

An Integrated and Coordinated Approach to Title IX: Understanding the Intersection of Title IX, the Clery Act and VAWA

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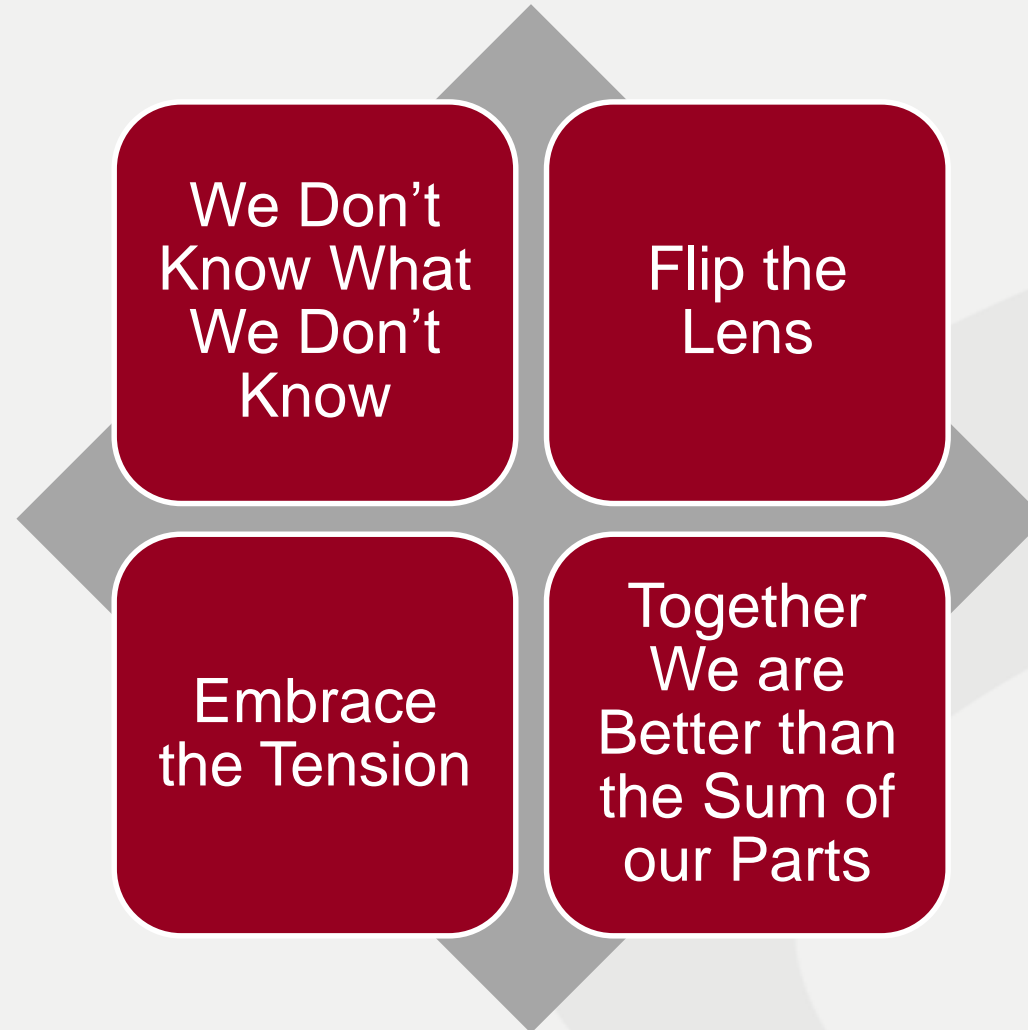
Use of Slides

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

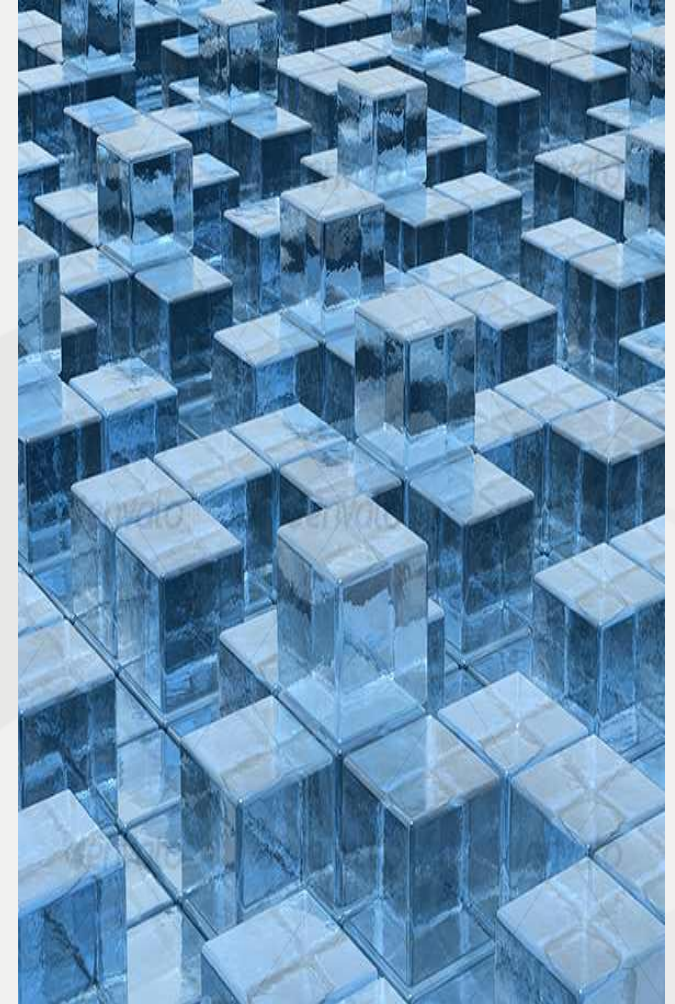


Framing the Conversation

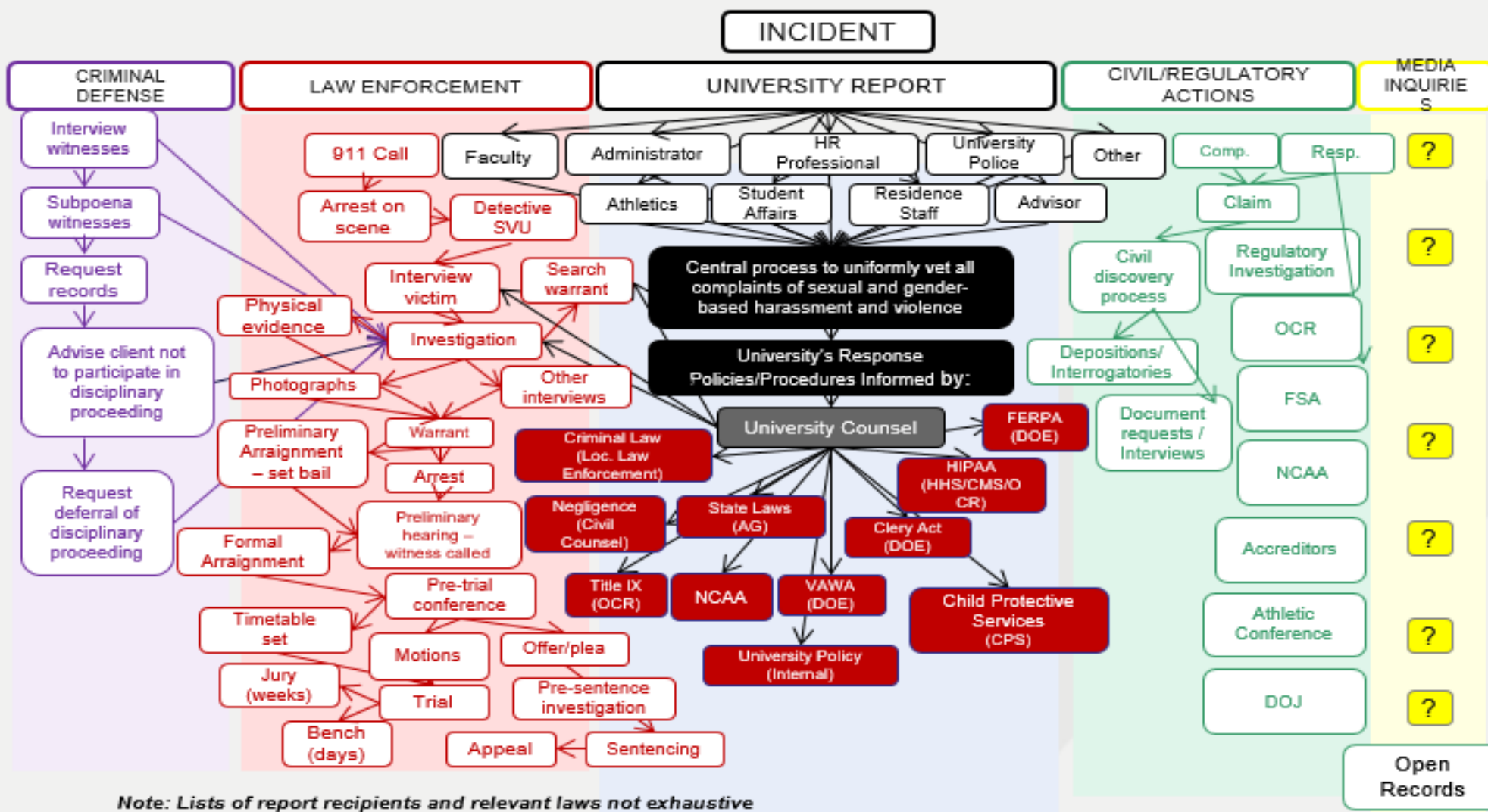


The Context

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



The Challenge of the Context

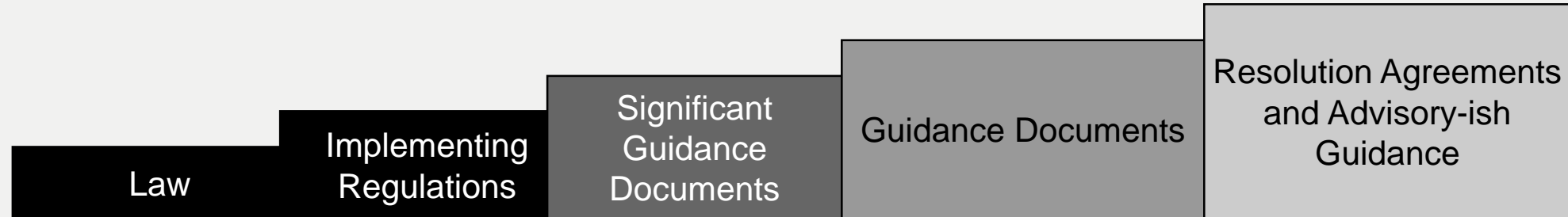






FEDERAL LEGISLATION AND GUIDANCE

The Hierarchy



- Title IX

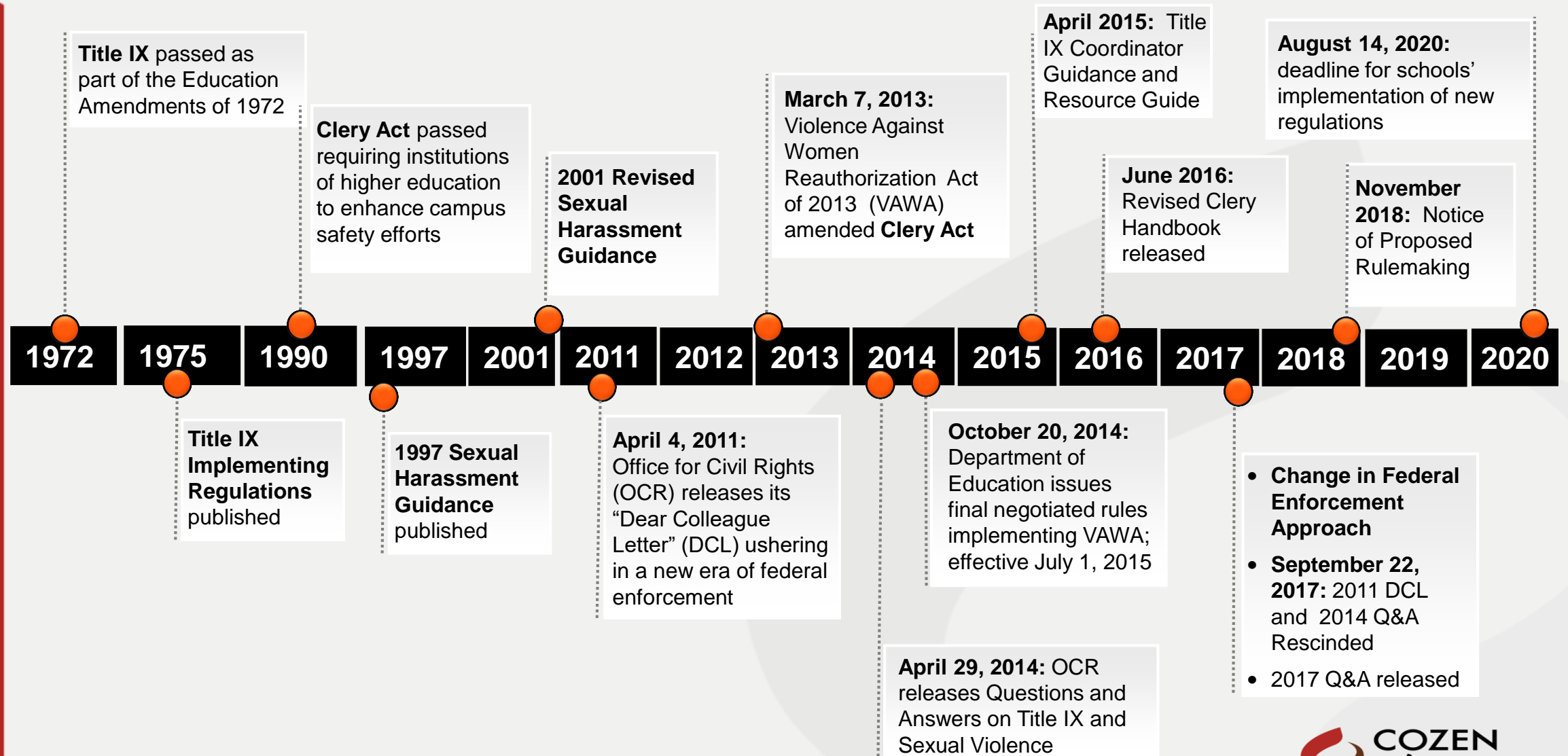
- Title IX Implementing Regulations (August 2020)

- 2011 Dear Colleague Letter (Rescinded)
- 2014 Q&A (Rescinded)
- 2017 Q&A (Rescinded)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

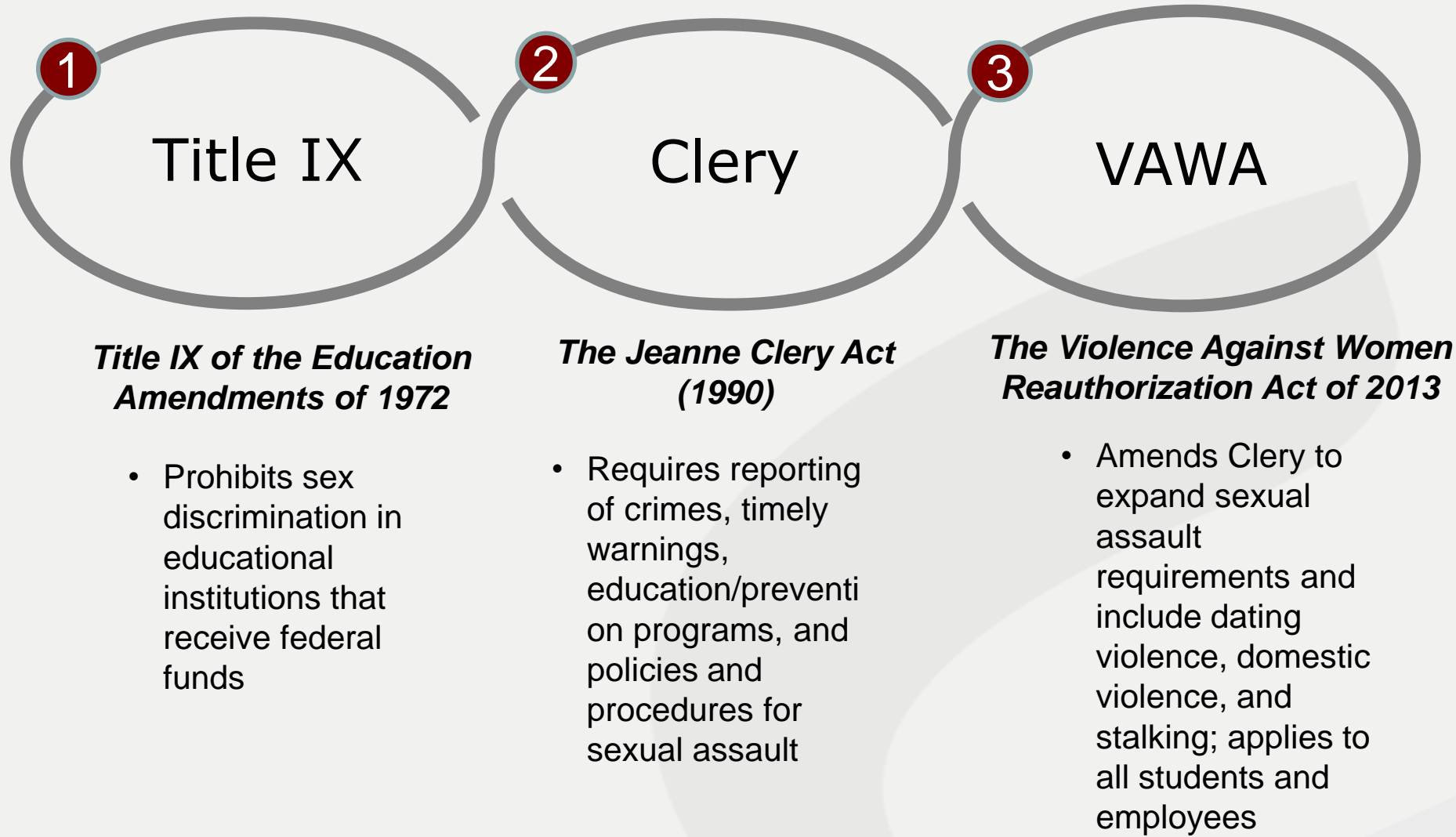
- 1997 Sexual Harassment Guidance
- 2001 Revised Sexual Harassment Guidance (Rescinded)
- Dear Colleague Letters
 - Bullying
 - Hazing
 - Title IX Coordinator (Rescinded)
 - Retaliation

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

Evolution of Federal Legislation and Guidance



Federal Regulatory Framework



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

AUGUST 2020 TITLE IX REGULATIONS

Understanding Title IX

The Law:

“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”

20 USC § 1681

The August 2020 Title IX Regulations

- 2033 page document issued by the U.S. Department of Education, Office for Civil Rights (OCR) on May 6, 2020
- Includes significant resource materials: a preamble, executive summary, overview of public comments, discussion of directed questions, regulatory impact analysis and other content
- Final regulations are located at page 2008-2033
- Official version in the Federal Register was issued on May 19, 2020
- Regulations implemented as of August 14, 2020

Regulations Formally Incorporate Sexual Harassment as a Form of Sex Discrimination

- Title IX obligations related to **sexual harassment as a form of sex discrimination** had not been formally addressed in the regulations
- “These final regulations impose, for the first time, **legally binding rules** on recipients with respect to responding to sexual harassment.”

August 2020 Title IX Regulations; Executive Summary, 85 F.R. 30029.

Title IX

Core Tenets:

Definition of Sexual Harassment

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

- (1) An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;
- (2) Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity; or
- (3) "Sexual assault" as defined in 20 U.S.C. 1092(f)(6)(A)(v), "dating violence" as defined in 34 U.S.C. 12291(a)(10), "domestic violence" as defined in 34 U.S.C. 12291(a)(8), or "stalking" as defined in 34 U.S.C. 12291(a)(30).

Title IX

Response to Sexual Harassment

Core Tenets:

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

Title IX

Core Tenets:

Education Program or Activity

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

Overview of Significant Provisions

- Jurisdiction & Scope
- Notice
- Formal Complaint & Dismissal
- Supportive Measures
- Emergency Removal
- Basic Requirements of Grievance Process
- Written Notice to Parties
- Consolidation
- Investigations
- Hearings
- Determination of Responsibility
- Appeals
- Informal Resolution
- Documentation
- Retaliation
- Training

Impact of Final Regulations

What is (or Should be) the Same

- Intake and outreach process
- Supportive measures
- Neutral, impartial and trained implementers
- Investigative protocols
 - Notice
 - Opportunity to be heard
- Documentation

What is Significantly Different

- Jurisdiction/scope
- Live hearing
- Cross examination by the advisor
- Proponent of a statement must be subject to cross-examination (until *Cardona* decision)
- Recipient must provide advisor

The Big Three

Regulations Promulgated in 1975

- Designation of responsible employee
- Complaint procedure of recipient
- Notification of policy

2020 Final Regulations

- Designation of coordinator
- Adoption of grievance procedures
- Dissemination of policy

Relevant Regulations Sections:

Title IX Coordinator: §§106.8(a) and 106.8(b)(2)(i)

Notice of Non-Discrimination: §106.8(b)

Grievance Procedures: §106.8(c)

Designation of Coordinator

- Each recipient must designate and authorize at least one employee to coordinate its efforts to comply with its responsibilities under this part, its responsibilities under this part, which employee must be referred to as the “Title IX Coordinator.”
- Any person may report sex discrimination, including sexual harassment (whether or not the person reporting is the person alleged to be the victim of conduct that could constitute sex discrimination or sexual harassment) . . .

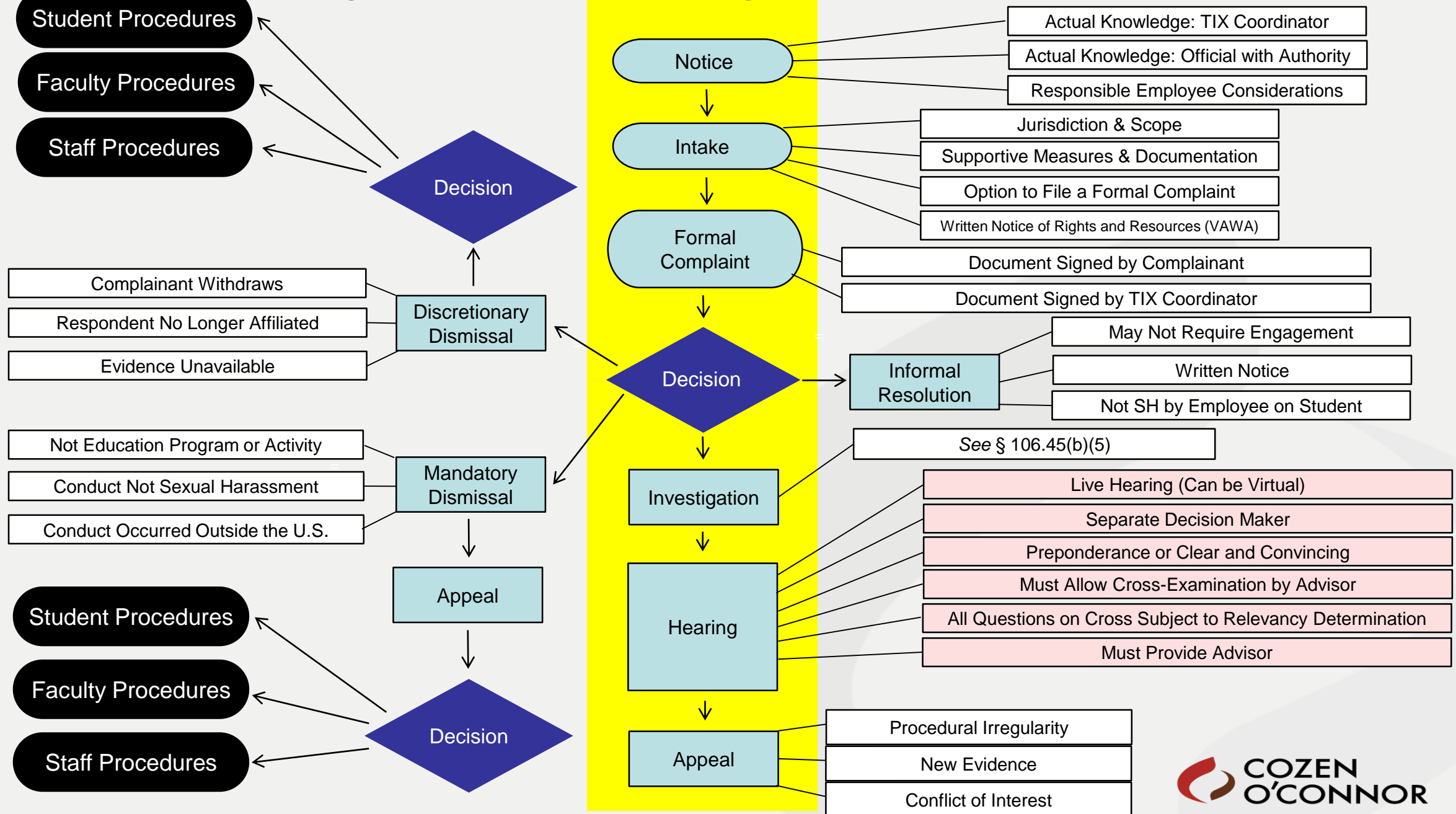
Adopt Grievance Procedures

- A recipient must adopt and publish grievance procedures that provide for the prompt and equitable resolution of student and employee complaints alleging any action that would be prohibited by this part and a grievance process that complies with § 106.45 for formal complaints as defined in § 106.30.
- A recipient must provide to persons entitled to a notification under paragraph (a) of this section notice of the recipient's grievance procedures and grievance process, including how to report or file a complaint of sex discrimination, how to report or file a formal complaint of sexual harassment, and how the recipient will respond.

Dissemination of Policy

- Each recipient must notify persons entitled to a notification under paragraph (a) of this section that the recipient does not discriminate on the basis of sex in the education program or activity that it operates, and that it is required by title IX and this part not to discriminate in such a manner.
- Such notification must state that the requirement not to discriminate in the education program or activity extends to admission (unless subpart C of this part does not apply) and employment, and that inquiries about the application of title IX and this part to such recipient may be referred to the recipient's Title IX Coordinator, or to the Assistant Secretary, or both.

August 2020 Title IX Regulations



POST-2020 REGULATION UPDATES: EXECUTIVE ORDERS, CASES AND GUIDANCE

March 8, 2021: Executive Order

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

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

March 8, 2021: Executive Order

Context

- The United States Supreme Court decision in *Bostock v. Clayton County* (June 15, 2020) (140 S.Ct. 1731).
 - The Supreme Court held that sex discrimination under Title VII includes **sexual orientation and gender identity**.
 - The Court specifically refused to extend the holding to Title IX's definition of sex discrimination.

April 6, 2021: Letter to Students, Educators, and other Stakeholders

- OCR is undertaking a comprehensive review of the Department's existing regulations, orders, guidance, policies, and any other similar agency actions, including the August 14, 2020 Title IX regulations
- **Planned actions**
 - **Public hearings** (held in June 2021)
 - **Q&A** to provide additional clarity about how OCR interprets schools' existing obligations under the 2020 amendments
 - **New notice of proposed rulemaking** anticipated

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

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

Victim Rights Law Center v. Cardona

(U.S. District Court, D. Massachusetts, July 28, 2021, 2021 WL 3185743)

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

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

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

INTERSECTION OF TITLE IX, THE CLERY ACT AND NEW YORK LAW

Intersection: Scope

Clery

- Conduct:
 - Sexual assault
 - Dating violence
 - Domestic violence
 - Stalking
 - Other Clery crimes
- Jurisdiction:
 - Clery geography (for counting)
 - Across campus (for policies and procedures)

Title IX

- Conduct:
 - Sex discrimination
 - Sexual and gender-based harassment
 - Sexual violence
- Jurisdiction:
 - On campus
 - In the context of any school program or activity
 - Continuing effects on campus caused by off-campus conduct

NY 129-B

- Conduct:
 - Sexual activity without affirmative consent
 - Domestic violence
 - Dating violence
 - Stalking
 - Sexual assault
- Jurisdiction:
 - Not tied to geography
 - Based on the identity of the reporting individual and/or accused/respondent

Intersection: Key Distinctions

- **Definitions** are not consistent
- **Procedural** requirements differ
 - Standard of proof
 - Written notice of rights
 - Advisor of choice
 - Equal and timely access to all information that will be used
 - Notice of outcome
- Different **enforcement** mechanisms

Intersection: Definitions/Concepts

Clery

- Sexual Assault: An offense that meets the definition of rape, fondling, incest, or statutory rape as used in the FBI's UCR program.
- 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.

Title IX

- Title IX Sexual Harassment
- Sexual Assault
- Dating Violence
- Domestic Violence
- Stalking

NY 129-B

- Sexual Activity includes "sexual act" and "sexual contact"
- "Sexual Act" defined in 18 U.S.C. 2246(2) and (3).
- Also uses Clery Act definitions

Clery: Campus Security Authority

- “Campus security authority” is a Clery-specific term that encompasses four groups of individuals and organizations associated with an institution:
 - A campus police department or a campus security department of an institution
 - Any individual(s) who have responsibility for campus security but who do not constitute a campus police department or a campus security department (guard, escort, etc.)
 - Any individual or organization specified in an institution’s statement of campus security policy as an individual or organization to which students and employees should report criminal offenses
 - An official of an institution who has significant responsibility for student and campus activities, including, but not limited to, student housing, student discipline, and campus judicial proceedings

Procedural Elements

Clery

- Must state **standard of proof**
- Must give written notice of **rights**
 - Describe range of protective measures and must list ALL sanctions
- Decline to notify **law enforcement**
- Right to **advisor of choice**

Title IX

- **Preponderance** of the evidence or **clear and convincing** evidence
- Inform of all **resources and options**
- Notify of option to go to **law enforcement**
- Must provide **equal access to process**

Procedural Elements

Clery

- **Simultaneous written notice** of outcome, sanction and rationale
- **Timely and equal access** to the accuser, the accused, and appropriate officials to any information that will be used during informal and formal disciplinary meetings and hearings (Compliance with this section does not constitute a violation of FERPA)

Title IX

- Complainant and Respondent must be provided **notice of outcome**
- Complainant and Respondent must be afforded **similar and timely access** to any information that will be used at the hearing

Procedural Elements

Clery

- Require **simultaneous notification**, in writing, to both the accuser and the accused, of—
 - (A) The **result** of any institutional disciplinary proceeding that arises from an allegation of dating violence, domestic violence, sexual assault, or stalking;
 - (B) The institution's **procedures** for the accused and the victim to **appeal** the result of the institutional disciplinary proceeding, if such procedures are available;
 - (C) Any **change** to the result; and
 - (D) When such results become **final**.

Title IX

- Must inform the **complainant** as to:
 - **whether or not** it found that the alleged conduct occurred,
 - any individual **remedies** offered or provided to the complainant or any **sanctions** imposed on respondent that **directly relate** to the complainant, and
 - **other steps** the school has taken to eliminate the hostile environment, if the school finds one to exist, and prevent recurrence.

Reporting

Clery

- A campus police department or a campus security department of an institution
- Anyone responsible for campus security but does not constitute police or security
- Anyone designated to receive crime reports
- Officials of an institution with significant responsibility for student and campus activities

Title IX

- Any official who has the authority to institute corrective measures and who has **actual knowledge**

Reporting Responsibilities

Duty	CSA	Official with Authority
To Whom	Official or office designated by the institution to collect crime report information	Title IX Coordinator
What	Clery offenses on Clery geography	Sexual harassment and violence
Content	Nature of crime, date and time it occurred, date and time reported, location	Names of Complainant, alleged perpetrator (if known), other students involved, and any other relevant facts (date, time, and location)
Anonymity	Can be non-identifiable information	Must include identifying information
Notice	Direct reports only	Actual knowledge
Timing	Immediately; Ongoing	Immediately*

NEW YORK STATE EDUCATION LAW 129-B

NY 129-B – Quick Facts and Resources

- NY 129-B statute – became law on July 7, 2015
- NY 129-B guidance promulgated by NYSED
 - First guidance document – June 2, 2016
 - Second guidance document – October 14, 2016
- NY 129-B regulations – July 2017
 - 48.1 – Definitions
 - 48.2 – Annual aggregate data reporting

NY 129-B – Incident Reporting

Per regulations:

- By October 1 each year, institutions shall report to NYSED concerning incidents that were reported during the prior calendar year:
 - a) The number of incidents reported to the Title IX Coordinator (per Complainant):
 - 1. Number of incident that occurred on campus
 - 2. Number of incidents that occurred off campus
 - 3. Total of 1 and 2 above
 - b) Of the total number of incidents:
 - 1. Number in which Complainant or school sought a school-based process
 - 2. Number not included in 1 above (includes where school lacked jurisdiction or where process could not go forward for another reason)
 - 3. Number in which Complainant sought a No Contact Order and total # of NCOs issued

NY 129-B – Incident Reporting

Per regulations (continued):

- c) Of the incidents in b)1 above, the number that proceeded through the school-based process
- d) Of those in c) above, the number of respondents who were found responsible or who accepted responsibility
- e) Of those in c) above, the number of respondents who were found not responsible
- f) A description of the final sanctions imposed by the school in each incident for which the Respondent was found responsible for sexual assault, dating violence, domestic violence, or stalking, broken down as follows:
 - 1. Expulsions
 - 2. Suspensions
 - 3. Another sanction not expulsion or suspension
 - 4. Transcript notation indicating found responsible for a violation of the institution's code of conduct
 - 5. Transcript notation indicating that they withdrew with charges pending

NY 129-B – Incident Reporting

Per regulations (continued):

- g) Number of cases closed prior to final determination because Respondent withdrew and declined to complete the disciplinary process
- h) Number of cases closed prior to final determination because Complainant withdrew the complaint or an informal resolution was reached
- i) Additional training information. Institutions may report the number of trainings held, the number of staff trained, and the number of students trained during the reporting period.

NY 129-B – Key Provisions

Affirmative Consent

- Requires adoption of a uniform definition of Affirmative Consent:

Affirmative consent is a knowing, voluntary, and mutual decision among all participants to engage in sexual activity. Consent can be given by words or actions, as long as those words or actions create clear permission regarding willingness to engage in the sexual activity. Silence or lack of resistance, in and of itself, does not demonstrate consent. The definition of consent does not vary based upon a participant's sex, sexual orientation, gender identity, or gender expression.

NY 129-B – Key Provisions

Affirmative Consent

- Requires inclusion of other principles in institution's policy:
 - a. Consent to any sexual act or **prior consensual activity** between or with any party does not necessarily constitute consent to any other sexual act.
 - b. Consent is **required regardless** of whether the person initiating the act is under the influence of drugs and/or alcohol.
 - c. Consent may be initially given but **withdrawn** at any time.
 - d. Consent cannot be given by a person who is **incapacitated**, which occurs when an individual lacks the ability to knowingly choose to participate in sexual activity. Incapacitation may be caused by the lack of consciousness or being asleep, being involuntarily restrained, or if an individual cannot otherwise consent. Depending on the degree of intoxication, someone who is under the influence of alcohol, drugs, or other intoxicants may be incapacitated and therefore unable to consent.
 - e. Consent cannot be given when it is the result of any **coercion, intimidation, force, or threat** of harm.
 - f. When consent is **withdrawn or can no longer be given**, sexual activity must stop.

NY 129-B – Key Provisions

Amnesty for Alcohol and/or Drug Use

- Requires adoption of the following amnesty provision:

*The health and safety of every student at [Institution] is of utmost importance. [Institution] recognizes that students who have been drinking and/or using drugs (whether such use is voluntary or involuntary) at the time that violence, including but not limited to domestic violence, dating violence, stalking, or sexual assault occurs **may be hesitant** to report such incidents due to fear of potential consequences for their own conduct. ...*

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NY 129-B – Key Provisions

Amnesty for Alcohol and/or Drug Use

... [Institution] strongly encourages students to report domestic violence, dating violence, stalking, or sexual assault to institution officials. A **bystander acting in good faith** or a **reporting individual acting in good faith** that discloses any incident of domestic violence, dating violence, stalking, or sexual assault **to [Institution's] officials or law enforcement** will not be subject to [Institution's] code of conduct action for violations of alcohol and/or drug use policies occurring **at or near the time** of the commission of the domestic violence, dating violence, stalking, or sexual assault.

NY 129-B – Key Provisions

Student Bill of Rights

➤ Requires adoption of the following provision:

All students have the right to:

1. *Make a report to local **law enforcement** and/or state police*
2. *Have disclosures of domestic violence, dating violence, stalking, and sexual assault **treated seriously***
3. *Make a decision about whether or not to disclose a crime or violation and participate in the judicial or conduct process and/or criminal justice process **free from pressure by the institution***
4. *Participate in a process that is **fair**, impartial, and provides adequate notice and a meaningful opportunity to be heard*
5. *Be treated with **dignity** and to receive from the institution courteous, fair, and respectful health care and counseling services, where available*

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NY 129-B – Key Provisions

Student Bill of Rights

6. Be **free from any suggestion that the reporting individual is at fault** when these crimes and violations are committed, or should have acted in a different manner to avoid such crimes or violations
7. Describe the incident to as **few institution representatives as practicable** and not be required to unnecessarily repeat a description of the incident
8. Be protected from **retaliation** by the institution, any student, the accused and/or the respondent, and /or their friends, family and acquaintances within the jurisdiction of the institution
9. Access to at least one level of **appeal** of a determination
10. Be accompanied by an **advisor** of choice who may assist and advise a reporting individual, accused, or respondent throughout the judicial or conduct process including during all meetings and hearings related to such process
11. Exercise civil rights and practice of religion **without interference** by the investigative, criminal justice, or judicial or conduct process of the institution

NY 129-B – Key Provisions

Rights of Reporting Parties

- Requires that institutions advise reporting individuals of their right to:
1. *Notify university police or campus security, local **law enforcement**, and/or state police*
 2. *Have **emergency access** to a Title IX Coordinator or other appropriate official trained in interviewing victims of sexual assault*
 - *Must be available at first disclosure to provide information about reporting options, confidentiality, privacy and, if applicable, preserving evidence, obtaining a sexual assault forensic exam, explaining differences between the campus and law enforcement processes*
 - *Must state verbatim language at first disclosure*
 - *Must provide information about resources including counseling and medical services, including if those services are free or fee-based*
 - *Must provide information about STIs, sexual assault forensic exams, and resources through the NY state office of victim services*

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NY 129-B – Key Provisions

Rights of Reporting Parties

3. *Disclose **confidentially** the incident to **institution** representatives, who may offer confidentiality pursuant to applicable laws and can assist in obtaining services for reporting individuals*
4. *Disclose **confidentially** the incident and obtain services from the **state or local government***
 - *Regarding 3 and 4 above, 129-B requires a “plain language explanation” of confidentiality for students that contains, at a minimum, the following language: “Even [Institution] offices and employees who cannot guarantee confidentiality will maintain your privacy to the greatest extent possible. The information you provide to a nonconfidential resource will be relayed only as necessary for the Title IX Coordinator to investigate and/or seek a resolution.”*
5. *Disclose the incident to institution representatives who can offer **privacy or confidentiality**, as appropriate, and can assist in obtaining resources for reporting individuals*

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NY 129-B – Key Provisions

Rights of Reporting Parties

6. *File a **report** of sexual assault, domestic violence, dating violence, and/or stalking and the right to consult the Title IX Coordinator and other appropriate institution representatives for information and assistance.*
 - *Reports shall be investigated in accordance with the institution policy and **reporting party's identity shall remain private** at all times if said reporting party wishes to maintain privacy*
7. *Disclose, if the accused is an employee of the institution, the incident to the institution's **HR authority** or the right to request that a confidential or private employee assist in reporting to HR*
8. *Receive assistance from appropriate institution representatives in initiating legal proceedings in **family court or civil court***
9. *Withdraw a complaint or involvement from the institution process at any time*

NY 129-B – Key Provisions

Protections and Accommodations

- Requires that institutions provide the following protections and accommodations:
1. *If the accused is a student, the issuance of a “**no contact order**” where the burden to avoid contact is on the accused and not the reporting party.*
 - *Either party, the accused or reporting party, may request a prompt review of the need for and terms of the no contact order*
 2. *Assistance by the institution’s police or security forces in obtaining a **protective/restraining order** or in effectuating an arrest if a person violates a protective/restraining order (if arrest powers exist)*
 3. *Information from the institution about the operation of the protective order (for both accused parties and reporting parties) and **consequences** for violating such an order*

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NY 129-B – Key Provisions

Protections and Accommodations

4. *If the accused is a student determined to present a continuing threat to the health and safety of the community, subjecting the accused to **interim suspension***
5. *If the accused is a non-student but member of the institution's community, subjecting the accused to **other interim measures** consistent with other institutional policies*
6. *Other **interim measures** as appropriate, including changes in academic, housing, employment, transportation, or the like in order to help ensure safety, prevent retaliation, and avoid an ongoing hostile environment consistent with the institution's policies and procedures*

NY 129-B – Key Provisions

Additional Rights

- Requires that institutions provide the following rights to all students:
 1. The right to **request** that student conduct charges be filed against the accused
 2. In all non-consensual sexual activity, domestic violence, dating violence, and stalking cases, the right to a process that includes:
 - A. **Notice** to the accused describing date, time, location, facts alleged, potential policy violation(s), and possible sanctions
 - B. An opportunity to **offer evidence** during an investigation and to present evidence and testimony at a hearing, where appropriate, and to have access to the record for such hearing (maintained for 5 years)
 - Both parties have the right to review the available evidence in the case file consistent with institution policies and procedures
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NY 129-B – Key Provisions

Additional Rights

- C. Access to at least one level of **appeal before a panel**
 - In order to effectuate an appeal, both parties must have simultaneous access to written notice of the findings of fact, the decision and sanction, if any, and the rationale for each.
 - Accused and reporting party must have the same rights
- D. Accompaniment by the party's **advisor of choice**
- E. An impartial, timely, and thorough investigation and adjudication by people who receive annual **training** in
 - Conducting investigations, the effects of trauma, Respondents' rights, the presumption of non-responsibility, and the institution's policies and procedures
- F. **Exclusion** of prior sexual history with persons other than the other party
 - May include prior findings of domestic violence, dating violence, stalking, or sexual assault in sanctioning phase only

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NY 129-B – Key Provisions

Additional Rights

- G. **Exclusion** of mental health diagnoses or histories*
- H. **Written notice** of any meeting the party is required to attend*
- I. An opportunity to offer an **impact statement** prior to the issuance of a sanction*
- J. A choice about **whether to disclose or discuss** the outcome of a conduct or judicial process*
- K. Protection from the public release of information obtained during the investigation (until the appeals panel makes a final determination or unless otherwise required by law)*

NY 129-B – Key Provisions

Transcript Notations

- For **crimes of violence**, including but not limited to sexual violence, institutions shall make a notation on the transcript of students **found responsible** after a conduct process that they were:
 - *“Suspended after a finding of responsibility for a code of conduct violation”*
 - *“Expelled after a finding of responsibility for a code of conduct violation”*
- For **crimes of violence**, including but not limited to sexual violence, institutions shall make the following notation on the transcript of students **who withdraw** during a conduct process:
 - *“Withdrew with conduct charges pending”*
- **Removal** of transcript notations:
 - The institution shall adopt a policy on appeals seeking the removal of a transcript notation for a suspension, provided that such notation shall not be removed prior to **one year** after conclusion of the suspension
 - Notations for expulsion shall not be removed

NY 129-B – Key Provisions

External Resources

- Institutions that lack appropriate on-campus resources or services shall enter into MOUs, agreements, or partnerships with existing community-based organizations such as rape-crisis centers, domestic violence shelters and assistance organizations to provide services to students
- Institutions shall ensure that students have access to a sexual assault forensic examination by employing the use of a SANE in the campus health center or entering into an MOU with at least one local health care facility to provide such a service

NY 129-B – Key Provisions

Climate Assessments

- At least every other year, each institution shall conduct a campus climate assessment to “ascertain general awareness and knowledge of the provisions of this article, including student experience with and knowledge of reporting and college adjudicatory processes”
- The climate assessment shall include questions about:
 - The Title IX Coordinator’s role
 - Campus policies and procedures addressing sexual assault
 - How and where to report domestic violence, dating violence, stalking or sexual assault as a victim, survivor, or witness
 - The availability of resources on and off campus, such as counseling, health and academic assistance
 - The prevalence of victimization and perpetration of domestic violence, dating violence, stalking, or sexual assault on and off campus during a set time period
 - Bystander attitudes and behavior
 - Whether reporting individuals disclosed to the institution and/or law enforcement, experiences with reporting and institution processes, and reasons why they did or did not report
 - General awareness of the difference between the institution’s policies and the penal law
 - General awareness of the definition of affirmative consent
- The climate assessment should be anonymous
- Institutions must publish results on their website

NY 129-B – Key Provisions

Addressing Requests for Confidentiality

- Every institution must ensure that reporting individuals have information about how the institution will weigh a request for confidentiality and respond to such a request.
- In this part of the law, “confidentiality” is used as shorthand for “declining to consent to an investigation.”

NY 129-B – Key Provisions

Addressing Requests for Confidentiality

- Factors that the Title IX Coordinator should use in evaluating whether to proceed with an investigation despite a reporting party's request for confidentiality:
 - Whether the accused has a **history of violent behavior** or is a repeat offender
 - Whether the incident represents **escalation** in unlawful conduct on behalf of the accused from previously noted behavior
 - The **increased risk** that the accused will commit additional acts of violence
 - Whether the accused used a **weapon or force**
 - Whether the reporting **individual is a minor**
 - Whether the institution possesses **other means to obtain evidence** such as security footage and
 - Whether available information reveals a **pattern of perpetration** at a given location or by a particular group

NY 129-B – Key Provisions

Student Onboarding

- Includes and goes beyond the Clery Act requirements for education and training
- Requires new first-year (undergrad, graduate, and professional) and transfer students to receive the following information during their onboarding:
 - The institution **prohibits** sexual and interpersonal violence, provides **resources** to any victims and survivors of such violence, and **addresses** reports of such violence when it has jurisdiction over the accused
 - The institution **defines** sexual assault, domestic violence, dating violence, stalking, confidentiality, privacy, and consent as follows...
 - The institution's policies apply **equally** to all students regardless of sexual orientation, gender identity, or gender expression
 - The **role** of the Title IX Coordinator, university police or campus safety, and other relevant offices
 - Awareness of **violence**, its impact on victims and survivors and their friends and family, and its long-term impact
 - Bystander **intervention** and the importance of taking action to prevent violence when one can safely do so
 - Risk assessment and **risk reduction** including steps that potential victims, perpetrators, and bystanders can take to lower the incidence of violations
- Institutions must use **multiple methods** of education
- Institutions must offer general and specific training in domestic violence, dating violence, stalking, and sexual assault **prevention**
- **Special training** requirements for student leaders, student org officers, and student-athletes
- Institutions must regularly assess programs and policies for effectiveness and relevance

NY 129-B – Key Provisions

Reporting Aggregate Data to NYSED

- Each year, each institution must report the following aggregate data to the NYSED regarding incidents of domestic violence, dating violence, stalking, and sexual assault:
 - Number of incidents reported to the Title IX Coordinator
 - Number of individuals who sought the institution's judicial or student conduct process
 - Number of cases that proceeded through the judicial or student conduct process
 - Number of Respondents found responsible
 - Number of Respondents found not responsible
 - Description of the final sanctions imposed for each finding of responsibility
 - Number of cases closed prior to a final determination because the Respondent withdrew and declined to participate
 - Number of cases closed prior to a final determination because the Complainant withdrew and declined to participate

NEW YORK STATE SEXUAL HARASSMENT LAW

NY State Sexual Harassment Law

- Passed as part of Governor Cuomo's Fiscal Year 2019 budget
- Press release March 30, 2018
- Key resources (<https://www.ny.gov/programs/combating-sexual-harassment-workplace>)
 - FAQ sheet
 - Sexual Harassment Prevention Employer Toolkit
 - Minimum Standards for Sexual Harassment Prevention Policies
 - Minimum Standards for Sexual Harassment Prevention Trainings
 - Model Policy
 - Model Training
 - Slide deck
 - Case studies
 - Prevention Policy Notice Poster
 - Harassment Complaint Form

NY State Sexual Harassment Law

Key Provisions

- Complainants may report harassment to their employer and/or to the New York State Division of Human Rights
- The Law covers *all* employers, regardless of the number of employees
- The Law protects non-employee contractors, vendors, consultants, etc
- Under certain circumstances, the Law provides for simultaneous obligations to address harassment
 - Example: an employee of a ABC Cleaning Company is assigned to clean the offices of XYZ Architecture Firm. An XYZ employee continually asks the ABC employee out on dates. The ABC employee is entitled to report to **both** ABC and XYZ. The Law requires **both** companies to provide grievance procedures and appropriate remedies.

NY State Sexual Harassment Law

Key Provisions

- Employers must provide a legally-compliant written policy to all employees in printed or electronic form
 - For third-party vendors or other non-employees, posting the policy in a conspicuous place is sufficient.
 - “Employee” includes all workers, regardless of immigration status. It includes exempt, and non-exempt employees, and those who are part-time, seasonal, or temporary employees.
- Employers must provide a legally-compliant interactive training to all employees annually
 - “Interactive” trainings can be web-based or in-person but must provide an opportunity for trainees to ask questions and receive answers
 - Extra training required for employees in managerial/supervisory roles
 - Employers must take appropriate steps to ensure all employees are trained

NY State Sexual Harassment Law

Key Provisions

- Employers must provide the policy and training in the language(s) spoken by their employees, as long as those languages are those with state-issued translations
 - If there is not a state-issued translation, the employer may provide the policy and training in English.
- Employers may not mandate arbitration of sexual harassment claims
- Employers may not request or agree to non-disclosure agreements in sexual harassment claims unless requested by the Complainant
 - “Complainant’s request” requires a 21-day waiting and 7-day revocation period

NY State Sexual Harassment Law

Policy – Minimum Standards

The policy must:

1. Prohibit sexual harassment **consistent with NY State Department of Labor guidance** (enacted in 2015, <https://www.labor.ny.gov/legal/anti-discrimination-harassment-guidance.shtm>)
2. Provide **examples** of conduct that would constitute unlawful sexual harassment
3. Include information about **federal and state statutes** addressing sexual harassment, **remedies** available to victims, and a statement that there **may be applicable local laws**
4. Include a **complaint form**

NY State Sexual Harassment Law

Policy – Minimum Standards

The policy must (continued):

5. Include a procedure for the **timely and confidential investigation** of complaints that ensures due process for all parties
6. Inform employees of their **rights of redress** and all available forums for adjudicating sexual harassment complaints administratively and judicially
7. Clearly state that sexual harassment is a form of employee **misconduct** and that **sanctions** will be enforced against individuals engaging in such conduct and against supervisors/managers who knowingly allow such behavior to continue
8. Clearly state that **retaliation** against individuals who complain or who testify or assist in any investigation or proceeding is unlawful

NY State Sexual Harassment Law

Training – Minimum Standards

The training must:

1. Be **interactive**
2. Include an explanation of sexual harassment consistent with NY State Department of Labor guidance (enacted in 2015, <https://www.labor.ny.gov/legal/anti-discrimination-harassment-guidance.shtm>)
3. Include **examples** of conduct that would constitute unlawful sexual harassment
4. Include information about federal and state statutes addressing sexual harassment, and remedies available to victims

NY State Sexual Harassment Law

Training – Minimum Standards

The training must (continued):

5. Include information about employees' rights of redress and all available forums for adjudicating sexual harassment complaints
6. Include information addressing **conduct by supervisors** and any additional **responsibilities** for such supervisors

NY State Sexual Harassment Law

Model Policy

Sexual Harassment Policy for All Employers in New York State



Combating
Sexual Harassment

Introduction

[Employer Name] is committed to maintaining a workplace free from sexual harassment. Sexual harassment is a form of workplace discrimination. All employees are required to work in a manner that prevents sexual harassment in the workplace. This Policy is one component of [Employer Name's] commitment to a discrimination-free work environment. Sexual harassment is against the law¹ and all employees have a legal right to a workplace free from sexual harassment and employees are urged to report sexual harassment by filing a complaint internally with [Employer Name]. Employees can also file a complaint with a government agency or in court under federal, state or local antidiscrimination laws.

Policy:

1. [Employer Name's] policy applies to all employees, applicants for employment, interns, whether paid or unpaid, contractors and persons conducting business, regardless of immigration status, with [Employer Name]. In the remainder of this document, the term "employees" refers to this collective group.
2. Sexual harassment will not be tolerated. Any employee or individual covered by this policy who engages in sexual harassment or retaliation will be subject to remedial and/or disciplinary action (e.g., counseling, suspension, termination).
3. Retaliation Prohibition: No person covered by this Policy shall be subject to adverse action because the employee reports an incident of sexual harassment, provides information, or otherwise assists in any investigation of a sexual harassment complaint. [Employer Name] will not tolerate such retaliation against anyone who, in good faith, reports or provides information about suspected sexual harassment. Any employee of [Employer Name] who retaliates against anyone involved in a sexual harassment investigation will be subjected to disciplinary action, up to and including termination. All employees, paid or unpaid interns, or non-employees² working in the workplace who believe they have been subject to such retaliation should inform a supervisor, manager, or [name of appropriate person]. All employees, paid or unpaid interns or non-employees who believe they have been a target of such retaliation may also seek relief in other available forums, as explained below in the section on Legal Protections.

¹ While this policy specifically addresses sexual harassment, harassment because of and discrimination against persons of all protected classes is prohibited. In New York State, such classes include age, race, creed, color, national origin, sexual orientation, military status, sex, disability, marital status, domestic violence victim status, gender identity and criminal history.

² A non-employee is someone who is (or is employed by) a contractor, subcontractor, vendor, consultant, or anyone providing services in the workplace. Protected non-employees include persons commonly referred to as independent contractors, "gig" workers and temporary workers. Also included are persons providing equipment repair, cleaning services or any other services provided pursuant to a contract with the employer.

Adoption of this policy does not constitute a conclusive defense to charges of unlawful sexual harassment. Each claim of sexual harassment will be determined in accordance with existing legal standards, with due consideration of the particular facts and circumstances of the claim, including but not limited to the existence of an effective anti-harassment policy and procedure.

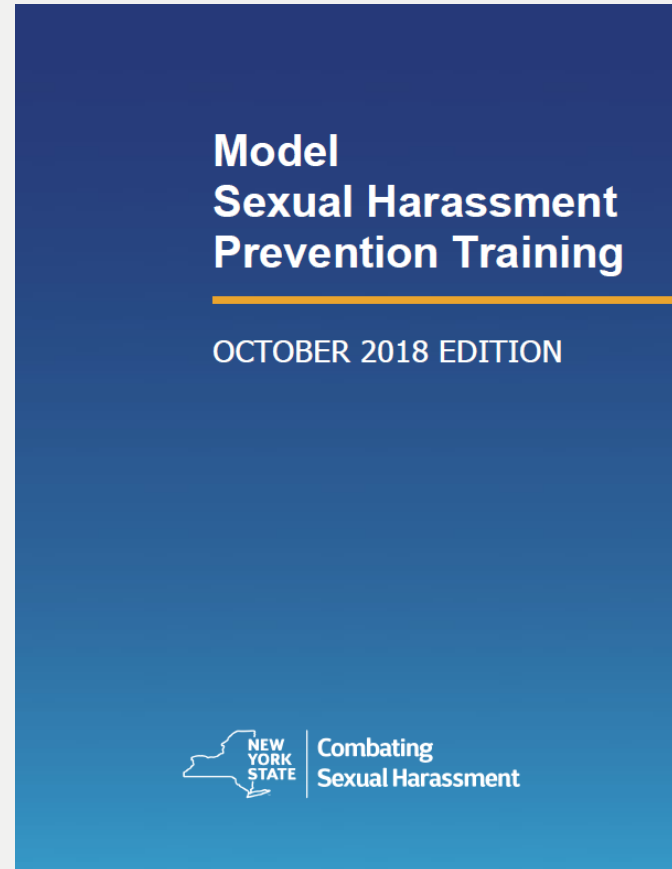
- Eight pages
- “Fill in the blank” format
- Specifically addresses sexual harassment but footnote clarifies that NY State prohibits all forms of discrimination and harassment based on protected status, including:
 - Age
 - Race
 - Color
 - Creed
 - National origin
 - Sexual orientation
 - Military status
 - Sex
 - Disability
 - Marital status
 - Domestic violence victim status
 - Gender identity
 - Criminal history

NY State Sexual Harassment Law

Model Training and Slides

Model training:

- Twenty-three pages
- Provides instructions to employers and a checklist of minimum standards
- Includes trainer script, policy walk-through, definitions, procedural overview, and case studies for interactive portion of training



Slides:

- One slide deck for prevention training
- Separate slide deck with case studies (includes six case studies with several questions for each)

THE STOP SEXUAL HARASSMENT IN NYC ACT

Stop Sexual Harassment in NYC Act

- Signed into law by Mayor Bill Di Blasio on May 9, 2018
- Codified as Local Law 96 of 2018
- Expands the City Human Rights Law in cases of gender-based harassment to increase the **statute of limitations** from one year to three years and **expand protections to all employees** regardless of the size of their employer



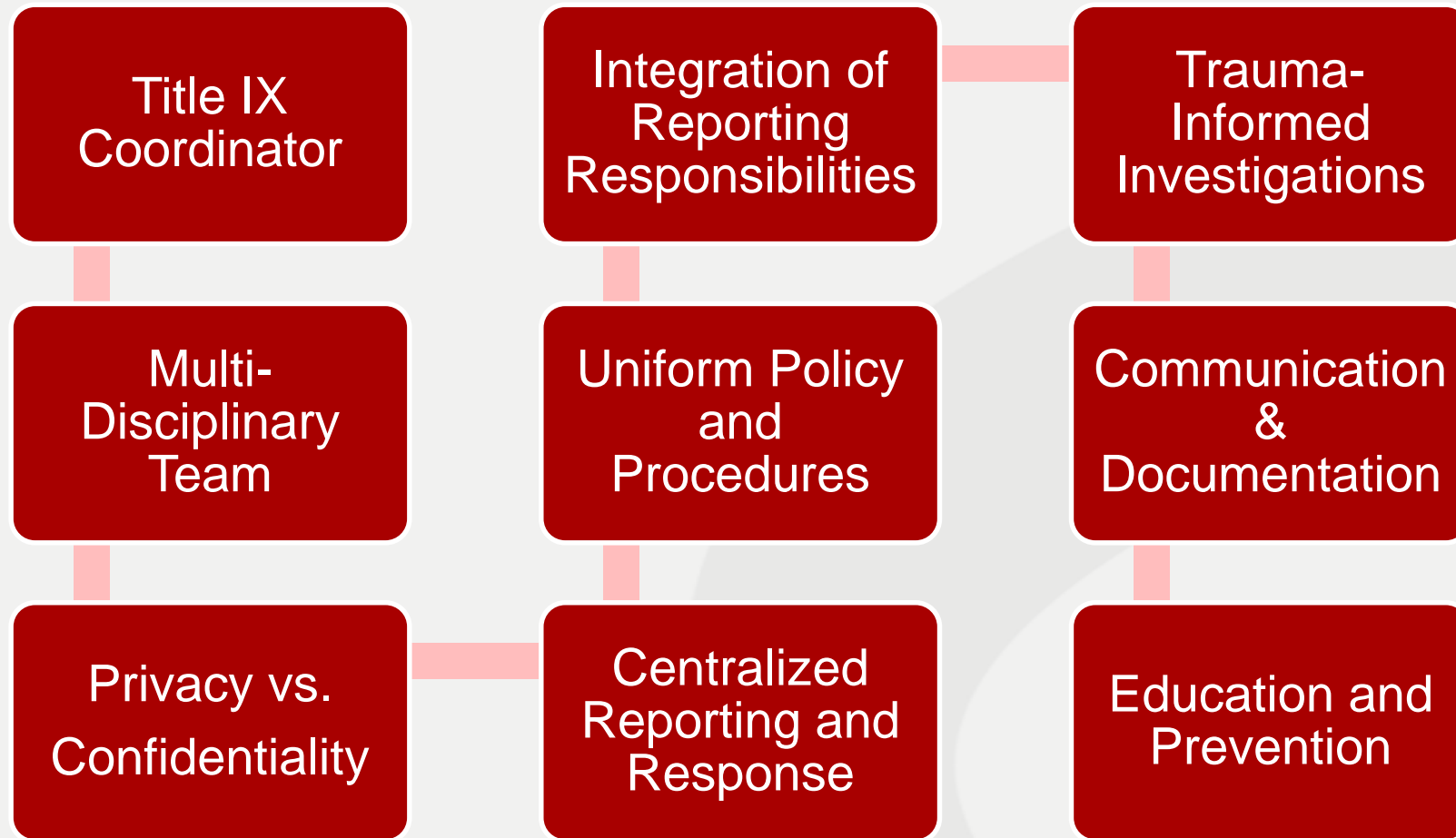
Stop Sexual Harassment in NYC Act

— Additional obligations for employers include:

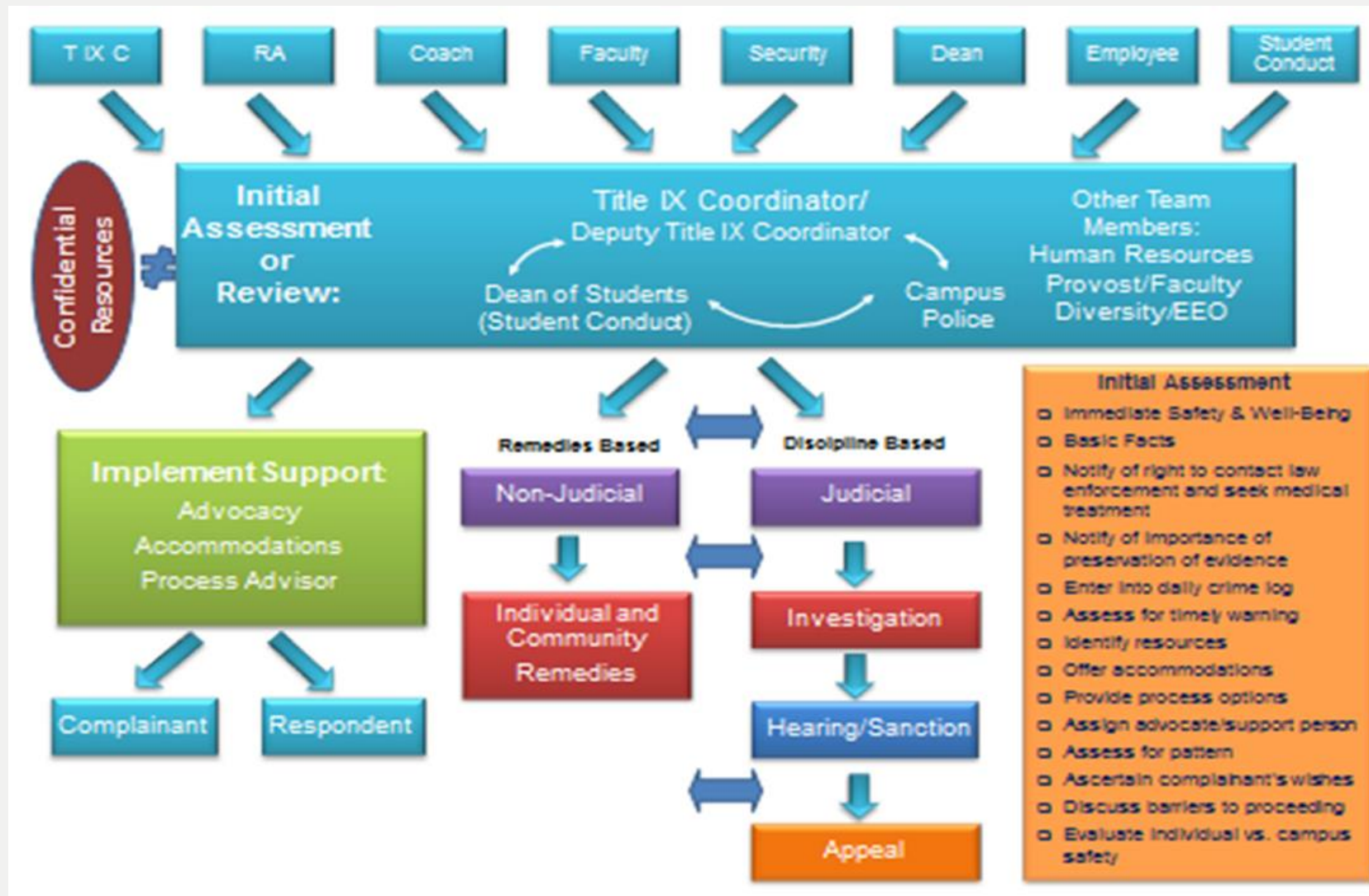
- For employers with 15+ employees, required to conduct annual anti-sexual harassment trainings for all employees
- Employers must keep records of all trainings, including a signed employee acknowledgement (Note: This was not required by the New York State Sexual Harassment Law)
- All employers in the city are required to conspicuously display anti-sexual harassment rights and responsibilities notices in English and Spanish and distribute a factsheet to individual employees at the time of hire

OVERVIEW OF EFFECTIVE PRACTICES

Key Elements of Effective Practices



Integration and Coordination



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

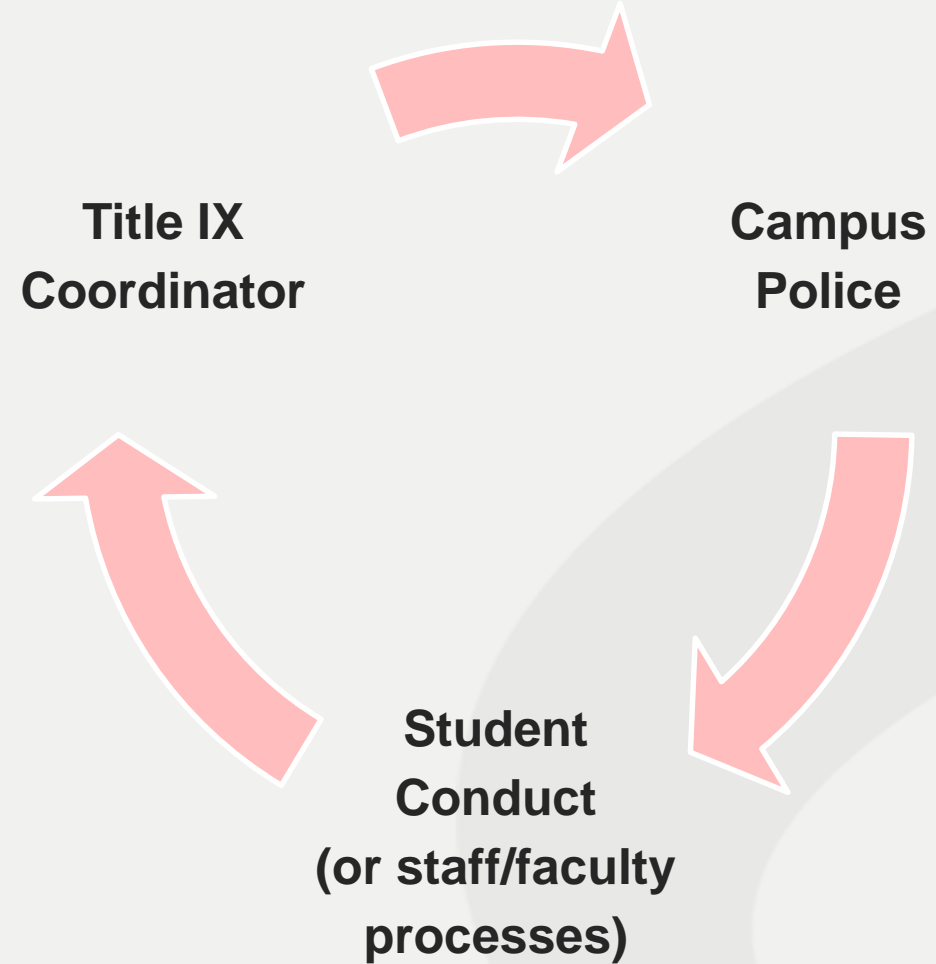
Separation of Roles

- Separate support and advocacy role from investigation and adjudication
- Conflation of roles can:
 - Impact thorough assessment of the facts
 - Create distrust/confusion by complainant
 - Give appearance of bias/lack of impartiality

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

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
- Template communications
- Central tracking for patterns
- Documentation/records
- Ensure consistent implementation:
 - Accommodations
 - Protective measures
 - Investigative practices
 - Sanctions
 - Community remedies
- Transparency in outcomes

Title IX Assessment → Investigation

- 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
- Enter into daily crime log
- Assess for timely warning
- Identify resources
- Offer accommodations
- Provide process options
- Assess for pattern
- Ascertain complainant's wishes
- Discuss barriers to proceeding
- Evaluate individual vs. campus safety
- Assign advocate/support person

Practical Implications: Documenting Key Decisions

- Timely warning
- Interim measures
 - Emergency removal
 - Protective measures
- Request for “confidentiality”
- Steps taken to eliminate, prevent & address
- Investigative chronology
- Outcome
- Sanction
- Identify decision-maker(s)
- Outline key factors
- Outline steps taken
- Communicate to parties
- Document in file
 - Capture emails
 - Capture phone calls

Interim Measures

- Range of available measures
 - Remedial
 - Protective
- “Reasonably available”
- Factors to consider in implementation
 - When to take action against a respondent
- Defining decision-making authority
- Enforcement

Practical Implications: Evaluation Panel

- Multi-disciplinary team
- Regular communication
- Sharing of information
- Set factors to consider in each report
- Documentation of information sought and received
- Clear decision-making authority

A Practical Response

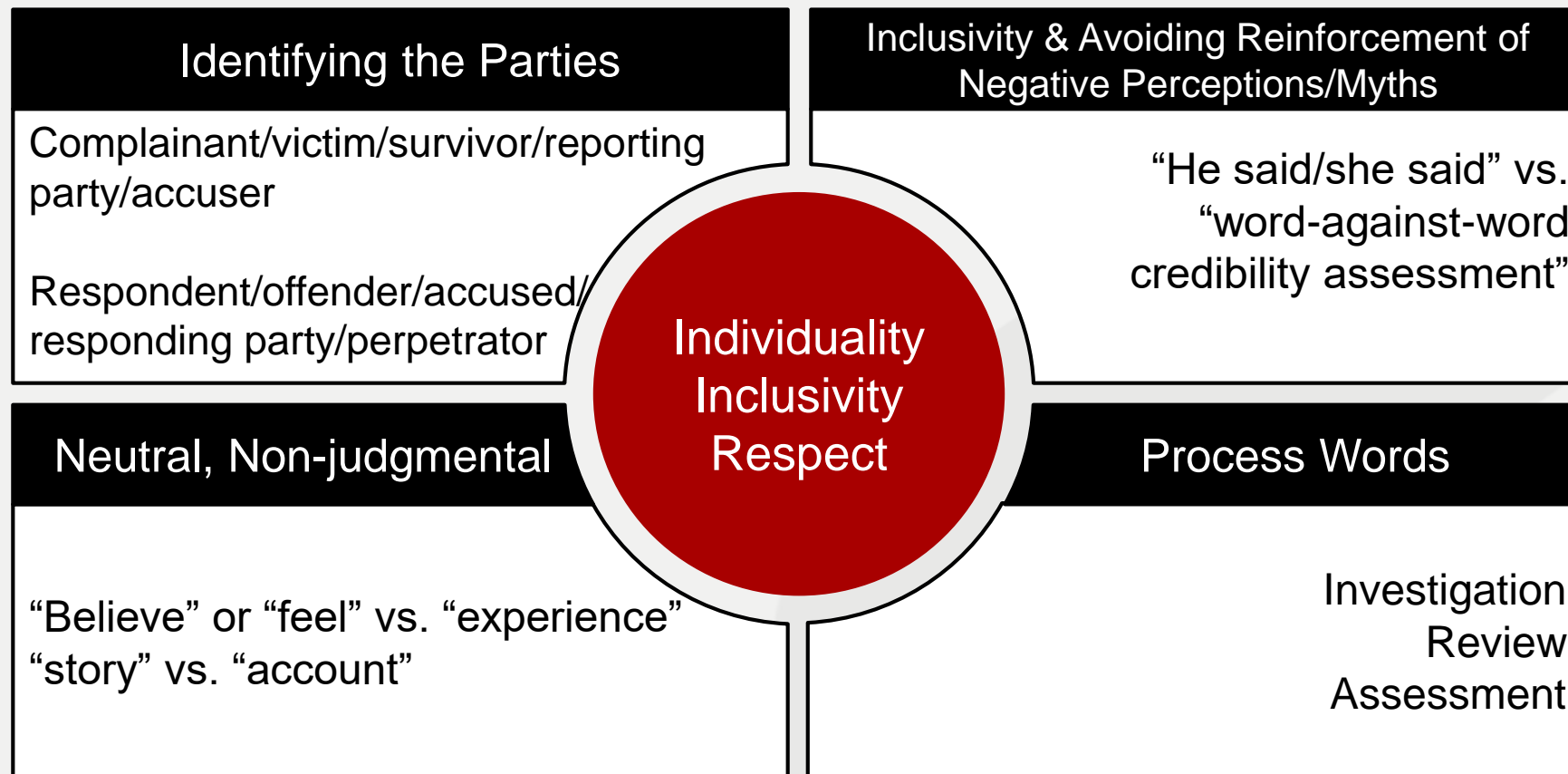
- Ensure policies clearly identify reporting options and support resources both on and off campus
- Delineate confidential resources vs. non-confidential reporting options in policy and training
- Ensure all employees are familiar with Title IX reporting expectations
- Offer clear and easy to follow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

Tending to the Individual

- Tend to the individual through:
 - Practices informed by an understanding of the impacts of trauma and the dynamics of sexual assault
 - Regular communications
 - Ensuring appropriate support through an advocate, advisor, or support person
 - Adhering to time frames and communicating regarding delays
 - Implementing appropriate interim remedial and protective measures

DYNAMICS OF SEXUAL AND GENDER-BASED HARASSMENT AND INTERPERSONAL VIOLENCE

Awareness of the Impact of Language



The Dynamics of Sexual Assault

- Nature of victimization
- Counter-intuitive victim behaviors
- Delay in reporting
- Wavering level of cooperation/recantation
- Role of drugs and alcohol
- Most sexual assaults committed by someone known to the victim
- Most sexual assaults are achieved through threats, intimidation, and exploiting vulnerabilities or incapacitation
- Likelihood of repeat offenders and undetected predators
- Concerns over false reports
- Little to no physical or forensic evidence
- Most common defense is consent
- Decisions based solely on credibility
- Inability to completely eliminate occurrence
- Emotionally charged and incendiary in nature

Sexual Assault on College Campuses

- Most sexual assaults are committed by someone known to the complainant
- Most sexual assaults result in delayed reporting or no report at all
- Most sexual assaults are achieved through threats, intimidation, and exploiting vulnerabilities or incapacitation due to drugs or alcohol
- Most sexual assaults lack physical evidence
- Most common defense is consent

Non-Stranger Sexual Assault

- Force is typically not physical
- Does not involve use of weapons
- Force likely to be moral, intellectual, emotional, or psychological
- Often plays upon vulnerability that arises from intoxication of complainant
- Relationship issues greatly affect delay in reporting
- Varying degrees of relationship/trust

Investigative Considerations

- 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

Investigative Considerations

- Effect of power differential
- Preservation of dignity
- Cultural or religious influences
- Processing of incident not linear

Delay in Reporting

- Delay in reporting
 - Expectation of prompt/fresh complaint
 - Did the victim understand the significance of the act?
- Consider barriers to reporting
 - Ask the why without judgment
 - Help me understand . . .

Barriers to Reporting

- Fear of not being believed
- Fear of retaliation
- Fear a loss of privacy
- Fear of being blamed
- Incident may be trivialized
- Incident may be minimized
- Self-doubt:
 - Who to tell?
 - How to report?
 - When to report?
 - Why report?
- Ensure process for reporting that is:
 - Known to victims
 - Convenient
 - Professional
 - Trauma-informed
 - Private

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 – victim's secret is found out
 - Purposeful – victim makes decision to tell

Recantation

- Understand the real life repercussions of disclosing
- How was disclosure received?
- Tremendous actual & emotional costs of disclosure
- Possibility that recantation is real
- Does NOT end the investigation or the process
- Explore direct and indirect causes of recantation

Direct Causes of Recantation

- Complainant is blamed by family, friends, or respondent
- Direct threats to complainant by respondent/others
- Indirect threats to complainant by community members (shunning)
- Complainant is stigmatized, labeled, or the object of ridicule on campus
- Pressure by any individual to recant
- Emotional blackmail by respondent (I'll be kicked out of school)

Indirect Causes of Recantation

- Love for the respondent
- Loss of offender in life
- Fragmented peer group/community
- Effect on family members (sadness/depression)
- Lack of family support
- Feeling guilty/responsible
- Fear of testifying
- No desire or emotional fortitude to endure process
- Change in living conditions
- Change in financial status
- Change in school, neighborhood, circle of friends
- Multiple interviews and medical procedures
- Does not want respondent to suffer consequences
- Does not want to relive incident again
- Only wanted abuse to stop
- Just wants life to get back to normal

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.
- **Each individual case must be evaluated on its facts.**

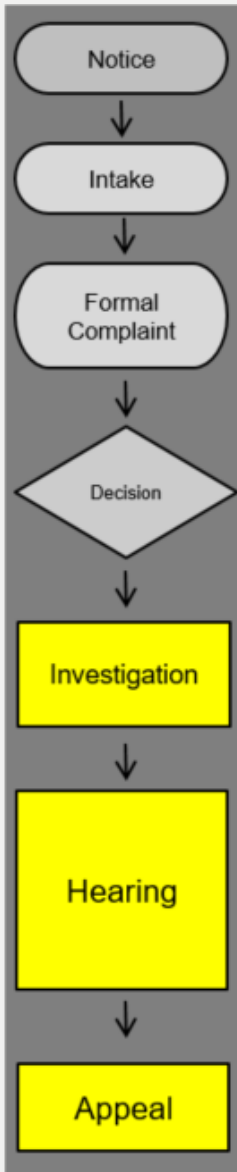
AUGUST 2020 TITLE IX REGULATIONS: BASIC REQUIREMENTS OF THE GRIEVANCE PROCESS

Basic Requirements

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



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



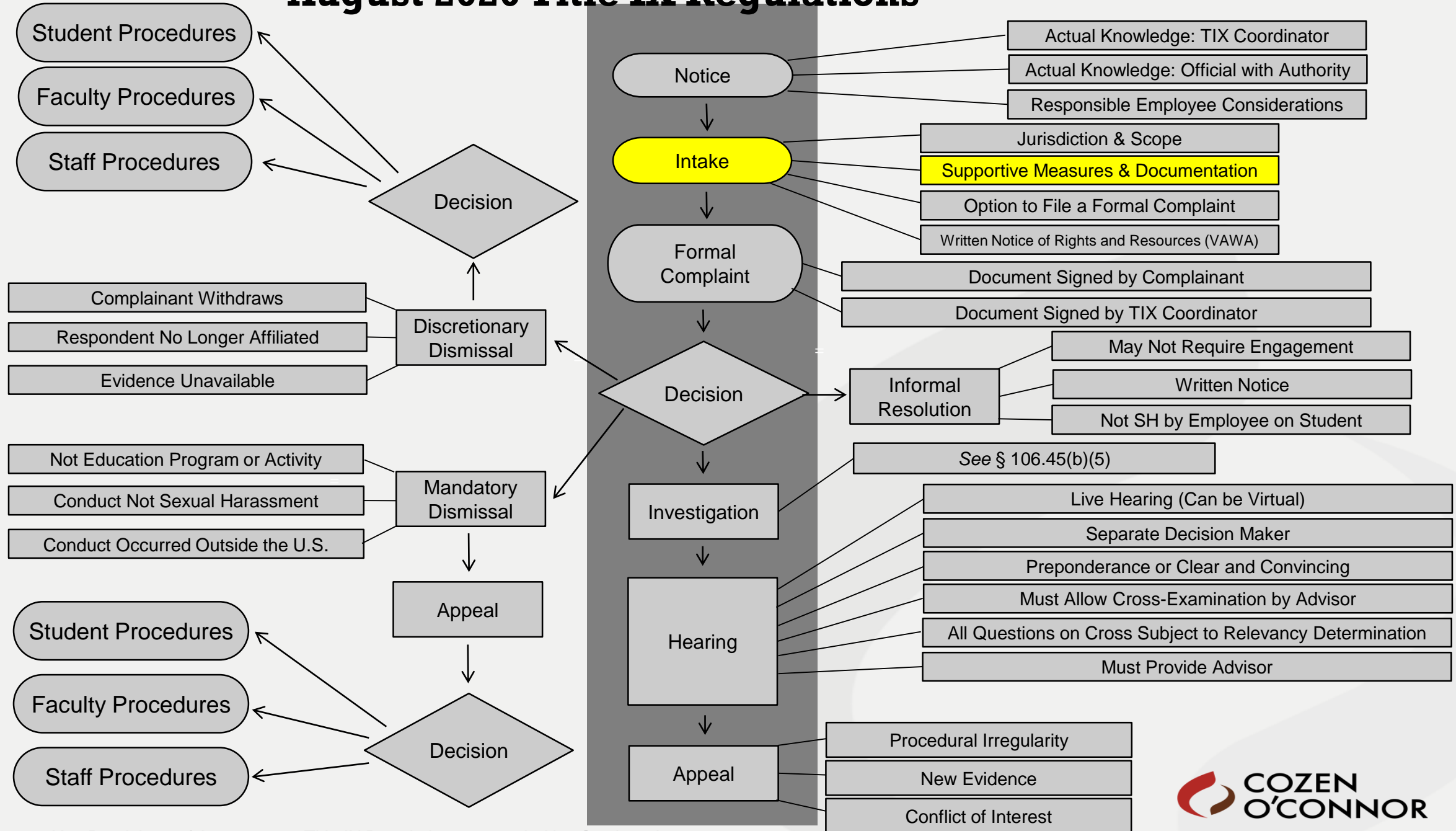
Basic Requirements



- 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

AUGUST 2020 TITLE IX REGULATIONS: SUPPORTIVE MEASURES

August 2020 Title IX Regulations

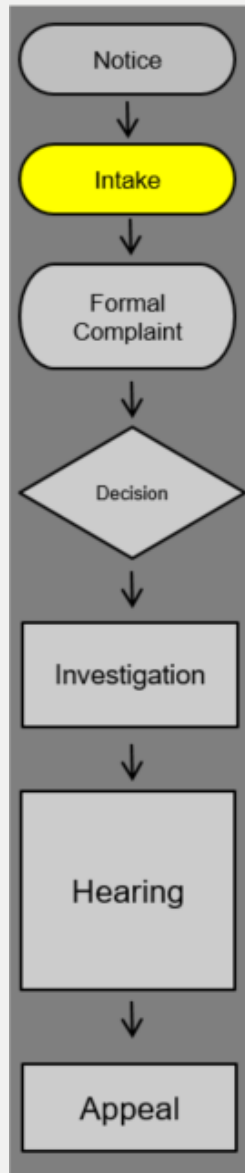


Reports vs. Formal Complaints

- The August 2020 Title IX 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.

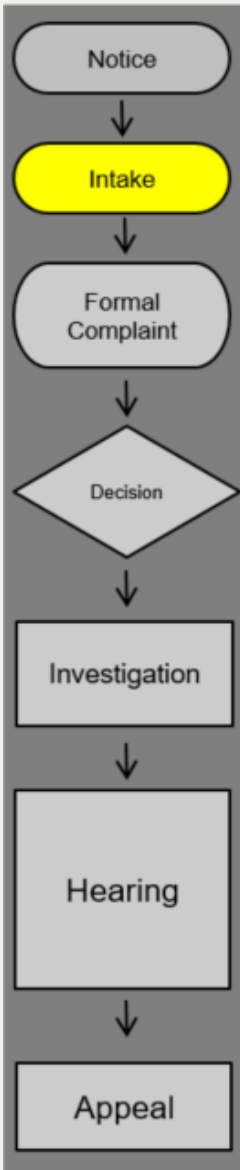
August 2020 Title IX Regulations; Preamble, 85 F.R. 30190.

Offering Supportive Measures



- The Title IX Coordinator must promptly contact the complainant to:
 - Inform of the availability of supportive measures **with or without the filing of a formal complaint**,
 - Consider the **complainant's wishes** with respect to supportive measures
 - Explain the process for filing a formal complaint.
- July 2021 Q & A sample policy:
 - Example Policy 1: The school presumes that reports of prohibited conduct are made in good faith. A finding that the alleged behavior does not constitute a violation of this school's policy or that there is insufficient evidence to establish that the alleged conduct occurred as reported does not mean that the report was made in bad faith.

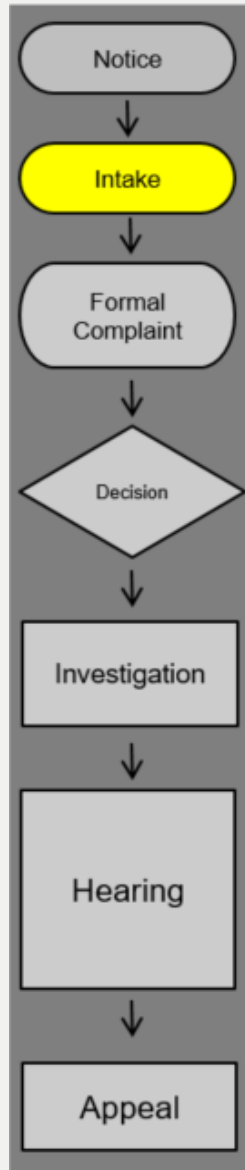
Supportive Measures



- Non-disciplinary, non-punitive individualized services
- Offered to both parties without fee or charge
- Designed to restore or preserve equal access to the education program or activity without unreasonably burdening the other party
- 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

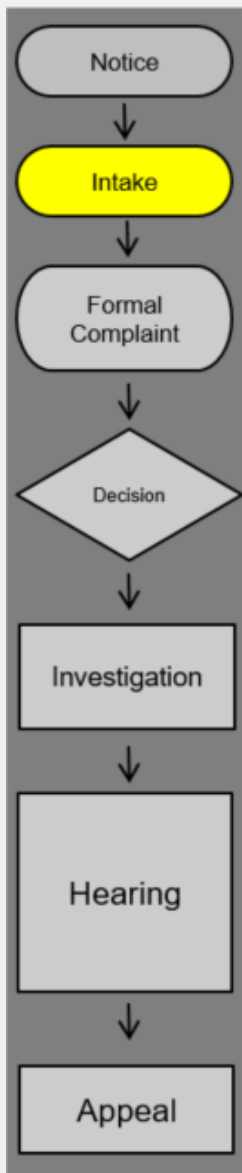
August 2020 Title IX Regulations; §106.30(a), 85 F.R. 30574.

Supportive Measures

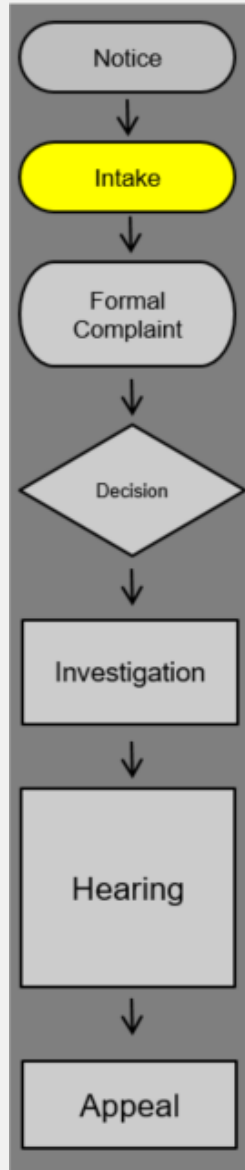


- Must maintain as confidential any supportive measures provided to the complainant or respondent, to the extent that maintaining such confidentiality would not impair the ability of the recipient to provide the supportive measures.
- The Title IX Coordinator is responsible for coordinating the effective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

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



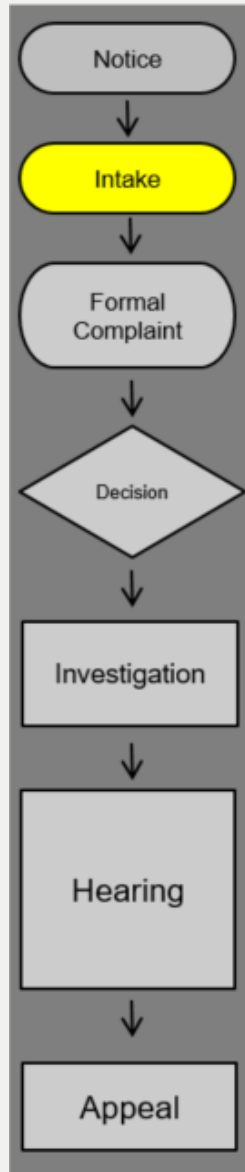
Emergency Removal for Students

- 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

August 2020 Title IX Regulations; §106.44(c), 85 F.R. 30575.

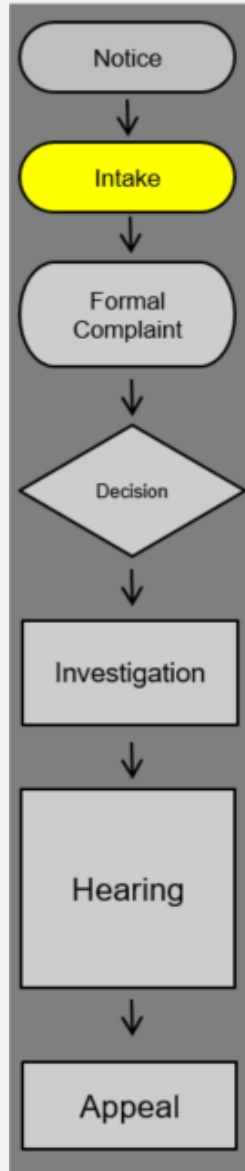
Emergency Removal

- 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.



August 2020 Title IX Regulations; Preamble, 85 F.R. at 30181.

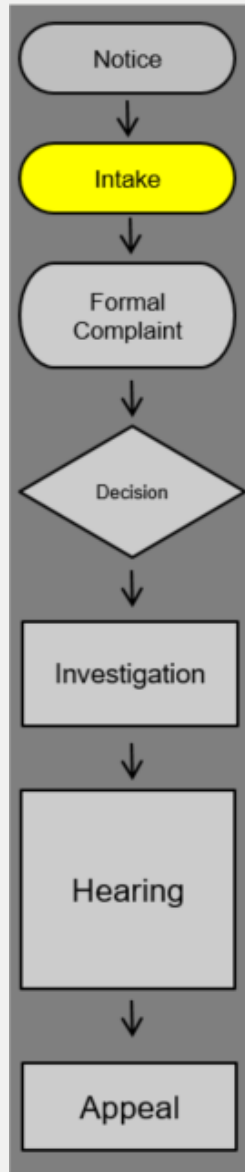
Emergency Removal



- 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.

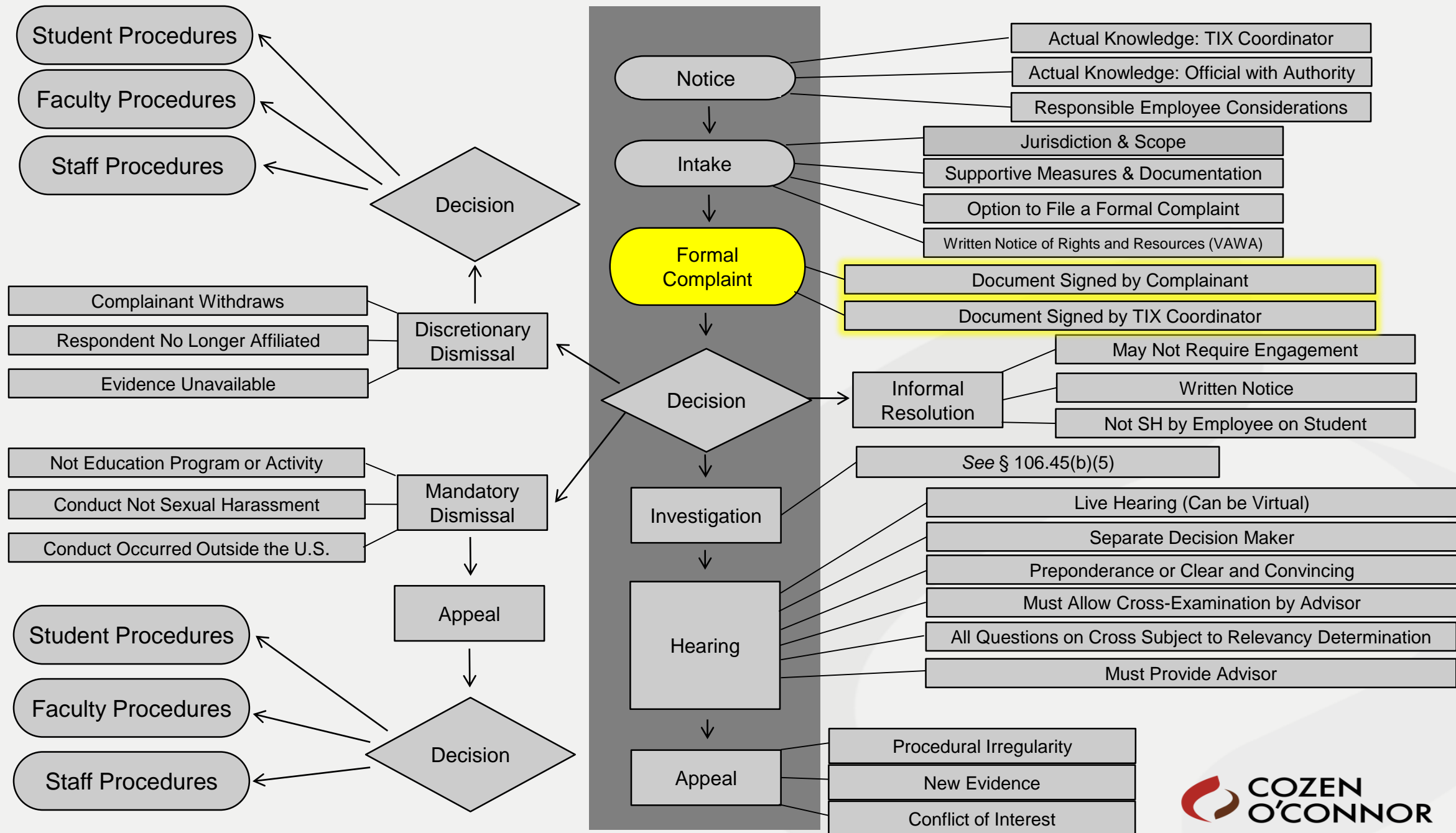
August 2020 Title IX Regulations; Preamble, 85 F.R. 30348.

Administrative Leave

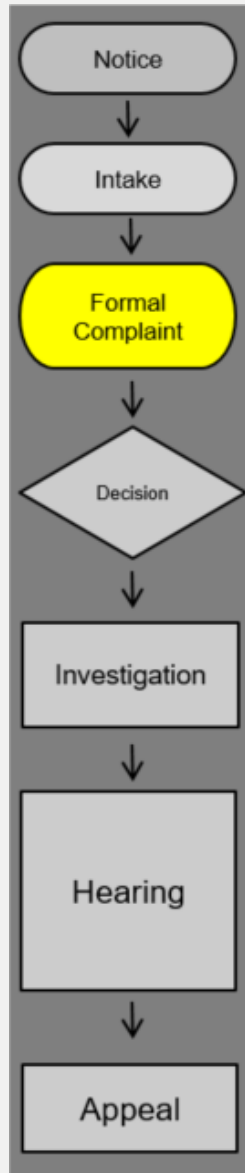


- Nothing in this subpart precludes a recipient from placing a non-student employee respondent on administrative leave during the pendency of a grievance process that complies with § 106.45.
- This provision may not be construed to modify any rights under Section 504 of the Rehabilitation Act of 1973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

AUGUST 2021 TITLE IX REGULATIONS: FORMAL COMPLAINTS



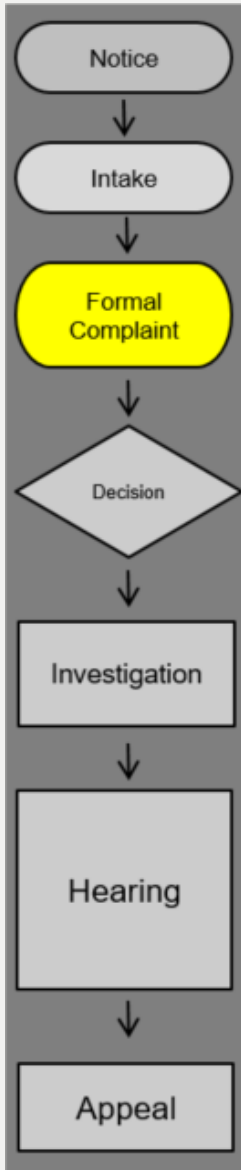
Formal Complaint



- 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

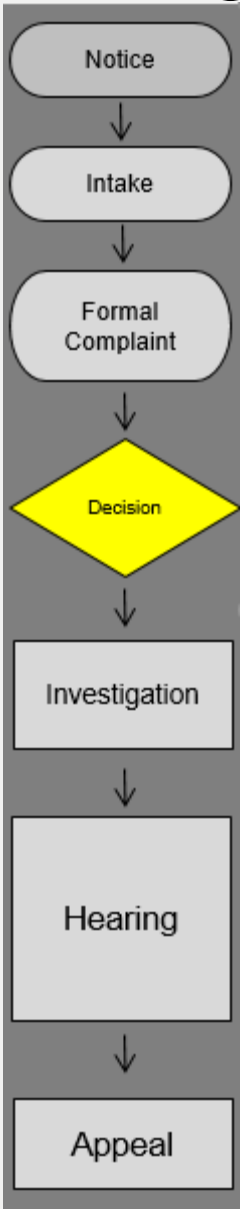
August 2020 Title IX Regulations; §106.30(a), 85 F.R. 30574.

Formal Complaint: Institutional Response



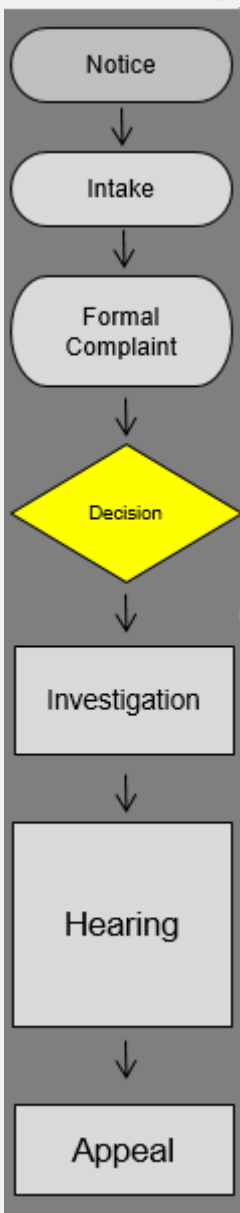
- Upon receipt of a **formal complaint**, the institution:
1. Must complete the actions required upon receiving notice, if not already completed,
 2. Must evaluate jurisdiction and required/discretionary dismissal,
 3. Should assess appropriate supportive measures for both parties,
 4. Should evaluate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

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

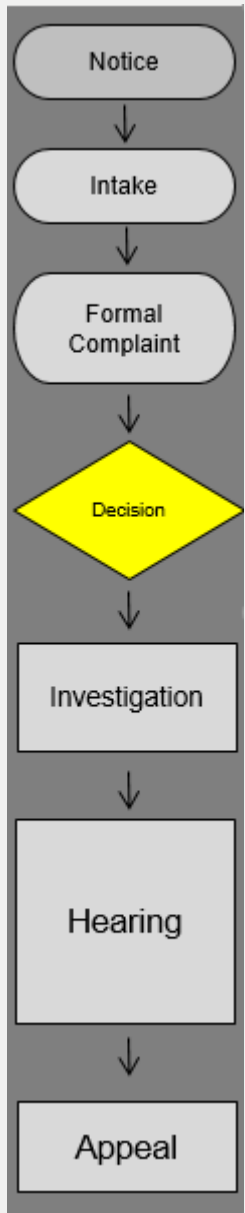
Formal Complaint: Discretionary Dismissal



- **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.

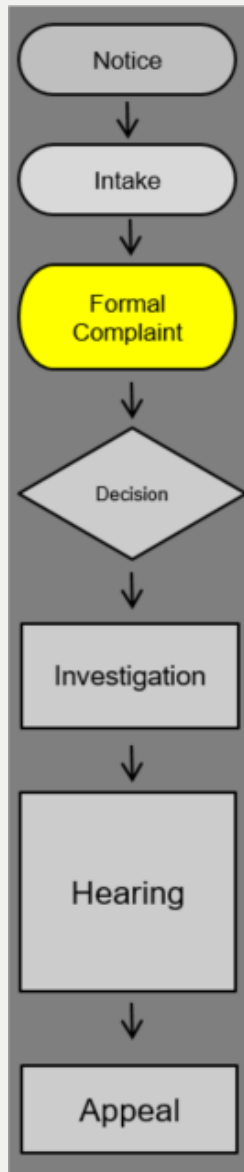
Dismissal of Formal Complaint

- 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



August 2020 Title IX Regulations; §§106.45(b)(3) and (b)(8), 85 F.R. 30576 and 30577-78.

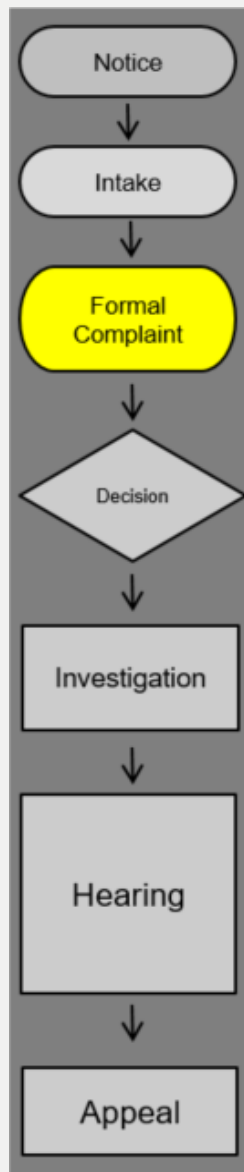
Consolidation of Formal Complaints



- 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.**

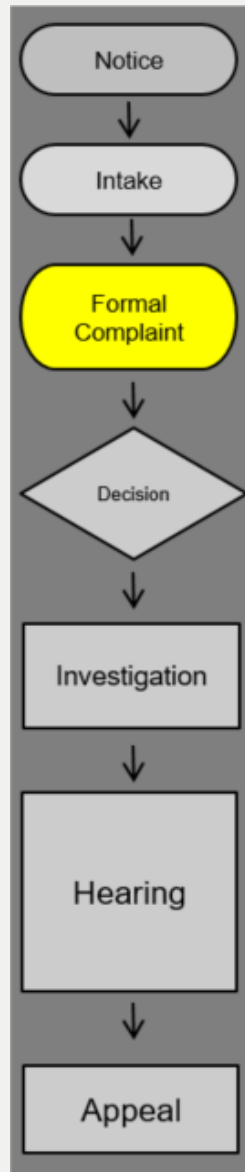
August 2020 Title IX Regulations; §106.45(b)(4), 85 F.R. 30576.

Consolidation of Formal Complaints



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

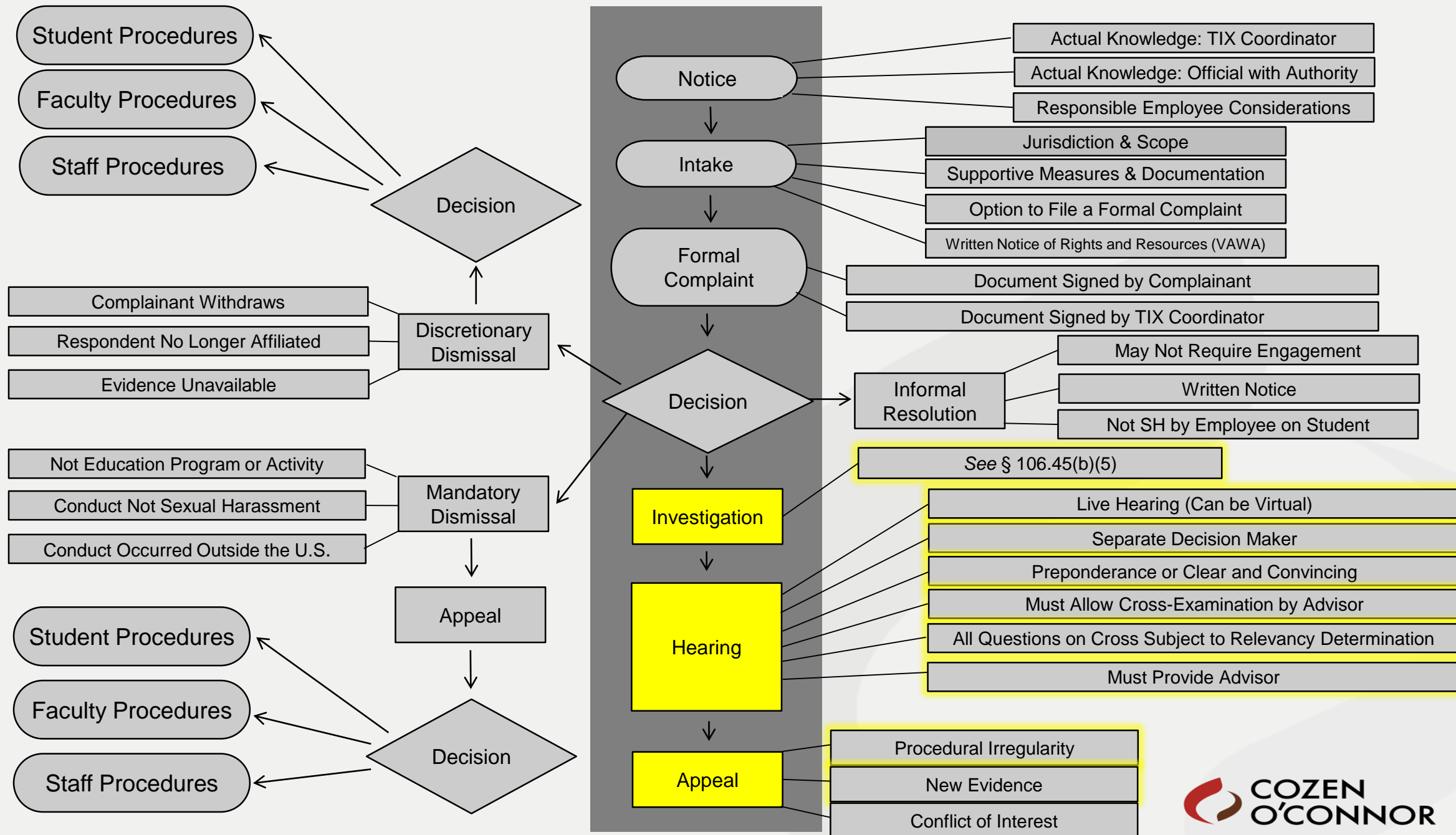
Consolidation of Formal Complaints



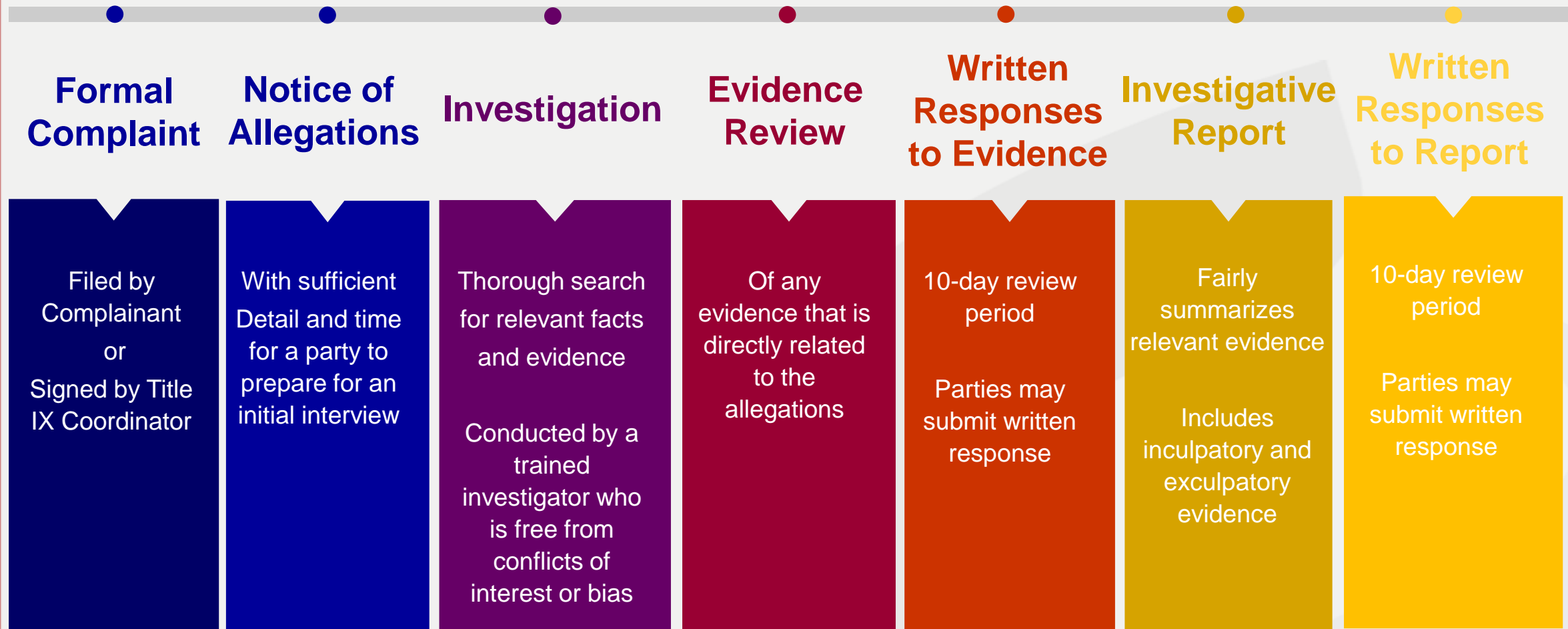
- If the respondent is facing an additional allegation, the respondent has a right to know what allegations have become part of the investigation for the same reasons the initial written notice of allegations is part of a fair process, and the complainant deserves to know whether additional allegations 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.

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

AUGUST 2020 TITLE IX REGULATIONS: INVESTIGATIONS



Grievance Process



The Obligation to Investigate

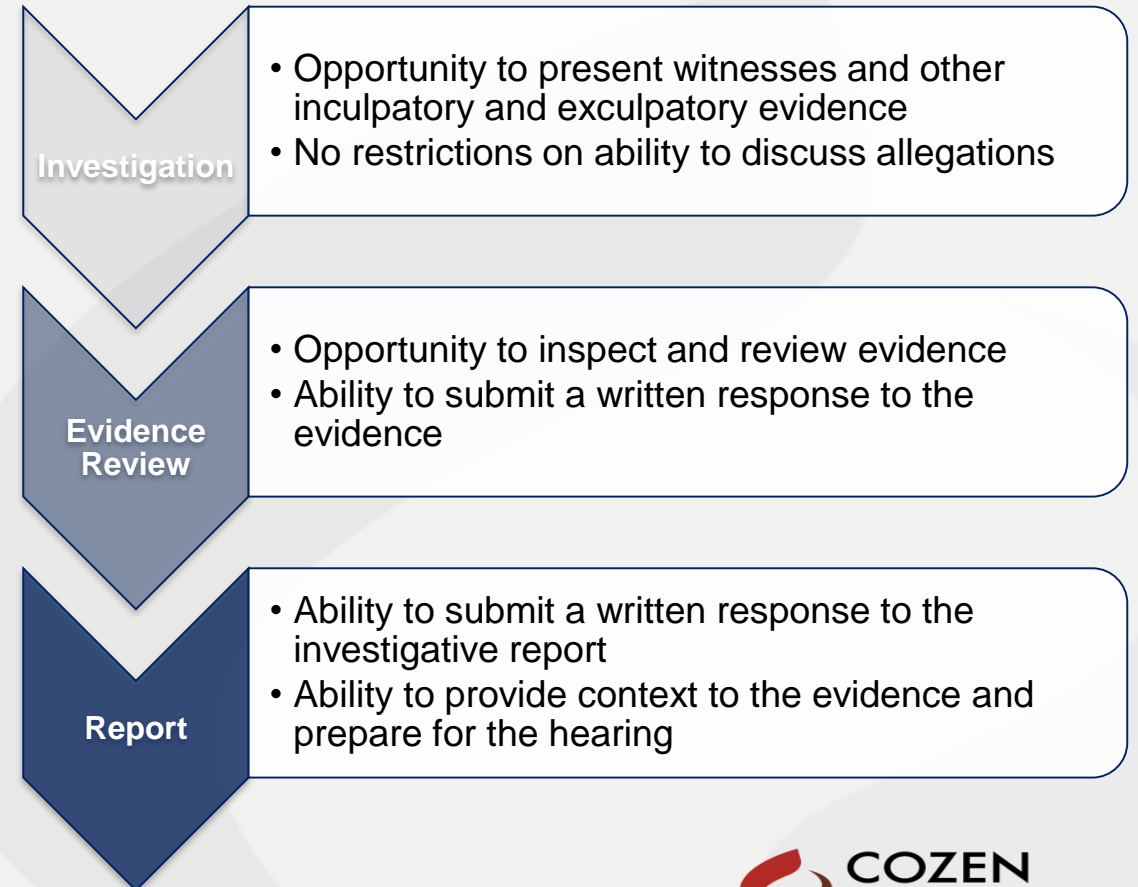
- Preamble to the August 2020 regulations:
- Once a formal complaint is filed, a recipient **must** investigate the allegations in that complaint
 - The Department believes that where a complainant has chosen to file a formal complaint, or the Title IX Coordinator has decided to sign a formal complaint, the recipient must investigate those allegations regardless of the merits of the allegations. (emphasis in original)

Setting the Stage - Investigations

Institutional Obligations



Parties' Opportunity to Participate



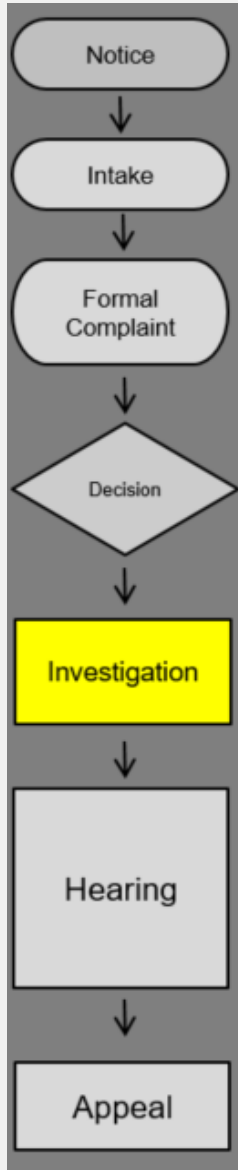
Investigative Principles

- 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

Separating Support from Investigations

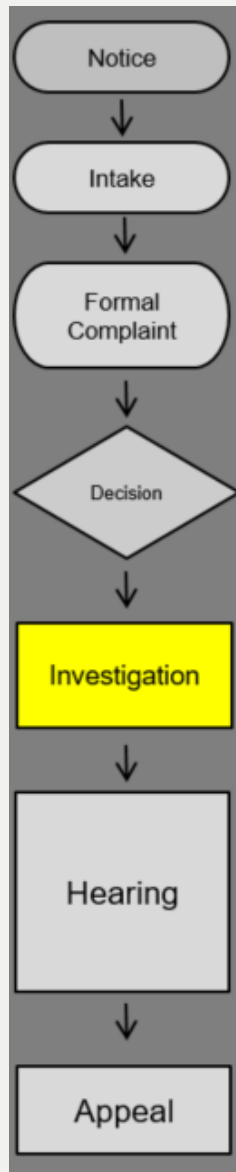
- Separate support/advocacy/intake functions from investigative/adjudicative functions to reduce potential for conflict of interest or perception of bias
- Conflation of roles can:
 - Impact thorough assessment of the facts
 - Create distrust/confusion by complainant
 - Give appearance of bias/lack of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

Written Notice of all Proceedings



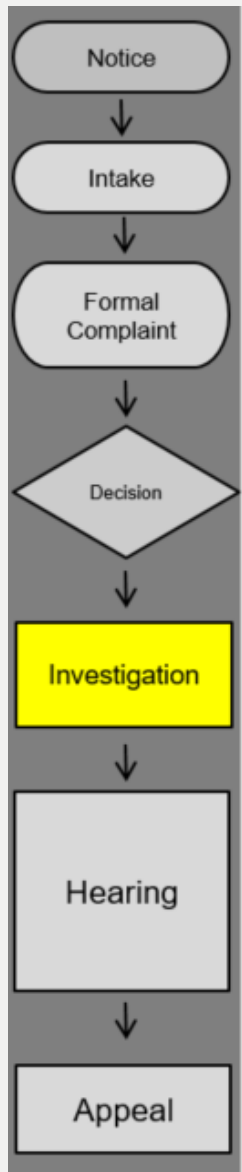
- Written notice of all hearings, investigative interviews or other meetings
- With sufficient time for the party to prepare to participate
- Notice must include:
 - Date, time, location of proceeding
 - Participants invited or expected to attend
 - Purpose of the proceeding

Written Notice of Allegations



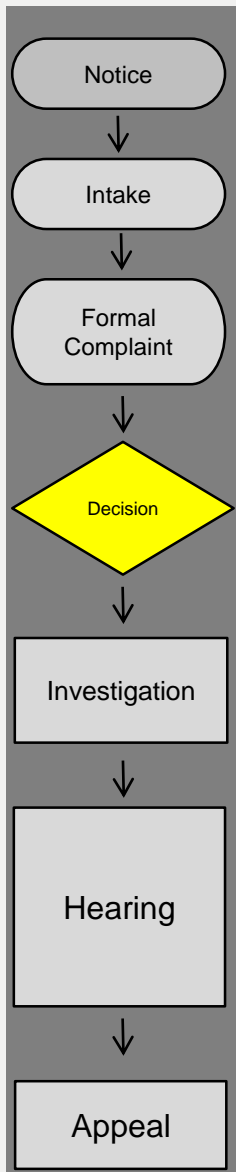
- Must provide written notice of the allegations.
 - Sufficient time to prepare a response before any initial interview
 - Sufficient details known at the time
 - identities of the parties, if known;
 - the conduct alleged to constitute sexual harassment; and
 - the date and location of the alleged incident,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

Written Notice of the Allegations



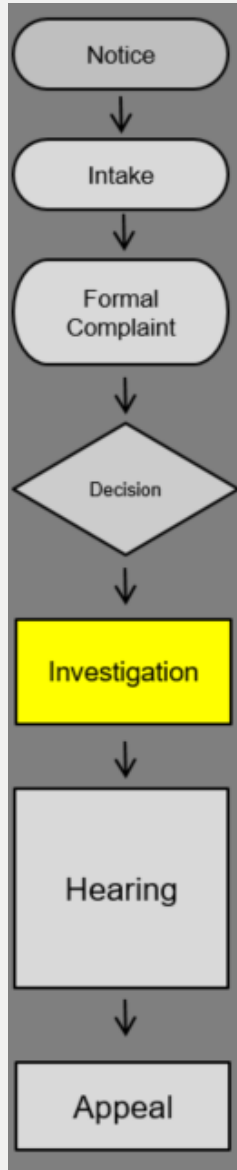
- Must state that:
 - the respondent is presumed not responsible for the alleged conduct
 - a determination regarding responsibility is made at the conclusion of the grievance process
- Must inform the parties:
 - they may have an advisor of their choice
 - they may inspect and review evidence gathered
 - of a prohibition against knowingly making false statements or knowingly submitting false information

Supplemental Notice



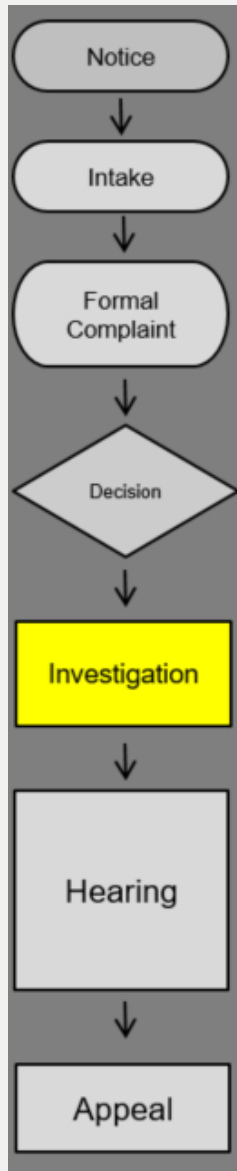
- If during the investigation, the recipient decides to investigate allegations about the complainant or respondent that are not included in the original notice, the recipient must provide notice of the additional allegations to the parties whose identities are known.
- The Preamble makes it clear that 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...

Burden of Gathering Evidence



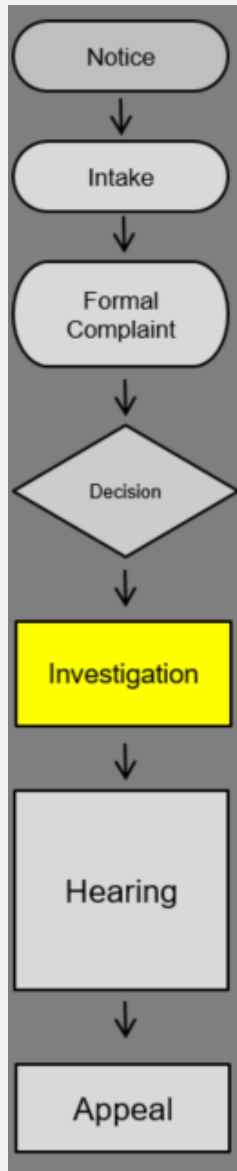
- Ensure that the burden of proof and the burden of gathering evidence rests on the recipient and not on the parties
 - The recipient's burden is **to gather evidence sufficient to reach a determination** regarding responsibility

Burden of Gathering Evidence



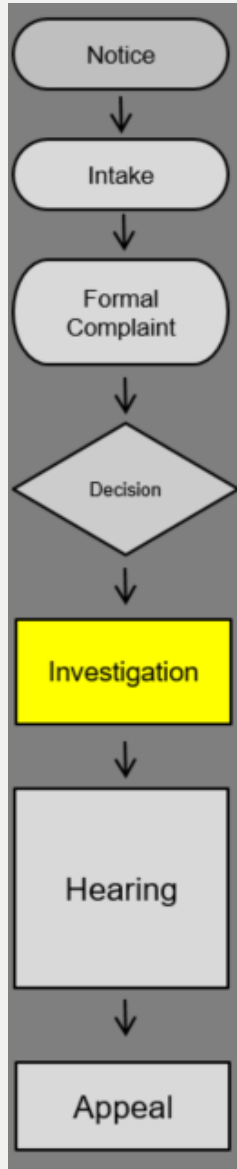
- Undertake a **thorough search for relevant facts and evidence** pertaining to a particular case, while operating under the constraints of conducting and concluding the investigation under designated, reasonably prompt time frames and without powers of subpoena.
- Such conditions limit the extensiveness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

Burden of Gathering Evidence



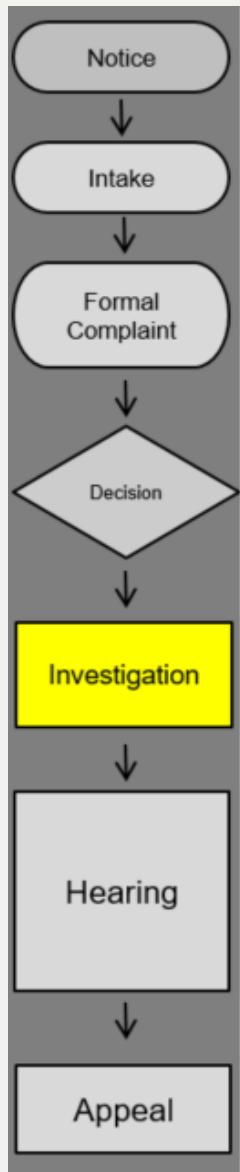
- The investigator is obligated to **gather evidence directly related to the allegations** whether or not the recipient intends to rely on such evidence (for instance, where evidence is directly related to the allegations but the recipient's investigator does not believe the evidence to be credible and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

Opportunity to Participate



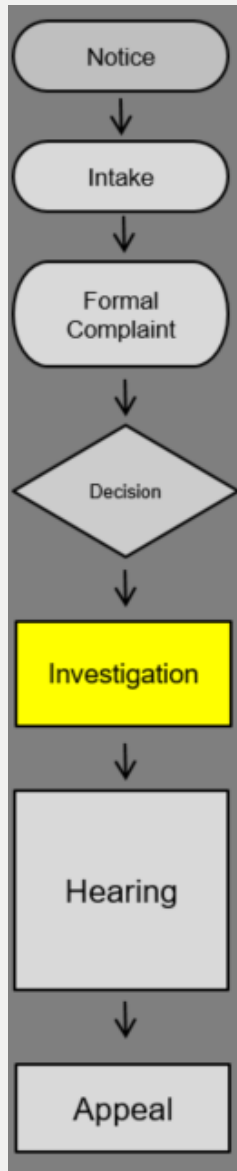
- Not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence.
- Provide an equal opportunity for the parties to present witnesses and evidence
 - Fact and expert witnesses
 - Inculpatory and exculpatory evidence

Advisor of Choice



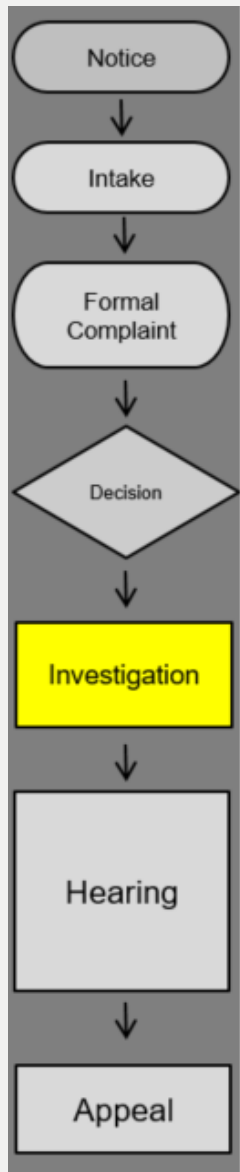
- Provide the parties with the same opportunities to have others present during any grievance proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice, who may be, but is not required to be, an attorney.
- A recipient may establish restrictions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

Restrictions on Advisor Participation



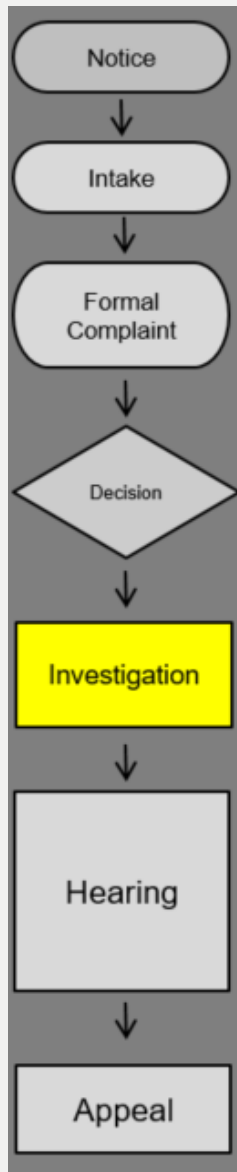
- We do not believe that specifying what restrictions on advisor participation may be appropriate is necessary, and we decline to remove the discretion of a recipient to restrict an advisor's participation so as not to unnecessarily limit a recipient's flexibility to conduct a grievance process that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

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.”

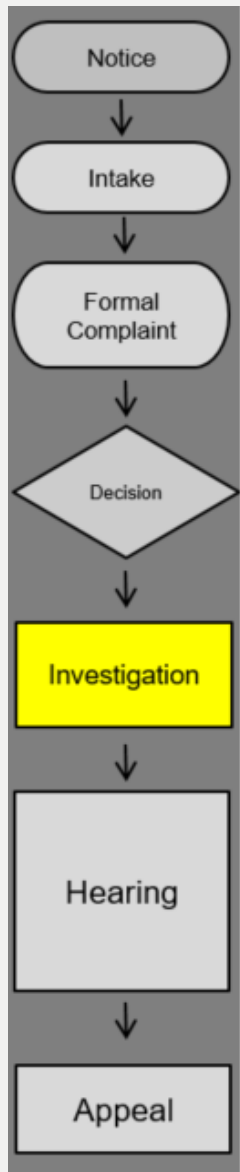
Training of Advisors Not Required



- 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.

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.



August 2020 Title IX Regulations; Preamble, 85 F.R. 30340-41.

INVESTIGATIVE PROTOCOLS

Investigative Protocols

- Developing an investigation plan
- Maintaining a working chronology
- Building a timeline
- Communications
- Documenting interviews
- Gathering physical evidence
- Investigative report
- Privacy and retaliation considerations

Developing an Investigative Plan

- Develop an investigative plan at the outset
- Make a list of witnesses and order of interviews
- Make a list of other possible sources of evidence
 - How will the evidence be obtained?
- Use checklists to ensure that all possible sources of evidence are considered

Developing an Investigative Plan

- Explore multiple sources for potential witness interviews
 - Complainant
 - Respondent
 - Any witnesses to the alleged incident
 - Any witnesses to the disclosure(s)
 - First responder personnel
 - Hospital
 - Police
 - Campus
 - Any other alleged victims of the respondent
 - Any witnesses to relevant prior contact between complainant and respondent
 - Other witnesses identified through interviews

Developing an Investigative Plan

- Maintain flexibility and revise the plan as the investigation reveals other potential sources of evidence
- Look for continually evolving evidence
 - Social media
 - Recent contact between the complainant and the respondent
 - Acts of retaliation

Developing an Investigative Plan

- Be mindful of timeliness and schedule interviews immediately
 - Leave time for follow-up interviews
 - Memories generally do not improve with time
 - Limit effect of witnesses talking to one another
 - Assume there will be delays outside of your control and plan accordingly

Developing an Investigative Plan

Investigation Cover Sheet

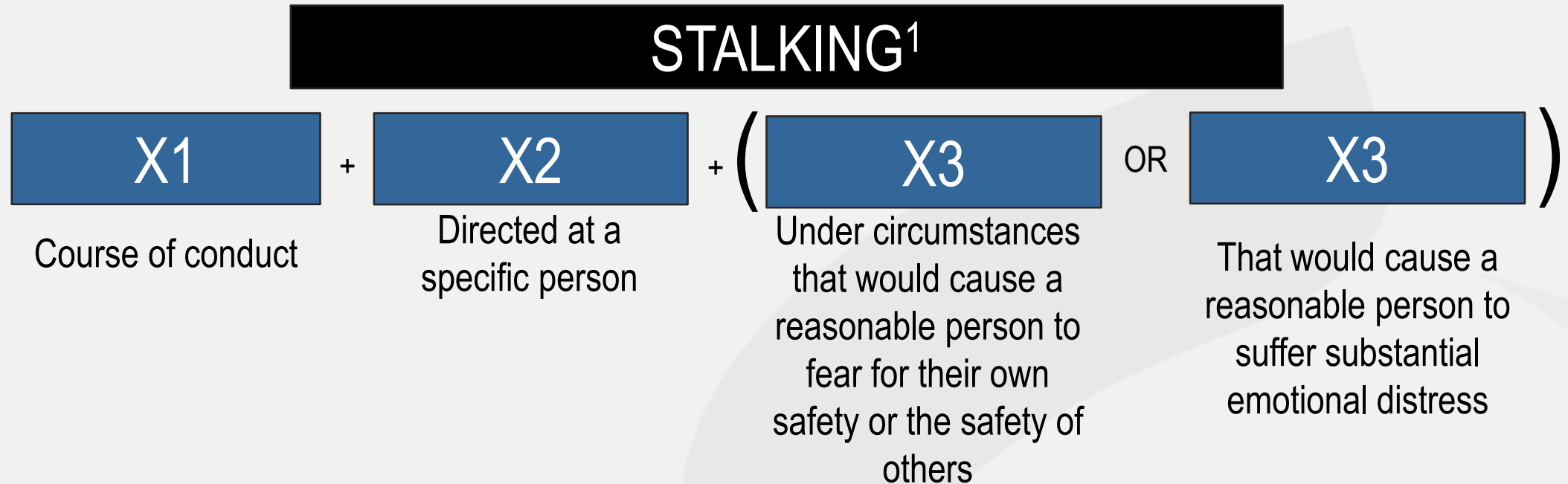
Internal Case No.		Investigator # 1	
		Investigator # 2	
Respondent Name		Advisor	
Complainant Name		Advisor	
NOI / Start Date		Alleged Policy Violation(s):	
30 Days			
45 Days			
60 Days			
Draft Report Date			
Final Report Date			
Hearing Date		Hearing Chair	
Complainant Witnesses / Contact Info		Respondent Witnesses / Contact Info	
<input type="checkbox"/>		<input type="checkbox"/>	
<input type="checkbox"/>		<input type="checkbox"/>	
<input type="checkbox"/>		<input type="checkbox"/>	
<input type="checkbox"/>		<input type="checkbox"/>	
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<input type="checkbox"/>		<input type="checkbox"/>	
Other Witnesses / Contact Info			
<input type="checkbox"/>		<input type="checkbox"/>	
<input type="checkbox"/>		<input type="checkbox"/>	
<input type="checkbox"/>		<input type="checkbox"/>	
<input type="checkbox"/>		<input type="checkbox"/>	
<input type="checkbox"/>		<input type="checkbox"/>	
Documentary Evidence			
Internal Documentation		Communications	
<input type="checkbox"/> Initial Report		<input type="checkbox"/> All communications between Parties	
<input type="checkbox"/> Notes of follow-up meetings / discussions		<input type="checkbox"/> Texts/posts close in time to incident	
<input type="checkbox"/> Notices of Investigation		<input type="checkbox"/> Communications about incident w/ others	
<input type="checkbox"/> No Contact Order(s)		<input type="checkbox"/> Contemporaneous photos	
<input type="checkbox"/> Documentation re: other interim measures		<input type="checkbox"/>	
<input type="checkbox"/> Scene photos / maps		<input type="checkbox"/>	
<input type="checkbox"/>		<input type="checkbox"/> Records	
<input type="checkbox"/>		<input type="checkbox"/> Medical records (need release)	
<input type="checkbox"/>		<input type="checkbox"/> Police / Public Safety Reports	

Case: _____

Date opened: _____

[illegible]

Map the Elements of the Alleged Conduct



¹ Source: Berkeley College Policy, p. 5 (draft as of 8/5/2020)

Maintaining a Case Log

- Maintain a chronological log of the investigation including dates/times of interviews, meetings, requests for evidence, receipt of evidence, and all other key events
- Ensure that the investigation is completed within the institution's time frame or that written notice of extensions are given specifying good cause reasons for the delay

Building a TimeLine

- Create a timeline of events of the incident
 - Remember to include key events other than the alleged sexual assault itself: i.e., relevant prior contact, other complainants, disclosure
- Create a timeline of the relationship between the parties
- Identify witnesses to each event
- Identify any other evidence relevant to each event
- Note where there is agreement/disagreement as to events

Communications

- Identify contact person for the parties to avoid the need to coordinate with multiple departments
- Ensure regular and timely communications re: next steps, expectations, timing and delays
- Check in!!
- Follow up in person meetings and telephone calls with written memory markers
- Use sensitive and informed tone and content
- Use common and consistent language among team members

Communications

- Ensure active and regular communication with complainant and respondent regarding procedure and what can be expected.
- Be sensitive, courteous, and professional in all communications. The investigation is stressful on all involved.
- Maintain a working list of contact information for all relevant parties.
- Document all communications.

Identifying Our Own Biases

- What does rape look like?
- Victim-blaming
 - What was she thinking when...
 - What did he think was going to happen?
- Over-identifying with complainant or respondent
 - I would have...
 - If it was me..
 - That could have been me...
- Culture/diversity/world view

Diversity and Culture

- Sensitivity to language and bias
 - LGBTQ
 - Cultural differences
 - Race
 - Insular groups
 - 504/disability
- Reporting barriers
- Communication differences/impediments

FORENSIC INTERVIEWING

Before You Begin

- Consider timing and location
- Prepare for the interview by reviewing information gathered to date and listing all questions and/or subject matters to be covered
 - But don't forget to listen and follow-up during the interview
- Think about:
 - What information the interviewee is likely to have about the incident
 - The interviewee's relationship to each party
 - Barriers to the interviewee's participation, including:
 - Concerns about retaliation
 - Needing to navigate ongoing relationships
- Permit a support person to be present
- Allow enough time for thorough exploration of the issues

Before You Begin

- Look beyond the initial set of information
- Ask yourself:
 - What would I want to know?
 - What is missing here?
 - What questions do I still have?
 - What external facts would corroborate or refute the information?
 - Are you able to preliminarily assess the type of case (fabrication, identification, or consent)
- Organization, knowledge, and fluency

Fabrication, Identification, or Consent

- Fabrication (It didn't happen.)
 - Used when there is no corroborating physical or eyewitness evidence
- Identification (Someone else did it.)
 - Used when there is corroborating physical evidence to establish that act occurred
- Consent
 - Used when there is DNA or other identification evidence
 - Consent is the most common defense in acquaintance rape prosecutions.

Corinne Casarino, *Civil Remedies in Acquaintance Rape Cases*, 6 B.U. Pub. Int. L.J. 185, 189 (1996).

The Interview Preamble

- Introduce roles:
 - Investigator as fair, impartial, thorough fact-gatherer
 - Advisor as emotional support, silent observer
- Clearly explain that the information you gather will be shared with both parties and with a small circle of administrators involved in resolution
 - If there were to be a criminal or civil case in the future, could be shared pursuant to subpoena or other legal process
- Explain the obligation to provide truthful and complete information
- Reminder not to engage in retaliation or interfere with fact-gathering
- Overview of amnesty policy
- “Do you have any other questions before we begin?”

Privacy Considerations

- Inform all witnesses that the information:
 - Will be shared with school personnel (need-to-know limited group)
 - May be shared with law enforcement (no requirement to participate)
 - Will not be shared beyond the “need to know” circle
- Request that witnesses:
 - Keep the contents of the interview confidential
 - Avoid discussing the underlying events with other potential witnesses

Retaliation Considerations

- Discuss importance of non-retaliation with all parties
- Discuss with the respondent that any acts of retaliation could be used as evidence against him/her

Interview Techniques

- Develop rapport
 - Invest in learning the language of your witness
 - Begin with background/context questions – including the nature of the parties' relationship, if any.
 - Exercise reflective listening in framing next question
 - Maintain attentive posture and good eye contact
 - Allow witness to ask questions

Interview Techniques

- Allow your witness to give a narrative
 - Refrain from interrupting or from asking clarifying questions
 - Use open-ended free recall questions
 - Focus on sensory details the individual may be able to recall
 - Pay attention to emotional cues and responses and other non-verbal communication
 - Look for any evidence of motive/bias/interest, even where not immediately apparent
 - Listen for “ring of truth” answers

Interview Techniques

- Go back and ask questions to clarify details
 - Ask memory trigger questions (focused or multiple choice)
 - Explore and allow witness opportunity to reconcile internal inconsistencies
 - Recognize the potential impacts of events on memory and presentation
 - Avoid asking questions that imply a value judgment
 - Frame questions about sensitive areas with an explanation of why you are exploring that area of inquiry
 - Manner of dress
 - Alcohol or other drug consumption
 - Prior sexual history

Interview Techniques: Corroboration

- Exhaustive search for corroboration
- Identify and explore areas of inquiry that can be corroborated
 - Photos/text messages/social media posts/Uber receipts
- The disclosure of event should be thoroughly explored
 - Circumstances
 - Witnesses (“prompt complaint witnesses”)
- Question opportunity, access, means, and motive
- Test the sensory and emotional details
- Take the claims/defenses to their logical ends and explore logical inconsistencies
- Assess import of lack of corroboration

Interview Techniques

- Pay attention to your tone of voice and volume level
- In consent cases, identify each parties' perspective on the other's method of communication (verbal and non-verbal) during incident
- Rely upon maps, photos, charts where available
 - Have witness draw a diagram (or mark up a previously obtained floor plan)
- Create running timeline
- Set the stage for a follow-up interview
- Send follow-up email
 - To correct any mistakes/misstatements
 - To provide any additional information recalled after the interview

The Continuum Approach

- Open-ended
 - Calls for narrative or recall
- Focused
 - Directs the witness to a particular area of focus
- Multiple choice
 - Provides a range of options, “or some other way”
- Yes/No
 - Seeks to clarify a specific point
- Leading
 - Assumes the answer . . .

Some Useful Phrases

- **Could you/would you be willing to** tell us more about....?
- **How** did you feel about...?
- **What** did you do after...?
- **What happened** then?
- **Can you** explain to me what you meant when you said....?
- **How** did ...?
- **Can you help me** understand ...?

Informed and Effective Communication

- Using open and conversational communication style
 - Not a “gotcha”
- Listen – don’t assume!
- Embrace the uncomfortable, the pause, and the silence
 - Take a break
 - Offer reassurance
 - Reschedule
- Support the witness by:
 - Demonstrating desire to understand
 - Using reflective listening
 - Avoiding emphasis on “you”
 - Explaining the purpose of the questions
 - Allowing a support person to be present

Closing the Interview

- After reading the interview statements:
 - What other information will you seek?
 - Who will you seek to interview?
- Is there anything you need to discuss with the interviewee about that information or those witnesses?
 - Contact information
 - Releases for records
 - Caveats
- Set the stage for follow-up
- Reminder about resources and supports
- Reminder about retaliation and non-interference
- Leave the door open

Documenting Interviews

- Take detailed notes of interviews
 - Details are essential to assessing corroboration
- Determine method of note-taking – handwritten notes, computer, recording
- Preferred method employs two interviewers in which one person focuses on thorough notes
- Use verbatim quotes where possible
 - Assists in evaluating the “ring of truth”
- Document the questions and investigator framing of issues
- Note changes in demeanor, tone or engagement

Documenting Interviews

- Maintain interview documentation in investigation file
- Remember that students have a right to view their educational record
- Professionalism
- Precision
- Clear and accessible language

Gathering Physical Evidence

- Determine whether the College has a memorandum of understanding (MOU) with local law enforcement
 - Information-sharing
 - Coordination of interviews
- Consider opportunity to photograph injuries, property damage, or location of incident
- Timeliness is key
 - Physical evidence can be lost, destroyed, or contaminated
 - Injuries heal quickly

Gathering Physical Evidence

- Physical evidence may include:
 - Injuries, photographs of injuries, medical records
 - Communication records such as telephone, email, voicemail, text, social media
 - Security monitoring video, visitor logs
 - Clothing, bedding, other tangible objects
 - Photographs of scene
 - School records
 - 911 tape, police records
 - Forensic evidence such as DNA

*Note: Forensic evidence must be reviewed by a trained forensic examiner

Gathering Physical Evidence

- Important to preserve evidence, whether or not law enforcement is involved
- Limited window for evidence collection
 - 72 to 96 hours for a sexual assault nurse examination
 - Physical evidence in clothing or on bedding may last indefinitely
- Ensure the proper medical or forensic personnel handle forensic evidence

Gathering Physical Evidence

- All physical evidence, whether subject to forensic analysis or not, should be preserved and the chain of custody should be maintained
- Ensure that evidence collection and maintenance is documented including:
 - Date of evidence recovery
 - Location of evidence recovery
 - Person who recovered evidence
 - All persons who handled evidence
 - Location of evidence storage
- Ensure that evidence is stored in a secure location
- Document any time the evidence is removed

Principles to Remember

- Conduct a follow-up interview for clarification when necessary
- Prepare an amended written notice when necessary
- Document and communicate extensions for good cause
- Document all missing information and attempts to obtain
- Synthesize and assess for gaps before closure

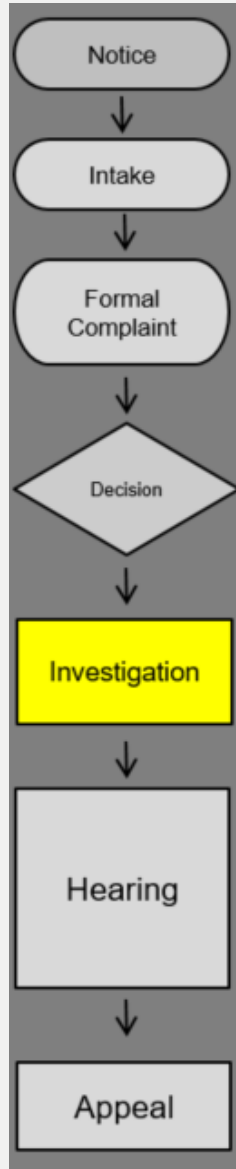
AUGUST 2020 TITLE IX REGULATIONS: EVIDENTIARY CONSIDERATIONS

Evidentiary Considerations

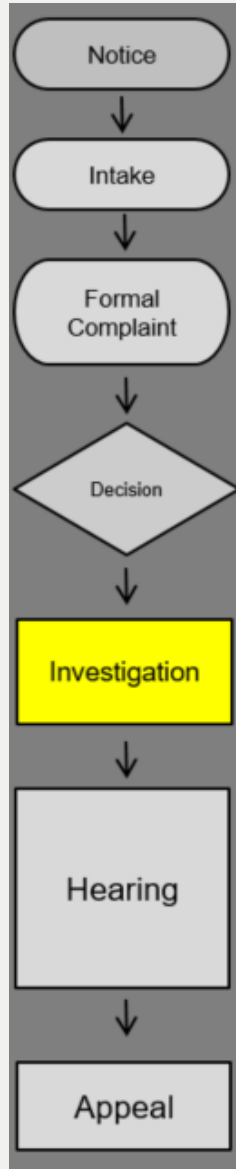
- Privileged Information & Records
- Relevance
- Prior Sexual History
- Prior or Subsequent Misconduct
- Setting Evidentiary Rules

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

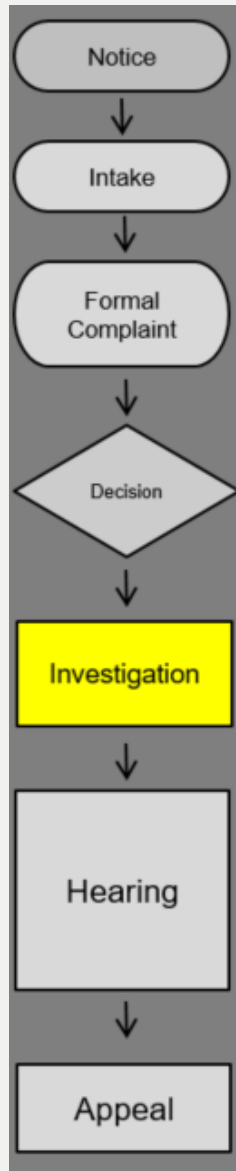


Privileged Records



- 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.

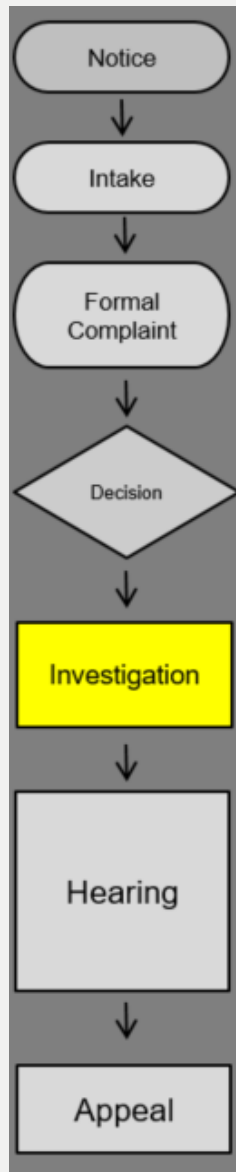
Berkeley Policy and Procedures



- The Title IX Investigator(s) will 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.
- If a person voluntarily chooses to share medical or counseling records with the Title IX Investigator(s), they must sign a written consent that acknowledges that relevant information from the medical or counseling records must be shared with the other party to ensure the other party has notice of that information and an opportunity to respond.
- At the conclusion of the investigation, the Complainant and the Respondent will both have the opportunity to review and respond to all information gathered in the investigation that is directly related to the allegations, including information shared by the Complainant or the Respondent during their interviews or through evidence either provides.

Berkeley Procedures at 12.

Prior Sexual History

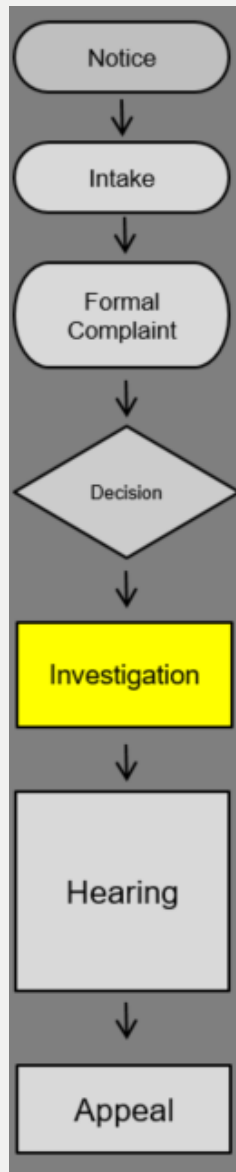


- Questions and evidence about the complainant's sexual predisposition or **prior sexual behavior** are not relevant, unless such questions and evidence about the complainant's prior sexual behavior are offered:
 - To prove that someone other than the respondent committed the conduct alleged by the complainant,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

August 2020 Title IX Regulations; §§106.45(b)(1)(iii) and (b)(6), 85 F.R.30575 and 30577.

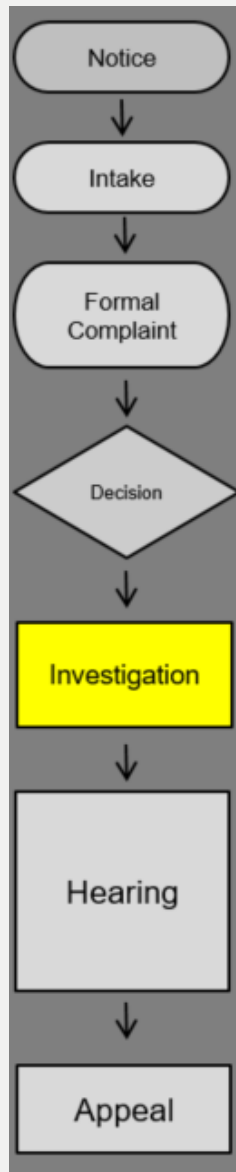
Prior Sexual History

- 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.



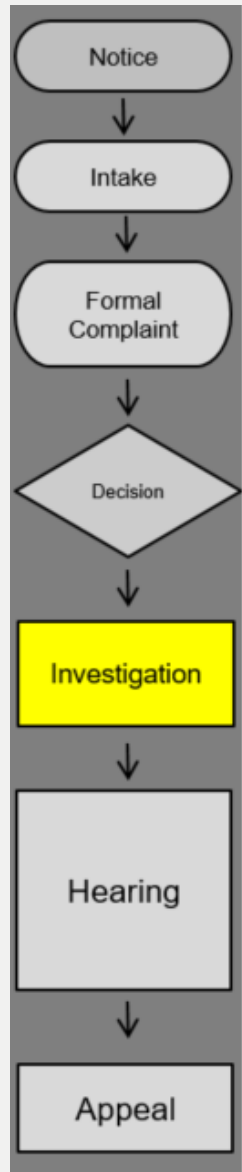
August 2020 Title IX Regulations; Preamble, 85 F.R.30353.

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.

Berkeley Policy and Procedures



- 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 if the questions and evidence concern specific incidents of the Complainant's prior sexual behavior with respect to the Respondent and are offered to prove consent.

Berkeley Procedures at 19.

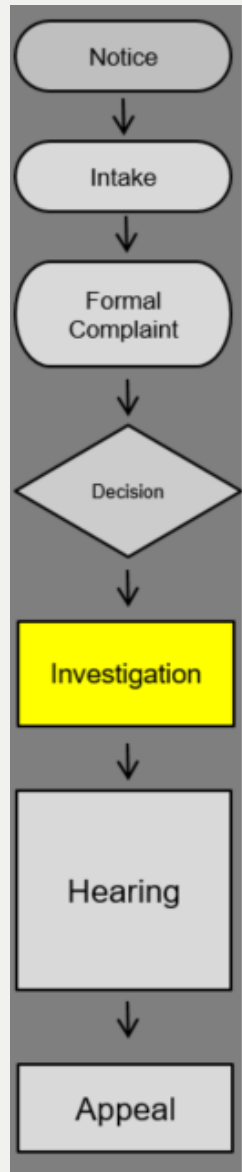
Prior or Subsequent Misconduct

- 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

Prior or Subsequent Misconduct

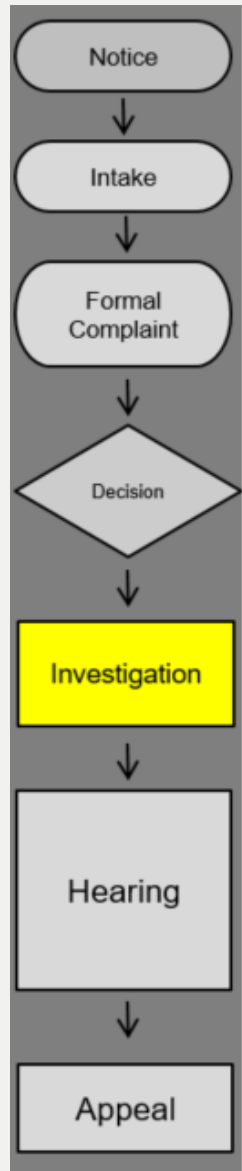
- Prior or subsequent misconduct may be relevant to demonstrate:
 - Intent/knowledge/state of mind
 - Motive
 - Opportunity
 - Lack of mistake
 - Pattern
 - Identity
 - Information that is inextricably interwoven with the facts
- Consider prejudicial vs. probative value

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.

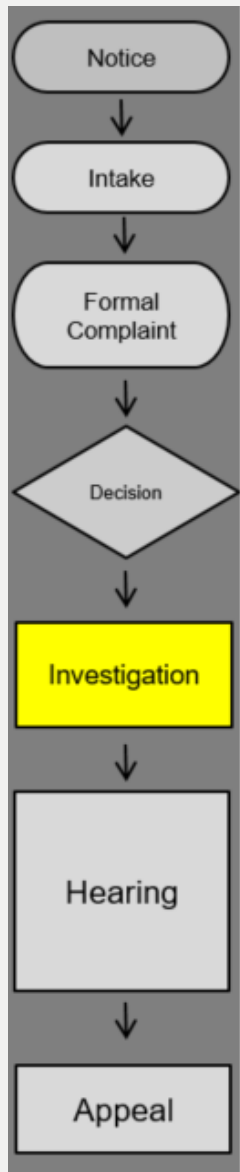
Flexibility to Adopt Rules – Except



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

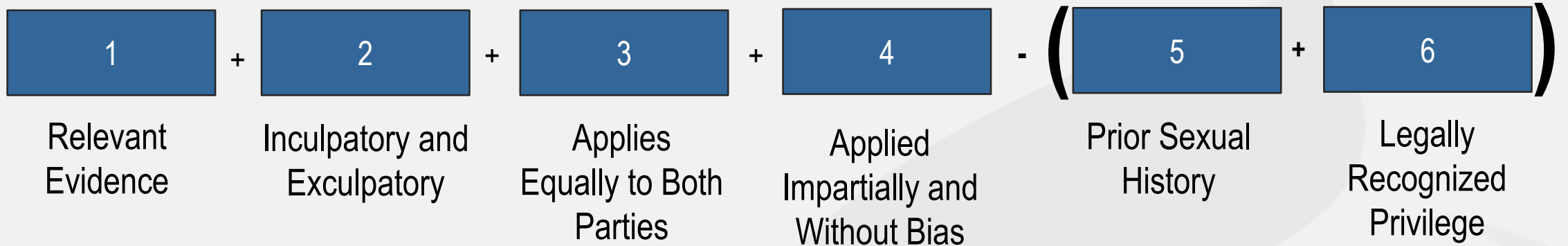
Relevance

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



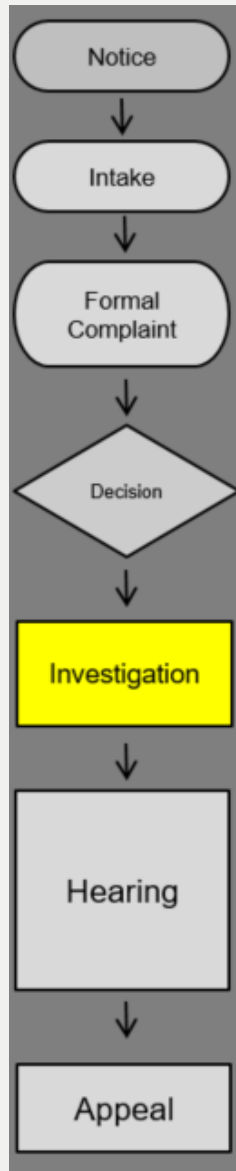
August 2020 Title IX Regulations; Preamble, FN 1018, 85 F.R. 30247.

Evidentiary Rules Must Consider



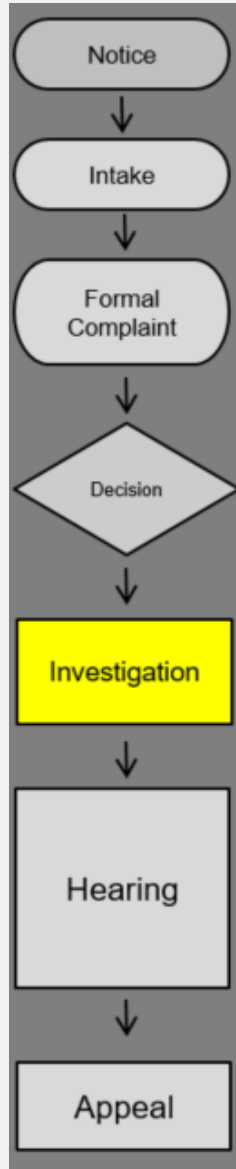
AUGUST 2020 TITLE IX REGULATIONS: EVIDENCE REVIEW

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.”

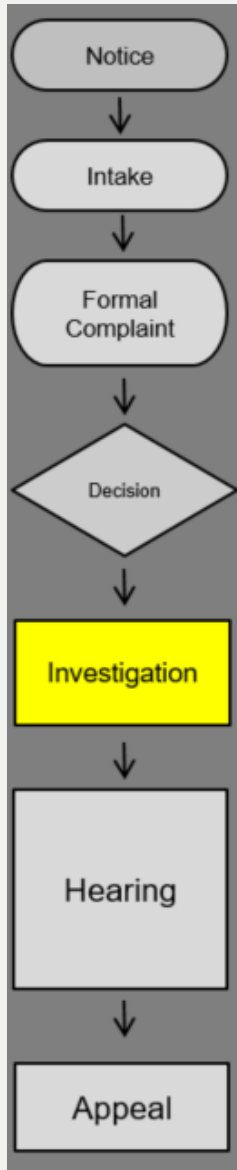
Evidence Review



- “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.”

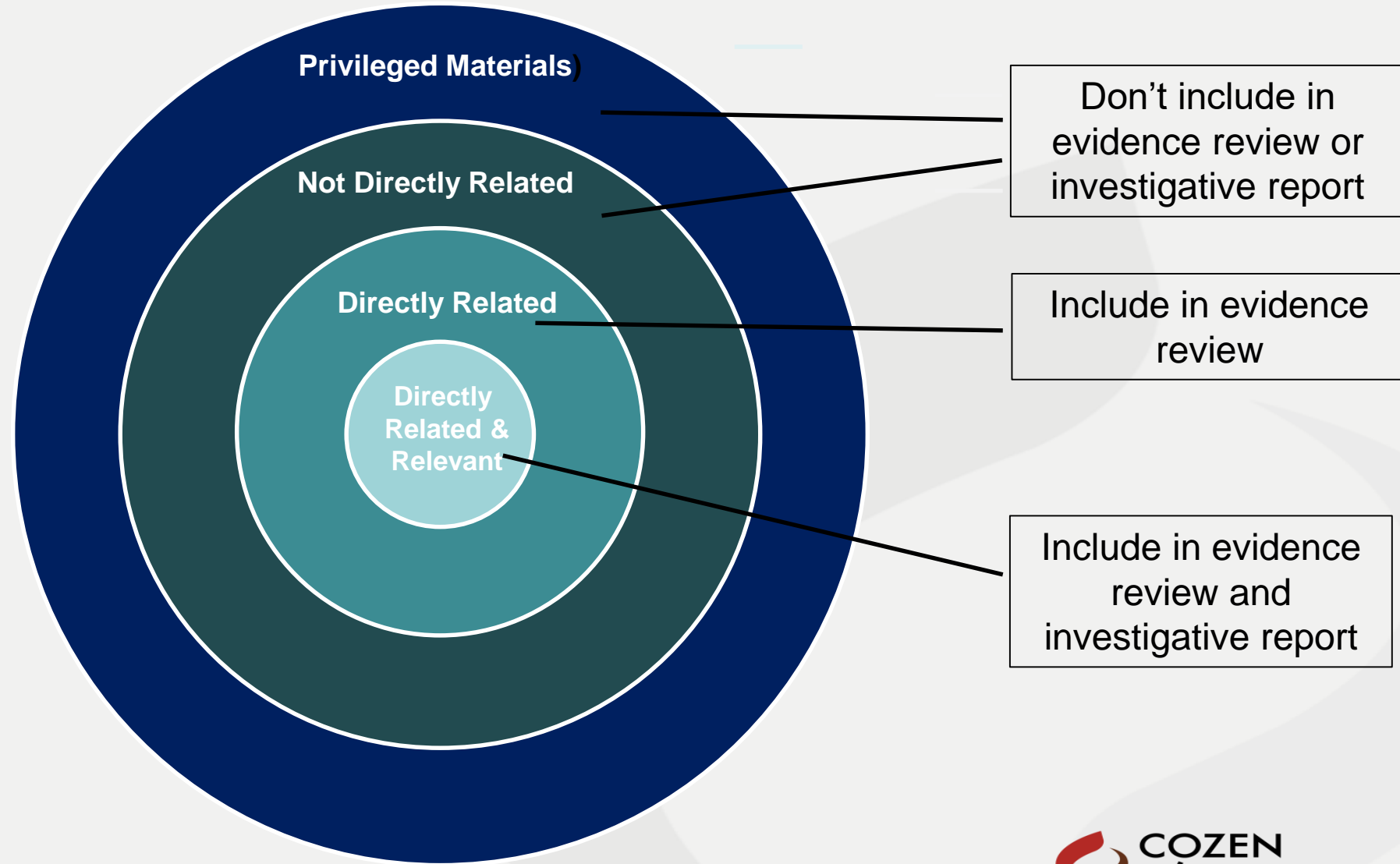
Evidence Review

- 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.

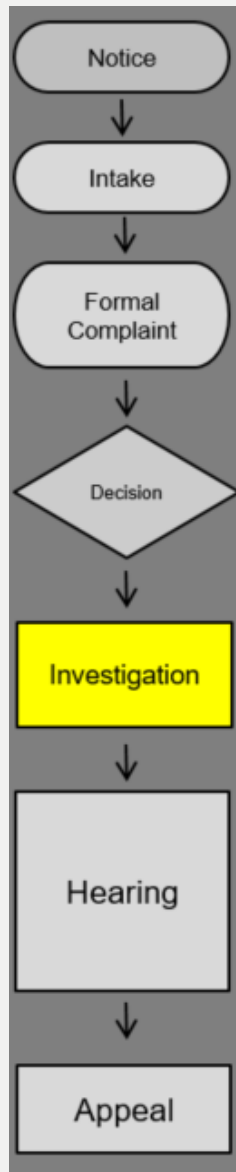


August 2020 Title IX Regulations; Preamble, 85 F.R.30303.

Evidentiary Levels for Inclusion

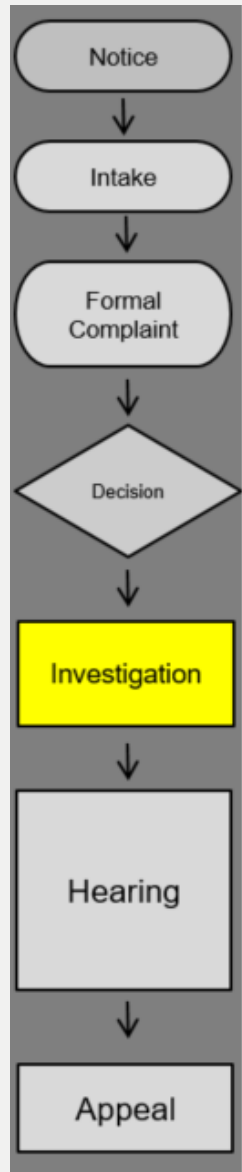


Directly Related



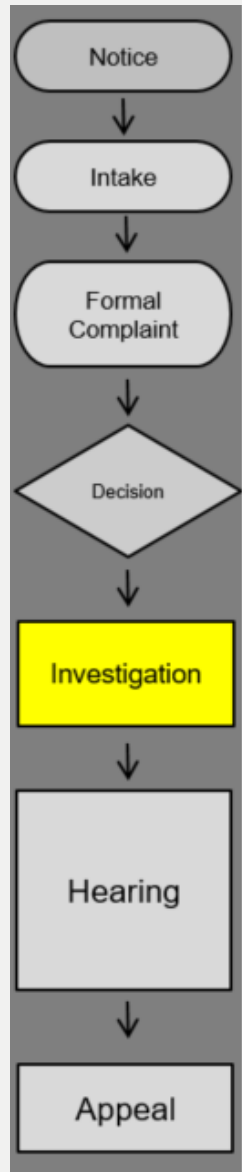
- Not defined in the regulations or the Preamble
 - The Department declines to define certain terms such as “evidence directly related to the allegations,” as these terms should be interpreted using their plain and ordinary meaning.
- “Directly related” aligns with the requirements in FERPA
 - The Department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

Directly Related vs. Relevant



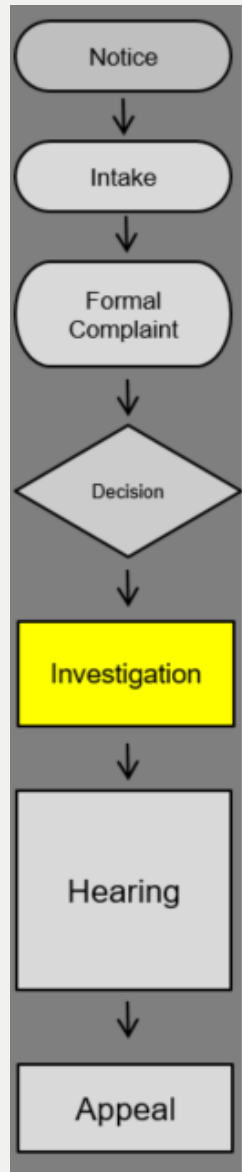
- Evidence that is “directly related to the allegations” may encompass a broader universe of evidence than evidence that is “relevant.”
- The Department does not believe that determinations about whether certain questions or evidence are relevant or directly related to the allegations at issue requires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

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.

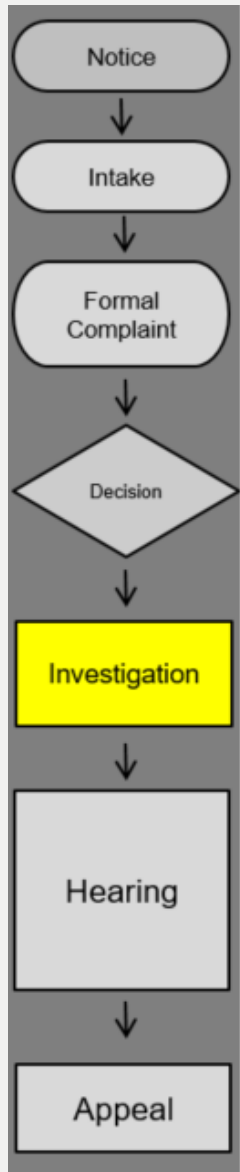
Directly Related



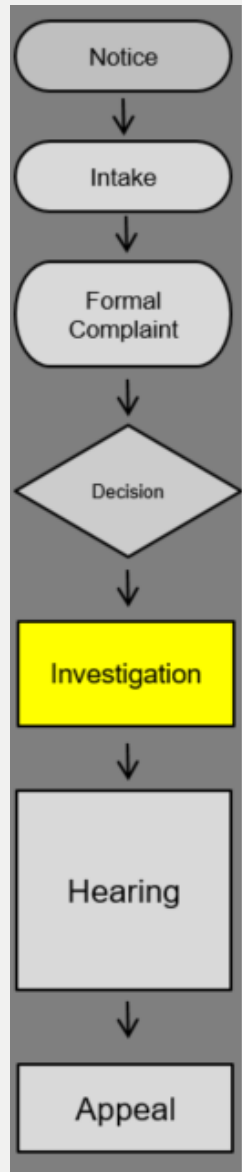
- Imposing restrictions on dissemination or use
 - Recipients may impose on the parties and party advisors restrictions or require a non-disclosure agreement not to disseminate or use any of the evidence for a purpose unrelated to the Title IX grievance process.
 - As long as doing so does not violate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

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.



Scope of Parties' Review

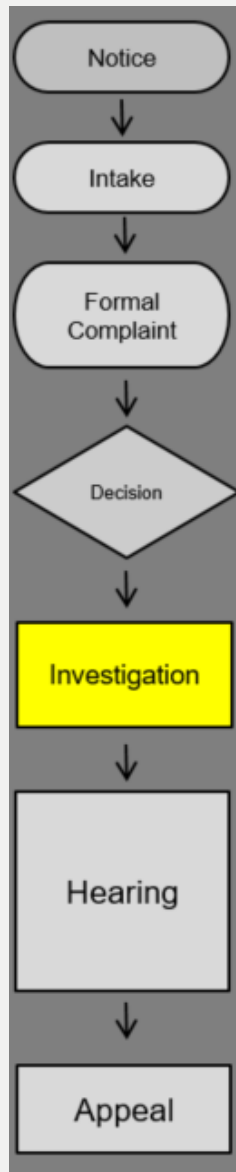


- The parties may make corrections, provide appropriate context, and prepare their responses and defenses before a decision-maker reaches a determination regarding responsibility.
- If relevant evidence seems to be missing, a party can point that out to the investigator, and if it turns out that relevant 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.

August 2020 Title IX Regulations; Preamble, 85 F.R.30305 and 30300.

AUGUST 2020 TITLE IX REGULATIONS: INVESTIGATIVE REPORT

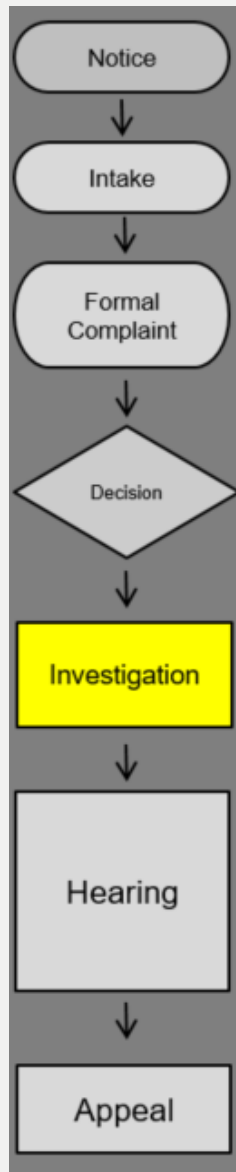
Investigative Report



- 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.”

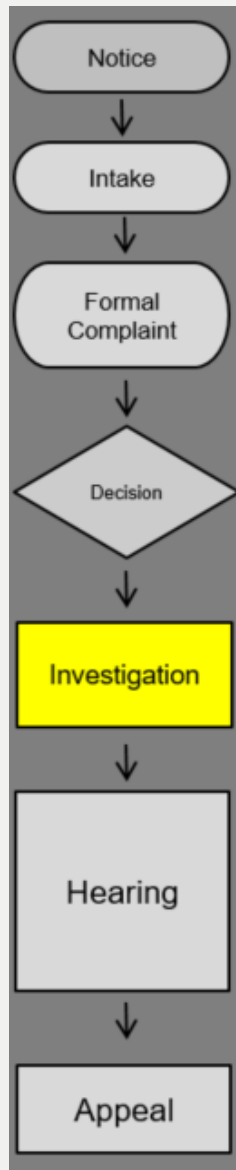
August 2020 Title IX Regulations; §106.45(b)(5)(vii), 85 F.R. 30576.
August 2020 Title IX Regulations; Preamble, 85 F.R.30254, 30307,
and 30309.

Revisiting Relevance



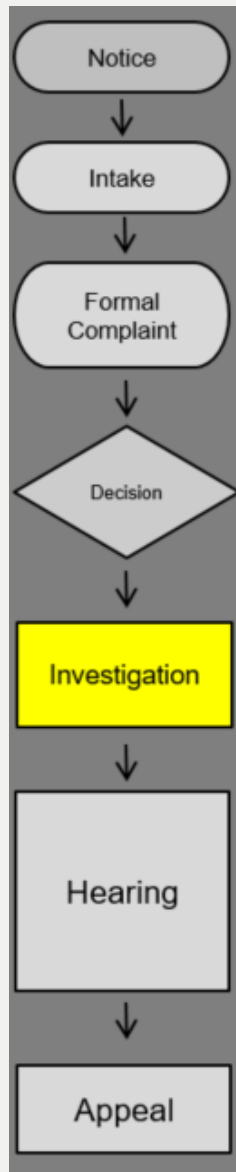
- Fairly summarizes the relevant evidence
- Investigator may redact information from the report
 - Recipients may permit or require the investigator to redact from the investigative report information that is not relevant, which is contained in documents or evidence that is relevant.

Investigative Report: Findings?



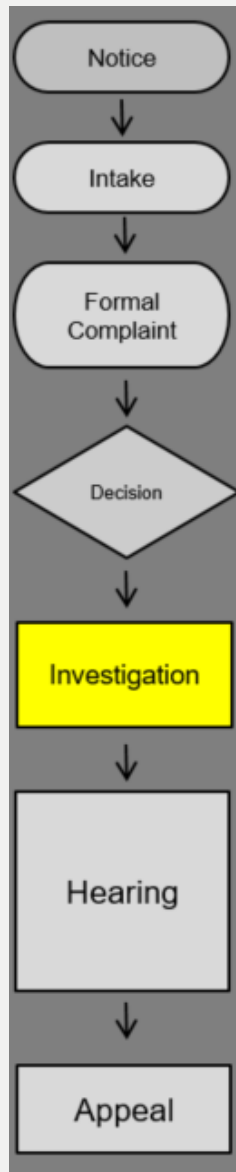
- § 106.45(b)(7)(i) prevents an investigator from actually making a determination regarding responsibility.
- If an investigator's determination regarding credibility is actually a determination regarding responsibility, then §106.45(b)(7)(i) would prohibit it.

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).

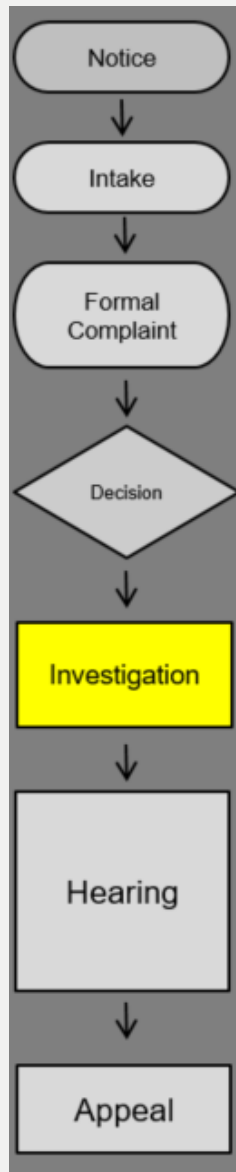
Investigative Report



- 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.

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.



Report Writing Techniques

- Report writing:
 - Professional
 - Balanced and neutral language
 - Content
 - Linguistics
 - Avoid declarative credibility language
 - “Unreliable” vs. insufficient information
 - Recognize perspective of the parties
 - Comment on the evidence, not the parties
 - Avoid the “you”
 - Use of verbatim quotes

Investigative Report

- Use template format with consistent language and content across investigations
- Leave sufficient time for writing, editing, proof reading and review by a fresh set of eyes
- Use of language
 - Non-judgmental
 - Consistent with the policy
- Provides a road map to the reader
- Provides a referendum on fairness, bias, completeness and competence

Investigative Report

- Begin with introduction of parties, relationship to one another relationship to the institution
- Describe when and how report was received
- Outline basic nature of report as presented by the complainant
- Outline response to the report by the respondent
- Include notice of investigation
- Specify policy violations at issue
- Identify role of the investigator
- Reinforce procedural protections and protocols

Investigative Report

- Summary of investigation
 - Identify all witnesses interviewed by name and record dates of the interviews
 - Chart may be helpful to identify roles and organize information
 - List any other evidence collected and date of collection
 - Where applicable, explain reasons for inability or decision not to interview witnesses or collect pieces of evidence
 - Reiterate interview protocols

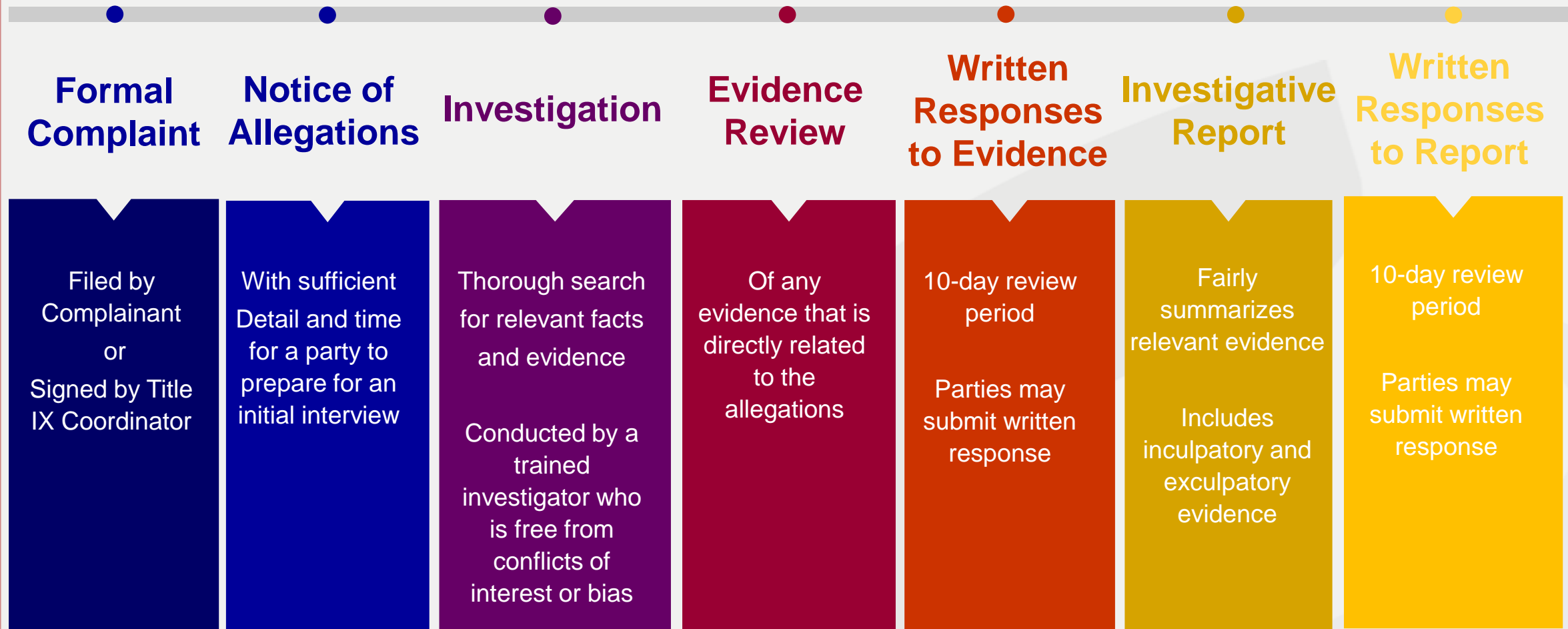
Investigative Report

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

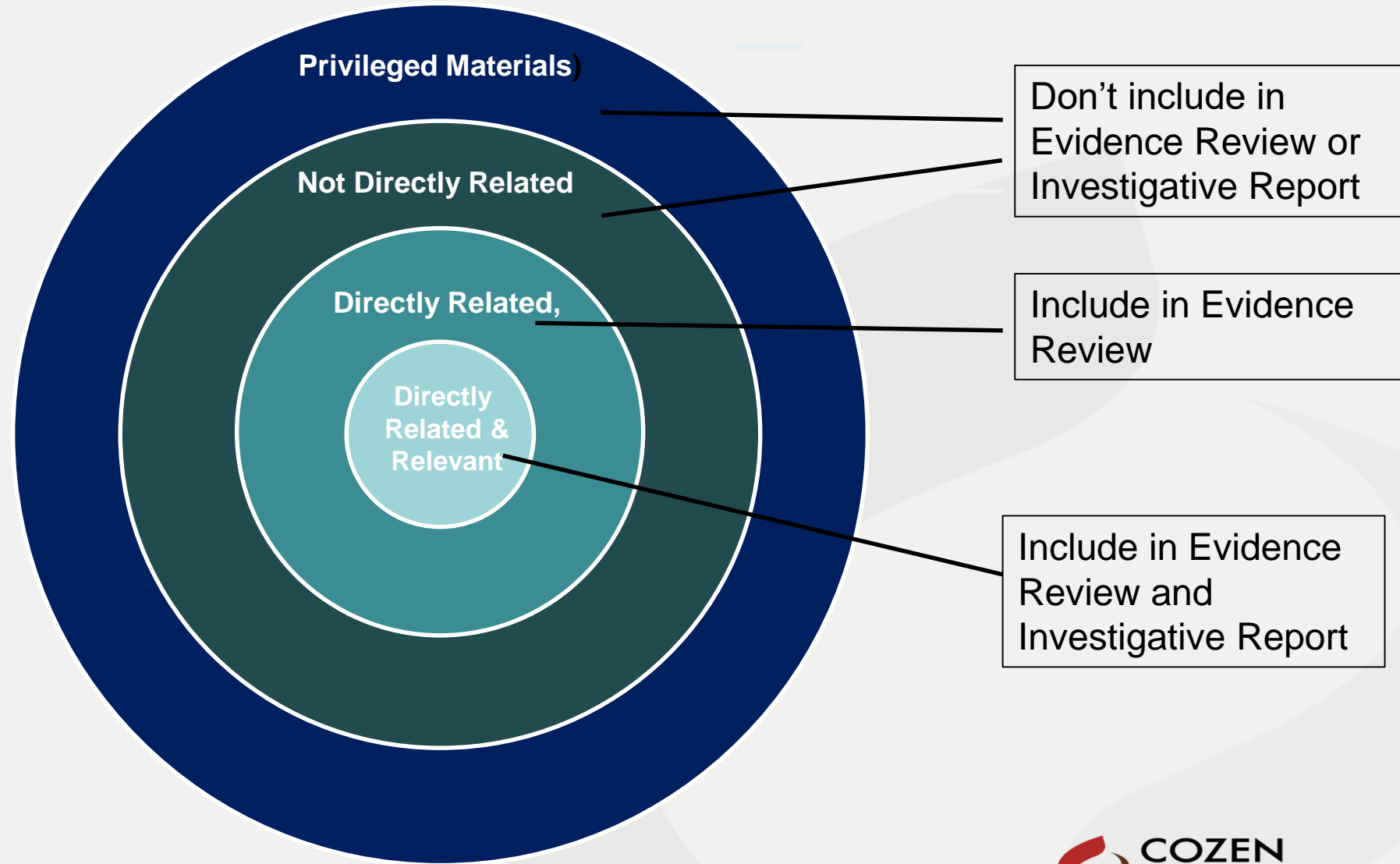
Investigative Report

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

Recap of Investigation Requirements



Evidentiary Levels for Inclusion



Investigative Report – Considerations

- Procedural issues:
 - Notice
 - Have you provided amended notice for any additional potential policy violations
 - Have you shared party and witness names to permit a meaningful evaluation of the sources of information
 - Have you permitted the parties (and their advisors) access to all information that is directly related to the allegations
 - Opportunity to be heard
 - Have you followed up on information offered by the parties, including cross-complaints

Investigative Report – Considerations

- Factual issues:
 - Detail around sensitive but important issues:
 - Body positions
 - Communications about consent in words/actions
 - Alcohol or other drug use
 - Clothing removal
 - Inclusion of key facts from other sources
 - Disclosure witnesses
 - Parties' communications
 - With one another
 - To others

Investigative Report

- Include elements that are required as part of the written notice of determination by the decision-maker
 - Identification of the allegations
 - Description of the procedural steps taken from the receipt of the formal complaint through the determination
 - Findings of fact supporting the determination
 - Conclusions regarding the application of the recipient's code of conduct to the facts
 - Rationale
 - Appeal procedures

Investigative Report

- Summary of investigation
 - Identify all witnesses interviewed by name and record dates of the interviews
 - Chart may be helpful to identify roles and organize information
 - List any other evidence collected and date of collection
 - Where applicable, explain reasons for inability or decision not to interview witnesses or collect pieces of evidence
 - Reiterate interview protocols

Investigative Report

- Provide a detailed summary of all relevant information
- Maintain the “source” of the information
 - Interview notes
 - Documentary evidence
 - Other evidence
- Include details of the prohibited conduct that speak to the elements of definitions in policy

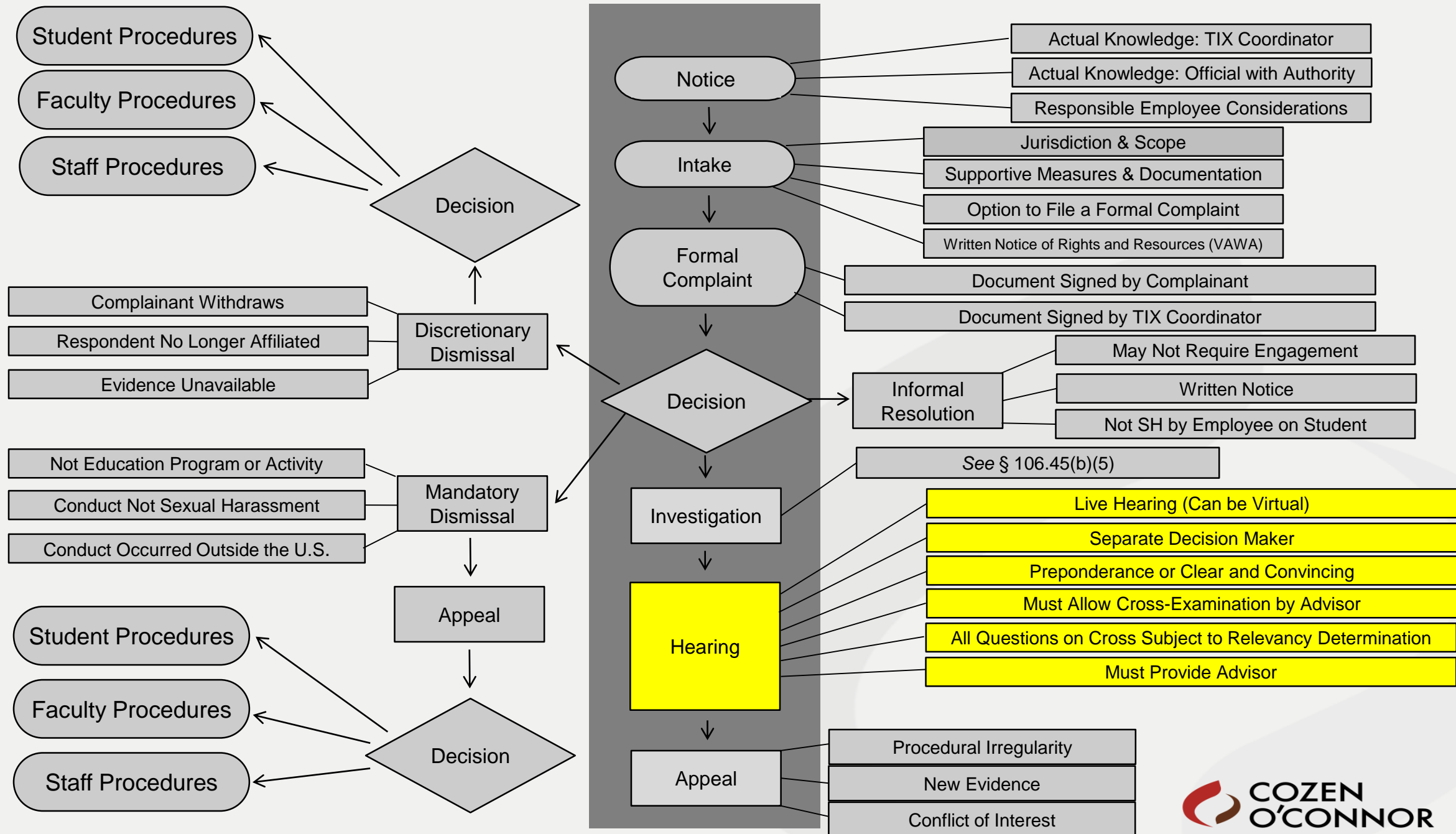
Investigative Report

- Use template format with consistent language and content across investigations
- Leave sufficient time for writing, editing, proof reading and review by a fresh set of eyes
- Use of neutral, consistent language
 - Non-judgmental
 - Consistent with the policy
- Provide an organized road map to the reader
- Remember report is an opportunity to reflect fairness, completeness and competence of the process

Investigative Report

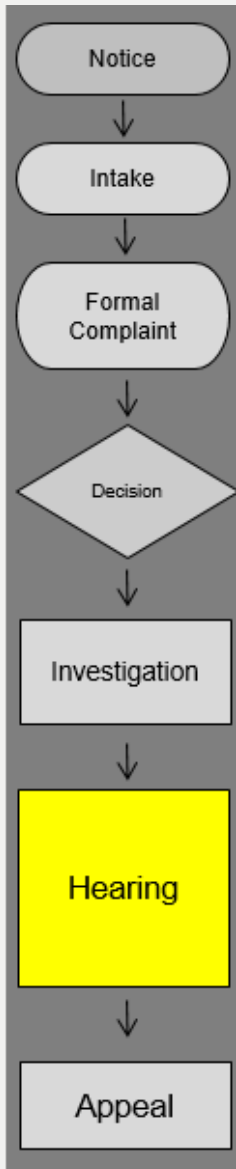
- Outline areas of agreement/disagreement (areas where the information is contested/not contested)
- Include timeline for synthesis and analysis of facts
- If making determinations of credibility or recommendations:
 - Identify the elements
 - Tie discussion and rationale to the elements of the potential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

AUGUST 2020 TITLE IX REGULATIONS: LIVE HEARINGS

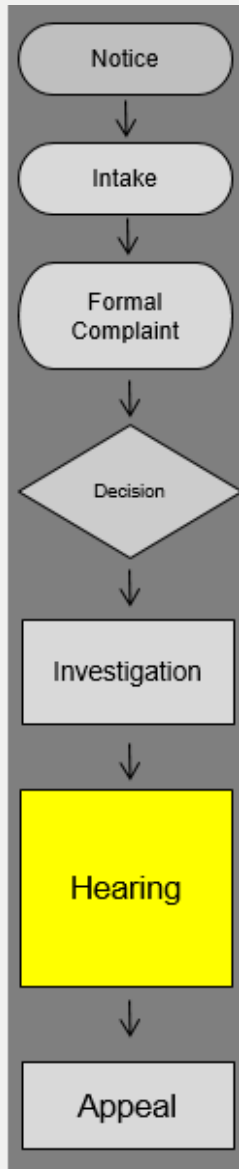


Hearings

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



Hearings



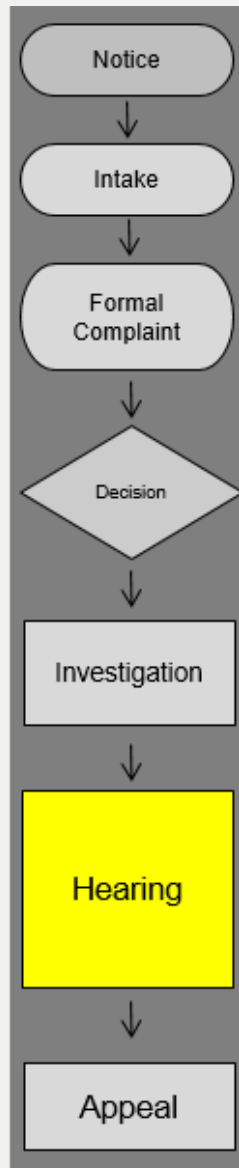
- Only relevant cross-examination and other questions may be asked of a party or witness.
- If a party does not have an advisor present at the live hearing, the recipient must provide without fee or charge to that party, an advisor of the recipient's choice, who may be, but is not required to be, an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

Cross-Examination



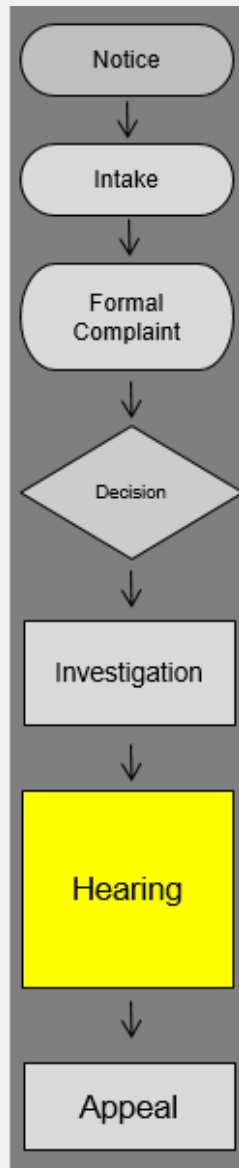
- At the live hearing, the decision-maker(s) must permit each party's advisor to **ask the other party and any witnesses all relevant questions** and follow-up questions, including those challenging credibility.

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.

Cross-Examination



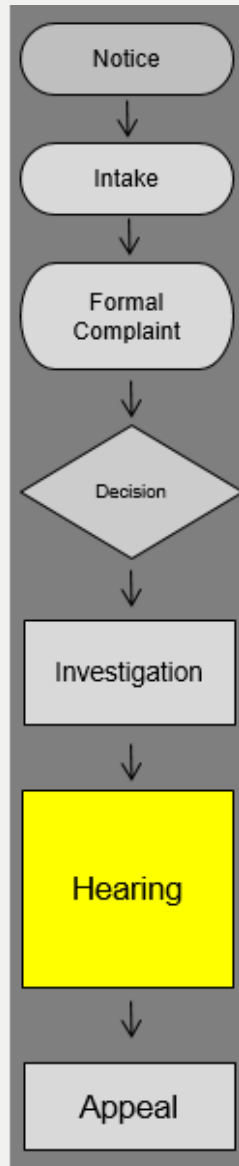
- Only **relevant** cross-examination and other questions may be asked of a party or witness.
- Before a complainant, respondent, or witness answers a cross-examination or other question, the decision-maker(s) must **first determine whether the question is relevant ...**
- The decision-maker(s) must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

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.

Protecting the Well-Being of the Parties



➤ July 2021 Q & A:

- A school is permitted to grant breaks to the parties during a live hearing.
- The regulations require a pause in the cross-examination process each time before a party or witness answers a cross-examination question.
 - Allows the decision-maker to determine if the question is relevant.
 - Helps ensure that the pace of the cross-examination does not place undue pressure on a party or a witness to answer immediately.

Hearings

Rules of Decorum

➤ July 2021 Q & A:

- If the manner in which an advisor attempts to ask the question is harassing, intimidating, or abusive (e.g., advisor yells, screams, or comes too close to a witness), the preamble explains that a school may enforce a rule requiring that relevant questions must be asked in a respectful, non-abusive manner.

Hearings

Rules of Decorum

➤ July 2021 Q & A:

- A school also may require a party to use a different advisor if the party's advisor refuses to comply with the school's rules of decorum.
 - For example, the preamble explains that if a party's advisor of choice yells at others in violation of a school's rules of decorum, the school may remove the advisor and require a replacement. The school has this authority even when the advisor is asking a question that is relevant to the hearing.

Hearings

Evaluating Responses

➤ July 2021 Q & A:

- The preamble adds that the 2020 amendments “protect against a party being unfairly judged due to inability to recount each specific detail of an incident in sequence” because “decision-makers must be trained to serve impartially without prejudging the facts.”

Personal Preparation: Be Objective

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

Personal Preparation: Be Professional

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

Responding to Inadmissible Evidence

- Advance determinations of challenged evidence are critical to the proper functioning of the process
 - Use Investigative Report as a guide
- In the event of a deliberate or inadvertent utterance of inadmissible information, how do you unring the bell?
 - Instruction on the record

Advisors

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

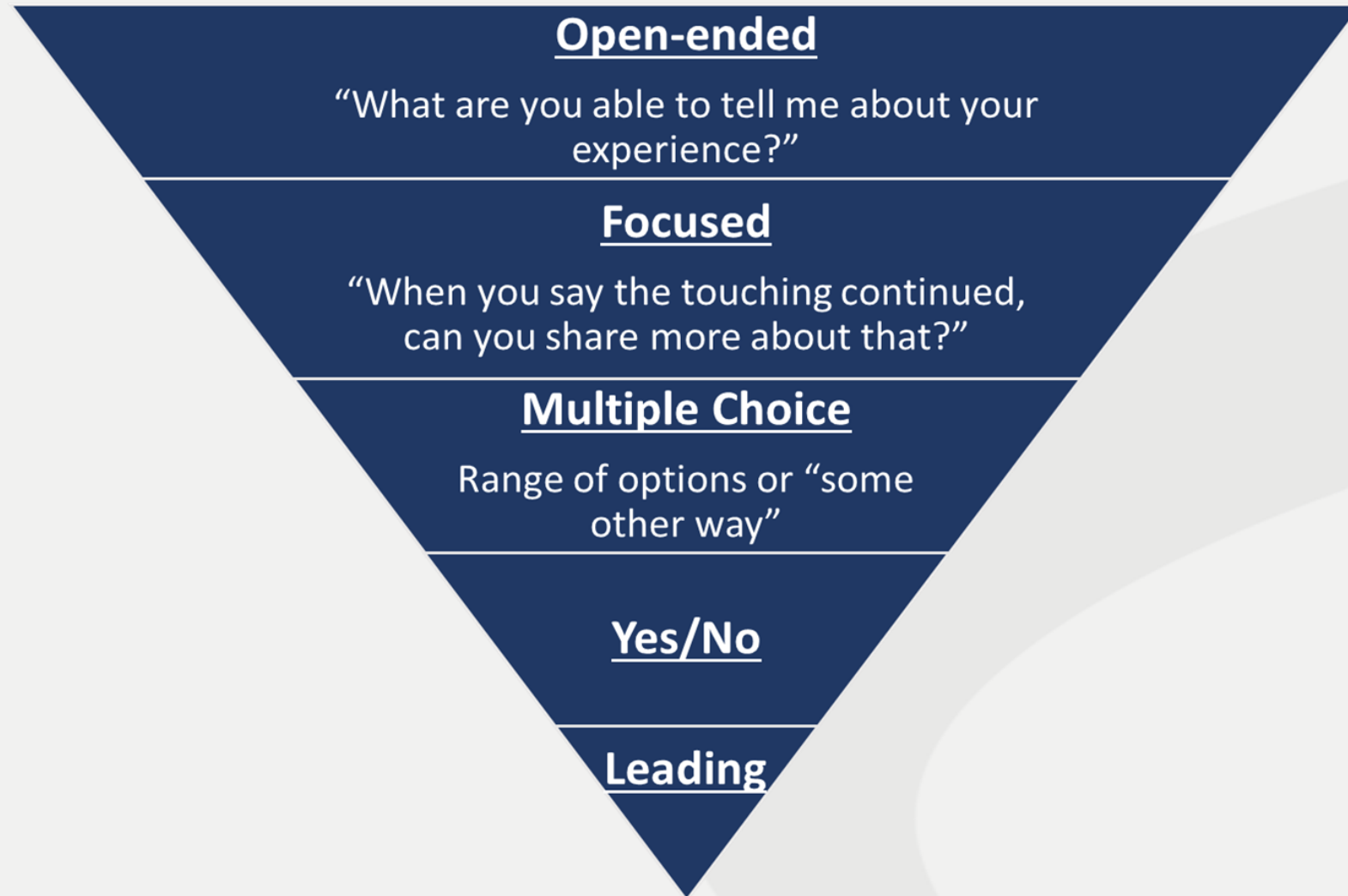
Participation Techniques

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

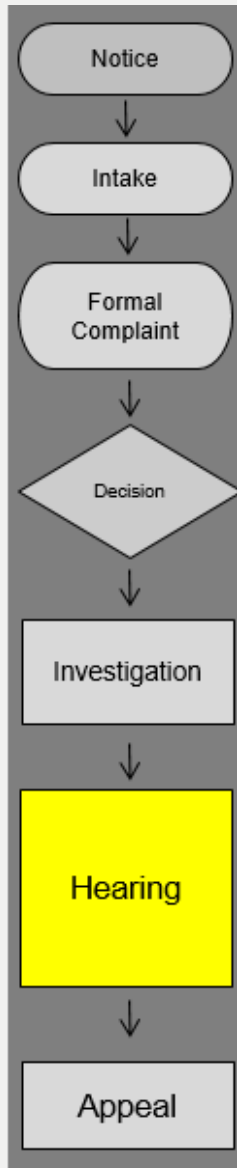
What to Ask

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

The Continuum Approach



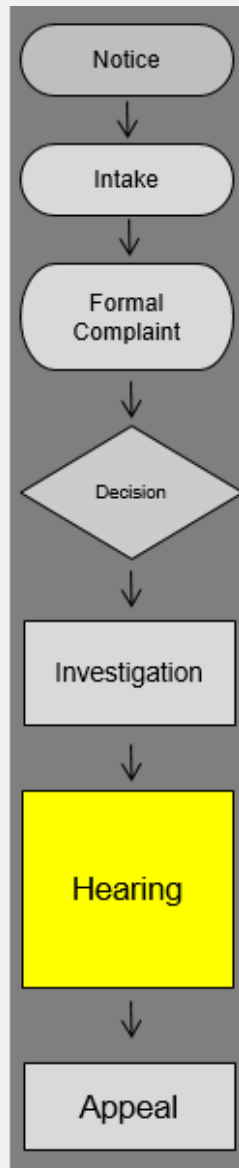
Option to Use Technology



- 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.
- 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.

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.



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

Technology Options

- Zoom
 - Ability to see and hear in real time
 - Breakout rooms
 - Recording

Deliberation Techniques

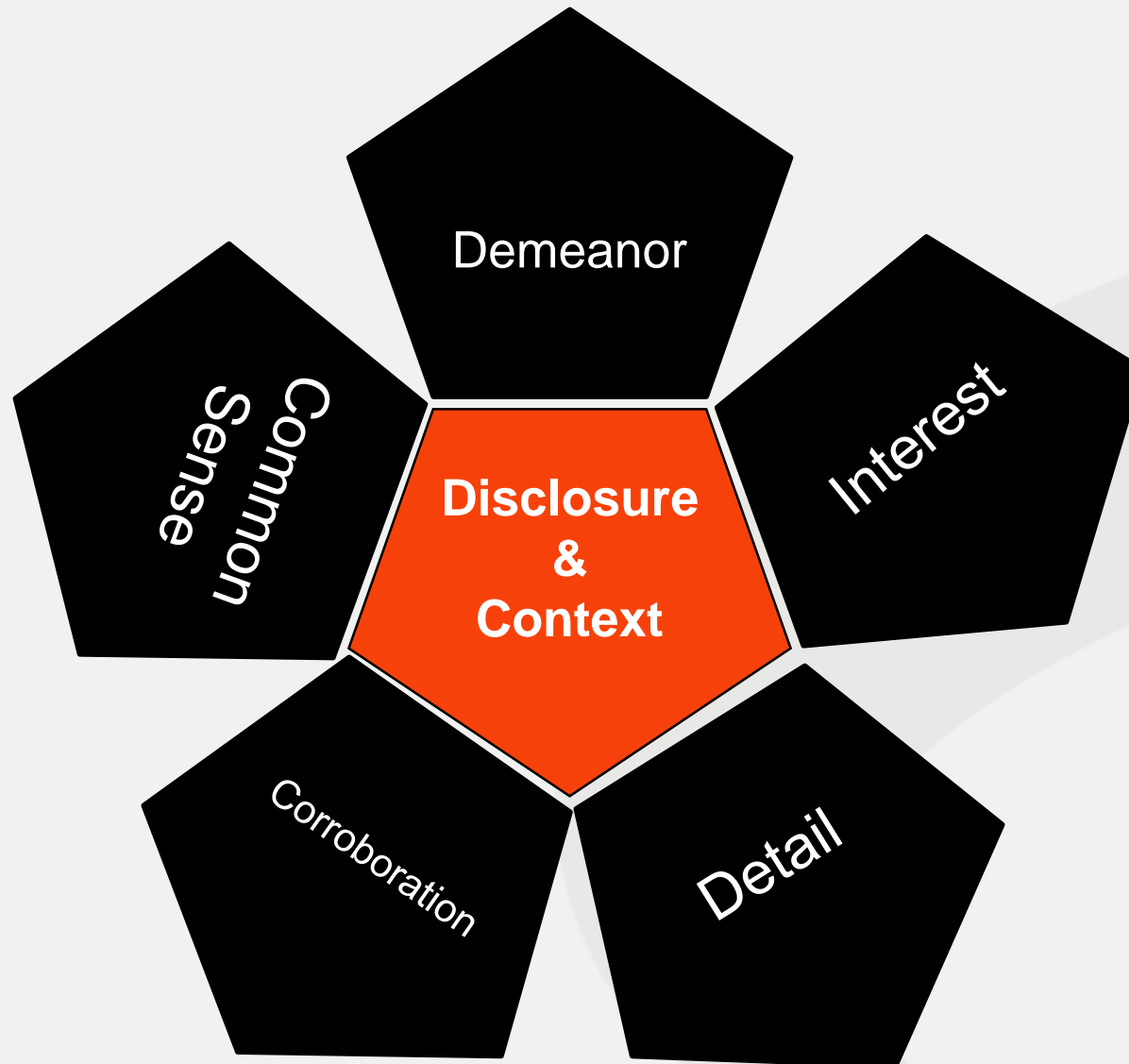
- Gather all documents and exhibits in advance
- Use cross-referencing grids/matrices
- Identify specific elements of alleged misconduct from policy definitions
- Begin by identifying areas of agreement as to evidence
- Identify conflicts and prioritize
- Discuss each conflict individually
- Articulate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

EVALUATING CREDIBILITY

Evaluating Credibility

- Investigating Credibility in the context of:
 - Sexual Assault
 - Dating violence
 - Domestic violence
 - Stalking
 - Other forms of sexual and gender-based harassment and violence
- Common Challenges
 - Consent
 - Alcohol/incapacitation
 - History of the individual and community relationships

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

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

Interest

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

Detail

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

Corroboration

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

Corroboration

- Verify any statements obtained from witnesses by the first-responding individual (witness, law enforcement)
- Obtain statements from witnesses not interviewed in the preliminary investigation
- Re-photograph any non-genital injuries in order to document changes
- Determine whether a search warrant is needed for any aspect of the investigation
- Identify and contact others who may have been victimized by the respondent

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 Complainant
 - 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 and stopped attending class regularly
 - E.g., friends noticed Respondent became withdrawn and went home every weekend

Evaluating Changes in Account

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

Synthesis

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

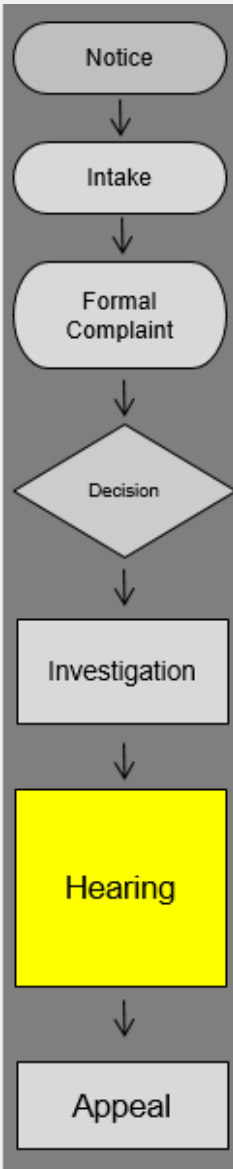
Integrated Analysis

Dynamics of Sexual Assault	Informed understanding based on competent experts / debunking the myths.
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?

Issue Written Determinations



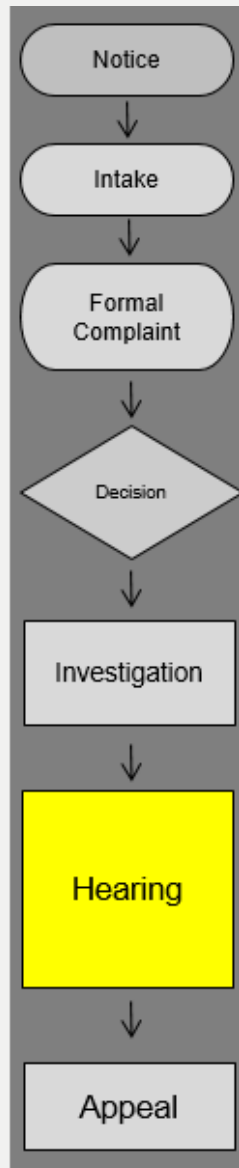
- The decision-maker(s) ... must issue a simultaneous written determination regarding responsibility, including
 - Identification of the allegations
 - Description of the procedural steps taken from the receipt of the formal complaint through the determination
 - Findings of fact supporting the determination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



Determination of Responsibility

- Decision-maker(s), cannot be the same person(s) as the Title IX Coordinator or the investigator(s)
- Must issue a simultaneous written determination regarding responsibility, including
 - Identification of the allegations
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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.

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.

Title IX Sexual Harassment and Sexual Misconduct Policy and Procedures

If you are a victim of a Sexual Assault, Domestic Violence, Dating Violence, or Stalking, your first priority should be to get to a place of safety and/or call 911 for emergency assistance. You should then obtain any necessary medical treatment.

v. 1.2, 06/28/21

BERKELEY COLLEGE

Title IX (and Non-Title IX) Sexual Harassment and Sexual Misconduct Policy

I. Introduction

Berkeley College (the "College") is committed to providing a safe and equitable environment that promotes the well-being of all students. The College prohibits discrimination on the basis of sex or gender in any of its programs or activities, including in its admissions, financial aid, and employment practices. Sexual and Gender-Based Harassment, Sexual Assault, Domestic Violence, and Stalking are prohibited and are described in this Policy.

v. 1.1, 06/28/21

BERKELEY COLLEGE

Title IX Sexual Harassment and Sexual Misconduct Procedures

I. Introduction

Berkeley College (the "College") is committed to providing a prompt and equitable response to reports of Prohibited Conduct under the [Title IX \(and Non-Title IX\) Sexual Harassment and Sexual Misconduct Policy](#) (the "Policy"). These procedures apply to the conduct of students and associates for:

- Reports of Title IX Sexual Harassment, Dating Violence, Domestic Violence, and Stalking, that are reported to have occurred against a person in the United States **and** within the Berkeley College Education Program or Activity; and,
- Reports of Sexual Assault.¹

Policy Language on Hearings

- Hearings will be conducted either in-person or virtually with technology that enables the Decision Maker and parties to simultaneously see and hear the party and witnesses speaking.
- The College will provide for the live hearing to occur with the parties located in separate rooms with technology enabling the Decision Maker and the parties and their advisors to simultaneously see and hear the party or the witness answering questions.

Policy Language on Hearings

- The Decision Maker may be a Berkeley College associate or an external professional, as determined at the sole discretion of the Title IX Coordinator.
- Hearings will generally consist of the following steps, allowing the parties equal opportunities at each stage:
 - a) introductions;
 - b) review of procedural rules;
 - c) presentation of information and witnesses by parties;
 - d) the advisor for each party will ask the other party and any witnesses all relevant questions and follow-up questions, including those assessing credibility; and
 - e) closing remarks.

Policy Language on Hearings

- All parties and witnesses will be invited to speak at the hearing, but no party or witness is required to attend the hearing.
- Provisions impacted by the *Cardona* decision related to consideration of statements not subjected to cross:
 - If a party or witness declines to attend a hearing, or attends but declines to submit to questioning by the other party's advisor, the Decision Maker may not rely on any statement of that party or witness in reaching a determination regarding responsibility.
 - The Decision Maker will not draw an inference about the determination regarding responsibility based solely on a party's or witness's absence from the live hearing or declination to answer cross-examination or other questions.

Policy Language on Hearings

- Traditional civil or criminal court rules of evidence do not apply.
- The Decision Maker will determine the relevance of questions asked by the parties, and preclude questions that seek irrelevant information.

Policy Language on Hearings

- However, both parties have the right to exclude their own irrelevant prior sexual history with persons other than the other party in the conduct process or their own mental health diagnosis and/or treatment during the finding of responsibility phase of the hearing.
- As noted above in Section XI.B.1.g. related to Investigations, 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 if the questions and evidence concern specific incidents of the Complainant's prior sexual behavior with respect to the Respondent and are offered to prove consent.

Policy Language on Hearings

- At their sole discretion, the Decision Maker may rely upon the investigator's report, the parties' responses to the report, and any supplemental reports, for their understanding of the relevant facts, or they may conduct additional witness interviews and/or gather additional information.
- The Decision Maker may also invite the investigator to participate as a witness at the hearing.

Policy Language on Hearings

- Each party's advisor may ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility.
- 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.
- Only relevant cross-examination and other questions may be asked of a party or witness.

Policy Language on Hearings

- Before a Complainant, Respondent, or witness answers a cross-examination or other question, the Decision Maker must first determine whether the question is relevant and explain any decision to exclude a question as not relevant.
- If a party does not have an advisor present at the live hearing, the College will provide without fee or charge to that party, an advisor of the College's choice, who may be, but is not required to be, an attorney, to conduct cross-examination on behalf of that party.
- The hearing will be recorded. Recordings will not include deliberations.

Policy Language on Advisors

- Complainants and Respondents are entitled to be accompanied and assisted by an advisor of their choice throughout all phases of the process, including at interviews, other meetings, or hearings.
- There is no requirement that the advisor be an individual from Berkeley College.
- Advisors, including attorneys, may not participate in the process or speak on behalf of the Complainant or Respondent, although advisors are permitted to question the other party and witnesses at a live hearing under the process.

Policy Language on Advisors

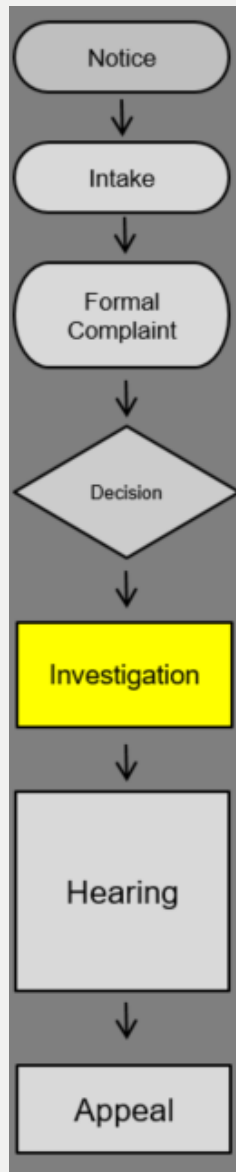
- In addition, advisors may ask to suspend any meetings, interviews, or hearings briefly to consult with the party they are advising.
- The College retains the discretion to deny advisors' requests to suspend meetings, interviews, or hearings if such requests are excessive, burdensome, or otherwise unreasonable.

Policy Language on Advisors

- Complainants and Respondents may choose to have an attorney serve as their advisor, but adjustments to the process, including scheduling of interviews or hearings, will not be made for any advisors, including attorneys, if they unduly delay the process.
- If a Complainant or Respondent does not have an advisor present at a live hearing (see *Section XI.B.7 below for more information on live hearings*), the College will provide an advisor free of charge to the party for the sole purpose of facilitating questioning on the party's behalf of other parties and witnesses.

AUGUST 2020 TITLE IX REGULATIONS: WRITTEN DETERMINATION

Content for Written Determination



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

Title IX Sexual Harassment and Sexual Misconduct Policy and Procedures

If you are a victim of a Sexual Assault, Domestic Violence, Dating Violence, or Stalking, your first priority should be to get to a place of safety and/or call 911 for emergency assistance. You should then obtain any necessary medical treatment.

v. 1.2, 06/28/21

BERKELEY COLLEGE

Title IX (and Non-Title IX) Sexual Harassment and Sexual Misconduct Policy

I. Introduction

Berkeley College (the "College") is committed to providing a safe and equitable environment that promotes the well-being of all students. The College prohibits discrimination on the basis of sex or gender in any of its programs, activities, or policies, including in its admissions, financial aid, and employment practices. This Policy describes the College's procedures for addressing sexual harassment, sexual misconduct, sexual assault, domestic violence, dating violence, and stalking.

v. 1.1, 06/28/21

BERKELEY COLLEGE

Title IX Sexual Harassment and Sexual Misconduct Procedures

I. Introduction

Berkeley College (the "College") is committed to providing a prompt and equitable response to reports of Prohibited Conduct under the [Title IX \(and Non-Title IX\) Sexual Harassment and Sexual Misconduct Policy](#) (the "Policy"). These procedures apply to the conduct of students and associates for:

- Reports of Title IX Sexual Harassment, Dating Violence, Domestic Violence, and Stalking, that are reported to have occurred against a person in the United States **and** within the Berkeley College Education Program or Activity; and,
- Reports of Sexual Assault.¹

Policy on Written Decision Letter

- The Title IX Coordinator shall provide the written determination to the parties simultaneously.
- The determination regarding responsibility becomes final either on the date that the College provides the parties with the written determination of the result of the appeal, if an appeal is filed, or if an appeal is not filed, the date on which an appeal would no longer be considered timely.
- The written determination must include:

...

Policy on Written Decision Letter

(continued from previous slide)

- Identification of the allegations potentially constituting sexual harassment as defined in this Policy;
- A description of the procedural steps taken from the receipt of the Formal Complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held;
- Findings of fact supporting the determination;

...

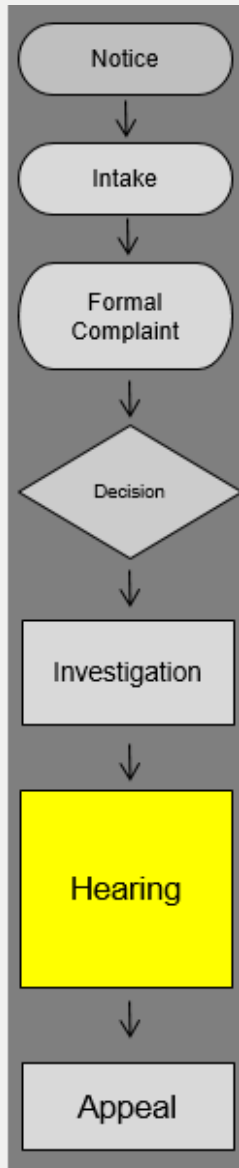
Policy on Written Decision Letter

(continued from previous slide)

- Conclusions regarding the application of the College's Policy to the facts;
- A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions the College imposes on the respondent, and whether remedies designed to restore or preserve equal access to the College's education program or activity will be provided by the College to the complainant; and,
- The College's appeal procedures and permissible bases for the complainant and respondent to appeal.

AUGUST 2020 TITLE IX REGULATIONS: SANCTIONING

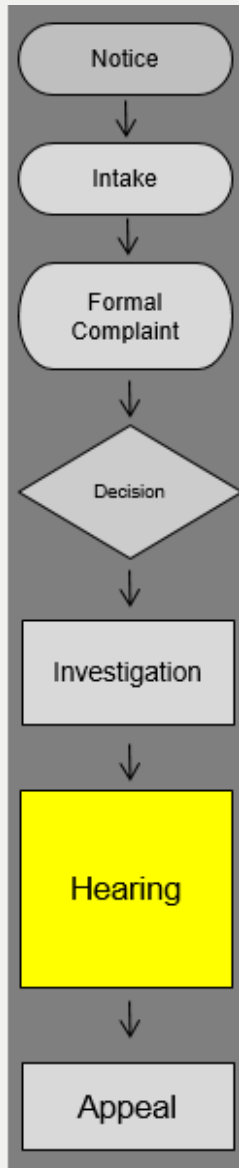
Sanctioning



- 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.

August 2020 Title IX Regulations; §106.44(a) and §106.45(b)(1)(vii), 85 F.R. 30574 and 30375.

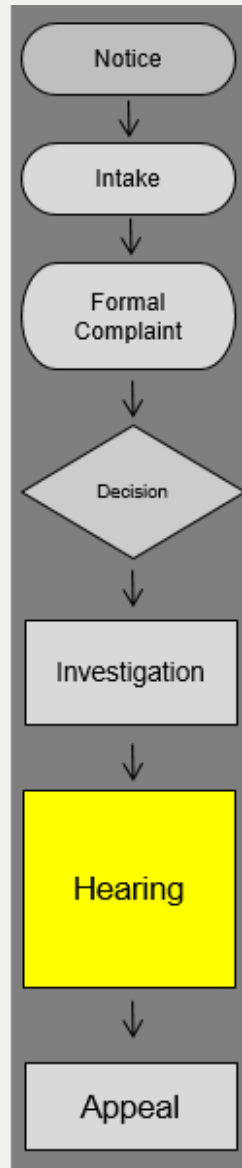
Discretion in Sanctioning



- 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.

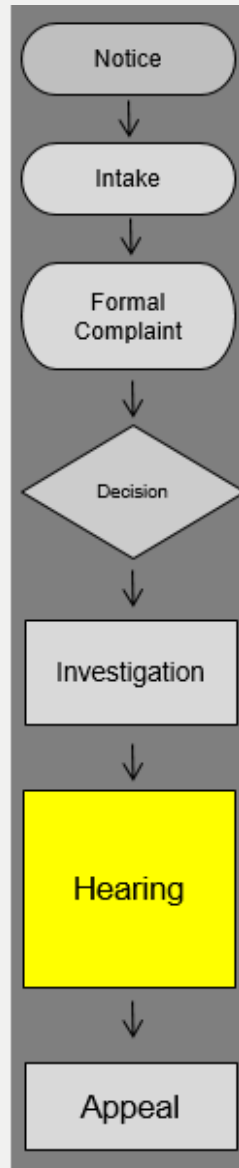
Educational Purpose

- 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.



Discretion in Sanctioning

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

Discretion in Sanctioning

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

Discretion in Sanctioning

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

Discretion in Sanctioning

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

Title IX Sexual Harassment and Sexual Misconduct Policy and Procedures

If you are a victim of a Sexual Assault, Domestic Violence, Dating Violence, or Stalking, your first priority should be to get to a place of safety and/or call 911 for emergency assistance. You should then obtain any necessary medical treatment.

v. 1.2, 06/28/21

BERKELEY COLLEGE

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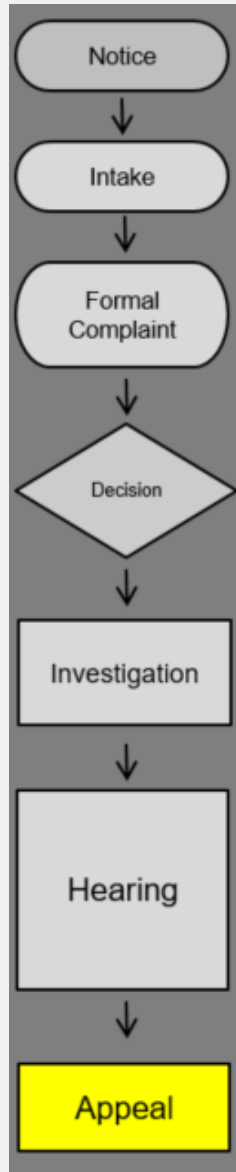
- Reports of Title IX Sexual Harassment, Dating Violence, Domestic Violence, and Stalking, that are reported to have occurred against a person in the United States **and** within the Berkeley College Education Program or Activity; and,
- Reports of Sexual Assault.¹

Policy on Sanctioning

- Sanctions imposed by the institution following a Title IX sexual harassment hearing may include, but are not limited to, oral or written warning/probation, mandatory counseling, education and training requirements, no-contact orders, changes to academic, working or living arrangements (if applicable), revocation of campus privileges, suspension (length of which, and reinstatement conditions, shall depend upon the nature and severity of the offense) and dismissal/termination.

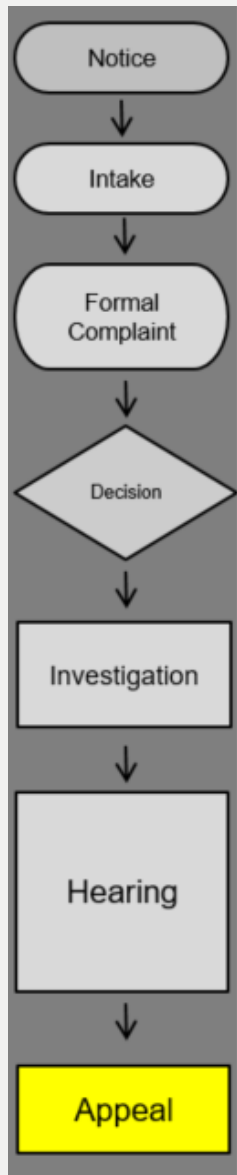
AUGUST 2020 TITLE IX REGULATIONS: APPEALS

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.

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.

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- Reports of Sexual Assault.¹

Policy on Appeals

- Any party may appeal the determination of the Decision Maker, or the dismissal of a Formal Complaint or any allegations therein (as stated in Sections XI.B.8. and VII above), within ten (10) business days of its issuance (the “Appeal Period”).

Policy on Appeals

- Parties wishing to appeal may do so only by (1) notifying the Title IX Coordinator in writing of the party's intent to appeal, and (2) submitting a written statement prior to the expiration of the Appeal Period.

Policy on Appeals

- In their sole discretion, the Title IX Coordinator may grant a brief extension of the Appeal Period for good cause shown upon a party's written request, and such extension shall apply to all parties.

Policy on Appeals

- The Title IX Coordinator shall advise all parties of any party's intention to appeal and furnish each party copies of any appeal statements simultaneously. If one party submits a written statement during the Appeal Period, the other party will be given an opportunity to submit a written statement in response, within a designated time period.

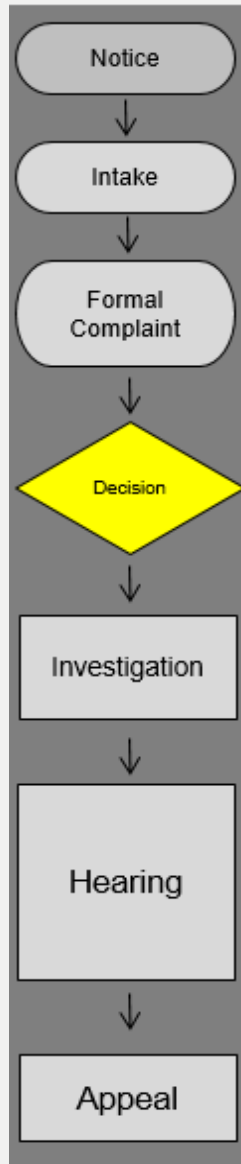
Policy on Appeals

- Determinations will only be overturned or modified on appeal on the following bases
 - a 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; or
 - The Title IX Coordinator, Title IX Investigator(s), or Decision-Maker had a conflict of interest or bias for or against complainants or respondents generally or the individual Complainant or Respondent that affected the outcome of the matter

Policy on Appeals

- In each instance, the College will convene a panel of not less than three (3) appropriately trained members to decide an appeal based upon the appeal statement(s) and the original record; and the decision of the appeal panel by majority vote will be final.
- Whenever practicable, such review will be completed within thirty (30) business days, and both parties will be informed of the result, and the rationale for the result, simultaneously in writing.

AUGUST 2020 TITLE IX REGULATIONS: INFORMAL RESOLUTION



Informal Resolution

- May not require waiver of right to investigation and adjudication of formal complaints
- May not require parties to participate in an informal resolution process
- May not offer an informal resolution process unless a formal complaint is filed
- Must obtain the parties' voluntary, written consent to the informal resolution process
- Cannot offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student

Informal Resolution

➤ July 2021 Q & A:

- A school is not required to offer an informal resolution process but may facilitate an informal resolution process at any time prior to reaching a determination regarding responsibility, subject to certain conditions.
- The amendments do not require that the parties interact directly with each other as part of an informal resolution process
 - Mediations are often conducted with the parties in separate rooms and the mediator conversing with each party separately.

Informal Resolution

➤ July 2021 Q & A:

- The parties' participation in mediation or restorative justice, if offered, should remain a decision for each individual party to make in a particular case, and neither party should be pressured to participate in the process.
- A school is not permitted to offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a students.

INVESTIGATING ALCOHOL-INVOLVED CASES

The Role of Alcohol

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

The Role of Alcohol

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

1. DOJ, National Institute of Justice, 2005.

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

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

Alcohol: Investigative Challenges

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

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

Consideration	Why?
Avoid asking about intoxication on a scale (e.g. “from 1 to 10”)	<ul style="list-style-type: none"> • There is no universal understanding of what the numbers on the scale mean. • Instead, ask about the impacts of drugs or alcohol on a person physically, cognitively, verbally, and otherwise.
Avoid over-reliance on online BAC calculators in determining incapacity	<ul style="list-style-type: none"> • Without a blood or breath test, it is hard to pinpoint a person’s BAC, especially after the fact. • 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; otherwise, rely on subjective and objective indicia of impairment.
Consider the observations of any sober witnesses with experience and/or training	<ul style="list-style-type: none"> • Medics, police, firefighters, and even trained security guards, volunteer EMS, and residence hall staff are generally sober, trained observers paying close attention. • May need to work with local agencies to secure participation and obtain records, if available.
Create and use a universal timeline	<ul style="list-style-type: none"> • 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 and highlight the timeframe the parties were in each other’s presence.

Creating a Universal Timeline

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

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

*These case facts are fictional and were created for training purposes.

Report-Writing Considerations

- Lay out what each witness saw in chronological form
- Focus on what the Respondent knew or what a reasonable, sober person in Respondent's position would have known
- Pay close attention to what your reasonable, sober witnesses saw or did not see.
 - First responders: police, medics, student EMTs, public safety, RAs
 - Greek risk management officers "on duty" (but consider relationships/interest)
- Consider whether it is necessary to find that Complainant was or was not incapacitated
 - Where the information supports that Complainant credibly reported their own memory loss, consider the impact of a finding that Complainant "was not incapacitated."
 - Instead, may choose to write, "the Investigators find that there is insufficient evidence, by a preponderance of the evidence, to find that Respondent knew, or that a reasonable, sober person in Respondent's position would have known, of Complainant's potential incapacitation. The Investigators make that finding based on the following information..."

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: Complainant

- ☐ 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: Complainant

- ☐ 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

Key Resources: Clery

- The Clery Act – Statute and Implementing Regulations
- The Handbook for Campus Safety and Security Reporting (June 2016)
- Westat
 - campussafetyhelp@westat.com
 - 800-435-5985
- Department of Education (ED) Program Review Findings

Use of Slides

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