Evidence and Credibility

Peter Lake
Professor of Law, Charles A. Dana Chair,
Director of the Center for Excellence in Higher Education Law & Policy
Stetson University College of Law

Senior Higher Education Consulting Attorney
Steptoe & Johnson, PLLC

1

Some Sample Language from GVSU's *Procedures for Responding to Reports of Harassment, Discrimination, Retaliation, & Sexual Misconduct (including Sexual Assault, Intimate Partner Violence, Stalking, & Sexual Exploitation)*

PROCESS A

2

GVSU Language on "Evidence"

*All investigations are thorough, reliable, impartial, prompt, and fair. Investigations involve interviews with all relevant parties and witnesses; obtaining available, **relevant evidence**; and identifying sources of expert information, as necessary.*

*During the investigation, the parties will have an equal opportunity to be heard, to **submit information and corroborating evidence, to identify witnesses who may have relevant information, and to submit questions that they believe should be directed by the investigator to each other or to any witness**. The investigator will notify and seek to meet separately with the complainant, the respondent, and third-party witnesses, and will **gather other relevant and available evidence and information**, including without limitation, **electronic or other records of communications between the parties or witness (via voice-mail, text message, email and social media sites), photographs (including those stored in computers, phones, tablets, etc.), and medical records (subject to the consent of the applicable party)**.*

*All parties have a full and fair opportunity, through the investigation process, to suggest witnesses and questions, to provide **evidence and expert witnesses, and to fully review and respond to all evidence on the record**.*

3

GVSU Language on "Evidence"

*The investigator(s) will write a **comprehensive investigation report fully summarizing the investigation, all witness interviews, and addressing all relevant evidence. Appendices including relevant physical or documentary evidence will be included**.*

*Prior to the conclusion of the investigation, parties will be provided with a secured electronic or hard copy of the draft investigation report as well **as an opportunity to inspect and review all of the evidence obtained as part of the investigation that is directly related to the reported misconduct, including evidence upon which GVSU does not intend to rely in reaching a determination, for a ten (10) business day review and comment period so that each party may meaningfully respond to the evidence**. The parties may elect to waive the full ten days.*

4

©Hierophant Enterprises, Inc, 2022. Copyrighted material. Express permission to post this material on the Grand Valley State University website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

GVSU Language on "Evidence"

*The Investigator will incorporate any relevant feedback, make any necessary revisions, and finalize the report, and the final report is then shared with all parties and their Advisors through secure electronic transmission or hard copy. **The parties are also provided with a file of any directly related evidence that was not included in the report**.*

5

GVSU Language on "Evidence"

Any **evidence that the Decision-makers determine is relevant and credible may be considered.** The hearing does not consider:

1) incidents not directly related to the possible violation, unless they evidence a pattern;
2) the character of the parties; or
3) questions and evidence about the Complainant's sexual predisposition or prior sexual behavior, 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.

6

GVSU Language on "Evidence"

The parties will be given a list of the names of the Decision-maker(s) at least five (5) business days in advance of the hearing. All objections to any Decision-maker must be raised in writing, detailing the rationale for the objection, and must be submitted to the Title IX Coordinator as soon as possible and no later than two (2) business days prior to the hearing. Decision-makers will only be removed if the Title IX Coordinator concludes that their bias or conflict of interest precludes an impartial hearing of the allegation(s).

Any witness scheduled to participate in the hearing must have been first interviewed by the Investigator(s). Any evidence offered at the hearing must have been submitted to investigator(s) during the investigation.

During the ten (10) business day period prior to the hearing, the parties have the opportunity for continued review and comment on the final investigation report and available evidence.

7

GVSU Language on "Evidence"

At each pre-hearing meeting with a party and their Advisor, the Chair will consider arguments that evidence identified in the final investigation report as relevant is, in fact, not relevant. Similarly, evidence identified as directly related but not relevant by the Investigator(s) may be argued to be relevant. The Chair may rule on these arguments pre-hearing and will exchange those rulings between the parties prior to the hearing to assist in preparation for the hearing.

8

GVSU Language on "Evidence"

Parties and witnesses will submit to indirect questioning by the Decision-makers and then by the parties through their Advisors. All questions are subject to a relevance determination by the Chair. Any party or witness may choose not to answer questions at the hearing, either because they do not attend the hearing, or because they attend but refuse to participate in some or all questioning. The Decisionmaker(s) can only rely on whatever relevant evidence is available through the investigation and hearing in making the ultimate determination of responsibility.

The Decision-makers may not draw any inference solely from a party's or witness's absence from the hearing or refusal to answer questions. If a party's Advisor of choice refuses to comply with GVSU's established rules of decorum for the hearing, GVSU may require the party to use a different Advisor.

If a GVSU-provided Advisor refuses to comply with the rules of decorum, GVSU may provide that party with a different Advisor to conduct cross-examination on behalf of that party.

9

GVSU Language on "Evidence"

The Decision-makers will deliberate in closed session to determine whether the Respondent is responsible or not responsible for the policy violation(s) in question. A simple majority vote is required to determine the finding. The preponderance of the evidence standard of proof is used. The hearing facilitator may be invited to attend the deliberation by the Chair, but is there only to facilitate procedurally, not to address the substance of the allegations.

10

GVSU Language on "Evidence" and "Credibility"

The Chair will then prepare a written deliberation statement and deliver it to the Title IX Coordinator, detailing the determination, rationale, the evidence used in support of its determination, the evidence not relied upon in its determination, credibility assessments, and any sanctions.

11

GVSU Language on "Evidence"

a) Grounds for Appeal

Appeals are limited to the following grounds:

i. Procedural irregularity that affected the outcome of the matter;

ii. New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; and

iii. The Title IX Coordinator, Investigator(s), or Decision-maker(s) had a conflict of interest or bias for or against Complainants or Respondents generally or the specific Complainant or Respondent that affected the outcome of the matter.

12

GVSU Language on "Evidence"

a) Grounds for Appeal

Appeals are limited to the following grounds:

i. Procedural irregularity that affected the outcome of the matter;

ii. New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; and

iii. The Title IX Coordinator, Investigator(s), or Decision-maker(s) had a conflict of interest or bias for or against Complainants or Respondents generally or the specific Complainant or Respondent that affected the outcome of the matter.

Appeals granted based on new evidence should normally be remanded to the original Investigator(s) and/or Decision-maker(s) for reconsideration.

13

GVSU Language on "Evidence"

a) Grounds for Appeal

Appeals are limited to the following grounds:

i. Procedural irregularity that affected the outcome of the matter;

ii. New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; and

iii. The Title IX Coordinator, Investigator(s), or Decision-maker(s) had a conflict of interest or bias for or against Complainants or Respondents generally or the specific Complainant or Respondent that affected the outcome of the matter.

Appeals granted based on new evidence should normally be remanded to the original Investigator(s) and/or Decision-maker(s) for reconsideration.

14

Let's examine some language regarding "evidence and credibility" from the 2020 regulations…

Department of Education, *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 85 Fed. Reg. 30026 (May 19, 2020) (final rule) (online at www.govinfo.gov/content/pkg/FR-2020-05-19/pdf/2020-10512.pdf).

15

§ 106.45 (1)(iii) Grievance process for formal complaints of sexual harassment.

*"A recipient must ensure that **decision-makers** receive training on . . . issues of relevance of questions and evidence, including when questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant . . ."*

*"A recipient also must ensure that **investigators** receive training on issues of relevance to create an investigative report that fairly summarizes relevant evidence . . ."*

(emphasis added)

16

©Hierophant Enterprises, Inc, 2022. Copyrighted material. Express permission to post this material on the Grand Valley State University website has been granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). This material is not intended to be used by other entities, including other entities of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

§ 106.45 (1)(ii) Grievance process for formal complaints of sexual harassment.

"(1)Basic requirements for grievance process. A recipient's grievance process must—

. . .

(ii) Require an objective evaluation of all relevant evidence – including both inculpatory and exculpatory evidence – and provide that credibility determinations may not be based on a person's status as a complainant, respondent, or witness . . ."

(emphasis added)

17

§ 106.45 (1)(iv) Grievance process for formal complaints of sexual harassment.

"(1)Basic requirements for grievance process. A recipient's grievance process must—

. . .

(iv) Include a presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process . . ."

(emphasis added)

18

§ 106.45 (1)(vii) Grievance process for formal complaints of sexual harassment.

"(1)Basic requirements for grievance process. A recipient's grievance process must—

. . .

(vii) State whether the standard of evidence to be used to determine responsibility is the preponderance of the evidence standard or the clear and convincing evidence standard, apply the same standard of evidence for formal complaints against students as for formal complaints against employees, including faculty, and apply the same standard of evidence to all formal complaints of sexual harassment . . ."

(emphasis added)

19

§ 106.45 (1)(x) Grievance process for formal complaints of sexual harassment.

"(1)Basic requirements for grievance process. A recipient's grievance process must—

. . .

(x) Not require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege."

(emphasis added)

20

§ 106.45 (5)(i) Grievance process for formal complaints of sexual harassment.

"(5) Investigation of a formal complaint. When investigating a formal complaint and throughout the grievance process, a recipient must—

(i) Ensure that the burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rest on the recipient and not on the parties provided that the recipient cannot access, consider, disclose, or otherwise use a party's records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional's or paraprofessional's capacity, or assisting in that capacity, and which are made and maintained in connection with the provision of treatment to the party, unless the recipient obtains that party's voluntary, written consent to do so for a grievance process under this section (if a party is not an "eligible student," as defined in 34 CFR 99.3, then the recipient must obtain the voluntary, written consent of a "parent," as defined in 34 CFR 99.3) . . ."

(emphasis added)

21

§ 106.45 (5)(ii) Grievance process for formal complaints of sexual harassment.

"(5) Investigation of a formal complaint. When investigating a formal complaint and throughout the grievance process, a recipient must—

. . .

(ii) Provide an equal opportunity for the parties to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence . . ."

(emphasis added)

22

. . . § 106.45 does not set parameters around the "quality" of evidence that can be ***relied*** *on, § 106.45 does prescribe that all relevant evidence, inculpatory and exculpatory, whether obtained by the recipient from a party or from another source,* ***must be objectively evaluated*** *by investigators and decision-makers free from conflicts of interest or bias and who have been trained in (among other matters) how to serve impartially.*

(emphasis added)

23

§ 106.45 (5)(vii) Grievance process for formal complaints of sexual harassment.

"(5) Investigation of a formal complaint. When investigating a formal complaint and throughout the grievance process, a recipient must—

. . .

(vii) Create an investigative report that fairly summarizes relevant evidence and, at least 10 days prior to a hearing (if a hearing is required under this section or otherwise provided) or other time of determination regarding responsibility, send to each party and the party's advisor, if any, the investigative report in an electronic format or a hard copy, for their review and written response. "

(emphasis added)

24

§ 106.45 (6)(i) Grievance process for formal complaints of sexual harassment.

"(6) Hearings.

(i) For postsecondary institutions, the recipient's grievance process must provide for a live hearing. At the live 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. . . . 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."

(emphasis added)

25

§ 106.45 (6)(i) Grievance process for formal complaints of sexual harassment. [Cont'd]

"(6) Hearings.

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. . . ."

(emphasis added)

26

§ 106.45 (6)(i) Grievance process for formal complaints of sexual harassment. [Cont'd]

"(6) Hearings.

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 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. . . ."

(emphasis added)

27

§ 106.45 (6)(ii) Grievance process for formal complaints of sexual harassment.

"(6) Hearings.

(ii). . . With or without a hearing, 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 decision-maker(s) must explain to the party proposing the questions any decision to exclude a question as not relevant."

(emphasis added)

28

Let's Look at Some of the Comments in the 2020 Regulations

29

The Department believes the protections of the rape shield language remain stronger if decision-makers are not given discretion to decide that sexual behavior is admissible where its probative value substantially outweighs the danger of harm to a victim and unfair prejudice to any party. If the Department permitted decision-makers to balance ambiguous factors like "unfair prejudice" to make admissibility decisions, the final regulations would convey an expectation that a non-lawyer decision-maker must possess the legal expertise of judges and lawyers. Instead, the Department expects decision-makers to apply a single admissibility rule (relevance), including this provision's specification that sexual behavior is irrelevant with two concrete exceptions. This approach leaves the decisionmaker discretion to assign weight and credibility to evidence, but not to deem evidence inadmissible or excluded, except on the ground of relevance (and in conformity with other requirements in § 106.45, including the provisions discussed above whereby the decisionmaker cannot rely on statements of a party or witness if the party or witness did not submit to cross-examination, a party's treatment records cannot be used without the party's voluntary consent, and information protected by a legally recognized privilege cannot be used). Id. at 30351-52.

30

[T]he Department declines to import a balancing test that would exclude sexual behavior questions and evidence (even meeting the two exceptions) unless probative value substantially outweighs potential harm or undue prejudice, because that open-ended, complicated standard of admissibility would render the adjudication more difficult for a layperson decision-maker competently to apply. Unlike the two exceptions in this provision, a balancing test of probative value, harm, and prejudice contains no concrete factors for a decision-maker to look to in making the relevance determination.

Id. at 30353.

31

The Department therefore believes it is important that at the phase of the investigation where the parties have the opportunity to review and respond to evidence, the universe of that exchanged evidence should include all evidence (inculpatory and exculpatory) that relates to the allegations under investigation, without the investigator having screened out evidence related to the allegations that the investigator does not believe is relevant. The parties should have the opportunity to argue that evidence directly related to the allegations is in fact relevant (and not otherwise barred from use under § 106.45), and parties will not have a robust opportunity to do this if evidence related to the allegations is withheld from the parties by the investigator.

Id. at 30304.

32

Unlike court trials where often the trier of fact consists of a jury of laypersons untrained in evidentiary matters, the final regulations require decision-makers to be trained in how to conduct a grievance process and how to serve impartially, and specifically including training in how to determine what questions and evidence are relevant. The fact that decision-makers in a Title IX grievance process must be trained to perform that role means that the same well-trained decision-maker will determine the weight or credibility to be given to each piece of evidence, and the training required under § 106.45(b)(1)(iii) allows recipients flexibility to include substantive training about how to assign weight or credibility to certain types or categories of evidence, so long as any such training promotes impartiality and treats complainants and respondents equally. Thus, for example, ***where a cross-examination question or piece of evidence is relevant, but concerns a party's character or prior bad acts, under the final regulations the decision-maker cannot exclude or refuse to consider the relevant evidence, but may proceed to objectively evaluate that relevant evidence by analyzing whether that evidence warrants a high or low level of weight or credibility, so long as the decisionmaker's evaluation treats both parties equally by not, for instance, automatically assigning higher weight to exculpatory character evidence than to inculpatory character evidence.***

Id. at 30337 (emphasis added).

33

[A] recipient must objectively evaluate all relevant evidence (inculpatory and exculpatory) but retains discretion, to which the Department will defer, with respect to how persuasive a decision-maker finds particular evidence to be.

Id. at 30337.

34

While the proposed rules do not speak to admissibility of hearsay, prior bad acts, character evidence, polygraph (lie detector) results, standards for authentication of evidence, or similar issues concerning evidence, the final regulations require recipients to gather and evaluate relevant evidence, with the understanding that this includes both inculpatory and exculpatory evidence, and the final regulations deem questions and evidence about a complainant's prior sexual behavior to be irrelevant with two exceptions and preclude use of any information protected by a legally recognized privilege (e.g., attorney-client).

Id. at 30247-48 (internal citations omitted).

35

While not addressed to hearsay evidence as such, § 106.45(b)(6)(i), which requires postsecondary institutions to hold live hearings to adjudicate formal complaints of sexual harassment, states that the decision-maker must not rely on the statement of a party or witness who does not submit to cross-examination, resulting in exclusion of statements that remain untested by cross-examination.

Id. at 30247 n. 1017.

The final regulations do not define relevance, and the ordinary meaning of the word should be understood and applied.

Id. at 30247 n. 1018.

36

[W]here a party or witness does not appear and is not cross-examined, the statements of that party or witness cannot be determined reliable, truthful, or credible in a non-courtroom setting like that of an educational institution's proceeding that lacks subpoena powers, comprehensive rules of evidence, and legal professionals. . . . [R]ecipients are educational institutions that should not be converted into de facto courtrooms. The final regulations thus prescribe a process that simplifies evidentiary complexities while ensuring that determinations regarding responsibility result from consideration of relevant, reliable evidence. The Department declines to adopt commenters' suggestion that instead the decision-maker should be permitted to rely on statements that are not subject to cross-examination, if they are reliable; making such a determination without the benefit of extensive rules of evidence would likely result in inconsistent and potentially inaccurate assessments of reliability. Commenters correctly note that courts have not imposed a blanket rule excluding hearsay evidence from use in administrative proceedings. However, cases cited by commenters do not stand for the proposition that every administrative proceeding must be permitted to rely on hearsay evidence, even where the agency lacks subpoena power to compel witnesses to appear.

Id. at 30348.

37

[R]elevance is the sole gatekeeper evidentiary rule in the final regulations, but decision-makers retain discretion regarding the weight or credibility to assign to particular evidence. Further, for the reasons discussed above, while the final regulations do not address "hearsay evidence" as such, § 106.45(b)(6)(i) does preclude a decision-maker from relying on statements of a party or witness who has not submitted to cross-examination at the live hearing.

Id. at 30354.

38

Considerations for Applying Regulatory Requirements

39

Recipients may not…

. . . adopt evidentiary rules of admissibility that contravene those evidentiary requirements prescribed under § 106.45 . . .

. . . adopt a rule excluding relevant evidence whose probative value is substantially outweighed by the danger of unfair prejudice . . .

. . . 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) or otherwise barred from use under § 106.45 (as is, for instance, information protected by a legally recognized privilege) . . .

Id. at 30294 (internal citations omitted).

40

Overview

- **Credibility**
- **Relevance**
- **Evidentiary Standard**
- Probative Evidence
- Prejudice
- **Inculpatory Evidence**
- **Exculpatory Evidence**
- Hearsay
- Expert Testimony

41

[A] recipient must objectively evaluate all relevant evidence (inculpatory and exculpatory) but retains discretion, to which the Department will defer, with respect to how persuasive a decision-maker finds particular evidence to be.

Id. at 30337.

42

Inculpatory Evidence

Evidence showing or tending to show one's involvement in a crime or wrong.

Bryan A. Gardner, Black's Law Dictionary 10, (2014). Pg. 676.

43

Exculpatory Evidence

Evidence tending to establish a defendant's innocence.

Bryan A. Gardner, Black's Law Dictionary 10, (2014). Pg. 675.

44

Evidentiary Standard

Using a **preponderance of the evidence standard**, and considering relevant definitions in the Policy, the hearing panel weighs the evidence to determine whether the Respondent violated the Policy.

50.01% likelihood or 50% and a feather

Which side do you fall on?

Contrast this with **"clear and convincing"** and "beyond a reasonable doubt."

45

Relevance

The final regulations do not define relevance, and the ordinary meaning of the word should be understood and applied.

Id. at 30247 n. 1018.

46

Definition of "Relevant"

Having significant and demonstrable bearing on the matter at hand.

Affording evidence tending to prove or disprove the matter at issue or under discussion.

merriam-webster.com

47

[R]elevance is the sole gatekeeper evidentiary rule in the final regulations, but decision-makers retain discretion regarding the weight or credibility to assign to particular evidence. Further, for the reasons discussed above, while the final regulations do not address "hearsay evidence" as such, § 106.45(b)(6)(i) does preclude a decision-maker from relying on statements of a party or witness who has not submitted to cross-examination at the live hearing.

Id. at 30354.

48

Relevance Cont'd

The new Title IX regulations specifically . . .

. . . require ***investigators*** *and decision-makers* ***to be trained on issues of relevance***, *including* ***how to apply the rape shield provisions*** *(which deem questions and evidence about a complainant's prior sexual history to be irrelevant with two limited exceptions).*

Id. at 30125 (emphasis added).

49

Prior Sexual History/Sexual Predisposition

Section 106.45(b)(6)(i)-(ii) protects complainants (but not respondents) from ***questions or evidence about the complainant's prior sexual behavior or sexual predisposition***, *mirroring rape shield protections applied in Federal courts.*

Id. at 30103 (emphasis added).

50

Rape Shield Language

[T]he rape shield language in § 106.45(b)(6)(i)-(ii) bars questions or evidence about a complainant's sexual predisposition (with no exceptions) and about a complainant's prior sexual behavior subject to two exceptions:

1) if offered to ***prove that someone other than the respondent committed the alleged sexual harassment****, or*

2) if the question or evidence concerns sexual behavior between the complainant and the respondent and is offered to prove ***consent****.*

Id. at 30336 n. 1308 (emphasis added).

51

Consent and Rape Shield Language

[A] recipient selecting its own definition of consent must apply such definition consistently both in terms of not varying a definition from one grievance process to the next and as between a complainant and respondent in the same grievance process. The scope of the questions or evidence permitted and excluded under the rape shield language in § 106.45(b)(6)(i)-(ii) will depend in part on the recipient's definition of consent, but, whatever that definition is, the recipient must apply it consistently and equally to both parties, thereby avoiding the ambiguity feared by the commenter.

Id. at 30125.

52

Rape Shield Language

[T]he rape shield language in this provision:

- *considers all questions and evidence of a complainant's sexual predisposition irrelevant, with no exceptions;*
- *questions and evidence about a complainant's prior sexual behavior are irrelevant unless they meet one of the two exceptions;*
- *and* ***questions and evidence about a respondent's sexual predisposition or prior sexual behavior are not subject to any special consideration but rather must be judged like any other question or evidence as relevant or irrelevant to the allegations at issue.***

Id. at 30352 (emphasis added).

53

Rape Shield Protections and the Investigative Report

[T]he investigative report must summarize "relevant" evidence, and thus at that point the rape shield protections would apply to preclude inclusion in the investigative report of irrelevant evidence.

Id. at 30353-54.

54

How is "evidence" addressed in the proposed Title IX regulations released in 2022?

55

[U]nder the proposed regulations . . . a recipient's grievance procedures would have to, among other things:

- *Require an objective evaluation of all relevant evidence and exclude certain types of evidence as impermissible;*
- *Place the burden on the recipient to conduct an investigation that gathers sufficient evidence to reach a determination;*
- *Provide an equal opportunity for the parties to present relevant fact witnesses and other inculpatory and exculpatory evidence;*
- *Provide each party with a description of the relevant and not otherwise impermissible evidence and a reasonable opportunity to respond to that evidence;*

NPRM at 349-350.

56

The Department proposes adding a definition of "relevant" to the regulations to help recipients understand their obligations under Title IX. The Department proposes defining "relevant" as related to the allegations of sex discrimination under investigation as part of the grievance procedures in § 106.45, and if applicable § 106.46. The proposed regulations would clarify as part of the definition that questions are relevant "when they seek evidence that may aid in showing whether the alleged sex discrimination occurred," and that evidence is relevant "when it may aid a decisionmaker in determining whether the alleged sex discrimination occurred."

NPRM at 109.

57

Scope of evidence provided to the parties

*To assist recipients (and parties) in determining the scope of permissible evidence, the Department proposes merging the "directly related" and "relevant" evidentiary standards by defining "relevant" in proposed § 106.2 as evidence related to the allegations of sex discrimination. Because relevant evidence includes all evidence related to the allegations of sex discrimination under investigation, any evidence that is directly related to the allegations would necessarily be considered evidence that is related to the allegations. **Therefore, it is the Department's tentative view that once the term "relevant" is properly defined** within the regulations, the proposed regulations would require a similar universe of evidence to be made available to the parties with one exception: unlike the current regulations, the proposed regulations would prohibit a postsecondary institution from disclosing evidence of the complainant's sexual interests and prior sexual conduct, except as narrowly permitted by proposed § 106.45(b)(7).*

NPRM at 401.

58

In the preamble to the 2020 amendments, the Department "decline[d] to 110 define" the term "relevant" and stated that it "should be interpreted using [its] plain and ordinary meaning."

NPRM at 109-110.

59

In addition, the proposed regulations, at § 106.45(b)(7), would set out three categories of evidence, including records, that would be impermissible (i.e., must not be accessed, considered, disclosed, or otherwise used) in the grievance procedures, regardless of whether the evidence is relevant. Likewise, questions seeking these types of evidence would be impermissible.

NPRM at 109.

60

First, proposed § 106.45(b)(7)(i) would provide that evidence that is protected under a privilege as recognized by Federal or State law (e.g., attorney-client privilege, doctor-patient privilege, spousal privilege) would not be permitted and must not be accessed, considered, disclosed, or otherwise used in a recipient's grievance procedures—unless the person holding the privilege has waived it voluntarily in a manner permitted in the recipient's jurisdiction. A similar prohibition is included at current § 106.45(b)(1)(x).

NPRM at 111.

61

Second, proposed § 106.45(b)(7)(ii) would provide that a party's records that are made or maintained by a physician, psychologist, or other recognized professional or paraprofessional in connection with the provision of treatment to the party would not be permitted and must not be accessed, considered, disclosed, or otherwise used in the grievance procedures without the party's consent for use in the recipient's grievance procedures. Any consent must be voluntary and in writing. A similar prohibition is included at current § 106.45(b)(5)(i).

NPRM at 111-112.

62

Third, proposed § 106.45(b)(7)(iii) would provide that evidence related to the complainant's sexual interests would not be permitted in a recipient's grievance procedures. Proposed § 106.45(b)(7)(iii) would also provide that evidence related to the complainant's prior sexual conduct would not be permitted in a recipient's grievance procedures unless it is offered to prove that someone other than the respondent committed the alleged conduct or to prove consent with evidence concerning specific incidents of the complainant's prior sexual conduct with the respondent. Similar prohibitions appear at current § 106.45(b)(6)(i)-(ii). Proposed revisions to these prohibitions, such as replacing "sexual behavior" with "sexual conduct" and replacing "sexual predisposition" with "sexual interests" are explained in greater detail in the discussion of proposed § 106.45(b)(7). Proposed § 106.45(b)(7)(iii) would further clarify that the fact that prior consensual sexual conduct occurred between the complainant and the respondent does not itself demonstrate or imply the complainant's consent to the alleged sex-based harassment or preclude determination that sex-based harassment occurred.

NPRM at 112.

63

Under the third category, the Department proposes clarifying in § 106.45(b)(7)(iii) that evidence, or questions seeking evidence, about the complainant's sexual interests and prior sexual conduct would be impermissible and a recipient must not rely upon such evidence regardless of relevance other than in either of two narrow exceptions: (1) when evidence of the complainant's prior sexual conduct is offered to prove that someone other than the respondent committed the alleged conduct; or (2) when evidence concerning specific incidents of the complainant's prior sexual conduct with the respondent is offered to prove consent.

NPRM at 301.

64

Proposed § 106.8(d)(2) would require investigators, decisionmakers, and other persons who are responsible for implementing the recipient's grievance procedures or have the authority to modify or terminate supportive measures . . . . to be trained, to the extent related to their responsibilities, on . . . . the meaning and application of the term "relevant," in relation to questions and evidence, and the types of evidence that are impermissible regardless of relevance under proposed § 106.45, and if applicable proposed § 106.46.

NPRM at 143-144.

65

Among other obligations, a recipient must . . . objectively evaluate all relevant evidence (proposed § 106.45(b)(6)); review all evidence gathered to determine which evidence is relevant and what is impermissible (proposed § 106.45(f)(3)); provide each party with a description of evidence that is relevant and not otherwise impermissible (proposed § 106.45(f)(4)) . . .

NPRM at 284-285.

66

Proposed § 106.45(b)(7) identifies three categories of evidence that a recipient must not access, consider, disclose, or otherwise use, or permit questions seeking, in a recipient's grievance procedures required by the proposed regulations regardless of whether evidence in these categories is relevant.

NPRM at 298.

67

In conducting an investigation and reaching a determination, the recipient's responsibility is to gather and review evidence with neutrality and without bias or favor toward any party.

NPRM at 285.

68

Under proposed § 106.45(b)(5), a recipient would not be permitted to restrict the parties' ability to obtain and present evidence, including by speaking to witnesses.

NPRM at 291.

69

Proposed § 106.45(f)(1) would require that the recipient—and not the parties—bear the burden of conducting an investigation that gathers sufficient evidence to determine whether sex discrimination occurred.

NPRM at 331.

70

Proposed § 106.45(f)(2) would retain the requirement that a recipient provide an equal opportunity for the parties to present fact witnesses and other inculpatory and exculpatory evidence, and would clarify that the fact witnesses and evidence must be "relevant" as defined in proposed § 106.2. The topic of expert witnesses in grievance procedures resolving complaints of sex-based harassment involving students at the postsecondary level would now appear in proposed § 106.46(e)(4).

NPRM at 332.

71

*Proposed § 106.46(e)(4) would provide a postsecondary institution with the **discretion** to determine whether to allow the parties to present expert witnesses as long as the determination of whether to permit expert witnesses applies equally to the parties.*

NPRM at 394.

Under proposed § 106.46(e)(4), the postsecondary institution would be permitted to exercise this discretion by deciding to allow each party to use experts, to not to allow any experts, or to use its own expert in lieu of experts presented by the parties.

NPRM at 395.

72

*Proposed § 106.45(f)(4) would require a recipient, as part of its obligation to conduct an adequate, reliable, and impartial investigation of sex discrimination complaints, to provide each party with a **description** of the evidence that is relevant to the allegations of sex discrimination and not otherwise impermissible. Proposed § 106.45(f)(4) would also require a recipient to provide the parties with a reasonable opportunity to respond to this **description** of evidence.*

NPRM at 336.

73

*Under proposed § 106.45(f)(4), the Department proposes requiring a recipient to, at minimum, provide the parties with a **description** of the relevant evidence as part of the investigation of all sex discrimination complaints. A recipient may provide this description orally or in writing.*

NPRM at 337.

74

*In proposed § 106.45(h)(1), the Department proposes allowing recipients to **use the clear and convincing evidence standard of proof for sex discrimination allegations only if the recipient uses the clear and convincing evidence standard of proof in all other comparable proceedings**, including proceedings relating to other discrimination complaints.*

NPRM at 354.

75

***The decisionmaker must evaluate the relevant evidence for its persuasiveness**. The Department recognizes that clarifying that relevant evidence must be evaluated for its persuasiveness will help inform decisionmakers of the appropriate way to evaluate evidence under either a preponderance of the evidence or clear and convincing evidence standard of proof. In particular, OCR has received comments and heard in listening sessions that this type of clarification may be especially useful for those without formal legal training to confirm that the evaluation of evidence involves an assessment of the persuasiveness of evidence rather than a weighing of the sheer quantity of evidence tending to support or disprove the allegations.*

NPRM at 358.

76

Method of providing evidence to the parties

*[T]he Department proposes giving a postsecondary institution the **discretion** to decide whether to provide access to the relevant and not otherwise impermissible evidence or to provide an investigative report that accurately summarizes the relevant and not otherwise impermissible evidence and then provide access to the evidence if requested by one or more parties.*

NPRM at 404.

77

*Either **option** under proposed § 106.46(e)(6)— providing an investigative report or the evidence itself—would enable the parties to access the universe of evidence relevant to the allegations of sex-based harassment. In turn, this would enable the parties to meaningfully prepare arguments, contest the relevance of evidence, and present additional evidence for consideration. The Department tentatively views the requirement to convey the same universe of evidence in two different formats (an investigative report and access to the evidence) as unnecessary for ensuring that grievance procedures are implemented equitably and effectively, and as increasing costs, burden, and delay without providing a meaningful benefit to the parties.*

NPRM at 405.

78

Equitable access to the evidence

Under proposed § 106.46(e), if a postsecondary institution provides an electronic copy of the relevant evidence to one party, the institution would be required to do the same for all parties. If a postsecondary institution permits a party only to inspect and review the evidence without providing that party their own copy, the institution would not be permitted to provide a physical copy to another party. If, however, a party needs to access the evidence in a particular mode due to a ***disability****, a postsecondary institution would be required to comply with its obligations to ensure effective communication through the provision of auxiliary aids and services. For persons with* ***limited English proficiency****, a postsecondary institution may need to provide language assistance services, such as translations or interpretation. To comply with the requirement under proposed § 106.46(e)(6) to provide equitable access to the evidence, a postsecondary institution would also be required to be mindful of any* ***extenuating circumstances*** *(e.g., one party is studying abroad) that affect a party's ability to access the evidence in a particular manner.*

NPRM at 405-406.

79

Timeframe for receiving and responding to the evidence

[T]he Department proposes in § 106.46(e)(6)(ii) ***to remove the specific timeframes*** *and instead permit a postsecondary institution flexibility to set reasonable timeframes for ensuring that parties have a reasonable opportunity to review and respond to evidence. When the grievance procedures do not involve a live hearing, proposed § 106.46(e)(6)(ii) would require a postsecondary institution to provide the parties with a reasonable opportunity to review and respond to the evidence prior to the determination of whether sex-based harassment occurred. When a postsecondary institution conducts a live hearing as part of its grievance procedures, proposed § 106.46(e)(6)(ii) would require the institution to provide the parties with the opportunity to review the evidence in advance of the live hearing. This provision would allow the postsecondary institution to decide whether to provide the opportunity to respond to the evidence prior to the hearing, during the hearing, or both prior to and during the hearing.*

NPRM at 407-408.

80

Protections against unauthorized disclosures

[T]he Department proposes, at § 106.46(e)(6)(iii), to require a postsecondary institution to take reasonable steps to prevent and address any unauthorized disclosures by the parties and their advisors of information and evidence obtained through the sex-based harassment grievance procedures. As noted above, unauthorized disclosure of sensitive information could threaten the fairness of the process by deterring parties or witnesses from participating, affecting the reliability of witness testimony, leading to retaliatory harassment, and other consequences. The Department is not proposing specific steps that a postsecondary institution must take, as what is reasonable to prevent unauthorized disclosure may vary depending on the circumstances. In some circumstances, it may be sufficient to inform the parties of the institution's expectations for how the parties should safeguard the evidence and the consequences for unauthorized disclosures.

NPRM at 409.

81

Credibility Determinations

82

Credibility Determinations

- Credibility vs. Reliability
- Often these cases are "word against word," so what exists to corroborate claims?
- Reports to law enforcement, medical assistance, contemporaneous reports or conversations, journal entries, witness accounts, etc. can be viewed as corroborating (if medical or mental health reports exist you can ask the alleged victim for access to those records)
- In cases where medical or mental health records exist and panel members gain access, it's a good idea to enlist the help of medical/mental health experts to interpret.
- Avoid expectations or assumptions about behaviors or responses by either complainant or respondent. Avoid stereotypes; prevent bias, implicit or otherwise

83

Credibility Determinations Cont'd

- Assess demeanor: Does the person appear credible? Look at body language, eye contact, level of nervousness, defensiveness, evasiveness, etc.
- Is the person's account inherently believable? Plausible? What is his or her potential bias?
- Does the person have a motive to be untruthful?
- Are there past acts that could be relevant (although past acts are not determinative of the issue before you they can be relevant for some purposes).
- Pay attention to inconsistencies, but remember that in cases of trauma, inconsistencies can be normal. Inconsistencies alone should not determine credibility or lack thereof.
- Look out for attempts to derail the hearing, deflect away from questions, and/or bog down the hearing with irrelevant information or minutia.
- Check your own bias at the door. Do not pre-judge your findings until all relevant information is heard. Working with "theories of the case" are not bias, but remain open to revising those theories based on fact. Do not be lured towards confirmations bias.

84

Credibility
The quality of being convincing or believable

Reliability
The quality of being trustworthy or of performing consistently well

Ex: Dr. Christine Blassey Ford/Brett Kavanaugh hearing.
Many on the Congressional hearing committee found Dr. Ford to be credible but did not believe her recollection of events was reliable.

85

Florida Supreme Court Jury Instructions

It is up to you to decide what evidence is reliable. You should use your common sense in deciding which is the best evidence and which evidence should not be relied upon in considering your verdict. You may find some of the evidence not reliable, or less reliable than other evidence.

You should consider how the witnesses acted, as well as what they said. Some things you should consider are:

1. Did the witness seem to have an opportunity to see and know the things about which the witness testified?
2. Did the witness seem to have an accurate memory?
3. Was the witness honest and straightforward in answering the attorneys' questions?
4. Did the witness have some interest in how the case should be decided?
5. Does the witness's testimony agree with the other testimony and other evidence in the case?

86

Florida Supreme Court Jury Instructions Cont'd

6. Has the witness been offered or received any money, preferred treatment, or other benefit in order to get the witness to testify?
7. Had any pressure or threat been used against the witness that affected the truth of the witness's testimony?
8. Did the witness at some other time make a statement that is inconsistent with the testimony [he] [she] gave in court?
9. Has the witness been convicted of a [felony] [misdemeanor involving [dishonesty] [false statement]]?
10. Does the witness have a general reputation for [dishonesty] [truthfulness]?

Whether the State has met its burden of proof does not depend upon the number of witnesses it has called or upon the number of exhibits it has offered, but instead upon the nature and quality of the evidence presented.

87

How is "credibility" addressed in the proposed Title IX regulations released in 2022?

88

*The Department proposes adding § 106.45(g), which would require a recipient to **provide a process** that enables the decisionmaker to adequately assess the credibility of the parties and witnesses to the extent credibility is both in dispute and relevant to evaluating one or more allegations of sex discrimination.*

NPRM at 339.

89

*Under proposed § 106.45(g) a recipient would be permitted to incorporate the methods for assessing credibility that would be required under proposed § 106.46(f) or **may choose to incorporate other methods that the recipient believes are better suited to the nature of the allegations and the recipient's educational environment** as long as they aid in fulfilling the recipient's obligation to provide an education program or activity free from sex discrimination. In situations in which credibility is not in dispute or is not relevant to evaluating one or more allegations of sex discrimination, a recipient would not be required to implement its process required under proposed § 106.45(g) for assessing credibility.*

NPRM at 341.

106.45(g) *Evaluating allegations and assessing credibility.* A recipient must provide a process that enables the decisionmaker to adequately assess the credibility of the parties and witnesses to the extent credibility is both in dispute and relevant to evaluating one or more allegations of sex discrimination.

90

Proposed § 106.46(f)(1) would require a postsecondary institution to provide a process as specified in this subpart that enables the decisionmaker to adequately assess the credibility of the parties and witnesses to the extent credibility is both in dispute and relevant to evaluating one or more allegations of sex-based harassment. This assessment of credibility would include either:

(i) allowing the decisionmaker to ask the parties and witnesses relevant and not otherwise impermissible questions and follow-up questions, including those challenging credibility, during individual meetings with the parties or at a live hearing before determining whether sex-based harassment occurred and allowing each party to propose to the decisionmaker or investigator relevant and not otherwise impermissible questions and follow-up questions, including questions challenging credibility that the party wants asked of any party or witness and have those questions asked during individual meetings with the parties or at a live hearing subject to the requirements in proposed § 106.46(f)(3); or

(ii) when a postsecondary institution chooses to conduct a live hearing, allowing each party's advisor to ask any party and any witnesses all relevant and not otherwise impermissible questions under proposed §§ 106.2 and 106.45(b)(7) and follow-up questions, including those challenging credibility, subject to the requirements in proposed § 106.46(f)(3).

NPRM at 412.

91

Proposed § 106.46(f)(4) would prohibit the decisionmaker from drawing an inference about whether sex-based harassment occurred based solely on a party's or witness's refusal to respond to questions related to credibility, including a refusal to answer such questions during a live hearing.

NPRM at 414.

92

[T]he Department's tentative position that the relevant case law does not require a postsecondary institution to provide for a live hearing with advisor-conducted cross-examination in all cases, at least as long as it provides another live method of determining credibility.

NPRM at 429.

93

For this reason, to the extent credibility is in dispute and relevant to evaluating one or more allegations of sex-based harassment, proposed § 106.46(f)(1) would permit a postsecondary institution to have the decisionmaker ask the parties and witnesses relevant questions and follow-up questions, including questions challenging credibility. Proposed § 106.46(f)(1) would permit the decisionmaker to do this during individual meetings with the parties or at a live hearing.

NPRM at 431.

94

Proposed § 106.46(f)(1) would also allow each party to propose to the decisionmaker or investigator relevant questions and follow-up questions, including those challenging credibility that they want asked of any party or witness and have those questions asked, subject to the requirement in proposed § 106.46(f)(3), during individual meetings with the parties or at a live hearing, in addition to permitting any postsecondary institution that so chooses, to use advisor-conducted cross-examination. The Department's tentative view is that any benefit that adversarial cross-examination may have over other methods of live questioning is not sufficient to justify mandating that all postsecondary institutions permit adversarial cross-examination in every case, either as a matter of due process or fundamental fairness or of effectuating Title IX's nondiscrimination mandate, in light of the considerable costs imposed by adversarial cross-examination, particularly in the context of allegations of sex-based harassment.

NPRM at 431.

95

When credibility is not in dispute. Courts, including the Sixth Circuit in Baum, have held that there are situations in which cross-examination is unwarranted. These include, for example, situations in which the respondent admits to engaging in the misconduct, in which a recipient reaches a decision based on evidence other than the complainant's statements, and in which the respondent waives their right to a hearing.

NPRM at 433-434.

96

The Department is concerned, however, that placing no limitations on the decisionmaker's ability to consider statements made by a party who does not submit to a credibility assessment could lead to manipulation by the parties. For example, if there were no limitations placed on the decisionmaker's ability to consider prior statements from parties who do not submit to a credibility assessment, a complainant could write an email to a friend and leave a voicemail for another friend detailing the events related to the alleged sex-based harassment. If the complainant refused to submit to a credibility assessment, the decisionmaker would be permitted to consider the email and voicemail for their truth, but the respondent would not have an opportunity to question the complainant, including to assess credibility. This same result could also occur if a respondent writes an email to a friend and leaves a voicemail for another friend detailing the events in question and then refuses to submit to a credibility assessment.

NPRM at 436-437.

97

Under proposed § 106.46(f)(4), if a party does not respond to questions related to their own credibility, the decisionmaker would be prohibited from relying on any statement of that party that supports that party's position. The Department's proposed language is intended to avoid situations like that described above in which a party could avoid responding to questions related to their own credibility and the decisionmaker would have to consider prior statements made by that party that support that party's position. It would apply when a party refuses to answer questions related to their own credibility either during the investigation in individual meetings with the decisionmaker or investigator or during the live hearing, if the postsecondary institution holds a live hearing.

NPRM at 437.

98

For later:

Victim Rights Law Center et al. v. Cardona

Vacated part of the 2020 regulations with regards to parties who do not submit to cross examination…

99

Questions?

100