

Title IX Training:

An Integrated and Coordinated Approach

Presented By:

The Institutional Response Group | Cozen O'Connor

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July 14 and 15, 2021

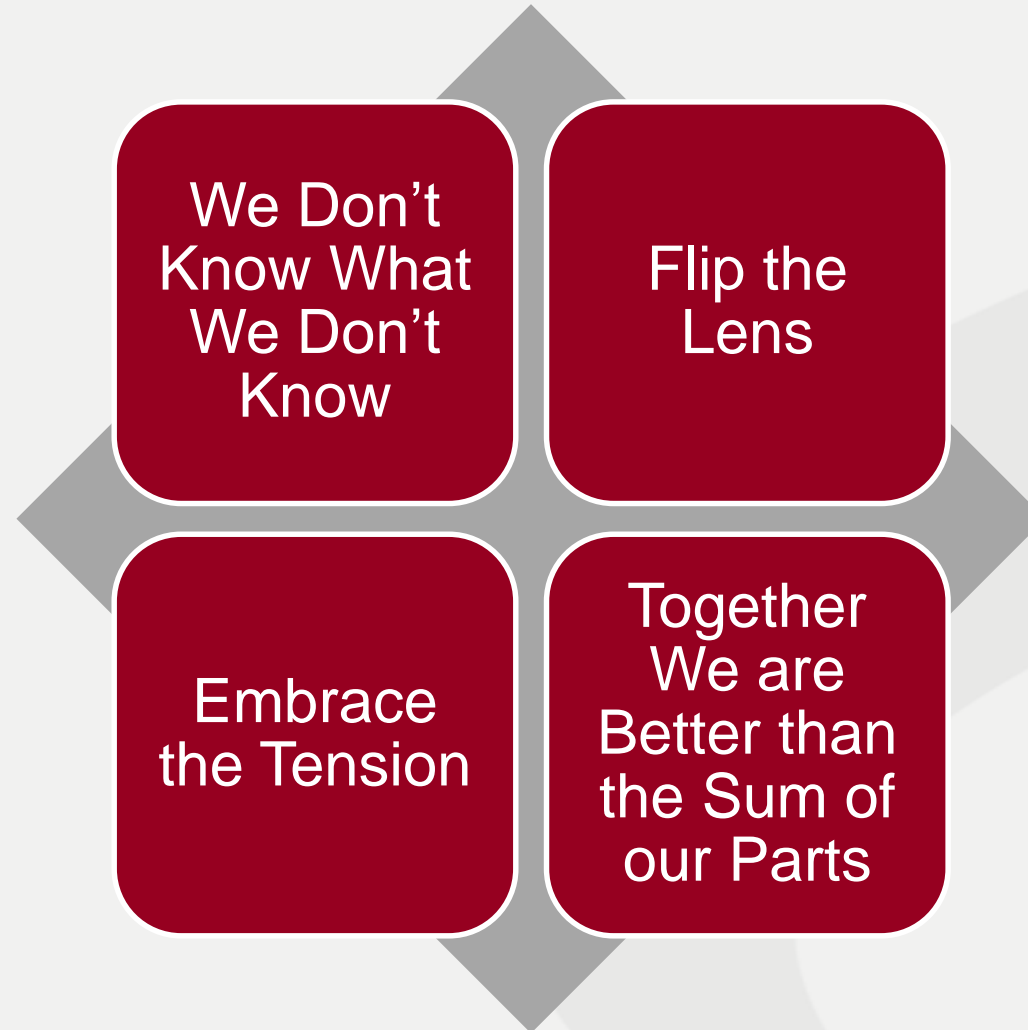


INTRODUCTION



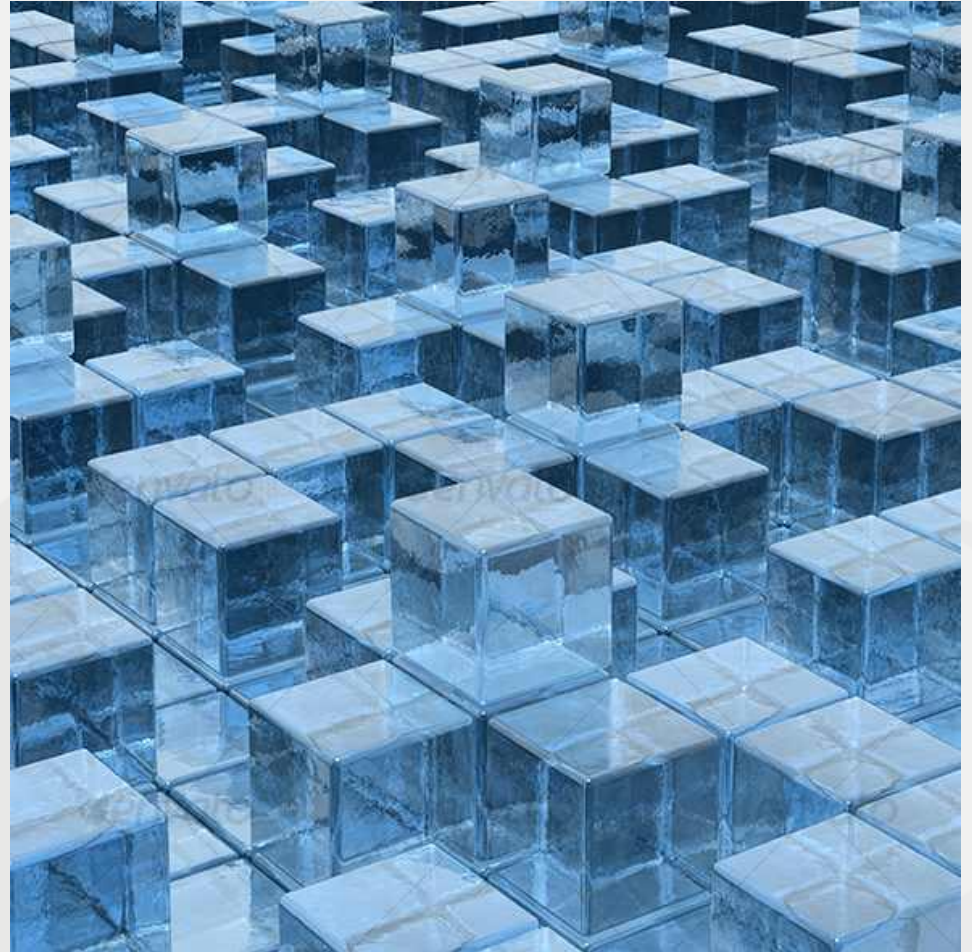
FRAMING THE CONTEXT

Framing the Conversation

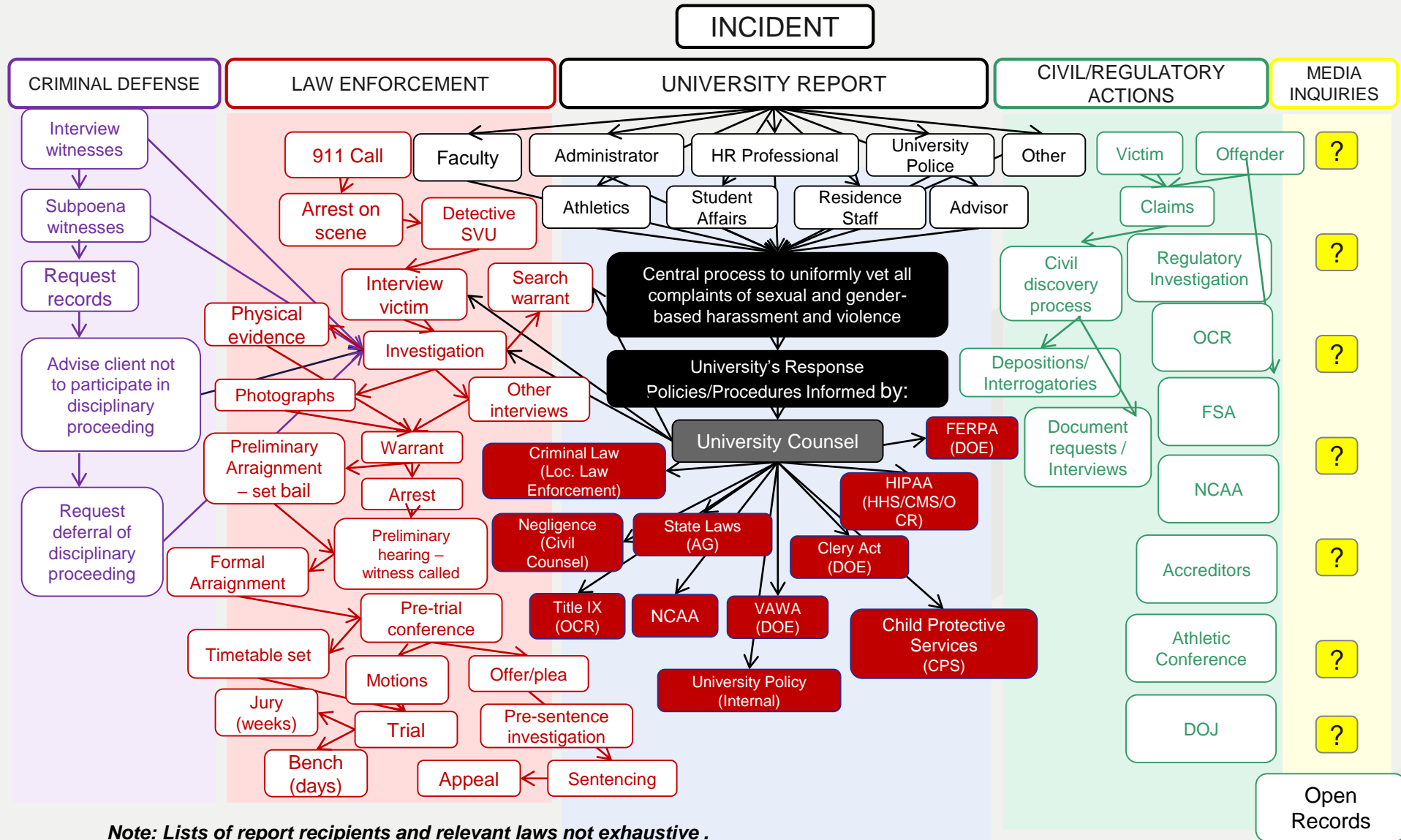


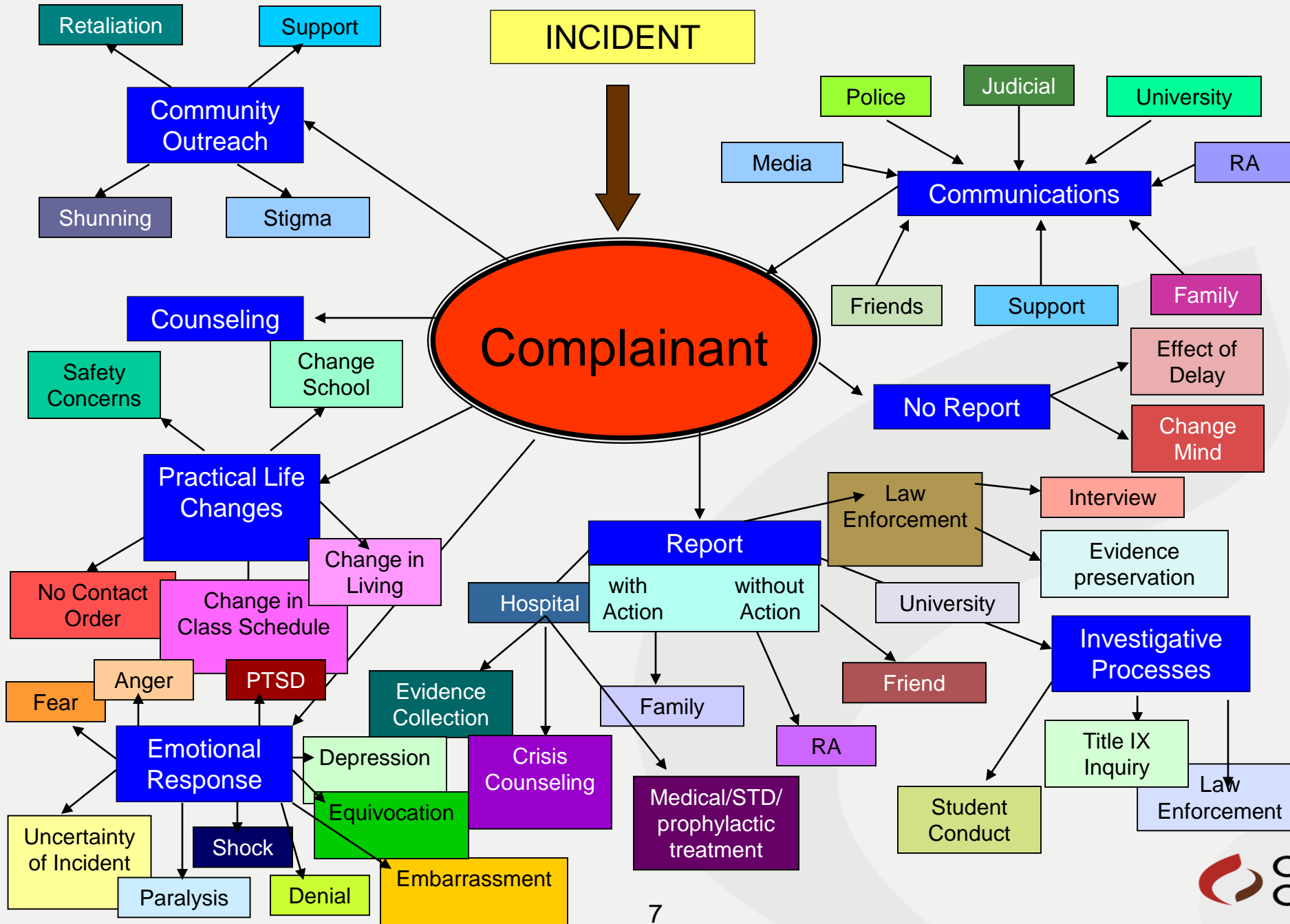
The Context

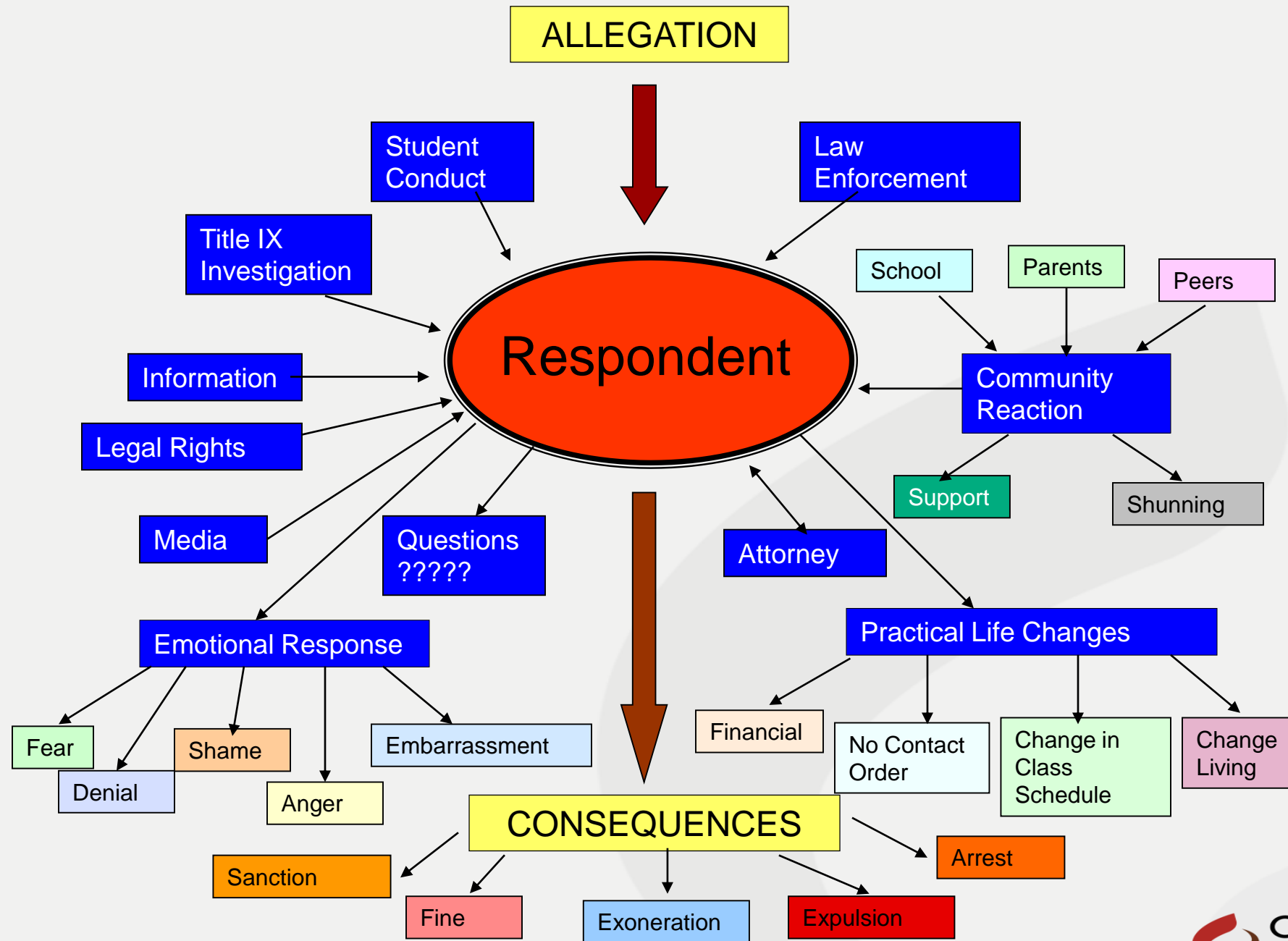
- Regulatory Framework
- Dynamics of Trauma & Sexual and Gender-Based Harassment and Violence
- Individual Culture, Climate, History, Resources, Policies, Procedures, Personnel and Values of the Institution



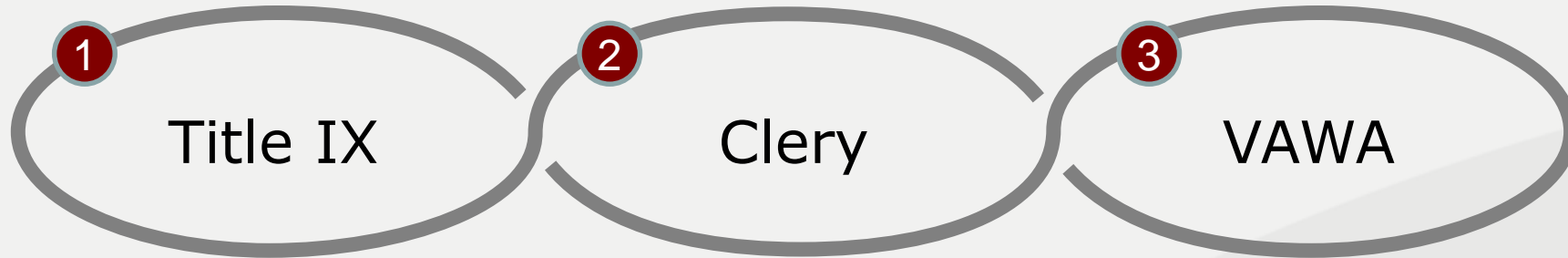
The Challenge of the Context







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

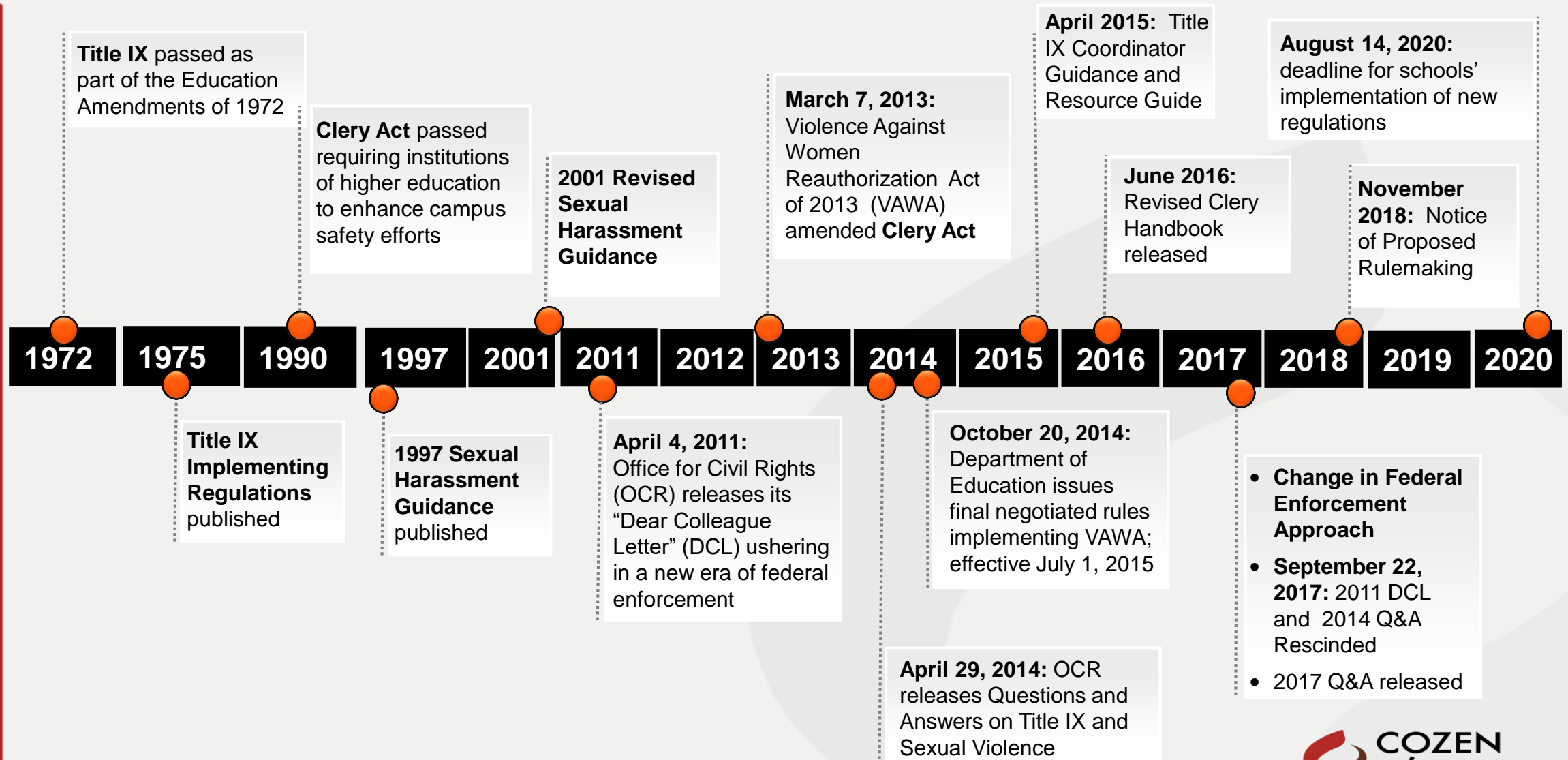
- Amends Clery to expand sexual assault requirements and include dating violence, domestic violence, and stalking; applies to all students and employees

Implementation Rubric

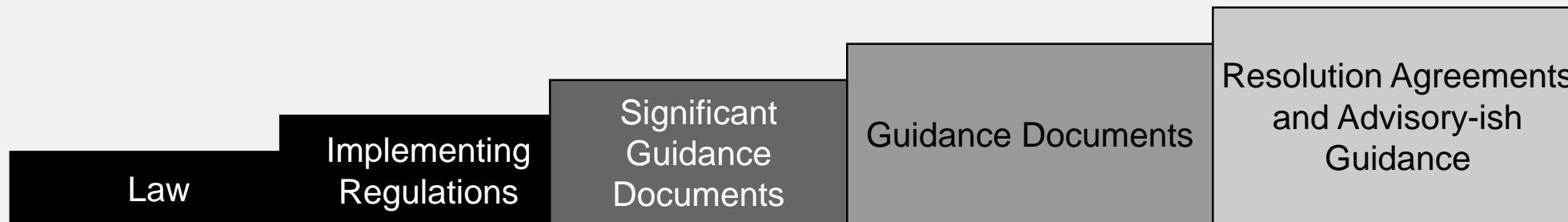
- Law
- Regulations
- Guidance
- Preamble and commentary
- OCR webinars, charts, blog
- Policy
- Higher education experience
- Institutional values



Evolution of Federal Legislation and Guidance



The Hierarchy



- Title IX

- Title IX Implementing Regulations (2020)

- 2011 Dear Colleague Letter (Rescinded)
- 2014 Q&A (Rescinded)
- 2017 Q&A (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

Recent Court Cases

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

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

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

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



The Courts on Due Process and Fundamental Fairness

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

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

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

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

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

2016

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

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

2017

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

2018

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

2019

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

2020

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

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

The Courts on Due Process and Fundamental Fairness

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

Doe v. Regents of the University of California

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

2016

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

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

2017

Doe v. Trustees of Boston College

2018

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

The Courts on Due Process and Fundamental Fairness

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

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

2019

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

2020

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

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

THE CLERY ACT

The Clery Act (As Amended by VAWA)

Core Tenets:

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

VAWA: Prompt, Fair, and Impartial Investigation & Resolution

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

VAWA: Prompt, Fair, and Impartial Investigation & Resolution

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

NEUROBIOLOGY OF TRAUMA

**SHANNON K. NIX, M.S., LPC, VSP
ASSOCIATE DIRECTOR, SAVIP**

Neurobiology of Trauma

TIX Training, July 2021

Shannon K. Nix, M.S., LPC, VSP
Associate Director, SAVIP

Objectives

This training is designed to:

- Facilitate understanding of the neurobiology of trauma
- Help you recognize continued impacts of trauma

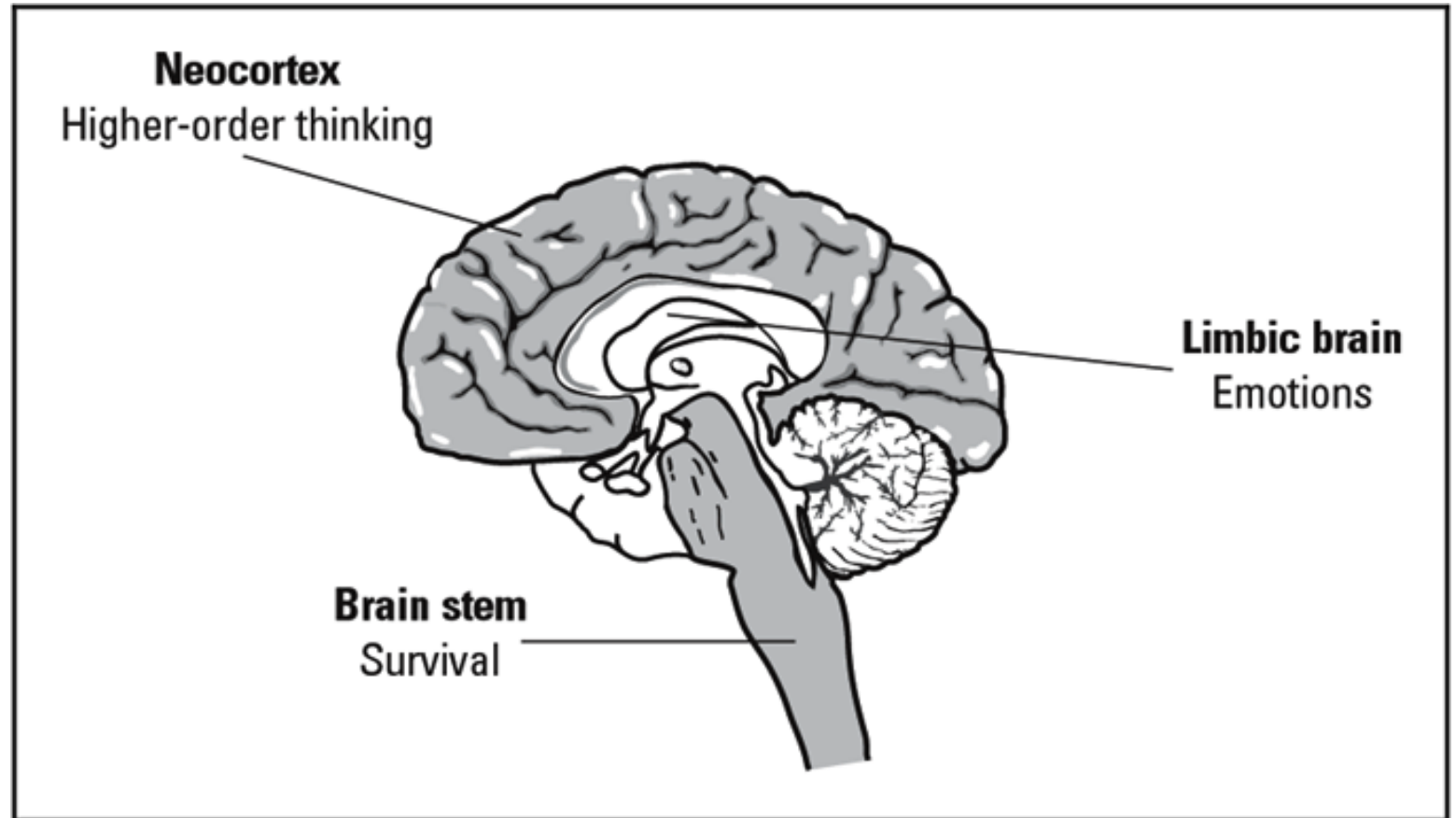


What is Trauma?

Rather than an ***event***,
trauma is a
neurobiological
process that occurs as
a result of an event or
series of events

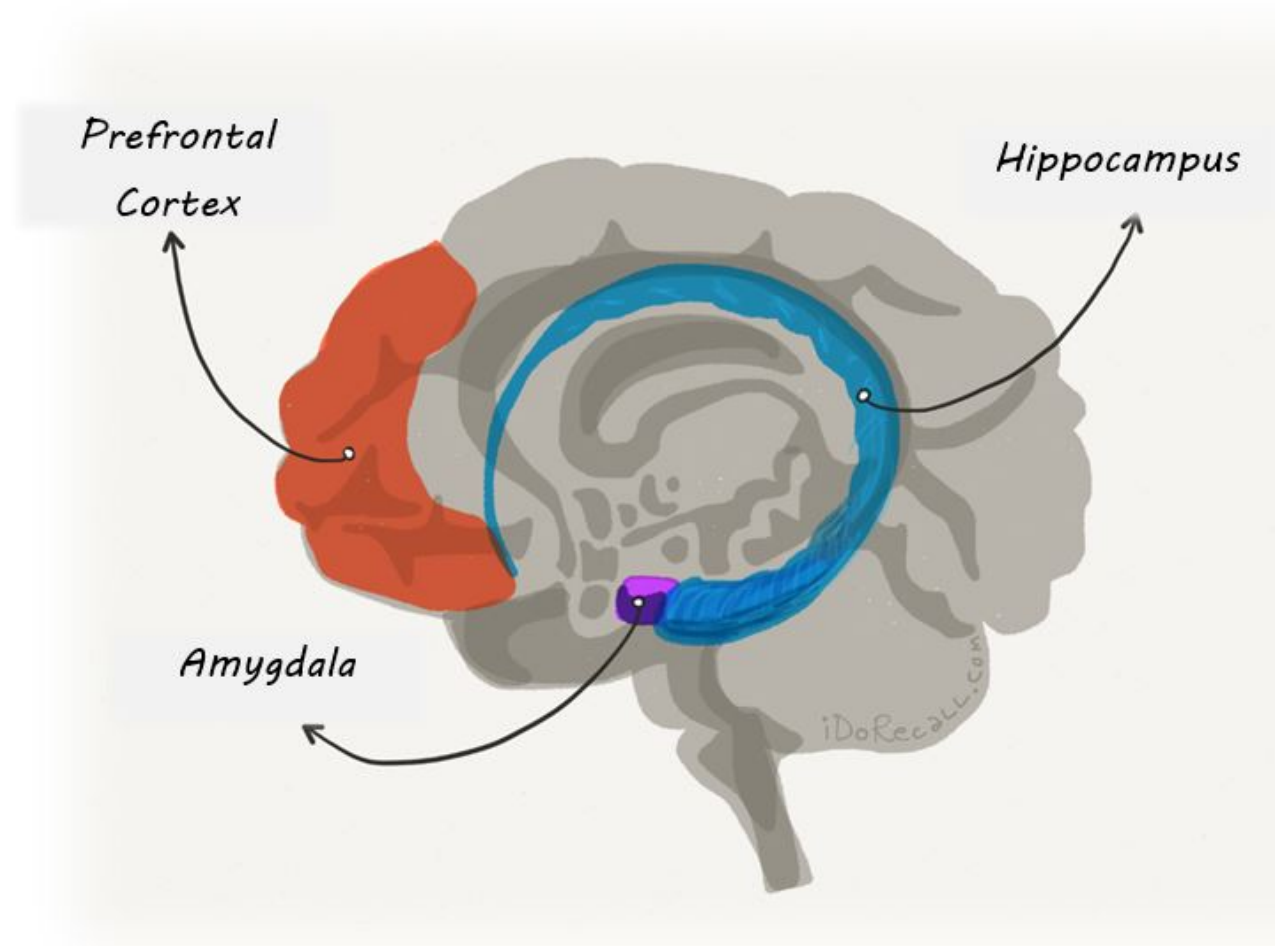
(Wright, 2020)

3-Part Brain



Standard Functioning Brain

- Hippocampus
 - Memory & time
 - Central hub
- Amygdala
 - Fear
 - Stamps memory with emotion
- Prefrontal Cortex
 - Logic & decision making
 - Moderates amygdala
- Cortisol
 - Activation
 - Stress hormones

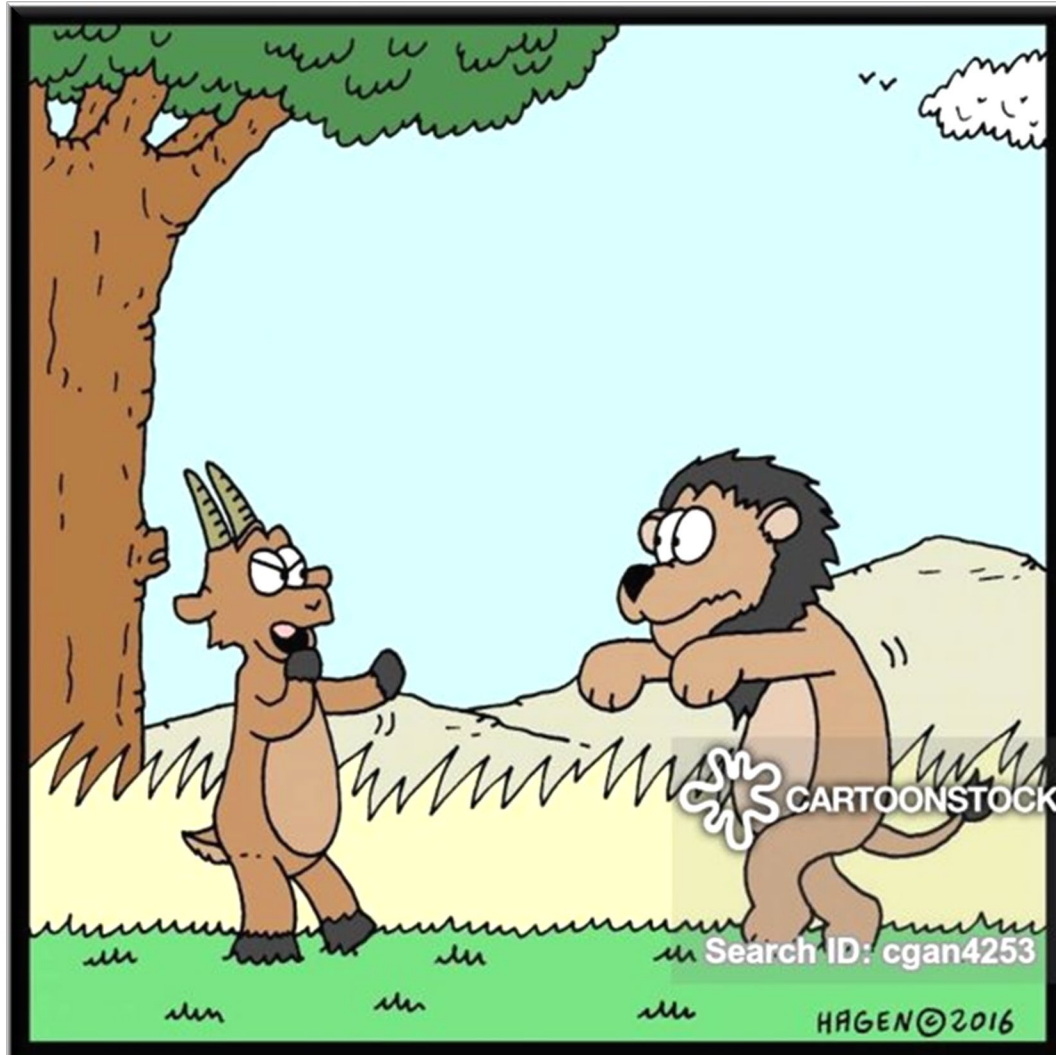




Trauma & the Brain: Hippocampus

- Short-term memory impairment
- **Sense of time distorted**
- Memories are not stored in the standard way
 - **Lack beginning, middle, end**
- Broad disconnection of brain areas



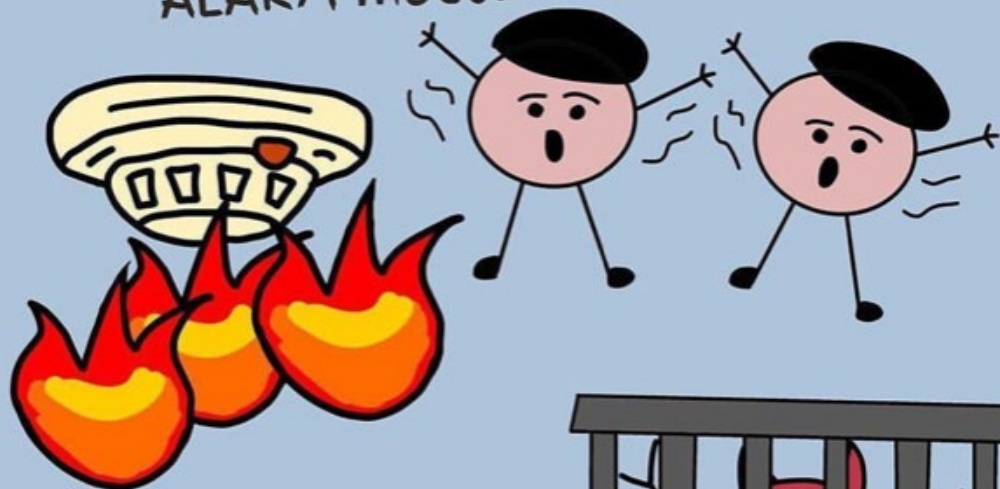


Oy, just wait a second please!
I'm still debating my "Fight or Flight" response...

Trauma & the Brain: Amygdala

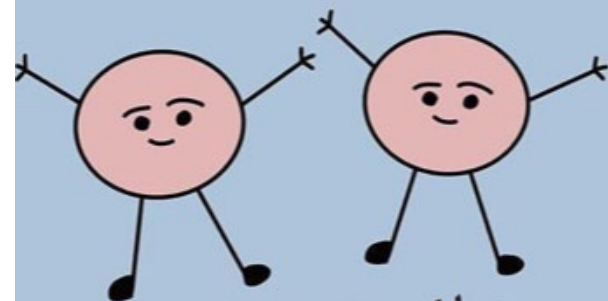
- Dominates awareness
- **Holds memory when hippocampus is off-line**
 - **Visceral and timeless**
- More stimuli interpreted as scary
- **Tonic immobility**, aka rape paralysis syndrome

With PTSD, the amygdala's detectors get stuck on ALARM mode!



Even when there are no dangers or potential threats present.

@metoomanyvoices



Hi! We're the AMYGDALA.

We live in the limbic system of the brain!



We work as the smoke detector of the brain.

@metoomanyvoices

Scanning and looking for any potential dangers or threats that may come our way.

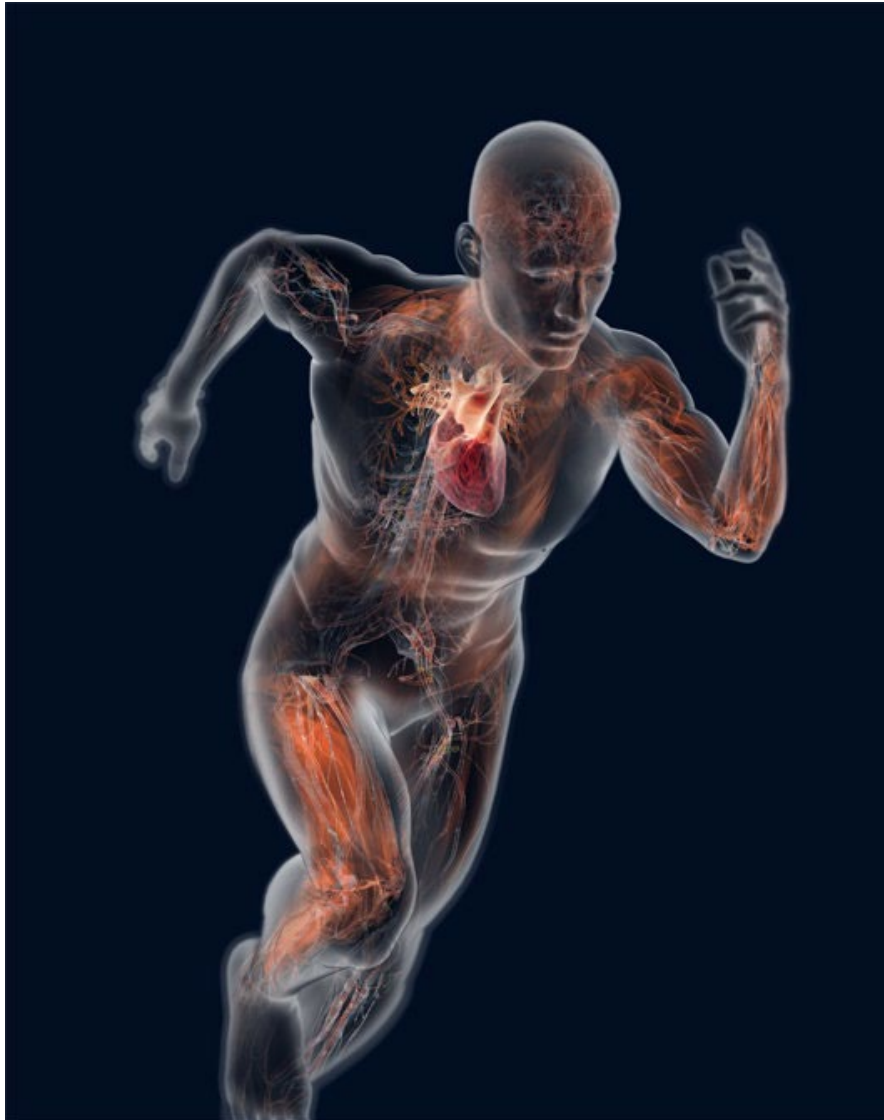


Trauma & the Brain: Prefrontal Cortex

- **Logic is not accessible**
- **Language can be lacking**
- Long term planning impaired
- Attention bias for trauma related information
- **Difficulty moderating fear from amygdala**

(Wright, 2020)





Key Hormones - Adrenaline

- Prepares body for fight or flight
 - Increases heart & breathing rate, blood pressure
 - Pupils enlarge, hair stands on end
 - Reroutes blood from major organs to arms & legs, reduces flow to arteries
 - **Inhibits rational & complex thought**
 - **Continued production can result in irritability, memory & attention problems, sleep disorders**

Key Hormones - Cortisol

- “Turns the dial up” in response to circumstances
 - Gives body energy for fight or flight
 - **Perceiving environment as dangerous results in continued cortisol production**
- Physical health consequences:
 - Decreased insulin production - Belly/Sick fat
 - Increased blood pressure
 - Immune system bottoms out
 - Can become exhausted
 - Long-term health impacts are possible





Key Hormones - Opiates

- Pain killers, or “natural morphine”
 - Released if physical pain accompanies traumatic event
 - Blunts pain
 - **Can also blunt emotional response**

Key Hormones - Oxytocin

- Also known as the “pair bonding” hormone
 - Increases positive emotions
 - Also released in response to physical pain that accompanies traumatic events
 - **Leads to what we call contradictory reactions – laughing, good mood, etc.**



KEEP
CALM
AND
RELEASE
OXYTOCIN



Standard
Functioning Brain

Homeostasis

- *The tendency of the body to seek and maintain a condition of balance or equilibrium within its internal environment, even when faced with external changes.*



After the Storm

A Review: The Brain During Trauma

- Amygdala remains activated
- Cortisol levels stay high or bottom out
- Hippocampus not functioning optimally
 - Memories are visceral
 - Lack accurate time stamp
- “Thinking” brain not functioning optimally
- Integration between parts of brain and between brain and body impaired

(Wright, 2020)

Goal of Brain : Survival

Efficiency over Accuracy

- To survive in a complex, unpredictable environment, brain needs “shortcuts” to react quickly in dangerous situations
- Learn fear response
- Generalize dangerous stimuli
- Seek control

Negative Bias

- Focus on threats keeps us alive
- More likely to react to threats than neutral stimuli
- More likely to recall “bad” memories that have a stronger “emotional stamp”
- Evolution favors the anxious



HIGH ALERT

High arousal

- Sleep troubles
- Easily startled
- Need for high levels of stimulation to cope/feel “alive”

Potential Physical Symptoms

- Neck/back pain
- Fibromyalgia
- Migraines
- Digestive problems
- IBS
- Chronic fatigue
- Asthma
- Lethargy
- Increased heart rate
- Sensory processing difficulties

HIGH ALERT



HIGH ALERT

Thinking is Hard

- Concentration difficulties
- Impaired memory
- Decision-making more difficult



HIGH ALERT

Cues & Triggers

- People, places, sensory input, etc. create fear response



HIGH ALERT

Overgeneralizations

- Innocuous things interpreted as dangerous

Identity & Sense of Self

- Different from before
- Less in control of and/or disconnected from thoughts, feelings, and sensations
- Cannot find words for their feelings
- “Damaged goods”

HIGH ALERT

Relationships

- May become over-dependent
- May become counter-dependent
- Feel disconnected
- Normal conflicts & problems solving efforts perceived as threats

HIGH ALERT

Important Considerations

- Trauma responses exist on a continuum and will differ based on a variety of factors:
 - One's history with stress/trauma (ACES)
 - Coping skills
 - Social support
 - Type of incident/event(s) (threat to physical body, lack of control and/or perceived inability to escape)



Interested
in
knowing
more?

- **Mental Health and Well-being Competency Certificate Program for faculty through CTE**
 - Includes Support Zone Training, Resilience in the Classroom, & Trauma 101
- **Full Trauma 101 series via Zoom (email me at nixs2@mailbox.sc.edu to register):**
 - Series 1: Sept. 14, 21, & 28, 5:30-7:30pm
 - Series 2: Oct. 20, 27, & Nov. 3, 2:30-4:30pm
- Wright, S. E. (2020). *Redefining Trauma: Understanding and Coping with a Cortisoaked Brain*. Routledge.

Additional resources (tonic immobility)

Kozłowska, K., Walker, P., McLean, Loyola, & Carrive, P. (2015). Fear and the Defense Cascade: Clinical Implications and Management. *Harvard Review of Psychiatry*, 23(4), 272-275.

Russo, F. (2017). *Sexual Assault May Trigger Involuntary Paralysis*. Scientific American.

<https://www.scientificamerican.com/article/sexual-assault-may-trigger-involuntary-paralysis/>.

DYNAMICS OF INTERPERSONAL VIOLENCE AND TRAUMA

Caveat About Statistics

- Statistics vary greatly in reliability and accuracy.
- For every statistic, there is an exception to the rule.
- While useful for cataloging what we know about human behavior, statistics should never be a substitute for good independent judgment and careful attention to the facts.
- Many statistical analyses are available regarding sexual assault. Any use or reference to statistics is meant to provide information about prevalence and context, not provide an exhaustive list of available research.

Statistics (and their limits)

- Examples of common sources of statistics on sexual and gender-based harassment and violence:
 - [National Intimate Partner and Sexual Violence Survey](#) (ongoing survey by the Centers for Disease Control and Prevention; full reports published in 2010, 2011, and 2015)
 - [American Association of Universities \(AAU\) Climate Survey on Sexual Assault and Sexual Misconduct](#) (2015 survey commissioned by the AAU and conducted by Westat)
 - [College Dating Violence and Abuse Poll](#) (2011 poll commissioned by Fifth & Pacific Companies and conducted by Knowledge Networks)
- Limitations:
 - Context matters
 - Research methodologies differ
- **Key takeaway:** each individual case must be evaluated on its facts. We cannot punt to statistics for decision-making.

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

Potential Effects of Trauma

- APA DSM-5 defines “trauma” as: “Exposure to actual or threatened death, serious injury, or sexual violence in one (or more) of the following ways: directly experiencing the traumatic event(s)”
- During a traumatic event, the brain may detect a threat to survival
- The body may respond to this threat by producing hormones that can affect a person’s reaction to the event, during and after
- It may also affect a person’s ability:
 - To remember details (some details may be recalled in great detail, others details not - central versus peripheral)
 - To recount incident (memory of sexual assault may be fragmented and impaired)
 - To provide a chronological account
- **Key Takeaway:** Just as it is improper to cede decision making to statistics, it is improper to base a finding of responsibility on whether the Complainant appears to exhibit effects of trauma.

Key Takeaways

- Individuals respond to trauma differently. Our role is never to conclude that a person has or has not experienced trauma.
- We learn about the potential impacts of trauma so that we avoid improper prejudgments about a person or the information they share.
- Just as it is improper to cede decision making to statistics, it is improper to base a finding of responsibility on whether the Complainant appears to exhibit effects of trauma.
- While we do not typically think of Respondents experiencing potential neurobiological impacts of trauma, they may experience stressors that impact the way they present themselves and how they share information. We should avoid improper prejudgments about all people and the information they share.
- Again, each individual case must be evaluated on its facts.

Reactive Coping Mechanisms

- Understand that each individual will react in a unique manner
- While many responses fall within an expected range of response, any response must be evaluated in the context of the individual's context, circumstances, coping mechanisms, and available resources and supports

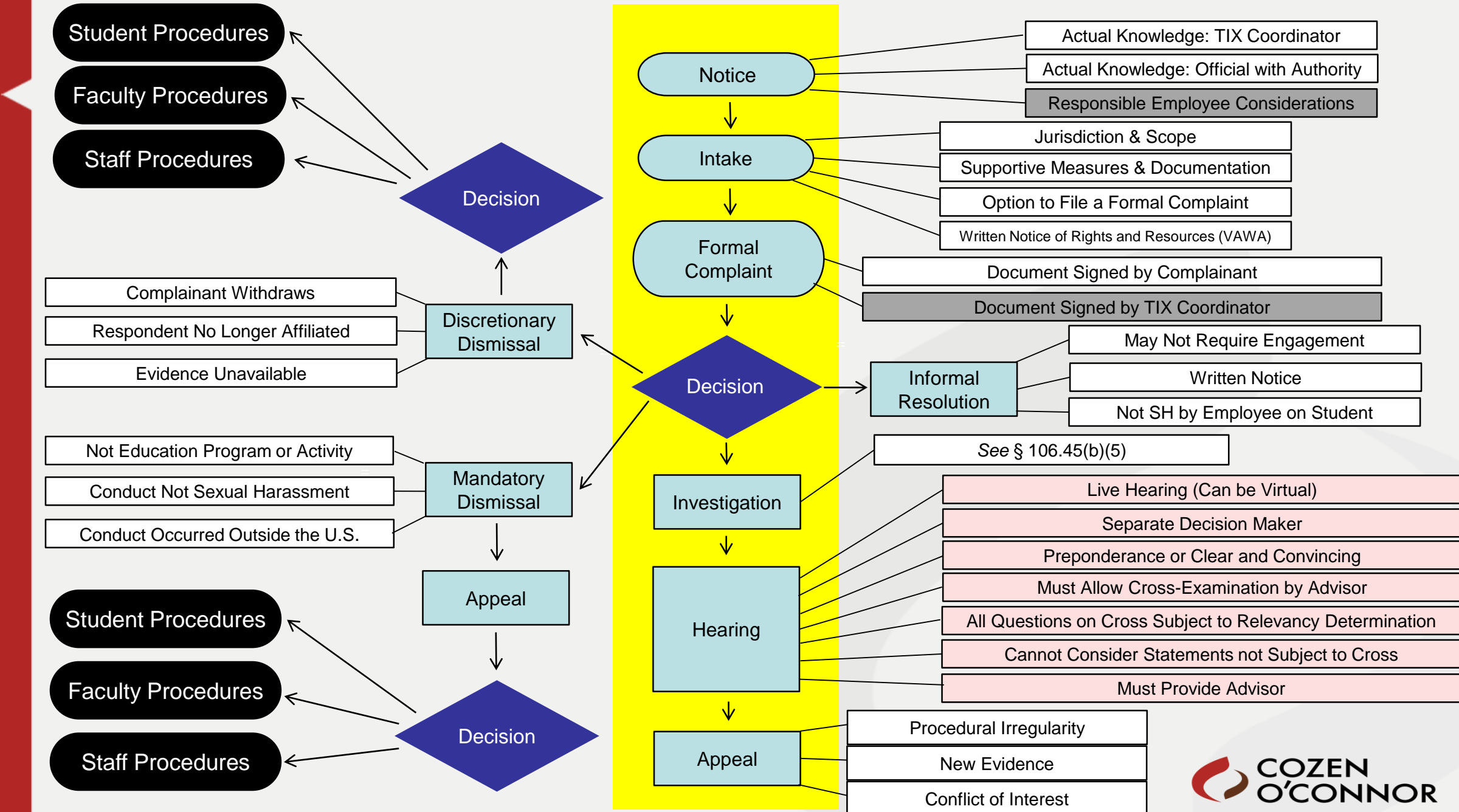
Reactive Coping Mechanisms

- Limited or no verbal or physical resistance offered
 - Paralyzing fear or terror
 - Disbelief/denial/disassociation
 - Belief that it escalate the offender's actions
- Displaying “non-victim like” behavior after the event
 - Shock/disbelief
 - Rush to normalization
 - Fear of offender reaction

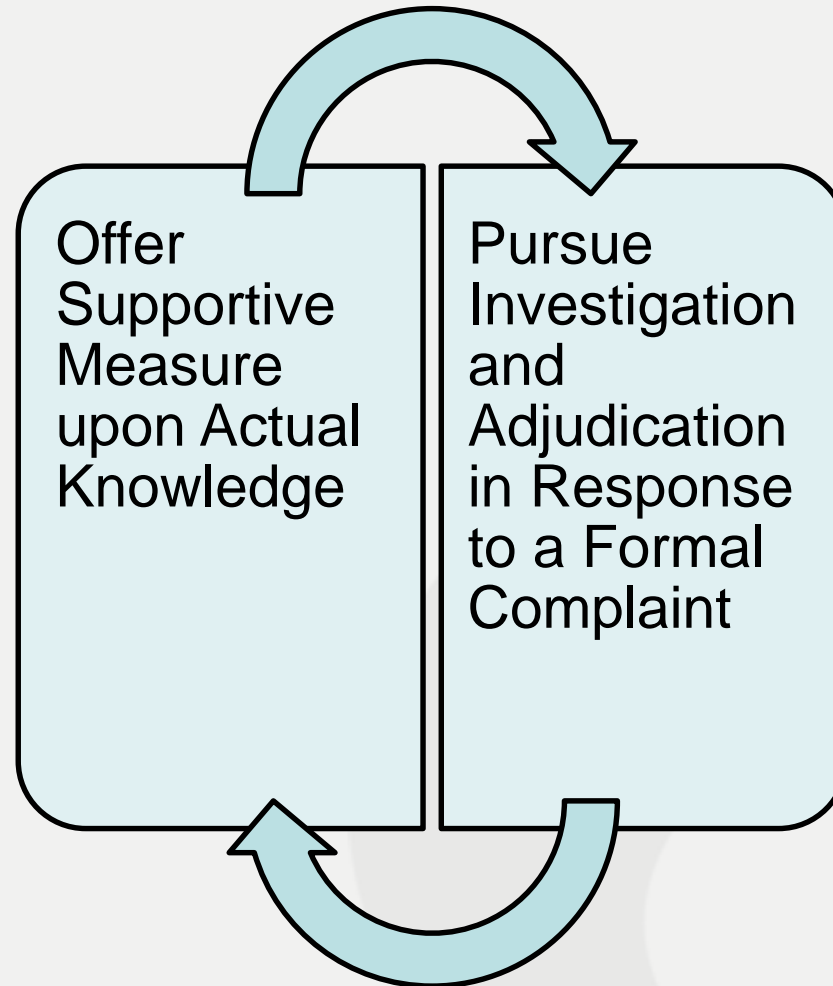
Reactive Coping Mechanisms

- Questioning of event and actions
 - I should/shouldn't have
 - Why did/didn't I
- Effect of complainant's own misconceptions
 - I was drinking
 - I consented to some of the acts
 - I put myself in that position
 - Not enough force/no weapon used
 - Not a stranger
 - I have been abused before – it must just be me

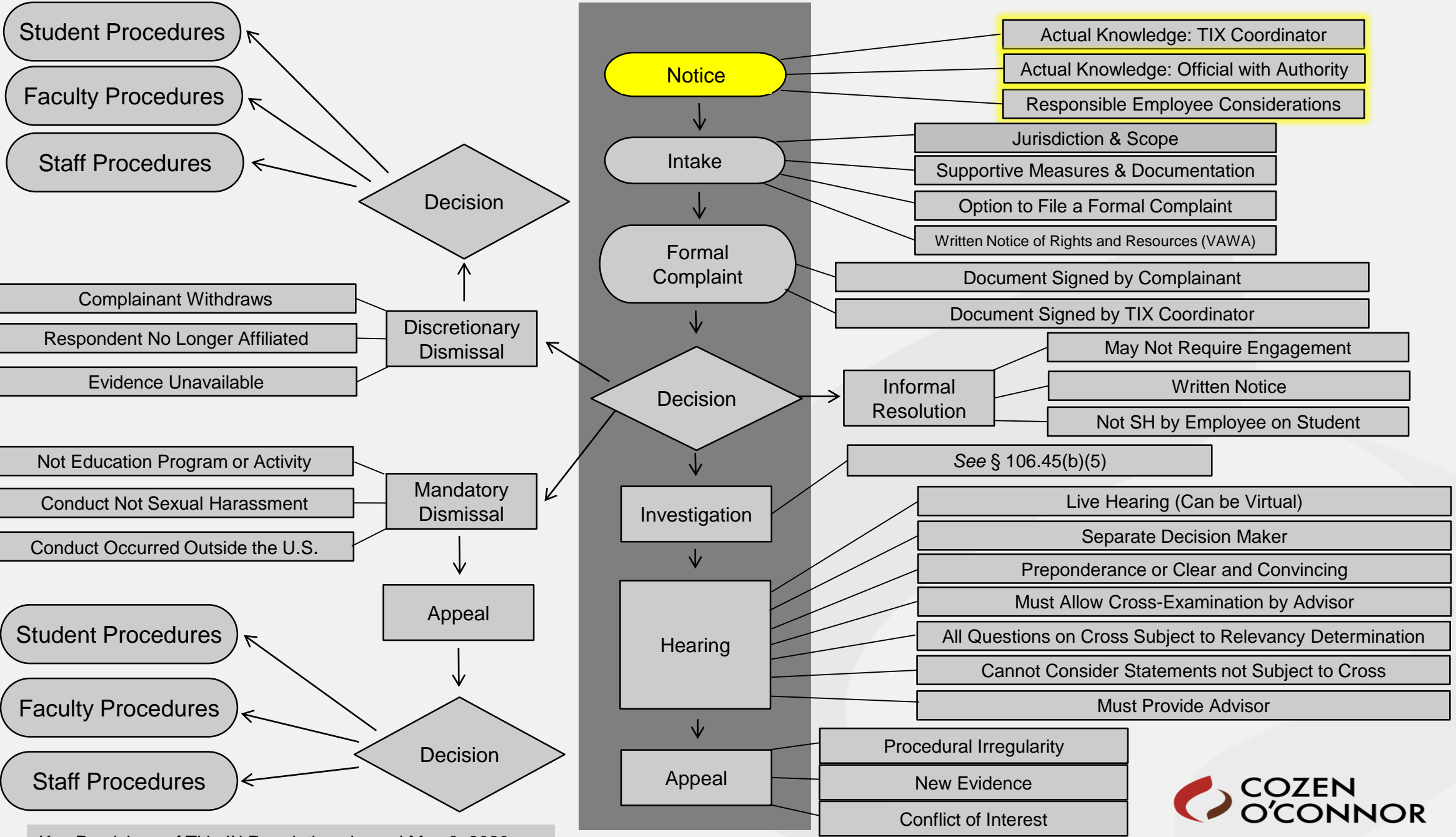
THE FINAL TITLE IX REGULATIONS



Understanding Two Key Provisions



NOTICE

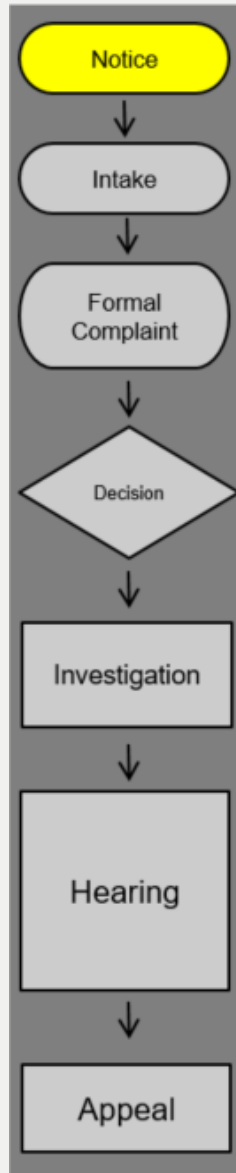


Key Provisions of Title IX Regulations issued May 6, 2020;



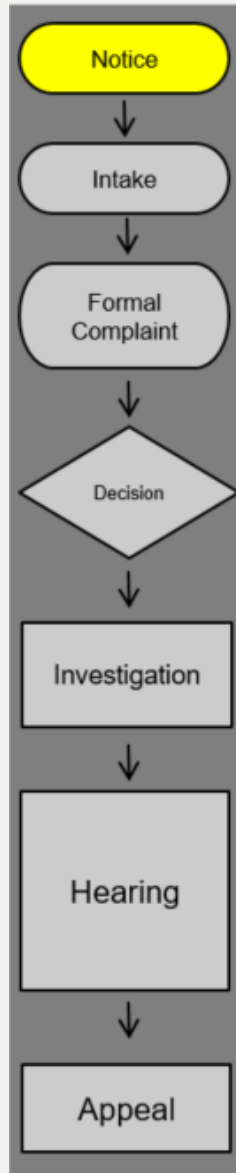
Notice

- Notice to the **Title IX Coordinator** or any official of the recipient who has **authority to institute corrective measures** on behalf of the recipient, or to any employee of an elementary or secondary school



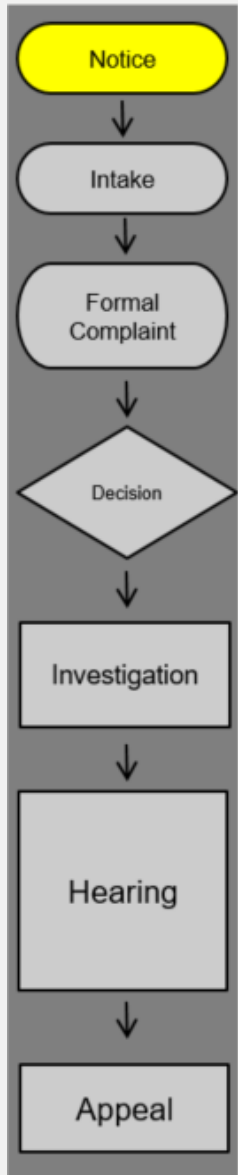
Title IX Regulations issued May 6, 2020; § 106.30(a)

Notice



- **Actual knowledge**, not constructive notice or vicarious liability
 - Can come from personal observation, hearing about it from a complainant or third-party, receiving a written or oral complaint, or by any other means
- The mere ability or obligation to report sexual harassment or to inform a student about how to report sexual harassment, or having been trained to do so, does not qualify an individual as one who has authority to institute corrective measures on behalf of the recipient.

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

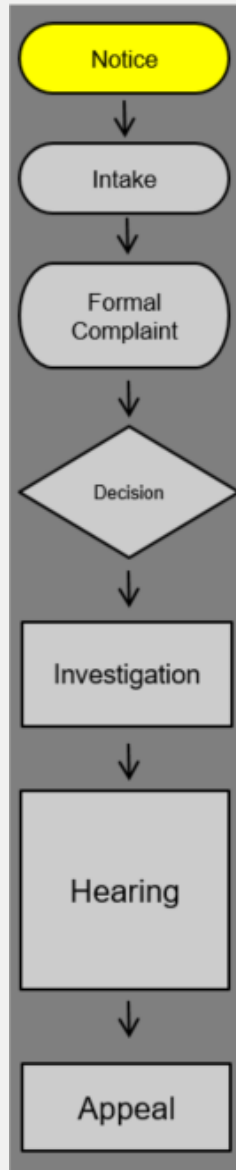


Notice: Institutional Response

When a school has **notice**, the Title IX Coordinator must:

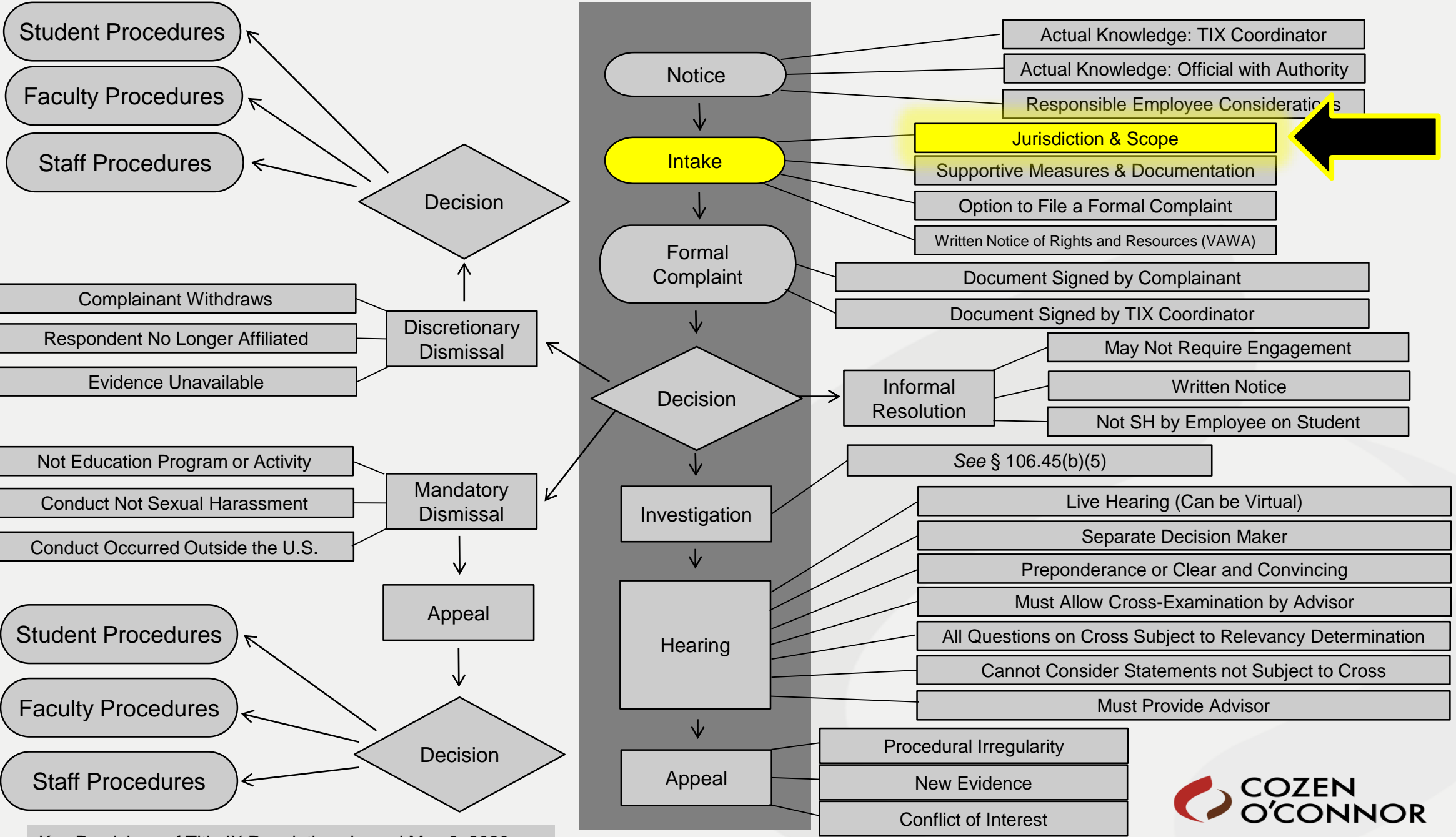
1. Promptly contact the complainant to discuss the availability of supportive measures
2. Consider the complainant's wishes with respect to supportive measures
3. Inform the complainant of the availability of supportive measures with or without the filing of a formal complaint
4. Explain to the complainant the process for filing a formal complaint.

Practical Considerations & Challenges



- Responsible Employee
 - Higher education institutions have the option to continue to designate responsible employees and require reporting
 - How should an institution decide whether to maintain or move away from responsible employee reporting?
- Centralized Reporting
 - Because responsible employee reporting is no longer required, how can institutions ensure they have necessary information to assess for repeat instances of sexual harassment by a person or within a group?
- Training and Resetting Expectations

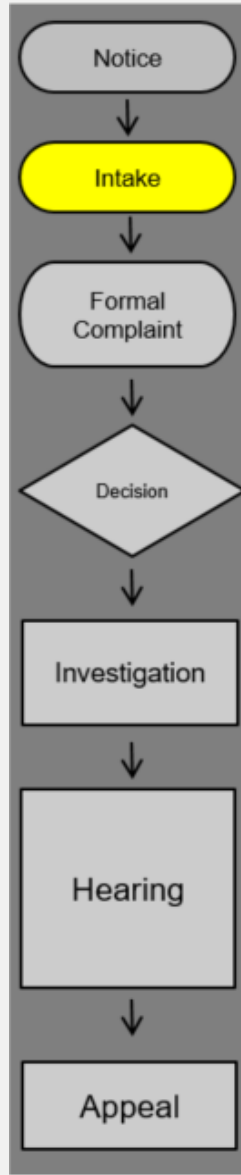
JURISDICTION AND SCOPE



Key Provisions of Title IX Regulations issued May 6, 2020;



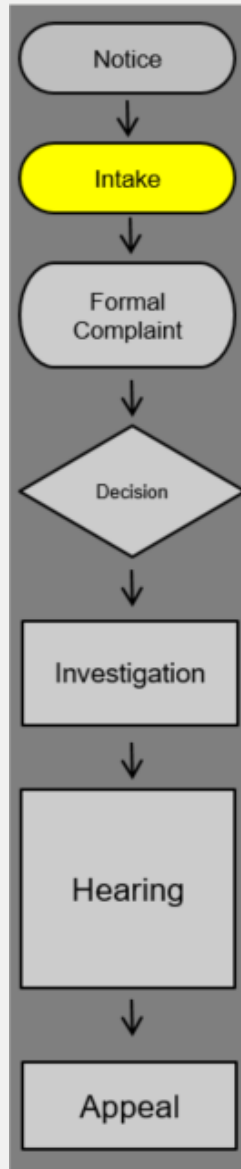
Jurisdiction: Who



- Title IX statute applies to **any person**, in the United States, on the basis of sex, who is excluded from participation in, denied the benefits of, or is subjected to discrimination **under any education program or activity** receiving federal financial assistance.
- **Program or activity and program** means all of the operations of—
 - A college, university, or other postsecondary institution, or a public system of higher education; or
 - A local educational agency (as defined in 20 U.S.C. 8801), system of vocational education, or other school system

Title IX of the Education Amendments of 1972; § 20 U.S.C. 1681;
Title IX Implementing Regulations; § 106.2(h)

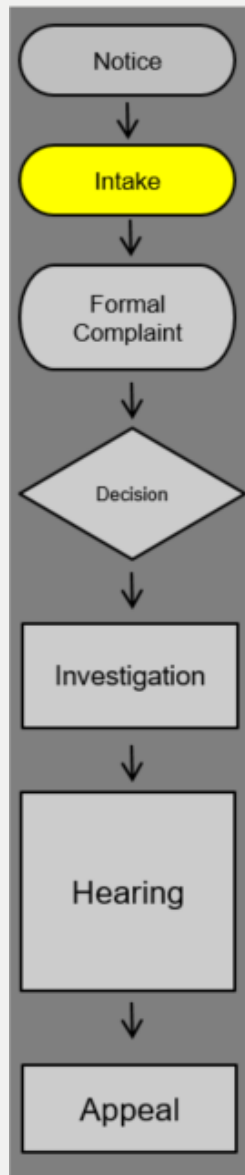
Jurisdiction: Where



- “**Education program or activity**” includes:
 - Locations, events, or circumstances over which the recipient exercised **substantial control** over both
 - the respondent and
 - the context in which the sexual harassment occurs, and
 - Any building **owned or controlled by a student organization that is officially recognized** by a postsecondary institution

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

Jurisdiction: Where

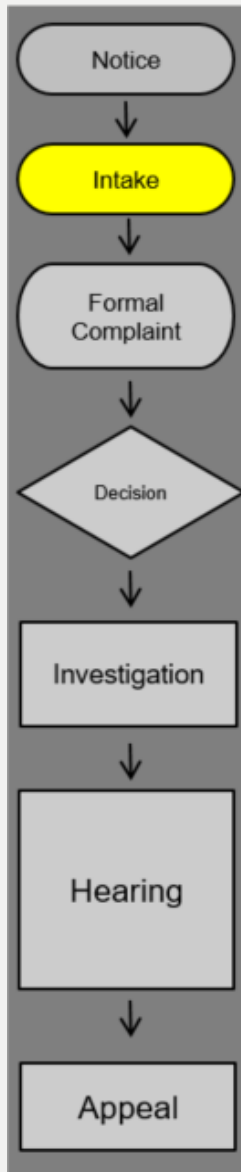


- Applies only to sex discrimination occurring **against a person in the United States** in an education program or activity
 - “The Department reiterates that the ‘education program or activity’ limitation in the final regulations
 - does not create or apply a geographic test
 - does not draw a line between ‘off campus’ and ‘on campus,’ and
 - does not create a distinction between sexual harassment occurring in person versus online.”

Title IX Regulations issued May 6, 2020; § 106.8(d); Preamble at 649

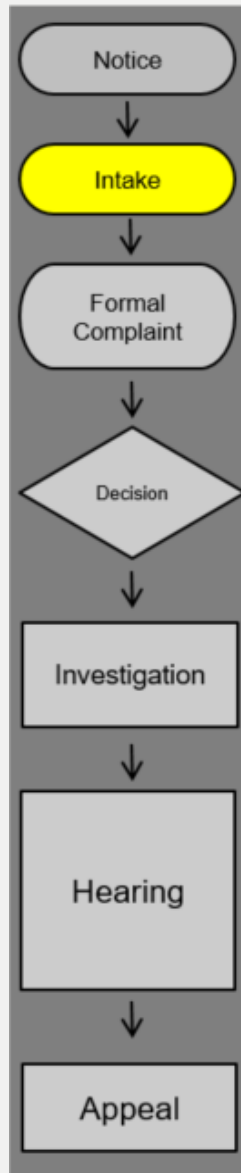
Jurisdiction: On Campus

“[A]ll of the operations’ of a recipient (per existing statutory and regulatory provisions), and the additional ‘substantial control’ language in these final regulations, clearly include all incidents of sexual harassment occurring on a recipient’s campus.”



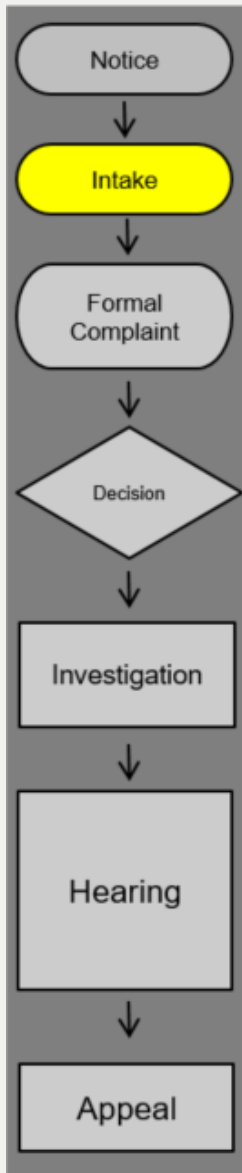
Title IX Regulations issued May 6, 2020; Preamble at 624

Jurisdiction: Off Campus



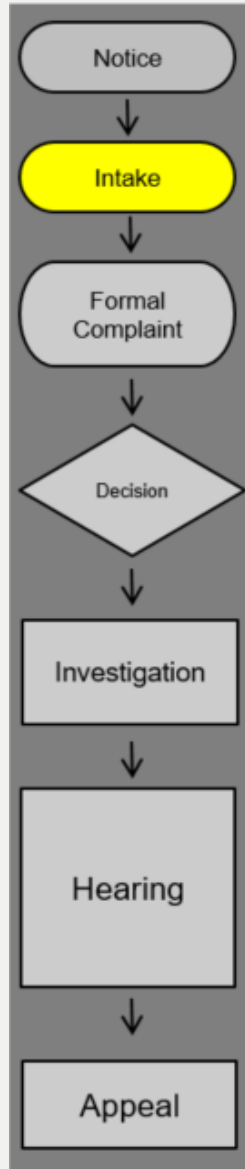
- “[T]he statutory and regulatory definitions of program or activity along with the revised language in § 106.44(a) clarify that a recipient’s Title IX obligations extend to sexual harassment incidents that occur off campus **if any of three** conditions are met:
 - if the off-campus incident occurs as part of the recipient’s **‘operations’** pursuant to 20 U.S.C. 1687 and 34 CFR 106.2(h);
 - if the recipient exercised **substantial control over the respondent and the context** of alleged sexual harassment that occurred off campus pursuant to § 106.44(a); or
 - if a sexual harassment incident occurs at an off-campus building **owned or controlled by a student organization officially recognized** by a postsecondary institution pursuant to §106.44(a).”

Jurisdiction: Course of Conduct



- “In situations involving some allegations of conduct that occurred in an education program or activity, and some allegations of conduct that did not, the recipient **must investigate the allegations of conduct that occurred in the recipient’s education program or activity**, and nothing in the final regulations precludes the recipient from choosing to **also address allegations of conduct outside the recipient’s education program or activity**.
- For example, if a student is sexually assaulted outside of an education program or activity but subsequently suffers Title IX sexual harassment in an education program or activity, then these final regulations apply to the latter act of sexual harassment, and the **recipient may choose to address the prior assault through its own code of conduct.**”

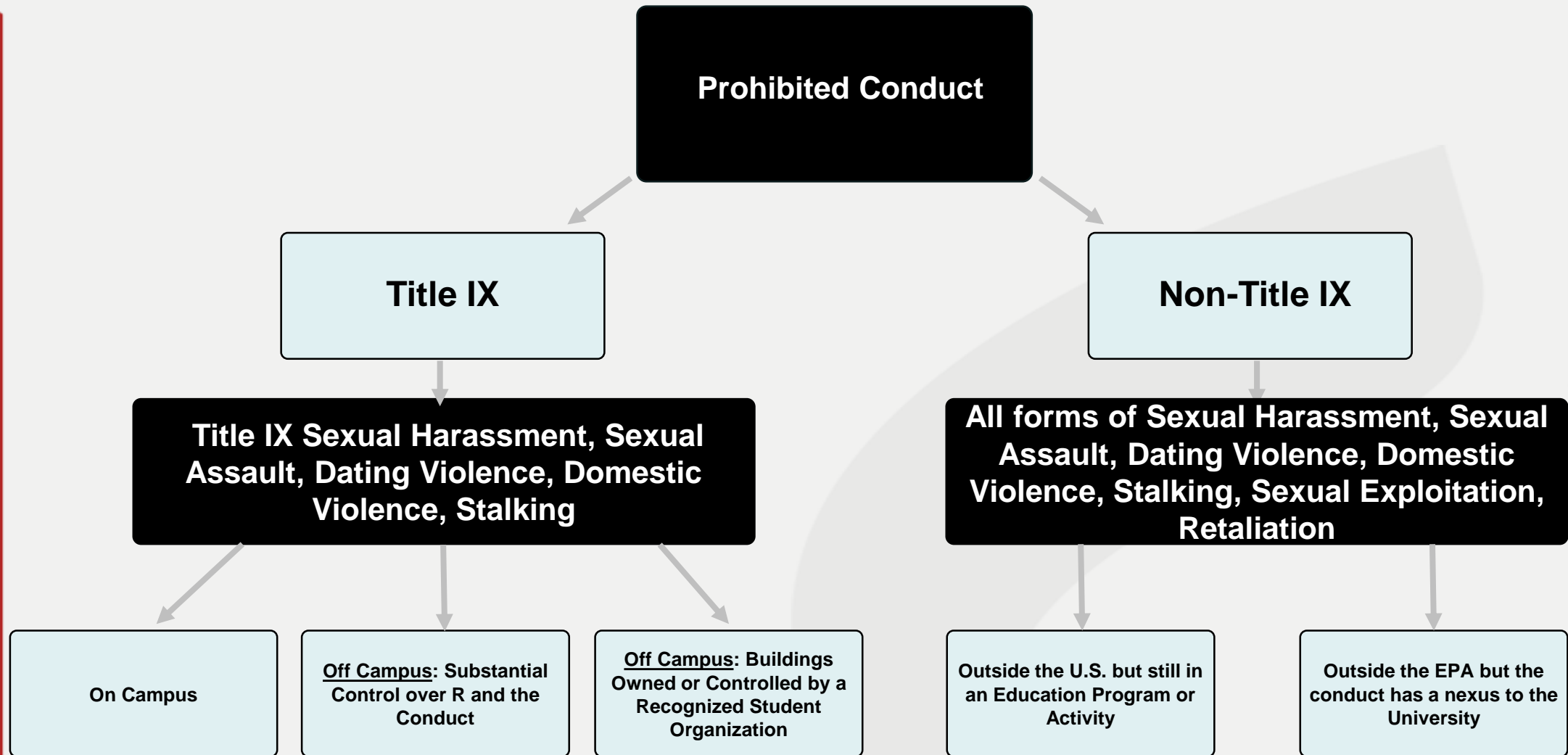
Jurisdiction: What



- Narrowed & expanded definition of sexual harassment
 - Quid pro quo
 - Unwelcome conduct determined by a reasonable person to be so **severe, pervasive, and objectively** offensive that it **effectively denies** a person equal access to the recipient's education program or activity
 - Inclusion of sexual assault, dating violence, domestic violence, and stalking as a form of sexual harassment

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

What is Prohibited Conduct?





U of SC Policy: Scope

- Scope: Individuals who alone, or in concert with others, participate or attempt to participate in prohibited conduct described in this policy are subject to disciplinary action by the university, notwithstanding any action that may or may not be taken by civil or criminal authorities. This policy applies to all members of the university community, including students, employees, volunteers, independent contractors, visitors, and any individuals regularly or temporally employed, studying, living, visiting, conducting business, or having any official capacity at the university regardless of gender, gender identity, or gender expression.

Policy 1.06, page 5.



U of SC Policy: Scope

- To consider a formal complaint, the respondent must have been a student, faculty, or staff in accordance with the definition articulated in this policy, at the time of the reported incident. While the current Title IX regulations outline specific requirements for meeting the criteria of a Title IX complaint, this interim policy applies equal consideration to reports that involve individuals who were students, faculty, or staff at the time of the incident and the incident occurred in the continental United States.

Policy 1.06, p. 4.



Definitions of Prohibited Conduct

- *Sexual Harassment:*
 - An employee of the University of South Carolina conditioning the provision of an aide, benefit, or service of the University of South Carolina on an individual's participation in unwelcome sexual conduct;

Policy 1.06, p. 2.



Definitions of Prohibited Conduct

- *Sexual Harassment:*
 - Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the University of South Carolina's education program or activity;

Policy 1.06, p. 2.



Definitions of Prohibited Conduct

- *Sexual Harassment:*
 - Sexual assault, as defined in 20 USC 1092 (f)(6)(A)(v); dating violence as defined in 34 USC 12291(a)(10); domestic violence as defined in 34 USC 12291(a)(8); or stalking as defined in 34 USC section 12291 (a) (30).

Policy 1.06, p. 2.



Definitions of Prohibited Conduct

Sexual Assault:

- i. An offense that meets the definition of rape, fondling, incest or statutory rape as used in the FBI's Uniform Crime Reporting system.
- ii. A sex offense is any sexual act directed against another person, without the consent ** of the victim, including instances where the victim is incapable of giving consent.
- iii. Rape: The penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim.



Definitions of Prohibited Conduct

Sexual Assault:

- iv. Fondling: The touching of the private body parts of another person for the purpose of sexual gratification, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental incapacity.
- v. Incest: Sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law. Statutory Rape: Sexual intercourse with a person who is under the statutory age of consent.



Definitions of Prohibited Conduct

Dating Violence

- The term “dating violence” means violence committed by a person
 - i. who is or has been in a social relationship of a romantic or intimate nature with the victim; and
 - ii. where the existence of such a relationship shall be determined based on a consideration of the following factors:
 - a. The length of the relationship.
 - b. The type of relationship.
 - c. The frequency of interaction between the persons involved in the relationship.



Definitions of Prohibited Conduct

Domestic Violence

- The term “domestic violence” includes felony or misdemeanor crimes of violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction receiving grant monies, or by any other person against an adult or youth victim who is protected from that person’s acts under the domestic or family violence laws of the jurisdiction.

Policy 1.06, p. 3

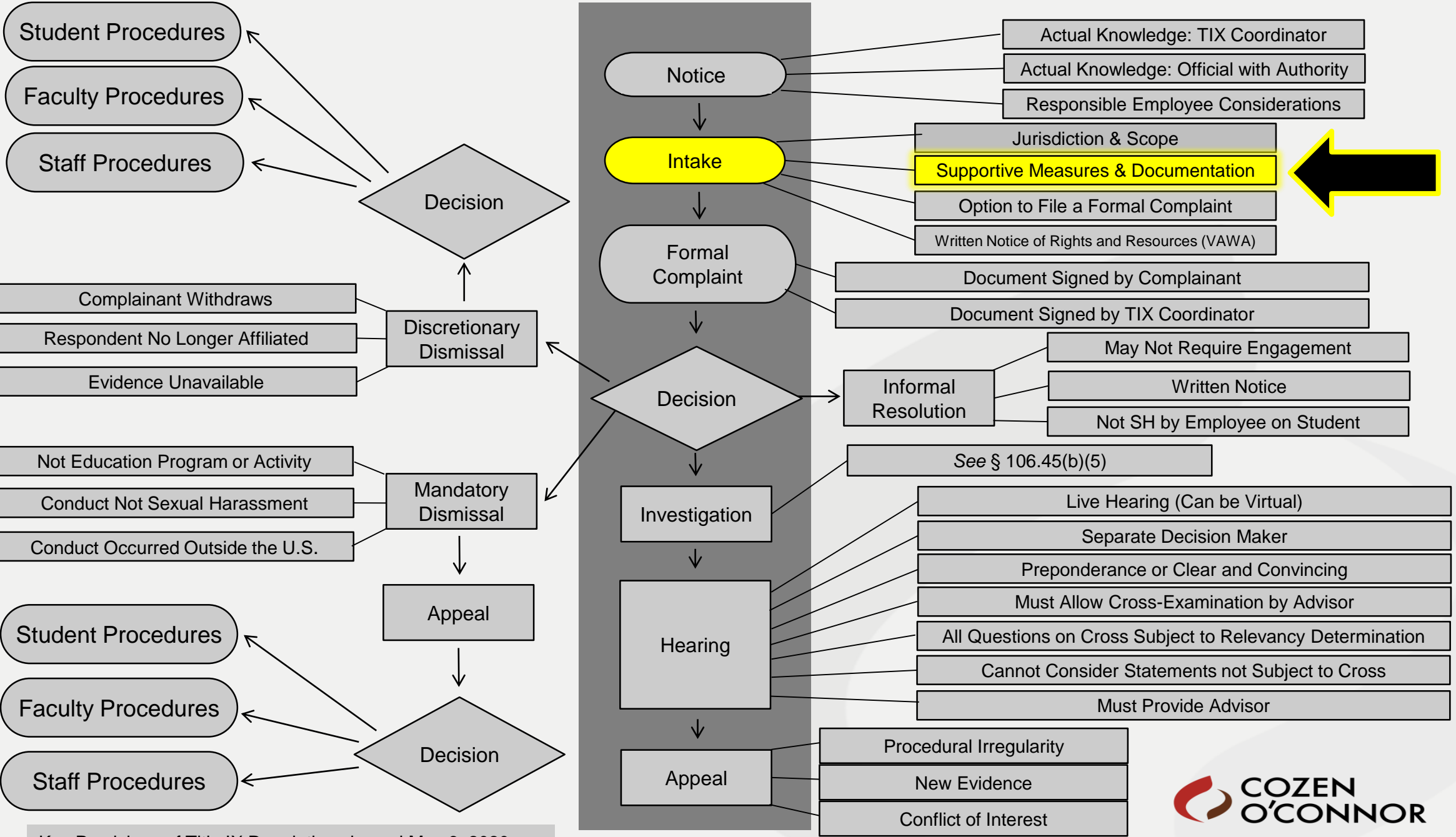


Definitions of Prohibited Conduct

Stalking

- The term “stalking” means engaging in a course of conduct directed at a specific person that would cause a reasonable person to— i. fear for his or her safety or the safety of others; or ii. suffer substantial emotional distress.
 - Course of conduct means two or more acts, including, but not limited to, acts in which the stalker directly, indirectly, or through third parties, by any action, method, device, or means follows, monitors, observes, surveils, threatens, or communicates to or about, a person, or interferes with a person’s property.
 - Substantial emotional distress means significant mental suffering or anguish that may, but does not necessarily, require medical or other professional treatment or counseling.
 - Reasonable person means a reasonable person under similar circumstances and with similar identities to the victim.

SUPPORTIVE MEASURES

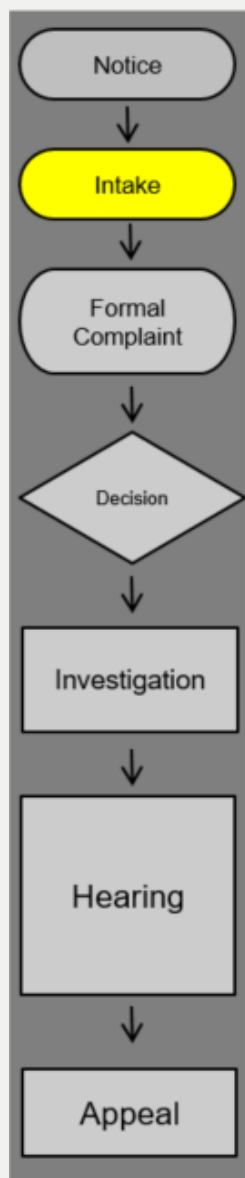


Key Provisions of Title IX Regulations issued May 6, 2020;

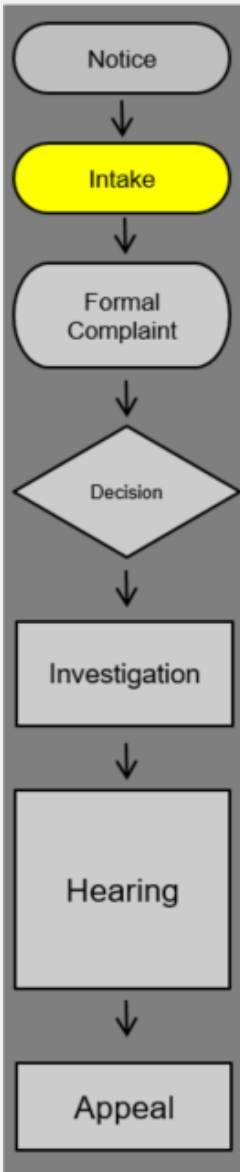


Offering Supportive Measures

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



Supportive Measures

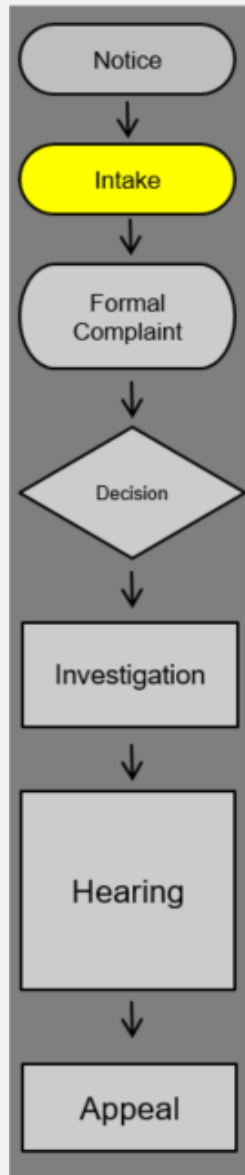


- Non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed.
- Designed to restore or preserve equal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

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

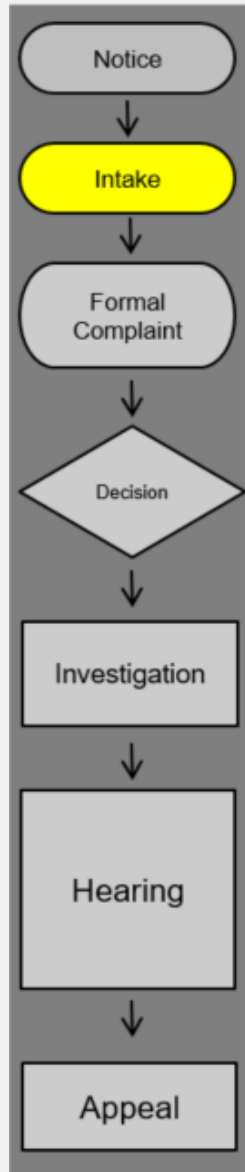
Supportive Measures

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



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

Supportive Measures



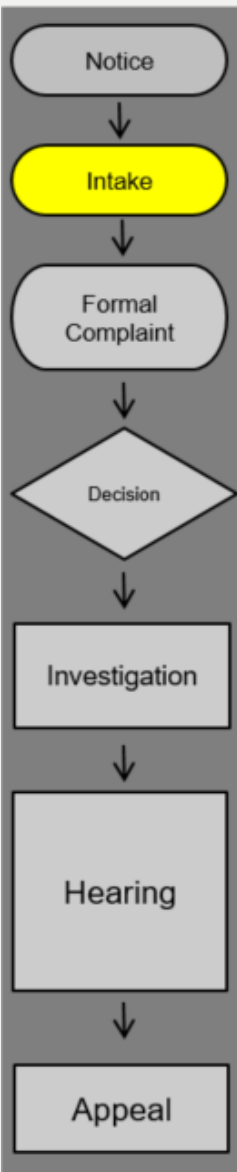
- Must maintain as confidential any supportive measures provided to the complainant or respondent, to the extent that maintaining such confidentiality would not impair the ability of the recipient to provide the supportive measures.
- The Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures.

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

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

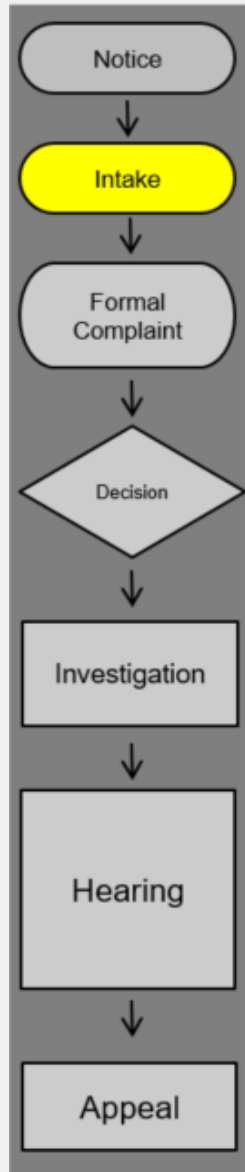
Documentation



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

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

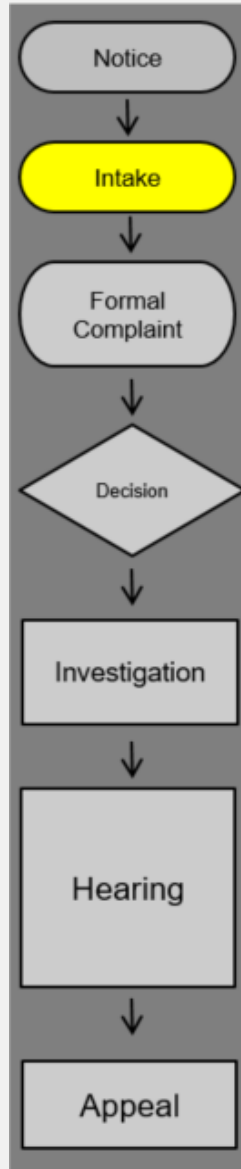
Administrative Leave



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

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

Emergency Removal for Students

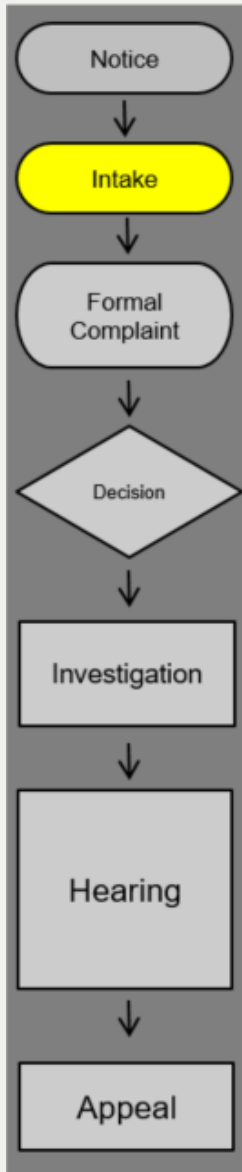


- Must undertake an individualized safety and risk analysis and determine that an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal
- Must provide the respondent with notice and an opportunity to challenge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

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

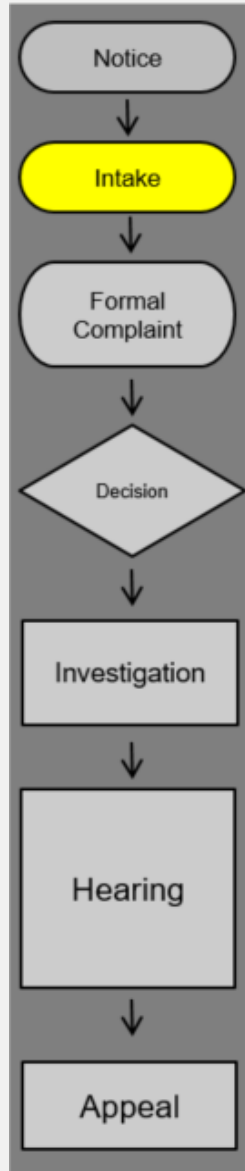
Emergency Removal

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



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

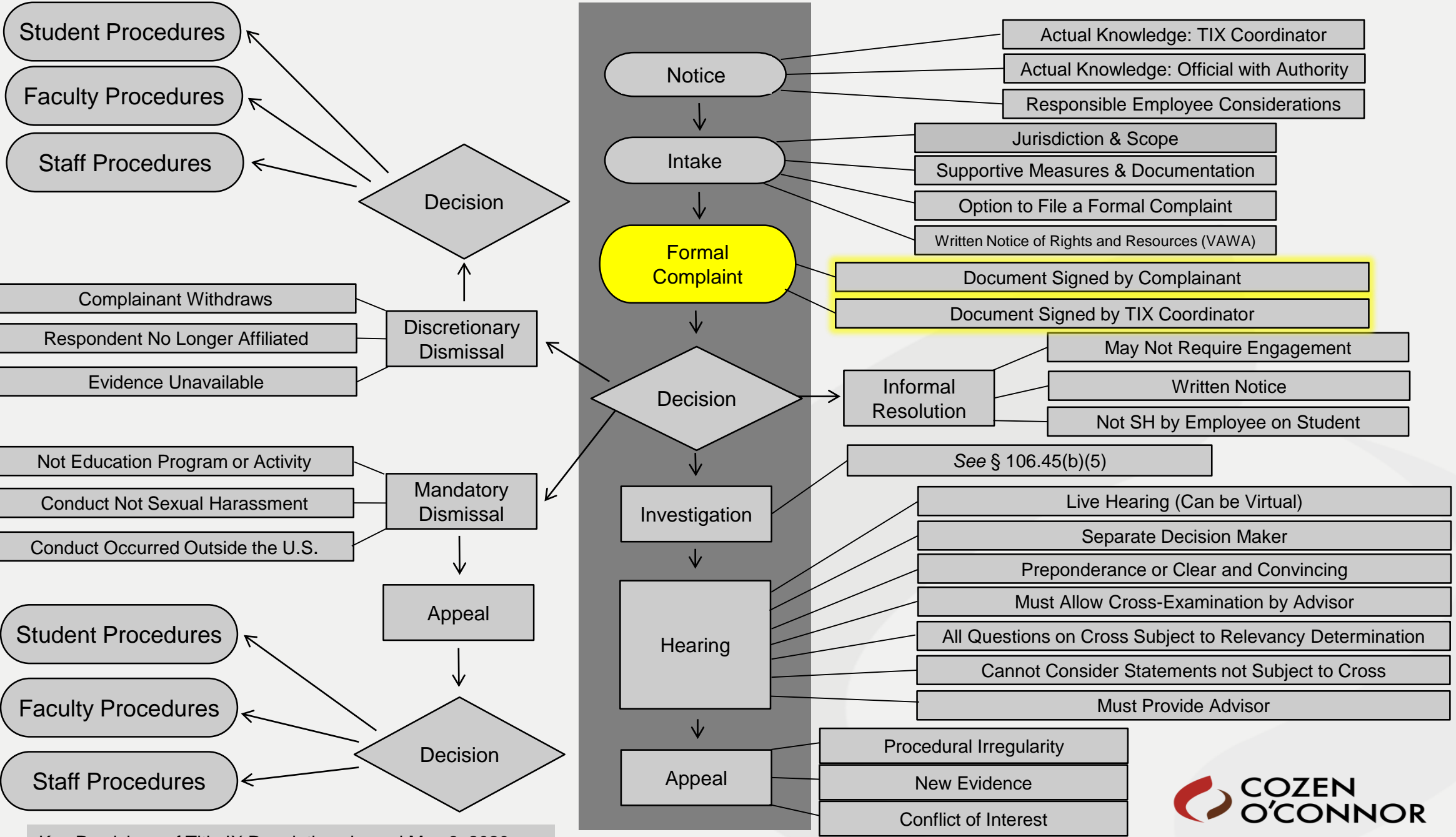
Emergency Removal



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

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

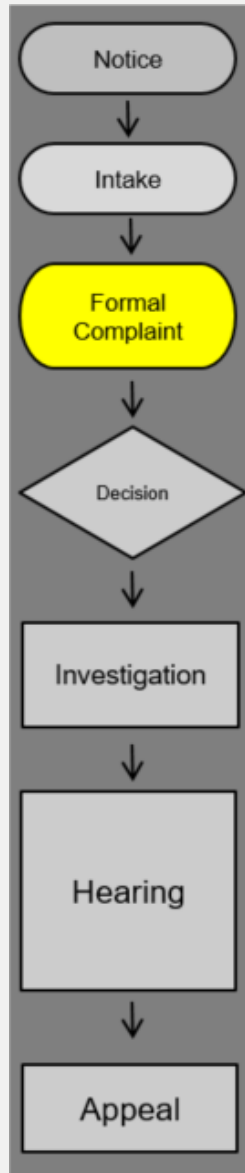
FORMAL COMPLAINTS



Key Provisions of Title IX Regulations issued May 6, 2020;



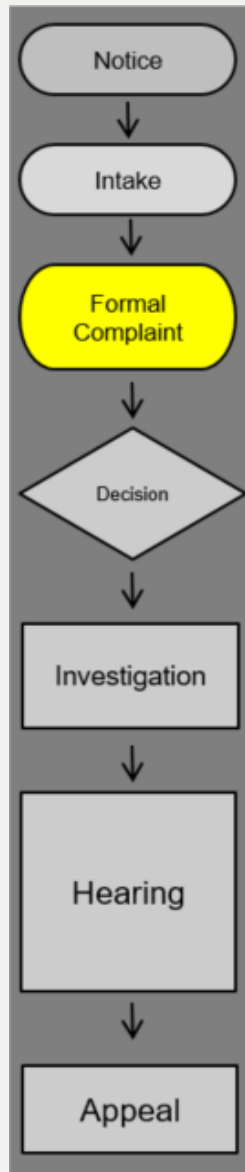
Formal Complaint



- Document filed by a complainant or signed by the Title IX Coordinator
- At the time of filing a formal complaint, a complainant **must be participating in or attempting to participate in** the education program or activity of the recipient with which the formal complaint is filed

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

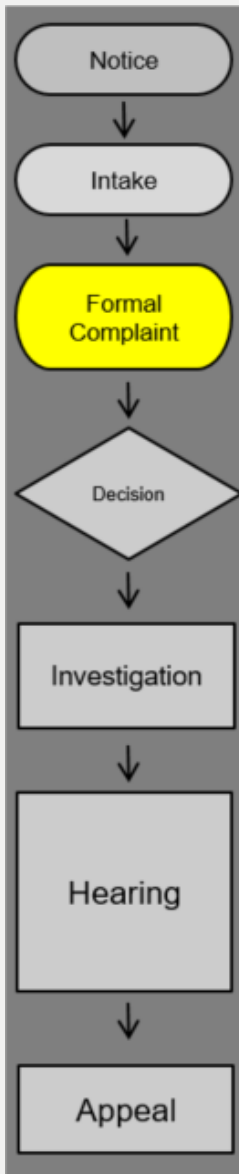
Formal Complaint: Program or Activity



- The following may constitute “**attempting to participate**” in the recipient’s education program or activity:
 - Applying (or intending to apply) for admission
 - Indicating a desire to re-enroll if the recipient appropriately responds to sexual harassment allegations
 - Intending to remain involved in alumni programs
- “[The ‘education program or activity’ requirement] prevents recipients from being legally obligated to investigate **allegations made by complainants who have no relationship with the recipient**, yet still protects those complainants by requiring the recipient to respond promptly in a non-deliberately indifferent manner.”

Title IX Regulations issued May 6, 2020; Preamble, see pp. 225, 411, 629

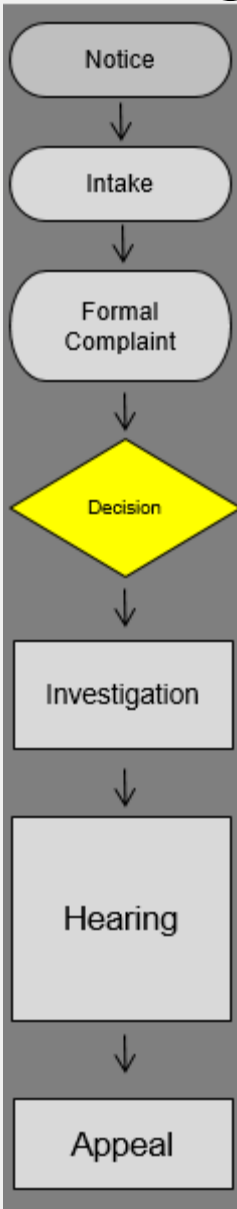
Formal Complaint: Institutional Response



- Upon receipt of a **formal complaint**, the institution:
1. Must complete the actions required upon receiving notice, if not already completed,
 2. Must evaluate jurisdiction and required/discretionary dismissal,
 3. Should assess appropriate supportive measures for both parties,
 4. Should evaluate the need for any other measures, including emergency removal/administrative leave,
 5. Must initiate a grievance process that complies with § 106.45

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

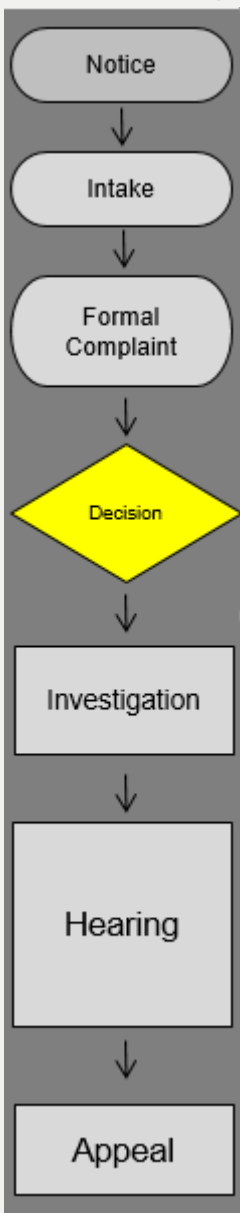
Formal Complaint: Required Dismissal



- **Must dismiss if:**
 - Conduct would not constitute sexual harassment even if proved,
 - Conduct did not occur in the recipient’s education program or activity, or
 - Conduct did not occur against a person in the United States.
- Such a dismissal does not preclude action under another provision of the recipient’s code of conduct

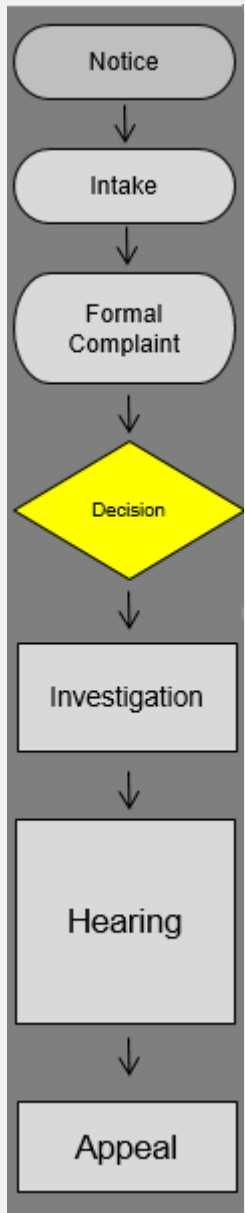
Title IX Regulations issued May 6, 2020; § 106.45(b)(3)

Formal Complaint: Discretionary Dismissal



- **May** dismiss the formal complaint or any allegations therein if:
 - A complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the formal complaint or any allegations,
 - 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.

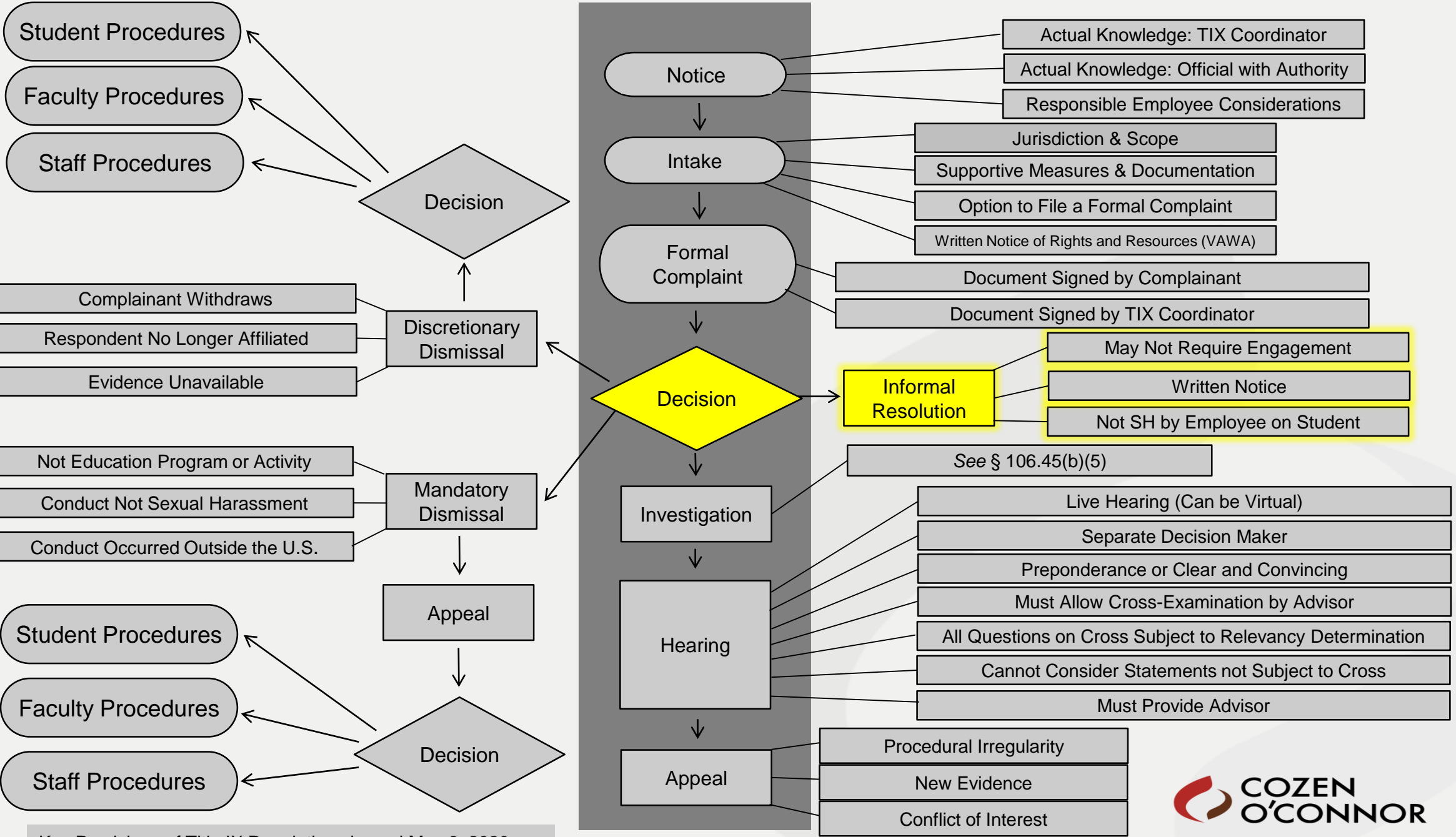
Title IX Regulations issued May 6, 2020; § 106.45(b)(3)



Dismissal of Formal Complaint

- Upon a dismissal required or permitted, the recipient must promptly send **written notice** of the dismissal and reason(s) therefor simultaneously to the parties
- Must offer both parties an **appeal** from a recipient's dismissal of a formal complaint or any allegations therein

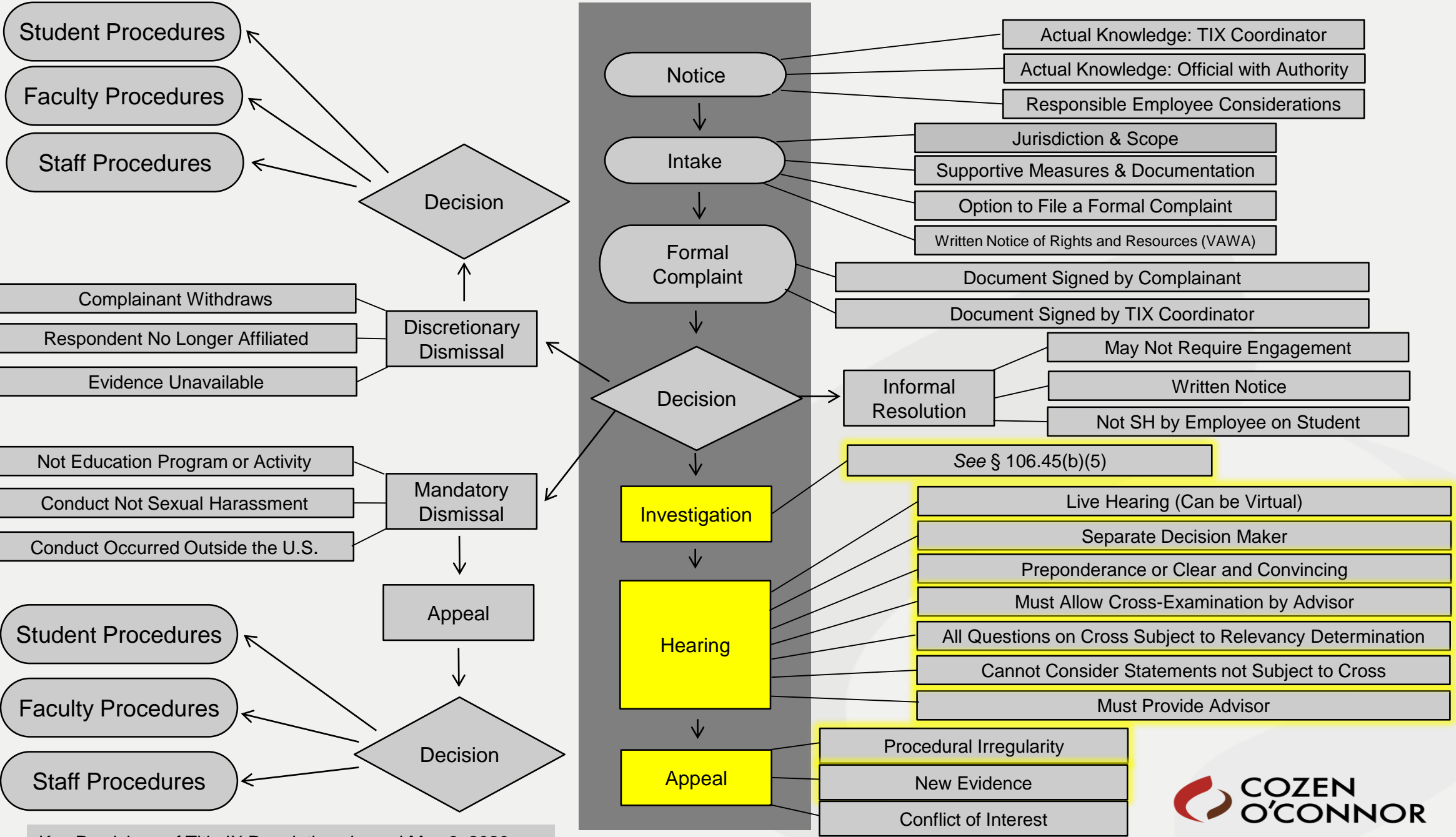
Title IX Regulations issued May 6, 2020; §§ 106.45(b)(3) and 106.45(b)(8)



Key Provisions of Title IX Regulations issued May 6, 2020;



BASIC REQUIREMENTS OF GRIEVANCE PROCESSES

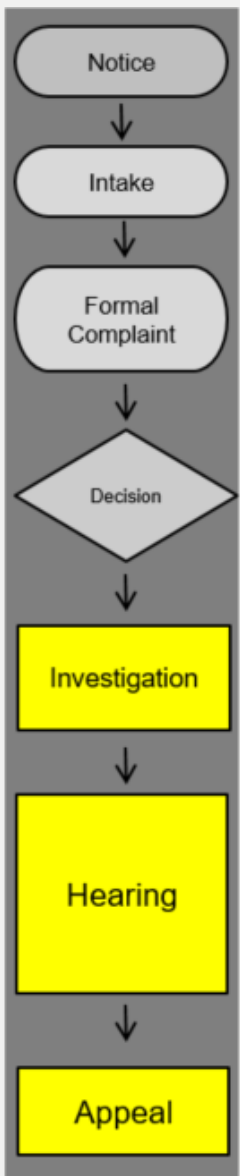


Key Provisions of Title IX Regulations issued May 6, 2020;



Basic Requirements

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



Relevant Regulations Sections:

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

Basic Requirements



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

Basic Requirements



- **Presumption that the respondent is not responsible** for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process
- Include reasonably prompt time frames for conclusion of the grievance process with permissible delay for good cause
- Describe the range (or list) of possible disciplinary sanctions and remedies

Basic Requirements



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

Title IX Regulations issued May 6, 2020; §§ 106.45(b)(1)(vii) and 106.45(b)(7)(i)

Basic Requirements



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

Relevant Regulations Sections:

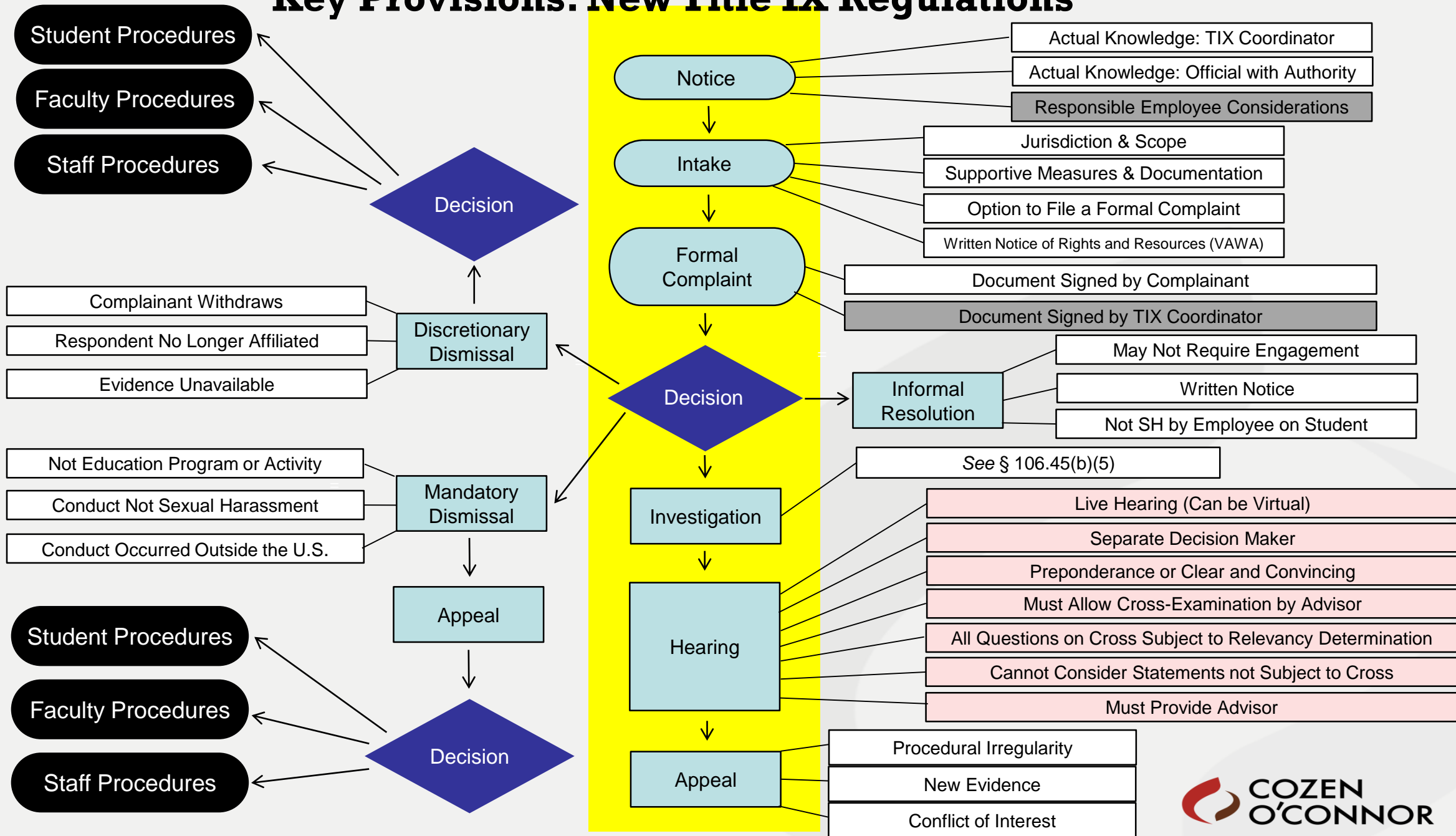
Appeal: §§ 106.45(b)(1)(viii) and 106.45(b)(7)(ii)(F)

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

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

INVESTIGATIONS

Key Provisions: New Title IX Regulations



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

Regulations: “Legally Binding Obligations”

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

Regulations: “Best Practices”

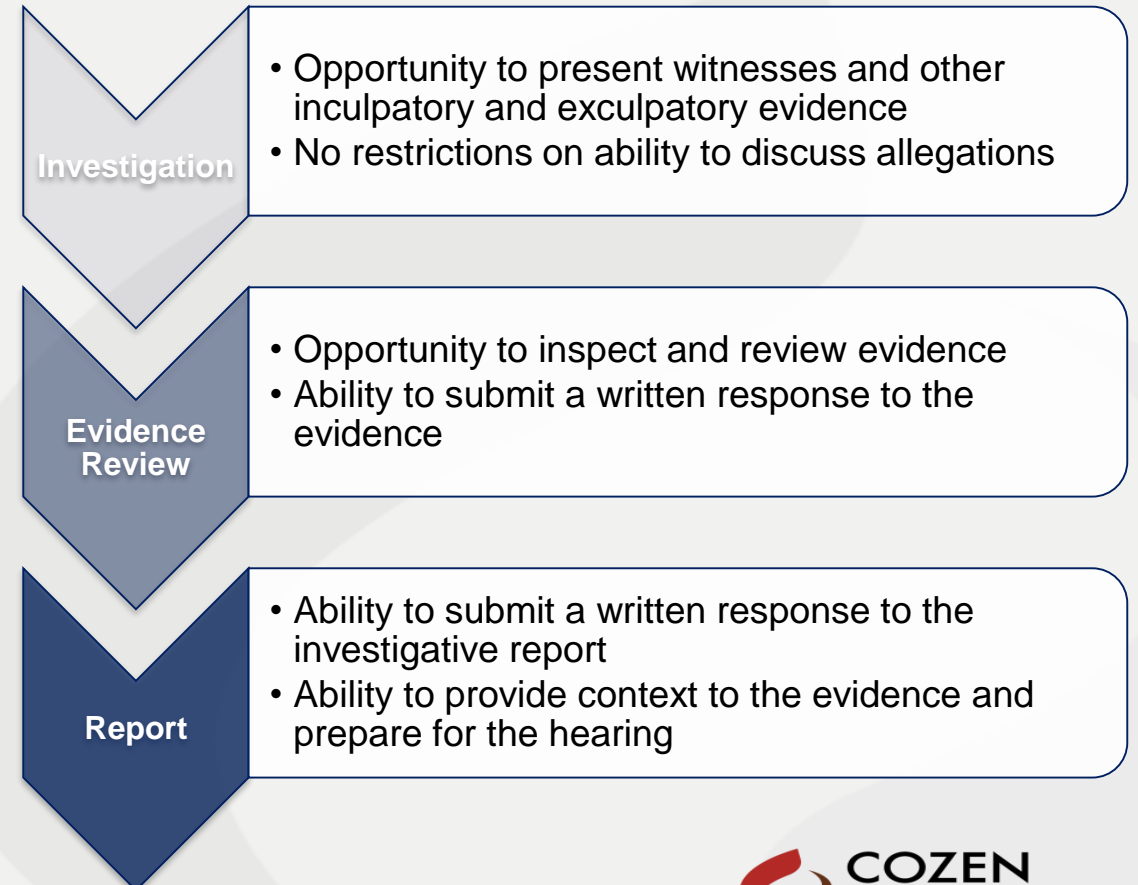
- “These final regulations leave recipients the **flexibility to choose to follow best practices and recommendations** contained in the Department’s guidance, or similarly, best practices and recommendations made by non-Department sources, such as Title IX consultancy firms, legal and social sciences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

Setting the Stage - Investigations

Institutional Obligations



Parties' Opportunity to Participate

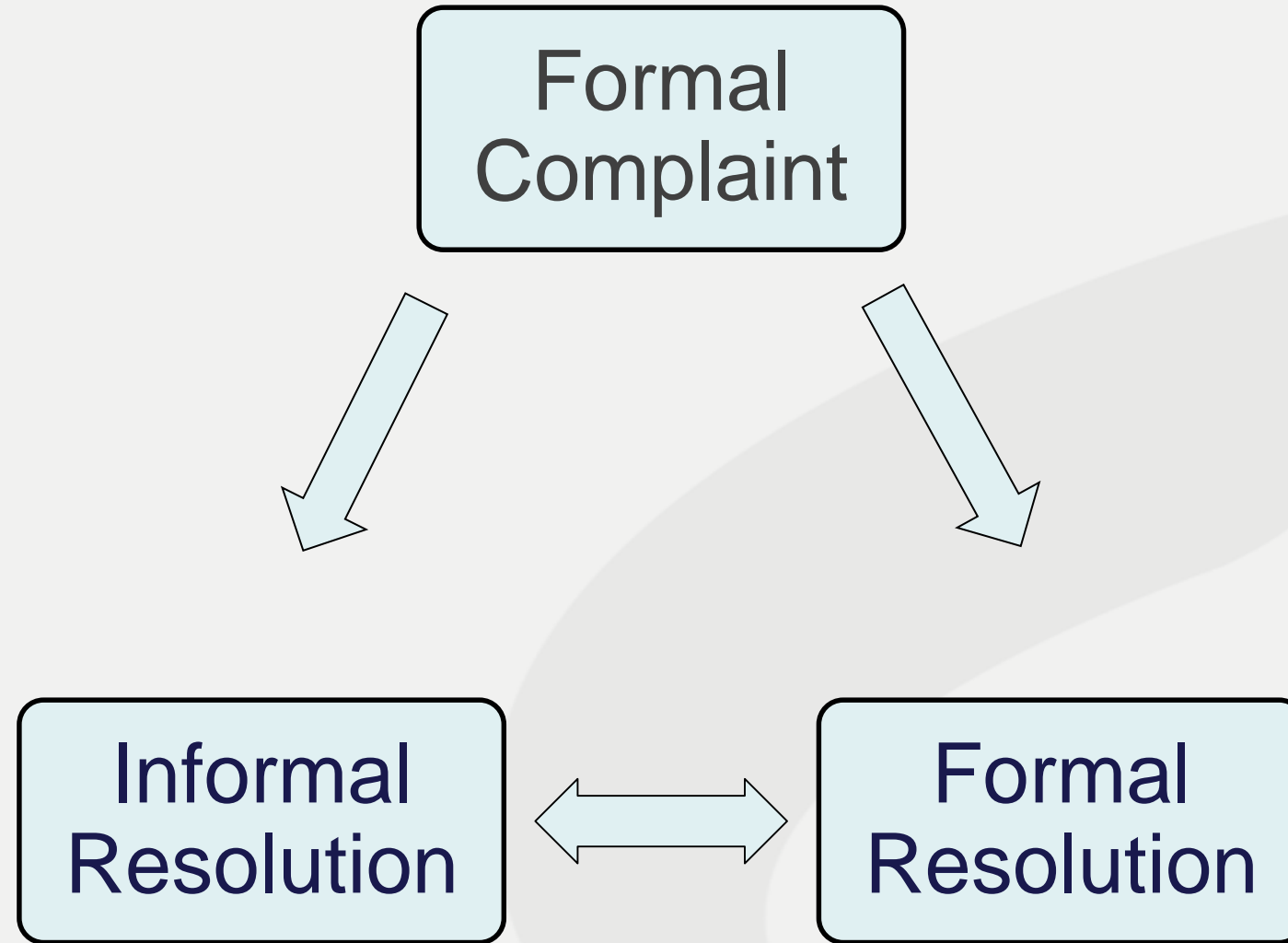
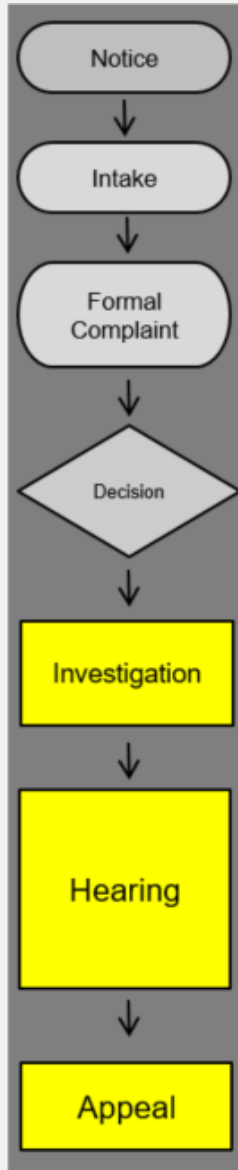


Overview

- 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 May 19, 2020, Preamble, 85 F.R. 30282; 30219.

Reports vs. Formal Complaints

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

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

Reinforcing Agency & Autonomy

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

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

The Obligation to Investigate

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

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

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

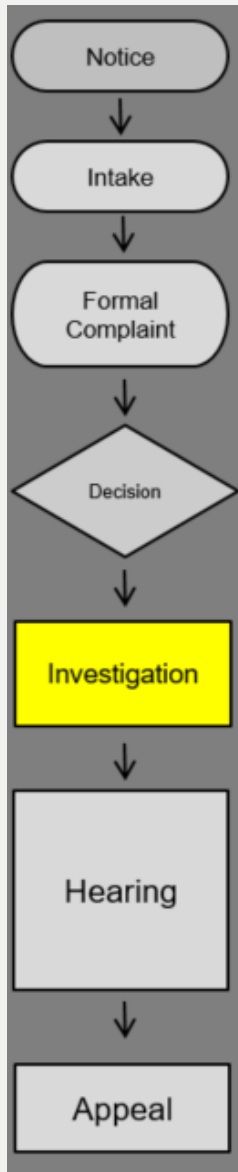
Separating Support from Investigations

- 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.”

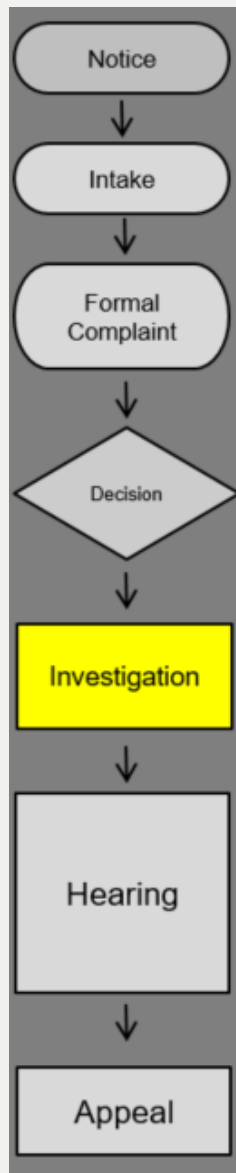
Written Notice of all Proceedings



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

Title IX Regulations May 19 2020; §106.45(b)(5)(v) 85 F.R. 30424

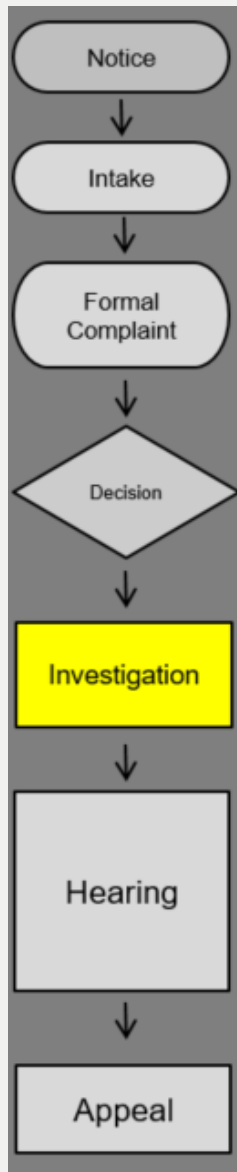
Written Notice of Allegations



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

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

Written Notice of the Allegations



– Must state that:

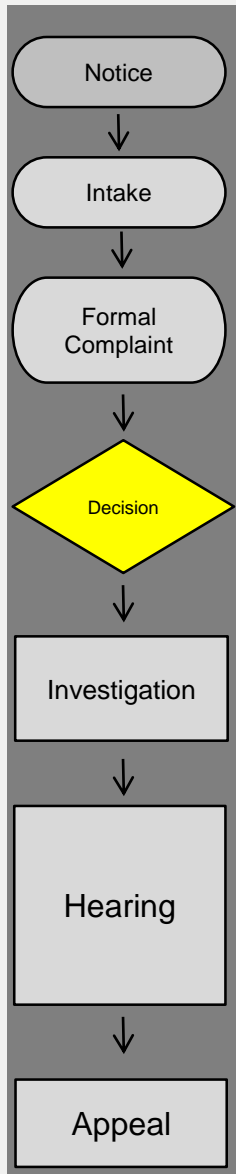
- the respondent is presumed not responsible for the alleged conduct
- a determination regarding responsibility is made at the conclusion of the grievance process

– Must inform the parties:

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

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

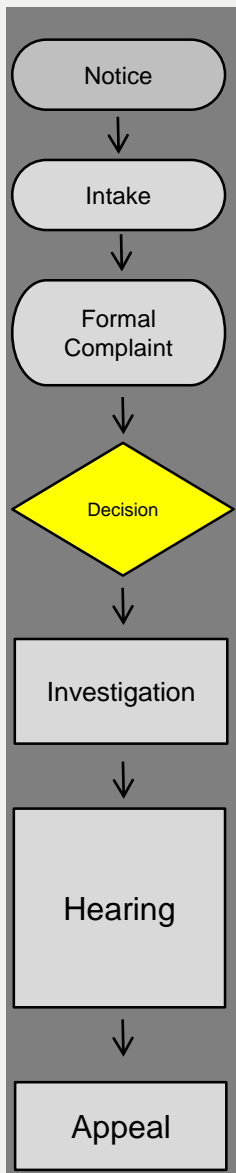
Written Notice of Allegations



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

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

Supplemental Notice



- If during the investigation, the recipient decides to investigate allegations about the complainant or respondent that are not included in the original notice, the recipient must provide notice of the additional allegations to the parties whose identities are known.
- The Preamble makes it clear that any supplemental notice must be in writing.
 - Although § 106.45(b)(2) requires subsequent written notice to the parties as the recipient discovers additional potential violations...

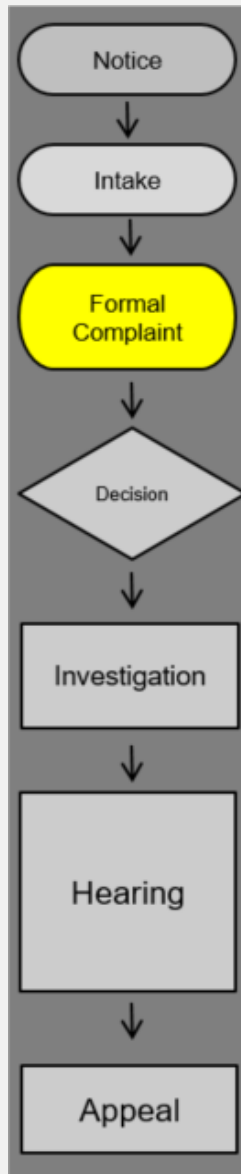
Title IX Regulations May 19, 2020 §106.45(b)(2)(ii); Preamble 85 F.R. 30283

Practical Considerations

- Checkpoints for additional policy violations
 - Post complainant interview
 - Post respondent interview
 - Post evidence review
- Procedural due process: “Notice”
- Consider similar checkpoints for mandatory dismissal of the formal complaint

CONSOLIDATION OF FORMAL COMPLAINTS

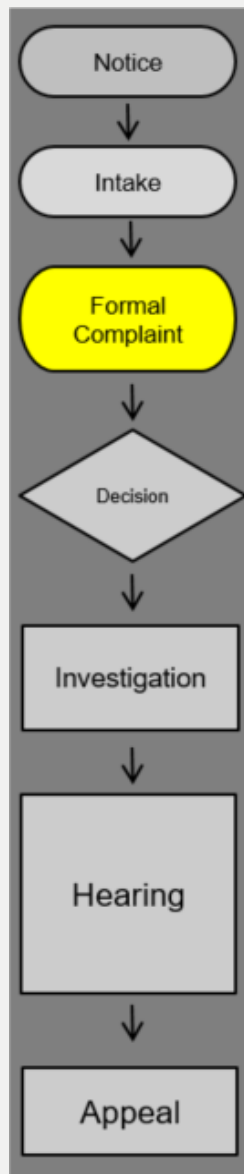
Consolidation of Formal Complaints



- A recipient **may** consolidate formal complaints as to allegations of sexual harassment against more than one respondent, or by more than one complainant against one or more respondents, or by one party against the other party, **where the allegations of sexual harassment arise out of the same facts or circumstances.**

Title IX Regulations May 19, 2020; §106.45(b)(4) 85 F.R. 30576

Consolidation of Formal Complaints



- The requirement for the same facts and circumstances means that the multiple complainants' allegations are so intertwined that their allegations directly relate to all the parties.

Title IX Regulations May 19, 2020 Preamble 85 F.R. 30436

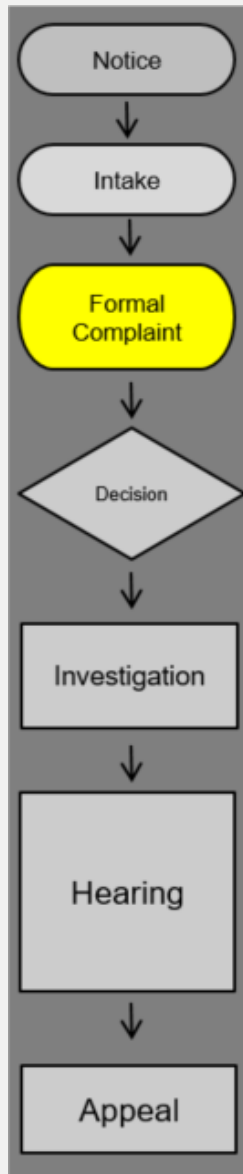
Consolidation of Formal Complaints



- The Department believes that recipients and parties will benefit from knowing that recipients have discretion to consolidate formal complaints...
- Intended to give “discretion” to consolidate formal complaints that arise “out of the same facts or circumstances and involve more than one complainant, more than one respondent, or what amount to counter-complaints by one party against the other.”

Title IX Regulations May 19, 2020; Preamble 85 F.R. 30291

Consolidation of Formal Complaints



- If the respondent is facing an additional allegation, the respondent has a right to know what allegations have become part of the investigation for the same reasons the initial written notice of allegations is part of a fair process, and the complainant deserves to know whether additional allegations have (or have not) become part of the scope of the investigation.
- This information allows both parties to meaningfully participate during the investigation, for example by gathering and presenting inculpatory or exculpatory evidence (including fact and expert witnesses) relevant to each allegation under investigation.

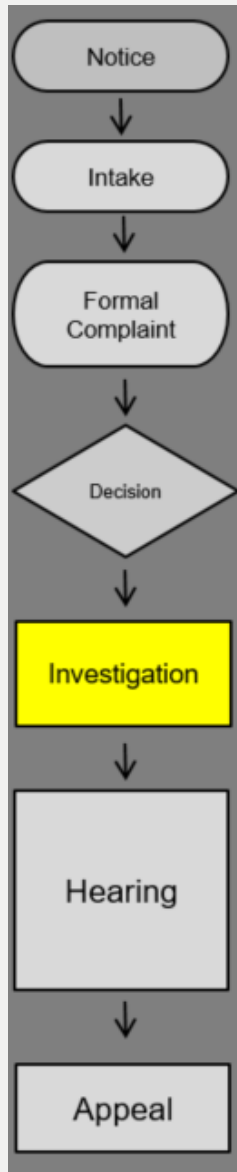
Title IX Regulations May 19, 2020; Preamble 85 F.R. 30283

Application to Specific Circumstances

- Multiple instances of a respondent engaging in misconduct towards the same complainant
- Multiple allegations by same complainant against same respondent
- Multiple allegations by different complainants against same respondent
- Respondent alleges complainant has engaged in past misconduct involving false reports

EVIDENCE GATHERING

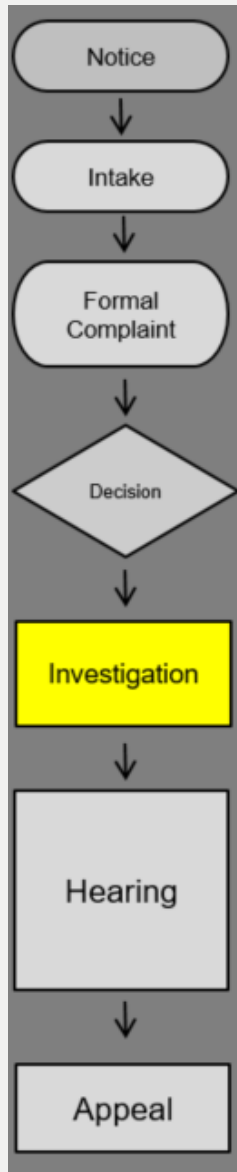
Burden of Gathering Evidence



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

Title IX Regulations May 19, 2020; §106.45(b)(5)(i) FN 562 .

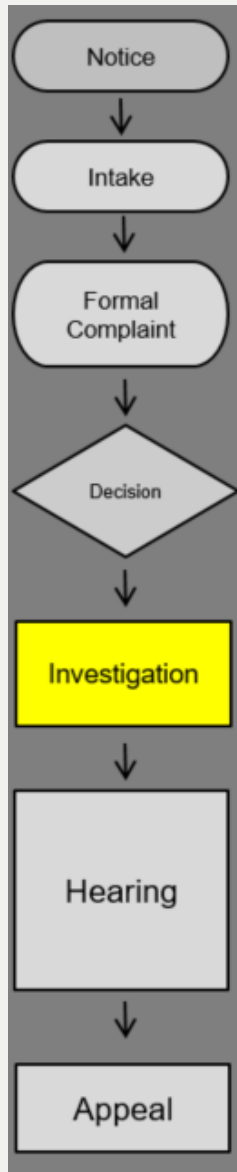
Burden of Gathering Evidence



- Undertake a **thorough search for relevant facts and evidence** pertaining to a particular case, while operating under the constraints of conducting and concluding the investigation under designated, reasonably prompt time frames and without powers of subpoena.
- Such conditions limit the extensiveness or comprehensiveness of a recipient's efforts to gather evidence while reasonably expecting the recipient to gather evidence that is available.

Title IX Regulations May 19, 2020; Preamble at 30292.

Burden of Gathering Evidence

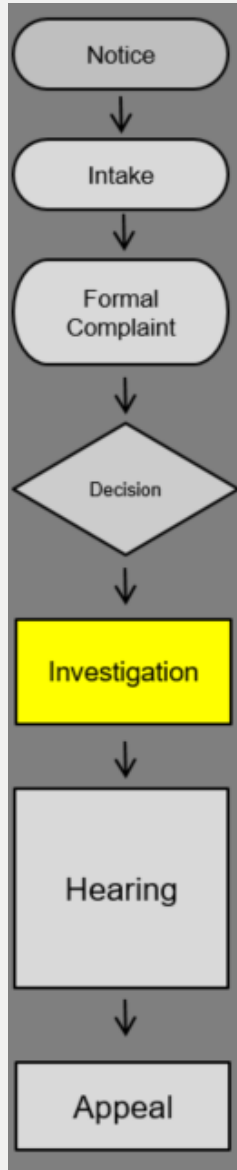


- The investigator is obligated to **gather evidence directly related to the allegations** whether or not the recipient intends to rely on such evidence (for instance, where evidence is directly related to the allegations but the recipient's investigator does not believe the evidence to be credible and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

Title IX Regulations May 19, 2020; Preamble at 30248-49.

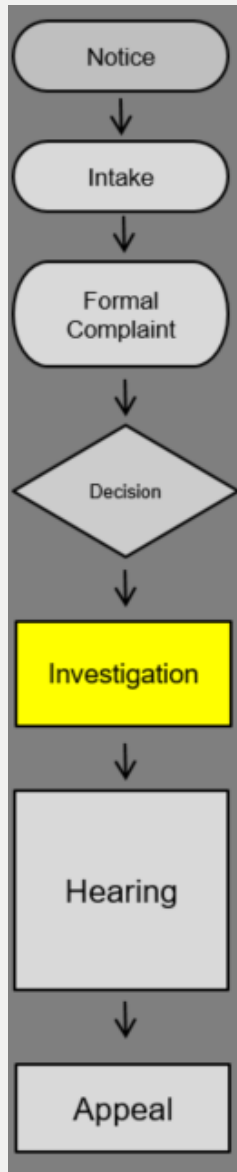
Opportunity to Participate

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



Title IX Regulations May 19, 2020; §106.45(b)(5)(ii) ; 85 F.R. 30422-23.

Witnesses & Evidence



- Provide an equal opportunity for the parties to present witnesses and evidence
 - Fact and expert witnesses
 - Inculpatory and exculpatory evidence

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

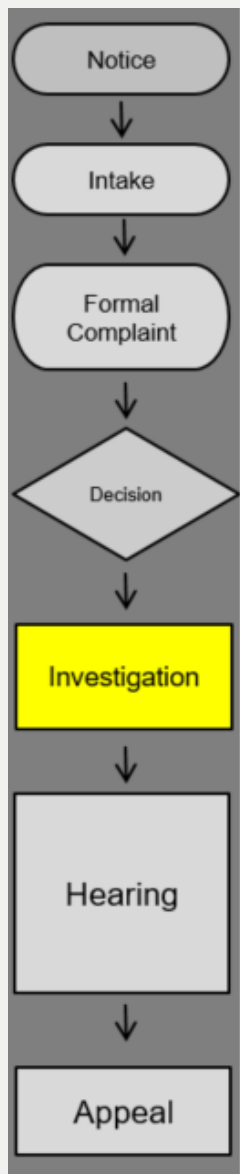
Practical Considerations & Effective Practices

- Preparing for interview
- Interview protocols and templates for introduction, scope and conclusion
- Documenting interviews
 - Note-taking vs. recording
 - Use of two investigators
- Decision-points
 - Sharing interviews with the parties for feedback
 - Considerations regarding character witnesses
 - Guidance about expert witnesses
 - Compelling witness participation

Practical Considerations for Remote Interviews

- Developing rapport
 - Allow additional time for the interview
 - Conversational language and tone
 - Avoid distractions
- Privacy considerations
 - Ensuring a private setting
 - Facilitating the presence of advisor of choice
- Sharing documents

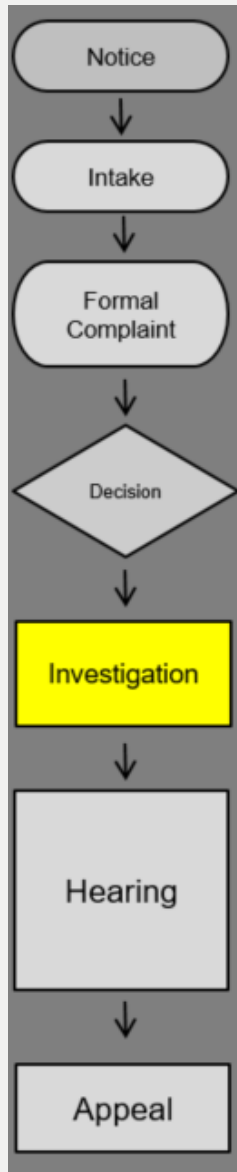
Advisor of Choice



- Provide the parties with the same opportunities to have others present during any grievance proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice, who may be, but is not required to be, an attorney.
- A recipient may establish restrictions on advisors' participation, as long as the restrictions apply equally to both parties.

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

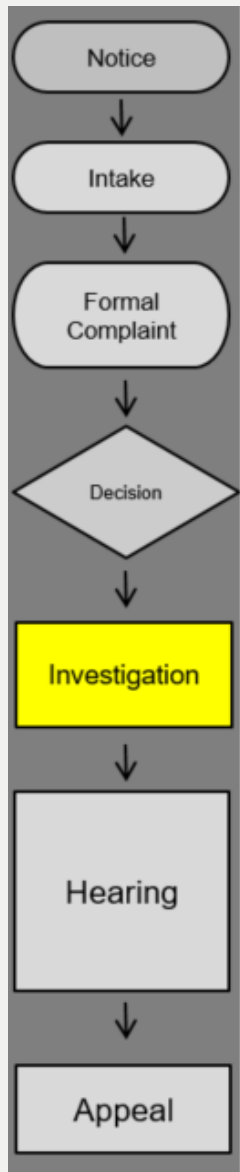
Restrictions on Advisor Participation



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

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

Restrictions on Advisor Participation



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

Title IX Regulations May 19 2020; Preamble at 30298.

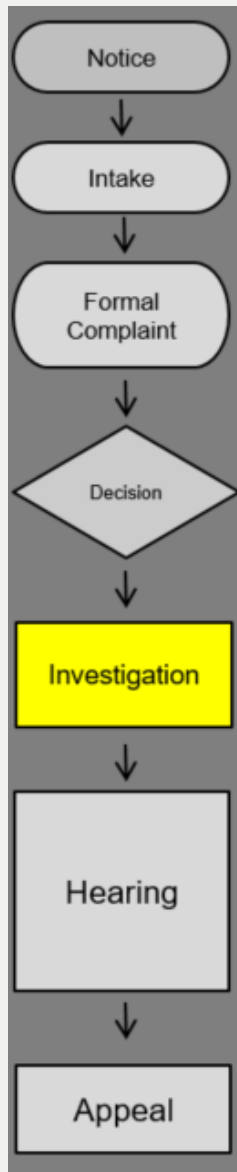
Training of Advisors Not Required



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

Title IX Regulations May 19 2020; Preamble at 30333.

Training of Advisors Not Required



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

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

Practical Considerations & Effective Practices

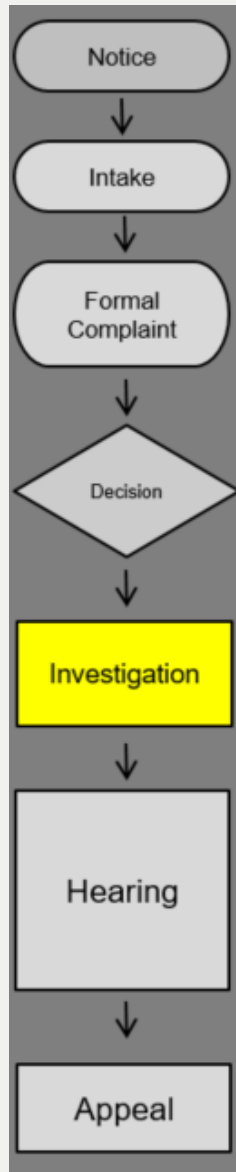
- Process meeting to discuss policy, decorum, and expectations
- Requirement that advisors:
 - Review policy in advance
 - Acknowledge decorum expectations
 - Acknowledge privacy protections regarding documents
- Consider the importance of continuity in process re: advisor given requirement to provide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

EVIDENTIARY CONSIDERATIONS

Evidentiary Considerations

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

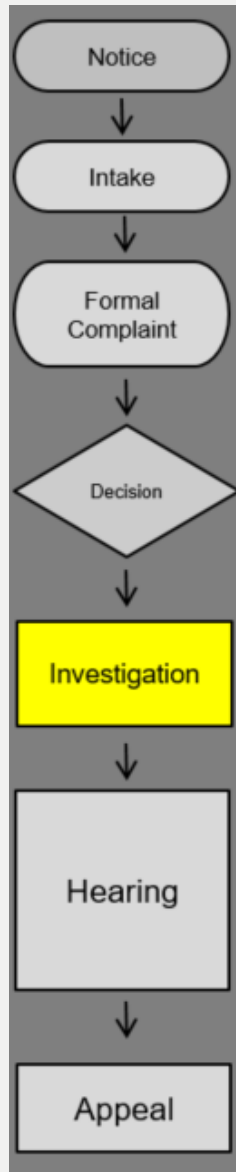
Privileged Information



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

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

Privileged Records

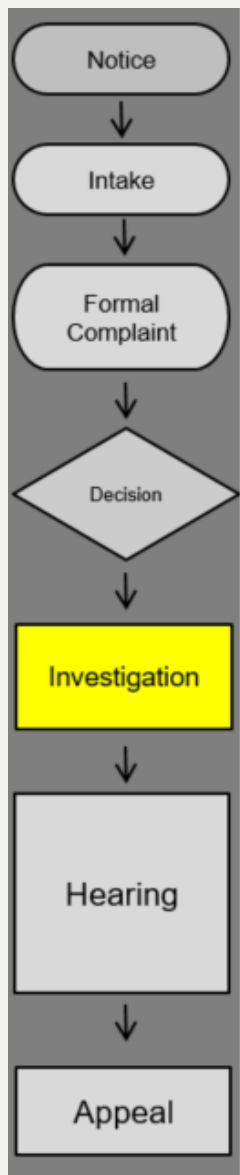


- Recipient cannot access, consider, disclose, or otherwise use a party's records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional's or paraprofessional's capacity, or assisting in that capacity, and which are made and maintained in connection with the provision of treatment to the party, unless the recipient obtains that party's **voluntary, written consent** to do so for a grievance process under this section.

Title IX Regulations May 19, 2020; § 106.45(b)(5)(i) 85 F.R.30423

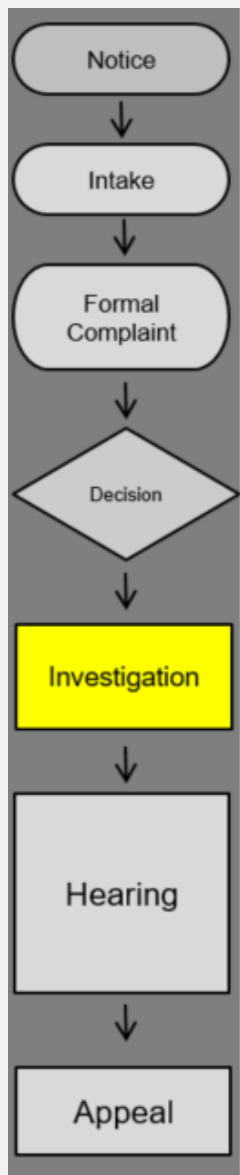
Relevance

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



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

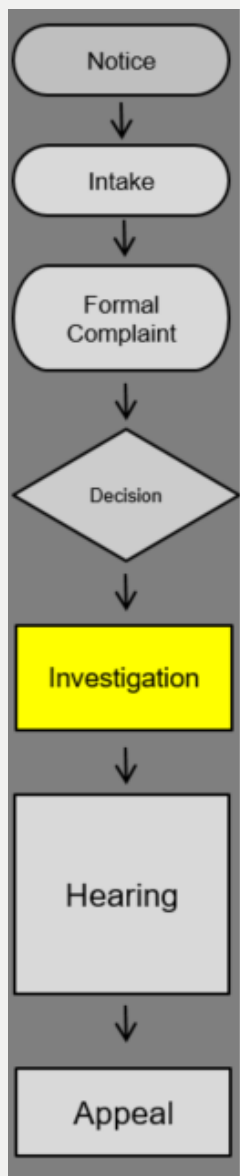
Relevance



- “While the proposed rules do not speak to
 - admissibility of hearsay,
 - prior bad acts,
 - character evidence,
 - polygraph (lie detector) results,
 - standards for authentication of evidence,
 - or similar issues concerning evidence,
- the final regulations require recipients to **gather and evaluate relevant evidence**, with the understanding that . . .

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

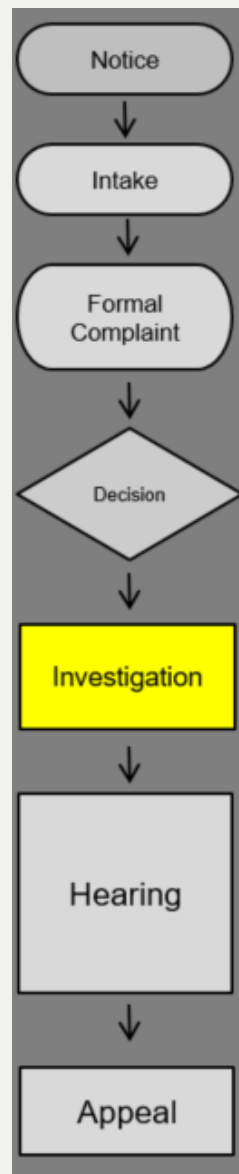
Relevance



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

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

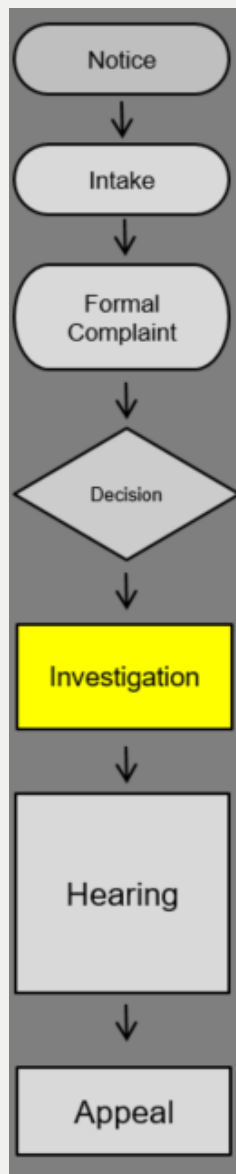
Prior Sexual History



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

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

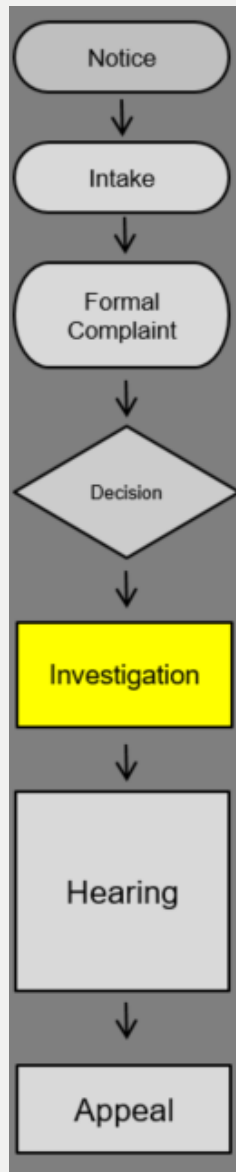
Prior Sexual History



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

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

Prior Sexual History: Motive



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

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

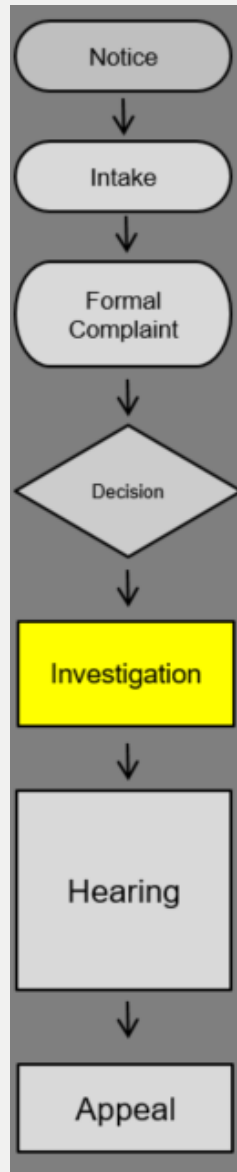
Prior or Subsequent Misconduct

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

Practical Considerations

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

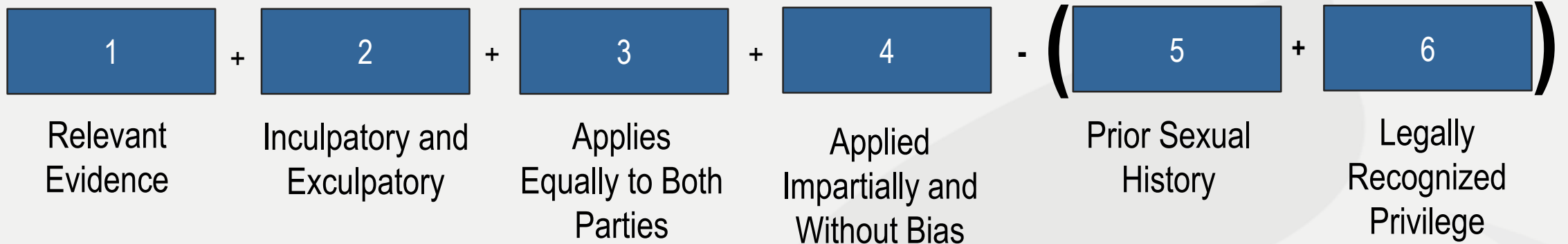
Flexibility to Adopt Rules



- “Within these evidentiary parameters **recipients retain the flexibility to adopt rules that govern how the recipient’s investigator** and decision-maker evaluate evidence and conduct the grievance process (so long as such rules apply equally to both parties).
- **Relevance is the standard that these final regulations require**, and any evidentiary rules that a recipient chooses must respect this standard of relevance.
- For example, a recipient **may not adopt a rule excluding relevant evidence** because such relevant evidence may be **unduly prejudicial, concern prior bad acts, or constitute character evidence.**”

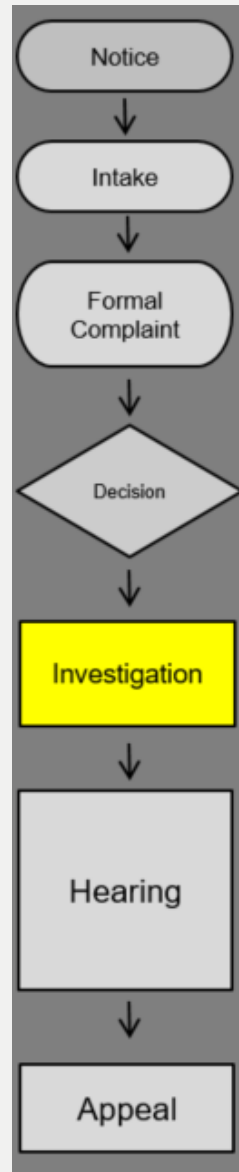
Title IX Regulations May 19, 2020; Preamble at 30248.

Evidentiary Rules Must Consider



EVIDENCE REVIEW

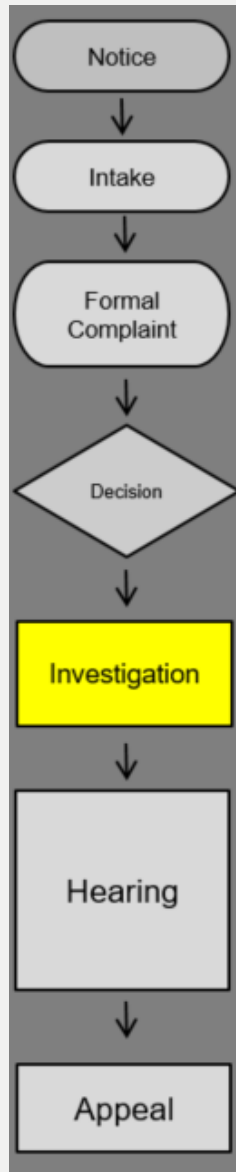
Evidence Review



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

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

Evidence Review

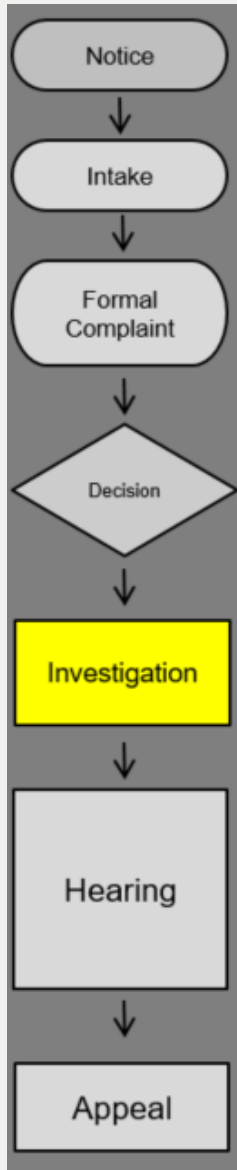


- “Recipient must send to each party and the party’s advisor, if any, **the evidence subject to inspection and review** in an electronic format or a hard copy, and the parties must have at least **10 days to submit a written response**, which the investigator will consider prior to completion of the investigative report.”

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

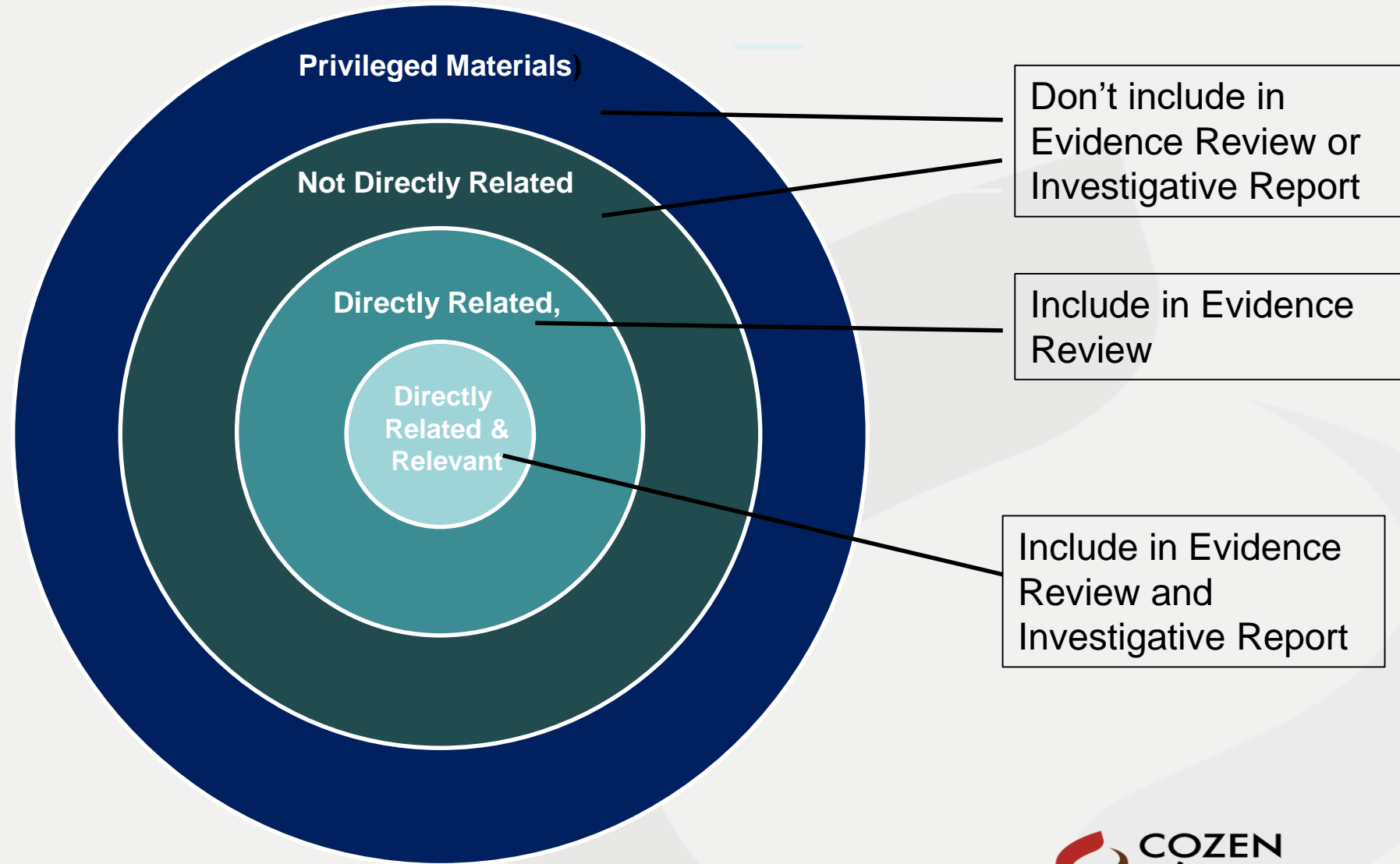
Evidence Review

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

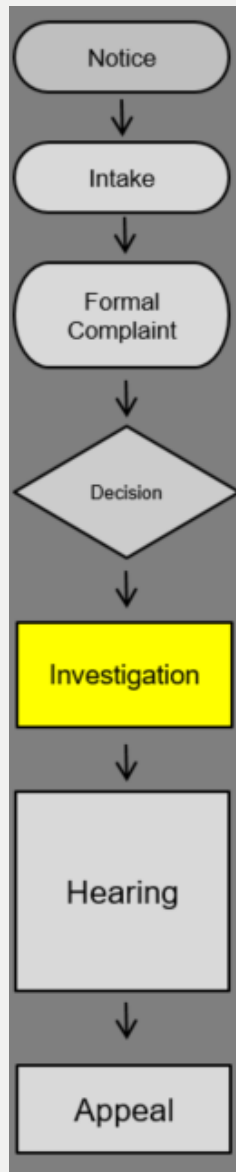


Title IX Regulations May 19, 2020; Preamble 85 F.R.30303

Evidentiary Levels for Inclusion



Directly Related

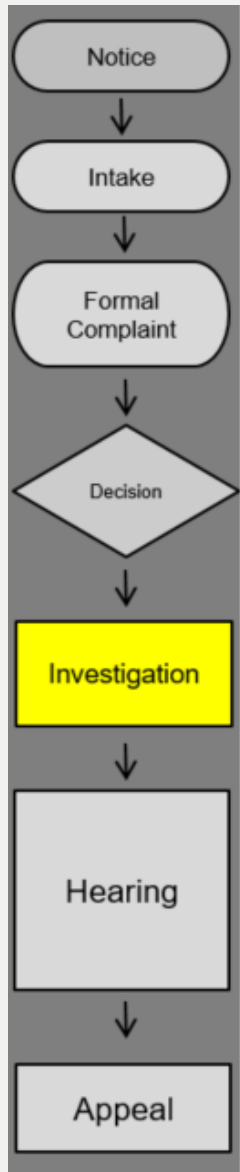


- Not defined in the regulations or the Preamble
 - The Department declines to define certain terms such as “evidence directly related to the allegations,” as these terms should be interpreted using their plain and ordinary meaning.
- “Directly related” aligns with the requirements in FERPA
 - The Department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

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

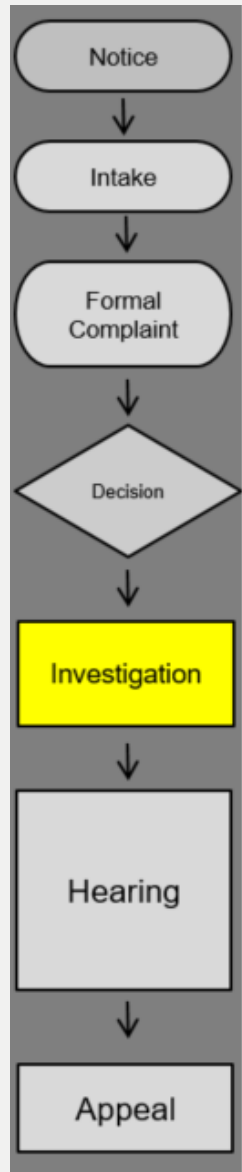
Directly Related

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



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

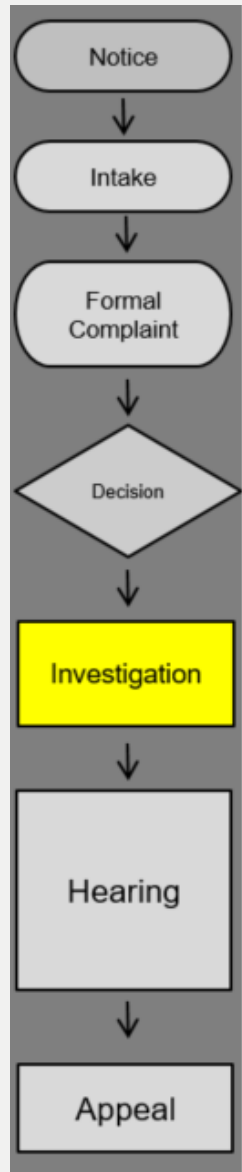
Directly Related vs. Relevant



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

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

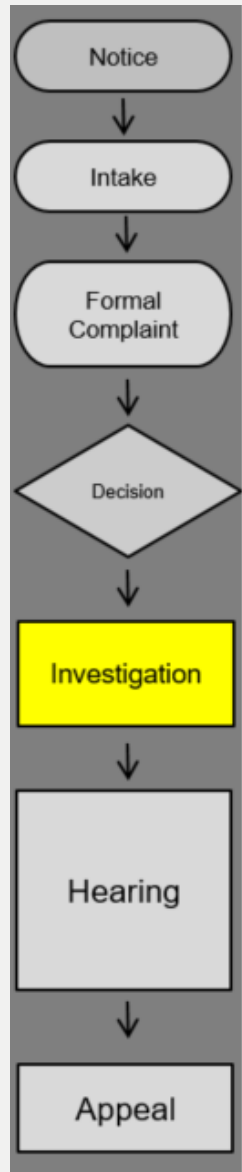
Directly Related



- Redacting information within evidence (documents, interviews, medical records, etc.)
- May be redacted if:
 - Not directly related to the allegations
 - Privileged, or
 - Obtained without proper consent
- A recipient may permit or require the investigator to redact information ... such as information protected by a legally recognized privilege ... contained within documents ... that are directly related to the allegations, before sending the evidence to the parties for inspection and review.

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

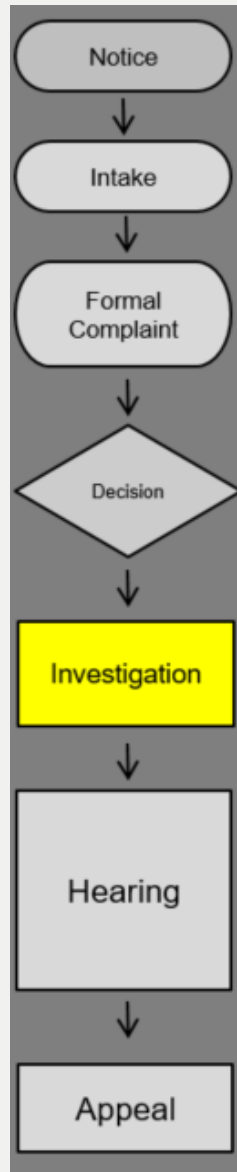
Directly Related



- Imposing restrictions on dissemination or use
 - Recipients may impose on the parties and party advisors restrictions or require a non-disclosure agreement not to disseminate or use any of the evidence for a purpose unrelated to the Title IX grievance process.
 - As long as doing so does not violate the regulations or law.

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

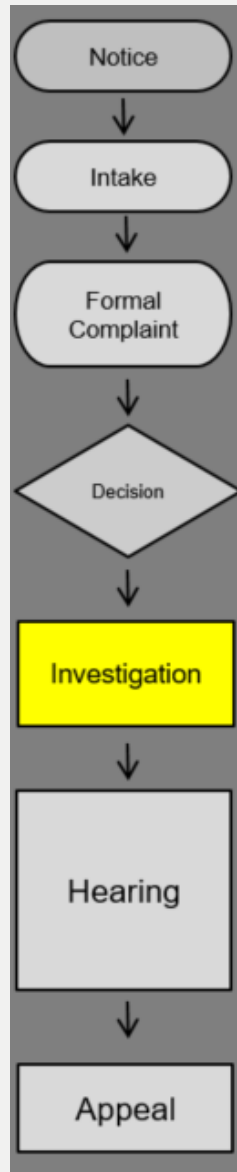
Directly Related



- Exception for evidence that is obtained illegally, such as a wiretap violation
 - If a recipient knows that a recording is unlawfully created under State law, then the recipient should not share a copy of such unlawful recording. The Department is not requiring a recipient to disseminate any evidence that was illegally or unlawfully obtained.

Title IX Regulations May 19, 2020; Preamble 85 F.R.30427.

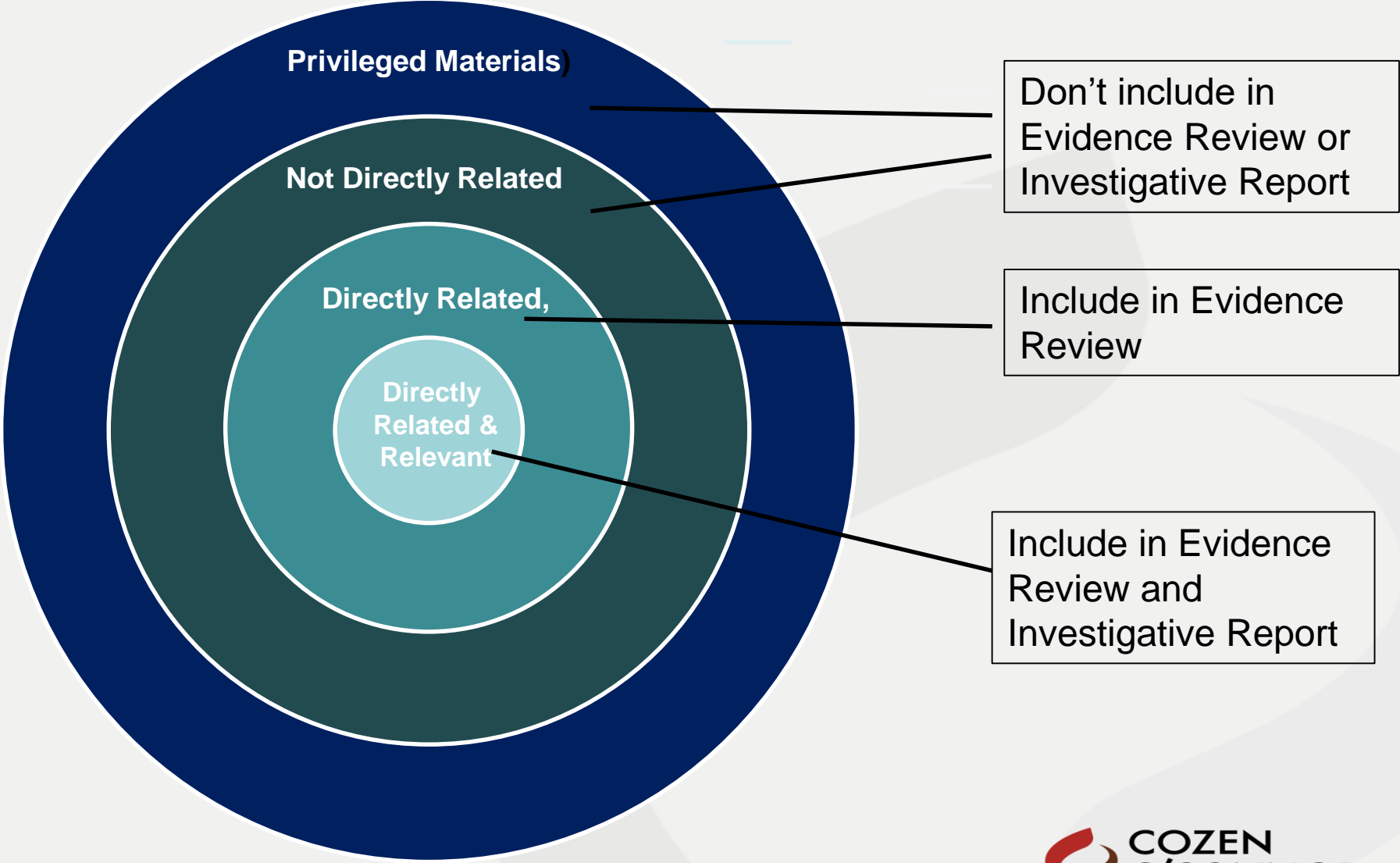
Scope of Parties' Review



- The parties may make corrections, provide appropriate context, and prepare their responses and defenses before a decision-maker reaches a determination regarding responsibility.
- If relevant evidence seems to be missing, a party can point that out to the investigator, and if it turns out that relevant evidence was destroyed by a party, the decision-maker can take that into account in assessing the credibility of parties, and the weight of evidence in the case.

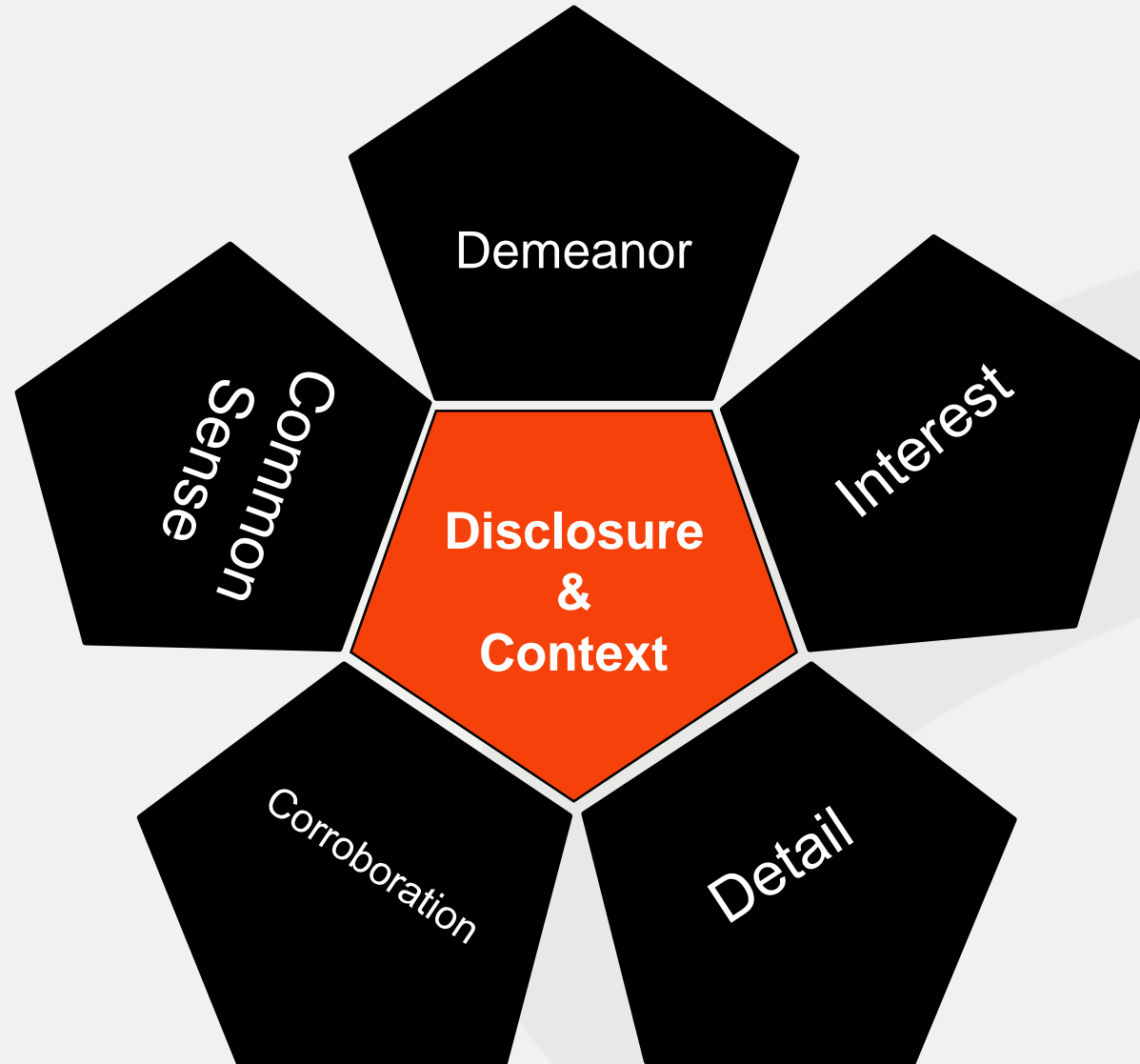
Title IX Regulations May 19, 2020; Preamble 85 F.R.30305 & 30300

Recap of Evidentiary Levels for Inclusion



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?

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

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?

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

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

Integrated Analysis

Dynamics of Sexual Assault	Informed understanding of dynamics of sexual and gender-based harassment and interpersonal violence.
Demeanor	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?
Interest / Motive / Bias	Did the witness have any interest in the outcome of the case, bias, prejudice, or other motive that might affect his/her testimony?
Detail	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?
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?
Common Sense	Does it all add up? (Gut check) Is there something missing?

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

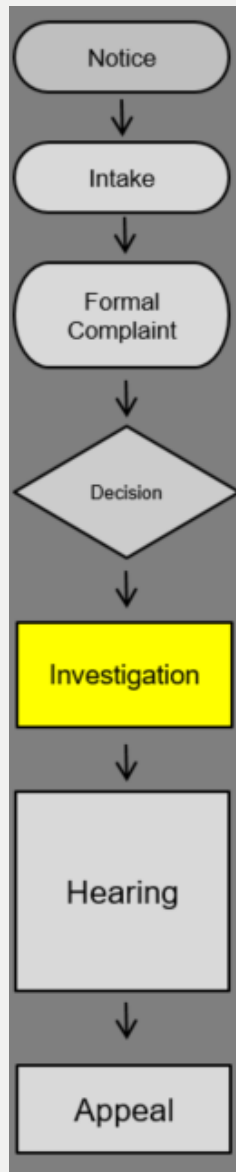
(1997 Sexual Harassment Guidance continued)

- 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

INVESTIGATIVE REPORT

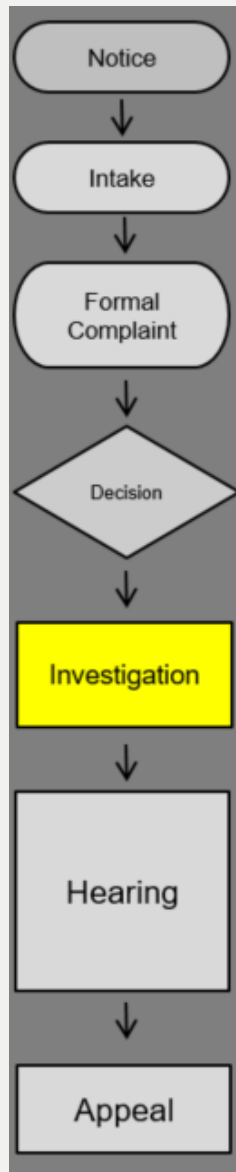
Investigative Report



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

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

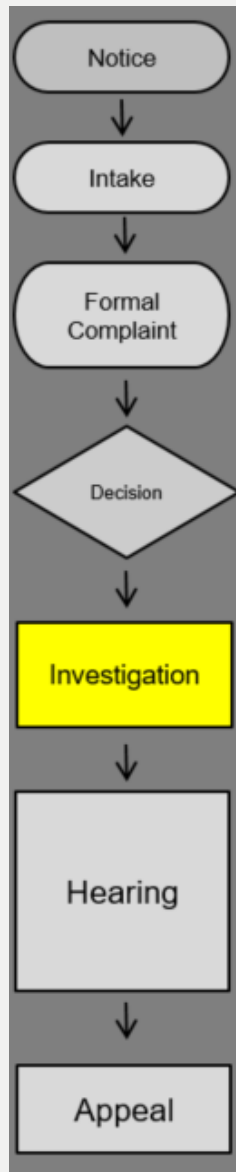
Investigative Report



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

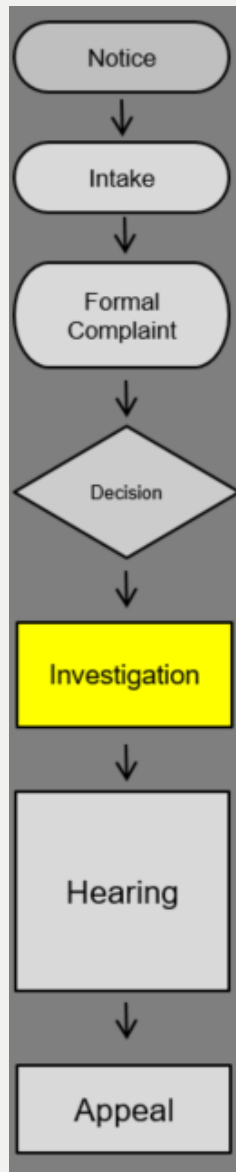
Title IX Regulations May 19, 2020; §§ 106.45(b)(5)(vii); Preamble 85 F.R.30310.

Investigative Report



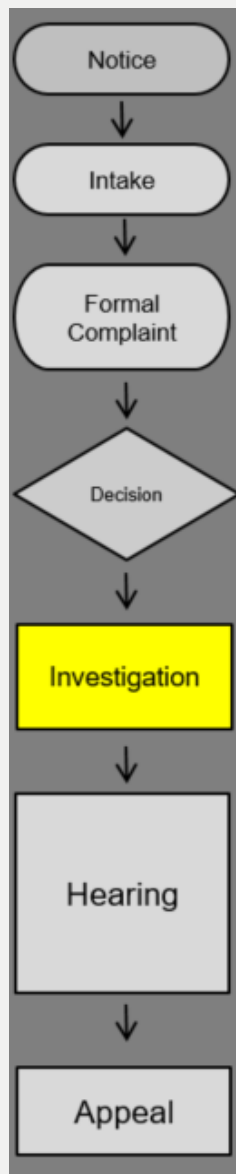
- We note that the decision-maker must prepare a written determination regarding responsibility that must contain certain specific elements (for instance, a description of procedural steps taken during the investigation) and so a recipient **may wish to instruct the investigator to include such matters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

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

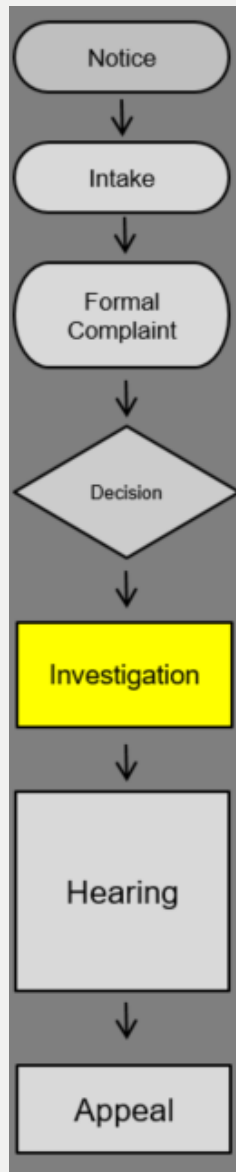
Revisiting Relevance



- Fairly summarizes the relevant evidence
- Investigator may redact information from the report
 - Recipients may permit or require the investigator to redact from the investigative report information that is not relevant, which is contained in documents or evidence that is relevant.

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

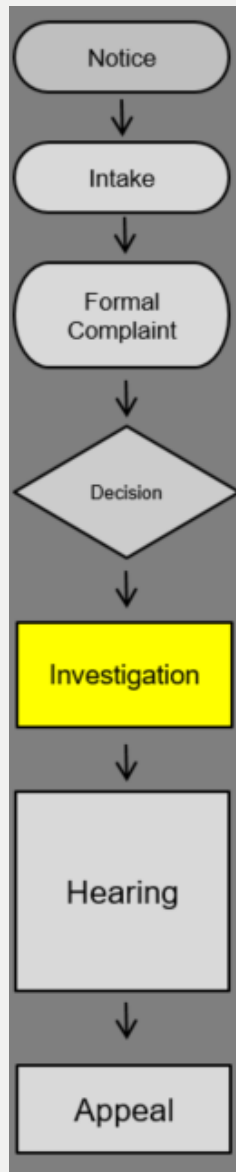
Investigative Report



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

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

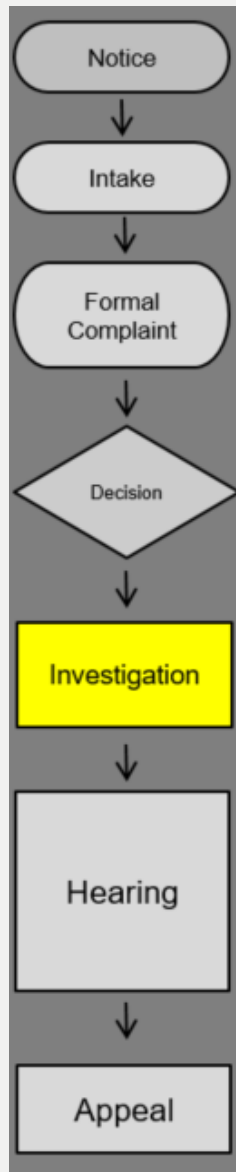
Investigative Report



- At least 10 days prior to the determination of responsibility (hearing)
 - Without advance knowledge of the investigative report, the parties will be unable to effectively provide context to the evidence included in the report.
 - A valuable part of this process is giving the parties (and advisors who are providing assistance and advice to the parties) adequate time to review, assess, and respond to the investigative report in order to fairly prepare for the live hearing or submit arguments to a decision-maker where a hearing is not required or otherwise provided.

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

Investigative Report



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

Title IX Regulations May 19, 2020; §§ 106.45(b)(5)(vii); Preamble 85 F.R.30248-49

Practical Considerations & Effective Practices

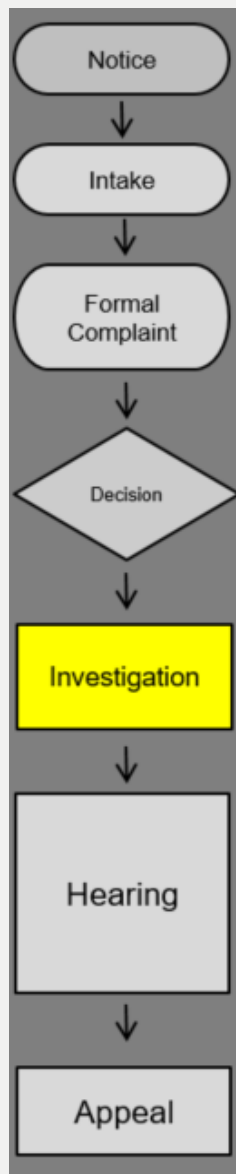
- Use template format with consistent language and content across investigations
- Language: balanced, neutral and non-judgmental
- Avoid declarative credibility language
 - “Unreliable” vs. insufficient information
 - Recognize perspective of the parties
 - Comment on the evidence, not the parties
-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

Recap of Investigation Requirements



REASONABLY PROMPT TIME FRAMES

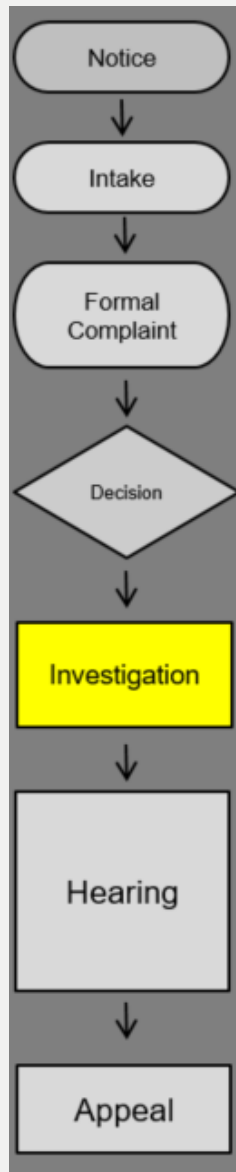
Reasonably Prompt Time Frames



- 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 May 19, 2020 §106.45(b)(1)(v) 85 F.R.30522 & 30575

Reasonably Prompt Time Frames



- The grievance process must include:
 - reasonably prompt time frames for conclusion of the grievance process, including reasonably prompt time frames for filing and resolving appeals and informal resolution processes if the recipient offers informal resolution processes
 - a process that allows for the temporary delay of the grievance process or the limited extension of time frames for good cause with written notice to the complainant and the respondent of the delay or extension and the reasons for the action
- Good cause may include considerations such as:
 - the absence of a party, a party’s advisor, or a witness;
 - concurrent law enforcement activity;
 - the need for language assistance or accommodation of disabilities

Title IX Regulations May 19, 2020 §106.45(b)(1)(v). 85 F.R. 30575

TRAINING

Training

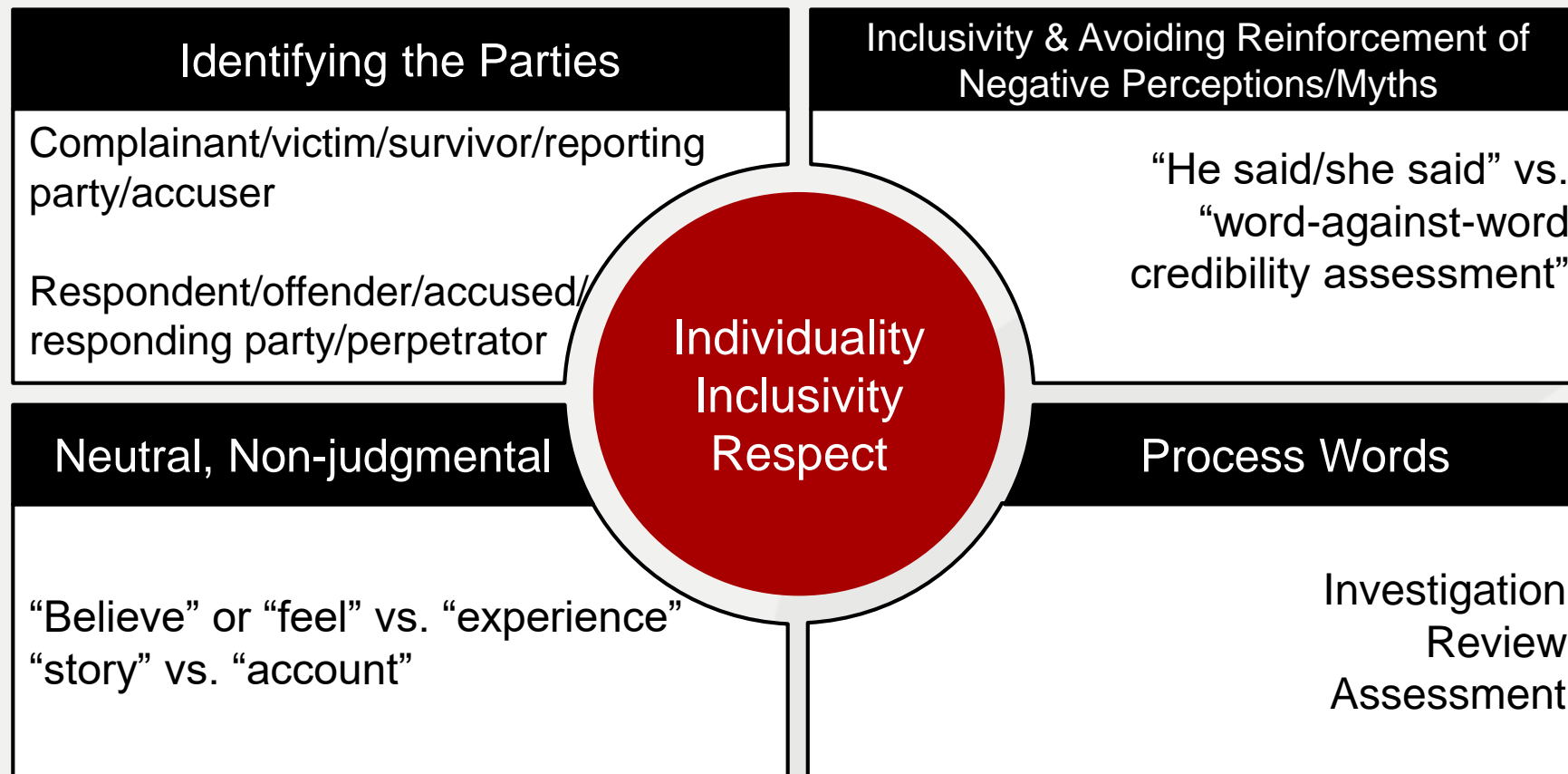
- A recipient must ensure that **Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution** process, receive training on:
 - The definition of sexual harassment in § 106.30
 - The scope of the recipient's education program or activity
 - How to conduct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

Training

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

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

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

- In approximately 80% of campus sexual assault cases, Complainants reported that they were drinking alcohol prior to the incident.¹
- In approximately 60% of campus sexual assault cases, Complainants reported that the Respondent was drinking alcohol prior to the incident.²
- Almost 53% of full-time college students ages 18 to 22 drank alcohol in the past month and about 33% engaged in binge drinking during that same time frame.³

1. [Report on the AAU Climate Survey on Sexual Assault and Sexual Misconduct](#) (2019)

2. Id.

3. [NIH, National Institute on Alcohol Abuse and Alcoholism](#) (citing studies from 2018 and 2019)

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

Get Detailed Information

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

Get Detailed Information

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

Get Detailed Information

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

Get Detailed Information

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

Get Detailed Information

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

Considerations

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

Creating a Universal Timeline

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

Complainant	Source(s)		Respondent	Source(s)
Complainant and C“ pre-gamed at A s apartment. Drank 3 shots Jim Beam and ate chips and guacamole. Walked from A s apartment to second“ pre-gamed at B s apartment. Drank 2 shots of Ciroc Peach and threw up in B s sink.	C interview A interview B interview C s photos w/ date/time	8:00 PM	Respondent arrived at party by himself. Filled one 16-ounce cup with beer and drank it quickly.	R interview
		8:30 PM	Saw friends X, Y, Z. Z gave Respondent keys to his room where Z kept hard liquor. Respondent retrieved a 750 ml bottle of Fireball and drank approximately¼ of it himself over the course of about an hour and a half. X and Y each had about 2 shot glasses full.	R interview X interview Y interview Z interview
		9:00 PM		
		9:30 PM		
Complainant arrived at party with A, B, C. Complainant s friend D got her a 16-ounce cup of “jungle juice” which she drank slowly over the course of about an hour.	C interview A interview B interview D interview	10:00 PM		
Complainant went upstairs to check out the view from the roof. As she was walking back downstairs, she took the last sip of her“ jungle juice” and saw Respondent. Complainant texted her mom,“ addfa.”	C interview C s texts C s photos w/ date/time	10:30 PM	Respondent texted Z“ thanks for the fireball. Let me know where I can meet you to give you your key back.” Respondent saw Complainant coming down the stairs.	R interview R s texts
Complainant reported a complete memory loss from about 10:30 until the next morning.	C interview	11:00 PM	Complainant and Respondent went upstairs into the bathroom. Respondent s friend W walked in as they were kissing and undressing.	R interview W interview
Complainant s friend A saw her leaving the bathroom with her shirt on backwards. A escorted Complainant home.	A interview	11:30 PM	Respondent left the bathroom and texted Z“ I just got laid!”	R interview Z interview R s texts

INVESTIGATIVE RESOURCES

Incident Response Checklist

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

Incident Report Form

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

Investigation Checklist

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

Investigation Checklist: Reporter

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

Investigation Checklist: Reporter

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

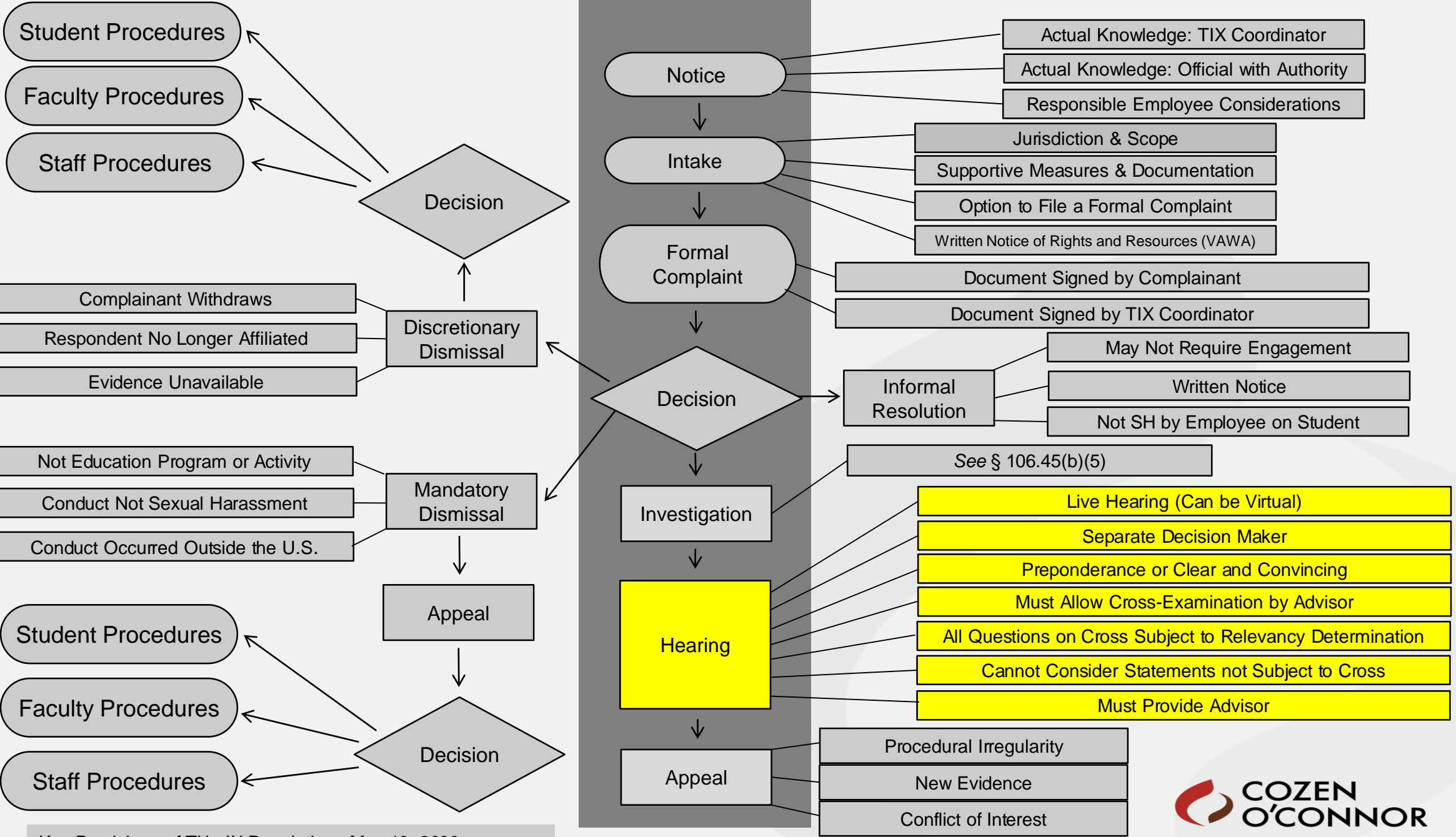
Investigation Checklist: Respondent

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

Resources

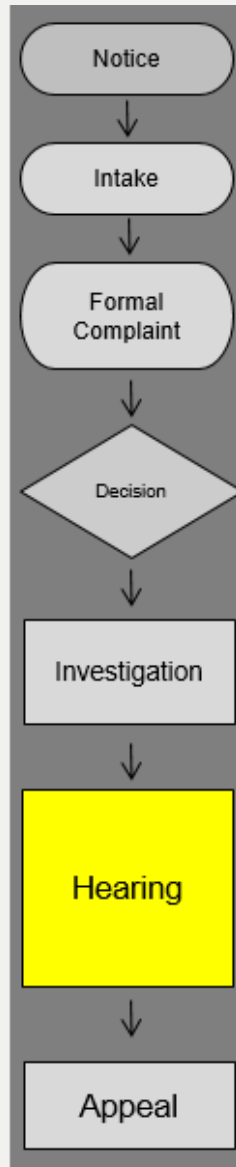
- As investigator, develop and be prepared to refer to:
 - Incident Response Checklist
 - Incident Report Form
 - Investigation Checklist
 - Investigation Checklist: Complainant
 - Investigation Checklist: Respondent

OVERVIEW OF HEARING REQUIREMENTS



ROLE OF DECISION-MAKER

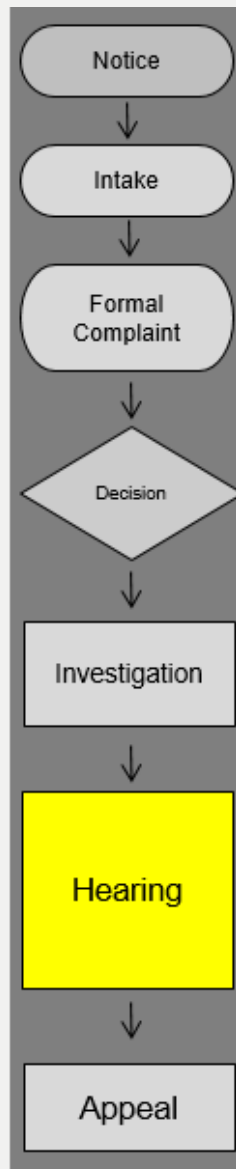
Determine Relevance of Questions



- Before a complainant, respondent, or witness answers a cross-examination or other question, the decision-maker(s) must **first determine whether the question is relevant ...**

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

Explain Decisions to Exclude Questions

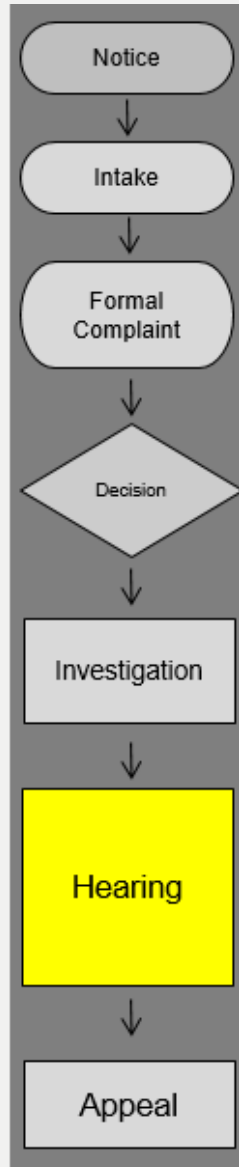


- The decision-maker(s) must explain to the party proposing the questions **any decision to exclude** a question as not relevant.

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

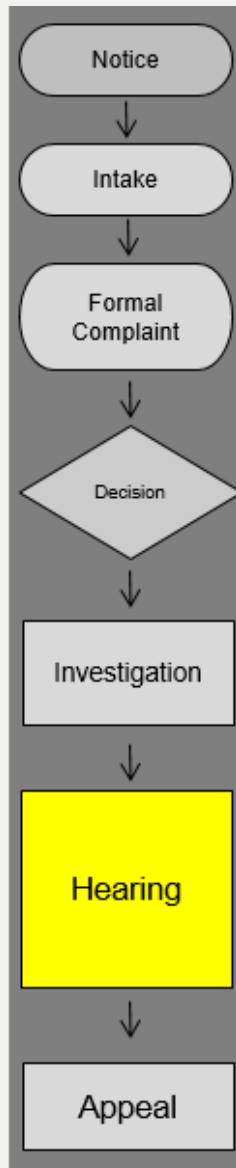
Apply the Standard of Evidence

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



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

Issue Written Determinations



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

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

Separate Decision-Maker

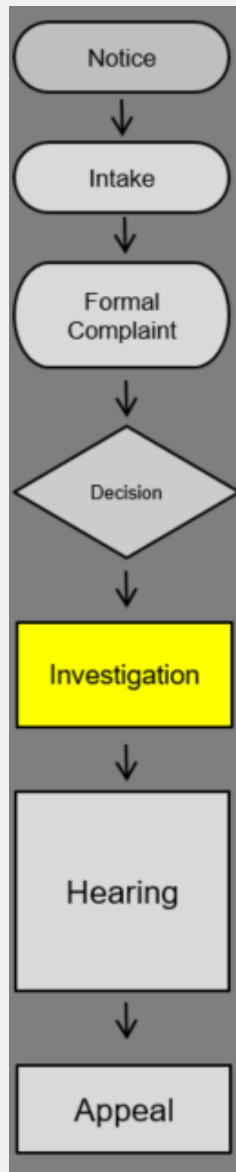
- The Department wishes to clarify that the final regulations **require the Title IX Coordinator and investigator to be different individuals from the decision-maker**, but nothing in the final regulations requires the Title IX Coordinator to be an individual different from the investigator.



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

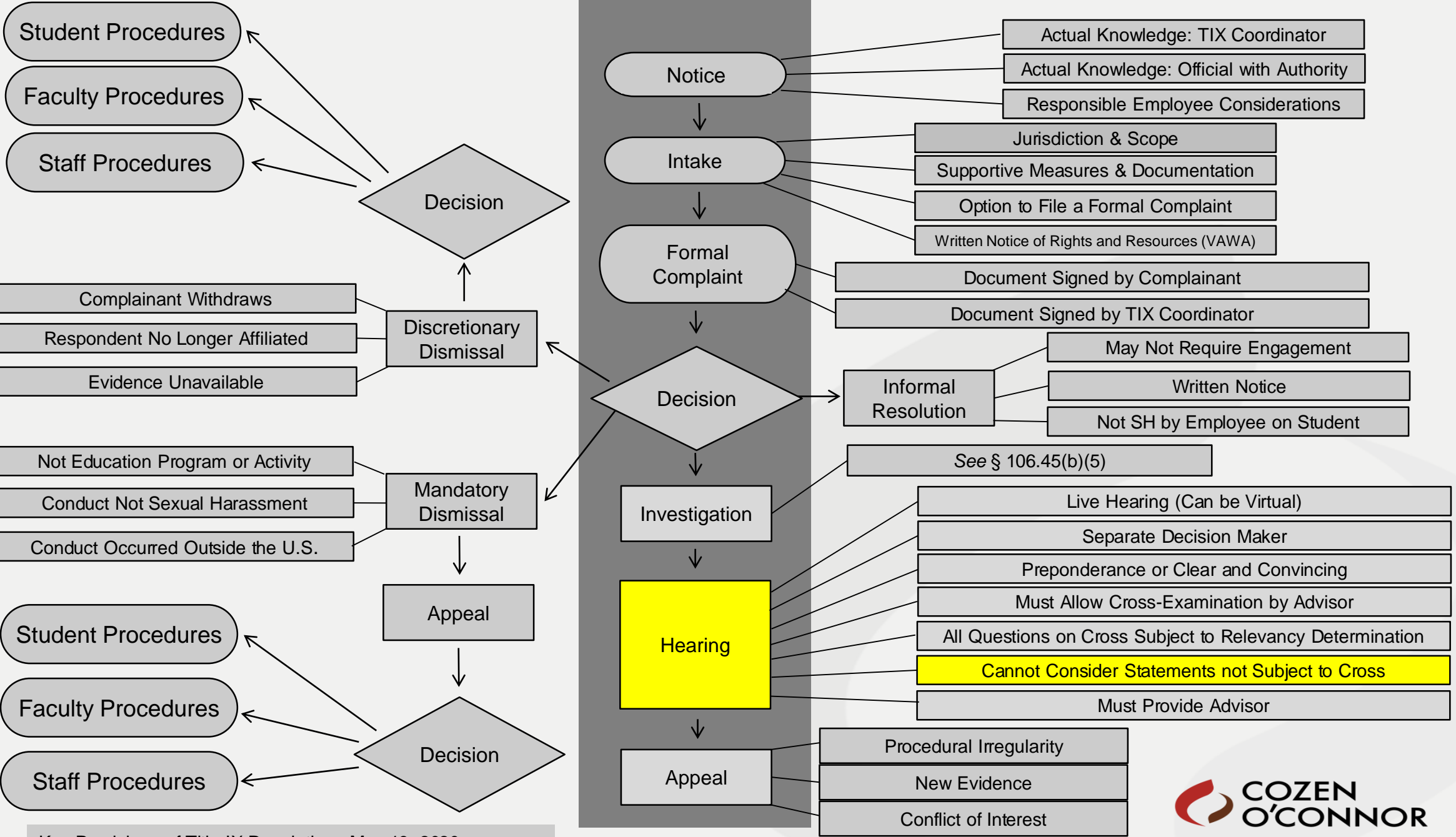
Investigator May not Determine Responsibility

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

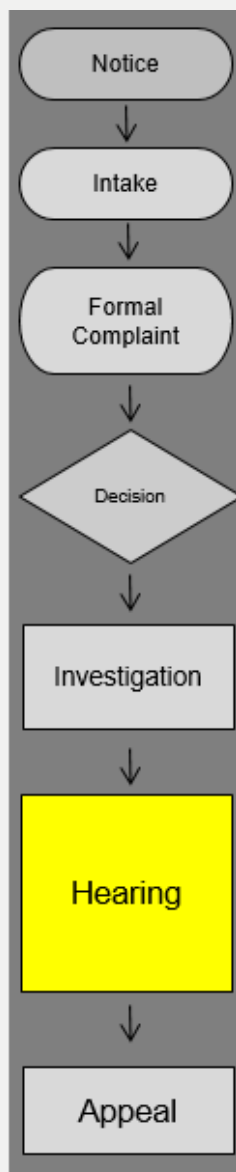


Title IX Regulations May 19, 2020; §§ 106.45(b)(5)(vii); Preamble 85
F.R.30436 235

EXCLUSION OF STATEMENTS NOT SUBJECT TO CROSS-EXAMINATION



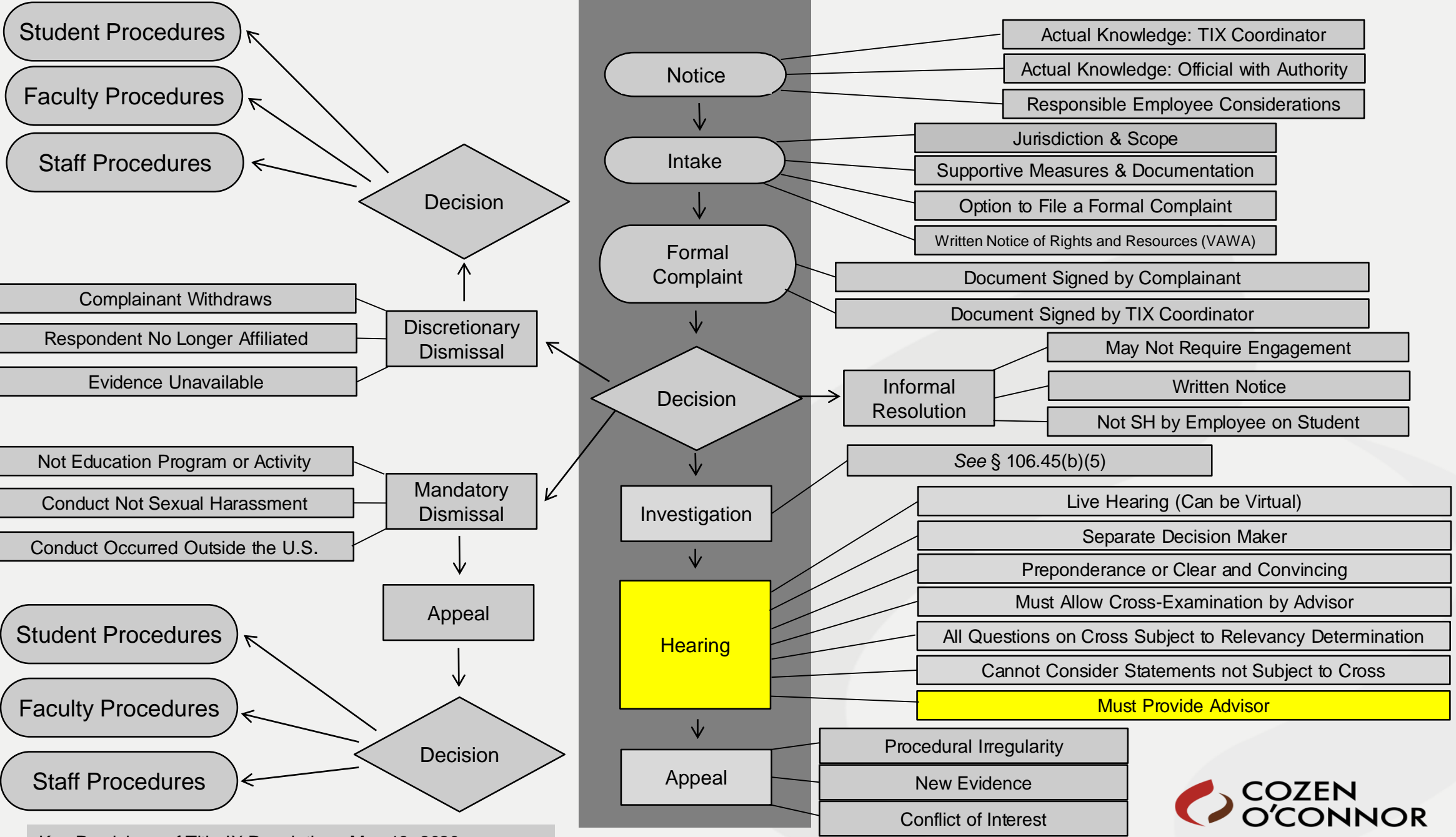
Exclusion of Statement



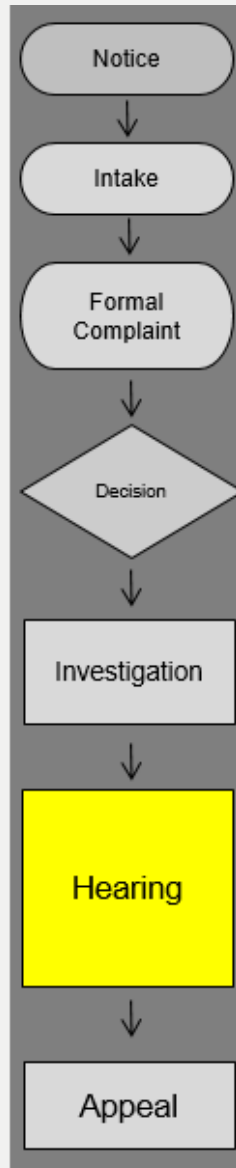
- If a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) **must not rely on any statement of that party or witness** in reaching a determination regarding responsibility; provided, however, that the decision-maker(s) cannot draw an inference about the determination regarding responsibility based solely on a party's or witness's absence from the live hearing or refusal to answer cross-examination or other questions.

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

ADVISOR OF CHOICE



Title IX: Advisor of Choice



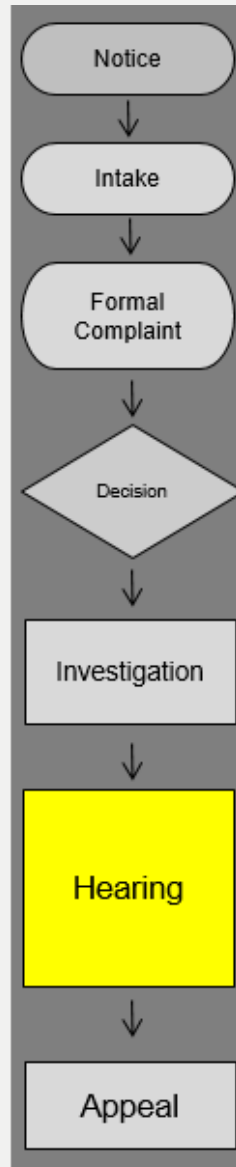
- Parties must have the same opportunities to ... be accompanied to any related meeting or proceeding by **an advisor of their choice**.
- The advisor may be, but is not required to be, **an attorney**.
- A recipient **may establish restrictions** on advisors' participation, as long as the restrictions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

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

ROLE OF THE ADVISOR AT HEARING

Role of the Advisor

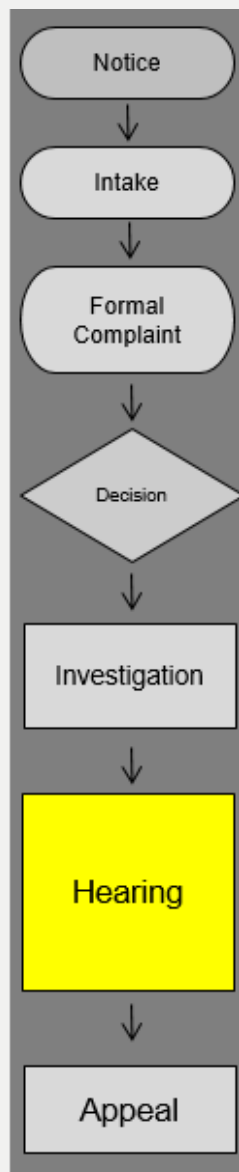


- At the live hearing, the decision-maker(s) must permit each party's advisor to **ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility.**

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

Advisor's Role at the Hearing

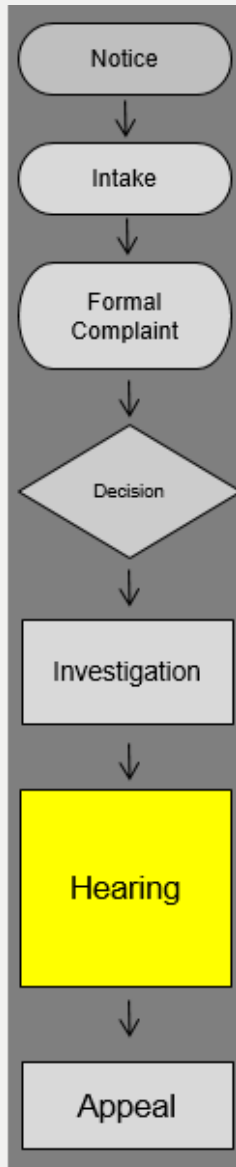
- Such cross-examination at the live hearing must be conducted directly, orally, and in real time by the party's advisor of choice and never by a party personally, **notwithstanding the discretion of the recipient under paragraph (b)(5)(iv) of this section to otherwise restrict the extent to which advisors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



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

Cross-Examination by Advisor

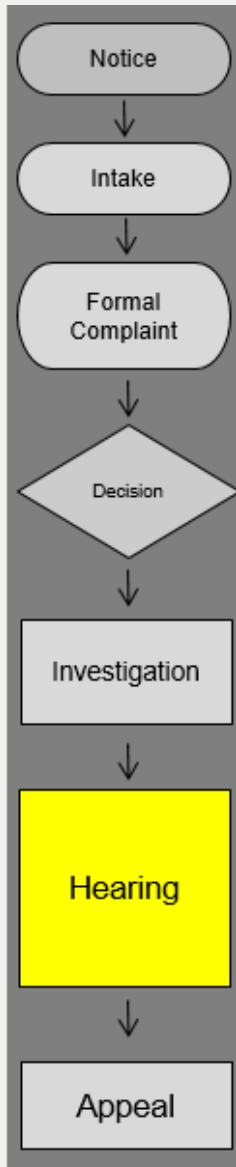
- [A] party's advisor may appear and conduct cross-examination **even when the party whom they are advising does not appear.**



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

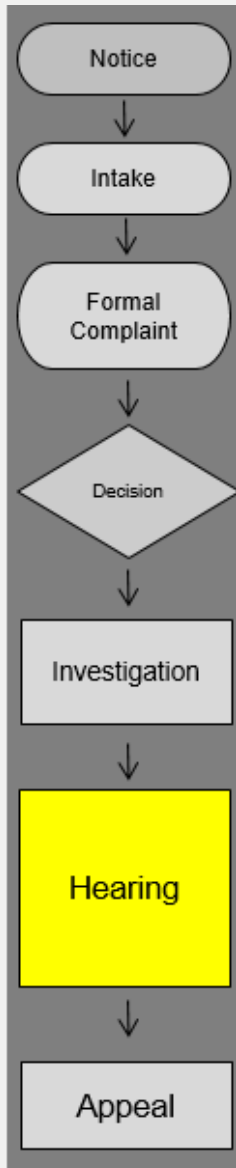
Discretion as to Advisor's Role

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



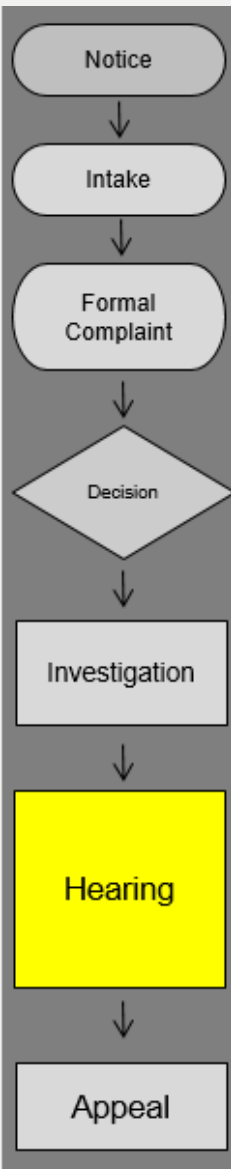
Discretion as to Advisor's Role

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



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

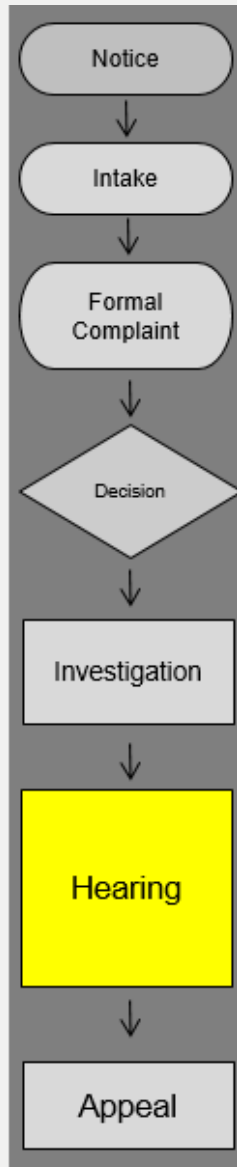
Obligation to Provide an Advisor



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

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

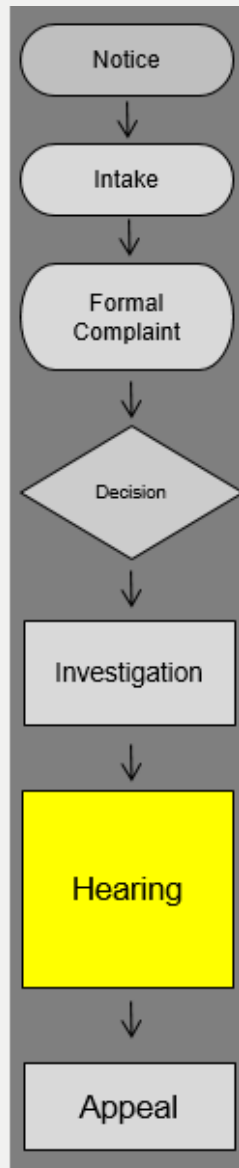
Must Provide Advisor Even in Party's Absence



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

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

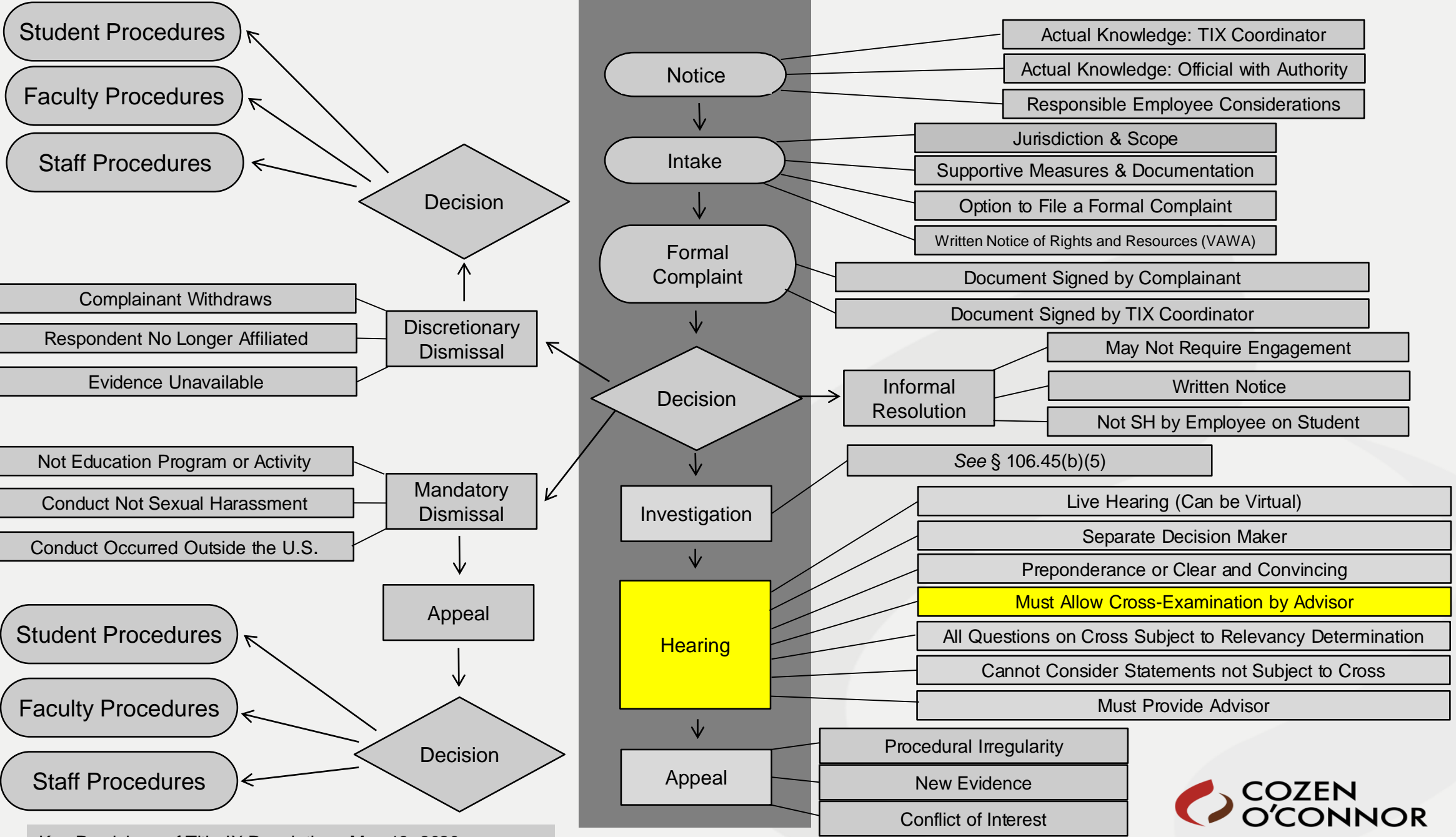
Appearance Without an Advisor



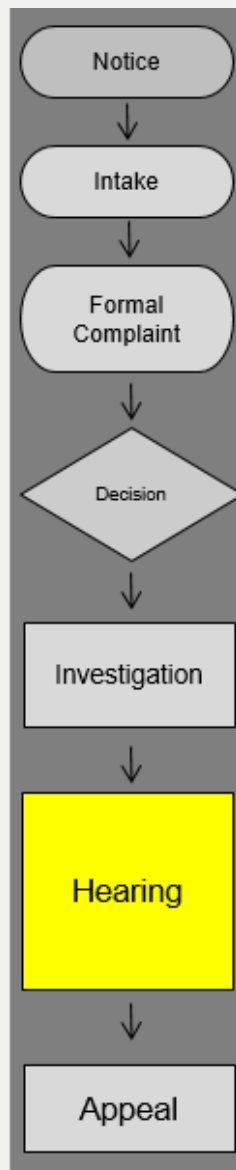
- The final regulations do not preclude recipients from adopting a rule that requires parties to inform the recipient in advance of a hearing whether the party intends to bring an advisor of choice to the hearing; but **if a party then appears at a hearing without an advisor** the recipient would need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

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

CROSS-EXAMINATION BY ADVISOR



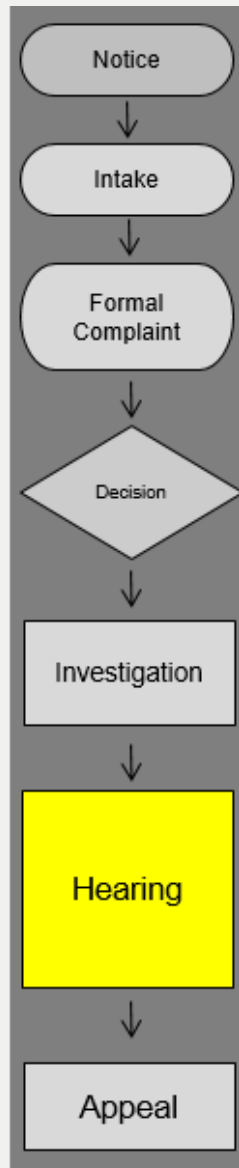
Cross-Examination



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

Title IX Regulations, May 19, 2020; § 106.45(b)(6)
254

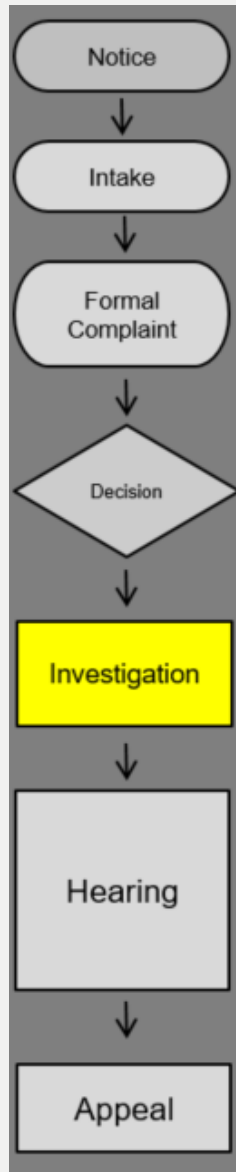
Cross-Examination



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

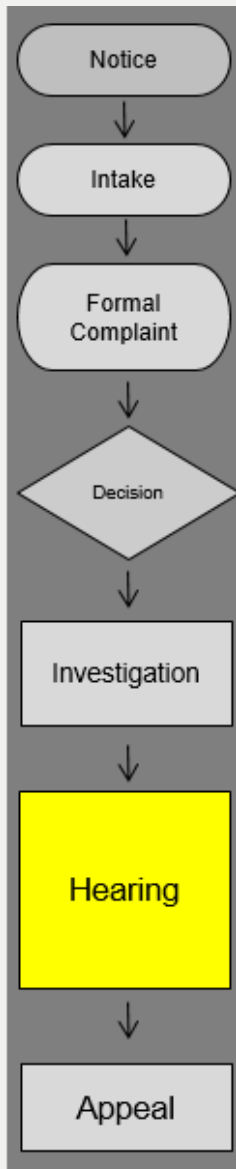
Title IX Regulations, May 19, 2020; § 106.45(b)(6)

Recap on Evidence Review



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

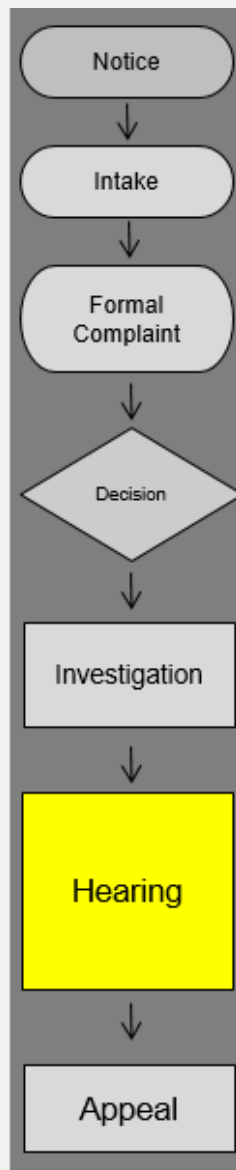
Availability of Evidence at the Hearing



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

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

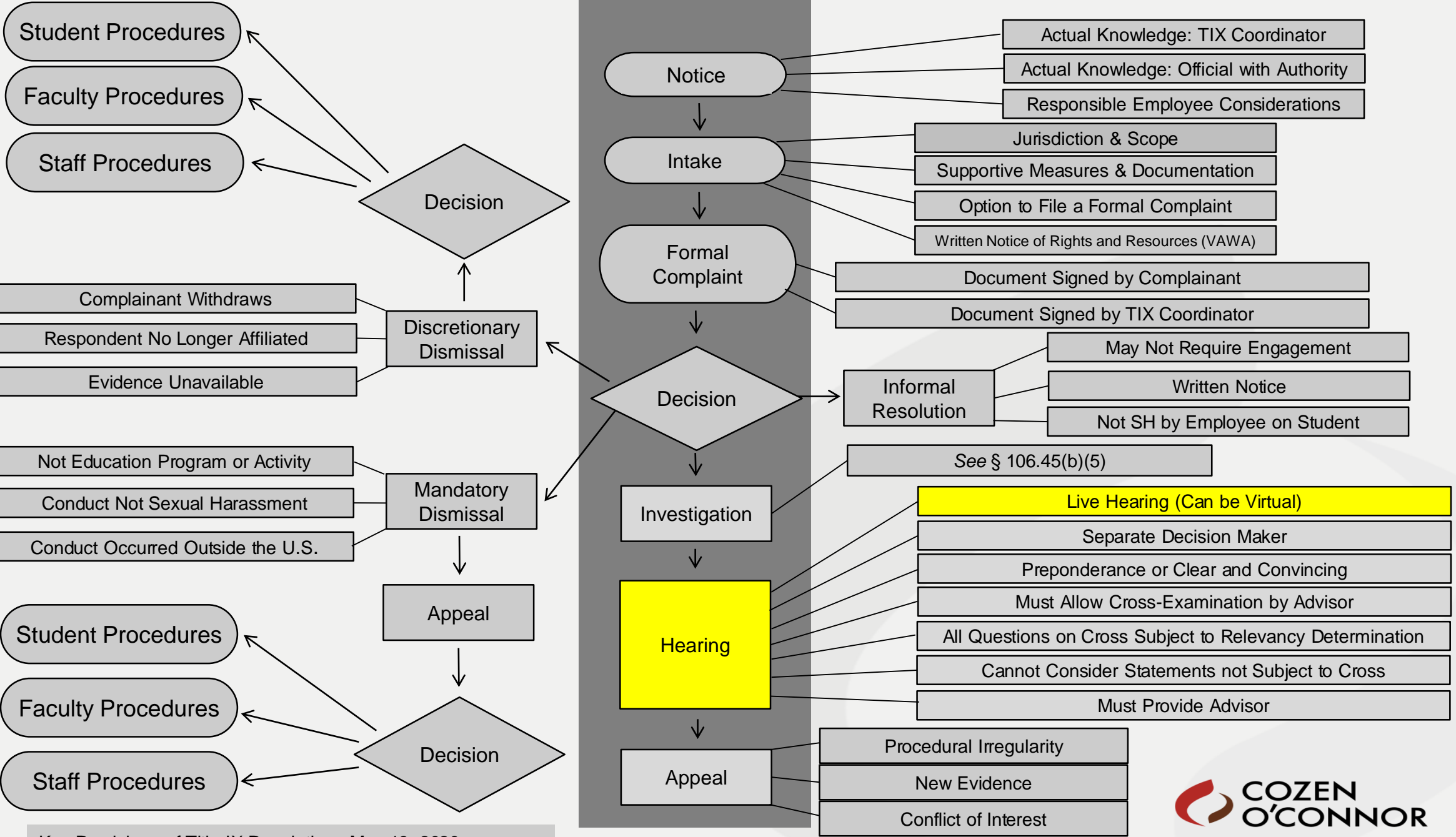
Cross-Examination



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

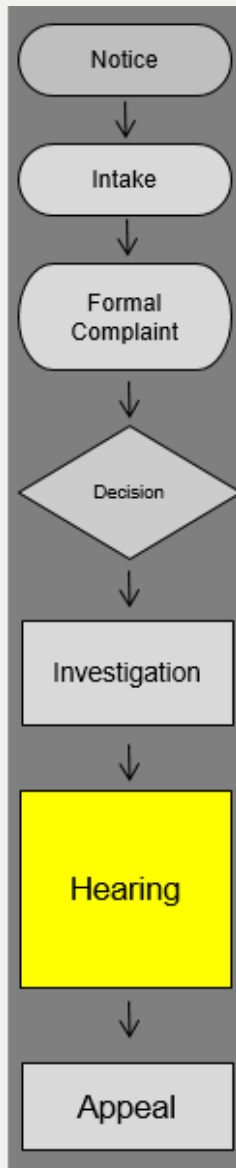
Title IX Regulations, May 19, 2020; § 106.45(b)(6)

THE LIVE HEARING REQUIREMENT



Live Hearing Required

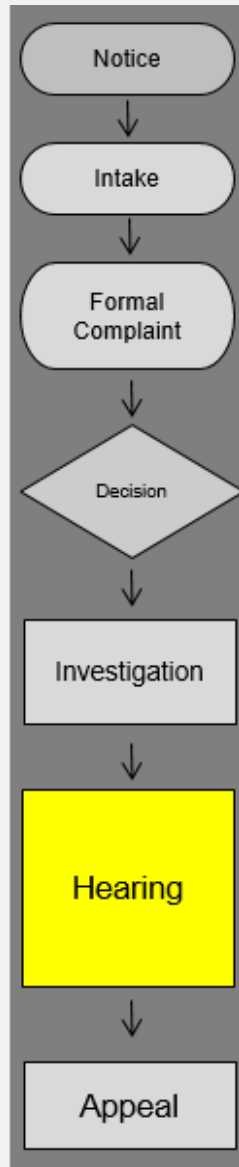
- For postsecondary institutions, the recipient's grievance process **must provide for a live hearing.**



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

Option to Use Technology

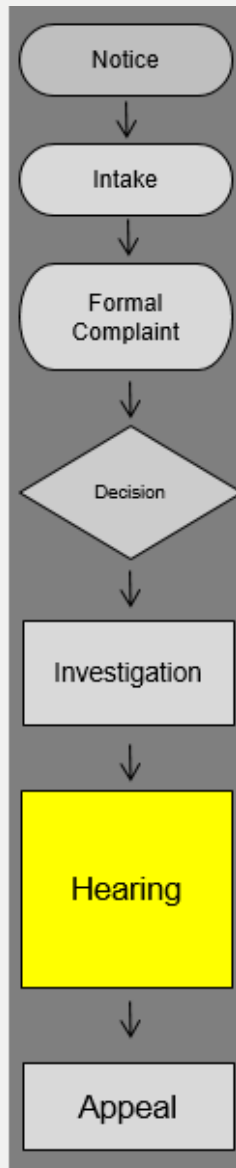
- Live hearings pursuant to this paragraph may be conducted with all parties physically present in the same geographic location or, at the recipient's direction, any or all parties, witnesses and other participants may appear at the live hearing **virtually, with technology** enabling participants simultaneously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



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

Virtual Hearing Considerations

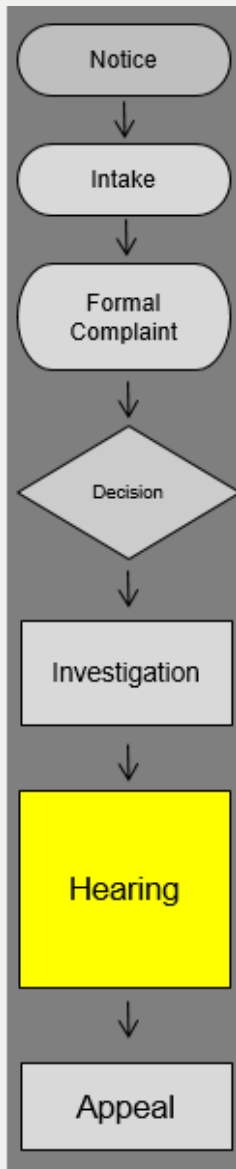
- At the request of either party, the recipient must provide for the live hearing to occur with the parties located in separate rooms with **technology** enabling the decision-maker(s) and parties to **simultaneously see and hear** the party or the witness answering questions.



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

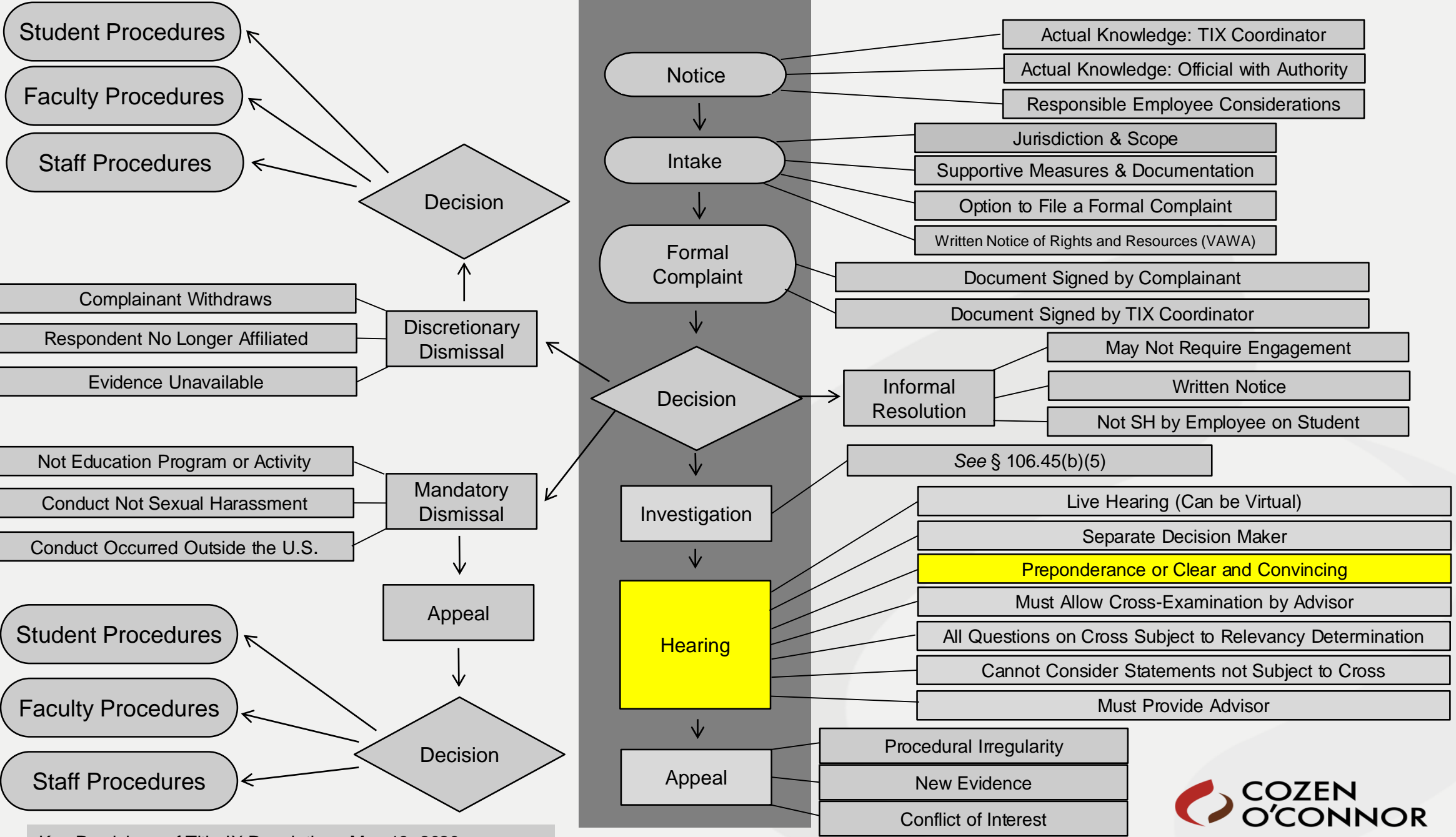
Transcript or Recording

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

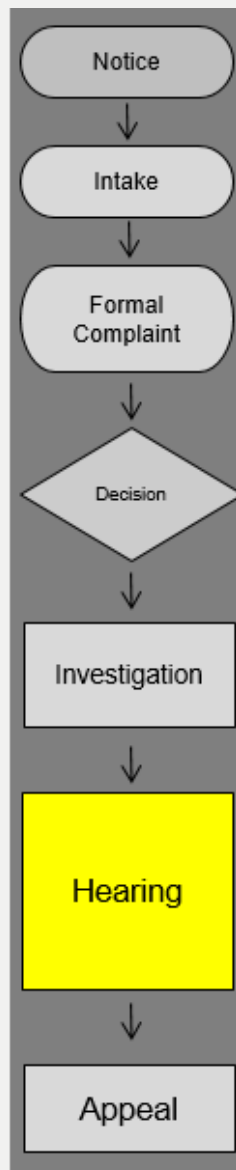


Title IX Regulations, May 19, 2020; § 106.45(b)(6)

STANDARD OF EVIDENCE



Standard of Evidence



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

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

Standard of Evidence



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

Clear and Convincing*

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

* Based on common usage.

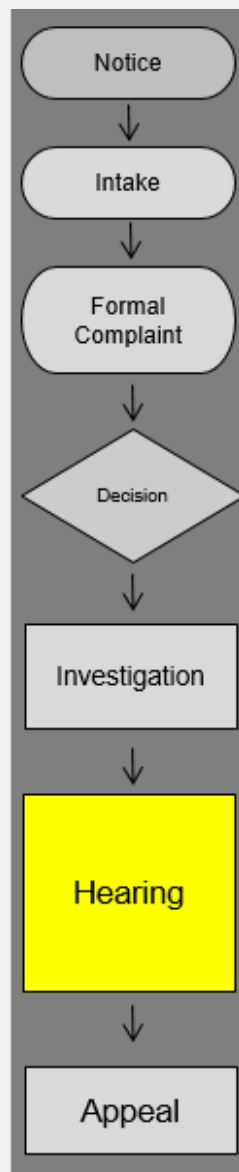
Preponderance of the Evidence*

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

* Based on common usage.

SANCTIONING

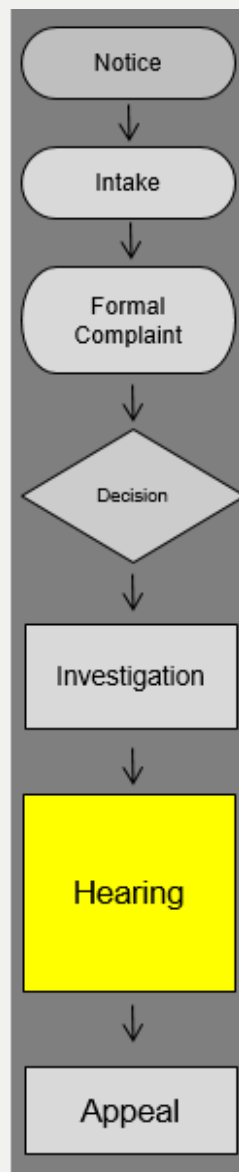
Sanctioning



- An equitable response for a respondent means a grievance process that complies with § 106.45 before the imposition of any disciplinary sanctions or other actions that are not supportive measures, as defined in § 106.30.
- The grievance process must describe the range of possible disciplinary sanctions and remedies.

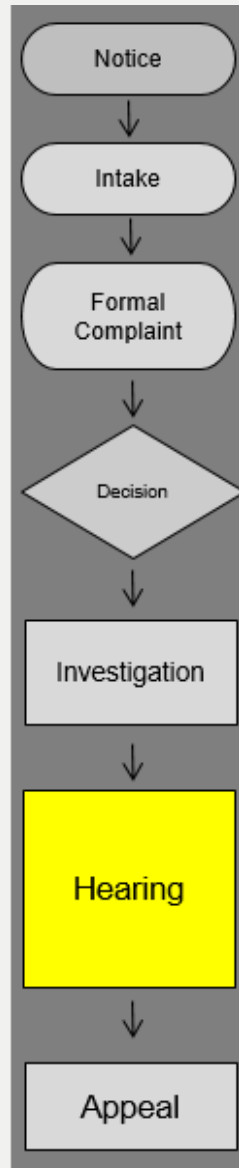
Title IX Regulations May 19, 2020 § 106.44 (a); § 106.45(b)(1)(vii) 85 F.R. 30575, 30395

Discretion in Sanctioning



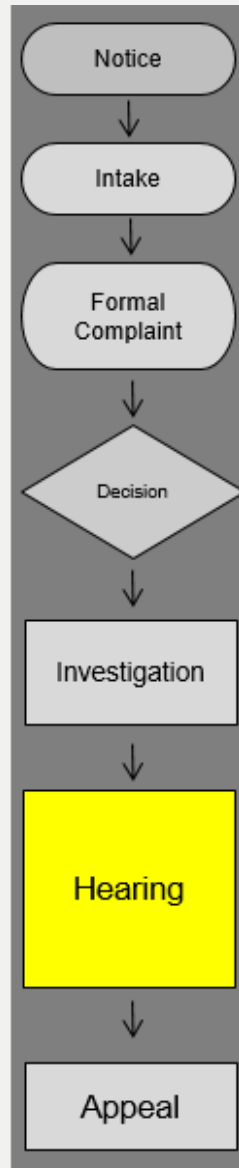
- The Department does not wish to dictate to recipients the sanctions that should be imposed when a respondent is found responsible for sexual harassment as each formal complaint of sexual harassment presents unique facts and circumstances.
- As previously stated, the Department believes that teachers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

Educational Purpose



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

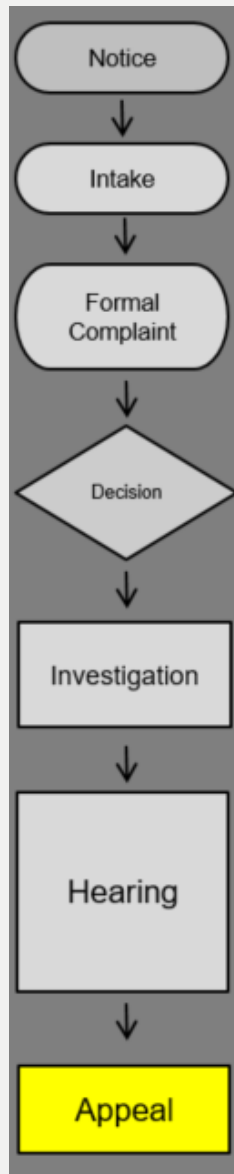
Appeal of Sanction



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

APPEALS

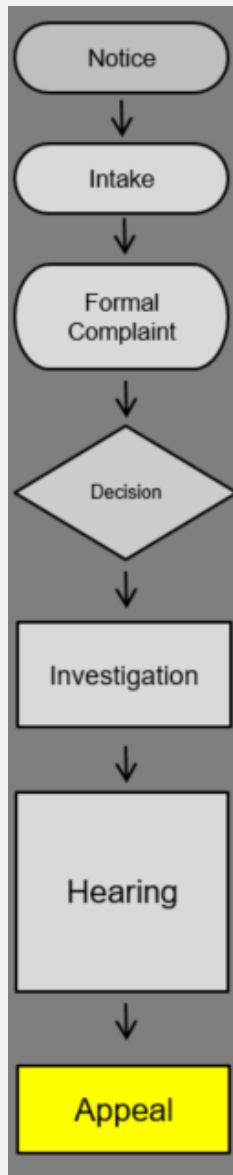
Appeals



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

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

Appeals

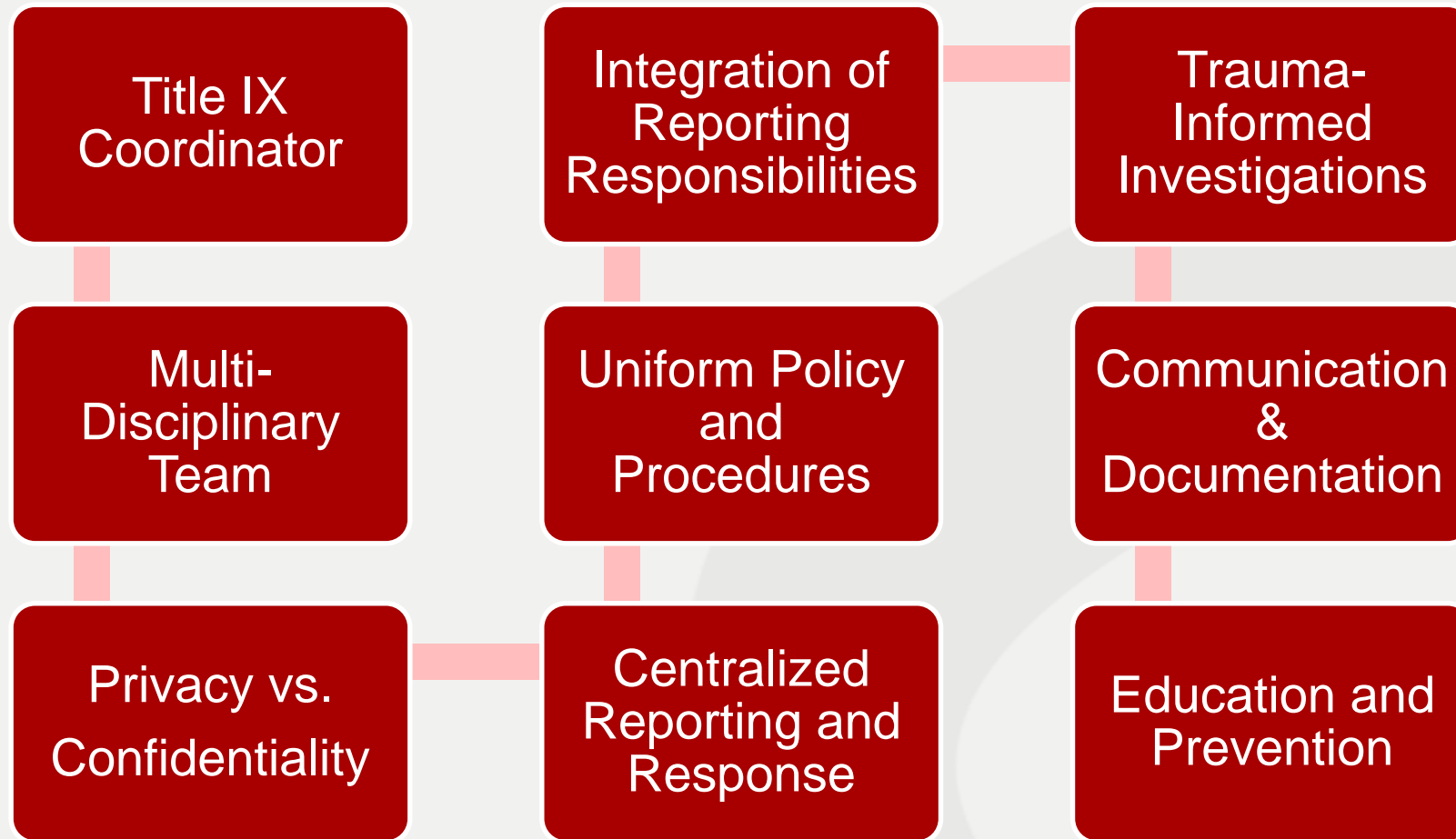


- As to all appeals, the recipient must:
 - Notify the other party in writing when an appeal is filed and implement appeal procedures equally for both parties;
 - Ensure that the decision-maker(s) for the appeal is not the same person as the decision-maker(s) that reached the determination regarding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

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

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

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

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

Privacy vs. Confidentiality

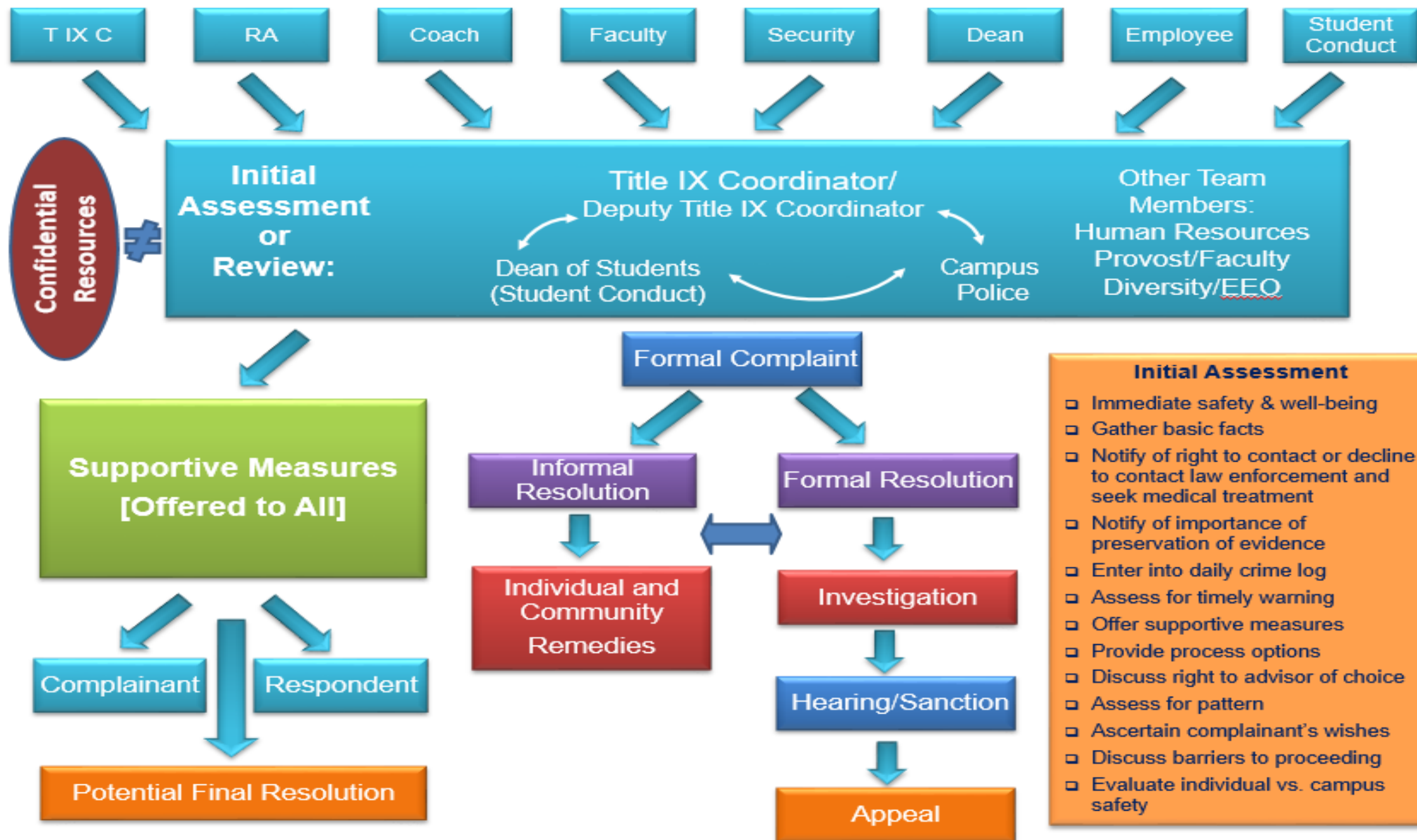
- Ensure policies clearly identify reporting options and support resources both on and off campus
- Delineate confidential resources vs. non-confidential reporting options in policy and training
- Ensure all employees are familiar with Title IX reporting expectations
- Offer clear and easy to follow 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

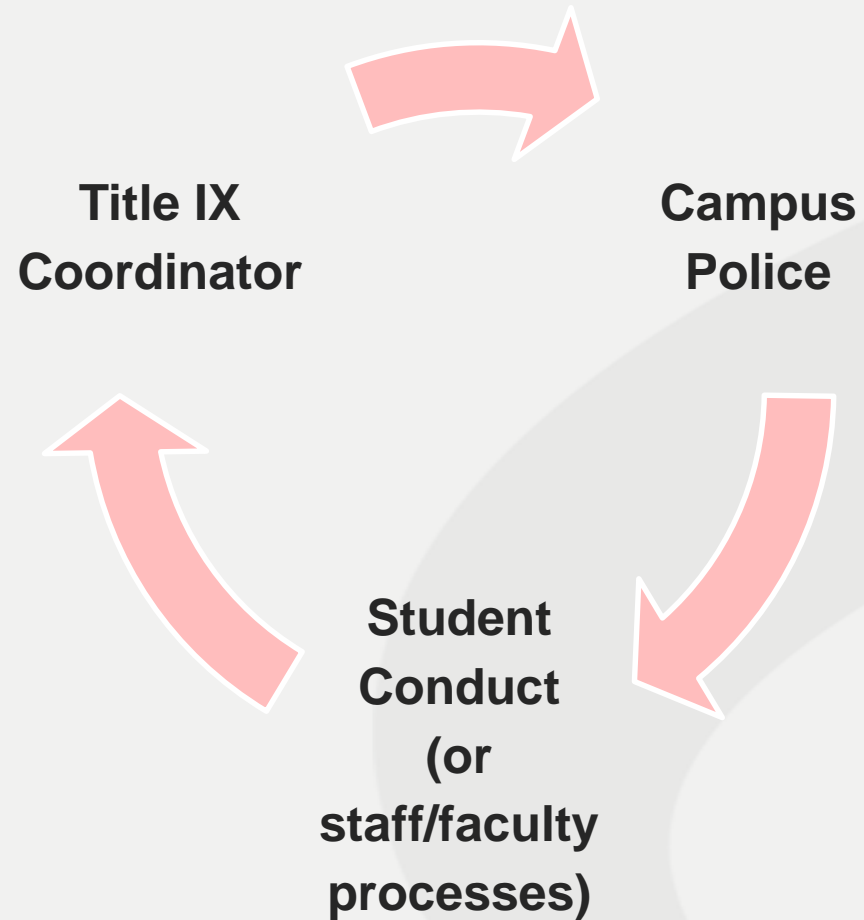
- Students or employees wishing to obtain confidential assistance may do so by speaking with professionals who are obligated by law to maintain confidentiality
- Confidential resources generally include medical providers, mental health providers, clergy, and rape crisis counselors
- Exceptions to confidentiality 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



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:
 - Supportive measures
 - Determination whether to proceed
 - Investigative practices
 - Sanctions
 - Community remedies
- Transparency in outcomes

Use of Slides

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