2022-2023: Determining Relevance in Title IX Hearings

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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
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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 cross-examination 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 pre-hearing 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.
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:

1. Questions must be conveyed in a neutral tone.

2. 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 mis-name or mis-gender that person in communication or questioning.

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

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

5. 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.

6. 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.

7. 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.

8. 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.
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.
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.

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.
Lesson 5 of 7

Cross-Examination of the Parties
Welcome!

Hi, my name is Al, and I will be serving as the Hearing Chair. I'm responsible for making relevance determinations for all parties throughout the hearing. Let's work together to apply the rules.

CONTINUE
How it works! You'll see three choices for how to rule on each question. Select the best answer. A question may be relevant but not trauma-informed or meet decorum requirements in its phrasing.

The ability to identify relevant questions, even when presented in a manner that falls outside of desired form and decorum is critical.
Cross-Examination of Complainant

First, the Respondent's advisor will ask the Complainant questions about the incident. Let's answer relevance questions together.
Question 1/9: You had a dating relationship with the Respondent before this incident. Was all of the sexual activity in that relationship consensual?

1. Relevant because it tends to make a fact at issue more or less likely to be true: whether the sexual activity on the night at issue was consensual.

2. Irrelevant because it raises the prior sexual history of the parties.

3. Relevant, but may violate a rule of decorum.
Question 2/9: Didn’t you tell your campus pastor that you wanted to marry the Respondent?

1 Relevant because it tends to make a fact at issue more or less likely to be true: whether the sexual activity was consensual.

2 Irrelevant because conversations between a student and their pastor are privileged communications.

3 Relevant, but may violate a rule of decorum.
Question 3/9: You can save your tears for another time, because we KNOW it's true that you've hooked up with MANY of the players on the team! Isn't that right?

1. Relevant because it tends to address the credibility of the complainant.

2. Irrelevant because it is a question about the Complainant's sexual history with someone other than the Respondent.

3. Irrelevant, and would likely violate your rules of decorum.
Question 4/9: You told the Title IX Investigator that the Respondent sexually assaulted you at 1:00 AM. You told the hearing board that the assault happened at 2:00 AM. Is that correct?

1. Relevant because it asks about a fact at issue and raises a credibility question regarding the Complainant’s memory of the event.

2. Irrelevant because the time of the incident is unrelated to whether the assault occurred.

3. Relevant, but may violate a rule of decorum.
Question 5/9: Why didn’t you push the Respondent away during this sexual activity?

1. Relevant because it asks about a fact at issue: whether the Complainant consented to the sexual activity.

2. Irrelevant because the Complainant does not need to show they pushed the Respondent away to show a lack of consent.

3. Relevant, but may violate a rule of decorum.
Question 6/9: You told the Title IX investigator that you take several psychiatric medications. Is it possible that those medications compromised your ability to remember that night?

1. Relevant because it raises questions about the Complainant’s memory based on medical information the Complainant introduced.

2. Irrelevant because the Complainant’s private medical information is shielded from questioning.

3. Relevant, but may violate a rule of decorum.
Question 7/9: Let me get this straight: you say the Respondent assaulted you, but isn’t it true that the Respondent walked you back to your residence hall afterward?

1 Relevant because it tends to make a fact at issue more or less likely to be true: whether the sexual activity was consensual.

2 Irrelevant because the Complainant’s post-incident behavior is irrelevant to whether she consented to the sexual activity.

3 Relevant, but may violate a rule of decorum.
Question 8/9: And so I ask you again: you let the Respondent walk you back to your dorm?

1. Relevant because it tends to make a fact at issue more or less likely to be true: whether the sexual activity was consensual.

2. Irrelevant because it is repetitive of a question already asked.

3. Relevant, but may violate a rule of decorum.
Question 9/9: Didn’t you post pictures of yourself and the Respondent on Instagram after the conference?

1 Relevant because it asks about post-incident behavior relevant to a fact at issue: whether the Complainant consented to the sexual activity.

2 Irrelevant because the Complainant’s post-incident behavior is irrelevant to whether she consented to the sexual activity.

3 Relevant, but may violate a rule of decorum.

Scene 1 Slide 12

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Cross-Examination of Respondent

The Complainant's Advisor will ask the Respondent questions about the incident. Let's work together to figure out which are relevant.

CONTINUE
Question 1/7: You have known the Complainant since your first year in college? And you dated prior to the incident in question?

1. Relevant because it tends to make a fact at issue more or less likely to be true: whether the sexual activity was consensual.

2. Irrelevant because it raises the prior sexual history of the parties.

3. Relevant, but may violate a rule of decorum.
Question 2/7: Didn’t you tell the Complainant that you wouldn’t be at the party after the conference?

1. Relevant because the question appears designed to elicit information about whether the assault was premeditated.

2. Irrelevant because it has nothing to do with the incident itself.

3. Relevant, but may violate a rule of decorum.
Question 3/7: You told the Title IX Investigator that you were sober at the party, correct?

1. Relevant because the question asks about the Respondent’s state of mind and capacity to make decisions.

2. Irrelevant because the question calls for expert medical testimony.

3. Relevant, but may violate a rule of decorum.
Question 4/7: You are familiar with the Complainant’s appearance when sober and when drunk? Wouldn’t you say that the Complainant was not sober?

1. Relevant because it asks about a fact at issue: the Complainant’s capacity to consent.
2. Irrelevant because the Respondent does not have the expertise to judge another person's sobriety.
3. Relevant, but may violate a rule of decorum.
Question 5/7: Isn’t it true that the Complainant pushed you away when you tried to kiss her?

1. Relevant because it asks about a fact at issue: the Complainant’s consent to the sexual activity.

2. Irrelevant because it calls for the Respondent to incriminate himself.

3. Irrelevant, and violates a rule of decorum.
Question 6/7: You helped the Complainant get back to her dorm afterwards. Wasn't this because the Complainant could barely stand?

1 Relevant because the question elicits information about a fact at issue: the Complainant's ability to consent to the sexual activity.

2 Irrelevant because it concerns matters outside the incident itself.

3 Relevant, but may violate a rule of decorum.

Scene 2 Slide 7

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Question 7/7: You continued to participate in Model UN with the Complainant after the party. Isn’t it common for your team to take group photos with one another and to share it on social media?

1. Relevant because it responds to the Respondent Advisor’s question about why the parties took photographs together after the incident.

2. Irrelevant because it concerns matters outside the incident itself.

3. Relevant, but may violate a rule of decorum.
End of Party Questioning

The portion of the hearing for party questioning is over. Now, the advisors will ask questions of witnesses.

START OVER

Scene 2 Slide 9

Continue  →  End of Scenario

Complete the content above before moving on.
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.
Question 1/4: You told the hearing board you are friends with the Complainant. Does that have any impact on your ability to be fully truthful about the incident in question?

1. Relevant because it raises questions about the witness’s potential bias.

2. Irrelevant because it concerns matters outside the incident itself.

3. Relevant, but may violate a rule of decorum.
Question 2/4: Didn’t you post on Instagram that the Respondent was a “sleazebag who preys on women”?

1. Relevant because it raises questions about the witness’s potential bias.
2. Irrelevant because it concerns matters outside the incident itself.
3. Relevant, but may violate a rule of decorum.

Scene 1 Slide 3

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Question 3/4: You didn’t actually observe Sam and Jan together at the party, did you?

1. Relevant because it asks about a fact at issue: whether the witness observed the incident and therefore lacks first-hand knowledge of the incident.

2. Irrelevant because second-hand testimony is equally weighted as first-hand observations.

3. Relevant, but may violate a rule of decorum.

Scene 1 Slide 4

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Question 4/4: So you can’t actually tell us ANYTHING about what really happened. Why are you here, anyway!?

1. Relevant because it asks about a fact at issue: whether the witness observed the incident and therefore lacks first-hand knowledge of the incident.

2. Irrelevant because second-hand testimony is equally weighted as first-hand observations.

3. Relevant, but would likely violate a rule of decorum.
Cross-Examination of Witnesses

Complainant's advisor will now question Jaime.
Question 1/3: Isn’t it fair to say that, as a member of the Model UN Team, you are friendly with both Sam and Jan?

1. Relevant because it raises questions about the witness’s potential bias.

2. Irrelevant because it concerns matters outside the incident itself.

3. Relevant, but may violate a rule of decorum.
Question 2/3: Jan told you about the incident the day after it happened, correct?

1. Relevant because the question asks about the witness’s reliability and credibility.

2. Irrelevant because it concerns matters outside the incident itself.

3. Relevant, but may violate a rule of decorum
Question 3/3: Can you tell me what Jan told you about the incident?

1. Relevant because it elicits information about what the Complainant told the witness about the incident.
2. Irrelevant because the question is open-ended and may result in the sharing of irrelevant information.
3. Relevant, but may violate a rule of decorum.

Scene 2 Slide 4

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Cross-Examination of Witnesses

The Complainant has introduced an expert witness psychiatrist, Dr. Spock. The Complainant's advisor begins questioning.
Question 1/4: You are the Complainant’s psychiatrist. Have you treated her for a long time?

1. Relevant because it helps establish the expertise of the witness.
2. Irrelevant because it inquires into privileged medical information.
3. Relevant, but may violate a rule of decorum.
Question 2/4: Did the Complainant consult with you after the sexual assault and give you permission to testify today?

1. Relevant because it establishes that the Complainant waived privilege for the limited purpose of the psychiatrist’s hearing testimony.

2. Irrelevant because it inquires into privileged medical information.

3. Relevant, but may violate a rule of decorum.
Question 3/4: The hearing board heard testimony that the Complainant takes certain psychiatric medications that can have adverse effects when combined with alcohol. Is that correct?

1. Relevant because it addresses a fact at issue regarding the Complainant’s ability to consent.

2. Irrelevant because it inquires into privileged medical information.

3. Relevant, but may violate a rule of decorum.
Question 4/4: In your professional opinion, would combining a standard dose of that medication with several alcoholic beverages actually impair the Complainant's memory?

1. Relevant because it addresses a fact at issue regarding the Complainant’s ability to accurately recall the incident.

2. Irrelevant because it inquires into privileged medical information.

3. Relevant, but may violate a rule of decorum.
Cross-Examination of Witnesses

The Respondent's advisor now questions Dr. Spock.

CONTINUE
Question 1/3: I’m sure you wrote down things that the Complainant told you about this incident. Can you please provide this hearing board with those written notes so we can verify your testimony?

1 Relevant because the Complainant “opened the door” for entering the notes.

2 Irrelevant because the Complainant did not volunteer written medical records, but only her psychiatrist’s testimony.

3 Relevant, but may violate a rule of decorum
Question 2/3: Are you an expert toxicologist?

1 Relevant because it questions the witness’s expertise regarding a fact they are testifying about.

2 Irrelevant because anyone can testify about a person’s intoxication based on personal observation.

3 Relevant, but may violate a rule of decorum
Question 3/3: If you are not an expert toxicologist, then how can you be sure the Complainant’s memory was not at all impacted by mixing her meds with alcohol?

1. Relevant because it questions the witness’s expertise regarding a fact they are testifying about.

2. Irrelevant because anyone can testify about a person’s intoxication based on personal observation.

3. Relevant, but may violate a rule of decorum.
Cross-Examination of Witnesses

The final witness is Agent Orange, an expert polygraph examiner introduced by the Respondent. The Respondent's advisor begins questioning.
Question 1/2: Is it the case that you have worked as an FBI polygraph examiner for twenty-five years, and you are now retired and work as a consultant to companies and in litigation?

Relevant, as the question is meant to show the witness’s credentials to speak to a fact at issue with the polygraph: the Respondent’s credibility.

Irrelevant because it does not concern a fact at issue.

Relevant, but may violate a rule of decorum.
Question 2/2: When you administered the polygraph to the Respondent, what was the result?

1 Relevant because the question calls on the expert witness to describe the results of a test meant to establish the Respondent's credibility.

2 Irrelevant because polygraph evidence is not reliable and cannot establish whether someone is telling the truth.

3 Relevant, but may violate a rule of decorum
Cross-Examination of Witnesses

The Complainant's advisor now questions the polygraph expert.

Scene 6 Slide 1

Continue  →  Next Slide
Question 1/2: How much experience do you have working with college-aged students in Title IX matters?

1. Relevant because the question tests the witness’s expertise in handling matters similar to this case.

2. Irrelevant because the witness’s experience with college-aged students has no bearing on the case at hand.

3. Relevant, but may violate a rule of decorum.

Scene 6 Slide 2

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Question 2/2: Isn’t it the case that polygraph evidence is almost never admissible in a trial court? Why is that?

1. Relevant because the question tests whether the evidence should be used by the hearing board in making their decision.

2. Irrelevant because Title IX hearings have different rules than trial courts.

3. Relevant, but may violate a rule of decorum.
The Hearing is Over

Thank you for joining us for this training! We hope it was helpful in preparing you for the challenging task of applying the Title IX relevance rules.

Scene 6 Slide 4

Continue → End of Scenario

Complete the content above before moving on.
Lesson 7 of 7

Conclusion

Thank you for taking this training!

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