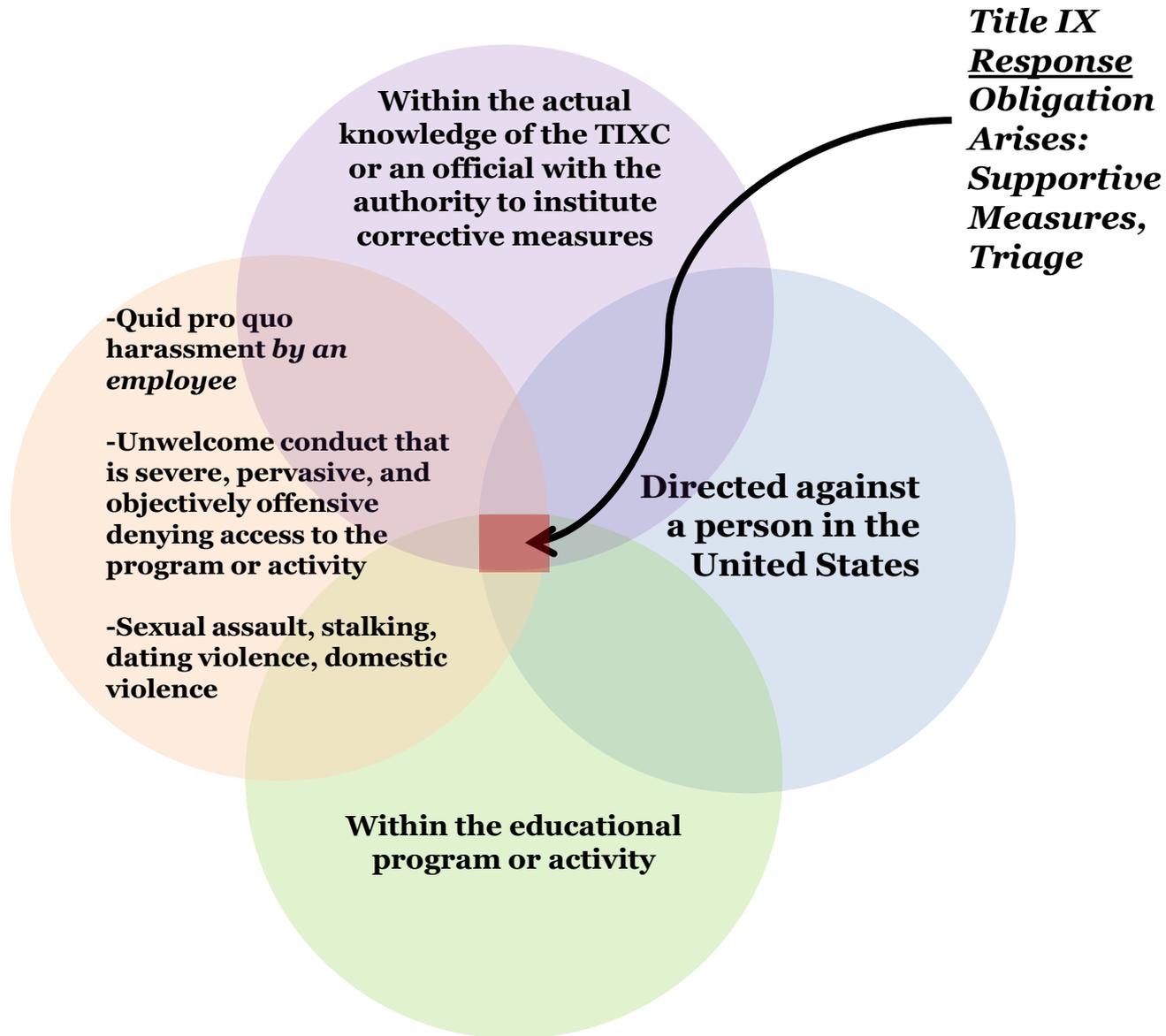


Title IX Appeal Officer Training

October 9, 2020

How did we get here?

REFRESHER



Response Obligations

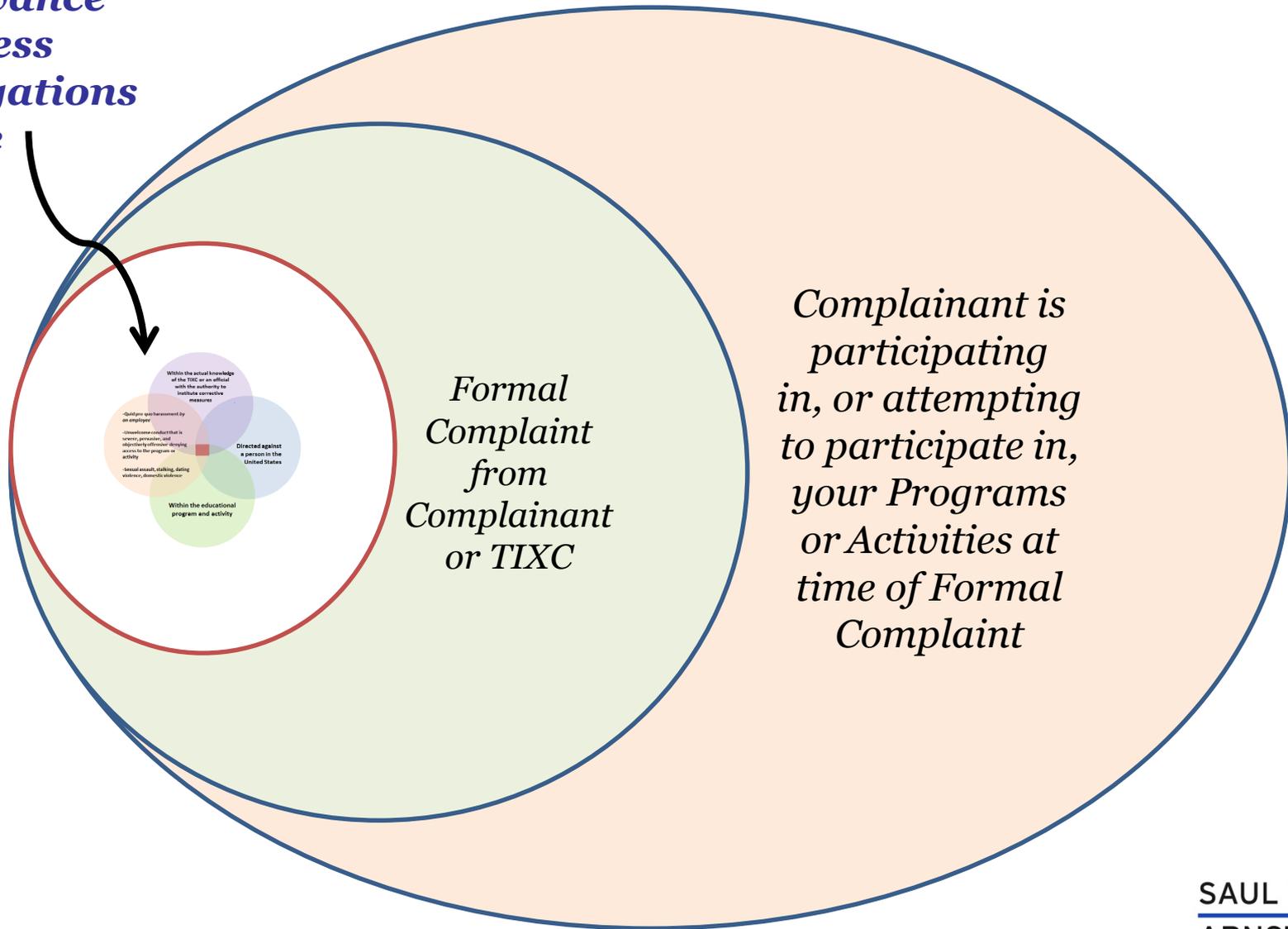
Once the institution has actual knowledge the Title IX Coordinator must:

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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**§106.45
Grievance
Process
Obligations
Arise**



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.

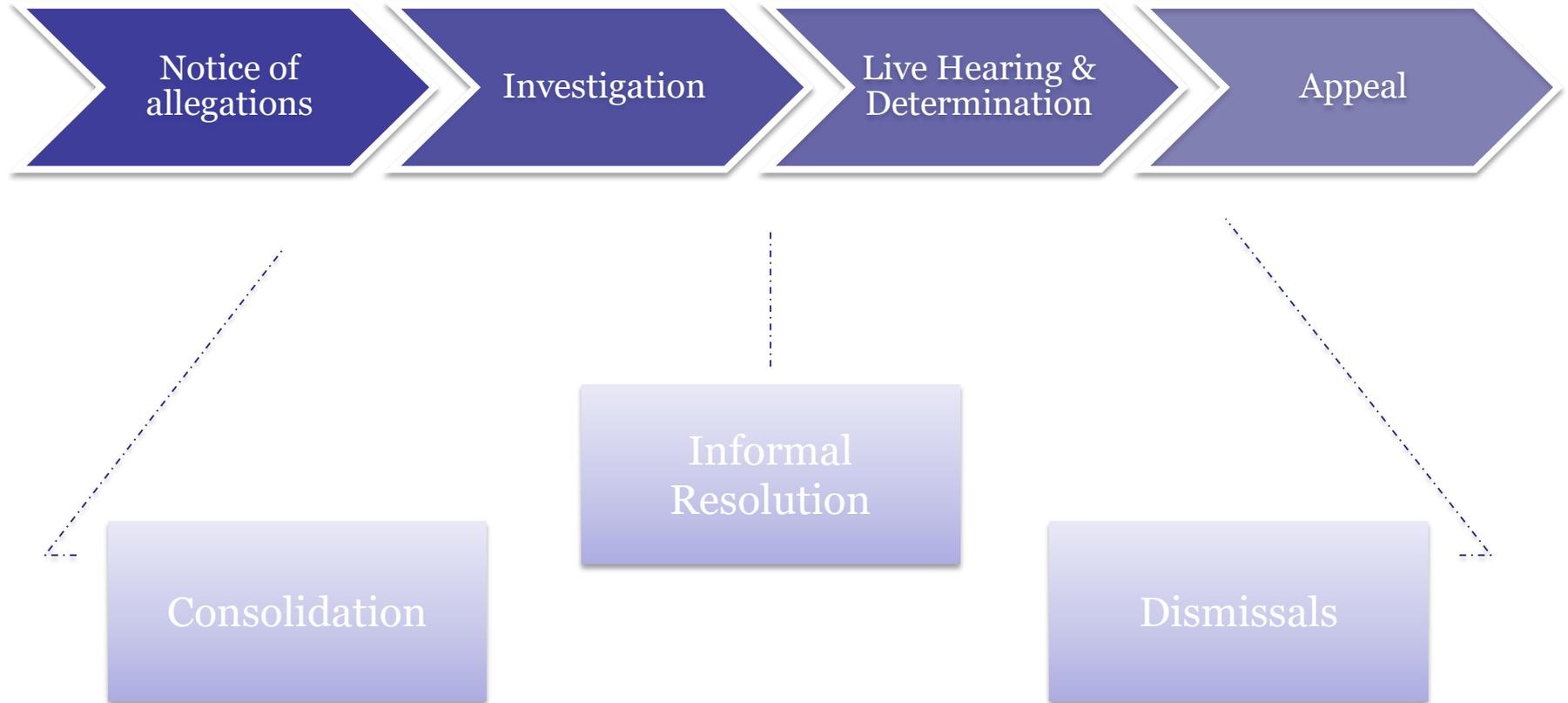
is required to initiate the grievance process.

§ 106.30

Overview of Formal Complaints and the requirements of §106.45

THE GRIEVANCE PROCESS

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

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

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

§ 106.30

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)

The Hearing

- Live
- With Cross-Examination
 - Advisor asks other party and witnesses **relevant questions** and follow-up questions, including those challenging credibility
 - 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
- Results in a written determination of responsibility

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

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)

After the Hearing & Notice of Decision

APPEALS

Mandatory & Equal Appeal Rights

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

§ 106.45(b)(8)(i)-(ii)

Requirements for Appeals

Requirements for Appeals:

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

§106.45(b)(8)(iii)

Grounds for Appeal

- Mandatory bases for appeal:
 - **Procedural irregularity** that affected the outcome of the matter;
 - **New evidence** that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; and
 - The Title IX Coordinator, investigator(s), or decision-maker(s) had a **conflict of interest or bias** for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter.
- A recipient **may offer** additional bases (CMU: 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)

Dismissal of Formal Complaints

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

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

The Analysis

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

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)