive, intimidating, or disrespectful manner." 85 Fed. Reg. 30026, 30319 (May 19, 2020).

The Department of Education has determined that institutions "are in a better position than the Department to craft rules of decorum best suited to their educational environment" and build a hearing process that will reassure the parties that the institution "is not throwing a party to the proverbial wolves."

85 Fed. Reg. 30026, 30319 (May 19, 2020).

To achieve this purpose, institutions may provide for **reasonable rules of order and decorum**, which may be enforced through the removal of an advisor who refuses to comply with the rules. Id., at 30320. As the Department explains, the removal process "incentivizes a party to work with an advisor of choice in a manner that complies with a recipient's rules that govern the conduct of a hearing, and incentivizes colleges and universities to appoint advisors who also will comply with such rules, so that hearings are conducted with respect for all participants." Id.

Model Rules of Decorum:

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Questions must be conveyed in a neutral tone.

Parties and advisors will refer to other parties, witnesses, advisors, and institutional staff using the name and gender used by the person and shall not intentionally misname or mis-gender that person in communication or questioning.

No party may act abusively or disrespectfully during the hearing toward any other party or to witnesses, advisors, or decision-makers.

While an advisor may be an attorney, no duty of zealous advocacy should be inferred or enforced within this forum.

The advisor may not yell, scream, badger, or physically ''lean in'' to a party or witness's personal space. Advisors may not approach the other party or witnesses without obtaining permission from the decision-maker.

The advisor may not use profanity or make irrelevant *ad hominem* attacks upon a party or witness. Questions are meant to be interrogative statements used to test knowledge or understand a fact; they may not include accusations within the text of the question.

The advisor may not ask repetitive questions. When the decision-maker determines a question has been "asked and answered" or is otherwise not relevant, the advisor must move on.

Parties and advisors may take no action at the hearing that a reasonable person in the shoes of the affected party would see as intended to intimidate that person (whether party, witness, or official) into not participating in the process or meaningfully modifying their participation in the process.

The Intersection of Relevance and Decorum

If a question is relevant but **offered in an hostile or argumentative way**, the decision-maker has the discretion to ask the advisor to rephrase the question in an appropriate manner, consistent with the institution's decorum policy for hearings.

That said, you may find a question relevant, but still ask that it be rephrased to meet the standards of decorum. You might decide that the question is relevant because it addresses a fact at issue, but it was asked in a disrespectful manner. You can then require that the advisor **rephrase or restate** the question in a way that would not violate the decorum rules.

In the scenario, we will highlight examples of questions that **may be relevant**, **but can be asked to be rephrased** to meet reasonable rules of decorum.

CONTINUE

Lesson 3 of 7

What is an Irrelevant Question?

Overview

The relevance question is more complicated when the decision-maker has to apply the small range of evidentiary exclusions defined in the Final Rule. If the question touches upon these issues, it cannot be asked.

"Rape Shield" Exclusion

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(6)(i).

Legally-Privileged Information

Questions that constitute, or seek disclosure of, information protected under a legally-recognized privilege are irrelevant. 34 C.F.R. § 106.45(1)(x).

Depending on your state, individuals with legal privilege may include attorneys, medical providers (physician, dentist, podiatrist, chiropractor, nurse), psychologists, clergy, rape crisis counselors, and social workers.



Medical Records

Questions that call for information about any party's medical, psychological, and similar records are irrelevant UNLESS the party has given voluntary, written consent. 85 Fed. Reg. 30026, 30294 (May 19, 2020).



Duplicative Questions

A question may be irrelevant if it duplicates another question that has already been asked and answered. 85 Fed. Reg. 30026, 30331 (May 19, 2020).

Summary

Questions that tend to make a fact at issue more or less likely to be true are relevant. The only exception is a question that falls within one of those four categories. Those questions are irrelevant.

Now that we've gone over those rules, let's apply what we have learned in practice.



Complete the content above before moving on.

Lesson 4 of 7

Scenario: Sexual Assault After an On-Campus Event



Your university held a Model UN conference which brought students from twenty-five colleges to your campus. Several weeks later, Jan, a member of your university's team, filed a formal complaint with the Title IX Coordinator.

Jan alleged that Sam, another member of the team, sexually assaulted her at a party held on campus during the conference.

Specifically, Jan alleges that Sam pushed her against a wall, kissed her, and put his hands up her shirt.

During the investigation, Sam admits that some sexual activity occurred at the party but denies that it occurred without Jan's affirmative consent.

You are a member of the panel assembled to hear this case, and will assist the Hearing Chair in making relevance determinations.

i Remember that these hearing questions are representative of types you might encounter in a typical hearing. But they are not intended to be comprehensive of all the questions that would ordinarily be asked.

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Lesson 5 of 7

Cross-Examination of the Parties



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Lesson 6 of 7

Cross-Examination of Witnesses

Cross-Examination of Witnesses

Now the hearing board will hear from three witnesses regarding the incident. The first witness is Jaime, one of the Complainant's friends. Respondent's advisor will begin questioning.



Scene 1 Slide 1

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Conclusion

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