

A New Era of Title IX

(Module 3: Relevance Assessments Required
Under Title IX: Questions and Evidence)

Presented on
Friday, October 9, 2020
10:00 - 11:30 AM | Zoom

Presented by
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Notes:

DrummondWoodsum
ATTORNEYS AT LAW

The New Era of Title IX

MODULE 3

RELEVANCE ASSESSMENTS REQUIRED UNDER TITLE IX: QUESTIONS AND EVIDENCE

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AGENDA

- (Very Brief!) Recap. of Modules 1& 2
- Title IX Regulations and Requirements on:
 - Relevant Evidence
 - Relevant Questions during decision-making
- Practical Approach to meeting requirements and reaching decisions
- Final Q & A (on all 3 Modules!)

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Basic Requirements for Grievance Process

- Treat complainants and respondents equitably . . .
- Require an objective evaluation of all **relevant evidence**—including both inculpatory and exculpatory evidence
- Investigators must receive training on, and create an investigative report that fairly summarizes, **relevant evidence**
- Decision-makers must receive training on issues of **relevance of questions and evidence**, including when questions and evidence about sexual predisposition/prior sexual behavior are not relevant

Role of the Title IX Investigator

Among the Investigator's tasks:

- Allow Parties to identify witnesses and submit favorable and unfavorable evidence.
- Ascertain the facts: Interview witnesses, make site visits, review documents (including emails and texts).
- *Consider only evidence that is **relevant and directly related** to the allegations in the Formal Complaint.*
- Provide the Parties with an equal opportunity to inspect and review any evidence that is obtained in the investigation, whether the Investigator considers the evidence reliable or not, and including favorable and unfavorable evidence.
- Give the Parties the opportunity to respond to the evidence prior to the conclusion of the investigation.
- *Write an investigation report that fairly summarizes **relevant** evidence and submit it to the Title IX Coordinator.*

Decision-making

- No live hearing requirement for K-12 (unlike postsecondary)
- After investigative report is issued to the parties:
 - The decision-maker(s) must afford each party the opportunity to submit written, **relevant questions** that a party wants asked of any party or witness, provide each party with the answers, and allow for additional, limited follow-up questions from each party.
 - The decision-maker must explain to the party proposing the questions any decision to exclude a question **as not relevant**.

What is "Relevant" Evidence?

Rule 401 of the Federal Rules of Evidence

Evidence is relevant if:

- (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and
- (b) the fact is of consequence in determining the action

"Relevant" Evidence That May Not Be Considered

- Evidence about a Complainant's sexual predisposition or prior sexual behavior is not relevant, unless it:
 - (1) is offered to prove that someone other than a Respondent committed the alleged conduct, or
 - (2) concerns specific incidents of a Complainant's prior sexual behavior with a Respondent and is offered as evidence of consent.
- Evidence that is privileged
 - Medical, psychological or similar records are not admissible unless the Party has consented in writing to the disclosure of those records.
 - Other legally recognized privilege or immunity in the State of New Hampshire (communications with attorney, clergy, spouse)
- Evidence that is needlessly cumulative

How does the Decision Maker make this work?

- Review investigator's report and provide it to both parties
- Review and categorize proposed questions
 1. Questions that are relevant and appropriate—ask them
 2. Questions that are not appropriate either because they are not relevant or are otherwise not to be considered – notify requesting party that they will not be asked and why
 3. Questions that are questionable – either because relevance is not apparent or question is objectionable as phrased but not in theory – clarify

Katherine and Eric Hypothetical

Katherine (a sophomore) and Eric (a senior) hook up at a band trip after drinking in a hotel room.

Katherine claims Eric went too far; Eric claims the sexual activity was consensual.

Questions Requested by Eric's Family

To Katherine:

- How many boys had you hooked up with before the incident with Eric?
- Do you have a close relationship with your parents?
- Did you take antidepressant medication before drinking at the party?
- How far is "too far" in your opinion?
- Did you delete all of your texts or just those you received from Eric? What are you trying to hide?

Notes:

Questions Raised by Eric's Family - Continued

Questions to Sallie:

- Has Katherine told you about other boys she has hooked up with?
- Does Katherine party a lot?
- Do you know of any instances where Katherine has lied to her parents to keep out of trouble?

Wrap Up

WHAT'S STILL ON YOUR MIND???

Notes:

Thank You

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