

Title IX Training:

An Integrated and Coordinated Approach

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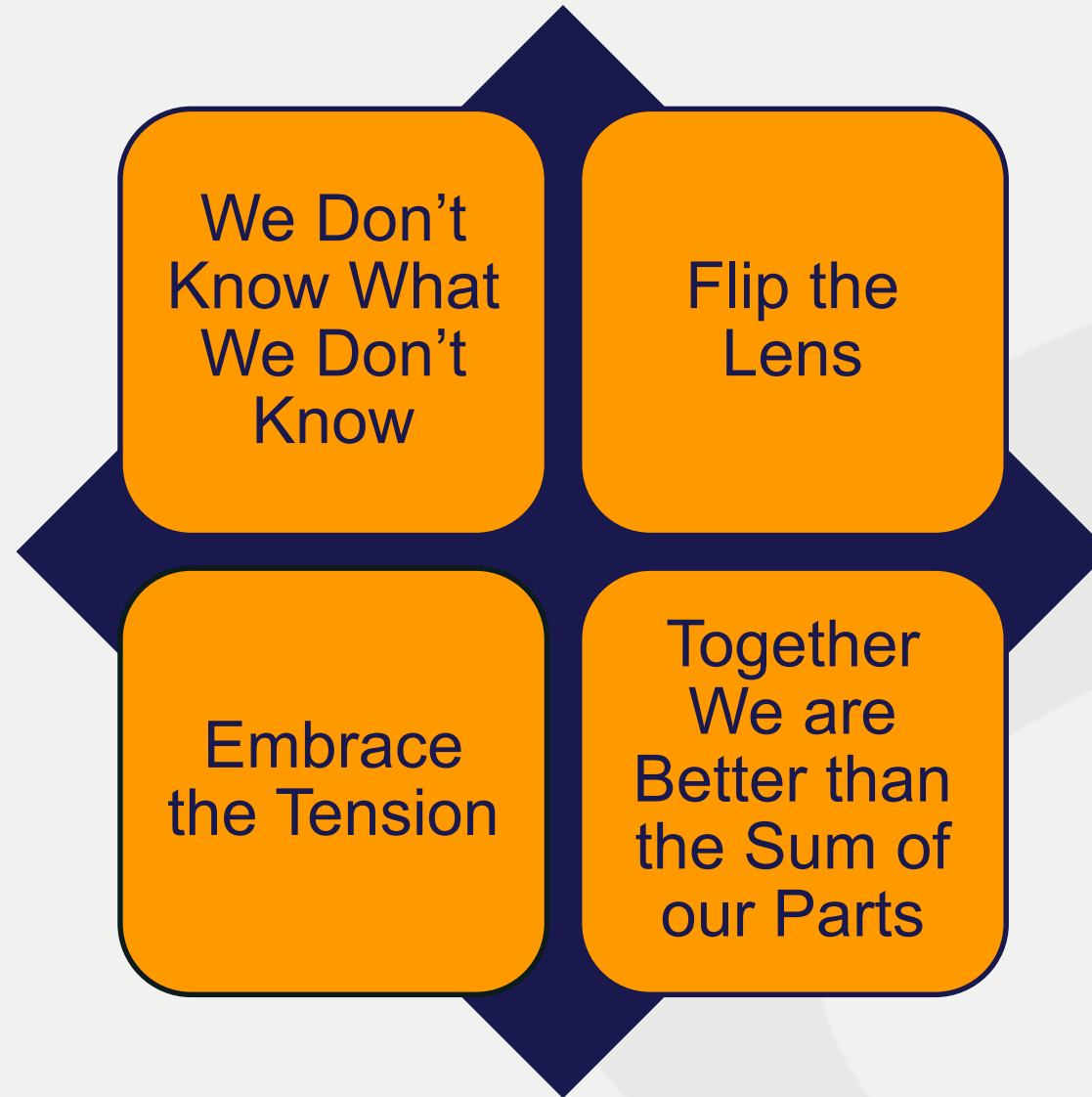
Syracuse University

August 18 and 28, 2020

INTRODUCTION

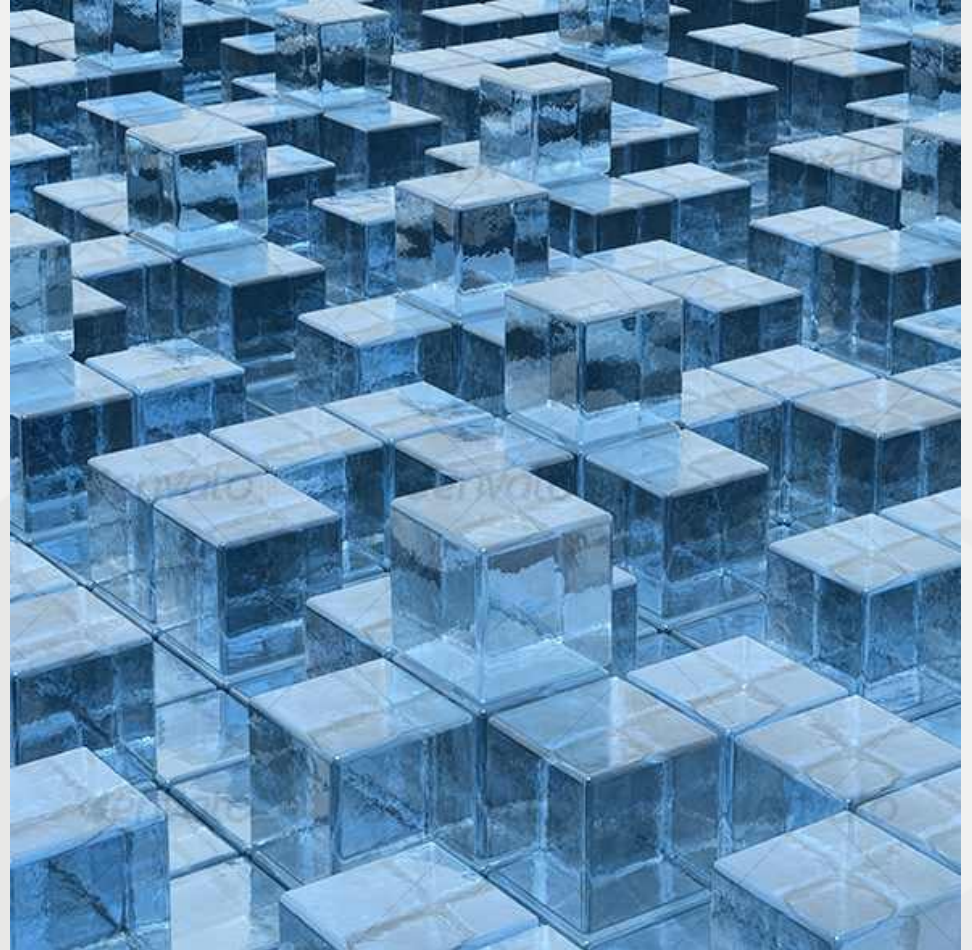


Framing the Conversation

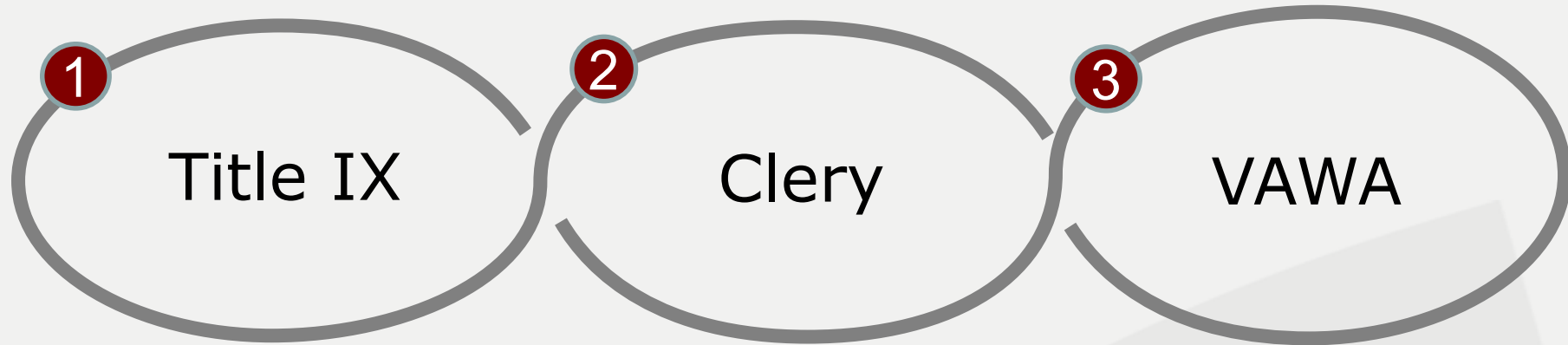


The Context

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



Federal Regulatory Framework



Title IX of the Education Amendments of 1972

- Prohibits sex discrimination in educational institutions that receive federal funds

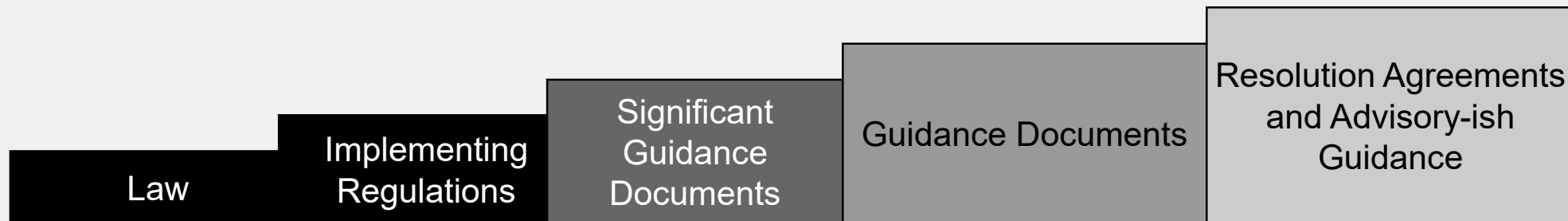
The Jeanne Clery Act (1990)

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

The Violence Against Women Reauthorization Act of 2013

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

The Hierarchy



- Title IX

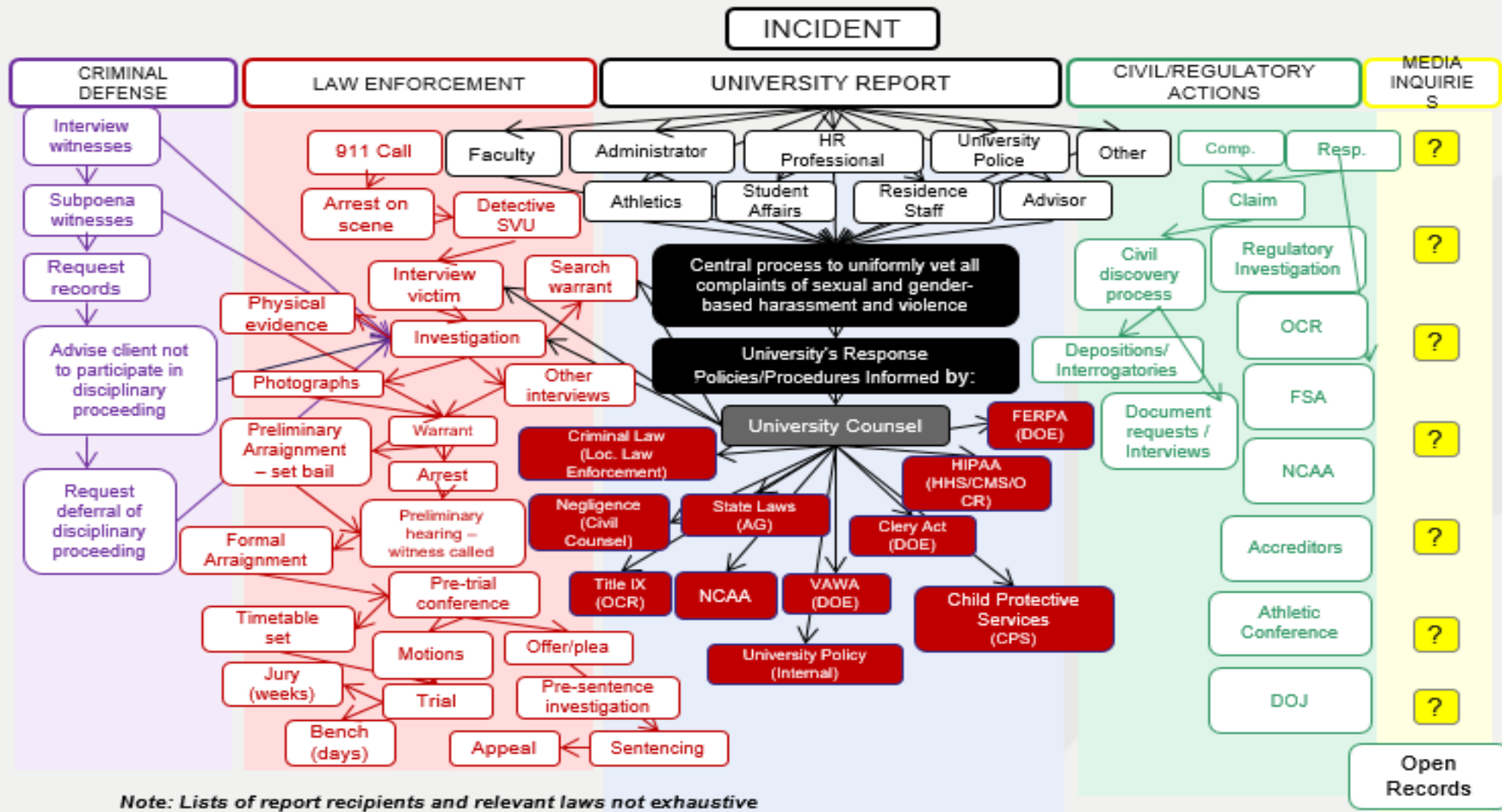
- Title IX Implementing Regulations (2020)

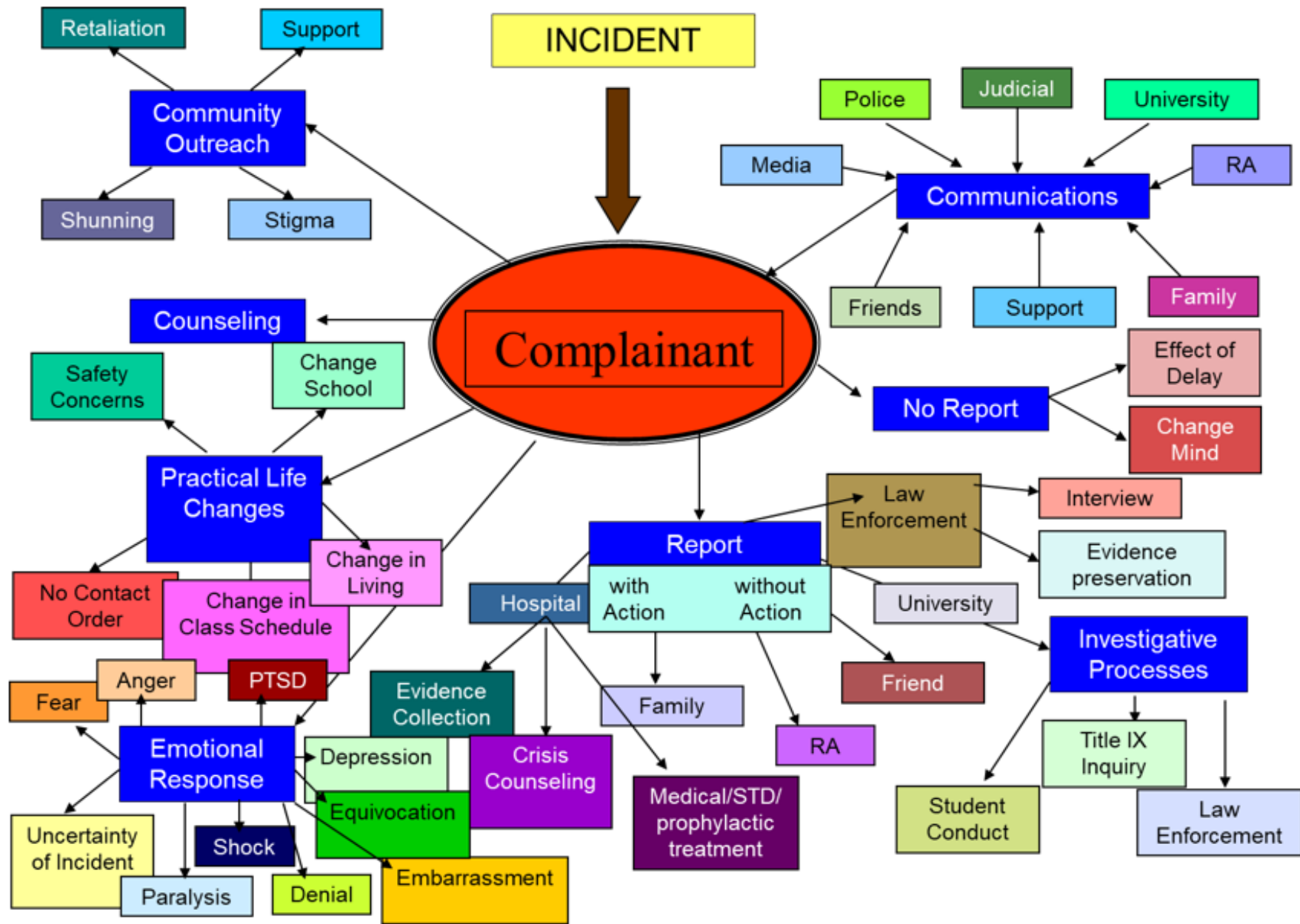
- 2011 Dear Colleague Letter (Rescinded)
- 2014 Q&A (Rescinded)
- 2017 Q&A
- Preamble to Title IX Implementing Regulations

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

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

The Legal Context







Options for Title IX Cases at Syracuse

Supportive Measures Only

- Parties may receive supportive measures **with or without** the filing of a Formal Complaint
- **Non-disciplinary**, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to a party.
- Designed to restore or preserve equal access to the education program or activity **without unreasonably burdening** the other party.

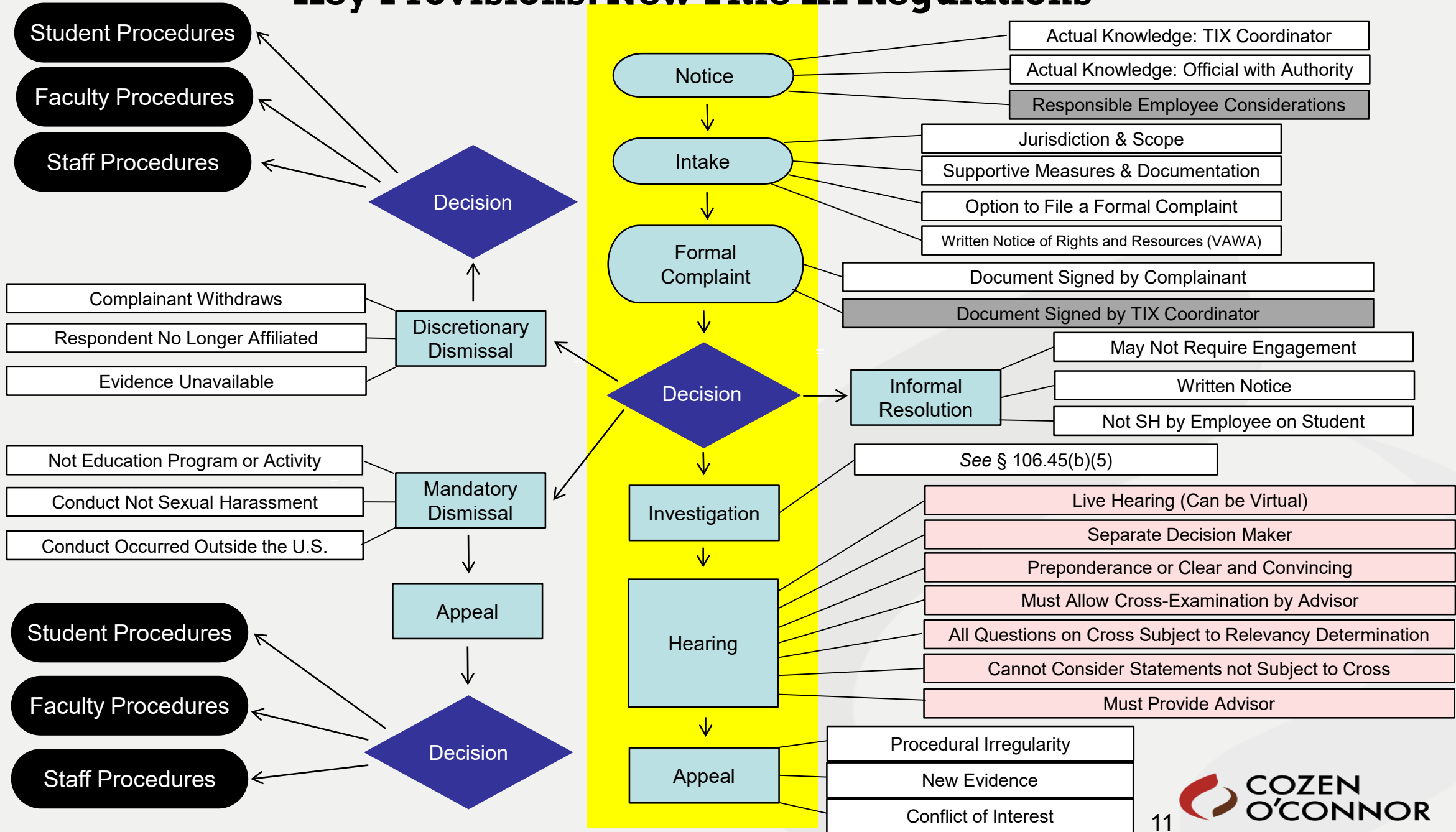
Informal Resolution

- Initiated with the filing of a **Formal Complaint**
- Must give **written notice** to the parties as described in § 106.45(b)(9)
- Both parties must give **voluntary written consent**
- Administered by trained facilitators
- Not available to address allegations that an employee sexually harassed a student

Formal Resolution

- Initiated with the filing of a **Formal Complaint**
- Must give **written notice** to the parties as described in § 106.45(b)(2)(i)
- Follows **prescribed grievance process** described in § 106.45
- Administered by trained investigators and decision-makers who are free from conflicts of interest or bias

Key Provisions: New Title IX Regulations



TITLE IX AND THE CLERY ACT

The Clery Act (As Amended by VAWA)

Core Tenets:

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

VAWA: Prompt, Fair, and Impartial Investigation & Resolution

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

VAWA: Prompt, Fair, and Impartial Investigation & Resolution

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

Understanding Title IX

The Law:

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

20 USC § 1681

Title IX

Definition of Sexual Harassment

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

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

Title IX Regulations May 19, 2020; § 106.30(a)

**Core
Tenets:**

Title IX

Response to Sexual Harassment

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

Title IX Regulations May 19, 2020; § 106.44(a)

**Core
Tenets:**

Title IX

Education Program or Activity

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

**Core
Tenets:**

Title IX Regulations May 19, 2020; § 106.44(a)

RESPONDING TO A REPORT OF PROHIBITED CONDUCT

Title IX

Two Key Provisions

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

Core
Tenets:

Title IX Regulations May 19, 2020; §§ 106.44(a) and 106.45(b)(1)(i)

Understanding Two Key Provisions



Complainant Agency & Autonomy

- “The final regulations promote clarity as to recipient’s legal obligations, and **promote respect for each complainant’s autonomy**, by distinguishing between a complainant’s report of sexual harassment, on the one hand, and the filing of a formal complaint that has initiated a grievance process against a respondent, on the other hand.”
- “The Department acknowledges that **a recipient should respect the complainant’s autonomy and wishes** with respect to a formal complaint and grievance process **to the extent possible.**”

Title IX Regulations May 19, 2020, Preamble, 85 F.R. 30282; 30219

Reports vs. Formal Complaints

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

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

The Obligation to Investigate

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

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

Sexual Harassment, Abuse, and Assault Prevention Policy



Office of Equal Opportunity,
Inclusion, and Resolution Services



August 14, 2020

A. Scope and Jurisdiction

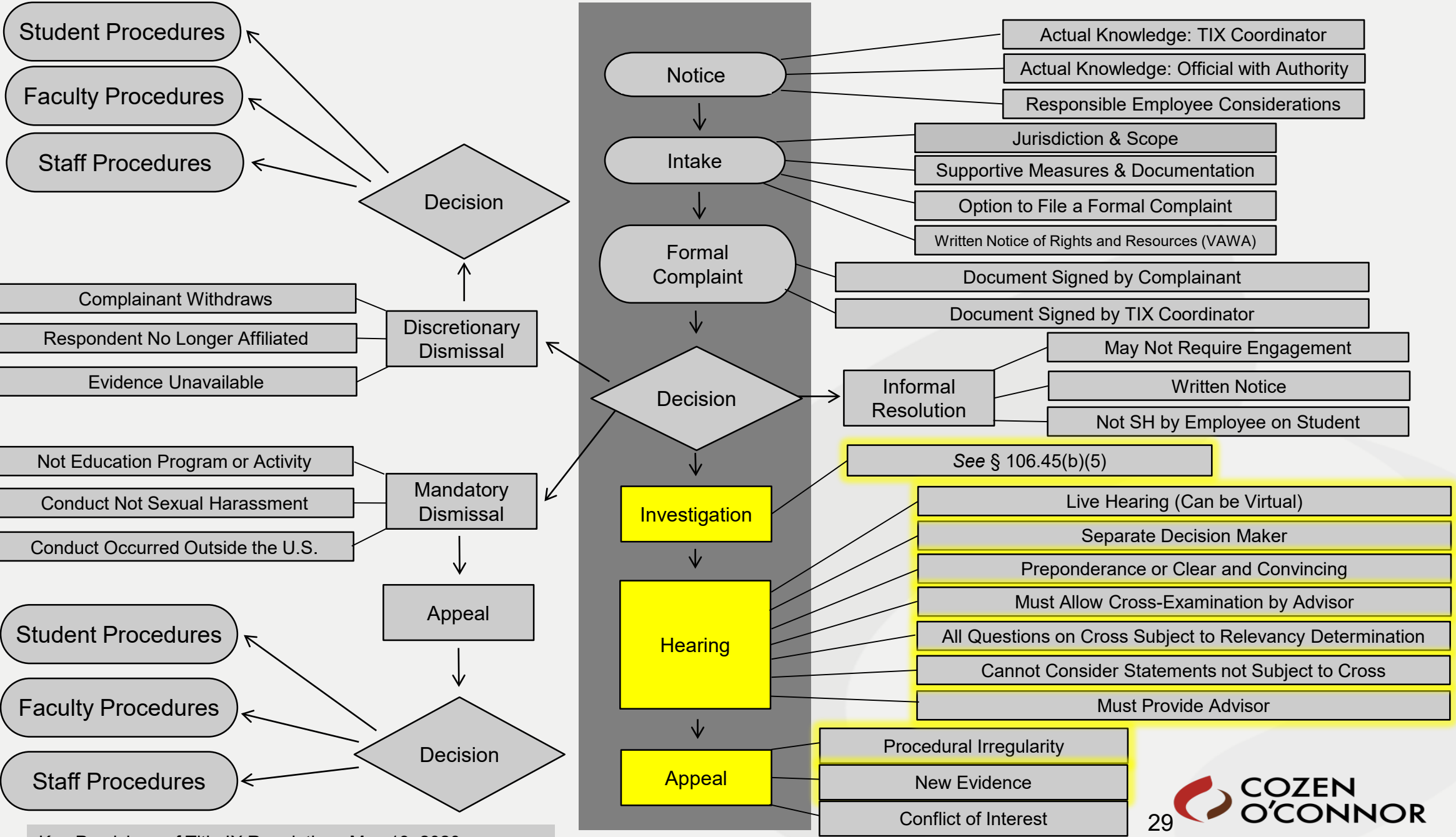
This policy applies to students, staff, faculty, and third-parties such as volunteers, vendors, consultants, guests, alumni, applicants for admission or employment, or other individuals participating in—or attempting to participate in—the University’s Education Program or Activities.

This policy prohibits Sexual Harassment as defined in the Title IX regulations (“Title IX Sexual Harassment”), which includes Sexual Assault, Dating Violence, Domestic Violence, and Stalking. This policy also prohibits other forms of Sexual Harassment, including as defined in Title VII of the Civil Rights Act of 1964, Sexual Exploitation, and Retaliation. Collectively, these forms of conduct are referred to in the policy and accompanying procedures as “Prohibited Conduct.”

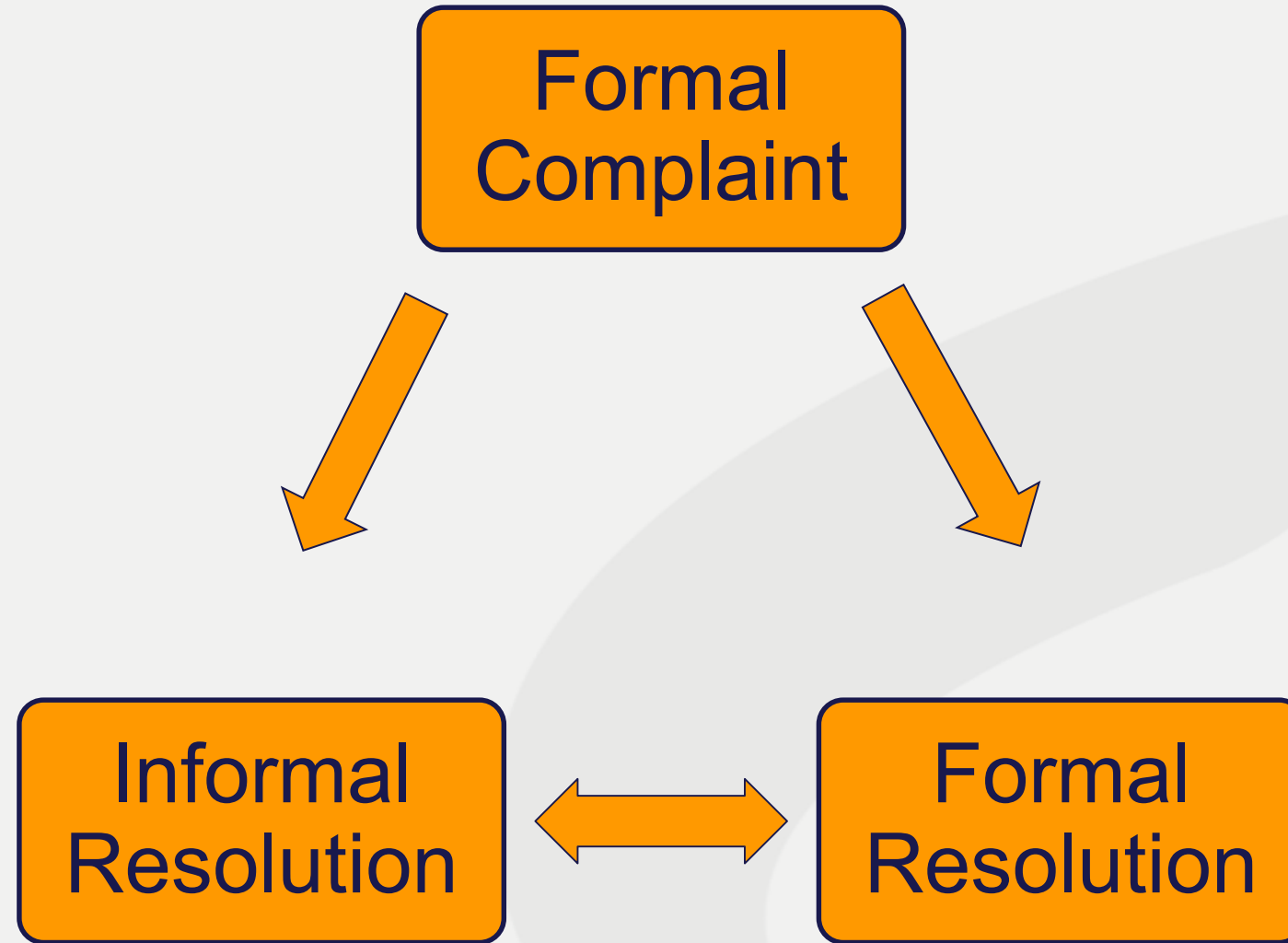
Syracuse's Response to a Report

- Report to University
- Intake and Outreach
 - Promptly contact Complainant
 - Provision of Supportive Measures
 - Consider Complainant's wishes
 - Explain process for filing a Formal Complaint
- Filing of Formal Complaint
 - By Complainant
 - By Title IX Coordinator

RESOLUTION PROCESS



Resolution Process



Basic Requirements



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

Relevant Regulations Sections:

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

Basic Requirements



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

Relevant Regulations Sections:

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

Objective evaluation of all relevant evidence: § 106.45(b)(1)(ii)

Training and avoidance of conflicts or bias: § 106.45(b)(1)(iii)

Basic Requirements



- **Presumption that the respondent is not responsible** for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process
- Follow reasonably prompt time frames for conclusion of the grievance process with permissible delay for good cause

Relevant Regulations Sections:

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

Objective evaluation of all relevant evidence: § 106.45(b)(1)(ii)

Training and avoidance of conflicts or bias: § 106.45(b)(1)(iii)

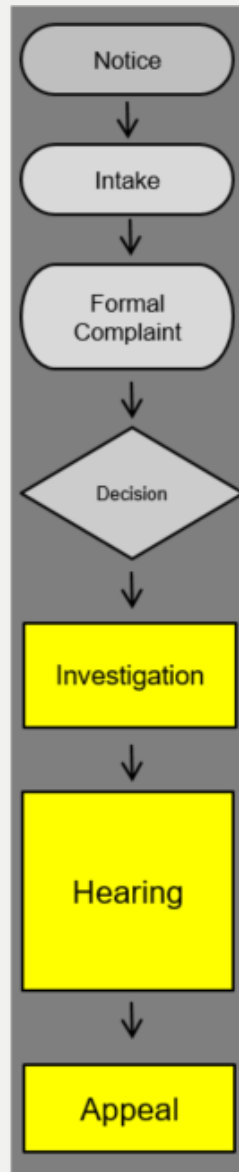
Basic Requirements



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

Title IX Regulations May 19 2020; §§ 106.45(b)(1)(vii) and 106.45(b)(7)(i), 85 F.R. 30275

Basic Requirements



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

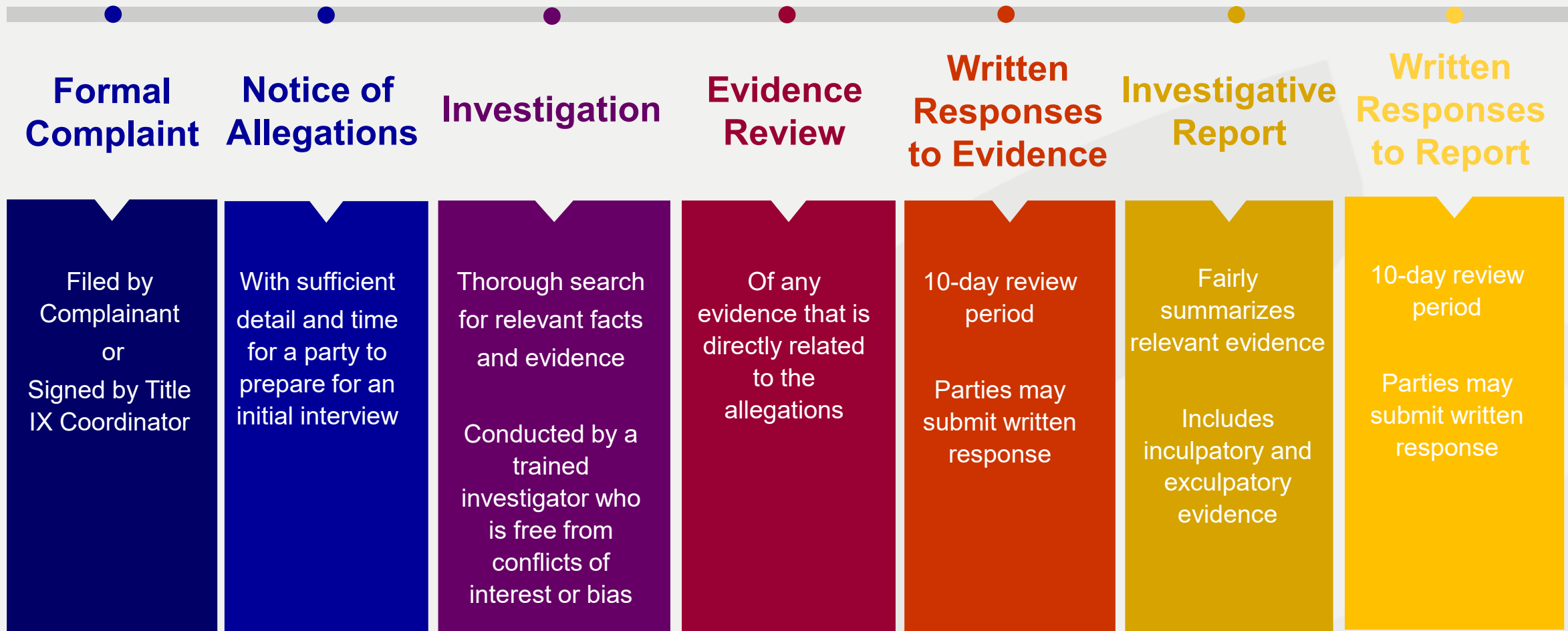
Relevant Regulations Sections:

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

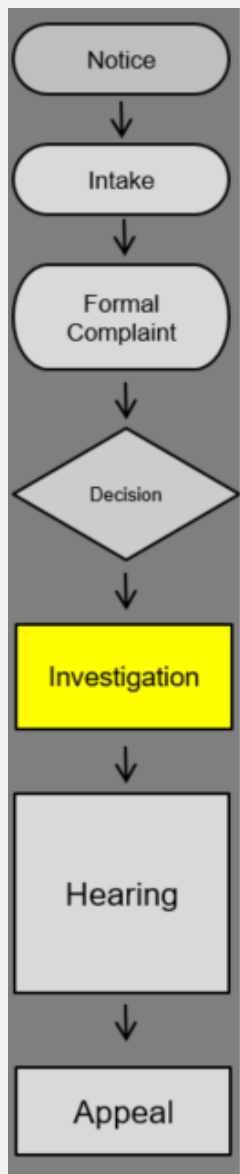
Range of Supportive Measures: § 106.45(b)(1)(ix)

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

Overview of Investigation Requirements



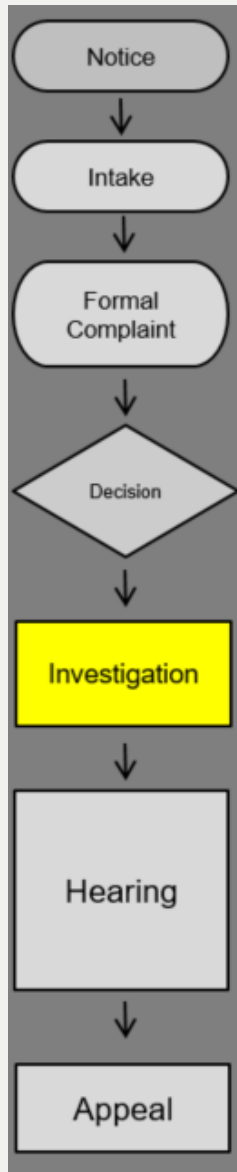
Advisor of Choice



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

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

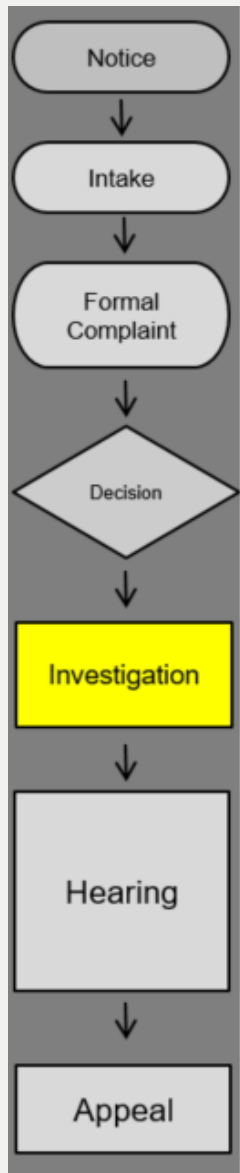
Restrictions on Advisor Participation



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

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

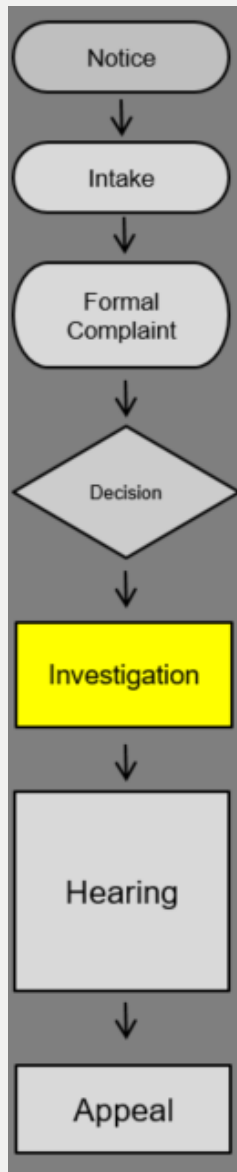
Restrictions on Advisor Participation



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

Title IX Regulations May 19 2020; Preamble at 30298

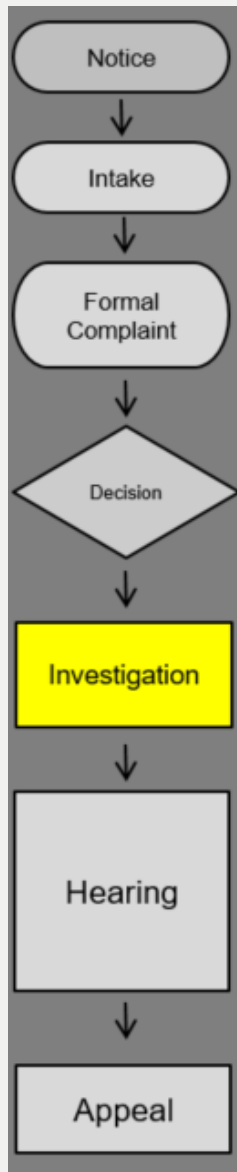
Training of Advisors Not Required



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

Title IX Regulations May 19 2020; Preamble at 30333

Training of Advisors Not Required



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

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

Sexual Harassment, Abuse, and Assault Prevention Policy



Office of Equal Opportunity,
Inclusion, and Resolution Services



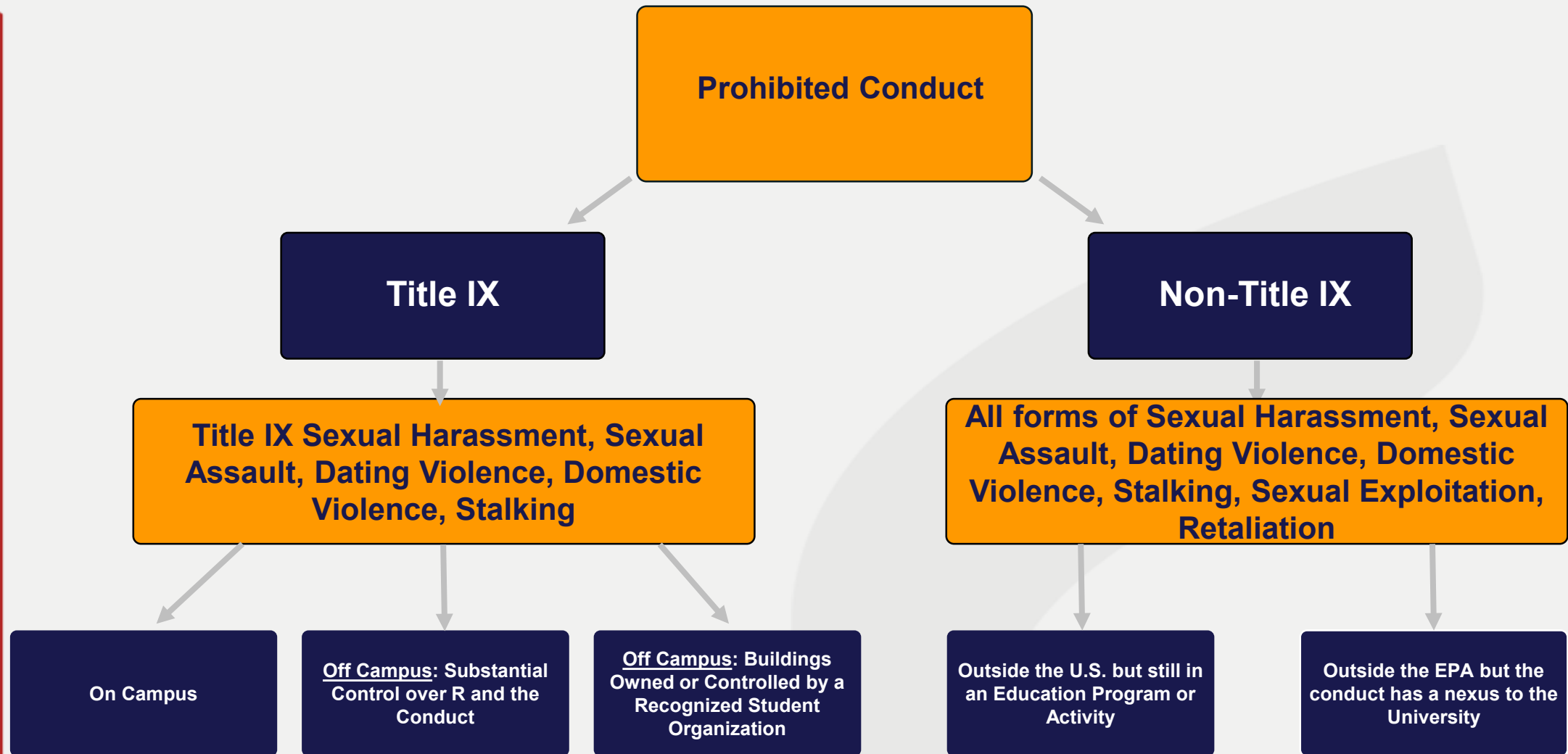
August 14, 2020

B. Prohibited Conduct

The University prohibits the following forms of conduct, collectively referred to as Prohibited Conduct in this policy and the associated procedures:

1. **Title IX Sexual Harassment**
 - a) **Sexual Assault, Dating Violence, Domestic Violence and Stalking**
2. **Other forms of Sexual Harassment (*quid pro quo* and hostile environment)**
3. **Sexual Exploitation, and**
4. **Retaliation**

What is Prohibited Conduct?



Definitions of Prohibited Conduct

- *Sexual Harassment:*
 - Actions by a University faculty or staff member conditioning the provision of an aid, benefit, or service of the University on an individual's participation in unwelcome sexual conduct.

Definitions of Prohibited Conduct

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

Definitions of Prohibited Conduct

Sexual Assault is having or attempting to have sexual contact with another individual without affirmative consent or where the individual cannot affirmatively consent because of age or temporary or permanent mental incapacity (see *below for definition of affirmative consent and incapacitation*). **Sexual contact includes:**

- sexual intercourse (anal, oral, or vaginal), including penetration with a body part (g., penis, finger, hand, or tongue) or an object, or requiring another to penetrate themselves with a body part or an object, however slight;
- sexual touching of the private body parts, including, but not limited to, contact with the breasts, buttocks, groin, genitals, or other intimate part of an individual's body for the purpose of sexual gratification; or
- attempts to commit Sexual Assault.

Definitions of Prohibited Conduct

Domestic Violence: includes any act of violence committed by:

- (1) a current or former spouse or intimate partner of the Complainant,
- (2) by a person with whom the Complainant shares a child in common,
- (3) by a person who is cohabitating with, or has cohabitated with, the Complainant as a spouse or intimate partner,
- (4) by a person similarly situated to a spouse of the Complainant under New York state law, or
- (5) by any other person against an adult or minor Complainant who is protected from that person's acts under New York state law;

Domestic Violence may also include forms of Sexual Harassment under this policy, including Sexual Assault, Sexual Exploitation, and Stalking.

Definitions of Prohibited Conduct

Dating Violence: includes any act of violence committed by a person:

- who is or has been in a social relationship of a romantic or intimate nature with the Complainant; and
- where the existence of such a relationship shall be determined based on a consideration of the following factors:
 - The length of the relationship;
 - The type of relationship; and
 - The frequency of interaction between the persons involved in the relationship.

Dating Violence may also include forms of Sexual Harassment under this policy, including Sexual Assault, Sexual Exploitation, and Stalking.

Definitions of Prohibited Conduct

- **Stalking** occurs when a person engages in a course of conduct directed at a specific person under circumstances that would cause a reasonable person to fear for their own safety or the safety of others or suffer substantial emotional distress.
 - **Course of conduct means** two or more instances including but not limited to unwelcome acts in which an individual directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person's property. **Substantial emotional distress means** significant mental suffering or anguish.
 - **Stalking includes the concept of cyber-stalking**, a particular form of stalking in which electronic media such as the internet, social networks, blogs, cell phones, texts, or other similar devices or forms of contact are used.

Definitions of Prohibited Conduct

- *Other forms of Sexual Harassment:*
- The University also defines Sexual Harassment to include **any sexual advance, request for sexual favors, or other unwelcome conduct of a sexual nature**, whether verbal, non-verbal, graphic, physical, electronic, or otherwise; or, any act of intimidation or hostility, whether verbal or non-verbal, graphic, physical, or otherwise based on sex or gender, sexual orientation, gender identity, or gender expression, even if the acts do not involve conduct of a sexual nature; **when one or more of the following conditions are present:**

Definitions of Prohibited Conduct

- Submission to or rejection of such conduct is either an explicit or implicit term or condition of, or is used as the basis for decisions affecting, an individual's employment or advancement in employment, evaluation of academic work or advancement in an academic program, or basis for participation in any aspect of a University program or activity (**quid pro quo**); or
- The conduct is sufficiently severe, pervasive, or persistent that it has the purpose or effect of unreasonably interfering with, limiting or depriving an individual from participating in or benefiting from the University's learning, working, or living programs under both an objective and subjective standard (**hostile environment**).

Definitions of Prohibited Conduct

In evaluating whether a *hostile environment* exists, the University will evaluate the totality of known circumstances, including, but not limited to:

- the frequency, nature and severity of the conduct;
- whether the conduct was physically threatening;
- the effect of the conduct on the Complainant's mental or emotional state;
- whether the conduct was directed at more than one person;
- whether the conduct arose in the context of other discriminatory conduct;
- whether the conduct unreasonably interfered with the Complainant's educational or work performance and/or University programs or activities;
- whether the conduct implicates academic freedom or protected speech; and,
- other relevant factors that may arise from consideration of the reported facts and circumstances.

Definitions of Prohibited Conduct

- **Sexual Exploitation** is any act where one person violates the sexual privacy of another or takes unjust or abusive sexual advantage of another without permission. Acts of Sexual Exploitation may include:
 - secretly observing another individual's nudity or sexual activity or allowing another to observe sexual activity without the knowledge and permission of all parties involved;
 - recording, photographing, transmitting, showing, viewing, streaming, or distributing intimate or sexual images, audio recordings, or sexual information without the knowledge and permission of all parties involved; or
 - exposing one's genitals or inducing another to expose their own genitals without Affirmative Consent.

Definitions of Prohibited Conduct

Retaliation means any adverse action, intimidation, threat, coercion or discrimination against an individual for the purpose of interfering with any right or privilege secured by Title IX or its regulations, or because the individual has made a report or Formal Complaint of Prohibited Conduct, testified, assisted, or participated or refused to participate in any manner in any investigation, proceeding or hearing under this policy. Retaliation includes conduct through associates or agents of a Complainant, Respondent, or participant in any investigation or proceeding related to this policy.

Affirmative Consent

A knowing, voluntary, and mutual decision among all participants to engage in sexual activity. Consent can be given by words or actions, as long as those words or actions create clear permission regarding willingness to engage in the sexual activity. Silence or lack of resistance, in and of itself, does not demonstrate consent.

- The definition of Affirmative Consent does not vary based upon a participant's sex, sexual orientation, gender identity, or gender expression.

Affirmative Consent (cont'd)

- Guidance regarding Consent (under New York State Law):
- Consent to any sexual act or prior consensual sexual activity between or with any party does not necessarily constitute consent to any other sexual act.
- Consent is required regardless of whether the person initiating the act is under the influence of drugs and/or alcohol.
- Consent may be initially given but withdrawn at any time.
- Consent cannot be given when a person is incapacitated, which occurs when an individual lacks the ability to knowingly choose to participate in sexual activity.

Affirmative Consent (cont'd)

- Guidance regarding Consent (under New York State Law):
- **Incapacitation** may be caused by the lack of consciousness or being asleep, being involuntarily restrained, or if an individual otherwise cannot consent. Depending on the degree of intoxication, someone who is under the influence of alcohol, drugs, or other intoxicants may be incapacitated and therefore unable to consent.
- Consent cannot be given when it is the result of any coercion, intimidation, force, or threat of harm.
- When consent is withdrawn or can no longer be given, sexual activity must stop.

Affirmative Consent (cont'd)

More on Incapacitation:

In evaluating consent in cases of reported incapacitation, the University asks two questions:

- (1) Did the Respondent know that the Complainant was incapacitated? and if not,
- (2) Should a sober, reasonable person in a similar set of circumstances as the Respondent have known that the Complainant was incapacitated?

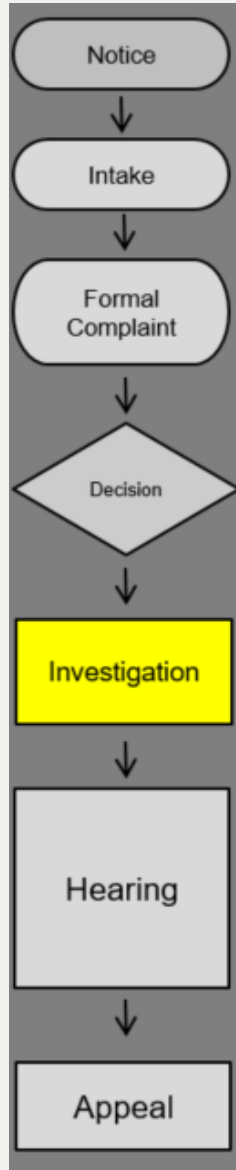
If the answer to either of these questions is “yes,” the Complainant could not consent; and the conduct is likely a violation of this policy.

Sexual Harassment, Abuse, and Assault Prevention Policy

- Notice of Investigation
- Appointment of Investigator
- Fact gathering process
- Evidence review
- Written investigative report

INVESTIGATION

Investigative Steps

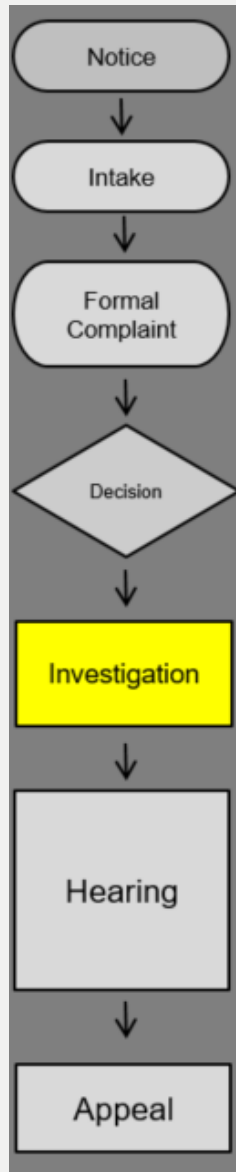


- Notice of Investigation
 - Written notice to parties detailing allegations, policy violations, procedural rights, and other prescribed information
- Appointment of Investigator
 - No conflict of interest or bias
- Gathering Information
 - Investigator responsible for gathering all inculpatory and exculpatory information; cannot restrict parties from presenting evidence
 - Notice to parties prior to meeting
 - Interviews, documents, social media, photographs, site visits
 - Can consider expert witnesses/reports
 - Cannot coerce participation; cannot restrict parties from talking about case
- Evidence Review
 - Review by parties and advisors of all information directly related to allegation
 - Opportunity to respond before investigation report is issued
- Investigation Report
 - Fair summary of all relevant evidence

Evidentiary Considerations

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

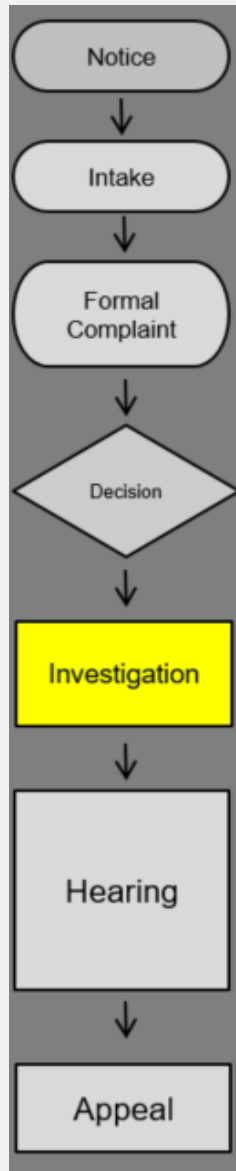
Privileged Information



- 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

Sexual Harassment, Abuse, and Assault Prevention Policy

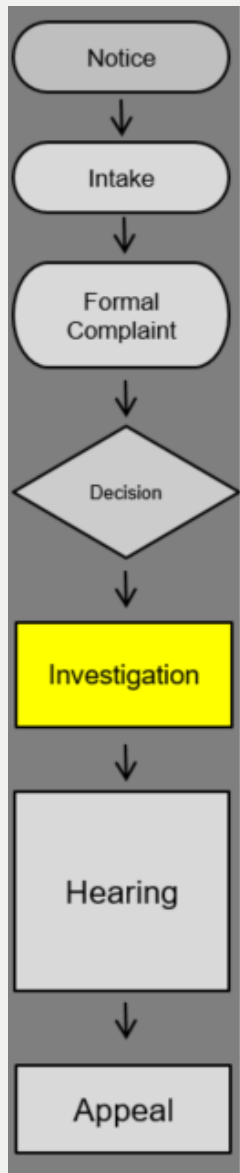


- “The investigator will not require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege. If a person voluntarily chooses to share medical or counseling records with the investigator, 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.”

Procedures for Responding to Reports of Student Violations of the Sexual Harassment, Abuse, and Assault Prevent Policy

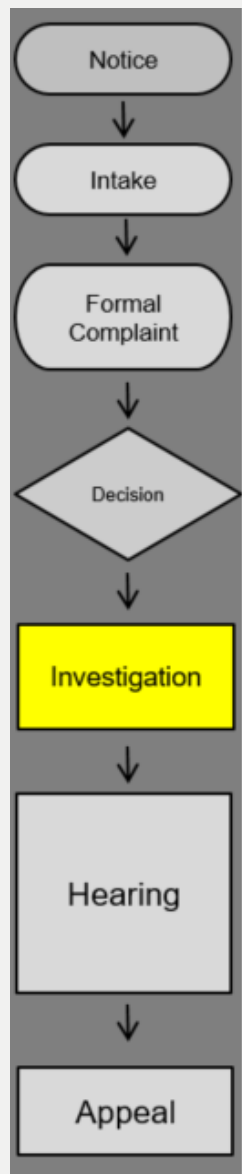
Relevance

- 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



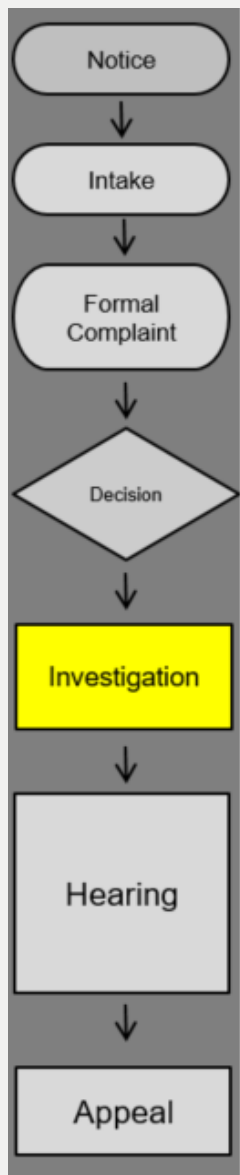
“While the proposed rules do not speak to

- 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

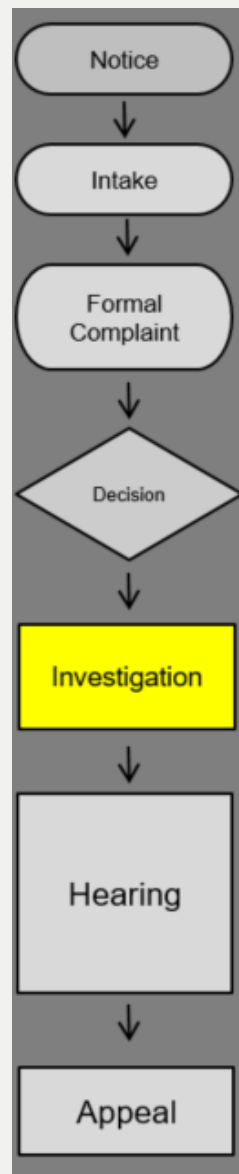
Relevance



- 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

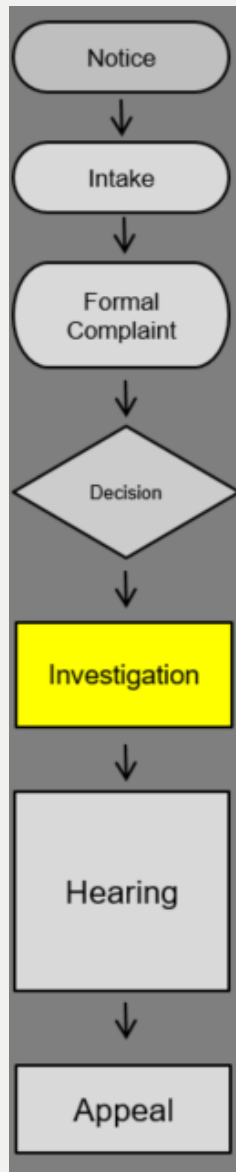
Prior Sexual History



- 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

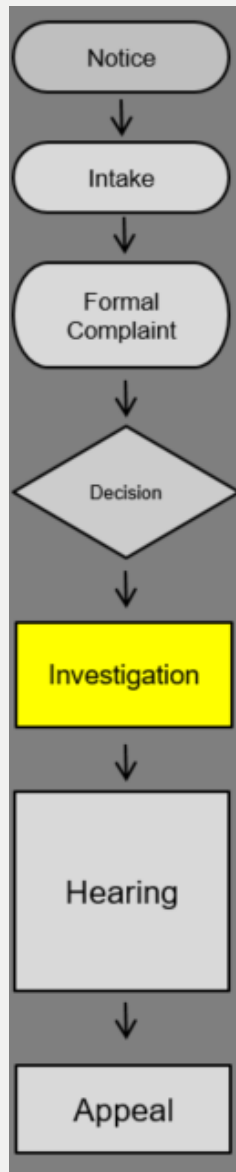
Prior Sexual History



- 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

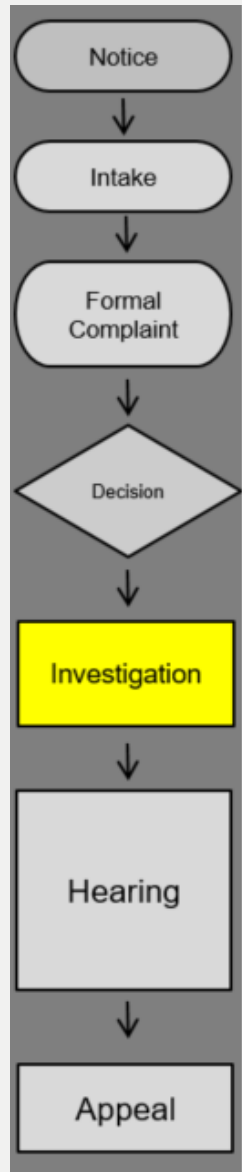
Prior or Subsequent Misconduct

- 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

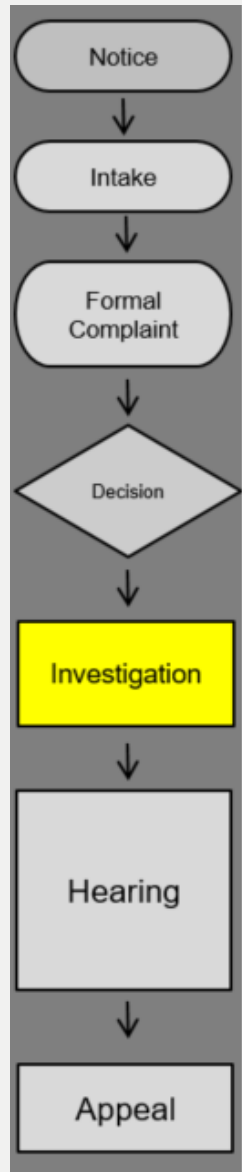
Flexibility to Adopt Rules



- “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

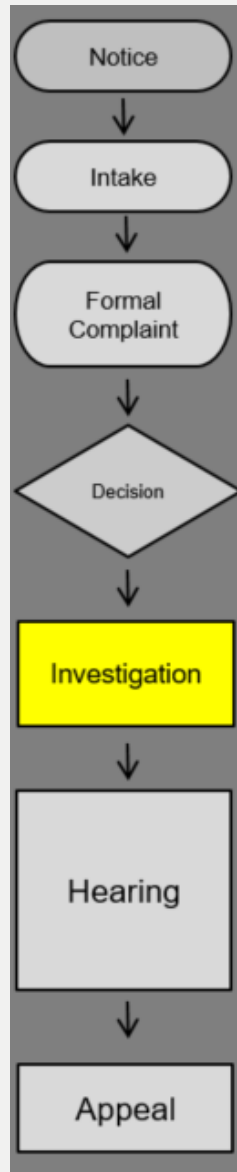


- For example, a recipient **may not adopt a rule excluding relevant evidence** because such relevant evidence may be **unduly prejudicial, concern prior bad acts, or constitute character evidence.**
- A recipient's additional evidentiary rules may not, for example, **exclude *relevant* cross-examination 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

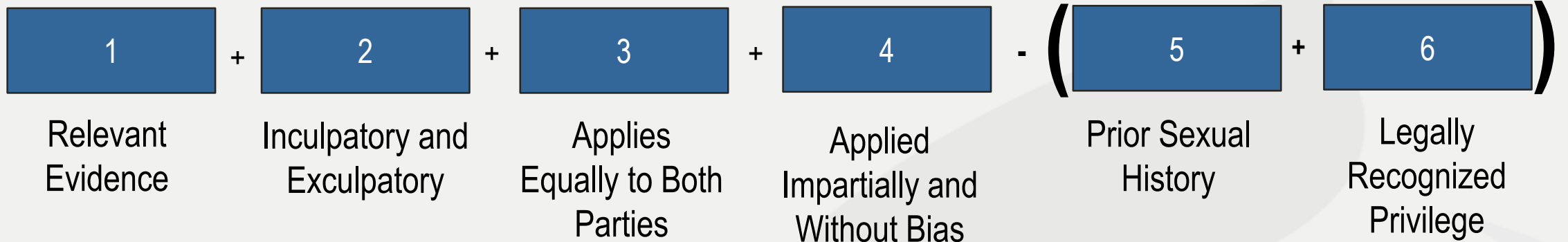
Sexual Harassment, Abuse, and Assault Prevention Policy



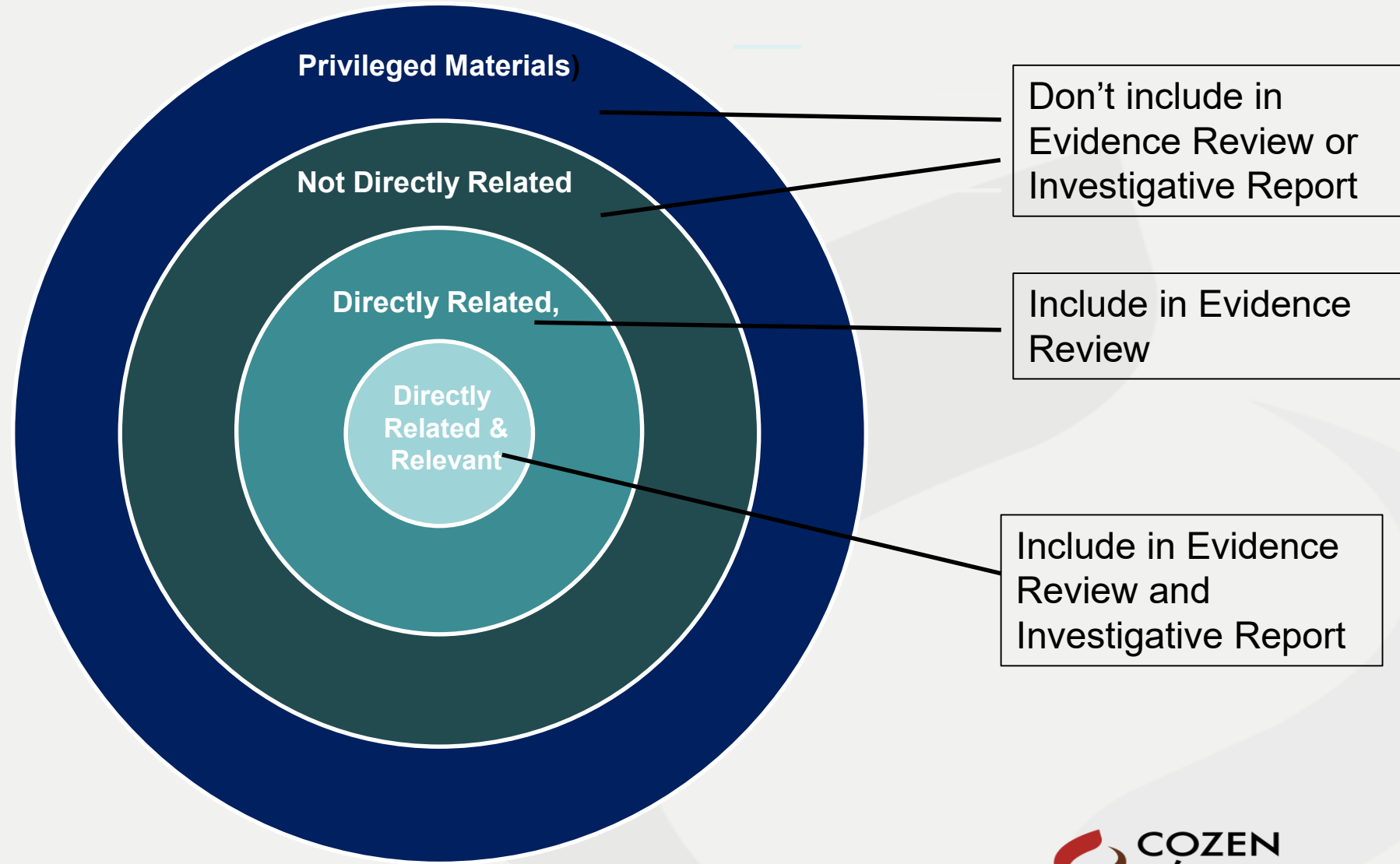
- “Evidence about the Complainant’s sexual predisposition or prior sexual behavior is not relevant, unless such questions and evidence about the Complainant’s prior sexual behavior are offered to prove that someone other than the Respondent committed the conduct alleged by the Complainant, or if the questions and evidence concern specific incidents of the Complainant’s prior sexual behavior with respect to the Respondent and are offered to prove consent..”

Procedures for Responding to Reports of Student Violations of the Sexual Harassment, Abuse, and Assault Prevent Policy

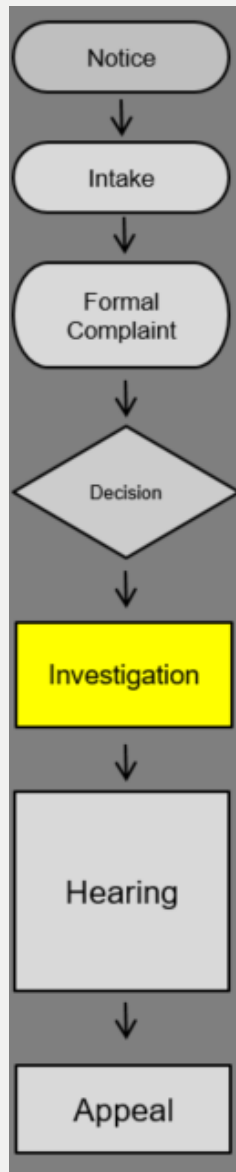
Evidentiary Rules Must Consider



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

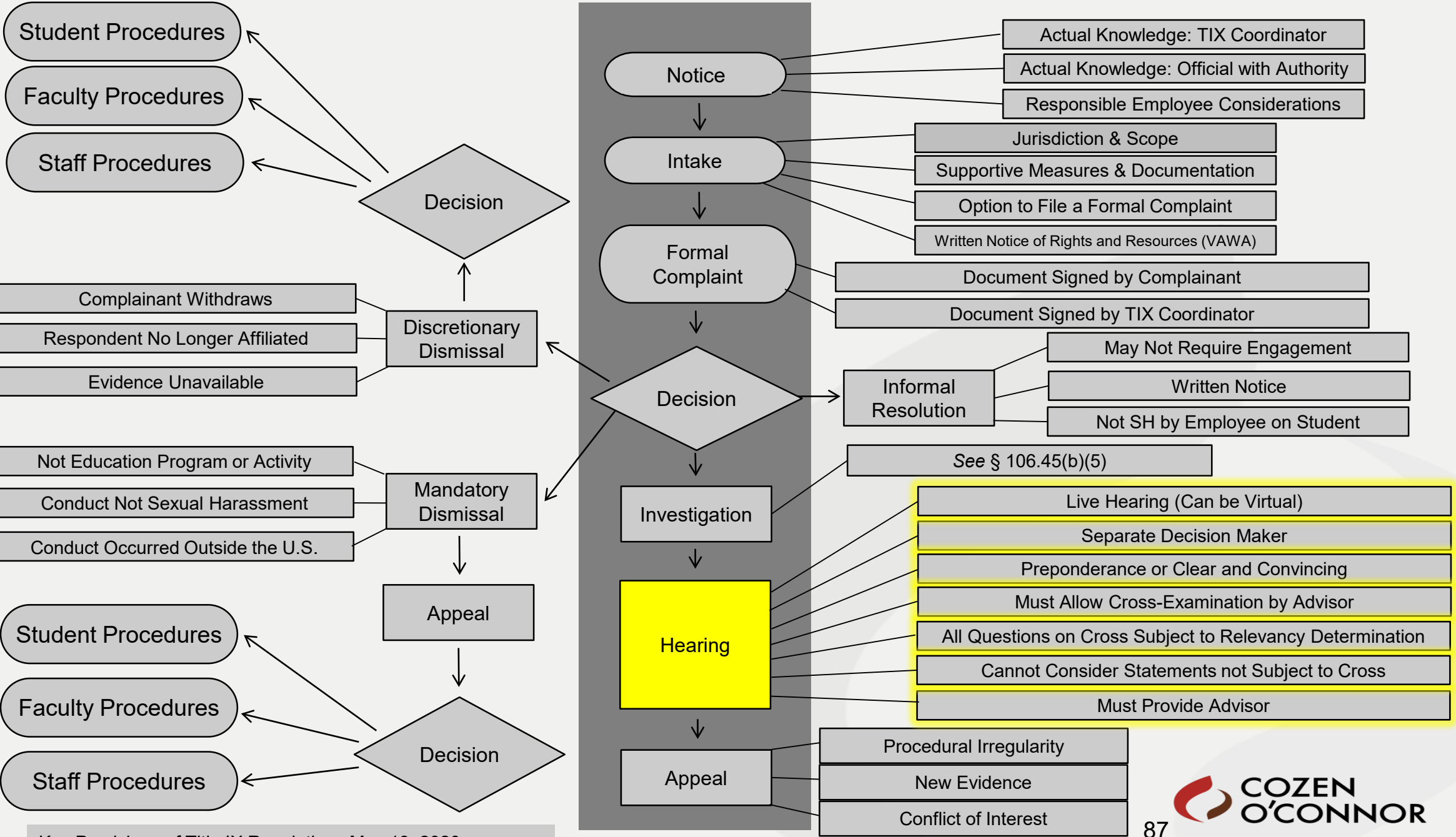
- Nature of sexual and gender-based harassment and violence
 - Delay in reporting
 - Barriers to reporting and proceeding with formal action
 - Reluctance to report to law enforcement
 - Word-against-word credibility
 - Often involve the use of alcohol or other drugs
 - Often involve people who are known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

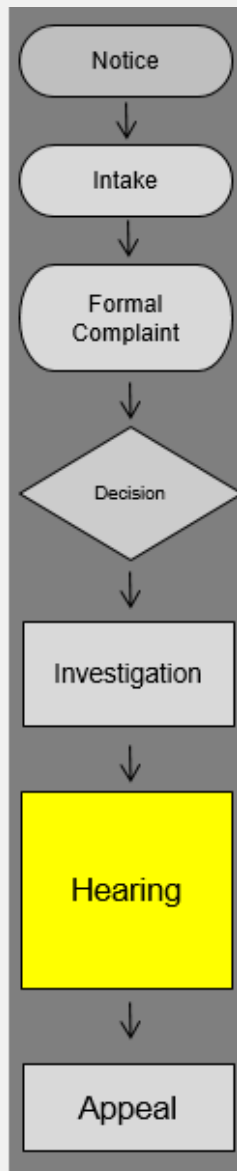


HEARINGS

THE FINAL TITLE IX REGULATIONS

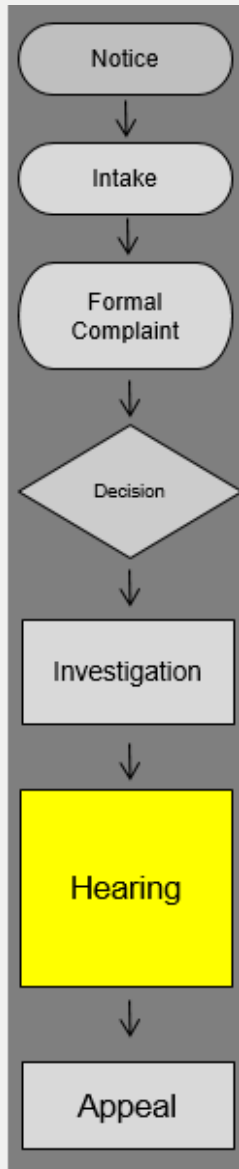
Hearings

- 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)

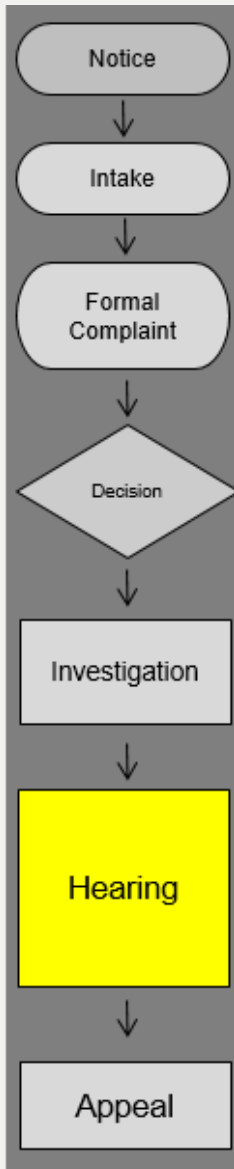
Hearings



- 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

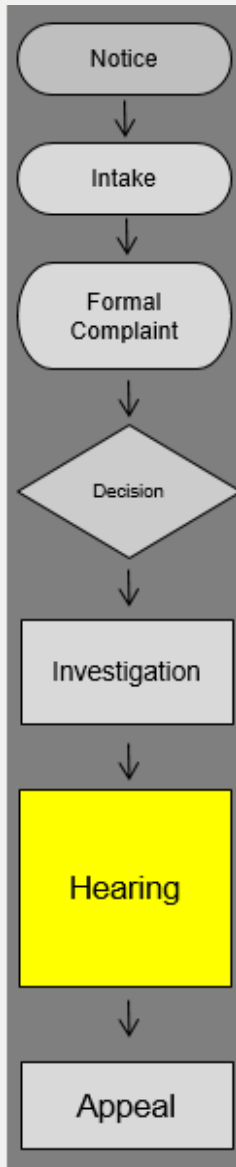


- [A] party’s advisor may appear and conduct cross-examination even when the party whom they are advising does not appear.
- Similarly, where one party does not appear and that party’s advisor of choice does not appear, a recipient-provided advisor must still cross-examine the other, appearing party “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

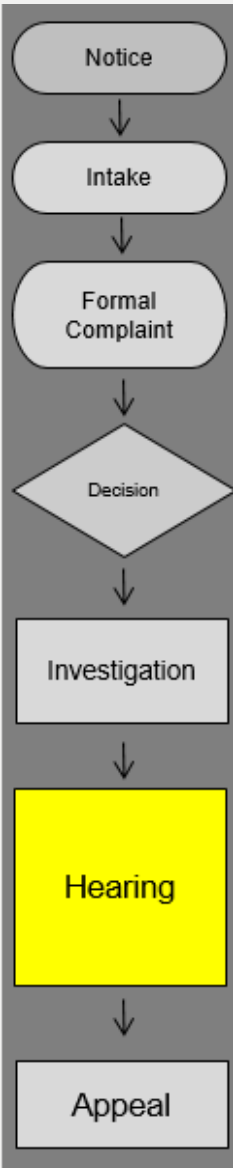
Hearings

- 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)

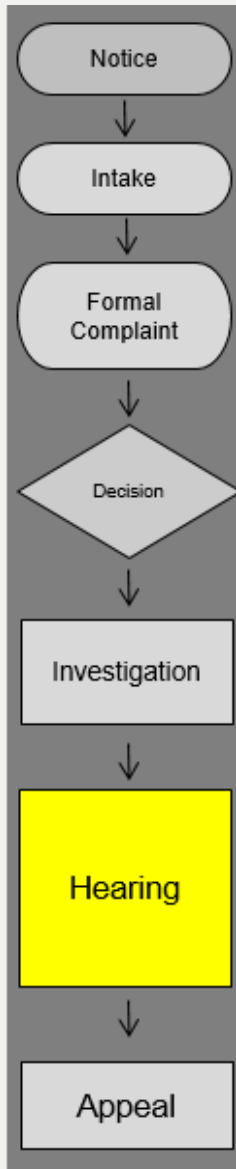
Tested for Credibility



- 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

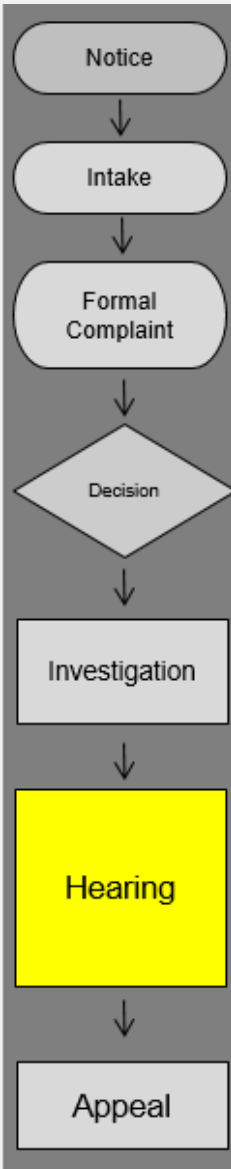
Statements



- [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

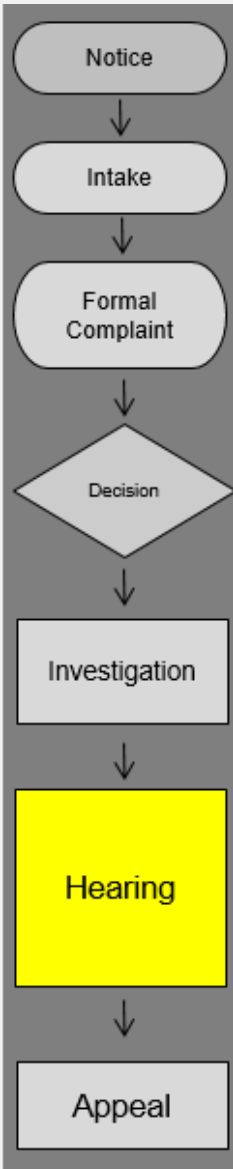
Bright-Line Rule



- 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

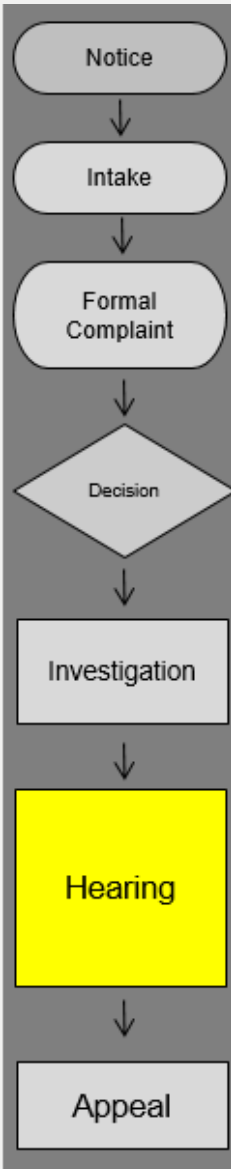
Fairness and Accuracy



- 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

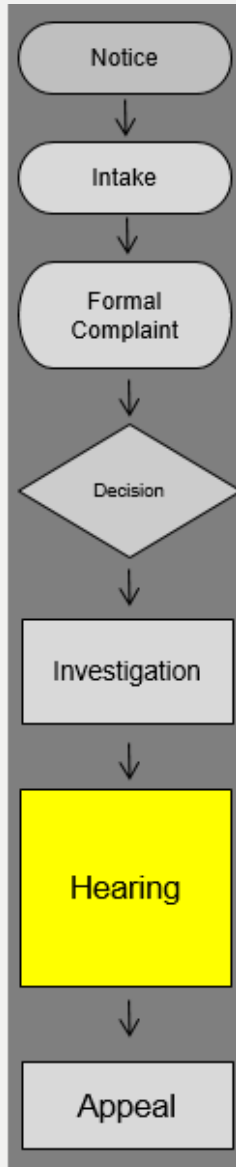


- The Department appreciates the opportunity to clarify here that to “submit to cross-examination” means answering those cross-examination questions that are relevant
- This provision requires a party or witness to “submit to cross-examination” to avoid exclusion of their statements; the same exclusion 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.

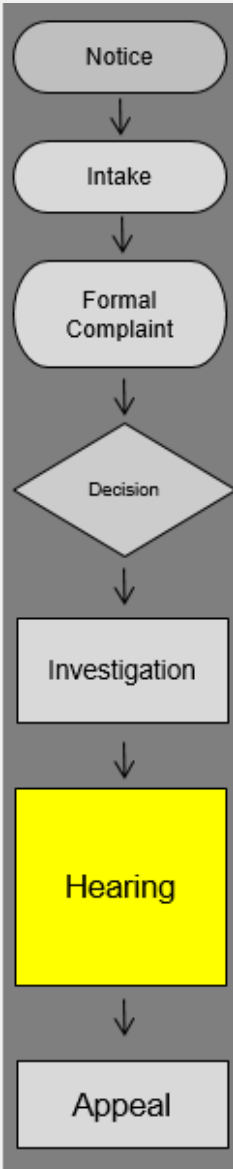
Title IX Regulations May 19, 2020; Preamble at 85 F.R. 30349

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)

Procedures for Responding to Reports of Student Violations of the Sexual Harassment, Abuse, and Assault Prevent Policy



Office of Equal Opportunity,
Inclusion, and Resolution Services



August 14, 2020

11. Hearing Format: Hearings will typically be conducted virtually with technology that enables the decision-maker(s) and parties to simultaneously see and hear the party and witnesses speaking.

The hearing will be heard or conducted by either a hearing panel or an individual hearing officer. Hearing panels or officers may be faculty or staff at the University, or external professionals, as determined in the sole discretion of OSRR. Any individuals serving as a hearing panel member or hearing officer will be free from conflicts of interest and bias for or against either party, and trained as set forth in the *Training and Conflict/Bias Prevention* section of these procedures. The hearing panel or officer may consult with or be advised by OSRR staff and/or an attorney, although the hearing panel or officer retains full discretion and decision-making authority.

Procedures for Responding to Reports of Student Violations of the Sexual Harassment, Abuse, and Assault Prevent Policy (Hearings)

- “Hearings will typically be conducted virtually with technology that enables the decision-maker(s) and parties to simultaneously see and hear the party and witnesses speaking.
- The hearing will be heard or conducted by either a hearing panel or an individual hearing officer. Hearing panels or officers may be faculty or staff at the University, or external professionals, as determined in the sole discretion of OSRR. Any individuals serving as a hearing panel member or hearing officer will be free from conflicts of interest and bias for or against either party, and trained as set forth in the *Training and Conflict/Bias Prevention* section of these procedures. The hearing panel or officer may consult with or be advised by OSRR staff and/or an attorney, although the hearing panel or officer retains full discretion and decision-making authority.”

Procedures for Responding to Reports of Student Violations of the Sexual Harassment, Abuse, and Assault Prevent Policy (**Hearings**)

- “**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 testimony by the parties and their witnesses; (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.”

Procedures for Responding to Reports of Student Violations of the Sexual Harassment, Abuse, and Assault Prevent Policy (Hearings**)**

- “All parties and witnesses will be invited to speak at the hearing, but no party or witness is required to attend the hearing. The parties must submit to the hearing panel or officer a list of witnesses they believe have relevant information to the outcome of the hearing at least three (3) business days prior to the hearing.
- The hearing panel or officer will review the parties’ requested witnesses and consider any other witnesses. The hearing panel or officer has discretion to determine which witnesses are relevant and may decline to hear from witnesses where they conclude that the information is not necessary for a decision. Witnesses will only be permitted inside the hearing location during their own testimony.”

Procedures for Responding to Reports of Student Violations of the Sexual Harassment, Abuse, and Assault Prevent Policy (**Hearings**)

- “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 hearing panel or officer may not rely on statement of that party or witness in reaching a determination regarding responsibility. The hearing panel or officer 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. If, despite being notified of the date, time, and location of the hearing, either party is not in attendance, the hearing may proceed, factual findings may be resolved, and applicable sanctions may be imposed. Neither party is required to participate in the hearing in order for the hearing to proceed.”

Procedures for Responding to Reports of Student Violations of the Sexual Harassment, Abuse, and Assault Prevent Policy (**Hearings**)

- “Rules of evidence and criminal standards of proof do not apply. **The hearing panel or officer will determine the relevance of questions asked by the parties, and preclude questions that seek irrelevant information.**
- . . .
- In particular, 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.”

Procedures for Responding to Reports of Student Violations of the Sexual Harassment, Abuse, and Assault Prevent Policy (**Advisors**)

- “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. **Before a Complainant, Respondent, or witness answers a cross-examination or other question, the hearing panel or officer 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 University will provide without fee or charge to that party, an advisor of the University’s choice, who may be, but is not required to be, an attorney, to conduct cross-examination on behalf of that party.”

Procedures for Responding to Reports of Student Violations of the Sexual Harassment, Abuse, and Assault Prevent Policy (Recordings)

- “The hearing will be recorded. Recordings will not include deliberations. Either party may request access to a written transcript of the recording at no cost to the party. Printed transcripts may be redacted by OSRR prior to being provided to the requesting party in accordance with applicable privacy laws.”

Procedures for Responding to Reports of Student Violations of the Sexual Harassment, Abuse, and Assault Prevent Policy (**Written Decision**)

- “Typically within fifteen (15) business days of a hearing, the hearing panel or officer will issue to the Director of OSRR (or a designee) a written decision regarding responsibility. The written decision will include the following elements:
 - (1) identification of the allegations potentially constituting Prohibited Conduct;
 - (2) 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;
 - (3) findings of fact supporting the determination;
 - (4) conclusions regarding the application of the Sexual Harassment, Abuse, and Assault Prevention Policy to the facts; and
 - (5) a statement of, and rationale for, the result as to each alleged policy violation.”

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

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

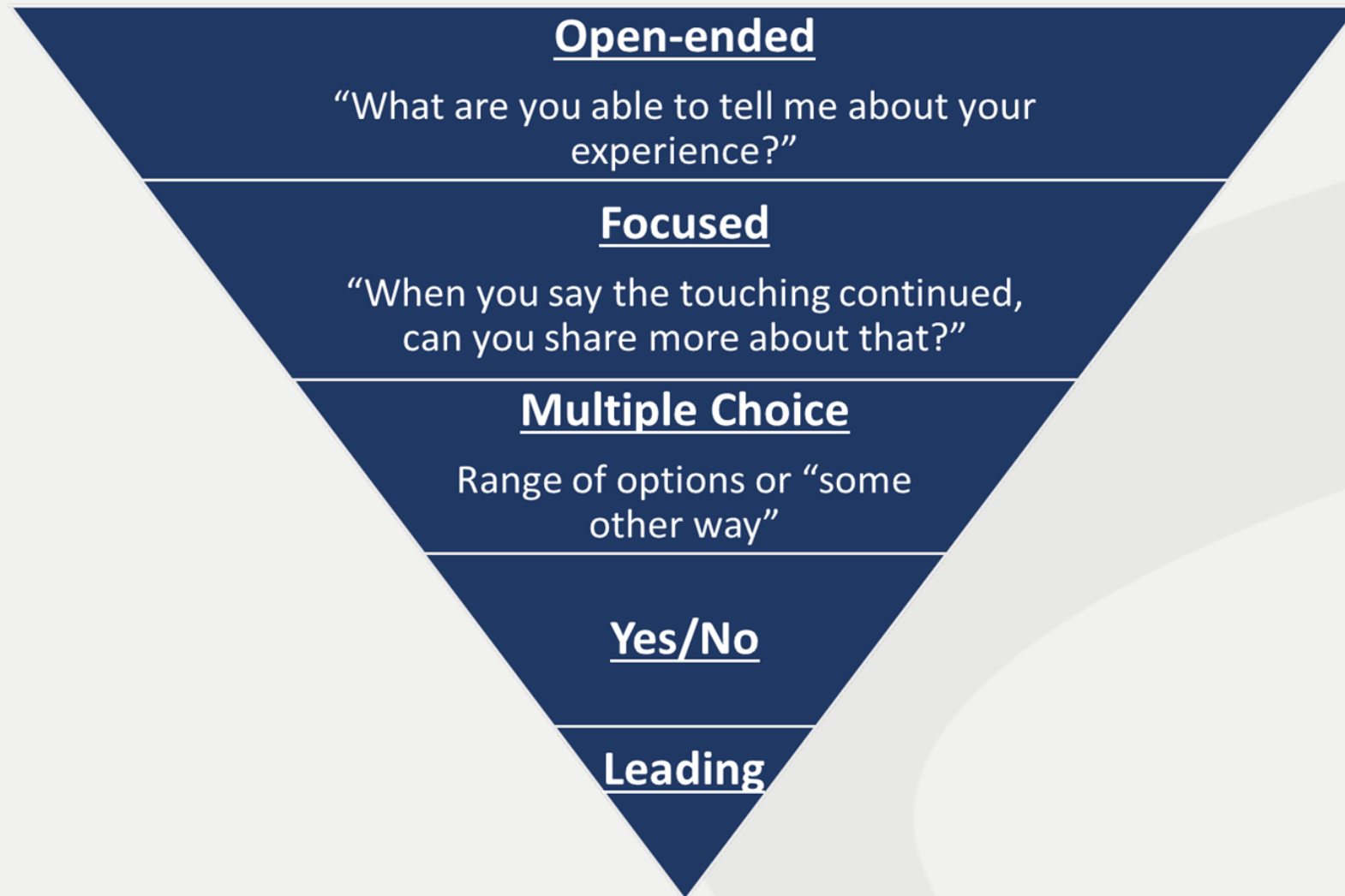
Participation Techniques

- 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
- Below are links to the zoom training videos:
 - The basics of meeting controls: <https://support.zoom.us/hc/en-us/articles/201362603-What-Are-the-Host-Controls->
 - Break Out Rooms: <https://support.zoom.us/hc/en-us/articles/206476093-Getting-Started-with-Video-Breakout-Rooms>

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

Procedures for Responding to Reports of Student Violations of the Sexual Harassment, Abuse, and Assault Prevent Policy



Office of Equal Opportunity,
Inclusion, and Resolution Services



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13. Sanction: If a finding of responsibility is made, the Director of OSRR (or designee) will set sanctions or remedies. Prior to setting sanctions or remedies, the Director (or designee) will consider any other relevant information including, without limitation:

Procedures for Responding to Reports of Student Violations of the Sexual Harassment, Abuse, and Assault Prevent Policy (Sanctions)

- If a finding of responsibility is made, the Director of OSRR (or designee) will set sanctions or remedies. Prior to setting sanctions or remedies, the Director (or designee) will consider any other relevant information including, without limitation:
 - the extent of harm caused to or impact on individuals and the community (i.e. living environment, University community, and the surrounding community) including the level of intervention necessary;
 - the potential for ongoing risk to the student, other individuals, the community, or property;
 - a student's disciplinary record and status of any prior conduct sanctions;

Procedures for Responding to Reports of Student Violations of the Sexual Harassment, Abuse, and Assault Prevent Policy (Sanctions)

- level of intent, remorse, cooperation, and willingness to take responsibility;
- evidence that the student’s conduct was motivated by bias regarding an individual or group’s real or perceived race, color, creed, religion, political or social affiliation, sex, gender, national origin, citizenship, ethnicity, marital status, age, disability, sexual orientation, gender identity and gender expression, and/or veteran status;
- sanctions issued in prior similar University conduct cases;
- impact statements submitted by either party;
- the nature or violence of the conduct at issue; and
- any other mitigating, exacerbating, or compelling circumstances.

Procedures for Responding to Reports of Student Violations of the Sexual Harassment, Abuse, and Assault Prevent Policy (Sanctions)

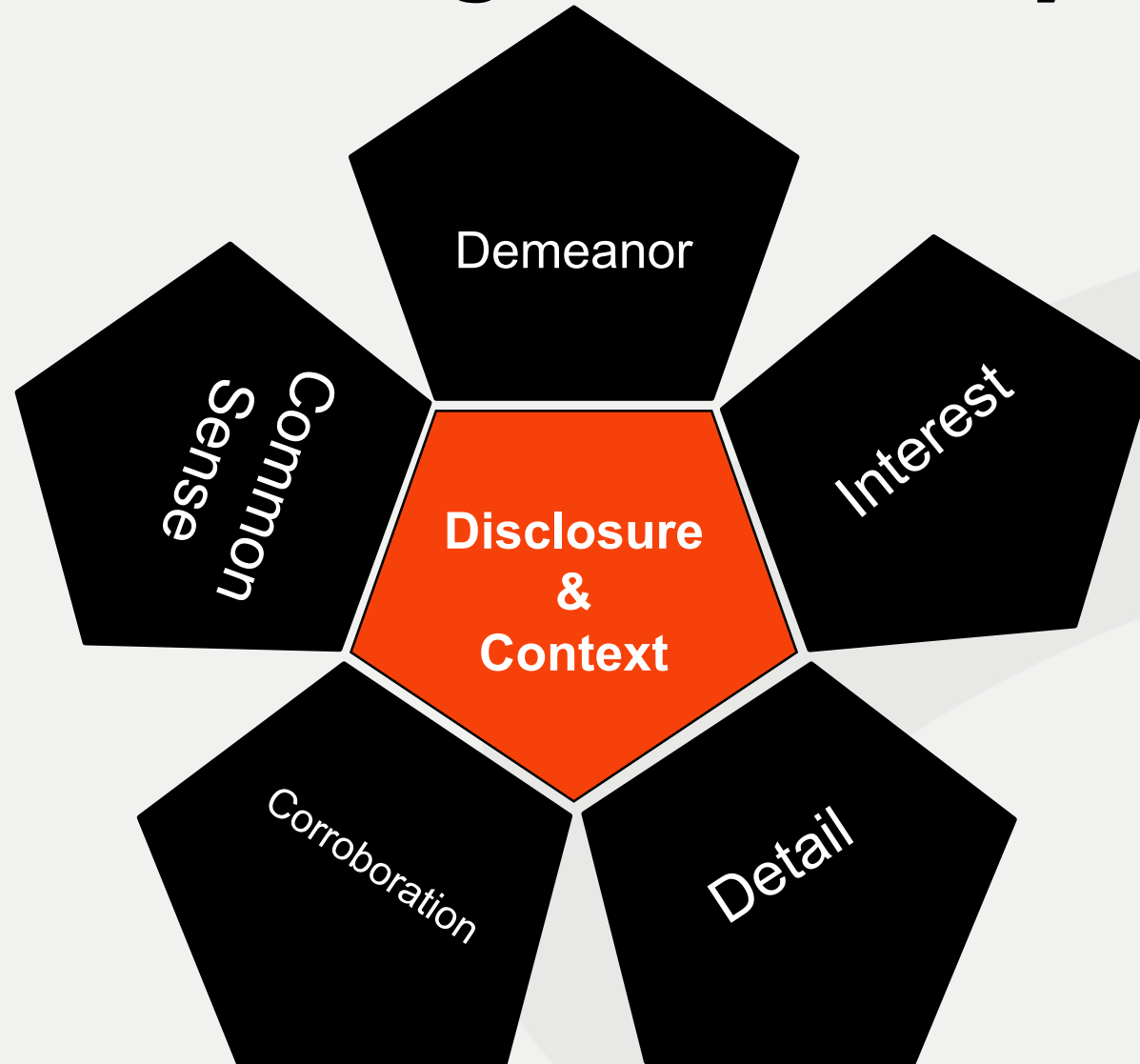
The Sexual Harassment, Abuse, and Assault Prevention Policy prohibits a broad range of conduct, all of which is serious in nature. In keeping with the University's commitment to foster an environment that is safe, inclusive, and free from discrimination and harassment, the **Director (or designee) has great latitude in the imposition of sanctions tailored to the facts and circumstances of each report**, the impact of the conduct on the Complainant and surrounding community, and accountability for the Respondent. The full range of possible sanctions appear at Part 11 of the Student Conduct System Handbook.

Procedures for Responding to Reports of Student Violations of the Sexual Harassment, Abuse, and Assault Prevent Policy (Remedies**)**

- Regardless of the outcome, the Director of OSRR (or designee) may recommend to the Title IX Coordinator (or designee) additional Remedies for the Complainant to address the effects of the conduct on the Complainant, restore or preserve the Complainant's access to University programs and activities, and restore to the Complainant, to the extent possible, benefits and opportunities lost as a result of the prohibited conduct. The Director (or designee) may also identify remedies to address the effects of the conduct on the University community.
- The Title IX Coordinator (or designee) will review the remedies recommended by the Director (or designee) and will consider the appropriateness of continuing Supportive Measures on an ongoing basis. The Title IX Coordinator, OSRR, and the Dean of Students' Office are responsible for the effective implementation of remedies.

EVALUATING CREDIBILITY

Evaluating Credibility



Credibility Factors

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

Demeanor

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

Demeanor

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

Interest

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

Interest

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

Detail

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

Corroboration

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

Corroboration

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

Evaluating Changes in Account

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

Disclosure

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

Synthesis

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

Integrated Analysis

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?

Credibility Considerations from OCR

1997 Sexual Harassment Guidance

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

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

...

(continued on next slide)

Credibility Considerations from OCR

(1997 Sexual Harassment Guidance continued)

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

...

Credibility Considerations from OCR

(1997 Sexual Harassment Guidance continued)

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

...

Credibility Considerations from OCR

(1997 Sexual Harassment Guidance continued)

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

Credibility Considerations from OCR

(1997 Sexual Harassment Guidance continued)

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

...

Credibility Considerations from OCR

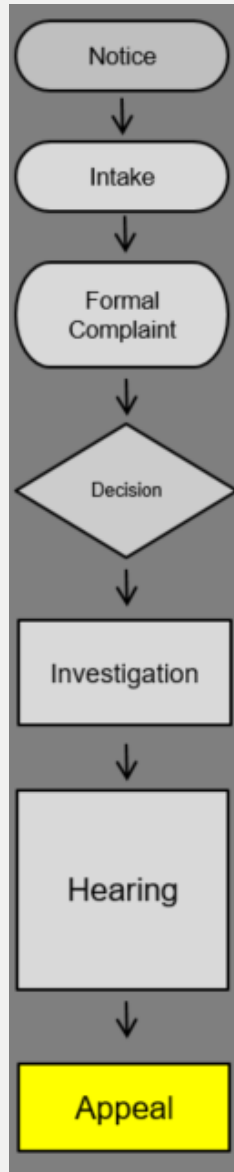
(1997 Sexual Harassment Guidance continued)

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

See [1997 Sexual Harassment Guidance](#)

APPEALS

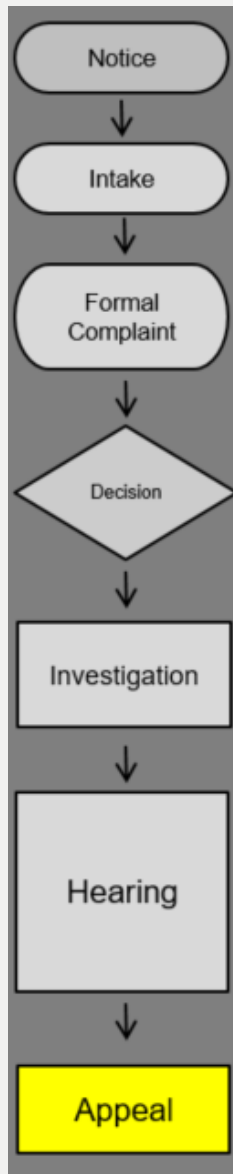
Appeals



- 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)

Procedures for Responding to Reports of Student Violations of the Sexual Harassment, Abuse, and Assault Prevent Policy



Office of Equal Opportunity,
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15. Appeal: Any party may appeal the decision of a hearing panel or officer on one or more of the following grounds:

- 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;
- The Title IX Officer, investigator(s), or decision-maker(s) 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; or
- Errors in the interpretation of University policy so substantial as to deny either party a fair hearing; or
- Grossly inappropriate sanction having no reasonable relationship to the charges.

Procedures for Responding to Reports of Student Violations of the Sexual Harassment, Abuse, and Assault Prevent Policy (Appeals**)**

- Appeals are limited to ten (10) pages in length and must be received by OSRR no later than five (5) business days after transmission of the hearing panel or officer decision. Late appeals will not be considered.
- When an appeal is submitted, OSRR will notify the non-appealing party in writing and provide an opportunity to submit a response to the appeal within five (5) business days.

Procedures for Responding to Reports of Student Violations of the Sexual Harassment, Abuse, and Assault Prevent Policy (**Appeals**)

- Appeals will be decided by an appeals panel who will be faculty or staff from the University, or external professionals, as determined in the sole discretion of OSRR.
- Any individuals deciding appeals will be different from the Title IX Coordinator, the investigators, and those serving on the hearing panel or as hearing officer, and will be trained and free from conflicts of interest or bias for or against either party (see Section IX *Training and Conflict/Bias Prevention* below). The name(s) of the appeal officer(s) will be provided to the parties and the parties will be allowed to challenge their appointment on the basis of conflict of interest or bias. The appeal officer(s) may interview parties, witnesses, investigators, or the hearing panel or officer. The appeal officer may be advised by OSRR staff and/or an attorney.

Procedures for Responding to Reports of Student Violations of the Sexual Harassment, Abuse, and Assault Prevent Policy (Appeals)

- Appeal officers will objectively consider all relevant evidence and the case file to either uphold, reverse, or modify the decision at issue. Appeal officers can order new hearings, request further investigation, or take any other steps to address the issues raised by the parties on appeal. Appeal officers will issue written decisions simultaneously to all parties within fifteen (15) business days of receiving the appeal and response (if any).

Procedures for Responding to Reports of Student Violations of the Sexual Harassment, Abuse, and Assault Prevent Policy (Appeals)

- The determination regarding responsibility becomes final either on the date that the University 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.

Use of Slides

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- These materials are meant to provide a framework for informed discussion, not to provide legal advice regarding specific institutions or contexts.
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