



TITLE IX FOR HEARING BOARD PANELISTS

DAY 2: The Hearing

DISCLAIMER

This presentation shall not constitute legal advice, nor create an attorney-client relationship. This presentation is for informational purposes only.

If you have any specific legal questions or require legal advice for specific situations, please contact or refer to your institutional, general, or outside counsel.



The documents included in the training materials for & referenced in this training are purely fictional.

The case is not based on any real case that the SCI staff is aware of. The characters named are fictional & are not intended to represent any real person.

The details of this case & these documents should not be used to make decisions in similar cases, nor should they be considered precedent or advice from SUNY or the Student Conduct Institute.

TRAINING MATERIALS





DAY 2 PREVIEW

Consent continued

Overview of the hearing

Relevancy Determinations

Questioning

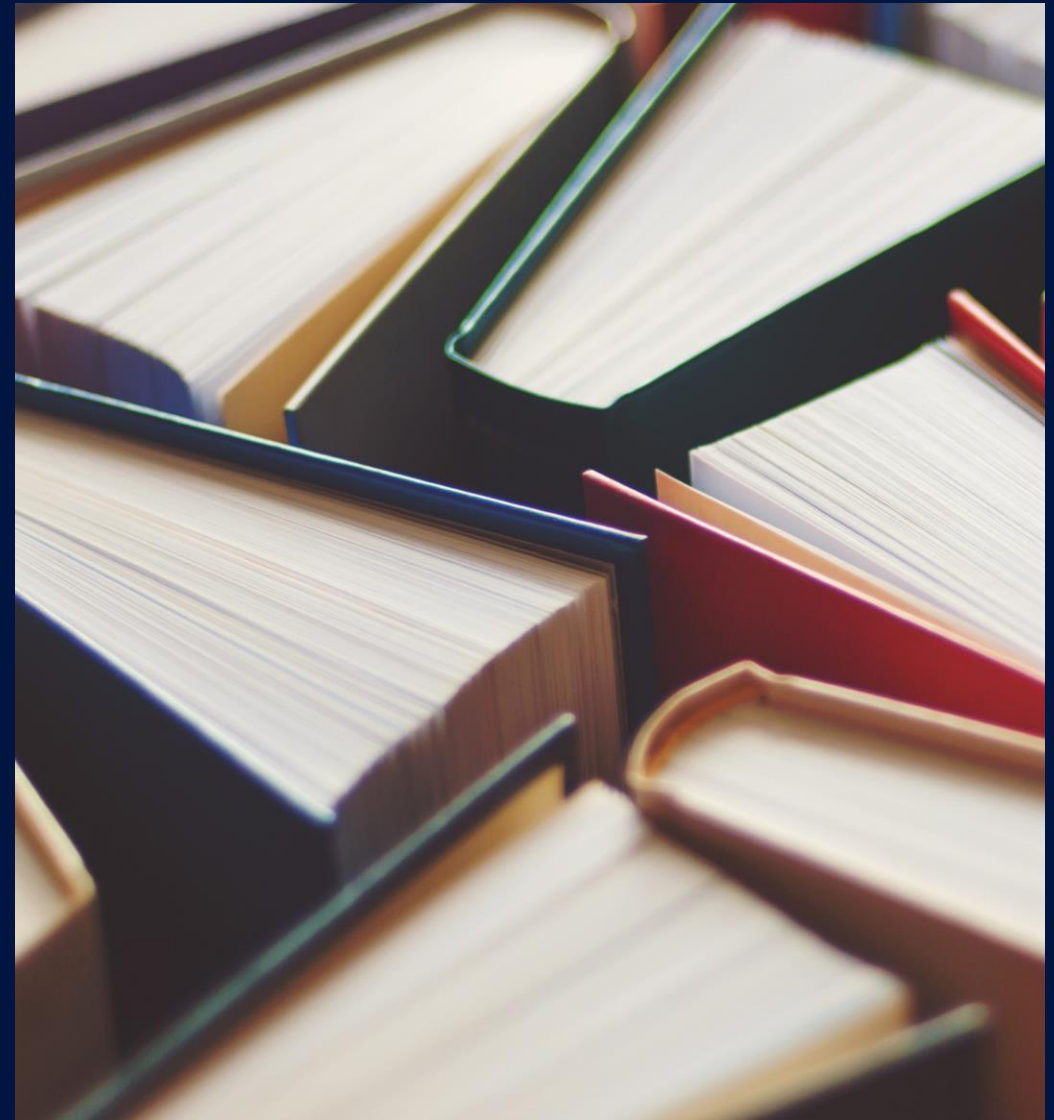
KEY CONCEPTS & DEFINITIONS

CONSENT



NYS DEFINITION

“Affirmative consent is a knowing, voluntary, and mutual decision among all participants to engage in sexual activity. Consent can be given by words or actions, as long as those words or actions create clear permission regarding willingness to engage in the sexual activity.”



BREAKOUT!

Instructions:

- 1.) In the “Training Materials” for this training, you will find items titled “Consent – Scenario 1-14”
- 2.) We will be assigning you to a numbered breakout room (Room 1, Room 2, etc.). Once in the room, locate the corresponding document number. So- Room 1 should review Consent – Scenario 1, Room 2 would review Consent- Scenario 2, and so on)
- 3.) Review the scenario provided by ChatGPT and answer the questions together
- 4.) Consider if there are questions you would want to ask to be able to make a determination of whether or not consent was present in this interaction
- 5.) Identify someone to report out the main points of your discussion

Time in groups: 15 minutes



EVIDENCE

STANDARD OF EVIDENCE

Which standard of evidence does your institution use?

1. PREPONDERANCE OF THE EVIDENCE

- More likely than not to be true
- 50%, plus a feather

2. CLEAR & CONVINCING EVIDENCE

- Highly probable to be true



CRUCIAL: you will use this language and standard to determine the responsibility of your respondents. You may be telling students, for example, that they are **“more likely than not”** responsible for sexual assault.

SPECIFIC EXCLUSIONS for **TITLE IX HEARINGS**

RAPE SHIELD (with two exceptions) 32 C.F.R. § 106.45(6)(i)

- Offered to prove someone else committed alleged conduct
- Offered to prove consent

PRIVILEGED INFORMATION: 34 C.F.R. § 106.45(1)(x)

UNDISCLOSED MEDICAL RECORDS: See, 85 Fed. Reg. 30026, 30294

DUPLICATIVE QUESTIONS: See, 85 Fed. Reg. at 30331

... EVIDENCE THAT MUST BE INCLUDED ...

EXCULPATORY & INCULPATORY

Exculpatory evidence increases the likelihood of finding of **non-responsibility or non-liability**

Inculpatory evidence increases the probability of a finding of **responsibility or liability.**

PLEASE NOTE: investigations & findings of **INNOCENCE** and **GUILT** are not applicable to Title IX or student conduct grievances. These processes are administrative processes & are not civil or criminal in nature.



Testimony

Text Messages

Social Media Posts

Medical Records

Public Safety / Police Records

Videos / Surveillance Footage

Pictures

ID Card Data / Network Usage Location Data

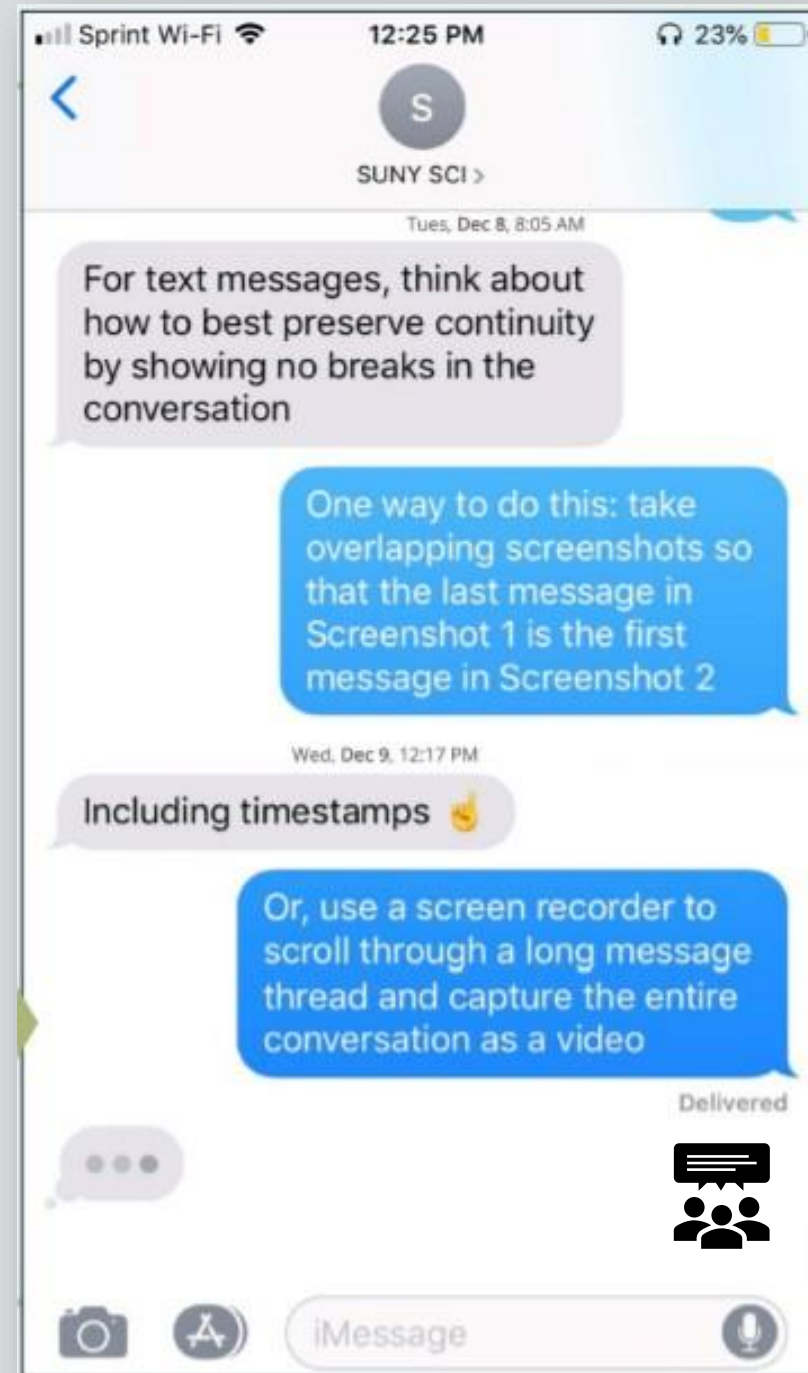
Email

Voice notes

POSSIBLE EVIDENCE



KEEP IN MIND: Institutions should collect **BOTH** exculpatory & inculpatory evidence.





ZZZ

Z

BREAK & Knowledge Check



THE HEARING, AN OVERVIEW



MODEL CASE

Find the case materials for our model case in the “Course Materials” Section of this training



Benji Houser
Hearing Panel Chair



Joyce Conceição
Administrative Hearing Officer



STICKING TO THE SCRIPT



1. Introductions
2. **Purpose of Hearing, Review of Allegations**
3. Privacy & Decorum Expectations
4. **Due Process Rights**
5. Notice of Allegations & Claims
6. **Opening Statements**
7. Presentation of Investigative Information
8. **Cross Examination & Relevancy Determinations**
9. Witnesses & Cross Examination
10. **Closing Statements**
11. End of Hearing

HEARING: INTRODUCTIONS

- Opportunity to review roles & participants in hearing
- Begins the recording – officially kicking off the hearing
- Reviewing basic expectations
 - Cell phone & device decorum
 - Notification of transcript
 - Rights to access
 - Ownership of recording
- Introduction of participants



Joyce Conceição
Administrative Hearing
Officer



PURPOSE OF HEARING

- Review objectives of the hearing
 - Goal is to make a decision about responsibility for the policy violation
 - To have an equitable, fair process (not a perfect one)
- Obligation of truthfulness & transparency
- Reminder of educational philosophy of grievance process
- **Not a criminal proceeding**
- Discuss flow of meeting



PRIVACY

- Notice of privacy & confidentiality
- Reminder that sharing materials to non-participating individuals may be retaliatory & violation of conduct code
- Review of decorum (will review later)
- Review of cross-examination (will review later)
- Discuss role & obligations of advisors
- How to request breaks or troubleshooting needs
- Review of accommodations

DECORUM

Colleges and universities “**are in a better position than the Department to craft rules of decorum best suited to their educational environment**” and build a hearing process that will reassure the parties that the institution “**is not throwing a party to the proverbial wolves.**”

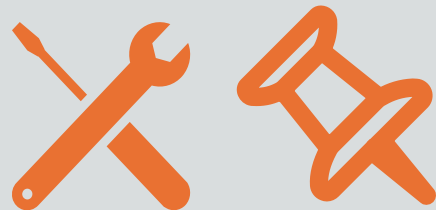
- See, 85 Fed. Reg. 30026, 30319

ADVISORS WHO VIOLATE THE RULES OF DECORUM MAY BE REMOVED



Questions should be asked in a neutral tone.

- No accusatory questions
- No “duty of zealous advocacy” inferred or enforced, even for attorney-advisors
- No abusive behavior: yelling, screaming, badgering, leaning in, or approaching witnesses/parties without permission
- No use of profanity or personal attacks
- Repetitive questions are not allowed



DECORUM



DUE PROCESS RIGHTS

DO PARTIES UNDERSTAND THEIR DUE PROCESS RIGHTS AS WELL AS THEIR RIGHTS UNDER TITLE IX?

- Opportunity for parties to object to panelists participation
 - If yes, decisionmakers meet off record to discuss objection
 - If the objection is sustained, substitute an alternate decisionmaker & repeat
 - May delay hearing
 - If not, you can continue
- Opportunity for process questions
- Move towards **formally** beginning the hearing, turn over facilitation responsibilities to **hearing chair**



OPENING STATEMENTS



Acknowledge parties' opportunity to review investigative report & to respond to elements within the report



Parties can provide opening statements



Move to questions





Overview of cross-examination, review rules & expectations of all parties & advisors

Questions for all parties by the alternate parties' advisor

Relevancy determinations

Board questions for all parties



CROSS-EXAMINATION & QUESTIONING



Questions posed by advisors must be evaluated for relevance in real time by a decisionmaker.

Relevant questions ask whether facts material to allegations under investigation are more or less likely to be true.

Relevance decisions are made on a question-by-question basis.

Relevance decisions **should not** be based on:

- who asked the question,
- their possible (or clearly stated) motives,
- who the question is directed to,
- or the tone or style used to ask about the fact.

What about sensitive topics or issues?

QUESTION REGARDING PRIVILEGED INFORMATION

- The question is irrelevant because it calls for information shielded by a legally-recognized privilege **[identify the privilege]**
- The question is relevant because, although it calls for information shielded by a legally recognized privilege **[identify the privilege]**, that privilege has been waived in writing, and the question tends to prove that a material fact at issue is more or less likely to be true



QUESTION ABOUT COMPLAINANT'S PRIOR SEXUAL BEHAVIOR, OR SEXUAL PREDISPOSITION

The question is relevant because although it calls for prior sexual behavior information about the complainant, it meets one of the two expectations to the **rape shield** protections defined in 34 C.F.R. § 106.45(b)(6)(i), and it tends to prove that a material fact at issue is more or less likely to be true:

EXCEPTION 1: The question is asked to prove that someone other than the respondent committed the conduct alleged by the complainant.

EXCEPTION 2: The question concerns specific incidents of the complainant's prior sexual behavior with respect to the respondent and is asked to prove consent

The question is irrelevant because it calls for prior sexual behavior information about the complainant without meeting one of the two exceptions



GENERAL PROBATIVE QUESTIONS

Determining whether a question is relevant because it asks whether a fact material to the allegations is more or less likely to be true

Determining whether a question is irrelevant because it asks about a detail that does not touch on whether a material fact concerning the allegations is more or less likely to be true

See, 85 Fed. Reg. 30026, 30343 (May 19, 2020)



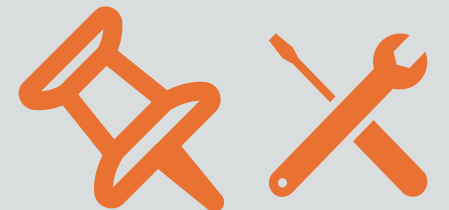
HOW DO YOU MAKE RELEVANCE DETERMINATIONS?

If decisionmaker is a single individual, they make the decision prior to the question being asked.

If decisionmaker is a panel, the panel chair will make that determination prior to the question being asked.

WHAT DOES THE RELEVANCE DETERMINATION CONSIST OF?

The Final Rule “does not require a decisionmaker to give a lengthy or complicated explanation.” It is sufficient to explain why a question is irrelevant



LET'S PRACTICE - RELEVANCE



BREAKOUT!

Instructions:

- 1.) Locate “Sample Document 10” in the “Training Materials” area of today
- 2.) Breakouts with odd numbers should review the odd numbered questions. Breakout rooms with even numbers should review the even numbered questions.
- 3.) As a group, make a relevancy determination for each question that is going to be asked for our model case.
- 4.) The SCI trainers will review the questions when you return to the main group!

Time in groups: 10 minutes

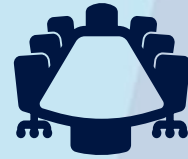


WITNESSES

- Same process of cross-examination
- Reminiscent of the introduction stage
 - Introduce witness
 - Notice that the hearing is recorded
 - Expectation of truthfulness
 - Reminder of educational philosophy of institution
 - Not a criminal proceeding
- Review process of cross-examination
- Move to questions, then dismiss witnesses from hearing after testimony
- Repeat for every witness



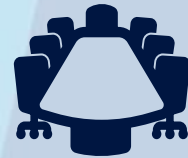
CLOSING STATEMENTS



Closing statements



Impact statement submissions



Next steps



Decision making process begins!



QUESTIONS?

SUNY.EDU

system.suny.edu/sci/news

SYSTEM.SUNY.EDU/SCI/TIX2020

system.suny.edu/sci/titleix





YOU MADE IT!

