Title IX Training: Decision-makers & Advisors

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How did we get here?

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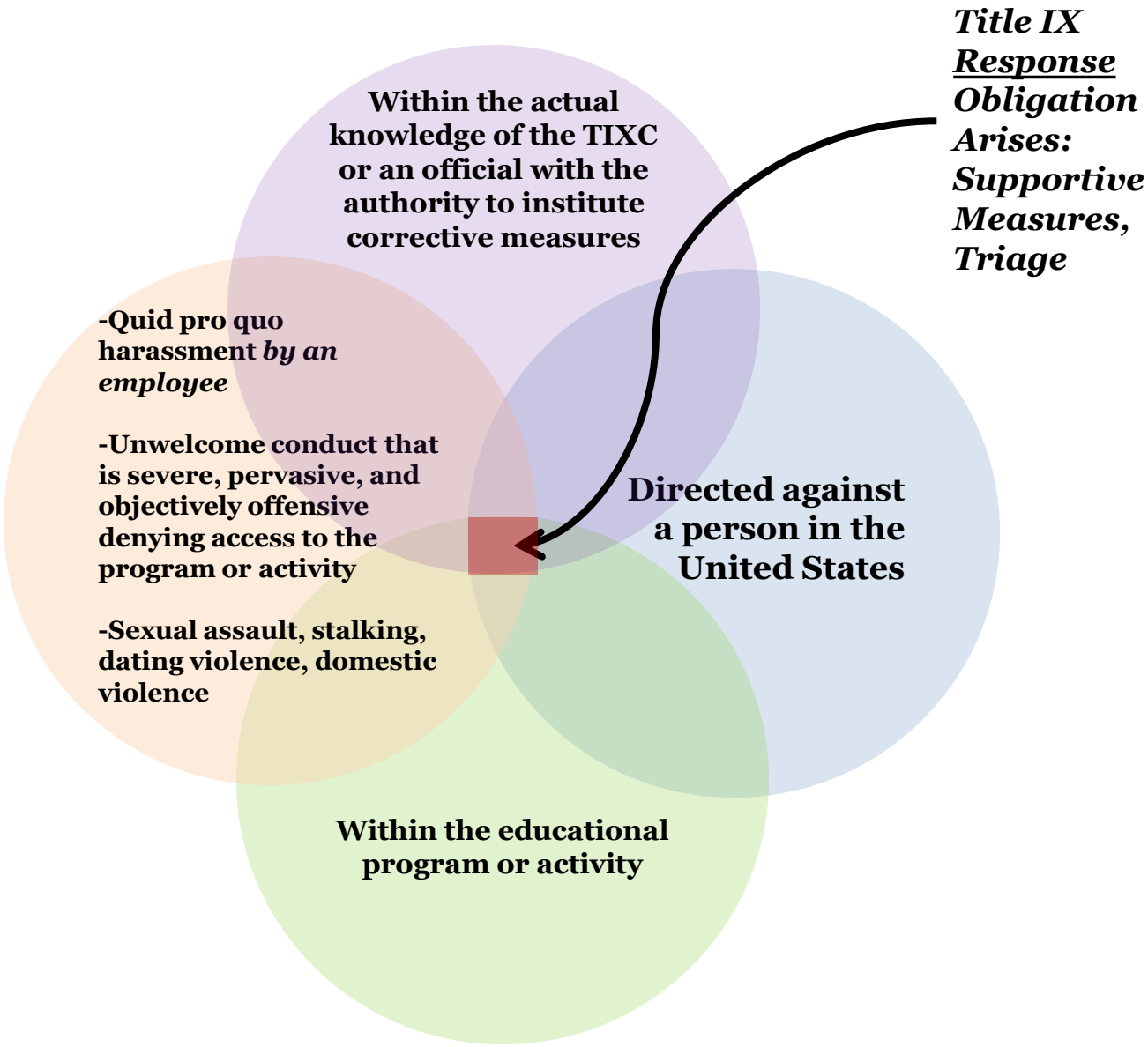

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Response Obligations

Once the institution has **actual knowledge** the Title IX Coordinator **must**:

1. promptly contact the complainant to discuss the availability of supportive measures
2. consider the complainant's wishes with respect to supportive measures,
3. inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and
4. explain to the complainant the process for filing a formal complaint.

§ 106.44(a)

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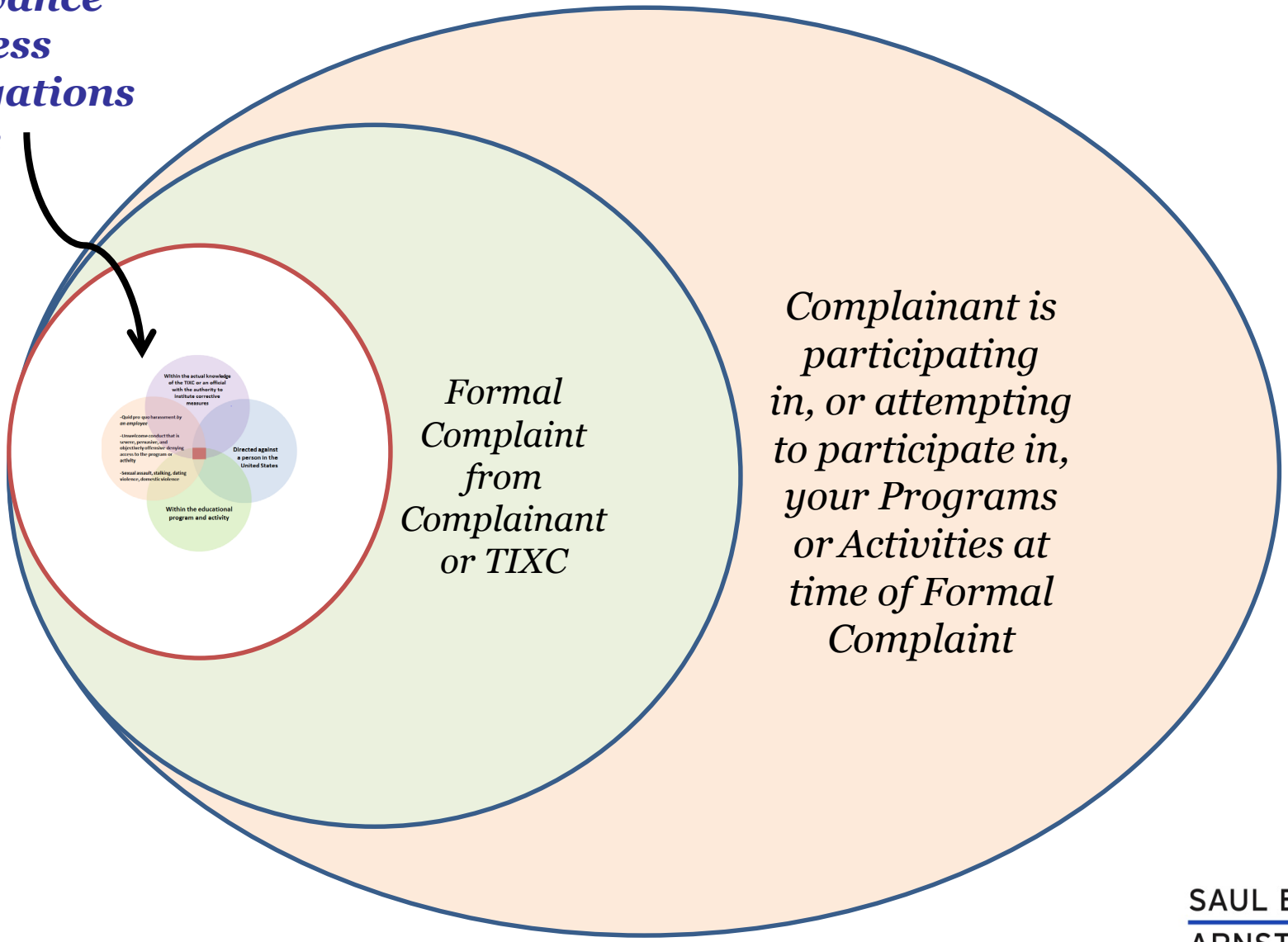
§106.45 Grievance Process Obligations Arise



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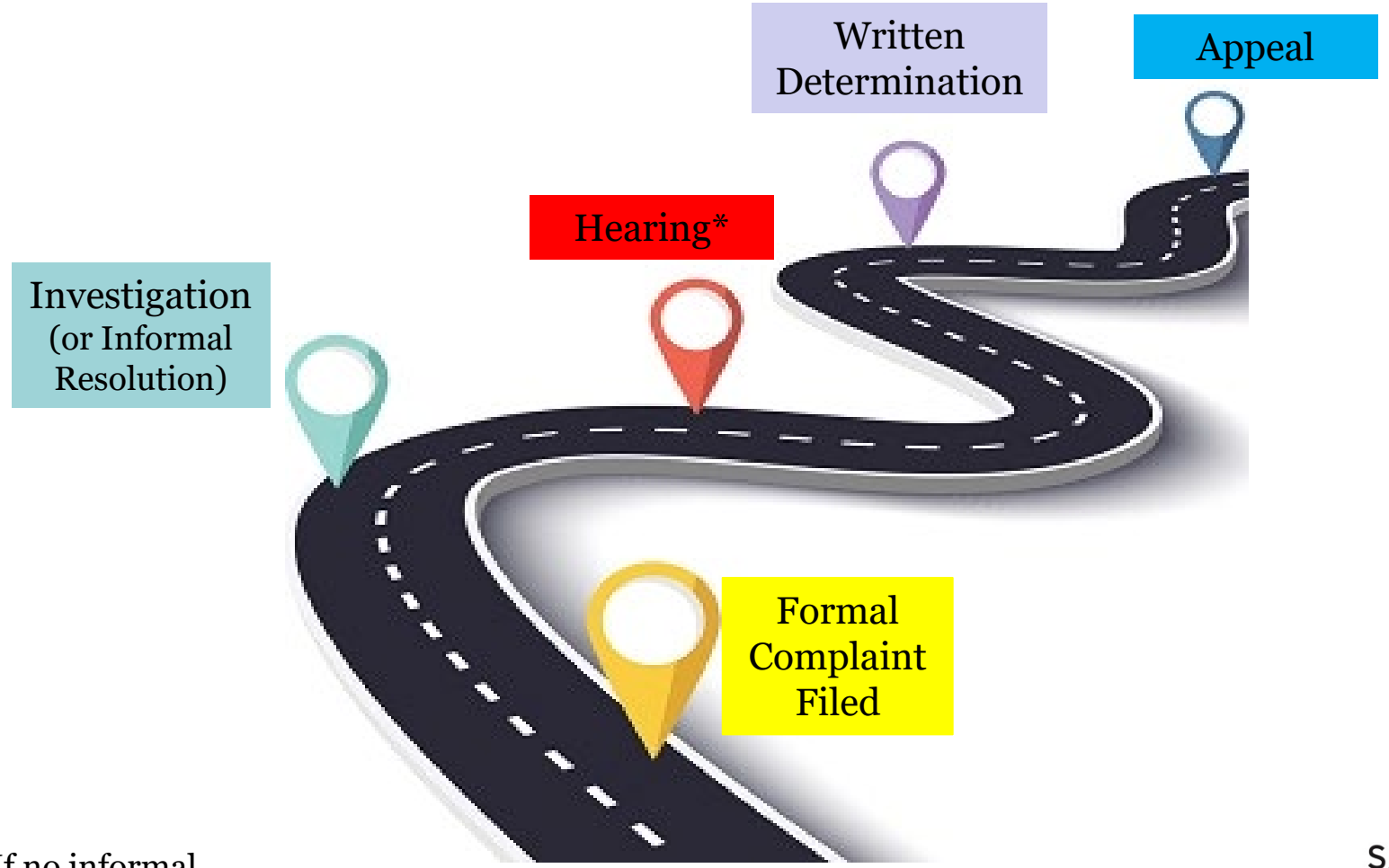
Roadmap: Grievance Process



*If no informal resolution is reached

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Location, purpose, process

THE HEARING

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The Hearing Officer

- Serve impartially
  - Avoid prejudgment of the facts at issue, bias, and conflict of interest
- Oversee the hearing
- Objectively evaluate all relevant evidence
  - Inculpatory & exculpatory
- Independently reach a determination regarding responsibility
  - Cannot give deference to an investigation report

The Hearing

- Live
- With Cross-Examination

  Opportunity for Hearing Officer to ask questions of parties/witnesses, and to observe how parties/witnesses answer questions posed by the other party

- Results in a determination of responsibility

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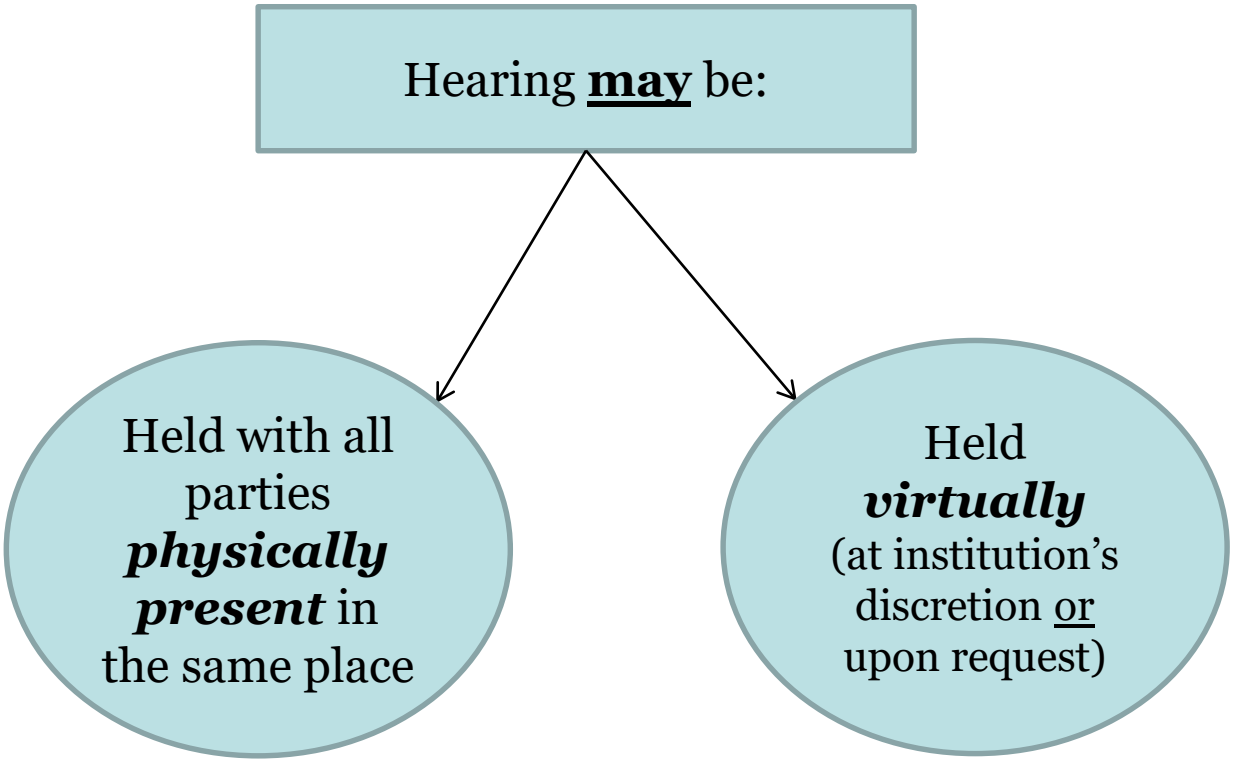
Live Hearing: Location

Hearing must be live



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Live Hearing: Location

- If the hearing is virtual, institutions *must* use technology that allows all parties to **simultaneously see and hear** each other
  - *No telephonic appearances*

§ 106.45(b)(6)(i)

Live Hearing: Technology

- Thoughts to consider if hearing is virtual:
  - Break-out rooms
  - Decision-maker retains ability to mute participants when necessary
  - Pausing when necessary (e.g. relevancy determination)

Living Hearing: Recording

- Institutions must create an **audio or audiovisual recording, or transcript**, of the live hearing. § 106.45(b)(6)(i).
- The recording or transcript must be made available to the parties for inspection and review.
  - "Inspection and review" **does not** obligate an institution to send the parties a copy of the recording or transcript. 85 FR 30392.

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Parties' roles, cross-examination

PRESENTATION OF RELEVANT EVIDENCE

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Presentation of Relevant Evidence

"[T]hroughout the grievance process, a recipient must not restrict the ability of either party . . . to gather and present relevant evidence."

§106.45(b)(5)(iii).

Presentation of Relevant Evidence

"The recipient must make **all evidence** [directly related to the allegations] subject to the parties' inspection and review **available at any hearing to give each party equal opportunity to refer to such evidence** during the hearing, including for purposes of cross-examination."

§106.45(b)(5)(vi)

Relevance Determinations

- The final regulations do not define relevance.
  - "Ordinary meaning of relevance should be applied throughout the grievance process." 85 FR 30247, n. 1018.
  - "Fact determinations reasonably can be made by layperson recipient officials impartially applying logic and common sense." 85 FR 30343
  - Relevant evidence must include both inculpatory and exculpatory evidence. 85 FR 30314.

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Relevance Determinations

rel·e·vant | \ ˈre-lə-vənt \ adj.

a: having significant and demonstrable bearing on the matter at hand

b: affording evidence tending to prove or disprove the matter at issue or under discussion

// relevant testimony

Relevance Determinations

- The following evidence is always considered "**irrelevant**" (or otherwise not admissible):
  - Any party's medical, psychological, and similar treatment records without the party's voluntary, written consent;
  - Any information protected by a legally recognized privilege without waiver;
  - Complainant's sexual predisposition or prior sexual behavior (subject to two exceptions); and
  - Party or witness statements that have not been subjected to cross-examination at a live hearing.

85 FR 30293 n. 1147

Rape Shield Provision

- Prohibits questions or evidence about a complainant's prior **sexual behavior**, with two exceptions. *See* 34 CFR § 106.45(b)(6).
- Deems all questions and evidence of a complainant's **sexual predisposition** irrelevant, with no exceptions. *See* 85 FR 30352.

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Rape Shield Provision

- Intended to protect **complainants** from harassing, irrelevant questions.
- Does not apply to respondents
  - Questions and evidence about a respondent's sexual predisposition or prior sexual behavior are not subject to any special consideration, but rather must be evaluated based on relevancy, like any other question or evidence.

Rape Shield Provision

- What is "sexual predisposition"?
  - No definition in regulations or preamble
  - Advisory comment to Fed. R. Evidence 412 defines sexual predisposition as "the victim's mode of dress, speech, or life-style."

Rape Shield Provision

- What is "sexual behavior"?
  - No definition in final regulations or preamble.
  - Advisory comments to Fed. R. Evid. 412 explains that sexual behavior "connotes all activities that involve actual physical conduct, i.e., sexual intercourse and sexual contact, or that imply sexual intercourse or sexual contact."

Rape Shield Provision

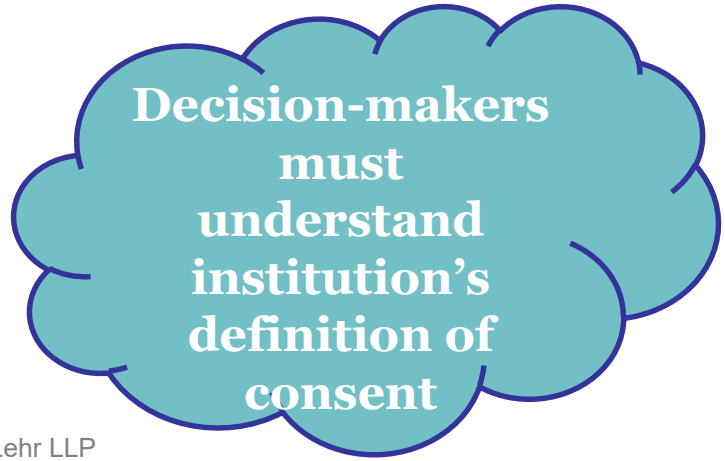
- There are two exceptions where questions or evidence of past sexual behavior are allowed:
- **Exception 1**: Evidence of prior sexual behavior is permitted if offered to prove someone other than the respondent committed the alleged offense.

Rape Shield Provision

- **Exception 2**: Evidence of prior sexual behavior is permitted if it is specifically about the complainant and the respondent **and** is offered to prove consent. 34 CFR § 106.45(b)(6).
- Does not permit evidence of a complainant's sexual behavior with anyone other than the respondent.

Rape Shield Provision

- No universal definition of "consent."
- Each institution is permitted to adopt its own definition of "consent."
- Thus, the scope of the second exception to the rape shield provision will turn, in part, on the definition of "consent" adopted by the institution.



Relevance: In Conclusion

- "The final regulations do not allow [institutions] to impose rules of evidence that result in exclusion of relevant evidence" 85 FR 30336-37
- "The decision-maker must consider relevant evidence and must not consider irrelevant evidence" 85 FR 30337

Relevance: In Conclusion

- At the hearing, the decision-maker may apply "logic and common sense" to reach any conclusions but must explain their rationale
- No "lengthy or complicated explanation" is necessary
  - For example, "the question is irrelevant because it calls for prior sexual behavior information without meeting one of the two exceptions"
  - For example, "the question asks about a detail that is not probative of any material fact concerning the allegations"

Challenging Relevancy Determinations

- Parties **must** be afforded the opportunity to challenge relevance determinations. 85 FR 30249.
  - Erroneous relevancy determinations, if they affected the outcome of the hearing, may be grounds for an appeal as a "procedural irregularity"
- Institutions may (but are not required to) allow parties or advisors to discuss the relevance determination with the decision-maker during the hearing. 85 FR 30343.

Relevance and the role of advisors

CROSS-EXAMINATION

Cross-Examination

Cross-examination: Advisor asks other party and witnesses **relevant questions** and follow-up questions, including those challenging credibility

Cross-Examination

- Decision-maker must permit each party's **advisor** to **conduct cross-examination** of the other party and all witnesses
- Cross-examination may **not** be conducted by the parties themselves (only advisors)
- If a party does not have an advisor present at the hearing to conduct cross-examination, the institution must provide an advisor without fee or charge

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Advisor Required

- Parties may have advisors throughout the process, and **must** have them at the hearing.
  - Advisor of choice
  - If a party does not select an advisor of choice, institution must assign an advisor for purposes of the hearing. 34 CFR § 106.45(b)(6)(i).

Advisor Required

- Institutions cannot:
  - impose any limit on who a party selects as an advisor of choice;
  - set a cost "ceiling" for advisors selected by parties; or
  - charge a party a cost or fee for an assigned advisor. 85 FR 30341.

Advisor Required

- Regs **do not** preclude a rule regarding advance notice from parties about intent to bring an advisor of choice to the hearing. 85 FR 30342.
- If a party arrives at the hearing without an advisor, then *the institution would need to stop the hearing as necessary to assign an advisor to that party. Id.*

Role of Advisor

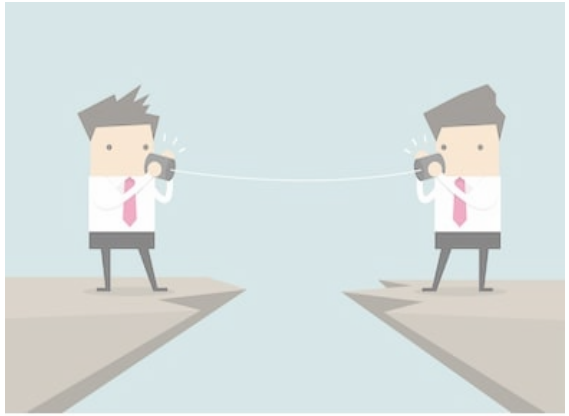
- Advisor must conduct **cross-examination** on behalf of party. § 106.45(b)(6)(i).
  - Whether advisors also may conduct **direct examination** is left institution's discretion, but any rule to this effect must apply equally to both parties. 85 FR 30342.
- Cross must be conducted directly, orally, and in real time by the party's advisor and never by a party personally. § 106.45(b)(6)(i).

Role of Advisor

- Advisor may serve as proxy for party, advocate for party, or neutrally relay party's desired questions. 85 FR 30340.
- Whether a party views an advisor of choice as 'representing' the party during a live hearing or not, [§ 106.45(b)(6)(i)] only requires recipients to permit advisor participation on the party's behalf *to conduct cross-examination*; not to 'represent' the party at the live hearing." 85 CFR 30342

Role of Advisor

- Cross "on behalf of that party" is satisfied where the advisor poses questions on a party's behalf. 85 FR 30340.
- Regulations impose no more *obligation* on advisors than relaying a party's questions to the other parties or witnesses. 85 FR 30341.



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Role of Advisor

- Assigned advisors are not required to assume that the party's version of events is accurate, but still must conduct cross-examination on behalf of the party. 85 FR 30341.

Qualifications of Advisor

- **No** particular expectation of skill, qualifications, or competence. 85 FR 30340.
- Advisors are **not** subject to the same impartiality, conflict of interest, or bias requirements as other Title IX personnel. *Id.*

Qualifications of Advisors

- Institutions may not impose training or competency assessments on advisors of choice. 85 FR 30342.
- Regulations do not preclude institution from training and assessing the competency of its own employees whom it appoint as assigned advisors. *Id.*

Assigning Advisors

- Institutions are not required to pre-screen a panel of assigned advisors for a party to choose from at the live hearing. 85 FR 30341.
- Institution is not required to (but may) train assigned advisors. *Id.*
- Assigned advisor may be, but is not required to be, an attorney (even if other party's advisor is an attorney). *Id.*; 85 F.R. 30332.

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Qualifications of Advisors

- If you decide you want to offer to train advisors of choice (whether internal or external) or require training of assigned advisors, topics to consider include:
  - *Scope of role*
  - *Relevance (incl. exceptions)*
  - *How questions are formulated*
  - *Hearing procedures*
  - *Rules of Decorum*

Qualifications of Advisor

- Department will not entertain ineffective assistance of counsel claims. 85 FR 30340.
- Department does not view advisors conducting cross as engaging in the unauthorized practice of law.

Advisor at the Live Hearing

- Party cannot "fire" an assigned advisor during the hearing. 85 FR 30342.
- If assigned advisor refuses to conduct cross on party's behalf, then institution is obligated to:
  - Counsel current advisor to perform role; or
  - Assign a new advisor. *Id.*

Advisor at the Live Hearing

- If a party refuses to work with an assigned advisor who is willing to conduct cross on the party's behalf, then that party has waived right to conduct cross examination. 85 FR 30342.

Mechanics of Questioning

- Questions asked → Must be **relevant**
  - "Ordinary meaning of relevance." 85 FR 30247, n. 1012.
- Decision-maker determines whether question is relevant
  - And must explain its reasoning if a question is deemed not relevant. 85 FR 30343.

Questioning In Practice

- **Step 1, Question**: Advisor asks the question.
- **Step 2, Ruling**: Decision-maker determines whether question is relevant.
    - If not relevant, decision-maker must explain reasoning to exclude question.
    - If relevant, **Step 3**: Question must be answered.

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Options for Streamlining Hearing/Cross

- Decision-maker may conduct direct exam
- Pre-hearing meeting to discuss/resolve hearing procedures in advance, e.g.:
  - Scheduling;
  - Identifying advisors and witnesses;
  - Witness and advisor participation at the live hearing;

Options for Streamlining Hearing/Cross

- Determining relevance of questions/ evidence in advance as ***option*** for parties;
- Decorum rules to be followed at the hearing;
- Technology that will be used, and how to use that technology;
- Timing of the hearing and each subpart.

Limiting Advisor's Role

- Institutions may apply rules (equally applicable to both parties) restricting advisor's active participation in non-cross examination aspects of the hearing or investigation process. 34 CFR § 106.45(b)(5)(iv).
  - Department declines to specify what restrictions on advisor participation may be appropriate. 85 FR 30298.

Decorum

- An institution cannot forbid a party from **conferring** with the party's advisor. 85 FR 30339.
- *But* institution does have discretion to adopt rules governing the conduct of hearings.
- Purpose of rules re: decorum is to make the hearing process respectful and professional

Examples of Optional Rules of Decorum

- Rules governing the timing and length of breaks requested by parties or advisors.
- Instructions that the parties and advisors remain seated at all times during the hearing, including during cross-examination.

Examples of Optional Rules of Decorum

- Requiring any participants in the hearing not involved in current questioning to refrain from disrupting the hearing, making gestures, facial expressions, audible comments, or the like, as manifestations of approval or disapproval during any testimony.

Examples of Optional Rules of Decorum

- Prohibiting a list of behaviors like yelling, verbal abuse, disruptive behavior, interrupting or talking over one another, name calling, or using profane or vulgar language (except where such language is relevant).

Examples of Optional Rules of Decorum

- Setting a rule that when cross-examining a party or witness, advisors shall not repeat, characterize, editorialize, or otherwise state any response to the answer given by the party or witness except to ask a follow up question to elicit relevant evidence.

Decorum

- If **advisor of choice** refuses to comply with a recipient's rules of decorum → institution may provide that party with an assigned advisor to conduct cross. 85 FR 30342.
- If **assigned advisor** refuses to comply with a recipient's rules of decorum → institution may provide that party with a different assigned advisor to conduct cross. *Id.*

Decorum

- Institutions are free to enforce their own codes of conduct with respect to conduct other than Title IX sexual harassment. 85 FR 30342.
- If a party or advisor breaks code of conduct during a hearing, then the institution retains authority to respond in accordance with its code, so long as the recipient is also complying with all obligations under § 106.45. *Id.*

Impact of declining to submit to cross-examination

"HEARSAY"

Hearsay

- If a party or witness does not submit to cross-examination at the live hearing, then the **decision-maker cannot rely on any statement** of that party or witness in reaching a determination regarding responsibility.
- But, decision-makers cannot draw an inference as to responsibility based on a party or witness's refusal to answer.

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"Statements"

- "Statements" has its ordinary meaning
- "Statements" do not include evidence (such as videos) that do not constitute a person's intent to make factual assertions
- Doesn't apply to evidence that doesn't contain statements
- Police reports, SANE reports, medical reports, other documents and records may not be relied upon to the extent they contain statements of a party who has not been cross-examined
- Not limited to statements made during the hearing

85 FR 30349

Hearsay

- Hearsay prohibition **does not apply** if the Respondent's statement, itself, constitutes the **sexual harassment at issue**.
  - The verbal conduct does not constitute the making of a factual assertion to prove or disprove the allegations of sexual harassment because the statement itself is the sexual harassment.

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Hearsay

Exclusion of statements does not apply to a party or witness' refusal to answer questions ***posed by the decision-maker***. 85 FR 30349.

If a party or witness refuses to respond to a decision-maker's questions, the decision-maker is not precluded from relying on that party or witness's statements (may not rely only if the party or witness does *not submit to cross-examination* which is done by the advisors)

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Retaliation

- A party cannot "wrongfully procure" another party's absence
  - If institution has notice of that misconduct, it must remedy retaliation, which may include rescheduling the hearing with safety measures.

The Hearing Decision-Maker's Determination

THE OUTCOME

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Outcome Determination

At the conclusion of the hearing, the Decision-maker must make a determination regarding responsibility

- Based on (at institution's discretion): Either the preponderance of the evidence or clear and convincing evidence standard. ***Your policy informs!***
  - Must apply the same standard to all Formal Complaints of sexual harassment – including those involving students, employees, faculty, and third parties. §106.45(b)(1)(vii), §106.45(b)(7)(i)

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Assessing Evidence

- Decision-maker assigns weight & credibility to evidence
  - Ex. Where a cross-examination question is relevant, but concerns a party's character, the decision-maker *must consider* the evidence, but may proceed to *objectively evaluate* it by analyzing whether the evidence *warrants a high or low level of weight or credibility*
    - Evaluation must treat the parties equally by not, for instance, automatically assigning higher weight to exculpatory character evidence than to inculpatory character evidence

Outcome Determination

- **Important considerations:**
  - The Respondent must be **presumed not responsible** for the alleged conduct until the determination regarding responsibility is made. §106.45(b)(1)(iv).
  - Outcome must be based on an objective evaluation of all **relevant evidence**—including both inculpatory and exculpatory—and not taking into account the relative "skill" of the parties' advisors. §106.45(b)(1)(ii); 85 FR 30332
  - **Credibility determinations** may not be based on a person's status as a Complainant, Respondent, or witness. §106.45(b)(1)(ii).

Presumption of Non-Responsibility

- The respondent is **presumed not responsible** for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process. §106.45(b)(1)(iv).
- The decision-maker cannot draw any inference about the responsibility or non-responsibility of the respondent solely based on a party's failure to appear or answer cross-examination questions at a hearing. §106.45(b)(6)(i).

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Notice of Decision

- Decision-maker must issue a **written determination regarding responsibility** and provide the written determination to the parties *simultaneously*. §106.45(b)(7)(ii)-(iii)
- The determination regarding responsibility becomes final either on the date that the recipient provides the parties with the written determination of the result of the appeal, if an appeal is filed, or if an appeal is not filed, the date on which an appeal would no longer be considered timely. §106.45(b)(7)(iii)

Written Determination - Key Elements

1. **Identification of the allegations** alleged to constitute sexual harassment as defined in § 106.30;
2. **The procedural steps taken** from receipt of the formal complaint through the determination regarding responsibility;
3. **Findings of fact** supporting the determination;
4. **Conclusions** regarding the application of the **recipient's code of conduct** to the facts;
5. The decision-maker's **rationale for the result** of <u>each</u> allegation, including rationale for the determination regarding responsibility;
6. **Any disciplinary sanctions** the recipient imposes on the respondent, and whether the recipient will provide **remedies** to the complainant; and
7. Information regarding the **appeals process**. § 106.45(b)(7)(ii)

Written Determination – Sanctions and Remedies

- The decision-maker(s) written determination **must** include a statement of, and rationale for, the result as to each allegation, including any **disciplinary sanctions imposed on the respondent**, and ***whether*** **remedies** will be provided by the recipient **to the complainant**. §106.45 (b)(7)(ii)(E).

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Equitable treatment ≠ "Strictly equal treatment"

- "[W]ith respect to remedies and disciplinary sanctions, strictly equal treatment of the parties does not make sense . . ." 85 FR 30242.
- To treat the parties **equitably**, a complainant must be provided with remedies where the outcome shows the complainant was victimized by sexual harassment; and a respondent must be afforded a fair grievance process before disciplinary sanctioning. *Id.*

Remedies – Purpose

- Remedies must be designed to "restore or preserve equal access to the recipient's education program or activity." §106.45(b)(1)(i).

Remedies v. Sanctions

- The Department does not require or prescribe disciplinary sanctions after a determination of responsibility and leaves those decisions to the discretion of recipients, but recipients must effectively implement remedies. 85 FR 30063

Remedies Defined

- Final regs. do not provide a definition of "remedies."
- May include the same services described as "supportive measures." *See* 34 CFR § 106.30.
  - Unlike supportive measures, though, remedies may in fact burden the respondent, or be punitive or disciplinary in nature. § 106.45(b)(1)(i); 85 FR 30244.

Implementing Remedies

- The Title IX Coordinator is responsible for the "effective implementation of remedies." 85 FR 30276.
- When remedies are included in the final determination, the complainant then communicates **separately** with the Title IX Coordinator to discuss appropriate remedies. 85 FR 30392.

Simultaneous Delivery

- The recipient must **provide the written determination to the parties simultaneously.**

- The determination regarding responsibility becomes final either on the date that the recipient provides the parties with the written determination of the result of the appeal, if an appeal is filed, or if an appeal is not filed, the date on which an appeal would no longer be considered timely.

106.45(b)(7)(iii)

After the Hearing & Notice of Decision

APPEALS

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Mandatory & Equal Appeal Rights

- Institutions must offer both parties an appeal from a **determination regarding responsibility** and from an institution's **dismissal of a formal complaint** or any allegations therein (whether or not it is a mandatory or discretionary dismissal). §106.45(b)(8)(i)
- Parties must have an **equal opportunity** to appeal any dismissal decision

§ 106.45(b)(8)(i)-(ii)

Grounds for Appeals

- The University **must offer both parties** an appeal from a determination regarding responsibility , and from a recipient's dismissal of a formal complaint or any allegations therein on the following bases:
  - Procedural irregularity that affected the outcome of the matter;
  - 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
  - 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 individual complainant or respondent that affected the outcome of the matter.
- A recipient **may offer** an appeal equally to both parties on additional bases.

§ 106.45(b)(8)(i)-(ii)

Requirements for Appeals

Requirements for Appeals:

- Notify the other party in writing when an appeal is filed and implement appeal procedures equally for both parties;
- Ensure that the decision-maker(s) for the appeal is not the same person as the decision-maker(s) that reached the determination regarding responsibility or dismissal, the investigator(s), or the Title IX Coordinator;
- Ensure that the decision-maker(s) for the appeal complies with the standards set forth in paragraph (b)(1)(iii) of this section;
- Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome [of the initial determination];
- Issue a written decision describing the result of the appeal and the rationale for the result; and
- Provide the written decision simultaneously to both parties.

§106.45(b)(8)(iii)

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Appeals: Written Determination

- Appellate Decision-maker must issue a **written decision** describing the result of the appeal and the rationale for the result
  - "[R]easoned written decisions describing the appeal results." 85 FR 30397.
- Written decision must be issued simultaneously to both parties.

§106.45(b)(8)(iii)