

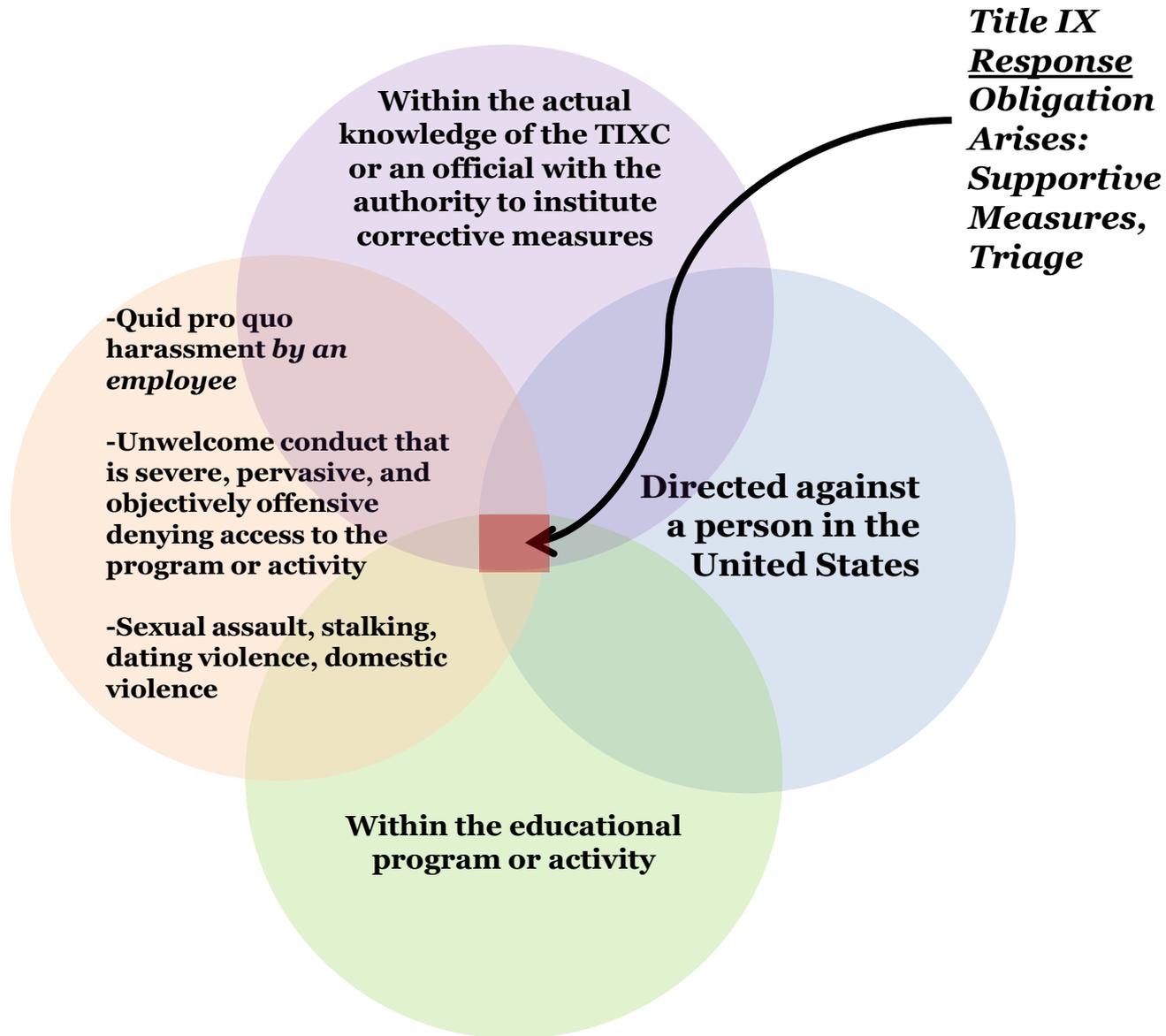
Title IX Hearing Officer Training

October 12, 2020

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ARNSTEIN
& LEHR^{LLP}

How did we get here?

REFRESHER



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

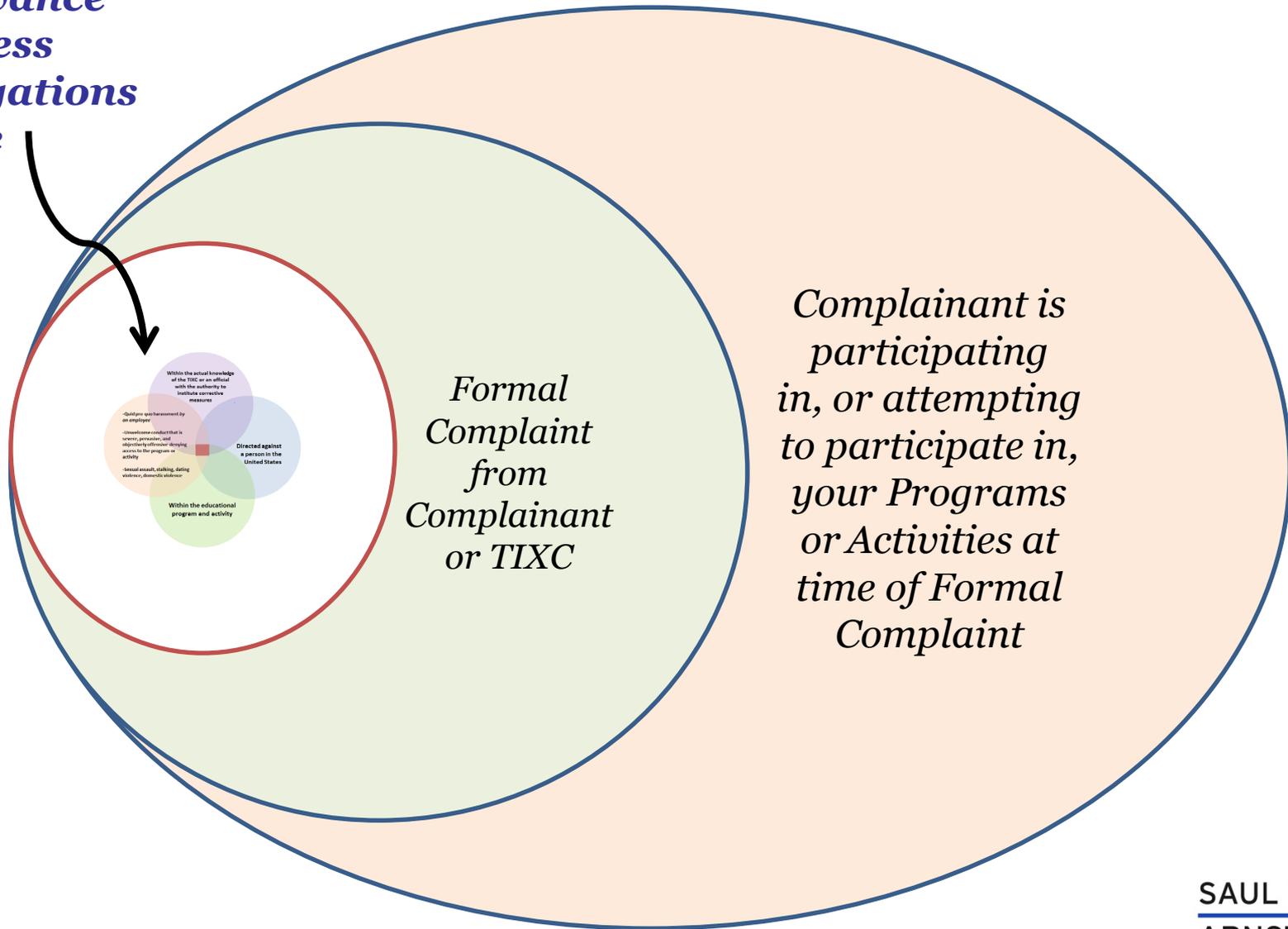
A Formal Complaint

- (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**



Formal Complaint

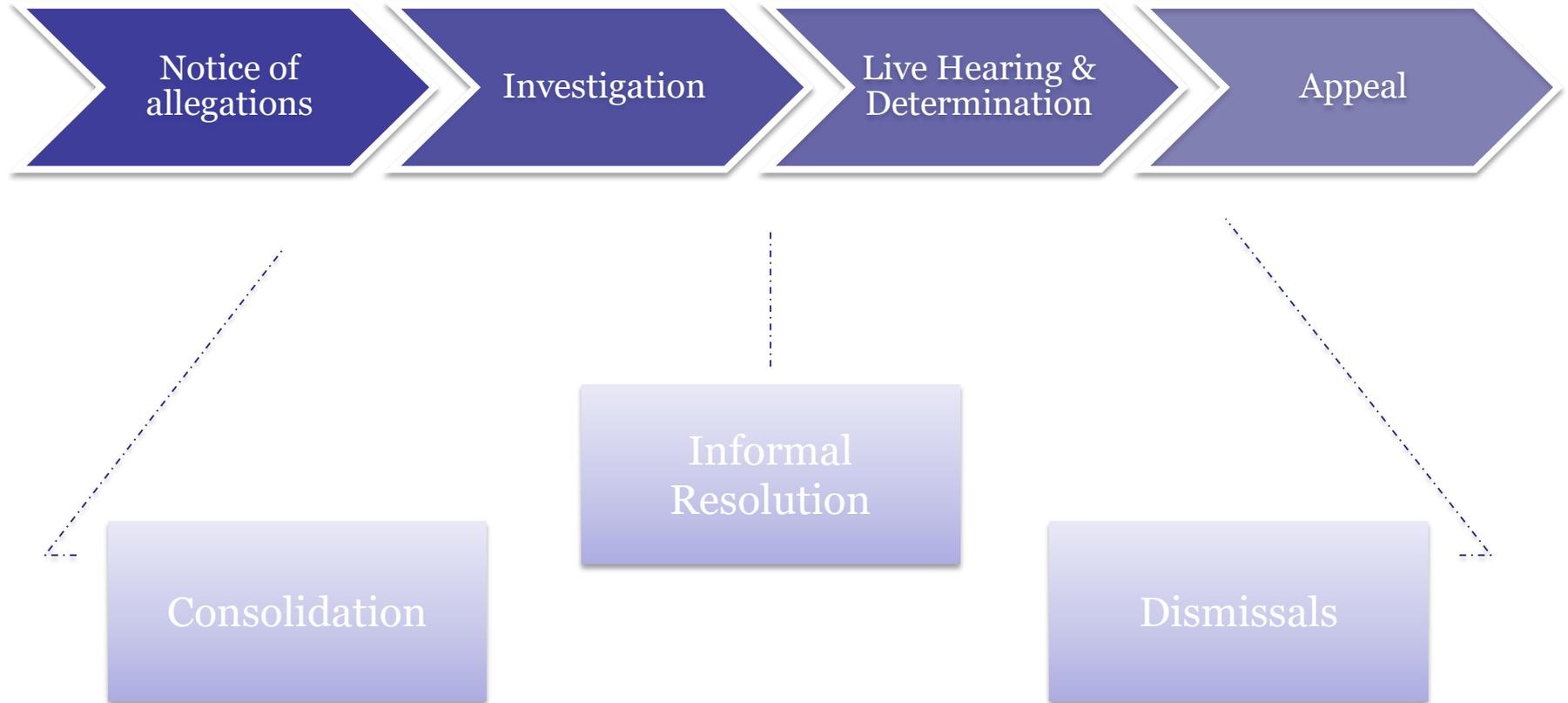
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§ 106.30

Outline of the Process



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

Investigation

All evidence gathered



Evidence directly related
to the allegations in the
formal complaint

(Evidence sent to parties/advisors)



Relevant
evidence

(Evidence included in the Investigative Report)

Location, purpose, process

THE HEARING

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

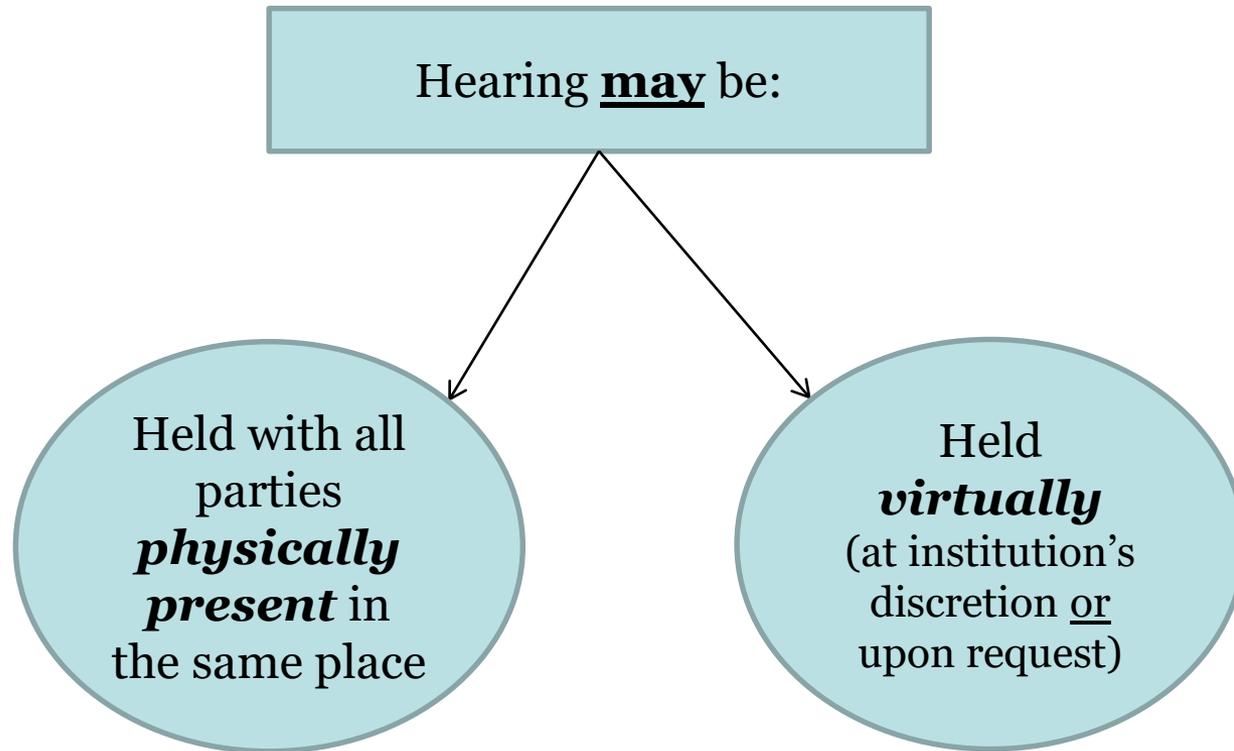
- Live
- With Cross-Examination

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

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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)

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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.

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

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.

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.



Hearing Officers
must
understand
CMU’s definition
of consent

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.

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

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

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.
 - *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
 - **A person's intent to make factual assertions**

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.”

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 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 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)