



St. Charles Borromeo Seminary

Title IX Sexual Harassment Foundational Training

June 2, 2021

**SAUL EWING
ARNSTEIN
& LEHR^{LLP}**

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,

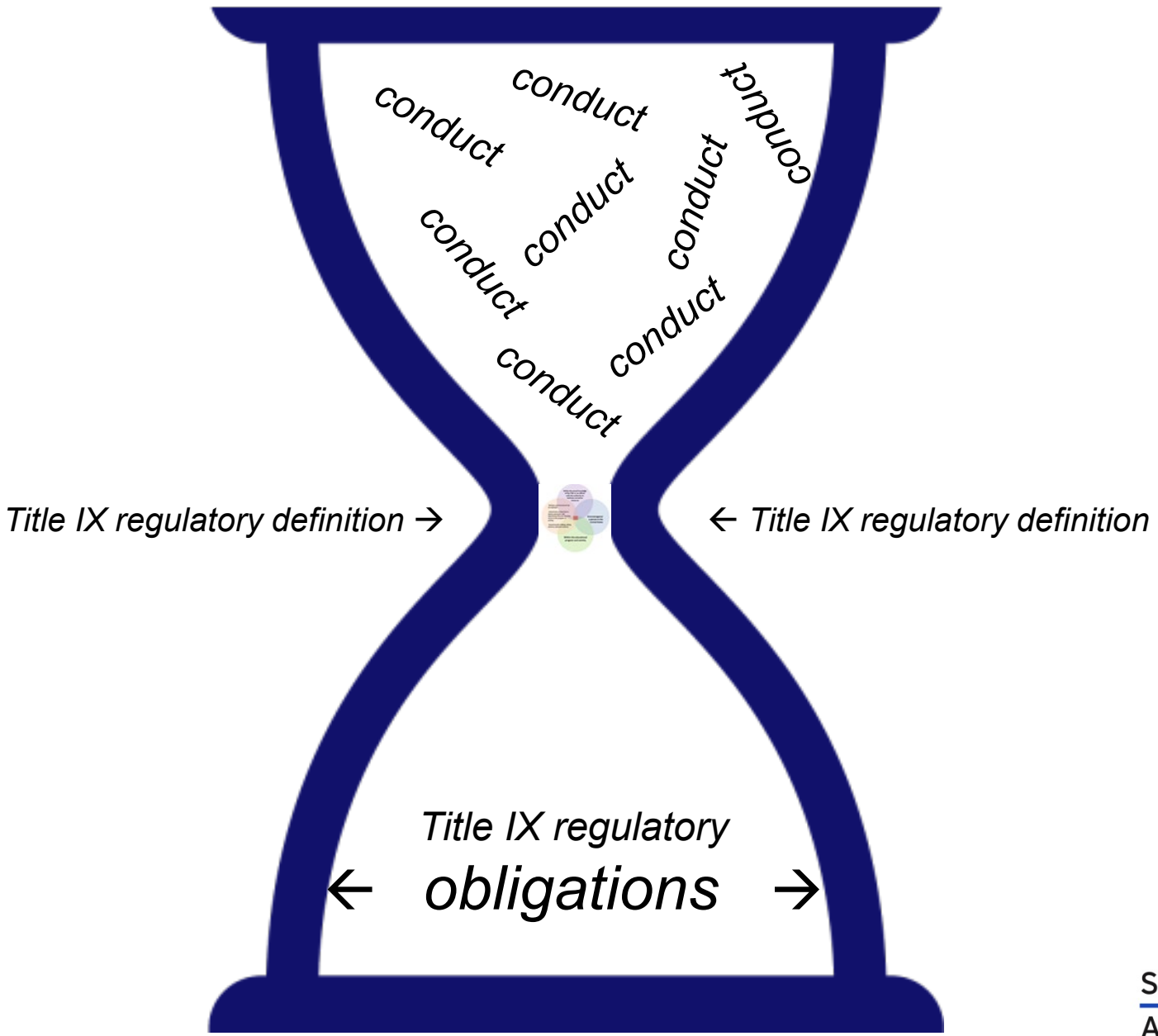
- be excluded from participation in,
- be denied the benefits of, or
- be subjected to discrimination

under any education program or activity receiving Federal financial assistance.

20 U.S.C. § 1681

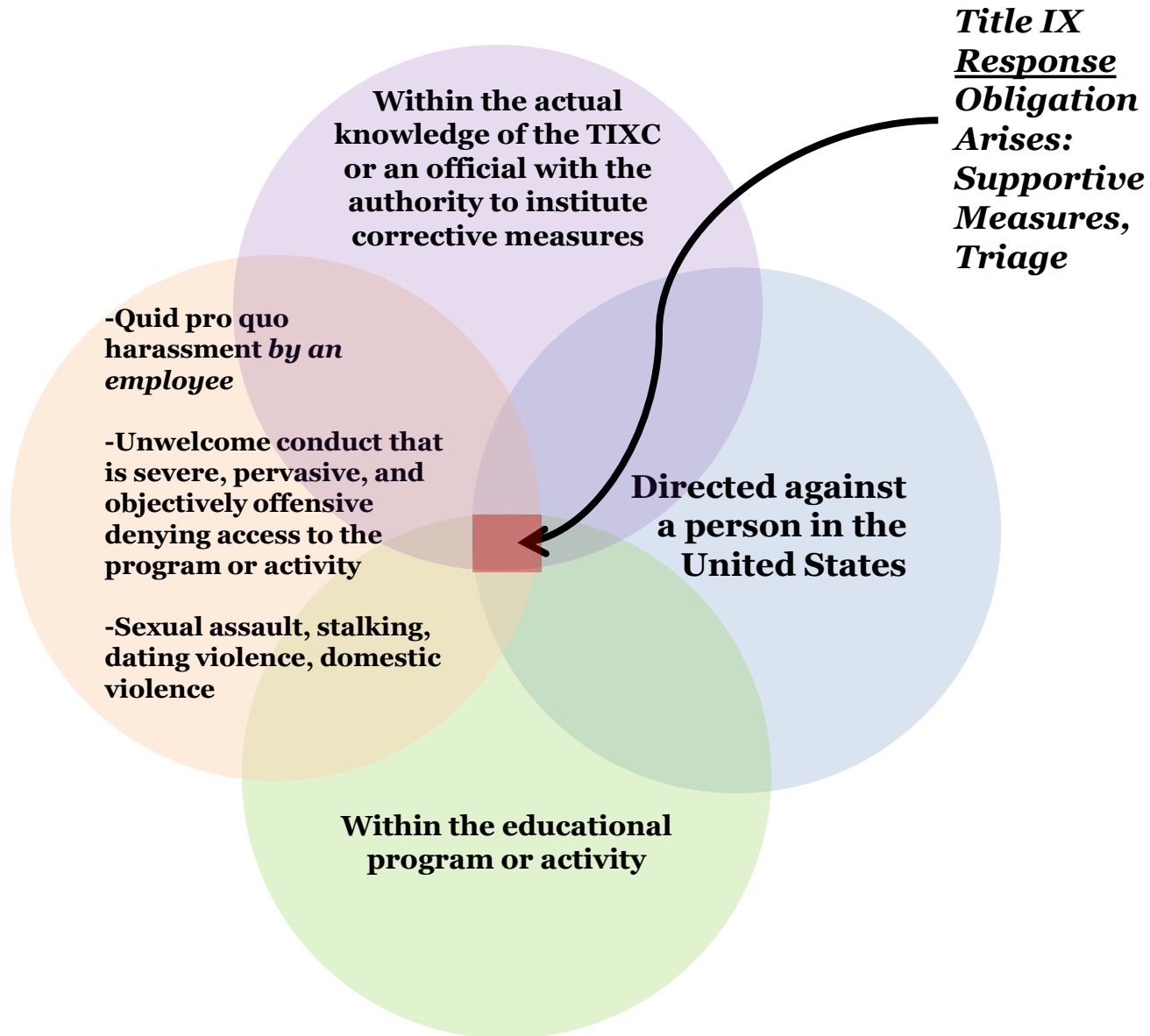
The Final Regulations

- 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
 - *Do not apply retroactively*



The Foundation: Principle #1

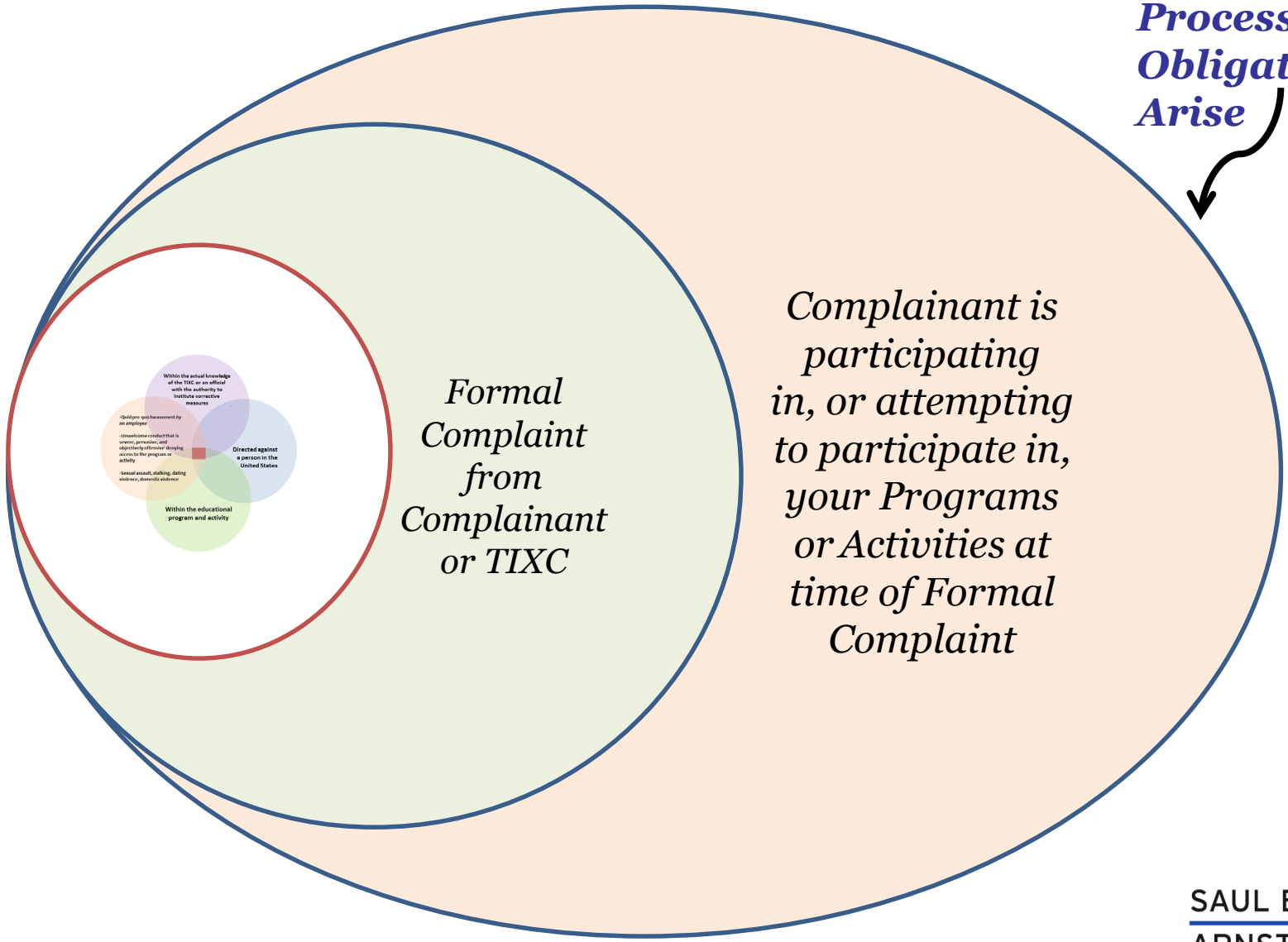
If you have actual knowledge of sexual harassment that occurred in your education program or activity against a person in the United States, then you must respond promptly in a manner that is not deliberately indifferent.



The Foundation: Principle #2

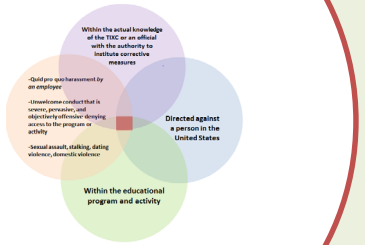
If you receive a formal complaint of sexual harassment signed by a complainant who is participating in or attempting to participate in your education program or activity, then you must follow a grievance process that complies with Section 106.45.

**§106.45
Grievance
Process
Obligations
Arise**

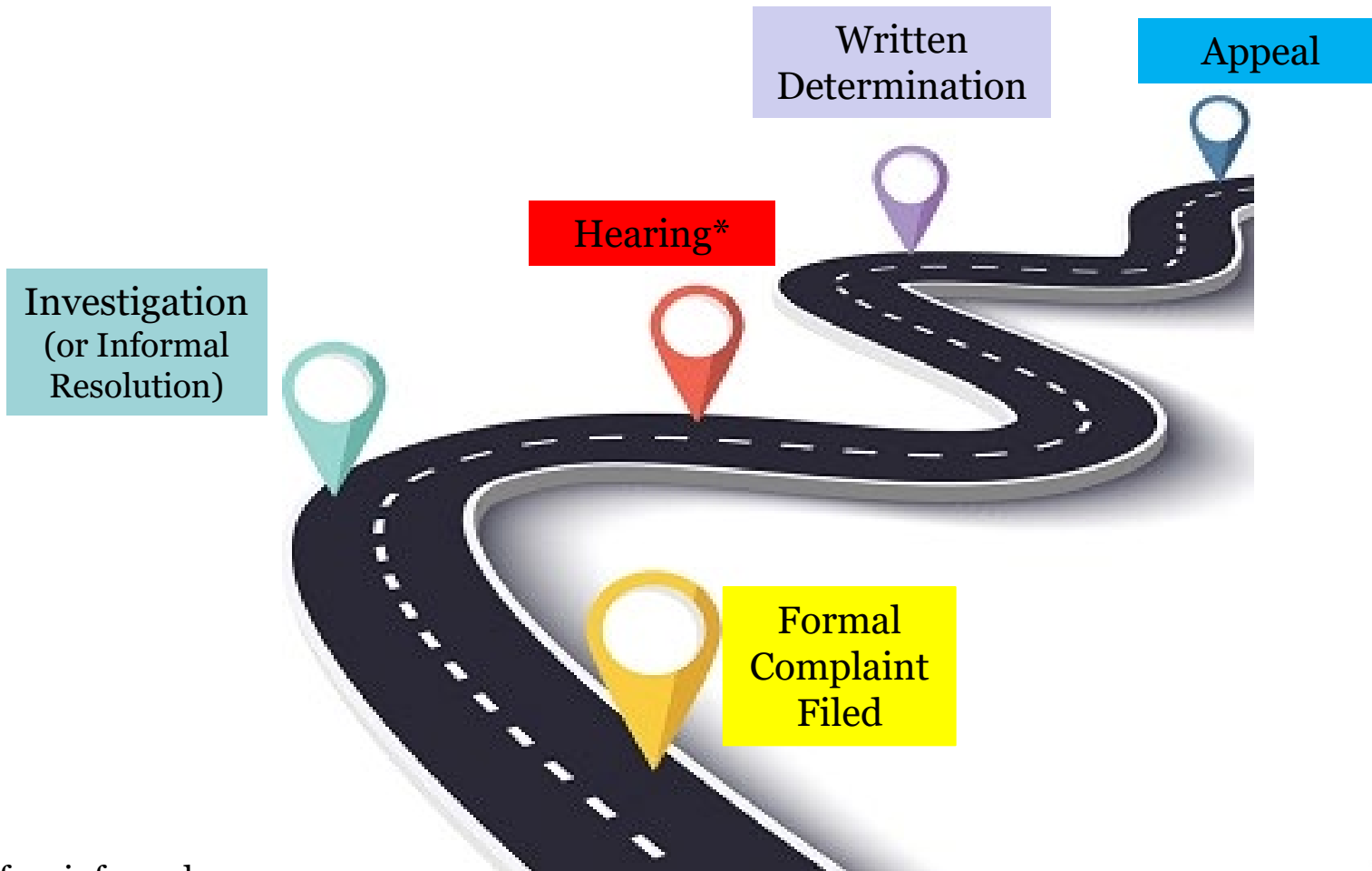


Complainant is participating in, or attempting to participate in, your Programs or Activities at time of Formal Complaint

Formal Complaint from Complainant or TIXC



The Grievance Process

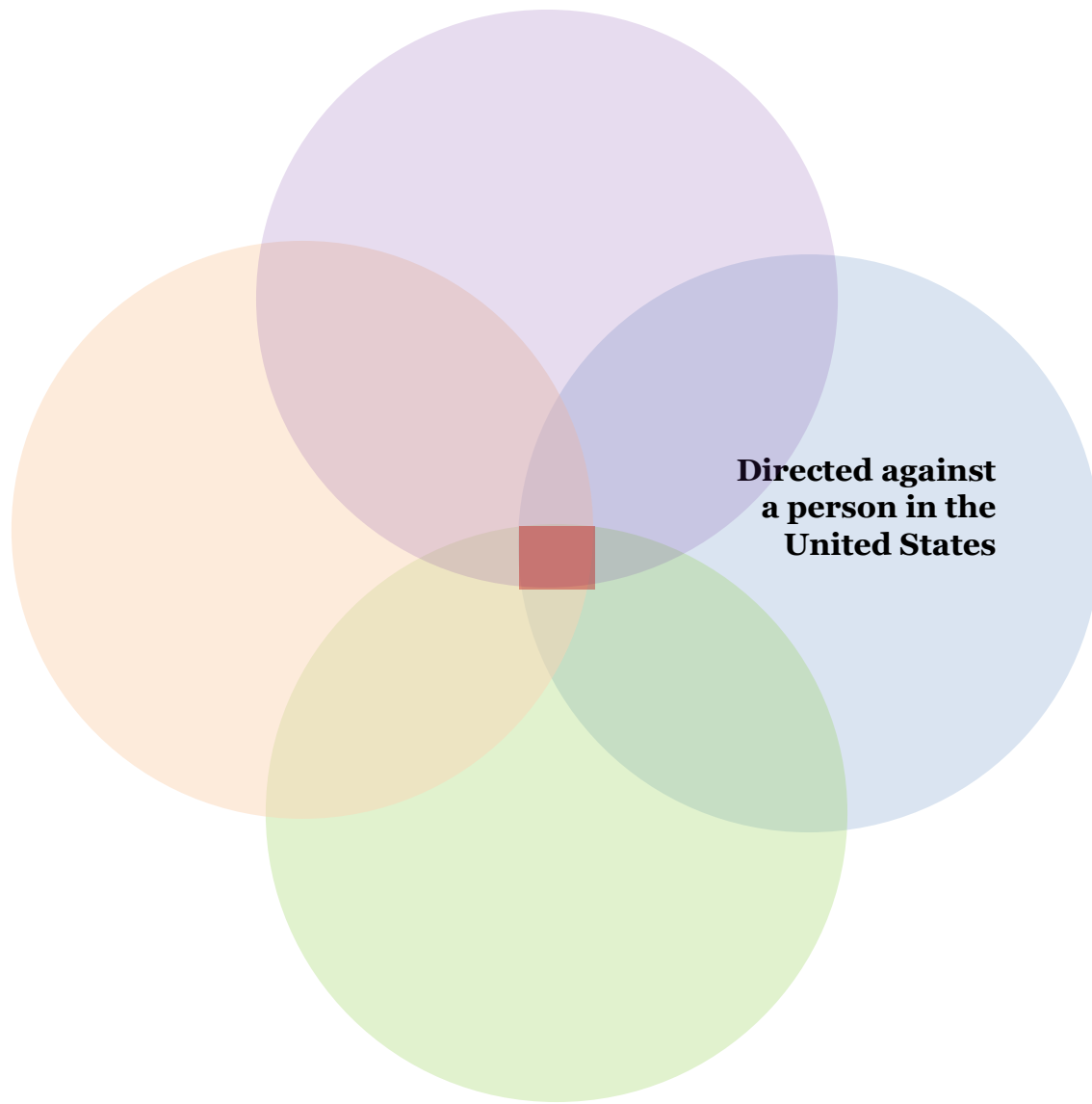


*If no informal resolution is reached

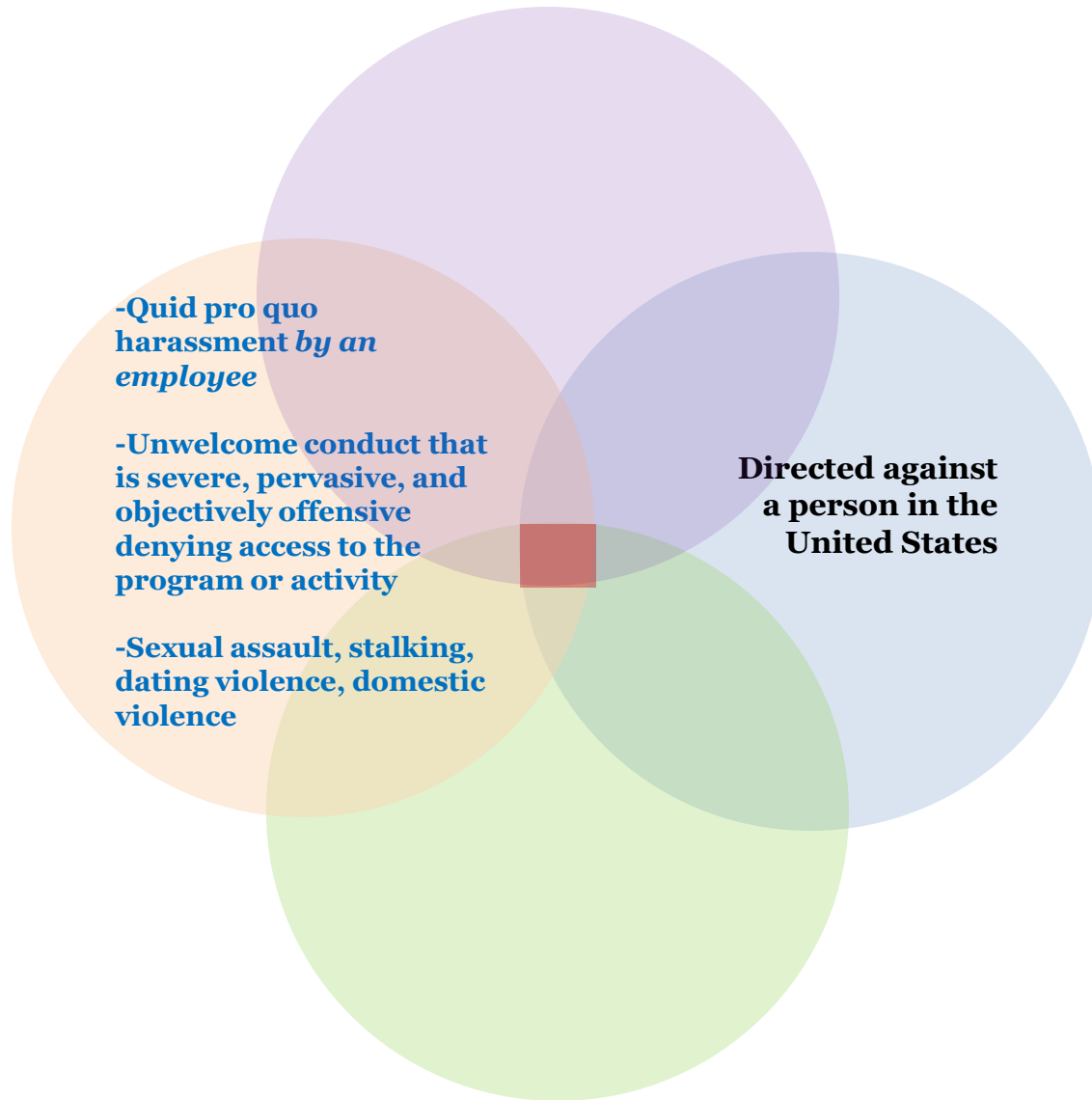
Scope and Jurisdiction

TITLE IX-COVERED CONDUCT

SAUL EWING
ARNSTEIN
& LEHR^{LLP}



**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

“On the basis of sex”

- “[D]oes not require probing the subjective motive of the respondent (e.g., whether a respondent subjectively targeted a complainant because of the complainant’s or the respondent’s actual or perceived sex, as opposed to because of anger or romantic feelings).
- Where conduct is sexual in nature, or where conduct references one sex or another, that suffices”

Reasonable Person Standard

“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”

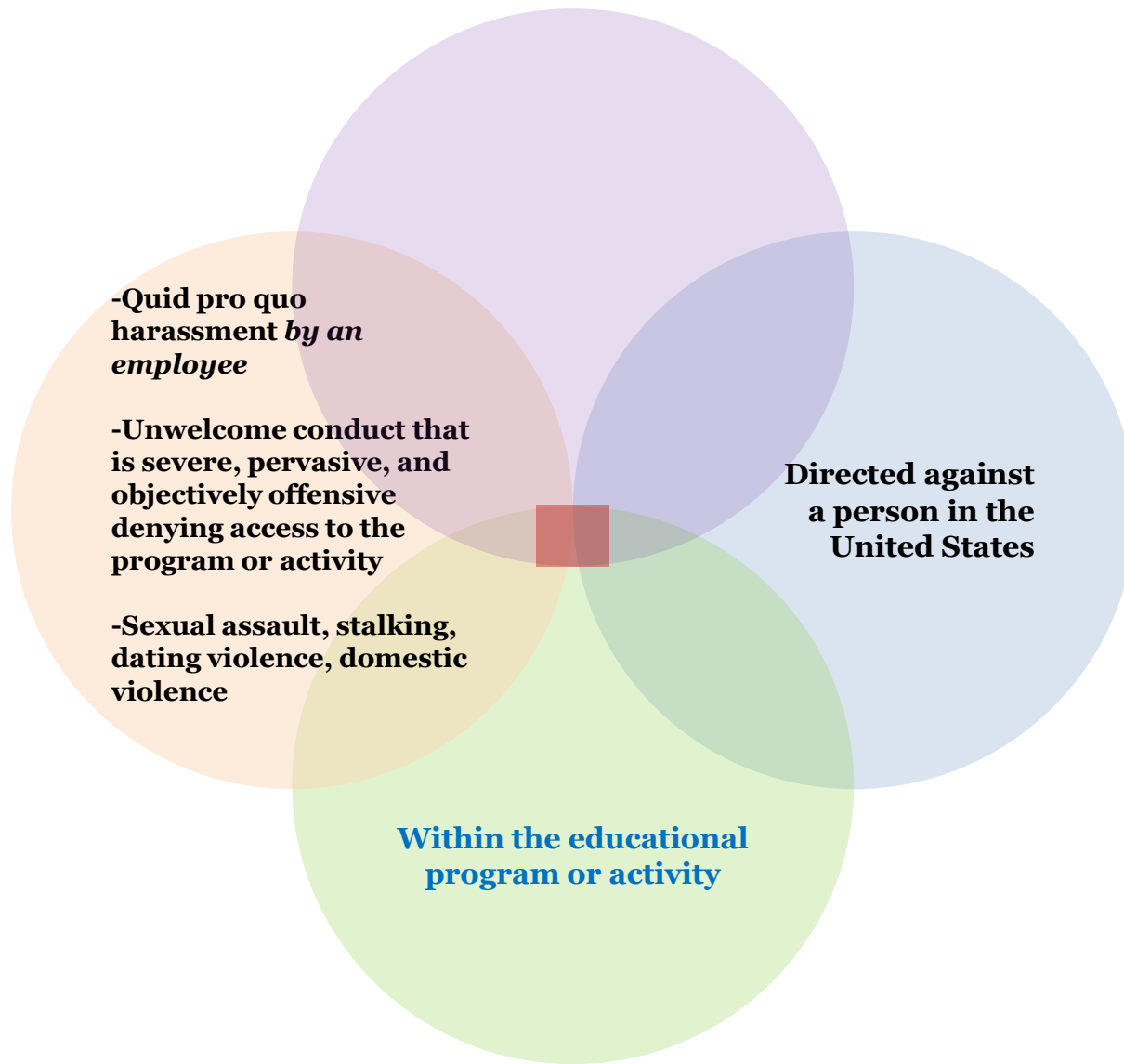
- Applies to both elements: (1) severity, pervasiveness, objective offensiveness *and* (2) effective denial of equal education access
 - No “perfect victim”
 - No concrete injury is required

See Sept. 4, 2020 Q&A, Question 4

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



Jurisdiction

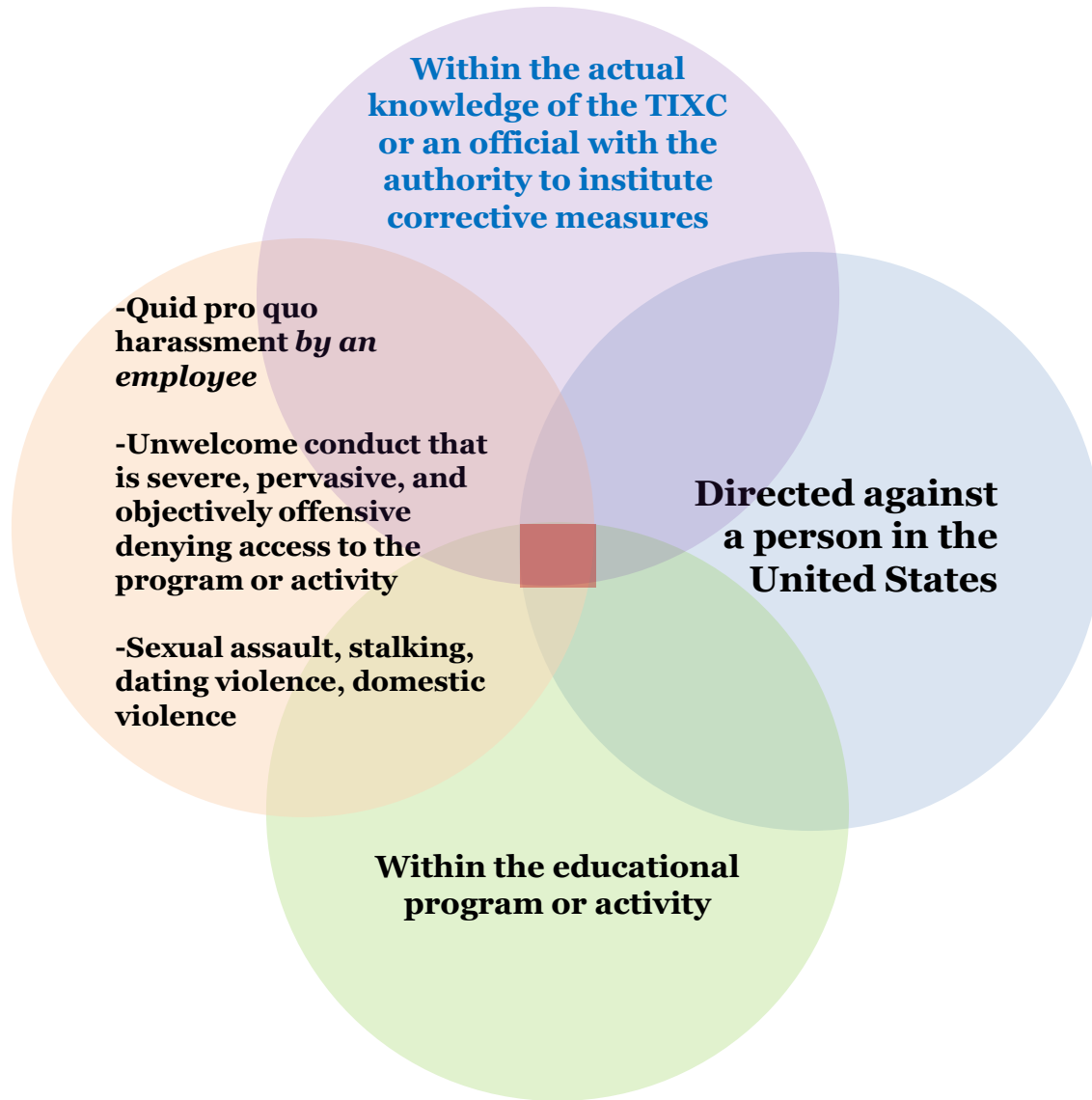
Education program or activity includes:

- ✓ 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.

Also includes:

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

§ 106.44(a)



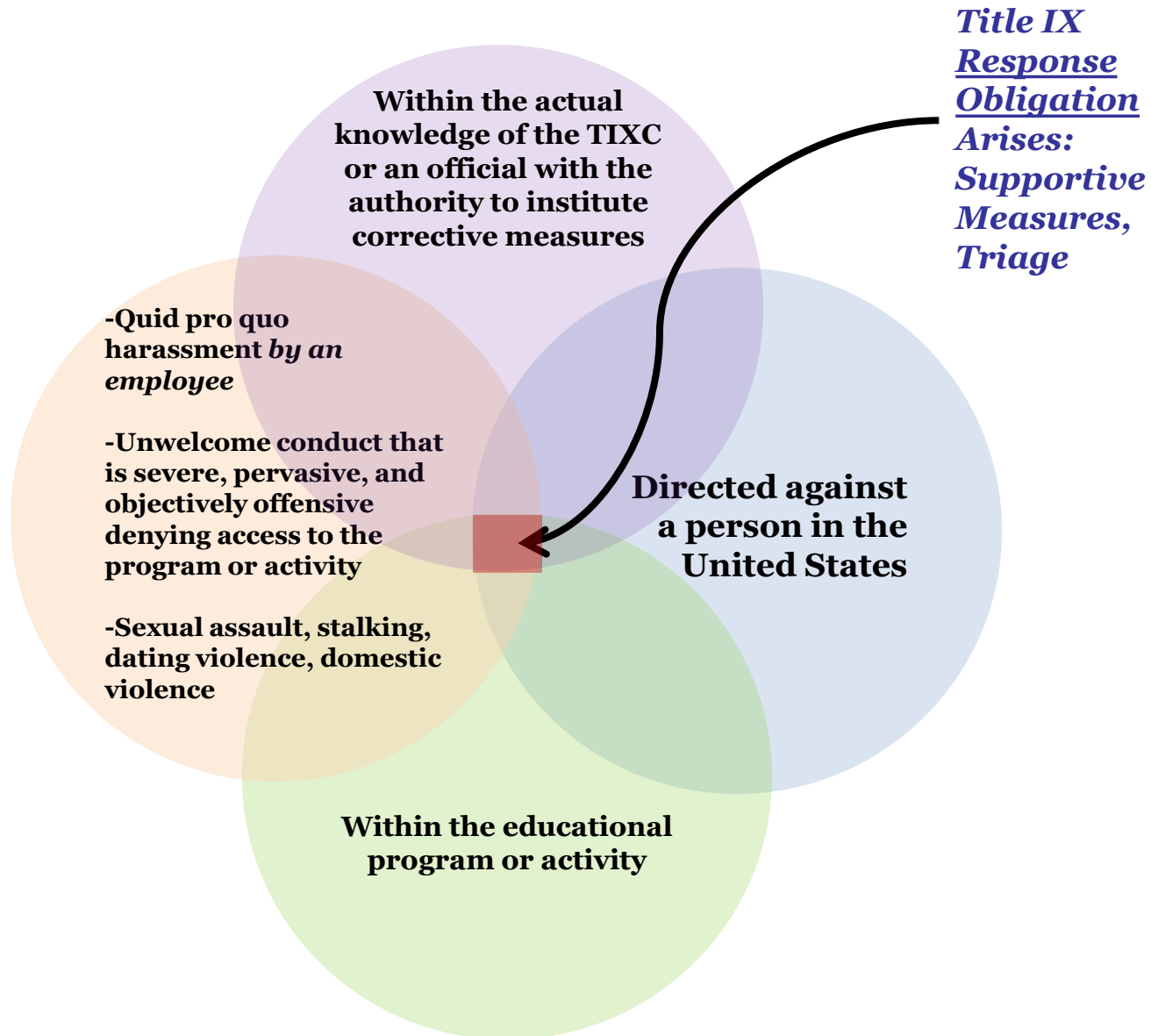
Actual Knowledge

“*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

What Constitutes Notice?

- “Notice results whenever . . . any Title IX Coordinator, or any official with authority: **Witnesses** sexual harassment; **hears about** sexual harassment or sexual harassment allegations from a complainant . . . or third party; **receives a written or verbal complaint** about sexual harassment or sexual harassment allegations; or **by any other means.**” 85 FR 30040
- “‘Notice’ . . . includes, but is not limited to, a report of sexual harassment to the Title IX Coordinator”
§ 106.30(a)



Actual Knowledge & Deliberate Indifference

RESPONSE OBLIGATIONS

Response Obligations

Actual Knowledge -- What now?

To a report:

- *Offer of supportive measures*
- *Explain formal complaint process*

To a formal complaint:

- *Investigation followed by*
- *Live hearing/compliant grievance process*

Unless facts 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)

SAUL EWING
ARNSTEIN
& LEHR^{LLP}

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)

SAUL EWING
ARNSTEIN
& LEHR^{LLP}

Supportive Measures

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

Hold

“Even a temporary ‘hold’ on a transcript, registration, or graduation will generally be considered to be disciplinary, punitive, and/or unreasonably burdensome.”

1/15/2021 Q&A, Question 21

Supportive Measures: Process & Oversight

- Title IX Coordinator must:
 - Serve as the point of contact for parties
 - Ensure that the burden of navigating administrative requirements does not fall on the parties
- Title IX Coordinator may:
 - Rely on other campus offices/administrators to *actually provide* supportive measures

How can you best serve the parties through coordination & planning?

Supportive Measures: Confidentiality

Must be kept confidential unless confidentiality would impair provision

- Complainant thus may obtain supportive measures while keeping identity confidential from respondent (and others)
 - Unless disclosure is necessary to provide the measures (e.g. where a no-contact order is appropriate)

Emergency Removal & Administrative Leave

- 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, Part 2

(a/k/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.

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; or
- 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)

**SAUL EWING
ARNSTEIN
& LEHR^{LLP}**

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)

But not advisors. . .

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

85 FR 30254 n.1041

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.

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.

SAUL EWING
ARNSTEIN
& LEHR^{LLP}

Avoiding Prejudgment of the Facts at Issue

- 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

85 FR 30256, 30323

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.

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

**SAUL EWING
ARNSTEIN
& LEHR^{LLP}**

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 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

Conflicts of Interest

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.

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 ✘

