

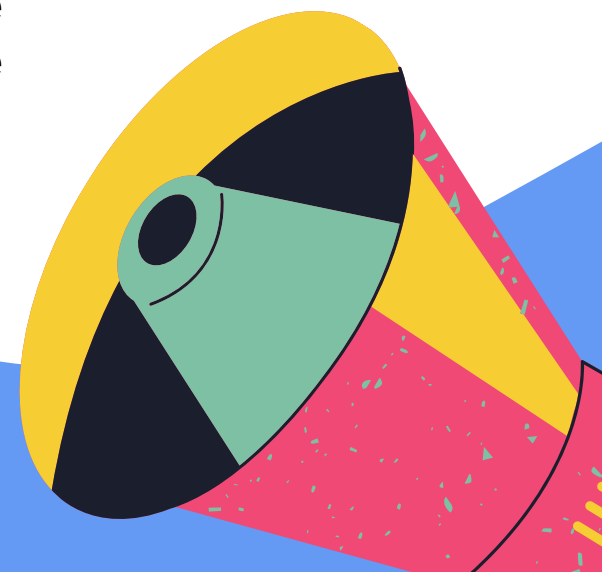
WHAT IS CROSS-EXAMINATION?

Cross-examination in Title IX hearings happens when a witness, including the complainant and respondent*, gets directly questioned by the advisor of one of the parties . As a result of the 2020 Title IX regulations, advisors of the complainant and respondent will now be able to cross-examine all witnesses.

This is a big change. Before these recent changes, many schools allowed parties to submit questions in writing that, depending on the school's rules, would then be asked of the parties by a hearing administrator, hearing panel, or an investigator.

Although cross-examination is a procedure that criminal and civil court cases have required for a long time but generally has not existed in Title IX cases in the way the 2020 changes require. Recently, several lawsuits have asked the question of whether or not cross-examination should be used in university hearings, and different cases came out with different decisions. As a result, the Department of Education made a decision, now requiring live cross-examination by each parties' advisor.

*A "complainant" is the term Title IX uses for the person who files a complaint informing the school that they experienced sexual harassment. NVRDC uses "complainant" and "survivor" interchangeably in our materials. A "respondent" is the term Title IX uses for the person against whom the sexual harassment complaint is filed. "Parties" refers to both the complainant and the respondent.



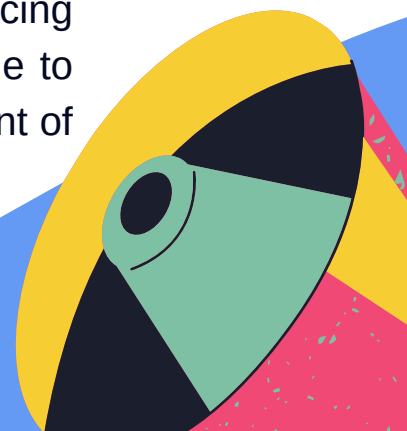
WHAT WILL CROSS-EXAMINATION LOOK LIKE IN TITLE IX HEARINGS?

Under the new Title IX regulations, colleges and universities are obligated to hold live hearings. These hearings must include cross-examination of the complainant, the respondent, and of all witnesses by the parties' advisors. While the complainant and respondent cannot ask questions of each other directly, each of their advisors will be responsible for asking questions of the other party. 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. An advisor may be a friend, family member, an attorney, or another individual chosen by the party. A postsecondary school must provide an advisor to conduct cross-examination for any party who does not have their own advisor.

During cross-examination, after a party or witness is asked a question, the hearing panel will first decide whether or not the question is relevant to the case. If it is relevant, then the party or witness must answer the question. If the question is determined to not be relevant, the hearing panel has to explain why and the party or witness will not have to answer the question.

WILL WITNESSES BE REQUIRED TO TESTIFY?

The current version of Title IX regulations released by the Department of Education in May 2020 requires that if a party wants to use a statement by a witness as evidence (including using text messages from that witness), then the witness would need to speak at the hearing and be cross-examined. However, a federal court in Massachusetts issued two decisions in 2021, deciding to set aside this provision of the current regulations; however, whether this type of invalidation applies nationwide is an issue still undecided by the United States Supreme Court. After the decisions were issued, the Department of Education Office for Civil Rights issued a letter in August 2021, announcing that it will cease enforcing the part of the regulations prohibiting statements from witnesses that are not available to testify and be cross-examined at a hearing. While this guidance clarifies the Department of Education's position, how your school approaches this issue may vary.



WHAT TYPES OF QUESTIONS CAN BE ASKED AT A HEARING?

The questions that an advisor asks a party or a witness need to be relevant to determining whether or not the respondent committed the violations of the code with which the respondent is charged. Questions may not be asked about a survivor's sexual history or behavior except under two specific circumstances: First, questions about a survivor's sexual history can be used if they are asked to show that someone other than the respondent committed the assault that is the subject of the hearing. Second, if the questions are about prior sexual encounters with the respondent and the purpose of the questions is to show consent, then the questions are allowed. Questions that seek information about any party's medical, psychological, and similar records are not permitted unless the party has given written consent.

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)."

IF I FILED A SEXUAL HARASSMENT COMPLAINT, DO I NEED AN ADVISOR?

Complainants and respondents will need an advisor for at least the hearing portion of the Title IX grievance process in order for their advisors to conduct cross-examination of the opposing party and witnesses. In addition to conducting cross-examination, advisors can be very helpful to students during the Title IX process in many ways, including helping students gather and organize evidence, providing emotional support during interviews and hearings, preparing students for hearings, and, now, conducting cross-examination. Schools cannot limit who a student chooses to be their advisor.

Although a student's advisor does not need to be a lawyer, having an attorney who is familiar with a school's hearing procedures, with evidence gathering, and with cross examination can be very helpful. If a student does not have an advisor, a school is obligated to provide one free of charge to a student for the purpose of conducting cross examination.



WHAT CAN I DO TO PREPARE FOR CROSS-EXAMINATION?

To prepare for the hearing, a student and their advisor will need to create questions to ask witnesses and the other party. These questions will vary depending on the facts of the case. Parties and witnesses will also want to prepare to answer questions themselves. It may be helpful for a party and their advisor to create some practice questions to answer, based on what they think the other party's advisor may ask at the hearing. This practice will help the student feel more comfortable during live cross-examination at the hearing.

NVRDC provides free lawyers who act as attorney-advisors to survivors in Title IX cases at DC colleges and universities. If you are the complainant in a Title IX case and you would like to speak to an NVRDC lawyer who could potentially serve as your advisor, please contact 202-742-1727 or email: info@nvrdc.org.



FAQS

What measures could the school put in place to protect my well-being during the cross-examination?

A school is permitted to grant breaks to the parties during a live hearing. A pause is required 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. 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.

How should I answer cross-examination questions?

First, be honest and true to the facts. However, your answers do not need to be in linear or sequential form, and you are not required to recall details with certain level of specificity. In fact, the regulations protect against you being unfairly judge due to inability to recount each specific detail of an incident in sequence because your school's decision-makers must be trained to serve impartially without prejudging the facts.

May a decision-maker at my school consider my statements if I do not submit to cross-examination at a live hearing?

Yes. Even more so, a decision-maker may not draw any inference (negative or otherwise) solely from a party's decision not to participate at the hearing. This is a change in the law as a result of federal litigation from the U. S. District Court for the District of Massachusetts in August 2021.

If I do not submit to cross-examination, what information may a decision-maker at my school consider?

Any statement otherwise permitted under the regulations. For example, a decision-maker might consider relevant statements made during the investigation and emails or text message exchanges between the parties. Also, a decision-maker may consider police reports, Sexual Assault Nurse Examiner documents, medical reports, and other documents as long as they satisfy the regulation's relevance rules.

May a decision-maker at my school rely on the statements I make during cross-examination if I do not answer certain questions posed by the decision-maker?

Yes, cross-examination differs from questions posed by a neutral factfinder 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.

