

Relevance and Decorum in a Title IX Hearing

1. FINAL Relevance and Decorum Power Point with Audio 08.12.2020.jtg

1.1 SCI Welcome & Legal disclaimer



Notes:

1.2 Relevance and Decorum in a Title IX Hearing



**STUDENT
CONDUCT
INSTITUTE**

Relevance and Decorum in a Title IX Hearing

 **John Graff, Partner**
Hirsch Roberts Weinstein LLP
jgraff@hrwlawyers.com | 617-348-4356

August 2020

1.3 Learning objectives

Learning objectives

- ✓ L01: Understand the importance of maintaining decorum during TIX hearings
- ✓ L02: Learn how to establish proper decorum prior to hearings
- ✓ L03: Learn how to maintain decorum through enforcement of hearing rules
- ✓ L04: Learn how to make fair, reasoned relevance determinations

2

1.4 Remember!



Remember!

- 'Beginner level' presentation aimed at helping to establish fundamental understanding of how to preserve decorum and determine relevance.
- Regulation is brand new - it will take higher ed some time to get comfortable with managing hearings.
- Anchoring to fundamentals will be key to ensuring compliance.

3

1.5 Importance of Decorum During Title IX Hearings



Importance of Decorum During Title IX Hearings

Learning Objective No. 1

4

1.6 Decorum is a corner stone of equity under the new Regulation

Decorum is a corner stone of equity under the new Regulation

*It is not that you are allowed to establish the rules. It is that you are **EXPECTED** to establish the rules. And to ensure they are followed.*

- ✓ The purpose of a hearing is to ensure **equitable treatment** in the review of sexual misconduct allegations.
- ✓ **Equitable treatment** requires establishment and enforcement of rules governing proceeding decorum.

5

1.7 Snapshot comparison of proper and poor decorum

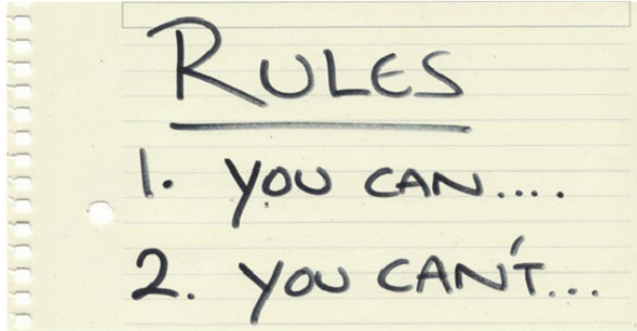
Snapshot comparison of proper and poor decorum

Proper	Poor
➤ clear communication about expectations ➤ efficient hearing reflecting respect toward participants ➤ hearing officer can focus on making appropriate evidentiary rulings and creating an adequate record ➤ the parties can adequately put on their cases and test the evidence	➤ disrespectful or hostile speech/conduct toward participants ➤ examination or testimony regarding irrelevant matters wades into unnecessarily inflammatory territory ➤ efficiency is slowed due to lack of hearing structure ➤ participants fail to comply with hearing officer's reasonable instructions

6

2. Establishing Decorum

2.1 Establish Proper Decorum Prior to Hearings



Establish Proper Decorum
Prior to Hearings

Learning Objective No. 2

7

2.2 Untitled Slide

Some things to remember when setting decorum

Title IX hearings are educational proceedings.

- The purpose of a hearing is to effectuate the intent of Title IX.
- The purpose of Title IX is to ensure equal access to educational opportunities through a process that equitably addresses allegations of sexual misconduct.

Title IX hearings are NOT criminal or civil trials.

- A Title IX proceeding is not a court of law – it is an administrative proceeding designed to promote individual accountability for conduct that violates policy.
- Neither federal nor state rules of evidence control a Title IX proceeding. The Regulation and school hearing policies govern a proceeding.

The Regulation contemplates flexibility.

- The Regulation was “purposefully designed...to allow [schools] to retain flexibility to adopt rules of decorum that prohibit any party advisor or decision-maker from questioning witnesses in an abusive intimidating, or disrespectful manner.” 85 Fed. Reg. 30026, 20319 (May 19, 2020)

8

2.3 Know what is required of participants:



Know what is required of participants:

- ✓ Maintain physical distance
- ✓ Refer to people by *their* names
- ✓ Ask questions in a neutral tone
- ✓ Ask relevant, probative questions
- ✓ Wait for rulings
- ✓ Keep it moving
- ✓ Comply with hearing officer's instructions
- ✓ Remain cool, calm, and collected - at all times
- ✓ Remember, this is not a jury trial so no theatrics necessary

9

2.4 Know what is prohibited from participants:



Know what is prohibited from participants:

- ✓ Do not intentionally mis-name or mis-gender individuals
- ✓ Do not act abusively or disrespectfully toward any individual
- ✓ Do not yell, scream, badger, or physically "lean in"
- ✓ Do not approach parties or witnesses without permission
- ✓ Do not attempt to intimidate
- ✓ Do not use profanity
- ✓ Do not make irrelevant *ad hominem* attacks
- ✓ Do not ask repetitive questions unnecessarily
- ✓ Do not forget the purpose of the proceeding

10

2.5 Hold pre-hearing conferences

Hold pre-hearing conferences

Prior to conference	During conference	Following conference
➤ Review messaging to community regarding cross-examination procedure ➤ Contact participants to schedule conference* ➤ Advise participants to review policy ➤ Request parties to conference regarding policy questions and anticipated evidentiary issues ➤ Review policy and draft pre-hearing conference outline	➤ Confirm participant opportunity to review procedure/decorum requirements in policy ➤ Explain decorum and evidence rules ➤ Invite questions regarding rules for clarification purposes ➤ Confirm participant understanding of rules and agreement to comply ➤ Address anticipated evidentiary issues, including relevance concerns	➤ Email participants to document discussion at pre-hearing conference, including agreement to follow decorum procedures ➤ Resolve and communicate pending decorum or procedural issues, to the extent possible ➤ At the start of the hearing, remind participants of obligations (in summary form) and their prior agreement to comply

11

2.6 Maintain Decorum through Enforcement of Hearing Rules



Maintain Decorum through Enforcement of Hearing Rules

Learning Objective No. 3

12

3. Enforcement & Relevance

3.1 Keys to effective enforcement

Keys to effective enforcement

The Regulation sees decorum as the inseparable partner of fairness, and the hearing officer as the guardian of both.



- Set aside personal feelings about the Regulation
- Have a strong working knowledge of relevant policies and the Regulation
- Communicate decorum expectations prior to a hearing
- Work to establish expectations around presentation of highly charged evidentiary issues
- Apply the rules throughout the entire hearing – *equitably and consistently*

13

3.2 Tips for addressing decorum issues in real time

Tips for addressing decorum issues in real time



✓ Remain calm and "evenhanded" ✓ Speak with neutral tone ✓ Articulate issues clearly and succinctly ✓ Provide participants an opportunity to respond ✓ Render determination with respect to issues ✓ Ensure record/hearing officer notes are clear with respect to issues and resolutions ✓ If appropriate, remind participants of their agreement to comply with the rules ✓ If necessary, consider exercising removal option (<i>see next slide</i>)	✓ Do not get flustered or avoid issues ✓ Do not become intimidated ✓ Do not get tied up in debate ✓ Do not allow conduct once addressed to continue ✓ Do not allow single issues to influence decision making regarding unrelated matters ✓ Do not forget the flexibility the Regulation provides to the cross-examining advisor when it comes to relevance (<i>see next section</i>)
--	---

14

Notes:

3.3 Warning and removal

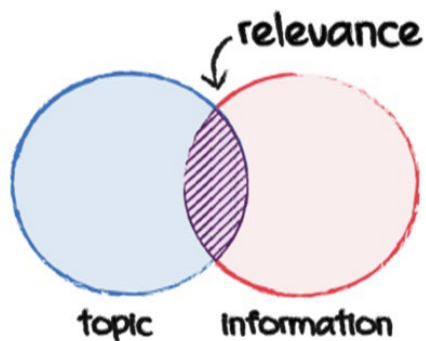
Warning and removal

Decorum may be enforced through removal of an advisor, where the advisor refuses to comply with hearing rules. 85 Fed. Reg. 30026, 30320 (May 19, 2020).

- Badgering, yelling, profanity, *ad hominem* attacks, and refusal to comply with instructions to refrain from continuing prohibited conduct may be grounds for removal.
- Consider advising participants during a pre-hearing conference what will constitute grounds for removal and sending follow-up documentation.
- If conduct violates decorum, warn the offending person and ensure the record reflects the warning. If conduct repeats, depending on severity, consider issuing a second warning or initiate removal.
- Ensure the hearing record reflects any action taken against an advisor, including grounds therefor and steps taken to preserve party rights.
- Notify institution leadership of any removal and the basis therefor, and reflect such action in the final written decision.
- Remember – the fact that an advisor's conduct results in a warning or removal *does not necessarily* mean the question asked at the time of such action is irrelevant. *Relevance must be determined separately.*

15

3.4 Make Fair, Reasoned Relevance Determinations



Make Fair, Reasoned Relevance
Determinations

Learning Objective No. 4

16

3.5 Determining relevance

Determining relevance

Is it probative of an ultimate issue? If so, it's relevant.

"Does the answer to this question make it any more or less likely that a policy violation will be, or has been, established under the relevant standard of proof?"

- If the answer is "yes," then it is probative of an ultimate issue and is relevant?
- If the answer is "no," then it is not probative of an ultimate issue and is not relevant.

Is credibility an issue requiring a relevance determination? Yes.

"Does the answer to this question make it any more or less likely that the witness is testifying truthfully or accurately regarding an issue in the case?"

- If the answer is "yes," then it is relevant for the purpose of determining the witness's credibility or reliability, and thus must be considered in reaching a determination.
- If the answer is "no," then it is not relevant to a credibility determination and thus may not be considered unless it has other relevance to a determination.

17

3.6 What does the term "relevant" mean for Title IX hearing purposes?

What does the term "relevant" mean for Title IX hearing purposes?

We are **not** concerned with the definition of "relevant" under federal or state criminal or civil procedure rules – those definitions do not apply to Title IX hearings under the Regulation. *85 Fed. Reg. 30026, 303434 (May 19, 2020).*

We **are** concerned with evaluating **all** information, both inculpatory and exculpatory, that helps render a determination whether the evidence supports a finding of a policy violation under the institution's stated standard of proof (*i.e.* either under the preponderance or clear and convincing standards). *Id. at 30320 and 30331.*

Even if the probative value of the information is outweighed by the risk that it results in prejudice, as long as it is relevant and is not expressly prohibited under the Regulation, it **must be considered** if it is presented to the decision-maker. *Id. at 30294.*

18

4. Conclusion

4.1 Relevance exceptions

Relevance exceptions

Is evidence of a complainant's sexual behavior relevant? No, subject to two exceptions.

A complainant's sexual behavior is **off limits** during a hearing, except when it is:

- offered to prove the identity of a person, other than the respondent, who may have engaged in the conduct being attributed to the respondent; or
- offered to prove consent, but only to the extent it relates to specific instances of sexual activity between the complainant and respondent.

How do I know whether a question applies as a sexual behavior relevance exception? If testimony is going to address sexual behavior, then it must relate to heart of the defense.

These exceptions speak to the core of a defense – *i.e.* identity or consent.

- Use investigation reports and pre-hearing conferences to identify these issues and to set ground rules with respect to conducting cross-examinations.
- General rule of thumb - the issue of whether sexual behavior is relevant **usually should not** be surfacing for the first time **during** a hearing.

19

4.2 We're not quite done

We're not quite done with exceptions

Given the broad definition of relevance, can an advisor question a person regarding privileged information? No.

In order for information to be off limits due to privilege, it must be protected under a legally recognized privilege. If the information is privileged:

- it may not be discussed during the hearing in the absence of a privilege waiver; and
- the decision-maker may not reach an inference from either a question that asks for privileged information or a refusal to answer based on privilege.

Practical tip:

There are a number of legally recognized privileges in most jurisdictions, and privilege varies from place to place. Try to use the pre-hearing conference to assess whether privilege issues may arise during the hearing, so you have lead time to think about application of local privilege protections.

20

4.3 Final relevance considerations

Final relevance considerations

Familiarize yourself with any relevance/evidence exclusions set forth in the school's policy. If the exclusions are impermissible under the Regulation, raise that issue with institution Title IX officials *prior* to any pre-hearing conference or hearing.

The law affords flexibility with respect to the weight to be given to evidence. Make sure you understand the policy governing evidentiary weight (if any), *and* confirm that policy guidance on credibility assessments is reflected in training materials.

Remember, you are required to make evidentiary determinations *after* every question is asked and *before* every question is answered.

22

4.4 Closing thoughts

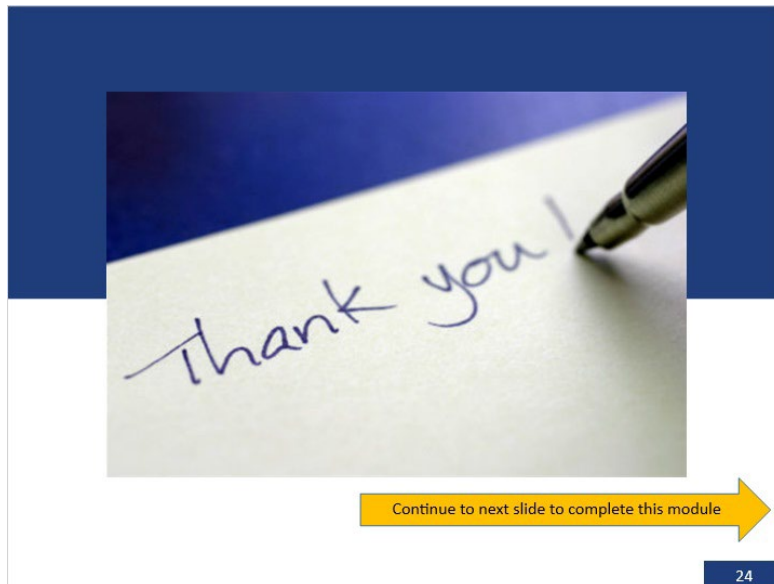
Closing thoughts

We may be in new terrain, but that doesn't mean we don't know how to get the job done.

- The hearing officer is the gatekeeper of process integrity under the Regulation, and, therefore, of hearing compliance.
- Know the applicable rules, communicate them to the participants, and create accountability when necessary.
- Make good faith, reasoned relevance determinations in real time.
- Create and preserve an adequate record of proceedings.
- Be objective, reasonable, diligent, thoughtful, fair, and confident.
- And remember, the facts are the facts. Your job is to make sure they are fairly tested and considered while simultaneously ensuring the parties receive the rights and protections they are owed under the Regulation.

23

4.5 Thank you



Notes:

5. Exit Questions

5.1 Attest

(True/False, 100 points, 1 attempt permitted)



I attest that I watched and completed this course in full.

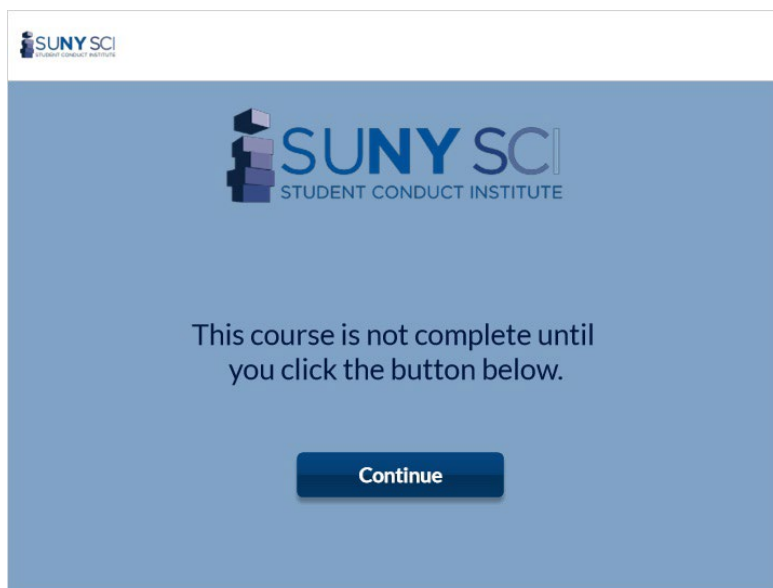
☒ True

Submit

Correct	Choice
X	True

5.2 Results Slide

(Results Slide, 0 points, 1 attempt permitted)



Results for
5.1 Attest

Result slide properties	Passing Score
80%	

Success (Slide Layer)



This course is not complete until
you click the button below.

Continue

Failure (Slide Layer)



This course is not complete until
you click the button below.

Continue

5.3 End Course



We invite you to take an optional Course Feedback Survey to help our team improve your learning experience. The link to this survey is located in the Table of Contents menu.

To end the course, click the button below.
Proceed back to the main menu.
DO NOT CLICK THE BACK BUTTON

SUNY Student Conduct Institute
State University of New York
H. Carl McCall Building
Albany, NY 12246

<https://system.suny.edu/sci/>
studentconductinstitute@suny.edu
 @SUNYSCI

End Course