

OHIO DEPARTMENT OF HIGHER EDUCATION DECISION-MAKER TRAINING

Part One of Two

TITLE IX DECISION-MAKER TRAINING

FEBRUARY 15, 2021



Bricker & Eckler
ATTORNEYS AT LAW

Presenters - Erin



Erin E. Butcher

- Bricker & Eckler, Attorneys at Law, Columbus, Ohio
- Former Assistant Attorney General, OAG
- Contact:

Bricker & Eckler
100 South Third Street
Columbus, OH 43215 -4291
614.227.2303
ebutcher@bricker.com



Presenters - Jessica



Jessica L. Galanos

- Bricker & Eckler, Attorneys at Law, Columbus, Ohio
- Former Deputy Title IX Coordinator
- Contact:

Bricker & Eckler
100 South Third Street
Columbus, OH 43215 -4291
614.227.2341
jgalanos@bricker.com



Disclaimers



We can't help ourselves. We're lawyers.

- We are not giving you legal advice. Consult with your legal counsel regarding how best to address a specific situation.
- This training does not cover institution-specific grievance procedures, policies, or technology.
- Use the chat function to ask general questions and hypotheticals.
- This training is not being recorded, but we will provide you with a packet of the training materials to post on your websites for Title IX compliance.

Presentation Rules



Questions are encouraged

- “For the sake of argument...” questions help to challenge the group, consider other perspectives, and move the conversation forward
- Be aware of your own responses and experiences
- Follow-up with someone if you have any questions or concerns
- Take breaks as needed

Aspirational Agenda



Day One

- 1:00-2:15 Introduction, Title IX Overview, and Discussion of Bias, Conflicts-of-Interest, and Serving Impartially
- 2:15-2:30 Break/Q&A
- 2:30-3:45 Relevance and Relevance Hypotheticals
- 3:45-4:00 Break/Q&A
- 4:00-5:00 Continue Relevance Discussion, Live Cross-Examination Theory and Practice

Day Two

- 1:00-2:00 Observe a Live Cross-Examination Hearing and Debrief
- 2:00-2:15 Break/Q&A
- 2:15-3:45 Discussion of the Hearing and Evaluating Evidence and Credibility
- 3:45-4:00 Break/Q&A
- 4:00-5:00 Hearing Toolbox and Writing a Decision

Posting these Training Materials?



YES – Post away!

- The “recipient” is required by §106.45(b)(10)(i)(D) to post materials used to train Title IX personnel on its website
- We know this and will make this packet available to you electronically to post.



Title IX Overview



New Title IX Regulations

- “Non-negotiable principles”
 - Training Requirements
 - Formal Rulemaking
 - Preamble and guidance versus the regulations
 - New Definitions
 - New Required Processes
- Changes to Jurisdiction
 - “Education Program or Activity”
 - Complainant must be in the United States
 - Mandatory Dismissal from the Title IX process
 - Recipients must provide live cross-examination hearings as part of the grievance process prior to any determination that could result in discipline

Non-Negotiable Principles

Preamble, p. 30059

- **The right of every survivor to be taken seriously, and**
- **The right of every person accused to know that guilt is not predetermined**



Training Requirements for Decision Makers



34 C.F.R. §106.45(b)(1)(iii)

Specifically, the new Title IX regulations require that decision-makers be trained on the following subjects:

- Jurisdiction
- Definition of “sexual harassment”
- How to conduct a live cross-examining hearing
- How to serve impartially
- Relevance
- How to objectively evaluate all relevant evidence to reach a decision
 - Determining weight, persuasiveness, and/or credibility
- Inability to draw negative inferences about failure to subject to cross-examination

Formal Rulemaking



Preamble/Guidance and the Regulations

Preamble/Guidance:

- Dept. of Ed. Interpretation
- May rely on legal precedent
- Entitled to deference
- Potential for change based on Dept. of Ed. leadership
 - Ex: 2011 Dear Colleague Letter

The Regulations:

- 34 C.F.R. § 106
- Force and effect of law
- Will require notice and comment rulemaking in order to amend

PART 106—NONDISCRIMINATION ON THE BASIS OF SEX IN EDUCATION PROGRAMS OR ACTIVITIES RECEIVING FEDERAL FINANCIAL ASSISTANCE

- 1. The authority citation for part 106 continues to read as follows:

Authority: 20 U.S.C. 1681 *et seq.*, unless otherwise noted.

New Definitions



34 C.F.R. § 106.30(a)

- Actual Knowledge
- Complainant
- Consent**
- Formal Complaint
- Respondent
- Sexual Harassment (See next slide)
- Supportive Measures

New Definition of Sexual Harassment

34 C.F.R. § 106.30(a)

Sexual harassment means conduct on the basis of sex that satisfies one or more of the following:

(1) An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;

(2) Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity; or

(3) "Sexual assault" as defined in 20 U.S.C. 1092(f)(6)(A)(v), "dating violence" as defined in 34 U.S.C. 12291(a)(10), "domestic violence" as defined in 34 U.S.C. 12291(a)(8), or "stalking" as defined in 34 U.S.C. 12291(a)(30).

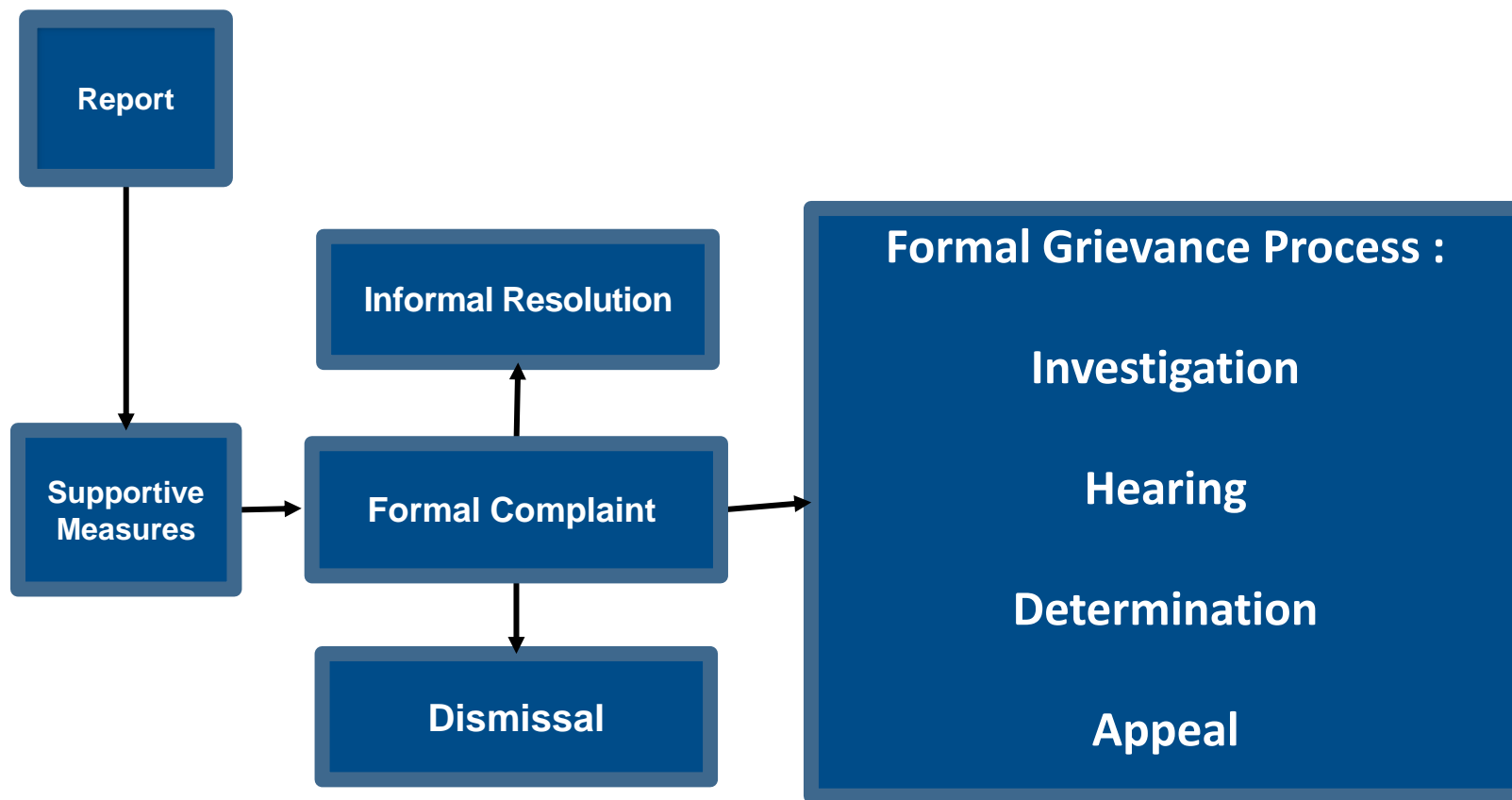
Sexual Harassment



- **Sexual harassment** means conduct on the basis of sex that satisfies one or more of the following:
 - [**Quid pro quo**] An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;
 - [**Hostile environment**] Unwelcome conduct determined by a reasonable person to be so **severe, pervasive, and objectively offensive** that it effectively denies a person equal access to the recipient's education program or activity; or
 - [**Clery crimes**] Sexual assault, dating violence, domestic violence, or stalking

New Required Processes

Process Overview



Changes to Jurisdiction

Actual Knowledge of SH or Activity  Educational Program
 Against a Person in the United States

- A recipient with actual knowledge of sexual harassment in an educational program or activity of the recipient against a person in the United States, must respond promptly in a manner that is not deliberately indifferent.
- “includes locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution. “ 34 C.F.R. §106.44(a)

Mandatory Dismissal



Dismissal of a formal complaint— §106.45(b)(3)(i)

The recipient **must** investigate the allegations in a formal complaint

- **(BUT)** If the conduct alleged in the formal complaint would not constitute sexual harassment as defined in §106.30 even if proved, did not occur in the recipient's **education program or activity**, ...
- or **did not occur against a person in the United States**,
- then the recipient **must** dismiss the formal complaint with regard to that conduct for purposes of sexual harassment under title IX or this part; **such a dismissal does not preclude action under another provision of the recipient's code of conduct.**

Live Cross-Examination Hearings

Overview of the Hearing



- Recipients must provide a live hearing with cross-examination
 - Parties may be in different locations
 - “Live” means in real-time
 - No submitting written questions that may be answered later
- Parties must be represented by an advisor
 - If a party does not have one, the university must provide one
 - Does not have to be a lawyer – can be a parent, friend, or witness
 - Emphasis on the right of parties to have an advisor of their choice
- Must be recorded or transcribed

Live Cross-Examination Hearings

Who can be a Decision-Maker?



- Does not have to be a lawyer
- May be a panel of individuals
- Must be impartial and free from bias or conflict-of-interest
- Must have received training outlined in 34 C.F.R. 106.45(b)(1)(iii)

Live Cross-Examination Hearings

Why Cross-Examination?



Per Dept. of Ed., cross-examination is essential for truth-seeking

- Provides opportunity to both parties to test “consistency, accuracy, memory, and credibility”
- Regs do not require strict interpretation of cross-examination (leading) questions

Per the 6th Circuit in *Doe v. Baum*, cross-examination

- “Due process requires cross-examination in circumstances [where a determination turns on credibility] because it is the greatest legal engine ever invented for uncovering the truth.” [internal citations omitted]

Live Cross-Examination Hearings

Cross-Examination Overview



- ONLY advisors may cross-examine, NOT the parties themselves
- Institutions can set rules of decorum to avoid abusive questioning
- Be aware of provisions re: consideration of prior statements if not subjected to cross
 - Does your policy address this issue?
 - Sept. 4th guidance from Dept. of Ed.

Live Cross-Examination Hearings & Relevance



34 C.F.R. § 106.45(b)(6)(i)

- Relevance rulings req'd for EVERY question
- All “relevant” questions must be allowed, including those challenging credibility
- Questions that do not seek “relevant” information are NOT allowed
- No definition of relevance in the regulations
 - Preamble information re: Rules of Evidence
 - Polygraph examinations, expert witnesses, private investigators

Live Cross-Examination Hearings

Inadmissible Evidence



34 C.F.R. § 106.45(b)(6)(i)

Must consider relevant evidence with the following exceptions:

- (1) Complainant's sexual behavior ("Rape Shield Provisions")
 - Two exceptions apply (see next slide)
- (2) Information protected by a legal privilege
- (3) Party's treatment records (absent voluntary written waiver by the party)

Live Cross-Examination Hearings

Two Exceptions to Rape Shield



34 C.F.R. § 106.45(b)(6)(i)

Cross-examination **must exclude** evidence of the Complainant's "sexual behavior or predisposition" **UNLESS:**

(1) its use is to prove that someone other than the Respondent committed the conduct,

OR

(2) it concerns specific incidents of the complainant's sexual behavior with respect to the respondent and is offered to prove consent

**Bias, Conflicts-of-
Interest, and
Serving Impartially**

Impartially Serving as a Decision-Maker



Components of Impartial Service

- Avoiding pre-judgment of the facts at issue
- Avoiding conflicts-of-interest
- Avoiding bias

Things to Note:

- Department declined to determine whether bias has to be actual or if perceived is sufficient to create an issue
- Each specific bias issue requires a fact-specific analysis

Impartiality and Recall



According to the Preamble...

A decision-maker needs to recognize that a party

- **should not be** “unfairly judged due to
- inability to recount each specific detail of an incident in sequence,
- whether such inability is due to:
 - trauma,
 - the effects of drugs or alcohol,
 - or simple fallibility of human memory.” (Preamble, p. 30323)

Process-Related Efforts to Minimize Bias & Conflicts (1 of 3)



No single-investigator model for Title IX

- Decision-maker (or makers if a panel) cannot have been the same person who served as the Title IX Coordinator or investigator (Preamble, p. 30367)
- Prevents the decision-maker from improperly gleaning information from the investigation that isn't relevant that an investigator might be aware of from gathering evidence (Preamble, p. 30370)
- The institution may consider external or internal investigator or decision-maker (Preamble, p. 30370)

Process-Related Efforts to Minimize Bias & Conflicts (2 of 3)



Mandatory Training for Different Roles

- The Regs require specific training for Title IX Coordinators, Investigators, Decision-Makers, Informal Resolution Facilitators, and Appeals Decision-Makers
 - See 34 C.F.R. § 106.45(b)(1)(iii)
- Mandatory training is intended to provide Title IX personnel with the tools needed to serve impartially and without bias
 - Including individuals with prior professional experience in related fields (Preamble, p. 30252)

Process-Related Efforts to Minimize Bias & Conflicts (3 of 3)



Institutional Discretion to Identify Bias

- “[R]ecipients should have objective rules for determining when an adjudicator (or Title IX Coordinator, investigator, or person who facilitates an informal resolution) is biased, and the Department leaves recipients discretion to decide how best to implement the prohibition on conflicts of interest and bias...” (Preamble, p. 30250)
 - Recipients have the discretion to have a process to raise bias during the investigation
 - Bias is a basis for appeal of the decision-maker’s determination (34 C.F.R. 106.45(b)(8)(i)(C))

***Per Se* Conflicts & Bias**



According to the Preamble, page 30252

- Supervisors, employees, administrative staff
 - No *per se* prohibited conflicts of interest
 - Ultimately, the Department will hold institutions accountable
- Individuals with certain professional experiences or affiliations
 - No *per se* prohibited conflicts of interests
 - Professional Experience Example: investigator with a history of working in the field of sexual violence
 - Affiliation Example: self-professed feminists, defense attorneys

***Per Se* Conflicts & Bias (Cont.)**



According to the Preamble, page 30252

- Recommends using a reasonable person standard to identify bias/conflicts
 - Cautions against using generalizations
- Also cautions parties and recipients from concluding bias “based solely on the outcomes of grievance processes decided under the final regulations.”
 - The “mere fact that a certain number of outcomes result in determinations of responsibility, or non-responsibility, does not necessarily indicate bias.”

Possible Examples of Bias



- Situations where a decision-maker has already heard from a witness or party in a prior case and has made a credibility determination re: that person;
- Situations where information “gleaned” by the investigator is shared with the decision-maker outside the investigation report (in meetings to discuss pending cases, in passing while at work, etc.)

Avoiding Pre-Judgment of the Facts



A good way to avoid bias and ensure impartiality

Remember:

- **Keep an open mind** as a decision-maker and actively listen to all the facts presented as subjected to cross-examination
- If a party or witness does not submit to cross-examination, may not be able to consider statements in the record
- Each case is unique and different

Avoiding Sex Stereotypes



Necessary for avoiding bias and ensuring impartiality

- “Must” not rely on sex stereotypes
- Decision-makers are trained to avoid bias and sex stereotypes—
 - “such that even if a cross-examination question impermissibly relies on **bias or sex stereotypes** while attempting to challenge a party’s plausibility, credibility, reliability, or consistency,
 - it is the trained decision-maker, and not the party advisor asking a question,
 - who determines whether the question is relevant if it is relevant, then evaluates the question and any resulting testimony in order to reach a determination on responsibility” (Preamble, 30325)

**ISSUES OF
RELEVANCY:
Not Rules of Evidence**

Relevancy

(1 of 2)



From the Regulations

Per 34 C.F.R. 106.45(b)(6)(i):

- “At the live hearing, the decision-maker(s) must permit each party’s advisor to ask the other party and all witnesses **all relevant** questions and follow-up questions, including those challenging credibility...”
- “**Only relevant** cross-examination and other questions may be asked of a party or witness...”

Relevancy

(2 of 2)



From the Regulations

Per 34 C.F.R. 106.45(b)(6)(i):

- “Before a complainant, respondent, or witness answers a cross-examination or other question, the decision-maker(s) must first determine whether the question is relevant and explain any decision to exclude a question as not relevant.”

Relevancy Takeaways



Big Picture Items

- *All* relevant questions must be allowed
- *Only* relevant questions may be asked
- Every question must be evaluated for relevance
 - Requires decision-makers to make “on the spot” determinations
 - When a question is excluded, the decision-maker(s) must explain the decision

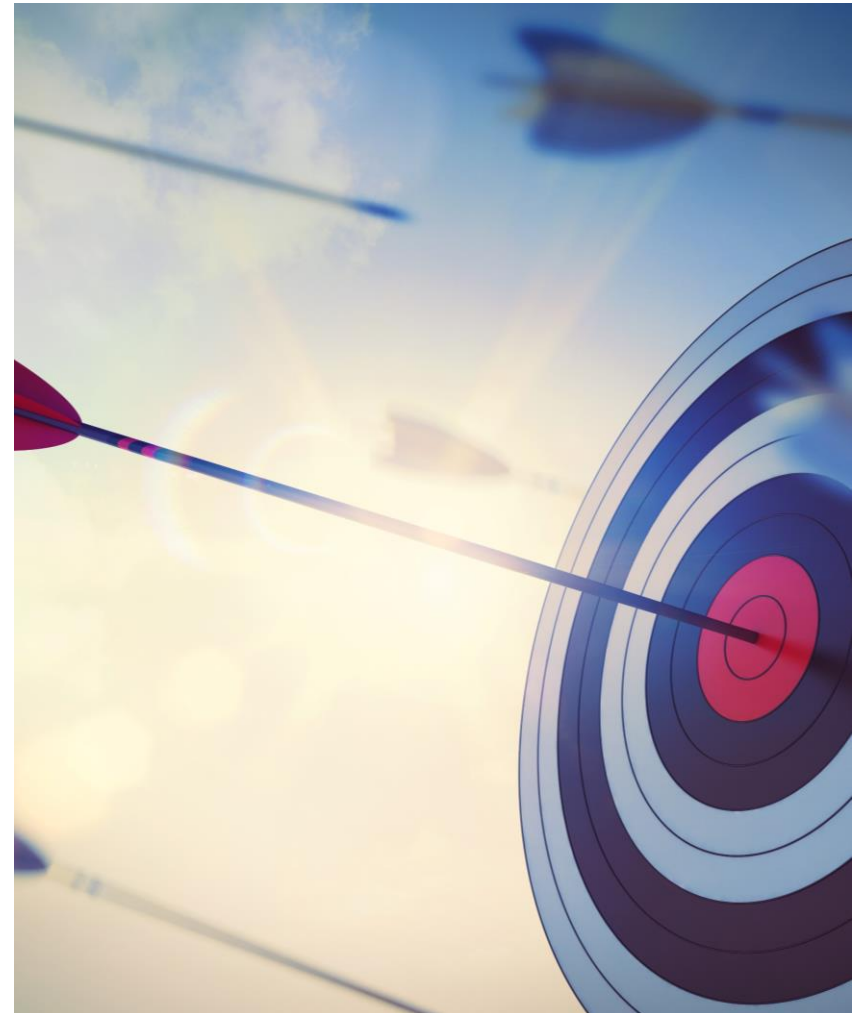
What is Relevant?



From the Regulations

- No definition of “Relevance” in the regs
 - However, significant commentary and guidance in the Preamble
 - We will discuss guidance from the Preamble, but guidance may change easier than the regulations
- Prohibitions on certain types of questions and evidence (discussed later)

Relevancy Visuals



Relevancy in the Preamble

(1 of 3)



- Certain provisions hint at what may be relevant
- In the context of discussing relevancy decisions, the prior Dept. of Ed. explained:
 - “... it is sufficient... to explain that a question is irrelevant because it 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.” (Preamble, p. 30343)
 - This suggests that questions about details that are not probative of any material fact concerning the allegations may not be relevant

Relevancy in the Preamble

(2 of 3)



- The Rules of Evidence do NOT and CANNOT apply
 - “[T]he decision-maker’s only evidentiary threshold for admissibility or exclusion of questions and evidence is not whether it would then still be excluded under the myriad of other evidentiary rules and exceptions that apply under, for example, the Federal Rules of Evidence.” (Preamble, p. 30343)
- Examples:
 - No reliance of statement against a party interest (Preamble, p. 30345)
 - No reliance on statement of deceased party (Preamble, p. 30348)
 - A recipient may not adopt a rule excluding relevant evidence whose probative value is substantially outweighed by the danger of unfair prejudice (Preamble, p. 30294)

Relevance versus Weight



Something may be relevant, but not given much weight in the decision

- “[D]oes not prescribe rules governing how admissible, relevant evidence must be evaluated for weight or credibility by recipient’s decision-maker, and recipients thus have discretion to adopt and apply rules in that regard, so long as such rules do not conflict with 106.45 and apply equally to both parties.” (Preamble, p. 30294)

WARNING:

- “[I]f a recipient trains Title IX personnel to evaluate, credit, or assign weight to types of relevant, admissible evidence, that topic will be reflected in the recipient’s training materials.” (Preamble, p. 30293)

Relevancy in the Preamble

(3 of 3)



- Cannot *per se* exclude certain types of evidence:
 - A recipient may not adopt rules excluding certain types of relevant evidence (**lie detector** or rape kits) where that type of evidence is not labeled irrelevant in the regulations (e.g., sexual history) or otherwise barred for use under 106.56 (privileged) and must allow fact and **expert witnesses**. (Preamble, p. 30294)

Relevancy & the Standard of Evidence



Questions to consider:

- Does this question, topic, evidence help move the dial under the standard of evidence?
 - **Preponderance of the evidence:** a fact is more likely than not to be true (Preamble, p. 30373 fn. 1409)
 - **Clear and convincing:** a fact is highly probable to be true (Preamble, p. 30373 fn. 1409)

Relevancy:

Preponderance of the Evidence



Under the **preponderance of the evidence** standard:

- Does this help me in deciding if there was more likely than not a violation?
- Does it make it more or less likely?
- Why or why not?

If it doesn't move this dial: likely not relevant.

Relevancy: Clear and Convincing



Under the **clear and convincing** standard of evidence:

- Does this help me in deciding if a fact is highly probable to be true?
- Does it make it more or less probable?
- Why or why not?

If it doesn't move this dial: likely not relevant.

“Not Relevant”



From the Regulations

The Department has determined that recipients must consider relevant evidence with the following exceptions:

- (1) Complainant’s sexual behavior (except for two narrow exceptions)
 - 34 C.F.R. § 106.45(b)(6)(i)
- (2) information protected by a legal privilege
 - 34 C.F.R. § 106.45(b)(5)(i)
- (3) party’s treatment records (absent voluntary written waiver by the party)
 - 34 C.F.R. § 106.45(b)(5)(i)

Relevancy: Regulations' Rape Shield Law-Complainants



- According to 34 C.F.R. 106. 45(b)(6)(i), Cross-examination **must exclude** evidence of the Complainant's "sexual behavior or predisposition" **UNLESS**
 - its use is to prove that someone other than the Respondent committed the conduct, OR
 - it concerns specific incidents of the complainant's sexual behavior with respect to the respondent and is offered to prove consent

Relevancy: Regulations' Rape Shield Law - Respondents



- Rape shield protections **do not apply to Respondents**
 - Plain language of the regulations concerns “complainant’s sexual predisposition or prior sexual behavior” only
 - According to the Preamble:
 - “The Department reiterates that the rape shield language . . . does not pertain to the sexual predisposition or sexual behavior of respondents, so **evidence of a pattern** of inappropriate behavior by an alleged harasser must be judged for relevance as any other evidence must be.” (Preamble, p. 30353)

Treatment Records



From the Regulations

Under the “Investigation” section:

- “[C]annot access, consider, disclose, or otherwise use a party’s records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional’s or paraprofessional’s capacity, or assisting in that capacity, and **which are made and maintained in connection with the provision of treatment to the party, unless the recipient obtains that party’s voluntary, written consent** to do so for a grievance process under this section.”
 - 34 C.F.R. § 106.45(b)(5)(i)

Privileged Information



From the Regulations

Under the “Basic Requirements for a Grievance Process” section:

- “A recipient’s grievance process must...not require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege.”
 - Per 34 C.F.R. § 106.45(b)(1)(x)

Privileges that May Apply



Whether or not a privilege applies will depend on your legal jurisdiction

- Always involve your legal counsel for privileges in your jurisdiction
- Example privileges:
 - Attorney-client communications
 - Implicating oneself in a crime
 - Confessions to a clergy member or other religious figures
 - Spousal testimony in criminal matters
 - Some confidentiality/trade secrets

Submission to Cross-Examination



From the Regulations

When parties do not participate:

- “If a party or witness does not submit to cross-examination at the live hearing...the decision-maker(s) cannot draw an inference about the determination regarding responsibility **based solely** on a party’s or witness’s absence from the live hearing or refusal to answer cross-examination or other questions.” 34 C.F.R. 106.45(b)(6)(i).
- If statement is in a video or text message, still cannot be considered if no submission to cross-examination (Preamble, p. 30346)
- What does it mean to “not submit to cross-examination at the live hearing”?
 - Refuse to answer one question?
 - Refuse to answer questions about a particular subject?

Submission to Cross-Examination Rationale



According to the Dept. of Ed:

- There are many reasons a party or witness may elect not to participate in the live cross-examination hearing or answer a question or set of questions
- The decision-maker cannot make inferences from non-participation or compel participation (retaliation)
(Preamble, p. 30322)
- Relevant questioning by advisor along these lines?

What Amounts to Submission to Cross-Examination?



Post-Regulation Guidance

Sept. 4, 2020, Questions and Answers Regarding the Department's Final Title IX Rule, p. 9:

- “Conversely, if a party or witness answers one, or some, but not all, relevant cross-examination questions asked by a party’s advisor at the live hearing, then that party or witness has not submitted to cross-examination and that party’s or witness’s statements cannot be relied on by the decision-maker. See Preamble at page 1183 (“the Department declines to allow a party or witness to “waive” a question because such a rule would circumvent the benefits and purposes of cross-examination as a truth-seeking tool for postsecondary institutions’ Title IX adjudications”).
- Talk to your legal counsel about how to handle this

Cross-Examination Without a Party



- A party's advisor may appear and conduct cross-examination even when the party whom they are advising does not appear (Preamble, 30346)
- If both the party and the party's advisor do not appear, "a recipient-provided advisor must still cross-examine the other, appearing party, resulting in consideration of the appearing party's statements (without any inference being drawn based on the non-appearance)." (Preamble, 30346)
 - Does your institution have a back-up for this situation?

Cross-Examination of a Third Party Substitute



- Third party cross-examination of what a non-appearing party stated does not count as statements tested on cross-examination. (Preamble, p. 30347)
- Examples: family and friends showing up and answering questions on behalf of a non-appearing party
- Rationale: “[A] rule of non-reliance on untested statements is more likely to lead to reliable outcomes than a rule of reliance on untested statements.” (Preamble, 30347)

When a Prior Statement IS the Title IX Sexual Harassment



Verbal Conduct that is the basis of the SH charge:

Thus, a respondent's alleged verbal conduct, that itself constitutes the sexual harassment at issue, is not the respondent's "statement" as that word is used in § 106.45(b)(6)(i), because the verbal conduct does not constitute the making of a factual assertion to prove or disprove the allegations of the sexual harassment; instead, the verbal conduct constitutes part or all of the underlying allegation of sexual harassment itself.

- Office for Civil Rights Blog - 20200522
- Ex: "If you go on a date with me, I'll give you a higher grade in my class"
- If you don't already follow the blog, add it to your favorites bar: <https://www2.ed.gov/about/offices/list/ocr/blog/index.html> (May 22, 2020 blog post)

When a Party Does Not Submit to Cross-Examination



- Consider the evidence you have
- Don't draw an inference from an absence
- Address these issues in your decision
 - “[E]ven though the refusing party’s statement cannot be considered, the decision-maker may reach a determination based on the remaining evidence so long as no inference is drawn based on the party or witness’s absence from the hearing or refusal to answer cross-examination (or other) questions.” (Preamble, p. 30322)
 - Example: “[W]here a complainant refuses to answer cross-examination questions but video evidence exists showing the underlying incident, a decision-maker may still consider the available evidence and make a determination” (30328)

Relevancy: No Reliance on Prior Statements – SANE and Police Reports



- This expressly means no statements in police reports, no SANE reports, medical reports, or other documents to the extent they contain statements of parties or witnesses who do not submit to cross examination (Preamble, p. 30349)
- If non-cross-examined statements are intertwined with statements tested by cross-examination, can only consider those that have been cross-examined (Preamble, p. 30349)
 - Think text messages

Other Considerations



- What about sex stereotyping questions?
- What about questions by advisor about why a party isn't participating?
- What about decorum?

Rules of Decorum



According to the Preamble

- Institutions may adopt rules regarding conduct and decorum at hearings
- They must apply equally to both parties
 - What we do for one, we do for the other
- Goal of cross-examination is to allow for truth-seeking that benefits both parties, while “minimizing the discomfort or traumatic impact of answering questions about sexual harassment” (Preamble, p. 30315)

Decorum

(1 of 3)



According to the Preamble

- Relevant questions must not be abusive
- Enforcement of decorum rules must be evenhanded
- “[W]here the **substance of a question is relevant**, but the manner in which an advisor attempts to ask the question is **harassing, intimidating, or abusive (for example, the advisor yells, screams, or physically ‘leans in’ to the witness’s personal space)**, the recipient may appropriately, evenhandedly enforce rules of decorum that require relevant questions to be asked in a respectful, non-abusive manner.” (Preamble, p. 30331)

According to the Preamble

- Concerns about aggressive and victim-blaming cross-examination should be addressed by educating a recipient's community
 - “The Department acknowledges that predictions of **harsh, aggressive, victim-blaming** cross-examination may dissuade complainants from pursuing a formal complaint out of fear of undergoing questioning that could be perceived as interrogation. However, recipients retain discretion under the final regulations to educate a recipient's community about what cross-examination during a Title IX grievance process will look like, including developing rules and practices (**that apply equally to both parties**) to oversee cross-examination to **ensure that questioning is relevant, respectful, and non-abusive.**” (Preamble, p. 3031,6 see also 30315; 30340)

According to the Preamble

- Remember the essential function of cross-exam is to probe competing narratives, not humiliate
 - “[T]he essential function of cross-examination is **not to embarrass, blame, humiliate, or emotionally berate a party**, but rather to ask questions that probe a party’s narrative in order to give the decision-maker the fullest view possible of the evidence relevant to the allegations at issue.” (30319)
- Institutions may impose consequences (according to the Preamble)
 - Nothing in this rule prevents recipient from enforcing decorum rules in the hearing and “the recipient may require the party to use a different advisor” if the advisor does not comply and may provide a different advisor to conduct cross examination on behalf of that party (Preamble, p. 30320)

Practice Making Relevancy Determinations

Relevancy Determination Hypotheticals



Okay, decision-maker, is this question relevant?

For practice, we will pose these in cross-examination format. As discussed before, the traditional cross-examination style is aimed at eliciting a short response, or a “yes” or “no,” as opposed to open-ended question which could seek a narrative (longer) response.

For example, instead of, “How old are you?” the question would be, “You’re 21 years old, aren’t you?”

Ask Yourself



For each practice hypothetical, ask yourself:

Is this question relevant or seeking relevant information?

- Why or why not?
- Does the answer to this depend on additional information?
- If it so, what types of additional information would you need to make a relevancy determination?

Relevancy Determination Hypotheticals Disclaimer



Disclaimer: The following hypotheticals are not based on any actual cases we have handled or of which we are aware. Any similarities to actual cases are coincidental.

Practice Hypothetical #1



Question from Respondent's advisor to Complainant:

Have you used marijuana in the past? How often?

Practice Hypothetical #2



Question from Complainant's Advisor to Respondent:

**You told the investigator that
after you and Cassie took a
shot together, she was a little
tipsy, right?**

Practice Hypothetical #3



Question from Respondent's advisor to Complainant:

**Do you always take shots of
tequila from anyone who
gives them to you?**

Practice Hypothetical #4



Question from Complainant's Advisor to Respondent:

And you thought Cassie was tipsy because she was giggling and because, according to your statement, she put her hands down your pants while the two of you were dancing between the living room and the kitchen, right?

Practice Hypothetical #5



Question from Respondent's advisor to Complainant:

**When you were dancing with
Roger, and the two of you
were kissing, you liked the
kissing, didn't you?**

Practice Hypothetical #6



Question from Complainant's Advisor to Respondent:

**You tried to kill yourself the
day after this incident
because you knew you raped
Cassie, isn't that right?**

Practice Hypothetical #7



Question from Respondent's advisor to Complainant:

**You remember telling either
Todd or Gus that you were
fine, right?**

Practice Hypothetical #8



Question from Complainant's Advisor to Respondent:

**You grabbed Cassie's hand to
pull her into your bedroom,
right?**

Practice Hypothetical #9



Question from Respondent's advisor to Complainant:

**You declined to pursue a
criminal investigation, right?**

Practice Hypothetical #10



Question from Complainant's Advisor to Respondent:

**Other students have accused
you of rape, haven't they?**

Practice Hypothetical #11



Question from Respondent's advisor to Complainant:

You told Roger that it was “a good party” for having sex, didn't you?

Practice Hypothetical #12



Question from Complainant's Advisor to Respondent:

**Your next-door neighbors,
Brian and Joe, refused to get
involved in the investigation,
right?**

Practice Hypothetical #13



Question from Respondent's advisor to Complainant:

You were wearing very tight pants on the night in question, right?

Practice Hypothetical #14



Question from Complainant's Advisor to Respondent:

Earlier in the evening, you got yelled at by your girlfriend, right?

**LIVE CROSS-
EXAMINATION:
Theory and Practice**

Cross Examination



Traditionally, cross-examination questions are those that try to elicit “yes” or “no” answers, not explanations.

Examples:

- You were at the party that night, weren't you?
- You'd agree with me that you had three beers, wouldn't you?
- You didn't call an Uber, did you?

Live Cross-Examination: Theory

(1 of 3)



From the Preamble

According to the Dept. of Ed., cross-examination is

- Essential for truth seeking (Preamble, p. 30313)
- Provides opportunity of both parties to **test “consistency, accuracy, memory, and credibility** so that the decision-maker can better assess whether a [party’s] narrative should be believed” (Preamble, p. 30315)

Live Cross-Examination: Theory

(2 of 3)



From the Preamble

According to the Dept. of Ed., cross-examination is

- Provides parties with the opportunity to “direct the decision-maker’s attention to implausibility, inconsistency, unreliability, ulterior motives, and lack of credibility” in the other party’s statements. (Preamble, p. 30330)
- Promotes transparency and equal access (Preamble, p. 30389)

Live Cross-Examination: Theory

(3 of 3)



The Preamble pointing to the Regulations

According to the Department, the process in 106.45 best achieves the purposes of:

- (1) effectuating Title IX's non-discrimination mandate by ensuring **fair, reliable outcomes** viewed as **legitimate** in resolution of formal complaints of sexual harassment so that victims receive remedies
- (2) **reducing and preventing sex bias** from affecting outcomes; and
- (3) ensuring that Title IX regulations are consistent with **constitutional due process and fundamental fairness** (Preamble, p. 30327)

Live Cross-Examination: Theory in the 6th Circuit



Doe v. Baum

- “Due process requires cross-examination in circumstances [where a determination turns on credibility] because it is the greatest legal engine ever invented for uncovering the truth.” [internal citations omitted]

Live Cross-Examination: How it should look



According to the Dept. of Ed.,

- “[C]onducting cross-examination consists simply of posing questions intended to advance the asking party’s perspective with respect to the specific allegation at issue.” (Preamble, p. 30319)

Takeaways:

- Questions
- Intended to advance the asking party’s perspective
- Regarding a specific allegation

Live Cross-Examination:

34 CFR 106.45(b)(6)

(1 of 2)



From the Regulations

In this process:

- Decision-maker must permit each party's advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility
- Must be conducted directly, orally, and in real time by the party's advisor, but never party personally
- Only relevant cross-examination and other questions may be asked of a party or witness

Live Cross-Examination:

34 CFR 106.45(b)(6)

(2 of 2)



From the Regulations

In this process:

- Before a party or witness may answer a question, the decision-maker must first determine whether the question is relevant and explain the reason if not relevant
- Must audio record, audio-video record or provide a transcript of the hearing

Cross-Examination by Decision-Makers?



According to the Preamble

Remember:

- Decision-Makers are Neutral
- Cross-Examination is intended to advance one party's perspective
- No "taking sides"
- "To the extent that **a party wants the other party questioned in an adversarial manner** in order to further the asking party's views and interests, that questioning is conducted by the party's own advisor, **and not by the recipient**...
- Thus, no complainant (or respondent) need feel as though the recipient is "taking sides" or otherwise engaging in cross-examination to make a complainant feel as though the recipient is blaming or disbelieving the complainant." (Preamble, p. 30316)

Questioning by Decision-Makers



According to the Preamble

Remember:

- Burden to get the information you need
- Can and should ask questions if more information is needed
- “[O]n the decision-maker’s initiative [can] ask questions and elicit testimony from parties and witnesses,
- **as part of the recipient’s burden to reach a determination regarding responsibility based on objective evaluation of all relevant evidence** including inculpatory and exculpatory evidence.
- **Thus , the skill of a party’s advisor is not the only factor in bringing evidence to light for a decision-maker’s consideration.**” (Preamble, p.30332)

Confidentiality



From to the Regulations

- 34 C.F.R.106.71 requires that recipients keep party and witness identities confidential except as permitted by law or FERPA, and as needed to conduct an investigation or hearing (30316)

According to the Preamble

- Confidentiality concerns prevents anyone other than advisors from attending the hearing with the party, unless otherwise required by law (Preamble, p. 30339)
- ADA accommodations-required by law
- CBA require advisor and attorney?

Reminders (1 of 3)



- Individual cases are not about statistics
- Decision in every case must be based on preponderance of evidence or clear and convincing evidence presented
- Cannot fill in evidentiary gaps with statistics, personal beliefs or information about trauma
- Process must be fair and impartial to each party
- Institution may proceed without active involvement of one or both parties; base conclusions on impartial view of evidence presented

Reminders (2 of 3)



- **Withhold pre-judgment:** The parties may not act as you expect them to
- Be aware of your own biases as well as those of the complainant, respondent, and witnesses
- Let the available facts and standard of proof guide your role in overseeing the live cross-examination hearing, not unfair victim-blaming or societal/personal biases

Reminders (3 of 3)



- Burden of gathering the evidence on the recipient, not the parties (Preamble, p. 30333)
- This is an issue for the investigation, but might be something you see as the decision-maker

Questions?

Additional information available at:

Title IX Resource Center at www.bricker.com/titleix

Free upcoming webinars at www.bricker.com/events

Find us on **Twitter** at
@BrickerHigherEd

Erin Butcher
ebutcher@bricker.com

Jessica Galanos
jgalanos@bricker.com

**Sign up for
email insights
authored by
our attorneys.**



Text 'Bricker'
to 555888.