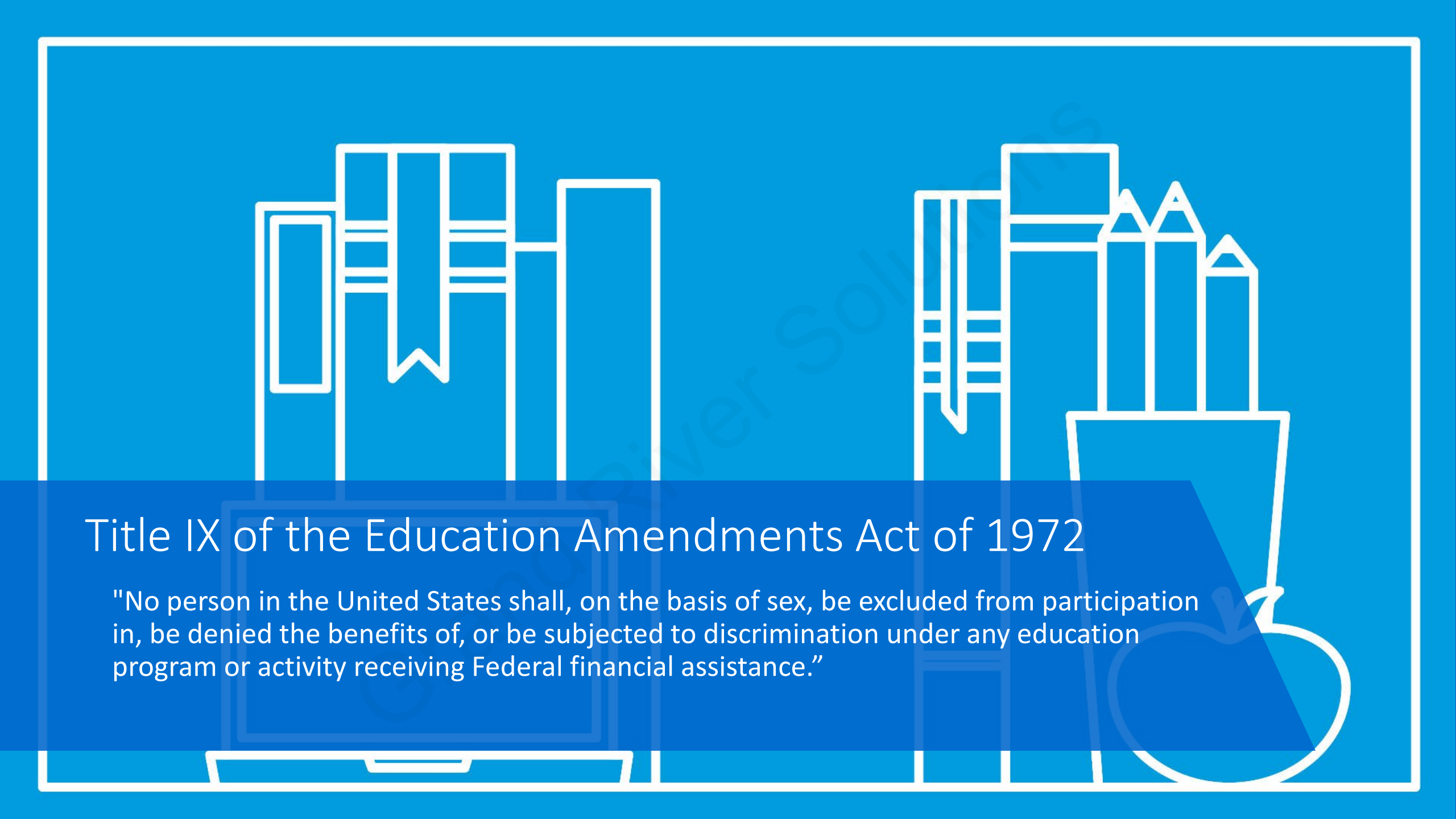




APPEALS

Martha Compton
November 1, 2023

GRAND RIVER | SOLUTIONS

The background features a collection of white line-art icons on a blue gradient. On the left, there are several books of varying heights, some with bookmark-like shapes. On the right, there are three pencils of different sizes and a large apple. A faint, diagonal watermark reading "Never Sold" is visible across the center of the image.

Title IX of the Education Amendments Act of 1972

"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."

Definitions

Recipient: The recipient of federal funds; the institution/school/college

Complainant: An individual who is alleged to be the victim of conduct that could constitute sexual harassment.

Respondent: An individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.

Education Program or Activity

“

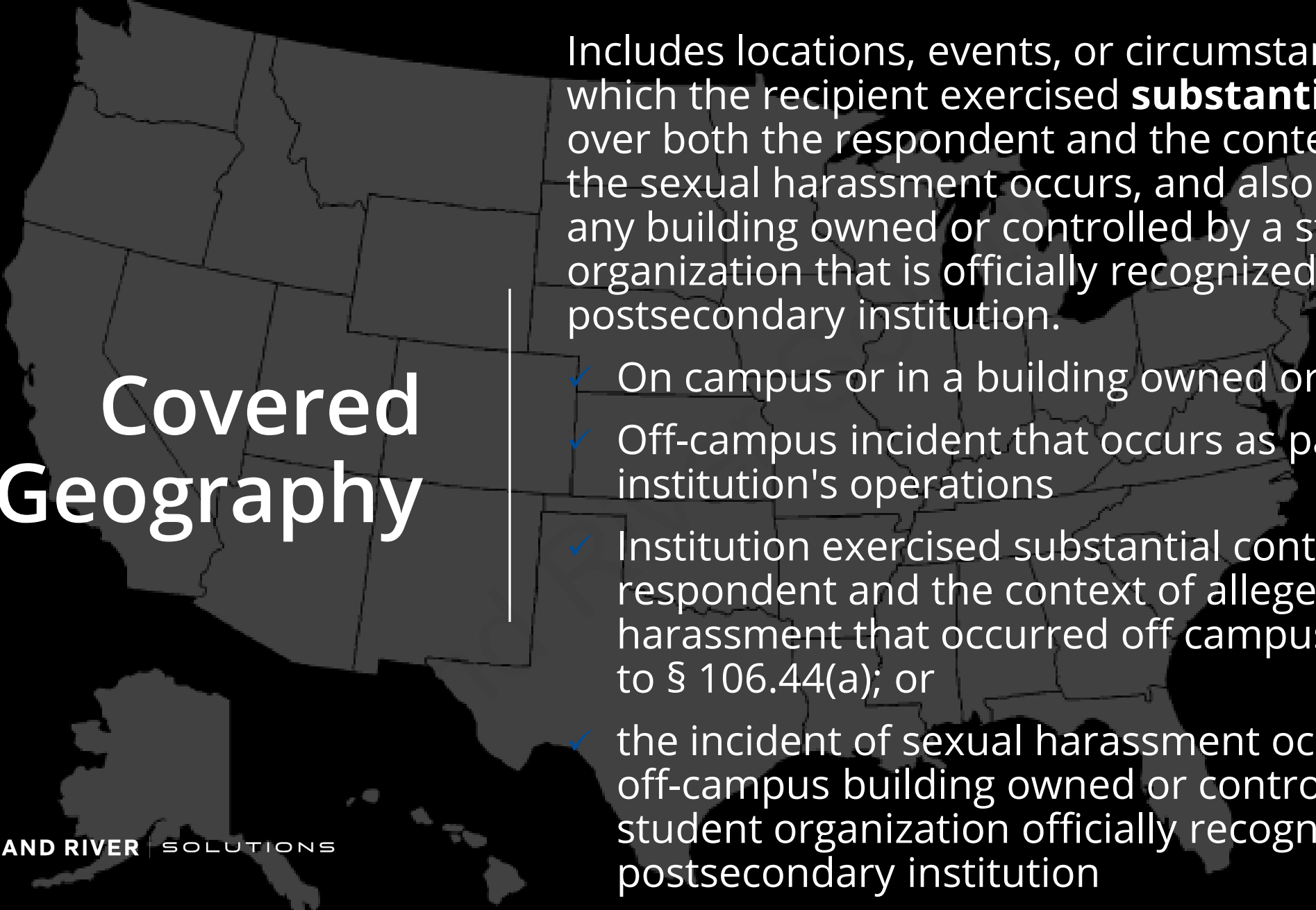
For the purposes of this section, §§ 106.30, and 106.45, “education program or activity” includes locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.

”

Sexual Harassment: *Section 106.30*

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

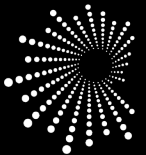
- (1) An **employee** of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;
- (2) Unwelcome conduct determined by a reasonable person to be so **severe, pervasive, and objectively offensive** that it **effectively denies** a person equal access to the recipient's education program or activity; or
- (3) "**Sexual assault**" as defined in 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).

A dark gray map of the United States, including Alaska and Hawaii, serves as the background for the slide. The text is overlaid on this map.

Covered Geography

Includes locations, events, or circumstances over which the recipient exercised **substantial control** over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.

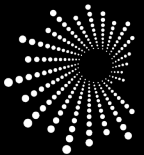
- ✓ On campus or in a building owned or controlled
- ✓ Off-campus incident that occurs as part of the institution's operations
- ✓ Institution exercised substantial control over the respondent and the context of alleged sexual harassment that occurred off campus pursuant to § 106.44(a); or
- ✓ the incident of sexual harassment occurs at an off-campus building owned or controlled by a student organization officially recognized by a postsecondary institution



A dark gray map of the United States with white state boundaries. The text "Not Covered" is overlaid on the western half of the map, and a bulleted list is on the eastern half.

Not Covered

- Off campus conduct, even if it has an impact on the educational program or activity;
- Conduct that occurs outside of the United States.





Covered Individuals

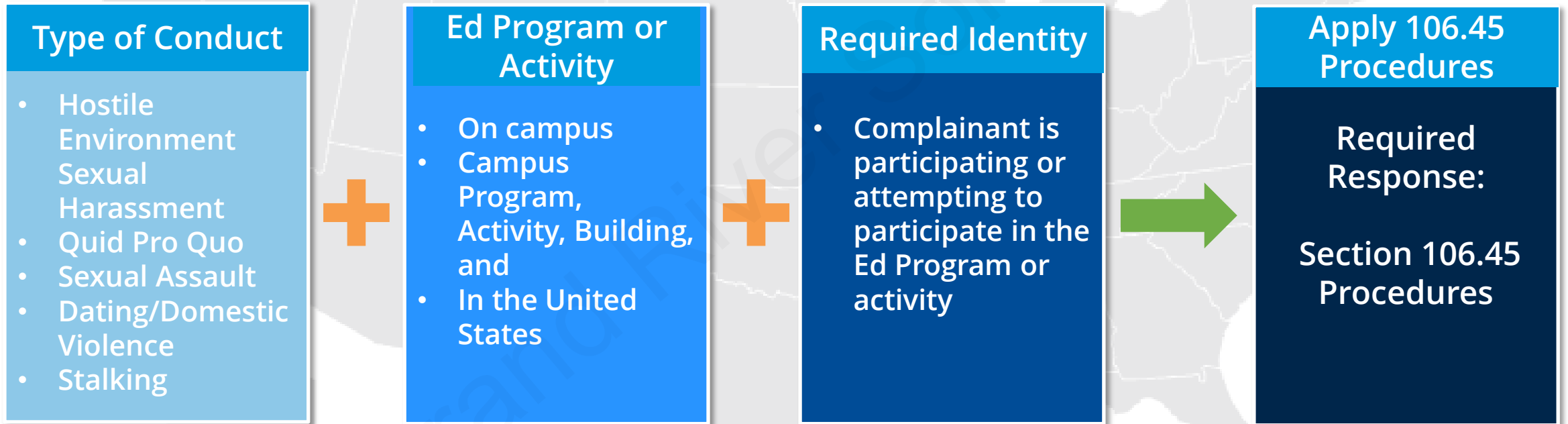
Eligibility for Title IX's Protections

"At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed." 34 C.F.R. § 106.30

- **Applicant**
- **Accepted/Hired**
- **Enrolled/Employed**

Title IX Application

Post May 2020 Regulations



Conduct Falling Outside the Scope of Title IX

- Apply other institutional policies and procedures
- Ensure that those policies and procedures are compliant with VAWA/Clery, other intersecting federal and state laws



Procedural Requirements for Investigations

Notice to both parties

Equal opportunity to
present evidence

An advisor of choice

Written notification of
meetings, etc., and
sufficient time to prepare

Opportunity to review all
evidence, and 10 days to
submit a written response
to the evidence prior to
completion of the report

Report summarizing
relevant evidence and 10
day review of report prior
to hearing

Procedural Requirements for Hearings

Must be live, but can be conducted remotely

Cannot compel participation of parties or witnesses

Standard of proof used may be preponderance of the evidence or clear and convincing; standard must be the same for student and employee matters

Cross examination must be permitted and must be conducted by advisor of choice or provided by the institution

Decision maker determines relevancy of questions and evidence offered

Written decision must be issued that includes finding and sanction

Grounds for Appeal (per Regulations)

(A) Procedural irregularity that affected the outcome of the matter;

(B) 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/or

(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.

Other Requirements of the Regulations

Designation of
a Title IX
Coordinator

Dissemination
of policy

Separation of
Responsibilities

Training and
posting of
training

Impartiality

Record
Keeping

THE BASIC TENETS

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EVIDENCE: GATHERING, WEIGHING, ANALYZING

Avoiding Common Errors

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ALL APPEALS

Trauma-Informed

Each in their lane: The limits of an appeal officer's task

Fundamental Fairness

Due Process

Follow Your Process

THE RIGHT TO APPEAL?

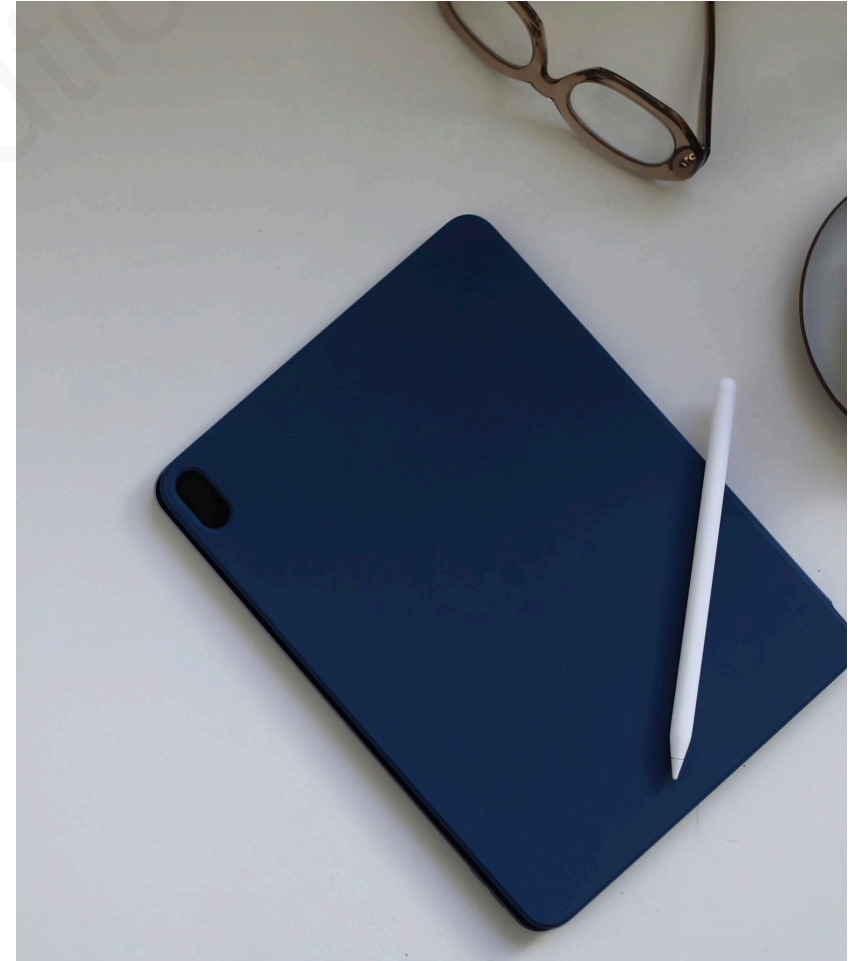
Both the complainant and respondent have the right to:



- Appeal the same things in the same way to the same person(s);
- Receive information about the appeal process;
- Appeal a sanction;
- Have all aspects of the process be the same for each party;
- Have their appeal reviewed and decided upon;
- Receive notice of the outcome of the appeal.

SANCTIONS AND INTERIM MEASURES DURING APPEAL PROCESS

- Maintaining or changing interim measures during the process
- Communicating and documenting sanctions and interim measures
- Deciding whether to impose sanctions during the process
 - Pros and Cons



DUE PROCESS DURING THE APPEAL PROCESS

Equal Rights and Fair Process for Each Party

- Using regular, published procedures
- Grounds for appeal
- Who is reviewing or hearing the appeal

BEFORE THE APPEAL

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NOTIFICATION OF THE APPEALS PROCESS

Who Gets Notified	What They are Notified Of
• Complainant • Respondent • Student Conduct? • Human Resources? • Academic Personnel?	• Allegations • Investigation Outcome • Applicable Policy • Appeals Process • Timeline • Links • Dates • How to submit

WHOSE JOB IS IT?

Receive the appeals

Determine whether the grounds for appeal have been met

Notify the person(s) responsible for reviewing the appeal

Arrange the logistics for the appeal

Communicate with complainant and respondent and advisors and witnesses as appropriate

WHOSE JOB IS IT ? (CONTINUED)

- Communicate the decision
 - Complainant and Respondent
 - Title IX
- Document retention
- Determine remedies



DE NOVO APPEALS?

We Are Never, EVER,
going back to this

DIFFERENCES IN RESPONSIBILITY

RESOLUTIONS

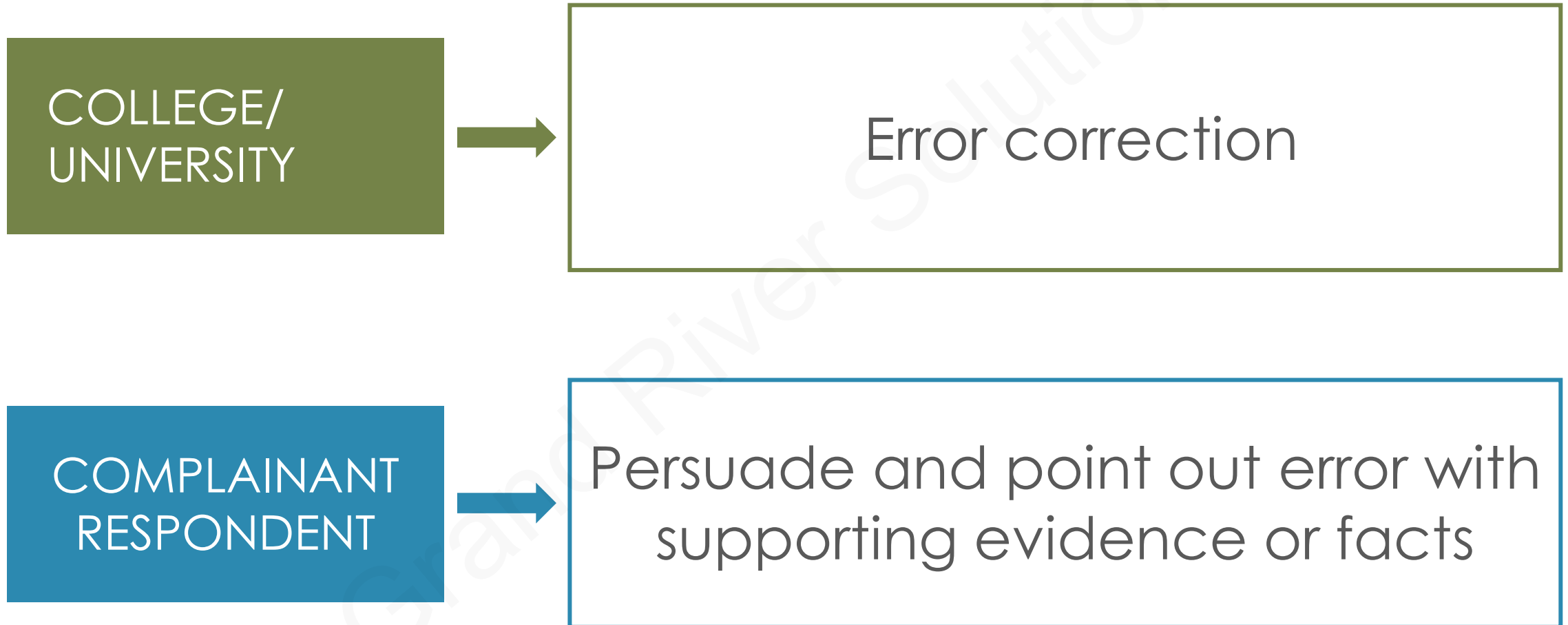
- Investigate, Hearing
- Determine What Happened
 - Findings of Fact
 - Findings of Policy

SANCTION

APPEAL

- Review the Appeal
- Determine Whether Grounds for Appeal Have Been Met
- Make Decision Regarding Merits of Appeal

DIFFERENCES IN BURDEN



HAS THE BURDEN BEEN MET?

Review the information provided by Complainant and/or Respondent and determine whether it contains sufficient information concerning the grounds for appeal and the reasons related to those grounds

This step is **not** to decide the merits of the appeal, but to identify the nature and scope of the issues to be addressed.

IN THEIR APPEAL, RESPONDENT WRITES:

- I have new evidence not previously available to me. Having read the hearing officer's report, I now know the hearing officer was biased (new evidence) because the hearing officer found against me, and there is no way that any unbiased hearing officer would have properly weighed the evidence and come to any conclusion other than the fact that complainant was lying.
- The hearing officer failed to call 1 key witness. The Title IX coordinator should have been questioned, and she could have explained that Complainant was given a free pass and allowed to drop out of organic chem after it was obvious Complainant was going to fail. This would have proven that Complainant made up the complaint and filed only to avoid failing a difficult class.

WHAT DOES THIS MEAN?

- You are reviewing the appeal for what it says, not how it is said.
- You are identifying what the party says went wrong in the process or whether the party has identified new information and IF the party has articulated that what went wrong or what is new, if true, would have led to a different outcome.



COMMON CHALLENGES

Non-Participating Parties

- Bias/conflict of interest
- Error

Uncooperative Witnesses

Uncooperative Advisors

DEAR APPEALS OFFICER...

- I am the victim of a false accusation...
- The police were not contacted, and I was not charged by law enforcement with a crime
- After the supposed sexual assault, she sent me a friend request on Instagram and asked me to dance at a party
- No one listened to my explanation or reviewed the evidence so they could see that I was falsely accused.

DOES THIS MEET ANY GROUNDS FOR APPEAL?

- Procedural error?
- Bias/conflict of interest?
- New evidence?



NEW EVIDENCE: WHAT WOULD YOU DO?



Appeal states there is
new evidence...

Evidence not provided with the
appeal

How do you know it is new?

It is new but is it relevant and
reliable?

DEAR APPEALS OFFICER...

I am the victim of a false accusation. Something went terribly wrong.....



PROCEDURAL ERROR: THE DECISION WAS UNREASONABLE

The decision was unreasonable based on the evidence.

- I am the victim of a false accusation
- There was no crime
- She initiated it, not me
- We were both drunk

PROCEDURAL ERROR

There was a procedural error in the process that materially affected the outcome.

- Someone was not interviewed
- I was not allowed to cross-examine the complainant
- Burden was put onto me to prove consent

DENIAL OF A PROCESS YOU DON'T OFFER

Cross examination

Representation

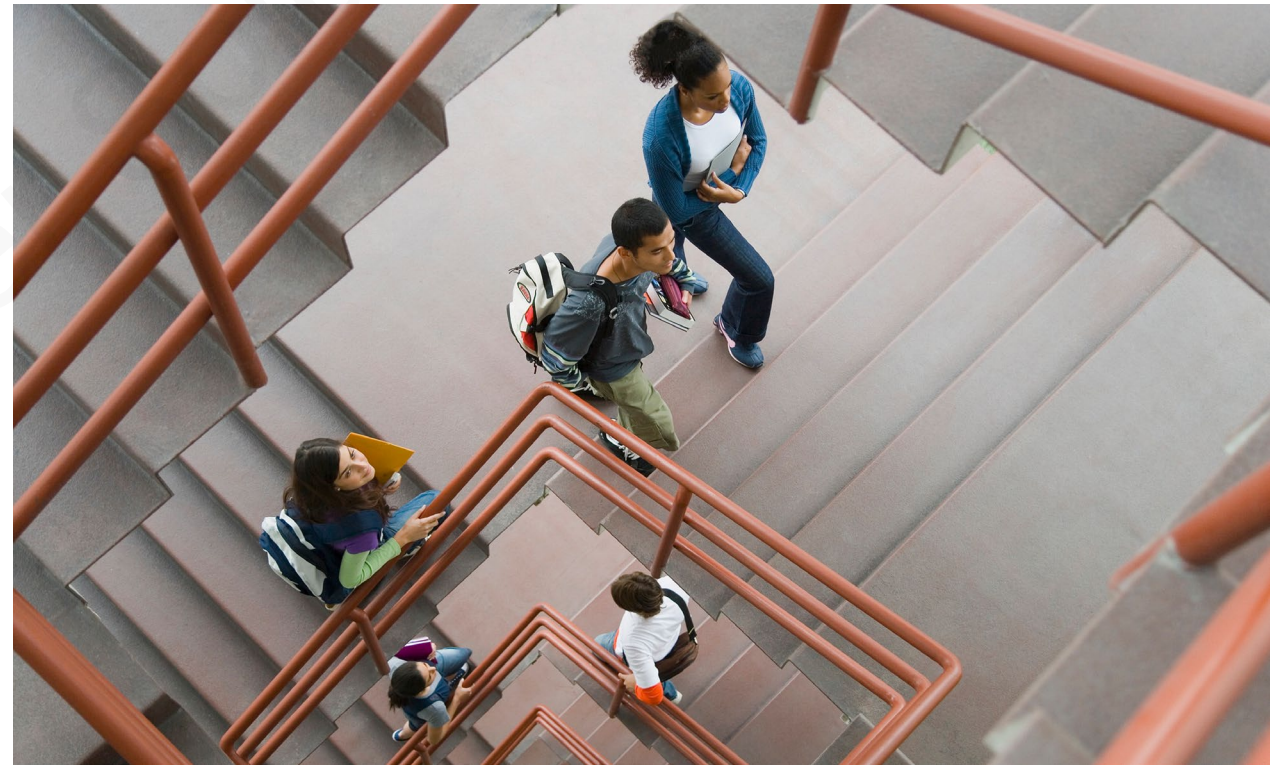
Discovery

Subpoena / compel witnesses

WHEN A RESPONDENT REFUSES TO PARTICIPATE IN THE PROCESS BUT CLAIMS DUE PROCESS IS VIOLATED

“The Plaintiff waived his right to challenge the process resulting in his expulsion by failing to participate in the process afforded him.”

- Herrell v. Benson



WHEN EXCEPTIONS TO PROCESS OCCURS

Some examples

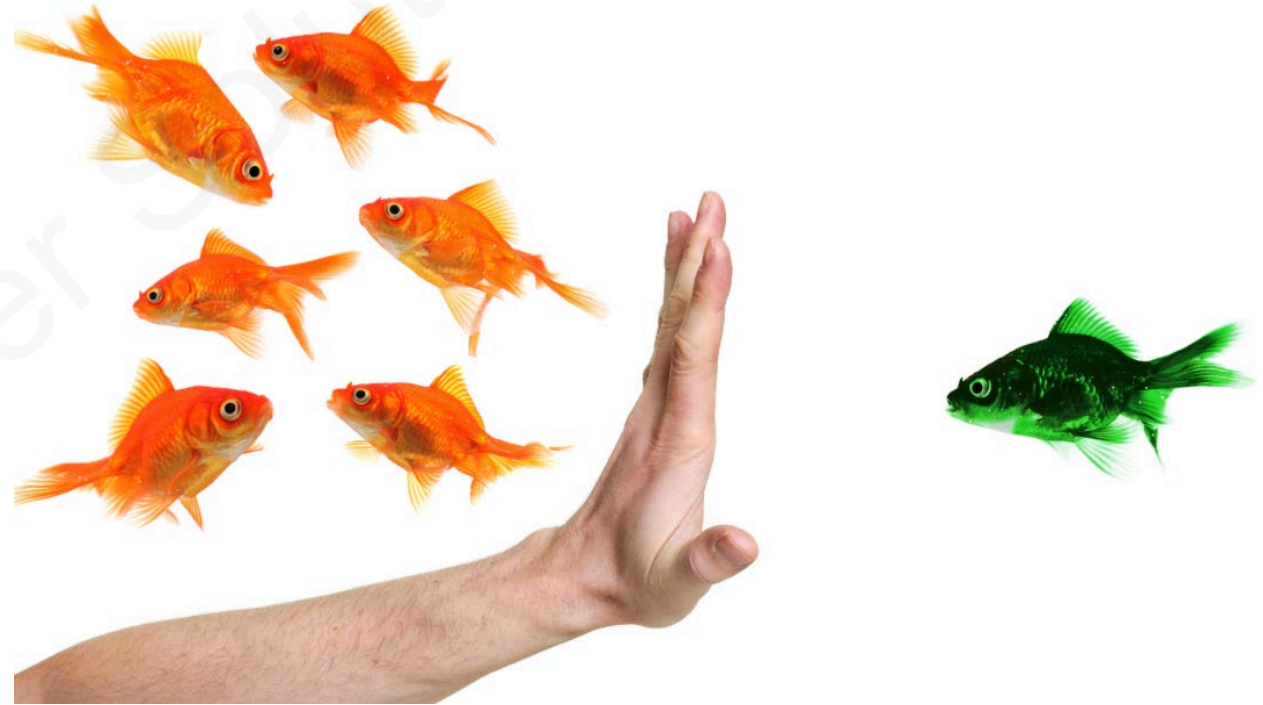
University brings the case against one if its own

Recusal of a member of a panel

Changing composition of a panel

BIAS

- What constitutes bias?
- The investigator was biased against me because...
- The investigator was biased against (complainants/respondents generally) because . . .



ALLEGATIONS FOR BIAS

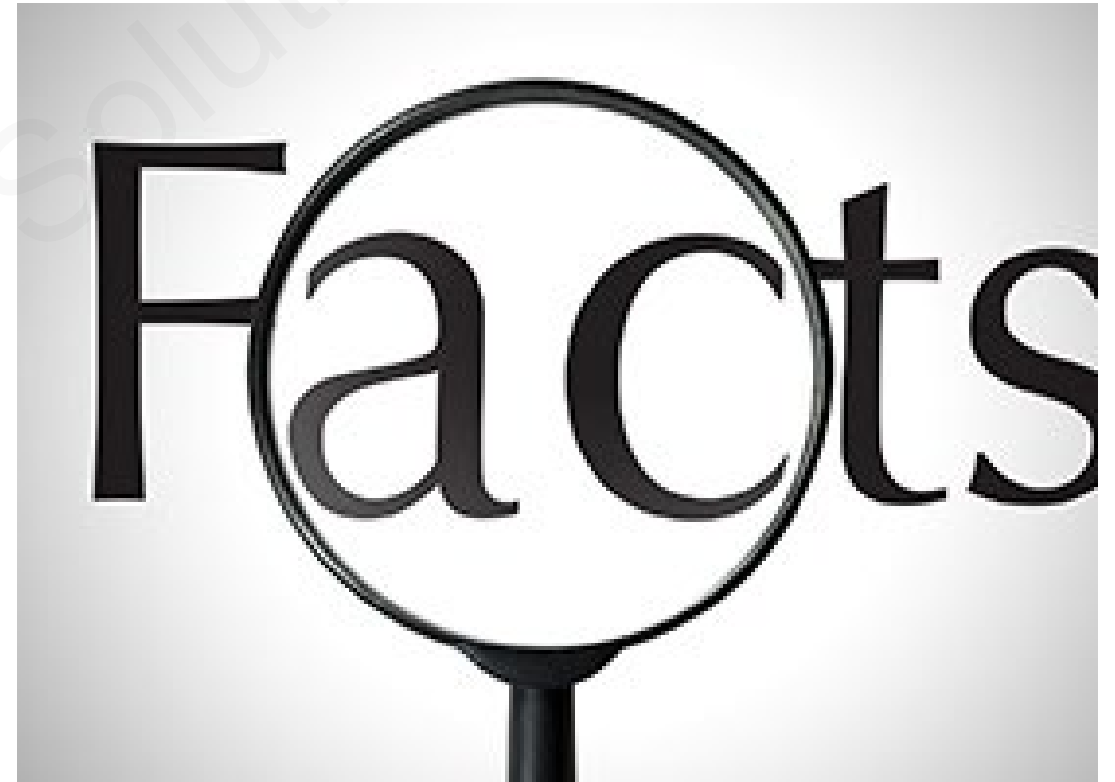
“Pro-victim bias does not equate to anti-male bias.”
-Doe v. University of Colorado

Anti-violence bias does not equate to anti-male bias.

ALLEGATIONS OF BIAS AS THE BASIS FOR APPEAL

An allegation of bias without factual support “no longer passes muster”.

-Doe v. University of Colorado



NEW INFORMATION

- Is it really new?
- If it is new, would it change the findings/outcome
- Who investigates new information?



COMMON ERRORS

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SOMETIMES INSTITUTIONS DO THE WRONG THING



- Missing deadlines for providing materials
- Misunderstanding of consent or incapacitation
- Errors at a hearing

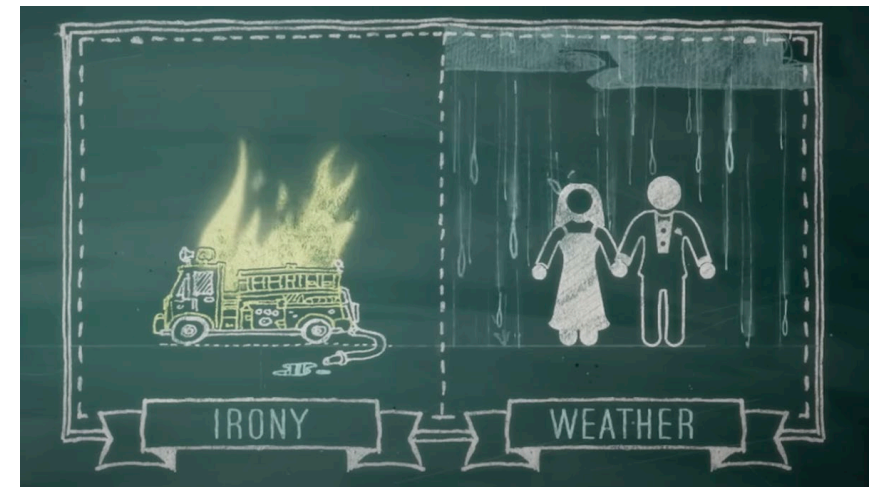
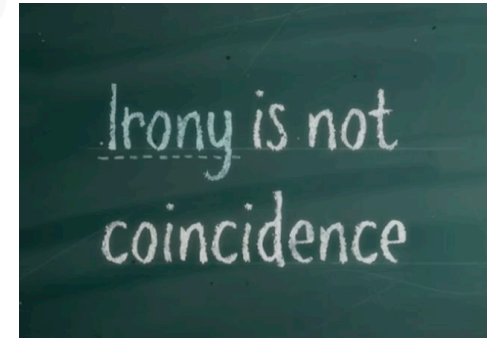
DETERMINING CREDIBILITY ON APPEAL

If Complainant does not participate, can you judge credibility?

Do you need to see demeanor to note credibility?

EVIDENCE – KNOWING WHAT TO CONSIDER

- Drunk vs. Intoxicated vs. Incapacitated
 - Language matters
 - Clarity and consistency of application
- Who has to prove consent?
- Know the language of your policy



Courtesy Weird Al's Word Crimes

CROSS COMPLAINTS



- Was it handled?
- How was it handled?
- When raised for first time in the appeal, what is your process?
- Who handles?

APPEALS OFFICERS THAT EXCEED THEIR AUTHORITY



- Stay In Your Lane
- How Do You Know
- How To Correct

WHY SHOW YOUR WORK: WHEN A JUDGE HAS A DIFFERENT DEFINITION OF CONSENT

“Because she removed her own shirt when Respondent suggested having sex, there was insufficient proof of a lack of affirmative consent.” Haug v. SUNY Potsdam, 2018

As the Complainant did not report the rape, and did not initially think she had been raped . . . more likely there was an erroneous outcome due to gender. Doe v. Dordt University, 2022

LESSER-INCLUDED CHARGES ON APPEAL

There are no lesser-included charges.

Reflects lack of notice and opportunity to respond.

- Powell v. St. Joseph's University
- Doe v. U.S.C.

SANCTIONS ARE NOW WRONG BECAUSE FINDING WAS WRONG

Does appeals officer determine new sanction, or send case back for appropriate determinations?



CAN A SANCTION INCREASE ON APPEAL?

- A. In response to Complainant's appeal?
- B. Sua sponte (meaning, just on their own determining it was not sufficient) ?

LANGUAGE MATTERS WHEN WRITING APPEAL RESPONSE

Drunk vs. Intoxicated vs.
Incapacitated

Language matters

Clarity and consistency of application

Who has to prove
consent?

Know the language of your policy

HOW MUCH INFORMATION TO PROVIDE ON APPEAL?

The appellate officer's failure to plainly articulate why he granted the appeal, which resulted in a new hearing that found the respondent in violation, was "perplexing" to the reviewing court, along with the appellate officer's ad hoc decision to request an independent Title IX opinion prepared in the course of determining the appeal.

COMMUNICATIONS ERRORS

- Communicate the decision
 - Complainant and Respondent
 - Title IX
- Interim measures
- No contact directives
- Remedial measures
- Sanctions



APPELLATE OFFICER/PANEL MAY NOT...



Substitute their own findings for the findings of the decision maker



Engage in fact-finding/weigh new evidence



Correct procedural errors on their own

QUESTIONS?

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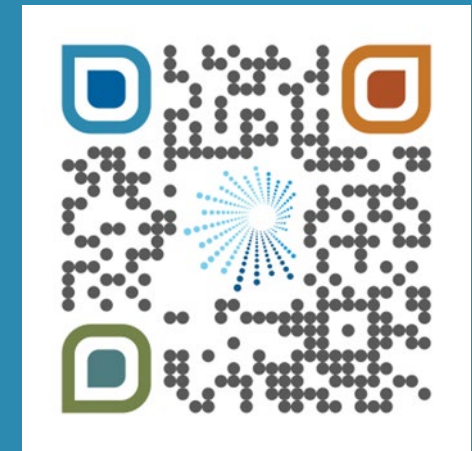
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