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Title IX Training

January 29, 2021

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The statute, the final rule, what it all means

WHERE ARE WE & WHERE ARE WE HEADED?

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The Statute

No person in the United States shall, on the basis of sex,

-- be excluded from participation in,
-- be denied the benefits of, or
-- be subjected to discrimination

under any education program or activity receiving Federal financial assistance.

20 U.S.C. § 1681

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The Final Regulations

- Final rule released by ED informally on its website on May 6, 2020
- Published in the Federal Register on May 19, 2020 (34 CFR Part 106)
- Effective date: August 14, 2020
  - *Does not apply retroactively*

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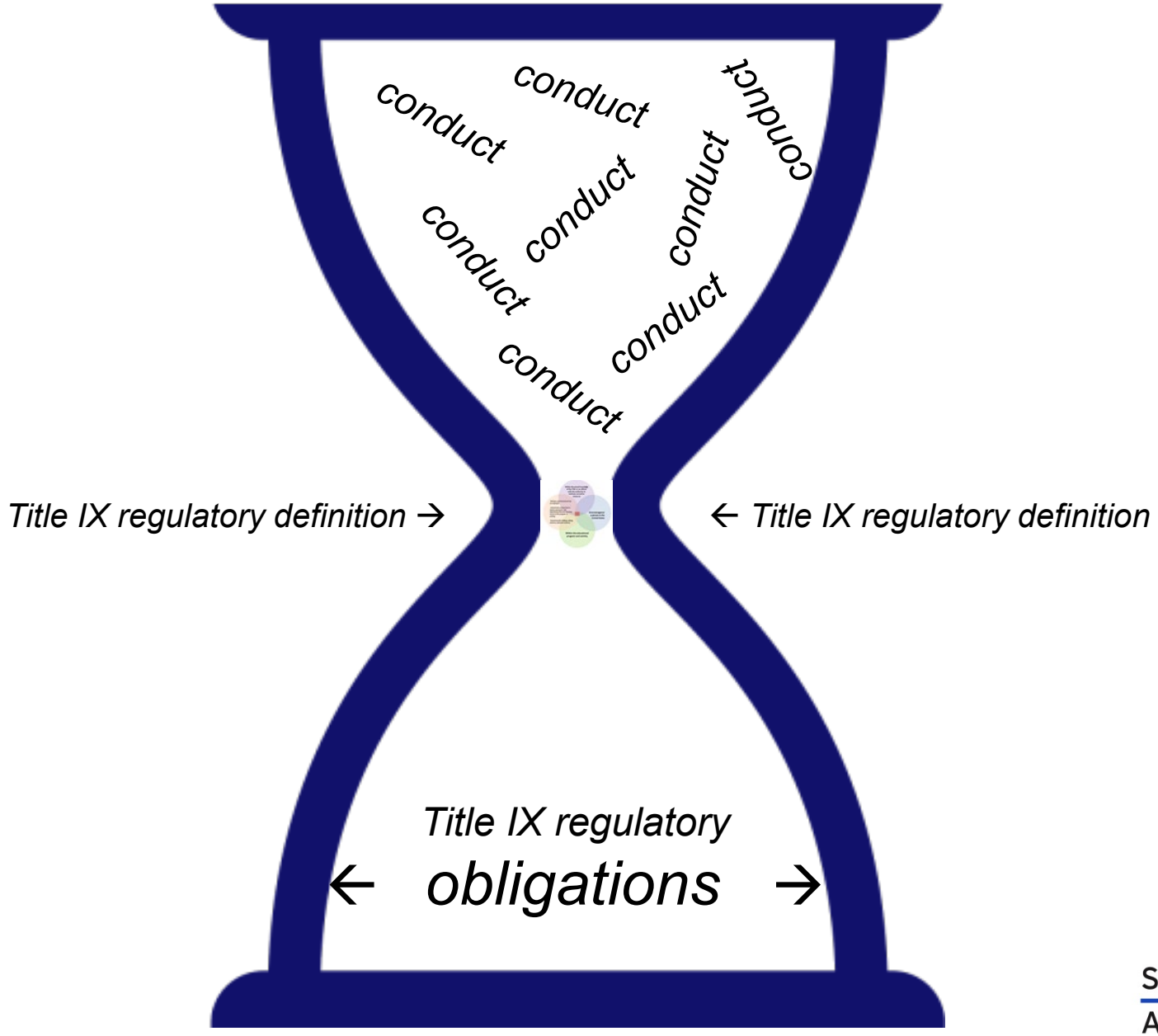

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The Foundation: Principle #1

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.

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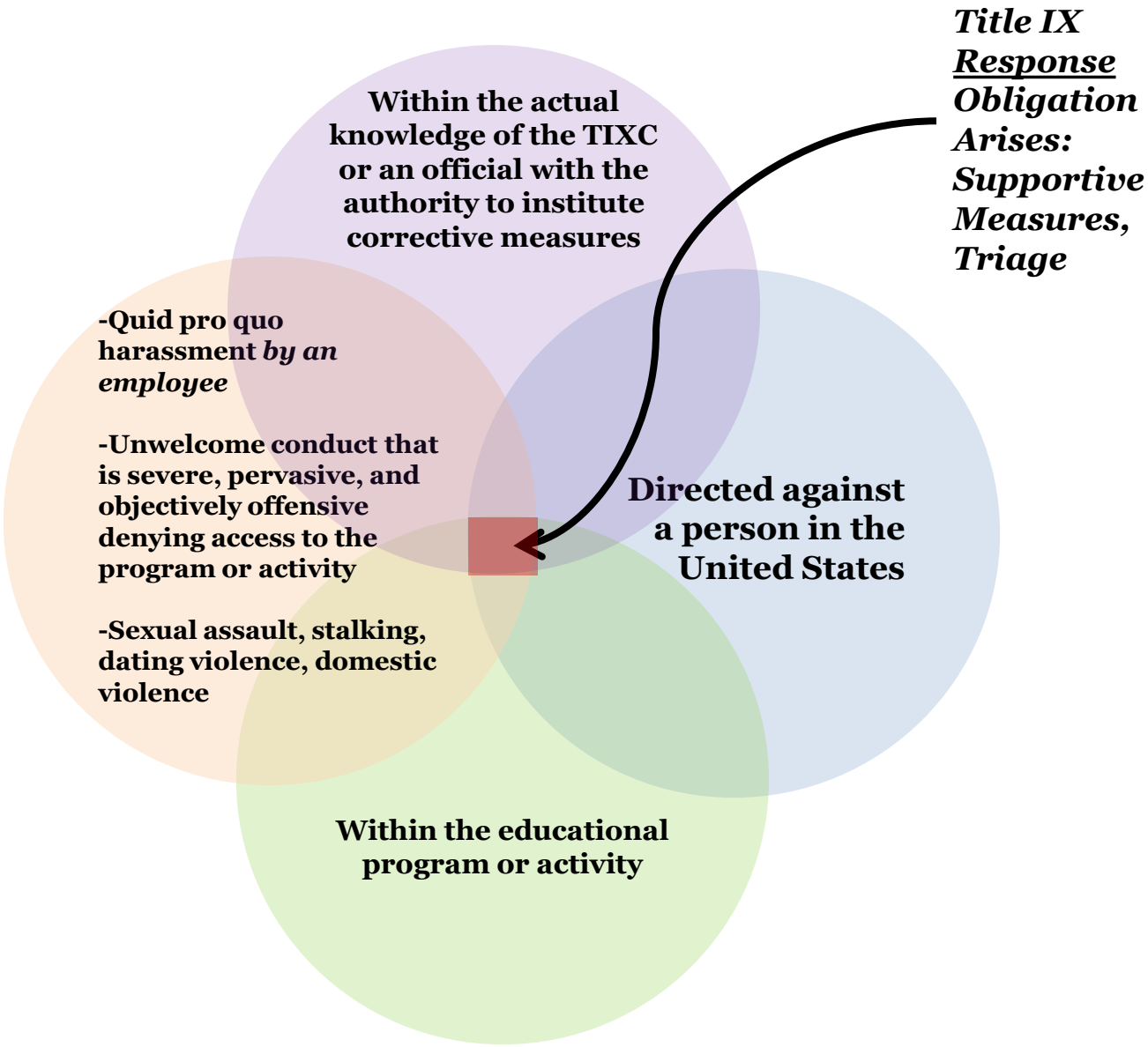

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The Foundation: Principle #2

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.

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Scope and Jurisdiction

TITLE IX-COVERED CONDUCT

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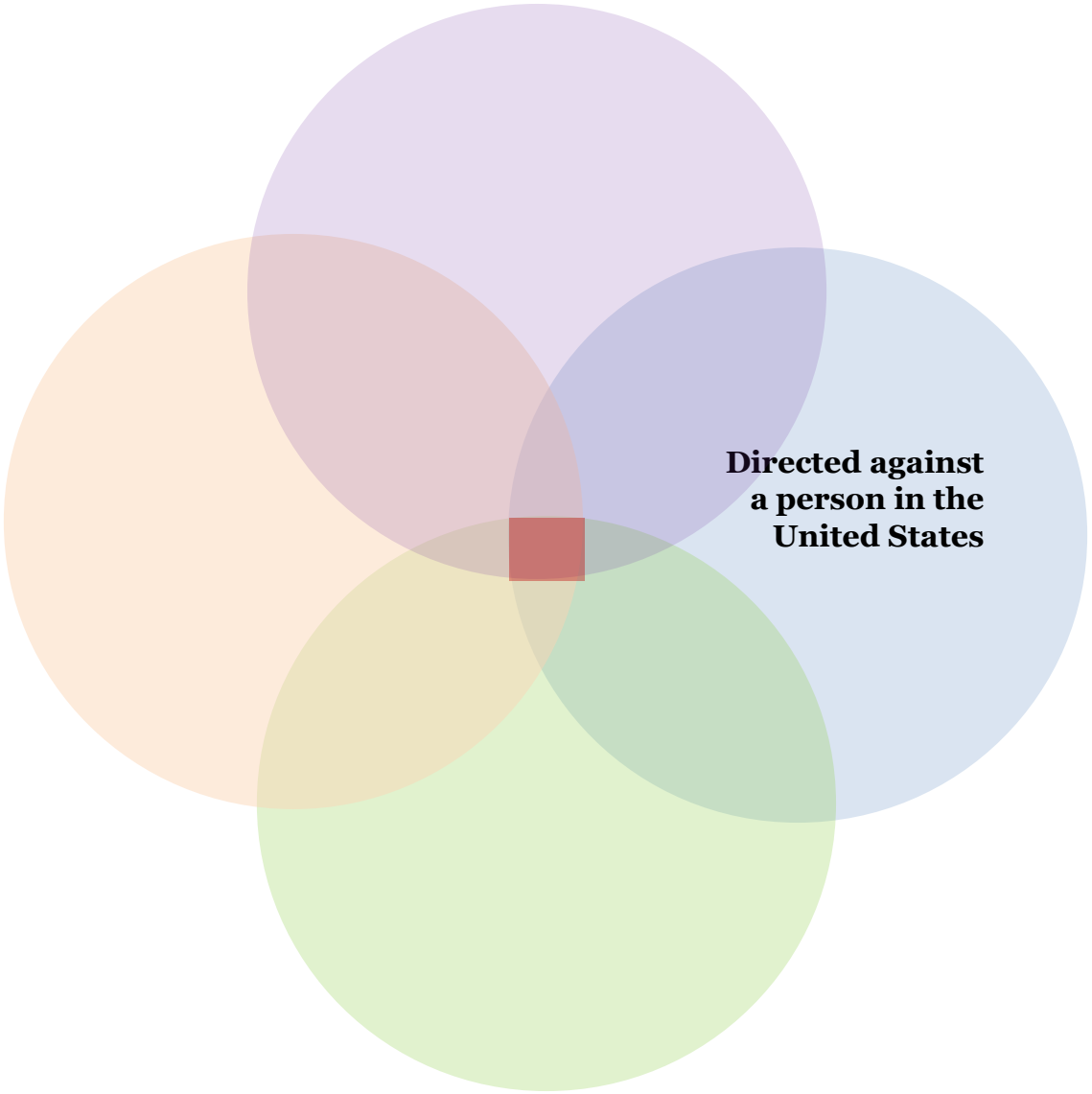

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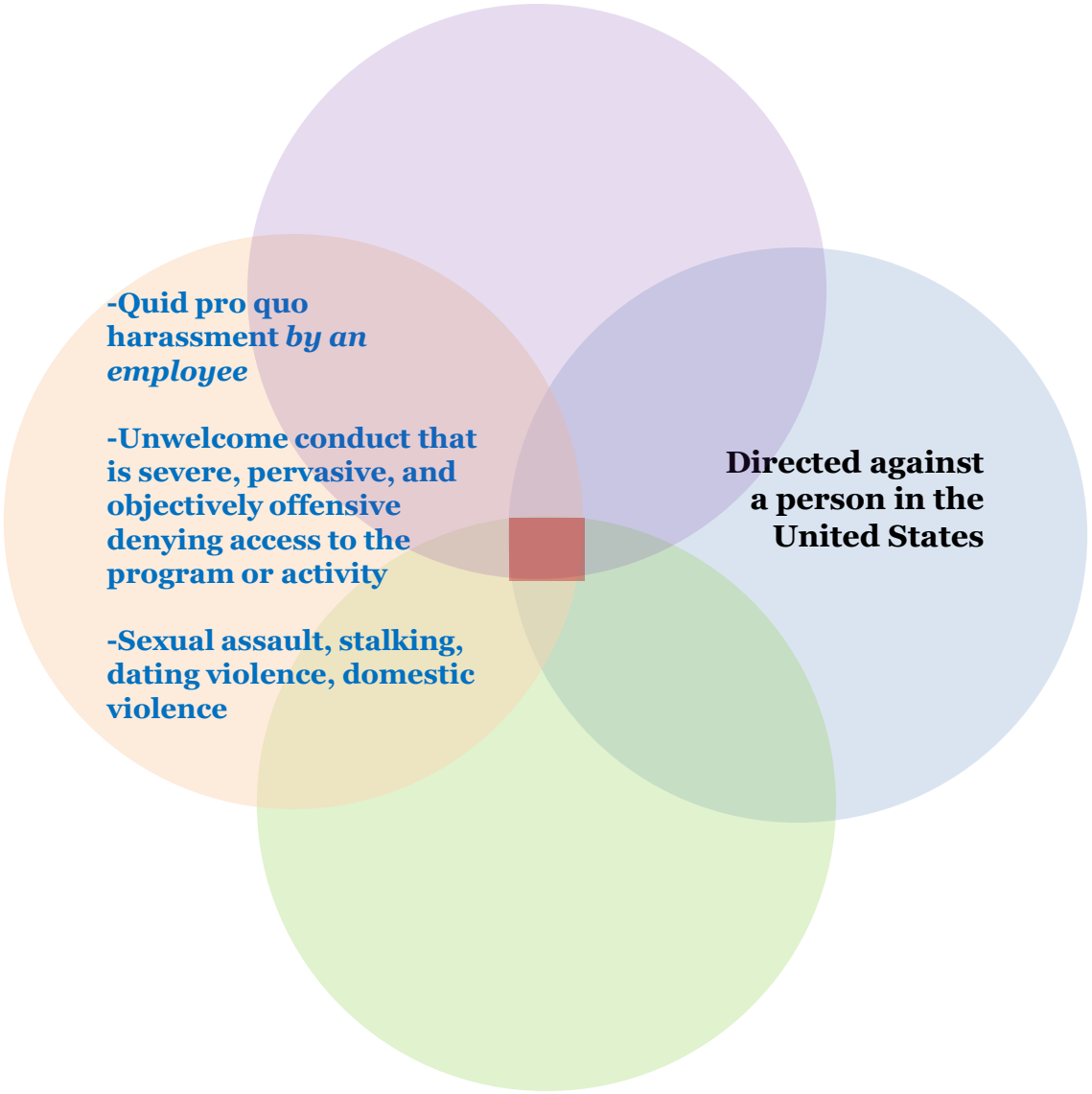

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Scope: Sexual Harassment

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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Reasonable Person Standard

"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"

- Applies to both elements: (1) severity, pervasiveness, objective offensiveness *and* (2) effective denial of equal education access
  - No "perfect victim"
  - No concrete injury is required

See Sept. 4. 2020 Q&A, Question 4

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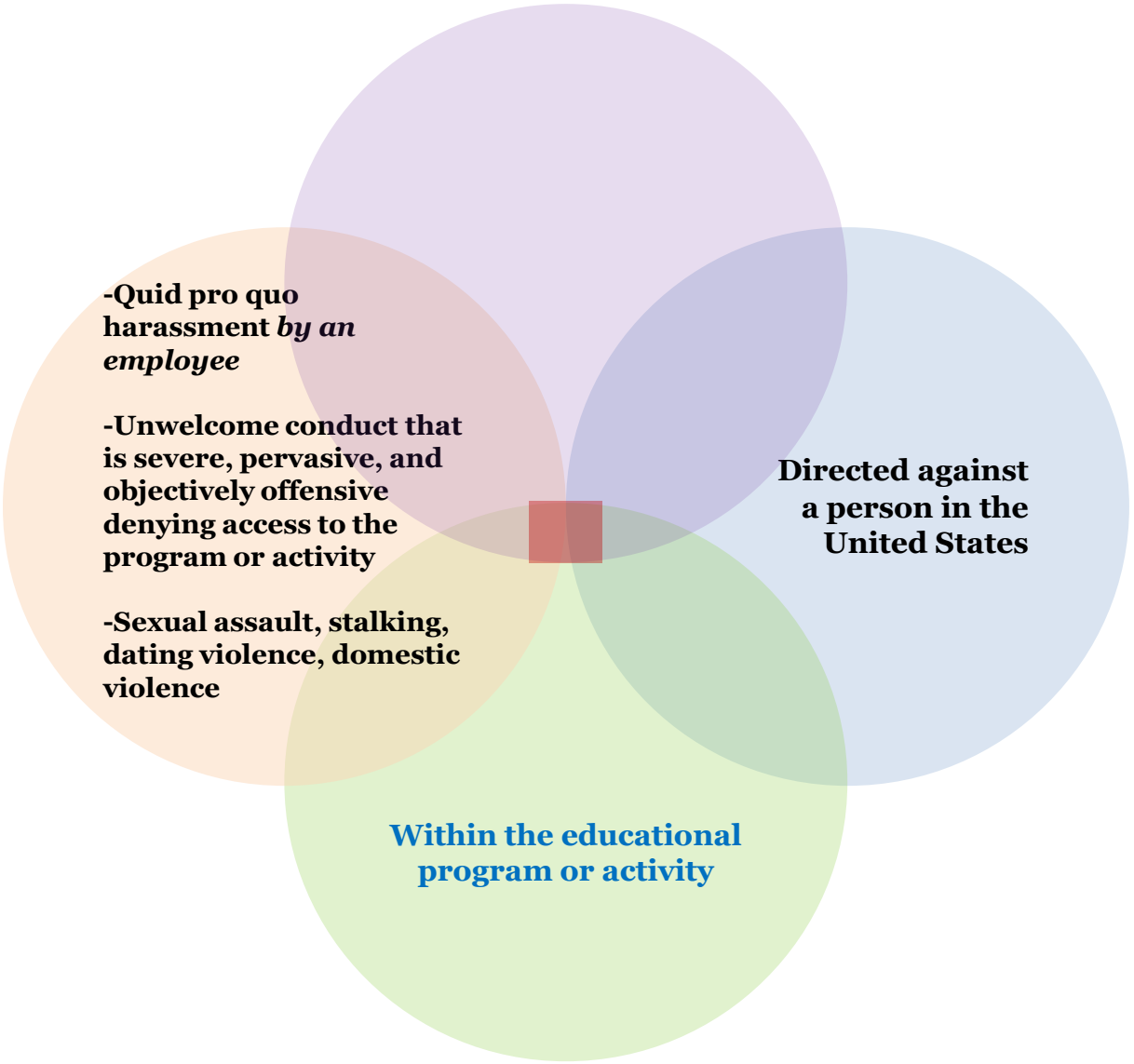

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Jurisdiction

Education program or activity includes:

- ✓ Locations, events, or circumstances
- ✓ whether on campus or off campus
- ✓ over which the institution exercised **substantial control** over both the respondent and the context in which the sexual harassment occurs.

It also includes:

- ✓ any building owned or controlled by an officially recognized student org., e.g., fraternity or sorority houses

§ 106.44(a)

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Actual Knowledge & Deliberate Indifference

RESPONSE OBLIGATIONS

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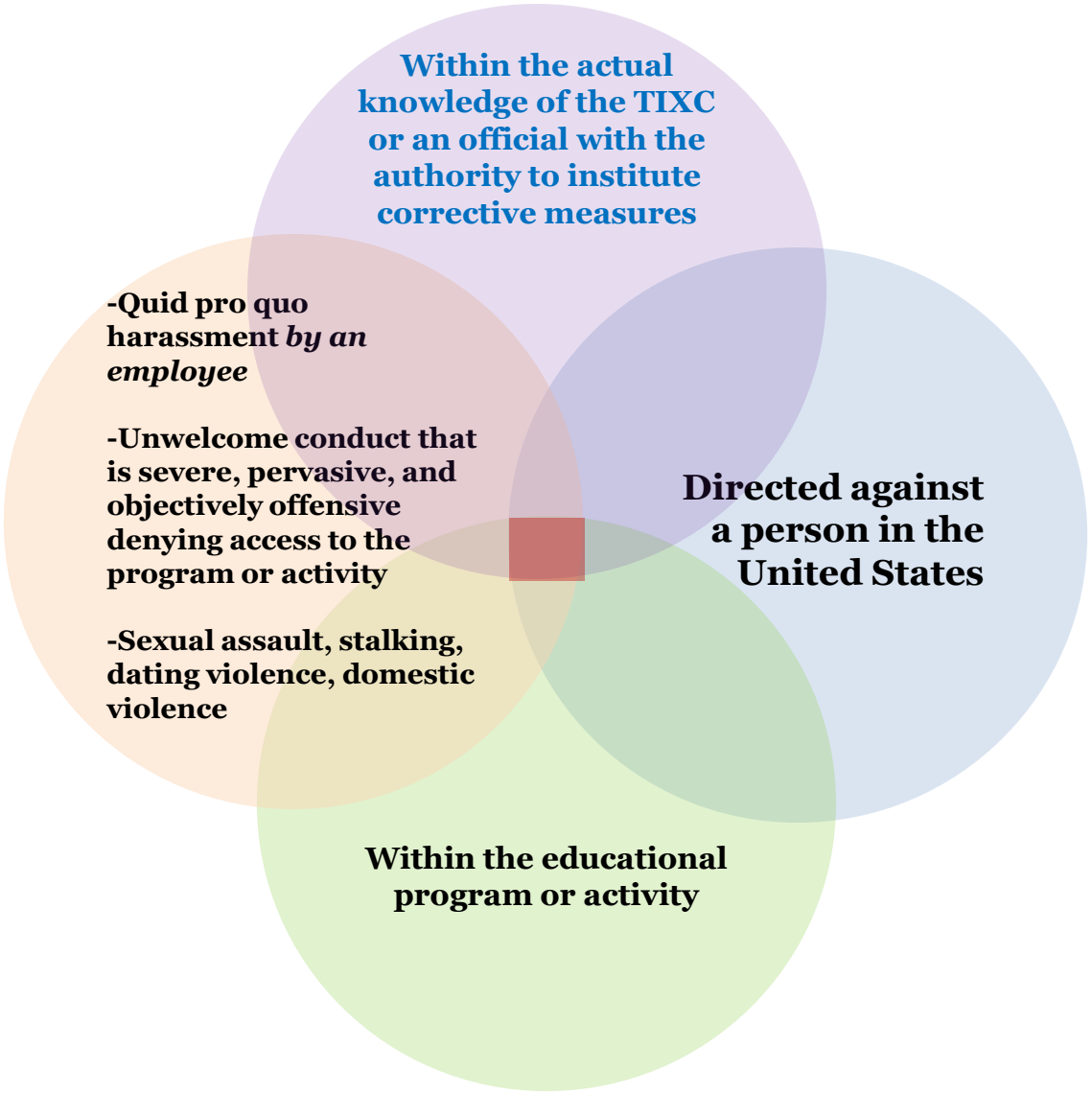

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Actual Knowledge

"*Actual Knowledge* means notice of sexual harassment or allegations of sexual harassment to a recipient's *Title IX Coordinator or any official of the recipient who has the authority to institute corrective measures* on behalf of the recipient…"

§ 106.30

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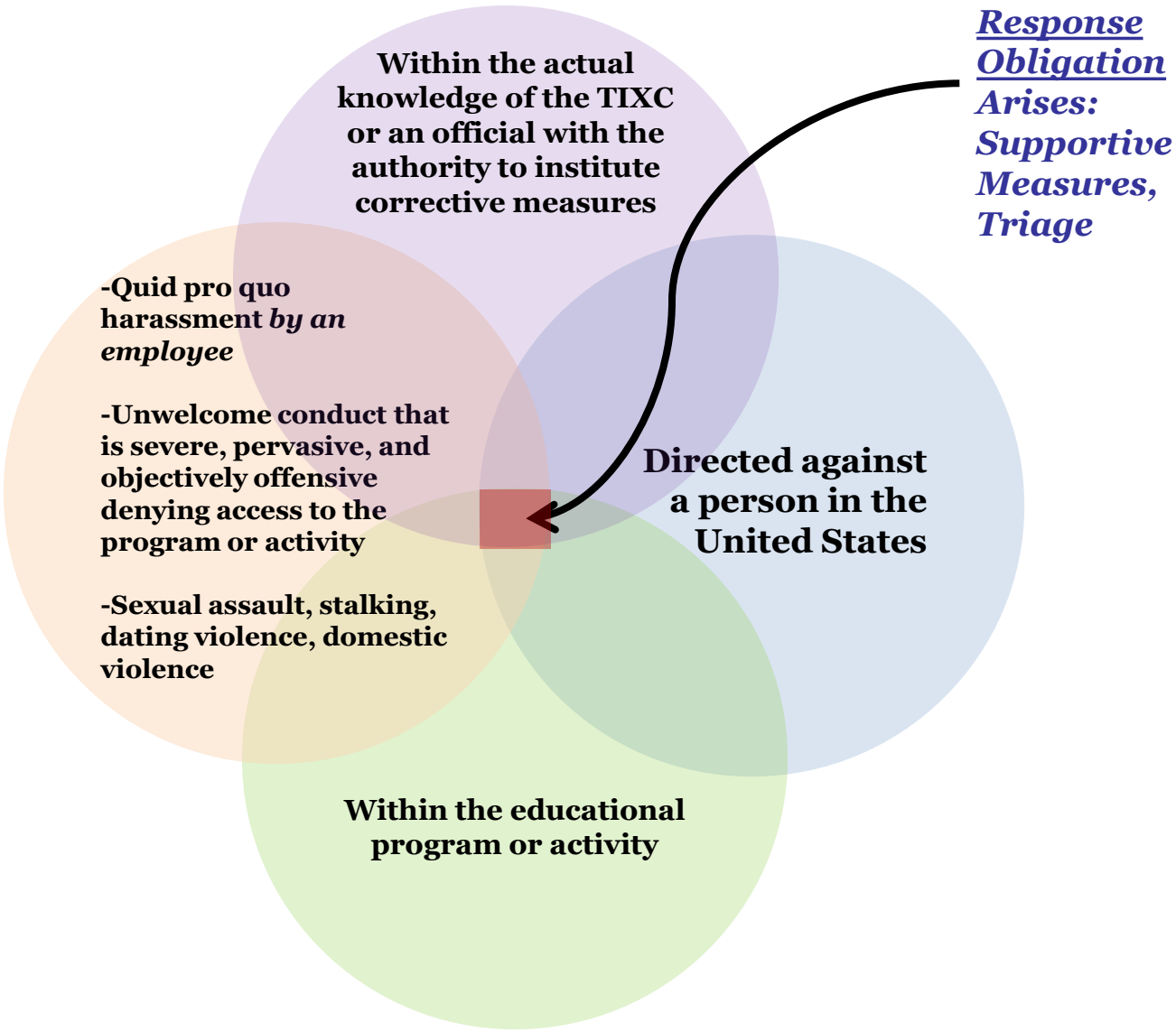

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Response Obligations

Actual Knowledge -- What now?

To a report:

- *Offer of supportive measures*
- *Explain formal complaint process*

To a formal complaint:

- *Investigation followed by . . .*
- *A live hearing/compliant grievance process*

<u>Unless</u> facts/circumstances require or permit dismissal

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Response Obligations, Part 1

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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Response Obligations, Part 2

(a/k/a 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.

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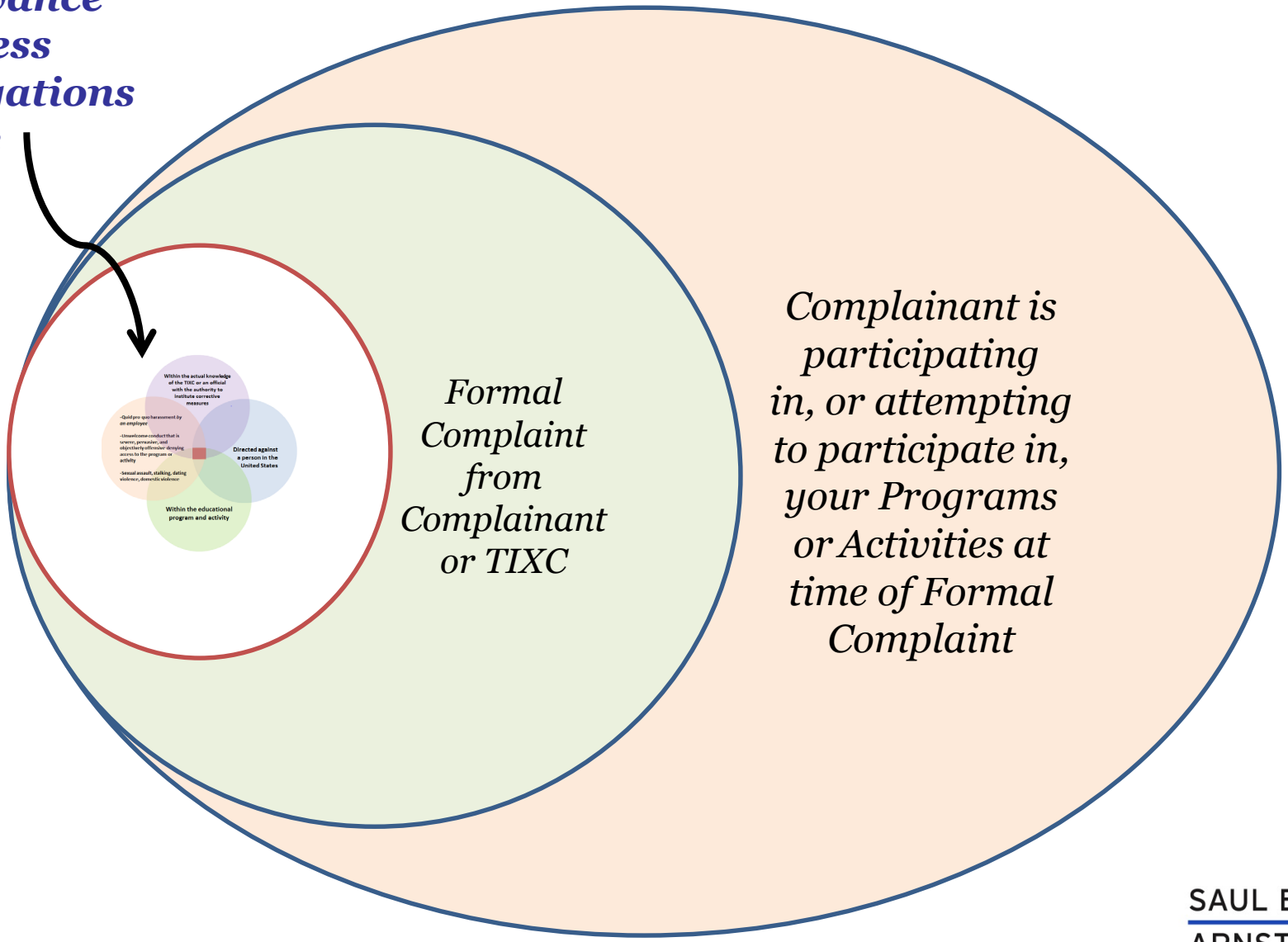
§106.45 Grievance Process Obligations Arise



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Dismissal

Mandatory Dismissal

If the conduct alleged in the Formal Complaint:

- would not constitute sexual harassment even if proved,
- did not occur within the recipient's program or activity,
- did not occur against a person in the United States, ***or***
- complainant is not participating in the programs or activities;

the recipient must terminate its grievance process with regard to that conduct for the purposes of sexual harassment under Title IX. *Dismissal does not preclude action under another provision of the recipient's code of conduct.*

§ 106.45(b)(3)

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Dismissal

Discretionary Dismissal

If one (or more) of the following conditions is **not met**, the Title IX Coordinator **may dismiss** the Formal Complaint for Title IX purposes:

- Complainant withdraws Formal Complaint or allegations in writing;
- Respondent is no longer enrolled or employed by the institution; or
- Specific circumstances prevent the institution from gathering evidence sufficient to reach a determination regarding responsibility.

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Training, serving without bias or conflicts of interest

EXPECTATIONS

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Expectations: Training

- ***Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process must receive training on:***
  - Definition of sexual harassment in § 106.30,
  - The scope of the recipient's education program or activity,
  - How to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, as applicable, and
  - How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias.

(Note: additional training requirements exist for investigators and decision-makers)

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Serving Impartially

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

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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)

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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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But not advisors. . .

The final regulations impose no prohibition of conflict of interest or bias for advisors

85 FR 30254 n.1041

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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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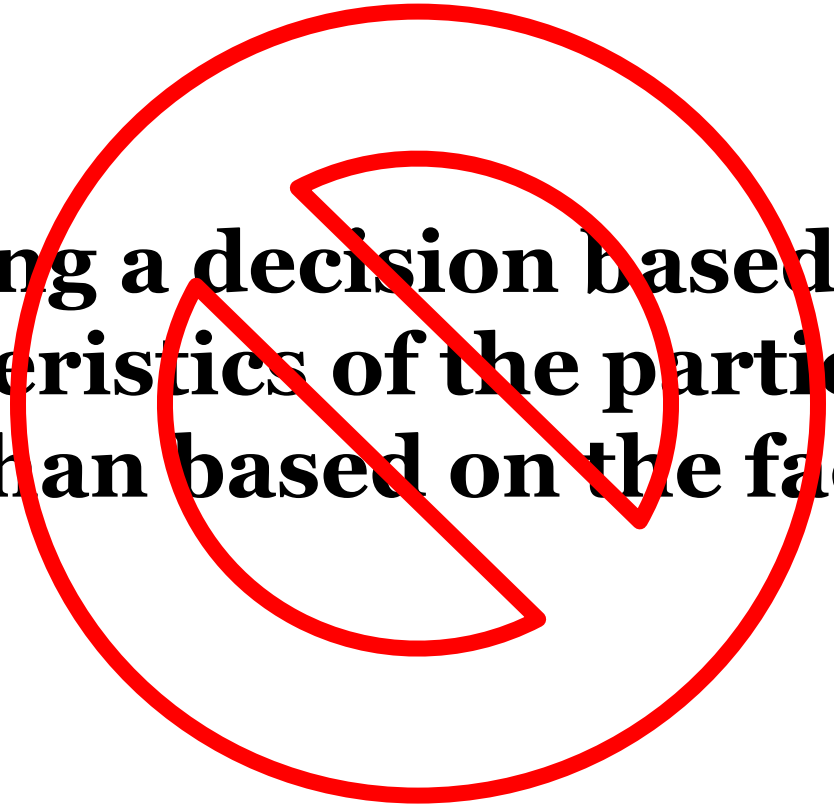
Impermissible Bias



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

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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

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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

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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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But consider . . .

Whether Title IX personnel has a bias and/or conflict of interest is determined on a **case-by-case basis**, and any combination of the experiences or affiliations on the prior slide ***may*** constitute bias and/or conflict of interest, depending on the circumstances

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Conflicts of Interest

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It is <u>not</u> a conflict of interest for…

A recipient to fill Title IX personnel positions with its <u>own employees</u>

- Recipients are not required to use outside, unaffiliated Title IX personnel. 85 FR 30252.
- Any recipient, *irrespective of size*, may use existing employees to fill Title IX roles, "as long as these employees do not have a conflict of interest or bias and receive the requisite training[.]" 85 FR 30491-92.
- Even a student leader of the recipient may serve in a Title IX role. 85 FR 30253.

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It is <u>not</u> a conflict of interest for…

A recipient to have a co-worker from the same office as the hearing officer serve as an investigator

- Recipients may have *different individuals* from the *same office* serve separate Title IX roles

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Conflict of Interest: Who can serve which function?

Title IX Coordinator …

- Investigator ✔
- Informal resolution facilitator ✔
- "Procedural facilitator" @ hearing ✔
- Decision-maker or appeal decision-maker ✘

Investigator …

- Title IX Coordinator ✔
- Informal resolution facilitator ✔
- Decision-maker or appeal decision-maker ✘

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Conflict of Interest: Who can serve which function?

Hearing decision-maker…

- Investigator ✗
- Title IX Coordinator ✗
- Appeal decision-maker ✗

Appeal decision-maker …

- Investigator ✗
- Title IX Coordinator ✗
- Hearing decision-maker ✗

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Avoiding 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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Trauma-Informed Practices

- 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

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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.

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Reports Received & Supportive Measures

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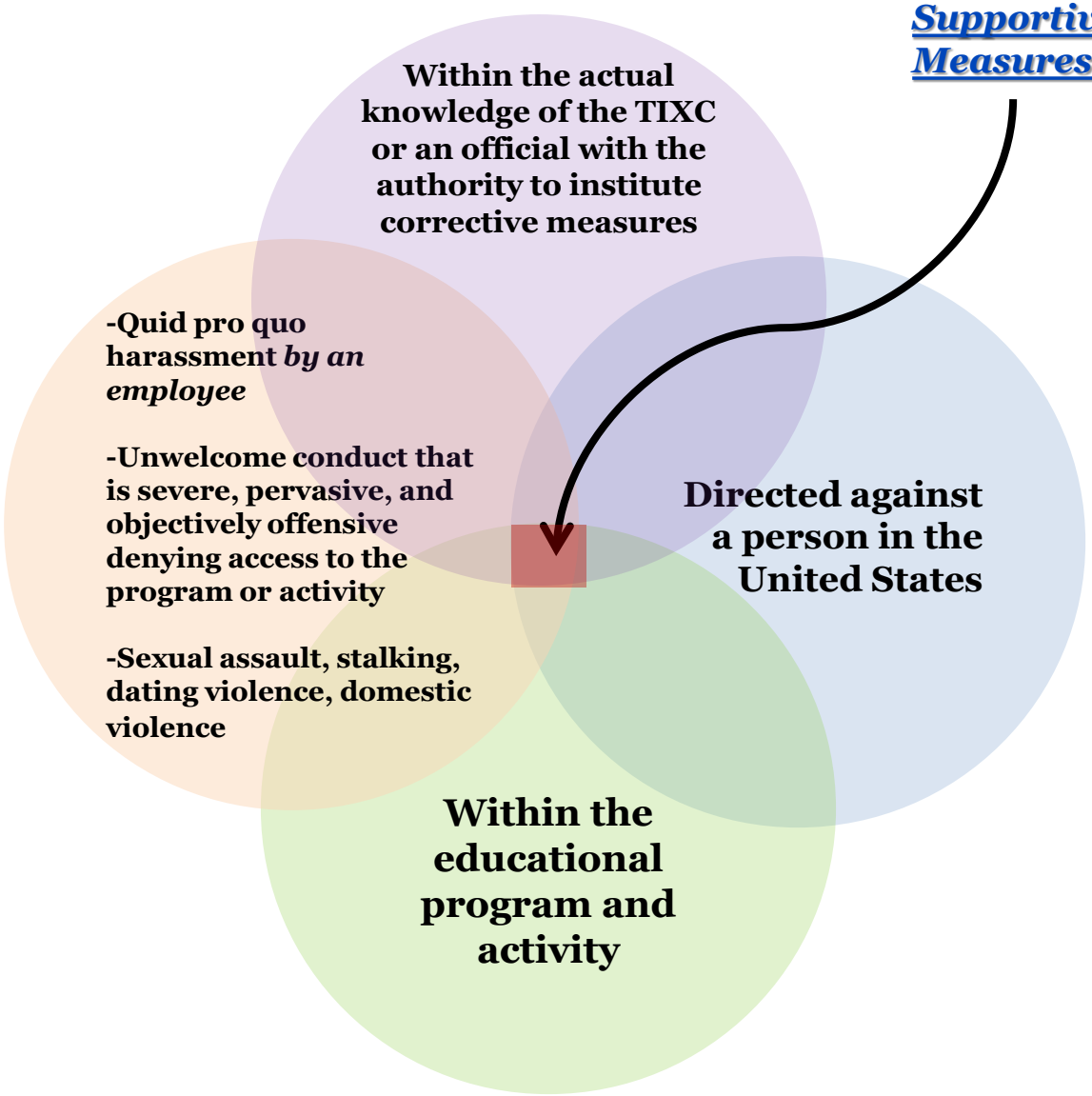
Title IX Response Obligation Arises: Supportive Measures, Triage



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Obligation to Respond

"***Actual knowledge*** means ***notice*** of sexual harassment or allegations of sexual harassment to a recipient's Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient" § 106.30(a)

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What Constitutes Notice?

- "Notice results whenever . . . any Title IX Coordinator, or any official with authority: **Witnesses** sexual harassment; **hears about** sexual harassment or sexual harassment allegations from a complainant . . . or third party; **receives a written or verbal complaint** about sexual harassment or sexual harassment allegations; or **by any other means**." 85 FR 30040
- "'Notice' . . . includes, but is not limited to, a report of sexual harassment to the Title IX Coordinator" § 106.30(a)

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Notice*

Response**

**Notice includes a Report*
*** The response obligation is the same*

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REPORTING

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Reporting (Alleged) Sexual Harassment

The Title IX Coordinator

- Students/employees must have a "**clear channel** through the Title IX Coordinator" to report
- Ensure that "complainants and third parties have **clear, accessible ways to report** to the Title IX Coordinator"
- Must "[n]otify all students and employees (and others) of the Title IX Coordinator's contact information"

§ 106.8; 85 FR 30106

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Reporting (Alleged) Sexual Harassment

Who can report?

- "**Any person** may report sex discrimination, including sexual harassment (whether or not the person reporting is the person alleged to be the victim of conduct that could constitute sex discrimination or sexual harassment)" § 106.8(a)
  - Complainant
  - Third Party ("such as an alleged [complainant's] friend or a bystander witness"; "e.g., the complainant's parent, friend, or peer")

85 FR 30108; 85 FR 30040

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Reporting (Alleged) Sexual Harassment

Who can report?

- Institutions may permit anonymous/blind reporting
  - *"[N]otice conveyed by an anonymous report may convey actual knowledge to the recipient to trigger a recipient's response obligations"*
  - *"Nothing in the final regulations precludes a recipient from implementing reporting systems that facilitate or encourage an anonymous or blind reporting option"*
- Note: ability to respond, i.e. offer supportive measures, or to consider initiating a grievance process will be affected by whether the report disclosed the identity of the complainant or respondent

85 FR 30132-33

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Reporting (Alleged) Sexual Harassment

Who must report?

- ~~Responsible employees~~
  - "[R]ecipients have discretion to determine which of their employees should be mandatory reporters, and which employees may keep a postsecondary student's disclosure about sexual harassment confidential." 85 FR 30108

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Reporting (Alleged) Sexual Harassment

How to Report

- In person
- Mail
- Telephone
- Email
- Electronic/online portal
- Using Title IX Coordinator's published contact information

Any means that results in the Title IX Coordinator receiving a verbal or written report

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Responding to a Report

Once the institution has **actual knowledge** of allegations of sexual harassment 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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Emergency Removal / Administrative Leave

- The institution may employ an **emergency removal process** if there is an **immediate threat to the physical health or safety** of any students or other individuals arising from the allegations of sexual harassment.
- The institution may place a non-student employee on **administrative leave** during the pendency of a grievance process.
  - **Employee may not be placed on administrative leave unless and until a Formal Complaint is filed

§ 106.44(c), (d)

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SUPPORTIVE MEASURES

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What are Supportive Measures?

- Non-disciplinary, non-punitive individualized services,
- offered as appropriate, as reasonably available, and without fee or charge,
- to the complainant or the respondent,
- designed to restore or preserve equal access to the recipient's education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the recipient's educational environment, or deter sexual harassment.

§ 106.45(a)(3)

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Process & Oversight

- Flexibility to determine *how* to process requests for supportive measures
- The burden of arranging & enforcing supportive measures remains on the institution not on a party
- Title IX Coordinator must remain responsible for coordinating effective implementation . . .

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Process & Oversight

- Title IX Coordinator must:
  - Serve as the point of contact for parties
  - Ensure that the burden of navigating administrative requirements does not fall on the parties
- Title IX Coordinator may:
  - Rely on other campus offices/administrators to *actually provide* supportive measures

How can you best serve the parties through coordination & planning?

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Process & Oversight

- Select & implement measures:
  - Meet one or more of the stated purposes (i.e. restore/preserve equal access; protect safety; deter sexual harassment)
  - Within the stated parameters (i.e. not punitive/disciplinary/unreasonably burdensome)
- Flexibility based on (1) specific facts and circumstances; and (2) unique needs of the parties in individual situations

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What are Supportive Measures?

- Non-disciplinary, non-punitive individualized services,
- offered as appropriate, as reasonably available, and without fee or charge,
- **to the complainant or the respondent**,
- designed to restore or preserve equal access to the recipient's education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the recipient's educational environment, or deter sexual harassment.

§ 106.45(a)(3)

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To Whom and When?

The Complainant

- Must be discussed with/offered to every complainant promptly upon receipt of actual notice (including a report) § 106.44(a); 85 FR 30180
  - "Section 106.44 *obligates* a recipient to offer supportive measures to every complainant . . . ." 85 FR 30266
  - If you do not provide supportive measures to the Complainant, you must document why that response was not clearly unreasonable in light of the known circumstances (e.g. because complainant did not wish to receive supportive measures or refused to discuss measures with the Title IX Coordinator") 85 FR 30266
- Discretion to continue providing measures after a finding of non-responsibility

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To Whom and When?

The Respondent

- "There is no corresponding obligation to offer supportive measures to respondents [at reporting], rather, recipients *may* provide supportive measures to respondents." 85 FR 30266
- *Permitted* before or after a formal complaint is filed. 85 FR 30185
  - Recommended discussion after formal complaint (at least)
  - Consider also that the respondent may request supportive measures at any point
- Discretion to continue providing after a finding of non-responsibility

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Supportive Measures

- Non-disciplinary, non-punitive,
- **individualized services offered as appropriate, as reasonably available, and without fee or charge**,
- to the complainant or the respondent,
- designed to restore or preserve equal access to the recipient's education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the recipient's educational environment, or deter sexual harassment.

§ 106.45(a)(3)

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Individualized & Reasonably Available

- Complainant's wishes must be considered after a report
- Case-by-case basis
- "Reasonable efforts" standard from Clery/VAWA might be helpful

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Supportive Measures

- **Non-disciplinary, non-punitive**,
- individualized services offered as appropriate, as reasonably available, and without fee or charge,
- to the complainant or the respondent,
- designed to restore or preserve equal access to the recipient's education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the recipient's educational environment, or deter sexual harassment.

§ 106.45(a)(3)

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Non-disciplinary & Non-punitive

- Institutions cannot "treat a Respondent as though accusations are true before the accusations have been proved" 85 FR 30267

- "The final regulations prohibit a recipient from taking disciplinary action, or other action that does not meet the definition of a supportive measure, against a respondent without following a [compliant] grievance process" 85 FR 30267, n.1097

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Supportive Measures

- Non-disciplinary, non-punitive,
- individualized services offered as appropriate, as reasonably available, and without fee or charge,
- to the complainant or the respondent,
- **designed** to restore or preserve equal access to the recipient's education program or activity without **unreasonably burdening** the other party, including measures designed to **protect the safety of all parties or the recipient's educational environment**, or **deter sexual harassment**.

§ 106.45(a)(3)

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Designed to Restore/Preserve Equal Access

"Designed to" ≠ "Necessarily Do"

- Measures should be intended to help a party retain equal access to education
- Preserve discretion and protect against "unfair imposition of liability" (e.g. where "underlying trauma from a sexual harassment incident still results in a party's inability to participate in an education program or activity")

85 FR 30182

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Goals / Purpose

- Restore or preserve equal access to the recipient's education program or activity:
  - E.g., help to stay in school, stay on track academically (85 FR 30088)
  - Protect the safety of all parties or the recipient's educational environment
  - Deter sexual harassment

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No "unreasonable burden"

- Protect each party from a request from the other for "measures that would unreasonably interfere with either party's educational pursuits" 85 FR 30180

- "Does not bar all measures that place *any* burden on a respondent" 85 FR 30267; 85 FR 30180 (or complainant)

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No "unreasonable burden"

- **Does not mean** "proportional to the harm alleged"
- **Does not mean** "least burdensome measures" possible
- **May be** (un)reasonable to make housing/schedule adjustments or to remove a party from an extracurricular/athletic pursuit (85 FR 30182)
  - Fact-specific determination
    - Take into account the nature of the educational programs, activities, opportunities, and benefits in which a party is participating . . . <u>not limited to academic pursuits</u>

Document the reasons why a particular supportive measure was not appropriate, even though requested . . . including by documenting the assessment of burden

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Punitive + Unreasonably Burdensome

- The possible sanctions described/listed in a grievance procedure constitute actions the institution considers "disciplinary"
- Those sanctions thus cannot be supportive measures

Supportive Measures ≠ Sanctions

- Certain actions are inherently disciplinary/punitive/unreasonably burdensome even if not listed as sanctions in grievance procedure:

Suspension, Expulsion, Termination ≠ Supportive Measures

85 FR 30182 (*but see* emergency removal & administrative leave)

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Holds

"Even a temporary 'hold' on a transcript, registration, or graduation will generally be considered to be disciplinary, punitive, and/or unreasonably burdensome."

1/15/2021 Q&A, Question 21

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One-Way No Contact Orders

- Require a fact-specific inquiry
- Must be carefully crafted
- For example:
  - Help enforce a restraining order, preliminary injunction, or other order of protection issued by a court
  - Doesn't unreasonably burden the other party

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Mutual No Contact Orders

- Limit interactions, communications, contact between the parties
- No communication:
  - Likely would not unreasonably burden either party
  - May avoid more restrictive orders (or measures)
- No physical proximity:
  - Requires a fact-specific analysis to assess, among other things, the burden
  - Consider alternatives to a no contact order

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Confidentiality

Must be kept confidential unless confidentiality would impair provision

- Complainant thus may obtain supportive measures while keeping identity confidential from respondent (and others)
  - Unless disclosure is necessary to provide the measures (e.g. where a no-contact order is appropriate)

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Part One: formal complaint through notice of allegations

THE GRIEVANCE PROCESS

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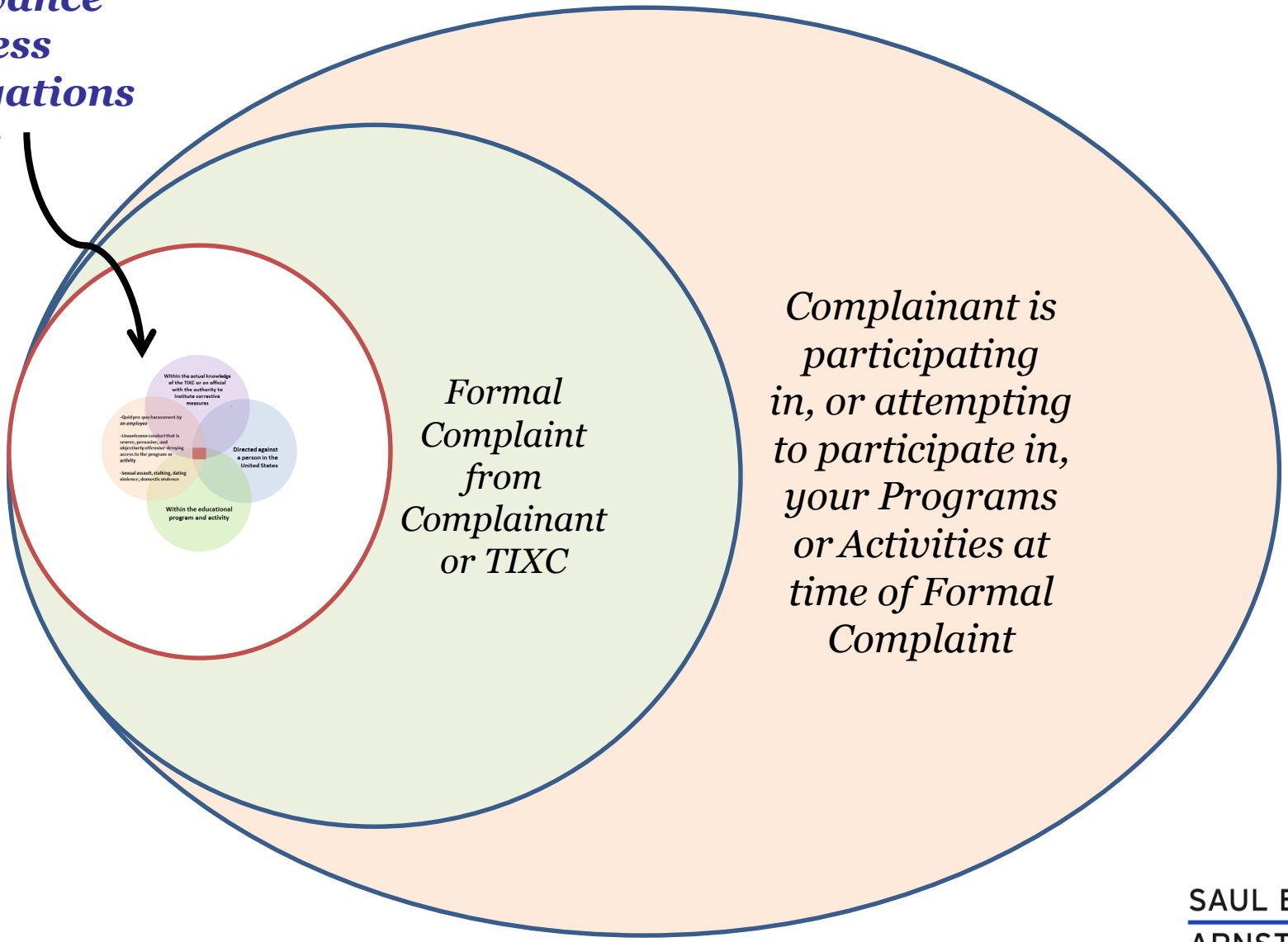
§106.45 Grievance Process Obligations Arise



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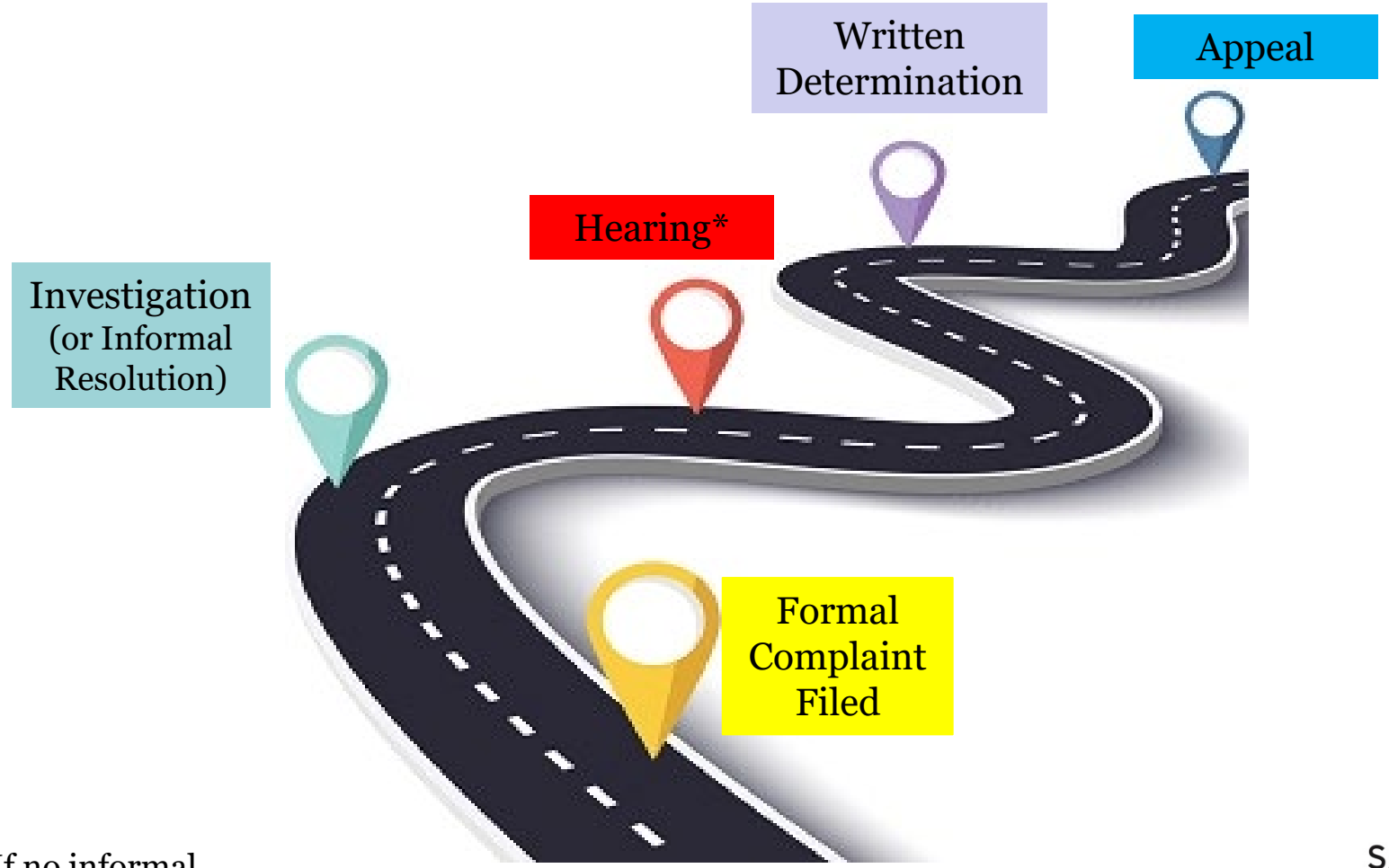
Roadmap: Grievance Process



*If no informal resolution is reached

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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

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Formal Complaint

Who can file?

- Complainant may file Formal Complaint by signing document
  - Institution *must* investigate when Complainant desires the action
- Title IX Coordinator may sign Formal Complaint
  - If the Title IX Coordinator has determined on behalf of the institution that an investigation is needed (*clearly unreasonable standard*)
- No anonymous filing

§ 106.30; 85 FR 30131 n. 580; 85 FR 30133

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Formal Complaint

If the Title IX Coordinator signs the Formal Complaint

- Title IX Coordinator is not a complainant or otherwise a party
- Not evidence of "bias"
- Complainant remains the party to the action
- Complainant has right to refuse to participate in grievance process

§ 106.71

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Formal Complaint

Where and How to File:

"A formal complaint may be filed with the Title IX Coordinator **in person**, **by mail**, or by **electronic mail**, by using the contact information required to be listed for the Title IX Coordinator under § 106.8(a), and by **any additional method designated by the recipient**."

§ 106.30

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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)*

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Evaluating Formal Complaint: Consolidation

- Institution **may consolidate** multiple Formal Complaints
- Consolidation may involve:
  - Same facts or circumstances involving multiple respondents or multiple complainants;
  - Allegations of conduct that are temporally or logistically connected.

§ 106.45(b)(4).

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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)

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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*

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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*

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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.

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Informal Resolution

Alternative Resolution Requirements

A written consent form to participate in informal resolution might include e.g., agreement that:

- Successful completion of preparatory meetings is a precondition to participation in informal resolution
- The parties are bound by the terms of any final informal resolution agreement, cannot return to formal resolution after an agreement, and consequences for failing to comply with agreement terms
- How, and for how long, records will be kept

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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."*

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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

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Notice of Meetings

Parties must be given **written notice** of the date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings where the party's participation in such meetings is invited or expected. The written notice to the parties of such meetings must be provided with sufficient time for the party to prepare to participate.

§ 106.45(b)(5)(v)

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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)

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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)

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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)

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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

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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"

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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)

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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*

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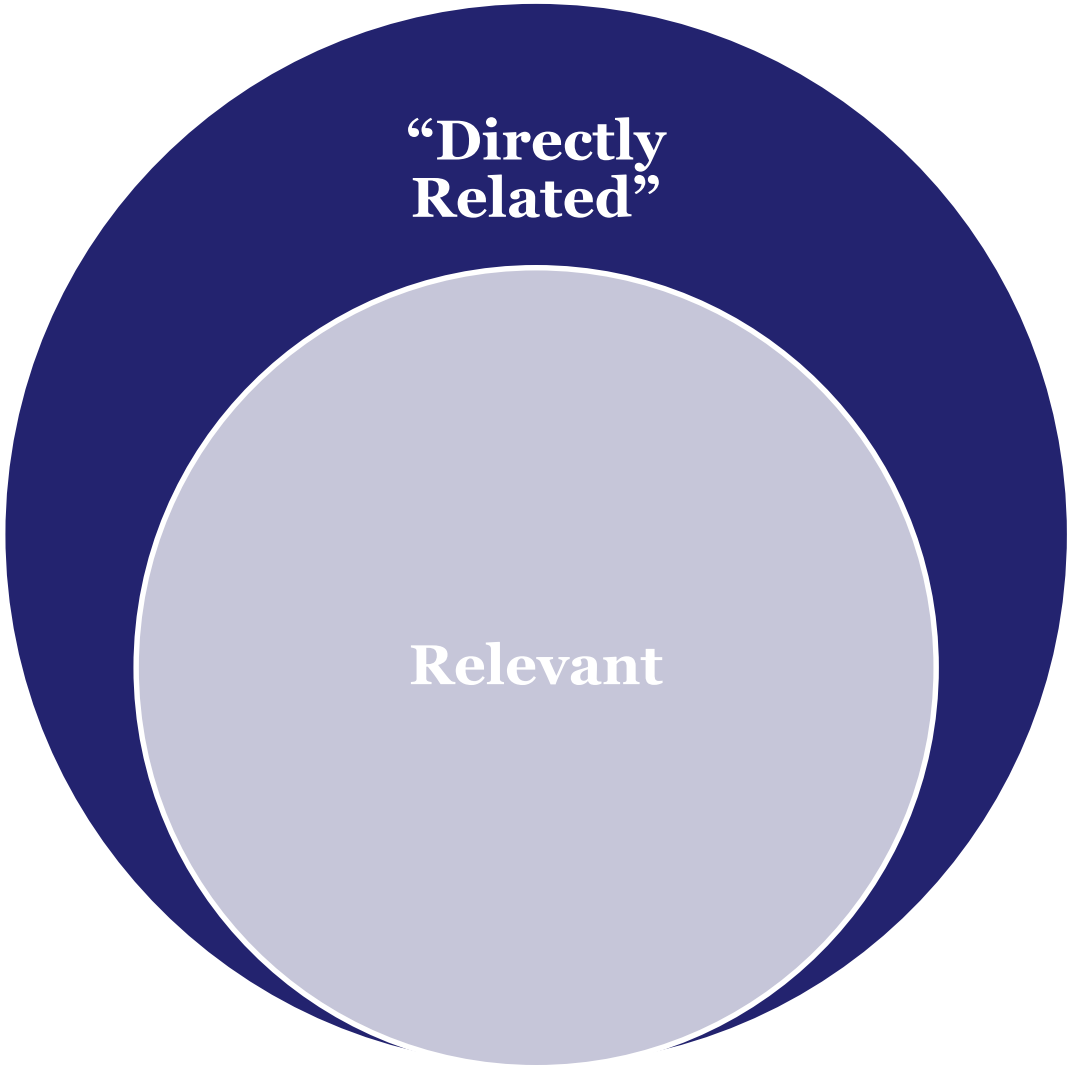

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Step Two: Review of and Response to Evidence

- 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

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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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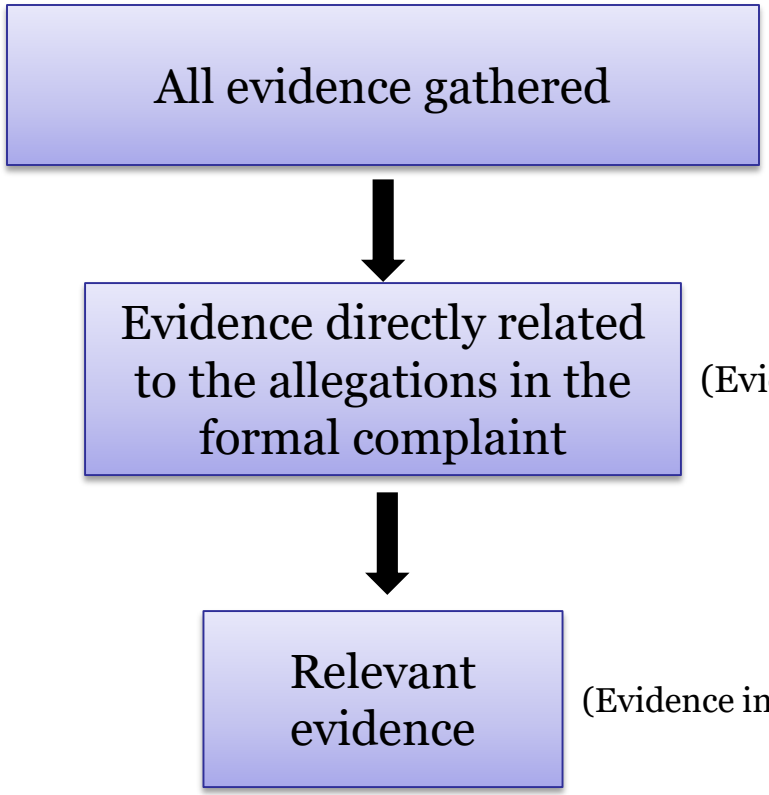
Evidence



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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.

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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

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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

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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

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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

- 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."

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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."

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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.

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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.

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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.

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"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.")

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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

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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

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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

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Part Three: 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

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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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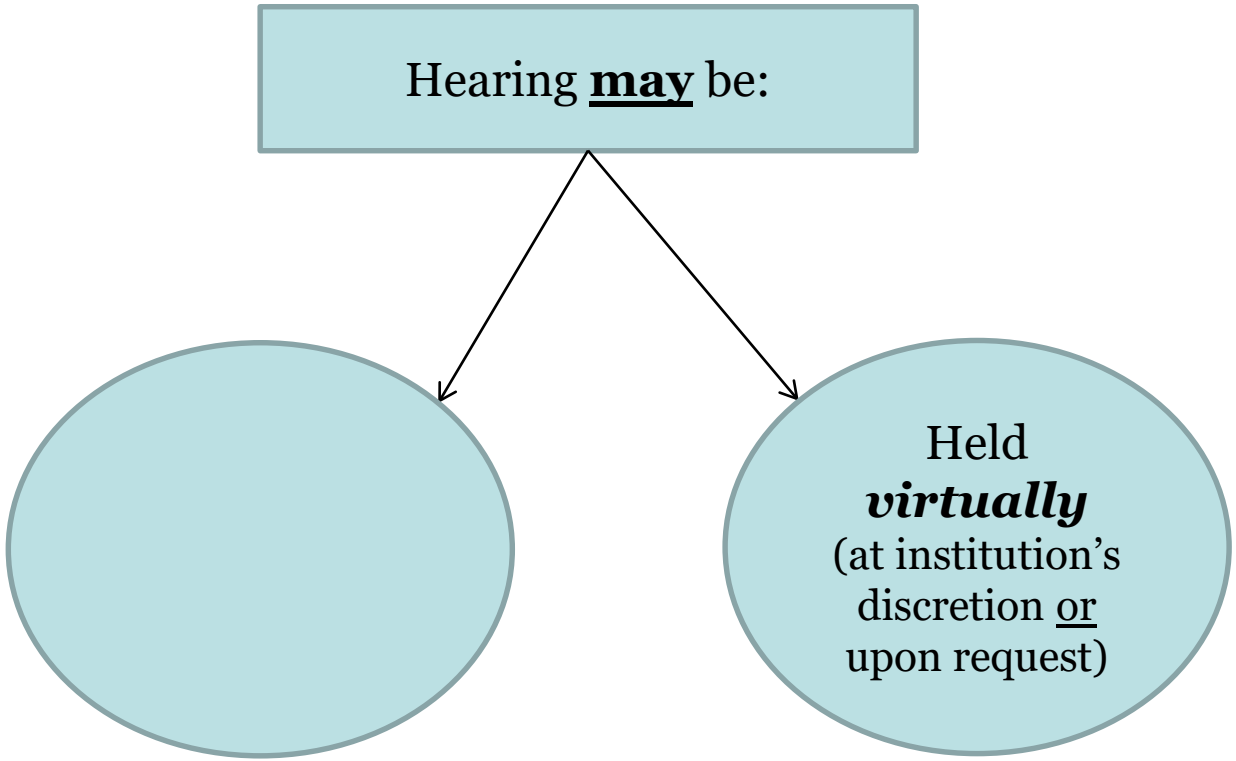
Live Hearing: Location

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)

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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

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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

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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.

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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 & 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."

1/15/2021 Q&A, Question 15

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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"

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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"

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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

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Relevance and the impact of declining to participate

CROSS-EXAMINATION

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Cross-Examination

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

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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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"Hearsay"

- If a party or witness does not submit to cross-examination at the live hearing, then the **decision-maker cannot rely on <u>ANY</u> statement** of that party or witness in reaching a determination regarding responsibility.
  - *If a party's advisor asks a <u>relevant question</u> of another party or a witness, and the party/witness declines to respond to the question, then the decision-maker is <u>precluded from relying on **any** statement made by that party or witness</u>.*

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Hearsay

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

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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)

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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.

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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.

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The role of advisors

CROSS-EXAMINATION

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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).

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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.*

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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.

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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.*

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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.*

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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*

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Basics: Assigned Advisor

- 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.
- 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.*

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Role of Advisor

- Advisor conducts any **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).

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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

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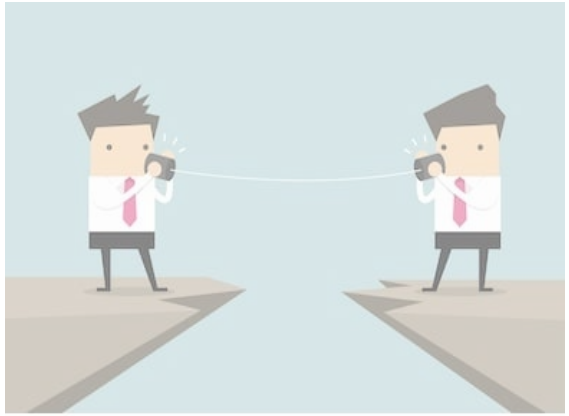
Role of Advisor

- 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 & 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***."

9/4/2020 Q&A, Question 12

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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.*

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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.
- *Consider hearsay rules. . .*

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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.

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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

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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.*

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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.*

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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

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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).

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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)

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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)

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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

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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).

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Remedies Defined

- Designed to "restore or preserve equal access to the recipient's education program or activity." §106.45(b)(1)(i)
- May include the same services described as "supportive measures." 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.

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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.

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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)-(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)

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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)

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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)

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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

85 FR 30294

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The Analysis

- *First*, do sufficient grounds exist for at least one basis of appeal (i.e., procedural irregularity, new evidence, bias/conflict, disproportionate sanction)?
- *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)?

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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)

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Documenting Decisions & Recordkeeping

DOCUMENTATION

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Documentation: The Requirements

An institution **must** create and maintain records of any actions taken in response to a report or formal complaint of sexual harassment.

§106.45(b)(10)(ii)

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Documentation: The Requirements

- Document . . .
  - the basis for conclusion that response was not deliberately indifferent; and
  - that measures taken were designed to restore or preserve equal access to the education program or activity.

§106.45(b)(10)(ii)

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Documentation: Supportive Measures

- Requirement extends to decisions re: provision of supportive measures
- If an institution does not provide a complainant with supportive measures, then the institution must document the reasons why such a response was not "clearly unreasonable in light of the known circumstances."
- Documentation of certain bases/measures does not limit the institution from providing additional explanations or detailing additional measures taken in the future.

§106.45(b)(10)(ii)

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Document Retention

- The Department extended the three-year retention period to seven years. §106.45(b)(10)(i)
  - **Date of creation begins the seven-year period.** 85 FR 30411
- Harmonizes recordkeeping requirements with the Clery Act. 85 CFR 30410
- Institutions are permitted to retain records for a longer period of time.
  - E.g. seven years from creation of the last record pertaining to the case

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Document Retention

Must maintain records of:

- Investigation;
- Any determination regarding responsibility;
- Audio or visual recording or transcript;
- Any disciplinary sanctions imposed on the respondent; and
- Any remedies provided to the complainant designed to restore or preserve equal access to the institution's educational program or activity.

§106.45(b)(10)(i)(A)

- Any appeal and the result.
- Any informal resolution and the result.

§106.45(b)(10)(i)(B)-(C)

- All materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process.

§106.45(b)(10)(i)(D)

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Document Retention: Investigations

- Any record the institution creates to investigate an allegation, regardless of later dismissal or other resolution of the allegation, must be maintained.
  - Even those records from "truncated investigations" that led to no adjudication because the acts alleged did not constitute sex discrimination under Title IX (dismissal)

§106.45(b)(10)(i)(A); 85 FR 30411

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Publication

- An institution must make training materials publicly available on its website.
  - If the institution does not maintain a website, the institution must make the materials available upon request for inspection by members of the public.
- *Goal*: Increase transparency and integrity of grievance process.

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Your Trainers

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