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NACUA Online Course
Title IX Coordinator Training

Module 6: Practical Hearing Skills

Bindu Jayne, Founding Partner, Sage Consulting

Lucy France, General Counsel, University of Montana

Melissa Carleton, Partner and Higher Ed Co-Chair, Bricker Graydon LLP

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Welcome to Module 6: Practical Hearing Skills

- Pre-Hearing Conferences
- Procedural Elements
- Choosing Your Questions
- Deciding Relevancy
- Role of the Advisor and Support Person

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Submodule 1

Is it helpful to have a pre-hearing conference?

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Pre-Hearing Conferences

- These are not required under the Title IX regulations.
- These are not prohibited under the Title IX regulations.
- Pre-hearing conferences are generally held to ensure the parties (and their advisors) understand the purpose of the hearing, their rights and responsibilities, the order of the hearing, decorum expectations, and other procedural details.
- Pre-hearing conferences also allow the decision maker to get more information about witnesses and any evidentiary issues.

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Why Hold Them?

- Keep the emotional temperature turned down.
- Answer procedural questions of the parties/advisors.
- Get a preview of what to expect at the hearing in terms of concerns the parties/advisors may have.
- Get witness lists and discuss hearing dates.
- Begin building rapport with the parties so they feel comfortable answering your questions.
- Typically makes for a more efficient hearing.

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Who Comes?

- Multiple models
  - One big conference
  - Two conferences – one for each party
- Who runs them?
  - Title IX Coordinator or Hearing Coordinator
  - Decision Maker
- Can you require a party and/or advisor to participate in a pre-hearing conference?

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To-Do List (1 of 2)

- Explain the nature of a pre-hearing conference
- Outline the goals of the hearing
- Explain roles of attendees at the hearing and determine identities of who will attend
- Discuss logistics (e.g. using Zoom, breaks)
- No contact orders vs. Protection orders
- Discuss prohibited questions and relevancy

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To-Do List (2 of 2)

- Outline the order of the hearing
- Effect of decision not to participate
- Witnesses to be called
- Evidentiary questions to be considered prior to hearing
- Answer any procedural questions they may have
- Two offers to everyone: accommodations for disability, and interpreter for languages

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Submodule 2

What procedural elements are helpful at a hearing?

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In-Person Hearing Preparation

- Where will the parties wait before the hearing begins?
- Will they have different spaces for the hearing?
  - Do you need to define which doors they will use to enter/exit?
- Where will they go for breaks to confer with their advisor and support person?
- Where will the witnesses wait?
- How will we ensure that witnesses do not speak with each other?

- Do you need security present?

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Virtual Hearing Preparation

- Ensure that parties, advisors, and witnesses cannot automatically enter the hearing without being admitted
- Admit hearing administrators first
- Tech check
  - Admit one party, advisor, and support person
  - Do tech checks to make sure everyone can see and hear
  - Put party, advisor, and support person in break out room for just them
  - Repeat for the other party, advisor, and support person
- Bring everyone together to begin the hearing

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Are these in your policy?

- Asking whether the Respondent accepts responsibility
- Opening statements
- Questioning of own party
- Closing statements

None of these are required by the regulations. You can decide whether to include them.

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Scripts

- Scripts are incredibly important
- They ensure you miss nothing, and that you are using policy language to reflect the hearing procedures
- Does your institution already have one?
- Put right at the top: a reminder to turn on the recording!

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Welcome

- Date and time the hearing is starting
- Your name and role
- Case number or other identifiers
- Introduce the other people in the room
- Ensure there is no one else in the room (if attendees are virtual)

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Role of Decision Maker

- Maintain an orderly, respectful, and fair hearing
- Maintain control and ensure efficiency

- Respond to disruptive behaviors, including removal of individuals
- Make relevancy determinations
- Question the parties and witnesses
- Make a decision using the appropriate standard of evidence

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Advisor Expectations and Decorum

- Remind parties and advisors of behavioral expectations
- Explain the procedure for requesting a break to hold discussions
- If virtual, encourage the parties not to use the software chat to communicate
- If parties are not in the same location as the advisor, outline what is and is not acceptable communication (and when it is not OK)
- What if they have an objection?
- Support persons have no active role

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Rights

- Notice
- Access to files
- Request witnesses
- Not to participate (and effects on determination)
- To challenge the Decision Maker for cause
- To have an advisor ask questions
- To file an appeal of the decision

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Responsibilities

- Protect the integrity and confidentiality of the hearing
- Provide truthful information to the extent they choose to answer questions
    - Providing information that is not truthful will be subject to discipline
- Communicate in a respectful manner
- Abide by the directions of the Decision Maker

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Allegations

- Read allegations into the record
- Note which provisions of the policy may have been violated if these allegations are true
- Some institutions ask Respondent if they accept responsibility for the allegations
    - If they choose to do so, prepare a colloquy to ensure they understand the impact of doing so

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Timing of the Hearing

- Are both parties planning to answer questions?
- Which witnesses have indicated they will attend, and when will they arrive?
- Which witnesses have declined?
- Which witnesses have failed to respond?

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Opening Statement?

- These are not required by the regulations.
- Institutions who allow them typically require them to be given by the parties themselves, not the advisors.
- Some institutions put time limits on them.

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Order of Questioning (1 of 2)

- There is no regulatory requirement as to the order of questioning.
- At a typical hearing, most choose this order:
  - Complainant
  - Respondent
  - Witnesses according to availability

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Order of Questioning (2 of 2)

- Encourage parties to be flexible. Their testimony may get delayed or interrupted to accommodate witness availability.
- If a Respondent does not participate in the investigation, consider having them testify first so that their story is present in the record before the Complainant is questioned.

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Who asks first?

- When advisors are asking the questions, the regulations do not provide who goes first.
  - Decision Maker could go first, to set a neutral tone.
  - Advisors could go first, to ensure they can ask all the questions they want.
  - There are no right or wrong answers, but be consistent.
  - In which order do you want the advisors to go?

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When Questioning Starts

- Is their testimony voluntary?
- Do they understand they can choose to answer some, all, or none of the questions posed to them?
- Have they been pressured or coerced into participating?

- Do they understand that to the extent they choose to answer questions, they will be subject to disciplinary action for failure to provide truthful information?
- To witnesses: Is anyone else present in the room with them? Are they recording or livestreaming the hearing?

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Closing Statement?

- These are not required by the regulations.
- Institutions who allow them typically require them to be given by the parties themselves, not the advisors.
- Do you want to have a time limit?

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Conclusion

- Thank everyone for their participation
- Remind about no retaliation
- Remind about the continued availability of supportive measures
- If there is a no contact order, it continues until further notice
- When can they expect the decision?

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Transcripts

- Decision Maker will need access to the recording or to the transcript in order to properly cite evidence obtained at the hearing. Which is right for you?
    - Public records?
    - Time to review recording versus time to review transcript?
    - Appeals officer time to review recording versus transcript?

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Submodule 3

How do I decide what questions to ask?

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Disputed vs. Undisputed Facts

Undisputed Facts

What do the parties agree on?

What does the objective evidence demonstrate?

Disputed Facts

What key facts do the parties disagree about?

Do they go to credibility, facts, or both?

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Pieces and Parts

- Focus on your disputed facts!
- What facts are necessary to resolve to determine whether each element of the alleged prohibited conduct is met?
- What facts are necessary to resolve because they are key credibility issues?
- What information do you need to ask about to make a determination, using the appropriate standard of evidence, as to whether each of these facts occur?

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Don't Skip Consent Questions

- Consent often requires a very nuanced consideration of both verbal and non-verbal communication and actions
- It is difficult to be asked nuanced questions, so we ask carefully and frame our questions to be respectful of the individuals we are questioning
- If we don't ask the difficult questions, how can we conduct a full, robust analysis and ensure we are using the best evidence to reach decisions?

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Consent Questions: Examples (1 of 2)

- Where were they touching your body at that moment?
- Where was their body weight? Where was yours?
- How did you transition from that position to this other position?
- How did that person transition between these positions?
- You indicated that they removed your clothing. Do you recall how they did that?
- How did you respond to that, if at all? Did you say anything? Did you move in any way?

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Consent Questions: Examples (2 of 2)

- How did you know that they were "into it" (reflecting back whatever phrase they had used)?
    - Did they say anything in that moment?
    - Did they make any noises?
    - Did they move their body in any way?
    - Did they help you in any way?
- Did you kiss them back?
- How did the situation transition from conversation to sexual contact?

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Impact Matters

- The impact of a respondent's conduct may be an element of the prohibited conduct (e.g. hostile environment, stalking)
- The impact on a respondent is not an element of prohibited conduct (unless they are also a complainant...)
- All parties and witnesses may have impact information

- Help the parties understand that when you ask about impact, this is because it is part of the required analysis – not because you are more sympathetic to the complainant

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Difficult Questions

- "Help me understand" - use to evaluate evidence that appears to conflict
  - You told the police X, but you told the investigators "not X" - can you help me understand what is correct?
  - You told the investigators X, but in the text message, you say Y – can you help me understand why that is?
  - You told the police ABC, the investigators BCD, and your best friend ACE. Can you help me understand the reasons why these statements differed?

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Tricky Questions

- "Why did you do that?"
- "Why didn't you do that?"
- "What were you thinking?"
- "What is the reason you asked for a break?"
- "Why did you refuse to answer that question?"

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Remember

- Your "gut feeling" isn't evidence, but can help point you to areas where you need to ask more questions.
- The institution has the burden to gather the best evidence, and your Decision Maker has the last opportunity to do so.
- If they don't ask, the answer never gets included.
- Ask the questions!

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Submodule 4

How do I decide which questions are relevant?

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Strategy

- Is the question impermissible? If yes, then do not permit question.
- Is the question relevant?
  - Relating to the allegation of misconduct or a defense?
  - Relating to the context of the allegation?
  - Relating to credibility?

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Impermissible Evidence

- Evidence protected under privilege, unless the person who holds the privilege has waived that privilege
- Medical and psychological records, unless the patient gives voluntary written consent for the inclusion of the records in the process
- "Rape shield" evidence – see next slides

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Rape Shield Exclusion

- Questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, 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. 106.45(b)(6)(i).

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Definition of Relevance

- No definition included in the regulations
- Includes evidence that is "probative of any material fact concerning the allegations" per the 2020 Preamble at 30343

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Relevance is a Broad Concept

- Is it in the ballpark?
- When the evidence is more of a tailgate, balance hearing efficiency with making parties feel their evidence has been heard.

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Hypothetical

- Complainant is alleging dating violence against Respondent.
- They have been dating for six months.
- One incident could also constitute sexual assault.

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Example #1

- Respondent, why didn't you participate in an investigative interview and instead had your attorney write a letter on your behalf?

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Example #2

- Complainant, have you ever had sex with Witness 1?

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Example #2a

- Complainant, did you also have sex with Witness 1 on the evening in question?

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More Examples

- When did you start dating?
- Where did you go to dinner on the evening in question?
- Have you ever heard of a person named Notta Witness?
- Is this the first Title IX claim you've had brought against you?

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Relevancy Rulings

- The decision-maker's verbal ruling is the question mark on the end of the advisor's question

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Objection?

- There is no right to object, unless your policy grants that right
- Explain your relevancy determinations on the record
  - Consider more detailed written determinations where necessary (such as pattern evidence)
- It is easier to listen to something and reject it later, than to reject it now and never listen to it

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Submodule 5

What is the role of the advisor and support person at the hearing?

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Support Person

- These are not required by the regulations, but guidance has suggested they are permissible.
- They have no role at the hearing.
- They are a silent supportive presence.

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Advisors

- Live hearing with cross examination – they ask questions
  - They ask relevant, permissible questions that meet the decorum standards
  - They do not otherwise speak for their party
  - They do not answer questions for their party
  - They ask for breaks to provide advice to their party

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Advisors – Even If No Parties

- Where a live hearing with cross examination is held, the party must bring an advisor. If they do not, the institution must appoint one.
    - This is true even if the party does not wish to participate.
    - This is true even if the party does not wish to have an advisor.
- What if you strongly suspect that an advisor will not show up when they are required?

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Advisor Behavior

- Remind them of your policy regarding "objections"
- Decision Maker is responsible for enforcing decorum
- Consider whether a warning is appropriate before removing an advisor
- If appropriate, remind them that there is no need to "preserve an argument for appeal" under the procedures

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Questions?

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