Title IX Administrator and Investigator Training

July 31, 2020

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Roadmap

- Title IX Foundation
  - *The regulatory framework*
- Investigation Fundamentals
  - *What is a Title IX-compliant investigation?*
- Expectations of Investigators
  - *Avoiding bias and conflicts of interest*

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Our regulatory framework

TITLE IX FOUNDATION

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The Foundation

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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The Foundation

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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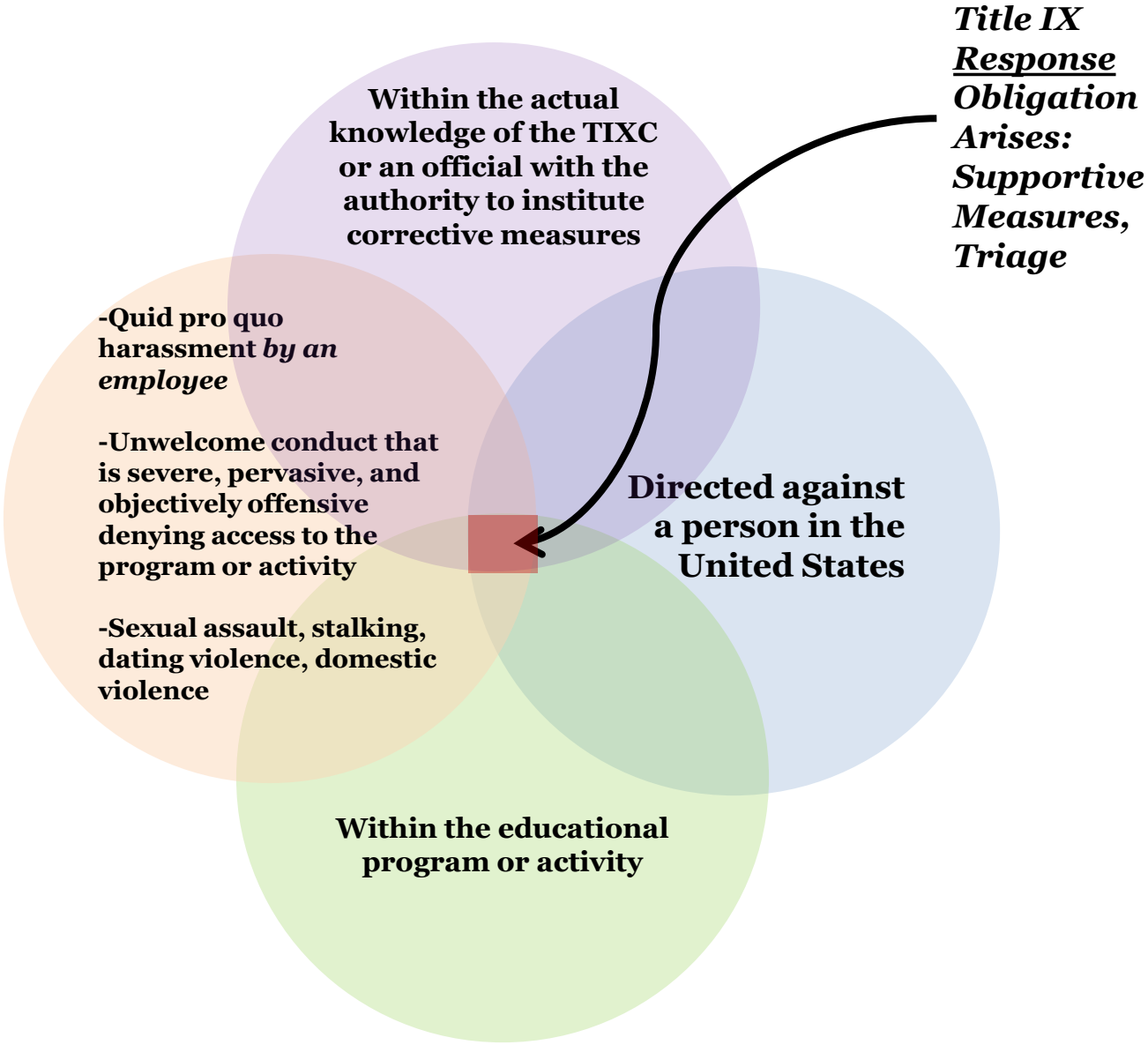

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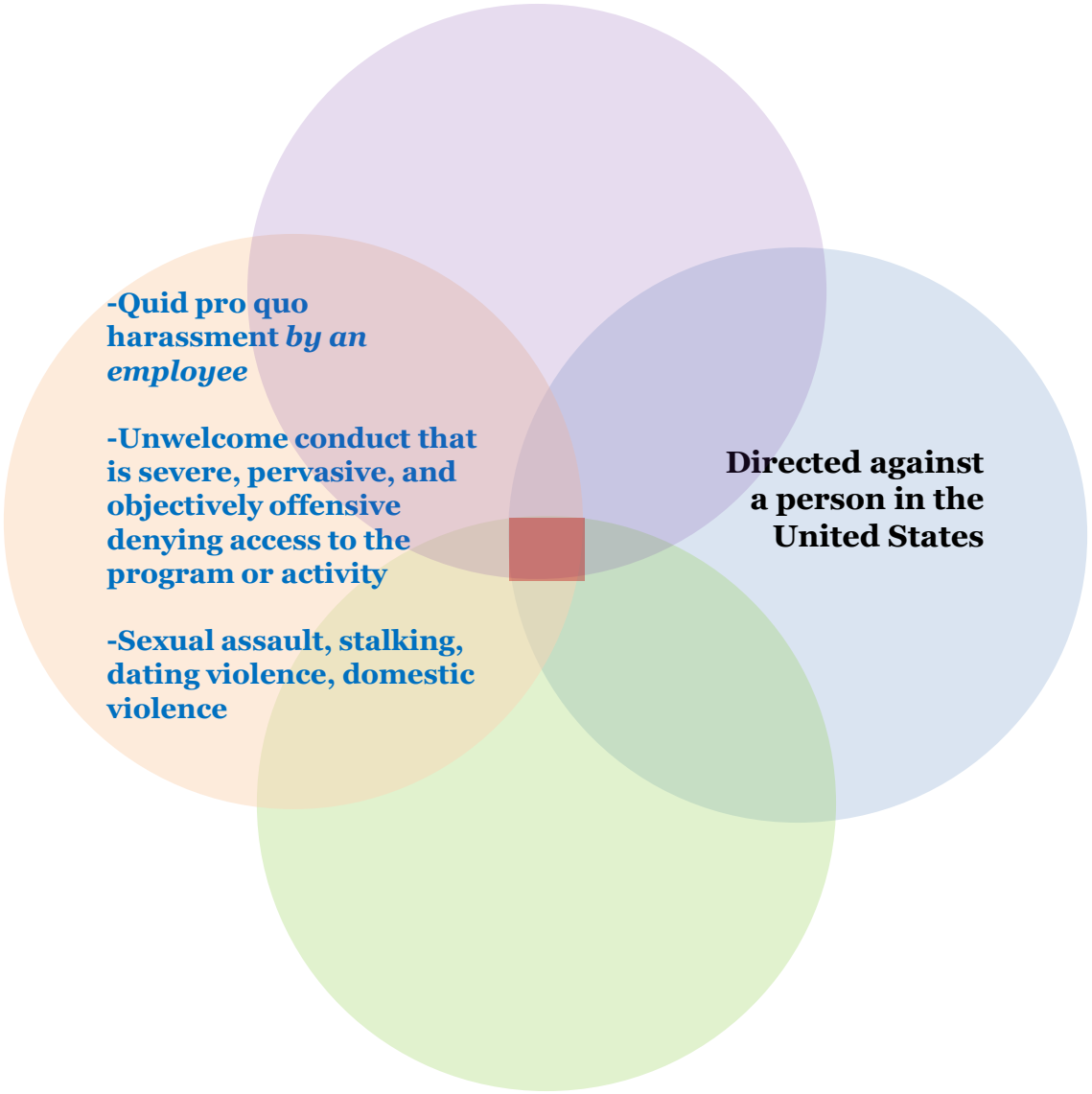

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Scope: Sexual Harassment

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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Sexual Harassment

Sexual assault. Sexual assault means any sexual act directed against another person, without the consent of the victim, including instances where the victim is incapable of giving consent. This includes the following:

- Rape
- Sodomy
- Sexual Assault with an Object
- Fondling
- Incest
- Statutory Rape

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Sexual Harassment

Rape: The carnal knowledge of a person, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity.

Sodomy: Oral or anal sexual intercourse with another person, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity.

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Sexual Harassment

Sexual Assault with an Object: To use an object or instrument to unlawfully penetrate, however slightly, the genital or anal opening of the body of another person, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity.

Fondling: The touching of the private body parts of another person for the purpose of sexual gratification, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity.

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Sexual Harassment

Incest: Sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law.

Statutory Rape: Sexual intercourse with a person who is under the statutory age of consent.

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Sexual Harassment

Dating violence. Dating violence means any act of violence committed by a person who is or has been in a *social relationship of a romantic or intimate nature* with the victim and where the existence of such a relationship is determined based on a consideration of the length, type, and frequency of interactions between the persons involved in the relationship.

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Sexual Harassment

Domestic violence. Domestic violence means a felony or misdemeanor crime of violence committed by a *current or former spouse or intimate partner* of the victim, by a person with whom the victim *shares a child in common*, by a person who is *cohabitating with or has cohabitated with the victim as a spouse or intimate partner*, by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction receiving grant monies, or by any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of the jurisdiction.

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Sexual Harassment

Stalking. Stalking means engaging in a course of conduct directed at a specific person that would cause a *reasonable person to fear for his or her safety or the safety of others* or *suffer substantial emotional distress.*

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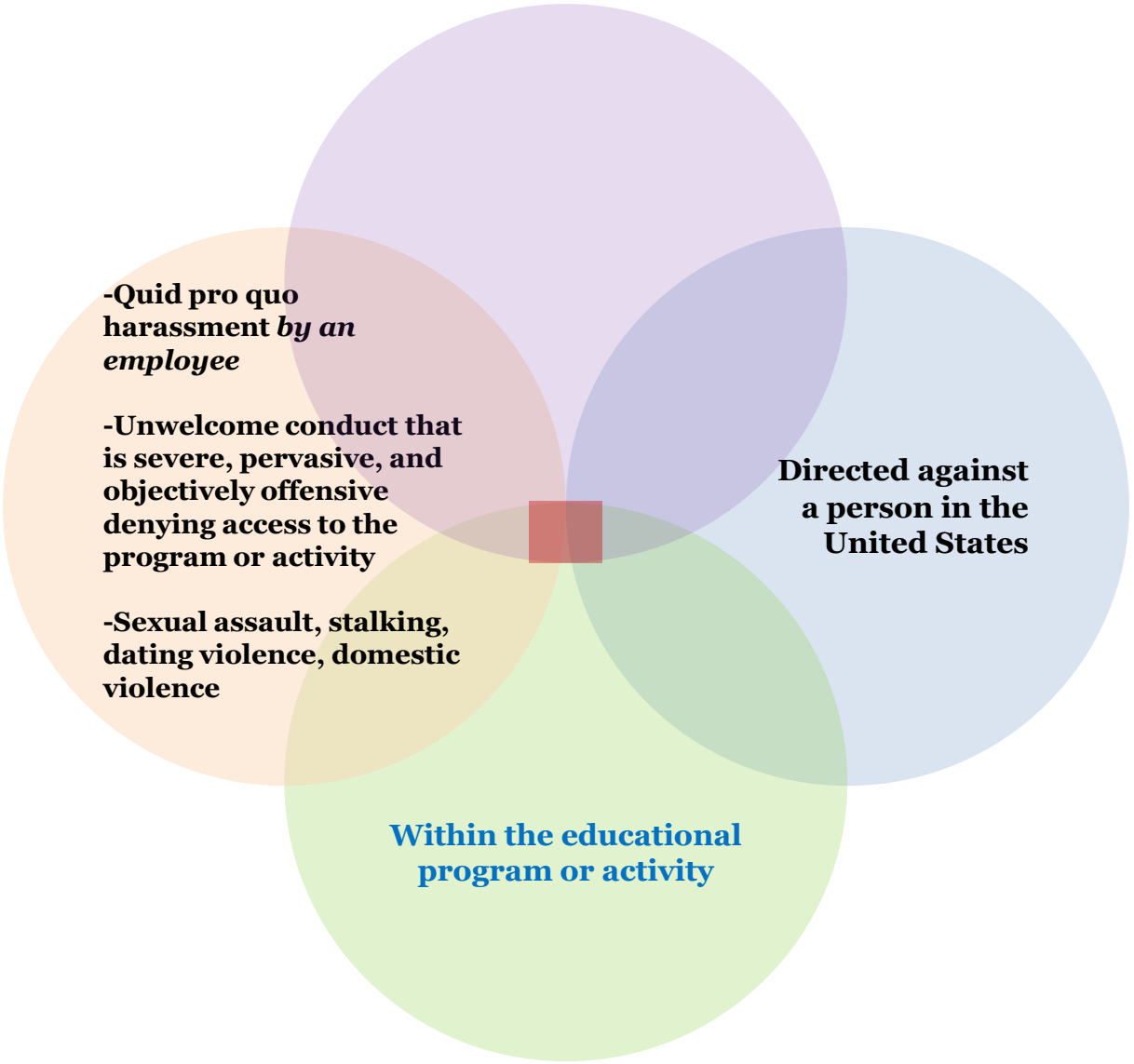

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Jurisdiction

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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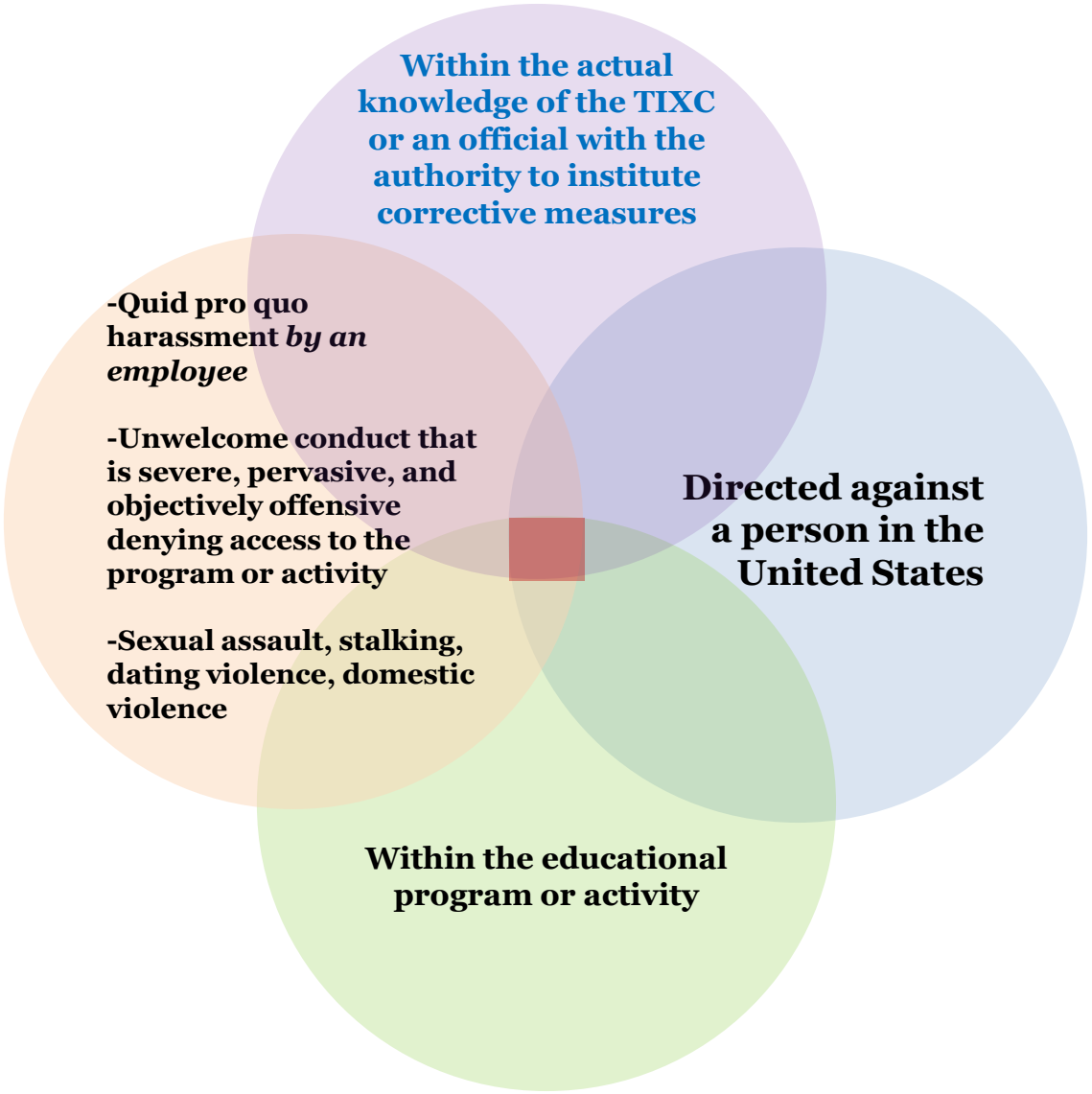

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Actual Knowledge

"*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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Officials with Authority

- "Mere ability or obligation to report sexual harassment" does not make you an official with authority.

- "Having been trained" to report sexual harassment does not make you an official with authority.

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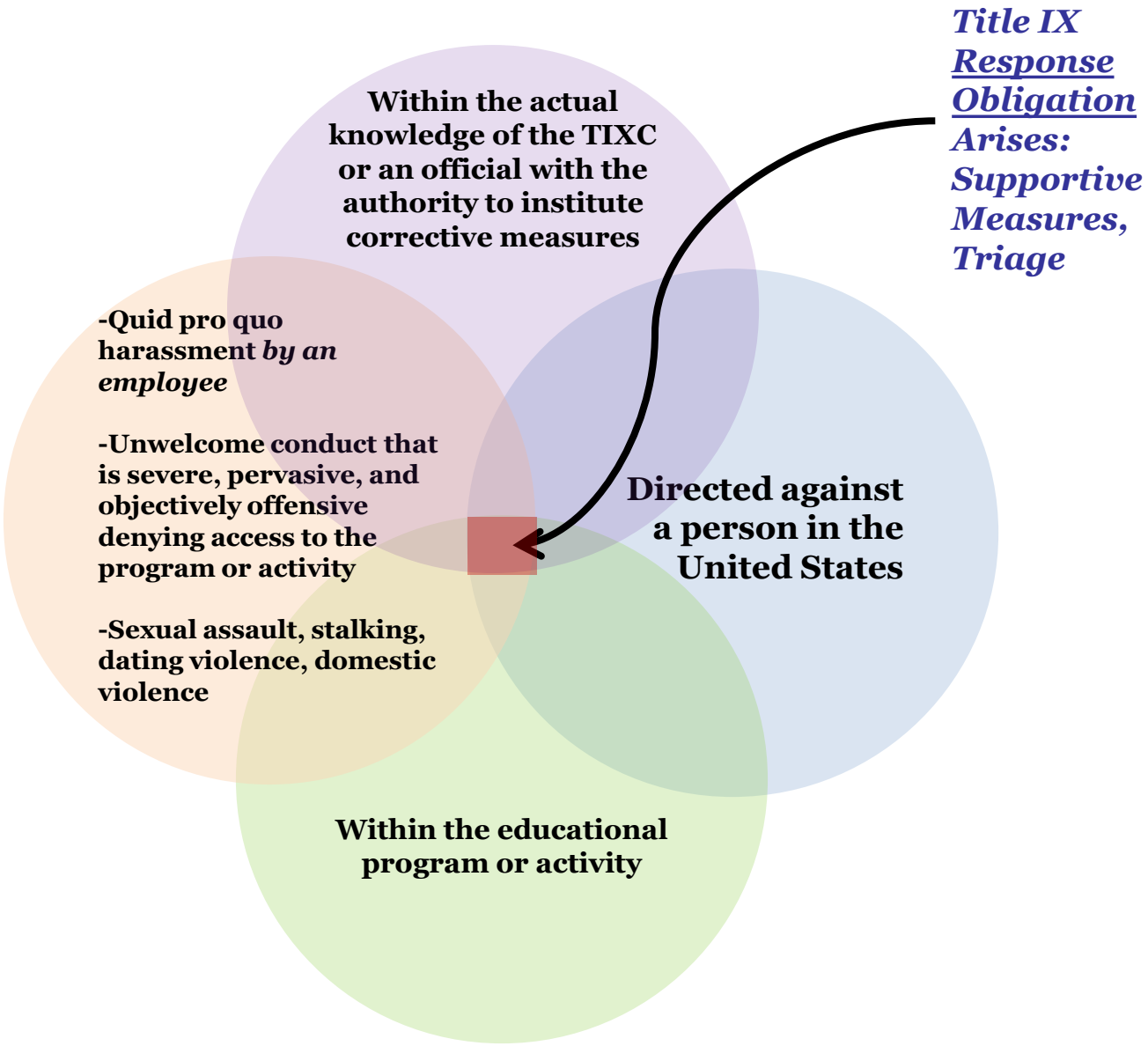

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Response Obligations

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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Supportive Measures

- Measures 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

§ 106.30(a)

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Supportive Measures

Supportive measures may include:

- Counseling
- Extension of deadlines or other course-related adjustments
- Modification of work or class schedules
- Campus escort services
- Mutual restrictions on contact between the parties
- Changes in work or housing locations
- Leaves of absence
- Increased security and monitoring of certain areas of the campus

(Institution & fact specific; examples only)

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Emergency Removal & Administrative Leave

- A recipient 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.
- A recipient may place a non-student on **administrative leave** during the pendency of a grievance process.

§ 106.44(c), (d)

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Formal Complaints and the requirements of §106.45

THE GRIEVANCE PROCESS

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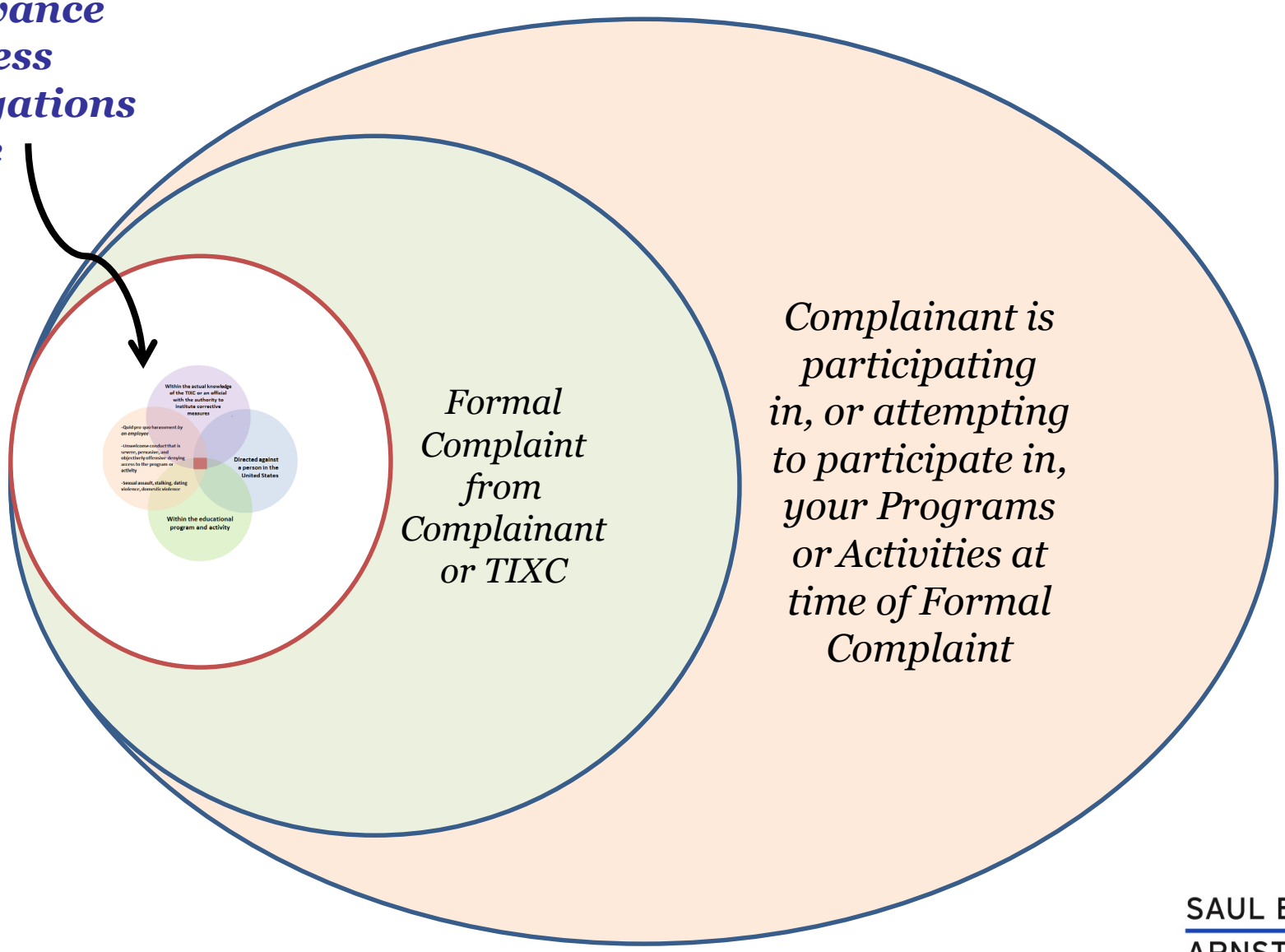
§106.45 Grievance Process Obligations Arise



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Formal Complaint

Definition:

"[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

Time for Filing

- 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.
- No statute of limitations.

§ 106.30, 85 FR 30127

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Formal Complaint

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

Who can file?

- Complainant
  - (§ 106.30)
- Complainant's parent or guardian
  - (§ 106.6(g))
- Title IX Coordinator
  - (§ 106.30)

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Formal Complaint

- A formal complaint cannot be filed unless the **complainant assents** or the **Title IX Coordinator believes it is necessary**.
  - "The formal complaint requirement ensures that a grievance process is the result of an intentional decision on the part of either the complainant or the Title IX Coordinator."

85 FR 30130

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Formal Complaint

- **Processing the Complaint**
  - Recipients' obligation to respond to reports of sexual harassment promptly in a way that is not clearly unreasonable in light of the known circumstances extends to recipients' processing of a formal complaint, or document or communication that purports to be a formal complaint.

85 FR 30135-30136

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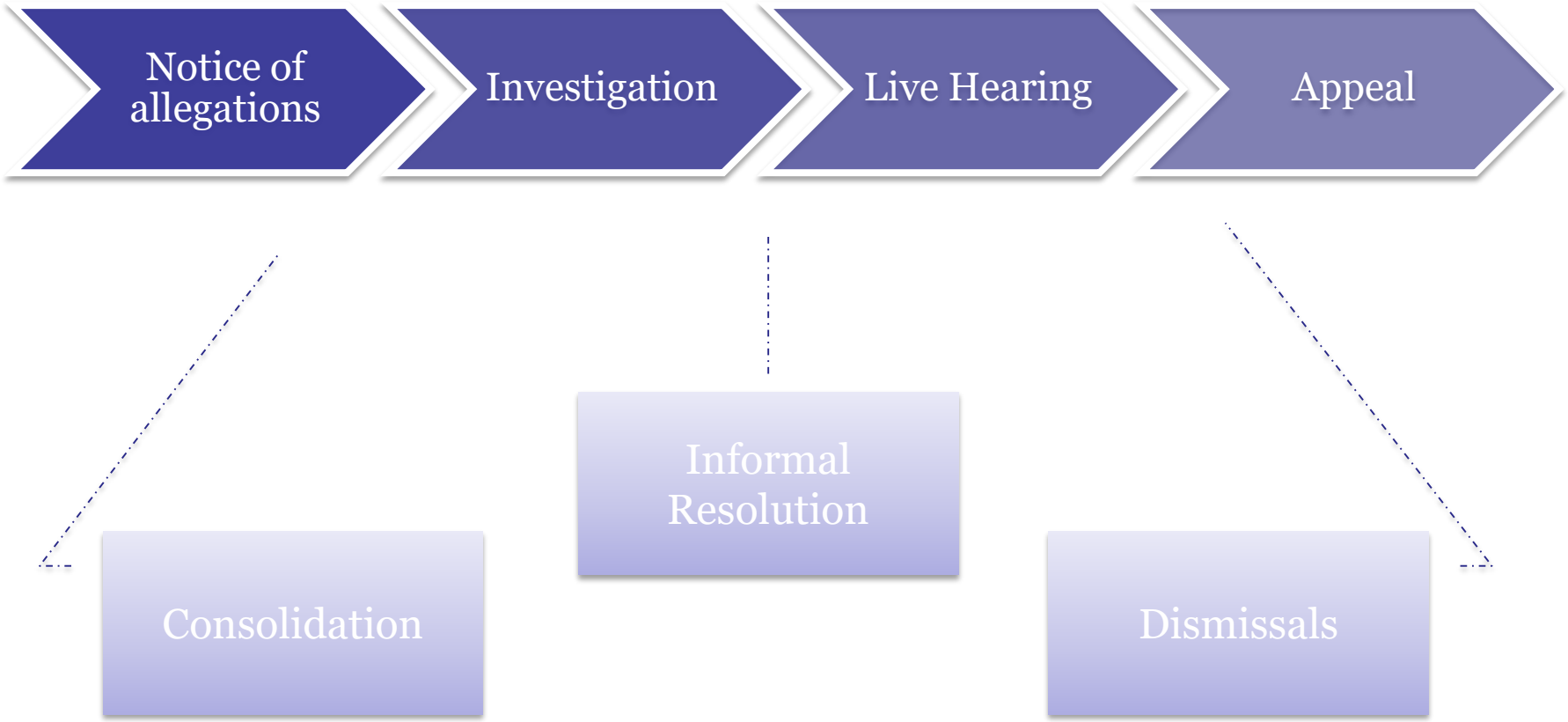
Outline of the Process



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Grievance Process: Basic Requirements

- Equitable treatment of the parties
- Objective evaluation of all relevant evidence
- No conflicts of interest or bias (and training!)
- Presumption of innocence
- Reasonably prompt timeframes

- Describe range of supportive measures
- Describe possible sanctions/remedies
- Standard of evidence (applies to all)
- Procedures for appeal
- Legally recognized privileges

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Written Notice

- Upon receipt of a formal complaint, recipients must provide the parties with written notice that explains the recipient's **grievance process**.
- Written notice must include **details known at the time**, including the identities of the parties, the conduct allegedly constituting sexual harassment, and the date and location of the alleged incident.

106.45(b)(2)(i)(A), (B)

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Written Notice

- Notice must include a statement that the respondent is **presumed not responsible** for the allegation and that the determination will be made at the conclusion of the grievance process.
- The parties should be informed that they have a **right to an advisor** of their choice, and that the advisor may, but need not be, an attorney.

106.45(b)(2)(i)(B)

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Written Notice

- Recipients are required to include a **warning about false statements** in the initial written notice to the parties **only if** the recipient's code of conduct prohibits students from making false statements or submitting false statements during a disciplinary proceeding.
- **Punishing a party** for making a false statement is permitted when the recipient has concluded that the party made a materially false statement in **bad faith**. A recipient may not conclude that a complainant made a false statement solely because there was a determination of no responsibility.

106.45(b)(2)(i)(B), 85 FR 30576

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Gather & fairly summarizing evidence

INVESTIGATIONS

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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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Right to Discuss Investigation

The institution may **not restrict** either party's ability to (1) discuss **the allegations** under investigation or (2) gather and present relevant evidence.

§ 106.45(b)(5)(iii)

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Advisors' Participation

Both parties must have the same opportunity to be ***accompanied*** by the advisor of their choice to any meeting or proceeding during the investigation process. The institution may ***not*** limit the ***presence or choice*** of an advisor at any meeting.

§ 106.45(b)(5)(iv)

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Advisors' Participation

The institution ***may*** establish restrictions regarding the extent to which the parties' advisors may ***participate*** in the meetings or other parts of the proceeding, so long as any restrictions apply equally to both parties. However, the institution may not restrict the advisors role in cross-examination

§ 106.45(b)(5)(iv)

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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 (the institution) must:
  - 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

- Each party must have an equal opportunity to **present witnesses**, which includes both fact witnesses and expert witnesses.
- Similarly, each party must have an equal opportunity to present **inculpatory and exculpatory** evidence.

§ 106.45(b)(5)(ii).

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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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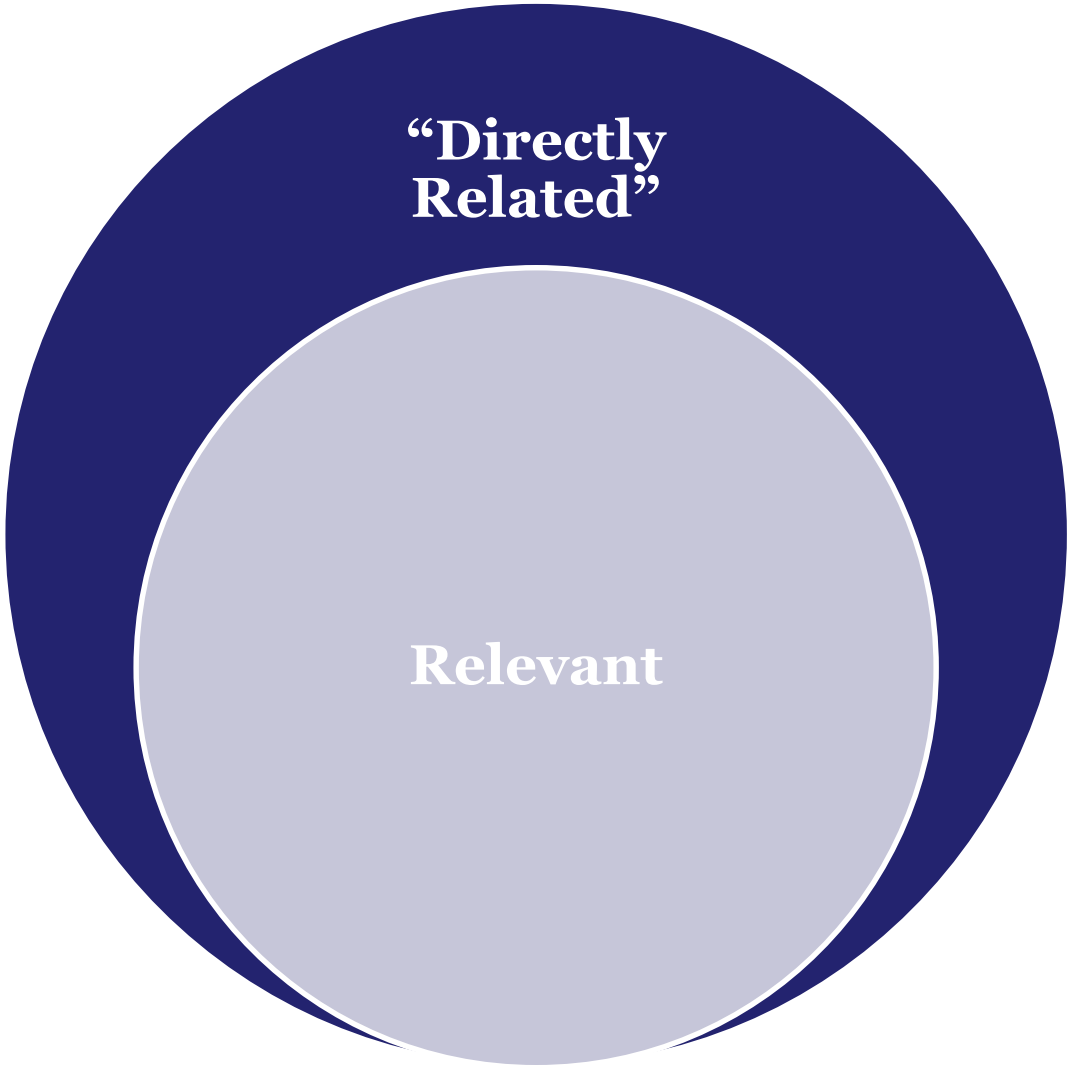

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Step Two: Review of and Response to Evidence

- Parties must have at least 10 days to respond in writing to the "directly related" evidence
- 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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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

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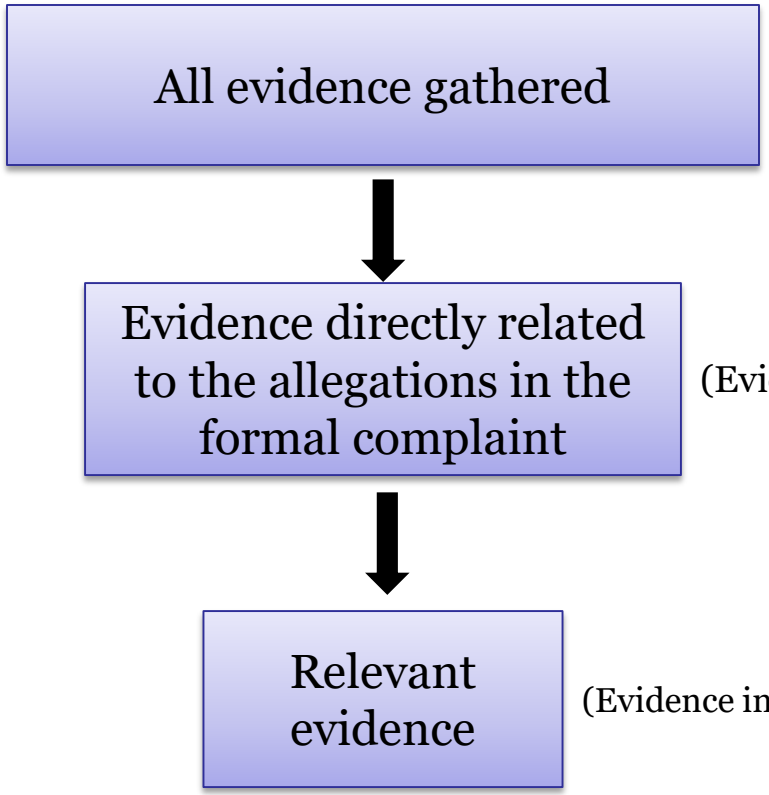
Step Three: The Investigative Report



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Prohibition on Exclusion of Relevant Evidence

"[A] recipient **may not adopt** evidentiary rules of admissibility that contravene [the] evidentiary requirements prescribed under 106.45"

85 FR 30294

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Prohibition on Exclusion of Relevant Evidence

"[A] recipient **may not adopt** a rule excluding relevant evidence whose probative value is substantially outweighed by the danger of unfair prejudice"

85 FR 30294

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Prohibition on Exclusion of Relevant Evidence

"[A] recipient **may not adopt** a rule excluding relevant evidence because such evidence may be unduly prejudicial, concern prior bad acts, or constitute character evidence."

85 FR 30248

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Prohibition on Exclusion of Relevant Evidence

"[A] recipient **may not adopt** rules excluding certain types of relevant evidence *(e.g.* lie detector test results, or rape kits) where the type of evidence is not either deemed 'not relevant' (as is, for instance, evidence concerning a complainant's prior sexual history) or otherwise barred from use under 106.45 (as is, for instance, information protected by a legally recognized privilege."

85 FR 30294

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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

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What is Relevant Evidence?

"The Department does not believe that determinations about whether certain questions or evidence are relevant or directly related to the allegations at issue requires legal training and that such factual determinations reasonably can be made by layperson recipient officials impartially applying **logic and common sense**."

85 FR 30343

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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

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What is Relevant Evidence?

"Evidence may be relevant whether it is **inculpatory or exculpatory**." 85 FR 30307

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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

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What is Not Relevant?

An institution may deem duplicative evidence irrelevant.

85 FR 30337

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"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.

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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

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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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Impartial and unbiased investigations

EXPECTATIONS

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Impartial and Unbiased Investigations

- A recipient's grievance process must require that the investigator **not have a conflict of interest or bias** for or against complainants or respondents generally or an individual complainant or respondent.
- A recipient must ensure that investigators **receive training** on how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias.

§ 106.45(b)(1)(iii)

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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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The Goal

- The investigation and adjudication of allegations **must be** based on an **objective evaluation** of the relevant evidence available
  - *Even where there is little or no evidence other than the statements of the parties themselves*
  - *Not the same as a requirement of "objective evidence"*

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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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What **is** defined as bias?

"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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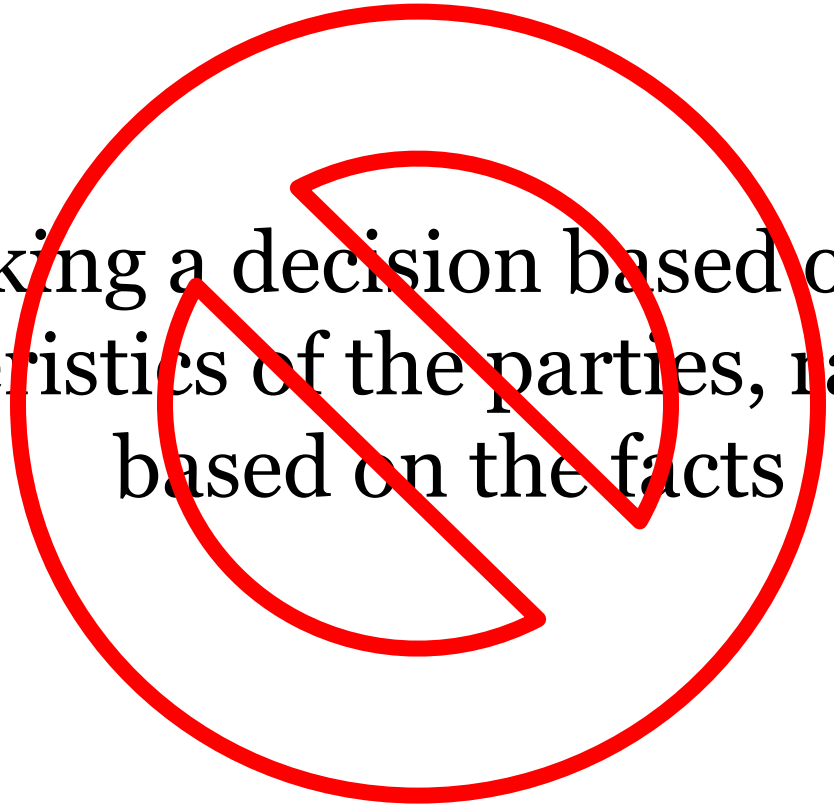
Impermissible Bias



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

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Investigative Reports

Consider whether **credibility determinations** should be included in investigative reports.

- The "core purpose" of the investigative report is to **summarize relevant evidence**.
- To avoid the perception of bias, the investigator may choose to keep the report strictly **factual**.
- In reaching the outcome on responsibility, Hearing Officers (decision-makers) must make credibility determinations.

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Investigative Reports

Example A:

The Respondent states *in interview one with the Investigator* that there were four people present in the room during the alleged sexual assault, but then states in *interview two* that there were three people present:

- *It **would not be** impermissible bias* for the Investigator to simply **state *factually*** that Respondent said four people in interview one and then said three people in interview two.
- Consider whether the Investigator will assess credibility (e.g. "This shows an inconsistency which suggests a lack of credibility for the Respondent.")

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Investigative Reports

Example B:

Witness X tells the Investigator that the Complainant previously told her she was romantically interested in the Respondent, but later in the interview with the Investigator, Witness X says the Complainant never expressed any interest in having a sexual encounter with the Respondent:

- It ***would not be*** impermissible bias for the Investigator to state factually in the report that Witness X made both the above statements.
- It also ***would not be*** impermissible bias if the Investigator asked Witness X to clarify whether Complainant was romantically interested and/or if she showed a desire to engage in a sexual encounter with Respondent prior to the alleged sexual assault incident.
- Consider whether Investigator will assess credibility (e.g. "This inconsistency shows lack of credibility and we should discount this witness' testimony")

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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 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

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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

But remember: this is a case-by-case analysis. A combination of experiences/affiliations could constitute bias/conflict of interest

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Flexibility in Defining Conflict of Interests

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

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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.

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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

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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 ✘

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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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Serving Impartially

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

&

Do not rely on sex stereotypes

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Avoiding Prejudgment of the Facts at Issue

- 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.

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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

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

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 it 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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Avoiding Prejudgment of the Facts at Issue

- Any and all stereotypes about men and women 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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Avoiding Prejudgment of the Facts at Issue

Bottom Line: The fact that an individual is "male", "female", or "non-binary" should not, and cannot, have any bearing on the credibility of the party or witness or how Title IX personnel approach the situation.

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