Carnegie Mellon University

Title IX Investigator Training

OCTOBER 27, 2023

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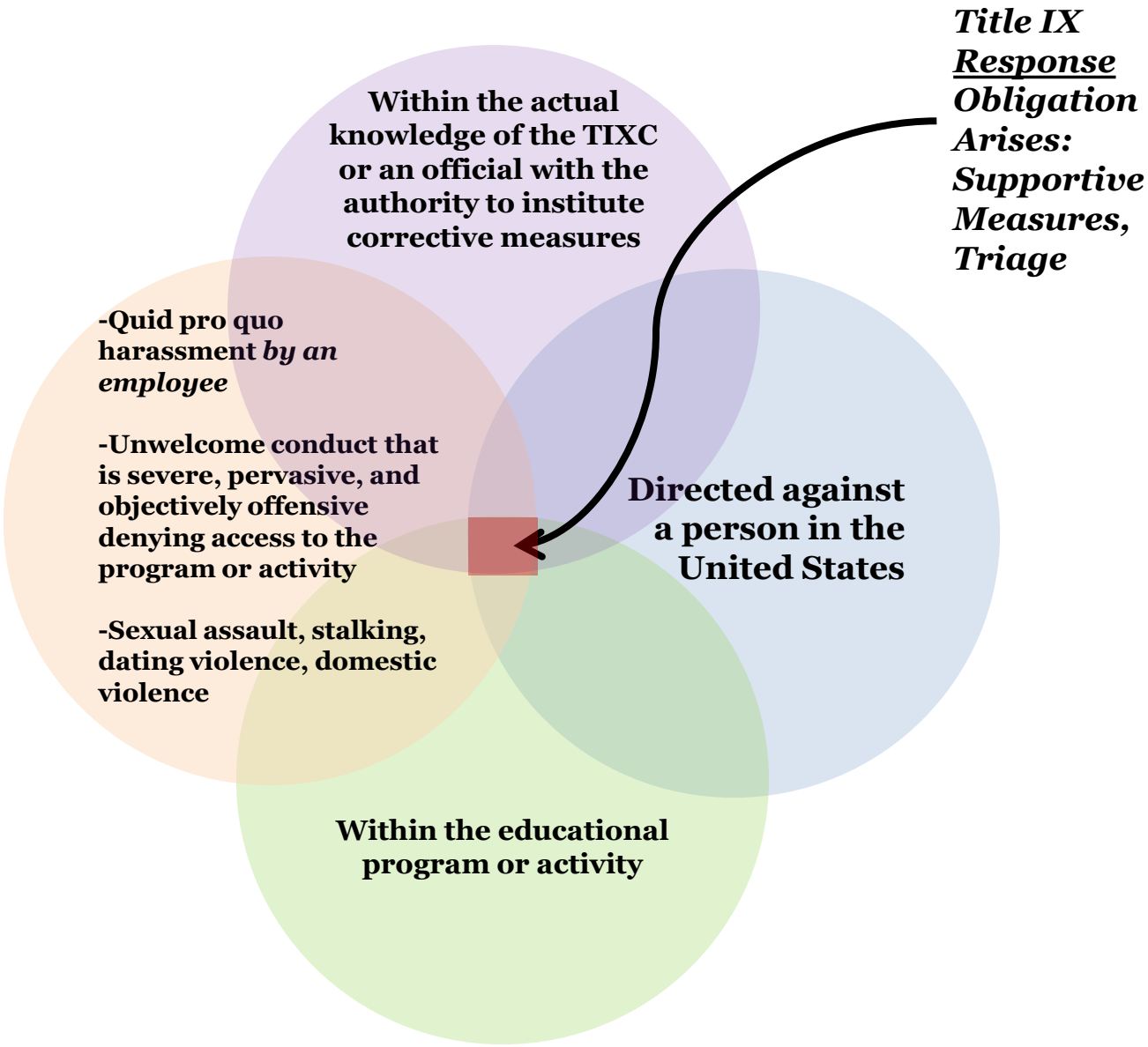
Agenda

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



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Response Obligations

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

1. promptly contact the complainant to discuss the availability of supportive measures
2. consider the complainant's wishes with respect to supportive measures,
3. inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and
4. explain to the complainant the process for filing a formal complaint.

§ 106.44(a)

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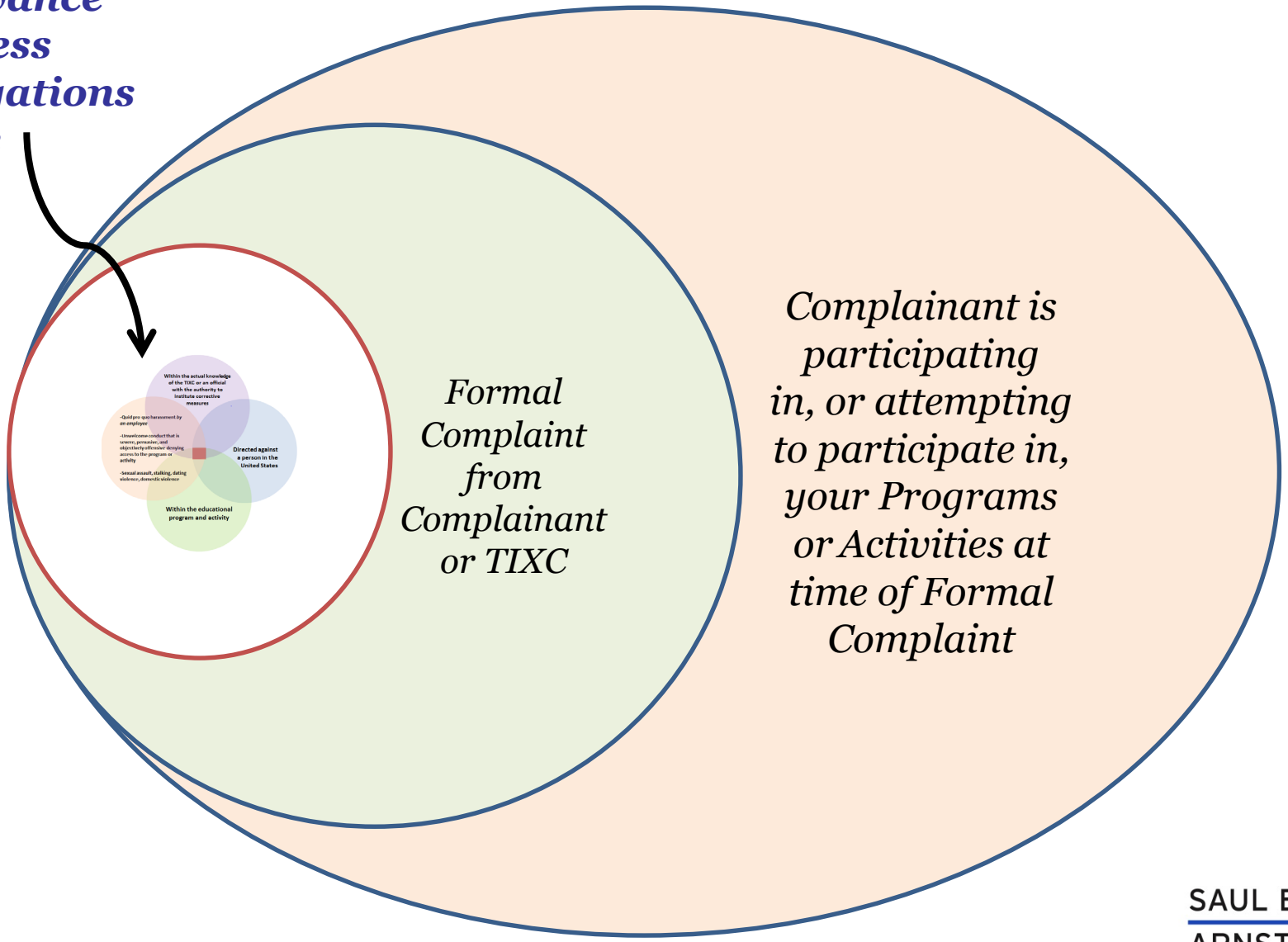
§106.45 Grievance Process Obligations Arise



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Overview of Formal Complaints and the requirements of §106.45

THE GRIEVANCE PROCESS

Formal Complaint

A Formal Complaint

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

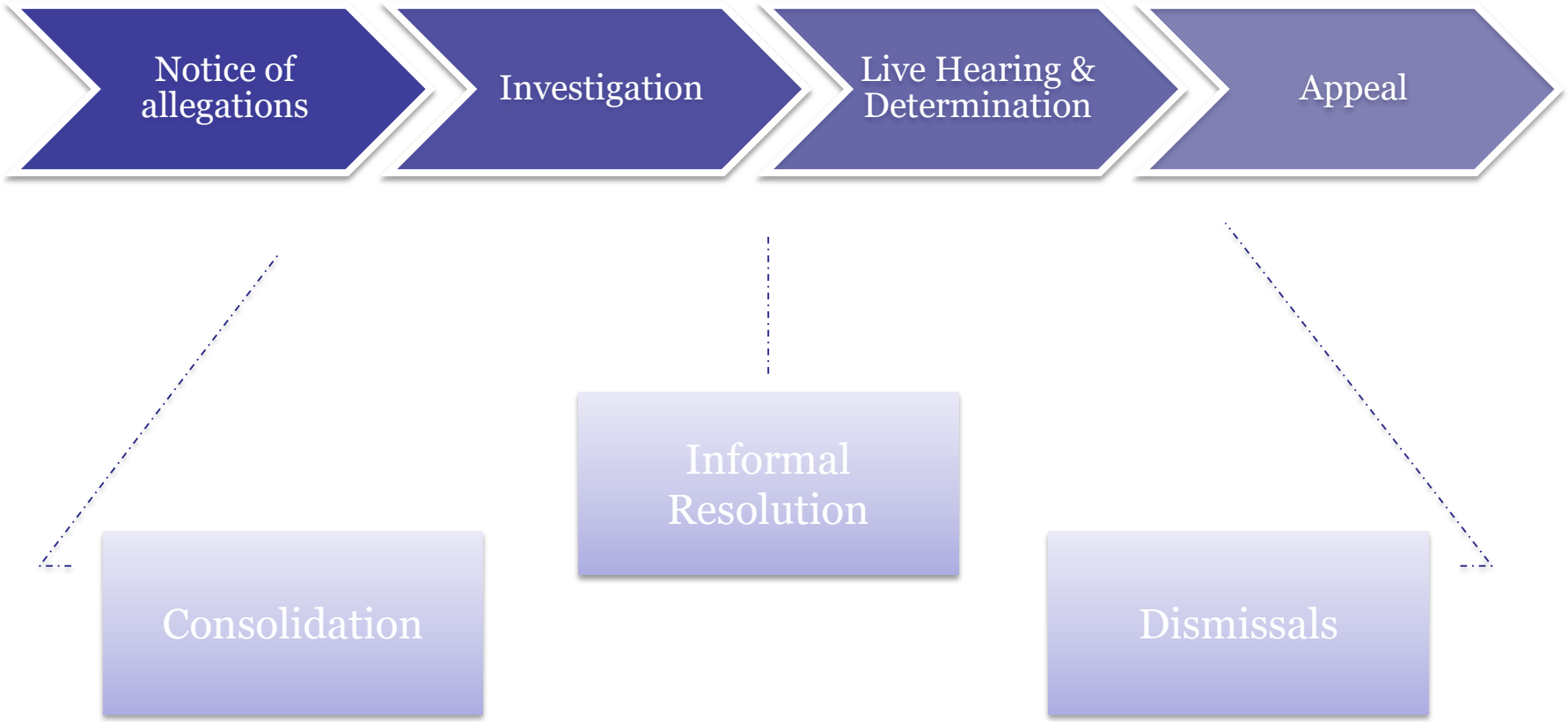
(2) alleging sexual harassment against a respondent, and

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

is required to initiate the grievance process.

§ 106.30

Outline of the Process



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Written Notice of Allegations

Written Notice of Allegations

Source: 106.45(b)(2)(B)

Update as needed throughout the investigation

- **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".

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Gather & fairly summarizing evidence

INVESTIGATIONS

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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: 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)

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

Source: 106.45(b)(5)

Throughout the investigation

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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 & expulpatory)

Source: 106.45(b)(5)

Throughout the investigation

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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

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"

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)

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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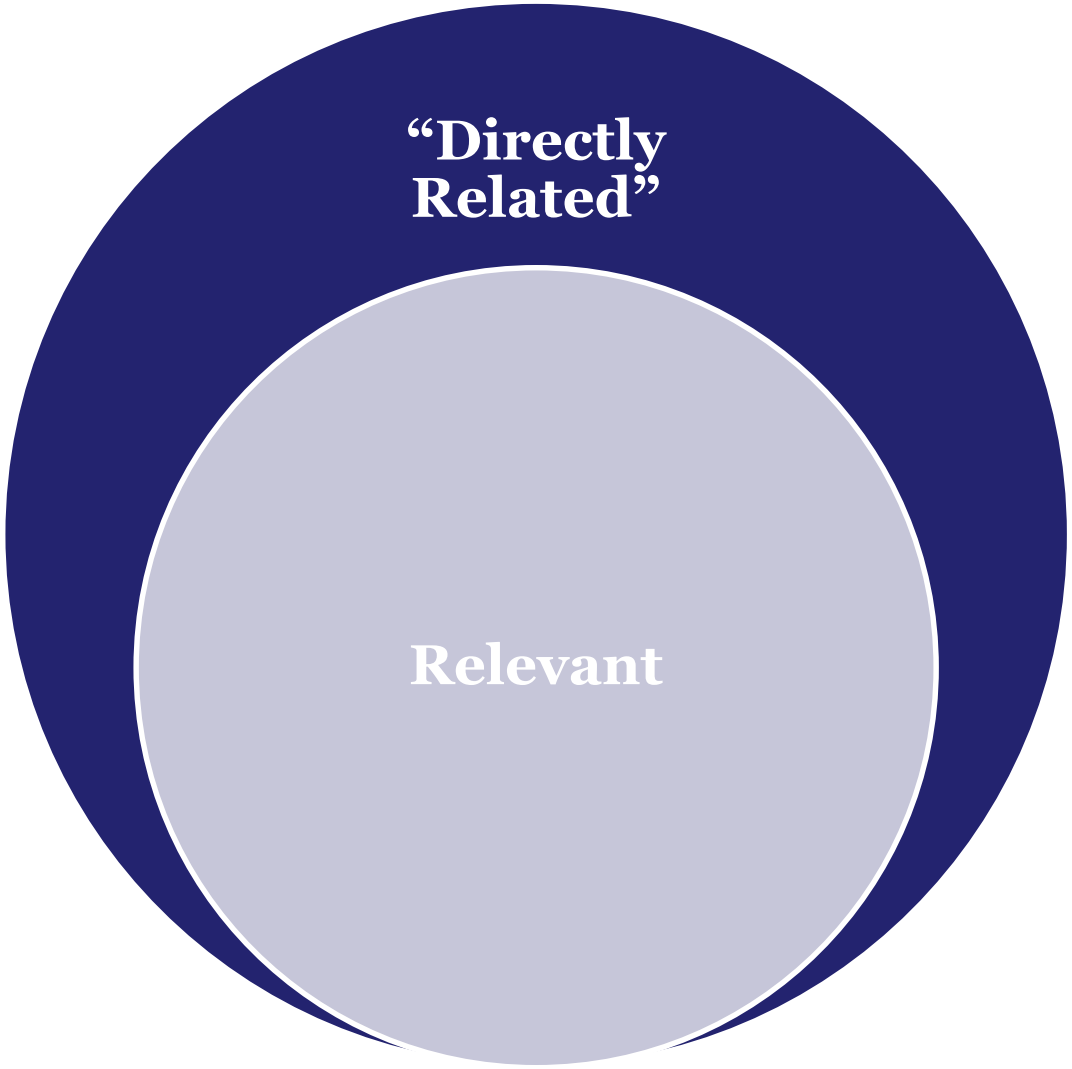

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Step Two: Review of and Response to Evidence

- 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

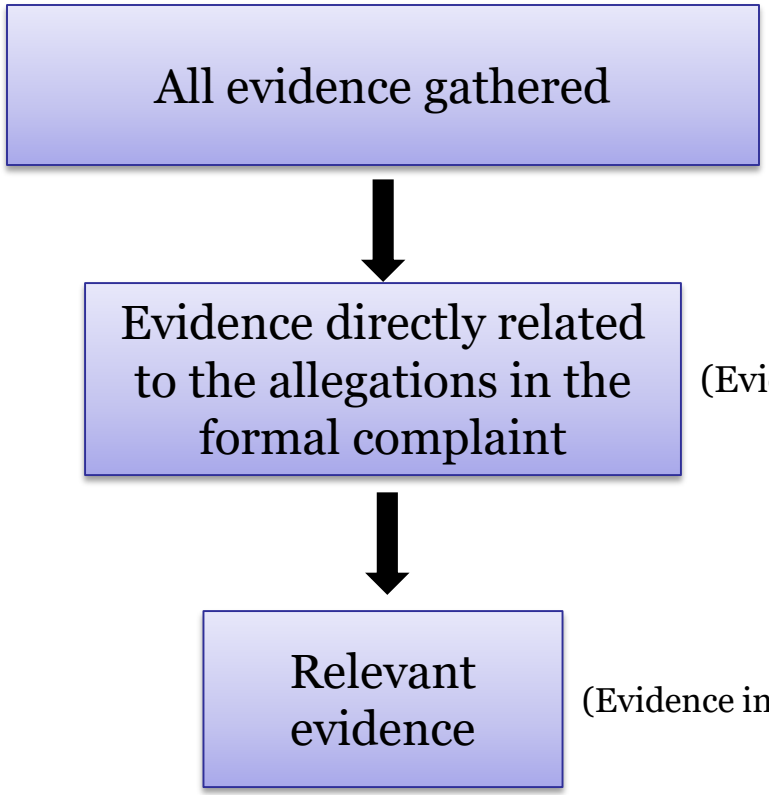
Step Three: The Investigative Report

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)

Evidence



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What is Relevant Evidence?

"The final regulations do not define relevance, and the **ordinary meaning** of the word should be understood and applied."

85 FR 30247 n. 1018

What is Relevant Evidence?

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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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

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

What is Not Relevant?

- The following is considered **per se not relevant** (or 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

"Rape Shield" Provision

Questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, ***unless*** such questions and evidence . . .

1. Are offered to prove that someone other than the respondent committed the conduct alleged by the complainant; or
2. Concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent.

"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

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

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

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)

Serving Impartially

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

Bias: what does it mean?

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

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

85 FR 30248.

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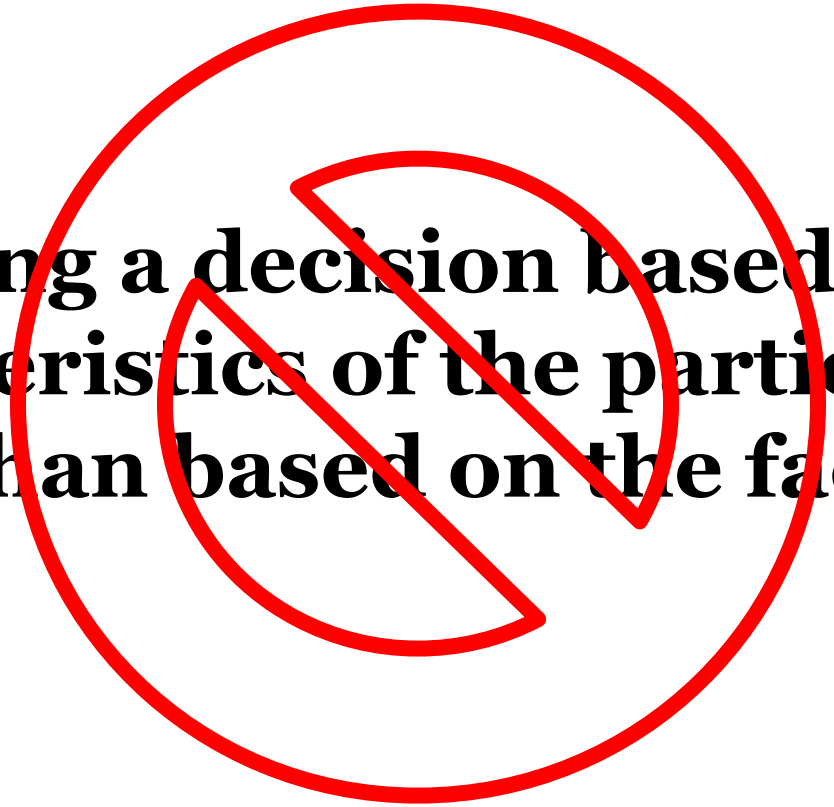
Impermissible Bias



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

Bias: what does it mean?

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

85 FR 30238-40

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

85 FR 30496

All protected classes

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

85 FR 30084

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What **is not** defined as bias?

1. Outcomes of the grievance procedure

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

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

What **is not** defined as bias?

2. Title IX Coordinator Signs Formal Complaint

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

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

85 FR 30372

What **is not** defined as bias?

3. Professional experiences or affiliations

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

85 FR 30252

What **is not** defined as bias?

3. Professional/Personal Experiences or affiliations

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

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

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Self-Disclosure of Potential Bias or Conflict of Interest

Transparency is key!

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Serving Impartially: Avoid Prejudgment of the Facts

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

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Avoiding Prejudgment of the Facts at Issue

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

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

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

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Avoiding Prejudgment of the Facts at Issue

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

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

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

85 FR 30256, 30323

Serving Impartially

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

2022 Update - Hearsay

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

2023 Update - NPRM

- The Trump Administration issued 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 are likely to be issued in Spring 2024.
- **In the meantime, the 2020 regulations remain in full effect.**

Discussion
&
Questions