

# Title IX Training

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August 27-28, 2020

# Agenda

**Part I: Final Regulations Update & Training Framework**

**Part II: Title IX-Covered Conduct, including, but not limited to:**

- The definition of sexual harassment
- The scope of education programs and activities

**Part III: Responding to Allegations, including but not limited to:**

- Actual Knowledge, Official with Authority, Supportive Measures, Reports v. Formal Complaint, Dismissals, Emergency Removals

**Part IV: How to Serve Your Role Impartially, including, but not limited to:**

- Avoiding prejudice of facts, conflicts of interest, and bias
- \*This applies to: Title IX Coordinators, investigators, decision makers, appellate officers, facilitators of informal resolution

## Agenda (Continued)

### Part V: Conducting Investigations, including, but not limited to:

- Nuts & Bolts (How to conduct an investigation)
- Creating an investigation report fairly summarizing relevant evidence

### Part VI: Conducting Hearing, including, but not limited to:

- Nuts & Bolts (How to conduct a hearing)
- Understanding technology to be used at a live hearing
- Understanding issues of relevance related to questions and evidence
- Preparing a written determination

### Part VII: Conducting Appeals, including, but not limited to:

- Nuts & Bolts (How to conduct an appeal process)
- Understanding issues of relevance related to questions and evidence
- Preparing a written appeal determination

### Part VIII: Informal Resolution

# PART I

## FINAL REGULATIONS UPDATE

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## Title IX 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

# 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)
- OCR Blog: <https://www2.ed.gov/about/offices/list/ocr/blog/index.html>
- Effective date: August 14, 2020
- Just announced: does *not* apply retroactively.

## Required Training – Who?

- Title IX Coordinators
- Investigators
- Hearing decision-makers
- Appellate officers
- Facilitators of informal resolution processes

## Required Training – What?

- ❑ The Title IX definition of sexual harassment.
- ❑ The scope of institution’s education programs and activities.
- ❑ How to conduct an investigation/grievance process/appeal.
- ❑ Issues of relevance (including as to questions and evidence at the hearing).
- ❑ How to prepare an investigative report (including how to fairly summarize relevant evidence), a written determination of responsibility, and an appeal determination.
- ❑ How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest and bias.



## Setting Framework #1 for Today's Training

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, which includes the provision of appropriate supportive measures.

*\*all underlined terms should be read as defined in the new regulations*

## Setting Framework #2 for Today's Training

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.

*\*all underlined terms should be read as defined in the new regulations*

**Now let's walk through those  
concepts & definitions ...**

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# PART II

## TITLE IX-COVERED CONDUCT

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## Sexual Harassment – *Section 106.30*

**Sexual Harassment** means conduct on the basis of sex that satisfies one or more of the following:

- An employee of the recipient [is] conditioning the provision of an aid, benefit, or service of the recipient on an individual’s participation in unwelcome sexual conduct;
- 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
- “Sexual assault” as defined 20 U.S.C. 1092(f)(6)(A)(v), “dating violence” as defined in 34 U.S.C. 12291(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)

## Sexual Harassment at TBR

Under TBR's revised Sexual Misconduct Policy these categories are defined:

- “Title IX Sexual Harassment,”
- “Dating Violence,”
- “Domestic Violence,”
- “Stalking,” and
- “Sexual Assault”

that occur within Title IX Jurisdiction

## Sexual Harassment – First Prong

Sexual harassment means conduct on the basis of sex where

...

**An employee of the recipient [is] conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct**

\*\*\*

At TBR, this is referred to  
Title IX Sexual Harassment (Quid Pro Quo)

## Sexual Harassment - First Prong (cont.)

**An employee of the recipient [is] conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct**

- Employee
- Conditioning the Provision of
- Aid, Benefit, or Service of the School
- Unwelcome sexual conduct



## Sexual Harassment – Second Prong

Sexual harassment means conduct on the basis of sex where

...

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.

\*\*\*

At TBR, this is referred to  
Title IX Sexual Harassment

## Sexual Harassment – Second Prong (cont.)

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.

- Unwelcome Conduct
- Reasonable Person
- Severe, Pervasive, and Objectively Offensive
- Effectively Denies Equal Access
- Education Program or Activity

## Sexual Harassment – Third Prong

Sexual harassment means conduct on the basis of sex where the conduct is ...

“sexual assault” as defined 20 U.S.C. 1092(f)(6)(A)(v),

“dating violence” as defined in 34 U.S.C. 12291(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)

\*\*\*

At TBR, this is referred to

Sexual Assault, Dating Violence, Domestic Violence, and Stalking

SAUL EWING  
ARNSTEIN  
& LEHR<sup>LLP</sup>

## Sexual Harassment – Third Prong (cont.)

- Sexual Assault
- Dating Violence
- Domestic Violence
- Stalking

## Sexual assault

The term “sexual assault” means an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation. (1092(f)(6)(A)(v)).

- **TBR covers these concepts as follow:** “Sexual Assault” is an umbrella term that includes the following:
  - **“Rape”** means the penetration, no matter how slight, of the vagina or anus, with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim.
  - **“Fondling”** means the touching of the private body part 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 age or because of temporary or permanent mental incapacity.
  - **“Incest”** means sexual intercourse between persons who are related to each other within degrees where marriage is prohibited by law.
  - **“Statutory rape”** means sexual intercourse with a person who is under the statutory age of consent.

## Consent

As defined by TBR

### TBR defines consent as:

- An active agreement to participate in a sexual act.
- An active agreement is words and/or actions that indicate a willingness to participate in a sexual act.

### TBR also notes that:

- Each person has responsibility for obtaining Consent from the other person.
- Past Consent does not imply future consent.
- Silence or an absence of resistance does not imply Consent.
- Consent to one type of sexual activity (e.g., oral sex) does not constitute or imply Consent for another type of sexual activity (e.g., vaginal intercourse)
- Consent can be withdrawn at any time.

## Who Cannot Consent

As defined by TBR

The following cannot give valid Consent:

- A person who is Incapacitated, if either the person claiming to have obtained Consent knows that the other person is Incapacitated or a reasonable person would know that the other person is Incapacitated;
- A person who is Forced; or
- A person who is under the age of eighteen (18), unless the person giving Consent is at least the age of thirteen (13) and the other person is less than four (4) years older than the person giving Consent.

**SAUL EWING  
ARNSTEIN  
& LEHR<sup>LLP</sup>**

## Consent (cont.)

### Understanding Force

#### What is force?

- words and/or conduct that, viewed from the perspective of a reasonable person, substantially impair(s) a person's ability to voluntarily choose whether to take an action or participate in an activity.

#### Words and/or conduct that would cause a reasonable person to fear:

- Physical force or other harm to the person's health, safety, or property, or a third person's health, safety, or property;
- Loss or impairment of an academic benefit, employment benefit, or money;
- Disclosure of sensitive personal information or information that would harm a person's reputation;
- Disclosure of video, audio, or an image that depicts the person's nudity or depicts the person engaging in a sexual act(s); or
- Other immediate or future physical, emotional, reputational, financial, or other harm to the person or a third person.



## Consent (continued)

### Understanding Incapacitation

### “Incapacitation” means:

- a person lacks the ability to actively agree to a sexual act because the person is asleep, unconscious, under the influence of an anesthetizing or intoxicating substance such that the person does not have control over their body, is otherwise unaware that a sexual act is occurring, or their mental, physical, or developmental abilities renders them incapable of making a rational informed judgment.
- Incapacitation is not the same as legal intoxication.

## 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.

## 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,
- a person with whom the victim shares a child in common,
- a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner,
- a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction receiving grant monies, or
- 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.

## 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

## Sexual Harassment At TBR ...

### Title IX Sexual Harassment

- Sexual Harassment
- Sexual Assault
- Dating Violence
- Domestic Violence
- or Stalking

**that occurs within Title IX  
jurisdiction**

**Sexual Misconduct : 6.03.00.00**

### Sexual Harassment (Non-Title IX)

- Sexual Harassment
- Sexual Assault
- Dating Violence
- Domestic Violence
- or Stalking

**which is not covered by Title IX  
jurisdiction**

**TBR Guideline P-080 and  
institutional policy**

## Title IX Jurisdiction

**Alleged conduct occurred:  
In a College education program or activity**

**AND**

**within the United States**

## Education Program or Activity - *Section 106.44(a)*

All operations of the institution, including . . .

- ✓ 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

## Education Program or Activity (cont.)

### Substantial Control?

- “no single factor is determinative to conclude whether a recipient exercised substantial control over the respondent and the context in which the harassment occurred, or whether an incident occurred as part of ‘all of the operations of’ a school, college, or university.”

### Off campus?

- Sexual harassment that occurs in buildings owned or controlled by officially recognized student organizations, including fraternities and sororities, fall within the scope of an institution’s Title IX obligations even if they are located off campus.
- Title IX applies to online sexual harassment if the postsecondary institution exercised “substantial control” over the “context” of the harassment, such as where a student uses a personal device to perpetrate online sexual harassment during class time.



## **Against a Person in the United States - 106.44(a)**

**This refers to location of the incident NOT citizenship or legal residency**

In other words ...

- ✓ **“Against a person in the United States” means:**
  - Title IX does not apply to sexual harassment that occurs outside of the United States (i.e., no “extraterritoriality”), even if the harassment occurs in the context of a study abroad program.
  
- ✓ **But Title IX protects every individual in the United States against discrimination, regardless of citizenship or legal residency, meaning:**
  - International students or foreign students studying in the United States are entitled to the same protections under Title IX as any other individuals.

# Questions

# PART III

## RESPONDING TO ALLEGATIONS

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## Putting Definitions into Framework #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**, which includes the provision of appropriate **supportive measures**.

*\*all underlined terms should be read as defined in the new regulations*

## Putting Definitions into Framework #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.

*\*all underlined terms should be read as defined in the new regulations*

## “Deliberately Indifferent”

An institution is “**deliberately indifferent**” if its response to sexual harassment is **clearly unreasonable in light of the known circumstances.**

- Whether an institution acted with deliberate indifference is a fact-specific inquiry that ties to the College’s “actual knowledge”.
- Institutions have flexibility to tailor their response to sexual harassment to unique circumstances, but must always incorporate § 106.44’s requirements in their response.

## Actual Knowledge

Once the institution has actual knowledge the Title IX Coordinator must take certain steps (discussed on future slides).

**Source: Section 106.30**

**Note:** Next slide we talk about making a report. Actual knowledge may be broader than a Report ... i.e., TBR has an obligation to act, in some circumstances, even without a “Report” or a “Formal Complaint”.

**Actual Knowledge** means:

- notice of
- sexual harassment or allegations of sexual harassment
- to the College’s Title IX Coordinator or **any official of the University who has the authority to institute corrective measures on behalf of an institution**

## Actual Knowledge Via a Report

- ❑ **What:** In person, by mail, by telephone, or by electronic mail, or by any other means that results in the Title IX Coordinator receiving the person's verbal or written report.
- ❑ **Who:** Any person may “report” (whether or not the person reporting is the person alleged to be the victim of conduct)
- ❑ **When:** Such a report may be made at any time, including during non-business hours.
- ❑ **Action Items:** TBR must publish the Title IX Coordinator's contact information (office address, office email, telephone, any other means)



## Title IX Coordinators at TBR

To view a list of Title IX Coordinators by Institution, follow this link:

<https://www.tbr.edu/oesi/office-organizational-effectiveness>

**\*Reports can be made at any time, including non-business hours, by phone, email, person, etc.**

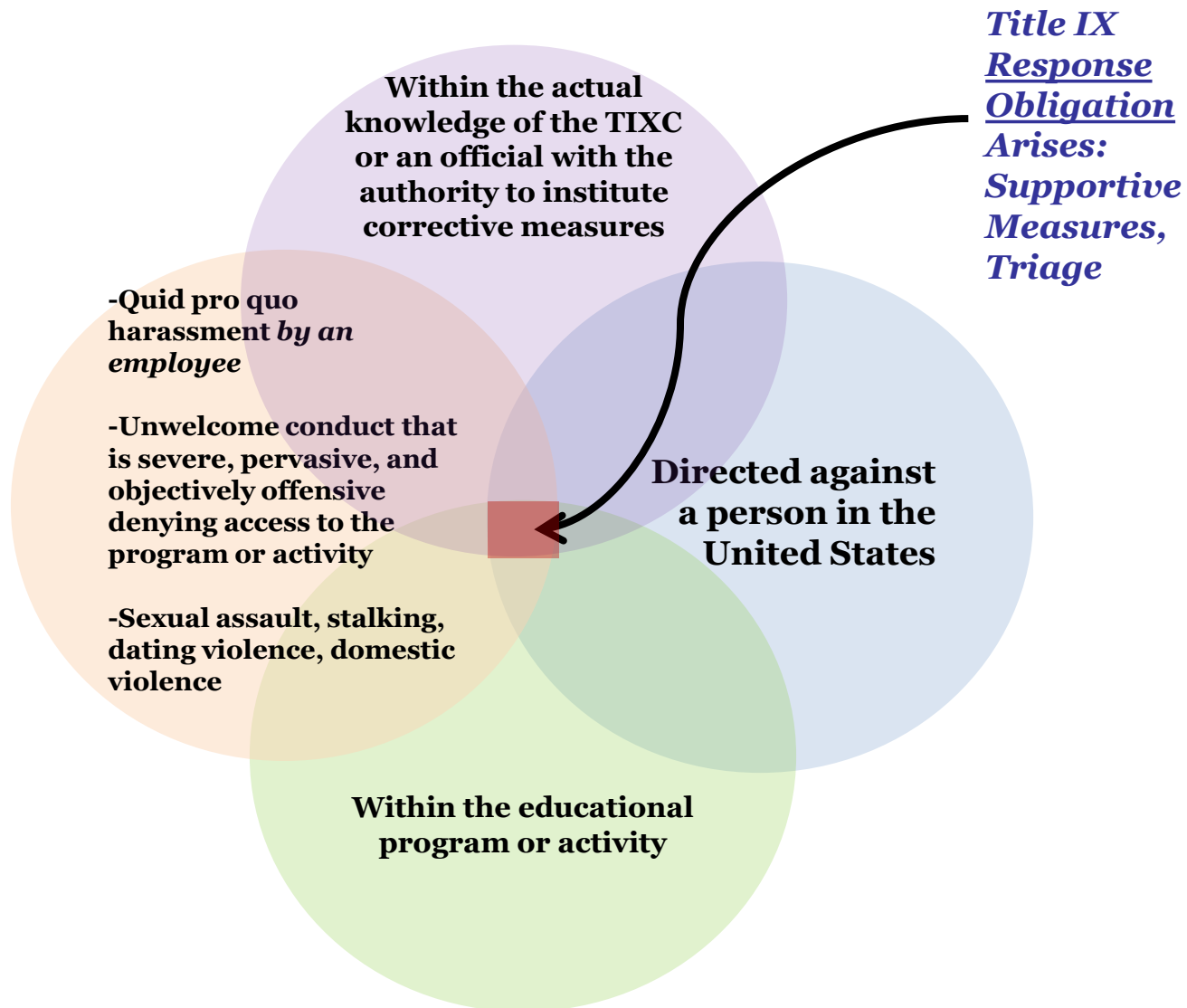
## Responding to Actual Knowledge of TIX Sexual Harassment

First, should be reported to Title IX Coordinator.

Then, 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.

**Source § 106.44(a)**



## Responding to Actual Knowledge ...

### To understand these four steps

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.

### We must define these terms

- Complainant
- Supportive Measures
- Formal Complaint

## Responding to Actual Knowledge (1)

### To understand these four steps

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.

### We must define these terms

- **Complainant**
- Supportive Measures
- Formal Complaint

## Understanding Terms - Parties

### Complainant

Complainant means any individual who has reported being or is alleged to be the victim of conduct that could constitute covered sexual harassment as defined under Title IX.

### Respondent

Respondent means any individual who has reported being or is alleged to be the perpetrator of conduct that could constitute covered sexual harassment as defined under Title IX.

## Responding to Actual Knowledge (2)

### To understand these four steps

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.

### We must define these terms

- Complainant
- **Supportive Measures**
- Formal Complaint

## Understanding Terms - Supportive Measures

### Must be:

- ✓ non-disciplinary
- ✓ non-punitive
- ✓ individualized services
- ✓ offered as appropriate
- ✓ offered as reasonably available
- ✓ without fee or charge
- ✓ to either party
- ✓ regardless of whether a formal complaint is filed

### Should be designed to:

- ✓ Restore or preserve equal access to education or activity
- ✓ without unreasonably burdening the other party
- ✓ Including measures designed to protect the safety of all parties or the school's educational environment



## Supportive Measures - Flexibility

The Title IX regulations do not contain explicit requirements for supportive measures.

Instead the regulations provide institutions with flexibility to craft supportive measures based on the unique circumstances of each report of sexual harassment.

The range of supportive measures offered will vary from case to case and institution to institution.

**Supportive measures may include, but are not limited to**

- Counseling
- extensions of deadlines or other course-related adjustments
- modifications of work or class schedules
- campus escort services
- restrictions on contact between the parties (no contact orders)
- changes in work or housing locations
- leaves of absence
- increased security and monitoring of certain areas of the campus

## Supportive Measures – Context

### To Whom

**must** offer supportive measures  
  
to both the complainant and the  
respondent.

### When

**must** consider supportive measures  
  
every time sexual harassment is  
reported and the College has actual  
knowledge, even in the absence of a  
formal complaint.

## Supportive Measures - Records

### Must maintain as **confidential**:

- any supportive measures provided to the complainant or respondent
- *to the extent* that maintaining such confidentiality would not impair the ability of the recipient to provide the supportive measures.

### Must create and maintain:

- for a period of seven years
- records of any actions, **including supportive measures**, taken in response to a report or formal complaint of sexual harassment.

## Responding to Actual Knowledge (3)

### To understand these four steps

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**.

### We must define these terms

- Complainant
- Supportive Measures
- **Formal Complaint**

## Understanding Terms - Formal Complaint

### Filed/Signed By

- a document (including an electronic submission) filed by a complainant with a signature or other indication that the complainant is the person filing the formal complaint

**OR**

- signed by the Title IX Coordinator

### Alleging/Requesting

- Alleging Title IX-defined sexual harassment against a respondent about conduct within TBR's education program or activity

**AND**

- requesting initiation of Title IX procedures

## Formal Complaint Signed by the Title IX Coordinator

Factors to Consider	Making the Decision	Additional Notes
<ul style="list-style-type: none"> <li>▪ Must take into account the complainant’s wishes regarding how the school should respond to the complainant’s allegations.</li> <li>▪ May take into account a variety of factors, including pattern of alleged misconduct by a particular respondent, whether complainant’s allegations involved violence, use of weapons, or similar factors.</li> </ul>	<ul style="list-style-type: none"> <li>▪ <b>Should not be an</b> automatic result that occurs any time you have notice that a complainant was allegedly sexual harassed.</li> <li>▪ Should be reached thoughtfully and intentionally <b>by the Title IX Coordinator</b>.</li> <li>▪ Should do so against the complainant’s wishes only if “not clearly unreasonable in light of known circumstances.” [30045].</li> </ul>	<ul style="list-style-type: none"> <li>▪ TIXC is not a complainant.</li> <li>▪ Complainant remains a party.</li> <li>▪ Complainant has right to refuse to participate in grievance process.</li> <li>▪ Even if Complainant refuses to participate, still entitled to inspect and review evidence and to receive all notices, including the notice of allegations, the notice of hearing, and the notice of outcome.</li> </ul>

## Formal Complaint by the Complainant

### At the time of filing

- Complainant
- Must be participating in or attempting to participate
- in TBR's education program or activity

### Impact?

- Graduated from one program but intends to apply to a different program.
- Graduated but intends to remain involved with alumni programs and activities.
- On a leave of absence but is still be enrolled as a student even while on LOA, or may intend to re-apply after a LOA.
- Left school because of sexual harassment, but expresses a desire to re-enroll if the school appropriately responds to the sexual harassment.

**Source:** 85 Fed. Reg. 30138

## Responding to Actual Knowledge (4)

### To understand these four steps

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**.

### We must define these terms

- **Complainant**
- **Supportive Measures**
- **Formal Complaint**



## Putting Definitions into Framework #1 (cont.)

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, which includes the provision of appropriate **supportive measures**.

*\*all underlined terms should be read as defined in the new regulations*

## Putting Definitions into Framework #2 (cont.)

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.

*\*all underlined terms should be read as defined in the new regulations*

## So we know ...

- there must be a formal complaint to trigger a school's Title IX grievance process.
- but what if the formal complaint filed does not meet the definition of, or jurisdictional scope of, Title IX Sexual Harassment?
- Let's discuss the concept of dismissal ...

## Dismissal of Formal Complaint – Sec. 106.45(b)(3)

### Mandatory

Conduct alleged in formal complaint:

1. would not constitute sexual harassment even if proved.
2. did not occur in your education program or activity.
3. did not occur against a person in the United States.

### Permissive

1. Complainant notifies the TIXC in writing that they would like to withdraw the formal complaint or the allegations therein.
2. Respondent is no longer enrolled or employed.
3. Specific circumstances prevent recipient from gathering evidence sufficient to reach a determination.

## Dismissal of Formal Complaint (cont.)

### When could this occur?

- Upon receipt of formal complaint?
- After initial interview?
- During investigation, but before hearing?

### Next steps = KEEP RECORDS

- Must promptly send written notice of dismissal and reasons simultaneously to parties (Section 106.45(b)(3)(iii))
- Must provide appeal option to both parties (Section 106.45(b)(8))
- May take action under another College policy or policies (Section 106.45(b)(3)(i))

# One more concept before another Q&A break

## Emergency Removal / Administrative Leave

- You 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.
- You may place a non-student on administrative leave during the pendency of a grievance process.

Source § 106.44(c), (d)

# Emergency Removal - Checklist

Must conduct an **individualized safety and risk analysis**

and

Must determine that removal is justified due to an **immediate threat to the physical health or safety of any student or other individual.**

and

Must comply with TBR institutional policy for interim suspension of students



# Let's break that down

## Individualized Safety and Risk Analysis

- Must be “more than a generalized, hypothetical, or speculative belief that the respondent may pose a risk to someone’s physical health or safety.” (30233).
- Cannot be based:
  - general assumptions about sex
  - research that purports to profile characteristics of sex offense perpetrators
  - statistical data about the frequency
  - infrequency of false or unfounded sexual misconduct allegations.

## Immediate Threat to Physical Health or Safety

- **Note the word physical.** Emotional and mental well-being may be addressed via supportive measures (30225).
- **Includes respondent’s threat of self-harm** (when threat arises from sexual harassment allegations) (30228).

# Emergency Removal - Process

## How?

- You have flexibility to decide how to conduct the individualized safety and risk analysis
- \*For students, follow TBR institutional policy regarding interim suspension

## Who?

- You have flexibility to decide who will conduct the analysis (e.g., provide specialized training to employees or convene an interdisciplinary threat assessment team)

## Upon Removal you must ...

- must provide respondent with notice of the emergency removal decision

**and**

- must provide respondent with an opportunity to challenge the emergency removal decision

# Administrative Leave

- “Administrative leave” is generally understood as temporary separation from a person’s job, with or without pay and benefits intact based on the recipient’s discretion and requirements of state law. 85 FR 30236. “[T]hese final regulations do not dictate whether administrative leave during the pendency of an investigation under § 106.45 must be with pay (or benefits) or without pay (or benefits).” 85 F.R. 30236.
- The regulations do not specify conditions justifying administrative leave so that recipients may have flexibility to decide when administrative leave is appropriate. 85 FR 30236.
- If State law allows or requires, an accused employee may be placed on “reassignment to home” or alternative assignment, during the pendency of an investigation under § 106.45 into sexual harassment allegations against the employee. 85 FR 30236.

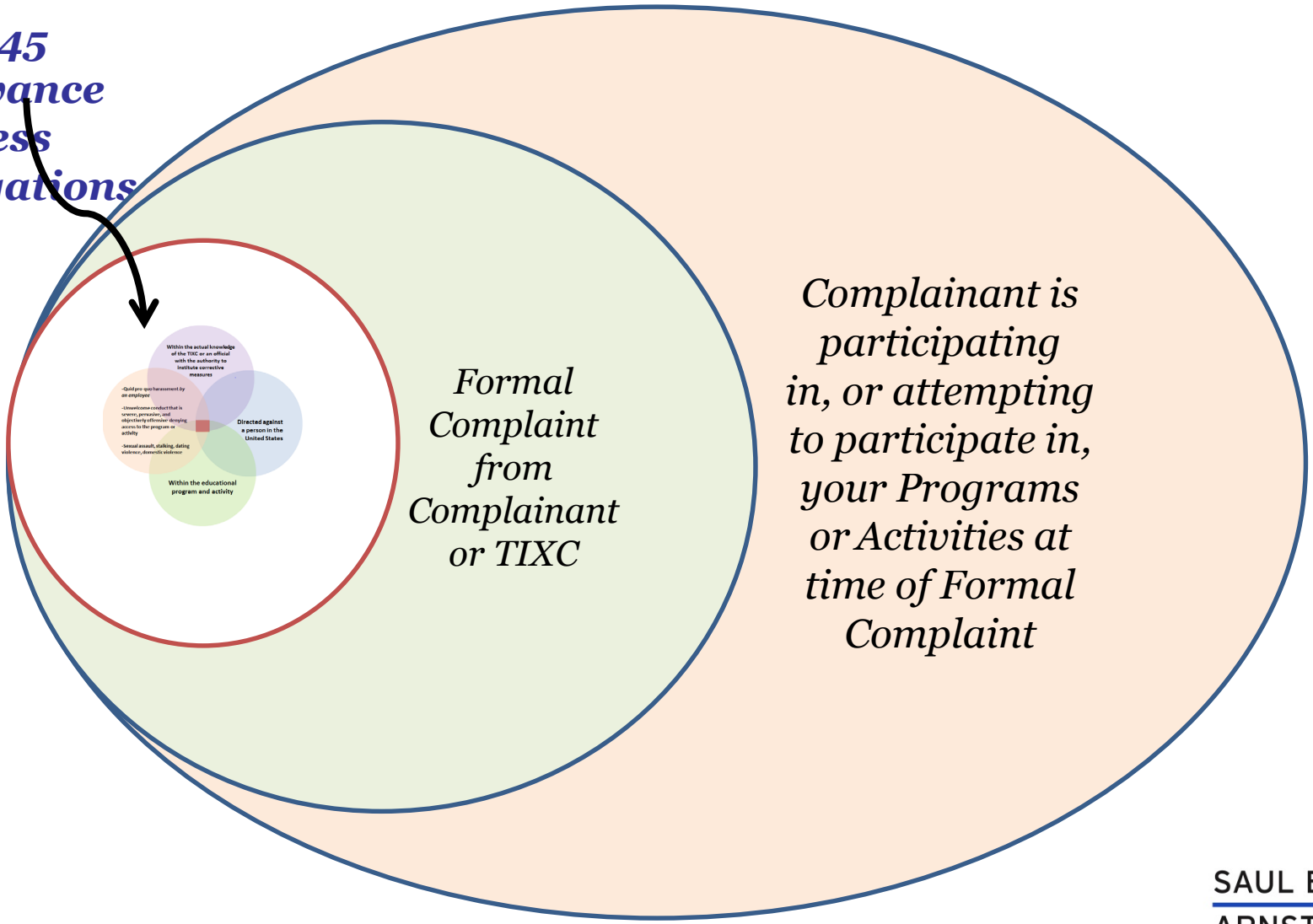
# Questions

## The Heart of the New Regulations – The Grievance Process

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.**

*\*all underlined terms should be read as defined in the new regulations*

**§106.45  
Grievance  
Process  
Obligations  
Arise**



## Coming Up ...

### **Part V: Conducting Investigations, including, but not limited to:**

- Nuts & Bolts (How to conduct an investigation)
- Creating an investigation report fairly summarizing relevant evidence

### **Part VI: Conducting Hearing, including, but not limited to:**

- Nuts & Bolts (How to conduct a hearing)
- Understanding technology to be used at a live hearing
- Understanding issues of relevance related to questions and evidence
- Preparing a written determination

### **Part VII: Conducting Appeals, including, but not limited to:**

- Nuts & Bolts (How to conduct an appeal process)
- Understanding issues of relevance related to questions and evidence
- Preparing a written appeal determination

### **Part VIII: Informal Resolution**



# But first ...

# PART IV

## HOW TO SERVE YOUR ROLE IMPARTIALLY

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## The Importance of Impartiality

An impartial process before unbiased officials ultimately promotes accurate, reliable outcomes, which effectuate the purpose of Title IX to provide individuals with effective protection from discriminatory practices.

85 Fed. Reg. 30054.

## What does it mean to be impartial?

### Any individual designated as

- Title IX Coordinator
- Investigator,
- Decision-maker
- Appellate officer
- Facilitator of an informal resolution process

\*

This list does **not** include Advisors. 85  
Fed. Reg 30254 n.1041

### Must **not** have a

- conflict of interest OR bias
- for OR against
- complainants or respondents generally OR an individual complainant or respondent

\*

Also means that you **cannot** prejudge  
the facts, addressed in later slides\*

# How to Serve Without Bias

## At its core impermissible bias is

- Making a decision based on the characteristics\* of the parties, rather than based on the facts.
- \*This includes any protected characteristic, not only sex. 85 Fed. Reg. 30084

## Identifying Bias

- ❑ To evaluate whether a particular person serving in a Title IX role is biased requires:
  - An examination of the **particular facts** of a situation
  - **Taking an objective** (whether a reasonable person would believe bias exists), **common sense approach.**

## Identifying Bias (cont.)

<ul style="list-style-type: none"><li>• Being for OR against complainants or respondents generally</li><li>• Being for OR against an individual complainant or respondent</li></ul>	<ul style="list-style-type: none"><li>• Treating a party differently on the basis of the party's sex or <b>stereotypes about how men or women behave</b> with respect to sexual violence</li></ul> <p>85 Fed.Reg. 30238-40</p>	<ul style="list-style-type: none"><li>• Ignoring, blaming, or punishing a party <b>due to stereotypes</b> about the party</li></ul> <p>85 Fed. Reg. 30496</p>
---	--	---



## What is NOT defined as bias?

❑ “[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 Fed. Reg. 30252

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

85 Fed. Reg. 30372

❑ 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 Fed. Reg. 30252

# How to Avoid Conflicts of Interest

## It is not a conflict of interest for...

### A recipient to:

- ✓ fill Title IX personnel positions with its own employees

- 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 Fed. Reg. 30491-92.
- Not required to use outside, unaffiliated Title IX personnel. 85 Fed. Reg. 30252.
- Even a student leader of the recipient may serve in a Title IX role. 85 Fed. Reg. 30253.
- 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? (cont.)

### Hearing decision-maker...

- Investigator ❌
- Title IX Coordinator ❌
- Appeal decision-maker ❌

### Appeal decision-maker ...

- Investigator ❌
- Title IX Coordinator ❌
- Hearing decision-maker ❌

# Be Transparent

Although prior professional experiences and affiliations do not automatically trigger a conflict of interest, whether a Title IX personnel has a conflict of interest will be a case-by-case determination. **So, be transparent.**

- Disclose (to TIX Coordinator) any prior professional experiences and affiliations
- Explain why you believe such experiences do not create a conflict
- If substantive, consider disclosing to parties and providing them the opportunity to object.

**\*If Title IX personnel feel that they do have a conflict of interest, and are incapable of acting in an impartial manner, they should step down from their role in that particular grievance process immediately.**

# How to Avoid Prejudgment of Facts

## Avoiding Prejudgment of the Facts at Issue

Do not **pass judgment** on the allegations presented by either party or witnesses.

Title IX Coordinators (and other personnel, e.g., investigators) **may not “believe”** one party or the other.

Do not **jump to any conclusions** without fully investigating the allegations and gathering all of the relevant facts and evidence from all parties involved.

Base all decisions on individualized facts, and not on stereotypical notions of what “men” and “women” do or not do. 85 FR 30254.

Avoid any and all stereotypes.

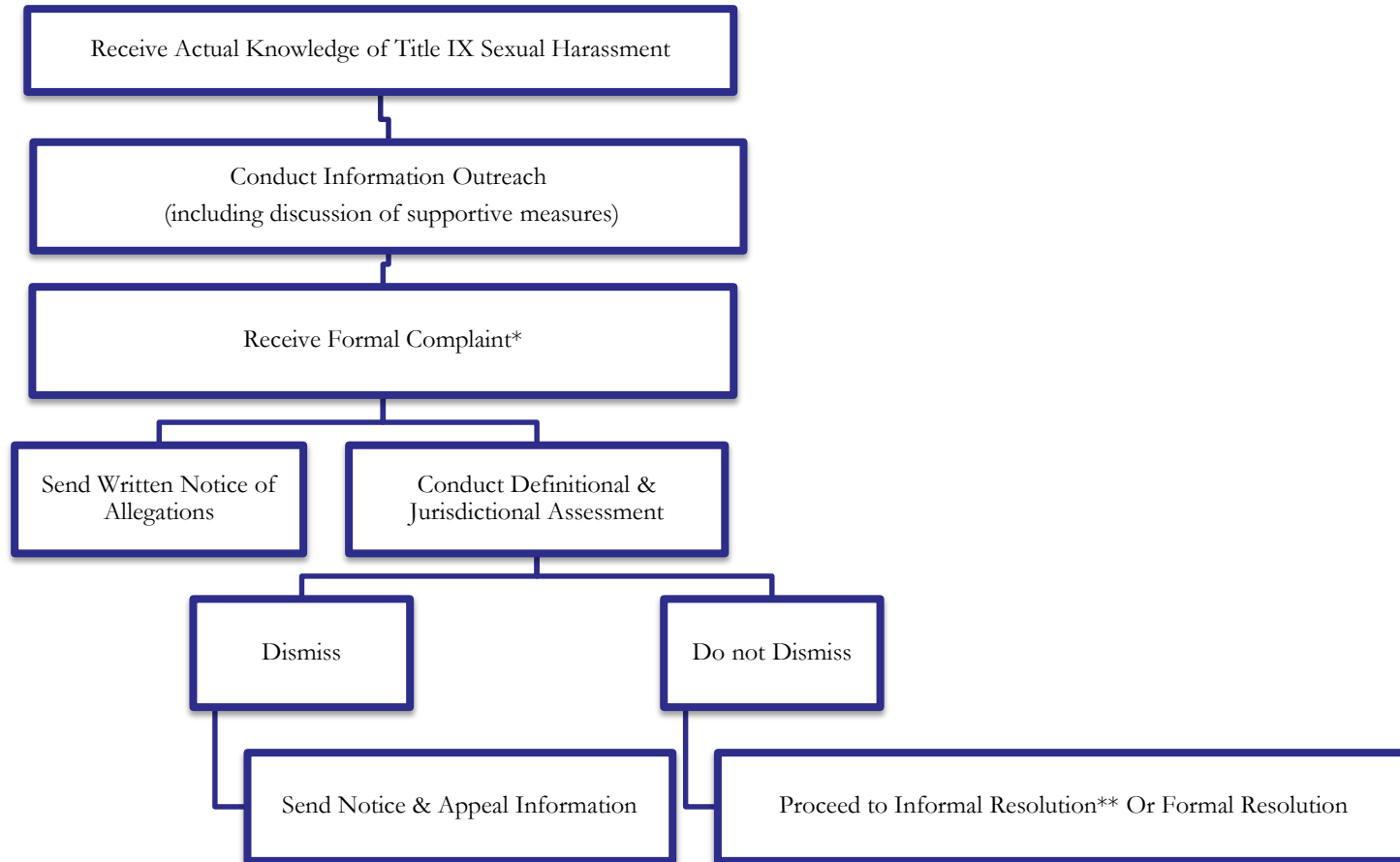
Approach the allegations of both parties with neutrality.

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



# Questions

# Day One Recap



# PART V

## CONDUCTING AN INVESTIGATION

---

## Conducting an Investigation

- 1) We have a formal complaint (as defined above).
- 2) It has not been dismissed.
- 3) Ok - what are the new rules of the road for investigations?

# 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
- Cannot Access Medical/Mental Health Records w/o voluntary, written consent
- Both Parties = Equal Advisor Rights (can be an attorney)
- Both Parties = Right to Present Witnesses/Evidence (including “experts”)
- Both Parties = Right to Inspect & Review Any Evidence “Directly Related” (Pre-Rpt)
- Both Parties = Meaningful Opportunity to Respond to Evidence (Pre-Report)
- Investigative Report = Fairly Summarize Relevant Evidence
- Both Parties = Right to Review & Respond to Investigative Report (Pre-Hearing)
- Retain Records for 7 years

## Written Notice of Allegations

Source: 106.45(b)(2)(B)

**\*Update as needed throughout the investigation\***

### 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
- Right to inspect and review
- Statement of policy re false allegations

### When to Send?

- “With sufficient time to prepare a response before any initial interview”.

## Written Notice of Interview

Source: 106.45(b)(5)

**\*Throughout the  
investigation\***

### To Whom?

- The interviewee/party
- Any identified advisor for that party

### What to Include?

- Date & Location of interview
- Purpose of interview

### When to Send?

- With “sufficient” lead time

**Burden on Institution  
to Collect Evidence  
&  
Medical/Mental  
Health Records**

Source: 106.45(b)(5)

**\*Throughout the investigation\***

**Burden to gather evidence?**

- Burden is not on the parties
- Burden is on institution
- What if party does not cooperate?

**You have the burden, but what if you want to access medical records or mental health records?**

- Need party's voluntary, written consent
- What if incapacitation an issue, and there are medical records with BAC information? You cannot get these without voluntary, written consent. See 85 Fed. Reg. 30294.



## Parties' Rights During the Investigation

Source: 106.45(b)(5)

\*Throughout the investigation\*

- Receive written notices (mentioned on other slides)
- Must have the opportunity to be accompanied by the Advisor of their choice, who may be attorney (TBR may not limit the presence or choice of an advisor)
- May not restrict either party's ability to (1) discuss the allegations under investigation or (2) gather and present relevant evidence
- Must be allowed to present witnesses & evidence
- Must allow parties to “present” expert witnesses

**Inspection & Review:  
Any Evidence  
“Directly Related”**

**Source: 106.45(b)(5)**

**\*Throughout the  
investigation\***

- ❑ **What?** Both parties can “inspect and review” any evidence obtained during investigation that is “directly related” to allegations. This includes evidence upon which you do not intend to rely in reaching a determination.
- ❑ **When?** Must provide this to each party (and their advisor) at least 10 days before completion of any report.
- ❑ **How?** Must send in electronic format or hard copy. But you can prevent copying, distribution, public posting. See 85 Fed. Reg. 30304. (TBR policy prohibits directly or indirectly photographing or reproducing)
- ❑ **Next Steps:** Parties must have “meaningful” opportunity to respond. 85 Fed. Reg. 30303.

**Inspection & Review:  
Any Evidence  
“Directly Related”  
(continued)**

**Source: 106.45(b)(5)**

**\*Throughout the  
investigation\***

**Opportunity to Respond**

**Per TBR policy:**

- the Parties will be given ten (10) calendar days
- to respond to the evidence
- the investigator will share any written response with the other Party and will consider any written response prior to completing the investigative report

## Right to Review: Investigative Report

Source: 106.45(b)(5)

**\*Throughout the  
investigation\***

- ❑ **What?** Both parties can “review”
- ❑ **When?** Must send this to each party (and their advisor) **at least 10 days before the hearing.**
- ❑ **How?** Must send in electronic format or hard copy. But you can prevent copying, distribution, public posting. See 85 Fed. Reg. 30309.
- ❑ **Next Steps:** Parties must have the opportunity to respond.
  - ❑ However, the “final regulations do not prescribe a process for the inclusion of additional information or for amending or supplementing the investigative report in light of the parties’ responses after reviewing the report . . . Recipients enjoy discretion with respect to whether and how to amend and supplement the investigative report [after the parties submit any written responses]” 85 FR 30310.
  - ❑ Per TBR policy, the investigator may amend the investigation report based on responses from the parties, if the investigator deems it appropriate.

## Investigation – Advanced Steps

- Planning
- Setting the Stage for Interviews
- Questioning at Interview
- Evidentiary Issues for Report
- Report Drafting

## Planning

\*\*\*

Remember you must conclude  
in a **reasonably prompt  
timeframe.**

Source: 106.45(b)(1)(v)

### **\*Per TBR Policy:**

Formal Complaints typically  
will be resolved (exclusive of  
any appeals) within 90 calendar  
days of filing

- **Review**
  - Formal Complaint
  - Notice of Allegations
  - Any statements/documents provided
  - Policy & Procedure
- **Identify the objective criteria**
  - Elements of alleged conduct, etc.
  - Avoid hypothesizing
- **Outline**
  - Witness order (be flexible)
  - Proposed questions (be flexible)
  - Investigation deadlines

## Setting the Stage

\*\*\*

Remember you will need to give **advanced notice** of any meeting or interview

Source: 106.45(b)(5)

- Thank the witness for coming
- Introduce yourself as a impartial investigator
- Maintain good eye contact
- Be mindful of your tone (calm & professional)
- Build rapport to ease anxiety (remain natural)
- Review expectation of truthfulness in policy
- Review TBR's prohibition on retaliation
- Review difference between privacy v. confidentiality
- State that you will be taking notes or recording
- State that parties are not permitted to record interviews (per TBR policy)
- State if/when they will be permitted to review your interview notes

## Questioning

**\*Goal\***

collect all facts necessary for  
decision-maker to reach  
decision

**\*Final product\***

report that fairly summarizes all  
relevant evidence

- Be intentional and unbiased in your questioning; you are not an advocate for either side
- Be aware of your voice & body language
- Ask questions in a fair, open manner
- Clarify unclear or confusing statements
- Resolve ambiguities, contradictions
- Address holes in statements
- Make sure record is complete
- Document any refusals



## Questioning - More Tips

### Good Techniques

- Ask essential questions -who, what, when, where, how and why
- Ask clear questions. Precision matters.
- Ask open-ended questions
- Follow-up on evasive answers
- Use responses as basis for follow up
- Ask if they have documents/materials
- Inquire into inconsistencies
- Watch facial expressions and body language of the witness

### Avoid

- Accusing a witness
- Leading a witness
- Asking “multiple choice” questions
- Interrupting a witness
- Using legal terminology
- Rushing to fill the silence
- Becoming emotional (angry, upset)
- Agreeing or disagreeing with a witness
- Condescending or blaming a witness

## More on Questioning

\*\*\*

Any trauma-informed techniques must not violate the requirement to serve impartiality and without bias **and** must be applied equally to all genders

85 Fed. Reg 30256, 30323

You can be empathetic in tone, but you must remain neutral & impartial:

- Tell me more about ...
- Help me understand ...
- What do you recall about ... sight/sound/smell, etc.
- What were your thoughts when ...
- What was your response when ...

### Tips:

- Be prepared for a non-linear account
- Allow time to respond
- Allow breaks

## Note-Taking Tips

### ✓ Do

- Be accurate & specific
- Include the date, time and place of each interview
- Include who was present at each interview
- Note any instructions provided. Ideally these instructions are identical from one interview to the next
- Note the invitation to provide docs/materials
- Note the invitation to identify witnesses
- Include any objective observations of witness reactions
- Identify where notes reflect verbatim responses
- Note any refusals to respond
- If drafting interview memo, do so as soon as possible

### ✗ Don't

- Include your own reactions
- Exaggerate witness statements or reactions
- Make determinations about responsibility

## Evidentiary Issues

### Issues of Relevance

\*

**The goal of the investigation is to draft an investigative report that fairly summarizes all relevant evidence**

#### ❑ What is Relevant Evidence?

- The regulations do not define “relevant”
- The regulations tell us to:
  - apply the “ordinary meaning of relevance.”
  - Include inculpatory and exculpatory evidence.

#### ❑ What is Inculpatory and Exculpatory Evidence?

- Inculpatory evidence indicates respondent was likely responsible for alleged violation
- Exculpatory evidence indicates respondent was likely not responsible

## Evidentiary Issues

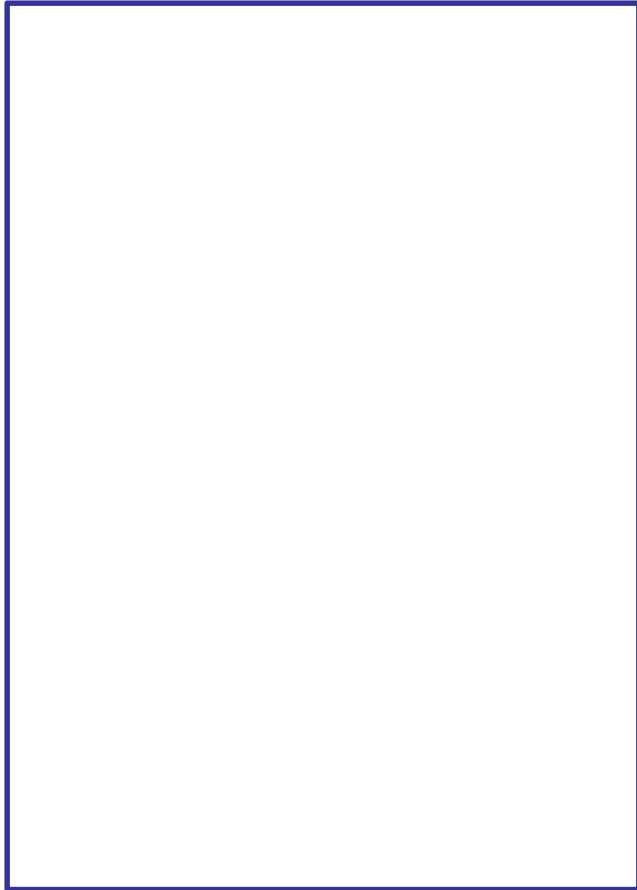
### Issues of Relevance

\*

The goal of the investigation is to draft an investigative report that fairly summarizes all relevant evidence

- ❑ **With limited exceptions**, the investigative report cannot exclude relevant evidence solely because it may be:
  - unduly prejudicial
  - prior bad acts
  - character evidence
- ❑ **Exceptions**
  - ❑ Privileged Information - (106.45(b)(1)(x))
  - ❑ Medical, Psychological, Psychiatric or similar treatment records - (106.45(b)(5)(i))
  - ❑ Rape Shield - (106.45(b)(6)(i))

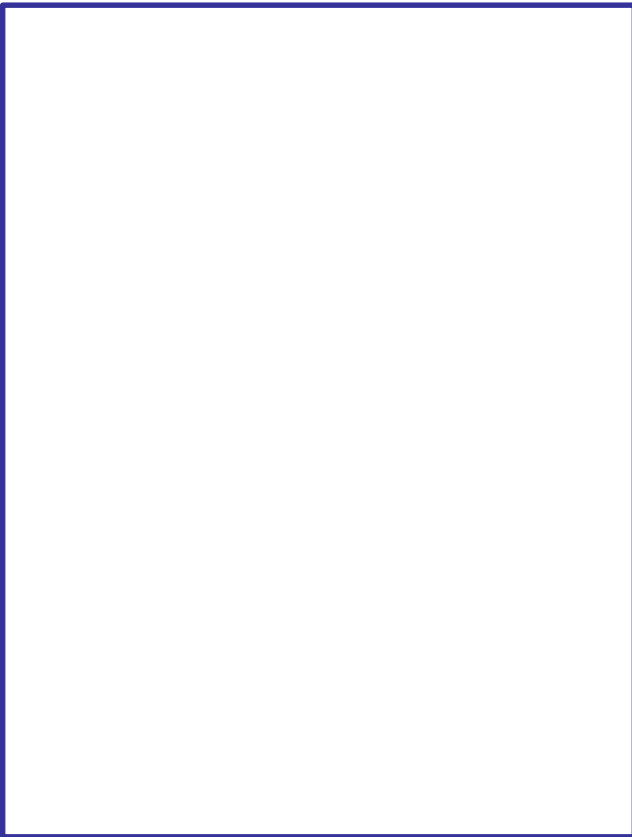
## Evidentiary Issues Privileged Information



- 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

## Evidentiary Issues

### Medical, Psychological, Psychiatric or similar treatment records



**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.

## Evidentiary Issues

### Rape Shield



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.



## Evidentiary Issues

### Rape Shield (cont.)

The inspect and review provision at the investigation stage is broader and permits the exchange of evidence “directed related to the formal complaint.” Parties may seek to have evidence that would be excluded by the rape shield provision exchanged at this stage. However, at the investigative report stage, the test is relevancy, so any evidence about sexual behavior (that does not fall into either of the two exceptions) or predisposition must be excluded from the report.

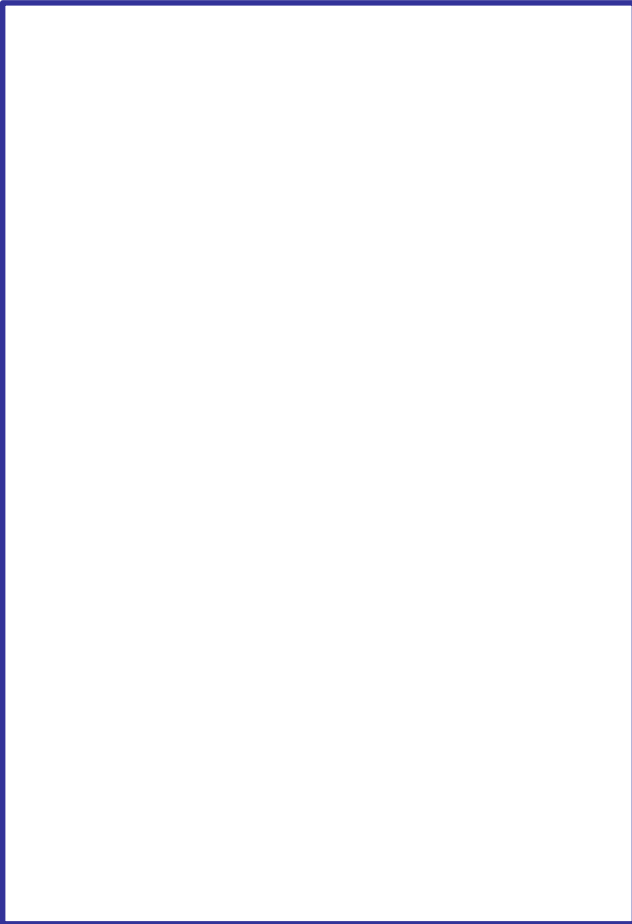
There will be more on the rape shield in our next session

- “[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 Fed. Reg. 30353

## Evidentiary Issues

### 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 Fed. Reg. 30304

## Investigative Report

\*Note

In a **consolidated investigation** that involves multiple complainants, multiple respondents, or both, a recipient may issue a **single investigative report**.

85 Fed. Reg. 30309.

## TBR policy

### ✓ **Must**

- Identify the allegations
- Identify relevant policies, guidelines, and other standards
- Explain procedural steps taken between receipt of Formal Complaint and the conclusion of the investigation, including
  - Notifications of the parties,
  - interviews with the parties,
  - interviews with witnesses,
  - dates of all interviews,
  - any site visits; and
  - methods used to gather evidence
- Fairly summarize relevant evidence

### ✗ **Must not**

- Make findings of fact or conclusions regarding the application of facts to policy

# 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)

# Questions

# PART VI

## CONDUCTING A HEARING

---

## Here's where we are in the process...

- We received a formal complaint (that was not dismissed).
- We conducted an investigation compliant with § 106.45(b)(2) and (b)(5), including creating a report and providing it to the parties.
- What now?

# Live Hearing

For postsecondary institutions, the grievance process must provide  
for a live hearing\*

**Source:** 106.45(b)(6)(i)



## What does “live” mean?

### **\*In essence, live participation where**

- ✓ You can hear one another in real-time
- ✓ You can see one another in real-time
- ✓ Allows for oral questioning
- ✓ No telephonic appearances

- May be conducted with all parties physically present in the same geographic location

**OR**

- At the school’s discretion, any or all parties, witnesses, and other participants may appear at the live hearing **virtually, with technology** enabling participants simultaneously to see and hear each other.

**OR**

- At the request of either party, the school must provide for the live hearing to occur with the parties located in **separate rooms with technology** enabling the decision-maker(s) and parties to simultaneously see and hear the party or the witness answering questions.

## Technology

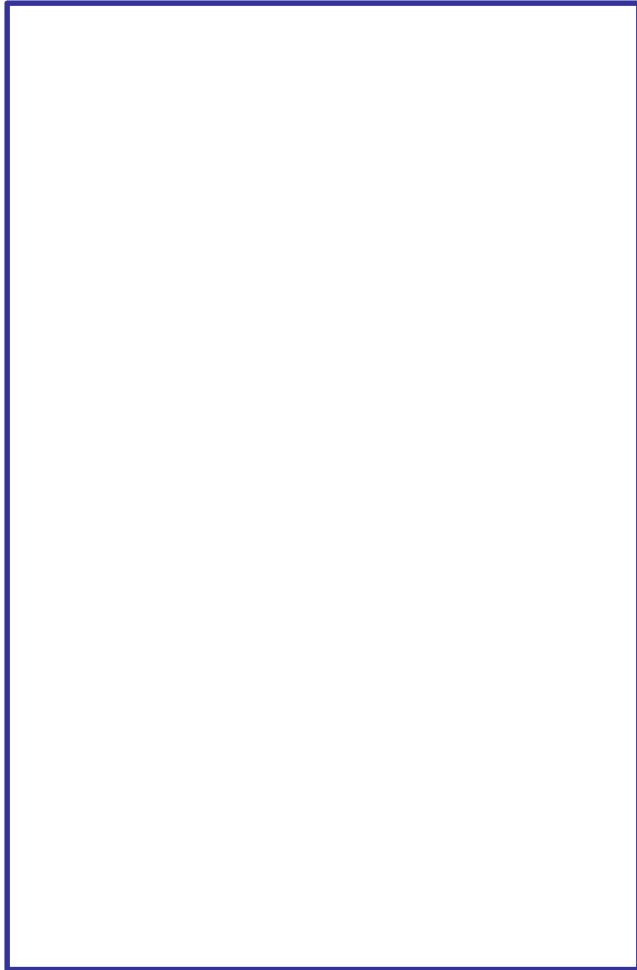
- Must be able to simultaneously see and hear
- Must create an audio or audiovisual recording, or transcript, of hearing. The recording or transcript must be made available to the parties for inspection and review. “Inspection and review” **does not** obligate an institution to send the parties a copy of the recording or transcript. 85 Fed. Reg. 30392.

*(Must provide access to evidence at hearing, per Section 106.45(b)(5)(vi))*

## Live Hearing – More Nuts & Bolts

- ✓ Trained Decision-Makers
- ✓ Live (as described on prior slide)
- ✓ Available Technology (as described on prior slide)
- Written Notice of Hearing
- Pre-Hearing Process (you have some flexibility)
- Decorum at Hearing (you have some flexibility)
- Structure of Live Hearing (you have some flexibility)
- Role of Advisors
- Role of Decision-Makers
- Cross-Examination & Relevancy
- Written Determination
- Recording or Transcript
- Retain Records for 7 years

## Notice of Hearing



Per TBR policy, at least 10 business days prior to a live hearing, the institution will provide both parties written notice, including:

- Time, place, and date of the hearing, and electronic access information, if applicable
- Name of each witness the institution expects to present or be present at the hearing
- Right to request a copy of the investigative file (*\*must provide access at hearing, per Section 106.45(b)(5)(vi)*)
- Right to have an advisor of their choice
- Any party in need of an institution-provided advisor must inform the TIXC at least 5 business days before the hearing
- Statement that any cross-examination of the other party or any witness must be conducted by the advisor; and
- Any other information necessary

## Pre-Hearing Process

“[A]ny rules a recipient adopts to use in the grievance process, other than those necessary to comply with § 106.45, must apply equally to both parties

TBR may hold a Pre-hearing Meeting with the Parties:

The decision-maker may conduct a pre-hearing meeting or conference with the Parties and their advisors to discuss pre-hearing issues, including:

- any technology to be used at the hearing and
- the general rules governing the hearing.

## Decorum at Hearings

“[A]ny rules a recipient adopts to use in the grievance process, other than those necessary to comply with § 106.45, must apply equally to both parties.”

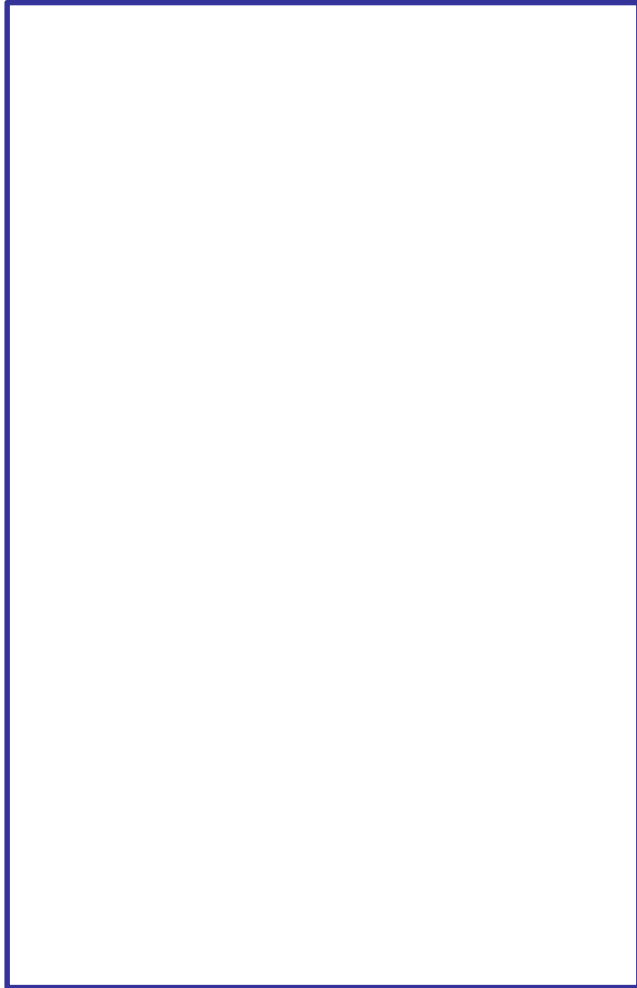
- TBR makes clear that the decision-maker has the authority to **maintain order at the hearing** and make all decisions necessary for the fair, orderly, and expeditious conduct of the hearing.
- Note: An institution cannot forbid a party from conferring with the party’s advisor. 85 FR 30339. But you do have discretion to adopt rules governing the conduct of hearings. Purpose of rules regarding decorum is to make the hearing process respectful and professional.

## Structure of Hearings

“[A]ny rules a recipient adopts to use in the grievance process, other than those necessary to comply with § 106.45, must apply equally to both parties”

- Live hearings will allow for cross-examination conducted by Advisors (discussed in future slides).
- At TBR, Advisors will not engage in other presentation of arguments or evidence, including opening statements, closing arguments, or direct examinations.

## Role of Advisors



- ❑ Parties have the right to be accompanied to any related meeting or proceeding by the advisor of their choice, who may be, but is not required to be, an attorney.
- ❑ TBR may not limit the choice or presence of advisor for either the complainant or respondent in any meeting or grievance proceeding.
- ❑ TBR may establish restrictions regarding the extent to which the advisor may participate in the proceedings, as long as the restrictions apply equally to both parties.
- ❑ TBR could, but does not have to, provide the advisor for entirety of grievance process.



## Role of Advisors

### At Hearings

- ❑ At the hearing, advisor must conduct **cross-examination** on behalf of party. 34 CFR § 106.45(b)(6)(i).
- ❑ Whether advisors also may conduct **direct examination** is left institution's discretion, but any rule to this effect must apply equally to both parties. 85 Fed. Reg. 30342.
- ❑ **\*If the party does not have an advisor at the live hearing, then TBR must provide an advisor of its choice to conduct cross-examination on behalf of that party.**
- ❑ The regulations **do not** preclude rule regarding advance notice from parties about intent to bring an advisor of choice to the hearing. 85 Fed. Reg. 30342. (If a party does not have an advisor, TBR requests advance notice no later than 5 business days before a hearing)

## Role of Advisor (cont.)

### Cross-Examination

85 Fed. Reg. 30340-42.

- Cross “on behalf of that party” is satisfied where the advisor poses questions on a party’s behalf.
- Party cannot “fire” an assigned advisor during the hearing.
- If **advisor of choice** refuses to comply with a recipient’s rules of decorum → institution may provide that party with an assigned advisor to conduct cross.
- If **assigned advisor** refuses to comply with a recipient’s rules of decorum → institution must provide that party with a different assigned advisor to conduct cross.

## Role of Decision Maker

- Oversee the hearing
- Ensure the hearing follows TBR procedures
- Ensure the hearing complies with 106.45(b)(1)
- Make relevancy determinations at the hearing
  - Objectively evaluate all relevant evidence
  - Inculpatory & exculpatory
- Make determination of responsibility
  - Independent determination regarding responsibility
  - Cannot give deference to an investigation report
- Prepare written determination
- Issue written determination to parties simultaneously

## Cross-Examination

### The Basics

**At the live hearing, the decision-maker(s) must**

- ✓ permit each party's advisor
- ✓ to ask the other party and any witnesses
- ✓ all relevant questions and follow-up questions, including those challenging credibility

**Such cross-examination at the live hearing, must be conducted:**

- ✓ directly
- ✓ orally
- ✓ in real time
- ✓ by the party's advisor of choice

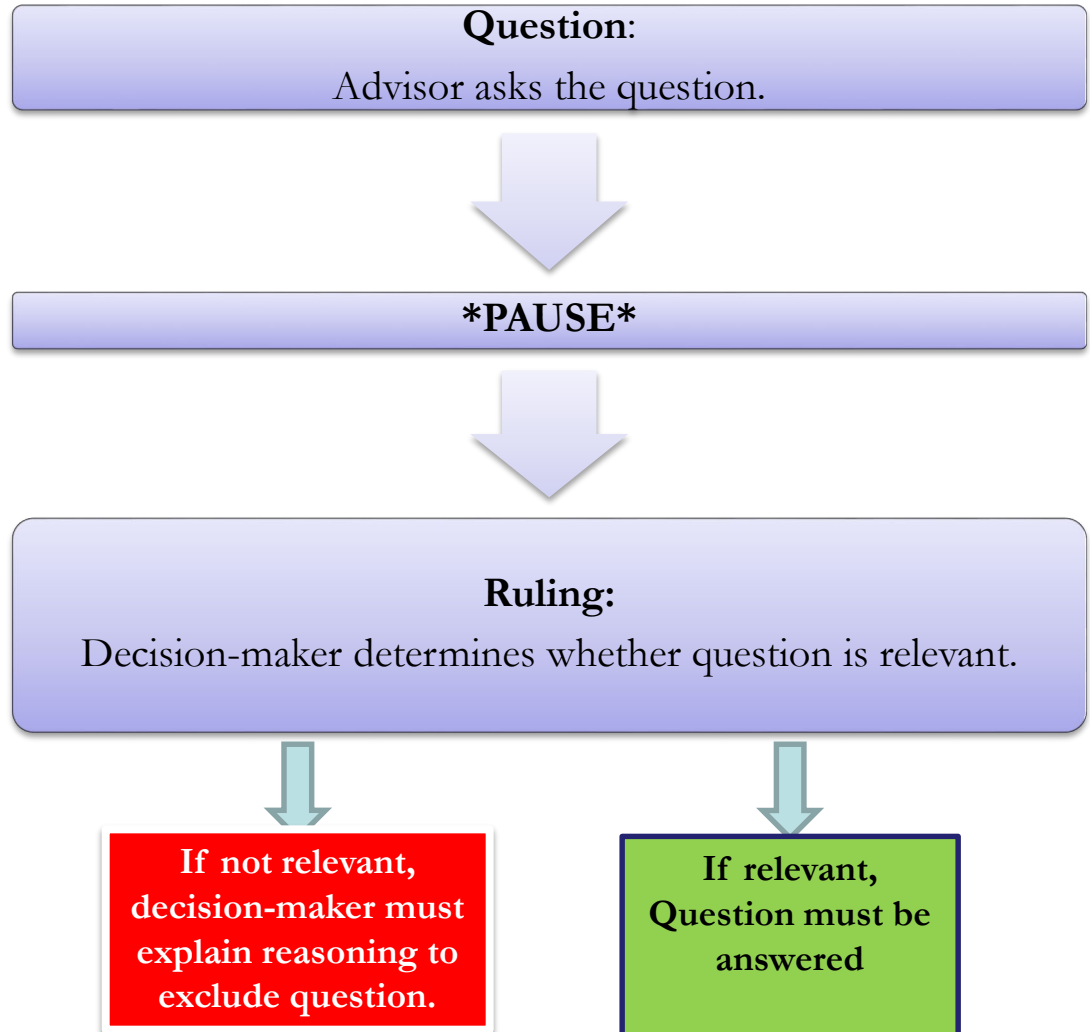
**If a party does not have an advisor present at the live hearing, TBR must provide:**

- ✓ at TBR's own expense
- ✓ an advisor of its choice to conduct cross-examination on behalf of that party

## Cross-Examination Mechanics

\*

Before a party or witness answers a question, the decision-maker(s) must first determine whether the question is relevant and explain any decision to exclude a question as not relevant.



## Cross-Examination

### Mechanics: Ruling on the Relevancy of a Question

- At the hearing, the decision-maker will serve as the gatekeeper, making relevance determinations after each question.
- The decision-maker may apply “logic and common sense” to reach any conclusions but must explain their rationale
- No “lengthy or complicated explanation” is necessary.

## Relevancy

Only relevant cross-examination and other questions may be asked of a party or witness.

- “Ordinary meaning of relevance should be applied throughout the grievance process.” 85 Fed. Reg. 30247, n. 1018.
- Relevant evidence must include both inculpatory and exculpatory evidence. 85 Fed. Reg. 30314.
- Decision-maker must determine whether it is relevant. 34 CFR § 106.45(b)(6)(i).

## Relevancy (cont.)

The Title IX regulations require an objective evaluation of relevant evidence.

### May not universally exclude:

- undue/unfair prejudice
- character or prior bad acts evidence.
- certain types of relevant evidence (e.g. lie detector test results, or rape kits).

### Decision-maker may consider the weight & credibility

- Ex. Where a cross-examination question is relevant, but concerns a party's character, the decision-maker must consider the evidence, but may proceed to objectively evaluate it by analyzing whether the evidence warrants a high or low level of weight or credibility.
- BUT evaluation must treat the parties equally by not, for instance, automatically assigning higher weight to exculpatory character evidence than to inculpatory character evidence or vice versa.



## Relevancy (Limits)

The following evidence is deemed not relevant at the live hearing:

- Evidence protected by the rape shield provision (as discussed in slides)
- Party or witness statements that have not been subjected to cross-examination at a live hearing.

**\*Remember** you need a waiver for privileged information (106.45(b)(1)(x)) and voluntary, written consent for medical, psychological, psychiatric or similar treatment records (106.45(b)(5)(i)).

## Rape Shield

Decision-makers must be trained on issues of relevance, including the application of the rape shield protections.

34 CFR 106.45(b)(1)(iii).

- Deems all questions and evidence of a complainant's **sexual predisposition** irrelevant, with no exceptions. See 85 Fed. Reg. 30352.
- Prohibits questions or evidence about a complainant's **prior sexual behavior**, with two exceptions. See 34 CFR § 106.45(b)(6).

## Evidence of prior sexual behavior is permitted if ...

### Exception 1

Offered to prove someone other than the respondent committed **the alleged offense**.

- ❑ “When a respondent has evidence that someone else committed the alleged sexual harassment, a respondent must have opportunity to pursue that defense, or else a determination reached by the decision-maker may be an erroneous outcome, mistakenly identifying the nature of sexual harassment occurring in the recipient’s education program or activity.” 85 Fed. Reg. 30353.

### Exception 2

It is specifically about the complainant and the respondent **and** is offered to prove consent.

- ❑ Does not admit complainant’s sexual behavior with anyone other than the respondent.
- ❑ Questions or evidence could be offered by either party, or by the investigator, or solicited on the decision-maker’s own initiative.
- ❑ The scope of this exception to the rape shield provision will turn, in part, on the definition of “consent” adopted by TBR.

## Cross-Examination (cont.)

Party or witness statements that have not been subjected to cross-examination at a live hearing.

- If a party or witness does not submit to cross-examination at the live hearing, then the decision-maker cannot rely on any statement of that party or witness in reaching a determination regarding responsibility. 34 CFR § 106.45(b)(6)(i).
  - To “submit to cross-examination” means answering cross-examination questions that are relevant.
- But, decision-makers cannot draw an inference as to responsibility based on a party or witness’s refusal to answer. Id.

## **Cross-Examination Hearsay Exception**

- The hearsay prohibition (discussed on the prior slide) does not apply if the respondent’s statement, itself, constitutes the sexual harassment at issue.
- Why? The verbal conduct does not constitute the making of a factual assertion to prove or disprove the allegations of sexual harassment because the statement itself is the sexual harassment.
- Source: This “exception,” is not expressly discussed in the final regulations; it was published on the Department’s blog following release of the regulations.

## Cross-Examination Effect of Failure to Appear

\*

Remember

“No recipient or other person may intimidate, threaten, coerce, or discriminate against any individual . . . because the individual has . . . refused to participate in any manner in an investigation, proceeding, or hearing under this part.”

Source 106.71

The decision-maker(s) cannot draw an inference about the determination regarding responsibility based solely on a party’s or witness’s absence from the live hearing or refusal to answer cross-examination or other questions.

Potential Scenario 1:

- Where one party appears at the hearing and the other party does not, the non-appearing party’s advisor may appear and conduct cross-examination even when the party whom they are advising does not appear.

Potential Scenario 2:

- Where one party and their advisor both do not appear, an advisor provided by TBR must still cross-examine the appearing party “on behalf of” the non-appearing party, resulting in consideration of the appearing party’s “statements”

# Questions

## Decision-Maker's Written Determination

To promote **transparency and impartiality** in the Title IX grievance process, the decision-maker must issue a written determination regarding responsibility.

**Source** 106.45(b)(7)



## Reaching an Outcome

### Per TBR Policy

Within fifteen (15) business days of the hearing, the decision-maker will issue a written Determination, based on a preponderance of the evidence standard, which will be provided to the Parties simultaneously.

### 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).
- TBR’s Standard = Preponderance of the Evidence

## 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.

Source 106.45(b)(7)(ii)

## Identification of Allegations

\*Recall\*

Prior to the investigation, you provided written notice of the allegations to both parties to give them enough time to adequately prepare for interviews.

85 CFR 30282

- Nothing in the regulations mandate how to phrase the information in the written notice.
- TBR is free to employ age-appropriate methods, common sense, and good judgment in choosing how to convey the information required to be included in the written notice.
- Good practice to create standardized form with room to add in the specifics and details.

## Description of Procedural Steps

\*

Goal is to ensure that both parties have a thorough understanding of how the complainant's allegations were resolved.

Source:

106.45(b)(7)(ii)(B)  
85 Fed. Reg 30390

Written Determination must demonstrate steps taken from the receipt of the formal complaint through the determination, e.g.,

- When the parties received notification
- Who performed the investigation
- Who was interviewed (parties and witnesses) & when
- Site visits, if any
- Methods used to gather other evidence (noting any issues)
- Process undertaken for inspect/review stage
- Process undertaken for report dissemination
- Describe “the investigator’s timeline” and explain investigative steps with sufficient specificity to further the purpose of promoting transparency

You may include procedural steps taken to address certain threats to fair and equitable treatment of parties in the grievance process.

## Findings of Fact Supporting the Determination

This part of the written determination:

- ✓ Must address:
  - the facts that support the determination of responsibility or no responsibility as to each allegation (pursuant to applicable burden of proof).
  
- ✗ But need not address\*:
  - evaluation of contradictory facts
  - exculpatory evidence
  - all evidence presented at a hearing, or
  - how credibility determinations were reached.

**\*Why?** The written determination also requires the decision-maker to explain the rationale for the result reached, and that rationale is to be based on an objective evaluation of the evidence, so the Department declined to also require the written determination to address evaluation of other facts and evidence that do not support the rationale behind the result reached. 85 FR 30389.

**Conclusions  
regarding the  
application of the  
recipient’s code of  
conduct to the facts**

**§ 106.45(b)(7)(ii)(D)**

This part of the written determination requirement should explain how the conduct under investigation “matches up” against particular portions of a recipient’s code of conduct. 85 Fed. Reg. 30391

- The Department does not specify what this “match-up” should look like in written form, but notes that this may come into play when issues of consent are central to the determination.
- If there are any other situations where you exercise your discretion and apply policies and procedures not otherwise required under Title IX, those must be addressed in this section.

## Rationale for Result

\*

The written determination must describe the decision-maker's rationale for the result of each allegation, including rationale for the determination regarding responsibility.

106.45(b)(7)(ii)(E)

- The decision-maker is obligated to objectively evaluate all relevant evidence, including inculpatory and exculpatory evidence (and to avoid credibility inferences based on a person's status as a complainant, respondent, or witness), under § 106.45(b)(1)(ii).
- The written determination must include explanations of the reasons why objective evaluation of the evidence supports findings of facts and conclusions based on those facts.  
85 FR 30389

**\*Recall, TBR applies preponderance of the evidence.**

**Any disciplinary sanctions the recipient imposes on the respondent ...**

- The sanction represents part of the recipient's response to addressing sexual harassment, and the victim should know how the sexual harassment which the victim suffered, was addressed. 85 FR 30425, n. 1576.
- A recipient is required to maintain for a period of 7 years records of any disciplinary sanctions imposed on the respondent and any remedies provided to the complainant designed to restore or preserve equal access to the recipient's education program or activity. 34 CFR §106.45 (b)(10)(ii).



**... and whether the recipient will provide remedies to the complainant**

Remedies are designed to restore or preserve equal access to the recipient's education program or activity and is provided by the recipient to the complainant

- May include the same services described as supportive measures. But unlike supportive measures remedies may burden the respondent, or be punitive or disciplinary.

**Nature of remedy not included.**

- Even where the no-contact order constitutes both a sanction and a remedy, the written determination would only list the measure insofar as it constitutes a sanction, preserving as much confidentiality as possible around the particular nature of a complainant's remedies.

## Information regarding the Appeals Process

Include

- How to submit an appeal
- Timing for submitting an appeal
- Appropriate bases for an appeal

**\*Note:** The decision-maker on appeal cannot be the Title IX Coordinator, the investigator, or the decision-maker that reached the determination regarding responsibility. 106.45(b)(7)(ii)(F)

## Written Determination – When it is Official

Must provide the written determination to the parties simultaneously.

The determination regarding responsibility becomes final either on the date that the recipient provides the parties with the written determination of the result of the appeal, if an appeal is filed, or if an appeal is not filed, the date on which an appeal would no longer be considered timely. 106.45(b)(7)(iii)

# Questions

# PART VII

## CONDUCTING AN APPEAL

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## 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)
- You may allow for appeal of sanctions, but do not have to do so.
- Parties must have an equal opportunity to appeal any dismissal decision.

## TBR 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; and
  
- ❑ The Title IX Coordinator, investigator(s), or Decision-Maker 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.

## TBR Appeal Timing

### Timing of an Appeal.

- A Party wishing to appeal a Determination regarding responsibility or the dismissal of a Formal Complaint or any allegations therein must file a written appeal with the Title IX Coordinator **within seven (7) business days of the date of the Determination or the dismissal.** The written appeal must identify the reasons for the appeal.

### Appeal Responses.

- If an appeal is filed, the Title IX Coordinator will notify the other Party and provide each Party five (5) business days to provide a written statement in support of, or challenging, the Determination



## TBR Appeal (cont.)

### Finality

The Determination becomes final either on the date that the institution provides the Parties with a written result of an appeal, or if an appeal is available but not filed, the day after the deadline to appeal.

### Appeal Process

The decider of the appeal will issue a written decision describing the result of the appeal and the rationale for the result, and will provide the written decision simultaneously to the Parties.

## Appeals - Requirements of Appeal - 106.45(b)(8)(iii)

- ✓ notify the other party, in writing, when an appeal is filed and implement appeal procedures equally for both parties;
- ✓ ensure that the decision-maker for the appeal is not the same person as the decision-maker that reached the initial determination, the investigator, or the Title IX Coordinator;
- ✓ ensure that the decision-maker for the appeal is free from bias, conflicts of interest, and trained to serve impartially;
- ✓ provide both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome;
- ✓ 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.

## Documentation: The Requirements

An institution **must** create and maintain records of any actions taken in response to a report or formal complaint of sexual harassment. §106.45(b)(10)(ii)

Includes documenting that:

- the response was not deliberately indifferent; and
- the measures taken were designed to restore or preserve equal access to the education program or activity.
- the decisions regarding the provision of supportive measures (note: If an institution does not provide a complainant with supportive measures, then the institution must document the reasons why such a response was not “clearly unreasonable in light of the known circumstances.”)

# Document Retention

## Must retain records of

- Investigation;
- Any determination regarding responsibility;
- Audio or visual recording or transcript;
- Any disciplinary sanctions imposed on the respondent; and
- Any remedies provided to the complainant designed to restore or preserve equal access to the institution's educational program or activity.

### §106.45(b)(10)(i)(A)

- Any appeal and the result.
- Any informal resolution and the result.

### §106.45(b)(10)(i)(B)-(C)

- All materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process.

### §106.45(b)(10)(i)(D)

## Document Retention (cont.)

### Also retain:

- Any record the institution creates to investigate an allegation, regardless of later dismissal or other resolution of the allegation, must be maintained.
- This means that even those records from “truncated investigations” that led to no adjudication because the acts alleged did not constitute sex discrimination under Title IX (dismissal)

§106.45(b)(10)(i)(A); 85 FR 30411

## Document Retention Period

- The Department extended the three-year retention period to seven years. §106.45(b)(10)(i). Date of creation begins the seven-year period. 85 FR 30411
- Harmonizes recordkeeping requirements with the Clery Act. 85 CFR 30410
- Institutions are permitted to retain records for a longer period of time. E.g. seven years from creation of the last record pertaining to the case

# PART VII

## INFORMAL RESOLUTION

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## Informal Resolution - 106.45(b)(9)

### TBR may not

- offer an informal resolution process unless a formal complaint is filed.
- require waiver of the right to an investigation and adjudication.
- require the parties to participate in an informal resolution process.
- offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student.**

### TBR may facilitate

- ✓ an informal resolution process
- ✓ at any time prior to reaching a determination regarding responsibility
- ✓ assuming certain requirements at met (next slide)

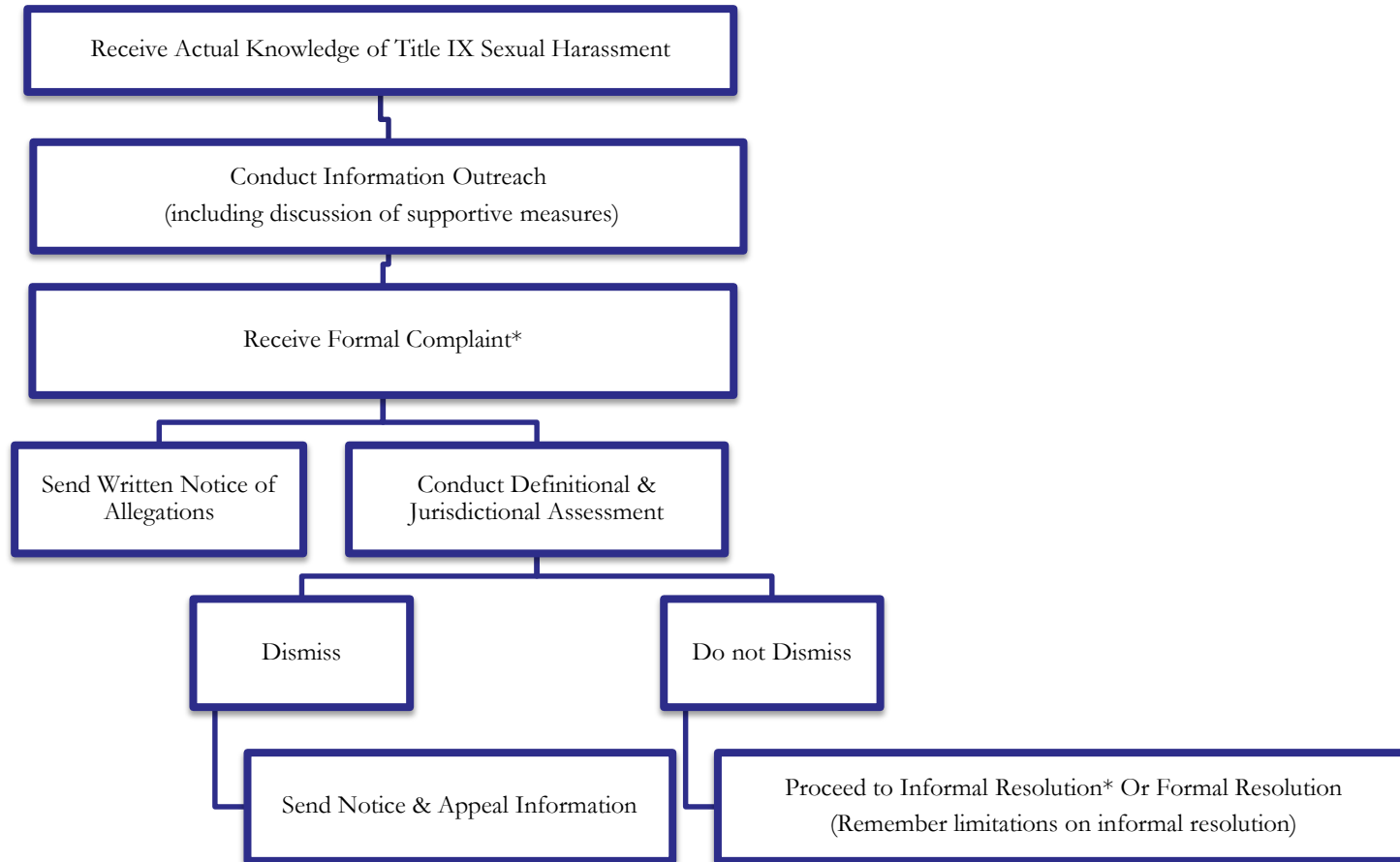


## Informal Resolution (cont.)

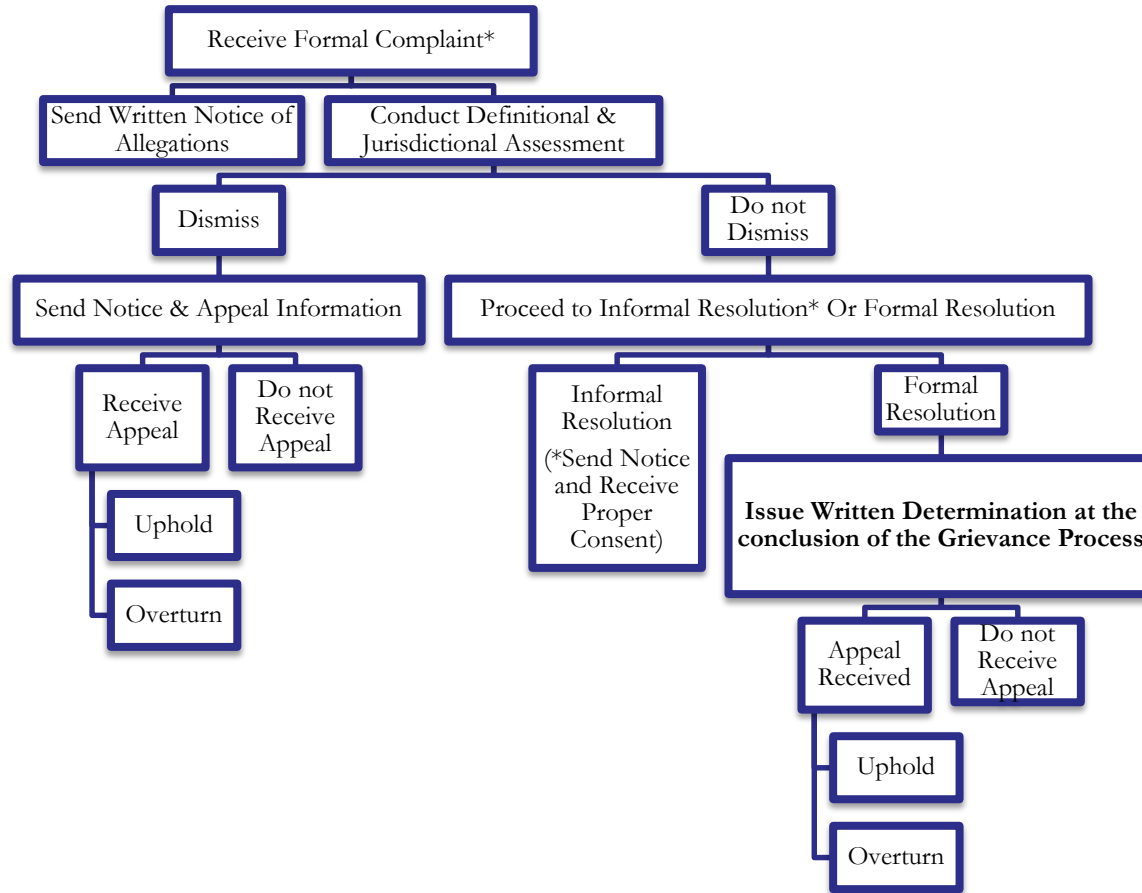
### Before facilitating informal resolution, TBR must:

- ✓ Provide to both parties a written notice disclosing
  - ❑ the allegations,
  - ❑ the requirements of the informal resolution process including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations, provided, however, that at any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint, **and**
  - ❑ any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared.
  
- ✓ Obtain the parties' voluntary, written consent

# Day One Recap



# Day Two Recap



# Any other questions?

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