LEVEL 2

HIGHER EDUCATION TITLE IX

DECISION MAKER TRAINING

Disclaimer

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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 satisfies both annual Clery training and the generally applicable topics required by the Final Title IX regulations. *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

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- 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

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9:00-10:30	Intro & Being Impartial, Avoiding Bias, and Conflict of Interest
10:30-10:45	Break
10:45-12:00	Live Cross-Examination Theory & Practice; Issues of Relevancy
12:00-12:30	Lunch
12:30-1:45	Issues of Relevancy, Hypotheticals
1:45-2:00	Break
2:00-3:00	Observe a Live Cross-Examination Hearing
3:00-3:30	Debrief/Hearing
3:30-3:45	Break
3:45-5:00	Hearing/Objectively Evaluating Evidence/Written Decision

Posting these Training Materials

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

Training Requirements

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Under the new Title IX regulations, recipients who receive federal funds must provide live cross-examination hearings before any determination and discipline can be issued against a respondent for sexual harassment accusations under Title IX

Training Requirements for Decision Makers

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Specifically, the new Title IX regulations require training of decision-makers on the following, which we will be discussing throughout this training in 106.45(b)(1)(iii):

- Jurisdiction: understanding "the scope of the recipient's education program or activity" (Level1)
- Definitions of "sexual harassment" under the new Title IX regulations (Level1)
- How to conduct a live cross-examining hearing. (30320)

Training Requirements (1 of 5)

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- How to serve impartially, including by avoiding prejudgment of the facts at issue, bias and conflicts of interest
  - Avoiding stereotypes (Level 1 and review here)
- Training on any technology to be used at a live hearing*
- The grievance process for the decision-maker's institution*

Training Requirements (2 of 5)

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- **Relevance** determinations (not Rules of Evidence)
  - knowing and applying remaining requirements and other specific exclusions from the Regulations
    - Rape shield law and its two narrow exceptions
    - legally privileged information absent voluntary written waiver of party holding privilege
  - *must make a relevancy determination before each question can be answered* (30324)

Training Requirements (3 of 5)

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- 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

Training Requirements (4 of 5)

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- That a decision-maker cannot draw inferences about failure to appear or answer questions in live cross-examination hearing
- How to determine weight , persuasiveness, and/or credibility in an objective evaluation

Training Requirements (5 of 5)

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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)

MAKE NO ASSUMPTIONS

Being impartial, avoiding bias and conflict of interest

Being Impartial

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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)

Bias: Concerns raised in comments in preamble

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- Are all paid staff members biased in favor of the institution that employs them?
- Was an institutional history of covering up issues enough for bias?
- Were past tweets or public comments that appear to support complainants or respondents sufficient to show bias?
- Is identifying as a feminist enough to show bias?
- Should bias extend to “perceived bias” or did it require actual bias?

Bias: Response of Department to Perceived v. Actual Bias

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- 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

(30252)

Bias: How the Department tried to minimize bias

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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 (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 (30370)
- The institution may consider external or internal investigator or decision-maker (30370)

Bias: Objective Rules and Discretion

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- "[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…**" (30250)
- Recipients have the discretion to have a process to raise bias during the investigation
- Bias is a basis for appeal of decision-maker's determination (34 C.F.R. 106.45(b)(8)(i)(C))

Conflict of Interest: Concerns raised in comments in preamble

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Similar to those raised regarding bias:

- Does a decision-maker with financial and reputational interests aligned with institution create a conflict?
- Would the Title IX Coordinator directly supervising the decision-maker create a conflict?
- Does past advocacy for a survivor's or respondent's rights group create conflict (also comes up in bias)?
- Are perceived conflicts of interest sufficient or do the conflicts have to be actual conflicts?

Preamble Discussion: Bias and Conflict of Interest (1 of 2)

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- No *per se* prohibited conflicts of interest from using employees and administrative staff, including supervisory hierarchies (30352)
  - but see portion about decision-makers and Title IX Coordinator as supervisor
- No *per se* conflict of interest or bias for professional experiences or affiliations of decision-makers and other roles in the grievance process (30353)

Preamble Discussion: Bias and Conflict of Interest (2 of 2)

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The preamble discussion:

- Provides as an example that it is not a *per se* bias or conflict of interest to hire professionals with histories of working in the field of sexual violence (30252)
- Cautions against using generalizations to identify bias and conflict of interest and instead recommends using a reasonable-person test to determine whether bias exists

Example in Discussion for Unreasonable Conclusion that Bias Exist

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"[F]or example, **assuming that all self-professed feminists**, or self-described **survivors**, are biased against men, or that a **male** is incapable of being sensitive to women, or that prior work as a **victim advocate**, or as a **defense attorney**, **renders the person biased** for or against complainants or respondents" is unreasonable (30252)

Discussion Regarding Training's Role

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"[T]he very training required by 106.45(b)(1)(iii) **[that you are sitting in right now]** is intended to

- provide Title IX personnel with the tools needed to serve impartially and without bias
- such that the prior professional experience of a person whom a recipient would like to have in a Title IX role
- need not disqualify the person from obtaining the requisite training to serve impartially in a Title IX role."

(30252)

Examples in Discussion for Unreasonable Conclusion that Bias Exist: Review of Outcomes

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- Department also cautioned parties and recipients from concluding bias or possible bias "based solely on the **outcomes of grievance processes** decided under the final regulations." (30252)
- Explained that this means, **the "mere fact that a certain number of outcomes result in determinations of responsibility, or non-responsibility, does not necessarily indicate bias."**

  (30252)

Examples of Bias

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- 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 Facts at Issue

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A good way to avoid bias and ensure impartiality: avoiding prejudgment of facts

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

Being impartial: Avoiding Sex Stereotypes

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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" (30325)

Avoiding Sex Stereotypes: Quick Recap

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- "Must" not rely on sex stereotypes: Also helpful to avoiding pre-judgment of facts, remaining unbiased and impartial
- Examples of sex stereotypes in comments (30253):
  - 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)

Sex Stereotypes: Rape Myths

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The preamble discussed a particular study referred to by commenters about a “common tactic” in defense of sexual assault remains the “leveraging rape myths” when cross-examining rape victims (30325)

- However, the preamble discussion determines that this is a broader societal issue, a not an issue with cross-examination as a tool for truth-seeking

LIVE CROSS-EXAMINATION: Theory and Practice

Cross Examination

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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)

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- 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)

Live Cross-Examination: Theory (2 of 3)

- 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)

Live Cross-Examination: Theory (3 of 3)

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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** (30327)

Live Cross-Examination: How it should look

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"[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." (30319)

Live Cross-Examination: Regulations (1 of 2)

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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: Regulations (2 of 2)

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- 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

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The preamble discussion provides some additional information on protecting neutrality of the decision-maker:

"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." (30316)

Role of Decision-Maker/questioning by

So take that into consideration if eliciting questions:

- "[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."** (30332)

Confidentiality

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- 106.71 requires recipients 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 advisor to attend the hearing with the party, unless otherwise required by law (30339)

Reminders

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- 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 (1 of 2)

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- 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 (2 of 2)

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- Burden of gathering the evidence on the recipient, not the parties (30333)
- should be an issue with investigation, but might be something you see as the decision-maker

ISSUES OF RELEVANCY:
Not Rules of Evidence

Relevancy (1 of 2)

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- Per 34 C.F.R. 106. 45(b)(6)(i):
  - **"Only relevant cross-examination and other questions may be asked of a party or witness."**

"[C]ross examination **must focus only on questions that are relevant to the allegations in dispute.**" (30319)

Relevancy (2 of 2)

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)

What is Relevant? (1 of 4)

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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? (2 of 4)

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

What is Relevant? (3 of 4)

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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.

What is Relevant? (4 of 4)

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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 Governed by Rules of Evidence (1 of 2)

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The Rules of Evidence do NOT apply 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.**" (30343)

Not Governed by Rules of Evidence (2 of 2)

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Examples:

- No reliance of statement against a party interest (30345)
- No reliance on statement of deceased party (30348)
- A recipient may not adopt a rule excluding relevant evidence whose probative value is substantially outweighed by the danger of unfair prejudice (30294)

Relevancy

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)

- 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. (30294)

Relevancy: Not Relevant

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

(1) Complainant's sexual behavior (except for two narrow exceptions)

(2) information protected by a legal privilege

(3) party's treatment records (absent voluntary written wavier by the party) (30337)

Relevancy: Regulations' Rape Shield Law-Complainants

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- 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

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- 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 Records

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"[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."

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

Relevancy: Legally Privileged Information

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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.

Relevancy: Legally Privileged Information

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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

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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).

Relevancy: No Reliance on Prior Statements

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When parties elect not to participate, a recipient cannot retaliate against them (30322)

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

- "Must not rely on any **statement** of that party or witness in reaching a determination"

Relevancy: No Reliance on Prior Statements - Theory

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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

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The preamble recognizes that 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

- The decision-maker cannot make inferences from non-participation or compel participation (retaliation) (30322)
- Relevant questioning by advisor along these lines?

Relevancy: No Reliance on Prior Statements (1 of 4)

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"[A] party's advisor may appear and 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 (2 of 4)

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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)

Relevancy: No Reliance on Prior Statements (3 of 4)

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When statement IS the sexual harassment…

"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."

- 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)

Relevancy: No Reliance on Prior Statements (4 of 4)

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"[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." (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- Examples

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- 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)
- Remember: No rules of evidence can be imported

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

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- 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)

Issues of Relevancy

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"[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." (30294)

BUT

"[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." (30293)

Other Considerations

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

Decorum (1 of 5)

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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.

Note: In our experience, we have seen decorum issues 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.

Decorum (2 of 5)

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"Recipients 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)

Decorum (3 of 5)

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"[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." (30331)

Decorum (4 of 5)

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"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)

Decorum (5 of 5)

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- "[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)
- 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)

Practice Making Relevancy Determinations

Relevancy Determination Hypotheticals (1 of 2)

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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?”

Relevancy Determination Hypotheticals (2 of 2)

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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

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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

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“Cameron, texted Riley the week before telling Riley that you wanted to have sex with them, didn’t you?”

Practice Hypothetical #2

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“Cameron, isn’t it true you usually have sex with Riley while intoxicated?”

Practice Hypothetical #3

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“Riley, did your attorney tell you not to answer that question?”

Practice Hypothetical #4

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“Riley, did your counselor tell you that you have anger issues?”

Practice Hypothetical #5

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“Cameron, you didn’t see who was allegedly sexually assaulting you during the alleged attack, did you?”

Practice Hypothetical #6

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“Cameron, are you choosing not to answer my questions because you lied to investigators?”

Practice Hypothetical #7

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“Riley, you’re not answering my questions because you don’t want criminal implications, right?”

Practice Hypothetical #8

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“Cameron, isn’t it true you asked Riley to put on a condom before what you now claim is a sexual assault?”

Practice Hypothetical #9

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“Riley, have you tested positive for sexually-transmitted diseases?”

Practice Hypothetical #10

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“Riley, isn’t it true you texted Cameron the next day to see if Cameron was mad at you?”

Practice Hypothetical #11

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“Cameron, if you were as drunk you just stated you were, you can’t even be sure whether you had sex with Riley or, say, Wyatt, can you?”

Practice Hypothetical #12

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“Cameron, did a doctor diagnose you with anxiety?”

Practice Hypothetical #13

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“Riley, isn’t it true you tried to kill yourself the next day because you knew you did something wrong?”

Practice Hypothetical #14

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“Cameron, you’ve had sex with Riley after drinking before, though, haven’t you?”

Practice Hypothetical #15

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“Cameron, you could be wrong about that timeline, right?”

Practice Hypothetical #16

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“Riley, this isn’t the only Title IX complaint against you right now, is it?”

Practice Hypothetical #17

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“Cameron, you had consensual sex with Riley the next night, didn’t you?”

Practice Hypothetical #18

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“Riley, didn’t the police question you for three hours about your assault of Cameron?”

Practice Hypothetical #19

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“Cameron, your witness, Wyatt, didn’t even show up today, right?”

Practice Hypothetical #20

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“Riley, you’re even paying for a criminal defense attorney instead of a free advisor, right?”

The Hearing

The Setup

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- Can have in one room if a party doesn't request separate rooms and recipient chooses to do so.
- Separate rooms with technology allowing live cross examination at the request of either party
- "At recipient's discretion, can allow any or all participants to participate in the live hearing virtually" (30332, see also 30333, 30346) explaining 106.45(b)(6)(i)

Process

- Discretion to provide opportunity for opening or closing statements
- Discretion to provide direct questioning (open-ended, non-cross questions)
- Cross-examination must to be done by the party's "advisor of choice and never by a party personally."

Process

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- An advisor of choice may be an attorney or a parent (or witness) (30319)
- Discretion to require advisors to be “potted plants” outside of their roles cross-examining parties and witnesses. (30312)

Advisors (1 of 3)

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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 (2 of 3)

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- 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” (30342)

Advisors (3 of 3)

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- 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)
- "If a recipient believes that arguments about a relevance determination during a hearing would unnecessarily protract the hearing or become uncomfortable for parties, the recipient 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)

Advisors: But Other Support People?

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- Not in the hearing, unless required by law (30339)
- “These confidentiality obligations may affect a recipient’s ability to offer parties a recipient-provided advisor to conduct cross-examination in addition to allowing the parties’ advisors of choice to appear at the hearing.”
- ADA accommodations-required by law
- CBA require advisor and attorney?

Recording the Hearing

- Now required to be audio, audio visual, or in transcript form
- Decision-makers have to know how to use any technology you have

The Hearing

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- Order of questioning parties and witnesses – not in regulations
  - Consider time restraints on witnesses
  - Questioning of Complainant
  - Questioning of Respondent

Questioning by the Decision-Maker (1 of 2)

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- The neutrality of the decision-maker role is and the role of the advisor to ask adversarial questions, protects the decision-maker from having to be neutral while also taking on an adversarial role (30330)
- "[P]recisely because the recipient must provide a neutral, impartial decision-maker, the function of adversarial questioning must be undertaken by persons who owe no duty of impartiality to the parties" (30330)

Questioning by the Decision-Maker (2 of 2)

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- BUT “the decision-maker has the right and responsibility to ask questions and elicit information from parties and witnesses on the decision-makers own initiative to aid the decision-maker in obtaining relevant evidence both inculpatory and exculpatory, and 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)

The Hearing (1 of 3)

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- Ruling on relevancy between every question and answer by a witness or party
  - Assumption that all questions are relevant unless decision-maker otherwise states irrelevant? Risky.
  - Set expectation that party or witness cannot answer question before decision-maker decides if relevant.
    - Pros: helps diffuse any overly aggressive or abusive questions/resets tone
    - Cons: may lengthen hearing

The Hearing (2 of 3)

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- "[N]othing in the final regulations precludes a recipient from adopting a rule that the decision-maker will, for example, send to the parties after the hearing any revisions to the decision-maker's explanation that was provided during the hearing." (30343)

The Hearing (3 of 3)

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- Confidentiality appears to preclude support persons other than the advisor from participating in the live-cross examination hearing
  - Perhaps allow support person to meet in waiting rooms or before and after hearing
  - Consistent with providing supportive services to both parties – hearings can be very stressful for both parties

Hearing Toolbox

Hearing Toolbox: Prehearing Conference

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- Pre-hearing conference – helps inform parties and set expectations – have one separate with each party and the party's advisor
- Provides opportunity to address issues common to both parties:
  - Parties and their representatives will often not understand the process: help educate and answer questions (again, know your institution's grievance process)
  - Jurisdictional challenges: perhaps less of an issue with new jurisdictional terms—many issues were related to off-campus extension of jurisdiction (may tell advisor that you will provide the opportunity for advisor to state on the record at the hearing)

Hearing Toolbox: the Pre-Hearing Conference

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- Parties may want to add evidence and witnesses that were not in the investigation for the first time at the hearing (perhaps outside of the process).

Hearing Toolbox: Use of a Script

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- Responsible for running an orderly and fair hearing.
- A script can serve as a checklist of everything the decision-maker wants to cover and a cheat sheet for reminders of allegations, alleged policy violations, and elements of the alleged policy violations
- Helps ensure rights, responsibilities, and expectations are set
- Helps provide consistency between one hearing and the another
- Helps provide transparency
- Can even have a separate one for prehearings

Hearing Toolbox: Decorum

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- Evaluating each question for relevancy before a party or witness can answer can help set the tone
- Remind parties about expectations of decorum

Hearing Toolbox: Breaks

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- Preamble discusses the use of breaks to allow parties to recover from panic attacks or emotional questioning
- Also helpful to reset tone and reduce emotion and tension
- Can use to review policy and procedures to address relevancy issues that arise

Hearing Toolbox: Questions

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- Do you have the information you need on each element to be able to evaluate the claims?
- Consider neutral phrasing of questions:
  - “In the report you said… Help me understand…”
  - “You stated… Tell me more about that.”
  - “Could you give more information about what happened before/after…”

Hearing Toolbox: Considerations for Panels

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Hearing panel:

- Identify one person on the panel to make relevancy rulings
- Identify one person to draft the decision (for review of other panel members)
- Determine how panel members will ask questions (e.g., will only one person ask the questions or will panelists take turns?)

Objectively Evaluating Evidence and Resolving Credibility Disputes

Objectively Evaluating Relevant Evidence

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- As addressed in the preamble and discussed earlier, the decision-maker should evaluate:
- **"consistency, accuracy, memory, and credibility** (30315)
- **"implausibility, inconsistency, unreliability, ulterior motives, and lack of credibility"** (030330)
- Standard of proof and using it to guide decision

Standard of Proof

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- Standard of Evidence: Preponderance of the Evidence or Clear & Convincing
- Must use same standard for formal Title IX complaints against both students and employees (including faculty) for all policies and procedures with adjudication for sexual harassment complaints (e.g., union grievances procedures, faculty conduct)
- Must begin with a presumption of no violation by Respondent.

Making credibility decisions

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The preamble discussion includes the following additional information on credibility:

- “Studies demonstrate that inconsistency is correlated with deception” (30321)
- Credibility decisions consider “plausibility and consistency” (30322)

Resolving Disputes (1 of 4)

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OCR 2001 Guidance recommends considering the following when resolving the conflict:

- Statements by any witnesses to the alleged incident (Regs: only when subjected to cross-examination)
- Evidence about the relative credibility of the complainant/respondent
  - The level of detail and consistency of each person's account should be compared in an attempt to determine who is telling the truth
  - Is corroborative evidence lacking where it should logically exist?

Resolving Disputes (2 of 4)

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OCR 2001 Guidance recommends considering the following when resolving the conflict and consistent with Regulations:

- Evidence of the complainant's reaction or behavior after the alleged harassment
  - Were there witnesses who saw that the complainant was upset?
  - Changes in behaviors? Work-related? School? Concerns from friends and family? Avoiding certain places?
    - May not manifest until later

Resolving Disputes (3 of 4)

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OCR 2001 Guidance recommends considering the following when resolving the conflict and consistent with Regulations:

- Evidence about whether the complainant filed the complaint or took other action to protest the conduct soon after the alleged incident occurred
  - But: failure to immediately complain may merely reflect a fear of retaliation, a fear that the complainant may not be believed, etc. rather than that the alleged harassment did not occur

Resolving Disputes (4 of 4)

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OCR 2001 Guidance recommends considering the following when resolving the conflict:

- Other contemporaneous evidence:
  - Did the complainant write about the conduct and reaction to it soon after it occurred (e.g. in a diary, email, blog, social media post)?
  - Did the student tell others (friends, parents) about the conduct and their reaction soon after it occurred?
- **Again, only if subjected to cross-examination**

#1 Keep An Open Mind

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- Keep an open mind until all statements have been tested at the live hearing
- 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)

#2 Sound, Reasoned Decision

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- You must render a sound, reasoned decision on every charge
- You must determine the facts in this case based on the information presented
- You must determine what evidence to believe, the importance of the evidence, and the conclusions to draw from that evidence

#3 Consider All/Only Evidence

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- You must 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
- You may consider nothing but this evidence

#4 Be Reasonable and Impartial

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

#5 Weight of Evidence (1 of 2)

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- The quality of evidence is not determined by the volume of evidence or the number of witnesses or exhibits.
- It is the weight of the evidence, or its strength in tending to prove the issue at stake that is important.
- You must evaluate the evidence as a whole based on your own judgment.

#5 Weight of Evidence (2 of 2)

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- Decision-makers who are trained to perform that role means that the same well-trained decision-maker will determine the weight or credibility to be given to each piece of evidence, and how to assign weight (30331)

Weight of Evidence Example

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The preamble provides in the discussion:

"[W]here a cross-examination question or piece of evidence is relevant, but concerns a party's character or prior bad acts, under the final regulations **the decision-maker cannot exclude or refuse to consider the relevant evidence, but may proceed to objectively evaluate that relevant evidence by analyzing whether that evidence warrants a high or low level weight or credibility**, so long as the decision-maker's evaluation treats both parties equally **by not, for instance, automatically assigning higher weight to exculpatory character evidence than to inculpatory character evidence**." (30337)

#6 Evaluate Witness Credibility (1 of 3)

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- You must give the testimony and information of each party or witness the degree of importance you reasonably believe it is entitled to receive.
- Identify all conflicts and attempt to resolve those conflicts and determine where the truth (standard or review/proof) lies.

#6 Evaluate Witness Credibility (2 of 3)

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- Consider the reasonableness or unreasonableness, or probability or improbability, of the testimony.
- Does the witness have any motive?
- Is there any bias?

#6 Evaluate Witness Credibility (3 of 3)

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- 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

#7 Draw Reasonable Inferences

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- Inferences are sometimes called “circumstantial evidence.”
- It is the evidence that you infer from direct evidence that you reviewed during the course of reviewing the evidence.
- Inferences only as warranted and reasonable and not due to decision to opt out of cross-examination or questioning.

#8 Standard of Evidence (1 of 2)

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

- Preponderance of the evidence: a fact is more likely than not to be true (30373 fn. 1409)
- Clear and convincing: a fact is highly probable to be true (30373 fn. 1409)

#8 Standard of Evidence (2 of 2)

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

#9 Don’t Consider Impact

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- Don’t consider the potential impact of your decision on either party when determining if the charges have been proven.
- 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.
- **Do not consider the impact of your decision**.

The Written Decision

Resolving Disputes

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- FACT FINDING PROCESS

- ONE
- List undisputed facts – what do parties agree on? = **findings of fact**
- List disputed facts – what do parties disagree on?

TWO
- What undisputed facts address each element?
- What disputed facts must be resolved for each element?

THREE
- Weigh the evidence for each **relevant** disputed fact
- Resolve disputed facts = **findings of fact**

Written Determination in 106.45(b)(7)(ii) – (1 of 9)

Written determination must include:

- Identification of the allegations potentially constituting sexual harassment;
- 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;

Written Determination in 106.45(b)(7)(ii) – (2 of 9)

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Include 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)

Written Determination in 106.45(b)(7)(ii) – (3 of 9)

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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)

Written Determination in 106.45(b)(7)(ii) – (4 of 9)

- 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

Written Determination in 106.45(b)(7)(ii) – (5 of 9)

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- Statement of rationale: requiring recipients to describe, in writing, conclusions (and reasons for those conclusions) will help prevent confusion about how and why a recipient reaches determinations regarding responsibility (30389)
- The requirement of "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" helps prevent injection of bias (30389)

Written Determination in 106.45(b)(7)(ii) – (6 of 9)

- Institution's procedures and permissible bases for complainant and respondent to appeal
- Provided to both parties in writing contemporaneously (106.45(b)(7)(ii))

Written Determination in 106.45(b)(7)(ii) – (7 of 9)

- Receiving decision simultaneously will ensure both parties have relevant information about the resolution of the allegations

Written Determination in 106.45(b)(7)(ii) – (8 of 9)

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Reference to code of conduct not prohibited:

"Recipients **retain discretion to also refer to in the written determination to any provision of the recipient's own code of conduct** that prohibits conduct meeting the [Title IX definition] of sexual harassment; however" the final regulations apply to recipient's response to Title IX portion only. (30389)

Written Determination in 106.45(b)(7)(ii) – (9 of 9)

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The preamble discussion notes that it does not "expressly require the written determination to address evaluation of contradictory facts, exculpatory evidence, all evidence presented at a hearing, or how credibility assessments were reached, because the decision-maker is obligated to objectively evaluate 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."

Note: Consider including these anyway for a more thorough determination.

Goals

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- Be consistent in terminology
- Be clear as to the source of information. Compare:
  - “Bob stated that this happened.”
  - “This happened.”

Unambiguous

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- Could someone unfamiliar with the incident pick up the decision and understand what happened?
- Make no assumptions that the reader will understand certain aspects of the community
- Write for a judge and jury to understand with no prior background

Relevancy.

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- Include any decisions made that exclude information as not relevant and the explanation given in hearing
- Check to ensure that your report does not contain any information you are prohibited from including?

Sensitive

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- Will the parties feel heard?
- Will the parties feel blamed?
- Will the parties feel vilified?
- Will the tone otherwise inflame the parties unnecessarily?
- Maintain neutral, evidence-driven tone.

Empathetic

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

Specific

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

Editing Exercises: Disclaimer

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The next few editing exercises are examples of bad—perhaps truly terrible—sentences that you might find in a written decision.

They do nearly everything wrong. Let's discuss how to make them right.

As always, these are not taken from real reports.

Editing Exercise 1

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Respondent engaged in sexual intercourse with Complainant from behind.

Editing Exercise 2

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Complainant couldn’t explain why she was sitting on the couch by herself.

Editing Exercise 3

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Complainant stated that Respondent jacked himself off, then gave him a blow job.

Editing Exercise 4

Bricker&Eckler
ATTORNEYS AT LAW

Respondent visibly winced when Complainant said “no.”

Editing Exercise 5

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John stated that Alice told him to "knock it off."

Editing Exercise 6

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On a scale of 1 to 10, Respondent was a “level 4 kind of drunk.”

Editing Exercise 7

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There was no evidence to support Complainant's assertion that the activity was without consent.

Editing Exercise 8

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During the mediation, Respondent admitted to the misconduct and promised not to do it again.

Editing Exercise 9

Professor Clark indicated that he had never known Respondent to commit sexual misconduct at 2:00 in the morning in the back of a bar before.

Editing Exercise 10

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Respondent stated that Complainant was diagnosed with bipolar disorder and that the complaint was “all in his head.”

Editing Exercise 11

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When Respondent asked if Complainant wanted oral sex and Complainant said, “That’s OK,” that was clear indication of the Complainant’s consent.

Questions?