

An Integrated and Coordinated Approach to Investigations and Hearings:

*Understanding the Intersections of Title IX,
Clery, VAWA, and New York Law*

Devon Turner Riley, Member
Peter Lim, Counsel
Maureen Holland, Member

The Institutional Response Group | Cozen O'Connor
Gina Maisto Smith, Chair
Leslie M. Gomez, Vice Chair

Berkeley College
August 5-7, 2020

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.

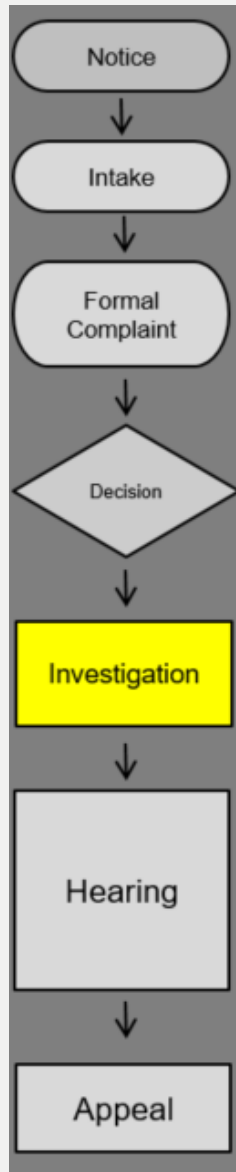
DAY 3 – DECISION-MAKER TRAINING

EVIDENTIARY CONSIDERATIONS

Evidentiary Considerations

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

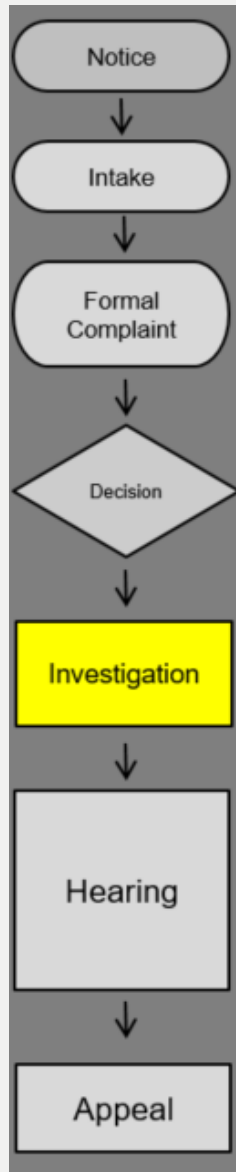
Privileged Information



- 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

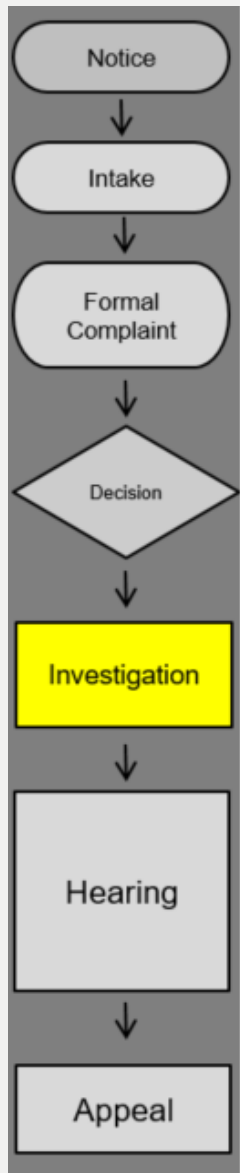


- The Title IX Investigator(s) will not require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege.
- If a person voluntarily chooses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

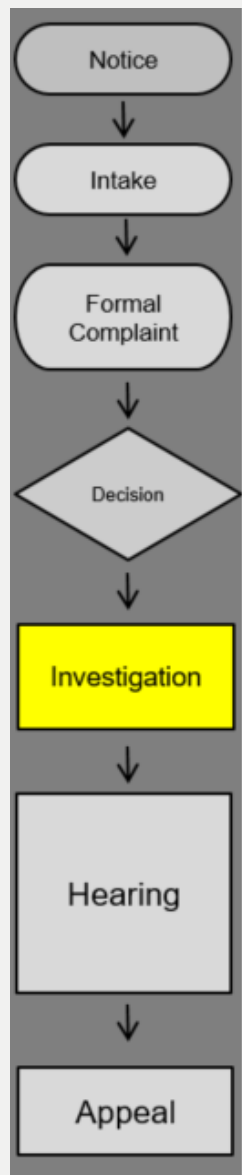
Relevance

- 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



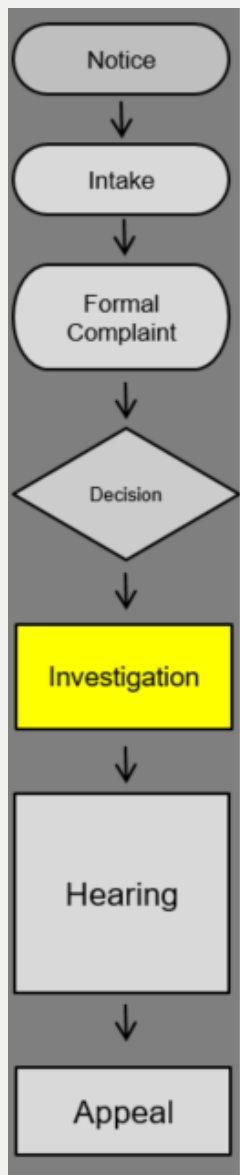
“While the proposed rules do not speak to

- 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

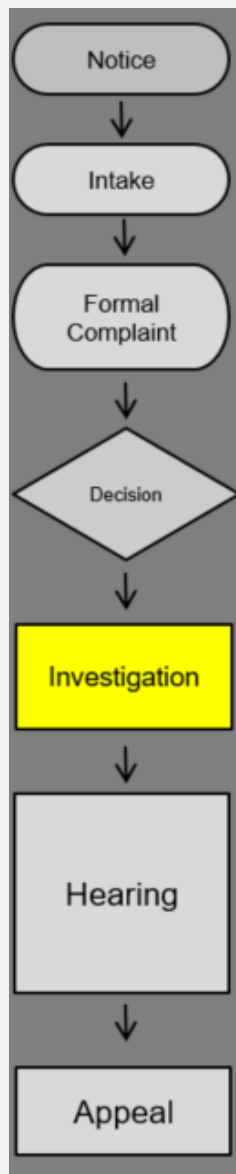
Relevance



- 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

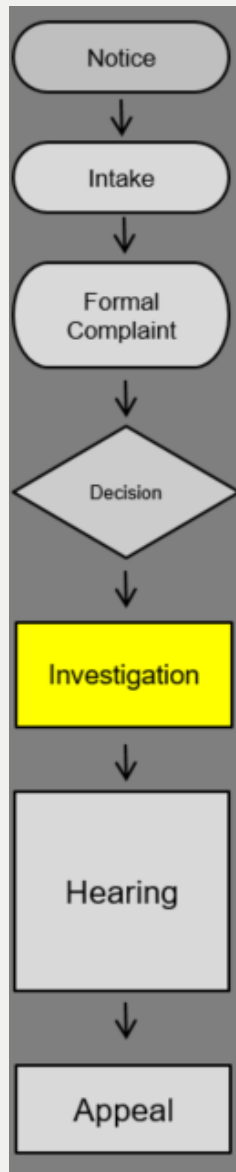
Prior Sexual History



- 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

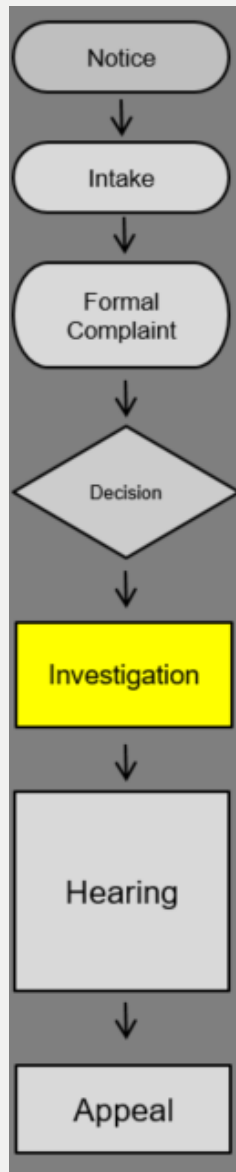
Prior Sexual History



- 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

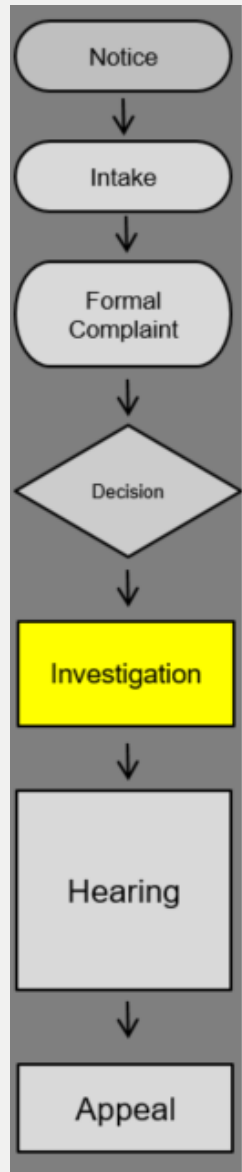
Prior or Subsequent Misconduct

- 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

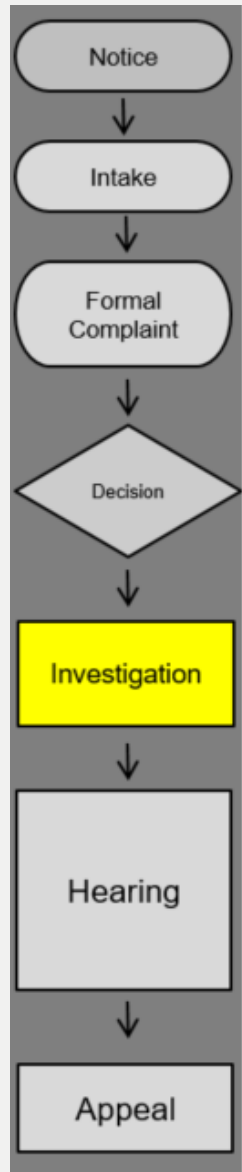
Flexibility to Adopt Rules



- “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.

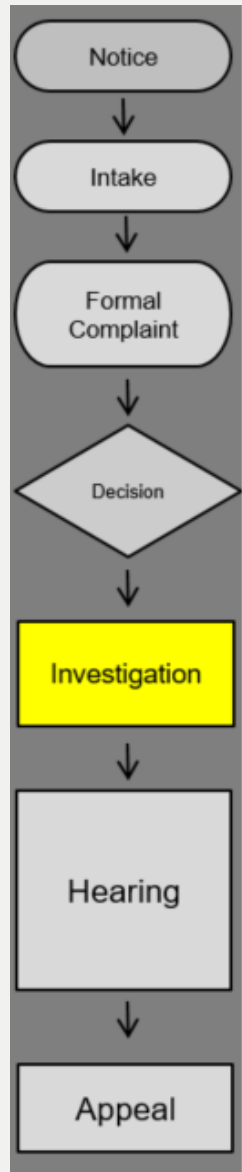
Title IX Regulations May 19, 2020; Preamble at 30248

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.**

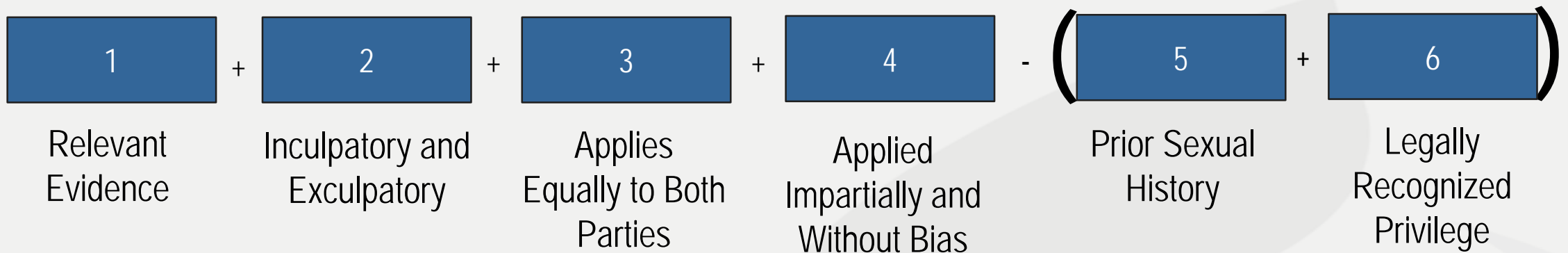
Berkeley Policy and Procedures



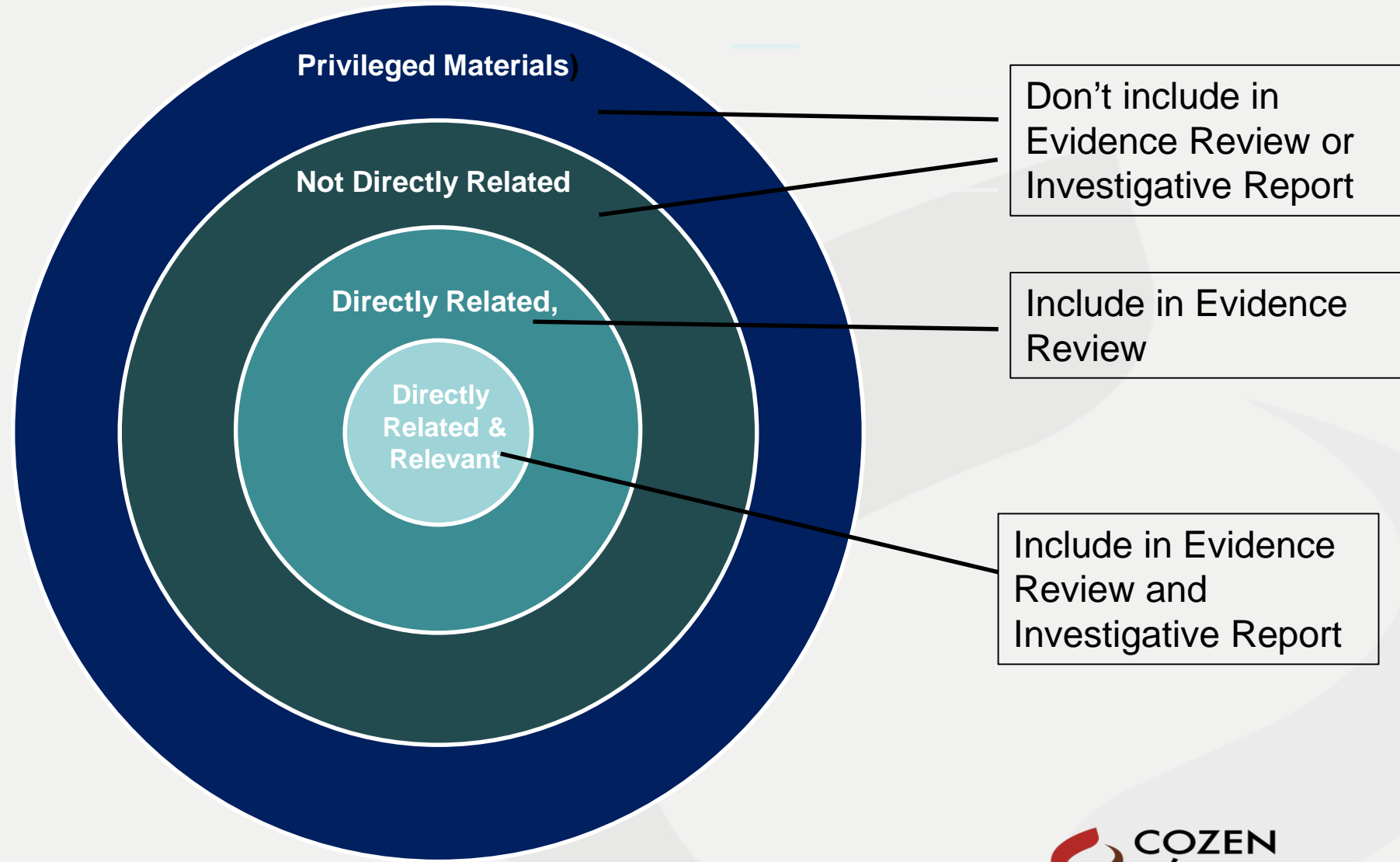
- Questions and evidence about the Complainant's sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the Complainant's prior sexual behavior are offered to prove that someone other than the Respondent committed the conduct alleged by the Complainant,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

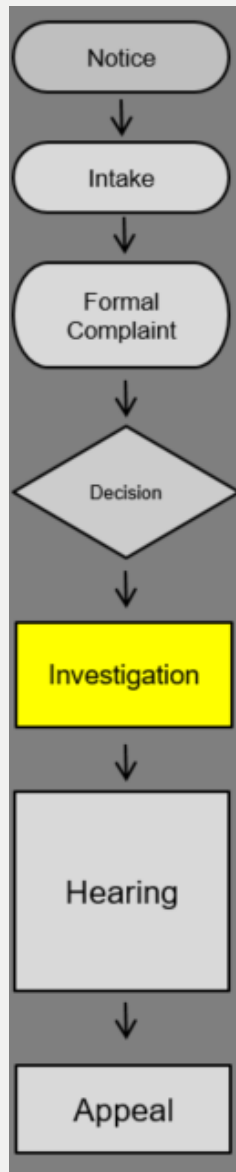
Evidentiary Rules Must Consider



Evidentiary Levels for Inclusion



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

Training

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

Training

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

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

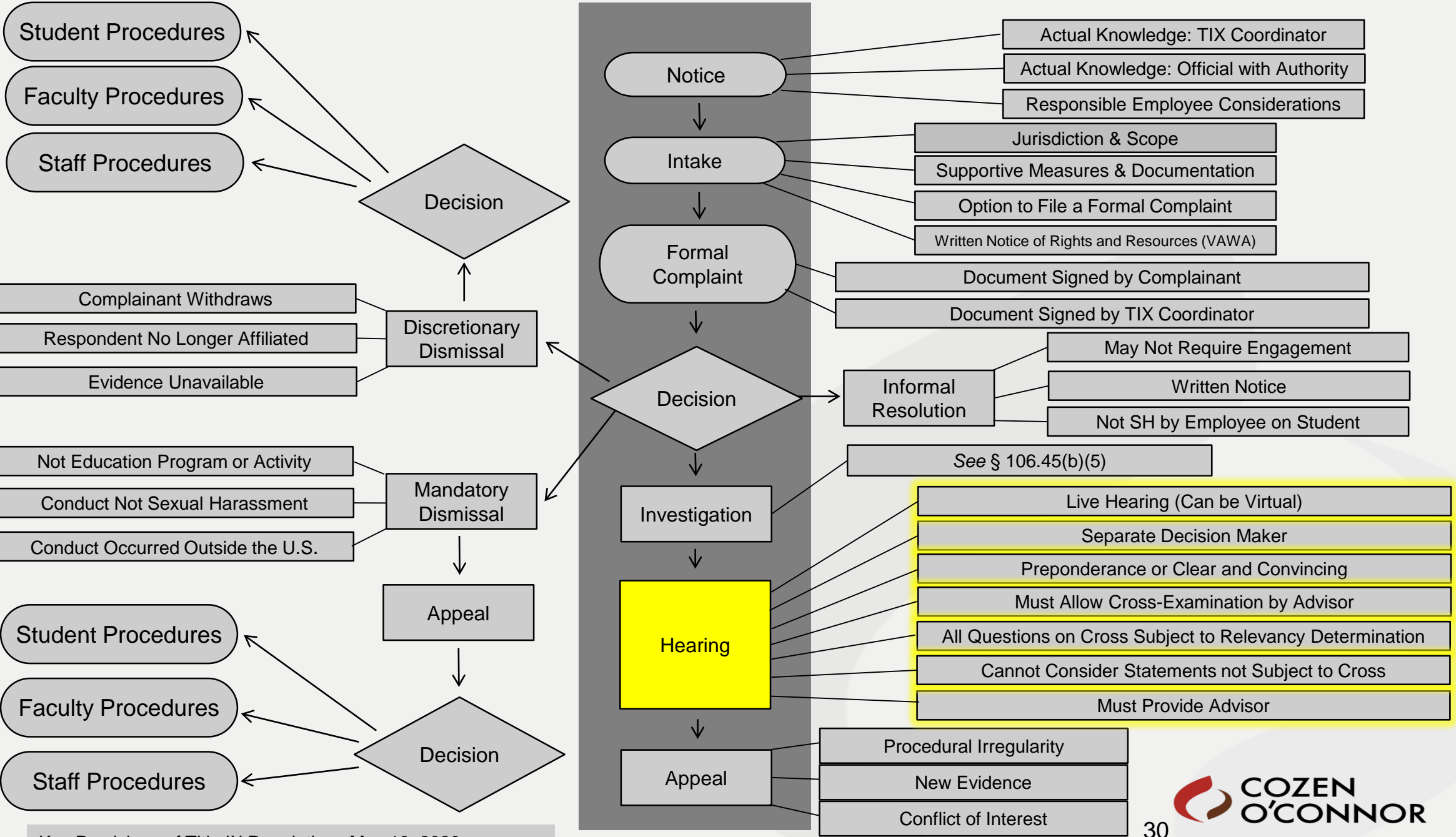
- Nature of sexual and gender-based harassment and violence
 - Delay in reporting
 - Barriers to reporting and proceeding with formal action
 - Reluctance to report to law enforcement
 - Word-against-word credibility
 - Often involve the use of alcohol or other drugs
 - Often involve people who are known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

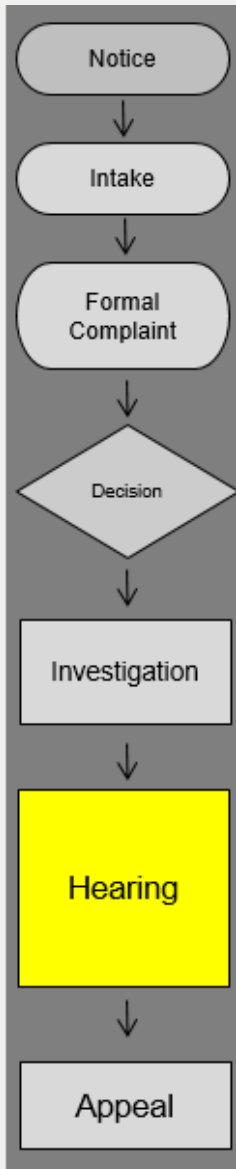


HEARINGS

THE FINAL TITLE IX REGULATIONS

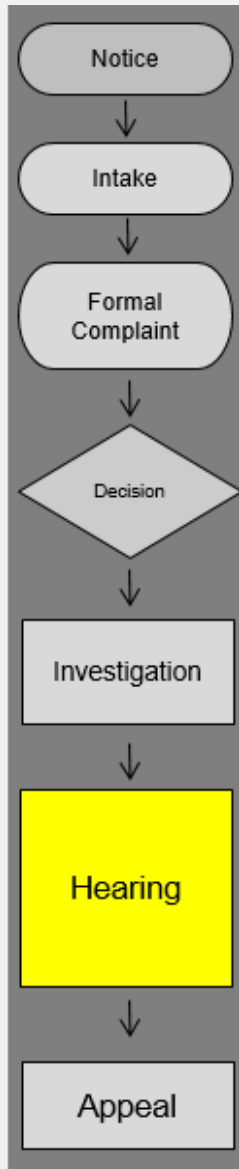
Hearings

- 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.



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

Hearings

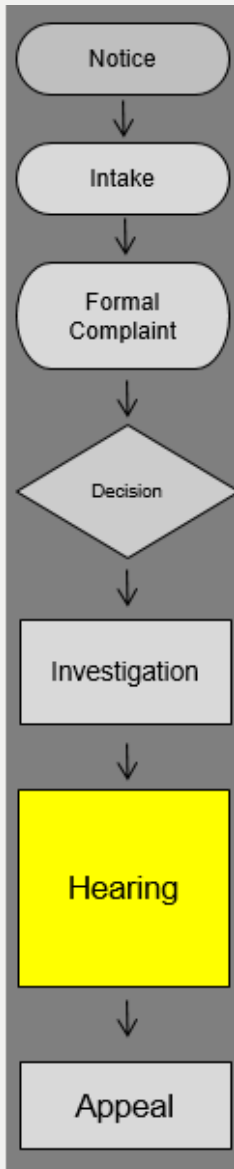


- Only relevant cross-examination and other questions may be asked of a party or witness.
- If a party does not have an advisor present at the live hearing, the recipient must provide without fee or charge to that party, an advisor of the recipient's choice, who may be, but is not required to be, an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

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

Cross-Examination by Advisor

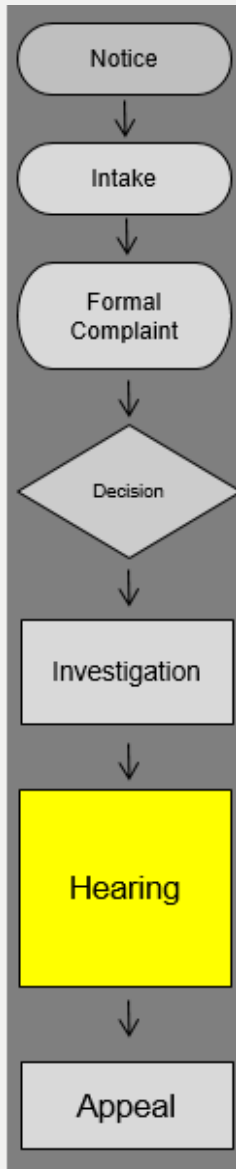
- [A] party's advisor may appear and conduct cross-examination even when the party whom they are advising does not appear.
- Similarly, where one party does not appear and that party's advisor of choice does not appear, a recipient-provided advisor must still cross-examine the other, appearing party "on behalf of" the non-appearing party, resulting in consideration of the appearing party's statements but not the non-appearing party's statements (without any inference being drawn based on the non-appearance).



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

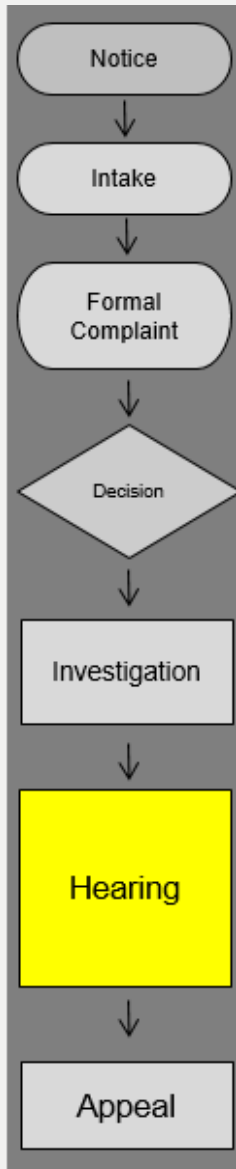
Hearings

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



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

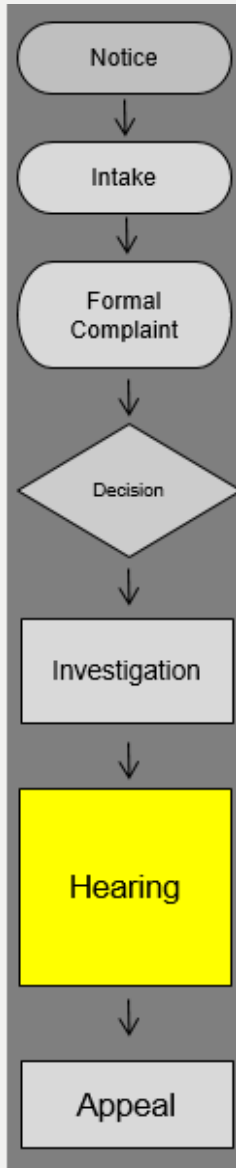
Tested for Credibility



- Probing the credibility and reliability of statements asserted by witnesses contained in such evidence requires the parties to have the opportunity to cross-examine the witnesses making the statements.
- Where a Title IX sexual harassment allegation does not turn on the credibility of the parties or witnesses, this provision allows the other evidence to be considered even though a party's statements are not relied on due to the party's or witness's non-appearance or refusal to submit to cross-examination.

Title IX Regulations May 19, 2020; Preamble at 85 F.R. 30349, 30345

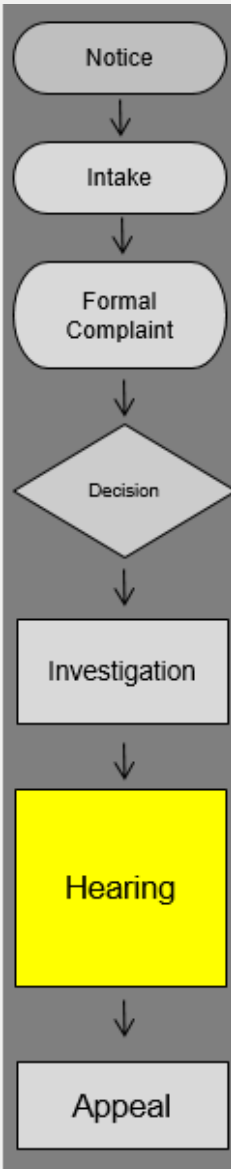
Statements



- [I]n the postsecondary context, only statements that have been tested for credibility will be considered by the decision-maker in reaching a determination regarding responsibility.
- The prohibition on reliance on “statements” applies not only to statements made during the hearing, but also to any statement of the party or witness who does not submit to cross-examination.

Title IX Regulations May 19, 2020; Preamble at 85 F.R. 30345, 30349

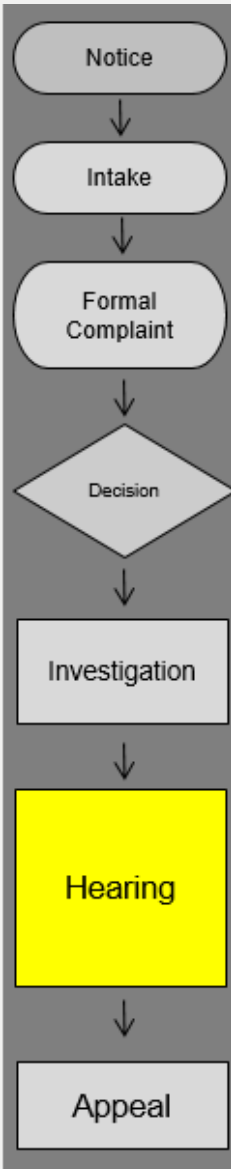
Bright-Line Rule



- Absent importing comprehensive rules of evidence, the alternative is to apply a bright-line rule that instructs a decision-maker to either consider, or not consider, statements made by a person who does not submit to cross-examination.
- The Department believes that in the context of sexual harassment allegations under Title IX, a rule of non-reliance on untested statements is more likely to lead to reliable outcomes than a rule of reliance on untested statements.
- If statements untested by cross-examination may still be considered and relied on, the benefits of cross-examination as a truth-seeking device will largely be lost in the Title IX grievance process.

Title IX Regulations May 19, 2020; Preamble at 85 F.R. 30347

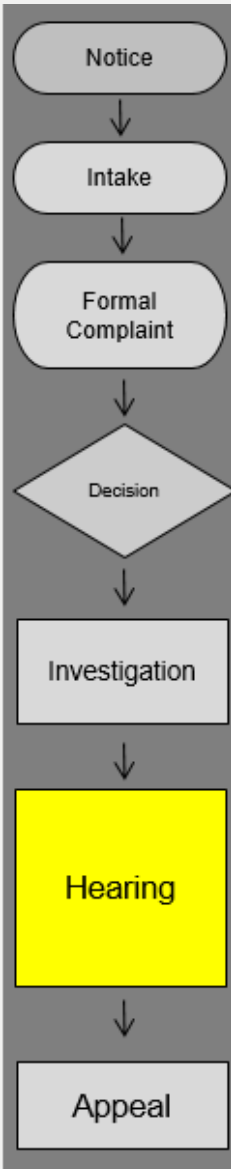
Fairness and Accuracy



- Reliance on party and witness statements that have not been tested for credibility via cross-examination undermines party and public confidence in the fairness and accuracy of the determinations reached by postsecondary institutions.
- This provision need not result in failure to consider relevant evidence because parties and witnesses retain the opportunity to have their own statements considered, by submitting to cross-examination.

Title IX Regulations May 19, 2020; Preamble at 85 F.R. 30347

Submit to Cross-Examination

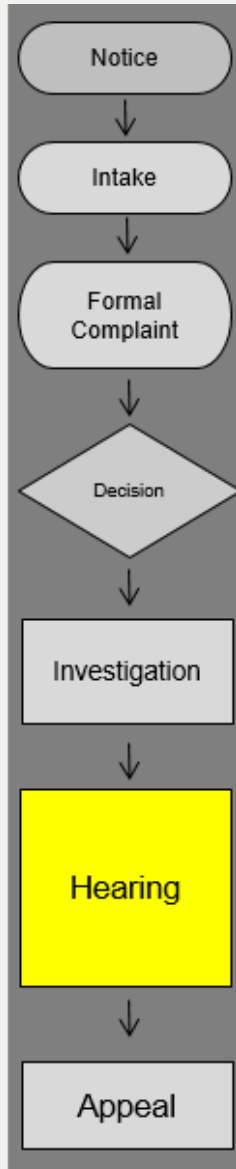


- The Department appreciates the opportunity to clarify here that to “submit to cross-examination” means answering those cross-examination questions that are relevant
- This provision requires a party or witness to “submit to cross-examination” to avoid exclusion of their statements; the same exclusion of statements does not apply to a party or witness’s refusal to answer questions posed by the decision-maker.
- If a party or witness refuses to respond to a decision-maker’s questions, the decision-maker is not precluded from relying on that party or witness’s statements.

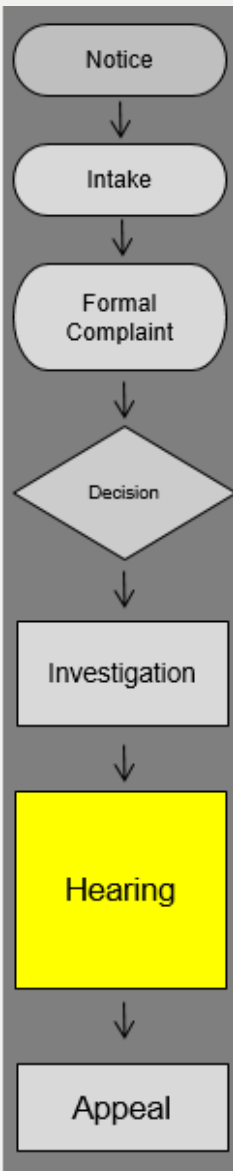
Title IX Regulations May 19, 2020; Preamble at 85 F.R. 30349

Limitation on Use of Statements

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



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



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
 - Description of the procedural steps taken from the receipt of the formal complaint through the determination
 - Findings of fact supporting the determination
 - Conclusions regarding the application of the recipient's code of conduct to the facts
 - Rationale
 - Appeal procedures

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

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. 1.0, 08/14/20

BERKELEY COLLEGE

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 highest quality of education. The College does not tolerate discrimination on the basis of sex or gender in any of its programs, activities, or services, including in its admission, enrollment, and financial aid processes. Sexual and Gender-Based Violence, and Stalking are prohibited and described in this Policy.

This Policy has been drafted in accordance with implementing regulations, issued by the U.S. Department of Education, which prohibit discrimination on the

v. 1.0, 08/14/20

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 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.
- 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.

Policy Language on Hearings

- 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.
- 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.

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.

HEARINGS PRACTICAL IMPLEMENTATION

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

Standard of Proof



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

Standard of Proof

- 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

Lessons From the Law: Procedural

- Appropriate question techniques
- Appropriate deliberation techniques
- Separate questions of responsibility from sanctioning considerations
- Responding to inadmissible evidence
- Decision should not be outcome or sanction driven

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

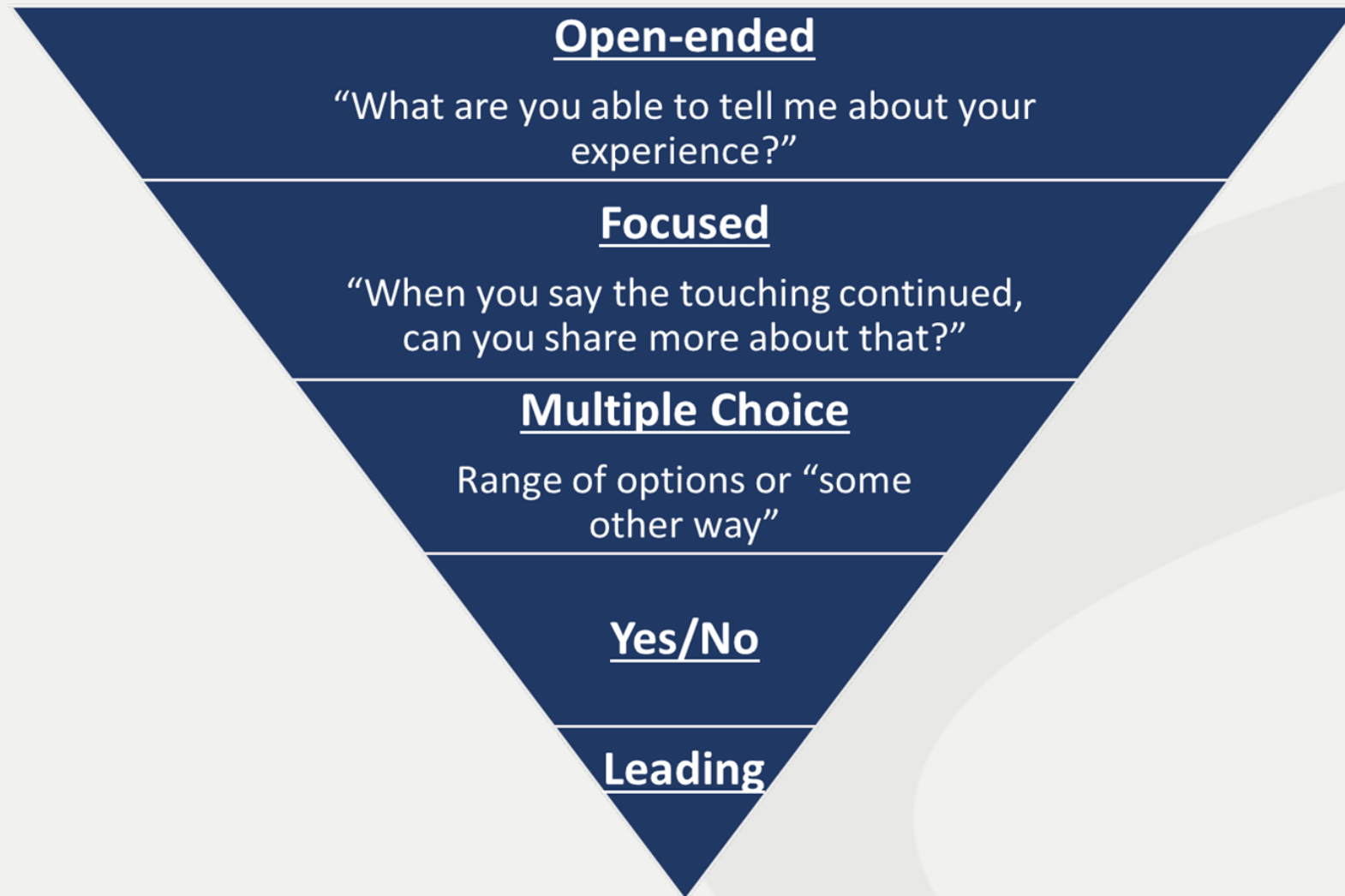
Participation Techniques

- 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



Technology Options

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

DELIBERATIONS

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

SANCTIONS

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.

Title IX Regulations May 19, 2020, Preamble at 85 F.R. 30224

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.

Title IX Regulations May 19, 2020, Preamble at 85 F.R. 30262

Discretion in Sanctioning

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

Title IX Regulations May 19, 2020, Preamble at 85 F.R. 30266, 30274

Discretion in Sanctioning

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

Title IX Regulations May 19, 2020, Preamble at 85 F.R. 30274

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. 1.0, 08/14/20

BERKELEY COLLEGE

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 highest quality of education. The College is committed to an environment that promotes the highest quality of education free from discrimination on the basis of sex or gender in all its programs and activities, including in its admission and enrollment processes. Sexual and Gender-Based Violence, and Stalking are prohibited and described in this Policy.

This Policy has been drafted to implement regulations, issued by the U.S. Department of Education, that prohibit discrimination on the

v. 1.0, 08/14/20

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 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 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.

THE WRITTEN DECISION LETTER

Policy Language 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 Language 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;

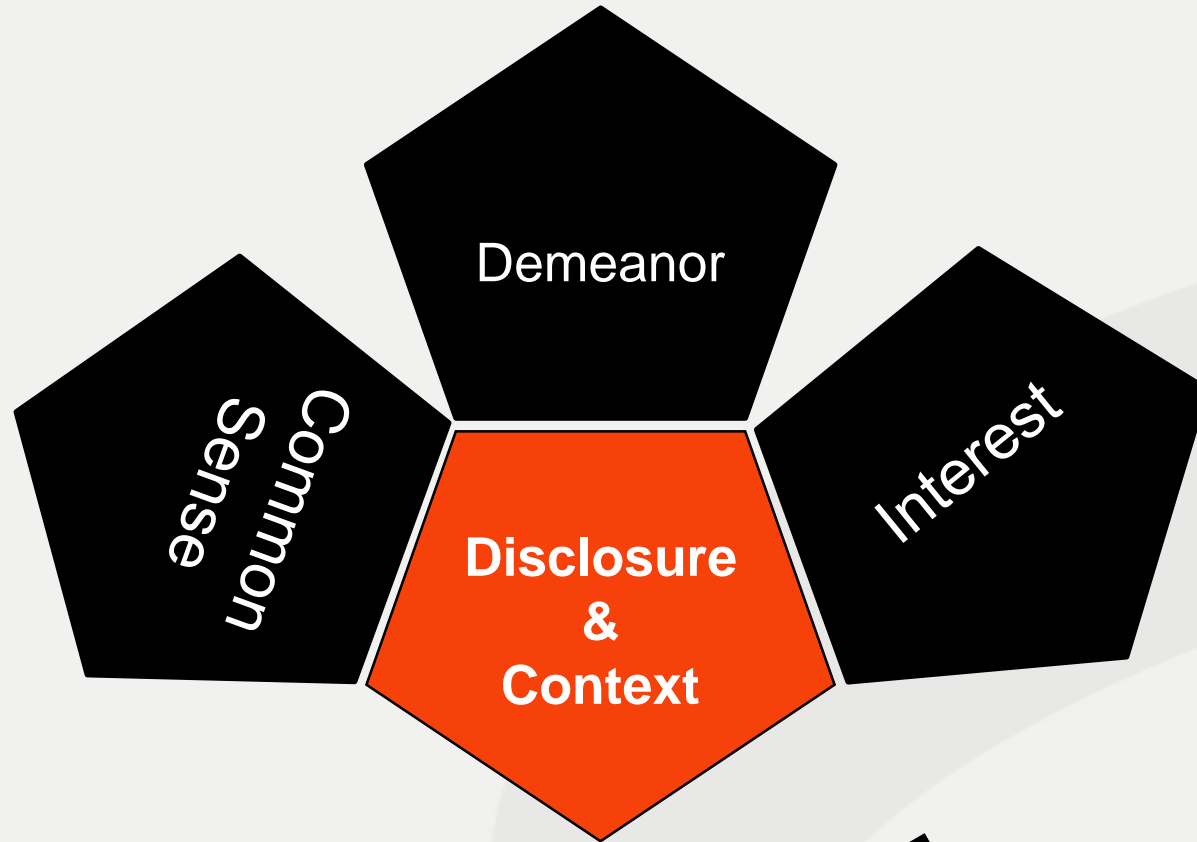
Policy Language on Written Decision Letter

(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.

EVALUATING CREDIBILITY

Evaluating Credibility



Detail

Credibility Factors

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

Demeanor

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

Demeanor

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

Interest

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

Interest

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

Detail

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

Corroboration

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

Corroboration

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

Evaluating Changes in Account

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

Disclosure

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

Synthesis

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

Integrated Analysis

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

Questions to Consider: Credibility Generally

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

Questions to Consider: Detail

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

Questions to Consider: Interest

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

Questions to Consider: Demeanor

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

Questions to Consider: Corroboration

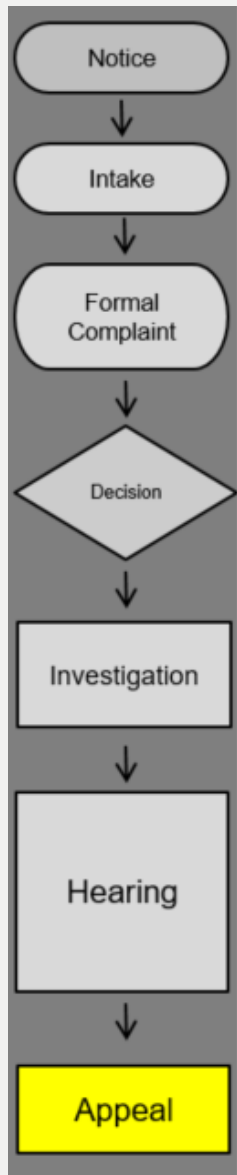
- How well did the testimony of the witness square with the other evidence in the case, including the testimony of other witnesses?
- Was it contradicted or supported by the other testimony and evidence?

Questions to Consider: Common Sense

- Does it make sense?

APPEALS

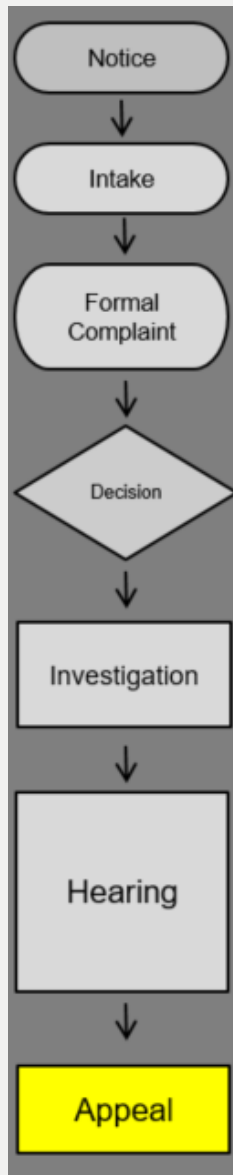
Appeals



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

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

Appeals



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

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

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. 1.0, 08/14/20

BERKELEY COLLEGE

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 highest standards of academic excellence and integrity. The College's policy of no discrimination on the basis of sex or gender in all its programs and activities, including in its admission and enrollment processes, and its prohibition of discrimination or harassment on the basis of sex or gender, including Sexual and Gender-Based Violence, and Stalking are described in this Policy.

This Policy has been drafted in accordance with implementing regulations, issued by the U.S. Department of Education, which prohibit discrimination on the

v. 1.0, 08/14/20

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 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

Berkeley 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”).

Berkeley 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.

Berkeley 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.

Berkeley 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.

Berkeley 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

Berkeley 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.

Credibility Considerations from OCR

(1997 Sexual Harassment Guidance)

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

Credibility Considerations from OCR

(1997 Sexual Harassment Guidance continued)

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

Credibility Considerations from OCR

(1997 Sexual Harassment Guidance continued)

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

Credibility Considerations from OCR

(1997 Sexual Harassment Guidance continued)

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

Credibility Considerations from OCR

(1997 Sexual Harassment Guidance continued)

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

Credibility Considerations from OCR

(1997 Sexual Harassment Guidance continued)

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

See 1997 Sexual Harassment Guidance

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.