



St. Charles Borromeo Seminary

Title IX Sexual Harassment Training: The Grievance Process

June 14, 2021

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& LEHR^{LLP}**

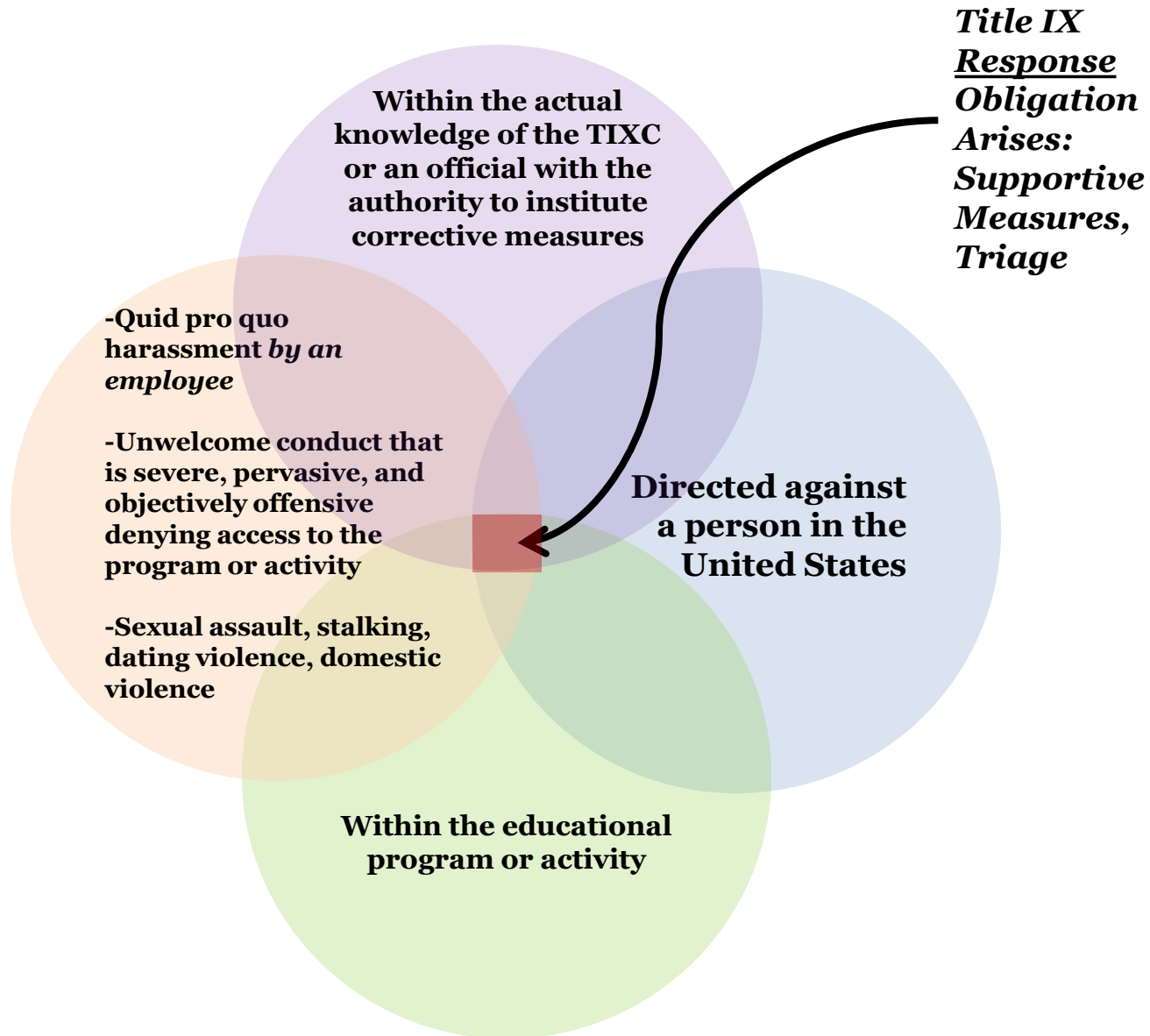


How did we get here?

REFRESHER

The Foundation: Principle #1

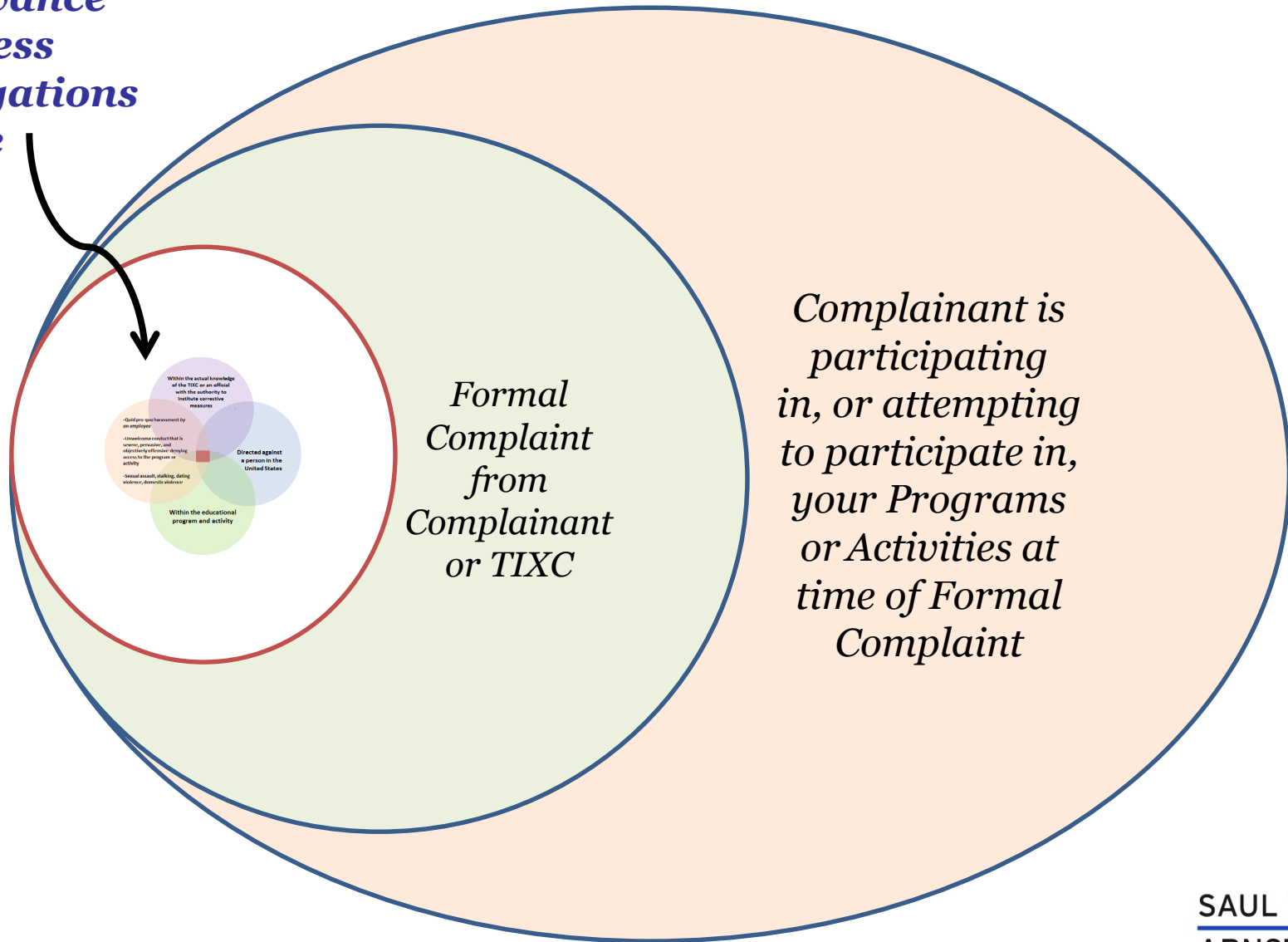
If you have actual knowledge of sexual harassment that occurred in your education program or activity against a person in the United States, then you must respond promptly in a manner that is not deliberately indifferent.



The Foundation: Principle #2

If you receive a formal complaint of sexual harassment signed by a complainant who is participating in or attempting to participate in your education program or activity, then you must follow a grievance process that complies with Section 106.45.

**§106.45
Grievance
Process
Obligations
Arise**

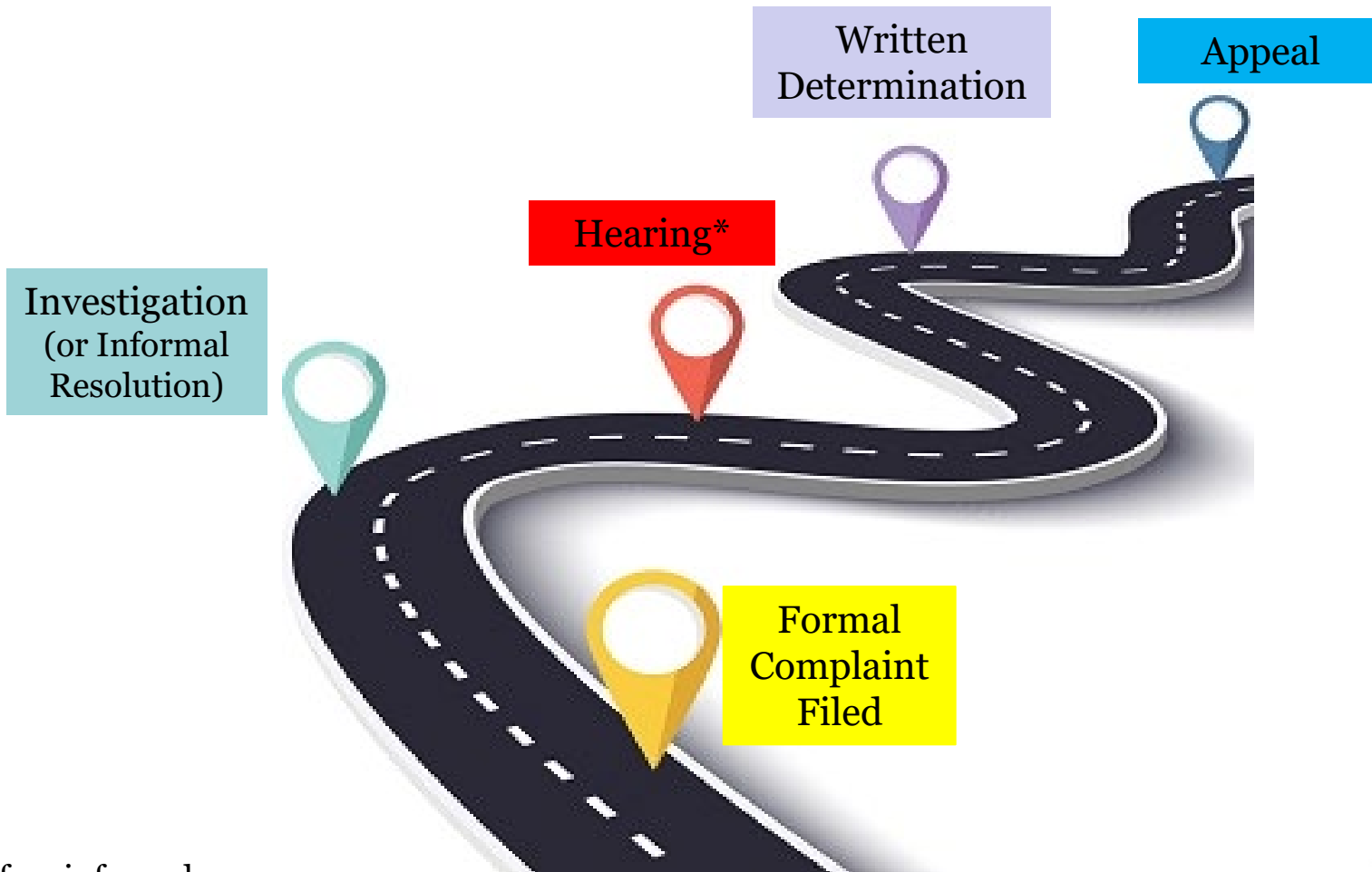




Part One: formal complaint through notice of allegations

THE GRIEVANCE PROCESS

Roadmap: Grievance Process



*If no informal resolution is reached

Formal Complaint

What is Formal Complaint?

“[A] document

- filed by a complainant or signed by the Title IX Coordinator
- alleging sexual harassment against a respondent and
- requesting that the recipient investigate the allegation of sexual harassment.”

§ 106.30

Formal Complaint

When to file:

- No set time limit from date of allegations to filing (no statute of limitations)
- “[The Department] decline[s] to impose a requirement that formal complaints be filed ‘without undue delay’”
 - Doing so would be “unfair to complainants” because “for a variety of reasons complainants sometimes wait various periods of time before desiring to pursue a grievance process in the aftermath of sexual harassment” 85 FR 30127
- At the time the complaint is filed the complainant **must be participating in or attempting to participate in** the recipient’s education program or activity in order
 - *But, “the Rule permits Title IX Coordinators to sign a formal complaint regardless of whether a complainant is ‘participating or attempting to participate’ in the school’s education program or activity.” (9/4/2020 Q&A, Question 5)*

Written Notice of Allegations

- ❑ **To Whom?**
 - ❑ “parties who are known”
- ❑ **What to Include?**
 - ❑ Identities of parties involved in incident
 - ❑ Conduct allegedly constituting sexual harassment
 - ❑ Date and location of alleged incident
 - ❑ Statement that respondent is presumed not responsible; determination regarding responsibility will be made at conclusion of process.
 - ❑ Right to an advisor
 - ❑ Right to inspect and review
 - ❑ Statement of policy re false allegations
- ❑ **When to Send?**
 - ❑ “With sufficient time to prepare a response before any initial interview”
 - ❑ Update as needed throughout investigation

106.45(b)(2)(B)

Informal Resolution

Alternative Resolution Available

- At any time prior to reaching a determination regarding responsibility, we may facilitate an informal resolution process that does not involve a full investigation and adjudication
 - *May not require the parties to participate in an informal resolution process; and*
 - *May not offer an informal resolution process unless a formal complaint is filed*

Informal Resolution

Alternative Resolution Requirements

- Any party has the right to withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint
- *May not offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student*

Informal Resolution

Alternative Resolution Requirements

To facilitate an alternative resolution, we must:

- Obtain the parties' voluntary written consent; and
- Provide written notice to the parties disclosing:
 - The allegations;
 - The requirements of the informal resolution process, including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations; and
 - Any consequences resulting from participating in the informal resolution process, including records that will be maintained or could be shared.



Part Two: The investigation

THE GRIEVANCE PROCESS

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Investigation

The institution **must investigate** allegations of a **Formal Complaint**

- *Remember: Formal Complaints request that the “recipient investigate the allegation of sexual harassment.”*

§ 106.30

Investigation: The Basics

- Trained Investigator(s)
- Written Notice of Allegations (*update if necessary*)
- Written Notice of any investigative interview(s)
- Burden on institution/investigator to collect evidence
- Both Parties = Equal Advisor Rights (*can be an attorney*)
- Both Parties = Right to Present Witnesses/Evidence (*including “experts”*)
- Voluntary, Written Consent to Access Medical/Mental Health Records
- Both Parties = Right to Inspect & Review Any Evidence “Directly Related”
- Both Parties = Meaningful Opportunity to Respond to Evidence
- Investigative Report = Fairly Summarize Relevant Evidence
- Both Parties = Right to Review & Respond to Investigative Report
- Retain Records for 7 years

Notice of Meetings

To Whom?

- The party/witness to be interviewed
- Any identified advisor for that party

What to Include?

- Date & Location of interview
- Purpose of Interview

When to Send?

- With “sufficient” lead time for the party to prepare

106.45(b)(5)

Rights of the Parties

- ❑ Receive written notices (i.e. notice of allegations, notice of interviews)
- ❑ Be accompanied by an advisor of choice
- ❑ Discuss the allegations under investigation
- ❑ Present witnesses & evidence (inculpatory & exculpatory)

Step One: Gathering Evidence

The burden of proof and the **burden of gathering evidence** sufficient to reach a determination regarding responsibility rests on the recipient and not on the parties.

§ 106.45(b)(5)(i)

Step One: Gathering Evidence

- The Investigator must gather **all available evidence sufficient to reach a determination regarding responsibility.**
- The investigator should:
 - undertake a thorough search,
 - for relevant facts and evidence,
 - while operating under the constraints of completing the investigation under designated, reasonably prompt timeframes,
 - and without powers of subpoena.

85 FR 30292

Step One: Gathering Evidence

“Cannot require, allow, rely upon, other use . . . Evidence that constitute[s] or seek[s] disclosure of, information protected under a **legally recognized privilege**, unless the person holding such privilege has waived the privilege”

Step One: Gathering Evidence

- **Cannot** access, consider, disclose, or otherwise use a party's records 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 party provides voluntary, written consent.

§ 106.45(b)(5)(i)

Step Two: Review of and Response to Evidence

- Both parties must be given equal opportunity to *inspect and review* any evidence obtained during the investigation that is *directly related* to the allegations in the formal complaint
- Evidence must be sent to each party, and their advisors (if any), in an electronic format or hard copy

§ 106.45(b)(5)(vi)

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Step Two: Review of and Response to Evidence

- Evidence that must be shared includes:
 - evidence upon which recipient does not intend to rely in reaching a responsibility determination
 - Inculpatory & exculpatory evidence, whether obtained from a party or other source
- *Note: all of the evidence that subject to review and response must be made available at the hearing*

Step Two: Review of and Response to Evidence

- Parties must have at least 10 days to respond in writing to the “directly related” evidence (if they so choose) to:
 - Clarify ambiguities or correcting where the party believes the investigator did not understand
 - **Assert which evidence is “relevant” and should therefore be included in the Investigative Report**
- The investigator must consider any written responses before finalizing the investigative report

Step Three: The Investigative Report

After the parties have had the opportunity to inspect, review, and respond to the evidence, the Investigator must –

- Create an investigative report that **fairly summarizes relevant evidence** and,
- At least 10 days prior to a hearing, send the report to each party and their advisor (if any) for their review and written responses.
 - (Hard copy or electronic format)

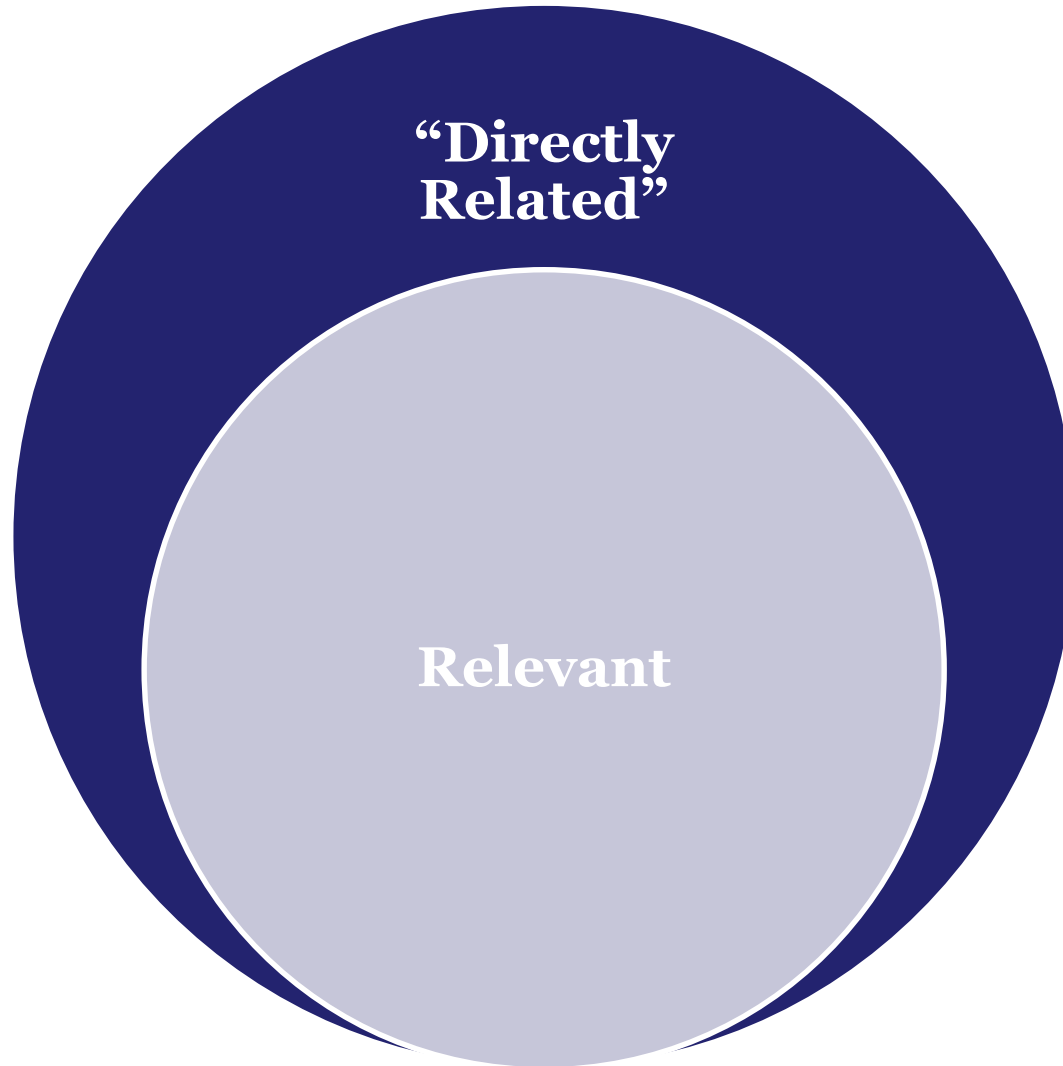
§ 106.45(b)(5)(vii)

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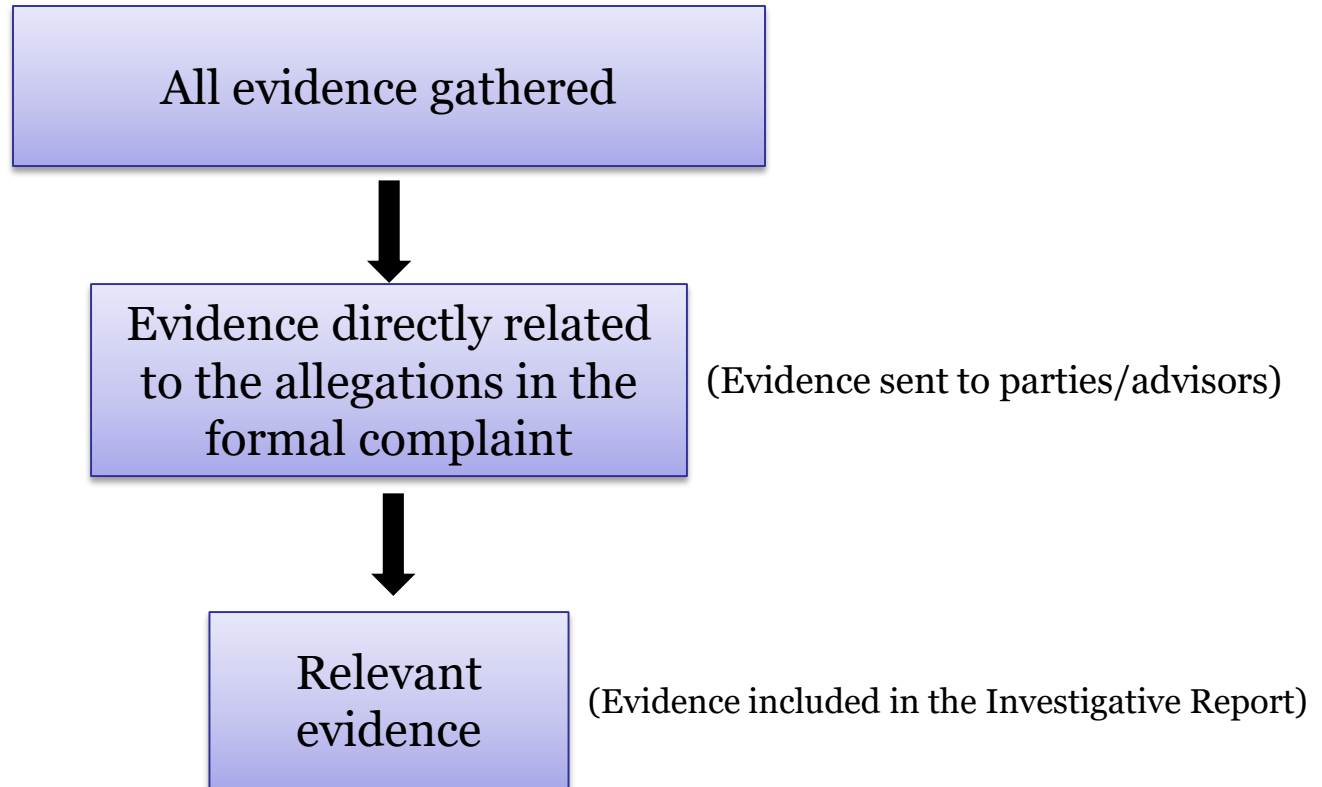
What is Relevant Evidence?

“The requirement for recipients to summarize and evaluate relevant evidence, . . . appropriately directs recipients to focus investigations and adjudications on *evidence pertinent to proving whether facts material to the allegations under investigation are more or less likely to be true* (i.e., on what is relevant).”

85 FR 30294



Evidence



Prohibition on Exclusion of Relevant Evidence

May not:

- Adopt an “undue/unfair prejudice” rule. 85 FR 30294
- Adopt a rule prohibiting character, prior bad acts, evidence. 85 FR 30248
- Exclude certain types of relevant evidence (*e.g.* lie detector test results, or rape kits). 85 FR 30294

What is Not Relevant?

- The following is considered **per se not relevant** (or is otherwise excluded):
 - Complainant's prior sexual behavior (subject to two exceptions) or predisposition;
 - Any party's medical, psychological, and similar treatment records without the party's voluntary, written consent; and
 - Any information protected by a legally recognized privilege unless waived.

85 FR 30293 n. 1147; 9/4/2020 Q&A, Question 7

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.

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.



Investigators &
Hearing Officers
must
understand
definition of
consent

“Rape Shield” Provision

- “[Q]uestions and evidence subject to the rape shield protections are ‘not relevant,’ and therefore **the rape shield protections apply wherever the issue is whether evidence is relevant or not.**
- [The regulation] requires review and inspection of the evidence ‘directly related to the allegations’ that universe of evidence is ***not screened for relevance***, but rather is measured by whether it is ‘directly related to the allegations.’
- **However, the 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.”**

85 FR 30353; *see also* 1/15/2021 Q&A, Question 16 (“evidence about a complainant’s sexual predisposition would never be included in the investigative report and evidence about a complainant’s prior sexual behavior would only be included if it meets one of two narrow exceptions.”)

Challenges to Investigator's Relevancy Determinations

“A party who believes the investigator reached the wrong conclusion about the relevance of the evidence **may argue** again to the decision-maker (i.e., as part of the party's response to the investigative report, and/or at a live hearing) about whether the evidence is actually relevant[.]”

85 FR 30304

Step Three: The Investigative Report

“[T]hese final regulations do not prescribe the contents of the investigative report **other than specifying its core purpose of summarizing relevant evidence.**” 85 FR 30310

✓ Good practice to include:

- Summary of allegations
- Policy provisions potentially implicated
- Timeline of investigative process
- Description of the procedural steps taken*
- Summary of relevant evidence
- Summary documents collected/reviewed
- Summary of witnesses interviewed
- Any unsuccessful efforts to interview
- Any unsuccessful efforts to obtain documents
- Parties’ required responses

The Investigative Report

- “The Title IX regulations . . . do not prescribe how or when the investigative report should be given to the decision-maker”
- *However*, “the decision-maker will need to have the investigative report and the parties’ responses to same, prior to reaching a determination regarding responsibility.”

1/15/2021 Q&A, Question 12



Part Three: The hearing

THE GRIEVANCE PROCESS

The Hearing Officer

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

The Hearing

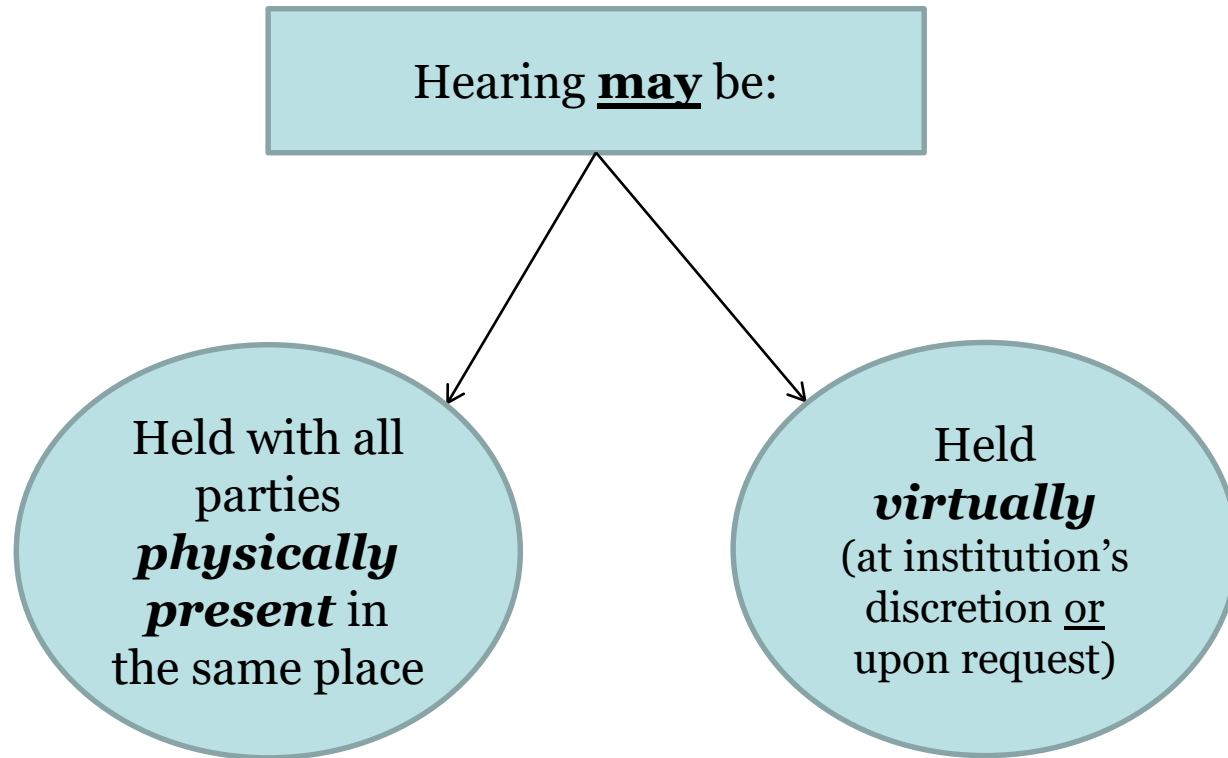
- Live
- With Cross-Examination

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

Live Hearing: Location

Hearing must be live



Live 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.



Parties' roles, cross-examination

PRESENTATION OF RELEVANT EVIDENCE

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)

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Relevance & 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.

Relevance Determinations

rel·e·vant | \ 're-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

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.

Relevance & the Investigative Report

“The Title IX regulations do not deem the investigative report itself, or a party’s written response to it, as relevant evidence that a decision-maker **must** consider, and the decision-maker has an **independent obligation** to evaluate the relevance of available evidence, including evidence summarized in the investigative report, and to consider all other evidence.”

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.
 - 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.
- Erroneous relevancy determinations, if they affected the outcome of the hearing, may be **grounds for an appeal** as a “procedural irregularity”

A Note on Witnesses

- Parties have an “equal opportunity” to present witnesses
 - So, *the decision-maker cannot request the presence of only those witnesses the decision-maker deems necessary*
 - Witnesses cannot, however, be compelled to participate in the grievance process

9/4/2020 Q&A, Question 14

- The investigator *might* be a witness
 - *Sneak preview*: The investigator “may not testify as to statements made by others, including the complainant or respondent, if the individual who made a statement does not submit to cross-examination”

1/15/2021 Q&A, Question 6



Relevance and the impact of declining to participate

CROSS-EXAMINATION

Cross-Examination

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

“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.
 - *If a party’s advisor asks a relevant question of another party or a witness, and the party/witness declines to respond to the question, then the decision-maker is precluded from relying on any statement made by that party or witness.*

Hearsay

- Statement
 - Ordinary meaning
 - **Verbal conduct that constitutes the making of a factual assertion** (OCR Blog, May 22, 2020)

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.” (OCR Blog, May 22, 2020)

Hearsay

- Hearsay prohibition **does not apply** to a party or witness' refusal to answer questions ***posed by the decision-maker***. 85 FR 30349.
 - So, a party's failure or refusal to answer a question posed by the decision-maker does not prohibit the decision-maker from relying on the party's statements.

Hearsay

- Decision-makers **cannot draw an inference as to responsibility** based on a party or witness's refusal to answer questions.
 - Applies when a party or witness refuses to answer cross-examination questions posed by a party advisor or refuses to answer questions posed by a decision-maker.



The role of advisors

CROSS-EXAMINATION

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Advisor Required

Parties **may** have advisors during the investigation, 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).
- 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.*

Advisor Of Choice

- 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.

Qualifications of Advisor

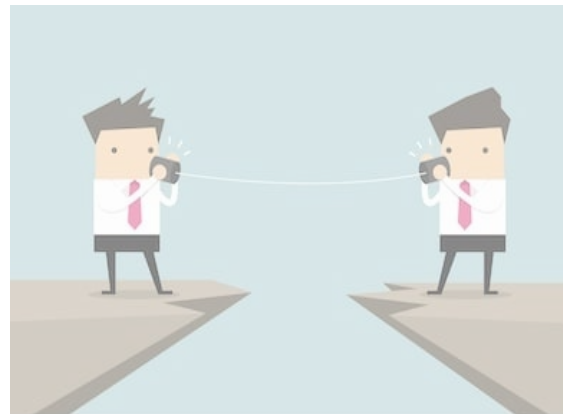
- **No** particular expectation of skill, qualifications, or competence. 85 FR 30340.
 - In fact, institutions **may not** impose training or competency assessments on advisors of choice. 85 FR 30342.
 - *But*, regs do not preclude institution from training and assessing the competency *of its own employees* whom it appoint as assigned advisors. *Id.*
- Advisors are **not** subject to the same impartiality, conflict of interest, or bias requirements as other Title IX personnel.

Advisor at the Live Hearing

- Party cannot “fire” an assigned advisor during the hearing. 85 FR 30342.
 - 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.
 - But, remember our hearsay rules!
- 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.*

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.



Role of Advisor & Hearsay

- The rule “does **not** purport to **require** that each party conduct cross-examination or . . . conduct cross-examination to the fullest extent possible. If a party chooses not to conduct to cross-examination of another party or witness, that other party or witness cannot ‘submit’ or ‘not submit’ to cross-examination. *Accordingly, the decision-maker is not precluded from relying on any statement of the party or witness who was not given the opportunity to submit to cross-examination.*”
- “The same is true if a party’s advisor asks some cross-examination questions but not every possible cross-examination question; as to cross-examination questions *not asked* of a party or witness, that party or witness cannot be said to have submitted or not submitted to cross-examination, so the *decision-maker is not precluded from relying on that party’s or witness’s statement.*”

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

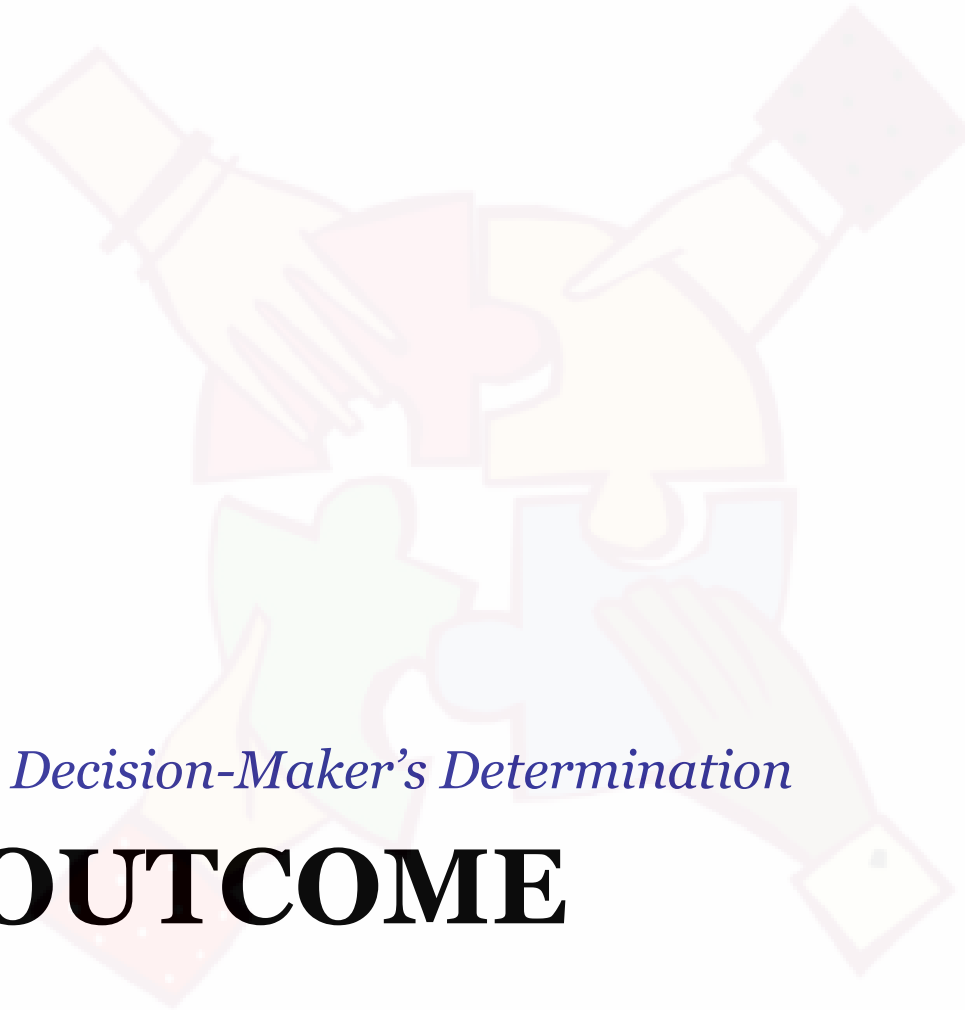
- An institution cannot forbid a party from **conferring** with the party's advisor. 85 FR 30339.
- *But* institution does have discretion to adopt rules governing the conduct of hearings.
- Purpose of rules re: decorum is to make the hearing process respectful and professional

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.*

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.*



The Hearing Decision-Maker's Determination

THE OUTCOME

Outcome Determination

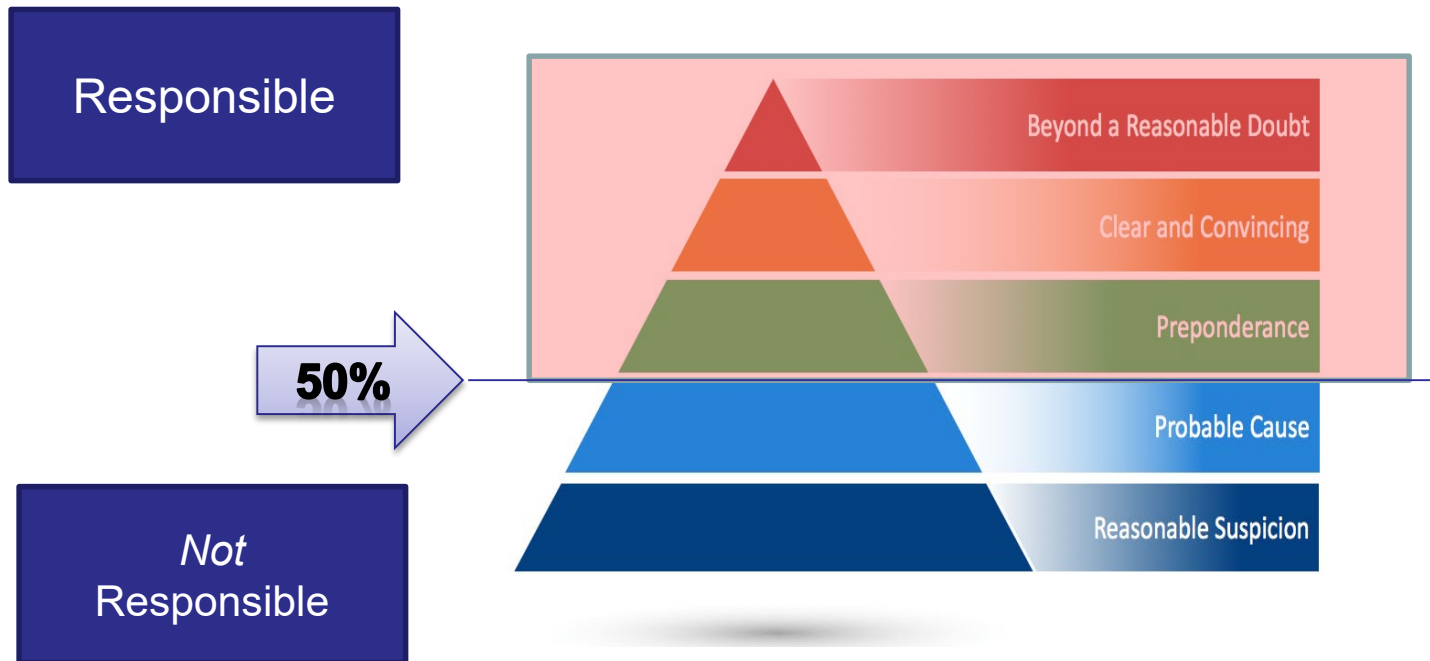
At the conclusion of the hearing, the Decision-maker must make a determination regarding responsibility

- Based on the preponderance of the evidence
- 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)

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

Preponderance of the 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).

Written Determination

- Hearing Officer 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 each 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)

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 must be designed to “restore or preserve equal access to the recipient’s education program or activity.” §106.45(b)(1)(i).



After the Hearing & Notice of Decision

APPEALS

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)-(ii)

- Appeal rights are not conditioned on enrollment/employment/participation. Meaning, for example, a respondent who has graduated or withdrawn from the institution since the hearing retains the right to an appeal.

1/15/2021 Q&A, Question 22

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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)

Grounds for Appeal

- Mandatory bases for appeal:
 - **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** additional bases, so long as they are offered equally (*e.g., sanctions imposed are disproportionate to the finding of responsibility*).

§ 106.45(b)(8)(i)-(ii)

Procedural Irregularity

Examples

- Failure to follow the § 106.45 grievance process
- Erroneous relevance determination
- Failure to objectively evaluate all relevant evidence (including inculpatory & exculpatory evidence)

Dismissal of Formal Complaints

Example - Dismissal because the misconduct alleged does not meet the definition of sexual harassment. Complainant might appeal that dismissal, asserting:

- newly discovered evidence demonstrates that the misconduct in fact does meet the definition of sexual harassment, or
- procedural irregularity on the basis that the alleged conduct in fact does meet the definition of sexual harassment and thus mandatory dismissal was inappropriate

The Analysis

- *First*, do sufficient grounds exist for at least one basis of appeal (i.e., procedural irregularity, new evidence, bias/conflict)?
- *Second*, is there merit to the appeal (e.g. there was a procedural irregularity)?
- *Third*, if yes, was the outcome affected (or, if new evidence, could it have been)?

Written Determination

- Appeal Officer must issue a **written decision** describing the result of the appeal and the rationale for the result
 - The regulations require “reasoned written decisions describing the appeal results.” 85 FR 30397.
- Written decision must be issued **simultaneously** to both parties.

§106.45(b)(8)(iii)

