



**Joint Guidance on Federal Title IX Regulations:
Analysis of Section 106.45: Live Hearings, Cross-Examination, and Access to Advisors**
May 22, 2020

Note: This document focuses on a summary analysis of Section 106.45(b)(6)(i) of the 2020 Final Title IX Regulations,¹ specifically the requirements related to live hearings for postsecondary institutions. For a full overview of the changes from the Proposed Regulations, see *Title IX Text for Text Proposed to Final Comparison* and *Title IX Summary Proposed to Final Comparison*, available at system.suny.edu/sci/tix2020

§106.45(b)(6)(i): Live Hearings, Cross-Examination, and Advisors of Choice at Postsecondary Institutions

Final Rule §106.45(b)(6)(i) requires that postsecondary institution’s grievance processes provide for a live hearing. At the hearing

... the decision-maker(s) must permit each party’s advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility. Such cross-examination at the live hearing must be conducted directly, orally, and in real time by the party’s advisor of choice and never by a party personally, notwithstanding the discretion of the recipient under paragraph (b)(5)(iv) of this section to otherwise restrict the extent to which advisors may participate in the proceedings. At the request of either party, the recipient must provide for the live hearing to occur with the parties located in separate rooms with technology enabling the decision-maker(s) and parties to simultaneously see and hear the party or the witness answering questions. 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, thus implying that a school may require that questions be submitted in advance. If a party does not have an advisor present at the live hearing, the recipient must provide without fee or charge to that party, an advisor of the recipient’s choice, who may be, but is not required to be, an attorney, to conduct cross-examination on behalf of that party. 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. If a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in

¹ The effective date for these regulations will be August 14, 2020 and will apply prospectively. The Department has stated it will provide technical assistance during the transition period and after the effective date.

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. Live hearings pursuant to this paragraph may be conducted with all parties physically present in the same geographic location or, at the recipient'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. Recipients must create an audio or audiovisual recording, or transcript, of any live hearing and make it available to the parties for inspection and review.

This section of the Final Rule is significantly expanded from its Notice of Proposed Rulemaking ("NPRM") originations. Most notably, the section clarifies that (1) an advisor "of the recipient's choice" must be provided "without fee or charge" to any party without an advisor in order to conduct cross-examination; (2) a decision maker may not draw any inference from a party's refusal to participate in cross-examination; (3) live hearings may be conducted with all parties present in the same location or virtually, as long as participants can simultaneously see and hear each other; and (4) a recording or transcript must be created and made available for the parties to review and inspect. In addition, the Final Rule omits the requirement from the NPRM that the advisor be "aligned with" the party.

Impact of §106.45(b)(6) on Campus Resources

For many institutions, this section poses a significant change to current practices and procedures. What's more, for those institutions, this section may pose significant increased costs and resource investments including, among others, (a) investment in appropriate and accessible technology for virtual hearings and for the recording of hearings; (b) increased storage costs for those transcripts or recordings; (c) the provision of an advisor; (d) either engaging external resources to serve as investigators or decision makers or providing significant training for current staff; and (e) general training on relevance standards, technology, and rape shield considerations.

The Final Rule does not appear to require, nor do the Regulations suggest on their face, that in the event that one party has hired an attorney to act as their advisor, an institution must provide an attorney for the other party if they have not already chosen an advisor or hired an attorney themselves (institutions are urged to determine whether their State laws would require that such cross examination be classified as the practice of law and require that it be performed only by attorneys licensed to practice in that State). Similarly, the Final Rule does not require the engagement of external third-party resources to perform the investigative or decision-maker functions required in this process.

However, especially regarding the decision-maker function, which requires the ability to make decisions as to relevance during a hearing, institutions may want to consider either hiring an attorney or student conduct professional with experience in student conduct and Title IX investigative matters or having an attorney or consultant available to answer procedural questions off-line as they arise during a hearing, especially for the first full grievance processes that take place in academic year 2020-2021, given the short turn around for implementation and training.

The Department of Education's Analysis

In explaining the decision to require a live hearing and cross-examination at the postsecondary level, the Department engages in an extensive, nearly 200 page discussion in the Final Regulations on the importance of cross-examination and the implementation of Final Rule §106.45(b)(6)(i).²

We will not attempt to undertake the task of fully summarizing this extensive, and frequently redundant, regulatory explanation, but instead provide an outline of what a proceeding conducted in accordance with the Final Regulations may look like. To that end, we have summarized key positions taken by the Department, which may be helpful in understanding the way institutions should conduct and consider these hearings:

Live Hearing Participants

Decision-maker. The live hearing must be overseen by a decision-maker who:

1. Is not the Title IX coordinator or the investigator;
2. is free from conflict of interest or bias, including bias for or against complainants or respondents; and,
3. who has been trained on topics including how to serve impartially, issues of relevance, including how to apply the rape shield protections provided for complainants, and any technology to be used at the hearing.

Advisor of Choice. The advisor may be any person of the party's choosing, If the party does not choose an advisor, however, the institution may select an individual to serve in this role for the limited purpose of conducting the cross-examination. On their face, the Final Regulations impose no prohibition of conflict of interest or bias for such advisors, nor any training requirement for such advisors, in order to "leave institutions as much flexibility as possible to comply with the requirement to provide those advisors." 85 Fed. Reg. 30254 n. 1041, 30298-30299. The Department explains that it believes that advisors in such a role do not need to be unbiased or lack conflicts of interest precisely because the role of such advisor is to conduct cross-examination on behalf of one party, and institutions can determine to what extent an institution wishes to provide training for advisors whom an institution may need to provide to a party to conduct cross-examination. *Id.* The Department also does not preclude a party from selecting an

² Relevant sections include: General Thoughts on Cross-Examination (30,313-30,314); the Re-Traumatizing Effects of Cross-Examination on Complainants (30,315-30,317); The Truth-Seeking Function Of Cross-Examination (30,319-30,320); Cross-Examination And Credibility (30,321-30,322); Trauma Related Challenges to Cross-Examination (30,323-30,324); Reliance On Rape-Myths (30,324-30,326); Due Process Considerations (30,327-30,331); Difficulty in Participating in a Formal Grievance Process and Possible Non-Participation (30,331-30,332); Financial Inequities (30,332-30,333); Burden of the Process Remains on the Institution (30,333-30,334); Written Questions Instead of Live Hearings (30,334-30,336); False Accusations (30,336); Excluding Questions (30,336-30,337); Self-Representation (30,339-30,342); Explaining the Decision to Exclude Questions (30,343-30,344); No Reliance on Statements of a Party who does not Submit to Cross-Examination (30,345-30,349); Rape Shield Protections (30,351-30,354); Separate Rooms for Cross-Examination Facilitated by Technology (30,355-30,356); Live Hearings (30,359-30,362).

advisor who may be a witness. *Id.* at 30299.³ The Department also suggests, but does not state, that the advisor may be simply a facilitator who asks the questions, and is not an appointed advocate for either party.

Regarding whether the advisor must or should be an attorney, the Department reiterates that the Final Regulations were written to provide institutions with flexibility and discretion to determine whether they wish to provide legal representation to parties in a grievance process, but the final regulations do not restrict the right of each party to select an advisor with whom the party feels most comfortable and believes will best assist the party, and thus clarifies that the party's advisor of choice may be, but is not required to be, an attorney. *Id.* at 30298-30299. The Department also emphasizes that the provision that the advisor of choice may be, but is not required to be, an attorney, is intended to clarify that a party's right to an advisor of choice differs from the right to legal representation in a criminal proceeding, and the constitutional protections attendant thereto. *Id.* at 30297.

The Final Regulations also note that institutions retain discretion to restrict participation by advisors in order to serve the needs and interests of the institution and its community, while complying with the requirements for Grievance Processes set out in Section 106.45. *Id.* at 30298. The Final Regulation further makes clear that a party does not have a right to "self-representation;" rather any and all cross-examination must be conducted by an advisor. *Id.* at 30320.

Finally, in the event that neither a party nor their advisor appear at the hearing, the institution must provide an advisor to appear "on behalf of" the non-appearing party. *Id.* at 30339-40. Note that, inasmuch as the failure to appear may not be known in advance, this may, in practice, require that institutions have designated advisors for cross examination "on call" for each party, at all hearings.

Complainant and Respondent. While the Final Regulations provide that neither party may choose to "waive" the right to a live hearing (85 Fed. Reg. 30361), they also "protect every individual's right to choose whether to participate" in the hearing or answer cross-examination questions. *Id.* at 30322. ("The Department acknowledges that cross-examination may be emotionally difficult for parties and witnesses, especially when the facts at issue concern sensitive, distressing incidents involving sexual conduct. The Department recognizes that not every party or witness will wish to participate, and that institutions have no ability to compel a party or witness to participate.").

In the event that any party declines to participate, the decision-maker(s) must not rely on any statement⁴ of that party or witness in reaching a determination regarding responsibility;

³ Note that this may be a significant change to what many institutions currently allow.

⁴ The Department defined "statement" as follows:

The prohibition on reliance on "statements" applies not only to statements made during the hearing, but also to any statement of the party or witness who does not submit to cross-examination. "Statements" has its ordinary meaning, but would not include evidence (such as videos) that do not constitute a person's intent to make factual assertions, or to the extent that such evidence does not contain a person's statements. Thus, police reports, SANE reports, medical reports, and other documents and records may not be relied on [in making a final determination after the completion of the hearing] to the extent that they contain the

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. *See* 34 C.F.R. §106.45(b)(6)(i).

The Department explains that this provision applies to situations where, for example, a respondent is concurrently facing criminal charges and chooses not to appear or answer questions to avoid self-incrimination that could be used against the respondent in the criminal proceeding. 85 Fed. Reg. 30099, 30344; *see also* 30267 (this modification addresses commenters' concerns that a respondent should not be found responsible solely because the respondent refused to provide self-incriminating statements).

Nonetheless, the Department notes that "even if no party appears for the live hearing such that no party's statements can be relied on by the decision-maker, it is still possible to reach a determination regarding responsibility where non-statement evidence has been gathered and presented to the decision-maker." *Id.* at 30361. As an example, the Department notes that "where a complainant refuses to answer cross-examination questions but video evidence exists showing the underlying incident, a decision-maker may still consider the available evidence and make a determination." *Id.* at 30328.

Where a party refuses to participate, the institution may still proceed with the grievance process (though the institution must still send to a party who has chosen not to participate notices required under § 106.45; for instance, a written notice of the date, time, and location of a live hearing). *Id.* at 30270.

The Final Rule is also clear that where a party does not wish to participate in a grievance process, including being cross-examined at a live hearing, the institution is not permitted to threaten, coerce, intimidate, or discriminate against the party in an attempt to secure the party's participation. *See* Section 106.71; *see also* 85 Fed. Reg. 30216 (noting that institutions may not retaliate against complainant for declining to participate in the grievance process, including the live hearing).

In the event that a party chooses not to attend, the Department clarifies that a party's advisor may nonetheless appear and conduct cross-examination. *Id.* at 30340.

Witnesses. Like parties, witnesses are not required to participate in the live hearing process, but without their live testimony the decision-maker cannot rely on their statements. *See* 34 C.F.R. §106.45(b)(6)(i). Further, the Department is clear that "[n]o person should coerce or intimidate any witness into participating in a Title IX proceeding, and § 106.71(a) protects every individual's right not to participate free from retaliation." 85 Fed. Reg. 30360.

statements of a party or witness who has not submitted to cross-examination. While documentary evidence such as police reports or hospital records may have been gathered during investigation and, if directly related to the allegations inspected and reviewed by the parties, and to the extent they are relevant, summarized in the investigative report, the hearing is the parties' first opportunity to argue to the decision-maker about the credibility and implications of such evidence. Probing the credibility and reliability of statements asserted by witnesses contained in such evidence requires the parties to have the opportunity to cross-examine the witnesses making the statements.

85 Fed. Reg. at 30349.

The Final Regulations indicate that a party’s statements to another witness may not be relied upon when the party chooses not to attend the live hearing or refuses to submit to cross-examination. The Department explains that even if a witness appears and recounts the statements of the party, “it would be unfair and potentially lead to an erroneous outcome to rely on statements untested via cross-examination.” *Id.* at 30347.

Live Hearing Process

In-Person or Virtually. Live hearings may be conducted with all parties physically present in the same geographic location or, at the school’s discretion, any or all parties, witnesses, and other participants may appear at the live hearing virtually, with technology enabling participants to see and hear each other. *See* 34 C.F.R. §106.45(b)(6)(i). Further, at any party’s request, cross-examination may occur with the parties in separate rooms using technology that enables participants to see and hear the person answering questions. *See Generally* 85 Fed. Reg. 30355-30358. The Department states that it has determined that this approach allows the full value of cross-examination to be achieved while shielding the complainant from being in the physical presence of the respondent. *Id.* at 30355.⁵

The Department declines to grant witnesses (as opposed to the parties) the right to demand to testify in a separate room, but allows an institution the discretion to permit any participant to appear remotely. *Id.* at 30356. In justifying this distinction, the Department explains that unlike complainants, witnesses usually do not experience the same risk of trauma through cross-examination. *Id.* Witnesses also are not required to testify and may simply choose not to testify because the determination of responsibility usually does not directly impact, implicate, or affect them. *Id.* With respect to a witness who claims to also have been sexually assaulted by the respondent, the institution has discretion to permit the witness to testify remotely, or to hold the entire live hearing virtually. *Id.*

Technology and Privacy. The Department does not discuss any specific technology that should be used in these proceedings, but notes that low-cost technology is available for both virtual participation and live streaming. *Id.* At 30356.. The Department notes, however, that institutions are obligated under § 106.71 to “keep confidential the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness” in a Title IX grievance process except as permitted by FERPA, required by law, or as necessary to conduct the hearing or proceeding. As a result, the Department cautions institutions to ensure that technology used to comply with this provision does not result in “live streaming” a party in a manner that exposes the testimony to persons outside those participating in the hearing. *Id.*

⁵ The Department explains: “To protect traumatized complainants from facing the respondent in person, cross-examination in live hearings held by postsecondary institutions must never involve parties personally questioning each other, and at a party’s request, the live hearing must occur with the parties in separate rooms with technology enabling participants to see and hear each other.” *See* 85 Fed. Reg. at 30069.

Similarly, the Department is clear that for these same reasons, the hearing is not a “public hearing.” *Id.* at 30362.

Record of Hearing. An audio or audiovisual recording, or transcript, of the hearing must be created, which must then be made available for the parties’ review. *See* 34 C.F.R.

§106.45(b)(6)(i). The Department explains that such a recording or transcript will help any party who wishes to file an appeal pursuant to § 106.45(b)(8) and also will reinforce the requirement that a decision-maker not have a bias for or against complainants or respondents generally, or for or against an individual complainant or respondent. 85 Fed. Reg. 30362.

Role of Advisors. The Department broadly explains that “cross-examination is especially critical to resolve factual disputes between the parties and give each side the opportunity to test the credibility of adverse witnesses, serving the goal of reaching legitimate and fair results.” *Id.* at 30311.

As such, Final Rule §106.45(b)(6)(i) allows advisors to “ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility” and must be conducted “directly, orally, and in real time” by the advisor and *never* by the parties.

The Department does not necessarily equate the advisor to a “zealous advocate” for the party. The Department notes that the duty to cross-examine “need not mean more than relaying that party’s questions to the other parties and witnesses... [t]hat function could therefore equate to serving as a party’s proxy, or advocating for a party, or neutrally relaying the party’s desired questions.” *Id.* at 30299,30340. It is not clear how this will translate to actual application in the process.

The Department specifically states that because the Final Rule includes the phrase “directly, orally, and in real time” to describe how cross-examination must be conducted, they decline to impose a requirement that questions be submitted for screening prior to the hearing (or during the hearing), in order to preserve the benefits of live, back-and-forth questioning and follow-up questioning unique to cross-examination. *Id.* at 30343. Nevertheless, as a practical matter, the requirement that questions be tested for relevance in advance of their asking may suggest the need for some form of prior submission for preliminary (and not necessarily follow-up) questions. The Department does not indicate to what extent the parties and institution could stipulate to the relevance of questions before or during the hearing.

Role of the Decision-maker. After a question is asked of a complainant, respondent, or witness, the decision-maker must determine, before any answer is provided, whether the question is relevant. *See* 34 C.F.R. §106.45(b)(6)(i). The decision-maker must explain to the party’s advisor asking cross-examination questions any decision to exclude a question as not relevant. *Id.*

Determining Relevance. The basic test for relevance is whether the question posed is probative of the question of responsibility. In determining whether a question is relevant, the Department explains that the decision-maker must focus on evidence pertinent to proving whether facts material to the allegations under investigation are more or less likely to be true. 85 Fed. Reg. 30294.

More specifically, questions and evidence about the complainant's sexual predisposition or prior sexual behavior are "irrelevant," 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) 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(b)(6)(i).

The Final Rule §106.45 deems other forms of evidence and information not relevant or otherwise not subject to use in a grievance process: information protected by a legally recognized privilege; evidence about a *complainant's* prior sexual history, and any party's medical, psychological, and similar records unless the party has given voluntary, written consent. 85 Fed. Reg. 30294. Furthermore, questions that are duplicative or repetitive may fairly be deemed not relevant and thus excluded. *Id.* at 30361.

Explaining Relevance Decisions. The Department explains that this provision "does not require a decision-maker to give a lengthy or complicated explanation" in support of a relevance determination. Rather, the Department states that "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." *Id.* at 30343. The Department explains that this requirement reinforces the decision-maker's responsibility to accurately determine relevance, including the irrelevance of information barred under the rape shield language, but also reinforces the requirement that the decision-maker not have a bias for or against complaints or respondents generally or an individual complainant or respondent specifically. *Id.*

Exceptions to Relevance.

Rape Shield. Section 106.45(b)(6)(i) 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. The Department explains that "the rape shield protections serve a critically important purpose in a Title IX sexual harassment grievance process: protecting complainants from being asked about or having evidence considered regarding sexual behavior, with two limited exceptions. The final regulations clarify that such questions, and evidence, are not only excluded at a hearing, but are deemed irrelevant." *Id.* at 30351. The Department notes that the scope of the questions or evidence permitted and excluded under the rape shield language in Final Rule §106.45(b)(6)(i) will depend in part on the institution's definition of consent, but adds that the decision-maker's training will include an understanding of this definition, and thus the decision-maker will understand how to apply the rape shield language in accordance with that definition. *Id.* at 30125, 30353.

Regarding the two exceptions to the Rape Shield provision, the Department explains as follows:

Neither of the two exceptions to the rape shield protections promote the notion that women, or complainants generally, are unreliable and that they may be mistaken about who committed an assault, or allow slut-shaming as a defense to sexual assault accusations. Rather, the first exception applies to the narrow circumstance where a respondent contends that someone other than the respondent committed the misconduct, 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. As noted above, the scope of when sexual behavior between the complainant and respondent might be relevant to the presence of consent regarding the particular allegations at issue depends in part on a recipient's definition of consent. Not all definitions of consent, for example, require a verbal expression of consent; some definitions of consent inquire whether based on the circumstances the respondent reasonably understood that consent was present (or absent), thus potentially making relevant evidence of past sexual interactions between the complainant and the respondent.

See 85 Fed. Reg. 30353.

The Department declines to extend the rape shield language to respondents, explaining that it "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." *Id.* at 30352. The Department notes that a "pattern of inappropriate behavior by an alleged harasser must be judged for relevance as any other evidence must be." *Id.* at 30353.

Attorney-Client Privilege

The Department explains that in response to concerns that relevant questions might implicate information protected by attorney-client privilege, the final regulations add Final Rule §106.45(b)(1)(x) to bar the grievance process from requiring, allowing, relying on, or otherwise using questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege. *Id.* at 30362, 30435. This bar on information protected under a legally recognized privilege applies at all stages of the §106.45 grievance process, including but not limited to the investigator's gathering of evidence, inspection and review of evidence, investigative report, and the hearing. This protection of privileged information also applies to a privilege held by an institution. *See Id.*

Psychological or Medical Records

The Department specifically prohibits the inclusion as relevant of any party's medical, psychological, and similar records unless the party has given voluntary, written consent. *Id.* at 30294.

Cross-Examination Process.

Effect of Failing to Submit to Cross-Examination

The hallmark of the required live hearing is an opportunity for each party’s advisor to conduct live cross-examination of the other party (or parties) and witnesses. As described above, the refusal by a party or a witness to show up to a live hearing and “submit” to cross-examination can have significant effects on the investigation process (and outcome), including by limiting the statements of the non-appearing party on which the decision-maker may rely in making a determination (this includes statements made to other witnesses). *See* 34 C.F.R. §106.45(b)(6)(i).

Effect of Failing to Respond to Question by Party’s Advisor

The Department states that to “submit to cross-examination” means answering those “cross-examination questions that are relevant,” as determined by the decision-maker “in real time during the hearing.” [85 Fed. Reg. 30349](#). If a party or witness is present at the live hearing, but disagrees with a relevance determination, they may have the choice of either (1) abiding by the decision-maker’s determination and answering or (2) refusing to answer the question. *Id.* However, unless the decision-maker reconsiders the relevance determination, the decision-maker cannot rely on any statement on which a party or witness has declined to answer cross-examination questions. *Id.* The Department explained that otherwise a party or witness may appear at the live hearing but “waive” questions under cross-examination, which would “circumvent the benefits and purposes of cross-examination as a truth-seeking tool for post-secondary institutions’ Title IX adjudications.” *Id.*

However, even if a witness or party refuses to submit themselves to cross-examination, or refuses to answer a question by a party advisor, as described above, the decision-maker may still rely on non-statement evidence. *Id.* at 30345. For example, the Department explains, where a complainant refuses to answer cross-examination questions, but video evidence exists showing the underlying incident, a decision-maker may still consider the available non-statement evidence and make a determination. *Id.* at 30328; *see also Id.* at 30346 (where 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). Further, the decision-maker must consider this evidence without drawing any inference about the determination based on lack of party or witness testimony. *Id.* at 30328.

Failure to Respond to Question by Decision-Maker

As discussed above, as a general matter a party or witness must “submit to cross-examination to avoid exclusion of their statements.” *Id.* at 30349. The Final Regulations note, however, that this exclusion does not apply to the refusal by a party or witness “to respond to a decision-maker’s questions.” *Id.* The Final Regulations explain this distinction as follows:

This is because cross-examination (which differs from questions posed by a neutral fact-finder) constitutes a unique opportunity for parties to present a decision-maker with the party’s own perspectives about evidence. This adversarial testing of credibility renders the person’s statements sufficiently reliable for consideration and fair for consideration by the decision-maker, in the context of a Title IX adjudication often overseen by

laypersons rather than judges and lacking comprehensive rules of evidence that otherwise might determine reliability without cross-examination.

85 Fed. Reg. 30349.

Further, the decision-maker is barred from drawing any inference about the determination of responsibility based solely on a party's refusal to answer questions posed by the decision-maker. *Id.* at 30349 n. 1341.

Other Rules. The Department notes that Institutions are free to “adopt rules to govern a Title IX grievance process in addition to those required under §106.45, so long as such rules apply equally to both parties.” *Id.* at 30360. Thus, the Department explains, institutions may decide:

- Whether or how to place limits on evidence introduced at a hearing that was not gathered and presented prior to the hearing;
- To adopt rules controlling the conduct of participants to ensure that questioning is done in a respectful manner;
- To adopt rules that instruct party advisors to conduct questioning in a respectful, non-abusive manner;
- To decide whether the parties may offer opening or closing statements;
- To specify a process for making objections to the relevance of questions and evidence;
- To place reasonable time limitations on a hearing;
- To adopt evidentiary rules (but any such rules must comport with all provisions in §106.45).
 - However, while the Department gives discretion to institutions to adopt rules related to how admissible, relevant evidence may be evaluated by the decision-maker, the Department specifically prohibits institutions from adopting a rule excluding relevant evidence whose probative value is substantially outweighed by the danger of unfair prejudice, or adopting rules excluding certain types of relevant evidence (e.g., lie detector test results, or rape kits) unless specifically excluded by Final Rule §106.45, as described above. *See Id.* at 30294.

85 Fed. Reg. 30360-30361, *see also, Id.* at 30319 (institutions may “adopt rules of decorum that prohibit any party advisor or decision-maker from questioning witnesses in an abusive, intimidating, or disrespectful manner.”)

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