




# TITLE IX FOR HEARING BOARD PANELISTS

RETURNING TO THE 2020 RULE (DAY 2)

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**ALEXANDER WHEELER, M.S.ED.**  
Assistant Director  
SUNY Student Conduct Institute



**RYAN RIBEIRO, M.A.**  
Assistant Director  
SUNY Student Conduct Institute

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## DISCLAIMER

This presentation shall not constitute legal advice, nor create an attorney-client relationship. This presentation is for informational purposes only.

If you have any specific legal questions or require legal advice for specific situations, please contact or refer to your institutional, general, or outside counsel.



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The documents included in the training materials for & referenced in this training are purely fictional.

The case is not based on any real case that the SCI staff is aware of. The characters named are fictional & are not intended to represent any real person.

The details of this case & these documents should not be used to make decisions in similar cases, nor should they be considered precedent or advice from SUNY or the Student Conduct Institute.

# TRAINING MATERIALS



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# RETURN TO 2020

**DURING THE LIVE@DISTANCE, MEANINGFUL CHANGES FOR INSTITUTIONS RETURNING TO THE 2020 RULE WILL BE REFERENCED WITH THE FOLLOWING SYMBOL:**



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# STEP-BY-STEP PROGRESSION OF THE GRIEVANCE PROCESS

- 1. Incident Reported
- 2. Title IX Grievance Process Initiated
- 3. Investigation & Pre-Hearing Prep
- 4. Hearing
- 5. Appeal Process
- 6. Decision Implementation

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# LEARNING OBJECTIVES

- Identify [Key Players](#) in this process on their campus
- Identify components of different [Procedures Meetings with Parties](#)
- Recall who can file [Formal Complaints](#)
- Compare [Evidence Types](#)
- Make [Relevancy Determinations](#)
- Prepare campus/team for [Hearing](#)
- Facilitate a [Hearing Board Training](#) for Title IX cases, including [Appeals](#)
- Understand and implement [Decisionmaking](#) processes & record keeping

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# RESOURCES TO SUPPORT YOUR PROCESS




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Model Policies  
Draft Notices  
Checklists  
Scripts  
& More



**SUNY SCI** THE SCI TOOLKIT

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CLERY ACT	VAWA	NYS-129B "ENOUGH IS ENOUGH"
<ul style="list-style-type: none"> <li>Annual training on issues relating to sexual violence, domestic violence, sexual assault &amp; stalking</li> <li>How to investigate &amp; hearing process that protects the safety of victims &amp; promotes accountability</li> <li>Consent</li> <li>Sexual assault definitions</li> </ul>	<ul style="list-style-type: none"> <li>Continuous &amp; ongoing training for board members that does not promote bias for victims or offenders.</li> <li>Confidentiality issues</li> <li>Working with law enforcement</li> <li>Viewing information without bias</li> <li>Consent</li> <li>Investigations</li> <li>How to conduct a hearing</li> <li>Definitions of sexual assault</li> </ul>	<ul style="list-style-type: none"> <li>Conflicts of interest &amp; bias</li> <li>Conducting a hearing</li> <li>Investigations</li> <li>Cultural awareness</li> <li>Consent</li> <li>Sexual assault definitions</li> <li>Trauma-informed practices</li> </ul> 

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# ALL ABOUT HEARING BOARDS




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## WHO CAN SERVE ON HEARING BOARDS?

- Trained administrators or faculty
  - 2020 Title IX Final Rule (this training meets that qualification)
- Employed by, or contracted on behalf of, a college or university
- In good standing with the institution
- Free from conflicts of interest or bias
- Trained on how to serve impartially, issues of relevance, & technology used in hearing

✗

- Title IX coordinators
- Investigators



Section 06.45(b)(6)(i)

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**VALUABLE CHARACTERISTICS OF A HEARING PANELIST**

- Critical thinking skills
- Understands the scope of Title IX
- Comfortable discussing sensitive or upsetting content & topics
- Unbiased, free of conflicts of interest




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**KEY ROLES OF THE HEARING BOARD/PANEL**

- Hearing Chair
- Note-taker
- Rationale Writer
- Administrative Support Staff
- Decision-makers


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**WHO IS HERE?**

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## INVESTIGATORS

Investigators do just that: they investigate the allegations in the Formal Complaint and provide an investigative report for a hearing panel.

These individuals, like others involved in this process, must be free of conflicts of interest or bias.

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The Title IX Coordinator is responsible for everything from the administration of the grievance process, intake, and overall maintenance of the Title IX policy at an institution.

## TITLE IX COORDINATOR

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Advisors serve two essential functions in the Title IX grievance space:

1. Support their student through this process, and
2. Ask questions through cross-examination

**ADVISORS**

Harriet Dejesus  
Cody Norman's Advisor

Harvey O'Sullivan  
Liana Jenkin's Advisor

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These individuals ensures the hearing runs smoothly, and that all procedures and processes are being followed.

They are likely a case manager or another kind of student conduct officer at your institution.

**ADMINISTRATIVE HEARING OFFICER**

Joyce Conceição

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The Panel Chair Serves As The Head of The Hearing Panel For Title IX cases.

They Also Serve As The Individual who makes Relevancy determinations After each Question asked by a Party's Advisor.

**CHAIR**

Benji Houser  
Hearing Panel Chair

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# KEY CONCEPTS & DEFINITIONS



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## TITLE IX: FORMAL COMPLAINT

Institutions must investigate all "formal complaints" filed with the Title IX Coordinator

### WHO CAN FILE A FORMAL COMPLAINT?

- A person who is currently participating in the education programs or activities of the institution
- A person who is **ATTEMPTING** to participate in those programs or activities
- The Title IX Coordinator



**MULTIPLE COMPLAINTS ARISING FROM THE SAME INCIDENT CAN BE CONSOLIDATED**



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## CONFIDENTIALITY

Worth revisiting from yesterday's chat:

- FERPA protects "education records"
- Directly related to a student
- Maintained by an educational agency or institution, or by a party acting for the agency or institution

The hearing testimony, investigation reports, intake, evidence, etc. - **this is all material that should be considered confidential.**

Section 106.6(g)

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## HOW TO SERVE IMPARTIALLY

- If you may have a bias or a conflict, admit it straight away
- **Remember you are hearing a case made up of individuals**
- Challenge your own perceptions by examining evidence
- **Be open & transparent, leave no stone unturned**
- Ensure everyone has opportunity to be heard, take your time
- **Base decisions on evidence, facts, & established criteria**




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## STANDARD OF EVIDENCE

Which standard of evidence does your institution use?:

### 1. PREPONDERANCE OF THE EVIDENCE

- More likely than not to be true
- 50%, plus a feather

### 2. CLEAR & CONVINCING EVIDENCE

- Highly probable to be true



CRUCIAL: you will use this language and standard to determine the responsibility of your respondents. You may be telling students, for example, that they are **“more likely than not”** responsible for sexual assault.

Section 106.45(b)(1)(vii)

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Section 006.45(b)(6)(i)

Questions posed by advisors **MUST BE EVALUATED FOR RELEVANCE** in real time by a decisionmaker.

Relevant questions ask whether facts material to allegations under investigation are **MORE OR LESS LIKELY TO BE TRUE.**



## RELEVANCE

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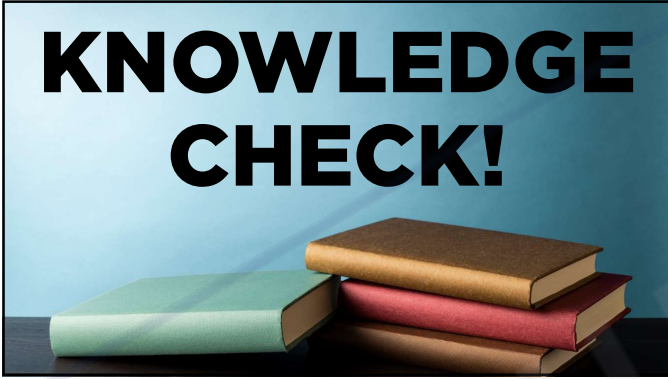
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Definition of Consent requires an affirmative indication of willingness to engage in sexual activity as been adopted in criminal law by few countries.

In the US, the Federal Bureau of Investigation changed the Uniform Crime Report's definition of sexual assault in 2013 to include "without the consent of the victim" rather than requiring force.

**CONTEXT FROM CRIMINAL LAW**

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# NYS DEFINITION

“Affirmative consent is knowing, voluntary, and mutual decision among all participants to engage in sexual activity. Consent can be given by words or actions, as those words or actions create a clear permission regarding willingness to engage in the sexual activity.”



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# NY-129 B REQUIREMENT



**F.R.I.E.S.** 🧑‍🎓

**FREELY GIVEN  
REVERSIBLE  
INFORMED  
ENTHUSIASTIC  
SPECIFIC**



### NYS SCHOOLS MUST REFLECT CERTAIN PRINCIPLES IN GUIDANCE:

- Consent to any act or prior act between any party does not imply or constitute consent to any other act
- Required regardless the person initiating is under the influence of drugs/alcohol
- Consent may be withdrawn as well as given
- Incapacitated individuals cannot give consent
- Consent cannot be coerced
- When consent is withdrawn or cannot be given, sexual activity must stop

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# COMMON QUESTIONS



- Does only verbal consent qualify as affirmative consent?
- Can you consent to sexual activity if you are under the influence of alcohol and/or drugs?
- How does the age of a party relate to the definition of affirmative consent?
- Are there limitations to what consent can cover?



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## STUDENT-CENTERED PROCESS

Individuals on hearing boards should be mindful that the participants may come from different backgrounds & cultures than their own

- Race
- Ethnicity
- Gender
- Religion
- Ability/disability
- Language (limited English proficiency)
- Immigration status
- Socioeconomic status
- Sexual orientation, Gender identity or expression
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### BIAS & KNOWLEDGE

- **ENHANCE CULTURAL COMPETENCY:** Recognize importance of integrating cultural awareness & sensitivity into student-centered approach to conduct addressing implicit biases & ensure equitable treatment.
- **ADAPT TO DIVERSE COMMUNICATION STYLES:** Analyze how direct & indirect communication, influenced by cultural backgrounds, affect perceptions of credibility & engagement in adjudication process.
- **ADDRESS CULTURAL PERCEPTIONS OF AUTHORITY:** Differentiate how different cultural attitudes toward authority & societal norms, influence student behavior in conduct cases.
- **IMPLEMENT EQUITABLE PRACTICES:** Apply strategies to adjust communication styles, recognize cultural norms, & provide contextual support to foster fairness & inclusivity in conduct process.

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### HOW CULTURE CAN IMPACT TITLE IX ADJUDICATION

- **ADJUST COMMUNICATION STYLES:** Frame questions to encourage open dialogue, ensuring students feel comfortable sharing their perspectives without cultural constraints.
- **AVOID OVERINTERPRETING BEHAVIOR:** Limited eye contact or formality, for example, may be culturally influenced.
- void letting cultural differences influence decision-making processes.




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### REFLECTION

Some questions that you can use to guide your reflection:

- What are my own areas of bias? (ex. Socioeconomic status, race, religion, etc.)
- What are some resources on or off campus that I could utilize to increase my cultural competencies?
- If I meet with someone from another culture who is involved in a Title IX process, what resources can I use to ensure a culturally inclusive experience?




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# PRE-HEARING PREP



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- Accessibility needs
- Reliable internet access
- Access to appropriate equipment (*don't make assumptions*)
- Technology settings
  - All parties must be able to see and hear each other (cameras must be on)
  - Req\* - Hearing panelists must be comfortable with tech
- Recording ability (*double check storage & voice pick-up*)
- Double check provided links
- Back up plan & back up tech person
- Access to documents



**TECHNOLOGY**



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- Physical Space for Party & Advisor
- Hearing Board member location
- Your location
- Witness & Investigator invites
- All Party & Advisor confirmations
  - *back up advisors?*
- Confidentiality & Privacy of communications
  - *tip @ in the room*

**PHYSICAL SPACE & FACILITIES**



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## TRAUMA-INFORMED PRACTICES

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- onsider@mpact@f@trauma:
  - Fragmented@emory&@on-linear@rder@f@vents
  - Specific@etails@bout@sensory@vents
- pproach@oesn't@ubstitute@or@missing@fo,@ustify@ot@oing@C full@nvestigation,@r@cause@biased@belief@n@party's@ccuracy
- No@ight@or@wrong@way@o@espond



- Training&@procedure@review
- hec@body@nguage&@emeanor
- Questioning&@word@usageC
  - "Help@ne@nderstand"C,@nd@what@re@you@ble@o@tell@neC about@what@you@xperienced?"
  - Describing@nother@n@ividual's@xperience
  - Framing@our@questions,@voiding@hy@uestions



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## HOW DO YOU PREP?

1. Read@hrough&@digest@our@hearing@aterials
  - Familiarize@ourself@with@lleged@iolation(s)
  - Review@nvestigative@report&@vidence,@ppendices
2. Examine@he@n@examined
  - Develop@uestions@hat@robe@hese@reas
  - Ensure@uestions@re@relevant@we'll@cover@elevance@ater)
3. hec@our@aterials
  - Tech,@hysical@pace,@rinted@aterial,@visual@ids



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- Gives@est@eneral@verview@f@he@ncident
- s@nvarnished@as@ossible,@ree@f@conflicts@f@interest@or@bias
- Investigators@re@identified@with@redentials&@raining
- Reviews@rohibited@conduct@lleged,@itnesses,@verview@f@vidence
  - In-depth@ummary@f@witness@estimony
  - Evidence@st,@ppendices
- Parties **required**@o@be@given@o@days@o@espond@o@vidence@n@report,@C report@nust@be@created@t@east@o@days@rior@o@hearing
  - ll@parties@will@ave@seen@relevant@vidence@rior@o@report's@completion
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## REVIEW INVESTIGATIVE REPORT



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Testimony

Text Messages

Social Media Posts

Medical Records

Public Safety & Police Records

Videos & Surveillance Footage

Pictures

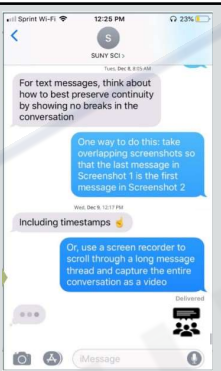
ID Card Data & Network Usage Location Data

Email

Voice Notes

**POSSIBLE EVIDENCE**

SUNY SUNY SCI KEEP IN MIND: Institutions should collect BOTH excusatory & inculpatory evidence.



The screenshot shows a text message from 'SUNY SCI' with the following text: 'For text messages, think about how to best preserve continuity by showing no breaks in the conversation'. A blue bubble contains the instruction: 'One way to do this: take overlapping screenshots so that the last message in Screenshot 1 is the first message in Screenshot 2'. Another blue bubble says: 'Or, use a screen recorder to scroll through a long message thread and capture the entire conversation as a video'. The screenshot also shows a timestamp 'Wed Dec 10 12:17 PM' and a 'Delivered' status.

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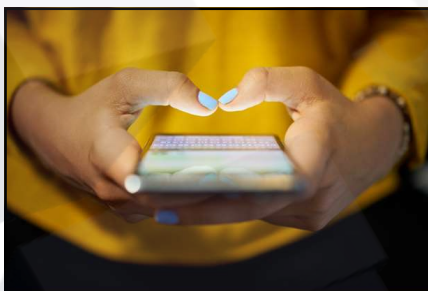
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**STUDENT CONDUCT INSTITUTE**

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**THE HEARING,  
AN OVERVIEW**

SUNY SUNY SCI

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**WHEN INFORMAL RESOLUTIONS ARE ALLOWED UNDER THE FINL RULE:**

- After a formal complaint
- When all parties & TIX Coordinator's consent
- Any party can withdraw at any time

**NOT ALLOWED IN CASES INVOLVING EMPLOYEE RESPONDENTS**

**TIX CAN RUN THE PROCESS, BUT IT IS NOT RECOMMENDED**

**EXAMPLES:**

- Administrative Resolution
- Restorative Justice
- Mediation



**INFORMAL RESOLUTIONS**




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**STICKING TO THE SCRIPT**




1. Introductions
2. Purpose of Hearing, Review of Allegations
3. Privacy & Decorum Expectations
4. Due Process Rights
5. Notice of Allegations & Claims
6. Opening Statements
7. Presentation of Investigative Information
8. Cross Examination & Relevancy Determinations
9. Witnesses & Cross Examination
10. Closing Statements
11. End of Hearing

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**HEARING: INTRODUCTIONS**

- Opportunity to review roles & participants in hearing
- Begins the recording & officially kicking off the hearing
- Reviewing basic expectations
  - Cell phone & device decorum
  - Notification of transcript
  - Rights to access
  - Ownership of recording
- Introduction of participants



Joyce Conceição  
Administrative Hearing Officer




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## PURPOSE OF HEARING

- Review Objectives of the hearing
  - Not to find anyone responsible or not responsible
  - To have an equitable, fair process (not a perfect one)
- Obligation of truthfulness & transparency
- Reminder of educational philosophy of grievance process
- **Not a criminal proceeding**
- Discuss flow of meeting




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## PRIVACY

- Notice of privacy & confidentiality
- Reminder that sharing materials to non-participating individuals may be retaliatory & violation of conduct code
- Review of decorum (will review later)
- Review of cross-examination (will review later)
- Discuss role & obligations of advisors
- How to request breaks or troubleshooting needs
- Review of accommodations




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**Questions should be asked in a neutral tone.**

- No accusatory questions
- No "duty of zealous advocacy" inferred or enforced, even for attorney-advisors
- No abusive behavior: yelling, screaming, badgering, leaning in, or approaching witnesses/parties without permission
- No use of profanity or personal attacks
- Repetitive questions are not allowed




## DECORUM

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## DUE PROCESS RIGHTS

DO PARTIES UNDERSTAND THEIR DUE PROCESS RIGHTS SC WELL AS THEIR RIGHTS UNDER TITLE X?

- Opportunity for Parties to Object to Panelists Participation
  - If Yes, Decision makers meet off record to discuss objection
    - If the objection is sustained, substitute an alternate decision maker & repeat
    - May delay hearing
  - If not, you can continue
- Opportunity for Process Questions
- Move towards **formally** beginning the hearing, turn over C facilitation responsibilities to **Hearing Chair**




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## NOTICE OF ALLEGATIONS & CLAIMS

- Hearing Chair reviews allegations
- Opportunity for Respondent to enter claims of **"in violation/responsible"** or **"not in violation/not responsible"**
  - Respondent can also enter **"decline to respond on record"**
- Repeat for each claim
- If responsible to the claim, hearing C would still be required to determine possible sanctioning



Benji Houser  
Hearing Panel Chair




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MUST INCLUDE:	NY129B REQ
Date/Time of Formal Complaint & Who Filed the Complaint	✓
References to Policies & Procedures	✓
Conduct Alleged (Including Possible Sanctions if Found Responsible)	✓
Date/Location of the Alleged Conduct	✓
Upcoming Meeting Date/Time/Location	✓
Notice of Advisor Choice	✓
Presumed NOT RESPONSIBLE until Determination is Made	✓
Copy Sent to Complainant	✓

## ANATOMY OF NOA




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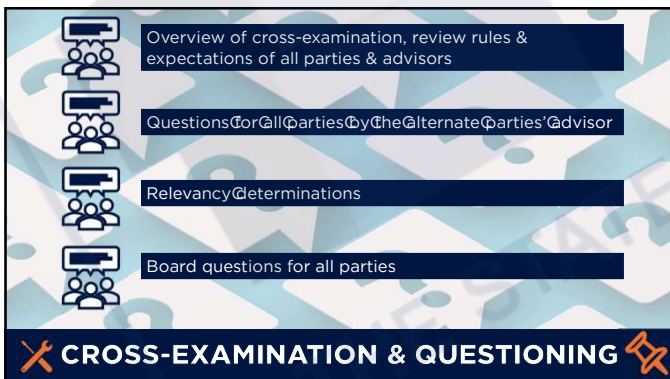
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Questions posed by advisors must be evaluated for relevance in real time by a decisionmaker.

Relevant questions ask whether facts material to allegations under investigation are more or less likely to be true.

Relevance decisions are made on a question-by-question basis.

Relevance decisions **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.

*What about sensitive topics or issues?*



## RELEVANT QUESTIONS

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### 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



## GUIDE FOR DETERMINING RELEVANCE

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### QUESTION ABOUT COMPLAINANT'S PRIOR SEXUAL BEHAVIOR, OR SEXUAL PREDISPOSITION

The question is relevant because although it calls for prior sexual behavior information about the complainant, it meets one of the two expectations to the **Gape 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:

**EXCEPTION 1:** The question is asked to prove that someone other than the respondent committed the conduct alleged by the complainant.

**EXCEPTION 2:** 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.



## GUIDE FOR DETERMINING RELEVANCE

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**GENERAL PROBATIVE QUESTIONS**


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

Determining whether a question is relevant because it asks about 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).



**GUIDE FOR DETERMINING RELEVANCE**




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**HOW DO YOU MAKE RELEVANCE DETERMINATIONS?**

If a decisionmaker is a single individual, they make the decision prior to the question being asked.

If a decisionmaker is a panel, the panel chair will make that determination prior to the question being asked.

**WHAT DOES THE RELEVANCE DETERMINATION CONSIST OF?**

The Final Rule does not require a decisionmaker to give a lengthy or complicated explanation. It is sufficient to explain why a question is relevant.





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**LET'S PRACTICE - RELEVANCE**





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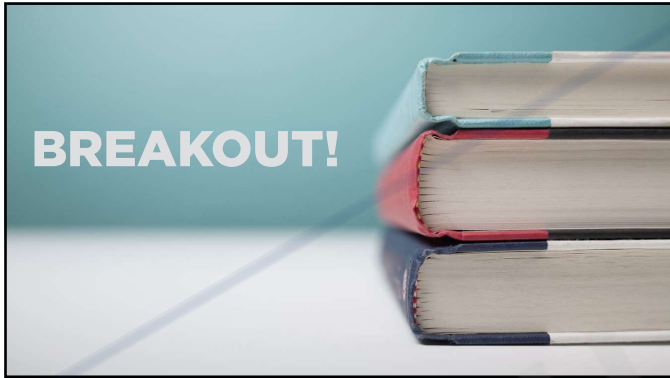
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## WITNESSES

- Same process of cross-examination
- Reminiscent of the introduction stage
  - Introduce witness
  - Notice that the hearing is recorded
  - Expectation of truthfulness
  - Reminder of educational philosophy of institution
  - Not a criminal proceeding
- Review process of cross-examination
- Move to questions, then dismiss witnesses from hearing after testimony
- Repeat for every witness



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## CLOSING STATEMENTS

-  Closing statements
-  Impact statement submissions
-  Next steps
-  Decision making process begins!



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**QUESTIONS?**

**SUNY.EDU**  
[system.suny.edu/sci/news](http://system.suny.edu/sci/news)

**SYSTEM.SUNY.EDU/SCI/TIX2020**  
[system.suny.edu/sci/titleix](http://system.suny.edu/sci/titleix)

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**COMING UP ...**

<b>2/18</b>	Entry Center's Train-the-Trainer
<b>2/19</b>	Stalking: The Use of Technology to Stalk
<b>2/20</b>	Stop Campus Hazing: What Are Your Compliance Responsibilities?
<b>2/25</b>	Stop Campus Hazing: Counting Hazing Incidents for Reporting
<b>2/27</b>	Annual Security Reports: Guide for Creating the "Campus Safety Handbook"
<b>3/4 &amp; 6</b>	Organizational Conduct
<b>3/11 &amp; 12</b>	The Neurobiology of Sexual Assault
<b>3/18</b>	Risk Assessment in Stalking Cases & Safety Planning with Victims
<b>3/19</b>	ResLife's Service Conflict Resolution Outside of the Conduct Model

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