



Effective Questioning Techniques for Title IX Hearings

Melissa M. Carleton
Partner/Higher Ed Chair
Bricker & Eckler LLP
mcarleton@bricker.com



1

Our Objectives Today

- Understand hearing objectives for decision-makers versus advisors
- Review the relevancy standard in the regulations
- Discuss different types of questioning styles and when each is appropriate
- Abide by decorum standards while asking difficult questions
- Strategize regarding questioning goals, and evolve that strategy based on a witness's response

2

Quick Disclaimer

- Advisors who are lawyers may approach hearings differently.
- This training is meant to assist institutional-appointed advisors who are not licensed attorneys, but may be helpful for attorneys also.

3

Audience Poll #1

What is your role?

- A. Title IX Coordinator
- B. Decision-Maker (Hearing Officer/Panel Member)
- C. Investigator
- D. Student Conduct
- E. Advisor
- F. Other

4

Audience Poll #2

What is your experience level with Title IX hearings since August 14, 2020?

- A. Have seen many
- B. Have seen one or two
- C. Have never seen one

5

There are Two Types of Questioners

- Decision-Makers
- Advisors for the Parties

The ultimate goal is the same: to get the best evidence out on the table for the Decision-Maker to consider.

6

Decision-Makers: Your Role

- Ask questions to ensure you have all the information you need to make a good decision.
- Make relevancy rulings after each question asked by an advisor.

7

Advisors: Your Role

- Ask relevant questions designed to highlight your party's perspective on the situation.
- Complainant's advisor: Help the decision-maker see that all of the elements of the alleged violation are present.
- Respondent's advisor: Help the decision-maker see that at least some of the elements are not present.

8

Relevancy is the Touchstone

- There are no “rules of evidence” in a Title IX hearing.
- Relevancy is not defined in the regulations, but the regulations do list things that are not permissible evidence.
- Preamble to the 2020 regulations say that relevant evidence is “probative of any material fact concerning the allegations.” (page 30343)

9

What Isn't Relevant (1 of 2)

- Privileged information without waiver of that privilege
- Medical/psychological records without written consent for inclusion in the case file

10

What Isn't Relevant (2 of 2)

- Questions and evidence about the complainant's sexual predisposition or prior sexual behavior, unless:
 - Offered to prove that someone other than the respondent committed the conduct alleged; or
 - 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

11

No Similar Respondent Protection

- What about a respondent's sexual predisposition or prior sexual behavior?
 - Subject to the relevancy test like any other evidence.
 - Look for policy language on "prior conduct" or "pattern" behavior?

12

Relevancy Determinations

- Decision-Makers must orally state, after every advisor question, whether the question is relevant
 - If it isn't, I recommend you discuss it with the advisor. Sometimes questions can be reformulated or narrowed to be relevant.

13

Basis for Choosing Questions

- What are the elements of a policy violation?
- What facts are disputed?
- What facts are undisputed?
- What inconsistencies do I need to explore as a decision-maker, or highlight as an advisor?
- What is the crux of the case?

14

A Note for our Lawyer Friends

- Everything in the investigation file or hearing packet is considered to be admitted at the hearing on direct.
- You don't need to lay an extensive foundation – just enough so everyone can understand what you're talking about.

15

Example Policy Language: Elements of Sexual Harassment

- Unwelcome Conduct Sexual Harassment must include all:
 - Unwelcome conduct
 - On the basis of sex
 - Severe
 - Pervasive
 - Objectively Offensive
 - Effectively denies a person equal access to the recipient's education program/activity

16

Agreement on the Elements?

- Do both parties agree on any of the elements?
- Do the parties disagree on any of the elements?
 - Where the parties disagree, is one side's version questionable?
 - Can one party's version be corroborated by other evidence?
- If impact is an element, is there sufficient information in the record to demonstrate the required impact on the complainant?

17

Open-Ended Questions: Examples

- “Tell me more about...”
- “What happened next? And then what happened?”
- “If I were a camera in the room, what would I see?”
- “Can you describe for me...”

18

Open-Ended Questions: When to Use

- Use when the investigative report does not have enough detail for you to compare statements from different parties/witnesses
- Use when you want to get a sense of how the person describes an event

19

Closed-Ended Questions: Examples

- “Were you at the restaurant by 9:00?”
- “Did you kiss them back?”
- “Were you feeling the effects of alcohol at that point?”

20

Closed-Ended Questions: When to Use

- Confirm undisputed facts on the record
- Get a solid answer, especially on yes/no questions relating to the elements of a case
- Clarify where statements are ambiguous, vague, or wandering
- We'll take about closed-ended questions to address certain topics shortly.

21

Challenging Questions: Examples

- “You said X, then said not X.” Consider a spectrum of potential follow up questions -
 - “Help me understand why...” (neutral – good for HO)
 - “Which is true?” (suggestion that one is false)
 - “Which is not true?” (accusation that one is false)

22

Challenging Questions: More Examples

- “Would it surprise you to learn...?”
- “Witness X said this. Do you agree?”
- “Witness X said this. Is Witness X lying?”
- “Can you help me understand how it could be the case that...”

23

Challenging Questions: When to Use

- Information is contradictory
- Someone may be lying or giving incomplete facts in a misleading manner
- A description is implausible on its face

24

Specific Details: Decision-Maker Preface

- To maintain neutrality, it may be helpful for the hearing officer to preface certain questions with an explanation as to why they are important:
 - Alcohol/drug use – for an incapacitation analysis or to determine effects on memory
 - Consent – because very specific information about movements and communications must be analyzed
 - Dress – because who took what off may be relevant to consent

25

Specific Details: Verbal Consent

- “What did you say to them and what did they say to you?”
- “Did they ask you if you wanted to...”
- “Did they ask you if it was OK to...”
- “Did they make any sounds during...? How would you describe those sounds?”
- “Did you discuss the sexual activity beforehand? Afterwards?”

26

Specific Details: Non-Verbal Consent

- “Who took off whose clothes?”
- “How was their body positioned? How was yours positioned? Where was their body’s weight?”
- “Where were they touching you at that point? Where were their hands? Where were their legs?”
- “Were they kissing you at this point? Were you kissing them?”

27

Specific Details: Alcohol Intake

- “How much did you have to drink?”
- “Which size solo cup were you using? How many fingers of alcohol were poured?”
- “Did you finish the cup/bottle?”
- “Did anyone else drink from the same container?”

28

Specific Details: Intoxication Level

- “Were you experiencing any effects of the alcohol at this point? What were they?”
- “Did you need help walking? Could you stand without leaning on something or someone?”
- “Could the person navigate the stairs? Did they know where they were going?”
- “Was the person coherent? Did they seem to understand what was going on?”

29

Specific Details: Drug Use

- “Did you use any illegal drugs that evening that may have affected your cognitive abilities to perceive what was happening?”
- “Did you use any legal drugs that may have affected your cognitive abilities to perceive what was happening?”
 - Anything make you sleepy?
 - Anything you aren’t permitted to mix with alcohol?

30

Hearing Decorum

- Each institution may have its own decorum rules. Check the policy/procedures.
- Typical rules:
 - Don't be repetitive
 - Don't be harassing or raise your voice
 - Don't use personal insults or be hostile

31

Hearing Decorum: Don't Be a Jerk

- When advisors are jerks, it adds stress to the situation for the parties (including your own party). There is always a better way to ask a question – even pointedly – without being a jerk.
- Decision-Makers have the authority to remove advisors from the hearing if they are not abiding by decorum rules or are being disruptive.

32

Coming Prepared

- As you write your questions, include page numbers so that the exhibits can be pulled up on the screen.
- There is no need to read exhibits into the record; questions should be more than “Can you please read from...”
- Advisors should make sure they attend pre-hearing conferences (if offered) so they have the best information on what to expect.

33

Opening and Closing Statements

- Not every institution permits these. Check the policy/procedures.
- Tips:
 - Opening statements might highlight the elements you want to focus on, the credibility concerns you believe exists, and the things you believe you can prove.
 - Closing statements are helpful when they point out discrepancies on key elements.

34

Next Title IX Webinar

- August 18th, 3:00 ET – Proposed Title IX Regulations

See www.InnovativeEducators.org/pages/events for upcoming training!

35



Melissa M. Carleton, Bricker & Eckler LLP

<http://www.linkedin.com/in/melissacarleton>

mcarleton@bricker.com

Twitter: @MCHigherEd

36