

UNCHARTED TERRITORY:

**NAVIGATING
LIVE HEARINGS**

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LEARNING OBJECTIVES

Examine the role of a hearing officer and advisor during the hearing.

Identify strategies for crafting clear direct and cross-examination questions.

Describe how to determine the relevance of questions and evidence.

Illustrate the procedural flow of a live hearing.

EXAMINING THE ROLES



ROLE OF THE DECISION-MAKER

Responsibilities:



Determines relevancy



Facilitates live hearing



Makes determination of (non)responsibility

Expectations:

Independent, unbiased, equitable, transparent, confidential



DECISION-MAKER QUALITIES

Despite similarities, the Decision-Maker is not a Judge. However, many of the same attributes are needed to carry out the role, especially as it relates to conducting the hearing itself.

- Understand Title IX law and institutional/district policy, and apply it to decision-making
- Carefully evaluate evidence
- Communicate effectively with Parties and Advisors
- Use critical thinking to determine relevance of evidence and questions, sometimes quickly
- Craft professional and thorough written determinations
- Be comfortable making tough, but equitable decisions



ADDRESSING BIAS

INDEPENDENT so no claim can be made of bias. A legitimate claim of bias can be a basis for a successful appeal and the basis for a do-over.

Coordinators should anticipate potential conflicts of interest when assigning the Decision-Maker

Allow a time prior to questioning for Parties to disclose potential conflicts of interest

Evaluate and assign a new Decision-Maker if conflicts are present, recuse if you can't serve impartially



Responsibilities:



Provides support during meetings



Reviews investigation report and file



Conducts cross-examination during the live hearing

ROLE OF THE ADVISOR

Expectations:

Professional, knowledgeable, thorough, empathetic



ADVISOR QUALITIES

Though Parties are able to select any individual to serve as their advisor (and many may not possess these qualities), an institutionally-provided advisor should have the following attributes.

- Understand Title IX law and institutional/district policy, how to serve during each step of the grievance process, and the rights of the Parties
- Carefully evaluate evidence to understand the Parties' positions
- Communicate effectively and professionally with Parties and Decision-Maker
- Use critical thinking to craft questions that support your Parties' position
- Be comfortable supporting a Party through a difficult time



DISTINCTION OF THE ROLE

The conflict of interest and bias requirements placed on other Title IX roles do not apply to Advisors.

The only role that is allowed to represent only one Party's interests

May consider conflicts of interest if you serve in another campus role (e.g. Dean or professor)

Assign a new Advisor if they cannot fulfill their role

CRAFTING QUESTIONS



REVIEW OF FILE

Decision-Makers, Advisors, and Parties will all have the opportunity to review the same information

CRAFTING OF QUESTIONS

Decision-Makers, Advisors, and Parties can create questions following this review to ask during direct or cross-examination. These can provide clarity, support, or refute positions.

LIVE HEARING

Decision-Maker and Advisors will conduct direct and cross-examination of Complainant, Respondent, and Witnesses, Decision-Maker determines relevancy of all questions.

STARTING POINT

Both Decision-Makers and Advisors can use this starting point to formulate questions

What information do I need to know to prove or disprove an element of the policy violated?

What is the best question to ask to generate an informative answer?

Who has this information?

Can this information be found anywhere in the Investigation Report or File?

CONSIDER THE DISPUTED FACTS

- Questions will depend on what facts are in dispute
- Could be clear conflict between the parties, for example, “he said, she said”
- Parties might agree on what happened but dispute whether it was based on sex or sufficiently severe, pervasive and objectively offensive
- If students are legally old enough to consent to sexual contact, dispute might center on consent

MORE QUESTIONS TO ASK

- ✓ Will these questions help reach the goal of supporting or refuting the Investigative Report? *(If not, consider skipping it)*
- ✓ Will any of these questions generate an unpredictable response that does more harm than good?
- ✓ Who is being questioned and is there an element of their credibility that needs to be challenged?
- ✓ Are these questions posed in a respectful, non-confrontational way? *(Remember, this is not a courtroom...no "gotcha" moments)*

GUIDING PRINCIPLES

EMPATHY

Complainants, Respondents, and Witnesses may be bringing previous trauma to the hearing. Keep this in mind as you develop your questions.

DE-ESCALATION

Knowing there may be potential for adversarial and confrontational reactions, aim to de-escalate by creating questions that minimize strong responses.

RESPECT

The Parties and Witnesses are members of your school community. Remember this as you outline your approach.

CREATING QUESTIONS

Good questions are:

Open-
ended

Open-ended questions prompt the Party to share more broadly.

Non-leading
vs. Leading

Do not guide your own Parties to the answer you want to hear.

Singular

Avoid complicated, multi-part questions.

Clear

Ensure questions use the most clear, concise language aimed at arriving at the information needed.

Sensitive

Though questions need to be direct, consider emotions that may be evoked by asking. Practice empathy.

LEADING QUESTIONS

- Suggest the desired answer
- Prompt the witness or party's response

OPINION QUESTIONS

- Outside of someone's scope of knowledge
- Do not produce fact-based answers

LEADING	NON-LEADING	OPINION	ALTERNATIVE
<p>"You told John you didn't want to have sex, right?"</p>	<p>"What did you say to John about having sex with him?"</p>	<p>"Was John frustrated when you told him you didn't want to have sex with him?"</p>	<p>"What did John say or do when you told him you didn't want to have sex with him?"</p>

HEARSAY QUESTIONS

- Generally, witnesses may not be asked about what other people have said about a topic if the purpose of the question is to prove that the other person's statement is true
- Example hearsay question to a friend of Complainant (Sam):

“What did Sam tell you about John’s conduct on the night of the alleged incident?”

UNDERSTANDING RELEVANCE

DECISION-MAKER'S PERSPECTIVE

- Only relevant questions may be asked during the hearing process
- Before a witness or party answers the question, the Decision-Maker must first determine whether the question is relevant
- The Decision-Maker must explain any decision to exclude a question as irrelevant

This may be accomplished in one of two ways:

①

Questions may be submitted to the Decision-Maker to review prior to the hearing.

②

Decision-Makers may rule of each question before a Witness or Party answers at the hearing.

ADVISOR'S PERSPECTIVE

- Advisors may respectfully object to questions asked by the other Party's Advisor or asked by the Decision-Maker
- They are not determining relevance, but instead asking for a review of the question by the Decision-Maker

Advisors typically object for one of two reasons

①

The question is not relevant under Title IX Regulations

②

The question is leading, calls for opinion, or constitutes hearsay

WHAT IS NOT RELEVANT UNDER TITLE IX?



Questions about a Complainant's sexual predisposition



Questions about a Complainant's prior sexual history, except when:

- a) Questions are offered to prove someone other than the Respondent committed the alleged conduct
- b) Questions concern specific incidents of the Complainant's prior sexual behavior with respect to the Respondent are offered to prove consent



Privileged records and communication (*unless the Party or parent waived in writing*)

RELEVANT vs. NON-RELEVANT



Question or evidence that is likely to prove or disprove allegations made, something of consequence



Question or evidence that is not of consequence in proving or disproving alleged conduct occurred

PROBABLY RELEVANT

- A receipt from a restaurant showing the number of drinks consumed on the evening of an alleged sexual assault
- A question regarding an Respondent's prior arrests for Domestic Violence perpetrated against the Complainant

PROBABLY NOT RELEVANT

- A receipt from a restaurant showing a lunch order the Complainant had two weeks before an alleged sexual assault
- A question regarding an Respondent's prior arrests for Possession of Marijuana

CHARACTER WITNESSES

Are character witnesses relevant or irrelevant?

- They may be relevant, but their purpose is limited.
- Character witnesses typically speak to the credibility of a party.
 - Advisors can consider calling character witnesses that speak to the credibility of their own Party.
 - Advisors may challenge the credibility and/or scope of knowledge of the other Party's character witnesses during cross-examination.
- The Decision-Maker should know how to weigh the relevance of a character witness's statement while reviewing the Investigative Report and/or during the hearing.

THE LIVE HEARING

HEARING AGENDA

- Opening of the Hearing (Decision-Maker)
- Opening Statements (Party or Advisor)
- Introduction of Testimonial Evidence
 - Complainant's case
 - Respondent's case
 - Decision-Maker's examination of Parties and Witnesses
- Closing Arguments or Statements (Party or Advisor)
- Closing of the Hearing

OPENING OF THE HEARING

Facilitated by the Decision-Maker who will:

- Welcome Parties and Advisors to the hearing
- Discuss rules and decorum for all individuals involved in the hearing
- State the time
- Answer any procedural questions prior to the start of the hearing
- Proceed to opening statements

OPENING STATEMENTS

The Decision-Maker may ask the Parties or their Advisors for an opening statement

- Outlines the issues that the Party & their Advisor would like to refute
- Provides an overview of the facts & evidence
- Describes the evidence that supports their statements (or their Party's statements)
- Presents what the Party and their Advisor expect to prove during the hearing
- Typically, the Complainant gives the first opening statement, followed by the Respondent

Parties may waive their opening statement

TESTIMONIAL EVIDENCE: DIRECT & CROSS EXAMINATION



DIRECT AND CROSS-EXAMINATION

Complainant's Case

- Typically, the Decision-Maker will ask the Complainant to provide testimonial evidence first.
- Opportunity to present witnesses & party for direct examination
- Present new evidence (if any)
- Cross-examination of the Complainant & witnesses by the Respondent's advisor
- Advisors- Be alert & watch for irrelevant questions asked of your party or witnesses

DIRECT AND CROSS-EXAMINATION

Respondent's Case

- Opportunity to present Witnesses and Party for direct examination
- Present new evidence (if any)
- Cross-examination of the Respondent and Witnesses by the Complainant's advisor
- Advisors– Be alert and watch for irrelevant questions asked of your Party or Witnesses

DIRECT AND CROSS-EXAMINATION

Decision-Maker's Examination

- Opportunity for Decision-Maker to ask questions of the Parties and Witnesses
- Provides time for any clarification needed

CLOSING STATEMENTS

The Decision-Maker may ask the Parties or their Advisors for a closing statement

- Final statement by the parties or their advisors to the Decision-Maker
- Summarizes the relevant evidence & arguments
- Asks the Decision-Maker to find that the evidence will support the determination in that party's favor
- Typically, the Complainant gives the first closing, followed by the Respondent

Parties may waive their closing statement

CLOSING OF THE HEARING

Facilitated by the Decision-Maker who will:

- Announce that the parties have completed the submission of all evidence
- State the time
- Announce the hearing is closed
- Explain next steps and timeline
- Leave the hearing & prepare the written determination of responsibility

QUESTIONS?
