

An Integrated and Coordinated Approach to Investigations and Hearings: *Understanding the Intersections of Title IX, Clery, VAWA, and New York Law*

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Berkeley College

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Use of Slides

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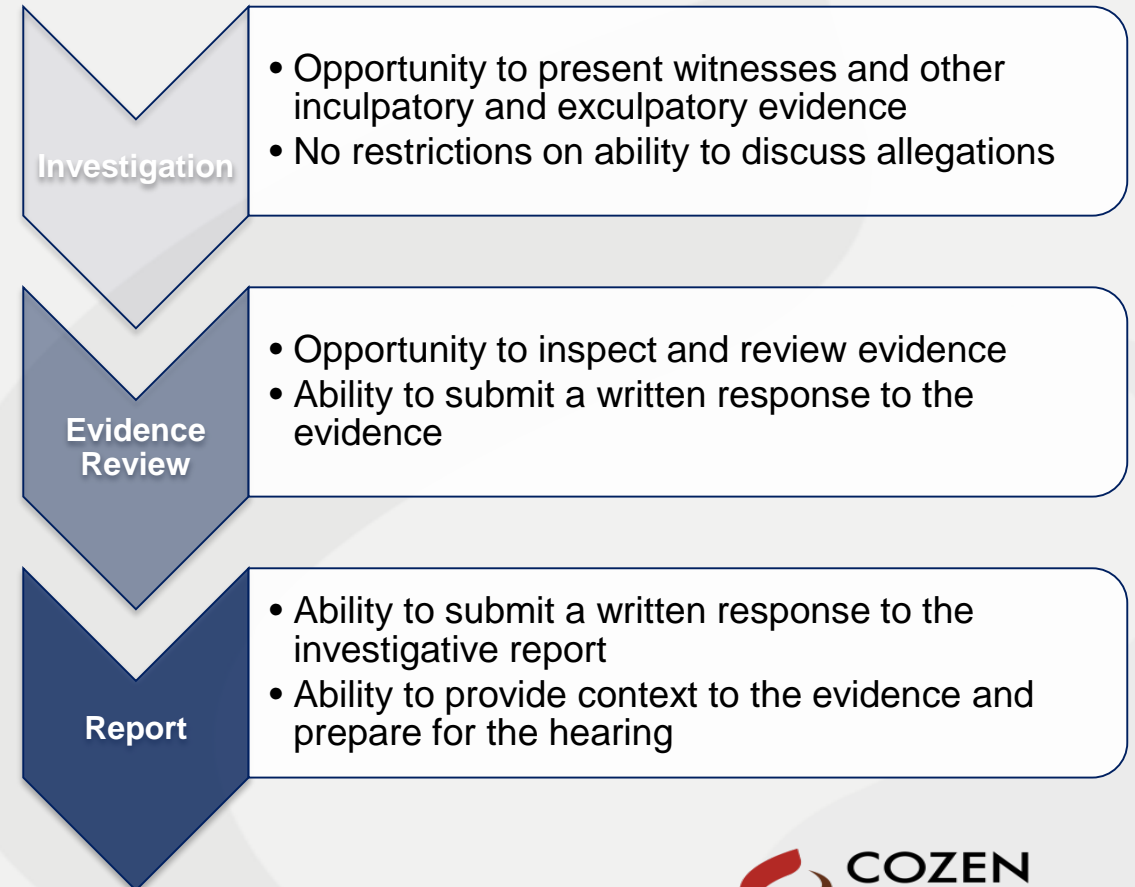
DAY 2 – INVESTIGATOR TRAINING

Setting the Stage - Investigations

Institutional Obligations



Parties' Opportunity to Participate



Investigative Principles

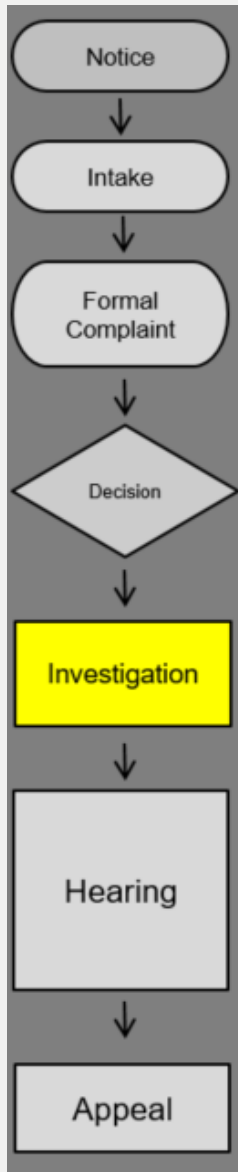
- Open-ended and thorough inquiry
- Equitable opportunities for the parties to participate
- The conduct of the investigation matters
- Maintaining and reinforcing impartiality
 - Screening for conflicts of interest or bias
 - Attention to language and communications
- Trained investigators free from conflicts of interest or bias for or against either party or Complainants or Respondents generally

PRE-INVESTIGATION CONSIDERATIONS

Removal of Bias or Conflict of Interest

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

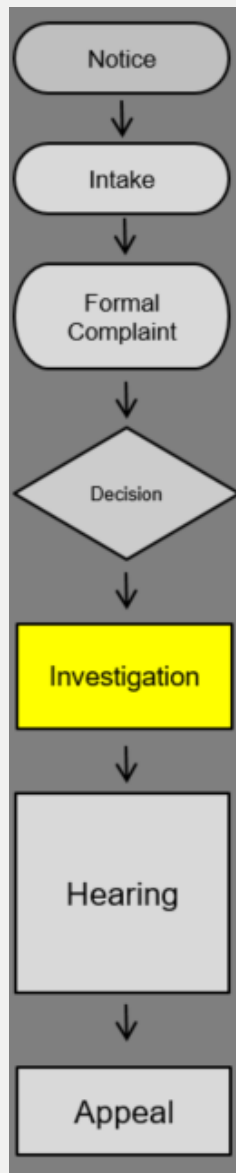
Written Notice of all Proceedings



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

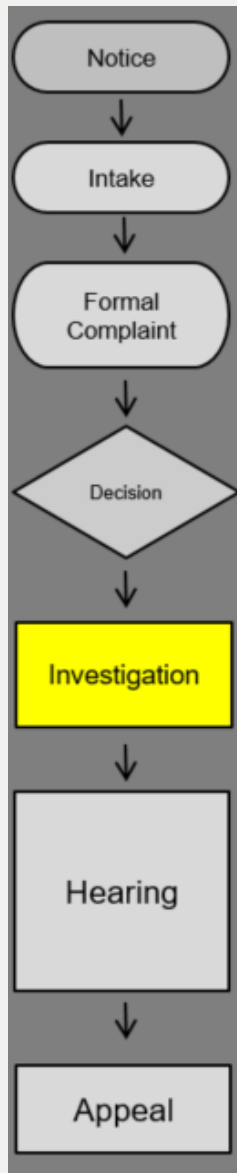
Title IX Regulations May 19 2020; §106.45(b)(5)(v) 85 F.R. 30424

Written Notice of Allegations



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

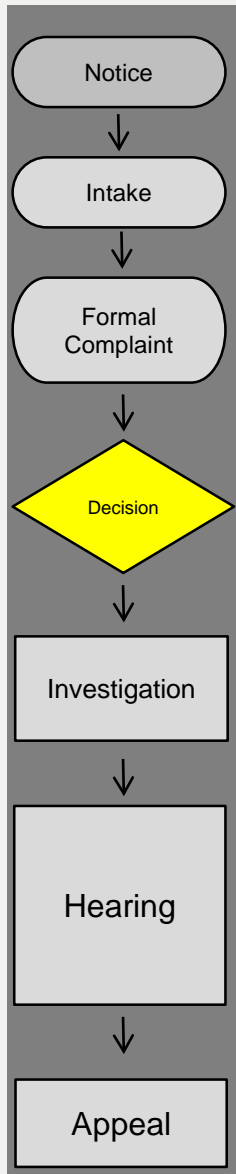
Written Notice of the Allegations



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

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

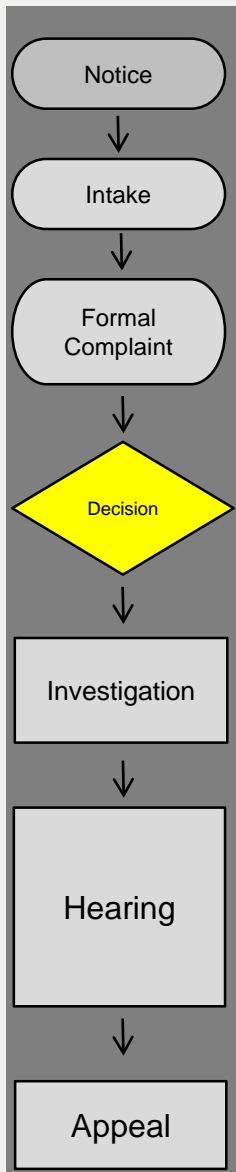
Written Notice of Allegations



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

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

Supplemental Notice



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

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

CONSOLIDATION OF FORMAL COMPLAINTS

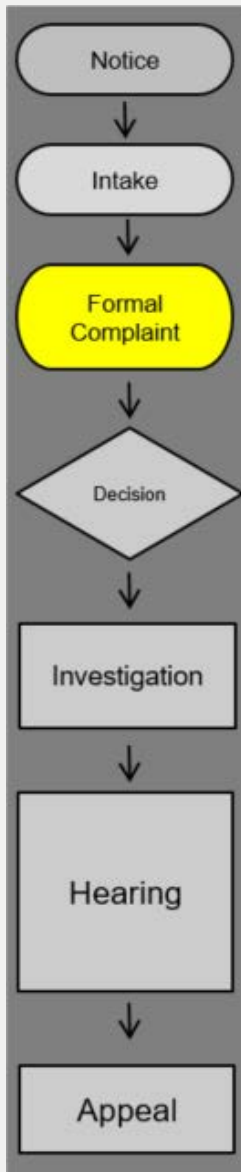
Consolidation of Formal Complaints



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

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

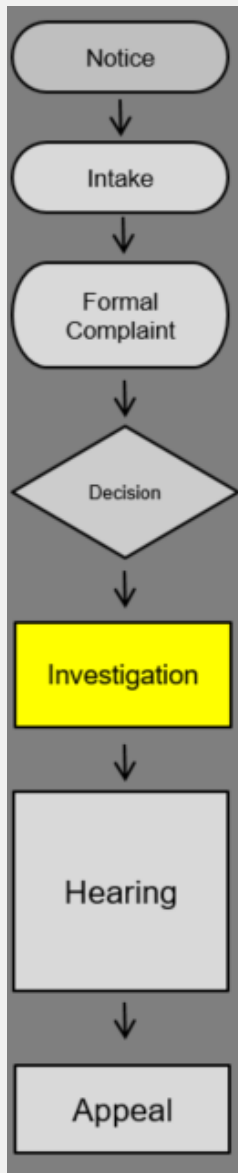
Consolidation of Formal Complaints



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

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

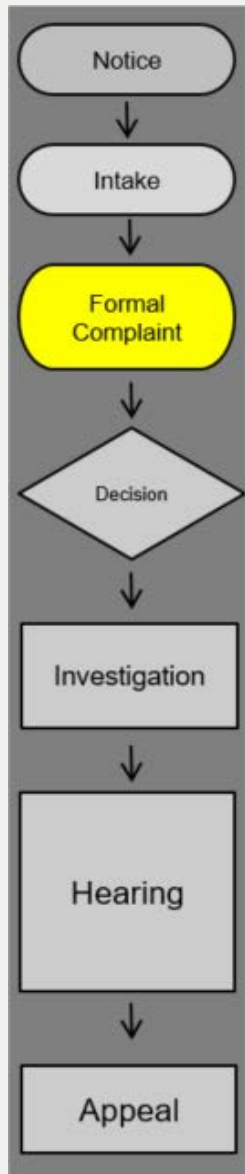
Consolidation of Formal Complaints



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

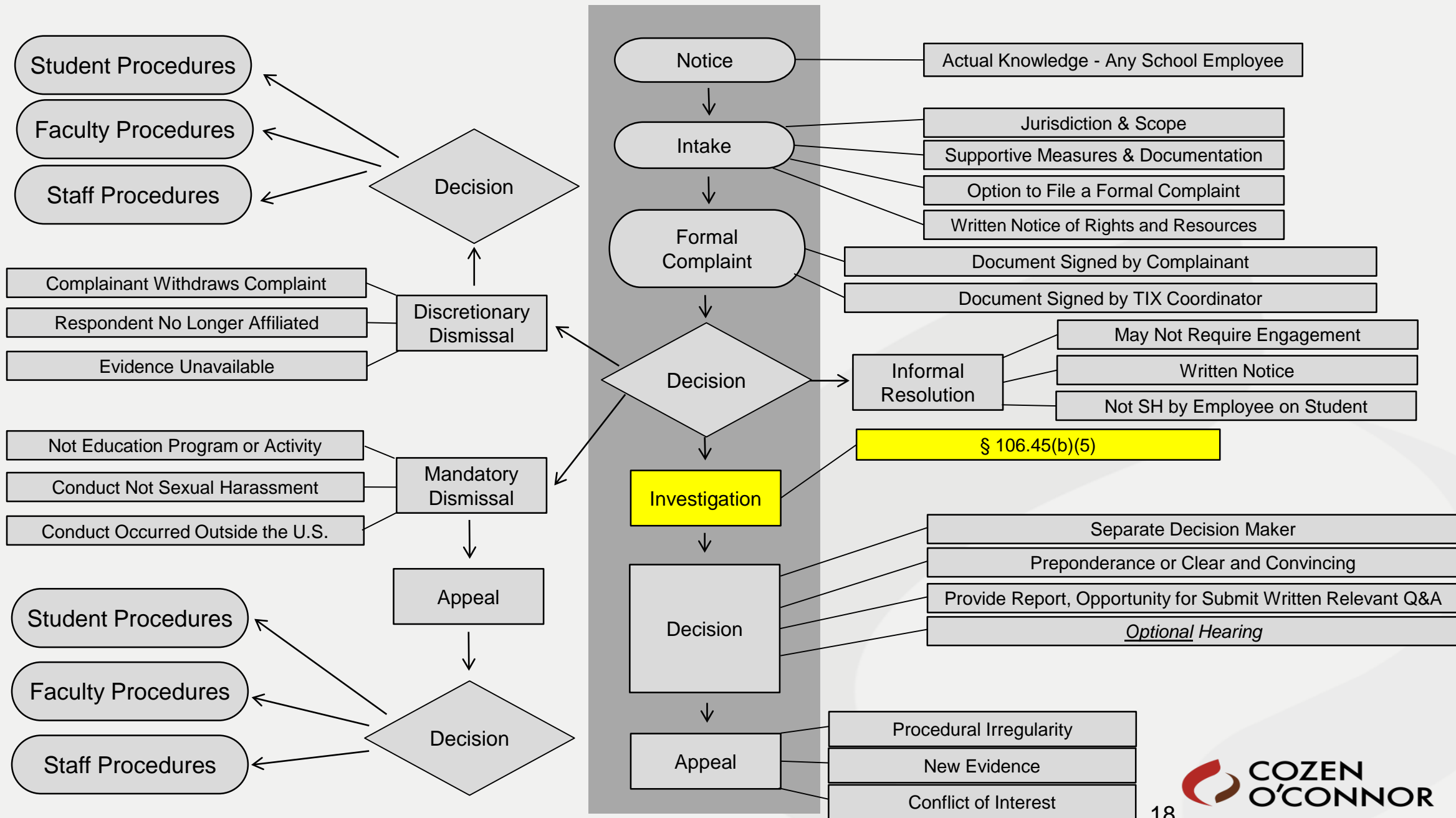
Title IX Regulations May 19, 2020; Preamble 85 F.R. 30291

Consolidation of Formal Complaints



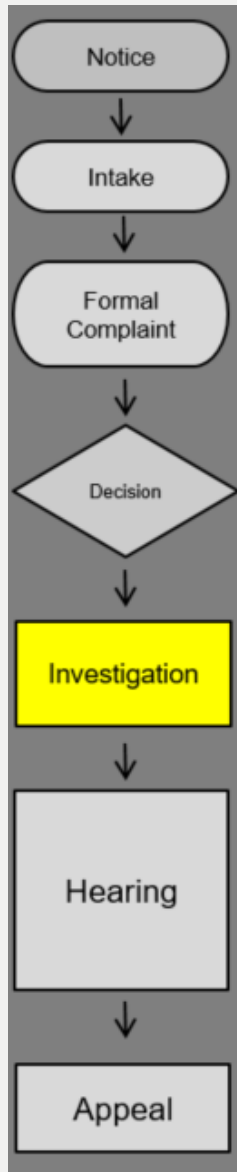
- If the respondent is facing an additional allegation, the respondent has a right to know what allegations have become part of the investigation for the same reasons the initial written notice of allegations is part of a fair process, and the complainant deserves to know whether additional allegations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

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



EVIDENCE GATHERING

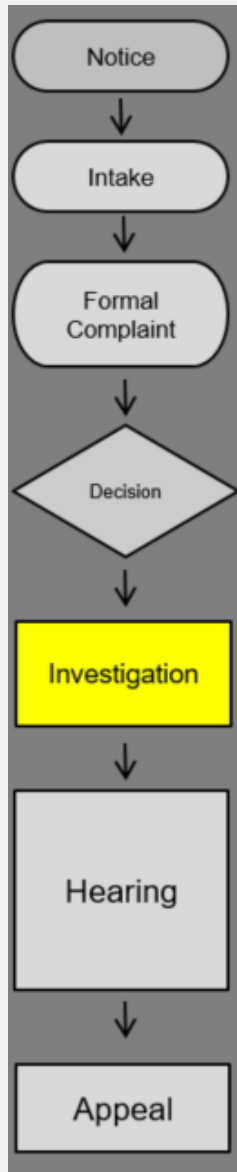
Burden of Gathering Evidence



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

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

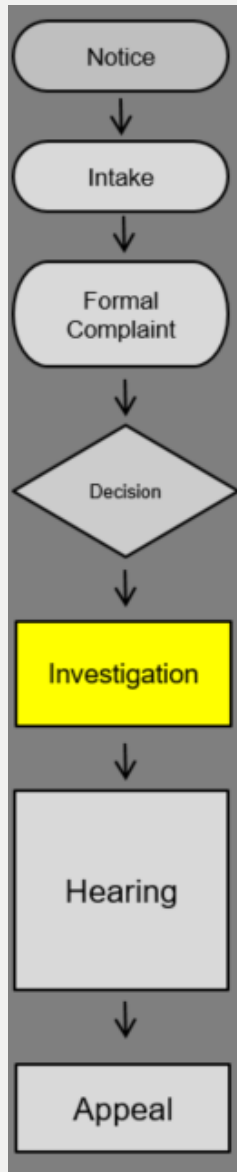
Burden of Gathering Evidence



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

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

Burden of Gathering Evidence

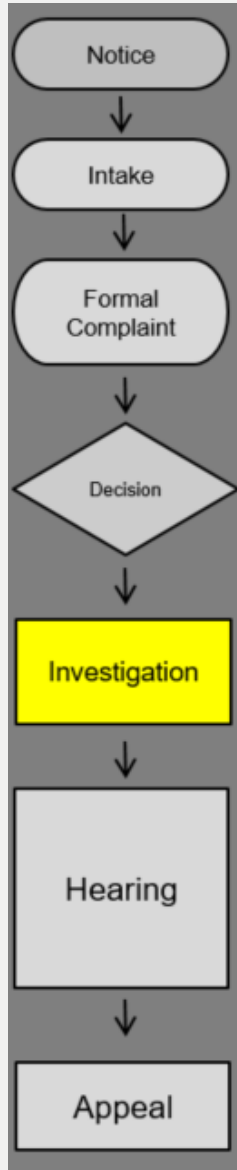


- The investigator is obligated to **gather evidence directly related to the allegations** whether or not the recipient intends to rely on such evidence (for instance, where evidence is directly related to the allegations but the recipient's investigator does not believe the evidence to be credible and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

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

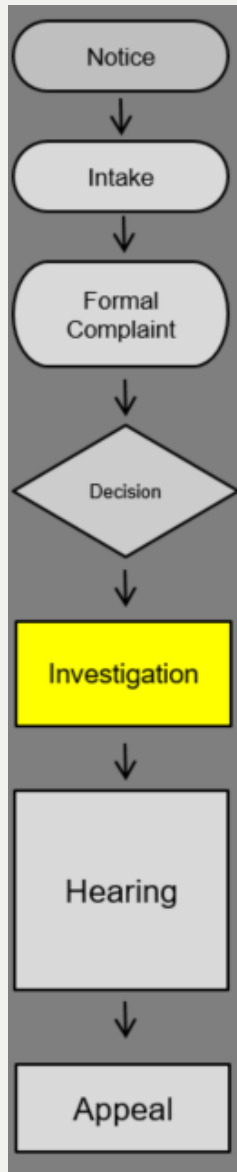
Opportunity to Participate

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



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

Witnesses & Evidence



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

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

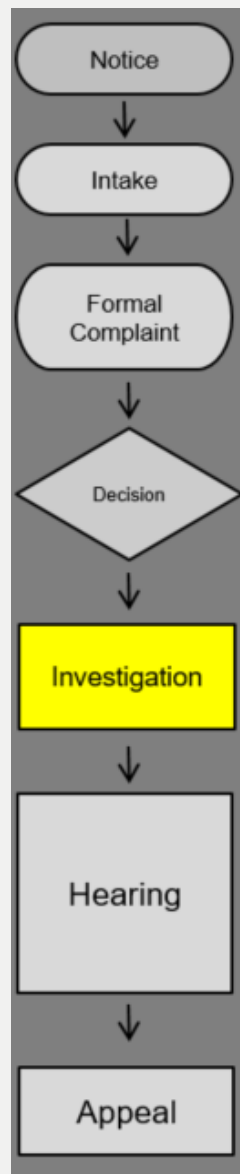
Practical Considerations & Effective Practices

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

Practical Considerations for Remote Interviews

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

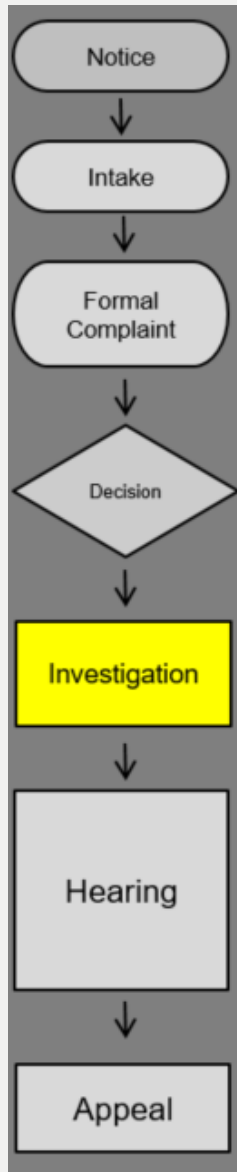
Advisor of Choice



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

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

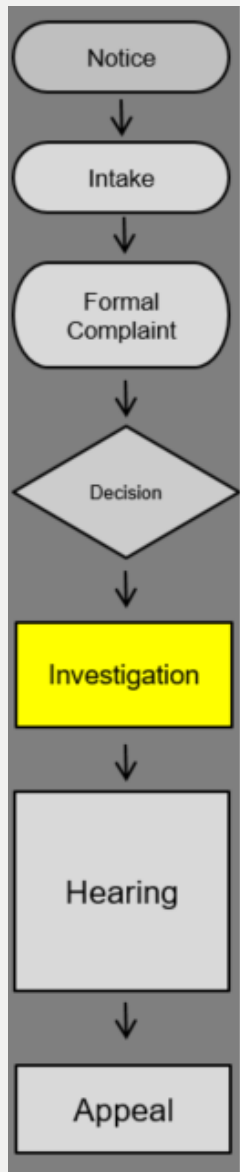
Restrictions on Advisor Participation



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

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

Restrictions on Advisor Participation



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

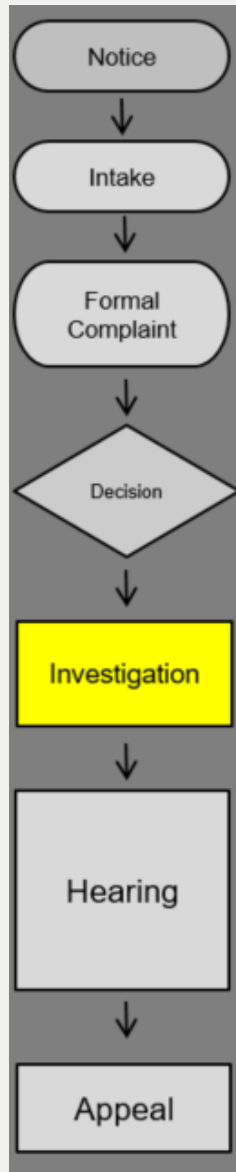
Title IX Regulations May 19 2020; Preamble at 30298.

EVIDENTIARY CONSIDERATIONS

Evidentiary Considerations

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

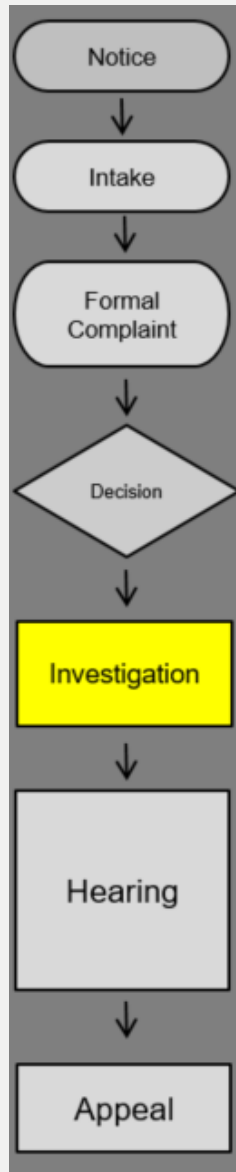
Privileged Information



- 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

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

Berkeley Policy and Procedures

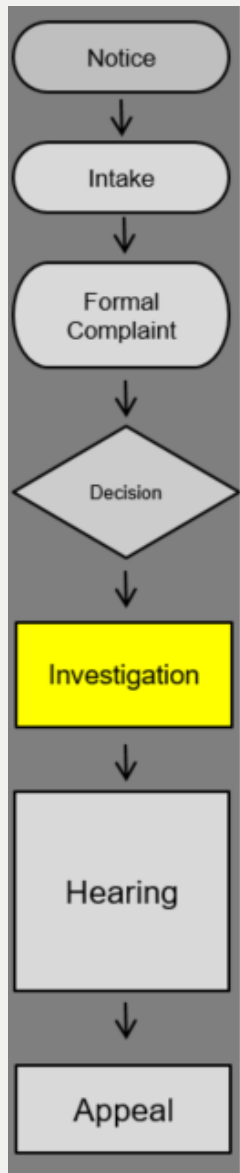


- The Title IX Investigator(s) will not require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege.
- If a person voluntarily chooses 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.

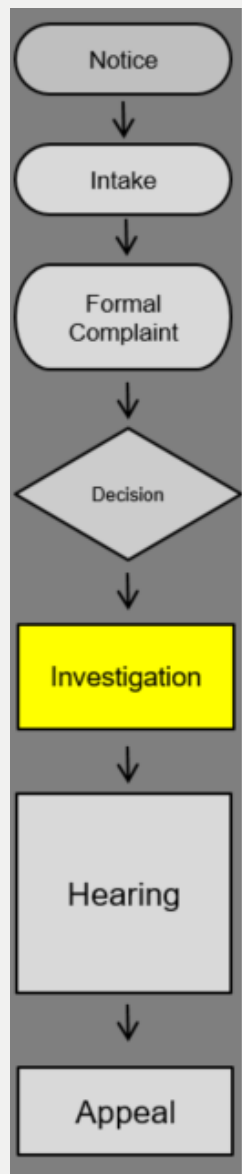
Relevance

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



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

Relevance



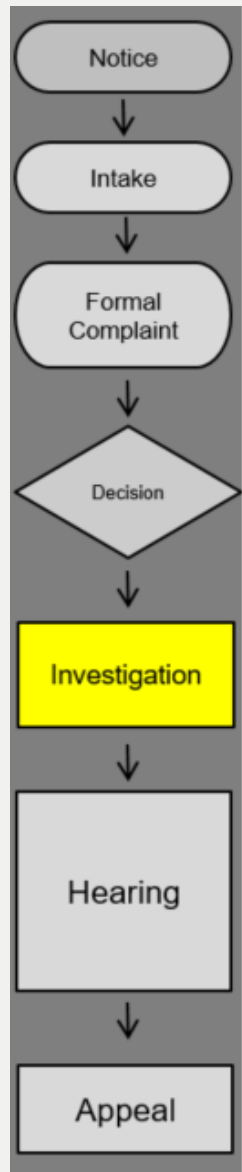
“While the proposed rules do not speak to

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

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

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

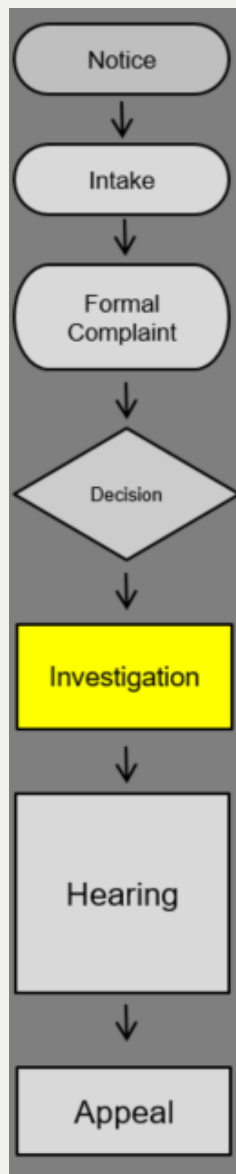
Relevance



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

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

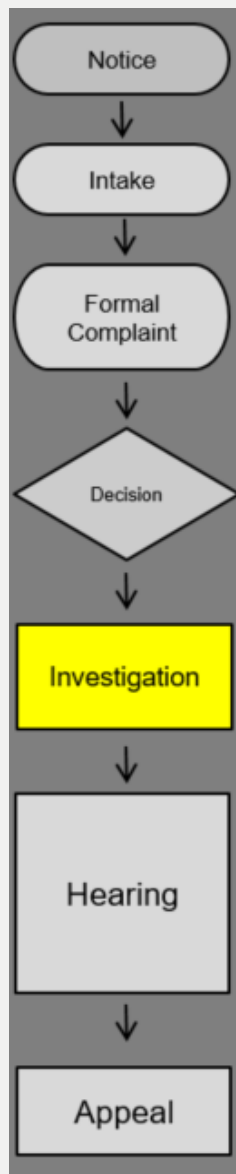
Prior Sexual History



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

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

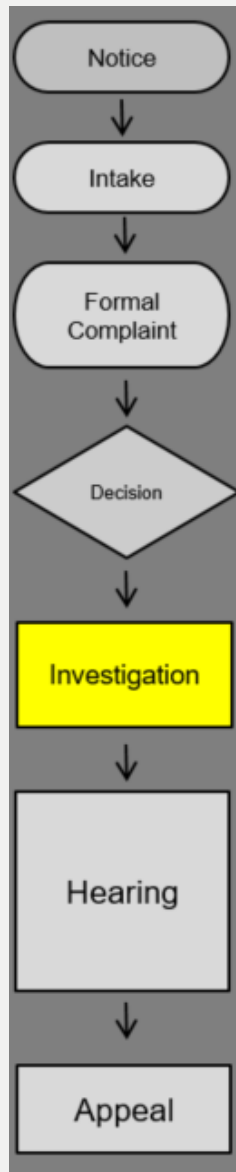
Prior Sexual History



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

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

Prior Sexual History: Motive



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

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

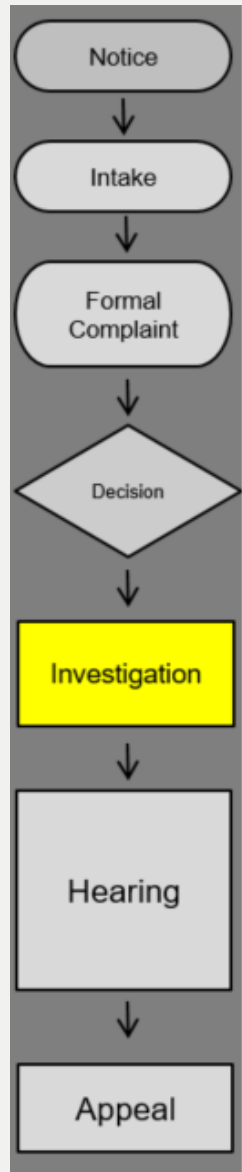
Prior or Subsequent Misconduct

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

Practical Considerations

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

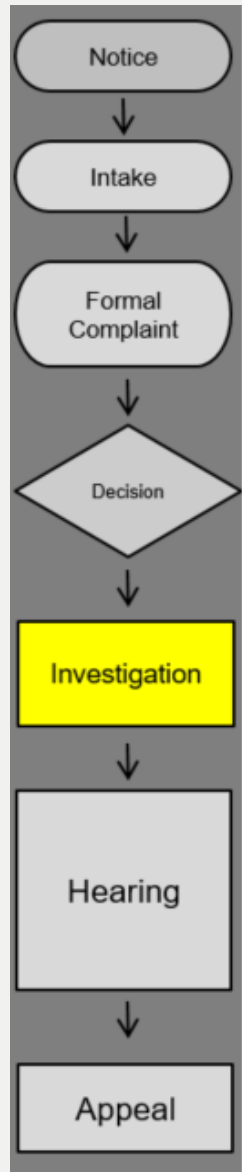
Flexibility to Adopt Rules



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

Title IX Regulations May 19, 2020; Preamble at 30248

Flexibility to Adopt Rules – Except

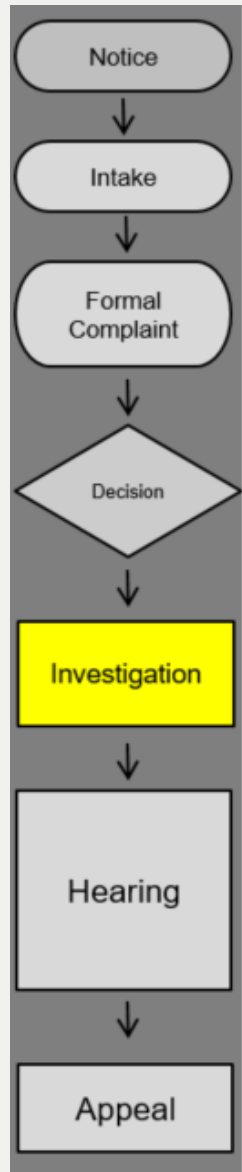


- For example, a recipient **may not adopt a rule excluding relevant evidence** because such relevant evidence may be **unduly prejudicial, concern prior bad acts, or constitute character evidence.**
- A recipient's additional evidentiary rules may not, for example, **exclude *relevant* cross-examination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

Title IX Regulations May 19, 2020; Preamble at 30248

Title IX Regulations May 19, 2020; Preamble at 30361

Berkeley Policy and Procedures

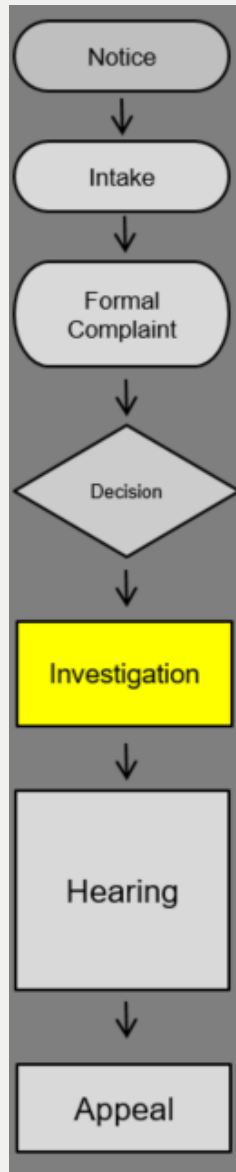


- Questions and evidence about the Complainant's sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the Complainant's prior sexual behavior are offered to prove that someone other than the Respondent committed the conduct alleged by the Complainant, 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.

EVIDENCE REVIEW

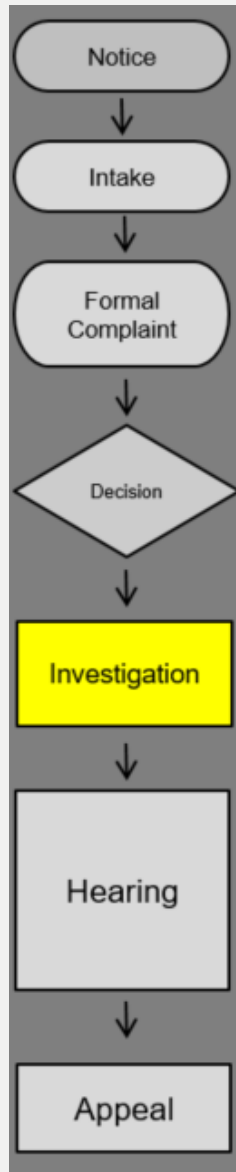
Evidence Review



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

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

Evidence Review

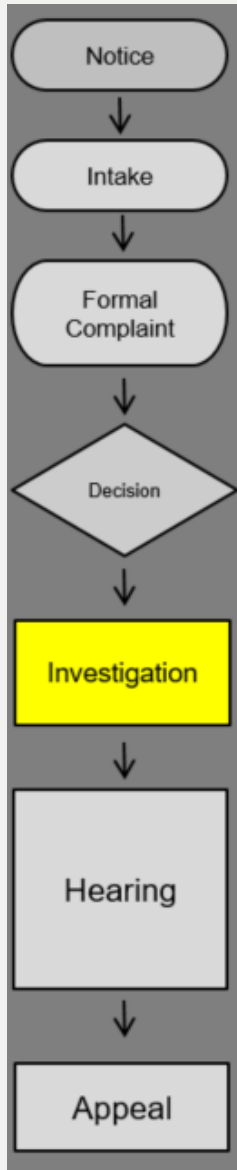


- “Recipient must send to each party and the party’s advisor, if any, **the evidence subject to inspection and review** in an electronic format or a hard copy, and the parties must have at least **10 days to submit a written response**, which the investigator will consider prior to completion of the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

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

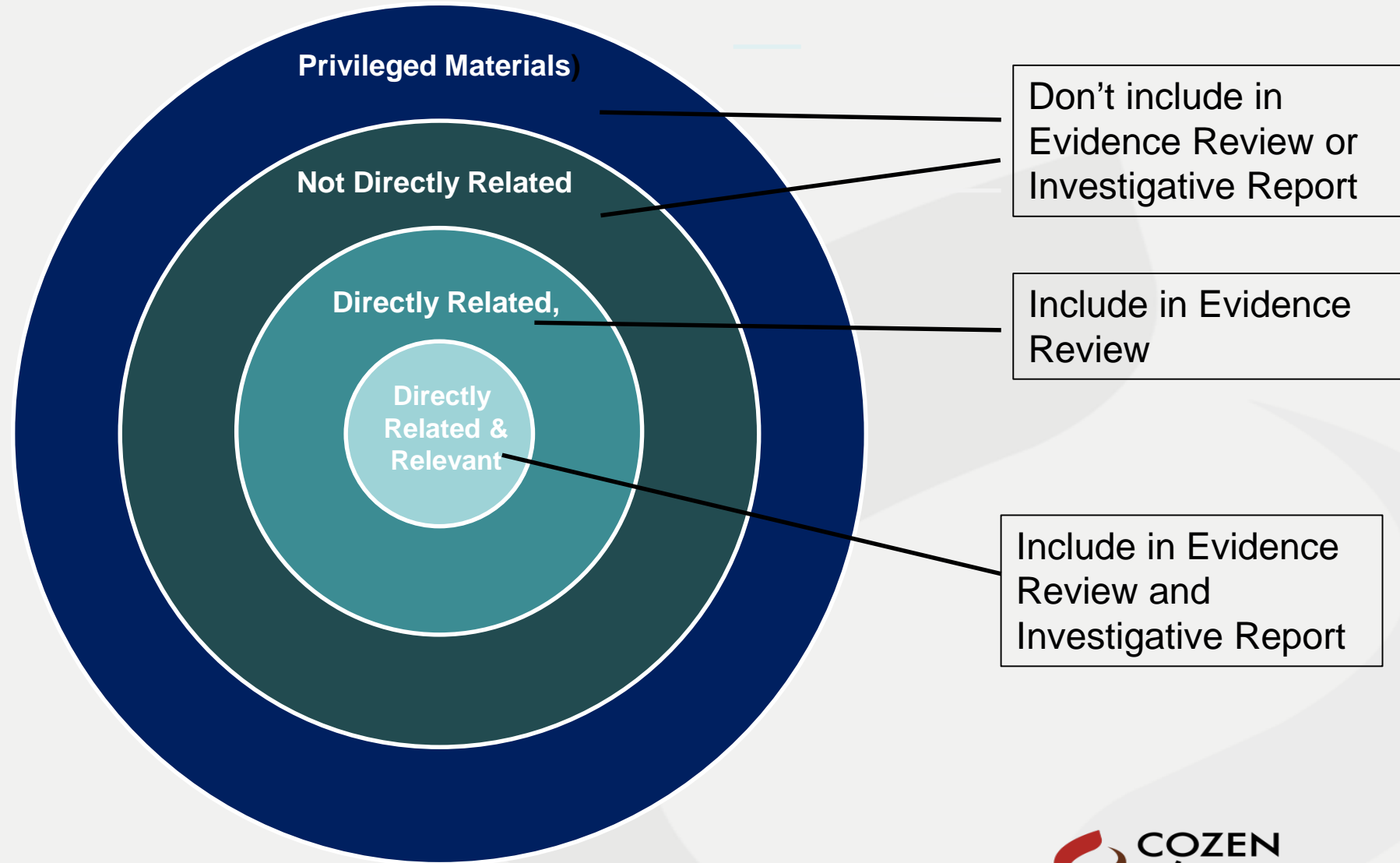
Evidence Review

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

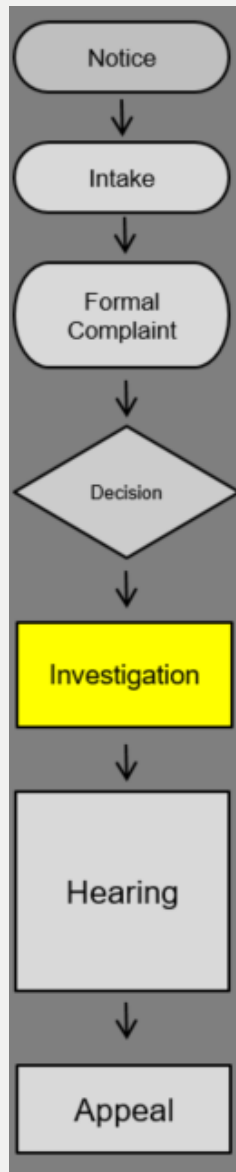


Title IX Regulations May 19, 2020; Preamble 85 F.R.30303

Evidentiary Levels for Inclusion



Directly Related

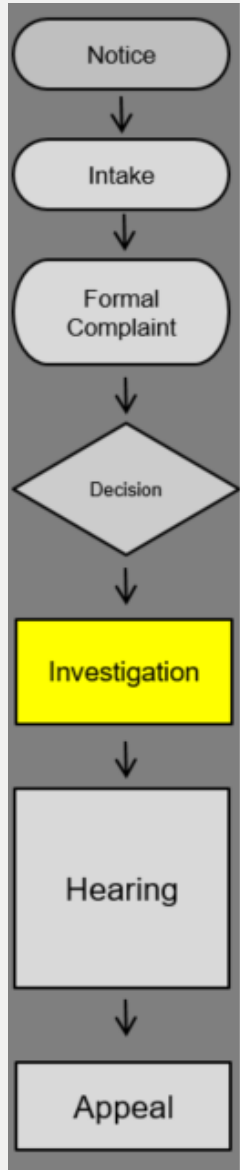


- Not defined in the regulations or the Preamble
 - The Department declines to define certain terms such as “evidence directly related to the allegations,” as these terms should be interpreted using their plain and ordinary meaning.
- “Directly related” aligns with the requirements in FERPA
 - The Department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

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

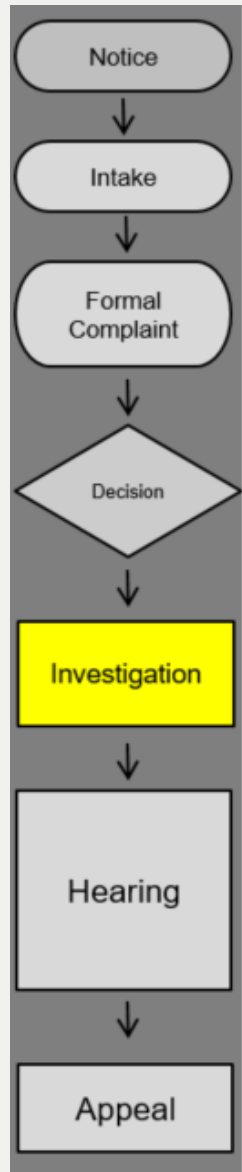
Directly Related

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



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

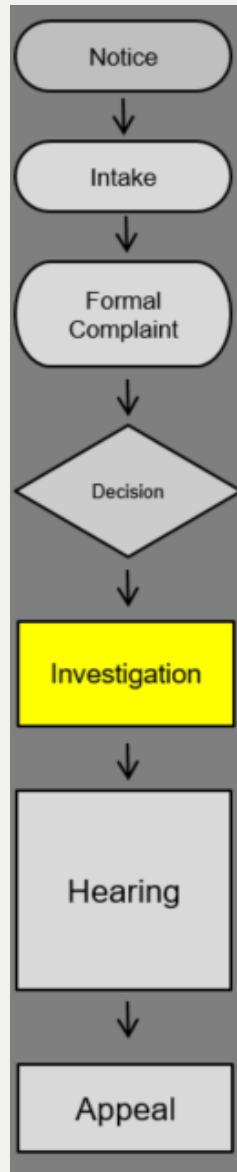
Directly Related vs. Relevant



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

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

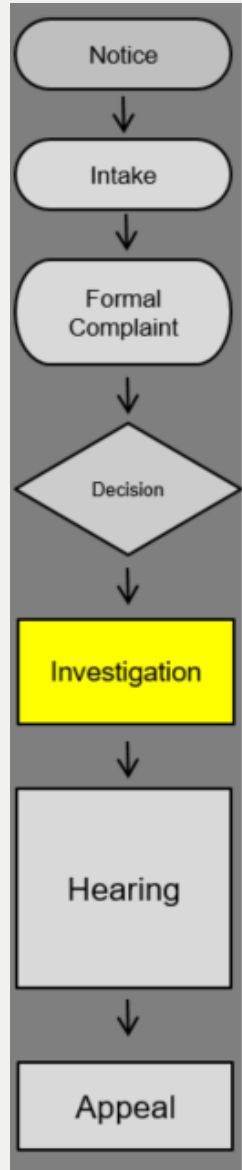
Directly Related



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

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

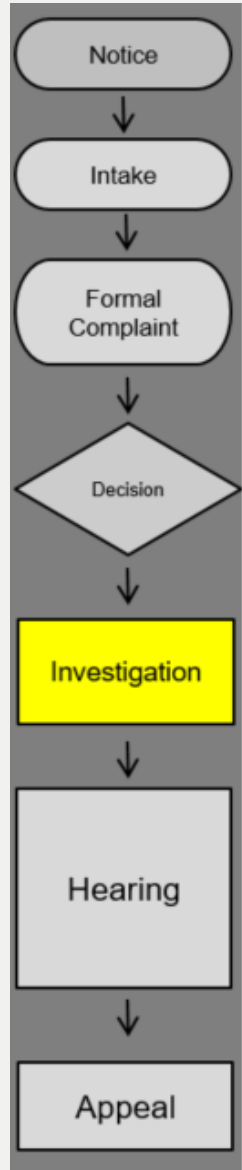
Directly Related



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

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

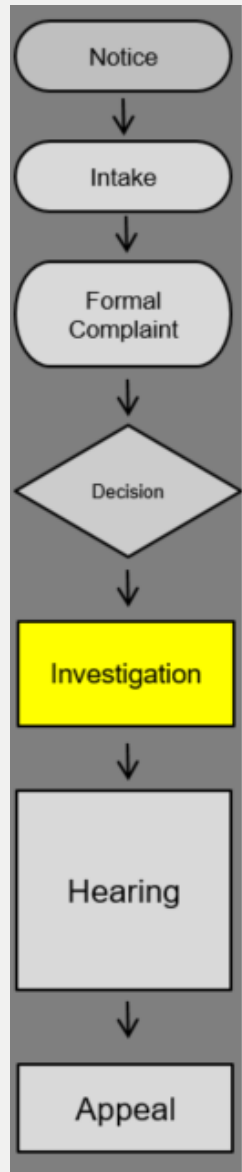
Directly Related



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

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

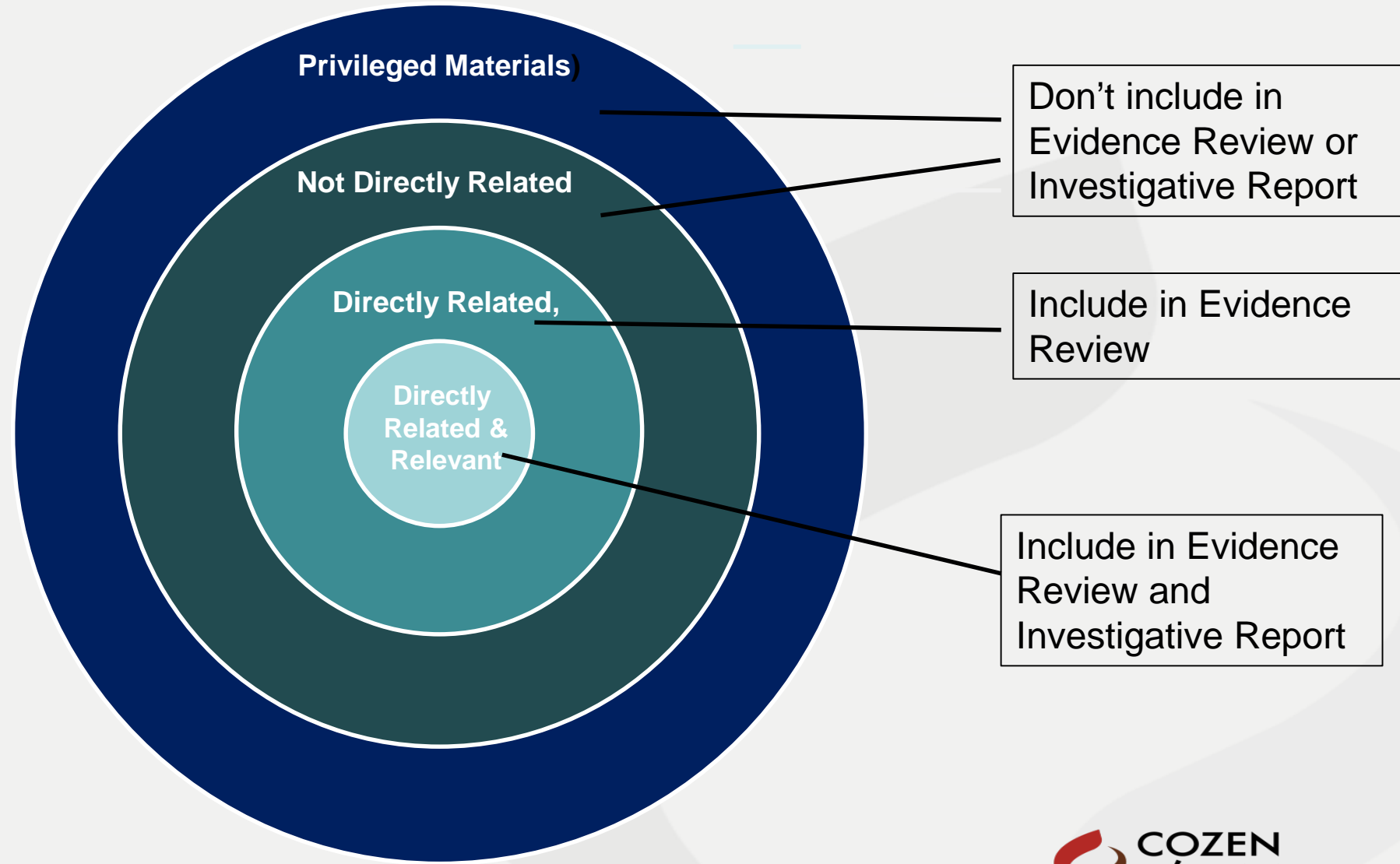
Scope of Parties' Review



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

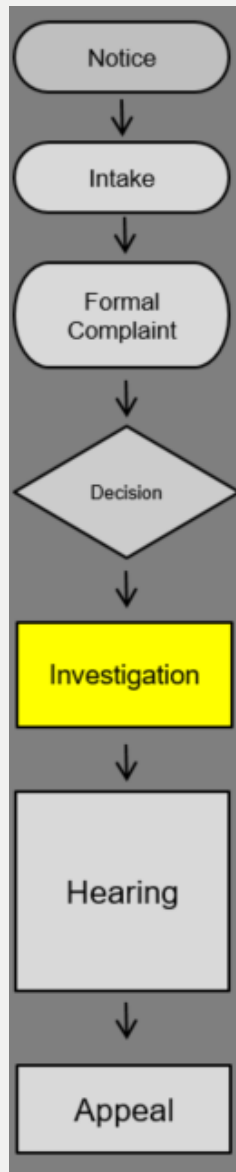
Title IX Regulations May 19, 2020; Preamble 85 F.R.30305 & 30300

Evidentiary Levels for Inclusion



INVESTIGATIVE REPORT

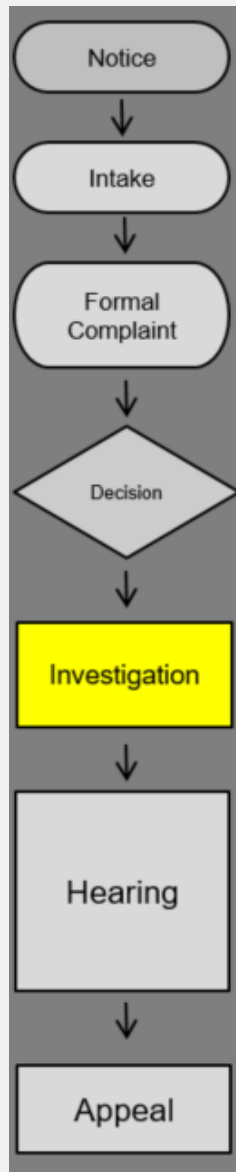
Investigative Report



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

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

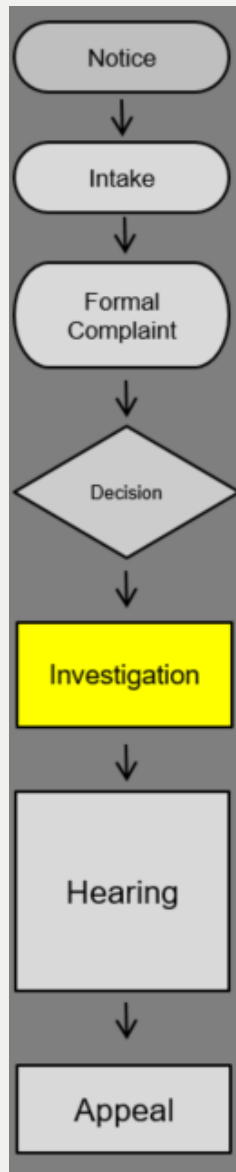
Investigative Report



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

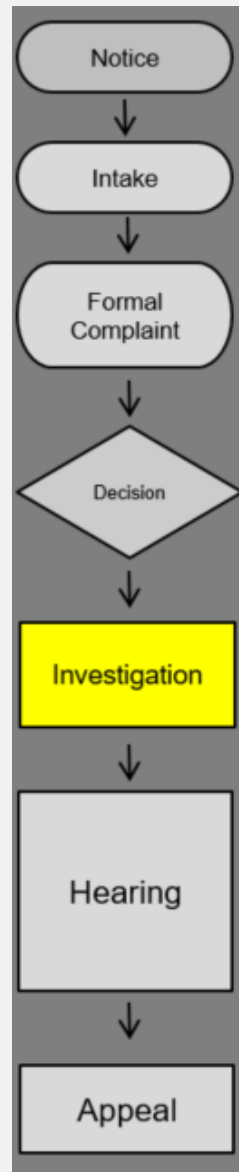
Title IX Regulations May 19, 2020; §§ 106.45(b)(5)(vii); Preamble 85 F.R.30310.

Investigative Report



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

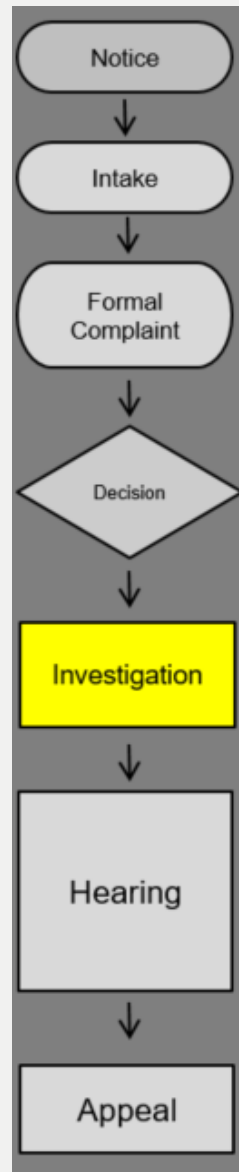
Investigative Report



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

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

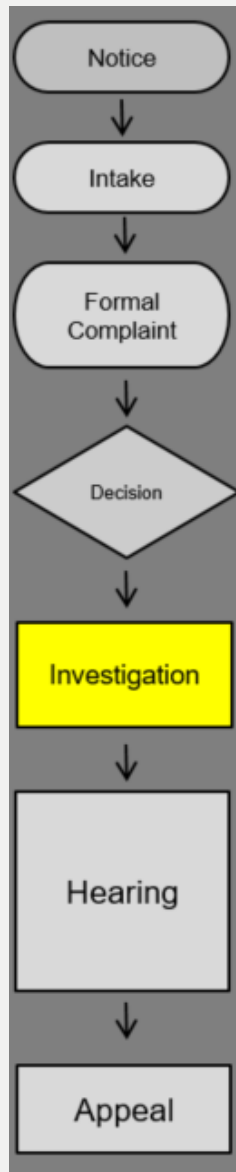
Investigative Report



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

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

Investigative Report



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

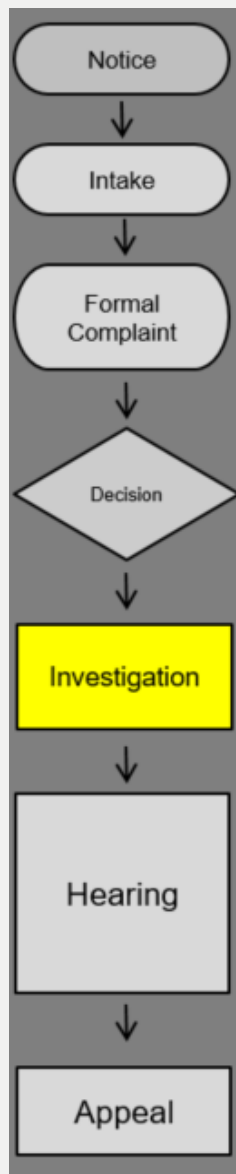
Title IX Regulations May 19, 2020; §§ 106.45(b)(5)(vii); Preamble 85 F.R.30248-49

Practical Considerations & Effective Practices

- Use template format with consistent language and content across investigations
- Language: balanced, neutral and non-judgmental
- Appropriate language
 - Recognize perspective of the parties
 - Comment on the evidence, not the parties
- Use of verbatim quotes
- Leave sufficient time for writing, editing, proof reading and review by a fresh set of eyes

REASONABLY PROMPT TIME FRAMES

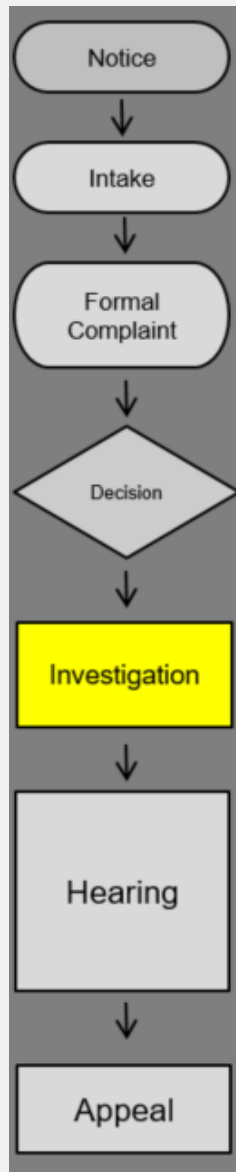
Reasonably Prompt Time Frames



- The grievance process must include:
 - reasonably prompt time frames for conclusion of the grievance process, including reasonably prompt time frames for filing and resolving appeals and informal resolution processes if the recipient offers informal resolution processes
 - a process that allows for the temporary delay of the grievance process or the limited extension of time frames for good cause with written notice to the complainant and the respondent of the delay or extension and the reasons for the action

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

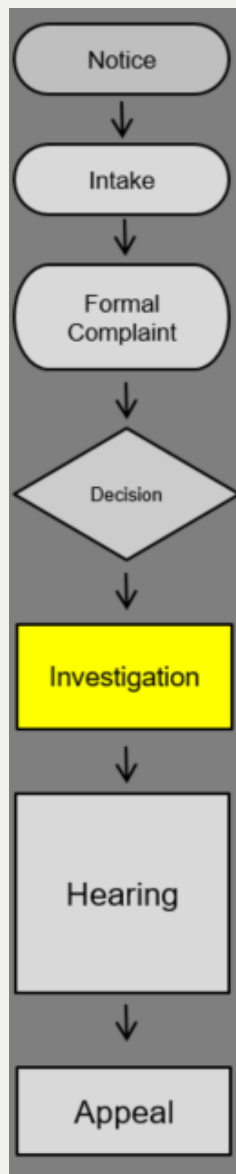
Reasonably Prompt Time Frames



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

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

Reasonably Prompt Time Frames



- A recipient must resolve each formal complaint of sexual harassment according to the time frames the recipient has committed to in its grievance process.
- The Department believes that each recipient is in the best position to balance promptness with fairness and accuracy based on the recipient's unique attributes and the recipient's experience with its own student disciplinary proceedings, and thus requires recipients to include "reasonably prompt time frames" for conclusion of a grievance process that complies with these final regulations.

Title IX Regulations May 19, 2020 §106.45(b)(1)(v); Preamble 85 F.R. 30269

INVESTIGATIONS

PRACTICAL IMPLEMENTATION

GETTING STARTED

THE ROLE OF THE INVESTIGATOR

CREATING AN INVESTIGATION PLAN

DRAFTING THE NOTICE OF INVESTIGATION

Role of the Investigator

- Investigator takes the lead on the investigation
 - Not the parties' burden
- Goals:
 - Maintain neutrality
 - To gather the most robust set of facts
 - To listen with an earnest intent to understand
 - To learn, not assume
 - To tend to the individual
 - Search for corroboration
- Key tasks:
 - Provide accurate information on investigatory process/timing
 - Maintain good communication
 - Provide notice of extensions
 - Document facts sought and gathered
- Documentation/Report
 - Verbatim/"quotes"
 - Areas of agreement and disagreement
 - To record or not to record?

Role of the Investigator

- A good investigator should be:
 - Objective
 - Fair
 - Impartial
 - Open-minded
 - Professional
 - Appropriate in demeanor
 - An active listener
 - Polite and respectful to all parties
- A good investigator should not:
 - Allow emotion to overrule reason
 - Make assumptions as to how a person “should” react
 - Pre-judge the facts
 - Put oneself in the shoes of the complainant or respondent
 - Allow bias or prejudice to affect their judgment

Identifying Our Own Biases

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

Diversity and Culture

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

Developing an Investigative Plan

- Map the policy elements
- List witnesses and order of interviews
- List other possible sources of evidence
 - How will the evidence be obtained?
 - Who do I need to enlist?
- Think broadly about potential witnesses
 - Eyewitnesses – before, during, after
 - Disclosure witnesses
 - First responder personnel – hospital, police, campus
 - Witnesses with awareness of the parties' relationship

Gathering Background Documents

- Available information about the report, including:
 - Notes from initial report
 - Notice of investigation
 - Intake notes (or relevant portions)
 - Law enforcement records
- Any information that may expire, such as:
 - Security camera footage
 - Parties' social media?
 - Snapchat stories or Instagram stories

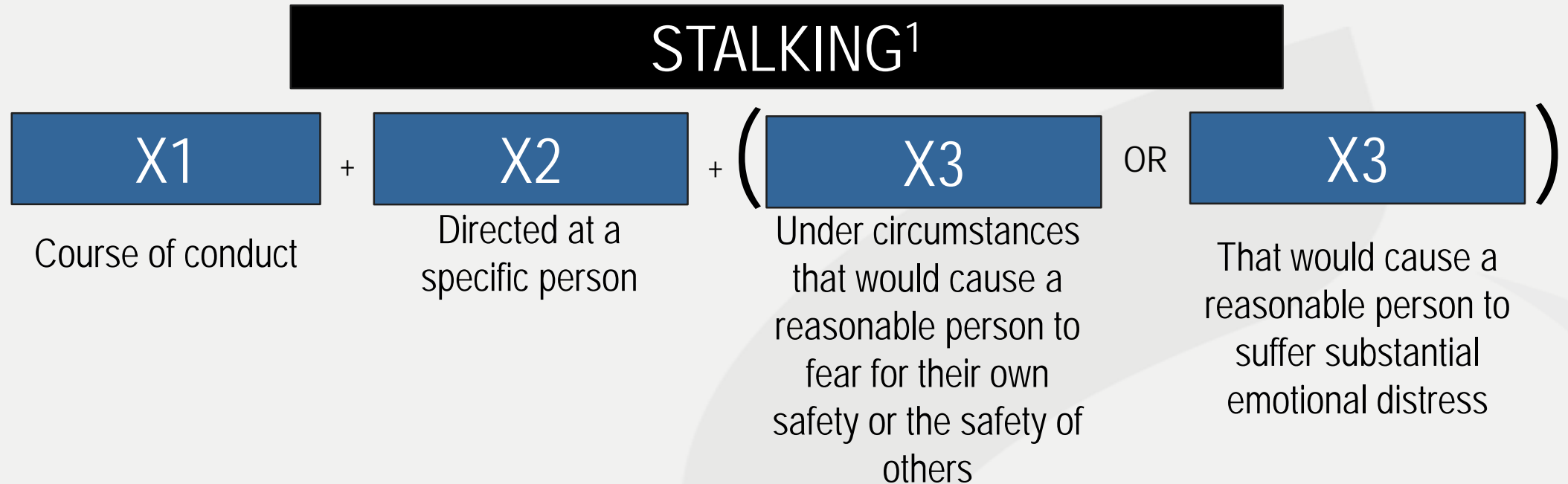
Developing an Investigative Plan

- 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

Map the Elements of the Alleged Conduct



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

Building a Timeline

- Create a timeline of events of the incident
 - Remember to include key events other than the alleged act(s) 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

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

Notice of Investigation

- Clear language
- Include:
 - Identities of the parties involved
 - The specific section(s) of the policy allegedly violated
 - The precise conduct allegedly constituting the potential policy violation(s)
 - Date and location of the alleged conduct
- Same notice to Complainant and Respondent
- Notify the parties that the College may issue an amended written notice

SETTING UP THE INTERVIEW

INITIAL COMMUNICATIONS

PREPARATION FOR INTERVIEW

ADDRESSING QUESTIONS AND BARRIERS TO PARTICIPATION

Initial Communications

- Be ready for questions about:
 - Obligation to participate
 - Role of the advisor and questions about whether to hire an attorney or use someone from the College
 - FERPA releases (“will my parents/professors/others know about this?”)
 - Co-interviewing with law enforcement
 - Amnesty under conduct code, and pursuant to role as student employee, student-athlete, etc.

Initial Communications

- Identify and address barriers to participation by:
 - Communicating care through tone and word choice
 - Using inclusive language
 - Addressing disability accommodations and interpreter services
 - Encouraging the use of available supports/resources
- Non-responsiveness
 - Make sufficient attempts at outreach and consider using different modes before concluding that someone is intentionally not responding
 - Think about other avenues/people for outreach

Initial Communications

- Sending “mirrored” communications to the parties
 - Notice of Investigation
 - Outreach emails
 - Answers to questions
- Documenting communications
 - Log all communications in case log
 - Save copies of email communications in case file
 - Take notes during phone calls and send follow-up “memory marker”

INTERVIEW SKILLS

Before You Begin

- Consider timing and location
- 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
- Allow enough time for thorough exploration of the issues

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?”

Forensic Interviewing Overview

- Narrative and follow up
- Corroboration
- Questioning techniques
- Informed and sensitive communications

Narrative and Follow Up

- Invest in learning the language of your witness
- Allow your witness to give a narrative
- Refrain from interrupting or from asking clarifying questions
- Go back and follow up to clarify details
- Explore areas of inquiry that can be corroborated
- Identify circumstances of disclosure and prompt complaint witnesses
- Set the stage for a follow-up interview

Narrative and Follow Up

- 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?
- Organization, knowledge, and fluency

Corroboration

- Exhaustive search for corroboration
- Assess import of lack of corroboration
- Question opportunity, access, means, and motive
- Test the sensory and emotional details
- Take the claims/defenses to their logical ends and explore logical inconsistencies
 - Denial
 - Identity
 - Consent

Questioning 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

Questioning Techniques

- Thoroughly prepare for interview by listing all questions and/or subject matters to be covered
 - Pay attention to what the witness says and respond accordingly
- Explore the entire incident and investigative process with witness

Questioning Techniques

- Focus on sensory details
- Pay attention to emotional cues and responses
- Look for any evidence of motive/bias/interest, even where not immediately apparent
- Listen for details that can be tested via other sources
- Rely upon maps, photos, charts where available
- Create running timeline
- Pay close attention to the circumstances of the disclosure

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

- Adopt an open and conversational communication style
- Listen – don't assume
- Embrace the uncomfortable, the pause, and the silence
 - Take a break
 - Be patient
 - 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

Framing Difficult Questions

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

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

- Verbatim quotes
- Importance of documenting questions when seeking clarification
- Pros and cons of recording interviews
- Note changes in demeanor, tone or engagement
- Maintain interview documentation in investigation file
- Professionalism & precision
- Clear and accessible language

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, swipe card records
 - Objects
 - Photographs of scene
 - School records
 - 911 tape, police records
 - Forensic evidence

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

Gathering Physical Evidence

- Examine whether the College has a Memorandum of Understanding with local law enforcement
 - Information-sharing
 - Coordination of interviews
- Consider opportunity to photograph injuries, property damage, or location of incident
- Have witnesses draw a diagram of the scene or obtain a floor plan
- Timeliness is key
 - Physical evidence can be lost, destroyed, or contaminated
 - Injuries heal quickly

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

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

DYNAMICS OF SEXUAL AND GENDER-BASED HARASSMENT AND VIOLENCE

Identifying Our Own Biases

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

Diversity and Culture

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

Case Evaluation

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

Disclosure

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

Framing Difficult Questions

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

Use of Slides

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