



# OHIO DEPARTMENT OF HIGHER EDUCATION DECISION-MAKER TRAINING

Part Two of Two

TITLE IX DECISION-MAKER TRAINING

FEBRUARY 16, 2020



**Bricker & Eckler**  
ATTORNEYS AT LAW

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# Disclaimers



## *We can't help ourselves. We're lawyers.*

- We are not giving you legal advice. Consult with your legal counsel regarding how best to address a specific situation.
- This training does not cover institution-specific grievance procedures, policies, or technology.
- Use the chat function to ask general questions and hypotheticals.
- This training is not being recorded, but we will provide you with a packet of the training materials to post on your websites for Title IX compliance.

# Presentation Rules

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## *Questions are encouraged*

- “For the sake of argument...” questions help to challenge the group, consider other perspectives, and move the conversation forward
- Be aware of your own responses and experiences
- Follow-up with someone if you have any questions or concerns
- Take breaks as needed

# Aspirational Agenda



## Day One

- 1:00-2:15 Introduction, Title IX Overview, and Discussion of Bias, Conflicts-of-Interest, and Serving Impartially
- 2:15-2:30 Break/Q&A
- 2:30-3:45 Relevance and Relevance Hypotheticals
- 3:45-4:00 Break/Q&A
- 4:00-5:00 Continue Relevance Discussion, Live Cross-Examination Theory and Practice

## Day Two

- 1:00-2:00 Observe a Live Cross-Examination Hearing and Debrief
- 2:00-2:15 Break/Q&A
- 2:15-3:45 Discussion of the Hearing and Evaluating Evidence and Credibility
- 3:45-4:00 Break/Q&A
- 4:00-5:00 Hearing Toolbox and Writing a Decision

# Posting these Training Materials?

**YES – Post away!**

- The “recipient” is required by §106.45(b)(10)(i)(D) to post materials used to train Title IX personnel on its website
- We know this and will make this packet available to you electronically to post.



# **Live Cross- Examination Presentation**

# Live Cross-Examination Presentation Disclaimer

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*Disclaimer: The following live cross-examination presentation is not based on any actual cases we have handled or of which we are aware. Any similarities to actual cases are coincidental.*

# **Debrief with Bricker Attorneys**

# **The Hearing**

# The Setup

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- Can have in one room if a party doesn't request separate rooms and recipient chooses to do so.
- Separate rooms with technology allowing live cross examination at the request of either party
- “At recipient’s discretion, can allow any or all participants to participate in the live hearing virtually” (Preamble, pp. 30332, see also 30333, 30346) explaining 34 C.F.R. §106.45(b)(6)(i)

- Discretion to provide opportunity for opening or closing statements
- Discretion to provide direct questioning (open-ended, non-cross questions)
- Cross-examination must to be done by the party's "advisor of choice and never by a party personally."

# Process

(2 of 2)



- An advisor of choice may be an attorney or a parent (or witness) (Preamble, p. 30319)
- Discretion to require advisors to be “potted plants” outside of their roles cross-examining parties and witnesses. (34 C.F.R. 106.45(b)(6)(i) and Preamble, p. 30312)

# Relevancy Reminder

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Per 34 C.F.R. 106. 45(b)(6)(i):

- “Only relevant cross-examination and other questions may be asked of a party or witness.”
- “[C]ross examination must focus only on questions that are relevant to the allegations in dispute.” (Preamble, p. 30319)

# Relevancy Determination for Every Question

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Party or witness cannot answer a question until the decision-maker determines whether it is relevant

- From the Regulations
  - 34 C.F.R. 106.45(b)(6)(i)
- Requires decision-makers to make “on the spot” determinations and explain the “why” if a question or evidence is not relevant

## From the Regulations and the Preamble

Must provide an advisor of the recipient's choice

- If a party does not have an advisor present at the live hearing, the recipient **must provide** without fee or charge to that party, an advisor **of the recipient's choice**, who may be, but is not required to be, an attorney, to conduct cross-examination on behalf of that party.
  - 34 C.F.R. §106.45(b)(6)(i)
  - Preamble, p. 30339

## According to the Preamble, p. 30342

- Advisors do not require Title IX Training, however a recipient may train its own employees whom the recipient chooses to appoint as party advisors
- A party cannot “fire” an appointed advisor
- “But, if the party correctly asserts that the assigned advisor is refusing to ‘conduct cross-examination on the party’s behalf’ then the recipient is obligated to provide the party an advisor to perform that function, whether counseling the advisor to perform the role or stopping the hearing to assign a different advisor”

## According to the Preamble, p. 30343

Can restrict discussions of relevance by parties and advisors:

- Regulations permit a recipient to adopt rules that (applied equally) do or do not give parties or advisors the right to discuss relevance determinations with the decision-maker during the hearing.
- “If a recipient believes that arguments about a relevance determination during a hearing would unnecessarily protract the hearing or become uncomfortable for parties, the recipient may adopt a rule that prevents parties and advisors from challenging the relevance determination (after receiving the decision-maker’s explanation) during the hearing.”

# Recording the Hearing

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- Now required to be audio, audio visual, or in transcript form
- Decision-makers have to know how to use any technology you have

# The Hearing

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- Order of questioning parties and witnesses – not in regulations
  - Consider time restraints on witnesses
  - Questioning of Complainant
  - Questioning of Respondent

# **Objectively Evaluating Evidence and Resolving Credibility Disputes**

# Objectively Evaluating Relevant Evidence



## From the Preamble

- No discussion of how to do this in the regs
- Factors to evaluate, according to the Preamble:
  - “consistency, accuracy, memory, and credibility (Preamble, p. 30315)
  - “implausibility, inconsistency, unreliability, ulterior motives, and lack of credibility” (Preamble, p. 30330)
- Always use your standard of proof as a guide for your decision

# Standard of Proof

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- Preponderance of the Evidence or Clear & Convincing
  - Must use same standard for formal Title IX complaints against both students and employees (including faculty) for all policies and procedures with adjudication for sexual harassment complaints (e.g., union grievances procedures, faculty conduct)
  - Must begin with a presumption of no violation by Respondent.

# #1 Keep An Open Mind

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- Keep an open mind until all statements have been tested at the live hearing
- Don't come to any judgment, opinion, conclusion or belief about any aspect of this matter until you've reviewed or heard all of the evidence AND consider only the evidence that can remain (statements in the record might have to be removed from consideration if not tested in live-hearing)

# #2 Sound, Reasoned Decision

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- You must render a sound, reasoned decision on every charge
- You must determine the facts in this case based on the information presented
- You must determine what evidence to believe, the importance of the evidence, and the conclusions to draw from that evidence

# #3 Consider All/Only Evidence

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- You must make a decision based solely on the relevant evidence obtained in this matter and only statements in the record that have been tested in cross-examination
- You may consider nothing but this evidence

# #4 Be Reasonable and Impartial

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- You must be impartial when considering evidence and weighing the credibility of parties and witnesses
- You should not be swayed by prejudice, sympathy, or a personal view that you may have of the claim or any party
- Identify any actual or perceived conflict of interest

# #5 Weight of Evidence



- Trained decision-makers will determine the weight or credibility to be given to each piece of evidence, and how to assign weight (Preamble, p. 30331)
- The **quality** of evidence is not determined by the **volume** of evidence or the number of witnesses or exhibits.
  - It is the weight of the evidence, or its strength in tending to prove the issue at stake that is important
  - You must evaluate the evidence, as a whole, based on your own judgment

# Weight of Evidence Example



The preamble provides in the discussion:

“[W]here a cross-examination question or piece of evidence is relevant, but concerns a party’s character or prior bad acts, under the final regulations the decision-maker cannot exclude or refuse to consider the relevant evidence, but may proceed to objectively evaluate that relevant evidence by analyzing whether that evidence warrants a high or low level weight or credibility, so long as the decision-maker’s evaluation treats both parties equally by not, for instance, automatically assigning higher weight to exculpatory character evidence than to inculpatory character evidence.” (Preamble, p. 30337)

# #6 Evaluate Witness Credibility

## (1 of 3)

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- You must give the testimony and information of each party or witness the degree of importance you reasonably believe it is entitled to receive.
- Identify all conflicts and attempt to resolve those conflicts and determine where the truth (standard or review/proof) lies.

# #6 Evaluate Witness Credibility

## (2 of 3)

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- Consider the reasonableness or unreasonableness, or probability or improbability, of the testimony.
- Does the witness have any motive?
- Is there any bias?

# #6 Evaluate Witness Credibility

## (3 of 3)

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- Credibility is determined fact by fact, not witness by witness
  - The most earnest and honest witness may share information that turns out not to be true

# #7 Draw Reasonable Inferences

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- Inferences are sometimes called “circumstantial evidence.”
- It is the evidence that you infer from direct evidence that you reviewed during the course of reviewing the evidence.
- Inferences only as warranted and reasonable and not due to decision to opt out of cross-examination or questioning.

# #8 Standard of Evidence (1 of 2)



Use your standard of evidence as defined by your policy when evaluating whether someone is responsible for each policy violation and ALWAYS start with presumption of no violation.

- Preponderance of the evidence: a fact is more likely than not to be true (Preamble, p. 30373 fn. 1409)
- Clear and convincing: a fact is highly probable to be true (Preamble, p. 30373 fn. 1409)

# #8 Standard of Evidence (2 of 2)

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- Look to all the evidence in total, and make judgments about the weight and credibility, and then determine whether or not the burden has been met.
- Any time you make a decision, use your standard of evidence

# #9 Don't Consider Impact



- Don't consider the potential impact of your decision on either party when determining if the charges have been proven.
- Focus only on the charge or charges brought in the case and whether the evidence presented to you is sufficient to persuade you that the respondent is responsible for the charges.
- **Do not consider the impact of your decision.**

# **Hearing Toolbox: Best Practices for Conducting a Title IX Hearing**

# Hearing Toolbox: Prehearing Conference

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- Pre-hearing conference
  - Helps inform parties and set expectations
  - Have separate conference with each party and the party's advisor
- Provides opportunity to address issues common to both parties:
  - Parties and their representatives will often not understand the process: help educate and answer questions (again, know your institution's grievance process)
  - Jurisdictional challenges: discuss the decision made by TIXC and maybe tell advisor that you will provide the opportunity for advisor to state on the record at the hearing

# Hearing Toolbox: Pre-Hearing Conference

(Cont.)



- Parties may want to add evidence and witnesses that were not in the investigation for the first time at the hearing (perhaps outside of the process)
  - What does this look like under your process?
  - When should a case return to the investigation phase?
  - Try to anticipate potential issues before the Pre-Hearing Conference and make sure to work with legal counsel

# Hearing Toolbox: Use of a Script

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- Responsible for running an orderly and fair hearing
- A script can serve as a checklist of everything the decision-maker wants to cover and a cheat sheet for reminders of allegations, alleged policy violations, and elements of the alleged policy violations
- Helps ensure rights, responsibilities, and expectations are set
- Helps provide consistency between one hearing and the another
- Helps provide transparency
- Can even have a separate one for prehearings

# Hearing Toolbox: Decorum

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- Remind parties about expectations of decorum
- Evaluating each question for relevancy before a party or witness can answer can help set the tone

# Hearing Toolbox: Breaks

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- Preamble discusses the use of breaks to allow parties to recover from panic attacks or emotional questioning
- Also helpful to reset tone and reduce emotion and tension
- Can use to review policy and procedures to address relevancy issues that arise

# Hearing Toolbox: Questions

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- Do you have the information you need on each element to be able to evaluate the claims?
- Consider neutral phrasing of questions:
  - “In the report you said... Help me understand...”
  - “You stated... Tell me more about that.”
  - “Could you give more information about what happened before/after...”

# Hearing Toolbox: Considerations for Panels

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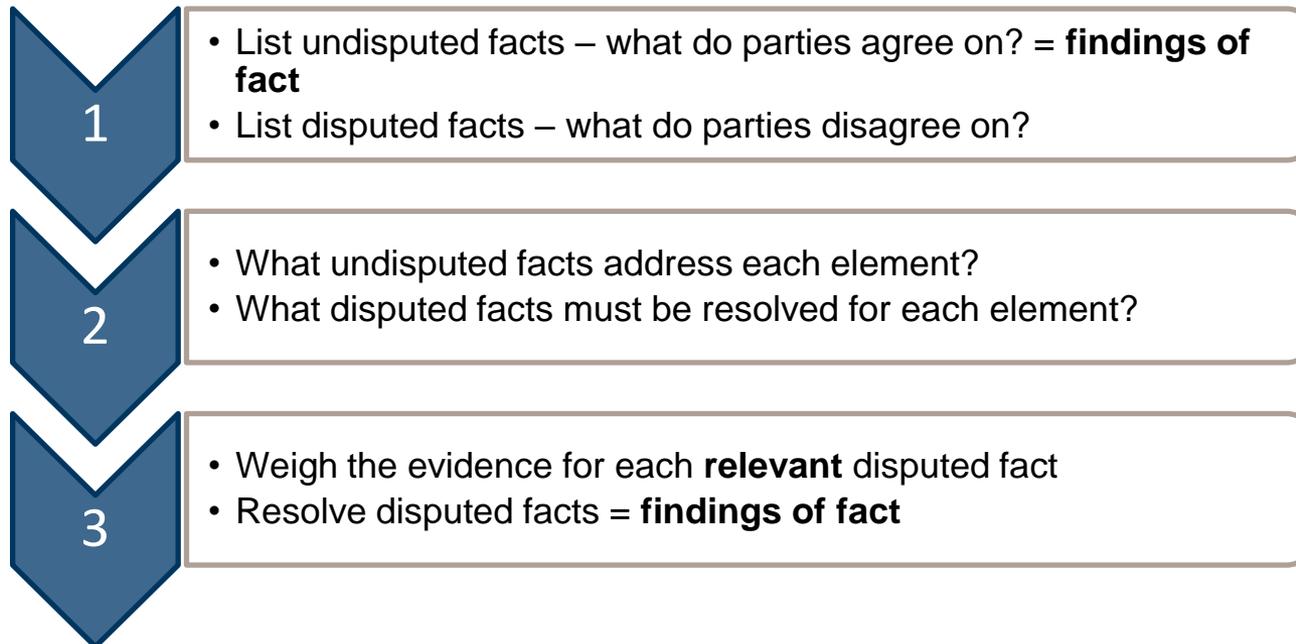
Hearing panel:

- Identify one person on the panel to make relevancy rulings
- Identify one person to draft the decision (for review of other panel members)
- Determine how panel members will ask questions (e.g., will only one person ask the questions or will panelists take turns?)

# **The Written Decision**

# Resolving Factual Disputes

## Fact Finding Process:



# Written Determination in 106.45(b)(7)(ii) (1 of 7)

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Written determination must include:

- Identification of the allegations potentially constituting sexual harassment;
- A description of the procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence; and hearings held;

# Written Determination in 106.45(b)(7)(ii) (2 of 7)

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- Key elements of potential policy violation
  - Include key elements of any potential policy violation so parties have a complete understanding of the process and information considered by the recipient to reach its decision – should “match up” with decision (Preamble, p. 30391)

# Written Determination in 106.45(b)(7)(ii) (3 of 7)

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- Purpose of key elements of procedure
  - Purpose of key elements of procedural steps “so the parties have a thorough understanding of the investigative process and information considered by the recipient in reaching conclusions.”  
(Preamble, p. 30389)

# Written Determination in 106.45(b)(7)(ii)

(4 of 7)



- A statement of, and rationale for, the results as to each allegation, including:
  - determination regarding responsibility,
  - any disciplinary sanctions the recipient imposes on the respondent,
  - and whether remedies designed to restore or preserve equal access to the recipient's education program or activity will be provided by the recipient to the complainant; and...

# Written Determination in 106.45(b)(7)(ii)

(5 of 7)



- Statement of rationale
  - Requiring recipients to describe, in writing, conclusions (and reasons for those conclusions) will help prevent confusion about how and why a recipient reaches determinations regarding responsibility (Preamble, p. 30389)
  - The requirement of “Transparent descriptions of the steps taken in an investigation and explanations of the reasons why objective evaluation of the evidence supports findings of facts and conclusions of facts” helps prevent injection of bias (Preamble, p. 30389)

# Written Determination in 106.45(b)(7)(ii)

(6 of 7)



- Institution's procedures and permissible bases for complainant and respondent to appeal
- MUST BE provided to both parties in writing contemporaneously (106.45(b)(7)(ii))
  - Receiving decision simultaneously will ensure both parties have relevant information about the resolution of the allegations

# Written Determination in 106.45(b)(7)(ii)

(7 of 7)



Reference to code of conduct not prohibited

- “Recipients retain discretion to also refer to in the written determination to any provision of the recipient’s own code of conduct that prohibits conduct meeting the [Title IX definition] of sexual harassment; however” the final regulations apply to recipient’s response to Title IX portion only. (Preamble, p. 30389)

# Goals

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- Be consistent in terminology
- Be clear as to the source of information.  
Compare:
  - “Bob stated that this happened.”
  - “This happened.”

# Unambiguous

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- Could someone unfamiliar with the incident pick up the decision and understand what happened?
- Make no assumptions that the reader will understand certain aspects of the community
- Write for a judge and jury to understand with no prior background

# Relevance

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- Include any decisions made that exclude information as not relevant and the explanation given in hearing
- Check to ensure that your report does not contain any information you are prohibited from including?

# Sensitive

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- Will the parties feel heard?
- Will the parties feel blamed?
- Will the parties feel vilified?
- Will the tone otherwise inflame the parties unnecessarily?
- Maintain neutral, evidence-driven tone.

# Empathetic

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- Maintain a non-judgmental tone
- Stay away from charged words of advocacy:
  - Clearly/obviously
  - Innocent/guilty
  - Victim/perpetrator
- Watch your adjectives and adverbs – unless they are in a quote
- Recognize the impact of your words

# Specific

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- Set the scene visually (will help identify inconsistencies in stories)
- Use quotation marks carefully
- Include details to the level that you can thoroughly understand what it looked like
- Be careful of pronoun usage so that we always know who is saying or doing what

# Advanced Decision-Maker Trainings



## Want to Practice?

### ➤ **Advanced Decision-Maker Training (Option #1)**

- February 25<sup>th</sup>, 1:00 p.m. to 5:00 p.m.
- Additional Hypotheticals
- Practice Serving as Decision-Makers

### ➤ **Decision-Maker Writing Workshop**

- February 26<sup>th</sup>, 1:00 p.m. to 3:00 p.m.

### ➤ **Advanced Decision-Maker Training (Option #2)**

- March 18<sup>th</sup>, 1:00 p.m. to 5:00 p.m.
- Additional Hypotheticals
- Practice Serving as Decision-Makers

### ➤ **Decision-Maker Writing Workshop**

- February 26<sup>th</sup>, 1:00 p.m. to 3:00 p.m.

**Questions?**

# Additional information available at:

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**Title IX Resource Center** at [www.bricker.com/titleix](http://www.bricker.com/titleix)

**Free upcoming webinars** at [www.bricker.com/events](http://www.bricker.com/events)

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