Excerpt From U.S. Department of Education's Office for Civil Rights Q&A on Title IX Regulations Dated: July 20, 2021, updated June 28, 2022

XII. Live Hearings and Cross-Examination

Please note: As a result of a federal district court order issued on July 28, 2021, the part of the 2020 amendments that states: "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," 34 C.F.R. § 106.45(b)(6)(i), has been set aside. In light of the district court's decision, Q&As 51-54 (as well as the reference to Question 51 in Answer 42) are no longer applicable. OCR has added Questions A through D to this section to provide additional clarification regarding the court's decision.

To see the complete Q&A document, see https://www2.ed.gov/about/offices/list/ocr/docs/202107-qa-titleix.pdf

Question 38: Are all schools required to hold live hearings as part of their Title IX grievance processes?

Answer 38: Postsecondary schools must have a live hearing under the 2020 amendments. A live hearing may occur virtually "with technology enabling the decision-maker [] and parties to simultaneously see and hear the party or the witness answering questions." Elementary and secondary schools are not required to have a live hearing. For additional information, please see 34 C.F.R. § 106.45(b)(6).

Question 39: What is cross-examination?

Answer 39: At a live hearing, "each party's advisor [must be permitted to] to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility." The 2020 amendments refer to this process of questioning as cross-examination.

The 2020 amendments explain that a party may not conduct cross-examination, but instead the party's advisor must ask the questions on their behalf. The amendments also require a postsecondary school to provide an advisor to conduct cross-examination for any party who does not have their own advisor. For additional information, please see 34 C.F.R. § 106.45(b)(6).

Question 40: Since elementary and secondary schools are not required to provide a live hearing, what kind of process are they required to provide?

Answer 40: The 2020 amendments state that elementary and secondary schools "must afford each party the opportunity to submit written, relevant questions that a party wants asked of any party or witness, provide each party with the answers, and allow for additional, limited follow up questions from each party." In addition, the decision-maker "must explain to the party proposing the questions any decision to exclude a question as not relevant."

The preamble also explains that a school may exclude as not relevant questions that are duplicative or repetitive.

The 2020 amendments permit a parent or legally authorized guardian to act on behalf of the complainant or respondent. Whether a parent or guardian has the legal right to act on behalf of a complainant or respondent "would be determined by State law, court orders, child custody arrangements, or other sources granting legal rights to parents or guardians." If a parent or guardian has a legal right to act on a complainant or respondent's behalf, this authority applies throughout all aspects of the Title IX matter,

including throughout the grievance process. For additional information, please see 34 C.F.R. § 106.45(b)(6)(ii) and 34 C.F.R. § 106.30.

Question 41: Is a postsecondary school required to provide complainants and respondents with an advisor for a live hearing?
Answer 41: Yes. The 2020 amendments require a postsecondary school to provide an advisor to conduct cross-examination for any party who does not have their own advisor. The amendments also require all schools to provide the parties with the same opportunities to be accompanied by an advisor of their choice in other parts of the grievance process, but do not require a school to provide an advisor for any part of the process other than the requirement that a postsecondary school provide one for cross-examination.

The preamble explains that the parties are in the best position to decide which individuals should serve as their advisors and notes that advisors may be friends, family members, an attorney, or other individuals chosen by the party or provided by the school if the party does not choose one. For additional information, please see 34 C.F.R. § 106.45(b)(5)(iv) and 34 C.F.R. § 106.45(b)(6)(i).

Question 42: Are parties and witnesses required to participate in the Title IX grievance process, including submitting to cross-examination during a live hearing at the post-secondary school level?
Answer 42: No. Parties and witnesses are not required to submit to cross-examination or otherwise participate in the Title IX grievance process.

The 2020 amendments do require schools to offer complainants supportive measures regardless of whether they participate in a grievance process and to prohibit retaliation against individuals based on their decision to participate, or not participate, in a grievance process.

Question 43: May a school create its own rules for conducting a live hearing?
Answer 43: Yes. The preamble states that a school may implement rules regarding how the live hearing is conducted as long as those rules are applied equally to both parties. For example, a school "may decide whether or how to place limits on evidence introduced at a hearing that was not gathered and presented prior to the hearing."

The preamble also explains that a school may adopt rules on "whether the parties may offer opening or closing statements, specify a process for making objections to the relevance of questions and evidence, [and] place reasonable time limitations on a hearing." The preamble adds that a school may adopt a rule stating that duplicative questions are irrelevant. In addition, the preamble says that an advisor's cross-examination role "is satisfied where the advisor poses questions on a party's behalf, which means that an assigned advisor could relay a party's own questions to the other party or witness."145 Thus, for example, a postsecondary school could limit the role of advisors to relaying questions drafted by their party.

For examples of language related to this issue, please see Q&A Appendix Sections V-VII.

Question 44: May a school put in place rules of decorum or other rules for advisors, parties, and witnesses to follow during a live hearing?
Answer 44: Yes. The preamble says that a school may "adopt rules of decorum" and notes that a school is "in a better position than the Department to craft rules of decorum best suited to [its]educational environment." For example, a school may prohibit advisors from questioning parties or witnesses in an abusive, intimidating, or disrespectful manner.

A school also may require a party to use a different advisor if the party's advisor refuses to comply with the school's rules of decorum. For example, the preamble explains that if a party's advisor of choice yells at others in violation of a school's rules of decorum, the school may remove the advisor and require a replacement. The school has this authority even when the advisor is asking a question that is relevant to the hearing. If the manner in which an advisor attempts to ask the question is harassing, intimidating, or abusive (e.g., advisor yells, screams, or comes too close to a witness), the preamble explains that a school may enforce a rule requiring that relevant questions must be asked in a respectful, non-abusive manner.

For examples of language related to this issue, please see Q&A Appendix Section VI.

Question 45: Are all parties required to be physically present in the same location during the live hearing?

Answer 45: No. The 2020 amendments state that, "at the [school'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." Additionally, the preamble states that even if a school does not regularly hold virtual hearings, any party may request that the entire hearing, including cross-examination, be held virtually, and the school must grant that request. The party does not need to provide a reason for making this request.

In addition, nothing in the 2020 amendments prohibits schools from holding virtual hearings or from having the parties participate in separate locations even if no party makes such a request, particularly in light of the operational challenges posed by the COVID-19 pandemic. For additional information, please see 34 C.F.R. § 106.45(b)(6)(i).

For examples of language related to this issue, please see Q&A Appendix Section V.

Question 46: Is a school permitted to limit the questions that may be asked by each party of the other party or witnesses?

Answer 46: Yes, and in fact the 2020 amendments require certain limitations, whether in a hearing or as part of an exchange of written questions at the elementary and secondary school level. Note that the 2020 amendments do not require a hearing at the elementary and secondary school level.

Questions must be relevant. More specifically, the 2020 amendments state that questions about the complainant's prior sexual behavior are not relevant, subject to certain limitations. The preamble states that any school may exclude as not relevant questions that are duplicative or repetitive. For more information regarding other limitations on questioning, see Question 48.

Further, the 2020 amendments state that during cross-examination at the postsecondary school level, "only relevant cross-examination questions and other questions may be asked of a party or witness" and the decision-maker must determine the relevance of a question before a party or a witness answers. For additional information, please see 34 C.F.R. § 106.45(b)(6).

For examples of language related to this issue, please see Q&A Appendix Sections VIII and IX.

Question 47: Are questions and evidence about the complainant's sexual history relevant?

Answer 47: The 2020 amendments state 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" or 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 preamble explains that the term "prior sexual behavior" refers to "sexual behavior that is unrelated" to the alleged conduct. The preamble also addresses questions and evidence about sexual behavior after an alleged incident, saying that the regulations do not imply that these kinds of questions are relevant. Whether sexual behavior between the complainant and respondent might be relevant to prove consent regarding the particular allegations at issue "depends in part on a [school's] definition of consent." Some schools' definitions of consent "require a verbal expression of consent," and other schools' definitions of consent "inquire whether based on circumstances the respondent reasonably understood that consent was present (or absent)." For additional information, please see 34 C.F.R. § 106.45(b)(6).

For examples of language related to this issue, please see Q&A Appendix Section IX.

Question 48: Can cross-examination include questions about an individual's medical or mental-health records?
Answer 48: Questions that seek information about any party's medical, psychological, and similar records are not permitted unless the party has given written consent. Questions about other records protected by a legally recognized privilege are also not permitted unless waived by the party.

The preamble also explains that "[schools] (and, as applicable, parties) must follow relevant State and Federal health care privacy laws throughout the grievance process." These protections apply throughout the investigation as well as the hearing.

Question 49: May a school put measures in place to protect the well-being of the parties during the cross-examination?
Answer 49: Yes. For example, the preamble notes that a school is permitted to grant breaks to the parties during a live hearing. Also, as discussed in Question 46, the 2020 amendments require a pause in the cross-examination process each time before a party or witness answers a cross-examination question in order for the decision-maker to determine if the question is relevant.

The preamble explains that this is to help ensure that the cross-examination includes only relevant questions and that the pace of the cross-examination does not place undue pressure on a party or a witness to answer immediately.

Question 50: How do the 2020 amendments address the manner in which a decision-maker should evaluate answers to cross-examination questions?
Answer 50: The 2020 amendments do not require that answers to cross-examination questions "be in linear or sequential formats" or that any party "must recall details with certain levels of specificity." The preamble adds that the 2020 amendments "protect against a party being unfairly judged due to inability to recount each specific detail of an incident in sequence" because "decision-makers must be trained to serve impartially without prejudging the facts."

For examples of language related to this issue, please see Q&A Appendix Section VIII.

OCR has added Q&As A-D below to provide postsecondary schools with additional updated information in light of the court's decision.

OCR provides the following questions and answers about the effect Victim Rights Law Center et al. v. Cardona, No. 1:20-cv-11104, 2021 WL 3185743 (D. Mass. July 28, 2021), appeals pending (1st Cir.), which struck down a part of the 2020 amendments:

Question A: May a decision-maker at a postsecondary school consider statements made by a party or witness who does not submit to cross-examination at a live hearing?
Answer A: Yes. A federal court vacated regulatory language in the 2020 amendments that prohibited decision-makers in postsecondary schools from relying on statements by individuals who did not submit to cross-examination during a live hearing. As a result, postsecondary schools are no longer subject to this language.

The Department will continue to enforce all other parts of the regulation, including other requirements in the same section of the regulation (34 C.F.R. § 106.45(b)(6)(i)) that were not vacated, including the regulatory language in 34 § 106.45(b)(6)(i) stating that the decision-maker may not draw any inference solely from a decision of a party or witness not to participate at the hearing, including not to submit to cross-examination. This means, for example, that the decision-maker may not make any decisions about a party's credibility based solely on their decision not to participate in a hearing or submit to cross-examination.

For additional information, please see OCR's August 24, 2021, letter to students, educators, and other stakeholders regarding the court's decision in *VRLC v. Cardona*.

Question B: When did this court-ordered change in the regulation take effect?
Answer B: The court's decision was issued July 28, 2021 and took effect immediately. This means that it applies to Title IX grievance processes initiated by postsecondary schools after July 28, 2021, regardless of when the alleged sexual harassment occurred. It also means that OCR will not enforce this restriction as to any Title IX grievance processes initiated by postsecondary schools after July 28, 2021.

Question C: What types of statements made by a party or witness who does not submit to cross-examination at a live hearing may a decision-maker at a postsecondary school consider?
Answer C: In reaching a determination regarding responsibility in a Title IX grievance process, a decision-maker at a postsecondary school may consider statements made by parties or witnesses that are otherwise permitted under the regulations, even if those parties or witnesses do not submit to cross-examination at the live hearing.

For example, a decision-maker at a postsecondary school may consider statements made by the parties and witnesses during the investigation. A decision-maker at a postsecondary school may also consider emails or text exchanges between the parties leading up to the alleged sexual harassment and statements about the alleged sexual harassment that satisfy the regulation's relevance rules, regardless of whether the parties or witnesses submit to cross-examination at the live hearing. Additionally, a decision-maker at a postsecondary school may consider police reports, Sexual Assault Nurse Examiner documents, medical reports, and other documents that satisfy the regulation's relevance rules even if those documents contain statements of a party or witness who is not cross-examined at the live hearing.

Question D: Despite the court's decision, may a postsecondary school choose to maintain the prohibition on considering statements made by a party or witness who does not submit to cross-examination at a live hearing as part of its Title IX grievance process?

Answer D: No. The 2020 amendments at 34 C.F.R. § 106.45(b)(1)(ii) require "an objective evaluation of all relevant evidence." To the extent that statements made by a party or witness who does not submit to cross-examination at a live hearing satisfy the regulation's relevance rules, they must be considered in any postsecondary school's Title IX grievance process that is initiated after July 28, 2021.

Question 55: May a decision-maker rely on the statements of a party or witness who submits to cross-examination, but does not answer questions posed by the decisionmaker?

Answer 55: Yes. The preamble explains that cross-examination differs from questions posed by a neutral fact-finder and that if a party or witness submits to cross-examination by a party's advisor, but does not answer a question posed by the decision-maker, the decision-maker may still rely on all of that person's statements. The preamble also explains that "the decisionmaker still may not draw any inference about the party's credibility in making the responsibility determination based solely on a party's refusal to answer questions posted by the decisionmaker" because 34 C.F.R. § 106.45(b)(6)(i) states that no inference may be drawn based on the refusal to answer cross-examination or other questions.