SUNY Geneseo Guide for Determining Relevance for Title IX Grievance Process Hearings

What is the purpose of this Guide?

On May 19, 2020, the U.S. Department of Education issued Final Rules governing the Title IX grievance process, effective August 14, 2020. The Final Rule requires that all colleges and universities hold a live hearing before making any determination regarding responsibility for covered reports of Title IX sexual harassment, including sexual violence. This hearing must provide for live cross-examination by the parties' advisors.

Any question posed by the advisors must be evaluated for "relevance" in real time by the hearing officer. According to Final Rule §106.45(b)(6)(i):

> 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.

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). Basically, a relevant question will ask whether the facts material to the allegations under investigation are more or less likely to be true. Id. at 30294. A question not directly related to the allegations will generally be irrelevant.

Officials should use common sense in this understanding. Things may be interesting or surprising but not be relevant.

Relevance decisions should be made on a question-by-question basis, looking narrowly at whether the question seeks information that will aid the decision-maker in making the underlying determination. The relevance decision should not be based on who asked the question, their possible (or clearly stated) motives, who the question is directed to, or the tone or style used to ask about the fact. Relevance decisions should not be based in whole or in part upon the sex or gender of the party for whom it is asked or to whom it is asked, nor based upon their status as complainant or respondent, past status as complainant or respondent, any organizations of which they are a member, or any other protected class covered by federal or state law (e.g. race, sexual orientation, disability).

If a question is relevant but offered in an abusive or argumentative manner, the Chair has the discretion to ask the advisor to rephrase the question in an appropriate manner, consistent with the institution's decorum policy for hearings.

What if the question is "prejudicial" and concerns sensitive or embarrassing issues?

Much of the content within these hearings may be considered sensitive and/or embarrassing by parties or advisors. However, relevant questions need to be considered *even if* a party or advisor believes the danger of unfair prejudice substantially outweighs their probative value.[1] Only irrelevant questions (detailed below), including about the complainant's prior sexual history, may be excluded.

What is an irrelevant question?

Question about Complainant's Prior Sexual Behavior or Sexual Predisposition

Questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, 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 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). Depending on your state, individuals with legal privilege may include medical providers (physician, dentist, podiatrist, chiropractor, nurse), psychologists, clergy, rape crisis counselors, and social workers. (for instance, New York's "laws of privilege" are listed within CPLR Article 45; Each state has its own rules around privilege).

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).

[1] 85 Fed. Reg. 30026, 30294 (May 19, 2020).

Duplicative Questions

Questions that repeat, in sum or substance, questions already asked by a party's advisor during cross-examination, may be ruled duplicative, and therefore irrelevant.[2]

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.

What should the relevance determination consist of?

The Department of Education explains that the Final Rule "does not require a decision-maker to give a lengthy or complicated explanation" in support of a relevance determination. Rather, "it 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.

As such, the Chair need only provide a brief explanation of the determination, which will ordinarily consist of one of the following statements depending on the situation.

Generally probative questions

- The question is relevant because it asks whether a fact material to the allegations is more or less likely to be true.

- The question is irrelevant 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).

Question about Complainant's Prior Sexual Behavior or Sexual Predisposition

[2] *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").

- The question is relevant because although it calls for prior sexual behavior information about the complainant, it meets *one of the two exceptions* to the rape shield protections defined in 34 C.F.R. § 106.45(b)(6)(i), and it tends to prove that a material fact at issue is more or less likely to be true [denote which exception].
    - Exception one: The question is asked to prove that someone other than the respondent committed the conduct alleged by the complainant.
    - Exception two: The question concerns specific incidents of the complainant's prior sexual behavior with respect to the respondent and is asked to prove consent

- The question is irrelevant 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 irrelevant because it calls for information shielded by a legally-recognized privilege [identify the privilege].

- The question is relevant because, although it calls for information shielded by a legally-recognized privilege [identify the privilege], 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.

Questions about Undisclosed Medical Records

- The question is irrelevant 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.

- This question is relevant 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 (May 19, 2020).

Duplicative Questions

- The question is irrelevant because it is duplicative of a question that was asked and answered.

The Chair may relay a longer explanation if necessary under the circumstances.

The relevance determination will be conveyed orally, except as needed to accommodate a disclosed disability of a hearing participant, and all relevance determinations will be preserved in the record of the proceeding.

May the parties and/or their advisors ask the decision-maker to reconsider their relevance decision?

An advisor may request that the decision-maker reconsider their relevance determination by providing a brief rationale behind the request.

The decision-maker may deny or grant the request to reconsider. This determination is final, but may be subject to appeal under the Title IX Grievance Process.