Higher Education: Level Two

TITLE IX DECISIONMAKER TRAINING

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Disclaimer

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- We are not giving you legal advice. Consult with your legal counsel regarding how best to address a specific situation.
- Use the chat function to ask general questions and hypotheticals.
- This training, along with Level 1, covers Title IX regulations-required decision-making requirements, but does not cover institution-specific grievance procedures, policies, or technology.
- This training is not being recorded, but we will provide you with a packet of the training materials. (*more on this point in a minute)
- This training is for institutions of higher education. If you're a K-12 school, our K-12 team has training specific to your needs.

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2024 Title IX Injunctions

- As of the date of this training…Enjoined in 26 states.
- Enjoined individually for hundreds of individual institutions.
- Applications for partial stay brought from the 5th and 6th Circuit Courts of Appeal to the Supreme Court *denied*.

What does this mean for you?...

WORK WITH LEGAL COUNSEL

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Posting these Training Materials

- 2020 Regs: 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.
- 2024 Regs: Required by 106.8(f) to make training materials available for public inspection upon request

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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

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Aspirational Agenda

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All times Eastern Time Zone

Day 1

2:00-3:15 Intro and Live Cross-Examination Theory and Practice/ Relevancy

3:15-3:30 Break

3:30-5:00 Issues of Relevancy/Relevancy Hypotheticals

Day 2

2:00-3:15 The Hearing

3:15-3:30 Break

3:30-4:00 Live Cross-Examination Hearing Presentation

4:00- 4:45 Written Decision and Objectively Evaluating Evidence

4:45-5:00 Being Impartial, Avoiding Bias/Conflict of Interest

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Training Requirements

2020 Training Requirements

106.45(b)(1)(iii) – Any individual designated as a Title IX Coordinator, investigator, Decisionmaker, or any person designated to facilitate an informal resolution process must be trained on:

- Scope of the recipient's education program or activity"
- Definition of "sexual harassment" under the 106.30
- How to conduct a live cross-examining hearing
- How to serve impartially, including by avoiding prejudgment of facts at issue, conflicts of interest, and bias

Additional training for Decisionmakers:

- Training on any technology to be used at a live hearing
- Issues of Relevance of questions and evidence
  - Relevance of questions and evidence about Complainant's sexual predisposition or prior sexual behavior

2024 Training Requirements
(1 of 3)

106.8(d)(1) – All employees must be **annually** trained on:

i. Recipient's obligation to address sex discrimination in its education program or activity;
ii. Scope of conduct that constitutes sex discrimination under Title IX, including sex-based harassment; and
iii. All notification and information requirements as it relates to reports regarding:
    i. Sex discrimination (106.44); and
    ii. Pregnancy or related conditions (106.40(b)(2))

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2024 Training Requirements
(2 of 3)

106.8(d)(1) requires "all personnel directly involved in carrying out the recipient's Title IX duties to be trained in a manner that promotes a recipient's compliance with these final regulations." (2024 Regs., p. 33550).

- Advisors
- Contractors
- Volunteers
- Third-party agents

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2024 Training Requirements
(3 of 3)

106.8(d)(2) – Investigators, Decisionmakers, and other persons who are responsible for implementing grievance procedures or have the authority to modify/terminate supportive measures (106.44(g))

- Everything covered in (d)(1), plus…
  i. Recipient's obligations in 106.44;
  ii. Grievance procedures in 106.45, and if applicable, 106.46;
  iii. How to serve impartially (avoiding prejudgment of facts, conflict of interest, and bias); and
  iv. Meaning and application of "relevant" in relation to questions and evidence
    - Types of evidence impermissible regardless of relevance

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What's The Same? What's Changed?

- The spirit of the training requirements in the 2020 and 2024 Regs is largely similar, but the framing of the training requirements is different.
  - Still need to know jurisdiction, key definitions, and how to facilitate a compliant grievance process
  - Expressly prohibited from relying on sex stereotypes in the Title IX process (including in training materials)
- Beware that, although the general training "topics" seem similar, the "subtopics" are different
  - Scope of "education program or activity"
  - "Sexual Harassment" vs "Sex Discrimination, including sex-based harassment"
  - 2020 Grievance Procedures vs 2024 Grievance Procedures

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What's Changed?

- All employees must be trained annually
  - Training cannot just "be made available."
- Training for anyone directly involved in carrying out the institution's Title IX obligations

Note: Training can still be facilitated in-person, online, synchronously, or asynchronously (same as 2020 Regs))

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Clery Training Requirements

Under Clery Act, must receive **annual** training on:

- Issues related to sexual assault, domestic violence, dating violence, stalking
- How to conduct an investigation and hearing process that protects the safety of victims and promotes accountability

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Training Requirements: Scope of Education Program or Activity

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Language in the 2020 Regs

- Education Program or Activity
  - On campus
  - Off campus:
    - Location where the recipient had substantial control over Respondent and the context of the misconduct
    - In buildings owned or controlled by a recognized student organization

(2020 Regs., 106.44(a)).

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Language in the 2024 Regs
(1 of 3)

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Clarification of "Education Programs of Activities"

- 106.31 - No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under **any academic, extracurricular, research, occupational training, or other education program or activity** operated by a recipient that receives Federal financial assistance

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Language in the 2024 Regs
(2 of 3)

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Clarification of extra-jurisdictional conduct

- 106.11 includes conduct that:
  - Occurs within the education program or activity, including conduct that occurs in a building owned or controlled by a student organization that is officially recognized by a postsecondary institutions and
  - Conduct that is subject to the recipient's disciplinary authority
- "A recipient has an obligation to address a sex-based hostile environment under its education program or activity, even when some conduct alleged to be contributing to the hostile environment occurred outside the recipient's education program or activity or outside the United States."

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Language in the 2024 Regs
(3 of 3)

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Impact on Sex-Based Hostile Environment Harassment

- Extra-jurisdictional conduct can impact the elements in sex-based harassment (106.2 definition, addressed above):
  1. The **degree** to which the **conduct affected the Complainant's ability to access** the recipient's education program or activity;
  2. The **type**, **frequency**, and **duration** of the conduct;
  3. The parties' ages, roles within the recipient's education program or activity, **previous interactions**, and other factors about each party that may be relevant to evaluating the effects of the conduct;
  4. The **location** of the conduct and the **context** in which the conduct occurred; and
  5. **Other sex-based harassment** in the recipient's education program or activity.

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Training Requirements: Sex-Based Harassment

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Sexual Harassment (2020)

- Hostile Environment
  - Severe, Pervasive, and Objectively Offensive
- Quid Pro Quo
  - Respondent must be an employee
- Specific Offenses
  - Sexual Assault
  - Domestic Violence
  - Dating Violence
  - Stalking

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Sex-Based Harassment (2024)
(1 of 2)

Text of Title IX Statute (20 U.S.C. 1681(a)):

*No person in the United States shall, **on the basis of sex**, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance…*

The Department explained that the statutory prohibition against discrimination (see text above), **"on the basis of sex,"** does not require that conduct be sexual in nature. (2024 Regs, p. 33493)

- The Department reads the statute to prohibit not only sexual behavior but also harassing behavior that is, more generally, on the basis of sex, even if not sexual in nature.

106.2 - Sex-based harassment is a form of sex discrimination and means sexual harassment **and** other forms of harassment on the basis of sex, including the bases described in 106.10

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Sex-Based Harassment (2024)
(2 of 2)

- Hostile Environment (pp. 33498, 33513-14)
  - Severe **or** Pervasive; and
  - Subjectively Offense; and
  - Objectively offensive; and
  - Limits or effectively denies a person's ability to participate in or benefit from the institution's education program or activity
- Quid Pro Quo (p. 33496)
  - Employees, contractors, volunteers
  - Could also apply to students who have power to provide an aid, benefit, or service to another student

Specific Offenses
- Sexual Assault
- Domestic Violence
- Dating Violence
- Stalking

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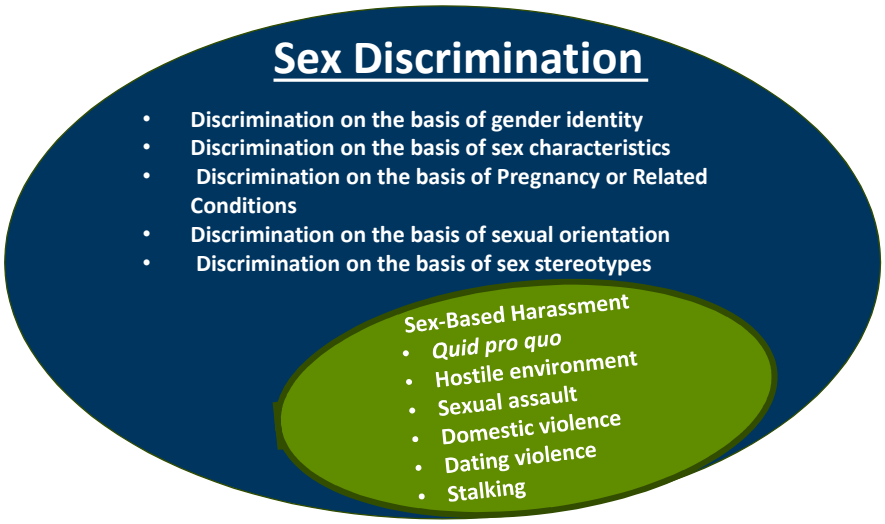
Sex Discrimination & Sex-Based Harassment (2024)



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Training Requirements: Serving Impartially

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Serving Impartially

2020 Regs, 106.45(b)(6)(i):

Under the 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.

2024 Regs, 106.45(g):

A recipient must provide a process that enables the Decisionmaker to question parties and witnesses to adequately assess a party's or witness's credibility to the extent credibility is both in dispute and relevant to evaluating one or more allegations of sex discrimination.

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Relevance

- Decisionmakers must objectively evaluate all evidence that is relevant and not otherwise impermissible. (2020 Regs., p. 30247. 2024 Regs., 33500).
  - Inculpatory: evidence that tends to prove the violation of a policy
  - Exculpatory: evidence that tends to exonerate the accused

(2020 Regs, p. 30320. 2024 Regs, p. 33675)

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Other considerations

- Decisionmaker cannot draw inferences about failure to participate in the grievance process
  - 2020 Regs: No inference drawn based on failure to appear or answer questions in live cross-examination hearing. (2020 Regs., p. 30267-68).
  - 2024 Regs: "The presumption that the Respondent is not responsible until a determination is made at the conclusion of the grievance procedures prevents the Decisionmaker from inferring responsibility for the alleged sex discrimination, including based on Respondent's silence, before the conclusion of the grievance procedures. (2024 Regs., p. 33666).
    - 106.46(f)(4) – Decisionmaker must not draw inferences about whether sex-based harassment occurred based solely on a party's or witness's refusal to respond to questions deemed relevant and not impermissible.
- How to determine weight , persuasiveness, and/or credibility in an objective evaluation

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Grievance Procedures

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2020 Grievance Procedures

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Review of the 2020 Requirements
(1 of 3)

- Hearing with live cross-examination required
  - Could do this in one room, unless the parties requested separate rooms
  - Could place the parties in separate rooms with technology allowing for live-cross examination
  - Could conduct the full hearing virtually. (2020 Regs., 30332, 30333, 30346).
- Discretion to allow for opening and/or closing statements
- Discretion to provide direct questioning

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Review of the 2020 Requirements
(2 of 3)

- Cross-examination must be conducted by the party's "advisor of choice and never by a party personally."
  - An advisor of choice may be an attorney or a parent (or witness). (2020 Regs., p. 30319)
  - Discretion to require advisors to be "potted plants" outside of their roles cross-examining parties and witnesses. (2020 Regs., p. 30312)
- Decisionmaker could not be the Title IX Coordinator or the investigator for the matter (2020 Regs., p. 30372).
- Investigator could not make a determination regarding responsibility. (See 106.45(b)(7)(i), 106.45(b)(5)(vii), and p. 30436).

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Review of the 2020 Requirements
(3 of 3)

- Must create a recording (audio or audiovisual) or a transcript of the hearing proceedings
- Decisionmaker must know how to use technology required to conduct the live hearing

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2024 Grievance Procedures

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2024 Title IX Grievance Procedures (1 of 2)

2024 Grievance Process Requirements, generally:

- The process must enable the Decisionmaker to adequately assess the credibility of parties and witnesses.*

  *Only if credibility is in dispute **and** relevant to evaluating the allegations

- No determination regarding responsibility prior to questioning of the parties and witnesses.
- Process must comply with 106.46 if the allegations involve sex-based harassment and at least one party is a student. institution.

(See 106.45(f))

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2024 Title IX Grievance Procedures (2 of 2)

2024 Grievance Process, generally:

- All recipients may choose to offer a single investigator model or live hearing model, so long as the selected process allows for Decisionmaker to assess credibility
- Live hearings (hearing officer led or live cross examination) do not require parties to be physically present in the same geographic location.
- Transcripts or recordings are required.

(See 106.45(f)).

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Basic Requirements For 2024 Grievance Procedures

- Presumption that Respondent is not responsible for the alleged sex discrimination until a determination is made at the conclusion of the grievance procedures
- Prompt timeframe for the major stages of the grievance process, including the "hearing," determination, and appeal
- Reasonable steps to protect the privacy of the parties and witnesses during the grievance process
- Equal opportunity for parties to present fact witnesses and other evidence (inculpatory and exculpatory) that is relevant and not otherwise impermissible (106.45(f)(2))
- Objective evaluation of all relevant and permissible evidence (inculpatory and exculpatory)
  - Exclude certain evidence as impermissible even if otherwise relevant (106.45(b)(7))
- No credibility determinations based on a party's status as a Complainant or Respondent

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2024 Standard of Evidence

- Both 106.45 and 106.46 use the preponderance of the evidence standard of proof to determine whether sex discrimination occurred
  - Can only use the clear and convincing standard if you are applying it in all other comparable proceedings related to complaints of discrimination
- Remember, it is the recipient, not the parties, who have the burden of gathering evidence.

(106.45(h)(1)-(2)).

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Options for Grievance Procedures in the 2024 Regs

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106.45 – "Simple Process" (again, our shorthand)

- These requirements apply to all cases involving allegations of sex discrimination, including 106.46 cases

106.46 – "Heightened Process" (our shorthand term)

- These apply only if:
  1. You are a postsecondary institution; and
  2. One of the parties in a particular case is a student; and
  3. The allegations, if true, may constitute Sex-Based Harassment.
- Must incorporate the requirements in 106.45

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2024 Title IX Grievance Procedures Chart

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	Student as Party	No Student as Party
Sex-Based Harassment is Alleged	**106.45 & 106.46**	106.45 (& Clery if specific offenses)
No Sex-Based Harassment is Alleged	106.45 only	106.45 only

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2024 Title IX Grievance Procedures

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What cases qualify for the "Heightened Procedures?" (106.46)

- Employee vs. Student – Sexual Assault - Yes
- Employee vs. Employee – Stalking - No
- Student vs. Employee – Quid Pro Quo - Yes
- Student vs. Employee – Sex Discrimination (only girls get A's) - No
- Student Employee vs. Employee – hostile environment – MAYBE (see 106.46(b))

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Overview of 106.45

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106.45 Simple Process gives you a lot of discretion as to how to structure your grievance procedures.

- Single Investigator model is permissible
- Decisionmaker may be the same person as the Title IX Coordinator or investigator (106.45(b)(2). See preamble discussion on pp. 33660-64).
- Advisors not required (unless Clery Act requires it)
- Silent on use of support persons
- "Less detailed" Notice of Allegations (106.45(c))
- Questioning process is entirely discretionary

*If your institution has decided to maintain the 2020-compliant live hearing process, this goes above and beyond what is required for 106.45, and it complies with 106.46!

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106.45 Decision-making Options

1. Single-investigator model – One person (or group) acts as the investigator and makes the decision.
   - Remember: The Decisionmaker must have the ability to ask questions of the parties and witnesses. (106.45(g)).
2. Split Model - Investigator prepares report; goes to hearing where only Decisionmaker asks questions.
   - Permit closing statements to help parties feel heard?
3. Any of the more robust hearing options under 106.46

*State law and/or case law may prohibit you from using one or more of these models.

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Overview of 106.46 (1 of 2)

106.46 Heightened Process has more requirements for the grievance procedures.

- Gives you three general options as to how to structure your grievance procedures.
  - Asynchronous hearings
  - Live Hearings
    - Hearing Officer Led hearings
    - Live Cross Hearings (what we currently do in cases of sexual harassment)
- Advisors are only required in live cross-exam hearings (so that someone can ask the questions to the parties and witnesses)
- Support persons permitted

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Overview of 106.46 (2 of 2)

- 106.46(e)(4) gives institutions discretion as to whether to allow expert witnesses
- Under 106.46(f)(4), if a party or witness refuses to respond to questions, the Decisionmaker "may choose to place less or no weight" upon that person's other statements. (State law and case law may affect the application of this.)
- 106.46(h) requirements for written decisions are more stringent than the requirements in 106.45(h)

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106.46 Decision-Making Options

106.46 gives you three general options as to how to structure your grievance procedures.

- Asynchronous hearings (106.46(f)(1)i))
  - Single investigator with party opportunity to ask follow up questions
- Hearing Officer Led hearings (106.46(f)(1)(ii)(A))
  - Cross examination conducted by the Decisionmaker
- Live Cross hearings ((106.46(f)(1)(ii)(B))
  - Cross examination conducted by the parties' advisors

If credibility is in dispute and relevant, the institution must provide a process that enables the Decisionmaker to question parties and witnesses

- This could mean your investigator is the Decisionmaker.

You must make a transcript or recording of a live hearing

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106.46 (f)(1)(i) Asynchronous

- Record or transcribe all interviews
- Provide the parties opportunity to review the recording or transcription and submit follow-up questions
- Allow each party to propose such questions that the party wants asked of any party or witness and have those questions asked by the investigator or Decisionmaker during one or more individual meetings, including follow-up meetings, with a party or witness. (questions must still be relevant and permissible)

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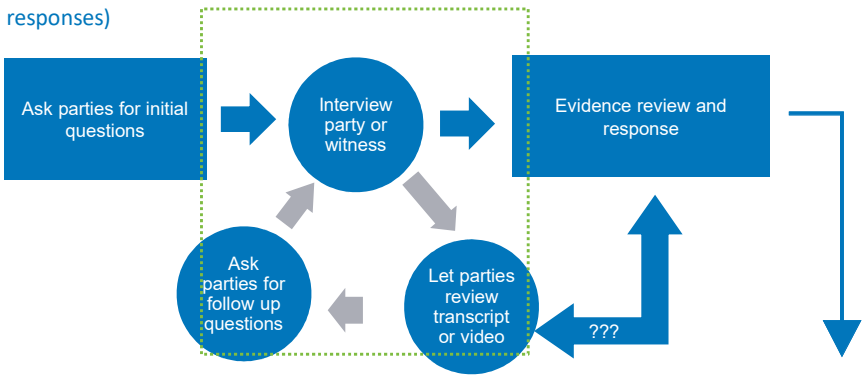
106.46 Asynchronous Option 1

Asynchronous Model – Option 1 Flow Chart (Evidence review comes after review & responses)



The 2024 Regs do not require you to allow the parties to draft additional questions after the initial evidence review and response period.

But you can probably contemplate a situation where the responses suggest that it would be appropriate to ask more questions. What might that additional step look like?

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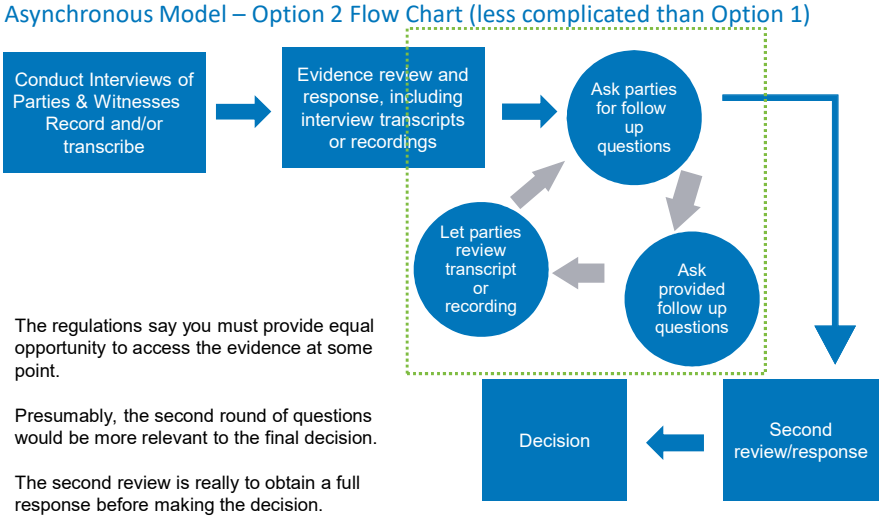
106.46 Asynchronous Option 2

Asynchronous Model – Option 2 Flow Chart (less complicated than Option 1)



The regulations say you must provide equal opportunity to access the evidence at some point.

Presumably, the second round of questions would be more relevant to the final decision.

The second review is really to obtain a full response before making the decision.

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Reflections on the 106.46 Asynchronous Model

- Can be done with a single investigator
- If more of the process is complete by the time the parties are permitted to provide follow-up questions, the follow-up questions may be more targeted and helpful after they've reviewed the evidence gathered
- Parties are not going to be in the same place at the same time, which they may find easier from an emotional perspective

Things to consider:

- What happens if you have to keep circling back to the same party or witness for multiple rounds of follow-up questions?
- What happens if a party or witness stops responding?
- What happens if a party or witness refuses to participate?
- Many rounds of follow-up could result in a prolonged process
  - What impact might this have on time-sensitive allegations? (ex: withholding a diploma from a graduating senior, pending resolution)
  - Participant fatigue (Does this chill the campus community from engaging with Title IX because they are weary of the length of the process?)
  - What else?

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106.46 Live Hearings

- Postsecondary institutions may, but are not required to, offer live hearings. (106.46(g)).
  - Remember: Live Hearing can mean "hearing officer led" or "live cross examination with advisors"
- Parties have the right to request that the live hearing be held with parties present in separate locations, and the institution must do so upon a party's request. (2024 Regs., p. 33722).
- If your institution is offering live hearings for some, but not all, cases of sex based harassment, the institution **must** articulate consistent principles for how it will decide when to offer a live hearing (106.46(g))
- Institution must provide reasonable opportunity to review and respond to the evidence in the investigation report.
  - Institution has discretion to provide this opportunity prior to the live hearing, **during the live hearing**, or both prior to and during the live hearing 106.46(e)(6)(i)-(ii)
    - Consistent w/106.2 and 106.45(b)(7)

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Stages of the 106.46(f)(1)(ii)(A) Hearing Officer Led Model

1. Hearing Officer would ask the parties and witnesses questions
2. Parties could then submit their own questions to the Hearing Officer
3. Hearing Officer determines whether each party's questions are relevant and not otherwise impermissible
4. Hearing Officer then asks the relevant and permissible questions proposed by the parties

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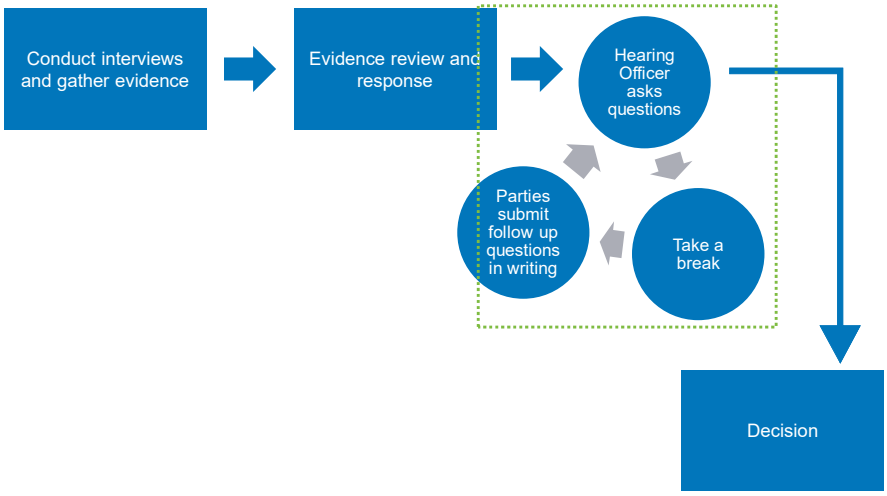
106.46(f)(1)(ii)(A) - Hearing Officer Led Process Flowchart



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Reflections on the 106.46 Hearing Officer Led Model

- Can be done with a single investigator
- This may be a shorter way of conducting questioning, compared to the Asynchronous models
  - Could be more efficient for the parties to submit questions after hearing the Decisionmaker's questions

Things to consider:

- How will parties submit their follow-up questions?
  - In the chat-function of Zoom?
  - Via email?
- Review through a trauma-informed lens.
  - If both parties participate, they would be simultaneously logged in. (Or, you could meet with the parties in person.)
  - Having to be simultaneously logged in could deter some from participating, which could diminish the quality of evidence available in the record to make a determination

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Stages of the 106.46(f)(1)(ii)(B) Live Cross Model

1. Hearing Officer would ask the parties and witnesses questions
2. Each advisor may question each party and witness
   - Under the 2024 Regs, advisors must have the opportunity to question their own party
     - This was allowable but not mandatory in the 2020 Regs
3. Hearing Officer makes a relevancy determination after each question
   - Hearing Officer determines whether the advisor's question is relevant and not otherwise impermissible

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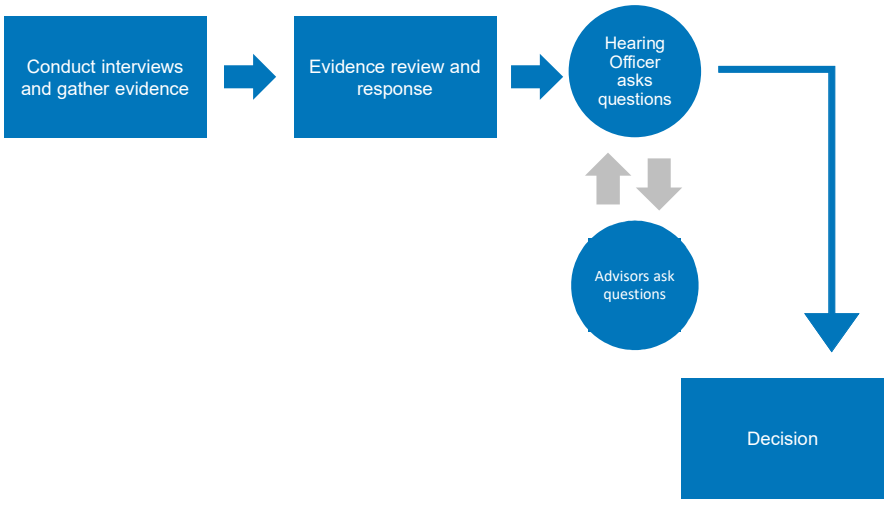
106.46 Live Cross Model Flowchart



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Reflections on the 106.46 Live Cross Hearing Model

- Can be done with a single investigator
- This might be the shortest, most efficient way of conducting the questioning process
  - Lack of breaks for written questions means the process will be shorter
- As with the 2020 Regs, the 2024 Regs require that the institution must provide an advisor to a party if the party does not choose their own.
  - Institution's advisor must be provided at no cost to the party
  - Advisor may not be a confidential employee
  - Advisor may be, but does not have to be, an attorney

Things to consider:

- Parties and witnesses may be deterred by the simultaneous presence requirement
- Parties and witnesses may also be deterred by the "advisor-led" aspect of the process…having to work with an advisor to create questions

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Hearing Toolbox

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Quick Recap of our Grievance Processes

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2020 Regs: Hearing with live cross-examination required

2024 Regs: Live hearing not required, but is an option, under 106.45 and 106.46.

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Live Hearings in 2020 and 2024

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If the recipient is in 2020 Regs jurisdiction **or** has chosen a Live Hearing process under the 2024 regs:

- Parties can be physically present in the same geographic location
- May, or upon request of either party, must, conduct the live hearing with parties physically present in separate locations
- May facilitate the entire hearing virtually
- Must create an audio or audiovisual recording or transcript of any live hearing and make it available to the parties for inspection and review
- Discretion to allow for opening and/or closing statements

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Your Goal as DM

- Follow your policy
- Keep the emotional temperature turned down so that everyone stays engaged
- Ask for information that will help you evaluate whether a policy violation occurred
- Work to help the parties feel heard, regardless of the outcome

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Hearing Toolbox: Prehearing Conference

- Prehearing conference – helps inform parties and set expectations – have one separate with each party and the party's advisor (if applicable)
- 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)
  - Challenges to jurisdiction and/or whether conduct meets definitions of sexual harassment (2020) or sex discrimination and/or sex-based harassment (2024)

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Hearing Toolbox: the Prehearing 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).

Thoughts for consideration:

- How does this impact a 2020 process or a 106.46 Live Cross-Examination process?
- How does this impact a 2024 106.45 process?
- What about a 2024 106.46 Hearing-Officer Led process?
- What about a 106.46 asynchronous process?

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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 Decisionmaker 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
- Consider a separate script for pre-hearing conferences

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Hearing Toolbox: Decorum

- Evaluating each question for relevancy before a party or witness can answer can help set the tone
  - Reminder: In the 2020 Regs., the decisionmaker is determining the relevancy of the advisor's questions. In the 2024 Regs., the decisionmaker is determining relevancy for a party's follow-up questions or an advisor's questions.
    - How can relevancy determinations help set the right tone for parties if choosing not to use the live cross-examination process?
- Remind parties about expectations of decorum (less prevalent in an asynchronous grievance process)

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Hearing Toolbox: Breaks

- 2020 Preamble discusses the use of breaks to allow parties to recover from panic attacks or emotional questioning. This can be useful regardless of which grievance process is being used.
- Also helpful to reset tone and reduce emotion and tension
- Can use a break to review policy and procedures to address relevancy issues that arise

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Hearing Toolbox: Questions

- 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…"

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Hearing Toolbox: Considerations for Panels

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?)

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Reminder about Advisors

- 2020 Regs: Required during the live cross exam hearing
- 2024 Regs:
  - 106.45 – Advisors not required unless Clery requires it
  - 106.46 – Advisors **only required** for the live cross-examination model

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Appointment of Advisors – 2020 & 2024

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.

(2020 Regs., 106.45(b)(6)(i) and p. 30339).
(2024 Regs., p. 33720).

70

Appointment of Advisors

- 2024 Regs: Recipient cannot appoint a confidential employee as an advisor, but a party may select a confidential employee as their advisor of choice under 106.46(e)(2). (2024 Regs.,p. 33721).

71

Advisors

- Training of Title IX Advisors
  - 2020 Regs: Advisors do not require Title IX Training, however a recipient may train its own employees whom the recipient chooses to appoint as party advisors. (2020 Regs., p. 30342).
  - 2024 Regs: Advisors (who are employees) must receive training. (2024 Regs.,p. 33550). Advisors who are not employees are not required to be trained, but institutions may provide training for advisors. (2024 Regs., p. 33721).
- 2020 Regs: A party cannot "fire" an appointed advisor. (2020 Regs., p. 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." (2020 Regs., p. 30342).

72

What about Support People?

- **July 2021 Q&A allows for support persons for the parties**
- ADA accommodations-required by law
- 2024 Regs: 106.46(3)(3) – "Must provide the parties with the same opportunities, if any, to have persons other than the advisor of the parties' choice present during any meeting or proceeding"

73

The Live Hearing (2020 and 2024)

- Order of questioning parties and witnesses – not in regulations
  - Consider time restraints on witnesses
  - Questioning of Complainant
  - Questioning of Respondent
  - Questions from advisors first, or questions from decision-maker?
  - Which advisor's questions go first?

74

Opening/Closing Statements

- Opening and closing statements are not required, but some procedures include those as an option
  - Delivered by the party, not the advisor
  - Can read them into the record
  - Some institutions have time limits
  - Offer a break prior to the closing statements to allow them to be finalized

75

Questions and Cross Examination

76

Questioning by the Decisionmaker

- 2020 Preamble: "the Decisionmaker has the right and responsibility to ask questions and elicit information from parties and witnesses on the Decisionmakers own initiative to aid the Decisionmaker in obtaining relevant evidence both inculpatory and exculpatory, and the parties also have equal rights to present evidence in front of the Decisionmaker so the Decisionmaker has the benefit of perceiving each party's unique perspective about the evidence." (2020 Regs.,p. 30331).

77

What is Cross-Examination? (1 of 2)

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?

Questions do not have to be presented in this format.

78

What is Cross-Examination? (2 of 2)

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Does the purpose of cross-examination change in the 2024 Regs (specifically 106.46)? → Not really.

Whether in an asynchronous process, a hearing officer-led process, or a live cross process, the purpose of "cross examination" is to afford the parties an opportunity to ask follow-up questions of the other party and the witnesses.

In the 2020 Regs and in a 2024 Live Cross model, cross-examination is done through an advisor. In an asynchronous or hearing officer-led process, "cross-examination" is facilitated through the decisionmaker, but parties still have the same opportunity to ask relevant and permissible questions.

79

Live Cross-Examination: Theory (1 of 3)

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- Essential for truth seeking (2020 Regs., p. 30313)
- Provides opportunity of both parties to **test "consistency, accuracy, memory, and credibility** so that the Decisionmaker can better assess whether a [party's] narrative should be believed" (2020 Regs., p. 30315)

80

Live Cross-Examination: Theory (2 of 3)

- Provides parties with the opportunity to "direct the Decisionmaker's attention to **implausibility, inconsistency, unreliability, ulterior motives, and lack of credibility**" in the other party's statements. (2020 Regs., p. 30330)
- Promotes transparency and equal access (2020 Regs., p. 30389)

81

Live Cross-Examination: Theory (3 of 3)

According to the Department, the process in 2020 Regs Section 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** (2020 Regs., p. 30327)

82

Live Cross-Examination: Theory

For consideration:

- Does anything about the theory of live-cross examination in the 2020 Regs no longer fit the goals of the 2024 grievance process options?
  - In other words, can and should the purpose and theory of "live cross examination" fit within the new regulations?

Title IX is still Title IX → Meaning that the 2020 goals of reliability, fairness, legitimacy, prevention of bias, and due process are all still goals of the 2024 grievance processes. The procedures may look different, but our goal remains the same.

83

Live Cross-Examination: Regulations (1 of 2)

In this process:

- Decisionmaker 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

84

Live Cross-Examination: Regulations (2 of 2)

- Before a party or witness may answer a question, the Decisionmaker 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

85

What are an advisor's goals of cross-examination?

- Obtain **factual admissions** helpful to your party's case.
- **Corroborate the testimony** of your party's witnesses.
- Minimize the other party's case by ***impeachment*** *of witness* being questioned.
- Minimize the other party's case by ***impeachment*** *of other witnesses* through the witnesses being questioned.
- Reduce **confusion and seek truth**.

86

What are a decision-maker's goals of cross-examination?

- Work to get sufficient information regarding every **element** you must decide.
- Work to get enough information to evaluate **credibility**.
- Ask the **relevant and permissible questions** that haven't been asked yet.
- Reduce **confusion and seek truth**.

87

Elements

- What charges are in the Notice of Allegations?
- What does the policy language require in terms of elements?
- What is disputed and undisputed with regard to each element?
  - Ask questions about the disputed evidence, as this is what you'll need to resolve!

88

Consent – Get Detailed

- What did you say to them? What did they say to you?
- Did they move their body in response to that?
- Did they/you assist with penetration?
- Who was controlling the rhythm? How?
- Was their body weight pressing on you? Where?
- Where was their body touching your body?
- Do you remember a particular smell, taste, sound?
- What happened next?
- How did you get into that position? How did you get into the next position?

89

Impact – Get Detailed

- How did this change the way you went about your business on campus?
  - Did it affect going to class? Your grades?
  - Did it change how you moved about on campus?
  - Did it affect what other activities you participate in?
  - After the incident, did it affect your emotions?
  - Did it affect the way you thought?
  - Did it affect eating or sleeping?
- What else did this change?

90

Testing Credibility (1 of 2)

- Is the party/witness consistent throughout? If not, ask them about it.
  - "You said X, but then you said not X. Can you help me understand which is accurate?
- Is the party/witness in a position to corroborate part of someone else's testimony that they haven't been asked about?
  - "Witness mentioned X. Can you tell me anything about that?"
- Is the party's/witness's story plausible?
  - "You said X, but I'm having trouble understanding how that happened. Can you explain how that came to be?"

91

Testing Credibility (2 of 2)

- Did this come from the party's/witness's personal knowledge, or were they told that by someone else?
  - "Did you see that happen, or is that something that Witness told you?"
- Was a party/witness sober enough to understand and remember what was happening?
  - "Were you intoxicated at that time? Do you think that may have affected your memory about this?"
- Is there some sort of underlying potential bias?
  - "How do you know Party? When was the last time you spoke about this case? When was the last time you spoke about anything at all?"

92

Demeanor?

- Demeanor is made up of the non-verbal observations of an individual.
  - Are they refusing to make eye contact?
  - Are they laughing inappropriately?
  - Do they fidget in their seat?
- Demeanor cues are processed according to cultural and societal expectations, myths about truthfulness, and other subjective "rules" to determine whether someone is being honest.
- Demeanor is not evidence. It's a clue to ask more questions.

93

Issues of Relevance

94

Definition of "Relevant"

- No definition provided in the 2020 Regs
- 2024 Regs: "Relevant" means related to the allegations of sex discrimination…
  - **Questions are relevant** when the seek evidence that may aid in showing whether the alleged sex discrimination occurred;
  - **Evidence is relevant** when it may aid a decisionmaker in determining whether the alleged sex discrimination occurred. (2024 Regs., 106.2).

95

What is Relevant? (1 of 3)

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.**" (2020 Regs., p. 30343).

96

What is Relevant? (2 of 3)

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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.

97

What is Relevant? (3 of 3)

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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.

98

Relevancy

Regardless of which set of Regs applies, a party or witness **cannot** answer a question until the Decisionmaker determines whether it is relevant. (2020 Regs., 106.45. 2024 Regs., 106.46).

- Requires Decisionmakers to make "on the spot" determinations and explain the "why" if a question or evidence is not relevant (2020 Regs., p. 30343)

99

2020 Relevancy Determinations
(1 of 2)

- Ruling on relevancy between every question and answer by a witness or party
  - Set expectation that party or witness cannot answer question before Decisionmaker decides if relevant.
    - Pros: helps diffuse any overly aggressive or abusive questions/resets tone
    - Cons: may lengthen hearing

100

2020 Relevancy Determinations
(2 of 2)

- 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)

101

2020 Regs. Guidance on Advisors Challenging Relevance Determinations

- 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 Decisionmaker during the hearing. (2020 Regs.,p. 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 Decisionmaker's explanation) during the hearing." (2020 Regs.,p. 30343).

102

2024 Relevancy Determinations

- The Decisionmaker must determine whether a proposed question is relevant and not otherwise impermissible prior to the question being posed
  - Is it relevant? → 106.2
  - Is it not otherwise impermissible? → 106.45(b)(7)
  - Provide an explanation for why any question has been excluded as irrelevant or impermissible
- Note: Even if a question is relevant and permissible, the institution must not permit unclear or harassing questions. Decisionmaker must provide the party the opportunity to clarify or revise the harassing or unclear question. Once the question has been sufficiently revised/clarified, then the question must be asked. (2024 Regs., 106.46(f)(3)).
- Can adopt decorum rules that apply to all parties

103

Impermissible Evidence (2020)

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

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

(2) information protected by a legal privilege

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

104

Impermissible Evidence (2024)
(1 of 2)

- Legally privileged information or info shared w/confidential employee absent voluntary written waiver of party holding privilege
    - *2024 Regs clarify that this applies to privilege recognized by Federal or state law*
    - *Records in connection w/treatment for a party or witness (unless voluntary, written consent is provided)*

(2024 Regs., 106.45(b)(7)(i)-(ii)).

105

Impermissible Evidence (2024)
(2 of 2)

- Exclude evidence related to Complainant's **sexual interest or prior sexual activity**
    - This includes any questions about sexual interest/prior sexual activity
    - Exceptions:
        - Allowed if the evidence is offered to prove someone other than the Respondent committed the alleged conduct; or
        - Allowed if the evidence about specific incidents of prior sexual contact with the respondent is offered to prove consent

(2024 Regs., 106.45(b)(7)(iii)).

106

Not Governed by Rules of Evidence (1 of 2)

The 2020 Regs provided a lot of distinction between what is "relevant" in Title IX proceedings, compared to what is "relevant" in The Rules of Evidence.

Both the 2020 and 2024 Regs emphasize that The Rules of Evidence do NOT apply and CANNOT apply

"[T]he Decisionmaker'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**." (2020 Regs., p. 30343).

107

Not Governed by Rules of Evidence (2 of 2)

Examples:

X No reliance of statement against a party interest (2020 Regs., p. 30345).

X No reliance on statement of deceased party (2020 Regs., p. 30348).

X A recipient may not adopt a rule excluding relevant evidence whose probative value is substantially outweighed by the danger of unfair prejudice (2020 Regs., p. 30294).

108

Relevancy Requirement

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 Decisionmaker)." (2020 Regs., p. 30331).

- 2020 Regs: 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)
- 2024 Regs. Change: Recipients may, but are not required to, allow expert witnesses in the 106.46 process.

109

2020 Regs. Rape Shield Law- Complainants

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

110

2020 Regs. 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."
- BUT – relevant? harassing?

111

2024 Regs. – Pattern Evidence

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- Respondent's past sex-based harassment of people other than the Complainant would not be part of the analysis of whether current sex-based harassment by the Respondent created a hostile environment for the Complainant. However, such pattern evidence may be permissible to the extent it is relevant.
  - Is it related to the allegations of sex-based harassment under investigation?
  - Will it aid the Decisionmaker in determining whether the alleged sex-based harassment occurred?

(2024 Regs., p. 33514. See also 106.45(b)(7)(iii)).

112

Treatment Records

"[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."

(2020 Regs., 106.45(b)(5)(i). See also 30317).

113

Legally Privileged Information

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

114

Decorum (1 of 6)

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The preamble to the 2020 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.

115

Decorum (2 of 6)

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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." (2020 Regs., p. 30315)

116

Decorum (3 of 6)

"[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." (2020 Regs., p. 30331)

117

Decorum (4 of 6)

"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**." (2020 Regs., p. 30315, 30316, 30340).

118

Decorum (5 of 6)

- "[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 Decisionmaker 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)

119

Decorum (6 of 6)

- The 2024 Regs also provide that a recipient may adopt other reasonable rules regarding decorum, provided that the rules are equally applied to all parties (106.46(f)(3)).

120

Practice with Relevancy Determinations

121

Relevancy Determination Hypotheticals (1 of 2)

Okay, Decisionmaker, is this question relevant?

Use the polling feature to select whether you believe the question to our Complainant, Cady, is relevant, not relevant, or needs to be revised.

122

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?

123

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.

124

Practice Hypothetical #1

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"Cady, isn't it true that you've always been attracted to Reese?"

125

Practice Hypothetical #2

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"Cady, isn't it true that you flirted with Reese even though he had a girlfriend and told you he didn't want to talk to you?"

126

Practice Hypothetical #3

"Isn't it true that you have always liked rough sex and you told Reese you wanted to have rough sex with him?"

127

Practice Hypothetical #4

"But Reese said he didn't like that type of sex didn't he?"

128

Practice Hypothetical #5

"What parts of your body did you previously consent to Reese biting? Bruising?"

129

Practice Hypothetical #6

How do you know that you didn't consent to Reese biting you on August 16, 2024 when you had told him that you "loved" it?

130

Practice Hypothetical #7

You told the investigator that you had sobered up after the day party, didn't you?

131

Practice Hypothetical #8

So you weren't actually drunk by the time you got to the hotel room, were you?

132

Practice Hypothetical #9

How did you and Reese create previous agreements on how hard he could bite you?

133

Practice Hypothetical #10

Isn't it true that you held hands with Reese the whole walk home and removed his belt as soon as you got to the hotel room?

134

Practice Hypothetical #11

Why didn't you go back to your own hotel room on August 17 if you didn't want to have sex with Reese?

135

Practice Hypothetical #12

Isn't it true that you and Reese always agreed to use condoms for sexual activity?

136

Practice Hypothetical #13

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And isn't it true that the condom wrapper you saw in the trash was the same brand as the condom you'd put in your purse?

137

Practice Hypothetical #14

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Don't you think that, because the condom used during intercourse was the same one you had put in your purse, you gave Reese the condom to use during sex?

138

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Objectively Evaluating Evidence and Resolving Credibility Disputes

139

Objectively Evaluating Relevant Evidence

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- As addressed in the preamble and discussed earlier, the Decisionmaker should evaluate:
- **"consistency, accuracy, memory, and credibility** (2020 Regs., p. 30315)
- **"implausibility, inconsistency, unreliability, ulterior motives, and lack of credibility"** (2020 Regs., p. 30330)
- Standard of proof and using it to guide decision

140

Credibility in the 2024 Regs

(1 of 3)

- 106.45(g) and 106.46(f) allow Decisionmaker to question a party or witness to assess credibility but may only do so to the extent that credibility is in dispute and relevant to evaluating one or more allegations of sex discrimination. (p. 33524)

141

Credibility in the 2024 Regs

(2 of 3)

- If using an Asynchronous 106.46 model
  - The Decisionmaker (or investigator in a single Decisionmaker model) must have the opportunity to ask questions about credibility during individual meetings with a party or witness
  - Allow each party to propose questions of any party or witness and have those questions asked by the Decisionmaker (or single investigator) during individual meetings or follow-up meetings
  - Provide each party with a recording (audio or audiovisual) or transcript of the individual meetings
  - Provide each party with reasonable opportunity to propose follow-up questions

(2024 Regs., 106.46(f)(1)(i)(A)-(C)).

142

Credibility in the 2024 Regs

(3 of 3)

- If using a Hearing Officer Led or Live Cross Model
  - Decisionmaker must have the opportunity to ask relevant and not otherwise impermissible questions and follow-up questions of the parties and witnesses, including questions on credibility
  - Each party must have the opportunity to propose questions they want to ask of any party or witness and have those questions (relevant and permissible) either:
    - Asked by the Decisionmaker
    - Asked by the party's advisor (as with the 2020 Regs, the parties themselves can never conduct their own cross-examination)
      - Reminder that the institution must provide a party with an advisor if the party does not obtain an advisor of their choosing. (No confidential employees as appointed advisors.)

(2024 Regs., 106.46(f)(1)(ii)(A)-(B)).

143

Credibility: Improper Inference

Reminder that under both the 2020 and 2024 Regs, decisionmakers are prohibited from drawing an inference about a party's credibility based solely on their participation in the grievance process.

144

Making credibility decisions

The 2020 Preamble discussion includes the following additional information on credibility:

- "Studies demonstrate that inconsistency is correlated with deception" (2020 Regs., p. 30321)
- Credibility decisions consider "plausibility and consistency" (2020 Regs., p. 30322)

145

Resolving Disputes (1 of 4)

Considerations:

- Statements by any witnesses to the alleged incident
- 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?

146

Resolving Disputes (2 of 4)

- 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

147

Resolving Disputes (3 of 4)

- 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

148

Resolving Disputes (4 of 4)

- 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?

149

#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

150

#2 Sound, Reasoned Decision

- 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

151

#3 Consider All/Only Evidence

- You must make a decision based solely on the relevant evidence obtained in this matter
- You may consider nothing but this evidence

152

#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

153

#5 Weight of Evidence

- 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.

154

#6 Evaluate Witness Credibility (1 of 3)

- 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.

155

#6 Evaluate Witness Credibility (2 of 3)

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

156

#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

157

#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.

158

#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 (2020 Regs, p. 30373 fn. 1409. 2024 Regs, p. 33702)
- Clear and convincing: a fact is highly probable to be true (2020 Regs, p. 30373 fn. 1409)
- The 2024 Regs still allow recipients the discretion to select the standard of evidence they believe is the most appropriate. (2024 Regs., p. 33703).

159

#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

160

#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**.

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Being Impartial, Avoiding Bias, Conflict of Interest, and Prejudgment of Facts

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Being Impartial

A Decisionmaker 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."

(2020 Regs., p. 30323)

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2020 Regs. Guidance on Minimizing Bias (1 of 2)

- No single-investigator model for Title IX
- Decisionmaker (or makers if a panel) cannot have been the same person who served as the Title IX Coordinator or investigator (30367)
- Prevents the Decisionmaker 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 Decisionmaker (30370)

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2020 Regs. Guidance on Minimizing Bias (2 of 2)

- "[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 Decisionmaker's determination (34 C.F.R. 106.45(b)(8)(i)(C))

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2024 Conflict of Interest/Bias

- Biggest change in the 2024 Regs is that single-investigator grievance procedures are allowed under 106.45 and 106.46.
  - Title IX Coordinator **can** be the decisionmaker
  - Investigator **can** be the decisionmaker
- 106.44(f)(1)(i) and 106.45(b)(1) require that the grievance procedures treat parties equitably, regardless of status as Complainant or Respondent
- 106.44(k)(4) and 106.45(b)(2) require that any Title IX Coordinator, investigator, Decisionmaker, or informal resolution facilitator be free from conflict of interest or bias for against complainants or respondents generally, or regarding an individual Complainant or Respondent
- 106.46(i)(1)(iii) requires that an appeal be allowed in the case of an allegation that the Title IX Coordinator, investigator, or Decisionmaker had a conflict of interest or bias

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Examples of Bias

- Situations where a Decisionmaker has already heard from a witness or party in a prior case and has made a determination on that person's credibility
- Situations where information "gleaned" by the investigator is shared with the Decisionmaker outside of the investigation report (in meetings to discuss pending cases, in passing while at work, etc.)

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Avoiding Pre-Judgment of Facts at Issue (2020 & 2024)

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

Remember:

- **Keep an open mind** as a Decisionmaker 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

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Being impartial: Avoiding Sex Stereotypes

Bricker Graydon

Decisionmakers 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 Decisionmaker**, 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" (2020 Regs., p. 30325).

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Avoiding Sex Stereotypes: 2020 Recap

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- Examples of sex stereotypes in comments (2020 Regs., p. 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 (2020 Regs., pp. 30259-30260)

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Avoiding Sex Stereotypes: 2024 Recap

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Major focus on gender-related stereotypes (gender identity, pregnancy, marital status, etc.)

- Examples of sex stereotypes in comments:
  - Stereotypes about traditional gender roles ("feminine" vs "masculine" stereotypes, stereotypes about pregnancy & related conditions)
  - Mis-gendering as a form of sex-based harassment (2024 Regs., p. 33516).

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Sex Stereotypes: Rape Myths

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The 2020 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 (2020 Regs., p. 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

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Confidentiality - 2020

- 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 live hearing with the party, unless otherwise required by law (30339)

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Confidentiality - 2024

- 106.71 now requires recipients to prohibit retaliation, including peer retaliation, in its education program or activity.
  - Recipients must allegations of retaliation through the appropriate grievance procedure in 106.45 or through the Informal Resolution process in 106.44(k) (33896)
- 106.45(b)(5): Require the recipient ***to take reasonable steps to protect the privacy of the parties and witnesses during the pendency of a recipient's grievance procedures***, provided that the steps do not restrict the ability of the parties to:
  - obtain and present evidence, including by speaking to witnesses, subject to § 106.71;
  - consult with their family members, confidential resources, or advisors;
  - or otherwise prepare for or participate in the grievance procedures (33891)
- Prevents anyone other than the parties' advisors or "those whose presence is legally required" to accompany a party to a meeting or proceeding (33723)

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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

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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 grievance proceeding, not unfair victim-blaming or societal/personal biases

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Reminders

- 2020 Regs: Burden of gathering the evidence on the recipient, not the parties (2020 Regs, p. 30333)
- 2024 Regs: Burden to conduct an investigation. (2024 Regs, p. 33693)
- The department clarified in the 2024 preamble that these phrases are to be interpreted the same. The institution still bears the burden of gathering evidence and deciding what is relevant or impermissible. (106.45(f)(1), (3)).

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The Written Decision

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2020 Regs – Written Determination

106.45(b)(7): Decisionmaker must issue a simultaneous written determination regarding responsibility

Required Components:

- Identification of the allegations
- Description of the procedural steps taken during the formal grievance process
- Findings of fact supporting the determination
- Conclusions regarding the application of the recipient's code of conduct to the facts
- Rationale
- Appeal procedures

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2024 Regs – 106.45 Written Determination

106.45(h)(2): Following an investigation and evaluation of all relevant and not otherwise impermissible evidence…the recipient must…notify the parties in writing of the determination whether sex discrimination occurred under Title IX or this part

Required Components:

- Rationale for the determination
- Procedures and permissible bases for appeal

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2024 Regs – 106.46 Written Determination

106.46(h): The postsecondary institution must provide the determination whether sex-based harassment occurred in writing to the parties, simultaneously.

- "The Department would not conclude a recipient failed to comply with Title IX because of a de minimis delay in notifications, such as a delay of a few minutes when sending email notifications to the parties." (2024 Regs., p. 33751).

Required Components:

- Description of the alleged sex-based harassment;
- Information about the policies and procedures that the postsecondary institution used to evaluate the allegations;
- The Decisionmaker's evaluation of the relevant and not otherwise impermissible evidence and determination whether sex-based harassment occurred;
- Sanctions imposed on Respondent and remedies for Complainant, if applicable;
- Procedures for appeal

Determinations regarding responsibility become final either on the date the parties are provided the written determination of the result of any appeal or, if no appeal, the date on which an appeal would no longer be timely.

106.46(h)(1)(i)-(v); 106.45(h)(2)

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2024 Appeals

- 2024 Regs (106.45(i)) - Appeal process must be, at minimum, the same as what the recipient offers in other comparable proceedings, including proceedings related to other discrimination complaints
- Both parties may file for any of the following bases:
  - Procedural irregularity that would change the outcome
  - New evidence that would change the outcome and that was not reasonably available when the determination whether sex-based harassment occurred or dismissal was made
  - Title IX Coordinator, investigator, or Decisionmaker had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that would change the outcome
- May provide additional bases equally to all parties. (106.46(i)(1)-(3)).

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Best Practices for the Written Determination (1 of 3)

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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." (2020 Regs., p. 30389).

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Best Practices for the Written Determination (2 of 3)

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Reference to code of conduct not prohibited in the 2020 and 2024 Regs:

"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. (2020 Regs., p. 30389. See also 2024 Regs., p. 33751).

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Best Practices for the Written Determination (3 of 3)

The 2020 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 Decisionmaker 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.

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Clear

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

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Unambiguous

- 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

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Relevancy Check

- 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?

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Sensitive

- 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.

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Empathetic

- 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

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Specific

- 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

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Bad vs. neutral and clear writing examples

Writing examples

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.

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Example 1

Bad example: Cady was very believable when she said she was assaulted by Reese.

Neutral and clear correction: Cady reported that she could not consent to sexual activity with Reese due to incapacitation from alcohol consumption. Cady provided the names of witnesses and contact information for those witnesses who were with her the night of the assault.

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Example 2

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Bad example: Winnie said she didn't think Wes observed Cady & Reese having sex but that I should check with Wes.

Neutral and clear correction: Winnie stated that she did not believe that another friend from the trip, Wes, had witnessed anything when he went to his hotel room on August 17. Winnie asked the investigator to follow up with Wes to verify what, if anything, Wes witnessed.

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Example 3

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Bad example: Reese seemed nervous at the interview and wasn't consistent with the information.

Neutral and clear correction: Reese provided the following information at the interview: that Reese observed Cady consume one shot and one mojito, that Reese took two shots of tequila with Cady, and that Reese did not observe Cady consume any alcohol on August 17.

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Example 4

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Bad example: Cady requested that I follow up with her mother, but I did not because the evidence seemed redundant.

Neutral and clear correction: Charlie requested the investigator follow up with her mother, Mandy. The investigator scheduled an interview with Mandy to follow up on any additional information Mandy may have. Mandy's account of events at the interview, provided in Exhibit C, is consistent with Cady's statement regarding the interactions Cady had with Reese after August 17. Mandy was not an eyewitness to the alleged assault or subsequent contacts by Reese, and she and had no additional information to provide.

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Questions?

Thank you for attending!

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