



**Seton Hall University
Guide for Determining Relevance in Title IX Grievance Hearings
as of January 2022**

What is the purpose of this Guide?

Title IX of the Educational Amendments of 1972 (“Title IX”) prohibits any person in the United States from being discriminated against on the basis of sex in seeking access to any educational program or activity receiving federal financial assistance. On May 19, 2020, the U.S. Department of Education issued Final Rules governing the Title IX grievance process, requiring that all colleges and universities hold a live hearing (the “Hearing”) before making any determination regarding responsibility for violations of Title IX. This Hearing must provide the opportunity for live cross-examination by the parties’ advisors.

Any question posed by such advisors during the Hearing must be evaluated for “relevance” in real time by the hearing officer (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 U.S. Department of Education encourages the application of the “plain and ordinary meaning” of relevance. 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.

Relevance determinations should be made by the Hearing Officer on a question-by-question basis, looking narrowly at whether the question seeks information that will aid the Hearing Officer in making the underlying determination. The determination as to whether a question is relevant should not take into consideration the individual or role of the individual who asked the question at issue, the possible (or clearly stated) motive for the question, the identity of the individual to whom the question is directed, or the tone. Relevance determinations also should not be based in whole or in part upon any protected characteristics possessed by any of the participants at the Hearing.

If a question is relevant but presented in a manner which violates the University's Rules of Decorum for Title IX Grievance Hearings, the Hearing Officer has the discretion to ask the advisor to rephrase the question in a manner consistent with the University's Rules of Decorum.

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

Much of the content within the Hearing may be considered sensitive and/or embarrassing by parties or advisors. However, relevant questions must 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 (defined below), including those about a complainant's prior sexual history, may be excluded.

An individual must submit to all relevant questions asked. Thus, if a witness does not answer one question, the Hearing Officer may not rely on **any** statement made by that individual. This is true even if that same question has been asked previously by a Hearing Officer.

What is an irrelevant question?

1. Questions about Complainant's Prior Sexual Behavior or Sexual Predisposition

Questions and evidence about a complainant's sexual predisposition or prior sexual behavior are not relevant, unless:

- * Offered to prove that someone other than the respondent committed the conduct alleged to have occurred; or
- * They concern specific incidents of a complainant's prior sexual behavior with respect to the respondent and are offered to prove consent. 34 C.F.R. § 106.45(6)(i).

2. Questions regarding Privileged Information

Questions that constitute, or seek disclosure of, information protected under a legally-recognized privilege (including, but not limited to, physician-patient, priest-penitent, attorney-client, psychologist, social worker, marital, and victim counselor) are irrelevant. 34 C.F.R. § 106.45(1)(x).

3. Questions about Undisclosed Medical Information

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

4. *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. *See* 85 Fed. Reg. 30026, 30331 (May 19, 2020)

How should the Hearing Officer reach a relevance determination?

The Hearing Officer is solely responsible for determining the relevance of the question before it is answered.

What should the relevance determination consist of?

The Hearing Officer is not required to give a lengthy or complicated explanation in support of a relevance determination. Rather, it is sufficient, for example, for a Hearing Officer 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 Hearing Officer need only provide a brief explanation of the reason for the determination.

The Hearing Officer may relay a longer explanation if necessary, depending upon 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 Hearing Officer to reconsider a relevance determination?

The parties may follow the Appeals procedures and timeline outlined in the University's Title IX Grievance Procedure.

Effective Date: February 10, 2022