

#aiTIXCoordinator

TITLE IX COORDINATORS AS COMPLIANCE OFFICERS



1



CHAT

**What was one area of new regulations
that you were able to implement with
ease?**

**What's one area that is/was much
harder to implement?**



2

HIGHLIGHTS OF 2020 TITLE IX REGULATIONS - FINAL RULE



Notice Requirements

Impact on Mandated Reporters/Responsible Employees



Covered Prohibited Conduct: Definitions, Scope, and Jurisdiction



Burden of Proof



Move from Single Investigator to Live Hearing Model

Cross Examination Requirement



Impact on Employees

3

Activity #1: *Select a category and share a best practice you have implemented, or one you are prepared to implement, that fits that category.*



Category 1: Structure and Staffing



Category 2: Reporting and Response



Category 3: Investigations



Category 4: Hearings and Appeals



Category 5: Prevention and Awareness

4

Applying the Seven Elements of Compliance to Implementation of the New Title IX Regulations



5

7 (Really 8) Elements of Compliance



Standards of
Conduct/Policies
and Procedure



Compliance
Officer/Committee
Oversight



Education and
Training



Monitoring and
Auditing



Reporting and
Investigating



Enforcement,
Discipline, and
Incentives



Response and
Prevention



Risk Assessment



6

Title IX Compliance Plan

- 1) Standards, Policies, and Procedures
 - Must have published grievance procedures and specific notification and posting requirements
- 2) Governance and Administration
 - Must designate a Title IX Coordinator
 - Supporting staff (Investigators, hearing administrators, etc.)
- 3) Education and Training
 - New training requirements for administrators
- 4) Monitoring and Auditing
- 5) Reporting and Investigation
 - New guidelines about what constitutes a report
 - Specific requirements for investigations and process
- 6) Enforcement, Discipline, and Incentives
 - New requirements for live hearings
 - Restrictions in interim measures and actions taken before final decision
- 7) Response and Prevention
 - VAWA Education and Prevention Requirements Still Apply
- 8) Risk Assessments
 - August 14th Compliance Deadline Forces Prioritized Response



7


STEPS TO COMPLIANCE



8



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RESOURCE

Free Resources to Define Scope and Requirements

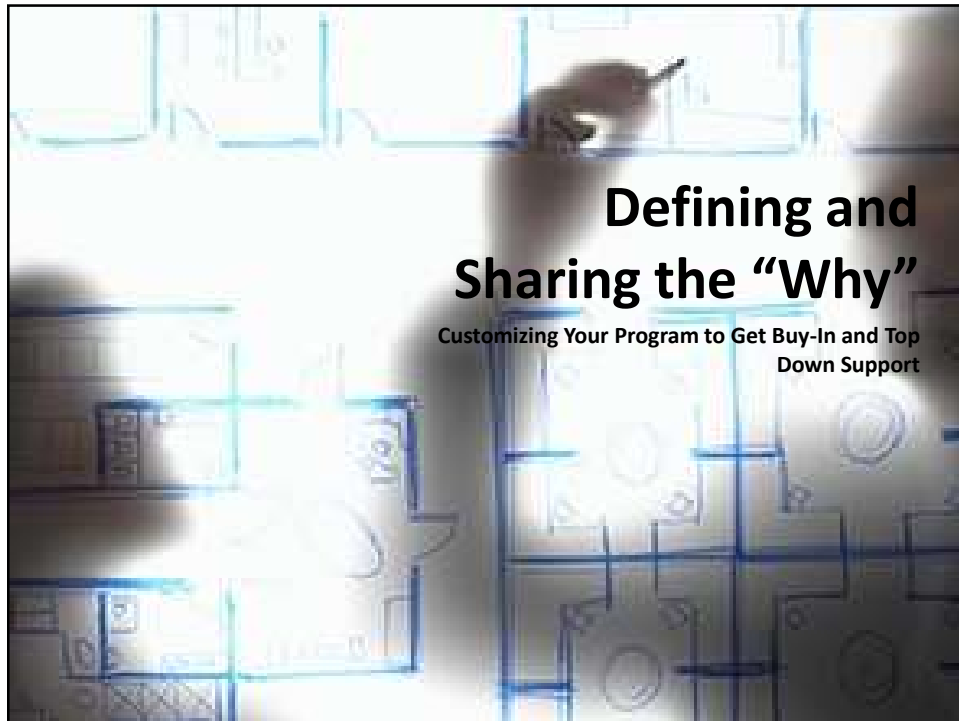
[DOE Summary of Major Provisions](#)
[ATIXA Regulation Resource Center](#)
[SUNY Student Conduct Institute Joint Guidance](#)
[CUPA HR Sexual Harassment Resources](#)

GUIDING QUESTIONS:

- What does our current Title IX Compliance Program look like?
- What, if anything, is contrary to the new regulations?
- What can we maintain?
- What must we change?



ACADEMIC
IMPRESSIONS

10



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GUIDING QUESTIONS



- How do the new Title IX Regulations fit or challenge your:
 - Ethical Code of Conduct
 - Student Code of Conduct
 - Employee and Faculty Conduct Policies
 - Mission and Values
 - Strategic Plan
 - Campus Culture
- Who do the new Title IX Regulations:
 - Protect?
 - Harm?
 - Challenge?
 - Support?
 - Impact?


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GUIDING QUESTIONS



- What positions are required for compliance?
 - Title IX Coordinator/Deputy Coordinators
 - Investigators
 - Hearing Staff/Panel Members
 - Appeals Staff
 - Advisors
 - Confidential Offices
- What departments are impacted by compliance?
 - General Counsel
 - Human Resources
 - Student Affairs
 - Athletics
 - Student Conduct
- What overlooked departments or staff could assist with compliance?
 - Athletics?
 - Faculty?
 - Counseling/Health?
 - Campus Safety/Law Enforcement?



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15



16



RESOURCE

Office for Civil Rights

<https://www2.ed.gov/about/offices/list/ocr/newsroom.html>

- [Title IX Regulations Addressing Sexual Harassment](#) (unofficial copy)
- [Title IX Regulations Addressing Sexual Harassment](#) (Federal Register)
- [Title IX: Fact Sheet: Final Title IX Regulations](#)
- [Title IX: U.S. Department of Education Title IX Final Rule Overview](#)
- [Title IX: Summary of Major Provisions of the Department of Education's Title IX Final Rule](#)
- [OCR Blog](#)

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QUESTIONS

18



1



2

#aiTIXAdvInvestigator

NEW REGULATIONS AND THE TITLE IX INVESTIGATION PROCESS



3

AGENDA

Review of the new Title IX regulations regarding investigation process

Address gaps in the new law that could impact the way investigations are facilitated



4

NEW REGS

TITLE IX

- Overarching summary - a neutrally trained investigator must gather relevant evidence, including exculpatory and inculpatory (but not privileged material unless consent), and fairly summarize the case in a report
- Investigator training [§106.45(b)(1)(3)]
- Conflict of interest and bias [§106.45(b)(1)(iii)]
- “Not Responsible” Presumption [§106.45(b)(1)(iv)]
- Medical records [§106.45(b)(5)(i)]

NEW REGS

TITLE IX

- Focus is “equity” for both parties.
- Advisor of choice [§106.45(b)(3)(iv)]
- Equal opportunity to present witnesses and offer information inculpatory and exculpatory info [§106.45(b)(5)(ii)]
- No gag orders on parties; ability to gather and present relevant information [§106.45(b)(5)(iii)]
- Legal privileges; waiver [§106.45(b)(1)(x)]
- Right to inspect, review, access, and respond to information [§106.45(b)(3)(vi)]

NEW REGS

TITLE IX

➤ **Written** communication will also be required throughout:

➤ (v) Provide, to a party whose participation is invited or expected, written notice of the date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings, with sufficient time for the party to prepare to participate

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NEW REGS

Inspection of Evidence (vi):

WHAT - Equal opportunity to inspect and review any evidence

- inculpatory or exculpatory evidence whether obtained from a party or other source

WHY - Each party can meaningfully respond to the evidence prior to conclusion of the investigation.

WHEN - Prior to completion of the investigative report...the parties must have at least 10 days to submit a written response

WHO - Send evidence to each party and advisor, if any

HOW - electronic or hard copy

PURPOSE - the investigator will consider prior to completion of the investigative report

8

THE INVESTIGATIVE REPORT [§106.45(b)(3)(vii)]

- Must fairly summarize relevant info
- AGAIN - Must be sent to both parties and advisors at least 10 days prior to scheduled hearing or time of determination regarding responsibility
- AGAIN - Must be in electronic format or hard copy
- AGAIN - Allows for both parties to review and/or provide written response



9

Case law DOE v. USC - 2018



No fair hearing because 3 key witnesses not interviewed



No ability to assess credibility



University's procedures for hearing weren't followed



Failed to request tangible, available evidence



10

CASE LAW DISCUSSED IN THE NEW REGULATIONS

DOE v. U of Cinn – 6th Cir.
2017

“In the case of competing narratives, ‘cross-examination has always been considered a most effective way to ascertain truth.’”



11

CASE LAW DISCUSSED IN THE NEW REGULATIONS



DOE v. Baum – 6th Cir. 2018



“...where university Title IX sexual misconduct proceeding turned on credibility of parties, the university must provide a hearing with opportunity for parties to cross-examine each other.”



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REASONABLE PERSON



...a fictional person with an ordinary degree of reason, prudence, care, foresight, or intelligence whose conduct, conclusion, or expectation in relation to a particular circumstance or fact is used as an objective standard by which to measure or determine something (as the existence of negligence) (m-w.com)

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CHAT

**What gaps have you found
in the new regulations
regarding investigations?**

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RESOURCE

Office for Civil Rights

<https://www2.ed.gov/about/offices/list/ocr/newsroom.html>

- [Title IX Regulations Addressing Sexual Harassment](#) (unofficial copy)
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QUESTIONS

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10-STEP INVESTIGATION MODEL INTRODUCTION



1

■ AGENDA

- I. The Complex Scenario
- II. Qualities of an Investigator
- III. Where to Start - Shell
 - i. Pre-Flight
- IV. Step by Step Approach - 10 Steps
- V. Approaches to Specific Types of Cases (Session 3)
- VI. Harvard IAT - Check Your Own Biases (Session 3)



2

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Complaint, Counter-Complaint, Retaliation

THE SCENARIO



3



ACTIVITY

To: Title IX Office

I need to report another student who is stalking me. Eliza Darcy has been following me around campus, lurking around my dorm and my classrooms, sneaking up on me in the dining hall, and yelling at me when I told her to stop. I told my RA today, and we called the police and told them about it. I wanted to also tell the Title IX office. I can't learn on a campus where I don't feel safe. Something has to happen; she has to leave me alone.

Sincerely,
Jane Bingley



4



CHAT

What are you thinking now?

What's your game plan?

5

QUALITIES OF AN INVESTIGATOR

Open-
minded

Courageous

Culturally
conscious

Aware of
own biases

Organized

Detailed-
oriented

6

KEY TO APPROACH

“Of all the ploys and techniques, the most important and, sadly, the most usually neglected is good organization. While this principle is the oldest and most widely recognized, it is the one that is most frequently violated.”

- McElhaney, Trial Notebook, *An Introduction to Cross-Examination*, 2 Litig 37, 48 (Spring 1976).

WHERE TO BEGIN?

start

- Investigate one time or separate investigations?
- OUTLINE your approach – deliberate, methodical; set expectations for time to completion
- Send out new notices of investigation for each complaint with specificity

■ WHERE TO BEGIN?

- Frame the beginning by what you'll need at the end
- A report that sets forth each complaint (e.g., harassment, stalking, sexual contact)
- The elements of each
- The evidence that addresses each

■ 10-Step Investigation Model



1. Identify Violations and Elements
2. Gather Information
3. Determine Interview Logistics
4. Review and Outline
5. Developing Questions
6. Using Documents
7. Starting the Interview
8. Questioning
9. Wrapping It Up
10. Specific Techniques/Situations

STEP 1: Identify Violations and Elements

Example: Stalking

1. repeated following, watching, or harassing
2. of a specific person
3. that would cause a reasonable person to
 - a. fear for their safety or the safety of others, or
 - b. suffer substantial emotional distress

You will target questions to these elements and will frame your report around the elements.



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STEP 2: Gather Information

Information gathering.

- Documents **BEFORE** interviews
- Student files, class schedules, activities
- Identify the location of the incident – surveillance camera (eyewitnesses identified from these)
- Cultural issues
- Documents **FROM** interviews
 - Social media and chat logs; IPs?
 - Photos/videos
 - Gather as much prior interactions between the parties as possible
 - Ask to read/copy their text messages
- Note re: “privileged materials”



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STEP 3:

Determine Interview Logistics

- Order of interviews
 - Usually going to be complainant/respondent first
 - CP then her witnesses?
- Try not to schedule interviews for more than 2-hour sessions
- Neutral place*
(digital world?)



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STEP 4:

Review and Outline

- REVIEW all the documents/evidence **BEFORE** your first interview
- START chronology
- OUTLINE your interview
 - Outline should start with what you think you know and be designed to help you figure out:
 - What you don't know
 - Whether what you think you know is correct (confirming or refuting what you do "know")
- BRAINSTORM your outline
- ELEMENTS and source of them (policy)



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STEP 5: Developing Questions



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STEP 6: Using Documents

Using Documents

- Organize documents by witness
- Two sets: one with your notes about what you want to ask, the other clean for use with the witness
- If it is to or from that witness, lay groundwork BEFORE you show them the document
 - Emails, texts, photos, videos, chat logs, social media

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STEP 6: Using Documents

Organizing them

- On your copy, mark (for example: 1) in big marker on the first page. Have a folder marked “1” for the associated document, clean copy, for your witness.
- Put your own copy in whatever order makes sense to you
- When you get to the document in your outline, just find the folder with the same number, pull it out, and go!
- You and/or your interview partner in taking notes can refer to the document as #1 instead of “showed email of 9/4/2019,” “showed doc #1.”
- Keep an index of the documents so you can be sure what you were asking about later.

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ACTIVITY

Prepare a Document

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QUESTIONS

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TITLE IX COORDINATOR AS THE CAMPUS EXPERT




1

AGENDA

- I. Becoming your campus subject matter expert
- II. Establishing your presence
- III. Building a coalition
- IV. Collaborations




2

 **CHAT**

**I never thought I could...
[fill in the blank].**

Submit your responses in the Chat Box.

 3

3

 **STEPS TO TAKE TO BECOME AN “EXPERT”**


- Practice
- Trial & Error
- Spoke to others
- Find a Mentor
- Jumped in the deep end
- Questions & Research
- Commitment/ Investment

ASK AN EXPERT




 4

4



POLL

**So, do you think you are
your campus's Title IX
expert?**



5

BECOMING A SUBJECT MATTER “EXPERT” - TALK THE TALK

- Training and Certifications
- Whitepapers
- Department of Education
- Other Title IX Coordinators



6

ESTABLISH A PRESENCE - WALK THE WALK

- Seen & Be Seen
- Campus Meeting & Presentations
- Website/ Social Media
- Crisis Manager



7

BUILDING A COALITION - CAMPUS WHO'S WHO



- General managers/owners
- Coaching team
- Game changers/MVPs
- Teammates
- Outfielders
- Spectators



8



ACTIVITY

A League of Your Own: Building Your Dream Team



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OTHER CONSIDERATIONS TO MAINTAIN YOUR EXPERTISE

- Campus Climate
- Managing Change
 - Staffing
 - Legal landscape (federal, state, and competing laws)
- Proactive vs. Reactive
- Negative PR
- Your Personality/Demeanor



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COLLABORATIONS

Programming

- Health Center
- Counseling

Students

- Student Government
- Greek Life

Employees

- Faculty Senate
- Staff Council

Other

- IT
- Public Relations


11

MAINTAINING AND CULTIVATING RELATIONSHIPS

- Consistency
- Receiving Feedback
- Self-Awareness
- Leadership Development
- Creditability
- Validating Others
- Open to Change
- Humility
- Accessibility
- Life-Long Learner




12

 **CHAT**

SHARE WITH US!

What have been some of your own strategies to establish yourself as a reliable and visible Title IX campus expert?



13

 **PITFALLS IN BEING THE CAMPUS EXPERT**

- Self-doubt
- Doubt of others
- Loss of credibility
- Getting through the tough times
- Re-establishing confidence





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 **QUESTIONS**



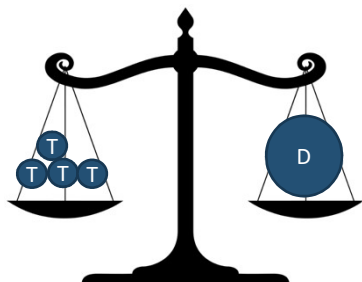


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WHY COMMUNICATION MATTERS



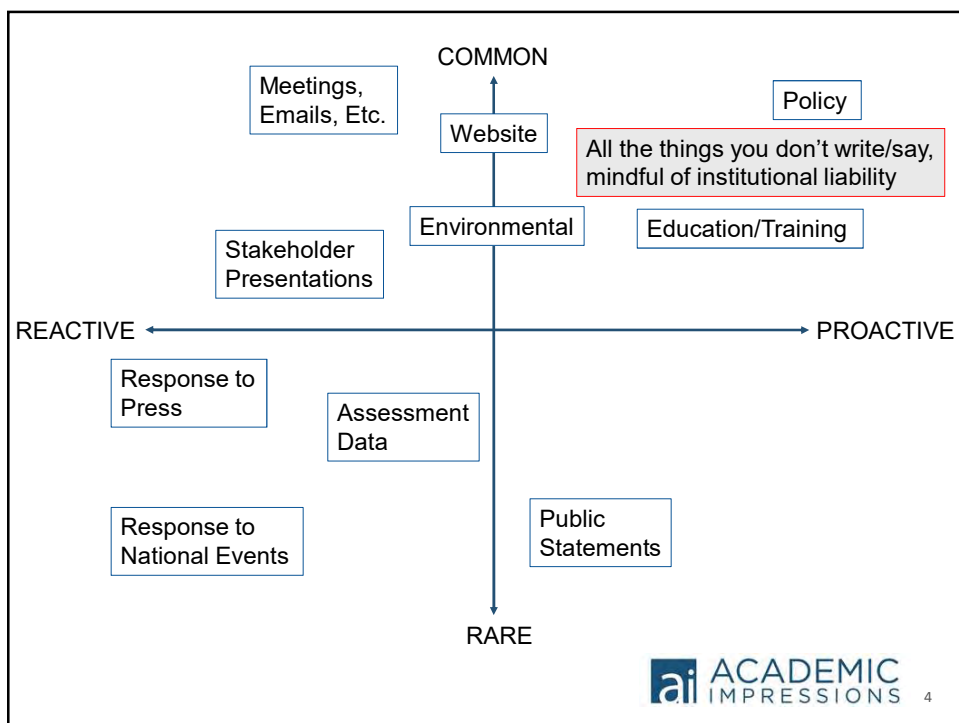
T9C in middle of competing obligations:

- Involved parties
- University community (students, employees, parents, etc.)
- University as an entity

Trust and Distrust (Makela and Shelton, 2012)

- Two separate ranges
- Trust = slow, gradual
- Distrust = rapid, persistent (20+yrs)

3



4

LEGAL REQUIREMENTS

Confusing messaging from related laws:

- FERPA
- Clery Act (Timely Warnings, Emergency Notifications)
- Title IX Guidance (now)
- Title IX Regulation (soon)
- State Laws (vary)




5

STRUCTURAL LENS: ENTERPRISE RISK MANAGEMENT


- **“Sexual assault/Title IX” ranks 2nd in top reputational risks over past three years** (behind “Campus climate”); also 2nd in top risks anticipated in the future (United Educators, 2017)
- Communication ideally addressed at an enterprise scale, with clear expectations, division of labor, and protocols understood at all levels of organization (board, top leadership, front line staff, etc.)
 - Identify, assess, and manage risks
 - Build resiliency to overcome (inevitable) risk events

6




CHAT

What are your major institutional/structural barriers to solid Title IX communications?



7

EFFECTIVE STAKEHOLDER ENGAGEMENT



Provide honest, transparent, & accessible information


Custom delivery tailored to stakeholder needs and culture

Seek to understand what your stakeholders value; be curious, not judgmental


Provide feedback on how you have addressed & resolved their issues

Track and record your engagement over time; refresh before showing up

(SustaiNet, 2019)




8



CHAT

What are some creative communication touchpoints that you have seen deployed to reach students, employees, parents, or others? (They can be Title IX-related or from other fields or industries.)



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FIGHT THE POWER (wait...that's you)

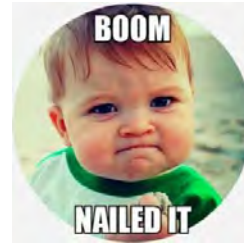
I AM THE MAN
and I'm fighting myself

BEWARE
WHAT YOU SHARE



10

THE SAVVY TITLE IX COMMUNICATOR...



- Conveys **professionalism** and **competence**
- **Knows their audience** and does their homework
- Appreciates institutional **liability**
- Commits to **accessibility** and **inclusivity**
- Communicates with **INTEGRITY ALWAYS**



11



ACTIVITY

CASE STUDY!

In small groups, you'll have the opportunity to offer your expertise by reviewing a case study that has caught your local newspaper's attention. You'll have the opportunity to discuss options for handling this matter and offering strategies to mitigate rumors and negative PR.



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 **QUESTIONS**

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REVISING INTERVIEW TECHNIQUES



1

AGENDA

- I. Continuation of Interview Steps – IN THE INTERVIEW ROOM
- II. Approaches to Specific Types of Cases
 - DV or IPV
 - Stalking
 - Cultural
- III. Expert Witness
- IV. Demo and Practice



2

STEP 7: Starting the Interview



The interview

- Interview in pairs
- Record the interview*?
- Don't dive right in
 - Establish rapport
 - Establish ground rules
 - Video interview rapport (later)

STEP 7: Starting the Interview

The interview

- Consider techniques for survivor interview/traumatized people:
 - Avoid judgmental attitudes
 - Recognize that events do not need to be extreme to be traumatic
 - Concurrent crises can occur
 - Make referrals to proper resources
 - Recognize resilience
 - Provide clear guidance on process

STEP 7: Starting the Interview

Pre-flight

- Create a habit of establishing neutrality
- Follow your checklist of what you say to each party/witness

I am a neutral investigator in an adjudicative process — that means I do not take sides, and I am here to do my job. I collect facts and treat everyone with respect and fairness. I will be friendly, but I am not your advisor; if you need one, I can connect you with one. We cannot require people to not discuss their experience with others. University policy prohibits retaliation against anyone involved in an investigation. We know how sensitive this investigation is, and we take great care with personal privacy during the investigation. However, the regulations require a release of my investigation to all parties before the report is finalized. What questions do you have?

Complainant - these are legal terms, not the plain English

Respondent

Neither the complainant nor the respondent is required to prove anything one way or another. It is the [institution's] responsibility to investigate and determine the facts.



5

STEP 7: Starting the Interview



Pre-flight

- Create a habit of establishing neutrality
- Follow your checklist of what you say to each party/witness

- neutral investigator
 - Don't take sides
 - Collect facts
 - Everyone gets respect/fairness
 - Friendly but not your advisor (do you need/want, let's make it happen)
- Sensitive and handled as such by [institution]
 - But can't require people not to talk
 - Retaliation — caution!
 - We are careful with your private info — need to know
 - Release to parties in advance of final report
- What does complainant/respondent mean?
- **Role of advisor (ask for input at end)**
- Questions



6

STEP 7: Starting the Interview

Ground Rules - use same with everyone

- What they know v. what they know about
- Find out everything you can
- Explain the various levels of credibility of evidence
- Always hard to be a witness, but is there any particular reason they aren't able to give their best recollection today?
- Don't expect they'll have answers to every question - normal

Ensure case management is happening, so the care and feeding of parties and witnesses is robust.

STEP 8: Questioning

- Start at the beginning. People can follow a chronology.
- **GOAL:** Breadth, or open phase ("What happened?" "And, what next?")
- **GOAL:** Depth, or clarification phase
 - Where were you when that happened?
 - How did you know that happened?
 - Will you draw me a map of the room and where everyone was?
- **GOAL:** Closing off
 - Did anything else happen?
 - Anything else?
 - Yes, great. Anything else?

STEP 8: Questioning



GOAL: Additional evidence gathering

Corroboration phase

- Did you document that?
- Texts?
- Other people there?
- Who?
- Who else knows about this?
- Where else can I find documentation of this?

STEP 9: Wrapping It Up

Wrapping up

- Check things off your outline as you go or during breaks.
- Take your time. Take breaks. If too emotional, then reschedule. Ensure lucidity. Bring tissues.
- BEFORE YOU FINISH, take a break and go over your outline with your interview partner. What did and didn't remember to ask?
- Ask before you leave: What else do you think I need to know? What have I forgotten to ask?

STEP 9: Wrapping It Up



Wrapping up

- Ask for evidence
- Note evidence you can get without witness participation/consent
- Physical evidence (must have a plan for maintenance)
- Access to phone/computer
 - Forensics on computers/phones/etc.

STEP 9: Wrapping It Up

Ending

- Thank them for their time.
- Acknowledge the difficulty of the situation.
- Invite them to contact you with additional information as it comes back to them.
- Provide a list of documents/evidence you discussed that they have indicated they might have. Let them know next steps.
- Check on crunch times coming up (or vacations or whatever) that would make it difficult to re-interview.
- Advise them; likely you'll need to conduct some follow up with them.

STEP 9: Wrapping It Up

Ending

- Log all evidence acquired
- Follow up checklist
 - Who did they suggest you interview and why?
 - What evidence did they suggest you get and why?
 - What interviews and evidence have you identified that you might want?
- Note all witness interview specifics
- Draft memorandum of interview (if not recorded) within 24 hours
- Resource (Investigation Tracking)

13

STEP 10: Specific Techniques/Situations



Specific Approaches: Dating/Domestic Violence

- Delicate with trauma
- Photos of injuries
 - Medical records too (consent)?
- Texts of apologies/texts of threats if disclosed/texts of cover-up requests
- Disclosure to confidants
- Behavior consistent with covering up physical injuries
- Behavior consistent with making excuses for partner's behavior
- Alcohol problems of partner?

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STEP 10: Specific Techniques/Situations



Specific Approaches: Stalking

- Follow the popcorn trail of evidence
 - Text messages
 - Social media and other on-line platforms
 - Phone calls/emails
 - Stalker reaching out to friends/family of complainant
 - Check RS's phone for evidence - consent first
 - Notes/letters/gifts/cards/offers of the same
- Observed in complainant's spaces: e.g., dorms, dining halls, common spaces
- Behavior consistent with obsession with/compulsion

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STEP 10: Specific Techniques/Situations



Specific Approaches: Cultural Issues

- Language issues, e.g., idioms, translations
- Cultural differences – what's allowed in country of origin
- The WAY the opposite sex intersects
- LGBTQ issues in home country
 - Family norms and what's acceptable
- Religion

*****Check your own implicit bias*****

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EXPERT WITNESSES



SAMPLE QUESTIONS:

- What are your qualifications?
- Have you worked primarily for complainants or respondents (or people in their general shoes)?
- What evidence or information did you rely on in coming to your opinions?
- What are your opinions?



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10-STEP INVESTIGATION MODEL



1. Identify Violations and Elements
2. Gather Information
3. Determine Interview Logistics
4. Review and Outline
5. Developing Questions
6. Using Documents
7. Starting the Interview
8. Questioning
9. Wrapping It Up
10. Specific Techniques/Situations



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CHAT

In breakout rooms, please take a moment to discuss your current interview strategy and identify opportunities for revision or modification based on the information provided in this session.

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QUESTIONS

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REFRESH & RESET

Based on what you learned yesterday, what resonated with you the most and why?



1

#aiTIXCoordinator

CONSIDERATIONS FOR PROCESSING STUDENT VS. FACULTY/STAFF CASES

2



CHAT

SHARE OUT & DISCUSS!

What have been some of your greatest challenges managing faculty/staff cases vs. student cases?

3

PHILOSOPHICAL QUESTION

“Do you approach faculty cases and student cases the same or differently?”

It's complicated.



4

SIMILARITIES

- Title IX Applicability
 - Notices
 - Evidentiary Standard
 - Other Regulatory Requirements
- Other Laws
 - Clery/VAWA (constituent group irrelevant)
- Investigatory Approach
- Care, Dignity, Privacy, Respect, Etc.
- Universal Institutional Policies/Procedures (?)

5

POLL

**Does your institution
currently maintain the same
Title IX procedures for
students and faculty/staff?**

6

■ DIFFERENCES

- Title IX Specifics
 - Education Program or Activities v. Employment
 - *Quid Pro Quo* (employees only)
 - Compelled Investigations
 - No Informal Resolution for Sexual Harassment by an Employee
 - Emergency Removal v. Administrative Leave
 - Supportive Measures and Remedies
 - Retaliation

■ DIFFERENCES (CONTINUED)

- Other Laws
 - Title VII (employment only; preemption circuit split)
 - FERPA (students only)
 - State and Local Employment Laws (N/A for students)
 - ADA, Section 504 (different parts)
- Contractual Considerations
 - Code of Conduct v. Employee/Faculty Handbooks
 - Collective Bargaining Agreements

■ DIFFERENCES (CONTINUED)

- Key Partnerships, Practical Considerations
 - For employees, stakes include livelihood, professional reputation, future employment prospects
 - Student Affairs v. Human Resources v. Faculty Administration
 - Decision-Makers, Appeals
- Training/Education
 - Venues, Approach/Focus, Delivery
 - “Responsible Employees”/Mandatory Reporting

9

■ 5 KEY PREPARATORY CONSIDERATIONS AT THE INSTITUTIONAL LEVEL

- 1) Policy/Procedural Framework
- 2) Tailoring Communications
- 3) Mitigating Power Dynamics
- 4) Preparing Investigative Staff
- 5) Preparing Decision-Makers and Appellate Decision-Makers



10



QUESTIONS

#aiTIXAdvInvestigator

IMPLICIT BIAS AND APPLYING NEW- FOUND INTERVIEW TECHNIQUES TO AN EXISTING CASE



1



RESOURCE

*Any volunteers want to share what
they learned about themselves
after taking the test?*

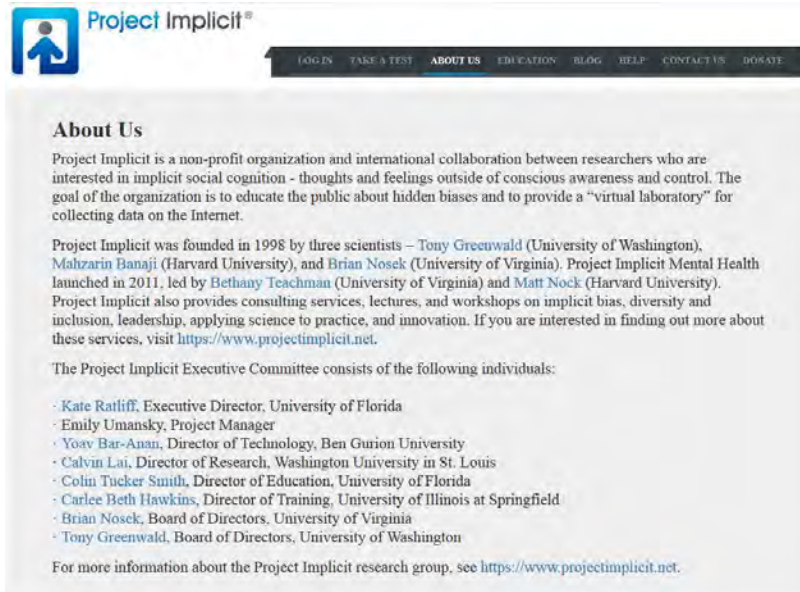
Implicit Bias Test

<https://implicit.harvard.edu/implicit/takeatest.html>



2

Understanding Bias - Project Implicit



The screenshot shows the Project Implicit website. At the top is the Project Implicit logo and a navigation bar with links: LOGIN, TAKE A TEST, ABOUT US, EDUCATION, BLOG, HELP, CONTACT US, and DONATE. The 'About Us' section is highlighted. It describes Project Implicit as a non-profit organization and international collaboration between researchers interested in implicit social cognition. It mentions the goal of educating the public about hidden biases and providing a 'virtual laboratory' for collecting data on the Internet. It also lists the founders: Tony Greenwald (University of Washington), Mahzarin Banaji (Harvard University), and Brian Nosek (University of Virginia). It notes that Project Implicit Mental Health was launched in 2011, led by Bethany Teachman (University of Virginia) and Matt Nock (Harvard University). The page further states that Project Implicit provides consulting services, lectures, and workshops on implicit bias, diversity and inclusion, leadership, applying science to practice, and innovation. It provides a link to <https://www.projectimplicit.net> for more information. A list of the Project Implicit Executive Committee members is also provided: Kate Ratliff (Executive Director, University of Florida), Emily Umansky (Project Manager), Yoav Bar-Amm (Director of Technology, Ben Gurion University), Calvin Lai (Director of Research, Washington University in St. Louis), Colin Tucker Smith (Director of Education, University of Florida), Carlee Beth Hawkins (Director of Training, University of Illinois at Springfield), Brian Nosek (Board of Directors, University of Virginia), and Tony Greenwald (Board of Directors, University of Washington). A final link to <https://www.projectimplicit.net> is provided for more information about the Project Implicit research group.

3



ACTIVITY

Time to Practice Case Study Introduction

4

COMPLAINT

To: Title IX Office

I need to report another student who is stalking me. Eliza Darcy has been following me around campus, lurking around my dorm and my classrooms, sneaking up on me in the dining hall, and yelling at me when I told her to stop. I told my RA today, and we called the police and told them about it. I wanted to also tell the Title IX office. I can't learn on a campus where I don't feel safe. Something has to happen; she has to leave me alone.

Sincerely,
Jane Bingley



5



CHAT



Rapport Building



6



CHAT



Volunteer A: Plays CP
Volunteer B: Plays Investigator

ai ACADEMIC
IMPRESSIONS 7

7



CHAT



Add New Volunteer: Difficult Witness
Use Digital Environment to Your Advantage

ai ACADEMIC
IMPRESSIONS 8

8



ACTIVITY

Large Group Debrief



9



QUESTIONS

10

#aiTIXAdvInvestigator

VIRTUAL NETWORKING RECEPTION



11

BEST PRACTICES FOR LEADING SEXUAL HARASSMENT/MISCONDUCT INVESTIGATIONS

1

CHANGES TO INVESTIGATIONS FROM NEW REGS

- Notice requirements and process for getting to formal investigation
- New Scope, Jurisdictions, and Definitions
- Application to Employees
- Distribution and Review of Evidence and Report
 - 10-Day Review Periods
 - Involvement of Advisors
- Training for Investigators
- Removal of Single Investigator Model
- Relevancy of Evidence and what must be included
- Witnesses including Character and Expert Witnesses



2

WHAT ARE WE INVESTIGATING?



Jurisdiction

Location
Program/Activity
Control Over Involved Parties



Definitions of Prohibited Conduct

VAWA Crimes
Quid Pro Quo
Severe, Pervasive, and Objectively Offensive



Title IX vs Title VII and application to Employees



What does your policy say?


3

THINGS TO CONSIDER AS PART OF GATEKEEPING FUNCTION


- What is a formal complaint?
- Jurisdiction and scope
- Title IX Coordinator signing complaint
- Decision on type of resolution
- Informal vs. Formal
- Dismissal



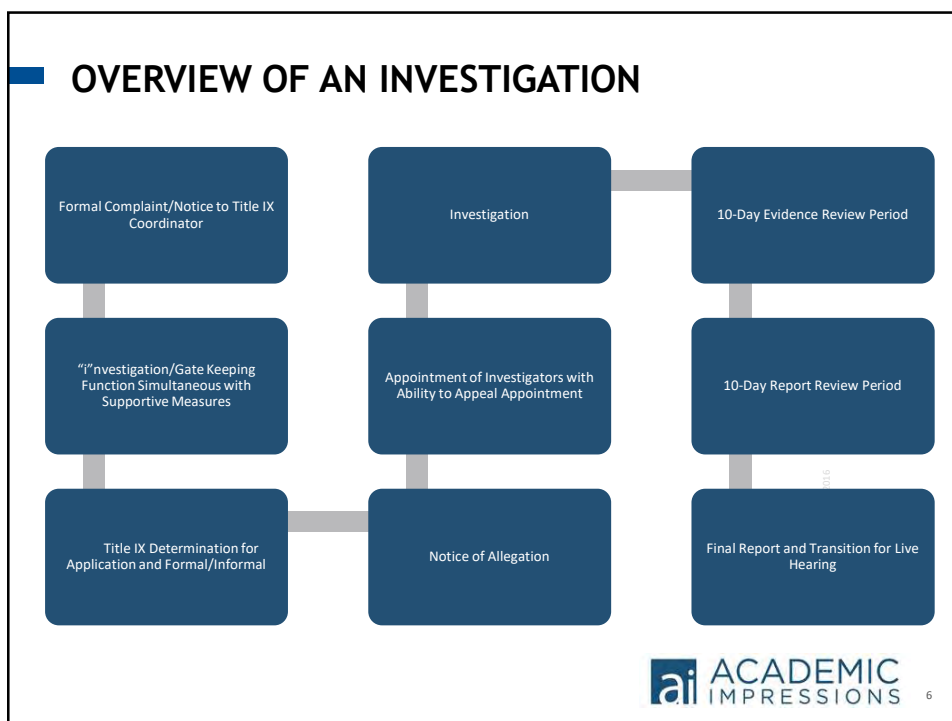
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POLL

How is your institution managing complaints that fall outside the Title IX Coordinator's jurisdiction?








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


6

ROLE OF THE TITLE IX COORDINATOR

-  Gatekeeping Function
-  Supportive Measures
-  Emergency Removal
-  Training Oversight
-  Actual Notice
-  Coordinates Individual Functions of Resolution Process

ROLE OF THE INVESTIGATOR

-  Gather all information regarding an allegation and determine relevancy
-  Interview all parties and witnesses, including character and expert witnesses
-  Fact gathering vs. fact finding
-  Collect and organize evidence and distribute to parties for review and comment
-  Weighing evidence Preponderance of the Evidence or Clear and Convincing
-  Write a detailed investigative report

WHO SHOULD/SHOULD NOT SERVE?

- Attorneys?
- Outside Investigator?
- General Counsel?
- Campus Safety/Security?
- Title IX Coordinator/Deputy Title IX Coordinator?
- Faculty?
- Students?
- Human Resources?
- Other members of Title IX or Conduct Team



REQUIRED TRAINING

- Definition of Sexual Harassment
- Educational Program or Activity
- Conducting an Investigation and Relevancy of Evidence
- Bias Prevention
- Technology Use



ADDITIONAL TRAINING CONSIDERATIONS

- Trauma informed investigations in light of new regulations?
- How to conduct remote investigations
- Working with advisors
- Impact of Alcohol and Drugs on Consent
- Allegations involving minors
- Terminology, language
- Social Media



11

POLL

Which standard of proof does your campus use or plan on using for your Title IX cases?

12

BUILDING YOUR INVESTIGATION TOOLKIT

Policy and Procedures

Planning Documents and Templates

- Prohibited Conduct Breakdown and Elements Worksheet
- Communication and Evidence Logs
- Evidence Analysis Chart and Relevancy Buckets
- Pre-investigation Checklist

Technology Plan

- Consistent plan for use of technology to support intake and investigation
- Method for evidence collection and distribution
- Confidentiality and record security

Other Considerations

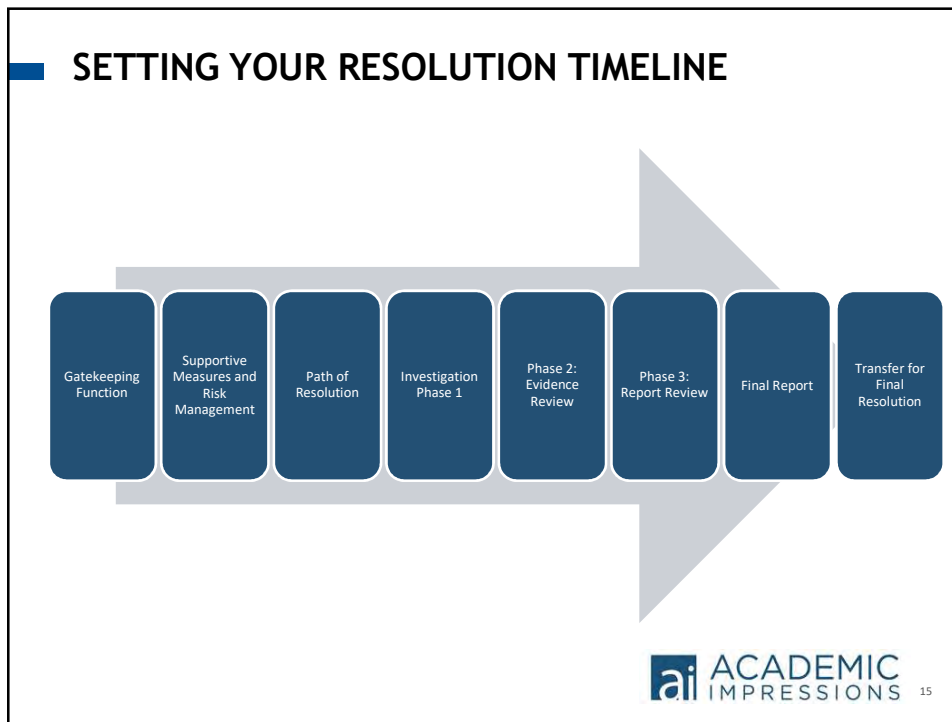
- Model and policy for working with advisors

13

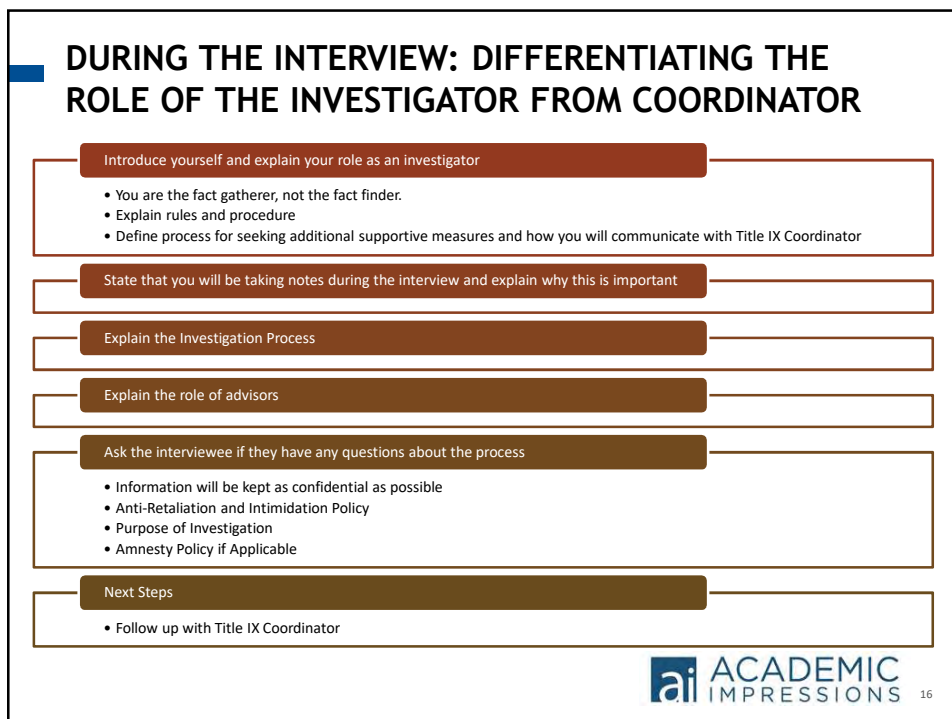
CONSIDERATIONS FOR THE TITLE IX COORDINATOR'S INVOLVEMENT DURING AN INVESTIGATION

- What role does the Title IX Coordinator play in the review process during investigation and before finalizing the report?
- Coordination amongst Title IX Coordinator and Investigator related to ongoing provision of supportive measures?
- Elevation of safety risk factors that may trigger need for emergency removal considerations?
- Assistance with enforcement of policy deviations or violations?
- Need for amended notification for violations?

14



15



16

COLLECTING EVIDENCE



How are you storing physical evidence?

Often depends on whether your University has sworn law enforcement



Who is providing the evidence?



Potential Sources of evidence:

Text messages, social media, phone records, etc.
Diaries, journals, timelines, etc.
Law Enforcement
Campus Records
Medical Evidence

17

CREDIBILITY ASSESSMENTS, FACT ANALYSIS, AND RECOMMENDATIONS: WHAT GOES IN THE REPORT?



Credibility Observations
Without Findings of Fact or
Determination



Using Evidence to Support Fact
Finding Through Report
Organization



Recommendations?

18

ORGANIZING YOUR DIGITAL CASE FILE



UNDERSTANDING OF SYSTEM
FOR COLLECTION AND
DISTRIBUTION



SORTING AND DISTRIBUTING
EVIDENCE AND REPORT
APPROPRIATELY



FINALIZING THE OFFICIAL
RECORD OF THE
INSTITUTION'S RESOLUTION

QUESTIONS AND KEY CONSIDERATIONS WHEN IMPLEMENTING THE NEW REGS

- Determining Scope and Application of Policies and what you investigating
- Challenges with remote or digital investigations
- Working with Advisors
- Tandem Law Enforcement Investigations
- Application to Employees
 - Faculty Unions and Contract
- Respecting Confidentiality while not prohibiting communication
- Working with Witnesses
- Investigator role in the Hearing Process
- Enhanced record protection when distributing reports including storage, redaction, and FERPA considerations



CHAT

SHARE OUT & DISCUSSION!


What have been some of your procedural challenges related to facilitating your investigation process? What have you recently adjusted considering the proposed regs, if any?

21



QUESTIONS


22

CHAT

***Favorite lesson from yesterday?
Or, what you're most looking forward to today?***

CONNECTING YOUR MICROPHONE

To connect your microphone, identify the Microphone Icon at the top of the screen and click on the drop-down menu. Once you connected, the icon should turn green. Please keep your mic muted at all times, unless you are speaking.




CONNECTING YOUR WEBCAM

To connect your webcam, identify the Camera Icon at the top of the screen and click on the drop-down menu. Once you connected, the icon should turn green. Please keep your webcam turned off at all times, unless you wish to have it on while speaking.

RAISING YOUR HAND TO SPEAK TO THE GROUP


If at any time during the event you'd like to say something using your mic, please raise your hand and the speaker will call on you. To raise your hand, identify the icon at the top of the screen that looks like someone raising their hand. You can click on this same icon to lower your hand. In the same drop-down box, you can "agree," "disagree," "step away" too.

1


1

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**UNDERSTANDING WITNESS TESTIMONY
CHALLENGES**

2

2

CHAT


**What are some of your
challenges related to analyzing
witness testimony?**

3

3

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**FILLING THE GAPS: ANALYZING
INCOMPLETE TESTIMONY**

4

4

AGENDA


- I. Overarching Principles
- II. Do You HAVE to Confront? What Does Confrontation Mean?
- III. What Type of Witness Do You Have?
- IV. Witness Type Techniques
- V. Demonstration (Time Allowing)

5

5

OVERARCHING PRINCIPLES

- You don't have a bet on this race.
- You don't have to "win" the interview.
- You don't have to make the witness defensive.

6

6

MUST YOU CONFRONT?

- Is the inconsistency or contradiction relevant?
 - If it's a "lie," then lies and motives to lie are usually relevant.
- Are "rape shield" questions allowable? Ask, are they relevant?
- But what about fact you have to share investigation before final?



7

WHO IS YOUR WITNESS?

- Hostile
- Clearly lying/grossly inconsistent
- Traumatized
- Drama Monarch
- Trickle Witness



8

■ WHAT ASPECT OF CREDIBILITY?

- Oath – How seriously are they taking their role in investigation?
- Perception
- Recollection
- Communication
- Bias/Interest/Motive
- External Credibility Issues

9

■ HOSTILE WITNESS

- Likely bias/interest issue
- “I get the sense that you don’t want to participate. I get it. These situations are never anyone’s first choice. Can you help me understand your reluctance?”
- Make clear the stakes, that non-participation doesn’t help who they’re aligned with.

10

CLEARLY LYING

- Once you understand someone is likely lying, start pinning down surrounding details – no confrontation yet.
- Key is you **MUST** know the evidence you prepared to review with that witness so you can do this.

11

CLEARLY LYING

BEFORE YOU CONFRONT

- Nail down all surrounding details.
- They should commit to the details of the “story.”
- It’s hard to maintain a lie with a lot of details.

12

CLEARLY LYING

- Make them commit to details of narrative.
 - So, this happened first?
 - This never happened?
 - Sam was(n't) there at all that night.
 - Avery was there.
 - No one had anything to drink.
 - No one touched anyone.

13

CLEARLY LYING

Confronting - Style

- Start from a place of confusion
- “I’m struggling with [X piece of evidence], can you help me understand how it fits with what you’ve said?”
- “I think most people looking at this would think it showed Y, would you agree? Why/why not?”
- “Can you give me your perspective on why you wrote this?”

Reasonable Person
Alert!!!

14

CLEARLY LYING

Confronting — Substance

- Have you ever said X to someone?
 - Yes? GREAT! Dig in.
 - No? Maybe confront.
- If someone said Y about that, how would you respond?
- Break it down: “You told me one. Then you told me three. Right? Doesn’t it seem like there’s something missing in the middle?”



15

CLEARLY LYING

Confronting — Substance

- Video/audio/photo contradiction
 - Review their version of events.
 - “I’ve reviewed this video, and it appears to me that [Sam was right there]. Can you help me understand why the video shows that, but your statement contradicts it?”



16

CLEARLY LYING

- Don't sweat the response, just record it
- Can remind them of the importance of the process and being truthful

17

CLEARLY LYING

What happens if you're not prepared enough to confront?

**THEY WHO FIGHT
AND RUNS AWAY
LIVES TO FIGHT
ANOTHER DAY**

18

■ TRICKLE OR RELUCTANT WITNESS

- E.g., person will provide one-word answers, shrug, or not remember
- Take breaks – give them time and be patient
- Ask questions they do know to get them warmed up – first, get them talking about subjects they like/know better
- Gently ask them what is going on with them that they are reluctant to talk (with empathy/compassion)
- Another day is better? – unknown if something is going on in their life



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■ TRAUMATIZED

- Give them time and space
- Make them comfortable
- Ask rapport building questions
- Offer services for support
- Offer to reschedule
- Offer non-verbal methods where you can (pen/paper to draw)
- Recognize that you may not be the right interviewer for this witness
- FETI
- Don't get a pass - job is to gather relevant evidence!



20



QUESTIONS

Jill and Jean will respond to the challenges that you brought up related to witnesses.

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MOCK INTERVIEW WITH A DIFFICULT WITNESS



1



ACTIVITY

We need one volunteer!

This volunteer will play the role of being a “difficult” witness while Jill plays the role of the investigator.

**volunteer will need to have their mic/webcam on please.*



2

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EXAMINING CORROBORATION AND CONTRADICTION IN EVIDENCE



3



LEARNING OUTCOME

After participating...

... you will be able to more effectively and efficiently make sense of consistent and inconsistent information gathered during the interview process for the final investigation report.



4

■ CREDIBILITY OF NON-WITNESS EVIDENCE

- Primary evidence
 - Authentic, relevant tangible evidence
 - Firsthand, uninvolved, unimpaired witness reports
 - Surveillance video
- Secondary or tertiary
 - Secondhand reports (rumors)
 - Relevant, tangible evidence that can't be authenticated
- “Anti-evidence”
 - Fabricated or tainted evidence

5

■ MUST HAVE STRUCTURE

Where do you get a disciplined approach to determining whether the information you're getting is accurate?

6

■ EVERY COURT SYSTEM HAS A CREDIBILITY INSTRUCTION

The trick is to apply the structure consistently.

Every time.

To all evidence.

Without bias.

And to look to how issues are illuminated by the contradictions and corroborations of all evidence obtained.



7

■ WITNESS CREDIBILITY: LYING or WRONG?

- Human nature to have imperfect or inconsistent recall
- Just because it doesn't make sense to you does not mean the person saying it is lying
- Just because someone is inconsistent (or flat wrong) doesn't mean they're a liar



8

BIASES

- General biases need to be left at the door
- Bias/concern about false rape reports
- Biases about how sexual assault victims “should” react should be left at the door, too
- Biases about how men behave

9

FALSE REPORTING HAPPENS

BUT NOT
VERY
OFTEN



10

■ FALSE REPORTING DEFINED

- “Unfounded”
 - Does not meet the legal definition of sexual assault
 - False
- Rates of False Reports

11

■ BIASES RE: COMPLAINANTS

[“Anatomy of Doubt”](#) (Podcast)

[“An Unbelievable Story of Rape”](#) (Written)

[“Unbelievable”](#) (Netflix series)

12

BIASES RE: COMPLAINANTS

- Common for victims of sexual violence to delay reporting.
- Common for victims of sexual violence to remember some things very clearly and some things not at all.

"Indelible in the hippocampus is the laughter. The uproarious laughter between the two. They're having fun at my expense. They were laughing with each other...I was underneath one of them, while the two laughed...Two friends having a really good time with one another."

- Dr. Christine Blasey-Ford



13

BIASES RE: COMPLAINANTS

- DO consider all standard factors in evaluating credibility in a sexual assault case.
- DO recognize the difference between a lack of credibility and your own biases about how a sexual assault victim “should” behave.



14

■ BIASES RE: ALL PARTIES & WITNESSES

- Race?
- Economic background?
- Religion?
- Culture?
- Disability?
- Membership in a particular group?
- What else?

15

■ OTHER ACTS

- Area is fraught with danger
- If you are aware of other incidents of behavior that you believe reflect on the strength or weakness of a particular allegation, consult with counsel before considering it.
- General principle:
Similar incidents can be considered NOT FOR GUILT but for similar motive, opportunity, lack of mistake, intent, *modus operandi*.

16



POLL

Is Circumstantial Evidence Less Credible than Direct Evidence?



17

CIRCUMSTANTIAL EVIDENCE

Evidence may be direct or circumstantial. Direct evidence is direct proof of a fact, such as testimony by a witness about what that witness personally saw or heard or did. Circumstantial evidence is indirect evidence, that is, it is proof of one or more facts from which one can find another fact.

You are to consider both direct and circumstantial evidence. Either can be used to prove any fact. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. It is for you to decide how much weight to give to any evidence.



18

■ PUTTING IT TOGETHER

Factual Issue:

1. What did person 1 say about the issue?
 - a. Assess person 1's testimony with evidence received from that person over time.
 - b. Assess person 1's testimony with testimony from others (consistent/inconsistent?).
 - c. Assess person 1's testimony with evidence received from others (e.g., video, documents, etc.).
2. Repeat with all witnesses or parties who addressed the issue.



QUESTIONS

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IDENTIFYING INCOMPLETE FACT PATTERNS TO ENHANCE YOUR INVESTIGATION



1



ACTIVITY

Identifying Incomplete Fact Patterns to a Case

(Small Groups)



2

■ SCENARIO 1

- Fraternity party
- Bart and George were alone with Cassie in an upstairs room.
- The following semester, Bart ran for the office of president of the campus diversity and inclusion group.
- Upon hearing this, Cassie reports what happened as a sexual assault.

■ SCENARIO 1

Bart's interview:

- This didn't happen.
- No one has ever accused me of anything like this.
- I would never do anything like this.
- Maybe something happened to her, but it wasn't with me.
- Her story doesn't make sense.
- I don't socialize with her sorority.
- I have so many female friends. Ask any of them. I have never done this with them.
- Sure, I drink some, but I don't get drunk.
- I have a sister – I totally respect women.
- I have a long history of community service.

SCENARIO 1

George's interview:

- George has left the school and declines to be interviewed.

SCENARIO 1

Our lease starts on Saturday the 18th at 3:00 pm. I will not be there until Sunday night, because I'll be in [REDACTED]. Therefore, one of you must take the lease to Leland Realty and pay the remaining money which is \$398, \$50 from each of us. The place is the Atlantis #1408 on 103RD St. Leland Realty is on 87th or 89th. If you guys want to get in on Saturday, you must arrive at Leland by 7:00 pm on Saturday. The money must be in cash. One of you has to grab the bull by the horns and take charge. We must supply our own TOWELS, sheets, pillow cases, blankets, etc. Our problem down there might be too many people. We're going to have to decide while we are there who we want and don't want. Possibilities for stays of a few days or more [REDACTED] Feeley

SCENARIO 1

of [REDACTED] etc. If half
we might have to give the boot
or else we might get it
ourselves. I think we are
unanimous that any girls we
can beg to stay there are
welcomed with open ... Anyway
I think we're all set. Remember
that the eight of us are in
charge - we get beds and we
kick people out - no one else.
The danger of eviction is
great and that would suck
because of the money and
because this week has big
potential. (Interpret as wish).
I'm leaving for [REDACTED] on
Wed - the 8th so someone has
to volunteer by then to be in
charge of money and signing
lease. (It will still be in my
name).
FFFFF
Bart
S. It would probably be a
good idea on Sat. the 18th to
warn the neighbors that we're
loud, obnoxious drunks with
prolific pokers among us. Advise
them to go about 30 miles if

7

SCENARIO 2

- Two months after a sexual encounter, Jane brings a complaint against John that he forced her into non-consensual oral sex, had vaginal sex with her after she withdrew consent, and had non-consensual anal sex with her.
- She also alleged a separate inappropriate touching incident occurring about a month after the initial events.

8

■ SCENARIO 2

- Jane states her roommates heard her crying.
- John states she was not crying and consented with enthusiasm.
- Jane is only witness to inappropriate touching.
- Jane initially stated non-consensual vaginal sex but later stated consent was withdrawn.
- Jane's statement to a nurse indicated she suffered vaginal bleeding. She stated during Title IX interview she had anal bleeding.

■ SCENARIO 2

- John produced a text in which he expressed his concern about pregnancy to Jane, since they had not used a condom.
- The day after the initial events, the two texted, and Jane invited John to her room. He had a prior commitment.
- They went with a group to a fraternity party.
- John began avoiding Jane when he heard rumors that she was telling others he had done “unspeakable” things.

■ SCENARIO 2

- During interview, John is visibly angry but cooperative. He reacts negatively to questions but takes a breath and answers.
- During interview, Jane is upset and crying. It is difficult to obtain details from her as a result; although, she is not apparently avoiding the question.

11

■ SCENARIO 3

- Emily, a college student from a different school, visited her sister at Texas University, and the two went out with friends, drinking.
- Emily and her friends got “buzzed” before they left for a party.
- At the party, Emily drank more and described her intoxication level as “very out of it” and stated she got very quiet, as she generally does when drunk.

12

■ Scenario 3

- At approximately midnight, Emily called her boyfriend and left him a voicemail that was very slurred, nearly incoherent.
- Matt and his buddy Tony arrived at the party at about 11 p.m. Both had been drinking pretty heavily.
- Matt saw Tony kissing several different girls at the party.



13

■ SCENARIO 3

- At one point, Matt was on the porch with Tony and Emily, and that was the last he saw Tony that night. He did not see Tony kiss Emily.
- At about 1 a.m., Lisa was walking past a closed restaurant on campus and saw people having sex just around the corner of the building as she was passing. When she looked, she saw the woman was unconscious.



14

■ SCENARIO 3

- Lisa yelled, and the man, Tony, jumped away from Emily and started running. Lisa recognized Tony from one of her classes and called the police, who found Tony at his dorm room 20 minutes later.
- Emily remained unconscious for over three hours after she was found. She had wounds on the backs of her hands and elbows.
- When she woke up, she did not recall meeting Tony, leaving the party, or anything that happened after leaving the party.



15

■ SCENARIO 3

- Tony stated that he did not get Emily's name and would not recognize her again.
- He said he consciously decided to have sex but thought Emily was "into it."
- He told the school that all the women he kissed that night would say he hadn't forced them.
- He told the school that he was a good citizen and lots of other people would tell them the same.



16

■ SCENARIO 3

- Video of the two leaving the party at about 12:45 a.m. shows Tony supporting a very drunk Emily, who barely appeared to be moving her own legs.
- Emily appeared to push at Tony's face with one arm, after which he tucked her arm between his body and hers, and continued in the direction of the nearby, closed restaurant.

17



ACTIVITY

Large Group Share Out

18



QUESTIONS

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FINAL INVESTIGATION REPORT



1

AGENDA

- I. Overall discussion of concept for format/elements
- II. Focus on structure of analysis
- III. Point by point format



2

CONCEPT



3

REPORT FORMAT

INVESTIGATION REPORT PREPARED FOR

Texas University

Issue: Stalking, Retaliation
Reporting Party: JP
Responding Party: EB
Report Date: October 3, 2019

Investigation Performed & Report Prepared by:

HOBLER

4



POLL

**What is the longest report
(page length) you've ever
written on an investigation?**

5

REPORT FORMAT

- Table of Contents
 - Include all the usual report headings
 - ALSO INCLUDE: resolution of issues (particularly for those of you who make findings)
 - Will show you a sample at the end, after we've discussed
 - Easy to create a TOC when you use Styles in Microsoft Word

6

REPORT FORMAT

- Executive Summary
- Background
 - General Background
 - Complaint
 - Investigation
 - Evidence Collection
- Evidence [and Factual Findings]
 - Subheadings depend on events in your case
- Analysis
 - **Credibility Analysis**
 - Issue Analysis
- Report Conclusion



7

REPORT FORMAT

- **Executive Summary**
- Background
 - General Background
 - Complaint
 - Investigation
 - Evidence Collection
- Evidence [and Factual Findings]
 - Subheadings depend on events in your case
- Analysis
 - **Credibility Analysis**
 - Issue Analysis
- Report Conclusion

Executive Summary: Example

JH is a female first year student who filed a reporting indicating that SC, a male third year student, made deliberate sexual contact with her without her consent on three occasions. As reported, the first was in JH's dorm room, the second was in a hallway in the STEM building, and the third was at a party in the middle of a group of dancers.

8

REPORT FORMAT

- **Executive Summary**
- Background
 - General Background
 - Complaint
 - Investigation
 - Evidence Collection
- Evidence [and Factual Findings]
 - Subheadings depend on events in your case
- Analysis
 - Credibility Analysis
 - Issue Analysis
- Report Conclusion

Executive Summary: Example

JH and SC are tenure track professors in the underwater basket-weaving department, which currently has no tenured professors due to faculty retirements. SC is a year ahead of JH in tenure track and is the department chair. JH alleged that SC removed responsibilities from him and changed department policies to his disadvantage in retaliation for a prior report by JH that SC engaged in unprofessional conduct, an allegation that was substantiated in a prior investigation.

REPORT FORMAT

- Executive Summary
- **Background**
 - **General Background**
 - **Complaint**
 - Investigation
 - Evidence Collection
- Evidence [and Factual Findings]
 - Subheadings depend on events in your case
- Analysis
 - **Credibility Analysis**
 - Issue Analysis
- Report Conclusion

- Background
 - General Background
 - Who's who in re: the complaint itself (major players, not all witnesses)
 - Complaint
 - Summarize what the complaint said
 - Summarize any related complaints
 - Include timing
 - Investigation (detail coming up)
 - Evidence Collection (detail coming up)

REPORT FORMAT

- Executive Summary
- **Background**
 - General Background
 - Complaint
 - **Investigation**
 - Evidence Collection
- Evidence [and Factual Findings]
 - Subheadings depend on events in your case
- Analysis
 - **Credibility Analysis**
 - Issue Analysis
- Report Conclusion

- Background
 - General Background (covered)
 - Complaint (covered)
 - Investigation
 - Who was interviewed, when, who they are, if they haven't already been introduced
 - Did they provide you any hard evidence (e.g., video, emails, text messages, etc.)?
 - Were interviews recorded? Transcribed?
 - Evidence Collection (detail coming up)

11

REPORT FORMAT

- Executive Summary
- **Background**
 - General Background
 - Complaint
 - Investigation
 - **Evidence Collection**
- Evidence [and Factual Findings]
 - Subheadings depend on events in your case
- Analysis
 - **Credibility Analysis**
 - Issue Analysis
- Report Conclusion

- Background
 - General Background/Complaint/Investigation (covered)
 - Evidence Collections and References
 - Where is the evidence obtained from different sources?
 - How is it organized?
 - How is it referenced in the report?
 - Audio: (JH [date of interview], 1:41)
 - Memo (JH Memo, at p. 2)
 - Memo (JH Memo, at ¶ 3)
 - Is there a transcript of any recorded audio?
 - Are there memoranda of interviews and, if so, where do they live? When and how were they produced?

12



POLL

**Where do you put your
interview summaries?**

13

REPORT FORMAT

- Executive Summary
 - Background
 - General Background
 - Complaint
 - Investigation
 - Evidence Collection
 - **Evidence [and Factual Findings]**
 - Subheadings depend on events in your case
 - Analysis
 - **Credibility Analysis**
 - Issue Analysis
 - Report Conclusion
- Evidence [and Factual Findings]
 - Introductory Material: “Unless otherwise noted, the facts stated herein were reported in material ways consistently among the witnesses and by reference to the evidence. Where, however, a material fact was presented differently by different witnesses, I provide some analysis and a finding. [All findings in this report are based on a preponderance of the evidence standard.]”

14

REPORT FORMAT

- Executive Summary
- Background
 - General Background
 - Complaint
 - Investigation
 - Evidence Collection
- Evidence [and Factual Findings]
 - Subheadings depend on events in your case
- Analysis
 - Credibility Analysis
 - Issue Analysis
- Report Conclusion

- Evidence
 - Start from the beginning
 - Chronology or Chronological?
 - Can start with some background if that is relevant.
 - “JH and SC have a shared, 150-person class, but otherwise did not know each other before the first incident reported.”
 - Use subheadings to guide the reader through the events
 - Pre-incident Interactions Between JH and SC
 - The First Reported Incident: Unwanted Touching on X Date



15

15

REPORT FORMAT

- Executive Summary
- Background
 - General Background
 - Complaint
 - Investigation
 - Evidence Collection
- Evidence [and Factual Findings]
 - Subheadings depend on events in your case
- Analysis
 - Credibility Analysis
 - Issue Analysis
- Report Conclusion

- Evidence
 - Set forth in neutral, narrative form
 - Acknowledge conflicts in the varying accounts
 - “JH stated that she and SC had never met before the first incident.”
 - “By contrast, SC indicates he and JH sat next to each other in their shared class and regularly chatted before and after class. On one occasion a week before the reported incident, SC said he and JH got coffee at Insight Roasters.”



16

16

REPORT FORMAT

- Executive Summary
- Background
 - General Background
 - Complaint
 - Investigation
 - Evidence Collection
- Evidence [and Factual Findings]
 - Subheadings depend on events in your case
- Analysis
 - Credibility Analysis
 - Issue Analysis
- Report Conclusion

- Analysis
 - Credibility Assessments
 - Issue Analysis



17

WRITE LIKE A LAWYER

- Executive Summary
- Background
 - General Background
 - Complaint
 - Investigation
 - Evidence Collection
- Evidence [and Factual Findings]
 - Subheadings depend on events in your case
- Analysis
 - Credibility Analysis
 - Issue Analysis
- Report Conclusion

- IRAC (law school)
- IRF (Title IX Investigation Report)
 - Issue
 - Rule
 - Fact relating to Issue & Specific Rule



18

WRITE LIKE A LAWYER

- Executive Summary
 - Background
 - General Background
 - Complaint
 - Investigation
 - Evidence Collection
 - Evidence [and Factual Findings]
 - Subheadings depend on events in your case
 - Analysis
 - Credibility Analysis
 - Issue Analysis
 - Report Conclusion
- What is the Issue in this case?
 - Did JB stalk EB?

19

WRITE LIKE A LAWYER

- Executive Summary
 - Background
 - General Background
 - Complaint
 - Investigation
 - Evidence Collection
 - Evidence [and Factual Findings]
 - Subheadings depend on events in your case
 - Analysis
 - Credibility Analysis
 - Issue Analysis
 - Report Conclusion
- What is the rule in this case?
 - Stalking is the repeated following, watching or harassing of a specific person that would cause a reasonable person to (a) fear for their safety or the safety of others, or (b) suffer substantial emotional distress. [Cite to policy.]

20

WRITE LIKE A LAWYER

- Executive Summary
 - Background
 - General Background
 - Complaint
 - Investigation
 - Evidence Collection
 - Evidence [and Factual Findings]
 - Subheadings depend on events in your case
 - Analysis
 - Credibility Analysis
 - Issue Analysis
 - Report Conclusion
- How do the facts in this case relate to the rule in this case?
 - Stalking is the repeated following, watching or harassing of a specific person...
 - Facts supporting or contradicting this, with analysis of how strong the evidence is
 - ...that would cause a reasonable person to (a) fear for their safety or the safety of others, or (b) suffer substantial emotional distress.
 - Facts supporting or contradicting this, with analysis of how strong the evidence is

21

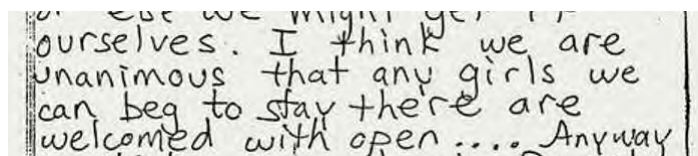
SIDE NOTE

Don't make your reader search out key information. If a piece of tangible evidence is key, put it right in the report.

22

EXAMPLE

Bart stated that he had a great deal of respect for women and would never have engaged with, or even spoken about, a woman in a disrespectful manner. The handwritten note from Bart, however, states:



ourselves. I think we are unanimous that any girls we can beg to stay there are welcomed with open ... Anyway

23

REPORT FORMAT

- Executive Summary
 - Background
 - General Background
 - Complaint
 - Investigation
 - Evidence Collection
 - Evidence [and Factual Findings]
 - Subheadings depend on events in your case
 - Analysis
 - Credibility Analysis
 - Issue Analysis
 - Report Conclusion
- Analysis Structure in Report
 - Credibility Assessments (Issue)
 - Rule (applies to all credibility assessments)
 - Application (by witness)
 - Conclusion (by witness)
 - Issue Analysis
 - Rule (applies to each issue specifically)
 - Application (by issue, credibility assessment completed above will play a part here)
 - Conclusion (by issue, only if investigator is decision-maker)

24



RESOURCE

Mock Incident Report

25



QUESTIONS

26

#aiTIXAdvInvestigator

TECHNOLOGY IN THE NEW ERA



1

AGENDA

- I. Remote Investigations
- II. Technology at Your School
 - a. At Your House?
 - b. Office?
- III. Technology for Your Witnesses
- IV. Special Challenges
- V. Developing Rapport



2

Remote Investigations

“School districts and postsecondary schools have significant latitude and authority to take necessary actions to protect the health, safety, and welfare of students and school staff. School officials have discretion to make educational decisions based on local health needs and concerns, and OCR recognizes this decision-making authority.”

<https://www2.ed.gov/about/offices/list/ocr/docs/ocr-coronavirus-fact-sheet.pdf>



3

CHAT

What are the conversations at your institution about remote investigations? Any idea how long they'll last?



4

PROBLEMS WITH REMOTE INVESTIGATIONS

- Technological challenges
 - School
 - Home
 - Student/Witness
- Privacy
 - Secure technology?
 - Ability to speak freely?
- Students or witnesses who require
 - Disability accommodations
 - Interpreters
- Developing Rapport Over Video



5

SCHOOL TECHNOLOGY CONSIDERATIONS

- What is your video conferencing software?
- Are you engaging in video interviews from school or home?
- How secure is your internet?
- How secure is your workspace?
- What equipment are you using for video, audio, and lighting?
- What is the environment you're showing your witness?

6

SCHOOL TECHNOLOGY: SOME TIPS

- Connections
- Hardware
- Software
- Cameras
- Lighting
- Audio
- Environment
- Distractions
- Evidence Receipt/Review



WITNESS TECHNOLOGY CONSIDERATIONS

- What computers/tablets do they have?
 - What about their advisor?
- What internet access/support?
- What privacy?
- What accommodations?
- Interpreters
- Should your school set up technological interview rooms?
 - With sanitization protocols?
 - What if the student can't get there?

RAPPORT OVER VIDEO



Present your best,
most communicative
self

- Clothing
- Make-up as a tool
- Background
- Framing/Gestures
- Face Touching
(generally avoid)
- Fidgeting



9

9

RAPPORT OVER VIDEO



Final Prep:

- Take 30 minutes before the call to:
 - check your bandwidth
 - check your space for minimized distractions
 - check yourself on video: remove distractions
 - turn off your cell phone/other noisemakers



10

10

RAPPORT OVER VIDEO

- Final Prep:
 - Have all the evidence you want to use/show open before the call starts.
 - Make sure they're all clearly named so that you can tell what's what.
 - Make sure you have the right one selected before screen sharing.



11

RAPPORT OVER VIDEO

Tech Issues:

- Leaning on your table/desk
- Look into camera, gives you eye contact (recognize that lack of eye contact is likely from witness as result of video....)
- Take 30 minutes before the call to:
 - check your bandwidth
 - get your evidence open and unnecessary programs/documents closed
 - check your space for minimized distractions
 - check yourself on video: remove distractions
 - turn off your cell phone/other noisemakers



12

SECOND INTERVIEWER CONSIDERATIONS



Rapport



Over Video



13

RAPPORT OVER VIDEO



“Best Practices for Video Interviews”
communication?



Pre-interview call to address concerns?



Set expectations/protocols at the beginning of the
interview



14



CHAT

Share with us!

What thoughts or suggestions do you have when it comes to technology and online interview techniques?

15



QUESTIONS

16

#aiTIXAdvInvestigator

CLOSING ACTIVITY



17



ACTIVITY

Any volunteer(s) wish to have their current working space or home office critiqued by Jean/Jill?



18



QUESTIONS

19



EVALUATION

Thank you!

Please remember to complete the event evaluation.
Your comments will help us continually improve the
quality of our programs.



20



Advisors in Title IX Investigations: Legal, Regulatory, and Public Policy Considerations

July 21, 2020

**EDUCATION**

JD, Harvard
Law School

MA, University
of Pennsylvania

BA, University
of Pennsylvania

DAN SCHORR

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Dan Schorr is a Managing Director at Ankura, based in New York. A former criminal prosecutor and municipal inspector general, he has more than 20 years of legal and investigative experience. Dan manages a variety of complex assignments, from investigations into major fraud, internal issues at corporations and governmental entities, and sexual misconduct and Title IX violations to litigation support, threat management, construction quality concerns, labor-law compliance, and independent monitorships. Dan began his legal career as an assistant district attorney, specializing in the investigation and prosecution of sex crimes, domestic violence, child abuse, and homicides. He also worked for several years as a vice president in the law division at Morgan Stanley, where he conducted investigations into claims related to client investments. He has appeared as a commentator on legal issues for television news programs on ABC, Fox News, CNN, and the BBC, among others. Dan conducts investigations at educational institutions, corporations, governments, and other entities. He has trained university investigators on best practices when handling Title IX matters and is a pre-approved Sexual Misconduct Investigator for the United Educators ProResponse Expert Services Benefit.

**EDUCATION**

MA, St. John's
University

BA, St. John's
University

ALYSSA-RAE MCGINN

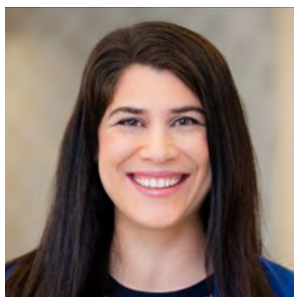
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Alyssa-Rae McGinn is a Senior Associate with five years of experience leading and conducting a variety of complex investigations, including monitorships of a large international bank and a governmental child welfare agency. Alyssa-Rae is an ATIXA-certified Civil Rights Investigator. Additionally, she is a pre-approved Sexual Misconduct Investigator for the United Educators ProResponse Expert Services Benefit. Alyssa-Rae conducts investigations at educational institutions and corporations into allegations of sexual misconduct and gender-based harassment involving students, faculty, staff, and corporate leadership. These investigations include communication with parties in accordance with school or company policy and Title IX and Title VII regulations, interviews with parties and witnesses, analysis of relevant evidence, and consultation on findings of liability and sanctions.



EDUCATION

J.D., The University of
Virginia School of
Law

B.A., *summa cum
laude*, University of
Arkansas at Little
Rock (*English, History,
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Jackie offers high-quality, prompt, and personable representation to educational institutions, including K-12 schools, colleges, and universities. Her breadth of experience in education and employment law means she can assist her clients with almost any issue they face, including board and school governance, labor and employment, immigration, discrimination and harassment, special education, student, and business and operations issues.

Jackie is passionate about civil rights law. From 2016 to 2018, Jackie was a Civil Rights Attorney in the Chicago office of the U.S. Department of Education's Office for Civil Rights. Her experience at OCR both before and after the 2016 administration change gives her clients unique insight into some of the most politicized legal issues in education today, including Title IX. Jackie uses this experience to counsel clients on internal investigations into complaints of student and staff misconduct, harassment, and discrimination; to efficiently and assiduously defend clients in legal and administrative civil rights proceedings; and to provide engaging, practical training on civil rights fundamentals and investigation techniques. Jackie has received all necessary training under the 2020 Title IX regulations to serve as an investigator, complaint decisionmaker/hearing officer, appellate decisionmaker, and informal resolution facilitator for Title IX matters. Her significant investigatory experience regarding complaints of discrimination based on race, color, national origin, sex, gender identity, and disability makes her an investigator of choice for high-profile, sensitive investigation facing schools, colleges, and universities.

Jackie is an experienced litigator. She represents clients in all stages of proceedings in state and Federal court; in administrative hearings, including employee dismissal hearings and disability rights hearings; and in proceedings before agencies such as OCR, the Illinois Department of Human Rights (IDHR), and the Equal Employment Opportunity Commission (EEOC).

Jackie crafts legally-compliant policies, procedures, handbooks, and webpage content for schools and regularly handles Freedom of Information Act (FOIA) and Open Meetings Act (OMA) issues for public-sector clients. She drafts, reviews, and negotiates a wide variety of contracts and agreements. Examples include contracts involving purchases of goods and services, employment, cooperative relationships, facilities use, data use, and privacy issues. She advises on all issues related to edtech, including the myriad privacy issues inherent in the use of educational applications, tools, and other products.

Jackie is a sought after speaker on the national, state, and local levels on education and labor and employment law topics. She especially enjoys training administrators, staff, and students on topics such as disability accommodations, discrimination and harassment, bullying, sexual harassment and assault, student data privacy, and acceptable use of technology.

The Advisor's Role

- ▶ **Advisors (even attorney advisors) are not new to Title IX proceedings**
- ▶ **Advisors have historically served as support and/or guidance during the misconduct process**
- ▶ **Students can choose who serves as advisors**
- ▶ **Schools can place reasonable limits on an advisor's role, including attorneys**
- ▶ **General role of complainant advisors**
- ▶ **General role of respondent advisors**
- ▶ **ADA accommodations**

The Advisor's Role

▶ The new Title IX regulations shift the role of the advisor

- ▶ An advisor may still act as:
 - ▶ Emotional support
 - ▶ Assistance in understanding the process
 - ▶ Guidance in preparing statements, evidence, and other materials
 - ▶ A second perspective on the matter
- ▶ Under the new regs, an advisor also acts as:
 - ▶ Representation in the hearing
 - ▶ Cross-examiner of other parties and witnesses

Choosing Advisors

▶ When a party elects to have an advisor, it should be someone of their choice

▶ An advisor can be:

- ▶ A parent
- ▶ A friend
- ▶ A trusted faculty or staff member
- ▶ A counselor
- ▶ An attorney

▶ However, an advisor should not be:

- ▶ A witness
- ▶ Someone who may influence the party's account

Choosing Advisors

- ▶ In guiding choice of an advisor or providing an advisor, an advisor should be well-trained in the misconduct process, including the rules governing the hearing, evidence evaluation, and cross-examination of witnesses and parties
- ▶ Cost considerations for providing advisors
- ▶ Develop pool of advisors to choose from, if possible (*can include school employees*)
- ▶ Consider training for advisors

During the Investigation

- ▶ **Depending on institution policies, the advisor may have direct contact with the Title IX Coordinator or investigators**
- ▶ **Advisors' key role in the investigation is to attend interviews with parties**
- ▶ **Interviewers should set boundaries with advisors, but be flexible**
- ▶ **Difficult advisors may require re-direction or be asked to leave**

Impact of the New Regulations on Advisor Role

- ▶ Advisors are not subject to the requirement to be impartial and free from bias
- ▶ Must send evidence to parties (*and advisors if applicable*) prior to completion of investigation report
- ▶ For higher education, must provide an advisor at no cost if requested by a party
- ▶ Only the advisor can attend the hearing with the parties, unless someone else is required to attend by law
- ▶ An advisor can appear even if the party they are advising does not appear

Impact of the New Regulations on Advisor Role

- ▶ If an advisor and party do not appear, a provided advisor must still cross-examine the other appearing party, resulting in consideration of the appearing party's statement *(without any inference being drawn based on the non-appearance)*
- ▶ Advisors must be permitted to question the opposing party directly, orally, and in real time on all relevant questions and follow up questions, including those challenging credibility, during a hearing *(for higher ed)* and through written questions *(for K-12)*
- ▶ Even if a hearing is held at K-12, live cross-examination is not required
- ▶ Prehearing conferences
- ▶ *What if advisor is doing a poor job with advising/cross-examination?*
- ▶ *What if advisor is disruptive during investigation or at hearing?*

Limitations on Advisors

- ▶ Can limit their participation in the process, but be particularly careful with limitations re: cross-examination
- ▶ Should not limit the ability of the advisor to investigate or communicate with opposing advisor
- ▶ *BUT: can limit contact with opposing party through a mutual no contact order*
- ▶ Cross examination/written cross questions must be relevant; if not, decisionmaker/hearing officer must say why on the record
- ▶ It is up to the decisionmaker/hearing officer, not the advisor, to decide if a question is relevant

K12 vs. Higher Ed

- ▶ In K12, advisors are likely to be parents
- ▶ When interviewing minors, always allow parents to attend if they want to
- ▶ In higher ed, complainant advisors are likely to be friends or counselors, while respondent advisors are likely to be parents or attorneys
- ▶ Hearings with live cross-examination by advisors not required in K-12

Conclusion

Q&A

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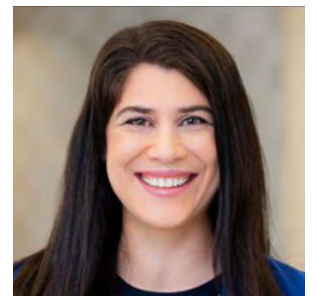
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The New Title IX Regulations: Live Hearings – Part 2 of 2

Presented By:

The Institutional Response Group | Cozen O'Connor

Gina Maisto Smith, Chair

Leslie M. Gomez, Vice Chair

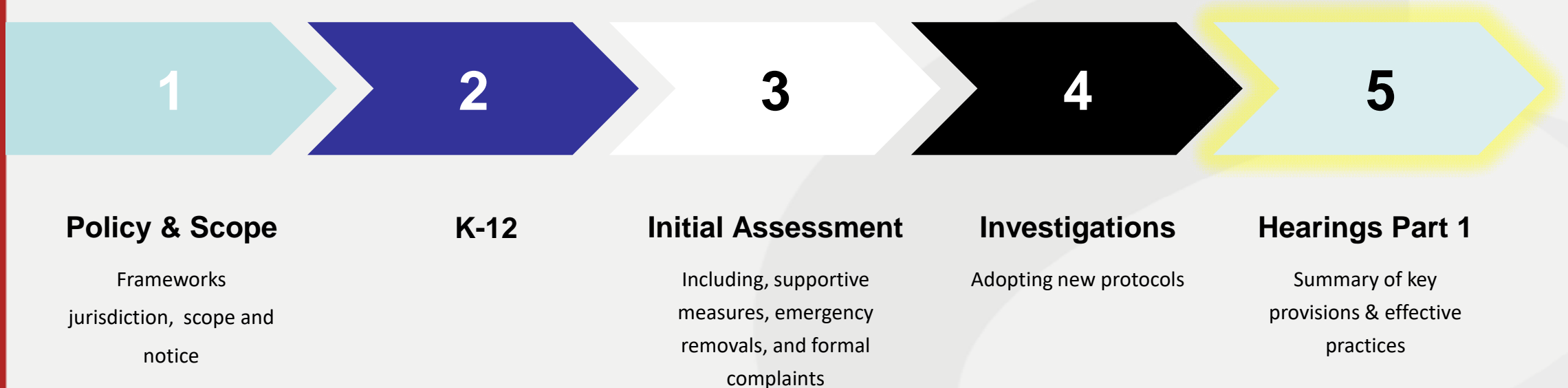
August 3, 2020

Today's Webinar

- Following an introductory webinar, A First Look at the New Title IX Regulations, this is the fifth in a series of webinars focusing on implementation.
- This webinar will:
 - Provide an **overview** of live hearings and decision-making
 - Outline the **legally-required elements** for live hearings, and
 - Set the context for further discussion on **effective practices** in conducting live hearings and decision-making

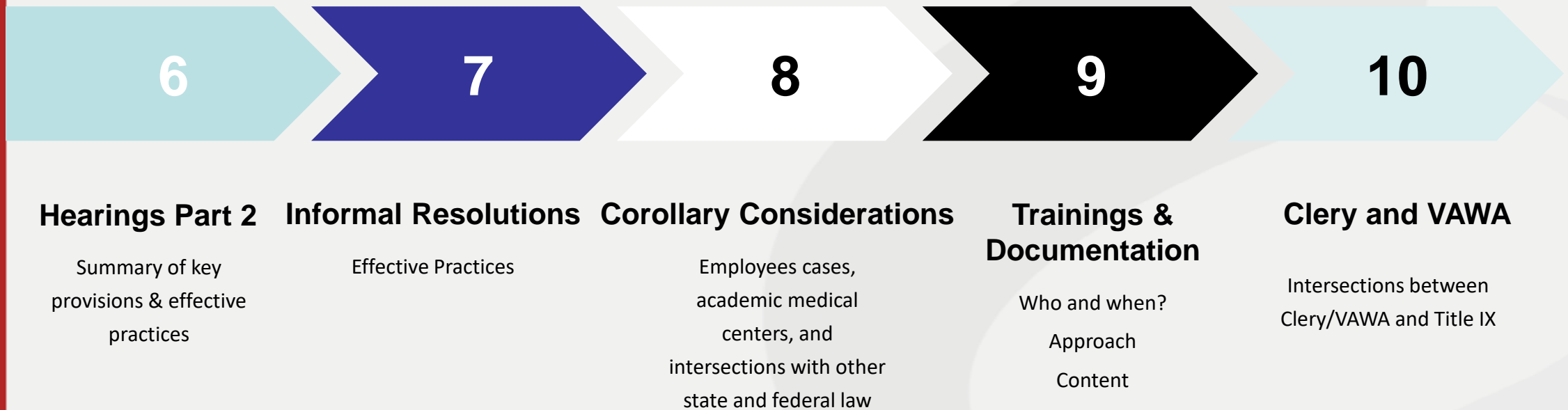
Introducing the Webinar Series

Subsequent IRG webinars will focus on specific aspects of the regulations, as written and as applied, including:

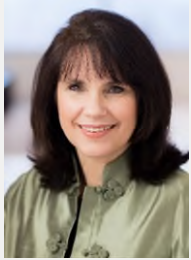


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Subsequent IRG webinars will focus on specific aspects of the regulations, as written and as applied, including:



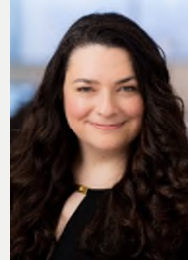
Institutional Response Group



Gina Maisto Smith
Cozen O'Connor



Leslie Gomez
Cozen O'Connor



Maureen P. Holland
Cozen O'Connor



Devon Turner Riley
Cozen O'Connor



Michael Stackow
Cozen O'Connor



Helen Park
Cozen O'Connor



Adam M. Shapiro
Cozen O'Connor



Peter C. Lim
Cozen O'Connor



Joseph A. Tate, Jr.
Cozen O'Connor

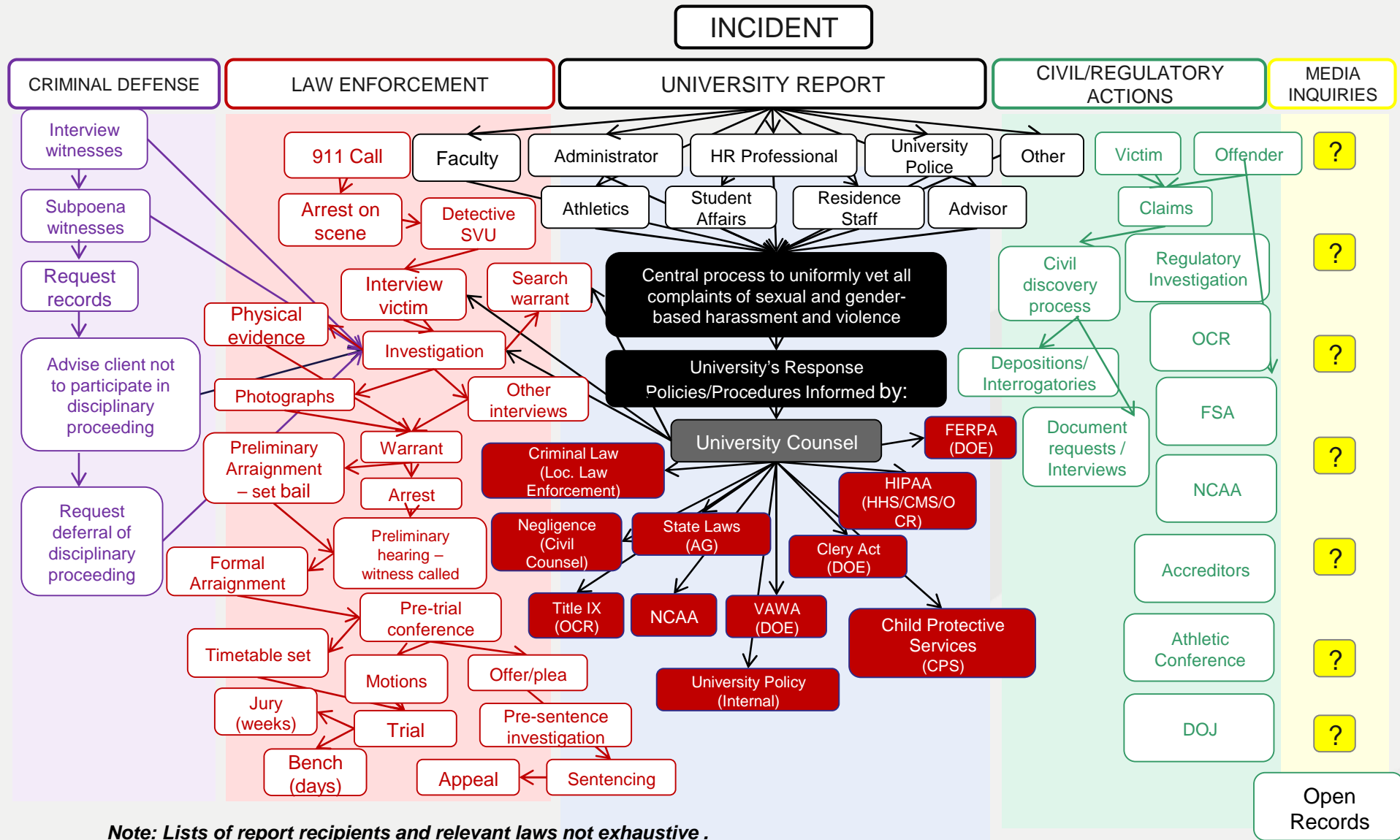


Christi Hurt
Margolis Healy

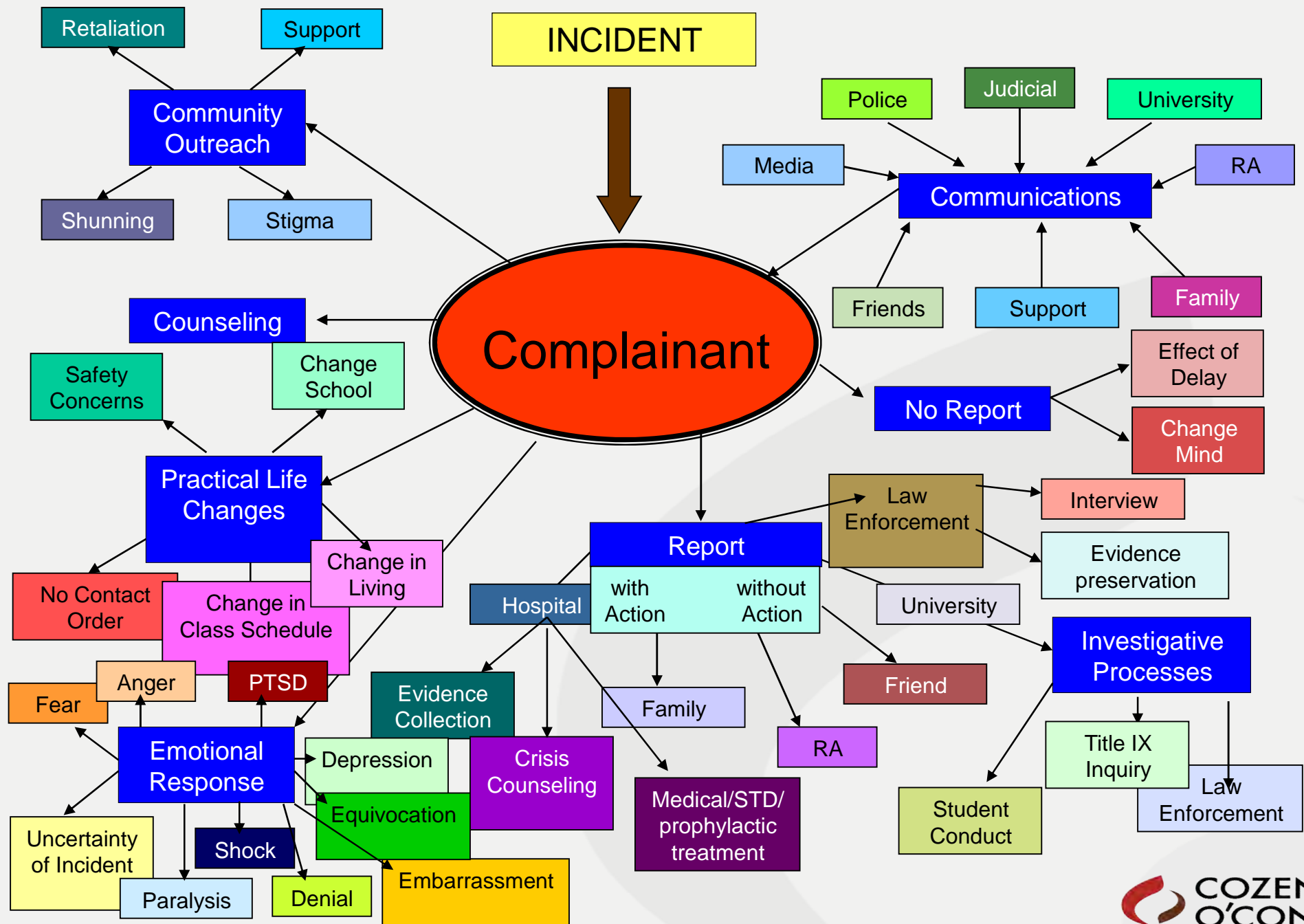
Institutional Response Group Paralegal and Administration Team:
Heather Dunn, Megan Lincoln, Braelyn Schenk, and Mary Sotos

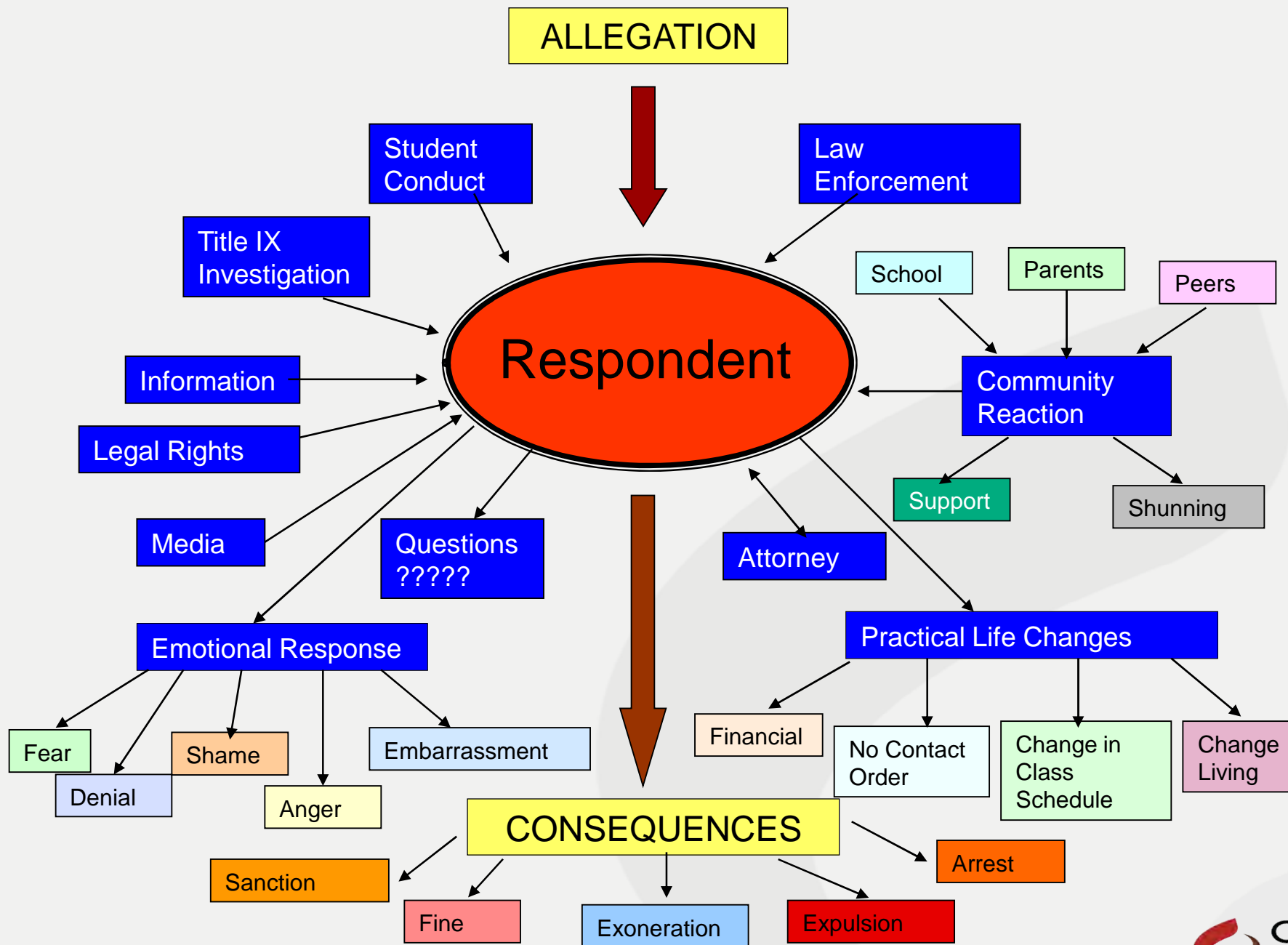
FRAMING THE CONTEXT

The Challenge of the Context



Note: Lists of report recipients and relevant laws not exhaustive.



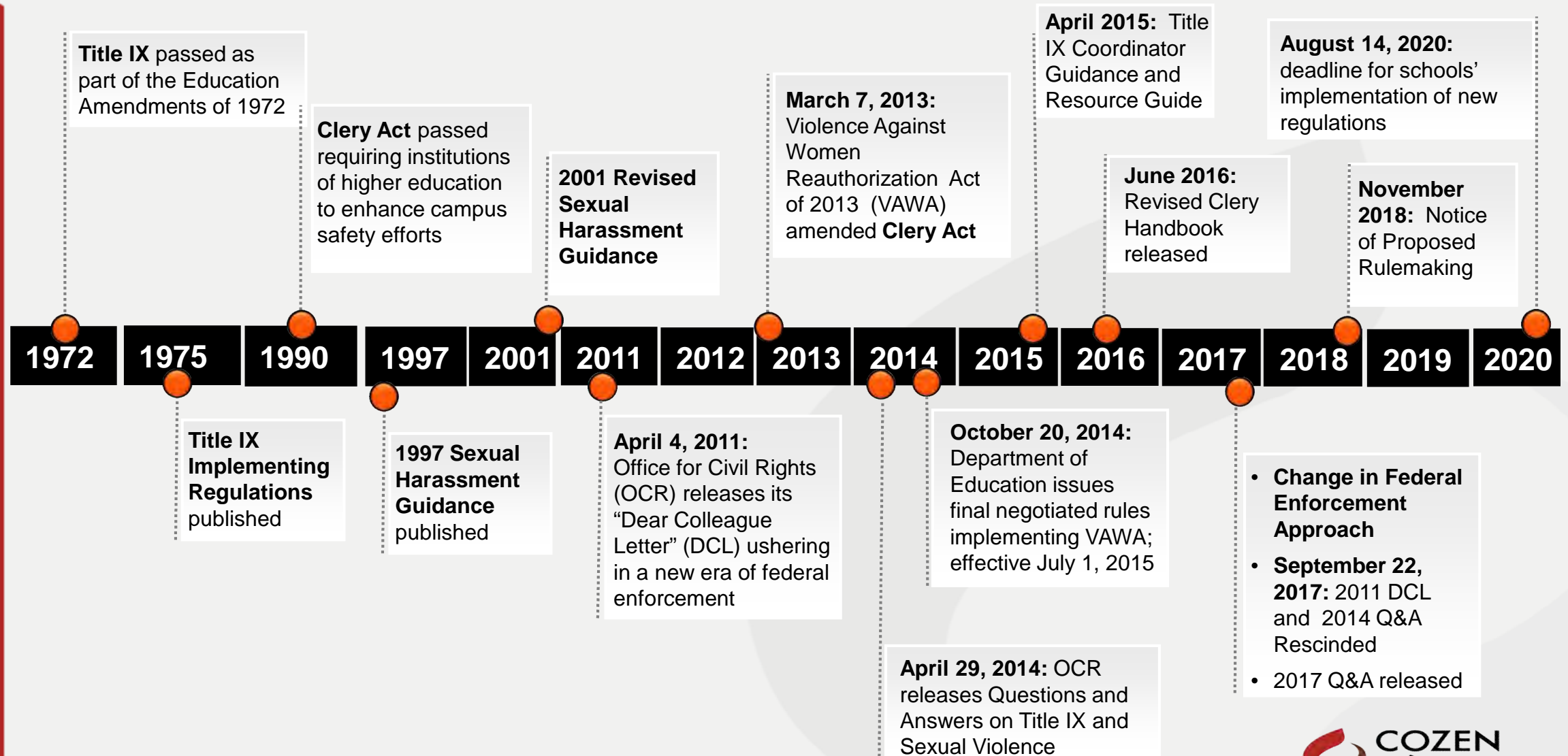


Implementation Rubric

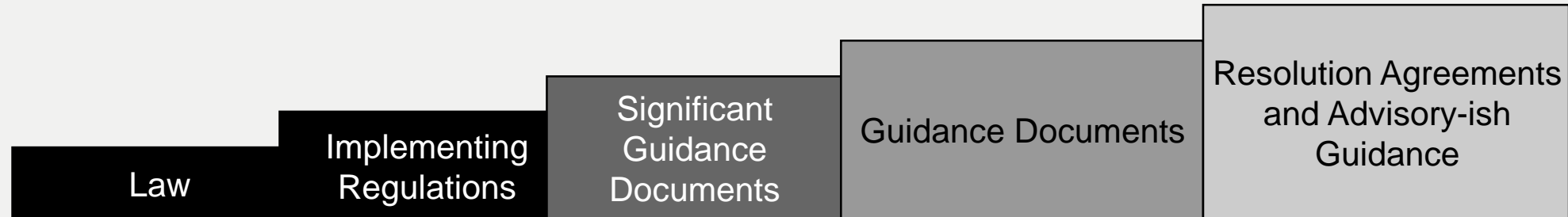
- Law
- Regulations
- Guidance
- Preamble and commentary
- OCR webinars, charts, blog
- Policy
- Higher education experience
- Institutional values



Evolution of Federal Legislation and Guidance



The Hierarchy



- Title IX

- Title IX Implementing Regulations (2020)

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

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

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

Guidance

- Preamble
 - Explains the basis and purpose for the final rule
 - Serves a guidance function
- Preamble on Prior Guidance
 - “The 2017 Q&A along with the 2001 Guidance, and not the withdrawn 2011 Dear Colleague Letter, remain the baseline against which these final regulations make further changes to enforcement of Title IX obligations.”
 - “Title IX policies and procedures that recipients have in place due to following the 2001 Guidance and the withdrawn 2011 Dear Colleague Letter remain viable policies and procedures for recipients to adopt while complying with these final regulations.”

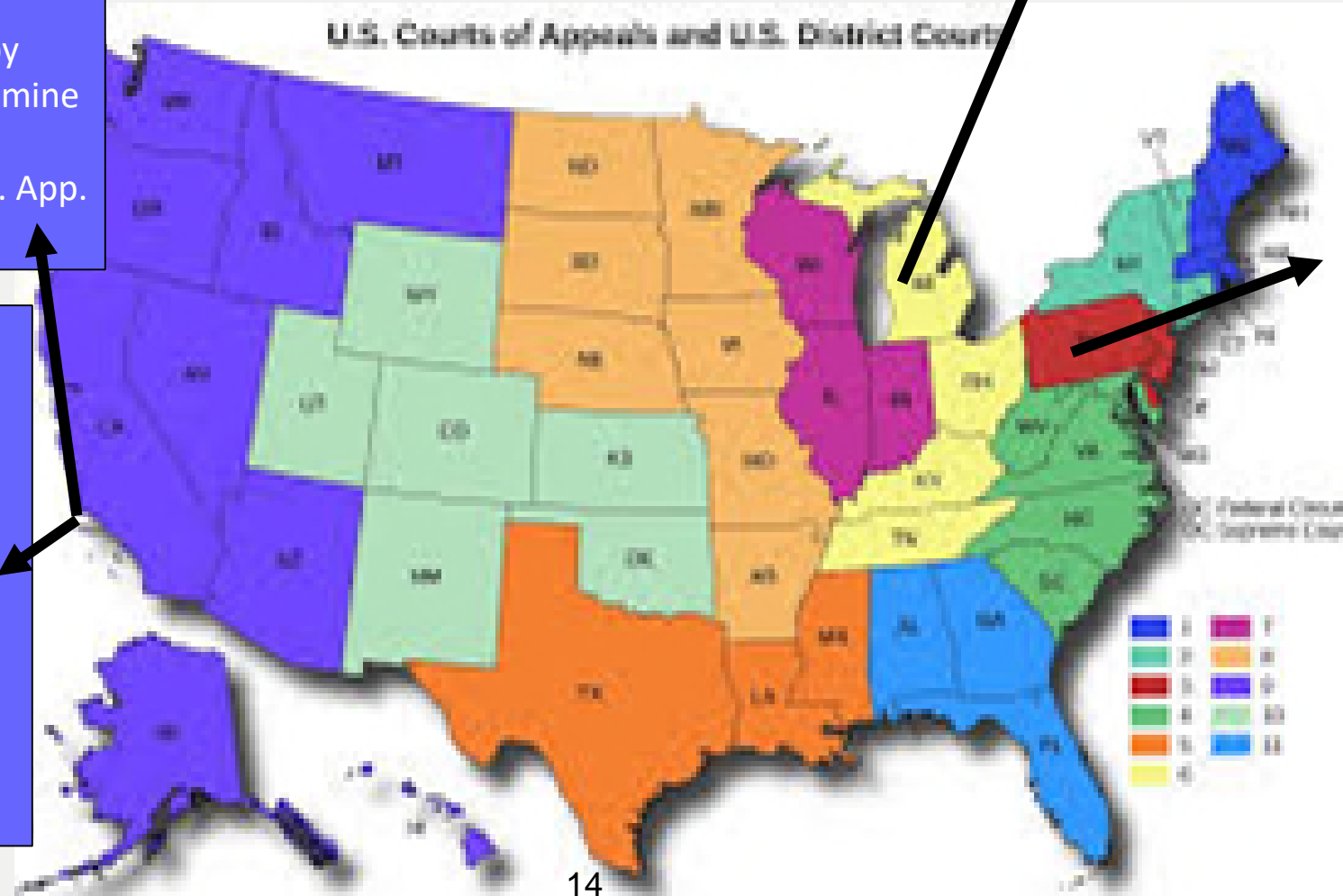
Recent Court Cases

When a student accused of sexual misconduct faces severe disciplinary sanctions, and the credibility of witnesses (whether the accusing student, other witnesses, or both) is central to the adjudication of the allegation, fundamental fairness requires, at a minimum, that the university provide a mechanism by which the accused may cross-examine those witnesses.” *Doe v. Allee*, 242 Cal. Rptr. 3d 109, 136 (Cal. Ct. App. 2019)

In a DV case, the state court ruled, “...procedures were unfair because they denied Respondent a meaningful opportunity to cross-examine critical witnesses at an in-person hearing.” *Boermeester v Carry*, No. B290675, 2020 WL 2764406 at *1 (Cal. Ct. App. May 28, 2020)

“If credibility is in dispute and material to the outcome, due process requires cross-examination.”
Doe v. Baum 903 F.3d 575, 585 (6th Cir. 2018)

“[N]otions of fairness in Pennsylvania law include providing the accused with a chance to test witness credibility through some form of cross-examination and a live, adversarial hearing during which he or she can put on a defense and challenge evidence against him or her.”
Doe v. Univ. of the Sciences, No. 19-2966, 2020 WL 2786840 at*5 (3d Cir. May 29, 2020)



The Courts on Due Process and Fundamental Fairness

Doe v. Brandeis University: 177 F.Supp.3d 561 (D. Mass. March 31, 2016).

Doe v. Regents of the University of California: 5 Cal. App. 5th 1055 (Cal. App. Ct. Nov. 22, 2016), review denied (Feb. 15, 2017).

Doe v. Claremont McKenna College: 25 Cal. App. 5th 1055, (Cal. Ct. App. 2018).

Doe v. Allee (USC): 30 Cal. App. 5th 1036, (Cal. Ct. App. 2019).

Doe v. Purdue University: 2:17-cv-00033 (U.S. District Court of Appeals for the Seventh Circuit, June 28, 2019)

2016

Doe. Rectors and Visitors of GMU: 149 F. Supp. 3d 602 (E.D. Va. February 25, 2016) Memorandum Opinion.

Doe v. University of Southern California: 146 Cal. App. 4th 221 (Cal. App. Ct. April 5, 2016).

2017

Doe v. Trustees of Boston College: 2016 WL 5799297 (D. Mass. October 4, 2016)

2018

Doe v. Baum: 903 F.3d 575 (6th Cir. 2018).

2019

Doe v. Rhodes College: 2:19-cv-02336 (Western Dist. Tennessee, June 14, 2019).

2020

Boermeester v. Carry: No. B290675, 2020 WL 2764406 at *1 (Cal. Ct. App. May 28, 2020).

Doe v. Univ. of the Sciences: No. 19-2966, 2020 WL 2786840 (3d Cir. May 29, 2020).

The Courts on Due Process and Fundamental Fairness

Doe v. Brandeis University: Basic fairness requires the university to provide an accused student with: (1) notice of charges, (2) the right to counsel, (3) the opportunity to confront the accuser, (4) cross-examination of evidence or witness statements, and an effective appeal.

Doe v. Regents of the University of California

Doe v. Claremont McKenna College: When the respondent faces a severe penalty and the case turns on credibility, the process must provide for a hearing where the respondent may question, if even indirectly, the complainant.

2016

Doe. Rectors and Visitors of GMU: A university provide an accused student with notice of the full scope of charges.

Doe v. University of Southern California: A university must provide an accused student with supplemental notice if the charges against the respondent change or expand.

2017

Doe v. Trustees of Boston College

2018

Doe v. Baum: When credibility is at issue, the Due Process Clause mandates that a university provide accused students a hearing with the opportunity to conduct cross-examination.

The Courts on Due Process and Fundamental Fairness

2019

Doe v. Allee (USC): Fundamental fairness requires, at a minimum, that the university provide a mechanism by which the accused may cross-examine those witnesses, directly or indirectly, at a hearing before a neutral adjudicator with the power to find facts and make credibility assessments independently.

Doe v. Rhodes College: An accused student must be afforded the opportunity to question the complainant and review all relevant evidence prior to the hearing.

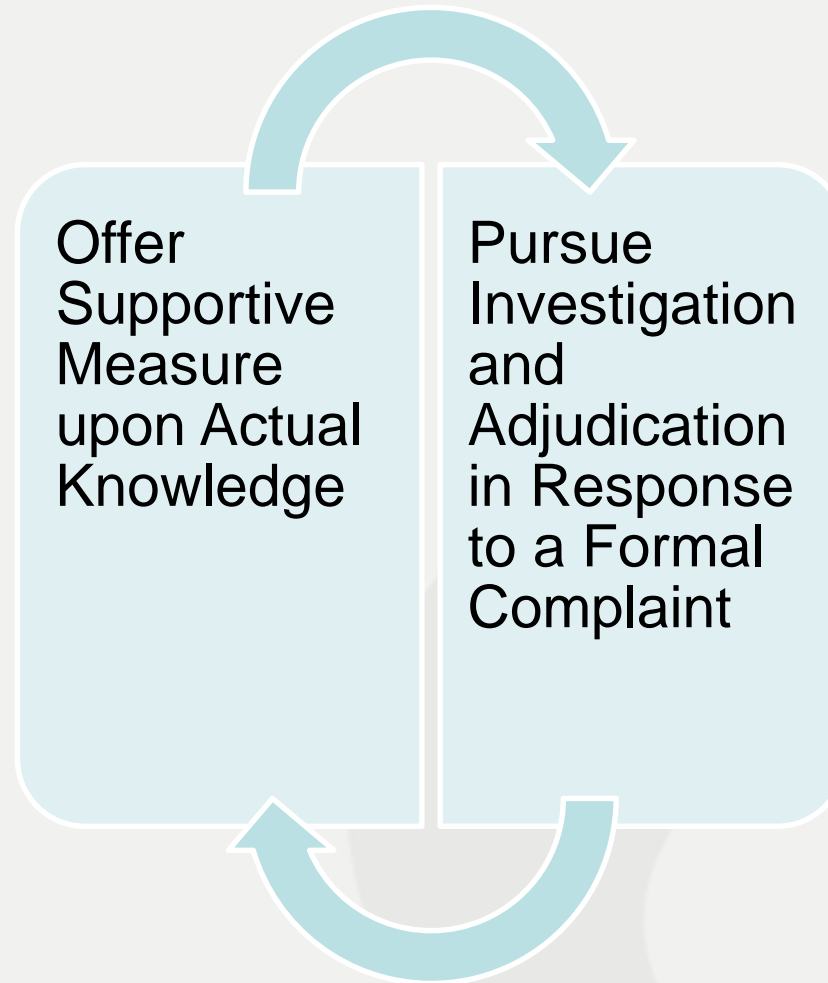
2020

Doe v. Purdue University: Investigation report must be provided to the parties prior to the hearing and must include summaries of both inculpatory and exculpatory evidence.

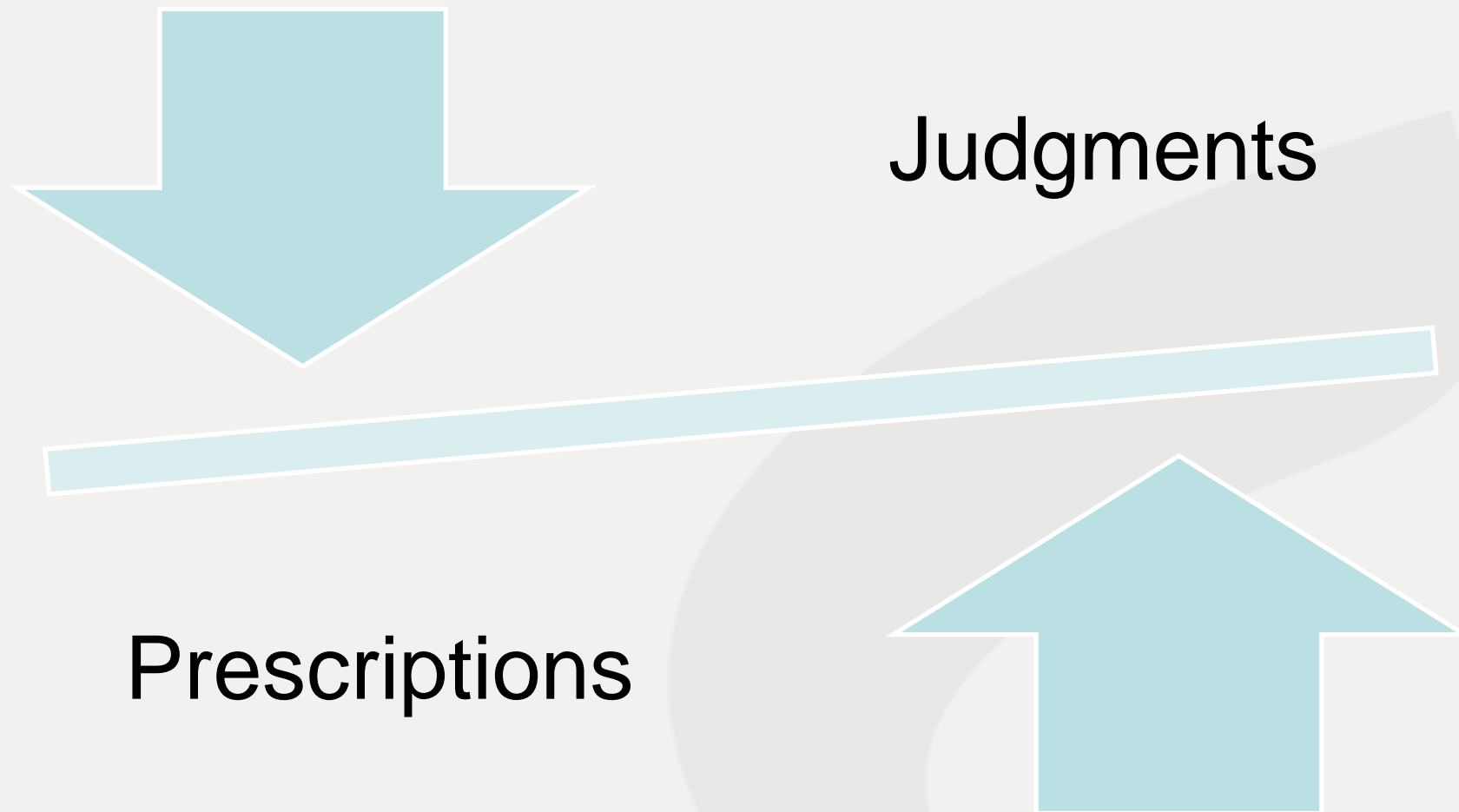
Boormeester v. Carry: In a DV case, the state court ruled, "...procedures were unfair because they denied Respondent a meaningful opportunity to cross-examine critical witnesses at an in-person hearing."

Doe v. Univ. of the Sciences: Notions of fairness include providing the accused with some form of cross-examination and a live, adversarial hearing during which he or she can put on a defense and challenge the evidence.

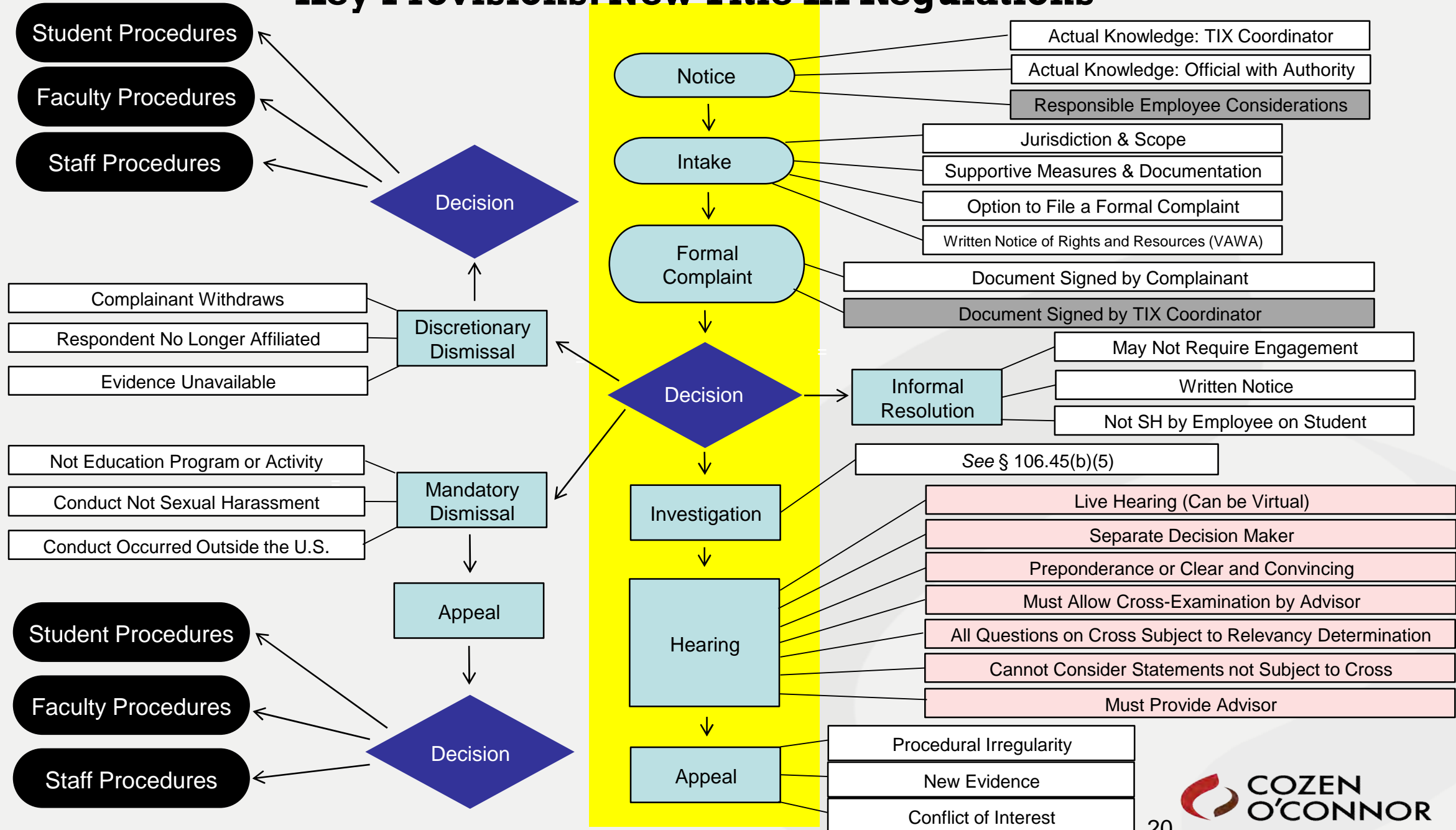
Understanding Two Key Provisions



Balancing



Key Provisions: New Title IX Regulations



Regulations: “Legally Binding Obligations”

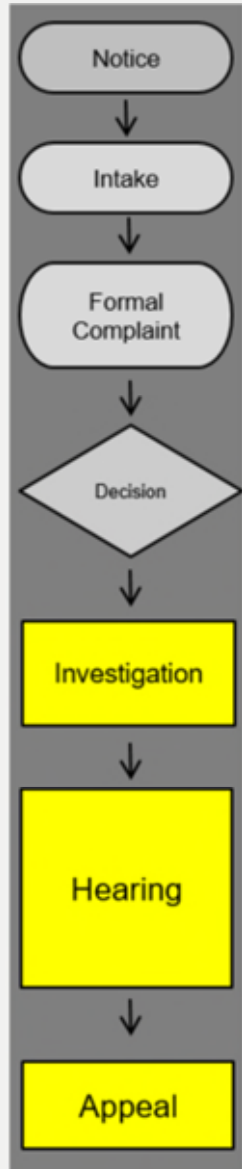
- “Because these final regulations represent the Department’s interpretation of a recipient’s legally binding obligations, **rather than best practices**, recommendations, or guidance, these final regulations focus on **precise legal compliance requirements** governing recipients.”

Regulations: “Best Practices”

- “These final regulations leave recipients the **flexibility to choose to follow best practices and recommendations** contained in the Department’s guidance, or similarly, best practices and recommendations made by non-Department sources, such as Title IX consultancy firms, legal and social sciences scholars, victim advocacy organizations, civil libertarians and due process advocates and other experts.”

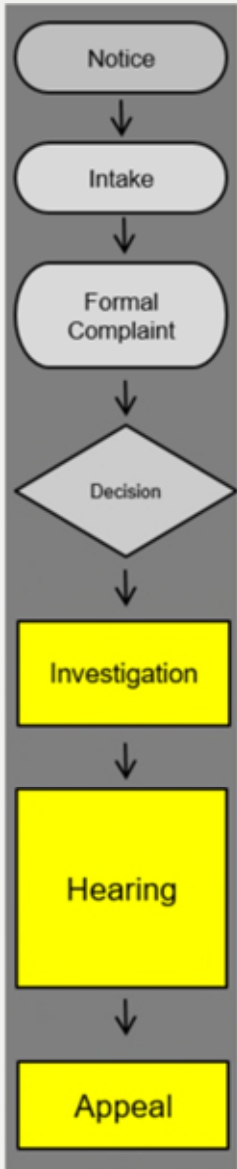
BASIC REQUIREMENTS OF GRIEVANCE PROCESSES

Grievance Process: The Basics



- Treat parties equitably
- Presumption of non-responsibility
- Reasonably prompt time frames with extensions for good cause
- Practitioners trained and free from conflict of interest and bias
- Uniform standard of evidence
- Restricted use of privileged information
- Objective evaluation of all relevant evidence
- Credibility determinations not based on person's status
- Range of supportive measures, remedies and sanctions
- Remedies only following a finding of responsibility
- Sanctions only following § 106.45 grievance process
- Designated appeal grounds

Basic Requirements

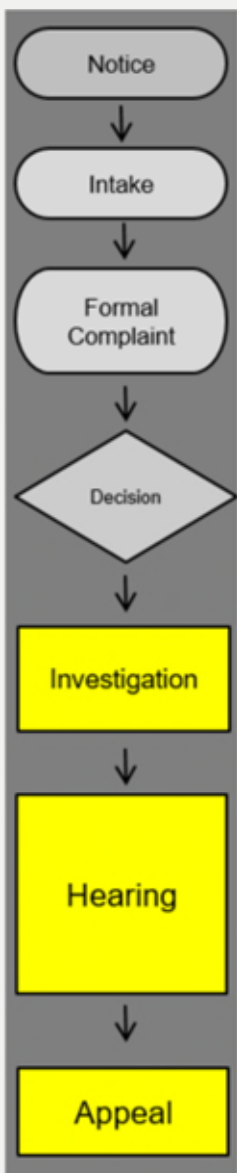


- **Treat complainants and respondents equitably** by providing **remedies** to a complainant where a determination of responsibility for sexual harassment has been made against the respondent, and by following a **grievance process** that complies with this section before the imposition of any disciplinary 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

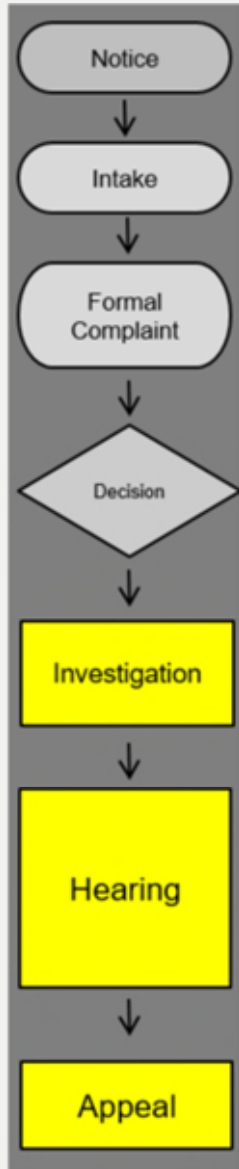
Relevant Regulations Sections:

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
- Include reasonably prompt time frames for conclusion of the grievance process with permissible delay for good cause
- Describe the range (or list) of possible disciplinary sanctions and remedies

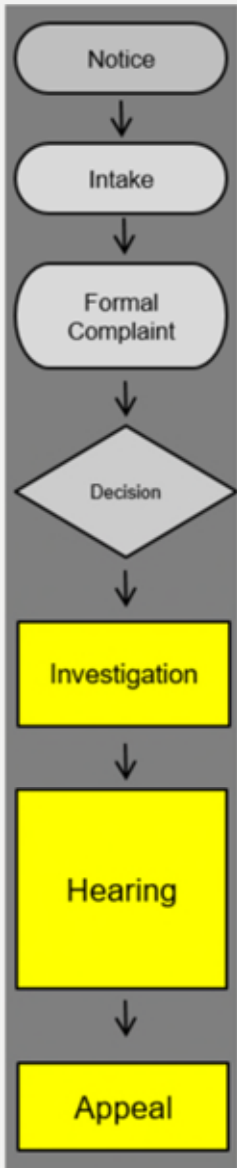
Relevant Regulations Sections:

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)

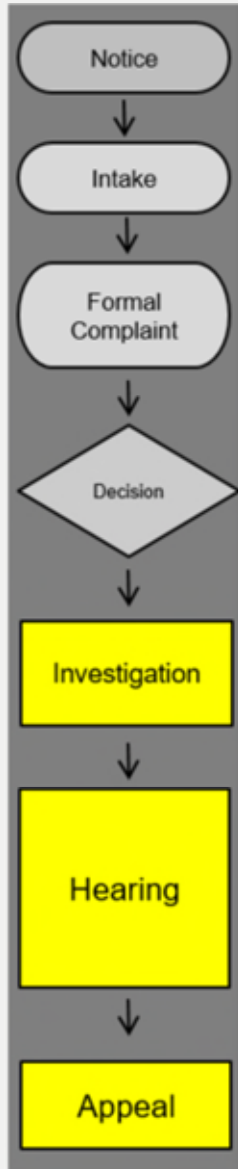
Basic Requirements



- State whether the **standard of evidence** to be used to determine responsibility is 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)

Basic Requirements



- Include the procedures and permissible bases for the complainant and respondent to appeal
- Describe the 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)

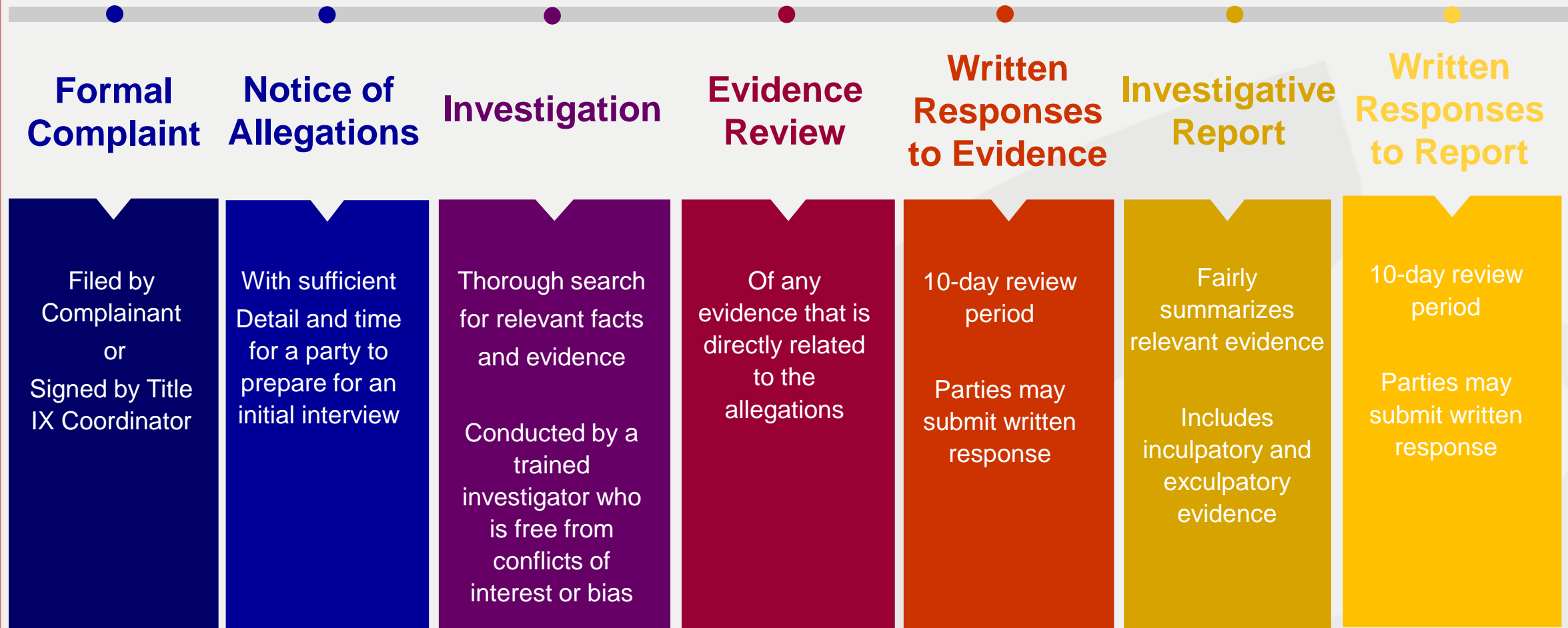
Range of Supportive Measures: § 106.45(b)(1)(ix)

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

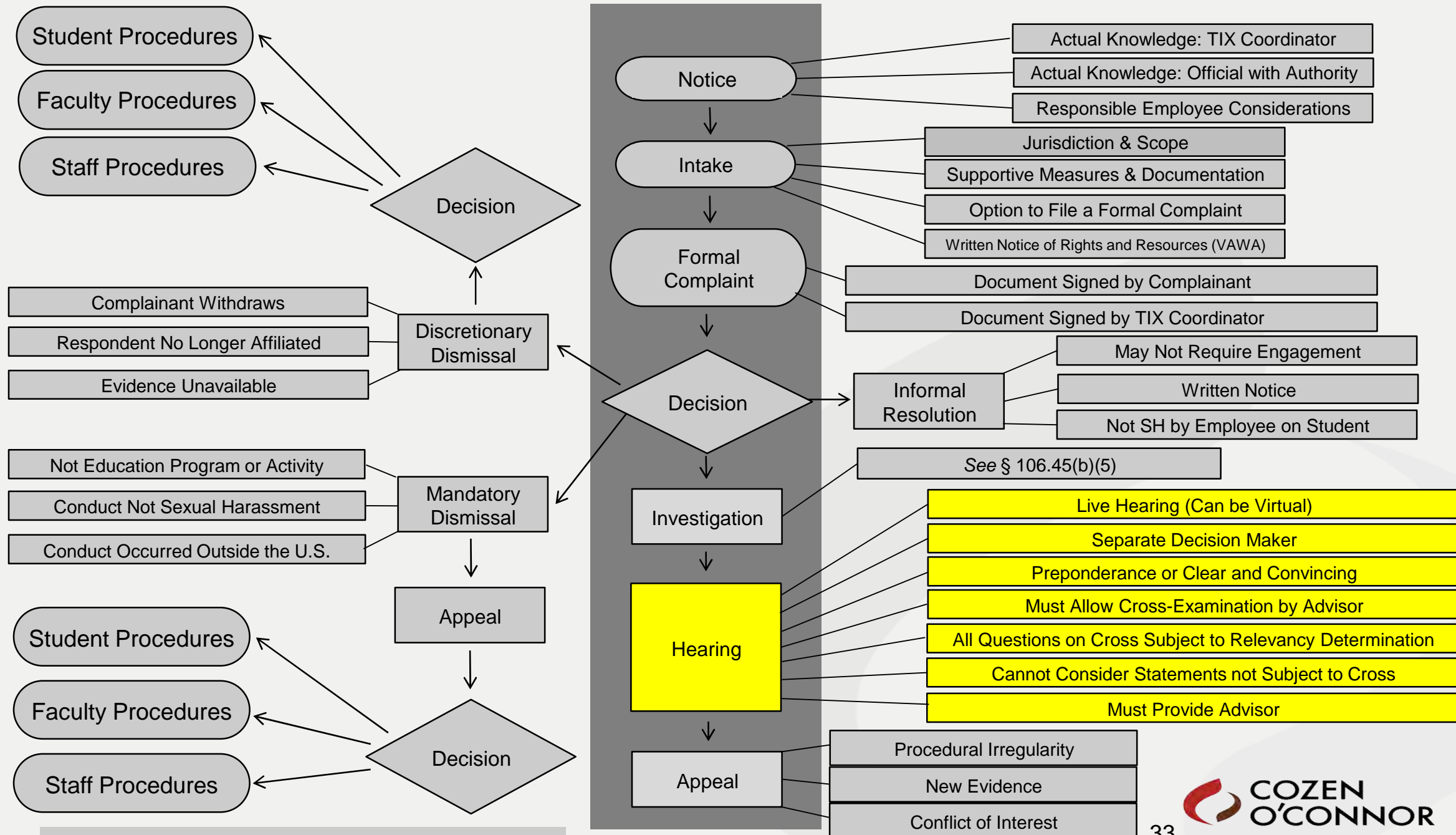
Recap of Investigation Requirements

- Formal Complaint
- Notice of Allegations
- Investigation
- Evidence Review
 - Review and response period
- Investigative Report
 - Review and response period

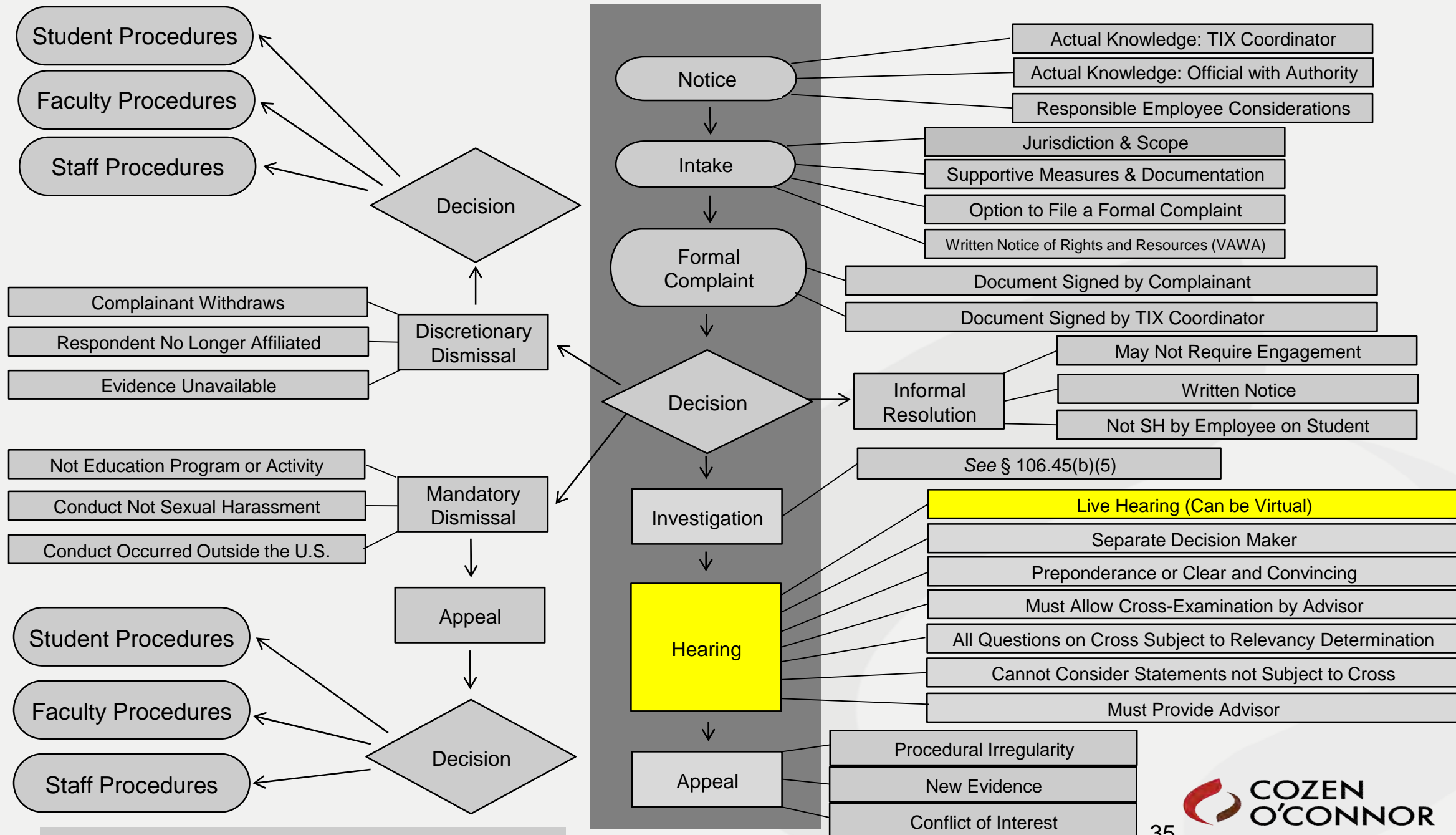
Recap of Investigation Requirements



OVERVIEW OF HEARING REQUIREMENTS



THE LIVE HEARING REQUIREMENT



Live Hearing Required

- For postsecondary institutions, the recipient's grievance process **must provide for a live hearing.**



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

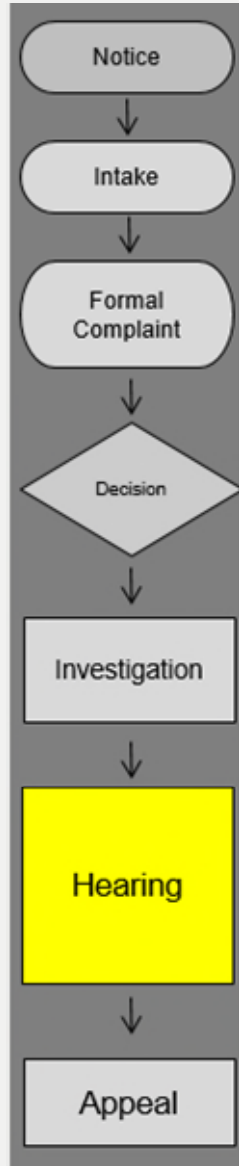
Live Hearing Required



- [A] live hearing gives both parties the most meaningful, transparent opportunity to present their views of the case to the decision-maker, **reducing the likelihood of biased decisions, improving the accuracy of outcomes, and increasing party and public confidence in the fairness and reliability** of outcomes of Title IX adjudications.

Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30359 .

Option to Use Technology

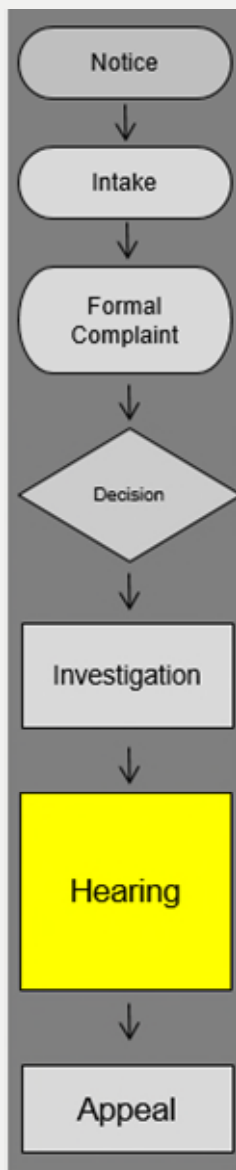


- Live hearings pursuant to this paragraph may be conducted with all parties physically present in the same geographic location or, at the recipient's direction, any or all parties, witnesses and other participants may appear at the live hearing **virtually, with technology** enabling participants simultaneously to see and hear each other.

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

Virtual Hearing Considerations

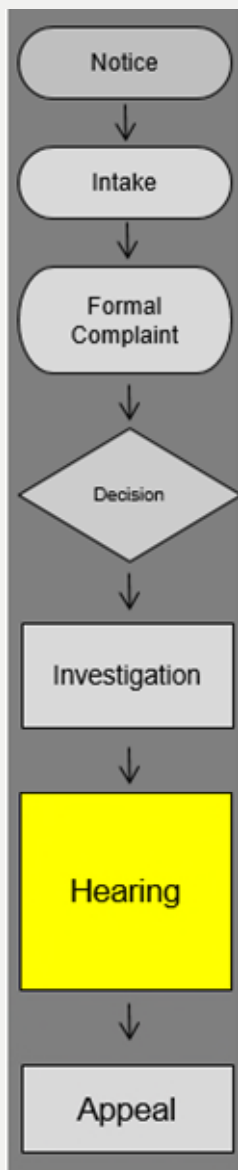
- At the request of either party, the recipient must provide for the live hearing to occur with the parties located in separate rooms with **technology** enabling the decision-maker(s) and parties to **simultaneously see and hear** the party or the witness answering questions.



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

Virtual Hearing Considerations

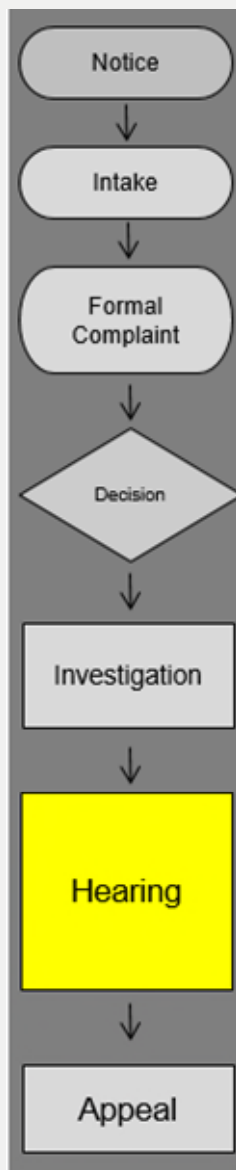
- The Department agrees with commenters who asserted that cross-examination provides opportunity for a decision-maker to assess credibility based on a number of factors, **including evaluation of body language and demeanor**, specific details, inherent plausibility, internal consistency, and corroborative evidence.



Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30321;

Virtual Hearing Considerations

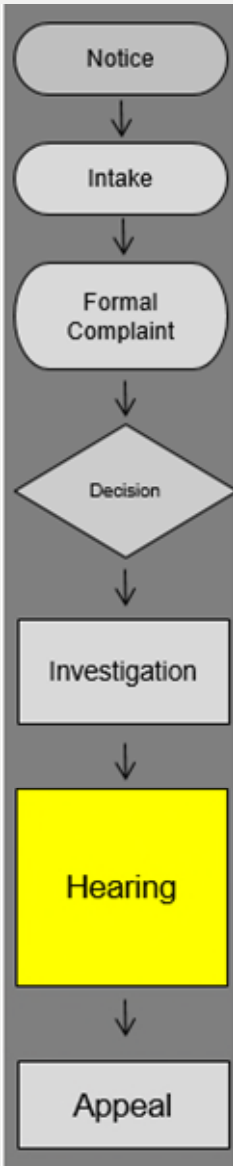
- The final regulations grant recipients discretion to allow participants, including witnesses, to appear at a live hearing virtually; however, **technology must enable all participants to see and hear other participants**, so a telephonic appearance would not be sufficient to comply with §106.45(b)(6)(i).



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

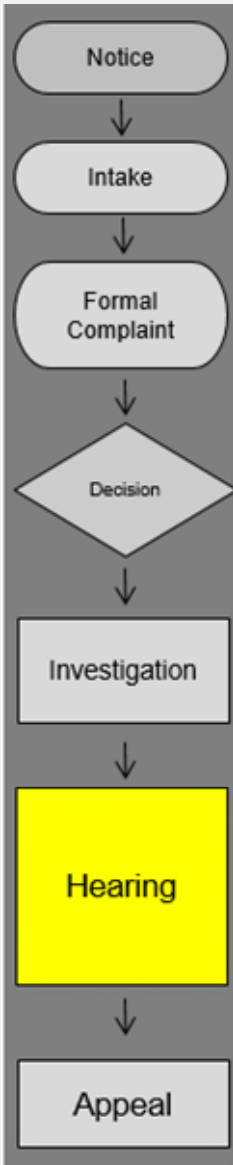
Flexibility to Adopt Rules

- Recipients may adopt rules that govern the **conduct and decorum** of participants at live hearings so long as such rules comply with these final regulations and apply equally to both parties.



Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30315.

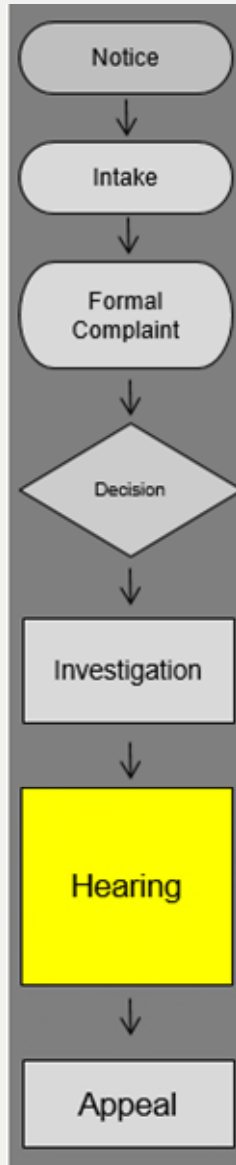
Flexibility to Adopt Rules



- 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).

Title IX Regulations May 19, 2020; Preamble at 30248

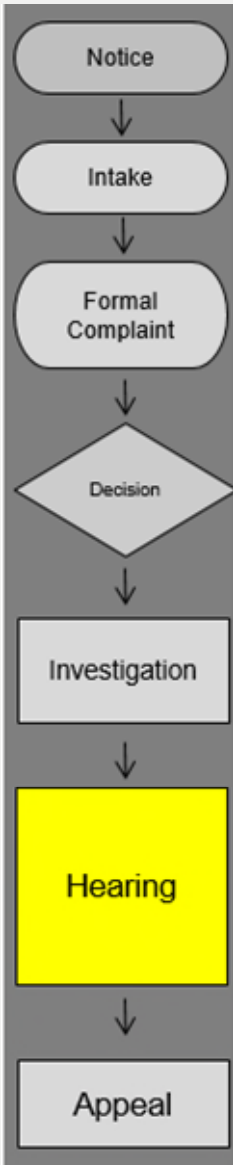
Relevance Limitation on Flexibility



- **Relevance is the standard that these final regulations require**, and any evidentiary rules that a recipient chooses must respect this standard of relevance.
- 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.**

Title IX Regulations May 19, 2020; Preamble at 30248

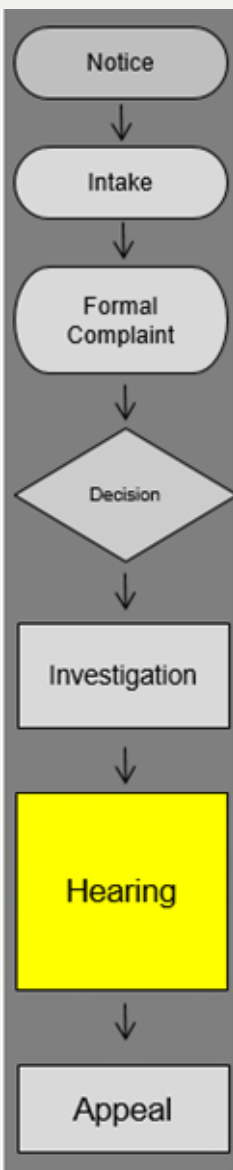
Participation by Parties and Witnesses



- The Department understands commenters concerns that **respondents, complainants, and witnesses may be absent from a hearing**, or may refuse to submit to cross-examination, for a variety of reasons, including a respondent's self-incrimination concerns regarding a related criminal proceeding, a complainant's reluctance to be cross-examined, or a witness studying abroad, among many other reasons.

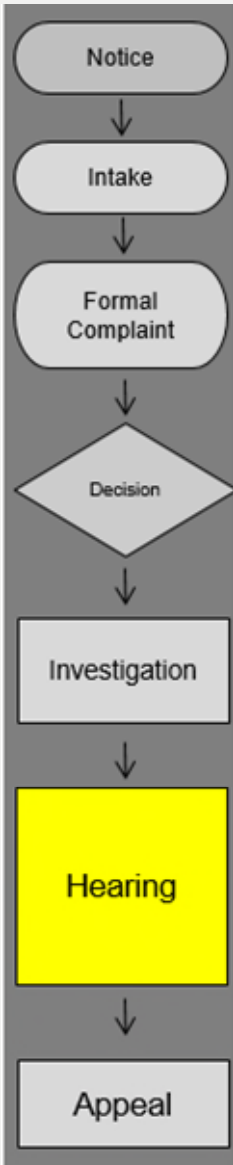
Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30346

Participation by Parties and Witnesses



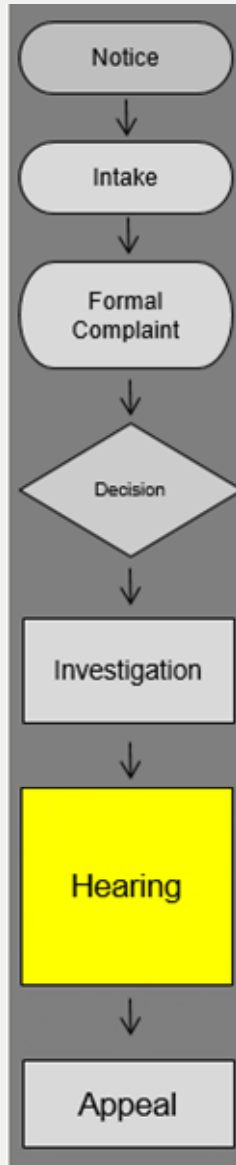
- In response to commenters' concerns, the Department has revised the proposed regulations as follows:
 - (1) We have revised § 106.45(b)(6)(i) to state that where a decision-maker must not rely on an absent or non-cross examined party or witness's statements, the decision-maker **cannot draw any inferences about the determination regarding responsibility based on such absence or refusal** to be cross-examined;
 - (2) We have revised § 106.45(b)(6)(i) to grant a recipient discretion to hold the entire hearing **virtually using technology** that enables any or all participants to appear remotely;

Participation by Parties and Witnesses



- (3) § 106.71 **expressly prohibits retaliation** against any party, witness, or other person exercising rights under Title IX, including the right to participate or refuse to participate in a grievance process;
- (4) § 106.45(b)(3)(ii) grants a recipient **discretion to dismiss a formal complaint**, or allegations therein, where the complainant notifies the Title IX Coordinator in writing that the **complainant wishes to withdraw** the allegations, or **the respondent is no longer enrolled or employed** by the recipient, or **specific circumstances prevent the recipient from gathering evidence** sufficient to reach a determination.
- These changes address many of the concerns raised by commenters stemming from reasons why parties or witnesses may not wish to participate and the consequences of non-participation.

Participation by the Complainant

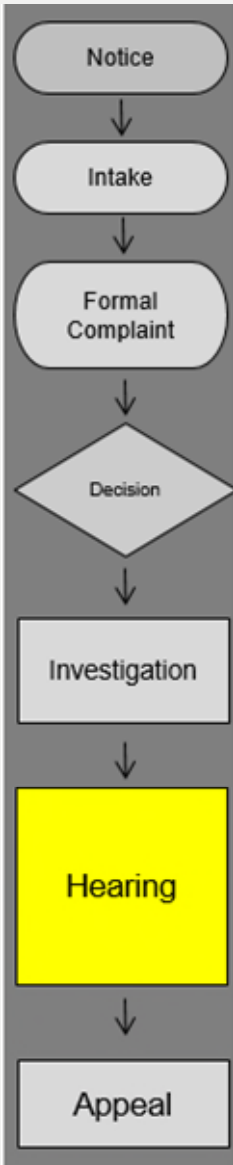


- Where a grievance process is initiated because the Title IX Coordinator, and not the complainant, signed the formal complaint, the complainant who did not wish to initiate a grievance process **remains under no obligation to then participate in the grievance process**, and the Department does not believe that exclusion of the complainant's statements in such a scenario is unfair to the complainant, who did not wish to file a formal complaint in the first place yet remains eligible to receive supportive measures protecting the complainant's equal access to education.

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

Transcript or Recording

- Recipients must create an **audio or audiovisual recording, or transcript**, of any live hearing and make it available to the parties for inspection and review.



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

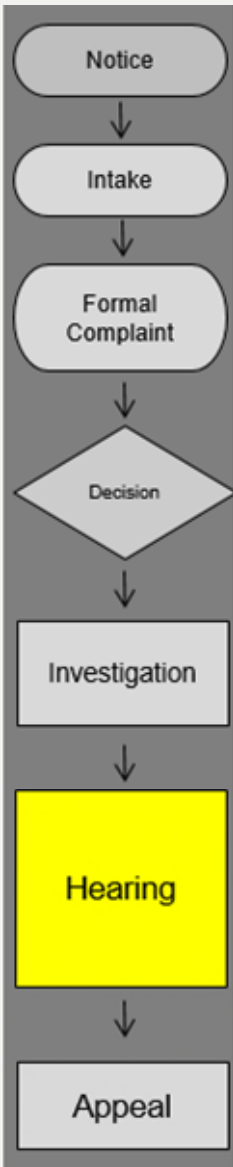
Applicability to K-12 Schools

- For recipients that are elementary and secondary schools, and other recipients that are not postsecondary institutions, the recipient's grievance process **may, but need not, provide for a hearing.**



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

Academic Medical Centers



- **Academic medical centers are not postsecondary institutions**, although an academic medical center may be affiliated with ... or even considered part of the same entity as the postsecondary institution.
- Through this revision, the Department is giving entities like academic medical centers **greater flexibility** in determining the appropriate process for a formal complaint.

Non-Postsecondary Institutions

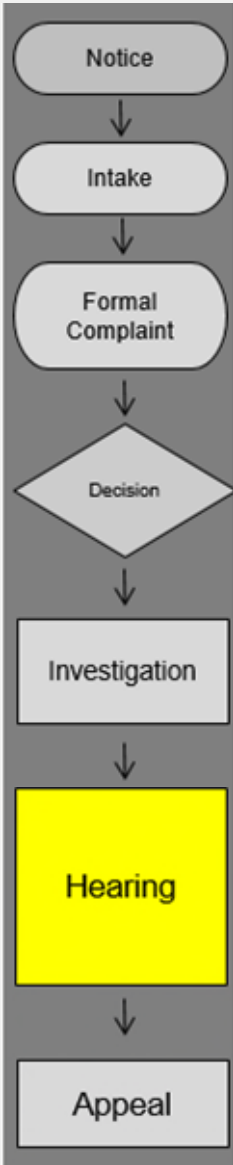


- With or without a hearing, after the recipient has sent the investigative report to the parties ... and before reaching a determination regarding responsibility, the decision-maker(s) must afford each party **the opportunity to submit written, relevant questions** that a party wants asked of any party or witness, **provide each party with the answers**, and **allow for additional, limited follow-up questions**.

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

Non-Postsecondary Institutions

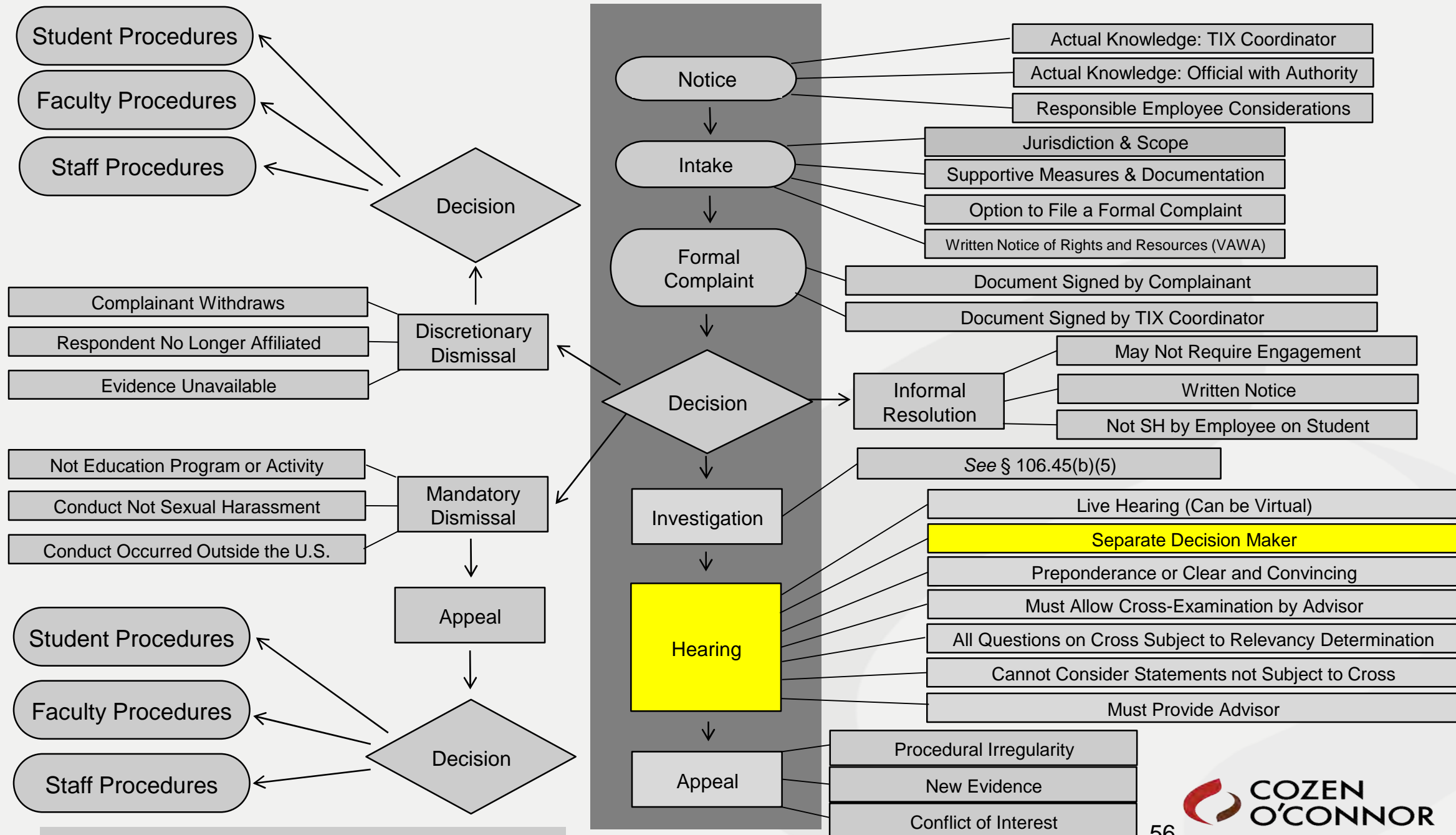
- As to recipients that are not postsecondary institutions, the Department has revised § 106.45(b)(6)(ii) to provide that the recipient *may* require a live hearing and *must* afford each party the opportunity to submit written questions, provide each party with the answers, and allow for additional, limited follow-up questions from each party.



Practical Considerations & Effective Practices

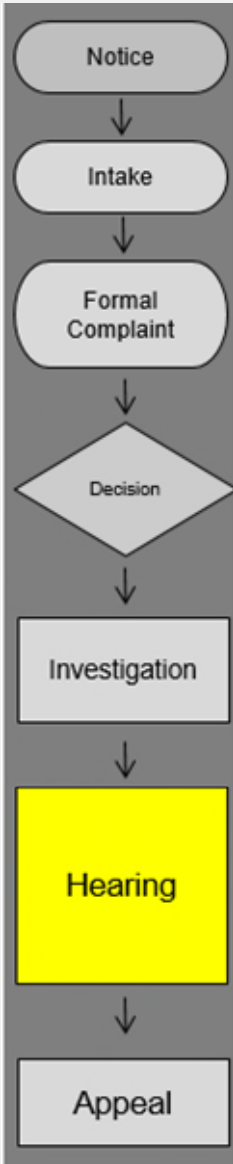
- Impact of requirement that parties and/or witnesses participate in the hearing
 - Party vs. witness
 - Student vs. employee
- Decisions re: technology
- Recording versus transcription
- Procedures for non-postsecondary institutions

ROLE OF DECISION-MAKER



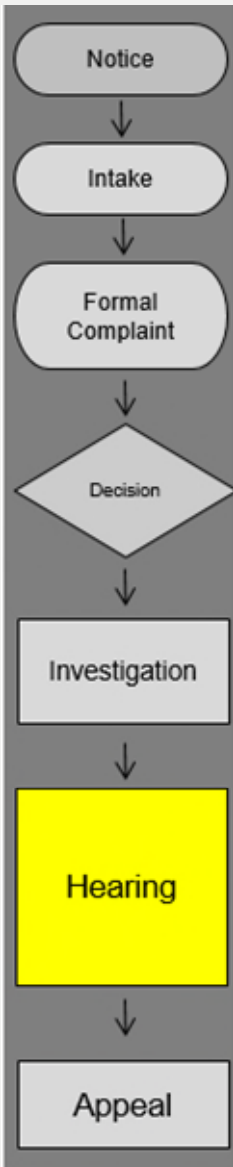
Determine Relevance of Questions

- 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 ...**



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

Explain Decisions to Exclude Questions

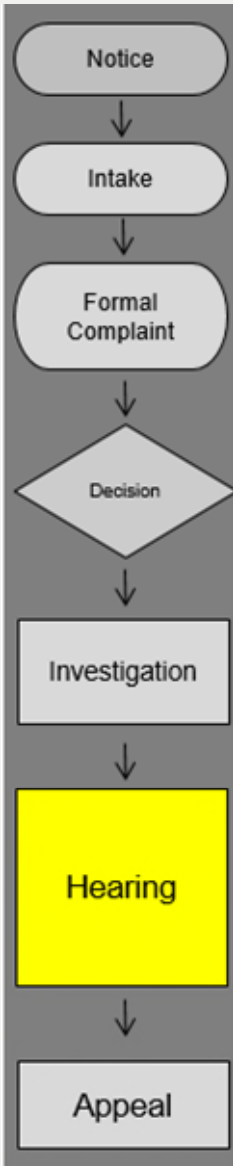


- The decision-maker(s) must explain to the party proposing the questions **any decision to exclude** a question as not relevant.

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

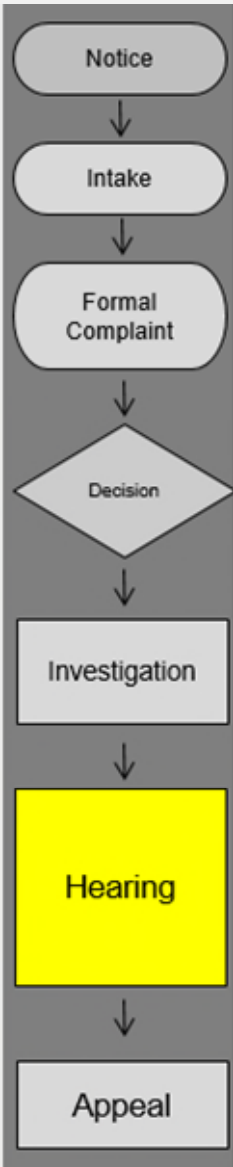
Apply the Standard of Evidence

- To reach [a] determination, the recipient must apply the standard of evidence described in paragraph (b)(1)(vii) of this section.



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

Issue Written Determinations

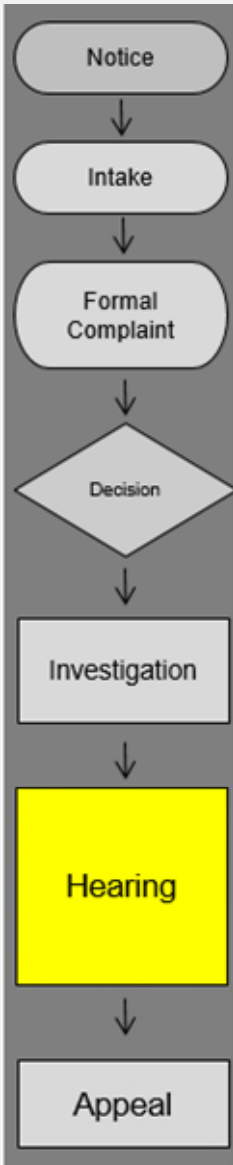


- The decision-maker(s) ... must issue a simultaneous written determination regarding responsibility, including
 - Identification of the allegations
 - Description of the procedural steps taken from the receipt of the formal complaint through the determination
 - Findings of fact supporting the determination
 - 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)

Separate Decision-Maker

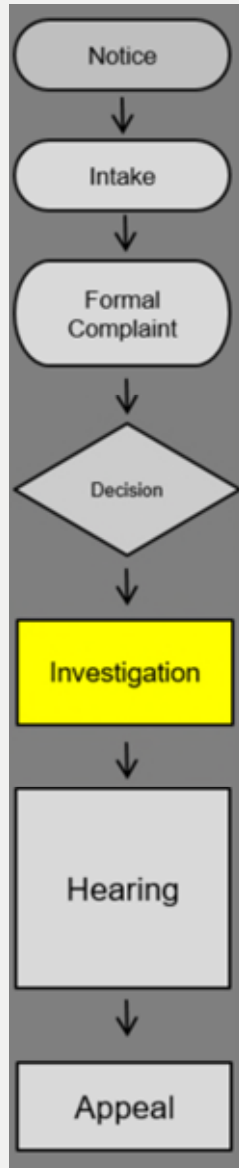
- The Department wishes to clarify that the final regulations **require the Title IX Coordinator and investigator to be different individuals from the decision-maker**, but nothing in the final regulations requires the Title IX Coordinator to be an individual different from the investigator.



Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30372

Investigator May not Determine Responsibility

- § 106.45(b)(7)(i) prevents an investigator from actually making a determination regarding responsibility.



Title IX Regulations May 19, 2020; §§ 106.45(b)(5)(vii); Preamble 85 F.R.30436

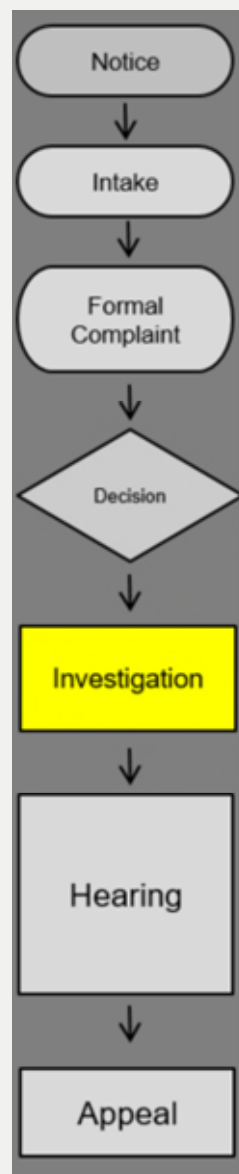
Decision-Maker Must Determine Responsibility



- Nothing in the final regulations prevents Title IX Coordinators from offering recommendations regarding responsibility to the decision-maker for consideration, but the final regulations **require the ultimate determination regarding responsibility to be reached by an individual (i.e., the decision-maker) who did not participate in the case as an investigator or Title IX Coordinator.**

Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30372

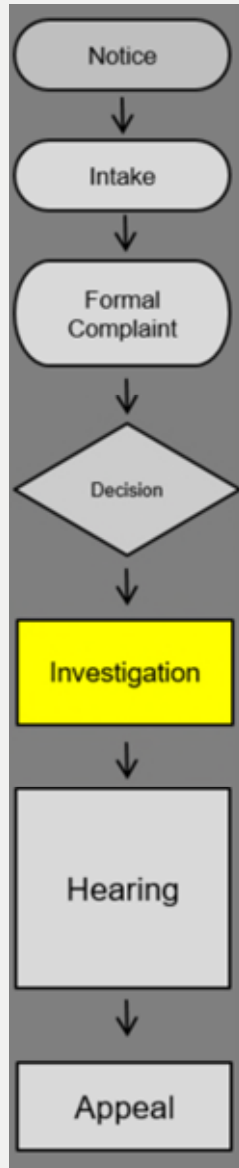
Independent Obligation to Evaluate Evidence



- The Department does not wish to prohibit the investigator from including recommended findings or conclusions in the investigative report.
- However, the decision-maker is under an **independent obligation to objectively evaluate relevant evidence**, and thus cannot simply defer to recommendations made by the investigator in the investigative report.

Title IX Regulations May 19, 2020; §§ 106.45(b)(5)(vii); Preamble 85 F.R.30308 & 30436

Independent Obligation to Evaluate Credibility



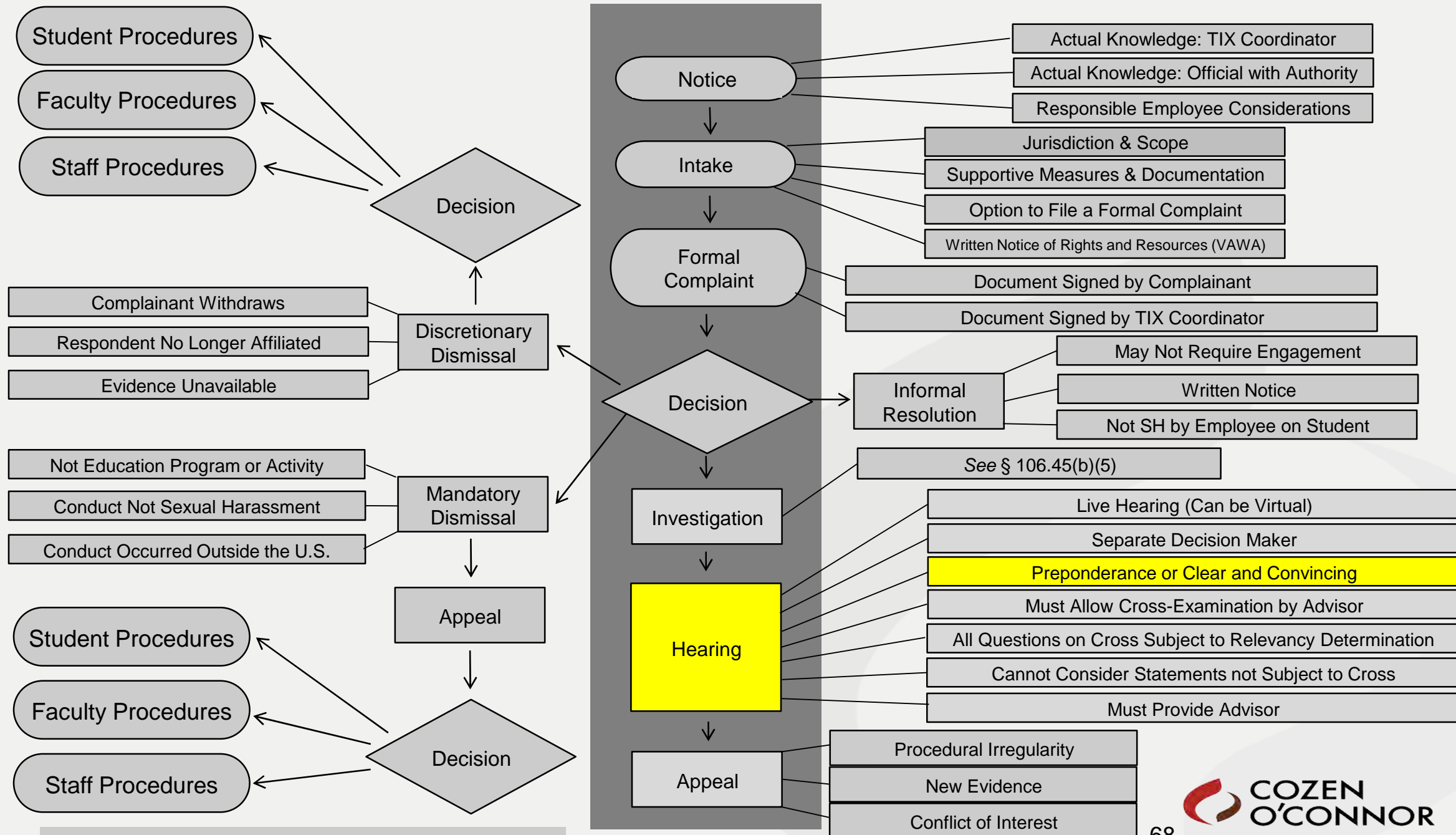
- If a recipient chooses to include a **credibility analysis** in its investigative report, the recipient must be cautious not to violate § 106.45(b)(7)(i), prohibiting the decision-maker from being the same person as the Title IX Coordinator or the investigator.
- If an investigator's determination regarding credibility is actually a determination regarding responsibility, then §106.45(b)(7)(i) would prohibit it.

Title IX Regulations May 19, 2020; §§ 106.45(b)(5)(vii); Preamble 85 F.R.30308 & 30436

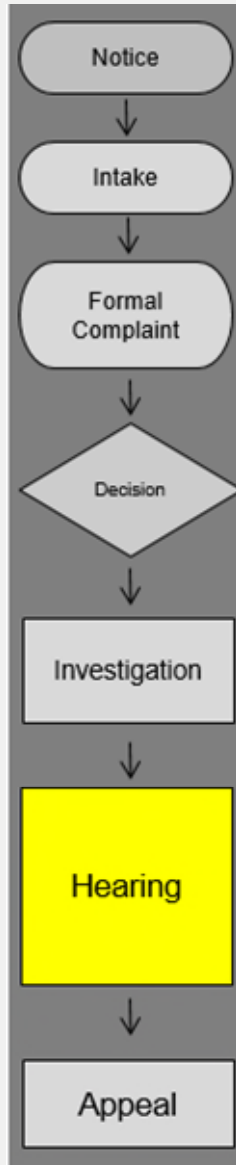
Practical Considerations & Effective Practices

- Choice of decision-maker(s)
 - Hearing panel vs. sole adjudicator
 - External professional vs. internal administrator
- Decision-maker on sanction
 - Can be same or different from decision-maker on finding
- Use of Hearing Coordinator?
- Whether to have investigator make recommended findings or include a credibility analysis

STANDARD OF EVIDENCE



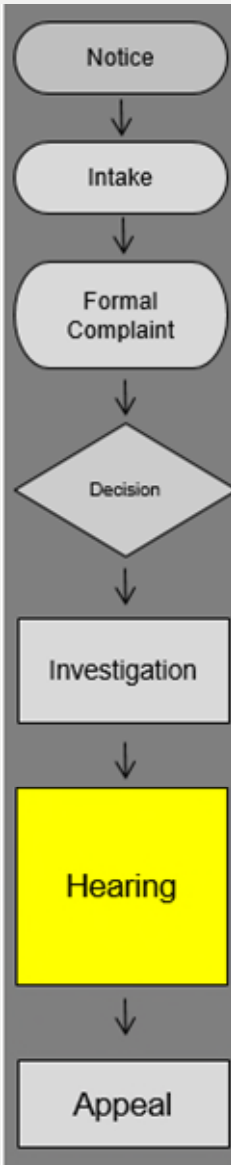
Standard of Evidence



- [T]he recipient must apply the same standard of evidence to student and employee matters, using either the clear and convincing standard or the preponderance of the evidence standard.
- The recipient must apply the same standard of evidence to all formal complaints of sexual harassment.

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

Standard of Evidence

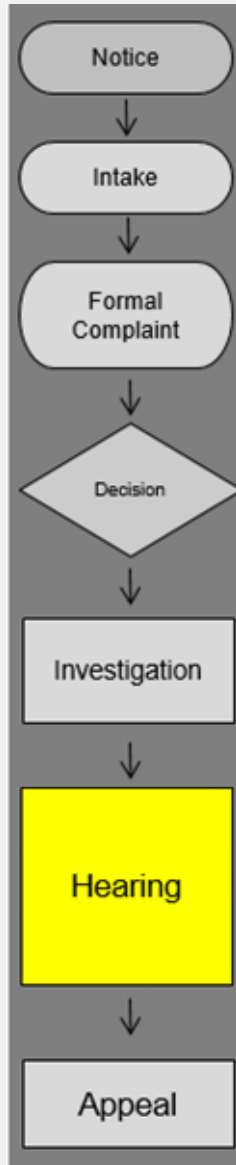


- For reasons described above, the Department has determined that the approach to the standard of evidence contained in § 106.45(b)(1)(vii) and § 106.45(b)(7)(i) of the final regulations represents the **most effective way of legally obligating recipients to select a standard of evidence** for use in resolving formal complaints of sexual harassment under Title IX to ensure a fair, reliable grievance process **without unnecessarily mandating that a recipient select one standard over the other.**

Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30388.

Standard of Evidence

- In short, under the final regulations the **same standard of evidence will apply to all formal complaints of sexual harassment** under Title IX responded to by a particular recipient, **whether the respondent is a student or employee.**



Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30388.

Standard of Evidence



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

Clear and Convincing*

- The evidence is highly and substantially more likely to be true than untrue
- The fact finder must be convinced that the contention is highly probable
- Proof which requires more than a preponderance of the evidence but less than proof beyond a reasonable doubt
- Clear and convincing proof will be shown where the truth of the facts asserted is highly probable
- Quality of the evidence, not quantity
- NOT beyond a reasonable doubt

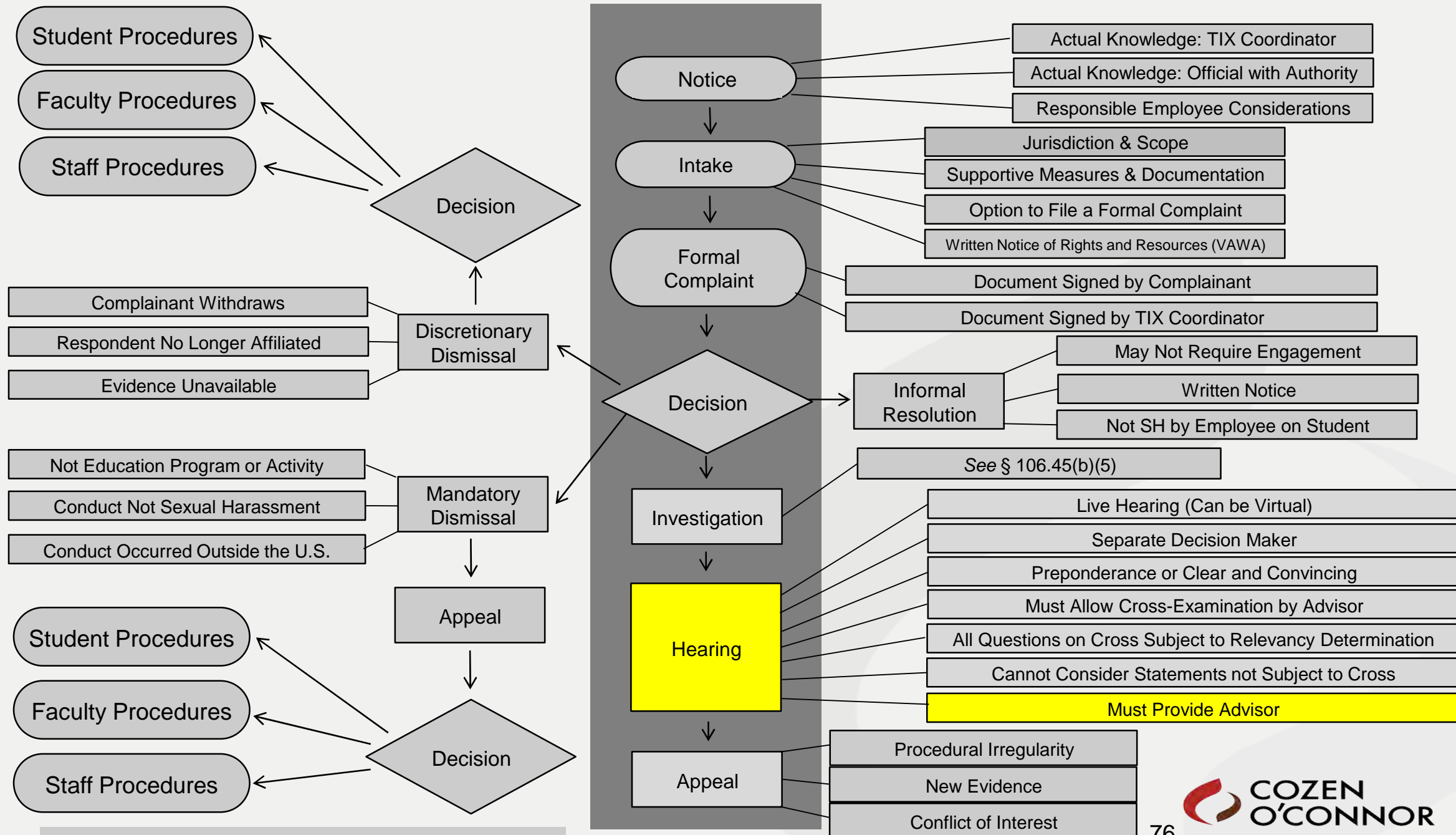
* Based on common usage.

Preponderance of the Evidence*

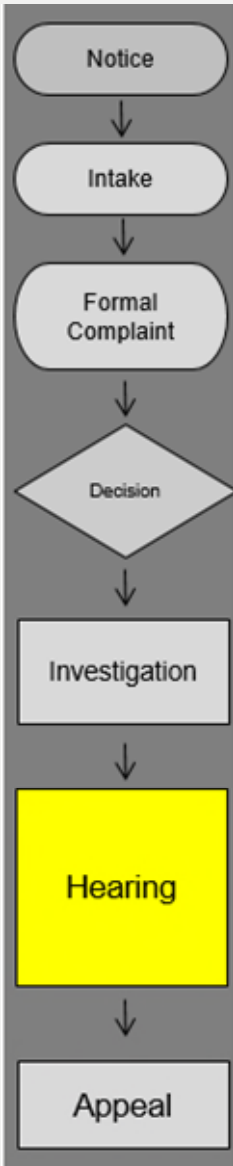
- More likely to be true than not
- More probable than not
- The greater weight of the evidence
- Tipping the scale ever so slightly
- 51 %
- Based on the more convincing evidence and it's probable truth or accuracy, not on the amount
- Quality of the evidence, not quantity
- NOT beyond a reasonable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

* Based on common usage.

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

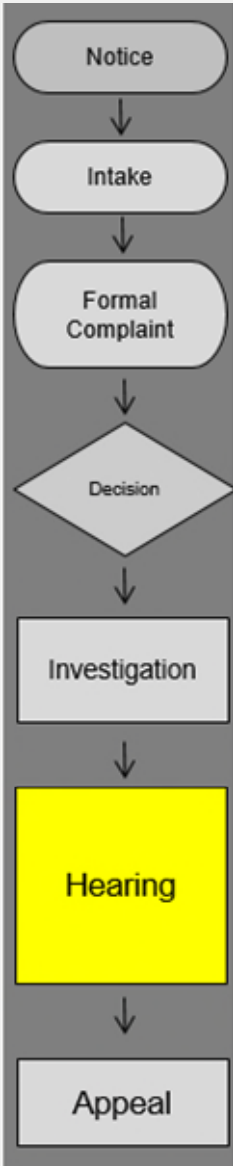


- The Department notes that the 106.45 (b)(1)(iii) prohibition of Title IX personnel having conflicts of interest or bias **does not apply to party advisors** (including advisors provided to a party by a post secondary institution as required under 106.45(b)(6)(i)) and thus, **the existence of a possible 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

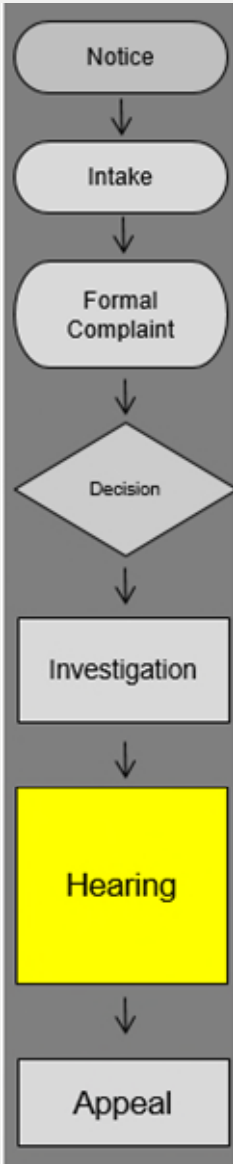
- [A] party's advisor may appear and conduct cross-examination **even when the party whom they are advising does not appear.**



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

Discretion as to Advisor's Role

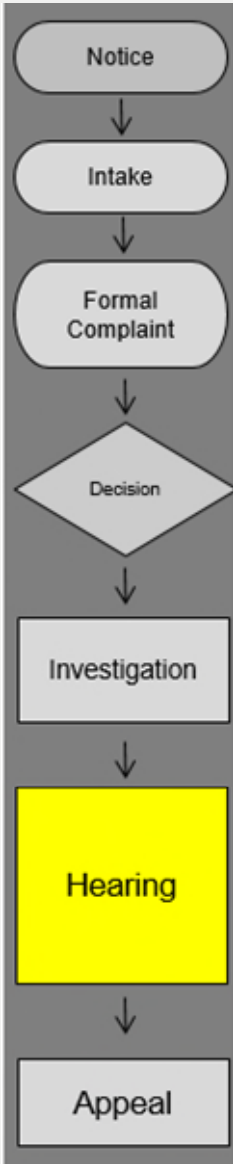
- Section 106.45(b)(5)(iv) (allowing recipients to place restrictions on active participation by party advisors) and the revised introductory sentence to § 106.45(b) (requiring any rules a recipient adopts for its grievance process other than rules required under § 106.45 to apply equally to both parties) 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.



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

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.

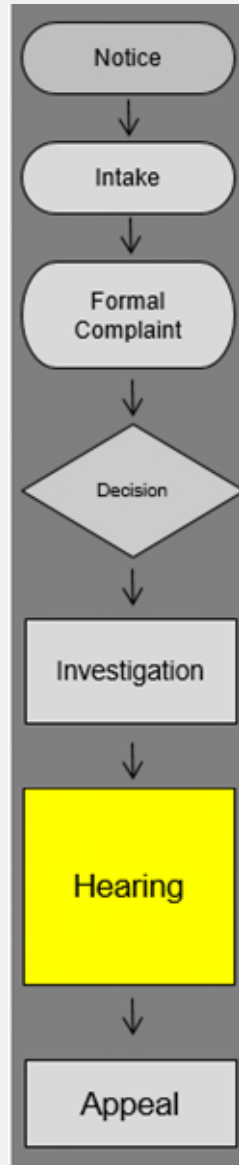
Obligation to Provide an Advisor

- 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)

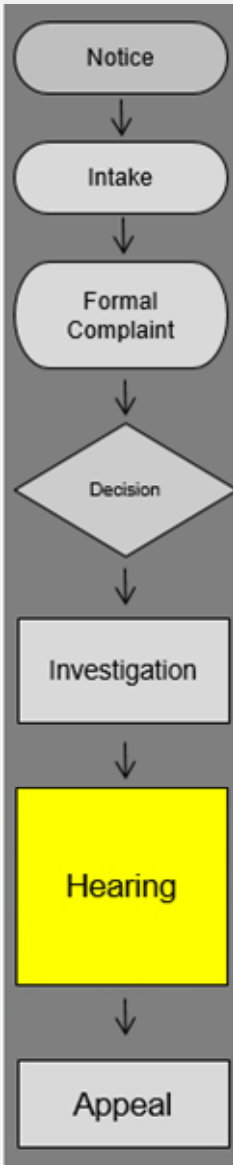
Must Provide Advisor Even in Party's Absence



- [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

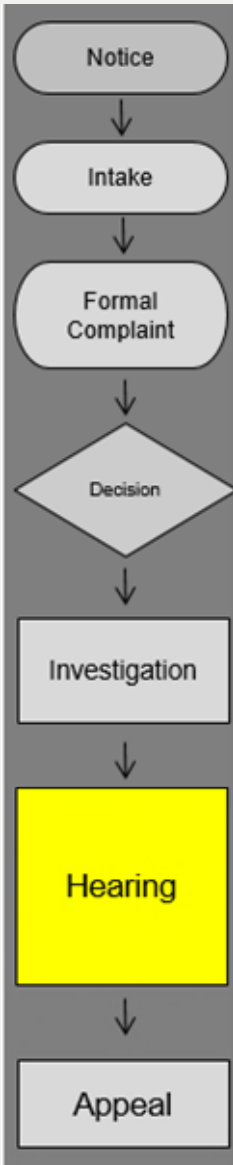
Appearance Without an Advisor



- 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

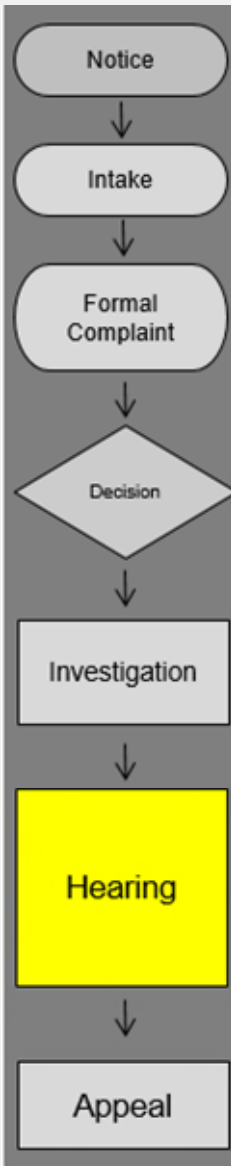
Refusal to Conduct Cross-Examination



- 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



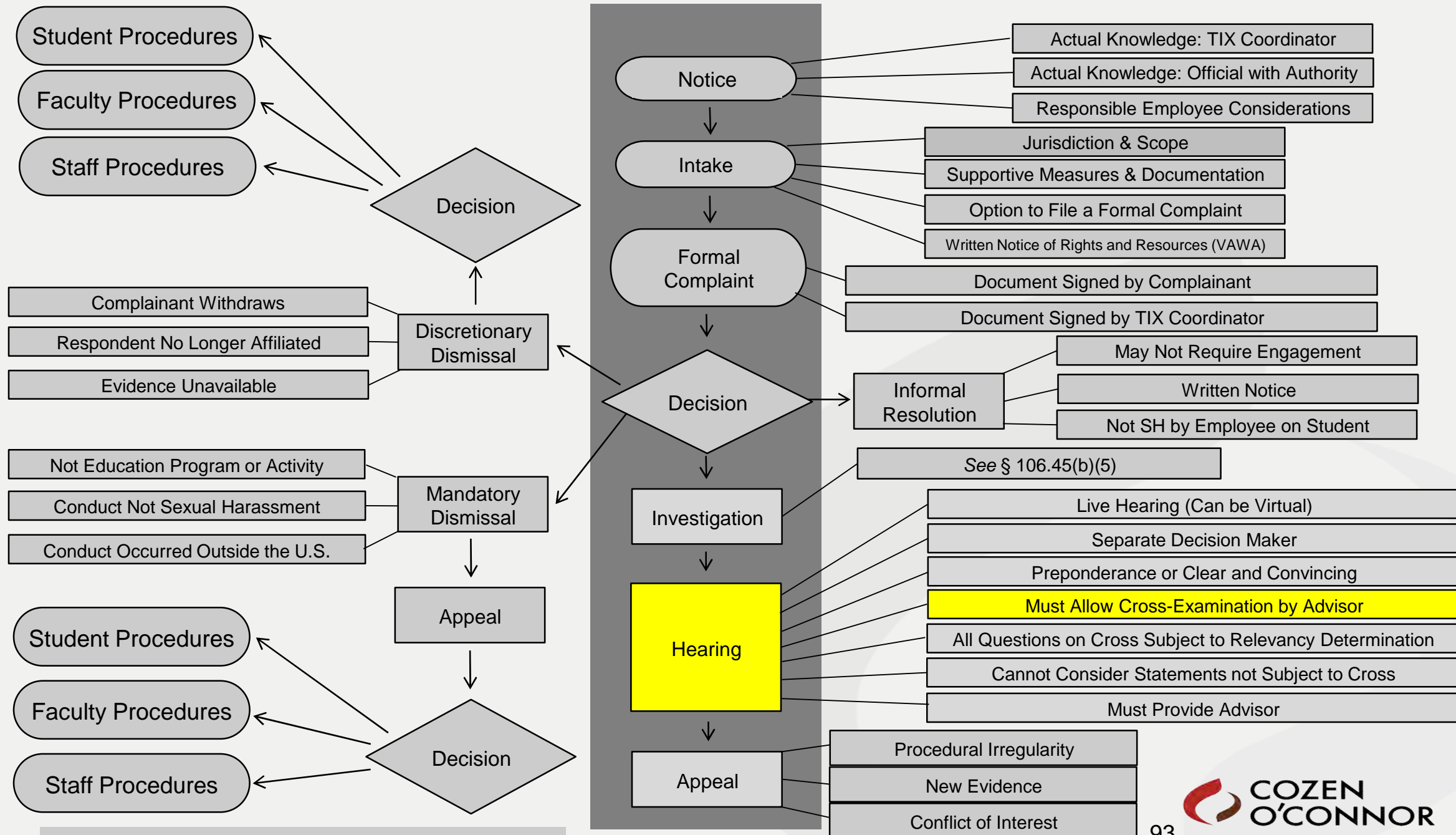
- If a party to whom the recipient assigns an advisor **refuses to work with the advisor** when the advisor is willing to conduct cross-examination on the party's behalf, then for reasons described above **that party has no right of self-representation with respect to conducting cross-examination**, 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

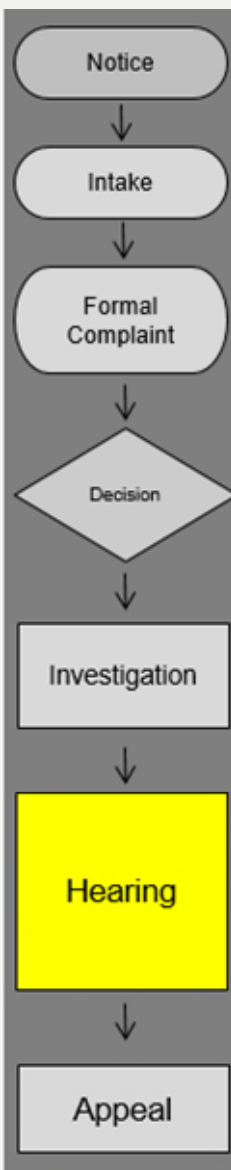
Practical Considerations & Effective Practices

- 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



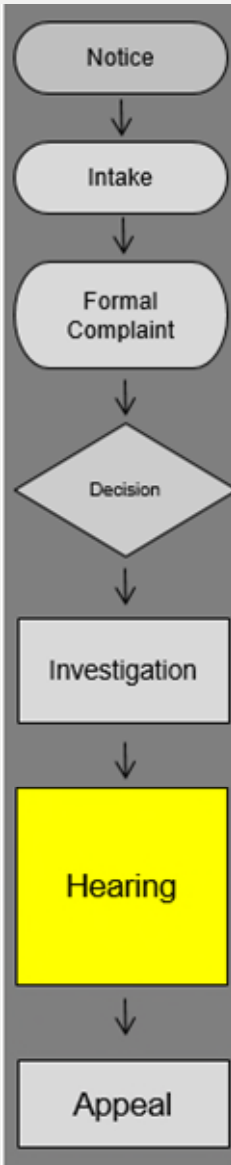
Cross-Examination



- 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)

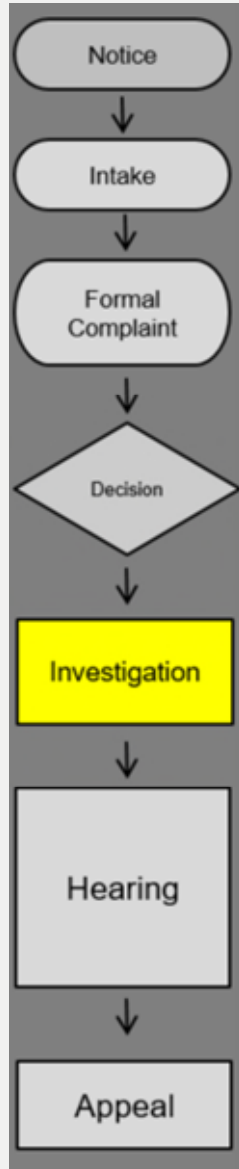
Cross-Examination



- 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)

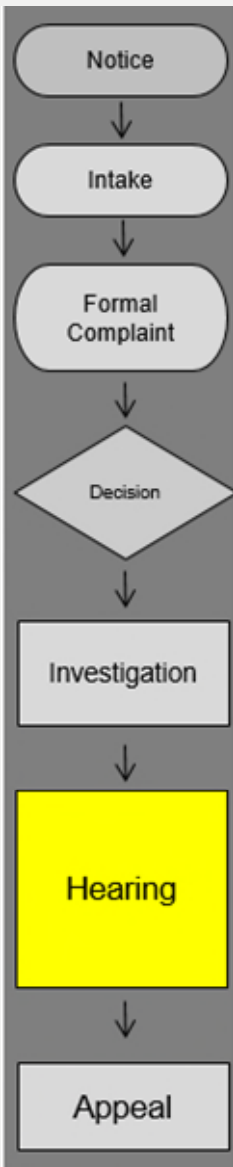
Recap on Evidence Review



- “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)

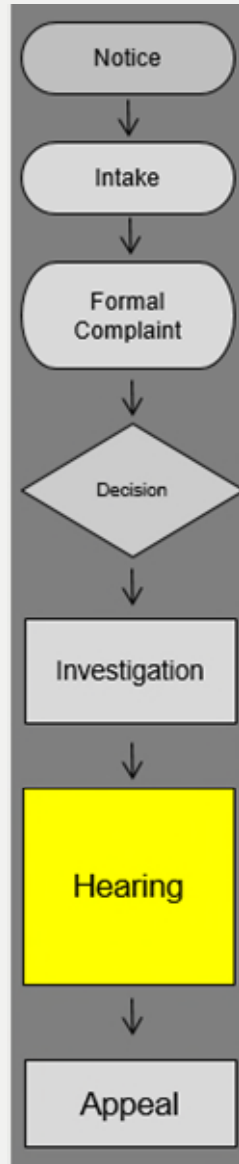
Opportunity to Challenge Evidence

- 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

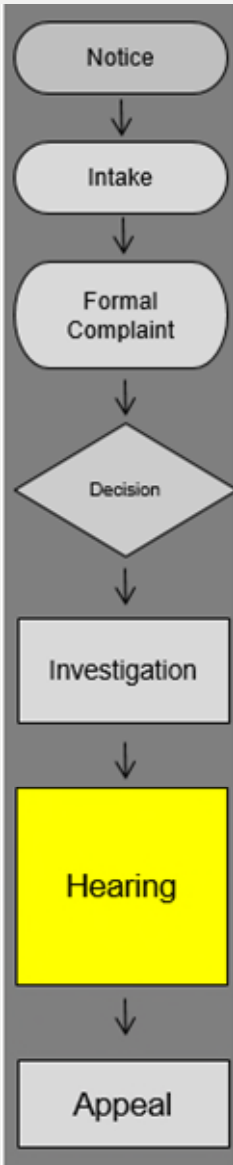
Questions to Advance a Party's Interest



- 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)

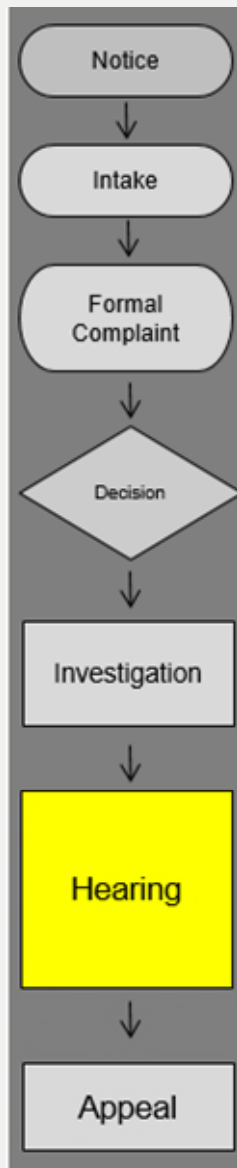
Determinations Regarding Relevance



- 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; 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

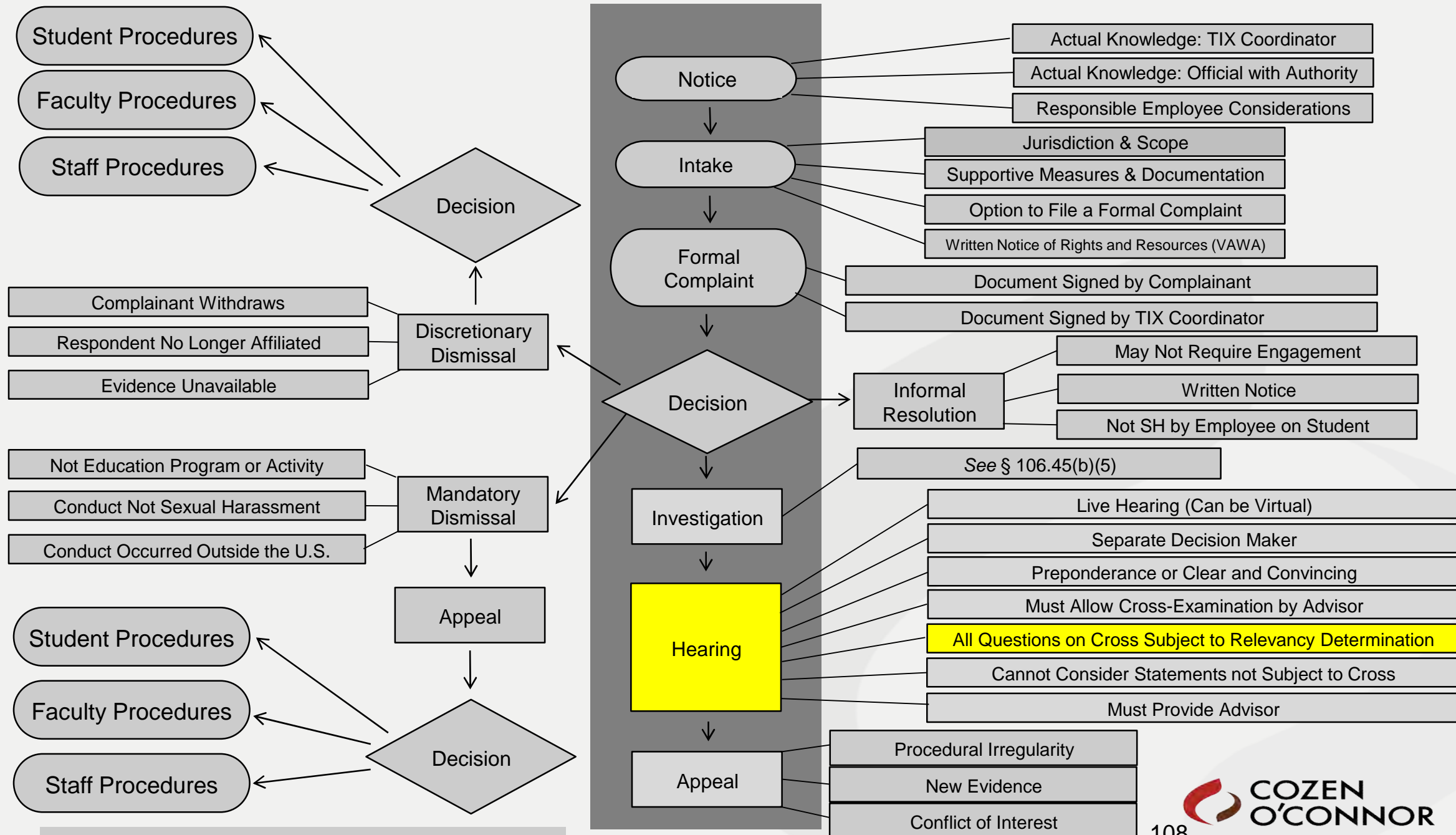
May Not Impose Training Requirements



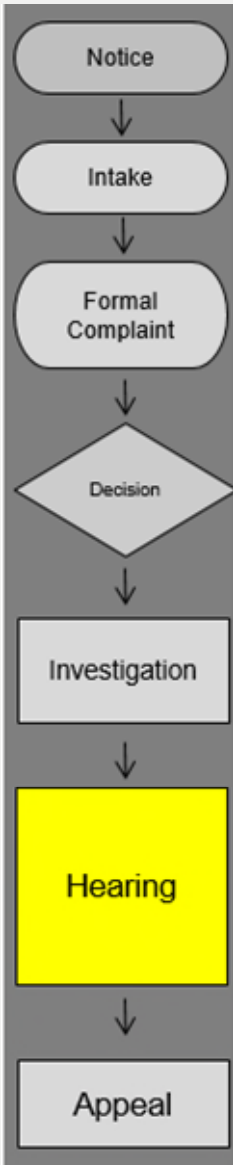
- Recipients may not impose training or competency assessments on advisors of choice selected by parties, but nothing in the final regulations prevents a recipient from training and assessing the competency of its own employees whom the recipient may desire to appoint as party advisors.

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

RELEVANCE



Questions Must be Relevant

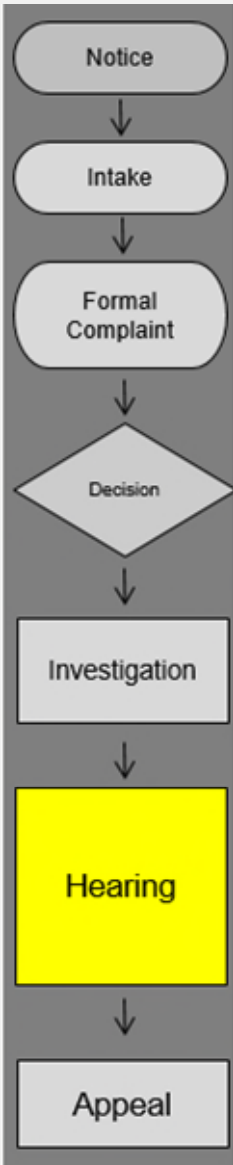


- Only **relevant** cross-examination and other questions may be asked of a party or witness.
- Before a complainant, respondent, or witness answers a cross-examination or other question, the decision-maker(s) must **first determine whether the question is relevant ...**
- The decision-maker(s) must 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)

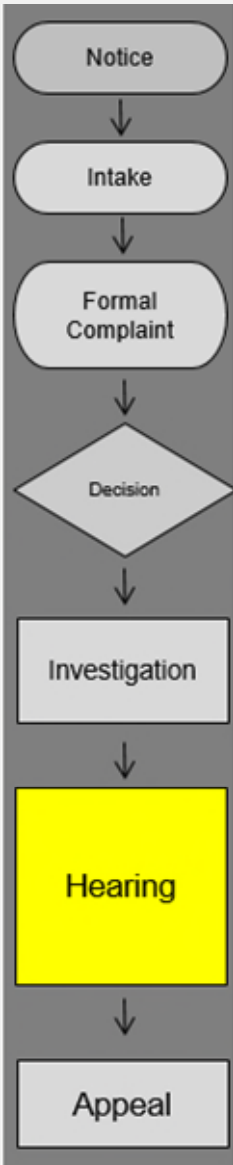
Relevance

- 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

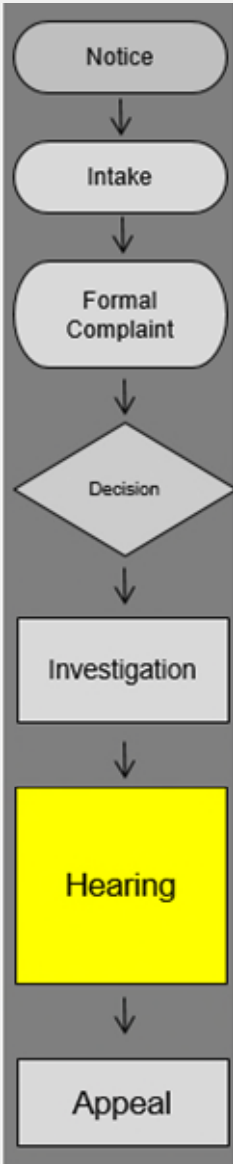
Relevance



- 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.

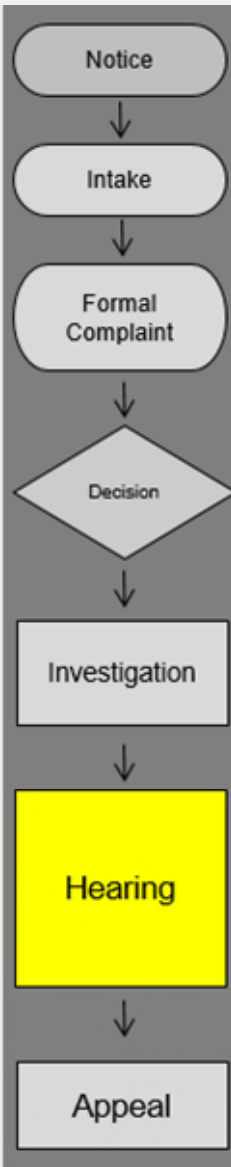
Relevance



- 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.

Limitations on Relevance

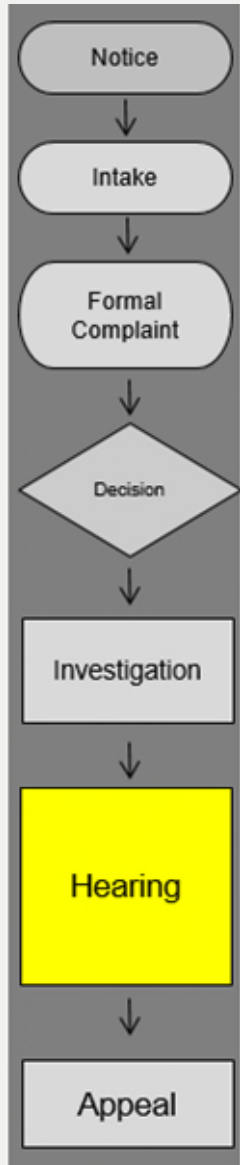


- To that end, the Department has determined that recipients **must consider relevant evidence** with the following conditions:
 - a complainant’s prior sexual behavior is **irrelevant** (unless questions or evidence about prior sexual behavior meet one of two exceptions, as noted above);
 - information protected by any legally recognized privilege **cannot be used**; no party’s treatment records may be used without that party’s voluntary, written consent; and
 - statements not subject to cross-examination in postsecondary institutions **cannot be relied on** by the decision-maker.
 - The Department notes that where evidence is duplicative of other evidence, a recipient may deem the evidence **not relevant**.

Title IX Regulations, May 19, 2020, Preamble 85 F.R. 30337

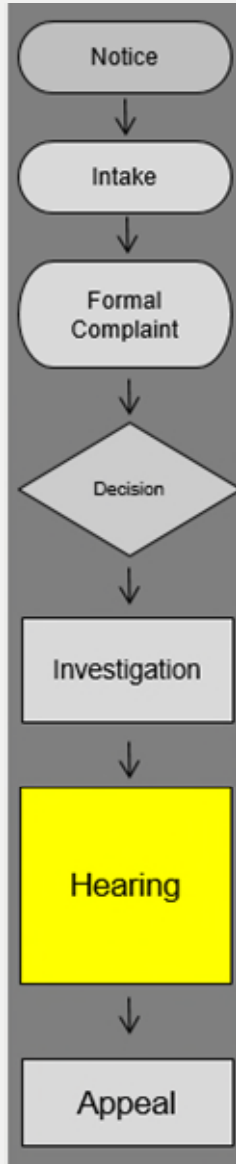
Privileged Information

- 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

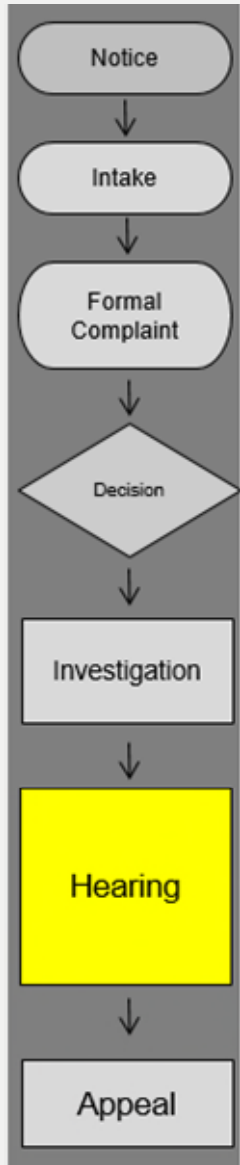
Privileged Information: Per Se Irrelevant



- In response to commenters' concerns that relevant questions might implicate information protected by attorney-client privilege, the final regulations add § 106.45(b)(1)(x) to bar the grievance process from requiring, allowing, relying on, **or otherwise using questions or evidence** that constitute, or seek disclosure of, information protected under a legally recognized privilege.

Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30361

Relevance: Prior Sexual History

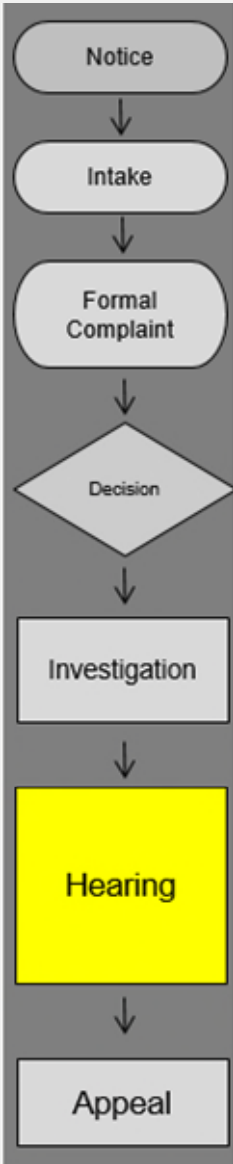


- Questions and evidence about the complainant's sexual predisposition or **prior sexual behavior are not relevant, unless** such questions and evidence about the complainant's prior sexual behavior are offered:
 - To prove that someone other than the respondent committed the conduct alleged by the complainant, 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

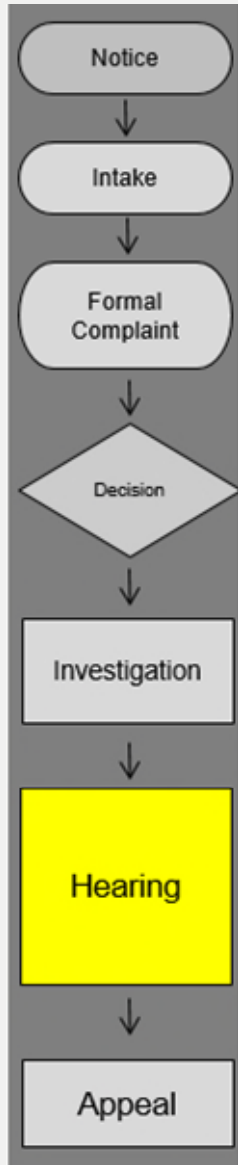
Prior Sexual History

- 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

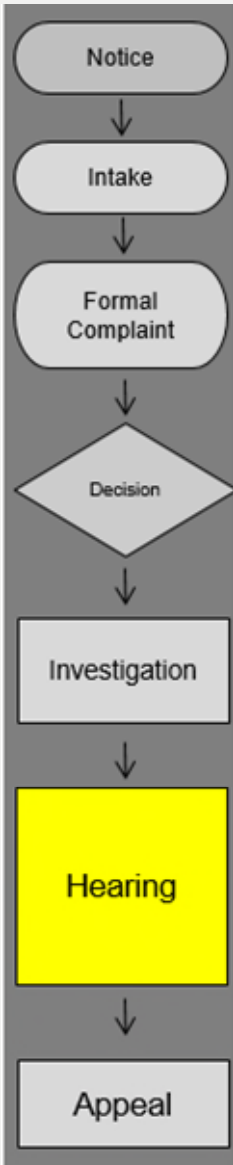
Prior Sexual History: Motive



- 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 Sexual History: Per Se Irrelevant



- The final regulations clarify the rape shield language to state that **questions and evidence subject to the rape shield protections are “not relevant,”** and therefore the rape shield protections apply wherever the issue is whether evidence is relevant or not.

Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30353

Prior or Subsequent Misconduct

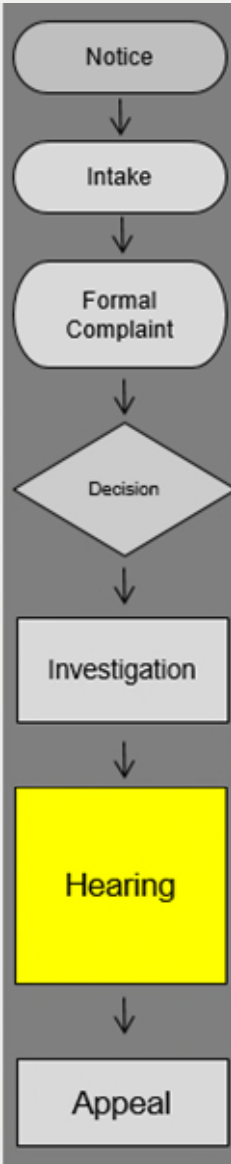


- The regulations do not prohibit the use of prior or subsequent misconduct
 - “Evidence of a pattern of inappropriate behavior by an alleged harasser” permitted if relevant
- Schools will need to determine if such conduct is:
 - Relevant
 - May be used in determining responsibility
 - May be used in sanctioning
- If so, will need to set criteria for consideration

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
- Consider prejudicial vs. probative value

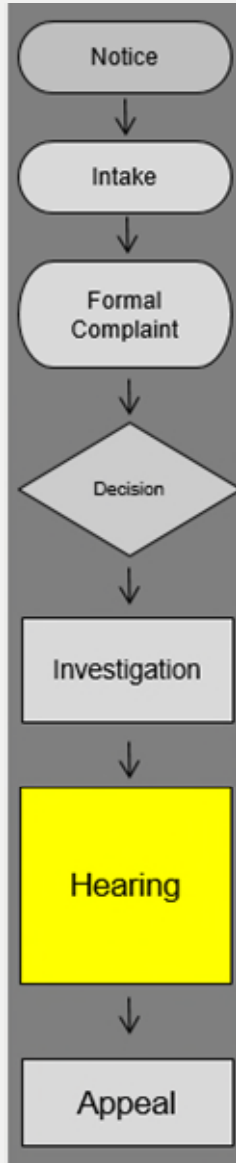
No Comprehensive Evidentiary Rules



- The Department desires to prescribe a grievance process adapted for an educational environment rather than a courtroom, and **declines to impose a comprehensive, detailed set of evidentiary rules** for resolution of contested allegations of sexual harassment under Title IX.
- Rather, the Department has carefully considered the procedures most needed to result in fair, accurate, and legitimate outcomes in Title IX grievance processes.

Title IX Regulations, May 19, 2020, Preamble 85 F.R. 30337

Simplified Evidentiary Considerations

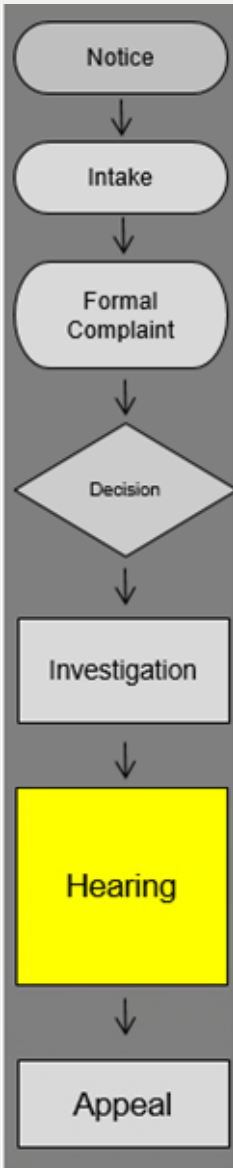


- Recipients are educational institutions that **should not be converted into *de facto* courtrooms.**
- The final regulations thus prescribe a process that **simplifies evidentiary complexities** while ensuring that determinations regarding responsibility result from **consideration of relevant, reliable evidence.**

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

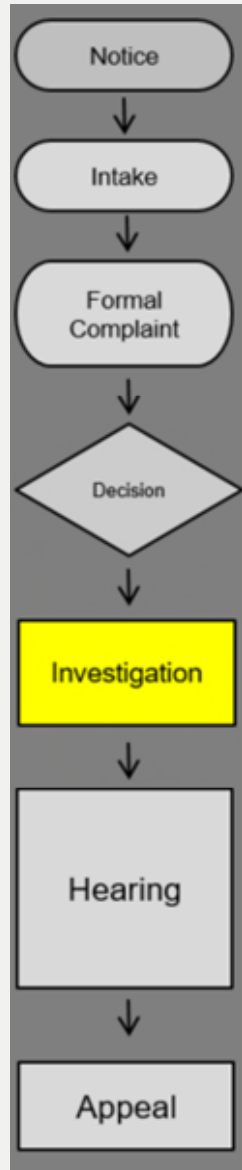
Relevant and Reliable Evidence

- The Department believes that the final regulations strike the appropriate balance for a postsecondary institution context between **ensuring that only relevant and reliable evidence is considered** while not over-legalizing the grievance process.



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

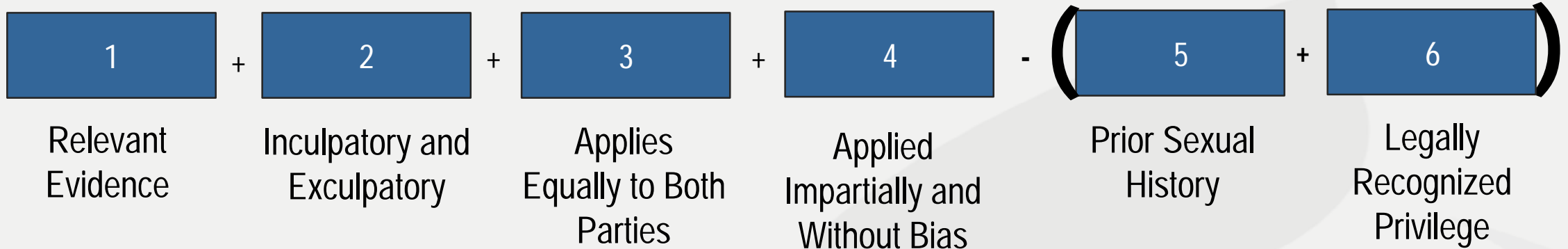
Flexibility to Adopt Rules



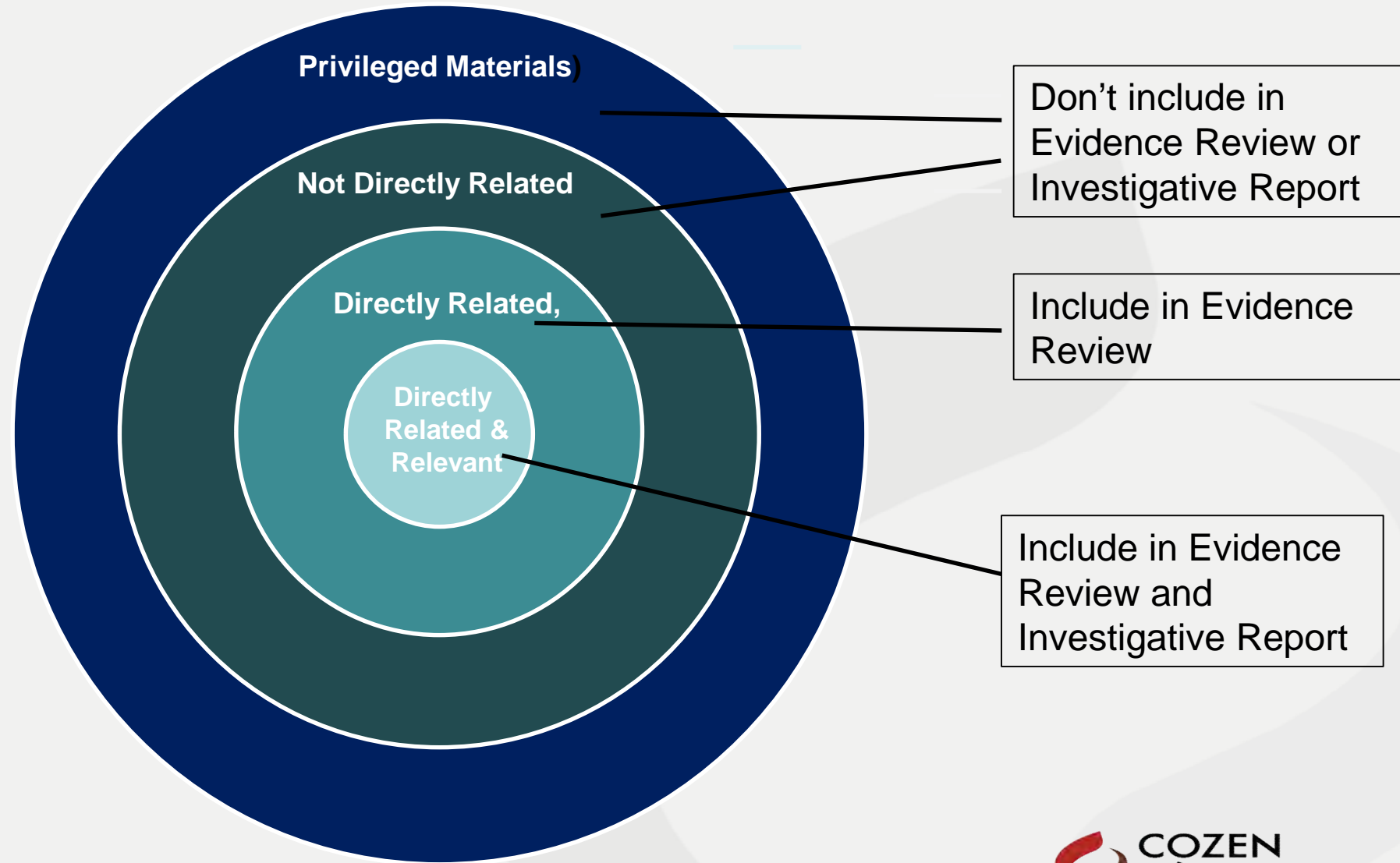
- “Within these evidentiary parameters **recipients retain the flexibility to adopt rules that govern how the recipient’s investigator** and decision-maker evaluate evidence and conduct the grievance process (so long as such rules apply equally to both parties).
- **Relevance is the standard that these 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.

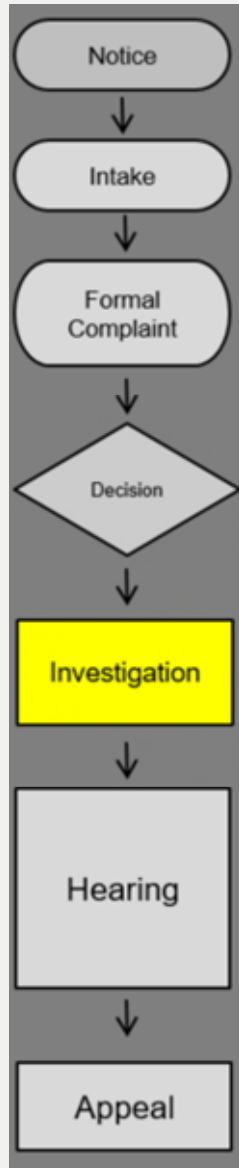
Evidentiary Rules Must Consider



Evidentiary Levels for Inclusion



Directly Related

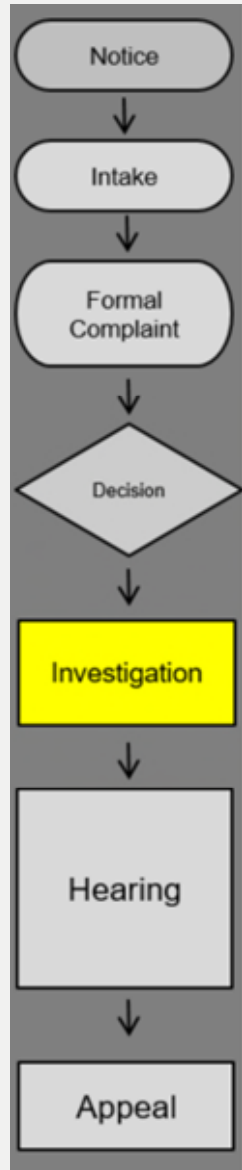


- Not defined in the regulations or the Preamble
 - The Department declines to define certain terms such as “evidence directly related to the allegations,” as these terms should be interpreted using their plain and ordinary meaning.
- “Directly related” aligns with the requirements in FERPA
 - The Department previously noted that the “directly related to” requirement in § 106.45(b)(vi) aligns with FERPA.
 - For example, the regulations implementing FERPA define education records as records that are “directly related to a student” pursuant to § 99.3.
- Left to the discretion of the school
 - [T]he school has some discretion to determine what evidence is directly related to the allegations in a formal complaint.

Title IX Regulations May 19, 2020; Preamble at 30304, 30428.

Directly Related

- [T]he universe of that exchanged evidence should include all evidence (inculpatory and exculpatory) that relates to the allegations under investigation, without the investigator having screened out evidence related to the allegations that the investigator does not believe is relevant.



Title IX Regulations May 19, 2020 §106.45(b)(5)(vi);
Preamble 85 F.R.30304

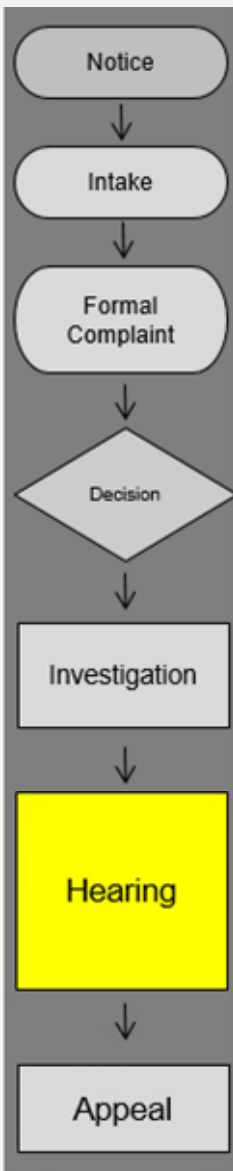
Directly Related vs. Relevant



- Evidence that is “directly related to the allegations” may encompass a broader universe of evidence than evidence that is “relevant.”
- The Department does not believe that determinations about whether certain questions or evidence are relevant or directly related to the allegations at issue requires legal training and that such factual determinations reasonably can be made by layperson recipient officials impartially applying logic and common sense.

Title IX Regulations May 19, 2020; Preamble at 30304, 30321.

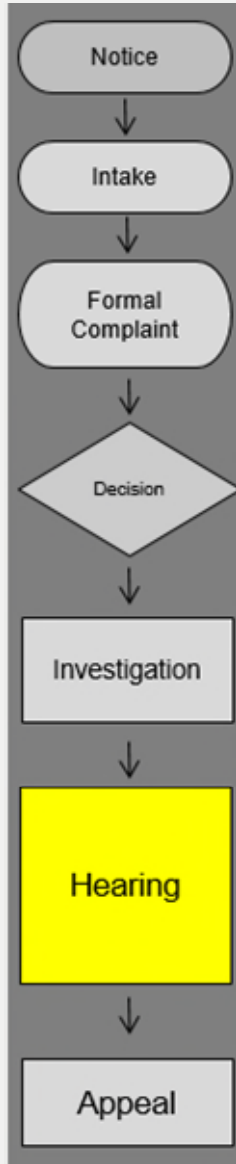
Relevant Questions



- 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.**

Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30248; 30361

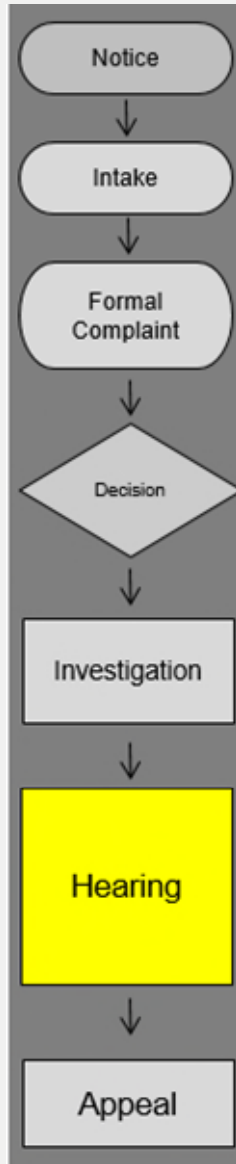
Relevant Questions



- [T]he final regulations add § 106.45(b)(1)(x) to bar the grievance process from requiring, allowing, relying on, or **otherwise using questions or evidence** that constitute, or seek disclosure of, information protected under a legally recognized privilege.
- Additionally, questions that are **duplicative or repetitive** may fairly be deemed not relevant and thus excluded.

Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30361

Relevance: Explaining Exclusion

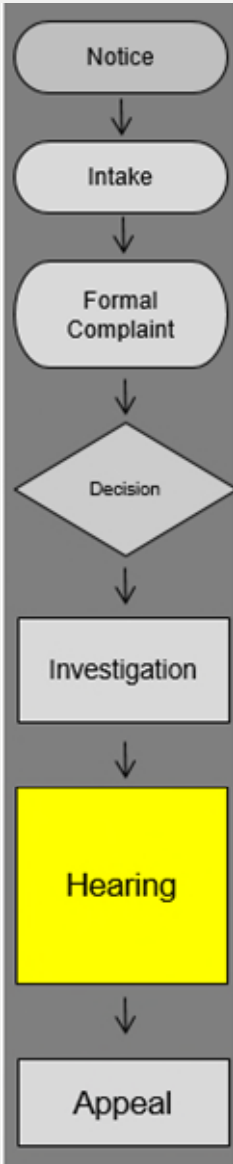


- Before a complainant, respondent, or witness answers a cross-examination or other question, the decision-maker(s) must first determine whether the question is relevant and explain any decision to exclude a question as not relevant.
- This provision **does not require a decision-maker to give a lengthy or complicated explanation.**

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

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

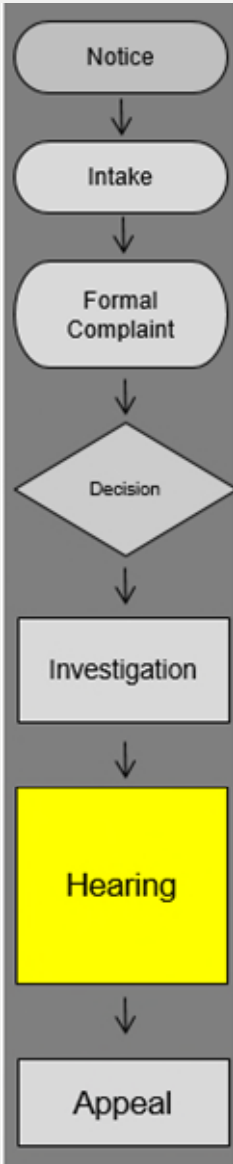
Relevance: Explaining Exclusion



- [I]t is sufficient, for example, for a decision-maker to explain that a question is irrelevant because the question calls for **prior sexual behavior** information without meeting one of the two exceptions, or because the question asks about a detail that is **not probative of any material fact** concerning the allegations. No lengthy or complicated exposition is required to satisfy this provision.

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

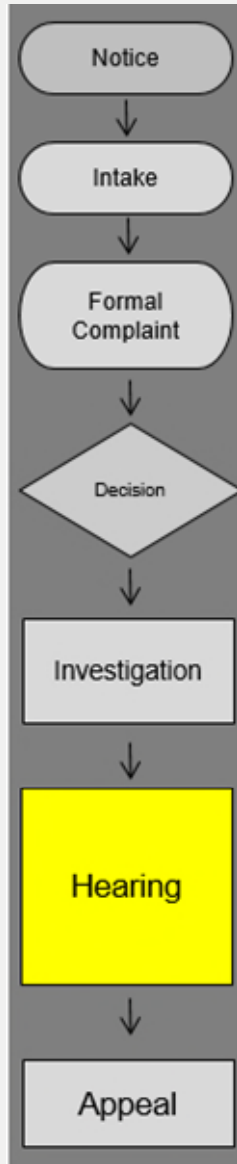
Flexibility to Discuss Relevance



- 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.**

Appeal of Relevance Determination

- Parties have the equal right to appeal on three bases including procedural irregularity that affects the outcome, so if a party disagrees with a decision-maker's relevance determination, the party has the **opportunity to challenge the relevance determination on appeal.**



Title IX Regulations, May 19, 2020; Preamble 85 F.R 30349, footnote 1340, citing § 106.45(b)(8)

Appeal of Relevance Determination



- Parties may appeal erroneous relevance determinations, if they affected the outcome, because § 106.45(b)(8) allows the parties equal appeal rights on grounds that include procedural irregularity that affected the outcome.
- However, asking the decision-maker to also explain the exclusion of questions during the hearing does not affect the parties' appeal rights and may reduce the number of instances in which a party feels the need to appeal on this basis because the decision-maker will have explained the decision during the hearing.

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

Practical Considerations & Effective Practices

- Use of a hearing coordinator to support timely determinations by the decision-maker regarding relevance
- How to enable panels to make real-time relevancy determination on cross-examination questions
- Whether to permit discussion of relevancy during the live hearing, or whether to defer the opportunity to challenge to the appeal
- Upon appeal, permitting the decision-maker to augment their reasoning for disallowing a question

Walking through an Example

- Can you adopt a rule excluding subsequent use of statements made during informal resolution?

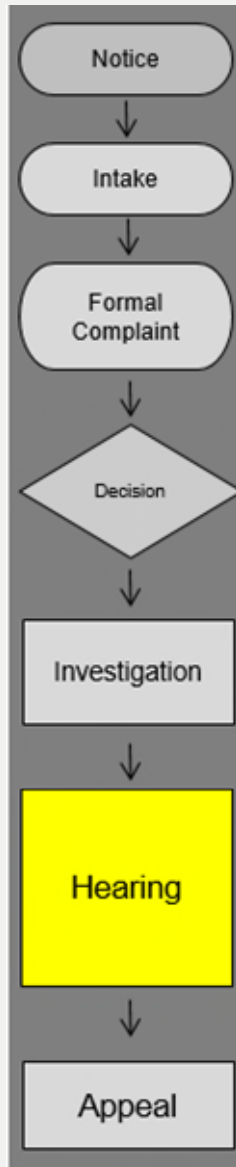
Statements Made During Informal Resolution



- The regulations permit a recipient to facilitate an informal resolution, provided that the recipient provides the parties written notice disclosing:
 - The allegations,
 - The requirements of the informal resolution process,
 - The circumstances under which it precludes the parties from resuming the formal complaint, provided that at any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and resume the grievance process, and
 - Any **consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared.**

Title IX Regulations, May 19, 2020; § 106.45(b)(9)

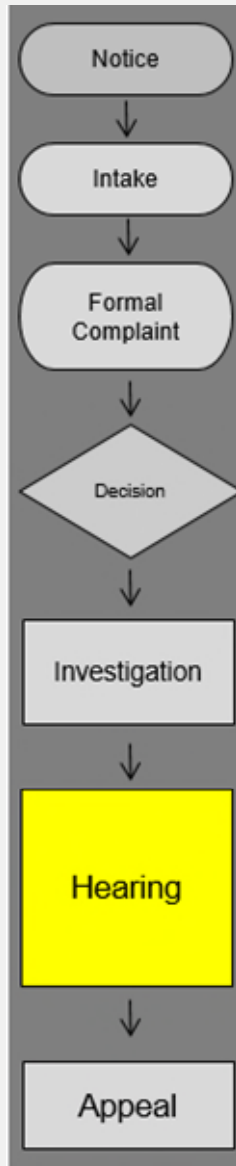
Statements Made During Informal Resolution



- The Department appreciates commenters' concerns that comprehensive rules of evidence adopted in civil and criminal courts throughout the U.S. legal system apply detailed, complex rules to certain types of evidence resulting in **exclusion of evidence that is otherwise relevant to further certain public policy values (e.g., exclusion of statements made during settlement negotiations, exclusion of hearsay subject to specifically-defined exceptions, exclusion of character or prior bad act evidence subject to certain exceptions, exclusion of relevant evidence when its probative value is substantially outweighed by risk of prejudice, and other admissibility rules).**

Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30337

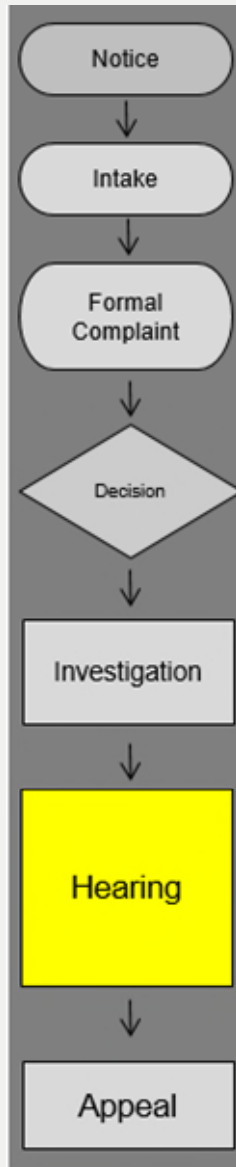
Statements Made During Informal Resolution



- With respect to **informal resolution facilitators potentially serving as witnesses** in subsequent formal grievance processes, we leave this possibility open to recipients.
- If recipients were to accept such witnesses, then the **Department would expect this possibility to be clearly disclosed to the parties** as part of the § 106.45(b)(9)(i) requirement in the final regulations to provide a written notice disclosing any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared.

Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30400-30401

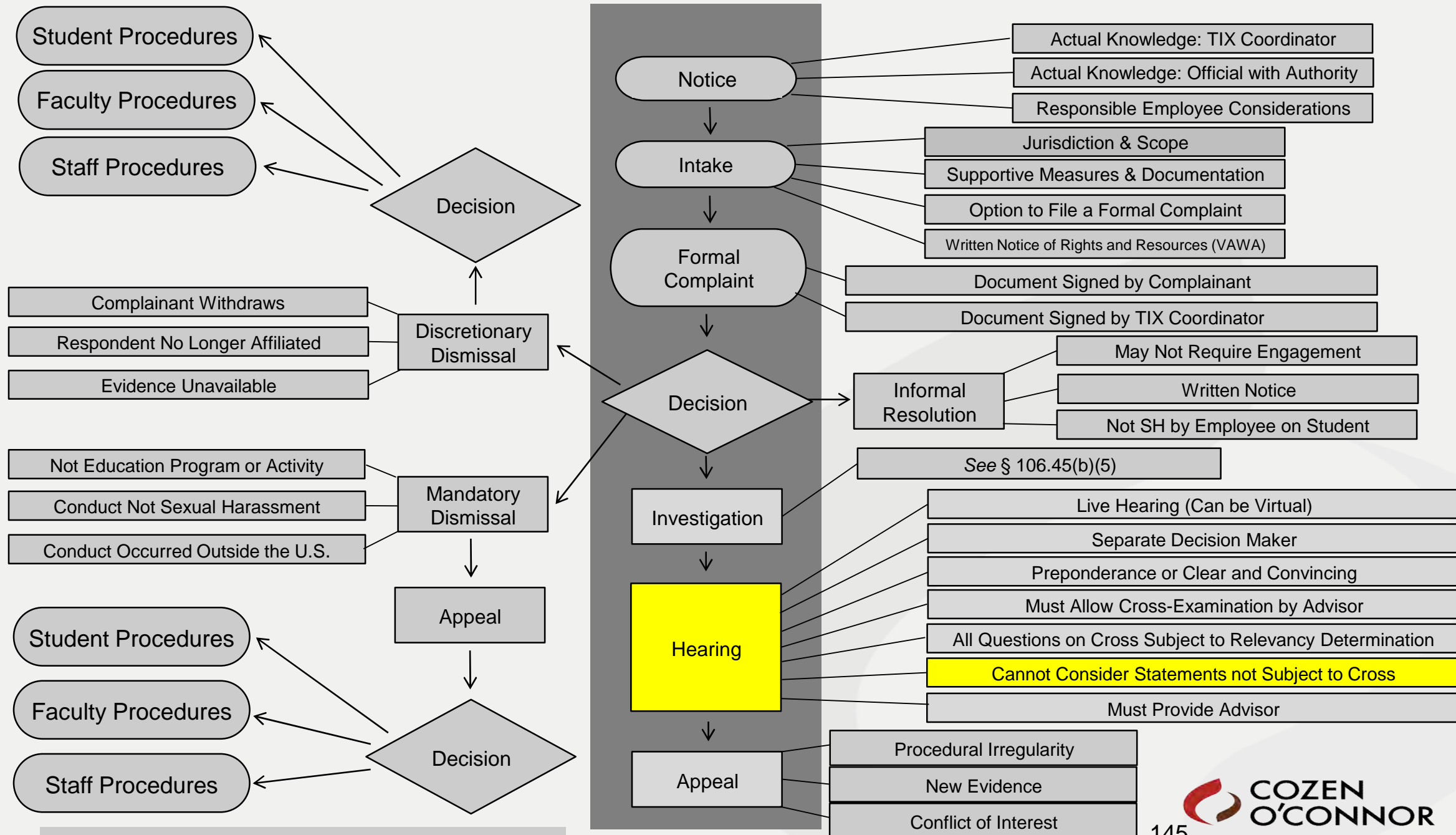
Statements Made During Informal Resolution



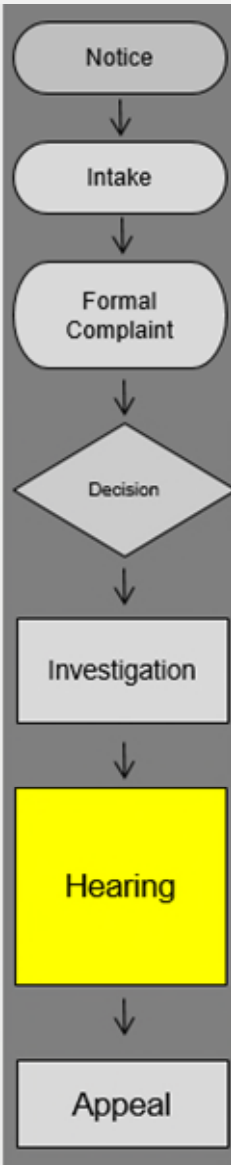
- **Relevance is the standard that these final regulations require, and any evidentiary rules that a recipient chooses must respect this standard of relevance.**
- For example, a recipient may not adopt a rule excluding relevant evidence because such relevant evidence may be unduly prejudicial, concern prior bad acts, or constitute character evidence.

Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30247-30248

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

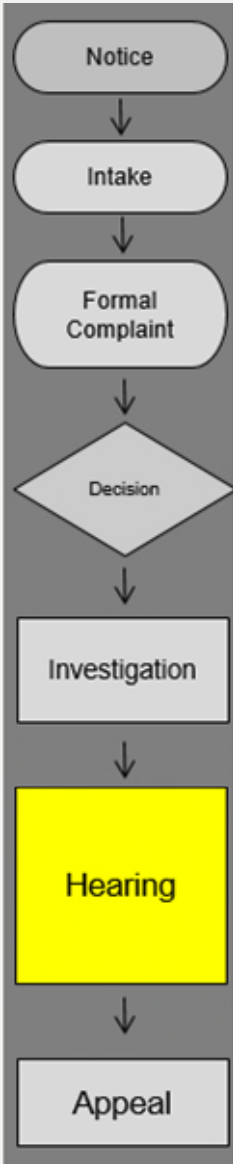
Exclusion of Statement

- 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

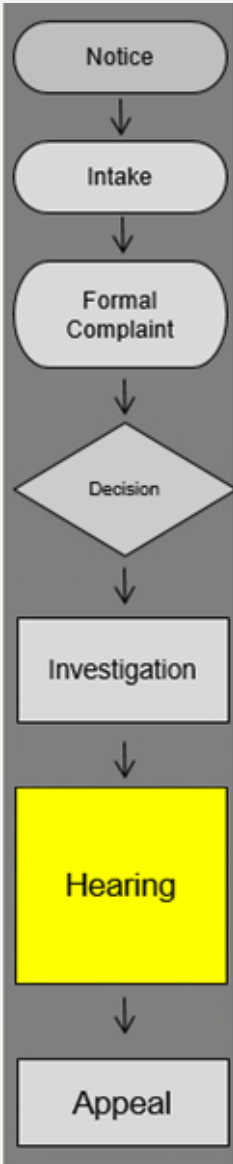
Exclusion of Statement



- 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

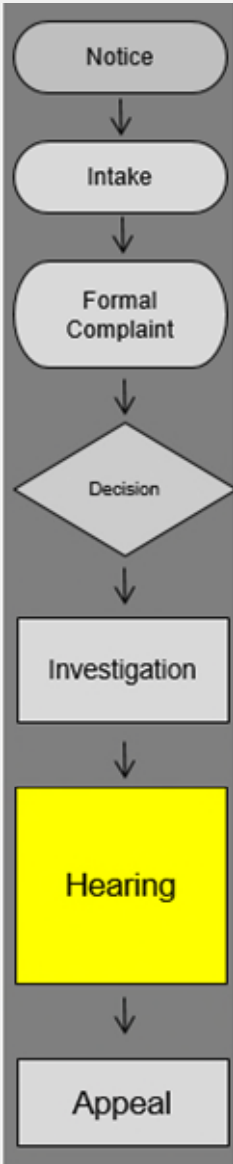
Exclusion of Statement



- 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

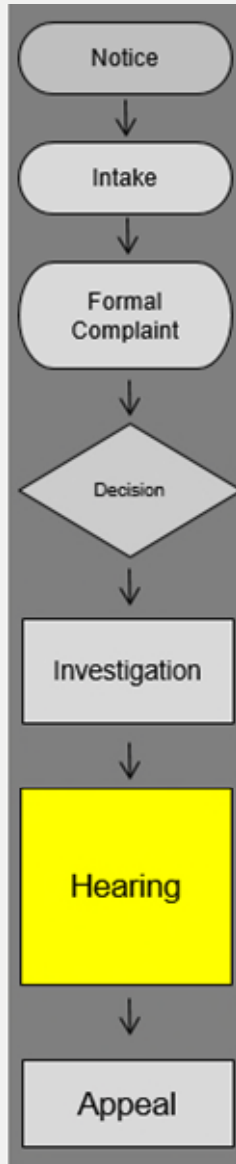
Exclusion of Statement



- 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

SANCTIONING

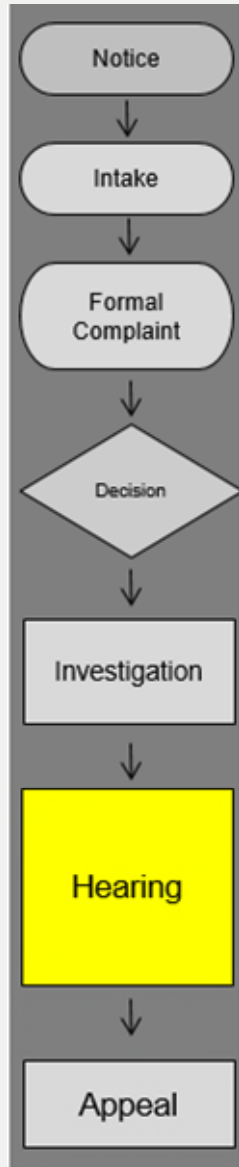
Sanctioning



- An equitable response for a respondent means 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.
- The grievance process must describe the range of possible disciplinary sanctions and remedies.

Title IX Regulations May 19, 2020 § 106.44 (a); § 106.45(b)(1)(vii) 85 F.R. 30575, 30395

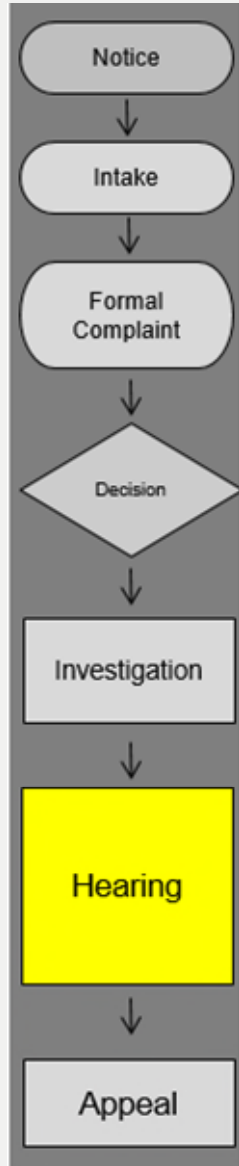
Discretion in Sanctioning



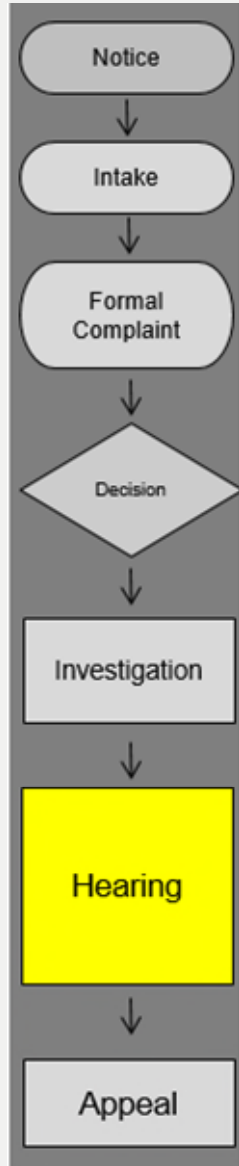
- The Department does not wish to dictate to recipients the sanctions that should be imposed when a respondent is found responsible for sexual harassment as each formal complaint of sexual harassment presents unique facts and circumstances.
- As previously stated, the Department believes that teachers and local school leaders with unique knowledge of the school climate and student body, are best positioned to make disciplinary decisions.

Educational Purpose

- Because the final regulations do not require particular disciplinary sanctions, the final regulations do not preclude a recipient from imposing student discipline as part of an “educational purpose” that may differ from the purpose for which a recipient imposes employee discipline.



Appeal of Sanction



- The Department notes that under the final regulations, whether the parties can appeal based solely on the severity of sanctions is left to the recipient's discretion, though if the recipient allows appeals on that basis, both parties must have equal opportunity to appeal on that basis.

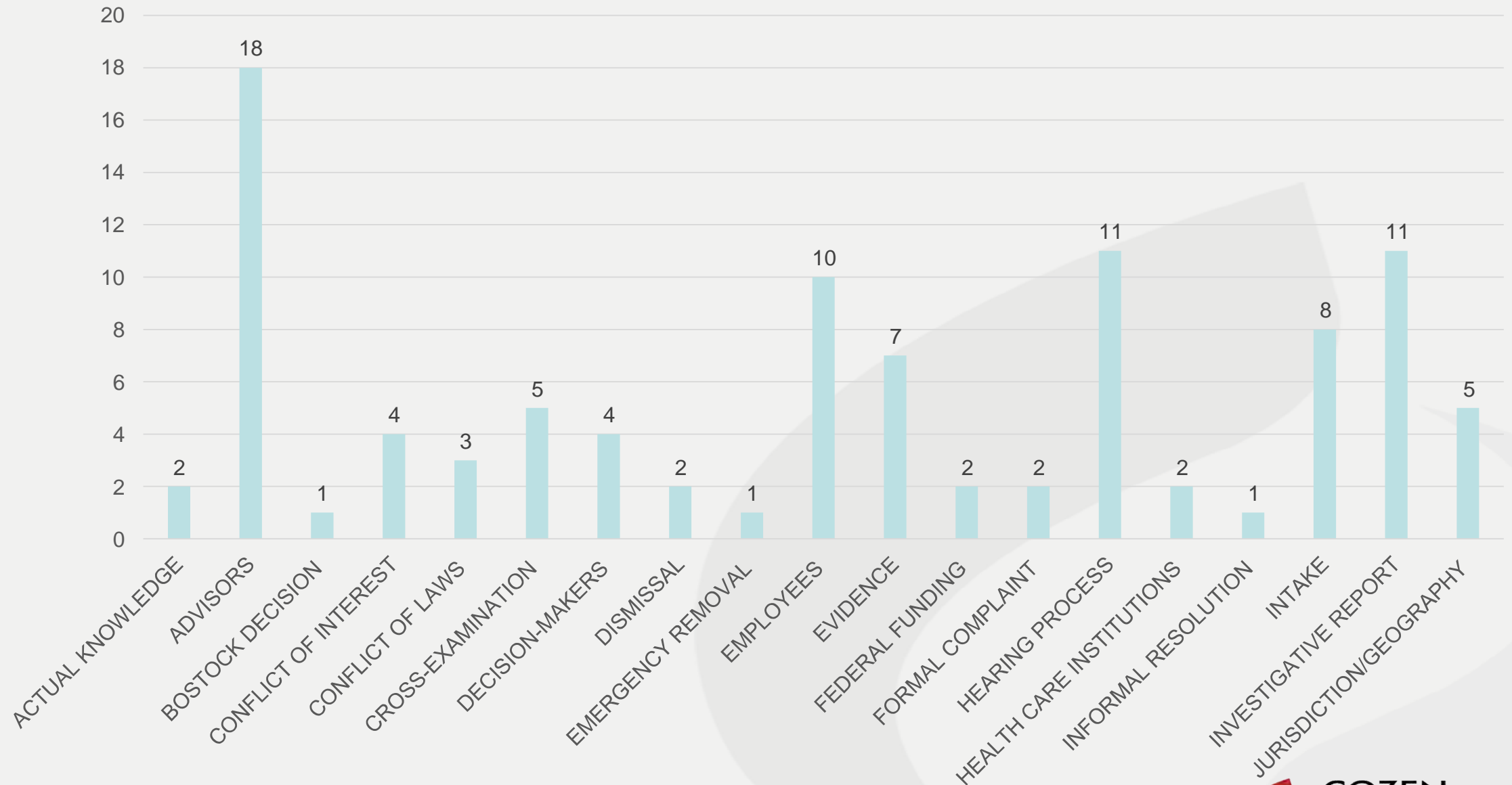
TRAINING

Training

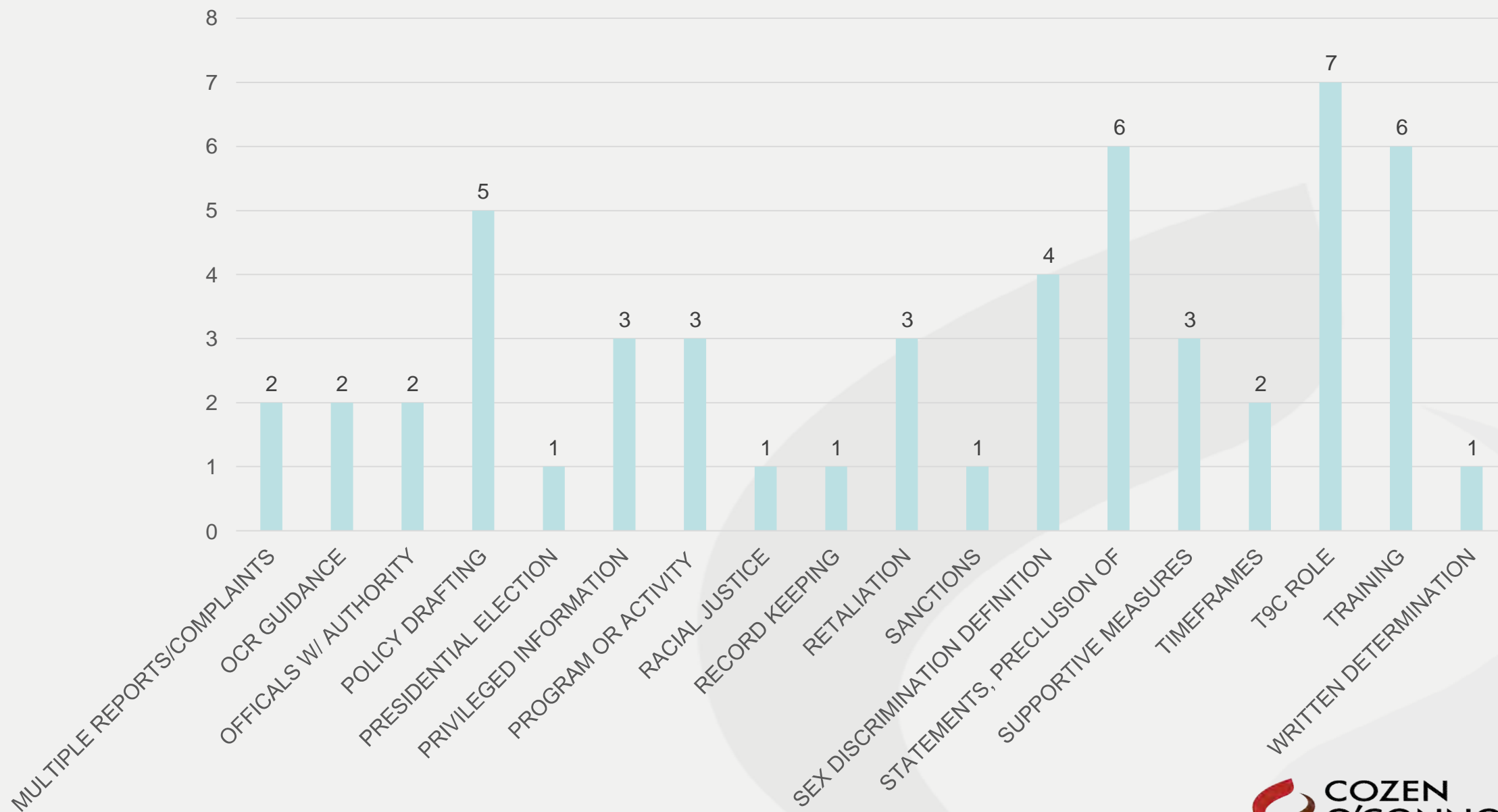
- A recipient must ensure that **Title IX Coordinators, investigators, decision-makers**, and any person who facilitates an informal resolution process, receive training on:
 - The definition of sexual harassment in § 106.30
 - The scope of the recipient's education program or activity
 - How to conduct 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.

WEBINAR QUESTIONS

CATEGORIES OF WEBINAR QUESTIONS



CATEGORIES OF WEBINAR QUESTIONS



Role of the Title IX Coordinator

- May the Title IX Coordinator be the investigator?
- May the Title IX Coordinator be the decision-maker?
- May the Title IX Coordinator facilitate an informal resolution?

Regulations

- The decision-maker(s), who cannot be the same person(s) as the Title IX Coordinator or the investigator(s), must issue a written determination regarding responsibility.

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

Preamble

- The Title IX Coordinator may serve as the investigator, but not the decision maker.
 - For example, although the investigator may not be the same person as the decision-maker under § 106.45(b)(7)(i), these final regulations **do not preclude the Title IX Coordinator from also serving as the recipient's investigator as long as the Title IX Coordinator does not have a conflict of interest or bias** for or against complainants or respondents generally or an individual complainant or respondent under § 106.45(b)(1)(iii).

Title IX Regulations May 19, 2020; §106.45(b)(2); Preamble 85 F.R. 30557

Preamble

- The Title IX Coordinator may facilitate an informal resolution.
 - These final regulations do not require a recipient to provide an informal resolution process pursuant to § 106.45(b)(9) and do not preclude the Title IX Coordinator from serving as the person designated by a recipient to facilitate an informal resolution process.

2015 DCL on Title IX Coordinators

- Title IX does not categorically exclude particular employees from serving as Title IX coordinators. However, when designating a Title IX coordinator, a recipient should be careful to avoid designating an employee whose other job responsibilities may create a conflict of interest. For example, designating a disciplinary board member, general counsel, dean of students, superintendent, principal, or athletics director as the Title IX coordinator may pose a conflict of interest.

Conflicts of Interest

- When might a conflict of interest exist?
- Will you address the problem of appointing Title IX Coordinators who might have a conflict of interest? For example, would it be appropriate to appoint a Superintendent, Assistant Superintendent, HR director, or Business Manager as Title IX Coordinator? What does it mean to have a conflict of interest?

Regulations

- Require that any individual designated by a recipient as a Title IX Coordinator, investigator, decision-maker, or any person designated by a recipient to facilitate an informal resolution process, **not have a conflict of interest or bias** for or against complainants or respondents generally or an individual complainant or respondent.

Title IX Regulations, May 19, 2020; § 106.45(b)(1)(iii)

Regulations

- A recipient must ensure that Title IX Coordinators, investigators, decision-makers, and any person who facilitates 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, and **how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias.**

Title IX Regulations, May 19, 2020; § 106.45(b)(1)(iii)

Preamble

- The Department declines to state whether particular professional experiences or affiliations do or do not constitute *per se* violations of § 106.45(b)(1)(iii).
- The Department declines to narrow or widen this provision by specifying whether conflicts of interest or bias must be “actual” or “perceived,” and declines to adopt an “appearance of bias” standard.

Other Guidance

- Excerpts from Candace Jackson's May 8, 2020 NACUA interview.
- On the absence of per se conflicts:
 - “This should be a fact specific analysis so that we leave recipients as much flexibility as possible to utilize personnel without automatically having people excluded on grounds of bias or conflicts of interest. You do need to be looking for specific concrete reasons why it would be reasonable to conclude that someone was exhibit bias or serving under a conflict of interest.”

Other Guidance

- Excerpts from Candace Jackson's May 8, 2020 NACUA interview.
- On past professional experience:
 - “Let's say that you want to have somebody as a Title IX coordinator or the decision maker who, you know, their past professional life was a victim advocate or on the flip side was a defense attorney, that prior professional experience should not automatically make anybody conclude that somebody is biased or can't serve impartially.”

Scope of the Investigator's Role

- What information should the investigation report contain?
- Can it include a credibility assessment and/or recommended findings?
- Would the investigative report include an analysis of evidence, credibility and findings?

Regulations

- Create an investigative report that fairly summarizes relevant evidence and, at least 10 days prior to a hearing (if a hearing is required under this section or otherwise provided) or other time of determination regarding responsibility, send to each party and the party's advisor, if any, the investigative report in an electronic format or a hard copy, for their review and written response.

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

Preamble

- The Department does not wish to prohibit the investigator from including recommended findings or conclusions in the investigative report.
- However, the decision-maker is under an independent obligation to objectively evaluate relevant evidence, and thus cannot simply defer to recommendations made by the investigator in the investigative report.

Preamble

- If a recipient chooses to include a credibility analysis in its investigative report, the recipient must be cautious not to violate § 106.45(b)(7)(i), prohibiting the decision-maker from being the same person as the Title IX Coordinator or the investigator.
- Section 106.45(b)(7)(i) prevents an investigator from actually making a determination regarding responsibility. If an investigator's determination regarding credibility is actually a determination regarding responsibility, then § 106.45(b)(7)(i) would prohibit it.

Retaliation and Required Participation

- Retaliation in the new regulations includes action because a person refused to participate in investigation, proceeding or hearing.
- Doesn't that mean that you can't require anyone, employee or student, to participate?

Regulations

- No recipient or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by title IX or this part, or because the individual has made a report or complaint, testified, assisted, or **participated or refused to participate** in any manner in an investigation, proceeding, or hearing under this part.

Title IX Regulations May 19, 2020 §106.70.

Preamble

- The final regulations have removed proposed § 106.44(b)(2) [from the NPRM] and revised the § 106.30 definition of “complainant” such that in combination, those revisions ensure that the final regulations do not require a Title IX Coordinator to initiate a grievance process over the wishes of a complainant, and **never require a complainant to become a party or to participate in a grievance process.**

Title IX Regulations May 19, 2020; Preamble 85 F.R. 30243.

Preamble

- We have added § 106.71 prohibiting retaliation and **expressly protecting any person's right *not to participate*** in a Title IX proceeding.
- § 106.71 protects all parties (and witnesses, and other individuals) from retaliation for exercising rights under Title IX.

Preamble

- Nothing in these final regulations purports to authorize recipients to compel witness participation in a grievance process, and § 106.71(a) protects every individual from retaliation for participating or refusing to participate in a Title IX proceeding.

Preamble

- The final regulations add § 106.71 prohibiting retaliation and including under prohibited actions those taken to dissuade a complainant from reporting or filing and those taken to punish a complainant (or anyone else) from refusing to participate in a Title IX proceeding.

Restrictions on the Parties

- The regulations prohibit a school from restricting the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence.
- Can a school impose any restrictions on the ability of the parties to discuss the allegations?

Regulations

- § 106.45(b)(5): When investigating a formal complaint and throughout the grievance process, a recipient must
 - (iii) Not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence

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

Preamble

- As discussed in this preamble at § 106.45(b)(5)(iii), the parties have a right to discuss the allegations under investigation, but this right does not preclude a recipient from warning the parties not to discuss or disseminate the allegations in a manner that constitutes retaliation or unlawful tortious conduct.

Preamble

- § 106.45(b)(5)(iii) is not unlimited in scope; by its terms, this provision stops a recipient from restricting parties' ability to discuss "the allegations under investigation."
- This provision does not, therefore, apply to discussion of information that does not consist of "the allegations under investigation" (for example, evidence related to the allegations that has been collected and exchanged between the parties and their advisors during the investigation under § 106.45(b)(5)(vi), or the investigative report summarizing relevant evidence sent to the parties and their advisors under § 106.45(b)(5)(vii).

Directly Related vs. Relevant

- What type of evidence might be “directly related to the allegations” but not relevant?
- Unless otherwise specifically prohibited by the regulations, is it a better practice to err on the side of determining that evidence is relevant and then let the decision-makers address the full evaluation of evidence in the written determination?
- Can you please give an example - any example! - of information that would be directly related, but not relevant?

Regulations

- 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, including the evidence upon which the recipient does not intend to rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence whether obtained from a party or other source, so that each party can meaningfully respond to the evidence prior to conclusion of the investigation.

Regulations

- Create an investigative report that fairly summarizes **relevant** evidence and, at least 10 days prior to a hearing (if a hearing is required under this section or otherwise provided) or other time of determination regarding responsibility, send to each party and the party's advisor, if any, the investigative report in an electronic format or a hard copy, for their review and written response.

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

Preamble

- A party who believes the investigator reached the wrong conclusion about the relevance of the evidence may argue again to the decision-maker (i.e., as part of the party's response to the investigative report, and/or at a live hearing) about whether the evidence is actually relevant.
- 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.

Title IX Regulations, May 19, 2020; Preamble 85 F.R 30304 and 30309.

Preamble

- A recipient has some discretion to determine whether evidence obtained as part of an investigation is directly related to allegations raised in a formal complaint...

Title IX Regulations, May 19, 2020; Preamble 85 F.R 30423.

Preamble

- The parties then have equal opportunity to review the investigative report; if a party disagrees with an investigator's determination about relevance, the party can make that argument in the party's written response to the investigative report under §106.45(b)(5)(vii) and to the decision-maker at any hearing held; either way 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).

Submit to Cross-Examination

- What does it mean to “submit to cross-examination?”
- For example, if upon cross-examination, a party refuses to answer one question, are all questions and supporting evidence out, or may the decision-maker still consider the information provided that was subjected to cross-examination?

Regulations

- 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)(i).

Preamble

- “[S]ubmit to cross-examination” means answering those cross-examination questions that are relevant; the decision-maker is required to make relevance determinations regarding cross-examination in real time during the hearing in part to ensure that parties and witnesses do not feel compelled to answer irrelevant questions for fear of their statements being excluded.

Advisors and Decorum

- Can you exclude a party's advisor of choice because they violated the recipient's standards of decorum?

Preamble

- If a party's advisor of choice refuses to comply with a recipient's rules of decorum ... the recipient may require the party to use a different advisor.
- 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.

Preamble

- [A]ny ... rules adopted by a recipient must ensure that all relevant questions and evidence are admitted and considered. ...Thus, for example, where the substance of a question is relevant, but **the manner in which an advisor attempts to ask the question is harassing, intimidating, or abusive** (for example, the advisor yells, screams, or physically “leans in” to the witness’s personal space), the recipient **may appropriately, evenhandedly enforce rules of decorum** that require relevant questions to be asked in a **respectful, non-abusive** manner.

Use of Slides

- This PowerPoint presentation is not intended to be used as a stand-alone teaching tool.
- 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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The New Title IX Regulations: Live Hearings – Part 1 of 2

Presented By:

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July 20, 2020

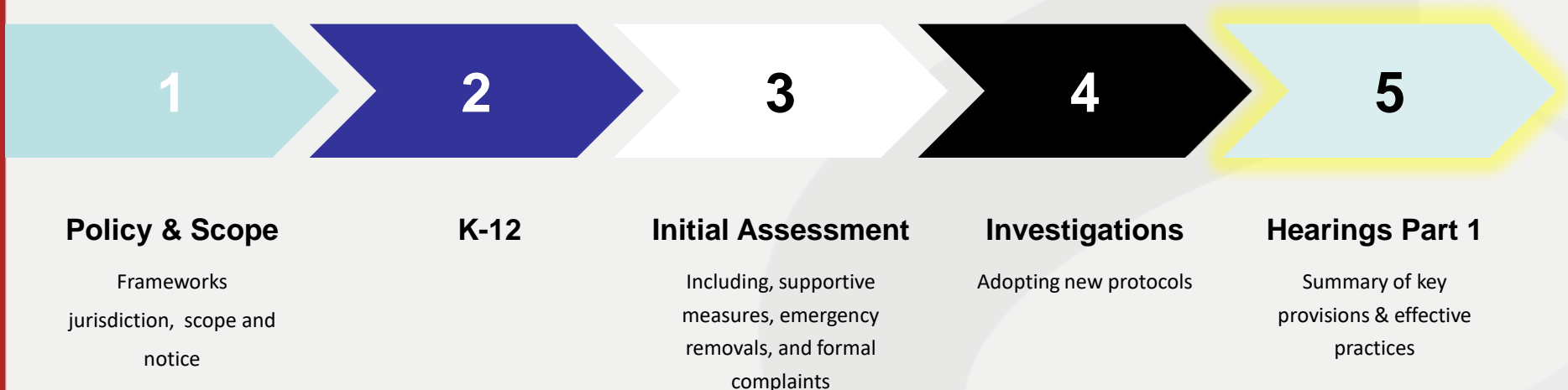


Today's Webinar

- Following an introductory webinar, A First Look at the New Title IX Regulations, this is the fifth in a series of webinars focusing on implementation.
- This webinar will:
 - Provide an **overview** of live hearings and decision-making
 - Outline the **legally-required elements** for live hearings, and
 - Set the context for further discussion on **effective practices** in conducting live hearings and decision-making

Introducing the Webinar Series

Subsequent IRG webinars will focus on specific aspects of the regulations, as written and as applied, including:



Introducing the Webinar Series

Subsequent IRG webinars will focus on specific aspects of the regulations, as written and as applied, including:

6

Hearings Part 2

Summary of key provisions & effective practices

7

Informal Resolutions

Effective Practices

8

Corollary Considerations

Employees cases, academic medical centers, and intersections with other state and federal law

9

Trainings & Documentation

Who and when?
Approach
Content

10

Clery and VAWA

Intersections between Clery/VAWA and Title IX

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Cozen O'Connor



Maureen P. Holland
Cozen O'Connor



Devon Turner Riley
Cozen O'Connor



Michael Stackow
Cozen O'Connor



Helen Park
Cozen O'Connor



Adam M. Shapiro
Cozen O'Connor



Peter C. Lim
Cozen O'Connor



Joseph A. Tate, Jr.
Cozen O'Connor

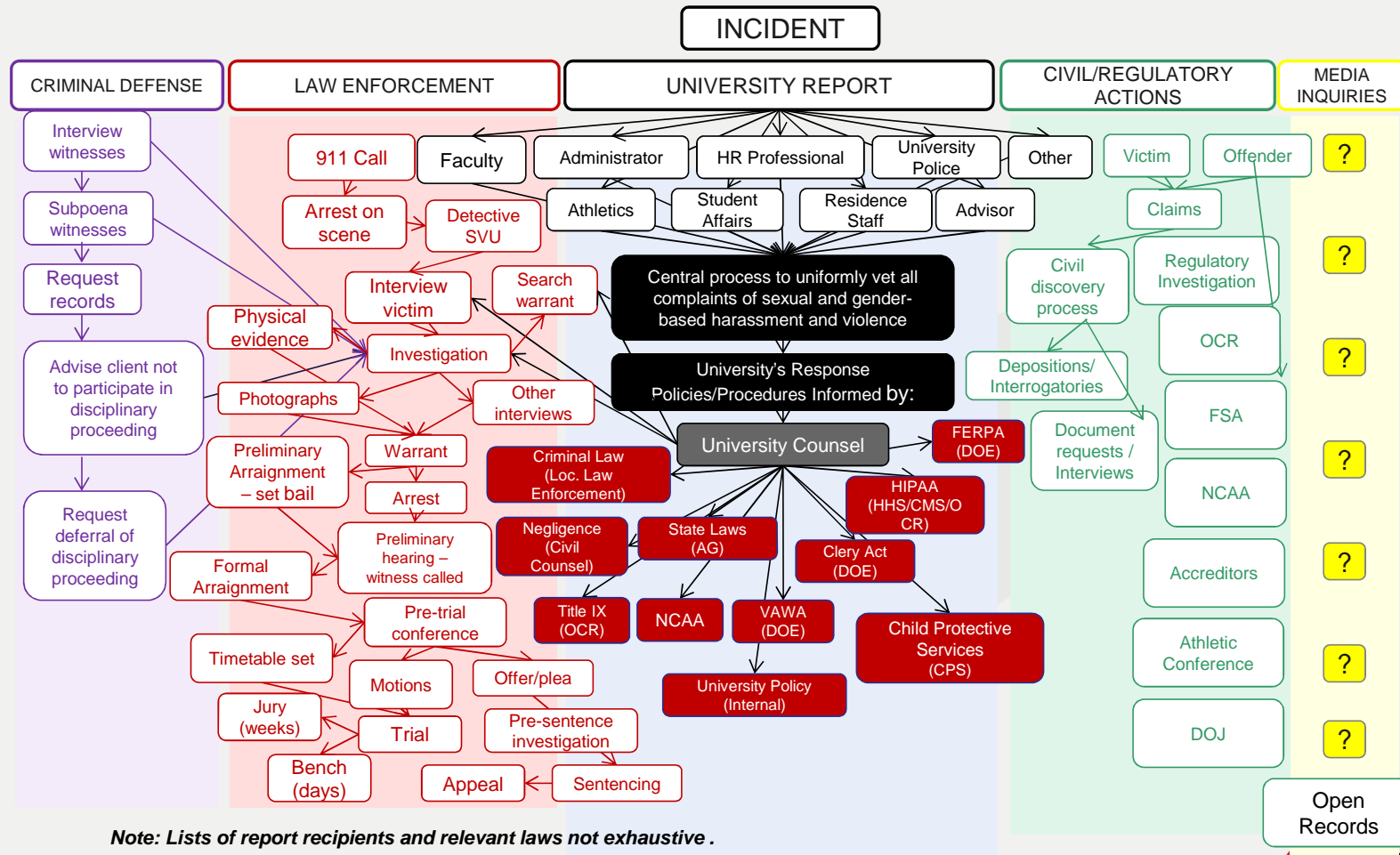


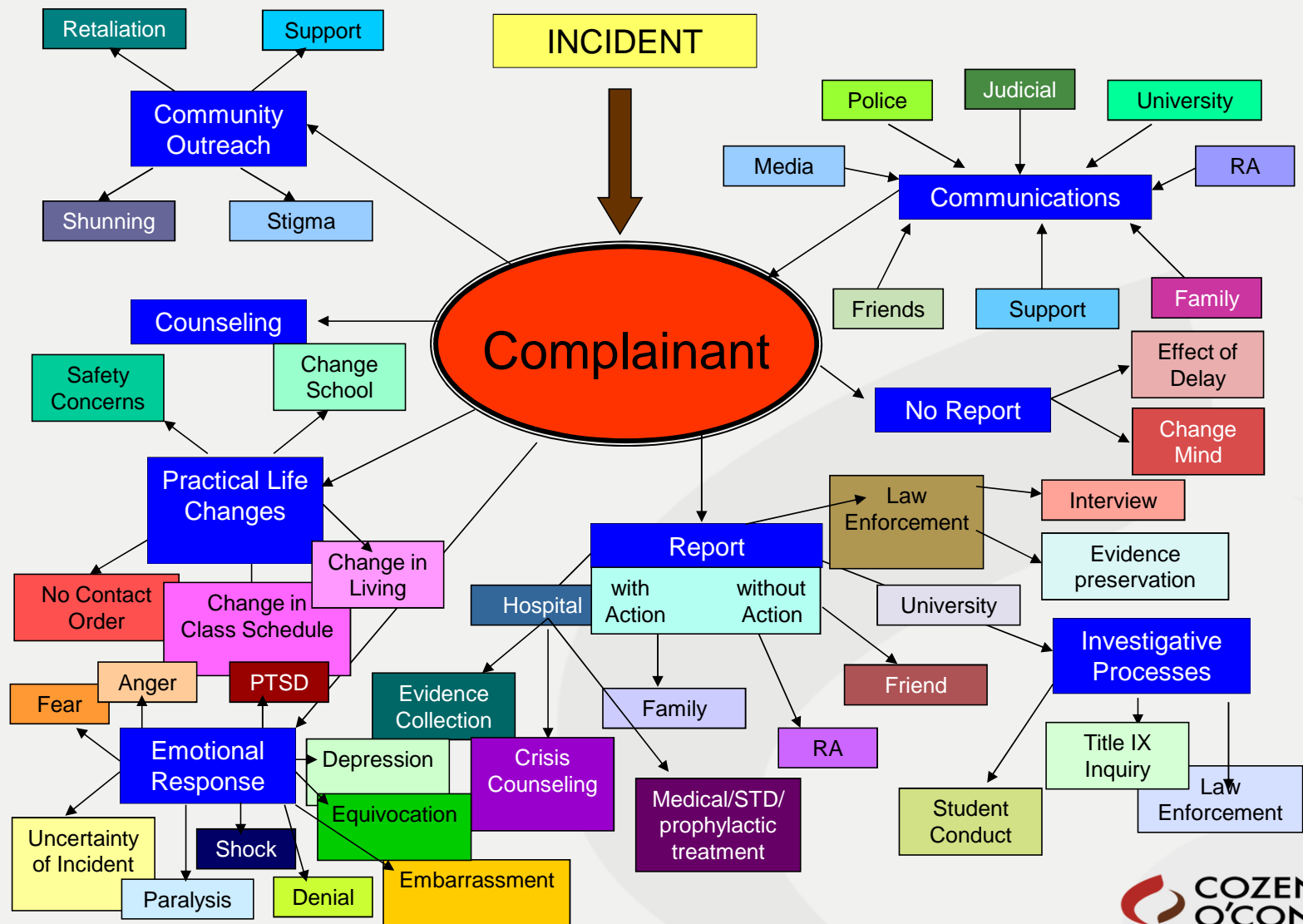
Christi Hurt
Margolis Healy

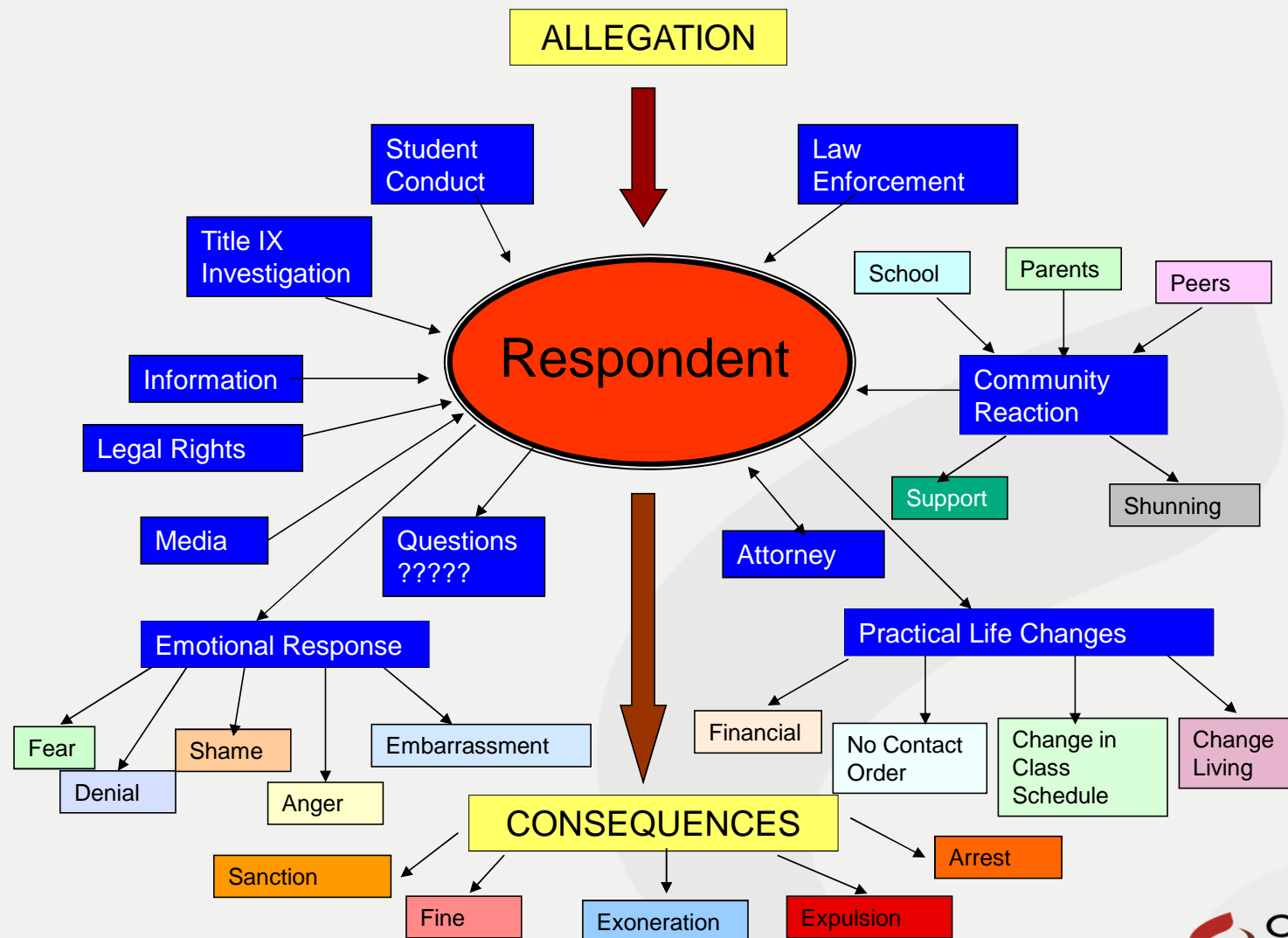
Institutional Response Group Paralegal and Administration Team:
Heather Dunn, Megan Lincoln, Braelyn Schenk, and Mary Sotos

FRAMING THE CONTEXT

The Challenge of the Context





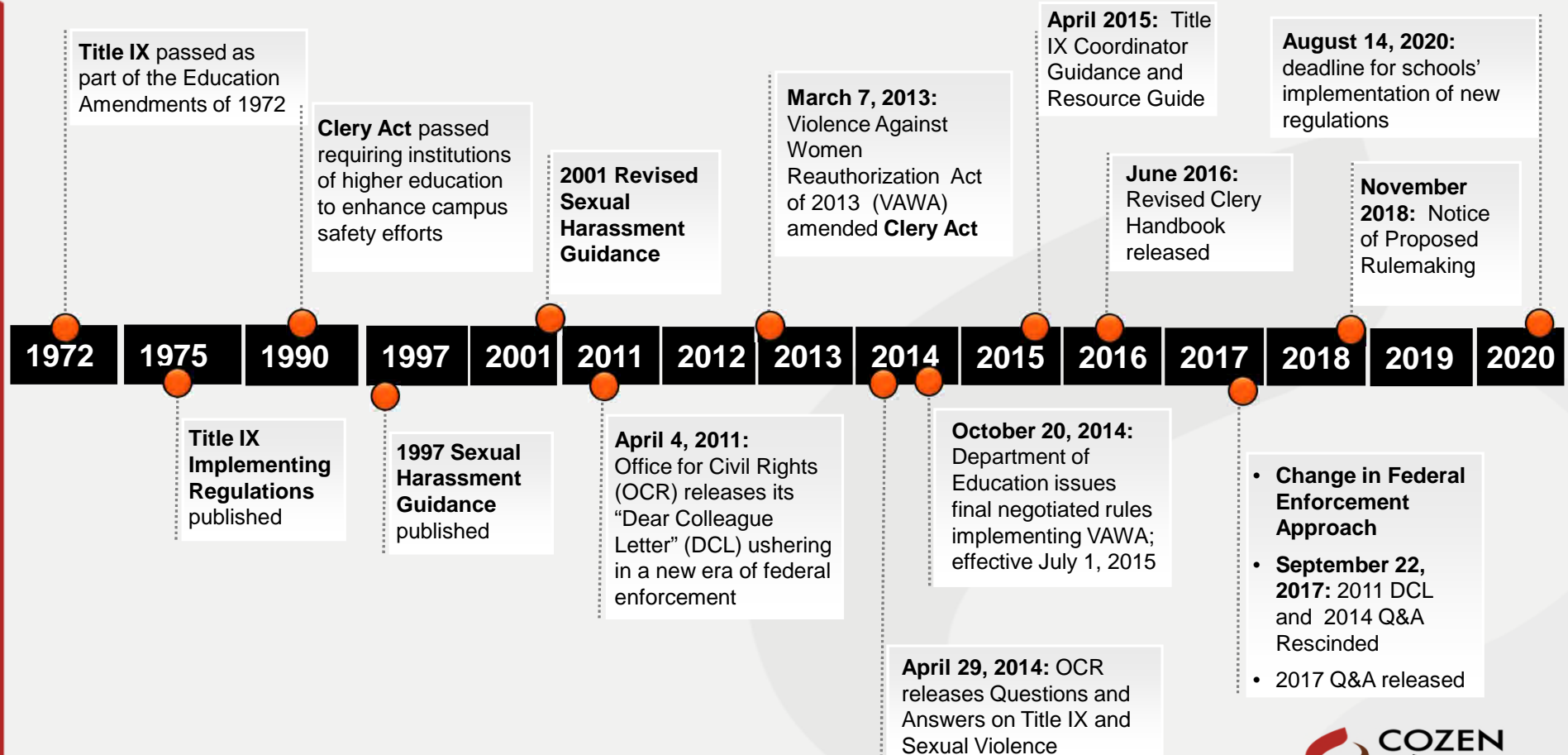


Implementation Rubric

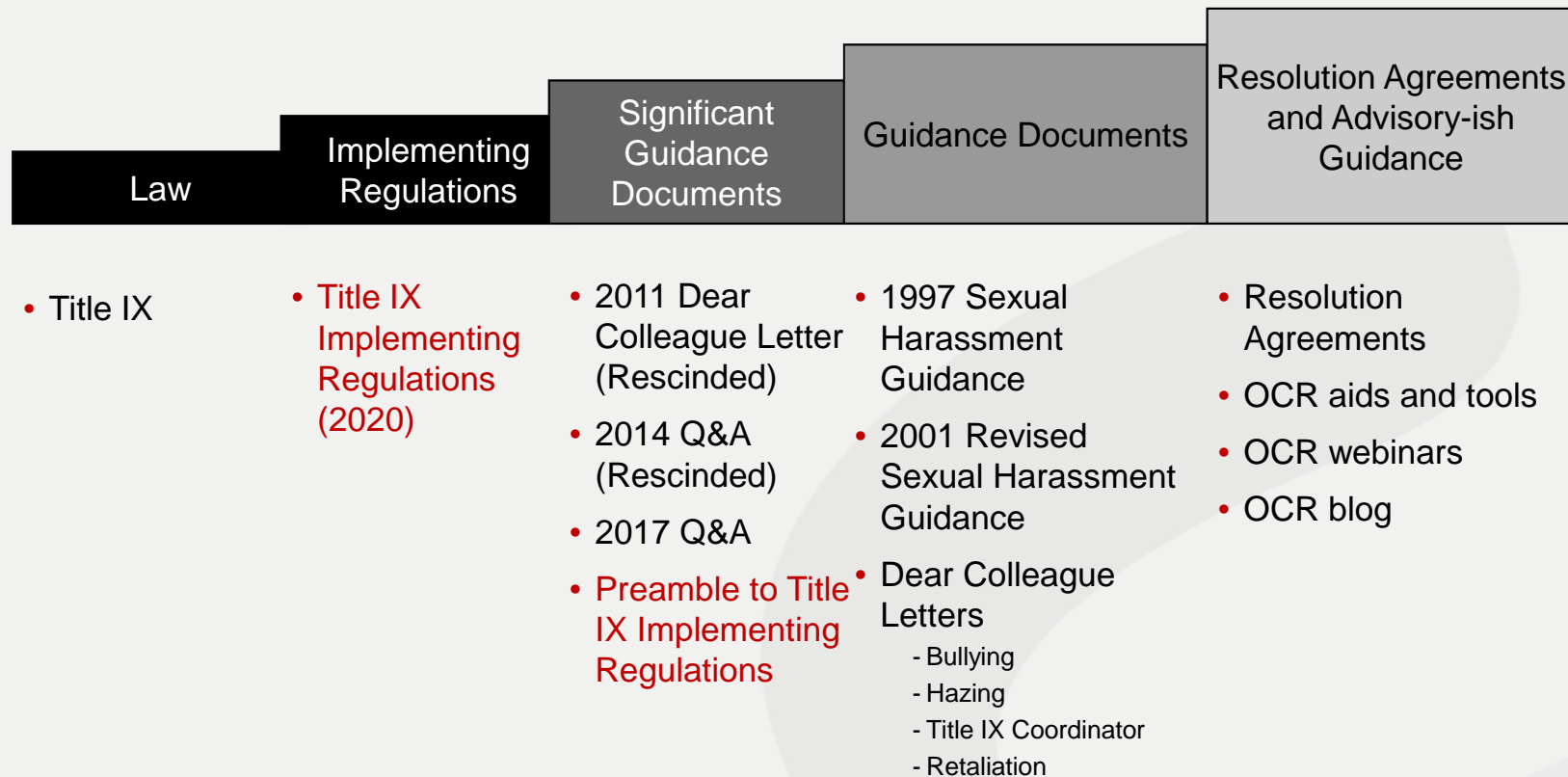
- Law
- Regulations
- Guidance
- Preamble and commentary
- OCR webinars, charts, blog
- Policy
- Higher education experience
- Institutional values



Evolution of Federal Legislation and Guidance



The Hierarchy



Guidance

- Preamble
 - Explains the basis and purpose for the final rule
 - Serves a guidance function
- Preamble on Prior Guidance
 - “The 2017 Q&A along with the 2001 Guidance, and not the withdrawn 2011 Dear Colleague Letter, remain the baseline against which these final regulations make further changes to enforcement of Title IX obligations.”
 - “Title IX policies and procedures that recipients have in place due to following the 2001 Guidance and the withdrawn 2011 Dear Colleague Letter remain viable policies and procedures for recipients to adopt while complying with these final regulations.”

Title IX Regulations issued May 6, 2020; Preamble at 17, 18

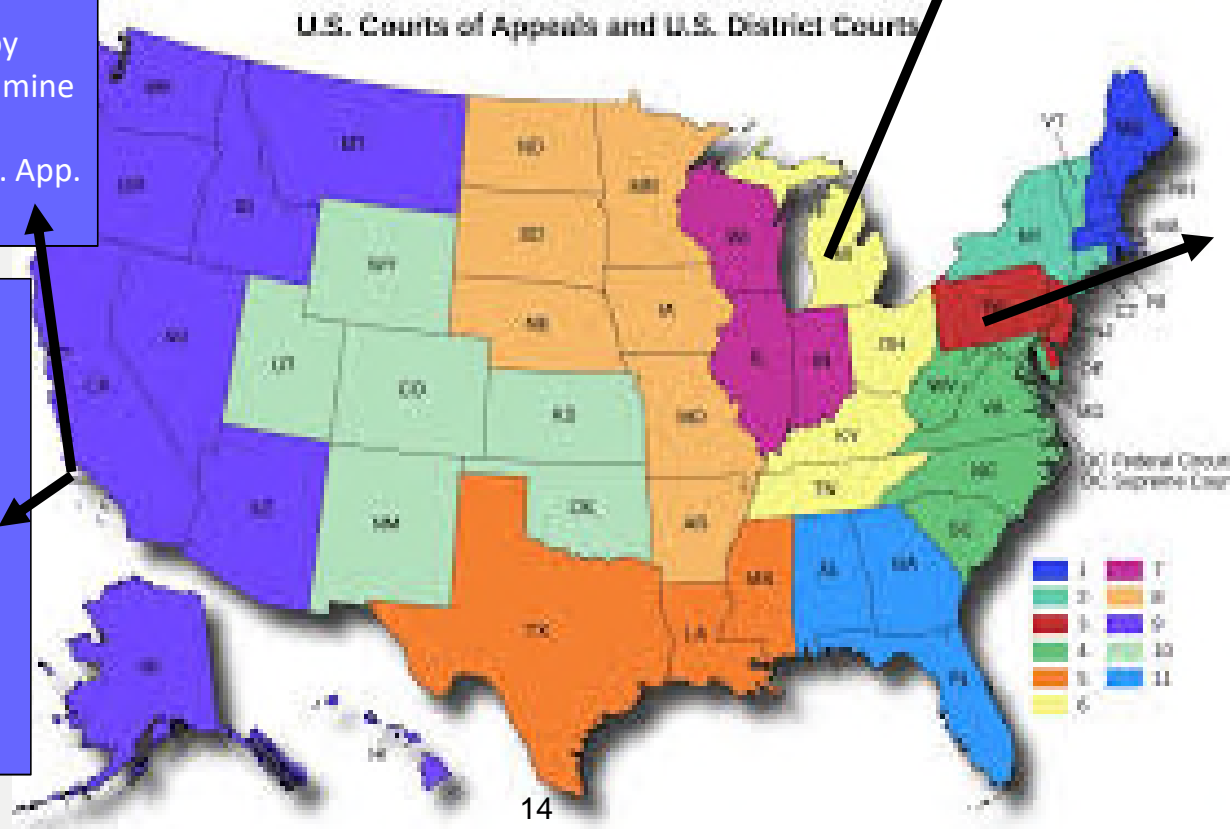
Recent Court Cases

When a student accused of sexual misconduct faces severe disciplinary sanctions, and the credibility of witnesses (whether the accusing student, other witnesses, or both) is central to the adjudication of the allegation, fundamental fairness requires, at a minimum, that the university provide a mechanism by which the accused may cross-examine those witnesses.” *Doe v. Allee*, 242 Cal. Rptr. 3d 109, 136 (Cal. Ct. App. 2019)

In a DV case, the state court ruled, “...procedures were unfair because they denied Respondent a meaningful opportunity to cross-examine critical witnesses at an in-person hearing.” *Boermeester v Carry*, No. B290675, 2020 WL 2764406 at *1 (Cal. Ct. App. May 28, 2020)

“If credibility is in dispute and material to the outcome, due process requires cross-examination.” *Doe v. Baum* 903 F.3d 575, 585 (6th Cir. 2018)

“[N]otions of fairness in Pennsylvania law include providing the accused with a chance to test witness credibility through some form of cross-examination and a live, adversarial hearing during which he or she can put on a defense and challenge evidence against him or her.” *Doe v. Univ. of the Sciences*, No. 19-2966, 2020 WL 2786840 at*5 (3d Cir. May 29, 2020)



The Courts on Due Process and Fundamental Fairness

Doe v. Brandeis University: 177 F.Supp.3d 561 (D. Mass. March 31, 2016).

Doe v. Regents of the University of California: 5 Cal. App. 5th 1055 (Cal. App. Ct. Nov. 22, 2016), review denied (Feb. 15, 2017).

Doe v. Claremont McKenna College: 25 Cal. App. 5th 1055, (Cal. Ct. App. 2018).

Doe v. Allee (USC): 30 Cal. App. 5th 1036, (Cal. Ct. App. 2019).

Doe v. Purdue University: 2:17-cv-00033 (U.S. District Court of Appeals for the Seventh Circuit, June 28, 2019)

2016

Doe. Rectors and Visitors of GMU: 149 F. Supp. 3d 602 (E.D. Va. February 25, 2016) Memorandum Opinion.

Doe v. University of Southern California: 146 Cal. App. 4th 221 (Cal. App. Ct. April 5, 2016).

Doe v. Trustees of Boston College: 2016 WL 5799297 (D. Mass. October 4, 2016)

2017

2018

Doe v. Baum: 903 F.3d 575 (6th Cir. 2018).

2019

Doe v. Rhodes College: 2:19-cv-02336 (Western Dist. Tennessee, June 14, 2019).

2020

Boermeester v. Carry: No. B290675, 2020 WL 2764406 at *1 (Cal. Ct. App. May 28, 2020).

Doe v. Univ. of the Sciences: No. 19-2966, 2020 WL 2786840 (3d Cir. May 29, 2020).

The Courts on Due Process and Fundamental Fairness

Doe v. Brandeis University: Basic fairness requires the university to provide an accused student with: (1) notice of charges, (2) the right to counsel, (3) the opportunity to confront the accuser, (4) cross-examination of evidence or witness statements, and an effective appeal.

Doe v. Regents of the University of California

Doe v. Claremont McKenna College: When the respondent faces a severe penalty and the case turns on credibility, the process must provide for a hearing where the respondent may question, if even indirectly, the complainant.

2016

Doe. Rectors and Visitors of GMU: A university provide an accused student with notice of the full scope of charges.

Doe v. University of Southern California: A university must provide an accused student with supplemental notice if the charges against the respondent change or expand.

2017

Doe v. Trustees of Boston College

2018

Doe v. Baum: When credibility is at issue, the Due Process Clause mandates that a university provide accused students a hearing with the opportunity to conduct cross-examination.

The Courts on Due Process and Fundamental Fairness

2019

Doe v. Allee (USC): Fundamental fairness requires, at a minimum, that the university provide a mechanism by which the accused may cross-examine those witnesses, directly or indirectly, at a hearing before a neutral adjudicator with the power to find facts and make credibility assessments independently.

Doe v. Rhodes College: An accused student must be afforded the opportunity to question the complainant and review all relevant evidence prior to the hearing.

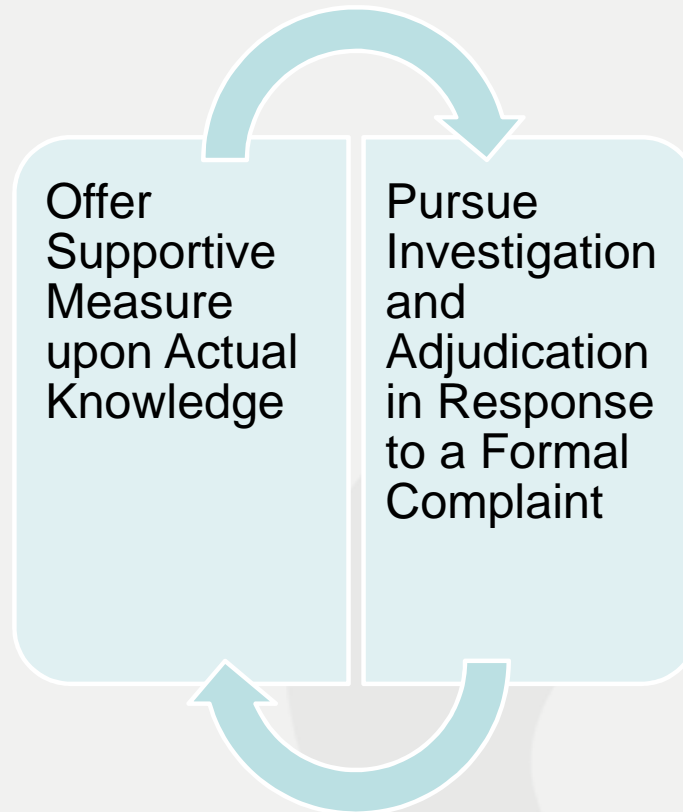
Doe v. Purdue University: Investigation report must be provided to the parties prior to the hearing and must include summaries of both inculpatory and exculpatory evidence.

2020

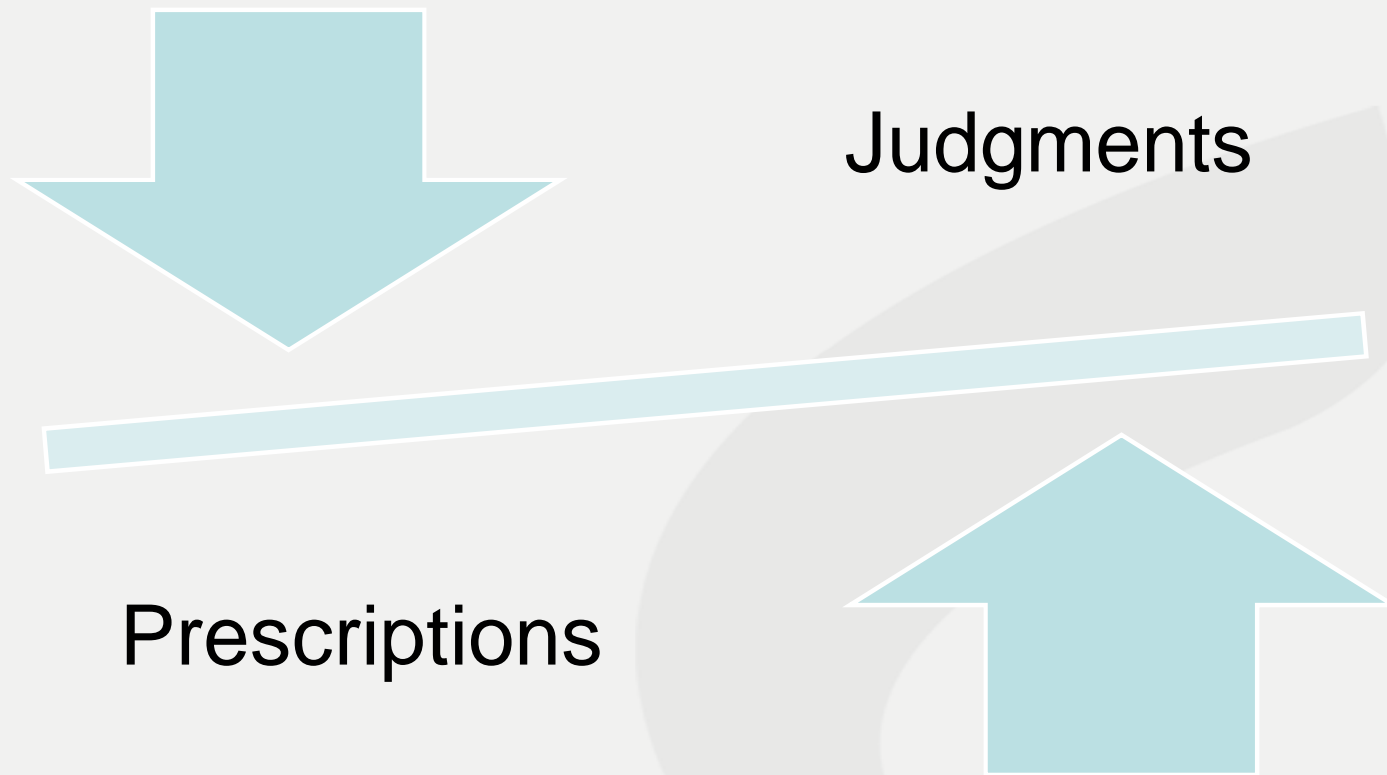
Boermeester v. Carry: In a DV case, the state court ruled, "...procedures were unfair because they denied Respondent a meaningful opportunity to cross-examine critical witnesses at an in-person hearing."

Doe v. Univ. of the Sciences: Notions of fairness include providing the accused with some form of cross-examination and a live, adversarial hearing during which he or she can put on a defense and challenge the evidence.

Understanding Two Key Provisions



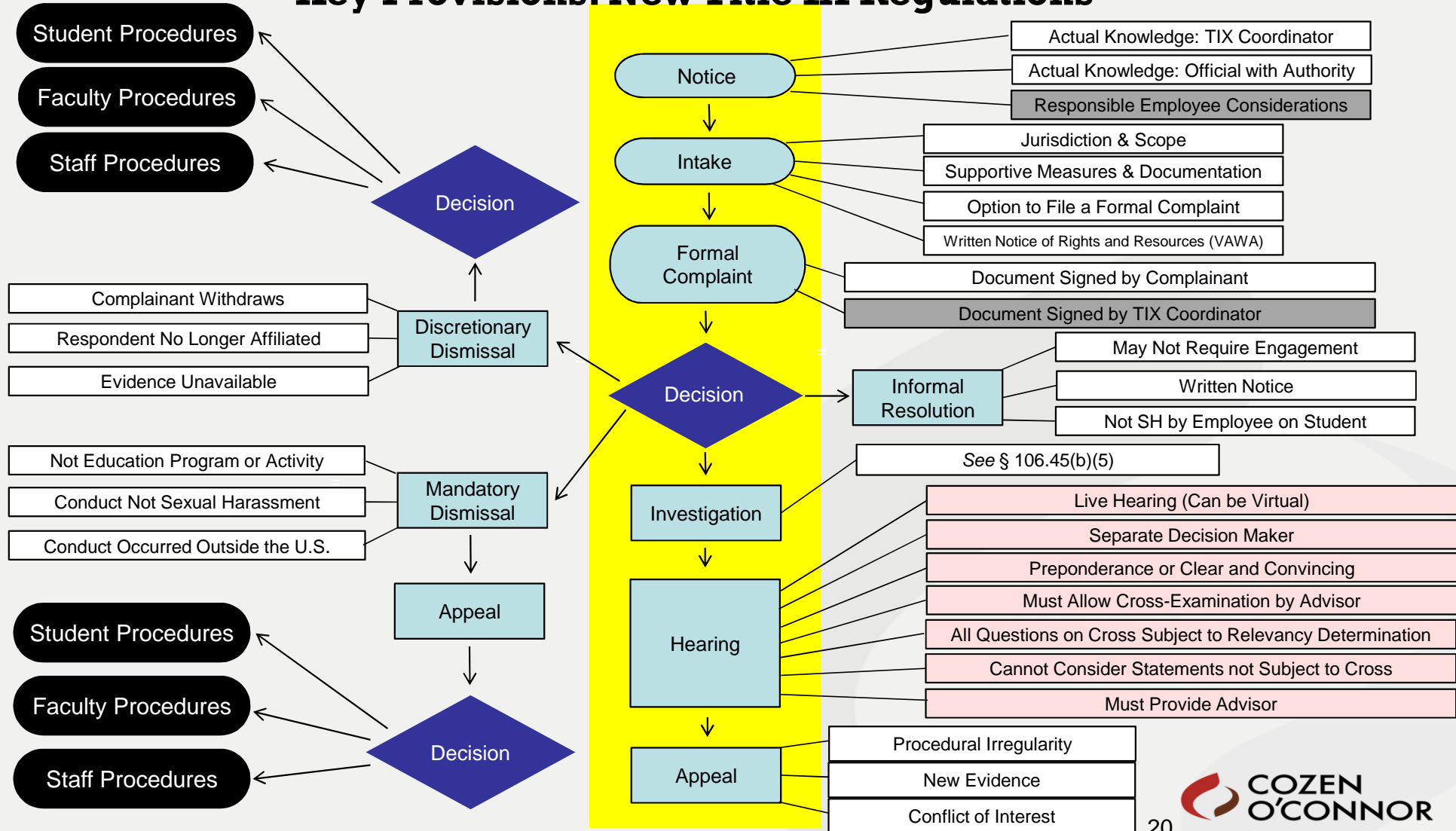
Balancing



Prescriptions

Judgments

Key Provisions: New Title IX Regulations



Regulations: “Legally Binding Obligations”

- “Because these final regulations represent the Department’s interpretation of a recipient’s legally binding obligations, **rather than best practices**, recommendations, or guidance, these final regulations focus on **precise legal compliance requirements** governing recipients.”

Title IX Regulations issued May 19, 2020; Preamble, 85 F.R. 30030

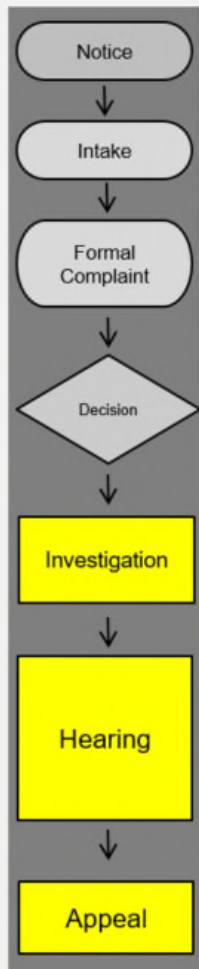
Regulations: “Best Practices”

- “These final regulations leave recipients the **flexibility to choose to follow best practices and recommendations** contained in the Department’s guidance, or similarly, best practices and recommendations made by non-Department sources, such as Title IX consultancy firms, legal and social sciences scholars, victim advocacy organizations, civil libertarians and due process advocates and other experts.”

Title IX Regulations issued May 19, 2020; Preamble, 85 F.R. 30030

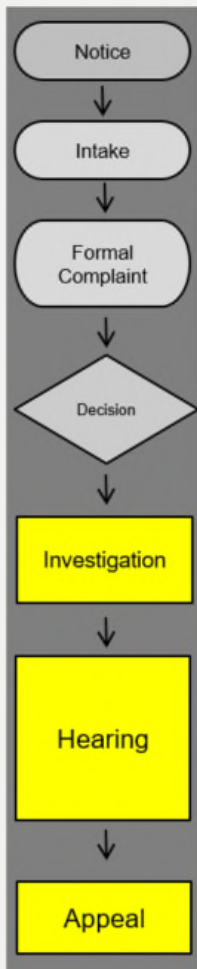
BASIC REQUIREMENTS OF GRIEVANCE PROCESSES

Grievance Process: The Basics



- Treat parties equitably
- Presumption of non-responsibility
- Reasonably prompt time frames with extensions for good cause
- Practitioners trained and free from conflict of interest and bias
- Uniform standard of evidence
- Restricted use of privileged information
- Objective evaluation of all relevant evidence
- Credibility determinations not based on person's status
- Range of supportive measures, remedies and sanctions
- Remedies only following a finding of responsibility
- Sanctions only following § 106.45 grievance process
- Designated appeal grounds

Basic Requirements

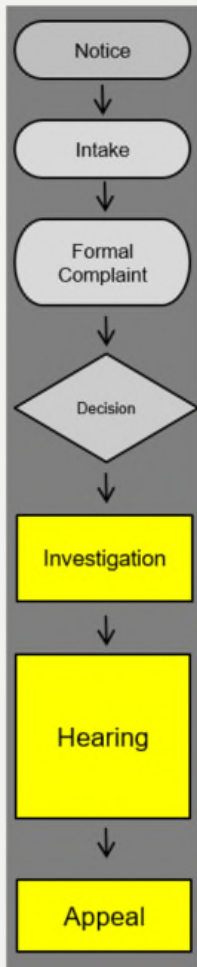


- **Treat complainants and respondents equitably** by providing **remedies** to a complainant where a determination of responsibility for sexual harassment has been made against the respondent, and by following a **grievance process** that complies with this section before the imposition of any disciplinary 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

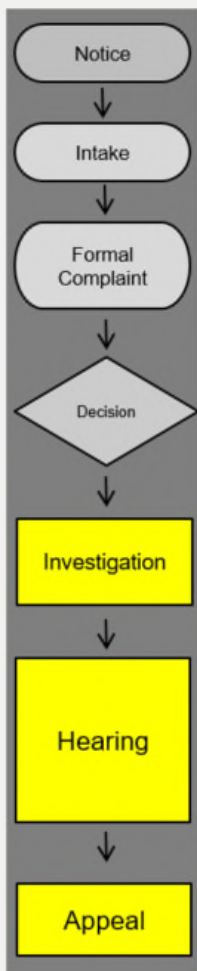
Relevant Regulations Sections:

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
- Include reasonably prompt time frames for conclusion of the grievance process with permissible delay for good cause
- Describe the range (or list) of possible disciplinary sanctions and remedies

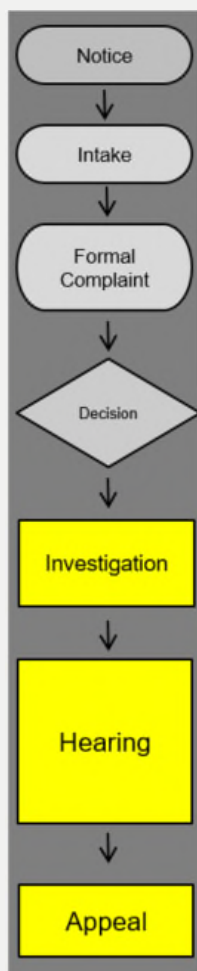
Relevant Regulations Sections:

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)

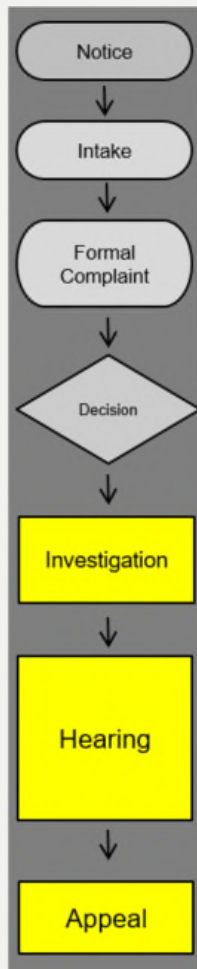
Basic Requirements



- State whether the **standard of evidence** to be used to determine responsibility is 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)

Basic Requirements



- Include the procedures and permissible bases for the complainant and respondent to appeal
- Describe the 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)

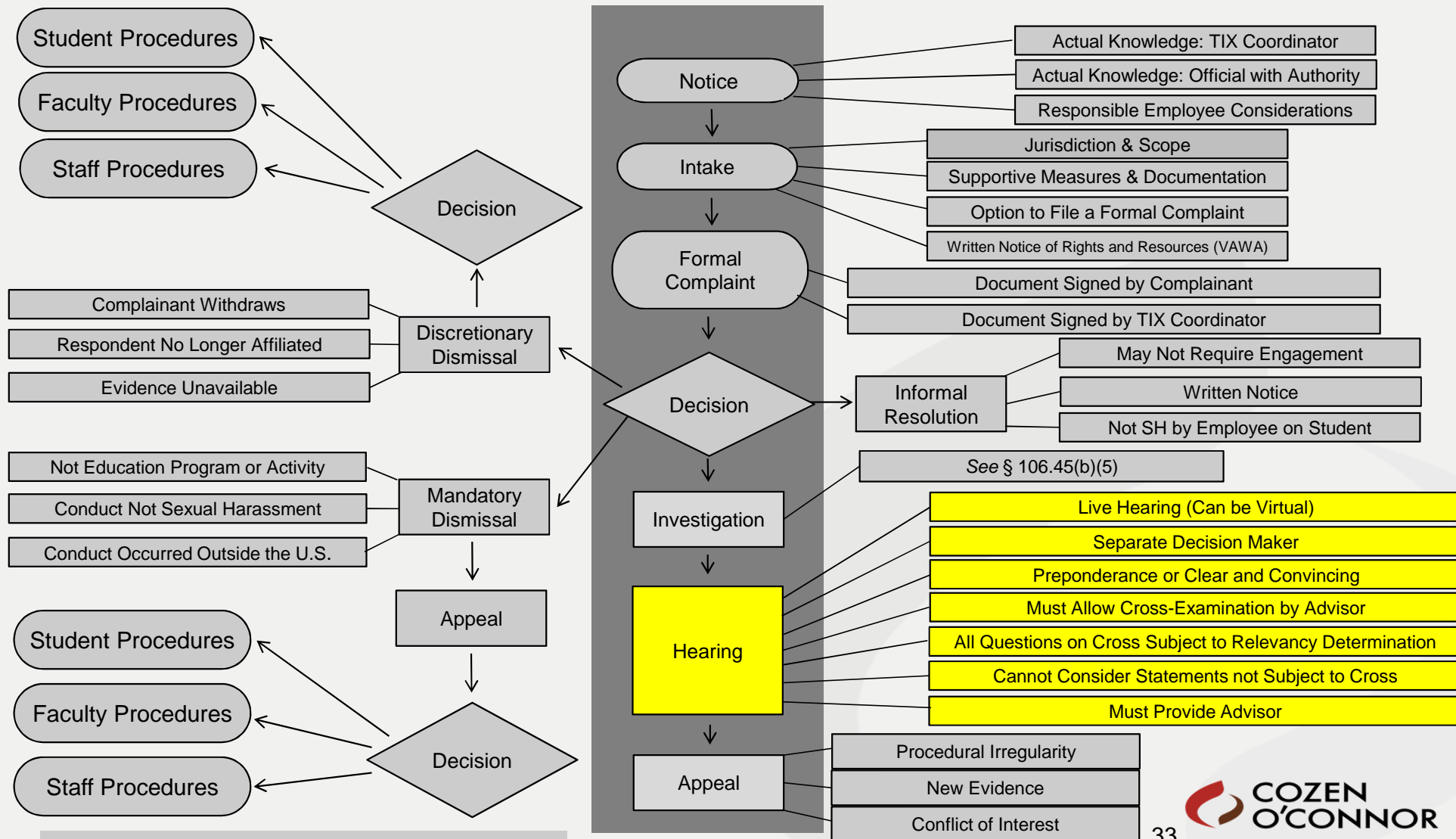
Recap of Investigation Requirements

- Formal Complaint
- Notice of Allegations
- Investigation
- Evidence Review
 - Review and response period
- Investigative Report
 - Review and response period

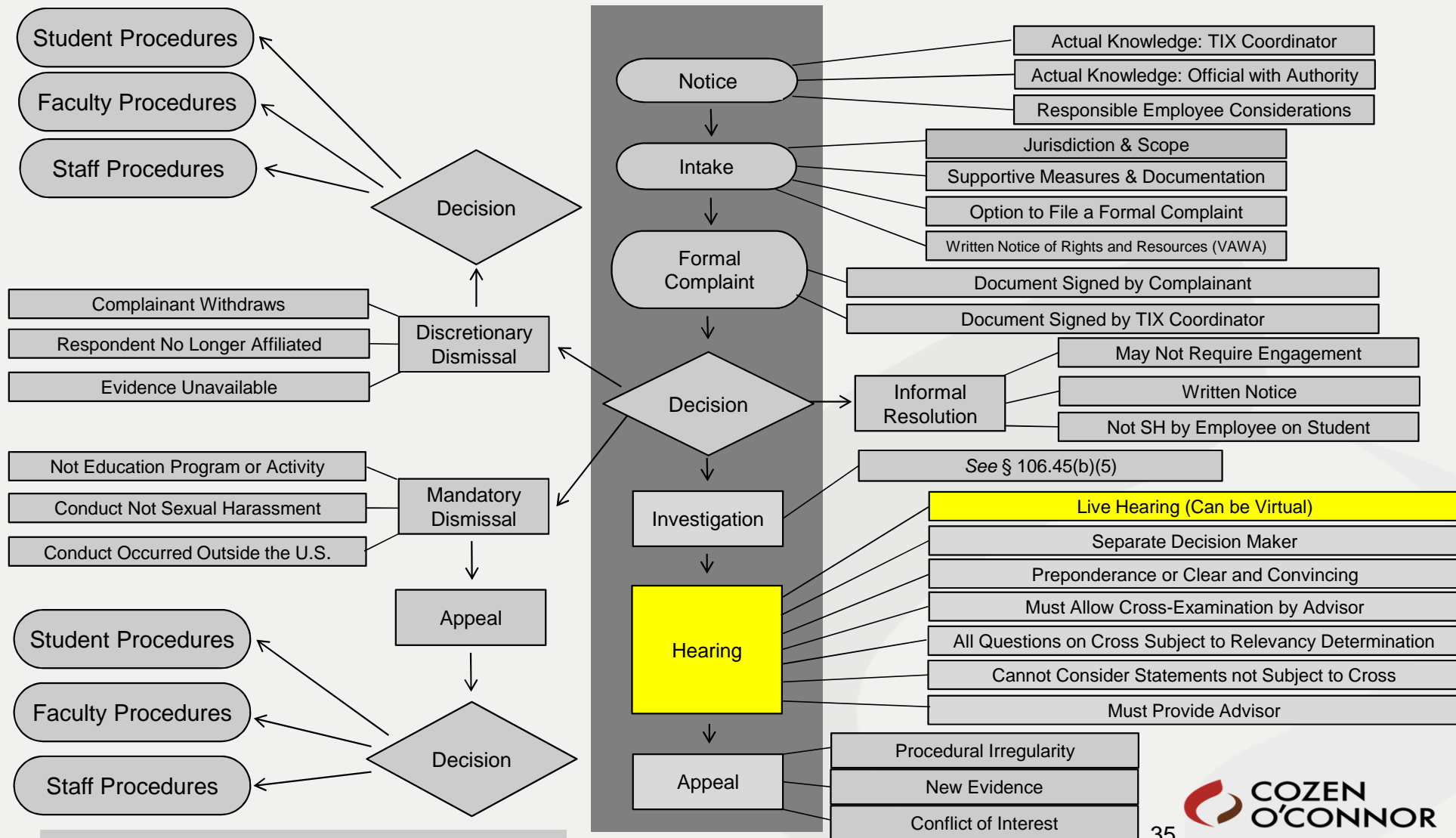
Recap of Investigation Requirements



OVERVIEW OF HEARING REQUIREMENTS



THE LIVE HEARING REQUIREMENT



Key Provisions of Title IX Regulations May 19, 2020

Live Hearing Required

- For postsecondary institutions, the recipient's grievance process **must provide for a live hearing.**



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

Live Hearing Required



- [A] live hearing gives both parties the most meaningful, transparent opportunity to present their views of the case to the decision-maker, **reducing the likelihood of biased decisions, improving the accuracy of outcomes, and increasing party and public confidence in the fairness and reliability** of outcomes of Title IX adjudications.

Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30359 .

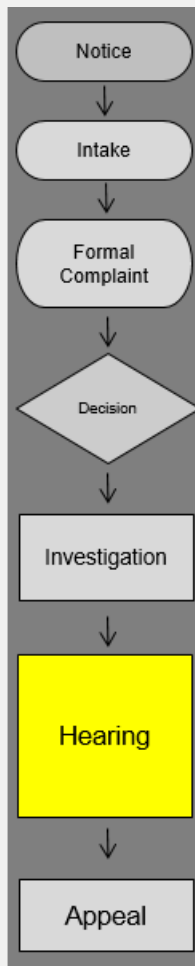
Option to Use Technology



- Live hearings pursuant to this paragraph may be conducted with all parties physically present in the same geographic location or, at the recipient's direction, any or all parties, witnesses and other participants may appear at the live hearing **virtually, with technology** enabling participants simultaneously to see and hear each other.

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

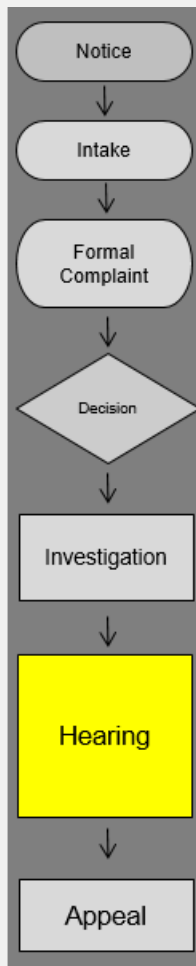
Virtual Hearing Considerations



- 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)

Virtual Hearing Considerations

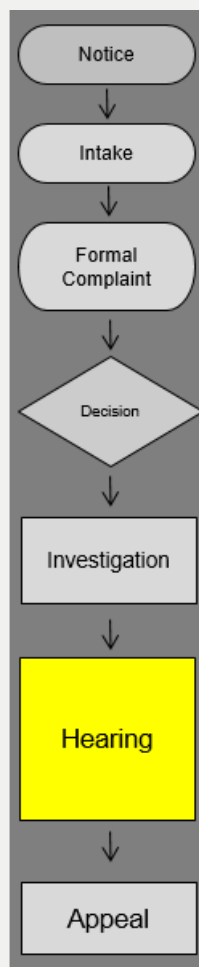


- The Department agrees with commenters who asserted that cross-examination provides opportunity for a decision-maker to assess credibility based on a number of factors, **including evaluation of body language and demeanor**, specific details, inherent plausibility, internal consistency, and corroborative evidence.

Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30321;

Virtual Hearing Considerations

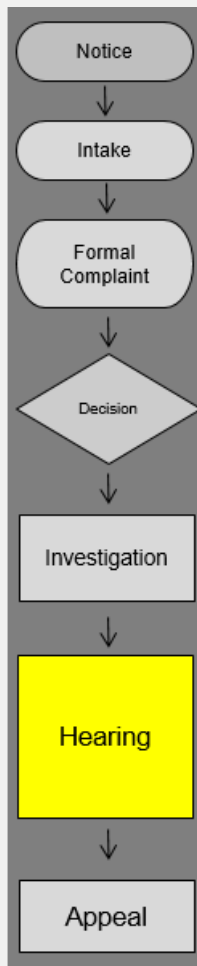
- The final regulations grant recipients discretion to allow participants, including witnesses, to appear at a live hearing virtually; however, **technology must enable all participants to see and hear other participants**, so a telephonic appearance would not be sufficient to comply with §106.45(b)(6)(i).



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

Flexibility to Adopt Rules

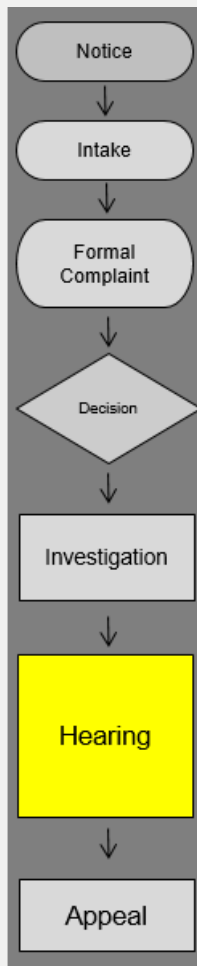
- Recipients may adopt rules that govern the **conduct and decorum** of participants at live hearings so long as such rules comply with these final regulations and apply equally to both parties.



Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30315.

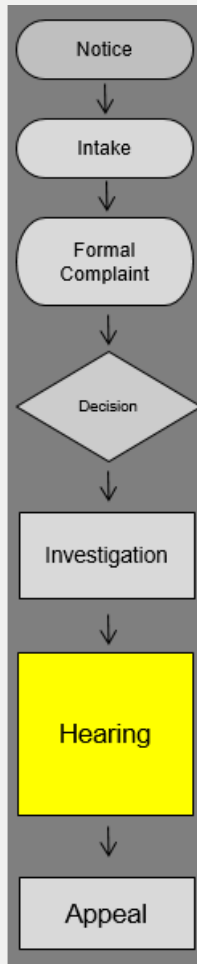
Flexibility to Adopt Rules

- 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).



Title IX Regulations May 19, 2020; Preamble at 30248

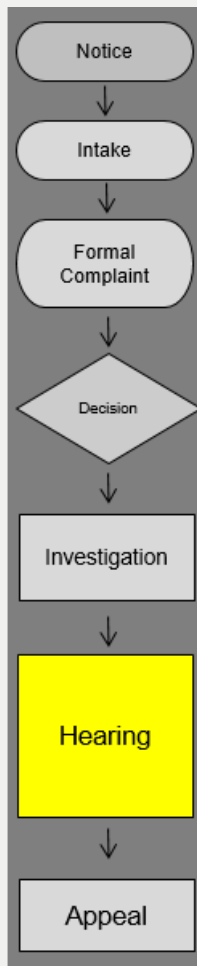
Relevance Limitation on Flexibility



- **Relevance is the standard that these final regulations require**, and any evidentiary rules that a recipient chooses must respect this standard of relevance.
- 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**.

Title IX Regulations May 19, 2020; Preamble at 30248

Participation by Parties and Witnesses



- The Department understands commenters concerns that **respondents, complainants, and witnesses may be absent from a hearing**, or may refuse to submit to cross-examination, for a variety of reasons, including a respondent's self-incrimination concerns regarding a related criminal proceeding, a complainant's reluctance to be cross-examined, or a witness studying abroad, among many other reasons.

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

Participation by Parties and Witnesses



- In response to commenters' concerns, the Department has revised the proposed regulations as follows:
 - (1) We have revised § 106.45(b)(6)(i) to state that where a decision-maker must not rely on an absent or non-cross examined party or witness's statements, the decision-maker **cannot draw any inferences about the determination regarding responsibility based on such absence or refusal** to be cross-examined;
 - (2) We have revised § 106.45(b)(6)(i) to grant a recipient discretion to hold the entire hearing **virtually using technology** that enables any or all participants to appear remotely;

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

Participation by Parties and Witnesses



- (3) § 106.71 **expressly prohibits retaliation** against any party, witness, or other person exercising rights under Title IX, including the right to participate or refuse to participate in a grievance process;
- (4) § 106.45(b)(3)(ii) grants a recipient **discretion to dismiss a formal complaint**, or allegations therein, where the complainant notifies the Title IX Coordinator in writing that the **complainant wishes to withdraw** the allegations, or **the respondent is no longer enrolled or employed** by the recipient, or **specific circumstances prevent the recipient from gathering evidence** sufficient to reach a determination.
- These changes address many of the concerns raised by commenters stemming from reasons why parties or witnesses may not wish to participate and the consequences of non-participation.

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

Participation by the Complainant

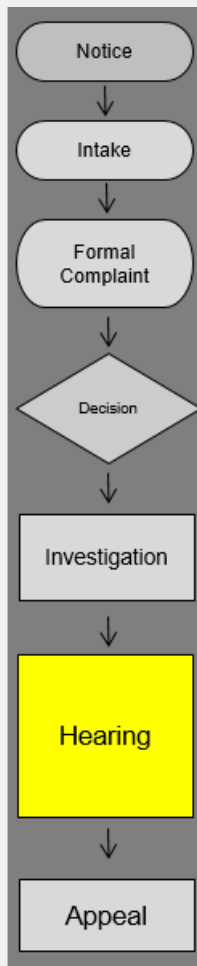


- Where a grievance process is initiated because the Title IX Coordinator, and not the complainant, signed the formal complaint, the complainant who did not wish to initiate a grievance process **remains under no obligation to then participate in the grievance process**, and the Department does not believe that exclusion of the complainant's statements in such a scenario is unfair to the complainant, who did not wish to file a formal complaint in the first place yet remains eligible to receive supportive measures protecting the complainant's equal access to education.

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

Transcript or Recording

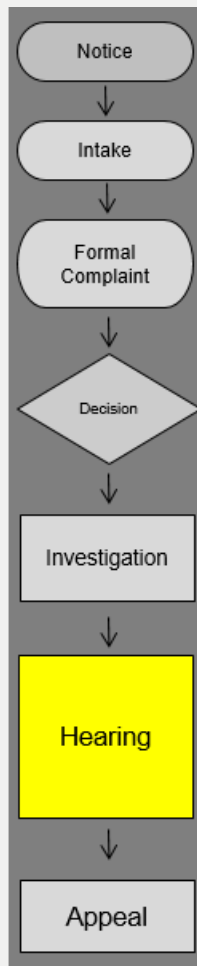
- Recipients must create an **audio or audiovisual recording, or transcript**, of any live hearing and make it available to the parties for inspection and review.



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

Applicability to K-12 Schools

- For recipients that are elementary and secondary schools, and other recipients that are not postsecondary institutions, the recipient's grievance process **may, but need not, provide for a hearing.**



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

Academic Medical Centers



- **Academic medical centers are not postsecondary institutions**, although an academic medical center may be affiliated with ... or even considered part of the same entity as the postsecondary institution.
- Through this revision, the Department is giving entities like academic medical centers **greater flexibility** in determining the appropriate process for a formal complaint.

Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30446

Non-Postsecondary Institutions

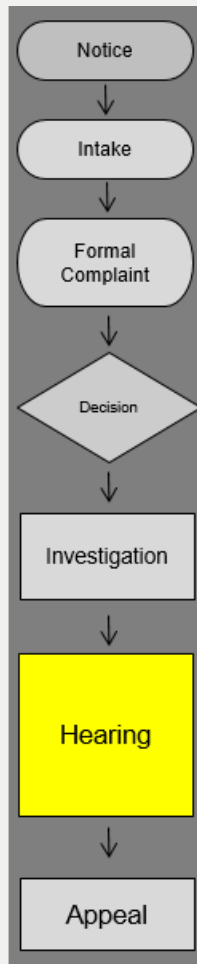


- With or without a hearing, after the recipient has sent the investigative report to the parties ... and before reaching a determination regarding responsibility, the decision-maker(s) must afford each party **the opportunity to submit written, relevant questions** that a party wants asked of any party or witness, **provide each party with the answers**, and **allow for additional, limited follow-up questions**.

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

Non-Postsecondary Institutions

- As to recipients that are not postsecondary institutions, the Department has revised § 106.45(b)(6)(ii) to provide that the recipient *may* require a live hearing and *must* afford each party the opportunity to submit written questions, provide each party with the answers, and allow for additional, limited follow-up questions from each party.

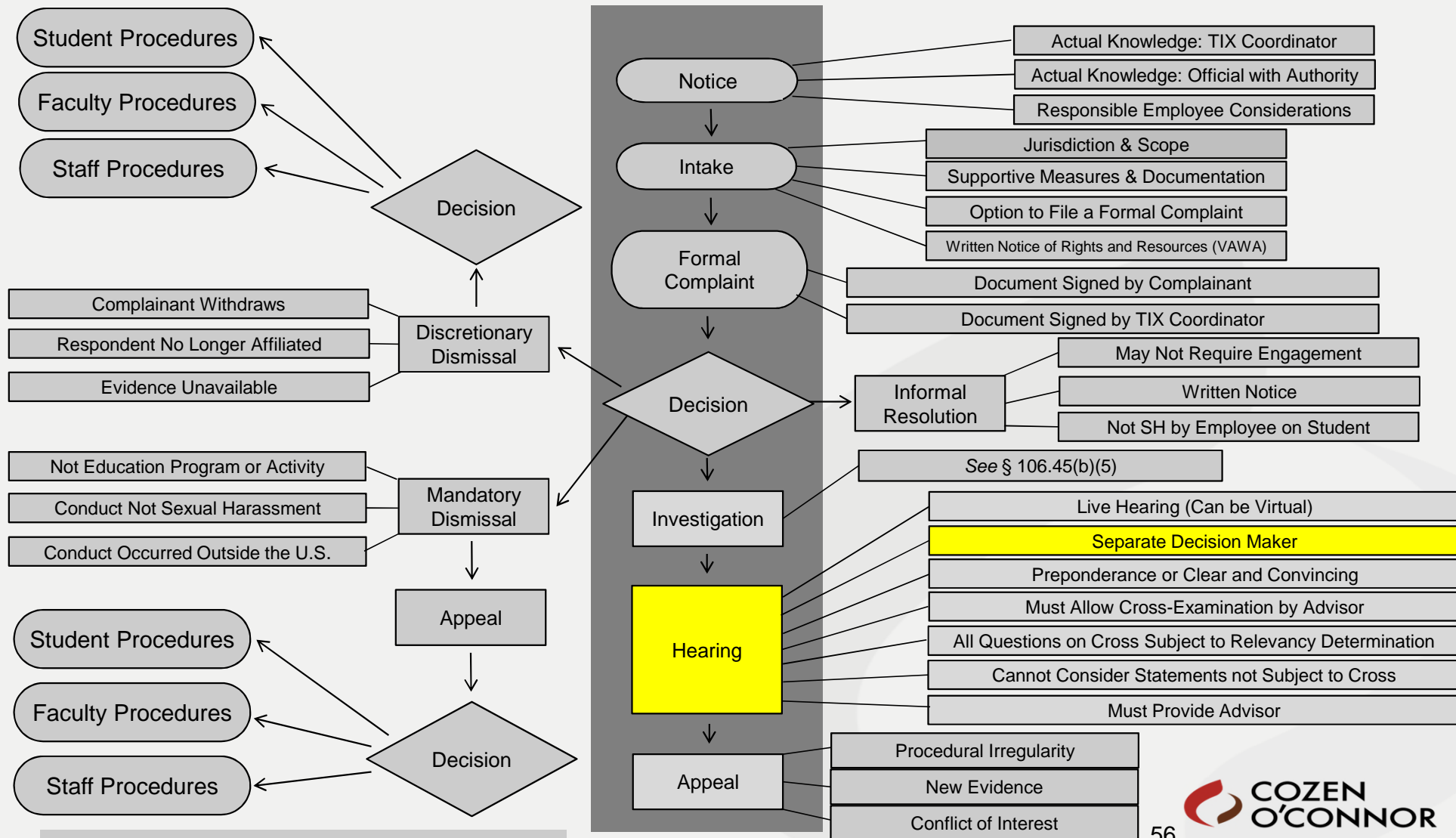


Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30446

Practical Considerations & Effective Practices

- Impact of requirement that parties and/or witnesses participate in the hearing
 - Party vs. witness
 - Student vs. employee
- Decisions re: technology
- Recording versus transcription
- Procedures for non-postsecondary institutions

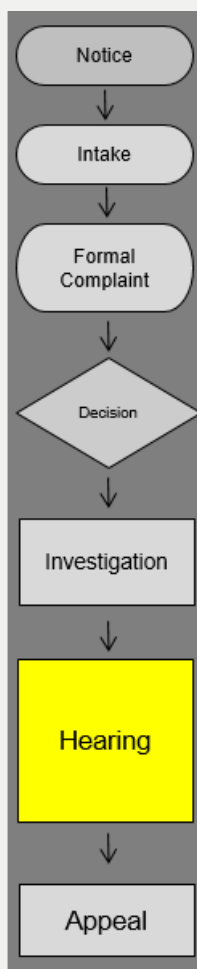
ROLE OF DECISION-MAKER



Key Provisions of Title IX Regulations May 19, 2020

Determine Relevance of Questions

- 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 ...**



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

Explain Decisions to Exclude Questions

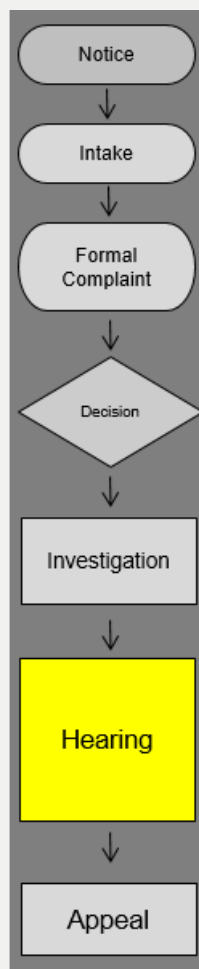


- The decision-maker(s) must explain to the party proposing the questions **any decision to exclude** a question as not relevant.

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

Apply the Standard of Evidence

- To reach [a] determination, the recipient must apply the standard of evidence described in paragraph (b)(1)(vii) of this section.



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

Issue Written Determinations

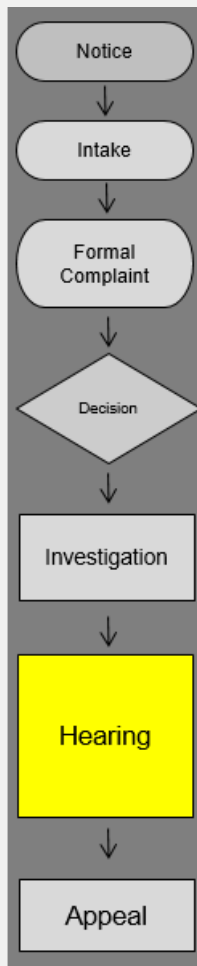


- The decision-maker(s) ... must issue a simultaneous written determination regarding responsibility, including
 - Identification of the allegations
 - Description of the procedural steps taken from the receipt of the formal complaint through the determination
 - Findings of fact supporting the determination
 - 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)

Separate Decision-Maker

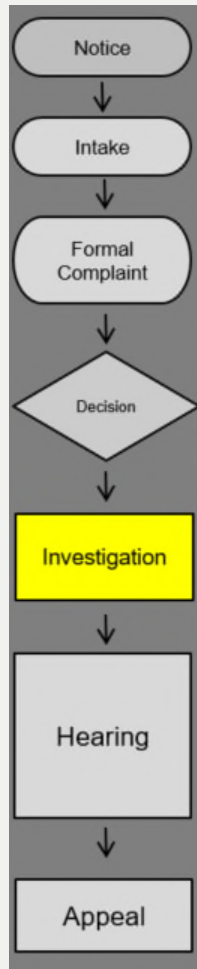
- The Department wishes to clarify that the final regulations **require the Title IX Coordinator and investigator to be different individuals from the decision-maker**, but nothing in the final regulations requires the Title IX Coordinator to be an individual different from the investigator.



Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30372

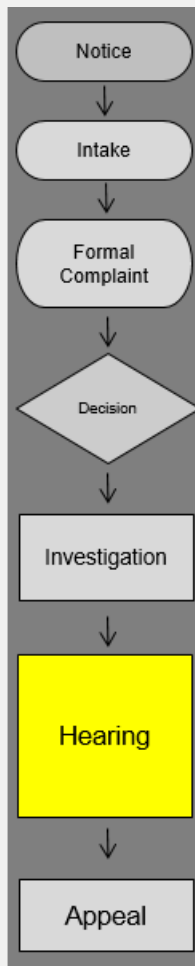
Investigator May not Determine Responsibility

- § 106.45(b)(7)(i) prevents an investigator from actually making a determination regarding responsibility.



Title IX Regulations May 19, 2020; §§ 106.45(b)(5)(vii); Preamble 85 F.R.30436

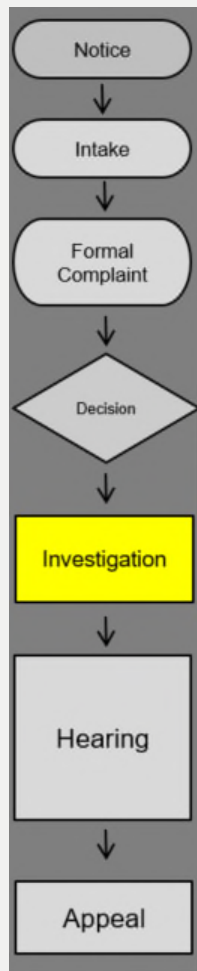
Decision-Maker Must Determine Responsibility



- Nothing in the final regulations prevents Title IX Coordinators from offering recommendations regarding responsibility to the decision-maker for consideration, but the final regulations **require the ultimate determination regarding responsibility to be reached by an individual (i.e., the decision-maker) who did not participate in the case as an investigator or Title IX Coordinator.**

Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30372

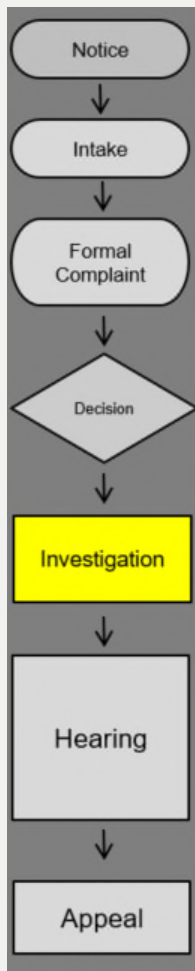
Independent Obligation to Evaluate Evidence



- The Department does not wish to prohibit the investigator from including recommended findings or conclusions in the investigative report.
- However, the decision-maker is under an **independent obligation to objectively evaluate relevant evidence**, and thus cannot simply defer to recommendations made by the investigator in the investigative report.

Title IX Regulations May 19, 2020; §§ 106.45(b)(5)(vii); Preamble 85 F.R.30308 & 30436

Independent Obligation to Evaluate Credibility



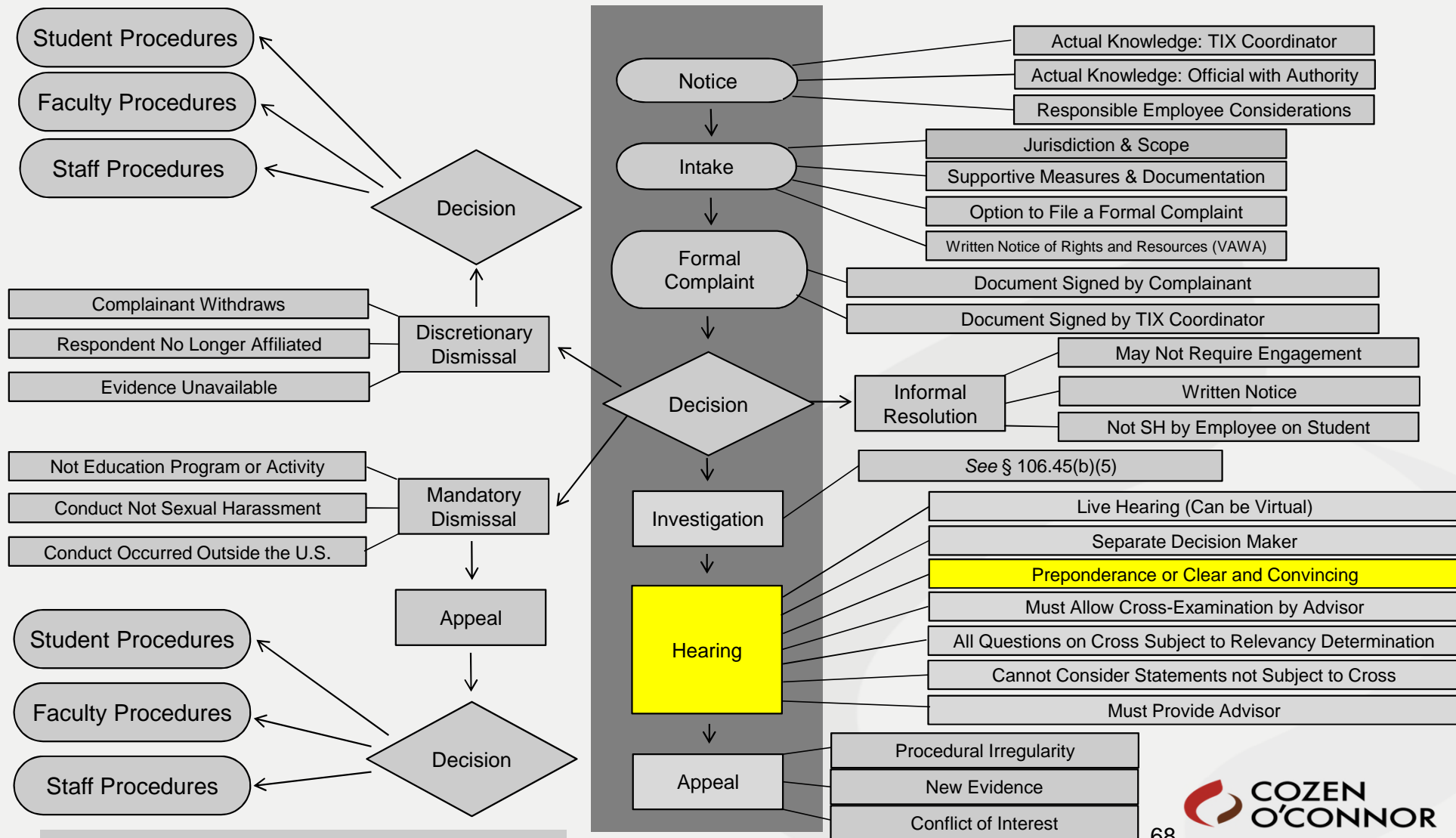
- If a recipient chooses to include a **credibility analysis** in its investigative report, the recipient must be cautious not to violate § 106.45(b)(7)(i), prohibiting the decision-maker from being the same person as the Title IX Coordinator or the investigator.
- If an investigator's determination regarding credibility is actually a determination regarding responsibility, then §106.45(b)(7)(i) would prohibit it.

Title IX Regulations May 19, 2020; §§ 106.45(b)(5)(vii); Preamble 85 F.R.30308 & 30436

Practical Considerations & Effective Practices

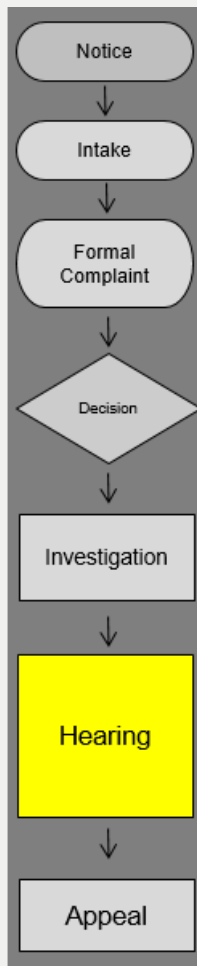
- Choice of decision-maker(s)
 - Hearing panel vs. sole adjudicator
 - External professional vs. internal administrator
- Decision-maker on sanction
 - Can be same or different from decision-maker on finding
- Use of Hearing Coordinator?
- Whether to have investigator make recommended findings or include a credibility analysis

STANDARD OF EVIDENCE



Key Provisions of Title IX Regulations May 19, 2020

Standard of Evidence



- [T]he recipient must apply the same standard of evidence to student and employee matters, using either the clear and convincing standard or the preponderance of the evidence standard.
- The recipient must apply the same standard of evidence to all formal complaints of sexual harassment.

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

Standard of Evidence



- For reasons described above, the Department has determined that the approach to the standard of evidence contained in § 106.45(b)(1)(vii) and § 106.45(b)(7)(i) of the final regulations represents the **most effective way of legally obligating recipients to select a standard of evidence** for use in resolving formal complaints of sexual harassment under Title IX to ensure a fair, reliable grievance process **without unnecessarily mandating that a recipient select one standard over the other.**

Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30388.

Standard of Evidence



- In short, under the final regulations the **same standard of evidence will apply to all formal complaints of sexual harassment** under Title IX responded to by a particular recipient, **whether the respondent is a student or employee.**

Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30388.

Standard of Evidence



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

Clear and Convincing*

- The evidence is highly and substantially more likely to be true than untrue
- The fact finder must be convinced that the contention is highly probable
- Proof which requires more than a preponderance of the evidence but less than proof beyond a reasonable doubt
- Clear and convincing proof will be shown where the truth of the facts asserted is highly probable
- Quality of the evidence, not quantity
- NOT beyond a reasonable doubt

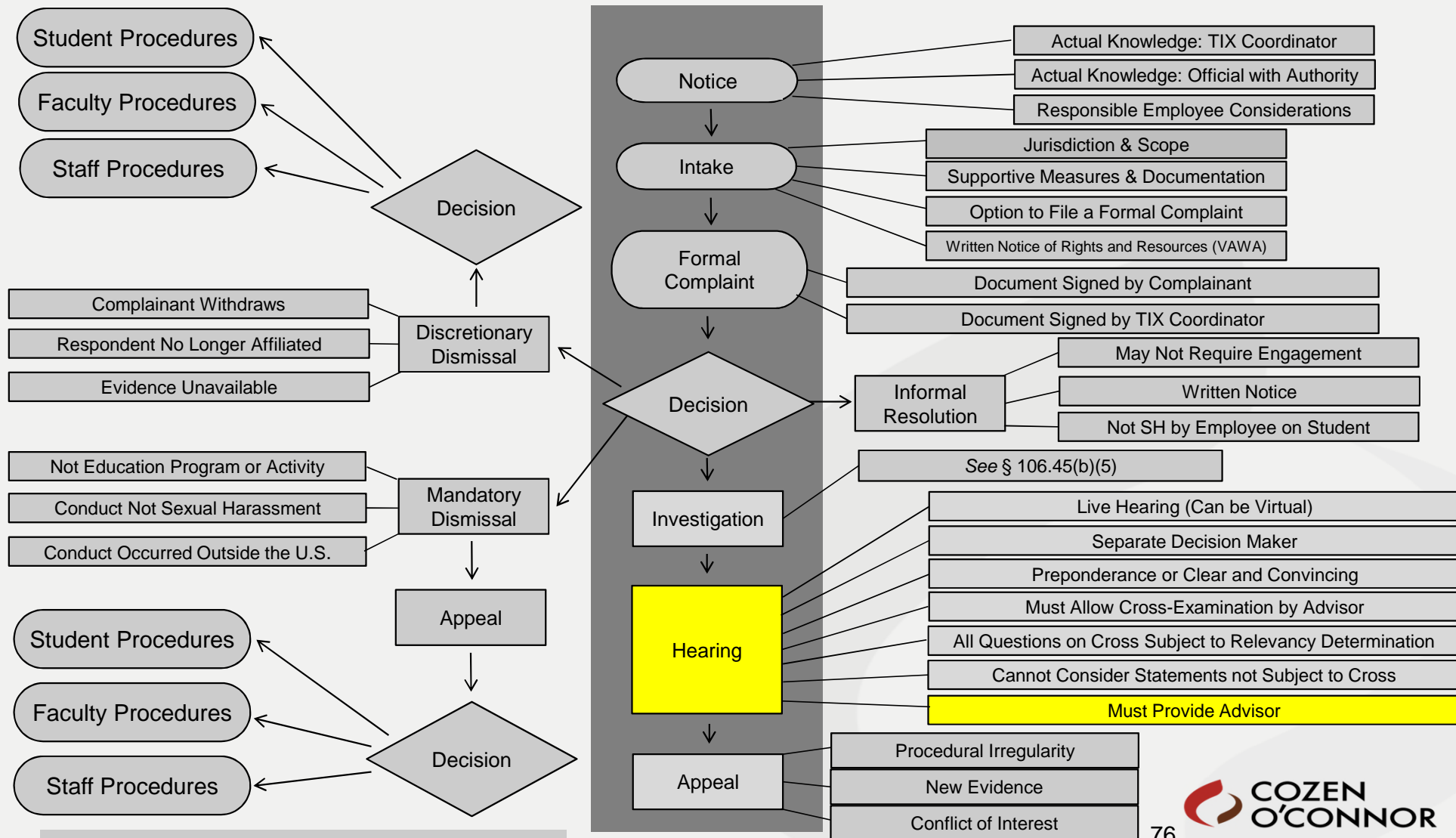
* Based on common usage.

Preponderance of the Evidence*

- 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

* Based on common usage.

ADVISOR OF CHOICE



Key Provisions of Title IX Regulations May 19, 2020

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

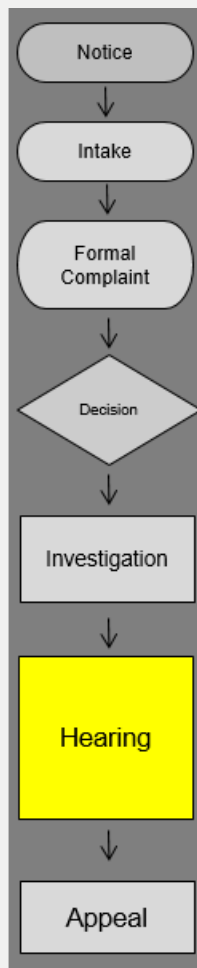


- The Department notes that the 106.45 (b)(1)(iii) prohibition of Title IX personnel having conflicts of interest or bias **does not apply to party advisors** (including advisors provided to a party by a post secondary institution as required under 106.45(b)(6)(i)) and thus, **the existence of a possible 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

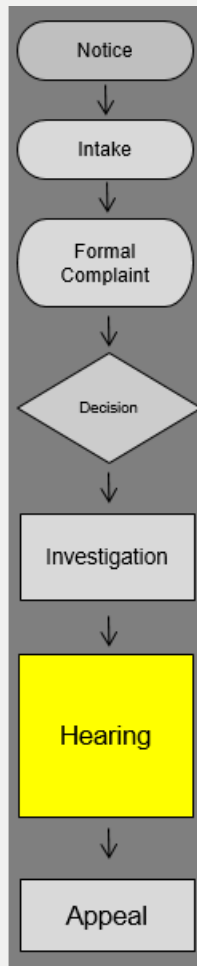


- At the live hearing, the decision-maker(s) must permit each party's advisor to **ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility.**

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.

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

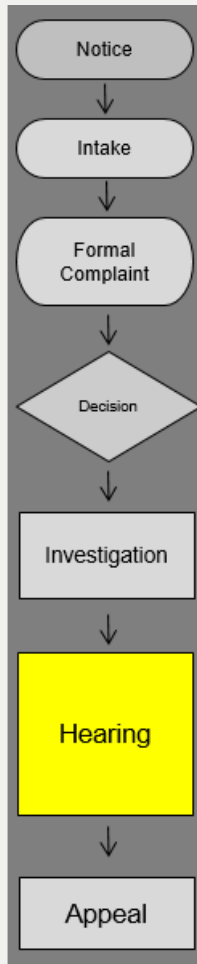
Discretion as to Advisor's Role

- 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.

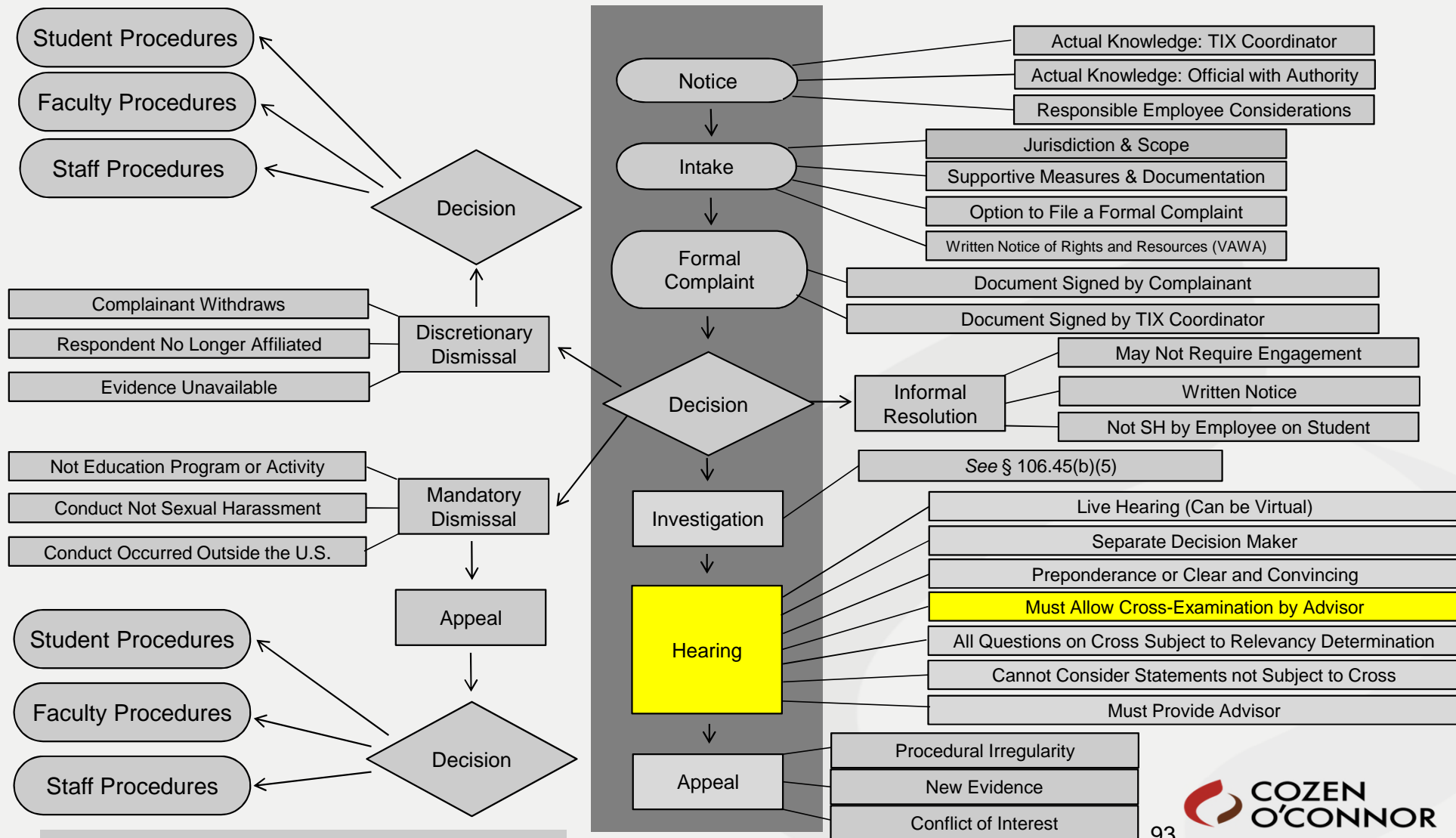
Title IX Regulations, May 19, 2020; § 106.45(b)(6)

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



Key Provisions of Title IX Regulations May 19, 2020

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)

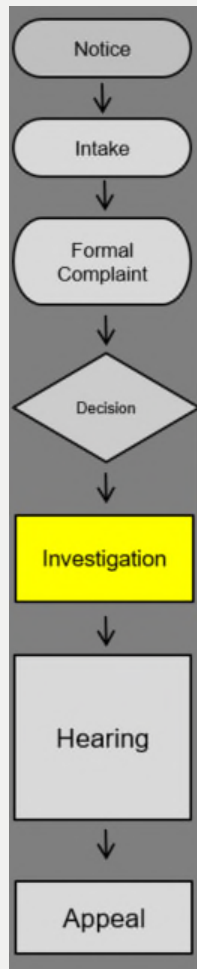
Cross-Examination



- 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

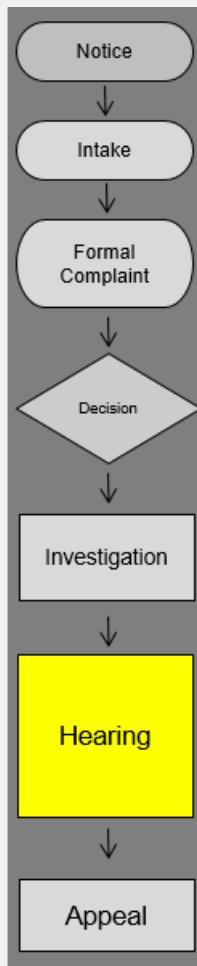
Questions to Advance a Party's Interest



- 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

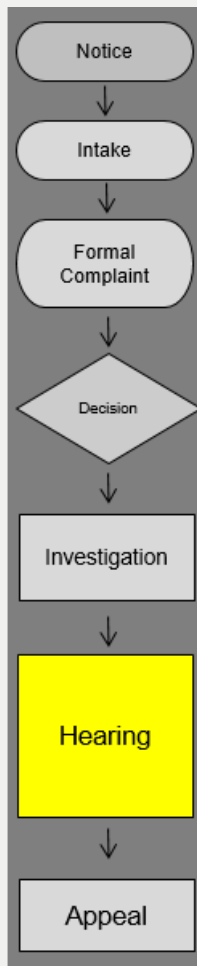
Cross-Examination



- 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

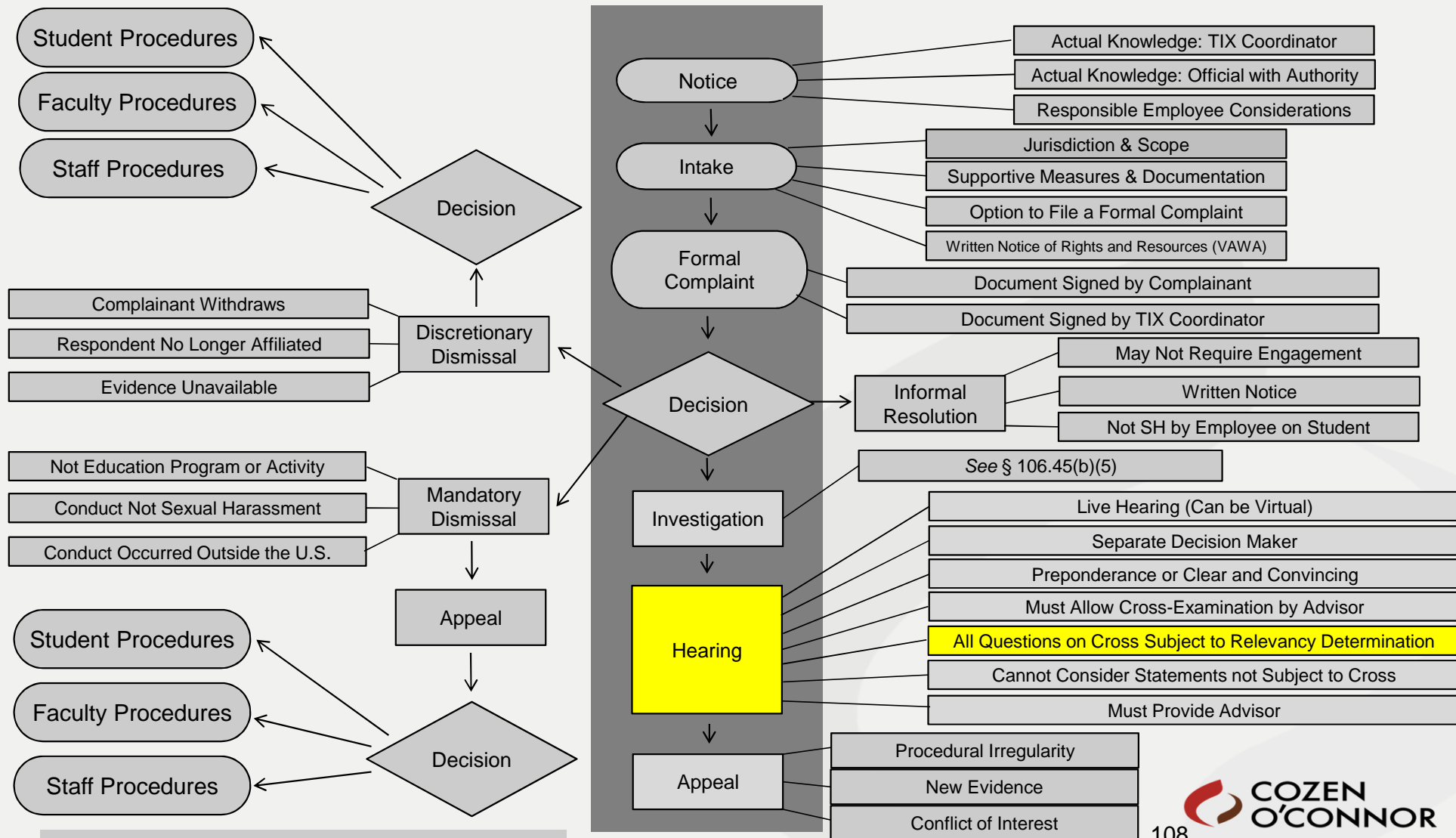
May Not Impose Training Requirements



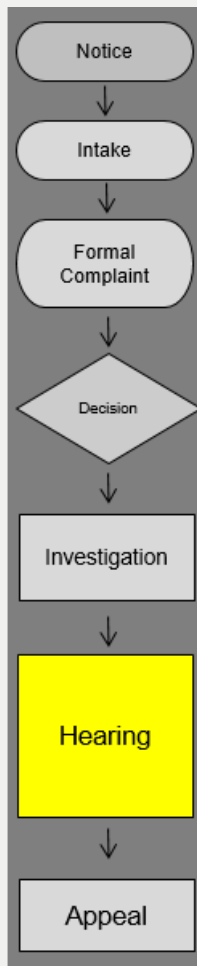
- Recipients may not impose training or competency assessments on advisors of choice selected by parties, but nothing in the final regulations prevents a recipient from training and assessing the competency of its own employees whom the recipient may desire to appoint as party advisors.

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

RELEVANCE



Questions Must be Relevant

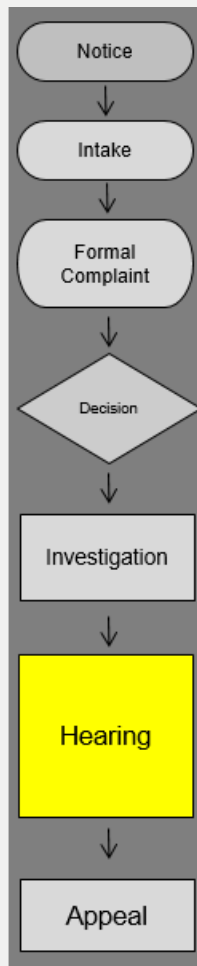


- Only **relevant** cross-examination and other questions may be asked of a party or witness.
- Before a complainant, respondent, or witness answers a cross-examination or other question, the decision-maker(s) must **first determine whether the question is relevant ...**
- The decision-maker(s) must 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)

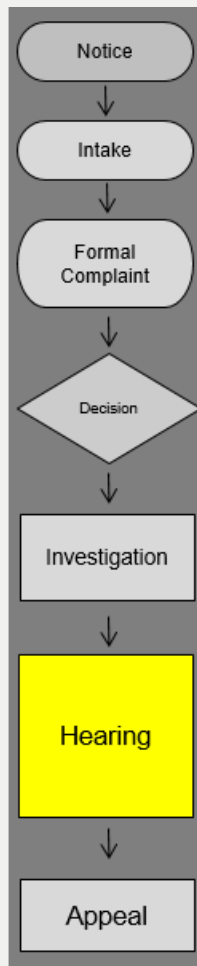
Relevance

- 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.

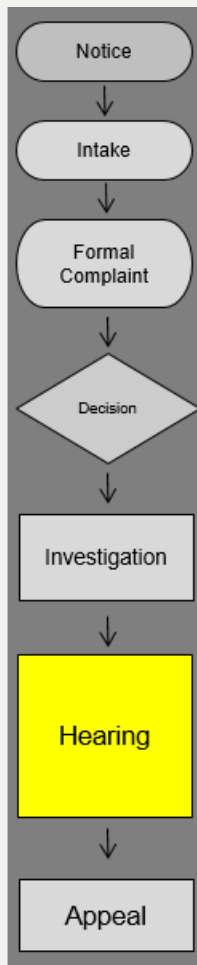
Relevance



- 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.

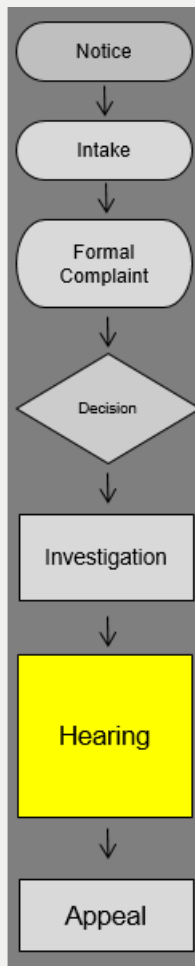
Limitations on Relevance



- To that end, the Department has determined that recipients **must consider relevant evidence** with the following conditions:
 - a complainant’s prior sexual behavior is **irrelevant** (unless questions or evidence about prior sexual behavior meet one of two exceptions, as noted above);
 - information protected by any legally recognized privilege **cannot be used**; no party’s treatment records may be used without that party’s voluntary, written consent; and
 - statements not subject to cross-examination in postsecondary institutions **cannot be relied on** by the decision-maker.
 - The Department notes that where evidence is duplicative of other evidence, a recipient may deem the evidence **not relevant**.

Title IX Regulations, May 19, 2020, Preamble 85 F.R. 30337

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

Privileged Information: Per Se Irrelevant



- In response to commenters' concerns that relevant questions might implicate information protected by attorney-client privilege, the final regulations add § 106.45(b)(1)(x) to bar the grievance process from requiring, allowing, relying on, **or otherwise using questions or evidence** that constitute, or seek disclosure of, information protected under a legally recognized privilege.

Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30361

Relevance: 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

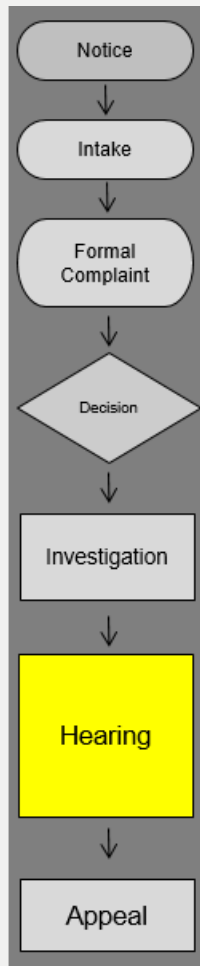
Prior Sexual History: Per Se Irrelevant



- The final regulations clarify the rape shield language to state that **questions and evidence subject to the rape shield protections are “not relevant,”** and therefore the rape shield protections apply wherever the issue is whether evidence is relevant or not.

Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30353

Prior or Subsequent Misconduct

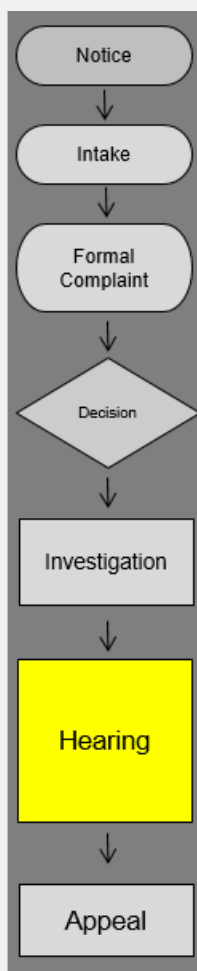


- The regulations do not prohibit the use of prior or subsequent misconduct
 - “Evidence of a pattern of inappropriate behavior by an alleged harasser” permitted if relevant
- Schools will need to determine if such conduct is:
 - Relevant
 - May be used in determining responsibility
 - May be used in sanctioning
- If so, will need to set criteria for consideration

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
- Consider prejudicial vs. probative value

No Comprehensive Evidentiary Rules



- The Department desires to prescribe a grievance process adapted for an educational environment rather than a courtroom, and **declines to impose a comprehensive, detailed set of evidentiary rules** for resolution of contested allegations of sexual harassment under Title IX.
- Rather, the Department has carefully considered the procedures most needed to result in fair, accurate, and legitimate outcomes in Title IX grievance processes.

Title IX Regulations, May 19, 2020, Preamble 85 F.R. 30337

Simplified Evidentiary Considerations

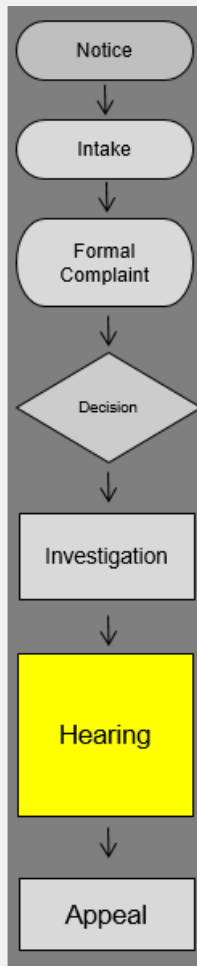


- Recipients are educational institutions that **should not be converted into *de facto* courtrooms.**
- The final regulations thus prescribe a process that **simplifies evidentiary complexities** while ensuring that determinations regarding responsibility result from **consideration of relevant, reliable evidence.**

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

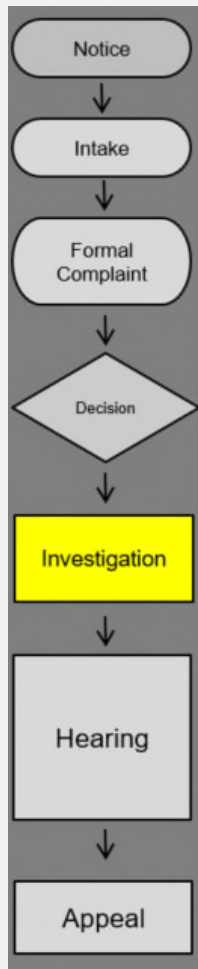
Relevant and Reliable Evidence

- The Department believes that the final regulations strike the appropriate balance for a postsecondary institution context between **ensuring that only relevant and reliable evidence is considered** while not over-legalizing the grievance process.



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

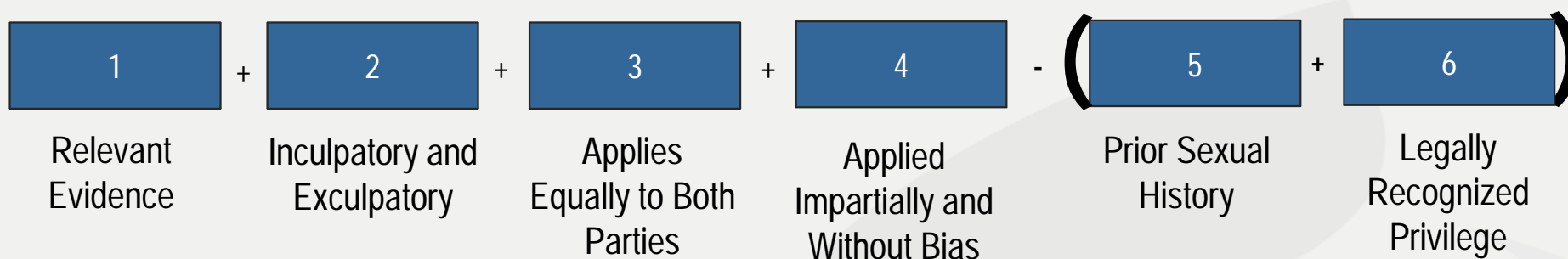
Flexibility to Adopt Rules



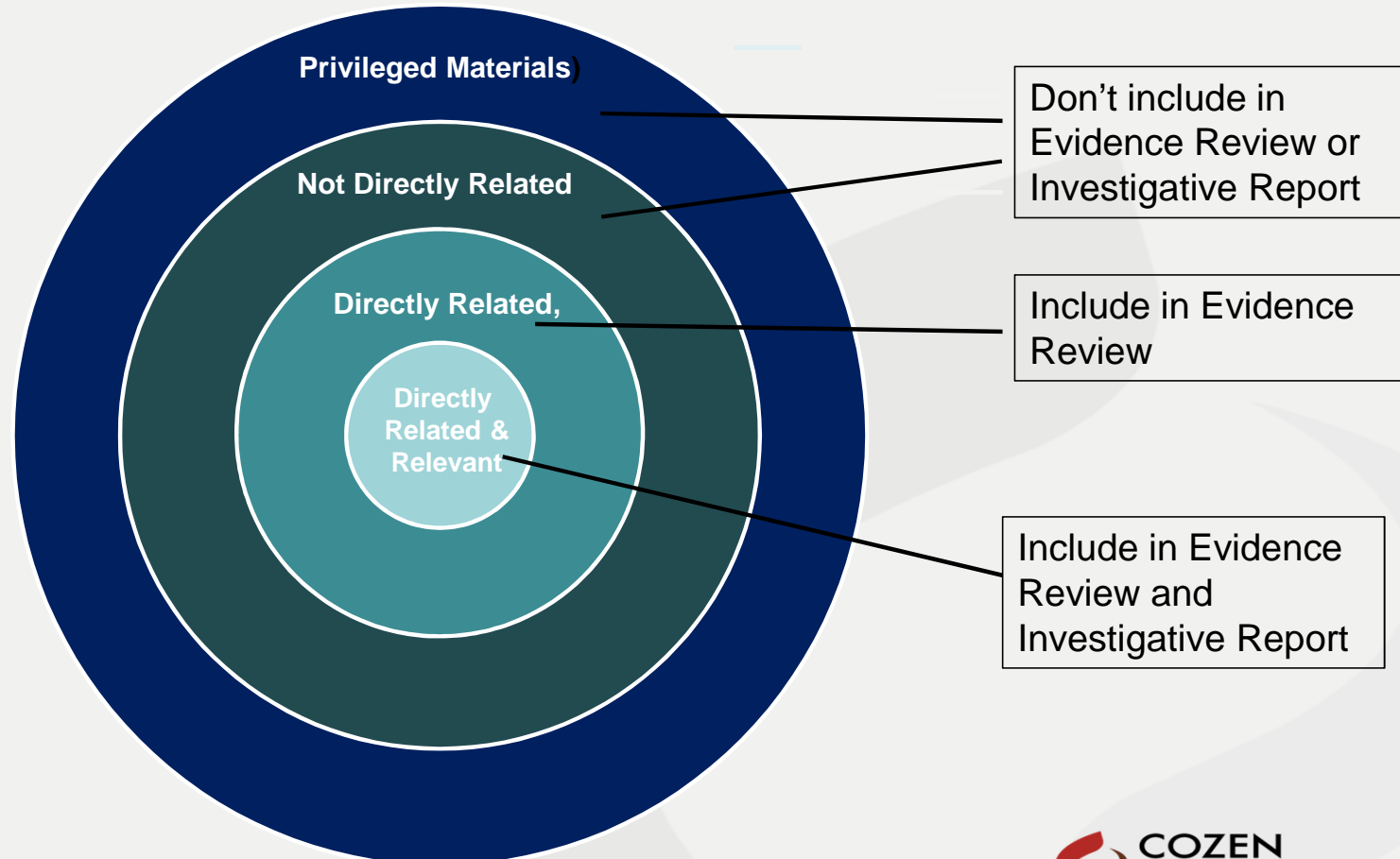
- “Within these evidentiary parameters **recipients retain the flexibility to adopt rules that govern how the recipient’s investigator** and decision-maker evaluate evidence and conduct the grievance process (so long as such rules apply equally to both parties).
- **Relevance is the standard that these 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.

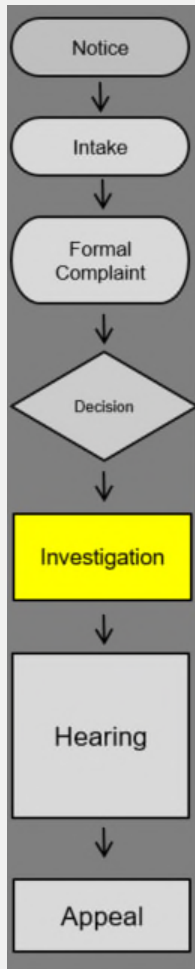
Evidentiary Rules Must Consider



Evidentiary Levels for Inclusion



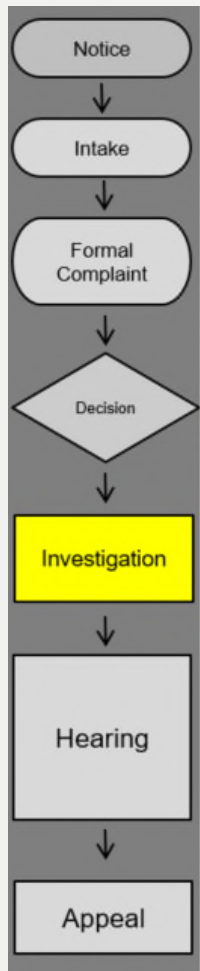
Directly Related



- Not defined in the regulations or the Preamble
 - The Department declines to define certain terms such as “evidence directly related to the allegations,” as these terms should be interpreted using their plain and ordinary meaning.
- “Directly related” aligns with the requirements in FERPA
 - The Department previously noted that the “directly related to” requirement in § 106.45(b)(vi) aligns with FERPA.
 - For example, the regulations implementing FERPA define education records as records that are “directly related to a student” pursuant to § 99.3.
- Left to the discretion of the school
 - [T]he school has some discretion to determine what evidence is directly related to the allegations in a formal complaint.

Title IX Regulations May 19, 2020; Preamble at 30304, 30428.

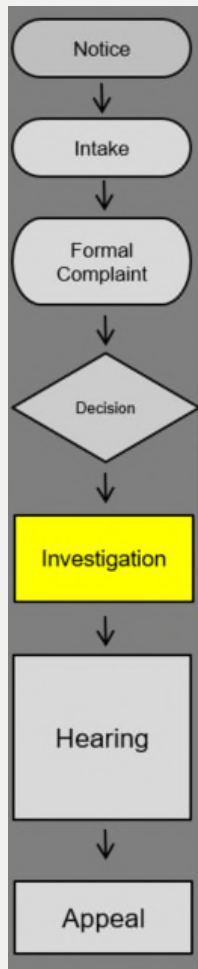
Directly Related



- [T]he universe of that exchanged evidence should include all evidence (inculpatory and exculpatory) that relates to the allegations under investigation, without the investigator having screened out evidence related to the allegations that the investigator does not believe is relevant.

Title IX Regulations May 19, 2020 §106.45(b)(5)(vi);
Preamble 85 F.R.30304

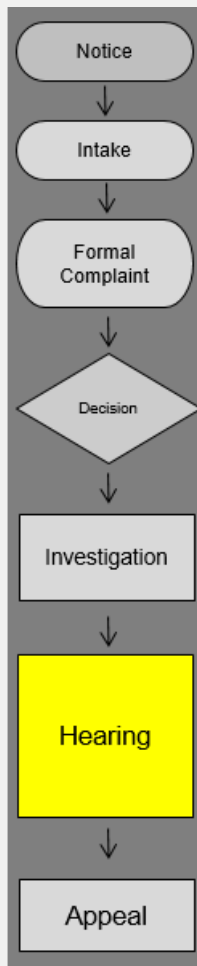
Directly Related vs. Relevant



- Evidence that is “directly related to the allegations” may encompass a broader universe of evidence than evidence that is “relevant.”
- The Department does not believe that determinations about whether certain questions or evidence are relevant or directly related to the allegations at issue requires legal training and that such factual determinations reasonably can be made by layperson recipient officials impartially applying logic and common sense.

Title IX Regulations May 19, 2020; Preamble at 30304, 30321.

Relevant Questions



- 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**.

Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30248; 30361

Relevant Questions



- [T]he final regulations add § 106.45(b)(1)(x) to bar the grievance process from requiring, allowing, relying on, or **otherwise using questions or evidence** that constitute, or seek disclosure of, information protected under a legally recognized privilege.
- Additionally, questions that are **duplicative or repetitive** may fairly be deemed not relevant and thus excluded.

Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30361

Relevance: Explaining Exclusion



- 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 and explain any decision to exclude a question as not relevant.
- This provision **does not require a decision-maker to give a lengthy or complicated explanation.**

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

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

Relevance: Explaining Exclusion

- [I]t is sufficient, for example, for a decision-maker to explain that a question is irrelevant because the question calls for **prior sexual behavior** information without meeting one of the two exceptions, or because the question asks about a detail that is **not probative of any material fact** concerning the allegations. No lengthy or complicated exposition is required to satisfy this provision.



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

Flexibility to Discuss Relevance

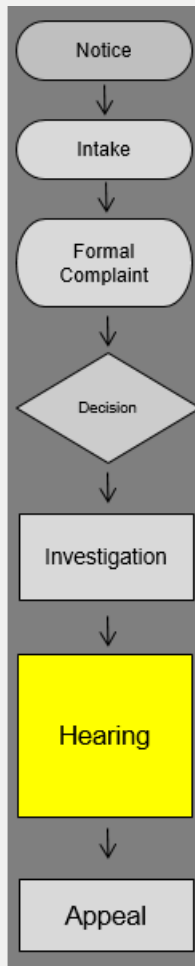


- The final regulations **do not preclude a recipient from adopting a rule** (applied equally to both parties) that does, or does not, **give parties or advisors the right to discuss the relevance determination with the decision-maker during the hearing.**
- If a recipient believes that arguments about 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; Preamble 85 F.R 30343

Appeal of Relevance Determination

- Parties have the equal right to appeal on three bases including procedural irregularity that affects the outcome, so if a party disagrees with a decision-maker's relevance determination, the party has the **opportunity to challenge the relevance determination on appeal.**



Title IX Regulations, May 19, 2020; Preamble 85 F.R 30349, footnote 1340, citing § 106.45(b)(8)

Appeal of Relevance Determination



- Parties may appeal erroneous relevance determinations, if they affected the outcome, because § 106.45(b)(8) allows the parties equal appeal rights on grounds that include procedural irregularity that affected the outcome.
- However, asking the decision-maker to also explain the exclusion of questions during the hearing does not affect the parties' appeal rights and may reduce the number of instances in which a party feels the need to appeal on this basis because the decision-maker will have explained the decision during the hearing.

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

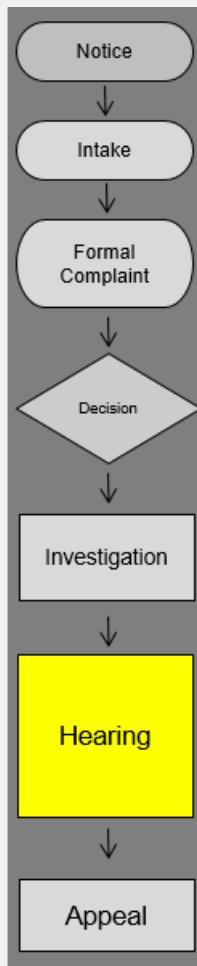
Practical Considerations & Effective Practices

- Use of a hearing coordinator to support timely determinations by the decision-maker regarding relevance
- How to enable panels to make real-time relevancy determination on cross-examination questions
- Whether to permit discussion of relevancy during the live hearing, or whether to defer the opportunity to challenge to the appeal
- Upon appeal, permitting the decision-maker to augment their reasoning for disallowing a question

Walking through an Example

- Can you adopt a rule excluding subsequent use of statements made during informal resolution?

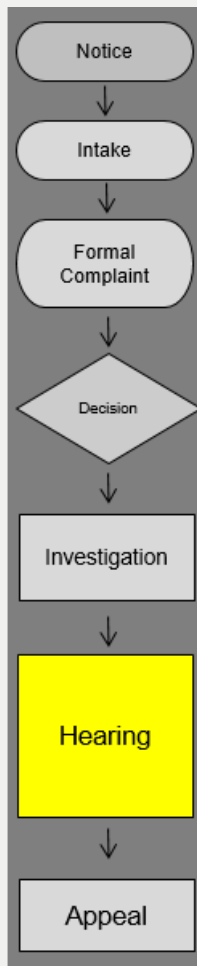
Statements Made During Informal Resolution



- The regulations permit a recipient to facilitate an informal resolution, provided that the recipient provides the parties written notice disclosing:
 - The allegations,
 - The requirements of the informal resolution process,
 - The circumstances under which it precludes the parties from resuming the formal complaint, provided that at any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and resume the grievance process, and
 - Any **consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared.**

Title IX Regulations, May 19, 2020; § 106.45(b)(9)

Statements Made During Informal Resolution



- The Department appreciates commenters' concerns that comprehensive rules of evidence adopted in civil and criminal courts throughout the U.S. legal system apply detailed, complex rules to certain types of evidence resulting in **exclusion of evidence that is otherwise relevant to further certain public policy values (e.g., exclusion of statements made during settlement negotiations, exclusion of hearsay subject to specifically-defined exceptions, exclusion of character or prior bad act evidence subject to certain exceptions, exclusion of relevant evidence when its probative value is substantially outweighed by risk of prejudice, and other admissibility rules).**

Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30337

Statements Made During Informal Resolution



- With respect to **informal resolution facilitators potentially serving as witnesses** in subsequent formal grievance processes, we leave this possibility open to recipients.
- If recipients were to accept such witnesses, then the **Department would expect this possibility to be clearly disclosed to the parties** as part of the § 106.45(b)(9)(i) requirement in the final regulations to provide a written notice disclosing any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared.

Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30400-30401

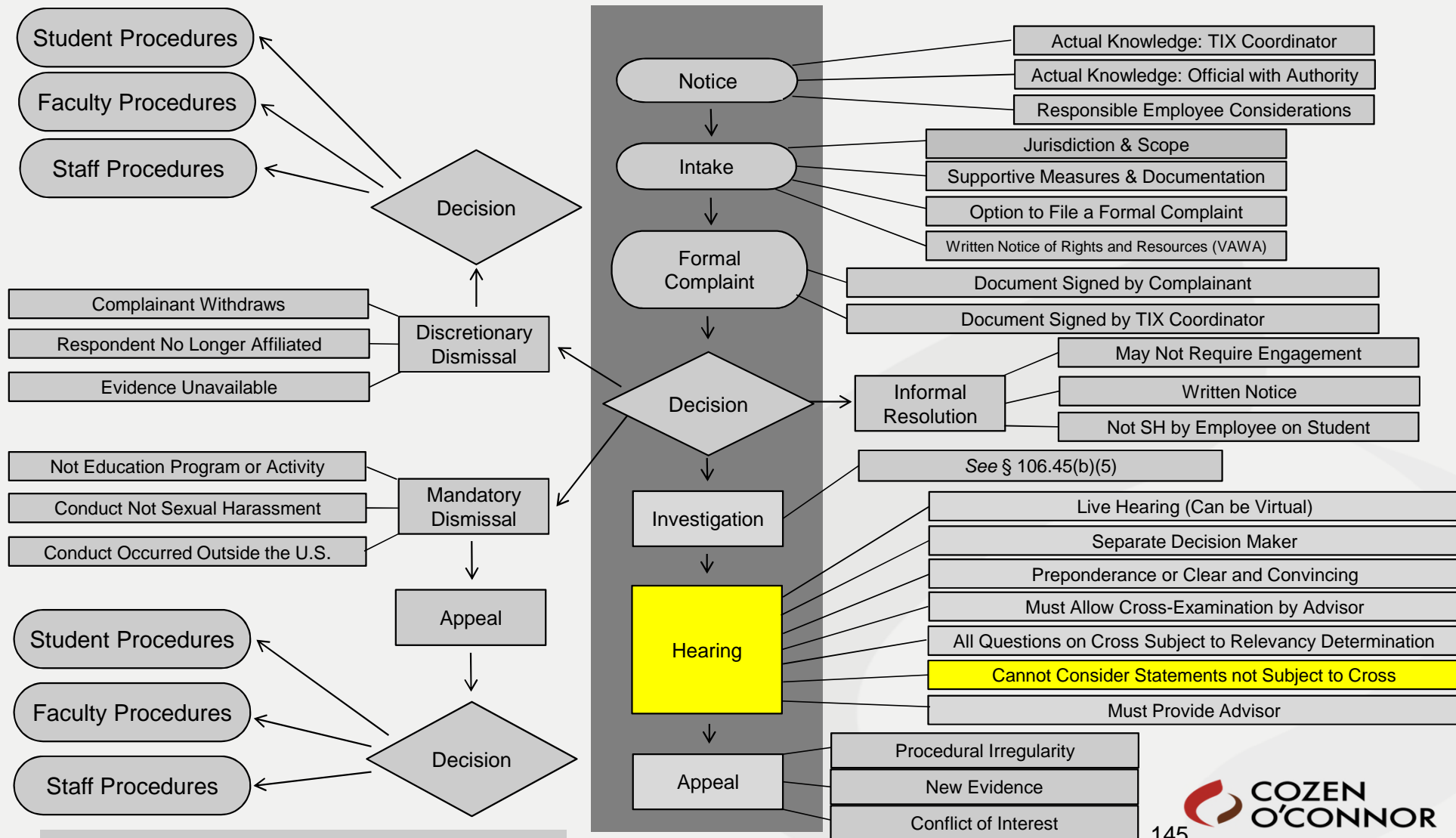
Statements Made During Informal Resolution



- **Relevance is the standard that these final regulations require, and any evidentiary rules that a recipient chooses must respect this standard of relevance.**
- 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.

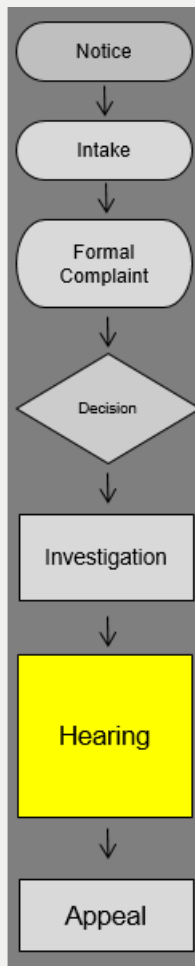
Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30247-30248

EXCLUSION OF STATEMENTS NOT SUBJECT TO CROSS-EXAMINATION



Key Provisions of Title IX Regulations May 19, 2020

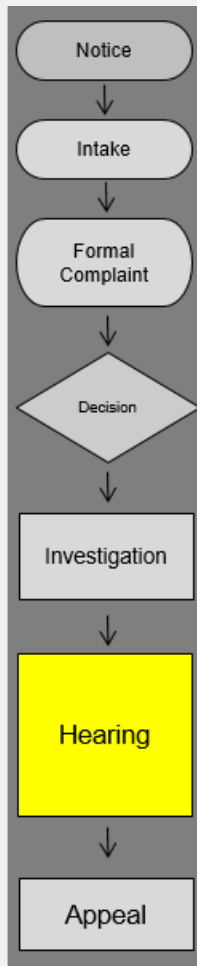
Exclusion of Statement



- 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

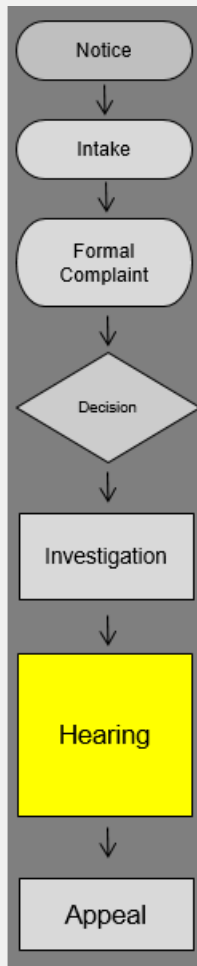


- [I]n the postsecondary context, **only statements that have been tested for credibility** will be considered by the decision-maker in reaching a determination regarding responsibility.
- Because party and witness statements so often raise **credibility** questions in the context of sexual harassment 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

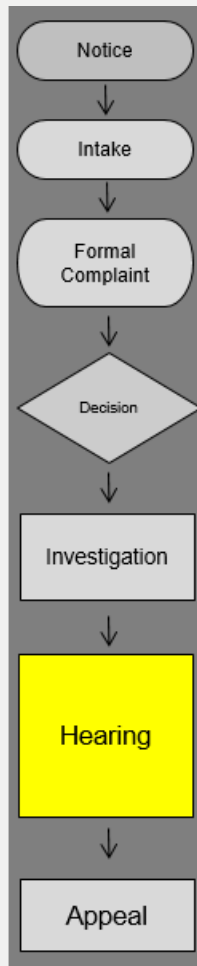
Exclusion of Statement

- 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

SANCTIONING

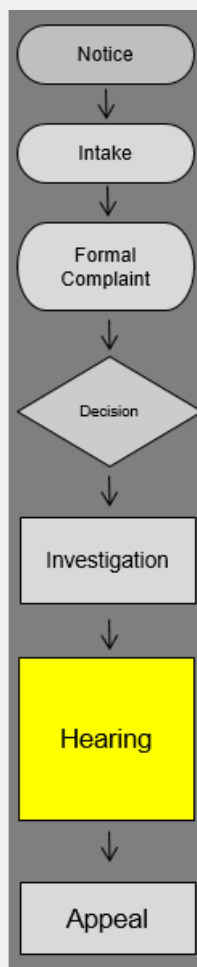
Sanctioning



- An equitable response for a respondent means 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.
- The grievance process must describe the range of possible disciplinary sanctions and remedies.

Title IX Regulations May 19, 2020 § 106.44 (a); § 106.45(b)(1)(vii) 85 F.R. 30575, 30395

Discretion in Sanctioning



- The Department does not wish to dictate to recipients the sanctions that should be imposed when a respondent is found responsible for sexual harassment as each formal complaint of sexual harassment presents unique facts and circumstances.
- As previously stated, the Department believes that teachers and local school leaders with unique knowledge of the school climate and student body, are best positioned to make disciplinary decisions.

Title IX Regulations May 19, 2020; Preamble 85 F.R. 30377, 30394

Educational Purpose

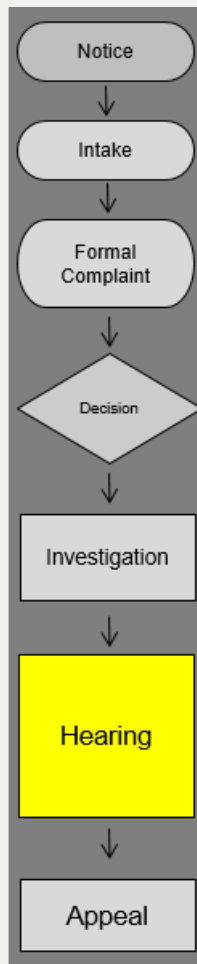


- Because the final regulations do not require particular disciplinary sanctions, the final regulations do not preclude a recipient from imposing student discipline as part of an “educational purpose” that may differ from the purpose for which a recipient imposes employee discipline.

Title IX Regulations May 19, 2020; Preamble 85 F.R. 30377, 30394

Appeal of Sanction

- The Department notes that under the final regulations, whether the parties can appeal based solely on the severity of sanctions is left to the recipient's discretion, though if the recipient allows appeals on that basis, both parties must have equal opportunity to appeal on that basis.



Title IX Regulations May 19, 2020; Preamble 85 F.R. 30397

TRAINING

Training

- A recipient must ensure that **Title IX Coordinators, investigators, decision-makers**, and any person who facilitates 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.

Use of Slides

- This PowerPoint presentation is not intended to be used as a stand-alone teaching tool.
- These materials are meant to provide a framework for informed discussion, not to provide legal advice regarding specific institutions or contexts.
- All rights are reserved to Cozen O'Connor.

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CHAT

Before we get started with the Pre-Conference, please familiarize yourself with your technical resources.

CONNECTING YOUR MICROPHONE

To connect your microphone, identify the Microphone Icon at the top of the screen and click on the drop-down menu. Once you connected, the icon should turn green. Please keep your mic muted at all times, unless you are speaking.


Meeting Layouts Pods Audio    

CONNECTING YOUR WEBCAM


To connect your webcam, identify the Camera Icon at the top of the screen and click on the drop-down menu. Once you connected, the icon should turn green. Please keep your webcam turned off at all times, unless you wish to have it on while speaking.

RAISING YOUR HAND TO BE CALLED UPON

To raise your hand, identify the icon at the top of the screen that looks like someone raising their hand. You can click on this same icon to lower your hand. In the same drop-down box, you can “agree,” “disagree,” “step away” anytime during the conference.




1



#aiTIXCoordinator

Pre-Conference Workshop: Basics for New Title IX Coordinators

VIRTUAL CONFERENCE | Monday, July 27, 2020



2

Pre-Conference Workshop: Basics for New Title IX Coordinators

Jeanine Bias-Nelson, MPA

Director of Institutional Diversity and Inclusion & Title IX Coordinator

Sam Houston State University

Monday, July 27, 2020

11:30 am - 3:00 pm EASTERN



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LEARNING OUTCOME

After participating...

... you will be able to comprehend and apply the essential responsibilities of a Title IX Coordinator in your new role.



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DEFINING YOUR COORDINATOR ROLE



5

BROAD DEFINITION OF TITLE IX COORDINATOR'S ROLE

The **Title IX Coordinator** is responsible for coordinating the recipient's responses to all complaints involving possible sex discrimination. This responsibility includes monitoring outcomes, identifying and addressing any patterns, and assessing effects on the campus climate.

[April 24, 2015 Dear Colleague Letter issued by the Office for Civil Rights](#)

TITLE IX



6

THE MANY “HATS” OF A TITLE IX COORDINATOR

1. Oversight of Title IX compliance and grievance process
2. Campus & Community Liaison
3. Training and Education
4. Policy Development and Implementation
5. Assess Campus Climate



SPECIFIC APPLICATIONS WITHIN “NEW RULE”

- Promptly respond to all reports of sexual harassment
- Gatekeeping responsibility for formal complaints
- Serve as facilitator through Grievance Process
- Ensure all university personnel with specific duties related to Title IX are appropriately trained, document completion, and publish record of training on designed website (including training materials)

SPECIFIC APPLICATIONS WITHIN “NEW RULE”

- Notification of Title IX Policy & Procedures to both current and potential members of the campus community
- Responsible for maintaining a record of all complaints, files, evidence, and other documents for a period of seven years

9



RESOURCE

Office for Civil Rights

<https://www2.ed.gov/about/offices/list/ocr/newsroom.html>

- [Title IX Regulations Addressing Sexual Harassment](#) (unofficial copy)
- [Title IX Regulations Addressing Sexual Harassment](#) (Federal Register)
- [Title IX: Fact Sheet: Final Title IX Regulations](#)
- [Title IX: U.S. Department of Education Title IX Final Rule Overview](#)
- [Title IX: Summary of Major Provisions of the Department of Education's Title IX Final Rule](#)
- [OCR Blog](#)

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POLICY FOUNDATION LEGAL REQUIREMENTS

Title IX

- Regulations
- DCLs

Clery

- Timely Warning
- Policy Definitions

VAWA

- Rights
- Procedural Requirements
- Training/ Programming

Other

- State Law
- FERPA

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YOUR INSTITUTIONAL POLICY AND PROCEDURES

- Comprehensive Institutional Policy
- Other related university policies
- Flowcharts
- Checklists
- Document templates



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POLICY CONSIDERATIONS

1. Where can you access the policy?
2. Is the policy reader-friendly for multiple audiences?
3. How often do you review the policy?
Opportunity for feedback?

15



RESOURCE

Policy Checklist

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 **QUESTIONS**

 17

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#aiTIXCoordinator

CASE MANAGEMENT

 18

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■ WHY IS CASE MANAGEMENT CRITICAL FOR TITLE IX COORDINATORS?



- Compliance
- Institutional Memory
- Clery Reporting
- State Law

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■ AGENDA

- I. Best practices for tracking cases
- II. Model checklist & timeline for case consistency and efficiency
- III. Sample Notice Letters for parties during cases
- IV. Developing your own case management log



20



POLL

**Do you currently have a
strategy for managing cases?**

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ACTIVITY



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ACTIVITY

From: Smith, Taylor
Subject: Fw: Makeup Request

Good morning Title IX Coordinator,

I just received this email from a student. I am not sure what to do. Please advise.

Dr. Smith

Forwarded Message -----

From: Johnson, Jayden
Subject: Makeup Assignment

Hey Dr. Smith,

I apologize for emailing you and not being in class lately, but is it possible to make up the exam from last week? I was assaulted in my dorm room the other day, had to go to emergency room, and then I was at the police station multiple times. I haven't been able to go back to my dorm, so my parents are picking me up today, and I don't know when I will feel comfortable coming back on campus.

Thanks for understanding!
Jayden



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ELEMENTS FOR TRACKING A CASE

- Receipt of Report
- Report Assessment
- Communicating with Parties
- Investigation/Resolution
- Case Oversight
- Case Completion/ Compliance



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RESOURCE

Case Management Log

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REPORT ASSESSMENT

Safety Concerns

- Threat to campus
- Individual safety

Reporting Obligations

- Clery
- State Law
- University Officials

Report Review

- Reporter Information
- Pattern

Additional Information

- Follow Up
- Other reporters?

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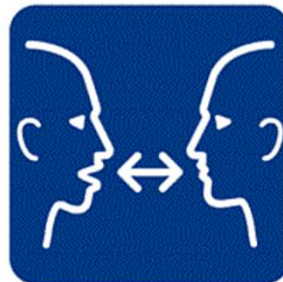
RESOURCE

Checklist Template

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COMMUNICATING WITH THE PARTIES

- Initial Contact with Complainant
 - Methods of Outreach
- What should the communication include
 - Purpose of communication
 - Rights
 - Resources
 - Policy
 - Request to meet
- Complainant response
 - Positive response
 - Negative response
 - No response



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COMMUNICATING WITH THE PARTIES

- Initial Contact with Respondent
 - Methods of Outreach
- What should the communication include
 - Purpose of communication
 - Rights
 - Resources
 - Policy
 - Request to meet
- Respondent response



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RESOURCE

Initial Communication Template

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COMMUNICATING WITH THE PARTIES

- Pre-Meeting
 - Location and set up
 - Technology
- Initial Meeting
 - Introduction
 - Rapport Building
 - Address Immediate Needs
 - Safety
 - Support/ Referrals
 - Academics
 - Intake Checklist
 - Gather additional information (if appropriate)
- Post-Meeting



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RESOURCE

Intake Checklist Template

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INVESTIGATION/RESOLUTION



- Support Services
- Informal Resolution
- Formal Investigation

33



RESOURCE

Sample Notice Letters & Sample Communication Log

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CASE OVERSIGHT

- Timeline
- Advisors
- Investigative Report Review
- Process Facilitator
 - Hearing
 - Appellate Process



35

CASE COMPLETION/COMPLIANCE

- Remedies
- Final Outcomes
- File Preservation



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BEST PRACTICES IN CASE MANAGEMENT

- Be organized
- Develop a process
- Seek assistance
- Utilize a case management system



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CHAT

What obstacles do you anticipate in case management as a result of implementing the “New Rule?”

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 QUESTIONS

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#aiTIXCoordinator

STRATEGIES TO LEAD TRAINING &
CAMPUS-WIDE PROGRAMMING EFFORTS

 40

40

AGENDA



- Compliance requirements
- Training plan
- Program plan
- Ongoing awareness campaign
- Marketing efforts

WHAT DO WE HAVE TO DO?

Each institution must develop and implement a comprehensive prevention and outreach program on sexual misconduct including but not limited, to sexual harassment, sexual assault, dating violence, and stalking. The comprehensive prevention and outreach program must address a range of strategies to prevent sexual misconduct, including sexual harassment, sexual assault, dating violence, and stalking. The program should include a public awareness campaign, primary prevention, bystander intervention, and risk reduction strategies.

-Violence Against Women's Act

WHAT DO WE HAVE TO DO?

- Training for Title IX Coordinators, Deputy Coordinators, Investigators, Decision Makers, and Appellate Authority
- Training for Responsible Employees
- NCAA Compliance Training for Athletics
- Primary Prevention Training
- Ongoing prevention programming
- State Law requirements?
- Other considerations?



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TRAINING YOUR TITLE IX TEAM

- Auditing your team's knowledge and skill level
- Identifying training gaps
- Internal training resources
- External training resources
- Cross training your team
- Your role as facilitator
- Self guided resources and training



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TRAINING FOR TITLE IX TEAM

- Critical Content
 - Definition
 - Bias
 - Stereotypes
 - Conflicts of Interest
 - Relevance
 - Credibility
 - Technology



45

TRAINING FOR RESPONSIBLE EMPLOYEES/CAMPUS AUTHORITIES

Delivery

- Who?
- When?
- How?
- Frequency?

Content

- Definitions
- Reporting Responsibilities
- Failure to Report
- Policy

46

NCAA COMPLIANCE

- Partnership with Athletics
- Timeframe
- Content



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PRIMARY PREVENTION TRAINING

Delivery

- Online
- In-person
- Alternatives

Content

- Length
- Definitions
- Policy
- Resources

Audience

- Incoming students
- Freshmen
 - Transfer
 - Graduate students

Completion Requirement

- Deadline
- Penalty

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QUESTIONS

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CHAT

**Who are your campus
collaborators when it comes
to Title IX programming
efforts?**

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ONGOING PREVENTION PROGRAMMING REQUIREMENTS

VAWA Amendments to Clery

6. **Programs to prevent dating violence, domestic violence, sexual assault, and stalking:** Comprehensive, intentional, and integrated programming, initiatives, strategies, and campaigns intended to end dating violence, domestic violence, sexual assault, and stalking that:
 - Are culturally relevant, inclusive of diverse communities and identities, sustainable, responsive to community needs, and informed by research or assessed for value, effectiveness, or outcome; and
 - Consider environmental risk and protective factors as they occur on the individual, relationship, institutional, community, and societal levels

Programs to prevent dating violence, domestic violence, sexual assault, and stalking include both primary prevention and awareness programs directed at incoming students and new employees and ongoing prevention and awareness campaigns directed at students and employees.
7. **Awareness programs:** Community-wide or audience specific programming, initiatives, and strategies that increase audience knowledge and share information and resources to prevent violence, promote safety, and reduce perpetration.
8. **Bystander intervention:** Safe and positive options that may be carried out by an individual or individuals to prevent harm or intervene when there is a risk of dating violence, domestic violence, sexual assault, or stalking;

Bystander intervention includes:

 - Recognizing situations of potential harm
 - Understanding institutional structures and cultural conditions that facilitate violence, overcoming barriers to intervening, identifying safe and effective intervention options, and taking actions to intervene
9. **Ongoing prevention and awareness campaigns:** Programming, initiatives, and strategies that are sustained over time and focus on increasing understanding of topics relevant to and skills for addressing dating violence, domestic violence, sexual assault, and stalking, using a range of strategies with audiences throughout the institution.
10. **Primary prevention programs:** Programming, initiatives, and strategies informed by research or assessed for value, effectiveness, or outcome that are intended to stop dating violence, domestic violence, sexual assault, and stalking before they occur through the promotion of positive and healthy behaviors that foster healthy, mutually respectful relationships and sexuality, encourage safe bystander intervention, and seek to change behavior and social norms in healthy and safe directions.

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ONGOING PREVENTION PROGRAM CONSIDERATIONS

Delivery

Who?
When?
How?
Frequency?

Collaborations

Victim Advocacy Centers
Health Center
Counseling Center
Academic Departments

Special Populations

Greek Life
Residence Life
Athletics
Others?

Topics

Consent
Bystander Intervention
Victim Empowerment
Risk Reduction Measures
Others?

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PROGRAM PLANNING ACTION PLAN

- 1) Create Comprehensive Program Goals
- 2) Content Development
- 3) Delivery
- 4) Campus-Wide Programming Vs Custom Programming
- 5) Budget



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BEST PRACTICES IN ONGOING PREVENTION PROGRAMMING

- Passive Marketing Campaign
- Training Peer Educators
- Calendar of Significant Events
 - Domestic Violence Awareness Month
 - Sexual Assault Awareness Month



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ONGOING PREVENTION PROGRAMMING



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ONGOING PREVENTION PROGRAMMING

Annual Calendar of Events:

- NOMC Take the Pledge Shirt Give-A-Way - August
- Consent Week - September
- NOMC Interest Meeting 1 - September
- NOMC New Member Orientation - September
- NOMC Interest Meeting 2 - October
- Domestic Violence Awareness Month Essay Contest September 30th - October 20th
- Domestic Violence Awareness Self Defense Training Class - October
- Bystander Intervention Training - November
- Healthy Relationships Workshop January
- Love is Love Week - February
- Alcohol & Spring Break Preparedness Training March
- Sexual Assault Awareness Month Events - (All Month Long in April)



ai ACADEMIC IMPRESSIONS 56

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ONGOING PREVENTION PROGRAMMING



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CHAT

What are your most successful programs to date?

What are your programming challenges or limitations?

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QUESTIONS

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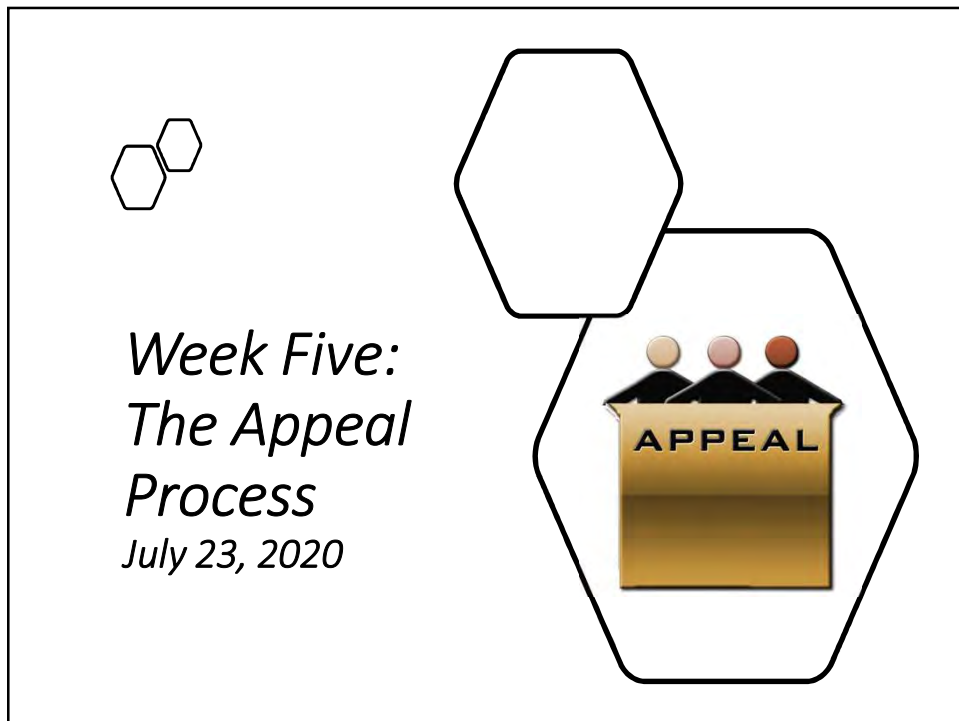
EVALUATION

Thank you!

Please remember to complete the event evaluation.
Your comments will help us continually improve the
quality of our programs.



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1

<h2>Welcome & Introductions</h2>		
<h3>Our Hopes...</h3>	<u>What this workshop is:</u>	<u>What this workshop is not:</u>
	<ol style="list-style-type: none">1. Unpack legal requirements2. Identify what needs to change in your policy3. Networking/discussion with colleagues/expert faculty	<ol style="list-style-type: none">1. Not legal advice2. Not a “how to” operationalize roles - focus is on integrating mandates into policy3. Not a “one-size-fits-all” given institutional context

2



Agenda:

1. Review appeal process in the final regulations for your policy
2. Question & Answer


3

CHAT

How do you like to participate in virtual learning environments? Let us know!

CONNECTING YOUR MICROPHONE

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RAISING YOUR HAND TO SHARE YOUR VOICE

If at any time during the event you'd like to say something using your mic, please raise your hand and the speaker/host will call on you. To raise your hand, identify the icon at the top of the screen that looks like someone raising their hand. You can click on this same icon to lower your hand.

ai ACADEMIC IMPRESSIONS

4

The Appeal Process

Cara Hardin, J.D.

Title IX Deputy Coordinator | Marquette University

cara.hardin@marquette.edu

Thursday, July 23, 2020

1:00 - 2:30 PM - Eastern



5

■ Appeal Process

§106.45(b)(8)

- The Final Regulations require an appeal process for two types of appeals:
 1. Appeal process for a determination regarding responsibility.
 2. Appeal process following a mandatory or discretionary dismissal of a formal complaint or an allegation contained in a formal complaint.
- Appeals must be equally available to both parties.




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Appeal Process


§106.45(b)(8)

For both types of appeals, a school 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 or the Title IX Coordinator;
 - Decision-maker(s) for the appeal can be a single Appeal Officer or an Appeal Panel.


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7



POLL

Who will conduct your appeals process?

8

8

■ Appeal Process

§106.45(b)(8)

- Ensure that decision-maker(s) for the appeal are free from a conflict of interest and bias, receive appropriate training, including anti-bias training, and otherwise comply with the requirements of §106.45(b)(1)(iii).
- Give both parties a reasonable and equal opportunity to submit a written statement in support of or challenging the responsibility determination or dismissal;
- Issue a written decision and rationale to both parties simultaneously.

■ Appeal Process

§106.45(b)(8)

The Final Regulations require *at least* three grounds for appeals:

- A. Procedural irregularity that affected the outcome;
- B. New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome; and
- C. The Title IX Coordinator, investigator(s), and/or Hearing Panelists had a conflict of interest or bias for or against Complainants or Respondents generally or the individual Complainant or Respondent that affected the outcome.

■ Appeal Process

§106.45(b)(8)

- Schools are permitted to include additional contents relating to the appeal process at their discretion.
- Schools may offer additional bases for appeal equally to both parties, such as to allow for an appeal on the severity or proportionality of the sanction. §106.45(b)(8)(ii).
- Allowing an appeal to challenge the remedies imposed is not necessary per OCR. (Preamble, p. 940 (Federal Register version)).



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■ Appeal Process

§106.45(b)(8)

- The parties should have access to the recorded hearing or hearing transcript before the time to appeal lapses.
- Schools should provide a reasonable timeframe for the appeal process.
 - The Final Regulations require that all schools include “reasonably prompt” timeframes for investigation and resolution, *including appeals*.
- The parties may have an advisor of their choice during the appeal process, who may or may not be an attorney.




12

■


Appeal Process

§106.45(b)(8)

- The written determination on responsibility and sanctions, if applicable, are postponed until the decision on the appeal is sent to the parties. §106.45(b)(7)(iii).
 - Keep supportive measures in place during appeal period to maintain status quo between the parties and ensure equal access to education.
 - Can revisit emergency removal if necessary.
- Appeal decision is final.




13



CHAT

What types of qualifications are you looking for when designating your appeal officer(s)?



14



QUESTIONS

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16

Appeal Procedure - Sample

1. Any party may appeal a determination regarding responsibility or a dismissal of part, or all of a formal complaint under the grounds set forth in Section ____ [insert grounds].
2. If no appeal is filed, or an appeal is not timely, the original finding will stand, effective on the date the appeal period expires.
3. The appeal procedures herein are implemented equally for all parties.
4. Supportive measures may be continued or reinstated by the Title IX Coordinator during the appeal process, as appropriate.



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Appeal Procedure - Sample

5. Upon delivery of the Notice of Outcome, both parties may submit an appeal to the Title IX Coordinator within 7 business days. Following receipt of a Notice of Dismissal, the parties may submit an appeal to the Title IX Coordinator within 2 business days.
6. An appeal must articulate the specific ground(s) for the appeal and provide a statement and/or evidence in support of or challenging the responsibility determination or dismissal decision.
7. The Title IX Coordinator will promptly confirm receipt of the appeal and notify the other party of the filing of the appeal by distributing a written Notice of Appeal to both parties.



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■ Appeal Procedure - Sample

8. The Title IX Coordinator will determine if the appeal is timely. If the appeal is timely, the Title IX Coordinator will:
 - a. Appoint an Appeal Officer to decide the appeal. The Appeal Officer is independent of the previous process, including from any dismissal appeal that may have been heard earlier in the process.
 - b. Provide the identity and contact information for the Appeal Officer to the parties.
 - c. If both parties submit appeals (i.e., cross-appeals or counter-appeals), the same Appeal Officer will decide both appeals individually, but contemporaneously. The same Appeal Officer will decide any appeals arising from the same facts and circumstances.



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■ Appeal Procedure - Sample

9. The parties shall have 24 hours to object to the appointment of the Appeal Officer, in writing, on bases of perceived bias or conflict of interest.
 - The bases of objection must be articulated in writing.
 - The Title IX Coordinator has the sole authority to determine whether to replace the Appeal Officer and that decision is final.
10. When the selection of the Appeal Officer is final, the Title IX Coordinator will provide the appeal to the Appeal Officer.



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■ Appeal Procedure - Sample

11. The parties are entitled to an advisor, who may or may not be an attorney during the appeal process.
12. The Appeal Officer will review the appeal and determine whether it articulates a valid ground or grounds for appeal pursuant to Section ____ of the Policy.
13. If an appeal does not articulate a valid ground or grounds for appeal, the Appeal Officer will dismiss the appeal, in writing, for failing to articulate a valid ground for appeal. The Title IX Coordinator will communicate the dismissal decision to the parties simultaneously.



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■ Appeal Procedure - Sample

14. If the Appeal Officer determines the appealing party has articulated valid grounds for appeal, the Appeal Officer will notify the parties simultaneously.
15. Following this notification, the non-appealing party has 2 business days to submit a written response to the appeal to the Appeal Officer, which will be provided to the appealing party.
16. The Appeal Officer may invite the investigator or Hearing Coordinator to submit a response to the appeal, which will be provided to the parties.
17. No further submissions related to the appeal are permitted.



22

■ Appeal Procedure - Sample

18. An appeal of a determination on responsibility is not a review of the entire matter; rather, it is an objective review of the written documentation related to the investigatory and hearing processes and record of the Hearing, along with the appeal-related submissions authorized herein.
19. Accordingly, the Appeal Officer will not interview, question, or meet with the parties or their advisors.



23

■ Appeal Procedure - Sample

20. The Appeal Officer is to defer to the original findings and determination, remanding only when there is clear reason to do so, and modifying the outcome and sanction(s) only when there is a compelling justification to do so.
21. The Appeal Officer may take one of three possible actions on appeal:
 - a) Dismiss the appeal for failure to meet the grounds of appeal, upholding the initial outcome and sanction(s), if applicable.
 - b) Remand to the original investigator or hearing panel with specific instructions on the remanded issue(s).
 - c) Modify the outcome and/or sanction with a rationale supporting the modification.



24

Appeal Procedure - Sample

22. The Appeal Officer will generally render a written decision on the appeal, as to each ground raised, and rationale for the decision, within five (5) business days from receipt of the appeal, absent exigent circumstances.
23. The Title IX Coordinator will simultaneously forward the Appeal Officer's written decision to the parties.
24. The Appeals Officer's decision is final and there are no further appeal options.



25

Appeal Procedure - Sample

25. If a sanction imposed in the original determination remains, the Title IX Coordinator will coordinate the implementation of the sanction. The Title IX Coordinator will also coordinate and implement the remedies owed to the Complainant and implement any other long-term support measures, as necessary.

####



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ACTIVITY

The Complainant filed a formal complaint alleging that the Respondent fondled the Complainant in a dorm room on campus. The parties completed the grievance process pursuant to § 106.45 and the Hearing Panel found the Respondent responsible for fondling and issued a sanction of probation.

The Complainant submitted a timely appeal stating the following:

*Dear Title IX Coordinator,
I am appealing the Respondent's sanction because it is too lenient. The Respondent should be expelled.*

How do you proceed under your policy?



27



ACTIVITY

Following a determination of responsibility where the sanction imposed on the Respondent was probation, the Respondent submitted an appeal on day 5 claiming decision-maker bias toward male respondents resulted in a harsher sanction than is appropriate under the circumstances.

After the Complainant is notified and provided a copy of the Respondent's appeal, the Complainant files their own appeal on day 7 that fails to articulate a bases for appeal, but claims a harsher sanction than probation was warranted.

The University requires appeals to be filed by the parties within 5 business days upon receipt of the Notice of Outcome.

How do you proceed under your policy?



28



ACTIVITY

A Complainant filed a formal complaint against a Respondent where the Complainant alleged that the Respondent engaged in hostile environment sexual harassment.

After the Title IX Coordinator met with the Complainant to discuss the specific allegations for purposes of the Notice of Allegations, the Title IX Coordinator determined that the alleged conduct did not constitute Title IX Sexual Harassment as defined in § 106.30. Accordingly, the Title IX Coordinator dismissed the formal complaint pursuant to the mandatory dismissal provision in the Final Regulations and provided the dismissal and rationale for the dismissal to both parties.

(con't to next page)



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ACTIVITY

Upon dismissal of the formal complaint, the Complainant immediately refiled the complaint against the Respondent with Student Conduct alleging General Harassment, an offense under the Conduct Code.

The Respondent then appealed the Title IX Coordinator's dismissal on the bases of "procedural irregularity that affected the outcome of the case" and asked that the formal complaint be reinstated as Title IX Hostile Environment Sexual Harassment.

Why would a Respondent want the formal complaint reinstated as Title IX Sexual Harassment opposed to going through the Student Conduct Process on the claim of General Harassment?

How do you proceed under the policy?



30



CHAT

Let's Chat!

Since we successfully completed five out of the six workshop series, let's use this time to hear from you!

- What questions remain?
- What feels uncertain?
- Do you feel like you're progressing towards successful revision of your policy? Why or why not?

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QUESTIONS

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RESOURCE

Office for Civil Rights

<https://www2.ed.gov/about/offices/list/ocr/newsroom.html>

- [Title IX Regulations Addressing Sexual Harassment](#) (unofficial copy)
- [Title IX Regulations Addressing Sexual Harassment](#) (Federal Register)
- [Title IX: Fact Sheet: Final Title IX Regulations](#)
- [Title IX: U.S. Department of Education Title IX Final Rule Overview](#)
- [Title IX: Summary of Major Provisions of the Department of Education's Title IX Final Rule](#)
- [OCR Blog](#)



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EVALUATION

Thank you!

Please remember to complete the event evaluation.
Your comments will help us continually improve the
quality of our programs.


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34

34



*Week Four:
The Hearing
Process and
Disciplinary
Sanctions*

July 9, 2020

1

Our
Hopes...

Welcome & Introductions


What this workshop is:

1. Unpack legal requirements
2. Identify what needs to change in your policy
3. Networking/discussion with colleagues/expert faculty

What this workshop is not:

1. Not legal advice
2. Not a “how to” operationalize roles - focus is on integrating mandates into policy
3. Not a “one-size-fits-all” given institutional context


2



Agenda:

1. The hearing process and disciplinary sanctions within the Final Regulations
2. Questions from Attendees after each major section

3





CHAT

Please let us know how you wish to participate in this virtual learning environment.


CONNECTING YOUR MICROPHONE

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Meeting
Layouts
Pods
Audio



RAISING YOUR HAND TO SHARE YOUR VOICE

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The Hearing Process and Disciplinary Sanctions

Cara Hardin, J.D.

Title IX Deputy Coordinator | Marquette University

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Thursday, July 9, 2020

1:00 - 2:30 PM - Eastern



5

Addressing the Hearing Process in the Policy

- Straight forward
- Easy to understand
- Transparent

a. Hearing Process

The hearing process is as follows:

- The Title IX Coordinator will appoint a three-member Hearing Panel from a pool consisting of trained faculty, staff, and/or outside experts to hear the case and determine the outcome. The panel will consist of a Hearing Coordinator, who will run the hearing, and two panelists. All three panelists are voting members for purposes of deliberation.
- The Title IX Coordinator will issue a Notice of Hearing to the Complainant and Respondent that provides the names of the hearing panelists. Within 24 hours of receipt of the notice, either party may assert to the Title IX Coordinator, in writing, that a panelist has a conflict of interest or perceived bias. If the Title IX Coordinator determines that such a conflict or bias exists, the Title IX Coordinator will replace that panelist with an alternate. The Title IX Coordinator's determination is final.
- The Title IX Coordinator will coordinate with the panelists and parties to schedule a date and time for the Hearing. The parties are provided at least 10 days' notice prior to the convening of the Hearing.
- The Hearing Panel will review the Investigative Report, along with the relevant evidence relied upon within the Investigative Report, prior to the hearing.
- The Title IX Coordinator will arrange for all named witnesses, including the investigator, to be available for the hearing at prearranged times. Should the name of an individual arise at the hearing who was not previously disclosed during the investigation process, the Hearing Coordinator may temporarily adjourn the Hearing and request that the investigator interview the witness and provide the interview summary/transcript to the parties before reconvening the hearing, or continue the hearing and invite the witness to appear and submit to questions from the Hearing Panel and the parties advisors.
- Hearings are audio recorded and will be made available to either party by request. The Hearing Panel's deliberations are not recorded.
- Hearings are not open to the public.
- If either the Complainant, Respondent, or witnesses fail to appear, the Hearing will continue as scheduled, unless for good cause the Hearing Coordinator determines otherwise.
- The Complainant and Respondent will be able to view the testimony of each other and witnesses virtually. Witnesses will not be present for or hear the testimony of the parties or other witnesses. The parties will not be permitted in the same room during the course of the hearing, but video of the hearing will be streamed in real time to the room where the party who is not being questioned is located.

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Pre-hearing process

The Title IX Coordinator (or designee) will:

- Appoint decisionmaker(s) - hearing officer/hearing panel.
 - Explain who these decisionmaker(s) will be (i.e., faculty, staff, students, outside experts, etc.)
- Decisionmaker(s) must be free of bias and conflict of interest. §106.45(b)(1)(iii)
- Ensure decisionmaker(s) receives training on (§106.45(b)(1)(iii)):
 - Any technology to be utilized at the live hearing.
 - On issues of relevance of questions and evidence.



7

Pre-hearing process

The Title IX Coordinator (or designee) will:

- Provide written “Notice of Hearing” to the parties and include date, time, location, participants (including witnesses), purpose of the hearing with sufficient time for the parties to prepare (at least 10 days). §106.45(b)(5)(v)
- Allow both parties at least 24 hours to object to decisionmaker(s) in writing on grounds of perceived bias or conflict of interest.
 - Grounds of objection must be articulated in the writing. Title IX Coordinator decides whether to replace decision maker.



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■ Pre-hearing process

The Title IX Coordinator (or designee) will:

- Provide decisionmaker(s) and parties/advisors the Investigative Report and all “relevant” evidence relied upon within the Investigative Report and the parties’ responses thereto.
 - At least 10 days prior to the hearing. §106.45(b)(5)(vii)
- Arrange for all named witnesses, including investigator, to be available for the hearing at prearranged times.
- Ensure all participants are trained on the technology to be utilized during the hearing.



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■ Pre-hearing process

The Title IX Coordinator (or designee) *may*:

- Coordinate a virtual pre-hearing conference for Hearing Officer or Chair of Hearing Panel and parties/advisors (optional).
- Hearing Officer/Chair will:
 - Hear and rule on any evidentiary challenges raised by parties
 - Review any pre-submitted cross-examination questions for relevance (optional for parties to pre-submit)
 - Conduct overview of rules and procedures for the hearing
 - Answer hearing process-related questions
 - Address requests for an accommodation due to a disability
 - Test technology



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Conflicts of Interest and Biases

- Decisionmaker(s) must not have a conflict of interest or bias:
 - For or against complainants or respondents generally, or
 - An individual complainant or respondent.

§106.45(b)(1)(iii)

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Conflicts of Interest and Biases

- Examples of potential conflicts of interest:
 - Decisionmaker is faculty advisor for one of the parties.
 - Decisionmaker is friends with one of the party's parents/relatives.
 - Decisionmaker ruled on one of the party's academic appeals relating to an academic integrity issue.
 - Decisionmaker investigated/disciplined a party for non-Title IX conduct.

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■ Conflicts of Interest and Biases

- Harmful/unlawful biases can be unconscious.
 - Unconscious bias is a person's preferences for objects and people at a subconscious level that unintentionally influence their behavior and decision making.
- How to recognize biases that impermissibly impact a determination:
 - Pre-judgment of the facts; pre-determined outcome
 - Partisan approach by decisionmaker in their questioning of the parties
 - Improper application of hearing procedures
 - Application of sex stereotypes



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■ Conflicts of Interest and Biases

- The key is for a Title IX Coordinator to recognize any potentially harmful biases of decisionmaker(s) before a hearing.
- Hearings must be based on evidence, not on personal beliefs about a complaint or the parties/witnesses involved.



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Conflicts of Interest and Biases

- The Final Regulations already provide some measures to prevent against conflicts of interest and potential biases that could inappropriately impact the outcome:
 - Separate the investigative and adjudication functions
 - Decisionmakers must be trained to serve impartially without prejudging the facts at issue
 - Require training materials that avoid sex stereotypes, including application of the rape shield protections.

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QUESTIONS

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Hearing Process

- Hearings must be “live.” §106.45(b)(6)(i)
- At the request of either party or in the school’s discretion, live hearing can occur with parties in separate rooms/locations. §106.45(b)(6)(i)
 - Hearings can be conducted virtually with participants in other geographic locations or on-campus.
- Must provide technology enabling the parties and decisionmaker(s) to simultaneously see and hear one another and any testifying witnesses. §106.45(b)(6)(i)
- Must record the hearing and provide the recording or transcript to the parties to review. §106.45(b)(6)(i)



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Hearing Process

- Parties must have an advisor for purposes of conducting cross-examination.
 - “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.” § 106.45(b)(6)(i).
- If an advisor refuses to cross-examine, Title IX Coordinator must appoint another advisor to do so. (Preamble, p.1186 (Federal Register version))



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■ Hearing process

- Party opening/closing statements optional.
- The decisionmaker(s) are permitted to ask questions directly to the parties and witnesses.
- The parties' advisors are permitted to cross-examine the other party and witnesses (decisionmaker(s) must first determine whether each question posed by an advisor is relevant before the witness answers). §106.45(b)(6)(i)
 - “Relevance” is the decisionmaker(s) only evidentiary threshold for admissibility or exclusion of questions and evidence. (Preamble, p. 1190 (Federal Register version)).



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■ Hearing process

- Decisionmaker(s) must enforce legally privileged information (i.e., Complainant's sexual history or behavior unless permitted by §106.45(b)(6)(i), and privileged information protected by federal law, unless person holding the privilege waives the privilege per §106.45(b)(1)(x)).
- If the decisionmaker(s) deems an advisor's question as not relevant, he/she/they must instruct the party/witness not to answer and verbally articulate why a question is not “relevant.” § 106.45(b)(6)(i))



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Hearing process

- The decisionmaker(s) will issue a written determination regarding responsibility, the rationale therefor and sanctions/remedies imposed, if applicable (within a specified timeframe). §106.45(b)(7)
- The timeframe for the hearing will depend upon how much evidence is involved, how many witnesses there are, and schedules of participants. The hearings can take one day to multiple days based on the foregoing.

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ACTIVITY

Fact pattern

A hearing is taking place for the adjudication of the Complainant's formal complaint alleging that the Respondent raped the Complainant in the Complainant's dorm room a year ago.

While the Respondent's advisor is virtually cross-examining the Complainant, half-way into the advisor's questions, the Complainant bursts into tears and is unable to stop sobbing. The Complainant then declines to participate further and leaves the room. The Complainant's advisor remains.

Respondent, seeing the reaction of the Complainant, also declines to participate further and leaves the room.

22



ACTIVITY

How should your policy address this situation (i.e., what options are available to the parties)?

23



QUESTIONS

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Cross-examination

§106.45(b)(6)

- Post-secondary schools are required by the Final Regulations to provide cross-examination opportunities at a live-hearing.
- A party's advisor conducts cross-examination of the other party and witnesses at the live hearing and never the parties. § 106.45(b)(6)(i).
- Cross-examination must occur directly, orally, and in real time. §106.45(b)(6)(i)
 - Written submission of questions is no substitute for live cross-examination.



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Cross-examination

§106.45(b)(6)

The objective for cross-examination under the Final Regulations:

- To allow parties to probe/challenge the credibility, plausibility and reliability of statements asserted by parties/witnesses.
- To give the decisionmaker(s) the opportunity to observe parties and witnesses answer questions, including those challenging credibility, to serve the truth-seeking purpose of an adjudication.
- To permit parties to pose questions intended to promote the asking party's perspective with respect to the allegations at issue and bring out additional facts and details about the alleged incident.



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■ Cross-examination §106.45(b)(6)

- Parties and witnesses must “submit to cross-examination” for their “statements” to be considered by the decisionmaker(s). §106.45(b)(6)(i)
 - “Statements” are intended assertions of fact. (Preamble p.1213 (Federal Register version))
 - “Statement” includes *any* statement made by a party or witness throughout the investigation, and statements made to the other party and witnesses during/around the alleged incident.
- “Submit to cross-examination” means answering those cross-examination questions that are relevant. (Preamble p.1213 (Federal Register version))



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■ Cross-examination §106.45(b)(6)

- Schools can adopt rules within the hearing process to ensure cross-examination is performed in a respectful and non-abusive manner.
 - Examples of questioning that may be harassing or abusive:
 - Advisor yells or screams at the other party/witness
 - Advisors stands and physically leans into the party/witness' personal space.
 - Advisor asks questions in a manner designed to promote rape myths or sex-based stereotypes.



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■ Cross-examination §106.45(b)(6)

- Decisionmaker(s) must not rely on the statement of a party or witness who does not submit to cross-examination, resulting in exclusion of statements that remain untested by cross-examination.
- Decisionmaker(s) must not draw any inferences based on a party's failure to appear or submit to cross-examination.
§106.45(b)(6)(i)

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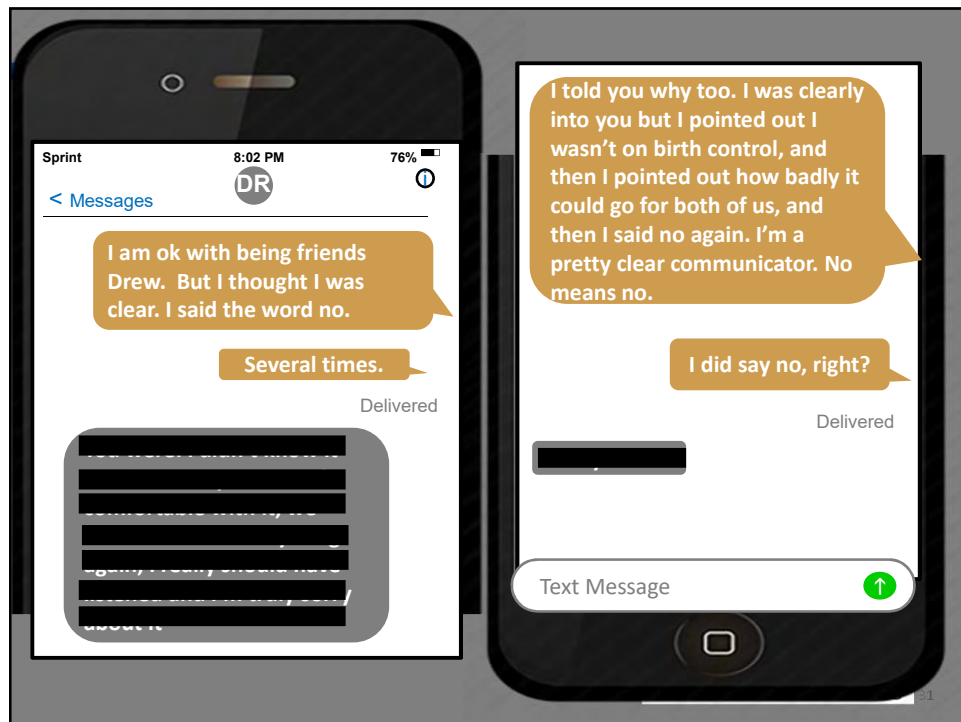


ACTIVITY

Consequence when a party or witness does not submit to cross-examination

Text messages

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■ Hearing Role of Advisor §106.45(b)(6)(i)

- The parties are entitled to have an advisor of their choice at the hearing, who may or may not be an attorney, to conduct cross-examination. §106.45(b)(2)(B).
 - Only one advisor/support person permitted at the hearing for each party, unless otherwise required by law. (Preamble, p. 1177-1178 (Federal Register version))
- Restrictions may be established regarding extent of advisor's participation in the hearing, as long as restrictions provided equally to both parties.



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■ Hearing Role of Advisor §106.45(b)(6)(i)

Example of a restricted advisor role that may be imposed:

- Advisor acts as party's proxy during hearing; is not "representing" the party (Final Regulations preamble, p.1180, 1187 (Federal Register version))
 - "...the requirement for a party's advisor to conduct cross-examination need not be more extensive than simply relaying the party's desired questions..." (Preamble, p.1028 (Federal Register version))



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■ Role of Advisor at the Hearing

§106.45(b)(6)(i)

Example of a broader advisor role that may be permitted:

- Advisor serves to “represent” their party.
 - “A recipient may, but is not required to, allow advisors to ‘represent’ parties during the entire live hearing (or, for that matter, throughout the entire grievance process).” (Preamble, p. 1186-1187 (Federal Register version))
 - “Representation” could allow advisors to raise objections to questions asked and evidentiary rulings by decisionmaker(s), argue their party’s position, instruct party not to answer a question, conduct direct examination of their party and witnesses in addition to cross-examination, etc.



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QUESTIONS



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■ Decisionmaker(s) Determination

- Decisionmaker(s) can deliberate right after the hearing, or at another date soon after the hearing.
- Decisionmaker(s) must objectively evaluate of all relevant evidence (inculpatory and exculpatory) and arrive at a finding of “responsible” or “not responsible” as to each allegation utilizing the preponderance of the evidence/clear and convincing standard of proof.

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■ Decision and rationale §106.45(b)(7)

- Decisionmaker(s) will provide the decision and rationale for the decision in writing.
- Where credibility of the parties is an issue in determining preponderance of the/clear and convincing evidence, the rationale will include an explanation of how the decisionmaker(s) resolved questions of credibility.
 - Credibility determinations will not be based upon a person’s status as Complainant or Respondent.

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■ Decision and rationale §106.45(b)(7)

The written decision must include:

- The allegations of sexual harassment
- A description of the procedural steps taken from receipt of the formal complaint through determination (notifications to parties, interviews with parties and witnesses, etc.)
- Findings of fact supporting the determination (what happened?)

39

■ Decision and rationale §106.45(b)(7)

- Conclusions regarding the application of the policy to the facts (utilizing chosen standard of proof)
- The result of each allegation (responsible or not responsible), and rationale for it.
- If finding of responsibility, decision must include the disciplinary sanction imposed, and remedies to preserve/restore equal access for the Complainant.
- Provide process and permissible grounds for appeal (both parties have right to appeal)

40



QUESTIONS

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■ Disciplinary Sanctions

- Schools must either “*describe the range of*” or “*list the possible*” disciplinary sanctions available under the grievance process.
- Disciplinary sanctions are imposed on a case-by-case basis and depend upon a variety of circumstances, including the severity and/or pervasiveness of the violation.
- Avoid arbitrary, disproportionate, or inconsistent disciplinary sanctions.

42

■ Disciplinary Sanctions

- While not required by the Final Regulations, if decisionmaker(s) is to consider certain factors when arriving on an appropriate sanction, list the factors for consideration in the policy. For example:

“In determining the appropriate sanction(s), the University must examine and consider a number of factors, including, but not limited to: 1) level of risk or harm to the community; 2) the nature and seriousness of the offense; 3) use of drugs or alcohol in the perpetration of the violation; 4) motivation underlying the Respondent’s behavior; 5) the Respondent’s record of past misconduct, including prior violations of the same or similar type.”



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■ Disciplinary Sanctions

- The range of disciplinary sanctions for students, faculty, and staff should, at a minimum, mirror the available sanctions within the school's:
 - Student conduct code
 - Employee handbook
 - Faculty handbook/statutes
- School has discretion to tailor disciplinary sanctions to address specific situations.
 - May use the disciplinary process as an educational tool rather than a punitive tool due to wide discretion to utilize informal resolution processes. (Preamble, p. 272 (Federal Register version))



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Disciplinary Sanctions

Examples of *possible* Student sanctions:

- Warning
- Probation
- Suspension (results in transcript notation)
- Expulsion (results in transcript notation)
- Withholding Diploma
- Withholding Degree
- Other Actions, including limitations on residential or co-curricular engagement such as removal from or limitations on access to a specific residence hall, or a co-curricular program.



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Disciplinary Sanctions

Examples of *possible* employee/staff sanctions:

- Corrective counseling including but not limited to warning through termination
- Behavioral Improvement Plan
- Referral to the Employee Assistance Program
- Required training or education
- Suspension without pay
- Suspension with pay
- Termination



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Disciplinary Sanctions

Examples of possible faculty sanctions:

- Corrective counseling
- Written warning
- Written reprimand
- Loss of prospective benefits for a stated period (for instance, suspension of "regular" or "merit" increase in salary or suspension of promotion eligibility)
- Reassignment of duties
- Suspension without pay
- Suspension with pay
- Tenure non-renewal
- Termination of employment



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RESOURCE

OCR's position on having a separate decisionmaker for determining responsibility and for the imposition of disciplinary sanctions

May have separate decisionmakers for determination and sanction (e.g., a tenure committee), but it cannot be a piecemeal process that is broken down into chronologically occurring subparts.

The written decision issued to the parties must include the determination on responsibility AND disciplinary sanction (if Respondent found responsible.) § 106.45(b)(7)(ii)(E)

Schools should remain aware of their obligation to conclude the grievance process within the reasonably prompt timeframes designated in the school's grievance process.



48



RESOURCE

OCR's position on separate decisionmaker for responsibility and imposition of disciplinary sanctions

Sample resource from Series 2

This policy does not provide a right to a separate decisionmaker for a tenured faculty member. To the extent that a faculty member's rights accompany a faculty member's tenure, the outcome of a disciplinary proceeding results in a sanction calling for separation/termination from the university, a recommendation made to the President of the University to pursue the separation.

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CHAT

How will your policy address this potential conflict with employee contracts and desired policy?

50



RESOURCE

OCR on at-will or contractual employment agreements relating to employee misconduct:

“...[R]ecipients of Federal financial assistance agree to comply with Title IX obligations as a condition of receiving Federal funds. Recipients’ contractual arrangements with employees must conform to Federal law, as a condition of receipt of Federal funds.” (Preamble, p. 1296 (Federal Register version))

51

Remedies

- If a respondent is found responsible, the complainant is entitled to remedies designed to preserve or restore equal access to the school’s education program and activity. §106.45(b)(1)(i).
- Schools must provide all students, faculty and staff a clear understanding of *possible* or a *range of* remedies available under the grievance process. §106.45(b)(1)(i).
- Remedies can be the same as or similar to the “support measures” listed in the policy, but do not need to be non-disciplinary or non-punitive and do not need to avoid burdening a respondent.

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Remedies

Examples of *possible* remedies:

- Counseling
- Extensions of deadlines or other course-related adjustments
- Modifications of work or class schedules
- Campus escort services
- Mutual/individual restrictions on contact between the parties
- Changes in work or housing locations
- Leaves of absence
- Increased security and monitoring of certain areas of campus
- “Other similar measures”

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QUESTIONS

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Hearing Rules and Procedures



55

Hearing Rules and Procedures

- The Final Regulations allow universities to proscribe rules and procedures for the hearing.
- Hearing rules and procedures should accurately illustrate the format and operation of the hearing for the involved participants.
- Recommend a link to the Hearing Rules and Procedures in the policy.
- The following provides a “sample” Hearing Rules and Procedures.

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■ Hearing Rules and Procedures

- The hearing will begin at the pre-scheduled time provided in the Notice of Hearing/email/etc.
- Prior to the start of the hearing, the parties and their advisors will report to their individually assigned private conference rooms in the student union. The Hearing Panel will be in a separate conference room nearby.
- The parties and advisors will have access to technology to enable them to see and hear one another and the Hearing Panel in real-time.
- The hearing will be recorded, and the parties will be provided with the recording or a transcript thereof to review within 5 days after the conclusion of the hearing.



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■ Hearing Rules and Procedures

- At the prescheduled time, the Hearing Panel Chair will convene the hearing by virtually connecting the Hearing Panel with the parties and their advisors.
- The Hearing Panel Chair will provide to the parties and their advisors a brief overview of the hearing process and expectations for participants' conduct.
- The parties and their advisors must agree to abide by those expectations or risk removal from the hearing. If an advisor is removed for failure to abide by the hearing rules, the hearing will continue after a new advisor is appointed by the university, who may or may not be an attorney.



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■ Hearing Rules and Procedures

- The Complainant and Respondent must each be accompanied by one advisor, unless required by law, who may or may not be an attorney, for the purpose of cross-examining (i.e., questioning) the other party and witnesses.
 - If a party does not choose an advisor or the chosen advisor becomes unavailable, the school will appoint an advisor for the party, who may or may not be an attorney.
- If a party's advisor is also a witness, the party may have an alternative advisor temporarily step-in to question the advisor/witness.

■ Hearing Rules and Procedures

- The purpose of allowing the parties, through their advisors, to question the other party and witnesses is to permit the parties:
 - To probe the credibility, plausibility and reliability of statements asserted by parties/witnesses, and
 - Provides an opportunity to bring out additional facts and details about the alleged incident(s).
- Advisors must engage in questioning that is relevant, respectful, non-intimidating and non-abusive.

■ Hearing Rules and Procedures

- If the Complainant, Respondent, or a witness fails to appear or stops participating before the conclusion of the hearing, the hearing will continue as scheduled, unless the Hearing Panel determines otherwise for good cause (define “good cause”).
- Once the hearing begins, the hearing will continue to completion except for breaks and other adjournments administered by the Hearing Panel. The hearing must not be unnecessarily delayed once it has begun.
 - Should a party or advisor leave their room without first requesting a break, the hearing will continue.



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■ Hearing Rules and Procedures

- The Hearing Panel shall:
 - Facilitate the hearing,
 - Ask questions of the parties and witnesses,
 - Verbally exclude non-relevant questions and testimony.
- Examples may include immaterial, extraneous, or unduly repetitious questioning or testimony, prior bad acts unrelated to the alleged incident(s), information regarding a party’s character.



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Hearing Rules and Procedures

- Take reasonable steps to maintain order and decorum, and
 - Includes ability to oversee advisor questioning in a manner that avoids aggressive, abusive questioning of any party or witness.
- Observe recognized legal privileges, such as:
 - Questions and evidence about the Complainant’s sexual history or behavior are not permitted, unless asked offered to prove that someone other than Respondent committed the conduct, or to prove consent.
 - Privileged information protected under HIPAA, FERPA, or any other federal law, unless a written waiver from the owner of the privilege is provided.



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Hearing Rules and Procedures

- The advisor’s role within the hearing is limited.* Complainants and Respondents are expected to respond to questions from the Hearing Panel and the other party’s advisor on their own behalf.
- The parties and their advisors may consult in private during the hearing, but not while a question is pending.
- The role of the advisor is to relay their party’s desired questions to be asked of the other party and witnesses.
- Advisors are not permitted to raise objections to questions posed by the other party’s advisor, argue in support of their party’s position, or otherwise “represent” the party at the hearing.

**example of a very limited advisor role.*



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■ Hearing Rules and Procedures

- The Hearing Panel will question the Complainant, Respondent, and witnesses directly.
- The Complainant and Respondent are prohibited from questioning each other and witnesses directly; rather, they must do so through their advisors.

■ Hearing Rules and Procedures

- The advisors will ask questions in the following manner: The advisors will pose each question verbally to the Hearing Panel Chair, who will determine whether the question is relevant.
 - If the Chair deems the question relevant, the Chair will instruct the party or witness to answer the question.
 - If the Chair deems the question as not relevant, the Chair will instruct the party or witness not to answer the question and provide an explanation for the decision.
- A question is “relevant” if it seeks an answer that has the tendency to make the existence of any fact that is of consequence to the determination more or less probable than it would be without it.

Hearing Rules and Procedures

- The Chair's decision on whether a question is relevant is final.
- The parties (accompanied by their advisors) and witnesses will testify in the same room as the Hearing Panel, or virtually at the Hearing Panel's discretion.
- The Complainant and Respondent will be able to view the testimony of each other and witnesses virtually.
- Witnesses will not be present for or hear the testimony of the parties or other witnesses.



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Hearing Rules and Procedures

- The questioning of the parties and witnesses will *generally* take place as follows:
 - The Hearing Panel will ask the Complainant questions first, while the Respondent may view the hearing virtually. The Respondent's advisor may then ask questions of the Complainant.
 - The Hearing Panel will next address the Respondent in the same format as the Complainant. The Complainant's advisor may then ask questions of the Respondent.
 - The Hearing Panel will next question each witness. After the Hearing Panel questions a witness, the Complainant and then the Respondent's advisors may ask questions of the witness.



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■ Hearing Rules and Procedures

- If a party or witness fails to submit to questioning from a party's advisor, the Hearing Panel may not rely on that individual's prior statements to the investigator or statements made by the individual within the relevant evidence before the Hearing Panel.
- If a party or witness fails to submit to questioning from a party's advisor, the Hearing Panel may not draw an inference about the decision regarding responsibility based solely on a party's or witness's absence from the live hearing or refusal to answer questions.

■ Hearing Rules and Procedures

- The parties and their advisors will return to their respective rooms after testifying before the Hearing Panel.
- Witnesses are permitted to leave the premises after testifying but remain available for re-call.
- If necessary, the Hearing Panel may recall the Complainant, Respondent, or any witness for further questioning.

■ Hearing Rules and Procedures

- Should the parties or Hearing Panelists wish to hear from a witness at the hearing who was not previously disclosed during the investigation process, the Hearing Chair may temporarily adjourn the hearing and request that the investigator interview the witness and provide the interview summary/transcript to the parties before reconvening the hearing, or continue the hearing and invite the witness to appear and submit to questions from the Hearing Panel and the parties advisors, if the testimony from that witness is relevant.
- The Hearing Panel shall have discretion whether to allow evidence to be presented at the hearing that was available during the investigatory process.



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■ Hearing Rules and Procedures

- Each party, speaking on their own behalf, shall have 5 minutes to provide a closing statement. The Complainant will speak first followed by the Respondent.
- The Hearing Panel Chair will adjourn the hearing.
- The Hearing Panel has 10 business days to objectively evaluate and weigh the relevant evidence, both inculpatory and exculpatory, to determine the outcome. A majority vote is required for an outcome.
- The Title IX Coordinator will distribute the Hearing Panel's determination to the parties simultaneously through Maxient.



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QUESTIONS

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RESOURCE

Office for Civil Rights

<https://www2.ed.gov/about/offices/list/ocr/newsroom.html>

- [Title IX Regulations Addressing Sexual Harassment](#) (unofficial copy)
- [Title IX Regulations Addressing Sexual Harassment](#) (Federal Register)
- [Title IX: Fact Sheet: Final Title IX Regulations](#)
- [Title IX: U.S. Department of Education Title IX Final Rule Overview](#)
- [Title IX: Summary of Major Provisions of the Department of Education's Title IX Final Rule](#)
- [OCR Blog](#)

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EVALUATION

Thank you!

Please remember to complete the event evaluation.
Your comments will help us continually improve the
quality of our programs.

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The New Title IX Regulations: Investigations & Evidentiary Considerations

Presented By:

The Institutional Response Group | Cozen O'Connor

Gina Maisto Smith, Chair

Leslie Gomez, Vice Chair

July 13, 2020



Today's Webinar

- Following an introductory webinar, “A First Look at the New Title IX Regulations,” this is the fourth in a series of webinars focusing on implementation.
- This webinar will:
 - Examine the prescriptive requirements of the final Title IX regulations related to investigations
 - Discuss evidentiary considerations
 - Directly related to the allegations
 - Relevant evidence
 - Privileged information
 - Outline effective investigation protocols

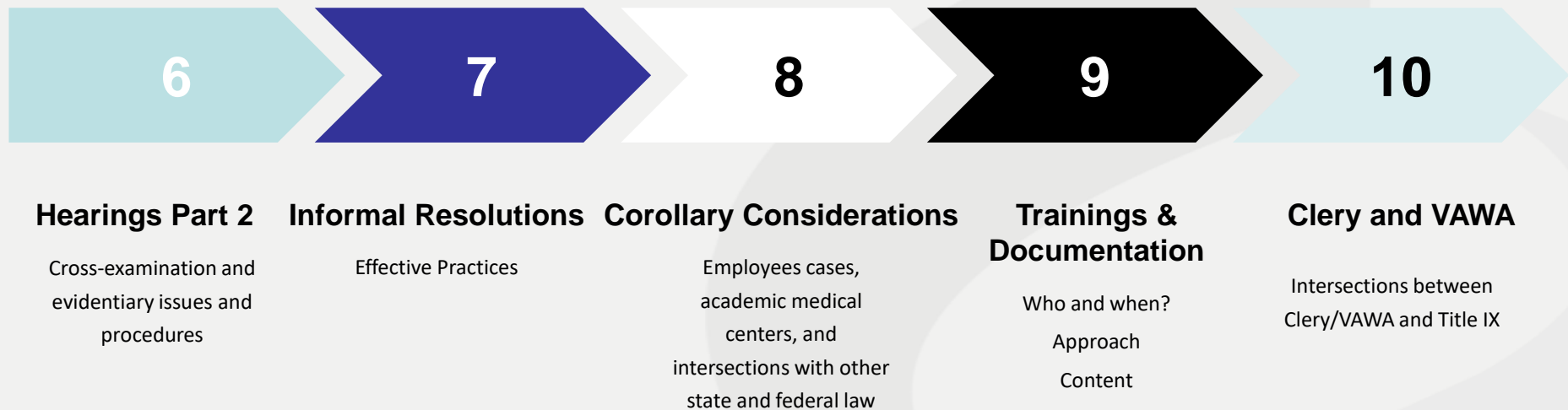
Introducing the Webinar Series

Subsequent IRG webinars will focus on specific aspects of the regulations, as written and as applied, including:



Introducing the Webinar Series

Subsequent IRG webinars will focus on specific aspects of the regulations, as written and as applied, including:



Institutional Response Group



Gina Maisto Smith
Cozen O'Connor



Leslie Gomez
Cozen O'Connor



Maureen P. Holland
Cozen O'Connor



Devon Turner Riley
Cozen O'Connor



Michael Stackow
Cozen O'Connor



Helen Park
Cozen O'Connor



Adam M. Shapiro
Cozen O'Connor



Peter C. Lim
Cozen O'Connor



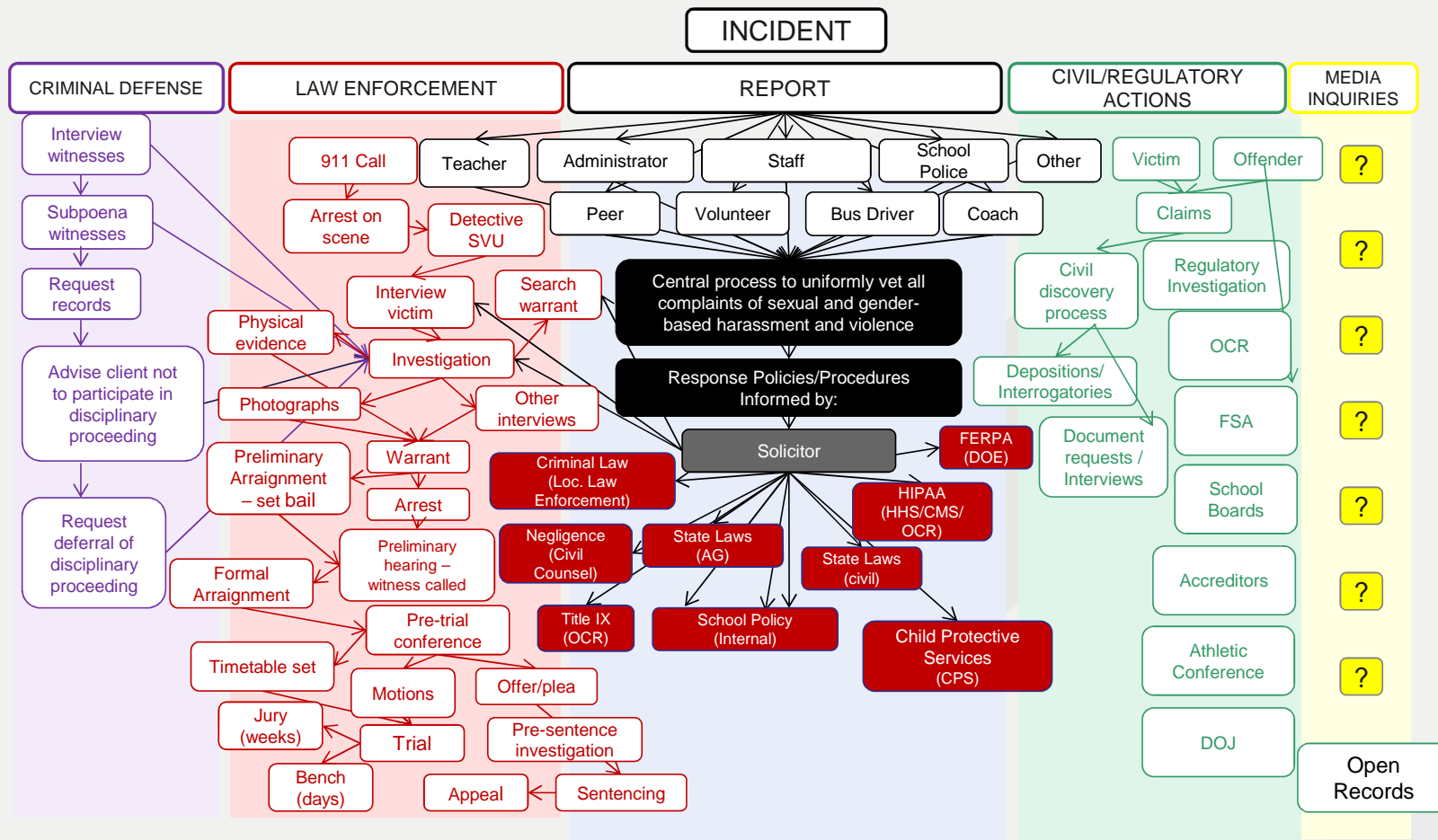
Joseph A. Tate, Jr.
Cozen O'Connor



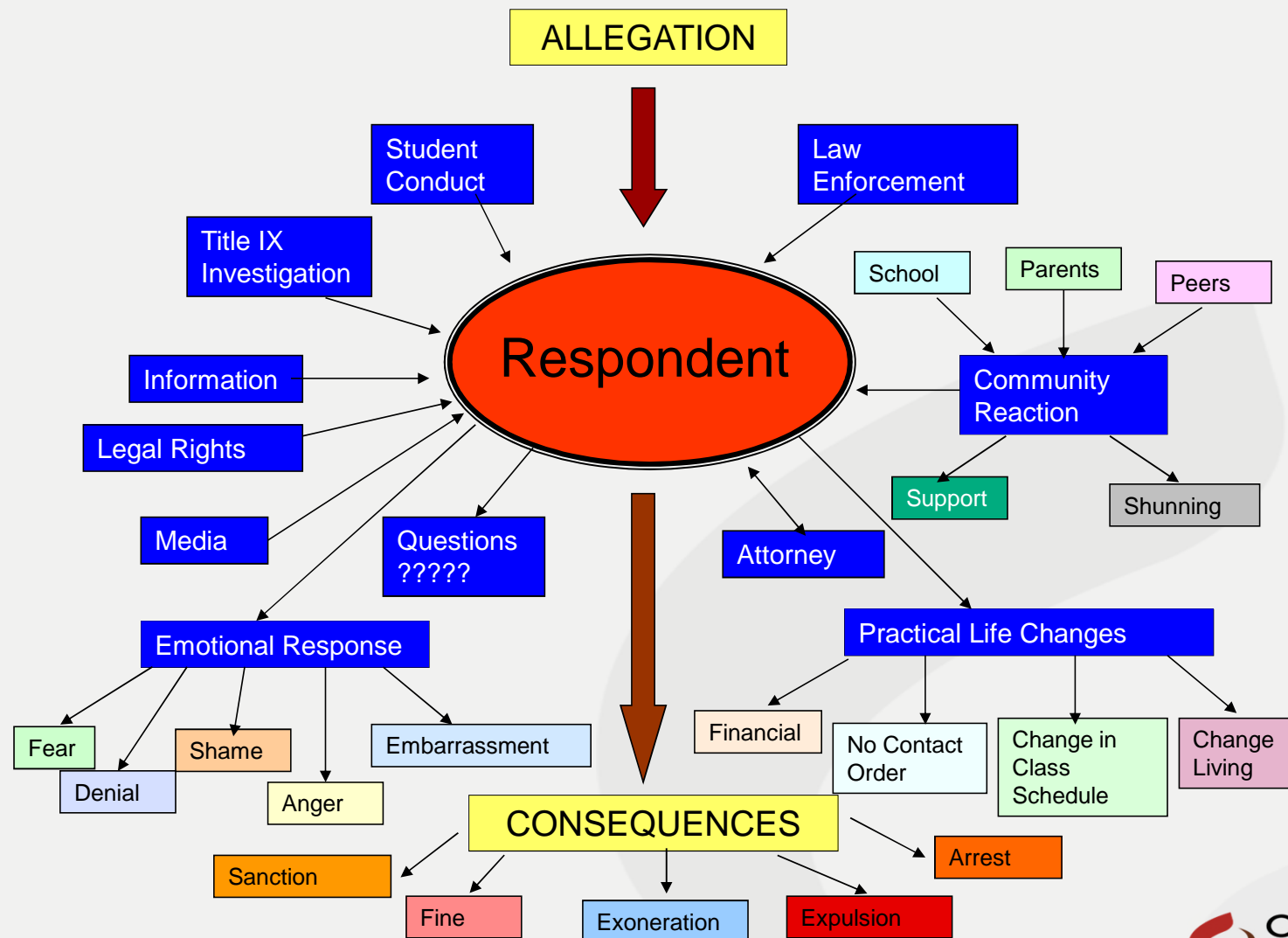
Christi Hurt
Margolis Healy

Institutional Response Group Paralegal and Administration Team:
Heather Dunn, Megan Lincoln, Braelyn Schenk, and Mary Sotos

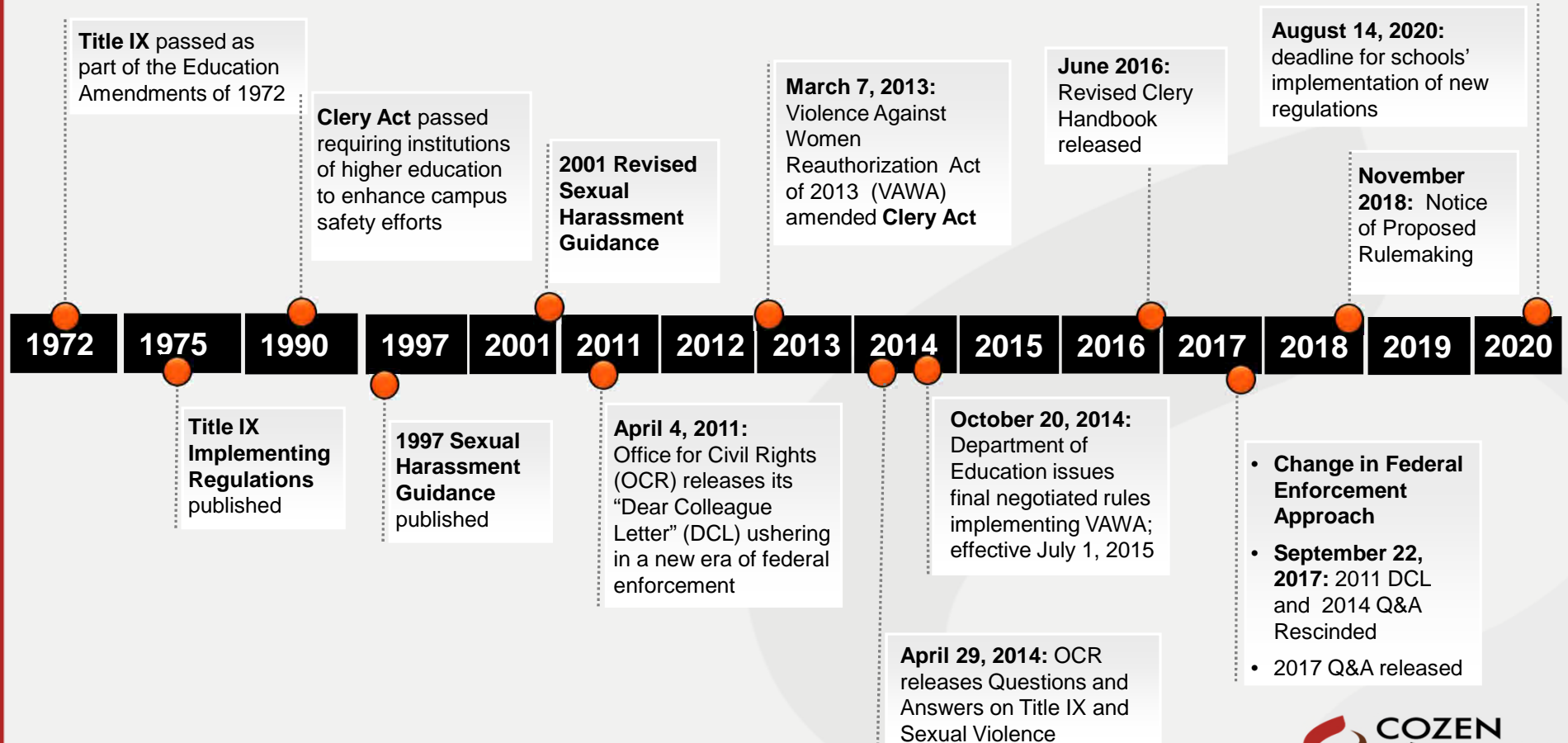
FRAMING THE CONTEXT







Evolution of Federal Legislation and Guidance



Silver Linings



2017 Q&A: Equitable Investigation

- The **burden is on the school** – not the parties – to gather sufficient evidence to reach a **fair, impartial** determination as to whether sexual misconduct or a hostile environment has occurred.
- Requires a **trained investigator** to analyze and document the available evidence to support reliable decisions, **objectively evaluate the credibility** of parties and witnesses, synthesize all available evidence and take into account the unique and complex circumstances of each case.
- Investigator must be free from actual or perceived **conflicts of interest** and **biases** for or against any party. Avoid **conflicts of interest and biases** in the adjudicatory processes and prevent institutional interests from interfering with the impartiality of the adjudication.

2017 Q&A: Equitable Investigation

- Any rights or opportunities that a school makes available to one party during the investigation should be made available to the other party on **equal** terms.
- The reporting and responding parties and appropriate officials must have **timely and equal access to any information** that will be used during informal and formal disciplinary meetings and hearings.

2017 Q&A: Equitable Investigation

- **Written notice** to a respondent of the allegations constituting a potential violation should include “**sufficient details and with sufficient time to prepare a response before any initial interview.**”
- Notice should include:
 - The identities of the parties involved
 - The specific section of the code of conduct allegedly violated
 - The precise conduct allegedly constituting the potential violation
 - The date and location of the alleged incident.

2017 Q&A: Equitable Investigation

- The investigation **should** result in a **written report** summarizing the relevant **exculpatory and inculpatory** evidence.
- The parties should have the **opportunity to respond to the report in writing** in advance of the decision of responsibility and/or at a live hearing to decide responsibility.
- OCR recommends that a school provide **written notice of the outcome** of disciplinary proceedings to the reporting and responding parties concurrently.

Maintaining Calm

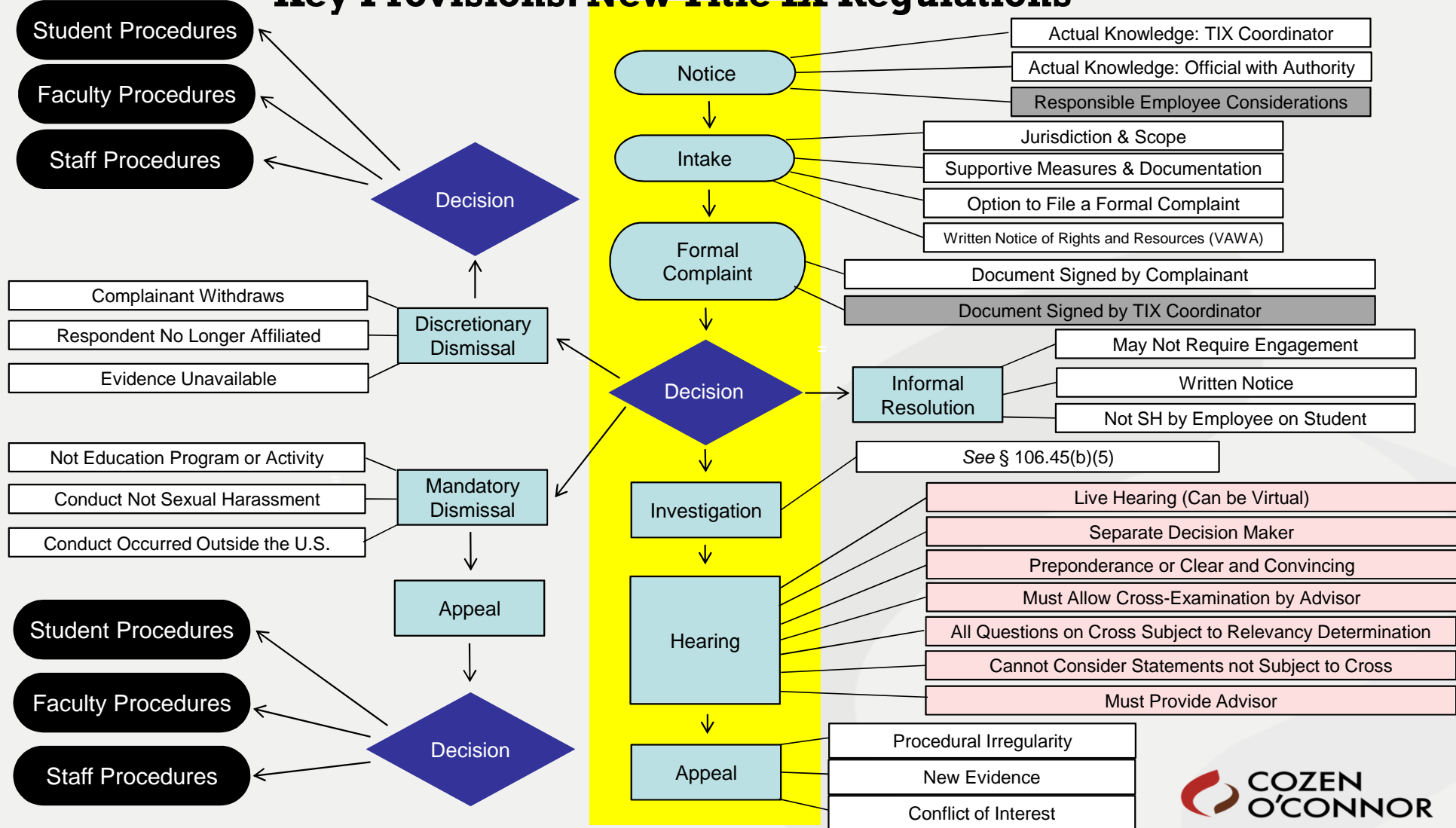


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Investigative Principles

- Open-ended and thorough inquiry
- Equitable opportunities for the parties to participate
- The conduct of the investigation matters
- Separating intake/support from investigation
- Maintaining and reinforcing impartiality
 - Screening for conflicts of interest or bias
 - Attention to language and communications
- Trained and experienced investigators

Key Provisions: New Title IX Regulations



Key Provisions of Title IX Regulations issued May 19, 2020;

Regulations: “Legally Binding Obligations”

- “Because these final regulations represent the Department’s interpretation of a recipient’s legally binding obligations, **rather than best practices**, recommendations, or guidance, these final regulations focus on **precise legal compliance requirements** governing recipients.”

Regulations: “Best Practices”

- “These final regulations leave recipients the **flexibility to choose to follow best practices and recommendations** contained in the Department’s guidance, or similarly, best practices and recommendations made by non-Department sources, such as Title IX consultancy firms, legal and social sciences scholars, victim advocacy organizations, civil libertarians and due process advocates and other experts.”

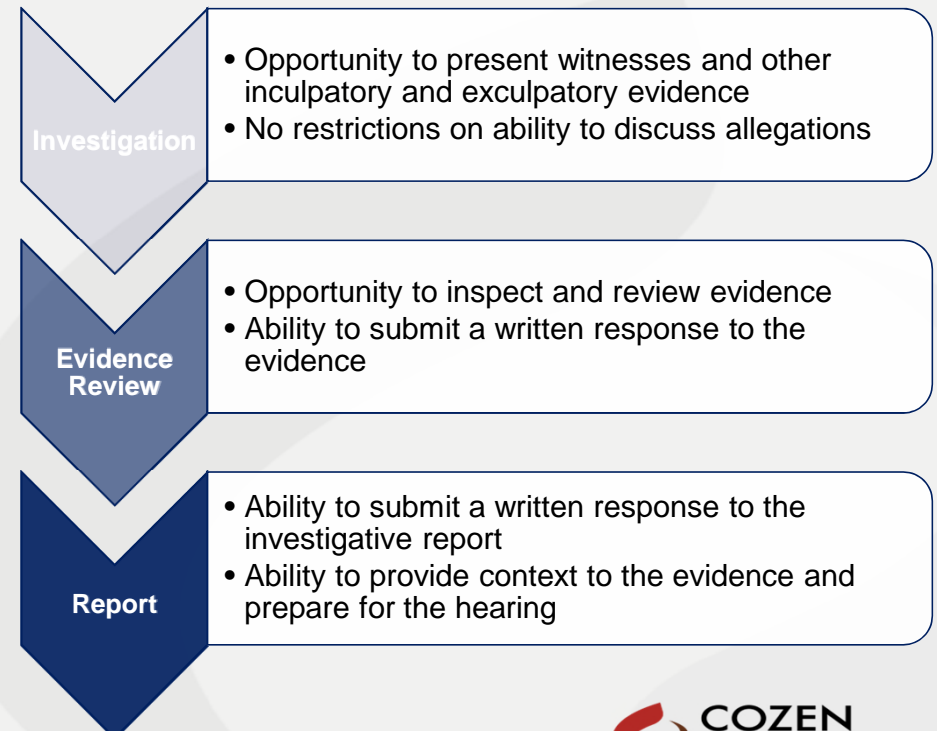
Title IX Regulations May 19, 2020; Preamble, 85 F.R. 30030

Setting the Stage - Investigations

Institutional Obligations



Parties' Opportunity to Participate



Overview

- Obligation to Investigate
- Basic Requirements of Grievance Processes
- Pre-Investigation Considerations
- Consolidation of Formal Complaints
- Investigation - Evidence Gathering
- Evidentiary Considerations
- Evidence Review
- Investigative Report
- Reasonably Prompt Time Frames

OBLIGATION TO INVESTIGATE

Understanding Two Key Provisions



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

Reinforcing Agency & Autonomy

- Balancing a recipient's obligation to respond to instances of sexual harassment with a complainant's autonomy
 - A rigid requirement such as an investigation in every circumstance may chill reporting of sexual harassment...
 - A student may receive supportive measures irrespective of whether the student files a formal complaint...these final regulations encourage students to report sexual harassment while allowing them to exercise some control over their report.

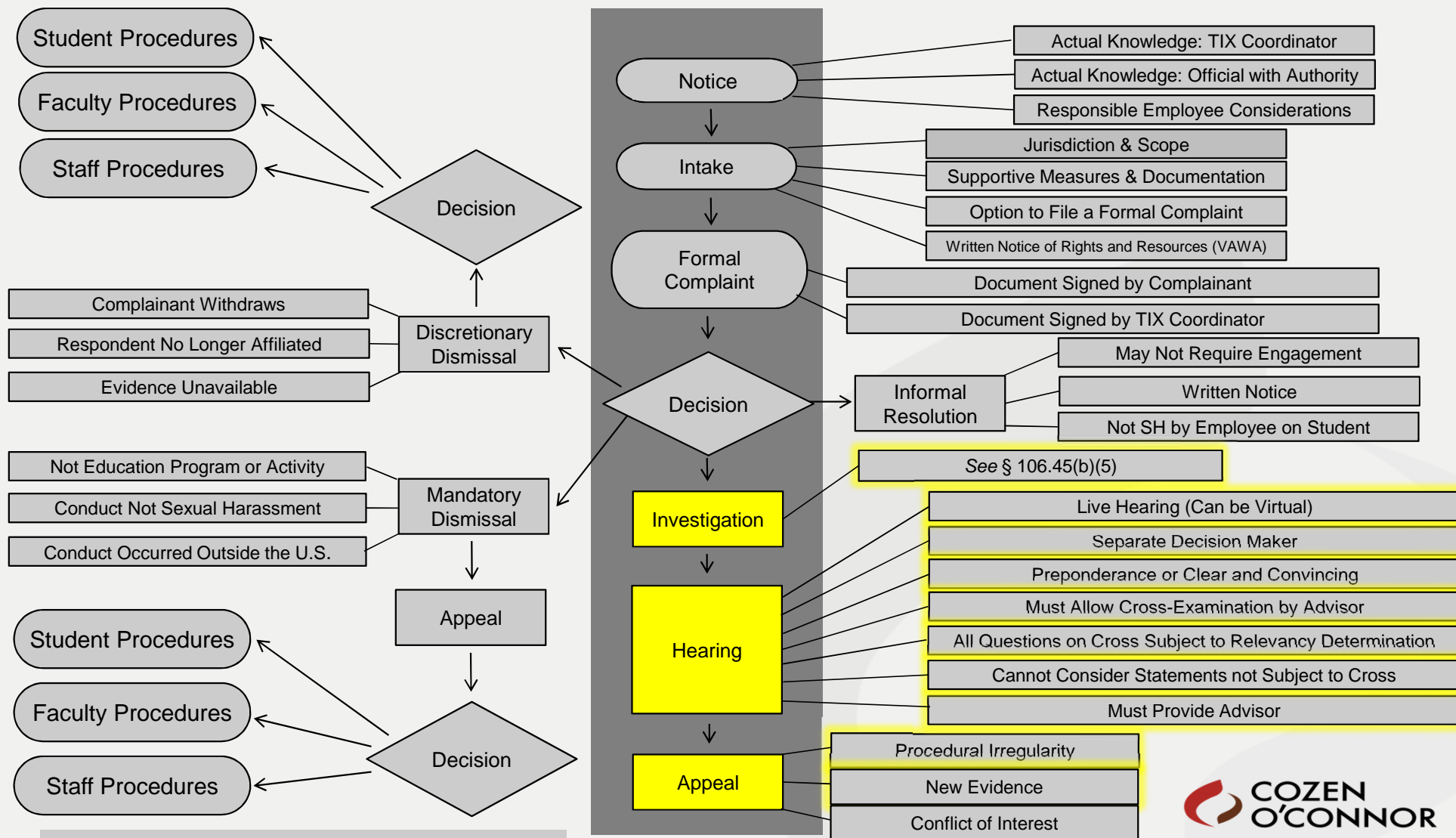
Title IX Regulations May 19, 2020; Preamble, 85 F.R. 30190

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)

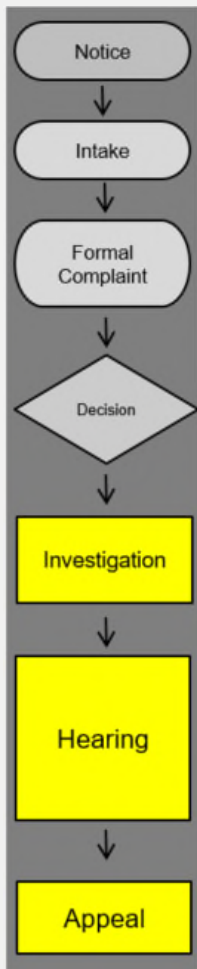
Title IX Regulations May 19, 2020 §106.30 Definitions and §106.45(b)(3)
Dismissal of a formal complaint; 85 F.R. 30574

BASIC REQUIREMENTS OF GRIEVANCE PROCESSES



Key Provisions of Title IX Regulations issued May 19, 2020;

Basic Requirements

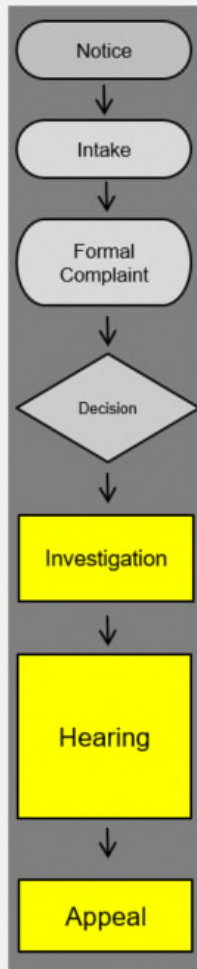


- **Treat complainants and respondents equitably** by providing **remedies** to a complainant where a determination of responsibility for sexual harassment has been made against the respondent, and by following a **grievance process** that complies with this section before the imposition of any disciplinary 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

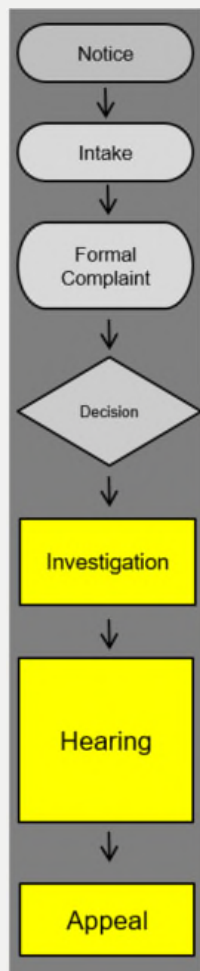
Relevant Regulations Sections:

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
- Include reasonably prompt time frames for conclusion of the grievance process with permissible delay for good cause
- Describe the range (or list) of possible disciplinary sanctions and remedies

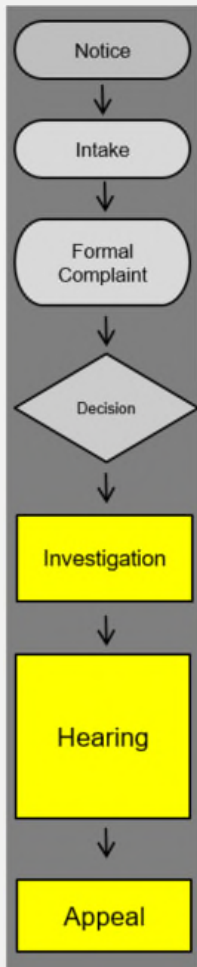
Relevant Regulations Sections:

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)

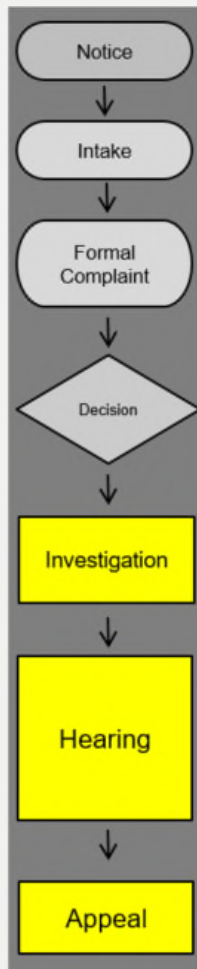
Basic Requirements



- State whether the **standard of evidence** to be used to determine responsibility is 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



- Include the procedures and permissible bases for the complainant and respondent to appeal
- Describe the 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)

PRE-INVESTIGATION CONSIDERATIONS

Pre-Investigation Considerations

- Choice of Investigator
 - Internal or external professional
 - Sufficient training and experience
 - Free from conflict of interest or bias
- Investigative Protocols
- Template Communications
- Notice of Allegations
- Consolidation of Formal Complaints

Separating Support from Investigations

- Separate support/advocacy/intake functions from investigative/adjudicative functions to reduce potential for conflict of interest or perception of bias
- Conflation of roles can:
 - Impact thorough assessment of the facts
 - Create distrust/confusion by complainant
 - Give appearance of bias/lack of impartiality

Separating Support from Investigations

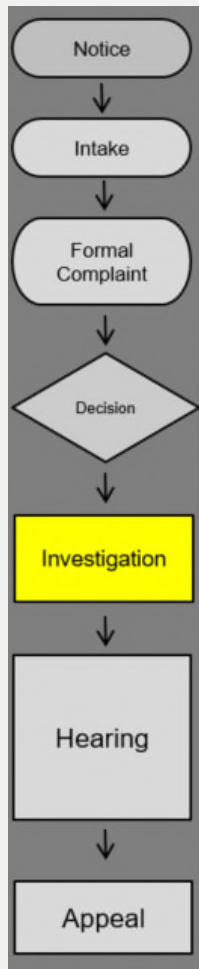
- Reinforce neutrality in language and communications
- Ensure sufficient resources for timely response
- Consider creative models for separation of intake from support from investigation from decision-making

Removal of Bias or Conflict of Interest

- “Section 106.44(c) does not preclude a recipient from using Title IX personnel trained under §106.45(b)(1)(iii) to make the emergency removal decision or conduct a post-removal challenge proceeding, but **if involvement with the emergency removal process results in bias or conflict of interest for or against the complainant or respondent, §106.45(b)(1)(iii) would preclude such personnel from serving in those roles during a grievance process.**”

Title IX Regulations May 19, 2020, Preamble, 85 F.R. 30235.

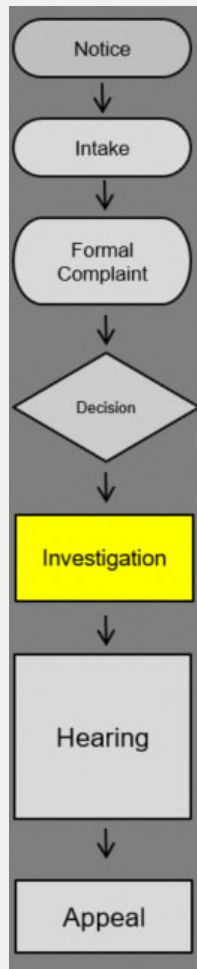
Written Notice of all Proceedings



- Written notice of all hearings, investigative interviews or other meetings
- With sufficient time for the party to prepare to participate
- Notice must include:
 - Date, time, location of proceeding
 - Participants invited or expected to attend
 - Purpose of the proceeding

Title IX Regulations May 19 2020; §106.45(b)(5)(v) 85 F.R. 30424

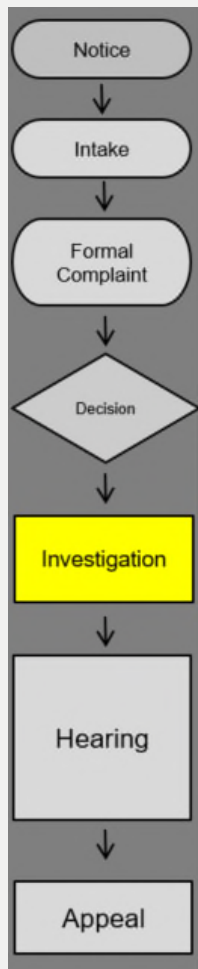
Written Notice of Allegations



- 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.

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

Written Notice of the Allegations



– Must state that:

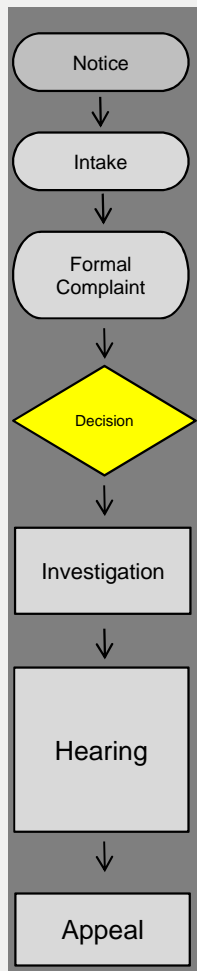
- the respondent is presumed not responsible for the alleged conduct
- a determination regarding responsibility is made at the conclusion of the grievance process

– 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

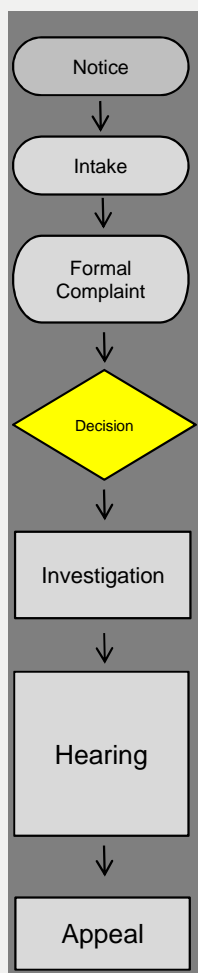
Written Notice of Allegations



- 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

Supplemental Notice



- If during the investigation, the recipient decides to investigate allegations about the complainant or respondent that are not included in the original notice, the recipient must provide notice of the additional allegations to the parties whose identities are known.
- The Preamble makes it clear that any supplemental notice must be in writing.
 - Although § 106.45(b)(2) requires subsequent written notice to the parties as the recipient discovers additional potential violations...

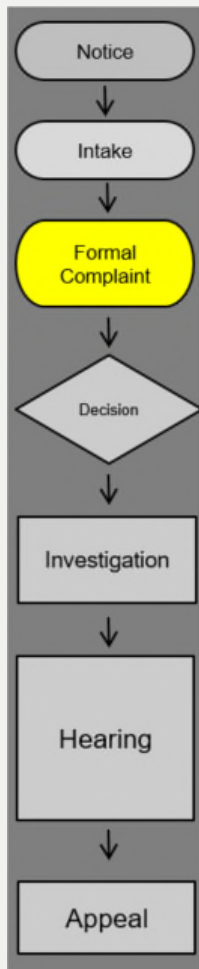
Title IX Regulations May 19, 2020 §106.45(b)(2)(ii); Preamble 85 F.R. 30283

Practical Considerations

- Checkpoints for additional policy violations
 - Post complainant interview
 - Post respondent interview
 - Post evidence review
- Procedural due process: “Notice”
- Consider similar checkpoints for mandatory dismissal of the formal complaint

CONSOLIDATION OF FORMAL COMPLAINTS

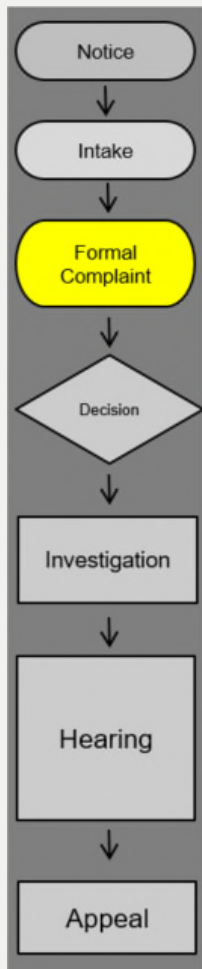
Consolidation of Formal Complaints



- A recipient **may** consolidate formal complaints as to allegations of sexual harassment against more than one respondent, or by more than one complainant against one or more respondents, or by one party against the other party, **where the allegations of sexual harassment arise out of the same facts or circumstances.**

Title IX Regulations May 19, 2020; §106.45(b)(4) 85 F.R. 30576

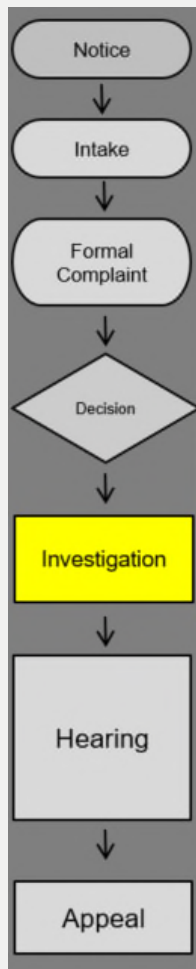
Consolidation of Formal Complaints



- The requirement for the same facts and circumstances means that the multiple complainants' allegations are so intertwined that their allegations directly relate to all the parties.

Title IX Regulations May 19, 2020 Preamble 85 F.R. 30436

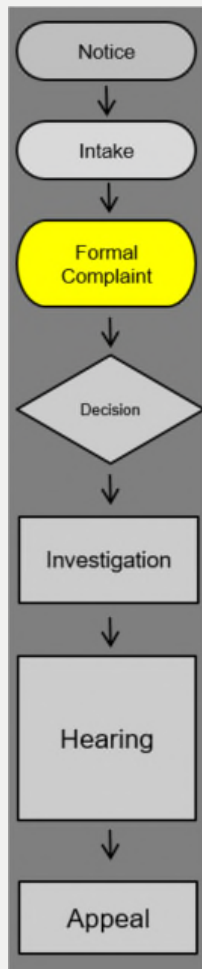
Consolidation of Formal Complaints



- The Department believes that recipients and parties will benefit from knowing that recipients have discretion to consolidate formal complaints...
- Intended to give “discretion” to consolidate formal complaints that arise “out of the same facts or circumstances and involve more than one complainant, more than one respondent, or what amount to counter-complaints by one party against the other.”

Title IX Regulations May 19, 2020; Preamble 85 F.R. 30291

Consolidation of Formal Complaints



- If the respondent is facing an additional allegation, the respondent has a right to know what allegations have become part of the investigation for the same reasons the initial written notice of allegations is part of a fair process, and the complainant deserves to know whether additional allegations have (or have not) become part of the scope of the investigation.
- This information allows both parties to meaningfully participate during the investigation, for example by gathering and presenting inculpatory or exculpatory evidence (including fact and expert witnesses) relevant to each allegation under investigation.

Title IX Regulations May 19, 2020; Preamble 85 F.R. 30283

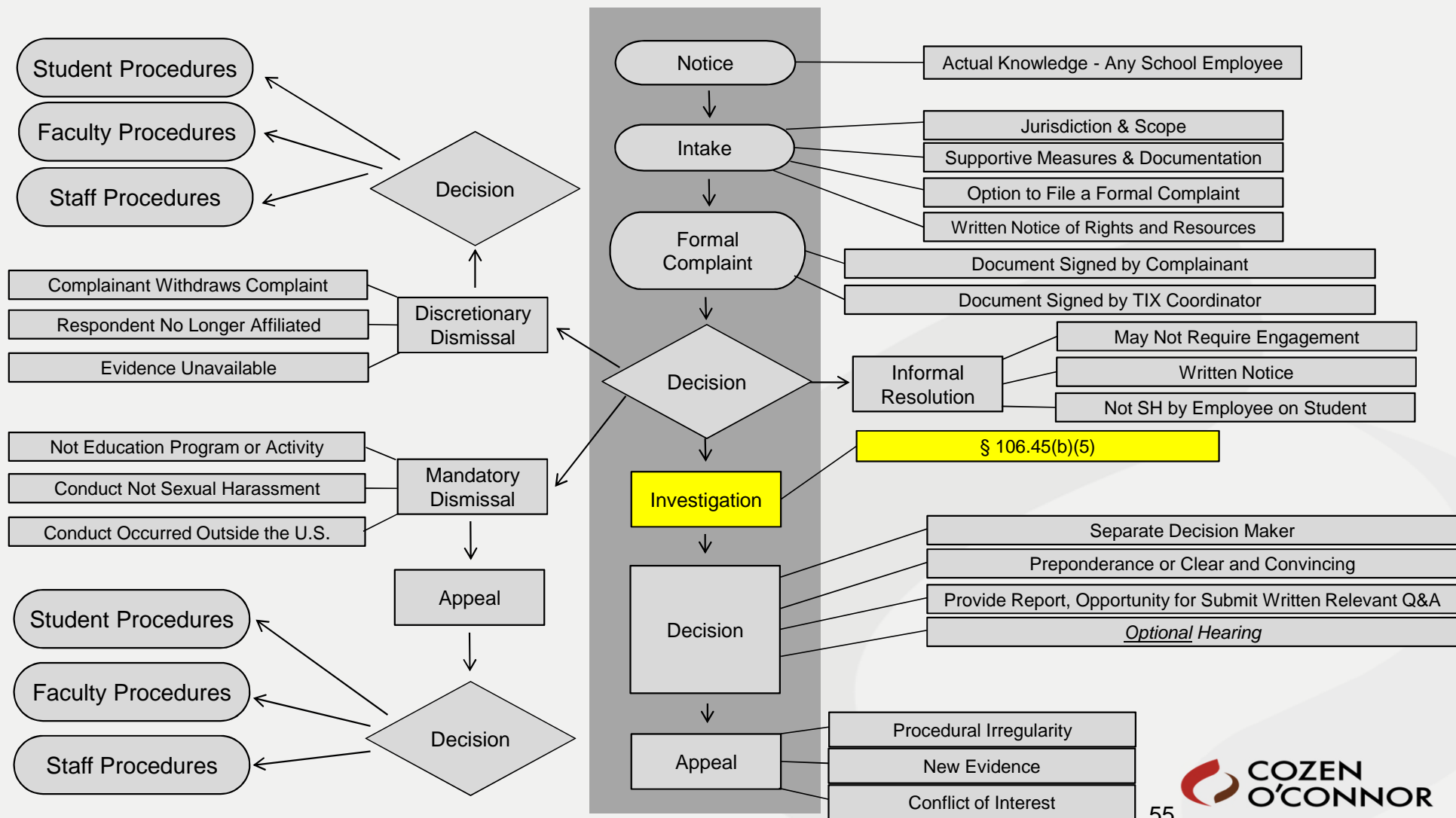
Application to Specific Circumstances

- Multiple instances of a respondent engaging in misconduct towards the same complainant
- Multiple allegations by same complainant against same respondent
- Multiple allegations by different complainants against same respondent
- Respondent alleges complainant has engaged in past misconduct involving false reports

Practical Considerations

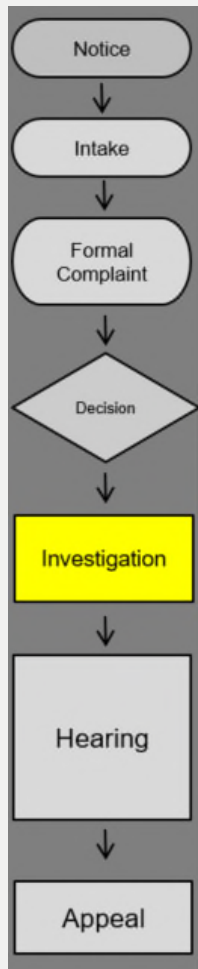
- Process for determining whether to consolidate formal complaints
 - Identify decision-makers
 - Identify criteria for consolidation
- Opportunity to contest consolidation?

INVESTIGATIONS



EVIDENCE GATHERING

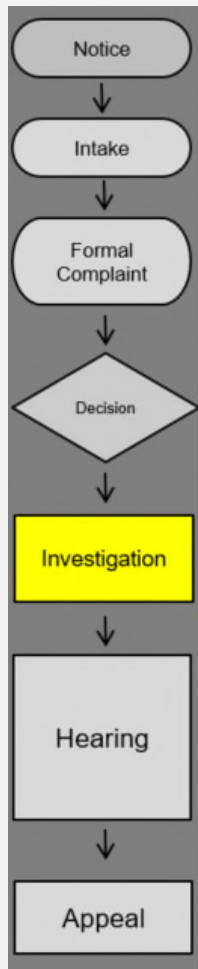
Burden of Gathering Evidence



- Ensure that the burden of proof and the burden of gathering evidence rests on the recipient and not on the parties
 - The recipient's burden is **to gather evidence sufficient to reach a determination** regarding responsibility

Title IX Regulations May 19, 2020; §106.45(b)(5)(i) FN 562 .

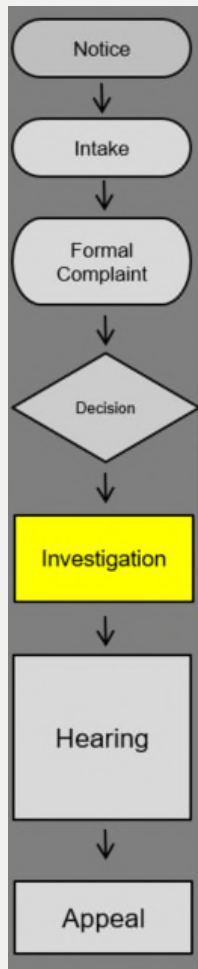
Burden of Gathering Evidence



- Undertake a **thorough search for relevant facts and evidence** pertaining to a particular case, while operating under the constraints of conducting and concluding the investigation under designated, reasonably prompt time frames and without powers of subpoena.
- Such conditions limit the extensiveness or comprehensiveness of a recipient's efforts to gather evidence while reasonably expecting the recipient to gather evidence that is available.

Title IX Regulations May 19, 2020; Preamble at 30292.

Burden of Gathering Evidence

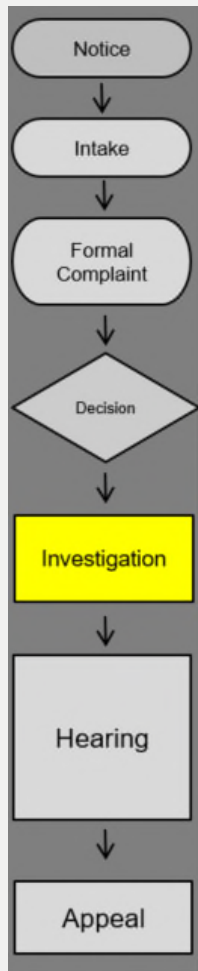


- The investigator is obligated to **gather evidence directly related to the allegations** whether or not the recipient intends to rely on such evidence (for instance, where evidence is directly related to the allegations but the recipient's investigator does not believe the evidence to be credible and thus does not intend to rely on it).

Title IX Regulations May 19, 2020; Preamble at 30248-49.

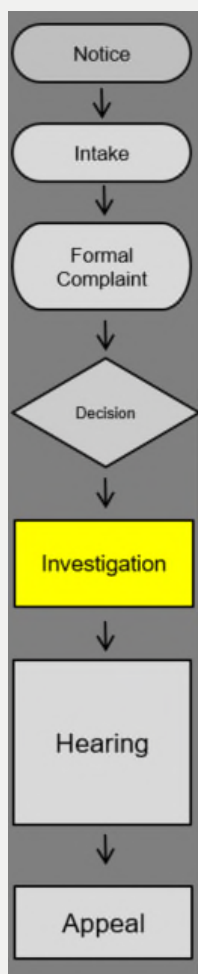
Opportunity to Participate

- Not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence.



Title IX Regulations May 19, 2020; §106.45(b)(5)(ii) ; 85 F.R. 30422-23.

Witnesses & Evidence



- Provide an equal opportunity for the parties to present witnesses and evidence
 - Fact and expert witnesses
 - Inculpatory and exculpatory evidence

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

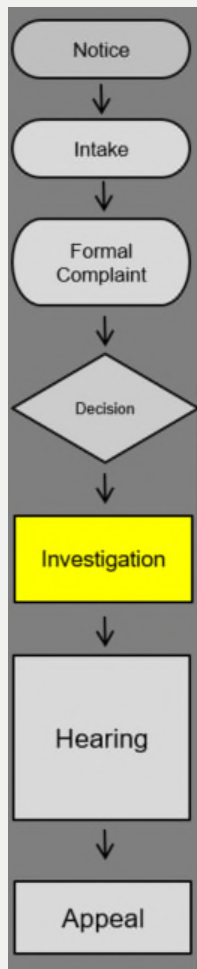
Practical Considerations & Effective Practices

- Preparing for interview
- Interview protocols and templates for introduction, scope and conclusion
- Documenting interviews
 - Note-taking vs. recording
 - Use of two investigators
- Decision-points
 - Sharing interviews with the parties for feedback
 - Considerations regarding character witnesses
 - Guidance about expert witnesses
 - Compelling witness participation

Practical Considerations for Remote Interviews

- Developing rapport
 - Allow additional time for the interview
 - Conversational language and tone
 - Avoid distractions
- Privacy considerations
 - Ensuring a private setting
 - Facilitating the presence of advisor of choice
- Sharing documents

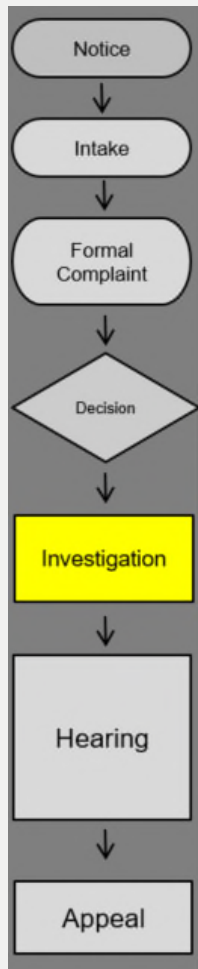
Advisor of Choice



- 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

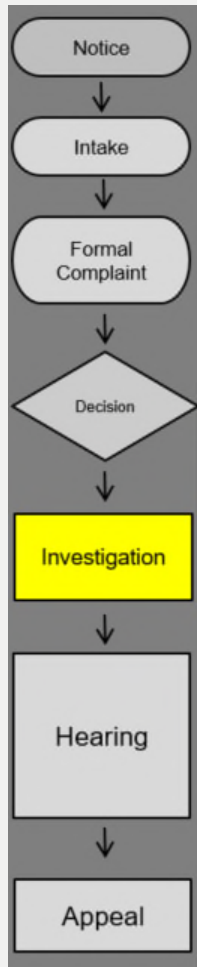
Restrictions on Advisor Participation



- 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

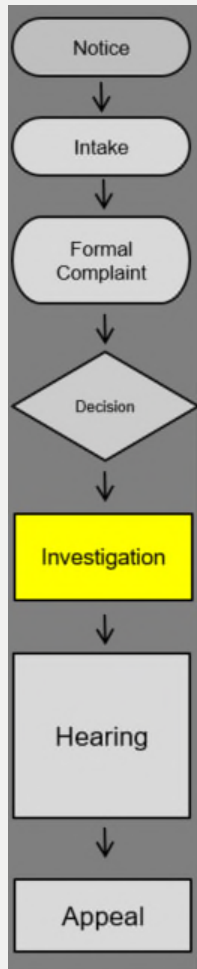
Restrictions on Advisor Participation



- “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.

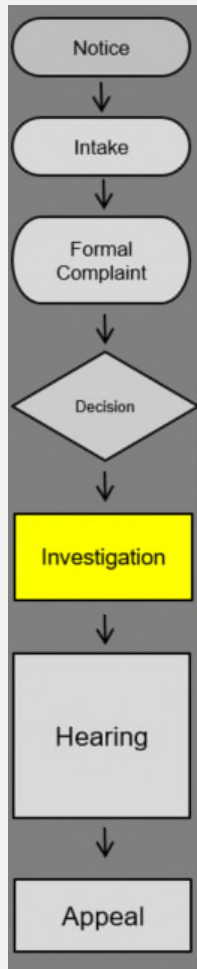
Training of Advisors Not Required



- 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.

Practical Considerations & Effective Practices

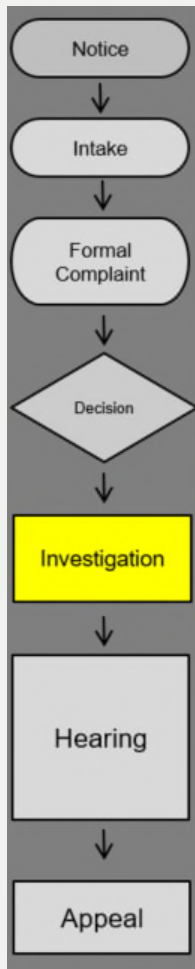
- Process meeting to discuss policy, decorum, and expectations
- Requirement that advisors:
 - Review policy in advance
 - Acknowledge decorum expectations
 - Acknowledge privacy protections regarding documents
- Consider the importance of continuity in process re: advisor given requirement to provide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

EVIDENTIARY CONSIDERATIONS

Evidentiary Considerations

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

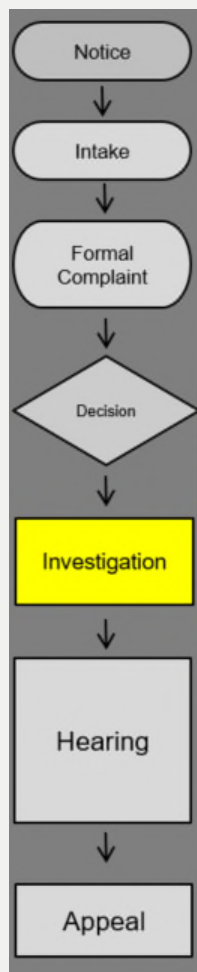
Privileged Information



- 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

Privileged Records

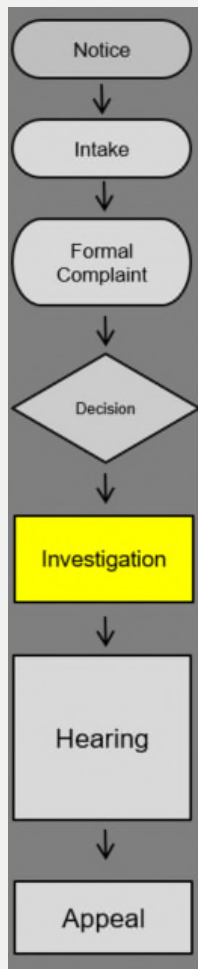


- Recipient cannot access, consider, disclose, or otherwise use a party's records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional's or paraprofessional's capacity, or assisting in that capacity, and which are made and maintained in connection with the provision of treatment to the party, unless the recipient obtains that party's **voluntary, written consent** to do so for a grievance process under this section.

Title IX Regulations May 19, 2020; § 106.45(b)(5)(i) 85 F.R.30423

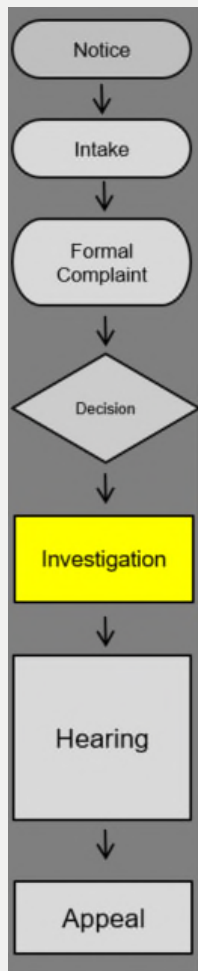
Relevance

- 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.

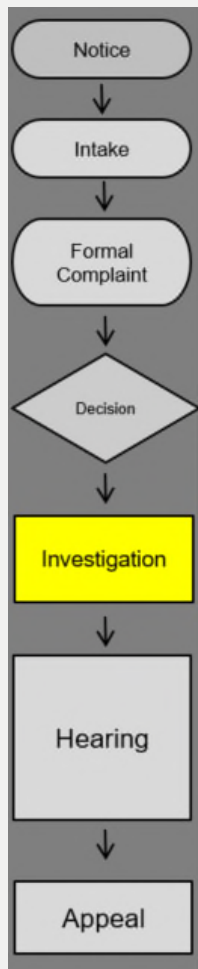
Relevance



- “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.

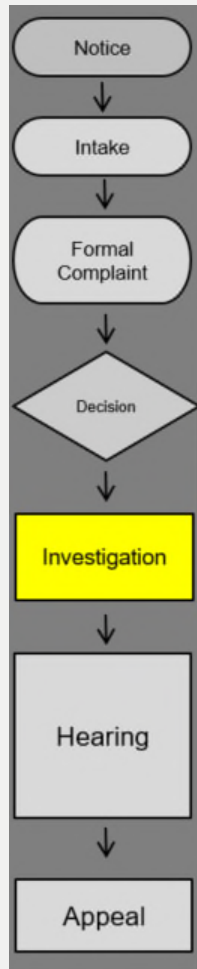
Relevance



- 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.

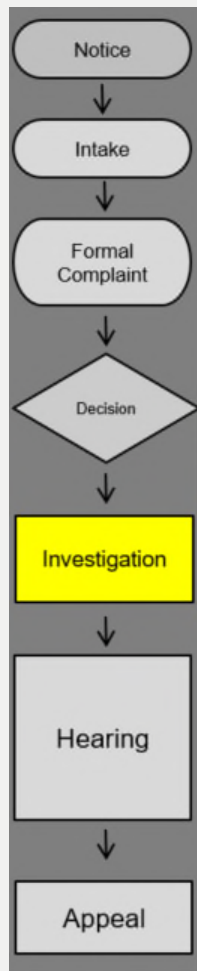
Prior Sexual History



- 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

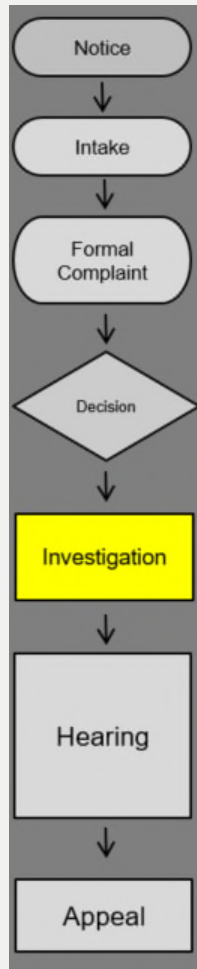
Prior Sexual History



- 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.

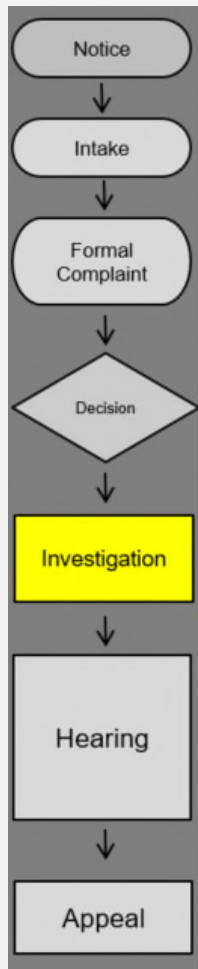
Prior or Subsequent Misconduct

- 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
- Schools will need to determine if such conduct is:
 - Relevant
 - May be used in determining responsibility
 - May be used in sanctioning
- If so, will need to set criteria for consideration

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
- Consider prejudicial vs. probative value

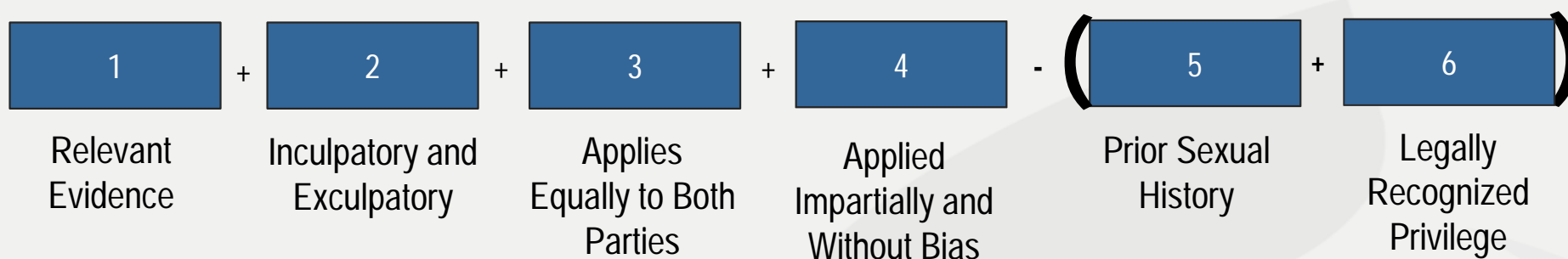
Flexibility to Adopt Rules



- “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.
- 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.**”

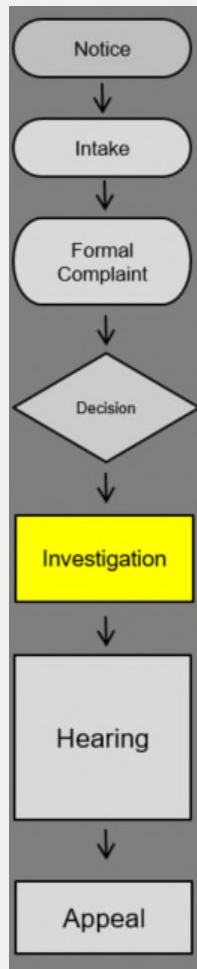
Title IX Regulations May 19, 2020; Preamble at 30248.

Evidentiary Rules Must Consider



EVIDENCE REVIEW

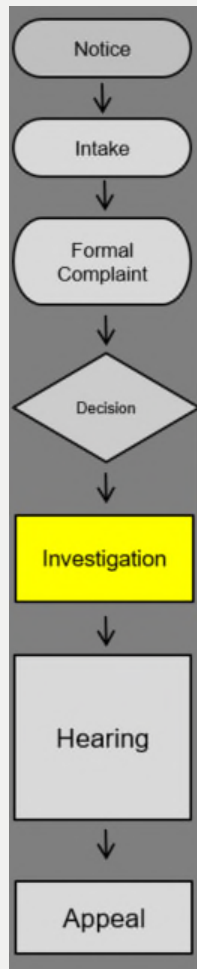
Evidence Review



- “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

Evidence Review

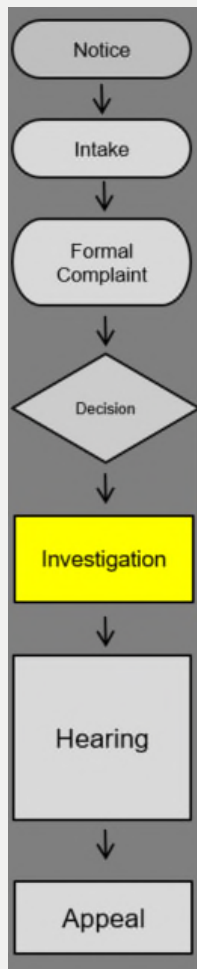


- “Recipient must send to each party and the party’s advisor, if any, **the evidence subject to inspection and review** in an electronic format or a hard copy, and the parties must have at least **10 days to submit a written response**, which the investigator will consider prior to completion of the investigative report.”

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

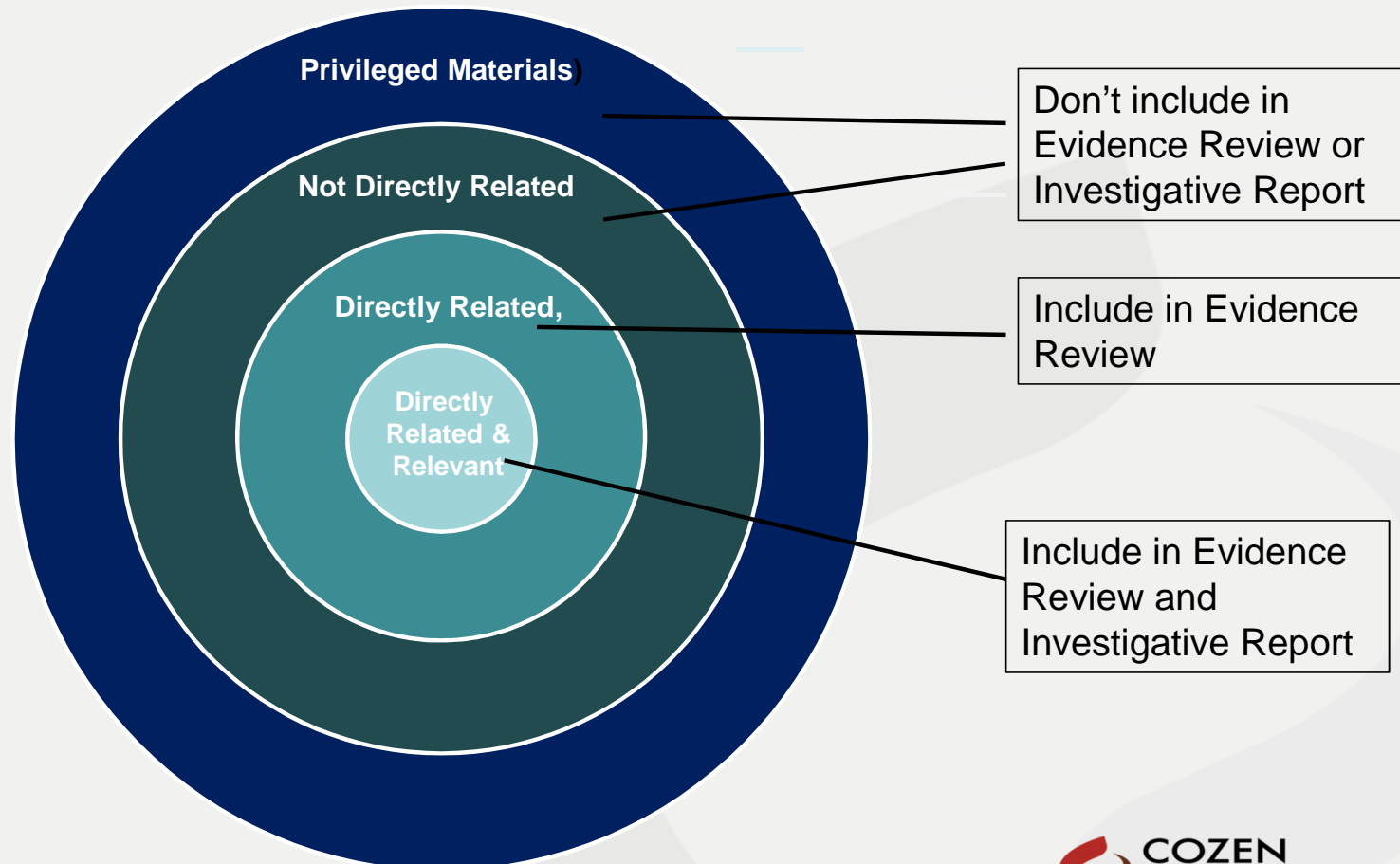
Evidence Review

- Allowing parties the opportunity to inspect this broader universe of evidence will further each party's own interests by identifying evidence either overlooked by the investigator or erroneously deemed relevant or irrelevant.

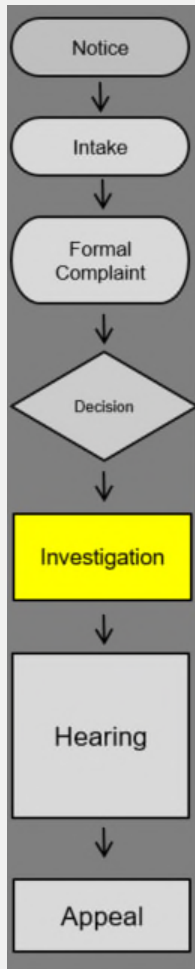


Title IX Regulations May 19, 2020; Preamble 85 F.R.30303

Evidentiary Levels for Inclusion



Directly Related



- Not defined in the regulations or the Preamble
 - The Department declines to define certain terms such as “evidence directly related to the allegations,” as these terms should be interpreted using their plain and ordinary meaning.
- “Directly related” aligns with the requirements in FERPA
 - The Department previously noted that the “directly related to” requirement in § 106.45(b)(vi) aligns with FERPA.
 - For example, the regulations implementing FERPA define education records as records that are “directly related to a student” pursuant to § 99.3.
- Left to the discretion of the school
 - [T]he school has some discretion to determine what evidence is directly related to the allegations in a formal complaint.

Title IX Regulations May 19, 2020; Preamble at 30304, 30428.

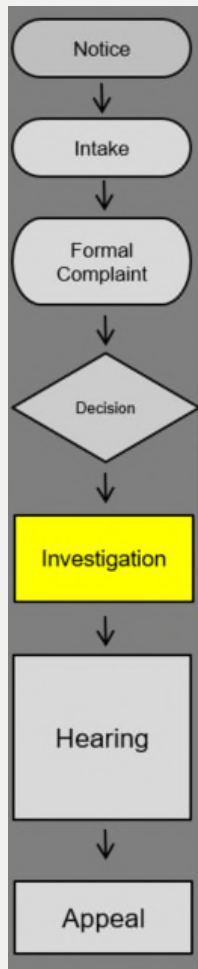
Directly Related

- [T]he universe of that exchanged evidence should include all evidence (inculpatory and exculpatory) that relates to the allegations under investigation, without the investigator having screened out evidence related to the allegations that the investigator does not believe is relevant.



Title IX Regulations May 19, 2020 §106.45(b)(5)(vi);
Preamble 85 F.R.30304

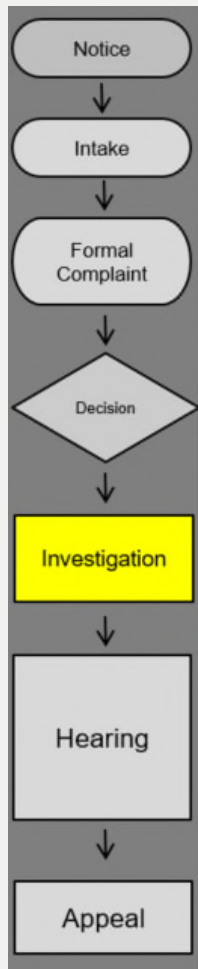
Directly Related vs. Relevant



- Evidence that is “directly related to the allegations” may encompass a broader universe of evidence than evidence that is “relevant.”
- The Department does not believe that determinations about whether certain questions or evidence are relevant or directly related to the allegations at issue requires legal training and that such factual determinations reasonably can be made by layperson recipient officials impartially applying logic and common sense.

Title IX Regulations May 19, 2020; Preamble at 30304, 30321.

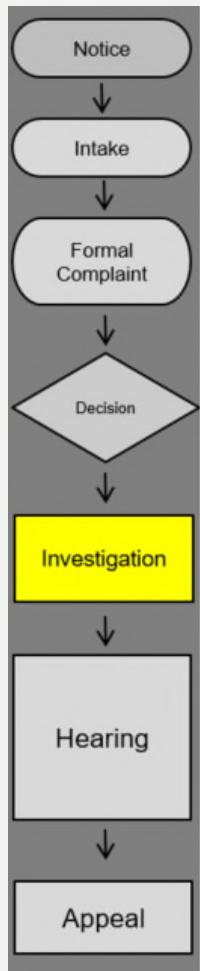
Directly Related



- Redacting information within evidence (documents, interviews, medical records, etc.)
- May be redacted if:
 - Not directly related to the allegations
 - Privileged, or
 - Obtained without proper consent
- A recipient may permit or require the investigator to redact information ... such as information protected by a legally recognized privilege ... contained within documents ... that are directly related to the allegations, before sending the evidence to the parties for inspection and review.

Title IX Regulations May 19, 2020; Preamble 85 F.R.30304

Directly Related

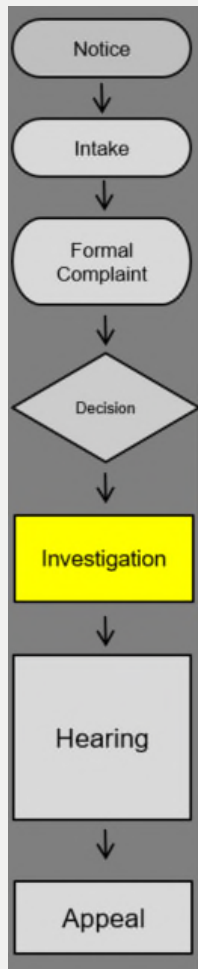


- Imposing restrictions on dissemination or use
 - Recipients may impose on the parties and party advisors restrictions or require a non-disclosure agreement not to disseminate or use any of the evidence for a purpose unrelated to the Title IX grievance process.
 - As long as doing so does not violate the regulations or law.

Title IX Regulations May 19, 2020; Preamble 85 F.R.30304.

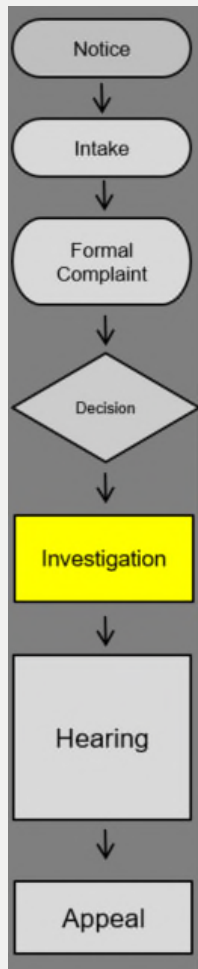
Directly Related

- Exception for evidence that is obtained illegally, such as a wiretap violation
 - If a recipient knows that a recording is unlawfully created under State law, then the recipient should not share a copy of such unlawful recording. The Department is not requiring a recipient to disseminate any evidence that was illegally or unlawfully obtained.



Title IX Regulations May 19, 2020; Preamble 85 F.R.30427.

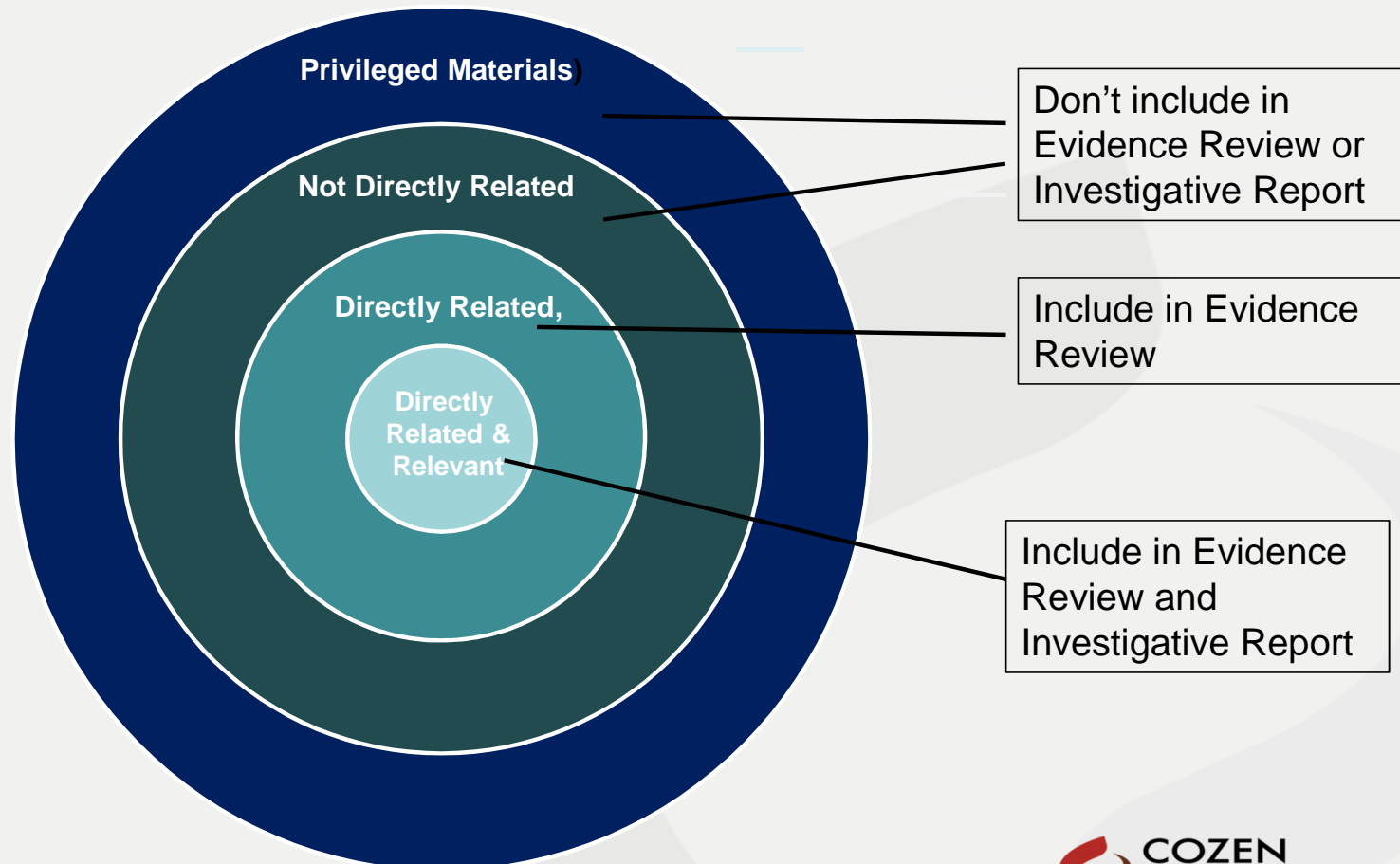
Scope of Parties' Review



- The parties may make corrections, provide appropriate context, and prepare their responses and defenses before a decision-maker reaches a determination regarding responsibility.
- If relevant evidence seems to be missing, a party can point that out to the investigator, and if it turns out that relevant evidence was destroyed by a party, the decision-maker can take that into account in assessing the credibility of parties, and the weight of evidence in the case.

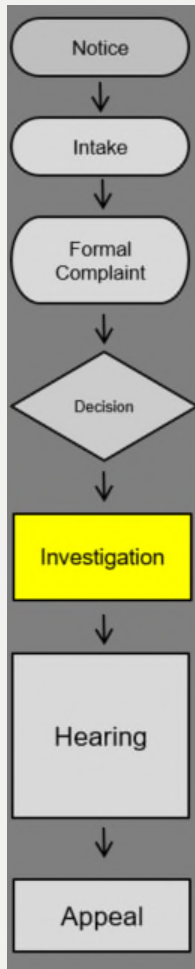
Title IX Regulations May 19, 2020; Preamble 85 F.R.30305 & 30300

Evidentiary Levels for Inclusion



INVESTIGATIVE REPORT

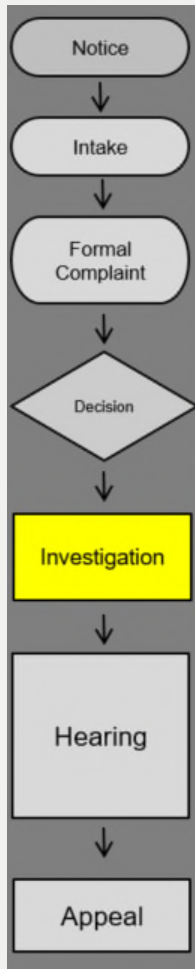
Investigative Report



- Create an **investigative report** that fairly summarizes relevant evidence and
- Send to each party and the party's advisor, if any, the investigative 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

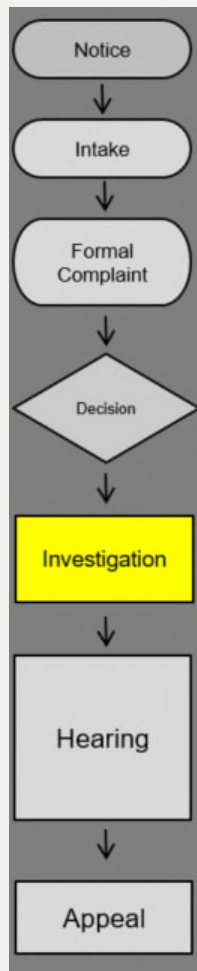
Investigative Report



- 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.

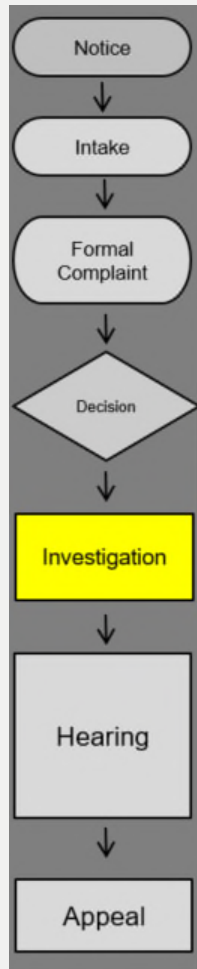
Investigative Report



- 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.

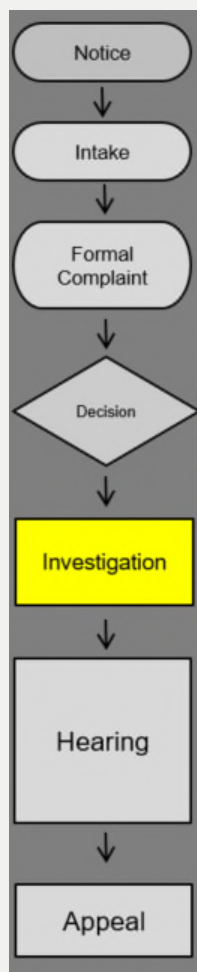
Title IX Regulations May 19, 2020; §§ 106.45(b)(5)(vii); Preamble 85 F.R. 3010.

Content for Written Determination



- 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

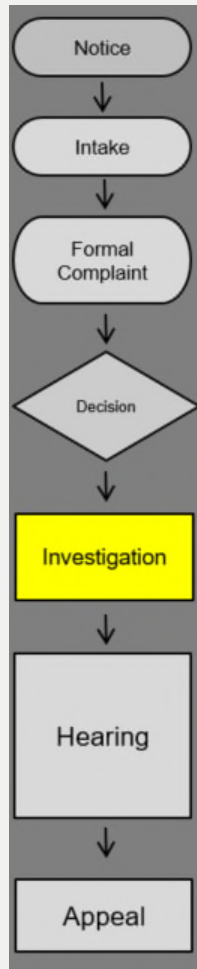
Investigative Report: Findings?



- The Department does not wish to prohibit the investigator from including recommended findings or conclusions in the investigative report.
- However, the decision-maker is under an independent obligation to objectively evaluate relevant evidence, and thus cannot simply defer to recommendations made by the investigator in the investigative report.
- If a recipient chooses to include a credibility analysis in its investigative report, the recipient must be cautious not to violate § 106.45(b)(7)(i), prohibiting the decision-maker from being the same person as the Title IX Coordinator or the investigator.

Title IX Regulations May 19, 2020; §§ 106.45(b)(5)(vii); Preamble 85 F.R.30308 & 30436

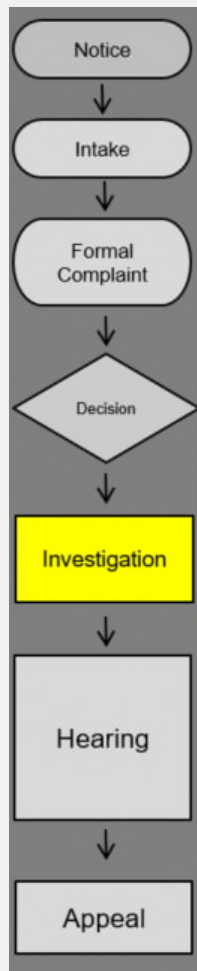
Investigative Report: Findings?



- § 106.45(b)(7)(i) prevents an investigator from actually making a determination regarding responsibility.
- If an investigator's determination regarding credibility is actually a determination regarding responsibility, then §106.45(b)(7)(i) would prohibit it.

Title IX Regulations May 19, 2020; §§ 106.45(b)(5)(vii); Preamble 85 F.R.30436

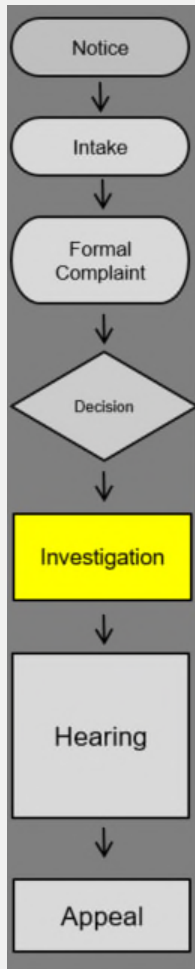
Revisiting Relevance



- Fairly summarizes the relevant evidence
- Investigator may redact information from the report
 - Recipients may permit or require the investigator to redact from the investigative report information that is not relevant, which is contained in documents or evidence that is relevant.

Title IX Regulations May 19, 2020; §§ 106.45(b)(5)(vii); Preamble 85 F.R.30436

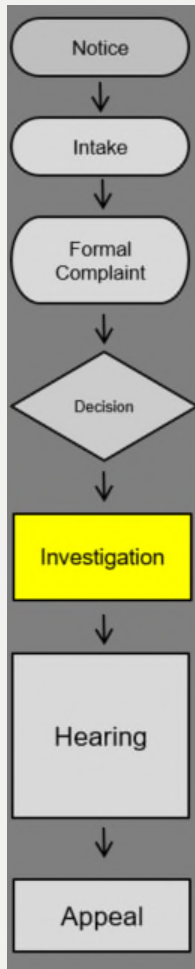
Investigative Report



- Allow parties to provide a written response to the investigative 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

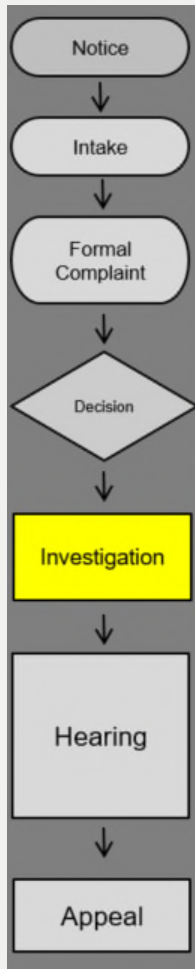
Investigative Report



- At least 10 days prior to the determination of responsibility (hearing)
 - Without advance knowledge of the investigative report, the parties will be unable to effectively provide context to the evidence included in the report.
 - A valuable part of this process is giving the parties (and advisors who are providing assistance and advice to the parties) adequate time to review, assess, and respond to the investigative report in order to fairly prepare for the live hearing or submit arguments to a decision-maker where a hearing is not required or otherwise provided.

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

Investigative Report



- At least 10 days prior to the determination of responsibility (hearing)
 - The parties then have equal opportunity to review the investigative report; if a party disagrees with an investigator's determination about relevance, the party can make that argument in the party's written response to the investigative report and to the decision-maker at any hearing held.

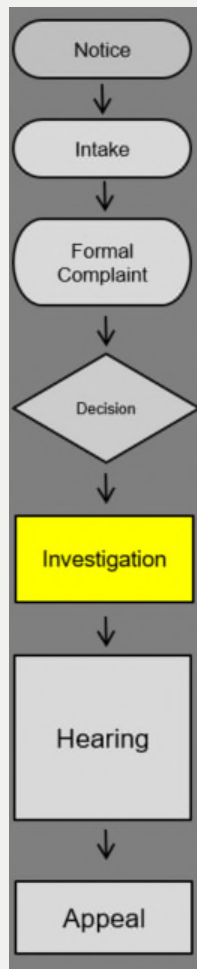
Title IX Regulations May 19, 2020; §§ 106.45(b)(5)(vii); Preamble 85 F.R.30248-49

Practical Considerations & Effective Practices

- Use template format with consistent language and content across investigations
- Language: balanced, neutral and non-judgmental
- Avoid declarative credibility language
 - “Unreliable” vs. insufficient information
 - Recognize perspective of the parties
 - Comment on the evidence, not the parties
- Use of verbatim quotes
- Leave sufficient time for writing, editing, proof reading and review by a fresh set of eyes

REASONABLY PROMPT TIME FRAMES

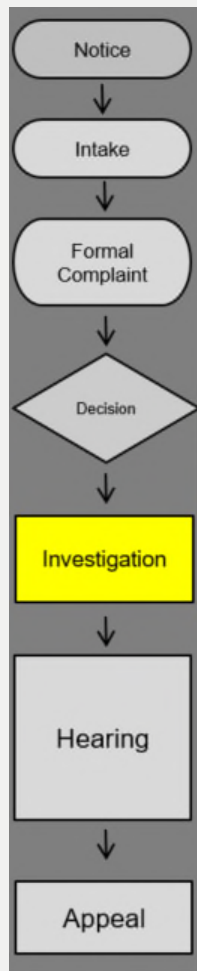
Reasonably Prompt Time Frames



- The grievance process must include:
 - reasonably prompt time frames for conclusion of the grievance process, including reasonably prompt time frames for filing and resolving appeals and informal resolution processes if the recipient offers informal resolution processes
 - a process that allows for the temporary delay of the grievance process or the limited extension of time frames for good cause with written notice to the complainant and the respondent of the delay or extension and the reasons for the action

Title IX Regulations May 19, 2020 §106.45(b)(1)(v) 85 F.R.30522 & 30575

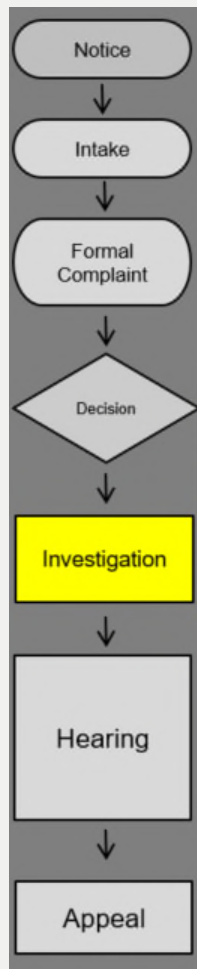
Reasonably Prompt Time Frames



- The grievance process must include:
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 - a process that allows for the temporary delay of the grievance process or the limited extension of time frames for good cause with written notice to the complainant and the respondent of the delay or extension and the reasons for the action
- Good cause may include considerations such as:
 - the absence of a party, a party's advisor, or a witness;
 - concurrent law enforcement activity;
 - the need for language assistance or accommodation of disabilities

Title IX Regulations May 19, 2020 §106.45(b)(1)(v). 85 F.R. 30575

Reasonably Prompt Time Frames



- A recipient must resolve each formal complaint of sexual harassment according to the time frames the recipient has committed to in its grievance process.
- The Department believes that each recipient is in the best position to balance promptness with fairness and accuracy based on the recipient's unique attributes and the recipient's experience with its own student disciplinary proceedings, and thus requires recipients to include "reasonably prompt time frames" for conclusion of a grievance process that complies with these final regulations.

Title IX Regulations May 19, 2020 §106.45(b)(1)(v); Preamble 85 F.R. 30269

TRAINING

Training

- A recipient must ensure that **Title IX Coordinators, investigators, decision-makers, and any person who facilitates 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

Recap on Effective Investigations

- Preparation
- Policy
- Protocols
- Personnel
- Proficiency
 - Training
 - Experience

Use of Slides

- This PowerPoint presentation is not intended to be used as a stand-alone teaching tool.
- These materials are meant to provide a framework for informed discussion, not to provide legal advice regarding specific institutions or contexts.
- All rights are reserved to Cozen O'Connor.

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The New Title IX Regulations: Investigations & Evidentiary Considerations

Presented By:

The Institutional Response Group | Cozen O'Connor

Gina Maisto Smith, Chair

Leslie Gomez, Vice Chair

July 13, 2020



Today's Webinar

- Following an introductory webinar, “A First Look at the New Title IX Regulations,” this is the fourth in a series of webinars focusing on implementation.
- This webinar will:
 - Examine the prescriptive requirements of the final Title IX regulations related to investigations
 - Discuss evidentiary considerations
 - Directly related to the allegations
 - Relevant evidence
 - Privileged information
 - Outline effective investigation protocols

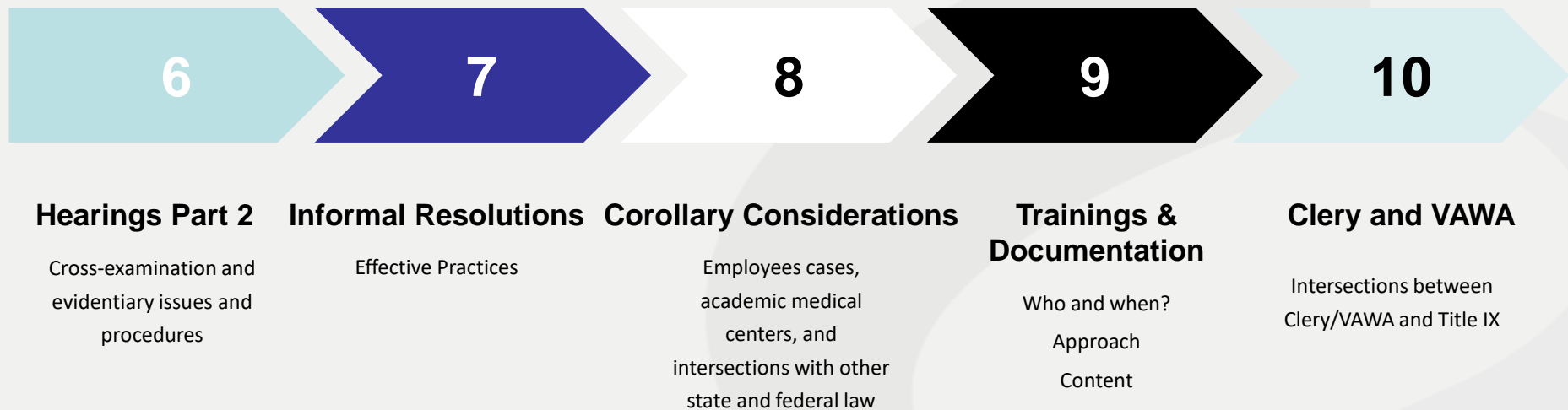
Introducing the Webinar Series

Subsequent IRG webinars will focus on specific aspects of the regulations, as written and as applied, including:



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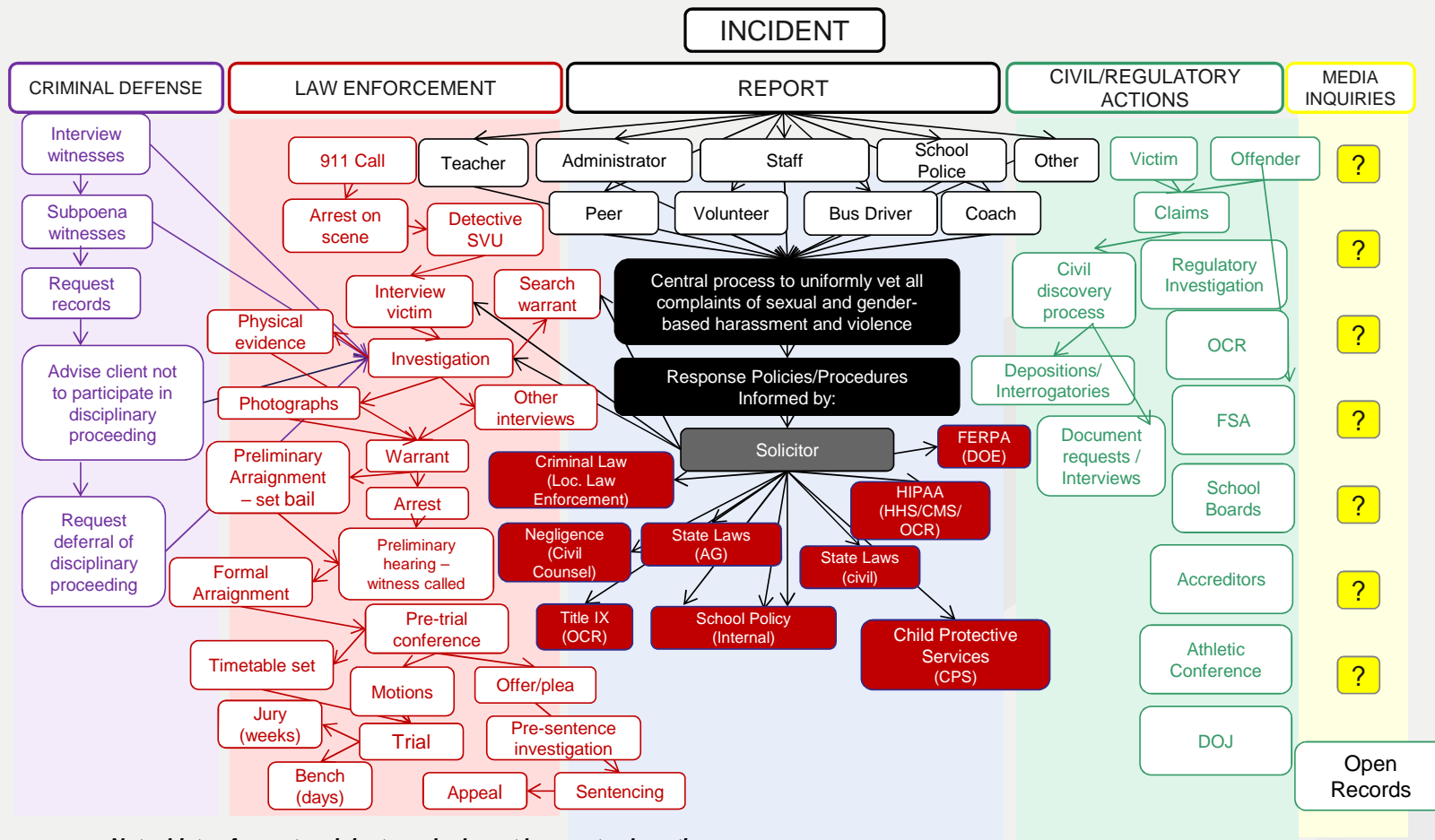
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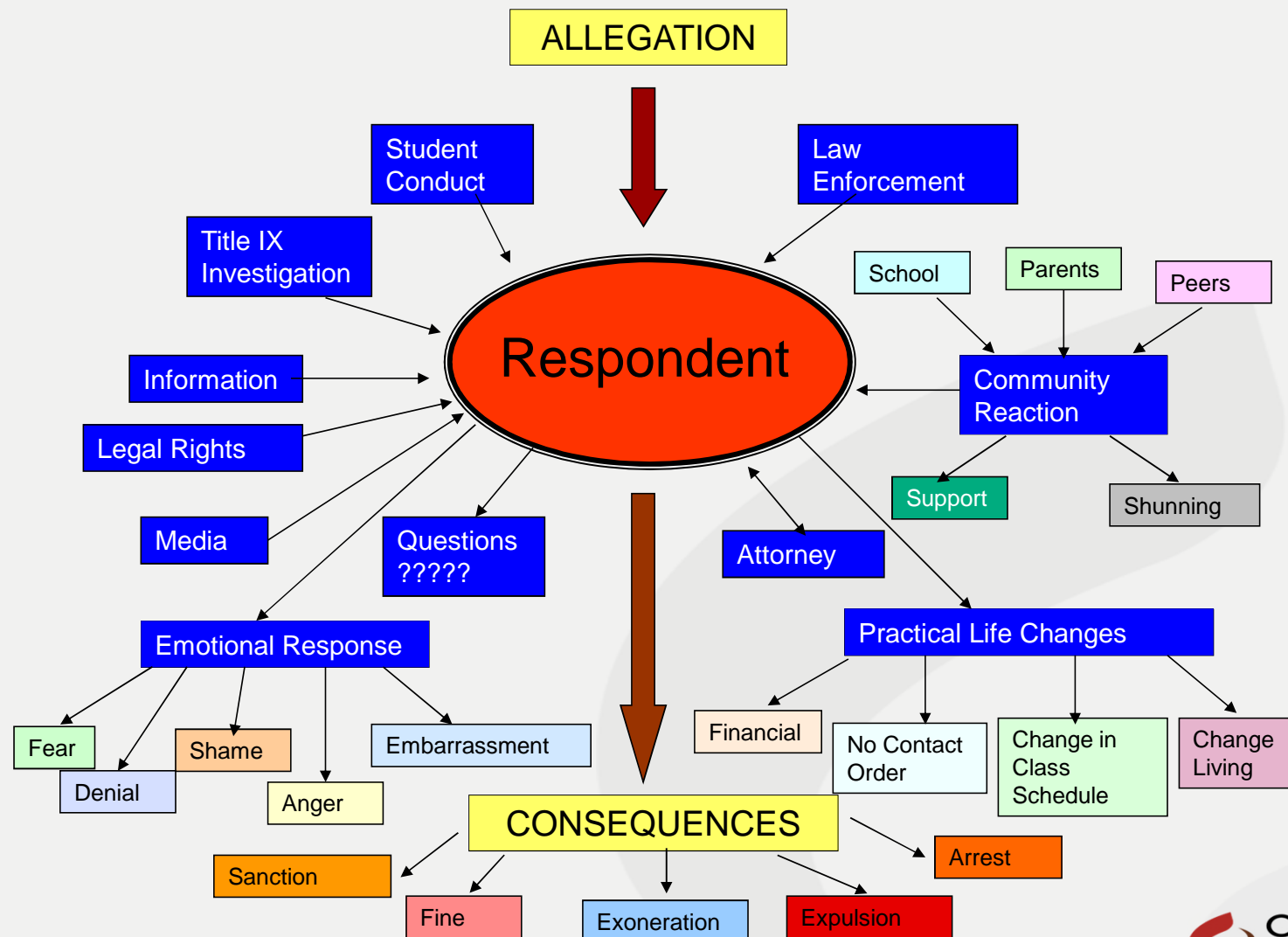
Christi Hurt
Margolis Healy

Institutional Response Group Paralegal and Administration Team:
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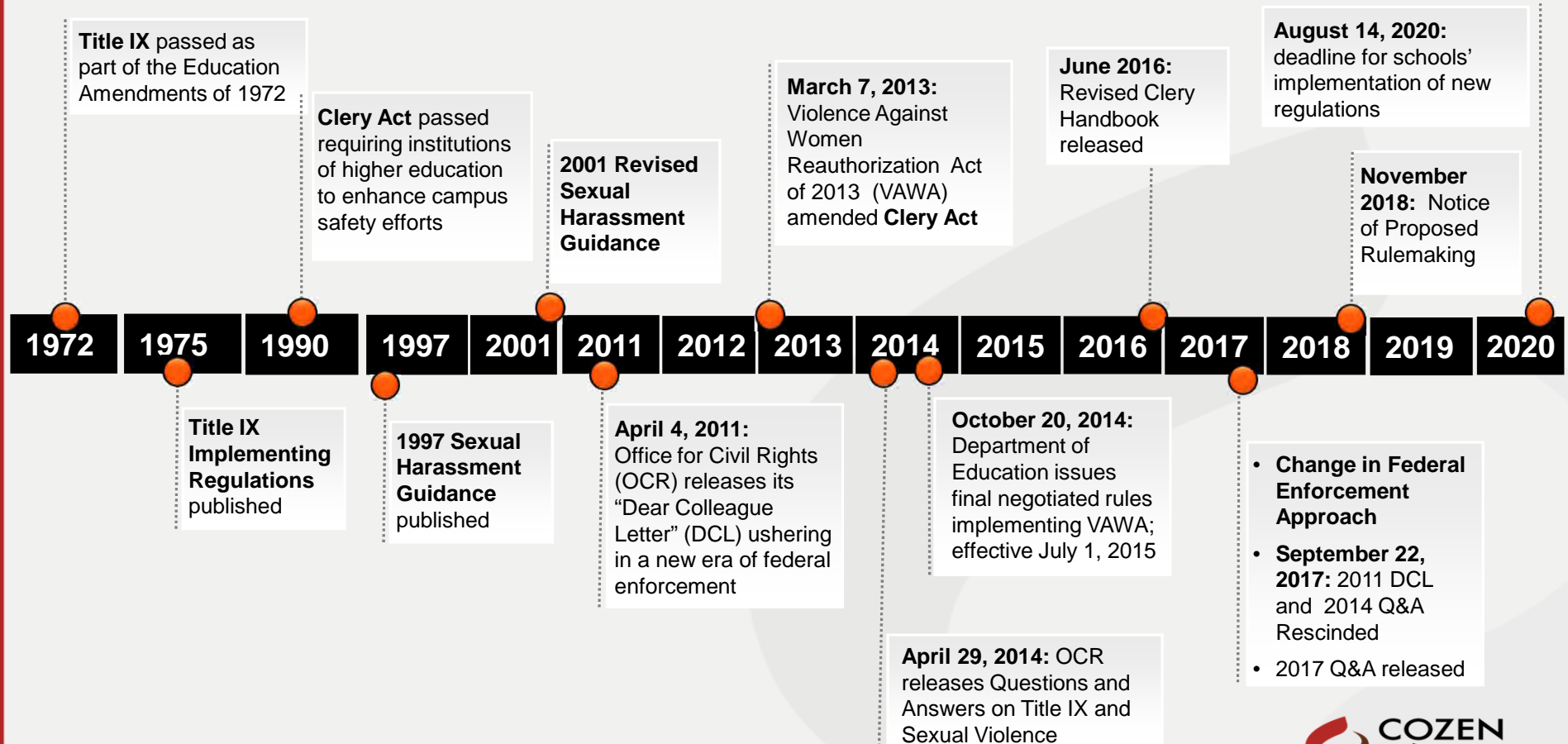
FRAMING THE CONTEXT







Evolution of Federal Legislation and Guidance



Silver Linings



2017 Q&A: Equitable Investigation

- The **burden is on the school** – not the parties – to gather sufficient evidence to reach a **fair, impartial** determination as to whether sexual misconduct or a hostile environment has occurred.
- Requires a **trained investigator** to analyze and document the available evidence to support reliable decisions, **objectively evaluate the credibility** of parties and witnesses, synthesize all available evidence and take into account the unique and complex circumstances of each case.
- Investigator must be free from actual or perceived **conflicts of interest** and **biases** for or against any party. Avoid **conflicts of interest and biases** in the adjudicatory processes and prevent institutional interests from interfering with the impartiality of the adjudication.

2017 Q&A: Equitable Investigation

- Any rights or opportunities that a school makes available to one party during the investigation should be made available to the other party on **equal** terms.
- The reporting and responding parties and appropriate officials must have **timely and equal access to any information** that will be used during informal and formal disciplinary meetings and hearings.

2017 Q&A: Equitable Investigation

- **Written notice** to a respondent of the allegations constituting a potential violation should include “**sufficient details and with sufficient time to prepare a response before any initial interview.**”
- Notice should include:
 - The identities of the parties involved
 - The specific section of the code of conduct allegedly violated
 - The precise conduct allegedly constituting the potential violation
 - The date and location of the alleged incident.

2017 Q&A: Equitable Investigation

- The investigation **should** result in a **written report** summarizing the relevant **exculpatory and inculpatory** evidence.
- The parties should have the **opportunity to respond to the report in writing** in advance of the decision of responsibility and/or at a live hearing to decide responsibility.
- OCR recommends that a school provide **written notice of the outcome** of disciplinary proceedings to the reporting and responding parties concurrently.

Maintaining Calm

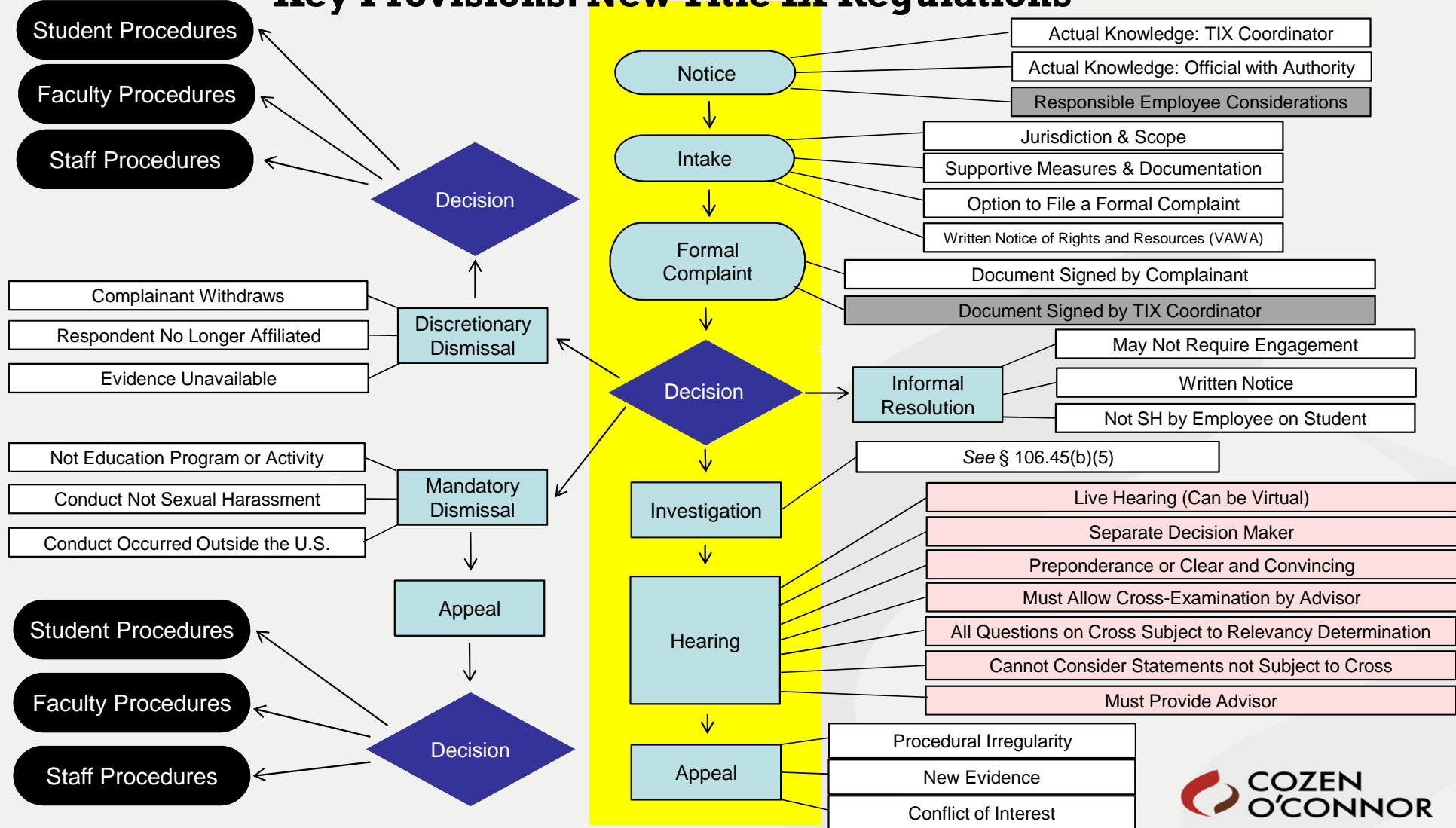


Getty Images

Investigative Principles

- Open-ended and thorough inquiry
- Equitable opportunities for the parties to participate
- The conduct of the investigation matters
- Separating intake/support from investigation
- Maintaining and reinforcing impartiality
 - Screening for conflicts of interest or bias
 - Attention to language and communications
- Trained and experienced investigators

Key Provisions: New Title IX Regulations



Key Provisions of Title IX Regulations issued May 19, 2020;

Regulations: “Legally Binding Obligations”

- “Because these final regulations represent the Department’s interpretation of a recipient’s legally binding obligations, **rather than best practices**, recommendations, or guidance, these final regulations focus on **precise legal compliance requirements** governing recipients.”

Regulations: “Best Practices”

- “These final regulations leave recipients the **flexibility to choose to follow best practices and recommendations** contained in the Department’s guidance, or similarly, best practices and recommendations made by non-Department sources, such as Title IX consultancy firms, legal and social sciences scholars, victim advocacy organizations, civil libertarians and due process advocates and other experts.”

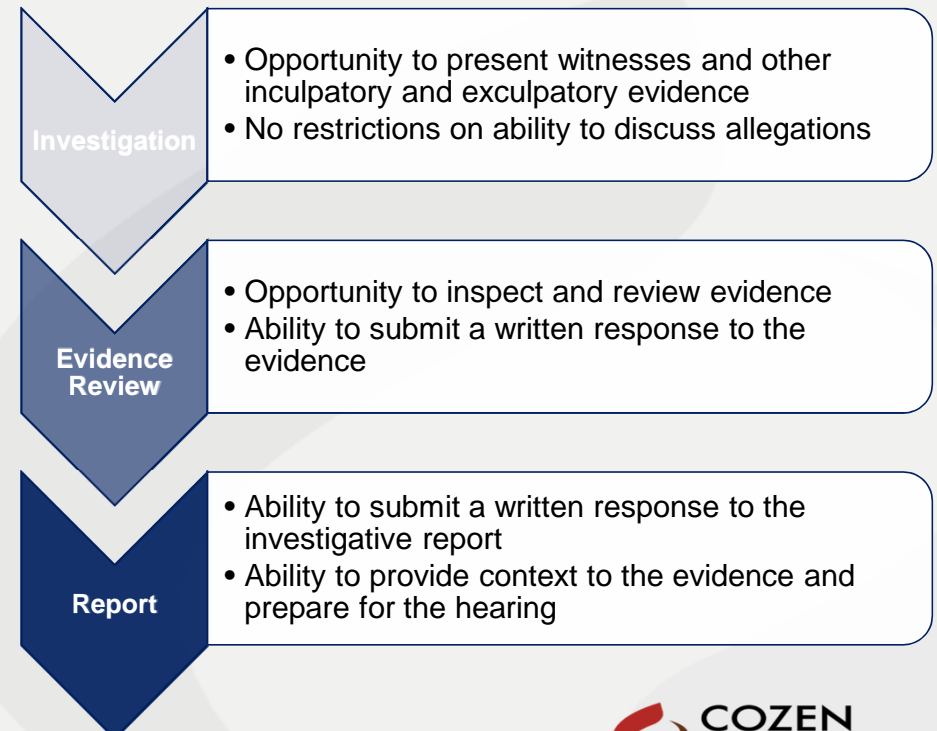
Title IX Regulations May 19, 2020; Preamble, 85 F.R. 30030

Setting the Stage - Investigations

Institutional Obligations



Parties' Opportunity to Participate

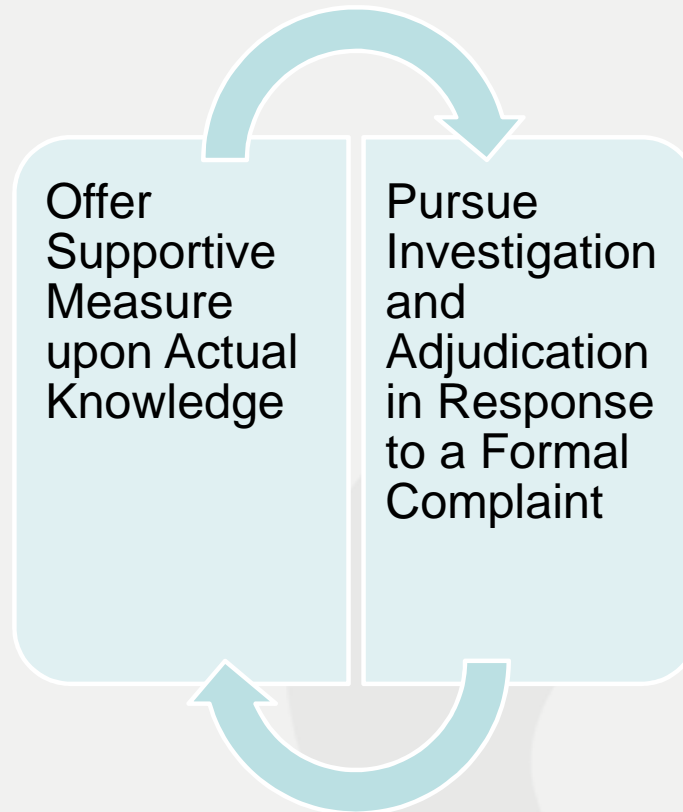


Overview

- Obligation to Investigate
- Basic Requirements of Grievance Processes
- Pre-Investigation Considerations
- Consolidation of Formal Complaints
- Investigation - Evidence Gathering
- Evidentiary Considerations
- Evidence Review
- Investigative Report
- Reasonably Prompt Time Frames

OBLIGATION TO INVESTIGATE

Understanding Two Key Provisions



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

Reinforcing Agency & Autonomy

- Balancing a recipient's obligation to respond to instances of sexual harassment with a complainant's autonomy
 - A rigid requirement such as an investigation in every circumstance may chill reporting of sexual harassment...
 - A student may receive supportive measures irrespective of whether the student files a formal complaint...these final regulations encourage students to report sexual harassment while allowing them to exercise some control over their report.

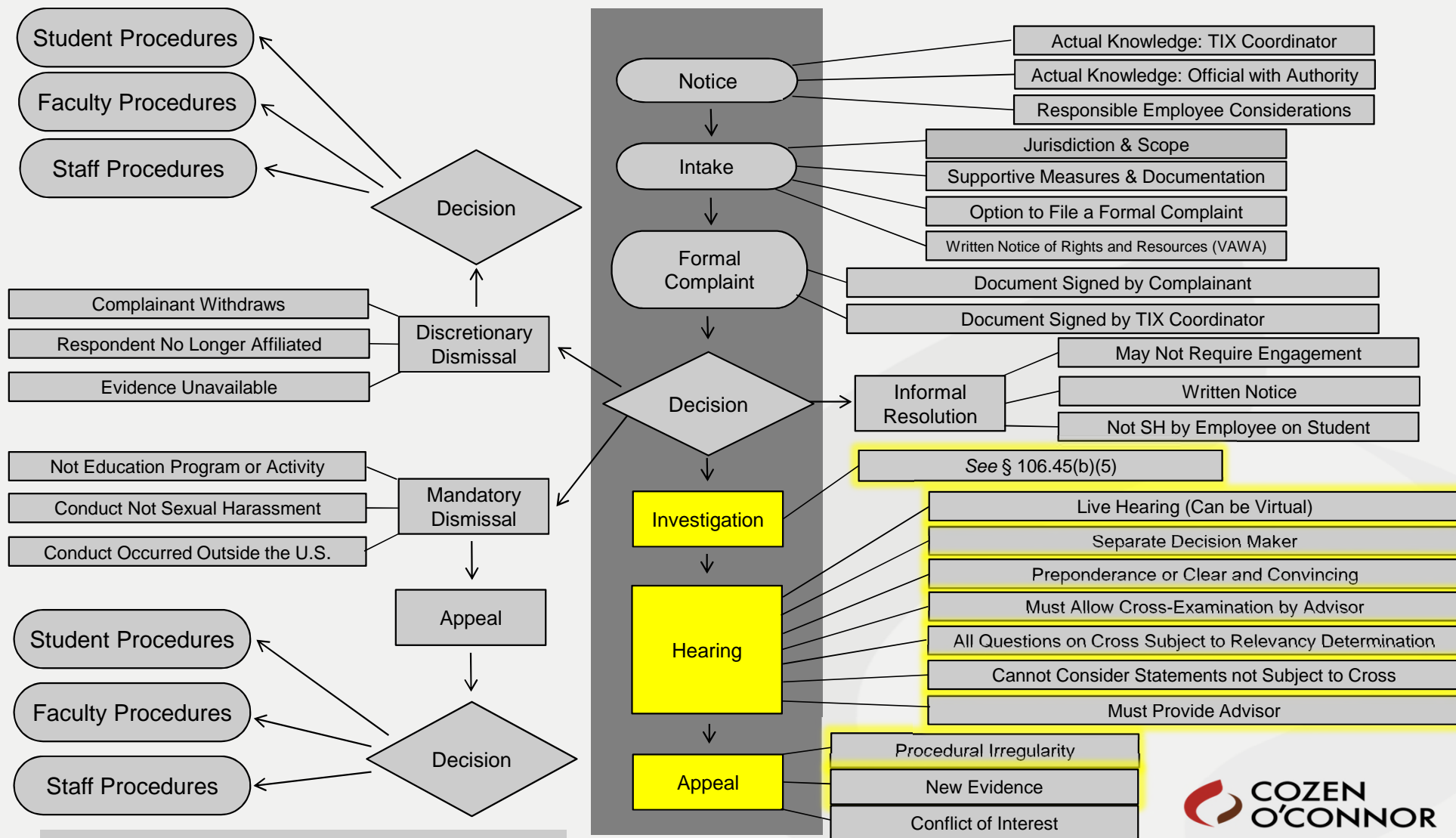
Title IX Regulations May 19, 2020; Preamble, 85 F.R. 30190

The Obligation to Investigate

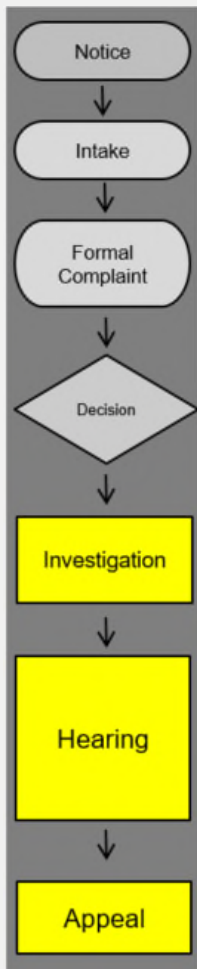
- Formal complaint:
 - A document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and
 - Requesting that the recipient investigate the allegation of sexual harassment
- Once a formal complaint is filed, a recipient **must** investigate the 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

BASIC REQUIREMENTS OF GRIEVANCE PROCESSES



Basic Requirements

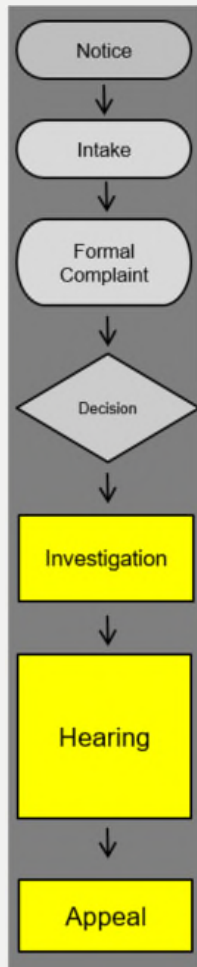


- **Treat complainants and respondents equitably** by providing **remedies** to a complainant where a determination of responsibility for sexual harassment has been made against the respondent, and by following a **grievance process** that complies with this section before the imposition of any disciplinary 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

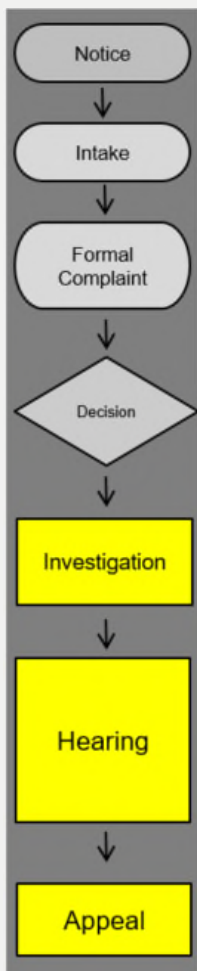
Relevant Regulations Sections:

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
- Include reasonably prompt time frames for conclusion of the grievance process with permissible delay for good cause
- Describe the range (or list) of possible disciplinary sanctions and remedies

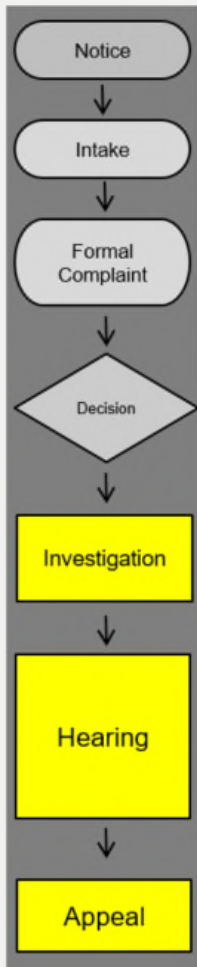
Relevant Regulations Sections:

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)

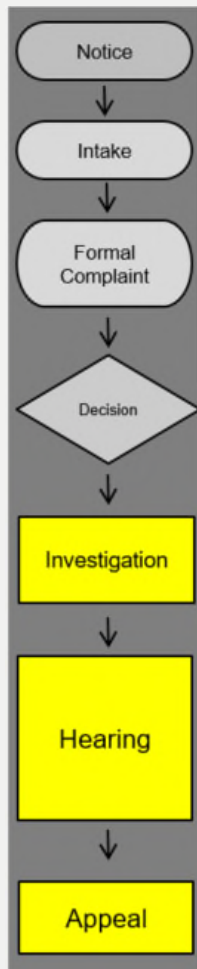
Basic Requirements



- State whether the **standard of evidence** to be used to determine responsibility is 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



- Include the procedures and permissible bases for the complainant and respondent to appeal
- Describe the 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)

PRE-INVESTIGATION CONSIDERATIONS

Pre-Investigation Considerations

- Choice of Investigator
 - Internal or external professional
 - Sufficient training and experience
 - Free from conflict of interest or bias
- Investigative Protocols
- Template Communications
- Notice of Allegations
- Consolidation of Formal Complaints

Separating Support from Investigations

- Separate support/advocacy/intake functions from investigative/adjudicative functions to reduce potential for conflict of interest or perception of bias
- Conflation of roles can:
 - Impact thorough assessment of the facts
 - Create distrust/confusion by complainant
 - Give appearance of bias/lack of impartiality

Separating Support from Investigations

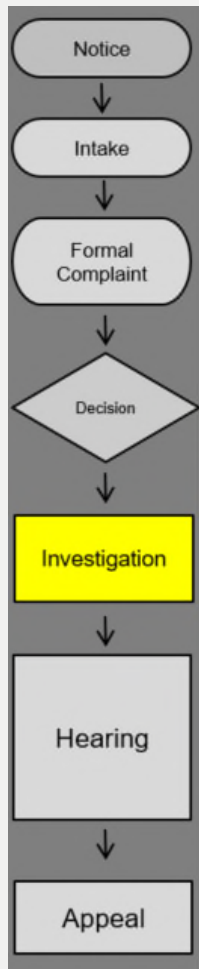
- Reinforce neutrality in language and communications
- Ensure sufficient resources for timely response
- Consider creative models for separation of intake from support from investigation from decision-making

Removal of Bias or Conflict of Interest

- “Section 106.44(c) does not preclude a recipient from using Title IX personnel trained under §106.45(b)(1)(iii) to make the emergency removal decision or conduct a post-removal challenge proceeding, but **if involvement with the emergency removal process results in bias or conflict of interest for or against the complainant or respondent**, §106.45(b)(1)(iii) would preclude such personnel from serving in those roles during a grievance process.”

Title IX Regulations May 19, 2020, Preamble, 85 F.R. 30235.

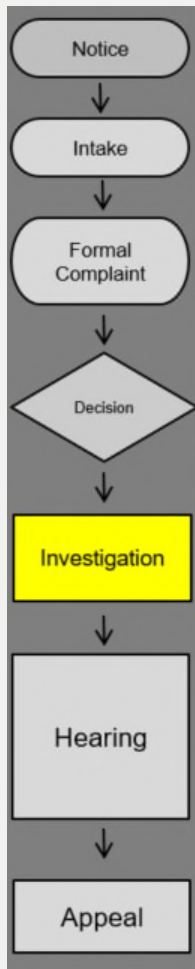
Written Notice of all Proceedings



- Written notice of all hearings, investigative interviews or other meetings
- With sufficient time for the party to prepare to participate
- Notice must include:
 - Date, time, location of proceeding
 - Participants invited or expected to attend
 - Purpose of the proceeding

Title IX Regulations May 19 2020; §106.45(b)(5)(v) 85 F.R. 30424

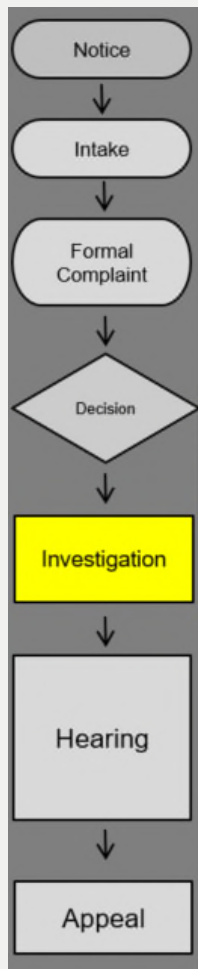
Written Notice of Allegations



- 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.

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

Written Notice of the Allegations



– Must state that:

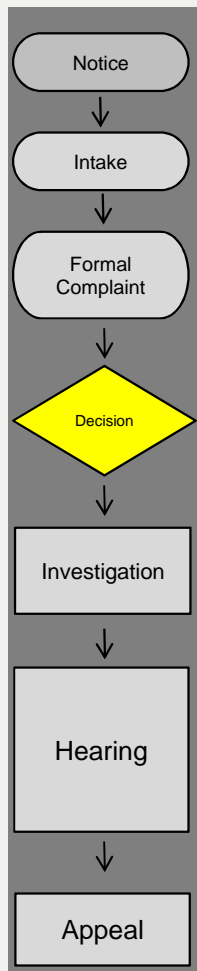
- the respondent is presumed not responsible for the alleged conduct
- a determination regarding responsibility is made at the conclusion of the grievance process

– 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

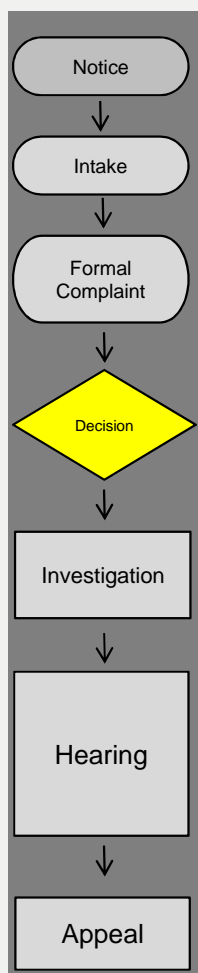
Written Notice of Allegations



- 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

Supplemental Notice



- If during the investigation, the recipient decides to investigate allegations about the complainant or respondent that are not included in the original notice, the recipient must provide notice of the additional allegations to the parties whose identities are known.
- The Preamble makes it clear that any supplemental notice must be in writing.
 - Although § 106.45(b)(2) requires subsequent written notice to the parties as the recipient discovers additional potential violations...

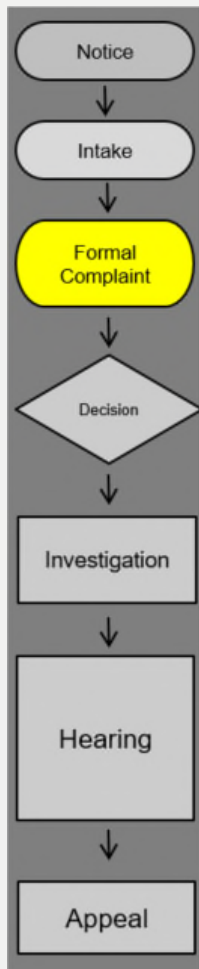
Title IX Regulations May 19, 2020 §106.45(b)(2)(ii); Preamble 85 F.R. 30283

Practical Considerations

- Checkpoints for additional policy violations
 - Post complainant interview
 - Post respondent interview
 - Post evidence review
- Procedural due process: “Notice”
- Consider similar checkpoints for mandatory dismissal of the formal complaint

CONSOLIDATION OF FORMAL COMPLAINTS

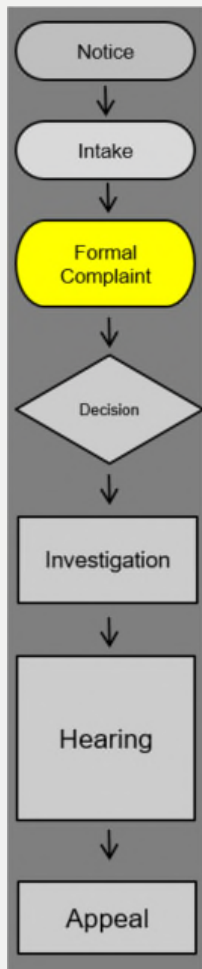
Consolidation of Formal Complaints



- A recipient **may** consolidate formal complaints as to allegations of sexual harassment against more than one respondent, or by more than one complainant against one or more respondents, or by one party against the other party, **where the allegations of sexual harassment arise out of the same facts or circumstances.**

Title IX Regulations May 19, 2020; §106.45(b)(4) 85 F.R. 30576

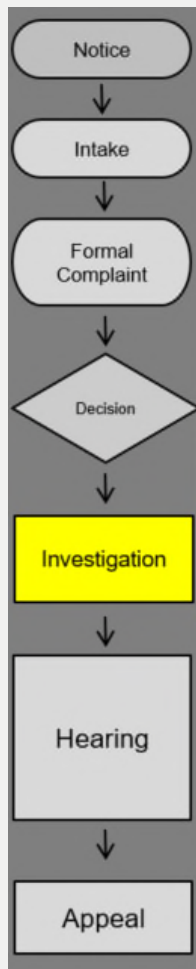
Consolidation of Formal Complaints



- The requirement for the same facts and circumstances means that the multiple complainants' allegations are so intertwined that their allegations directly relate to all the parties.

Title IX Regulations May 19, 2020 Preamble 85 F.R. 30436

Consolidation of Formal Complaints



- The Department believes that recipients and parties will benefit from knowing that recipients have discretion to consolidate formal complaints...
- Intended to give “discretion” to consolidate formal complaints that arise “out of the same facts or circumstances and involve more than one complainant, more than one respondent, or what amount to counter-complaints by one party against the other.”

Title IX Regulations May 19, 2020; Preamble 85 F.R. 30291

Consolidation of Formal Complaints



- If the respondent is facing an additional allegation, the respondent has a right to know what allegations have become part of the investigation for the same reasons the initial written notice of allegations is part of a fair process, and the complainant deserves to know whether additional allegations have (or have not) become part of the scope of the investigation.
- This information allows both parties to meaningfully participate during the investigation, for example by gathering and presenting inculpatory or exculpatory evidence (including fact and expert witnesses) relevant to each allegation under investigation.

Title IX Regulations May 19, 2020; Preamble 85 F.R. 30283

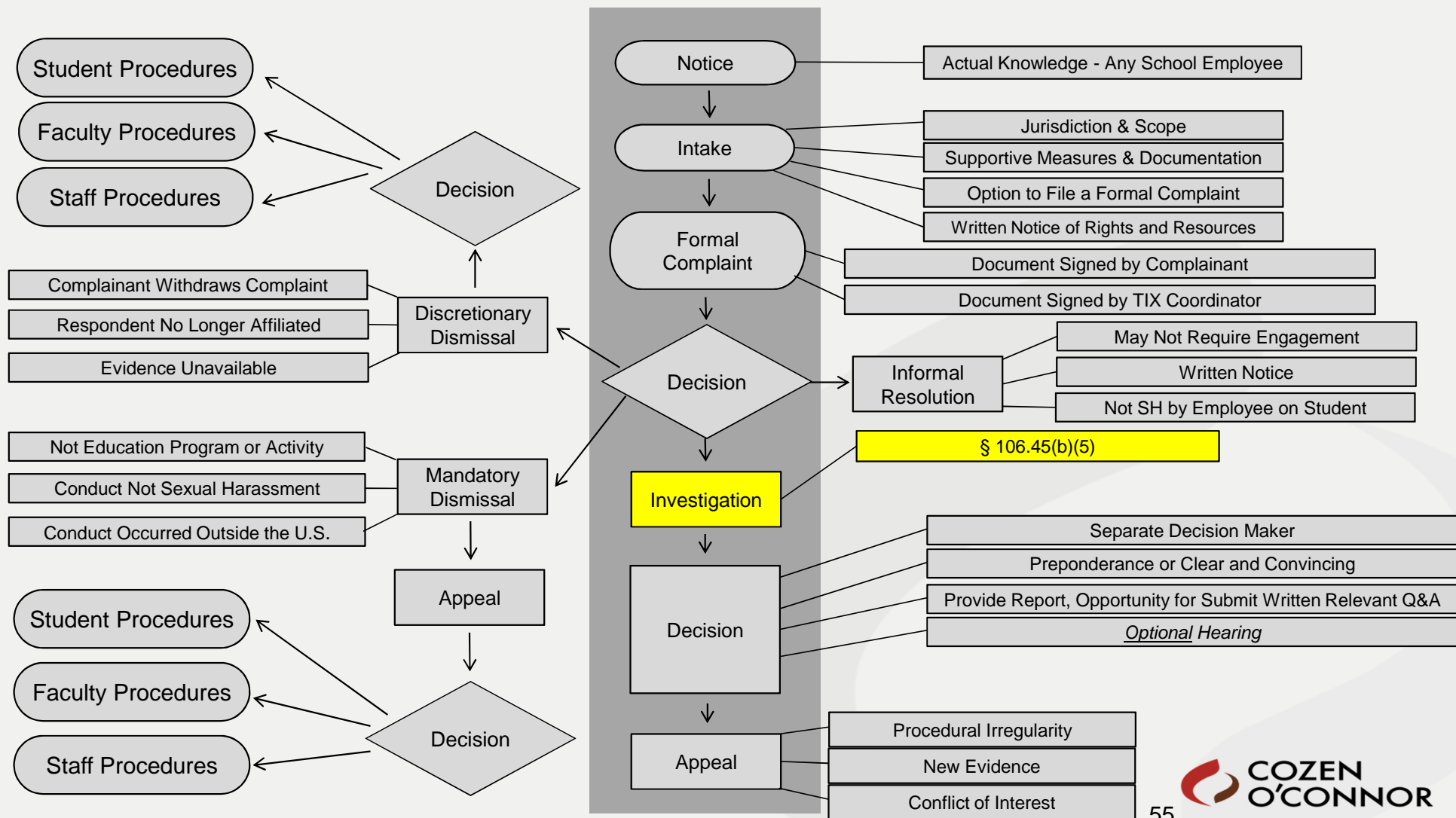
Application to Specific Circumstances

- Multiple instances of a respondent engaging in misconduct towards the same complainant
- Multiple allegations by same complainant against same respondent
- Multiple allegations by different complainants against same respondent
- Respondent alleges complainant has engaged in past misconduct involving false reports

Practical Considerations

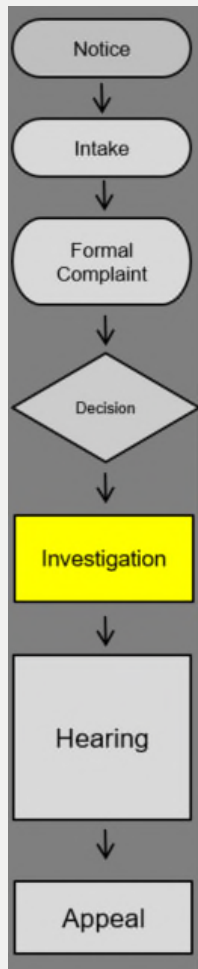
- Process for determining whether to consolidate formal complaints
 - Identify decision-makers
 - Identify criteria for consolidation
- Opportunity to contest consolidation?

INVESTIGATIONS



EVIDENCE GATHERING

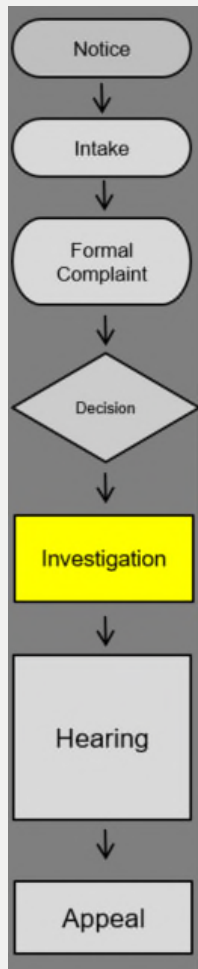
Burden of Gathering Evidence



- Ensure that the burden of proof and the burden of gathering evidence rests on the recipient and not on the parties
 - The recipient's burden is **to gather evidence sufficient to reach a determination** regarding responsibility

Title IX Regulations May 19, 2020; §106.45(b)(5)(i) FN 562 .

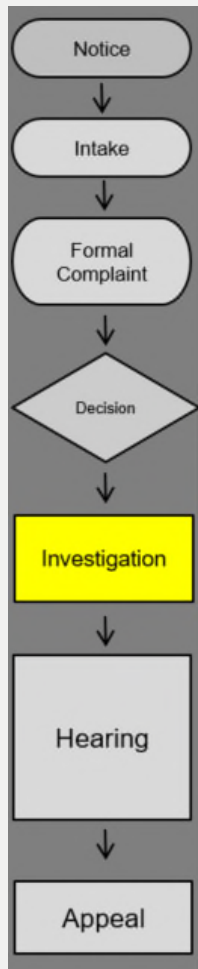
Burden of Gathering Evidence



- Undertake a **thorough search for relevant facts and evidence** pertaining to a particular case, while operating under the constraints of conducting and concluding the investigation under designated, reasonably prompt time frames and without powers of subpoena.
- Such conditions limit the extensiveness or comprehensiveness of a recipient's efforts to gather evidence while reasonably expecting the recipient to gather evidence that is available.

Title IX Regulations May 19, 2020; Preamble at 30292.

Burden of Gathering Evidence

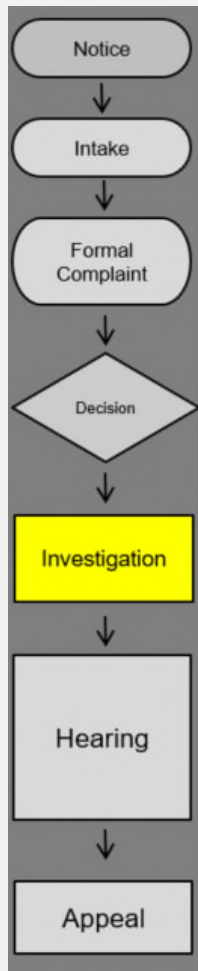


- The investigator is obligated to **gather evidence directly related to the allegations** whether or not the recipient intends to rely on such evidence (for instance, where evidence is directly related to the allegations but the recipient's investigator does not believe the evidence to be credible and thus does not intend to rely on it).

Title IX Regulations May 19, 2020; Preamble at 30248-49.

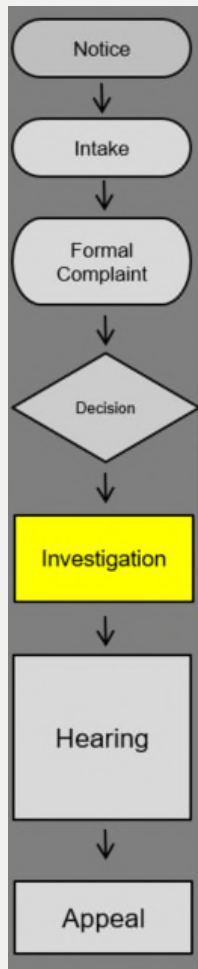
Opportunity to Participate

- Not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence.



Title IX Regulations May 19, 2020; §106.45(b)(5)(ii) ; 85 F.R. 30422-23.

Witnesses & Evidence



- Provide an equal opportunity for the parties to present witnesses and evidence
 - Fact and expert witnesses
 - Inculpatory and exculpatory evidence

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

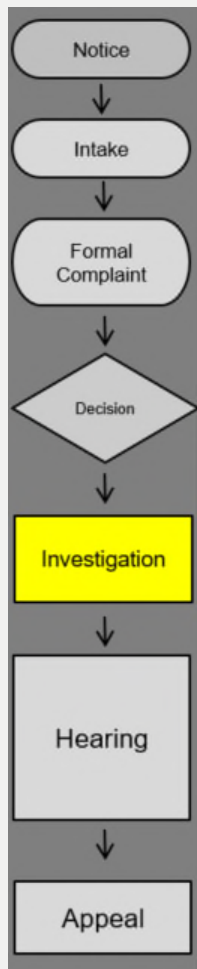
Practical Considerations & Effective Practices

- Preparing for interview
- Interview protocols and templates for introduction, scope and conclusion
- Documenting interviews
 - Note-taking vs. recording
 - Use of two investigators
- Decision-points
 - Sharing interviews with the parties for feedback
 - Considerations regarding character witnesses
 - Guidance about expert witnesses
 - Compelling witness participation

Practical Considerations for Remote Interviews

- Developing rapport
 - Allow additional time for the interview
 - Conversational language and tone
 - Avoid distractions
- Privacy considerations
 - Ensuring a private setting
 - Facilitating the presence of advisor of choice
- Sharing documents

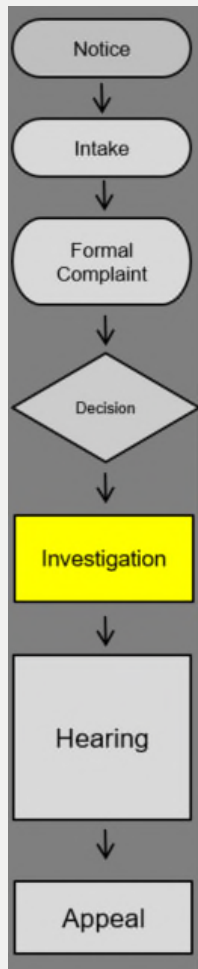
Advisor of Choice



- 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

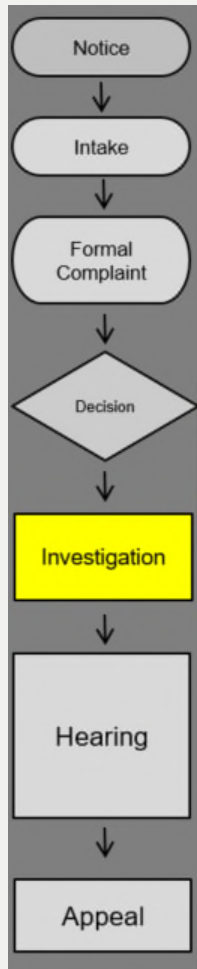
Restrictions on Advisor Participation



- 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

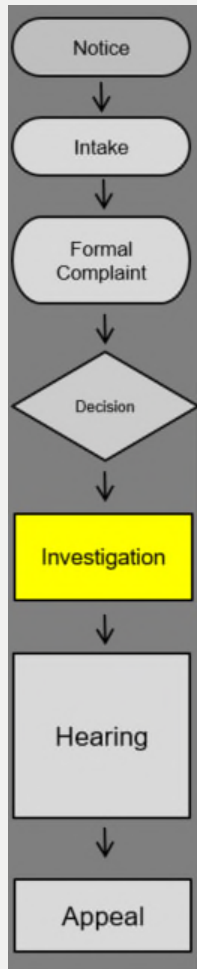
Restrictions on Advisor Participation



- “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.

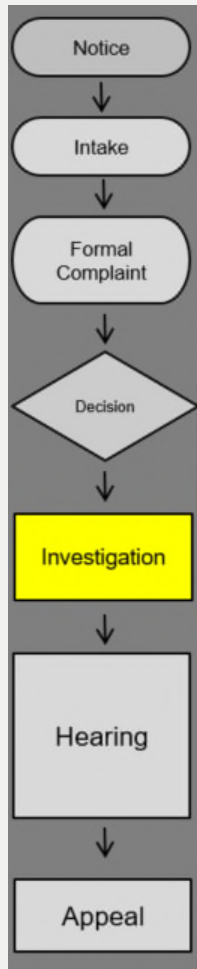
Training of Advisors Not Required



- 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.

Practical Considerations & Effective Practices

- Process meeting to discuss policy, decorum, and expectations
- Requirement that 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

EVIDENTIARY CONSIDERATIONS

Evidentiary Considerations

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

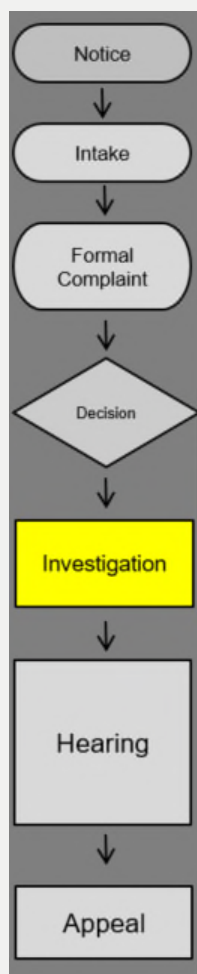
Privileged Information



- 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

Privileged Records

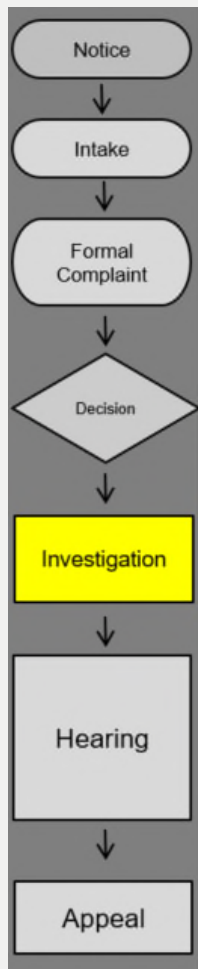


- Recipient cannot access, consider, disclose, or otherwise use a party's records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional's or paraprofessional's capacity, or assisting in that capacity, and which are made and maintained in connection with the provision of treatment to the party, unless the recipient obtains that party's **voluntary, written consent** to do so for a grievance process under this section.

Title IX Regulations May 19, 2020; § 106.45(b)(5)(i) 85 F.R.30423

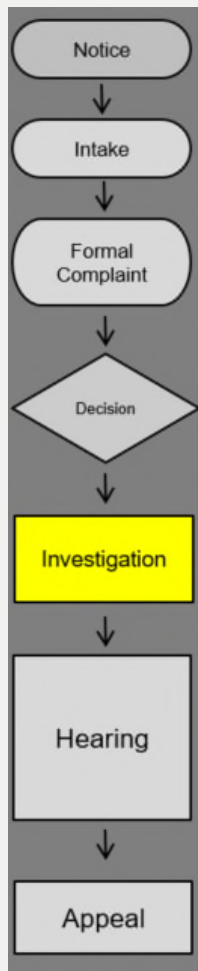
Relevance

- 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.

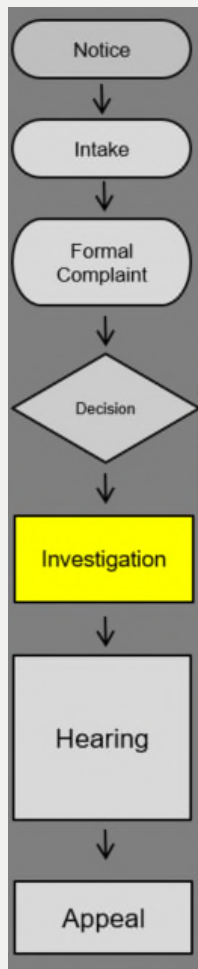
Relevance



- “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.

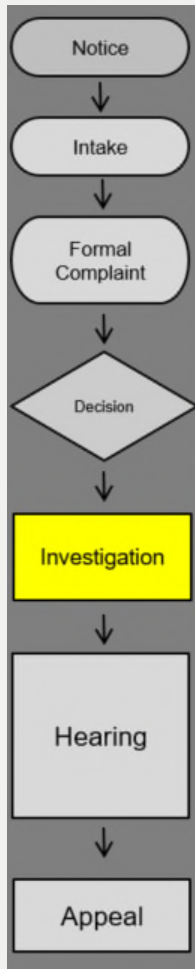
Relevance



- 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.

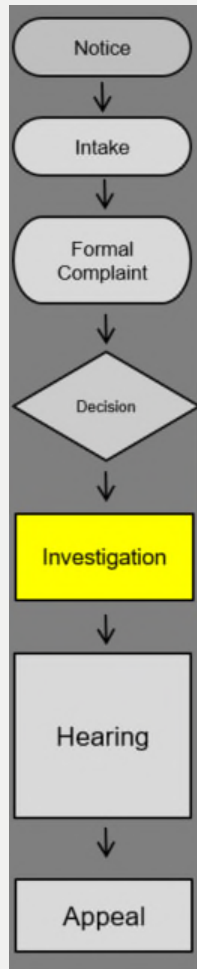
Prior Sexual History



- 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

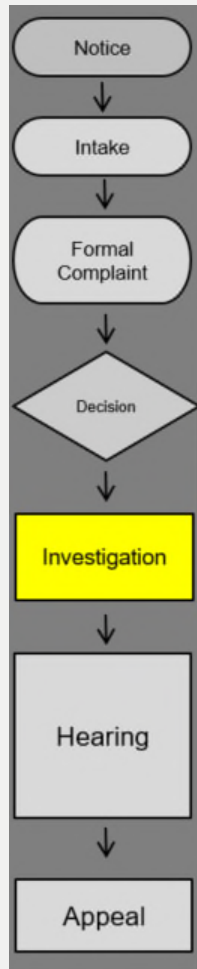
Prior Sexual History



- 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.

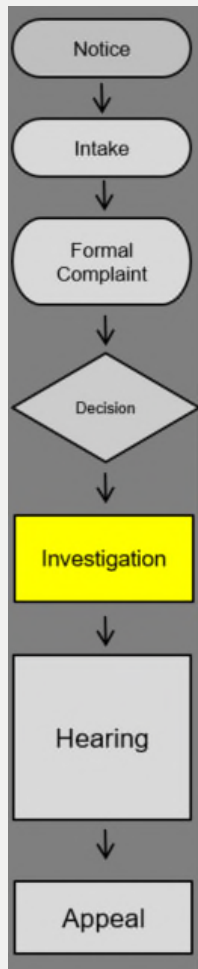
Prior or Subsequent Misconduct

- 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
- Schools will need to determine if such conduct is:
 - Relevant
 - May be used in determining responsibility
 - May be used in sanctioning
- If so, will need to set criteria for consideration

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
- Consider prejudicial vs. probative value

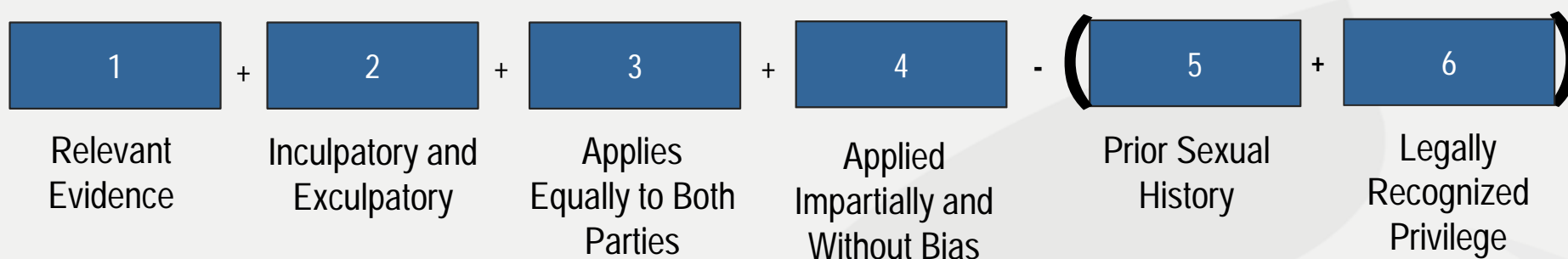
Flexibility to Adopt Rules



- “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.
- 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.**”

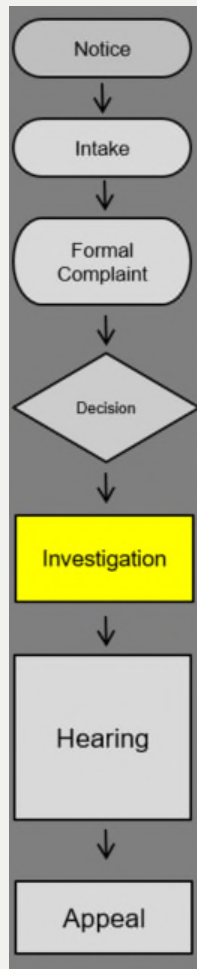
Title IX Regulations May 19, 2020; Preamble at 30248.

Evidentiary Rules Must Consider



EVIDENCE REVIEW

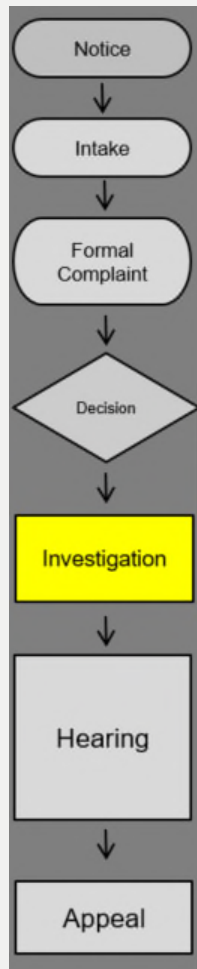
Evidence Review



- “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

Evidence Review

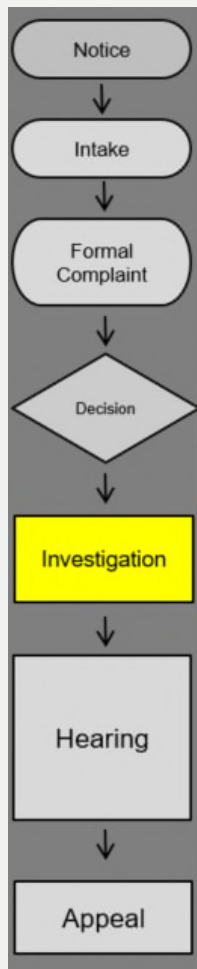


- “Recipient must send to each party and the party’s advisor, if any, **the evidence subject to inspection and review** in an electronic format or a hard copy, and the parties must have at least **10 days to submit a written response**, which the investigator will consider prior to completion of the investigative report.”

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

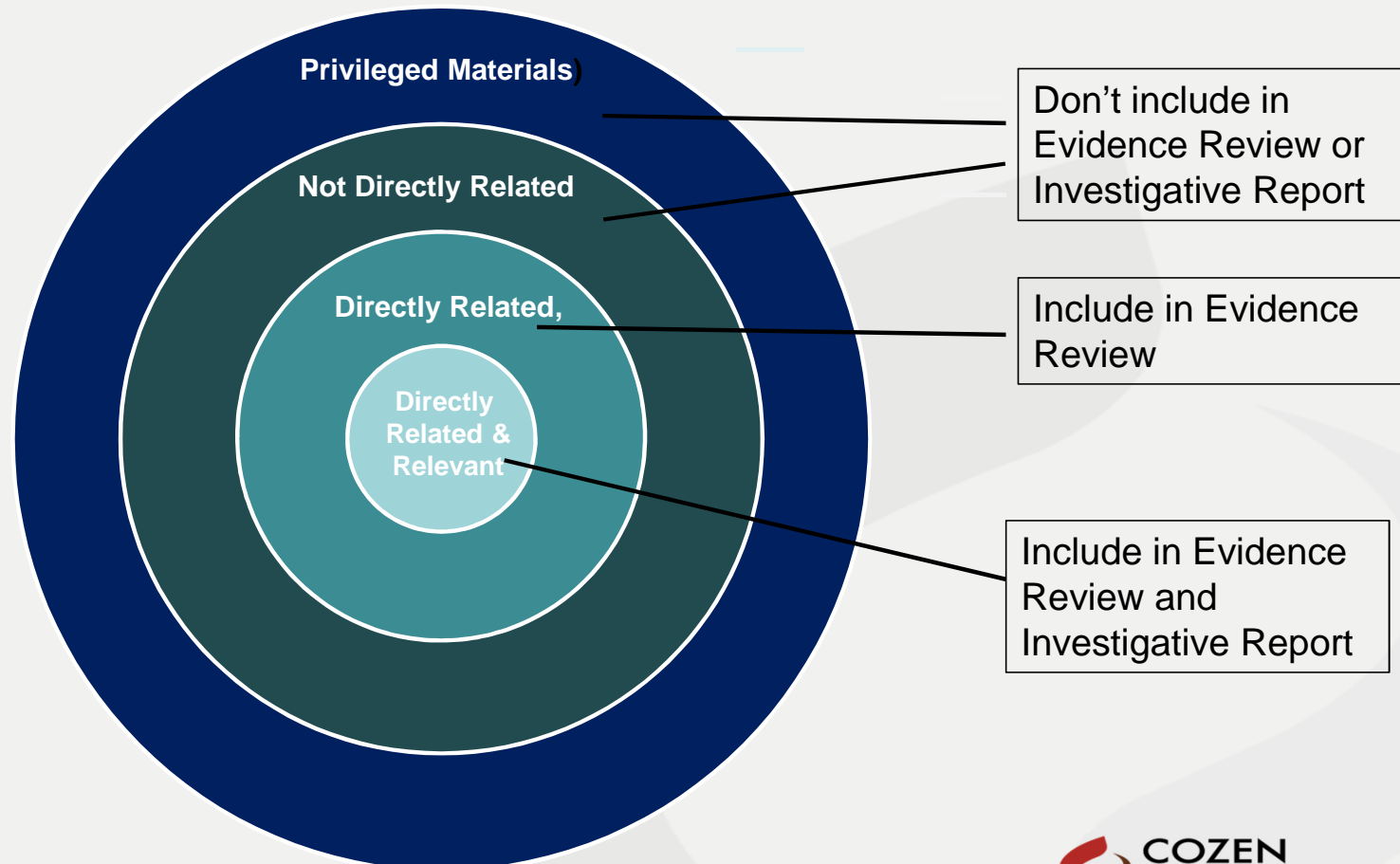
Evidence Review

- Allowing parties the opportunity to inspect this broader universe of evidence will further each party's own interests by identifying evidence either overlooked by the investigator or erroneously deemed relevant or irrelevant.

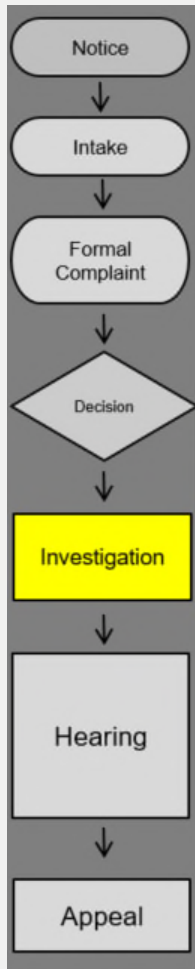


Title IX Regulations May 19, 2020; Preamble 85 F.R.30303

Evidentiary Levels for Inclusion



Directly Related

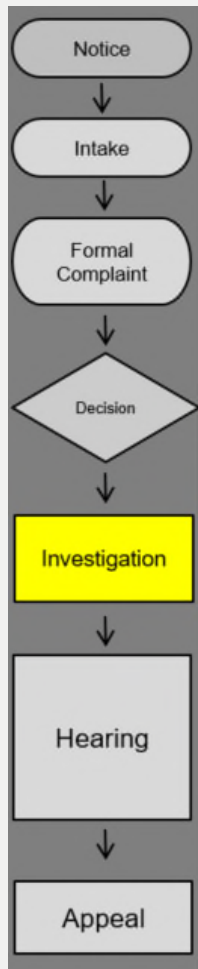


- Not defined in the regulations or the Preamble
 - The Department declines to define certain terms such as “evidence directly related to the allegations,” as these terms should be interpreted using their plain and ordinary meaning.
- “Directly related” aligns with the requirements in FERPA
 - The Department previously noted that the “directly related to” requirement in § 106.45(b)(vi) aligns with FERPA.
 - For example, the regulations implementing FERPA define education records as records that are “directly related to a student” pursuant to § 99.3.
- Left to the discretion of the school
 - [T]he school has some discretion to determine what evidence is directly related to the allegations in a formal complaint.

Title IX Regulations May 19, 2020; Preamble at 30304, 30428.

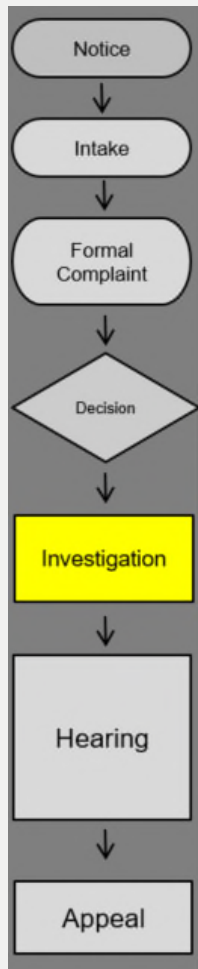
Directly Related

- [T]he universe of that exchanged evidence should include all evidence (inculpatory and exculpatory) that relates to the allegations under investigation, without the investigator having screened out evidence related to the allegations that the investigator does not believe is relevant.



Title IX Regulations May 19, 2020 §106.45(b)(5)(vi);
Preamble 85 F.R.30304

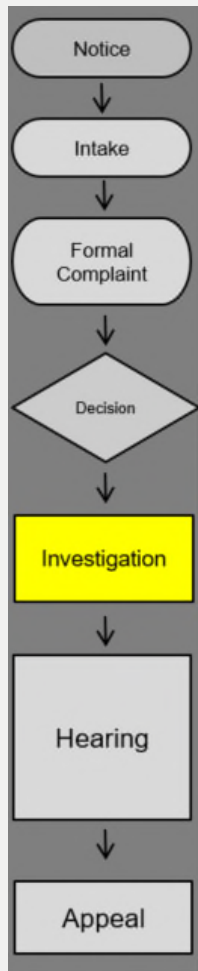
Directly Related vs. Relevant



- Evidence that is “directly related to the allegations” may encompass a broader universe of evidence than evidence that is “relevant.”
- The Department does not believe that determinations about whether certain questions or evidence are relevant or directly related to the allegations at issue requires legal training and that such factual determinations reasonably can be made by layperson recipient officials impartially applying logic and common sense.

Title IX Regulations May 19, 2020; Preamble at 30304, 30321.

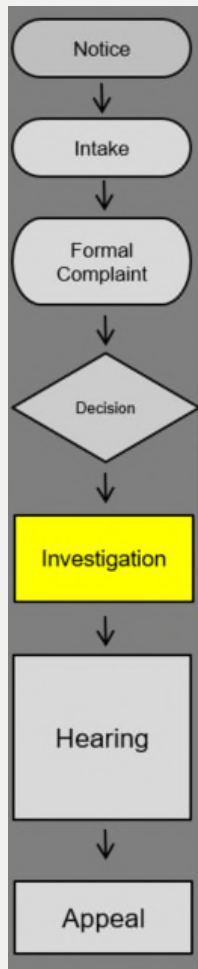
Directly Related



- Redacting information within evidence (documents, interviews, medical records, etc.)
- May be redacted if:
 - Not directly related to the allegations
 - Privileged, or
 - Obtained without proper consent
- A recipient may permit or require the investigator to redact information ... such as information protected by a legally recognized privilege ... contained within documents ... that are directly related to the allegations, before sending the evidence to the parties for inspection and review.

Title IX Regulations May 19, 2020; Preamble 85 F.R.30304

Directly Related

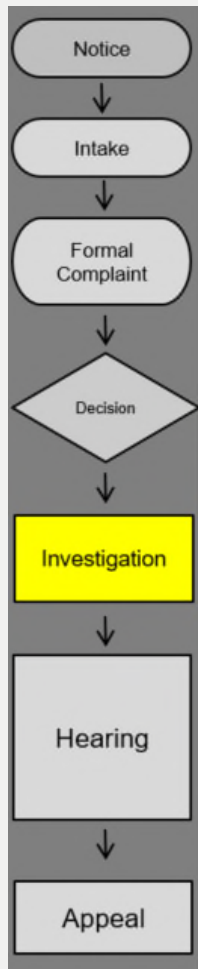


- Imposing restrictions on dissemination or use
 - Recipients may impose on the parties and party advisors restrictions or require a non-disclosure agreement not to disseminate or use any of the evidence for a purpose unrelated to the Title IX grievance process.
 - As long as doing so does not violate the regulations or law.

Title IX Regulations May 19, 2020; Preamble 85 F.R.30304.

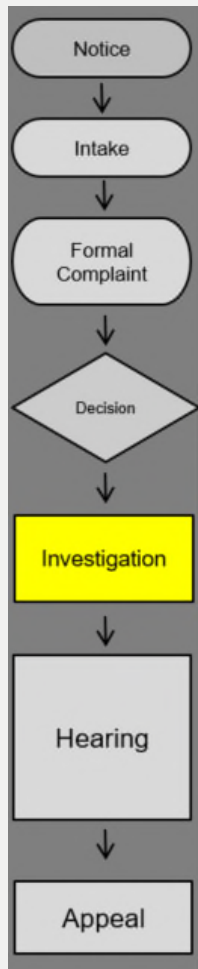
Directly Related

- Exception for evidence that is obtained illegally, such as a wiretap violation
 - If a recipient knows that a recording is unlawfully created under State law, then the recipient should not share a copy of such unlawful recording. The Department is not requiring a recipient to disseminate any evidence that was illegally or unlawfully obtained.



Title IX Regulations May 19, 2020; Preamble 85 F.R.30427.

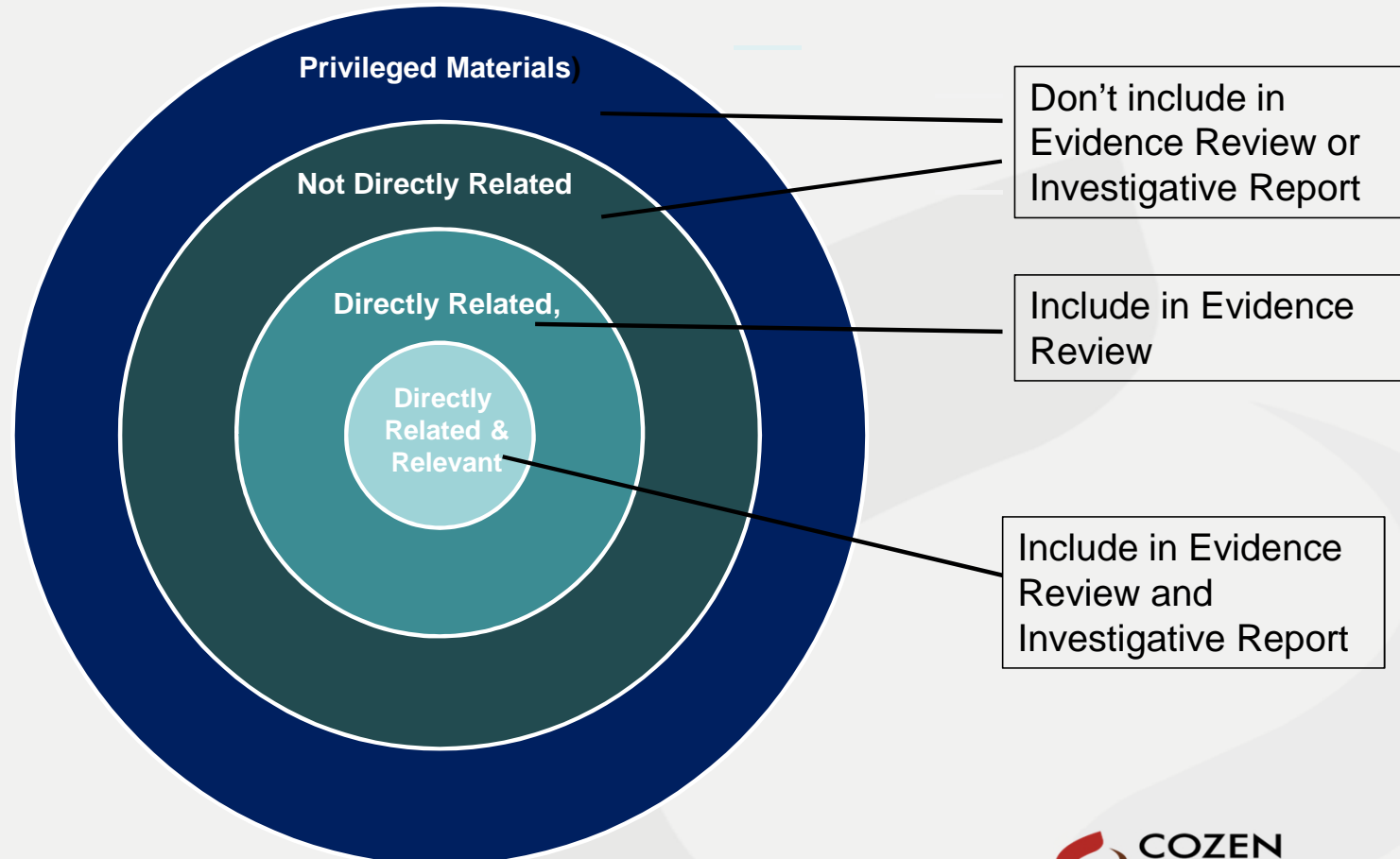
Scope of Parties' Review



- The parties may make corrections, provide appropriate context, and prepare their responses and defenses before a decision-maker reaches a determination regarding responsibility.
- If relevant evidence seems to be missing, a party can point that out to the investigator, and if it turns out that relevant evidence was destroyed by a party, the decision-maker can take that into account in assessing the credibility of parties, and the weight of evidence in the case.

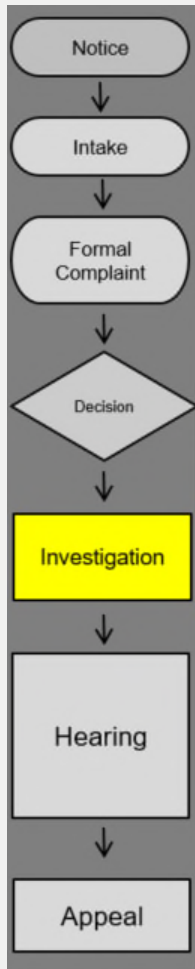
Title IX Regulations May 19, 2020; Preamble 85 F.R.30305 & 30300

Evidentiary Levels for Inclusion



INVESTIGATIVE REPORT

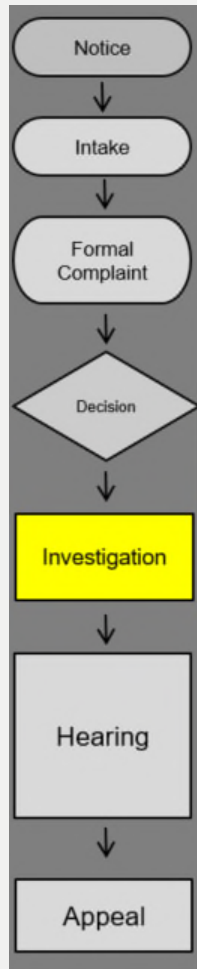
Investigative Report



- Create an **investigative report** that fairly summarizes relevant evidence and
- Send to each party and the party's advisor, if any, the investigative 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

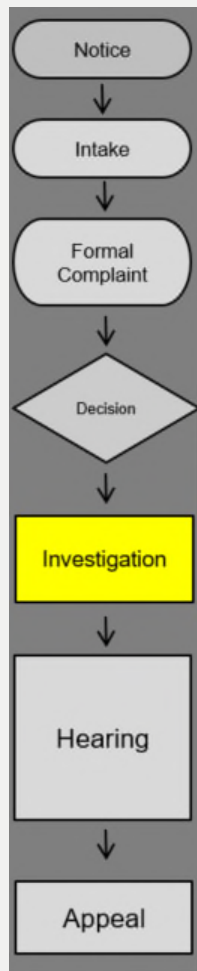
Investigative Report



- 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.

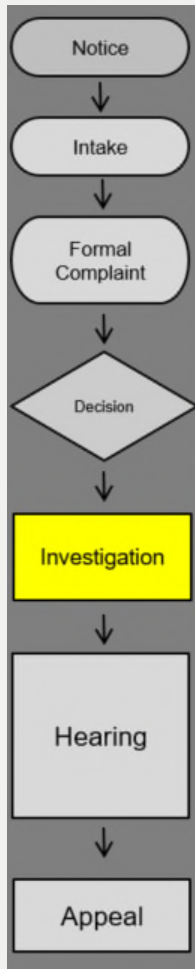
Investigative Report



- 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.

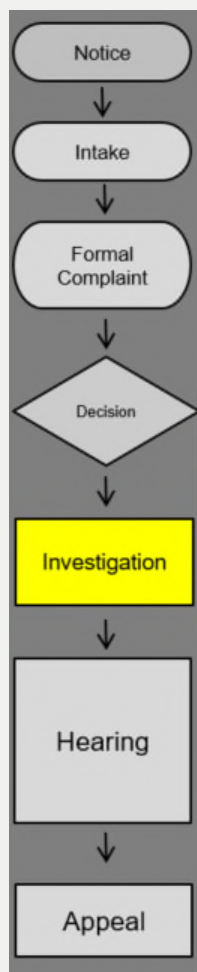
Title IX Regulations May 19, 2020; §§ 106.45(b)(5)(vii); Preamble 85 F.R. 3010.

Content for Written Determination



- 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

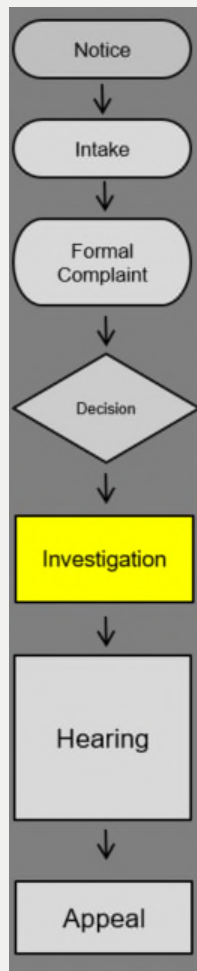
Investigative Report: Findings?



- The Department does not wish to prohibit the investigator from including recommended findings or conclusions in the investigative report.
- However, the decision-maker is under an independent obligation to objectively evaluate relevant evidence, and thus cannot simply defer to recommendations made by the investigator in the investigative report.
- If a recipient chooses to include a credibility analysis in its investigative report, the recipient must be cautious not to violate § 106.45(b)(7)(i), prohibiting the decision-maker from being the same person as the Title IX Coordinator or the investigator.

Title IX Regulations May 19, 2020; §§ 106.45(b)(5)(vii); Preamble 85 F.R.30308 & 30436

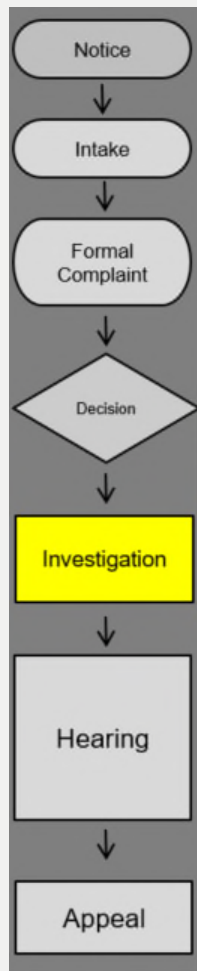
Investigative Report: Findings?



- § 106.45(b)(7)(i) prevents an investigator from actually making a determination regarding responsibility.
- If an investigator's determination regarding credibility is actually a determination regarding responsibility, then §106.45(b)(7)(i) would prohibit it.

Title IX Regulations May 19, 2020; §§ 106.45(b)(5)(vii); Preamble 85 F.R.30436

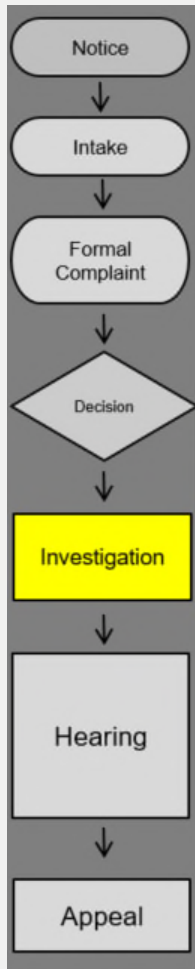
Revisiting Relevance



- Fairly summarizes the relevant evidence
- Investigator may redact information from the report
 - Recipients may permit or require the investigator to redact from the investigative report information that is not relevant, which is contained in documents or evidence that is relevant.

Title IX Regulations May 19, 2020; §§ 106.45(b)(5)(vii); Preamble 85 F.R.30436

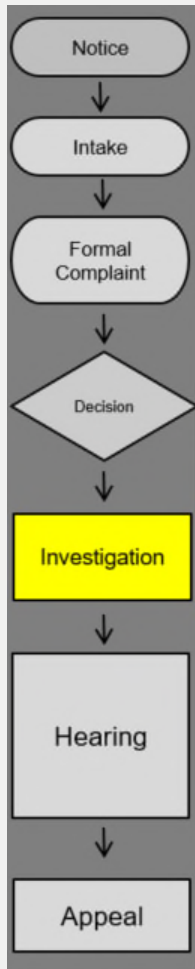
Investigative Report



- Allow parties to provide a written response to the investigative 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

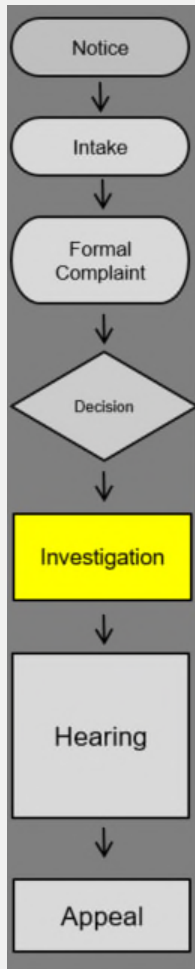
Investigative Report



- At least 10 days prior to the determination of responsibility (hearing)
 - Without advance knowledge of the investigative report, the parties will be unable to effectively provide context to the evidence included in the report.
 - A valuable part of this process is giving the parties (and advisors who are providing assistance and advice to the parties) adequate time to review, assess, and respond to the investigative report in order to fairly prepare for the live hearing or submit arguments to a decision-maker where a hearing is not required or otherwise provided.

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

Investigative Report



- At least 10 days prior to the determination of responsibility (hearing)
 - The parties then have equal opportunity to review the investigative report; if a party disagrees with an investigator's determination about relevance, the party can make that argument in the party's written response to the investigative report and to the decision-maker at any hearing held.

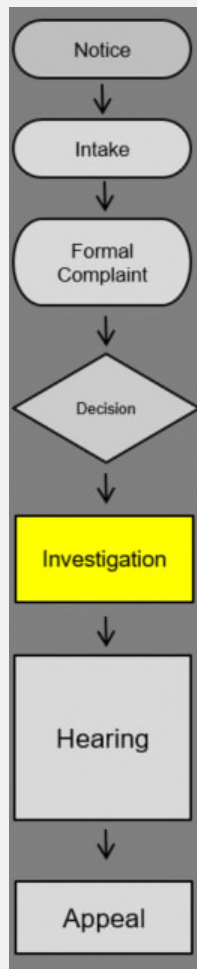
Title IX Regulations May 19, 2020; §§ 106.45(b)(5)(vii); Preamble 85 F.R.30248-49

Practical Considerations & Effective Practices

- Use template format with consistent language and content across investigations
- Language: balanced, neutral and non-judgmental
- Avoid declarative credibility language
 - “Unreliable” vs. insufficient information
 - Recognize perspective of the parties
 - Comment on the evidence, not the parties
- Use of verbatim quotes
- Leave sufficient time for writing, editing, proof reading and review by a fresh set of eyes

REASONABLY PROMPT TIME FRAMES

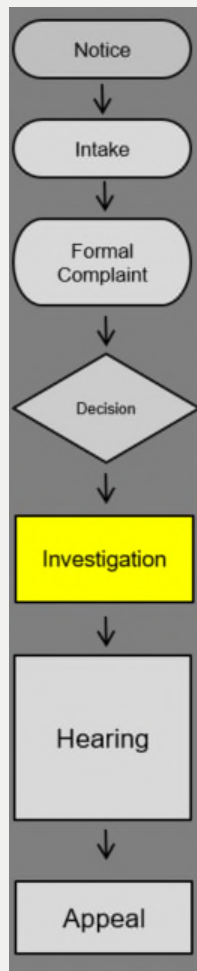
Reasonably Prompt Time Frames



- The grievance process must include:
 - reasonably prompt time frames for conclusion of the grievance process, including reasonably prompt time frames for filing and resolving appeals and informal resolution processes if the recipient offers informal resolution processes
 - a process that allows for the temporary delay of the grievance process or the limited extension of time frames for good cause with written notice to the complainant and the respondent of the delay or extension and the reasons for the action

Title IX Regulations May 19, 2020 §106.45(b)(1)(v) 85 F.R.30522 & 30575

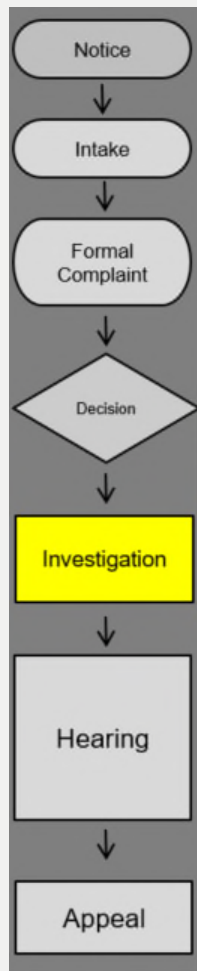
Reasonably Prompt Time Frames



- The grievance process must include:
 - reasonably prompt time frames for conclusion of the grievance process, including reasonably prompt time frames for filing and resolving appeals and informal resolution processes if the recipient offers informal resolution processes
 - a process that allows for the temporary delay of the grievance process or the limited extension of time frames for good cause with written notice to the complainant and the respondent of the delay or extension and the reasons for the action
- Good cause may include considerations such as:
 - the absence of a party, a party's advisor, or a witness;
 - concurrent law enforcement activity;
 - the need for language assistance or accommodation of disabilities

Title IX Regulations May 19, 2020 §106.45(b)(1)(v). 85 F.R. 30575

Reasonably Prompt Time Frames



- A recipient must resolve each formal complaint of sexual harassment according to the time frames the recipient has committed to in its grievance process.
- The Department believes that each recipient is in the best position to balance promptness with fairness and accuracy based on the recipient's unique attributes and the recipient's experience with its own student disciplinary proceedings, and thus requires recipients to include "reasonably prompt time frames" for conclusion of a grievance process that complies with these final regulations.

Title IX Regulations May 19, 2020 §106.45(b)(1)(v); Preamble 85 F.R. 30269

TRAINING

Training

- A recipient must ensure that **Title IX Coordinators, investigators, decision-makers, and any person who facilitates 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

Recap on Effective Investigations

- Preparation
- Policy
- Protocols
- Personnel
- Proficiency
 - Training
 - Experience

Use of Slides

- This PowerPoint presentation is not intended to be used as a stand-alone teaching tool.
- These materials are meant to provide a framework for informed discussion, not to provide legal advice regarding specific institutions or contexts.
- All rights are reserved to Cozen O'Connor.

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