

North Carolina Wesleyan University
Guide for Determining Relevance

August 1, 2020

What is the purpose of this Guide?

On May 19, 2020, the U.S. Department of Education issued Final Rules governing the Title IX grievance process, effective August 14, 2020. The Final Rule requires all colleges and universities to institute and utilize a grievance resolution procedure prior to making any determination regarding responsibility for covered reports of Title IX sex-based harassment or discrimination, including sexual violence. Part of this grievance process includes the collection and distribution of relevant evidence, and for the posing of relevant questions to all parties.

The Final Rules state in §106.45(b)(6):

Require an objective evaluation of all evidence that is relevant, as defined in 106.2, and not otherwise impermissible under paragraph (b)(7) of this section – including both inculpatory and exculpatory evidence – and provide that credibility determinations must not be based on a person’s status as a complainant, respondent, or witness;

What is a relevant question?

The Department of Education state that this definition of “relevant” reflects its “plain and ordinary meaning,” and further stresses that the clarifications in the 2020 amendments apply here. 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. Questions are, and evidence, is relevant when they may aid in showing whether the alleged sex-based harassment or discrimination occurred. A question not directly related to the allegations will generally be considered irrelevant.

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

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

of which they are a member, or any other protected class covered by federal or state law (e.g. race, sexual orientation, disability).

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

Much of the content within these hearings may be considered sensitive and/or embarrassing by parties or advisors. However, it’s crucial that relevant questions and evidence must be considered regardless of the discomfort of the parties. Only irrelevant questions and evidence (detailed below), including about the complainant’s prior sexual history, may be excluded.

What makes a question or evidence irrelevant?

Questions or Evidence about Complainant’s Prior Sexual Behavior or Sexual Predisposition

Questions and evidence “that relates to the complainant’s sexual interests or prior sexual conduct are not relevant, unless:

1. such questions and evidence are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or
2. if the questions and evidence concern specific incidents of the complainant’s prior sexual conduct with respect to the respondent and are offered to prove consent. 34 C.F.R. § 106.45(b)(7)(iii).

Question or Evidence regarding Privileged Information

Questions or evidence that “is protected under a privilege as recognized by Federal or State law or evidence provided to a confidential employee” are irrelevant and should be excluded. 34 C.F.R. § 106.45(b)(7)(i) Depending on your state, individuals with legal privilege may include medical providers (physician, dentist, podiatrist, chiropractor, nurse), psychologists, clergy, rape crisis counselors, and social workers. (for instance, New York's "laws of privilege" are listed within CPLR Article 45; Each state has its own rules around privilege). Evidence protected under this privilege can be admitted if the person to whom the privilege or confidentiality is owed voluntarily waives the privilege. 34 C.F.R. § 106.45(b)(7)(i)

Questions or Evidence about Medical Records

Questions that call for information about any party’s medical, psychological, and similar records are irrelevant unless the party has given voluntary, written consent for their use in an institution’s grievance procedures. 34 C.F.R. § 106.45(7)(ii).

Duplicative Questions

If at some point there are questions proposed by a party that are duplicative of questions that have already been asked or are designed to harass as opposed to assess credibility or elicit

relevant information, those questions may be declined and deemed irrelevant. *See* 85 Fed. Reg. 30026, 30331 (May 19, 2020)

How should the decision-maker reach a relevance determination?

If the decision-maker is a single individual, the decision-maker will be solely responsible for determining the relevance of the question before it is asked or of evidence before it is included for consideration. If the decision-maker is a panel, the panel's Chair will make all determinations of relevance.

What should the relevance determination consist of?

The Department of Education requires decisionmakers to explain any decision to exclude questions (and also evidence) that are impermissible in addition to those that are excluded for relevance. § 106.46(f)(3) The decision-maker need only provide a brief explanation of the determination, which will ordinarily consist of one of the following statements depending on the situation.

Generally probative questions

- The question is relevant because it asks whether a fact material to the allegations is more or less likely to be true.
- The question is irrelevant because it asks about a detail that does not touch on whether a material fact concerning the allegations is more or less likely to be true.

Question about Complainant's Prior Sexual Behavior or Sexual Predisposition

- The question is relevant because although it calls for prior sexual behavior information about the complainant, it meets *one of the two exceptions*, and it tends to prove that a material fact at issue is more or less likely to be true [chair must denote which exception applies].
 - Exception one: such questions and evidence are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or
 - Exception two: if the questions and evidence concern specific incidents of the complainant's prior sexual conduct with respect to the respondent and are offered to prove consent. 34 C.F.R. § 106.45(b)(7)(iii).
- The question is irrelevant because it calls for prior sexual behavior information about the complainant without meeting one of the two exceptions as defined in 34 C.F.R. § 106.45(b)(7)(iii).

Question regarding Privileged Information

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

- The question is relevant because, although it calls for information shielded by a legally recognized privilege [chair must identify the privilege], that privilege has been waived in writing, and the question tends to prove that a material fact at issue is more or less likely to be true.

Questions about Undisclosed Medical Records

- The question is irrelevant because it calls for information regarding a party's or witness'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 or witness.
- This question is relevant because although it calls for a party's or witness'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 or witness, that party has given their voluntary, written consent to including this material for the use in grievance procedures, and it tends to prove that a material fact at issue is more or less likely to be true. 34 C.F.R. § 106.45(b)(7)(ii).

Duplicative Questions

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

The decision-maker may relay a longer explanation if necessary under the circumstances.

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

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

Any party or their advisor may request that the decision-maker reconsider their relevance determination. The party or advisor should request the reconsideration at the time of the decision. The requesting party will be asked to provide a brief rationale explaining why the question is or is not (depending on the request) relevant. The decision-maker will then grant or deny the request, providing an explanation for the ruling. This determination is final.