

Title IX Foundation Training

Roadmap

- Where are we today?
- Title IX Scope & Jurisdiction
- Response Obligations
- Serving without bias or conflicts of interest

The statute, the final rule, what it all means

WHERE ARE WE TODAY?

The Statute

No person in the United States shall, on the basis of sex,

- be excluded from participation in,
- be denied the benefits of, or
- be subjected to discrimination

under any education program or activity receiving Federal financial assistance.

20 U.S.C. § 1681

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The Final Regulations

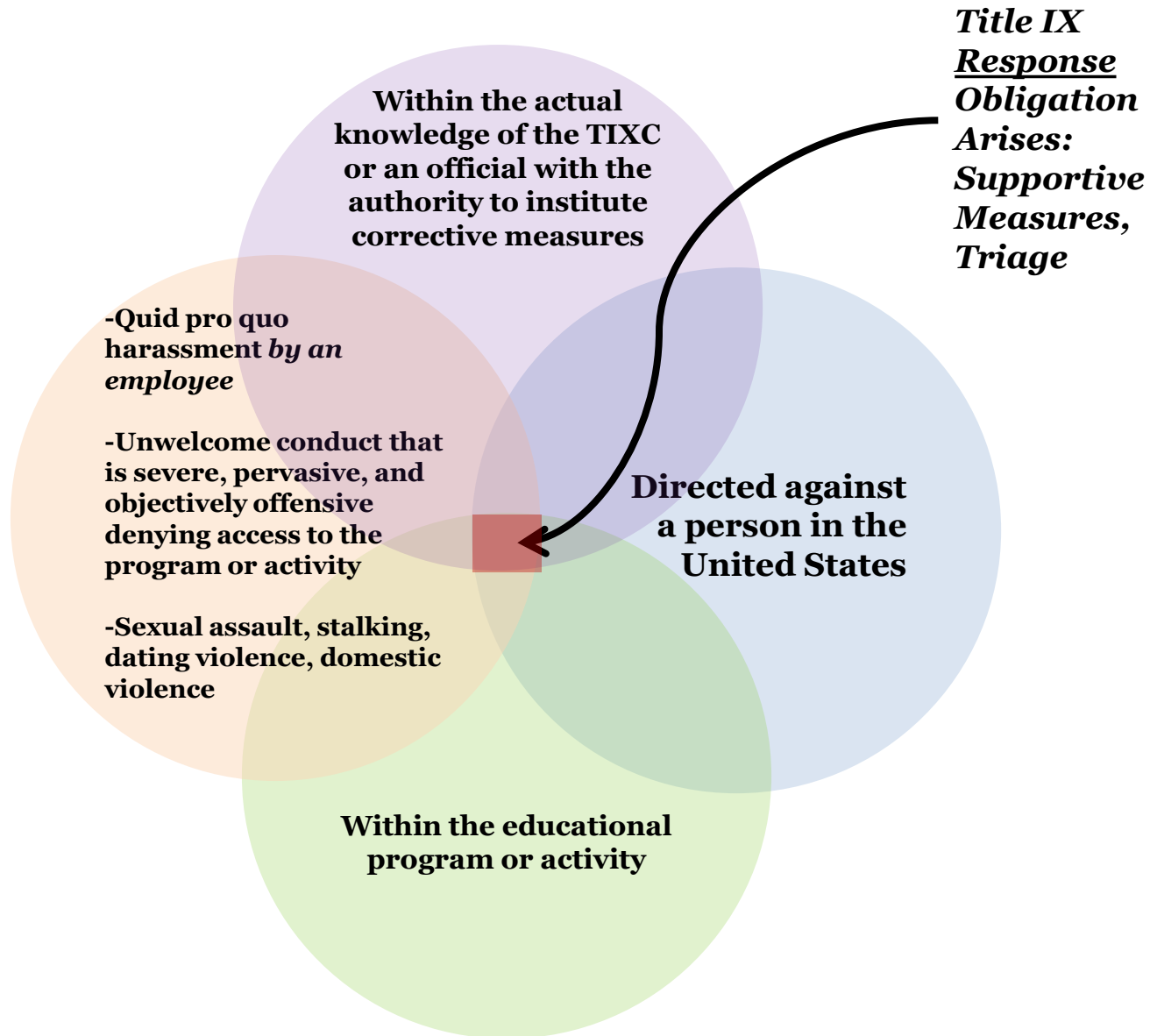
- Final rule released by ED informally on its website on May 6, 2020
- Published in the Federal Register on May 19, 2020 (34 CFR Part 106)
- Effective date: **August 14, 2020**

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.

The Foundation

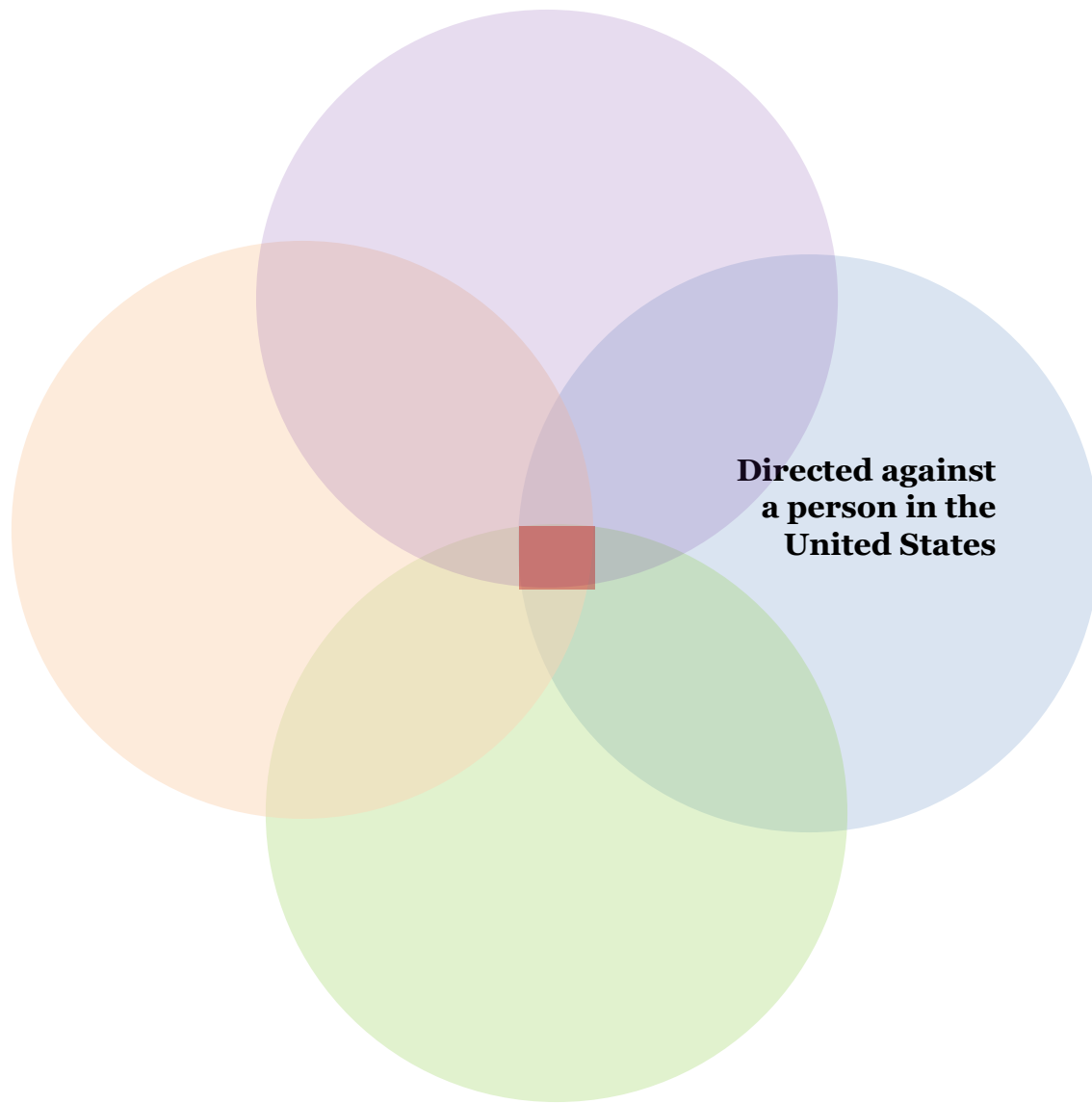
If you receive a formal complaint of sexual harassment signed by a complainant who is participating in or attempting to participate in your education program or activity, then you must follow a grievance process that complies with Section 106.45.



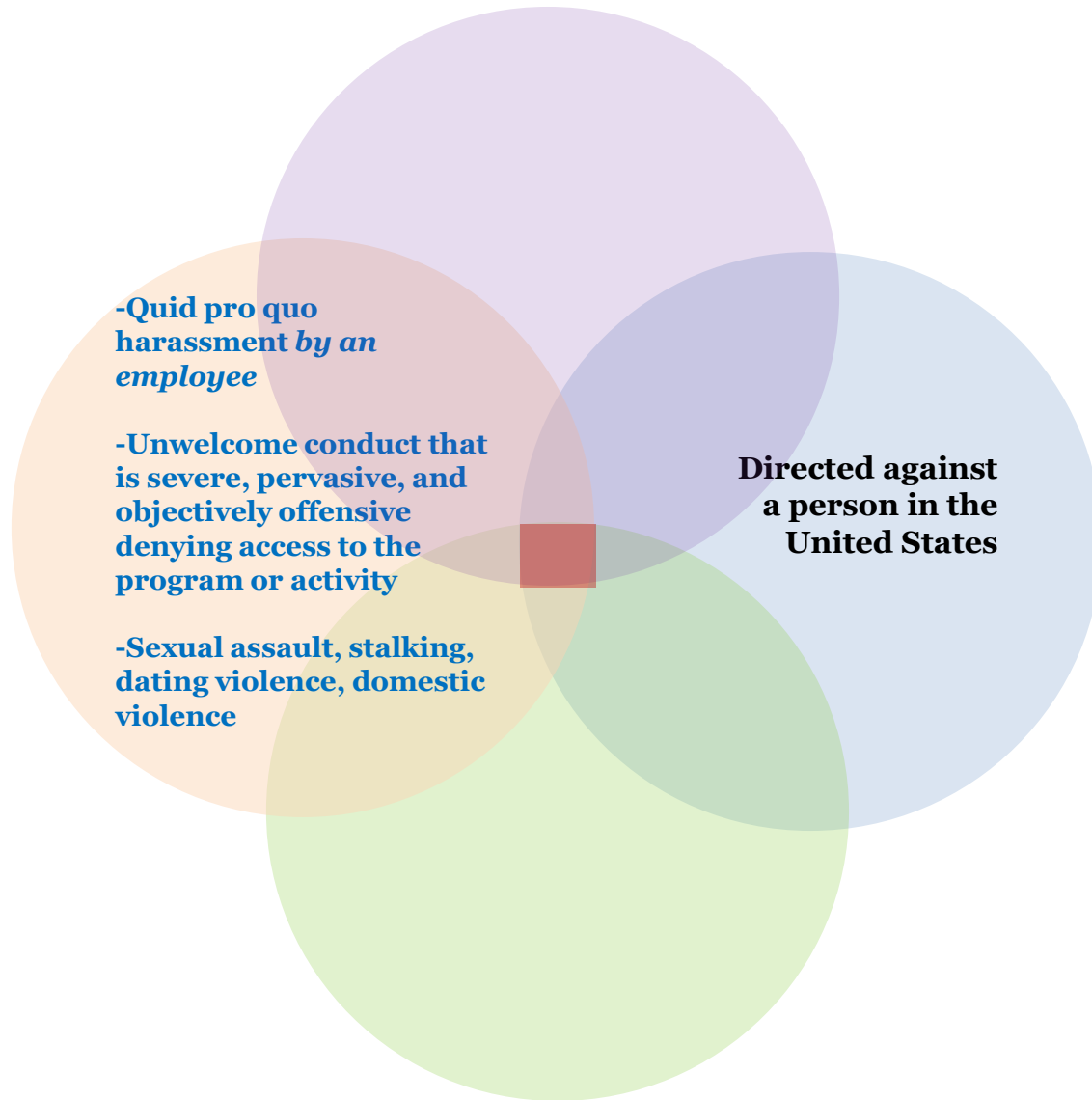
Scope and Jurisdiction

TITLE IX COVERED CONDUCT

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**Directed against
a person in the
United States**



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

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

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.

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.

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.

Sexual Harassment

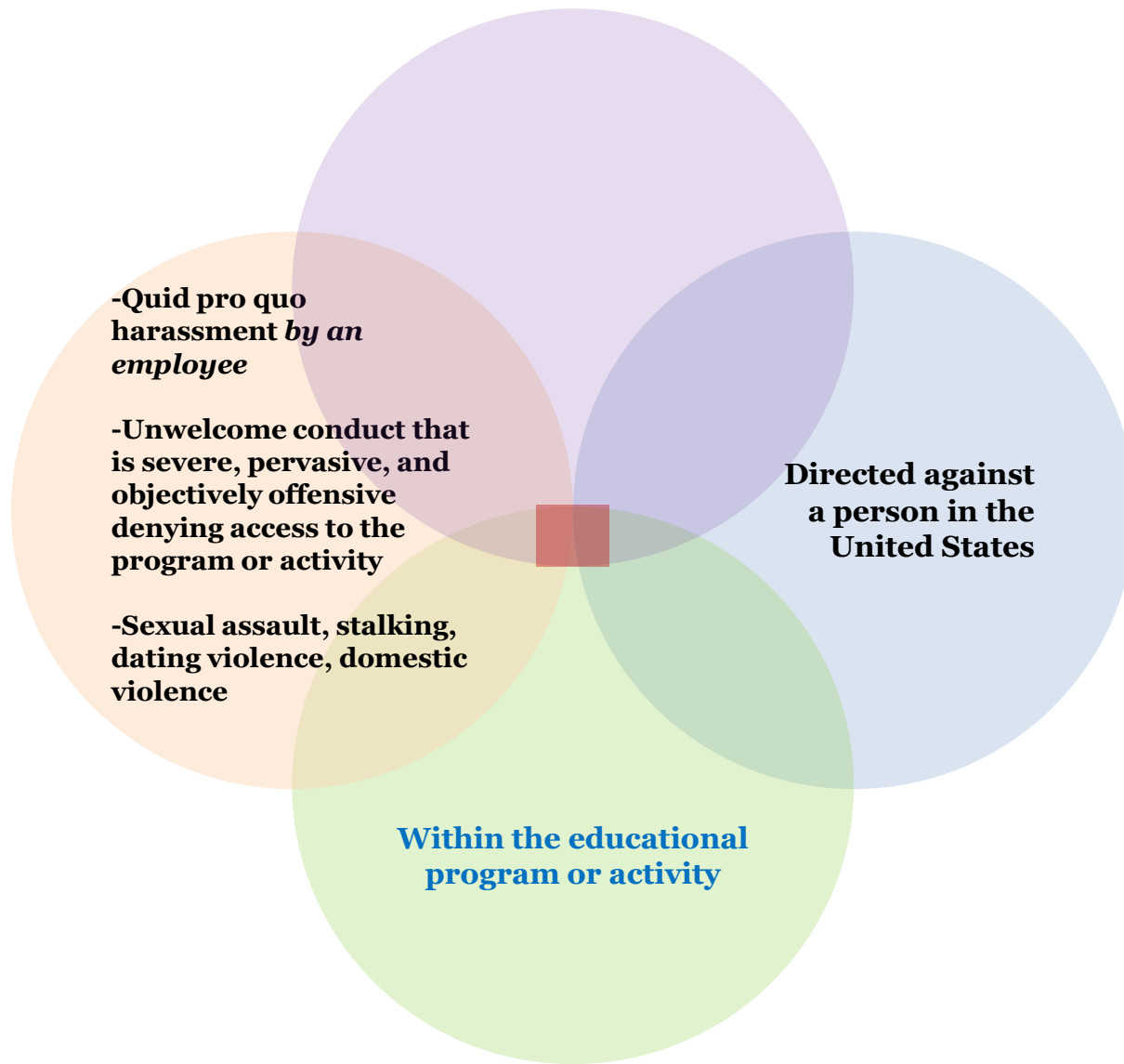
Dating violence. Dating violence means any act of violence committed by a person who is or has been in a *social relationship of a romantic or intimate nature* with the victim and where the existence of such a relationship is determined based on a consideration of the length, type, and frequency of interactions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

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.

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.*



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:

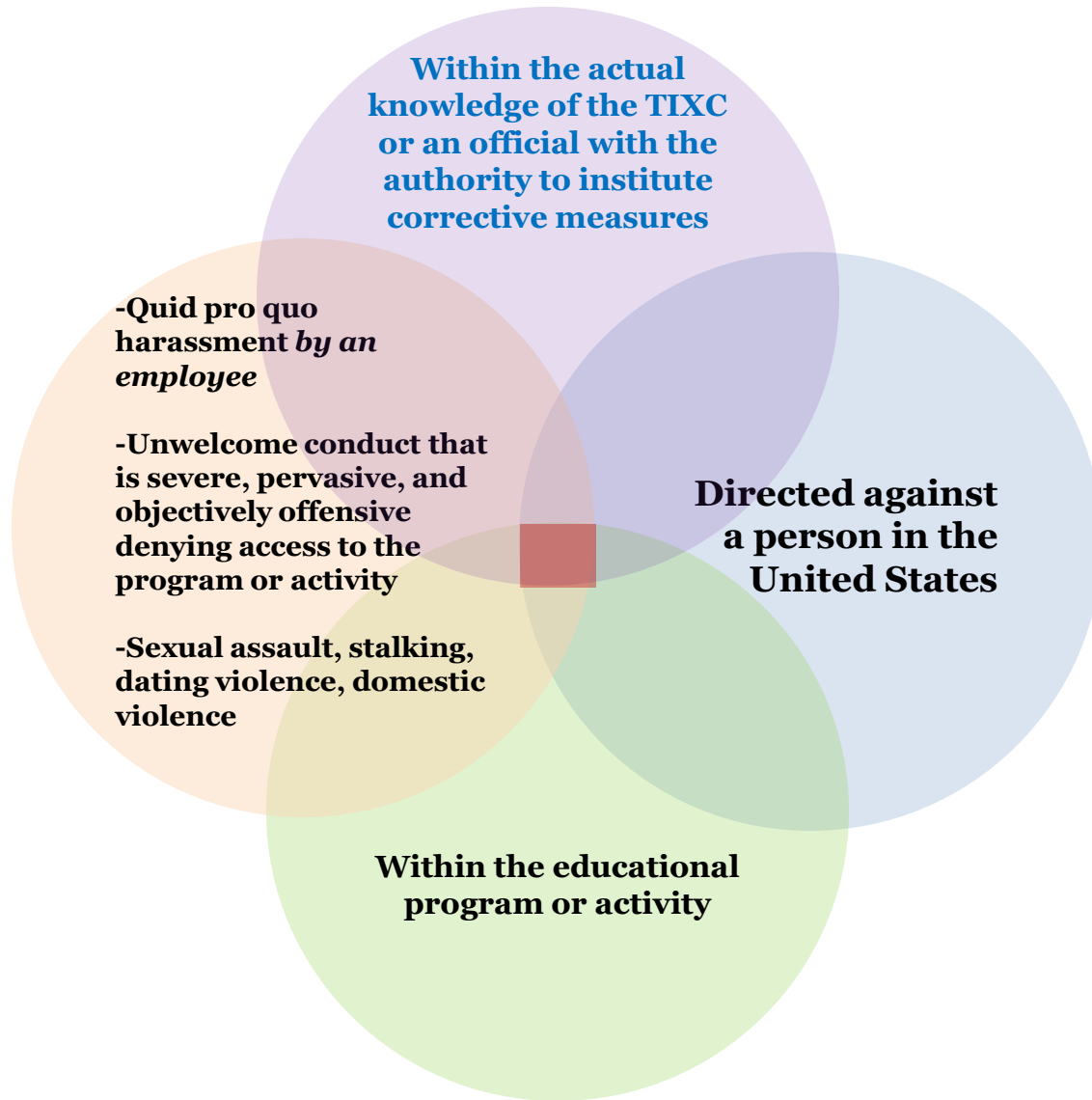
- ✓ any building
- ✓ owned or controlled by
- ✓ an officially recognized student org., e.g., fraternity or sorority houses

§ 106.44(a)

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Actual Knowledge & Deliberate Indifference

RESPONSE OBLIGATIONS



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...”

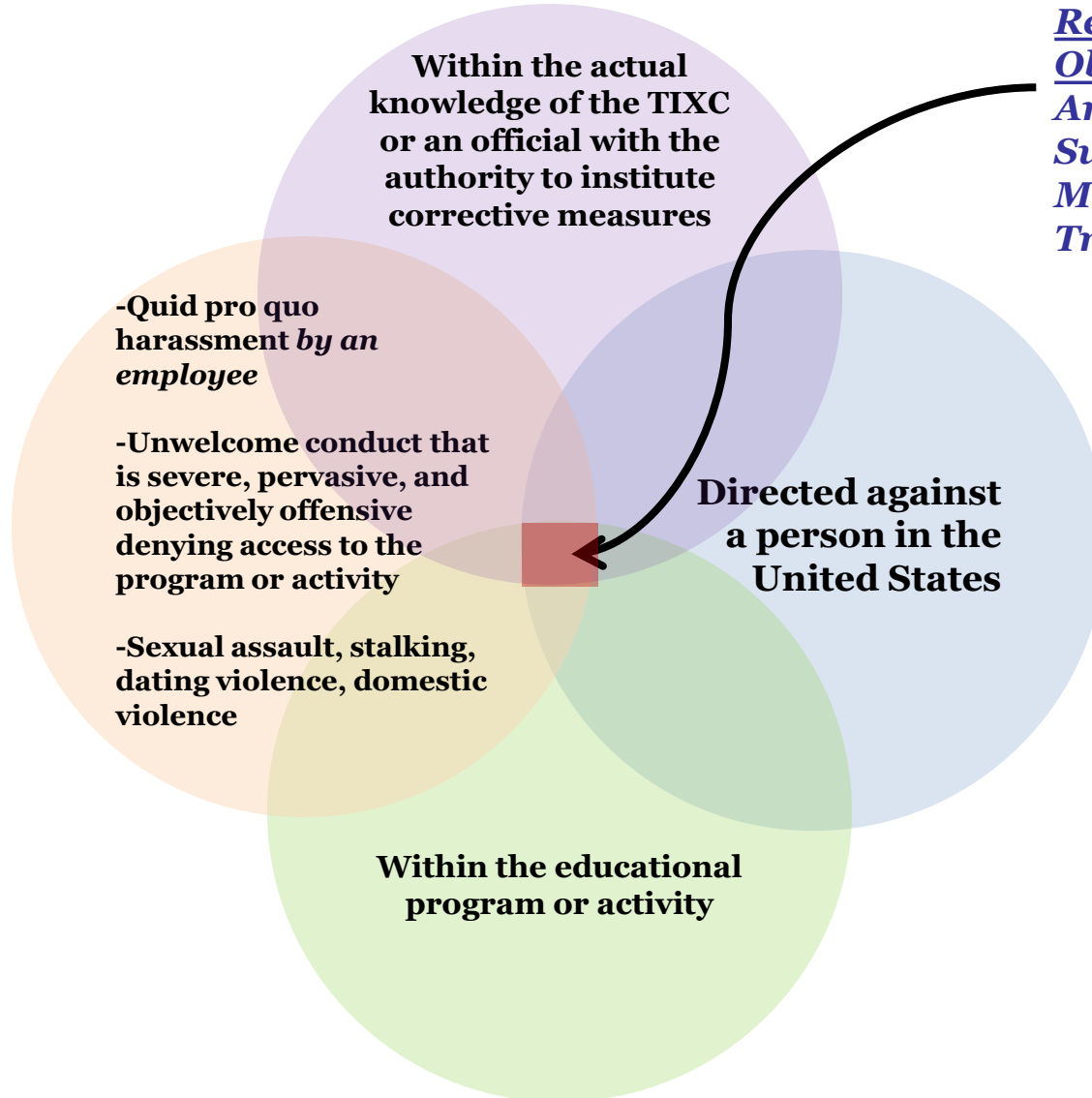
§ 106.30

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.

§ 106.30

**Title IX
Response
Obligation
Arises:
Supportive
Measures,
Triage**



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)

Response Obligations

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

Response Obligations

- 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.

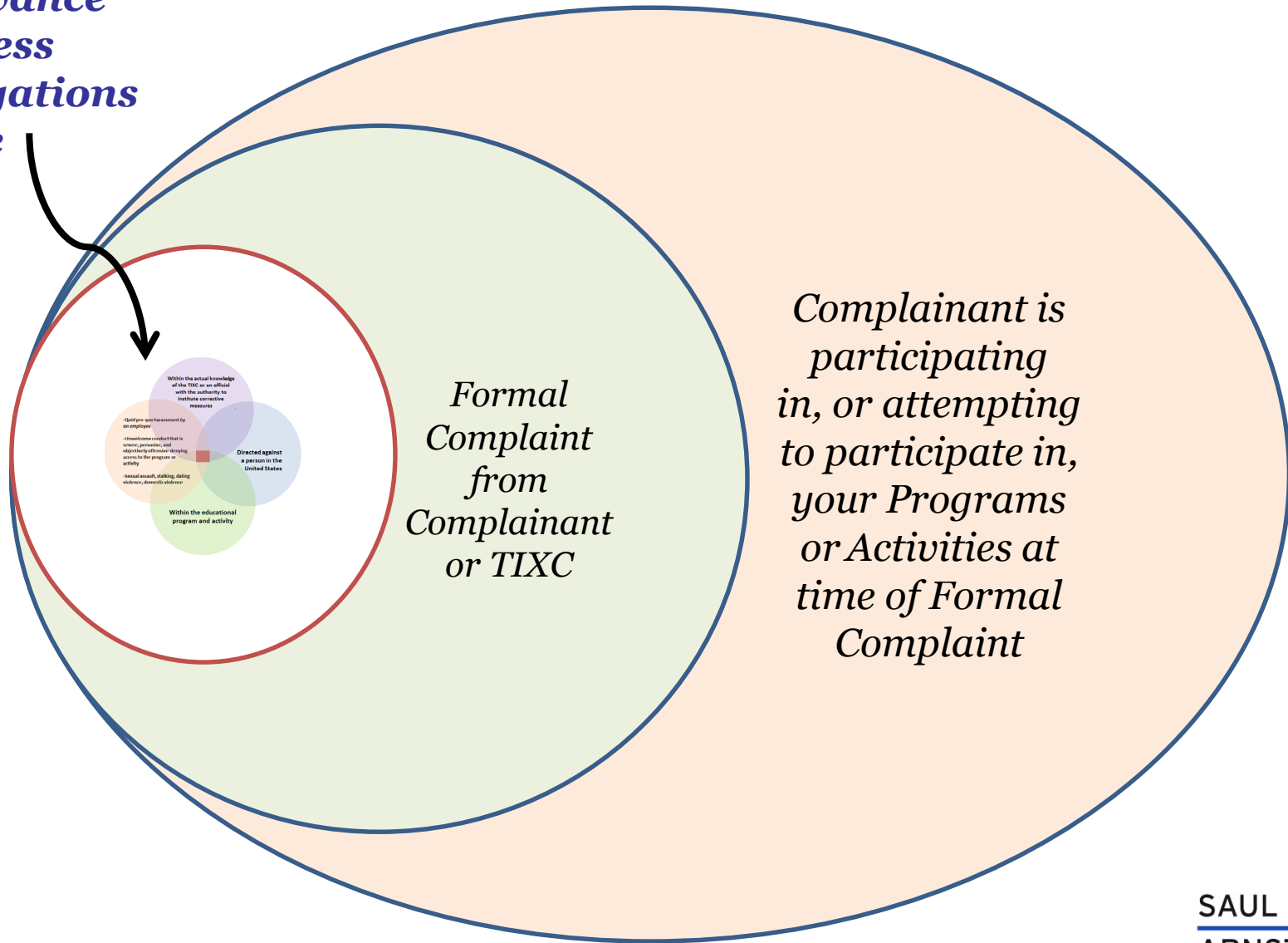
§ 106.44(c), (d)

Response Obligations

- A school **must follow** grievance process prescribed in the final regulations in response to a formal complaint
- **Formal Complaint:** a document signed by the complainant or by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the recipient investigate the allegation of sexual harassment. At the time of filing a formal complaint, ***a complainant must be participating in or attempting to participate in the education program or activity*** of the recipient with which the formal complaint is filed.

§ 106.30

**§106.45
Grievance
Process
Obligations
Arise**



Circling Back . . .

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**, or
- did not occur against a **person in the United States**,

the recipient **must terminate** its grievance process with regard to that conduct **for the purposes of sexual harassment under Title IX**.

However, such a dismissal does not preclude action under another provision of the recipient's code of conduct.

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 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.
- Must ensure that ***decision-makers receive training on*** any technology to be used at a live hearing and on issues of relevance of questions and evidence, including when questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant

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)

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)

But not advisors. . .

The final regulations impose no prohibition of conflict of interest or bias for advisors

85 FR 30254 n.1041

The Non-Bias Requirement

- Reliable;**
- Legitimate;**
- Impartial;**
- Accurate;**
- Truth-Seeking; and**
- Rooted in Due Process**

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.

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

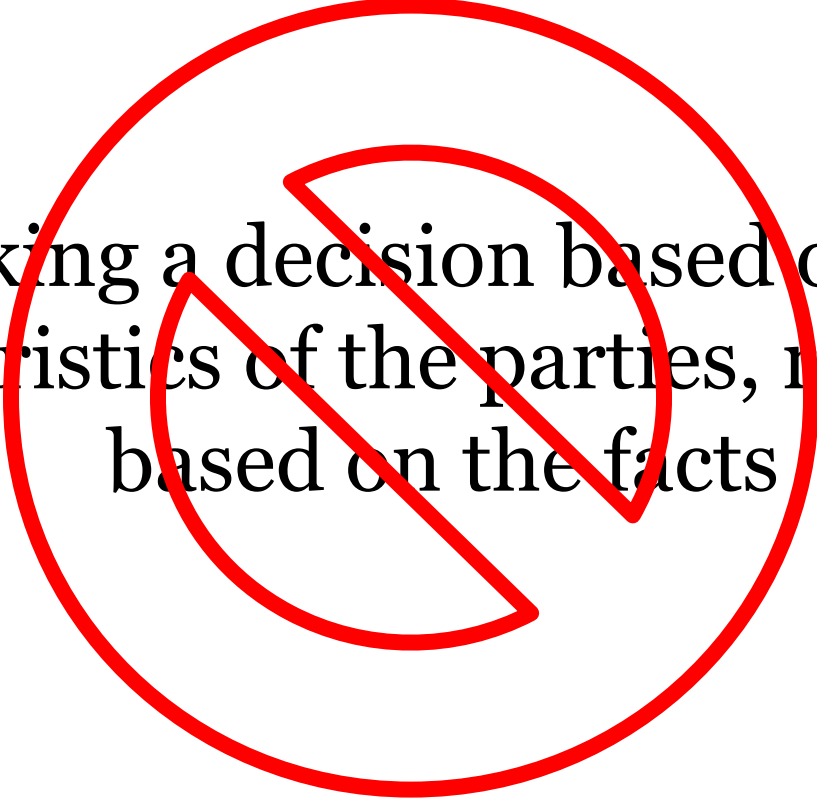
All protected classes

“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

Impermissible Bias

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



Investigative Reports

- The “core purpose” of the investigative report prepared by the investigator 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 independent credibility **determinations**.

Investigative Report

Relevant Evidence Summary

?Credibility Determinations?

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:

- Investigator might ***state factually*** that Respondent said four people in interview one and then said three people in interview two.
- Will the Investigator conclude “This shows an inconsistency which suggests a lack of credibility for the Respondent”?

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:

- The Investigator might state factually in the report that Witness X made both the above statements.
- The Investigator might also ask 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.
- Will the Investigator additionally write “This inconsistency shows lack of credibility and we should discount this witness’ testimony”?

What is not defined as bias?

1. Outcomes of the grievance procedure

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

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

85 FR 30252

What is not defined as bias?

2. Title IX Coordinator Signs Formal Complaint

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

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

85 FR 30372

What is not defined as bias?

3. Professional experiences or affiliations

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

85 FR 30252

What is not defined as bias?

3. Professional/Personal Experiences or affiliations

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

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

But consider . . .

- Whether a 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 on the prior slide *may* constitute bias and/or conflict of interest, depending on the circumstances

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.

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.

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

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 ❌

Self-Disclosure of any Potential Conflict of Interest

Transparency is key!

Serving Impartially

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

&

Don't rely on sex stereotypes

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.

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

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

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.

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.