
Pre-hearing Refresher Training



MIAMI UNIVERSITY



Purpose

- » Briefly review select elements of previous TIX trainings
- » Opportunity to ask procedural and logistic questions of process advisors
- » Meet as a Board to select the Chair and make logistical decisions

General Principles that Govern Process

- Equitable treatment of parties
 - Approach the allegations with neutrality
 - Provide an equal opportunity to present evidence, witnesses, and their versions of the story.
- No stereotypes based on a party's status
- The Respondent is presumed not responsible for the alleged conduct
- Decision makers are free of conflict and bias

Impartiality, Bias, Conflict of Interest & Prejudgment

- **Impartiality** – basing a conclusion or decision on the facts rather than on a preference for one party over another; unbiased.
- **Bias** – a pre-disposition or pre-conceived opinion that prevents one from impartially evaluating facts

- **Conflict of Interest** – demonstrating bias or inability to be impartial because it will be to one's own personal benefit or other competing interest
- **Prejudgment** – reaching a conclusion before considering all relevant evidence

Order of Hearing

- Introductory statement by the Board chair
- Respondent's indication of responsibility
- Opening remarks by complainant and respondent
- Witness testimony and questions by parties' advisors and the Board
- Complainant questioned by the Board and the respondent's advisor
- Respondent questioned by the Board and the complainant's advisor
- Closing remarks by complainant and respondent
- Hearing concluded by the Board chair

Questioning Procedures

- The Board asks questions first. Board questions do not require a relevancy determination (still must be relevant questions).
- Cross-examination must be conducted directly, orally, and in real time by the **party's advisor** and never by a party personally.
- The Board Chair makes a determination of relevance for every question posed by an Advisor.
 - Parties/witnesses may not answer until a determination of relevance has been made.
- Parties, Advisors, and all others present at the hearing, are held to the rules of decorum at all times.

Refusing Cross-examination

- If a party or witness does not submit to cross-examination at the hearing, the Board must not rely on any statement of that party or witness in reaching a determination regarding responsibility.
 - However, the Board cannot draw an inference regarding responsibility based solely on a party's or witness's absence from the hearing or refusal to answer cross-examination or other questions.

Preponderance of the Evidence

- Preponderance of the evidence is met if the decision-maker believes the evidence shows the person charged is more likely than not—more than 50% likely to be—responsible.
- It is the **quality** of the evidence that must be weighed.
 - Quality may or may not be identical with quantity or the greater number of witnesses.

Types of Evidence

Physical Evidence:

- Objects or things used to prove an incident occurred

Documentary Evidence:

- Any evidence that is written down, on paper or electronically

Demonstrative Evidence:

- Evidence that represents or preserves a piece of physical evidence

Verbal Evidence:

- Oral report of memories of a individual's experiences or observations related to the time and place of the incident under investigation

Evidence in a Title IX Sex Harassment investigation can be 'direct' or 'circumstantial'

Direct Evidence: Doesn't require drawing a conclusion/inference to show that something happened.

- *"I was in the bedroom and saw Nolan push Kelly into the corner and kiss Kelly. I heard Kelly say, "Stop," but Nolan just laughed. Then I saw Kelly smack Nolan and run out of the room crying."*
 - What the witness reports personally seeing and hearing is direct evidence that Nolan assaulted Kelly and was met with Kelly's self-defense.

Circumstantial Evidence: Requires drawing a conclusion/inference based the circumstances to show something happened.

- *"I was in the living room when I saw Nolan and Kelly go in the bedroom. A few minutes later, Kelly ran out of the bedroom crying. Then Nolan came out with a big red mark on their cheek."*
 - The witness didn't see/hear what happened in the bedroom, but we **could** conclude/infer from what the witness saw/heard in the living room that Nolan assaulted Kelly in the bedroom, and was struck in self defense.

Why Does Relevance Matter?

- The goal is a truth-seeking mission; gather everything relevant so that a neutral decision maker can reach an accurate determination based on the information presented during a hearing.
- The purpose of having restrictions placed on evidence that can be introduced is to prevent the fact finders from making decisions based on factors other than what is relevant.

What is Relevant?

“The final regulations do not define relevance, and the ordinary meaning of the word should be understood and applied.”

Generally, evidence is relevant if:

- It has any tendency to make a fact more or less probable than it would be without the evidence; and
- The fact is of consequence in proving or disproving the allegations.

Determining Relevance:

1. Review the evidence being offered.
2. Consider the allegations of the Title IX complaint.
3. Ask yourself whether the evidence being offered has the potential to prove or disprove an incident under investigation.

Determination of relevance requires you to apply your training, logic, experience, education, and expertise to your decision-making process.

Exceptions to Relevance

Must consider all relevant evidence EXCEPT:

1. Complainant's sexual behavior (with two narrow exceptions)
2. Information protected by a legal privilege
3. Party's treatment records (absent voluntary written waiver by the party)

When is sexual behavior relevant?

Cross-examination must **EXCLUDE** evidence of the Complainant's "sexual behavior or predisposition" **UNLESS**

- its use is to prove that someone other than the Respondent committed the conduct, OR
- it concerns specific incidents of the complainant's sexual behavior with respect to the respondent and is offered to prove consent

Rape shield protections do not apply to Respondents

- "evidence of a pattern of inappropriate behavior by an alleged harasser must be judged for relevance as any other evidence must be."

Weighing the evidence

The Regs require the decision-maker to objectively evaluate only “relevant” evidence during the hearing and when reaching the determination regarding responsibility.

Considerations:

- Is it corroborated?
- Is there a reason the source might not be reliable?
- Is it logical given other established facts?

The finding

What goes on the scale?

- Relevant evidence received from credible sources

What does not go on the scale?

- A claim of ignorance about policies
- The student's motivation or intent
- A student choosing not to answer questions in a hearing
- Assumptions that are based on information that was not presented or available
- Your "gut feeling"

