

***Required Title IX Training That is Required for All Title IX Personnel:
Title IX Coordinator, Title IX Investigator, Title IX Decision-Maker, and
Title IX Appeals Decision-maker.***

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Revised: *August 24, 2021 because of Department of Education notice to all universities*

TITLE IX DEFINITION

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.

TITLE IX DEFINITION OF SEXUAL HARASSMENT

Sexual harassment

For the purposes of Roseman University's Title IX policies, this term means conduct on the basis of sex that satisfies one or more of the conditions defined below that occurs in a Roseman University educational program or activity against a person in the United States:

- (1) An employee of the University conditioning the provision of an aid, benefit, or service of the University 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 University's education program or activity; or
- (3) "dating violence" as defined in 34 U.S.C. 12291(a)(10), "domestic violence" as defined in 34 U.S.C. 12291(a)(8), "Sexual assault" as defined in 20 U.S.C. 1092(f)(6)(A)(v), or "stalking" as defined in 34 U.S.C. 12291(a)(30).

Dating violence

Means violence committed by a person—

- (A) who is or has been in a social relationship of a romantic or intimate nature with the victim; and
- (B) where the existence of such a relationship shall be determined based on a consideration of the following factors:
 - (i) The length of the relationship.
 - (ii) The type of relationship.
 - (iii) The frequency of interaction between the persons involved in the relationship.

Domestic violence

Includes felony or misdemeanor crimes of violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction receiving grant monies, or by any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of the jurisdiction.

Sexual assault

Means an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation.

Stalking

Means engaging in a course of conduct directed at a specific person that would cause a reasonable person to (a) fear for his or her safety or the safety of others; or (b) suffer substantial emotional distress.

The Department of Education's final regulations provide students, employees, and Roseman university clear direction that when incidents of *quid pro quo* harassment or Clery Act/VAWA offenses are reported to the University, the University must respond without inquiring into the severity or pervasiveness of such conduct.

The Department of Education notes in the discussion of the final regulations that even if a complainant in a *quid pro quo* situation pretended to welcome the conduct (for instance, due to fear of negative consequences for objecting to the employee's suggestions or advances in the moment), the complainant's subjective statement that the complainant found the conduct to be unwelcome suffices to meet the "unwelcome" element.

The Department of Education explains in the discussion of the final regulations that determining whether unwelcome sexual conduct is proposed, suggested, or directed at a complainant, by a university's employee, as part of the employee "conditioning" an educational benefit on participation in the unwelcome conduct, does not require the employee to expressly tell the complainant that such a bargain is being proposed, and the age and position of the complainant is relevant to this determination. In situations where an employee did not intend to commit *quid pro quo* harassment (for instance, where an employee did not realize that what the employee believed were friendly back rubs had sexual overtones and made students feel uncomfortable), the Title IX Decision-maker may take the specific factual circumstances into account in deciding what remedies are appropriate for the complainants and what disciplinary sanctions are appropriate for the respondent.

The Department of Education noted in the discussion of the final regulations that signs of enduring *unequal* educational access due to severe, pervasive, and objectively offensive sexual harassment may include, skipping class to avoid a harasser, a decline in a student's grade point average, or having difficulty concentrating in class; however, no concrete

injury is required to conclude that serious harassment would deprive a reasonable person in the complainant's position of the ability to access the university's education program or activity on an equal basis with persons who are not suffering such harassment.

The Department of Education in the discussion of the final regulations also clarified and provided an example to help determine when the University would apply Title IX policy to a specific allegation. Although Title IX does not prohibit discrimination on the basis of sexual orientation, sexual harassment directed at gay or lesbian students that is sufficiently serious to limit or deny a student's ability to participate in or benefit from the school's program constitutes sexual harassment prohibited by Title IX under the circumstances described in this guidance. For example, if a male student or a group of male students target a gay student for physical sexual advances, serious enough to deny or limit the victim's ability to participate in or benefit from the school's program, the school would need to respond promptly and effectively, as described in this guidance, just as it would if the victim were heterosexual. On the other hand, if students heckle another student with comments based on the student's sexual orientation (e.g., "gay students are not welcome at this table in the cafeteria"), but their actions do not involve conduct of a sexual nature, their actions would not be sexual harassment covered by Title IX.

The Department of Education in the discussion of the final regulations noted that disseminating "revenge porn," or conspiring to sexually harass people, or other unwelcome conduct that harms and humiliates a person on the basis of sex may meet the elements of the Davis [a US Supreme Court Case] standard including pervasiveness, particularly where the unwelcome sex-based conduct involves widespread dissemination of offensive material or multiple people agreeing to potentially victimize others and taking steps in furtherance of the agreement.

The Department of Education noted in the discussion of the final regulations that, if a perpetrator commits misconduct that meets one or more of the three prongs, any misunderstanding due to cultural or other differences does not negate the commission of a sexual harassment violation. Similarly, a respondent's lack of comprehension that conduct constituting sexual harassment violates the bodily or emotional autonomy and dignity of a victim does not excuse the misconduct, though genuine lack of understanding may (in a Title IX Decision-maker's discretion) factor into the sanction decision affecting a particular respondent.

The following quoted text comes from the Department of Education’s discussion of the May 2020, Final Regulations (the page number listed refers to the page number of the double-spaced document published in May 2020 by the Department of Education)

DOE: Sexual harassment: a broad term requires some level of open-mindedness

Page 433

Similarly, sexual harassment under § 106.30 is a broad term that encompasses the “multifarious means which human ingenuity can devise” to foist unwelcome sex-based conduct on a victim jeopardizing educational pursuits. Thus, the Department agrees with commenters that some level of open-endedness is necessary to ensure that relevant misconduct is captured.

DOE definition of sexual harassment

Page 31-32

At the same time, the Department adapts the *Davis* definition of sexual harassment in these final regulations by also expressly including *quid pro quo* harassment and Clery Act/VAWA sex offenses. This expanded definition of sexual harassment ensures that *quid pro quo* harassment and Clery Act/VAWA sex offenses trigger a recipient’s response obligations, without needing to be evaluated for severity, pervasiveness, offensiveness, or denial of equal access, because prohibiting such conduct presents no First Amendment concerns and such serious misconduct causes denial of equal educational access;

DOE defines sexual harassment as unwelcome conduct of a sexual nature

Page 39-40

Section 106.30 provides that “sexual harassment” is conduct “on the basis of sex” including “unwelcome conduct.” This definition therefore includes unwelcome conduct of a sexual nature, or other unwelcome conduct on the basis of sex, consistent with Department guidance.

DOE defines sexual harassment as a SINGLE INSTANCE of sexual assault, dating violence, domestic violence, or stalking

Page 41

Incorporating these four Clery Act/VAWA offenses clarifies that sexual harassment **includes a single instance of sexual assault, dating violence, domestic violence, or stalking.**

Sexual harassment: Quid pro quo and Clery/VAWA are denied equal access to education

Page 431

This is because the *Davis* standard, alone, evaluates even physical assaults and violence through the lens of whether an incident is severe, pervasive, and objectively offensive so as to deny a person equal access; however, under these final regulations these elements do not apply to sex-based incidents of *quid pro quo* harassment, sexual assault, dating violence, domestic violence, or stalking. Under these final regulations, *quid pro quo* harassment, sexual assault, dating violence, domestic violence, and stalking do not require a showing of alteration of the educational environment. As previously stated, the Department assumes that a victim of *quid pro quo* sexual harassment or the criminal sex offenses included in the Clery Act, as amended by VAWA, has been effectively denied equal access to education.

Sexual harassment: quid pro quo or Clery/VAWA offenses don't need to meet severity or pervasiveness standards

Page 431

The final regulations provide students, employees, and recipients clear direction that when incidents of *quid pro quo* harassment or Clery Act/VAWA offenses are reported to the recipient, the recipient must respond without inquiring into the severity or pervasiveness of such conduct.

Sexual harassment: Verbal and expressive conduct is punishable ONLY when conduct crosses a line from protected speech into sexual harassment that denies a person equal access to education

Page 516

In this way, the § 106.30 definition stands firmly against sex-based physical conduct, including violence and threats of violence, while ensuring that verbal and expressive conduct is punishable as Title IX sex discrimination only when the conduct crosses a line from protected speech into sexual harassment that denies a person equal access to education.

Sexual harassment: Does not require complainant to already suffer loss of education

Page 524

The Department appreciates the opportunity to clarify that, contrary to many commenters' fears and concerns, this element does *not* require that a complainant has already suffered loss of education before being able to report sexual harassment. This element of the *Davis* standard formulated in § 106.30 requires that a person's "equal" access to education has been denied, not that a person's total or entire educational access has been denied. This element identifies severe, pervasive, objectively offensive unwelcome conduct that deprives the complainant of *equal* access, measured against the access of a person who has not been subjected to the sexual harassment.

Sexual harassment: Does not require complainant to already suffer loss of education
Page 524

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Sexual harassment: Complainant doesn't have to drop out of school, failed a class, had a panic attack or reached a "breaking point" for university to respond
Page 525

Neither the Supreme Court, nor the final regulations in § 106.30, requires showing that a complainant dropped out of school, failed a class, had a panic attack, or otherwise reached a "breaking point" in order to report and receive a recipient's supportive response to sexual harassment. The Department acknowledges that individuals react to sexual harassment in a wide variety of ways, and does not interpret the *Davis* standard to require certain manifestations of trauma or a "constructive expulsion."

The following references are to the US Supreme Court case, Davis.

Davis: Title IX standard: severe, pervasive and objectively offensive
Page 43-44

Specifically, commenters urged the Department to use a definition of sexual harassment that is "severe *or* pervasive" because that definition is used under Title VII⁹⁸ and the 1997 Guidance and 2001 Guidance relied on Title VII case law in using the definition of sexual harassment that is "severe, persistent, or pervasive." **However, in *Davis*, a case concerning sexual harassment of a fifth-grade student by another student, the Supreme Court did not adopt the Title VII definition of sexual harassment for use under Title IX, defining actionable sexual harassment for Title IX purposes as conduct that is "severe, pervasive, *and* objectively offensive.**

Davis: Sexual harassment focuses on sex discrimination that jeopardizes educational access
Page 441

However, guided by the Supreme Court's *Davis* opinion, the Department believes that unwelcome conduct (that does not constitute *quid pro quo* harassment or a Clery Act/VAWA offense included in § 106.30) rises to a civil rights violation where the seriousness (determined by a reasonable person to be so severe, pervasive, objectively offensive, that it negatively impacts equal access) jeopardizes educational opportunities. While non-severe instances of unwelcome harassment may negatively impact a person, and recipients retain authority to address such instances, Title IX is focused on sex discrimination that jeopardizes educational access.

***Davis*: Sexual harassment: severe AND pervasive standard appropriate for educational setting**

Page 453

The Department notes that the *Davis* Court repeated the “severe and pervasive” formulation five times showing that the Court noted differences between an educational and workplace environment that warranted a different standard under Title IX than under Title VII

***Davis*: Sexual harassment: Common sense approach to determine severity, pervasiveness, and objective offensiveness**

Page 456

The *Davis* Court noted that evaluation of whether conduct rises to actionable sexual harassment depends on a constellation of factors including the ages and numbers of parties involved, and nothing in the final regulations disallows or disapproves of that common sense approach to determinations of severity, pervasiveness, and objective offensiveness.

***Davis*: Sexual harassment: sexual assault not evaluated for severity, pervasiveness and objective offensiveness**

Page 461

The *Davis* standard embodied in the second prong of the § 106.30 definition differs from the third prong prohibiting sexual assault (and in the final regulations, dating violence, domestic violence, and stalking) because the latter conduct is not required to be evaluated for severity, pervasiveness, offensiveness, or causing a denial of equal access; rather, the latter conduct is assumed to deny equal access to education and its prohibition raises no constitutional concerns.

***Davis*: Sexual harassment: distinction between generic harassment and discriminatory harassment**

Page 503

We must distinguish generic harassment from discriminatory harassment. The standard laid out in *Davis* . . . makes this clear: To be considered discriminatory harassment, the conduct in question must be ‘so severe, pervasive, *and* objectively offensive that it effectively bars the victim’s access to an educational opportunity or benefit.’”) (emphasis in original).

***Davis*: Sexual harassment: objectively offensive determined by reasonable person**

Page 515

The Department believes that a benefit of the *Davis* standard as formulated in the second prong of § 106.30 is that whether harassment is actionable turns on both subjectivity (i.e., whether the conduct is unwelcome, according to the complainant) and objectivity (i.e., “objectively offensive”) with the *Davis* elements determined under a reasonable person standard, thereby retaining a similar “both subjective and objective” analytic approach that commenters point out is used in the 2001 Guidance.

Davis: Sexual harassment: Intent doesn't matter

Page 515-516

The *Davis* standard does not require an “intent” element; unwelcome conduct so severe, pervasive, and objectively offensive that it denies a person equal educational opportunity is actionable sexual harassment regardless of the respondent’s intent to cause harm

Davis: Sexual harassment: Reasonable person in complainant’s position finds the conduct severe, pervasive, and objectively offensive that effectively denies equal access to recipient’s education program or activity

Page 516

The *Davis* standard ensures that all students, employees, and recipients understand that unwelcome conduct on the basis of sex is actionable under Title IX when a reasonable person in the complainant’s position would find the conduct severe, pervasive, and objectively offensive such that it effectively denies equal access to the recipient’s education program or activity.

Davis: Sexual harassment: Standard is students are effectively denied equal access

Page 524

See Davis, 526 U.S. at 651 (“*It is not necessary, however, to show physical exclusion to demonstrate that students have been deprived by the actions of another student or students of an educational opportunity on the basis of sex. Rather, a plaintiff must establish sexual harassment of students that is so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims’ educational experience, that the victim-students are effectively denied equal access to an institution’s resources and opportunities.*”) (emphasis added).

SCOPE OF UNIVERSITY'S EDUCATION PROGRAM OR ACTIVITY

Education Program or Activity

- *For the purposes of Roseman University's Title IX policy*, this includes locations, events, or circumstances over which the university 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 the university.
- The Department of Education noted in the discussion of the final regulations that the “education program or activity of a school includes all of the school’s operations” which means “that Title IX protects students in connection with all of the academic, educational, extra-curricular, athletic, and other programs of the school, whether they take place in the facilities of the school, on a school bus, at a class or training program sponsored by the school at another location, or elsewhere.”
- The Department of Education explained in the discussion of the final regulations that “operations” may certainly include computer and internet networks, digital platforms, and computer hardware or software owned or operated by, or used in the operations of, the university. A student using a personal device to perpetrate online sexual harassment during class time may constitute a circumstance over which the University exercises substantial control. The Department of Education final regulations apply to sexual harassment perpetrated through use of cell phones or the internet if sexual harassment occurred in the University’s education program or activity.
- The Department of Education noted in the discussion the final regulations that a teacher’s sexual harassment of a student is likely to constitute sexual harassment “in the program” of the school even if the harassment occurs off campus.
- The Department of Education noted in the discussion of the final regulations that official recognition of a student organization, alone, does not conclusively determine whether all the events and actions of the students in the organization become a part of a university’s education program or activity.

HOW TO CONDUCT AN INVESTIGATION

General Approach to Investigation

Understand the Importance of Identifying and Developing an Inventory of Relevant Evidence and Creating a Title IX Investigation Plan

- Create list of witnesses and determine order of interviews
 - Who was the first person the complainant told about his event?
 - Who was the first person the respondent told about this event?
 - Who was around the complainant and respondent before and after the alleged sexual harassment? How did these individuals describe the complainant and respondent before and after the alleged sexual harassment?
- Collect documentation such as identification card entry and exit, video of individual's movement, text messages, phone records, social media posts, journal entries, police reports, *with complainant's and respondent's consent - medical documentation*
- When relevant, what documentation, if any, is there about details related to alcohol or drug consumption such as type, when consumed, how often, consumption with food, etc.,
- Was a Sexual Assault Forensic Exam (SAFE) conducted and is it available?
 - However, a SAFE is not required and SAFE results may not establish what did/did not happen*
 - * There may be evidence of trauma and no assault occurred
 - * There may be no evidence of trauma and an assault did occur
- Law Enforcement
 - Federal law places NO RESTRICTIONS on sharing information with police
 - Law Enforcement can't be used as a reason to delay in investigation – give law enforcement at least 10 business days and then ask if the University can begin investigation

Understand Roseman's definition of 'Consent'

Consent

Roseman University will consider the following issues to determine if a complainant gave consent:

- A person who is unconscious can't consent to sexual activity.
- Every individual has the right to say "no" at any time and to have that choice respected. A voluntary affirmative verbal response is a way to ensure that an individual has given consent to sexual activity. An individual does not have to physically resist for an activity to be considered sexual assault. Any sign of resistance eliminates consent.
- Silence is not accepted as a means to establish consent to any kind of sexual activity.
- A person who believes they were coerced, physically or mentally, is unable to give consent.

- Unless granted an exemption by the Office of Human Resources, any individual that has 'Academic or Supervisory Authority' over a Roseman student at any time during a current academic year is prohibited from initiating or continuing a sexual or romantic relationship with this student.
- An individual who is incapacitated is unable to consent to sexual activity. Roseman University will assess the following as indicators of being incapacitated:
 - Preceding and/or during the sexual activity, did the complainant know the respondent's name?
 - Did the complainant know if more than one person was engaging the complainant in sexual activity?
 - Preceding and/or during the sexual activity, did the complainant know the date and time?
 - Preceding and/or during the sexual activity, did the complainant know where the respondent was engaging the complainant in sexual activity?
 - Was the complainant aware of how the respondent was engaging the complainant in sexual activity?
 - Did the complainant show any signs of slurred speech, an inability to stand or walk without assistance, vomiting, and/or being in and out of consciousness preceding and/or during the sexual activity with the respondent?
 - Was there any other indicator that a reasonable person would conclude was a sign that the complainant was incapacitated?
- Prior sexual contact does not mean consent, even when individuals have been in a relationship. An individual who initially consents to sexual conduct has the right to withdraw this consent during the course of sexual activity.
- The University will apply the conditions defining consent consistently, including as between men and women and as between the complainant and respondent, in the University's Title IX grievance process.
- The burden of proof and the burden of collecting evidence sufficient to reach determination regarding consent, is the responsibility of the University's Title IX personnel. The Department of Education's final regulations do not require a respondent to prove consent and do not require a complainant to prove the absence of consent.

Understand Incapacitation:

- If a complainant is incapacitated due to alcohol and drugs, the complainant cannot consent to sexual acts.
- To substantiate an allegation that a person was incapacitated, *you must establish that the respondent knew or should have known the complainant was incapacitated.*
- Probe on the signs of incapacitation during your interviews with parties and witnesses (i.e., how did a complainant appear to others).

General Approach to Title IX Interviews

- The Title IX Investigator will remain neutral during all interviews without signaling agreement
- The interviewer's role *is not to determine responsibility*, therefore, listen to each party and witness without judgment
- Explain that the purpose of the interview is to gather information and the complainant's statement. Let the party and the witnesses know that you are not there to find fault or blame.
- Don't touch a party or a witness during an interview
- Allow a party or witness to tell their story with enough detail that the person is firm and committed before you ask follow-up questions
- Interview each witness privately, do not interview witnesses in a group
- Do not promise a witness confidentiality
- DON'T LECTURE A PARTY OR A WITNESS DURING AN INTERVIEW
- Do not react with surprise or shock at what anyone tells you. Some people will admit to engaging in certain behavior if you respond non-judgmentally
- Each party and each witness has the right to say "I'm done" at any time during the process
- The key to a good interview is planning – plan: what are the questions you are going to ask?
- Plan relevant interview questions in advance. Anticipate follow-up questions
- When conducting an interview, obtain as many details as possible. Compare where the complainant's and respondent's stories don't match up.
- Focus on at least these three questions:
 - 1) What were the sexual harassing behaviors? Was there force or coercion involved?
 - 2) Who was the initiator of these sexual harassing behaviors?
 - 3) Was there consent / was consent possible?
- Let each party and witness know you may need to conduct follow-up interviews
- Try to make each party feel comfortable in the interview space
- Avoid an environment and an interview style that feels like an interrogation
- Reflect back what you've heard

- Consider using the following open-ended phrases:
 - So when you say...help me understand what you mean by that?
 - When you use the word(s)...what does that mean to you?
 - So I'm hearing...is that accurate?
- Allow parties to explain what happened (but, do not tell them tell you what a reasonable person would consider to be "a story")
- It's OK for someone to say, "I don't know the answer to that question."
- Develop a timeline of events with specific information
 - "You said you were watching TV? What time were you watching TV and what show were you watching?"
- Avoid blaming language or questions. Examples:

Don't ask, "Why didn't you leave?",

Do ask: "What was going on in that moment for you? Did you feel like you could leave?"

Don't ask "Did you try to push the respondent off you?",

Do ask: "When the respondent was on top of you, tell me about how you responded

Don't ask, "So, you were drinking alcohol when this happened?"

Do ask, "I understand you consumed alcohol. I'm not here to judge you about that. Tell me what happened..."

- PHRASES TO USE

Tell me more about that

Tell me about that thing that happened Friday night

I know this is challenging, take your time

Tell me, what is going on here?

I have information that something like this may have happened...

I hear that something happened...

- PHRASES TO AVOID

It will be OK

I understand how you feel

At least you weren't physically hurt

Time heals all wounds

You'll get on with your life

Did you assault this person?

Why did you do that?

Why didn't you scream? Why didn't you run away, etc.?

- Become comfortable with using objective, non-slang, names for body parts and sexual acts
Use terms such as “penis” or “vagina”
- Learn the language that parties use and confirm what they mean to each person
e.g., Does “Hooking up” mean that there was vaginal sexual intercourse?
- Be politely and respectfully persistent if a party or witness is not answering a question
- Be assertive and control the interview – inform the party or witness if their responses are not answering the question. Do not let a party try to deflect the investigator’s questions and/or focus on irrelevant information.
- Silence is OK, learn to comfortable with silence and long pauses

Guidelines for the First Interview

- Timing: the first interview with the complainant should not be a comprehensive interview – give this person at least one 8-hour sleep cycle
- At the beginning of the interview, address a party’s or witness’s concerns
- Ask parties and witnesses, ‘What name they would like you to address them by? Can you call them by their first name? What is their preferred pronoun? When interviewing individuals with doctorate degrees, would they prefer you address them as ‘Dr. XYZ’?
- Assess if a complainant and respondent understand the meaning of those terms.
- Seating - invite the complainant/respondent/witness to choose where they would like to sit
- Explain that complainant/respondent can request reasonable breaks during the interview
- If the complainant/respondent brings an advisor to the meeting:
inform the complainant/respondent and the advisor about what the advisor is permitted to do during the interview session
- Review allegations with complainant and respondent
- Review Roseman’s process for conducting investigations
- Review the role of the Title IX Investigator
- Review the University’s Title IX Retaliation policy and remind parties to report acts of retaliation immediately to the Title IX Coordinator
- Explain that some of the questions may be uncomfortable

- Ask each party for their account of the time(s) in question, their relationship with the other party (if deemed relevant) before probing for additional details
- Ask each party for names of individuals who can provide relevant, first-hand accounts about the allegation. *Explicitly tell each party you do not want the names of individuals who can only provide information about each party's character*

Guidelines for Additional Interviews

- Review the timeframe and current status of the Title IX investigation
- Address any concerns about the need for an additional interview
- Address any other concerns
- Plan additional follow-up questions and anticipated responses

Interview Summaries

- The Title IX Investigator reports what the investigator heard during the interviews
- The Title IX Investigator may hear information that seems irrelevant and perhaps it is, but that doesn't mean that the Investigator should be making that judgment to filter the interviews

The Investigative Report

Suggested (*but not required*) framework/roadmap/template for a Roseman Title IX Investigative Report:

- Names and Titles of Title IX Investigator(s)

- Date of Final Version of Report

- Executive Summary

Example text:

The report is the product of an investigation conducted by Roseman University Title IX investigators into the complainant's, Jane Doe's, allegations that the respondent, John Doe, engaged in sexual harassment that violated the University's Title IX policy. The purpose of this report is to advise the University's Title IX Decision-maker of the findings of the neutral and impartial investigation into the formal complaint made by the complainant against the respondent.

- List and provide brief Background information about the parties and witnesses

- Summary of allegations

Example text:

Sexual assault as defined by Roseman University's Title IX policy which reads:

Sexual assault

Means an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation.

- Interview summaries

- Summary of other relevant evidence

- Investigative Findings

Example text:

On Monday, July 1, 20##, Jane Doe reported to Dean XYZ that she was raped by fellow student John Doe on May 1, 20## in a building owned by a student organization officially recognized by the University. Jane did not wish to pursue law enforcement action of any kind. However, Jane was interested in learning about receiving supportive measures and the University's Title IX grievance process. She met with the Title IX Coordinator, XYZ, on July 7, 20##. Supportive measures were discussed.

Jane asserts that on September 1, 20##, she and John Doe attended the same off campus party. *Continue background and investigation of allegation here, to include holistic case synopsis, facts, parties interviewed, etc*

GRIEVANCE PROCESS, INCLUDING HEARING

University Title IX personnel, a complainant and a respondent do not have the right to depose parties or witnesses, nor to invoke a court system's subpoena powers to compel parties or witnesses to appear at hearings, which are common features of procedural rules governing litigation and criminal proceedings.

The University has the right to control what Title IX Advisors are allowed to do during the University's Title IX grievance process. The University prohibits a Roseman employee or student who is serving as a complainant's or a respondent's advisor from attending a Title IX interview initiated by a complainant or respondent (but not a Title IX interview initiated by a Title IX Investigator or Title IX Decision-maker). The University also prohibits a Roseman employee or student who is serving as a complainant's or a respondent's advisor from independently conducting Title IX interviews with any party or witness, including contacting a party or witness to obtain information related to a Title IX case.

The University prohibits parties from photographing sensitive material such as photographs with nudity or disseminating such evidence to the public.

The Department of Education noted in the discussion of the final regulations that if there is a direct conflict between requirements of FERPA and requirements of Title IX, such that enforcement of FERPA would interfere with the primary purpose of Title IX to eliminate sex-based discrimination in schools, the requirements of Title IX override any conflicting FERPA provisions.

The Department of Education noted in the discussion of the final regulations regarding Title VII that:

- Title VII imposes different obligations with respect to sexual harassment, including a different definition, and employers that are subject to both Title VII and Title IX will need to comply with both sets of obligations,
- Nothing in these final regulations shall be read in derogation of an individual's rights, including an employee's rights, under Title VII,
- Nothing in these final regulations precludes an employer from complying with Title VII and that employers must fulfill both their obligations under Title VII and Title IX, and
- There is no inherent conflict between Title VII and Title IX.

Notice of Allegations and Initial Interview

The written notice of allegations identifying the parties to a sexual harassment incident is required only after a formal complaint has been filed by a complainant or signed by a Title IX Coordinator.

The Title IX Coordinator will provide the written 'Notice of Allegations' to the parties who are known within five (5) business days of the Title IX Coordinator's receipt of a formal complaint. Please see 'Notice of Allegations' in the 'Definitions' section for the information that will be provided to each party.

The Title IX Investigator or Title IX Coordinator will provide written notice to a complainant, respondent and witness that they have at least three (3) business days to prepare a response before the initial interview with the Title IX Investigator.

A complainant and respondent have the right to have an advisor of their choice attend Title IX interviews. However, an individual designated as having the status of ‘witness’ for the purpose of a specific Title IX Investigation, does not have the right to an advisor. An advisor is not allowed to make oral statements, ask questions, or raise objections during a Title IX interview. However, an advisor may request that the Title IX Investigator grant a reasonably brief break to provide advice to their advisee.

If, in the course of an investigation, a Title IX Investigator decides to investigate allegations about the complainant or respondent that are not included in the Title IX Coordinator’s initial Notice of Allegations, the Title IX Coordinator will provide notice of the additional allegations to the parties whose identities are known.

Investigation of a Formal Complaint

The Department of Education’s final regulations do not require a university to obtain evidence within a specific time frame.

When investigating a formal complaint and throughout the grievance process, the University’s Title IX personnel must:

- 1) Ensure that the burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rest on the University’s Title IX personnel and not on the parties provided that the university cannot access, consider, disclose, or otherwise use a party’s records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional’s or paraprofessional’s capacity, or assisting in that capacity, and which are made and maintained in connection with the provision of treatment to the party, unless Title IX personnel obtain that party’s voluntary, written consent to do so for a Title IX grievance process;
- 2) Provide an equal opportunity for the complainant and respondent to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence;
- 3) Not restrict the ability of either the complainant or respondent to discuss allegations under investigation or to gather and present relevant evidence;
- 4) Provide the complainant and respondent with the same opportunities to have others present during any grievance proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice, who may be, but is not required to be, an attorney, and not limit the choice or presence of advisor for either the complainant or respondent in any meeting or grievance proceeding; however, the University has the right to establish restrictions regarding the extent to which the advisor

may participate in the proceedings, as long as the restrictions apply equally to both parties;

5) Provide, to a complainant, respondent, advisor and/or witness whose participation is invited or expected, written notice of the date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings, with sufficient time for the party to prepare to participate.

- The Title IX Coordinator or Title IX Investigator will provide a party with at least three (3) business days written notice of Title IX meetings and Title IX investigative interviews so the party has time to prepare;
- The Title IX Coordinator or Title IX Investigator will provide both parties an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint, including the evidence upon which the University does not intend to rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence whether obtained from a party or other source, so that each party can meaningfully respond to the evidence prior to the conclusion of the investigation. The parties will have the opportunity to argue that evidence directly related to the allegations is in fact relevant.

Roseman University holds that providing the parties this equal opportunity for review and inspection at least five (5) business days prior to a good faith estimate of the date of the conclusion of the investigation is a reasonable timeframe to allow each party to meaningfully respond to the evidence.

- At least five (5) business days prior to a good faith estimate of the date of the completion of the investigative report, the Title IX Coordinator or Title IX Investigator must send to each party and the party's advisor, if any, the evidence subject to inspection and review in an electronic format or hard copy, and the parties will have at least ten (10) business days to submit a written response, which the Title IX Investigator will consider prior to the completion of the investigative report. The University must make all such evidence subject to the parties' inspection and review available at any hearing to give each party equal opportunity to refer to such evidence during the hearing, including for purposes of cross examination.
- The Title IX Coordinator or Title IX Investigator will send the Title IX investigative report at least ten (10) business days prior to a hearing to each party and the party's advisor, if any, in an electronic format or a hard copy, for their review and written response.
- The Title IX Coordinator reserves the right to send written notice of the hearing date, time, location participants, and purpose at the same time as the Title IX Investigative Report. Therefore, as long as the Title IX Coordinator or Title IX

Investigator has sent the Title IX Investigative Report at least ten (10) business days prior to a hearing to the complainant and respondent, the Title IX Coordinator can provide written notice of the hearing within at least five (5) of the ten (10) business days the parties have to review the investigative report.

Permissible Evidence Allowed in an Investigation and Hearing of a Formal Complaint

The Department of Education’s final regulations require the University to gather and evaluate relevant evidence with the understanding that this includes both inculpatory and exculpatory evidence, and the final regulations deem questions and evidence about a complainant’s prior sexual behavior to be irrelevant with two exceptions and preclude use of any information protected by a legally recognized privilege (e.g., attorney-client).

The Title IX Investigator may make police investigation files available to the complainant and respondent. If some of the evidence in the police investigation files is directly related to the allegations raised in a formal complaint, then the Title IX Investigator must provide that evidence to the complainant and respondent for their inspection and review.

Social media profiles, assuming that these social media profiles are lawfully obtained, may be included as part of the investigation.

The University’s Title IX policy does 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.

The Department of Education notes in the discussion of the final regulations that answers provided by a respondent in response to questioning by anyone acting on behalf of the University who questions a respondent (whether a student or employee) about a reported sexual harassment incident, in the absence of a formal complaint, may not be used as part of an investigation or grievance process if a formal complaint is later filed by the complainant or signed by the Title IX Coordinator.

The University’s Title IX grievance process does not allow for the admission of evidence obtained illegally. If any Title IX personnel know that a recording is unlawfully created under State law, then the Title IX personnel must not share a copy of such unlawful recording. The Department of Education does not require a university to disseminate any evidence that was illegally or unlawfully obtained.

Hearing

The Department of Education's final regulations require that the University's grievance process provides for a live hearing. Title IX hearings may be conducted with all parties physically present in the same geographic location or, at the Title IX Coordinator's discretion, any or all parties, witnesses, and other participants may appear at the live hearing virtually, with technology enabling participants simultaneously to see and hear each other.

Title IX hearings are not open to the public. Only individuals determined by the Title IX Coordinator as being necessary to conduct the hearing will be granted access. A person assisting a party with a disability, or a language interpreter, may accompany a party to the hearing, in addition to the party's advisor, because the presence of a person assisting a party with a disability at the hearing is required by law and/or necessary to conduct the hearing.

At the request of either party, the Title IX Coordinator must provide for the live hearing to occur with the parties located in separate rooms with technology enabling the Title IX decision-maker and parties to simultaneously see and hear the party or the witness answering questions.

The Title IX Decision-maker presides over this hearing and has the right to impose reasonable rules of conduct and decorum on all parties participating in the hearing, including reasonable time limits. The Title IX Decision-maker shall not allow the complainant, the respondent, and witnesses to be subjected to insulting treatment, including inappropriate comments, during the hearing. The Title IX Decision-maker has discretion to adopt rules governing the conduct of hearings that could, for example, include rules about the timing and length of breaks requested by parties or advisors and rules forbidding participants from disturbing the hearing by loudly conferring with each other. However, the parties have the right to reasonably consult with their advisor during a hearing.

The complainant and the respondent have the right, but are not required, to make opening and closing statements during the hearing. The Title IX Decision-maker has the right to establish and enforce rules for time limits, relevance, and civility for opening and closing remarks. Advisors are not allowed to make opening and closing statements on a complainant's or respondent's behalf.

The complainant and the respondent have the right to directly raise an objection to the relevance of evidence introduced during the hearing (i.e., they don't have to ask their advisor to raise an objection on their behalf). An advisor does not have the right to make objections on a complainant's or respondent's behalf. After a Title IX Decision-maker rules on a complainant's or respondent's objection to the relevance of evidence during the hearing, the Title IX Decision-maker's ruling shall be final. However, a complainant and/or respondent has the right to cite this decision if a party chooses to file an appeal with the Title IX Appeals Decision-maker.

A party cannot "fire" an assigned advisor during the hearing, but if the party correctly asserts that the assigned advisor is refusing to "conduct cross-examination on the party's behalf" then the Title IX Coordinator or Title IX Decision-maker is obligated to provide the party an

advisor to perform that function, whether that means counseling the assigned advisor to perform that role, or stopping the hearing to assign a different advisor.

Title IX requires the University to create an audio or audiovisual recording, or transcript, of any live hearing and make it available to the parties for inspection and review. However, the Department of Education's final regulations do not obligate the University to send the parties a copy of the recording or transcript.

Cross Examination

- Cross-examination at the live hearing must be conducted directly, orally, and in real time by an advisor acting on the complainant's and a respondent's behalf and never by a complainant or respondent personally, notwithstanding the right of the Title IX Decision-maker to use discretion to otherwise restrict the extent to which advisors may participate in the proceedings. The requirement for a party's advisor to conduct cross-examination on a party's behalf need not be more extensive than simply relaying the party's desired questions to be asked of other parties and witnesses.
- At the live hearing, the Title IX Decision-maker(s) must permit each party's advisor to ask the other party, any witnesses (and a Title IX Investigator can be called as a witness), all relevant questions and relevant follow-up questions, including those challenging credibility. If a party does not have an advisor present at the live hearing, the Title IX Coordinator or the Title IX Decision-maker must provide without fee or charge to that party, an advisor of the University's choice, who may be, but is not required to be, an attorney, to conduct cross-examination on behalf of that party.
- A party's advisor may appear and conduct cross-examination even when the party whom they are advising does not appear. Similarly, where one party does not appear and that party's advisor of choice does not appear, a Title IX personnel-provided advisor must still cross-examine the other, appearing party "on behalf of" the non-appearing party, resulting in consideration of the appearing party's statements but not the non-appearing party's statements (without any inference being drawn based on the non-appearance). Because the statements of the appearing party were tested via cross-examination, a fair, reliable outcome can result in such a situation.
- The Title IX Decision-maker may adopt rules of order or decorum to forbid badgering a complainant, respondent or witness, and may fairly deem repetition of the same question to be irrelevant. When 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 complainant's, respondent's witness's personal space), the Title IX Decision-maker may appropriately, evenhandedly enforce rules of decorum that require relevant questions to be asked in a respectful, non-abusive manner.

- If a complainant's or respondent's advisor of choice refuses to comply with a Title IX Decision-maker's rules of decorum (for example, by insisting on yelling at the other party), the Title IX Decision-maker may require that party to use a different advisor. Similarly, if an advisor that the Title IX Coordinator provides refuses to comply with a Title IX Decision-maker's rules of decorum, the Title IX Coordinator may provide that party with a different advisor to conduct cross-examination on behalf of that party.
- Only relevant cross examination and other questions may be asked of a party or witness. Questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the complainant's prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent.
- Before a complainant, respondent, or witness answers a cross-examination or other question, the Title IX decision-maker must first determine whether the question is relevant and explain any decision to exclude a question as not relevant. The requirement for an explanation does not require the decision-maker to give a lengthy or complicated explanation; it is sufficient, for example, for the decision-maker to explain that a question is irrelevant because the question 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. No lengthy or complicated exposition is required to satisfy this provision.
- A complainant, respondent or advisor does not have the right to object to the Title IX Decision-maker's determination of the relevance of a question during the hearing. However, a complainant and/or respondent has the right to cite this decision if a party chooses to file an appeal with the Title IX Appeals Decision-maker.

Rules and Guidance a Title IX Decision-maker Will Adhere to When Making a Determination of Responsibility

- The Title IX Decision-maker will use the preponderance of evidence (more likely than not) standard when making a determination of responsibility. The Title IX Decision-maker will apply the preponderance of evidence standard for formal complaints against students as well as for formal complaints against employees, including faculty, and will apply the same standard of evidence to all formal complaints of sexual harassment.

Note: the following rule for Title IX Decision-makers that was published in the August 3, 2020 policy was revised by the Department of Education on August 24, 2021:

- ~~If a party or witness does not submit to cross-examination at the live hearing, the Title IX decision maker must not rely on any statement of that party or witness in reaching a determination regarding responsibility; provided, however, that 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.~~ However, if a party refuses to answer cross-examination

questions but video evidence exists showing the underlying incident, the Title IX Decision-maker may still consider the available evidence and make a determination. ~~If a party or witness makes a statement in the video, then the Title IX Decision-maker may not rely on the statement of that party or witness in reaching a determination regarding responsibility.~~ The Title IX Decision-maker may consider video evidence that does not constitute statements or to the extent that the video contains non-statement evidence.

Per an email from the U.S. Department of Education <ed.gov@public.govdelivery.com>

Sent: Tuesday, August 24, 2021 1:44 PM

Subject: Update on Court Ruling about the Department of Education's Title IX Regulations

The Department of Education noted that on July 28, 2021 a federal district court in Massachusetts issued a decision in *Victim Rights Law Center et al. v. Cardona*, No. 1:20-cv-11104, 2021 WL 3185743 (D. Mass. July 28, 2021). The Department's email explained that:

In accordance with the court's order, the Department will immediately cease enforcement of the part of § 106.45(b)(6)(i) regarding the prohibition against statements not subject to cross-examination. Postsecondary institutions are no longer subject to this portion of the provision.

In practical terms, a decision-maker at a postsecondary institution may now consider statements made by parties or witnesses that are otherwise permitted under the regulations, even if those parties or witnesses do not participate in cross-examination at the live hearing, in reaching a determination regarding responsibility in a Title IX grievance process.

For example, a decision-maker at a postsecondary institution may now consider statements made by the parties and witnesses during the investigation, emails or text exchanges between the parties leading up to the alleged sexual harassment, and statements about the alleged sexual harassment that satisfy the regulation's relevance rules, regardless of whether the parties or witnesses submit to cross-examination at the live hearing. A decision-maker at a postsecondary institution may also consider police reports, Sexual Assault Nurse Examiner documents, medical reports, and other documents even if those documents contain statements of a party or witness who is not cross-examined at the live hearing.

Any statements in an OCR document about the vacated part of § 106.45(b)(6)(i) should not be relied upon.

- The credibility of any party, as well as ultimate conclusions about responsibility for sexual harassment, must not be prejudged and must be based on objective evaluation of the relevant evidence in a particular case.

- The Department of Education’s final regulations do not require that any party, including a complainant, must recall details with certain levels of specificity; rather, a party’s answers to cross-examination questions can and should be evaluated by a Title IX Decision-maker in context, including taking into account that a party may experience stress while trying to answer questions.

Hearing Outcome

- The Title IX Decision-maker will submit the formal ‘Written Determination’ of the hearing’s results to the Complainant, the Respondent and the Title IX Coordinator simultaneously within five (5) business days after the Decision-maker has adjourned the hearing. The Title IX Decision-maker has the right to extend this deadline for good cause upon written notice to the Respondent and Complainant.
- A determination of non-responsibility does not necessarily mean that the complainant’s allegations were false or unfounded but rather could mean that there was not sufficient evidence to find the respondent responsible.
- A determination of non-responsibility is only with regard to that conduct for the purposes of sexual harassment under Title IX; such a determination or dismissal does not preclude action under another provision of the student’s academic program’s code of conduct or employee/faculty code of conduct.
- The Title IX Decision-maker is responsible for determining remedies, disciplinary measures and sanctions on a respondent when the Title IX Decision-maker has determined that the respondent is responsible for violating the University’s Title IX policy. Please see the ‘Definition’ section for the University’s description of the range of possible disciplinary remedies and sanctions that could be imposed on a respondent and remedies that could be provided to complainants.
- The determination regarding responsibility becomes final either on:
 - 1) the date that the Title IX Appeals Decision-maker simultaneously provided the parties with the written decision describing the result of the appeal and the rationale for the result, if an appeal is filed,
or
 - 2) if an appeal is not filed, the date on which an appeal would no longer be considered timely.
- The Clery Act requires, and FERPA permits, the University to inform the complainant of the institution’s final determination and any disciplinary sanctions imposed on the respondent in sexual violence cases (as opposed to other forms of sexual harassment covered by Title IX), not just those sanctions that directly relate to the complainant. The victim will know whether the perpetrator was expelled, or whether the perpetrator was suspended for a period of time, as such information will inevitably impact the victim.

- The Title IX Coordinator is responsible for the effective implementation of any remedies.
- The Title IX Coordinator has the right to keep supportive measures in place even after a determination that a respondent is not responsible, so complainants do not necessarily need to be left in constant contact with the respondent, regardless of the result of the University's grievance process.
- The Department of Education noted in the discussion of the final regulations that it declines to require a university to offer remedies for respondents in situations where a complainant is found to have brought a false allegation. The Department of Education's final regulations are focused on sexual harassment allegations, including remedies for victims of sexual harassment, and not on remedies for other kinds of misconduct. A materially false statement may but does not always constitute discrimination on the basis of sex. The Title IX Coordinator would need to examine the content, purpose, and intent of the materially false statement as well as the circumstances under which the statement was made to determine whether the statement constitutes sex discrimination.

Right to Call for Temporary Delay or Extension of Time Frames for Notice of Allegation, Investigation, Grievance Process, Including Hearing and Written Determination, for Good Cause

The Title IX Coordinator, the Title IX Investigator and the Title IX Decision-maker each has the right to call for a temporary delay of the University's Title IX notice of allegations, investigation and grievance process or the limited extension of time frames for good cause with written notice to the complainant and the respondent of the delay or extension and the reason(s) for the action.

A complainant's or respondent's request to extend any deadline must be made in writing to the Title IX Coordinator (or designee). The Title IX Coordinator (or designee) will only grant a complainant's and/or respondent's request to extend a deadline for good cause and if granting the request does not unreasonably extend the total duration of the University's Title IX grievance process. In order for the Title IX Coordinator (or designee) to consider a request to extend a deadline, the complainant and/or respondent must:

- submit a written request to extend the deadline to the Title IX Coordinator (or designee) on or before the deadline,
- the written request must include the rationale for the extension, and
- the written request must propose a new date and time for the deadline.

If the Title IX Coordinator (or designee) grants a request to extend a deadline, the Title IX Coordinator will notify each party in writing that an extension will be granted to both parties and state the reason(s) why the decision was made for good cause.

Unless a deadline extension has been approved in writing by the Title IX Coordinator (or designee), a complainant, respondent or anyone acting on their behalf, is not allowed to submit information received after the deadline to the Title IX Investigator and/or Title IX Decision-maker. The Title IX Decision-maker will disregard evidence that was submitted after an approved deadline.

The following quoted text comes from the Department of Education’s discussion of the May 2020, Final Regulations (the page number listed refers to the page number of the double-spaced document published in May 2020 by the Department of Education)

Grievance Process: Title IX investigations and adjudication functions can be outsourced

Page 825

The final regulations leave recipients flexibility to use their own employees, or to outsource Title IX investigation and adjudication functions, and the Department encourages recipients to pursue alternatives to the inherent difficulties that arise when a recipient’s own employees are expected to perform these functions free from conflicts of interest and bias.

Grievance process – can use own employees in process

Page 826

although recipients may face challenges with respect to ensuring that personnel serve free from conflicts of interest and bias, recipients can comply with the final regulations by using the recipient’s own employees.

Grievance Process: Time frame: Select time frame to conclude grievance process in most situations

Page 890

Because the final regulations allow short-term delays and extensions for good cause, recipients need not base designated time frames on, for example, the most complex, time-consuming investigation that a formal complaint of sexual harassment *might* present. **Rather, the recipient may select time frames under which the recipient is confident it can conclude the grievance process in most situations, knowing that case-specific complexities may be accounted for with factually justified short-term delays and extensions.**

Grievance Process: Investigation: University’s burden to impartially gather evidence

Page 972

Ultimately, however, the recipient itself must take action in response to the determination regarding responsibility that directly affects both parties, and it is the recipient’s burden to impartially gather evidence and present it so that the decision-maker can determine whether the recipient (not either party) has shown that the weight of the evidence reaches or falls short of the standard of evidence selected by the recipient for making determinations.

Grievance Process: Investigation: Do a thorough search for evidence under constraints of designated, reasonably prompt timeframes

Page 973-974

The Department believes that the scope of § 106.45(b)(5)(i) appropriately obligates a recipient to undertake a thorough search for relevant facts and evidence pertaining to a particular case, while operating under the constraints of conducting and concluding the investigation under designated, reasonably prompt time frames and without powers of subpoena. Such conditions limit the extensiveness or comprehensiveness of a recipient's efforts to gather evidence while reasonably expecting the recipient to gather evidence that is available.

Grievance Process: Investigative Report: Only DOE requirement for investigative report is that it fairly summarize relevant evidence

Page 1039

The Department takes no position here on such elements beyond what is required in these final regulations; namely, that the investigative report must fairly summarize relevant evidence. We note that the decision-maker must prepare a written determination regarding responsibility that must contain certain specific elements (for instance, a description of procedural steps taken during the investigation) and so a recipient may wish to instruct the investigator to include such matters in the investigative report, but these final regulations do not prescribe the contents of the investigative report other than specifying its core purpose of summarizing relevant evidence.

Grievance Process: Evidence: No comprehensive rules of evidence, no subpoena power

Page 1483-1484

The grievance process in § 106.45 does not have all of the same protections as a court proceeding in a criminal case. **For example, these final regulations do not contain a comprehensive set of rules of evidence. Neither party may issue a subpoena to gather information from each other or the recipient for purposes of the grievance process under § 106.45. Neither of the parties has a right to effective assistance of counsel under these final regulations, whereas a criminal defendant does have that right throughout the criminal proceeding. Under these final regulations, the parties only receive an advisor, who does not need to be an attorney, to conduct cross-examination on behalf of that party so as to ensure that the parties do not directly cross-examine each other.**

Grievance Process: Employee respondents have same right as student respondents to respond to evidence

Page 1500

If an employee is a respondent, then the employee must be able to respond to any evidence that directly relates to the allegations in a formal complaint.

TITLE IX APPEALS PROCESS

The Complainant and Respondent have a right to submit a written appeal of the Title IX Coordinator's decision to dismiss a formal complaint or the Title IX Decision-maker's determination of responsibility to the Title IX Appeals Decision-maker. The complainant and/or respondent must submit a written appeal to the Title IX Appeals Decision-maker within five (5) business days after the Title IX Coordinator provided the parties with written notification to dismiss the formal complaint or the Title IX Decision-maker provided each party with the Written Determination. The Title IX Appeals Decision-maker will consider a temporary delay or limited extension of time frames in the appeals process for good cause with written notice to the complainant and the respondent of the delay or extension and the reasons for the action.

The Title IX Appeals Decision-maker will only consider appeals for any of the following bases:

- 1) Procedural irregularity that affected the outcome of the matter;
- 2) New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter;
- 3) The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter.

The severity of the sanctions shall not be subject to appeal for either party.

The Title IX Appeals Decision-maker will render a decision on any appeals within fifteen (15) business days of the Appeals Decision-maker's receipt of a party's written appeal. The Title IX Appeals Decision-maker may allow for a temporary delay or limited extension of time frames in the sharing the appeals decision with both parties for good cause with written notice to the complainant and the respondent of the delay or extension and the reason(s) for the delay or extension of the decision. The Title IX Appeals Decision-maker's decision shall be final.

A Title IX Appeals Decision-maker's decision to grant an appeal that results in a final determination that a respondent was not responsible for violating the University's Title IX policy, does not necessarily mean that the complainant's allegations were false or unfounded. Rather, the Title IX Appeals Decision-maker's decision could mean that there was a procedure irregularity, that the Appeals Decision-maker received new evidence not reasonably available at the time of the Title IX Decision-maker's determination, there was conflict of interest, and/or there was bias that had an impact on the Title IX Decision-maker's determination.

HOW TO:

- SERVE IMPARTIALLY
- AVOID PREJUDGMENT OF THE FACTS AT ISSUE
- AVOID BIAS

Title IX personnel must serve impartially, avoid prejudgment of the facts at issue, not have a bias for or against complainants or respondents generally, or an individual complainant or respondent and will not rely on sex stereotypes.

Title IX personnel will remain neutral during all meetings, Title IX interviews, and the hearing.

Title IX personnel will listen to each party and witness without judgment.

Title IX personnel will reflect on and use the issues presented below to promote impartial investigations and adjudications of formal complaints of sexual harassment.

Bias

- The Department of Education does not define this term in the final regulations.
- The University adopts the following definition of bias from this link to the National Institutes of Health: <https://diversity.nih.gov/sociocultural-factors/implicit-bias#:~:text=Bias%20consists%20of%20attitudes%2C%20behaviors,or%20group%20compared%20to%20another.>

Bias consists of attitudes, behaviors and actions that are prejudiced in favor of or against one person or group compared to another. *Implicit bias* is a form of bias that occurs automatically and unintentionally that nevertheless affects judgments, decisions, and behaviors.

- A person may not even be aware of the person's implicit or unconscious views and opinions, or be aware of the full impact and implications.

Sex Stereotyping

Sex stereotyping occurs when an individual has a preconceived idea about how someone should be, act, or behave on the basis of that person's sex.

An example of sex stereotyping:

- Treating someone differently because he or she does not act masculine or feminine enough based on predetermined ideas of what it means to be either masculine or feminine. Common gender stereotypes include things like expecting males to be tough, aggressive, or unattached or expecting females to be more sensitive, more emotional, and not aggressive.

Sexual stereotypes about men and women that pertain to sexuality include (but is not limited to):

Men are more sexual than women.

Women are not that interested in sex.

Men have more sexual experiences and fantasies than women do.

Women are not as sexually active and don't think about sex as much as men do.

Men are more sexually aggressive and more sexually oriented than women.

Women are more passive sexually and don't want sex as much as men do.

Men are more random and want variety more than women do.

Men are impersonal in their sexual encounters; they relate to women as sex objects.

Women are not interested in a casual sexual encounter. They only want to be sexual if they are in love with the guy.

The bottom line:

Title IX personnel recognize that men and women want sex, love, affection, success, dignity and self-fulfillment and to be acknowledged first as unique individuals, then as men and women.

Issues to consider:

- Check your biases: It is not unlikely that you will like one party more than the other. Don't let that drive your findings.
- Acknowledge our tendency to have biases
- Identify blind spots – reflect on when you have felt included/excluded
- Interrupt biases – be mindful of initial reactions, seek facts and evidence that challenges existing stereotypes
- Seek out alternative/opposing views – learn from mistakes
- Compare initial judgment and assessment to actual reality
- Acknowledge personal reactions and strive to understand other people's reactions or interpretations
- Think of counter-stereotypic examples: Identify people from diverse backgrounds
- Perspective-taking: Imagine what it is like to be a person who experiences people questioning your ability or skills because of your social identity.
- Interrupt automatic biased thoughts: Identify when you may be most influenced by implicit bias (e.g., evaluating performance) and create an action plan (e.g., review evaluation criteria before assessing each person's performance in the form of IF and THEN statements) to increase mindfulness of, or mitigate the influence of, implicit bias

- Assess each interviewee's relationship to the parties and consider whether bias is playing a role in their statements
- Assess the level of detail and consistency of each person's account – compare the versions of the descriptions of the events to identify the differences
- Assess each person's credibility by examining if corroborative evidence is lacking where it should logically exist.
- How did this person become aware of the information the person knows? Was the person present at the event – did the person directly observe and/or hear the event?
- Does this person have a motivation to lie and/or to protect someone?
- Does this person's statement make sense give the reports of other people?
- Is the information provided by this person consistent with other known facts?

Do not allow the following issues to influence the perception of a party or witness:

- Willingness to cooperate and behavior during the interview is NOT AN INDICATOR of credibility. A party or witness may be reluctant to testify because they are afraid of retaliation, shame, etc.,
- There is no "right way" for a complainant to behave
A rape victim doesn't need to cry when talking to an investigator, he/she may be in a state of shock
- There is no "right way" for a respondent to behave
A respondent may be stressed / anxious during an interview not because he/she is guilty, but because he/she is afraid of the process
- Character witnesses do not help establish credibility
Having other people who did not directly observe the event tell you, "Person A is a good person, person A would never lie, etc.," doesn't mean that Person A is credible *in this situation*
- A person's "likeability" or popularity doesn't mean a person is credible. [The mass murderer Ted Bundy was charming.]
- A person's lack of a disciplinary record or satisfactory academic performance doesn't mean that the person is credible *in this situation*

**HOW TO:
- AVOID CONFLICTS OF INTEREST**

Title IX personnel will not have an unreasonable conflict of interest for or against complainants or respondents generally or an individual complainant or respondent.

Title IX personnel who have an unreasonable personal, professional or financial conflict of interest with a complainant, respondent or witnesses will recuse themselves from being involved in a Title IX grievance and adjudication process.

Title IX personnel must assume the responsibility of acting in the best interests of promoting a fair Title IX grievance and adjudication process and not in their own self-interest.

Conflict of Interest

The Department of Education notes in the discussion of the final regulations that the Clery Act regulations do not further elaborate on what may constitute a conflict of interest or bias and further declines to do so in its final Title IX regulations. The University defines conflict of interest as any situation that could cause a reasonable person to question the impartiality or objectivity of University Title IX personnel.

Promoting Conflict of Interest Transparency

- Title IX personnel will reflect on the views of the persons likely to be impacted if the Title IX personnel would continue to participate in the Title IX grievance and adjudication process
- The Title IX Coordinator will encourage a “culture of candor” among Title IX personnel and promote disclosure and discussion of issues that may constitute a conflict of interest
- Title IX Investigators, Title IX Decision-makers and Title IX Appeal Decision-makers will disclose in writing an actual or potential conflict of interest to the University’s Title IX Coordinator.
- The Title IX Coordinator will disclose in writing an actual or potential conflict of interest to the University President

Understand the Consequences of Violating the Title IX Conflict of Interest Policy

Violating Title IX conflict-of-interest policies can have serious consequences for the University. Roseman employee and student trust in the Title IX grievance and adjudication process can be significantly undermined when Title IX personnel violate conflict of interest policies. Additionally, conflict of interest violations may expose the University to significant risk of litigation.

ADDITIONAL TRAINING SPECIFICALLY REQUIRED FOR TITLE IX INVESTIGATOR: ISSUES OF RELEVANCE AND HOW TO FAIRLY SUMMARIZE EVIDENCE

Title IX Investigator - Issues of Relevance

Relevance

Roseman University's Title IX policy uses a reasonable person standard when evaluating relevance. The Department of Education did not define this term in the final regulations and stated in the discussion of the final regulations that the ordinary meaning of the word should be understood and applied.

Rape Shield Protections and Relevance

- Means that questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant and are therefore prohibited, unless:
 - 1) such questions and evidence about the complainant's prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or
 - 2) if the questions and evidence are specifically about incidents of the complainant's prior sexual behavior with the respondent and is offered to prove consent.
- The Department of Education clarified in the discussion of the final regulations that the rape shield language in this provision considers all questions and evidence of a complainant's sexual *predisposition* irrelevant, with no exceptions; questions and evidence about a complainant's prior *sexual behavior* are irrelevant unless they meet one of the two exceptions.
- The Department of Education explained in the discussion of the final regulations that rape shield language deems irrelevant *all* questions or evidence of a complainant's sexual behavior *unless* offered to prove consent (and it concerns specific instances of sexual behavior with the respondent); thus, if "consent" is not at issue – for example, where the allegations concern solely unwelcome conduct that does not involve sexual assault, dating violence, domestic violence or stalking, then that exception does not even apply, and the rape shield protections would then bar *all* questions and evidence about a complainant's sexual behavior, with no need to engage in a balancing test of whether the value of the evidence is outweighed by harm or prejudice.
- The Department of Education noted in discussion of the final regulation that where a respondent might wish to prove the complainant had a motive to fabricate or conceal a sexual interaction, the University is not required to allow for admission or consideration of the complainant's sexual behavior. Respondents in this scenario could probe a complainant's motive by, for example, inquiring whether a complainant had a dating or romantic relationship with a person other than the respondent, without delving into a complainant's sexual behavior; sexual behavior evidence would remain irrelevant in such circumstances.

- The Department of Education clarified in the discussion of the final regulations that questions and evidence about a *respondent's* sexual predisposition or prior sexual behavior are not subject to any special consideration but rather must be judged like any other question or evidence as relevant or irrelevant to the allegations at issue.

Quid Pro Quo and Relevance

The Department of Education explains in the discussion of the final regulations that determining whether unwelcome sexual conduct is proposed, suggested, or directed at a complainant, by a university's employee, as part of the employee "conditioning" an educational benefit on participation in the unwelcome conduct, does not require the employee to expressly tell the complainant that such a bargain is being proposed, and the age and position of the complainant is relevant to this determination. In situations where an employee did not intend to commit *quid pro quo* harassment (for instance, where an employee did not realize that what the employee believed were friendly back rubs had sexual overtones and made students feel uncomfortable), the Title IX Decision-maker may take the specific factual circumstances into account in deciding what remedies are appropriate for the complainants and what disciplinary sanctions are appropriate for the respondent.

Evidence and Relevance

The following quoted text comes from the Department of Education's discussion of the May 2020, Final Regulations (the page number listed refers to the page number of the double-spaced document published in May 2020 by the Department of Education)

Grievance process: Evidence: Rules of evidence: Interviews conducted before formal complaint are not allowed to be used in an investigation

Page 956

¹¹⁴² The Department notes that a recipient's questioning of a respondent (whether a student or employee) about a reported sexual harassment incident, in the absence of a formal complaint, may not be used as part of an investigation or adjudication if a formal complaint is later filed by the complainant or signed by the Title IX Coordinator, because § 106.45(b)(5)(v) requires that a party be given written notice of any interview or meeting relating to the allegations under investigation, and a recipient is precluded from imposing disciplinary sanctions on a respondent without following the § 106.45 grievance process.

Grievance Process: Evidence: Evidence from law enforcement is admissible

Page 1015-1016

Such inculpatory or exculpatory evidence (related to the allegations) may, therefore, be gathered by the investigator from, for example, law enforcement where a criminal investigation is occurring concurrently with the recipient's Title IX grievance process.

Grievance process: evidence: Must be directly related to allegations

Page 1017

Non-treatment records and information, such as a party’s financial or sexual history, must be directly related to the allegations at issue in order to be reviewed by the other party under §106.45(b)(5)(vi), and all evidence summarized in the investigative report under §106.45(b)(5)(vii) must be “relevant” such that evidence about a complainant’s sexual predisposition would never be included in the investigative report and evidence about a complainant’s prior sexual behavior would only be included if it meets one of the two narrow exceptions stated in § 106.45(b)(6)(i)-(ii) (deeming all questions and evidence about a complainant’s sexual predisposition “not relevant,” and all questions and evidence about a complainant’s prior sexual behavior “not relevant” with two limited exceptions).

Grievance Process: Investigation: Decision maker must consider relevant evidence only

Page 1135

The Department appreciates the opportunity to clarify here that the final regulations do not allow a recipient to impose rules of evidence that result in exclusion of relevant evidence; the decision maker must consider relevant evidence and must not consider irrelevant evidence.

Grievance Process: Evidence: Relevance is single admissibility rule

Page 1190-1191

Instead, the Department expects decision-makers to apply a single admissibility rule (relevance), including this provision’s specification that sexual behavior is irrelevant with two concrete exceptions. This approach leaves the decision-maker discretion to assign weight and credibility to evidence, but not to deem evidence inadmissible or excluded, except on the ground of relevance (and in conformity with other requirements in § 106.45, including the provisions discussed above whereby the decision-maker cannot rely on statements of a party or witness if the party or witness did not submit to cross-examination, a party’s treatment records cannot be used without the party’s voluntary consent, and information protected by a legally recognized privilege cannot be used).

Grievance Process: Evidence: Rape Shield protections do not extend to respondents

Page 1191

The Department declines to extend the rape shield language to respondents. The Department does not wish to impose more restrictions on relevance than necessary to further the goals of a Title IX sexual harassment adjudication, and does not believe that a respondent’s sexual behavior requires a special provision to adequately protect respondents from questions or evidence that are *irrelevant*.

Grievance Process: Investigative Report: Investigator only has to summarize relevant evidence

Page 1194

The final regulations permit exchange of all evidence “directly related to the allegations in a formal complaint” during the investigation, but require the investigator to only summarize “relevant” evidence in the investigative report (**which would exclude sexual history information deemed by these final regulations to be “ not relevant”**), and require the decision-maker to objectively evaluate only “relevant” evidence during the hearing and when reaching the determination regarding responsibility.

Grievance Process: Evidence: University has some discretion to determine if evidence is directly related to allegations raised in a formal complaint

Page 1451

A recipient has some discretion to determine whether evidence obtained as part of an investigation is directly related to allegations raised in a formal complaint as described in § 106.45(b)(5)(vi), and the Department is required to enforce both FERPA and Title IX. The Department previously noted that the “directly related to” requirement in § 106.45(b)(vi) aligns with FERPA. For example, the regulations implementing FERPA define education records as records that are “directly related to a student” pursuant to § 99.3.

Grievance Process: Evidence: Only need to provide evidence that is directly related to allegations in a formal complaint

Page 1482-1483

The Department disagrees that these final regulations require a recipient to provide completely irrelevant evidence because § 106.45(b)(5)(vi) expressly states that the recipient must provide **“any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint.”** The only evidence that a recipient should be providing is evidence that is directly related to the allegations raised in a formal complaint.

Grievance Process: Evidence: University can’t use illegal evidence as part of an investigation

Page 1494

For purposes of these final regulations, the recipient should not obtain as part of an investigation any evidence, directly relating to the allegations in a formal complaint, that cannot legally be shared with the parties.

Title IX Investigator - How to Fairly Summarize Evidence

Investigative Report

- Means the formal investigative report that fairly summarizes relevant evidence that is completed by the individual designated as the Title IX Investigator.

The following quoted text comes from the Department of Education’s discussion of the May 2020, Final Regulations (the page number listed refers to the page number of the double-spaced document published in May 2020 by the Department of Education)

Documentary evidence, if directly related to allegations and relevant, are summarized in the investigative report

Page 1181

While documentary evidence such as police reports or hospital records may have been gathered during investigation¹³³⁷ and, if directly related to the allegations inspected and reviewed by the parties,¹³³⁸ and to the extent they are relevant, summarized in the investigative report

Grievance Process: Investigative Report: Investigator only has to summarize relevant evidence

Page 1194

The final regulations permit exchange of all evidence “directly related to the allegations in a formal complaint” during the investigation, but require the investigator to only summarize “relevant” evidence in the investigative report (**which would exclude sexual history information deemed by these final regulations to be “not relevant”**), and require the decision-maker to objectively evaluate only “relevant” evidence during the hearing and when reaching the determination regarding responsibility.

Grievance process: Investigative Report: Must consider rape shield when determining relevance

Page 1198

However, the investigative report must summarize “relevant” evidence, and thus at that point the rape shield protections would apply to preclude inclusion in the investigative report of irrelevant evidence.

ADDITIONAL TRAINING SPECIFICALLY REQUIRED FOR TITLE IX DECISION-MAKER

- TECHNOLOGY USED AT LIVE HEARING

- ISSUES OF RELEVANCE OF QUESTIONS AND EVIDENCE

- HOW TO OBJECTIVELY EVALUATE ALL RELEVANT EVIDENCE

-HOW NOT TO MAKE CREDIBILITY DETERMINATIONS BASED ON A PERSON'S STATUS AS A COMPLAINANT, RESPONDENT OR WITNESS BEFORE MAKING A DETERMINATION OF RESPONSIBILITY

TECHNOLOGY USED AT A LIVE HEARING

Roseman University will use Zoom software to conduct Title IX Live Hearings.

The Title IX Decision-maker will familiarize themselves with Zoom features and how to hold a hearing using Zoom by visiting this link: <https://www.zoom.us/>.

ISSUES OF RELEVANCE OF QUESTIONS AND EVIDENCE

★ Please review section: Title IX Investigator - Issues of Relevance

The following quoted text comes from the Department of Education's discussion of the May 2020, Final Regulations (the page number listed refers to the page number of the double-spaced document published in May 2020 by the Department of Education)

Grievance Process: Evidence: Rules of evidence:

- 1) can't rely on statements not submit to cross examination**
- 2) Relevance not defined by DOE, use ordinary meaning of the word**
- 3) Rape shield protections – only ask questions to prove that someone else committed assault or questions about prior sexual behavior are used to prove consent**

Page 811

While not addressed to hearsay evidence as such, § 106.45(b)(6)(i), which requires postsecondary institutions to hold live hearings to adjudicate formal complaints of sexual harassment, **states that the decision-maker must not rely on the statement of a party or witness who does not submit to cross-examination, resulting in exclusion of statements that remain untested by cross-examination. The final regulations do not define relevance, and the ordinary meaning of the word should be understood and applied.**

1019 Section 106.45(b)(6) contains rape shield protections, providing that questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, **unless such questions and evidence about the complainant's prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent.**

Grievance Process: Investigative Report: Parties have the opportunity to argue about relevance

Page 815

The parties then have equal opportunity to review the investigative report; if a party disagrees with an investigator's determination about relevance, the party can make that argument in the party's written response to the investigative report under §106.45(b)(5)(vii) and to the decision-maker at any hearing held; either way the decision-maker is obligated to objectively evaluate all relevant evidence and the parties have the opportunity to argue about what is relevant (and about the persuasiveness of relevant evidence).

Grievance Process: Evidence: Investigators must disclose evidence to both parties and let parties decide if relevant or irrelevant

Page 1018-1019

For example, an investigator may discover during the investigation that evidence exists in the form of communications between a party and a third party (such as the party's friend or roommate) wherein the party characterizes the incident under investigation. **If the investigator decides that such evidence is irrelevant (perhaps from a belief that communications before or after an incident do not make the facts of the incident itself more or less likely to be true), the other party should be entitled to know of the existence of that evidence so as to argue about whether it is relevant. The investigator would then consider the parties' viewpoints about whether such evidence (directly related to the allegations) is also relevant, and on that basis decide whether to summarize that evidence in the investigative report.** A party who believes the investigator reached the wrong conclusion about the relevance of the evidence may argue again to the decision-maker (i.e., as part of the party's response to the investigative report, and/or at a live hearing) about whether the evidence is actually relevant, but the parties would not have that opportunity if the evidence had been screened out by the investigator (that is, deemed irrelevant) without the parties having inspected and reviewed it as part of the exchange of evidence under §106.45(b)(5)(vi).

Hearing: Cross examination: rules for cross examination

Page 1053-1054

The Department agrees with commenters that the truth-seeking function of cross examination can be achieved while mitigating any re-traumatization of complainants because under the final regulations: **cross-examination is only conducted by party advisors** and not directly or personally by the parties themselves; **upon any party's request the entire live hearing, including cross-examination, must occur with the parties in separate rooms; questions about a complainant's prior sexual behavior are barred subject to two limited exceptions;** a party's medical or psychological records can only be used with the party's voluntary consent;¹¹⁹⁶ recipients are **instructed that only relevant questions must be answered and the decision-maker must determine relevance prior to a party or witness answering a cross-examination question; and recipients can oversee cross-examination in a manner that avoids aggressive, abusive questioning of any party or witness**

Hearing: Protections for sexual assault victims during hearing

Page 1090

however, the we believe that § 106.45(b)(6)(i) anticipates the potential for retraumatization of sexual assault victims and mitigates such an effect by ensuring that a complainant (or respondent) can request being in separate rooms for the entire live hearing (including during cross-examination) so that the parties never have to face each other in person, by leaving recipients flexibility to design rules (applied equally to both parties) that ensure that no party is questioned in an abusive or intimidating manner, and by requiring the decision-maker to determine the relevance of each cross-examination question before a party or witness answers.

Training: Decision-maker

Page 1158-1159

By contrast, the decisionmaker's only evidentiary threshold for admissibility or exclusion of questions and evidence is whether the question or evidence is relevant – 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. While this provision does require “on the spot” determinations about a question's relevance, **the decision-maker must be trained in how to conduct a grievance process, specifically including how to determine relevance within the scope of this provision's rape shield language and the final regulations' protection of privileged information and parties' treatment records.** Contrary to some commenters' assertions, judges in civil and criminal trials often do make “on the spot” relevance determinations, **and while this provision requires the decisionmaker to “explain” the decision in a way that rules of procedure do not require of judges, the Department believes that this provision will aid parties in having confidence that Title IX decision-makers are appropriately considering all relevant evidence. The final regulations contemplate that decision-makers often will be laypersons, not judges or lawyers.**

Hearing: Decision maker must explain why question was irrelevant. Relevance is determined by logic and common sense

Page 1159

By contrast, a layperson's determination that a question is not relevant is made by applying logic and common sense, but not against a backdrop of legal expertise. Thus, an explanation of how or why the question was irrelevant to the allegations at issue, or is deemed irrelevant by these final regulations (for example, in the case of sexual predisposition or prior sexual behavior information) provides transparency for the parties to understand a decision-maker's relevance determinations.

Hearing: Decision-maker not required to give lengthy explanation of irrelevance decision

Page 1161

This provision does not require a decision-maker to give a lengthy or complicated explanation; it is sufficient, for example, for a decision-maker to explain that a question is irrelevant because the question 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. No lengthy or complicated exposition is required to satisfy this provision.

Hearing: If a party or witness doesn't answer a question, the decision-maker can't consider any of the party's or witnesses statements.

Page 1181-1182

The Department appreciates the opportunity to clarify here that to “submit to cross examination” means answering those cross-examination questions that are relevant; the decisionmaker is required to make relevance determinations regarding cross-examination in real time during the hearing in part to ensure that parties and witnesses do not feel compelled to answer irrelevant questions for fear of their statements being excluded. **If a party or witness disagrees with a decision-maker's determination that a question is relevant, during the hearing, the party or witness's choice is to abide by the decision-maker's determination and answer, or refuse to answer the question, but unless the decision-maker reconsiders the relevance determination prior to reaching the determination regarding responsibility, the decision-maker would not rely on the witness's statements.**¹³⁴⁰ The party or witness's reason for refusing to answer a relevant question does not matter.

Grievance Process: Evidence: Relevance is single admissibility rule

Page 1190-1191

Instead, the Department expects decision-makers to apply a single admissibility rule (relevance), including this provision's specification that sexual behavior is irrelevant with two concrete exceptions. This approach leaves the decision-maker discretion to assign weight and credibility to evidence, but not to deem evidence inadmissible or excluded, except on the ground of relevance (and in conformity with other requirements in § 106.45, including the provisions discussed above whereby the decision-maker cannot rely on statements of a party or witness if the party or witness did not submit to cross-examination, a party's treatment records cannot be used without the party's voluntary consent, and information protected by a legally recognized privilege cannot be used).

Grievance Process: Evidence: Rape Shield applies in counter-claims when respondent is complainant

Page 1191-1192

The Department cautions recipients that some situations will involve counter-claims made between two parties, such that a respondent is also a complainant, and in such situations the recipient must take care to apply the rape shield protections to any party where the party is designated as a “complainant” even if the same party is also a “respondent” in a consolidated grievance process.

Grievance Process: Evidence: “Slut shaming” not allowed, can’t use evidence of sexual behavior with others

Page 1196

and the second applies narrowly to allow **sexual behavior questions or evidence concerning incidents between the complainant and respondent** if offered to prove consent. **The second exception does not admit sexual history evidence of a complainant’s sexual behavior with someone other than the respondent; thus, “slut shaming” or implication that a woman with an extensive sexual history probably consented to sexual activity with the respondent, is not validated or promoted by this provision.**

Grievance Process: Evidence: Rape Shield does not apply to respondents. Respondents past sexual behavior must be evaluated for relevance similar to other evidence

Page 1196-1197

The Department reiterates that the rape shield language in this provision 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.

Grievance process: Evidence: Rape Shield: Someone else committed assault or behavior between complainant and respondent established consent are only exceptions to relevance rule

Page 1197

this provision already deems irrelevant all questions or evidence of a complainant’s prior sexual behavior unless offered to prove that someone other than the respondent committed the alleged offense or if the questions or evidence concern specific sexual behavior between the complainant and respondent and are offered to prove consent. No other use of a complainant’s sexual behavior is authorized under this provision.

Grievance process: Evidence: Sexual behavior unrelated to the alleged sexual harassment is not relevant

Page 1200-1201

The Department emphasizes that “prior” does not imply admissibility of questions or evidence about a complainant’s sexual behavior that occurred after the alleged sexual harassment incident, but rather must mean anything “prior” to conclusion of the grievance process. This aligns with the intent of Fed. R. Evid. 412, which prohibits evidence of a victim’s “other” sexual behavior; the Advisory Committee Notes on that rule explain that use of the word “other” is to “suggest some flexibility in admitting evidence ‘intrinsic’ to the alleged sexual misconduct.” The Department chooses to use the phrase “prior sexual behavior” rather than “other sexual behavior” because based on public comments, **“prior sexual behavior” is a widely understood reference to evidence unrelated to the alleged sexual harassment at issue.**

HOW TO OBJECTIVELY EVALUATE ALL RELEVANT EVIDENCE

Sexual harassment: use reasonable person standard

Page 477

Elements of severity, pervasiveness, and objective offensiveness must be evaluated in light of the known circumstances and depend on the facts of each situation, but must be determined from the perspective of a reasonable person standing in the shoes of the complainant. The final regulations revise the second prong of the § 106.30 definition to state that the *Davis* elements must be determined under a reasonable person standard.

Grievance Process – Evidence: gather relevant evidence, inculpatory and exculpatory evidence, questions about complainant’s prior sexual behavior irrelevant with two exceptions, and preclude use of legally recognized privilege

Page 811

While the proposed rules do not speak to admissibility of hearsay,¹⁰¹⁷ prior bad acts, character evidence, polygraph (lie detector) results, standards for authentication of evidence, or similar issues concerning evidence, **the final regulations require** recipients to gather and evaluate **relevant evidence**,¹⁰¹⁸ with the understanding that this **includes both inculpatory and exculpatory evidence**, and the final regulations **deem questions and evidence about a complainant’s prior sexual behavior to be irrelevant with two exceptions**¹⁰¹⁹ and **preclude use of any information protected by a legally recognized privilege (e.g., attorney-client)**.¹⁰²⁰

Grievance process: Evidence: Parties have the right to argue if evidence is relevant during review and response to evidence

Page 1018

The Department therefore believes it is important that **at the phase of the investigation where the parties have the opportunity to review and respond to evidence, the universe of that exchanged evidence should include all evidence (inculpatory and exculpatory) that relates to the allegations under investigation, without the investigator having screened out evidence related to the allegations that the investigator does not believe is relevant. The parties should have the opportunity to argue that evidence directly related to the allegations is in fact relevant (and not otherwise barred from use under § 106.45), and parties will not have a robust opportunity to do this if evidence related to the allegations is withheld from the parties by the investigator**

Grievance Process: Investigative Report: Decision maker independently reaches determination without giving deference to investigative report

Page 1056

The Department emphasizes that the decision-maker must not only be a separate person from any investigator, but the decision-maker is under an obligation to objectively evaluate all relevant evidence both inculpatory and exculpatory, and must therefore independently reach a determination regarding responsibility without giving deference to the investigative report.

Grievance Process: Investigation: *Decision maker has the right to ask questions on their own initiative*

Page 1114

The Department believes that § 106.45(b)(6)(i) prescribes an approach that is both proactive and reactive, for the benefit of the recipient and both parties; **that is, the decision-maker has the right and responsibility to ask questions and elicit information from parties and witnesses on the decision-maker's own initiative to aid the decision-maker in obtaining relevant evidence both inculpatory and exculpatory, and the parties also have equal rights to present evidence in front of the decision-maker so the decision-maker has the benefit of perceiving each party's unique perspectives about the evidence.**

Training: Decision maker can't exclude relevant evidence

Page 1137

Thus, for example, where 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 of weight or credibility, so long as the decisionmaker's evaluation treats both parties equally¹³¹² by not, for instance, automatically assigning higher weight to exculpatory character evidence than to inculpatory character evidence.

~~***Rescinded by Department of Education August 24, 2021 because of Federal Court Decision Hearing: Party or witness statement on a video can't be used by the decision-maker if party or witness isn't available for cross examination***~~

~~Page 1169~~

~~As commenters acknowledged, not all Title IX sexual harassment allegations rely on party testimony; for example, in some situations video evidence of the underlying incident is available, and in such circumstances even if both parties fail to appear or submit to cross examination the decision-maker would disregard party statements yet proceed to evaluate remaining evidence, **including video evidence that does not constitute statements or to the extent that the video contains non-statement evidence. If a party or witness makes a statement in the video, then the decision-maker may not rely on the statement of that party or witness in reaching a determination regarding responsibility.**~~

Grievance Process: Investigative Report: Investigator only has to summarize relevant evidence

Page 1194

The final regulations permit exchange of all evidence "directly related to the allegations in a formal complaint" during the investigation, but require the investigator to only summarize "relevant" evidence in the investigative report (which would exclude sexual history information deemed by these final regulations to be "not relevant"), **and require the decision-maker to objectively evaluate only "relevant" evidence during the hearing and when reaching the determination regarding responsibility.**

Grievance Process: Evidence: Rape Shield does not apply to respondents. Respondents past sexual behavior must be evaluated for relevance similar to other evidence

Page 1196-1197

The Department reiterates that the rape shield language in this provision 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.

Hearing: If complainant doesn't appear, not required to drop the case

Page 1702-1703

Where sexual harassment is alleged in the education program or activity of a PSE institution, § 106.45(b)(6)(i) requires the recipient to adjudicate the allegations by holding a live hearing, with cross-examination conducted by party advisors (including a recipient-provided advisor if a party appears at the live hearing without an advisor of choice). That provision instructs the decisionmaker not to rely on statements of a party who chooses not to appear or be cross examined at the live hearing; however, the revised provision also directs the decision-maker not to draw any inference about the determination regarding responsibility based on the refusal of a party to appear or be cross-examined. **Thus, a recipient is not required to “drop the issue” or required to reach a non-responsibility finding whenever a complainant refuses to appear or be cross examined; rather, the decision-maker may proceed to objectively evaluate the evidence that remains (excluding the non-appearing party’s statements) and reach a determination regarding responsibility.**

106.44

(ii) Require an objective evaluation of all relevant evidence – including both inculpatory and exculpatory evidence – and provide that credibility determinations may not be based on a person’s status as a complainant, respondent, or witness;

(ii) Provide an equal opportunity for the parties to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence;

HOW NOT TO MAKE CREDIBILITY DETERMINATIONS BASED ON A PERSON'S STATUS AS A COMPLAINANT, RESPONDENT OR WITNESS BEFORE MAKING A DETERMINATION OF RESPONSIBILITY

The Title IX Decision-maker will not make credibility determinations based on person's status as a complainant, respondent, or witness before making a determination of responsibility.

The credibility of any party, as well as ultimate conclusions about responsibility for sexual harassment, must not be prejudged and must be based on objective evaluation of the relevant evidence in a particular case.

- Assess each person's credibility by examining if corroborative evidence is lacking where it should logically exist.
- Willingness to cooperate and behavior during the interview is NOT AN INDICATOR of credibility. A party or witness may be reluctant to testify because they are afraid of retaliation, shame, etc.,
- Character witnesses do not help establish credibility
Having other people who did not directly observe the event tell you, "Person A is a good person, person A would never lie, etc.," doesn't mean that Person A is credible *in this situation*

Grievance Process: Evidence: Credibility must be based on objective evaluation of relevant evidence

Page 810

Determinations of credibility, including of the respondent, must be based on objective evaluation of relevant evidence – not on inferences based on party status.

Training: Credibility must not be prejudged

Page 836

The credibility of any party, as well as ultimate conclusions about responsibility for sexual harassment, must not be prejudged and must be based on objective evaluation of the relevant evidence in a particular case; for this reason, the Department cautions against training materials that promote the application of “profiles” or “predictive behaviors” to particular cases.

Training: Don't train staff to believe one party / personnel must serve impartially

Page 836

Thus, the Department declines to require recipients to adopt the “Start by Believing” approach promoted by End Violence Against Women, **and cautions that a training approach that encourages Title IX personnel to “believe” one party or the other would fail to comply with the requirement that Title IX personnel be trained to serve impartially, and violate § 106.45(b)(1)(ii) precluding credibility determinations based on a party's status as a complainant or respondent.**

Training: personnel must refrain from drawing conclusions until conclusion of grievance process or making assumptions about either party's credibility or truthfulness until conclusion of grievance process

Page 873

A critical feature of a fair grievance process is that Title IX personnel refrain from drawing conclusions or making assumptions about either party's credibility or truthfulness until conclusion of the grievance process; therefore, the Department declines to impose a presumption that either party (or both parties) are credible or truthful.

Hearing: Judging credibility is done by jurors as functions of common sense rather than legal expertise

Page 1083

the Department notes that judging credibility is traditionally left in the hands of non-lawyers without specialized training, in the form of jurors who serve as fact-finders in civil and criminal jury trials, because assessing credibility based on factors such as witness demeanor, plausibility, and consistency are functions of common sense rather than legal expertise.

Hearing: Advisor for complainant can be appointed to conduct cross examination on behalf of absent complainant if respondent is at hearing

Page 1172

Further, as noted above, if a complainant still does not wish to appear or be cross-examined, an appointed advisor may conduct cross-examination of the respondent (if the respondent does appear) so that a decision-maker only considers the respondent's statements if the statements have been tested for credibility.

Rescinded by Department of Education August 24, 2021 because of Federal Court Decision

~~Hearing: Can't rely on statements that HAVE NOT been subjected to cross examination~~

~~Page 1175~~

~~Even though a party's statements that are not subject to cross examination might be admissible in a civil or criminal trial under rules of evidence that apply in those contexts, the Department has determined that such untested statements, whether testimonial or non-testimonial, should not be relied on in a Title IX grievance process. Reliance on party and witness statements that have not been tested for credibility via cross-examination undermines party and public confidence in the fairness and accuracy of the determinations reached by postsecondary institutions.~~

~~Hearings: If witness does not appear at hearing, witness's statements can't be considered by the decision-maker~~

~~Page 1176~~

~~The Department understands that complainants (and respondents) often will not have control over whether witnesses appear and are cross-examined, because neither the recipient nor the parties have subpoena power to compel appearance of witnesses. Some absences of witnesses can be avoided by a recipient thoughtfully working with witnesses regarding scheduling of a hearing, and taking advantage of the discretion to permit witnesses to testify remotely. Where a witness cannot or will not appear and be cross-examined, that person's~~

~~statements will not be relied on by the decision-maker, but the Department believes that any determination reached under this provision will be more reliable than a determination reached based on statements that have not been tested for credibility.~~

~~Hearings: Must exclude written statements not subjected to cross examination, even if witness had died or has a disability~~

~~Page 1177~~

~~For reasons discussed above, written statements cannot be relied upon unless the witness submits to cross-examination, and whether a witness's statement is reliable must be determined in light of the credibility-testing function of cross-examination, even where nonappearance is due to death or post-investigation disability. The Department notes that recipients have discretion to apply limited extensions of time frames during the grievance process for good cause, which may include, for example, a temporary postponement of a hearing to accommodate a disability.~~

~~Hearing: Decision-maker must consider only statements that are subjected to cross examination~~

~~Page 1179~~

~~the procedures in § 106.45 are deliberately selected to ensure that all evidence directly related to the allegations is reviewed and inspected by the parties, **that the investigative report summarizes only relevant evidence, and that the determination regarding responsibility relies on relevant evidence.** Because party and witness statements so often raise credibility questions in the context of sexual harassment allegations, **the decision-maker must consider only those statements that have benefited from the truth-seeking function of cross examination. The recipient, and the parties, have equal opportunity (and, for the recipient, the obligation) to gather and present relevant evidence including fact and expert witnesses, and face the same limitations inherent in a lack of subpoena power to compel witness testimony.**~~

Hearings: cross-examination – value of cross examination

Page 1208

The Department reiterates that while assessing demeanor is one part of judging credibility, other factors are consistency, plausibility, and reliability. Real-time cross-examination presents an opportunity for parties and decision-makers to test and evaluate credibility based on all these factors.