

Title IX Training:

An Integrated and Coordinated Approach

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Trinity College

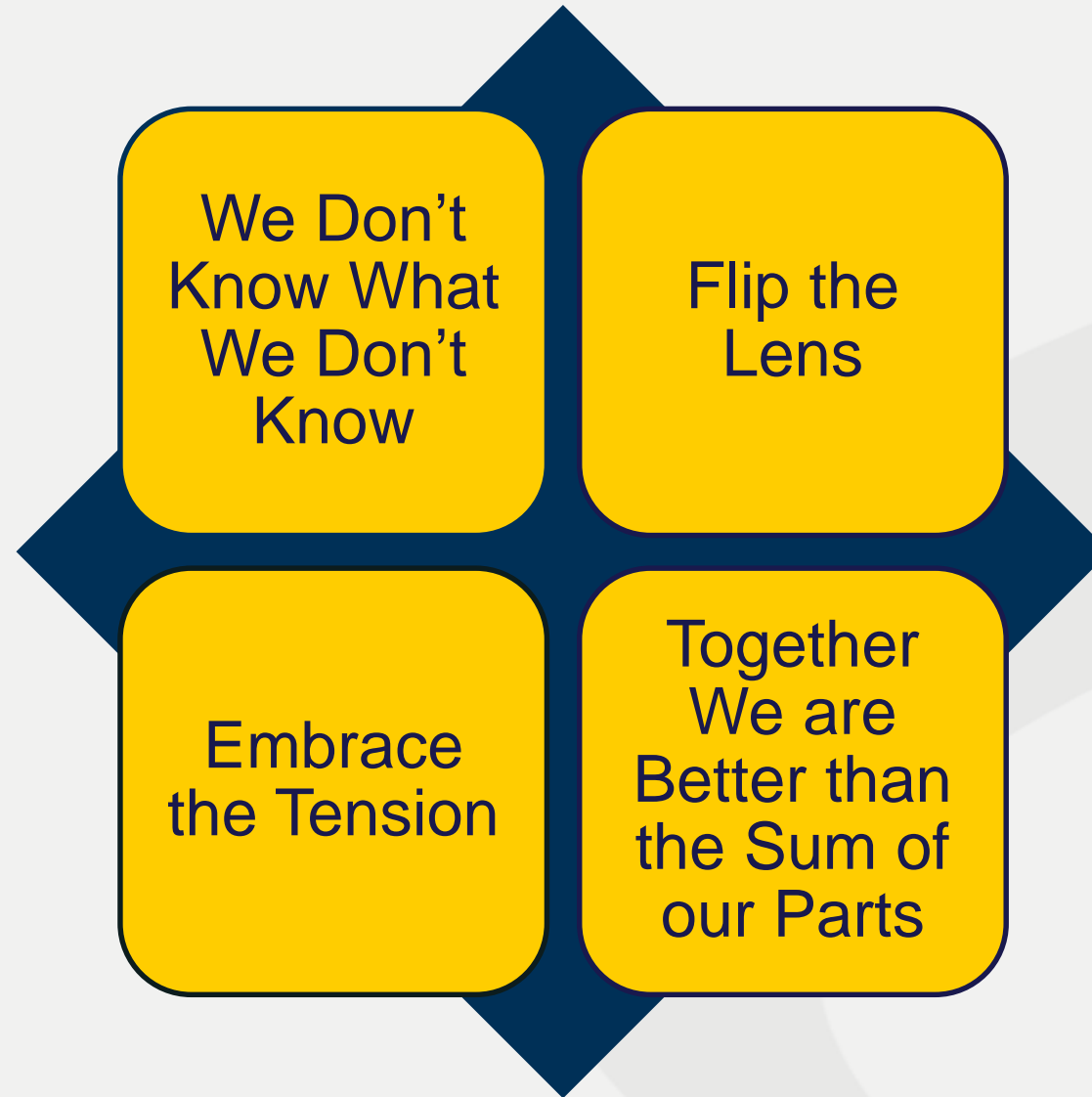
September 21 and 23, 2020



INTRODUCTION

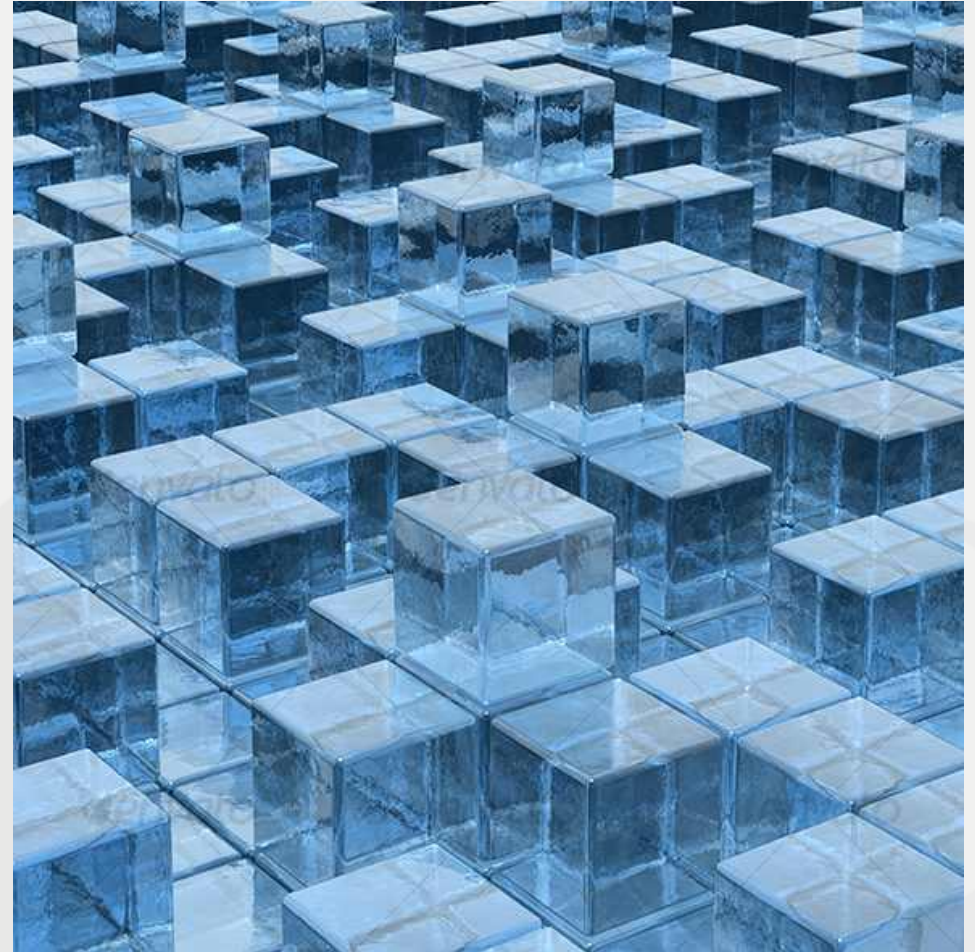


Framing the Conversation

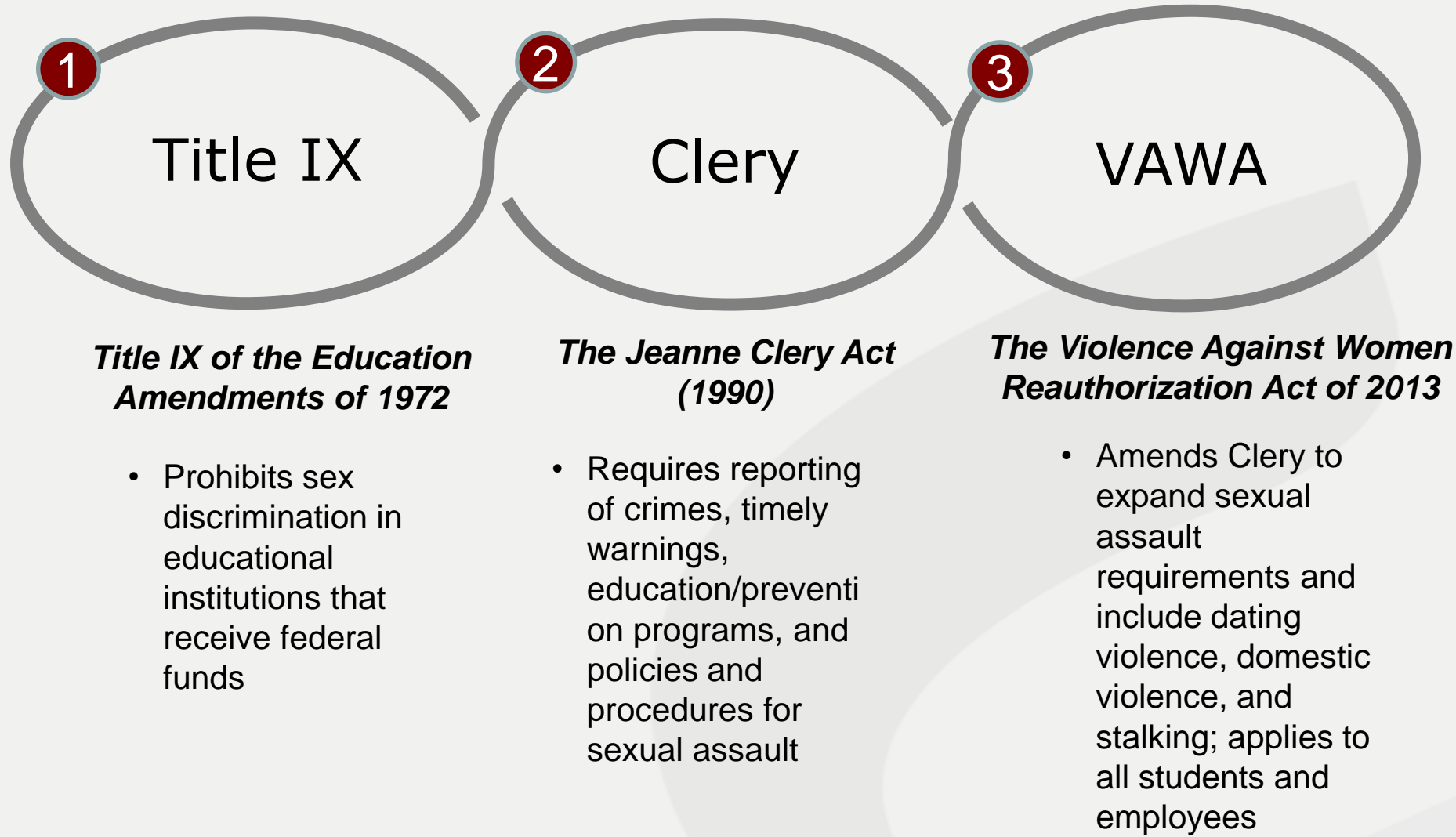


The Context

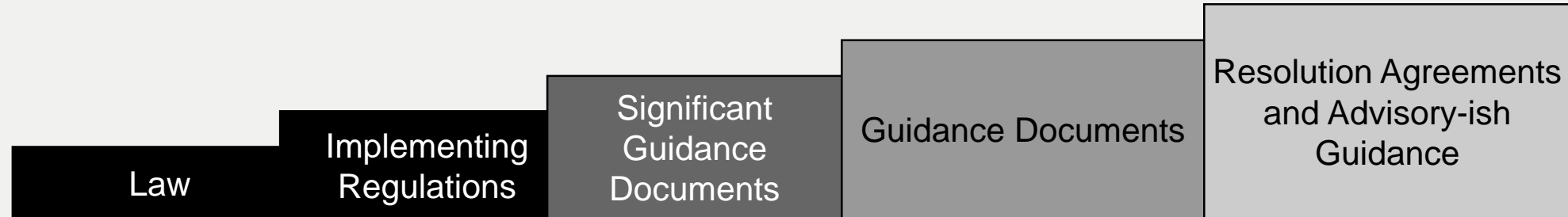
- Regulatory Framework
- Dynamics of Sexual and Gender-Based Harassment and Interpersonal Violence
- Individual Culture, Climate, History, Resources, Policies, Procedures, Personnel and Values of the Institution



Federal Regulatory Framework



The Hierarchy



- Title IX

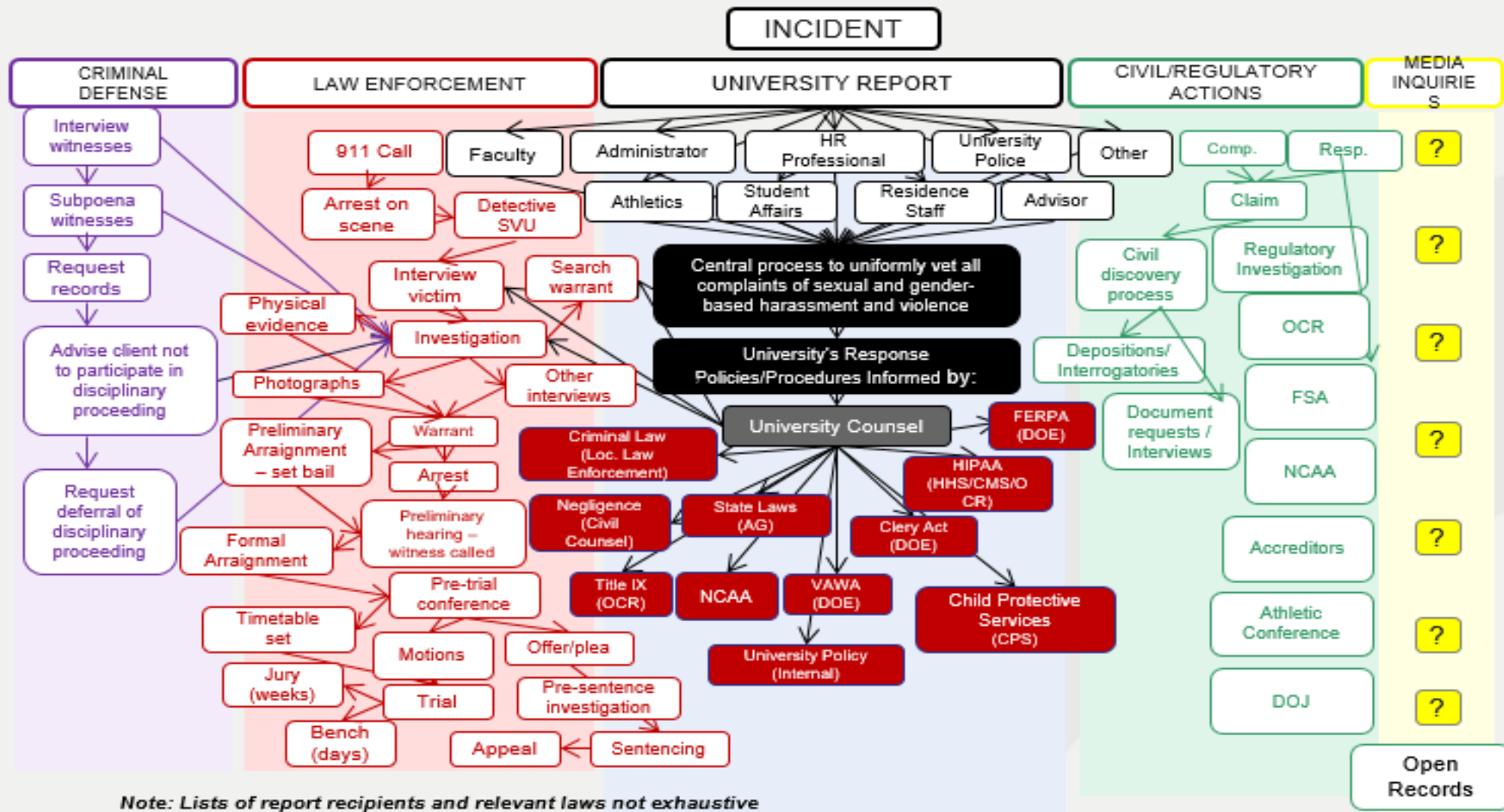
- Title IX Implementing Regulations (2020)

- 2011 Dear Colleague Letter (Rescinded)
- 2014 Q&A (Rescinded)
- 2017 Q&A (Rescinded)
- Preamble to Title IX Implementing Regulations

- 1997 Sexual Harassment Guidance
- 2001 Revised Sexual Harassment Guidance (Rescinded)
- Dear Colleague Letters
 - Bullying
 - Hazing
 - Title IX Coordinator (Rescinded)
 - Retaliation

- Resolution Agreements
- OCR aids and tools
- OCR webinars
- OCR blog

The Legal Context







Options for Title IX Cases at Trinity

Supportive Measures Only

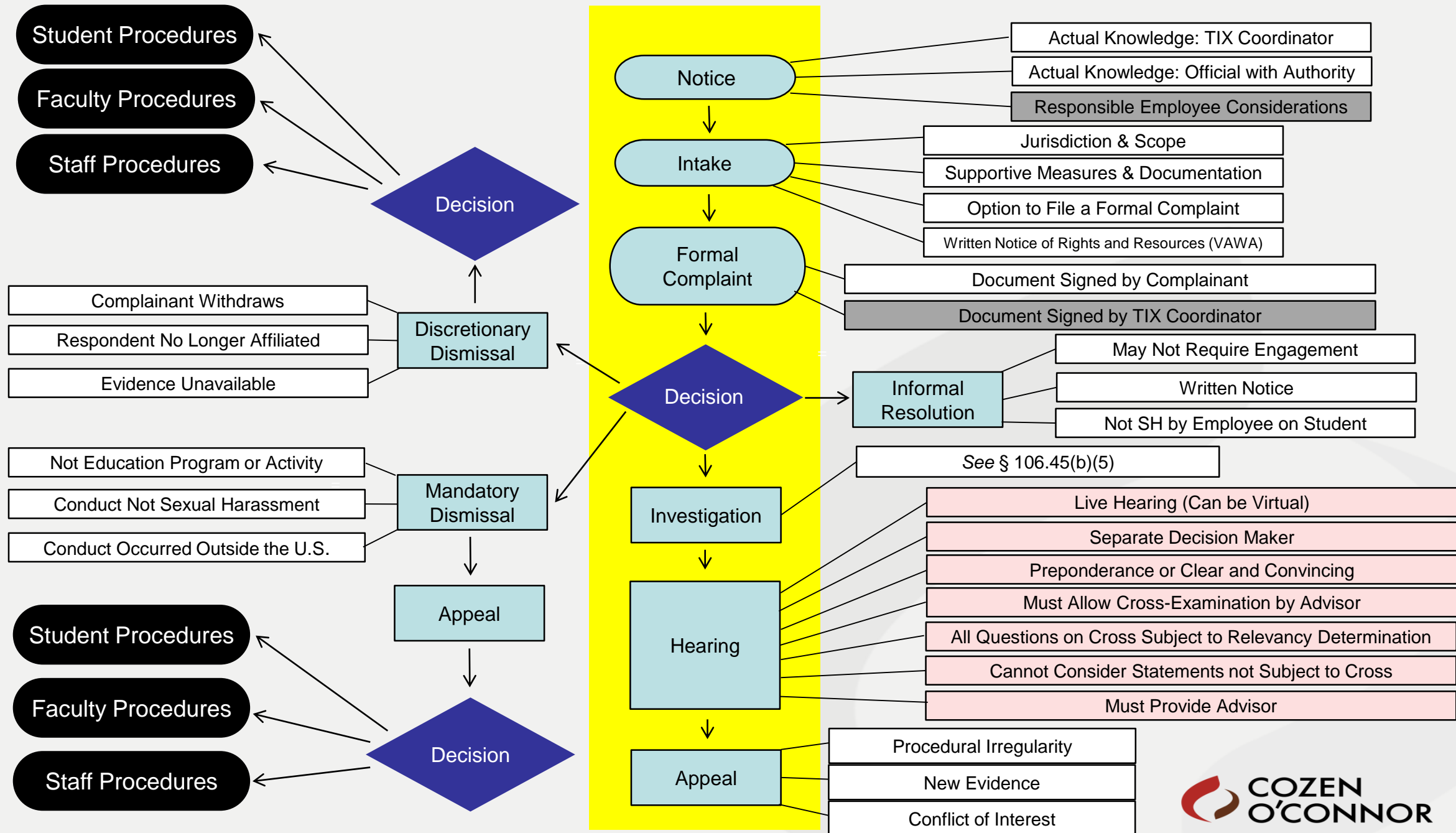
- Parties may receive supportive measures **with or without** the filing of a Formal Complaint
- **Non-disciplinary**, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to a party.
- Designed to restore or preserve equal access to the education program or activity **without unreasonably burdening** the other party.

Informal Resolution

- Initiated with the filing of a **Formal Complaint**
- Must give **written notice** to the parties as described in § 106.45(b)(9)
- Both parties must give **voluntary written consent**
- Administered by trained facilitators
- Not available to address allegations that an employee sexually harassed a student

Formal Resolution

- Initiated with the filing of a **Formal Complaint**
- Must give **written notice** to the parties as described in § 106.45(b)(2)(i)
- Follows **prescribed grievance process** described in § 106.45
- Administered by trained investigators and decision-makers who are free from conflicts of interest or bias



TITLE IX AND THE CLERY ACT

The Clery Act (As Amended by VAWA)

Core Tenets:

- Governs a school's response to **sexual assault, dating violence, domestic violence and stalking** (and other crimes)
- Applies to Clery-defined crimes reported to **campus security authorities** that occur **on Clery geography**
- Requires procedural and educational components that do not fully align with Title IX requirements
- Requires reporting of **crime statistics** through
 - Daily crime log
 - Annual security report
- Includes a duty to warn/**timely warnings**

VAWA: Prompt, Fair, and Impartial Investigation & Resolution

- **Prompt, fair, and impartial process** from the initial investigation to the final result
- Conducted in a manner consistent with the institution's policies and transparent to the accuser and accused
- The accuser and the accused have **equal opportunities** to have others present, including an **advisor of their choice**
- The accuser and accused are given **timely notice of meetings** at which one or the other or both may be present
- The accuser, the accused, and appropriate officials are given **timely and equal access to information** that will be used during informal and formal disciplinary meetings and hearings

VAWA: Prompt, Fair, and Impartial Investigation & Resolution

- Officials are appropriately **trained** and do not have a **conflict of interest or bias** for or against the accuser or the accused
- The proceeding is completed in a **reasonably prompt timeframe**
- Explicit provision noting that institutions may extend their reasonably prompt deadlines for **good cause** with written notice to the accused and accuser of the delay and the reason for the delay
- The accuser and the accused **receive simultaneous notification**, in writing, of the result of the proceeding, the rationale, sanctions, any available appeal procedures, any change to the results that occurs prior to final resolution and when results become final

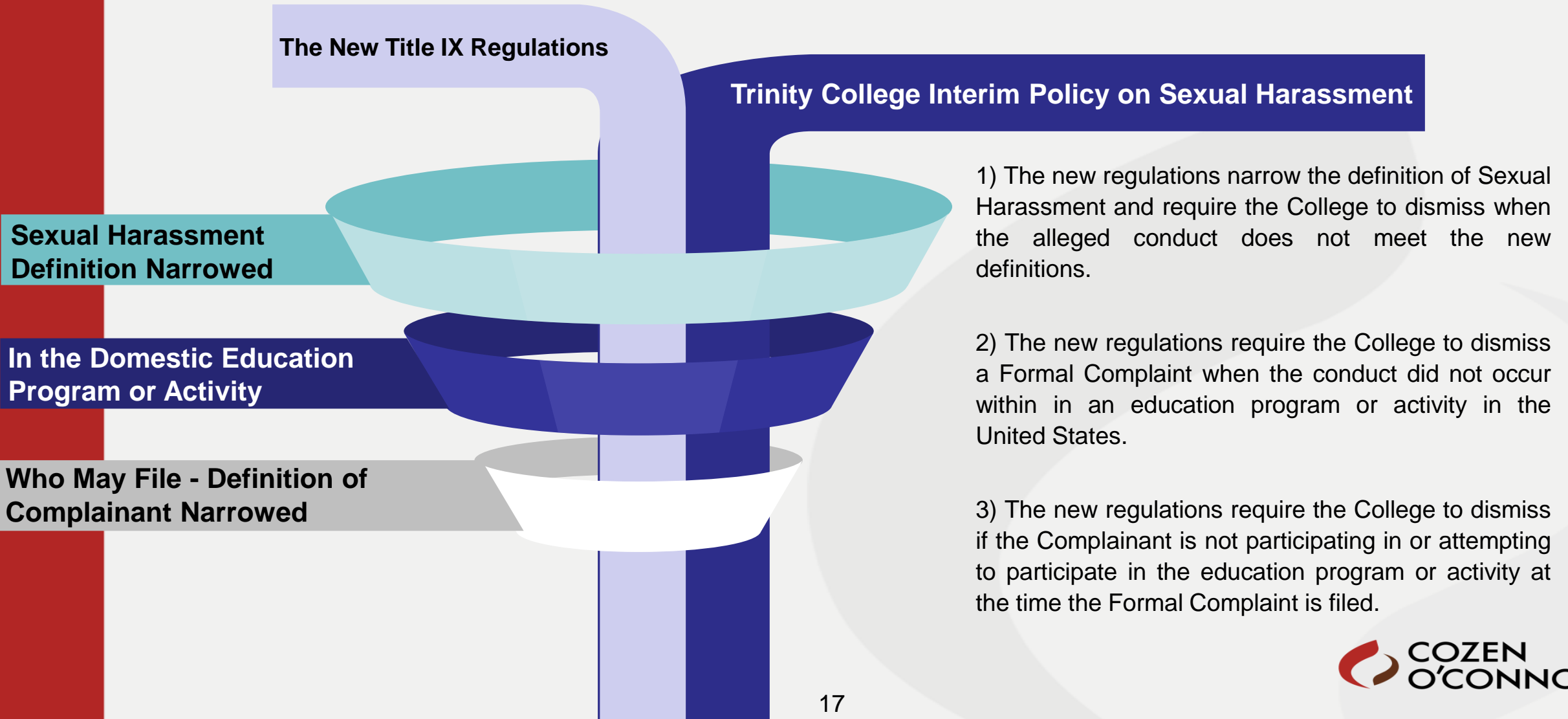
Understanding Title IX

The Law:

“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 USC § 1681

Limitations Under the New Title IX Regulations



Title IX

Core Tenets:

Definition of Sexual Harassment

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).

Title IX Regulations May 19, 2020; § 106.30(a)

Title IX

Response to Sexual Harassment

Core Tenets:

A recipient with actual knowledge of sexual harassment in an **education program or activity** of the recipient against a person **in the United States**, must respond promptly in a manner that is not deliberately indifferent. A recipient is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances. ... A recipient's response must treat complainants and respondents equitably by offering **supportive measures** as defined in § 106.30 to a complainant, and by following a **grievance process** that complies with § 106.45 before the imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in § 106.30, against a respondent.

Title IX Regulations May 19, 2020; § 106.44(a)

Title IX

Core Tenets:

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.

Title IX Regulations May 19, 2020; § 106.44(a)

DISCUSSION: JURISDICTION

Training

- A recipient must ensure that **Title IX Coordinators, investigators, decision-makers, and all persons who facilitate an informal resolution** process, receive training on:
 - The definition of sexual harassment in § 106.30
 - The scope of the recipient's education program or activity
 - How to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, as applicable
 - How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias
- A recipient must ensure that **decision-makers** receive training on:
 - Any technology to be used at a live hearing
 - Issues of relevance of questions and evidence, including when questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, as set forth in paragraph (b)(6) of this section.

Training

- A recipient also must ensure that investigators receive training on:
 - Issues of relevance to create an investigative report that fairly summarizes relevant evidence
- Any materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, must not rely on sex stereotypes and must promote impartial investigations and adjudications of formal complaints of sexual harassment

TRINITY COLLEGE INTERIM POLICY ON SEXUAL HARASSMENT: PROHIBITED CONDUCT

Trinity College Interim Policy on Sexual Harassment

Scope of the Policy:



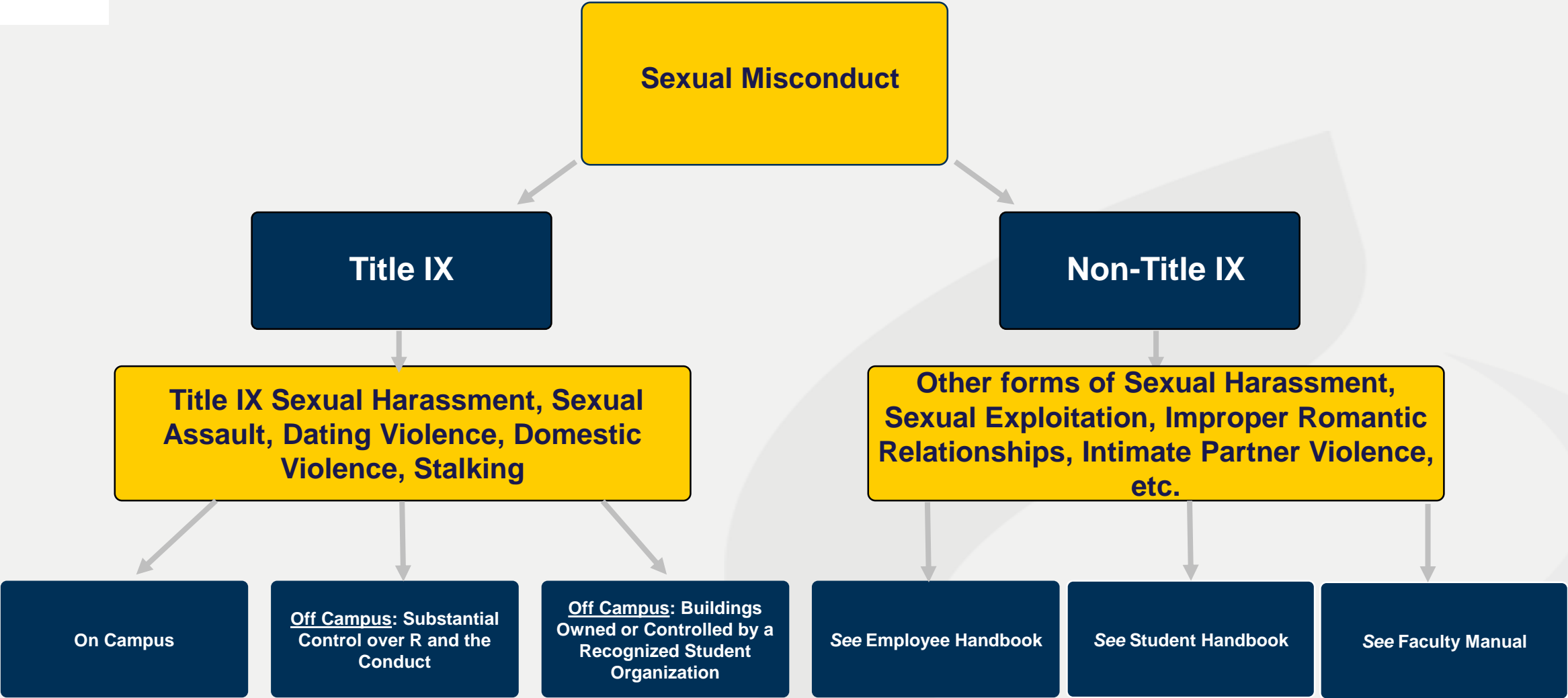
August 14, 2020

Applies to all College community members, regardless of the sexual orientation, gender expression, or gender identity of the parties involved, including students, faculty, staff, visitors, and independent contractors, as well as those who participate in the College's domestic programs and activities, whether on or off campus. Any such individual may make a report under this policy.

The College does not have jurisdiction to investigate reported incidents involving members of the College community that occurred prior to the individual being enrolled at or employed by the College when the incident did not occur on campus or in connection with the College's domestic program, activity, or employment.

Individuals who wish to report or file a complaint pertaining to sexual misconduct that falls outside the scope of this policy may do so under the Student Handbook or the Employee Handbook, as appropriate.

Applicable Policies for Sexual Misconduct



Trinity College Interim Policy on Sexual Harassment

Determining Jurisdiction:

The Title IX Coordinator or a Deputy Title IX Coordinator will determine if this policy should apply to a formal complaint. The sexual harassment investigation and adjudication process will apply when all of the following elements are met, in the reasonable determination of the Title IX Coordinator or a Deputy Title IX Coordinator:

- 1.The conduct is alleged to have occurred on or after August 14, 2020;
- 2.The conduct is alleged to have occurred in the United States;
- 3.The conduct is alleged to have occurred within the College's education program or
- 4.activity; and
- 5.The alleged conduct, if true, would constitute sexual harassment as defined in this policy.

If all of the elements are met, the College will investigate the allegations according to the investigation and adjudication process set forth below.

Trinity College Interim Policy on Sexual Harassment

Standing to File a Formal Complaint:

“A Complainant need not be a member of the College community so long as the Complainant at the time of the alleged sexual harassment was attempting to participate in the College’s education program or activity and the College has jurisdiction over the person accused of sexual harassment.”

Personal Jurisdiction:

“The College does not have jurisdiction to investigate reported incidents involving members of the College community that occurred prior to the individual being enrolled at or employed by the College, [or] when the incident did not occur on campus or in connection with the College’s domestic program, activity, or employment.”

Definitions of Sexual Harassment

For the purposes of this policy, “sexual harassment” is defined in three categories:

- Hostile Environment Sexual Harassment;
- Quid pro Quo Sexual Harassment; and
- Four specific offenses prohibited under the Clery Act, as amended by the Violence Against Women Act (VAWA) – Sexual Assault, Dating Violence, Domestic Violence, and Stalking.

Such conduct violates college policy when it has the purpose or effect of unreasonably interfering with an individual’s employment or educational opportunities by creating an intimidating, hostile, or offensive educational, living, or work environment.

Definitions of Sexual Harassment

- *Hostile Environment Sexual Harassment:*
 - Hostile environment sexual harassment involves unwelcome conduct of a sexual nature or based on a person's sex that is objectively offensive, pervasive, and severe. The College considers a variety of factors related to the objective offensiveness, pervasiveness and severity of the sex-based harassment, including: (1) the type, frequency, and duration of the conduct; (2) the identity and relationships of persons involved; (3) the number of individuals involved; (4) the location of the conduct and the context in which it occurred; and, (5) the degree to which the conduct affected one's employment or educational opportunities.

Definitions of Sexual Harassment

- *Quid Pro Quo Sexual Harassment:*
 - Quid pro Quo sexual harassment occurs when an employment opportunity (e.g., hiring, compensation, advancement, etc.) or an educational opportunity (e.g., admission, grades, research, etc.) is conditioned by an employee upon the targeted student or employee submitting to unwelcome requests or demands for sexual favors. **Only individuals with authority to grant or withhold employment or educational opportunities can engage in quid pro quo sexual harassment.**

Definitions of Sexual Harassment

Sexual Assault

Sexual assault is any intentional sexual contact without consent, whether such contact directly touches skin or is through clothing. It includes any intentional sexual contact with the breasts, buttocks, groin, genitals, mouth, or other bodily orifice of another; or touching another with any of these body parts; or making someone touch someone else's or that person's own body parts; or any intentional bodily contact of a sexual nature, whether or not it involves the previously mentioned body parts; or disrobing or exposure of another without that person's consent. Sexual assault also includes attempted nonconsensual sexual intercourse.

Definitions of Sexual Harassment

Rape

Rape is a form of sexual assault involving sexual penetration without consent. Rape is defined as: (a) any sexual penetration of the vagina or anus, however slight, with any object or body part without consent; or (b) any penetration of the mouth, however slight, by any sex organ or any object used in a sexual manner without consent.

Definitions of Sexual Harassment

Domestic Violence:

Domestic violence is abusive behavior in any relationship that is used by one person to gain or maintain power and control over another person. It includes asserted violent misdemeanor and felony offenses committed by the victim's current or former spouse, current or former cohabitant (e.g., roommate), or person similarly situated under domestic or family violence law. Domestic violence can be physical, sexual, emotional, economic, or psychological actions or threats of actions that influence another person.

Definitions of Sexual Harassment

Dating Violence:

Dating violence is violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim. Whether there was such a relationship will be determined by the length, type, and frequency of the interaction.

Definitions of Sexual Harassment

Stalking

- Stalking involves a **course of conduct** directed at a specific person that would cause a reasonable person to suffer **substantial emotional distress** or to **fear for that person's own safety or that of another**.
- This includes cyberstalking, a particular form of stalking in which electronic media such as the Internet, social networks, blogs, texts, or other similar forms of contact are used to pursue, harass, or make unwelcome contact with another person. Stalking and cyberstalking may involve individuals who are known to one another or have an intimate or sexual relationship or may involve individuals not known to one another. For the purposes of this definition:

Definitions of Sexual Harassment

For the purposes of the definition of **Stalking**:

- “**Course of conduct**” means two or more acts, including, but not limited to, acts in which the alleged stalker directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person’s property.
- “**Reasonable person**” means a prudent person who normally exercises due care under similar circumstances.
- “**Substantial emotional distress**” means significant mental suffering or anguish that may, but does not necessarily, require medical or other professional treatment or counseling.

Affirmative Consent

Affirmative consent means an active, clear and voluntary agreement by a person to engage in sexual activity with another person. Affirmative consent is informed, freely and actively given, and communicated through mutually understandable words or actions that indicate a willingness to participate in mutually agreed upon sexual activity. It is the responsibility of each person to ensure that he or she has the affirmative consent of all persons engaged in the sexual activity and that such consent is sustained throughout the sexual activity.

Affirmative Consent (cont'd)

Consent may never be given by minors, mentally disabled persons, those who are incapacitated, and those who are by law unable to give consent. **If a person is mentally or physically incapacitated or impaired so that such person cannot understand the fact, nature, or extent of the sexual situation, there is no consent; this includes impairment or incapacitation due to alcohol or drug consumption that meets this standard or being asleep or unconscious.**

Affirmative Consent (cont'd)

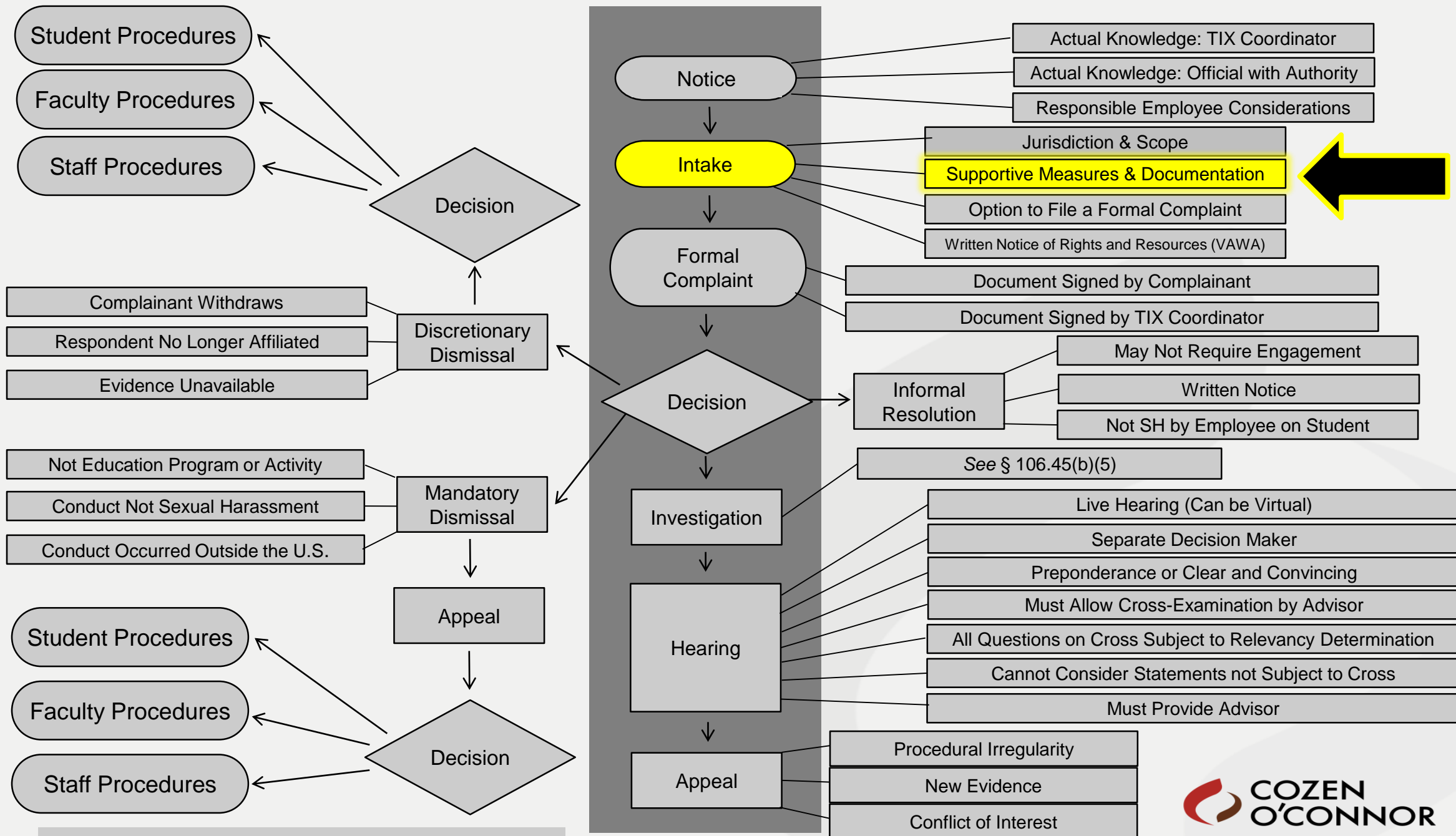
Consent obtained by fraud or force (actual or implied) is not consent, whether that force is physical force, threats, intimidation, or verbal coercion. A lack of verbal or physical resistance alone does not meet the affirmative-consent standard and does not of itself indicate consent. Past consent on its own cannot be construed as current/future consent.

Affirmative Consent (cont'd)

Moreover, consent may be **withdrawn** at any time. Consent to engage in sexual activity with one person does not imply consent to engage in sexual activity with another person. Consent to engage in one form of sexual activity does not imply consent to engage in other forms.

References to “consent” in this policy should be construed as meaning “affirmative consent.”

RESPONDING TO A REPORT OF PROHIBITED CONDUCT



Title IX

Core Tenets:

Two Key Provisions

- Treat complainants and respondents equitably by providing **remedies** to a complainant where a determination of responsibility for sexual harassment has been made against the respondent, and by following a **grievance process** that complies with this section before the imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in § 106.30, against a respondent.

Title IX Regulations May 19, 2020; §§ 106.44(a) and 106.45(b)(1)(i)

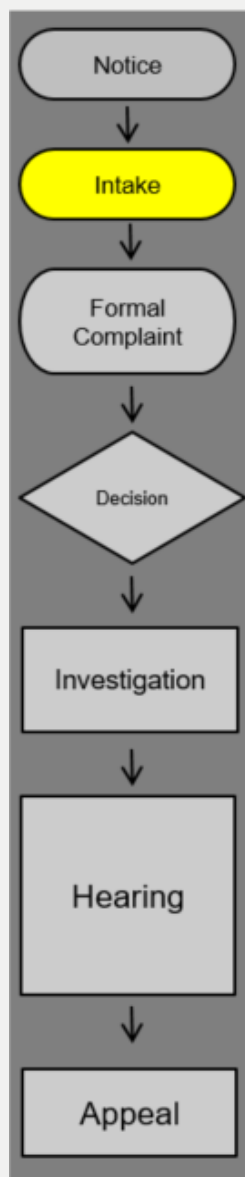
Understanding Two Key Provisions



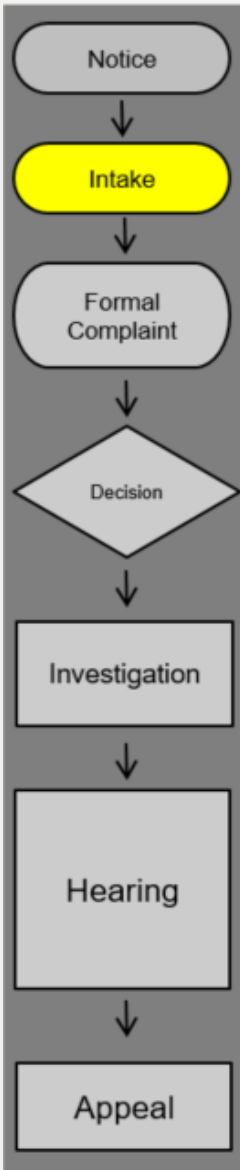
SUPPORTIVE MEASURES

Offering Supportive Measures

- The Title IX Coordinator must promptly contact the complainant to:
 - Discuss the **availability** of supportive measures as defined in § 106.30,
 - Consider the **complainant's wishes** with respect to supportive measures,
 - Inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and
 - Explain to the complainant the process for filing a formal complaint.



Supportive Measures

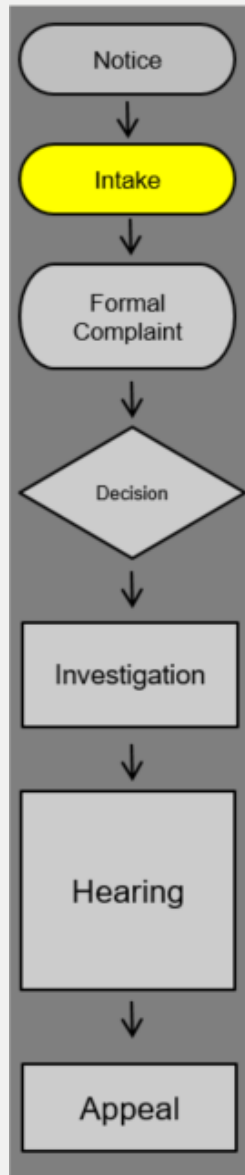


- Non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed.
- Designed to restore or preserve equal access to the recipient's education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the recipient's educational environment, or deter sexual harassment.

Title IX Regulations issued May 6, 2020; § 106.30(a)

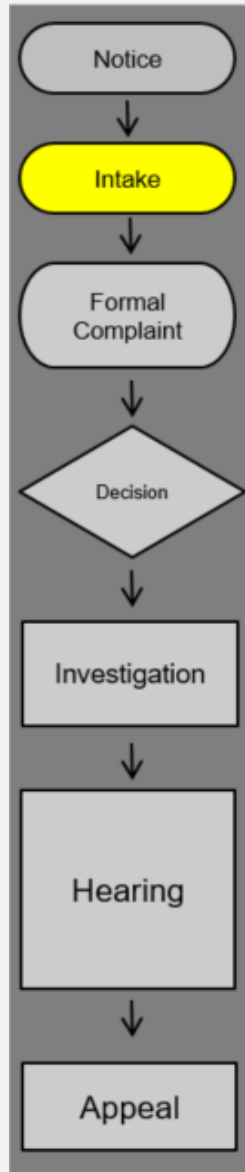
Supportive Measures

- May include counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of the campus, and other similar measures.



Title IX Regulations issued May 6, 2020; § 106.30(a)

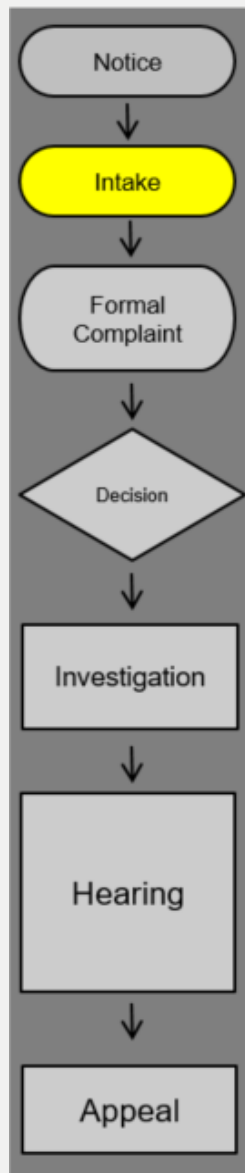
Supportive Measures



- 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.
- The Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures.

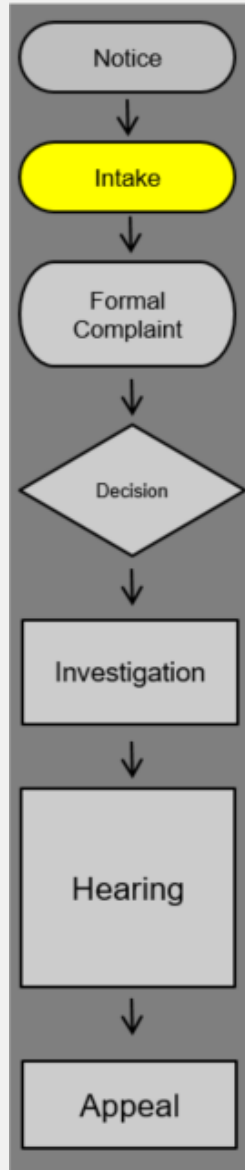
Title IX Regulations issued May 6, 2020; § 106.30(a)

Documentation



- Must maintain records of any actions, including any supportive measures, taken in response to a report or formal complaint of sexual harassment
- Must document the basis for its conclusion that its response was not deliberately indifferent, and document that it has taken measures designed to restore or preserve equal access to the recipient's education program or activity
- If a recipient does not provide a complainant with supportive measures, then the recipient must document the reasons why such a response was not clearly unreasonable in light of the known circumstances

Title IX Regulations issued May 6, 2020; § § 106.45(b)(10)(i) (ii)



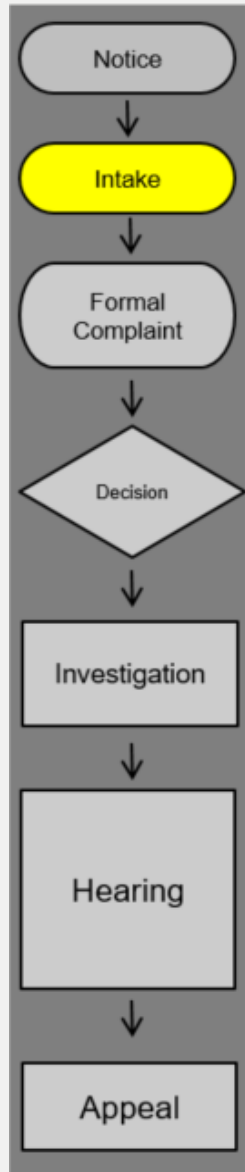
Emergency Removal for Students

- Must undertake an individualized safety and risk analysis and determine that an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal
- Must provide the respondent with notice and an opportunity to challenge the decision immediately following the removal

Title IX Regulations issued May 6, 2020; § 106.44(c)

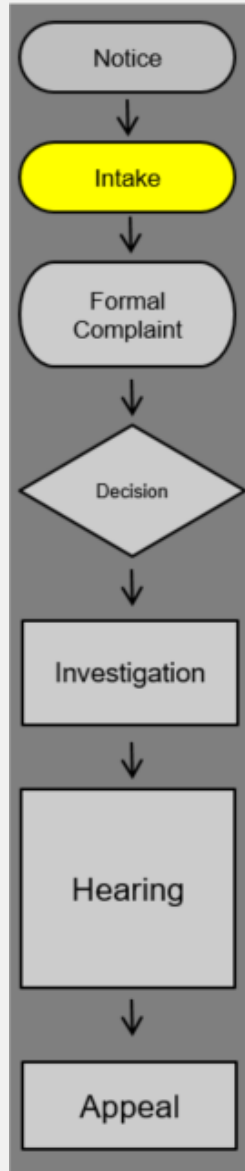
Emergency Removal

- Where a respondent poses an immediate threat to the physical health or safety of the complainant (or anyone else), § 106.44(c) allows emergency removals of respondents prior to the conclusion of a grievance process (or even where no grievance process is pending), thus protecting the safety of a recipient's community where an immediate threat exist.



Title IX Regulations issued May 6, 2020; Preamble at 566

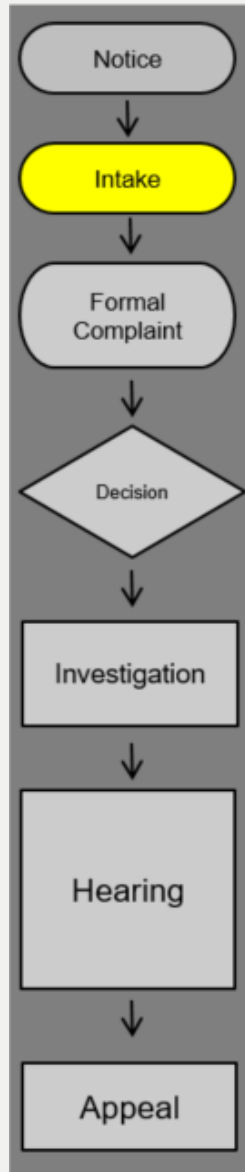
Emergency Removal



- The Department notes that the final regulations expressly allow a recipient to remove a respondent on an emergency basis and do not prescribe cross-examination as a necessary procedure during the post-removal opportunity to challenge the removal.
- Recipients may also implement supportive measures that restrict students' or employees' contact or communication with others.
- Recipients thus have avenues for addressing serial predator situations even where no victim chooses to participate in a grievance process.

Title IX Regulations issued May 6, 2020; Preamble at 1176-1177

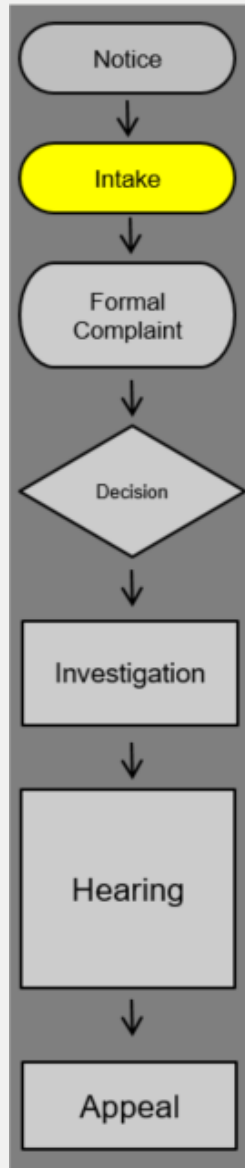
Administrative Leave



- Nothing in this subpart precludes a recipient from placing a non-student employee respondent on administrative leave during the pendency of a grievance process that complies with § 106.45.
- This provision may not be construed to modify any rights under Section 504 of the Rehabilitation Act of 1973 or the Americans with Disabilities Act.

Title IX Regulations issued May 6, 2020; § 106.44(d)

Practical Considerations & Challenges



- Limited scope allowable for emergency removal
 - Can you remove under code of conduct for lesser standard?
- What are the criteria for appropriate and reasonably available?
- What are measures to protect safety or deter sexual harassment?
- What supportive measures do you have to offer to a non-student/non-employee?
- Ensuring accurate documentation

Complainant Agency & Autonomy

- “The final regulations promote clarity as to recipient’s legal obligations, and **promote respect for each complainant’s autonomy**, by distinguishing between a complainant’s report of sexual harassment, on the one hand, and the filing of a formal complaint that has initiated a grievance process against a respondent, on the other hand.”
- “The Department acknowledges that **a recipient should respect the complainant’s autonomy and wishes** with respect to a formal complaint and grievance process **to the extent possible.**”

Title IX Regulations May 19, 2020, Preamble, 85 F.R. 30282; 30219

Reports vs. Formal Complaints

- The new regulations distinguish and separate a recipient's obligation to **respond to a report** of sexual harassment from a recipient's **obligation to investigate formal complaints** of sexual harassment
 - If students would like supportive measures but do not wish to initiate an investigation...they may make a report of sexual harassment.
 - If students would like supportive measures and also would like the recipient to initiate an investigation...they may file a formal complaint.

Title IX Regulations May 19, 2020; Preamble, 85 F.R. 30189

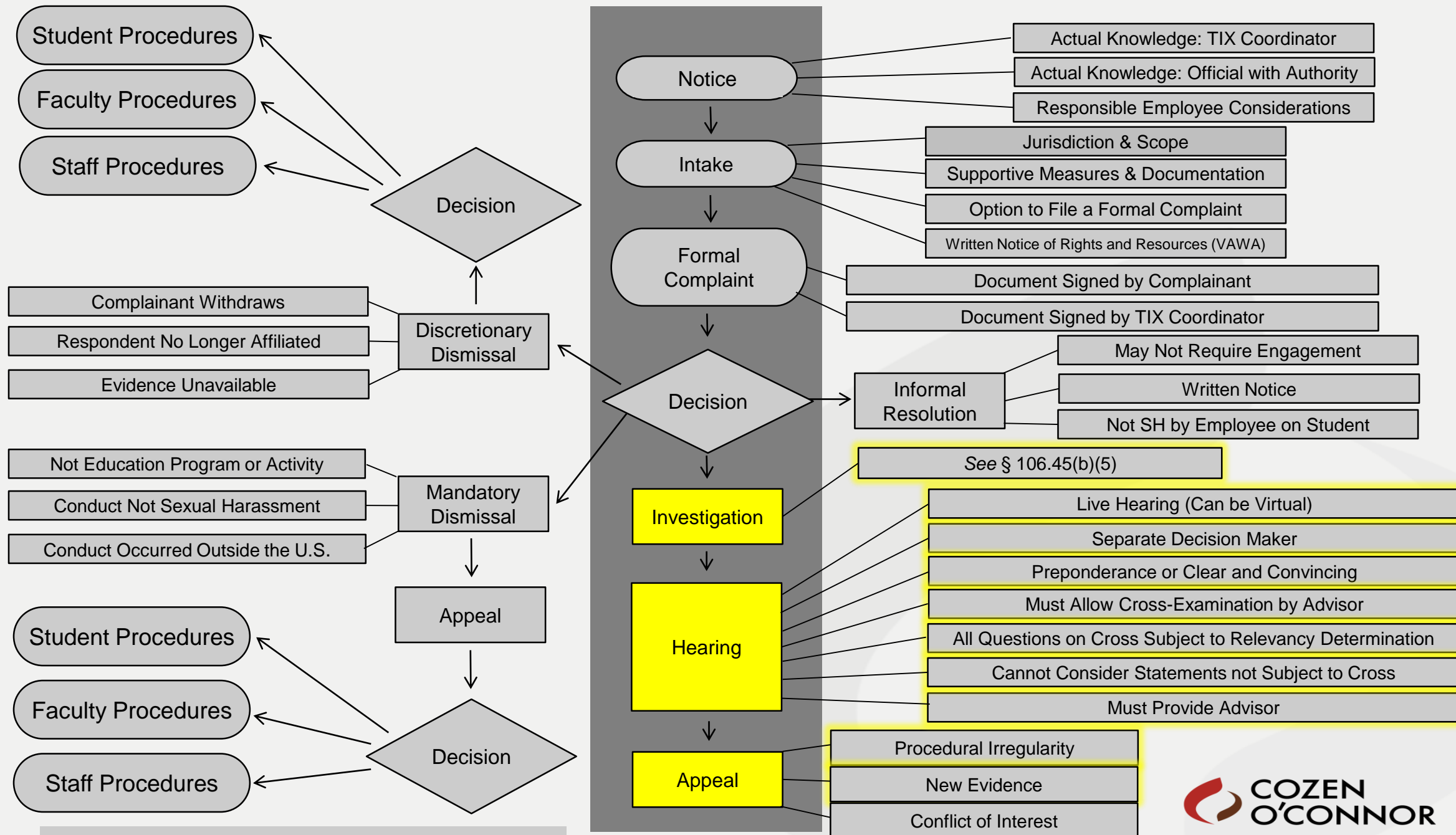
The Obligation to Investigate

- Formal complaint:
 - A document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and
 - Requesting that the recipient investigate the allegation of sexual harassment
- Once a formal complaint is filed, a recipient **must** investigate the allegations in that complaint
 - The Department believes that where a complainant has chosen to file a formal complaint, or the Title IX Coordinator has decided to sign a formal complaint, the recipient must investigate those allegations regardless of the merits of the allegations. (emphasis in original)

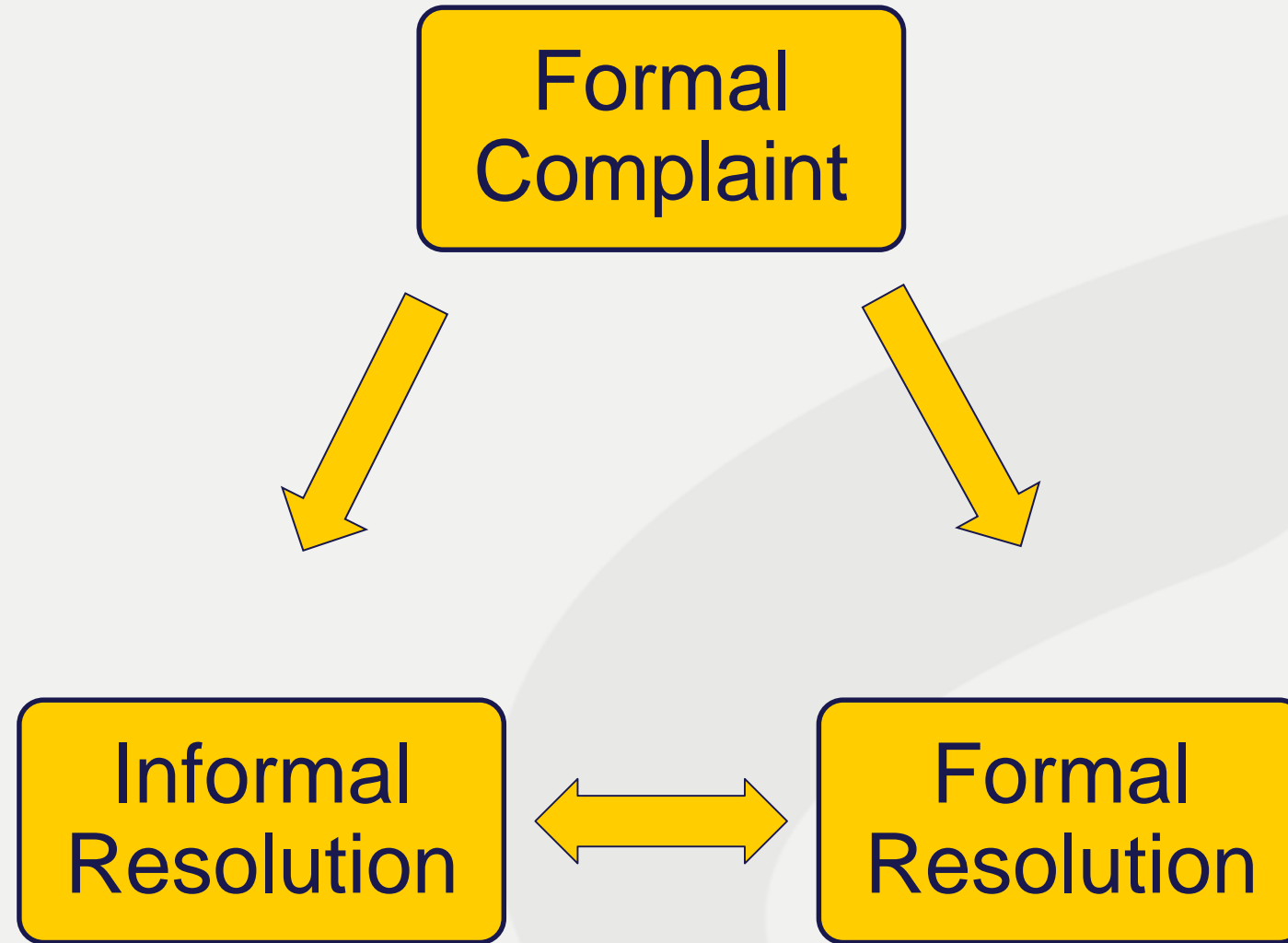
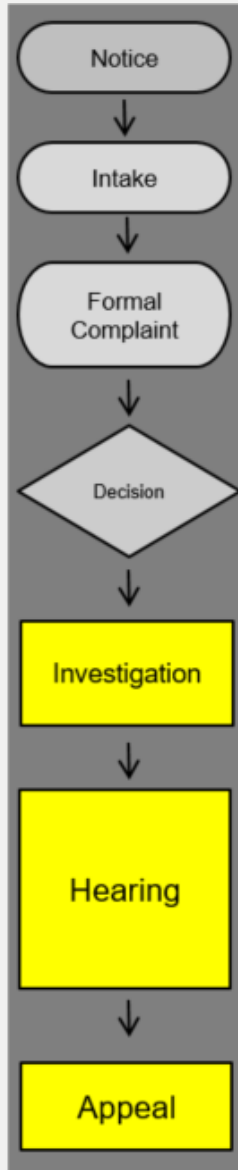
Title IX Regulations May 19, 2020 §106.30 Definitions and §106.45(b)(3)
Dismissal of a formal complaint; 85 F.R. 30574

DISCUSSION 2: SUPPORTIVE MEASURES

FORMAL RESOLUTION PROCESS



Resolution Process



Basic Requirements



“Treat complainants and respondents equitably by providing **remedies** to a complainant where a determination of responsibility for sexual harassment has been made against the respondent, and by following a **grievance process** that complies with this section before the imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in § 106.30, against a respondent.”

Relevant Regulations Sections:

Equitable Treatment: §§ 106.44(a) and 106.45(b)(1)(i)

Basic Requirements



- Require an objective evaluation of all relevant evidence
 - Including both inculpatory and exculpatory evidence
 - Credibility determinations may not be based on a person's status
- Implementers must be trained and free from conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent

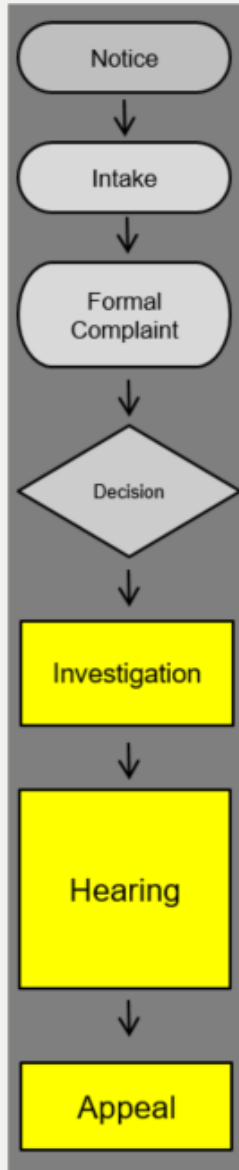
Relevant Regulations Sections:

Equitable Treatment: §§ 106.44(a) and 106.45(b)(1)(i)

Objective evaluation of all relevant evidence: § 106.45(b)(1)(ii)

Training and avoidance of conflicts or bias: § 106.45(b)(1)(iii)

Basic Requirements



- **Presumption that the respondent is not responsible** for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process
- Follow reasonably prompt time frames for conclusion of the grievance process with permissible delay for good cause

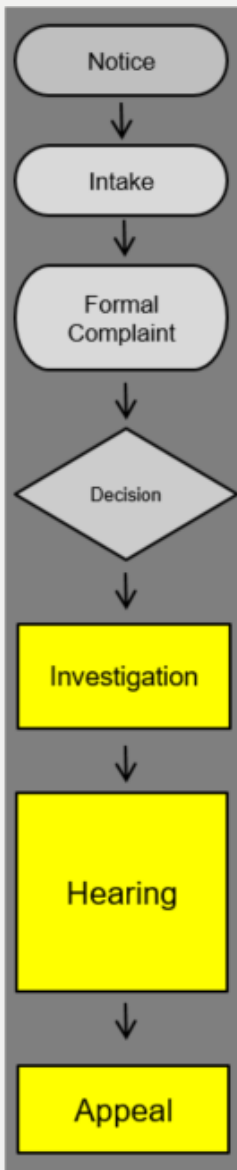
Relevant Regulations Sections:

Equitable Treatment: §§ 106.44(a) and 106.45(b)(1)(i)

Objective evaluation of all relevant evidence: § 106.45(b)(1)(ii)

Training and avoidance of conflicts or bias: § 106.45(b)(1)(iii)

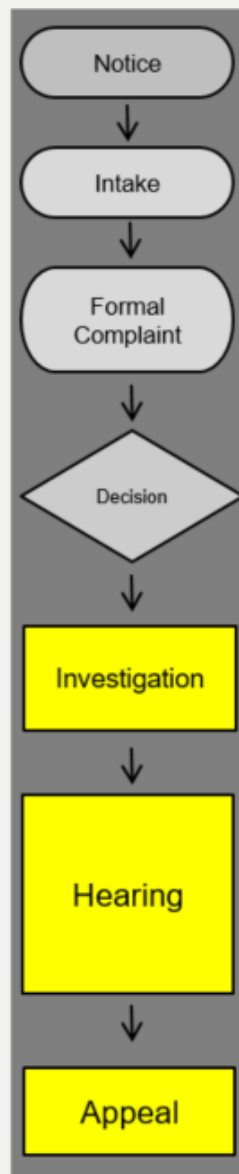
Basic Requirements



- Provide a **standard of evidence** to be used to determine responsibility, applying either the preponderance of the evidence standard or the clear and convincing evidence standard,
 - Apply the same standard of evidence for formal complaints against students as for formal complaints against employees, including faculty
 - Apply the same standard of evidence to all formal complaints of sexual harassment

Title IX Regulations May 19 2020; §§ 106.45(b)(1)(vii) and 106.45(b)(7)(i), 85 F.R. 30275

Basic Requirements



- Provide procedures and permissible bases for the complainant and respondent to appeal
- Provide a range of supportive measures available
- Not require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, **information protected under a legally recognized privilege**, unless the person holding such privilege has waived the privilege

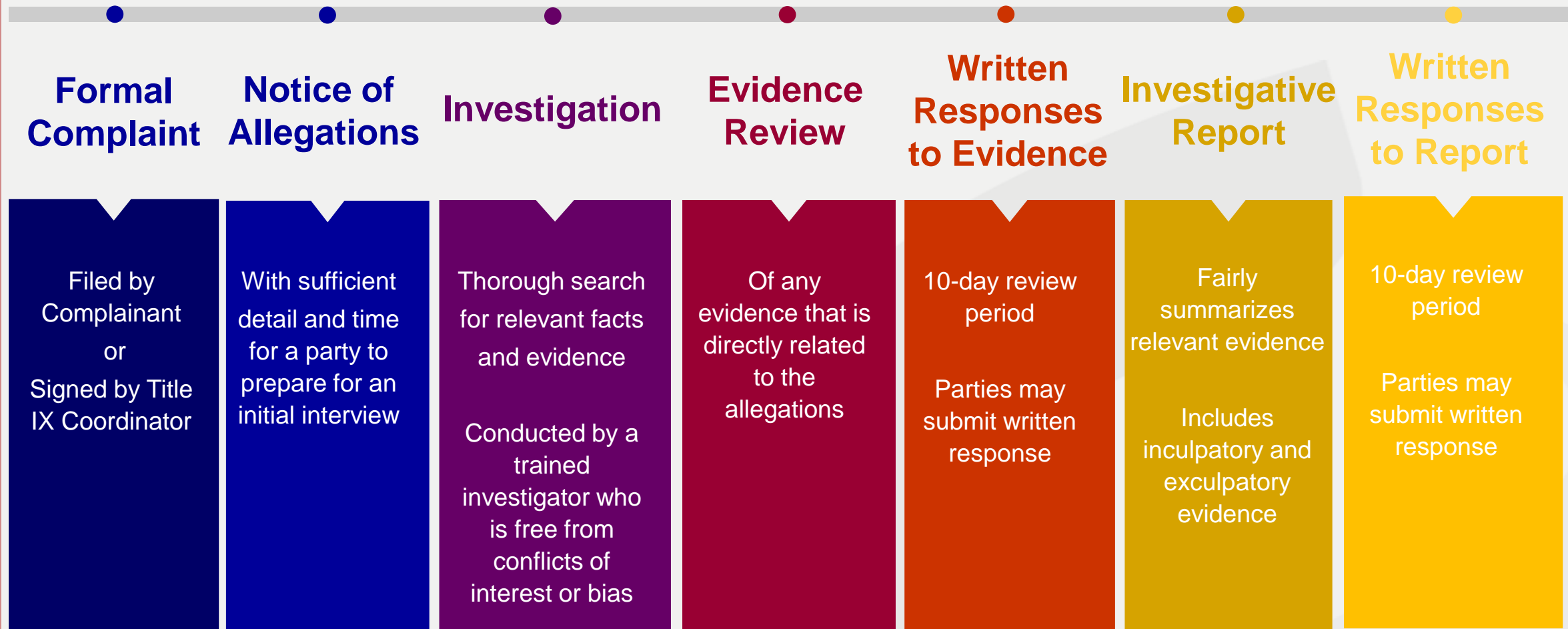
Relevant Regulations Sections:

Appeal: §§ 106.45(b)(1)(viii) and 106.45(b)(7)(ii)(F)

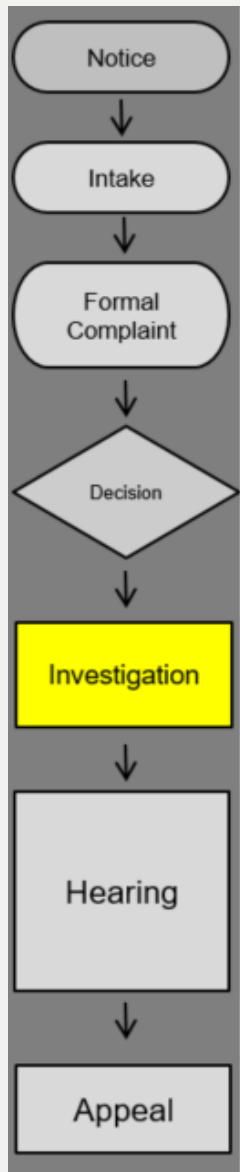
Range of Supportive Measures: § 106.45(b)(1)(ix)

Waiver of Privilege: § 106.45(b)(1)(x)

Overview of Investigation Requirements



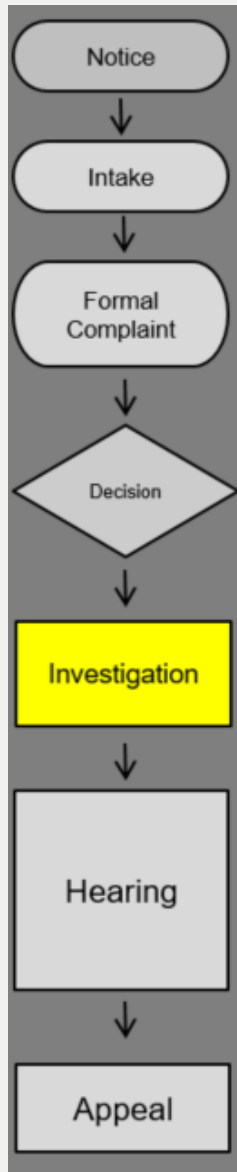
Advisor of Choice



- Provide the parties with the same opportunities to have others present during any grievance proceeding, including the opportunity 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.
- A recipient may establish restrictions on advisors' participation, as long as the restrictions apply equally to both parties.

Title IX Regulations May 19, 2020; §106.45(b)(5)(iv), 85 F.R. 30576

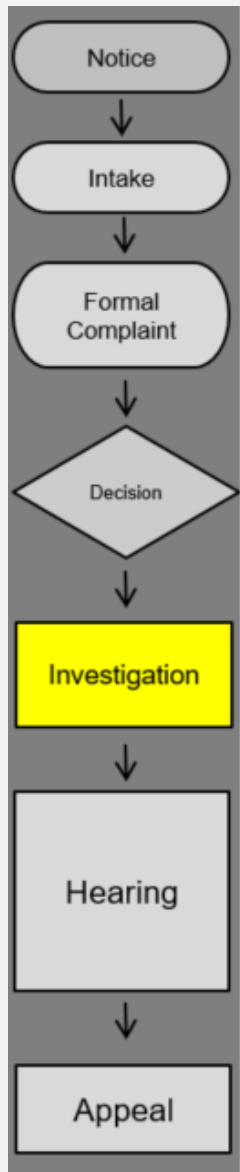
Restrictions on Advisor Participation



- We do not believe that specifying what restrictions on advisor participation may be appropriate is necessary, and we decline to remove the discretion of a recipient to restrict an advisor's participation so as not to unnecessarily limit a recipient's flexibility to conduct a grievance process that both complies with § 106.45 and, in the recipient's judgment, best serves the needs and interests of the recipient and its educational community.

Title IX Regulations May 19, 2020; Preamble 85 F.R. 30298

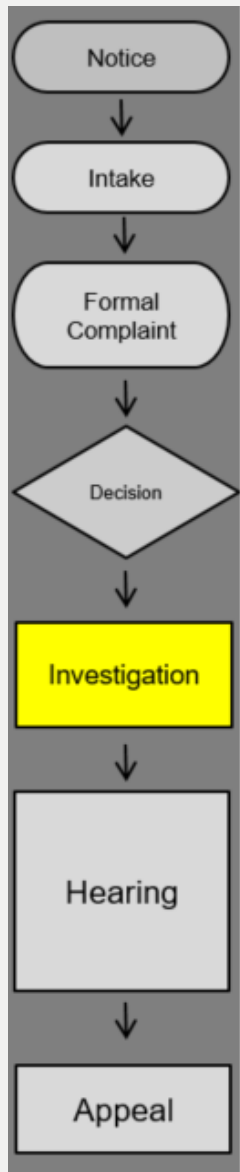
Restrictions on Advisor Participation



- “Section 106.45(b)(5)(iv) (allowing recipients to place restrictions on active participation by party advisors) and the revised introductory sentence to § 106.45(b) (requiring any rules a recipient adopts for its grievance process other than rules required under § 106.45 to apply equally to both parties) would, for example, **permit a recipient to require parties personally** to answer questions posed by an investigator during an interview, or personally to make any opening or closing statements the recipient allows at a live hearing, so long as such rules apply equally to both parties.”

Title IX Regulations May 19 2020; Preamble at 30298

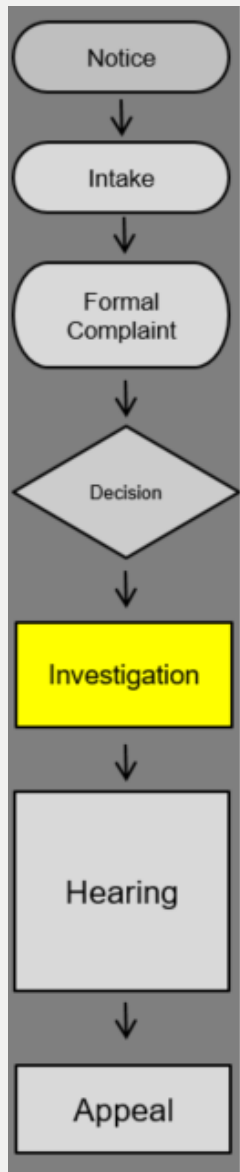
Training of Advisors Not Required



- The final regulations do not require training for advisors of choice. This is because the recipient is responsible for reaching an accurate determination regarding responsibility while remaining impartial, yet a party's ability to rely on assistance from an advisor should not be limited by imposing training requirements on advisors, who by definition need not be impartial because their function is to assist one particular party.

Title IX Regulations May 19 2020; Preamble at 30333

Training of Advisors Not Required

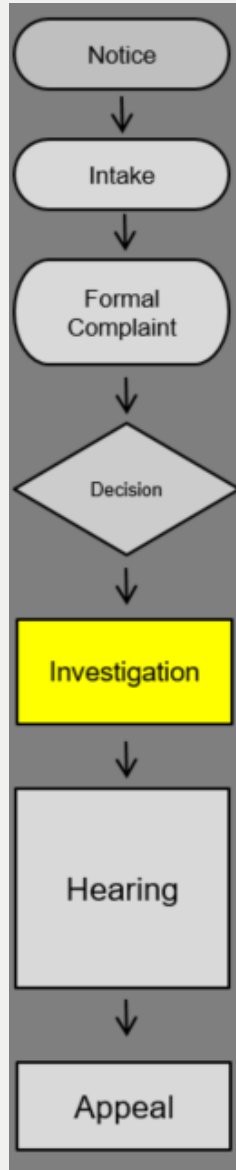


- To allow recipients to meet their obligations with as much flexibility as possible, the Department declines to require recipients to pre-screen a panel of assigned advisors from which a party could make a selection at a hearing, or to require provided advisors to receive training from the recipient.

Title IX Regulations May 19 2020; Preamble at 30340-41

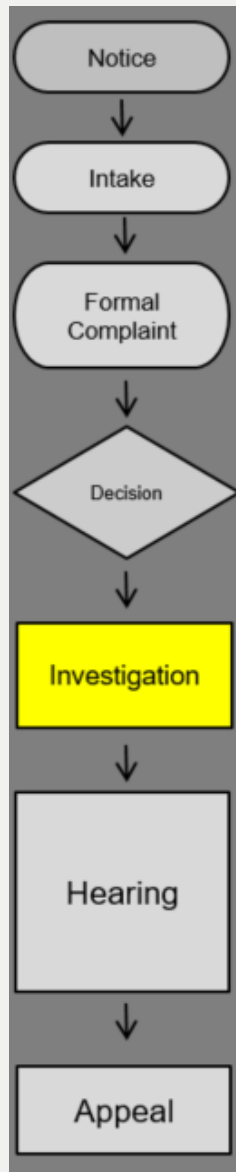
INVESTIGATION

Investigative Steps



- Notice of Investigation
 - Written notice to parties detailing allegations, policy violations, procedural rights, and other prescribed information
- Appointment of Investigator
 - No conflict of interest or bias
- Gathering Information
 - Investigator responsible for gathering all inculpatory and exculpatory information; cannot restrict parties from presenting evidence
 - Notice to parties prior to meeting
 - Interviews, documents, social media, photographs, site visits
 - Can consider expert witnesses/reports
 - Cannot coerce participation; cannot restrict parties from talking about case
- Evidence Review
 - Review by parties and advisors of all information directly related to the allegations
 - Opportunity to respond before investigation report is issued
- Investigation Report
 - Fair summary of all relevant evidence

Written Notice of Allegations



- Must provide written notice of the allegations.
 - Sufficient time to prepare a response before any initial interview
 - Sufficient details known at the time
 - identities of the parties, if known;
 - the conduct alleged to constitute sexual harassment; and
 - the date and location of the alleged incident, if known.

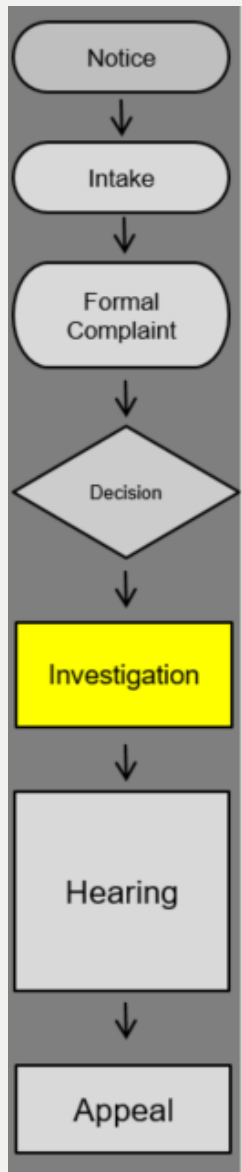
Written Notice of the Allegations

— Must state that:

- the respondent is presumed not responsible for the alleged conduct
- a determination regarding responsibility is made at the conclusion of the grievance process

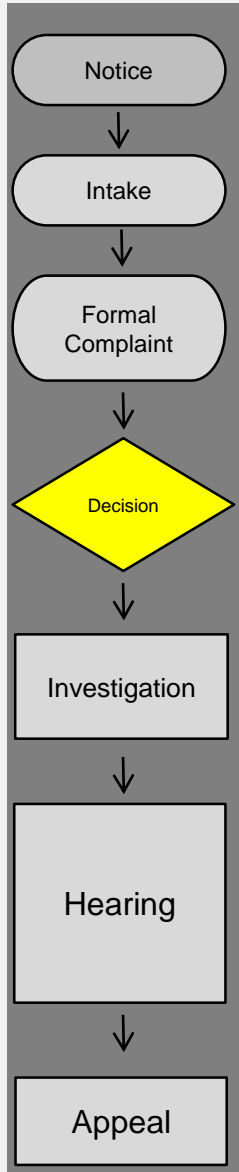
— Must inform the parties:

- they may have an advisor of their choice
- they may inspect and review evidence gathered
- of a prohibition against knowingly making false statements or knowingly submitting false information



Title IX Regulations May 19, 2020; § 106.45(b)(2) 85 F.R. 30576

Written Notice of Allegations



- The notice of the allegations must:
 - Be provided with sufficient time for a party to prepare a response before an initial interview
 - While the initial notice must be sent “upon receipt” of a formal complaint, with “sufficient time” for a party to prepare for an initial interview, such provisions do not dictate a specific time frame for sending the notice, leaving recipients flexibility to, for instance, inquire of the complainant details about the allegations that should be included in the written notice that may have been omitted in the formal complaint.

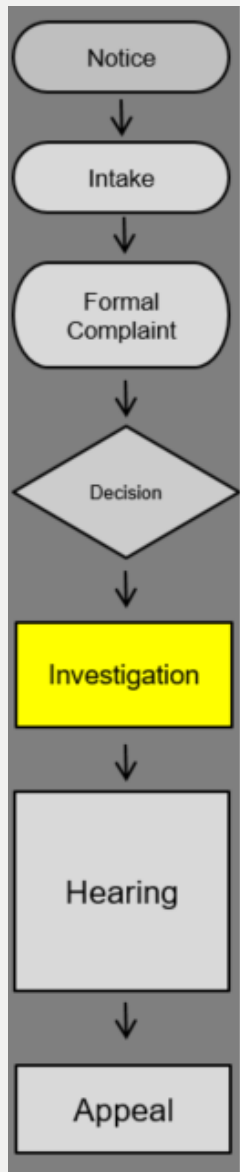
Title IX Regulations May 19, 2020; §106.45(b)(2); Preamble 85
F.R. 30283

Evidentiary Considerations

- Relevance
- Privileged Information & Records
- Prior Sexual History
- Prior or Subsequent Misconduct
- Setting Evidentiary Rules

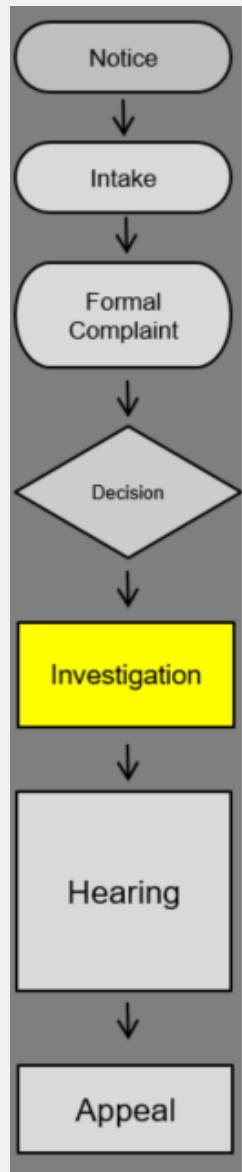
Relevance

- The final regulations do not define relevance, and the ordinary meaning of the word should be understood and applied.



Title IX Regulations May 19, 2020; Preamble at 30247, FN 1018

Relevance



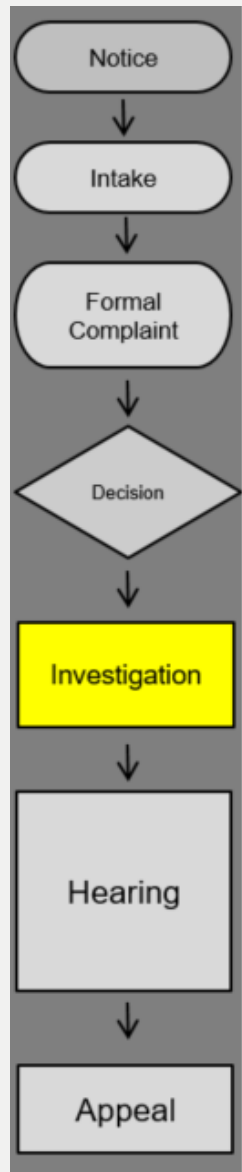
“While the proposed rules do not speak to

- admissibility of hearsay,
- prior bad acts,
- character evidence,
- polygraph (lie detector) results,
- standards for authentication of evidence,
- or similar issues concerning evidence,

the final regulations require recipients to **gather and evaluate relevant evidence**, with the understanding that . . .

Title IX Regulations May 19, 2020; Preamble at 30247, footnotes omitted

Relevance

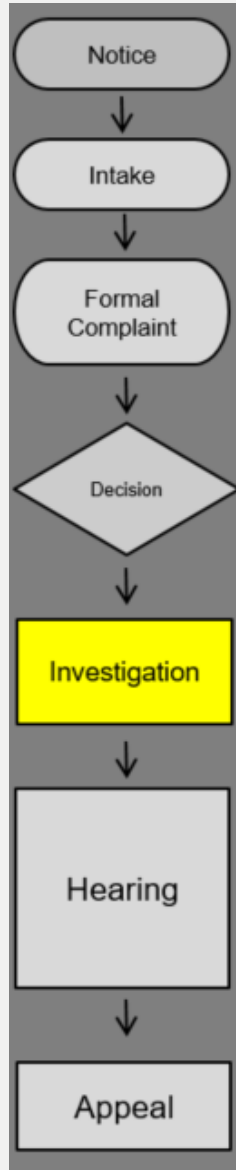


- This includes **both inculpatory and exculpatory evidence**, and
- The final regulations deem questions and evidence about a complainant's prior sexual behavior to be **irrelevant** with two exceptions, and
- Preclude use of any information protected by a **legally recognized privilege** (e.g., attorney-client)."

Title IX Regulations May 19, 2020; Preamble at 30247, footnotes omitted

Privileged Information

- Not require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, **information protected under a legally recognized privilege**, unless the person holding such privilege has waived the privilege

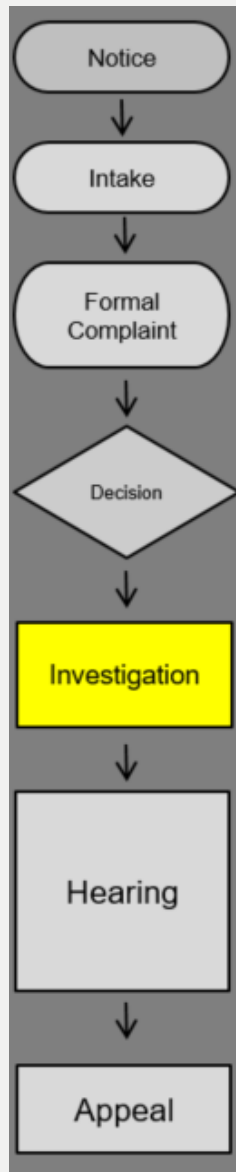


Title IX Regulations May 19, 2020; § 106.45(b)(1)(x) 85 F.R.30361

Interim Policy on Sexual Harassment

- “There is no requirement that a Complainant or Respondent share privileged or confidential medical and counseling records. However, where a party chooses to share medical or counseling records as part of the investigation, the records will be included in the investigation file and will be available to the other party.”

Prior Sexual History

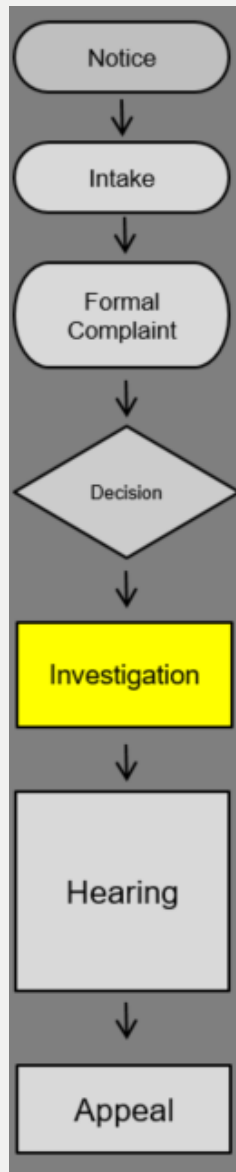


- Questions and evidence about the complainant's sexual predisposition or **prior sexual behavior** are not relevant, unless such questions and evidence about the complainant's prior sexual behavior are offered:
 - To prove that someone other than the respondent committed the conduct alleged by the complainant, or
 - To prove consent, if the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent.

Title IX Regulations May 19, 2020; §§ 106.45(b)(1)(iii) and 106.45(b)(6) 85 F.R.30461

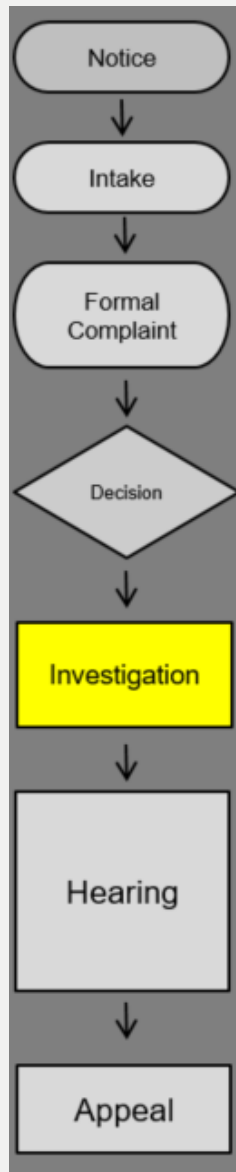
Prior Sexual History

- Only applies to complainants
 - The Department reiterates that the rape shield language in this provision does not pertain to the sexual predisposition or sexual behavior of respondents, so **evidence of a pattern of inappropriate behavior by an alleged harasser** must be judged for relevance as any other evidence must be.



Title IX Regulations May 19, 2020; §§ 106.45(b)(1)(iii) and 106.45(b)(6);
Preamble 85 F.R.30353

Prior Sexual History: Motive



- The Department disagrees that the rape shield language is too broad. Scenarios described by commenters, where a respondent might wish to prove the complainant had a motive to fabricate or conceal a sexual interaction, do not require admission or consideration of the complainant's sexual behavior.
- Respondents in that scenario could probe a complainant's motive by, for example, inquiring whether a complainant had a dating or romantic relationship with a person other than the respondent, without delving into a complainant's sexual behavior; sexual behavior evidence would remain irrelevant in such circumstances.

Title IX Regulations May 19, 2020; §§ 106.45(b)(1)(iii) and 106.45(b)(6);
Preamble at 30351

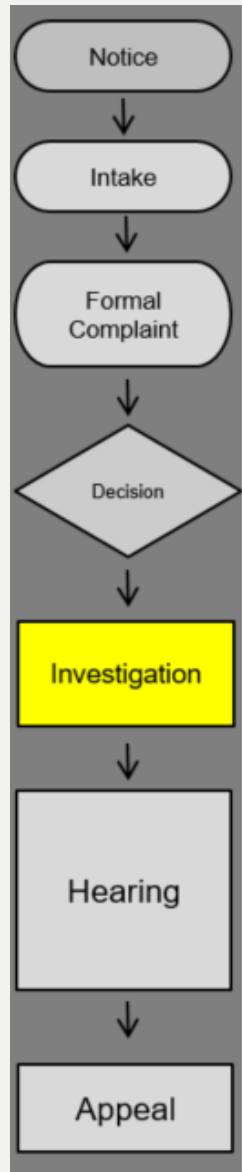
Prior or Subsequent Misconduct

- The regulations do not prohibit the use of prior or subsequent misconduct
 - “Evidence of a pattern of inappropriate behavior by an alleged harasser” permitted if relevant

Practical Considerations

- Prior or subsequent misconduct may be relevant to demonstrate:
 - Intent/knowledge/state of mind
 - Motive
 - Opportunity
 - Lack of mistake
 - Pattern
 - Identity
 - Information that is inextricably interwoven with the facts

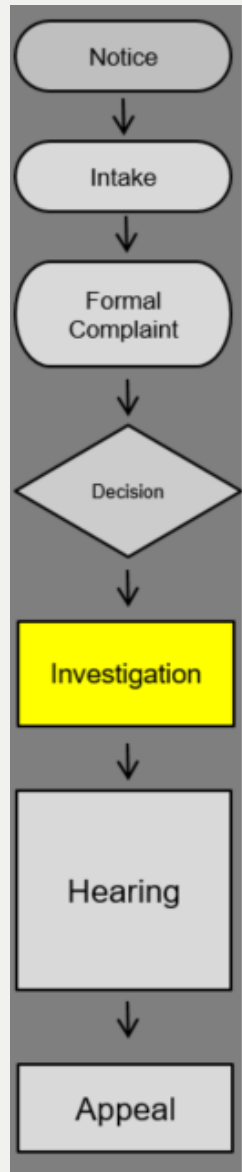
Flexibility to Adopt Rules



- “Within these evidentiary parameters **recipients retain the flexibility to adopt rules that govern how the recipient’s investigator and decision-maker evaluate evidence and conduct the grievance process (so long as such rules apply equally to both parties).**
- **Relevance is the standard that these final regulations require**, and any evidentiary rules that a recipient chooses must respect this standard of relevance.

Title IX Regulations May 19, 2020; Preamble at 30248

Flexibility to Adopt Rules – Except



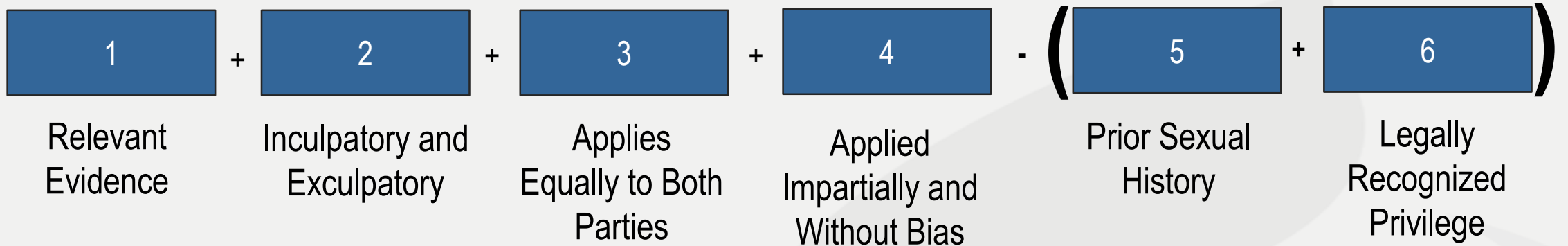
- For example, a recipient **may not adopt a rule excluding relevant evidence** because such relevant evidence may be **unduly prejudicial, concern prior bad acts, or constitute character evidence**.
- A recipient's additional evidentiary rules may not, for example, **exclude *relevant* cross-examination questions** even if the recipient believes the questions assume facts not in evidence or are misleading.

Interim Policy on Sexual Harassment

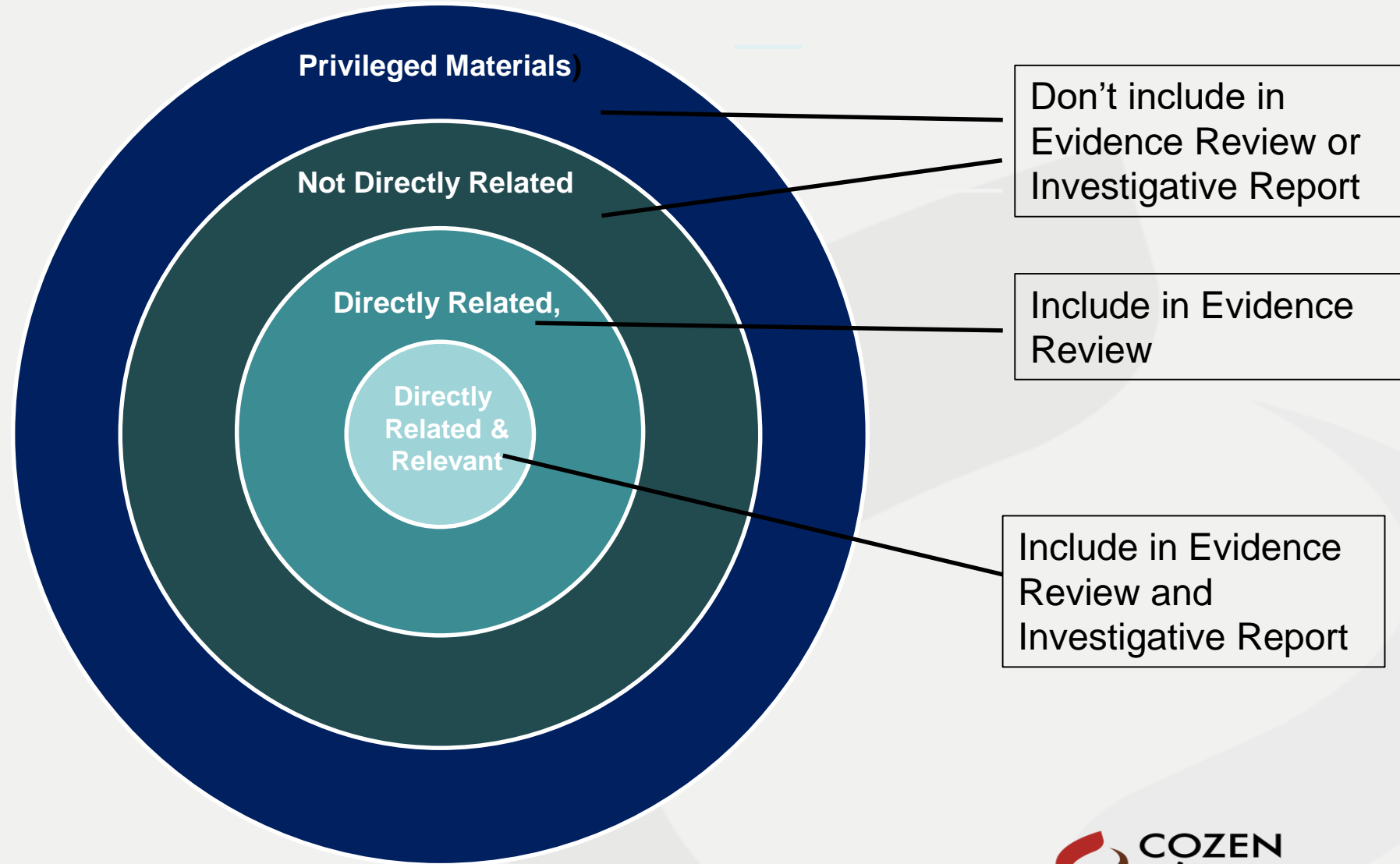
“Prior sexual history may be considered under the following limited circumstances:

- Where there was a prior or ongoing relationship between the Complainant and Respondent, and the Respondent asserts that consent was sought and given, the prior sexual history between the parties may be relevant to assess the manner and nature of communications between the parties. However, the mere fact of a current or previous dating or sexual relationship, by itself, is not sufficient to constitute consent.
- To analyze allegations of a pattern or practice of past conduct which is similar in nature by the respondent.

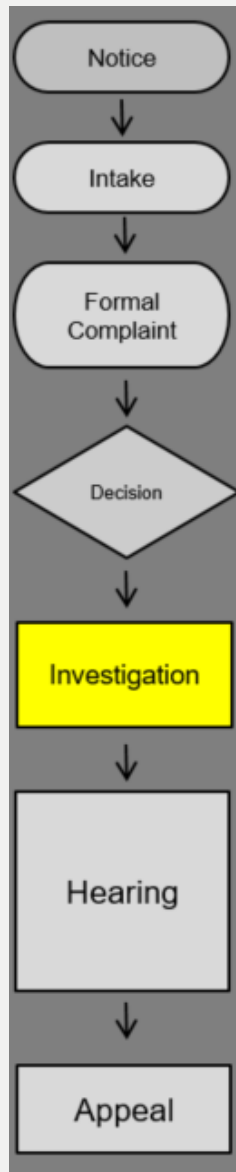
Evidentiary Rules Must Consider



Evidentiary Levels for Inclusion



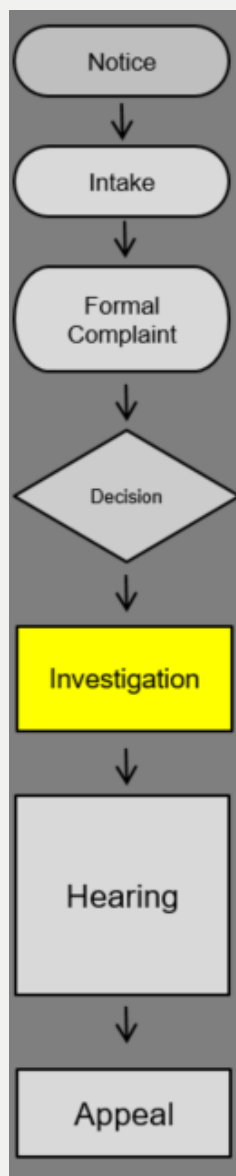
Investigation Report



- Create an **investigation report** that fairly summarizes relevant evidence and
- Send to each party and the party's advisor, if any, the investigation report in an electronic format or a hard copy, for their review and written response, **at least 10 days prior** to the determination of responsibility (hearing)
 - This opportunity allows the parties to “effectively provide context to the evidence included in the report” and to “advance their own interests for consideration by the decision-maker.”

Title IX Regulations May 19, 2020; §§ 106.45(b)(5)(vii); Preamble 85 F.R.30254, 30307, 30309

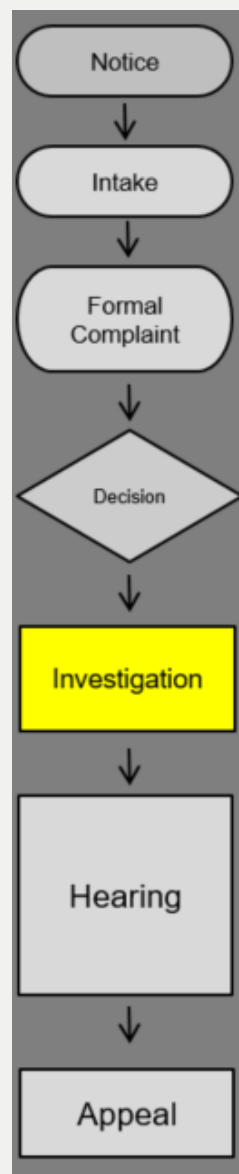
Investigation Report



- “The regulations do not address the specific contents of the investigative report other than specifying its core purpose of summarizing the relevant evidence.”
- “The Department takes no position here on such elements beyond what is required in these final regulations; namely, that the investigative report must fairly summarize relevant evidence.”

Title IX Regulations May 19, 2020; §§ 106.45(b)(5)(vii); Preamble 85 F.R.30310.

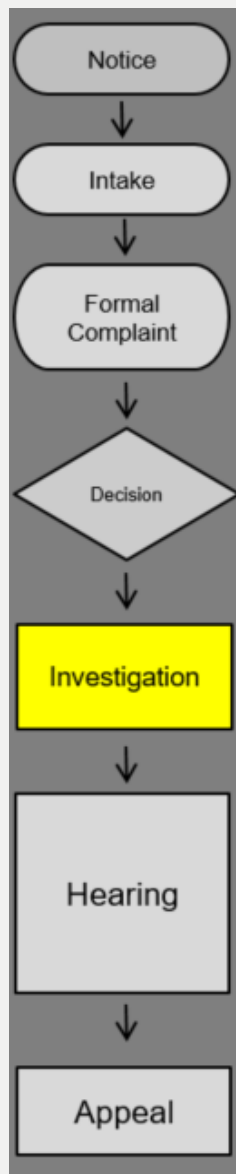
Investigation Report



“We note that the decision-maker must prepare a written determination regarding responsibility that must contain certain specific elements (for instance, a description of procedural steps taken during the investigation) and so a recipient **may wish to instruct the investigator to include such matters in the investigative report**, but these final regulations do not prescribe the contents of the investigative report other than specifying its core purpose of summarizing relevant evidence.”

Title IX Regulations May 19, 2020; §§ 106.45(b)(5)(vii); Preamble 85 F.R. 3010.

Investigation Report



- Allow parties to provide a written response to the investigation report
 - “Recipients must also give the parties meaningful opportunity to understand what evidence the recipient collects and believes is relevant, so the parties can advance their own interests for consideration by the decision-maker.”
 - “The decision-maker is obligated to objectively evaluate all relevant evidence and the parties have the opportunity to argue about what is relevant (and about the persuasiveness of relevant evidence).”

Title IX Regulations May 19, 2020; §§ 106.45(b)(5)(vii); Preamble 85 F.R. 30309, 30249

Trinity College: Investigative Steps

- Notice of Investigation
 - Written notice to parties detailing allegations, policy violations, procedural rights, and other prescribed information
- Assignment of Investigator(s)
 - No conflict of interest or bias
- Gathering Information
 - Investigator responsible for gathering all inculpatory and exculpatory information; cannot restrict parties from presenting evidence
 - Notice to parties prior to meeting
 - Interviews, documents, social media, photographs, site visits
 - Can consider expert witnesses/reports
 - Cannot coerce participation; cannot restrict parties from talking about case
- Preliminary Investigation Report and Evidence Review
 - Review by parties and advisors of the PIR and all information directly related to allegation
 - Parties may submit a response within five calendar days of receiving the PIR.
- Investigation Report
 - Fair summary of all relevant evidence
 - Both parties may submit a written response within 10 calendar days of receiving the FIR.

DYNAMICS OF SEXUAL AND GENDER-BASED HARASSMENT AND VIOLENCE

Identifying Our Own Biases

- What does sexual assault look like?
- Over-identifying with complainant or respondent
 - I would have...
 - If it was me...
 - That could have been me...
 - What were they thinking when...
 - What did they think was going to happen?
- Culture/diversity/world view

Diversity and Culture

- Sensitivity to language and bias in a variety of communities
 - LGBTQ+
 - Cultural differences
 - Race
 - Insular groups
 - 504/disability
 - Neurodiversity
- Reporting barriers
- Communication differences/impediments

Case Evaluation

- Nature of sexual and gender-based harassment and violence
 - Delay in reporting
 - Barriers to reporting and proceeding with formal action
 - Reluctance to report to law enforcement
 - Word-against-word credibility
 - Often involve the use of alcohol or other drugs
 - Often involve people who are known to one another
- Evaluate in the context of all available information

Disclosure

- A process where an individual reveals abuse or assault
- On-going, not a one time event
- Stages of Disclosure:
 - Denial
 - Tentative
 - Active
 - Recantation
 - Reaffirmation
- Triggers for Disclosure
 - Accidental – person's secret is found out
 - Purposeful – person makes decision to tell

Framing Difficult Questions

- Why frame?
- Difficult topics:
 - Alcohol or other drug use
 - Clothing
 - Body positions
 - How and whether consent was communicated

ALCOHOL, DRUGS AND INCAPACITATION

The Role of Alcohol

- Central nervous system depressant
- Impairs cognition and psychomotor skills
- Progressively impairs all body functions
- Decreases inhibitions
- Impairs perceptions
- May cause blackouts or loss of consciousness
- May cause memory loss
- Effects exacerbated when mixed with other drugs
- Intoxication breeds vulnerability
- A person may be less likely to think someone is trying to sexually assault him/her/them
- A person intent on harming another may not need to use physical force
- A person may not realize incident has occurred
- A person may delay in reporting for multiple reasons
- No toxicological evidence of BAC/impairment level due to delay in report

The Role of Alcohol

- 80% to 90% of sexual assaults on campus are acquaintance rapes and involve drugs or alcohol.¹
- “Nearly half of America’s 5.4 million full-time college students abuse drugs or drink alcohol on binges at least once a month.”²
- 90% of campus rapes are alcohol related.³

1. DOJ, National Institute of Justice, 2005.

2. National Center on Addition and Substance Abuse at Columbia University 2007.

3. Bureau of Justice Statistics, 2000, National Commission on Substance Abuse at Colleges and Universities

Alcohol: Investigative Challenges

- Lack of memory
- Inability to give detail
- Person may have been unconscious or in and out of consciousness
- Delay in reporting because:
 - May not know event occurred
 - May not recognize it as lack of consent
 - Feeling of “contributory negligence”
 - Concerns over conduct policy consequences

Know Your Policy on Incapacitation

- Consent may never be given by minors, mentally disabled persons, those who are incapacitated, and those who are by law unable to give consent. If a person is mentally or physically incapacitated or impaired so that such person cannot understand the fact, nature, or extent of the sexual situation, there is no consent; this includes impairment or incapacitation due to alcohol or drug consumption that meets this standard or being asleep or unconscious.

Frame Questions Appropriately

- Be aware that questions about drugs and alcohol are often subject to misinterpretation
- Explain amnesty
- Commit to clarity on why you are asking
- Explain the reasons for your questions
 - Assessing for incapacitation
 - Evaluating the “lens” through which the party or witness observed the events (opportunity to see, hear, understand, and remember)
- Explain that you will ask similar questions of all witnesses
- Invite the witness to ask questions before you go further

Get Detailed Information

- Timeframe of consumption (first drink, last drink, spacing)
- Number of drinks
- For each drink:
 - Type (beer, wine, liquor – with specific brand, if possible)
 - Was it mixed with anything? Who mixed it?
 - How was it served? (Bar or restaurant will lead to more available information)

Get Detailed Information

- List of others present and when they were there
- Other factors that affect the impact of alcohol:
 - Food consumed before, during, and after and whether food intake was normal or abnormal for the person
 - Height and weight
 - Medications
 - Different sleep patterns
 - Illness
 - Low hydration
 - History of blackouts

Get Detailed Information

- Complainant's internal experience of their own intoxication (subjective)
 - Loss of consciousness/lack of memory – get the “bookends” of memory
 - Physical impairments – walking, standing, sitting, grasping, keeping head upright, ability to text, ability to remove one's own clothing, incontinence, vomiting
 - Cognitive impairments – dizzy, foggy, sleepy, giggly, hyperactive, sluggish, nonsensical
 - Verbal impairments – slurring, inability to talk, volume regulation
 - Any other effects

Get Detailed Information

- Others' observations of Complainant (objective)
 - Observations of Complainant's consumption – when, where, what, who else was there?
 - Physical impairments
 - Cognitive impairments
 - Verbal impairments
 - Any other effects

Get Detailed Information

- Other information that can establish timeline, assist in assessing level of impairment, and can provide corroboration of either party's account:
 - History of relationship between the parties
 - Witness's knowledge of Complainant's sober behavior
 - Parties' communications or interactions with each other (compare pre- and post-incident)
 - Parties' descriptions of the incident to others – context, content, demeanor
 - Text/social media messages sent before, during, and after the incident

Considerations

Avoid	Why?	Try this instead
Asking about intoxication on a scale (e.g. "from 1-10")	There is no universal understanding of what the numbers on the scale mean	Asking about the impacts of alcohol on a person physically, cognitively, verbally, and otherwise; Asking for specific observations regarding conduct
Committing to a determining a specific BAC	It is very difficult to pinpoint a person's BAC after the fact. Additionally, BAC is only one data point and does not correlate precisely to a person's subjective experience or objective indicia of intoxication/incapacitation.	Use BAC when it is available in medical records. Otherwise, avoid attempting to pinpoint the BAC and rely instead on the subjective and objective indicia of intoxication/incapacitation.
Failing to obtain or ignoring medical evidence or observations of first responders, when they are available	Such witnesses are (generally) sober, trained observers who are paying close attention to the parties and surroundings. Their observations are critical, but it may necessitate coordination with external law enforcement or medical personnel.	Be attendant to mentions of first responders or medical personnel and try to obtain as much information about them as you can. Witnesses may remember, for example, that the EMT was female and had short brown hair. Work with your local agencies to identify such personnel and ascertain whether they can be made available for an interview.
Failing to fully contextualize witnesses' observations through use of a timeline	Witness statements taken out of context do not help answer the critical question: whether the Respondent knew or should have known that the Complainant was incapacitated.	Create a visual timeline of events that shows the parties' alcohol consumption, witness observations, and the alleged incident. Circle or highlight the timeframe when the parties were in each other's presences.

Creating a Universal Timeline

- Using information gathered in the investigation, create a timeline that captures both parties' actions and show the timeframe when they were in the same place (below in blue)

Complainant	Source(s)		Respondent	Source(s)
Complainant and C "pre-gamed" at A's apartment. Drank 3 shots Jim Beam and ate chips and guacamole. Walked from A's apartment to second "pre-game" at B's apartment. Drank 2 shots of Ciroc Peach and threw up in B's sink.	C interview A interview B interview C's photos w/ date/time	8:00 PM	Respondent arrived at party by himself. Filled one 16-ounce cup with beer and drank it quickly.	R interview
		8:30 PM	Saw friends X, Y, Z. Z gave Respondent keys to his room where Z kept hard liquor. Respondent retrieved a 750 ml bottle of Fireball and drank approximately ¼ of it himself over the course of about an hour and a half. X and Y each had about 2 shot glasses full.	R interview X interview Y interview Z interview
		9:00 PM		
Complainant arrived at party with A, B, C. Complainant's friend D got her a 16-ounce cup of "jungle juice" which she drank slowly over the course of about an hour.	C interview A interview B interview D interview	9:30 PM		
		10:00 PM		
Complainant went upstairs to check out the view from the roof. As she was walking back downstairs, she took the last sip of her "jungle juice" and saw Respondent. Complainant texted her mom, "addfa."	C interview C's texts C's photos w/ date/time	10:30 PM	Respondent texted Z "thanks for the fireball. Let me know where I can meet you to give you your key back." Respondent saw Complainant coming down the stairs.	R interview R's texts
Complainant reported a complete memory loss from about 10:30 until the next morning.	C interview	11:00 PM	Complainant and Respondent went upstairs into the bathroom. Respondent's friend W walked in as they were kissing and undressing.	R interview W interview
Complainant's friend A saw her leaving the bathroom with her shirt on backwards. A escorted Complainant home.	A interview	11:30 PM	Respondent left the bathroom and texted Z "I just got laid!"	R interview Z interview R's texts

INVESTIGATIVE RESOURCES

Incident Response Checklist

- ☐ Introduction focusing on safety and wellbeing
- ☐ Communication regarding preservation of evidence
- ☐ Support with transportation to obtain medical services and/or law enforcement support
- ☐ Inform / discharge duties
 - ☐ Options
 - ☐ Protections
 - ☐ Services
 - ☐ Clery Act:
 - ☐ Importance of prompt complaint
 - ☐ Importance of gathering evidence
- ☐ Title IX / DCL:
 - ☐ Confidentiality limitations
 - ☐ Facilitation of report to police

Incident Report Form

- ☐ Time and date of report
- ☐ Time and date of incident
- ☐ Location of incident
- ☐ Information about the Complainant:
 - ☐ Name
 - ☐ Sex
 - ☐ Affiliation
 - ☐ Residence
- ☐ Respondent:
 - ☐ Name (if known)
 - ☐ Relationship to Complainant
 - ☐ Sex
 - ☐ Number of Respondents
- ☐ Information about the alleged conduct:
 - ☐ Type of coercion/force
 - ☐ Physical injury
 - ☐ Penetration
 - ☐ Sexual contact without penetration
 - ☐ Reported to police

Investigation Checklist

- ☐ Complainant's name or anonymity requested
- ☐ Place of occurrence
- ☐ Nature of occurrence
- ☐ Time of occurrence
- ☐ Time of reporting
- ☐ Alcohol involved: Drugs involved
- ☐ Physical Injury
- ☐ Name of accused; known or unknown
- ☐ Other crimes evidence/priors
- ☐ Complainant's description of event
- ☐ Names of witnesses
- ☐ Interviews of all parties
- ☐ Prior contacts between complainant and accused
- ☐ School records
- ☐ Intimidation attempts
- ☐ Physical evidence:
 - ☐ Injury / Medical Evidence - records
 - ☐ Security Monitoring Records / Visitor Logs / Audio-Video recordings
 - ☐ Telephone records
 - ☐ Voicemail
 - ☐ Text / E-mail / Social Media
 - ☐ Clothing / Tangible Objects
 - ☐ Any other physical / forensic evidence
- ☐ 911 Tape
- ☐ Photographs of the scene
- ☐ Photographs of injuries
- ☐ Advised re: law enforcement report
- ☐ Advised re: preservation and medical treatment
- ☐ Advised re: counseling
- ☐ Concerns regarding safety of community
- ☐ Discharge Title IX responsibilities
- ☐ Discharge Clery responsibilities
- ☐ Court / Cease & Desist Orders
- ☐ Protection Orders

Investigation Checklist: Reporter

- ☐ Reports are consistent over time?
 - ☐ Is the complainant's account consistent?
 - ☐ Is timeline consistent?
 - ☐ Do allegations change ? If so, is there a reasonable explanation?
 - ☐ Over time?
 - ☐ During therapy?
 - ☐ With different interviewers?
 - ☐ In terms of content?
- ☐ Circumstances at time of report?
 - ☐ Where?
 - ☐ To whom?
 - ☐ When?
 - ☐ Why?
 - ☐ Demeanor?
 - ☐ Corroborated by witness?
- ☐ Any change in behavior/demeanor/routine after alleged incident?
- ☐ Explore past relationship:
 - ☐ Whether and how long he or she had known the accused?
 - ☐ Circumstances of their meeting
 - ☐ Extent of any previous relationship
 - ☐ Details of any relevant prior sexual contact with respondent
- ☐ Circumstances at time of prior disclosure(s)?
 - ☐ Where?
 - ☐ To Whom?
 - ☐ When?
 - ☐ Why?
 - ☐ Demeanor?

Investigation Checklist: Reporter

- ☐ Overall credibility?
 - ☐ Cognitive impairment?
 - ☐ Evidence of psychosis?
 - ☐ Evidence of coaching?
 - ☐ Current situation impacted by results of conclusions?
- ☐ Demeanor?
 - ☐ At time of event?
 - ☐ At time of reporting?
 - ☐ As reported by other witnesses?
If so, identify witnesses.
 - ☐ In our interview?
- ☐ Secondary gain?
 - ☐ Financial?
 - ☐ Situational?
 - ☐ Occupational?
- ☐ Interests or bias?
- ☐ Details of description:
 - ☐ Central issues?
 - ☐ Peripheral issues?
- ☐ Corroboration?
- ☐ Do facts hang together? Why? Why not?

Investigation Checklist: Respondent

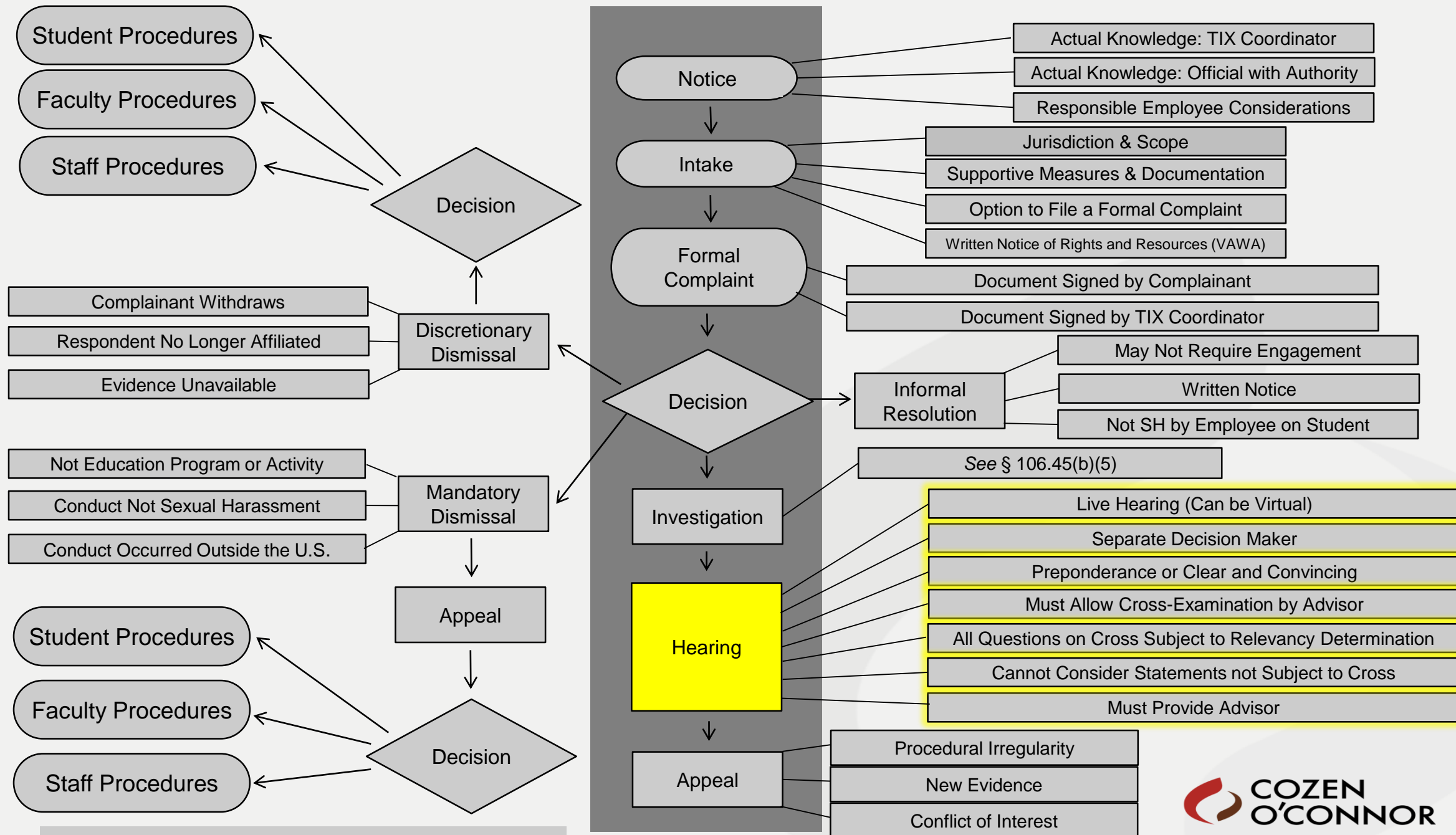
- ☐ Other acts/behaviors relevant to intent?
 - ☐ Evidence of substance abuse?
 - ☐ If so, is it admitted?
 - ☐ Evidence of impulse control issues?
 - ☐ If so, is it admitted?
 - ☐ Admission of physically inappropriate behavior?
 - ☐ Admission of sexually inappropriate behavior?
 - ☐ Evidence of fabrication in record (not limited to allegation)?
- ☐ Overall Credibility
 - ☐ Demeanor?
 - ☐ Interest or bias?
 - ☐ Corroboration?
 - ☐ Do facts hang together? Why or Why no?
- ☐ Any witness intimidation?
- ☐ Past History
 - ☐ Evidence of other misconduct or disciplinary action?
 - ☐ Theft/misappropriation?
 - ☐ Legal history?
 - ☐ Substance abuse?
 - ☐ How did the accused respond to prior interventions
 - ☐ Evidence of problematic behavior
 - ☐ Troubled relationships?
 - ☐ History of previous sanctions?
 - ☐ History of treatment/intervention of inappropriate or concerning behaviors?
 - ☐ Previous concerns re: protection of others?

Resources

- As investigator, develop and be prepared to refer to:
 - Incident Response Checklist
 - Incident Report Form
 - Investigation Checklist
 - Investigation Checklist: Complainant
 - Investigation Checklist: Respondent

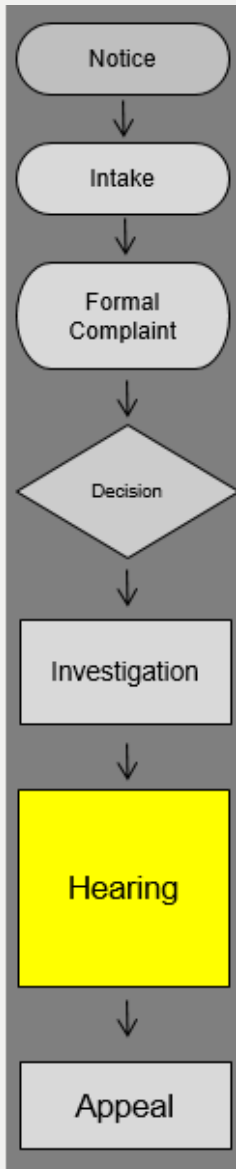
HEARINGS

THE FINAL TITLE IX REGULATIONS



Hearings

- At the request of either party, the recipient 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.

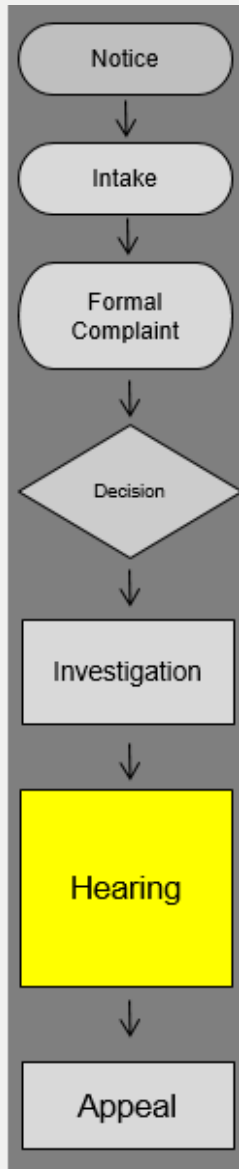


Title IX Regulations May 19, 2020; § 106.45(b)(6)(i)

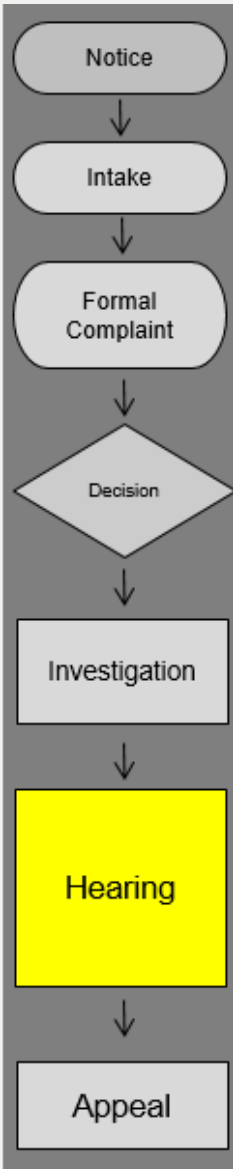
Technology Options

- Zoom
 - Ability to see and hear in real time
 - Breakout rooms
 - Recording
- Below are links to the Zoom training videos:
 - The basics of meeting controls: <https://support.zoom.us/hc/en-us/articles/201362603-What-Are-the-Host-Controls->
 - Break Out Rooms: <https://support.zoom.us/hc/en-us/articles/206476093-Getting-Started-with-Video-Breakout-Rooms>

Hearings



- Only relevant cross-examination and other questions may be asked of a party or witness.
- If a party does not have an advisor present at the live hearing, the recipient must provide without fee or charge to that party, an advisor of the recipient's choice, who may be, but is not required to be, an attorney, to conduct cross-examination on behalf of that party.



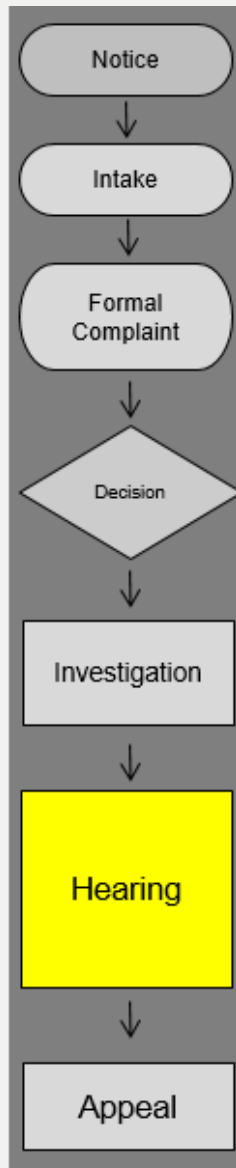
Determination of Responsibility

- Decision-maker(s), cannot be the same person(s) as the Title IX Coordinator or the investigator(s)
- Must issue a simultaneous written determination regarding responsibility, including
 - Identification of the allegations
 - Description of the procedural steps taken from the receipt of the formal complaint through the determination
 - Findings of fact supporting the determination
 - Conclusions regarding the application of the recipient's code of conduct to the facts
 - Rationale
 - Appeal procedures

Title IX Regulations May 19, 2020; § 106.45(b)(7)

EXCLUSION OF STATEMENTS NOT SUBJECT TO CROSS-EXAMINATION

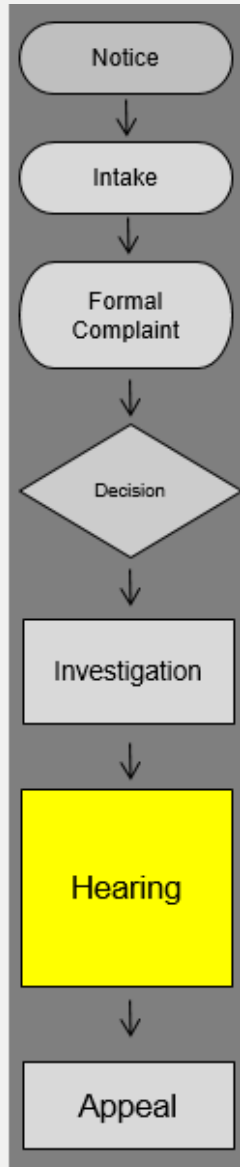
Exclusion of Statement



- If a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) **must not rely on any statement of that party or witness** in reaching a determination regarding responsibility; provided, however, that 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.

Title IX Regulations, May 19, 2020; § 106.45(b)(6) 85 F.R. 30577

Exclusion of Statement

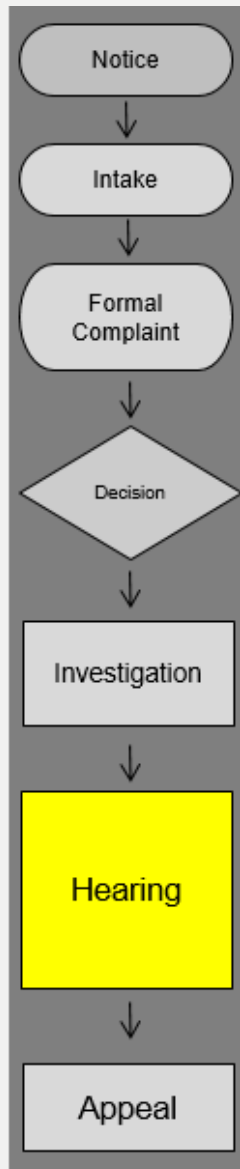


- [I]n the postsecondary context, **only statements that have been tested for credibility** will be considered by the decision-maker in reaching a determination regarding responsibility.
- Because party and witness statements so often raise **credibility** questions in the context of sexual harassment allegations, the **decision-maker must consider only those statements that have benefitted from the truth-seeking function of cross-examination.**

Title IX Regulations, May 19, 2020; Preamble 85 F.R 30345; 30348

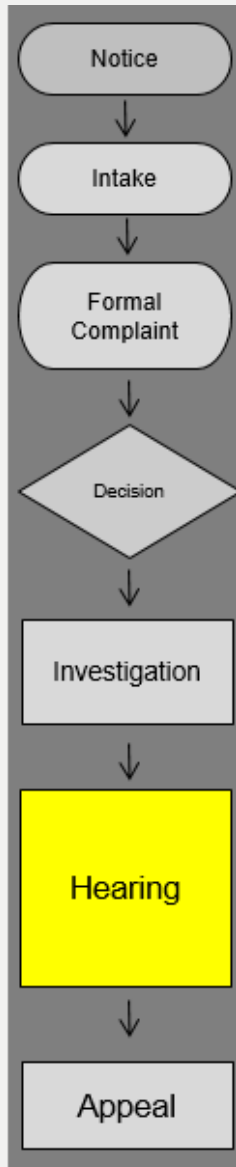
Exclusion of Statement

- The prohibition on reliance on “statements” applies not only to statements made during the hearing, but also to ***any statement of the party or witness*** who does not submit to cross-examination.



Title IX Regulations, May 19, 2020; Preamble 85 F.R 30349

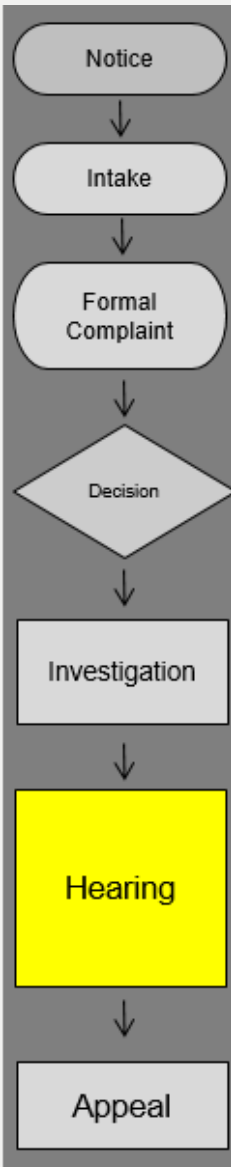
Exclusion of Statement



- Absent importing comprehensive rules of evidence, the alternative is to apply a **bright-line rule** that instructs a decision-maker to either consider, or not consider, statements made by a person who does not submit to cross-examination.
- The Department believes that in the context of sexual harassment allegations under Title IX, **a rule of non-reliance on untested statements is more likely to lead to reliable outcomes** than a rule of reliance on untested statements.
- If statements untested by cross-examination may still be considered and relied on, the benefits of cross-examination as a truth-seeking device will largely be lost in the Title IX grievance process.

Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30347

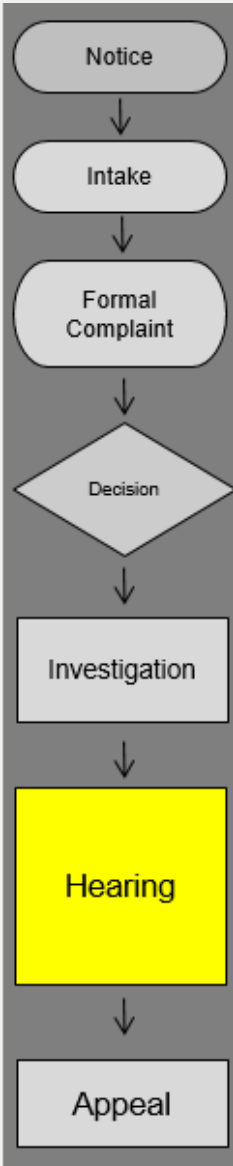
Exclusion of Statement



- Reliance on party and witness statements that have not been tested for credibility via cross-examination undermines **party and public confidence** in the fairness and accuracy of the determinations reached by postsecondary institutions.
- This provision **need not result in failure to consider relevant evidence** because parties and witnesses retain the opportunity to have their own statements considered, by submitting to cross-examination.

Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30347

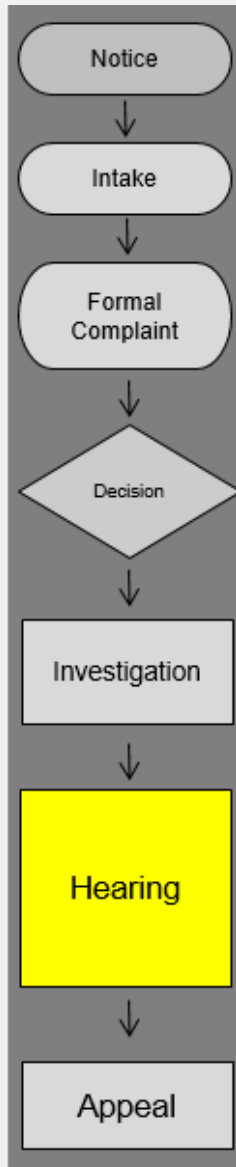
Exclusion of Statement



- Probing the **credibility and reliability** of *statements* asserted by witnesses contained in such evidence requires the parties to have the opportunity to cross-examine the witnesses making the statements.
- Where a Title IX sexual harassment allegation **does not turn on the credibility of the parties or witnesses**, this provision allows the other evidence to be considered even though a party's statements are not relied on due to the party's or witness's non-appearance or refusal to **submit to cross-examination**.

Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30349, 30345

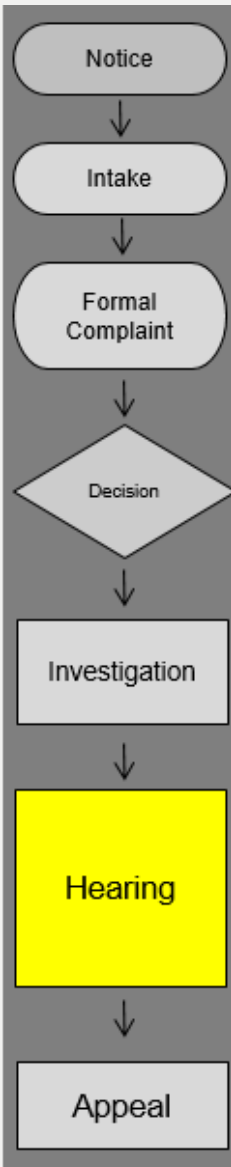
Submit to Cross-Examination



- Commenters suggested making this provision more precise by replacing “does not submit to cross-examination” with “does not appear for cross-examination.”
- Commenters asserted that parties should have the right to “waive a question” without the party’s entire statement being disregarded.
- The Department appreciates the opportunity to clarify here that to “**submit to cross-examination**” means answering those cross-examination questions that are relevant.

Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30345; 30349

Submit to Cross-Examination

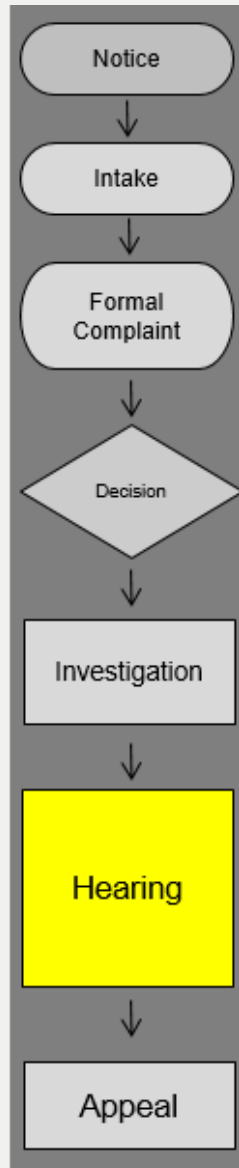


- This provision requires a party or witness to “submit to cross-examination” to avoid exclusion of their statements; the same exclusion of statements **does not apply to a party or witness’s refusal to answer questions posed by the decision-maker.**
- If a party or witness **refuses to respond to a decision-maker’s questions**, the decision-maker is not precluded from relying on that party or witness’s statements.

Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30349

ADVISOR OF CHOICE

Title IX: Advisor of Choice



- Parties must have the same opportunities to ... be accompanied to any related meeting or proceeding by **an advisor of their choice**.
- The advisor may be, but is not required to be, **an attorney**.
- A recipient **may establish restrictions** on advisors' participation, as long as the restrictions apply equally to both parties.
- “[T]he role of an advisor is to assist and advise the party.”

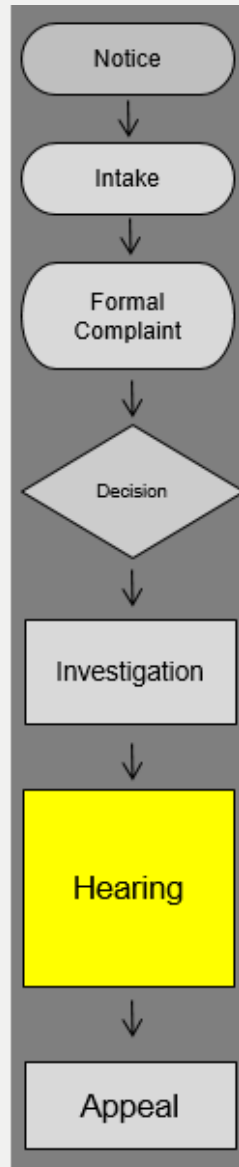
Title IX Regulations May 19, 2020; §106.45(b)(5)(iv);
Preamble 85 F.R. 30328.

VAWA: Advisor of Choice

- Provide the accuser and the accused with the same opportunities to have others present during any institutional disciplinary proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the **advisor of their choice**
- **Not limit the choice of advisor** or presence for either the accuser or the accused in any meeting or institutional disciplinary proceeding
- However, the institution **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

Violence Against Women Reauthorization Act § 668.46(k)(2)(iii)-(iv); 79 F.R. 62789

No Limit as to Conflicts of Interest

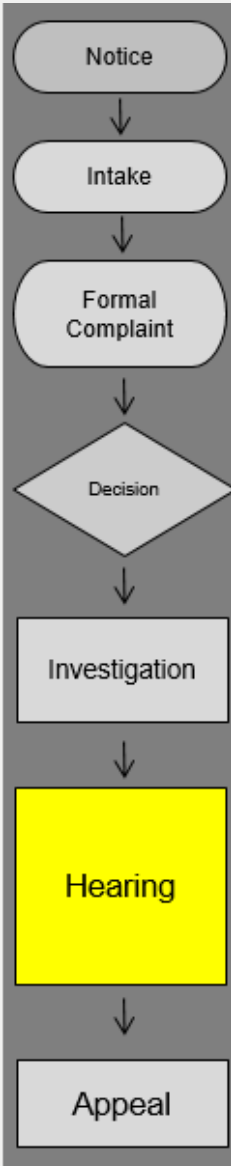


- The Department notes that the 106.45 (b)(1)(iii) prohibition of Title IX personnel having conflicts of interest or bias **does not apply to party advisors** (including advisors provided to a party by a post secondary institution as required under 106.45(b)(6)(i)) and thus, **the existence of a possible conflict of interest where an advisor is assisting one party and also expected to give a statements as a witness does not violate the final regulations.**

Title IX Regulations May 19, 2020; Preamble at 30299

ROLE OF THE ADVISOR AT HEARING

Role of the Advisor

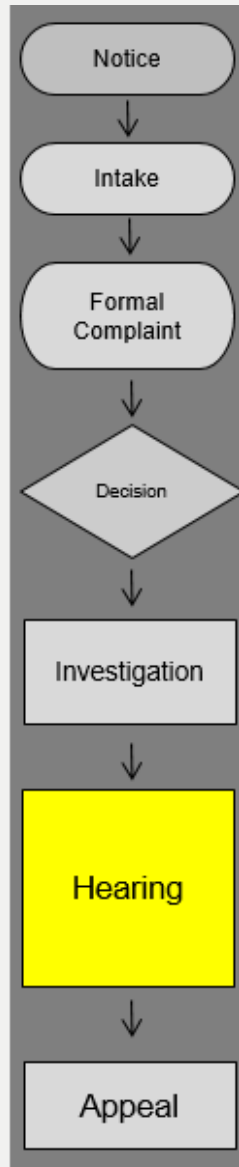


- At the live hearing, the decision-maker(s) must permit each party's advisor to **ask the other party and any witnesses all relevant questions** and follow-up questions, including those challenging credibility.

Title IX Regulations, May 19, 2020; § 106.45(b)(6)

Advisor's Role at the Hearing

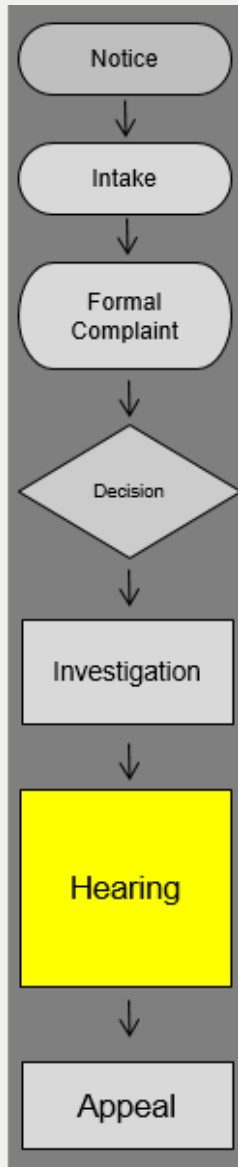
- Such cross-examination at the live hearing must be conducted directly, orally, and in real time by the party's advisor of choice and never by a party personally, **notwithstanding the discretion of the recipient under paragraph (b)(5)(iv) of this section to otherwise restrict the extent to which advisors may participate in the proceedings.**



Title IX Regulations, May 19, 2020; Preamble, 85 F.R. 30336, 30577.

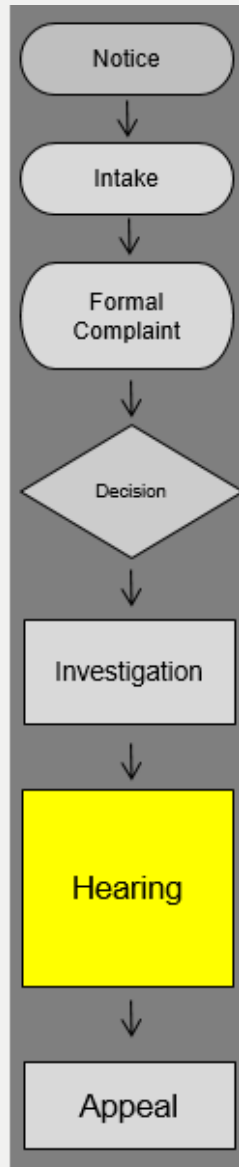
Cross-Examination by Advisor

- [A] party's advisor may appear and conduct cross-examination **even when the party whom they are advising does not appear.**



Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30346

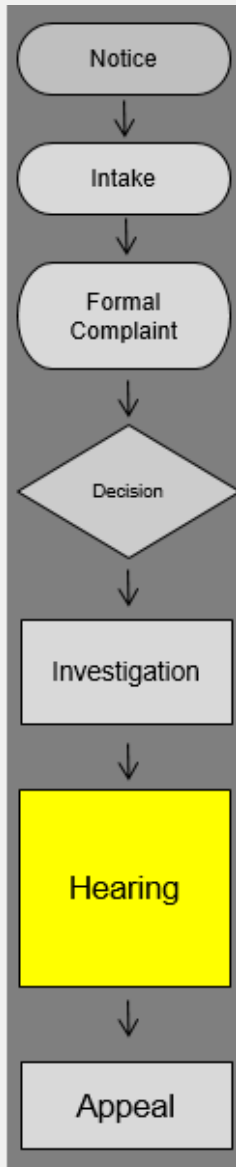
Discretion as to Advisor's Role



- Section 106.45(b)(5)(iv) (allowing recipients to place restrictions on active participation by party advisors) and the revised introductory sentence to § 106.45(b) (requiring any rules a recipient adopts for its grievance process other than rules required under § 106.45 to apply equally to both parties) would, for example, **permit a recipient to require parties personally to answer questions** posed by an investigator during an interview, or **personally to make any opening or closing statements** the recipient allows at a live hearing, so long as such rules apply equally to both parties.

Discretion as to Advisor's Role

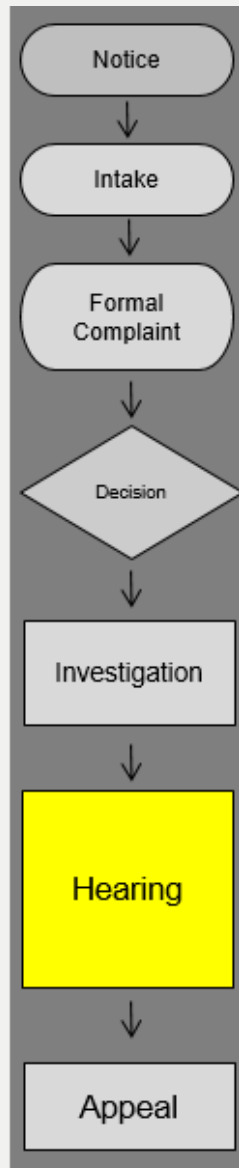
- We do not believe that specifying what **restrictions on advisor participation** may be appropriate is necessary, and we **decline to remove the discretion of a recipient to restrict an advisor's participation** so as not to unnecessarily limit a recipient's flexibility to conduct a grievance process that both complies with § 106.45 and, in the recipient's judgment, best serves the needs and interests of the recipient and its educational community.



Title IX Regulations, May 19, 2020; Preamble, 85 F.R. 30298.

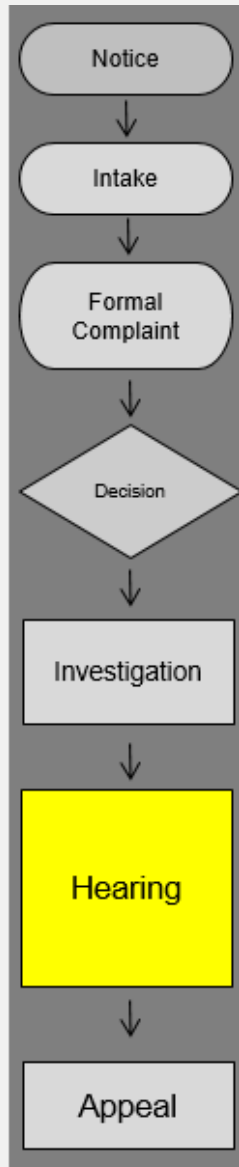
Obligation to Provide an Advisor

- If a party does not have an advisor present at the live hearing, the recipient **must provide without fee or charge to that party, an advisor** of the recipient's choice, who may be, but is not required to be, an attorney, to conduct cross-examination on behalf of that party.



Title IX Regulations, May 19, 2020; § 106.45(b)(6)

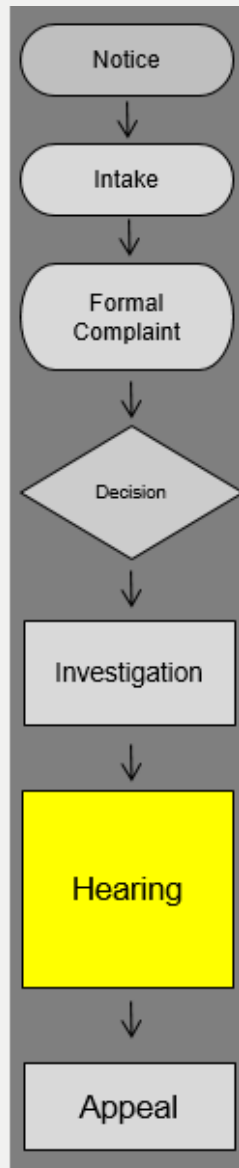
Must Provide Advisor Even in Party's Absence



- [W]here one party does not appear and that party's advisor of choice does not appear, a recipient-provided advisor **must still cross-examine the other, appearing party "on behalf of" the non-appearing party**, resulting in consideration of the appearing party's statements but not the non-appearing party's statements (without any inference being drawn based on the non-appearance).

Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30346

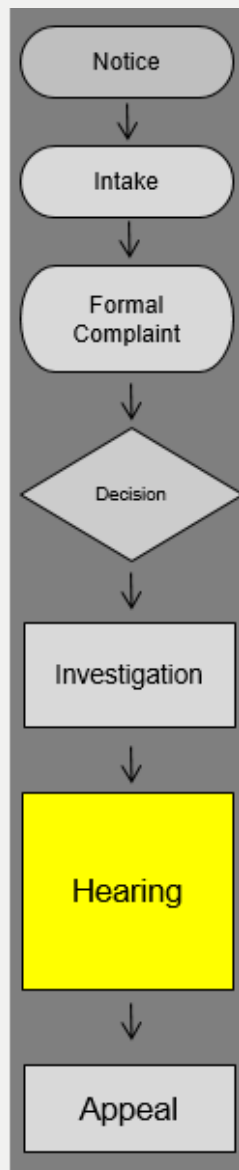
Appearance Without an Advisor



- The final regulations do not preclude recipients from adopting a rule that requires parties to inform the recipient in advance of a hearing whether the party intends to bring an advisor of choice to the hearing; but **if a party then appears at a hearing without an advisor** the recipient would need to **stop the hearing as necessary to permit the recipient to assign an advisor** to that party to conduct cross-examination.

Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30342

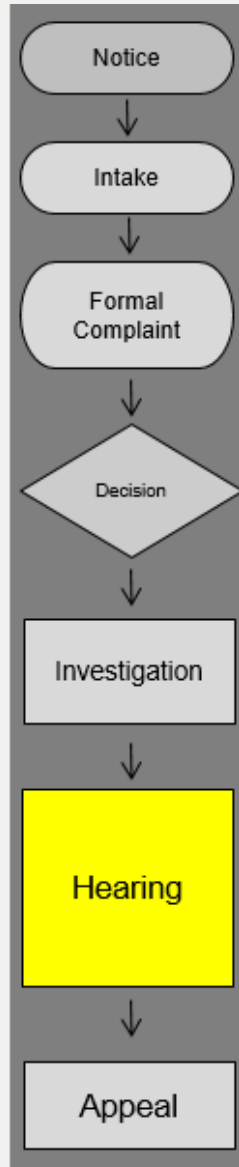
Refusal to Conduct Cross-Examination



- A party cannot “fire” an assigned advisor during the hearing, **but if the party correctly asserts that the assigned advisor is refusing to “conduct cross-examination on the party’s behalf” then the recipient is obligated to provide the party an advisor to perform that function,** whether that means counseling the assigned advisor to perform that role, or stopping the hearing to assign a different advisor. ...

Title IX Regulations, May 19, 2020; 85 F.R. 30342

Party Cannot Conduct Own Cross-Examination



- If a party to whom the recipient assigns an advisor **refuses to work with the advisor** when the advisor is willing to conduct cross-examination on the party's behalf, then for reasons described above **that party has no right of self-representation with respect to conducting cross-examination**, and that party would not be able to pose any cross-examination questions.

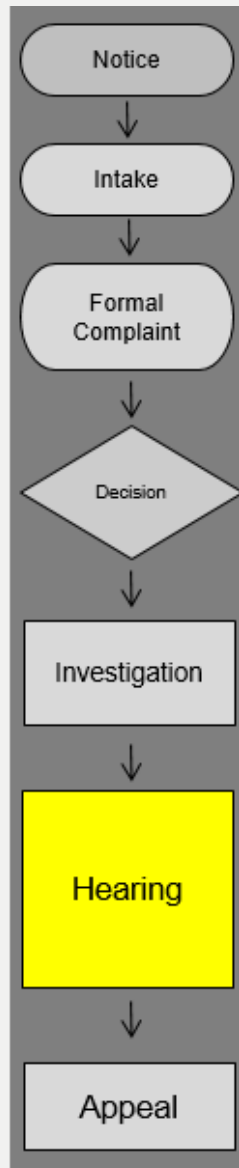
Title IX Regulations, May 19, 2020; § 106.45(b)(6)
Title IX Regulations, May 19, 2020; 85 F.R. 30342

Practical Considerations & Effective Practices

- Process meeting to discuss policy, decorum, and expectations
- Considerations for advisors:
 - Review policy in advance
 - Acknowledge decorum expectations
 - Acknowledge privacy protections regarding documents
- Consider the importance of continuity in process re: advisor given requirement to provide an advisor at the hearing

CROSS-EXAMINATION BY ADVISOR

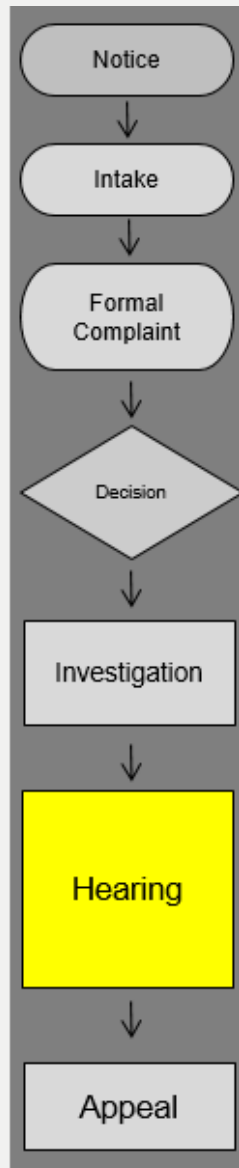
Cross-Examination



- 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.

Title IX Regulations, May 19, 2020; § 106.45(b)(6)

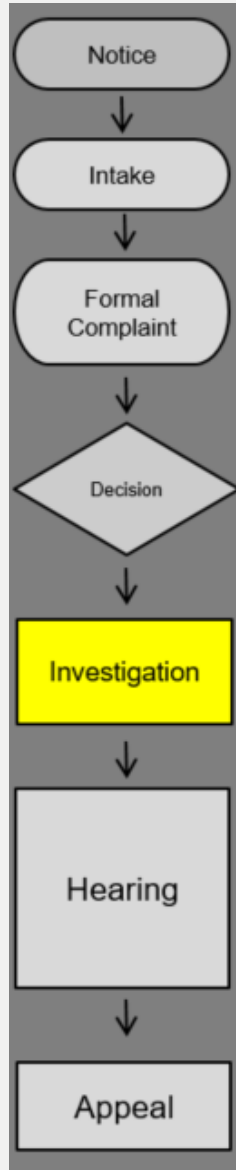
Cross-Examination



- Such cross-examination at the live hearing must be conducted **directly, orally, and in real time** by the party's advisor of choice and never by a party personally, notwithstanding the discretion of the recipient under paragraph (b)(5)(iv) of this section to otherwise restrict the extent to which advisors may participate in the proceedings.

Title IX Regulations, May 19, 2020; § 106.45(b)(6)

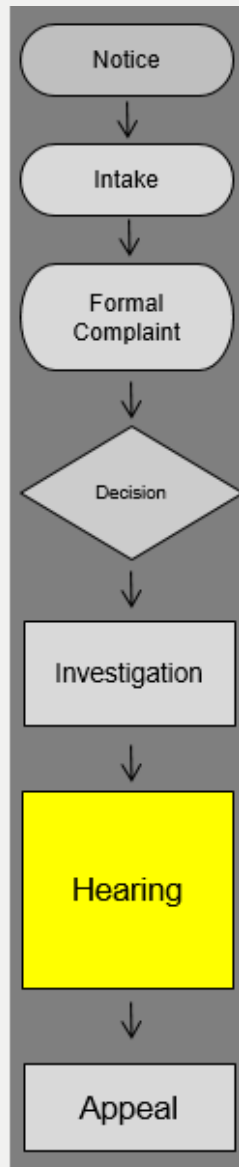
Recap on Evidence Review



- “Provide both parties an **equal opportunity to inspect and review any evidence** obtained as part of the investigation that is **directly related to the allegations** raised in a formal complaint so that each party can meaningfully respond to the evidence prior to conclusion of the investigation.”

Title IX Regulations May 19, 2020; §§ 106.45(b)(5)(vi). 85 F.R.30411

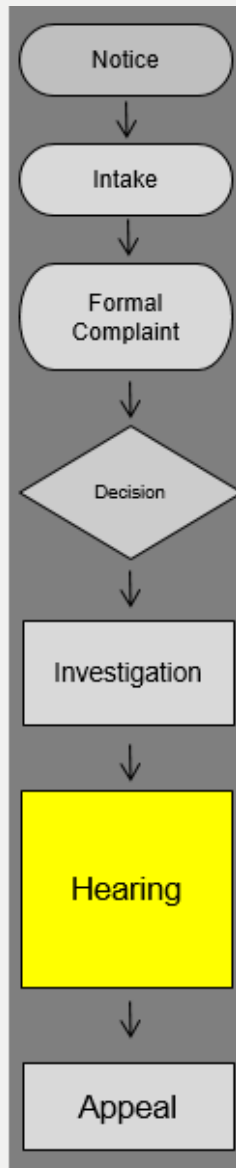
Availability of Evidence at the Hearing



- The recipient must make all such evidence subject to the parties' inspection and review [directly related evidence shared at the evidence review] available at any hearing to give each party equal opportunity to refer to such evidence during the hearing, including for purposes of cross-examination.

Title IX Regulations, May 19, 2020; § 106.45(b)(5)(vi)

Opportunity to Challenge Evidence



- Cross-examination in the § 106.45 grievance process is **intended to give both parties equal opportunity to meaningfully challenge the plausibility, reliability, credibility, and consistency of the other party and witnesses** so that the outcome of each individual case is **more likely to be factually accurate, reducing the likelihood of either type of erroneous outcome** (i.e., inaccurately finding a respondent to be responsible, or inaccurately finding a respondent to be non-responsible).

Title IX Regulations, May 19, 2020, Preamble 85 F.R. 30336

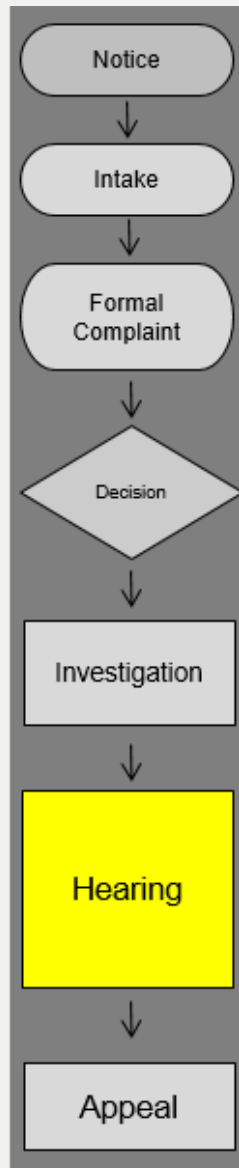
Questions to Advance a Party's Interest



- The Department clarifies here that conducting cross-examination **consists simply of posing questions intended to advance the asking party's perspective with respect to the specific allegations at issue**; no legal or other training or expertise can or should be required to ask factual questions in the context of a Title IX grievance process.

Title IX Regulations, May 19, 2020, Preamble 85 F.R. 30319

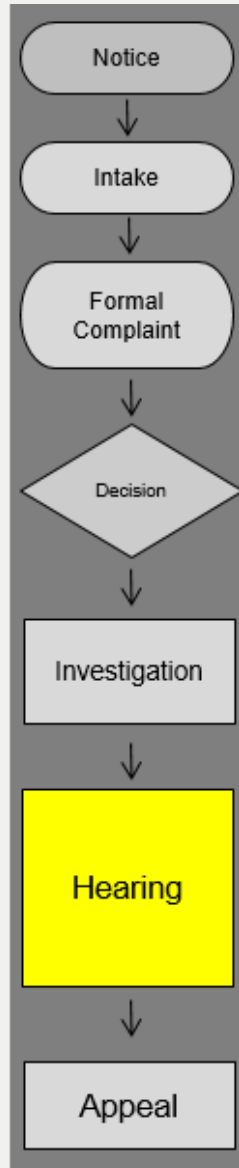
Cross-Examination



- Only **relevant** cross-examination and other questions may be asked of a party or witness.
- Before a complainant, respondent, or witness answers a cross-examination or other question, the decision-maker(s) must **first determine whether the question is relevant ...**
- The decision-maker(s) must explain to the party proposing the questions **any decision to exclude** a question as not relevant.

Title IX Regulations, May 19, 2020; § 106.45(b)(6)

Determinations Regarding Relevance

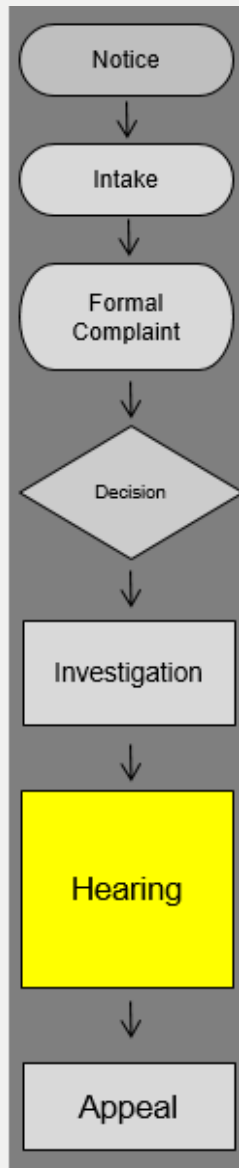


- The final regulations **do not preclude a recipient from adopting a rule** (applied equally to both parties) that does, or does not, **give parties or advisors the right to discuss the relevance determination with the decision-maker during the hearing.**
- If a recipient believes that arguments about a relevance determination during a hearing would unnecessarily protract the hearing or become uncomfortable for parties, **the recipient may adopt a rule that prevents parties and advisors from challenging the relevance determination (after receiving the decision-maker's explanation) during the hearing.**

Title IX Regulations, May 19, 2020; § 106.45(b)(6)

Title IX Regulations, May 19, 2020; Preamble 85 F.R 30343

“Pause” to Reinforce Decorum



- We have also revised § 106.45(b)(6)(i) in a manner that **builds in a “pause” to the cross-examination process**; before a party or witness answers a cross-examination question, the decision-maker must determine if the question is relevant.
- This helps ensure that content of cross-examination remains focused only on relevant questions and that the pace of cross-examination does not place undue pressure on a party or witness to answer immediately.

Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30323-24

Rules of Decorum



- The final regulations do not preclude a recipient from enforcing rules of decorum that **ensure all participants, including parties and advisors, participate respectfully and non-abusively during a hearing.**
- If a party's advisor of choice refuses to comply with a recipient's rules of decorum (for example, by insisting on yelling at the other party), the recipient may require the party to use a different advisor.

Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30320

Rules of Decorum

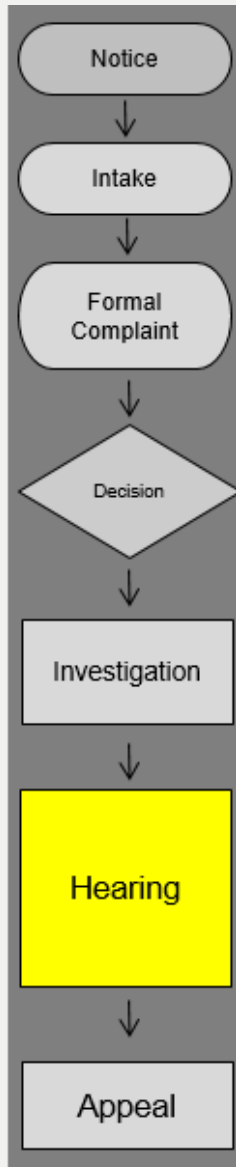


- Similarly, if an **advisor that the recipient provides** refuses to comply with a recipient's rules of decorum, the recipient may provide that party with a different advisor to conduct cross-examination on behalf of that party.
- This incentivizes a party to work with an advisor of choice in a manner that complies with a recipient's rules that govern the conduct of a hearing, and incentivizes recipients to appoint advisors who also will comply with such rules, so that hearings are conducted with **respect for all participants**.

Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30320

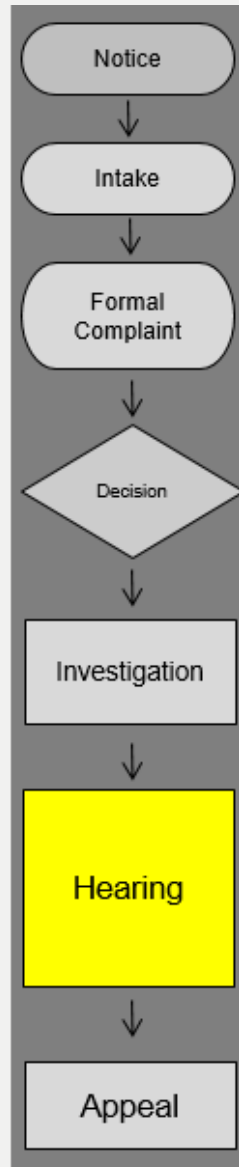
Training Not Required for Advisors

- The Department **declines to require training for assigned advisors** because the goal of this provision is not to make parties “feel adequately represented” but rather to ensure that the parties have the opportunity for their own view of the case to be probed in front of the decision-maker.



Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30342

May Not Impose Training Requirements



- Recipients may not impose training or competency assessments on advisors of choice selected by parties, but nothing in the final regulations prevents a recipient from training and assessing the competency of its own employees whom the recipient may desire to appoint as party advisors.

Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30342

TRINITY COLLEGE INTERIM POLICY ON SEXUAL HARASSMENT (HEARINGS)



Interim Policy on Sexual Harassment (**Hearings**)

Upon submission of the final investigation report to the parties, the Title IX Coordinator or a Deputy Title IX Coordinator will select an **Administrative Hearing Panel** and charge that panel to:

- (a) review the final report and the responses of the parties to that report,
- (b) convene and conduct an impartial hearing with live examination of witnesses,
- (c) determine, by a preponderance of the evidence, whether the allegations of the complaint are substantiated and the Respondent violated College policy, and
- (d) In cases where the Respondent is found responsible, impose an appropriate sanction.

Interim Policy on Sexual Harassment (**Hearings**)

The Administrative Hearing Panel will have **three members**, two of whom must be College employees. The employee members of the panel will be drawn from a pool of College employees who have received training regarding this policy and its investigation and adjudicate process.

Whenever possible, in cases in which the Respondent is an employee of the College, at least one member of the panel will be from the same job classification (i.e., staff or faculty) as the Respondent. The pool will not include the Vice President for Academic Affairs, the Vice President for Finance and Operations, nor the Vice President for Student Success and Enrollment Management, who must remain available for appeals, nor will the President of the College serve on an Administrative Hearing Panel.

The third member of the panel will serve as the chair and **Hearing Convener**, and will have experience and training in the administration of sexual assault hearings. The Hearing Convener need not be a member of the College community.



Interim Policy on Sexual Harassment (**Hearings**)

The Title IX Coordinator or a Deputy Title IX Coordinator will notify the Complainant and the Respondent of the proposed membership of the Administrative Hearing Panel, simultaneously, in writing. **The Complainant and Respondent will have three (3) business days to request that a proposed panel member be recused for cause, conflict of interest, or bias.**

The Title IX Coordinator or a Deputy Title IX Coordinator, after considering the party's stated reasons for recusal, will decide whether the proposed member should be recused and replaced with someone else. Anyone proposed as a replacement panel member will be subject to the same vetting process and timeframe set forth above in this paragraph. The Title IX Coordinator or a Deputy Title IX Coordinator will maintain a confidential written record of any request for recusal and the decision.

Interim Policy on Sexual Harassment (**Hearings**)

Upon expiration of the deadlines for the Complainant and Respondent to respond to the final report and to vet the members of the panel, the Title IX Coordinator or a Deputy Title IX Coordinator will share the final report and the written responses of the Complainant and Respondent to that report, and any evidence subject to the review of the parties, with the Administrative Hearing Panel, the Complainant, and the Respondent simultaneously, in writing. This record will constitute the entirety of the evidence that the Administrative Hearing Panel may consider prior to the live hearing.



Interim Policy on Sexual Harassment (**Hearings**)

Notification of the Determination of Responsibility: “The Title IX Coordinator or a Deputy Title IX Coordinator will notify the Complainant and the Respondent of the decision of the Administrative Hearing Panel, simultaneously, in writing, no later than one (1) business day following the decision. Both parties may submit **Impact Statements** to the Title IX Coordinator or a Deputy Title IX Coordinator within five (5) business days. Impact Statements will present the parties with the opportunity to share any information they would like the Administrative Hearing Panel to consider when assigning a sanction.”



Interim Policy on Sexual Harassment (**Hearings**)

Sanctioning: “If the Administrative Hearing Panel finds that College policy has been violated, that same panel will reconvene to assign a sanction. The Title IX Coordinator or a Deputy Title IX Coordinator will provide the Complainant and the Respondent (5) business days to prepare and Impact Statement, which will be shared with the Administrative Hearing Panel prior to the panel imposing a sanction. The Title IX Coordinator or a Deputy Title IX Coordinator will also provide the panel with a **summary of the judicial/disciplinary history (date, charge, and disciplinary action) of the respondent**, if applicable, along with any available **sanctioning precedents** in similar cases. The Administrative Hearing Panel will consider all of the documents and information provided in determining an appropriate sanction.”

HEARINGS

PRACTICAL IMPLEMENTATION

Personal Preparation: Be Objective

- Identify and set aside personal biases and prejudices
- Be careful to avoid making assumptions as to how a person “should” react
- Avoid putting oneself in the shoes of the complainant or the respondent
- Recognize emotional impact, if any, but do not allow emotion to impact fair and impartial fact-finding

Personal Preparation: Be Professional

- Maintain an appropriate demeanor at all times
- Be polite and respectful to all parties
- Maintain appropriate sensitivity to presentation of difficult information
- Prepare for the hearing by reading and annotating all materials
 - Outline areas of inquiry
 - Consider wording of questions ahead of time

Standard of Proof



Beyond a Reasonable Doubt
Clear and Convincing Evidence
Preponderance of the Evidence
Some Evidence

Standard of Proof

- More likely to be true than not
- More probable than not
- The greater weight of the evidence
- Tipping the scale ever so slightly
- 51 %
- Based on the more convincing evidence and it's probable truth or accuracy, not on the amount
- Quality of the evidence, not quantity
- NOT beyond a reasonable doubt

Advisors

- Advisors have a speaking role
- Establish rules of decorum and conduct in the hearing via opening instructions
- Establish tone of professionalism and respectful treatment of parties and advisors
- Promptly and firmly redirect advisors who do not abide by the guidelines you set forth

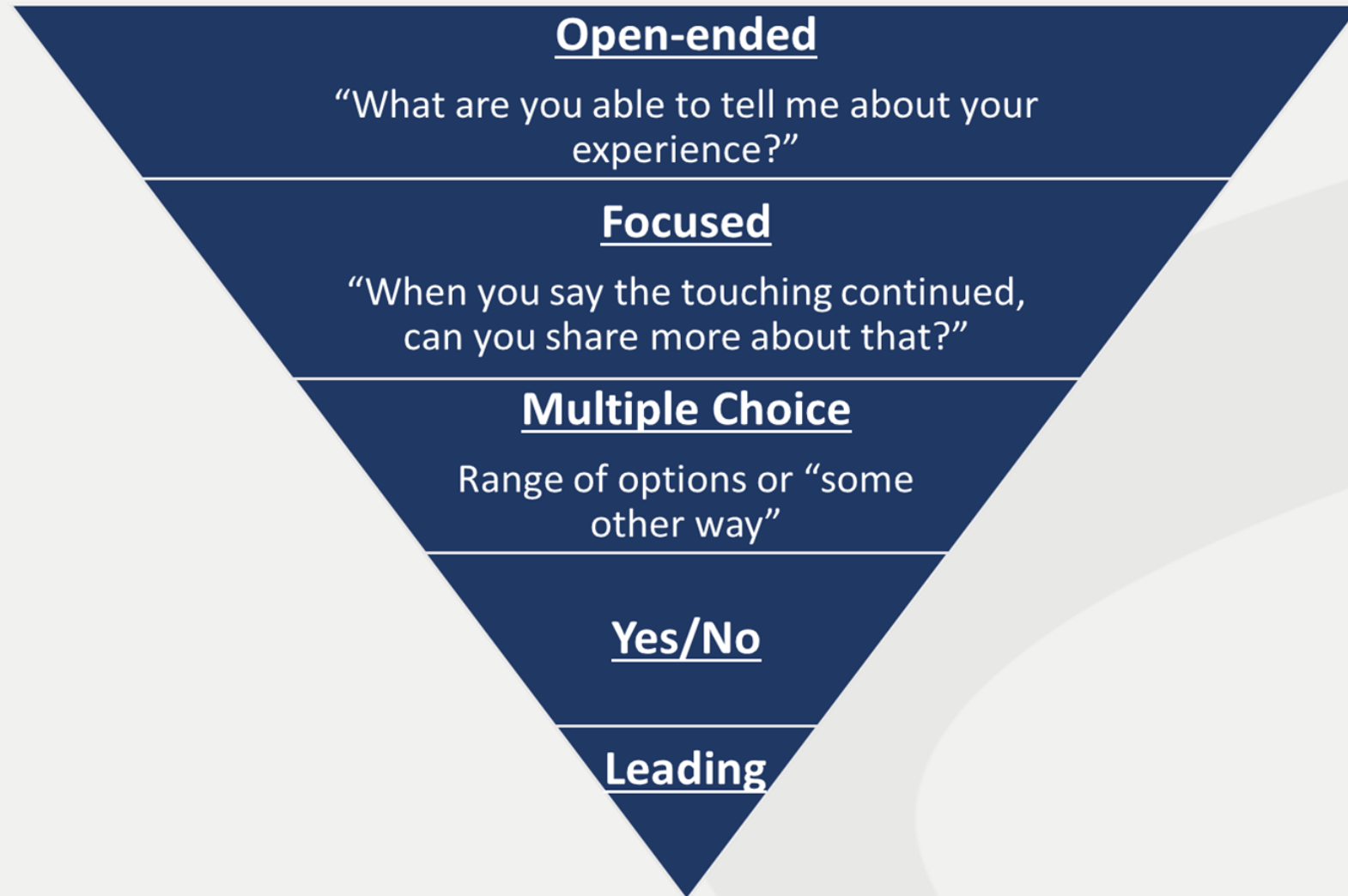
Participation Techniques

- Be alert to your non-verbal communication
- Pay attention to tone of voice and volume level
- Avoid asking questions that imply a value judgment
- Maintain attentive posture and good eye contact
- Exercise reflective listening in framing next question

What to Ask

- Do I need to know the information?
- When questions arise, it can be helpful to walk yourself through the following set of questions:
 - Will an answer to my question help me decide the appropriate outcome or sanction?
 - Will getting an answer to this question influence my decision?

The Continuum Approach



DELIBERATIONS

Deliberation Techniques

- Gather all documents and exhibits in advance
- Use cross-referencing grids/matrices
- Identify specific elements of alleged misconduct from policy definitions
- Begin by identifying areas of agreement as to evidence
- Identify conflicts and prioritize
- Discuss each conflict individually
- Articulate your position and support it from the evidence

EVALUATING CREDIBILITY

Evaluating Credibility



Credibility Factors

- Assessing credibility factors:
 - Demeanor
 - Interest
 - Detail
 - Corroboration
 - Common sense
- Testing inherent plausibility in light of the known information, relationships, and circumstances of the disclosure

Demeanor

- Demeanor may be informative, not determinative
- Assessing demeanor requires individual assessment as to how demeanor supports or detracts from overall reliability of information
- Fact-finders should not place undue reliance on demeanor as an indicator of candor or evasion.
- Demeanor is one factor to observe in the context of the totality of the information

Demeanor

- Complainant/respondent may be affected by emotional component of sexual assault allegations
- Range of behaviors and emotional reactions vary
- Elicit and consider information from witnesses as to demeanor after the reported incident, during the disclosure, and in response to the report
- Note changes in demeanor and explanations for significant changes
- Consider demeanor during proceedings

Interest

- If Respondent and Complainant know each other:
 - Understand the context and history of any prior relationships
 - Understand significant events or markers in relationship
- Explore effects of incident:
 - Emotional: fear, intimidation, worry, anxiety
 - Actual: financial, time, participation in the process
- Is there any particular animus/motive/ill will for/or against any party or witness?

Interest

- How will the party/witness be impacted by their participation in the process?
 - Was information provided “against” interests?
- How will the party/witness be impacted by any particular outcome?
 - Will information shared impact current or future relationships?

Detail

- Explore all details of event – before, during, and after
- Surrounding details – seemingly insignificant facts that may have greater import
- Sensory details – using the five senses to describe the physical reality of the crime
- Behavioral changes and responses
- Emotional cues and indicators
- Listen for “ring of truth” language on the periphery
- Evaluate panoramic view of events from all parties/witnesses

Corroboration

- Freeze frame and explore critical junctures
- Cross-reference Complainant and Respondent accounts with all other evidence and witnesses' statements
- Look to attendant details and behavior pre- and post-incident by both parties
- Focus on resolution of conflicts through believable evidence and common sense
- Outline case by issue and cross reference with all available evidence including timelines

Corroboration

- Consider other attendant details such as:
 - Size, age, power, authority and/or social status differential for Complainant and Respondent
 - Location of incident
 - Isolation of Claimant
 - Potential witnesses or reasons for lack of witnesses
 - Any change in either party's demeanor, personality, or routine after the incident
 - E.g., roommate noticed that Complainant began wearing baggy clothes, stopped attending class regularly, ceased eating
 - E.g., friends noticed Respondent became withdrawn and went home every weekend

Evaluating Changes in Account

- Explore all circumstances of each account
- Understand the who, what, and where of the interview
- Ask the “why” (without asking why); questions to explore:
 - State of mind
 - Life circumstances at the time
 - Perception of interviewer/process
 - Changes in interest or motivation
- Inquire directly about inconsistencies
- Attempt to reconcile where possible

Disclosure

- A process where an individual reveals abuse or assault
- On-going, not a one time event
- Stages of Disclosure:
 - Denial
 - Tentative
 - Active
 - Recantation
 - Reaffirmation
- Triggers for Disclosure
 - Accidental – person's secret is found out
 - Purposeful – person makes decision to tell

Synthesis

- Testing inherent plausibility of the conflicting accounts in light of the known information
- How does it all fit together?
- Does it make sense in the context of:
 - These individuals?
 - The setting?
 - The community?
 - The activity?
 - The relationships?

Integrated Analysis

Dynamics of Sexual Assault	Informed understanding of dynamics of sexual and gender-based harassment and interpersonal violence.
Demeanor	<p>Did the witness speak in a convincing manner? Was he/she uncertain, confused, self-contradictory or evasive?</p> <p>How did he/she look, act and speak while testifying / reporting?</p>
Interest / Motive / Bias	Did the witness have any interest in the outcome of the case, bias, prejudice, or other motive that might affect his/her testimony?
Detail	<p>Use direct quotes from testimony or statements.</p> <p>How well could the witness remember and describe the things about which he/she testified?</p> <p>Was the ability of the witness to see, hear, know, remember, or describe those things affected by youth or old age or by any physical, mental or intellectual deficiency?</p>
Corroboration	<p>How well did the testimony of the witness square with the other evidence in the case, including the testimony of other witnesses?</p> <p>Was it contradicted or supported by the other testimony and evidence?</p>
Common Sense	<p>Does it all add up? (Gut check)</p> <p>Is there something missing?</p>

Questions to Consider: Credibility Generally

- As judges of the facts, you are sole judges of the credibility of the witnesses and their testimony
- This means you must judge the truthfulness and accuracy of each witness's testimony and decide whether to believe all, or part, or none of that testimony
- The following are some factors that you may and should consider when judging credibility and deciding whether to believe or not to believe testimony

Questions to Consider: Detail

- Was the witness able to see, hear, or know the things about which they testified?
- How well could the witness remember and describe the things about which they testified?
- Was the ability of the witness to see, hear, know, remember, or describe those things affected by youth or old age or by any physical, mental, or intellectual deficiency?
- Were there inconsistencies or discrepancies in the witness's testimony?

Questions to Consider: Interest

- Did the witness have any interest in the outcome of the case, bias, prejudice, or other motive that might affect their testimony?
- Did the witness stand to receive any benefit from a particular outcome?

Questions to Consider: Demeanor

- Did the witness testify in a convincing manner?
- How did the witness look, act, and speak while testifying?
- How did the witness's nonverbal communications (posture, gestures, facial expressions, eye contact) match their verbal communications (voice, expression)?
- Was the testimony uncertain, confused, self-contradictory, or evasive?

Questions to Consider: Corroboration

- How well did the testimony of the witness square with the other evidence in the case, including the testimony of other witnesses?
- Was it contradicted or supported by the other testimony and evidence?

Questions to Consider: Common Sense

- Does it make sense?

Credibility Considerations from OCR

1997 Sexual Harassment Guidance

If there is a dispute about whether harassment occurred or whether it was welcome -- in a case in which it is appropriate to consider whether the conduct could be welcome -- determinations should be made based on the **totality of the circumstances**. The following types of information may be helpful in resolving the dispute:

- **Statements by any witnesses** to the alleged incident.

...

(continued on next slide)

Credibility Considerations from OCR

(1997 Sexual Harassment Guidance continued)

- **Evidence about the relative credibility** of the allegedly harassed student and the alleged harasser. For example, the level of **detail and consistency** of each person's account **should be compared** in an attempt to determine who is telling the truth. Another way to assess credibility is to see if **corroborative evidence is lacking where it should logically exist**. However, the absence of witnesses may indicate only the unwillingness of others to step forward, perhaps due to fear of the harasser or a desire not to get involved.

...

Credibility Considerations from OCR

(1997 Sexual Harassment Guidance continued)

- **Evidence that the alleged harasser has been found to have harassed others** may support the credibility of the student claiming the harassment; conversely, the student's claim will be weakened if he or she has been found to have made **false allegations against other individuals.**

...

Credibility Considerations from OCR

(1997 Sexual Harassment Guidance continued)

- Evidence of the allegedly harassed student's **reaction or behavior after the alleged harassment**.
 - For example, were there **witnesses who saw the student immediately after the alleged incident** who say that the student appeared to be upset?
 - However, it is important to note that **some students may respond to harassment in ways that do not manifest themselves right away**, but may surface several days or weeks after the harassment.
 - For example, **a student may initially show no signs** of having been harassed, but several weeks after the harassment, there may be significant changes in the student's behavior, including **difficulty concentrating on academic work, symptoms of depression, and a desire to avoid certain individuals and places at school**.

Credibility Considerations from OCR

(1997 Sexual Harassment Guidance continued)

- Evidence about whether the student claiming harassment filed a complaint or **took other action to protest the conduct** soon after the alleged incident occurred. However, failure to immediately complain may merely reflect a fear of retaliation or a fear that the Claimant may not be believed rather than that the alleged harassment did not occur.

...

Credibility Considerations from OCR

(1997 Sexual Harassment Guidance continued)

- Other **contemporaneous** evidence. For example, did the student claiming harassment write about the conduct, and his or her reaction to it, soon after it occurred (e.g., in a diary or letter)? Did the student tell others (friends, parents) about the conduct (and his or her reaction to it) soon after it occurred?

See 1997 Sexual Harassment Guidance

SANCTIONS

Discretion in Sanctioning

- Upon reaching a determination that a respondent is responsible for sexual harassment, the final regulations **do not restrict a recipient's discretion** to impose a disciplinary sanction against the respondent, including suspension, expulsion, or other removal from the recipient's education program or activity.

Title IX Regulations May 19, 2020, Preamble at 85 F.R. 30224

Discretion in Sanctioning

- For reasons described elsewhere in this preamble, the Department **does not require any particular disciplinary sanctions** against respondents, because these Title IX regulations are focused on requiring remedies for victims, leaving disciplinary decisions to recipients' discretion.

Title IX Regulations May 19, 2020, Preamble at 85 F.R. 30262

Discretion in Sanctioning

- The § 106.45 grievance process is designed for implementation by non-lawyer recipient officials, and the final regulations **do not intrude on a recipient's discretion** to use disciplinary sanctions as educational tools of behavior modification rather than, or in addition to, punitive measures.
- Similarly, these final regulations **do not impose a standard of proportionality** on disciplinary sanctions.

Title IX Regulations May 19, 2020, Preamble at 85 F.R. 30266, 30274

Discretion in Sanctioning

- The Department has determined that administrative enforcement of Title IX does not require overriding recipients' discretion to make decisions regarding disciplinary sanctions, and thus these final regulations focus on ensuring that respondents are not punished or disciplined unless a fair process has determined responsibility, but respects the discretion of State and local educators to make disciplinary decisions pursuant to a recipient's own code of conduct.

Title IX Regulations May 19, 2020, Preamble at 85 F.R. 30274



Interim Policy on Sexual Harassment (**Sanctions**)

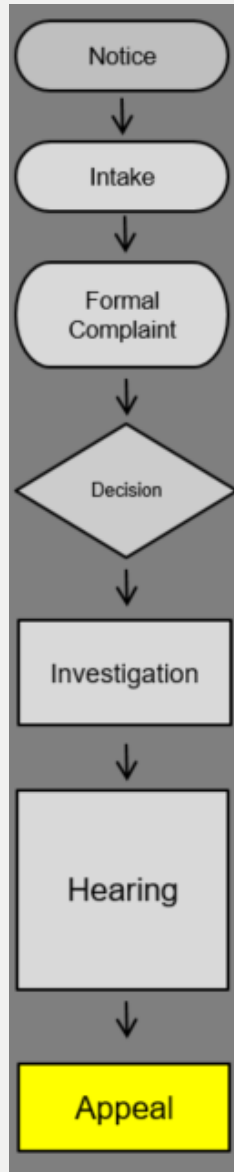
Wide Range of Sanctions for Student Respondents: “Students found to have committed sexual assault will most likely receive a sanction of suspension or expulsion.”

Range of Sanctions for Staff Respondents: Disciplinary action for staff employees is governed by existing policies in the *Employee Handbook* and/or collective bargaining agreements, as applicable, and may include verbal warnings, written warnings, written reprimands, suspension, termination of employment, or other action as deemed appropriate under the circumstances.

Range of Sanctions for Faculty Respondents: Disciplinary actions for faculty employees includes: treatment, admonition, censure, suspension and dismissal.

APPEALS

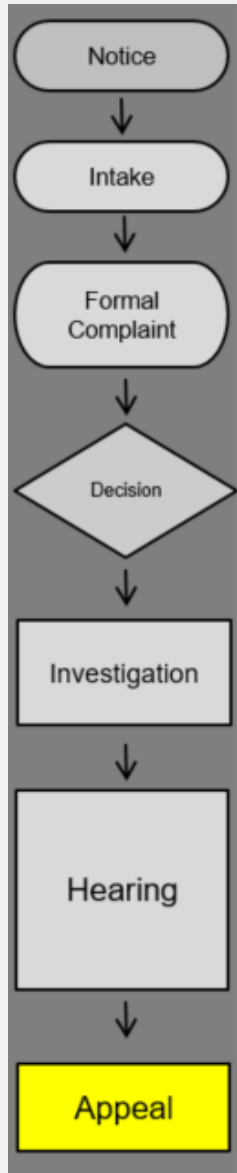
Appeals



- A recipient must offer both parties an appeal from a determination regarding responsibility, and from a recipient's dismissal of a formal complaint or any allegations therein, on the following bases:
 - 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(s) had a conflict of interest or bias for or against complainants or respondents generally or the individuals complainant or respondent that affected the outcome of the matter.
- A recipient may offer an appeal equally to both parties on additional bases.

Title IX Regulations May 19, 2020 §106.45 (b)(8)

Appeals



- As to all appeals, the recipient must:
 - Notify the other party in writing when an appeal is filed and implement appeal procedures equally for both parties;
 - Ensure that the decision-maker(s) for the appeal is not the same person as the decision-maker(s) that reached the determination regarding responsibility or dismissal, the investigator(s), or the Title IX Coordinator;
 - Ensure that the decision-maker(s) for the appeal complies with the standards set forth in paragraph (b)(1)(iii) of this section [regarding no conflict of interest or bias, and properly trained];
 - Give 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 written decision simultaneously.

Title IX Regulations May 19, 2020 §106.45 (b)(8)



Interim Policy on Sexual Harassment (**Appeals**)

Appeals:

The Complainant and Respondent may appeal the outcome, subject to the limitations set forth below. The Title IX Coordinator or a Deputy Title IX Coordinator will provide written notification to the Complainant and the Respondent of any applicable appeal procedures at the time the Complainant and Respondent receive notice of the outcome decision. The purpose of an appeal is to allow the College to review and correct material errors in the adjudication process.



Interim Policy on Sexual Harassment (**Appeals**)

Grounds for Appeal:

Appeals must satisfy one or more of the following bases for appeal:

1. Discovery of new factual information that was not known or available at the time of the adjudication and the presentation of which would have affected the original outcome. Omission of factual information that was known and available to the appealing party is not a valid ground for an appeal;
2. Material procedural error that rendered the process fundamentally unfair;
3. Abuse of discretion in the issuance of a sanction, meaning that the Administrative Panel imposed a sanction that was significantly disproportionate to the offense; or
4. Evidence of bias in the process.



Interim Policy on Sexual Harassment (**Appeals**)

Appeal Procedures:

An appeal must be made in writing and signed by the party filing the appeal.

- An appeal in which the Respondent is a **faculty employee** must be directed to the Vice President for Academic Affairs;
- An appeal in which the Respondent is a **student** must be directed to the Vice President for Student Success and Enrollment Management; and
- An appeal in which the Respondent is a **staff employee** must be directed to the Vice President for Finance and Operations. Any of these individuals may assign the appeal to a designee, so long as that person is appropriately trained and does not have a conflict of interest.



Interim Policy on Sexual Harassment (**Appeals**)

Appeal Procedures:

An appeal must be made in writing and signed by the party filing the appeal.

- An appeal in which the Respondent is a **faculty employee** must be directed to the Vice President for Academic Affairs;
- An appeal in which the Respondent is a **student** must be directed to the Vice President for Student Success and Enrollment Management; and
- An appeal in which the Respondent is a **staff employee** must be directed to the Vice President for Finance and Operations. Any of these individuals may assign the appeal to a designee, so long as that person is appropriately trained and does not have a conflict of interest.



Interim Policy on Sexual Harassment (**Appeals**)

Appeal Procedures (cont'd):

Appeals must be made within five (5) business days of receipt of the determination or within five (5) business days of receipt of the decision regarding sanctions and/or other actions and must include the grounds for appeal and an outline of any supporting evidence. Appeals transmitted via e-mail will be considered to be “in writing” for the purposes of this section.



Interim Policy on Sexual Harassment (**Appeals**)

Appeal Procedures (cont'd):

The appellate official may deny the appeal if it does not satisfy at least one of the four grounds for appeal described above. In cases in which one or more of the appeal grounds have been met, the substance of the appeal will be weighed carefully. If the appellate official determines that there are sufficient grounds to alter the prior decision, it is the responsibility of the appellate official to determine the scope of a new review and to award one of the following two forms of relief:

1. Return the case to the Title IX Coordinator or a Deputy Title IX Coordinator, with instructions for further investigation, if applicable, and consideration by the same or a different Administrative Panel; the decision about the composition of the panel, which shall be at the sole discretion of the appellate official; or
2. Return the case to the Title IX Coordinator or a Deputy Title IX Coordinator with instructions to appoint a different Administrative Panel to review the case.



Interim Policy on Sexual Harassment (**Appeals**)

Appeal Procedures (cont'd):

Absent extenuating circumstances, the appellate official will notify the Complainant and Respondent of the appeal decision (i.e., whether the grounds for appeal have been adequately established) simultaneously in writing within fifteen (15) business days of receiving the appeal and will notify the Title IX Coordinator or a Deputy Title IX Coordinator in writing of instructions for any further action.



Interim Policy on Sexual Harassment (**Appeals**)

Appeal Procedures (cont'd):

All decisions by the appellate official following a second review of the case are final. Absent extenuating circumstances, both parties will be notified of the final decision concurrently in writing within fifteen (15) business days of the deadline for the Complainant's or Respondent's response to the appeal but no later than one (1) business day following the decision, to the extent permitted by law.

Use of Slides

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- These materials are meant to provide a framework for informed discussion, not to provide legal advice regarding specific institutions or contexts.
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