

Equity Hearing Council Annual Training, Part 2B: Relevance, Credibility, Weighing Evidence, and Bias and Conflicts of Interest



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Today's Topics

First

- A refresher of responsibilities from parts 1 and 2A

Second

- An overview of relevance

Third

- An overview of credibility

Fourth

- An overview of weighing evidence

Fifth

- An overview of bias and conflicts of interest





Part One: Refresher of Responsibilities

Key question: What are Hearing Officers and Hearing Panel Members responsible for in the grievance process?

Hearing Officer Responsibilities (Select)

- Serve free of conflicts of interest and bias
- Conduct an unbiased review of the evidence in the Record and focus on what is relevant, credible, etc.
- Attend the live hearing and ask relevant questions of the parties and witnesses
- Determine whether questions asked by the process advisors, on behalf of the party, are relevant, and therefore allowed to be asked (if not relevant, state the reason)
- Determine if it is more likely than not that one party's representation of the facts is more "accurate" than the other's
- Determine whether there is preponderance of evidence that Respondent violated the policy

Hearing Panel Member Responsibilities (Select)

- Serve free of conflicts of interest and bias
- Conduct an unbiased review of the evidence in the Record and focus on what is relevant, credible, etc.
- Attend the live hearing and ask relevant questions of the parties and witnesses
- Determine it is more likely than not that one party's representation of the facts is more "accurate" than the other
- Make factual findings as to the underlying events and the parties' interactions and conduct
- Determine whether there is preponderance of evidence that Respondent violated the policy

Hearing Officer and Panel Member Responsibility: Asking Questions

- Questions should be used during the hearing to determine:
 - Who, What, When, Where, and How
- Be mindful of how a question could be perceived and be thoughtful when developing questions
 - Questions should be developed based on goals as a Hearing Officer/Panel Member: learn the facts and establish a timeline

Hearing Officer and Panel Member Responsibility: Developing Questions

- When developing questions, consider:
 - What do I need to know?
 - Why do I need to know it?
 - Does the question elicit information relevant to the allegations?
 - What is the best way to ask the question? How can I avoid asking questions that start with “why?”
 - Who is the best person to get this information from? The investigator? A party? A witness?



Part Two: Relevance Overview

Key question: What is considered relevant evidence in the grievance process?

Presentation of Relevant Evidence: Title IX Regulation Requirements

- “[T]hroughout the grievance process, a recipient must not restrict the ability of either party . . . to gather and present relevant evidence” §106.45(b)(5)(iii)
- “The recipient must make all evidence [directly related to the allegations] subject to the parties’ inspection and review available at any hearing to give each party equal opportunity to refer to such evidence during the hearing, including for purposes of cross-examination”
§106.45(b)(5)(vi)

What is Relevant Evidence?

- Evidence is relevant if it tends to make the allegations at issue more or less likely to be true
- Relevant evidence can include both exculpatory and inculpatory evidence
 - Inculpatory: evidence that shows, or tends to show, a person's involvement in an act, or evidence that can establish responsibility
 - Exculpatory: evidence that shows, or tends to show, a person's lack of responsibility

Irrelevant Questions and Evidence

- The following evidence is considered “irrelevant”:
 - Duplicative questions
 - Any party’s medical, psychological, and similar treatment records without the party’s voluntary, written consent
 - Any information protected by a legally recognized privilege without a waiver
 - Examples: rape crisis center counselors or advocates, clergy
 - Claimant’s sexual predisposition or prior sexual behavior (“rape shield” exclusion)
 - Subject to two exceptions
 - Office of Equity investigator will indicate if the information fits within an exception in the investigation report

Irrelevant Evidence Exceptions: Prior Sexual Behavior, Part 1/2

- Exception 1: Evidence of prior sexual behavior is permitted if offered to prove someone other than the Respondent committed the policy violation
 - Example: Witness saw Claimant, who was heavily intoxicated, having sex with Claimant's prior partner at the same time Claimant alleged Respondent sexually assaulted them

Irrelevant Evidence Exceptions: Prior Sexual Behavior, Part 2/2

- Exception 2: Evidence of prior sexual behavior is permitted if it is about the Claimant and Respondent's history together AND is offered to prove consent 34 CFR § 106.45(b)(6)
 - Example: Proof of past consensual intercourse between Claimant and Respondent that suggests consent in this case (e.g., Respondent and Claimant had previously established the use of a specific "safe word". During this sexual encounter, Claimant did not use the established safe word. Respondent interpreted this as consent to the sexual activity given their history.)

Asking Questions about Prior Sexual Behavior

- Questions about prior sexual behavior must mirror the two exceptions in the Title IX regulations in order to be relevant and permitted within the hearing
- For a question to be allowed within exception 2, it must be about the parties' prior interactions
 - Irrelevant: “Has the claimant ever shared with you that they have engaged in [specific behavior] in their sexual encounters?”
 - Relevant: “Has the claimant ever shared with you how they gave consent to engage in [specific behavior] in their prior sexual encounters with the respondent?”

Practice Determining Relevance: “Rape Shield” Exclusion

- Did you tell Respondent that you started using birth control because you plan to have a lot of sex in college?
 - Answer: irrelevant – sexual predisposition
- You had a dating relationship with the Respondent before this incident (sexual assault). Was nodding your head a common way that you communicated consent in that relationship?
 - Answer: relevant – prior sexual behavior, exception 2
- Why didn't you push the Respondent away during this sexual activity?
 - Answer: relevant* – related to consent analysis
- You have accused past partners of sexual assault, correct?
 - Answer: irrelevant – sexual history

Determining Relevance, Part 1/4

- The Office of Equity investigator will have made initial relevance “decisions” by including or excluding evidence in the investigation report
- Relevance determinations during the hearing are ultimately up to the Hearing Officer

Determining Relevance, Part 2/4

- When assessing for relevance of evidence, ask:
 - Is it relevant?
 - Does it assist in coming to a conclusion about whether the incident alleged occurred?
 - If so, does it assist in coming to a conclusion about whether the conduct was a policy violation?
 - Is it of consequence?

Determining Relevance, Part 3/4

- Not based on:
 - Who asked the question
 - Including sex or gender of the individual, current or past organizational membership, protected class identities
 - Who the question is directed to
 - Including sex or gender of the individual, status as current or past claimant or respondent, current or past organizational membership, protected class identities

Determining Relevance, Part 4/4

- Not based on:
 - A person's possible (or clearly stated) motives for asking the question
 - The tone or style used to ask about the fact
 - Hearing Officer can ask for abusive or argumentative questions to be rephrased
 - Whether the question is considered sensitive or embarrassing by parties and/or advisors

Determining Relevance for Process Advisor Questions During a Hearing, Part 1/2

- After each question is asked and before the party or witness answers it, the Hearing Officer will determine and state on the record whether the question is relevant or not
 - The Hearing Officer/Panel can take a recess, if needed

Determining Relevance for Process Advisor Questions During a Hearing, Part 2/2

- Potential outcomes:
 - The question is determined relevant, and the party or witness may answer it
 - The question is determined not relevant, and the Hearing Officer shall explain why the question is not relevant
 - Example: “Question 11 is irrelevant because it asks for the sexual history of the Claimant and does not meet one of the exceptions”
 - The Process Advisor is asked to reframe the question
- A Hearing Officer’s decision to require a Process Advisor to reframe the question or to exclude an irrelevant question is final

Practice Determining Relevance: Reviewing Evidence

Alex (claimant) alleges they were sexually assaulted by KC (respondent).

- Available evidence
 - Text messages between the parties: plans to meet up at the party that night, including sexually suggestive references and emojis
 - KC's interview: Alex has done the same sexual activity with one of KC's friends in the past and Alex was "okay with it"
 - Witness interview: KC is a "good person" and would never sexually assault someone
 - Forensic sexual exam results: provided by Alex to Equity investigator

Learn More via SUNY SCI Training: Determining Relevance in Title IX Hearings (2 Parts)



Determining Relevance Title IX Hearings

START COURSE

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RELEVANCE IN TITLE IX HEARINGS

☰ What is a Relevant Question?

☰ Relevance and Decorum

☰ What is an Irrelevant Question?

SKILLS PRACTICE

☰ Scenario: Sexual Assault After an On-Campus Event

☰ Cross-Examination of the Parties

☰ Cross-Examination of Witnesses

☰ Conclusion

Part Two Summary

- Evidence is relevant if it helps prove or disprove the allegations and the elements of the policy violation
- Irrelevant questions and evidence include duplicative questions, information about medical or psychological treatment records, information protected by a legally recognized privilege, and questions about a Claimant's sexual predisposition or prior sexual behavior
- Relevance determinations are up to the Hearing Officer
- Each question asked during the live hearing has to be assessed for relevance prior to a party or witness answering it





Part Three: Credibility Overview

Key question: What makes something or someone credible?

What is Credibility?

- The quality that makes someone (a witness or party) or something (some evidence) worthy of belief
- Helps the Hearing Officer/Panel determine how much weight or importance to give the evidence
- Is assessed issue by issue
 - A person may be credible on some issues and less credible on others
- Is determined by logic and comparisons to evidence in the Record

Determining Credibility, Part 1/2

- Credibility *may be* determined by:
 - Statements that are self-consistent, consistent with the Record, or consistent with other parties' statements
 - Statements that are inconsistent with the Record
 - Statements that are implausible or incoherent in light of the Record
 - For witnesses: the existence of evidence of a motive to lie
 - For parties: “defenses” that are not supported by the record (e.g., “I didn’t do this” or “I’m a good person and would never do this,” but there is evidence in the record indicating otherwise)

Determining Credibility, Part 2/2

- Not determined by:
 - A sense or feeling
 - A person's status as either Claimant, Respondent, or witness
§106.45(b)(1)(ii)

When to Assess for Credibility, Part 1/2

- Credibility must be assessed when:
 - The parties disagree about the relevant facts of the case
 - Example: Claimant believes sexual activity was not consensual, but Respondent thinks it was consensual
 - Hearing Officer/Panel response: evaluate whether external evidence (such as witnesses, photos, videos, etc.) or logic supports one party's version of events more persuasively than the other party

When to Assess for Credibility, Part 2/2

- Credibility must be assessed when:
 - A party changes their statement about what occurred during the course of the investigation
 - Example: a Respondent denies having engaged in sex with the Claimant to an Office of Equity investigator, but tells the police that they had consensual sex
 - Hearing Officer/Panel responses:
 - Ask questions to understand the seeming inconsistency
 - Be mindful of trauma-connected reactions to circumstances
 - Evaluate if they should assign less credibility and weight to statements that are materially or significantly inconsistent than are assigned to statements that are consistent

General Process for Assessing Credibility

- What did person 1 say about the factual issue?
- Assess person 1's testimony with evidence received from that person over time
- Assess person 1's testimony with testimony from others
 - Is person 1's testimony consistent or inconsistent with the other testimony?
- Assess person 1's testimony with evidence received from others
- Repeat with all witnesses or parties who addressed the issue

Assessing for Credibility, Part 1/3

- Potential questions to assess credibility:
 - Is the evidence provided by a party corroborated by a witness or other evidence?
 - Example question for a witness: Did you observe the parties together at the social event?

Assessing for Credibility, Part 2/3

- Potential questions to assess credibility:
 - Is there a reason the source of the evidence may not be reliable?
 - Example question for a witness: You told the Hearing Officer/Panel that you are friends with the Respondent. Does that impact your ability to be truthful about the incident in question?

Assessing for Credibility, Part 3/3

- Potential questions to assess credibility:
 - Is the evidence logical given the other established facts?
 - Example question for a Respondent: You told the Office of Equity investigator that you left the social event at 1:00 AM. Your rideshare app record indicated that you called a car at 2:00 AM. Is that correct?

How Parties and Witnesses Could Respond to Credibility Assessments

Hearing Officer/Panel Question Areas	Party or Witness Responses
Whether the witness or party is <i>impartial</i>	Explaining why they are <i>impartial</i>
The witness's or party's statements in light of <i>specific Record material</i>	Explaining how their statements are consistent with <i>specific Record material</i>
The witness's or party's statements in light of <i>common sense</i>	Explaining why their statements have <i>changed over time</i> (e.g., memory is not always perfect)
Observing whether the witness or party gives <i>true and complete</i> answers	For Witnesses: Explaining why their statements are not complete (commonly, to avoid prejudicing themselves in a parallel criminal proceeding)

Practice Assessing for Credibility

Alex (claimant) alleges they were sexually assaulted by KC (respondent).

- Available evidence
 - Alex's police report immediately after the assault: minimal details
 - Alex's interview with Equity investigator: more details, some of which are different than details in police report
 - Witness interview: Alex told witness about the assault immediately after it happened
 - Witness interview: witness was with KC all night and never saw them alone with Alex
 - Witness interview: KC has cheated on tests before and has been known to make things up to "get out of trouble"

Part Three Summary

- Credibility is the quality that makes someone or something worthy of belief
- Credibility is determined by logic and comparisons to evidence in the Record
- Credibility is not determined by a sense or feeling or a person's status as either Claimant, Respondent, or witness
- Credibility must be assessed when the parties disagree about the relevant facts of the case and a party changes their statement about what occurred during the course of the investigation





Part Four: Weighing Evidence Overview

Key question: How should evidence be weighed in the grievance process?

What is Weighing Evidence?

- Assessing the accuracy, impact, and importance of the evidence in the Record
- Weight of evidence is based on believability or persuasiveness of evidence
 - Example: indefinite, vague, or improbable evidence could be given less weight than direct and unrefuted evidence depending on the factors surrounding the evidence

Options for Weighing Evidence

- The Hearing Officer/Panel may give a piece of evidence (including a statement by a party or witness):
 - No weight
 - Some weight
 - A lot of weight

Determining Evidence Weight

- The Hearing Officer/Panel's purpose is to determine if the Respondent violated the policy by a preponderance of the evidence
- Start from the presumption of non-responsibility for Respondent
 - Weigh all the credible evidence
 - The Hearing Officer/Panel must consider the evidence that supports the allegation(s) and the evidence that disproves it
 - Determine responsibility for a policy violation

Practice Weighing Evidence

- Imagine you have the following types of evidence:
 - Claimant and respondent testimonies
 - Witness testimonies
 - Text messages
 - Videos
 - Audio recordings
- Discussion questions:
 - What types of evidence would you give no, some, and a lot of weight to? Why?
 - What factors would change your previously determined weights? Why?

Part Four Summary

- Weighing evidence involves assessing the accuracy, impact, and importance of the evidence in the Record
- The Hearing Officer/Panel may give a piece of evidence no weight, some weight, or a lot of weight
- Weighing all the credible evidence helps the Hearing Officer/Panel determine responsibility for a policy violation





Part Five: Bias and Conflicts of Interest Overview

Key question: How should a Hearing Officer/Panel Member avoid bias and conflicts of interest?

Actual Conflict of Interest

- Exists when a non-party individual with a role in the Grievance Process
 - Is in a position to gain a personal or self-serving benefit from an action or decision made in their role or
 - Is otherwise unable to participate with objectivity because of personal or professional relationships with other individuals involved in the process or associated with those involved
- That an individual with a role in the process works for the University alone is not enough, without more, to establish an Actual Conflict of Interest

Responding to Conflicts of Interest Check by Case Coordinator, Part 1/2

- Always disclose to the Case Coordinator whether you
 - Have
 - Personal or professional ties to the Respondent,
 - Personal or professional ties to the Claimant, or
 - Prior knowledge of the case
 - That could affect your ability to participate in the hearing process with objectivity
 - Will be able to
 - Disregard each party's status as Claimant or Respondent, and
 - Render impartial judgment based on the evidence presented

Responding to Conflicts of Interest Check by Case Coordinator, Part 2/2

- If your answer is “yes” to question 1 and/or “no” to question 2, you should:
 - Be honest about it
 - Admit that you cannot serve impartially

Demonstrated Bias

- Unfair prejudice in favor of or against one group compared with another, including bias against a particular class of parties (e.g., Respondents in the Grievance Process)
- Individuals with roles in the Grievance Process are prohibited from considering the party's status as a Claimant or Respondent as a negative factor during consideration of the Formal Complaint
- That an individual with a role in the process works for the University alone is not enough, without more, to establish Demonstrated Bias

Avoiding Bias, Part 1/3

- Don't let a party's race, gender, religion, national origin, disability, etc. influence your beliefs about the case, the evidence, or their credibility
 - A party's account should not be more or less believed because of their identities
- Focus on what the evidence (including the parties' and witnesses' statements) tells you
 - Do not focus on what you believe should happen in a situation like this or what you know to have occurred in other similar situations

Avoiding Bias, Part 2/3

- Questions to ask yourself:
 - Have I reached this conclusion, decision, or sanction based on the evidence, or based on something else?
 - Would I have come to this same conclusion if the Claimant or Respondent were a different race or gender?
 - Am I making this decision because of bias towards the Claimant or the Respondent, or because of Claimants or Respondents in general?

Avoiding Bias, Part 3/3

- If you are concerned that your decision is based on something other than the evidence:
 - Go back and look again
 - Ask for input from the Hearing Officer and/or other panel members

Part Five Summary

- An actual conflict of interest exists when a non-party individual with a role in the Grievance Process is in a position to gain a personal or self-serving benefit from an action or decision made in their role, or is otherwise unable to participate with objectivity because of personal or professional relationships with other individuals involved in the process
- Demonstrated bias is unfair prejudice in favor of or against one group compared with another
- Hearing Officer/Panel members can avoid bias by focusing on what the evidence tells them



Presentation Summary

- Evidence is relevant if it helps prove or disprove the allegations and the elements of the policy violation
- Each question asked during the live hearing has to be assessed for relevance prior to a party or witness answering it
- Credibility is determined by logic and comparisons to evidence in the Record
- The Hearing Officer/Panel may give a piece of evidence no weight, some weight, or a lot of weight
- Hearing Officer/Panel members can avoid bias by focusing on what the evidence tells them

