



Title IX Training

February 8, 2024

Today's Agenda

- Title IX Foundation
- Grievance Procedures
 - Intake
 - Investigation
 - Hearing
 - Appeal
- How To Serve Impartially

Title IX Foundation

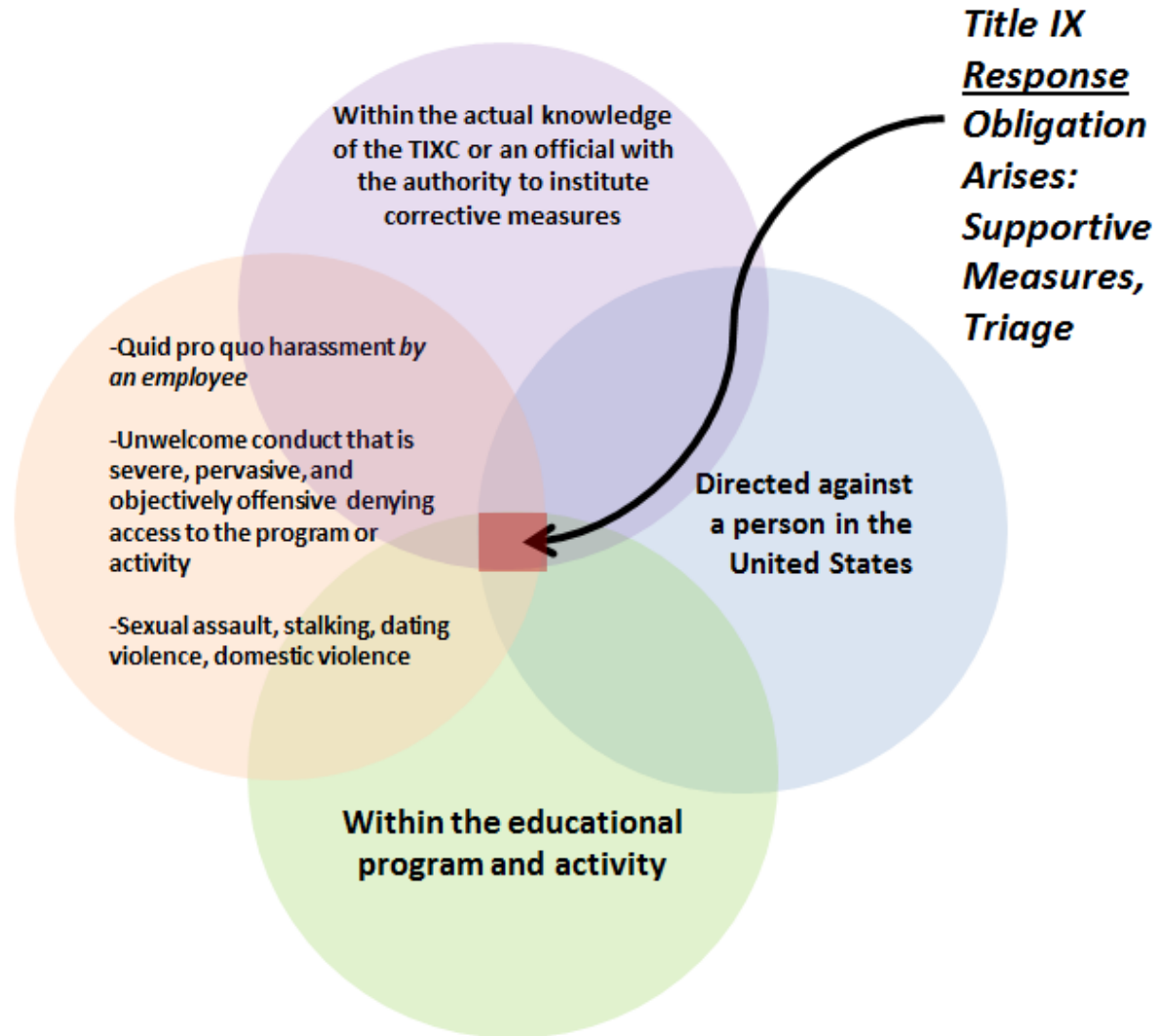
Framework for understanding the

Policy Prohibiting Sexual Harassment & Sexual Misconduct

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.

Title IX Jurisdiction



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)

Jurisdiction: Program or Activity

Education program or activity includes:

- ✓ Locations, events, or circumstances . . .
- ✓ whether on campus or off campus . . .
- ✓ over which AU 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.

§ 106.44(a)

Policy Prohibiting Sexual Harassment & Sexual Misconduct

The Policy also addresses Sexual Misconduct, as defined by AU, a broader category than Sexual Harassment as contemplated by Title IX.

And, it has broader jurisdictional boundaries than required by Title IX.

All relevant conduct is covered under the same Policy and Procedures, with any variances accounted for in the appendices.

Policy Prohibiting Sexual Harassment & Sexual Misconduct (cont.)

“If the alleged conduct falls outside of the definition of Sexual Harassment but would meet the definition of Sexual Misconduct, or could constitute Sexual Harassment but occurs outside of Arcadia’s Education Program or Activity (for example, in an off-campus building) or outside of the United States, Arcadia will use the hearing procedures provided in Appendix B (for student Respondents) or Appendix C (for employee Respondents)”

Policy Prohibiting Sexual Harassment & Sexual Misconduct (cont.)

“If the alleged conduct falls outside of the definition of Sexual Harassment but could meet the definition of Sexual Misconduct or could constitute Sexual Misconduct but occurs outside of an Education Program or Activity, for example, in an off-campus but inside of the United States, the hearing will use the hearing procedures provided in Appendix B (for student Respondents) or Appendix C (for employee Respondents)”

This training: Appendix A and all things Title IX

Policy Applies Regardless of Identity

This Policy applies to any allegation of Prohibited Conduct regardless of the sexual orientation or gender identity of the Complainant or the Respondent.

Status distinctions are also irrelevant: for example, a student may file a complaint against an employee, **including a faculty member – regardless of tenure status**; another student; or a staff member.

Response Obligation, Part One

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)

Supportive Measures

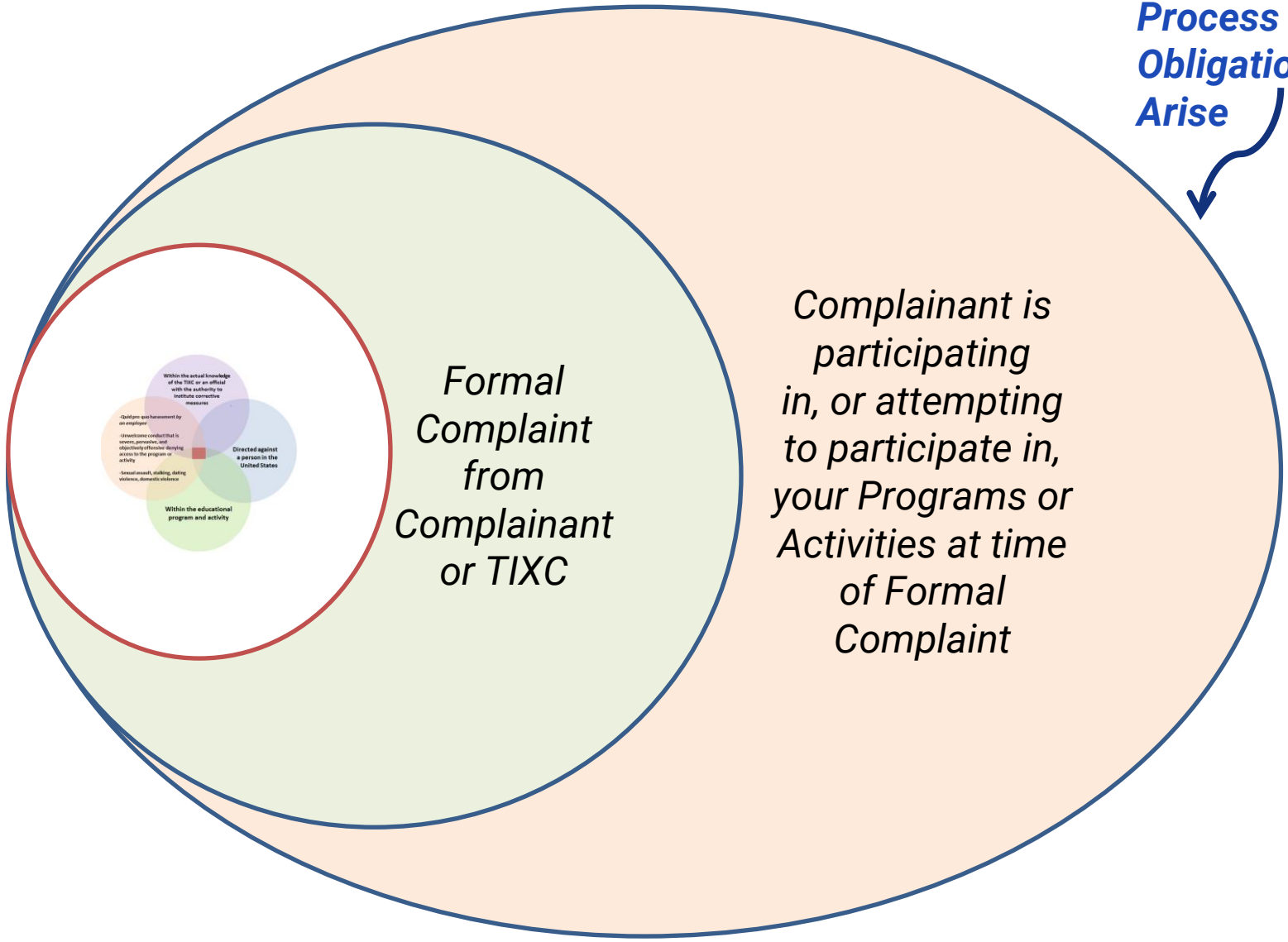
- **Non-disciplinary, non-punitive** individualized services,
- offered as appropriate, as reasonably available, and without fee or charge,
- to the complainant or the respondent,
- including as designed to restore or preserve equal access to the recipient's education program or activity **without unreasonably burdening** the other party, including measures designed to protect the safety of all parties or the recipient's educational environment, or deter sexual harassment.

§ 106.45(a)(3)

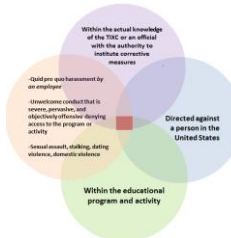
The Foundation: Principle #2

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



Again, AU policy is broader

“[Conduct] which would constitute Sexual Misconduct under the Policy Prohibiting Sexual Harassment or Sexual Misconduct, or Sexual Harassment...where the Complainant is not participating, nor attempting to participate, in Arcadia’s Education Program or Activity[,] will be resolved utilizing the procedures outlined in Appendix B (for student Respondents) or Appendix C (for employee Respondents).”

The Grievance Process



*If no informal resolution is reached

Informal Resolution

- Voluntary (both parties must agree)
 - Can be stopped at any time (formal process started or continued)
- Not utilized to resolve allegations of an employee's Sexual Harassment of a student
- Options:
 - Informal Resolution, intended to reach mutually agreed resolution
 - Respondent accepts responsibility (sanctions and/or responsive actions imposed as provided for by Policy)



Grievance Procedures

Intake through Investigation

Dismissal For Title IX Purposes

The Title IX Coordinator **must dismiss** the relevant allegations in the Formal Complaint when:

- the conduct alleged in the Formal Complaint would not constitute Sexual Harassment;
- the conduct alleged in the Formal Complaint, even if proved, did not occur in the University's education program or activity;
- the conduct alleged in the Formal Complaint did not occur against a person in the United States; *or*
- the complainant is not participating or attempting to participate in the programs or activities.

The Title IX Coordinator **may dismiss** the relevant allegations in the Formal Complaint:

- if, at any time during the Investigation or Hearing, the Complainant notifies the Title IX Coordinator in writing that they would like to withdraw the Formal Complaint (or any allegation therein);
- the Respondent is no longer enrolled or employed by the University; *or*
- specific circumstances prevent the University from gathering evidence sufficient to reach a determination as to the Formal Complaint or allegations therein.

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; availability of support and assistance
 - Right to inspect and review
 - Statement of policy re: false allegations and **retaliation**
- When to Send?**
 - “With sufficient time to prepare a response before any initial interview”
 - Update as needed throughout investigation

About Retaliation

- ❑ Intimidating, threatening, coercing, harassing, discriminating against, or taking other materially adverse action against any individual for the purpose of interfering with any right or privilege secured by law or policy, or because the individual has **made a report, filed a Formal Complaint, or participated in an investigation, proceeding, or resolution of an allegation of prohibited conduct**
- ❑ Retaliation may be committed by or against an individual or a group, **and may be committed across statuses, such as an employee retaliating against another employee or against a student**
- ❑ A reporting party, complainant, respondent, third party, and any employee charged with implementing the Policy and Procedures may be the subject of retaliation

About Retaliation (cont.)

- ❑ Acts of alleged retaliation should be reported immediately to the TIXC so the University may take prompt steps to address and remedy the effects of any retaliation
- ❑ This may include the implementation or revision of supportive measures, and/or the instigation of an investigation of the alleged retaliation
- ❑ **The University is prepared to take appropriate steps to protect individuals who have been or fear that they may be subjected to retaliation**
- ❑ Charging an individual for making a materially false statement in bad faith in the course of proceedings under the Policy does not constitute retaliation, and a determination regarding responsibility, alone, is not sufficient to conclude that any party has made a materially false statement in bad faith

Investigation

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

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

Investigation: The Basics

- Trained Investigator(s) (*at AU: usually OECR investigator or external*)
- 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

All About Advisors

- ❑ An individual who provides support, guidance, or advice to a party
- ❑ May be a parent, a member of the University community, or any other person (including an attorney)
- ❑ During the Investigation, the advisor's role is purely supportive – the advisor may not speak on behalf of the Complainant or Respondent during any part of the Title IX process, except for a Hearing
- ❑ If and when a Hearing is held, each party shall have an advisor present (one will be appointed by the University for any party who does not select an advisor on their own)
 - ❑ The advisor's role during a Hearing is discussed in more detail later

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.

Step Two: Review of and Response to Evidence

- Both parties given equal opportunity to *inspect and review* evidence 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
- **At AU: The parties receive access to the directly-related evidence and the draft investigation report**

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 have 10 business days to respond in writing to the “directly related” evidence and draft report (if they so choose) to, for example:
 - Clarify ambiguities or correction where the party believes the investigator did not understand
 - Assert which evidence is “relevant” and should therefore be included in the Final Investigative Report
- The investigator must consider any written responses before finalizing the investigative report
 - At AU: The Investigator may elect to respond in writing to the parties’ submitted responses and/or to share the responses between the parties for additional responses

Step Three: The Final Report

After the parties have had the opportunity to inspect, review, and respond to the evidence (and, at AU, the draft report), the Investigator must –

- Create a final 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
 - At AU, the parties are also provided with a file of any directly related evidence that was not included in the 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

Consider intoxication: Relevant to credibility? Establish a timeline?
Question of consent (incapacitation)?

What is Not Relevant?

- The following information is considered **per se not relevant** (or is otherwise automatically 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.

What is Not Relevant: *The “Rape Shield” Provision*

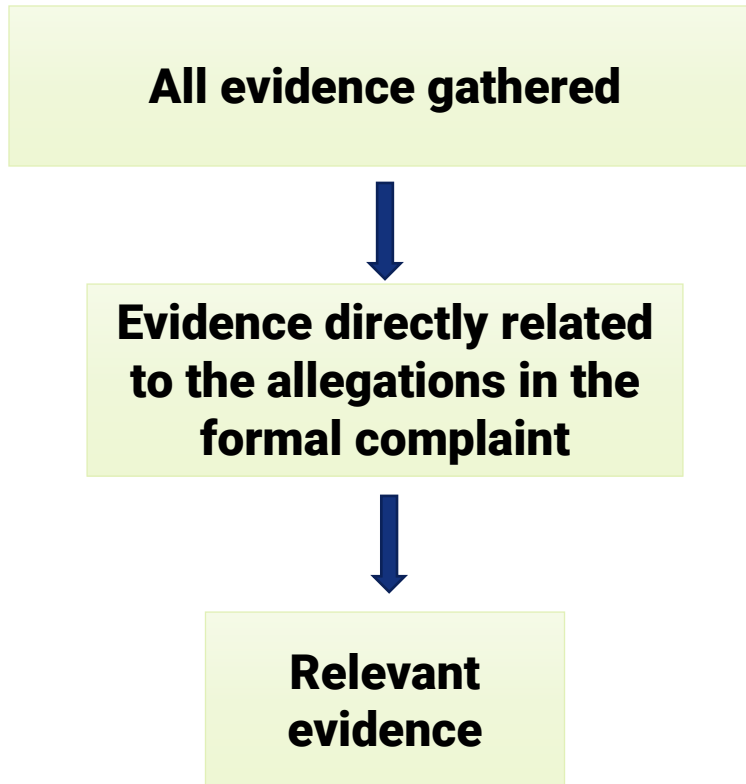
- Questions and evidence about the complainant’s sexual predisposition are not relevant
- Questions and evidence about the complainant’s sexual behavior are not relevant, **unless** such questions and evidence . . .
 1. Are offered to prove that someone other than the respondent committed the conduct 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.



“Directly Related”

Relevant

Evidence



Step Three: The Final 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 documents collected/reviewed
- **Summary of witness interviews**
- **Summary of relevant evidence**
- Any unsuccessful efforts to interview or obtain documents
- Parties' responses (if any)



Grievance Procedures

The Hearing

The Hearing Officer

- Serve impartially
 - Avoid prejudgment of the facts at issue, bias, and conflicts of interest
- Preside over the hearing
- Objectively evaluate all relevant evidence
 - Inculpatory & exculpatory
- Independently reach a determination regarding responsibility
 - Cannot give deference to an investigation report

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

Relevance & Mechanics of Questioning

- Questions asked → Must be **relevant**
 - “Ordinary meaning of relevance.” 85 FR 30247, n. 1012.
 - Evidence tending to prove or disprove the matter at issue or under discussion
- 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.

Outcome Determination

At the conclusion of the hearing, the Decision-maker must make a determination regarding responsibility

- Based on the preponderance of the evidence
 - Must apply the same standard to all Formal Complaints of sexual harassment – including those involving students, employees, faculty, and third parties. §106.45(b)(1)(vii), §106.45(b)(7)(i)
- Decision-maker assigns weight & credibility to evidence

Notice of Outcome

1. **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)

Sanctions

Determined by Dean of Students (students), VP of HR (staff), or the President (faculty), or their designees.

Factors considered when determining a sanction/responsive action may include, but are not limited to:

- The nature, severity of, and circumstances surrounding the violation(s).
- The Respondent's disciplinary history.
- Previous allegations or allegations involving similar conduct.
- The need for sanctions/responsive actions to bring an end to or prevent the future recurrence of discrimination, harassment, and/or retaliation.
- The need to remedy the effects of the discrimination, harassment, and/or retaliation on the Complainant and the community.
- The impact on the parties.
- Any other information deemed relevant by the Decision-maker.

Student sanctions may include:

Warning

Educational
Requirements

Probation

Restitution

Housing
Restrictions

Organizational
Sanctions

Suspension

Expulsion

Other

Faculty and staff sanctions may include:

Warning

Probation

Performance Improvement Plan or enhanced supervision, observation, or review

Suspension (with or without pay)

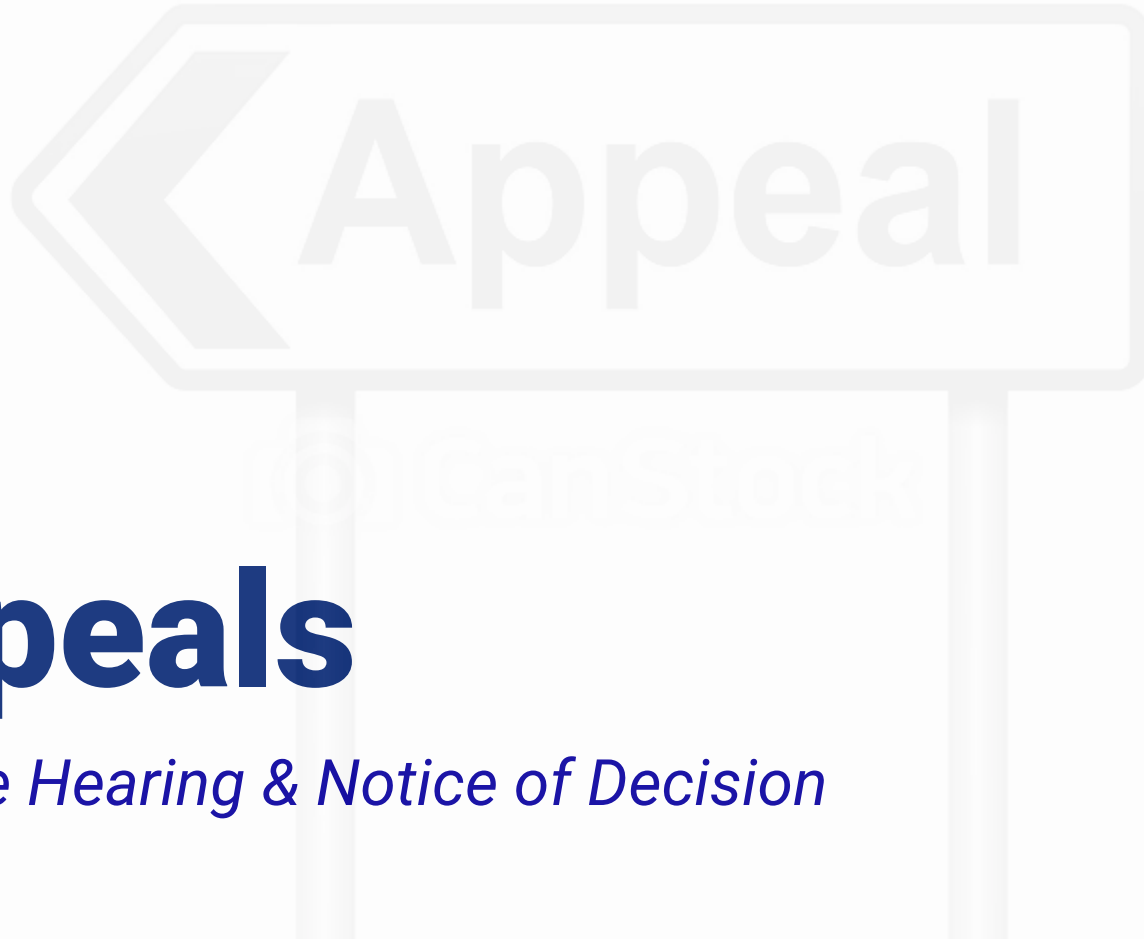
Training/Education or Counseling

Demotion, transfer, or loss of oversight/supervisory responsibility

Termination

Revocation of tenure

Other



Appeals

After the Hearing & Notice of Decision

Mandatory & Equal Appeal Rights

- Either party may appeal from a **determination regarding responsibility** or **dismissal of a formal complaint**. §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
- Written Request for Appeal must be submitted within 5 business days of delivery of Notice of Outcome

Grounds 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;
- 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; and/or
- The Sanction(s) imposed was inappropriate for the violation of the Policy of which the student was found in violation (“severity of the sanction imposed”).

Request for Appeal

- If Request does not meet one of the grounds for appeal, the Appeal Decision-maker denies the request.
- Parties and advisors are notified in writing of decision & rationale

- If Request does meet one of the grounds for appeal, the Appeal Decision-maker notifies the other party & advisor, TIXC, and Investigator and/or original Decision-maker
- Other party, TIXC, and Investigator/original Decision-maker have 5 business days to submit a response

Considerations

- Appeals are not intended to provide for a full re-hearing of the allegation(s)
- An appeal is not an opportunity to substitute judgment for that of the original decision maker merely because they disagree
- May involve consultation with the TIXC on questions of procedure or rationale for clarification
- Appeals granted based on new evidence should normally be returned to the original Investigator(s) and/or decision maker for reconsideration
- Once an appeal is decided, the outcome is final: further appeals are not permitted, even if a decision or Sanction is changed on remand (except in the case of a new hearing)
- In the event of a new hearing (with the original or a new decision-maker), the results of the new hearing can be appealed, once, on any of the four (4) available appeal grounds

Written Determination

- Within 10 business days, Appeal Decision-maker issues a **written decision** describing the result of the appeal and the rationale for the result
 - Decision will also include any specific instructions for remand or reconsideration, and any sanctions that may result
 - Written decision must be issued **simultaneously** to both parties.
- Once an appeal is decided, the outcome is final

§106.45(b)(8)(iii)

Serving Impartially

Avoiding bias and conflicts of interest

Serving Impartially

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

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.
- Treat parties **equally**: provide an equal opportunity to present evidence, witnesses, and their versions of the story.

Impermissible Bias

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



Bias: what does it mean?

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

85 FR 30238-40

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

85 FR 30496

All protected classes

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

85 FR 30084

What is not defined as bias?

- I. **OUTCOMES OF THE GRIEVANCE PROCEDURE** The Department cautions against conclusion of bias based solely on the outcome/finding
- II. **TITLE IX COORDINATOR SIGNS FORMAL COMPLAINT**
Title IX does not become adverse to respondent
- III. **PROFESSIONAL AND PERSONAL EXPERIENCES/AFFILIATIONS**
Prior professional experiences—e.g., teaching women’s studies or working as a public defender—need not automatically disqualify

BUT bias and/or conflict of interest determined on a case-by-case basis, and any combination of the experiences or affiliations may constitute bias and/or conflict of interest, depending on the circumstances

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 ✗



**Any
Questions?**



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.