

# **Title IX Training:**

## **An Integrated and Coordinated Approach**

### **Prepared for University of Oregon**

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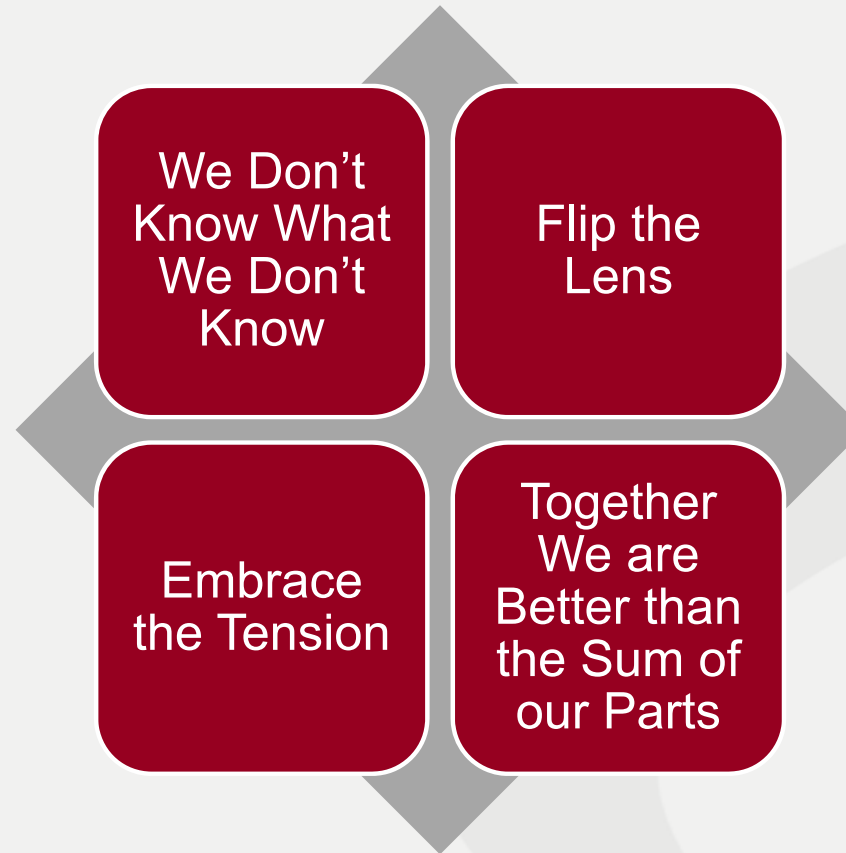
**Leslie M. Gomez, Vice Chair**

**October 17 and 24, 2022**



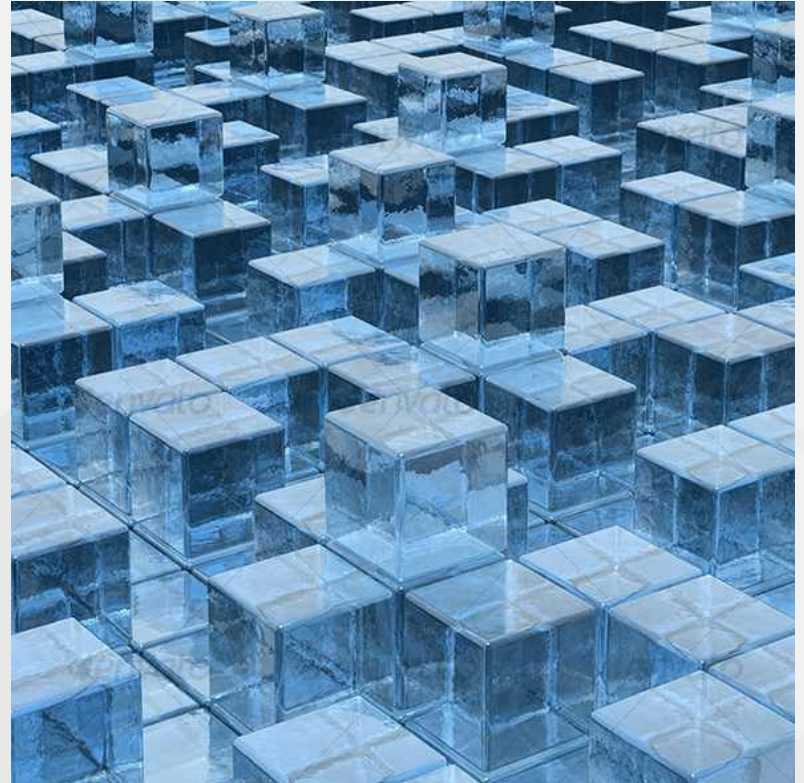
# FRAMING THE CONTEXT

# Framing the Conversation

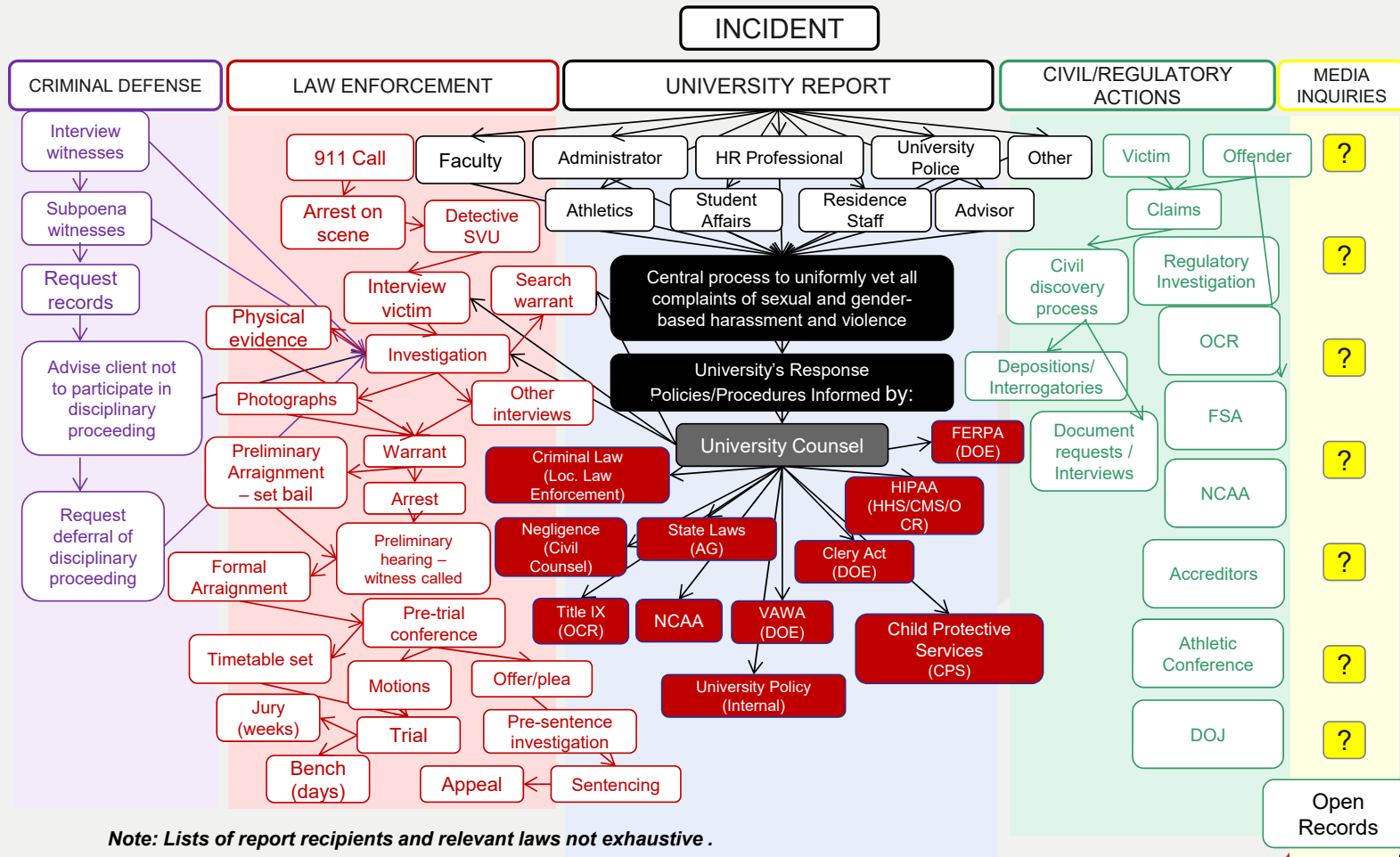


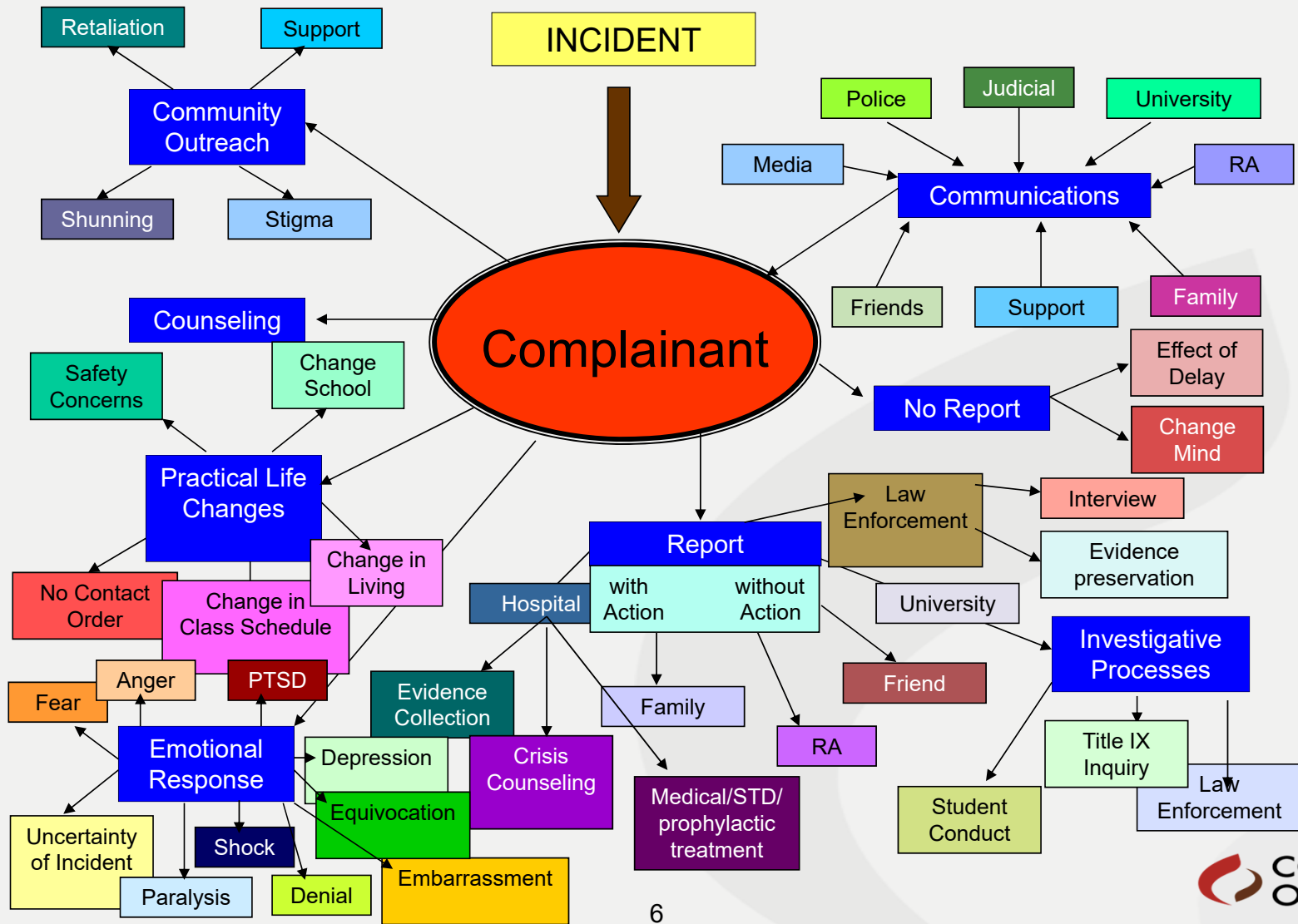
# The Context

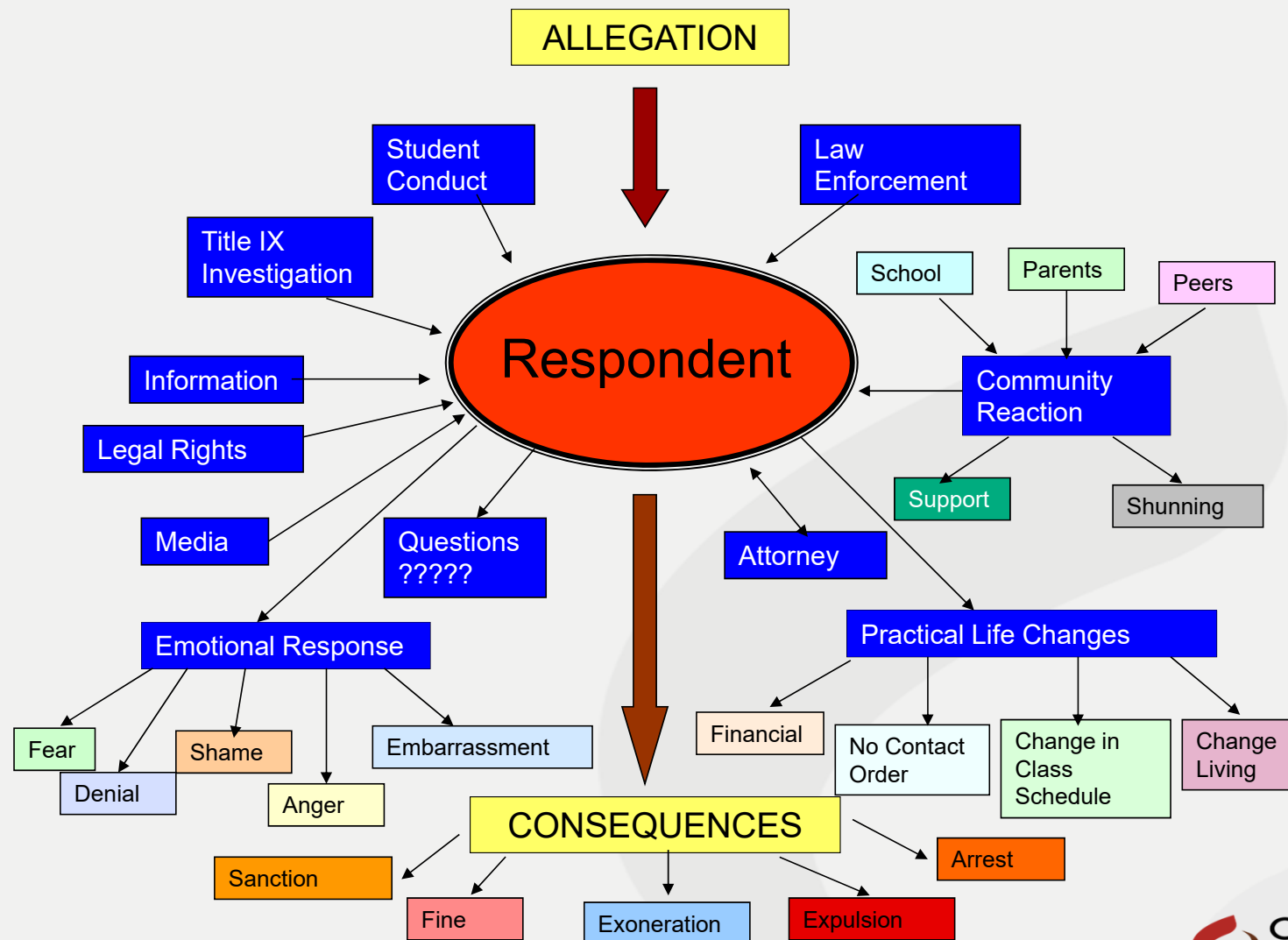
- Regulatory Framework
- Dynamics of Trauma & Sexual and Gender-Based Harassment and Violence
- Individual Culture, Climate, History, Resources, Policies, Procedures, Personnel and Values of the Institution



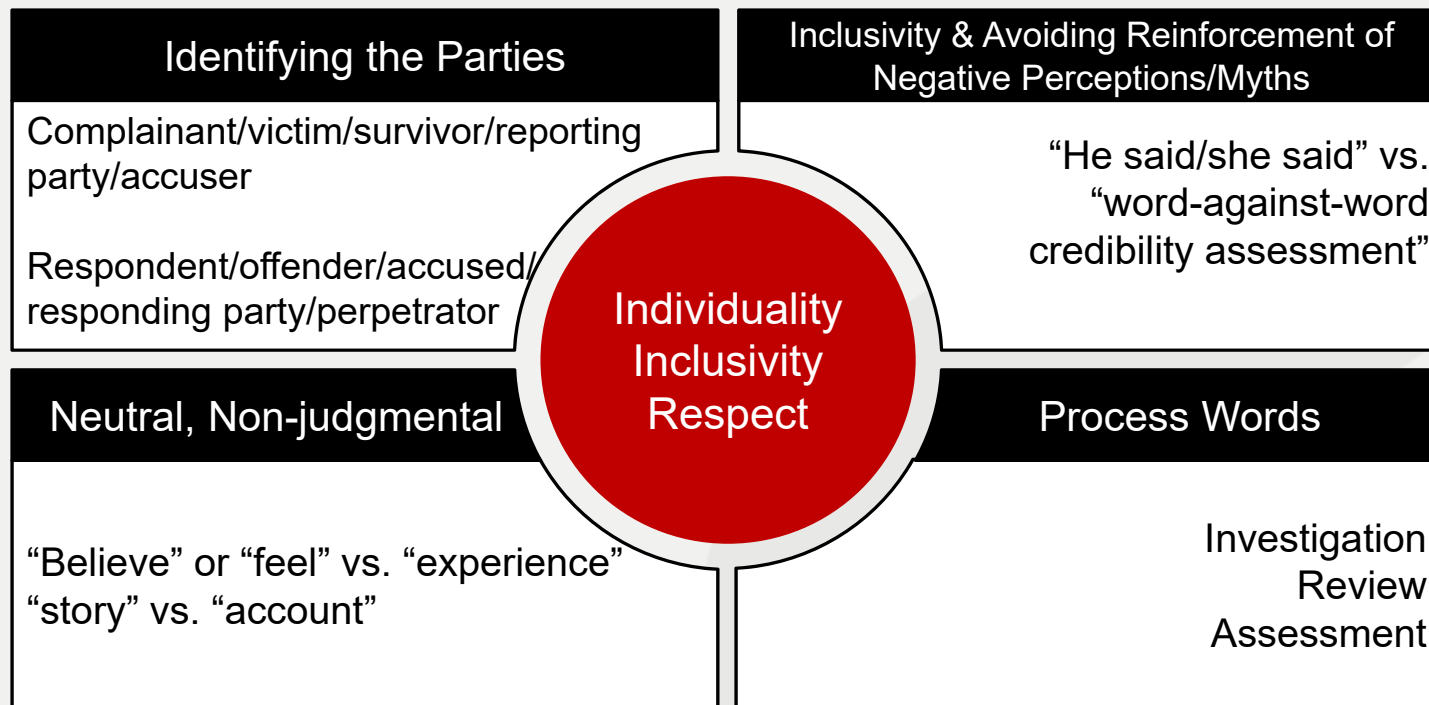
# The Challenge of the Context





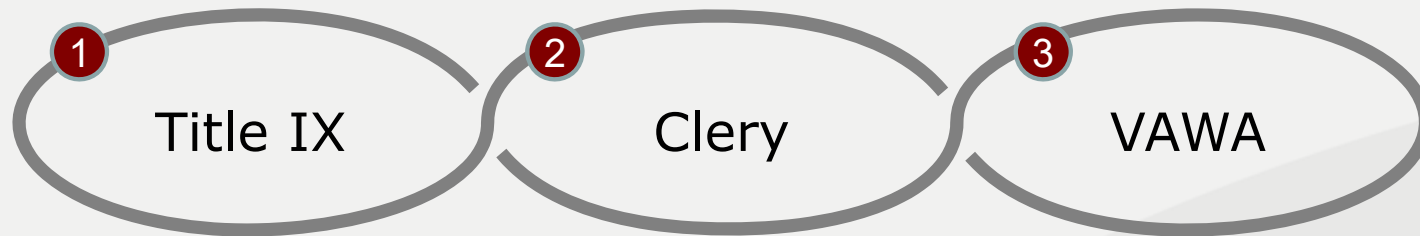


# Awareness of the Impact of Language





# Federal Regulatory Framework



## ***Title IX of the Education Amendments of 1972***

- Prohibits sex discrimination in educational institutions that receive federal funds

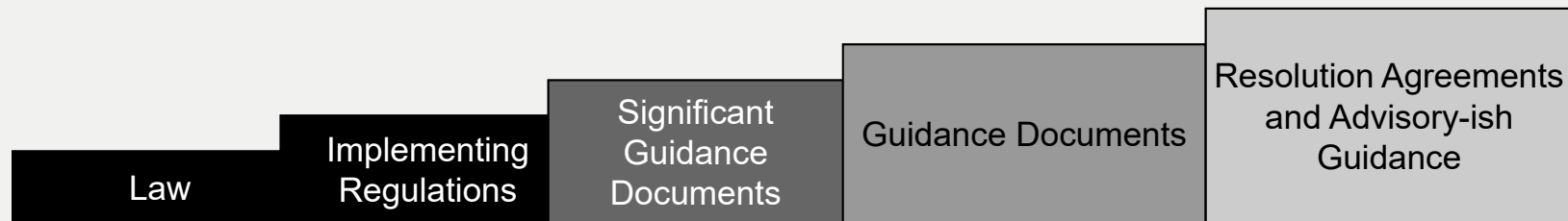
## ***The Jeanne Clery Act (1990)***

- Requires reporting of crimes, timely warnings, education/prevention programs, and policies and procedures for sexual assault

## ***The Violence Against Women Reauthorization Act of 2013***

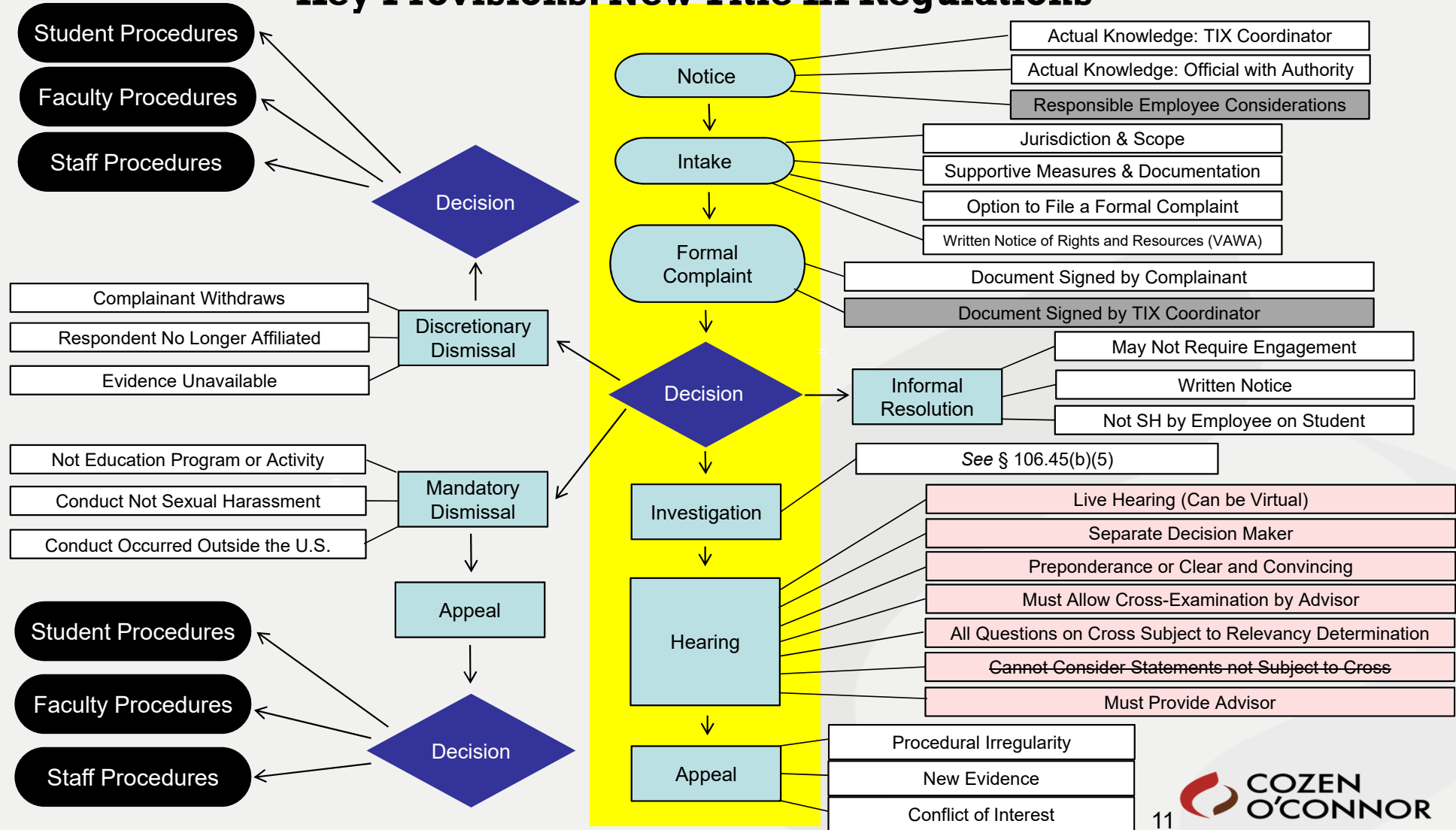
- Amends Clery to expand sexual assault requirements and include dating violence, domestic violence, and stalking; applies to all students and employees

# The Hierarchy

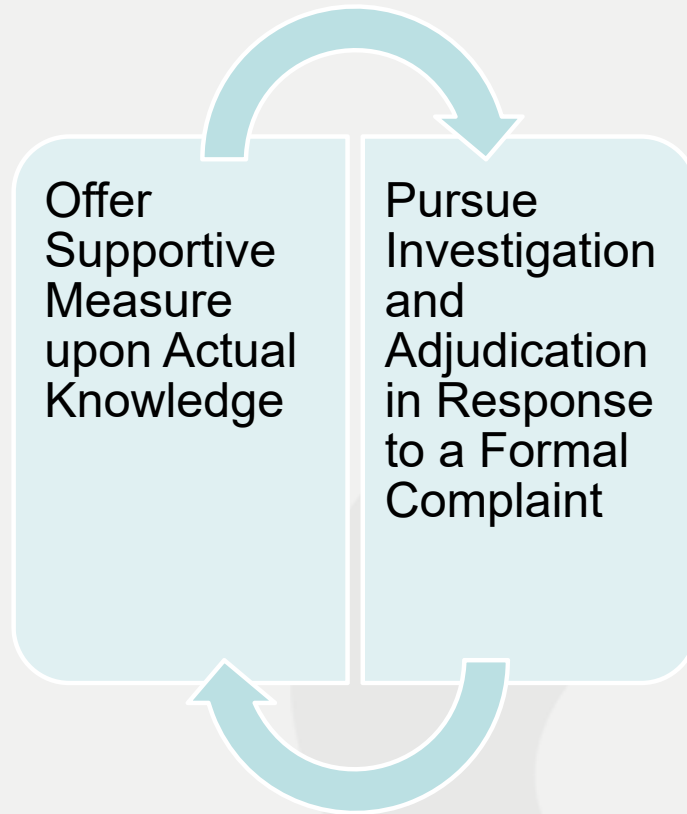


- Title IX
- Title IX Implementing Regulations (2020)
- 2011 Dear Colleague Letter (Rescinded)
- 2014 Q&A (Rescinded)
- 2017 Q&A (Rescinded)
- Preamble to Title IX Implementing Regulations
- 1997 Sexual Harassment Guidance
- 2001 Revised Sexual Harassment Guidance (Rescinded)
- Dear Colleague Letters
  - Bullying
  - Hazing
  - Title IX Coordinator
  - Retaliation
- Resolution Agreements
- OCR aids and tools
- OCR webinars
- OCR blogs

# Key Provisions: New Title IX Regulations



# The Compliance Care Continuum



# The Compliance Care Continuum

- System of care, belief, and support
  - Confidential resources
  - Advocacy
  - Intake and outreach
  - Supportive measures
- System of proof
  - Tethered to policy violations
  - Fair grievance procedures
  - Neutral and impartial fact gathering and decision-making

## Achieving the Balance

- Communication
- Coordination
- Competence
- Structural considerations: separation of roles and resources

# **POST-2020 REGULATION UPDATES: EXECUTIVE ORDERS, CASES & GUIDANCE**

# March 8, 2021 Executive Order

## “Guaranteeing an Educational Environment Free From Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity”

- It is the policy of my Administration that all students should be guaranteed an educational environment free from discrimination on the basis of sex, including discrimination in the form of sexual harassment, which encompasses sexual violence, and including discrimination on the basis of **sexual orientation or gender identity**.
- Secretary of Education to **review all existing regulations**, orders, guidance documents, policies, and any other similar agency actions **within 100 days**

# **April 6, 2021 Letter to Students, Educators, and other Stakeholders**

- OCR is undertaking a comprehensive review of the Department's existing regulations, orders, guidance, policies, and any other similar agency actions, including the August 14, 2020 Title IX regulations
- Next steps
  - Public hearings (held in June 2021)
  - Q&A (released July 2021)
- **Planned actions**
  - **New notice of proposed rulemaking** anticipated shortly



# July 20, 2021: Questions and Answers on the Title IX Regulations on Sexual Harassment

- **Questions and answers (37 pages)**
  - Largely repetitive content from regulations and preamble
  - Questions 52 and 53 address the use of photos/videos, texts/emails when a party does not submit to cross-exam
  - Question 24 addresses the filing a complaint on behalf of a complainant who is unassociated with the institution
- **Sample policy language to provide “clarity” (30 pages)**
  - Not endorsed or preferred
  - Does not have force of law
  - Use of sample policy language does not demonstrate compliance
  - Does not address other applicable laws

## **Victim Rights Law Center v. Cardona (U.S. District Court, District of Massachusetts, July 28, 2021)**

- Court found the **prohibition on statements not subject to cross-examination to be arbitrary and capricious**
- “Nothing in the administrative record demonstrates that the Department was aware of this result, considered its possibility, or intended this effect. Moreover, the construction of the Final Rule suggests that the Department failed even implicitly to recognize this result.”
- “To so carefully balance and craft the respondent’s safeguards, the definitions, the burdens, and the policies in the run-up to the hearing, just to have the prohibition and definition of absentee statements render the hearing a hollow exercise further demonstrates that the Department failed, even implicitly, to consider the consequences from the prohibition and definition of statements.”

## OCR Letter to Students, Educators, and Other Stakeholders, August 24, 2021)

- In light of the court's ruling in *Victim Rights Law Center v. Cardona*, the Department of Education will “**immediately cease enforcement** of the part of § 106.45(b)(6)(i) regarding the prohibition against statements not subject to cross-examination.”
- “In practical terms, **a decision-maker ... may now consider statements** made by parties or witnesses that are otherwise permitted under the regulations, **even if those parties or witnesses do not participate in cross-examination at the live hearing**, in reaching a determination regarding responsibility in a Title IX grievance process.”

# New Notice of Proposed Rulemaking

- Released June 23, 2022, (50<sup>th</sup> Anniversary of Title IX)
- 50 pages of proposed regulations, 650 pages of comments and discussion
- Officially published in the Federal Register on July 12, 2022
- 60-day public comment period ended September 12, 2022
- Big picture highlights:
  - Sex Discrimination includes discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, gender identity
  - Current, potential or past parental, family, or marital status also protected
  - Sex-Based Harassment proposed to include Harassment on the bases described above as well as other conduct on the basis of sex (QPQ, HE, Clery crimes)

# New Notice of Proposed Rulemaking

- Big picture highlights (continued)
  - Expansion of scope, jurisdiction, and notice
  - Choices regarding adjudication
  - Additional training requirements for all employees
  - Increase in documentation requirements
  - Title IX Coordinator required to monitor and address barriers to reporting
  - New requirements related to pregnancy
  - Employee reporting responsibilities would be based on employee role and parties involved. Any employee who has authority to institute corrective measures *and* any employee who has responsibility for administrative leadership, teaching, or advising must report.
    - Note: current UO Employee Reporting policy likely conflicts with the above

## Questions for the Group:

- What were you most concerned about when you first read the Final Title IX regulations?
- Did you see those concerns come to fruition during the past two years?
- Have you experienced any unexpected challenges in implementation?

# **DISCUSSION: MAKING THRESHOLD DETERMINATIONS**

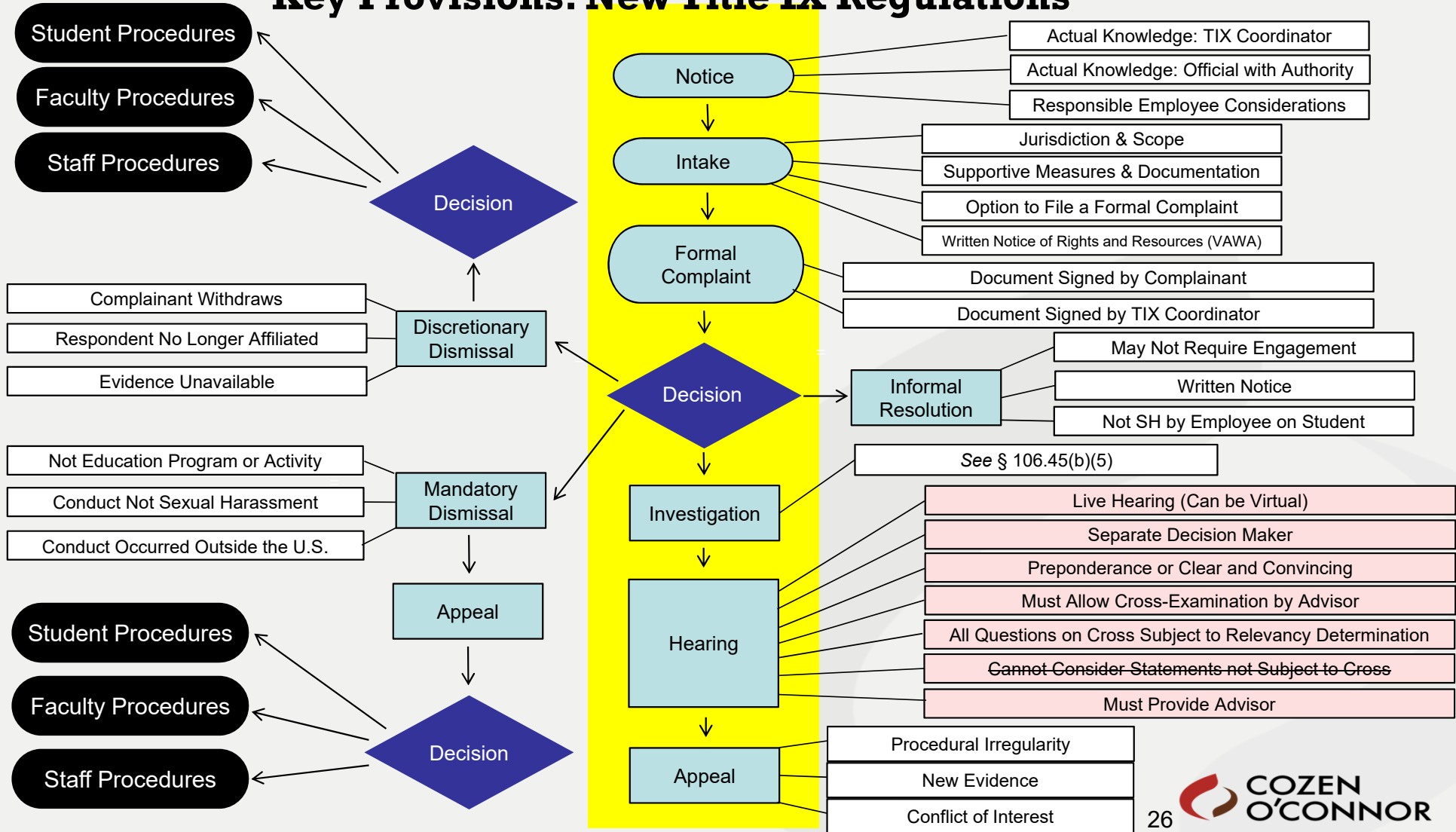
# Threshold Determinations

- Scenarios
  - Report of sexual harassment
  - Report of discrimination
- How to assess
  - Subjective
  - Objective
  - Contending with case law
  - Understanding power differentials
- How to communicate
- Next steps
  - Addressing reported conduct
    - Through the lens of other policies
    - Through the lens of impact
  - Addressing the impact of the conduct
    - On the individual
    - On the community



# INVESTIGATIONS

# Key Provisions: New Title IX Regulations



Key Provisions of Title IX Regulations issued May 19, 2020

# Investigative Principles

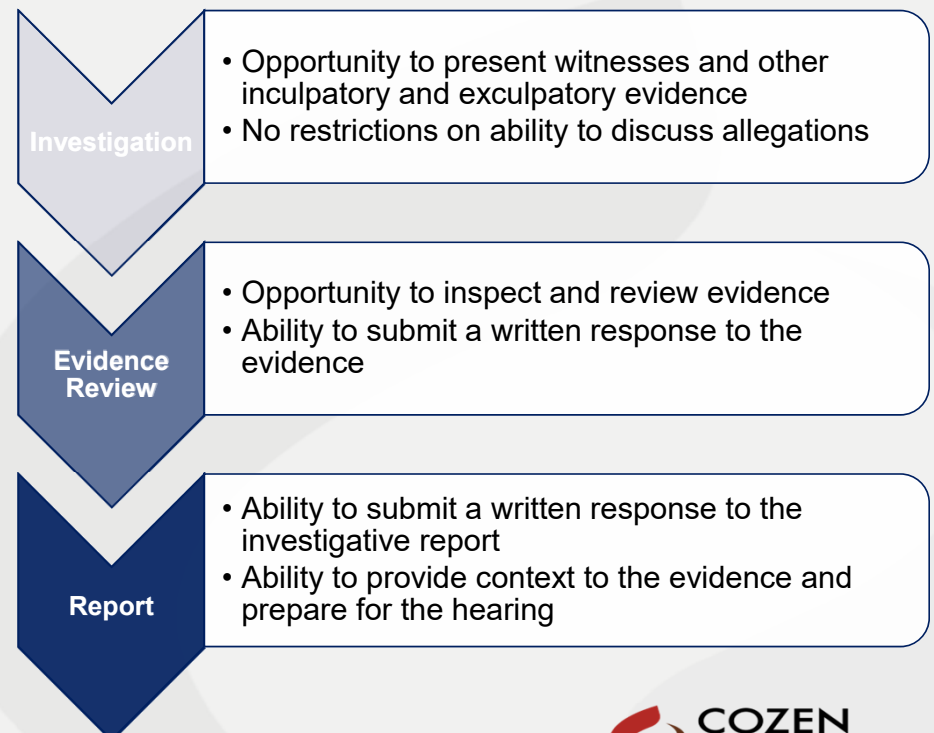
- Open-ended and thorough inquiry
- Equitable opportunities for the parties to participate
- The conduct of the investigation matters
- Separating intake/support from investigation
- Maintaining and reinforcing impartiality
  - Screening for conflicts of interest or bias
  - Attention to language and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

# Setting the Stage - Investigations

## Institutional Obligations



## Parties' Opportunity to Participate

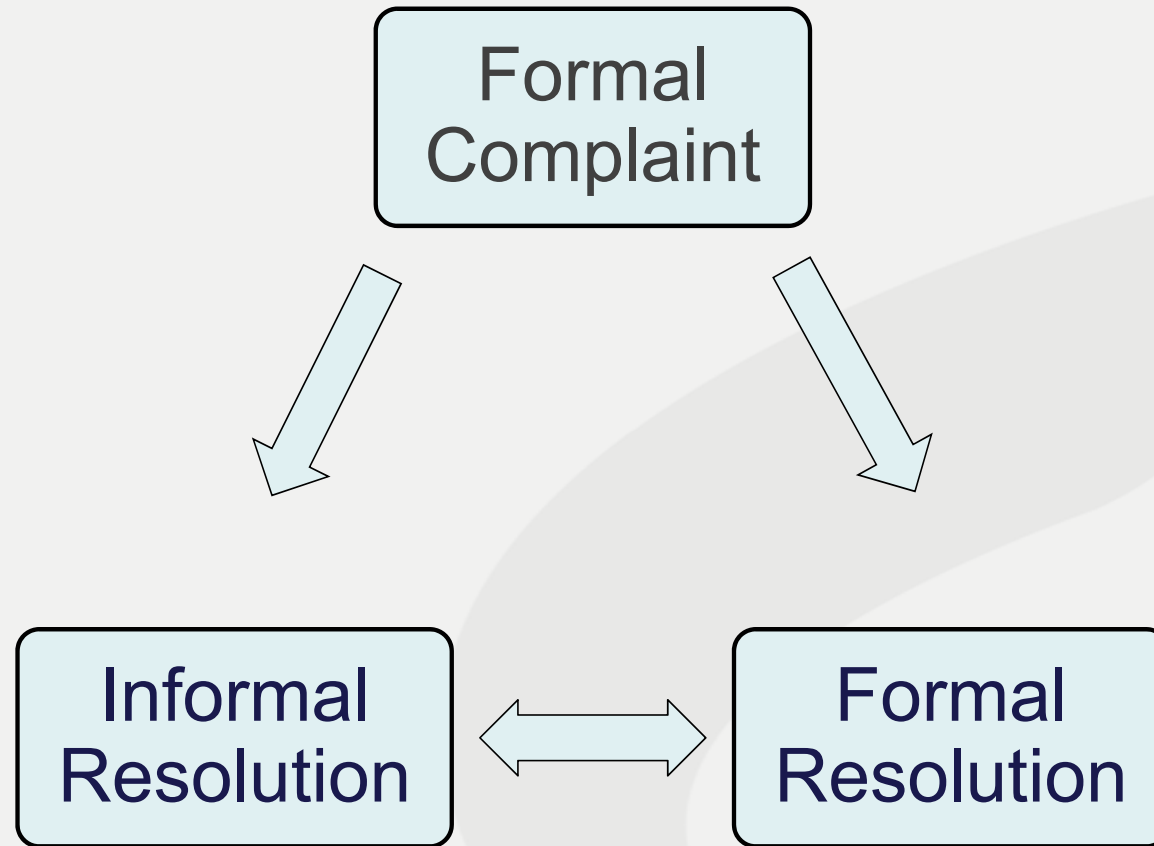
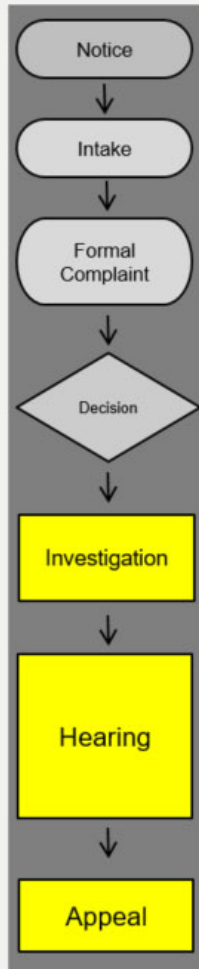


# Overview

- 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**

# Resolution Process



# 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; 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; 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; 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 §106.30 Definitions and §106.45(b)(3) Dismissal of a formal complaint; 85 F.R. 30574

# Investigation Requirements



# **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

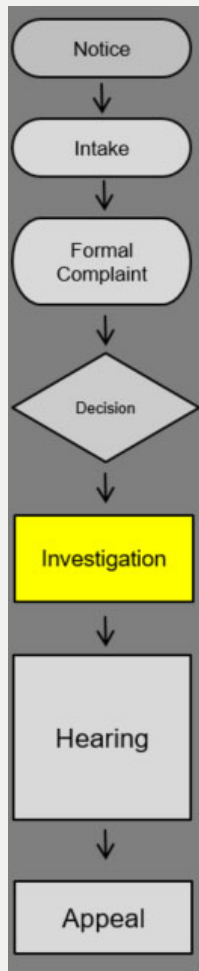


# Removal of Bias or Conflict of Interest

- “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; Preamble, 85 F.R. 30235

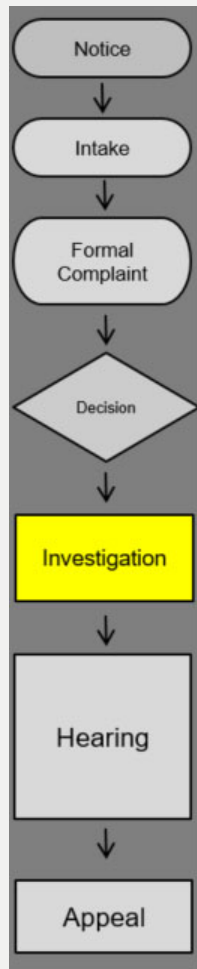
# Written Notice of all Proceedings



- 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 §106.45(b)(5)(v); 85 F.R. 30424

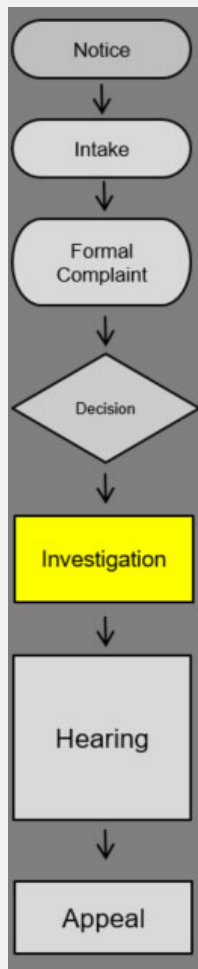
# Written Notice of Allegations



- 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 § 106.45(b)(2); 85 F.R. 30576

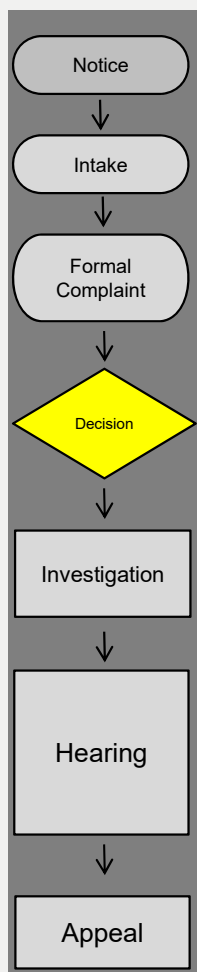
# Written Notice of the Allegations



- 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 § 106.45(b)(2); 85 F.R. 30576

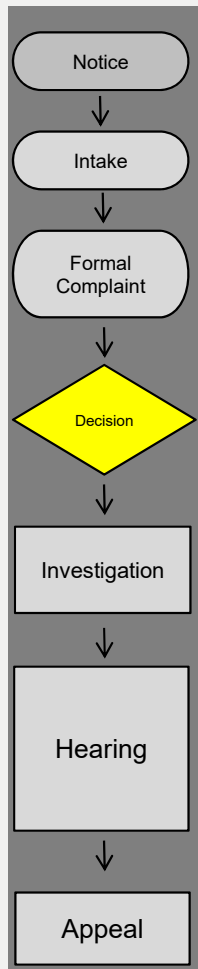
# Written Notice of Allegations



- 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 §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 §106.45(b)(2)(ii); Preamble 85 F.R. 30283

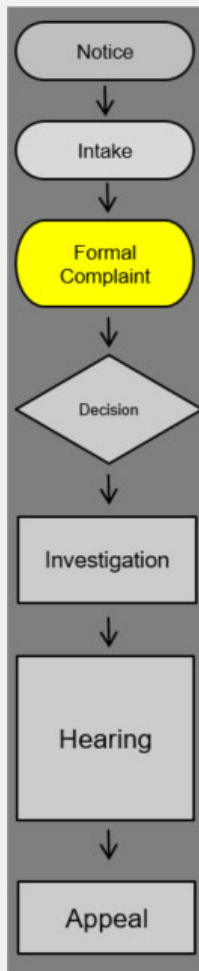
# Practical Considerations

- 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**



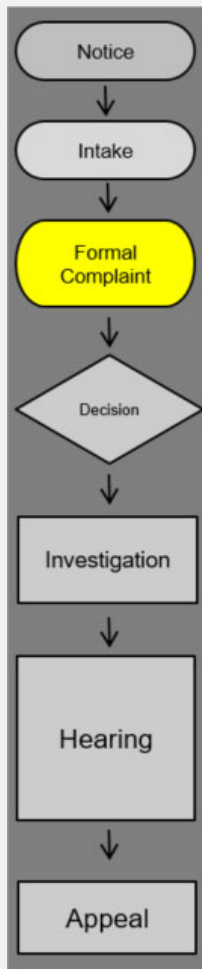
# Consolidation of Formal Complaints



- 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 §106.45(b)(4); 85 F.R. 30576

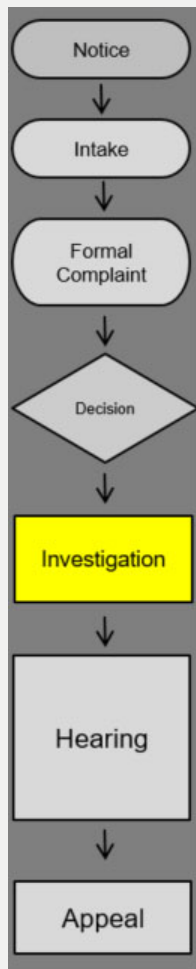
# Consolidation of Formal Complaints



- 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; Preamble 85 F.R. 30436

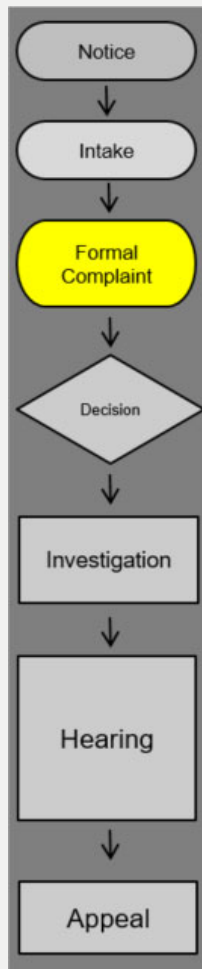
# Consolidation of Formal Complaints



- 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; 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; 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?

# EVIDENCE GATHERING

# Burden of Gathering Evidence

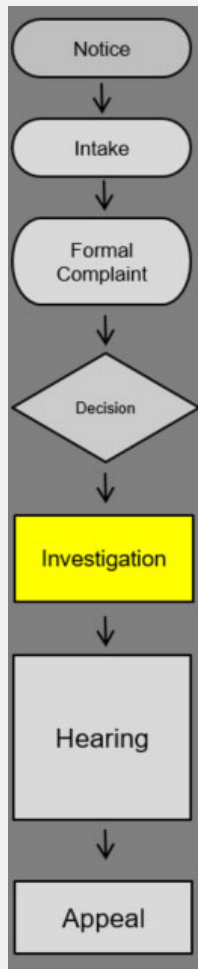


- Ensure that the burden of proof and the burden of gathering evidence rests on the recipient and not on the parties
  - The recipient’s burden is **to gather evidence sufficient to reach a determination** regarding responsibility

Title IX Regulations §106.45(b)(5)(i); 85 F.R. 30127, FN 562 .



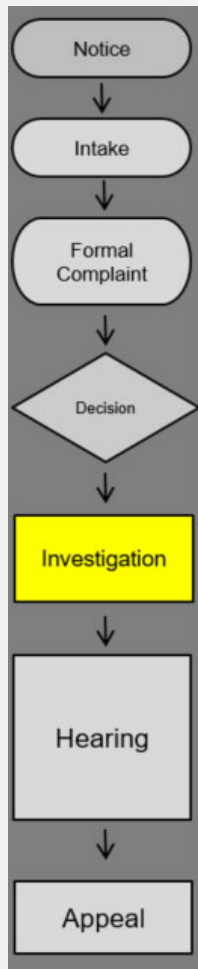
# Burden of Gathering Evidence



- 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; Preamble 85 F.R. 30292

# Burden of Gathering Evidence

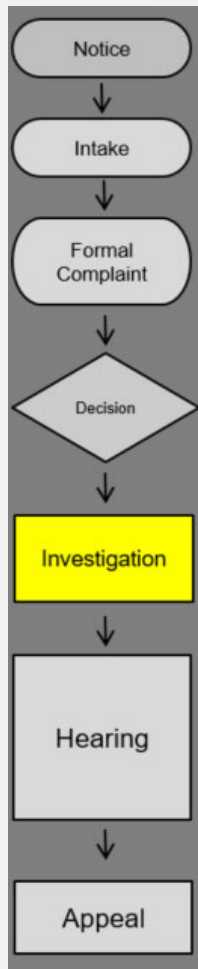


- The investigator is obligated to **gather evidence directly related to the allegations** whether or not the recipient intends to rely on such evidence (for instance, where evidence is directly related to the allegations but the recipient's investigator does not believe the evidence to be credible and thus does not intend to rely on it).

Title IX Regulations; Preamble 85 F.R. 30248-49.

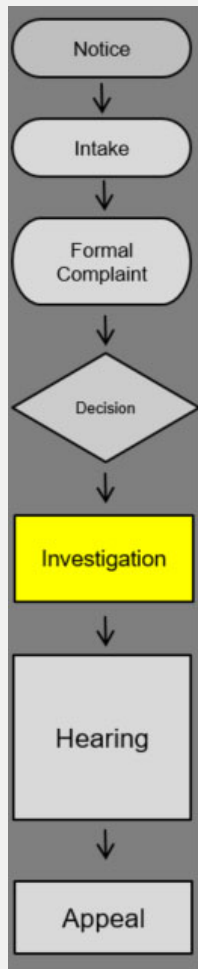
# Opportunity to Participate

- Not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence.



Title IX Regulations §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 §106.45(b)(5)(iii); 85 F.R. 30576.

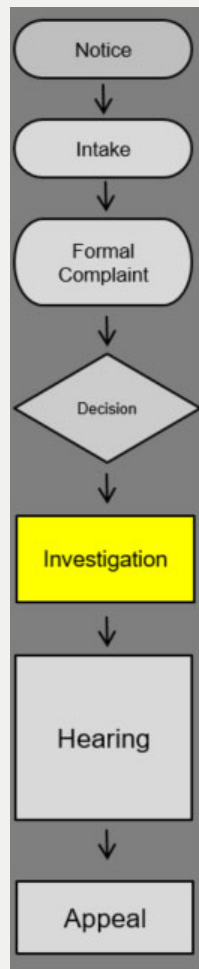
# Practical Considerations & Effective Practices

- 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 §106.45(b)(5)(iv); 85 F.R. 30576

# Restrictions on Advisor Participation

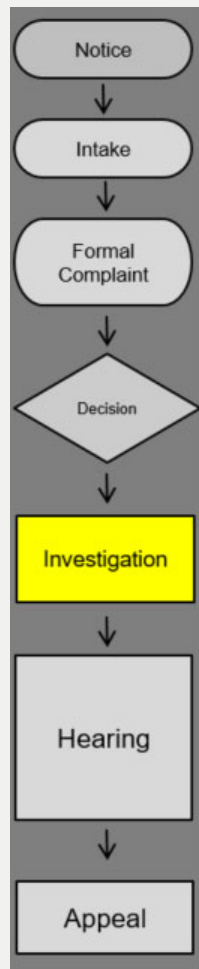


- We do not believe that specifying what restrictions on advisor participation may be appropriate is necessary, and we decline to remove the discretion of a recipient to restrict an advisor's participation so as not to unnecessarily limit a recipient's flexibility to conduct a grievance process that 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; Preamble 85 F.R. 30298



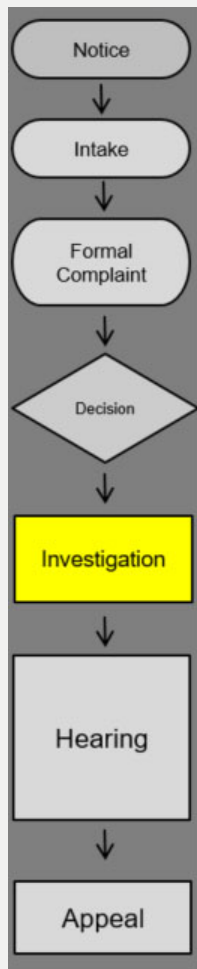
# Restrictions on Advisor Participation



- “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; Preamble, 85 F.R. 30298

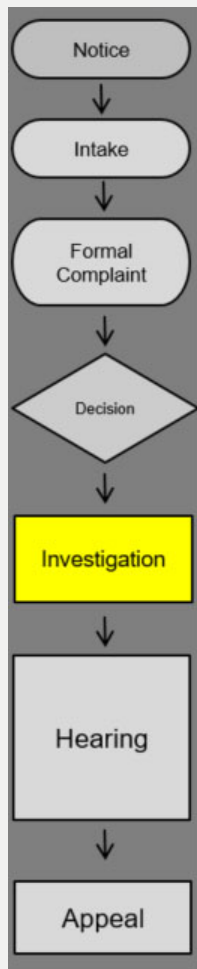
# Training of Advisors Not Required



- 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; Preamble 85 F.R. 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; Preamble 85 F.R. 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

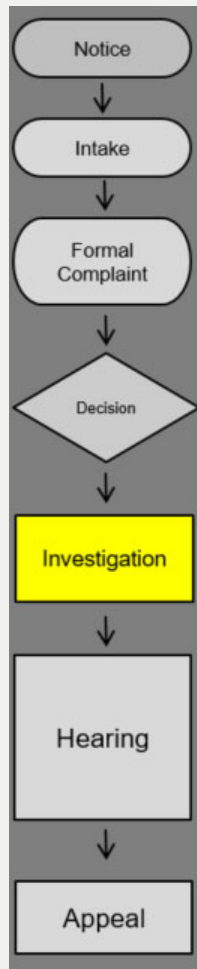
# **EVIDENTIARY CONSIDERATIONS**

# Evidentiary Considerations

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

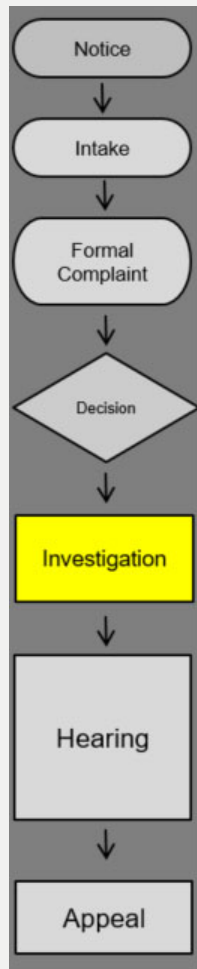
# Privileged Information

- 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 § 106.45(b)(1)(x); 85 F.R. 30361

# Privileged Records



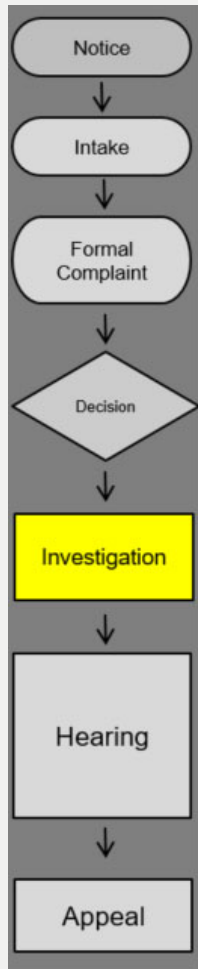
- Recipient cannot access, consider, disclose, or otherwise use a party's records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional's or paraprofessional's capacity, or assisting in that capacity, and 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 § 106.45(b)(5)(i); 85 F.R. 30423



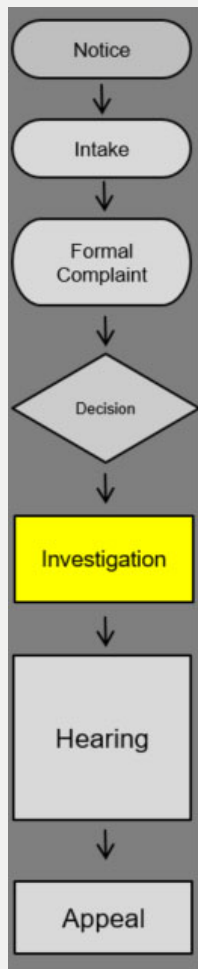
# Relevance

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



Title IX Regulations; Preamble 85 F.R. 30247, FN 1018.

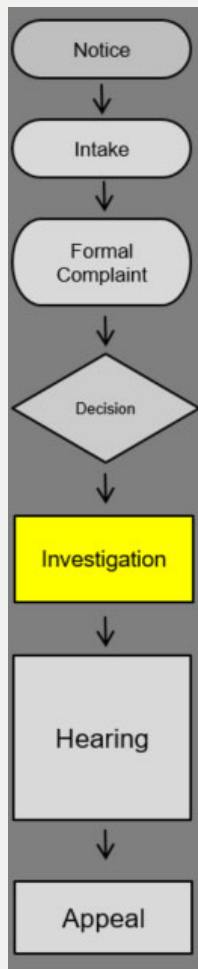
# Relevance



- “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; 85 F.R. 30247

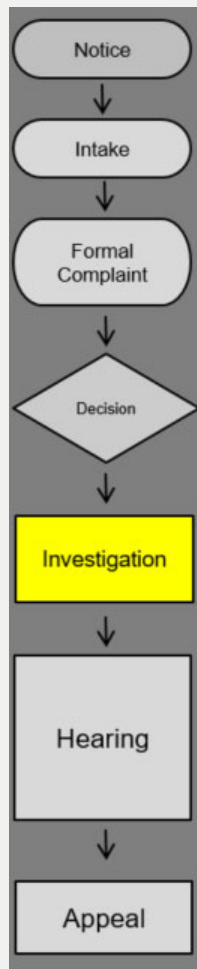
# Relevance



- 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; 85 F.R. 30247

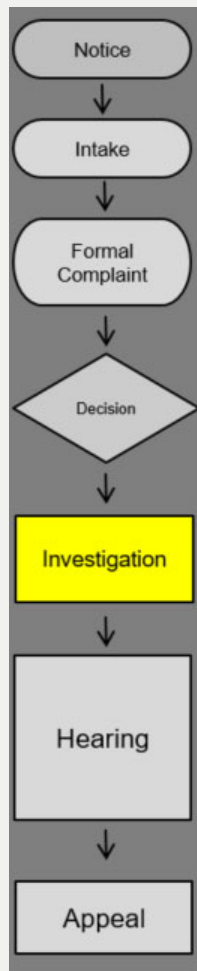
# Prior Sexual History



- 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 §§ 106.45(b)(1)(iii) and 106.45(b)(6); 85 F.R. 30461

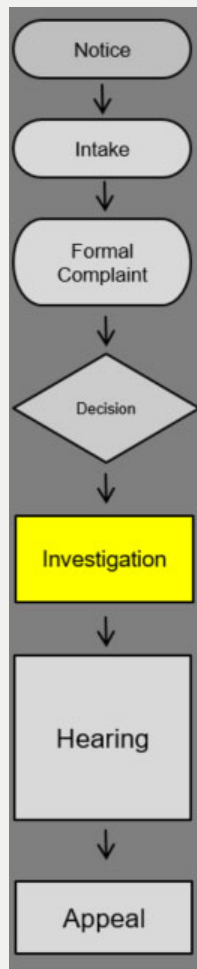
# Prior Sexual History



- 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 §§ 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 §§ 106.45(b)(1)(iii) and 106.45(b)(6); Preamble, 85 F.R. 30351

# Prior or Subsequent Misconduct

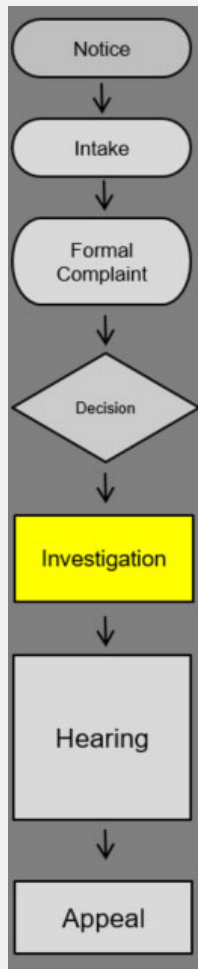
- The regulations do not prohibit the use of prior or subsequent misconduct
  - “Evidence of a pattern of inappropriate behavior by an alleged harasser” permitted if relevant
- Schools will need to determine if such conduct is:
  - Relevant
  - May be used in determining responsibility
  - May be used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



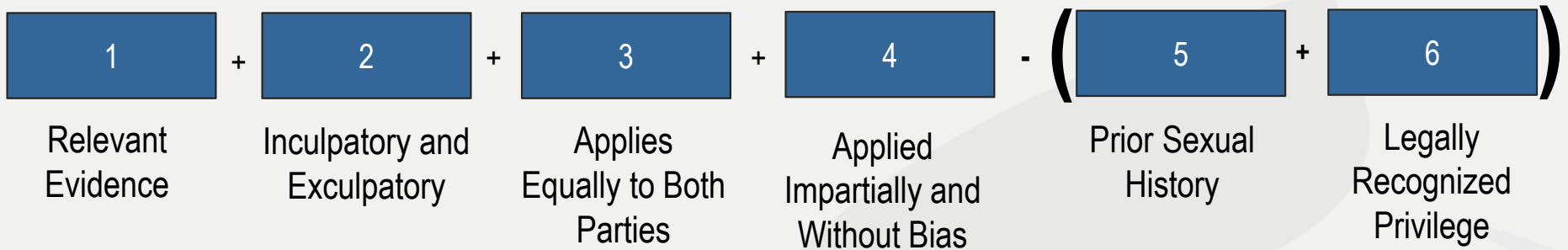
# Flexibility to Adopt Rules



- “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.**”

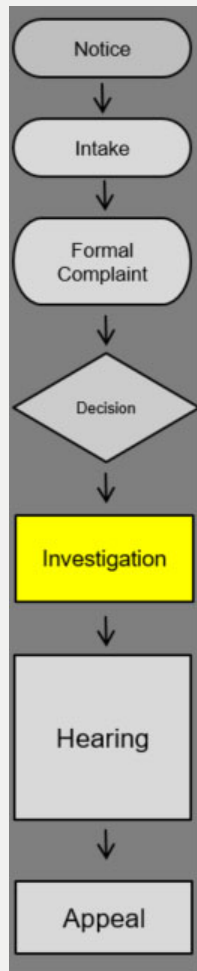
Title IX Regulations; Preamble 85 F.R. 30248

# Evidentiary Rules Must Consider



# EVIDENCE REVIEW

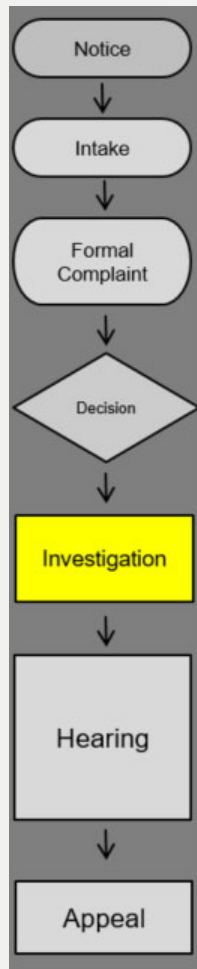
# Evidence Review



- “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 §§ 106.45(b)(5)(vi); 85 F.R. 30411

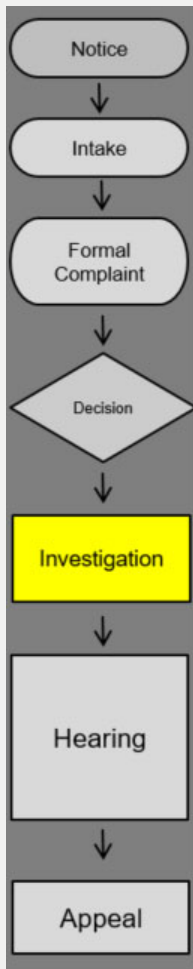
# Evidence Review



- “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 §§ 106.45(b)(5)(vi); 85 F.R. 30576

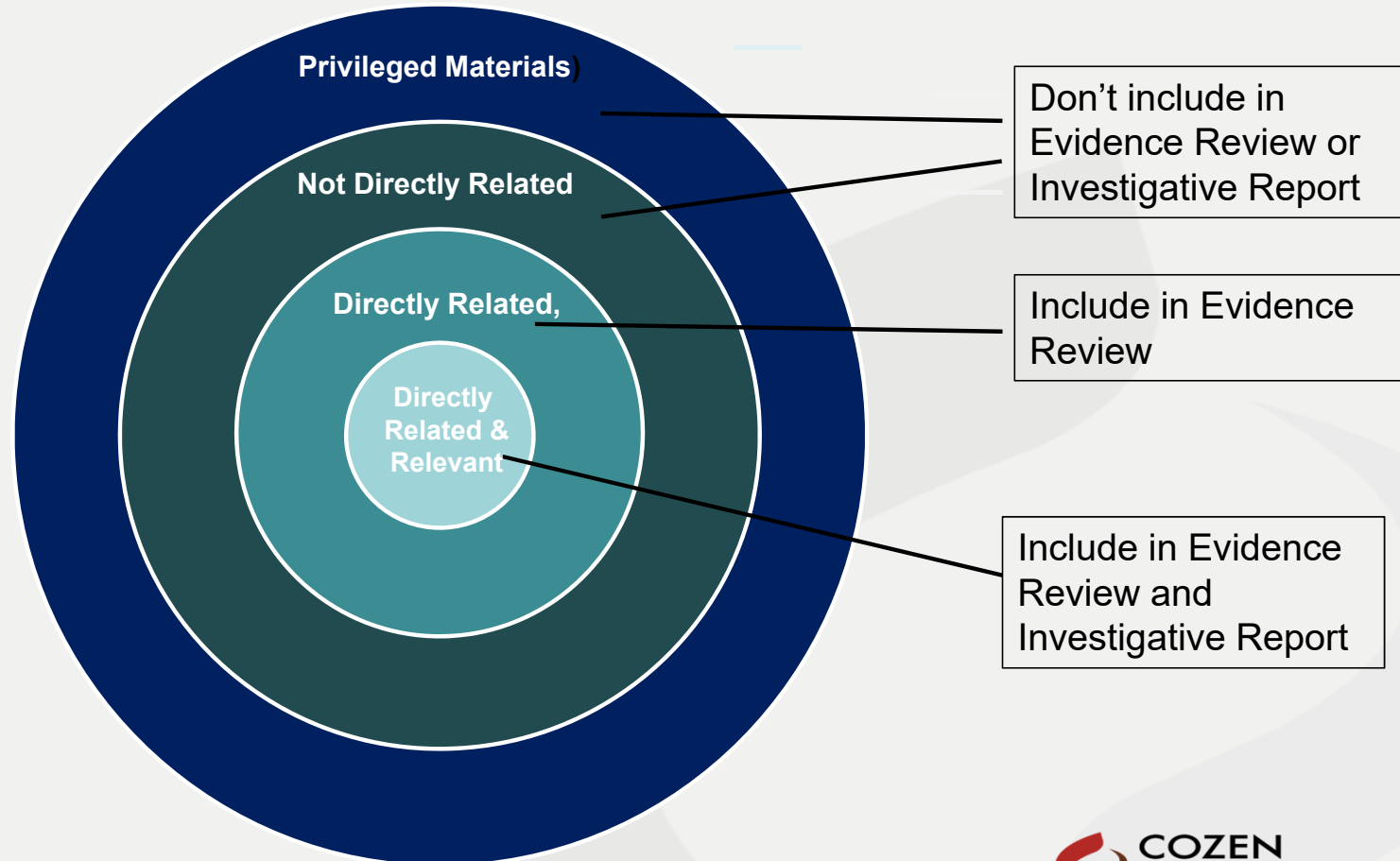
# Evidence Review



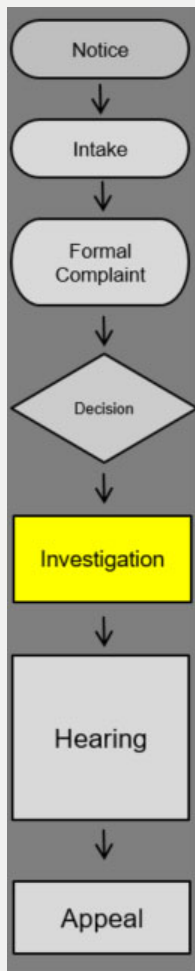
- Allowing parties the opportunity to inspect this broader universe of evidence will further each party's own interests by identifying evidence either overlooked by the investigator or erroneously deemed relevant or irrelevant.

Title IX Regulations; Preamble 85 F.R. 30303

# Evidentiary Levels for Inclusion



# Directly Related



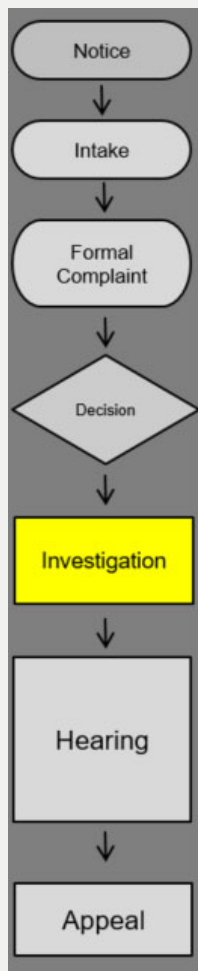
- Not defined in the regulations or the Preamble
  - The Department declines to define certain terms such as “evidence directly related to the allegations,” as these terms should be interpreted using their plain and ordinary meaning.
- “Directly related” aligns with the requirements in FERPA
  - The 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; Preamble 85 F.R. 30304, 30428.



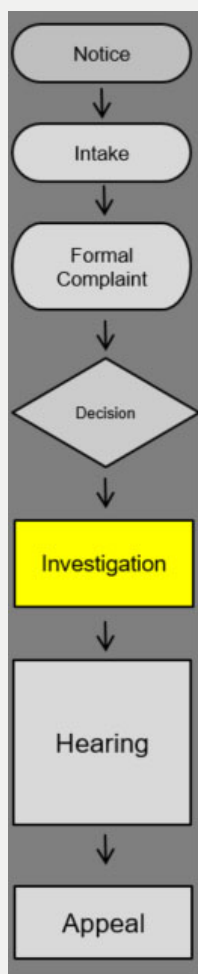
# Directly Related

- [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 §106.45(b)(5)(vi); Preamble 85 F.R. 30304

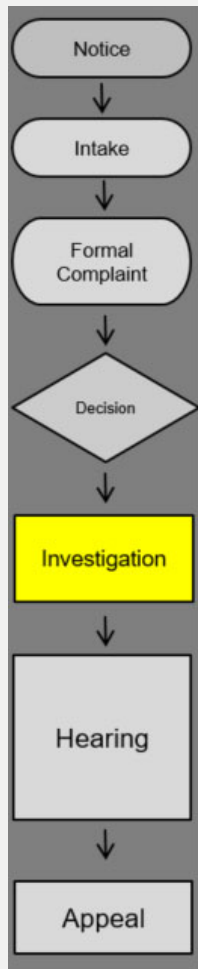
# Directly Related vs. Relevant



- 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; Preamble, 85 F.R. 30304, 30321.

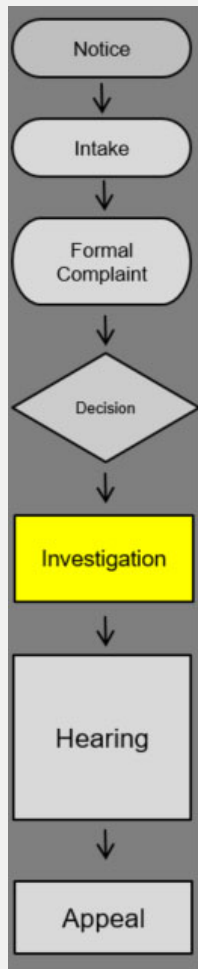
# Directly Related



- 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; Preamble 85 F.R. 30304

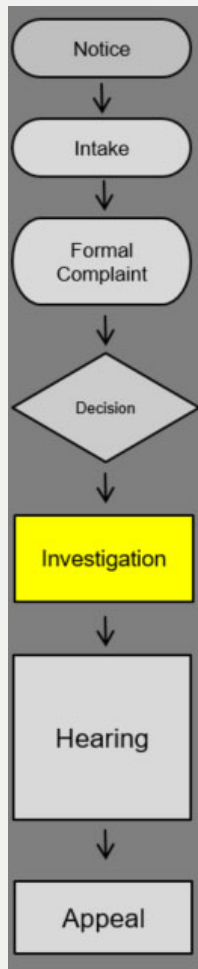
# Directly Related



- 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; Preamble 85 F.R. 30304.

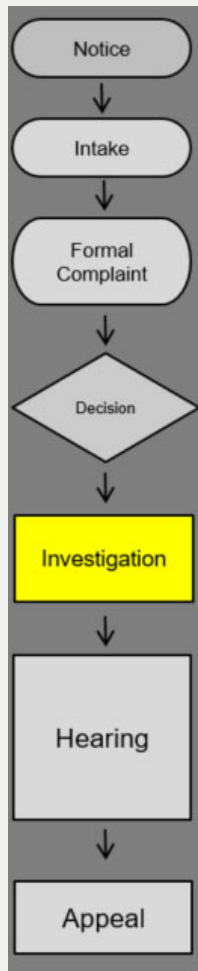
# Directly Related



- 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; Preamble 85 F.R. 30427.

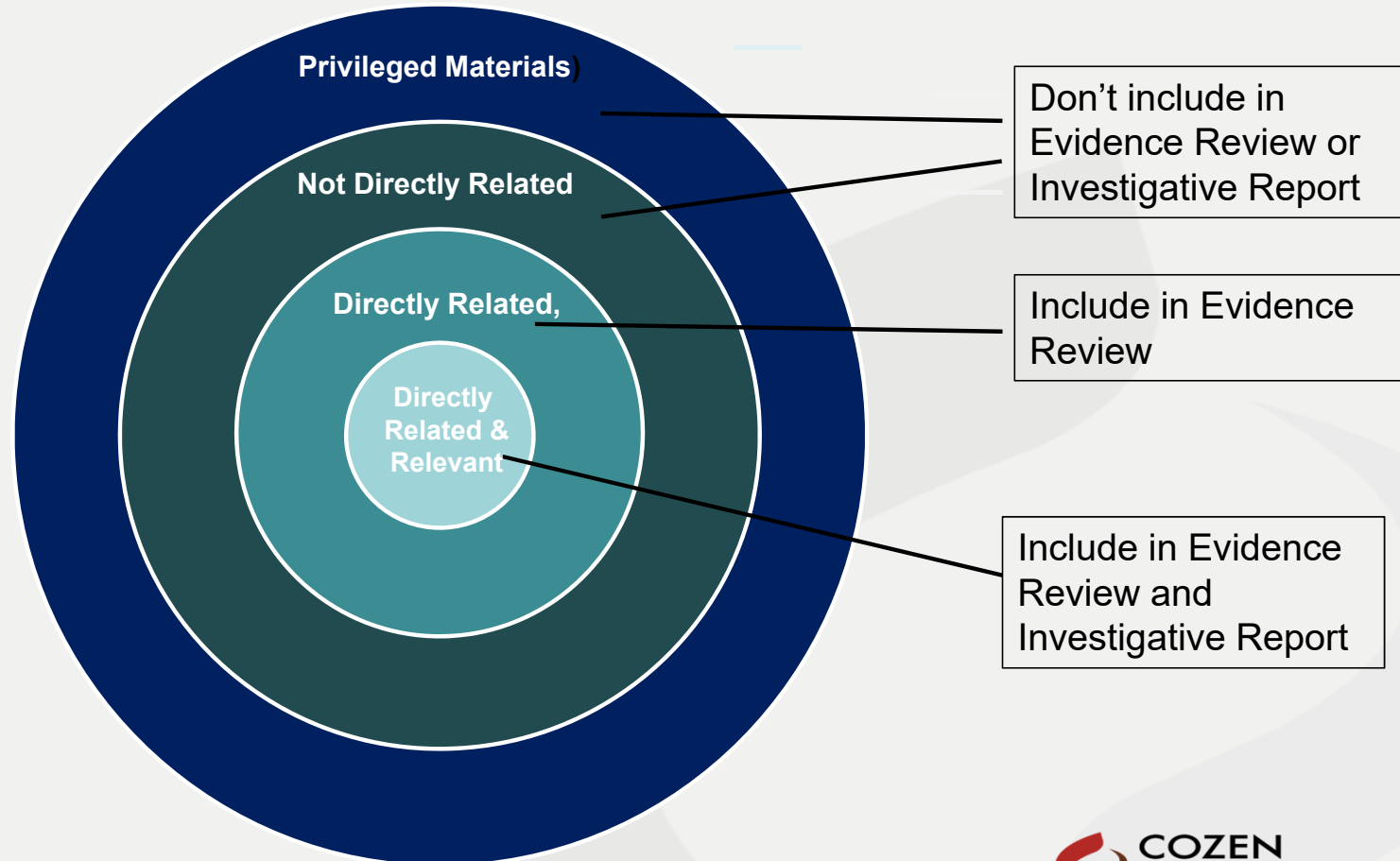
# Scope of Parties' Review



- 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; Preamble 85 F.R. 30305, 30300

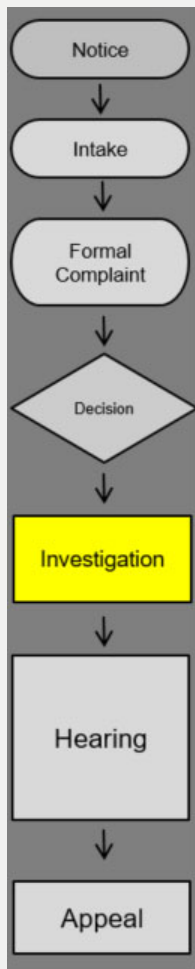
# Recap of Evidentiary Levels for Inclusion



# INVESTIGATIVE REPORT



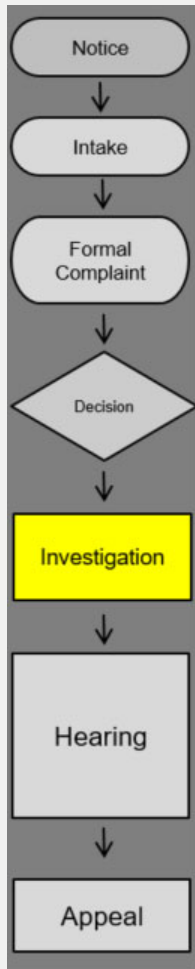
# Investigative Report



- 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 §§ 106.45(b)(5)(vii); Preamble 85 F.R. 30254, 30307, 30309

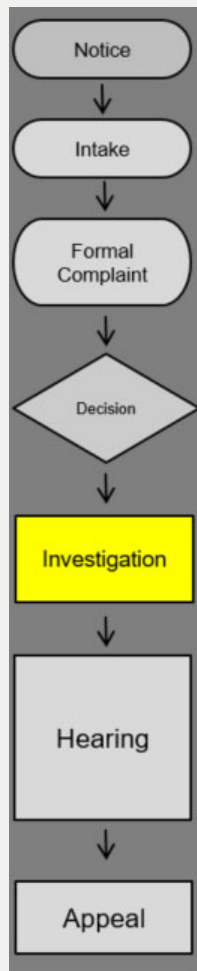
# Investigative Report



- 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 §§ 106.45(b)(5)(vii); Preamble 85 F.R. 30310.

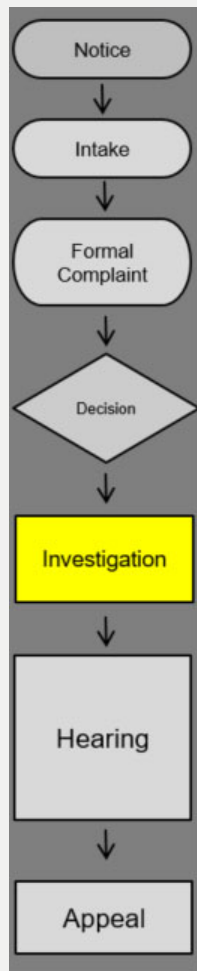
# Investigative Report



- 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 §§ 106.45(b)(5)(vii); Preamble 85 F.R. 3010.

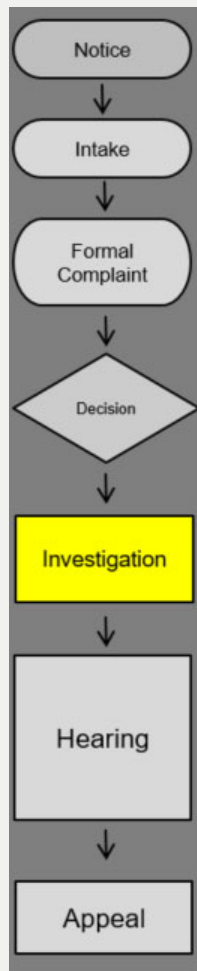
# Content for Written Determination



- 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

Title IX Regulations §§ 106.45(b)(5)(vii); Preamble 85 F.R. 30577

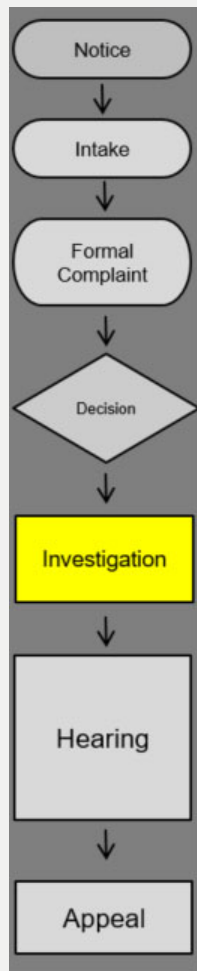
# Investigative Report: Findings?



- 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 §§ 106.45(b)(5)(vii); Preamble 85 F.R. 30308, 30436

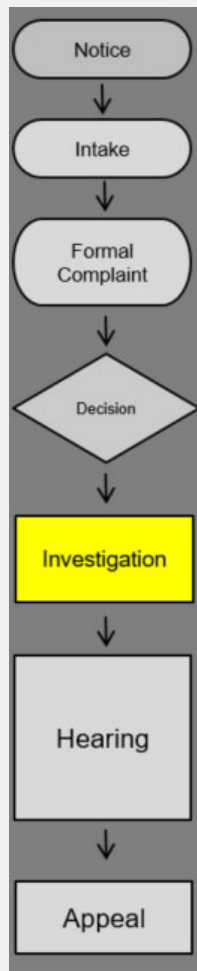
# Investigative Report: Findings?



- § 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 §§ 106.45(b)(5)(vii); Preamble 85 F.R. 30436

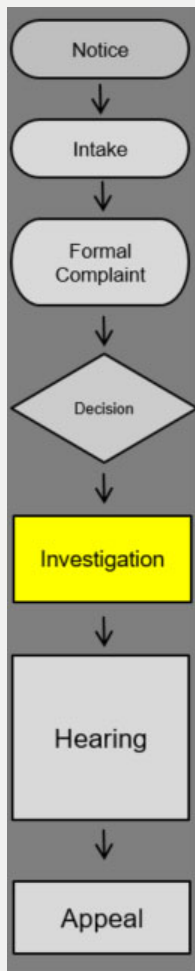
# Revisiting Relevance



- 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 §§ 106.45(b)(5)(vii); Preamble 85 F.R. 30436

# Investigative Report

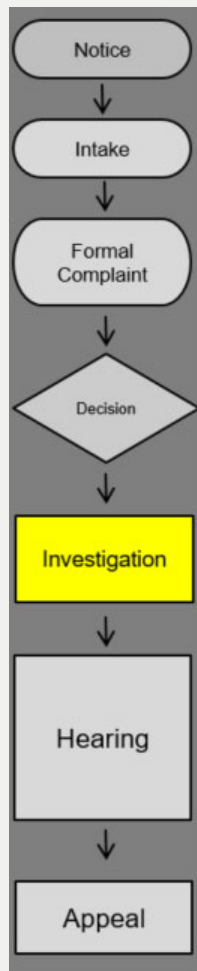


- Allow parties to provide a written response to the investigative report
  - Recipients must also give the parties meaningful opportunity to understand what evidence the recipient collects and believes is relevant, so the parties can advance their own interests for consideration by the decision-maker.
  - 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 §§ 106.45(b)(5)(vii); Preamble 85 F.R. 30309, 30249



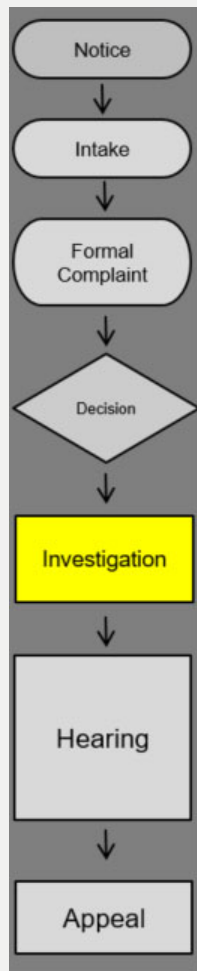
# Investigative Report



- 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 §§ 106.45(b)(5)(vii); Preamble 85 F.R. 30309 .

# Investigative Report



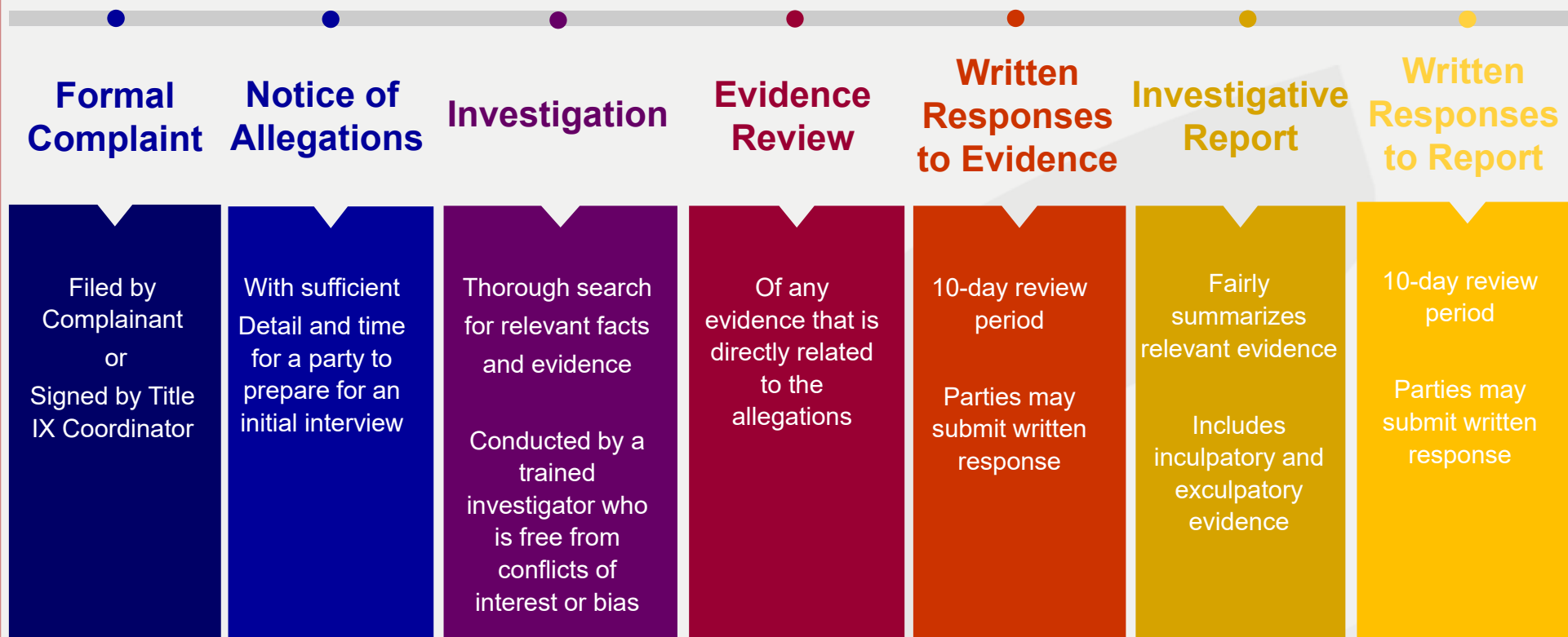
- At least 10 days prior to the determination of responsibility (hearing)
  - The parties then have equal opportunity to review the investigative report; if a party disagrees with an investigator’s determination about relevance, the party can make that argument in the party’s written response to the investigative report and to the decision-maker at any hearing held.

Title IX Regulations §§ 106.45(b)(5)(vii); Preamble 85 F.R. 30248-49

# Practical Considerations & Effective Practices

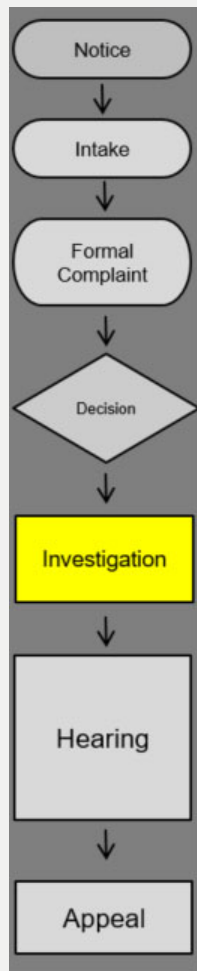
- Use template format with consistent language and content across investigations
- Language: balanced, neutral and non-judgmental
- Avoid declarative credibility language
  - “Unreliable” vs. insufficient information
  - Recognize perspective of the parties
  - Comment on the evidence, not the parties
- Use of verbatim quotes
- Leave sufficient time for writing, editing, proof reading and review by a fresh set of eyes

# Recap of Investigation Requirements



# **REASONABLY PROMPT TIME FRAMES**

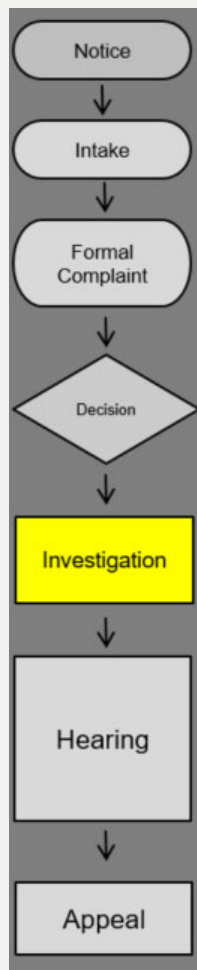
# Reasonably Prompt Time Frames



- 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 §106.45(b)(1)(v); 85 F.R. 30522, 30575

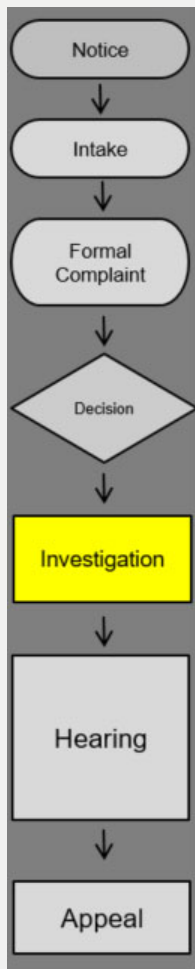
# Reasonably Prompt Time Frames



- 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 §106.45(b)(1)(v); 85 F.R. 30575

# Reasonably Prompt Time Frames

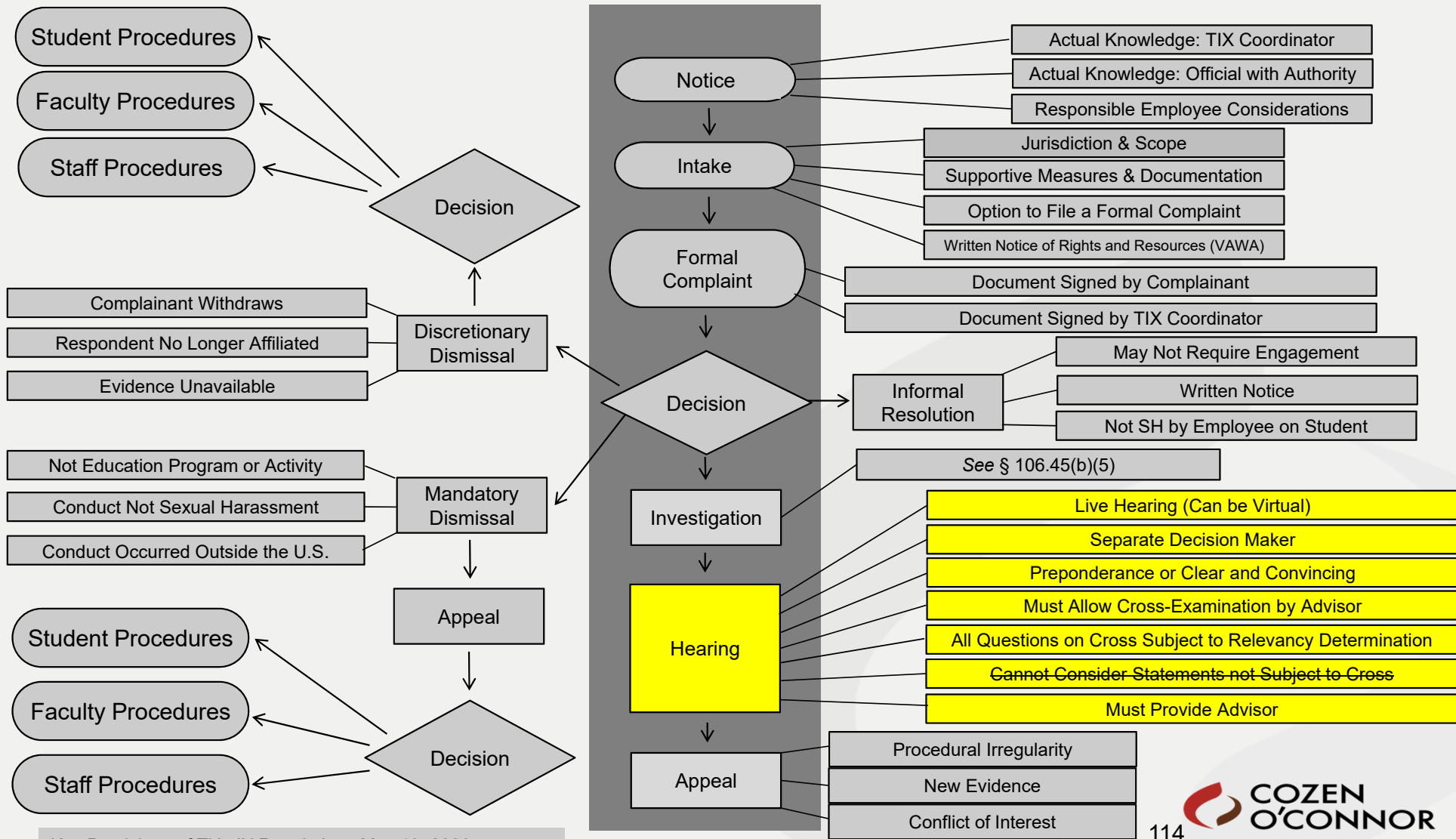


- A recipient must resolve each formal complaint of sexual harassment according to the time frames the recipient has committed to in its grievance process.
- The Department believes that each recipient is in the best position to balance promptness with fairness and accuracy based on the recipient's unique 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 §106.45(b)(1)(v); Preamble 85 F.R. 30269



# **OVERVIEW OF HEARING REQUIREMENTS**



Key Provisions of Title IX Regulations May 19, 2020

# **ROLE OF DECISION-MAKER**

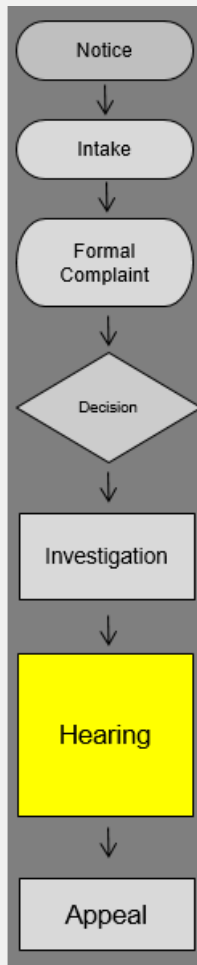
# Determine Relevance of Questions



- 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 § 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 § 106.45(b)(6)

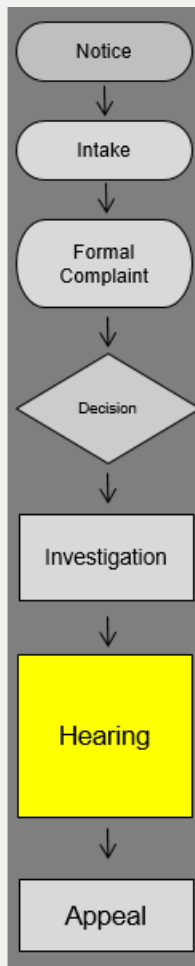
# Apply the Standard of Evidence

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



Title IX Regulations § 106.45(b)(7)

# Issue Written Determinations

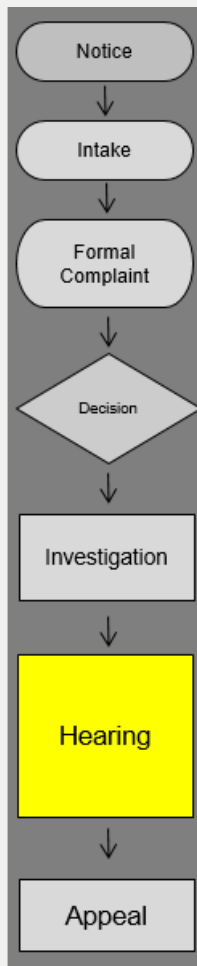


- The decision-maker(s) ... must issue a simultaneous written determination regarding responsibility, including
  - Identification of the allegations
  - Description of the procedural steps taken from the receipt of the formal complaint through the determination
  - Findings of fact supporting the determination
  - Conclusions regarding the application of the recipient's code of conduct to the facts
  - Rationale
  - Appeal procedures

Title IX Regulations § 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.

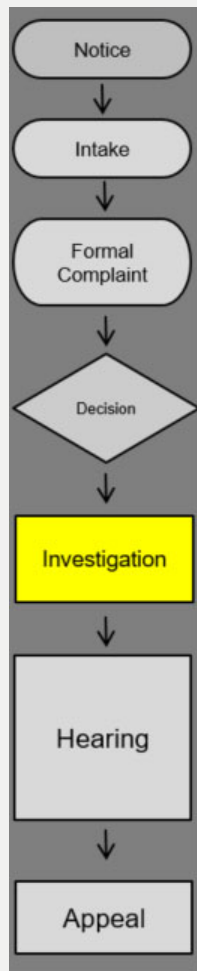


Title IX Regulations; Preamble 85 F.R. 30372



# Investigator May not Determine Responsibility

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



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

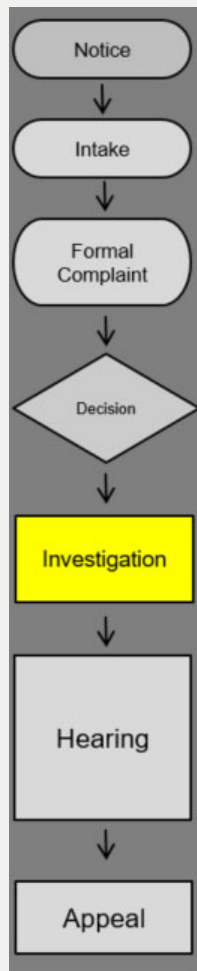
# Decision-Maker Must Determine Responsibility



- 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; Preamble 85 F.R. 30372

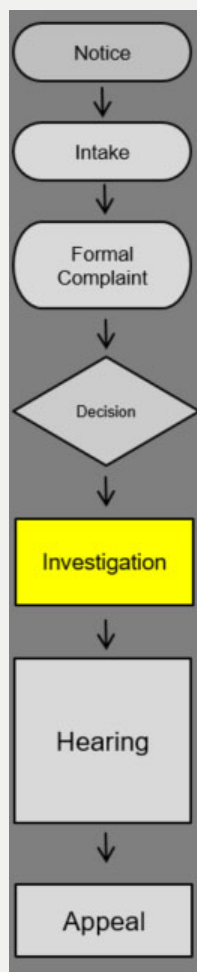
# Independent Obligation to Evaluate Evidence



- 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 §§ 106.45(b)(5)(vii); Preamble 85 F.R. 30308 & 30436

# Independent Obligation to Evaluate Credibility



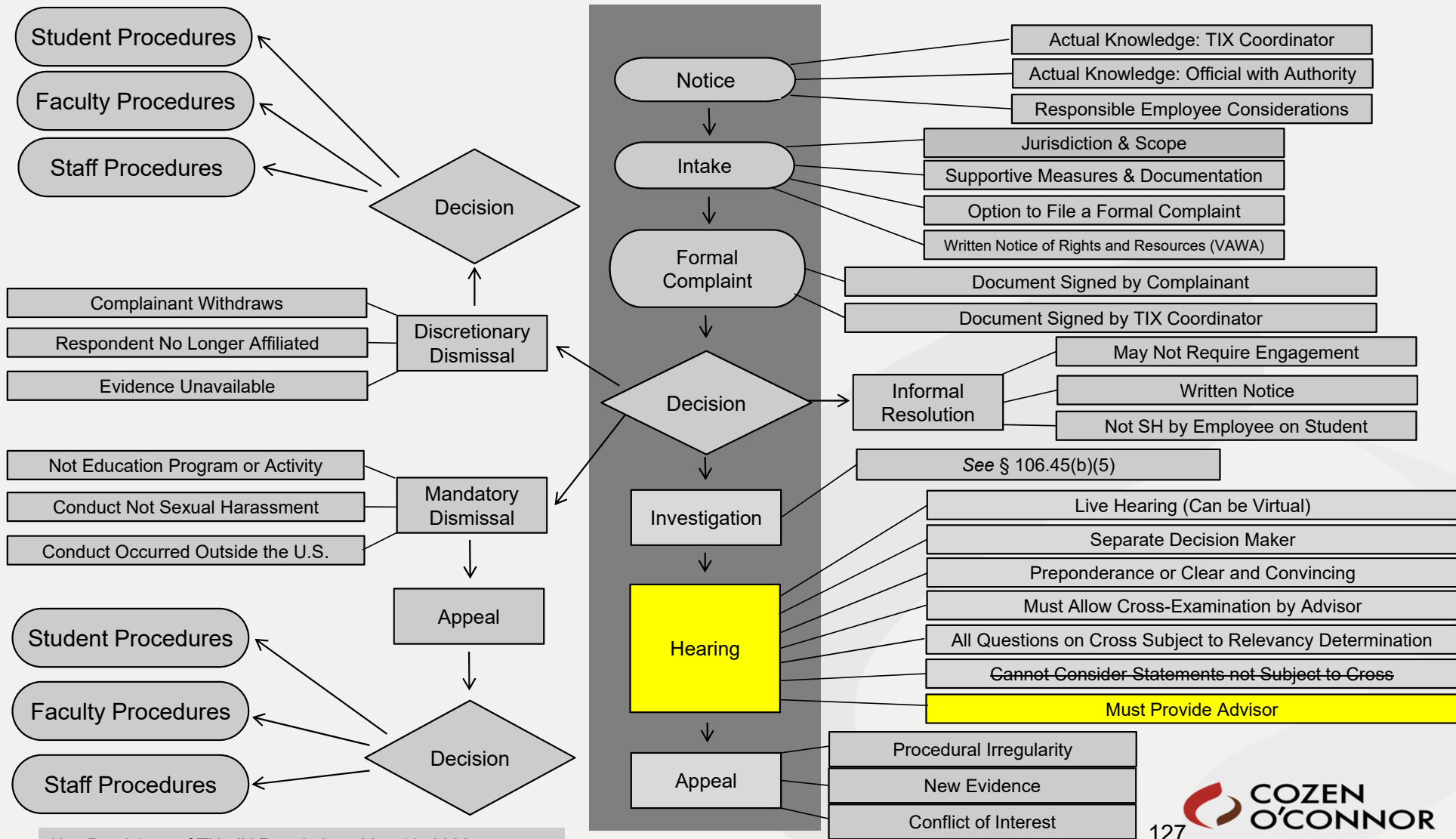
- If a recipient chooses to include a **credibility analysis** in its investigative report, the recipient must be cautious not to violate § 106.45(b)(7)(i), prohibiting the decision-maker from being the same person as the Title IX Coordinator or the investigator.
- If an investigator's determination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

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

# Practical Considerations & Effective Practices

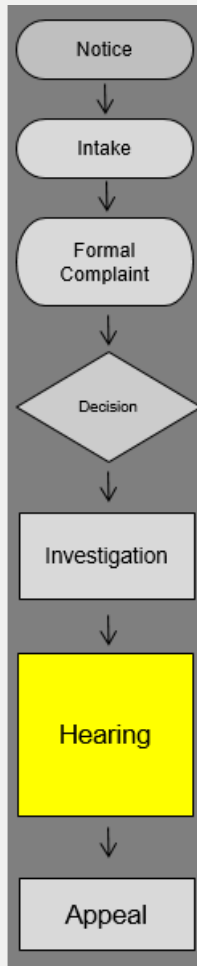
- Choice of decision-maker(s)
  - Hearing panel vs. sole adjudicator
  - External professional vs. internal administrator
- Decision-maker on sanction
  - Can be same or different from decision-maker on finding
- Use of Hearing Coordinator?
- Whether to have investigator make recommended findings or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

# **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 §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; Preamble, 85 F.R. 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 § 106.45(b)(6)

## Advisor's Role at the Hearing

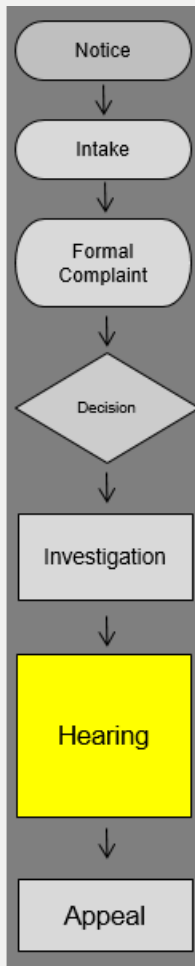
- Such cross-examination at the live hearing must be conducted directly, orally, and in real time by the party's advisor of choice and never by a party personally, **notwithstanding the discretion of the recipient under paragraph (b)(5)(iv) of this section to otherwise restrict the extent to which advisors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



Title IX Regulations; 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; 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; Preamble, 85 F.R. 30298



## Discretion as to Advisor's Role

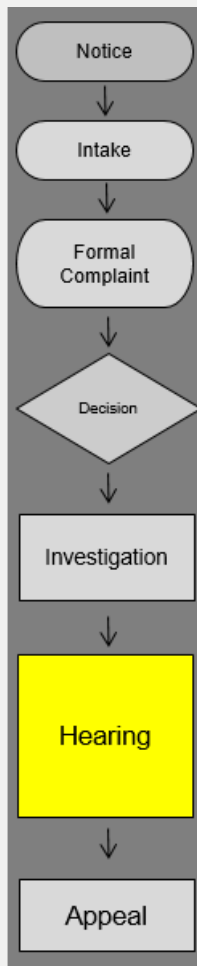
- We do not believe that specifying what **restrictions on advisor participation** may be appropriate is necessary, and we **decline to remove the discretion of a recipient to restrict an advisor's participation** so as not to unnecessarily limit a recipient's flexibility to conduct a grievance process 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, 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 § 106.45(b)(6)

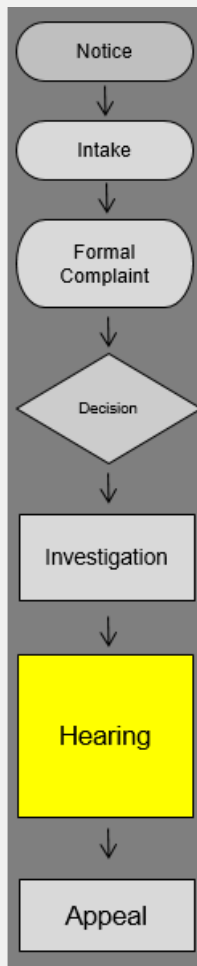
# Must Provide Advisor Even in Party's Absence



- [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; Preamble 85 F.R. 30346

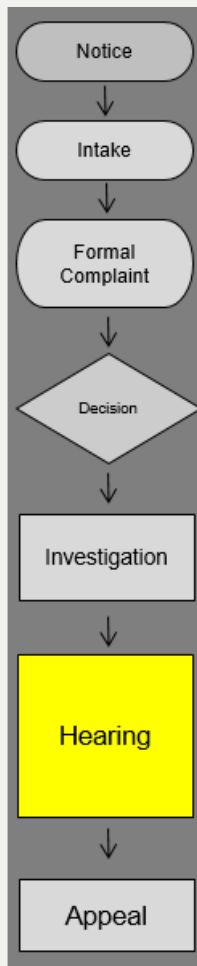
# Appearance Without an Advisor



- 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; Preamble 85 F.R. 30342

# Refusal to Conduct Cross-Examination

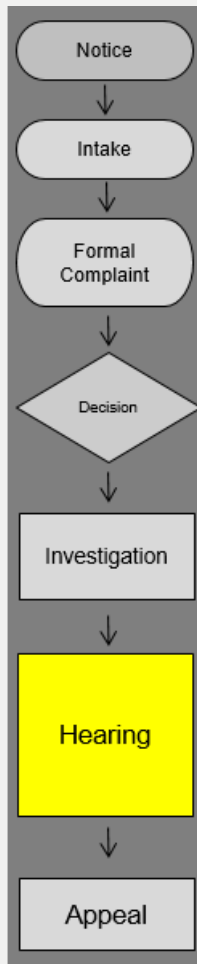


- A party cannot “fire” an assigned advisor during the hearing, **but if the party correctly asserts that the assigned advisor is refusing to “conduct cross-examination on the party’s behalf” then the recipient is obligated to provide the party an advisor to perform that function, whether that means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

Title IX Regulations 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.

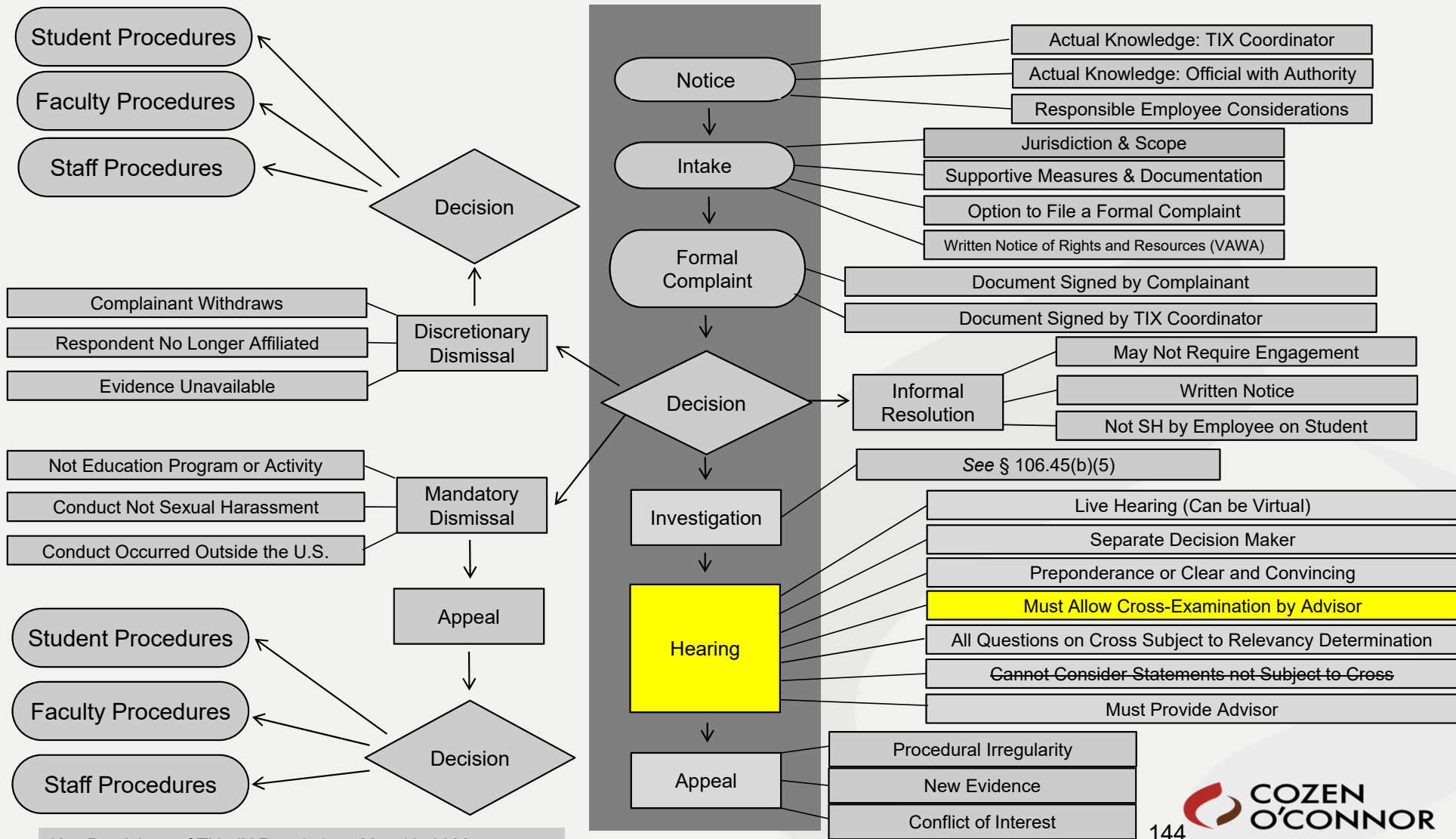


Title IX Regulations § 106.45(b)(6)  
Title IX Regulations 85 F.R. 30342

# 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

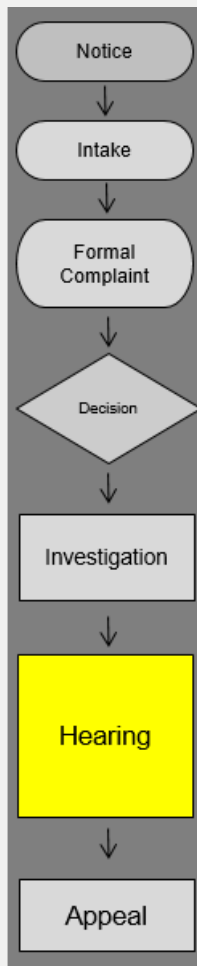
# **CROSS-EXAMINATION BY ADVISOR**



Key Provisions of Title IX Regulations May 19, 2020



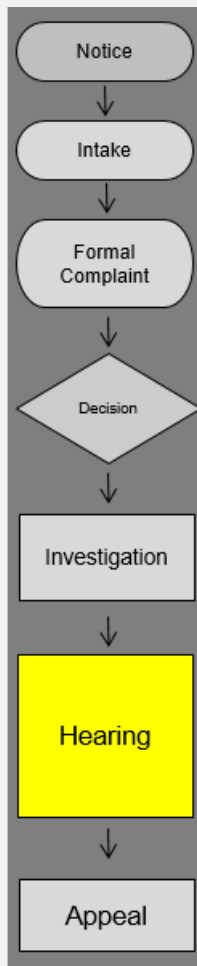
# Cross-Examination



- 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 § 106.45(b)(6)

# Cross-Examination

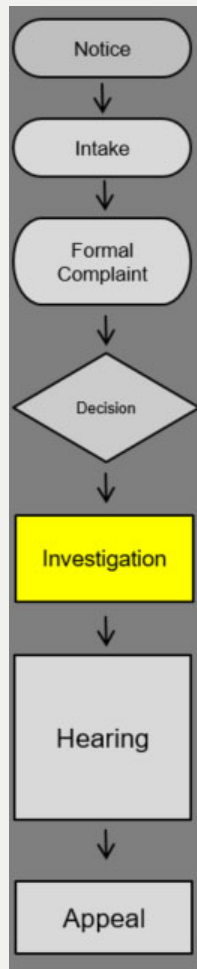


- Such cross-examination at the live hearing must be conducted **directly, orally, and in real time** by the party's advisor of choice and never by a party personally, notwithstanding the discretion of the recipient under paragraph (b)(5)(iv) of this section to otherwise restrict the extent to which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

Title IX Regulations § 106.45(b)(6)

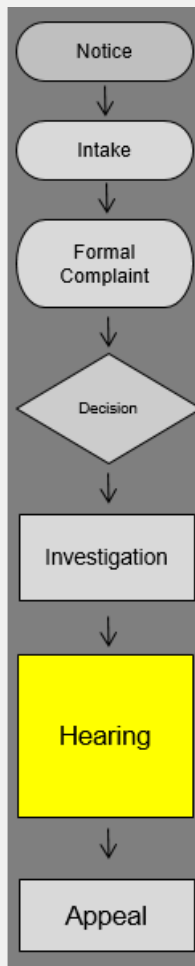
## Recap on Evidence Review

- “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 § 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 § 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; Preamble 85 F.R. 30336

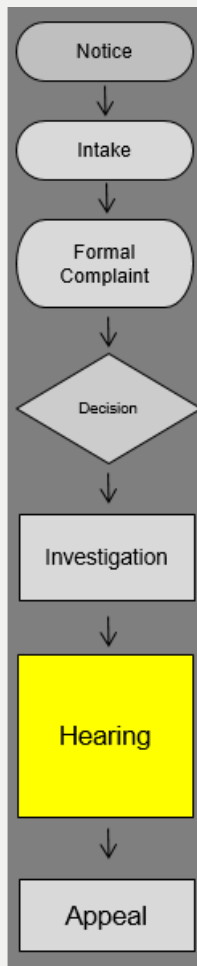
# Questions to Advance a Party's Interest



- 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; Preamble 85 F.R. 30319

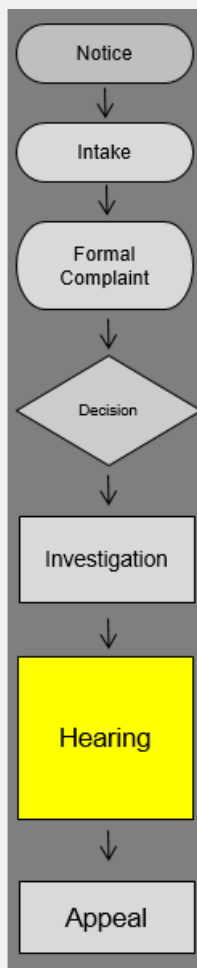
# Cross-Examination



- 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 § 106.45(b)(6)

# Determinations Regarding Relevance

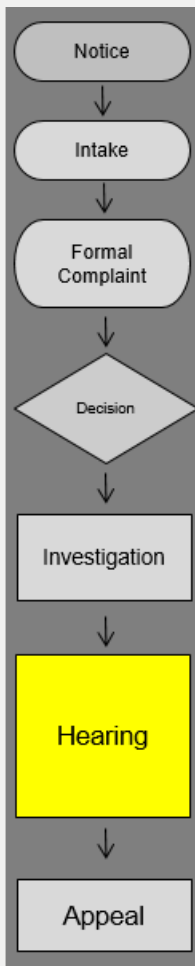


- The final regulations **do not preclude a recipient from adopting a rule** (applied equally to both parties) that does, or does not, **give parties or advisors the right to discuss the relevance determination with the decision-maker during the hearing.**
- If a recipient believes that arguments about 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 § 106.45(b)(6)  
Title IX Regulations; 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; 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; 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; 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; Preamble 85 F.R. 30342

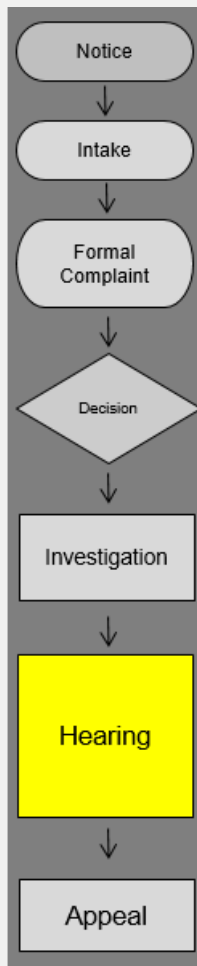
# May Not Impose Training Requirements



- 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; Preamble 85 F.R. 30342

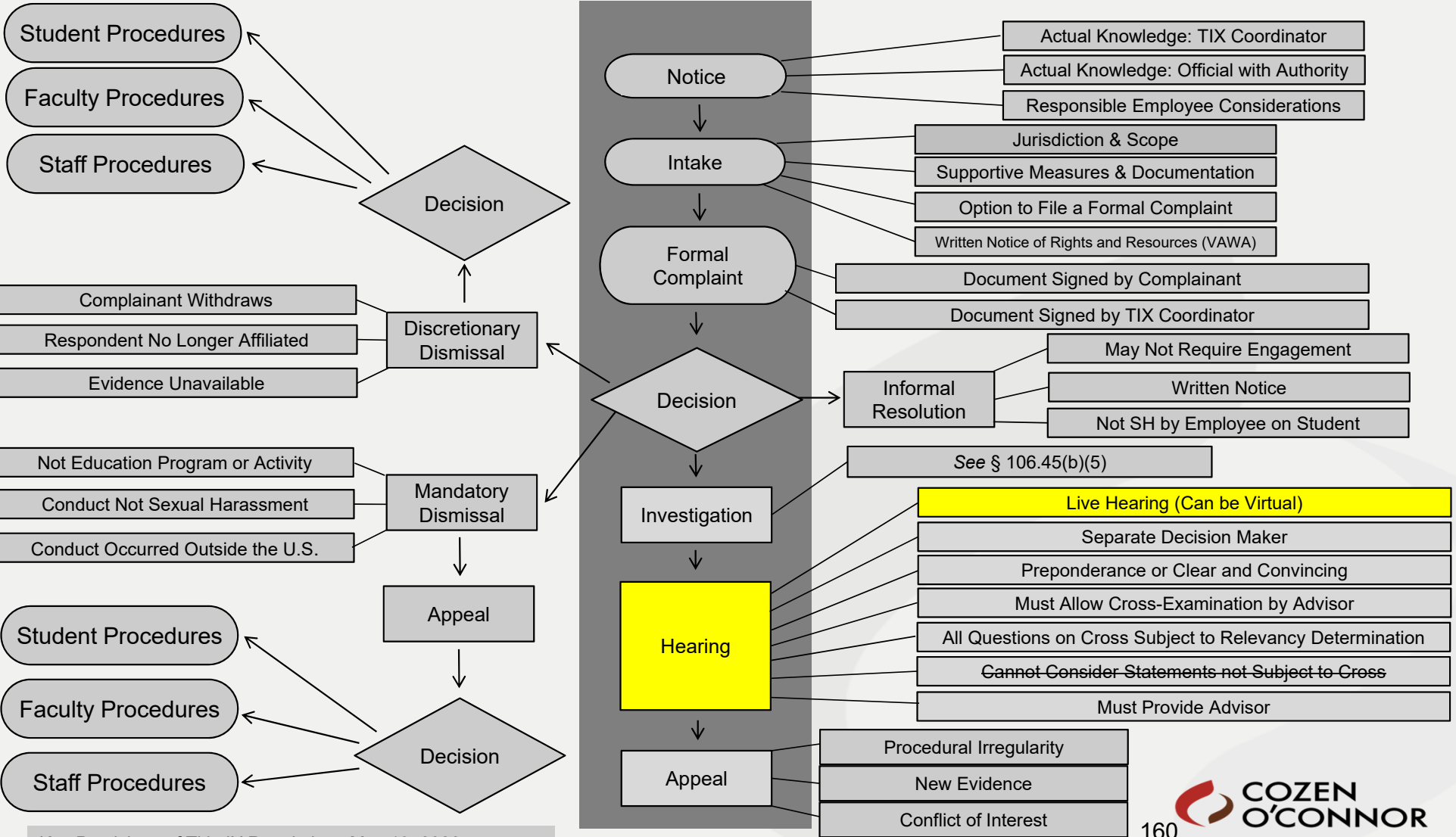
# Statements Made During Informal Resolution



- 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; Preamble 85 F.R. 30337

# THE LIVE HEARING REQUIREMENT

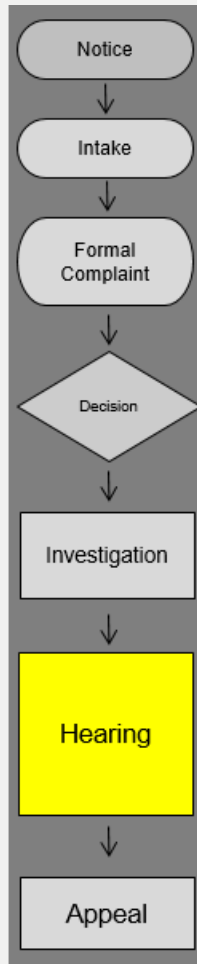


Key Provisions of Title IX Regulations May 19, 2020



# Live Hearing Required

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



Title IX Regulations § 106.45(b)(6)

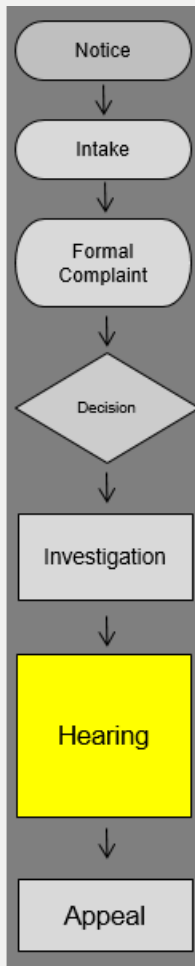
# Live Hearing Required

- [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; Preamble 85 F.R. 30359 .

# Option to Use Technology

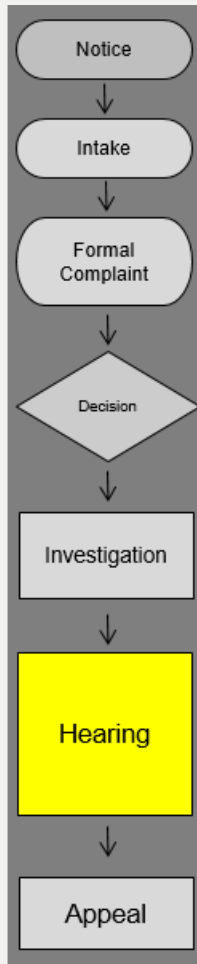


- Live hearings pursuant to this paragraph may be conducted with all parties physically present in the same geographic location or, at the recipient's direction, any or all parties, witnesses and other participants may appear at the live hearing **virtually, with technology** enabling participants simultaneously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

Title IX Regulations § 106.45(b)(6)

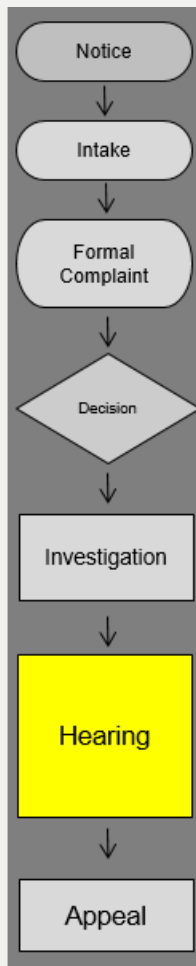
# Virtual Hearing Considerations

- 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 § 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; 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; Preamble 85 F.R. 30348

# Flexibility to Adopt Rules

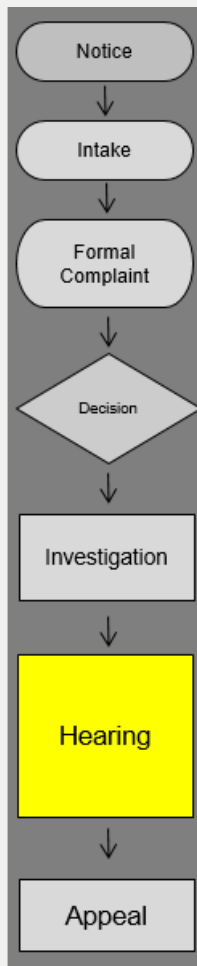
- Recipients may adopt rules that govern the **conduct and decorum** of participants at live hearings so long as such rules comply with these final regulations and apply equally to both parties.



Title IX Regulations; Preamble 85 F.R. 30315

# Flexibility to Adopt Rules

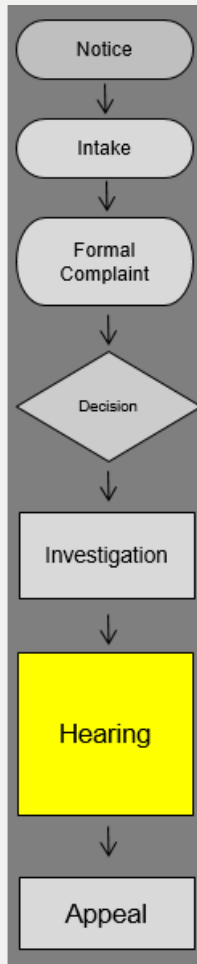
- Within these evidentiary parameters recipients retain the **flexibility to adopt rules** that govern how the recipient's investigator and **decision-maker** evaluate evidence and conduct the grievance process (so long as such rules apply equally to both parties).



Title IX Regulations; Preamble, 85 F.R. 30248



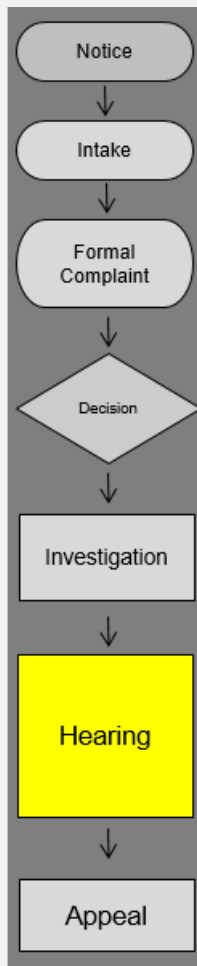
# Relevance Limitation on Flexibility



- **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; Preamble, 85 F.R. 30248

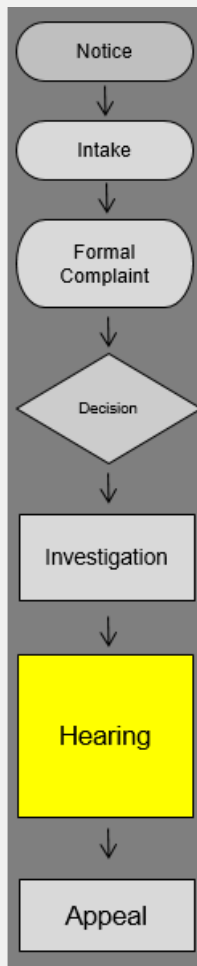
# Participation by Parties and Witnesses



- 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; Preamble 85 F.R. 30346

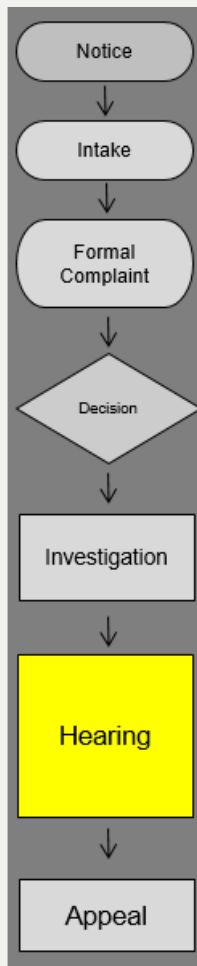
# Participation by Parties and Witnesses



- 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; Preamble 85 F.R. 30346

# Participation by Parties and Witnesses

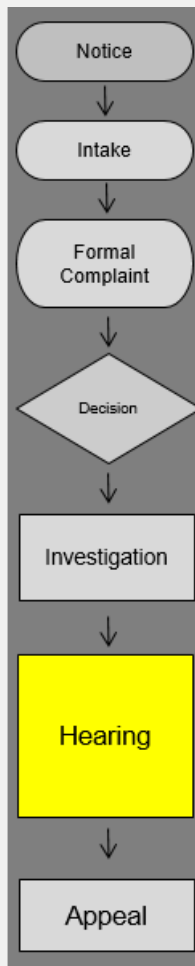


- (3) § 106.71 **expressly prohibits retaliation** against any party, witness, or other person exercising rights under Title IX, including the right to participate or refuse to participate in a grievance process;
- (4) § 106.45(b)(3)(ii) grants a recipient **discretion to dismiss a formal complaint**, 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; 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; 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.



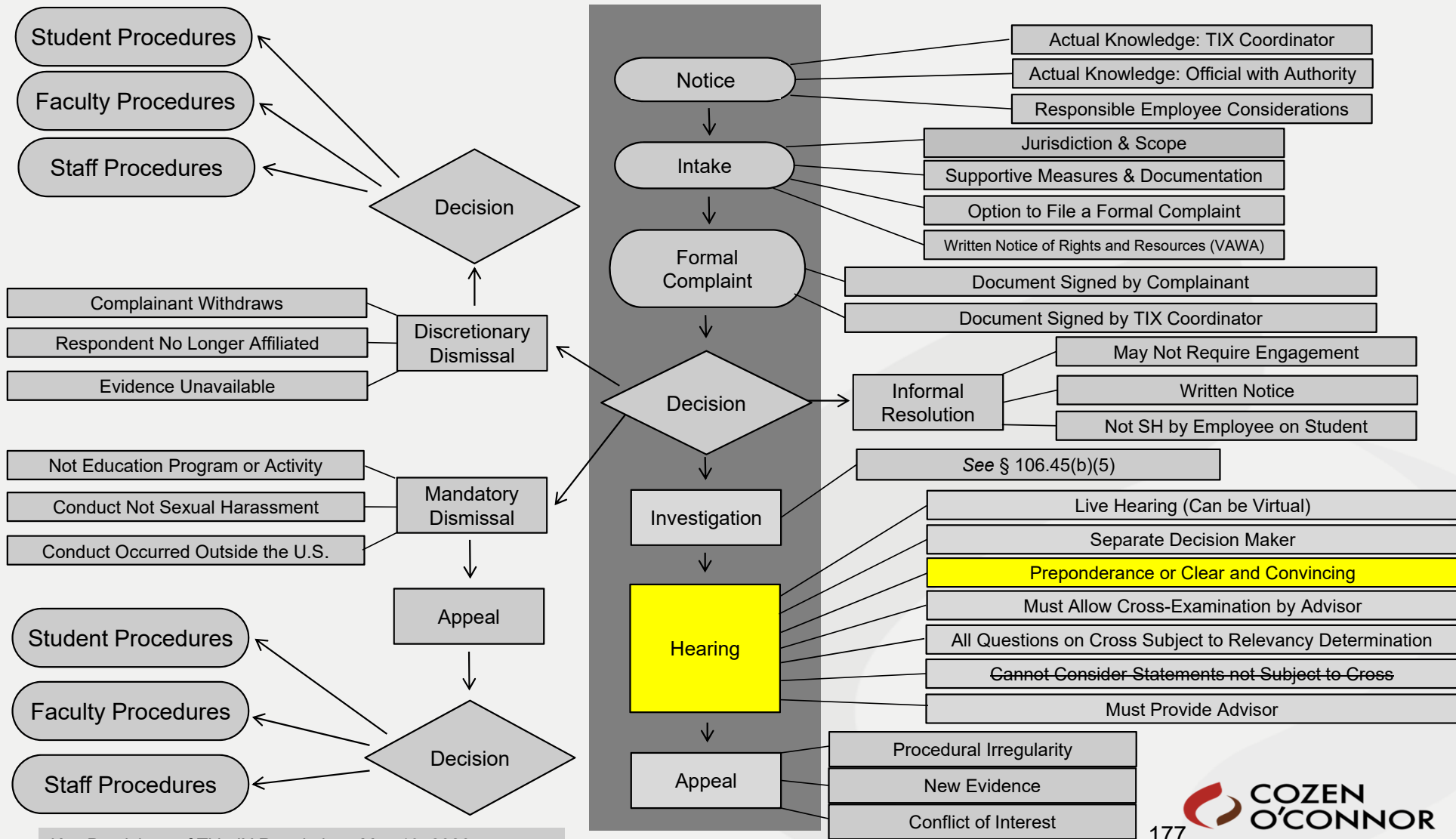
Title IX Regulations § 106.45(b)(6)

# 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

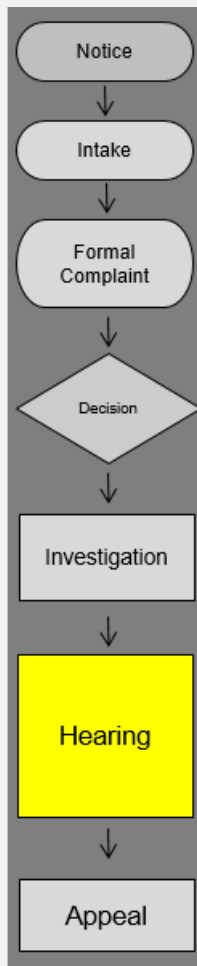
# **STANDARD OF EVIDENCE**





Key Provisions of Title IX Regulations May 19, 2020

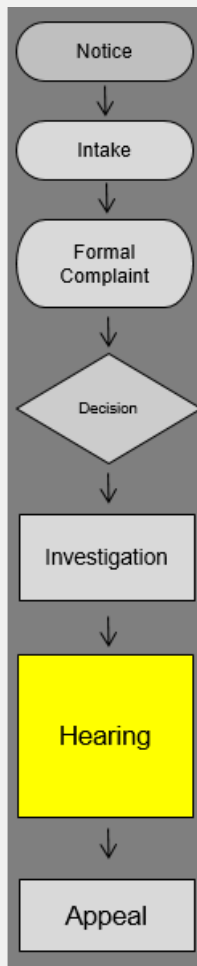
# Standard of Evidence



- [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 § 106.45(b)(6)

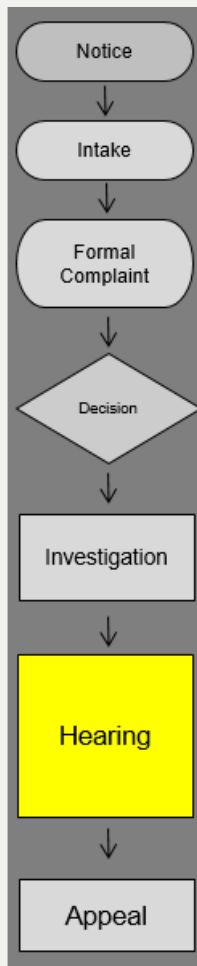
# Standard of Evidence



- 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; 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; 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 its probable truth or accuracy, not on the amount
- Quality of the evidence, not quantity
- NOT beyond a reasonable doubt

\* Based on common usage.

# **DISCUSSION: POST-PROCESS STEPS**

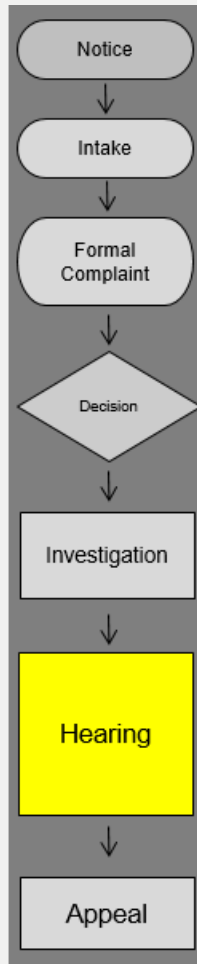


# Post-Process Steps

- After the Process:
  - Sufficient Evidence to Support a Finding of Responsibility
    - Considerations
  - Insufficient Evidence to Support a Finding of Responsibility
    - Considerations
- Outside the Process:
  - Prevention, Education, and Communication Outside the Context of a Particular Case
    - Educate about impact
    - Bystander intervention
    - Values-based versus policy-based
    - Updating training based on an assessment of patterns and trends
    - Peer-led efforts

# **SANCTIONING**

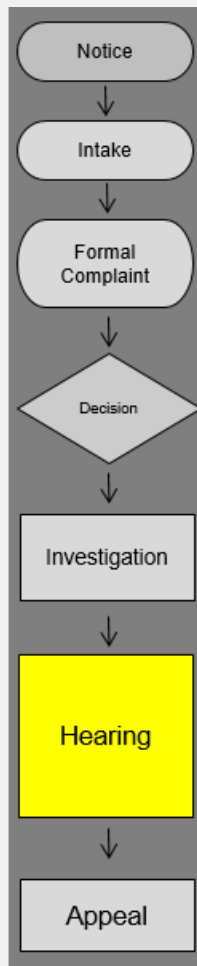
# Sanctioning



- 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 § 106.44 (a); § 106.45(b)(1)(vii); 85 F.R. 30575, 30395

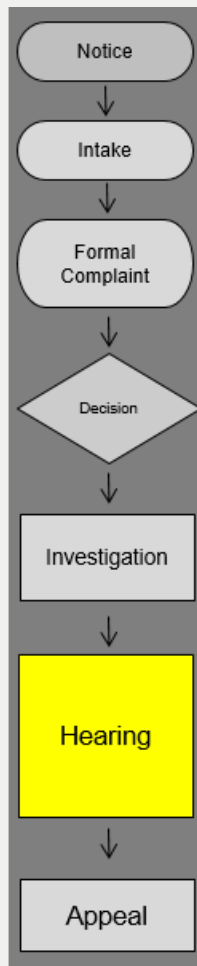
# Discretion in Sanctioning



- 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; Preamble 85 F.R. 30377, 30394

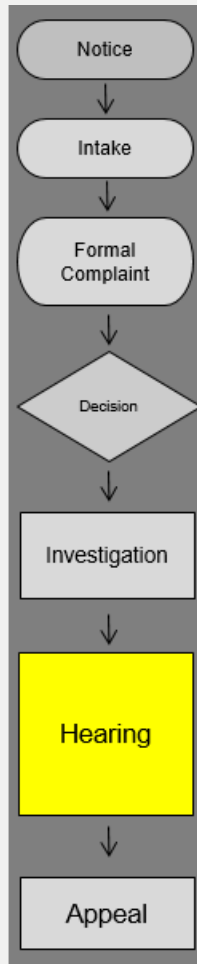
# Educational Purpose



- 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; Preamble 85 F.R. 30377, 30394

# Appeal of Sanction

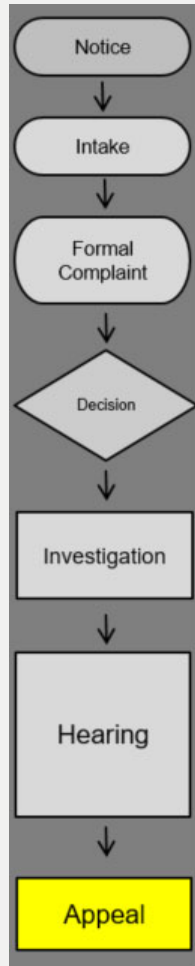


- The Department notes that under the final regulations, whether the parties can appeal based solely on the severity of sanctions is left to the recipient's discretion, though if the recipient allows appeals on that basis, both parties must have equal opportunity to appeal on that basis.

Title IX Regulations; Preamble 85 F.R. 30397

# APPEALS

# Appeals

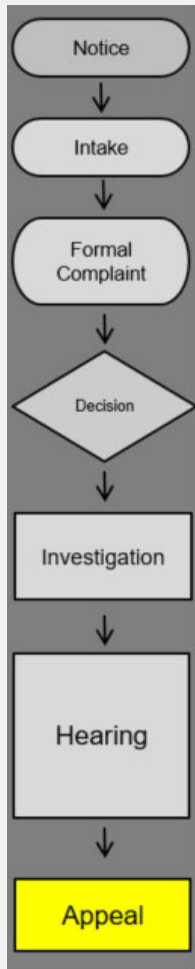


- A recipient must offer both parties an appeal from a determination regarding responsibility, and from a recipient's dismissal of a formal complaint or any allegations therein, on the following bases:
  - Procedural irregularity that affected the outcome of the matter
  - New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; and
  - The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individuals complainant or respondent that affected the outcome of the matter.
- A recipient may offer an appeal equally to both parties on additional bases.

Title IX Regulations §106.45 (b)(8)



# Appeals

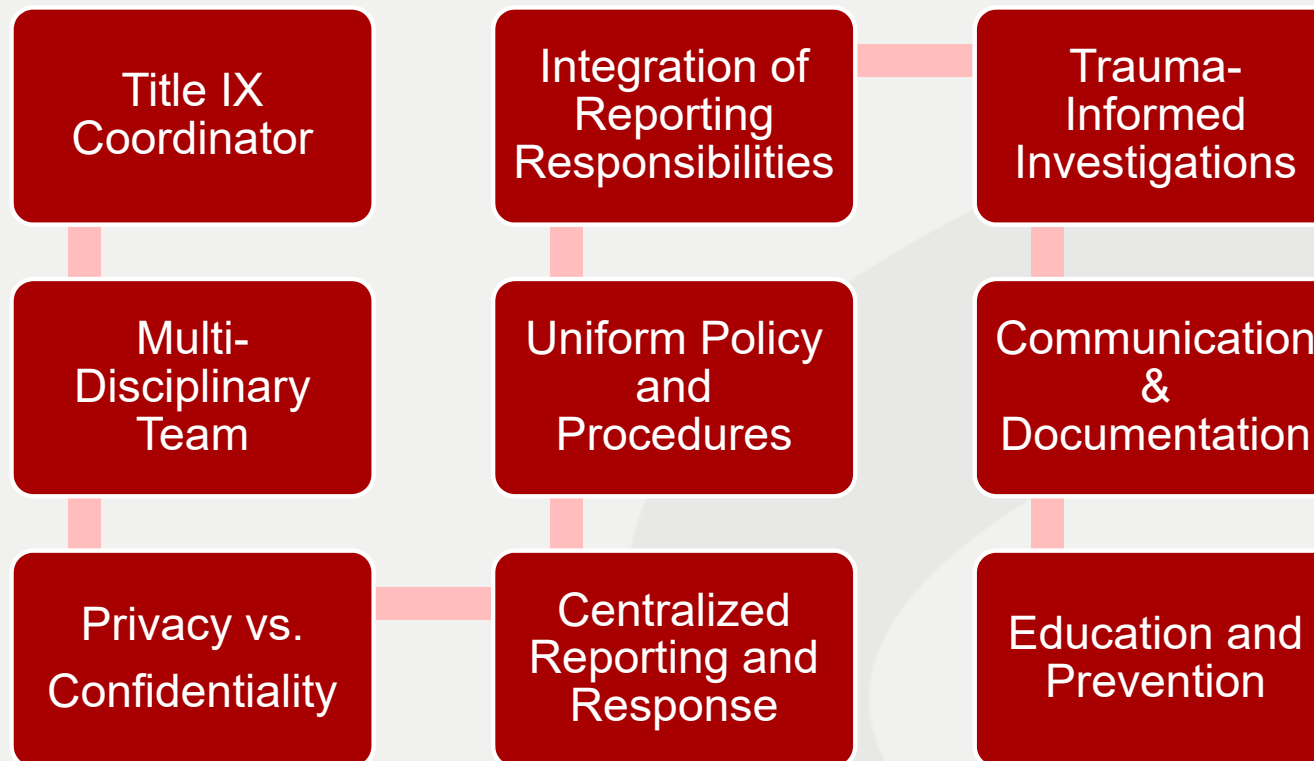


- As to all appeals, the recipient must:
  - Notify the other party in writing when an appeal is filed and implement appeal procedures equally for both parties;
  - Ensure that the decision-maker(s) for the appeal is not the same person as the decision-maker(s) that reached the determination regarding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

Title IX Regulations §106.45 (b)(8)

# **EFFECTIVE PRACTICES**

# Key Elements of Effective Practices



# Key Elements of Effective Practices

- Title IX Coordinator
  - Independent
  - Appropriately resourced
- Coordinated multi-disciplinary response team
  - Coordination of information
  - Coordination of personnel
- Privacy v. confidentiality
  - Distinction between confidential resources and reporting options
  - Informed reporting
- Integration of reporting responsibilities:
  - Responsible Employee
  - Campus Security Authority
  - Mandatory reporter of suspected child abuse

# Key Elements of Effective Practices

- Uniform policy and procedures for resolution:
  - Complainant autonomy/agency
  - Fair and impartial practices
  - Remedies-based options
  - Sanctions-based options
- Centralized reporting and review process
  - Consistent institutional responses
  - Tracking and monitoring of incidents and climate
- Trauma-informed investigations and practices
- Communication
  - Consistency and transparency
  - At the individual and community level
- Education, prevention and training programs

# The Title IX Coordinator

- Coordinates the recipient's compliance with Title IX
- Title IX coordinator must have appropriate authority, access, autonomy, and resources
- Oversees all Title IX complaints
- Identifies and addresses any patterns or systemic problems
- Meets with students and employees as needed
- Should not have other job responsibilities that may create a conflict
- A school may designate more than one coordinator
  - Must have clearly delineated responsibilities
  - Must have titles reflecting supporting role

# Personnel

- Individual
  - Personal preparation
  - Values-based approach
  - World class effort
  - Humility
  - Cultural competency
  - Warm-heartedness
  - Listen more, speak less
  - Be collaborative
- Structural
  - The gift of time
  - Tone at the top
  - Team building
  - Resources – budget, staffing, materials, professional development
  - Commitment and consistency
  - Clear expectations and enforcement
  - Development of compassionate compliance

# Title IX Multi-Disciplinary Team

- Core stakeholders
  - Title IX Coordinator
  - Student conduct
  - Campus safety/police
  - Human resources
  - Dean of faculty
- Additional campus stakeholders
  - Counseling
  - Health center
  - Advocacy
- Community partners
  - Law enforcement
  - Prosecutor
  - Hospital/Medical Providers
  - Community crisis or advocacy centers
    - Rape Crisis Counselors
    - Domestic Violence Counselors



# Policy Considerations

- Easily accessible, identifiable and locatable
- Uniform definitions and high level principles
- Consistent application across the institution
- Procedures may vary by respondent (student, staff, faculty, third party)
- Areas of concern:
  - Intersection between Title IX and Clery
  - Intersection with tenure processes
  - Intersection with collective bargaining agreements

# Privacy vs. Confidentiality

- Ensure policies clearly identify reporting options and support resources both on and off campus
- Delineate confidential resources vs. non-confidential reporting options in policy and training
- Ensure all employees are familiar with Title IX reporting expectations
- Offer clear and easy to follow guidance about what happens when a report is received
- Foster a climate that encourages reporting by providing consistency in message, policy, procedure, and outcome

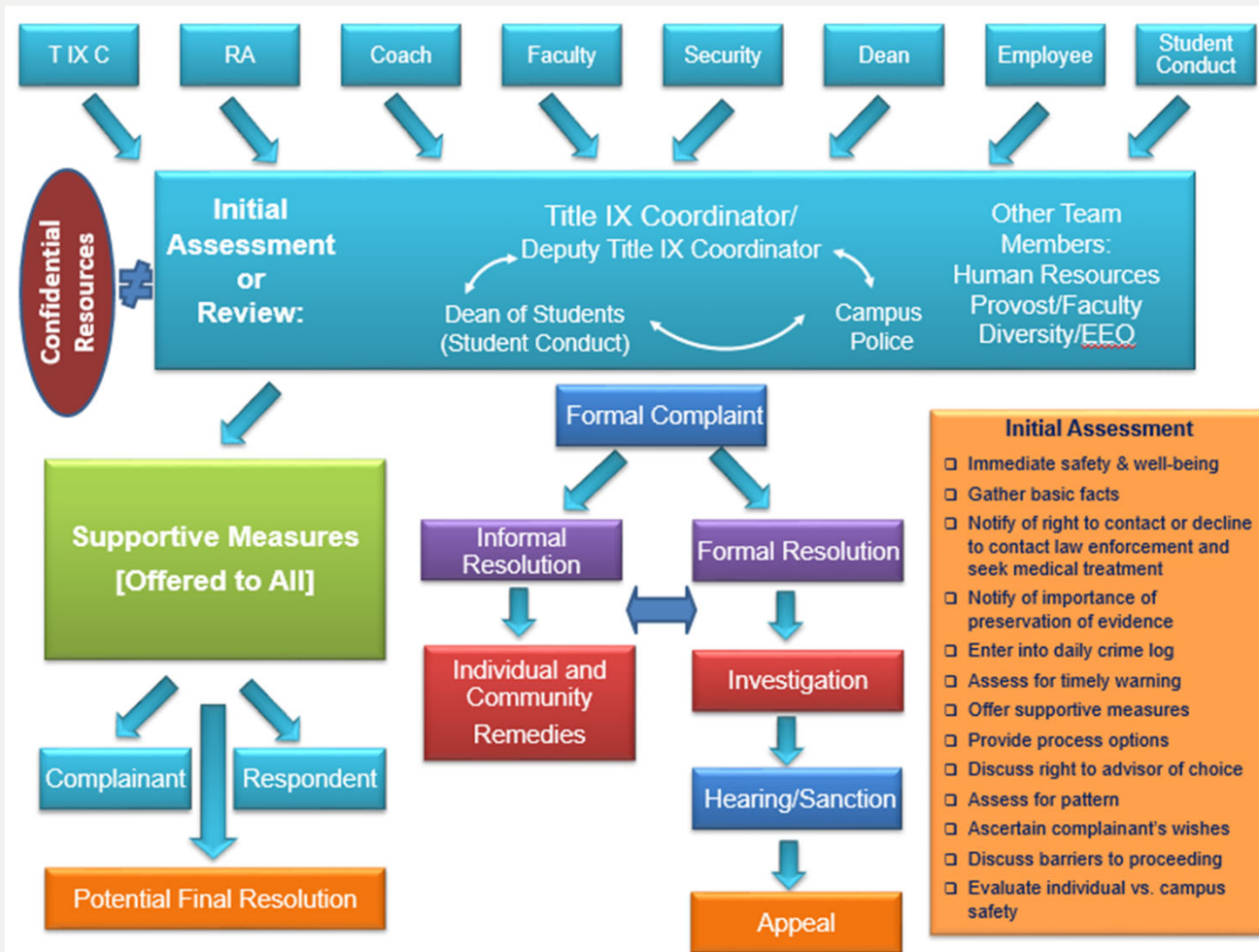
# Confidential Resources

- Students or employees wishing to obtain confidential assistance may do so by speaking with professionals who are obligated by law to maintain confidentiality
- Confidential resources generally include medical providers, mental health providers, clergy, and rape crisis counselors
- Exceptions to confidentiality include:
  - Mandatory child abuse reporting
  - Tarasoff imminent risk of harm to self or others
  - State felony or sexual assault reporting

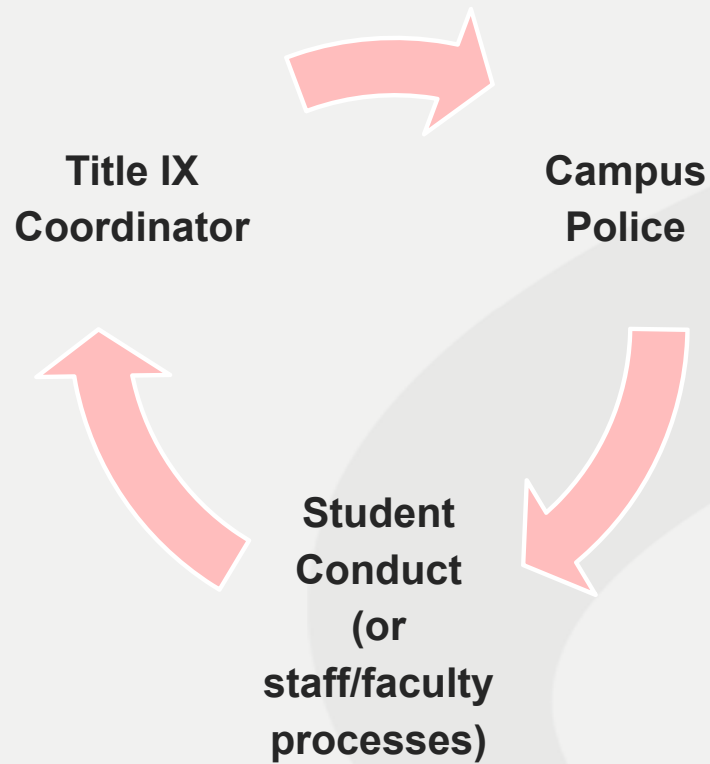
# Confidential Resources vs. Reporting Options

- Confidential Resources
  - Medical services
  - HIPAA
  - Mental health/counseling
  - Clergy
  - Rape crisis counselor
- Structural Challenges
  - Employees with multiple hats, e.g., counselor and administrator
- Reporting Options
  - Emergency for safety, physical, or emotional
  - Dedicated campus access points
    - Title IX
    - Campus safety/police
    - Student conduct
    - Human resources
  - To any school employee
  - Anonymous
  - Law enforcement

# Integration and Coordination



# Central Review Process Multi-disciplinary Team



# Centralized Review Process

- Coordination of information and personnel
  - Clearly delineated roles and responsibilities
  - Build in regular and open lines of communication
  - Sequence events in advance
- Separate support and advocacy from investigation and adjudication
- Design and use template communications
- Central tracking for patterns
- Documentation/records
- Ensure consistent implementation of:
  - Interim measures
  - Determination whether to proceed
  - Investigative practices
  - Sanctions
  - Community remedies
- Transparency in outcomes

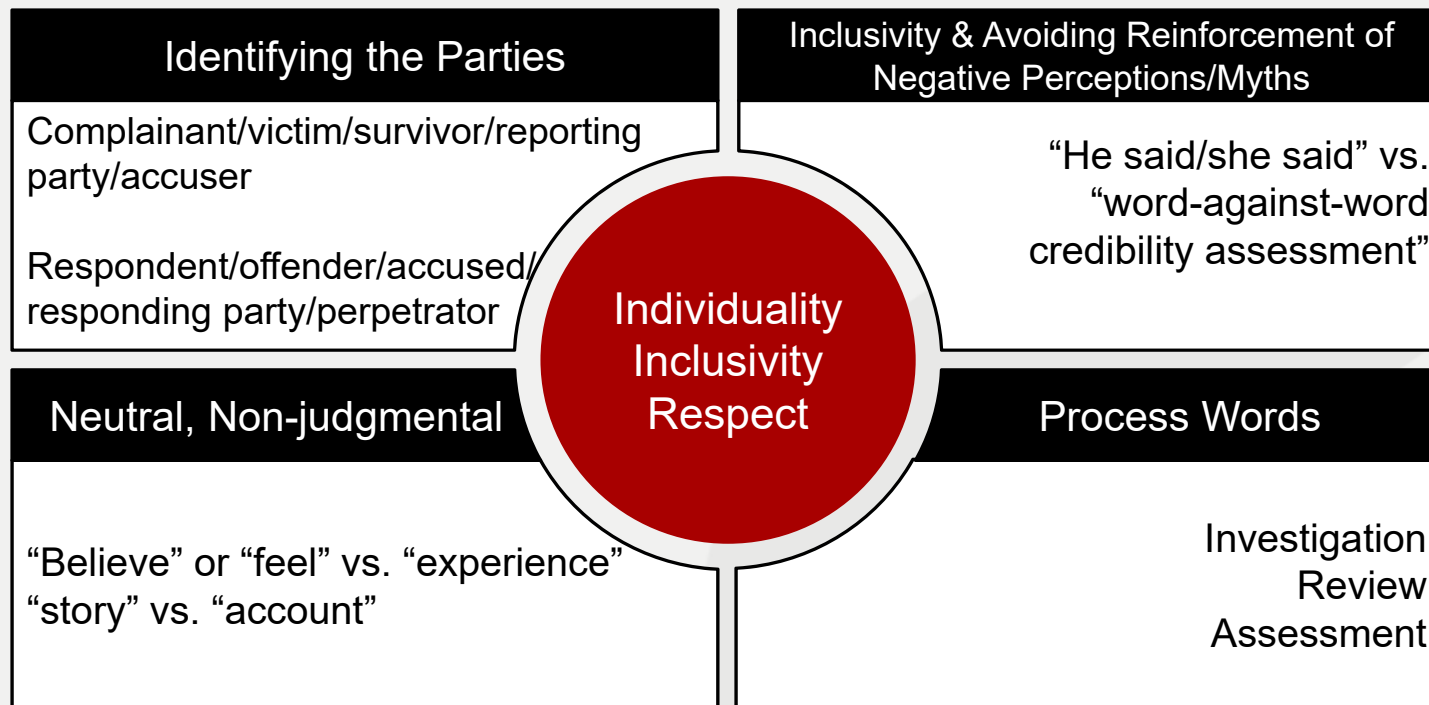
# Title IX Intake and Assessment

- Assess immediate safety and well-being
- Gather basic facts
- Notify of right to contact law enforcement and seek medical treatment
- Notify of importance of preservation of evidence
- Tend to Clery responsibilities:
  - Enter into daily crime log
  - Assess for timely warning
- Assess and implement interim measures
- Provide policies, process options, resources and supports
- Assess for pattern
- Ascertain complainant's wishes
- Discuss barriers to proceeding
- Evaluate individual vs. campus safety



# **SERVING WITHOUT CONFLICT OF INTEREST OR BIAS**

# Awareness of the Impact of Language



# Identifying Our Own Biases

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

# Diversity and Culture

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

# Case Evaluation

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

# Disclosure

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

# Framing Difficult Questions

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

# **ALCOHOL, DRUGS AND INCAPACITATION**

216



# The Role of Alcohol

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

# The Role of Alcohol

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

1. DOJ, National Institute of Justice, 2005.

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

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

# Alcohol: Investigative Challenges

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

# Frame Questions Appropriately

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

## Get Detailed Information

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

## Get Detailed Information

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

## Get Detailed Information

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

## Get Detailed Information

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



## Get Detailed Information

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

# Considerations

Consideration	Why?
Avoid asking about intoxication on a scale (e.g. “from 1 to 10”)	<ul style="list-style-type: none"> <li>• There is no universal understanding of what the numbers on the scale mean.</li> <li>• Instead, ask about the impacts of drugs or alcohol on a person physically, cognitively, verbally, and otherwise.</li> </ul>
Avoid over-reliance on online BAC calculators in determining incapacity	<ul style="list-style-type: none"> <li>• Without a blood or breath test, it is hard to pinpoint a person’s BAC, especially after the fact.</li> <li>• BAC is only one data point and does not correlate precisely to a person’s subjective experience or objective indicia of intoxication/incapacitation.</li> <li>• Use BAC when it is available; otherwise, rely on subjective and objective indicia of impairment.</li> </ul>
Consider the observations of any sober witnesses with experience and/or training	<ul style="list-style-type: none"> <li>• Medics, police, firefighters, and even trained security guards, volunteer EMS, and residence hall staff are generally sober, trained observers paying close attention.</li> <li>• May need to work with local agencies to secure participation and obtain records, if available.</li> </ul>
Create and use a universal timeline	<ul style="list-style-type: none"> <li>• Witness statements taken out of context do not help answer the critical question: whether the Respondent knew or should have known that the Complainant was incapacitated.</li> <li>• Create a visual timeline of events and highlight the timeframe the parties were in each other’s presence.</li> </ul>

# Creating a Universal Timeline

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

Complainant	Source(s)		Respondent	Source(s)
Complainant (C) and A "pre-gamed" at B's apartment. C drank three 1.5-ounce shots Jim Beam and ate three slices of pizza. C, A and B walked from B's apartment to second "pre-game" at D's apartment. C drank 2 shots of Ciroc Peach and threw up in D's sink. D and A took photos and posted them on Instagram.	A interview B interview C interview D interview D's and A's photos w/ date/time	8:00 PM	Respondent (R) arrived at party by himself. R filled one 16-ounce cup with beer and drank it quickly.	R interview
		8:30 PM	R saw friends X, Y, Z. Z gave R keys to his Z's room where Z kept hard liquor. R retrieved a 750 ml bottle of Fireball whiskey and drank approximately ¼ of it himself over the course of about an hour and a half. X and Y each had about 2 shot glasses full. X took a video of R, X and Y drinking Fireball. X sent it in the soccer group chat and R responded to it with a GIF of a flaming meteor.	R interview X interview Y interview Z interview X's video Group chat
		9:00 PM		
C arrived at the soccer party with A, B, and D. D got C a 16-ounce cup of "jungle juice" which C drank slowly over the course of about an hour. (Z on the soccer team provided the jungle juice. Z said it contained 3 parts lemonade, 2 parts Sprite, 1 part gin).	C interview A interview B interview D interview Z interview	9:30 PM		
		10:00 PM		
C went upstairs alone to check out the view from the roof. As C was walking back downstairs, C took the last sip of the "jungle juice" and saw R. C texted C's mom, "hapy biray mom I love u so must" (C's mom's birthday was 2 months ago).	C interview C's texts	10:30 PM	R texted Z "thanks for the fireball. Let me know where I can meet you to give you your key back." R saw C coming down the stairs.	R interview R's texts
C reported a complete memory loss from about 10:30 until the next morning.	C interview	11:00 PM	C and R went upstairs into the bathroom. R's friend W walked in as they were kissing and undressing.	R interview W interview
A saw C leaving the bathroom with C's t-shirt on backwards. A escorted C home.	A interview	11:30 PM	Respondent left the bathroom and texted Z "I just got laid!"	R interview Z interview R's texts

# Considerations for Outcome Letter

- Lay out what each witness saw in chronological form
- Focus on what the Respondent knew or what a reasonable, sober person in Respondent's position would have known
- Pay close attention to what your reasonable, sober witnesses saw or did not see.
  - First responders: police, medics, student EMTs, public safety, RAs
  - Greek risk management officers “on duty” (but consider relationships/interest)

# Considerations for Outcome Letter

- Consider whether it is necessary to find that Complainant was or was not incapacitated
  - Where the information supports that Complainant credibly reported their own memory loss, consider the impact of a finding that Complainant “was not incapacitated.”
  - Instead, may choose to write, “We find that there is insufficient evidence, by a preponderance of the evidence, to find that Respondent knew, or that a reasonable, sober person in Respondent’s position would have known, of Complainant’s potential incapacitation. We make that finding based on the following information...”

# **INVESTIGATIVE RESOURCES**

# Incident Response Checklist

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

# Incident Report Form

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



# Investigation Checklist

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

# Investigation Checklist: Reporter

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

# Investigation Checklist: Reporter

- Overall credibility?
  - Ability to observe/remember?
  - Account impacted by:
    - Trauma/stress
    - Alcohol or other drugs
    - Passage of time
    - Influence of others
    - Barriers to participation
  - Demeanor?
    - At time of event?
    - At time of reporting?
    - As reported by other witnesses?  
If so, identify witnesses.
    - In interview?
- Secondary gain?
  - Financial?
  - Situational?
  - Occupational?
- Interests or bias?
- Details of description:
  - Central issues?
  - Peripheral issues?
- Corroboration?
- Do facts hang together? Why? Why not?

# Investigation Checklist: Respondent

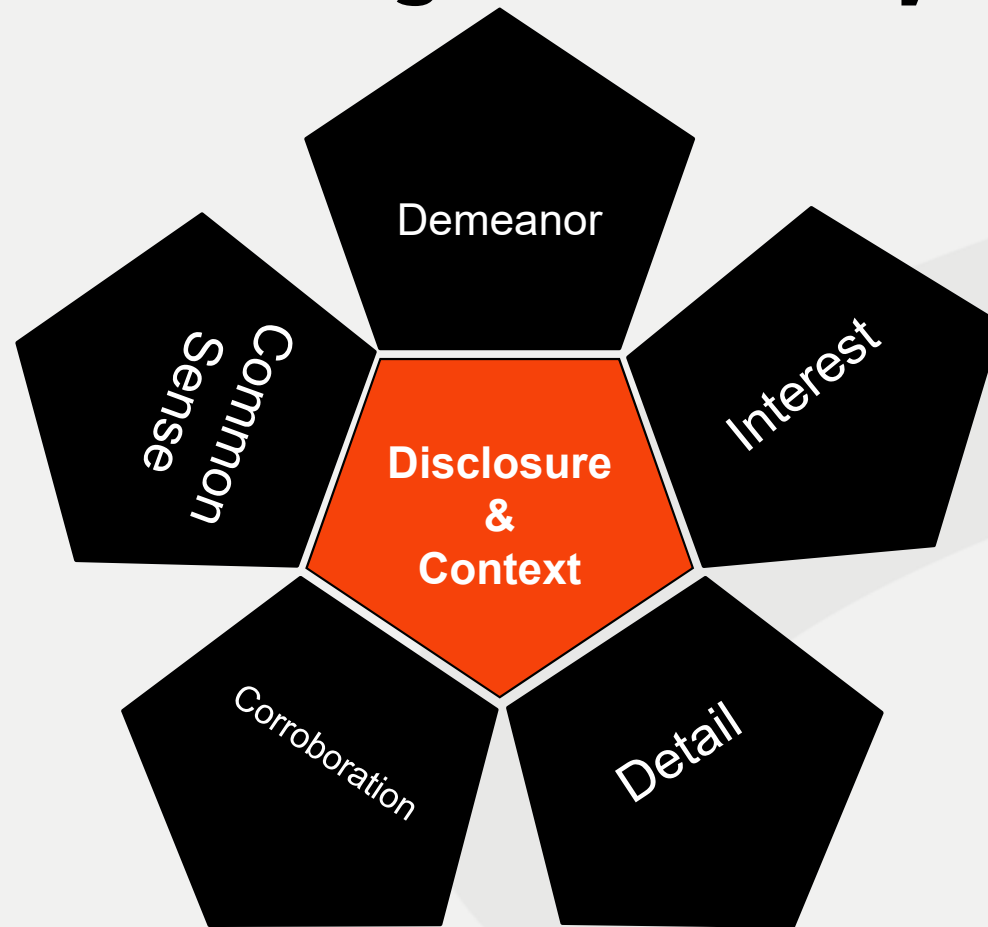
- Other acts/behaviors relevant to intent?
  - Evidence of substance abuse?
    - If so, is it admitted?
  - Evidence of impulse control issues?
    - If so, is it admitted?
  - Admission of physically inappropriate behavior?
  - Admission of sexually inappropriate behavior?
  - Evidence of fabrication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

# Resources

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

# EVALUATING CREDIBILITY

# Evaluating Credibility



# Credibility Factors

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



# Demeanor

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

# Demeanor

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

# Interest

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

# Interest

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

# Detail

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

# Corroboration

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

# Corroboration

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

# Evaluating Changes in Account

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



# Disclosure

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

# Synthesis

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

# Integrated Analysis

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

## Questions to Consider: Credibility Generally

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

## Questions to Consider: Detail

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

## Questions to Consider: Interest

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

## Questions to Consider: Demeanor

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

## Questions to Consider: Corroboration

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



# Questions to Consider: Common Sense

- Does it make sense?

# Credibility Considerations from OCR

## 1997 Sexual Harassment Guidance

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

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

...

(continued on next slide)

# Credibility Considerations from OCR

(1997 Sexual Harassment Guidance continued)

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

...

# Credibility Considerations from OCR

(1997 Sexual Harassment Guidance continued)

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

...

# Credibility Considerations from OCR

(1997 Sexual Harassment Guidance continued)

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

# Credibility Considerations from OCR

(1997 Sexual Harassment Guidance continued)

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

...

# Credibility Considerations from OCR

(1997 Sexual Harassment Guidance continued)

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

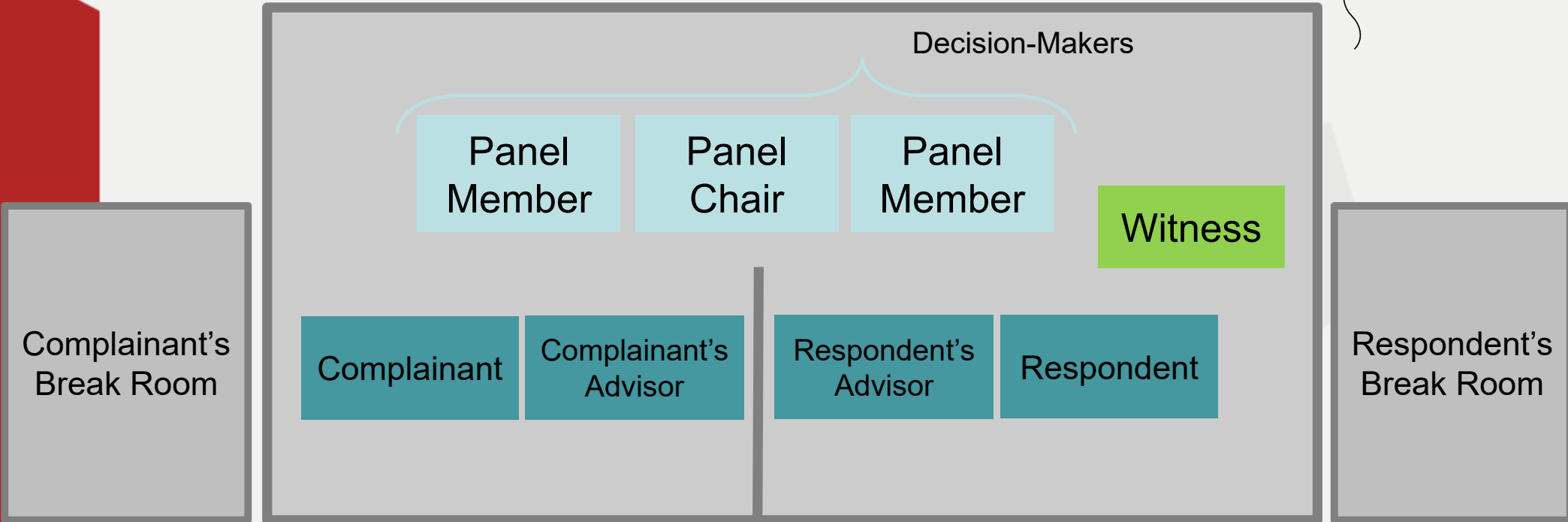
See [1997 Sexual Harassment Guidance](#)

# HEARING BASICS



# In-Person Hearing Option 1

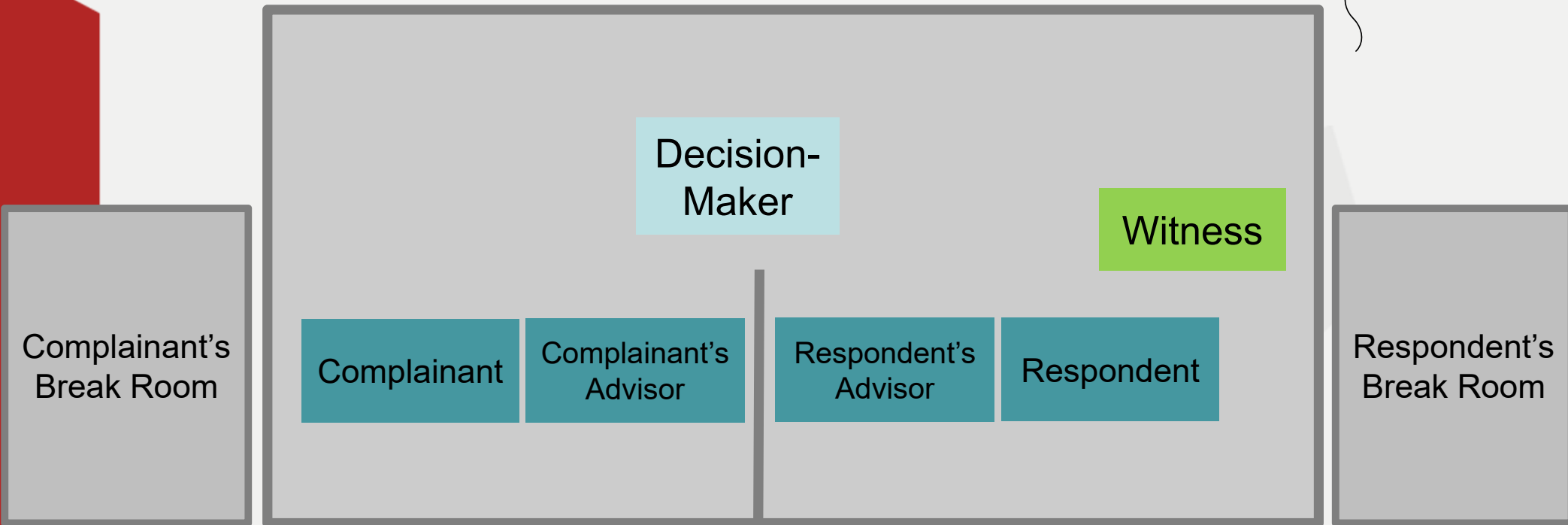
Hearing Room



- Physical room layout and seating arrangement may be adjusted to fit space/needs
- Partition between parties may be used to add physical separation

# In-Person Hearing Option 2

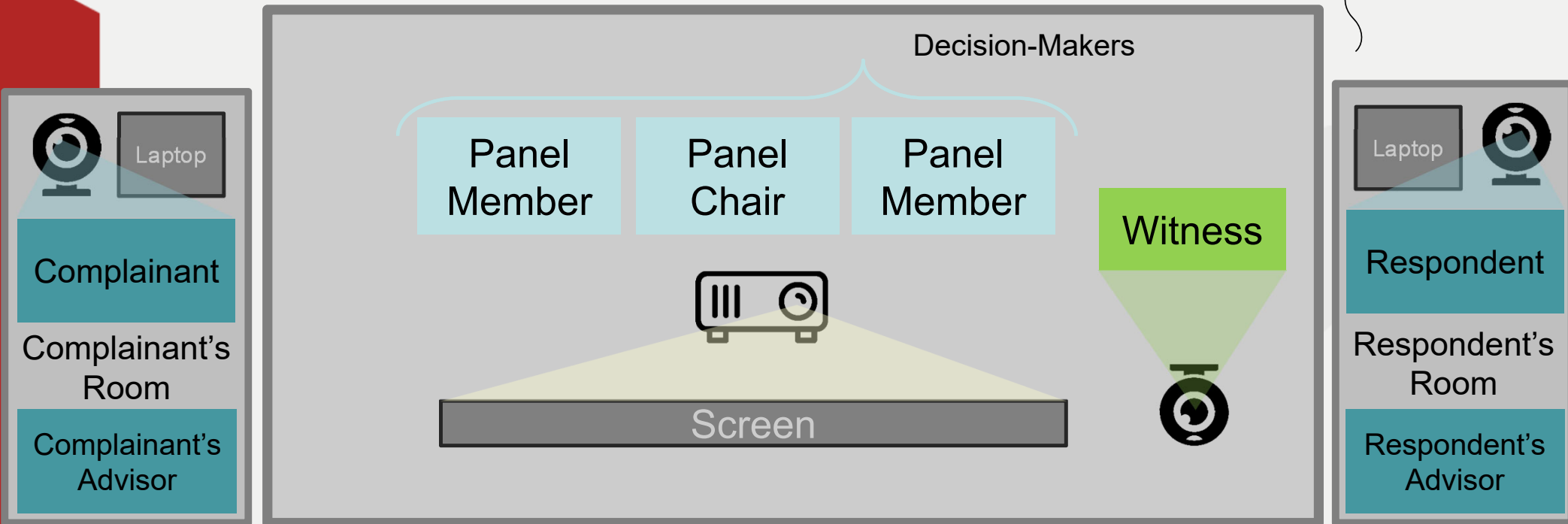
Hearing Room



- Physical room layout and seating arrangement may be adjusted to fit space/needs
- Partition between parties may be used to add physical separation

# In-Person Hearing Option 3

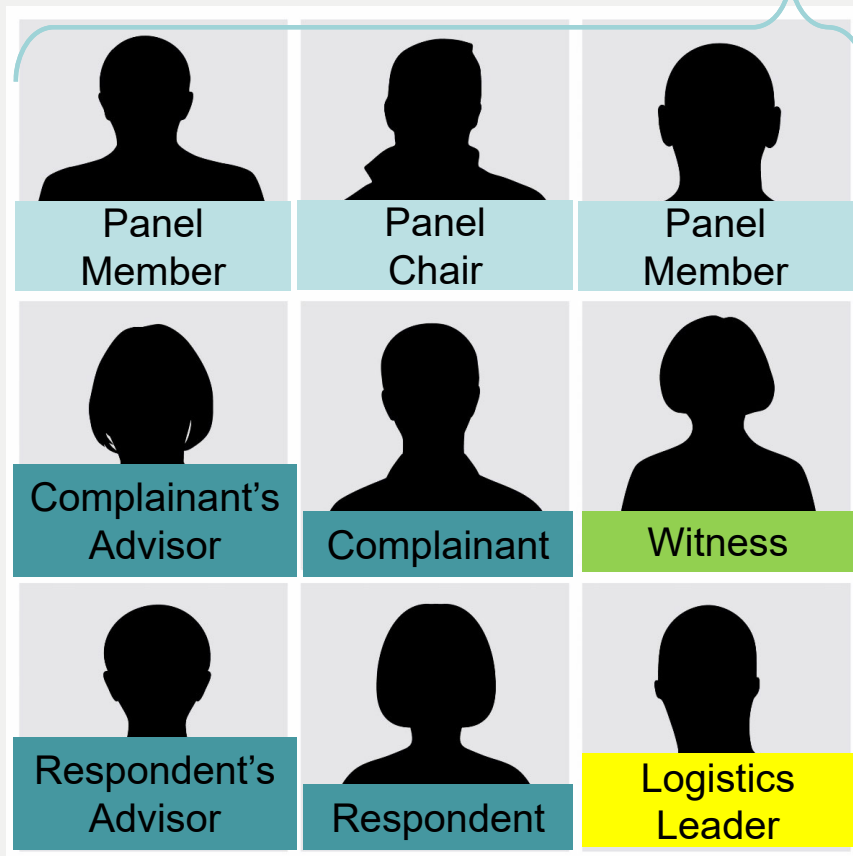
Hearing Room



- Physical room layout and seating arrangement may be adjusted to fit space/needs
- Panel may also be a sole decision maker (Option 4)

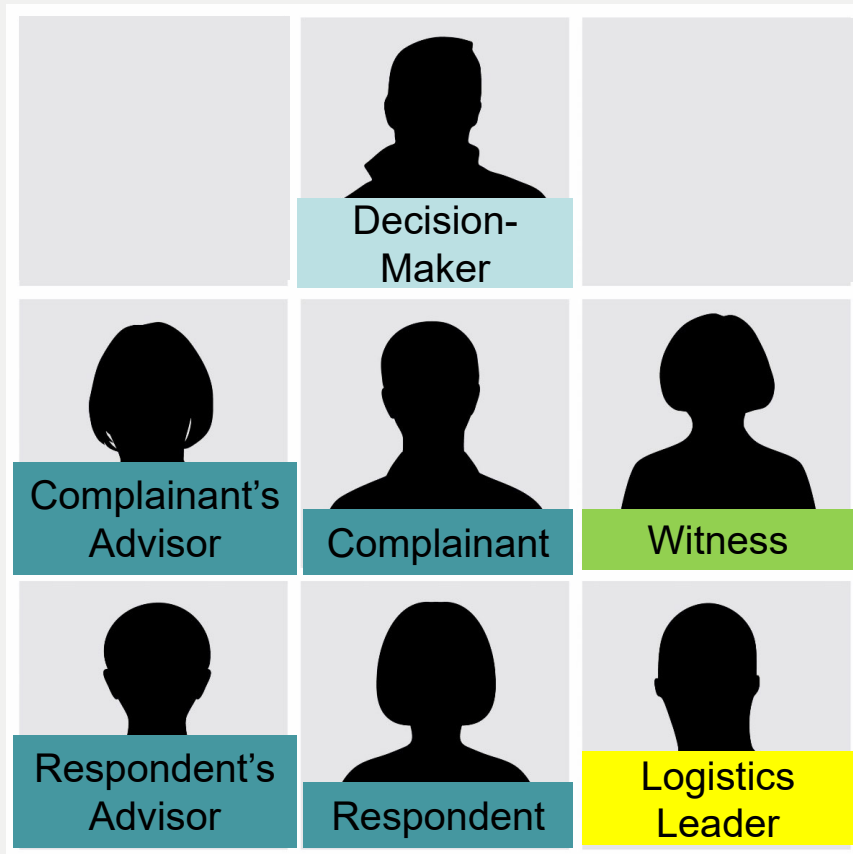
# Remote Hearing Logistics

## Decision-Makers



- Squares may be arranged in a different order (this arrangement is for illustration only)
- Logistics Leader should create virtual breakout rooms for Complainant/Advisor and Respondent/Advisor
- May wish to use the waiting room for witnesses to be taken in and out of the main room. Useful if the panel needs to confer privately
- Logistics Leader role:
  - Communicating with witnesses and alerting them by phone or email when it is their turn to log into the hearing
  - Putting parties/advisors into breakout rooms and pulling them back into the main room when the hearing is ready to resume
  - Basic tech assistance

# Remote Hearing Logistics



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# Technology Options

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

# **PRE-HEARING PREPARATION**

271

# Avoiding Conflicts of Interest

- Share parties' names with potential Panel Members
  - Invite panelists to identify any conflicts of interest
- Share potential Panel Members' names with parties
  - Invite parties to identify any conflicts of interest
- Remember that the obligation is to avoid conflicts of interest and bias either for or against a *particular* Complainant or Respondent or for or against Complainants or Respondents *generally*



# Know Your Policy

- Title IX Policies & Procedures
  - Definitions of prohibited conduct
  - Definitions of consent, incapacitation, etc.
- Rules of Decorum
- Questioning Procedures to be used

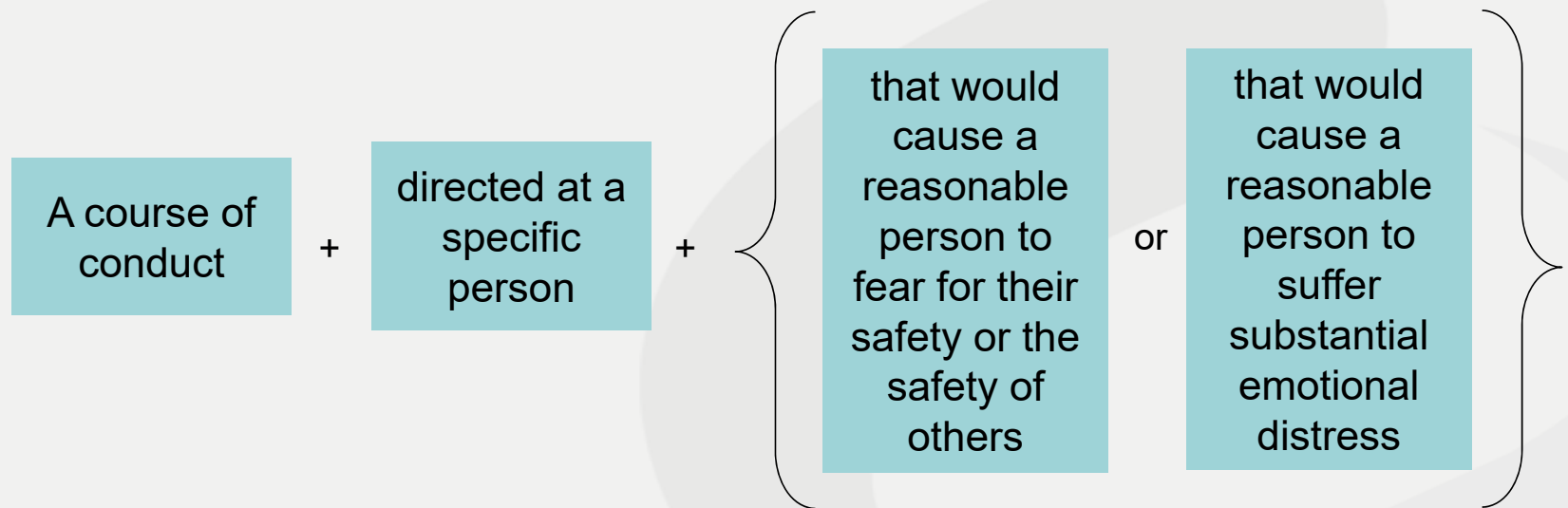
# Before the Hearing

- Read the materials
- Understand the conduct that is prohibited
  - Elements
- Identify the issues in the case
  - Contact
  - Consent
  - Defenses
- Identify key witnesses and missing information

# Mapping the Policy Elements & Case Facts

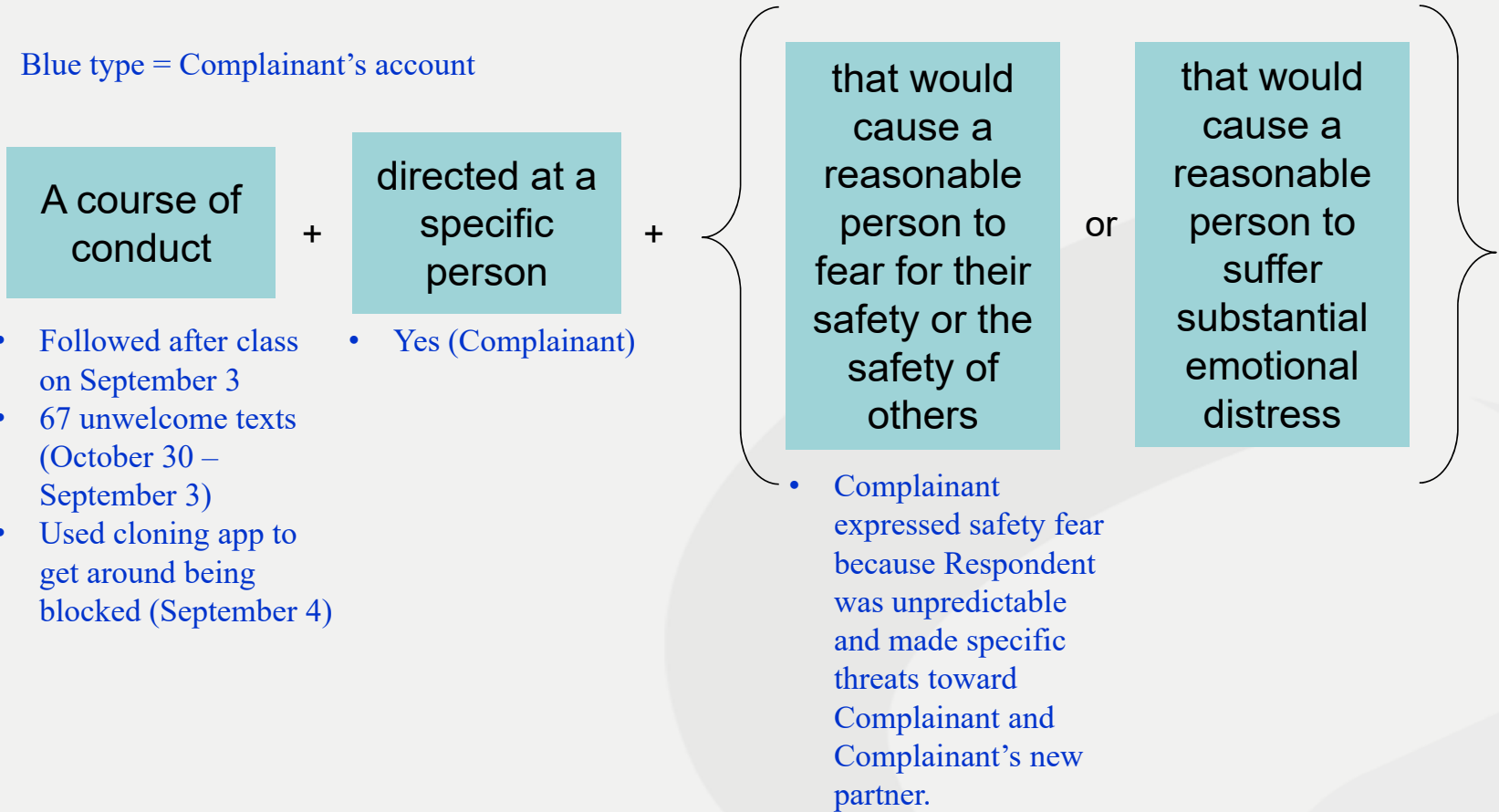
- **Stalking**

- ...[E]ngaging in a course of conduct directed at a specific person that would cause a reasonable person to fear for their safety or the safety of others or suffer substantial emotional distress.



# Mapping the Policy Elements & Case Facts

Blue type = Complainant's account



\* These case facts are fictional and were developed for training purposes

# Mapping the Policy Elements & Case Facts

Orange type = Respondent's account

A course of conduct

- Did not follow on September 3; always walk that way.
- Complainant responded positively to many of the texts; never said they were unwelcome.
- Used cloning app because thought blocking must have been a mistake.

+

directed at a specific person

- Yes (Complainant)

+

that would cause a reasonable person to fear for their safety or the safety of others

or

that would cause a reasonable person to suffer substantial emotional distress

- A reasonable person would not have felt in fear for their safety. I just wanted an explanation as to why our relationship ended. No threats made or implied.

\* These case facts are fictional and were developed for training purposes

# Witness Accounts

Witness Name	Relationship to Complainant	Relationship to Respondent	Relevant Information	Questions to Ask at Hearing
Sam	Acquaintance, in chemistry class together	Roommate	Left class with Complainant on September 3 and corroborated that Respondent followed Complainant. Said Respondent never walks that way.	<ol style="list-style-type: none"> <li>1. Did you and Respondent ever discuss that you saw him following Complainant after class?</li> <li>2. What was Complainant's demeanor when she said, "He's following me?"</li> </ol>
Alex	Friend	Friend	Saw Snapchat video of Complainant crying and reading Respondent's texts aloud. Complainant texted screenshots of Respondent's texts to witness.	<ol style="list-style-type: none"> <li>1. What is your relationship like now with Complainant and Respondent?</li> <li>2. Can you share your thought process around your decision to delete the screenshots Complainant sent you?</li> </ol>
Coach Jacobs	Coach	None	Disclosure witness for Complainant. Complainant sent text to Coach at 3AM on September 4. Stated that Complainant missed 2 weeks of practice.	
* These case facts are fictional and were developed for training purposes				

# HEARING PRACTICES

# Sample Hearing Overview

1. Panel Chair opens and establishes rules and expectations
2. Opening Statements
3. Panel questions Complainant
4. Cross-Examination of Complainant by Respondent's Advisor
5. Panel questions Respondent
6. Cross-Examination of Respondent by Complainant's Advisor
7. Panel questions Witness 1
8. Cross-Examination of Witness 1 by each party's Advisor  
[Repeat 7 and 8 for each witness]
9. Closing Statements



# Sample Outline of Introductory Remarks

- Hearing is being recorded
- Introduction of those present and their roles
- Remind all participants about the Rules of Decorum, Advisors' roles
- Hearing will include opening statements, questioning by the panel, and then questions from the parties
- Only those questions that seek relevant information may be asked
- The potential policy violation(s) at issue in the hearing are...
- Pursuant to our procedures, the Respondent is presumed to be not responsible. A finding of responsibility must be supported by a preponderance of the evidence.

# Sample Outline of Introductory Remarks

- If the Respondent is found responsible, the Panel will make a determination on the appropriate sanctions and remedies.
- Sanctions and remedies are designed to eliminate prohibited conduct, prevent its recurrence, remedy its effects, and restore or preserve the Complainant's equal access to education programs and activities while supporting the College's mission.
  - Sanctions may include educational, restorative, rehabilitative, and disciplinary components.
  - Some conduct is so egregious, harmful to the individuals involved, and/or so deleterious to the educational process that it requires severe sanctions including suspension or expulsion.
  - In determining the appropriate sanction, the hearing officer may consider factors including, but not limited to:
    - (List factors)

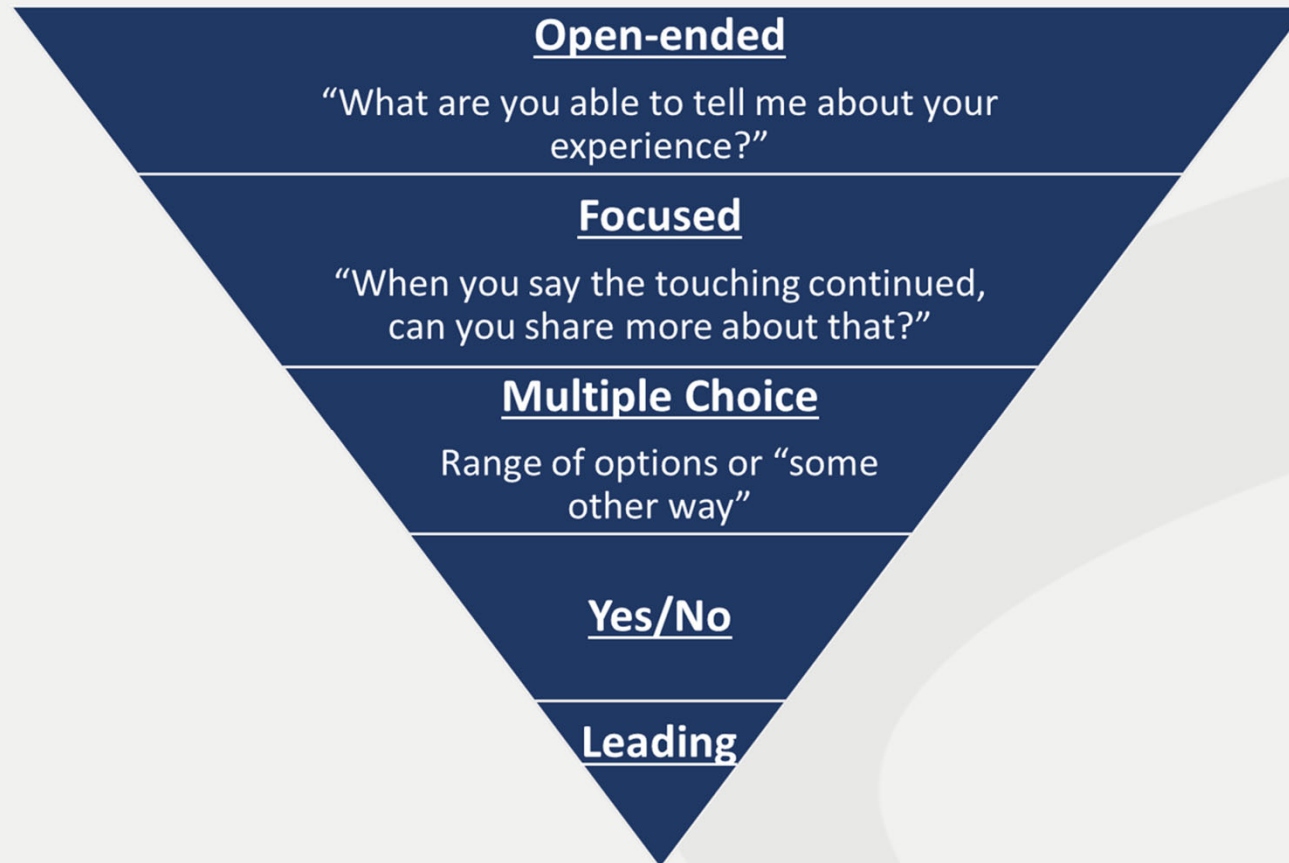
# Sample Outline of Introductory Remarks

- Statements made during the hearing are governed by the College's [honor code/code of conduct]. All College community members are expected to provide truthful information in any report or proceeding. Submitting or providing false or misleading information in bad faith or with a view toward personal gain or intentional harm to another is prohibited and subject to disciplinary action.
- Do you (parties and advisors) agree to uphold the Rules of Decorum?
- Any questions?
- (Addressing Complainant and Respondent individually) Do you promise that the statements you make during this hearing will be truthful?

# What to Ask

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

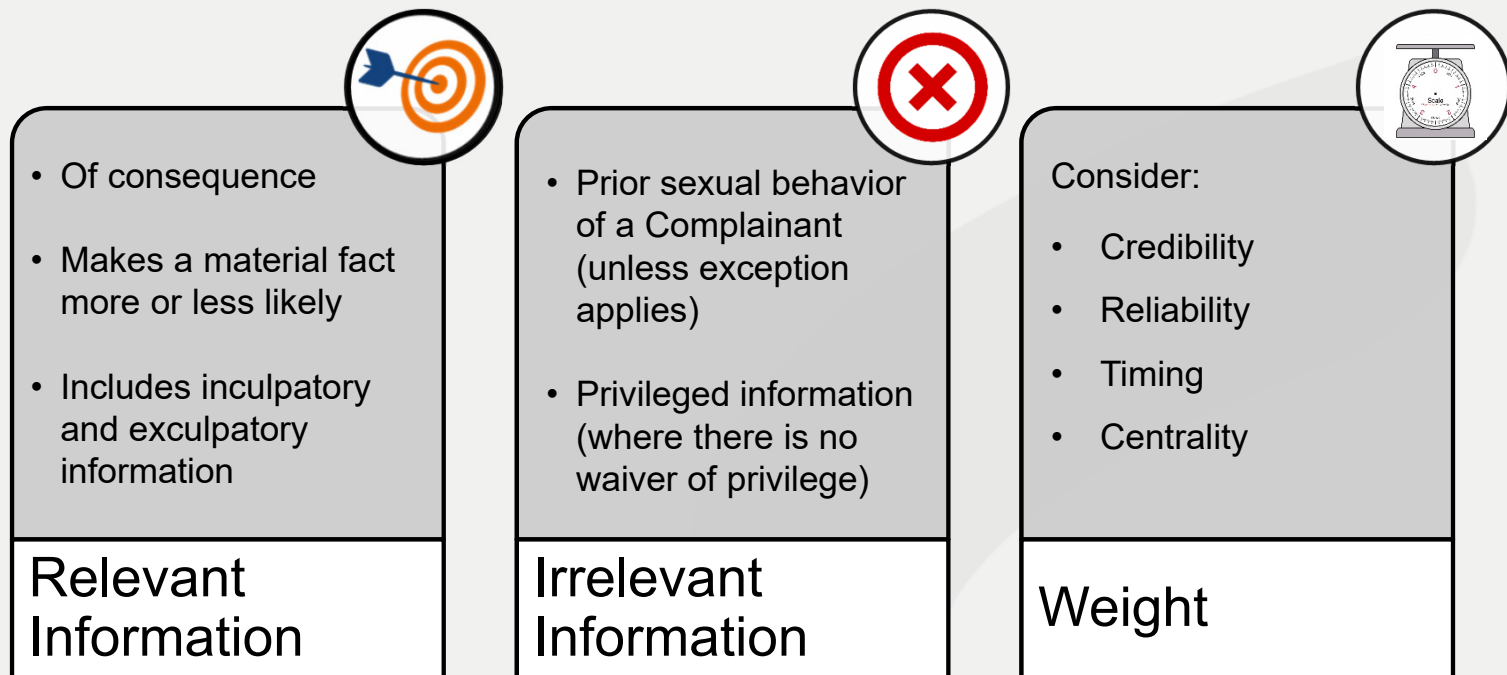
# The Continuum Approach



# Questioning

- Recognize the impact of trauma and stress on memory
  - Allow the witness to give a narrative
  - Use open-ended free recall questions
  - Build in an opportunity for follow up

# Evidentiary Concepts



# Evidentiary Concepts

Relevance/Irrelevance addresses **whether** the Panel should consider the information.



- Of consequence
- Makes a material fact more or less likely
- Includes inculpatory and exculpatory information

Relevant Information



- Prior sexual behavior of a Complainant (unless exception applies)
- Privileged information (where there is no waiver of privilege)

Irrelevant Information



Consider:


- Credibility
- Reliability
- Timing
- Centrality

Weight




# Evidentiary Concepts

Weight addresses how and to what extent the Panel should consider the information




- Of consequence
- Makes a material fact more or less likely
- Includes inculpatory and exculpatory information

Relevant Information



- Prior sexual behavior of a Complainant (unless exception applies)
- Privileged information (where there is no waiver of privilege)

Irrelevant Information



Consider:

- Credibility
- Reliability
- Timing
- Centrality

Weight

# Per Se Irrelevant Information



- Prior sexual behavior of a Complainant (unless exception applies)
- Privileged information (where there is no waiver of privilege)

Irrelevant Information

- Questions and evidence about the **Complainant's sexual predisposition or prior sexual behavior** are not relevant, unless 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.
- Information protected by any **legally recognized privilege** cannot be used without that party's voluntary, written consent.

# Relevant Information



- Of consequence
- Makes a material fact more or less likely
- Includes inculpatory and exculpatory information

## Relevant Information

- The investigation report fairly summarizes all relevant information.
- At the hearing, the parties have the opportunity to challenge the investigator's (implicit) determinations as to relevance.
- The parties and their advisors must have access to all of the information that the investigator gathered that is directly related to the allegations (broader category than what the investigator deemed relevant).
- In determining which questions to permit in the hearing, the Panel Chair must consider whether the question seeks relevant information.
- Blanket exclusions are no longer permitted. Instead, the Panel must be guided by relevance.

# Relevance of Prior or Subsequent Conduct

- Intent/knowledge/state of mind
- Motive
- Opportunity
- Lack of mistake
- Pattern
- Identity
- Information that is inextricably interwoven with the facts

# Framing Difficult Questions

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

# Weight

- Weight is a distinct concept
- When considering what weight to give to a piece of information, consider:
  - Credibility factors
  - Quality and quantity
  - Overall importance to the determination (centrally important versus peripherally important)
  - Totality of the circumstances



Consider:

- Credibility
- Reliability
- Timing
- Centrality

Weight

# Hearing Panel Conduct

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

# Standard of Proof



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



## **Personal Presentation: Be Objective**

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

# Personal Presentation: Be Professional

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

# **DETERMINATION REGARDING RESPONSIBILITY**

# Deliberation Techniques

- Discuss ground rules and manner of deliberation in advance
- Be respectful to your fellow panel members
- Each panelist has an equal voice, irrespective of role on campus
- Be willing to listen to the perspective of the other panelists

# Deliberation Techniques

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

# Determination Regarding Responsibility

- Includes:
  - All factual findings
  - Credibility determinations
  - Finding, by a preponderance of the evidence, of whether the conduct occurred
  - Finding of whether the conduct violated any institution policies
  - Recommendation for sanctions

# Determination Regarding Responsibility

- Begin with introduction of parties, relationship to one another relationship to the institution
- Describe when and how report was received
- Outline basic nature of report as presented by the complainant
- Outline response to the report by the respondent
- Specify policy violations at issue
- Outline information presented at hearing
- State finding and rationale for finding
- State recommended sanction and rationale (If applicable)

# Determination Regarding Responsibility

- Outline areas of agreement/disagreement (areas where the information is contested/not contested)
- Include timeline for synthesis and analysis of facts
- If making determinations of credibility or findings of fact:
  - Tie discussion and rationale to the elements of the potential policy violations
  - Identify the elements
  - Identify the evidence that supports/rebutts the establishment of the elements
  - Evaluate and analyze credibility factors



# Determination Regarding Responsibility

- When making the determination of responsibility
  - Make finding as to sufficiency, by a preponderance, to support finding of responsibility
    - Sufficient or insufficient
    - NOT a finding by a preponderance that event did not occur
  - Must provide rationale
    - Can be concise, but must communicate salient elements of finding
    - Again, comment on evidence, not the people
    - Avoid extraneous and tangential comments
    - Remain closely tied to the facts and reasonable inferences

# SANCTIONS

# Key Elements for Good Sanctioning

- Imposition of sanctions is designed to:
  - eliminate prohibited conduct, prevent its recurrence, and remedy its effects;
  - support the College’s educational mission and federal obligations.

# Sanctioning Considerations

- Severity of conduct
- Prior policy violations
- Must be proportionate to the violation

# Key Elements for Good Sanctioning

- Sanctions may include:
  - educational, restorative, rehabilitative, and punitive components.
  - Some conduct, however, is so egregious in nature, harmful to the individuals involved , or so deleterious to the educational process that it requires severe sanctions, including suspension or expulsion.

# Discretion in Sanctioning

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

# Discretion in Sanctioning

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

## Discretion in Sanctioning

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

Title IX Regulations; Preamble at 85 F.R. 30266, 30274



# Discretion in Sanctioning

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

Title IX Regulations; Preamble at 85 F.R. 30274

# 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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