

## **Title IX Final Rules Compliance Training**

### **Relevance Draft Training**

On May 19, 2020, the U.S. Department of Education issued Final Rules governing the Title IX grievance process, effective August 14, 2020. Any cross-examination question posed by the advisors must be evaluated for “relevance” in real time by the decision maker. “Only relevant cross-examination and other questions may be asked of a party or witness. Before a complainant, respondent, or witness answers a cross-examination or other question, the decision-maker(s) must first determine whether the question is relevant and explain any decision to exclude a question as not relevant.” §106.45(b)(6)(i)

#### **What is a relevant question?**

The Department of Education encourages institutions to apply the “plain and ordinary meaning” of relevance in their determinations. 85 Fed. Reg. 30026, 30304 (May 19, 2020). A relevant question seeks to elicit information that will aid the decision-maker in making the underlying determination of whether an event/conduct did or did not occur. The fact to which the evidence is directed need not be in dispute, often background although it does not involve a disputed matter is often offered as an aid to understanding an event or circumstance. A practice of limiting evidence to only things that provide or disprove only controversial or disputed points would invite the exclusion of this helpful evidence. See the commentary to Federal Rules of Evidence 401 Test for Relevant Evidence at [https://www.law.cornell.edu/rules/fre/rule\\_401](https://www.law.cornell.edu/rules/fre/rule_401)<sup>1</sup>

#### **What if the question concerns sensitive issue?**

Much of the content within these hearings may be considered sensitive by parties or advisors. Relevant questions need to be considered *even if* a party or advisor believes the danger of unfair prejudice substantially outweighs their probative value. 85 Fed. Reg. 30026, 30294 (May 19, 2020). Only irrelevant questions, including about the complainant’s prior sexual history, may be excluded.

#### **Common questions that may be irrelevant**

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<sup>1</sup> The Final Rules state “the Federal Rules of Evidence constitute a complex, comprehensive set of evidentiary rules and exceptions designed to be applied by judges and lawyers, while Title IX grievance processes are not court trials and are expected to be overseen by layperson officials of a school, college, or university rather than by a judge or lawyer. Similarly, a recipient may not adopt rules excluding certain types of relevant evidence (e.g., lie detector test results, or rape kits) where the type of evidence is not either deemed “not relevant” (as is, for instance, evidence concerning a complainant’s prior sexual history<sup>1153</sup>) or otherwise barred from use under § 106.45 (as is, for instance, information protected by a legally recognized privilege<sup>1154</sup>). However, the § 106.45 grievance process does not prescribe rules governing how admissible, relevant evidence must be evaluated for weight or credibility by a recipient’s decision-maker, and recipients thus have discretion to adopt and apply rules in that regard, so long as such rules do not conflict with § 106.45 and apply equally to both parties.” 85 Fed. Reg. 30294. Training on relevance is therefore critical and reflection upon, not adoption of, the Federal Rules of Evidence may be at least in part instructive.

### *Question about Complainant's Prior Sexual Behavior or Sexual Predisposition*

Questions and evidence about the “complainant’s sexual predisposition or prior sexual behavior”<sup>2</sup> are not relevant, unless:

1. such questions and evidence about the complainant’s prior sexual behavior<sup>3</sup> are offered to prove that someone other than the respondent committed the conduct alleged by the complainant<sup>4</sup>, or
2. 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. 34 C.F.R. § 106.45(6)(i).

### *Question regarding Privileged Information*

Questions that constitute, or seek disclosure of, information protected under a legally-recognized privilege are irrelevant. 34 C.F.R. § 106.45(1)(x). Individuals with legal privilege may include medical providers (physician, dentist, podiatrist, chiropractor, nurse), psychologists, clergy<sup>5</sup>, rape crisis counselors<sup>6</sup>, and social workers.<sup>7</sup>

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<sup>2</sup> Section 106.45(b)(6)

<sup>3</sup> The language from the regulations appears to be in part borrowed from Federal Rule of Evidence 412, the commentary to which is instructive in helping to define the term “sexual behavior”. Although the Rules of Evidence do not apply in these hearings, The commentary states “[p]ast sexual behavior connotes all activities that involve actual physical conduct, i.e. sexual intercourse and sexual contact, or that imply sexual intercourse or sexual contact. *See, e.g., United States v. Galloway*, [937 F.2d 542](#) (10th Cir. 1991), *cert. denied*, 113 S.Ct. 418 (1992) (use of contraceptives inadmissible since use implies sexual activity); *United States v. One Feather*, [702 F.2d 736](#) (8th Cir. 1983) (birth of an illegitimate child inadmissible); *State v. Carmichael*, 727 P.2d 918, 925 (Kan. 1986) (evidence of venereal disease inadmissible). In addition, the word “behavior” should be construed to include activities of the mind, such as fantasies or dreams. *See* 23 C. Wright & K. Graham, Jr., *Federal Practice and Procedure*, §5384 at p. 548 (1980) (“While there may be some doubt under statutes that require ‘conduct,’ it would seem that the language of Rule 412 is broad enough to encompass the behavior of the mind.”). In addition the commentary states “evidence such as that relating to the alleged victim's mode of dress, speech, or life-style will not be admissible.” Under this rules outlined in the Title IX regulations this would not be relevant.

<sup>4</sup> This was also addressed in the commentary to Rule 412 “evidence of specific instances of sexual behavior with persons other than the person whose sexual misconduct is alleged may be admissible if it is offered to prove that *another person was the source of semen, injury or other physical evidence*. Where the prosecution has directly or indirectly asserted that the physical evidence originated with the accused, the defendant must be afforded an opportunity to prove that another person was responsible. *See United States v. Begay*, [937 F.2d 515](#), 523 n. 10 (10th Cir. 1991).”

<sup>5</sup> See <https://law.justia.com/codes/oklahoma/2014/title-12/section-12-2505/#:~:text=A%20person%20has%20a%20privilege,acting%20in%20his%20professional%20capacity.>

<sup>6</sup> For information regarding this privilege in Oklahoma see <https://apps.rainn.org/policy/policy-state-laws-export.cfm?state=Oklahoma&group=6>

<sup>7</sup> For general information about privileges in Oklahoma see <https://www.victimrights.org/sites/default/files/Oklahoma.pdf>

### *Questions about Undisclosed Medical Records*

Questions that call for information about any party's medical, psychological, and similar records are irrelevant unless the party has given voluntary, written consent. 85 Fed. Reg. 30026, 30294 (May 19, 2020).

### *Duplicative Questions*

Questions that repeat, questions already asked by the decision-maker prior to cross-examination, or by a party's advisor during cross-examination (and if part of your process, during direct examination), may be ruled duplicative, and therefore irrelevant. *See* 85 Fed. Reg. 30026, 30331 (May 19, 2020) ("nothing in the final regulations precludes a recipient from adopting and enforcing (so long as it is applied clearly, consistently, and equally to the parties) a rule that deems duplicative questions to be irrelevant").

### **How should the decision-maker reach a relevance determination?**

If the decision-maker is a single individual, the decision-maker will be solely responsible for determining the relevance of the question before it is asked. If the decision-maker is a panel, the panel's Chair will make all determinations of relevance. The determination should be made after a question is asked by an advisor and before the question is answered. This will slow the pace of questions, and should be addressed in the hearing script.

- How will this work in practice – tell your decision makers how it should work –
  - Will questions be allowed and a decision maker will say stop only when they deem the questions irrelevant and then make the relevance determination on the record
  - Will the decision maker consider each question and then tell the answering party to proceed if the question is relevant and guide them to not answer if the question is not.

### **How lengthy should your determination be?**

The Department of Education explains that the Final Rule “does not require a decision-maker to give a lengthy or complicated explanation...[I]t is sufficient, for example, for a decisionmaker 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.” *Id.* at 30343.

**Options for explaining on the record whether a question is relevant or not.**

Topic	Relevant	Not-Relevant
General Questions	The question is <u>relevant</u> because it asks whether a fact material to the allegations is more or less likely to be true.	The question is <u>irrelevant</u> because it asks about a detail that does not touch on whether a material fact concerning the allegations is more or less likely to be true. See, 85 Fed. Reg. 30026, 30343 (May 19, 2020).
Complainant's Prior Sexual Behavior or Sexual Predisposition	<p>The question is asked to prove that someone other than the respondent committed the conduct alleged by the complainant.</p> <p align="center">OR</p> <p>The question concerns specific incidents of the complainant's prior sexual behavior with respect to the respondent and is asked to prove consent</p>	The question is <u>irrelevant</u> because it calls for prior sexual behavior information about the complainant without meeting one of the two exceptions to the rape shield protections defined in 34 C.F.R. § 106.45(b)(6)(i).
Question regarding Privileged Information	The question is <u>relevant</u> because, although it calls for information shielded by a legally-recognized privilege [ <u>identify the privilege</u> ], that privilege has been waived in writing, and the question tends to prove that a material fact at issue is more or less likely to be true.	The question is <u>irrelevant</u> because it calls for information shielded by a legally-recognized privilege [ <u>identify the privilege</u> ].
Questions about Undisclosed Medical Records	This question is <u>relevant</u> because although it calls for a party's medical, psychological, or similar records, that party has given their voluntary, written consent to including this material, and it tends to prove that a material fact at issue is more or less likely to be true. 85 Fed. Reg. 30026, 30294	The question is <u>irrelevant</u> because it calls for information regarding a party's medical, psychological, or similar record without that party's voluntary, written consent. 85 Fed. Reg. 30026, 30294.
Duplicative Questions		The question is <u>irrelevant</u> because it is duplicative of a question that was asked and answered previously.
Request to reconsider	<u>Deny</u> or <u>grant</u> the request to reconsider. This determination is final, but may be subject to appeal under the Title IX Grievance Appeals Process as outlined in the policy.	