Is Sexual Misconduct Title IX or Non-Title IX?

Did conduct occur in a University program or activity?

Yes

Did conduct occur in the United States?

Yes

Does conduct meet the definitions of Title IX Sexual Harassment?

Yes

Title IX

No

Non-Title IX

No

Title IX
Impartial investigation

Review of Draft Report;

Charge Decision

Charge

Parties review all evidence collected and investigation report

Pre-hearing conference; evidence determinations

HSMB hearing and decision

Former Non-Title IX HSMB Process

No Charge
Parties review and comment on all evidence collected.

Investigation Report created (evidence removed if irrelevant or violates Policy).

Parties review and comment on investigation report.

HSMB Hearing (cross handled differently depending on Title IX or non-Title IX).

Current Formal Complaint investigation and hearing process for Title IX AND Non-Title cases.
Court upheld most provisions of 2020 amendments, BUT found one arbitrary and capacious and vacated that part.

OCR stated will immediately cease enforcement of that part.
May now consider statements made by parties or witnesses that do not participate in cross examination at the live hearing (assuming relevant and not prohibited under Policy)
**Open Ended**
- Calls for narrative or recall

**Focused**
- Directs the witness to a particular issue
  - Ex: “I would like to talk to you about when you were in the bedroom. Can you describe it?”

**Multiple Choice**
- Provides a range of options
  - Ex: “Can you tell me whether the clothes were on, off, or some other way?”

**Yes/No**
- Seeks to clarify a specific point
  - Ex: “You talked about alcohol. Did you serve alcohol to Nicole?”

**Leading**
- Assumes the answer
  - Ex: “You served alcohol to Nicole correct?”
  - Use sparingly
INTERVIEW TECHNIQUES

Think about:
- What do I need to know?
- Why do I need to know it? (is it relevant?)
- What is the best way to ask the question? (how can I phrase the question appropriately)
INTERVIEW TECHNIQUES

- Ask for definitions of any terms/adjectives: “Hooking up” “making out” “cuddling” “belligerent”
- Avoid compound questions
- Know elements of alleged violations and focus questioning on those issues
- Ask hard questions in a non-accusatory way
  - “Why didn’t you report right away?”
  - “What brought you to report at this time? Did you consider reporting it after the incident? Why or why not?”
Relevant evidence must be:

- Probative
- Material
Any tendency to make the existence of any fact more or less probable than it would be without the evidence.
Evidence is “material” if it is being offered to prove an element of a policy violation or defense that needs to be established for one side or the other to prevail.
Complainant’s prior sexual behavior (with two exceptions)
Information protected by legally recognized privilege
Party’s treatment records cannot be used without party’s voluntary, written consent
Evidence that is duplicative of other evidence
In general, questions and evidence about the sexual predisposition or prior sexual behavior of the complainant are not relevant and will not be admitted as evidence during an investigation and/or hearing.
1. Where the sexual behavior is used to show that someone other than the respondent committed the conduct alleged by the complainant; or

2. Where if the questions and evidence concern a specific incident of the Complainant’s prior sexual behavior with respect to the Respondent and are offered to prove consent.
The prior sexual activity must have the potential to explain specific physical evidence at issue.

Ex. Respondent alleging not cause of semen in Complainant; Complainant engaging in heavy petting with boyfriend w/o penetration before would not be relevant as to whether or not semen was present and could be excluded.

Ex. Conduct must be close enough in time to explain injuries/evidence. Sexual activity with another person months before alleged assault would not be admissible under exception.
Even if a respondent is entitled to introduce evidence of the complainant’s prior sexual history with him/her, it does not follow that every detail of that sexual history is relevant.

The evidence may be limited to that which is relevant to the consent issue; superfluous details of the sexual activity may be excluded.
Cannot require, allow, rely on, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege (attorney-client; priest-penitent; doctor-patient; spousal)

An individual may disclose his or her medical and/or counseling records voluntarily, but the University will not request consent for the release of any medical or counseling records, nor will the University require any individual involved in the processes set forth in this policy to release any such medical and/or counseling records.
Before party/witness answers, the Chair of the HSMB informs whether the question is relevant. If not relevant, the Chair will explain the decision.

Questions, even if relevant, may be excluded if prior sexual history or privilege. Additionally, repetition of the same question may be deemed irrelevant.
Sufficient to explain that a question is irrelevant because the question calls for prior sexual behavior information without meeting one of the two exceptions, or because the question asks about a detail that is not probative of any material fact concerning the allegations.
SAMPLE EXERCISE TO PRACTICE DETERMINING RELEVANCY OF CROSS EXAMINATION QUESTIONS