



# HIGHER EDUCATION LEVEL TWO: TITLE IX DECISION-MAKER TRAINING

Level Two

**TITLE IX DECISION-MAKER TRAINING**



**Bricker & Eckler**  
ATTORNEYS AT LAW

# Presenters - Erin



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# Presenters - Jessica



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# Disclaimers



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

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

# Presentation Rules

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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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9:00-10:15	Introduction, Title IX Overview, and Discussion of Bias, Conflicts-of-Interest, and Serving Impartially
10:15-10:30	Break/Q&A
10:30-11:45	Relevance and Relevance Hypotheticals
11:45-12:30	Lunch Break
12:30-1:00	Continue discussion of Relevance
1:00-1:45	Live Cross-Examination Theory and Practice, Discussion of the Hearing
1:45-2:00	Break/Q&A
2:00-3:00	Observe a Live Cross-Examination Hearing and Debrief
3:00-3:15	Break/Q&A
3:15-4:30	Hearing Toolbox, Evaluating Evidence and Credibility
4:30-5:00	Writing a Decision

# Posting these Training Materials?

**YES – Post away!**

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



# Title IX Overview

## New Title IX Regulations

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



# Non-Negotiable Principles

## Preamble, p. 30059

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



# Training Requirements for Decision Makers



## 34 C.F.R. §106.45(b)(1)(iii)

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

- Jurisdiction (Level 1 Training)
- Definition of “sexual harassment” (Level 1 Training)
- How to conduct a live cross-examination hearing
- How to serve impartially
  - Avoiding stereotypes (Level 1 Training)
- Relevance
- How to objectively evaluate all relevant evidence to reach a decision
  - Determining weight, persuasiveness, and/or credibility
- Inability to draw negative inferences about failure to subject to cross-examination
- Training on technology to be used at a live hearing and the specific grievance process at your institution (Not covered in this training)

# Formal Rulemaking



## Preamble/Guidance and the Regulations

### Preamble/Guidance:

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

### The Regulations:

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

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

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

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

# New Definitions



## 34 C.F.R. § 106.30(a)

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

## New Definition of Sexual Harassment

### 34 C.F.R. § 106.30(a)

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

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

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

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

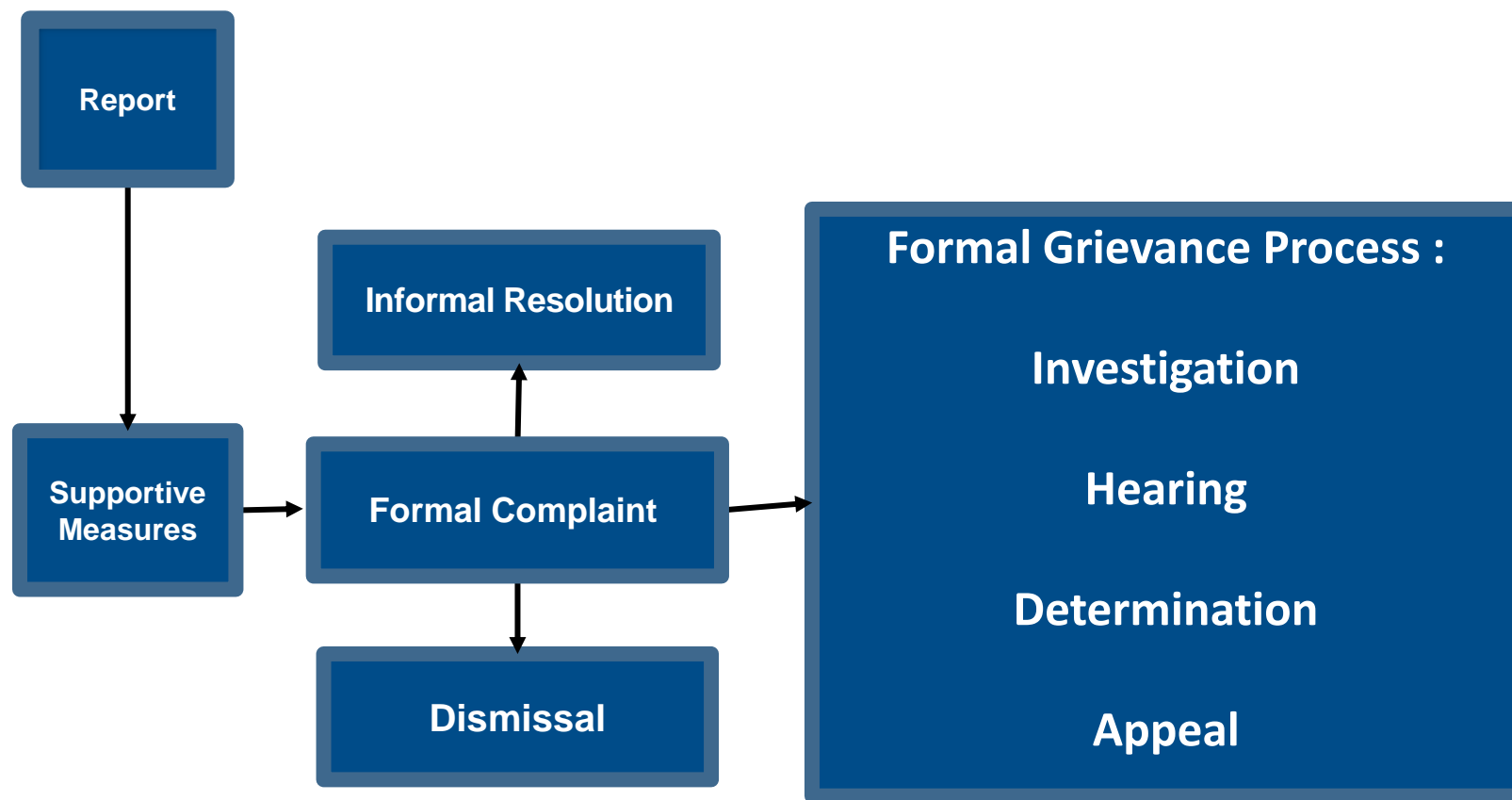
# Sexual Harassment



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

# New Required Processes

## Process Overview





# Changes to Jurisdiction

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

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



# Mandatory Dismissal



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

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

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

# Live Cross-Examination Hearings Overview of the Hearing

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

# Live Cross-Examination Hearings

## Who can be a Decision-Maker?

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

# Live Cross-Examination Hearings

## Why Cross-Examination?

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

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

Per the 6<sup>th</sup> Circuit in *Doe v. Baum*, cross-examination

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

# Live Cross-Examination Hearings

## Cross-Examination Overview

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

# Live Cross-Examination Hearings & Relevance



## 34 C.F.R. § 106.45(b)(6)(i)

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

# Live Cross-Examination Hearings

## Inadmissible Evidence



34 C.F.R. § 106.45(b)(6)(i)

Must consider relevant evidence with the following exceptions:

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

# Live Cross-Examination Hearings

## Two Exceptions to Rape Shield



34 C.F.R. § 106.45(b)(6)(i)

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

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

OR

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



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

# Impartially Serving as a Decision-Maker



## Components of Impartial Service

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

### Things to Note:

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

# Impartiality and Recall



## According to the Preamble...

A decision-maker needs to recognize that a party

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

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



## No single-investigator model for Title IX

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

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



## Mandatory Training for Different Roles

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

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



## Institutional Discretion to Identify Bias

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

# ***Per Se* Conflicts & Bias**



## According to the Preamble, page 30252

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

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



## According to the Preamble, page 30252

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



# Possible Examples of Bias



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

# Avoiding Pre-Judgment of the Facts



A good way to avoid bias and ensure impartiality

Remember:

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

# Avoiding Sex Stereotypes

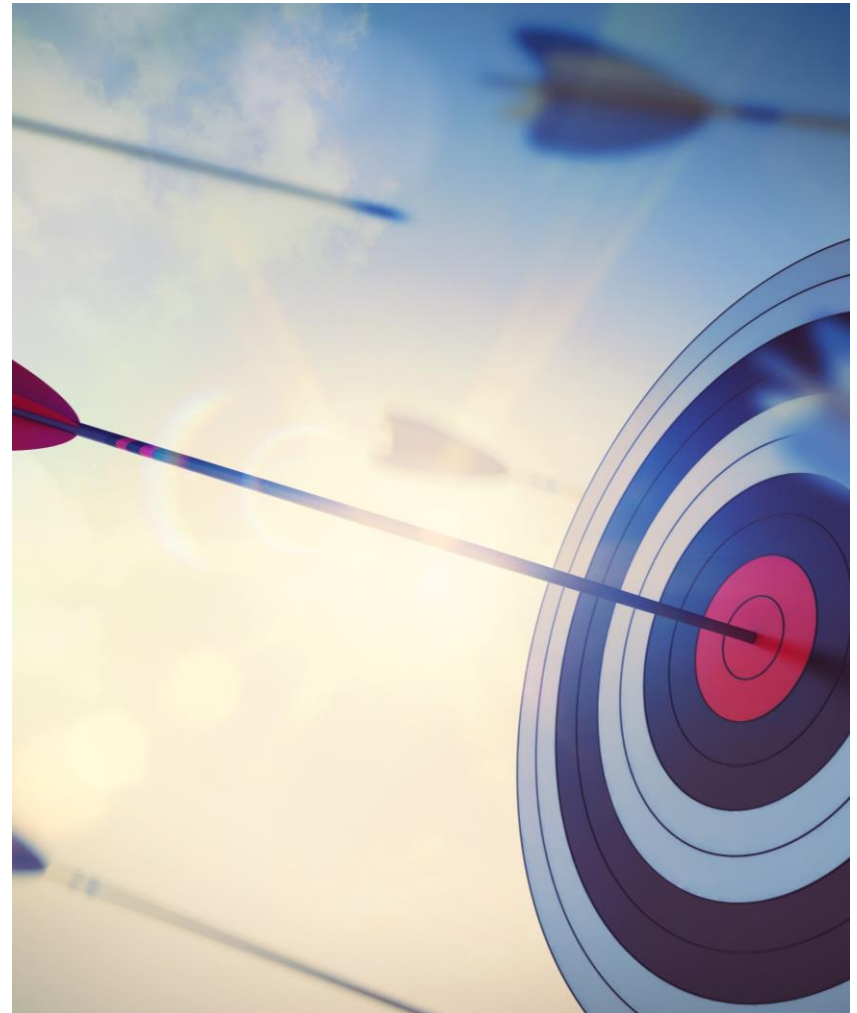


## Necessary for avoiding bias and ensuring impartiality

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

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

# Relevancy Visuals



# Relevancy

(1 of 2)



## From the Regulations

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

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

# Relevancy

(2 of 2)



## From the Regulations

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

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

# Relevancy Takeaways



## Big Picture Items

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



# What is Relevant?



## From the Regulations

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

# Relevancy in the Preamble

(1 of 3)



- Certain provisions hint at what may be relevant
- In the context of discussing relevancy decisions, the prior Dept. of Ed. explained:
  - “... it is sufficient... to explain that a question is irrelevant because it calls for prior sexual behavior information without meeting one of the two exceptions, or because the question asks about a detail that is not probative of any material fact concerning the allegations.” (Preamble, p. 30343)
  - This suggests that questions about details that are not probative of any material fact concerning the allegations may not be relevant

# Relevancy in the Preamble

(2 of 3)



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

# Relevancy in the Preamble

(3 of 3)



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

# Relevancy & the Standard of Evidence

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

# Relevancy:

## Preponderance of the Evidence

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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.

# Relevancy: Clear and Convincing

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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 Relevant”



## From the Regulations

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

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



# Relevancy: Regulations' Rape Shield Law-Complainants

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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



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

# Treatment Records



## From the Regulations

Under the “Investigation” section:

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

# Privileged Information



## From the Regulations

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

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

# Privileges that May Apply



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

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

# Submission to Cross-Examination



## From the Regulations

When parties do not participate:

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

# Submission to Cross-Examination Rationale

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According to the Dept. of Ed:

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

# What Amounts to Submission to Cross-Examination?



## Post-Regulation Guidance

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

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



# Cross-Examination Without a Party

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

# Cross-Examination of a Third Party Substitute

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

# When a Prior Statement IS the Title IX Sexual Harassment



## Verbal Conduct that is the basis of the SH charge:

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

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

# When a Party Does Not Submit to Cross-Examination

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

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

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

# Relevance versus Weight



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

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

## WARNING:

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

# 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?

# Rules of Decorum



## According to the Preamble

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



# Decorum

(1 of 3)



## According to the Preamble

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

## According to the Preamble

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

## According to the Preamble

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

# **Practice Making Relevancy Determinations**

# Relevancy Determination Hypotheticals

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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?”

# Ask Yourself



For each practice hypothetical, ask yourself:

**Is this question relevant or seeking relevant information?**

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

# Relevancy Determination Hypotheticals Disclaimer

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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?”

**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)



## From the Preamble

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

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

# Live Cross-Examination: Theory

(2 of 3)



## From the Preamble

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

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

# Live Cross-Examination: Theory

(3 of 3)



## The Preamble pointing to the Regulations

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

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



# Live Cross-Examination: Theory in the 6<sup>th</sup> Circuit



## *Doe v. Baum*

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

# Live Cross-Examination: How it should look

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According to the Dept. of Ed.,

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

## Takeaways:

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

# Live Cross-Examination: Regulations

(1 of 2)



## From the Regulations

In this process:

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

# Live Cross-Examination: Regulations

(2 of 2)



## From the Regulations

In this process:

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

# Cross-Examination by Decision-Makers?



## According to the Preamble

Remember:

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

# Questioning by Decision-Makers



## According to the Preamble

Remember:

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

# Confidentiality

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## From to the Regulations

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

## According to the Preamble

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

# Reminders (1 of 3)

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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 (2 of 3)

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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 (3 of 3)

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

# **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” (Preamble, pp. 30332, see also 30333, 30346) explaining 34 C.F.R. §106.45(b)(6)(i)

- 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

(2 of 2)



- An advisor of choice may be an attorney or a parent (or witness) (Preamble, p. 30319)
- Discretion to require advisors to be “potted plants” outside of their roles cross-examining parties and witnesses. (34 C.F.R. 106.45(b)(6)(i) and Preamble, p. 30312)

# Relevancy Reminder

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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.” (Preamble, p. 30319)

# Relevancy Determination for Every Question

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Party or witness cannot answer a question until the decision-maker determines whether it is relevant

- From the Regulations
  - 34 C.F.R. 106.45(b)(6)(i)
- Requires decision-makers to make “on the spot” determinations and explain the “why” if a question or evidence is not relevant



## From the Regulations and the Preamble

Must provide an advisor of the recipient's choice

- 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.
  - 34 C.F.R. §106.45(b)(6)(i)
  - Preamble, p. 30339

## According to the Preamble, p. 30342

- Advisors do not require Title IX Training, however a recipient may train its own employees whom the recipient chooses to appoint as party advisors
- A party cannot “fire” an appointed advisor
- “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”

## According to the Preamble, p. 30343

Can restrict discussions of relevance by parties and advisors:

- 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.
- “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.”

# Recording the Hearing

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- 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

# **Live Cross- Examination Presentation**

# Live Cross-Examination Presentation Disclaimer

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*Disclaimer: The following live cross-examination presentation is not based on any actual cases we have handled or of which we are aware. Any similarities to actual cases are coincidental.*

# **Debrief with Bricker Attorneys**



# **Hearing Toolbox: Best Practices for Conducting a Title IX Hearing**

# Hearing Toolbox: Prehearing Conference

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- Pre-hearing conference
  - Helps inform parties and set expectations
  - Have separate conference 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: discuss the decision made by TIXC and maybe 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)
  - What does this look like under your process?
  - When should a case return to the investigation phase?
  - Try to anticipate potential issues before the Pre-Hearing Conference and make sure to work with legal counsel

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

# 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



## From the Preamble

- No discussion of how to do this in the regs
- Factors to evaluate, according to the Preamble:
  - “consistency, accuracy, memory, and credibility (Preamble, p. 30315)
  - “implausibility, inconsistency, unreliability, ulterior motives, and lack of credibility” (Preamble, p. 30330)
- Always use your standard of proof as a guide for your decision

# Standard of Proof

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- 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.

# #1 Keep An Open Mind



- 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

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- 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



- Trained decision-makers will determine the weight or credibility to be given to each piece of evidence, and how to assign weight (Preamble, p. 30331)
- 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



# Weight of Evidence Example



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.**” (Preamble, p. 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)



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



- 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.**

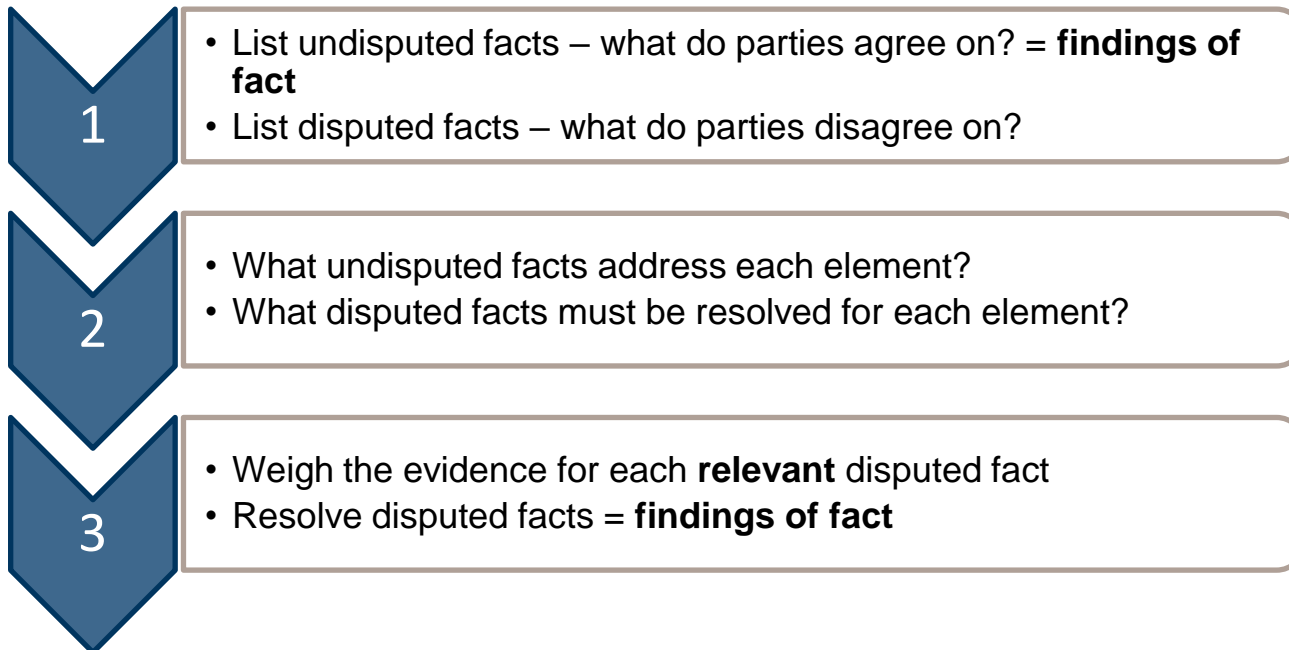


# **The Written Decision**

# Resolving Factual Disputes



## Fact Finding Process:



# Written Determination in 106.45(b)(7)(ii) (1 of 7)

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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 7)

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- Key elements of potential policy violation
  - 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 – should “match up” with decision (Preamble, p. 30391)

# Written Determination in 106.45(b)(7)(ii) (3 of 7)

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- Purpose of key elements of procedure
  - 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.”  
(Preamble, p. 30389)

# Written Determination in 106.45(b)(7)(ii)

(4 of 7)



- 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 7)



- 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 (Preamble, p. 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 (Preamble, p. 30389)

# Written Determination in 106.45(b)(7)(ii)

(6 of 7)



- Institution's procedures and permissible bases for complainant and respondent to appeal
- MUST BE provided to both parties in writing contemporaneously (106.45(b)(7)(ii))
  - Receiving decision simultaneously will ensure both parties have relevant information about the resolution of the allegations



# Written Determination in 106.45(b)(7)(ii)

(7 of 7)



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. (Preamble, p. 30389)

# 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

# Relevance

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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

# Advanced Decision-Maker Trainings



## Want to Practice?

### ➤ Advanced Decision-Maker Training (Option #1)

- February 25<sup>th</sup>, 1:00 p.m. to 5:00 p.m.
- Additional Hypotheticals
- Practice Serving as Decision-Makers

### ➤ Decision-Maker Writing Workshop

- February 26<sup>th</sup>, 1:00 p.m. to 3:00 p.m.

### ➤ Advanced Decision-Maker Training (Option #2)

- March 18<sup>th</sup>, 1:00 p.m. to 5:00 p.m.
- Additional Hypotheticals
- Practice Serving as Decision-Makers

### ➤ Decision-Maker Writing Workshop

- February 26<sup>th</sup>, 1:00 p.m. to 3:00 p.m.



**Questions?**

# Additional information available at:

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**Title IX Resource Center** at [www.bricker.com/titleix](http://www.bricker.com/titleix)

**Free upcoming webinars** at [www.bricker.com/events](http://www.bricker.com/events)

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