

Title IX Appeal Officer Training

December 4, 2023

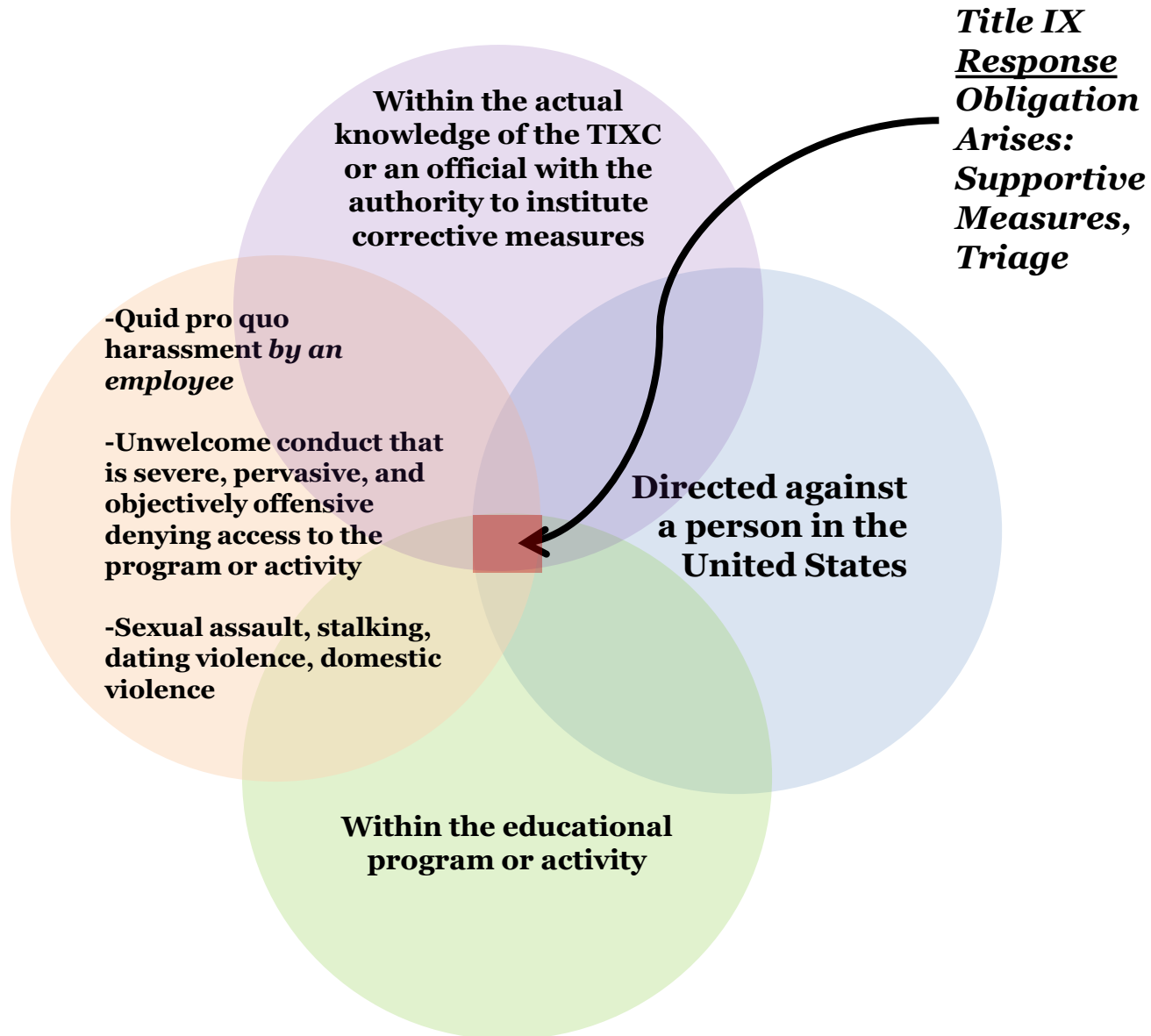
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Agenda

1. **Refresher**
2. **The Grievance Process**
3. **Appeals**
4. **Bias & Conflict of Interest**
5. **Updates for 2022**

How did we get here?

REFRESHER



Response Obligations

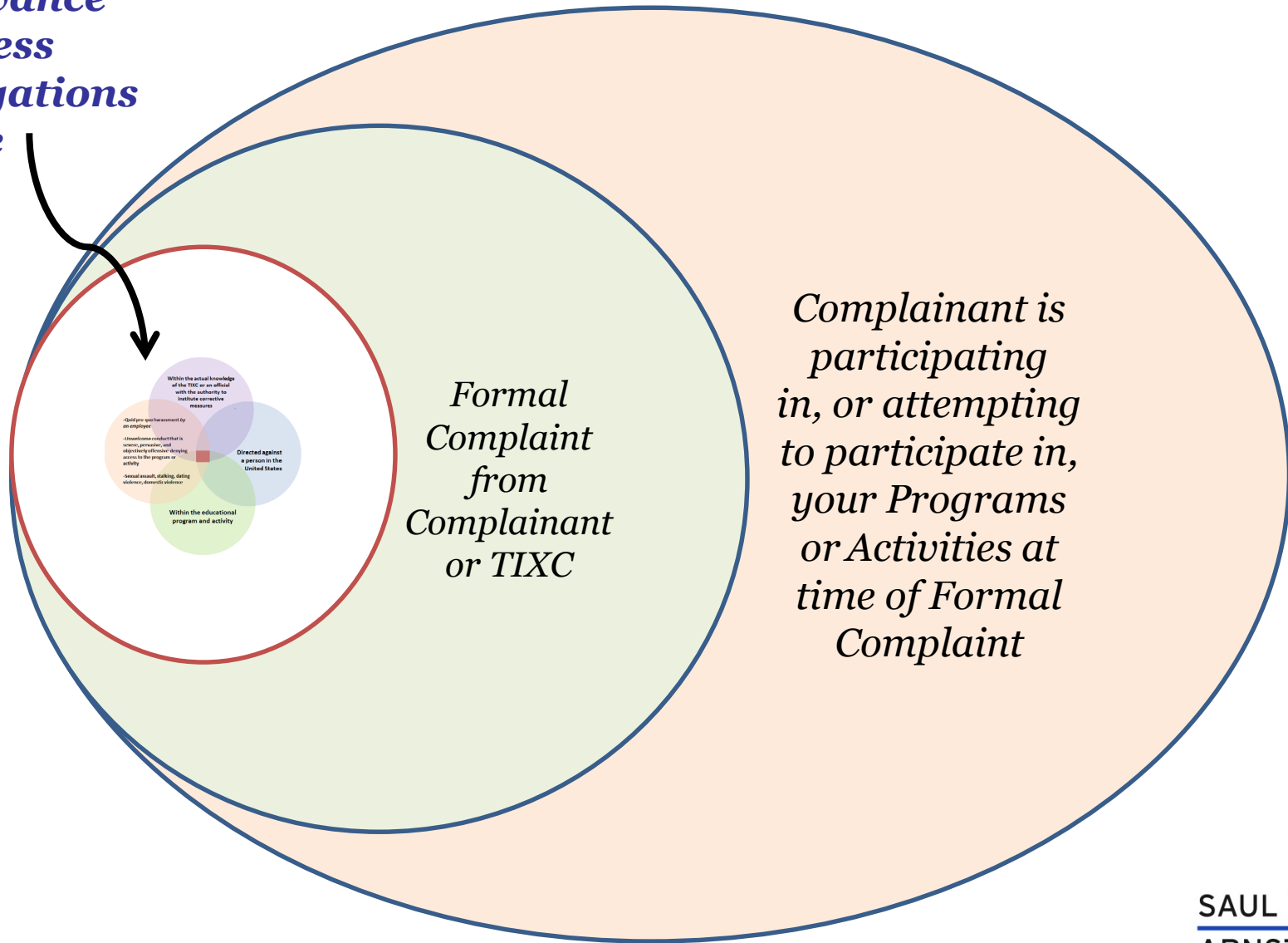
Once the institution has actual knowledge the Title IX Coordinator must:

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.

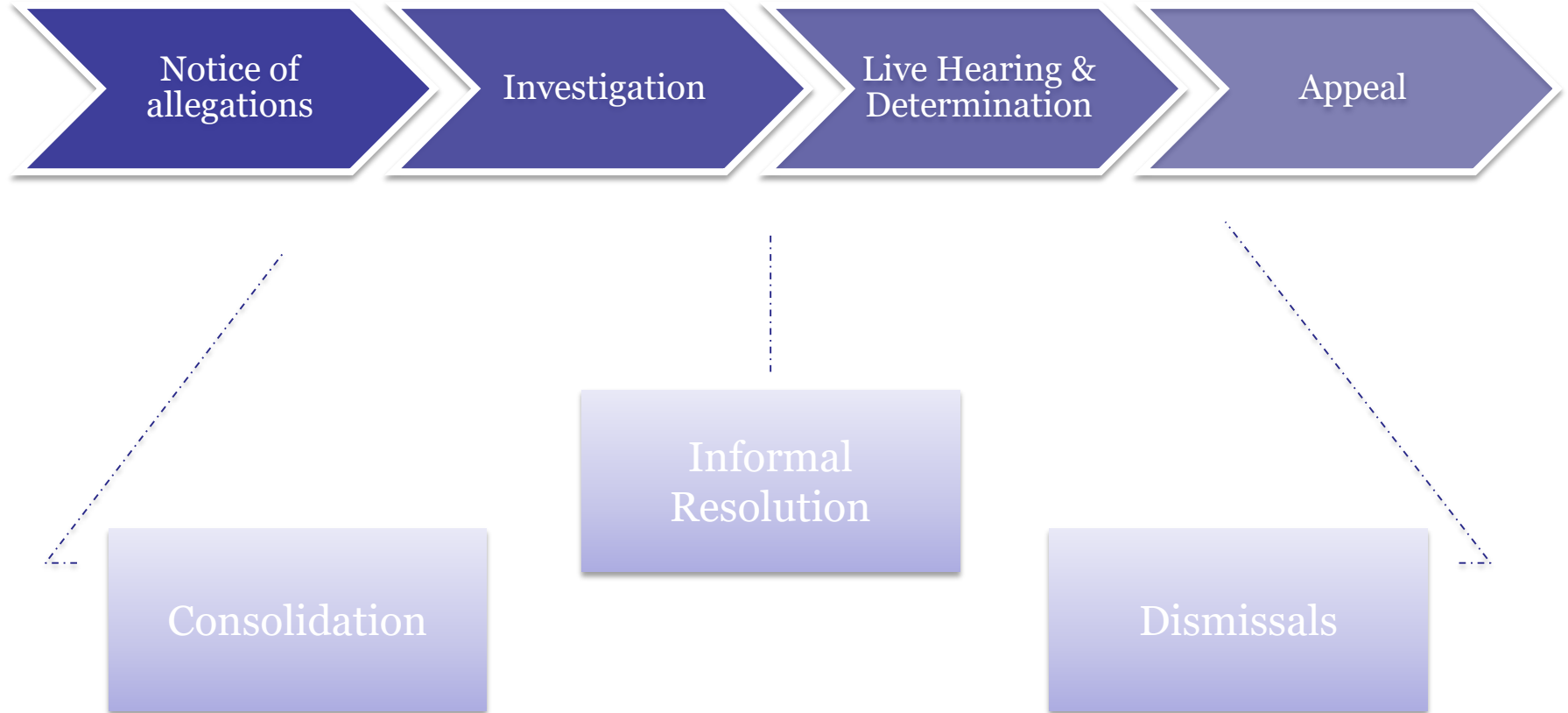
is required to initiate the grievance process.

§ 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
- 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

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)

Expectations: Bias & Conflicts

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

Bias & Conflicts: Grounds for Appeal

A recipient must offer both parties **an appeal** from a determination regarding responsibility, and from a recipient's dismissal of a formal complaint or any allegations therein, on the following bases:

(C) The Title IX Coordinator, investigator(s), or decision-maker(s) **had a conflict of interest or bias** for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter.

§106.45(b)(8)(i)

But not advisors. . .

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

85 FR 30254 n.1041

Serving Impartially

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

Bias: what does it mean?

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

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

85 FR 30248.

Impermissible Bias

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



Bias: what does it mean?

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

85 FR 30238-40

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

85 FR 30496

All protected classes

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

85 FR 30084

What is not defined as bias?

1. Outcomes of the grievance procedure

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

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

85 FR 30252

What is not defined as bias?

2. Title IX Coordinator Signs Formal Complaint

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

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

85 FR 30372

What is not defined as bias?

3. Professional experiences or affiliations

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

85 FR 30252

What is not defined as bias?

3. Professional/Personal Experiences or affiliations

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

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

But consider . . .

Whether a 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

Conflicts of Interest

The Department also declines to define conflict of interest and instead, leaves it in the discretion of the recipient.

It is not a conflict of interest for...

A recipient to fill Title IX personnel positions with its own employees

- 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.

It is not 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

Conflict of Interest: Who can serve which function?

Title IX Coordinator ...

- Investigator ✓
- Informal resolution facilitator ✓
- Decision-maker or appeal decision-maker ✗

Investigator ...

- Title IX Coordinator ✓
- Informal resolution facilitator ✓
- Decision-maker or appeal decision-maker ✗

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 ✘

Self-Disclosure of Potential Bias or Conflict of Interest

Transparency is key!

Serving Impartially: Avoid Prejudgment of the Facts

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

Avoiding Prejudgment of the Facts at Issue

- The Department **permits** institutions to apply **trauma-informed practices**, so long as doing so does not violate the requirement to serve impartiality and without bias
- It is possible, “albeit challenging,” to apply trauma-informed practices in an impartial, non-biased manner
- Any trauma-informed techniques must be applied equally to all genders

85 FR 30256, 30323

Serving Impartially

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



2022 Update - Hearsay

- *Victims Rights Law Center et al v. Cardona*
 - Prior Hearsay Rule - If a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility....”
 - The Court struck down this rule and applied a nation-wide injunction.
 - The Department of Education did not appeal and on August 24, 2021 issued guidance confirming the elimination of this hearsay rule.
- **Hearing Officers may now consider oral and written statements of a witness even if the witness does not submit to examination.**
- However, hearsay may still impact credibility and weight given to the evidence.



2023 Update - NPRM

- The Trump Administration issued implemented the current “final” Title IX regulations with an effective date of August 14, 2020.
- CMU adopted its current Interim Sexual Misconduct Policy on August 14, 2020.
- The Biden Administration issued a Notice of Proposed Rulemaking (NPRM) on July 12, 2022.
- Anticipate that new “final” regulations will be issued in Spring 2024.
- **In the meantime, the 2020 regulations remain in full effect.**



Scenarios

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



Appeal Scenario # 1

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

The Hearing Officer determines CP was incapacitated due to alcohol and finds RP "Responsible" for a violation of sexual assault. The Sanctioning Officer imposes expulsion as the sanction.

RP files an appeal on the basis of new evidence. RP submits "new" text messages that CP sent to a friend on the evening of the incident, shortly after engaging in sex with RP. RP claims these messages demonstrate the CP consented to the sexual activity and also show that CP was sufficiently sober so as to engage in detailed and coherent text conversations with friends.

RP also appeals on the basis that the sanction imposed is disproportionate to the finding of responsibility.



Appeal Scenario # 2

Female identifying adjunct faculty member Sanchez began teaching a summer course in 2020 in the College of Education and successfully taught the course in the summers of 2021 and 2022. Through Sanchez's engagement with the College, she met graduate students and was known to casually date students and faculty off and on.

Male identifying student Parkay enrolled as a PhD candidate in the College of Education in the fall of 2020 with an expected graduation in 2025. Sanchez and Parkay began a consensual relationship during the fall of 2021 that lasted until the spring of 2023. In April 2023 Department Head Schmidt learned of the relationship between Sanchez and Parkay along with other sexual encounters between Sanchez and faculty in the College of Education. Dept. Head Schmidt subsequently decided not to re-hire Sanchez to teach in the summer of 2023 and hired another female to teach the course. Sanchez filed a claim of sex-discrimination against Schmidt because she believes other similarly situated male faculty have been allowed to continue teaching while they also date and have sex with colleagues (although Sanchez is unable to identify any such faculty).

Investigation focuses on the treatment of similarly situated faculty under Schmidt's supervision. Sanchez demands a review of similarly situated faculty university-wide, as she is certain other male faculty have sexual relationships with colleagues. The investigate denies this request.

The Hearing Officer finds Schmidt "Not Responsible" for a disparate treatment discrimination on the basis of sex because Sanchez was unable to identify any male faculty who were treated differently.

Sanchez appeals the on the basis of procedural error and bias. Sanchez alleges procedural error and bias in the investigator's decision to limit the scope of the investigation to similarly situated faculty in the department, instead of the entire university.

Sanchez also claims that the Hearing Officer was biased because the Hearing Officer was previously employed as General Counsel for another university and, therefore, has a bias in favor of the administration.



QUESTIONS?