

# Delaware State University: Title IX Training

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# What will we cover today?

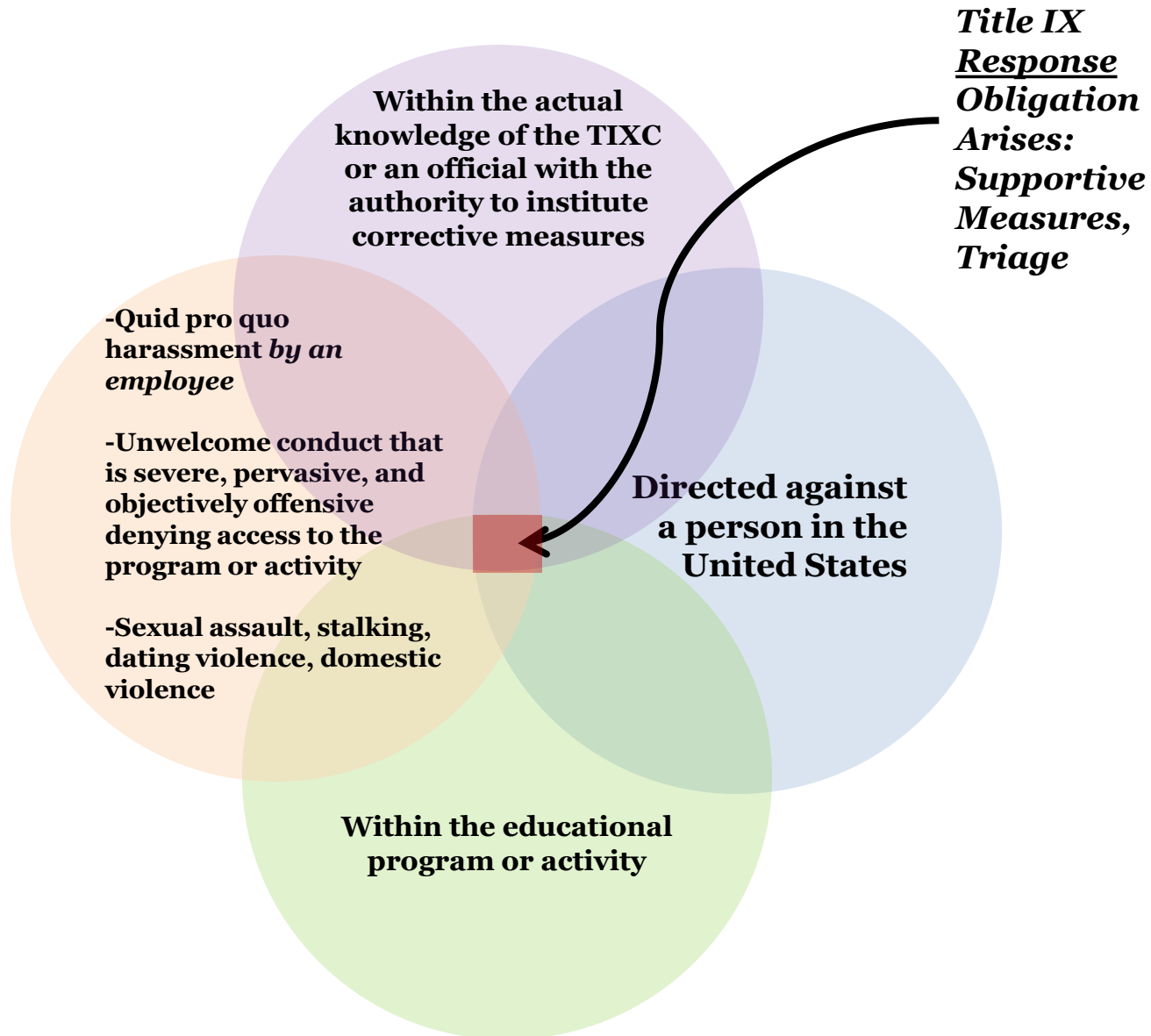
- General Title IX Training
  - *Scope & Response Obligations & Bias/Conflicts of Interest*
  - *Investigation Strategies and Techniques*
  - *Hearing & Appeal Procedures*
- DSU's Title IX Policy
- Questions

# 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*

# 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.



# 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

# 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)

# 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



# 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*

*Unless facts/circumstances require or permit dismissal*

# 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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# Emergency Removal / Administrative Leave

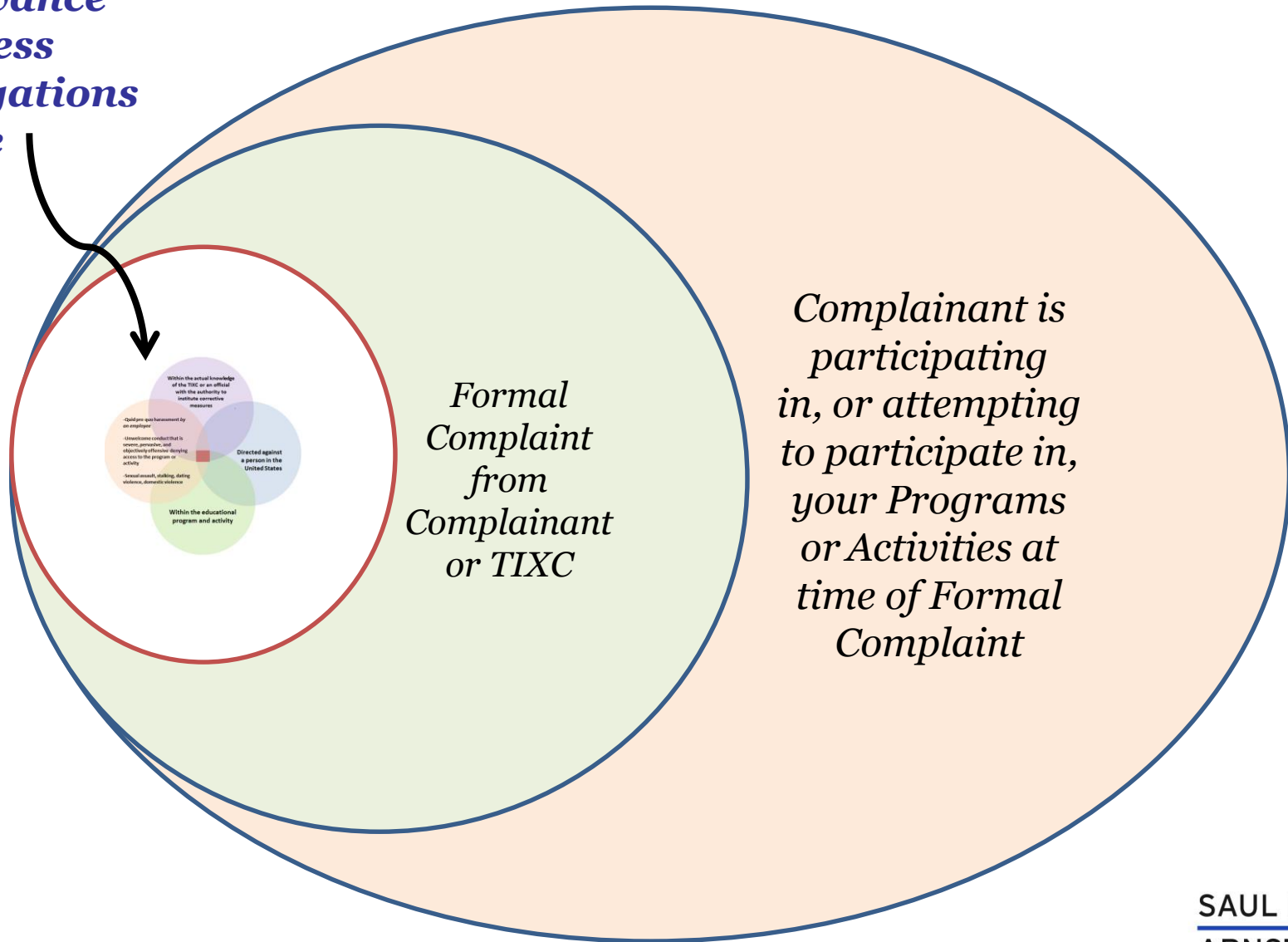
- The institution may employ an **emergency removal process** if there is an **immediate threat to the physical health or safety** of any students or other individuals arising from the allegations of sexual harassment.
- The institution may place a non-student employee on **administrative leave** during 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)

# 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.

**§106.45  
Grievance  
Process  
Obligations  
Arise**



# 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)

# 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.

*Training, serving without bias or conflicts of interest*

# **EXPECTATIONS**



# 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

# Impermissible Bias

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



# 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 ✗

# 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 ✘

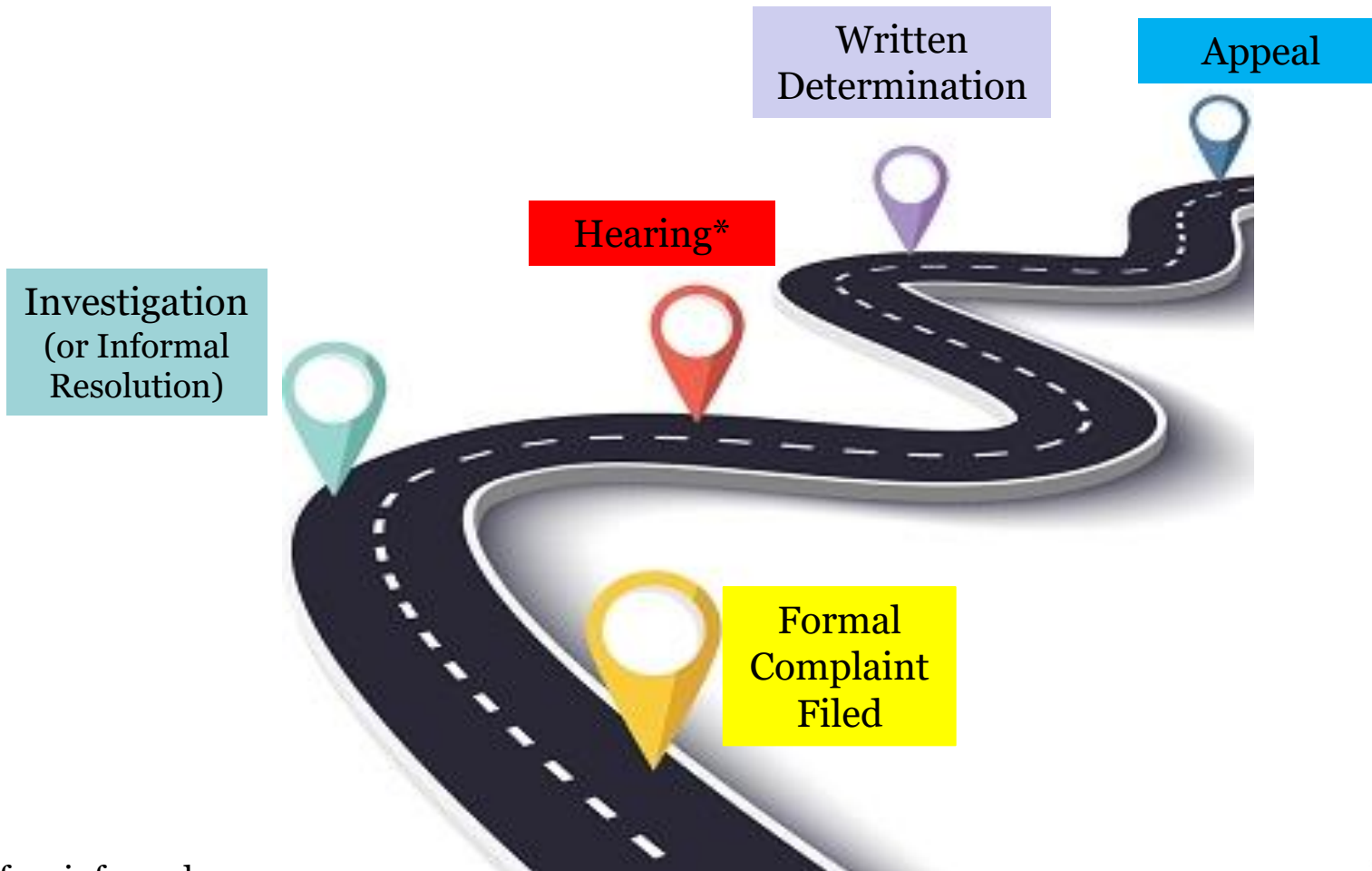
# Avoiding Prejudgment of the Facts

- 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

*Part One: formal complaint through notice of allegations*

# **THE GRIEVANCE PROCESS**

# Roadmap: Grievance Process



\*If no informal resolution is reached



# 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

# 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)

# Investigation

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

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

§ 106.30

# 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)

# 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*

# 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)

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# Evidence

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)

# 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

# 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

# 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.

# 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.



# 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.

# 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

# 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

# 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

# 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 & 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.

# 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.

# 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



*Relevance and the impact of declining to participate*

# **CROSS-EXAMINATION**

# Cross-Examination

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

# 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

# “Hearsay”

- 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.
  - *If a party’s advisor asks a relevant question of another party or a witness, and the party/witness declines to respond to the question, then the decision-maker is precluded from relying on any statement made by that party or witness.*

# Hearsay

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

# 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)

# 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.

# 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.



# 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)

# 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 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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# 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)

# 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)