Title IX Adjudicator and Liaison Training:

An Integrated and Coordinated Approach

Presented By:

The Institutional Response Group | Cozen O'Connor

Gina Maisto Smith, Chair

Leslie M. Gomez, Vice Chair

Maureen Holland, Member

Peter Lim, Counsel

Tufts University

July 2020

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Use of Slides

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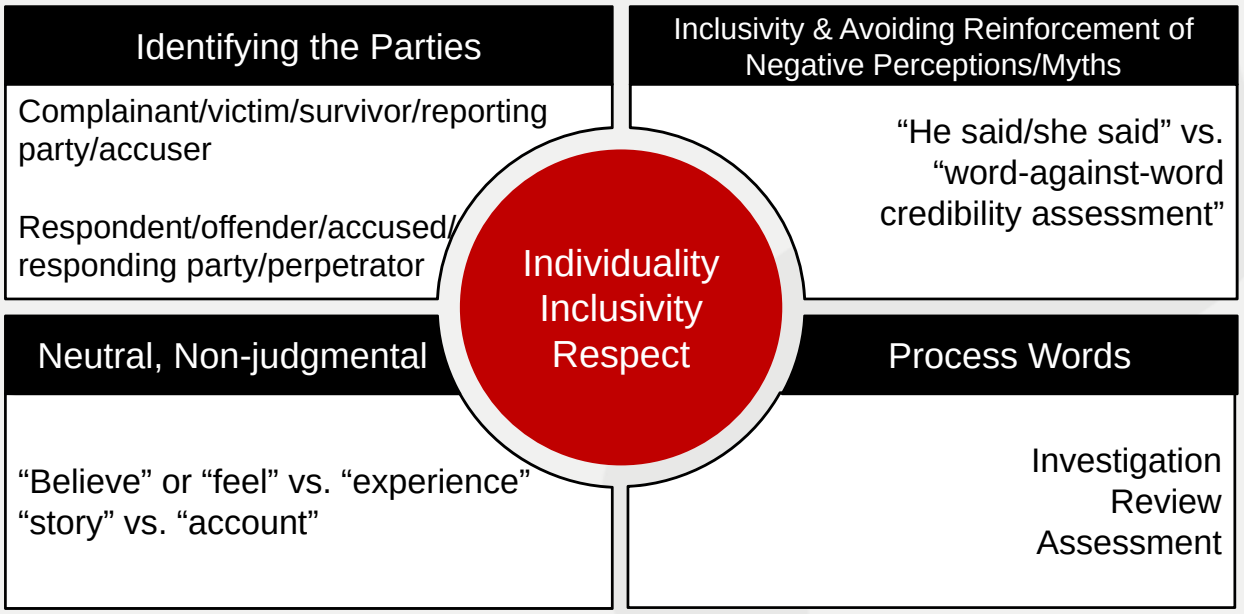
Awareness of the Impact of Language



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Framing the Conversation

- We Don't Know What We Don't Know
- Flip the Lens
- Embrace the Tension
- Together We are Better than the Sum of our Parts

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THE CONTEXT

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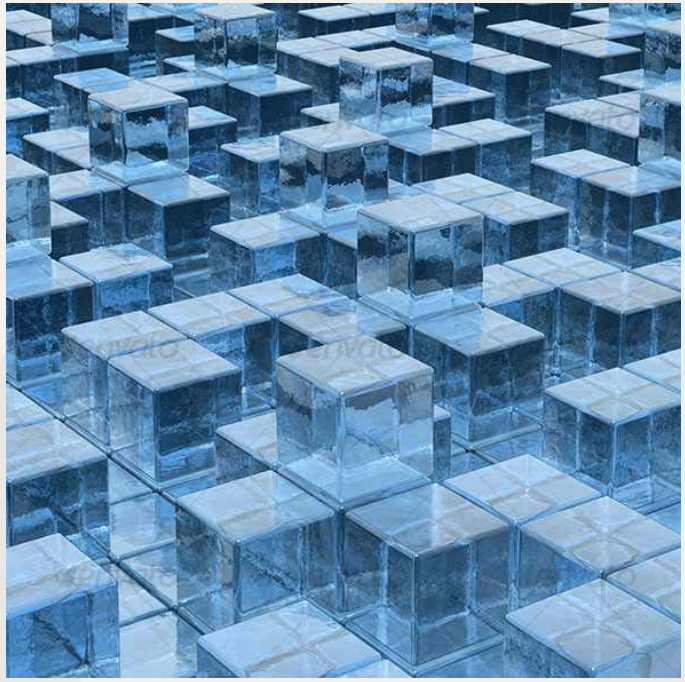
The Context

- 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



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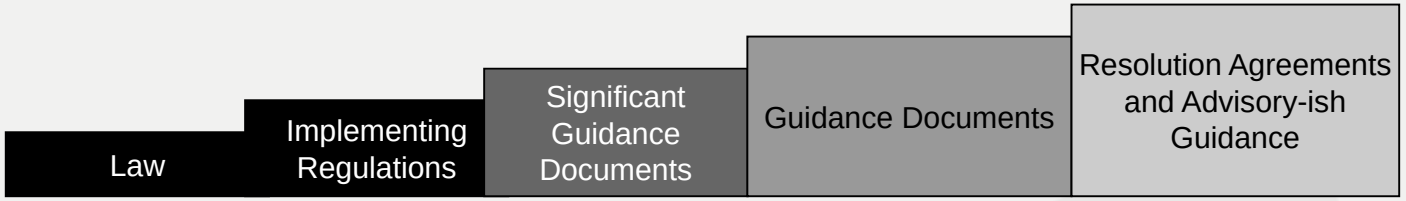
The Hierarchy



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- 2011 Dear Colleague Letter (Rescinded)
- 2014 Q&A (Rescinded)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

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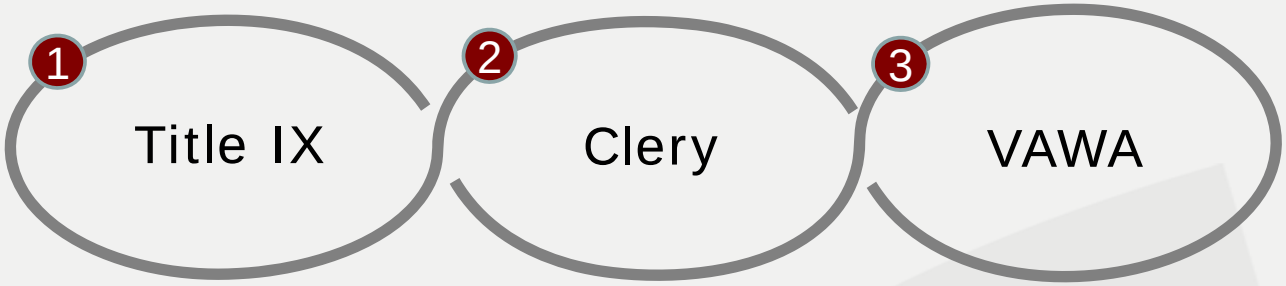
Federal Regulatory Framework



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

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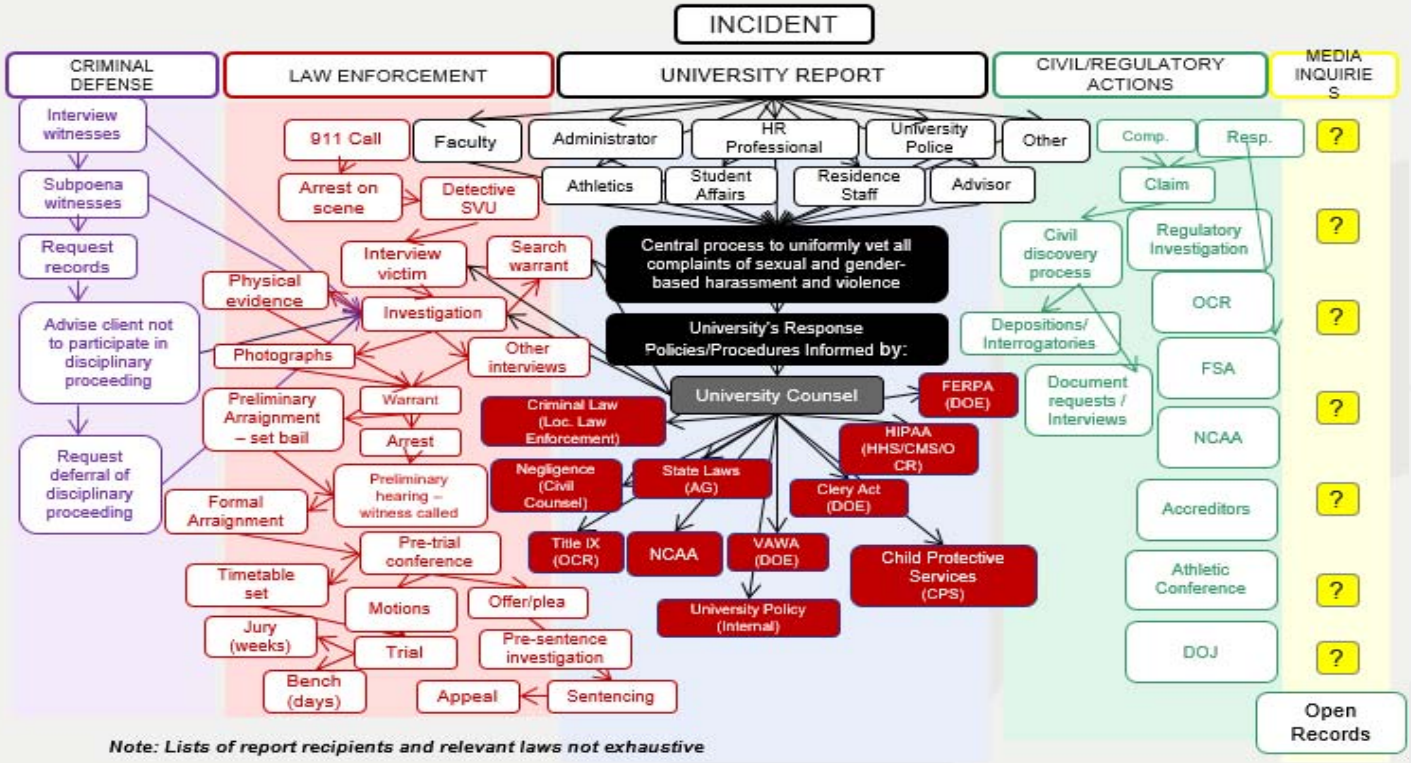
The Legal Context



Note: Lists of report recipients and relevant laws not exhaustive

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COMPLAINANT

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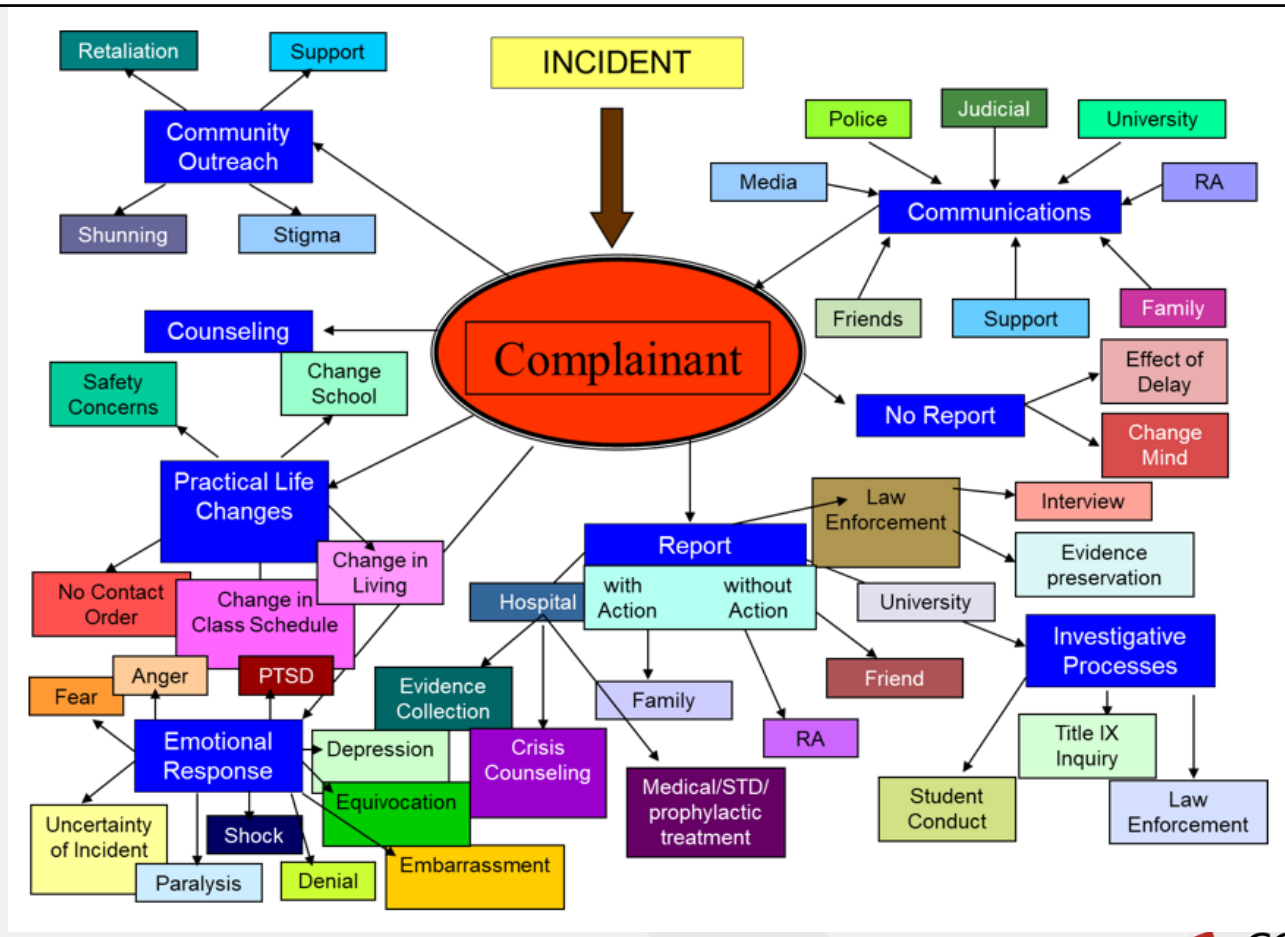
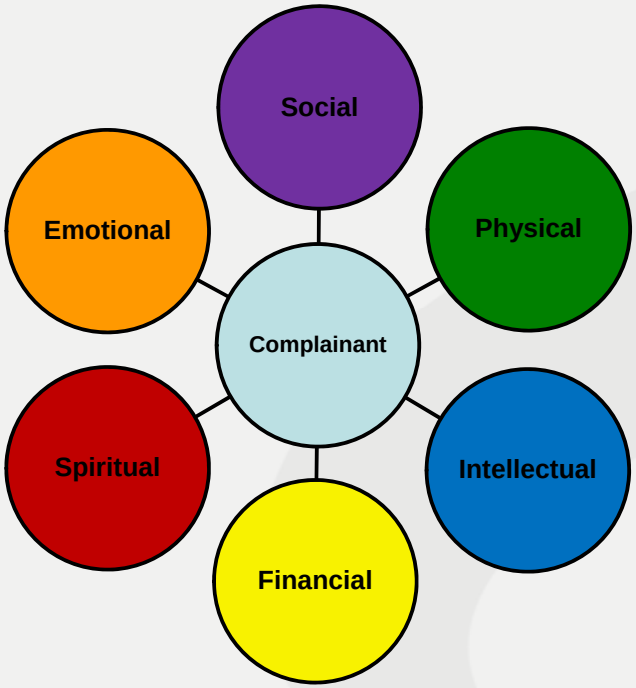

INCIDENT
Complainant
Retaliation
Support
Community Outreach
Shunning
Stigma
Police
Judicial
University
Media
RA
Communications
Friends
Support
Family
Counseling
Safety Concerns
Change School
Practical Life Changes
No Contact Order
Change in Class Schedule
Change in Living
Fear
Anger
PTSD
Emotional Response
Uncertainty of Incident
Shock
Paralysis
Denial
Depression
Equivocation
Embarrassment
Evidence Collection
Crisis Counseling
No Report
Effect of Delay
Change Mind
Report
Hospital
with Action
without Action
Family
RA
Medical/STD/ prophylactic treatment
Law Enforcement
Interview
Evidence preservation
University
Friend
Investigative Processes
Title IX Inquiry
Student Conduct
Law Enforcement

Complainant



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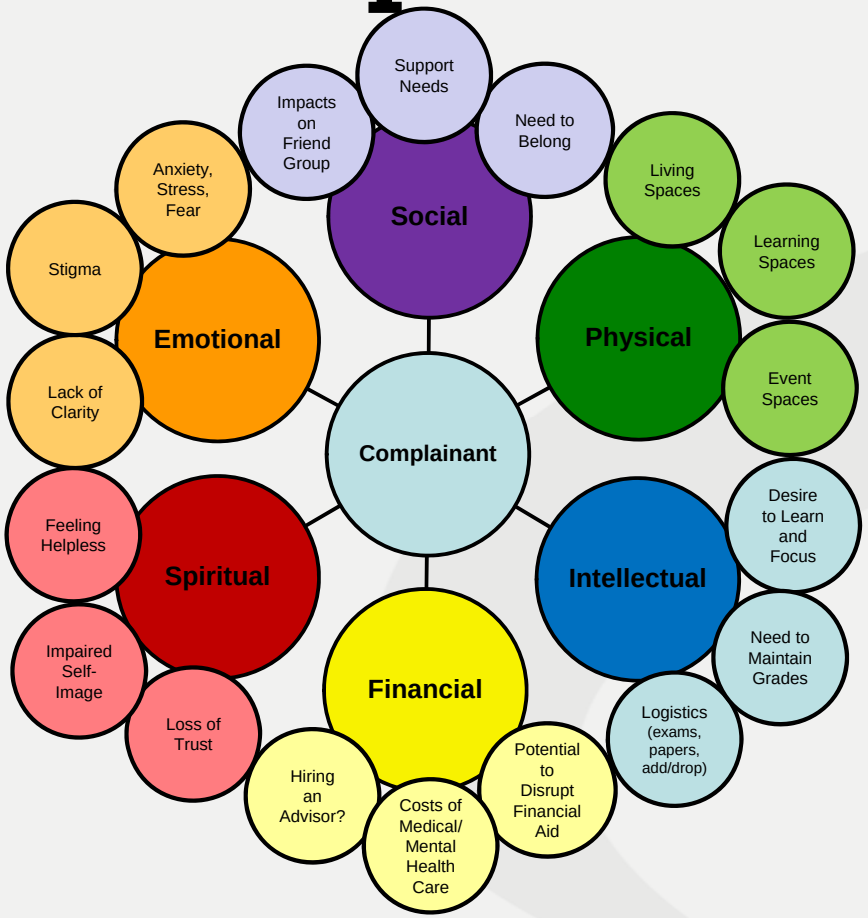
Complainant



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RESPONDENT

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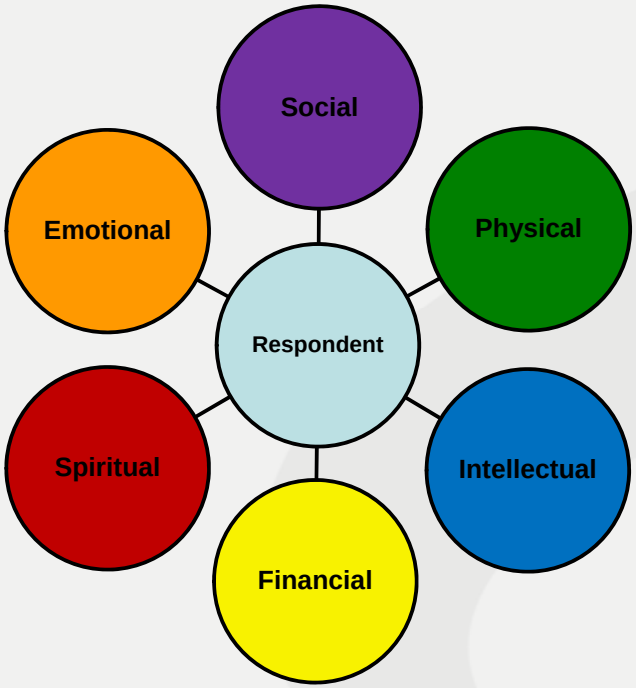
ALLEGATION
Student Conduct
Law Enforcement
Title IX Investigation
School
Parents
Peers
Respondent
Information
Legal Rights
Community Reaction
Support
Shunning
Media
Questions
Media
Attorney
Public Shaming by Complainant and/or others
MH Treatment / Counseling
Medical
Disability Considerations
Emotional Response
Practical Life Changes
Depression
Anxiety
Fear
Shame
Embarrassment
Financial
No Contact Order
Change in Class Schedule
Change in Living Arrangement
Other Interim Measures (e.g. suspension from athletic team)
Denial
Anger
CONSEQUENCES
Arrest
Dining Hall Restrictions
University Sanction: Probation, Suspension, Expulsion, Degree Deferral, Transcript Notation
Fine
Finding of Not Responsible
Expulsion
Exclusion from Campus Social Events
Limit on Campus Resources (e.g. buildings, services)

Respondent



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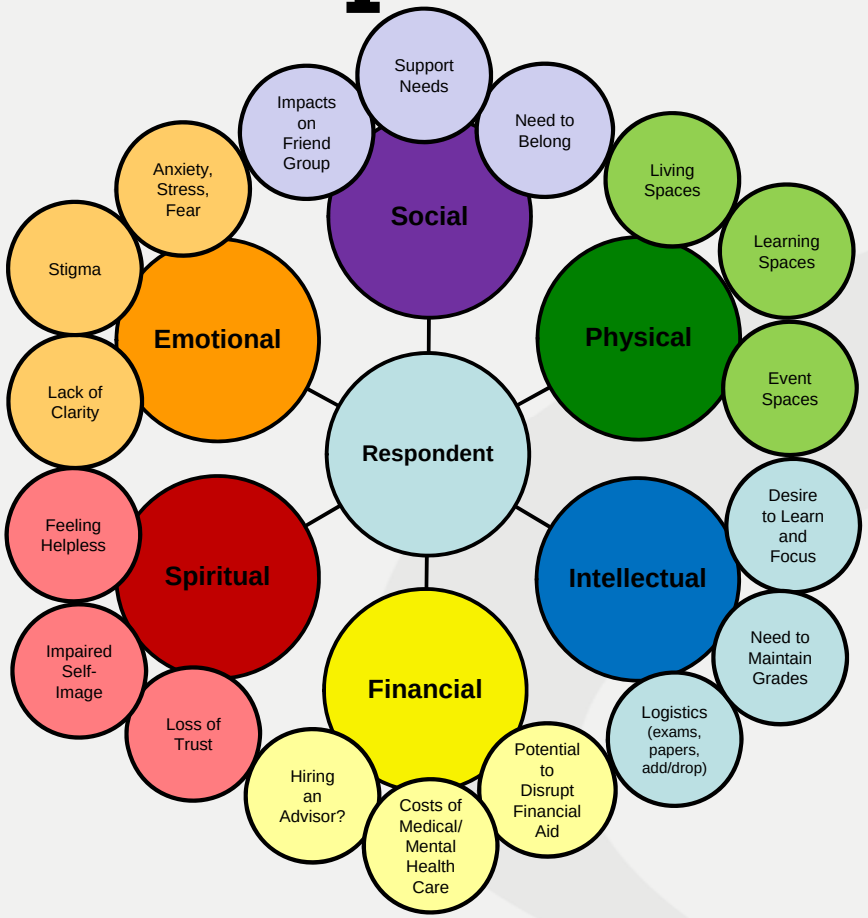
Respondent



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Options for Title IX Cases at Tufts

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

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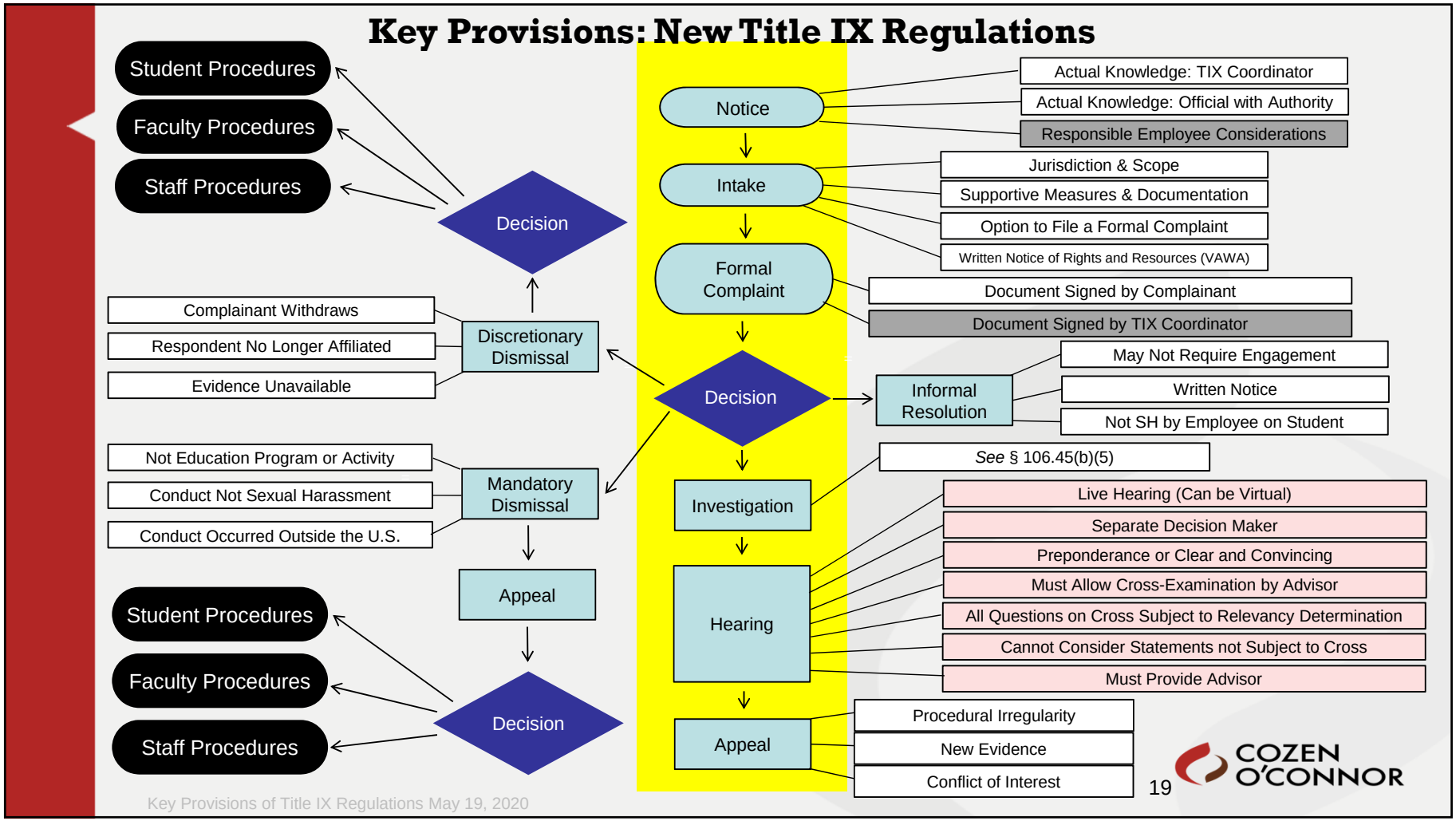
Key Provisions: New Title IX Regulations



TITLE IX AND THE CLERY ACT

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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**

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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

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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

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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

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Title IX

Core Tenets:

Definition of Sexual Harassment

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

(1) An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;

(2) Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity; or

(3) "Sexual assault" as defined in 20 U.S.C. 1092(f)(6)(A)(v), "dating violence" as defined in 34 U.S.C. 12291(a)(10), "domestic violence" as defined in 34 U.S.C. 12291(a)(8), or "stalking" as defined in 34 U.S.C. 12291(a)(30).

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

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Title IX

Core Tenets:

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)

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Title IX

Core Tenets:

Education Program or Activity

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

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

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Title IX

Core Tenets:

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.

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

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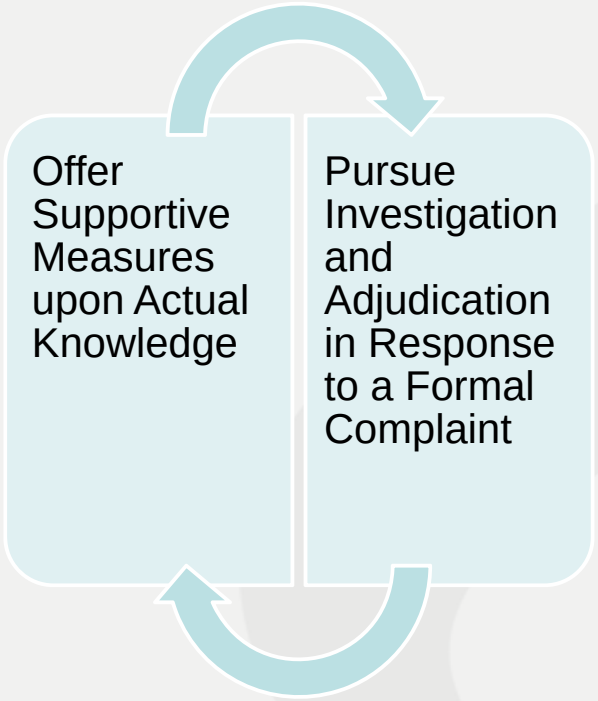
Understanding Two Key Provisions



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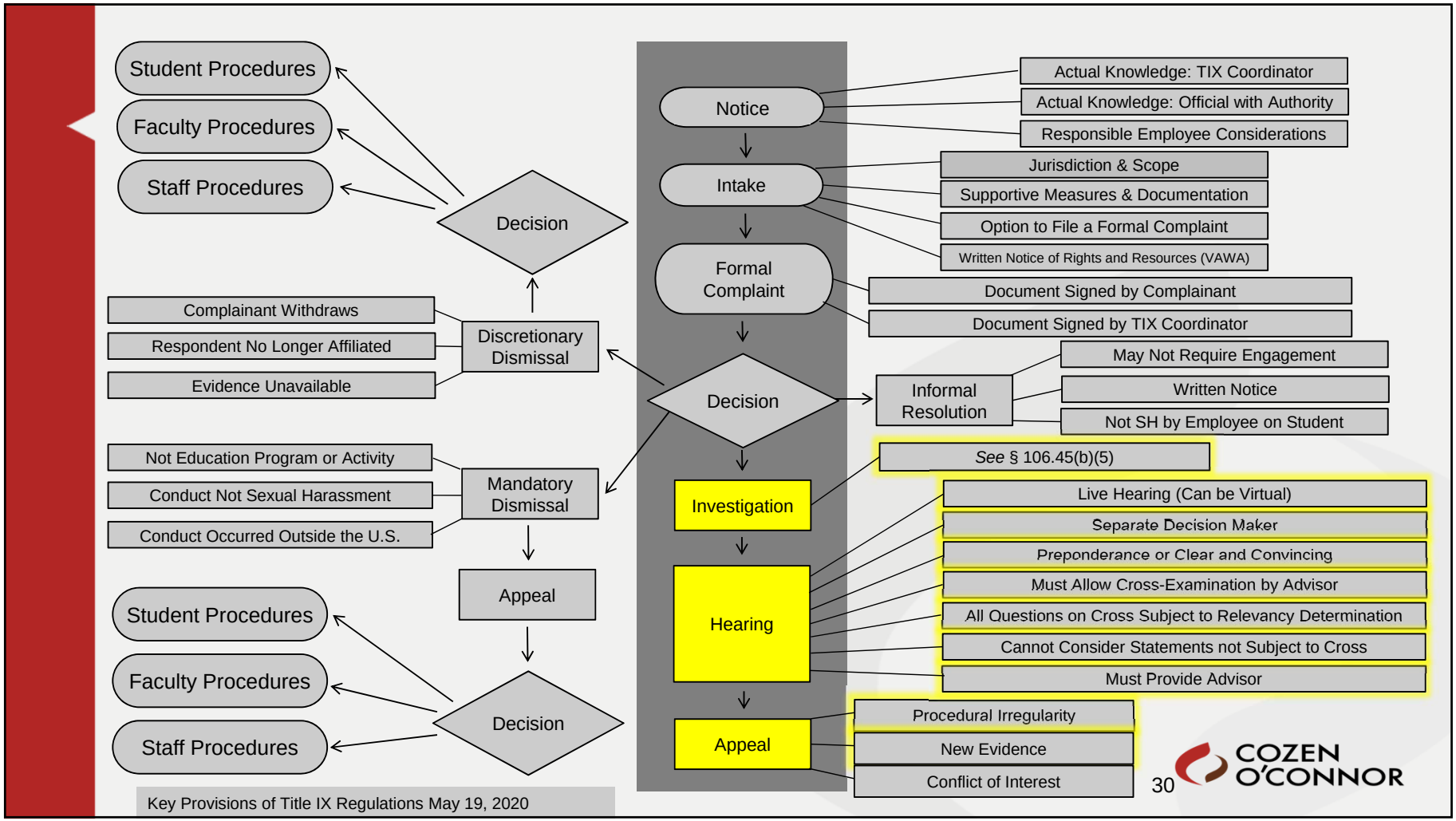
Student Procedures
Faculty Procedures
Staff Procedures
Decision
Complainant Withdraws
Respondent No Longer Affiliated
Evidence Unavailable
Discretionary Dismissal
Not Education Program or Activity
Conduct Not Sexual Harassment
Conduct Occurred Outside the U.S.
Mandatory Dismissal
Appeal
Student Procedures
Faculty Procedures
Staff Procedures
Decision
Notice
Intake
Formal Complaint
Decision
Investigation
Hearing
Appeal
Actual Knowledge: TIX Coordinator
Actual Knowledge: Official with Authority
Responsible Employee Considerations
Jurisdiction & Scope
Supportive Measures & Documentation
Option to File a Formal Complaint
Written Notice of Rights and Resources (VAWA)
Document Signed by Complainant
Document Signed by TIX Coordinator
Informal Resolution
May Not Require Engagement
Written Notice
Not SH by Employee on Student
See § 106.45(b)(5)
Live Hearing (Can be Virtual)
Separate Decision Maker
Preponderance or Clear and Convincing
Must Allow Cross-Examination by Advisor
All Questions on Cross Subject to Relevancy Determination
Cannot Consider Statements not Subject to Cross
Must Provide Advisor
Procedural Irregularity
New Evidence
Conflict of Interest
Key Provisions of Title IX Regulations May 19, 2020
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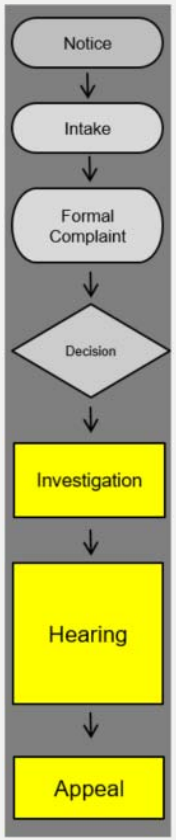
Basic Requirements



- **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)

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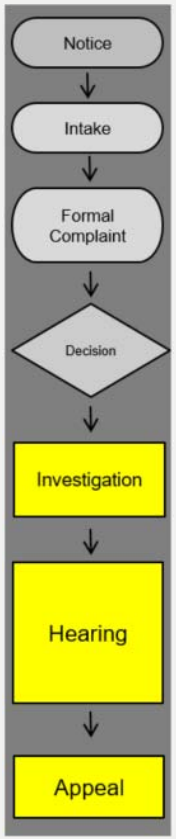
Basic Requirements



- 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)

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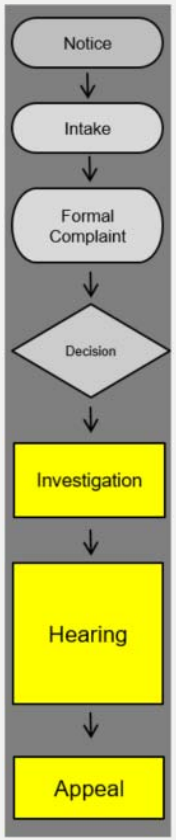
Basic Requirements



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

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)

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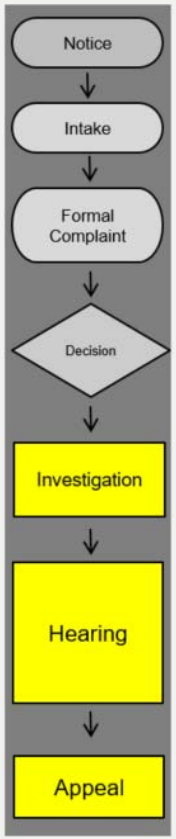
Basic Requirements



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

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

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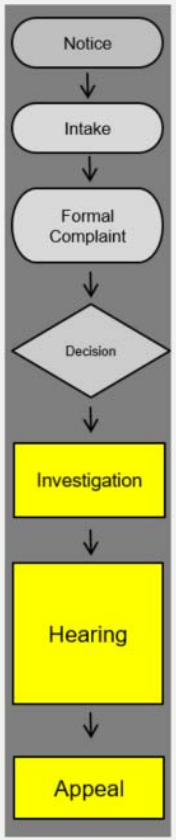
Basic Requirements



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

Relevant Regulations Sections:
Appeal: §§ 106.45(b)(1)(viii) and 106.45(b)(7)(ii)(F)
Range of Supportive Measures: § 106.45(b)(1)(ix)
Waiver of Privilege: § 106.45(b)(1)(x)

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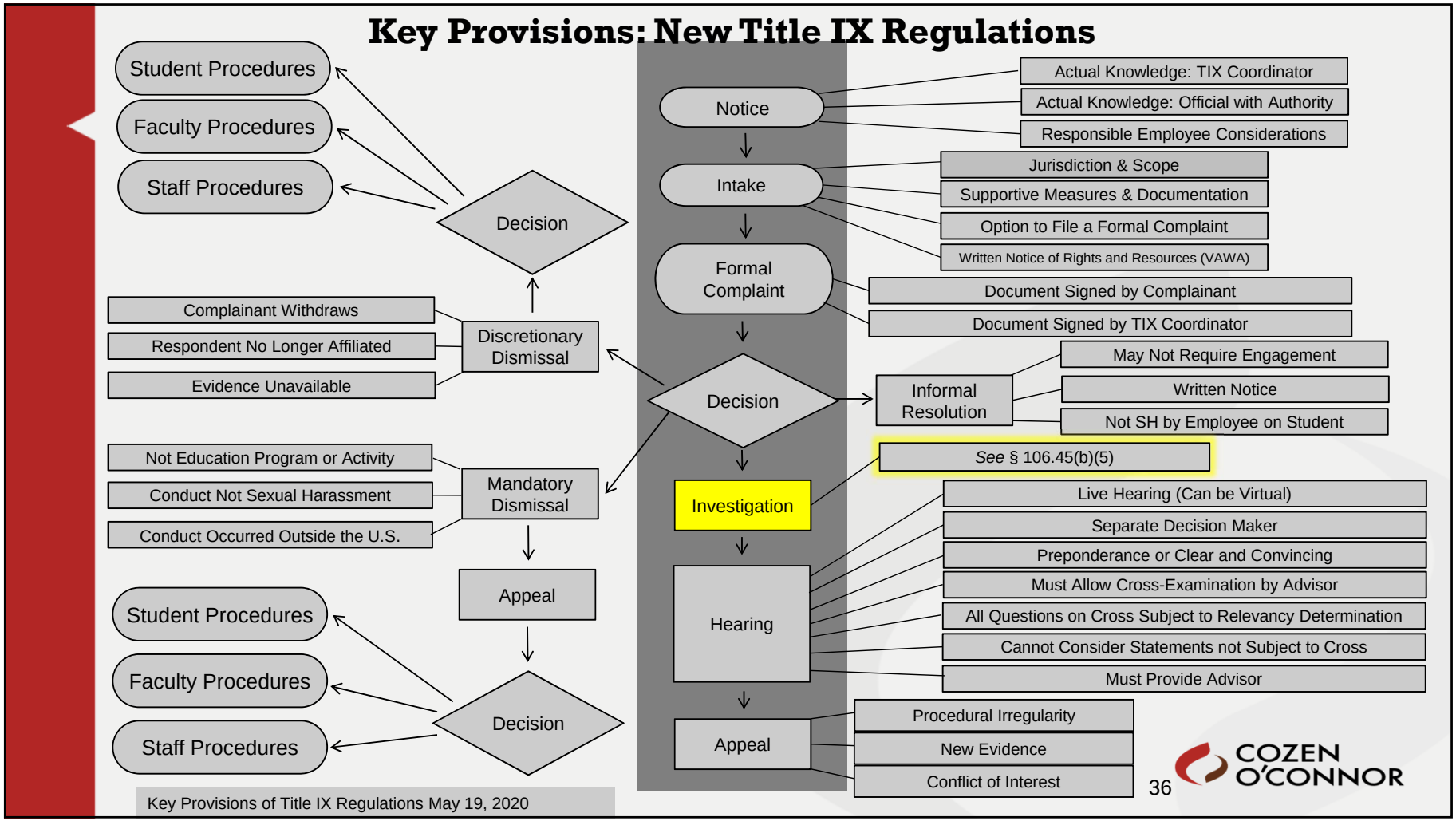
Key Provisions: New Title IX Regulations



Key Provisions of Title IX Regulations May 19, 2020

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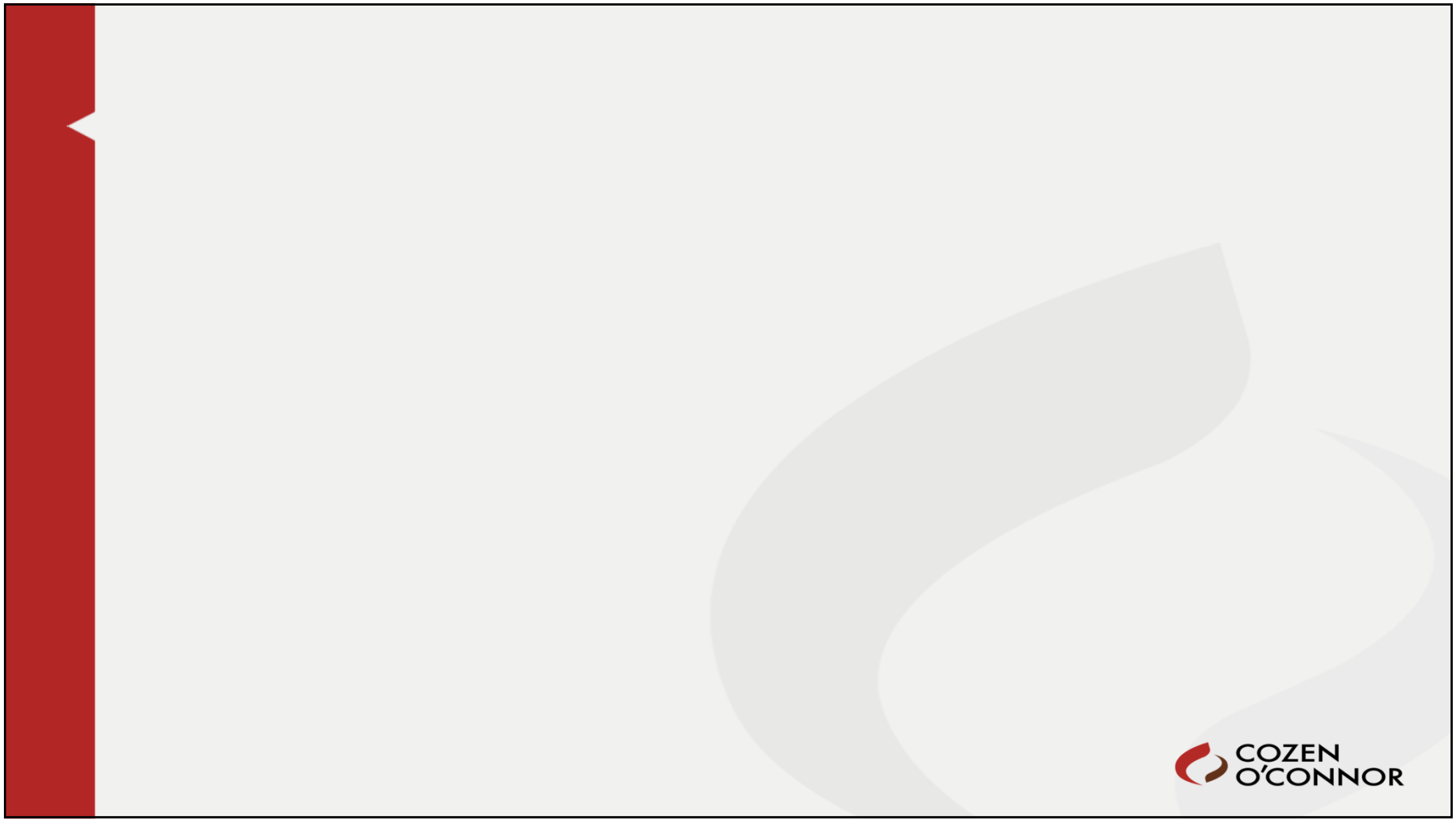
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INVESTIGATIONS

THE FINAL TITLE IX REGULATIONS

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Setting the Stage - Investigations

Institutional Obligations

Parties' Opportunity to Participate

Investigation

- Opportunity to present witnesses and other inculpatory and exculpatory evidence
- No restrictions on ability to discuss allegations

Evidence Review

- Opportunity to inspect and review evidence
- Ability to submit a written response to the evidence

Report

- Ability to submit a written response to the investigative report
- Ability to provide context to the evidence and prepare for the hearing

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Overview

- Obligation to Investigate
- Basic Requirements of Grievance Processes
- Pre-Investigation Considerations
- Consolidation of Formal Complaints
- Investigation - Evidence Gathering
- Evidentiary Considerations
- Evidence Review
- Investigative Report
- Reasonably Prompt Time Frames

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OBLIGATION TO INVESTIGATE

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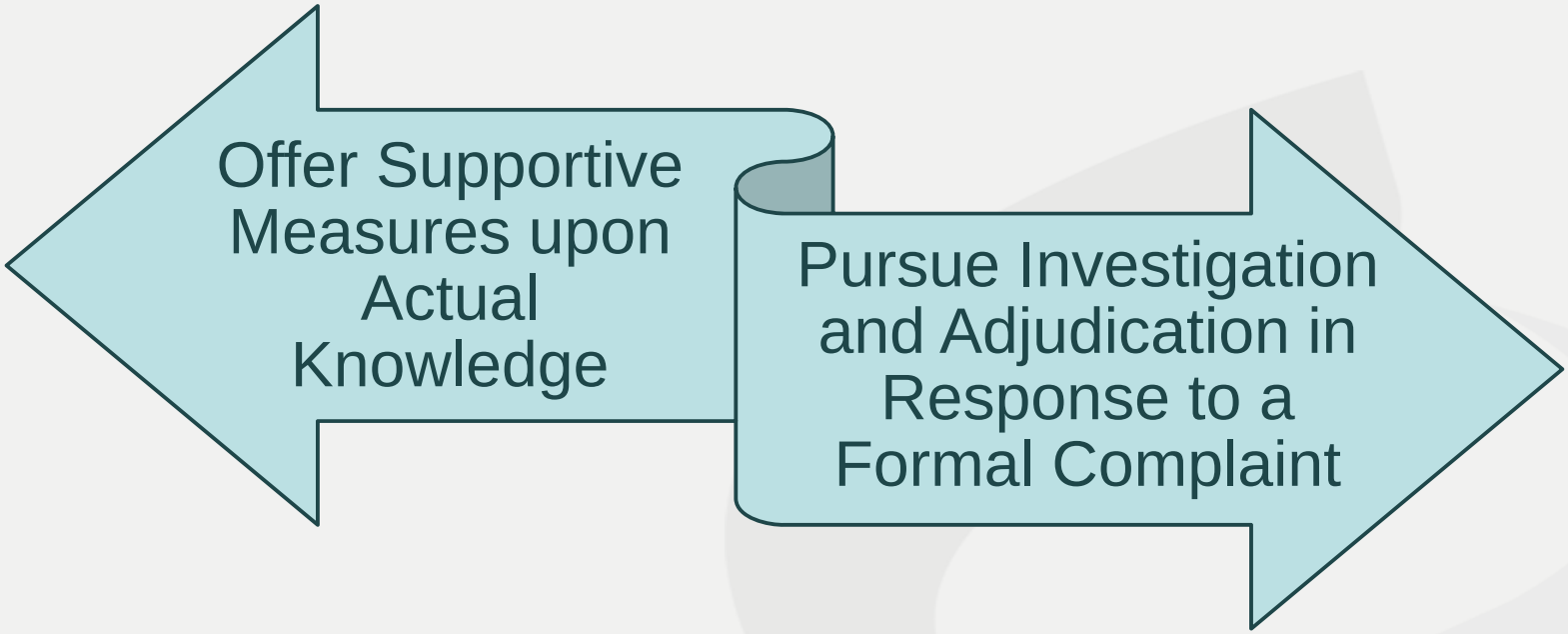
Understanding Two Key Provisions



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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

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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

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Reinforcing Agency & Autonomy

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

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

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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

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PRE-INVESTIGATION CONSIDERATIONS

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Pre-Investigation Considerations

- Choice of Investigator
  - Internal or external professional
  - Sufficient training and experience
  - Free from conflict of interest or bias
- Investigative Protocols
- Template Communications
- Notice of Allegations
- Consolidation of Formal Complaints

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Separating Support from Investigations

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

Separating Support from Investigations

- Reinforce neutrality in language and communications
- Ensure sufficient resources for timely response
- Consider creative models for separation of intake from support from investigation from decision-making

Removal of Bias or Conflict of Interest

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

Title IX Regulations May 19, 2020, Preamble, 85 F.R. 30235

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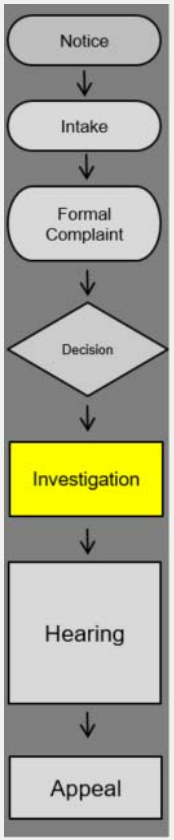
Written Notice of all Proceedings



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

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

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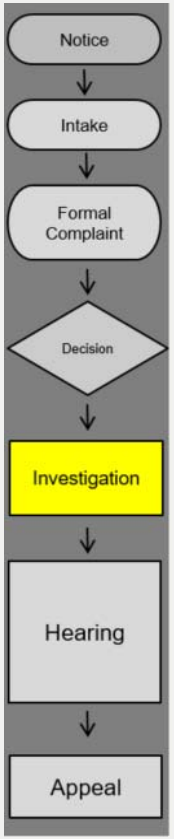
Written Notice of Allegations



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

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

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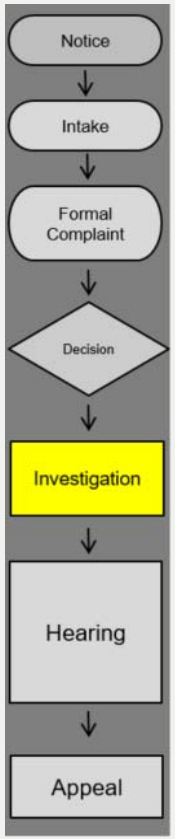
Written Notice of the Allegations



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

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

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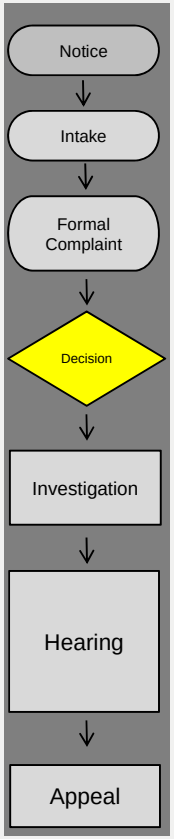
Written Notice of Allegations



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

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

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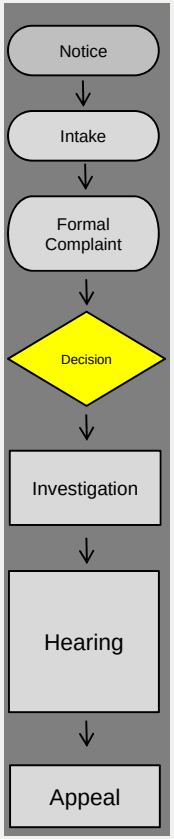
Supplemental Notice



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

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

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Practical Considerations

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

CONSOLIDATION OF FORMAL COMPLAINTS

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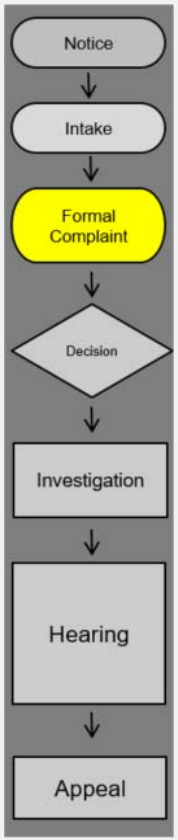
Consolidation of Formal Complaints



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

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

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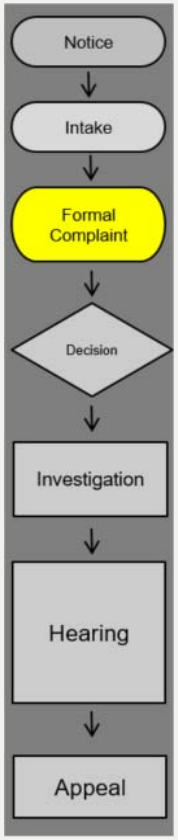
Consolidation of Formal Complaints



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

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

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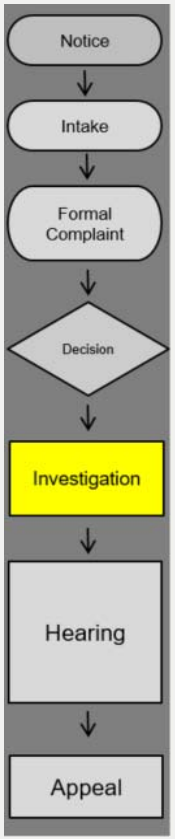
Consolidation of Formal Complaints



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

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

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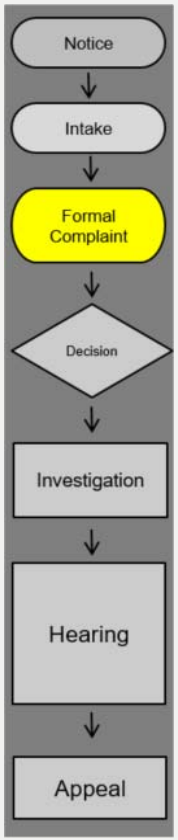
Consolidation of Formal Complaints



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

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

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Application to Specific Circumstances

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

INVESTIGATIONS

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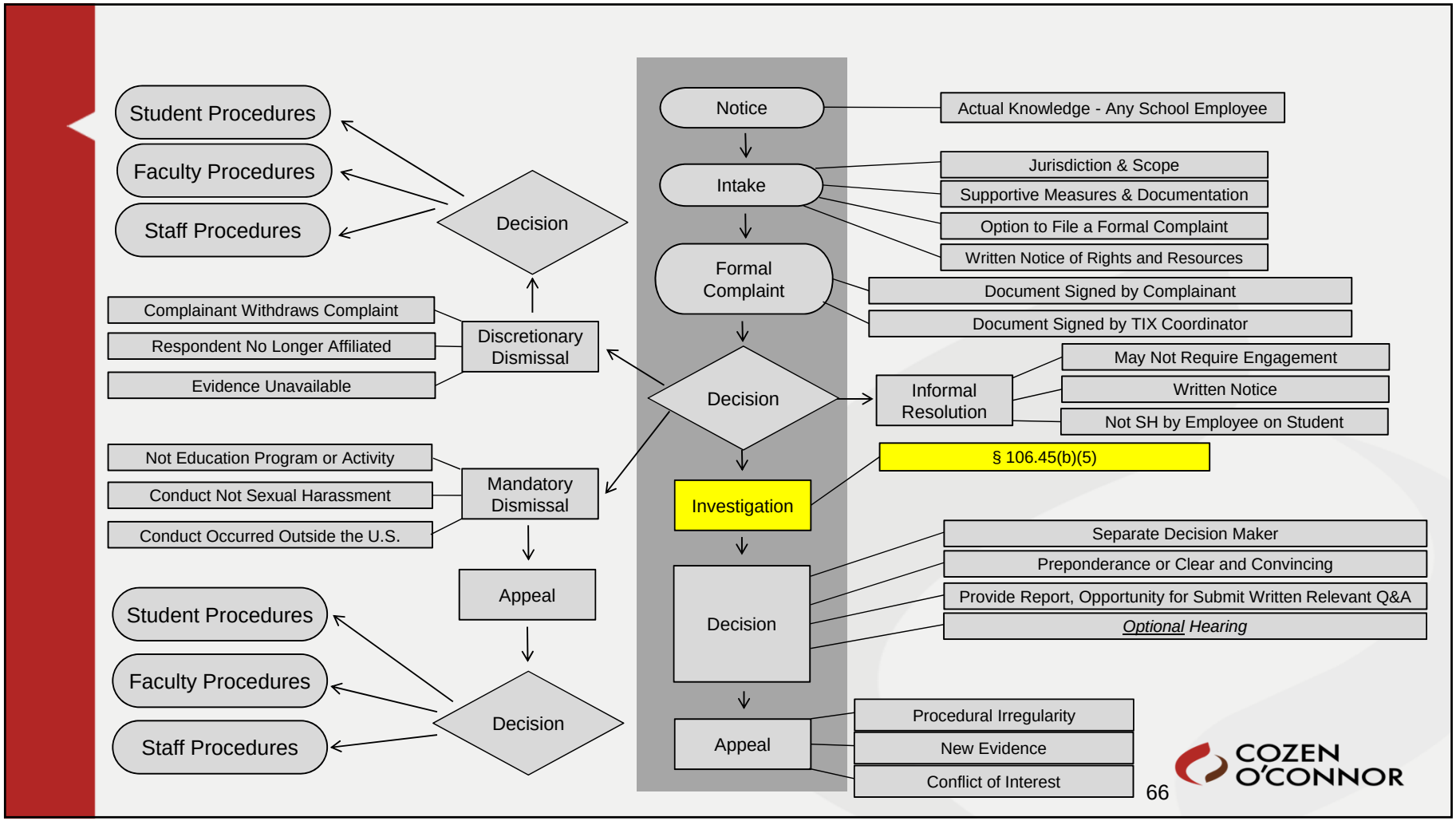
Notice
Actual Knowledge - Any School Employee
Intake
Jurisdiction & Scope
Supportive Measures & Documentation
Option to File a Formal Complaint
Written Notice of Rights and Resources
Formal Complaint
Document Signed by Complainant
Document Signed by TIX Coordinator
Decision
Informal Resolution
May Not Require Engagement
Written Notice
Not SH by Employee on Student
§ 106.45(b)(5)
Investigation
Decision
Separate Decision Maker
Preponderance or Clear and Convincing
Provide Report, Opportunity for Submit Written Relevant Q&A
Optional Hearing
Appeal
Procedural Irregularity
New Evidence
Conflict of Interest
Student Procedures
Faculty Procedures
Staff Procedures
Decision
Complainant Withdraws Complaint
Respondent No Longer Affiliated
Evidence Unavailable
Discretionary Dismissal
Not Education Program or Activity
Conduct Not Sexual Harassment
Conduct Occurred Outside the U.S.
Mandatory Dismissal
Appeal
Student Procedures
Faculty Procedures
Staff Procedures
Decision

EVIDENCE GATHERING

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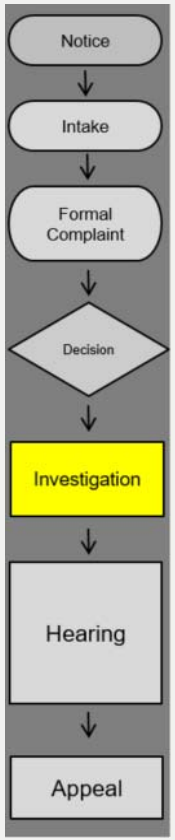
Burden of Gathering Evidence



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

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

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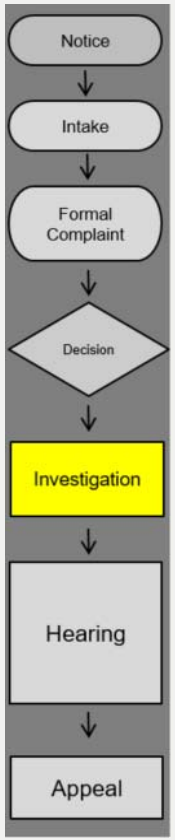
Burden of Gathering Evidence



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

Title IX Regulations May 19, 2020; Preamble at 30292

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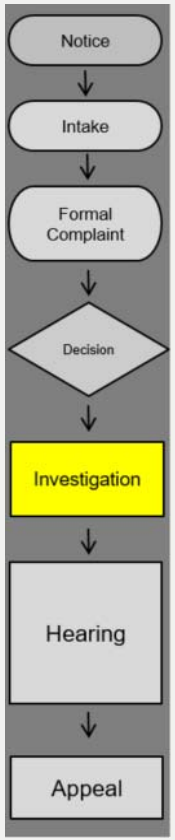
Burden of Gathering Evidence



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

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

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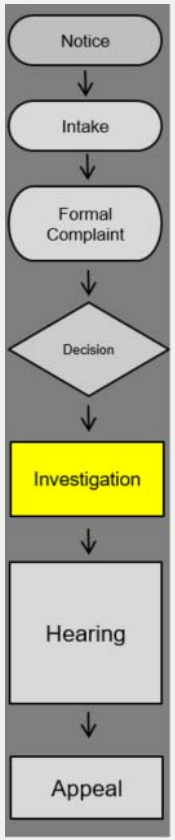
Opportunity to Participate



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

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

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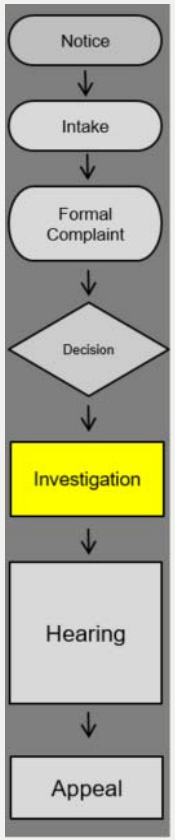
Witnesses & Evidence



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

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

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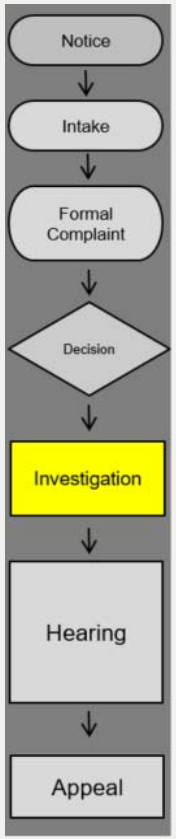
Practical Considerations & Effective Practices

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

Practical Considerations for Remote Interviews

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

Advisor of Choice



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

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

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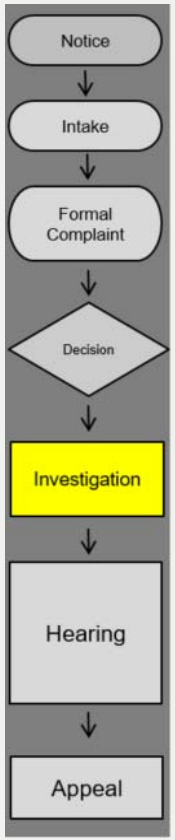
Restrictions on Advisor Participation



- 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

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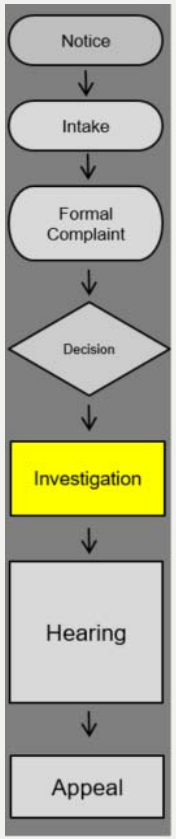
Restrictions on Advisor Participation



- "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

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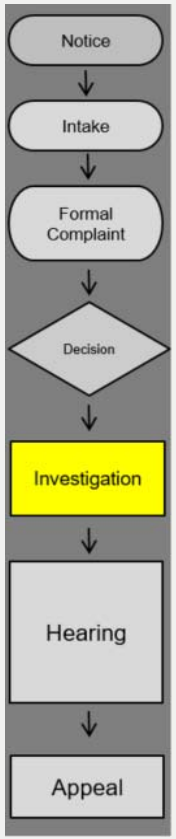
Training of Advisors Not Required



- 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

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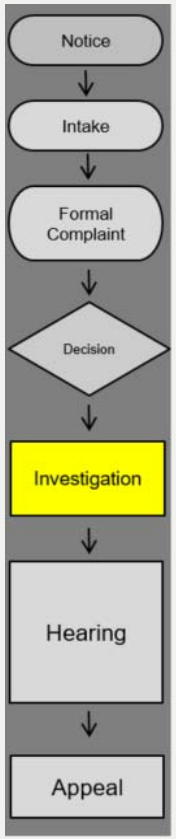
Training of Advisors Not Required



- 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

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Practical Considerations & Effective Practices

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

EVIDENTIARY CONSIDERATIONS

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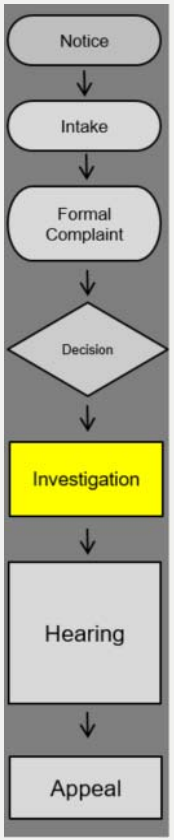
Evidentiary Considerations

- 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

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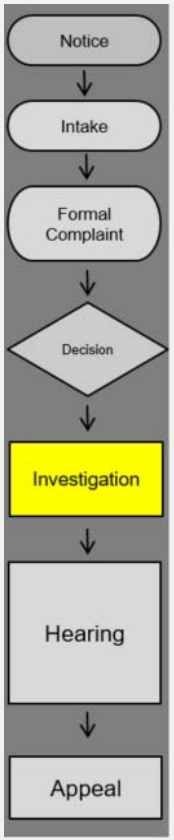
Privileged Records



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

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

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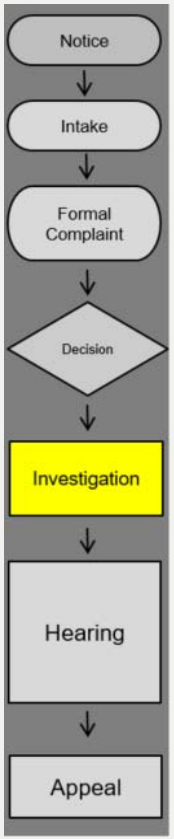
Relevance



- 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

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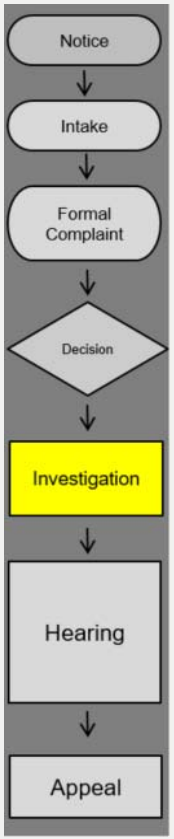
Relevance



- "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

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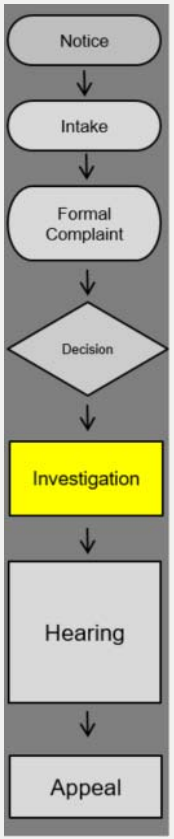
Relevance



- 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

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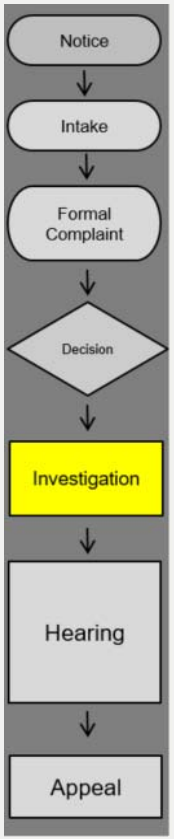
Prior Sexual History



- 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

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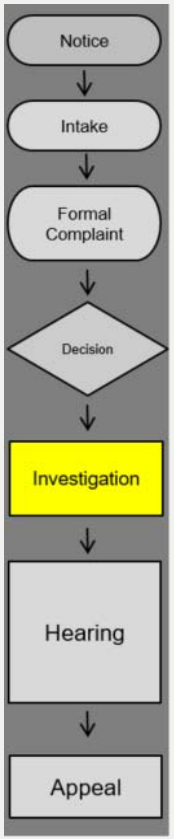
Prior Sexual History



- 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

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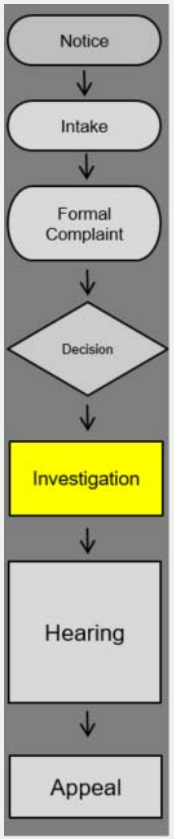
Prior Sexual History: Motive



- 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

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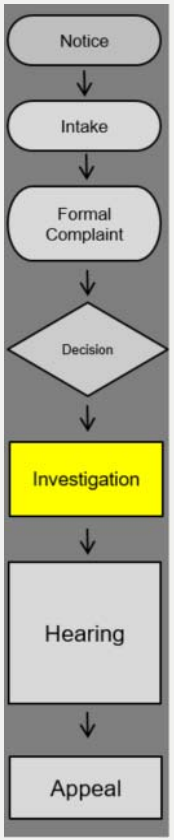
Prior or Subsequent Misconduct

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

Practical Considerations

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

Flexibility to Adopt Rules



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

Title IX Regulations May 19, 2020; Preamble at 30248

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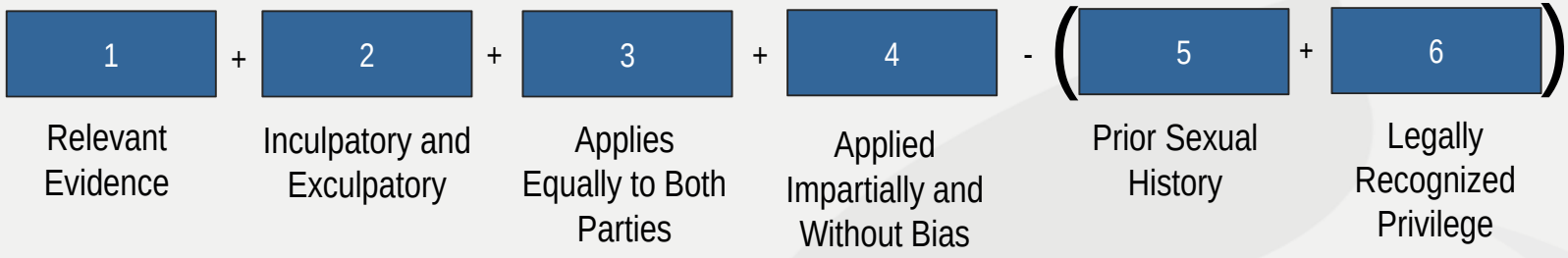
Evidentiary Rules Must Consider



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EVIDENCE REVIEW

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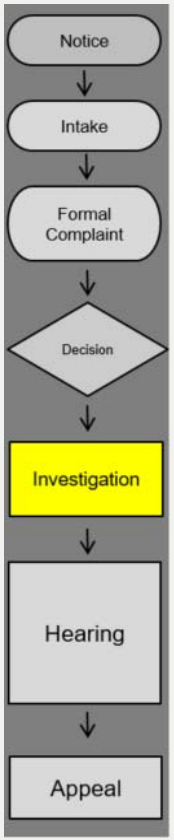
Evidence Review



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

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

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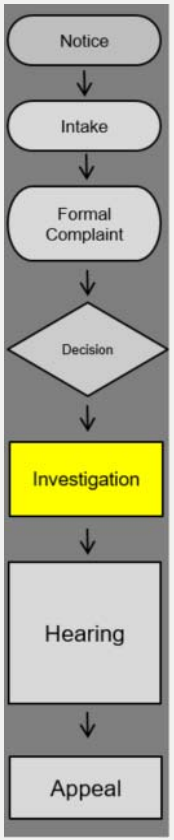
Evidence Review



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

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

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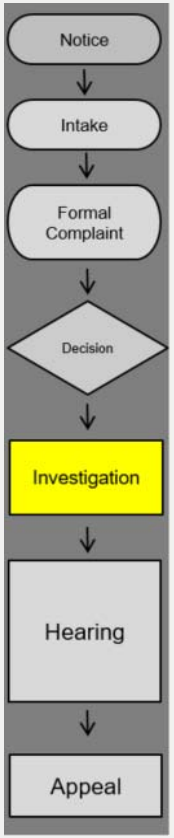
Evidence Review



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

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

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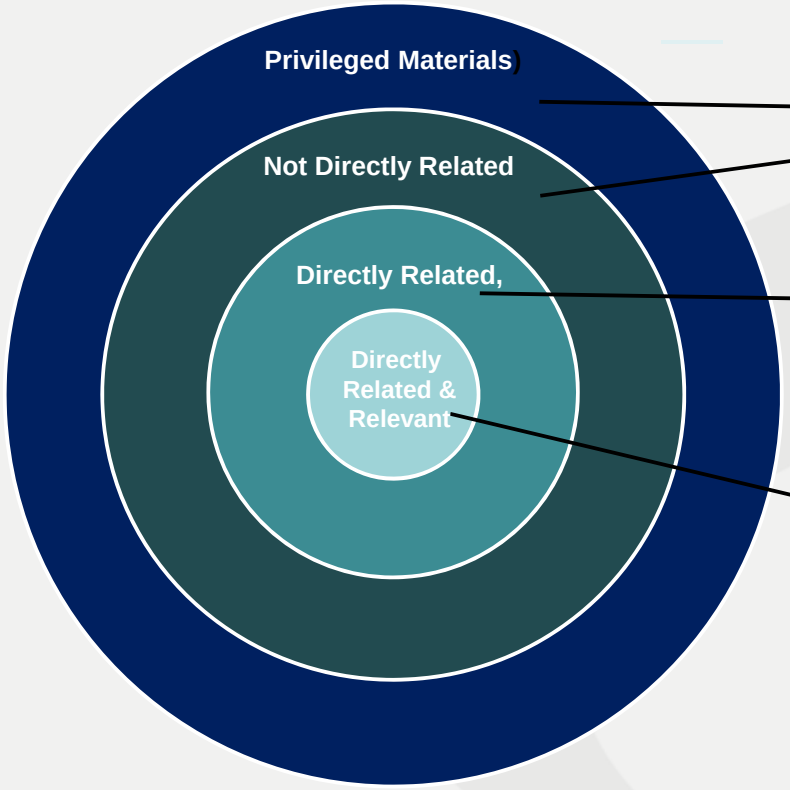
Evidentiary Levels for Inclusion



Don't include in Evidence Review or Investigative Report

Include in Evidence Review

Include in Evidence Review and Investigative Report

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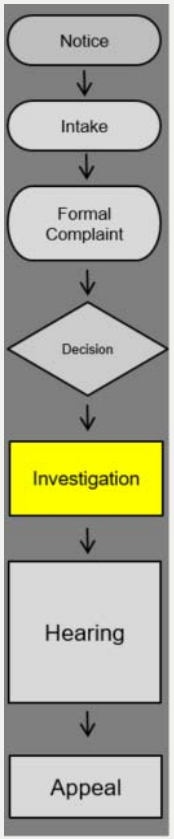
Directly Related



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

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

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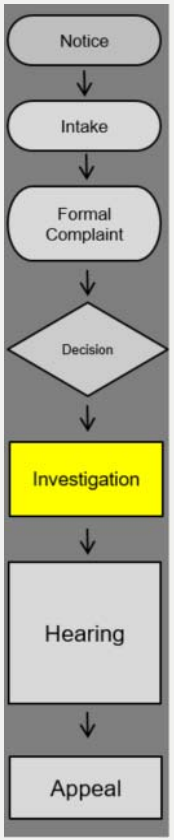
Directly Related



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

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

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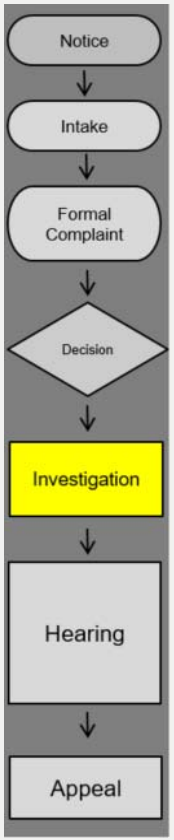
Directly Related vs. Relevant



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

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

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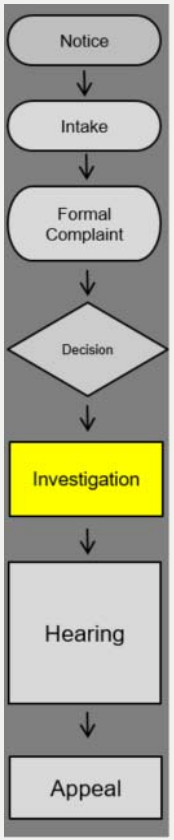
Directly Related



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

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

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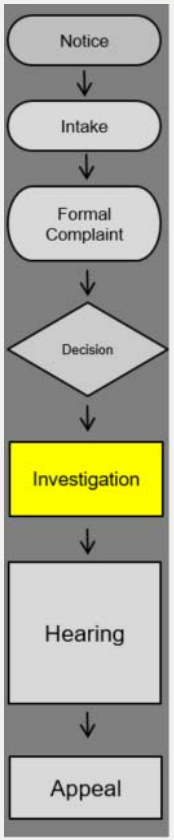
Directly Related



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

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

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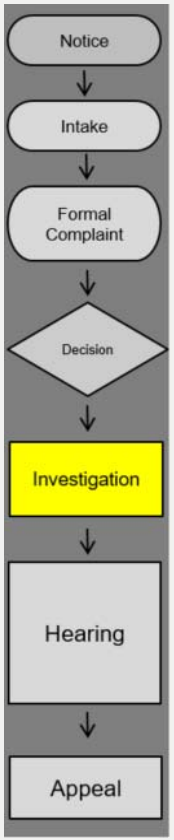
Directly Related



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

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

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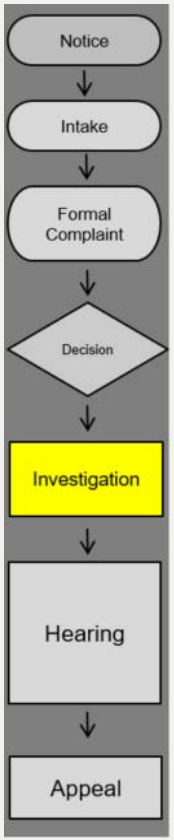
Scope of Parties' Review



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

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

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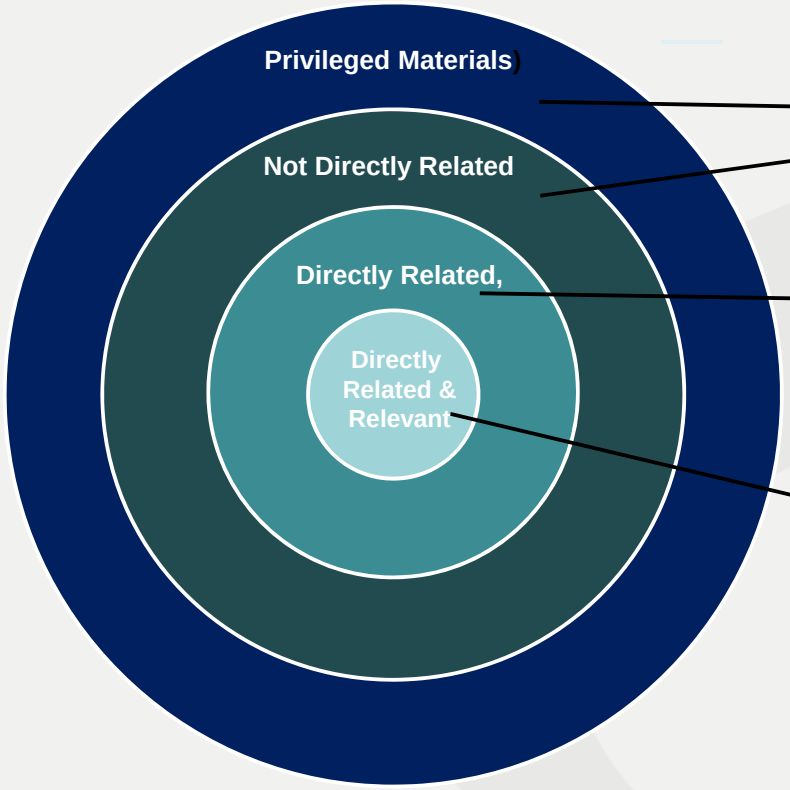
Evidentiary Levels for Inclusion



Don't include in Evidence Review or Investigative Report

Include in Evidence Review

Include in Evidence Review and Investigative Report

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INVESTIGATIVE REPORT

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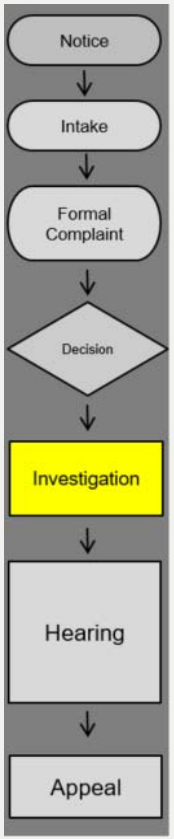
Investigative Report



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

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

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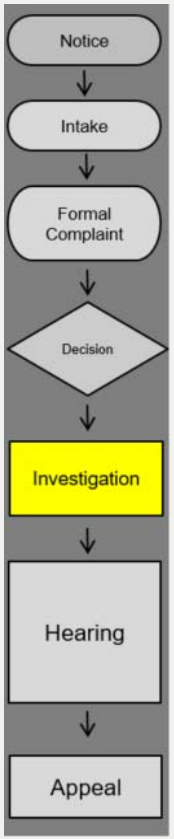
Investigative Report



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

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

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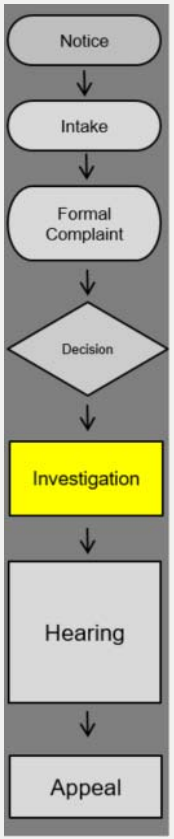
Investigative Report



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

Title IX Regulations May 19, 2020; §§ 106.45(b)(5)(vii); Preamble 85 F.R. 3010

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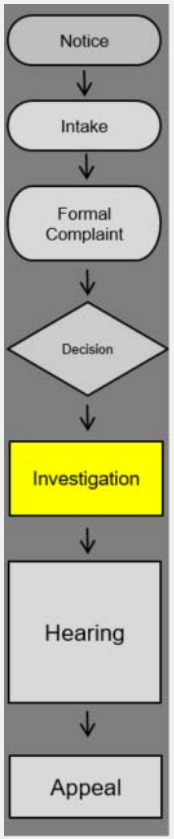
Investigative Report: Findings?



- The Department does not wish to prohibit the investigator from including recommended findings or conclusions in the investigative report.
- However, the decision-maker is under an independent obligation to objectively evaluate relevant evidence, and thus cannot simply defer to recommendations made by the investigator in the investigative report.
- If a recipient chooses to include a credibility analysis in its investigative report, the recipient must be cautious not to violate § 106.45(b)(7)(i), prohibiting the decision-maker from being the same person as the Title IX Coordinator or the investigator.

Title IX Regulations May 19, 2020; §§ 106.45(b)(5)(vii); Preamble 85 F.R.30308, 30436

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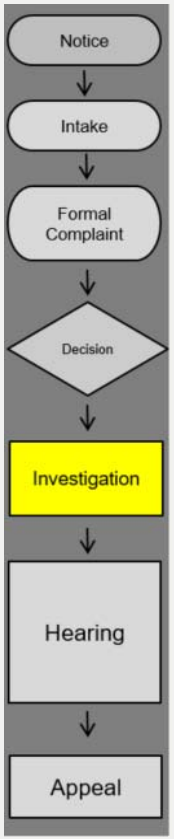
Investigative Report: Findings?



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

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

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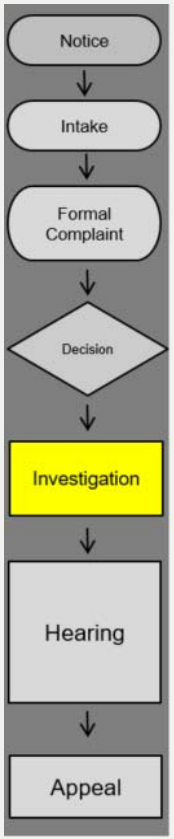
Revisiting Relevance



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

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

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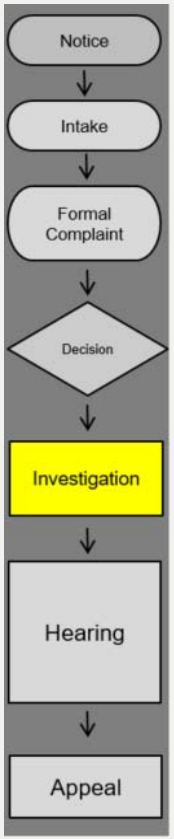
Investigative Report



- 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

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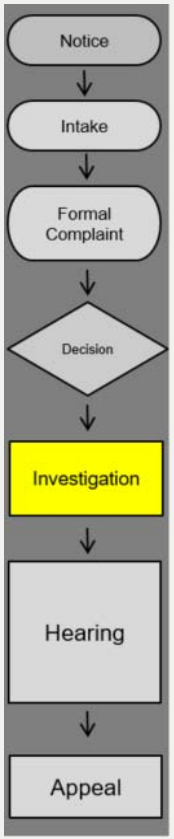
Investigative Report



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

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

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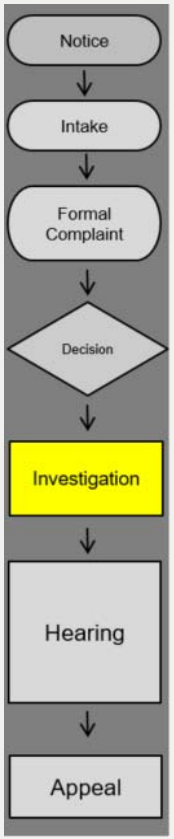
Investigative Report



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

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

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Practical Considerations & Effective Practices

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

REASONABLY PROMPT TIME FRAMES

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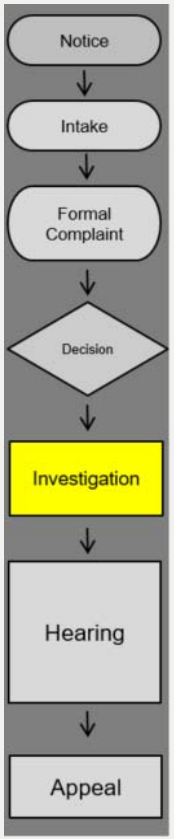
Reasonably Prompt Time Frames



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

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

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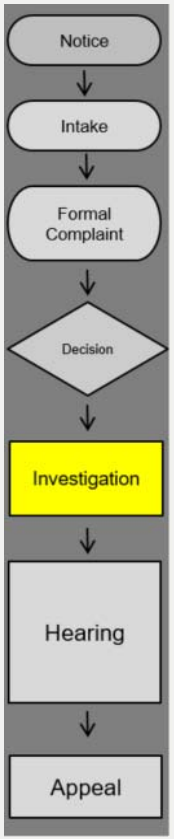
Reasonably Prompt Time Frames



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

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

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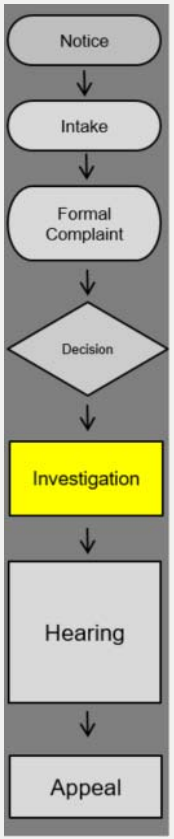
Reasonably Prompt Time Frames



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

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

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TRAINING

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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.

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

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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

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

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INVESTIGATIONS
PRACTICAL IMPLEMENTATION

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GETTING STARTED

THE ROLE OF THE INVESTIGATOR
CREATING AN INVESTIGATION PLAN
DRAFTING THE NOTICE OF INVESTIGATION

Role of the Investigator

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

Role of the Investigator

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

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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

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Developing an Investigative Plan

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

Gathering Background Documents

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

Developing an Investigative Plan

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

Developing an Investigative Plan

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

Developing an Investigative Plan

Investigation Cover Sheet

Internal Case No.		**Investigator # 1**	
		Investigator # 2	
Respondent Name		**Advisor**	
Complainant Name		**Advisor**	
NOI / Start Date		**Alleged Policy Violation(s):**	
30 Days			
45 Days			
60 Days			
Draft Report Date			
Final Report Date			
Hearing Date		**Hearing Chair**	

Complainant Witnesses / Contact Info	**Respondent Witnesses / Contact Info**
☐	☐
☐	☐
☐	☐
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☐	☐
Other Witnesses / Contact Info	
☐	☐
☐	☐
☐	☐
☐	☐
☐	☐
Documentary Evidence	
Internal Documentation	***Communications***
☐ Initial Report	☐ All communications between Parties
☐ Notes of follow-up meetings / discussions	☐ Texts/posts close in time to incident
☐ Notices of Investigation	☐ Communications about incident w/ others
☐ No Contact Order(s)	☐ Contemporaneous photos
☐ Documentation re: other interim measures	☐
☐ Scene photos / maps	☐
☐	☐ ***Records***
☐	☐ Medical records (need release)
☐	☐ Police / Public Safety Reports

Case: _____

Date opened: _____

Witness Name	Contact Info	Relationship to C	Relationship to R	Information they may have	Notes

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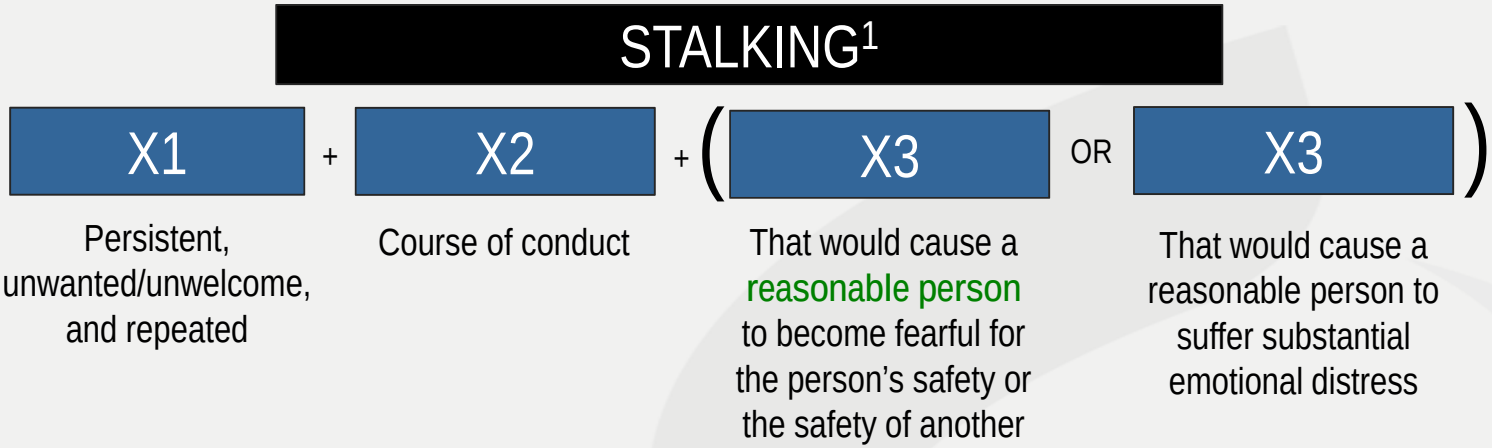
Map the Elements of the Alleged Conduct



[1] Source: Tufts University Sexual Misconduct Policy, p. 20 (accessed 7/10/2020)
Term in **green** is further defined in the policy

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Building a Timeline

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

Maintaining a Case Log

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

Notice of Investigation

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

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SETTING UP THE INTERVIEW

INITIAL COMMUNICATIONS

PREPARATION FOR INTERVIEW

ADDRESSING QUESTIONS AND BARRIERS TO PARTICIPATION

Initial Communications

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

Initial Communications

- Identify and address barriers to participation by:
  - Communicating care through tone and word choice
  - Using inclusive language
  - Addressing disability accommodations and interpreter services
  - Encouraging the use of available supports/resources

- Non-responsiveness
  - Make sufficient attempts at outreach and consider using different modes before concluding that someone is intentionally not responding
  - Think about other avenues/people for outreach

Initial Communications

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

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DYNAMICS OF SEXUAL AND GENDER-BASED HARASSMENT AND VIOLENCE

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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

Investigative Considerations

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

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Delay in Reporting

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

Barriers to Reporting

- Fear of not being believed
- Fear of retaliation
- Fear a loss of privacy
- Fear of being blamed
- Incident may be trivialized
- Incident may be minimized

- Self-doubt:
  - Who to tell?
  - How to report?
  - When to report?
  - Why report?
- Ensure process for reporting that is:
  - Known to victims
  - Convenient
  - Professional
  - Trauma-informed
  - Private

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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

Recantation

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

Direct Causes of Recantation

- Complainant is blamed by family, friends, or respondent
- Direct threats to complainant by respondent/others
- Indirect threats to complainant by community members (shunning)
- Complainant is stigmatized, labeled, or the object of ridicule on campus
- Pressure by any individual to recant
- Emotional manipulation by respondent

Indirect Causes of Recantation

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

INTERVIEW SKILLS

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Before You Begin

- Consider timing and location
- Think about:
  - What information the interviewee is likely to have about the incident
  - The interviewee's relationship to each party
  - Barriers to the interviewee's participation, including
    - Concerns about retaliation
    - Needing to navigate ongoing relationships
- Allow enough time for thorough exploration of the issues

The Interview Preamble

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

Forensic Interviewing Overview

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

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Narrative and Follow Up

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

Narrative and Follow Up

- Look beyond the initial set of information
- Ask yourself:
  - What would I want to know?
  - What is missing here?
  - What questions do I still have?
  - What external facts would corroborate or refute the information?
- Organization, knowledge, and fluency

Corroboration

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

Questioning Techniques

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

Questioning Techniques

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

Questioning Techniques

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

The Continuum Approach

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

Some Useful Phrases

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

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Informed and Effective Communication

- Adopt an open and conversational communication style
- Listen – don't assume
- Embrace the uncomfortable, the pause, and the silence
  - Take a break
  - Be patient
  - Reschedule
- Support the witness by:
  - Demonstrating desire to understand
  - Using reflective listening
  - Avoiding emphasis on "you"
  - Explaining the purpose of the questions
  - Allowing a support person to be present

Framing Difficult Questions

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

Closing the Interview

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

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Documenting Interviews

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

Gathering Physical Evidence

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

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

Gathering Physical Evidence

- Important to preserve evidence, whether or not law enforcement is involved
- Limited window for evidence collection
- Ensure the proper medical or forensic personnel handle forensic evidence

Gathering Physical Evidence

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

Gathering Physical Evidence

- Examine whether the University has a Memorandum of Understanding with local law enforcement
  - Information-sharing
  - Coordination of interviews
- Remember to photograph injuries, scene, clothing
- Draw a diagram of the scene
- Use experts where necessary
- Timeliness is key
  - Physical evidence can be lost, destroyed, or contaminated
  - Injuries heal quickly

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Principles to Remember

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

Investigative Report – Considerations

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

Investigative Report – Considerations

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

Investigative Report

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

Investigative Report

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

Investigative Report

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

Investigative Report

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

Investigative Report

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

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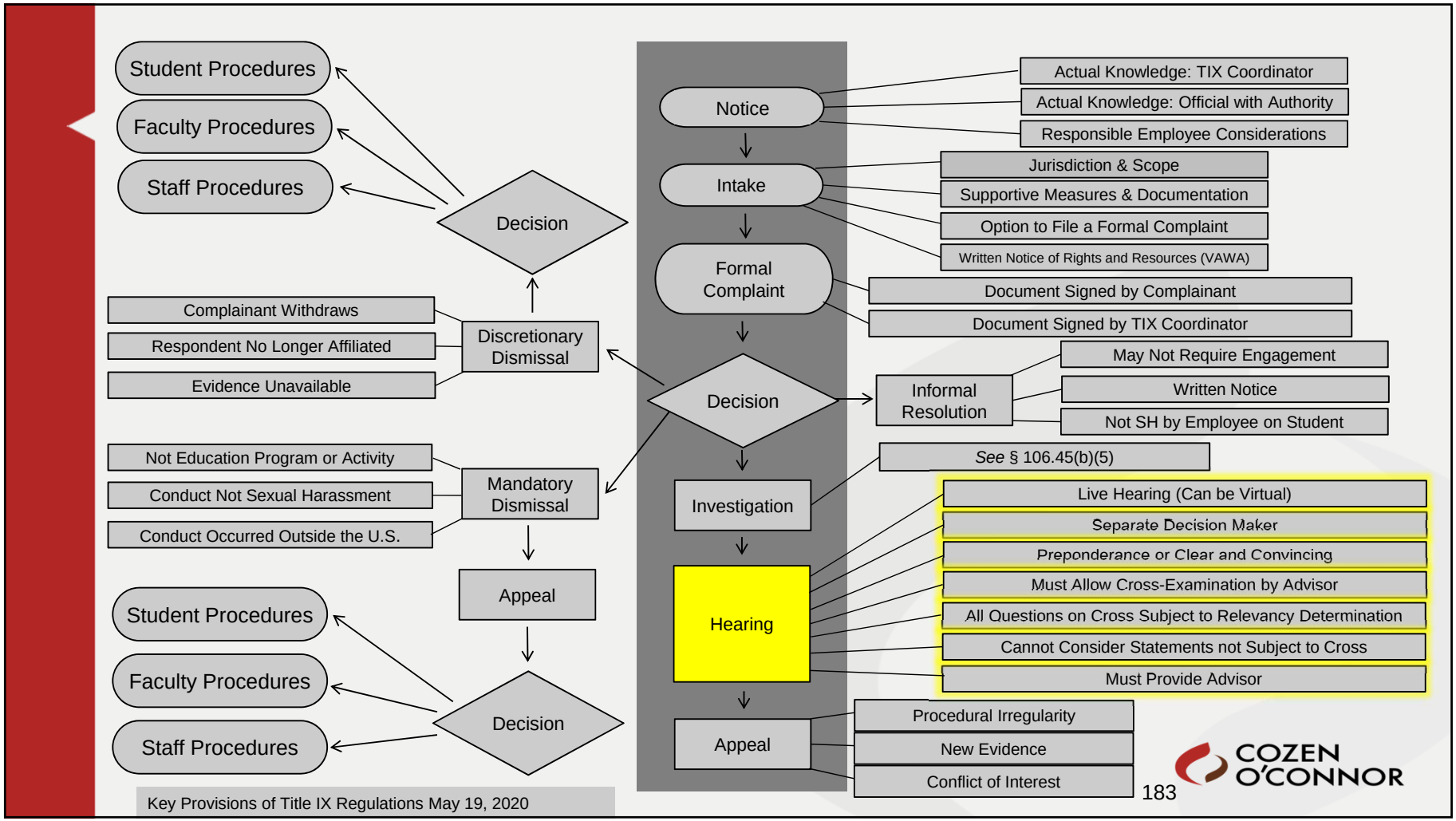
Student Procedures
Faculty Procedures
Staff Procedures
Decision
Complainant Withdraws
Respondent No Longer Affiliated
Evidence Unavailable
Discretionary Dismissal
Not Education Program or Activity
Conduct Not Sexual Harassment
Conduct Occurred Outside the U.S.
Mandatory Dismissal
Appeal
Student Procedures
Faculty Procedures
Staff Procedures
Decision
Notice
Intake
Formal Complaint
Decision
Investigation
Hearing
Appeal
Actual Knowledge: TIX Coordinator
Actual Knowledge: Official with Authority
Responsible Employee Considerations
Jurisdiction & Scope
Supportive Measures & Documentation
Option to File a Formal Complaint
Written Notice of Rights and Resources (VAWA)
Document Signed by Complainant
Document Signed by TIX Coordinator
Informal Resolution
May Not Require Engagement
Written Notice
Not SH by Employee on Student
See § 106.45(b)(5)
Live Hearing (Can be Virtual)
Separate Decision Maker
Preponderance or Clear and Convincing
Must Allow Cross-Examination by Advisor
All Questions on Cross Subject to Relevancy Determination
Cannot Consider Statements not Subject to Cross
Must Provide Advisor
Procedural Irregularity
New Evidence
Conflict of Interest
Key Provisions of Title IX Regulations May 19, 2020

HEARINGS

THE FINAL TITLE IX REGULATIONS

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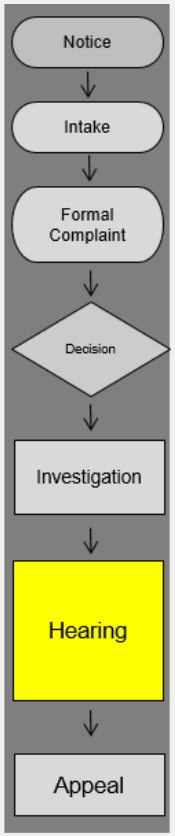

Hearings

- 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 issued May 19, 2020; § 106.45(b)(6)(i)

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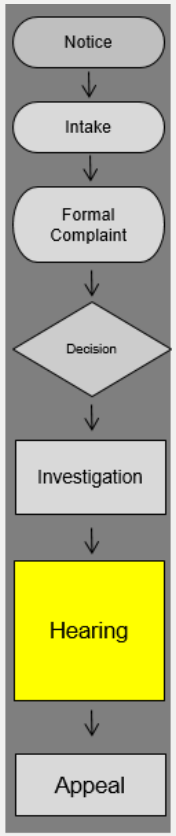

Hearings

- 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 issued May 19, 2020; § 106.45(b)(6)(i)

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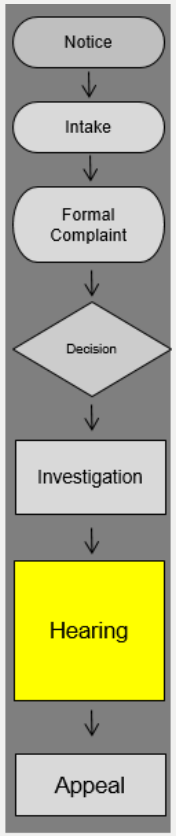

Cross-Examination by Advisor

- [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 issued May 19, 2020; Preamble at 1171

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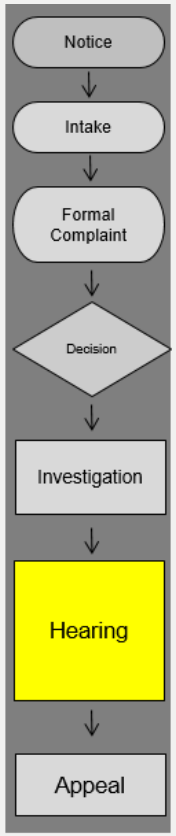

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Title IX Regulations issued May 19, 2020; Preamble at 85 F.R. 30346

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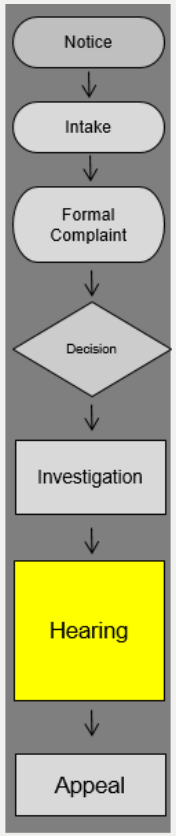

Hearings

- 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 issued May 19, 2020; § 106.45(b)(6)(i)

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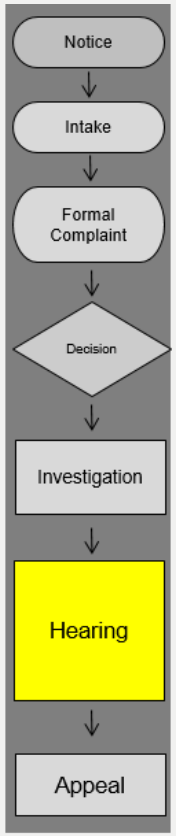

Tested for Credibility

- 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 issued May 19, 2020; Preamble at 85 F.R. 30349, 30345

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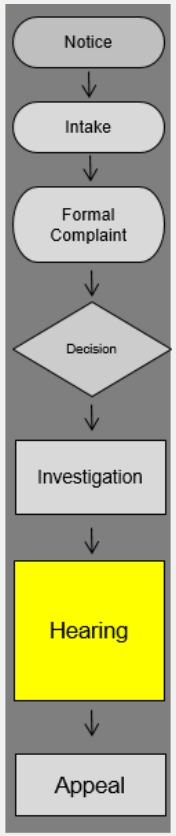

Statements

- [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 issued May 19, 2020; Preamble at 85 F.R. 30345, 30349

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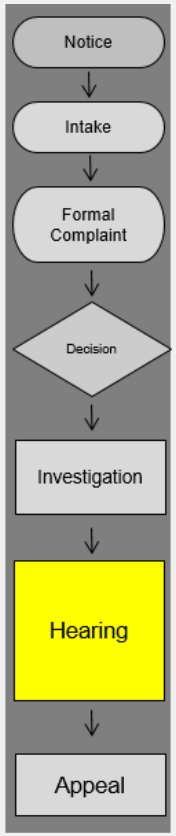

Bright-Line Rule

- 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 issued May 19, 2020; Preamble at 85 F.R. 30347

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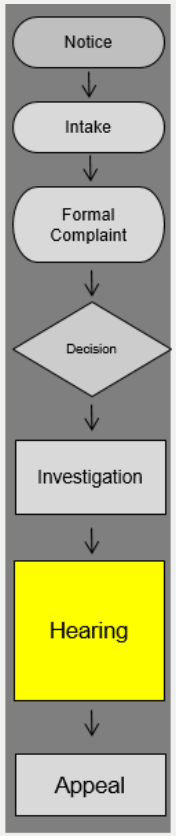

Fairness and Accuracy

- 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 issued May 19, 2020; Preamble at 85 F.R. 30347

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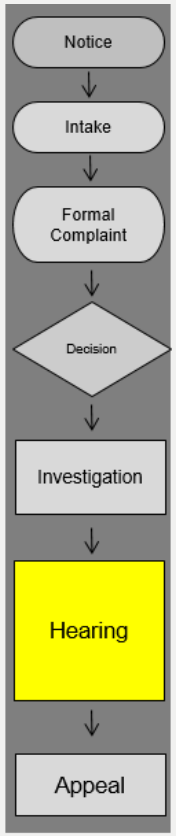

Submit to Cross-Examination

- 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 issued May 19, 2020; Preamble at 85 F.R. 30349

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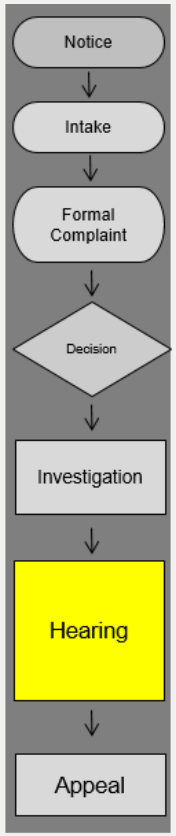

Limitation on Use of Statements

- 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 issued May 19, 2020; Preamble at 85 F.R. 30346

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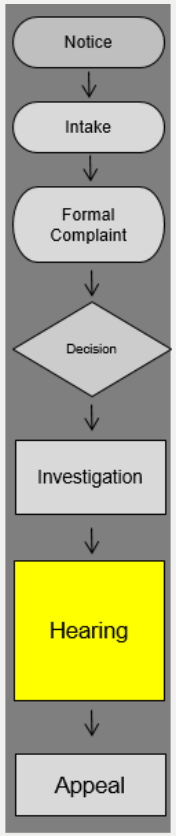

Hearings

- For recipients that are elementary and secondary schools, and other recipients that are not postsecondary institutions, the recipient's grievance process may, but need not, provide for a hearing.
- With or without a hearing, after the recipient has sent the investigative report to the parties … and before reaching a determination regarding responsibility, the decision-maker(s) must afford each party the opportunity to submit written, relevant questions that a part wants asked of any party or witness, provide each party with the answers, and allow for additional, limited follow-up questions.

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

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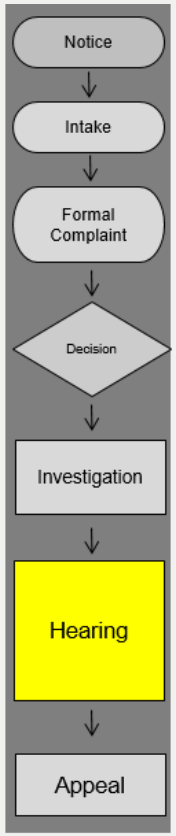

Determination of Responsibility

- 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 issued May 19, 2020; § 106.45(b)(7)

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HEARINGS
PRACTICAL IMPLEMENTATION

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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

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Standard of Proof

Beyond a Reasonable Doubt

Clear and Convincing Evidence

Preponderance of the Evidence

Some Evidence

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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

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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
- Separate questions of responsibility from sanctioning

Responding to Inadmissible Evidence

- Advance determinations of challenged evidence are critical to the proper functioning of the process
- In the event of a deliberate or inadvertent utterance of inadmissible information, how do you unring the bell?

Hearing Format

- Introductions by the Chair
- Opening statements by the parties
- Questions by the Panel of the parties
- Submission of questions by one party for review by the Panel to be asked, if appropriate, of the other party
- Questions by the Panel of witnesses
- Submission of questions by the parties for review by the Panel to be asked, if appropriate, of the witnesses
- Closing statements by the parties and Panel Chair

Advisors

- Each party can bring an advisor to the hearing.
- Consider prohibiting behavior that harasses, abuses, or intimidates either party, a witness, or individuals involved in resolving the complaint.
- Promptly and firmly redirect advisors who do not abide by the guidelines you set forth.

Role of the Advisor at the Hearing

- Ask relevant cross-examination questions of the other party and witnesses.
- 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.
- A recipient may establish restrictions on advisors' participation, as long as the restrictions apply equally to both parties.

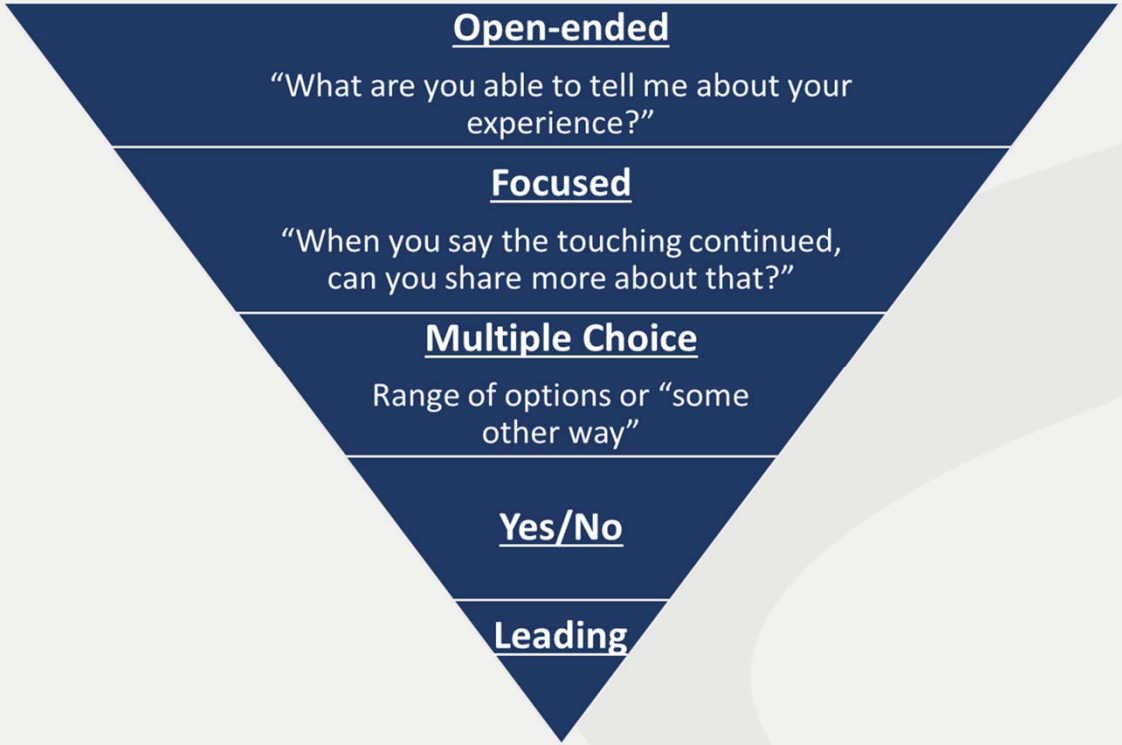
Participation Techniques

- 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



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DELIBERATIONS

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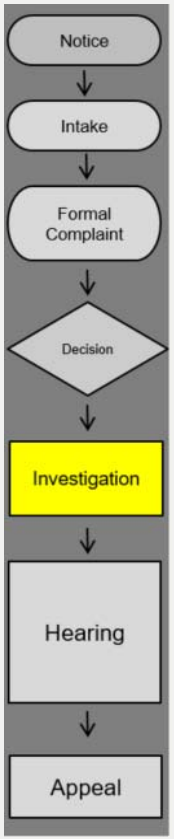
Deliberation Techniques

- Discuss ground rules and manner of deliberation in advance
- Be respectful to your fellow panel members
- Each panelist has an equal voice, irrespective of role on campus or in the community
- Be willing to listen to the perspectives of the other panelists

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

Content for Written Determination



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Title IX Regulations May 19, 2020; §§ 106.45(b)(5)(vii); Preamble 85 F.R. 30577

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SANCTIONS

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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

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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

Sanctioning Considerations

- Imposition of sanctions may be designed to:
  - Address the prohibited conduct that is found to have occurred, prevent its recurrence, and remedy its effects;
  - Support the University's educational mission and federal obligations.
- Typical sanctioning considerations:
  - Nature and severity of the conduct
  - Impact on the complainant or community
  - Prior conduct history

Sanctioning Actions

- Review of Tufts documents on sanctioning
  - Disciplinary Guidelines
  - Panel Decision Template
  - Appellate Panel Decision Template

Sanctioning Considerations

- Sanctions may include:
  - Educational, restorative, rehabilitative, and punitive components.
  - Some conduct is so egregious in nature, harmful to the individuals involved, or so deleterious to the educational process that it requires severe sanctions, including suspension or expulsion.

THE NOTIFICATION OF DECISION LETTER

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Requirements under Title IX Regulations

- 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
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  - Appeal procedures

Title IX Regulations May 19, 2020; §§ 106.45(b)(5)(vii); Preamble 85 F.R. 30577

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The Notification of Decision Letter

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

EVALUATING CREDIBILITY

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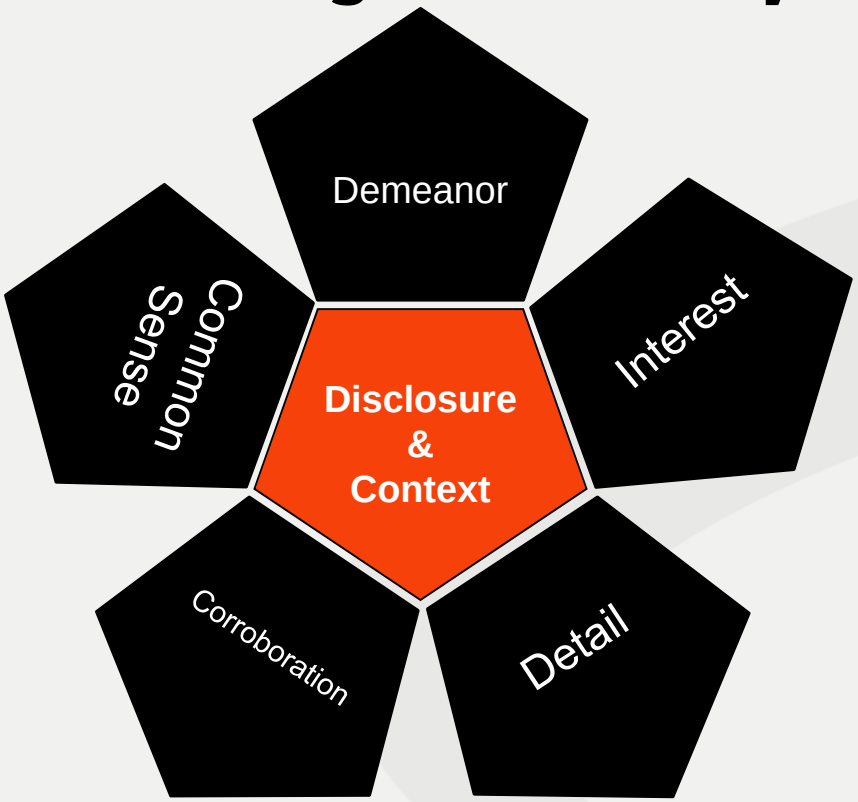
Evaluating Credibility



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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

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Corroboration

- Verify any statements obtained from witnesses by the first responding witness
- Obtain statements from witnesses not interviewed in the preliminary investigation
- Re-photograph injuries as appropriate
- Determine whether a search warrant is needed for any aspect of the investigation
- Identify and contact others who may have been harmed by the Respondent or observed relevant behaviors

Corroboration

- Consider other attendant details such as:
  - Size, age, power, authority and/or social status differential for Complainant and Respondent
  - Location of incident
    - Isolation of Complainant
    - Potential witnesses or reasons for lack of witnesses
  - Any change in either party's demeanor, personality, or routine after the incident
    - E.g., roommate noticed that Complainant began wearing baggy clothes, 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?

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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?

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Credibility Considerations from OCR

2001 Revised Sexual Harassment Guidance

- Based on the totality of the circumstances
- Witness statements
- Level of detail and consistency
- Existence or absence of corroborative evidence
- Prior bad acts and/or prior false reports
- Reaction or behavior after the alleged incident
- Behavioral changes
- Prompt complaint/disclosure
- Other contemporaneous evidence

See page 9 of the 2001 Revised Sexual Harassment Guidance

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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)

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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 Complainant may not be believed rather than that the alleged harassment did not occur.

...

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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

Gina Maisto Smith

gmsmith@cozen.com
215-266-9650

Leslie Gomez

lgomez@cozen.com
215-665-5546

Maureen Holland

mholland@cozen.com
610-331-3600

Peter Lim

plim@cozen.com
215-687-2116

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Use of Slides

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