Carnegie Mellon University

Title IX Hearing Officer Training

November 6, 2023

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Agenda

1. Refresher
2. The Hearing
3. Presentation of Relevant Evidence
4. Advisors and Cross-Examination
5. The Outcome
6. Bias & Conflict of Interest
7. Updates for 2022

How did we get here?

REFRESHER

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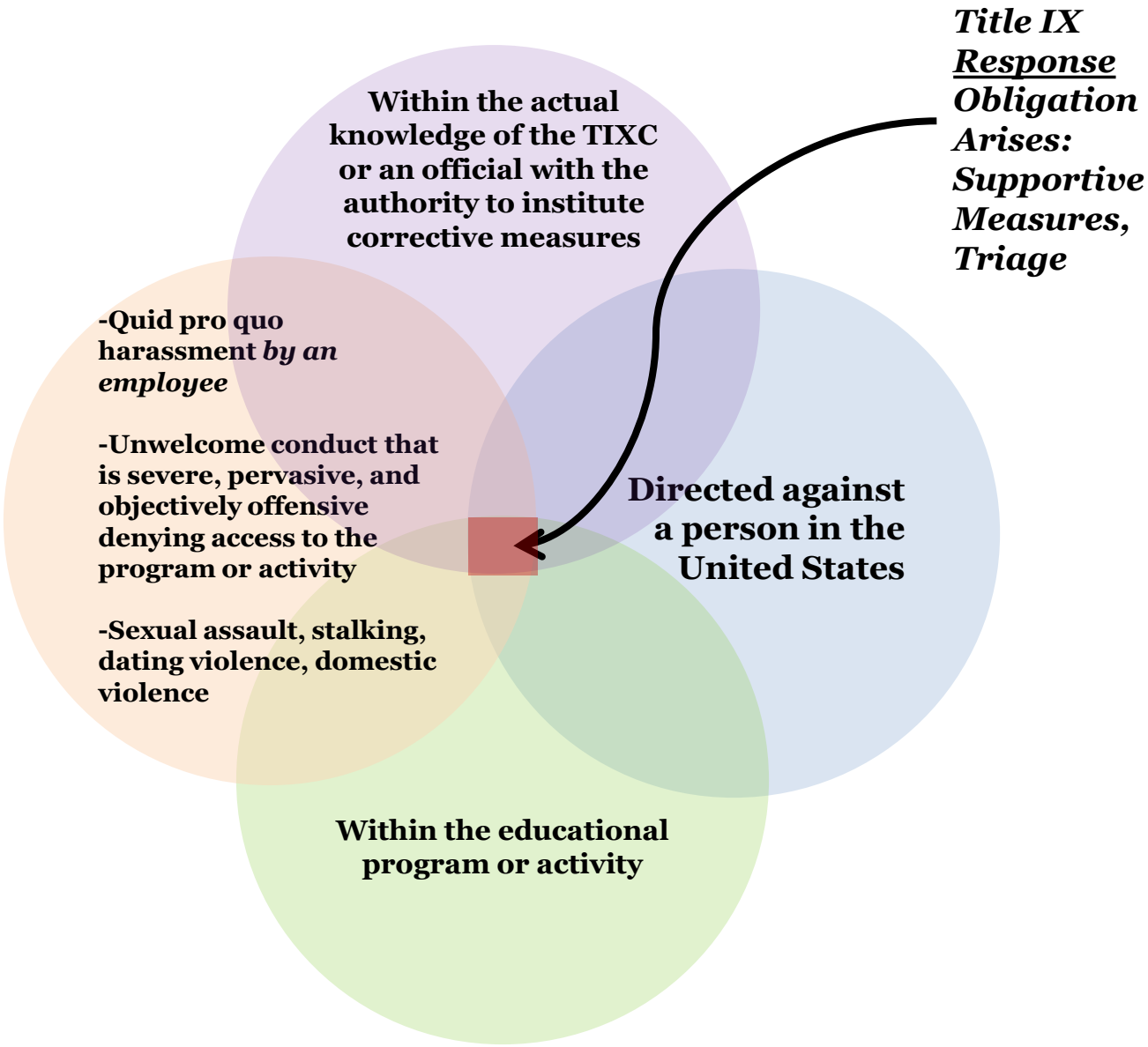

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Response Obligations

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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Formal Complaint

A Formal Complaint

(1) filed by a complainant or signed by the Title IX Coordinator,

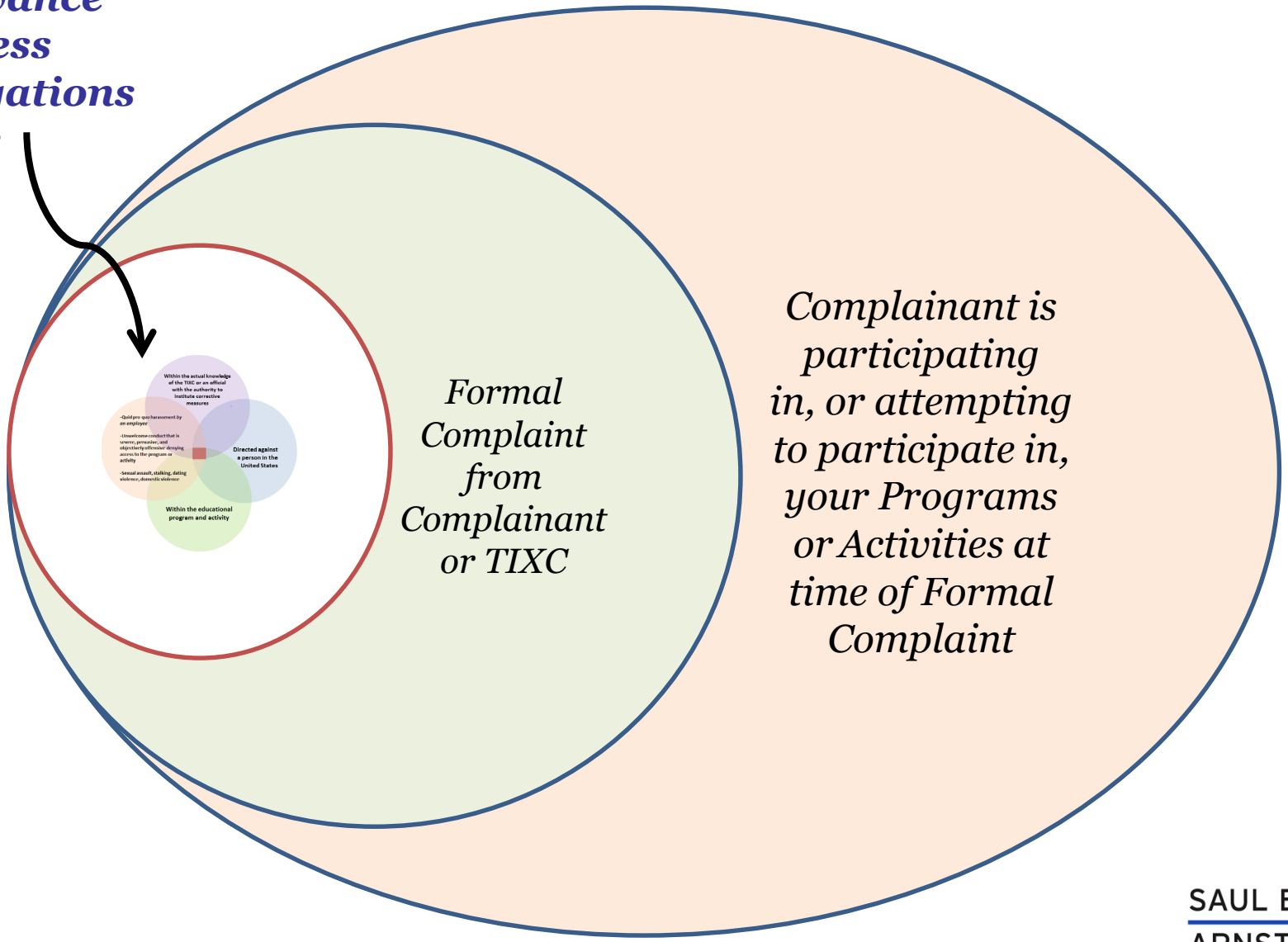
(2) alleging sexual harassment against a respondent, and

(3) requesting that the recipient investigate the allegation of sexual harassment.

is required to initiate the grievance process.

§ 106.30

§106.45 Grievance Process Obligations Arise



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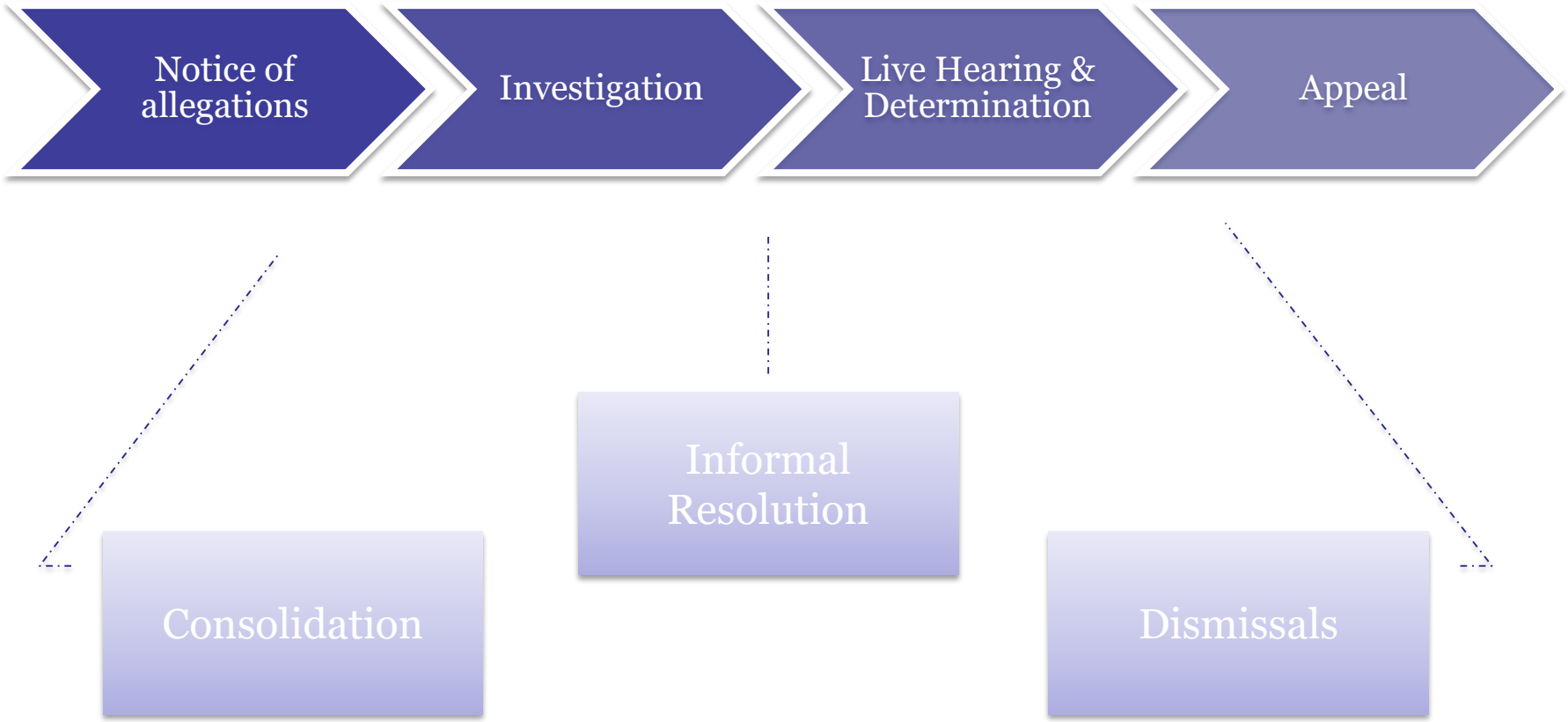
Outline of the Process



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Rights of the Parties

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

Source: 106.45(b)(5)

Throughout the grievance process

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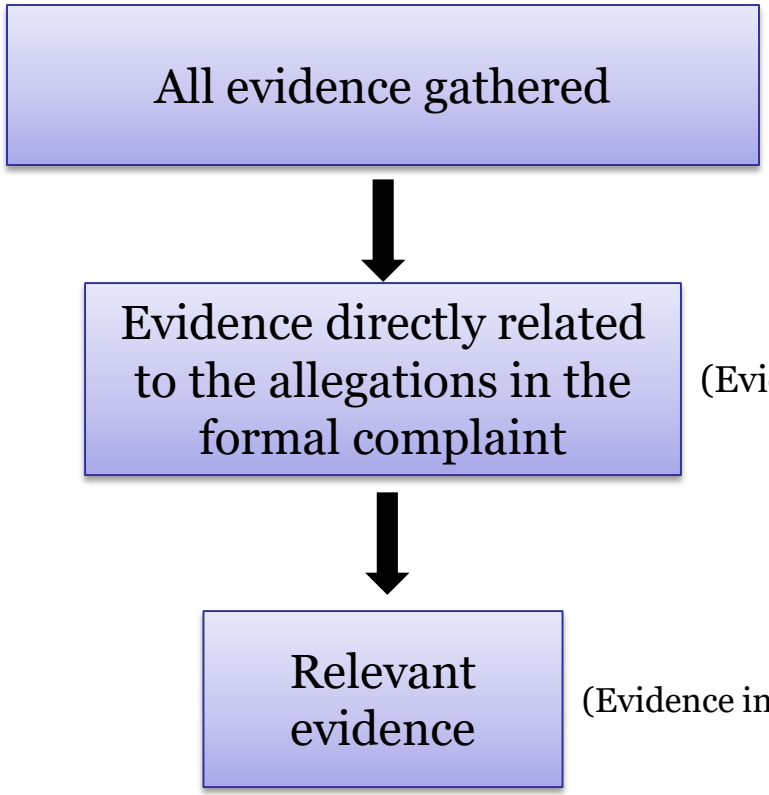
Investigation



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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 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

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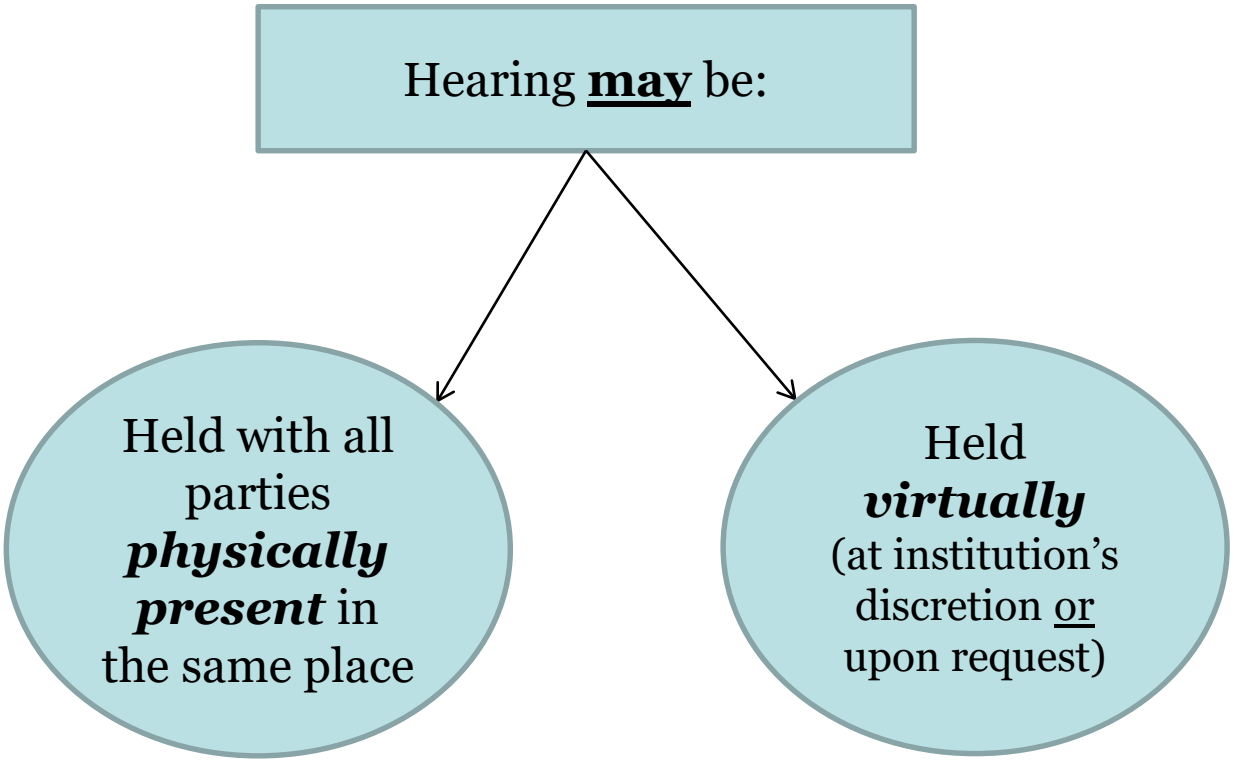
Live Hearing: Location

Hearing must be live



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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.

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Parties' roles, cross-examination

PRESENTATION OF RELEVANT EVIDENCE

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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

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 & 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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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"
- @ CMU – the Hearing Officer's decisions are not subject to argument or objection *at the hearing*.

Relevance and the role of advisors

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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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 **(and CMU has!)**.
- Purpose of rules re: decorum is to make the hearing process respectful and professional

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 the preponderance of the evidence standard.
  - 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

Hearing Officer 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).

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)

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Scope: Sexual Harassment

Sexual Harassment means: conduct ***on the basis of sex*** that satisfies one or more of the following –

(i) an employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;

(ii) unwelcome conduct determined by a reasonable person to be *so* severe, pervasive, ***and*** objectively offensive that it effectively denies a person equal access to the recipient's **education program or activity**; or

(iii) "sexual assault" as defined 20 U.S.C. 1092(f)(6)(A)(v), "dating violence" as defined in 34 U.S.C. 1229(a)(10), "domestic violence" as defined in 34 U.S.C. 12291(a)(8), or "stalking" as defined in 34 U.S.C. 12291(a)(30)

§ 106.30

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Sexual Harassment

Sexual assault. Sexual assault means any sexual act directed against another person, without the consent of the victim, including instances where the victim is incapable of giving consent. This includes the following:

- Rape
- Sodomy
- Sexual Assault with an Object
- Fondling
- Incest
- Statutory Rape

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Sexual Harassment

Rape: The carnal knowledge of a person, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity.

Sodomy: Oral or anal sexual intercourse with another person, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity.

Expectations: Bias & Conflicts

- Any individual designated as a Title IX Coordinator, investigator, decision-maker, or to facilitate an informal resolution process, must "*not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent*." §106.45(b)(1)(iii)

Bias & Conflicts: Grounds for Appeal

A recipient 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:

> (C) 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.

§106.45(b)(8)(i)

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Expectations: Bias & Conflicts

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Serving Impartially

Avoid prejudgment of the facts at issue, conflicts of interest, and bias

Bias: what does it mean?

"Whether bias exists requires examination of the ***particular facts*** of a situation . . .

. . . and the Department encourages recipients to apply ***an objective*** (whether a reasonable person would believe bias exists), ***common sense approach*** to evaluating whether a particular person serving in a Title IX role is biased[.]"

85 FR 30248.

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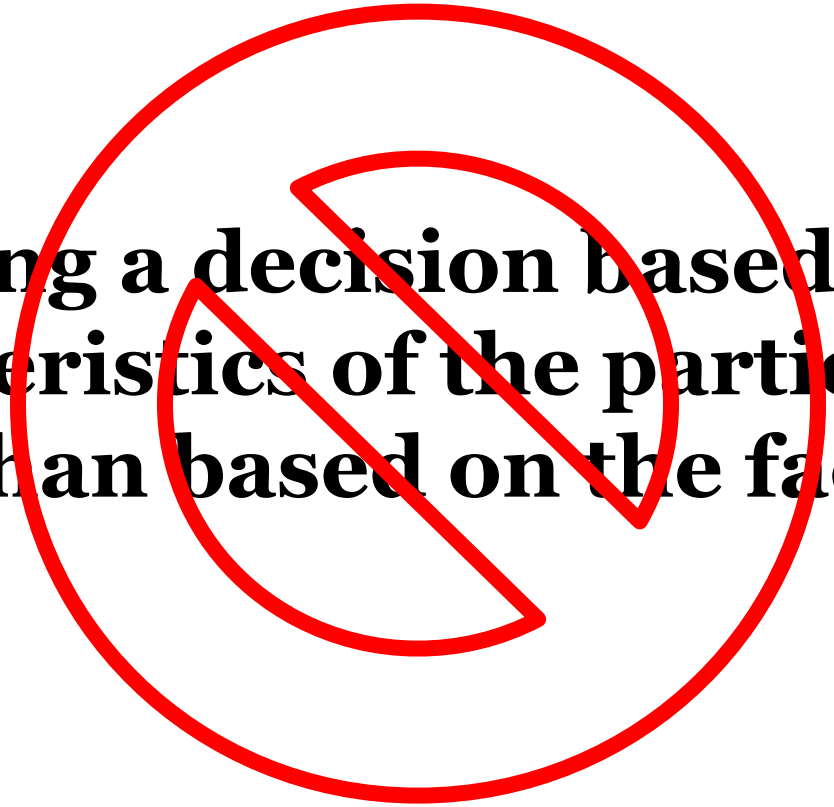
Impermissible Bias



Making a decision based on the characteristics of the parties, rather than based on the facts

Bias: what does it mean?

"Treating a party differently on the basis of the party's sex or **stereotypes about how men or women behave** with respect to sexual violence constitutes impermissible bias."

85 FR 30238-40

A "recipient that ignores, blames, or punishes a student **due to stereotypes** about the student violates the final regulations[.]"

85 FR 30496

All protected classes

"The Department's conception of bias is broad **and includes bias against** an individual's sex, race, ethnicity, sexual orientation, gender identity, disability or immigration status, financial ability, socioeconomic status, or other **characteristic**.

85 FR 30084

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What **is not** defined as bias?

1. Outcomes of the grievance procedure

The Department cautions parties and recipients from concluding bias based **solely on the outcome of the grievance procedure**.

> "[T]he mere fact that a certain number of outcomes result in determinations of responsibility, or non-responsibility, does not necessarily indicate or imply bias on the part of Title IX personnel."
>
> 85 FR 30252

What **is not** defined as bias?

2. Title IX Coordinator Signs Formal Complaint

When a Title IX Coordinator signs a formal complaint, it does not render the Coordinator biased or pose a conflict of interest.

The Department has clarified that this **does not place the Title IX Coordinator in a position adverse to the respondent** because the decision is made on behalf of the recipient and not in support of the complainant or in opposition of the respondent.

85 FR 30372

What **is not** defined as bias?

3. Professional experiences or affiliations

The **prior professional experience** of a person whom a recipient would like to have in a Title IX role **need not disqualify the person** from obtaining the requisite training to **serve impartially** in a Title IX role.

85 FR 30252

What **is not** defined as bias?

3. Professional/Personal Experiences or affiliations

Not *per se* bias; exercise caution not to apply "generalizations that might unreasonably conclude that bias exists":

- All "self-professed feminists" or "self-described survivors" as biased against men
- A male is incapable of being sensitive to women
- History of working in a field of sexual violence
- Prior work as a victim advocate = biased against respondents
- Prior work as a defense attorney = biased in favor of respondents
- Solely being a male or female
- Supporting women's or men's rights
- Having a personal or negative experience with men or women

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Self-Disclosure of Potential Bias or Conflict of Interest

Transparency is key!

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Serving Impartially: Avoid Prejudgment of the Facts

- Cannot **pass judgment** on the allegations presented by either party or witnesses.
- Cannot **jump to any conclusions** without fully investigating the allegations and gathering all of the relevant facts and evidence from all parties involved.
- Necessitates a broad prohibition on **sex stereotypes** -- decisions ***must*** be based on individualized facts, and not on stereotypical notions of what "men" and "women" do or not do

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Avoiding Prejudgment of the Facts at Issue

Title IX Coordinators and other personnel should not apply a "start by believing" approach

Doing so would violate the requirement to "serve impartially." 85 FR 30254.

"The credibility of any party, as well as ultimate conclusions about responsibility for sexual harassment must not be prejudged and must be based on objective evaluation of the relevant evidence." 85 FR 30254.

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Avoiding Prejudgment of the Facts at Issue

- The Department **permits** institutions to apply trauma-informed practices, so long as doing so does not violate the requirement to serve impartiality and without bias

- It is possible, "albeit challenging," to apply trauma-informed practices in an impartial, non-biased manner

- Any trauma-informed techniques must be applied equally to all genders

85 FR 30256, 30323

Serving Impartially

- Any and all stereotypes must be checked at the Title IX door.
    - Leave behind any prior experiences, whether that be from past Title IX proceedings or personal experiences.
- Approach the allegations (of both parties) with neutrality at the outset.
- Treat both parties equally and provide an equal opportunity to present evidence, witnesses, and their versions of the story.

2022 Update - Hearsay

- *Victims Rights Law Center et al v. Cardona*
  - Prior Hearsay Rule - 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…."
  - The Court struck down this rule and applied a nation-wide injunction.
  - The Department of Education did not appeal and on August 24, 2021 issued guidance confirming the elimination of this hearsay rule.
  - **Hearing Officers may now consider oral and written statements of a witness even if the witness <u>does not</u> submit to examination.**
  - However, hearsay may still impact credibility and weight given to the evidence.

2022 Update - NPRM

- The Trump Administration issued implemented the current “final” Title IX regulations with an effective date of August 14, 2020.
- CMU adopted its current Interim Sexual Misconduct Policy on August 14, 2020.
- The Biden Administration issued a Notice of Proposed Rulemaking (NPRM) on July 12, 2022.
- Anticipate that new “final” regulations will be issued sometime within the next 6 to 24 months.
- **In the meantime, the 2020 regulations remain in full effect.**

Scenarios

Complainant and Respondent meet at a party. They each drink 5-7 drinks throughout the evening. CP's friends state that CP was acting "drunk" and was "loud" and "laughing a lot." They decide to go to RP's apartment. On the way to RP's apartment, CP vomits. When they arrive at the apartment, RP begins kissing CP while they sit on the couch, and CP kisses back. CP gets on top of RP and begins undressing RP while kissing. CP then asks RP if they can go to RP's bed. RP responds, "Yes." CP & RP have sex. CP files a Formal Complaint and states that the sex was "not consensual." CP has "little memory of the event" but does remember asking RP to have sex and RP's response.

Acknowledgements to The University of Texas System

Scenarios

Complainant and Respondent meet at a party and spend a lot of time talking and laughing. CP recalls drinking 5 cups of “punch.” CP vomits at the party. When the party ends, CP orders an Uber-ride home. CP gets into the Uber car and the car begins its trip. While in the Uber car on the way to CP’s apartment, there is road construction that confuses the Uber driver. CP directs the driver around the construction to get home using an alternative route. Then, one mile away from CP’s apartment, CP receives a text from RP where RP invites CP to RP’s apartment and provides an address. RP states that RP “really enjoyed talking with [CP] and would like to spend some more time together.” When CP tells the Uber driver that CP wants to go to a different address, the driver tells the CP that CP must tell the Uber app what the new address is. CP does so and texts RP when the car gets close to the Main Street address, texting, “In Uber, turning on Mains Street.” According to RP, at RP’s apartment, RP asked CP to have sex and CP said “Yes.” CP, however, does not remember anything after vomiting at the party. The next morning, CP dresses and leaves before RP wakes up. When CP gets home, CP texts RP, asking what happened. RP explained “We had sex.” CP states that “if we had sex, it was not consensual.” CP files a Formal Complaint.

Acknowledgements to The University of Texas System

QUESTIONS?