



DECISION-MAKER ADDITIONAL TRAINING

As Established in the School P&P Supporting the School IA&IP 2020-2023

ST9T Training (#3)

Decision Maker Must Recall

1. How to **objectively** evaluate all **relevant** evidence, including inculpatory and exculpatory and **make decisions on relevancy** (30320).
 - ❖ **Inculpatory**: evidence that tends to prove the violation of a policy
 - ❖ **Exculpatory**: evidence that tends to exonerate the accused
2. That a decision-maker cannot draw inferences about failure to appear or answer questions in live cross examination hearing.
3. How to determine weight, persuasiveness, and/or credibility in an objective evaluation.
4. Under Clery Act, must receive annual training on:
 - ❖ Issues related to sexual assault, domestic violence, dating violence, stalking (Level 1).
 - ❖ How to conduct an investigation and hearing process that protects the safety of victims and promotes accountability (Level 1 and today).
5. Avoiding impartial judgment of parties:

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.” (30323)

Being Impartial: Avoiding Sex Stereotypes

- ❖ Avoid bias and sex stereotypes recalling examples such as:
 - Women have regret sex and lie about sexual assaults.
 - Men are sexually aggressive or likely to perpetrate sexual assault.
 - Consideration of marginalized groups: people with disabilities, people of color, people who identify in the “LGBTQ” community (30259-30260).
 - Common tactic used in defense of sexual assault remains the “leveraging rape myths” when cross-examining rape victims (30325).
- ❖ Focus proceedings on relevant questions and evidence, “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 “ (30325).
- ❖ Understand that this is a broader societal issue, a not an issue with cross-examination as a tool for truth-seeking.
- ❖ Enforce 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.” (30323)



Live Cross-examination Theory And Practice

Live Cross-examination: Theory

- ❖ Traditionally, cross examination questions are those that try to elicit “yes” or “no” answers, not explanations. For instance:
 - 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 a taxi service or a friend, did you?
- ❖ Essential for truth seeking (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” (30315).
- ❖ 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 (30330).
- ❖ Promotes transparency and equal access (30389).
- ❖ According to the Department, the process in 106.45 best achieves the purposes of:
 - 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;
 - Reducing and preventing sex bias from affecting outcomes; and
 - Ensuring that Title IX regulations are consistent with constitutional due process and fundamental fairness (30327)

“Conducting cross-examination consists simply of posing questions intended to advance the asking party’s perspective with respect to the specific allegation at issue.” (30319)

Live Cross-examination: Regulations

- ❖ During the live cross-examination process the Decision-Maker :
 1. 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.
 2. Must be conducted directly, orally, and in real time by the party's advisor, but never party personally .
 3. May ask only relevant cross-examination and other questions to a party or witness.
- ❖ 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.

Role of Decision- Maker/Questioning By

Actions Keeping Decision-Maker Neutrality

- ❖ 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 school**. Thus, no complainant or respondent need feel as though the school is "taking sides" or otherwise engaging in cross-examination to make a complainant feel as though the school is blaming or disbelieving the complainant. (30316)
- ❖ **On 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. (30332).
- ❖ 106.71 requires school to keep party and witness identities confidential except as permitted by law or FERPA, and as needed to conduct an investigation or hearing (30316).
- ❖ Prevents anyone in addition to the selected advisor to attend the hearing with the party, unless otherwise required by law (30339).

Decision- Maker Recap

- ❖ 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.
- ❖ Withhold pre-judgment considering that 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.
- ❖ Avoid unfair victim-blaming or societal/personal biases.
- ❖ Burden of gathering the evidence on the school, not the parties (30333)—should be an issue with investigation, but might be something the decision-maker sees.



Relevancy in Live Cross-examination

Relevancy

- ❖ Per 34 C.F.R. 106. 45(b)(6)(i):
 - Only relevant cross-examination and other questions may be asked of a party advisor or witness.
- ❖ Cross examination **must focus** only on questions that are relevant to the allegations in dispute. (30319)
- ❖ Party or witness cannot answer a question until the decision-maker determines whether it is relevant.
- ❖ Requires decision-makers to make “on the spot” determinations and explain the “why” if a question or evidence is not relevant (30343).
- ❖ Decisions regarding relevancy do not have to be lengthy or complicated:
 - “... 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.**” (30343)

What is Relevant or Pertinent?

- ❖ The Department is aware that the perception, and in some circumstances the reality, of cross examination in sexual assault cases has felt to victims like an emotional beating under which a skilled defense lawyer tries to twist a survivor's words, question the survivor's experience, or convince a fact-finder to find the defense lawyer's client is innocent by blaming the victim for the sexual assault or discrediting the victim with irrelevant character aspersions.
- ❖ Classical cross examination is designed to engage in DARVO (deny, attack, reverse victim/offender) strategies that harm victims. The Department reiterates, however, that **the 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.
- ❖ The school retains flexibility to adopt rules of decorum that prohibit any party advisor or decision-maker from questioning witnesses in an abusive, intimidating, or disrespectful manner.
- ❖ Cross examination does not inherently rely on or necessitate DARVO techniques, and the school retain discretion to apply rules designed to ensure that cross examination remains focused on relevant topics conducted in a respectful manner.
- ❖ To emphasize that cross-examination must focus only on questions that are **relevant to the allegations in dispute** ...and only relevant cross-examination or other questions may be asked of a party or witness, and before a party or witness answers a cross-examination question the decision-maker must determine whether the question is relevant and explain a decision to exclude a question as not relevant (30319).

What is Relevant or Pertinent?

- ❖ The Department further reiterates that the tool of cross-examination is equally as valuable for complainants as for respondents, because questioning that challenges a respondent's narrative may be as useful for a decision-maker to reach an accurate determination as questioning that challenges a complainant's narrative.
- ❖ Department agrees that even so-called "he said/she said" cases often involve evidence in addition to the parties' respective narratives, and the § 106.45 grievance process obligates the school to bear the burden of gathering evidence and to objectively evaluate all relevant evidence, both inculpatory and exculpatory, including the parties' own statements as well as other evidence.
- ❖ The Department disagrees that cross-examination disincentives the school from conducting a full investigation that uncovers all relevant evidence, in part because § 106.45 obligates the school to gather relevant evidence (thorough an investigation), and in part because cross-examination occurs at the end of the grievance process such that **the parties have already had** an opportunity to inspect and review the evidence collected by the recipient.
- ❖ Regardless of the identity, status, or profession of a party's advisor of choice, the Decision-Maker retains the discretion (30319):
 1. To apply school rules at a live hearing that require participants to refrain from engaging in abusive, aggressive behavior
 2. That only relevant cross-examination and other questions are asked, and determining the relevance of each cross-examination question before a party or witness answers
 3. To ensure that hearings in a § 106.45 grievance process are in no way "kangaroo courts" and instead function as truth-seeking processes.

What is Relevant or Pertinent?

- ❖ In some proceedings cross-examination on behalf of one or both parties will be conducted by non-lawyers who may be emotionally attached to the party whom they are advising. Yet attention must be the same.
- ❖ However, the Department believes that requiring cross-examination to be conducted by party advisors is superior to allowing parties to conduct cross-examination themselves.
- ❖ The Department believes that having advisors as buffers appropriately prevents personal confrontation between the parties while accomplishing the goal of a fair, truth seeking process. This does not remove accountability students should have for
- ❖ their own actions.
- ❖ Conducting cross-examination consists simply of posing questions intended to advance the asking party's perspective with respect to the specific allegations at issue; no legal or other training or expertise can or should be required to ask **factual questions** (from gathered evidence during investigation) in the context of a Title IX grievance process.
- ❖ The Department notes that a recipient is free to explain to complainants (and respondents) that the recipient is required by these Title IX regulations to provide cross examination opportunities.
- ❖ The school may reassure parties that the recipient is not throwing a party to the proverbial wolves by conducting a hearing designed to resolve the allegations at issue.

What is Relevant?

Conditions to Consider

- ❖ Does this question, topic, evidence helping to move the control under the standard of evidence?
 - a. **Under Preponderance of the evidence:** a fact is more likely than not to be true (30373 fn. 1409)
 - 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 change the topic position: likely not relevant
 - b. **Under Clear and convincing evidence:** a fact is highly probable to be true (30373 fn. 1409)
 - 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 change the topic position: likely not relevant

Relevancy: Regulations

The school (recipient) must ensure that “all *relevant* questions and evidence are admitted and considered (though varying weight or credibility may of course be given to particular evidence by the decision-maker).” (30331)

- The school 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. (30294).

The school must consider relevant evidence with the following exceptions:

- Complainant’s sexual behavior (except for two narrow exceptions).
- Information protected by a legal privilege.
- Party’s treatment records (absent voluntary written waiver by the party) (30337).

According to Regulations’ Rape Shield Law-Complainants, 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

According to Regulations’ Rape Shield Law- Respondents

- Rape shield protections do not apply to Respondents.
- 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.

Relevancy: Treatment of Records

School cannot 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.

Section 106.45(b)(5)(i) (see also 30317).

Relevancy: Legally Privileged Information

Section 106.45(b)(1)(x): 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.

Other typical privileges recognized across jurisdictions but with variations (will want to involve your legal counsel for definitions in your jurisdiction):

- 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

Relevancy: Improper Inference

When parties do not participate:

If a party or witness does not submit to cross-examination at the live hearing...the Decision-Maker cannot draw an inference (implication) 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).

Relevancy: No Reliance on Prior Statements

When parties elect not to participate, the school cannot retaliate against them (30322)

What if a party or witness gave a statement during the investigation but is not participating in cross-examination?

"Decision-maker must not rely on any statement of that party or witness in reaching a determination"

Relevancy: No Reliance on Prior Statements - Theory

If parties do not testify about their own statement and submit to cross-examination, **the Decision Maker will not have the appropriate context for the statement**, which is why the decision-maker cannot consider that party's statement (30349).

Relevancy: When Parties or Witnesses Do Not Participate

- There are many reasons a party or witness may not elect not to participate in the live cross-examination hearing or answer a question or set of questions, yet the Decision-Maker cannot make inferences from non-participation or compel participation (retaliation) (30322)
- A party's advisor may appear and the Decision Maker must conduct cross examination even when the party whom they are advising does not appear." (30346)
- Similarly, where one party does not appear and that party's advisor does 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) (30346).

Relevancy: No Reliance on Prior Statements

- ❖ Third party cross-examination of what a non-appearing party stated does not count as statements tested on cross examination. (30347) (provides examples of family and friends showing up on behalf of the non-appearing party).
- ❖ A rule of non-reliance on untested statements is more likely to lead to reliable outcomes than a rule of reliance on untested statements.” (30347)
- ❖ One question that a postsecondary institution may have is **whether not relying** on a party’s statement—because that party has not submitted to cross-examination — means not relying on a description of the words allegedly used by a respondent if those words constitute part of the alleged sexual harassment at issue. The answer is “no.”
- ❖ Even 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 (implication or extrapolation) is drawn based on the party or witness’s absence from the hearing or refusal to answer cross-examination (or other) questions.” (30322). For instance:
 - **Where 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).
 - **If the case does not depend on party’s or witness’s statements but rather on other evidence** (*e.g.*, video evidence that does not consist of “statements” or to the extent that the video contains non-statement evidence) the decision-maker can still consider that other evidence and reach a determination, and must do so without drawing any inference about the determination based on lack of party or witness testimony.

Relevancy: No Reliance on Prior Statements

- ❖ 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 sexual harassment; instead, the verbal conduct constitutes part or all of the underlying allegation of sexual harassment itself.
- ❖ But, if a party or witness does not submit to cross examination and makes a statement in a video, cannot consider that statement in the video to reach a decision on responsibility (30346).
- ❖ Recall: No rules of evidence can be imported.

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(30349).
- ❖ If non-cross-examined statements are intertwined with statements tested by cross examination, can only consider those that have been cross-examined (30349)

“Does not prescribe rules governing how admissible, relevant evidence must be evaluated for weight or credibility by recipient’s decision-maker. The school 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.” (30294)

Decorum

1. The preamble to the Title IX Regulations contains many discussions of an institution's discretion to set rules to maintain decorum throughout hearings and to remove non-complying advisors, parties, or witnesses.
2. Decorum issues are more commonly with advisors than parties...and have seen this equally on both sides. This is more likely to be an issue when family members serve as advisors, because, understandably, these can be emotional matters.
3. The school may adopt rules that govern the **conduct and decorum of participants at live hearings** so long as such rules comply with these final regulations and **apply equally to both parties**...These final regulations aim to ensure that the truth-seeking value and function of cross-examination applies for the benefit of both parties while minimizing the discomfort or traumatic impact of answer questions about sexual harassment. (30315)
4. Where 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. (30331)

Decorum

5. 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.** (30316 see also 30315; 30340)
6. The 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)
7. 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 (30320)

Relevancy Determination Fictional Examples

Explaining complicated topics that makes the most sense when are put into more realistic or relatable terms

For practice, we will pose a set of questions 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 instance instead of “How many kids do you have?” ask, “These three kids are yours, aren’t they?”

For each practice fictional example, 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 Fictional Examples

Explaining complicated topics that makes the most sense when are put into more realistic or relatable terms

1. You texted her the week before telling her that you wanted to have sex with her, didn't you?
2. But isn't it true you usually have sex with strangers at parties while intoxicated?
3. Did your attorney tell you not to answer that question?
4. Isn't it true that your counselor thinks you have anger issues focused at women?
5. You didn't see who was sexually assaulting you during the attack, did you?
6. Isn't it true that you won't answer my question because you lied to investigators?
7. Isn't it true you won't answer my question here because you don't want criminal implications?
8. Isn't it true you asked him to put on a condom before what you now claim is a sexual assault?
9. Have you tested positive for sexually transmitted diseases?
10. Isn't it true you texted Complainant the next day to see if she was mad at you?
11. If you were as drunk you just stated you were, you can't even be sure whether you had sex with Respondent or, say, Respondent's roommate, can you?
12. Did a doctor diagnose you with anxiety?
13. Isn't it true you tried to kill yourself later that night because you knew you did something wrong?
14. You've had sex with Respondent after drinking before, though, haven't you?
15. You could be wrong about that timeline, right?
16. This isn't the only Title IX complaint against you right now, is it?
17. You had consensual sex with him the next night, didn't you?
18. And you had to answer questions from police officers for three hours, didn't you?
19. Your witness didn't even show up today, right?
20. You're even paying for a criminal defense attorney instead of a free advisor, right?



The Hearing Procedures

The Hearing Setup

While the formality of the § 106.45 grievance process may seem “legalistic,” the process is very different from a civil lawsuit or criminal proceeding, such that Title IX grievance processes retain their character as administrative proceedings in an educational environment, focused on resolving allegations that **a respondent** committed sex discrimination in the form of sexual harassment against **a complainant**. 30332.

- ❖ Live hearings and cross examination...constitutes a serious, formal process, and the final regulations ensure that a school’s educational community is aware of that process and, when involved in the process, each party has the right to **assistance from an attorney or non attorney advisor** throughout the process.
- ❖ Can be scheduled on campus room if a party doesn’t request separate rooms, or separate rooms with technology allowing live cross examination at the request of either party.
- ❖ To make it easier for participants to participate in a live hearing, the final regulations expressly authorize the school, in the recipient’s discretion, to allow any or all participants to participate in the live hearing virtually. (30332, see also 30333, 30346) explaining 106.45(b)(6)(i).

Sex discrimination in the form of sexual harassment is a serious matter that warrants a predictable, fair grievance process with **strong procedural protections for both parties so that reliable determinations regarding responsibility are reached by the school (recipient).**

Hearing Process under Decision Maker

Because cross-examination questions and answers as well all relevant evidence, **is evaluated by a Decision-Maker trained to be impartial and neutral** that must:

- ❖ Provide opportunity for opening or closing statements.
- ❖ Provide direct questioning (open-ended, non cross questions).
- ❖ Allow cross-examination **conducted only by the appointed advisors** but never by a respondent or a complainant personally.
- ❖ Provide a neutral, impartial decision-maker, the function of adversarial questioning must be undertaken by advisors who owe no duty of impartiality to the parties (30330). However, determinations regarding responsibility will turn on the merits of each case, and not on the professional qualifications of a party's advisor.
- ❖ Ask questions and elicit testimony from parties and witnesses, as part of the its burden to reach a determination regarding responsibility based on objective evaluation of all relevant evidence including inculpatory and exculpatory evidence. But the parties also have equal rights to present evidence in front of the decision-maker so the decision-maker has the benefit of perceiving each party's unique perspective about the evidence." (30331)
- ❖ State when questions are irrelevant to diffuse any overly aggressive or abusive situation despite it may lengthen the hearing.
- ❖ Order of questioning parties and witnesses and time restraints are not stated in Title IX regulations.
- ❖ Enforce confidentiality which precludes support persons other than the advisor from participating in the live-cross examination hearing.

Regardless of whether certain demographic groups are more or less financially disadvantaged and thus more or less likely to hire an attorney as an advisor of choice, Decision-Makers in each case must reach determinations based on the evidence and not solely based on the skill of a party's advisor in conducting cross-examination.

Hearing Cross-Examination by Advisors

Department has concluded that self representation by parties in a live hearing in the context of a Title IX adjudication presents substantial risk of diminishing the effectiveness and benefits of cross-examination while increasing the probability that parties will feel traumatized by the prospect and reality of personal confrontation.

- ❖ If a party does not have an advisor present at the live hearing, the recipient **must provide** without fee or charge to that party, an advisor **of the recipient's choice**, who may be, but is not required to be, an attorney, to conduct cross examination on behalf of that party. (106.45(b)(6)(i) and preamble 30339).
- ❖ Advisors do not require Title IX Training, however a recipient may train its own employees whom the recipient chooses to appoint as party advisors (30342)
- ❖ A party cannot “fire” an appointed advisor (30342). But, if the party correctly asserts that the assigned advisor is refusing to ‘conduct cross-examination on the party’s behalf’ then the recipient is obligated to provide the party an advisor to perform that function, whether counseling the advisor to perform the role or stopping the hearing to assign a different advisor .
- ❖ Regulations permit a recipient to adopt rules that (applied equally) do or do not give parties or advisors the right to discuss relevance determinations with the decision-maker during the hearing. (30343).
- ❖ Whether a Decision-Maker, as the school representative in the hearing, believes that arguments about a relevance determination during a hearing would unnecessarily **prolong the hearing** or **become uncomfortable for parties**, the Decision-Maker may adopt a rule that prevents parties and advisors from challenging the relevance determination (after receiving the decision-maker’s explanation) during the hearing. (30343).
- ❖ A party always retains the right not to participate in a grievance process, but where the party does wish to participate and advance the party’s interests in the case outcome, with respect to testing the credibility of testimony via cross-examination, the party must do this by selecting an advisor of choice, or else working with an advisor provided to the party (without fee or charge) by the recipient.

The Department...declines to authorize that parties may be accompanied to a live hearing by persons other than the parties’ advisors, or other persons for reasons “required by law.”

Hearing Process Recording the Hearing

- ❖ The Department is persuaded by commenters' suggestions that all hearings should be recorded or transcribed, and has revised § 106.45(b)(6)(i) to require recipients to create an audio or audiovisual recording, or transcript, of any live hearing and make that recording or transcript available to the parties for inspection and review.
- ❖ As the commenters asserted, such a recording or transcript will help any party who wishes to file an appeal pursuant to § 106.45(b)(8) and also will reinforce the requirement that a decision-maker not have a bias for or against complainants or respondents generally or an individual complainant or respondent as set forth in § 106.45(b)(1)(iii).
- ❖ Hearings under § 106.45(b)(6) are not "public" hearings, and § 106.71(a) states that recipients must keep confidential the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness, except as permitted by the FERPA statute or regulations, 20 U.S.C. 1232g and 34 CFR part 99, or as required by law, or as necessary to conduct the hearing.

The Hearing recording or transcript is not required to be part of the written determination sent to the parties

Rather, under § 106.45(b)(6)(i) the parties have equal opportunity to inspect and review the recording or transcript of a live hearing, but that inspection and review right does not obligate the recipient to send the parties a copy of the recording or transcript.

Prehearing Conference

At the discretion of the Decision-Maker, a prehearing conference may be called prior to the commencement of the official hearing. Written notice of the prehearing conference shall be sent by the to all parties to the hearing proceeding and to other witnesses that may appear in such proceeding. The purpose of such a conference is to define the issues and the scope of the proceeding such like:

1. The standard of prove the Decision-Maker will consider and beginnings with a presumption of no violation by respondent.
2. Education about the school's grievance process;
3. Limitation of the number of witnesses;
4. Ensuring that rights, responsibilities, and expectations are set;
5. Clarification that cross-examination must be conducted only "directly, orally, and in real time;"
6. The rule of evaluating each question for relevancy, before a party or witness could answer, setting the tone;
7. Adopted rules governing the conduct and decorum of participants at the live hearing, in compliance with Title IX regulations and applying equally to both parties;
8. Recall that cross examination does not inherently involve victim-blaming attitudes, and ensuring that cross-examination always occurs in a respectful, non-abusive manner;
9. Discussing the use of breaks to allow parties to recover from panic attacks or emotional questioning, reset the tone, and reduce emotion and tensions;
10. Prevent disclosure or use during a grievance process of information protected by a legally recognized privilege... without the party's voluntary, written consent;
11. Any addition of evidence and witnesses that were not in the investigation for the first time at the hearing and perhaps outside of the process;
12. Submit a checklist of everything the Decision-Maker wants t cover during the live cross-examination by advisors;
13. Use of electronic media as a basis for exchange of briefs, hearing transcripts and exhibits, etc., in addition to the official record copy;
14. Review procedures to address relevancy issues that may arise; and
15. Offer a chance to receive and respond any concerns that may have arisen.

Evaluating Relevant Evidence and Resolving Credibility Disputes

- ❖ By giving both parties *equal* cross examination rights, the final regulations contemplate that a complainant's allegations, and a respondent's denials, equally warrant probes for credibility and truthfulness giving the parties opportunity to challenge credibility and require the decision-maker to "reasonably assess credibility."
- ❖ Because the subject matter involves sensitive, personal matters presenting high stakes and long-lasting consequences for both parties, robust hearing procedural rights for both parties are all the more important so that each party may fully, meaningfully put forward the party's viewpoints and beliefs about the allegations and the case outcome.
- ❖ While credibility is typically based on a number of factors such as sufficient specific detail, inherent plausibility, internal consistency, corroborative evidence, and demeanor, the most unreliable factor is demeanor.
- ❖ The hearing cross-examination provides opportunity for a Decision-Maker to assess credibility based on a number of factors, including evaluation of body language and demeanor, specific details, inherent plausibility, internal consistency, and corroborative evidence. Cross-examination brings those important factors to a decision-maker's attention in a way that no other procedural device does; furthermore, while social science research demonstrates the limitations of demeanor as a criterion for judging deception, studies demonstrate that inconsistency is correlated with deception.
- ❖ The hearing cross-examination remains an important part of truth seeking in adjudicative proceedings, partly because of the live, in-the moment nature of the questions and answers, and partly because cross examination by definition is conducted by someone whose very purpose is to advance one side's perspective. When that happens on behalf of each side, the decision-maker **is more likely to see and hear relevant evidence** from all viewpoints and have more information with which to reach a determination that better reflects the truth of the allegations.

Objectively Evaluating Relevant Evidence

- ❖ A cross-examination procedure does not imply that the credibility of sexual assault complainants is particularly suspect; rather, wherever allegations of serious misconduct involve contested facts, cross-examination is one of the time-tested procedural devices recognized throughout the U.S. legal system as effective in reaching accurate determinations resolving competing versions of events. (30315)
- ❖ The right of cross-examination equally to complainants and respondents, is as useful and powerful a truth-seeking tool for a complainant's benefit as for a respondent, so that a complainant may direct the decision-maker's attention to implausibility, inconsistency, unreliability, ulterior motives, and lack of credibility in the respondent's statements. (30330)
- ❖ Giving the parties equal opportunity to challenge credibility (through written questions for non-postsecondary institutions, and through cross-examination for postsecondary institutions) obligates the decision-maker to reach a determination regarding responsibility by objectively evaluating all relevant evidence.
- ❖ The function of cross-examination is precisely not to be neutral but rather to point out in front of the neutral decision-maker each party's unique perspective about relevant evidence and desire regarding the outcome of the case.
- ❖ "Only relevant cross examination and other questions may be asked of a party or witness. Before a complainant, respondent, or witness answers a cross-examination question, the decision-maker must first determine whether the question is relevant and explain any decision to exclude a question as not relevant." This provision better ensures that cross-examination in the out-of-court setting of a campus Title IX proceeding remains focused only on relevant questions and answers (which might produce relevant evidence).

Resolving a Dispute Whether Harassment Occurred or Welcome

From Revised Sexual Harassment Guidance: Harassment Of Students By School Employees, Other Students, Or Third Parties. OCR

If there is a dispute about whether harassment occurred or whether it was welcome — in a case in which it is appropriate to consider whether the conduct would be welcome — determinations should be made based on the totality of the circumstances. **The following types of information may be helpful in resolving the dispute:**

- ❖ Statements by any witnesses to the alleged incident.
- ❖ Evidence about the relative credibility of the allegedly harassed student and the alleged harasser.
For example, the level of detail and consistency of each person's account should be compared in an attempt to determine who is telling the truth. Another way to assess credibility is to see if corroborative evidence is lacking where it should logically exist. However, the absence of witnesses may indicate only the unwillingness of others to step forward, perhaps due to fear of the harasser or a desire not to get involved.
- ❖ Evidence that the alleged harasser has been found to have harassed others may support the credibility of the student claiming the harassment; conversely, the student's claim will be weakened if he or she has been found to have made false allegations against other individuals.
- ❖ Evidence of the allegedly harassed student's reaction or behavior after the alleged harassment.
For example, were there witnesses who saw the student immediately after the alleged incident who say that the student appeared to be upset? However, it is important to note that some students may respond to harassment in ways that do not manifest themselves right away, but may surface several days or weeks after the harassment. For instance, a student may initially show no signs of having been harassed, but several weeks after the harassment, there may be significant changes in the student's behavior, including difficulty concentrating on academic work, symptoms of depression, and a desire to avoid certain individuals and places at school.

Resolving a Dispute Whether Harassment Occurred or Welcome

Revised Sexual Harassment Guidance: Harassment Of Students By School Employees, Other Students, Or Third Parties. OCR

- ❖ Evidence about whether the student claiming harassment filed a complaint or took other action to protest the conduct soon after the alleged incident occurred. However, failure to immediately complain may merely reflect a fear of retaliation or a fear that the complainant may not be believed rather than that the alleged harassment did not occur.
- ❖ Other contemporaneous evidence. For example, did the student claiming harassment write about the conduct and his or her reaction to it soon after it occurred (e.g., in a diary or letter)? Did the student tell others (friends, parents) about the conduct (and his or her reaction to it) soon after it occurred?

§ 106.45 does not attempt to incorporate protections constitutionally guaranteed to criminal defendants such as the Sixth Amendment right to confront accusers face to face, the right of self representation, or the right to effective assistance of counsel.

Approaches During Cross-Examination

Keep an Open Mind

1. Keep an open mind until all statements have been tested at the live hearing.
2. Don't come to any judgment, opinion, conclusion or belief about any aspect of this matter until you've reviewed or heard all of the evidence and consider only the evidence that can remain (statements in the record might have to be removed from consideration if not tested in live-hearing).

Sound Reasoned Decision

3. Must render a sound, reasoned decision on every charge.
4. Must determine the facts in this case based on the information presented.
5. Must determine what evidence to believe, the importance of the evidence, and the conclusions to draw from that evidence.

Consider All Evidence

6. Consider all/only evidence: make a decision based solely on the relevant evidence obtained in this matter and only statements in the record that have been tested in cross examination.
7. Consider nothing but this evidence.

Be Reasonable and Impartial

8. Must be impartial when considering evidence and weighing the credibility of parties and witnesses.
9. You should not be swayed by prejudice, sympathy, or a personal view that you may have of the claim or any party.
10. Identify any actual or perceived conflict of interest.

Fact Finding Process

11. List undisputed facts – what do parties agree on? = findings of Fact
12. List disputed facts – what do parties disagree on?
13. What undisputed facts address each element?
14. What disputed facts must be resolved for each element?

Approaches During Cross-Examination

Weight of Evidence

15. The engine of cross-examination may appropriately look different in a Title IX grievance process than in a criminal proceeding.
16. The quality of evidence is not determined by the volume of evidence or the number of witnesses or exhibits.
17. It is the weight of the evidence, or its strength in tending to prove the issue at stake that is important.
18. Evaluate the evidence as a whole based on your own judgment.
19. Exclude irrelevant questions and adopt and enforce (so long as it is applied clearly, consistently, and equally to the parties) a rule that deems duplicative questions to be irrelevant.
20. Impose rules of decorum that require questions to be asked in a respectful manner
21. All relevant questions and evidence are admitted and considered (though varying weight or credibility may of course be given to particular evidence by the decision-maker) (30331).

*Thus, for example, where 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.*

22. Written submission of questions is no substitute for live cross-examination.
23. Determine the weight or credibility to be given to each piece of evidence; allow flexibility about how to assign weight or credibility to certain types or categories of evidence; maintain impartiality and treat complainants and respondents equally and, do not automatically assigning higher weight to exculpatory character evidence than to inculpatory character evidence .

Approaches During Cross-Examination

Weight of Evidence

25. Keep in mind the Department will refrain from second guessing a recipient's determination regarding responsibility based solely on whether the Department would have weighed the evidence differently. That provision therefore reinforces the approach to the grievance process throughout § 106.45 under which a recipient must objectively evaluate all relevant evidence (inculpatory and exculpatory) but retains discretion, to which the Department will defer, with respect to how persuasive a decision maker finds particular evidence to be.
26. The complainant's sexual predisposition is never relevant and about a complainant's prior sexual behavior are not relevant with two exceptions:
 - a. Where the question or evidence about sexual behavior is offered to prove that someone other than the respondent committed the alleged misconduct; or
 - b. Where the question or evidence relates to sexual behavior between the complainant and respondent and is offered to prove consent.
27. Prevent disclosure or use during a grievance process of information protected by a legally recognized privilege... without the party's voluntary, written consent.

Evaluate Witness Credibility

28. Must give the testimony and information of each party or witness the degree of importance you reasonably believe it is entitled to receive.
29. Identify all conflicts and attempt to resolve those conflicts and determine where the truth (standard or review/proof) lies.
30. Consider the reasonableness or unreasonableness, or probability or improbability, of the testimony.
31. Does the witness have any motive?
32. Is there any bias?
33. Credibility is determined fact by fact, not witness by witness: ***"The most earnest and honest witness may share information that turns out not to be true."***

Approaches During Cross-Examination

Draw Reasonable Inferences

34. Inferences are sometimes called “circumstantial evidence:”

Evidence that relies on an inference to connect it to a conclusion of fact—such as a fingerprint at the scene of a crime. By contrast, direct evidence supports the truth of an assertion directly—i.e., without need for any additional evidence or inference.

35. It is the evidence that you infer from direct evidence that you reviewed during the course of reviewing the evidence.

36. Inferences only as warranted and reasonable and not due to decision to opt out of cross examination or questioning.

Standard of Evidence

37. Use the standard of evidence defined by the school policies and procedures when evaluating whether someone is responsible for each policy violation and ALWAYS start with presumption of no violation.

a. Preponderance of the evidence: a fact is more likely than not to be true (30373 fn. 1409)

b. Clear and convincing: a fact is highly probable to be true (30373 fn. 1409)

38. Look to all the evidence in total, and make judgments about the weight and credibility, and then determine whether or not the burden has been met.

39. Any time you make a decision, use your standard of evidence.

Don't Consider Impact

40. Don't consider the potential impact of your decision on either party when determining if the charges have been proven.

41. Focus only on the charge or charges brought in the case and whether the evidence presented to you is sufficient to persuade you that the respondent is responsible for the charges.

42. Do not consider the impact of your decision.



The Written Decision

Written Determination Regarding Responsibility

Provided to the parties simultaneously to ensuring independent judgment and decision making free from bias, responsibility to foster reliability and thoroughness, transparency and equal treatment of the parties and to ensure that a recipient's findings are adequately explained.

Written Determination Must Include

1. Identification of the allegations potentially constituting sexual harassment;
2. A description of the procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence; and hearings held;
3. Key elements of any potential policy violation so parties have a complete understanding of the process and information considered by the recipient to reach its decision (30391) – should “match up” with decision (30391);
4. Purpose of key elements of procedural steps “so the parties have a thorough understanding of the investigative process and information considered by the recipient in reaching conclusions.” (30389)
5. A statement of, and rationale for, the results as to each allegation, including determination regarding responsibility, any disciplinary sanctions the recipient imposes on the respondent, and whether remedies designed to restore or preserve equal access to the recipient's education program or activity will be provided by the recipient to the complainant; and
6. Statement of rationale: requiring describe, in writing, conclusions and reasons for those conclusions, to prevent confusion about how and why the school reaches determinations regarding responsibility (30389)
7. Transparent descriptions of the steps taken in an investigation and explanations of the reasons why objective evaluation of the evidence supports findings of facts and conclusions of facts to prevent injection of bias (30389) into Title IX sexual harassment grievance process.
8. Describe objectively evaluation of all relevant evidence, including inculpatory and exculpatory evidence (and to avoid credibility inferences based on a person's status as a complainant, respondent, or witness), under
9. § 106.45(b)(1)(ii).
10. Basis for the decision-maker's “rationale” for “the result” of each allegation.
11. Permissible bases adequate for the purposes of an appeal or judicial proceeding reviewing the determination regarding responsibility.

Written Determination Regarding Responsibility

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Written Explanations Must Include

12. Discretion to also refer to any provision of the school's own code of conduct that prohibits conduct meeting the § 106.30 definition of sexual harassment; however, the final regulations apply to the school's response to Title IX portion only. (30389)
13. Although is not required consider writing, for a more complete determination, explanations about:
 - a. Evaluation of contradictory facts, exculpatory evidence.
 - b. All evidence presented at A hearing, or how credibility.
 - c. Assessments were reached, because the decision-maker.
 - d. Is obligated to objectively evaluate all relevant evidence.
 - e. Including inculpatory and exculpatory evidence (and to
 - f. Avoid credibility inferences based on A person's status
 - g. As A complainant, respondent, or witness.
14. Consistency in terminology.
15. Clear contrast as to the source of information: "She stated that this did not happened that day"; "This happened."

Must Not be Unambiguous

16. Consistency in terminology.
17. Clear contrast as to the source of information: "She stated that this did not happened that day"; "This happened."
18. Could someone totally unfamiliar and inexperienced with the investigated incident pick up the decision and understand what happened?
19. Make no assumptions that the reader will understand certain aspects of the community.
20. Write for a judge and jury to understand with no prior background.

Written Determination Regarding Responsibility

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Relevancy

21. Include any decisions made that exclude information as not relevant and the explanation given in hearing
22. Check written documentation with published 34 CFR Part 106 to ensure that the report does not contain any information **you are prohibited** from including?

Considerate

23. Will the parties feel heard?
24. Will the parties feel blamed?
25. Will the parties feel vilified?
26. Will the tone otherwise inflame the parties unnecessarily?
27. Maintain across the written document a neutral, evidence-driven tone.

Compassionate

28. Maintain a non-judgmental tone
29. Stay away from charged words of advocacy:
 - a. Clearly/obviously
 - b. Innocent/guilty
 - c. Victim/perpetrator
30. Watch your adjectives and adverbs – unless they are in a quote.
31. Recognize the impact of your words.

Specific

32. Set the scene visually (will help identify inconsistencies in stories).
33. Use quotation marks carefully.
34. Include details to the level that you can thoroughly understand what it looked like.
35. Be careful of pronoun usage so that we always know who is saying or doing what .