



# PPDHRM Training

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December 13, 2022

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**SAUL EWING**

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# Agenda

- Title IX Foundation
- The PPDHRM & Related Procedures
  - Including recent updates!
- The Title IX Investigation & Hearing
- The Title IX Appeal Process
- Bias: Rules, Disclosures, Avoidance

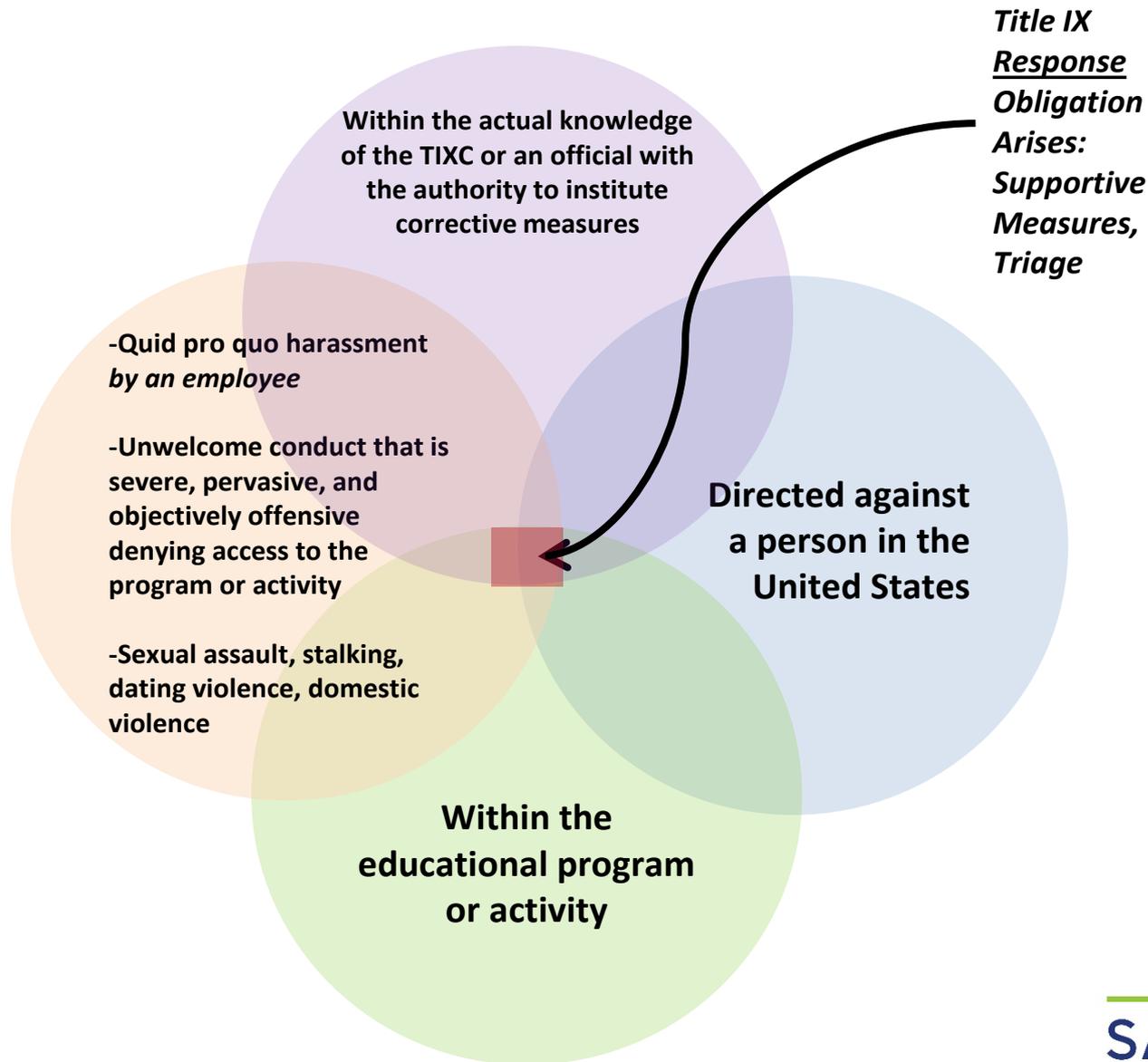
*Framework for understanding the PPDHRM*

# TITLE IX FOUNDATION

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# 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

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# Jurisdiction: Program or Activity

## 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.

## Also includes:

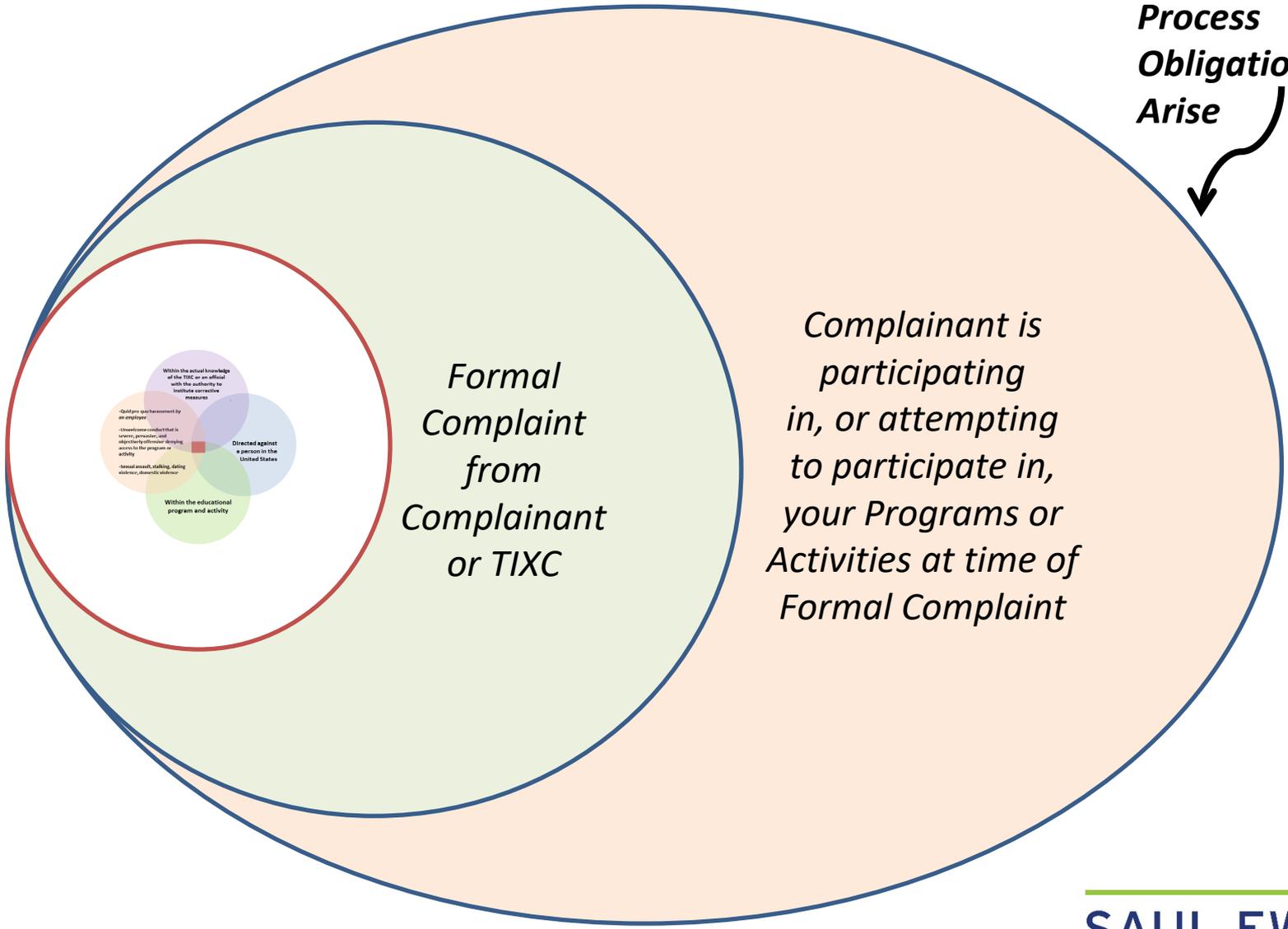
- ✓ any building owned or controlled by an officially recognized student organization (e.g., fraternity or sorority houses).

§ 106.44(a)

# 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**



*Formal  
Complaint  
from  
Complainant  
or TIXC*

*Complainant is  
participating  
in, or attempting  
to participate in,  
your Programs or  
Activities at time of  
Formal Complaint*

# The Grievance Process



\*If no informal resolution is reached

# THE PPDHRM

# Policy on Prohibited Discrimination, Harassment and Related Misconduct

## *Updates*

- PPDHRM- Prohibited Conduct
  - Added Relationship Violence
  - Clarified Sexual or Gender-Based Misconduct (Non-Title IX)
    - Sexual Assault
    - Sexual Exploitation
- Title IX Procedures
  - Clarified Advisor's Role
  - Added Alternative Resolution process

*Gathering and assessing relevant information*

# THE INVESTIGATION & HEARING

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# Investigation

Duke **must investigate** allegations of a **Formal Complaint**

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

§ 106.30

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# 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, Respond to “Directly Related” Evidence
- Investigative Report = Fairly Summarize Relevant Evidence
- Both Parties = Right to Review & Respond to Investigative Report
- Retain Records for 7 years

# 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 & exculpatory)

# 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

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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 hardcopy

§ 106.45(b)(5)(vi)

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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

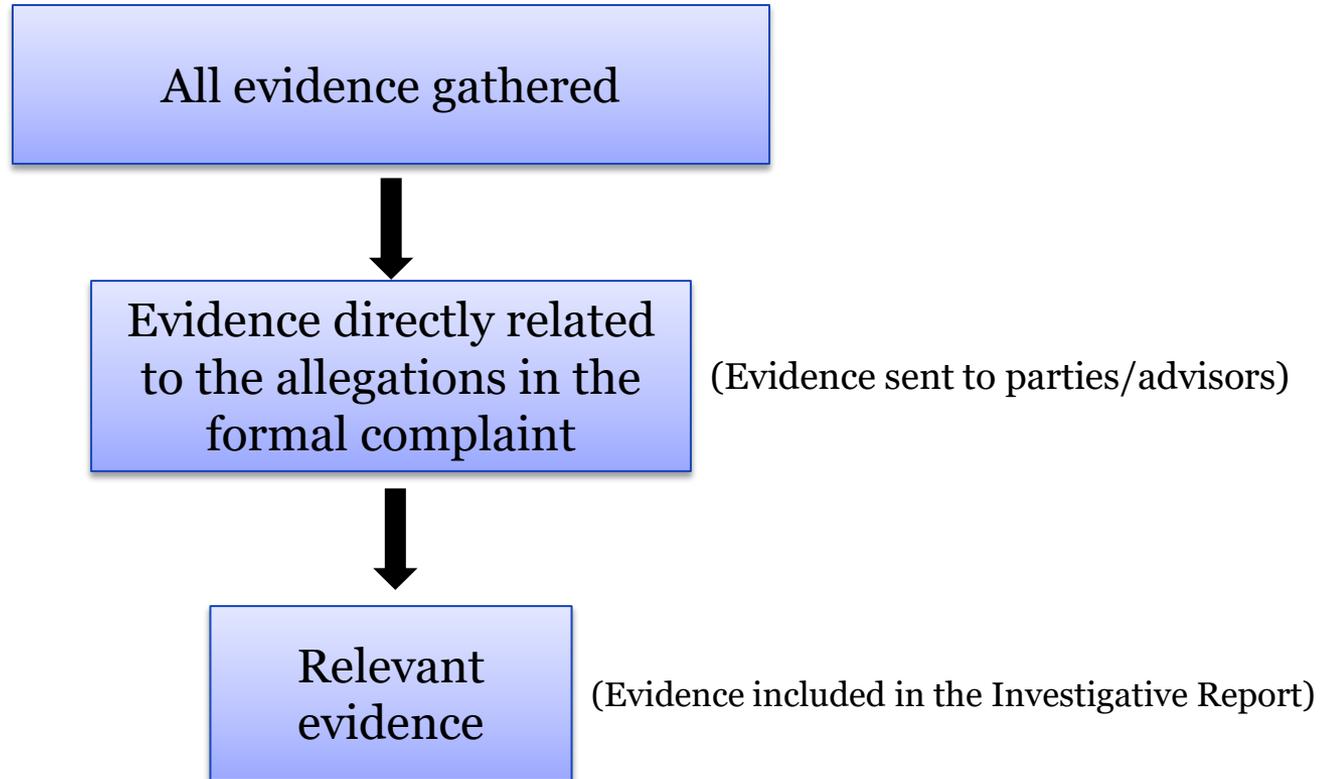
After the parties have had the opportunity to inspect, review, and respond to the “directly related” evidence, the Investigator must –

- 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 (hardcopy or electronic format).

§ 106.45(b)(5)(vii)

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# Evidence



# 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 witnesses or obtain documents
- Parties’ permitted responses

# The Hearing Officer

- Serve impartially
  - Avoid prejudgment of the facts at issue, bias, and conflicts of interest
- Set pre-hearing procedures and ground rules
- Preside over the hearing (decorum!)
- Objectively evaluate all **relevant** evidence
  - Inculpatory & exculpatory
- Independently reach a determination regarding responsibility

# Pre-Hearing Preparation (One Strategy)

- Review:
  - Applicable policy
  - Hearing procedures
  - Investigation report and evidence
- Preparation
  - Identify areas in investigation report needing clarification
  - Outline issues and questions
  - Make/review plan for how to handle new evidence in the hearing

# Pre-Hearing Preparation

## (One Strategy)

Review the file and ask:

- What is disputed? Undisputed?
- What is missing?
- What questions do I have?
- What types of facts would corroborate or refute the information?
- ***What do I need to know to make a decision?***

# 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

# General Course of Procedure

- Introductions;
- Respondent's statement accepting or denying responsibility;
- Opening Statement from the Complainant;
- Opening Statement from the Respondent;
- Questioning of the Complainant by the Hearing Officer;
- Cross-examination of the Complainant by the Respondent's advisor;
- Questioning of the Respondent by the Hearing Officer;
- Cross-examination of the Respondent by the Complainant's advisor;
- Hearing Officer questioning of other material witnesses (if applicable);
- Cross-examination of other material witnesses by the parties' advisors;
- Closing comments from the Complainant; and,
- Closing comments from the Respondent.

# Relevance & Mechanics of Questioning

- Questions asked → Must be **relevant**
  - “[P]ertinent to proving whether facts material to the allegations under investigation are more or less likely to be true” 85 FR 30294.
- Relevance is a determination for the Hearing Officer
  - H.O. must explain reasoning if a question is deemed not relevant. 85 FR 30343.

# Questioning In Practice

- **Step 1, Question:** Advisor asks the question.
- **Step 2, Ruling:** Hearing Officer determines whether question is relevant.
  - If not relevant, Hearing Officer must explain reasoning to exclude question.
- If relevant, **Step 3:** Question must be answered.

# Putting it all together

- **Important considerations:**

- The Respondent must be **presumed not responsible** for the alleged conduct until the determination regarding responsibility is made. §106.45(b)(1)(iv).
- Outcome must be based on an objective evaluation of all **relevant evidence**—including both inculpatory and exculpatory—and not taking into account the relative “skill” of the parties’ advisors. §106.45(b)(1)(ii); 85 FR 30332
- **Credibility determinations** may not be based on a person’s status as a Complainant, Respondent, or witness. §106.45(b)(1)(ii).

# Putting it all together

- Possible strategy:
  - Identify the determinative issues
  - Sort the evidence\* by relevance to those issues
  - Weigh the evidence
  - Identify your reasons for ascribing more or less weight to each piece of evidence
  - Make clear findings of fact
  - Apply the preponderance standard to the evidence

# Putting it all together

- What happened? (*Not “are they responsible?”!*)
  - What is more likely than not to have occurred?
- The findings of fact are the events/circumstances/incidents/actions that you believe occurred based upon the information you received

# 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)

*Standards and impact*

# THE TITLE IX APPEAL

# 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

# 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;
- Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome [of the initial determination];
- 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.

§ 106.45(b)(8)(i)-(ii)

# 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)

# The Analysis

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

# Possible Outcomes

- Affirm the decision, deny the appeal
- Alter the findings, grant the appeal
  - If procedures were not followed, request that a new hearing occur before a new adjudicator
  - Return the case to the original Hearing Officer to assess the weight and effect of new evidence (or, sometimes, return to an investigator)

# 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)

*Rules, disclosures, avoidance*

# **BIAS & CONFLICTS OF INTEREST**

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# 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)

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# Bias: what does it mean?

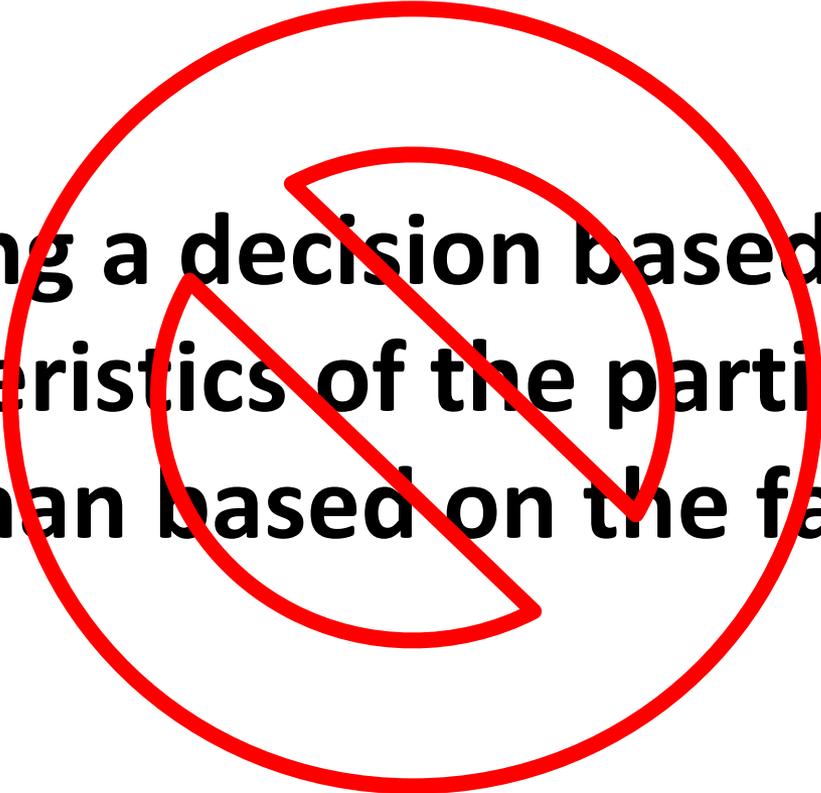
A “recipient that ignores, blames, or punishes a student **due to stereotypes** about the student violates the final regulations[.]”

85 FR 30496

# What is not defined as bias?

1. Outcomes of the grievance procedure
2. Title IX Coordinator Signs Formal Complaint
3. **Professional experiences or affiliations**
  - Not per se bias
  - Exercise caution not to apply “generalizations that might unreasonably conclude that bias exists”
  - Whether 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 **may** constitute bias, depending on the circumstances

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



# Trauma-Informed Practices

- 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 [and parties]

85 FR 30256, 30323

# 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 ✘

# The Title IX Procedures

- A Complainant or a Respondent who has concerns that the assigned investigator cannot conduct a fair and unbiased review (e.g., has a personal connection with one of the parties or witnesses, etc.) may report those concerns to the Title IX Coordinator, who will assess the circumstances and determine whether a different investigator should be assigned to the matter.
- **Bias and Conflict of Interest.** The Hearing Officer must be impartial and free from bias or conflict of interest, including bias for or against a specific Complainant or Respondent or for or against Complainants and Respondents generally. If the Hearing Officer has concerns that they cannot conduct a fair or unbiased review, the Hearing Officer shall report those concerns to OIE and a different Hearing Officer will be assigned. A Complainant and/or Respondent may challenge the participation of the Hearing Officer because of perceived conflict of interest, bias, or prejudice. . . . Postponement of a hearing may occur if a replacement Hearing Officer cannot be immediately identified.
- Duke will notify the Appellant and Appellee of the name of the appellate officer. The Appellant and/or Appellee may challenge the participation of an appellate officer because of an actual conflict of interest, bias, or prejudice. Such challenges, including rationale, must be submitted in writing to Duke no later than 48 hours after notification of the name of the appellate officer. Duke will determine whether such a conflict of interest exists and whether an appellate officer should be replaced

***The provision and receipt of the information in these materials (a) should not be considered legal advice, (b) does not create a lawyer-client relationship, and (c) should not be acted on without seeking professional counsel who have been informed of the specific facts.***