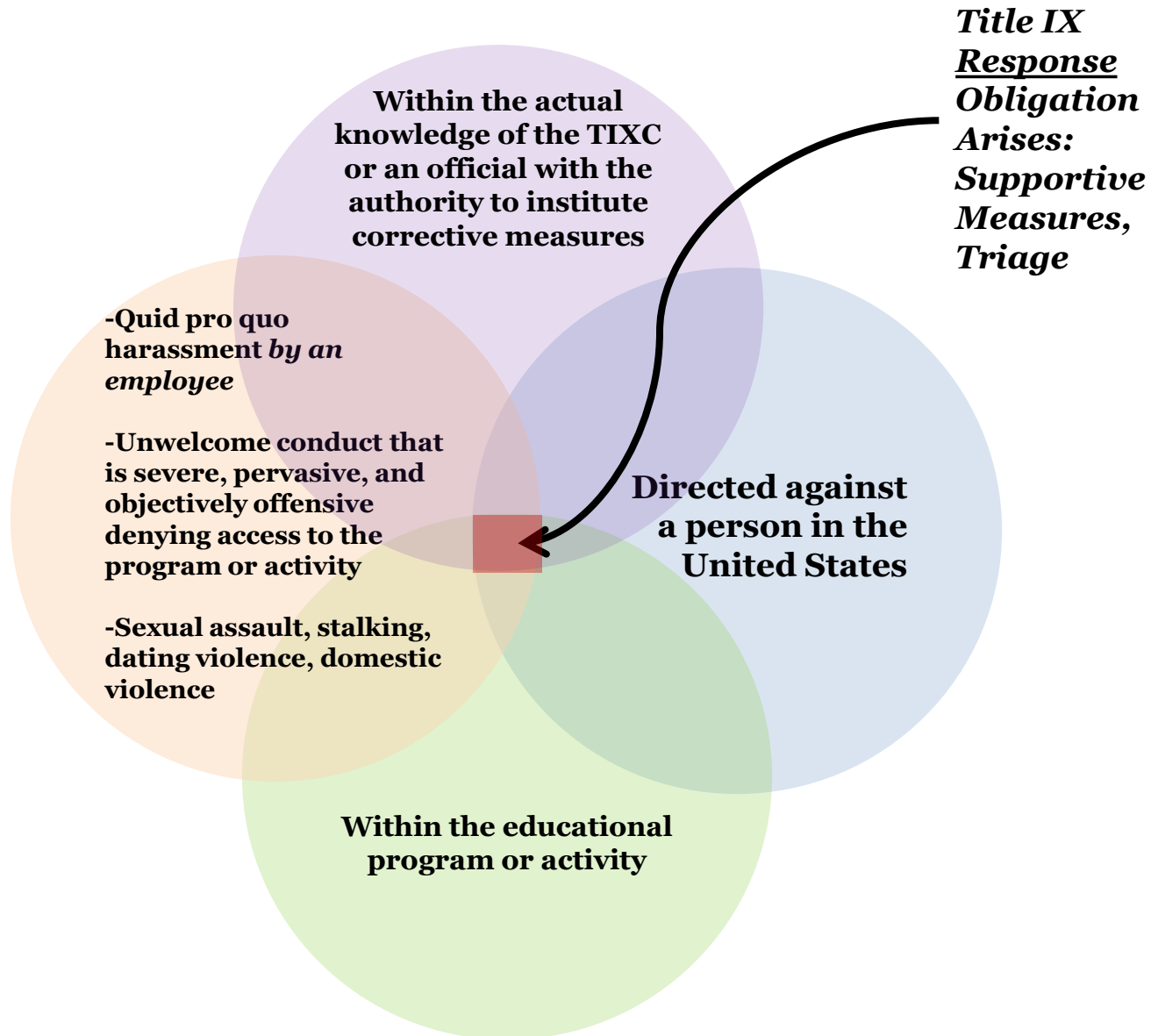


# Title IX Investigator Training

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*How did we get here?*

# REFRESHER



# Response Obligations

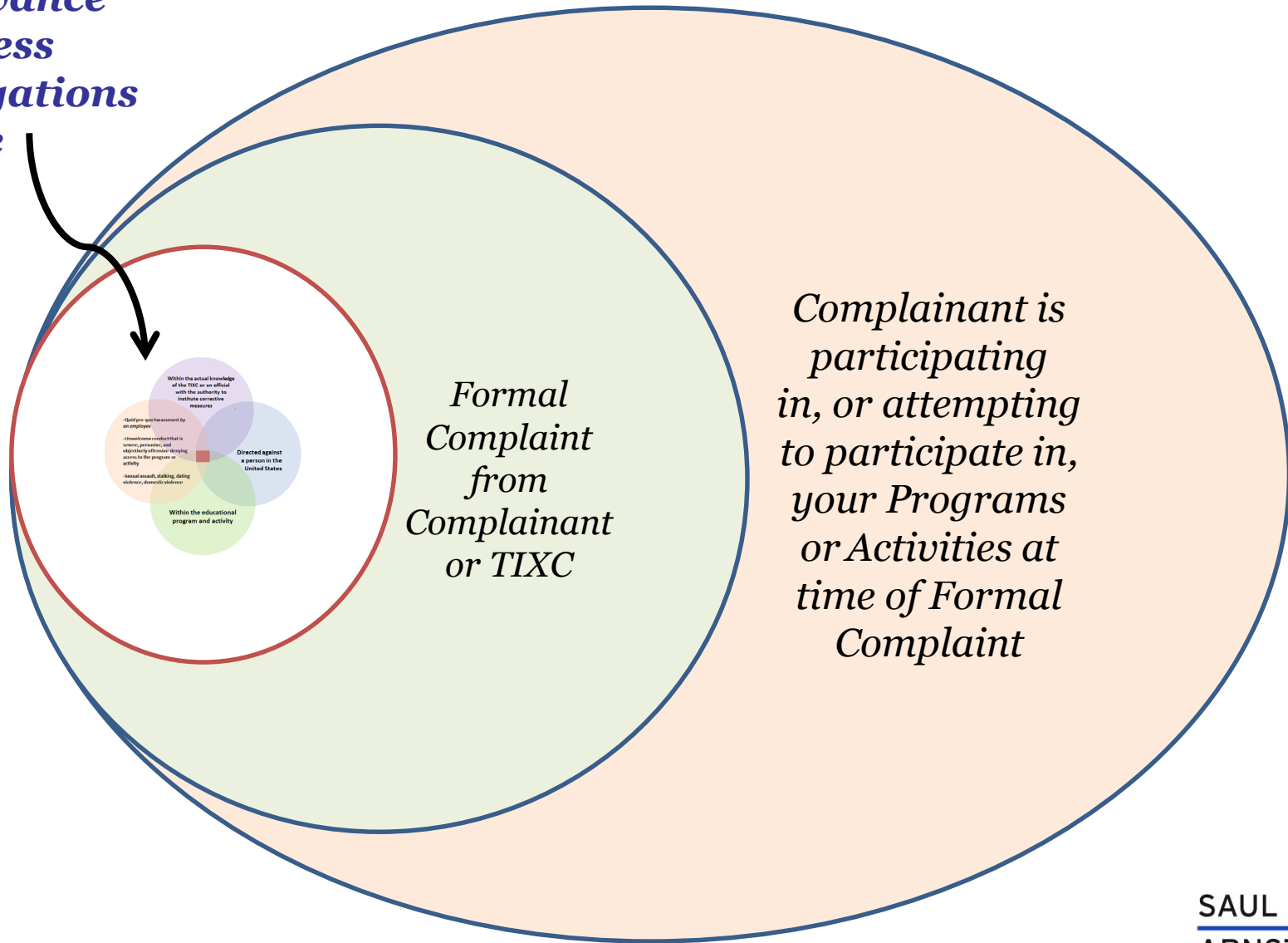
Once the institution has actual knowledge the Title IX Coordinator must:

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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**§106.45  
Grievance  
Process  
Obligations  
Arise**



*Overview of Formal Complaints and the requirements of §106.45*

# **THE GRIEVANCE PROCESS**

# 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

# Formal Complaint

## Who can file?

- Complainant may file Formal Complaint by signing document; or
  - University *must* investigate when Complainant desires the action
- Title IX Coordinator may sign Formal Complaint
  - If the Title IX Coordinator has determined on behalf of the University that an investigation is needed

§ 106.30; 85 FR 30131 n. 580



# Formal Complaint

In other words, **complainant must assent** or the **Title IX Coordinator must believe 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

# Formal Complaint

## If the Title IX Coordinator signs the Formal Complaint

- Title IX Coordinator is not a complainant or otherwise a party
- Complainant remains the party to the action
- Complainant has right to refuse to participate in grievance process § 106.71

# Formal Complaint

## No anonymous filing

“A complainant...**cannot file a formal complaint anonymously** because § 106.30 defines a formal complaint to mean a document or electronic submission...that contains the complainant’s physical or digital signature or otherwise indicates that the complainant is the person filing the formal complaint. The final regulations require a recipient to send written notice of the allegations to both parties upon receiving a formal complaint. The written notice of allegations under § 106.45(b)(2) must include certain details about the allegations, including the identity of the parties, if known.”

85 FR 30133.

# 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

# Formal Complaint

## Where to File

- “A formal complaint may be filed with the Title IX Coordinator”
  - At the Title IX Office
  - Online submission system
  - Via email or mail to the Title IX Coordinator’s contact address/email

\*Must consist of a *written document*

85 FR 30137

# Formal Complaint

## Time for Filing

- No set time limit from date of allegations to filing (no statute of limitations)
- “[The Department] decline[s] to impose a requirement that formal complaints be filed ‘without undue delay’”
  - Doing so would be “unfair to complainants” because “for a variety of reasons complainants sometimes wait various periods of time before desiring to pursue a grievance process in the aftermath of sexual harassment”

85 FR 30127

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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.

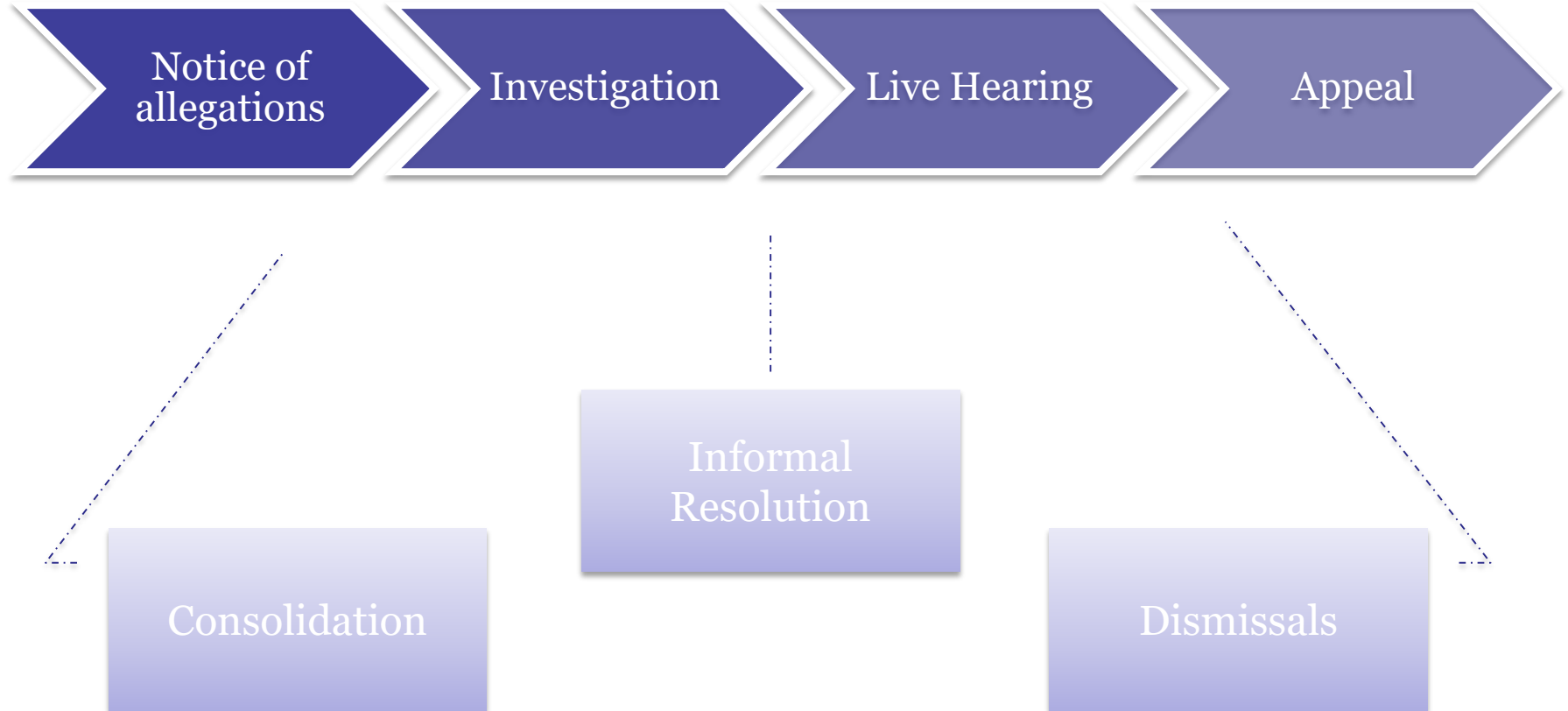
# Formal Complaint

- **Fulfill Title IX Obligation**
  - 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



# Outline of the Process



# 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

# Written Notice

After a Formal Complaint is filed, the institution must **simultaneously send both parties written notice of allegations, containing the following:**

- Notice that the informal and formal resolution processes **comply with the requirements of Title IX;**
- Notice of the **allegations potentially constituting sexual harassment**, providing sufficient detail for a response to be prepared before any initial interview, including (1) identities of the parties, if known; (2) the conduct allegedly constituting sexual harassment; and (3) the date and location of the alleged incident, if known;

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

# Written Notice

## [CONT.]

- A statement that the respondent is **presumed not responsible** for the allegations and a determination regarding responsibility is made at the conclusion of the grievance process;
- Notice that each party **may have an advisor** of their choice who may be, but is not required to be, an attorney and who may inspect and review evidence;
- Warning about **false statements** if the recipient's code of conduct prohibits students from making false statements or submitting false statements during a disciplinary proceeding.

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

# Formal Complaint: Written Notice

## [CONT.]

- Notice that **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**. The institution 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

*Gather & fairly summarizing evidence*

# INVESTIGATIONS

# Investigation

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

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

§ 106.30

# 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)



# 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)

# 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)

# 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)

# 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)

# Step One: Gathering Evidence

- The Investigator must gather **all 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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& LEHR<sup>LLP</sup>

# 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).

# 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

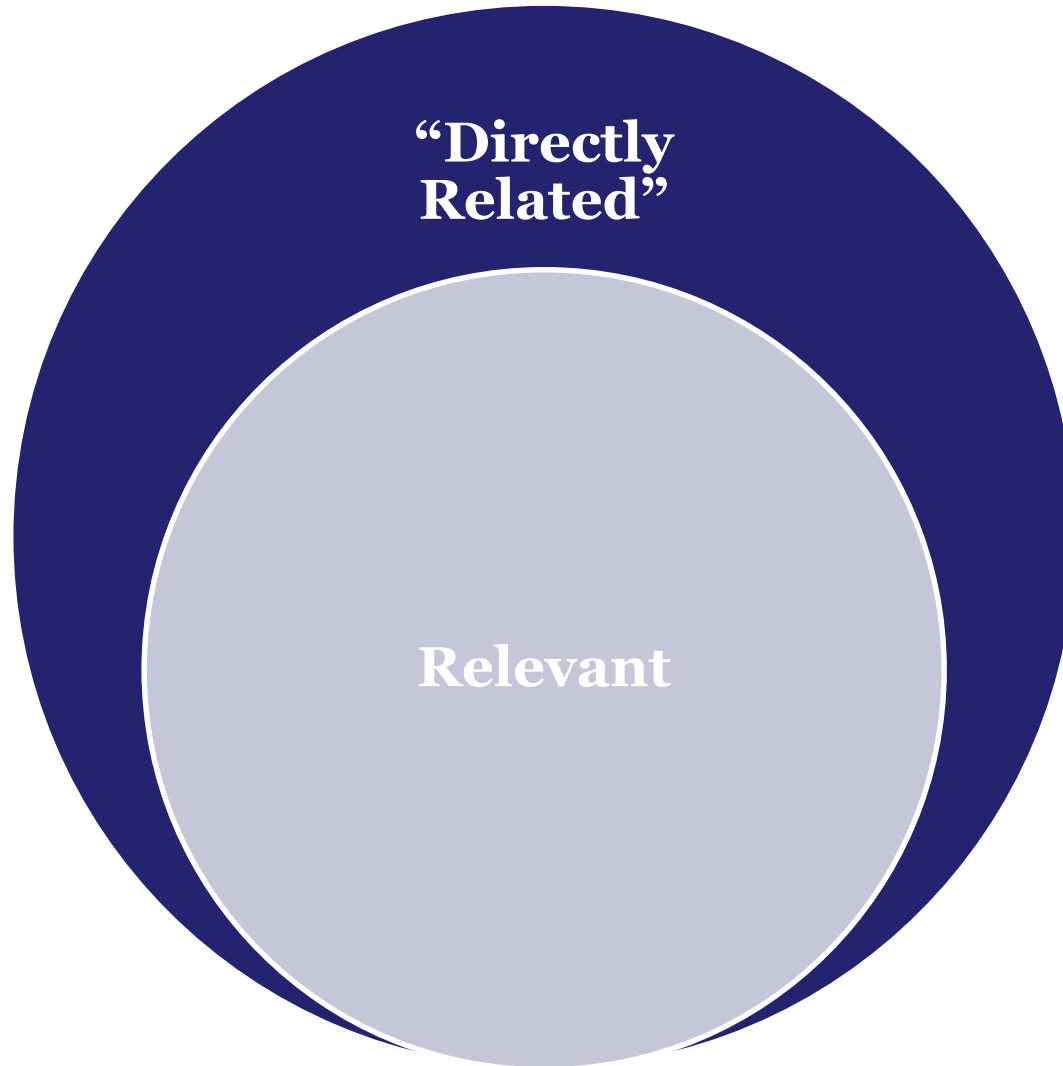
- Both parties must be given equal opportunity to *inspect and review* any evidence obtained during the investigation that is *directly related* to the allegations in the formal complaint
- Evidence must be sent to each party, and their advisors (if any), in an electronic format or hard copy

§ 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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# Step Three: The Investigative Report

Creating an investigative report that “fairly summarizes relevant evidence” does not require making credibility determinations, proposing findings, or a recommending an outcome.

# 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

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)



# 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

# 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

# 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

# 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

# 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

# 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

# What is Relevant Evidence?

**rel·e·vant** | \ 're-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

# 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 Relevant Evidence?

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

# What is Not Relevant?

The Preamble and Final Rule provide some insight into what is deemed “irrelevant.”

- An institution may deem duplicative evidence irrelevant.

85 FR 30337

# 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

# “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.

# “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

# Bias/Conflict of Interest

- “A recipient must ensure that Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, receive training on . . . how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias.”

# Bias

- bi·as | \ 'bī-əs\ **noun**
- **1a:** an inclination of temperament or outlook *especially* : a personal and sometimes unreasoned judgment : PREJUDICE



# Bias

- Fundamentally about making a decision based on something about the characteristics of the parties, instead of based on the facts.