

# **A First Look at the New Title IX Regulations**

**Summary of Key Provisions and  
Practical Implementation Considerations**

Presented By:

**The Institutional Response Group | Cozen O'Connor**

**Gina Maisto Smith, Chair**

**Leslie M. Gomez, Vice Chair**

**May 21, 2020 | Updated June 3, 2020**



# Today's Webinar

- This is the first in a series of webinars hosted by Cozen O'Connor's Institutional Response Group (IRG).
- Today's session will focus, at a high level, on the significant changes required — and challenges posed — by the new Title IX regulations.
- This session will frame the “musts,” the “shoulds,” and the “mays” and help educational institutions develop a plan for revising policies and procedures to incorporate required elements while still embodying institutional values.

# Introducing the Webinar Series

Subsequent IRG webinars will focus on specific aspects of the regulations, as written and as applied, including:



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Subsequent IRG webinars will focus on specific aspects of the regulations, as written and as applied, including:

6

## Hearings Part 2

Cross-examination and evidentiary issues and procedures

7

## Informal Resolutions

Effective Practices

8

## Corollary Considerations

Employees cases, academic medical centers, and intersections with other state and federal law

9

## Trainings & Documentation

Who and when?  
Approach  
Content

10

## Clery and VAWA

Intersections between Clery/VAWA and Title IX



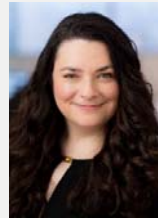
# Institutional Response Group



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# Agenda

- Background and Frameworks
- Key Provisions
- Practical Considerations and Challenges
- Implementation and Considerations

# FRAMING THE CONVERSATION

# Now What?



# Silver Lining



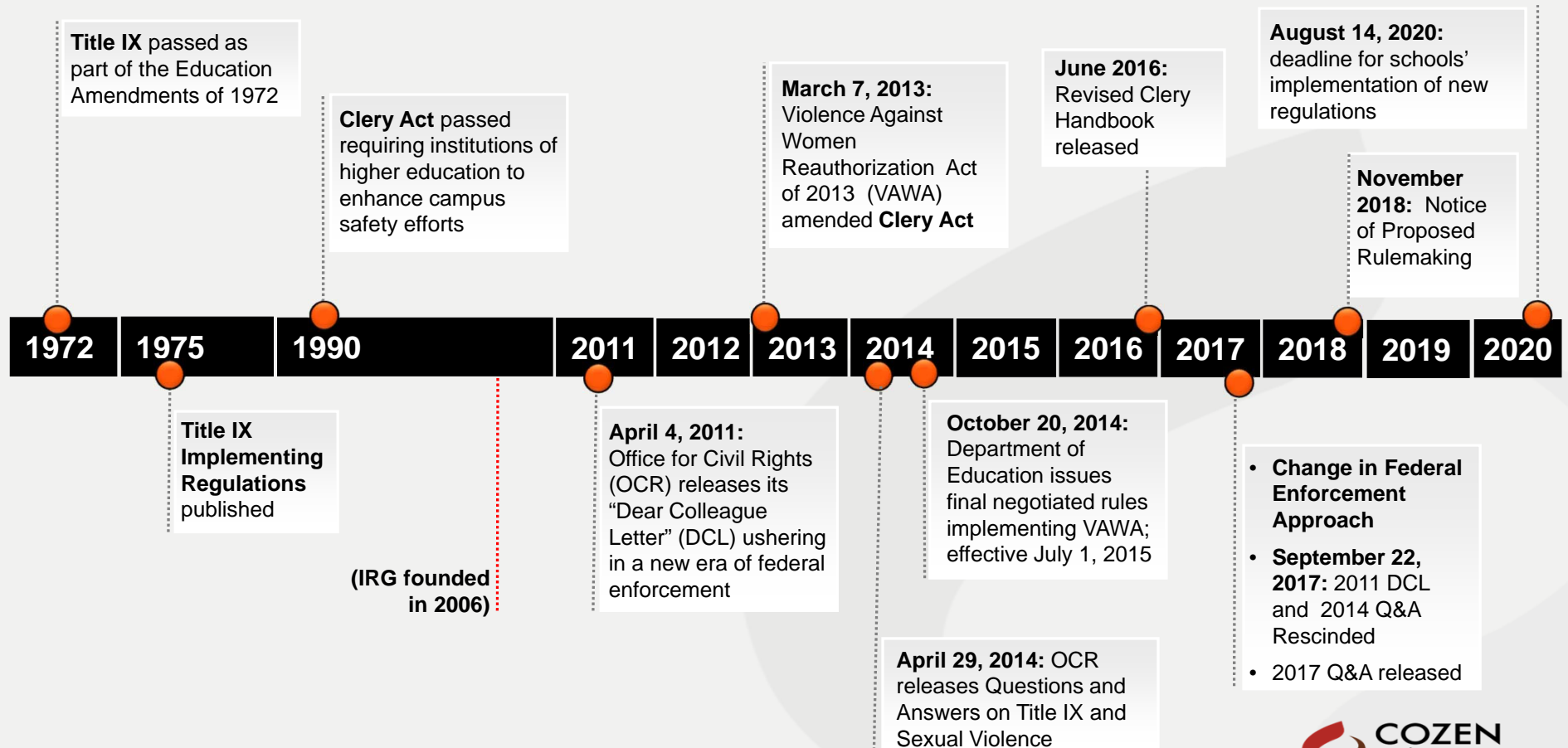
# Maintaining Calm



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# Evolution of Federal Legislation and Guidance



# Approach to Mastery

- Legal
  - New definitions
  - Analysis and synthesis
- Procedural Requirements
  - Required elements
  - Attendant legal issues
- Practical Implementation
  - Communication
  - Customized considerations





# Approach to Implementation

## Crafting

- Gather key stakeholders and current policies and procedures
- Form working group for planning and implementation
- Review new legal requirements and compare with current practices

## Drafting

- Update written policies, procedures, templates and forms
- Prepare communications plan and draft communications to constituent groups
- Review web and print materials to ensure consistent messaging

## Staffing

- Realign current roles or recruit/hire to fulfill all required functions
- Ensure all staff members receive training; maintain training materials for publication online
- Reinforce partnerships with key units and ensure consistent protocols for case referrals

## Grafting

- Roll out training and education on new policies, procedures, and protocols
- Develop awareness campaign to educate community about resources, supports, and reporting options
- Create mechanism to gather feedback about gaps in process, questions or concerns

# Implementation Rubric

- Law
- Regulations
- Guidance
- Preamble and commentary
- OCR webinars, charts, blog
- Policy
- Higher education experience
- Institutional values



# New Title IX Regulations

- 2033 page document issued by the U.S. Department of Education, Office for Civil Rights (OCR) on May 6, 2020
- Includes significant resource materials: a preamble, executive summary, overview of public comments, discussion of directed questions, regulatory impact analysis and other content
- Final regulations are located at page 2008-2033
- Official version (2082 pages) were released May 19, 2020
- Regulations must be implemented by **August 14, 2020**

# Regulations Formally Incorporate Sexual Harassment as a Form of Sex Discrimination

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

Title IX Regulations issued May 6, 2020; Executive Summary, pp. 15-16

# Regulations: “Legally Binding Obligations”

- “Because these final regulations represent the Department’s interpretation of a recipient’s legally binding obligations, **rather than best practices**, recommendations, or guidance, these final regulations focus on **precise legal compliance requirements** governing recipients.”

## Regulations: “Best Practices”

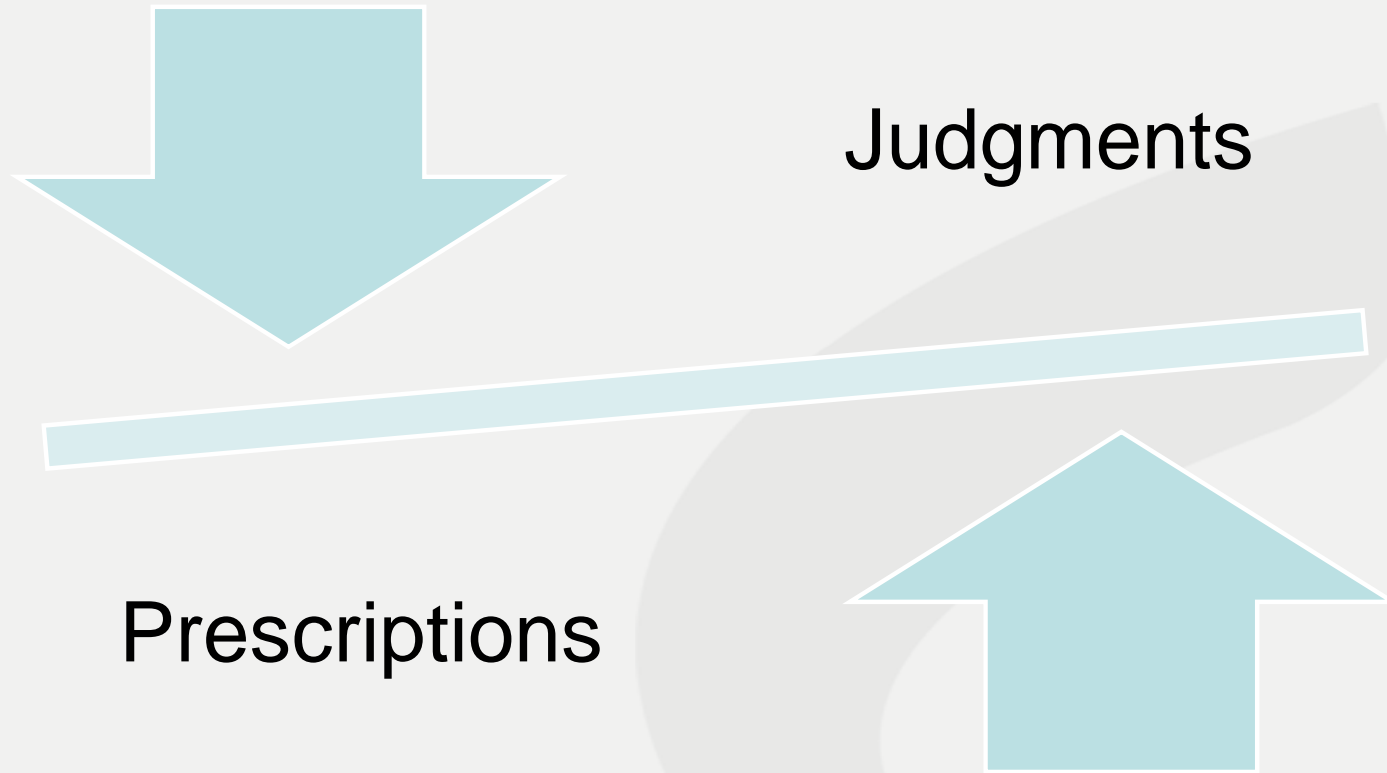
- “These final regulations leave recipients the **flexibility to choose to follow best practices and recommendations** contained in the Department’s guidance, or similarly, best practices and recommendations made by non-Department sources, such as Title IX consultancy firms, legal and social sciences scholars, victim advocacy organizations, civil libertarians and due process advocates and other experts.”

# Guidance

- Preamble
  - Explains the basis and purpose for the final rule
  - Serves a guidance function
- Preamble on Prior Guidance
  - “The 2017 Q&A along with the 2001 Guidance, and not the withdrawn 2011 Dear Colleague Letter, remain the baseline against which these final regulations make further changes to enforcement of Title IX obligations.”
  - “Title IX policies and procedures that recipients have in place due to following the 2001 Guidance and the withdrawn 2011 Dear Colleague Letter remain viable policies and procedures for recipients to adopt while complying with these final regulations.”

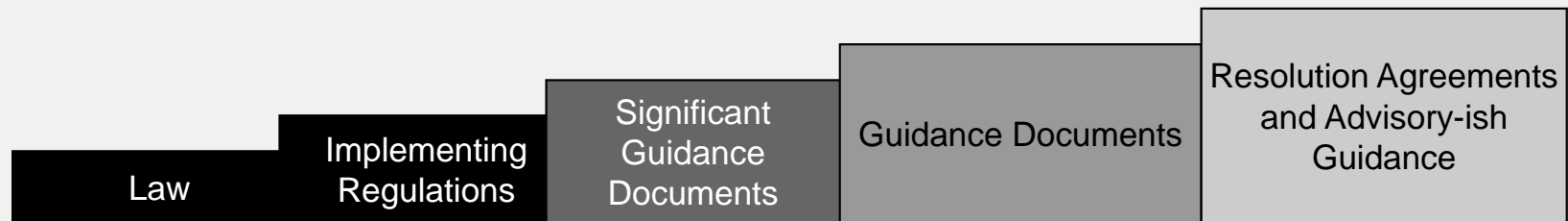
Title IX Regulations issued May 6, 2020; Preamble at 17, 18

# Balancing



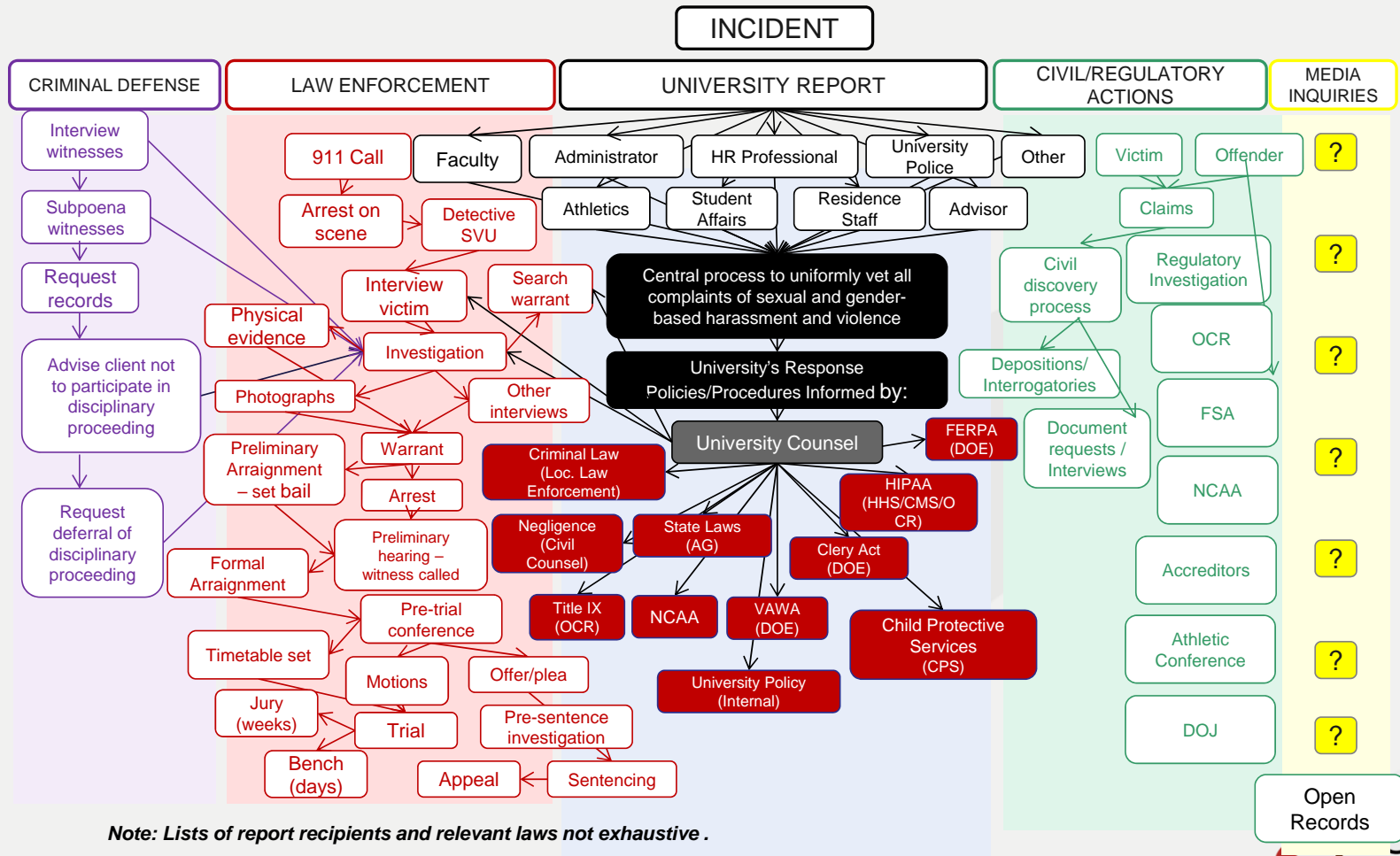


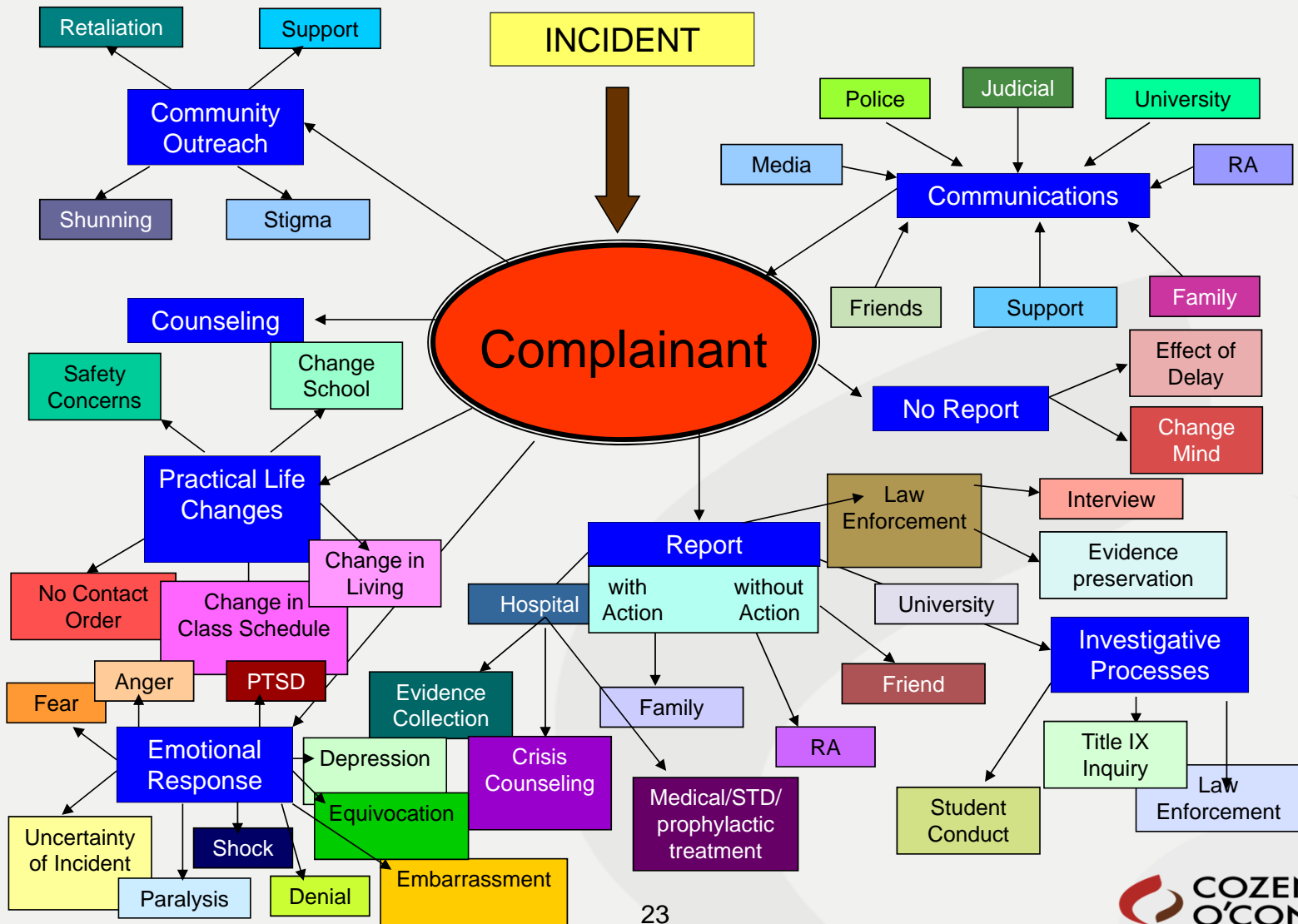
# The Hierarchy

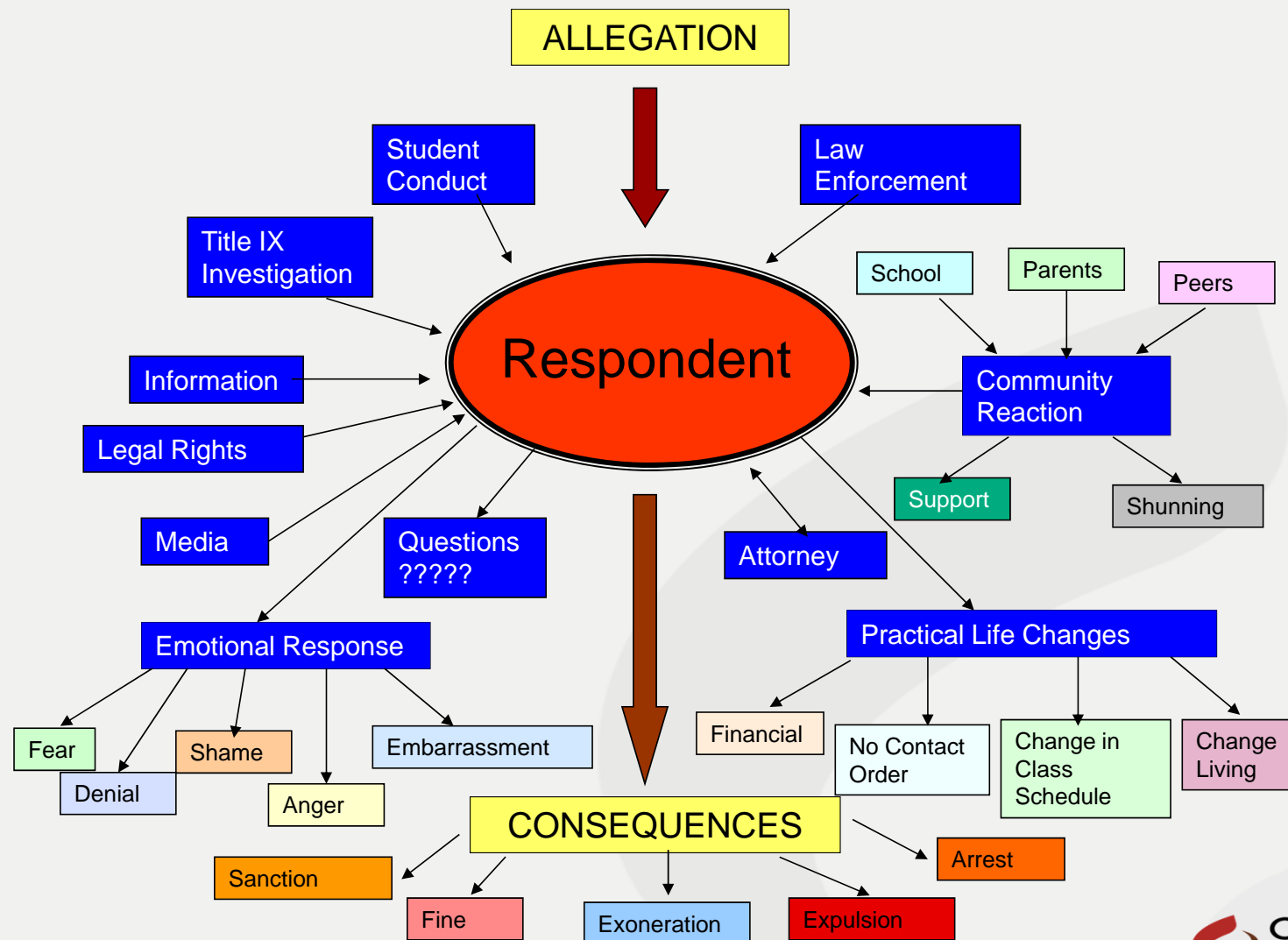


- Title IX
- Title IX Implementing Regulations (2020)
- 2011 Dear Colleague Letter (Rescinded)
- 2014 Q&A (Rescinded)
- 2017 Q&A
- Preamble to Title IX Implementing Regulations
- 1997 Sexual Harassment Guidance
- 2001 Revised Sexual Harassment Guidance
- Dear Colleague Letters
  - Bullying
  - Hazing
  - Title IX Coordinator
  - Retaliation
- Resolution Agreements
- OCR aids and tools
- OCR webinars
- OCR blog

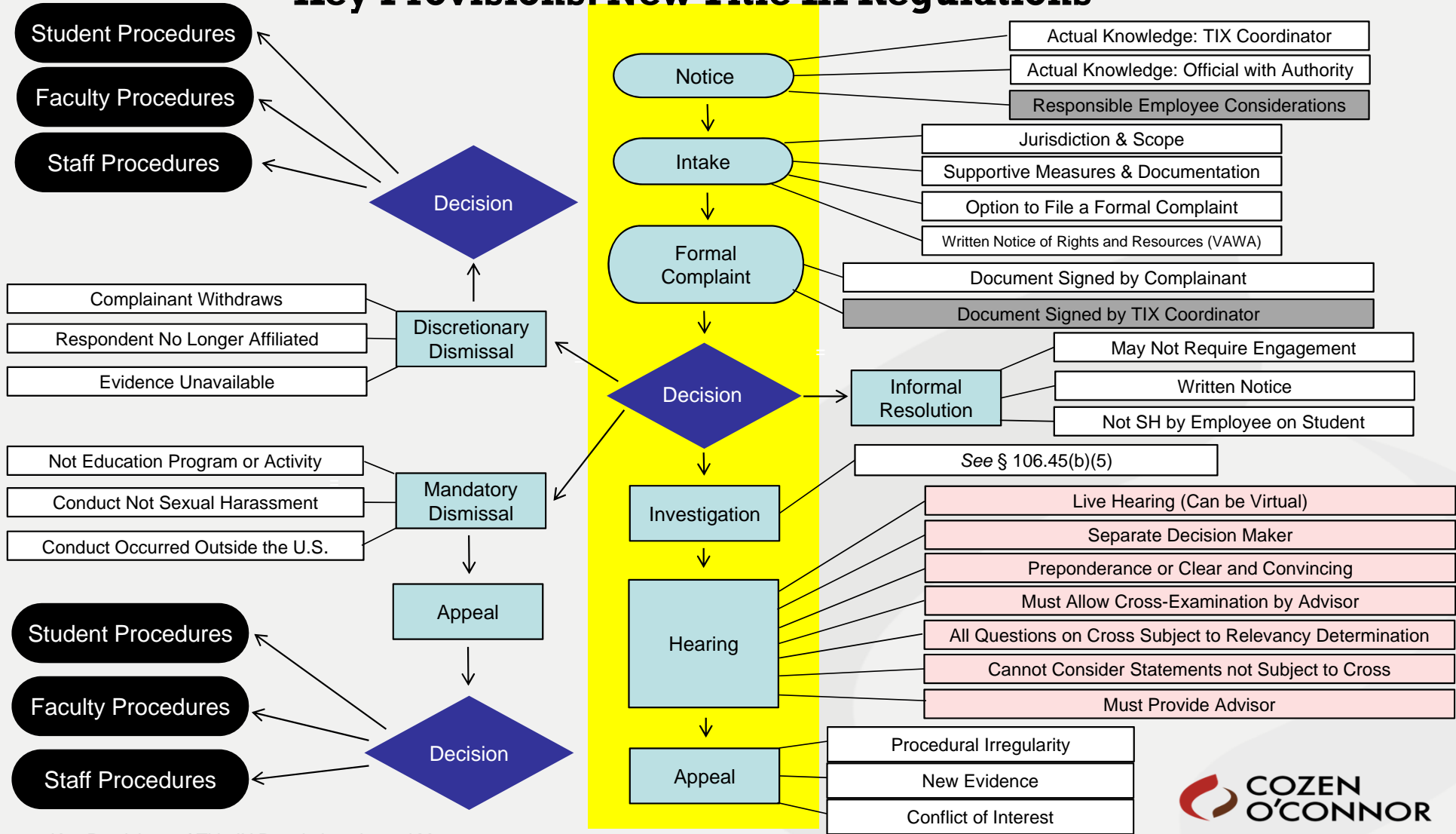
# The Challenge of the Context







# Key Provisions: New Title IX Regulations



Key Provisions of Title IX Regulations issued May 6, 2020;



# Overview of Significant Provisions

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

# Impact of Final Regulations

## What is (or Should be) the Same

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

## What is Significantly Different

- Jurisdiction/scope
- Live hearing
- Cross examination by the advisor
- Proponent of a statement must be subject to cross-examination
- Recipient must provide advisor

# THE BIG THREE



# Implementing Regulations

## Regulations Promulgated in 1975

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

## 2020 Final Regulations

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

### Relevant Regulations Sections:

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

Notice of Non-Discrimination: § 106.8(b)

Grievance Procedures: § 106.8(c)

# Designation of Coordinator

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

Title IX Regulations issued May 6, 2020; § 106.8(a)

# Dissemination of Policy

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

Title IX Regulations issued May 6, 2020; § 106.8(b)

# Adopt Grievance Procedures

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

# **SHIFT IN APPROACH & FRAMING PRINCIPLES**

# Framing Principles

1

“A recipient’s treatment of a complainant or a respondent in response to a formal complaint of sexual harassment may constitute discrimination on the basis of sex under title IX.”

2

“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.”

3

“A recipient’s response must treat complainants and respondents equitably by offering supportive measures . . . to a complainant, and by following a grievance process . . . before the imposition of any disciplinary sanctions or other actions that are not supportive measures . . . against a respondent.”

4

“A recipient is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances.”

5

“If the Assistant Secretary finds that a recipient has discriminated against persons on the basis of sex in an education program or activity under this part, or otherwise violated this part, such recipient must take such remedial action as the Assistant Secretary deems necessary to remedy the violation.”

# Framing Principles

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“A recipient’s treatment of a complainant or a respondent in response to a formal complaint of sexual harassment may constitute discrimination on the basis of sex under title IX.”

Title IX Regulations issued May 6, 2020; § 106.45(a)

# Framing Principles

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“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.”

Title IX Regulations issued May 6, 2020; § 106.45(a)



## Framing Principles

3

“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.”

# Framing Principles

4

“A recipient is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances.”

Title IX Regulations issued May 6, 2020; § 106.45(a)

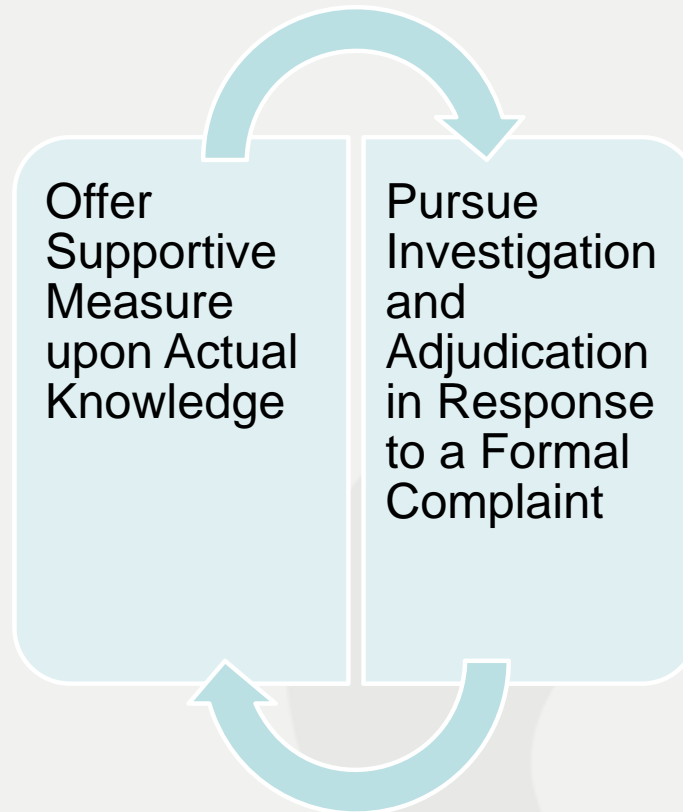
## Framing Principles

5

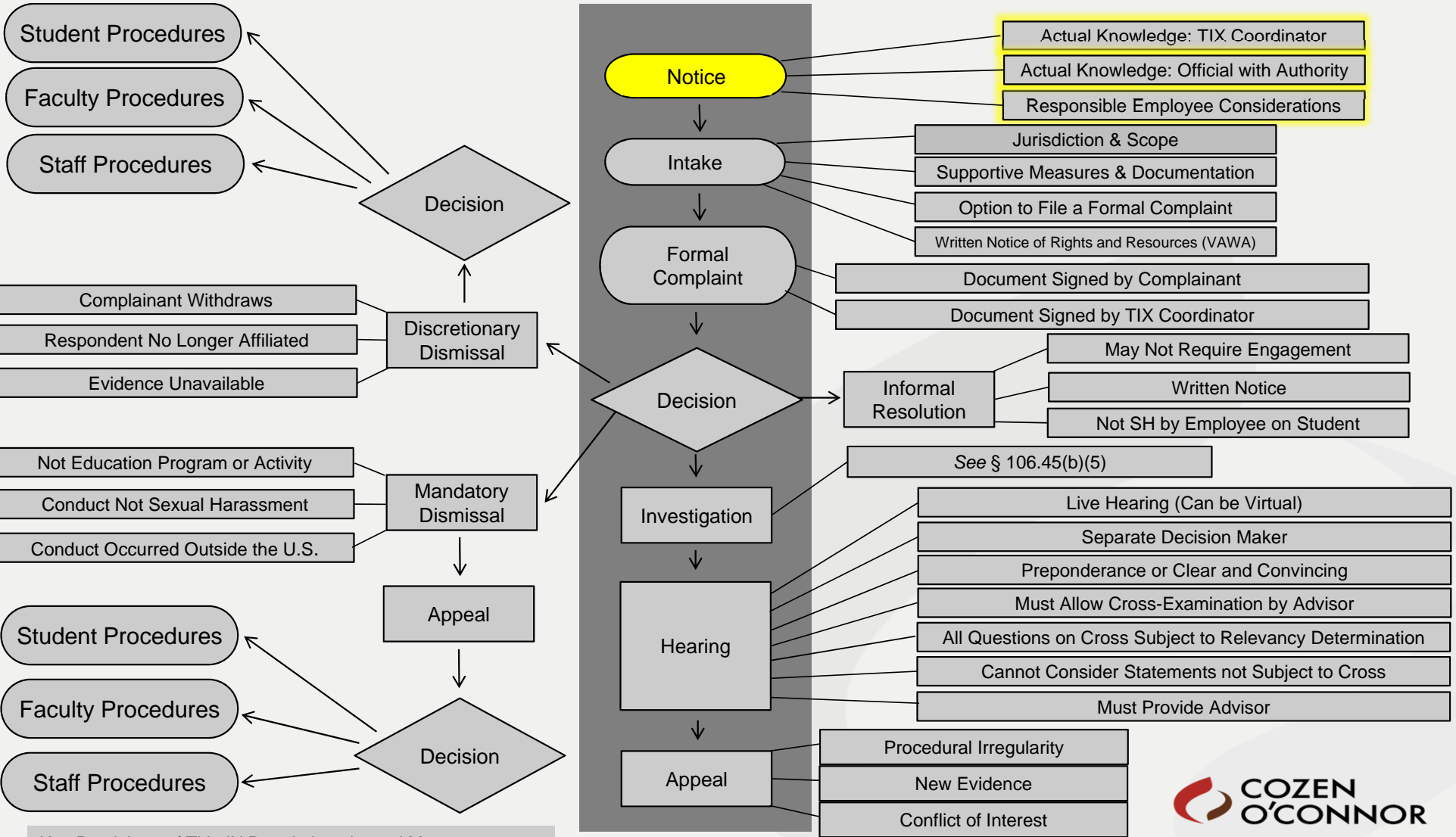
“If the Assistant Secretary finds that a recipient has discriminated against persons on the basis of sex in an education program or activity under this part, or otherwise violated this part, such recipient must take such remedial action as the Assistant Secretary deems necessary to remedy the violation.”

Title IX Regulations issued May 6, 2020; § 106.45(a)

# Understanding Two Key Provisions



# NOTICE

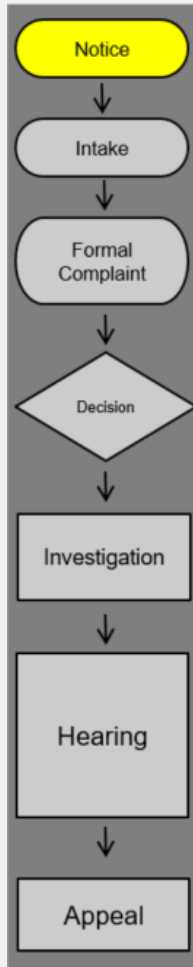


Key Provisions of Title IX Regulations issued May 6, 2020;

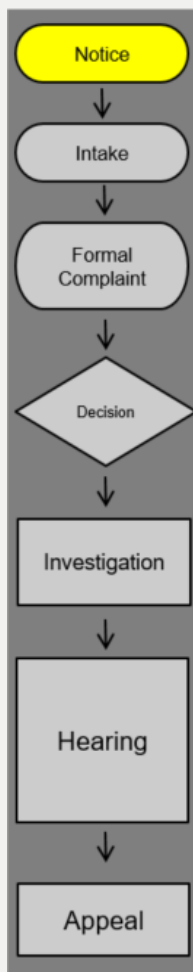


# Notice

- Notice to the **Title IX Coordinator** or any official of the recipient who has **authority to institute corrective measures** on behalf of the recipient, or to any employee of an elementary or secondary school



Title IX Regulations issued May 6, 2020; § 106.30(a)

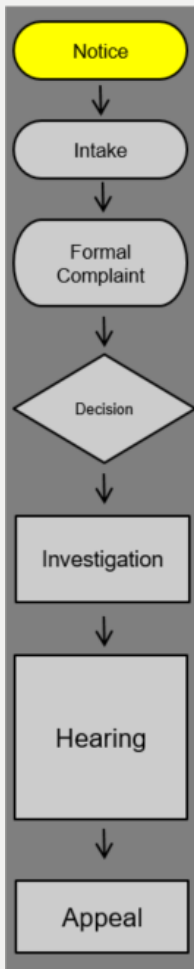


# Notice

- **Actual knowledge**, not constructive notice or vicarious liability
  - Can come from personal observation, hearing about it from a complainant or third-party, receiving a written or oral complaint, or by any other means
- The mere ability or obligation to report sexual harassment or to inform a student about how to report sexual harassment, or having been trained to do so, does not qualify an individual as one who has authority to institute corrective measures on behalf of the recipient.

Title IX Regulations issued May 6, 2020; § 106.30(a)





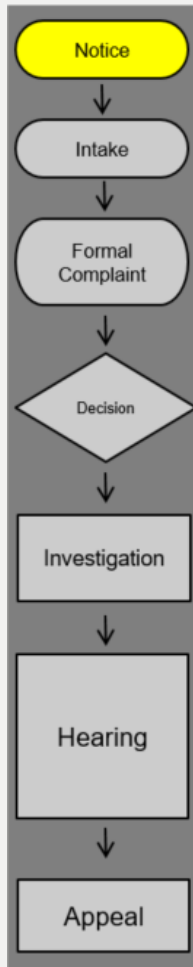
## Notice: Institutional Response

When a school has **notice**, the Title IX Coordinator must:

1. Promptly contact the complainant to discuss the availability of supportive measures
2. Consider the complainant's wishes with respect to supportive measures
3. Inform the complainant of the availability of supportive measures with or without the filing of a formal complaint
4. Explain to the complainant the process for filing a formal complaint.

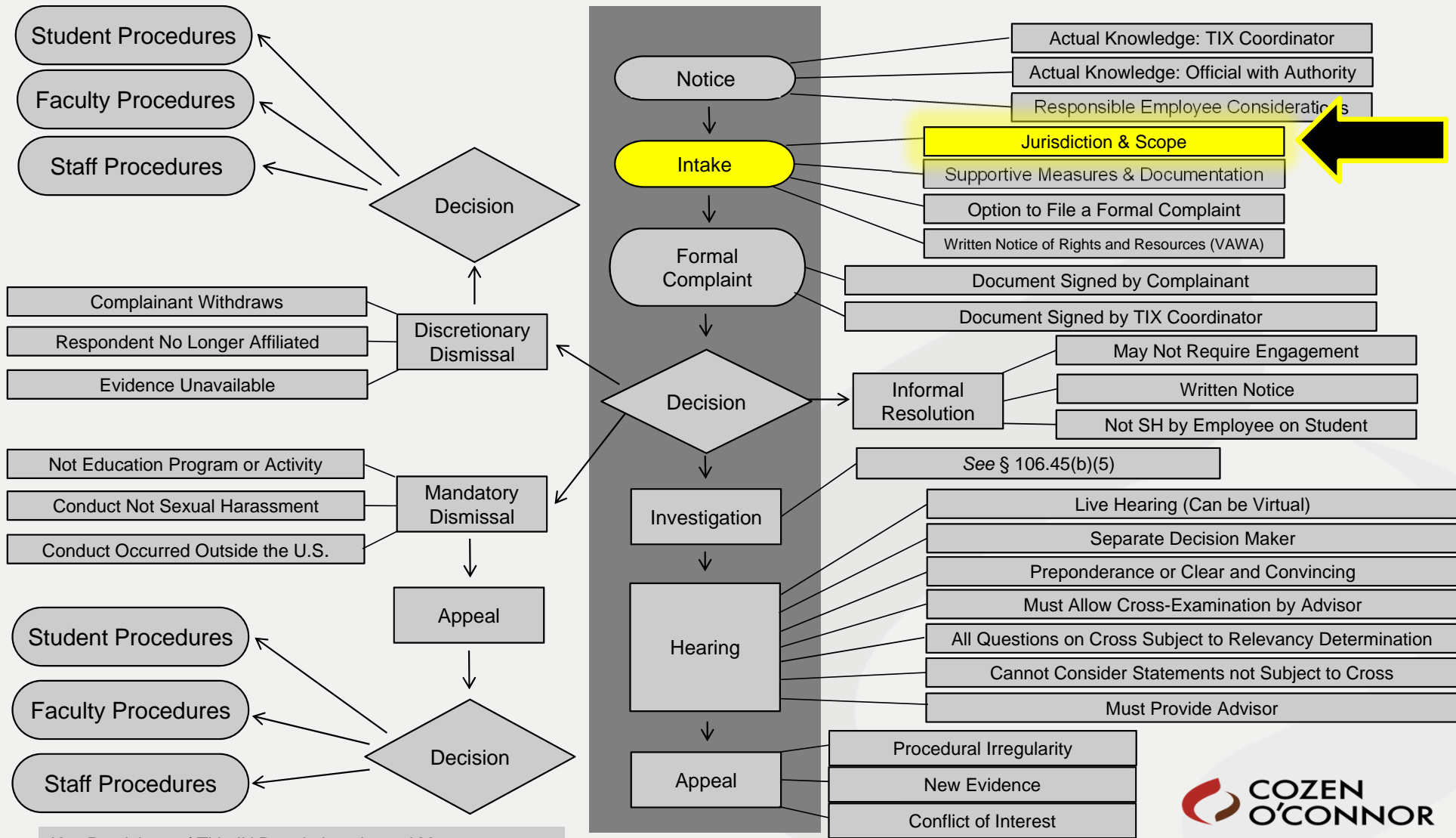
Title IX Regulations issued May 6, 2020; § 106.44(a)

# Practical Considerations & Challenges



- Responsible Employee
  - Higher education institutions have the option to continue to designate responsible employees and require reporting
  - How should an institution decide whether to maintain or move away from responsible employee reporting?
- Centralized Reporting
  - Because responsible employee reporting is no longer required, how can institutions ensure they have necessary information to assess for repeat instances of sexual harassment by a person or within a group?
- Training and Resetting Expectations

# **JURISDICTION AND SCOPE**



Key Provisions of Title IX Regulations issued May 6, 2020;



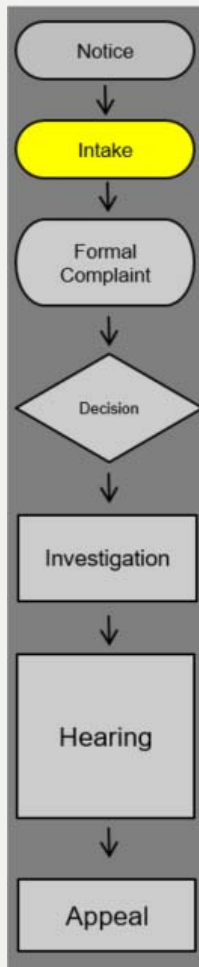
# Jurisdiction: Framing Principle

2

“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.”

Title IX Regulations issued May 6, 2020; § 106.45(a)

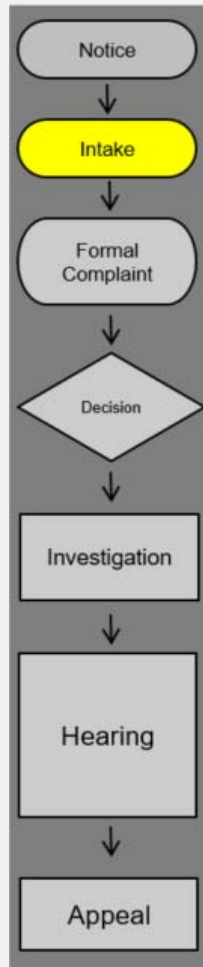
# Jurisdiction: Education Program or Activity



- “**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
  - Any building **owned or controlled by a student organization that is officially recognized** by a postsecondary institution

Title IX Regulations issued May 6, 2020; § 106.44(a)

# Jurisdiction: Who



- Title IX statute applies to **any person**, in the United States, on the basis of sex, who is excluded from participation in, denied the benefits of, or is subjected to discrimination **under any education program or activity** receiving federal financial assistance.
- **Program or activity and program** means all of the operations of—
  - A college, university, or other postsecondary institution, or a public system of higher education; or
  - A local educational agency (as defined in 20 U.S.C. 8801), system of vocational education, or other school system

Title IX of the Education Amendments of 1972; § 20 U.S.C. 1681;  
Title IX Implementing Regulations; § 106.2(h)

# Jurisdiction: Where



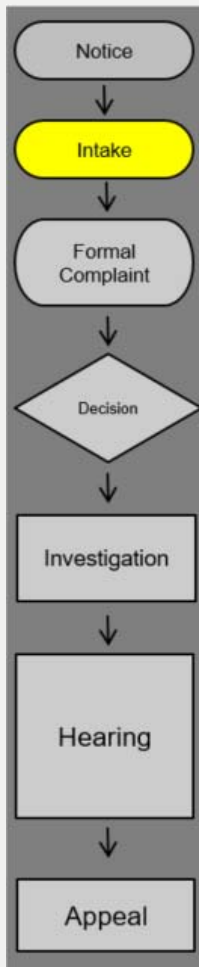
- Applies only to sex discrimination occurring **against a person in the United States** in an education program or activity
  - “The Department reiterates that the ‘education program or activity’ limitation in the final regulations
    - does not create or apply a geographic test
    - does not draw a line between ‘off campus’ and ‘on campus,’ and
    - does not create a distinction between sexual harassment occurring in person versus online.”

Title IX Regulations issued May 6, 2020; § 106.8(d); Preamble at 649



# Jurisdiction: On Campus

“[A]ll of the operations’ of a recipient (per existing statutory and regulatory provisions), and the additional ‘substantial control’ language in these final regulations, clearly include all incidents of sexual harassment occurring on a recipient’s campus.”



Title IX Regulations issued May 6, 2020; Preamble at 624

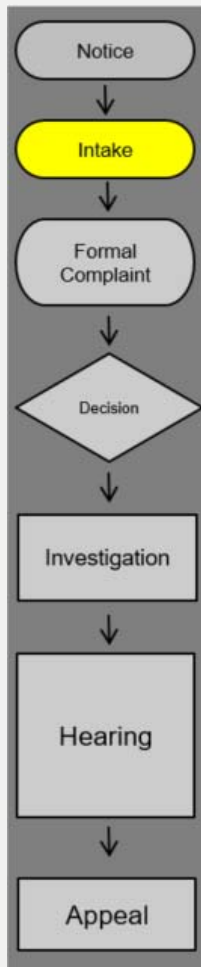
# Jurisdiction: Off Campus



- “[T]he statutory and regulatory definitions of program or activity along with the revised language in § 106.44(a) clarify that a recipient’s Title IX obligations extend to sexual harassment incidents that occur off campus **if any of three** conditions are met:
  - if the off-campus incident occurs as part of the recipient’s **‘operations’** pursuant to 20 U.S.C. 1687 and 34 CFR 106.2(h);
  - if the recipient exercised **substantial control over the respondent and the context** of alleged sexual harassment that occurred off campus pursuant to § 106.44(a); or
  - if a sexual harassment incident occurs at an off-campus building **owned or controlled by a student organization officially recognized** by a postsecondary institution pursuant to §106.44(a).”

Title IX Regulations issued May 6, 2020; Preamble at 624-5

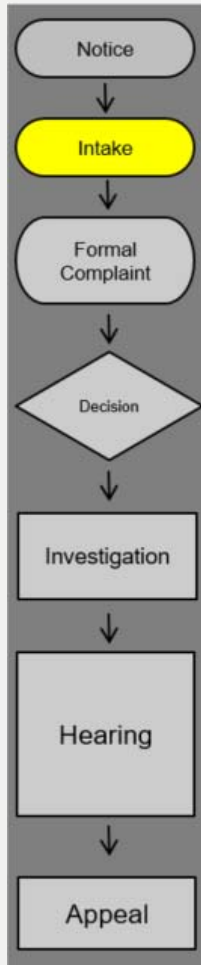
# Jurisdiction: Course of Conduct



- “In situations involving some allegations of conduct that occurred in an education program or activity, and some allegations of conduct that did not, the recipient **must investigate the allegations of conduct that occurred in the recipient’s education program or activity**, and nothing in the final regulations precludes the recipient from choosing to **also address allegations of conduct outside the recipient’s education program or activity**.”
- For example, if a student is sexually assaulted outside of an education program or activity but subsequently suffers Title IX sexual harassment in an education program or activity, then these final regulations apply to the latter act of sexual harassment, and the **recipient may choose to address the prior assault through its own code of conduct.**”

Title IX Regulations issued May 6, 2020; Preamble at 631

# Jurisdiction: What



- Narrowed & expanded definition of sexual harassment
  - Quid pro quo
  - 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
  - Inclusion of sexual assault, dating violence, domestic violence, and stalking as a form of sexual harassment

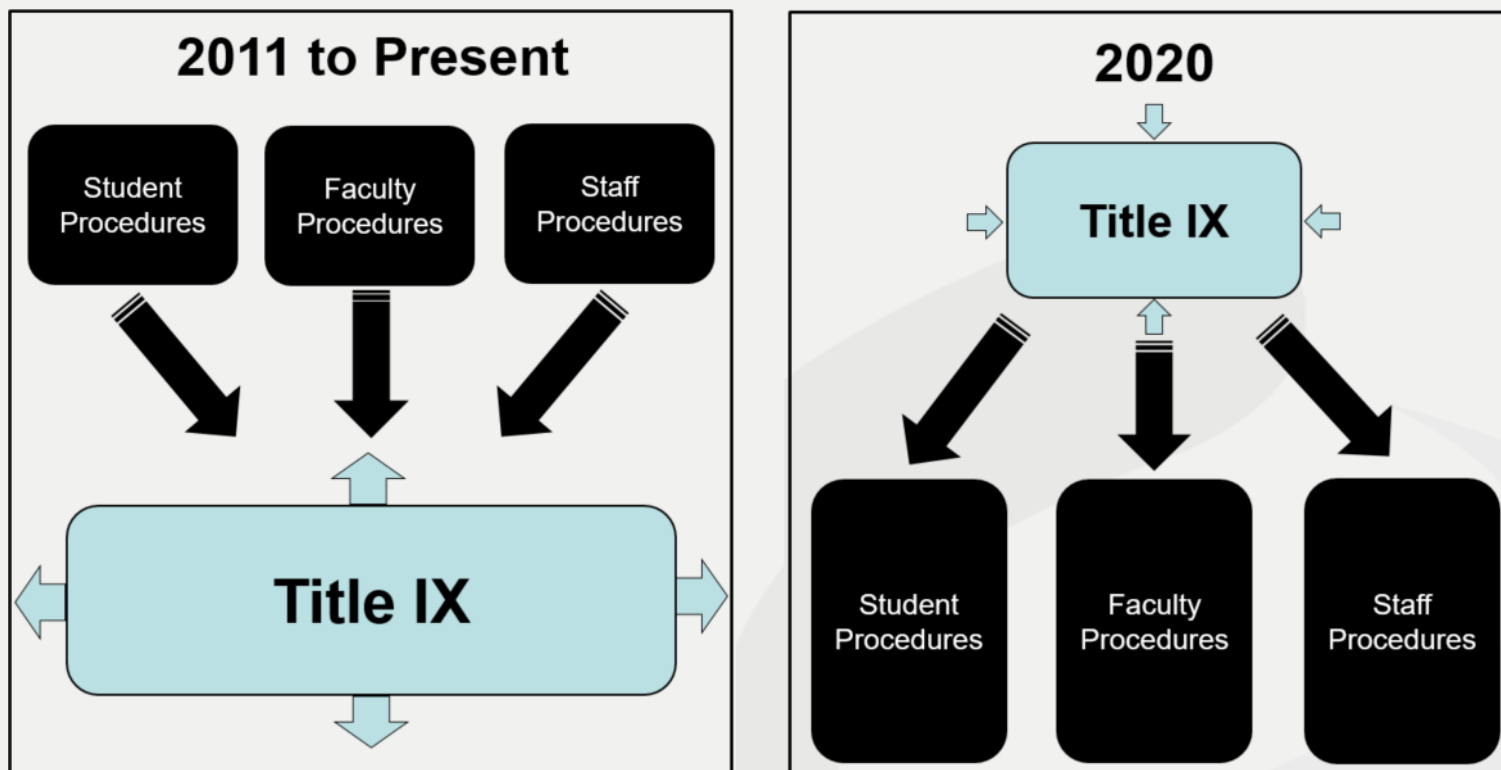
Title IX Regulations issued May 6, 2020; § 106.30(a)

# Practical Considerations & Challenges



- Policy frameworks
  - How to incorporate non-Title IX conduct
  - How to address other forms of discrimination and harassment
- Coordinating with other conduct codes
  - When can you proceed under another code?
  - When is the jurisdiction determination made?
    - Threshold during initial assessment?
    - Charging decision following investigation
- What about retaliation?

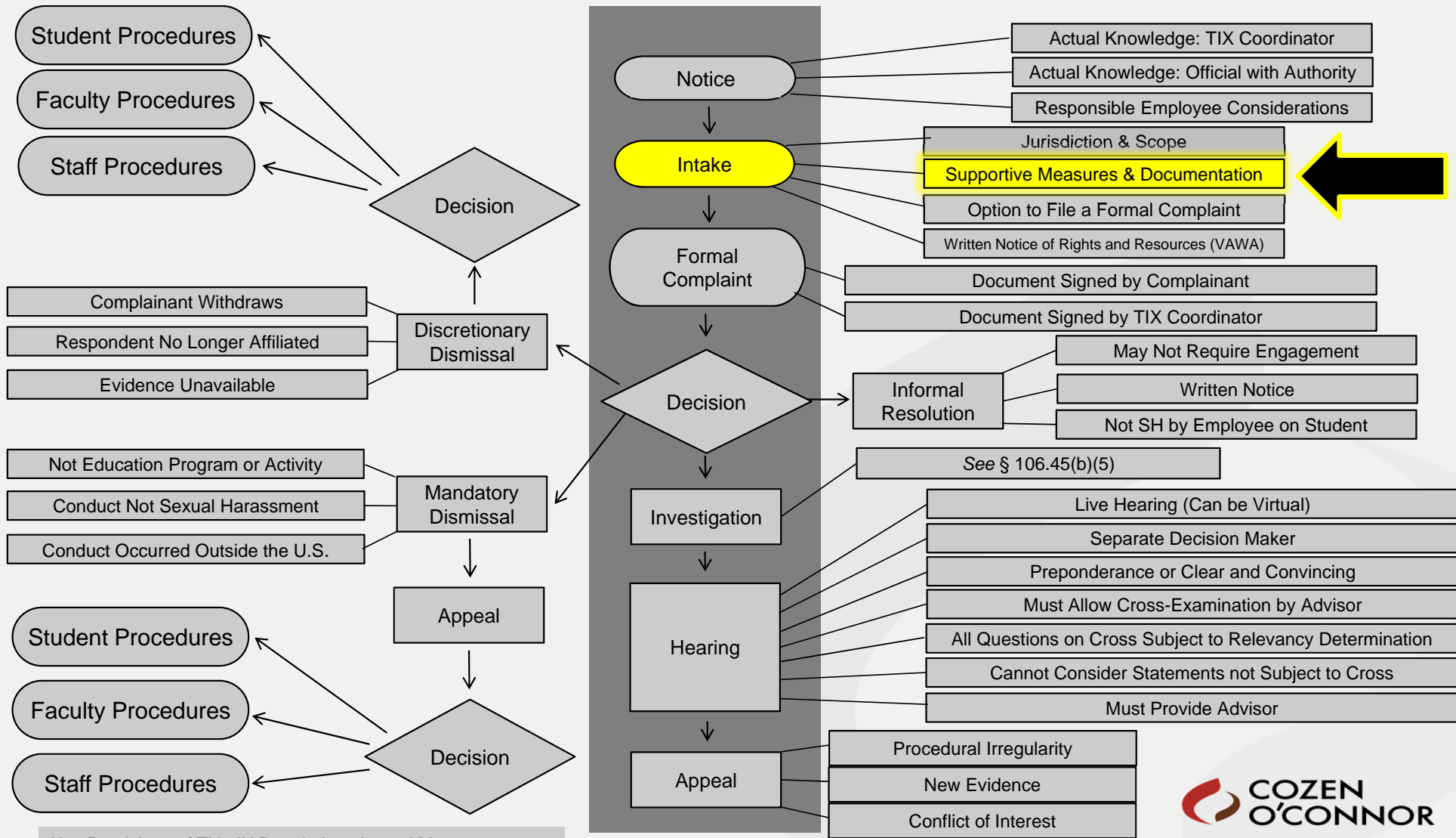
## Impact of Jurisdictional Requirements



**“We emphasize that nothing in these final regulations prevents recipients from initiating a student conduct proceeding [for sexual harassment no longer covered by Title IX].”**

Title IX Regulations issued May 6, 2020; § 106.45(b)(3)(i). See also Preamble, at 46, 237, 241, 251, 258, 457, 472, 481, 482, 485, 496, 631, 636, 642, 645, 660, 681, 730, 907, 939, 962, 963, 964, 1302, 1333, 1516, 1518, 1524, 1558, 1572, 1575, 1578, 1591, 1595, 1689, 1764, 1796, 1826.

# **SUPPORTIVE MEASURES**



Key Provisions of Title IX Regulations issued May 6, 2020;





## Framing Principles

3

“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.”

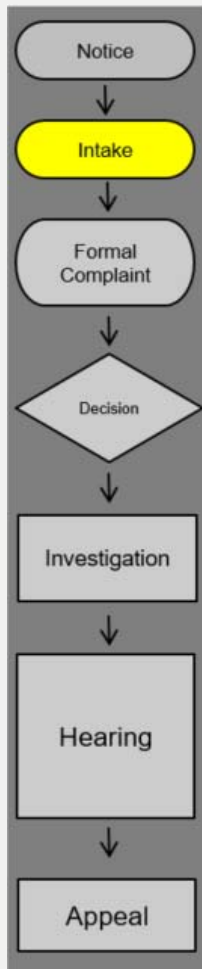
# Offering Supportive Measures



- The Title IX Coordinator must promptly contact the complainant to:
  - Discuss the **availability** of supportive measures as defined in § 106.30,
  - Consider the **complainant's wishes** with respect to supportive measures,
  - Inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and
  - Explain to the complainant the process for filing a formal complaint.

Title IX Regulations issued May 6, 2020; §§ 106.45(b)(3) and 106.45(b)(8)

# Supportive Measures



- Non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed.
- Designed to restore or preserve equal access to the recipient's education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the recipient's educational environment, or deter sexual harassment.

Title IX Regulations issued May 6, 2020; § 106.30(a)

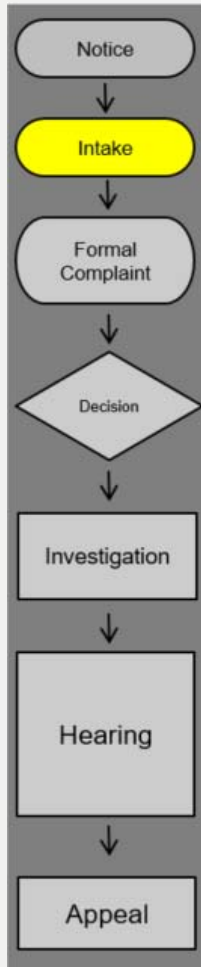
## Supportive Measures



- May include counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of the campus, and other similar measures.

Title IX Regulations issued May 6, 2020; § 106.30(a)

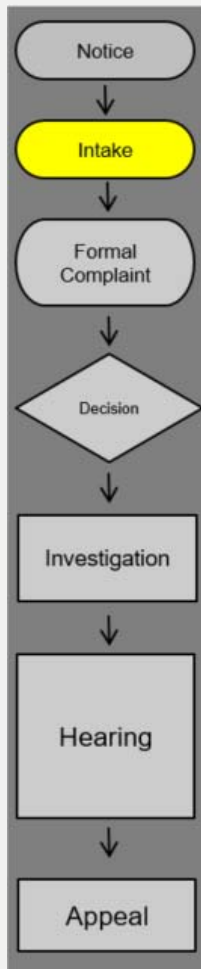
# Supportive Measures



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

Title IX Regulations issued May 6, 2020; § 106.30(a)

# Documentation



- Must maintain records of any actions, including any supportive measures, taken in response to a report or formal complaint of sexual harassment
- Must document the basis for its conclusion that its response was not deliberately indifferent, and document that it has taken measures designed to restore or preserve equal access to the recipient's education program or activity
- If a recipient does not provide a complainant with supportive measures, then the recipient must document the reasons why such a response was not clearly unreasonable in light of the known circumstances

Title IX Regulations issued May 6, 2020; § 106.45(b)(10)(i) (ii)

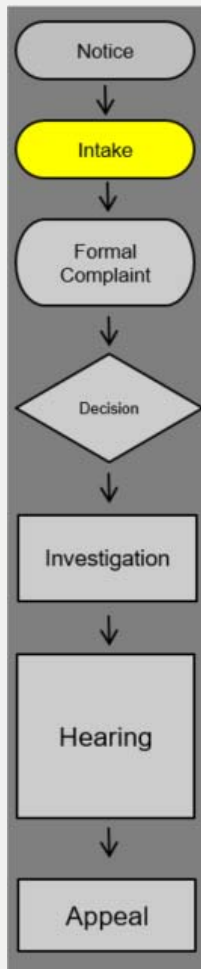


## Emergency Removal for Students

- Must undertake an individualized safety and risk analysis and determine that an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal
- Must provide the respondent with notice and an opportunity to challenge the decision immediately following the removal

Title IX Regulations issued May 6, 2020; § 106.44(c)

# Emergency Removal

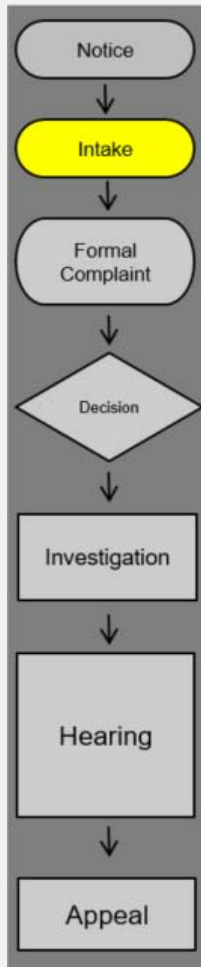


- Where a respondent poses an immediate threat to the physical health or safety of the complainant (or anyone else), § 106.44(c) allows emergency removals of respondents prior to the conclusion of a grievance process (or even where no grievance process is pending), thus protecting the safety of a recipient's community where an immediate threat exist.

Title IX Regulations issued May 6, 2020; Preamble at 566



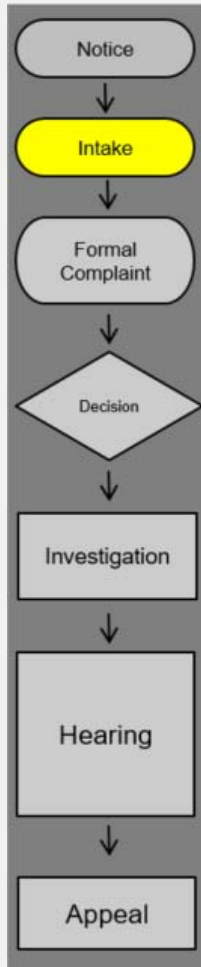
# Emergency Removal



- The Department notes that the final regulations expressly allow a recipient to remove a respondent on an emergency basis and do not prescribe cross-examination as a necessary procedure during the post-removal opportunity to challenge the removal.
- Recipients may also implement supportive measures that restrict students' or employees' contact or communication with others.
- Recipients thus have avenues for addressing serial predator situations even where no victim chooses to participate in a grievance process.

Title IX Regulations issued May 6, 2020; Preamble at 1176-1177

# Administrative Leave



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

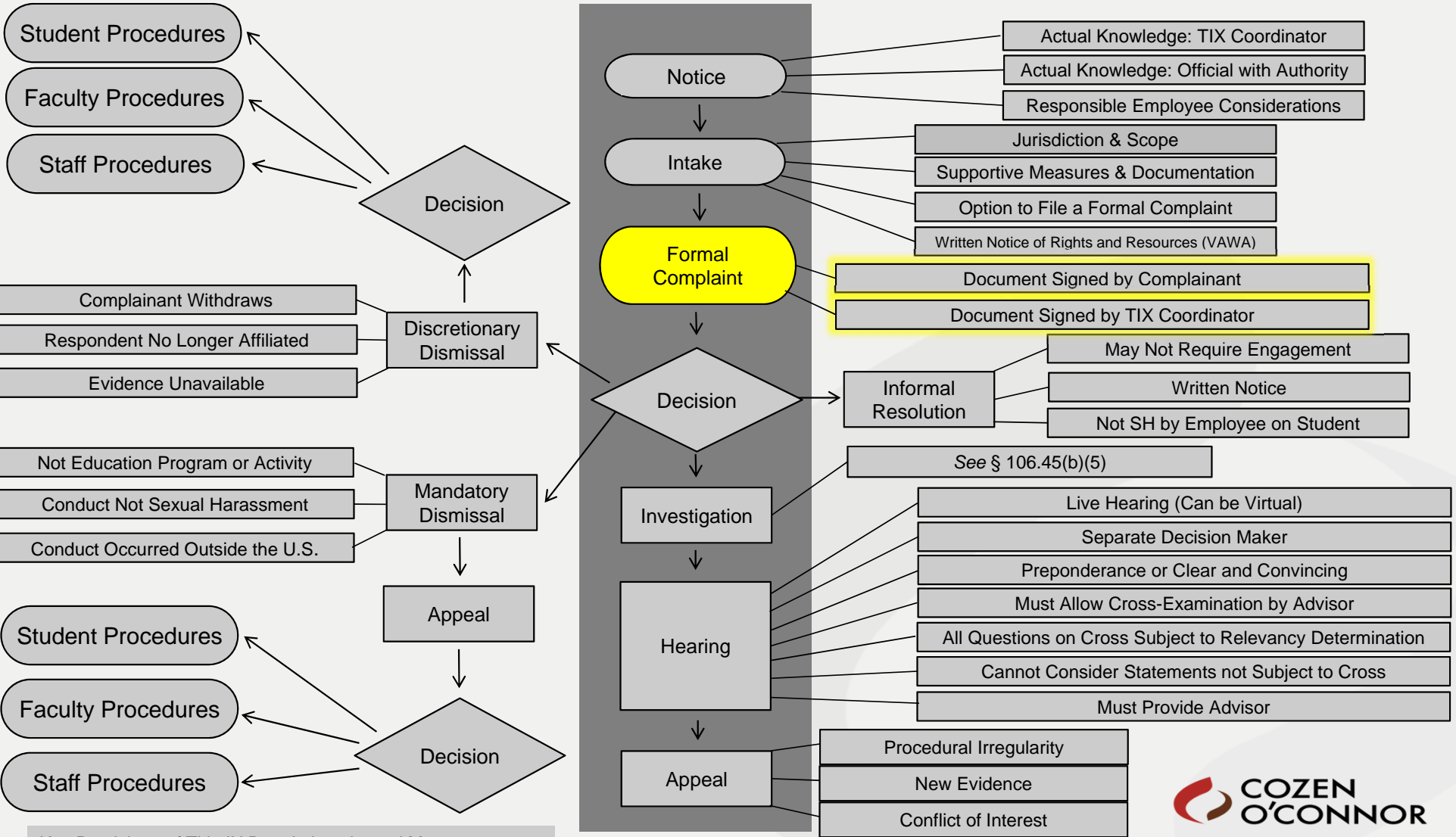
Title IX Regulations issued May 6, 2020; § 106.44(d)

# Practical Considerations & Challenges



- Limited scope allowable for emergency removal
  - Can you remove under code of conduct for lesser standard?
- What are the criteria for appropriate and reasonably available?
- What are measures to protect safety or deter sexual harassment?
- What supportive measures do you have to offer to a non-student/non-employee?
- Ensuring accurate documentation

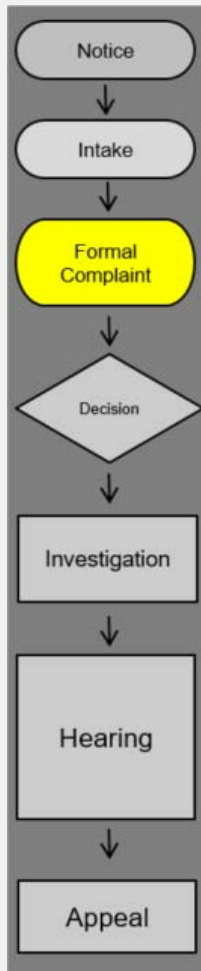
# FORMAL COMPLAINTS



Key Provisions of Title IX Regulations issued May 6, 2020;



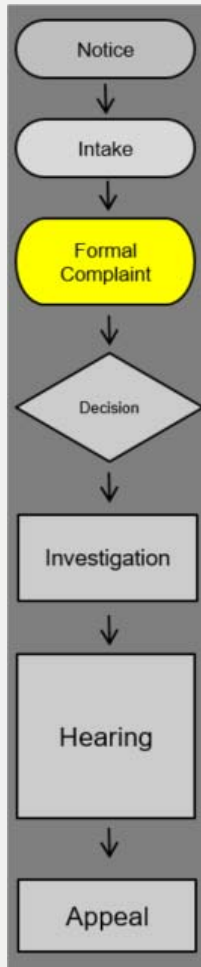
# Formal Complaint



- Document filed by a complainant or signed by the Title IX Coordinator
- At the time of filing a formal complaint, a complainant **must be participating in or attempting to participate in** the education program or activity of the recipient with which the formal complaint is filed

Title IX Regulations issued May 6, 2020; § 106.30(a)

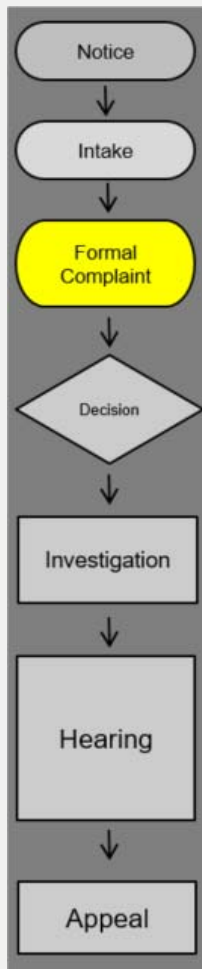
# Formal Complaint: Program or Activity



- The following may constitute “**attempting to participate**” in the recipient’s education program or activity:
  - Applying (or intending to apply) for admission
  - Indicating a desire to re-enroll if the recipient appropriately responds to sexual harassment allegations
  - Intending to remain involved in alumni programs
- “[The ‘education program or activity’ requirement] prevents recipients from being legally obligated to investigate **allegations made by complainants who have no relationship with the recipient**, yet still protects those complainants by requiring the recipient to respond promptly in a non-deliberately indifferent manner.”

Title IX Regulations issued May 6, 2020; Preamble, see pp. 225, 411, 629

# Formal Complaint: Institutional Response



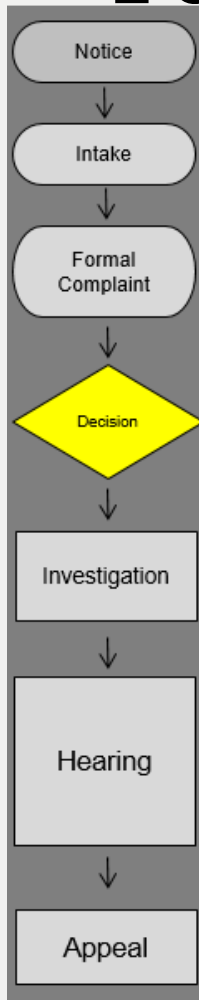
Upon receipt of a **formal complaint**, the institution:

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

Title IX Regulations issued May 6, 2020; § 106.30(a)



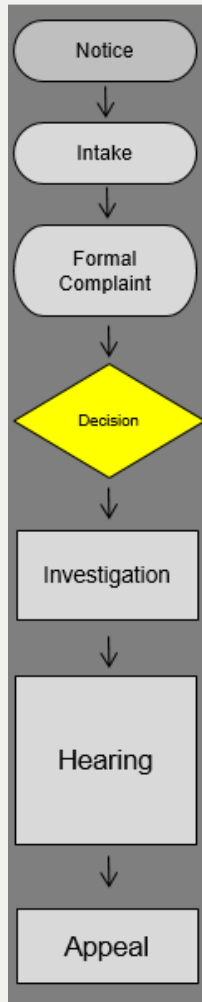
# Formal Complaint: Required Dismissal



- **Must** dismiss if:
  - Conduct would not constitute sexual harassment even if proved,
  - Conduct did not occur in the recipient’s education program or activity, or
  - Conduct did not occur against a person in the United States.
- Such a dismissal does not preclude action under another provision of the recipient’s code of conduct

Title IX Regulations issued May 6, 2020; § 106.45(b)(3)

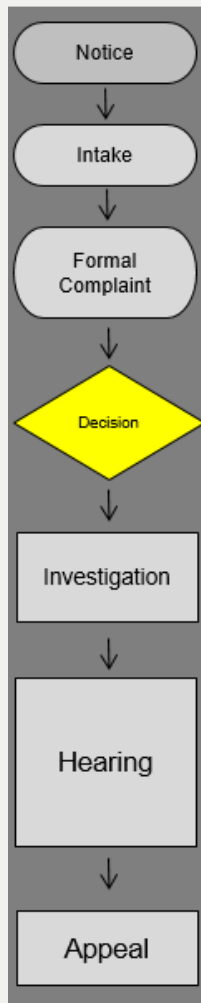
# Formal Complaint: Discretionary Dismissal



- **May** dismiss the formal complaint or any allegations therein if:
  - A complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the formal complaint or any allegations,
  - The respondent is no longer enrolled or employed by the recipient, or
  - Specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination.

Title IX Regulations issued May 6, 2020; § 106.45(b)(3)

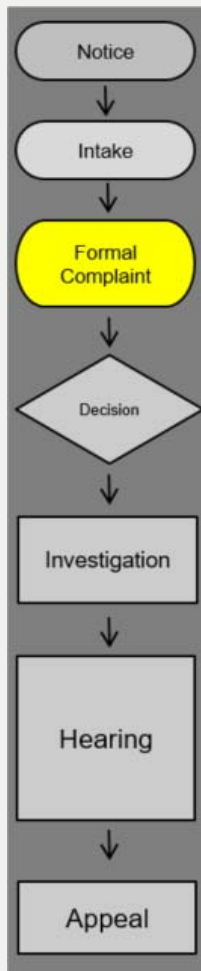
# Dismissal of Formal Complaint



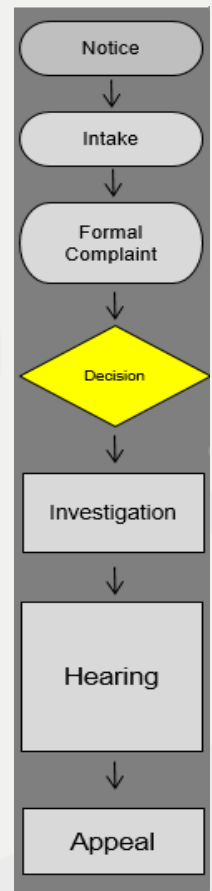
- Upon a dismissal required or permitted, the recipient must promptly send **written notice** of the dismissal and reason(s) therefor simultaneously to the parties
- Must offer both parties an **appeal** from a recipient's dismissal of a formal complaint or any allegations therein

Title IX Regulations issued May 6, 2020; §§ 106.45(b)(3) and 106.45(b)(8)

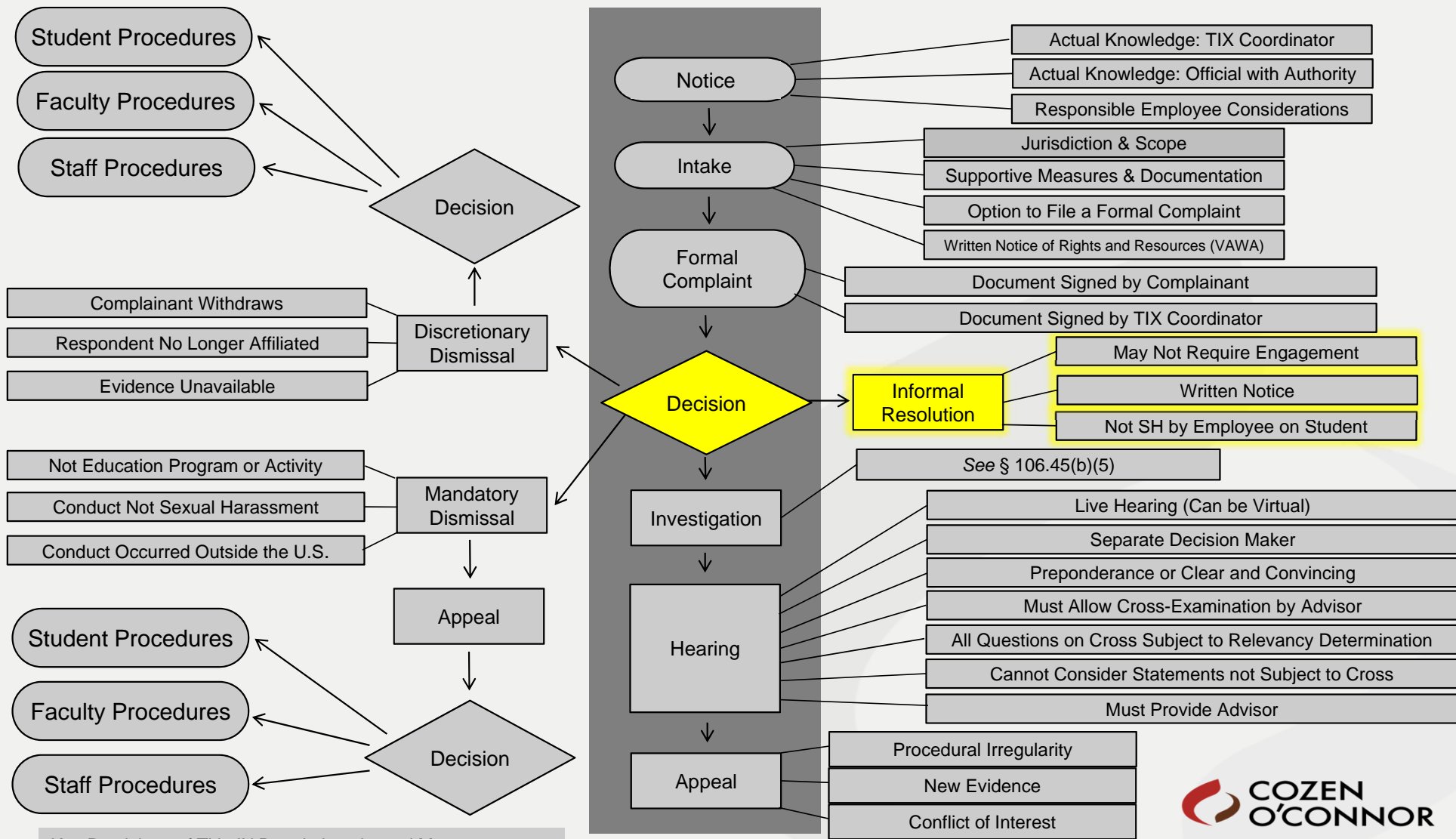
# Practical Considerations & Challenges



- Criteria for when the Title IX Coordinator files the formal complaint
- Process for evaluating dismissal
- Appeal from dismissal
- Proceeding under other policies
  - Policy frameworks
  - When is charging under a code of conduct retaliation?
- Timing of analysis for dismissal



# **INFORMAL RESOLUTION**



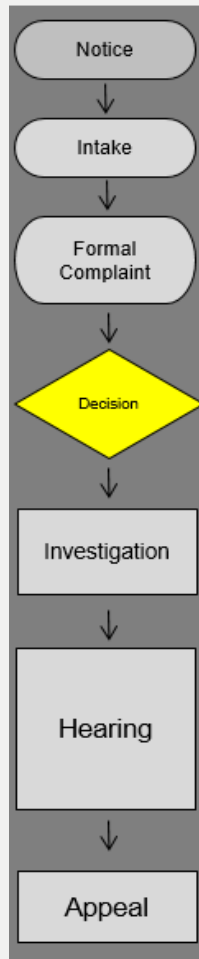
Key Provisions of Title IX Regulations issued May 6, 2020;



# Informal Resolution



# Informal Resolution

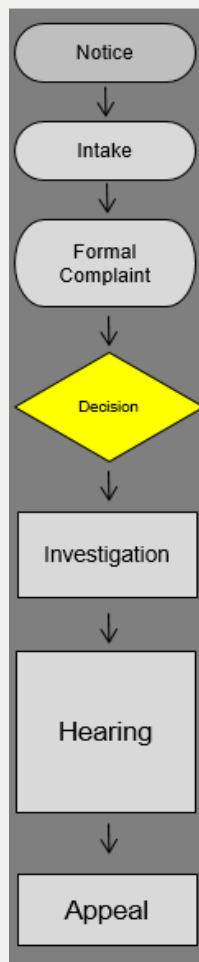


- May not require waiver of right to investigation and adjudication of formal complaints
- May not require parties to participate in an informal resolution process
- May not offer an informal resolution process unless a formal complaint is filed
- Must obtain the parties' voluntary, written consent to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

Title IX Regulations issued May 6, 2020; § 106.45(b)(9)



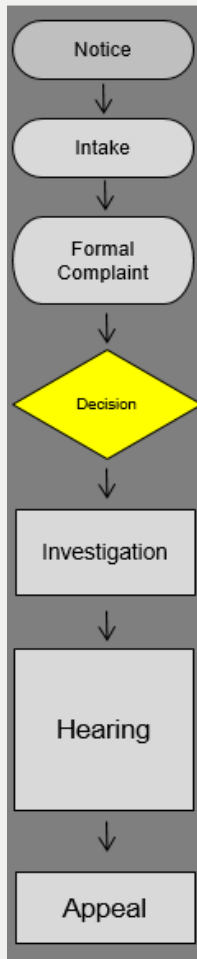
# Informal Resolution



- At any time prior to reaching a determination of responsibility the recipient may facilitate an informal resolution process, such as mediation, provided:
- Provides to the parties a written notice disclosing
  - Allegations
  - Requirements of the informal resolution process
  - Circumstances under which it precludes formal complaint
  - Can withdraw and resume formal complaint prior to agreeing to resolution
  - Consequences

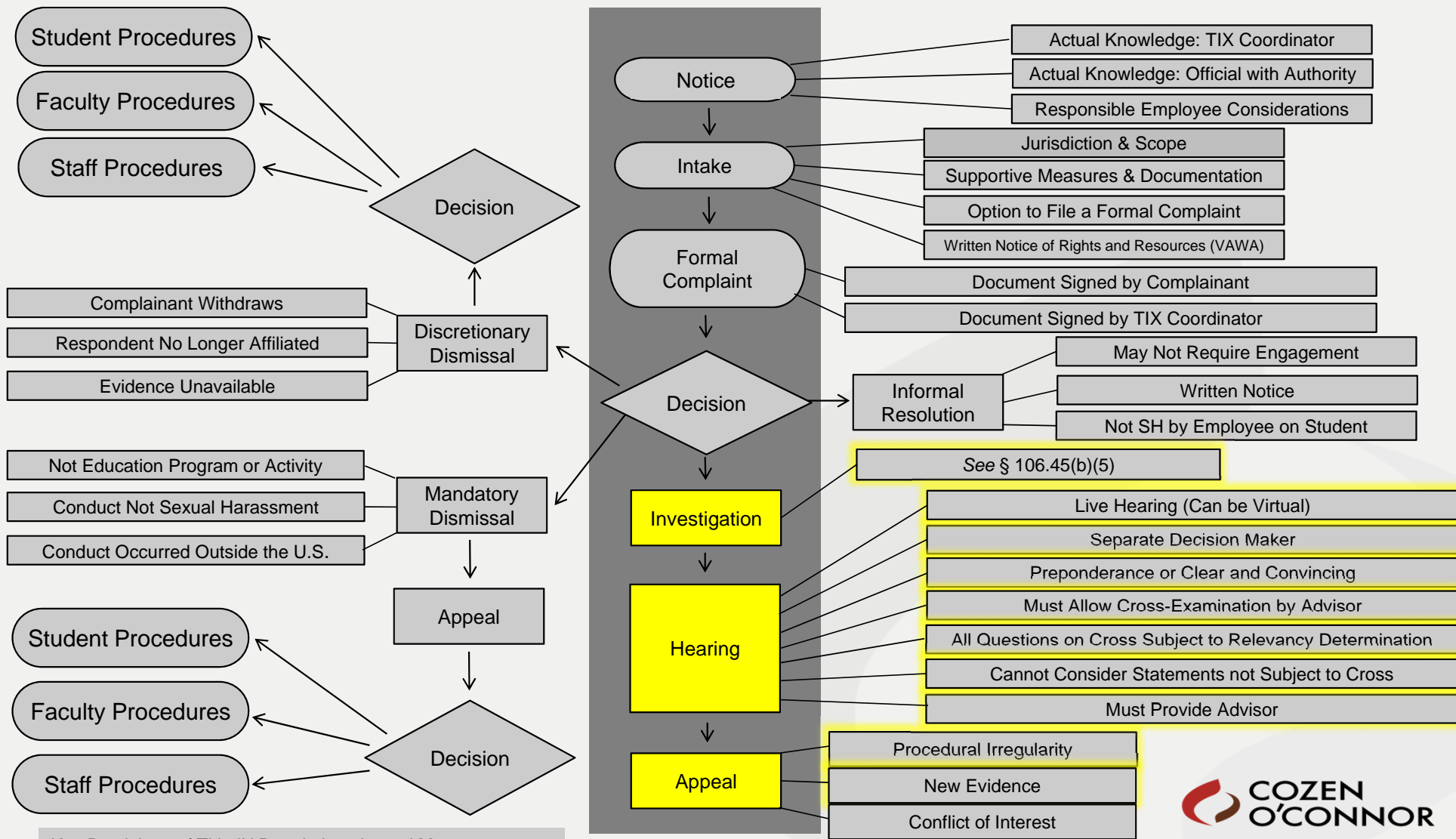
Title IX Regulations issued May 6, 2020; § 106.45(b)(9)

# Practical Considerations & Challenges



- Deferring offering an informal resolution until after a formal complaint is filed
- Ensuring implementers who conduct mediation have appropriate training and competencies
- Documenting of the available information and factors considered

# **BASIC REQUIREMENTS OF GRIEVANCE PROCESSES**

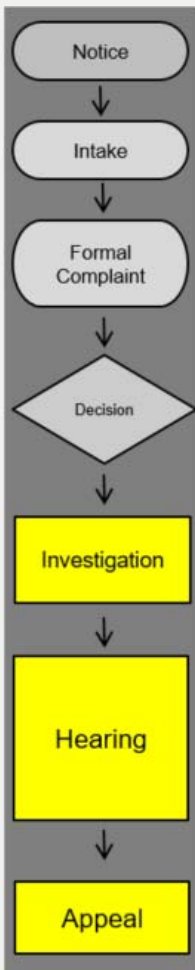


Key Provisions of Title IX Regulations issued May 6, 2020;



# Basic Requirements

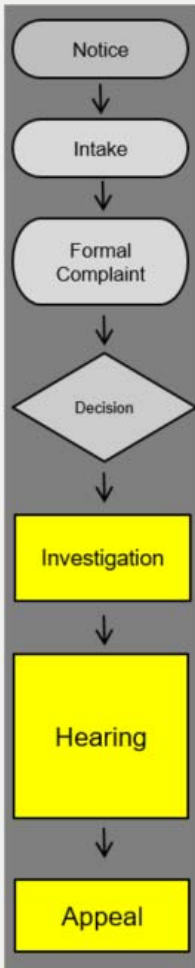
- **Treat complainants and respondents equitably** by providing **remedies** to a complainant where a determination of responsibility for sexual harassment has been made against the respondent, and by following a **grievance process** that complies with this section before the imposition of any disciplinary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



Relevant Regulations Sections:

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

# Basic Requirements



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

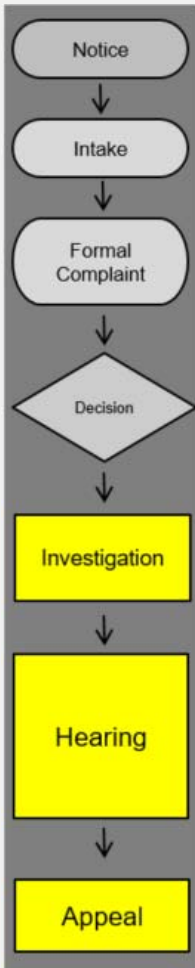
Relevant Regulations Sections:

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

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

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

# Basic Requirements



- **Presumption that the respondent is not responsible** for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process
- 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

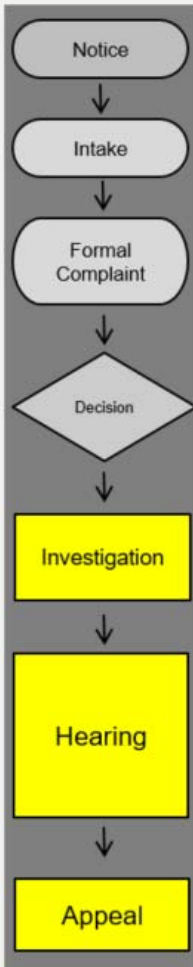
## Relevant Regulations Sections:

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)

# 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 issued May 6, 2020; §§ 106.45(b)(1)(vii) and 106.45(b)(7)(i)



# 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

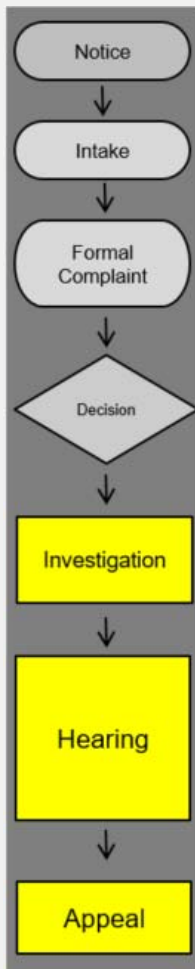
## Relevant Regulations Sections:

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

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

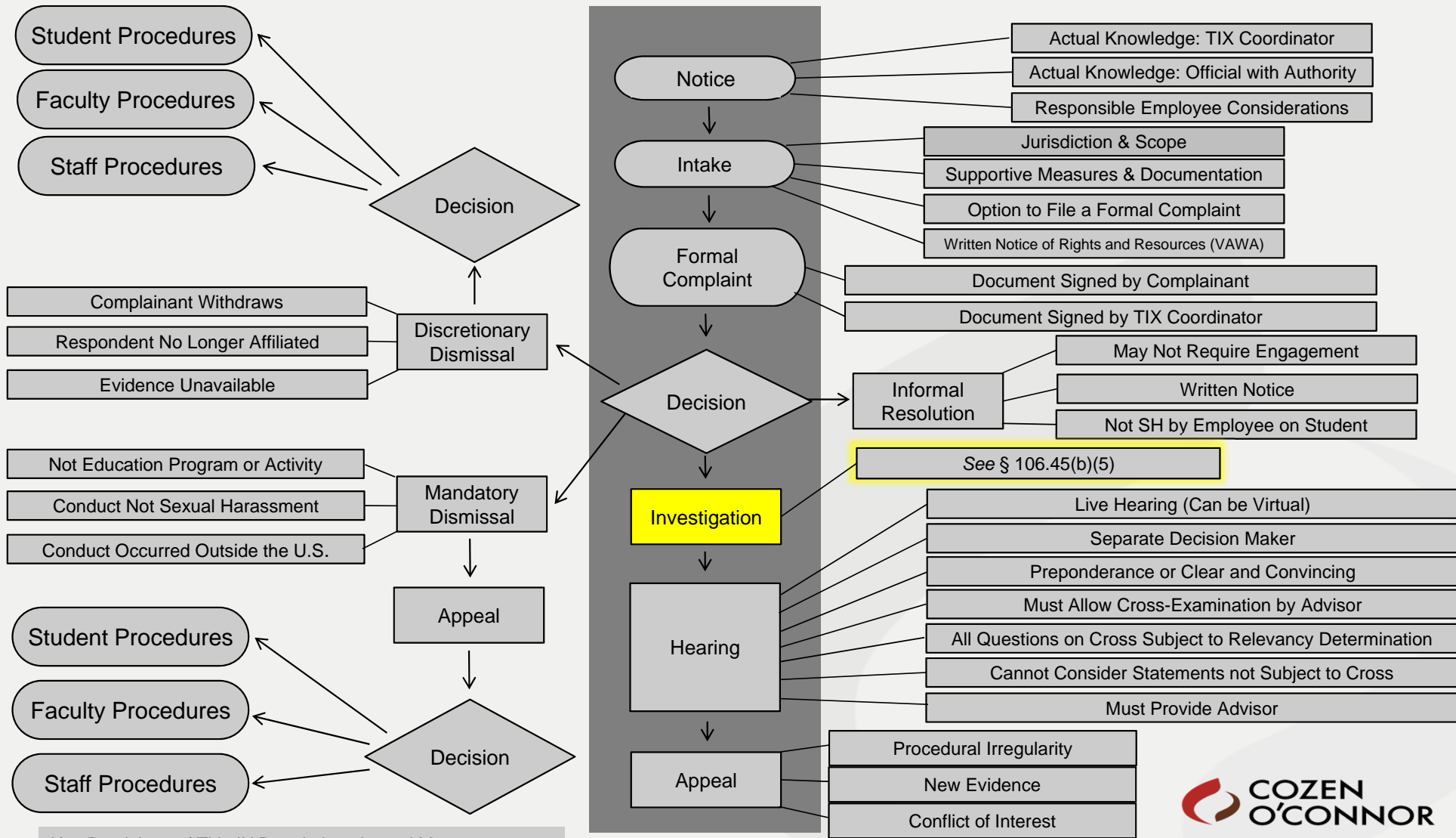
Waiver of Privilege: § 106.45(b)(1)(x)

# Practical Considerations & Challenges



- How does the standard of evidence alignment impact:
  - Faculty codes
  - Staff procedures
  - Collective bargaining agreements
- Creating an evidentiary code

# INVESTIGATIONS



Key Provisions of Title IX Regulations issued May 6, 2020;

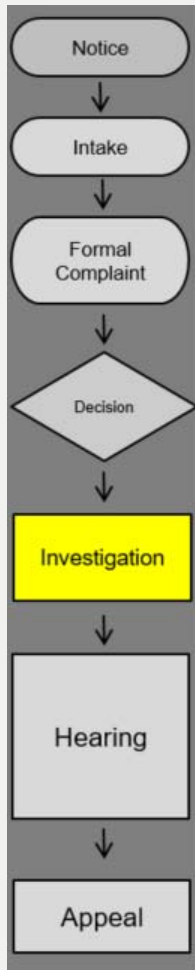


# Obligation to Investigate



- Separation of the recipient's obligation to respond to a report of sexual harassment from the recipient's obligation to investigate formal complaints of sexual harassment.
  - See discussion in Preamble at 598-599.
- The recipient **must** investigate the allegations in a formal complaint.

Title IX Regulations issued May 6, 2020; Preamble at 598-599;  
§ 106.45(b)(3) .

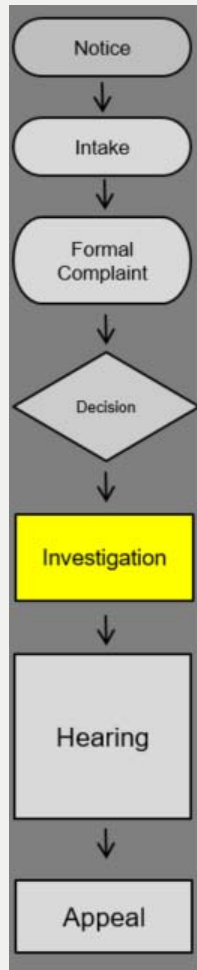


## Written Notice to Parties

- Must provide written notice of the recipient's grievance process, including any informal resolution process.
- 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 issued May 6, 2020; § 106.45(b)(2)

# Written Notice to Parties



– Must state that:

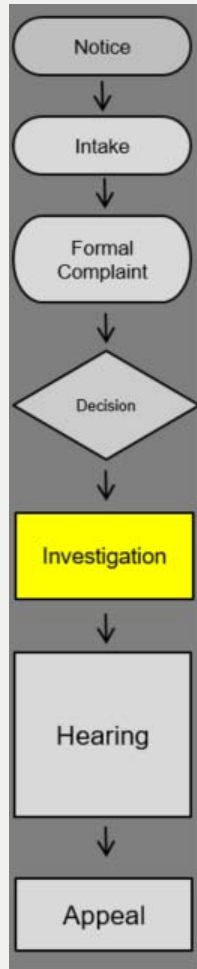
- the respondent is presumed not responsible for the alleged conduct
- a determination regarding responsibility is made at the conclusion of the grievance process

– 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
- Provide supplemental notice of additional allegations.

Title IX Regulations issued May 6, 2020; § 106.45(b)(2)

# Consolidation



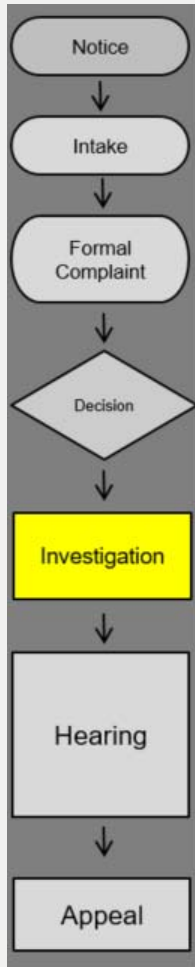
- May consolidate formal complaints as to allegations of sexual harassment against more than one respondent, or by more than one complainant against one or more respondents, or by one party against the other party, where the allegations of sexual harassment **arise out of the same facts or circumstances.**
  - 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.”
  - 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 issued May 6, 2020; § 106.45(b)(4); Preamble at 968-969; 1498



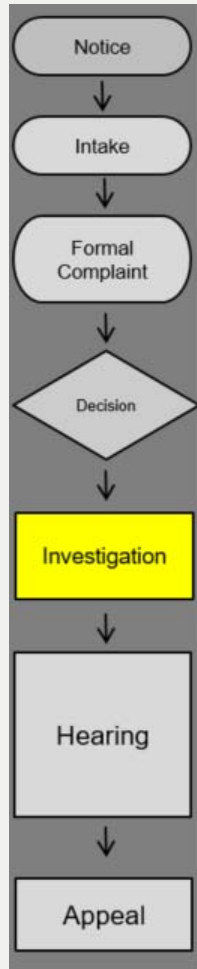
# Investigations

- Ensure that the burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rest on the recipient and not on the parties.



Title IX Regulations issued May 6, 2020; § 106.45(b)(5)

# Investigations

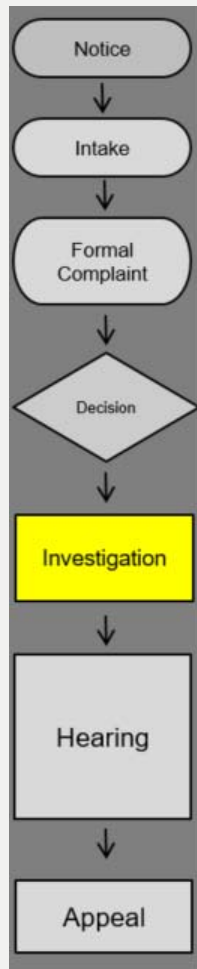


- Recipient cannot access, consider, disclose, or otherwise use a party's records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional's or paraprofessional's capacity, or assisting in that capacity, and 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 issued May 6, 2020; § 106.45(b)(5)(i)

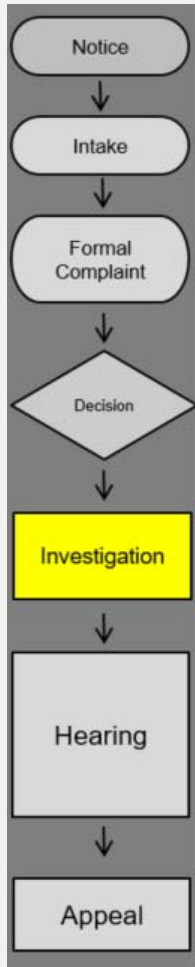
# Investigations

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



Title IX Regulations issued May 6, 2020; §§ 106.45(b)(1)(iii) and 106.45(b)(6)

# Investigations



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

Title IX Regulations issued May 6, 2020; §§ 106.45(b)(5)(ii)-(iv)

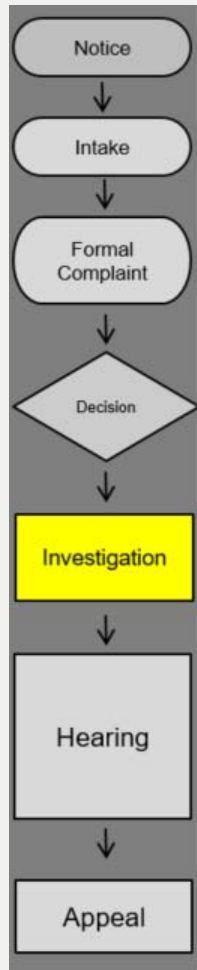
# Investigations

- Provide written notice of the date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings, with sufficient time for the party to prepare to participate.



Title IX Regulations issued May 6, 2020; §§ 106.45(b)(5)(v)

# Investigations

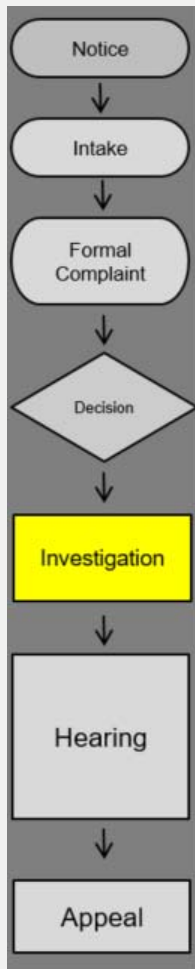


- Provide both parties an **equal opportunity to inspect and review any evidence** obtained as part of the investigation that is **directly related to the allegations** raised in a formal complaint so that each party can meaningfully respond to the evidence prior to conclusion of the investigation.
  - Evidence that is “directly related to the allegations” may encompass a broader universe of evidence than evidence that is “relevant.”
  - 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 issued May 6, 2020; §§ 106.45(b)(5)(vi); Preamble at 1041, 1015

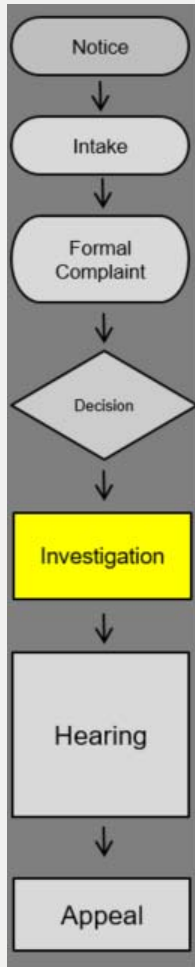
# Investigations

- 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 issued May 6, 2020; §§ 106.45(b)(5)(vi)

# Investigations

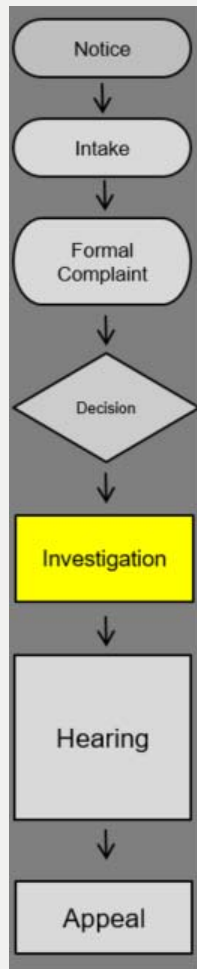


- Create an **investigative report** that fairly summarizes relevant evidence and
- Send to each party and the party’s advisor, if any, the investigative report in an electronic format or a hard copy, for their review and written response, **at least 10 days prior** to the determination of responsibility (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 issued May 6, 2020; §§ 106.45(b)(5)(vii); Preamble at 1037

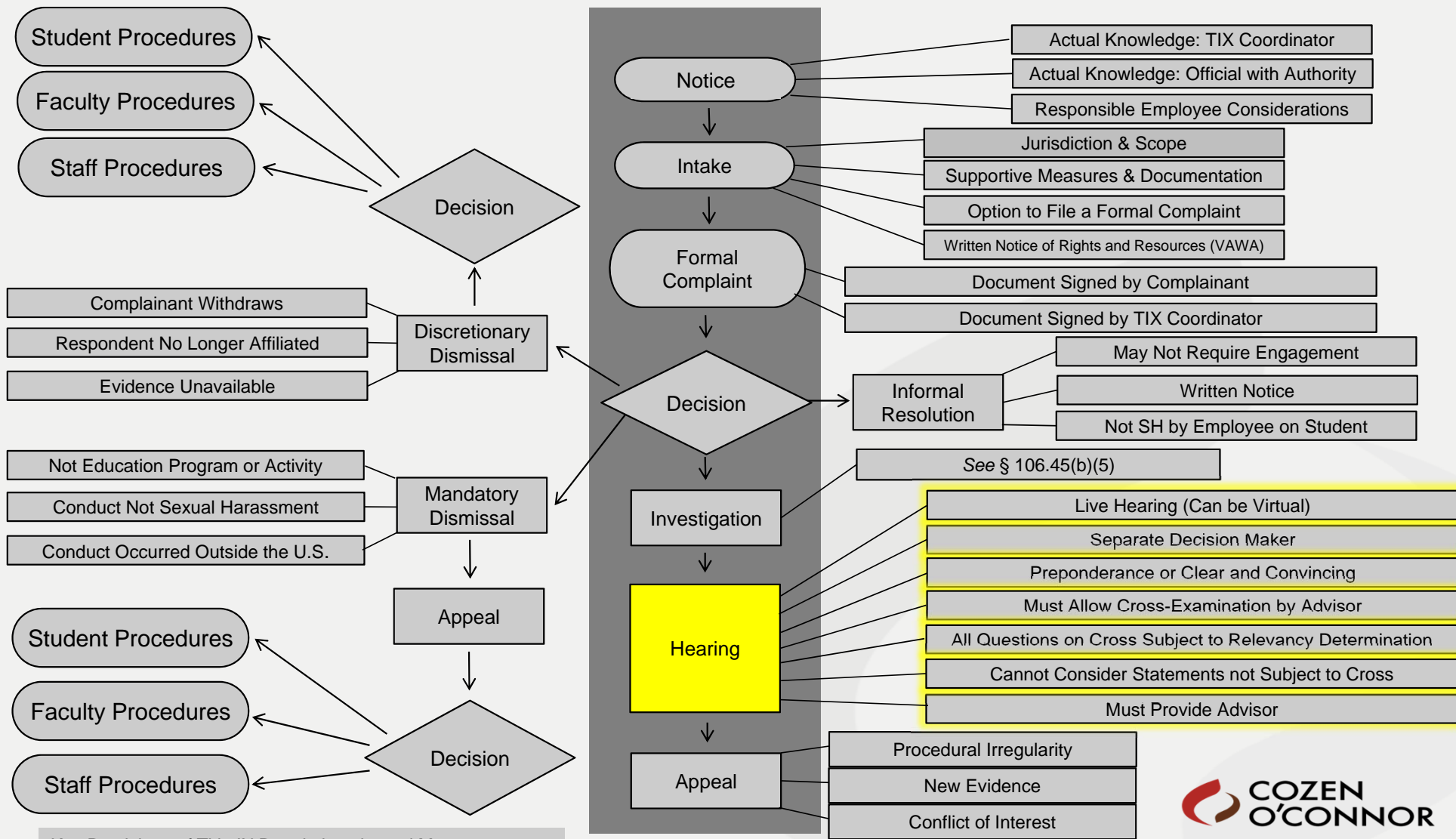


# Practical Considerations and Challenges



- Will require revisions to written language of policies and procedures
- What information has to be shared?
  - Access to evidence, not just report
  - Inculpatory and exculpatory
- How is information shared?
- Will it require investment in infrastructure/systems for electronic dissemination?
- Impacts on resources – adequate personnel and staffing?

# LIVE HEARINGS

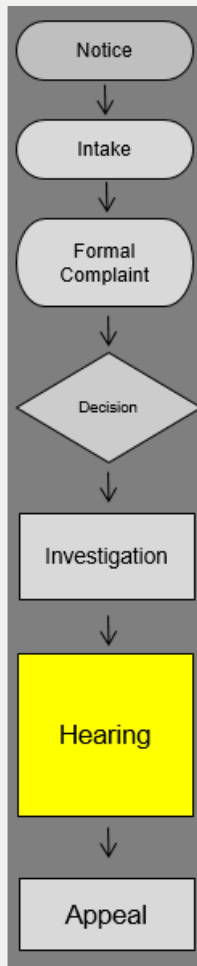


Key Provisions of Title IX Regulations issued May 6, 2020;



# Hearings

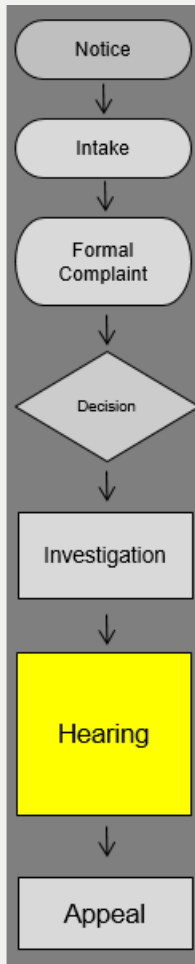
- At the request of either party, the recipient must provide for the live hearing to occur with the parties located in separate rooms with technology enabling the decision-maker(s) and parties to simultaneously see and hear the party or the witness answering questions.



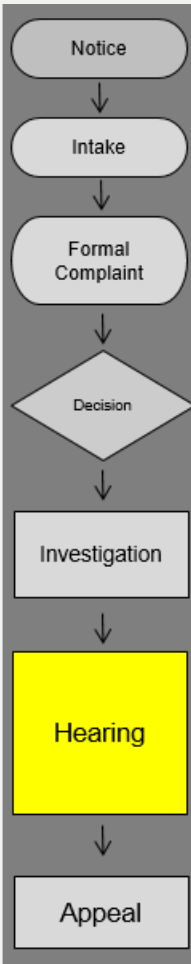
Title IX Regulations issued May 6, 2020; § 106.45(b)(6)(i)

# Hearings

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



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



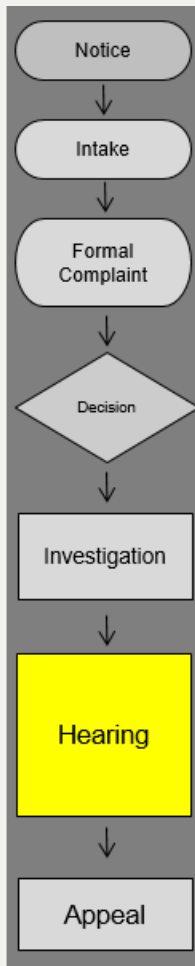
# Cross-Examination by Advisor

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

Title IX Regulations issued May 6, 2020; Preamble at 1171

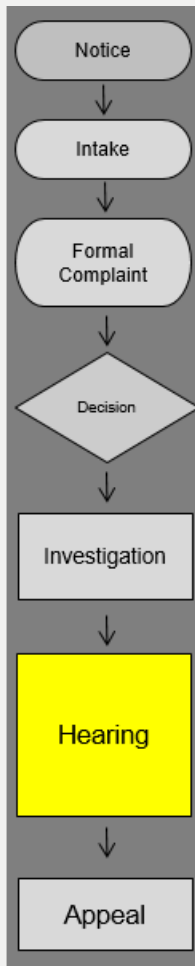
# Hearings

- 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 6, 2020; § 106.45(b)(6)(i)

# Tested for Credibility

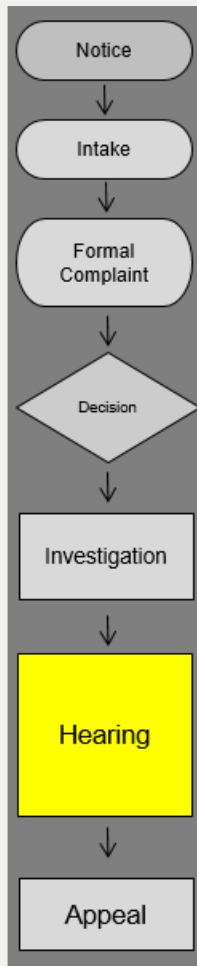


- Probing the **credibility and reliability** of *statements* asserted by witnesses contained in such evidence requires the parties to have the opportunity to cross-examine the witnesses making the statements.
- Where a Title IX sexual harassment allegation does not turn on the credibility of the parties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

Title IX Regulations issued May 6, 2020; Preamble at 1181, 1168



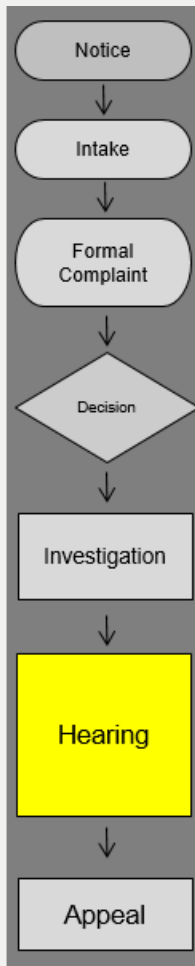
# Statements



- [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 6, 2020; Preamble at 1168, 1181

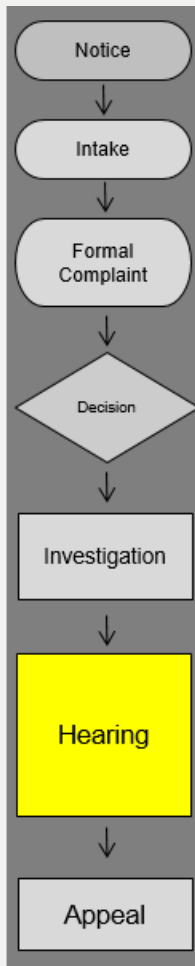
# Bright-Line Rule



- 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 6, 2020; Preamble at 1174

# 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 6, 2020; Preamble at 1175

# Submit to Cross-Examination

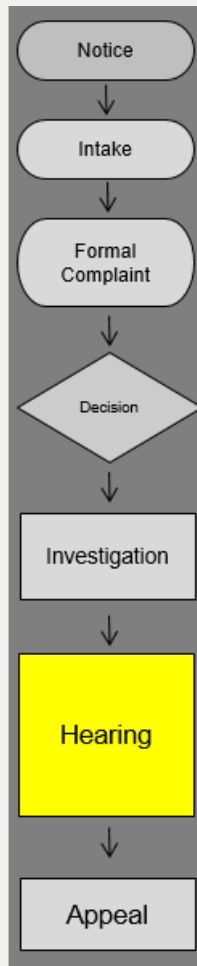


- The Department appreciates the opportunity to clarify here that to “submit to cross-examination” means answering those cross-examination questions that are relevant
- This provision requires a party or witness to “submit to cross-examination” to avoid exclusion of their statements; the same exclusion 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 6, 2020; Preamble at 1182

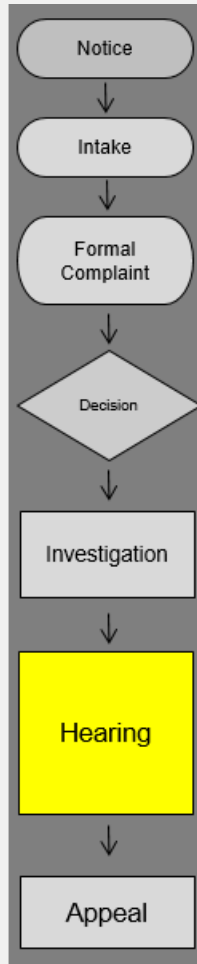
# Hobson's Choice

- 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.



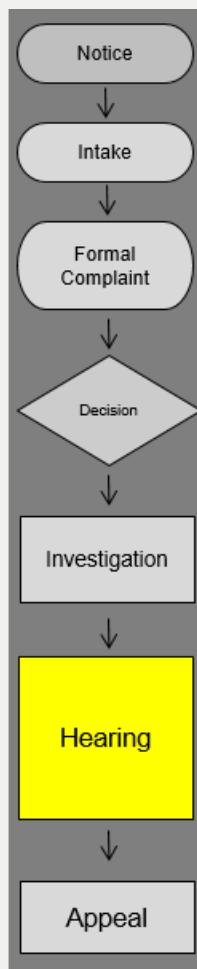
Title IX Regulations issued May 6, 2020; Preamble at 1172

# 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 6, 2020; § 106.45(b)(6)(ii)



# 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 6, 2020; § 106.45(b)(7)

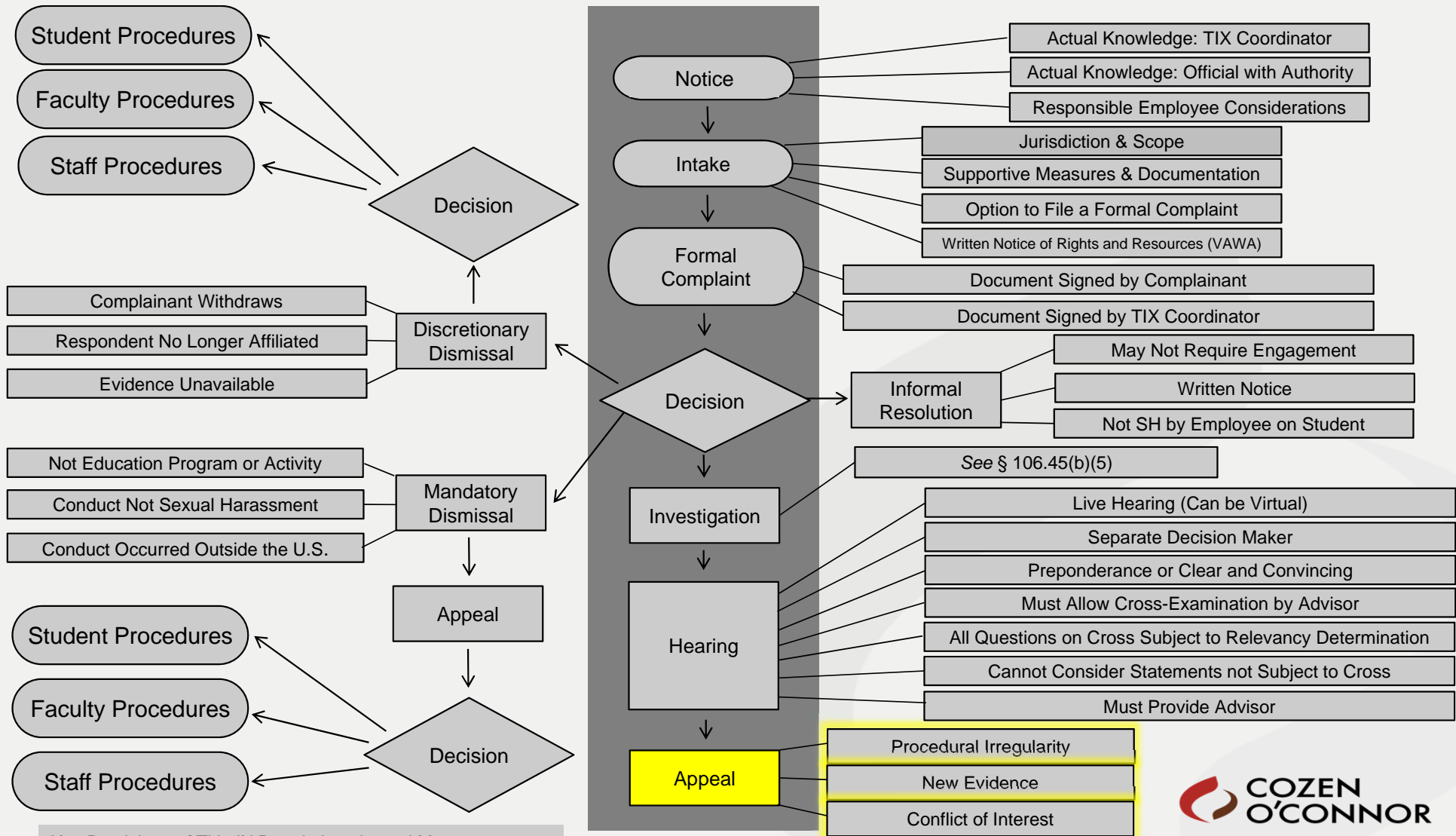
# Practical Considerations & Challenges



- Resources, staffing and training
- Securing cooperation of parties and witnesses through investigation and hearing
- Evidentiary considerations
- Technology considerations
- Provision of advisor if party does not have one



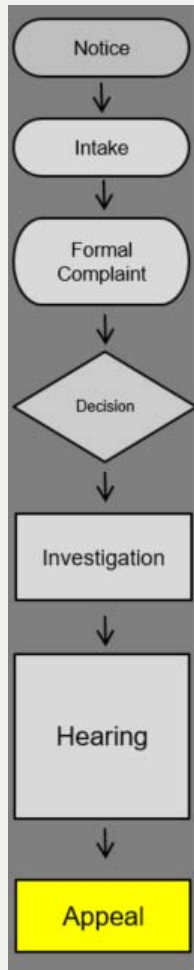
# **OTHER CONSIDERATIONS**



Key Provisions of Title IX Regulations issued May 6, 2020;



# Appeals



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

Title IX Regulations issued May 6, 2020; § 106.45(b)(8)

# Appeals



- As to all appeals, the recipient must
  - Notify the other party in writing when an appeal is filed and implement appeal procedures equally for both parties;
  - Ensure that the decision-maker(s) for the appeal is not the same person as the decision-maker(s) that reached the determination regarding responsibility or dismissal, the investigator(s), or the Title IX Coordinator;
  - Ensure that the decision-maker(s) for the appeal complies with the standards set forth in paragraph (b)(1)(iii) of this section;
  - Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome;
  - Issue a written decision describing the result of the appeal and the rationale for the result; and
  - Provide the written decision simultaneously to both parties.

Title IX Regulations issued May 6, 2020; § 106.45(b)(8)

# 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 issued May 6, 2020; § 106.45(b)(1)(iii)

# 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

# Retaliation

- No recipient or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by title IX or this part, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under this part

Title IX Regulations issued May 6, 2020; § 106.71(a)

# Retaliation

- The exercise of rights protected under the First Amendment does not constitute retaliation
- Charging an individual with a code of conduct violation for making a materially false statement in bad faith in the course of a grievance proceeding under this part does not constitute retaliation

Title IX Regulations issued May 6, 2020; § 106.71(b)



# Documentation

- Must maintain records for 7 years
- Must make training materials publicly available on website
- Must maintain records of any actions, including any supportive measures, taken in response to a report or formal complaint of sexual harassment

Title IX Regulations issued May 6, 2020; § 106.45(b)(10)(i)

# Documentation

- Must document the basis for its conclusion that its response was not deliberately indifferent, and document that it has taken measures designed to restore or preserve equal access to the recipient's education program or activity
- If a recipient does not provide a complainant with supportive measures, then the recipient must document the reasons why such a response was not clearly unreasonable in light of the known circumstances

Title IX Regulations issued May 6, 2020; § 106.45(b)(10)(ii)

# **NEXT STEPS: UPDATING CAMPUS POLICIES AND PROCEDURES**

# Putting the Pieces Together



§ 106.1 Purpose and effective date.

§ 106.2 Definitions.

§ 106.3 Remedial and affirmative action and self-evaluation.

Remedial action.

Affirmative action.

Self-evaluation.

Availability of self-evaluation and related

§ 106.4 Assurance required.

General

Duration of obligation.

Form.

§ 106.5 Transfers of property.

§ 106.6 Effect of other requirements and preservation of rights.

Effect of other Federal provisions.

Effect of State or local law or other requirements.

Effect of rules or regulations of private organizations.

Constitutional protections.

Effect of Section 444 of General Education Provisions Act (GEPA)/Family Educational Rights and Privacy Act (FERPA).

Title VII of the Civil Rights Act of 1964.

Exercise of rights by parents or guardians.

Preemptive effect.

§ 106.7 Effect of employment opportunities.

§ 106.8 Designation of coordinator, dissemination of policy, and adoption of grievance procedures

Designation of coordinator.

Dissemination of policy

Notification of policy.

Publications.

Adoption of grievance procedures.

Application outside the United States.

§ 106.9 Severability.

§ 106.11 Application.

§ 106.12 Educational institutions controlled by religious organizations.

Application.

Assurance of exemption.

§ 106.13 Military and merchant marine educational institutions.

§ 106.14 Membership practices of certain organizations.

Social fraternities and sororities.

YMCA, YWCA, Girl Scouts, Boy Scouts and Camp Fire Girls.

Voluntary youth service organizations..

§ 106.15 Admissions.

Admissions to educational institutions prior to June 24, 1973, are not covered by this part.

Administratively separate units.

Educational institutions.

Public institutions of undergraduate higher education.

§ 106.16 Educational institutions eligible to submit transition plans.

(a) Application.

(b) Provision for transition plans.

§ 106.17 Transition plans.

Submission of plans.

Content of plans.

Nondiscrimination.

Effects of past exclusion.

§ 106.18 Severability.

§ 106.21 Admission.

General.

Specific prohibitions.

Prohibitions relating to marital or parental status.

§ 106.22 Preference in admission.

§ 106.23 Recruitment.

Nondiscriminatory recruitment.

Recruitment at certain institutions.

§ 106.24 Severability

§ 106.30 Definitions. As used in this part:

Actual knowledge ;Complainant ;Consent ;Formal complaint;  
Respondent ;Sexual harassment; Supportive measures

As used in §§ 106.44 and 106.45:

Elementary and secondary school

Succeeds Act

Postsecondary institution

§ 106.31 Education programs or activities.

General; Specific prohibitions.

§ 106.32 Housing.

Generally. Housing provided by recipient.Other housing.

§ 106.33 Comparable facilities.

§ 106.34 Access to classes and schools.

General standard. Classes and extracurricular activities.

Schools.

§ 106.35 Access to institutions of vocational education.

§ 106.36 Counseling and use of appraisal and counseling materials.

Counseling. Use of appraisal and counseling materials.

Disproportion in classes.

§ 106.37 Financial assistance.

General. Financial aid established by certain legal instruments.

Athletic scholarships.

§ 106.38 Employment assistance to students.

Assistance by recipient in making available outside employment.

Employment of students by recipients.

§ 106.39 Health and insurance benefits and services.

§ 106.40 Marital or parental status.  
Status generally; Pregnancy and related conditions.

§ 106.41 Athletics.  
General. Separate teams Equal opportunity.  
Adjustment period.

§ 106.42 Textbooks and curricular material.

§ 106.43 Standards for measuring skill or progress in physical education classes.

§ 106.44 Recipient's response to sexual harassment.  
General response to sexual harassment.  
Response to a formal complaint.  
Emergency removal. with Disabilities Act.  
Administrative leave.

§ 106.45 Grievance process for formal complaints of sexual harassment. Discrimination on the basis of sex. Grievance process.  
Basic requirements for grievance process.  
Notice of allegations  
Dismissal of a formal complaint  
Consolidation of formal complaints.  
Investigation of a formal complaint.  
Hearings.  
Determination regarding responsibility.  
Appeals.  
Informal resolution.  
Recordkeeping.

§ 106.46 Severability.

§ 106.51 Employment.  
General. Application.

§ 106.52 Employment criteria.

§ 106.53 Recruitment.

§ 106.54 Compensation.

§ 106.55 Job classification and structure.

§ 106.56 Fringe benefits.  
Fringe benefits defined. Prohibitions.

§ 106.57 Marital or parental status.  
General. Pregnancy. Pregnancy as a temporary disability.  
Pregnancy leave.

§ 106.58 Effect of State or local law or other requirements.  
Prohibitory requirements. Benefits.

§ 106.59 Advertising.

§ 106.60 Pre-employment inquiries.  
Marital status.  
Sex.

§ 106.61 Sex as a bona-fide occupational qualification.

§ 106.62 Severability.

§ 106.71 Retaliation.  
Retaliation prohibited.  
Specific circumstances.

§ 106.72 Severability.

§ 106.81 Procedures.

§ 106.82 Severability.

# Effective Preparation: Mapping Current State

- Policies and Procedures
  - Students
  - Faculty
  - Staff
- Current institutional Issues
- Implementers
- Training/Education
  - Students
  - Faculty
  - Staff
- Website
- Infrastructure/Systems
- Resources



# Effective Preparation: Identify Delta

- Identify delta between current state of operation and new regulations
- Identify delta between current state of operation and effective, informed practices
- Design future state
- Map implementation plan based on evidence, culture, and available resources.

# Effective Preparation: Designing Future State

- Policies and Procedures
  - Document delta for project planning and measurable implementation
  - Appoint point person/team
  - Philosophical decision-making
  - Practical implementation
- Current institutional Issues
  - Coordination team
  - Communications – messaging
  - Audiences
- Implementers
  - Current staff
  - Future staffing needs

# Effective Preparation: Designing Future State

- Training
  - Audiences
  - Frequency
  - Platforms
- Website
  - Consider centralized landing page
  - Remove outdated material
- Infrastructure and Systems
- Resources
  - Pan-institutional responsibilities
  - Sharing of costs
  - Creative funding and support

# Rollout Considerations

- Implementation and Response Team
- Internal and External Communications
- Campus Education and Awareness Efforts
- Task force, Steering Committee, Advisory Team
  - Customize based on issue, needs, appropriateness
  - Students, faculty, staff
- Website Considerations

# Rollout Considerations

- Communicate core messages and changes to campus constituents
- Ensure that changes are specifically tasked to individuals with trackable targets and reasonable deadlines for implementation

# QUESTIONS

# Use of Slides

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

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# **The New Title IX Regulations: Policies, Procedures, and Practical Implementation**

*Putting the Pieces Together by August 14, 2020*

Presented By:

**The Institutional Response Group | Cozen O'Connor**

**Gina Maisto Smith, Chair**

**Leslie Gomez, Vice Chair**

**June 8, 2020**



## A Message from Cozen O'Connor

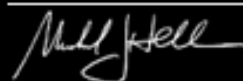
We are living in unprecedented times. The words "I can't breathe" resonate over and over in our minds as we think about the tragic and heartbreaking events that have unfolded in the last several days in Minneapolis, Minnesota. The unjustified killing of George Floyd, is one example of how bias, hatred, and racism are still alive and prevalent in our country. This must stop.

Far too many black and brown people in this country are hurting as they continue to suffer the trauma of witnessing the repeated and unfettered killings of unarmed African-Americans in the United States. These tragic deaths are horrifying and remind us we have a long way to go. As a country, we should continue to honor the memories of these individuals by standing together against racism and lawlessness, and by continuing to fight peacefully for what is right.

Cozen O'Connor and our employees have a long history of unwavering personal and financial commitment to the protection of civil and human rights. But we can and will do better. We commit to do all we can to promote a just society for which we can all be proud. In the next several weeks, we will be rallying behind our colleagues of color and our communities by providing internal and external support, training, and education. Our firm will continue to offer pro bono legal services for matters that derive from civil rights' violations. Lastly, we will financially support social justice organizations committed to these ideals.

Cozen O'Connor will not stand on the sidelines in the race for justice and equality. We will work together, tirelessly, to ensure that we live in a society that reflects our morals and values, and supports our employees, partners, and clients every step of the way.

Michael J. Heller  
Executive Chairman and Chief Executive Officer



Vincent R. McGuinness, Jr.  
President and Managing Partner



# Today's Webinar

Following an introductory webinar, *A First Look at the New Title IX Regulations*, this is the first in a series of webinars focusing on implementation hosted by Cozen O'Connor's Institutional Response Group (IRG). This webinar will:

- Explore **decision making frameworks** to implement the prescriptive and discretionary aspects of the regulations;
- Outline **policy frameworks** to effectively navigate the myriad policy components of the new regulations;
- Augment the frameworks with a discussion of the regulations through the use of **hypothetical scenarios** to bring key decisions to light; and
- Provide a sample **weekly project management plan** for effective implementation, community engagement and comprehensive communications.

# Introducing the Webinar Series

Subsequent IRG webinars will focus on specific aspects of the regulations, as written and as applied, including:



## Policy & Scope

Frameworks  
jurisdiction, scope and  
notice

## K-12

## Initial Assessment

Including, supportive  
measures, emergency  
removals, and formal  
complaints

## Investigations

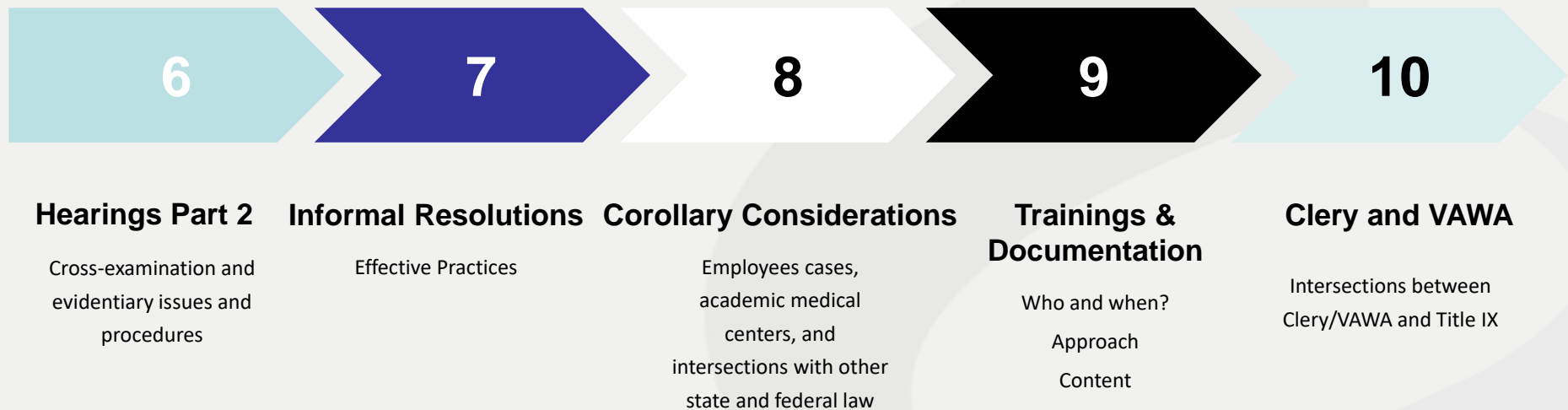
Adopting new protocols

## Hearings Part 1

Adjudication procedures:  
structure and format

# Introducing the Webinar Series

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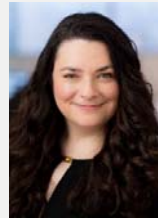
# Institutional Response Group



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**Leslie Gomez**  
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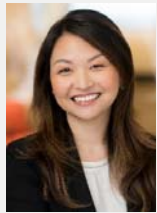
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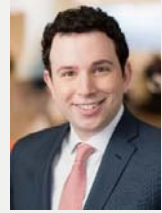
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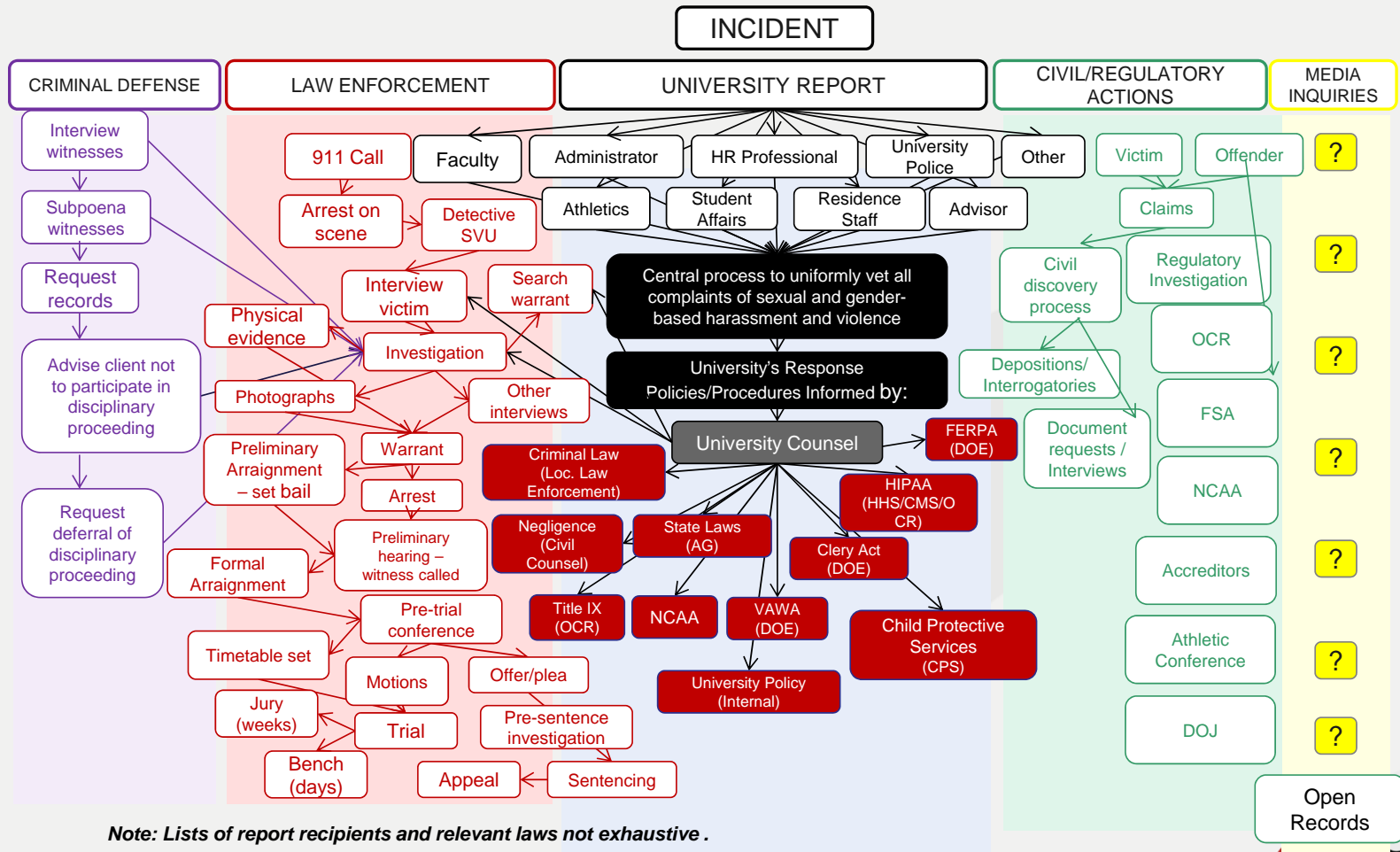
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# The Challenge of the Context





## Now What?





# Silver Lining

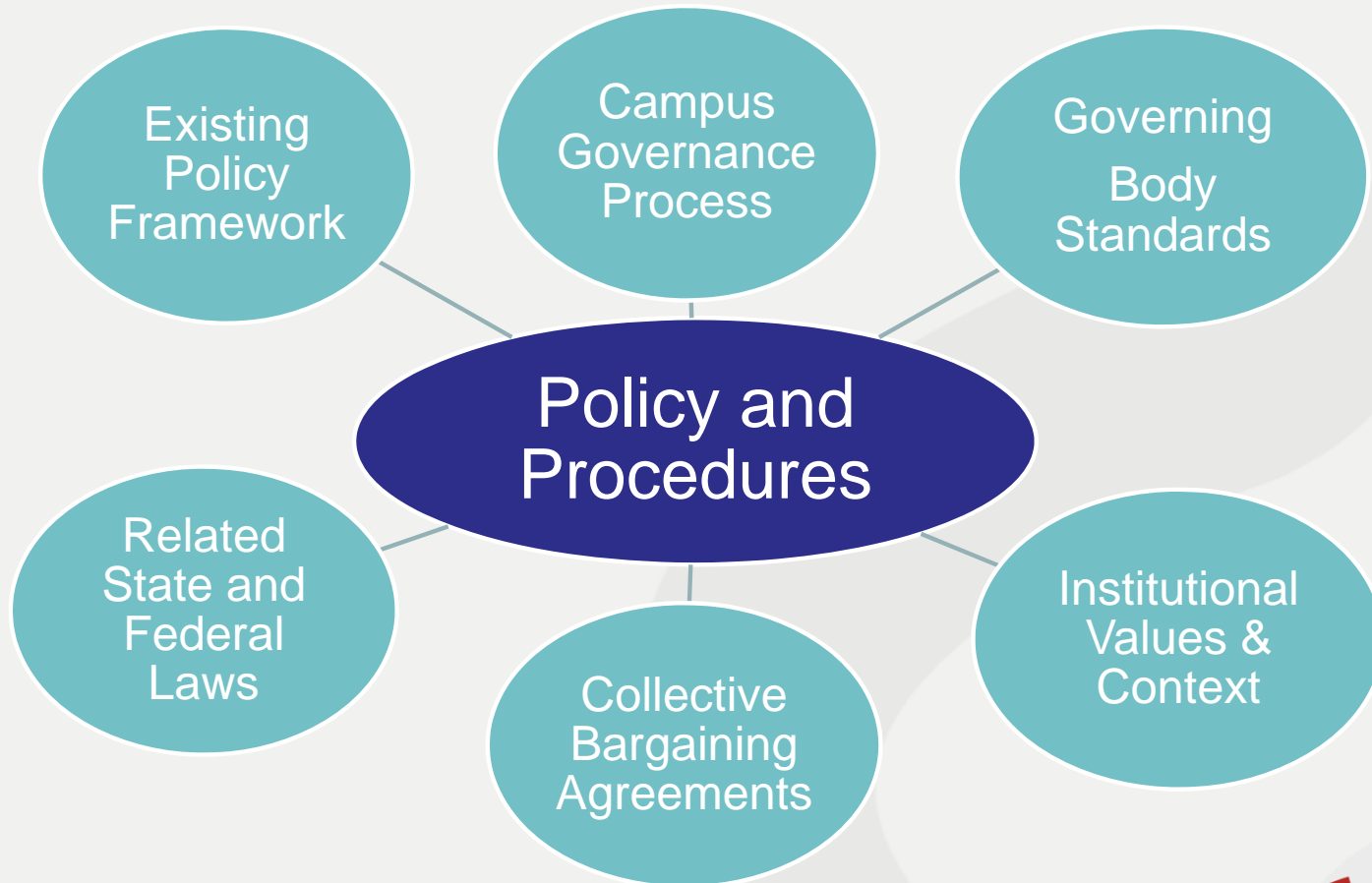


# Maintaining Calm



Getty Images

# Decision-Making Considerations



# Approach to Implementation

## Crafting

- Gather key stakeholders and current policies and procedures
- Form working group for planning and implementation
- Review new legal requirements and compare with current practices

## Drafting

- Update written policies, procedures, templates and forms
- Prepare communications plan and draft communications to constituent groups
- Review web and print materials to ensure consistent messaging

## Staffing

- Realign current roles or recruit/hire to fulfill all required functions
- Ensure all staff members receive training; maintain training materials for publication online
- Reinforce partnerships with key units and ensure consistent protocols for case referrals

## Grafting

- Roll out training and education on new policies, procedures, and protocols
- Develop awareness campaign to educate community about resources, supports, and reporting options
- Create mechanism to gather feedback about gaps in process, questions or concerns

# Effective Preparation: Mapping Current State

- Policies and Procedures
  - Students
  - Faculty
  - Staff
- Current institutional Issues
- Implementers
- Training and Education
  - Students
  - Faculty
  - Staff
- Website
- Infrastructure/Systems
- Resources

# Effective Preparation: Identify Delta

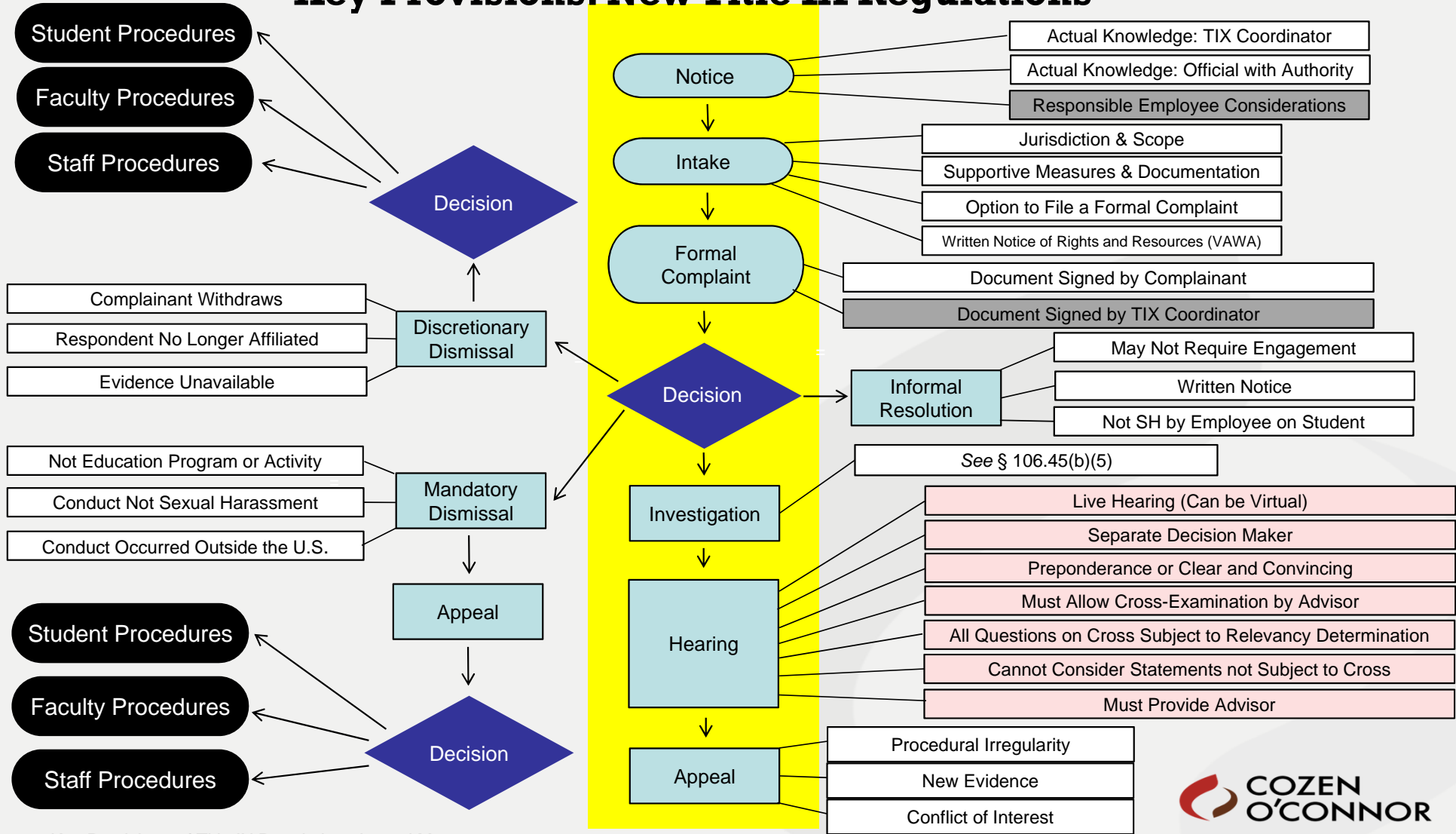
- Review new legal requirements
- Identify delta between current state of operation and new regulations
- Identify delta between current state of operation and effective, informed practices
- Identify key elements to inform design of future state
- Map implementation plan based on evidence, culture, and available resources

# Implementation Rubric

- Law
- Regulations
- Guidance
- Preamble and commentary
- OCR webinars, charts, blog
- Policy
- Higher education experience
- Institutional values



# Key Provisions: New Title IX Regulations



Key Provisions of Title IX Regulations issued May 6, 2020;





# Regulations: “Legally Binding Obligations”

- “Because these final regulations represent the Department’s interpretation of a recipient’s legally binding obligations, **rather than best practices**, recommendations, or guidance, these final regulations focus on **precise legal compliance requirements** governing recipients.”

## Regulations: “Best Practices”

- “These final regulations leave recipients the **flexibility to choose to follow best practices and recommendations** contained in the Department’s guidance, or similarly, best practices and recommendations made by non-Department sources, such as Title IX consultancy firms, legal and social sciences scholars, victim advocacy organizations, civil libertarians and due process advocates and other experts.”

# **DECISION-MAKING FRAMEWORK**

# Framing Principles

1

“A recipient’s treatment of a complainant or a respondent in response to a formal complaint of sexual harassment may constitute discrimination on the basis of sex under title IX.”

2

“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.”

3

“A recipient’s response must treat complainants and respondents equitably by offering supportive measures . . . to a complainant, and by following a grievance process . . . before the imposition of any disciplinary sanctions or other actions that are not supportive measures . . . against a respondent.”

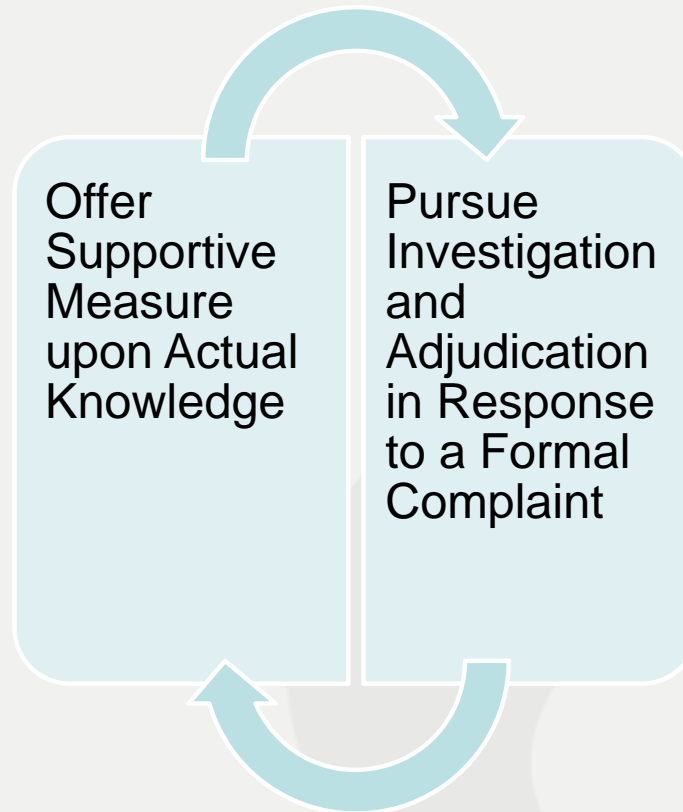
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“A recipient is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances.”

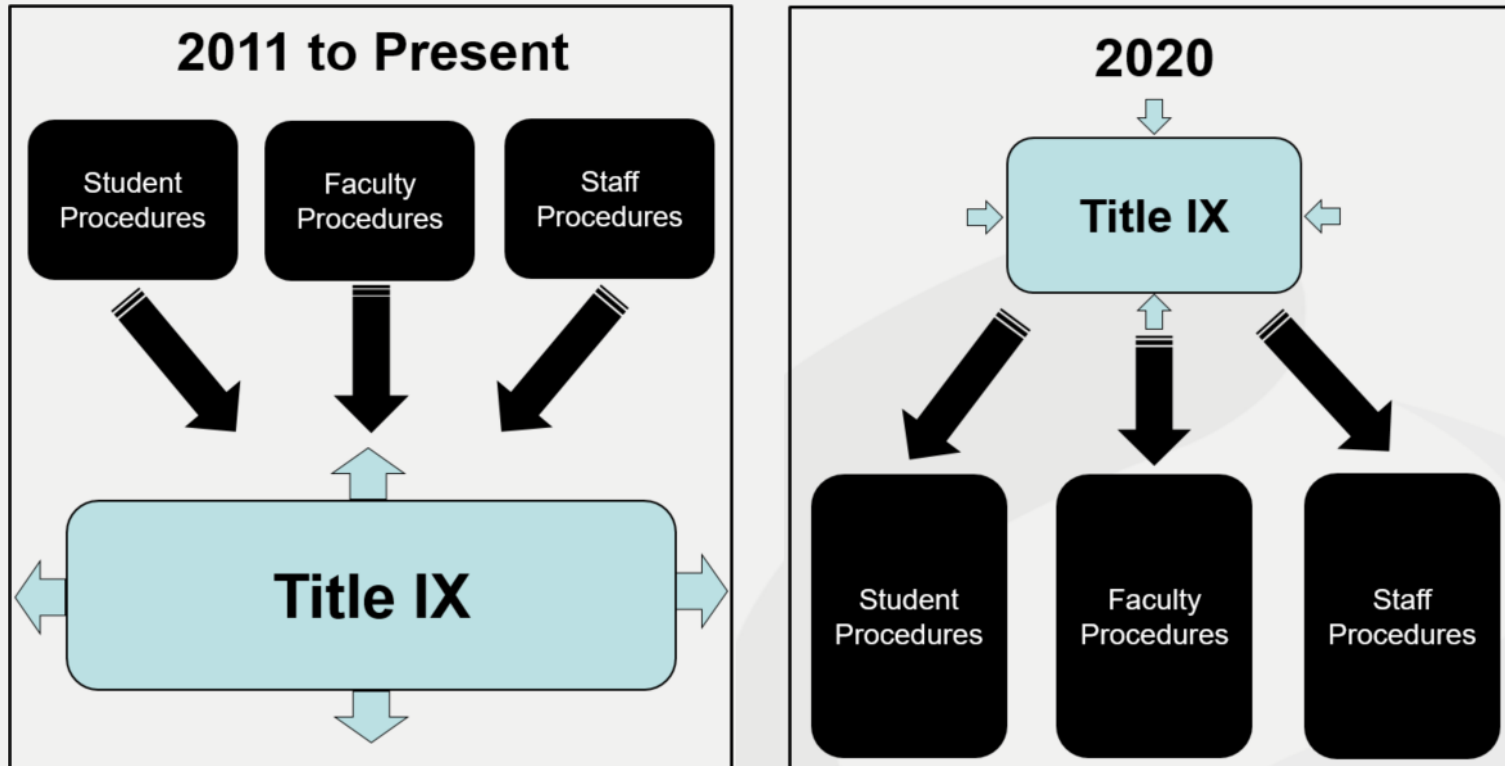
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“If the Assistant Secretary finds that a recipient has discriminated against persons on the basis of sex in an education program or activity under this part, or otherwise violated this part, such recipient must take such remedial action as the Assistant Secretary deems necessary to remedy the violation.”

# Understanding Two Key Provisions



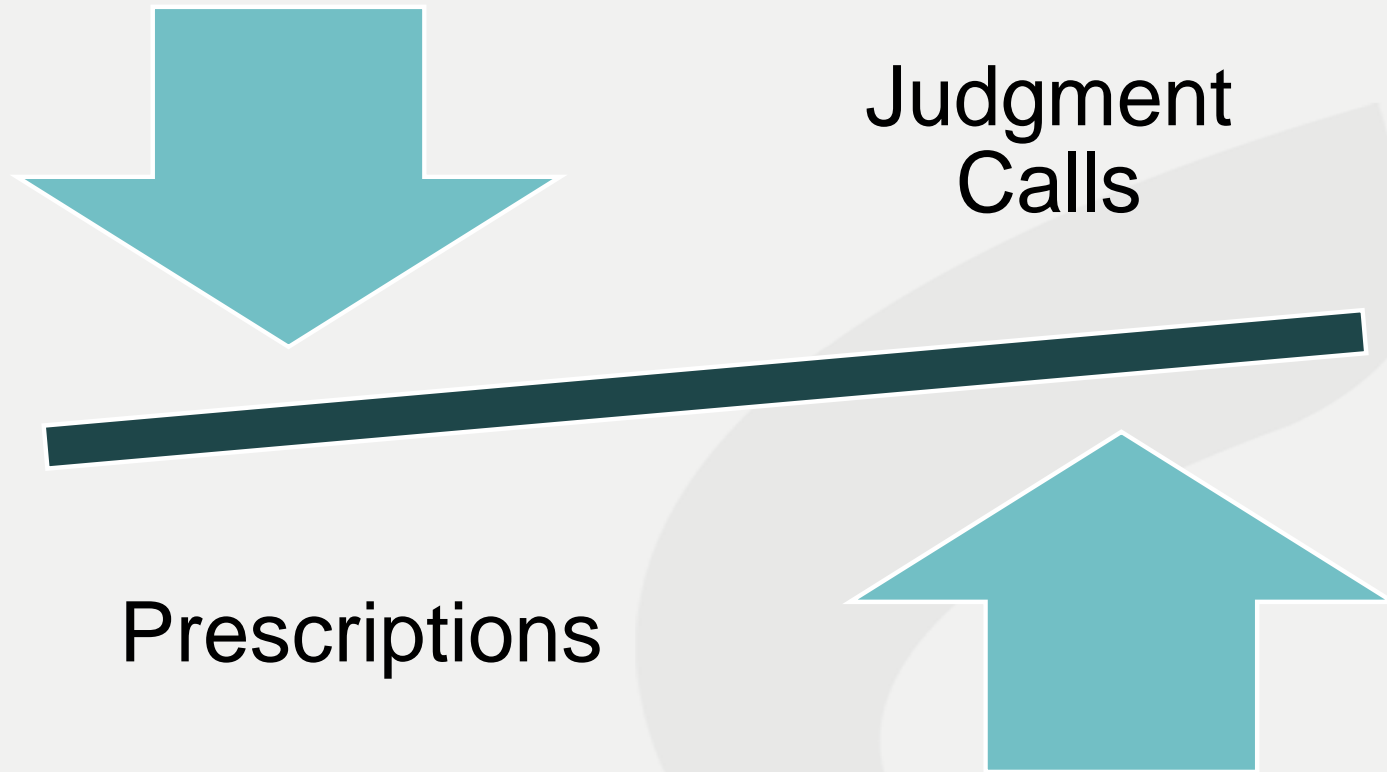
# Impact of Jurisdictional Requirements



**“We emphasize that nothing in these final regulations prevents recipients from initiating a student conduct proceeding [for sexual harassment no longer covered by Title IX].”**

Title IX Regulations issued May 6, 2020; § 106.45(b)(3)(i). See also Preamble, at 46, 237, 241, 251, 258, 457, 472, 481, 482, 485, 496, 631, 636, 642, 645, 660, 681, 730, 907, 939, 962, 963, 964, 1302, 1333, 1516, 1518, 1524, 1558, 1572, 1575, 1578, 1591, 1595, 1689, 1764, 1796, 1826.

# Balancing



# Decision-Making Framework

## Prescriptive Elements

- Required language of the regulations

## Discretionary Elements

- Many details regarding implementation are left to the discretion of the institution



# Key\* Prescriptive/Required Elements

- Respond promptly in a manner that is not deliberately indifferent
- Treat complainants and respondents equitably
- Promptly contact Complainant to discuss supportive measures
- Follow a grievance process that complies with 106.45
- Apply equally to both parties any provisions, rules, or practices that a recipient adopts as part of its grievance process for handling formal complaints.

\*Not a complete list of all prescriptive elements.

# Key\* Prescriptive/Required Elements

- Must provide written notice upon receipt of a formal complaint
- Must investigate the allegations in a formal complaint
- Dismiss the formal complaint under certain circumstances
- Ensure burden of proof and burden of gathering evidence rest on the recipient and not the parties
- Provide an equal opportunity for the parties to present witnesses and evidence
- Send to each party and the party's advisor the evidence subject to inspection and review
- Create an investigative report that fairly summarizes relevant evidence and send to party at least 10 days prior to hearing

\*Not a complete list of all prescriptive elements.

# Key\* Prescriptive/Required Elements

- Provide for a live hearing
- Permit each party's advisor to ask the other party and any witnesses all relevant questions
- Allow cross-examination to be conducted directly, orally, and in real time by the party's advisor
- Provide advisor without fee or charge to conduct cross-examination at the hearing
- Not rely on any statement of a party or witness who does not submit to cross-examination

\*Not a complete list of all prescriptive elements.

# Key\* Prescriptive/Required Elements

- Issue a written determination regarding responsibility
- Offer both parties an appeal from dismissal of formal complaint and from determination of responsibility
- Create and maintain records for seven years
- Document the basis for its conclusion that response was not deliberately indifferent

\*Not a complete list of all prescriptive elements.

# Key Discretionary Elements

- Policy and procedural framework
- Scope of conduct to be prohibited and addressed
  - Conduct beyond Title IX jurisdiction
    - Title VII sexual harassment
    - Outside of the United States
    - Outside of the education program or activity
  - How to adjudicate after mandatory dismissal
  - Accepting a formal complaint from Complainant not participating or seeking to participate in education program or activity
- Supportive measures
  - Process for challenging emergency removal
  - Factual predicate for use of more restrictive supportive measures

# Key Discretionary Elements

- Employee reporting responsibilities
  - Officials with authority to impose corrective measures
  - Responsible employees
- Process considerations
  - Extend formal complaint to all complaints?
  - Provide advisor at all stages?
  - Permit cross-examination at all hearing types?
- When should the Title IX Coordinator file a formal complaint
  - Outline factors to be considered
  - Process for evaluating

# Key Discretionary Elements

- Standard of evidence
  - Preponderance of the evidence or clear and convincing
- Decision-maker for hearing
  - Administrator
  - Panel
  - External professional
- Structure of the institutional response
- Personnel and staffing
- Designation of reasonably prompt timeframes
- Systems for documentation

# **POLICY FRAMEWORK OPTIONS**



# Model Policy Elements

- Statement of Institutional Values
- Scope & Jurisdiction
- Notice of Non-discrimination
- Role of the Title IX Coordinator
- Definitions of Prohibited Conduct
- Privacy vs. Confidentiality
- Reporting Options
- Confidential Resources
- Supportive Measures
- Education and Prevention

# Model Procedural Elements\*

- Reporting options
- Resources and supports
- Intake and outreach
- Initial assessment
- Filing a formal complaint
- Evaluating moving forward without a Complainant
- Investigative protocols
- Evidentiary considerations
- Standard of evidence
- Hearing or adjudication process
- Sanctions & remedies
- Written notice of outcome
- Appeal
- Coordination with law enforcement
- Role of the advisor
- Timeframes

\*Not a complete list of all elements.

## **Flexibility to Adopt Other Provisions**

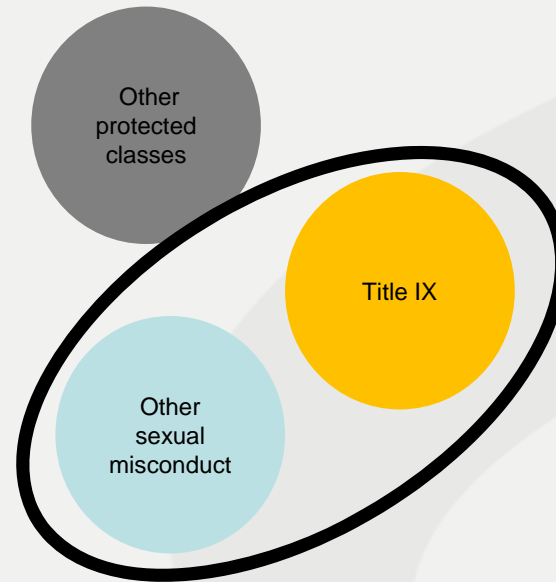
- For the purpose of addressing formal complaints of sexual harassment, a recipient's grievance process must comply with the requirements of this section.
- Any provisions, rules, or practices other than those required by this section that a recipient adopts as part of its grievance process for handling formal complaints of sexual harassment as defined in § 106.30, must apply equally to both parties.

# Policy Framework Options

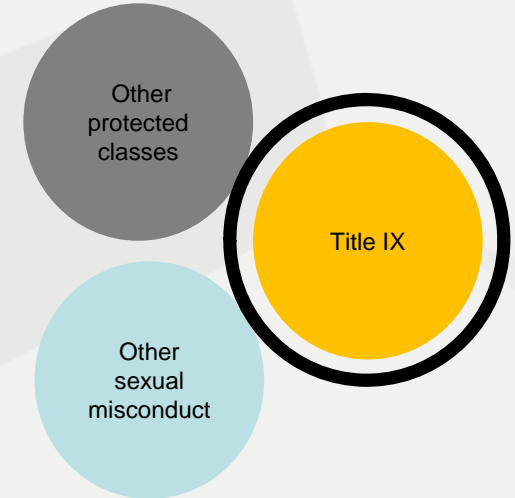
All Protected Classes



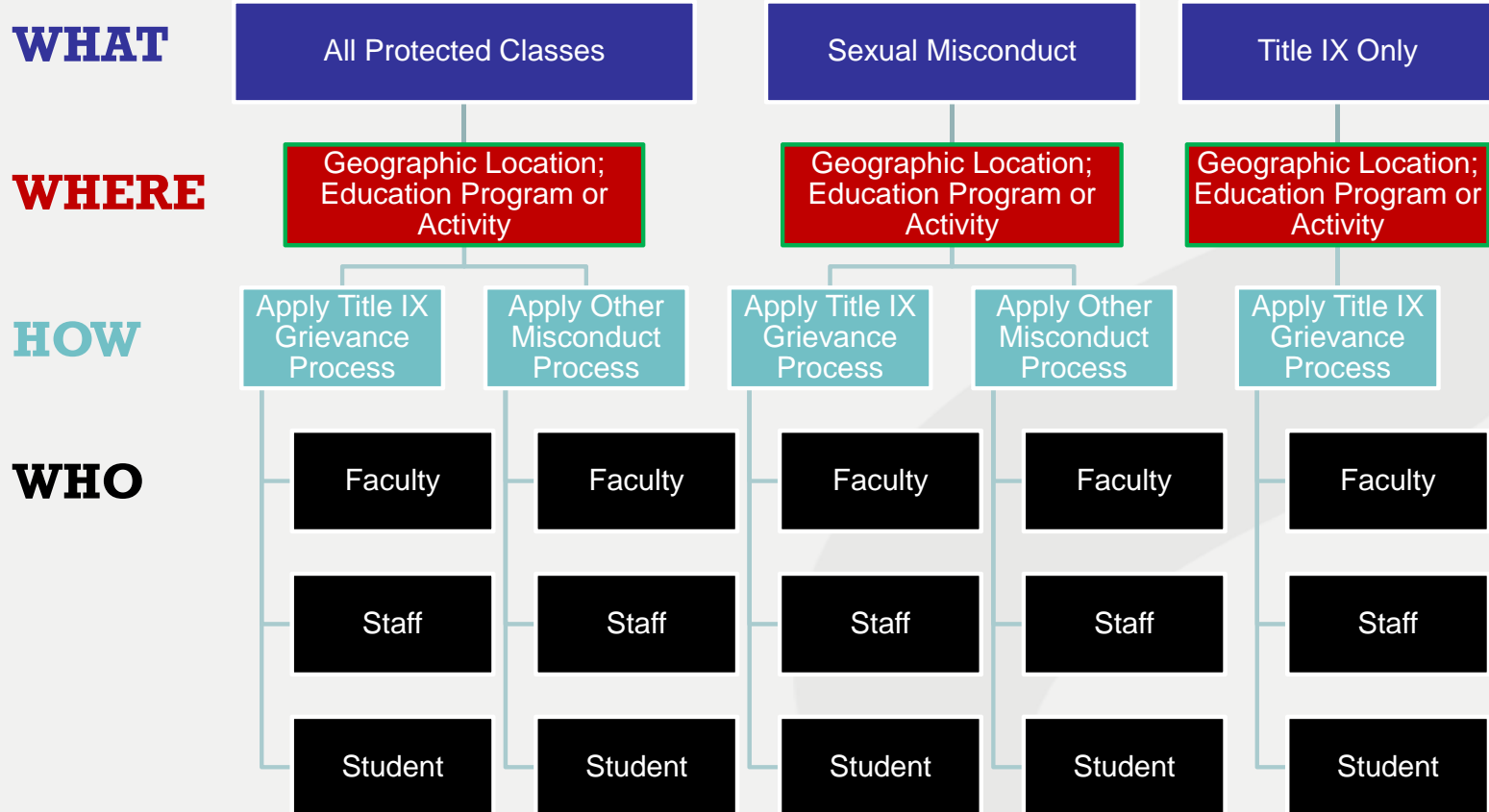
Sexual Misconduct



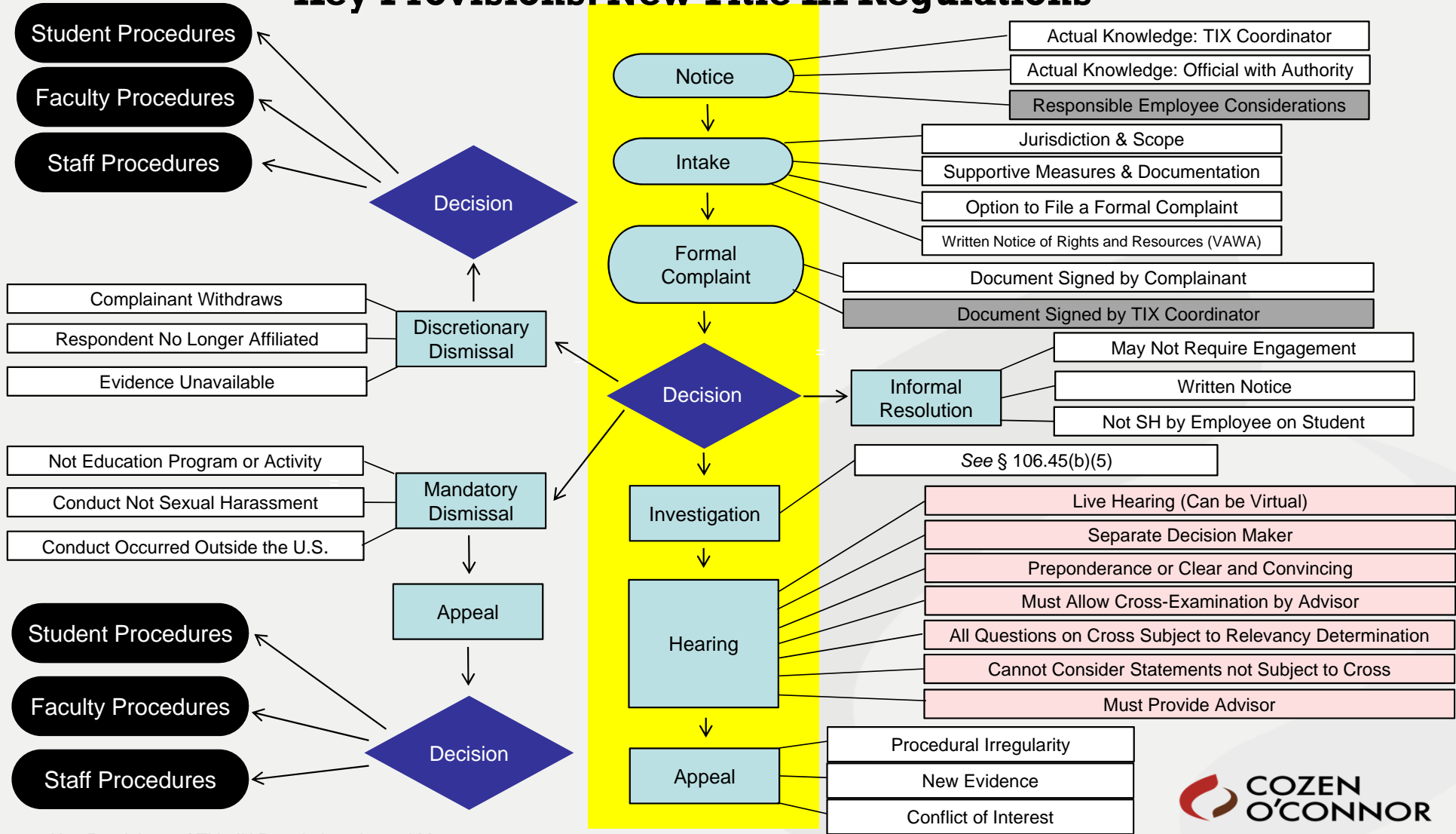
Title IX Only



# Procedural Framework

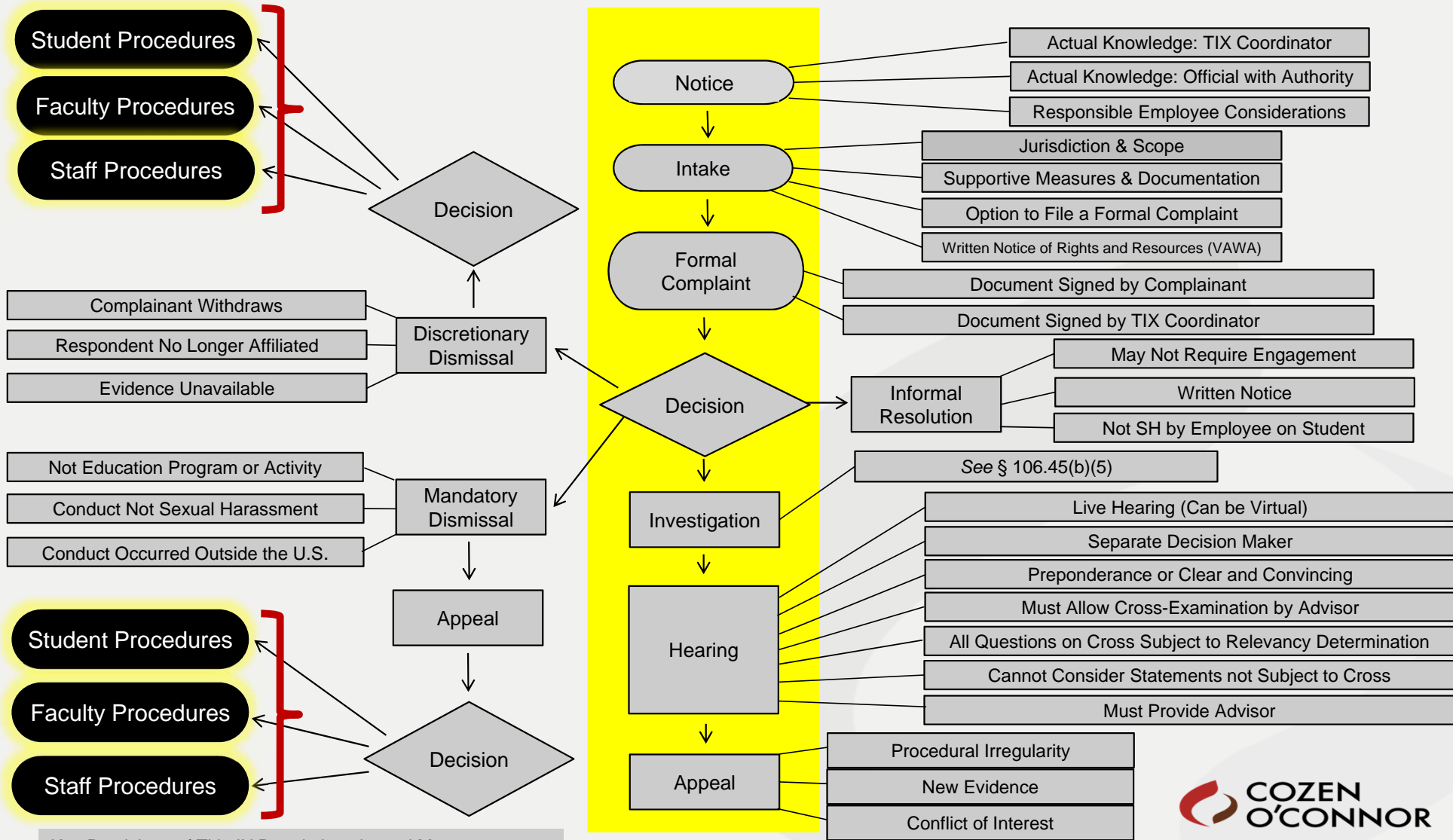


# Key Provisions: New Title IX Regulations



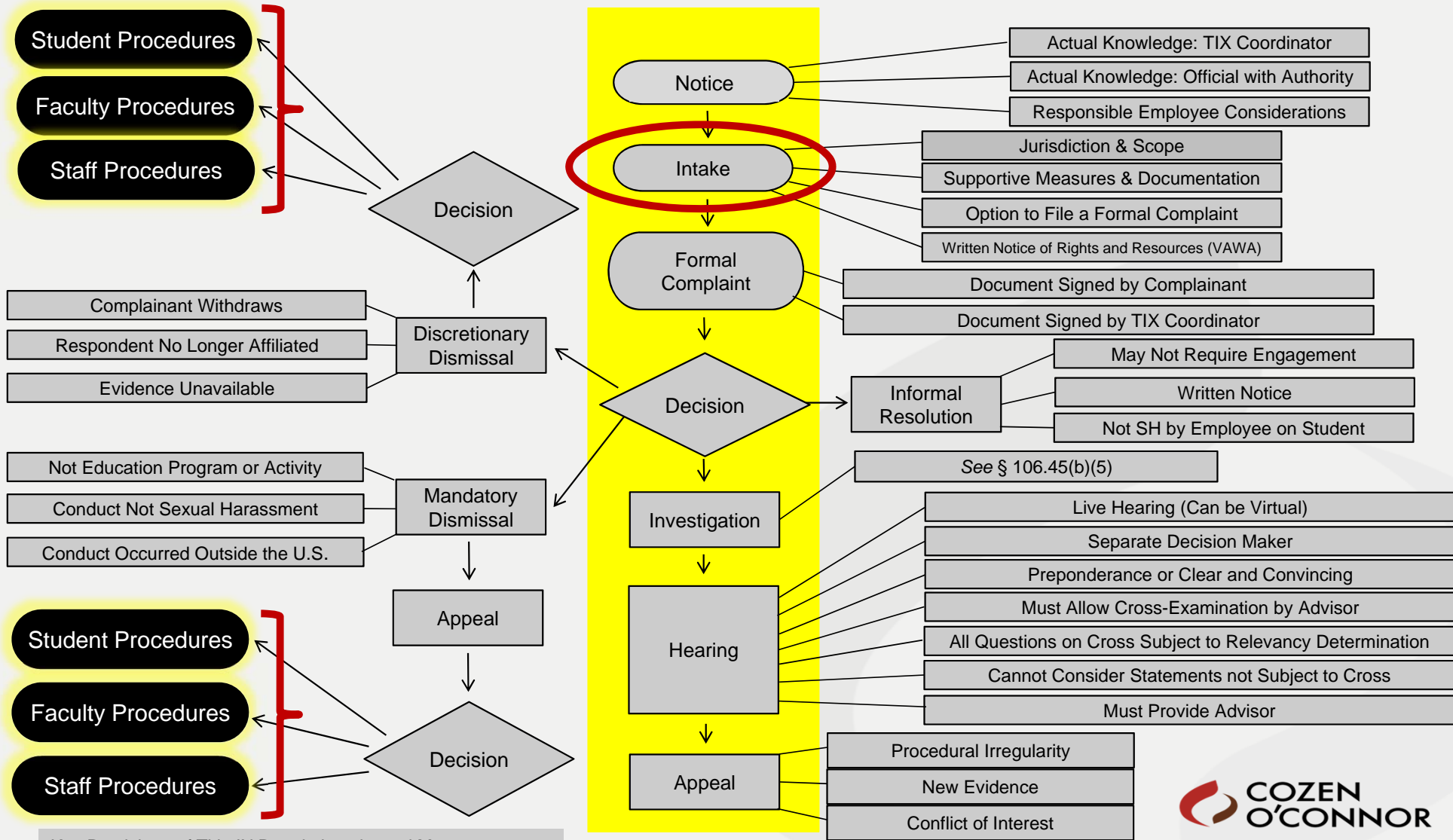
Key Provisions of Title IX Regulations issued May 6, 2020;





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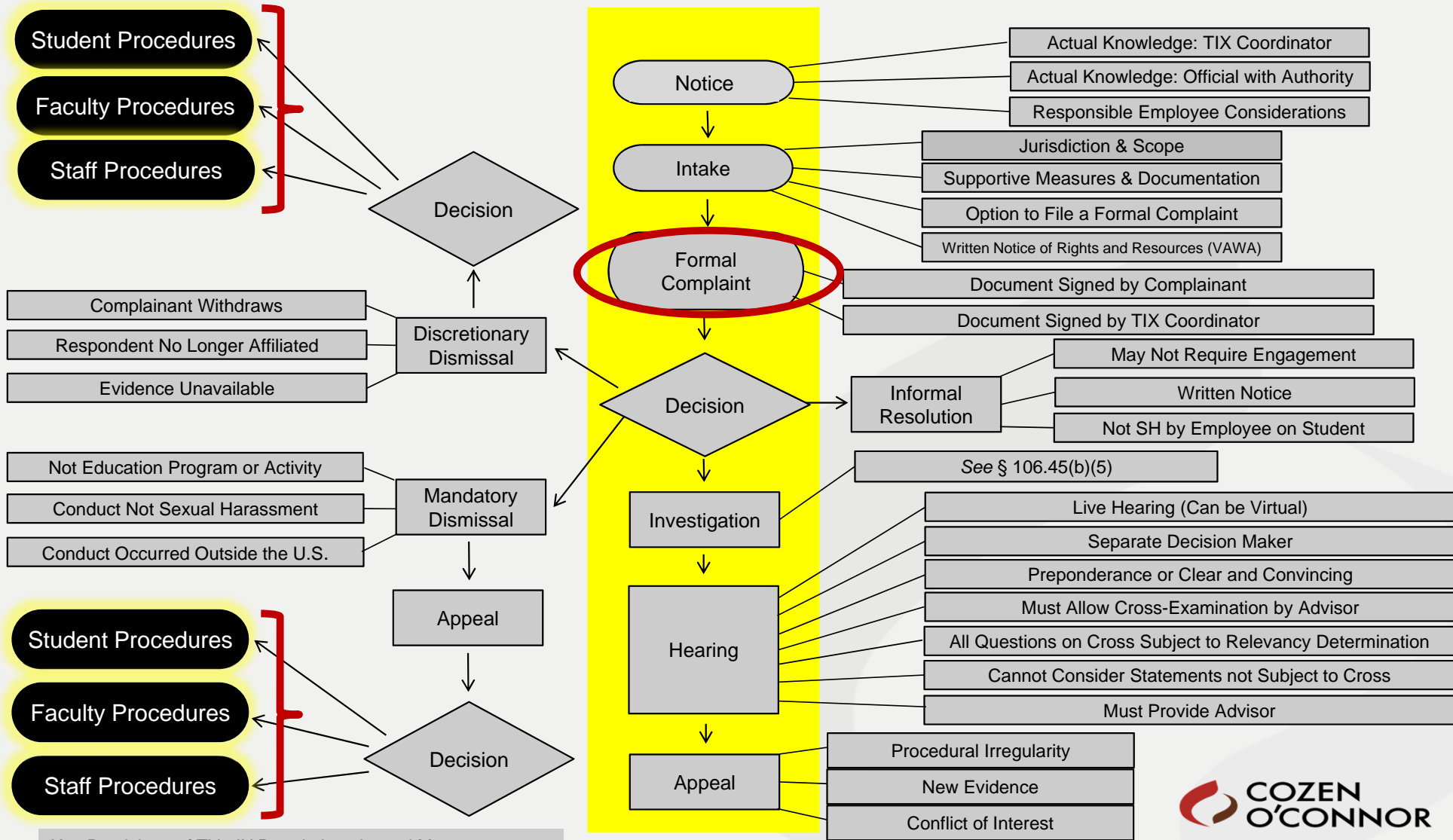




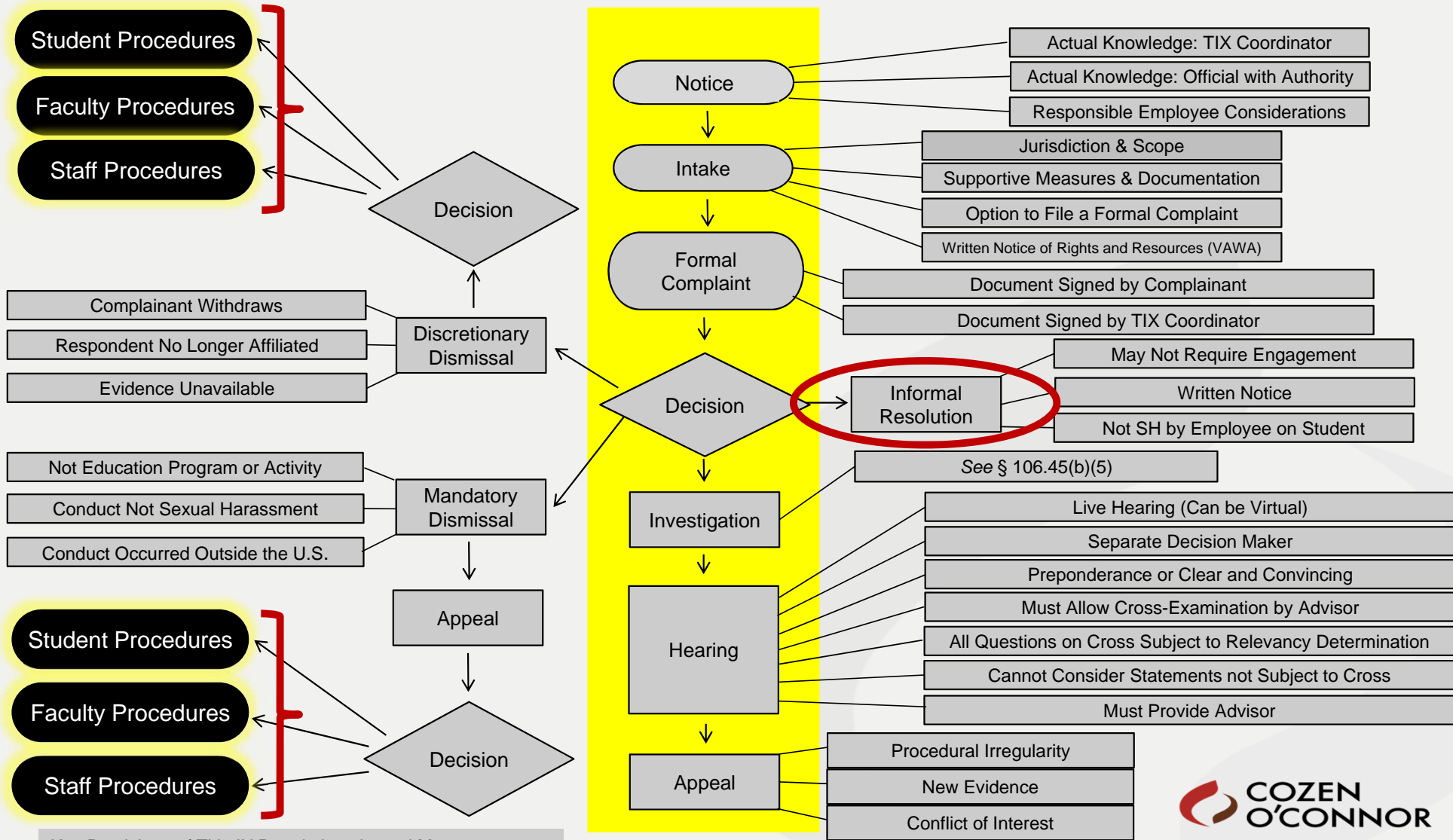
Key Provisions of Title IX Regulations issued May 6, 2020;





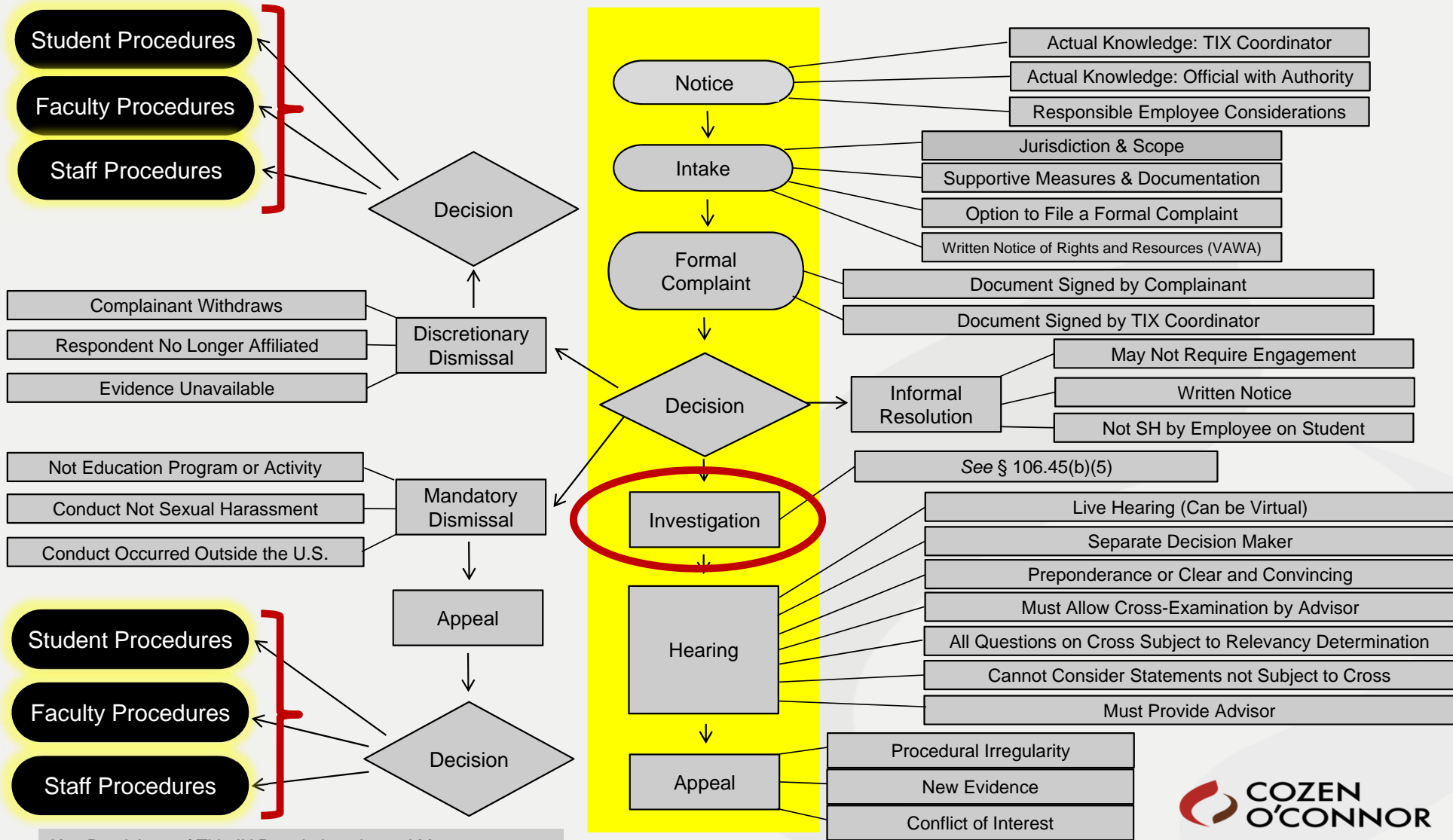


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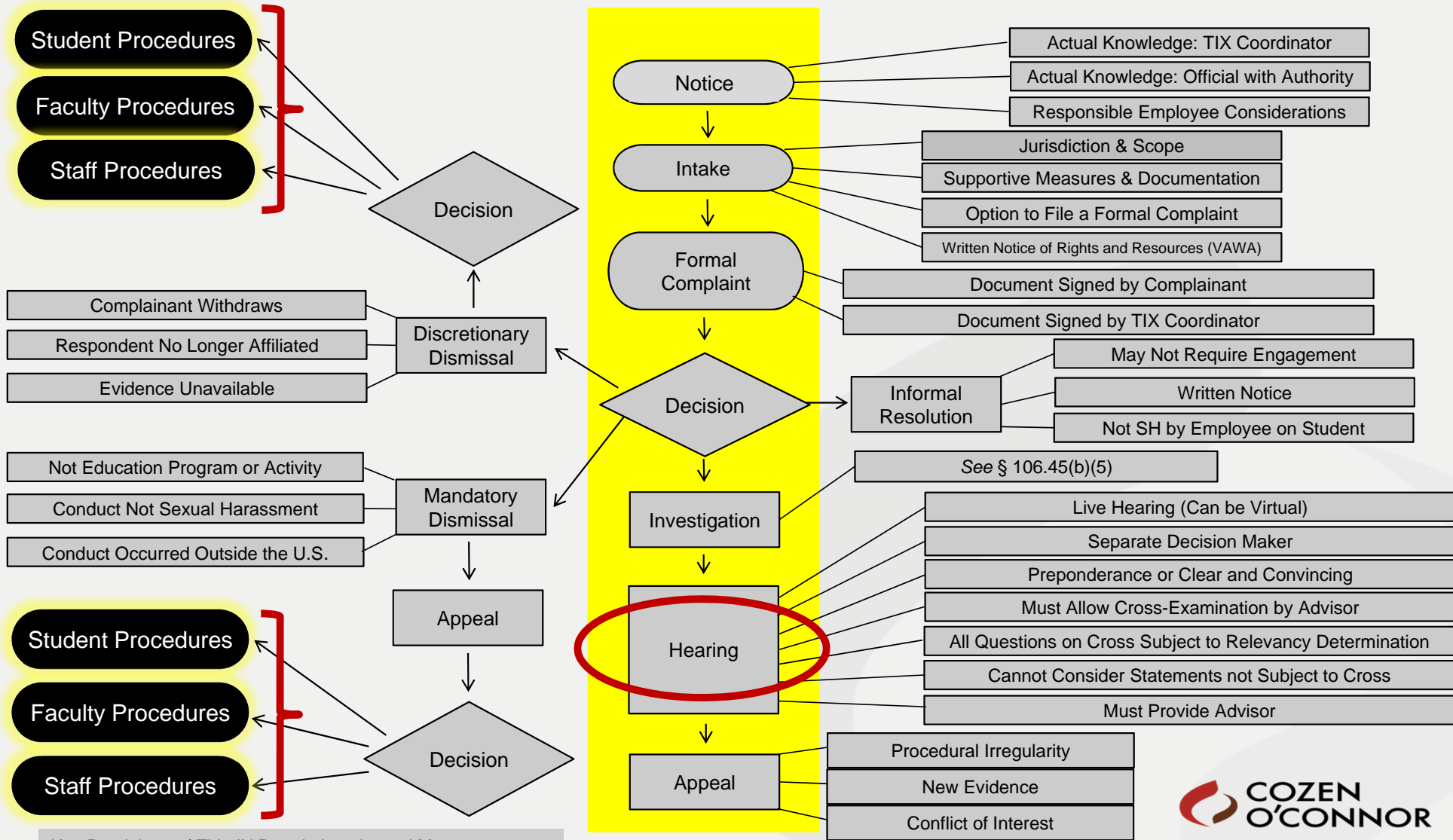
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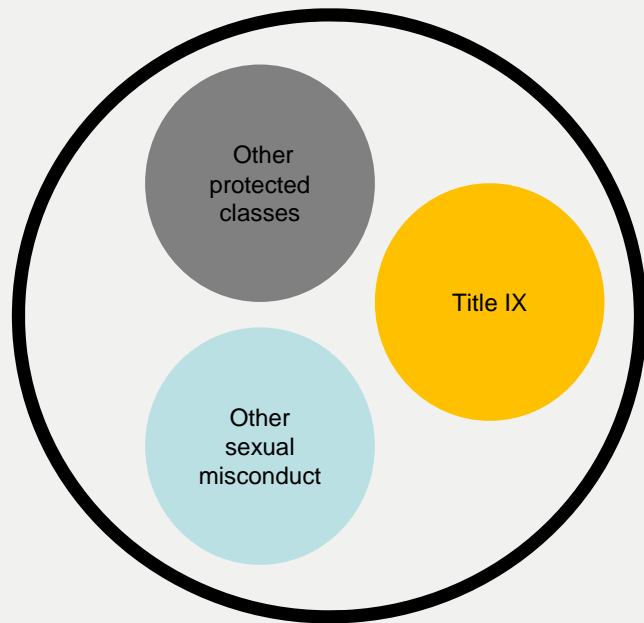


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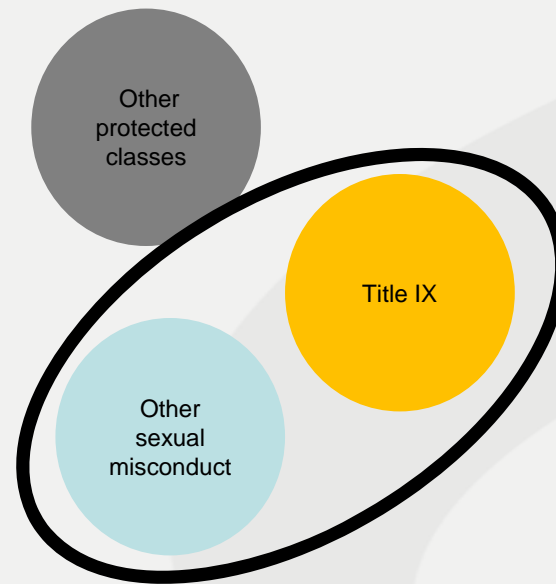


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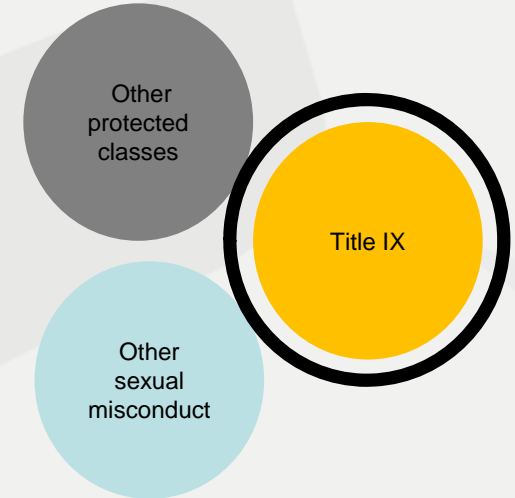
All Protected Classes

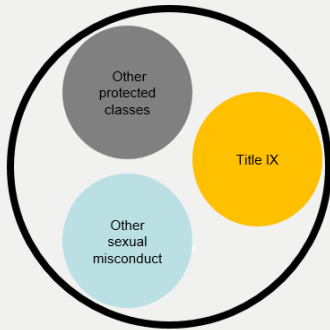


Sexual Misconduct



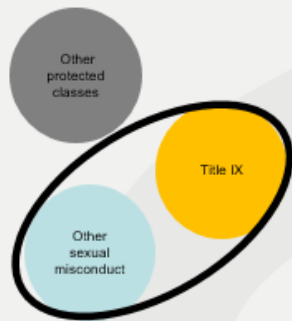
Title IX Only





# All Protected Class Misconduct

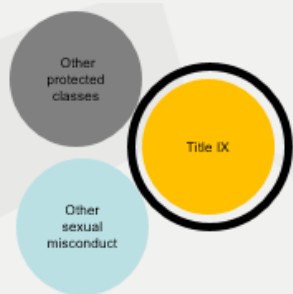
Challenges	Benefits
Additional process in cases where not legally required	Uniform approach to resolution for all civil rights and all sexual misconduct
Additional resources (e.g. advisors, hearing officers, appeal officers, time)	Message to community about equal importance of all forms of discrimination and harassment and awareness of intersectionality
Implications of expanded scope in terms of personnel (e.g. broader and more complex apparatus, timeliness of resolutions)	More streamlined process: fewer decision points
Elevates protected class misconduct over other misconduct (e.g. physical assault, honor code, other personnel matters)	Easier alignment when multiple protected classes are implicated



# All Sexual Misconduct\*

\*Whether or not the conduct qualifies as Sexual Harassment as defined by the regulations

Challenges	Benefits
Additional process in cases where not legally required	Uniform approach to resolution for all instances of sexual misconduct
Additional resources (e.g. advisors, hearing officers, appeal officers, time)	Message to community about equal importance of all forms of sexual misconduct
Implications of expanded scope in terms of personnel (e.g. broader and more complex apparatus, timeliness of resolutions)	More streamlined process: fewer decision points
Community perception that school is applying Title IX prescriptive regulations too broadly (extends to cover additional conduct than is required under the law)	Parity between Title IX sexual harassment and other sexual misconduct, regardless of jurisdiction; accessible and user-friendly
Distinguishes sexual harassment from other protected classes	Continuity of practices (i.e. messaging to the community that the conduct we are addressing has not changed)



# Only Title IX Sexual Harassment

Challenges	Benefits
Hyper-technical application of regulations that is inconsistent with value of treating all sexual misconduct equally	Ease of policy drafting
Less alignment with other processes; complex and discretionary decision-making throughout	Does only what is required under the law; narrowly tailored
Schools will need to determine how to regulate conduct beyond Title IX jurisdiction; continuing effects analysis	Narrows scope of changes needed; requires additional resources in the fewest number of cases
Still need to consider Title VII for employee conduct, necessitating parallel or tiered processes	Easier to explain changes to the community because changes are tied strictly to legal requirements



# **PRESSURE-TESTING TO GUIDE DECISION-MAKING**

# Consistent Elements Across All Matters

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



# Pressure Test

- What
  - Conduct
- Where
  - Geographic location
  - Program/activity
- How
  - What grievance process
- Who
  - Parties (faculty, staff, student, other)



# Scenario # 1

An RA was doing rounds and passed by one of their resident's whiteboards outside their room. They noticed that someone wrote, "You're a B----" on the whiteboard in permanent marker. When the RA asked the resident about it, they said, "Oh, that was my ex. It's whatever."

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Sexual Harassment (as defined by the regulation)

Directed against a person in the U.S.

Within the education program or activity

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A student, Nikole, works out at the café on campus. It is open to the public. Simon is a local who often patronizes the café. Simon has made it clear that he has a crush on Nikole. Somehow, Simon got Nikole's phone number and has been sending her incessant text messages. Simon also pieced together Nikole's schedule and has started to show up outside of buildings when she's leaving class. One time, she even saw him waiting for her outside her dorm. She has asked him to leave her alone, but he won't stop texting and showing up.

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## Scenario # 6

Garrett and Stefan are both undergrad students at your school and are part of the same study abroad program in Madrid. Not only does your school sponsor the study-abroad program and provide all the faculty for it, but the Madrid campus is actually wholly owned and operated by your school. One night in Madrid, in their on-campus dorm room, Stefan sexually assaulted Garrett.



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## Scenario # 7

A former faculty member, Jill, reported that, during her time at your institution three years ago, she was subjected to repeated unwelcome hugs and flirtatious comments from Rob—a fellow faculty member who still works at your school. Jill has no current affiliation with your institution. For the last three years, she has worked at another school.

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BUT... at the time of making the formal complaint, Jill is not participating in or attempting to participate in the education program or activity of your school.

## Scenario # 8

An employee, Alan, reported that his supervisor, Elyse, openly and graphically discussed her sex life in the workplace including showing explicit photos and videos from dating websites and expressed a preference for men of a particular race. Alan said that, when discussing online dating, Elyse once commented that she “swipes left” on men of Alan’s race because she “doesn’t trust” them. Alan said he felt targeted by Elyse based on his race and sex. Things came to a head recently when Elyse wrote Alan up for lateness. Alan is the only person of his race in the department. Alan said that even though everyone runs late, he was the only one Elyse reprimanded.



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BUT... the report involves Title IX *and* non-Title IX conduct

# **NEXT STEPS: UPDATING CAMPUS POLICIES AND PROCEDURES**

# Putting the Pieces Together



# Effective Preparation: Designing Future State

- Policies and Procedures
  - Document delta for project planning and measurable implementation
  - Appoint point person/team
  - Philosophical decision-making
  - Practical implementation
- Current institutional Issues
  - Coordination team
  - Communications – messaging
  - Audiences
- Implementers
  - Current staff
  - Future staffing needs

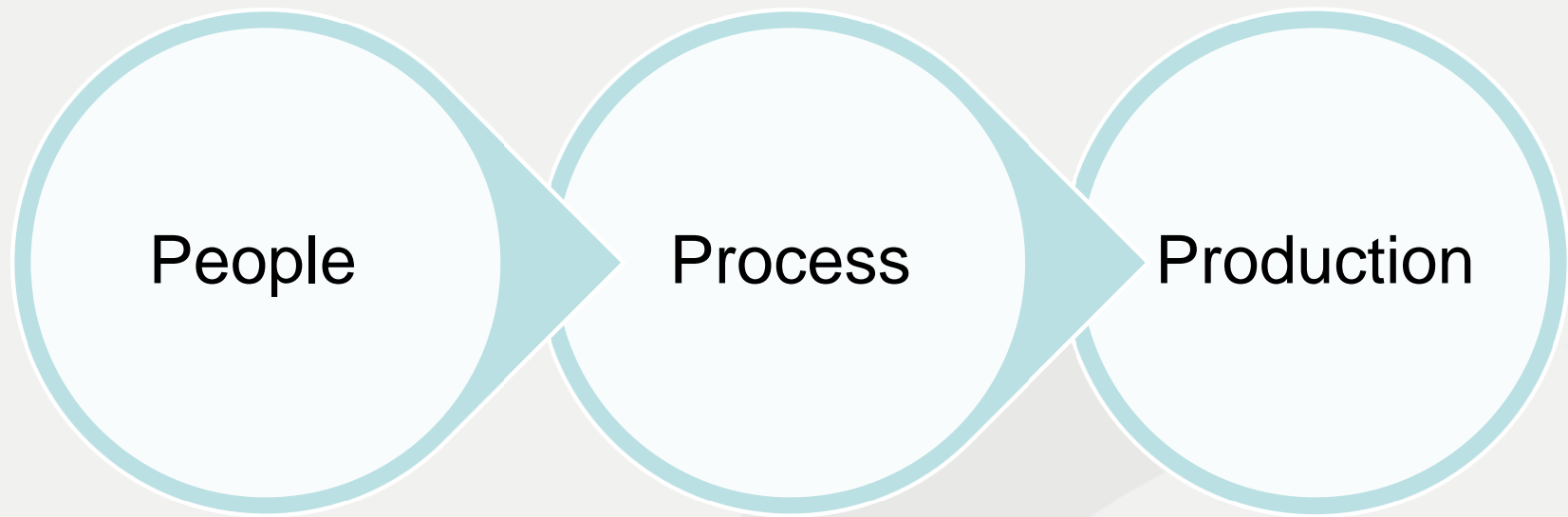
# Effective Preparation: Designing Future State

- Training
  - Audiences
  - Frequency
  - Platforms
- Website
  - Consider centralized landing page
  - Remove outdated material
- Infrastructure and Systems
- Resources
  - Pan-institutional responsibilities
  - Sharing of costs
  - Creative funding and support

# **ROLLOUT CONSIDERATIONS**



# Designing Future State



People

Process

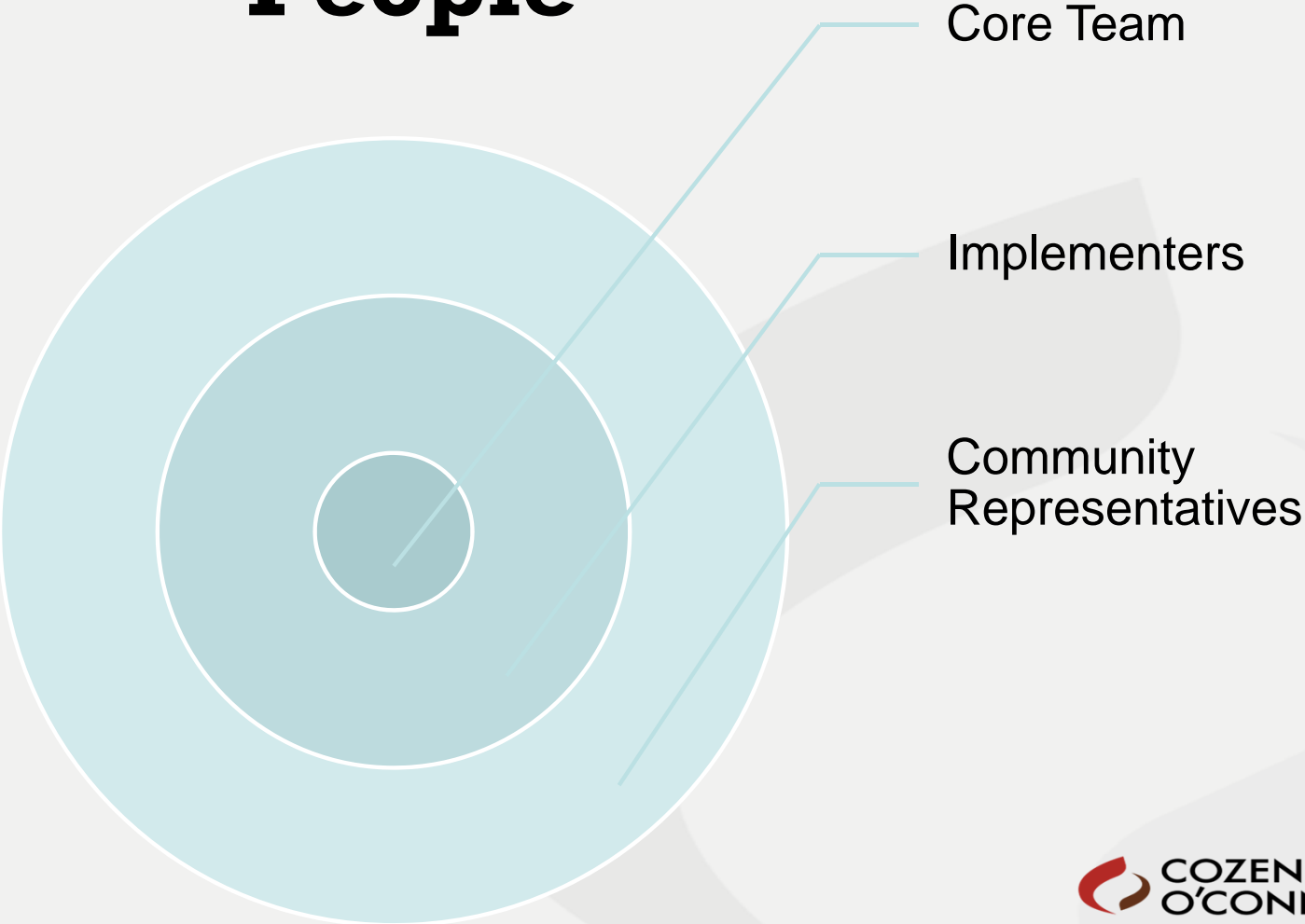
Production

Inputs

Decision-making  
structure

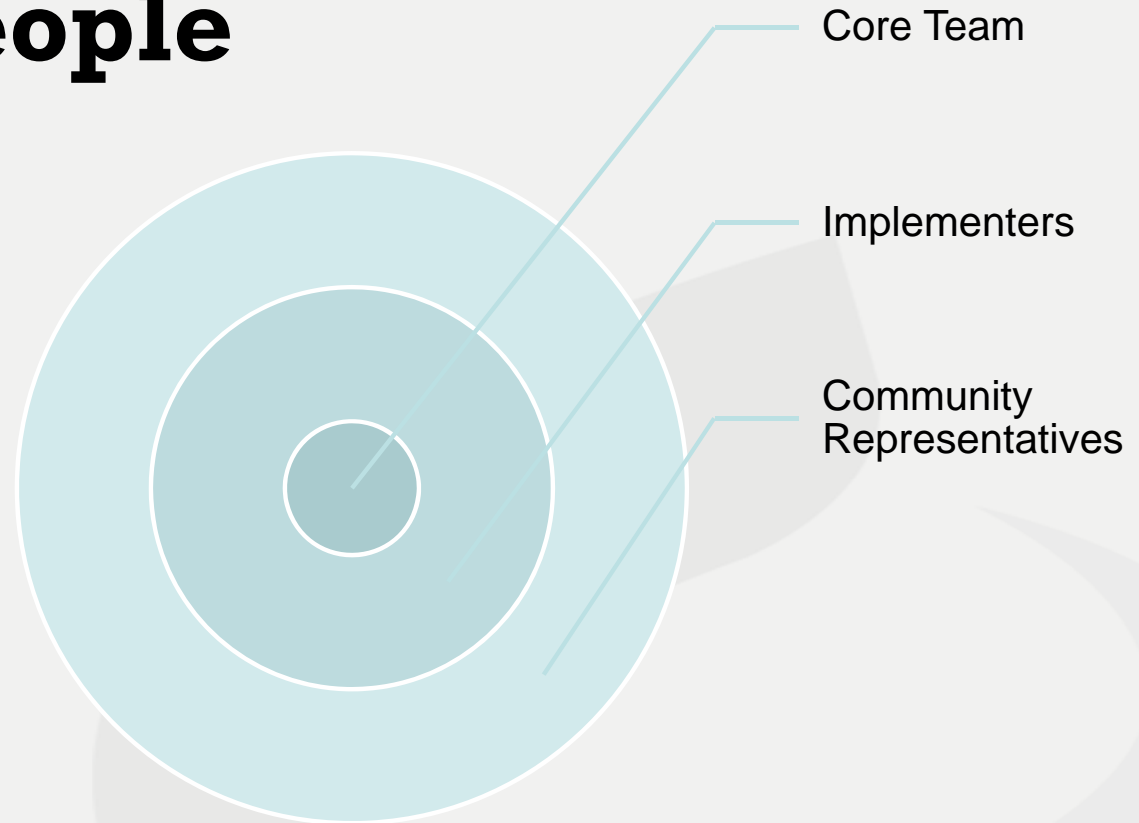
Outputs

# People



# People

- Who are the decision-makers?
- Who knows how this will work on the ground?
- Who needs to be an emissary for this work and inform practices/impacts on different constituent groups?



# Process: Considerations

- Charge
- Remote Engagement
- Culture of Institution
- Levels of Community Engagement
- Facilitation/Chair
- Decision-Making (consensus, voting)
- Operational Ground Rules/Guidelines
- Continuing Work



# Process: Getting Started

- Identify who you need to be involved, engaged, informed
- Determine structure (committee, task force, etc.)
  - Invitations
  - Meeting platform
  - Facilitator/Chair
- Set meetings (frequency and timing)
- Set timeline for progress (identify end points)
- Establish agendas (plan in advance)
- Additional issues (public meetings, etc.)

# Products: Communications

## Internal: Team

- **What** process plan is
- **Who** will be involved
- **What** the timeline is
- **Who** is communicating with media/community
- **Where** questions should be directed
- **What** can be shared

## External: Community

- **What** they can expect
- **Who** is running point
- **What** the timeline is
- **Where** they can go for more information
- **How** they can give feedback

# Messages

- Communicate core messages and changes to campus and community constituents, including what is not changing
- Frequency
- Method
- Expectations
- Any feedback loops

## **Products: Campus Education and Awareness Efforts**

- Orientation
- Trainings (in person and online)
- Other policies
- Prevention efforts
- Advocacy groups
- Written materials
- Emissaries





# Products: Websites and Online Presence

- Social media
- ALL webpages (double check links)
- Identify a communications subcommittee
- Need a webmaster: SEO functions
- Other connections (community, etc.)



# **WEEKLY PROJECT MANAGEMENT PLAN**

# Weekly Project Management Plan

## 10 Weeks To Go:

- Attend webinars from subject matter experts
- Form working group for planning and implementation
- Gather all current policies/procedures
- Identify where requirements in the new regulations differ from current practices
- Gather key stakeholder group and present key components of new regulations
- Assess resource needs, identify gaps and personnel re-alignment options
- Map key decisions to be made (e.g. responsible employees, evidentiary standard, non-Title IX cases)
- Plan key decision-making process with working group; incorporate stakeholder feedback

# Weekly Project Management Plan

## 9 Weeks To Go:

- Gather info about training options, share options with working group, book/reserve training
- Inform IT/IS about records retention policy, technology needs, web publication requirement
- Draft realignment plan of current staff roles or initiate discussion about hiring/outsourcing

## 8 Weeks To Go:

- Share realignment or hiring/outsourcing plan with working group and key stakeholders
- Incorporate feedback into realignment/hiring/outsourcing plan, finalize, and present
- Review web and print materials and identify necessary updates

# Weekly Project Management Plan

## 7 Weeks To Go:

- Review available template/model policies
- Draft new written policies and procedures
- Share draft policies and procedures with working group

## 6 Weeks To Go:

- Incorporate working group feedback into draft of policies and procedures
- Share draft policies and procedures with key stakeholder group for feedback
- Gather all templates, forms, handouts, signs, print materials and assess for accuracy/consistency

# Weekly Project Management Plan

## 5 Weeks To Go:

- Incorporate stakeholder feedback into policies and procedures and finalize
- Update all templates, forms, handouts, and web and print materials, arrange printing
- Training – TIXC, investigators, decision-makers, appeals officers, informal resolution facilitators

## 4 Weeks To Go:

- Draft internal training and education for campus partners – residence life, student conduct, public safety, HR, provosts office, counseling center, faculty senate, responsible employees
- Draft awareness campaign to educate community about resources, supports, reporting options

# Weekly Project Management Plan

## 3 Weeks To Go:

- Share draft awareness campaign and campus partner training with working group and key stakeholders; incorporate feedback and finalize
- Map rollout of awareness campaign (working with marketing/communications) and campus partner training (working with unit heads or IT/IS and communications if it will be online)

## 2 Weeks To Go:

- Roll out awareness campaign
- Roll out campus partner training

## 1 Week To Go:

- Continue to deliver training, gather feedback, and address community questions and concerns.

# Use of Slides

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



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# **The New Title IX Regulations: Practical Implications for K-12 Schools**

Presented By:

**The Institutional Response Group | Cozen O'Connor**

**Gina Maisto Smith, Chair**

**Leslie Gomez, Vice Chair**

**June 15, 2020**



# Today's Webinar

- Following an introductory *webinar*, A First Look at the New Title IX Regulations, this is the second in a series of webinars focusing on implementation.
- This webinar will:
  - Review **basic requirements of Title IX** for K-12 schools
  - Introduce the **new Title IX regulations**, effective August 14, 2020
  - Outline **effective practices** in responding to reports of sexual harassment, sexual assault, dating violence, domestic violence, and stalking in the K-12 context

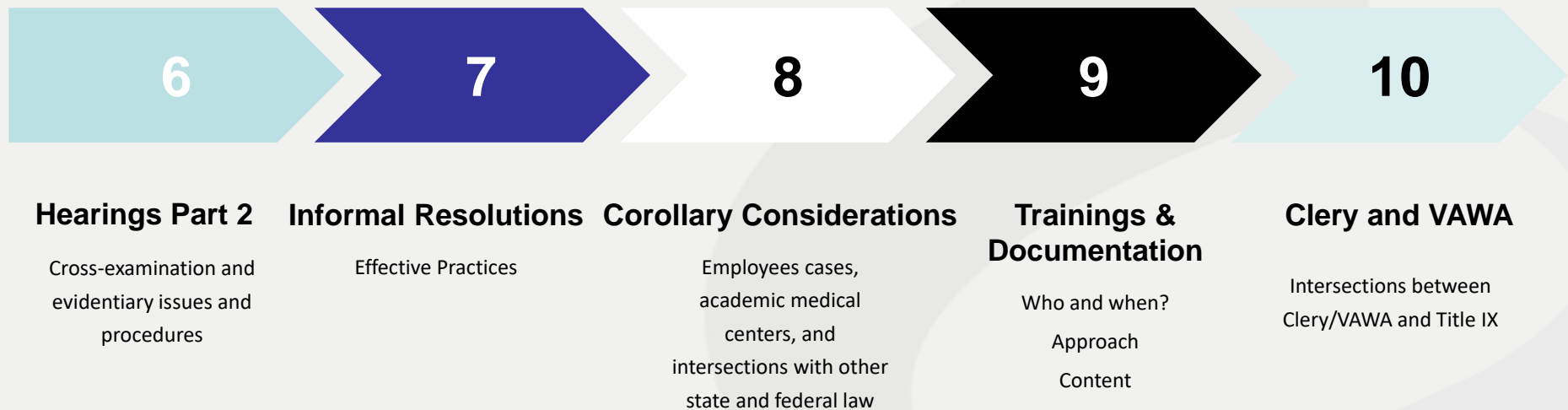
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Subsequent IRG webinars will focus on specific aspects of the regulations, as written and as applied, including:



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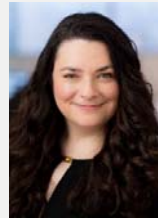
# Institutional Response Group



**Gina Maisto Smith**  
Cozen O'Connor



**Leslie Gomez**  
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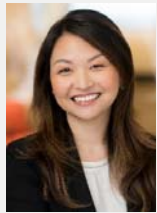
**Maureen P. Holland**  
Cozen O'Connor



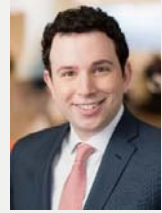
**Devon Turner Riley**  
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**Michael Stackow**  
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**Christi Hurt**  
Margolis Healy

**Institutional Response Group Paralegal and Administration Team:**  
Heather Dunn, Megan Lincoln, Braelyn Schenk, and Mary Sotos

# Margolis Healy and Associates

- National thought leaders in K-12 safety, security and emergency preparedness for public, private and independent schools across the country
- Given the honor in 2013 by then Attorney General Holder to develop and manage the Congressionally funded, first ever National Center for Campus Public Safety
- Provides clients with reasonable and actionable security solutions that can lead to program efficiencies and cost savings
- Provides assessments focused on building or enhancing existing systems, including access control, visitor management, security staffing and behavioral threat assessment
- Provides full range of school safety planning, training and exercises, and support tailored for each school's unique culture and climate



For more information:  
Margolis Healy Solutions for Safe Schools:  
<https://www.margolishealy.com/k-12>

# FRAMING THE CONVERSATION



## Dedication: To Those We Serve



*My Head is Full of Children*

*Many People on My Mind*

©Kiki Suarez

# 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

# The National Paradigm



Increased awareness of and attention to child abuse and sexual violence

Extensive media coverage of high profile case  
Organized social media  
First person advocacy



Evolving legal and regulatory framework

Child protective services laws  
Civil and criminal statutes of limitations

# The National Paradigm



Shifting and heightened expectations for institutional responses



Impact of trends and practices in higher education



Challenge in implementing complex and pan-institutional responsibilities in a traditionally siloed environment

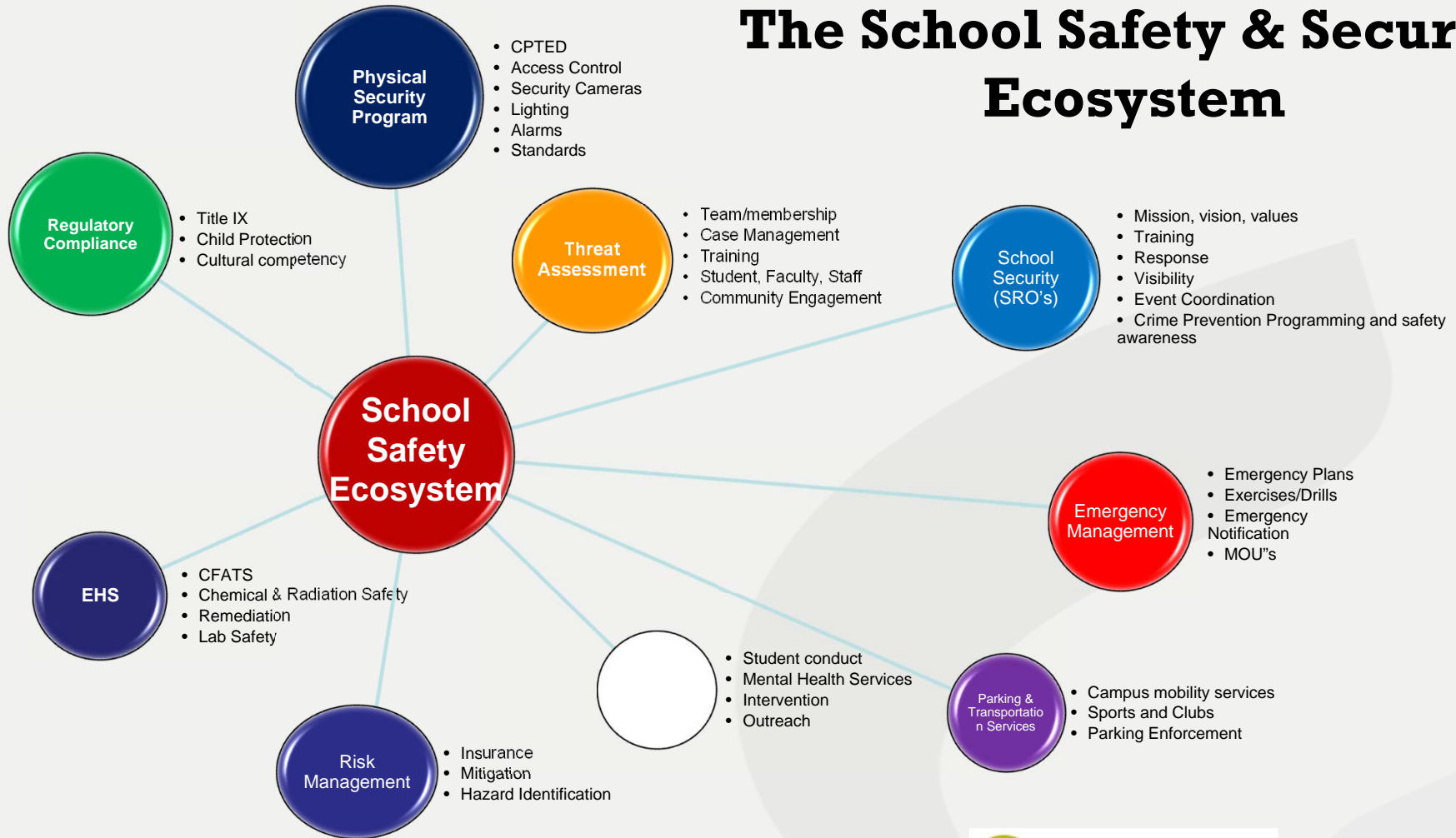
# The Elementary and Secondary School Context

- Educate students at a wide range of ages and developmental levels, with different degrees of understanding of sexuality, communication abilities, and understanding of the impact of their actions on others
- Students often feel deep trust and connection with their teachers and other administrators, which enriches the educational experience but also creates risks and vulnerabilities in light of the differentials in power and authority

# The Elementary and Secondary School Context

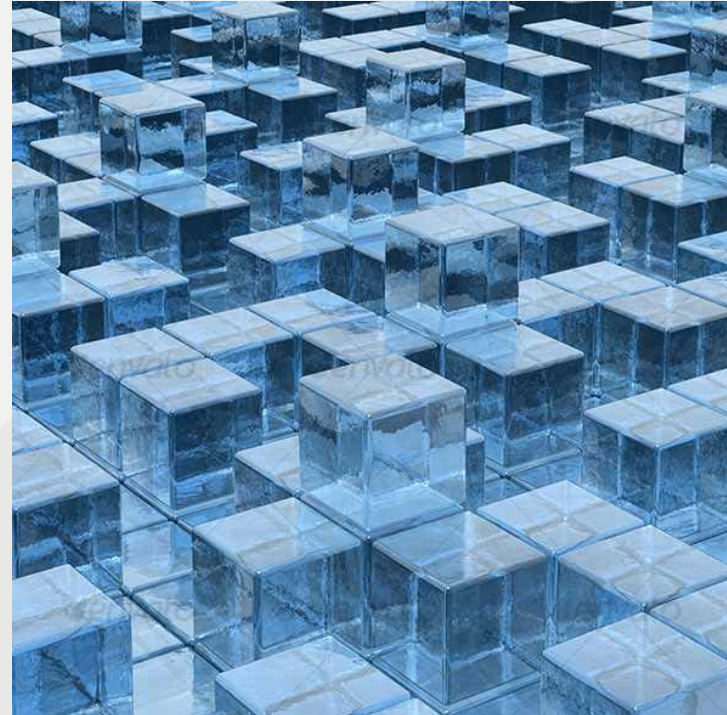
- School systems are decentralized organizations where management and oversight are often diffuse, making it harder to maintain complex accountability mechanisms and consistent behavioral norms
- Must consider interplay of federally-mandated processes with mandatory child abuse reporting laws and other state licensing regulations
- Resource and staffing challenges

# The School Safety & Security Ecosystem



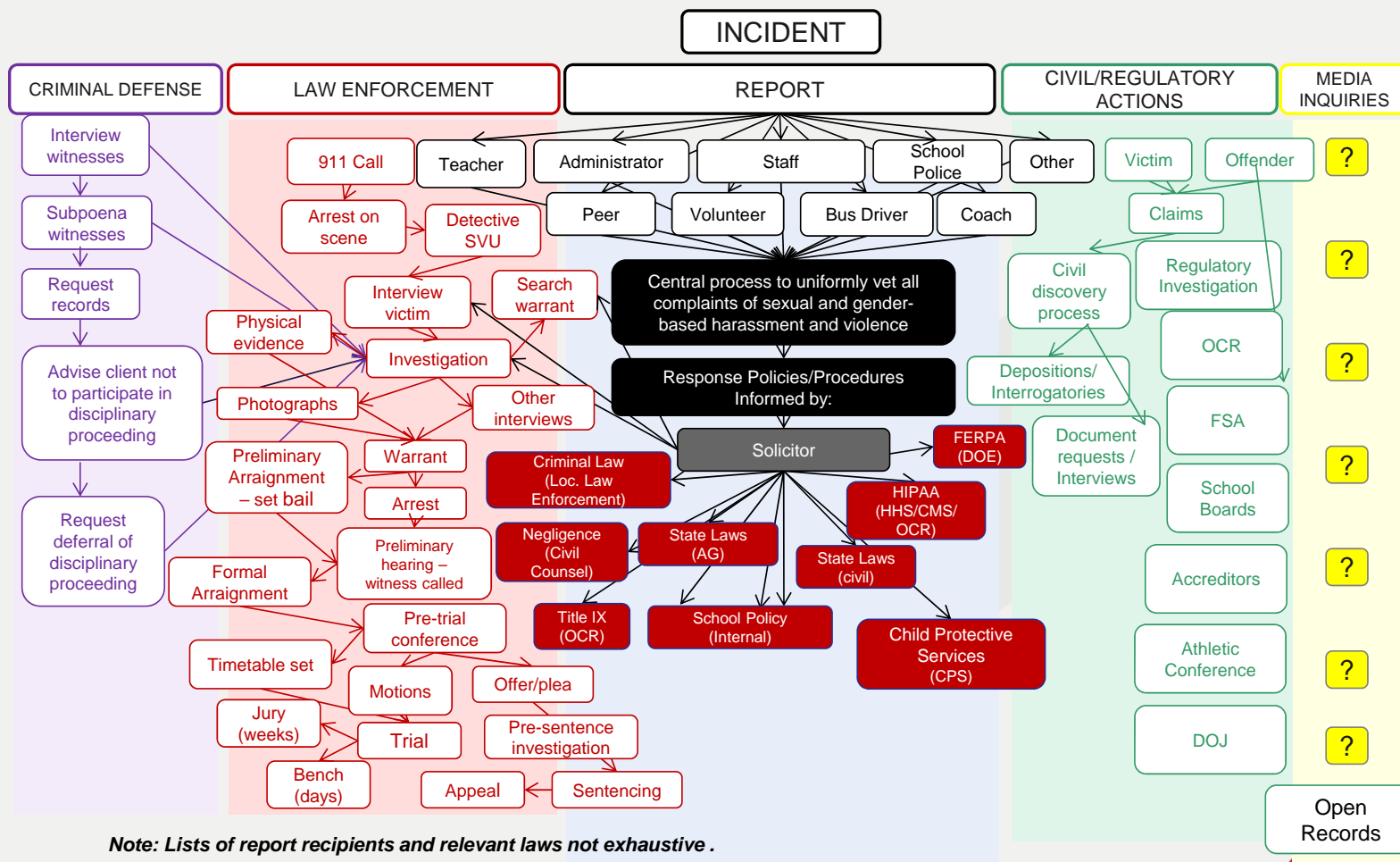
# The Context

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





# The Challenge of the Context – K-12



# Regulatory Framework

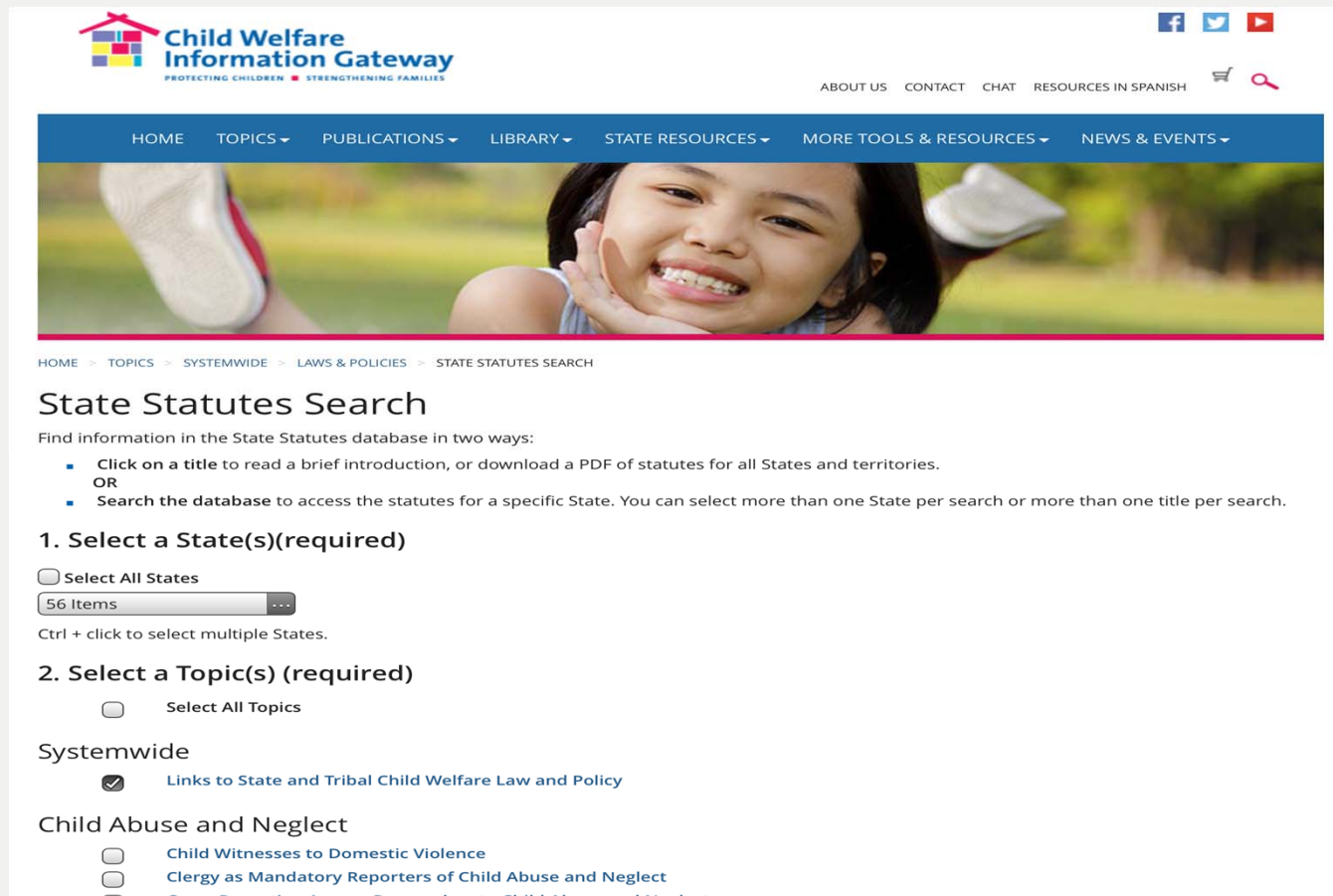
- State child protective services laws
  - Mandated screening and background clearances
  - Mandated training and education
  - Mandated reporting of child abuse and student abuse
  - Sharing of personnel information
- Regulations re: youth-serving programs
  - Supervision and ratios
  - Reporting of injury or abuse
- State education statutes
- Federal and state criminal statutes re: child pornography and sex offenses
- Civil liability and common law (duty, breach, causation, negligence and other considerations)

# Mandatory Reporter Laws

- Most states require professionals likely to come into contact with children to report suspected abuse or neglect
- About 18 states require anyone to report suspected abuse or neglect
- [https://www.childwelfare.gov/systemwide/laws\\_policies/state/index.cfm?event=stateStatutes.processSearch](https://www.childwelfare.gov/systemwide/laws_policies/state/index.cfm?event=stateStatutes.processSearch)
- [https://www.childwelfare.gov/systemwide/laws\\_policies/statutes/manda.pdf](https://www.childwelfare.gov/systemwide/laws_policies/statutes/manda.pdf)



# Regulatory Framework - Matrix



The screenshot displays the Child Welfare Information Gateway website. The header includes the logo with the tagline "PROTECTING CHILDREN • STRENGTHENING FAMILIES" and social media icons for Facebook, Twitter, and YouTube. A navigation menu contains links for ABOUT US, CONTACT, CHAT, RESOURCES IN SPANISH, and a search icon. Below the menu is a blue navigation bar with dropdown menus for HOME, TOPICS, PUBLICATIONS, LIBRARY, STATE RESOURCES, MORE TOOLS & RESOURCES, and NEWS & EVENTS. A banner image shows a young girl smiling. The main content area is titled "State Statutes Search" and includes a breadcrumb trail: HOME > TOPICS > SYSTEMWIDE > LAWS & POLICIES > STATE STATUTES SEARCH. The text instructs users to find information in two ways: clicking on a title to read an introduction or download a PDF, or searching the database for specific states or titles. The interface shows "1. Select a State(s)(required)" with a "Select All States" button and a dropdown menu showing "56 Items". Below this is the instruction "Ctrl + click to select multiple States." The second step is "2. Select a Topic(s) (required)" with a "Select All Topics" button. Under the "Systemwide" category, the option "Links to State and Tribal Child Welfare Law and Policy" is selected. Under the "Child Abuse and Neglect" category, the options "Child Witnesses to Domestic Violence" and "Clergy as Mandatory Reporters of Child Abuse and Neglect" are visible.

# Mandatory Reporter Laws

- Based on SUSPICION not PROOF
- Records are always confidential
- Report can usually be anonymous
- Reporter's identity is usually confidential
- Good faith immunity
- Often criminal liability for failure to report
- Practical considerations:
  - Who makes the report?
  - Where will the report be stored?
- When in doubt, report it out

# Types of Child Abuse

- Sexual Abuse
- Physical Abuse
- Emotional Abuse
- Imminent Risk of Physical Injury or Sexual Abuse
- Serious Physical Neglect
- Abuse by parent or caregiver
- Abuse by a family member or friend
- Abuse by person in authority (teacher, administrator, coach)
- Abuse by another student
- Abuse by stranger

# Nature of Child Abuse

- Occurs across all ages, races, genders and socioeconomic classes
- No institution – or individual – is immune
- Most often committed by a parent or caregiver, or by someone trusted and known by the parent and child
- Often achieved by exploiting vulnerabilities
  - Age, disability, isolation, power differential
- Significant barriers to reporting for the child – and for adults

# Nature of Child Abuse

- In sexual abuse cases, often little to no physical or forensic evidence
- Decisions often based on credibility assessment
- Often accompanied by a delay in reporting
- Likelihood of repeat offenders and undetected predators
- Concerns over false reports
- Many misconceptions and barriers to understanding the dynamics



# Grooming

- Gradual and specific process used by the offender to select and target a victim & minimize risk of disclosure
- Behaviors of an adult that may cross emotional or physical boundaries with a minor in order to:
  - Build trust
  - Facilitate access to the minor
  - Shape the minor's perception of the conduct
  - Discourage reporting
- Early behaviors, which may mimic healthy and appropriate behaviors, later escalate into a pattern of conduct or series of encroachments that facilitate the abuse

# Grooming

- Grooming also involves shaping the perception of the child's parents, the institution and the community



# Barriers to Reporting

## Why Children Don't Disclose

- Threats
- Loss of trust
- Confusion
- Low self-esteem
- Feelings of shame or guilt
- Unaware that acts are inappropriate
- Fear of being removed from supports
- Fear of being disbelieved
- Taught to trust and obey adults
- May not have anyone to tell

## Why Adults Don't Report

- Confusion or uncertainty about reporting responsibilities
- Ignorance of warning signs
- Fear of inadequate response
- Do not want to become involved
- Fearful of repercussions
- Concern that reporting may violate professional obligations
- Fear of not being taken seriously
- Relationships that blur understanding

# Policy Frameworks in the K-12 Context

- Broad range of intersecting policies
  - Student code of conduct
  - Employee handbook
    - Title VII policy re: sexual harassment
    - Sexual abuse prevention and response
  - Mandatory reporting of suspected abuse
  - Supervision and ratios
  - Professional boundaries
  - IT and responsible use policies



# Reporting of Boundary Violations

- Set clear expectations and guidelines for professional boundaries
- Provide specific procedures for reporting of conduct that is concerning, but does not rise to the level of suspected abuse or neglect
- Build and reinforce pathways for routine and consistent responses
- Ensure consistent and centralized documentation of concerns
- Take investigative or remedial steps
- Utilize external professionals



# **TITLE IX IN THE K-12 CONTEXT**

# Title IX

*“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 USCA Sec. 1681(a)

June 23, 1972

## OCR K-12 Initiative

- On February 26, 2020, Ken Marcus, the Assistant Secretary for Civil Rights, announced that Secretary Betsy DeVos has directed OCR **to ensure that school districts understand their obligations under federal law and are prepared to respond effectively to student complaints of sexual harassment and assault**, including sexual acts perpetrated upon students by teachers, staff, and other school personnel
- Focus is **teacher-on-student** or **staff-on-student** sexual harassment and assault



## OCR K-12 Initiative

- OCR announced an initiative “**to examine the problem of sexual assault** in public elementary and secondary schools.”
- OCR **will be conducting widespread “compliance reviews”** at K–12 schools and school districts
  - To examine how sexual assault cases, including sexual incidents involving teachers and school staff, are handled under Title IX; and,
  - To identify compliance concerns and work with schools to correct any identified noncompliance

# OCR K-12 Initiative

- **Raising Public Awareness and Support**
  - Providing technical assistance, training opportunities, and other resources to school districts to raise awareness of these issues
- **Undertaking Data Quality Reviews**
  - Partnering with the National Center for Education Statistics (NCES) to help school districts accurately report sexual offenses through the Civil Rights Data Collection (CRDC) and conducting quality reviews of that data
- **Adding New Questions to the CRDC**
  - A proposal to collect more detailed data from schools on sexual assault, especially acts perpetrated by a school or staff member

## **New Title IX Regulations**

- 2033 page document issued by the U.S. Department of Education, Office for Civil Rights (OCR) on May 6, 2020
- Includes significant resource materials: a preamble, executive summary, overview of public comments, discussion of directed questions, regulatory impact analysis and other content
- Final regulations are located at page 2008-2033
- Official version (2082 pages) were released May 19, 2020
- Regulations must be implemented by **August 14, 2020**

# Regulations Formally Incorporate Sexual Harassment as a Form of Sex Discrimination

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

Title IX Regulations issued May 6, 2020; Executive Summary, pp. 15-16

# Regulations: “Legally Binding Obligations”

- “Because these final regulations represent the Department’s interpretation of a recipient’s legally binding obligations, **rather than best practices**, recommendations, or guidance, these final regulations focus on **precise legal compliance requirements** governing recipients.”

## Regulations: “Best Practices”

- “These final regulations leave recipients the **flexibility to choose to follow best practices and recommendations** contained in the Department’s guidance, or similarly, best practices and recommendations made by non-Department sources, such as Title IX consultancy firms, legal and social sciences scholars, victim advocacy organizations, civil libertarians and due process advocates and other experts.”

# Title IX - Core Elements

- Title IX Coordinator
- Notice of Non-Discrimination
- Prompt and Equitable Grievance Procedures

## Regulations Promulgated in 1975

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

## 2020 Final Regulations

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

# Core Elements

## 1. Designate and Authorize a Title IX Coordinator

- Notify all **students, parents/guardians, employees, unions, and job applicants** of the Title IX Coordinator's name or title and contact information, including email address
- Permit reporting at any time (including non-business hours) via phone or email



# Core Elements

## 2. Disseminate Notice of Non-Discrimination

- Notify all **students, parents/guardians, employees, unions, and job applicants** of non-discrimination provision.
- State that inquiries about the application of Title IX may be addressed to the Title IX Coordinator, the Assistant Secretary for Civil Rights, or both.

# Core Elements

## 3. Adopt and Publish Grievance Procedures

- Procedures must provide for the **prompt and equitable** resolution of **student and employee** complaints
- Notify all **students, parents/guardians, employees, unions, and job applicants** of grievance procedures including:
  - How to file a report or complaint
  - How the district/school will respond

# **SHIFT IN APPROACH & FRAMING PRINCIPLES**

# Framing Principles

1

“A recipient’s treatment of a complainant or a respondent in response to a formal complaint of sexual harassment may constitute discrimination on the basis of sex under title IX.”

Title IX Regulations issued May 6, 2020; § 106.45(a)

# Framing Principles

2

“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.”

Title IX Regulations issued May 6, 2020; § 106.45(a)

## Framing Principles

3

“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.”

# Framing Principles

4

“A recipient is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances.”

Title IX Regulations issued May 6, 2020; § 106.45(a)

## Framing Principles

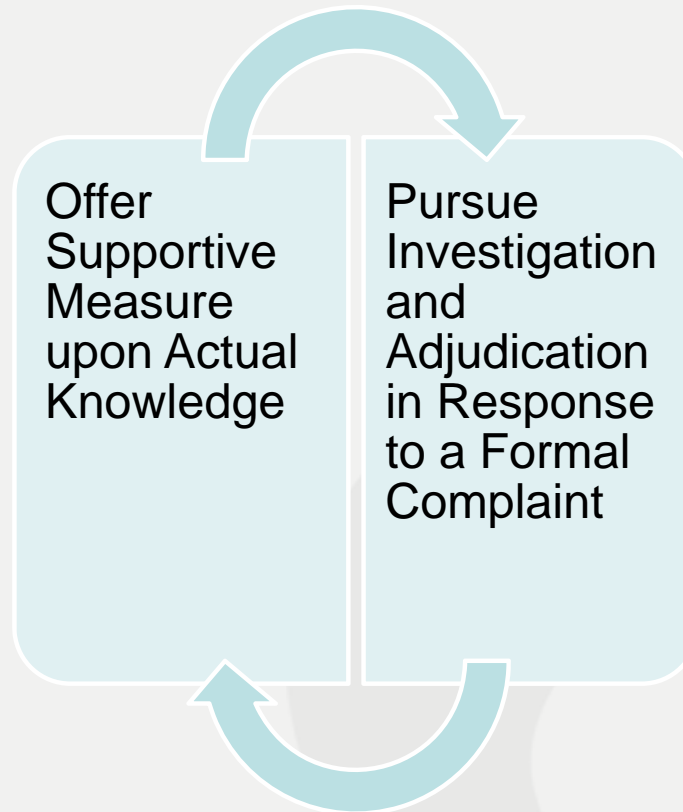
5

“If the Assistant Secretary finds that a recipient has discriminated against persons on the basis of sex in an education program or activity under this part, or otherwise violated this part, such recipient must take such remedial action as the Assistant Secretary deems necessary to remedy the violation.”

Title IX Regulations issued May 6, 2020; § 106.45(a)



# Understanding Two Key Provisions



# Key Provisions: New Title IX Regulations – K-12

## Postsecondary Institutions

- Notice
  - Notice comes from the **Title IX Coordinator or any official who has authority to institute corrective measures on behalf of the school** having actual knowledge of sexual harassment.
- Hearing
  - **Must** adjudicate formal complaints through a live hearing with cross-examination by the party's advisor.

## K-12 Institutions

- Notice
  - Notice comes from **any employee** having actual knowledge of sexual harassment
- Hearing
  - **May** adjudicate formal complaints through a hearing or a written exchange of questions.

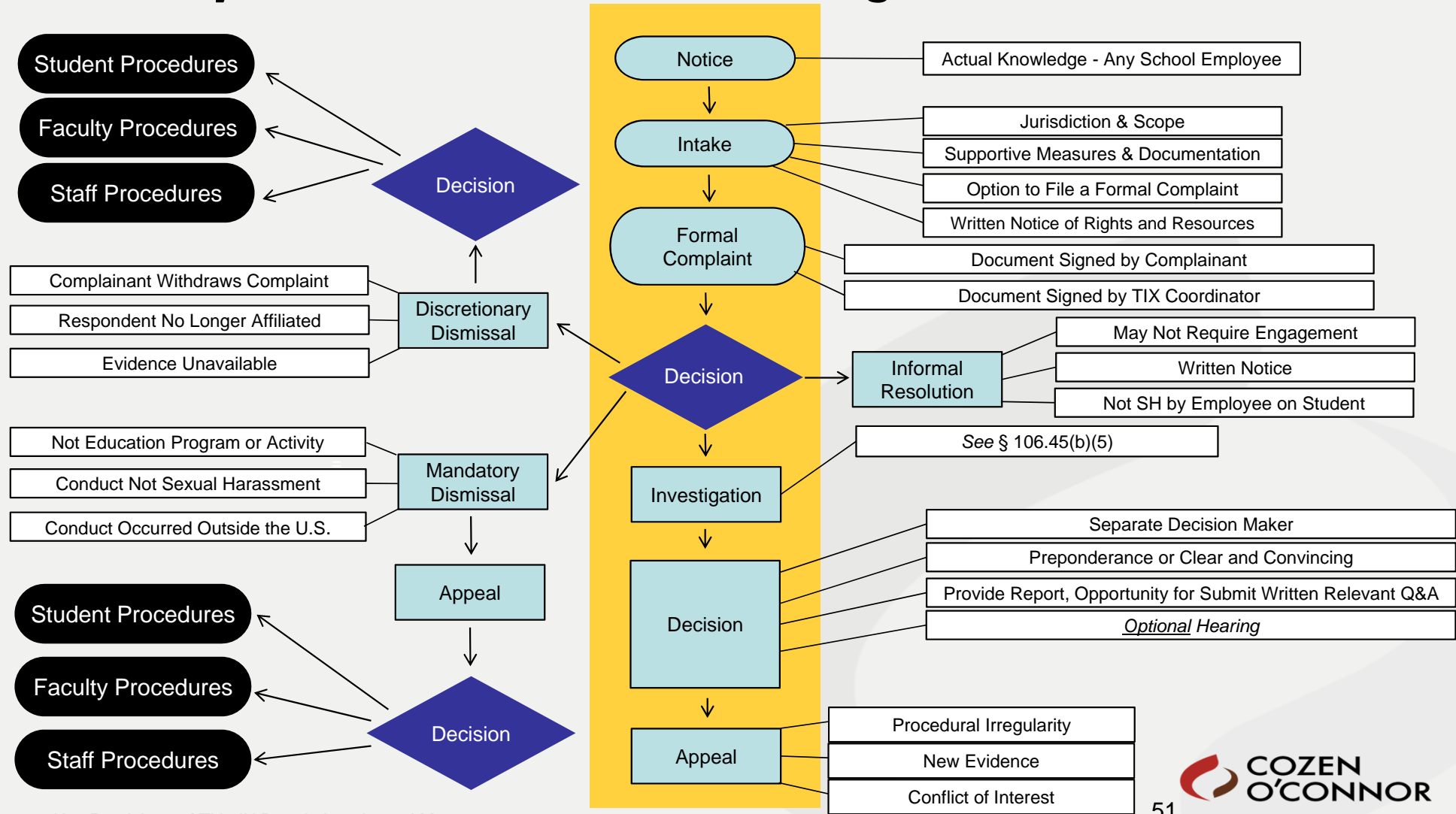
Title IX Regulations issued May 6, 2020; § 106.6(g), § 106.30(a), § 106.45(b)(6)(ii).

# Rights of Parents in K-12 Context

- Retain the legal rights to act on behalf of their child
- File formal complaints on their child's behalf
- Request supportive measures
- Accompany student to meetings, interviews and hearings
- Inspect and review the evidence gathered (in addition to FERPA rights)
- Write out the questions and answers for the student
- Along with parent or guardian participation, student may still have an advisor of their choice

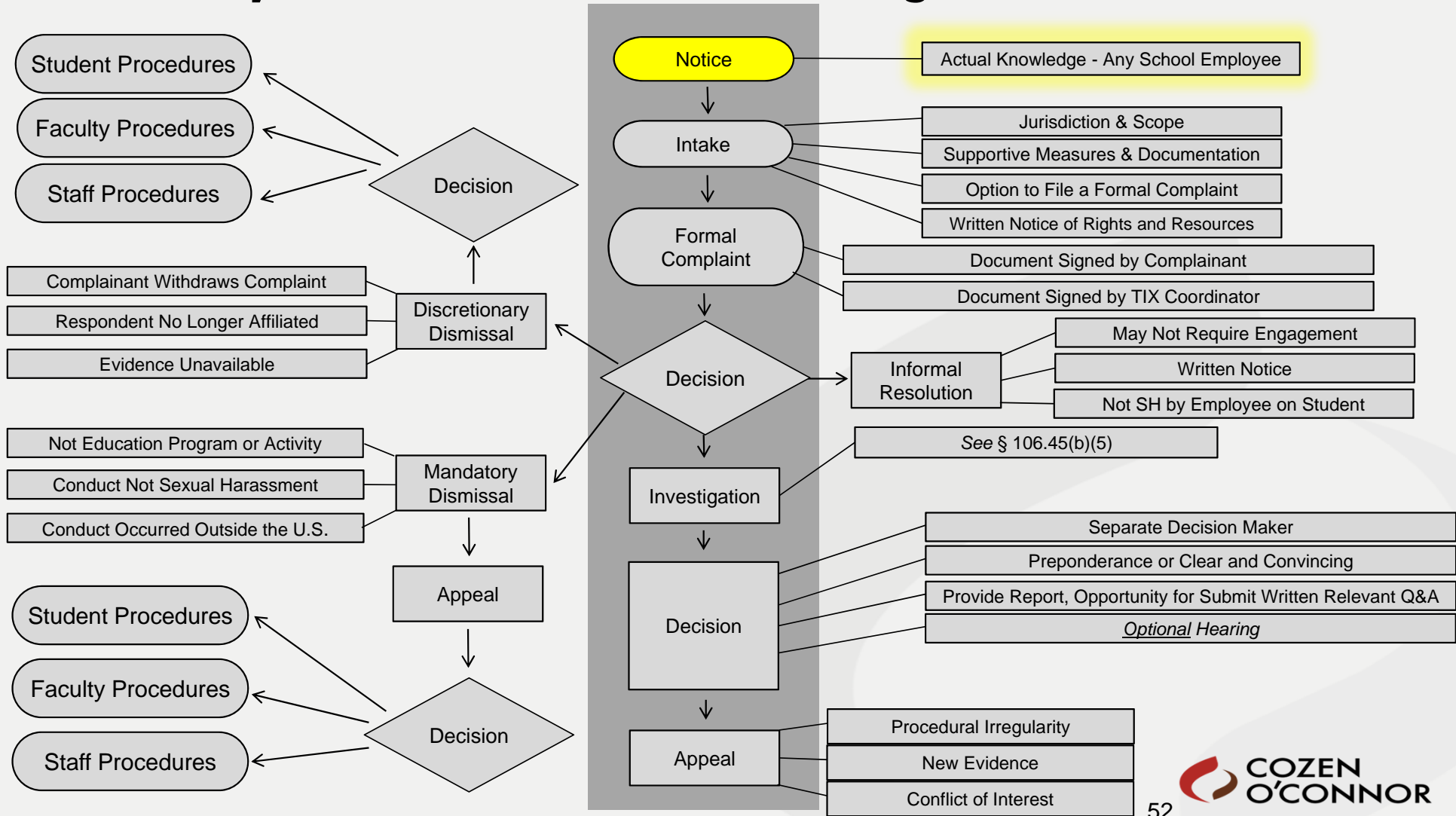
Title IX Regulations issued May 6, 2020; § 106.6(g), § 106.30(a), § 106.45(b)(6)(ii);  
Preamble at 1564-1565.

# Key Provisions: New Title IX Regulations – K-12

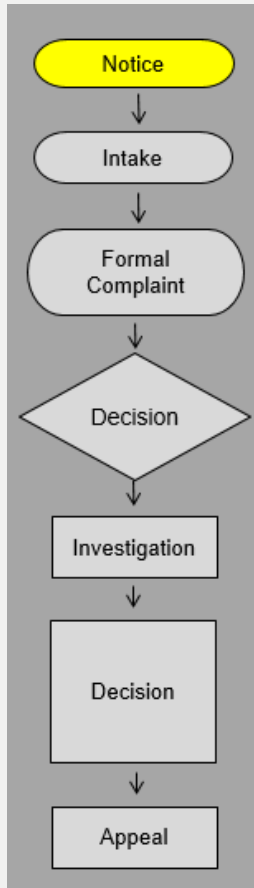


Key Provisions of Title IX Regulations issued May 6, 2020;

# Key Provisions: New Title IX Regulations – K-12



# Notice

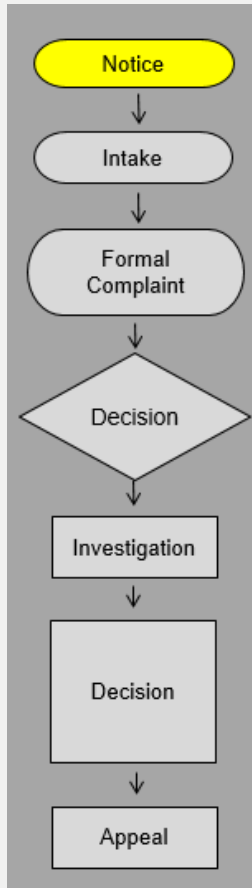


- Notice to the **Title IX Coordinator** or any official of the recipient who has authority to institute corrective measures on behalf of the recipient, or to **any employee of an elementary or secondary school**
- **Actual knowledge**, not constructive notice or vicarious liability
  - Can come from personal observation, hearing about it from a complainant or third-party, receiving a written or oral complaint, or by any other means

Title IX Regulations issued May 6, 2020; § 106.30(a)

# Notice

- What about volunteers or independent contractors?
  - The mere ability or obligation to report sexual harassment or to inform a student about how to report sexual harassment, or having been trained to do so, does not qualify an individual as one who has authority to institute corrective measures on behalf of the recipient.

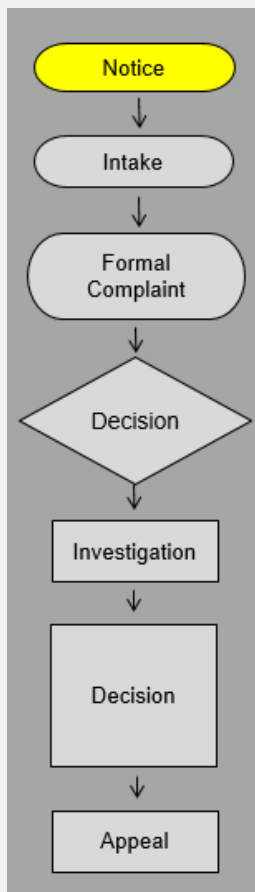


Title IX Regulations issued May 6, 2020; § 106.30(a)

# Notice: Institutional Response

When a school has **notice**, the Title IX Coordinator must:

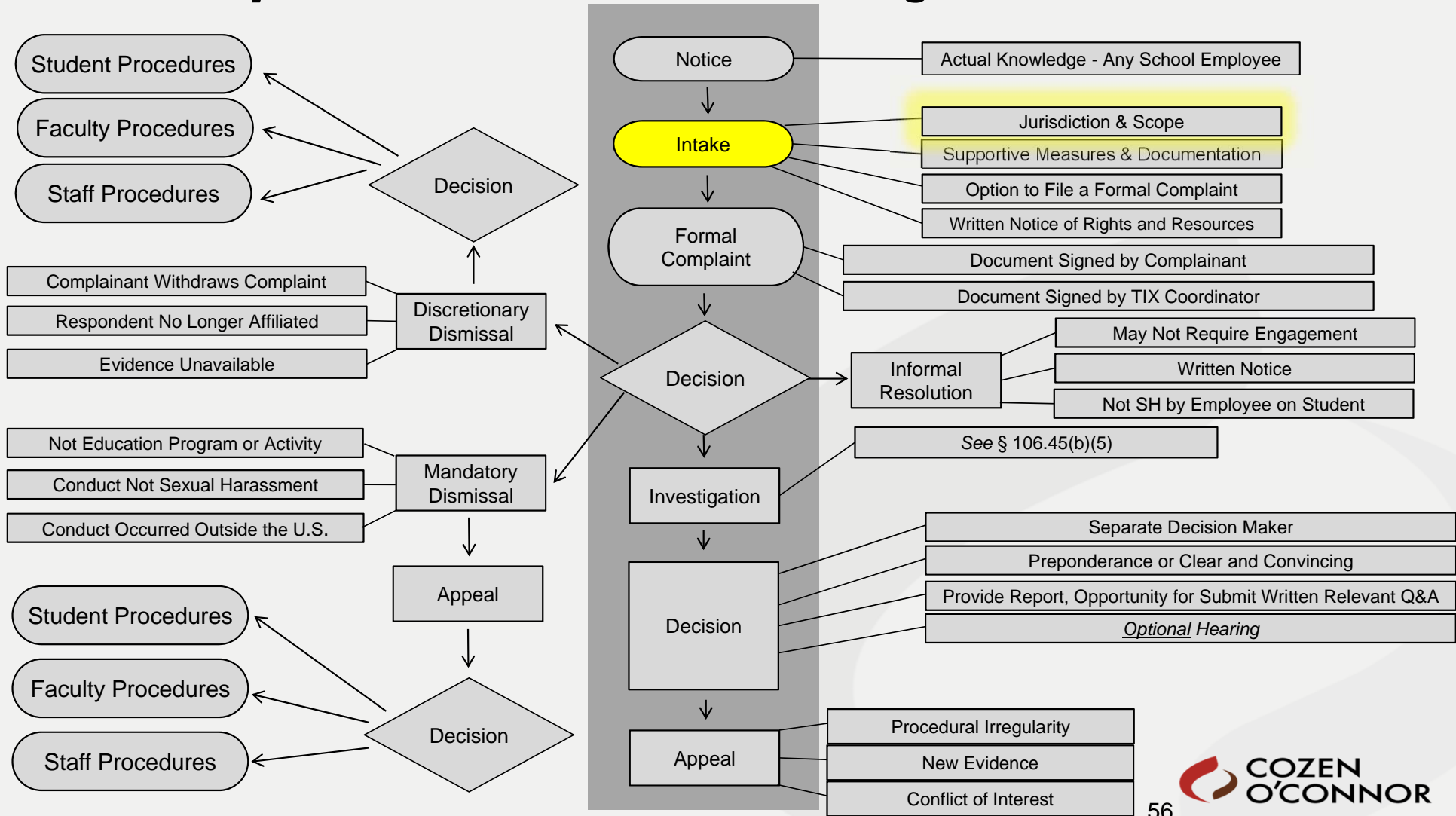
1. Promptly contact the complainant to discuss the availability of supportive measures
2. Consider the complainant's wishes with respect to supportive measures
3. Inform the complainant of the availability of supportive measures with or without the filing of a formal complaint
4. Explain to the complainant the process for filing a formal complaint.



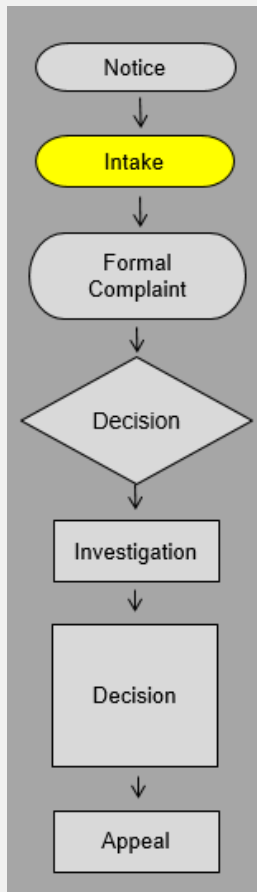
Title IX Regulations issued May 6, 2020; § 106.44(a)



# Key Provisions: New Title IX Regulations – K-12

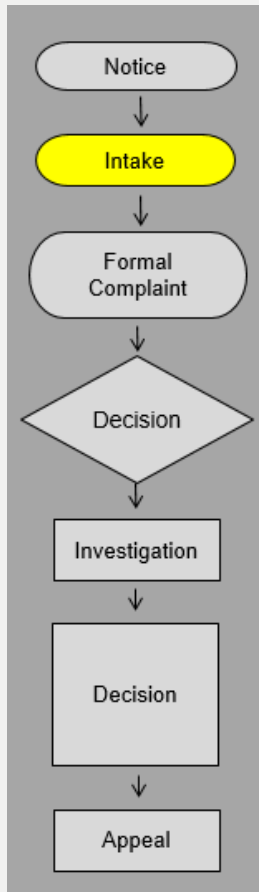


# Jurisdiction: Who



- Title IX applies to **any person**, in the United States, on the basis of sex, who is excluded from participation in, denied the benefits of, or is subjected to discrimination **under any education program or activity** receiving federal financial assistance.
- **Program or activity and program** means all of the operations of—
  - A college, university, or other postsecondary institution, or a public system of higher education; or
  - **A local educational agency** (as defined in 20 U.S.C. 8801), system of **vocational** education, or **other** school system;

Title IX of the Education Amendments of 1972; § 20 U.S.C. 1681;  
Title IX Implementing Regulations; § 106.2(h)

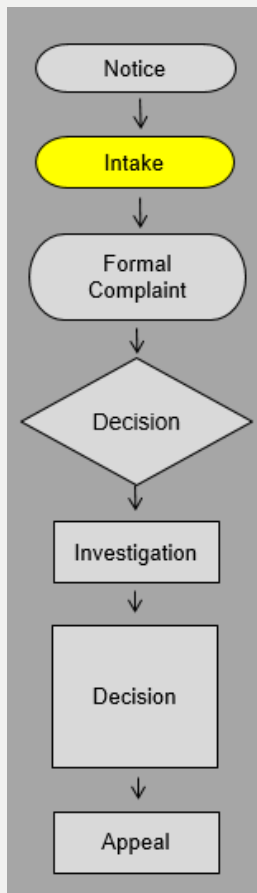


## Jurisdiction: Education Program or Activity

- “**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

Title IX Regulations issued May 6, 2020; § 106.44(a)

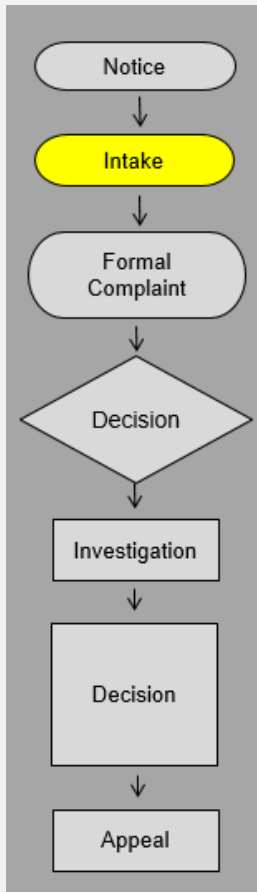
# Jurisdiction: Where



- Applies only to sex discrimination occurring **against a person in the United States** in an education program or activity
  - “The Department reiterates that the ‘education program or activity’ limitation in the final regulations
    - does not create or apply a geographic test
    - does not draw a line between ‘off campus’ and ‘on campus,’ and
    - does not create a distinction between sexual harassment occurring in person versus online.”

Title IX Regulations issued May 6, 2020; § 106.8(d); Preamble at 649

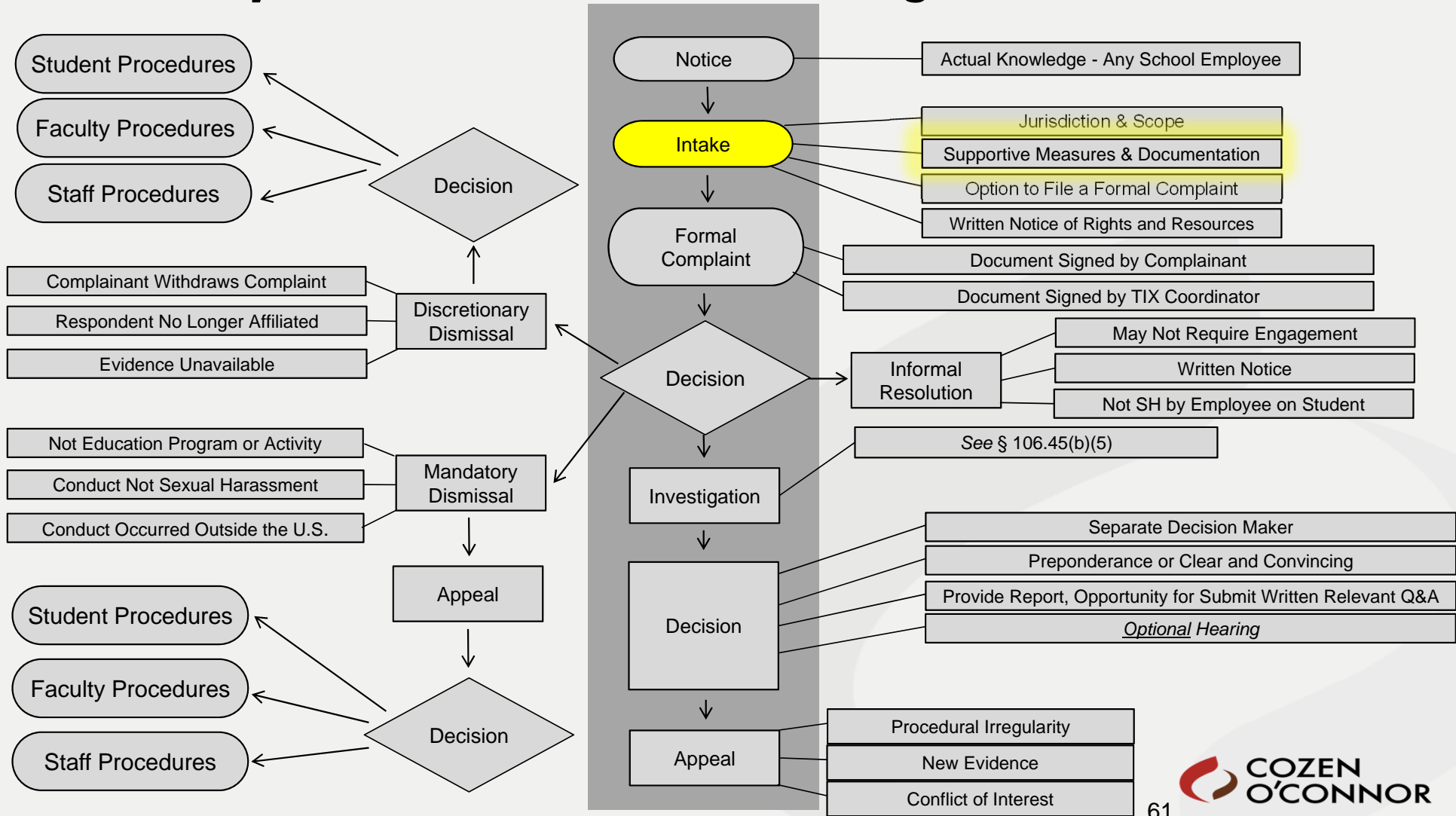
# Jurisdiction: What



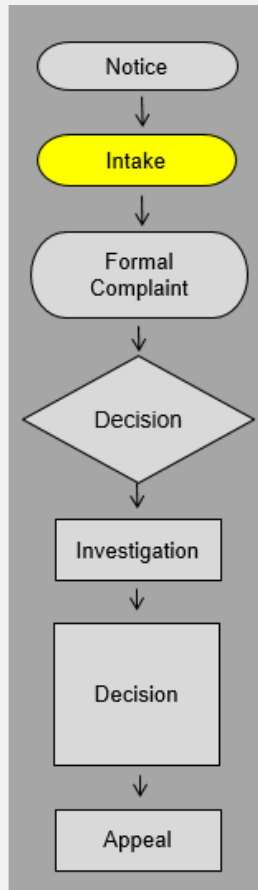
- Narrowed & expanded definition of sexual harassment
  - Quid pro quo by employee
  - Unwelcome conduct determined by a reasonable person to be so **severe, pervasive, and objectively** offensive that it **effectively denies** a person equal access to the recipient's education program or activity
  - Inclusion of sexual assault, dating violence, domestic violence, and stalking as a form of sexual harassment

Title IX Regulations issued May 6, 2020; § 106.30(a)

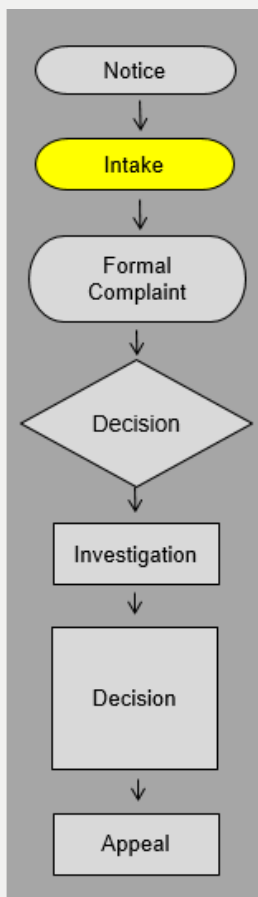
# Key Provisions: New Title IX Regulations – K-12



# Supportive Measures



- Non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed.
- Designed to restore or preserve equal access to the recipient's education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the recipient's educational environment, or deter sexual harassment.
- The Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures.

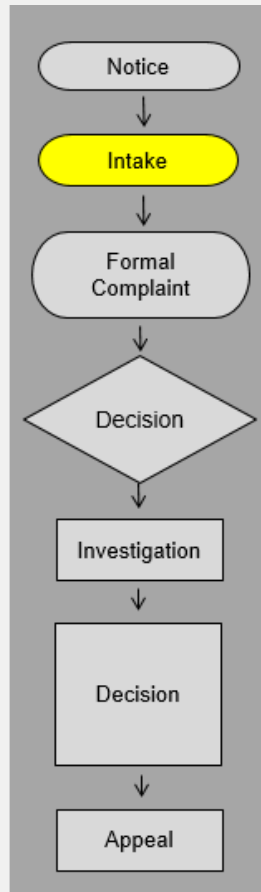


## Offering Supportive Measures

- The Title IX Coordinator must promptly contact the complainant to:
  - Discuss the **availability** of supportive measures as defined in § 106.30,
  - Consider the **complainant's wishes** with respect to supportive measures,
  - Inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and
  - Explain to the complainant the process for filing a formal complaint.
- Title IX Coordinator must document actions taken.



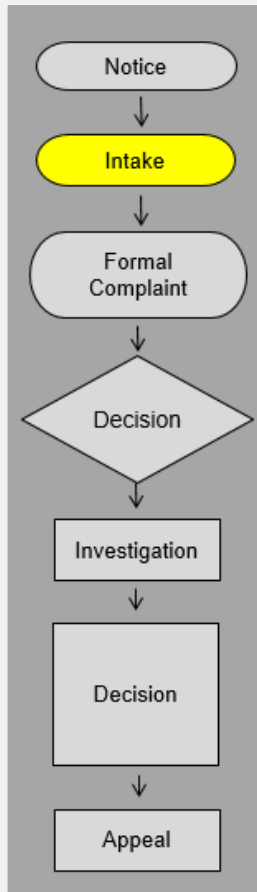
# Emergency Removal for Students



- Must undertake an individualized safety and risk analysis and determine that an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal
- Must provide the respondent with notice and an opportunity to challenge the decision immediately following the removal

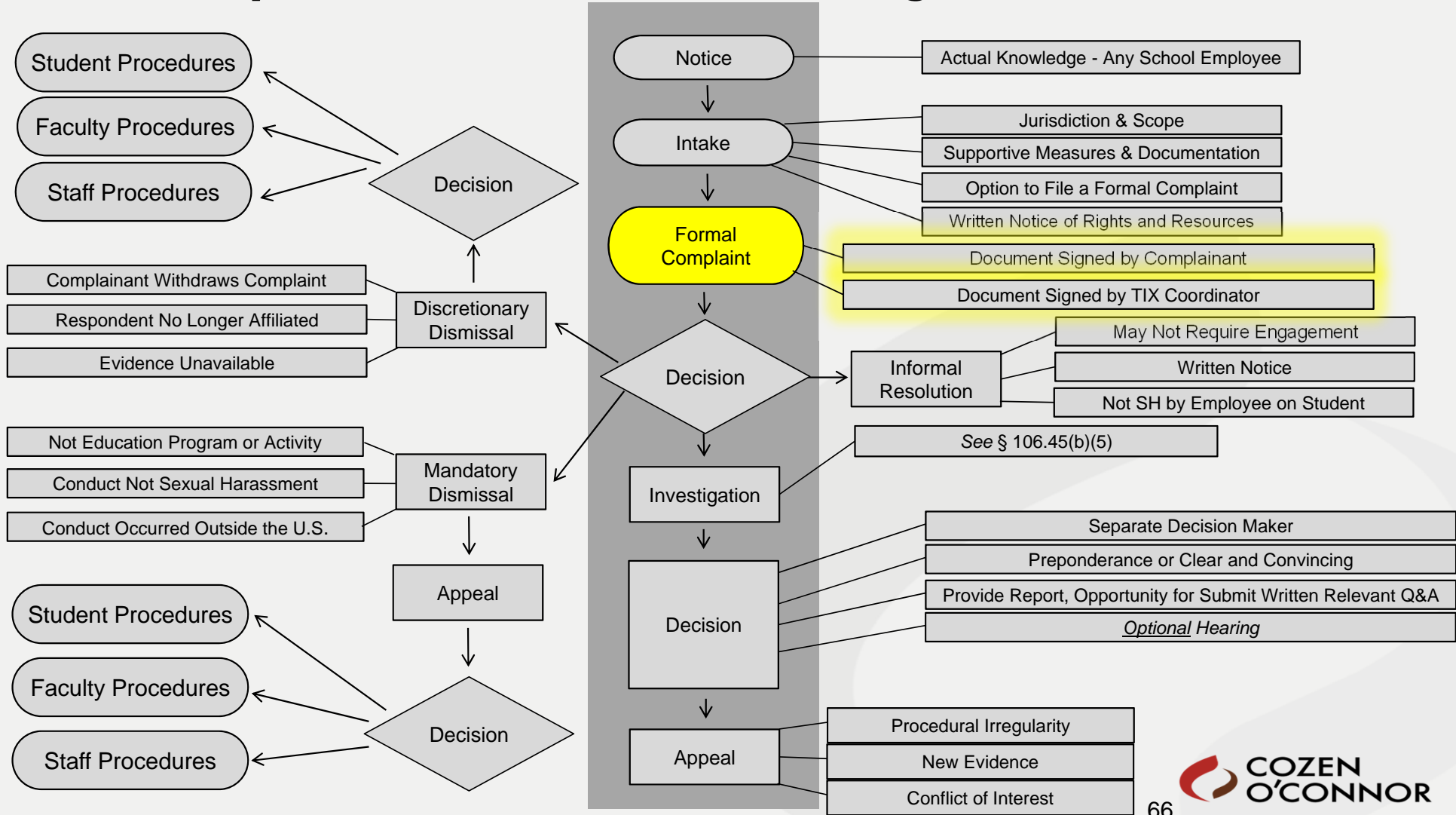
Title IX Regulations issued May 6, 2020; § 106.44(c)

# Administrative Leave

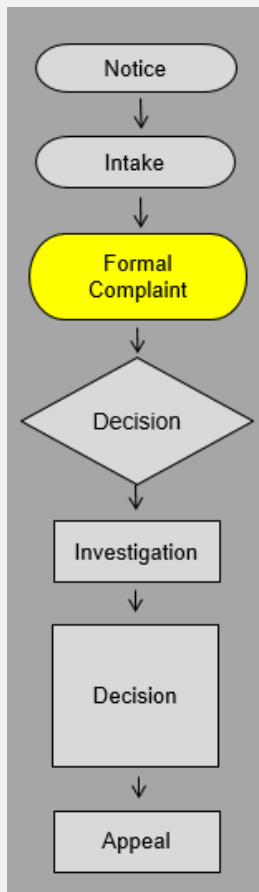


- Nothing in this subpart precludes a recipient from placing a non-student **employee respondent** on administrative leave during the pendency of a grievance process that complies with § 106.45.
- This provision may not be construed to modify any rights under Section 504 of the Rehabilitation Act of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

# Key Provisions: New Title IX Regulations – K-12



# Formal Complaint

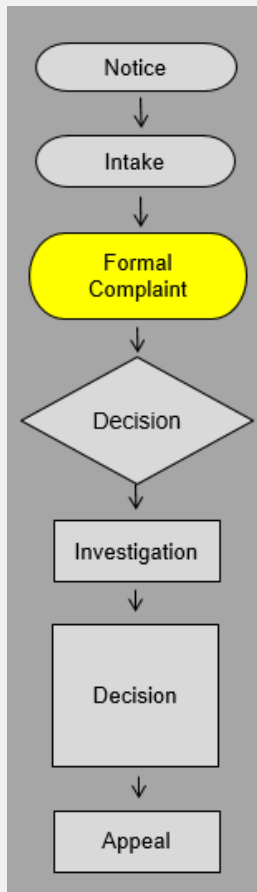


- Document filed by a complainant or signed by the Title IX Coordinator
- At the time of filing a formal complaint, a complainant **must be participating in or attempting to participate in** the education program or activity of the recipient with which the formal complaint is filed

# Formal Complaint

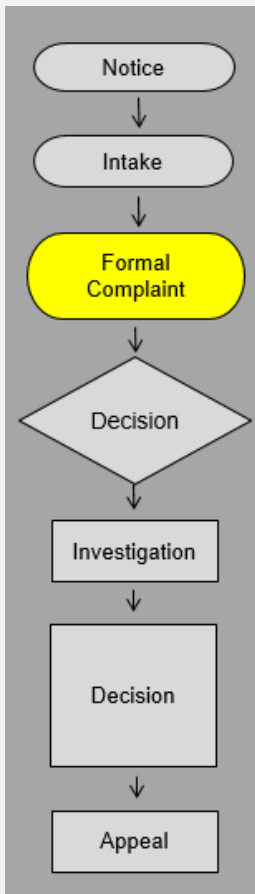
Upon receipt of a **formal complaint**, the institution:

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



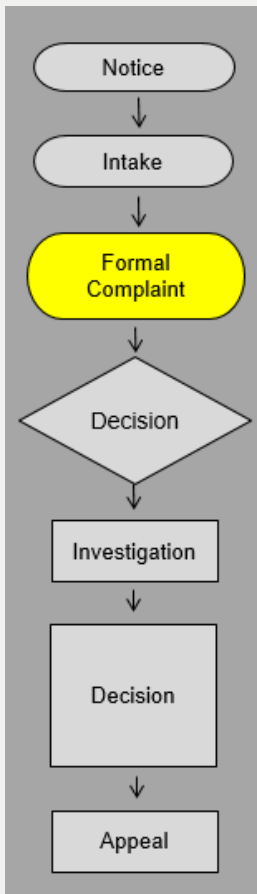
Title IX Regulations issued May 6, 2020; § 106.30(a)

# Formal Complaint: Required Dismissal



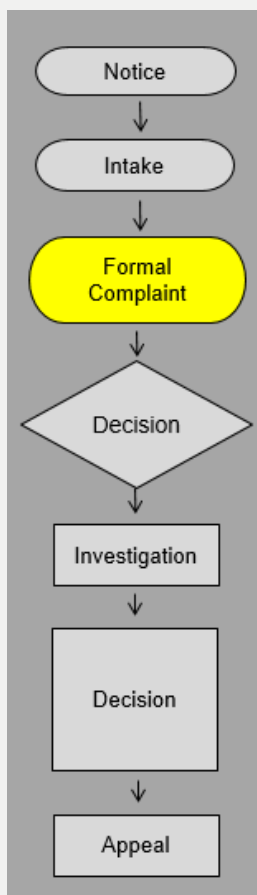
- **Must dismiss if:**
  - Conduct would not constitute sexual harassment even if proved,
  - Conduct did not occur in the recipient’s education program or activity, or
  - Conduct did not occur against a person in the United States.
- Such a dismissal does not preclude action under another provision of the recipient’s code of conduct

# Formal Complaint: Discretionary Dismissal



- **May** dismiss the formal complaint or any allegations therein if:
  - A complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the formal complaint or any allegations,
  - The respondent is no longer enrolled or employed by the recipient, or
  - Specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination.

## Formal Complaint: Dismissal

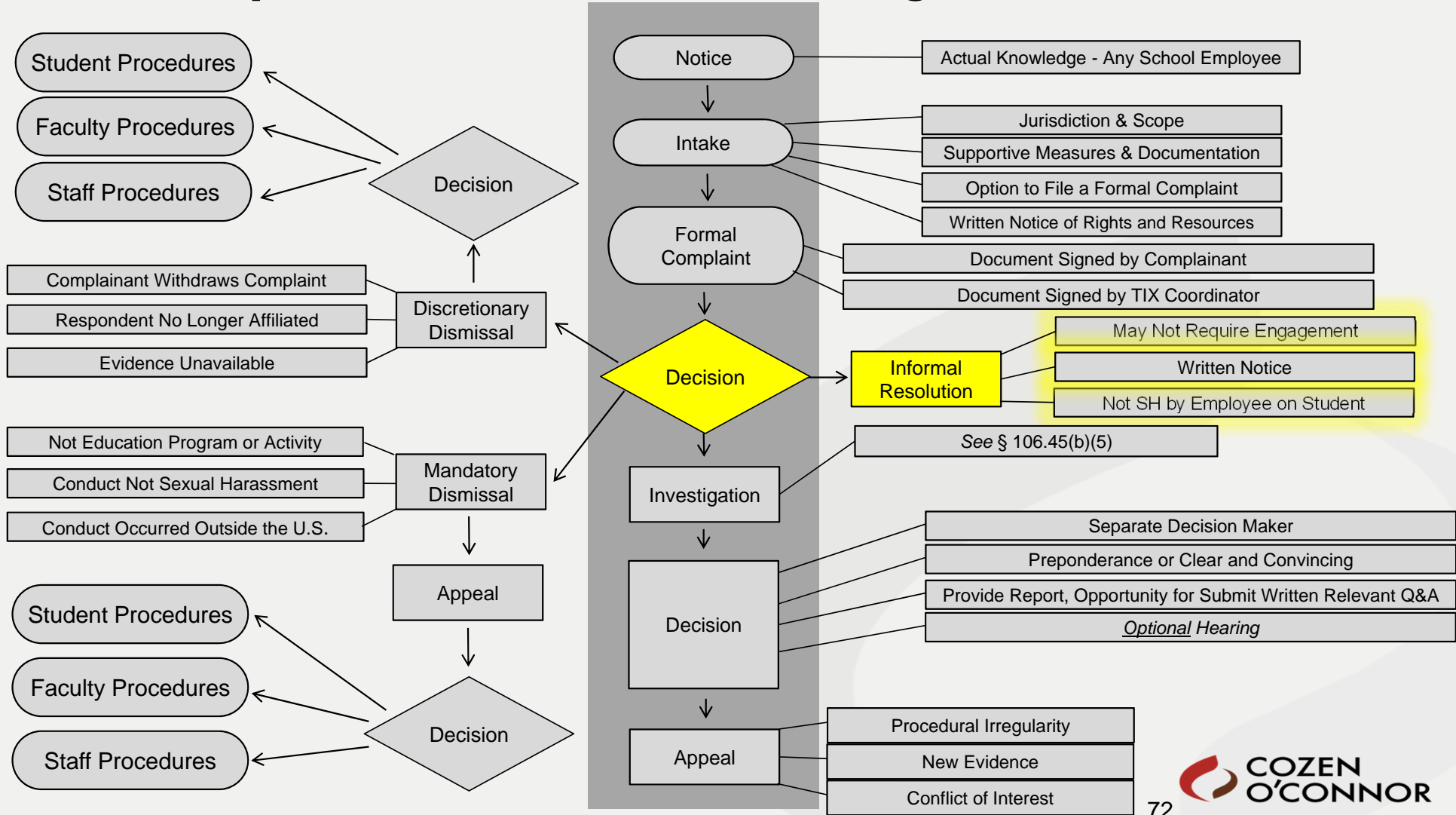


- Upon a dismissal required or permitted, the recipient must promptly send **written notice** of the dismissal and reason(s) therefor simultaneously to the parties
- Must offer both parties an **appeal** from a recipient's dismissal of a formal complaint or any allegations therein

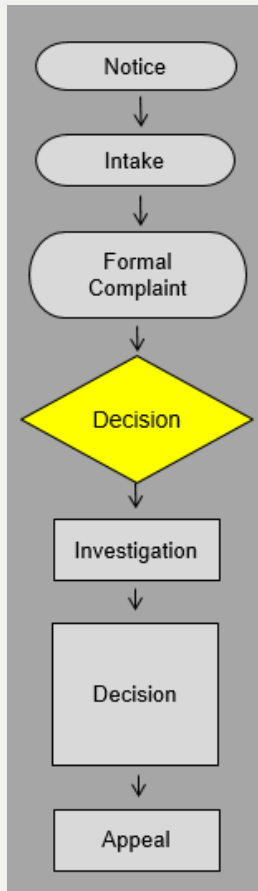
Title IX Regulations issued May 6, 2020; §§ 106.45(b)(3) and 106.45(b)(8)



# Key Provisions: New Title IX Regulations – K-12



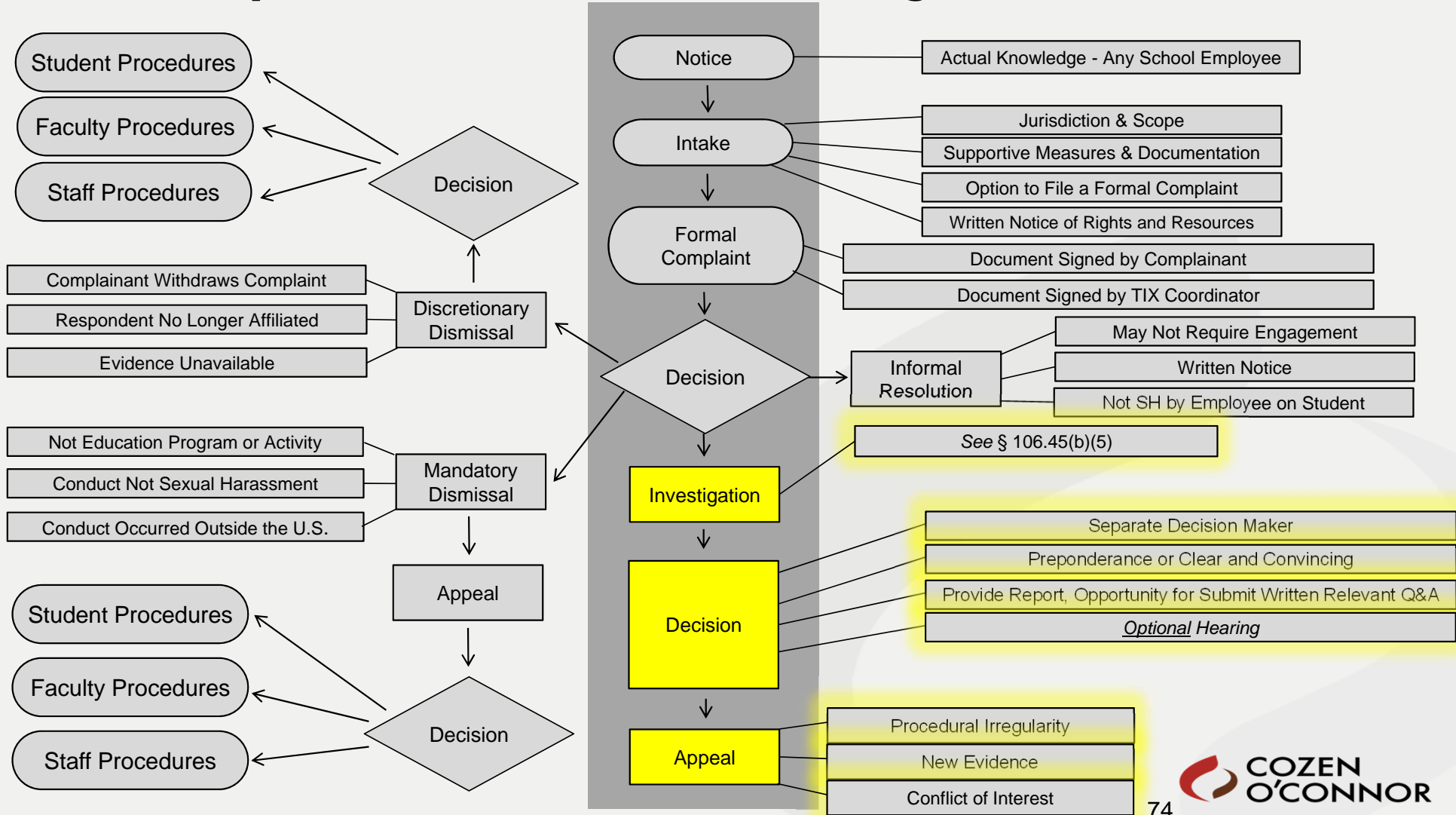
# Informal Resolution



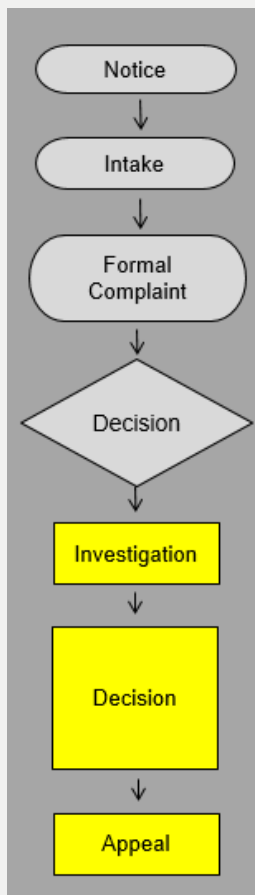
- May not require waiver of right to investigation and adjudication of formal complaints
- May not require parties to participate in an informal resolution process
- May not offer an informal resolution process unless a formal complaint is filed
- Must obtain the parties' voluntary, written consent to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

Title IX Regulations issued May 6, 2020; § 106.45(b)(9)

# Key Provisions: New Title IX Regulations – K-12



# Basic Requirements of Grievance Process



- **Treat complainants and respondents equitably**
- Require an objective evaluation of all relevant evidence
- Implementers must be trained and free from conflict or bias
- Presumption of non-responsibility
- Reasonably prompt time frames

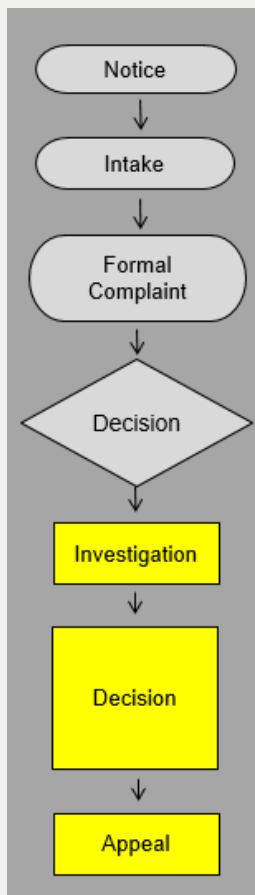
## Relevant Regulations Sections:

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

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

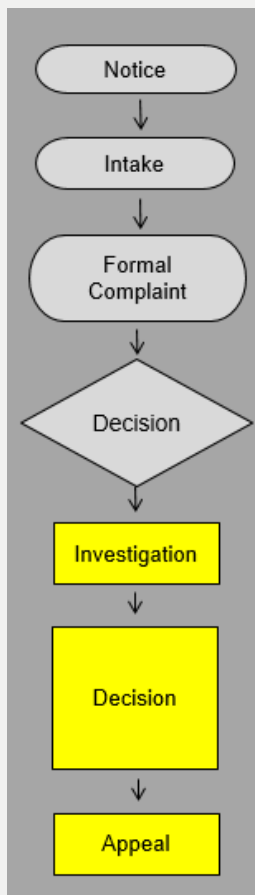
Training and avoidance of conflicts or bias: § 106.45(b)(1)(iii)

# Basic Requirements of Grievance Process



- Describe the range (or list) of possible disciplinary sanctions and remedies
- 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
- Include the procedures and permissible bases for the complainant and respondent to appeal
- Describe the range of supportive measures available

# Basic Requirements of Grievance Process



- 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

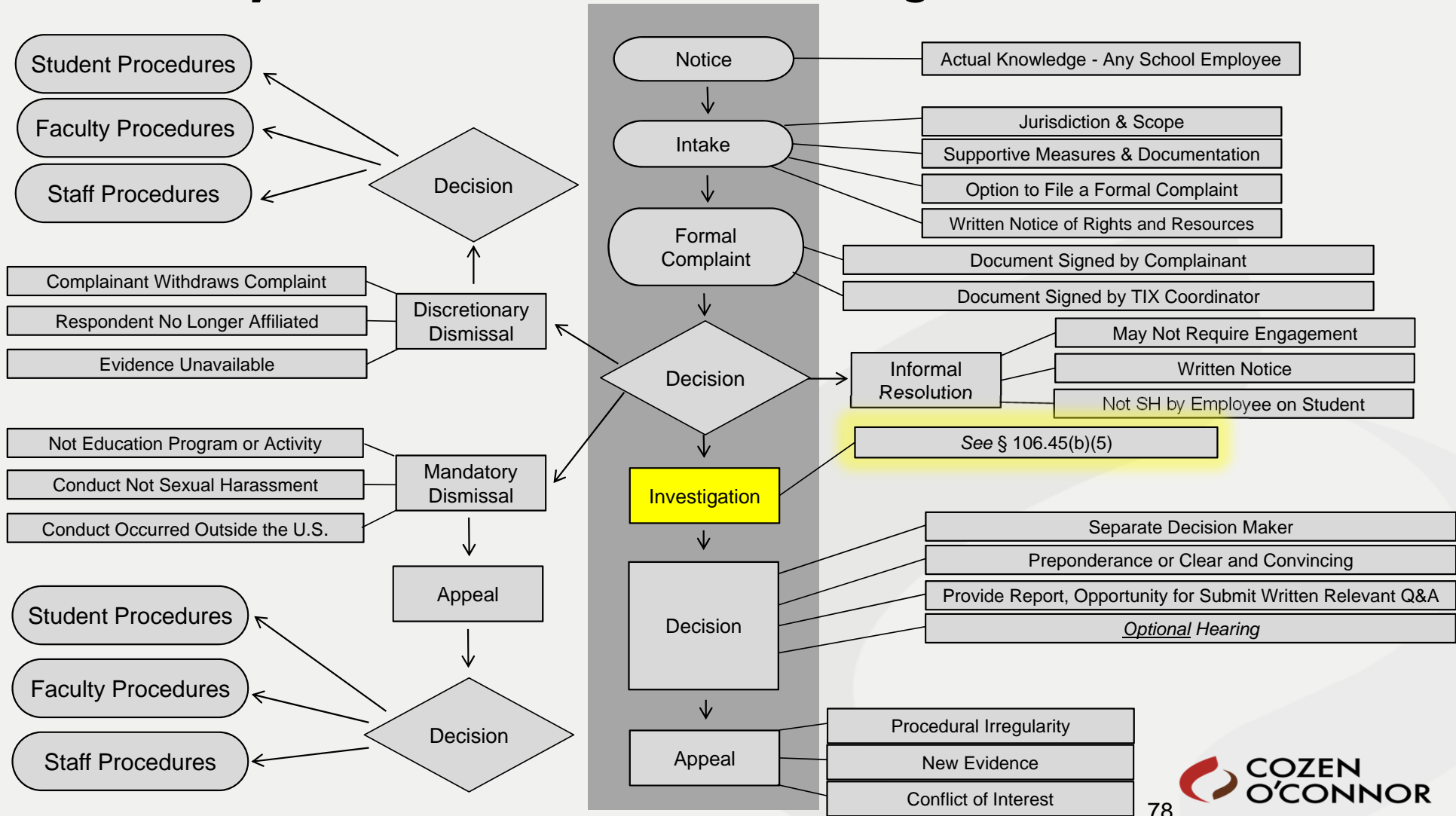
Relevant Regulations Sections:

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

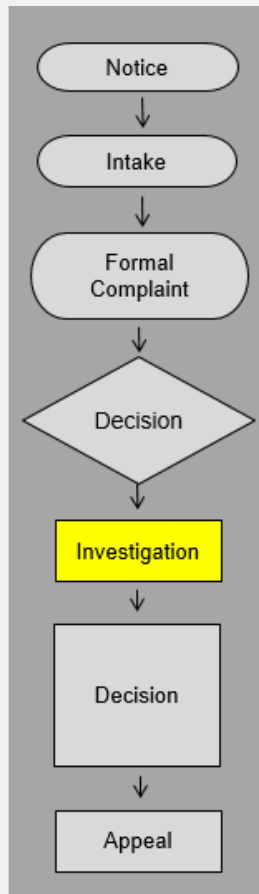
Range of Supportive Measures: § 106.45(b)(1)(ix)

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

# Key Provisions: New Title IX Regulations – K-12



# Obligation to Investigate

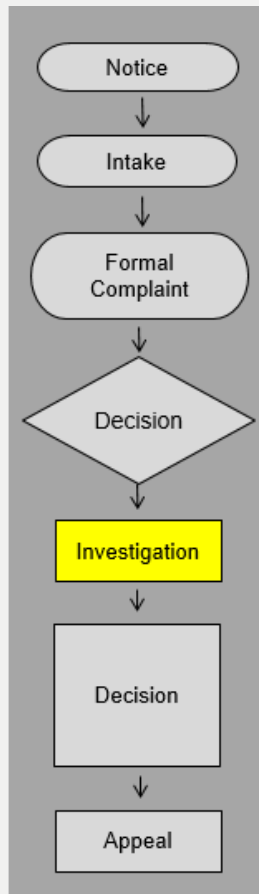


- Separation of the recipient’s obligation to respond to a report of sexual harassment from the recipient’s obligation to investigate formal complaints of sexual harassment.
  - See discussion in Preamble at 598-599.
- The recipient **must** investigate the allegations in a formal complaint.

Title IX Regulations issued May 6, 2020; Preamble at 598-599;  
§ 106.45(b)(3) .



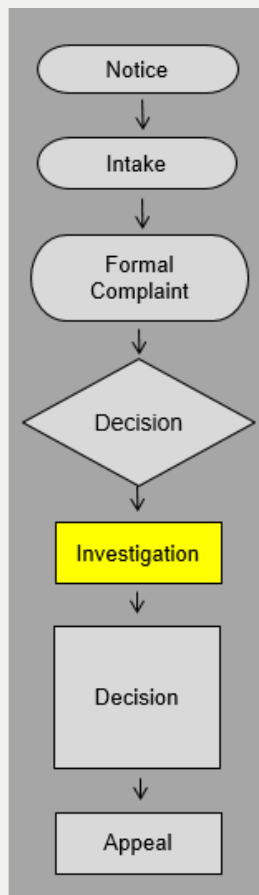
# Written Notice to Parties



- Must provide written notice of the recipient’s grievance process, including any informal resolution process.
- Must provide written notice of the allegations.
  - Sufficient time to prepare a response before any initial interview
  - Sufficient details known at the time
- Must provide supplemental notice of additional allegations

Title IX Regulations issued May 6, 2020; § 106.45(b)(2)

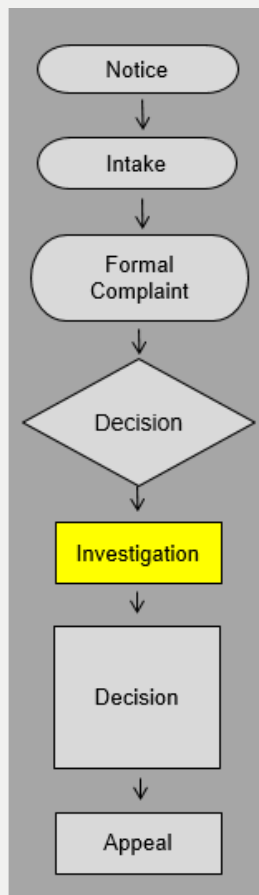
# Investigations



- Ensure that the burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rest on the recipient and not on the parties.
- Provide written notice of the date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings, with sufficient time for the party to prepare to participate.

Title IX Regulations issued May 6, 2020; § 106.45(b)(5); 106.45(b)(5)(v)

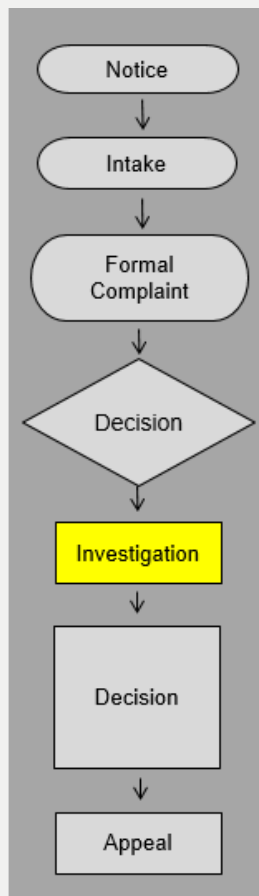
# Investigations



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

Title IX Regulations issued May 6, 2020; §§ 106.45(b)(5)(ii)-(iv)

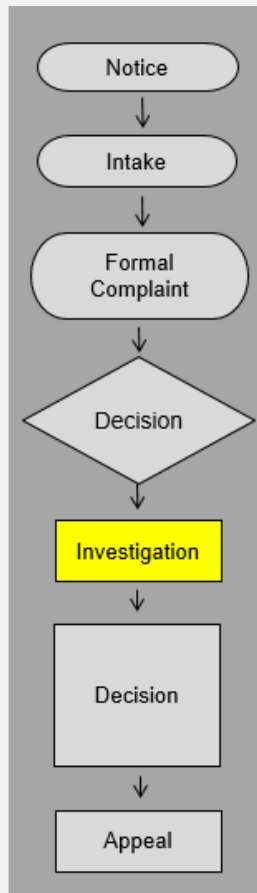
# Investigations



- Provide both parties an **equal opportunity to inspect and review any evidence** obtained as part of the investigation that is **directly related to the allegations** raised in a formal complaint so that each party can meaningfully respond to the evidence prior to conclusion of the investigation.
  - Evidence that is “directly related to the allegations” may encompass a broader universe of evidence than evidence that is “relevant.”
  - 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 issued May 6, 2020; §§ 106.45(b)(5)(vi); Preamble at 1041, 1015

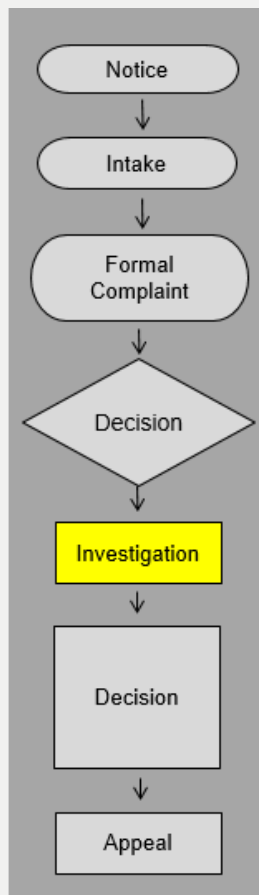
# Investigations



- 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 issued May 6, 2020; §§ 106.45(b)(5)(vi)

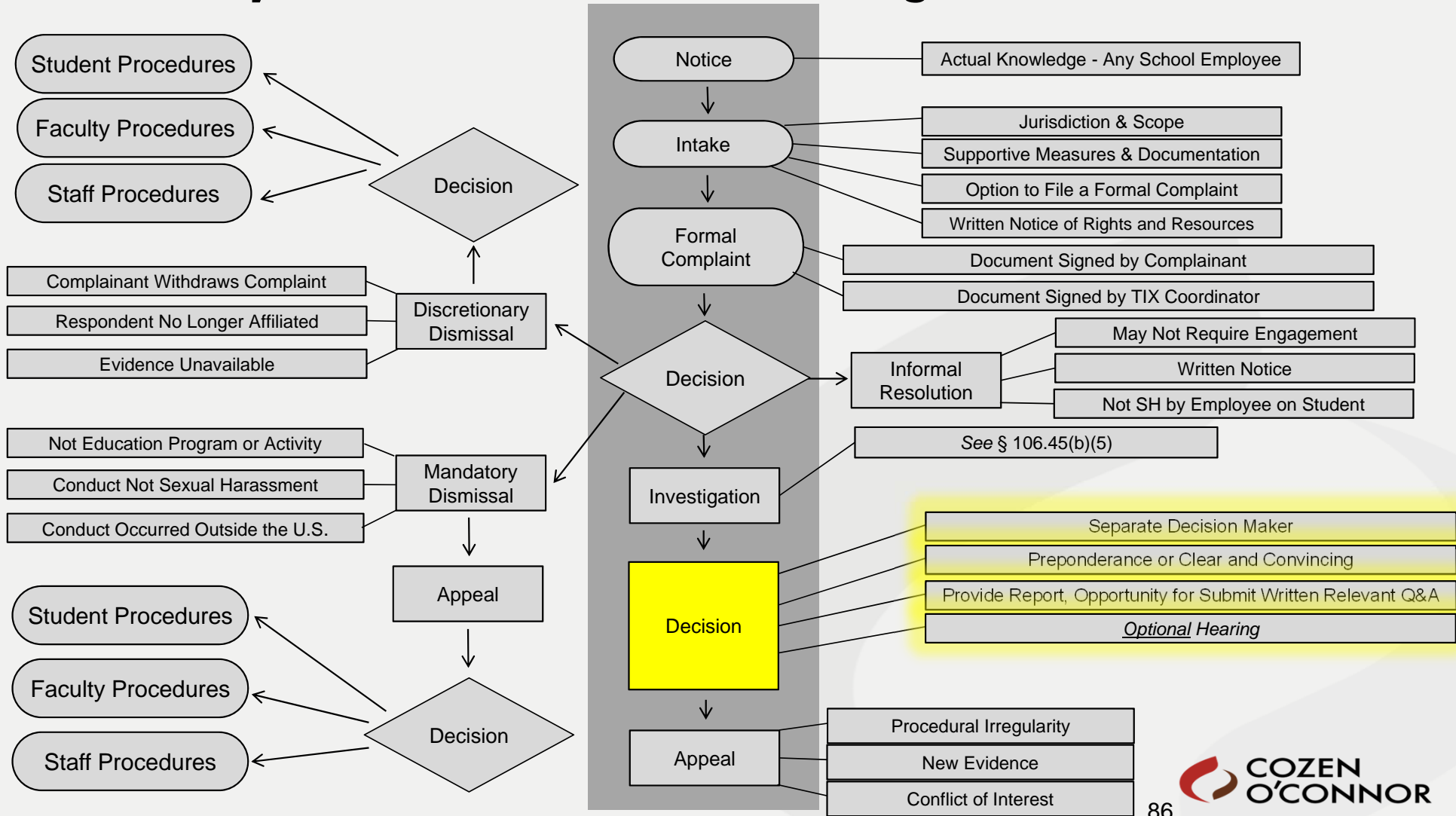
# Investigations



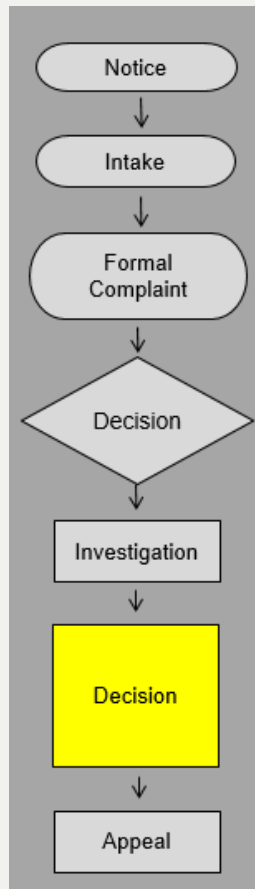
- Create an **investigative report** that fairly summarizes relevant evidence and
- Send to each party and the party’s advisor, if any, the investigative report in an electronic format or a hard copy, for their review and written response, **at least 10 days prior** to the determination of responsibility (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 issued May 6, 2020; §§ 106.45(b)(5)(vii); Preamble at 1037

# Key Provisions: New Title IX Regulations – K-12



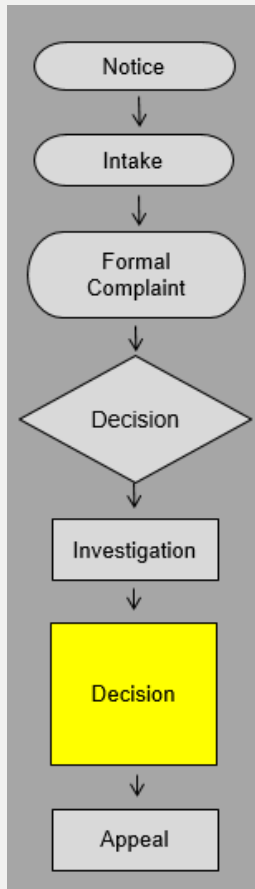
# Decision



- 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



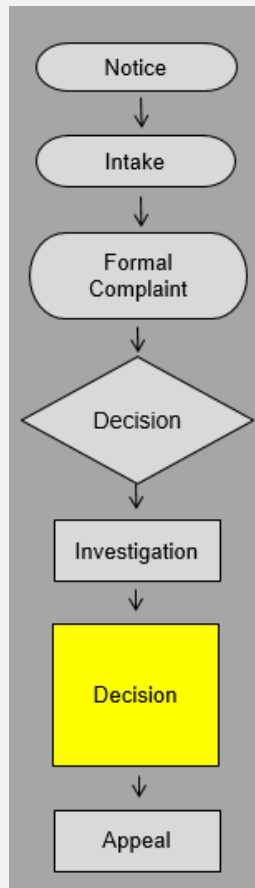
# Decision



- 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.**

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

# Decision

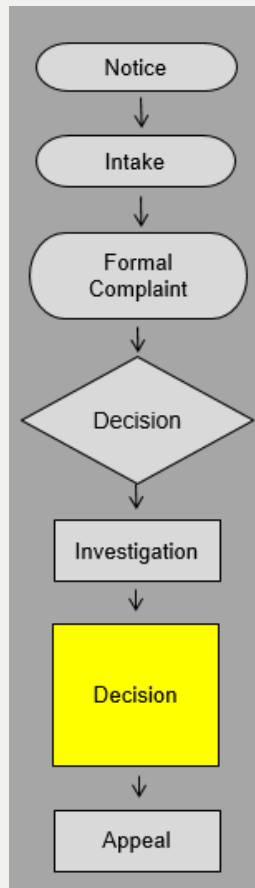


- Elementary and secondary schools have “**significant discretion**” whether to adjudicate formal complaints through a hearing or a written exchange of questions.
- “The Department desires to leave elementary and secondary schools as much flexibility as possible to apply procedures that fit the needs of the recipient’s educational environment.”
- Discretion is only limited by the requirement that “any rules adopted by a recipient must apply equally to both parties.”

Title IX Regulations issued May 6, 2020; Preamble at 1240-1241)

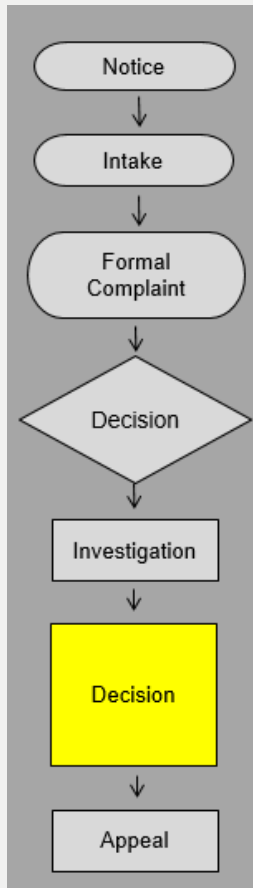
# Decision

- “Therefore, the recipient has flexibility to make a hearing available on a case by case basis, for example where the Title IX Coordinator determines a hearing is needed, so long as the grievance process . . . clearly identifies the circumstances under which a hearing may, or may not, be held.”



Title IX Regulations issued May 6, 2020; Preamble at 1239)

# Decision

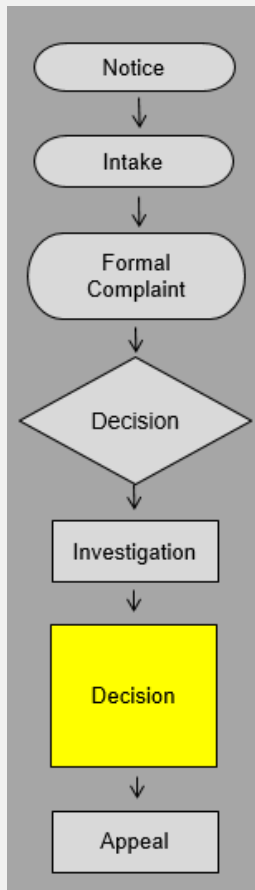


- With or without a hearing, after [sending] the investigative report to the parties ... and before reaching a determination regarding responsibility, the decision-maker **must afford each party the opportunity to submit written, relevant questions** that a party wants asked of any party or witness, provide each party with the answers, and allow for additional, limited follow-up questions from each party.

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

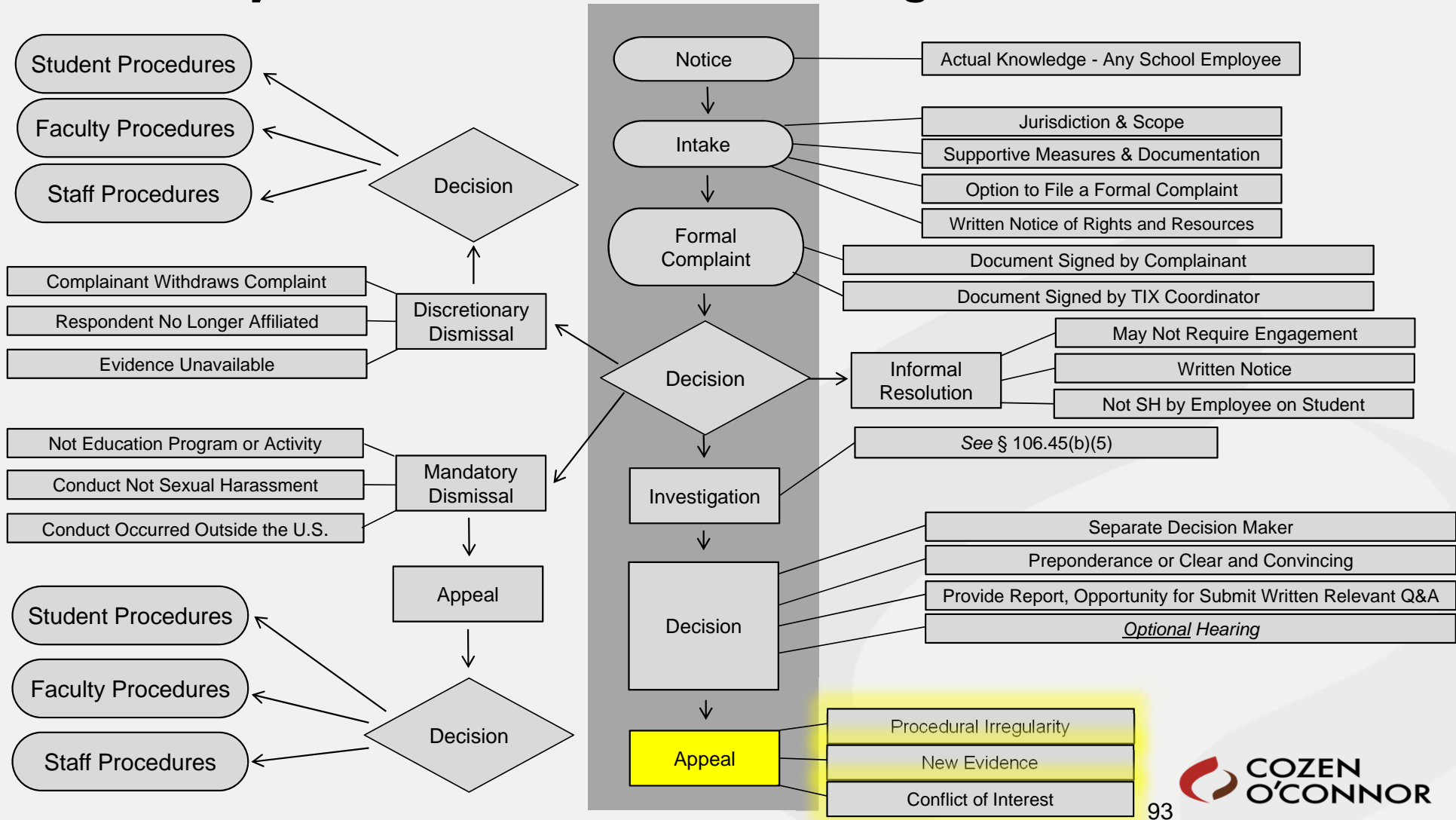
# Decision

- The decision-maker(s) must **explain** to the party proposing the questions any **decision to exclude** a question as not relevant.

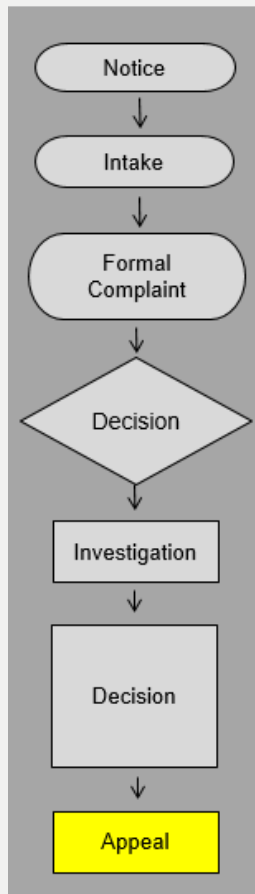


Title IX Regulations issued May 6, 2020; § 106.45(b)(6)(ii)

# Key Provisions: New Title IX Regulations – K-12



# Appeals



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

Title IX Regulations issued May 6, 2020; § 106.45(b)(8)

# 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 (if offered)
  - Issues of relevance of questions and evidence, including when questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, as set forth in paragraph (b)(6) of this section.



# Training

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

# Retaliation

- No recipient or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by title IX or this part, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under this part

Title IX Regulations issued May 6, 2020; § 106.71(a)

# Retaliation

- The exercise of rights protected under the First Amendment does not constitute retaliation
- Charging an individual with a code of conduct violation for making a materially false statement in bad faith in the course of a grievance proceeding under this part does not constitute retaliation

Title IX Regulations issued May 6, 2020; § 106.71(b)

# Documentation

- Must maintain records for 7 years
- Must make training materials publicly available on website
- Must maintain records of any actions, including any supportive measures, taken in response to a report or formal complaint of sexual harassment

Title IX Regulations issued May 6, 2020; § 106.45(b)(10)(i)

# Documentation

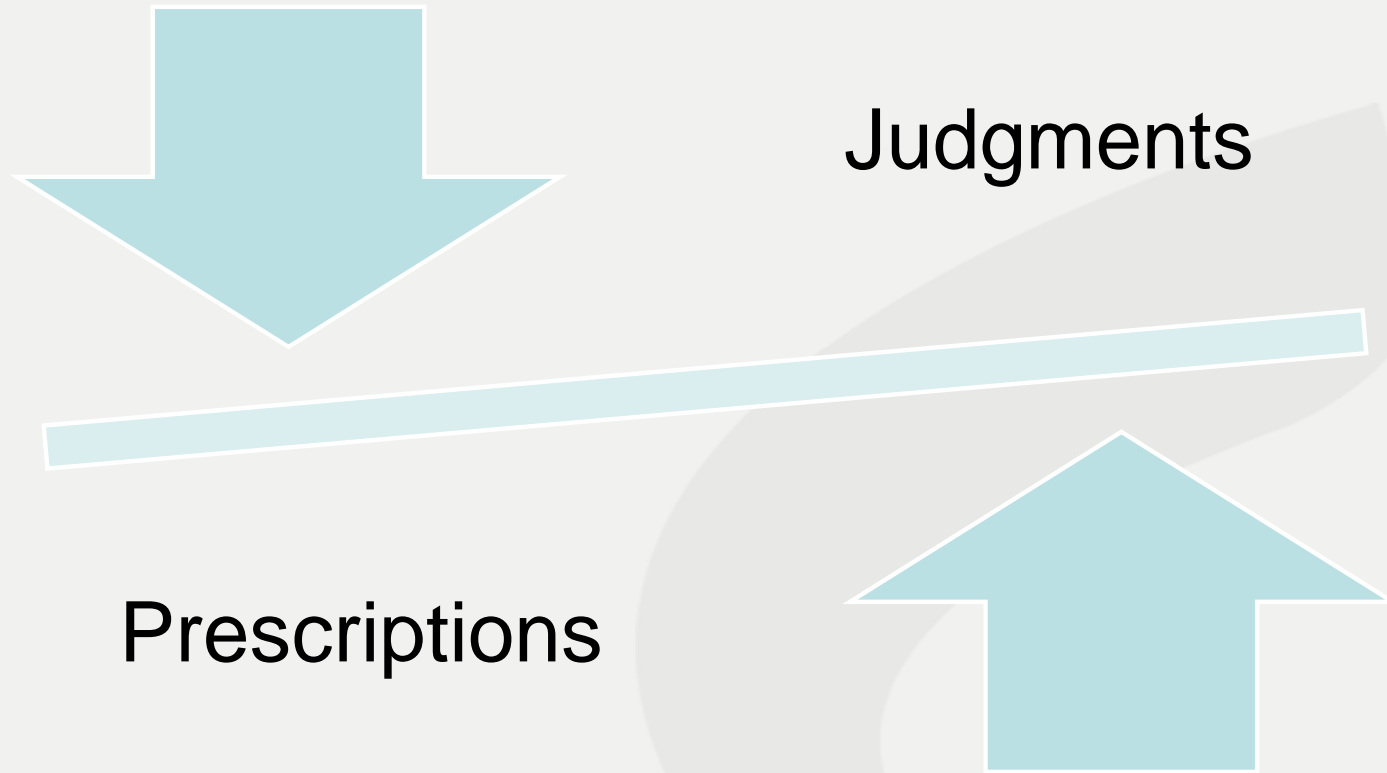
- Must document the basis for its conclusion that its response was not deliberately indifferent, and document that it has taken measures designed to restore or preserve equal access to the recipient's education program or activity
- If a recipient does not provide a complainant with supportive measures, then the recipient must document the reasons why such a response was not clearly unreasonable in light of the known circumstances

Title IX Regulations issued May 6, 2020; § 106.45(b)(10)(ii)

# Recap of Two Key Provisions



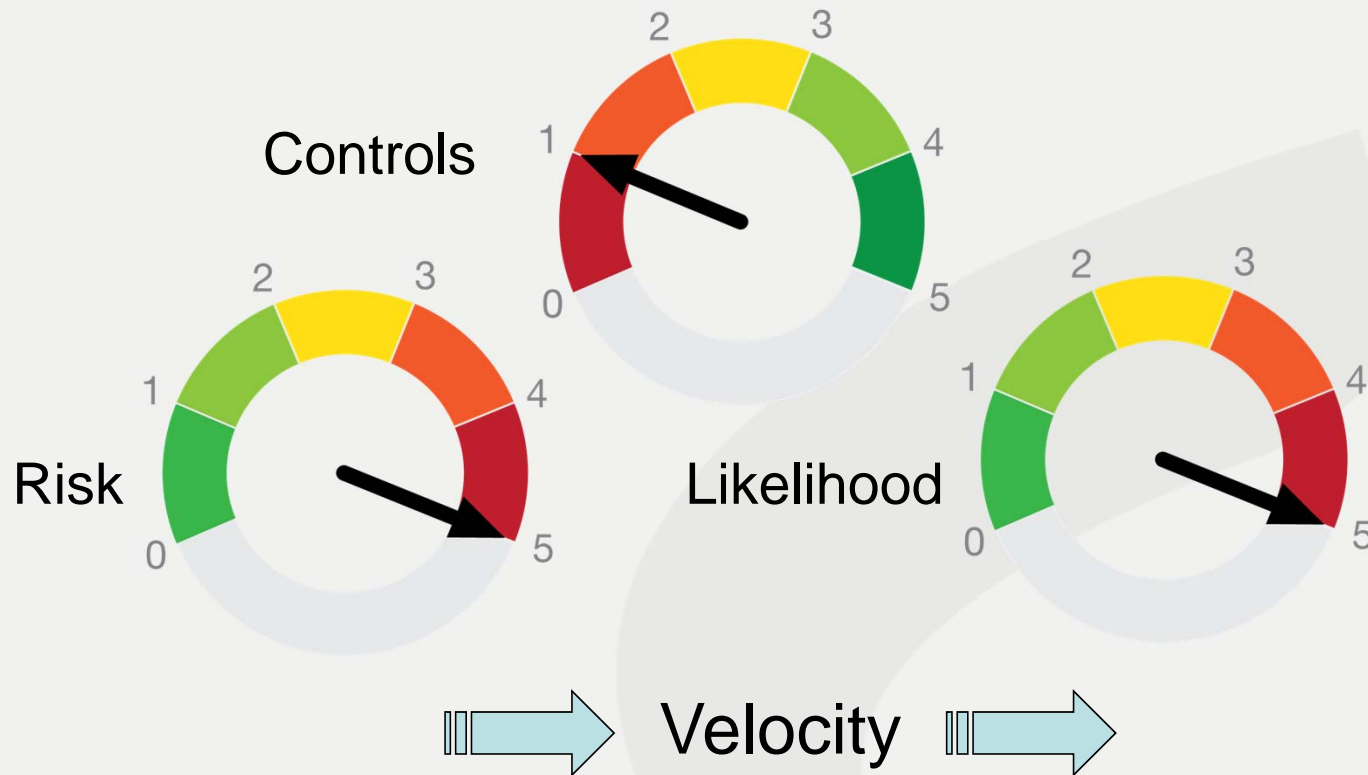
# Balancing



# **EFFECTIVE PRACTICES**



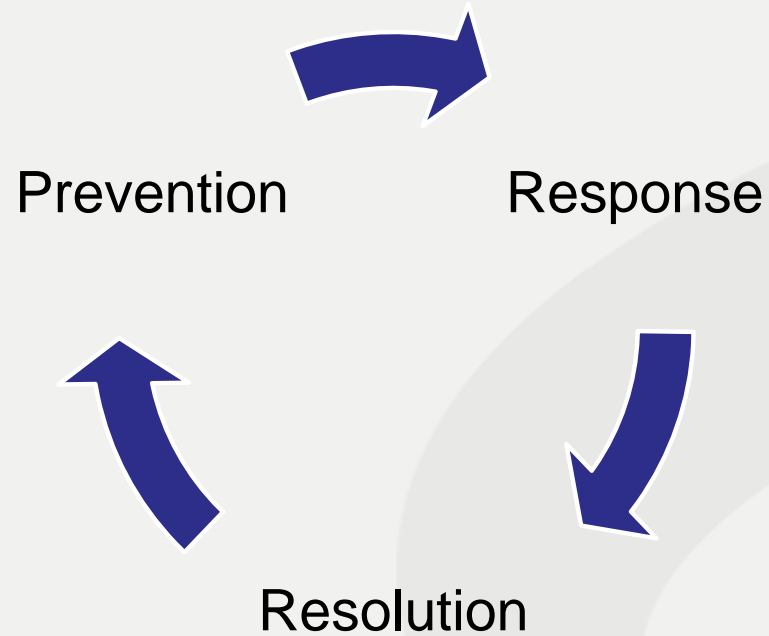
# Risk Management



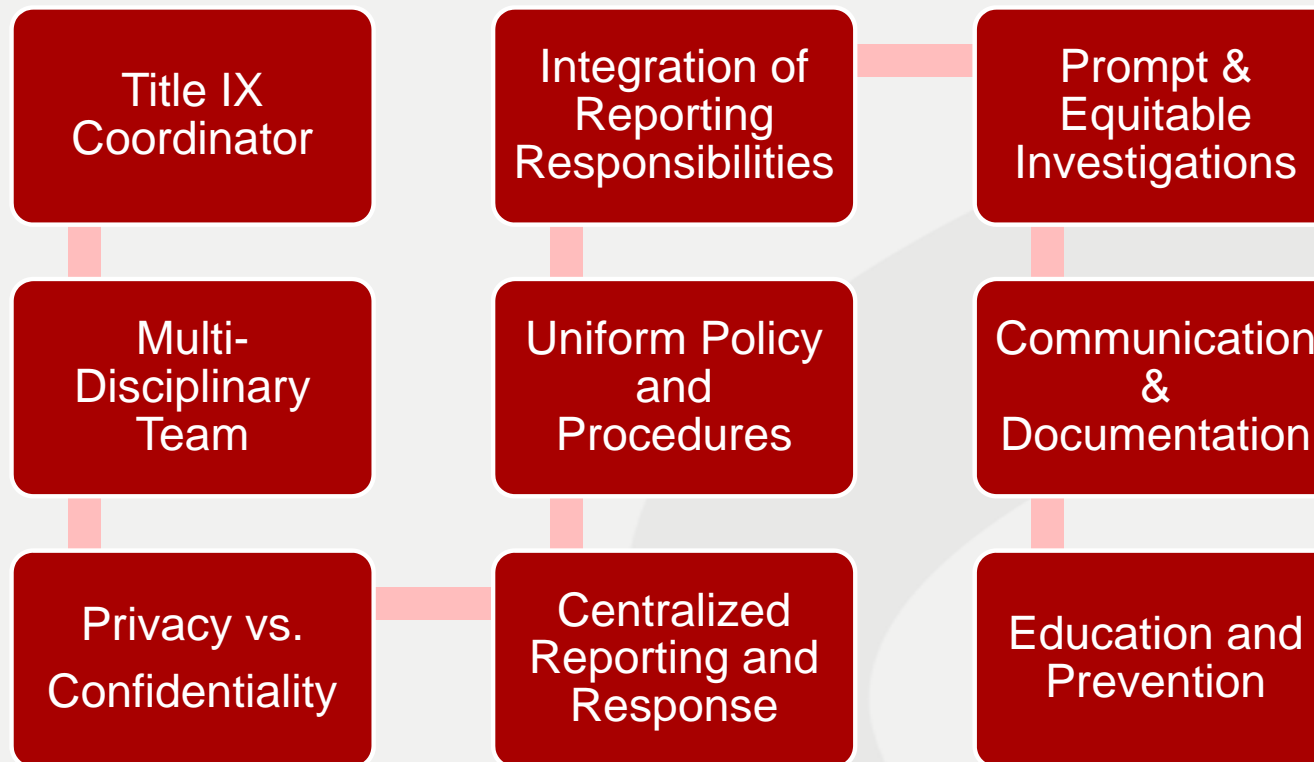
# Implementation Rubric

- Evaluate the facts and context in light of:
  - Law
  - Regulations
  - Education experience
  - District and School Values
- Make iterative decisions with fidelity to core principles
- Document and show your work

# Create a Culture of Responsibility and Accountability



# Key Elements of Effective Practices



# Centralized Reporting

- Sharing of reports by employees is imperative to:
  - Ensure consistent responses by the school to allow the entity to carry out its Title IX and Title VII obligations
  - Prevent a wide variety of ad hoc responses that may result in not treating all complaints fairly or equitably
  - Prevent misconduct from continuing unchecked without providing the institution with the opportunity to respond and take corrective action as is appropriate
  - Protect school from legal liability for failure to respond or for future acts

# Centralized Reporting

- Critical questions:
  - What gets “reported up” to Principal? To Title IX or Deputy Title IX Coordinator?
  - Do frontline employees have competence and judgement?
  - How do you respond with timely and proportional response while still satisfying Title IX obligation to share all reports with Title IX Coordinator for centralized response?

# Centralized Reporting

- Values/interests to consider:
  - Misbehavior and deviation from norms occur frequently in school – they are normal and developmentally appropriate
  - Need to avoid over-processing of low-level incidents that can be effectively dealt with in the moment they occur
  - But also need to ensure leadership engagement when incidents occur that may be impacting students' education (e.g., creating a hostile environment)

# Centralized Review Process

- Coordination of information and personnel
  - Clearly delineated roles and responsibilities
  - Build in regular and open lines of communication
  - Sequence events in advance
- Separate support and advocacy from investigation and adjudication
- Template communications
- Central tracking for patterns
- Documentation/records
- Ensure consistent implementation:
  - Supportive measures
  - Investigative protocols
  - Sanctions
  - Community remedies
- Transparency in outcomes



# Effective Practices

- Pragmatism
- Proactive Preparation
- Physical Plant
- Personnel
- Policies and Procedures
- Practices and Protocols
- Prevention
- Partnerships
- Permission

# Pragmatism

- A reasonable and logical way of doing things or of thinking about problems that is based on responding to specific circumstances instead of on ideas and theories
- Embrace the reality that it happens here
- Respond in the same, reasonable common sense manner you respond to other significant issues
- Prioritize values - student and employee welfare, school safety, diverse and inclusive community and institutional integrity

# Proactive Preparation

- Leadership
- Tone at the top
- Culture of reporting, accountability and responsibility
- Shared responsibility
- Consistency of leading with values
- Commitment to informed communication that is as transparent as possible
- Be careful not to confuse institutional integrity with institutional reputation

# Proactive Preparation

- Appoint individual responsible for
  - Policy
  - Training
  - Implementation of procedures
  - Systems/record-keeping
  - Oversight
  - Identification of all applicable laws and regulations and oversight of process for implementation
- Ownership rather than diffusion of responsibility
- Ensure coordination with Board and senior leadership

# Physical Plant

- Security
- Access
- Lighting
- Physical plant:
  - Areas of isolation
  - Cyber-safety
- Areas of vulnerability
  - Transitions
  - Transportation to and from school
  - Travel with sports teams, administrators or other parents
  - One on one contact
  - Locker rooms
  - Summer camps

# Personnel

- Precautionary measures
  - Hiring protocols
  - Background checks
  - Reference checks
- Job descriptions that provide clarity and role definition
- Periodic evaluations and assessments
- Training requirements
- Documentation of concerns
- Timely and responsive corrective action

# Employee Policies

- Policies
  - Clear definitions of prohibited conduct and behavioral expectations
  - Clear reporting structure
  - Prohibition against retaliation
- Prohibition against fraternization and dating of students

# Protection of Minors Policies

- Protection of Minors Policies
  - Limits on nature and scope of contact
  - Set appropriate boundaries
    - Safe supervision and ratio
    - “Rule of Three”
    - Manner and mode of contact
  - Bystander intervention/engagement
  - Culture of care requires reporting



# Mandatory Reporter Policies

- Mandatory reporting of suspected child abuse
  - Institutional reporting
  - How to identify
  - What to do/what not to do
  - Option to call hotline directly?
  - Circle back to reporter
  - Timeliness
  - Record keeping
  - Forms
  - Enforcement and accountability for failure to report

# Technology Policies

- IT and Responsible Use Policies
  - Email
  - Social media
  - Photographs
  - Educational sites

# Protocols

- Internal protocols re: coordination of information
- Multi-disciplinary response team
  - Site level
  - District level
- Centralized reporting and response
- Supportive measures (individual and community)
- Consistent application of policy and procedures to avoid ad hoc responses
- Documentation
- Track patterns and address climate

# Prevention and Education

- Training and education for staff
  - Mandatory reporting
  - Identifying and recognizing prohibited conduct
  - Professional boundaries
  - Centralized reporting
  - Policies and procedures
- Training and education for students
  - Resources and policies
  - Consent
  - Alcohol and other drugs
  - Interpersonal violence
  - Social media
  - Bystander Intervention
  - Safety planning and permission

# Prevention and Education

- Constituencies
  - Students
  - Parents
  - Staff
  - Volunteers
- Considerations
  - State law requirements
  - Frequency
  - Modality
  - Effectiveness

# Partnerships

- Establish relationships with community partners
  - Law enforcement
  - District Attorney
  - Child welfare agencies
  - Domestic violence or sexual assault advocacy centers
  - Child advocacy centers
- Partnerships with parents

# Permission

- Give permission to students and staff to speak up
- Overcome insular loyalty
- Build relationships of trust
- Identify resources
- Ensure parental permission

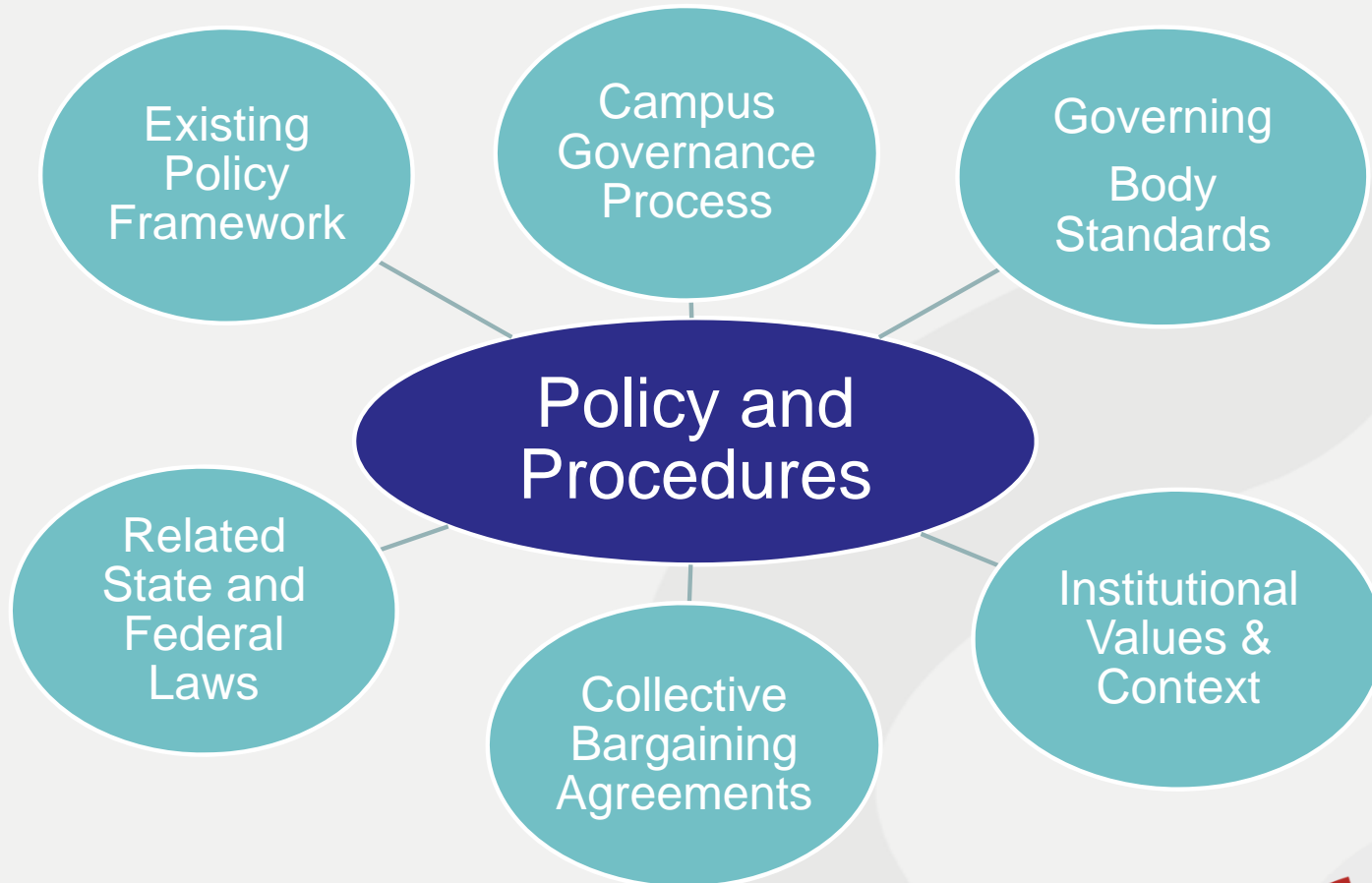
# **NEXT STEPS: UPDATING POLICIES AND PROCEDURES**



# Putting the Pieces Together



# Decision-Making Considerations



# Approach to Implementation

## Crafting

- Gather key stakeholders and current policies and procedures
- Form working group for planning and implementation
- Review new legal requirements and compare with current practices

## Drafting

- Update written policies, procedures, templates and forms
- Prepare communications plan and draft communications to constituent groups
- Review web and print materials to ensure consistent messaging

## Staffing

- Realign current roles or recruit/hire to fulfill all required functions
- Ensure all staff members receive training; maintain training materials for publication online
- Reinforce partnerships with key units and ensure consistent protocols for case referrals

## Grafting

- Roll out training and education on new policies, procedures, and protocols
- Develop awareness campaign to educate community about resources, supports, and reporting options
- Create mechanism to gather feedback about gaps in process, questions or concerns

# Implementation Rubric

- Law
- Regulations
- Guidance
- Preamble and commentary
- OCR webinars, charts, blog
- Policy
- K-12 education experience
- Institutional values



# Articulating Institutional Values

- Make iterative decisions with fidelity to core principles
  - Child protection
  - Openness and transparency
  - Partnership with parents and caregivers
  - Partnership with and reliance on external authorities

# Use of Slides

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

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# **The New Title IX Regulations: Initial Assessment: Notice, Jurisdiction, Supportive Measures and Formal Complaints**

Presented By:

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**Gina Maisto Smith, Chair**

**Leslie Gomez, Vice Chair**

**June 29, 2020**



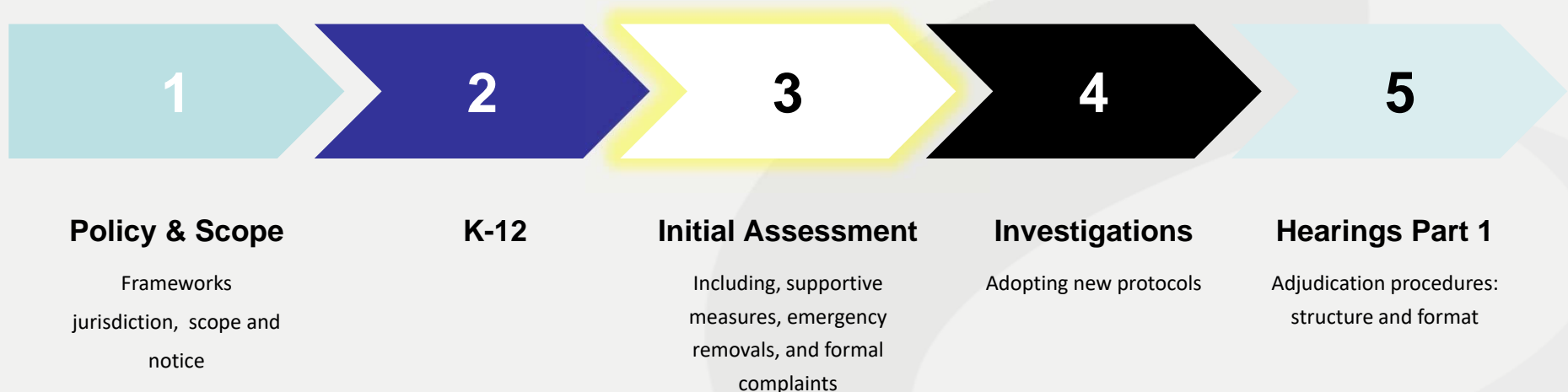


# Today's Webinar

- Following an introductory webinar, A First Look at the New Title IX Regulations, this is the third in a series of webinars focusing on implementation.
- This webinar will:
  - Provide an **overview** of initial assessment or intake and outreach processes
  - Outline the **legally-required elements** for intake processes under the new Title IX regulations, and
  - Share **effective practices** in conducting initial assessments and intake processes

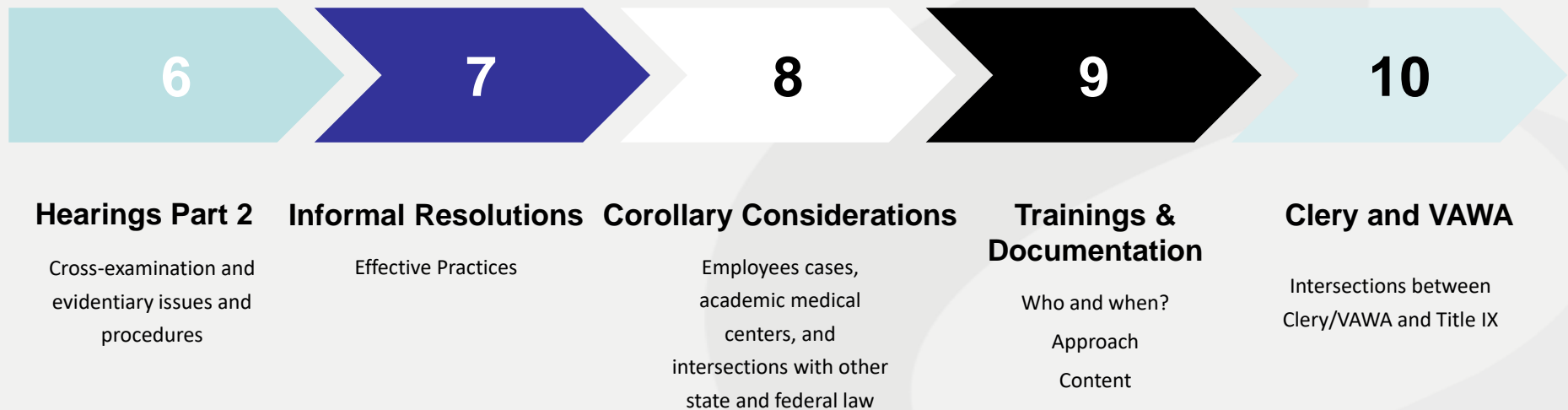
# Introducing the Webinar Series

Subsequent IRG webinars will focus on specific aspects of the regulations, as written and as applied, including:



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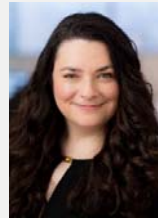
# Institutional Response Group



**Gina Maisto Smith**  
Cozen O'Connor



**Leslie Gomez**  
Cozen O'Connor



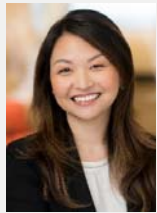
**Maureen P. Holland**  
Cozen O'Connor



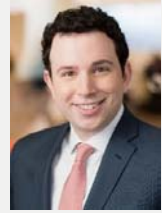
**Devon Turner Riley**  
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**Michael Stackow**  
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**Helen Park**  
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**Adam M. Shapiro**  
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**Peter C. Lim**  
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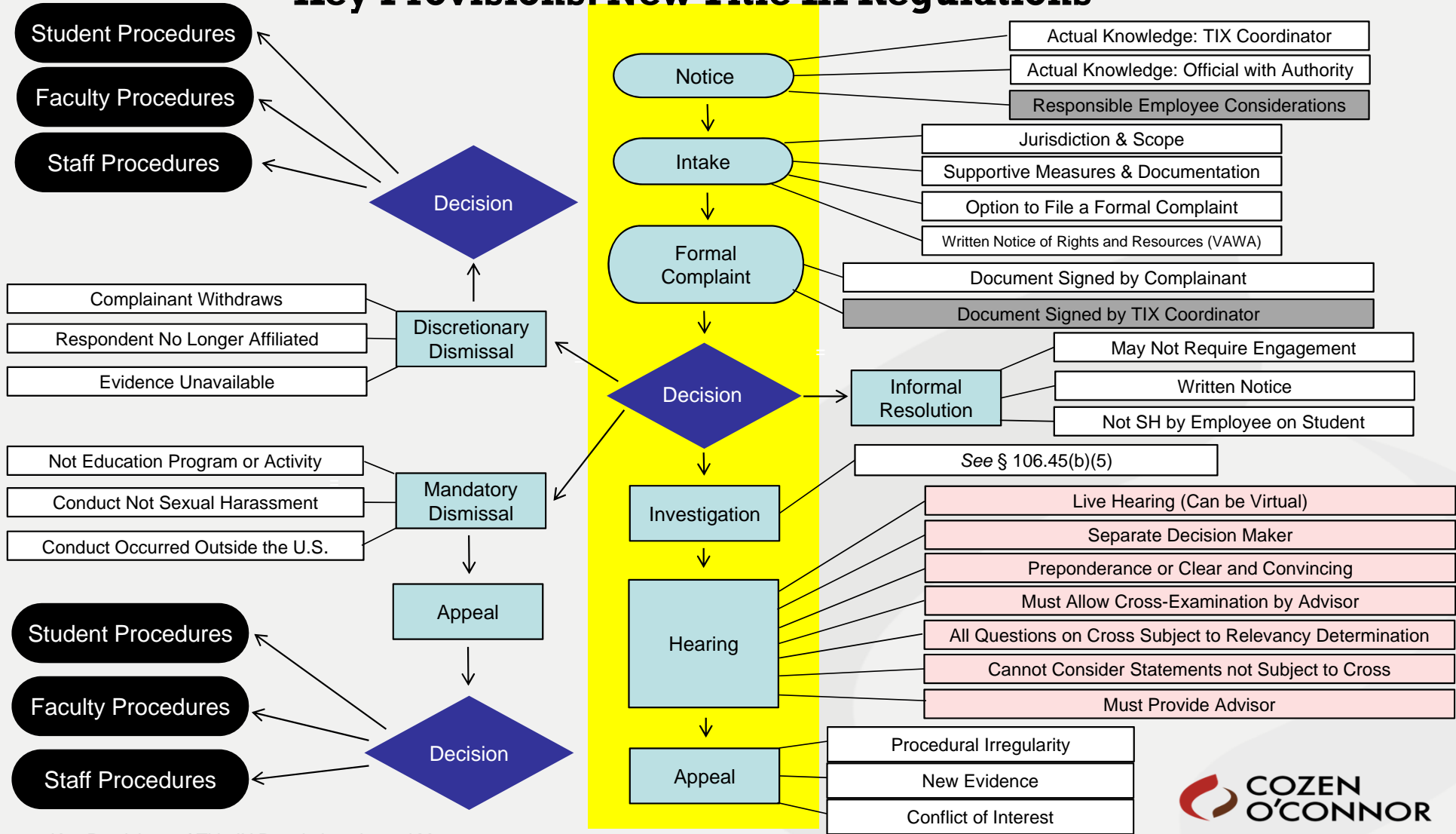
**Joseph A. Tate, Jr.**  
Cozen O'Connor



**Christi Hurt**  
Margolis Healy

**Institutional Response Group Paralegal and Administration Team:**  
Heather Dunn, Megan Lincoln, Braelyn Schenk, and Mary Sotos

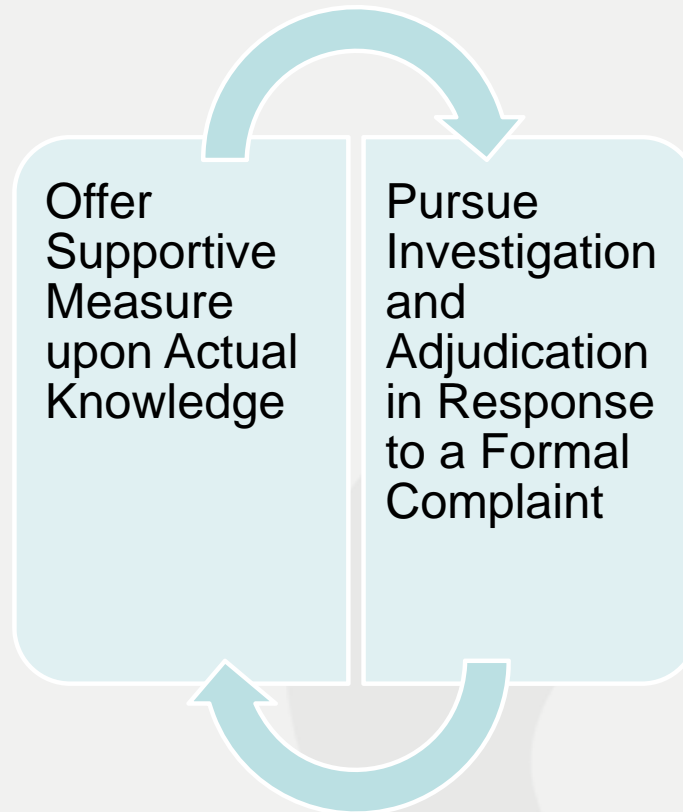
# Key Provisions: New Title IX Regulations



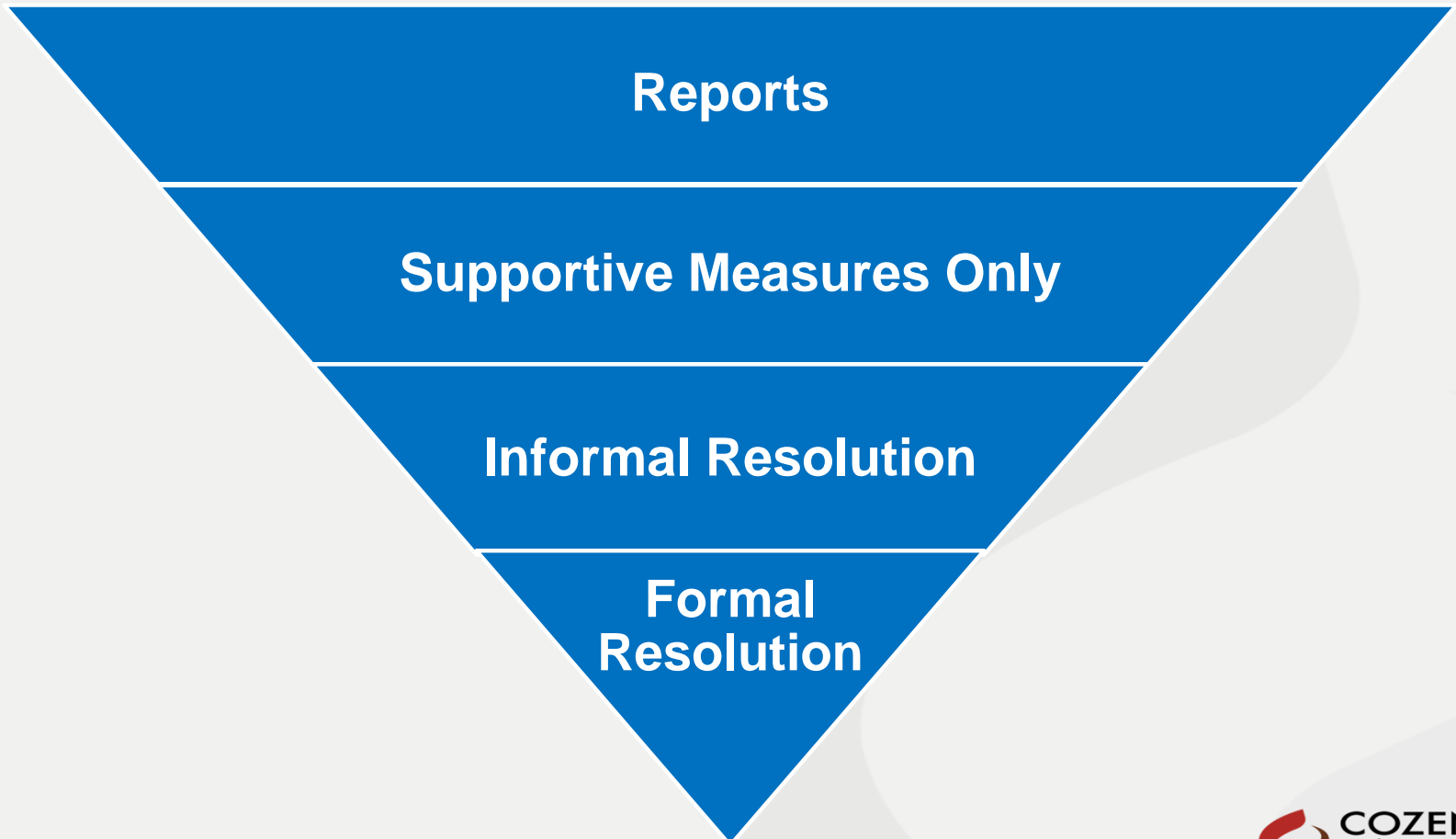
Key Provisions of Title IX Regulations issued May 6, 2020;



# Understanding Two Key Provisions



# The Importance of Intake and Outreach



# Intake and Outreach

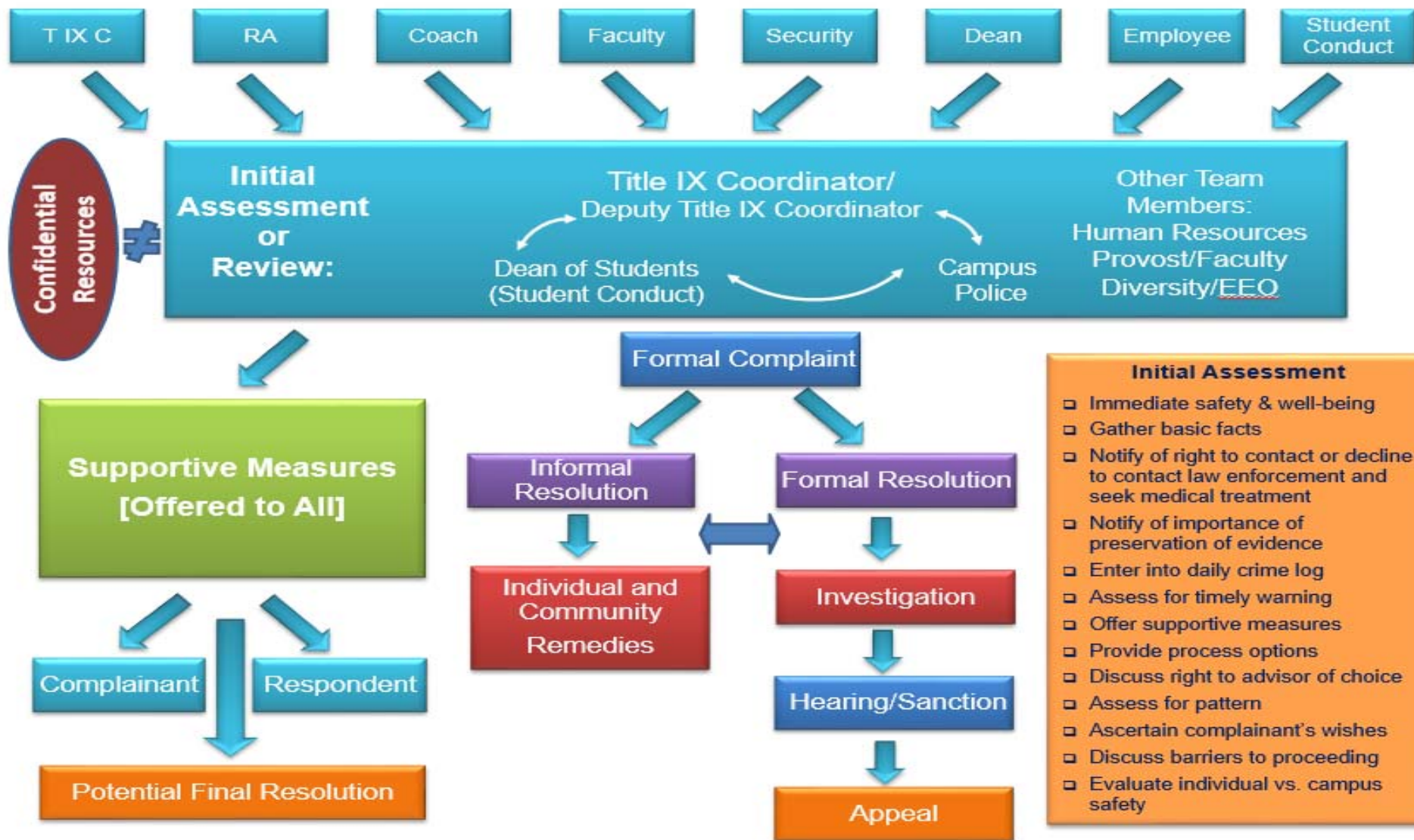
- Opportunity to re-envision this critical step in the process
  - Foster increased reporting
  - Respond in a compassionate and effective manner
  - Engender trust in personnel and processes
  - Assess effectiveness of current intake functions
  - Conduct gap assessment
- Aspire to ready accessible information about resources and policies
- Increase accessibility of and participation in investigation and resolution processes



# The Importance of Intake and Outreach

- The Department's adaptations of the three-part Gebser/Davis framework achieve important policy objectives that arise in the context of a school's response to reports, allegations, or incidents of sexual harassment in a school's education program or activity, including respect freedom of speech and academic freedom, **respect for complainants' autonomy, protection of complainants' equal educational access while respecting the decisions of...educators to determine appropriate supportive measures, remedies,** and disciplinary sanctions, consistency with constitutional due process and fundamental fairness, and clear legal obligations that enable robust administrative enforcement of Title IX violations.

Title IX Regulations issued May 6, 2020, Preamble p. 61; Final Regulations May 19, 2020, 85 F.R. 30035 (footnotes omitted)



# Intake and Initial Assessment

- Assess immediate safety and well-being
- Gather basic facts
- Advise of right to notify or decline to notify law enforcement and seek medical treatment
- Notify of importance of preservation of evidence
- Tend to Clery responsibilities:
  - Enter into daily crime log
  - Assess for timely warning
- Assess and implement supportive measures
- Provide policies, process options, resources and supports
- Assess for pattern
- Ascertain complainant's wishes
- Discuss barriers to proceeding
- Evaluate individual vs. campus safety

# Importance of Getting Everything Central

- Allow for real-time triage and safety assessment
- Provide consistent access to supportive measures
- Provide accurate information about resolution options
- Track and assess for pattern among individuals, groups, programs, locations
- Ensure informed and sensitive information-gathering
- Ensure legal compliance with Title IX regulations
- Fulfill institutional values to reduce sexual and gender-based harassment and violence

# Centralized Review Process

- Coordinate personnel and processes
  - Clearly delineated roles and responsibilities
  - Build in regular and open lines of communication
  - Sequence events in advance
- Remove conflict of interest and reduce bias
- Separate support and advocacy from investigation and adjudication
- Develop and use template communications
- Central tracking for patterns
- Documentation/records
- Ensure consistent implementation of:
  - Supportive measures
  - Investigation protocols
  - Sanctioning & remedies
- Reinforce neutrality and impartiality

# Fostering Increased Reporting

- Understand general and specific barriers to reporting
- Provide clear and accessible information to ensure complainants and others understand the decisions involved in reporting
  - Privacy vs. confidentiality
  - Reporting options vs. confidential resources
  - What happens when a report is made
  - Respecting complainant agency and autonomy
- Set clear guidelines for employee reporting obligations

# Fostering Increased Reporting

- Demystify the process
- Provide multiple pathways for reporting including online, phone, appointment, walk-in
- Consider location and accessibility of office
  - Centrally-located
  - Private
- Offer to meet where and when the complainant is most comfortable
- Be a visibly invested member of the community
  - Attending non-Title IX functions
  - Speaking and training opportunities

# Core Elements of Initial Assessment

- Provide written information about resources and rights under the Clery Act (or analogous state law)
- Provide reasonably available supportive measures
- Consider the complainant's wishes with respect to supportive measures and how to proceed
- Balance complainant agency and autonomy with broader campus safety and Title IX obligations
- Gather all relevant information to inform the institutional response
- Evaluate jurisdiction to proceed with formal complaint
- Document all relevant and required information



# VAWA Requirements

- Statement of policy re: procedures victims should follow if a crime of dating violence, domestic violence, sexual assault, or stalking has occurred, including written information about:
  - the importance of preserving evidence
  - how and to whom the alleged offense should be reported
  - options regarding notifying law enforcement and campus authorities about alleged offenses, including the option to be assisted by campus authorities in notifying law enforcement authorities or to decline to notify authorities
  - information on individual rights and the school's responsibilities regarding orders of protection, no contact orders, restraining orders, or similar lawful orders issued by a criminal, civil or tribal court.

20 U.S.C. § 1092 (f)(8)(B)(iii); 34 C.F.R. § 668.46(b)(11)(ii); 34 C.F.R. § 668.46(b)11.

# VAWA Requirements

- Notify individuals in writing of resources and rights:
  - the range of interim measures available that are available regardless of whether an individual chooses to report an alleged crime to campus police or law enforcement
  - on and off campus counseling, health, mental health, victim advocacy and legal assistance programs
  - an explanation of the procedural options, including alternative resolutions and investigative resolutions
  - the right to be accompanied at any meeting by an advisor of choice
  - the policy prohibiting retaliation and how to report acts of retaliation

34 C.F.R. 668.46(b)(11)(ii)

# Separating Support from Investigations

- Separate support/advocacy/intake functions from investigative/adjudicative functions to reduce potential for conflict of interest or perception of bias
- 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

# Separating Support from Investigations

- “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.

# Complainant Agency & Autonomy

- Balancing competing considerations
  - Agency and autonomy of an adult complainant/victim/survivor
  - Legally required procedural protections
  - Broader responsibility to campus safety
- Addressing the needs of an individual reporting sexual or gender-based harassment or violence while determining an appropriate institutional response requires expertise and attention

# 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.

# Assessing for Pattern

- People
  - Are the complainant or respondent parties in another current or prior matter?
  - Are the complainant or respondent involved in an organization, department, or team that is part of a current or prior matter?
- Locations
  - Has the location of the incident come up in a prior matter?
- Conduct
  - Does the conduct itself suggest a need for further training or education on a specific topic?
- Potential Sources of Information:
  - Title IX
  - Student Conduct
  - Campus Police
  - Human Resources
  - Threat Assessment
  - Supervisor
  - Personnel File
  - Provost
  - External Law Enforcement
  - Other
- Document All Results
  - Including no records found

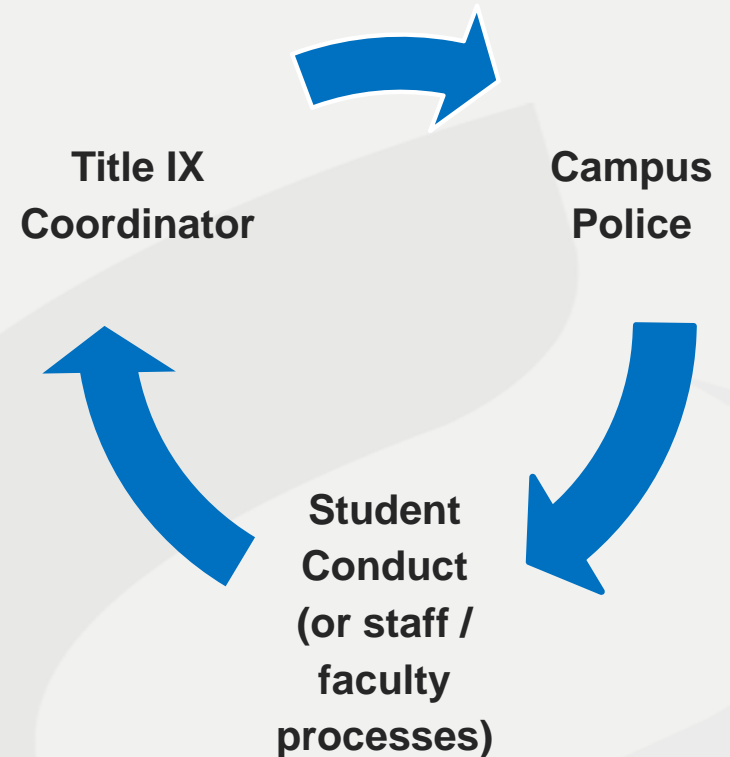
# Importance of Training

- Regulations require training for Title IX Coordinator, Investigator, Decision-Maker, Facilitator of Informal Resolution Process:
  - The definition of Sexual Harassment under § 106.30
  - The scope of the University's education program or activity
  - How to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes
  - How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias
- For Decision-Makers
  - 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
- For Investigators
  - Issues of relevance to create an investigative report that fairly summarizes relevant evidence



# Importance of Coordination

- Multi-disciplinary perspectives
- Integration with threat assessment
- Working with campus partners
  - Robust gathering of information
  - Seamless access to supportive measures
  - Foster increased cooperation
- Promote routine sharing of information
- Consider consistent information in each report
- Reinforce clear decision-making authority



# Title IX Multi-Disciplinary Team

- Core stakeholders
  - Title IX Coordinator
  - Student conduct
  - Campus safety/police
  - Human resources
  - Provost
- Additional campus stakeholders
  - Counseling
  - Health center
  - Advocacy
- Additional campus partners
  - Residence Life
  - Greek life
  - Athletics
- Community partners
  - Law enforcement
  - Prosecutor
  - Hospital/Medical Providers
  - Community crisis or advocacy centers
    - Rape Crisis Counselors
    - Domestic Violence Counselors

# Importance of Documentation

- Checklists for consistency
- Intake and initial assessment forms
- Opening and closing case management checklists, forms and templates
- Template communications/memory markers
- Texts, telephone calls, and in person/Zoom meetings
- Customizing existing data and case management systems

# Importance of Documentation

- “Tyranny of temporal compression”
- Final regulations require seven-year retention period for:
  - All sexual harassment investigations including hearing recording/transcript, disciplinary sanctions imposed on respondent, remedies provided to complaint
  - Appeals and results of appeals
  - Informal resolutions and results therefrom
  - All materials used to train Title IX Coordinators, investigators, decision-makers, and informal resolution facilitators (and post on website)

# Importance of Documentation

- Final regulations require seven-year retention period for:
  - For each response required under § 106.44 (includes supportive measures, formal complaint, emergency removal, and administrative leave), records of any actions, including any supportive measures, taken in response to a report or formal complaint of sexual harassment.
  - Must document the basis for its conclusion that its response was not deliberately indifferent, and document that it has taken measures designed to restore or preserve equal access to the recipient's education program or activity.
  - If a recipient does not provide a complainant with supportive measures, then the recipient must document the reasons why such a response was not clearly unreasonable in light of the known circumstances.

# Case Management and Documentation

- Efforts to contact complainant
- Supportive measures
- Reasonableness of measures designed to restore or preserve equal access to education program or activity
- Jurisdiction
- Decision to move forward with formal complaint
- Pattern assessment
- Core elements for each critical determination:
  - Identify decision-maker(s)
  - Outline key factors
  - Outline steps taken
  - Communicate to parties
- Documentation must capture:
  - Emails
  - Telephone calls
  - In person meetings
  - Text messages

# Sample Checklists

<p>U.S. Department of Education Party wants to <a href="http://www.ed.gov">http://www.ed.gov</a></p> <p><b>The Party requested the following:</b></p> <p>_____ <b>Personal Support</b></p> <p>_____ <b>Academic Support</b> specify: _____</p> <p>_____ <b>Other Interim</b></p> <p>_____ The Party requested _____</p> <p>By signing below, I signify that I agree with the above. If the Party had any questions, I will contact the Party with my contact information at any time.</p> <p>_____ Signature</p> <p>_____ Printed Name</p> <p>_____ Signature</p> <p>_____ Printed Name</p>	<p>_____ <b>Standard of Review</b> determining whether the Party is more likely than not to be responsible for the incident.</p> <p>_____ <b>Right to Notification</b> regarding the timeframe to request updates and have the right to request which their present outcome, sanction, and other consequences.</p> <p>_____ <b>Resolution &amp; Remediation</b> of the policy occurs is designed to eliminate the incident while supporting the individual. It may include education, counseling, conduct, however, not include expulsion, delinquent, or expulsion. The Party may also include academic probation, University housing, and other accommodations. The University may also include academic probation, University housing, and other accommodations.</p> <p>_____ <b>Timing</b>. The Party will seek resolution within 60 calendar days of the incident, or for good cause, a longer timeframe may be required for good cause. For calendar, University and extent of the all.</p> <p>_____ <b>Amnesty</b>. The Party reports of conduct action against student (underage or illegal investigation of procedure or safety of any educational discussion drug use.</p> <p>_____ <b>Additional Information</b> their rights, or if the</p>	<p>_____ counseling, medical, and other confidential information.</p> <p>_____ <b>Privacy</b>. The Party will ensure that individuals who are available regarding confidential, the Party's information.</p> <p>_____ <b>Process Options:</b></p> <p>_____ <b>Formal Investigation</b> right to a prompt investigation of the University, by both parties—conducting an investigation, including a hearing panel, a decision in the attention of the Party, the investigation interviewed.</p> <p>_____ <b>Informal/Voluntary Resolution</b> investigation and resolution, which is supportive, educational, and community-based. It may not involve taking disciplinary action, instituting support, counseling or other accommodations, and community-based education, extracurricular, hostile environment, and other accommodations.</p> <p>_____ Other possible resolution used, will not compel or to participate voluntarily, may be used.</p> <p>_____ <b>Preserving Evidence</b> evidence that documents, photographs, and consent of the Party.</p>	<p>_____ experience; protect broader University process; and determine continued restrictive action are available regarding disciplinary action.</p> <p>_____ <b>Medical Attention</b> strongly encourage obtain medical assessment for physical "forensic exam" to local resources that</p> <p>_____ <b>First Hospital</b> XXX Blank St (123) 123-4567</p> <p>_____ <b>Second Hospital</b> XXX Blank St (123) 123-4567</p> <p>_____ <b>Anti-Retaliation</b> retaliation by individual may take strong review over the individual words taken against. Protected activity is complaint; opposing reasonably believed or words taken against in proceedings under to, adverse action or person (under similar in protected activity.</p> <p>_____ <b>Right to Advisor</b> of his/her choice including any meeting person, including an investigation. The Party or in any manner determined.</p> <p>_____ <b>Confidential Support</b> campus confidential</p>	<p style="text-align: center;"><b>TITLE IX OFFICE INTAKE / CHECKLIST FORM</b></p> <p>Meeting Date: _____ Meeting Time: _____ AM / PM</p> <p>Meeting Location: _____</p> <p>Name: _____ ID: _____</p> <p>Phone: _____ Email: _____</p> <p>Date of Birth: _____ Was Party a minor at the time of the incident? _____</p> <p>Location of Incident: _____ Date of Incident: _____</p> <p>Other Party's Name: _____ Phone: _____</p> <p>Has the individual filed a police report? _____</p> <p>Title IX Staff Member(s): _____</p> <p>Basic Incident Summary: _____ _____ _____</p> <p>How did the Party connect with the Title IX Office? _____ _____ _____</p> <p>I acknowledge that in meeting with the Party, the following information was discussed, and the Party was given the opportunity to ask questions:</p> <p>_____ <b>Title IX Coordinator</b>. The Party was informed that the University's Title IX Coordinator is XXX and that he can be reached at <u>email address</u>. The Party was instructed that they may contact them at any time.</p> <p>_____ <b>Policy Document</b>. The Party was provided with a copy of the applicable Policy/<u>ies</u> and Procedures and had the opportunity to ask questions about them.</p> <p>_____ <b>Law Enforcement</b>. The Party was informed that they have the right to choose to report an incident to law enforcement or to decline to report to law enforcement. The Party was informed of their right to participate in the Title IX resolution process, or file criminal charges through the appropriate police department, or both. The Party was informed that a criminal investigation does not relieve the University of its duties under Title IX to respond promptly and effectively to such complaints.</p> <p>_____ <b>Interim Measures</b>. The Party was instructed about their ability to request and receive reasonable and appropriate interim measures designed to preserve the Party's educational</p> <p style="text-align: right;">Page 1 of 5</p>
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# Sample Checklists

<ul style="list-style-type: none"> <li>- whether the report reveals a p drugs or alcohol) at a given lo _____</li> <li>- the complainant's interest in t impact of such actions on the _____</li> <li>- whether the College possesses _____</li> <li>- fairness considerations for bo _____</li> <li>- the College's obligation to pro _____</li> <li>- any other available and relev  <ul style="list-style-type: none"> <li>o Multiple Respondents</li> <li>o Is a group, team, or or</li> <li>o Serial Behavior?</li> <li>o Threatened violence o</li> <li>o Physical violence?</li> <li>o Drugs or intoxicants?</li> <li>o Was C unconscious or</li> <li>o Was C under 18?</li> <li>o If yes, then end</li> <li>o Is Complainant or Res</li> <li>o Has individual commu</li> <li>o Any other aggravating</li> </ul> </li> </ul>	<p style="text-align: center;"><b>Assessment Tool</b> for Evaluating a Complainant's Request Not to Pursue Disciplinary Action</p> <p>Complainant: _____ Assessment Completed by: _____          Respondent: _____ Date Assessment Completed: _____          Date of reported incident: _____</p> <p><b>Steps to perform:</b></p> <ul style="list-style-type: none"> <li><input type="checkbox"/> <b>Criminal records check</b> <ul style="list-style-type: none"> <li>o Safety and Security or local law enforcement</li> </ul> </li> <li><input type="checkbox"/> <b>Prior TIX history check</b> <ul style="list-style-type: none"> <li>o For students, TIX records</li> <li>o For employees, do records check in TIX, HR, VPAA/Provost, and anywhere else employee records are kept</li> </ul> </li> <li><input type="checkbox"/> <b>Prior other conduct history check</b> <ul style="list-style-type: none"> <li>o Dean of Students' Office</li> <li>o HR</li> <li>o VPAA/Provost</li> <li>o Supervisor/Chair/Dean</li> </ul> </li> </ul> <p>The Title IX Coordinator will balance the complainant's request against the following factors in reaching a determination on whether the request can be honored:</p> <ul style="list-style-type: none"> <li>- the totality of the known circumstances _____</li> <li>- the nature and scope of the alleged conduct, including whether the reported behavior involves the use of a weapon; _____</li> <li>- the respective ages and roles of the complainant and respondent; _____</li> <li>- the risk posed to any individual or to the campus community by not proceeding, including the risk of additional violence; _____</li> <li>- whether there have been other reports of other prohibited conduct or other misconduct by the respondent; _____</li> </ul>
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# Sample Checklists

## Interim Measures Assessment Team (IMAT) Worksheet

Form completed by:  
 Form completed on (date):  
 IMAT convened on (date):  
 IMAT members present/on phone:

### Case Information

#### Name of Respondent:

- Prior contact with campus police?
- Prior contact with Student Conduct?
- Other prior concerns?

#### Allegation(s):

Has there been press/social media about this incident?<sup>1</sup>

#### Safety:

- Was the incident isolated or part of a broader pattern?
- Did the incident involve a weapon?
- Did the incident involve force or violence?
- Did the incident involve drugging or over-serving Complainant?
- Is Respondent in a position of power or authority over Complainant?
- Does Respondent pose a threat of future harm to Complainant or others?
- Has the Respondent disregarded any prior campus or law enforcement directives?

#### Complainant's wishes regarding interim measures, if known:

(Pull Complainant's class schedule / local address to assess overlap)

#### Respondent's wishes regarding interim measures, if known:

(Pull Respondent's class schedule / local address to assess overlap)

<sup>1</sup> If so, inform Media & Communications about interim measures.

### Remedial Interim Measures Implemented (*non-restrictive on Respondent*)

Remedial Measure	Implemented?
Offered C access to medical services/SAFE exam	
Offered C access to counseling	
Offered C access to academic support	
Offered C assistance with rescheduling exams/assignments	
Offered C referral to OALA for long-term academic accommodations	
Offered C class schedule changes, transfers or withdrawals	
Offered C change in work assignment or schedule	
Offered C change to campus housing	
Offered C assistance navigating off-campus housing concerns	
Offered C escort and other safety planning steps	
Offered C a No Contact Directive	
Offered C a referral to legal resources (protective order, visa, immigration concerns)	
Offered C a referral to resources to assist with financial aid	
Other	

### Protective Interim Measures Implemented (*restrictions imposed on Respondent*)

Protective Measure	Implemented?
Changed or restricted R's class schedule <sup>2</sup>	
Changed or restricted R's work schedule or job assignment <sup>3</sup>	
Changed or restricted R's campus housing <sup>4</sup>	
Restricted R's access to any area(s) of campus (dining hall, parking areas, etc.) <sup>5</sup>	
Restricted R's ability to participate in Baylor activities <sup>6</sup>	
Prohibited R from representing the university as a student leader, athlete, musician, or the like <sup>7</sup>	
Interim campus restriction (can <i>only</i> be on campus to attend class)	
Interim suspension (no classes, no ability to be on campus) <sup>8</sup>	

<sup>2</sup> Advise academic department, professors, Provost's office, Registrar of measure; R may need assistance navigating whether suspension qualifies for a refund and whether it should be counted as an Incomplete, Withdrawal, etc. Refer R as appropriate.

<sup>3</sup> Advise R's supervisor. If R is a graduate student, contact Assistant Dean for Graduate Studies. If R is a student worker, contact the appropriate office. If R is a staff member, contact HR. If R is faculty, contact the Provost and the academic department. If R is employed by a vendor, contact that vendor's HR.

<sup>4</sup> Contact residence life and campus police.

<sup>5</sup> Contact appropriate authority and campus police.

<sup>6</sup> Contact Student Life and the advisor for that activity.

<sup>7</sup> Contact Student Life, residence life (if R lived on campus) and campus police.

<sup>8</sup> Contact campus police, Student Life, residence life (if R lived on campus), academic department, professors, Provost's office, and Registrar.

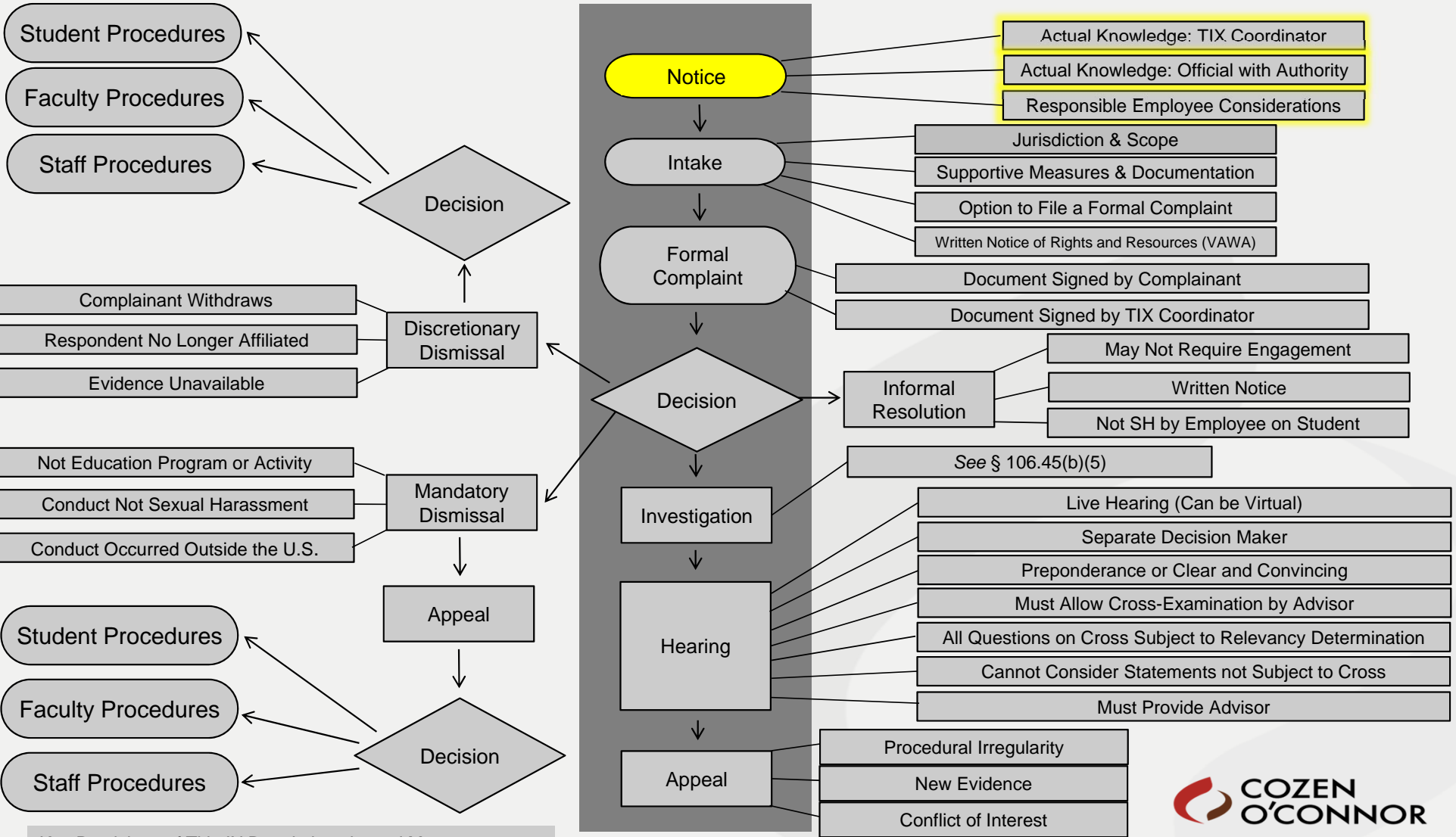
# Tending to the Individual

- Tend to the individual through:
  - Implementing appropriate supportive measures and revisiting effectiveness of measures periodically
  - Practices and communications informed by an understanding of the impacts of trauma and the dynamics of sexual and gender-based harassment and violence
  - Routine and periodic communications
  - Ensuring appropriate support through an advocate, advisor, or support person
  - Adhering to time frames and communicating regarding delays

# Communications

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

# NOTICE

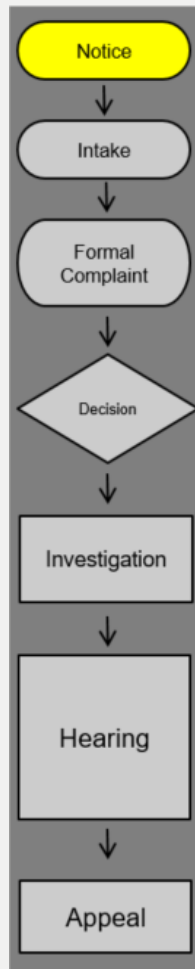


Key Provisions of Title IX Regulations issued May 6, 2020;

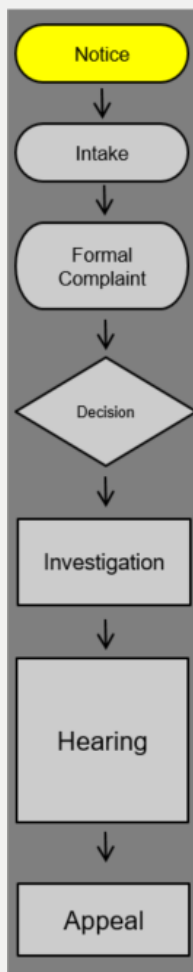


# Notice

- Notice to the **Title IX Coordinator** or any official of the recipient who has **authority to institute corrective measures** on behalf of the recipient, or to any employee of an elementary or secondary school



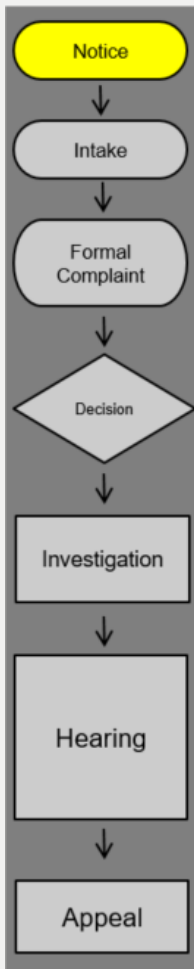
Title IX Regulations issued May 6, 2020; § 106.30(a)



# Notice

- **Actual knowledge**, not constructive notice or vicarious liability
  - Can come from personal observation, hearing about it from a complainant or third-party, receiving a written or oral complaint, or by any other means
- The mere ability or obligation to report sexual harassment or to inform a student about how to report sexual harassment, or having been trained to do so, does not qualify an individual as one who has authority to institute corrective measures on behalf of the recipient.

Title IX Regulations issued May 6, 2020; § 106.30(a)



## Notice: Institutional Response

When a school has **notice**, the Title IX Coordinator must:

1. Promptly contact the complainant to discuss the availability of supportive measures
2. Consider the complainant's wishes with respect to supportive measures
3. Inform the complainant of the availability of supportive measures with or without the filing of a formal complaint
4. Explain to the complainant the process for filing a formal complaint.

Title IX Regulations issued May 6, 2020; § 106.44(a)



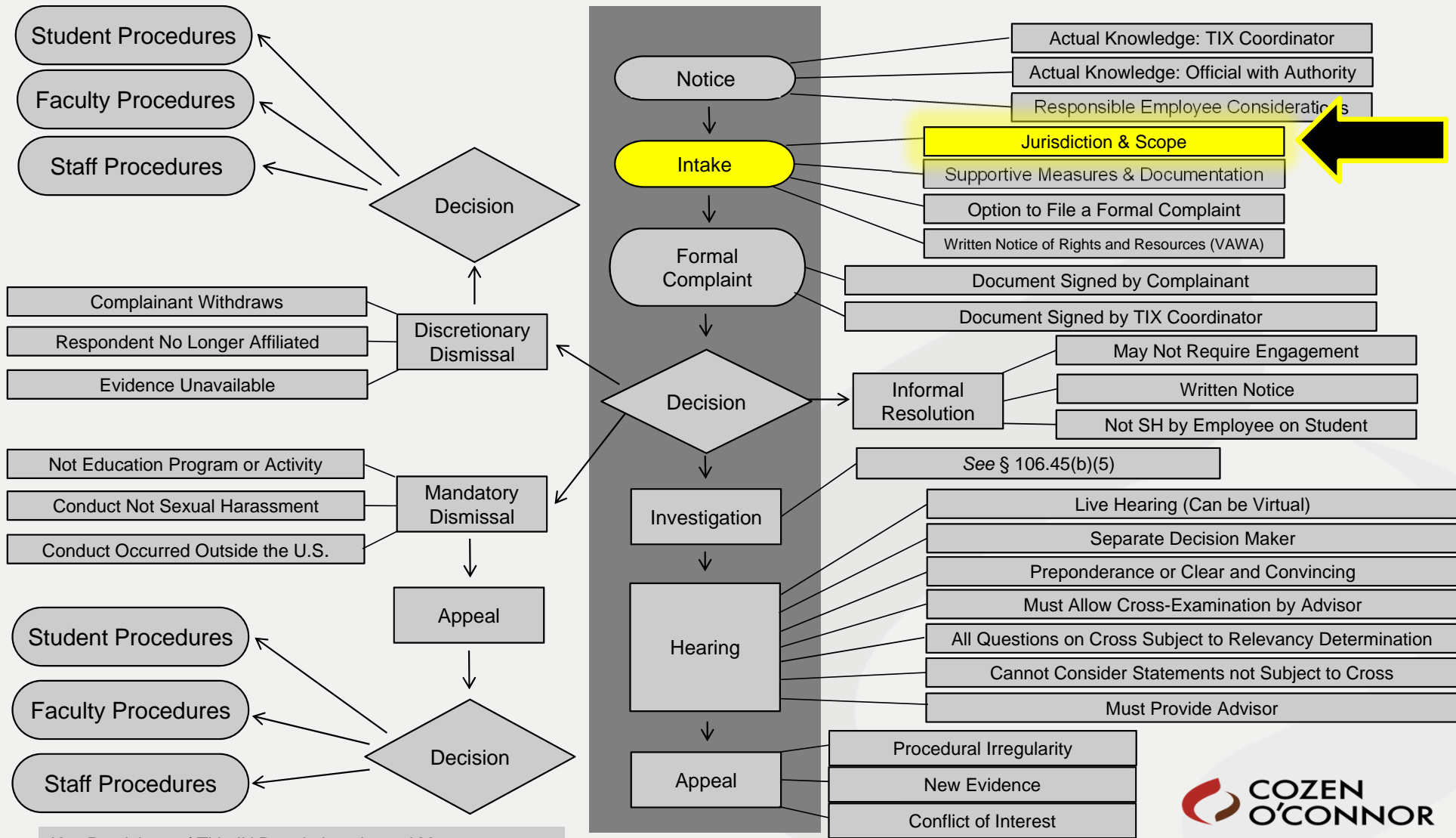
# Practical Considerations & Challenges

- Who are your officials with authority to institute corrective measures?
  - Title IX Coordinator and Deputy Title IX Coordinators
  - Those who generally have authority to institute any corrective measures for anyone in the institution (supervisors, dean of students, HR administrators, etc.)
  - Those individuals that have particular authority over a program or activity of students (coach, etc.)
- Responsible employee considerations

# Practical Considerations & Challenges

- Responsible Employee
  - Higher education institutions have the option to continue to designate responsible employees and require reporting
  - How should an institution decide whether to maintain or move away from responsible employee reporting?
- Centralized Reporting
  - Because responsible employee reporting is no longer required, how can institutions ensure they have necessary information to assess for repeat instances of sexual harassment by a person or within a group?
- Training and Resetting Expectations

# JURISDICTION AND SCOPE



Key Provisions of Title IX Regulations issued May 6, 2020;



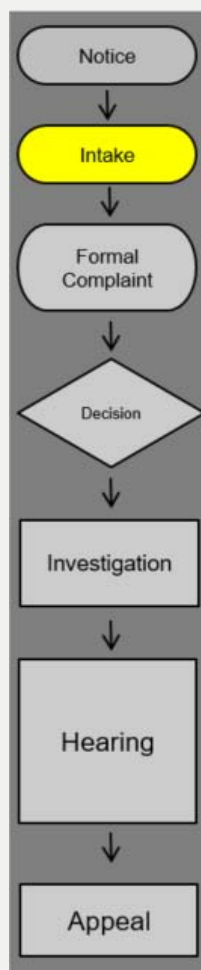
# Jurisdiction: Framing Principle

2

“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.”

Title IX Regulations issued May 6, 2020; § 106.45(a)

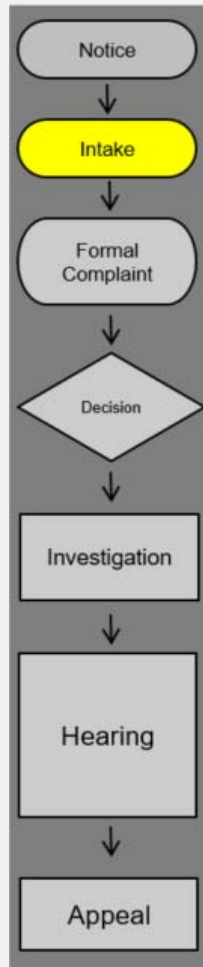
# Jurisdiction: Education Program or Activity



- “**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
  - Any building **owned or controlled by a student organization that is officially recognized** by a postsecondary institution

Title IX Regulations issued May 6, 2020; § 106.44(a)

# Jurisdiction: Who



- Title IX statute applies to **any person**, in the United States, on the basis of sex, who is excluded from participation in, denied the benefits of, or is subjected to discrimination **under any education program or activity** receiving federal financial assistance.
- **Program or activity and program** means all of the operations of—
  - A college, university, or other postsecondary institution, or a public system of higher education; or
  - A local educational agency (as defined in 20 U.S.C. 8801), system of vocational education, or other school system

Title IX of the Education Amendments of 1972; § 20 U.S.C. 1681;  
Title IX Implementing Regulations; § 106.2(h)

# Jurisdiction: Where



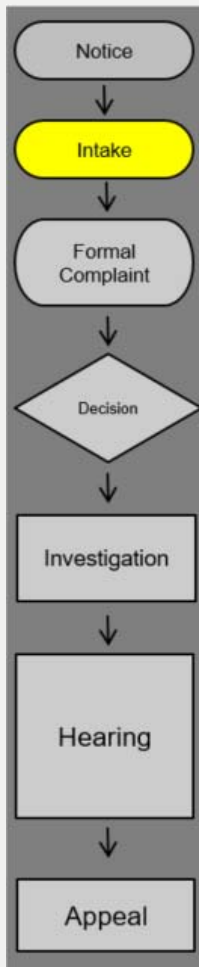
- Applies only to sex discrimination occurring **against a person in the United States** in an education program or activity
  - “The Department reiterates that the ‘education program or activity’ limitation in the final regulations
    - does not create or apply a geographic test
    - does not draw a line between ‘off campus’ and ‘on campus,’ and
    - does not create a distinction between sexual harassment occurring in person versus online.”

Title IX Regulations issued May 6, 2020; § 106.8(d); Preamble at 649



# Jurisdiction: On Campus

- “[A]ll of the operations’ of a recipient (per existing statutory and regulatory provisions), and the additional ‘substantial control’ language in these final regulations, clearly include all incidents of sexual harassment occurring on a recipient’s campus.”



Title IX Regulations issued May 6, 2020; Preamble at 624

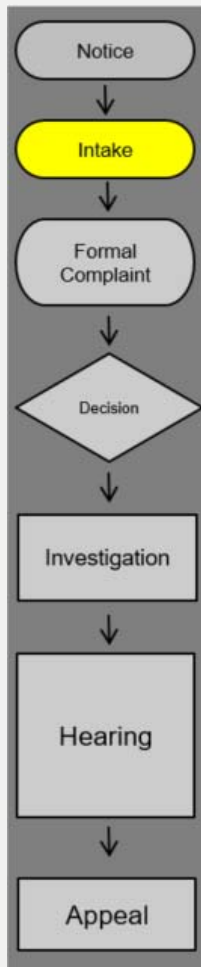
# Jurisdiction: Off Campus



- “[T]he statutory and regulatory definitions of program or activity along with the revised language in § 106.44(a) clarify that a recipient’s Title IX obligations extend to sexual harassment incidents that occur off campus **if any of three** conditions are met:
  - if the off-campus incident occurs as part of the recipient’s **‘operations’** pursuant to 20 U.S.C. 1687 and 34 CFR 106.2(h);
  - if the recipient exercised **substantial control over the respondent and the context** of alleged sexual harassment that occurred off campus pursuant to § 106.44(a); or
  - if a sexual harassment incident occurs at an off-campus building **owned or controlled by a student organization officially recognized** by a postsecondary institution pursuant to §106.44(a).”

Title IX Regulations issued May 6, 2020; Preamble at 624-5

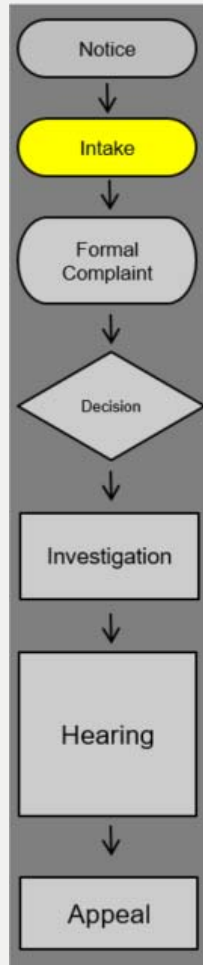
# Jurisdiction: Course of Conduct



- “In situations involving some allegations of conduct that occurred in an education program or activity, and some allegations of conduct that did not, the recipient **must investigate the allegations of conduct that occurred in the recipient’s education program or activity**, and nothing in the final regulations precludes the recipient from choosing to **also address allegations of conduct outside the recipient’s education program or activity**.”
- For example, if a student is sexually assaulted outside of an education program or activity but subsequently suffers Title IX sexual harassment in an education program or activity, then these final regulations apply to the latter act of sexual harassment, and the **recipient may choose to address the prior assault through its own code of conduct.**”

Title IX Regulations issued May 6, 2020; Preamble at 631

# Jurisdiction: What

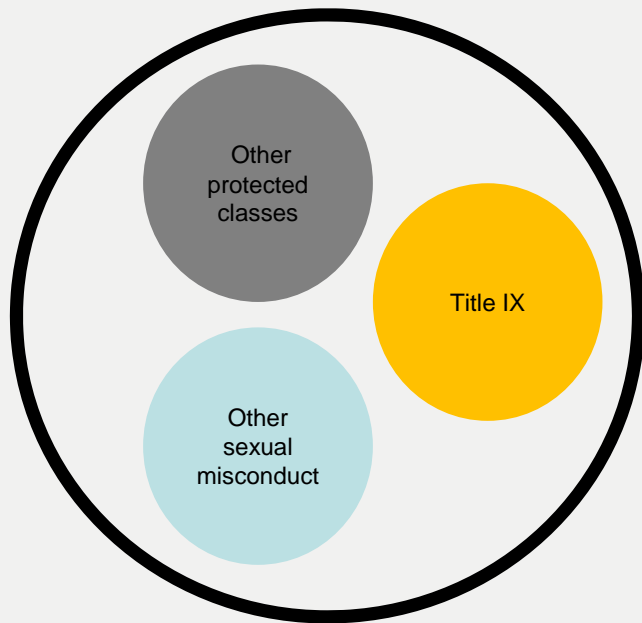


- Narrowed & expanded definition of sexual harassment
  - Quid pro quo
  - Unwelcome conduct determined by a reasonable person to be so **severe, pervasive, and objectively** offensive that it **effectively denies** a person equal access to the recipient's education program or activity
  - Inclusion of sexual assault, dating violence, domestic violence, and stalking as a form of sexual harassment

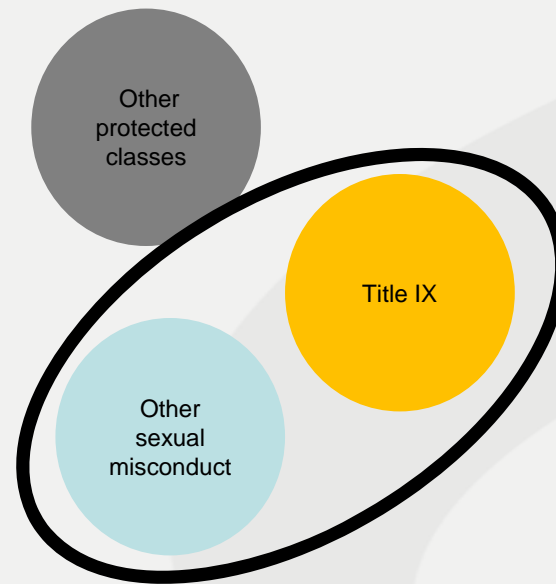
Title IX Regulations issued May 6, 2020; § 106.30(a)

# Policy Framework Options

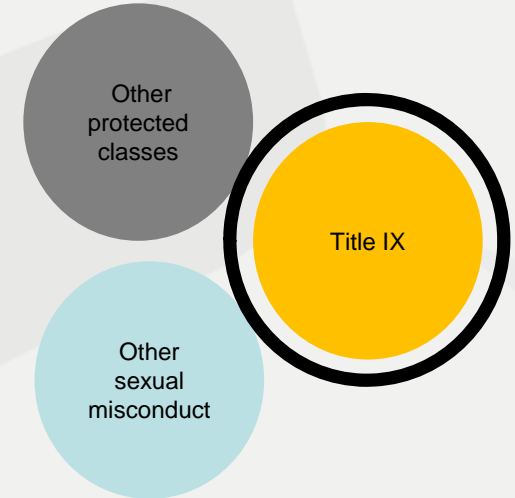
All Protected Classes



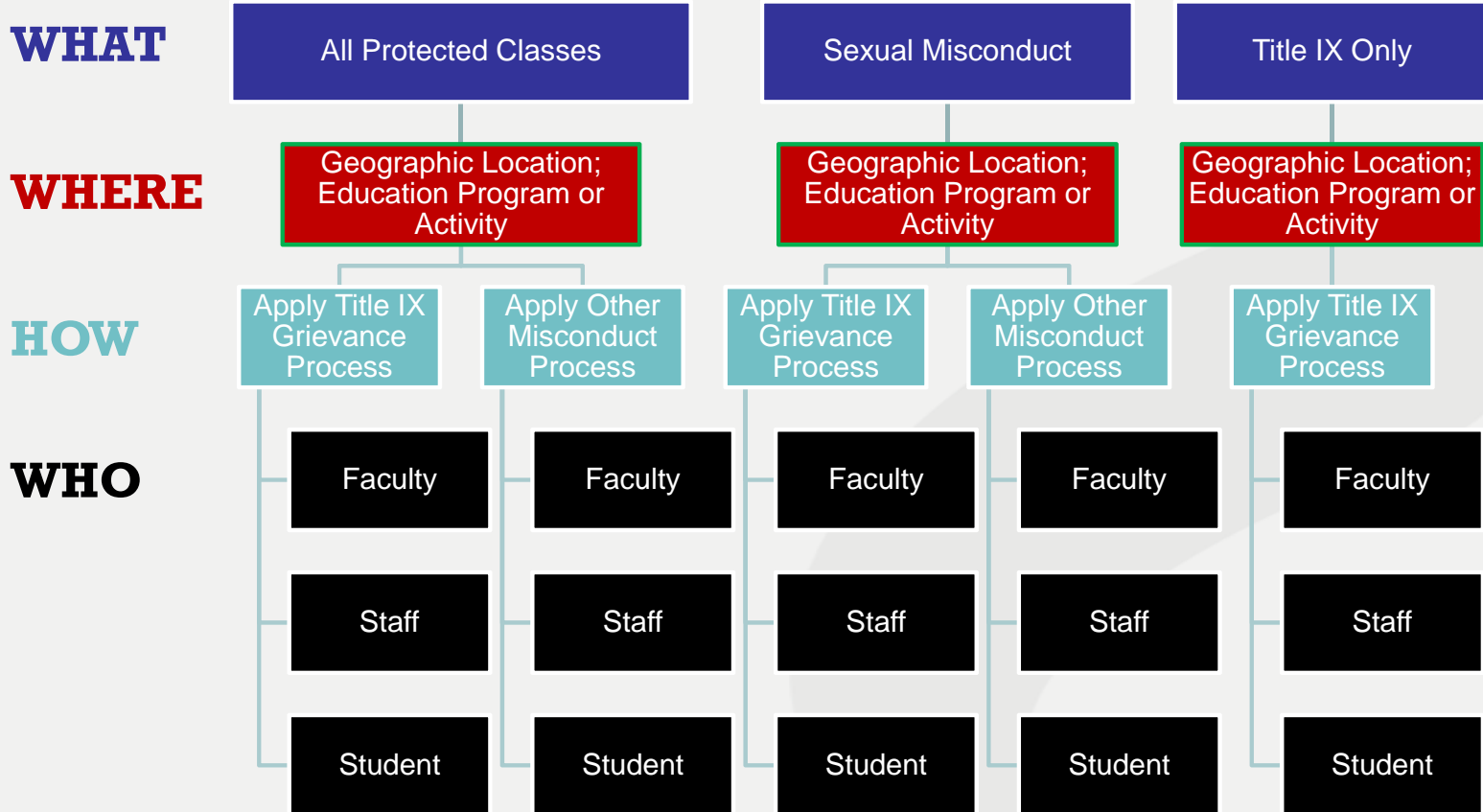
Sexual Misconduct



Title IX Only



# Procedural Framework



# Practical Considerations & Challenges

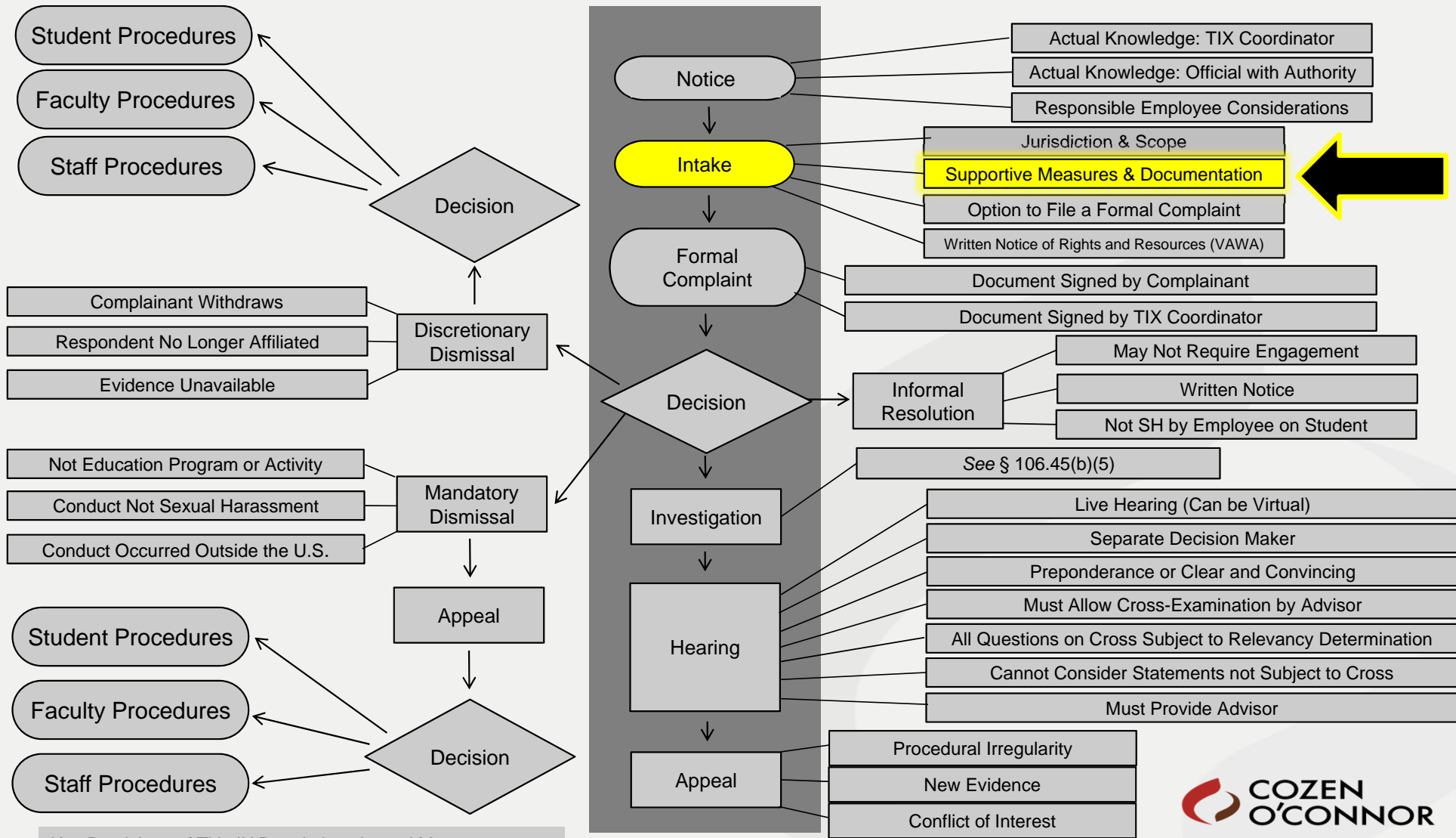
- Building in jurisdiction questions into the initial assessment
- Communicating jurisdiction and scope to complainants
  - In-person meeting
  - Written follow-up
  - Use of flow chart or other visual aid
- Implications of mandatory and discretionary dismissal of formal complaints

# Sample Jurisdiction Questions

- Based on reasonably available information at the time of intake, the Title IX Coordinator's inquiry will include assessing whether:
  - The reported conduct occurred within the University's Education Program or Activity, which requires:
    - The University to have substantial control over the Respondent; and
    - The University to have substantial control over the context in which the conduct is reported to have occurred; or
    - The conduct occurred in a building owned or controlled by a student organization that is officially recognized by the University
  - The reported conduct occurred in the United States; and,
  - The facts set forth by the report, if substantiated, would constitute a violation of Title IX Sexual Harassment as defined by the Title IX regulations.
- May also consider
  - The facts set forth by the report, if substantiated, would constitute a violation of Prohibited Conduct as defined by the policy.



# **SUPPORTIVE MEASURES**



Key Provisions of Title IX Regulations issued May 6, 2020;



## Framing Principles

3

“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.”

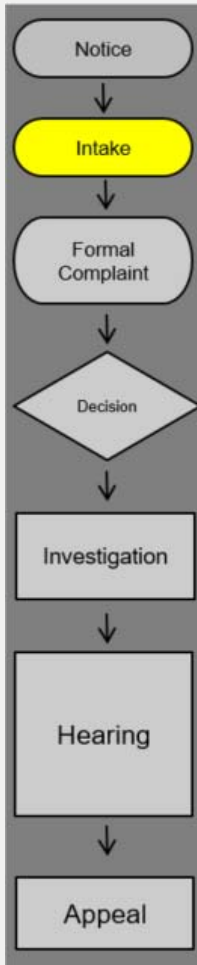
# Offering Supportive Measures



- The Title IX Coordinator must promptly contact the complainant to:
  - Discuss the **availability** of supportive measures as defined in § 106.30,
  - Consider the **complainant's wishes** with respect to supportive measures,
  - Inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and
  - Explain to the complainant the process for filing a formal complaint.

Title IX Regulations issued May 6, 2020; §§ 106.45(b)(3) and 106.45(b)(8)

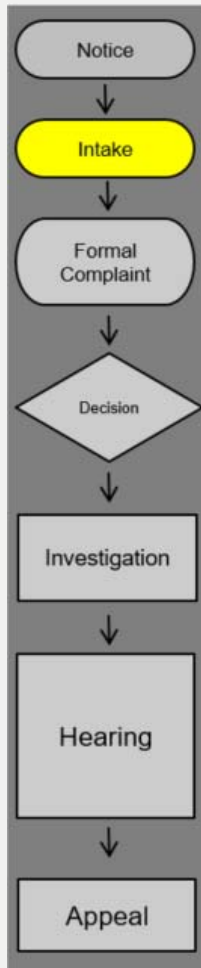
# Supportive Measures



- Non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed.
- Designed to restore or preserve equal access to the recipient's education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the recipient's educational environment, or deter sexual harassment.

Title IX Regulations issued May 6, 2020; § 106.30(a)

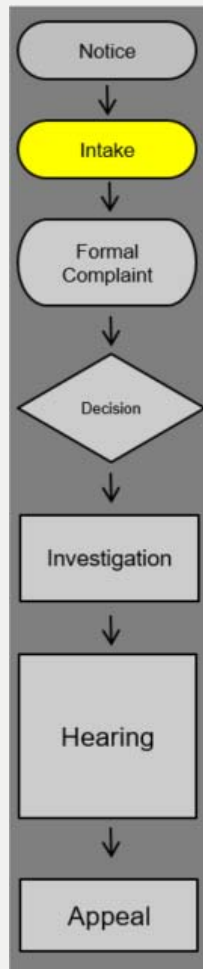
# Supportive Measures



- May include counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of the campus, and other similar measures.

Title IX Regulations issued May 6, 2020; § 106.30(a)

# Supportive Measures



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

Title IX Regulations issued May 6, 2020; § 106.30(a)

# Supportive Measures

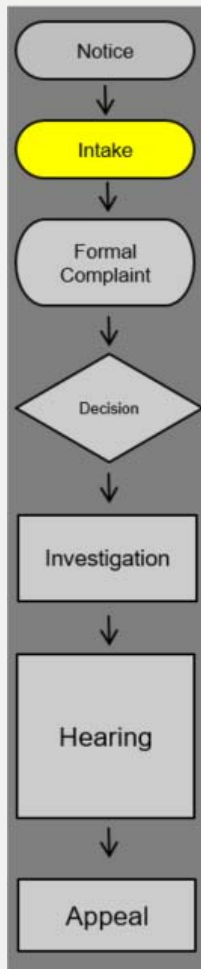


- The Department does not equate the trauma experienced by a sexual harassment victim with the experience of a person accused of sexual harassment.
- Nonetheless, the Department acknowledges that a grievance process may be difficult and stressful for both parties.
- Further, supportive measures may be offered to complainants and respondents . . . and §106.45(b)(5)(iv) requires recipients to provide both parties the same opportunity to select an advisor of the party's choice.
- These provisions recognize that the stress of participating in a grievance process affects both complainants and respondents and may necessitate support and assistance for both parties.”

Title IX Regulations May 19, 2020, Preamble, 85 F.R. 30103 footnote 477.



## Supportive Measures



- “Whether an action **“unreasonably burdens”** a respondent is **fact-specific**, but should be evaluated in light of the **nature and purpose** of the benefits, opportunities, programs and activities, of the recipient in which the respondent is participating, and the **extent to which an action taken as a supportive measure would result in the respondent forgoing** benefits, opportunities, programs, or activities in which the respondent has been participating.”

Title IX Regulations May 19, 2020, Preamble, 85 F.R. 30231.

# Documentation



- Must maintain records of any actions, including any supportive measures, taken in response to a report or formal complaint of sexual harassment
- Must document the basis for its conclusion that its response was not deliberately indifferent, and document that it has taken measures designed to restore or preserve equal access to the recipient's education program or activity
- If a recipient does not provide a complainant with supportive measures, then the recipient must document the reasons why such a response was not clearly unreasonable in light of the known circumstances

Title IX Regulations issued May 6, 2020; § 106.45(b)(10)(i) (ii)

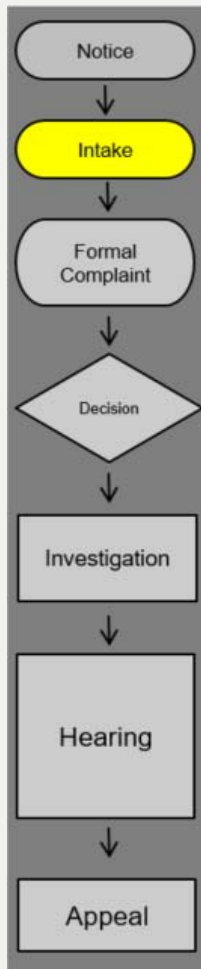


## Emergency Removal for Students

- Must undertake an individualized safety and risk analysis and determine that an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal
- Must provide the respondent with notice and an opportunity to challenge the decision immediately following the removal

Title IX Regulations issued May 6, 2020; § 106.44(c)

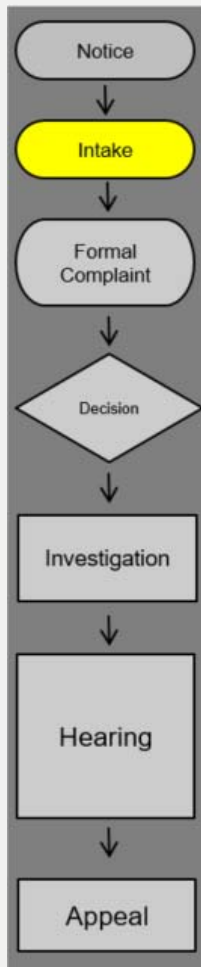
# Emergency Removal



- Where a respondent poses an immediate threat to the physical health or safety of the complainant (or anyone else), § 106.44(c) allows emergency removals of respondents prior to the conclusion of a grievance process (or even where no grievance process is pending), thus protecting the safety of a recipient's community where an immediate threat exist.

Title IX Regulations issued May 6, 2020; Preamble at 566

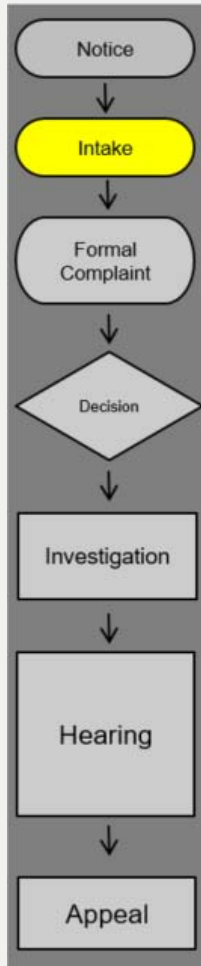
# Emergency Removal



- “Supportive measures are intended to address restoration and preservation of equal educational access, while § 106.44(c) is **intended to apply to genuine emergencies that justify essentially punishing a respondent** (by separating the respondent from educational opportunities and benefits) arising out of sexual harassment allegations **without having fairly, reliably determined whether the respondent is responsible** for the alleged sexual harassment.”

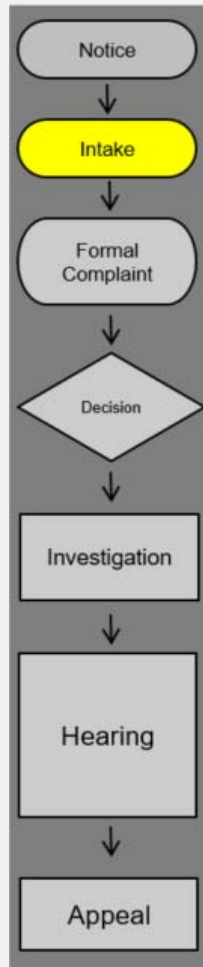
Title IX Regulations May 19, 2020, Preamble, 85 F.R. 30225.

# Emergency Removal



- “We appreciate the opportunity to clarify that, where the standards for emergency removal are met under § 106.44(c), the recipient has discretion whether to remove the respondent from *all the recipient’s education programs and activities, or to narrow the removal to certain classes, teams, clubs, organizations, or activities.*”

# Emergency Removal



- The Department notes that the final regulations expressly allow a recipient to remove a respondent on an emergency basis and do not prescribe cross-examination as a necessary procedure during the post-removal opportunity to challenge the removal.
- Recipients may also implement supportive measures that restrict students' or employees' contact or communication with others.
- Recipients thus have avenues for addressing serial predator situations even where no victim chooses to participate in a grievance process.

Title IX Regulations issued May 6, 2020; Preamble at 1176-1177

# Emergency Removal

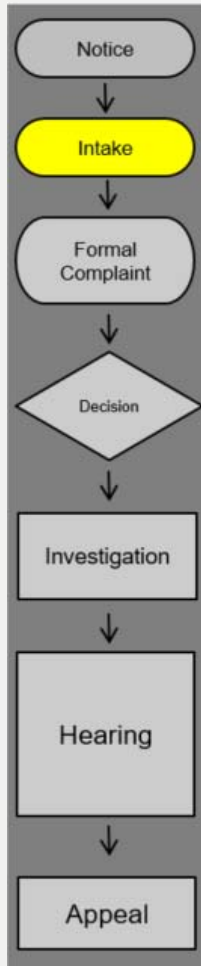


- “The Department **declines to put any temporal limitation** on the length of a valid emergency removal, although nothing in the final regulations precludes a recipient from **periodically assessing** whether an immediate threat to physical health or safety is ongoing or has dissipated.”

Title IX Regulations May 19, 2020, Preamble, 85 F.R. 30230.



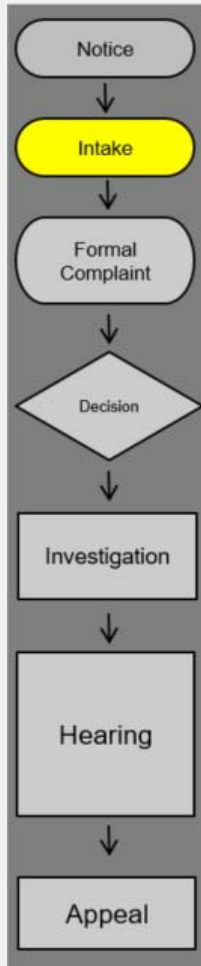
# Emergency Removal



- “We acknowledge that a recipient could remove a respondent under § 106.44(c) without a formal complaint having triggered the § 106.45 grievance process; in such situations, the requirements in § 106.44(c) giving the respondent notice and opportunity to be heard post-removal suffice to protect a respondent from a removal without a fair process for challenging that outcome, and the Department **does not believe it is necessary to require periodic review** of the removal decision.”

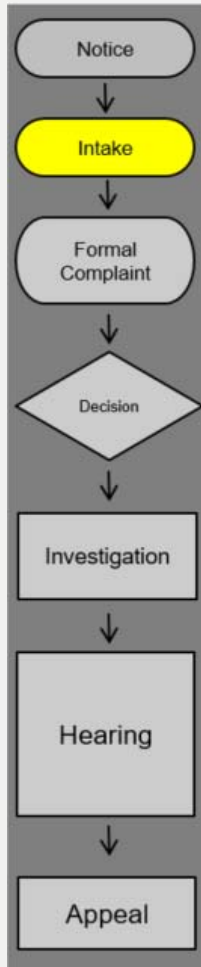
Title IX Regulations May 19, 2020, Preamble, 85 F.R 30226.

# Emergency Removal



- “Emergency removal under § 106.44(c) is not a substitute for reaching a determination as to a respondent’s responsibility for the sexual harassment allegations; rather, emergency removal is for the purpose of addressing imminent threats posed to any person’s physical health or safety, which might arise out of the sexual harassment allegations.”

# Administrative Leave



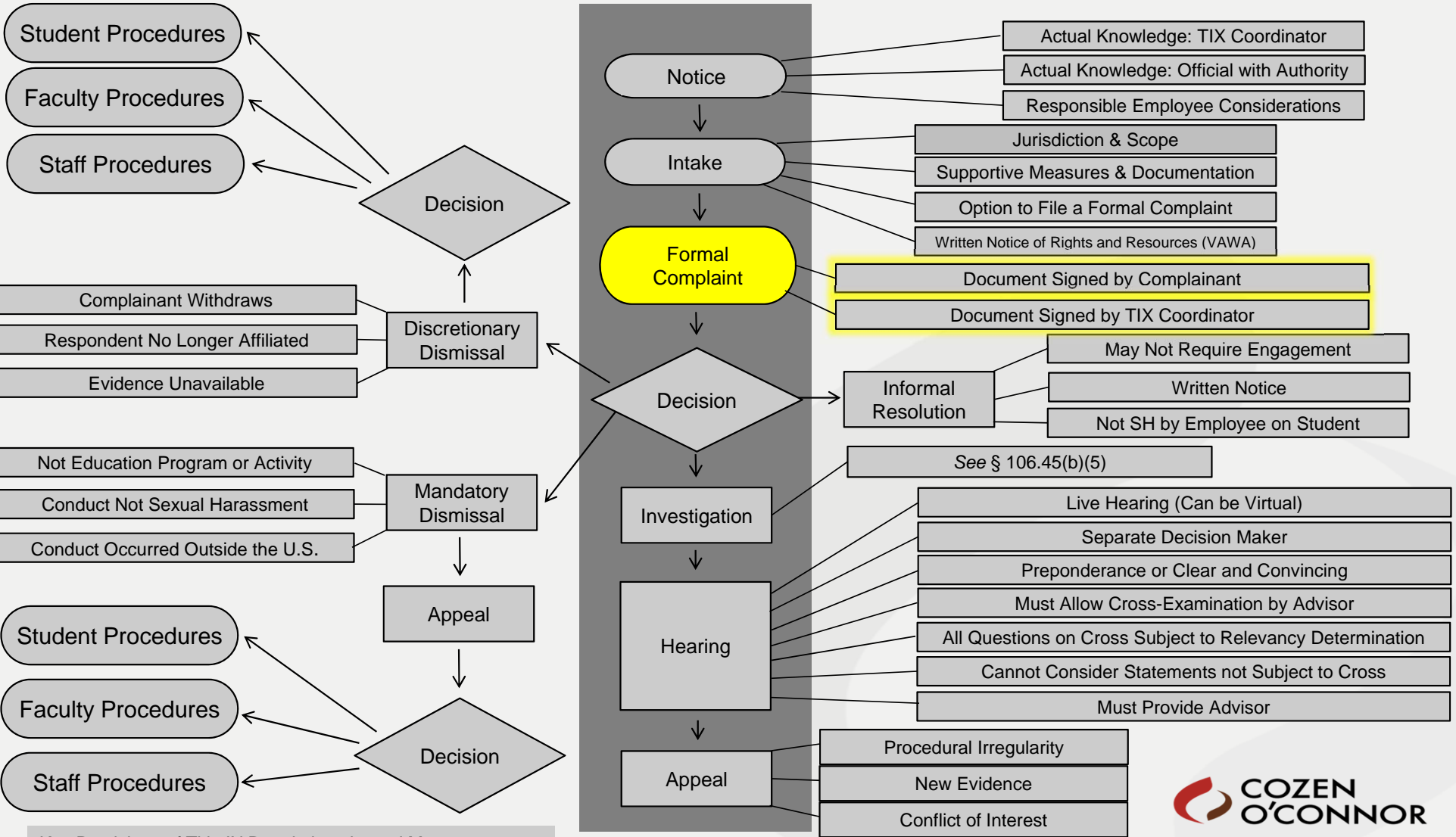
- Nothing in this subpart precludes a recipient from placing a non-student employee respondent on administrative leave during the pendency of a grievance process that complies with § 106.45.
- This provision may not be construed to modify any rights under Section 504 of the Rehabilitation Act of 1973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

Title IX Regulations issued May 6, 2020; § 106.44(d)

# Practical Considerations & Challenges

- Limited scope allowable for emergency removal
  - Can you remove under code of conduct for lesser standard?
- Understanding core concepts
  - “Appropriate, as reasonably available”
  - “Protect safety or deter sexual harassment”
  - “Not unreasonably burden the other party”
- Do you need a heightened process for imposing more restrictive measures
- What supportive measures do you have to offer to a non-student/non-employee?

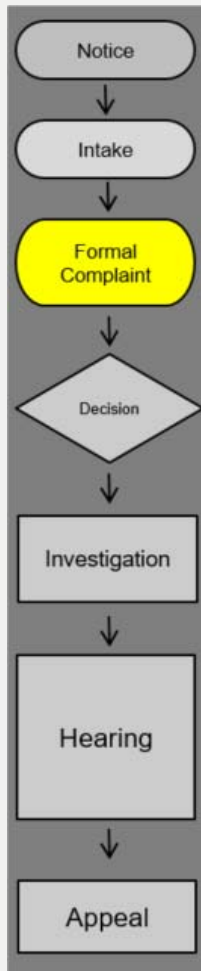
# FORMAL COMPLAINTS



Key Provisions of Title IX Regulations issued May 6, 2020;



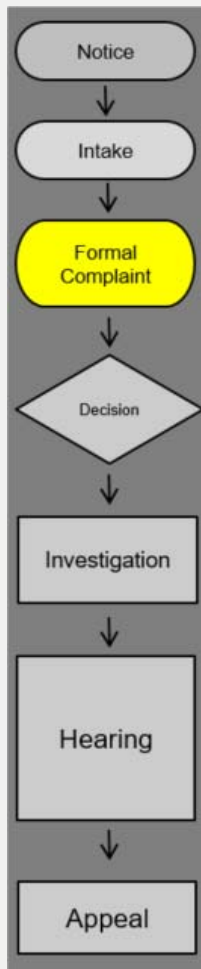
# Formal Complaint



- Document filed by a complainant or signed by the Title IX Coordinator
- At the time of filing a formal complaint, a complainant **must be participating in or attempting to participate in** the education program or activity of the recipient with which the formal complaint is filed

Title IX Regulations issued May 6, 2020; § 106.30(a)

# Formal Complaint: Program or Activity

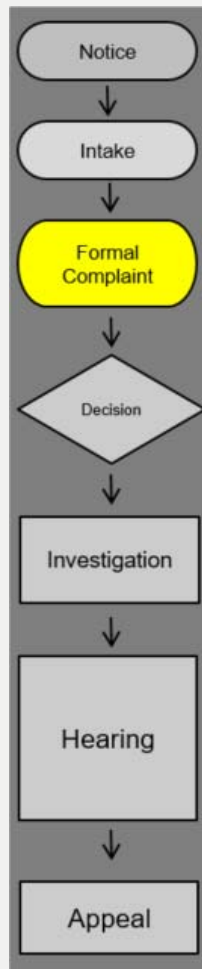


- The following may constitute “**attempting to participate**” in the recipient’s education program or activity:
  - Applying (or intending to apply) for admission
  - Indicating a desire to re-enroll if the recipient appropriately responds to sexual harassment allegations
  - Intending to remain involved in alumni programs
- “[The ‘education program or activity’ requirement] prevents recipients from being legally obligated to investigate **allegations made by complainants who have no relationship with the recipient**, yet still protects those complainants by requiring the recipient to respond promptly in a non-deliberately indifferent manner.”

Title IX Regulations issued May 6, 2020; Preamble, see pp. 225, 411, 629



# Formal Complaint: Institutional Response

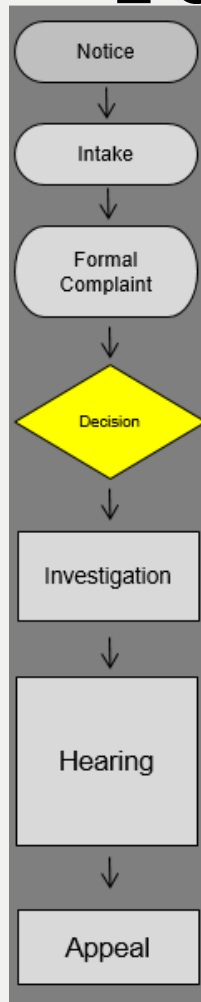


Upon receipt of a **formal complaint**, the institution:

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

Title IX Regulations issued May 6, 2020; § 106.30(a)

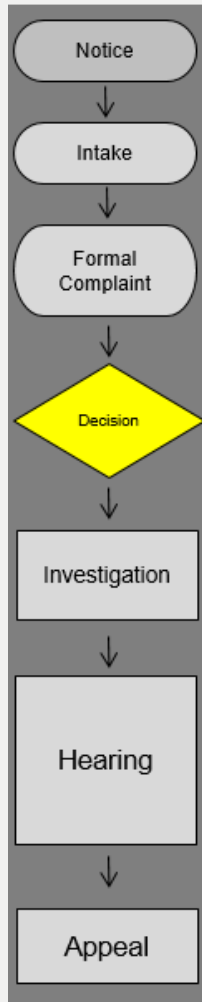
# Formal Complaint: Required Dismissal



- **Must** dismiss if:
  - Conduct would not constitute sexual harassment even if proved,
  - Conduct did not occur in the recipient’s education program or activity, or
  - Conduct did not occur against a person in the United States.
- Such a dismissal does not preclude action under another provision of the recipient’s code of conduct

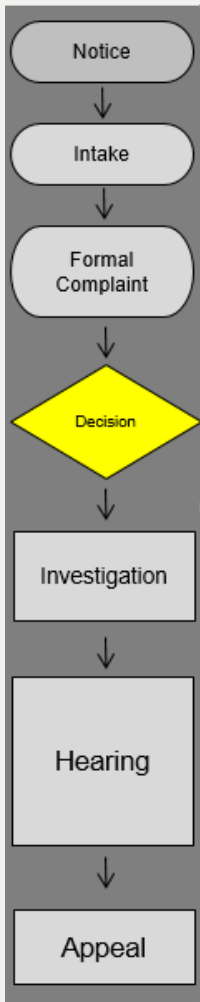
Title IX Regulations issued May 6, 2020; § 106.45(b)(3)

# Formal Complaint: Discretionary Dismissal



- **May** dismiss the formal complaint or any allegations therein if:
  - A complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the formal complaint or any allegations,
  - The respondent is no longer enrolled or employed by the recipient, or
  - Specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination.

Title IX Regulations issued May 6, 2020; § 106.45(b)(3)



## Dismissal of Formal Complaint

- Upon a dismissal required or permitted, the recipient must promptly send **written notice** of the dismissal and reason(s) therefor simultaneously to the parties
- Must offer both parties an **appeal** from a recipient's dismissal of a formal complaint or any allegations therein

Title IX Regulations issued May 6, 2020; §§ 106.45(b)(3) and 106.45(b)(8)

# Practical Considerations & Challenges

- Do you expand the concept of formal complaint to non-Title IX sexual misconduct?
- How to remove the barrier of the formal complaint
- Can the Title IX Coordinator file a formal complaint on behalf of a non-student, non-employee who is not seeking to participate in the educational program or activity?

## Obligation to Third Parties

- “Like the ‘no person’ language in the Title IX statute, the final regulations **place no restriction on the identity of a complainant** (§106.30 defines complainant to mean “an individual who is alleged to be the victim of conduct that could constitute sexual harassment”), **obligating a recipient to respond to such a complainant regardless of the complainant’s relationship to the recipient.**”

Title IX Regulations May 19, 2020, Preamble, 85 F.R. 30197-30198.

# Obligations to Third Parties

- “These final regulations require a recipient to respond to sexual harassment whenever the recipient has notice of sexual harassment that occurred in the recipient’s own education program or activity, **regardless of whether the complainant or respondent is an enrolled student or an employee of the recipient.**”
- The manner in which a recipient must, or may, respond to the sexual harassment incident **may differ based on whether the complainant or respondent are students, or employees, of the recipient.**

Title IX Regulations May 19, 2020, Preamble, 85 F.R. 30488.

# Obligations to Third Parties

- “We have, however, revised the § 106.30 definition of formal complaint to state that at the time of filing a formal complaint, the **complainant must be participating in or attempting to participate in the recipient’s education program or activity.**”
- “This ensures that a recipient is **not required to expend resources** investigating allegations in circumstances where the complainant has no affiliation with the recipient, yet refrains from imposing a time limit on a complainant’s decision to file a formal complaint.”

Title IX Regulations May 19, 2020, Preamble, 85 F.R. 30220.



# Obligations to Third Parties

- “The Department believes these provisions help address commenters’ concerns about being forced to expend resources **investigating situations where one or both parties have no affiliation with the recipient**, without arbitrarily or unreasonably imposing a deadline on complainants, in recognition that complainants sometimes do not report or desire to pursue a formal process in the immediate aftermath of a sexual harassment incident.”

Title IX Regulations May 19, 2020, Preamble, 85 F.R. 30220.

## **When Might a Title IX Coordinator File a Formal Complaint**

- Complainant's identity is unknown
- Serial sexual predator
- Multiple reports against the same respondent but no complainant wishes to file a complaint
- Respondent is not affiliated with the institution but commits sexual harassment in the recipient's education program or activity

Title IX Regulations May 19, 2020, Preamble, 85 F.R. 30133; 30131;  
30210; 30488

# Traditional OCR Approach

When weighing a student's request for confidentiality that could preclude a **meaningful** investigation or potential discipline of the respondent, a school should consider a range of factors:

- 
- Seriousness
  - Pattern or other harassment complaints
  - Respective ages of the parties
  - The alleged harasser's rights to receive information about the allegations if the information is maintained by the school as an "education record" under FERPA
  - Weapon
  - Threats to repeat
  - One or more prior sexual assaults committed by respondent
  - Pattern of perpetration (e.g., via illicit use of drugs or alcohol, at a given location, or by a particular group)
  - History of arrests or records indicating a history of violence
  - Multiple respondents
  - Whether the school possesses other means to obtain relevant evidence (e.g., security cameras or personnel, physical evidence)

# Effective Practices

- Develop criteria that assess risk factors
- Communicate criteria clearly in policy, resources and online content
- Document information considered
- Document rationale for decision-making

# Practical Considerations & Challenges

- Impacts of mandatory and discretionary dismissal
- Checkpoints in process for evaluating dismissal
  - Implications where processes are different
  - Implications where processes are the same
- Appeal from dismissal
- Written notice of how institution will proceed at the conclusion of initial assessment

# Use of Slides

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

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# SCENARIOS



# Scenario # 1

An RA was doing rounds and passed by one of their resident's whiteboards outside their room. They noticed that someone wrote, "You're a B----" on the whiteboard in permanent marker. When the RA asked the resident about it, they said, "Oh, that was my ex. It's whatever."

- ✗ Sexual Harassment (as defined by the regulation)
- ✓ Directed against a person in the U.S.
- ✓ Within the education program or activity

## Scenario # 2

A student reports that a professor routinely gives lower grades to men based on gender. The reporting student says she has been the professor's TA for the last 2 years and cannot be silent anymore.

- ✘ Sexual Harassment (as defined by the regulation)
- ✓ Directed against a person in the U.S.
- ✓ Within the education program or activity

## Scenario # 3

At a university soccer game, a number of soccer players smacked one another's buttocks when running on and off the field.

- ✗ Sexual Harassment (as defined by the regulation)
- ✓ Directed against a person in the U.S.
- ✓ Within the education program or activity

## Scenario # 4

Zoe and Rachel are both PhD students and are married. They live off-campus in a private apartment. Zoe reports that, sometimes when Rachel gets drunk, she hits Zoe. Zoe says it has only ever happened at their apartment.

- ✓ Sexual Harassment (as defined by the regulation)
- ✓ Directed against a person in the U.S.
- ✗ Within the education program or activity

## Scenario # 5

A student, Nikole, works out at the café on campus. It is open to the public. Simon is a local who often patronizes the café. Simon has made it clear that he has a crush on Nikole. Somehow, Simon got Nikole's phone number and has been sending her incessant text messages. Simon also pieced together Nikole's schedule and has started to show up outside of buildings when she's leaving class. One time, she even saw him waiting for her outside her dorm. She has asked him to leave her alone, but he won't stop texting and showing up.

- ✓ Sexual Harassment (as defined by the regulation)
- ✓ Directed against a person in the U.S.
- ✗ Within the education program or activity

## Scenario # 6

Garrett and Stefan are both undergrad students at your school and are part of the same study abroad program in Madrid. Not only does your school sponsor the study-abroad program and provide all the faculty for it, but the Madrid campus is actually wholly owned and operated by your school. One night in Madrid, in their on-campus dorm room, Stefan sexually assaulted Garrett.

- ✓ Sexual Harassment (as defined by the regulation)
- ✗ Directed against a person in the U.S.
- ✓ Within the education program or activity

## Scenario # 7

A former faculty member, Jill, reported that, during her time at your institution three years ago, she was subjected to repeated unwelcome hugs and flirtatious comments from Rob—a fellow faculty member who still works at your school. Jill has no current affiliation with your institution. For the last three years, she has worked at another school.

- ✓ Sexual Harassment (as defined by the regulation)
- ✓ Directed against a person in the U.S.
- ✓ Within the education program or activity

BUT... at the time of making the formal complaint, Jill is not participating in or attempting to participate in the education program or activity of your school.

## Scenario # 8

An employee, Alan, reported that his supervisor, Elyse, openly and graphically discussed her sex life in the workplace including showing explicit photos and videos from dating websites and expressed a preference for men of a particular race. Alan said that, when discussing online dating, Elyse once commented that she “swipes left” on men of Alan’s race because she “doesn’t trust” them. Alan said he felt targeted by Elyse based on his race and sex. Things came to a head recently when Elyse wrote Alan up for lateness. Alan is the only person of his race in the department. Alan said that even though everyone runs late, he was the only one Elyse reprimanded.

- ✓ Sexual Harassment (as defined by the regulation)
- ✓ Directed against a person in the U.S.
- ✓ Within the education program or activity

BUT... the report involves Title IX *and* non-Title IX conduct



# **The New Title IX Regulations: Investigations & Evidentiary Considerations**

Presented By:

**The Institutional Response Group | Cozen O'Connor**

**Gina Maisto Smith, Chair**

**Leslie Gomez, Vice Chair**

**July 13, 2020**



# Today's Webinar

- Following an introductory webinar, “A First Look at the New Title IX Regulations,” this is the fourth in a series of webinars focusing on implementation.
- This webinar will:
  - Examine the prescriptive requirements of the final Title IX regulations related to investigations
  - Discuss evidentiary considerations
    - Directly related to the allegations
    - Relevant evidence
    - Privileged information
  - Outline effective investigation protocols

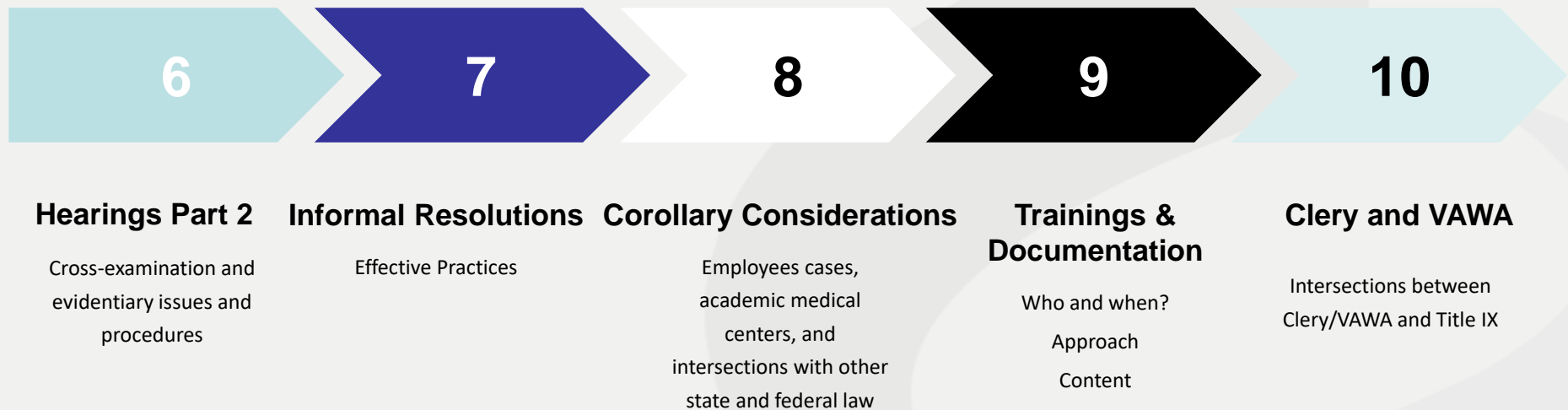
# Introducing the Webinar Series

Subsequent IRG webinars will focus on specific aspects of the regulations, as written and as applied, including:



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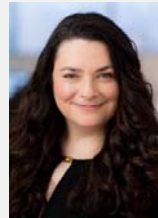
# Institutional Response Group



**Gina Maisto Smith**  
Cozen O'Connor



**Leslie Gomez**  
Cozen O'Connor



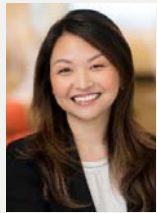
**Maureen P. Holland**  
Cozen O'Connor



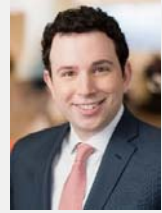
**Devon Turner Riley**  
Cozen O'Connor



**Michael Stackow**  
Cozen O'Connor



**Helen Park**  
Cozen O'Connor



**Adam M. Shapiro**  
Cozen O'Connor



**Peter C. Lim**  
Cozen O'Connor



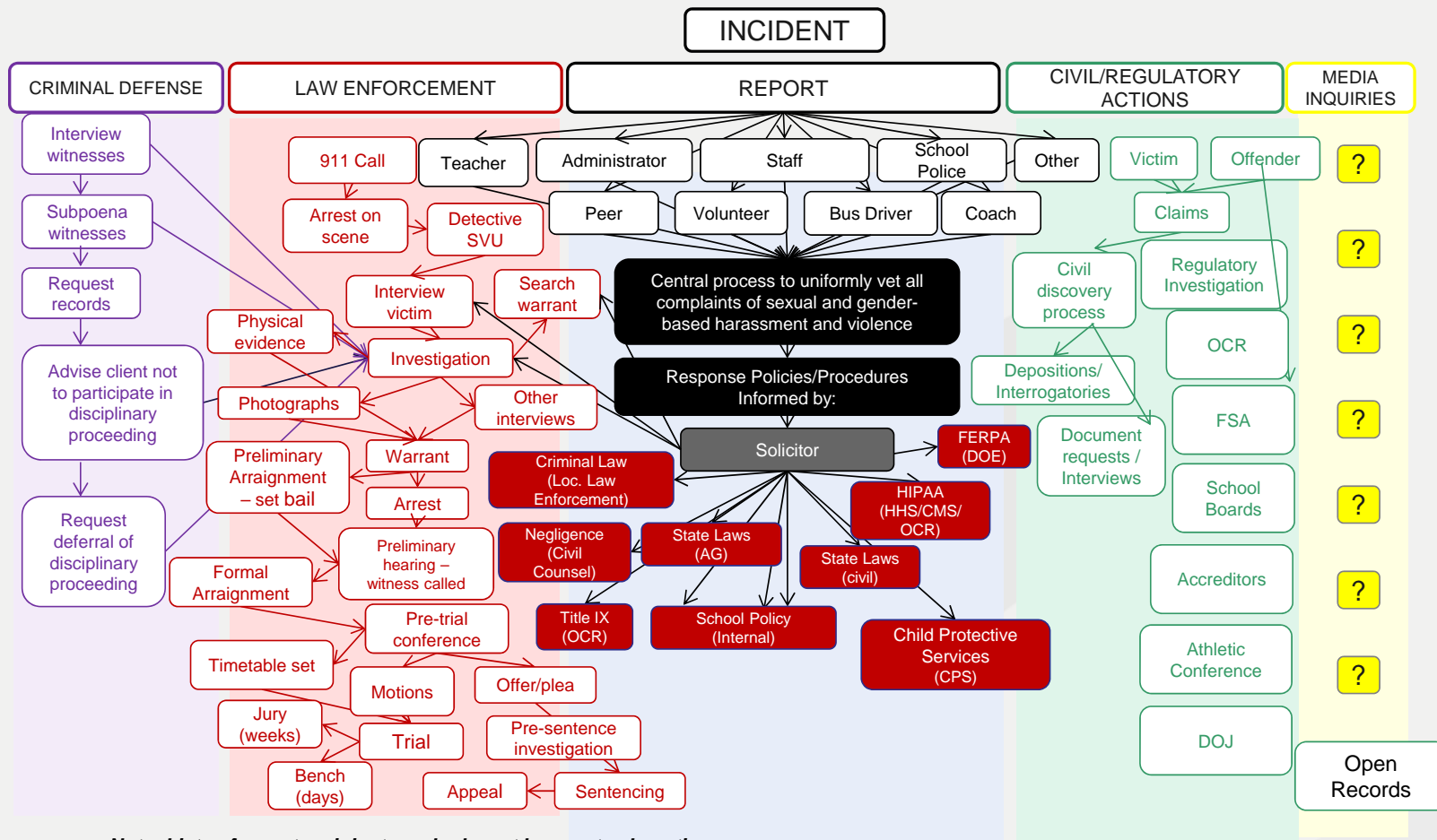
**Joseph A. Tate, Jr.**  
Cozen O'Connor



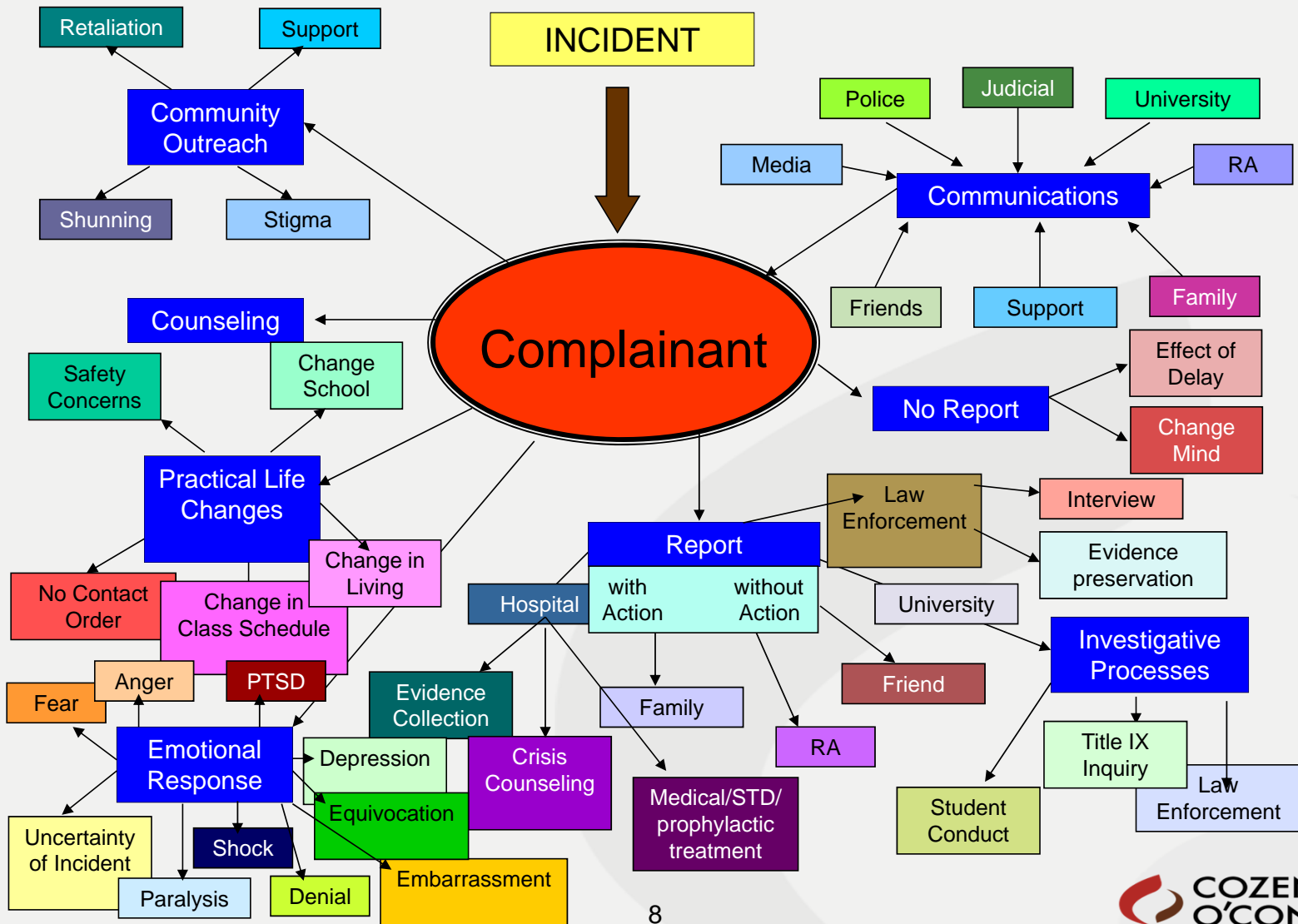
**Christi Hurt**  
Margolis Healy

**Institutional Response Group Paralegal and Administration Team:**  
Heather Dunn, Megan Lincoln, Braelyn Schenk, and Mary Sotos

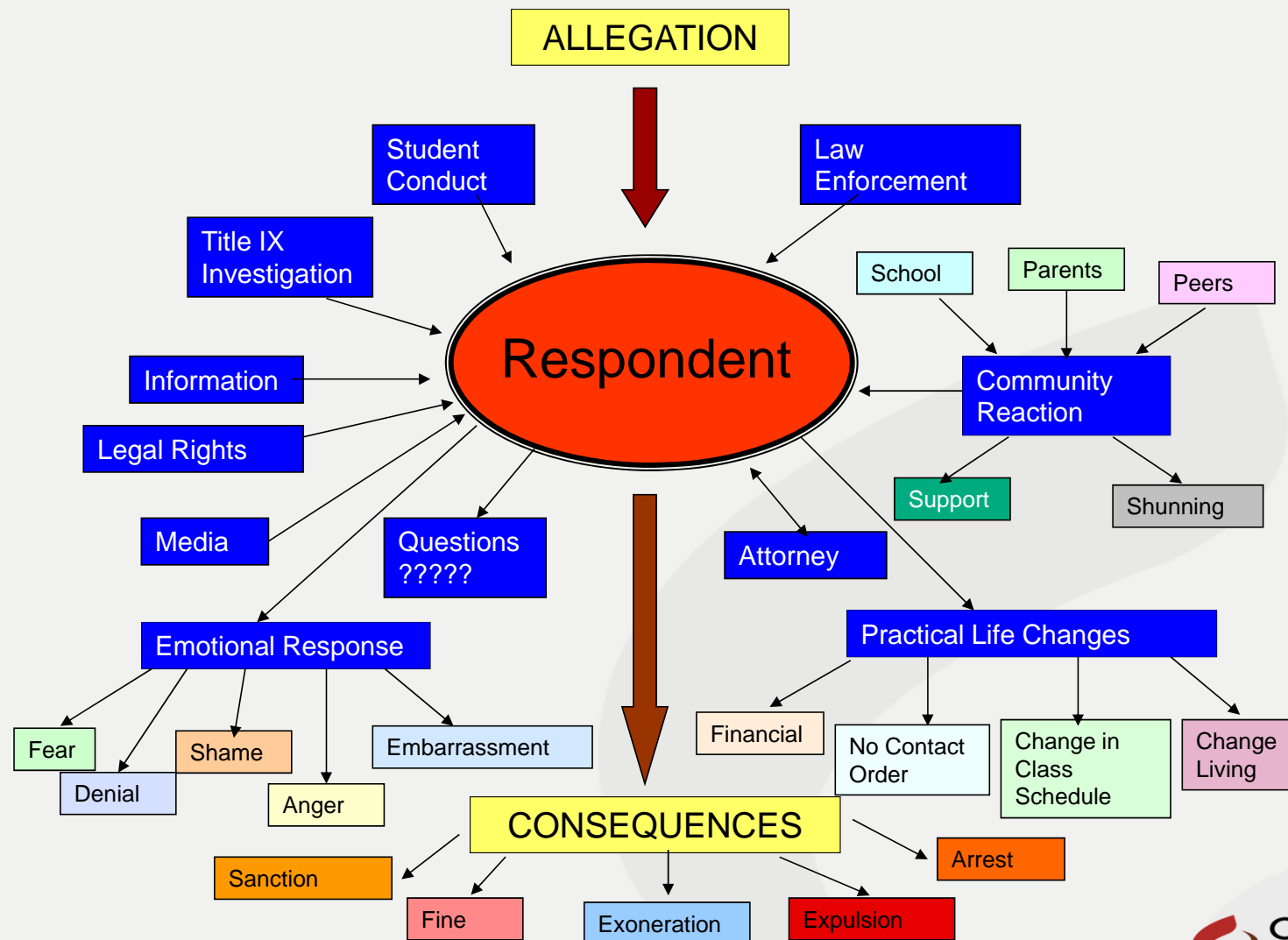
# FRAMING THE CONTEXT



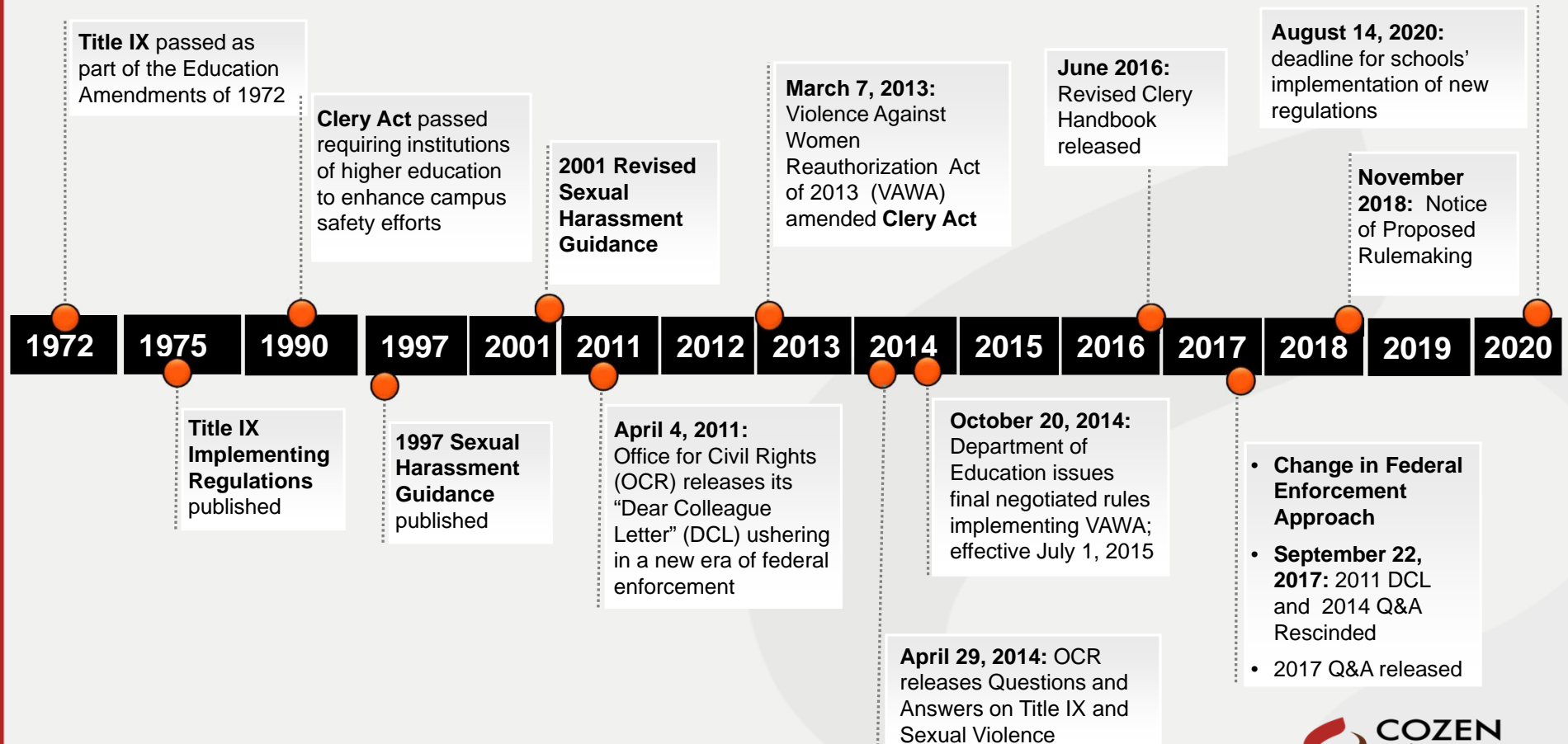
*Note: Lists of report recipients and relevant laws not exhaustive.*







# Evolution of Federal Legislation and Guidance



# Silver Linings



# 2017 Q&A: Equitable Investigation

- The **burden is on the school** – not the parties – to gather sufficient evidence to reach a **fair, impartial** determination as to whether sexual misconduct or a hostile environment has occurred.
- Requires a **trained investigator** to analyze and document the available evidence to support reliable decisions, **objectively evaluate the credibility** of parties and witnesses, synthesize all available evidence and take into account the unique and complex circumstances of each case.
- Investigator must be free from actual or perceived **conflicts of interest** and **biases** for or against any party. Avoid **conflicts of interest and biases** in the adjudicatory processes and prevent institutional interests from interfering with the impartiality of the adjudication.

## 2017 Q&A: Equitable Investigation

- Any rights or opportunities that a school makes available to one party during the investigation should be made available to the other party on **equal** terms.
- The reporting and responding parties and appropriate officials must have **timely and equal access to any information** that will be used during informal and formal disciplinary meetings and hearings.

# 2017 Q&A: Equitable Investigation

- **Written notice** to a respondent of the allegations constituting a potential violation should include “**sufficient details and with sufficient time to prepare a response before any initial interview.**”
- Notice should include:
  - The identities of the parties involved
  - The specific section of the code of conduct allegedly violated
  - The precise conduct allegedly constituting the potential violation
  - The date and location of the alleged incident.

## 2017 Q&A: Equitable Investigation

- The investigation **should** result in a **written report** summarizing the relevant **exculpatory and inculpatory** evidence.
- The parties should have the **opportunity to respond to the report in writing** in advance of the decision of responsibility and/or at a live hearing to decide responsibility.
- OCR recommends that a school provide **written notice of the outcome** of disciplinary proceedings to the reporting and responding parties concurrently.

# Maintaining Calm



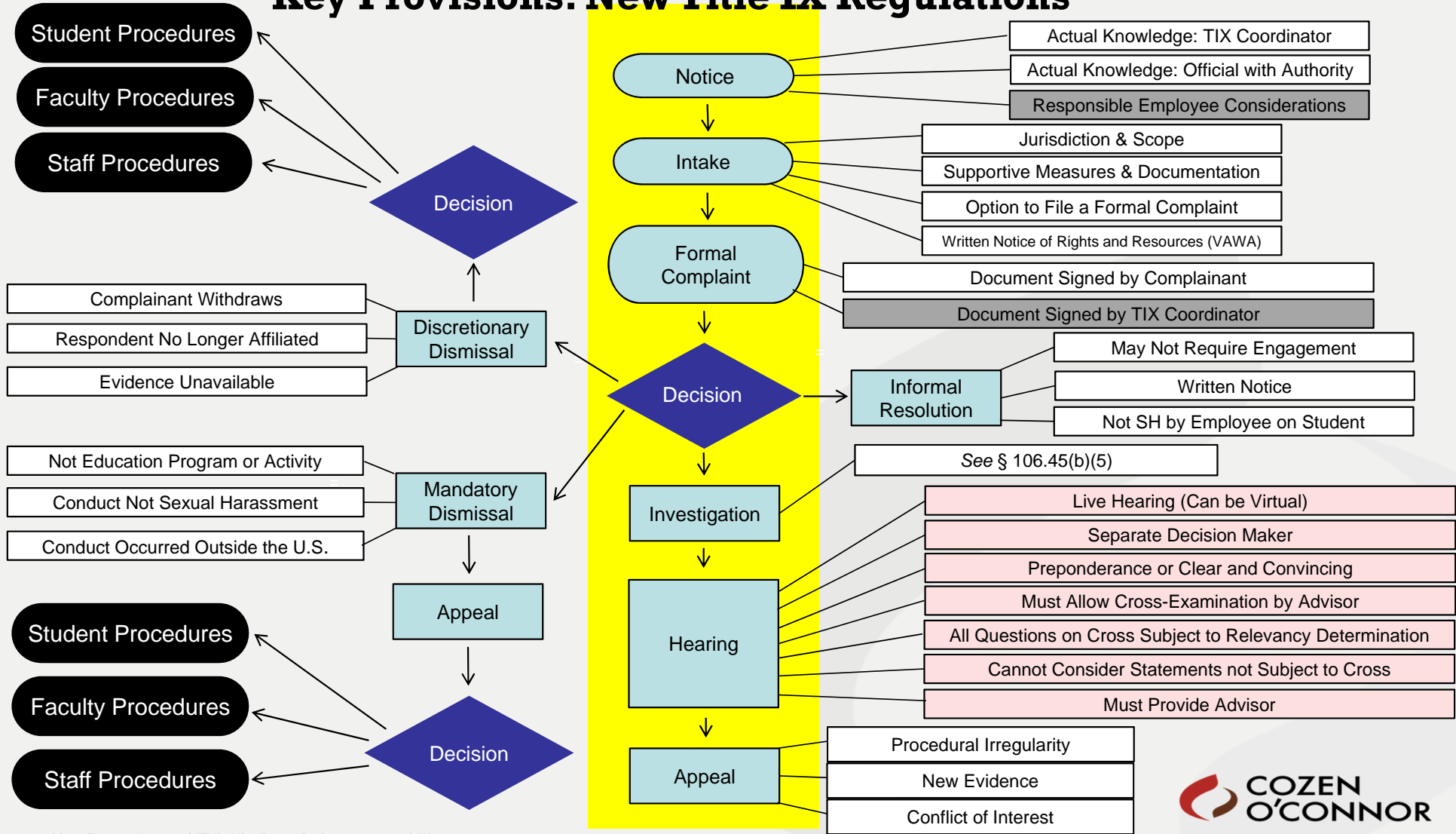
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# Investigative Principles

- Open-ended and thorough inquiry
- Equitable opportunities for the parties to participate
- The conduct of the investigation matters
- Separating intake/support from investigation
- Maintaining and reinforcing impartiality
  - Screening for conflicts of interest or bias
  - Attention to language and communications
- Trained and experienced investigators

# Key Provisions: New Title IX Regulations



Key Provisions of Title IX Regulations issued May 19, 2020;



# Regulations: “Legally Binding Obligations”

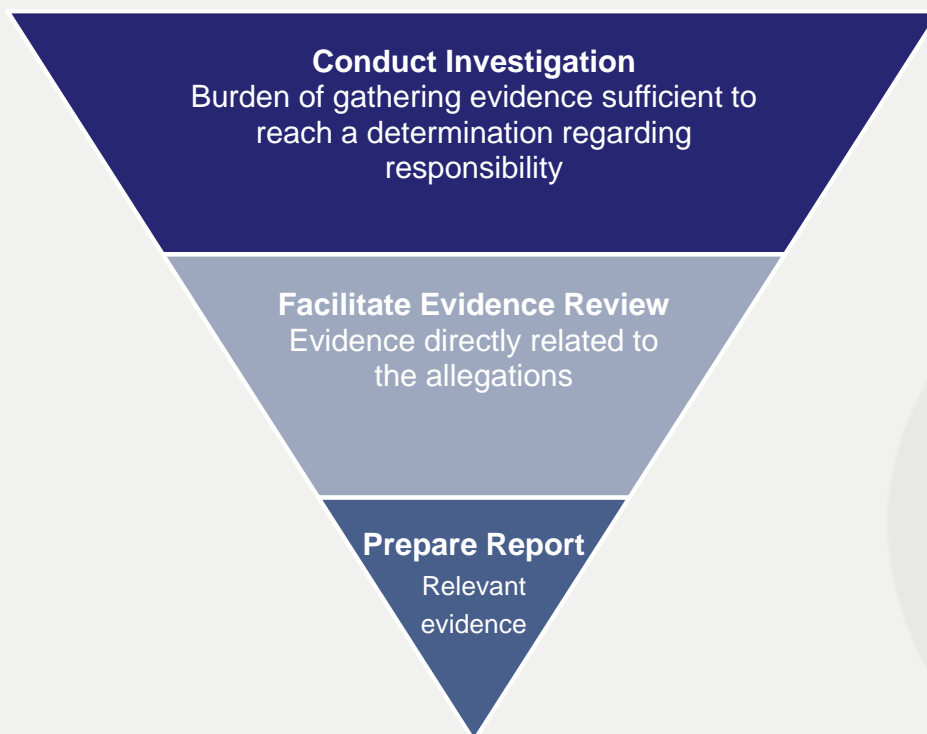
- “Because these final regulations represent the Department’s interpretation of a recipient’s legally binding obligations, **rather than best practices**, recommendations, or guidance, these final regulations focus on **precise legal compliance requirements** governing recipients.”

## Regulations: “Best Practices”

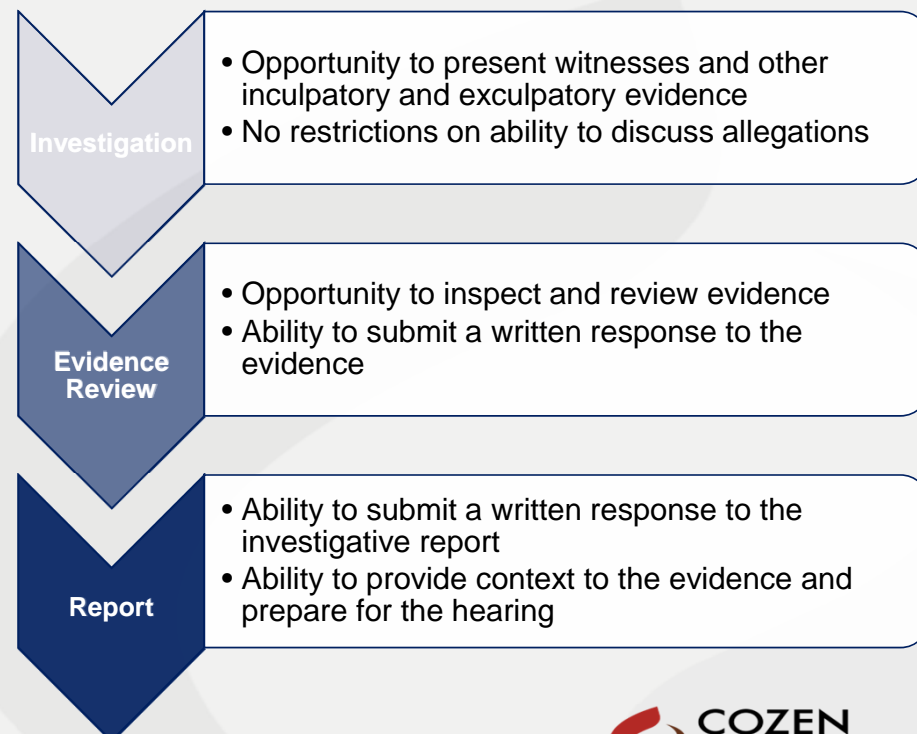
- “These final regulations leave recipients the **flexibility to choose to follow best practices and recommendations** contained in the Department’s guidance, or similarly, best practices and recommendations made by non-Department sources, such as Title IX consultancy firms, legal and social sciences scholars, victim advocacy organizations, civil libertarians and due process advocates and other experts.”

# Setting the Stage - Investigations

## Institutional Obligations



## Parties' Opportunity to Participate

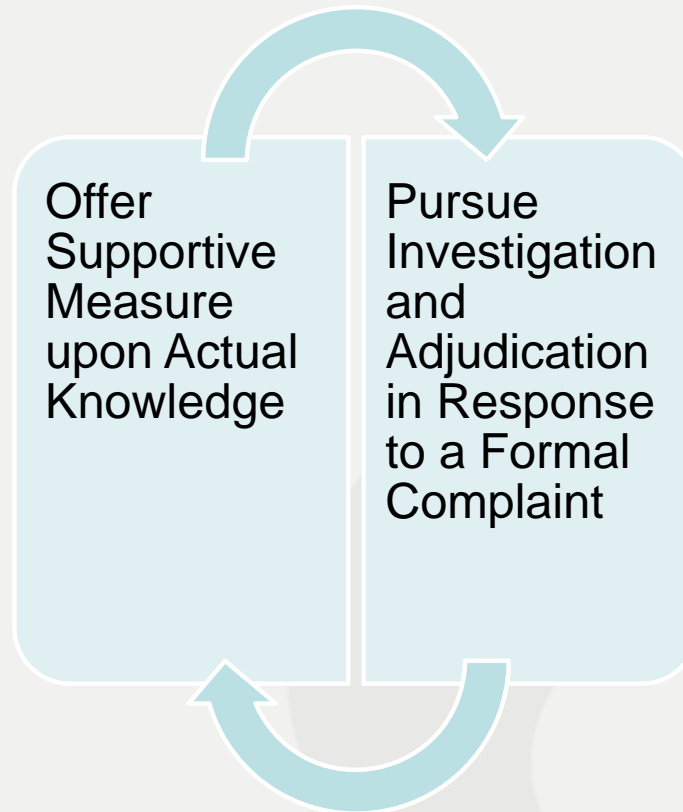


# Overview

- 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

# **OBLIGATION TO INVESTIGATE**

# Understanding Two Key Provisions





# Complainant Agency & Autonomy

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

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

# Reports vs. Formal Complaints

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

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

# 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.

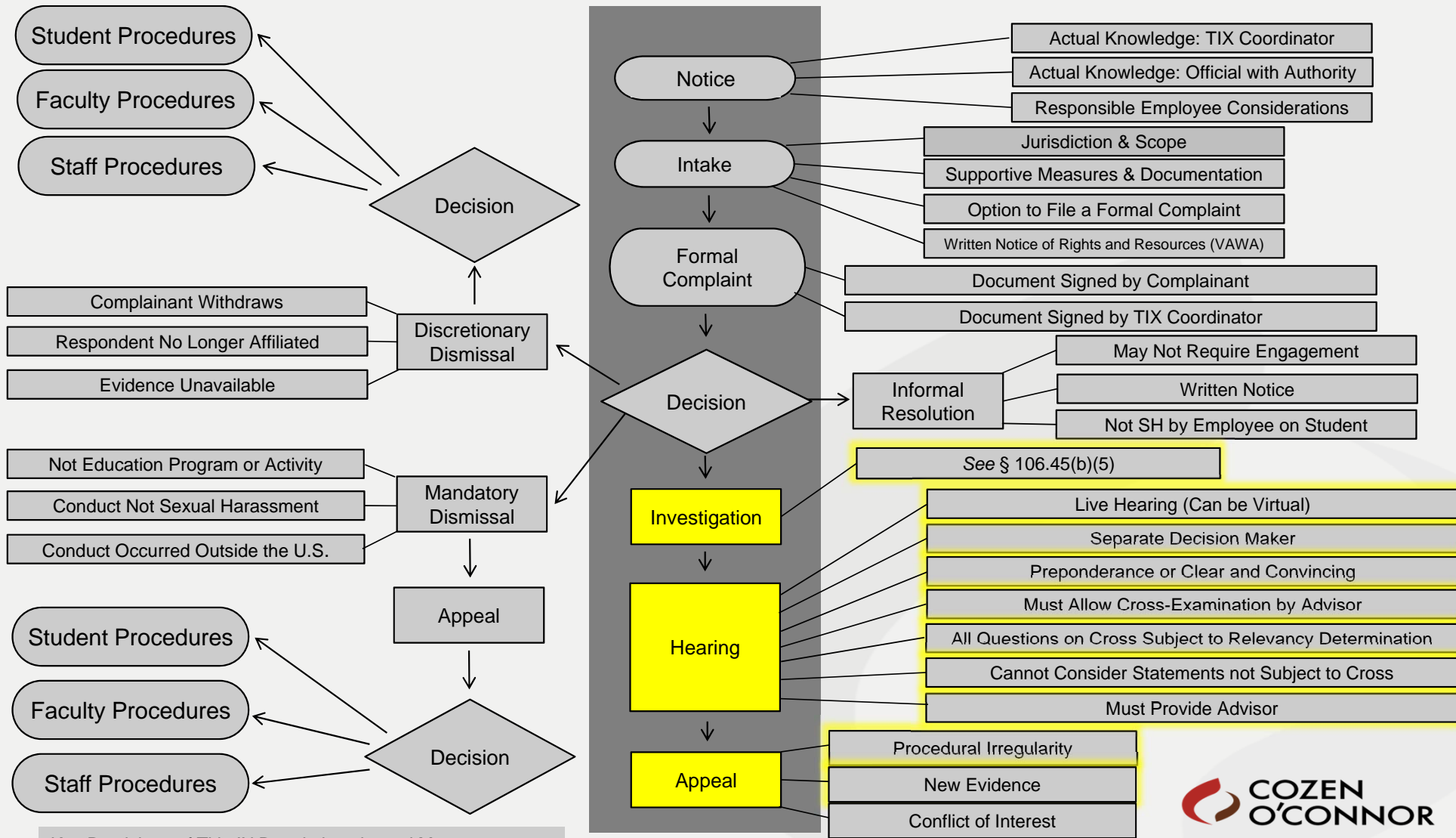
Title IX Regulations May 19, 2020; Preamble, 85 F.R. 30190

# 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

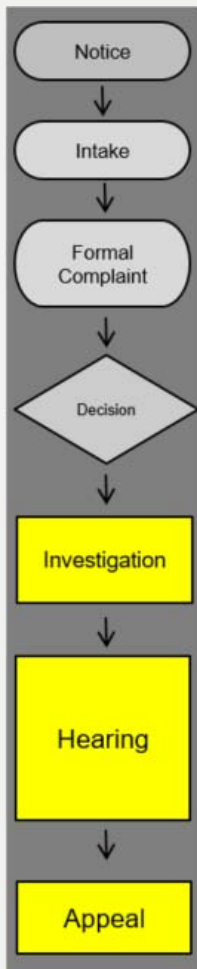
# **BASIC REQUIREMENTS OF GRIEVANCE PROCESSES**



Key Provisions of Title IX Regulations issued May 19, 2020;



# Basic Requirements

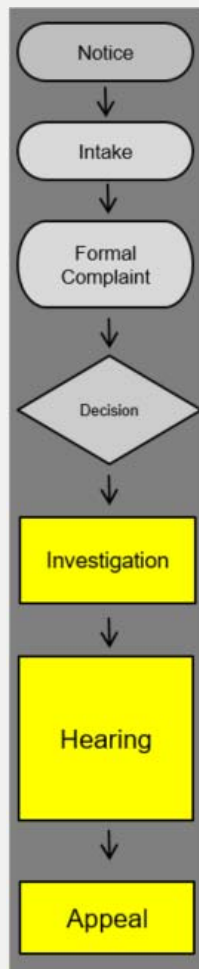


- **Treat complainants and respondents equitably** by providing **remedies** to a complainant where a determination of responsibility for sexual harassment has been made against the respondent, and by following a **grievance process** that complies with this section before the imposition of any disciplinary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

Relevant Regulations Sections:

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

# Basic Requirements



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

Relevant Regulations Sections:

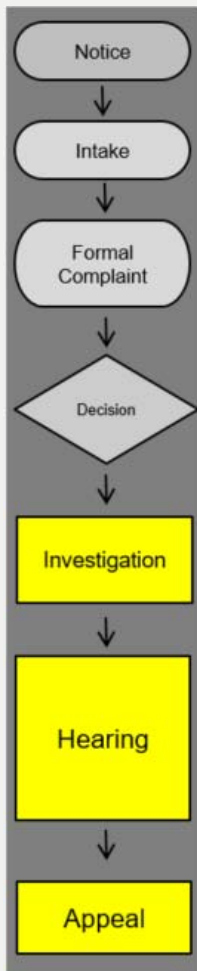
Equitable Treatment: §§ 106.44(a) and 106.45(b)(1)(i)

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

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



# Basic Requirements



- **Presumption that the respondent is not responsible** for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process
- 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

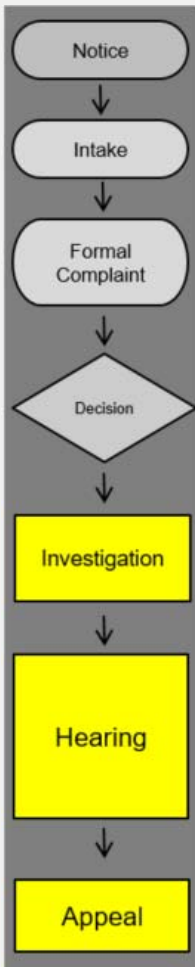
Relevant Regulations Sections:

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)

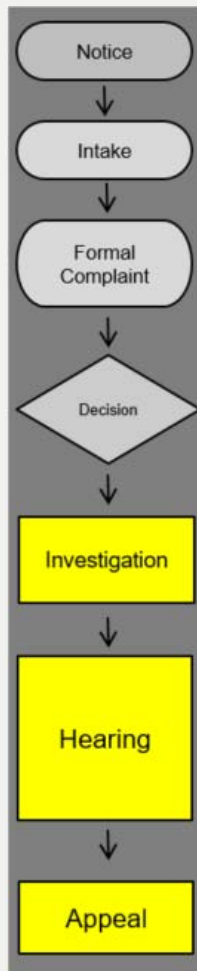
# Basic Requirements



- 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

# 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)

# **PRE-INVESTIGATION CONSIDERATIONS**

# 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

# 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

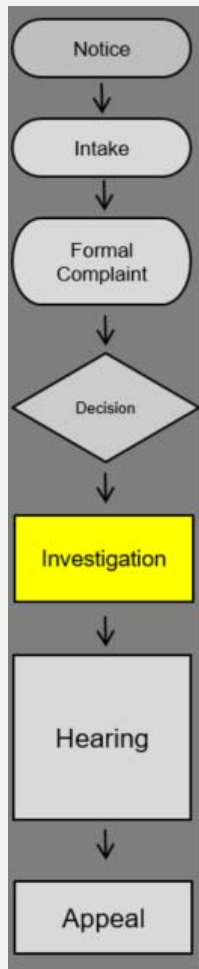
# Removal of Bias or Conflict of Interest

- “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.



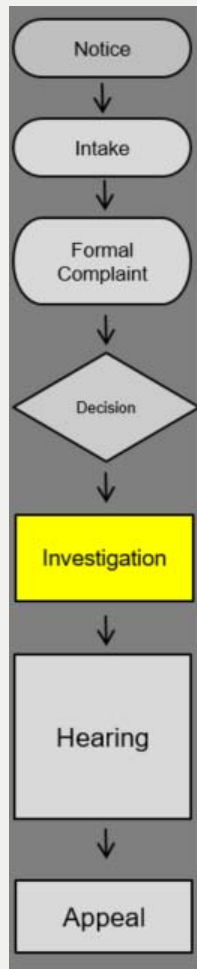
# Written Notice of all Proceedings



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

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

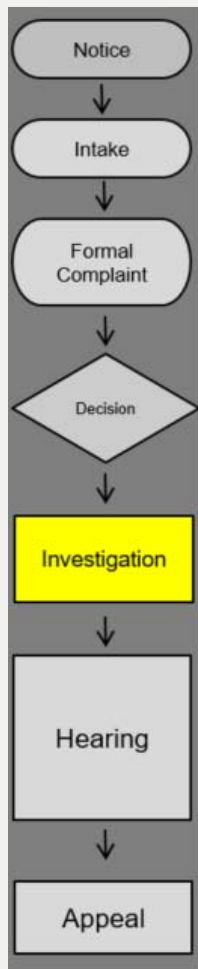
# Written Notice of Allegations



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

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

# Written Notice of the Allegations



## – Must state that:

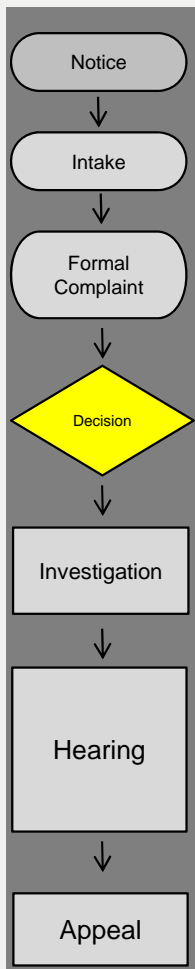
- the respondent is presumed not responsible for the alleged conduct
- a determination regarding responsibility is made at the conclusion of the grievance process

## – Must inform the parties:

- they may have an advisor of their choice
- they may inspect and review evidence gathered
- of a prohibition against knowingly making false statements or knowingly submitting false information

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

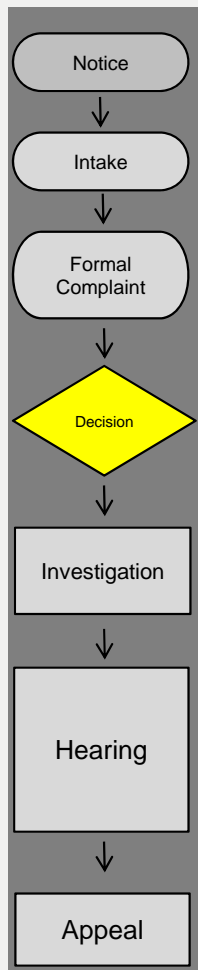
# Written Notice of Allegations



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

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

# Supplemental Notice



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

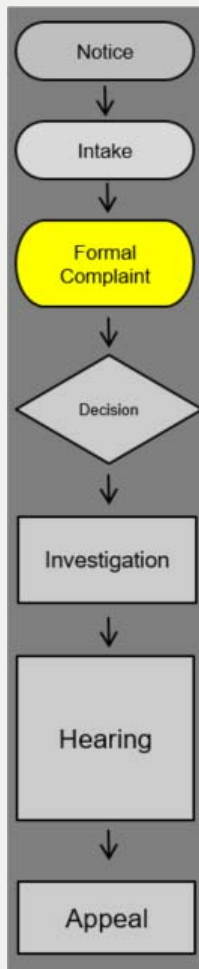
Title IX Regulations May 19, 2020 §106.45(b)(2)(ii); Preamble 85 F.R. 30283

# 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**

# Consolidation of Formal Complaints

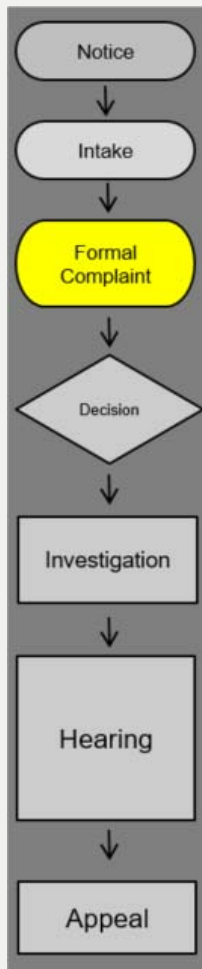


- A recipient **may** consolidate formal complaints as to allegations of sexual harassment against more than one respondent, or by more than one complainant against one or more respondents, or by one party against the other party, **where the allegations of sexual harassment arise out of the same facts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

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



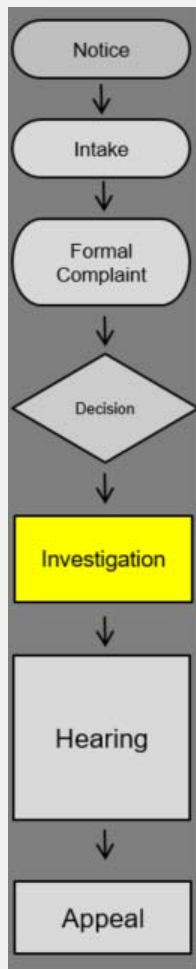
# Consolidation of Formal Complaints



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

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

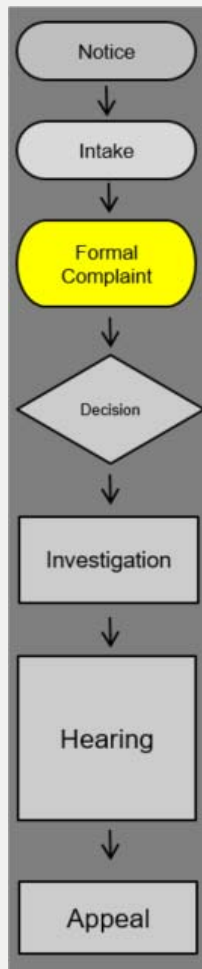
# Consolidation of Formal Complaints



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

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

# Consolidation of Formal Complaints



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

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

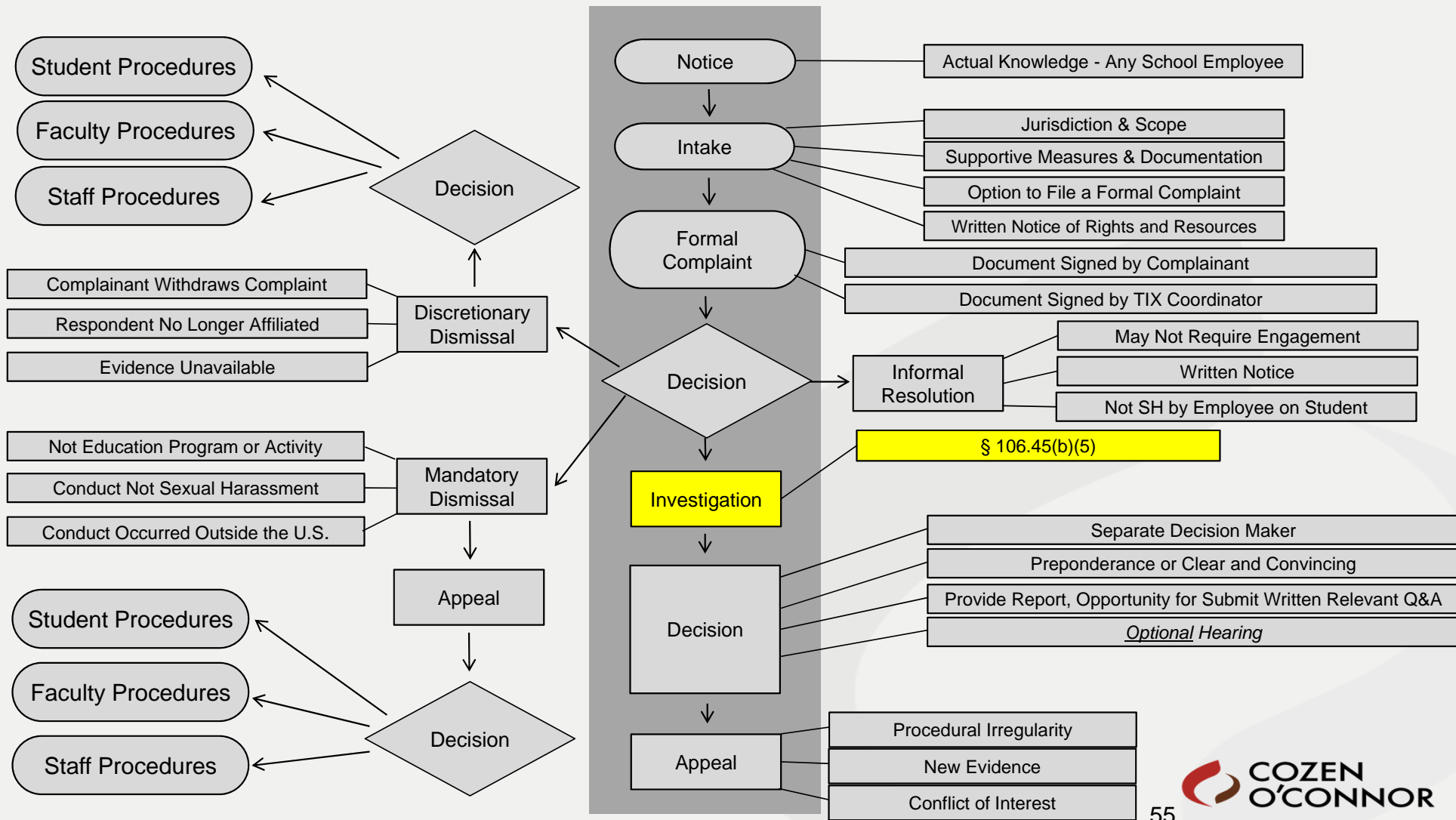
# Application to Specific Circumstances

- 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

# Practical Considerations

- Process for determining whether to consolidate formal complaints
  - Identify decision-makers
  - Identify criteria for consolidation
- Opportunity to contest consolidation?

# INVESTIGATIONS

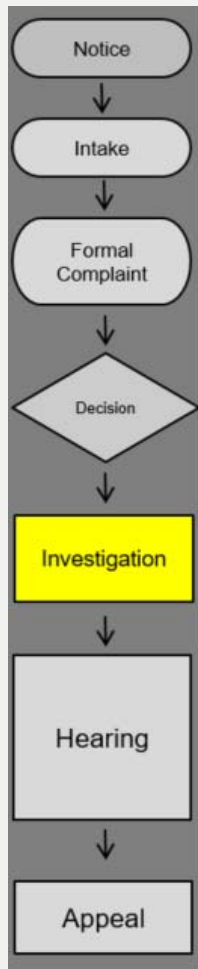


# EVIDENCE GATHERING



# Burden of Gathering Evidence

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



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

# Burden of Gathering Evidence



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

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

# Burden of Gathering Evidence

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



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

# Opportunity to Participate

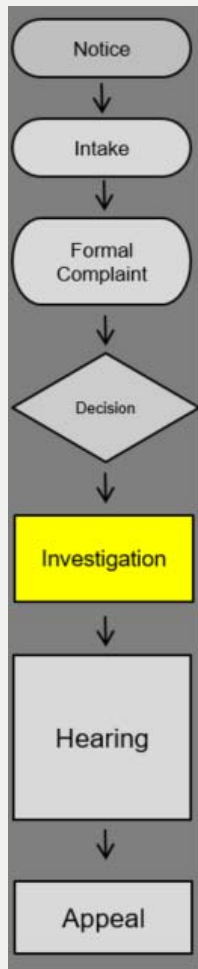
- Not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence.



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

# Witnesses & Evidence

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



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

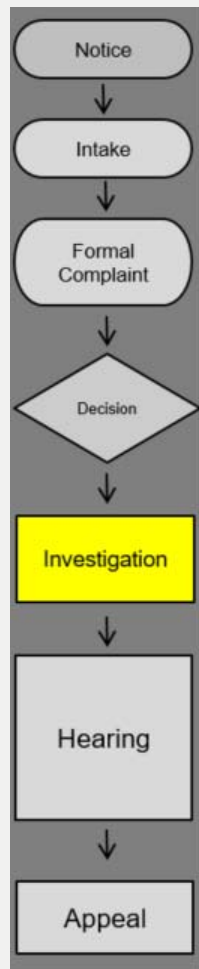
# Practical Considerations & Effective Practices

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

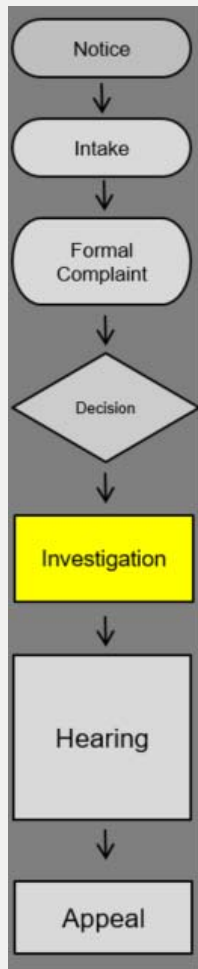


- Provide the parties with the same opportunities to have others present during any grievance proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice, who may be, but is not required to be, an attorney.
- A recipient may establish restrictions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



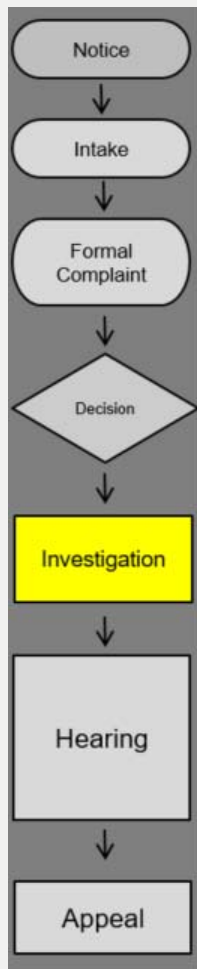
# Restrictions on Advisor Participation



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

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

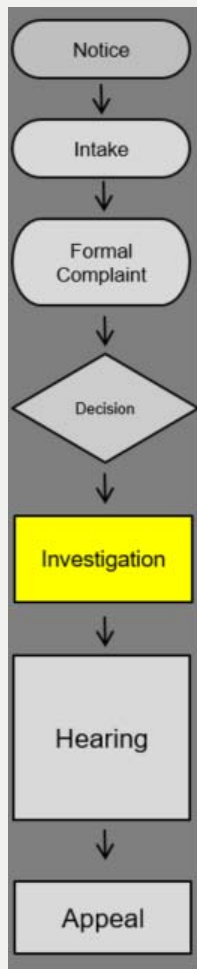
# Restrictions on Advisor Participation



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

Title IX Regulations May 19 2020; Preamble at 30298.

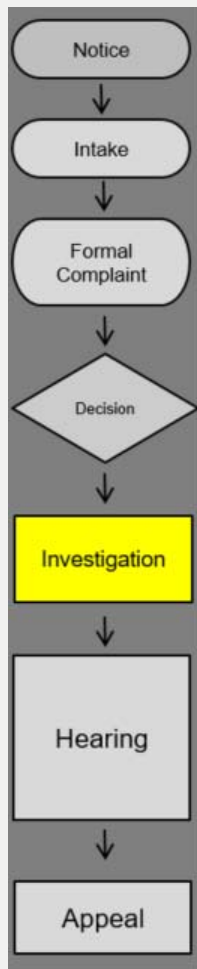
# Training of Advisors Not Required



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

Title IX Regulations May 19 2020; Preamble at 30333.

# Training of Advisors Not Required



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

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

# Practical Considerations & Effective Practices

- Process meeting to discuss policy, decorum, and expectations
- Requirement that 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

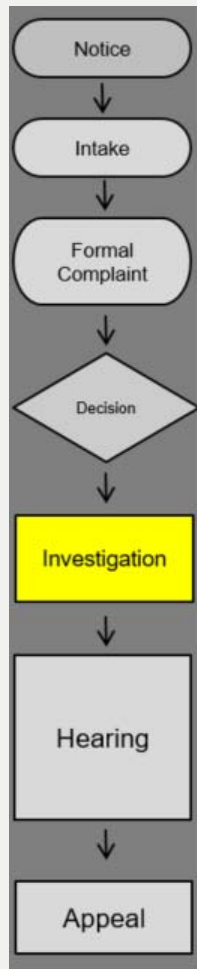
# **EVIDENTIARY CONSIDERATIONS**

# Evidentiary Considerations

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

# Privileged Information

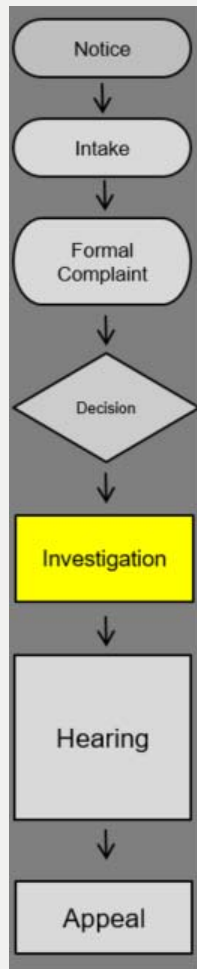
- Not require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, **information protected under a legally recognized privilege**, unless the person holding such privilege has waived the privilege



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



# Privileged Records

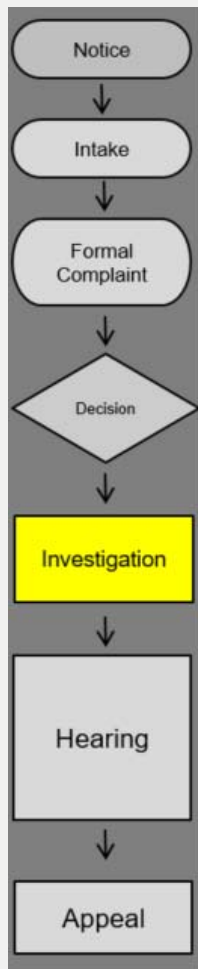


- Recipient cannot access, consider, disclose, or otherwise use a party's records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional's or paraprofessional's capacity, or assisting in that capacity, and 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

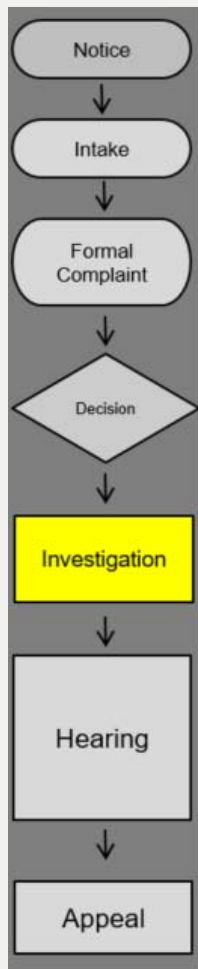
# Relevance

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



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

# Relevance



- “While the proposed rules do not speak to
  - admissibility of hearsay,
  - prior bad acts,
  - character evidence,
  - polygraph (lie detector) results,
  - standards for authentication of evidence,
  - or similar issues concerning evidence,
- the final regulations require recipients to **gather and evaluate relevant evidence**, with the understanding that . . .

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

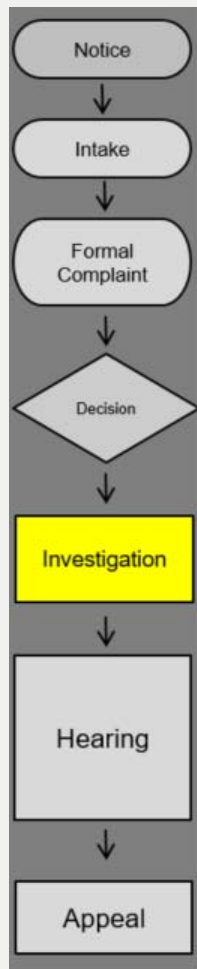
# Relevance



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

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

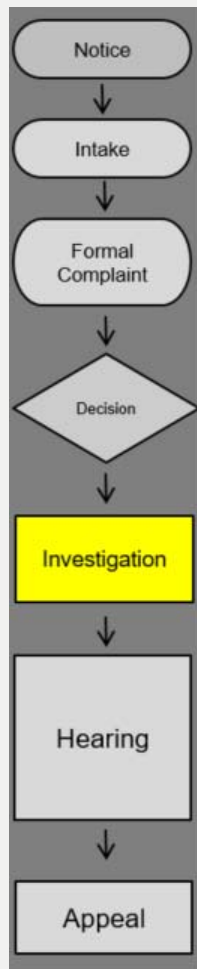
# Prior Sexual History



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

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

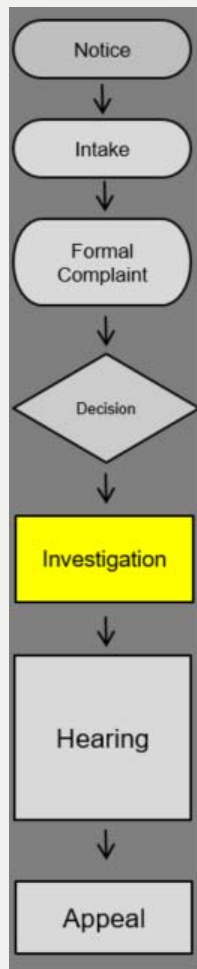
# Prior Sexual History



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

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

# Prior Sexual History: Motive



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

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

# Prior or Subsequent Misconduct

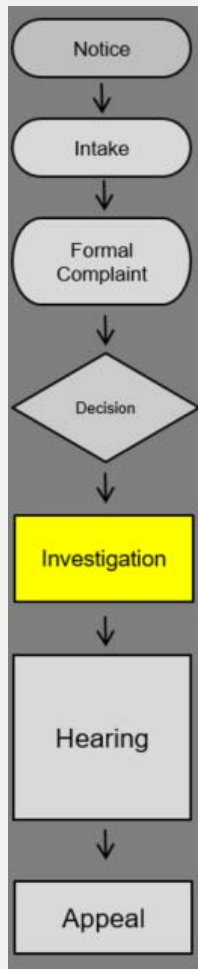
- The regulations do not prohibit the use of prior or subsequent misconduct
  - “Evidence of a pattern of inappropriate behavior by an alleged harasser” permitted if relevant
- Schools will need to determine if such conduct is:
  - Relevant
  - May be used in determining responsibility
  - May be used 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

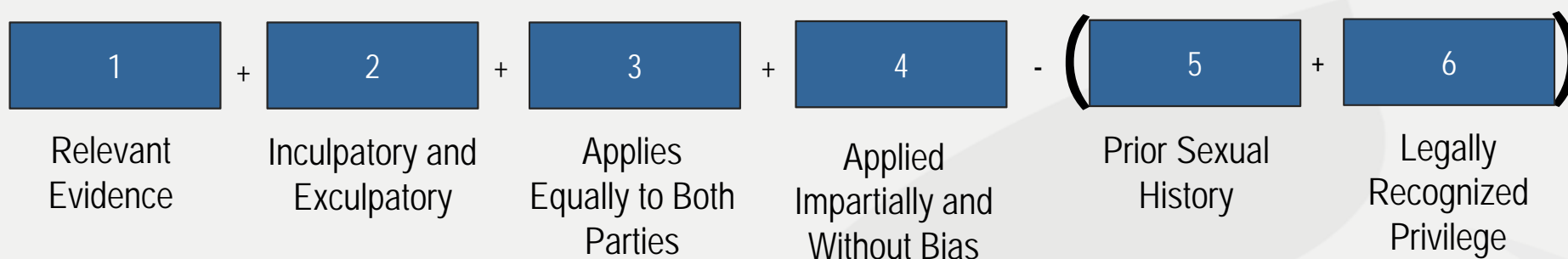
# Flexibility to Adopt Rules



- “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.**”

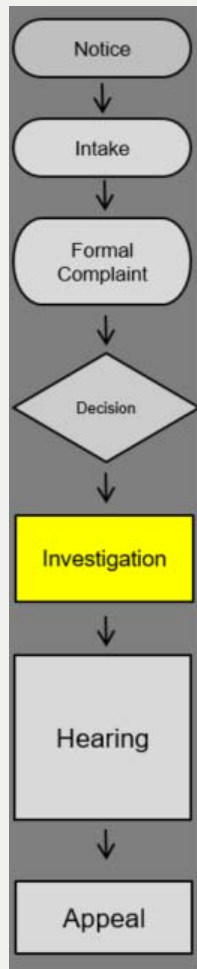
Title IX Regulations May 19, 2020; Preamble at 30248.

# Evidentiary Rules Must Consider



# EVIDENCE REVIEW

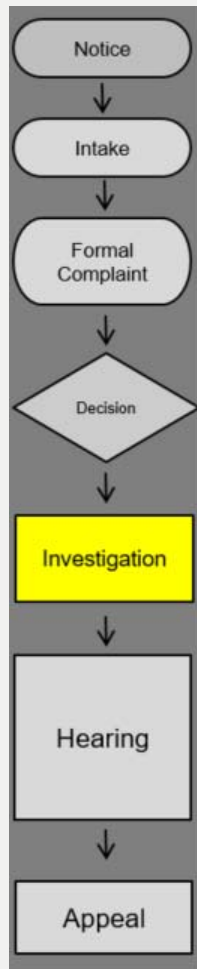
# Evidence Review



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

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

# Evidence Review



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

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

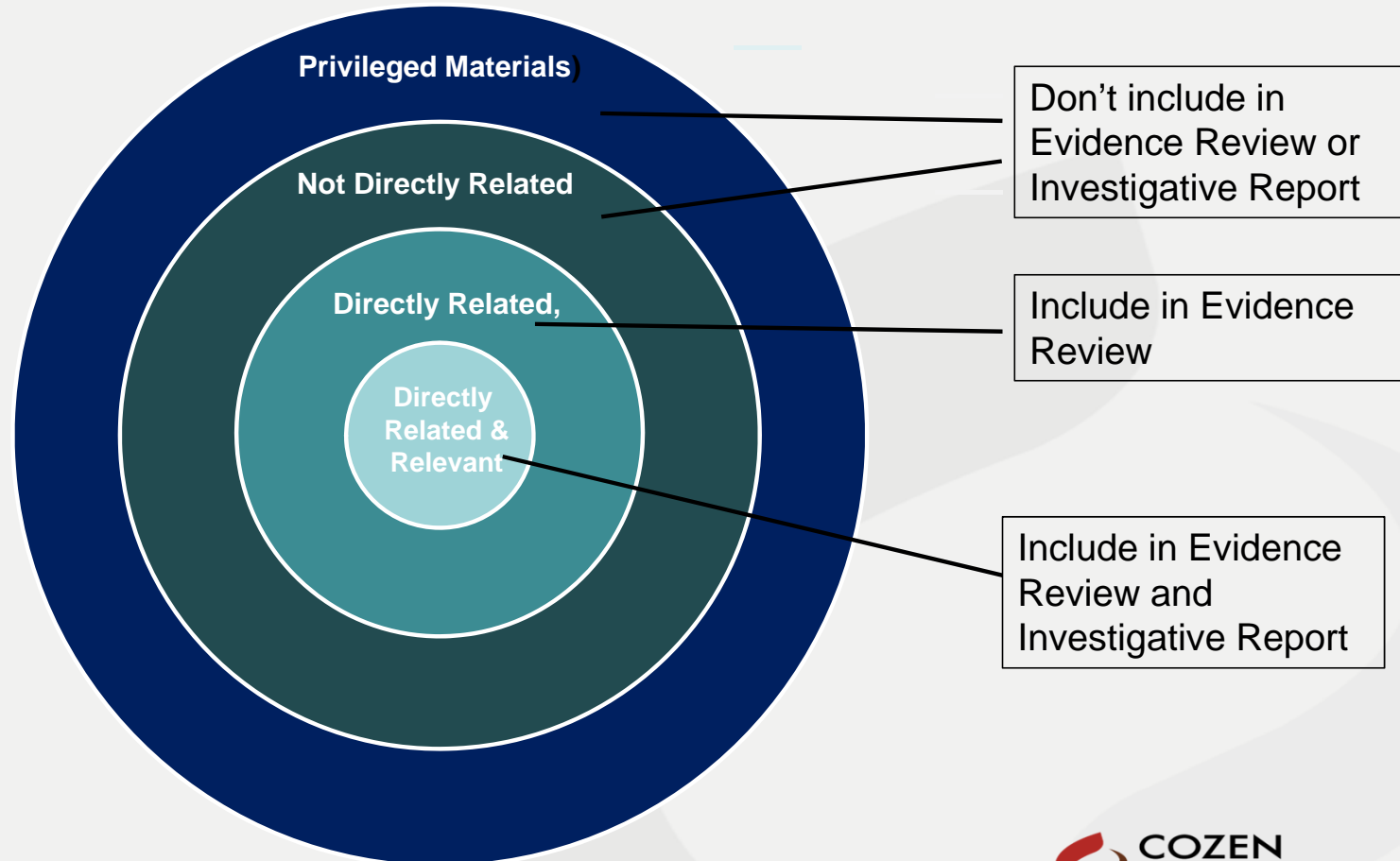
# Evidence Review



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

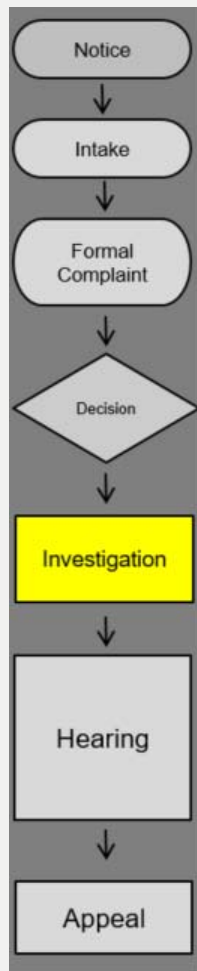
Title IX Regulations May 19, 2020; Preamble 85 F.R.30303

# Evidentiary Levels for Inclusion





# Directly Related

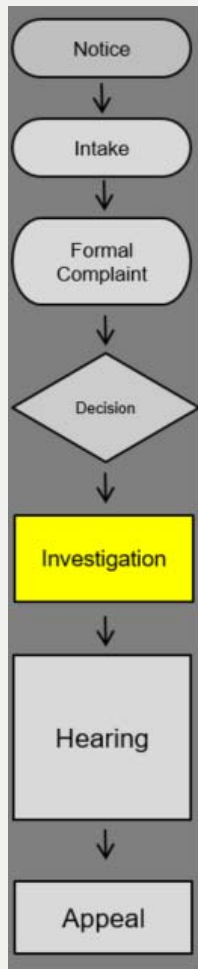


- Not defined in the regulations or the Preamble
  - The Department declines to define certain terms such as “evidence directly related to the allegations,” as these terms should be interpreted using their plain and ordinary meaning.
- “Directly related” aligns with the requirements in FERPA
  - The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

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

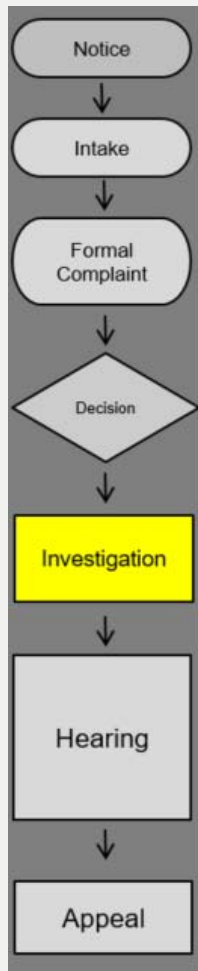
# Directly Related

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



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

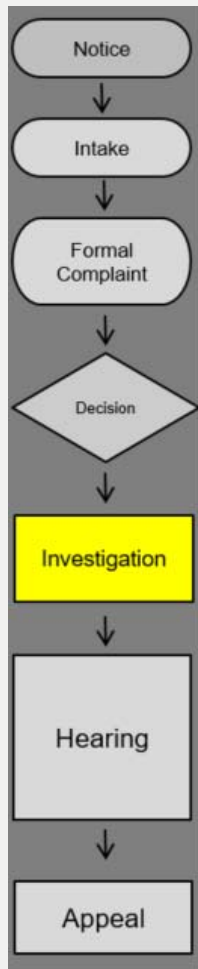
# Directly Related vs. Relevant



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

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

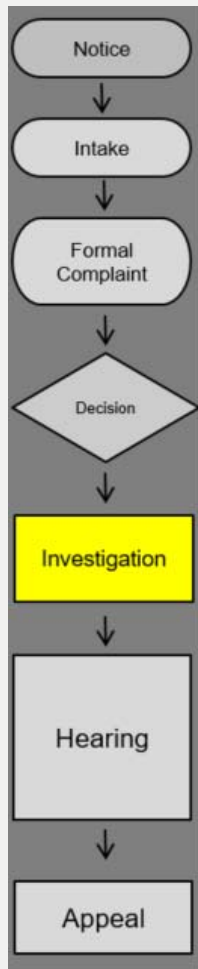
# Directly Related



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

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

# Directly Related



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

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

# Directly Related



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

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

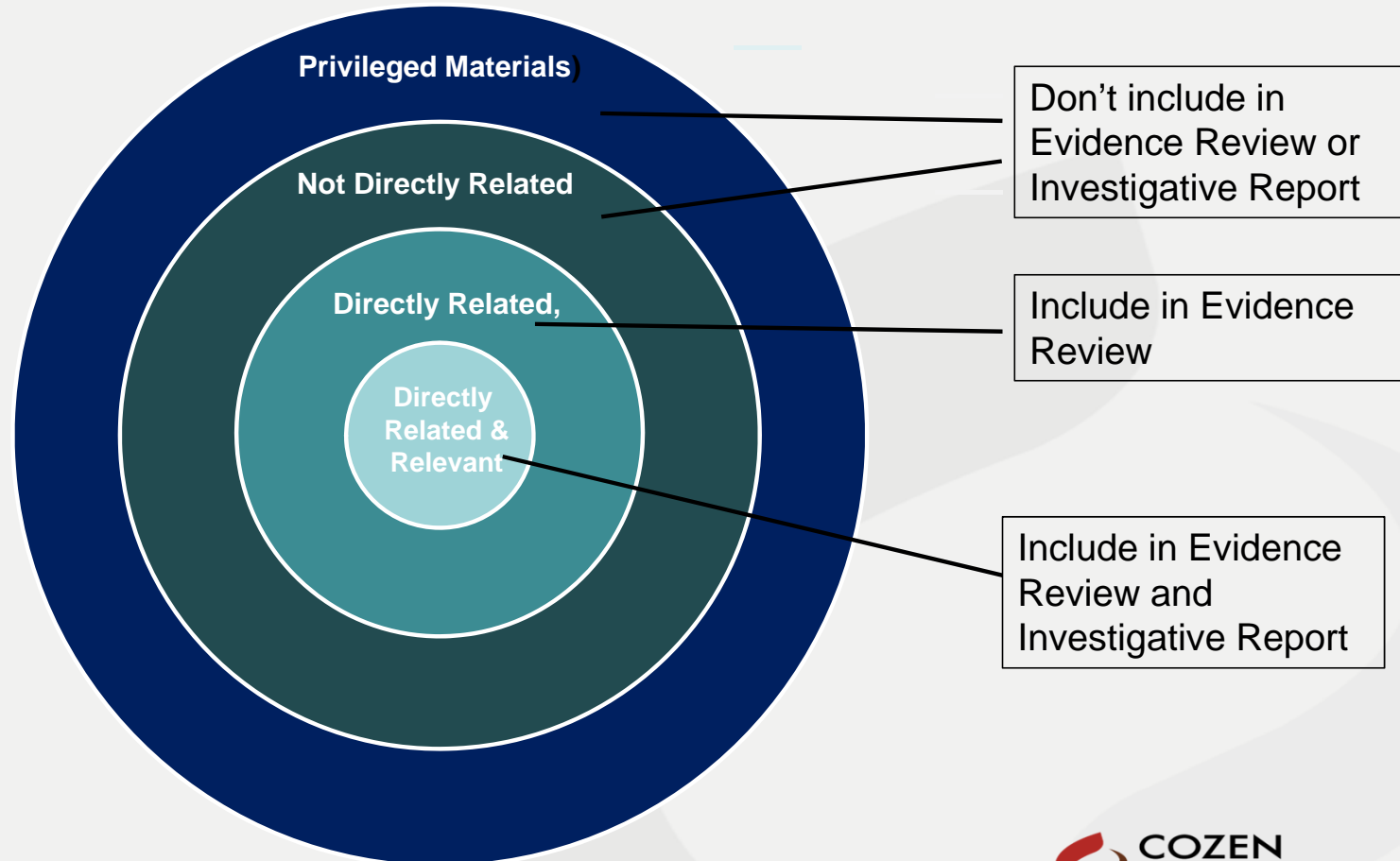
# Scope of Parties' Review



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

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

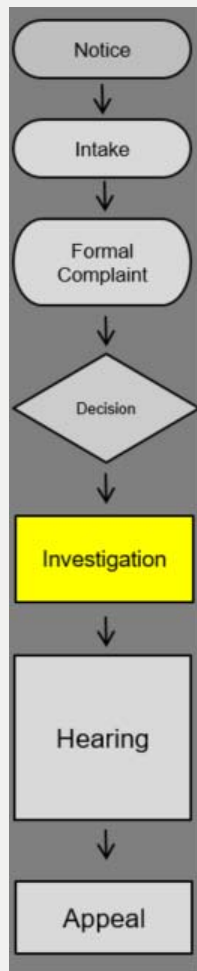
# Evidentiary Levels for Inclusion





# INVESTIGATIVE REPORT

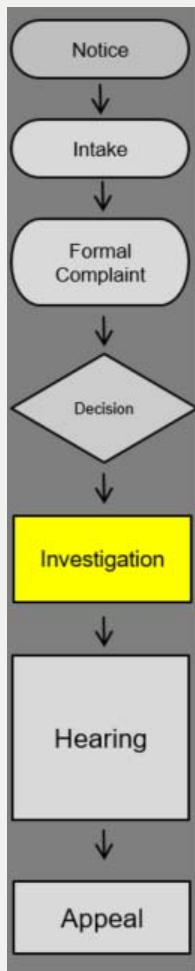
# Investigative Report



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

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

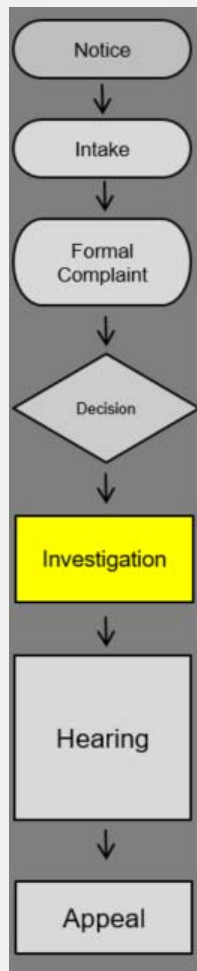
# Investigative Report



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

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

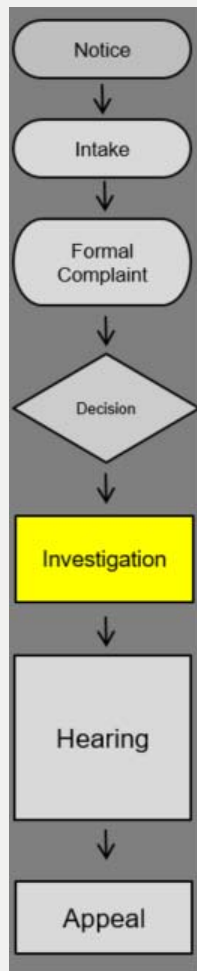
# Investigative Report



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

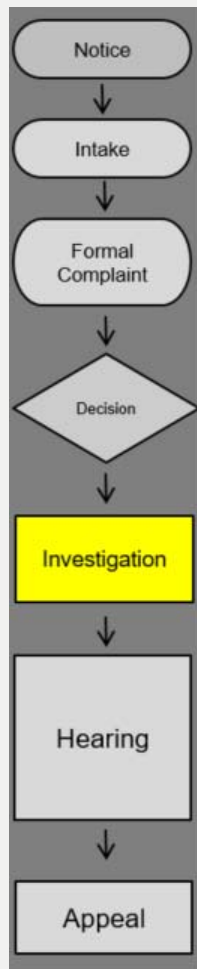
Title IX Regulations May 19, 2020; §§ 106.45(b)(5)(vii); Preamble 85 F.R. 3010.

# Content for Written Determination



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

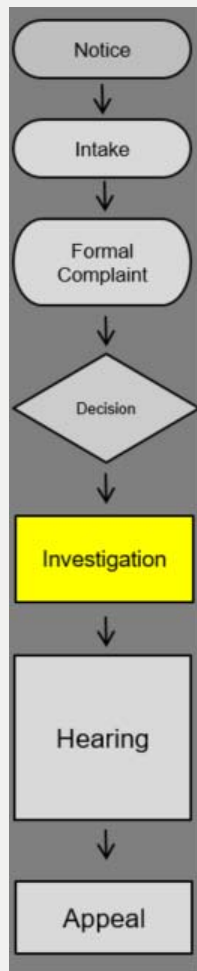
# Investigative Report: Findings?



- 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

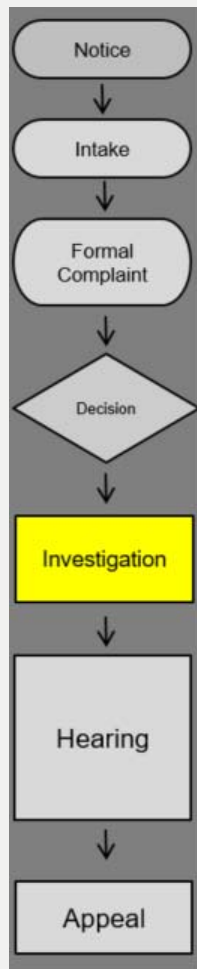
# Investigative Report: Findings?



- § 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

# Revisiting Relevance

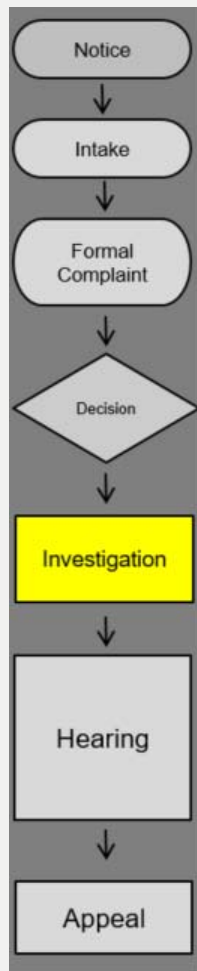


- Fairly summarizes the relevant evidence
- Investigator may redact information from the report
  - Recipients may permit or require the investigator to redact from the investigative report information that is not relevant, which is contained in documents or evidence that is relevant.

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



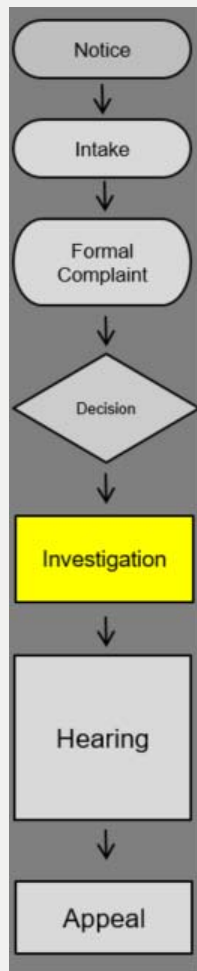
# Investigative Report



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

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

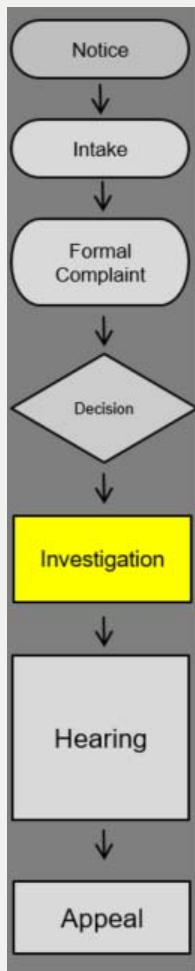
# Investigative Report



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

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

# Investigative Report



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

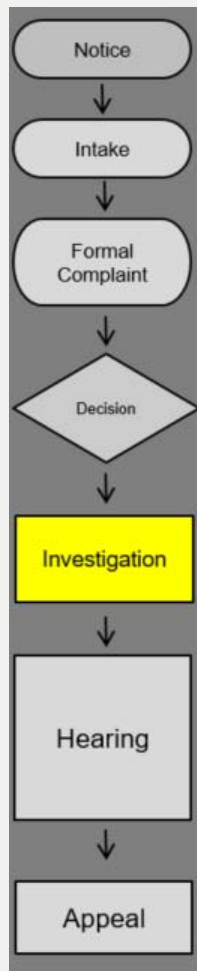
Title IX Regulations May 19, 2020; §§ 106.45(b)(5)(vii); Preamble 85 F.R.30248-49

# Practical Considerations & Effective Practices

- Use template format with consistent language and content across investigations
- Language: balanced, neutral and non-judgmental
- 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**

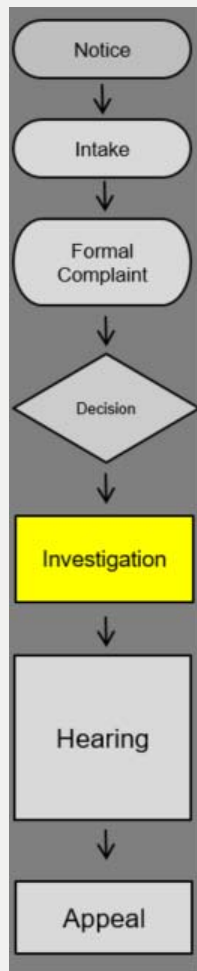
# Reasonably Prompt Time Frames



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

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

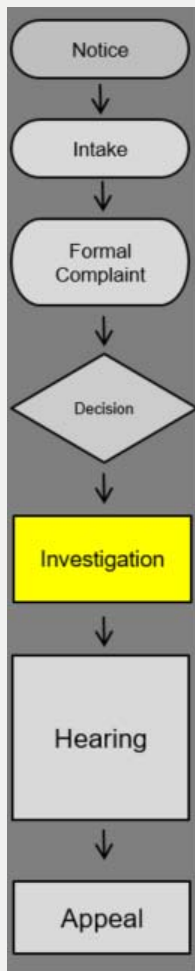
# Reasonably Prompt Time Frames



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

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

# Reasonably Prompt Time Frames



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

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



# TRAINING

# Training

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

# Training

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

# Recap on Effective Investigations

- Preparation
- Policy
- Protocols
- Personnel
- Proficiency
  - Training
  - Experience

# Use of Slides

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

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# **The New Title IX Regulations: Live Hearings – Part 1 of 2**

Presented By:

**The Institutional Response Group | Cozen O'Connor**

**Gina Maisto Smith, Chair**

**Leslie M. Gomez, Vice Chair**

**July 20, 2020**



# Today's Webinar

- Following an introductory webinar, A First Look at the New Title IX Regulations, this is the fifth in a series of webinars focusing on implementation.
- This webinar will:
  - Provide an **overview** of live hearings and decision-making
  - Outline the **legally-required elements** for live hearings, and
  - Set the context for further discussion on **effective practices** in conducting live hearings and decision-making



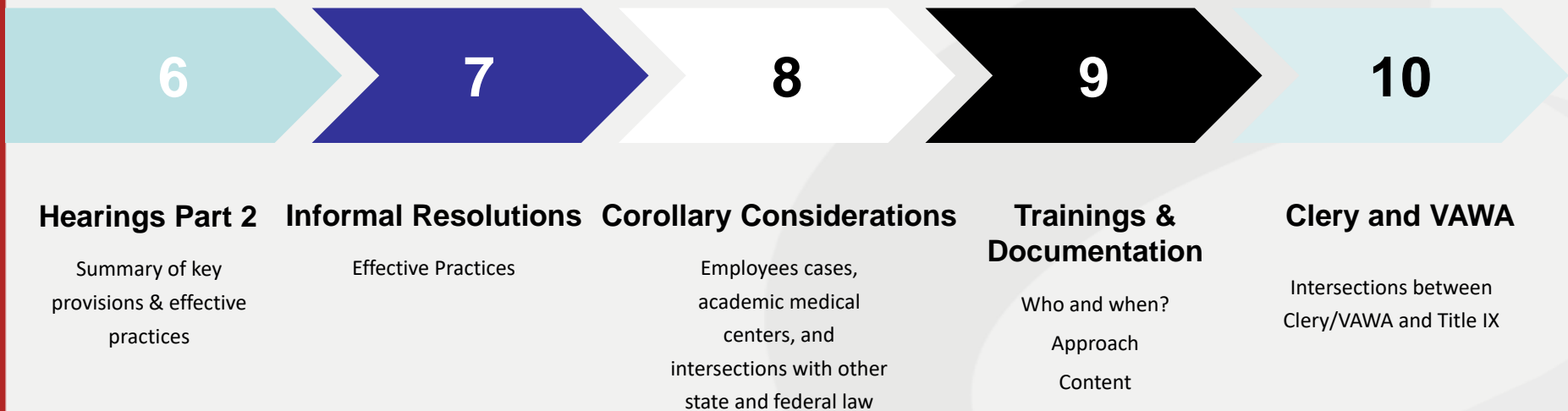
# Introducing the Webinar Series

Subsequent IRG webinars will focus on specific aspects of the regulations, as written and as applied, including:



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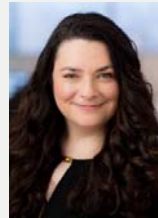
# Institutional Response Group



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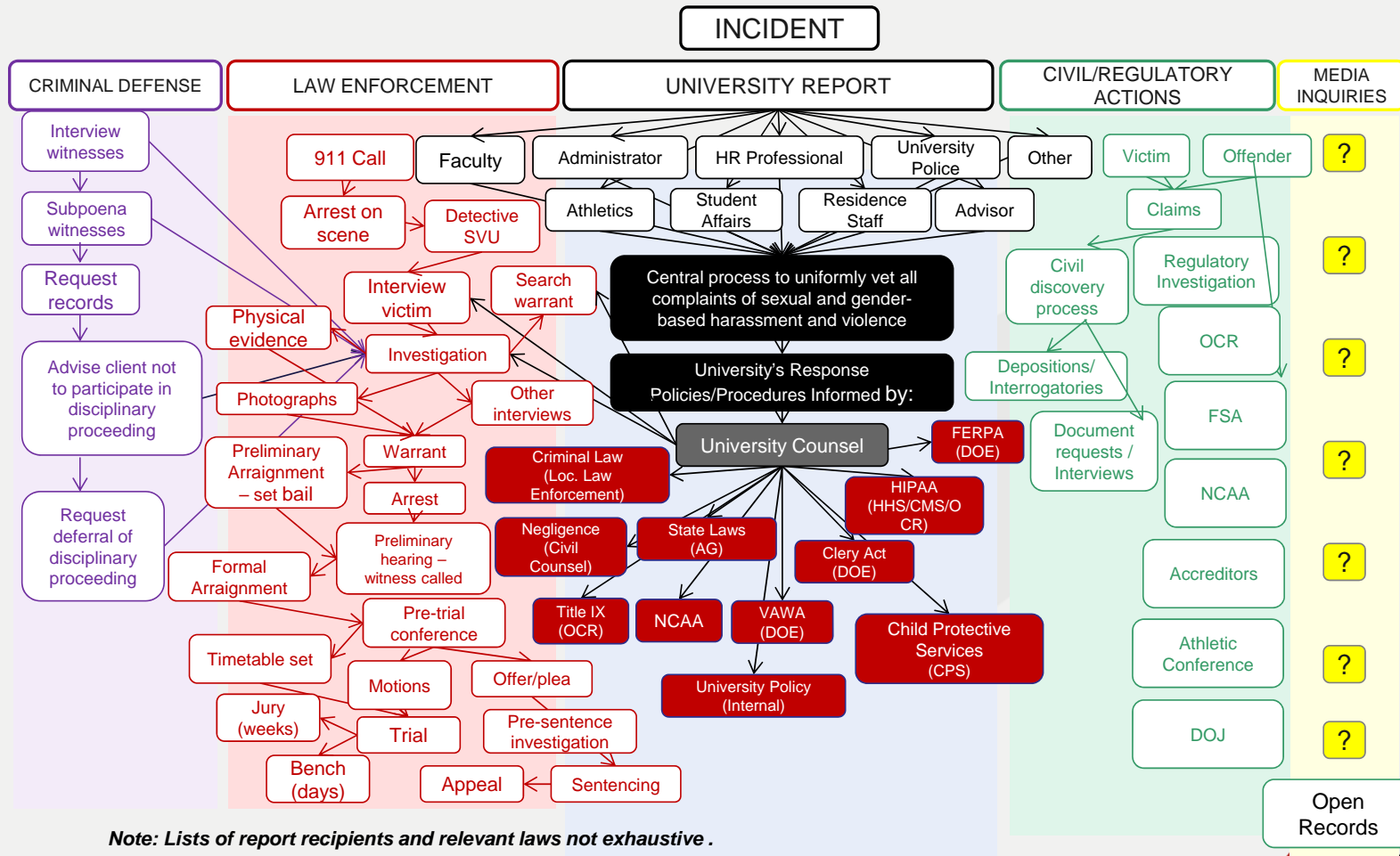


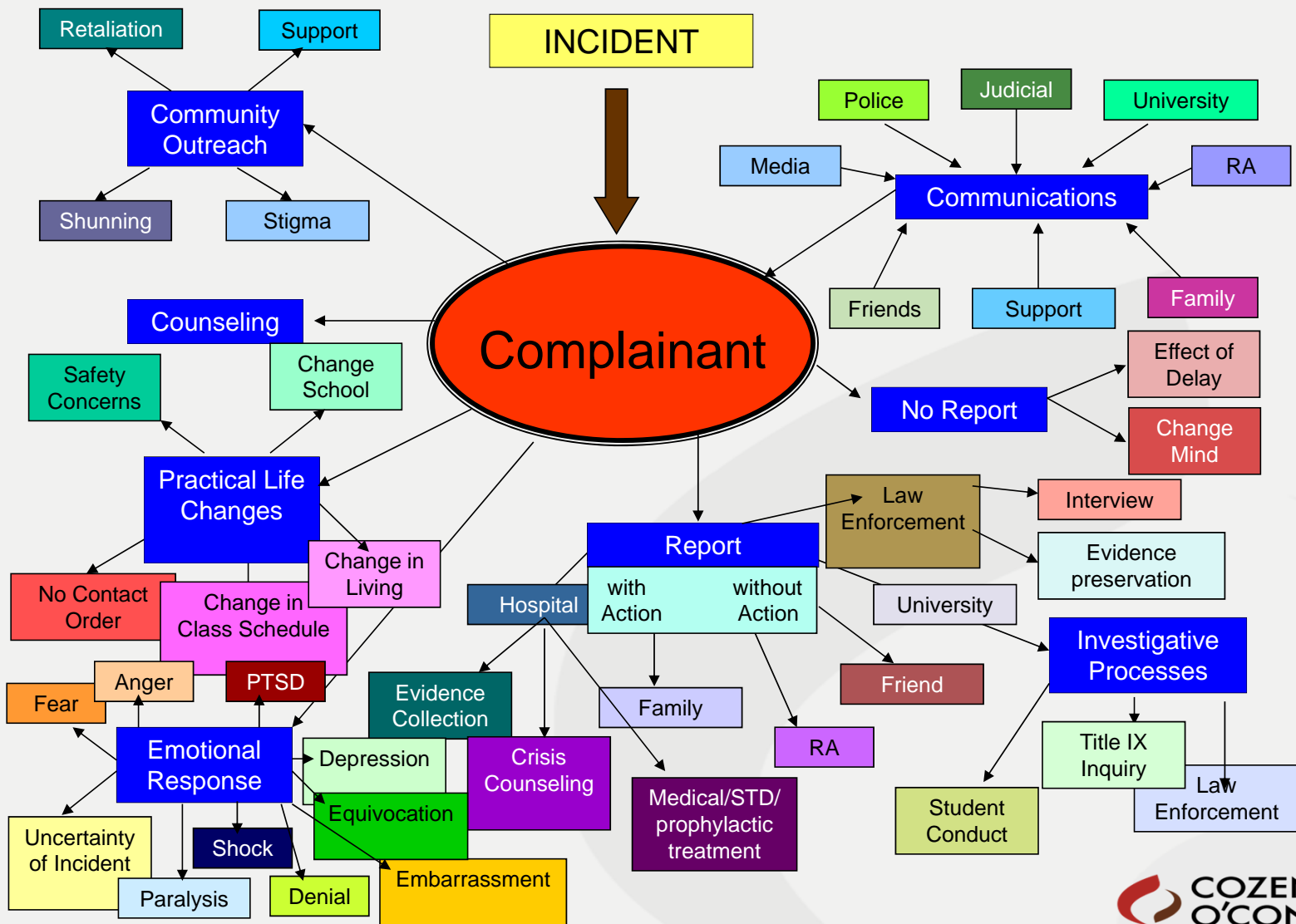
**Christi Hurt**  
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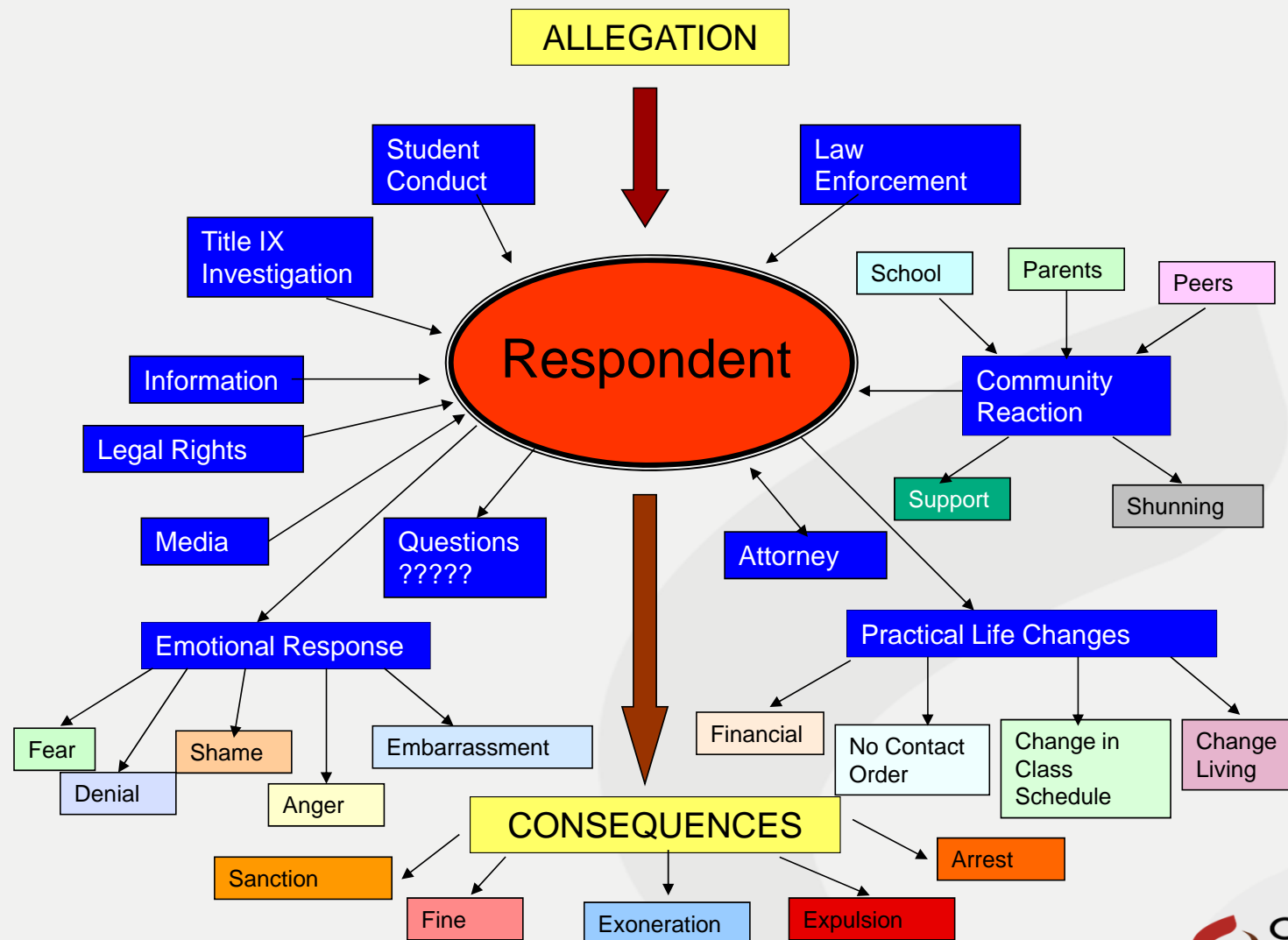
**Institutional Response Group Paralegal and Administration Team:**  
Heather Dunn, Megan Lincoln, Braelyn Schenk, and Mary Sotos

# FRAMING THE CONTEXT

# The Challenge of the Context







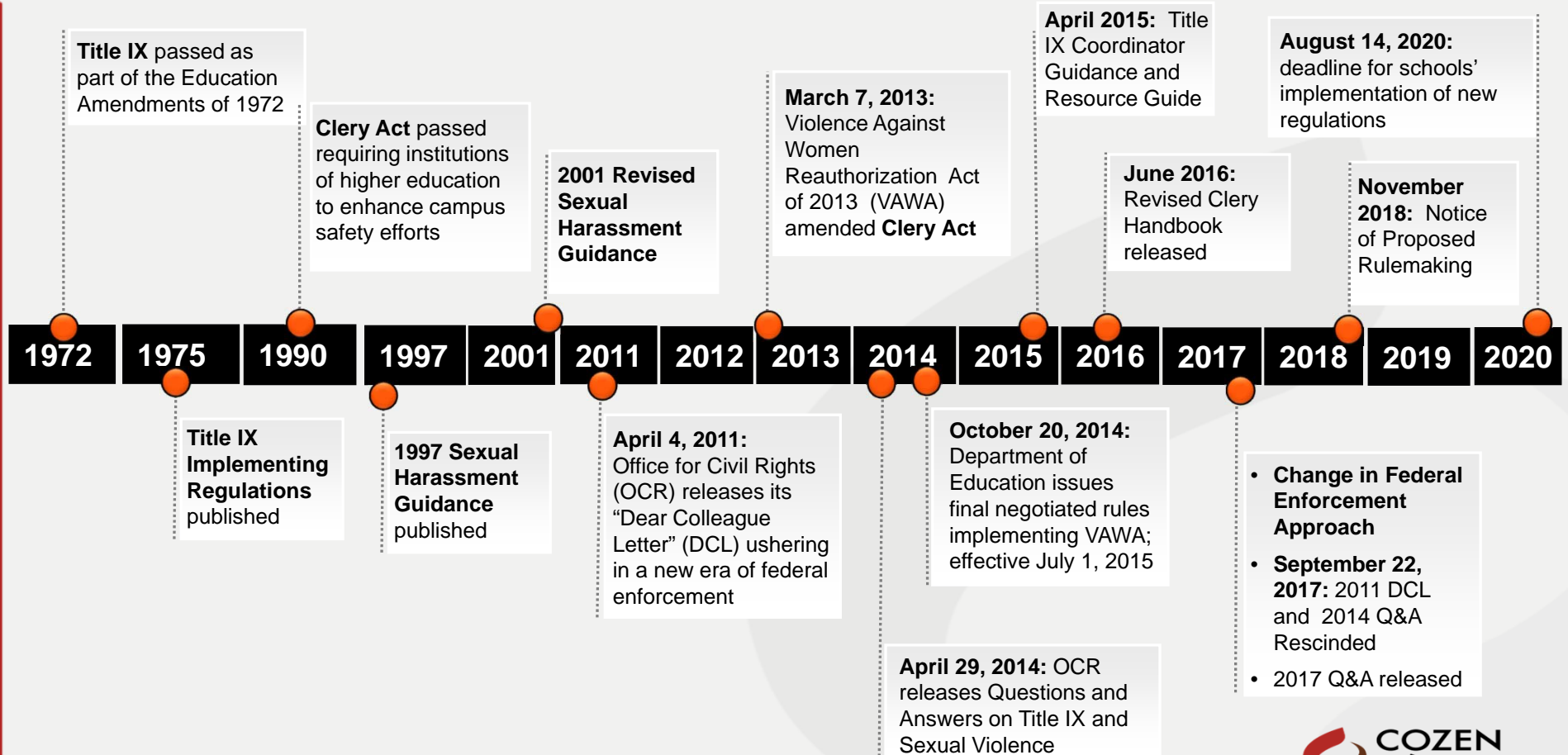
# Implementation Rubric

- Law
- Regulations
- Guidance
- Preamble and commentary
- OCR webinars, charts, blog
- Policy
- Higher education experience
- Institutional values

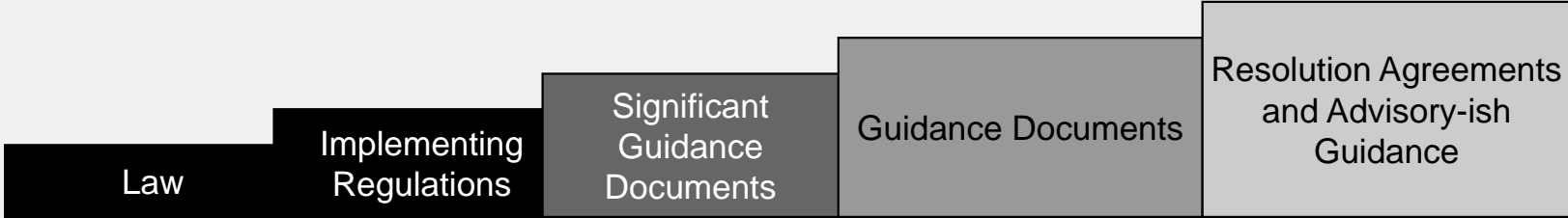




# Evolution of Federal Legislation and Guidance



# 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

# Guidance

- Preamble
  - Explains the basis and purpose for the final rule
  - Serves a guidance function
- Preamble on Prior Guidance
  - “The 2017 Q&A along with the 2001 Guidance, and not the withdrawn 2011 Dear Colleague Letter, remain the baseline against which these final regulations make further changes to enforcement of Title IX obligations.”
  - “Title IX policies and procedures that recipients have in place due to following the 2001 Guidance and the withdrawn 2011 Dear Colleague Letter remain viable policies and procedures for recipients to adopt while complying with these final regulations.”

Title IX Regulations issued May 6, 2020; Preamble at 17, 18

# Recent Court Cases

When a student accused of sexual misconduct faces severe disciplinary sanctions, and the credibility of witnesses (whether the accusing student, other witnesses, or both) is central to the adjudication of the allegation, fundamental fairness requires, at a minimum, that the university provide a mechanism by which the accused may cross-examine those witnesses.” *Doe v. Allee*, 242 Cal. Rptr. 3d 109, 136 (Cal. Ct. App. 2019)

In a DV case, the state court ruled, “...procedures were unfair because they denied Respondent a meaningful opportunity to cross-examine critical witnesses at an in-person hearing.” *Boermeester v Carry*, No. B290675, 2020 WL 2764406 at \*1 (Cal. Ct. App. May 28, 2020)

“If credibility is in dispute and material to the outcome, due process requires cross-examination.” *Doe v. Baum* 903 F.3d 575, 585 (6th Cir. 2018)

“[N]otions of fairness in Pennsylvania law include providing the accused with a chance to test witness credibility through some form of cross-examination and a live, adversarial hearing during which he or she can put on a defense and challenge evidence against him or her.” *Doe v. Univ. of the Sciences*, No. 19-2966, 2020 WL 2786840 at\*5 (3d Cir. May 29, 2020)



# The Courts on Due Process and Fundamental Fairness

**Doe v. Brandeis University**: 177 F.Supp.3d 561 (D. Mass. March 31, 2016).

**Doe v. Regents of the University of California**: 5 Cal. App. 5th 1055 (Cal. App. Ct. Nov. 22, 2016), review denied (Feb. 15, 2017).

**Doe v. Claremont McKenna College**: 25 Cal. App. 5th 1055, (Cal. Ct. App. 2018).

**Doe v. Allee (USC)**: 30 Cal. App. 5th 1036, (Cal. Ct. App. 2019).

**Doe v. Purdue University**: 2:17-cv-00033 (U.S. District Court of Appeals for the Seventh Circuit, June 28, 2019)

2016

**Doe. Rectors and Visitors of GMU**: 149 F. Supp. 3d 602 (E.D. Va. February 25, 2016) Memorandum Opinion.

**Doe v. University of Southern California**: 146 Cal. App. 4th 221 (Cal. App. Ct. April 5, 2016).

**Doe v. Trustees of Boston College**: 2016 WL 5799297 (D. Mass. October 4, 2016)

2017

2018

**Doe v. Baum**: 903 F.3d 575 (6th Cir. 2018).

2019

**Doe v. Rhodes College**: 2:19-cv-02336 (Western Dist. Tennessee, June 14, 2019).

2020

**Boermeester v. Carry**: No. B290675, 2020 WL 2764406 at \*1 (Cal. Ct. App. May 28, 2020).

**Doe v. Univ. of the Sciences**: No. 19-2966, 2020 WL 2786840 (3d Cir. May 29, 2020).

# The Courts on Due Process and Fundamental Fairness

**Doe v. Brandeis University**: Basic fairness requires the university to provide an accused student with: (1) notice of charges, (2) the right to counsel, (3) the opportunity to confront the accuser, (4) cross-examination of evidence or witness statements, and an effective appeal.

**Doe v. Regents of the University of California**

**Doe v. Claremont McKenna College**: When the respondent faces a severe penalty and the case turns on credibility, the process must provide for a hearing where the respondent may question, if even indirectly, the complainant.

2016

**Doe. Rectors and Visitors of GMU**: A university provide an accused student with notice of the full scope of charges.

**Doe v. University of Southern California**: A university must provide an accused student with supplemental notice if the charges against the respondent change or expand.

2017

**Doe v. Trustees of Boston College**

2018

**Doe v. Baum**: When credibility is at issue, the Due Process Clause mandates that a university provide accused students a hearing with the opportunity to conduct cross-examination.

# The Courts on Due Process and Fundamental Fairness

2019

**Doe v. Allee (USC)**: Fundamental fairness requires, at a minimum, that the university provide a mechanism by which the accused may cross-examine those witnesses, directly or indirectly, at a hearing before a neutral adjudicator with the power to find facts and make credibility assessments independently.

**Doe v. Rhodes College**: An accused student must be afforded the opportunity to question the complainant and review all relevant evidence prior to the hearing.

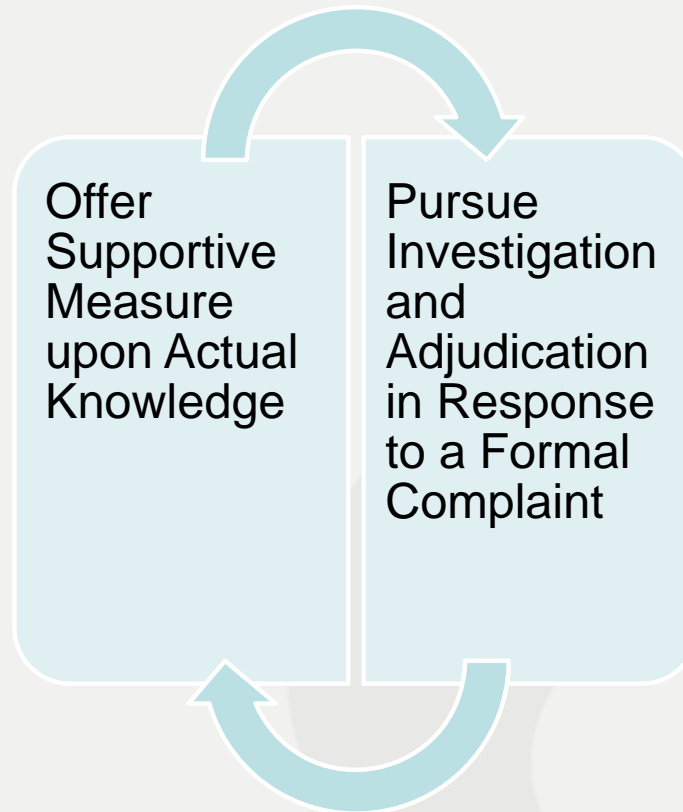
**Doe v. Purdue University**: Investigation report must be provided to the parties prior to the hearing and must include summaries of both inculpatory and exculpatory evidence.

2020

**Boermeester v. Carry**: In a DV case, the state court ruled, "...procedures were unfair because they denied Respondent a meaningful opportunity to cross-examine critical witnesses at an in-person hearing."

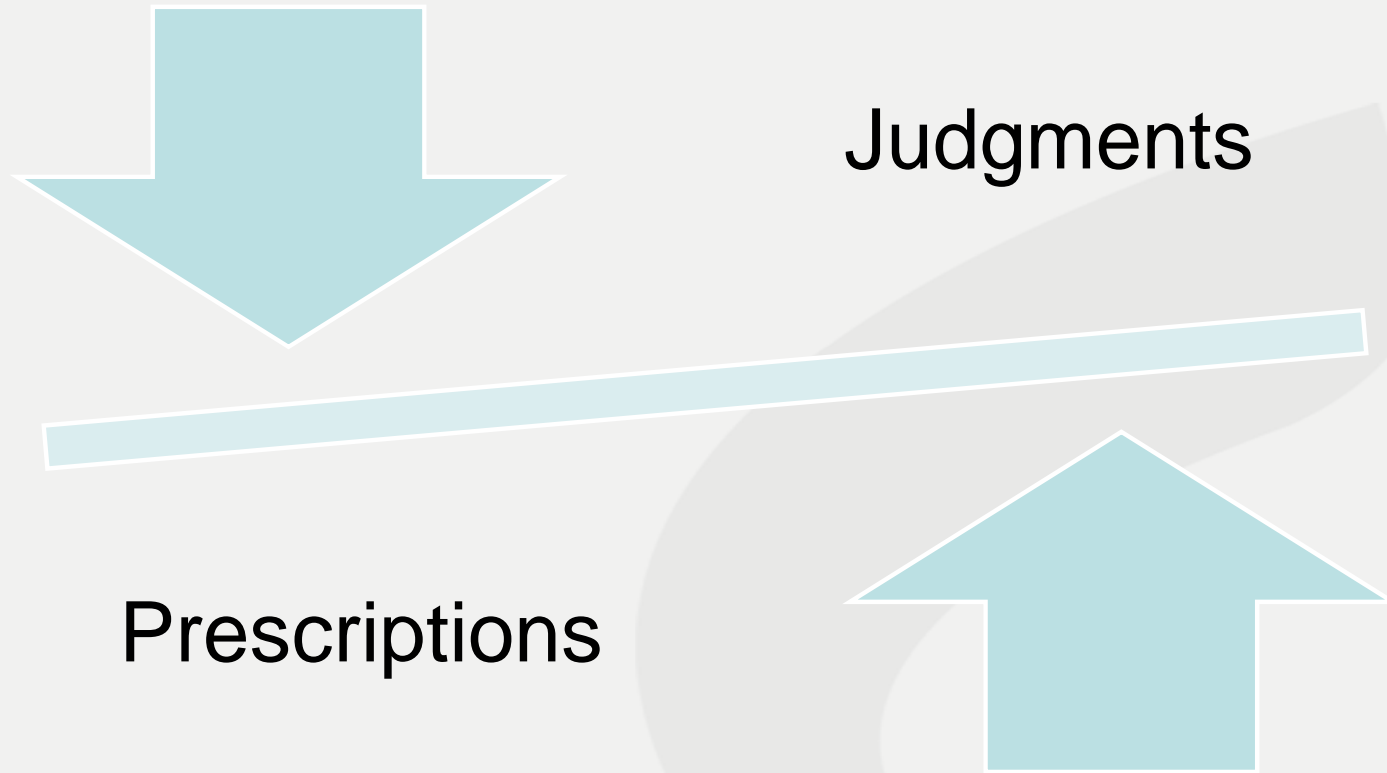
**Doe v. Univ. of the Sciences**: Notions of fairness include providing the accused with some form of cross-examination and a live, adversarial hearing during which he or she can put on a defense and challenge the evidence.

# Understanding Two Key Provisions

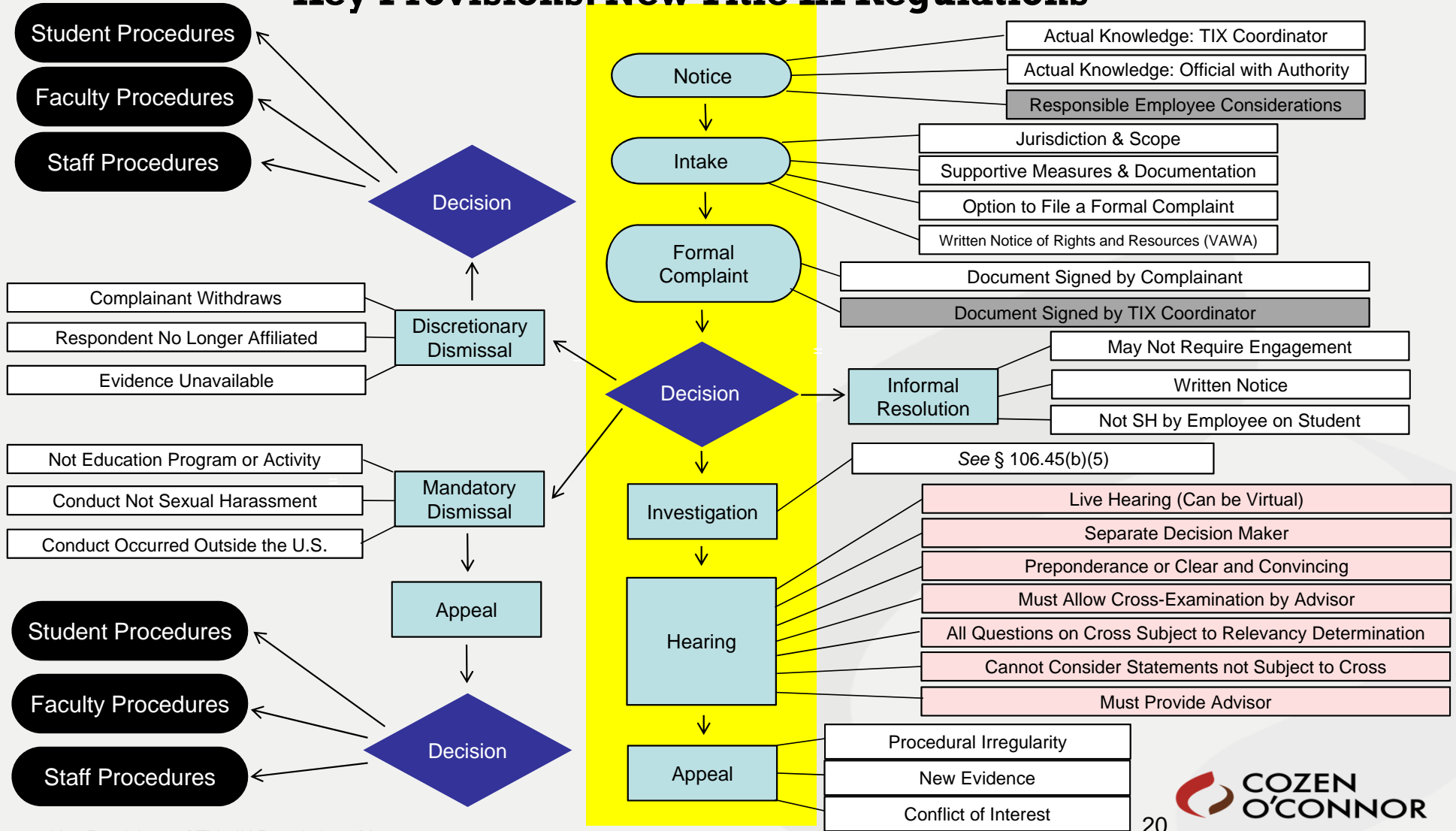




# Balancing



# Key Provisions: New Title IX Regulations



Key Provisions of Title IX Regulations May 19, 2020

# Regulations: “Legally Binding Obligations”

- “Because these final regulations represent the Department’s interpretation of a recipient’s legally binding obligations, **rather than best practices**, recommendations, or guidance, these final regulations focus on **precise legal compliance requirements** governing recipients.”

Title IX Regulations issued May 19, 2020; Preamble, 85 F.R. 30030

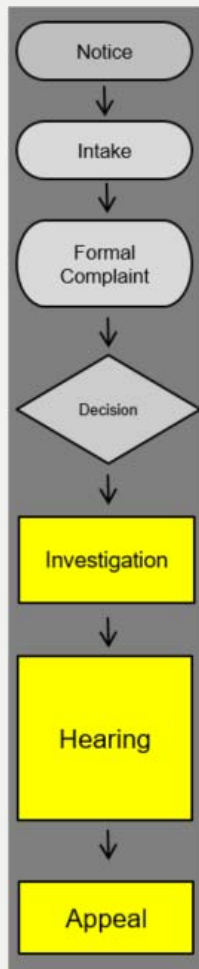
## Regulations: “Best Practices”

- “These final regulations leave recipients the **flexibility to choose to follow best practices and recommendations** contained in the Department’s guidance, or similarly, best practices and recommendations made by non-Department sources, such as Title IX consultancy firms, legal and social sciences scholars, victim advocacy organizations, civil libertarians and due process advocates and other experts.”

Title IX Regulations issued May 19, 2020; Preamble, 85 F.R. 30030

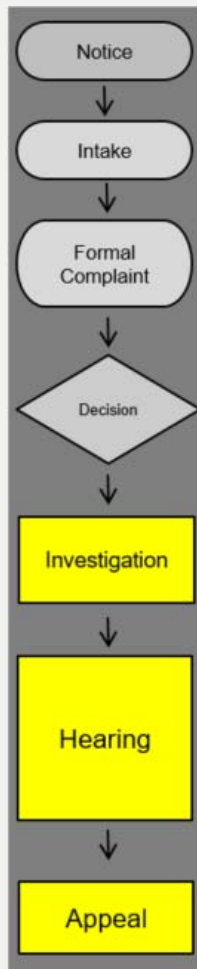
# **BASIC REQUIREMENTS OF GRIEVANCE PROCESSES**

# Grievance Process: The Basics



- Treat parties equitably
- Presumption of non-responsibility
- Reasonably prompt time frames with extensions for good cause
- Practitioners trained and free from conflict of interest and bias
- Uniform standard of evidence
- Restricted use of privileged information
- Objective evaluation of all relevant evidence
- Credibility determinations not based on person's status
- Range of supportive measures, remedies and sanctions
- Remedies only following a finding of responsibility
- Sanctions only following § 106.45 grievance process
- Designated appeal grounds

# Basic Requirements

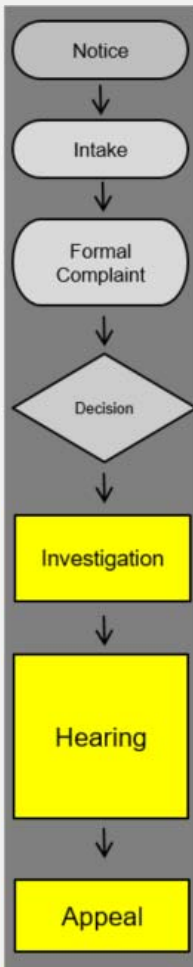


- **Treat complainants and respondents equitably** by providing **remedies** to a complainant where a determination of responsibility for sexual harassment has been made against the respondent, and by following a **grievance process** that complies with this section before the imposition of any disciplinary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

Relevant Regulations Sections:

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

# Basic Requirements



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

Relevant Regulations Sections:

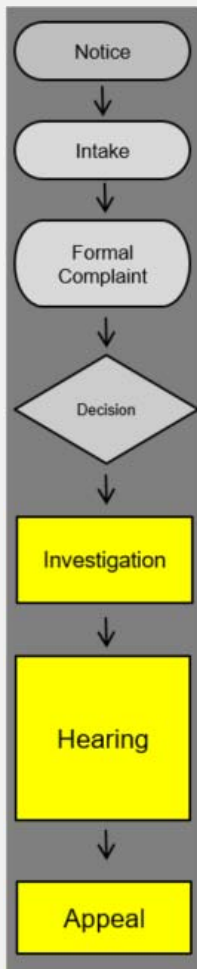
Equitable Treatment: §§ 106.44(a) and 106.45(b)(1)(i)

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

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



# Basic Requirements



- **Presumption that the respondent is not responsible** for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process
- 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

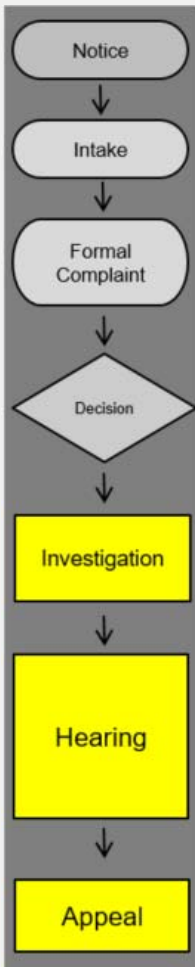
Relevant Regulations Sections:

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)

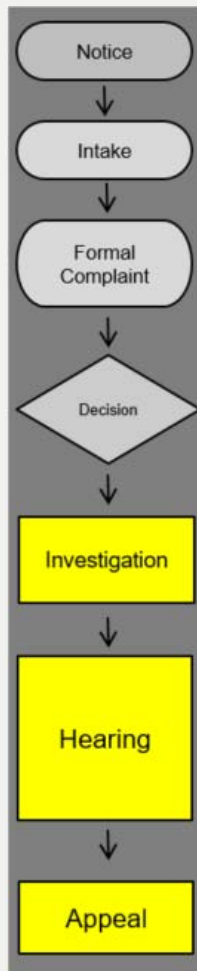
# Basic Requirements



- 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)

# 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)

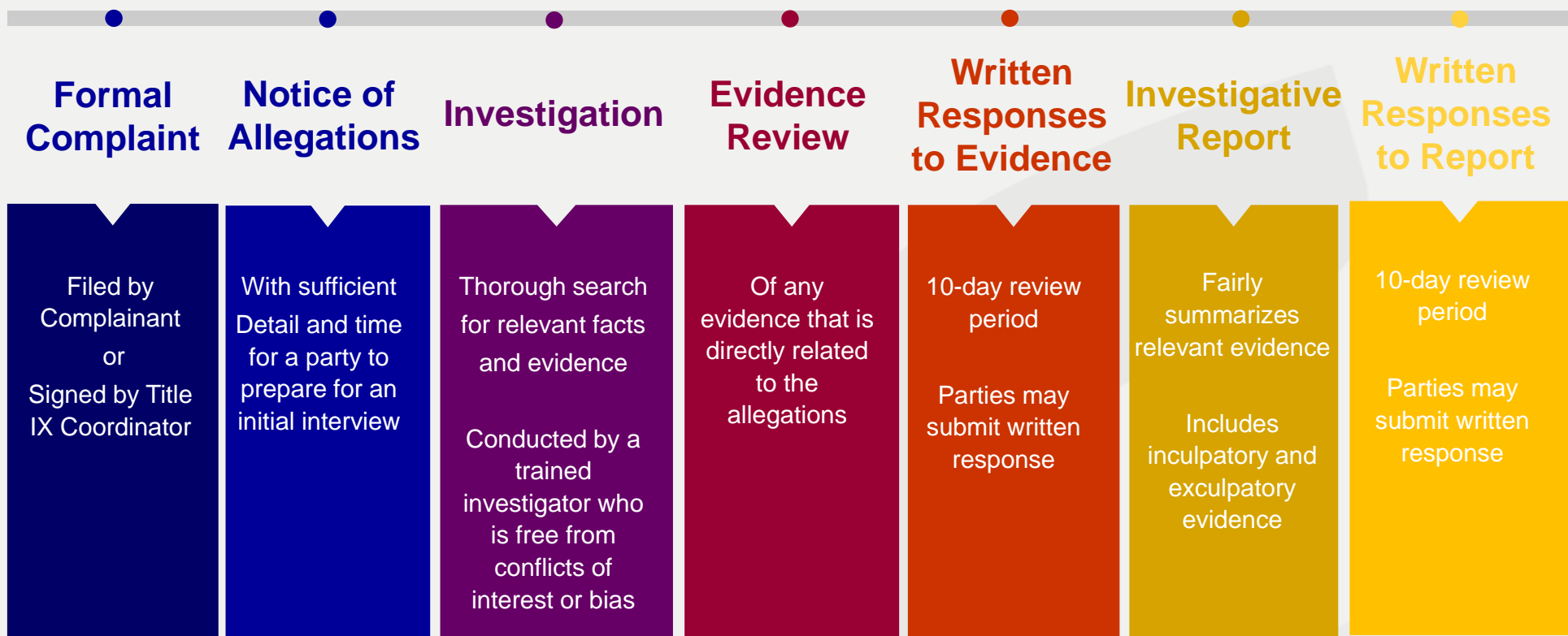
Range of Supportive Measures: § 106.45(b)(1)(ix)

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

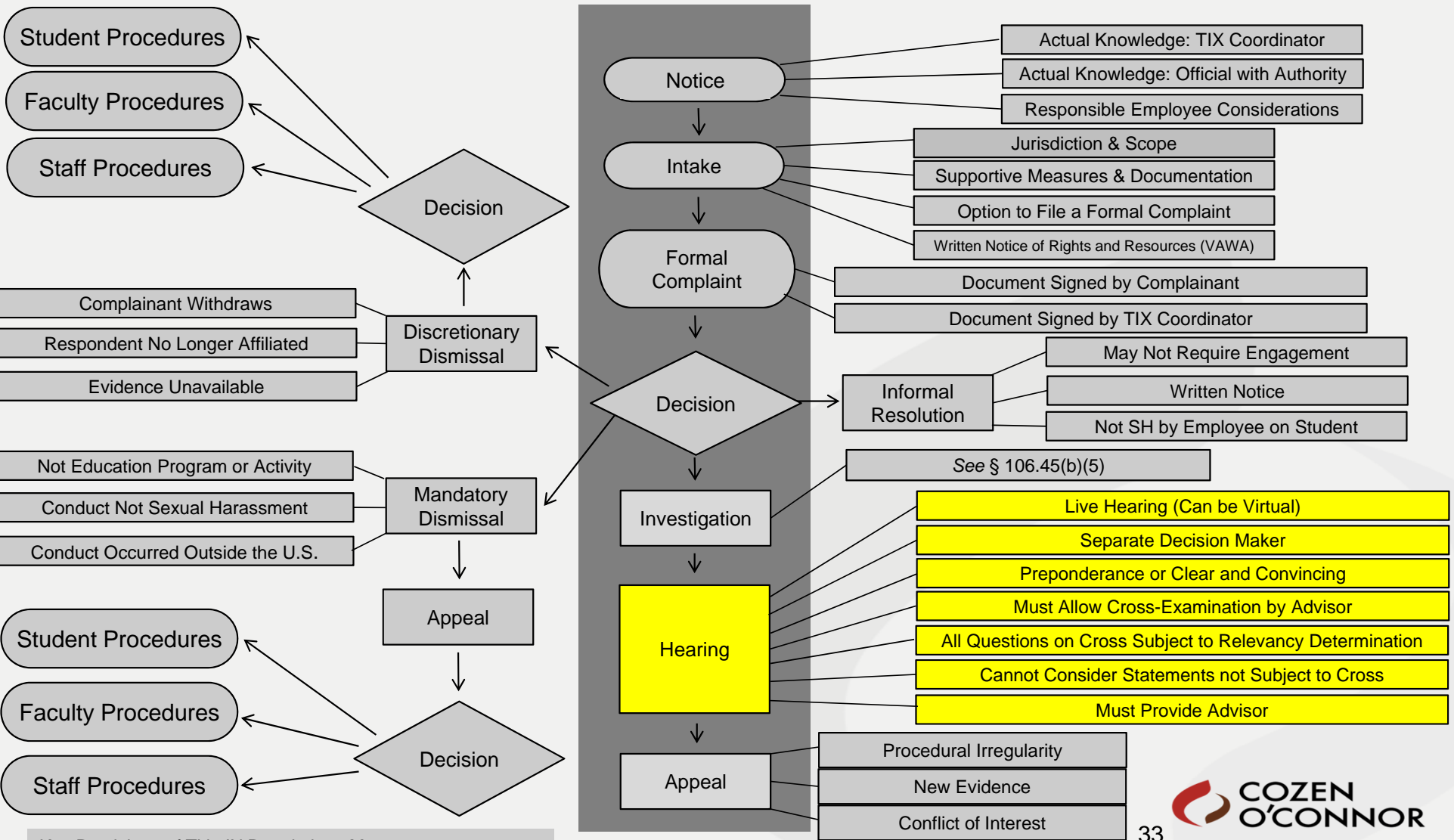
# Recap of Investigation Requirements

- Formal Complaint
- Notice of Allegations
- Investigation
- Evidence Review
  - Review and response period
- Investigative Report
  - Review and response period

# Recap of Investigation Requirements



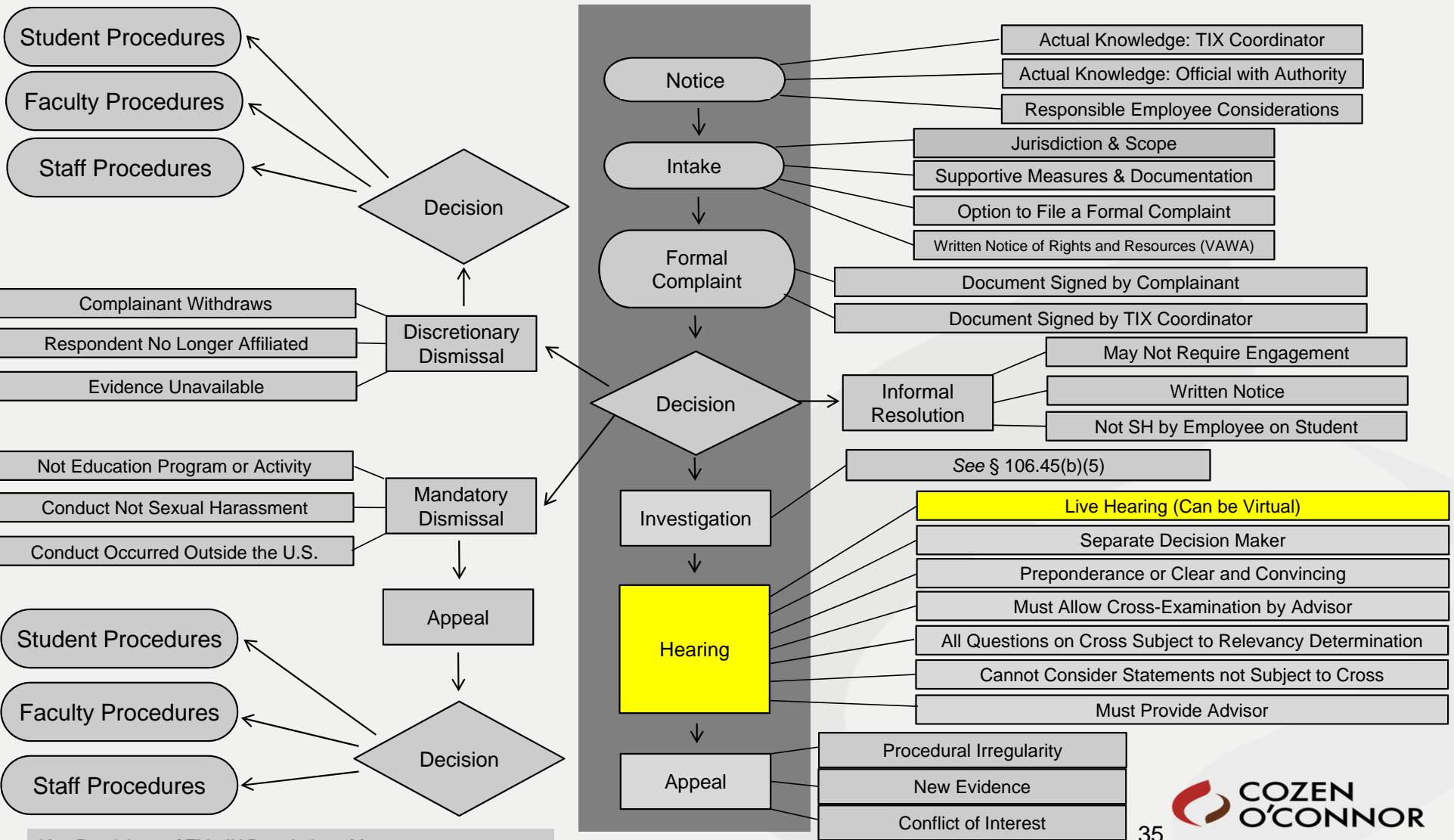
# **OVERVIEW OF HEARING REQUIREMENTS**



Key Provisions of Title IX Regulations May 19, 2020

# THE LIVE HEARING REQUIREMENT





Key Provisions of Title IX Regulations May 19, 2020

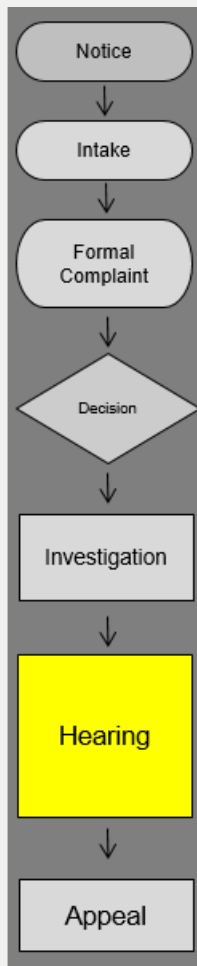
# Live Hearing Required

- For postsecondary institutions, the recipient's grievance process **must provide for a live hearing.**



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

# Live Hearing Required



- [A] live hearing gives both parties the most meaningful, transparent opportunity to present their views of the case to the decision-maker, **reducing the likelihood of biased decisions, improving the accuracy of outcomes, and increasing party and public confidence in the fairness and reliability** of outcomes of Title IX adjudications.

Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30359 .

# Option to Use Technology

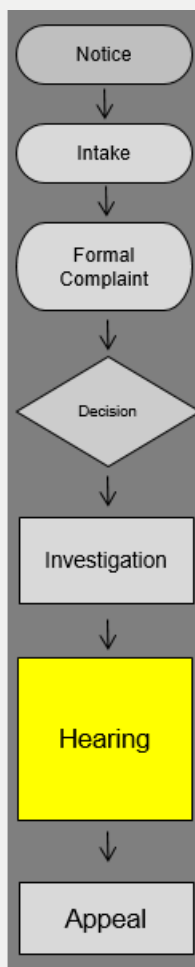


- Live hearings pursuant to this paragraph may be conducted with all parties physically present in the same geographic location or, at the recipient's direction, any or all parties, witnesses and other participants may appear at the live hearing **virtually, with technology** enabling participants simultaneously to see and hear each other.

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

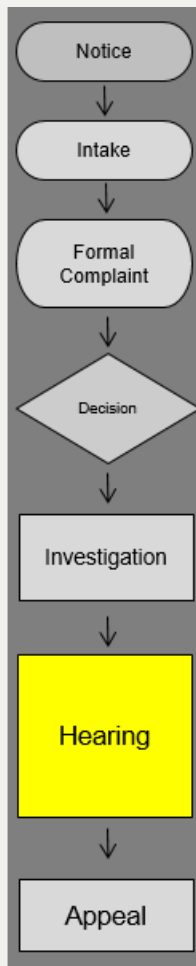
# Virtual Hearing Considerations

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



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

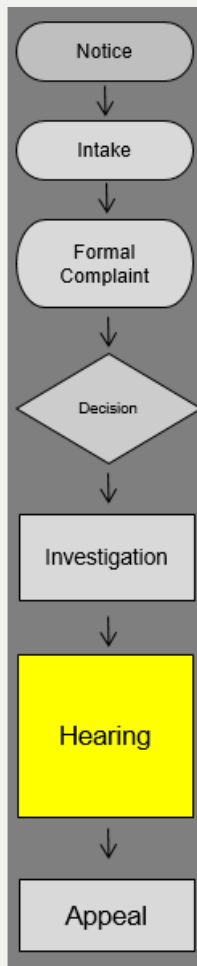
# Virtual Hearing Considerations



- The Department agrees with commenters who asserted that cross-examination provides opportunity for a decision-maker to assess credibility based on a number of factors, **including evaluation of body language and demeanor**, specific details, inherent plausibility, internal consistency, and corroborative evidence.

Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30321;

# Virtual Hearing Considerations



- The final regulations grant recipients discretion to allow participants, including witnesses, to appear at a live hearing virtually; however, **technology must enable all participants to see and hear other participants**, so a telephonic appearance would not be sufficient to comply with §106.45(b)(6)(i).

Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30348

# Flexibility to Adopt Rules

- Recipients may adopt rules that govern the **conduct and decorum** of participants at live hearings so long as such rules comply with these final regulations and apply equally to both parties.

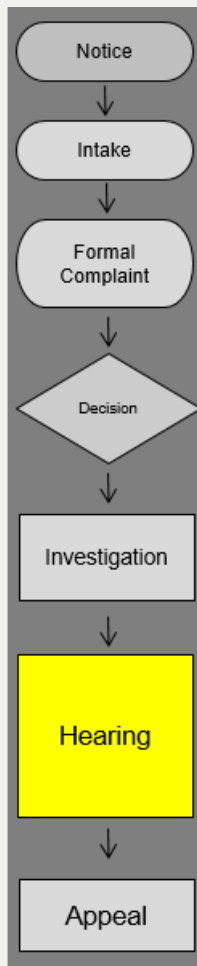


Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30315.



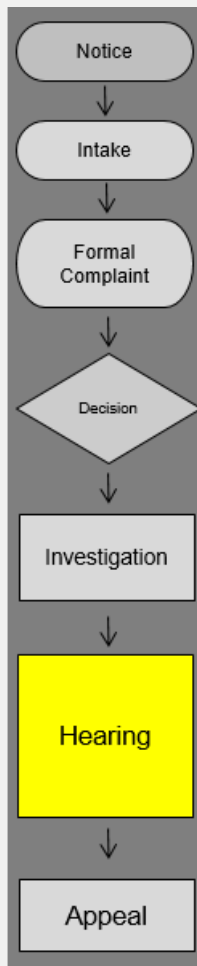
# Flexibility to Adopt Rules

- 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).



Title IX Regulations May 19, 2020; Preamble at 30248

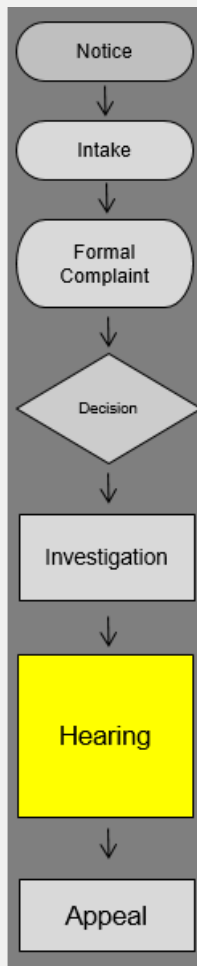
# Relevance Limitation on Flexibility



- **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

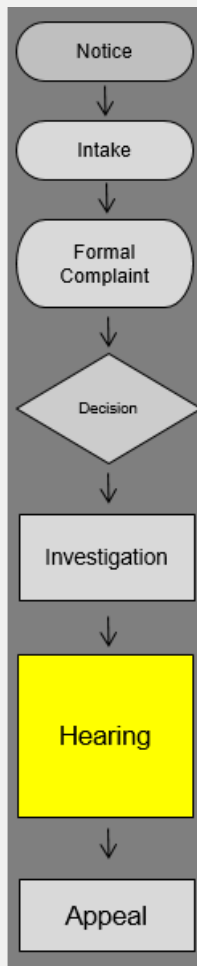
# Participation by Parties and Witnesses



- The Department understands commenters concerns that **respondents, complainants, and witnesses may be absent from a hearing**, or may refuse to submit to cross-examination, for a variety of reasons, including a respondent's self-incrimination concerns regarding a related criminal proceeding, a complainant's reluctance to be cross-examined, or a witness studying abroad, among many other reasons.

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

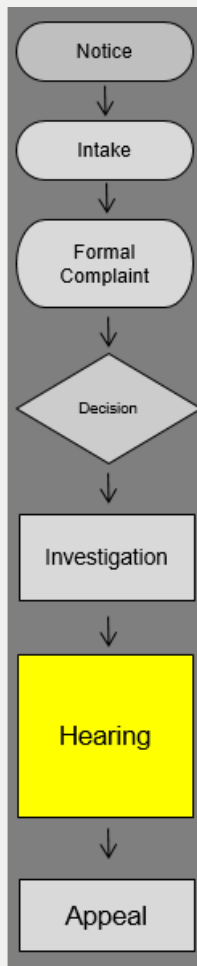
# Participation by Parties and Witnesses



- In response to commenters' concerns, the Department has revised the proposed regulations as follows:
  - (1) We have revised § 106.45(b)(6)(i) to state that where a decision-maker must not rely on an absent or non-cross examined party or witness's statements, the decision-maker **cannot draw any inferences about the determination regarding responsibility based on such absence or refusal** to be cross-examined;
  - (2) We have revised § 106.45(b)(6)(i) to grant a recipient discretion to hold the entire hearing **virtually using technology** that enables any or all participants to appear remotely;

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

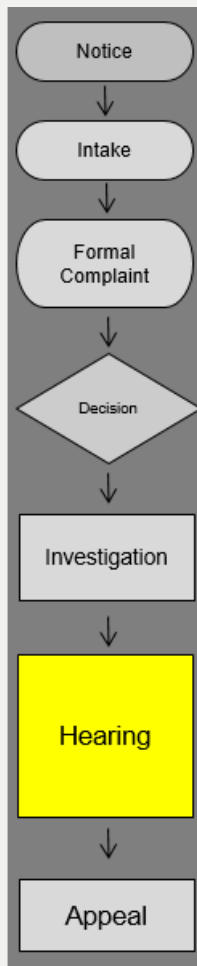
# Participation by Parties and Witnesses



- (3) § 106.71 **expressly prohibits retaliation** against any party, witness, or other person exercising rights under Title IX, including the right to participate or refuse to participate in a grievance process;
- (4) § 106.45(b)(3)(ii) grants a recipient **discretion to dismiss a formal complaint**, or allegations therein, where the complainant notifies the Title IX Coordinator in writing that the **complainant wishes to withdraw** the allegations, or **the respondent is no longer enrolled or employed** by the recipient, or **specific circumstances prevent the recipient from gathering evidence** sufficient to reach a determination.
- These changes address many of the concerns raised by commenters stemming from reasons why parties or witnesses may not wish to participate and the consequences of non-participation.

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

# Participation by the Complainant

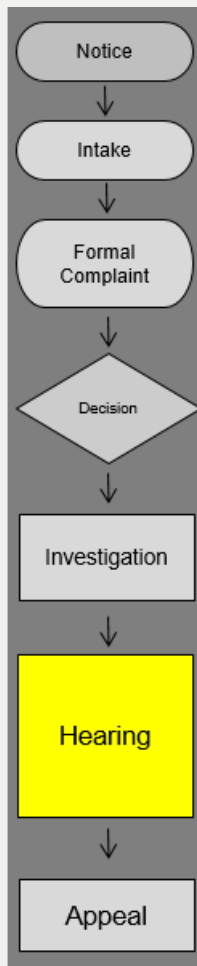


- Where a grievance process is initiated because the Title IX Coordinator, and not the complainant, signed the formal complaint, the complainant who did not wish to initiate a grievance process **remains under no obligation to then participate in the grievance process**, and the Department does not believe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

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

# Transcript or Recording

- Recipients must create an **audio or audiovisual recording, or transcript**, of any live hearing and make it available to the parties for inspection and review.



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

# Applicability to K-12 Schools

- 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.**



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



# Academic Medical Centers



- **Academic medical centers are not postsecondary institutions**, although an academic medical center may be affiliated with ... or even considered part of the same entity as the postsecondary institution.
- Through this revision, the Department is giving entities like academic medical centers **greater flexibility** in determining the appropriate process for a formal complaint.

Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30446

# Non-Postsecondary Institutions

- 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 party wants asked of any party or witness, **provide each party with the answers**, and **allow for additional, limited follow-up questions**.



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

# Non-Postsecondary Institutions

- As to recipients that are not postsecondary institutions, the Department has revised § 106.45(b)(6)(ii) to provide that the recipient *may* require a live hearing and *must* afford each party the opportunity to submit written questions, provide each party with the answers, and allow for additional, limited follow-up questions from each party.

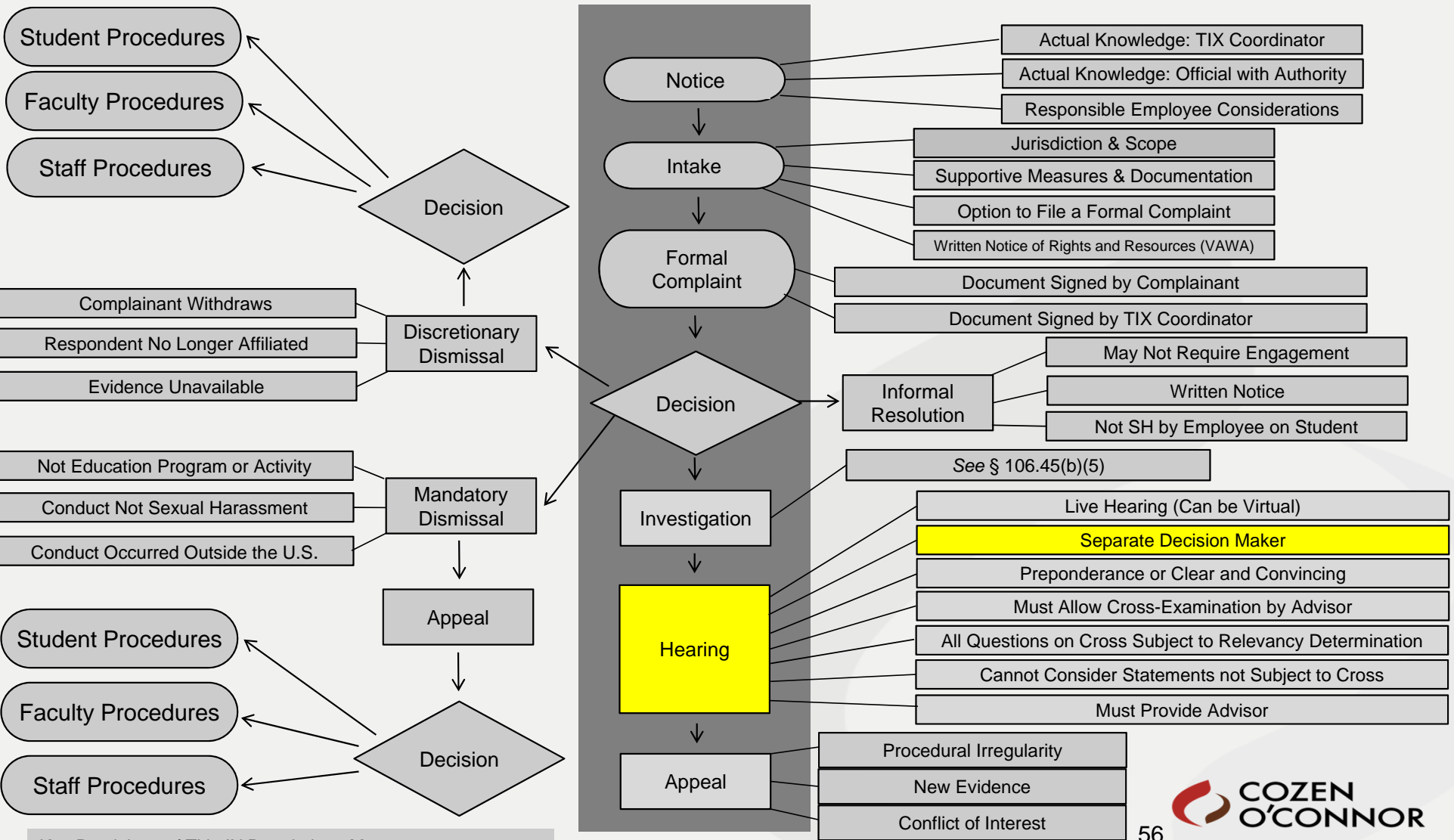


Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30446

# Practical Considerations & Effective Practices

- Impact of requirement that parties and/or witnesses participate in the hearing
  - Party vs. witness
  - Student vs. employee
- Decisions re: technology
- Recording versus transcription
- Procedures for non-postsecondary institutions

# **ROLE OF DECISION-MAKER**



Key Provisions of Title IX Regulations May 19, 2020

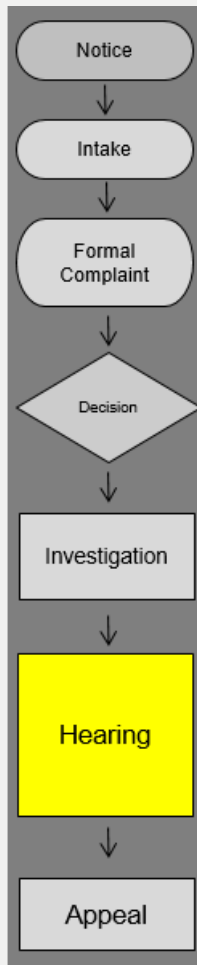
# Determine Relevance of Questions

- Before a complainant, respondent, or witness answers a cross-examination or other question, the decision-maker(s) must **first determine whether the question is relevant ...**



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

# Explain Decisions to Exclude Questions



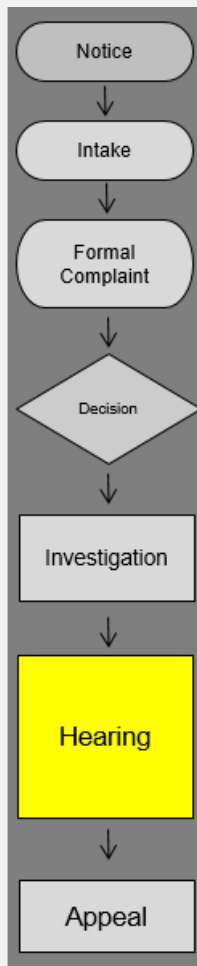
- The decision-maker(s) must explain to the party proposing the questions **any decision to exclude** a question as not relevant.

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



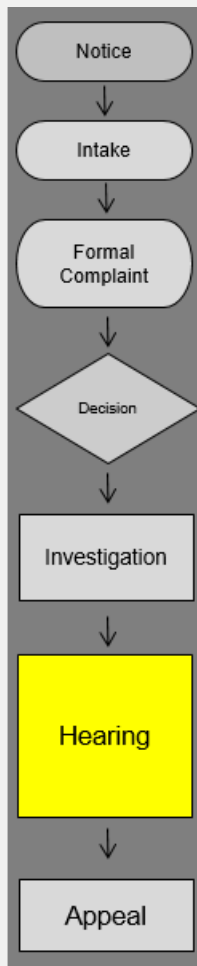
# Apply the Standard of Evidence

- To reach [a] determination, the recipient must apply the standard of evidence described in paragraph (b)(1)(vii) of this section.



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

# Issue Written Determinations



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

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

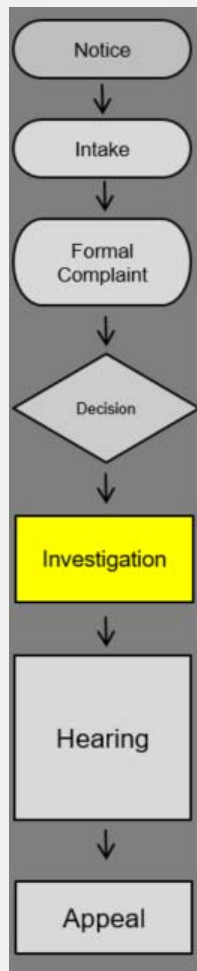
# Separate Decision-Maker

- The Department wishes to clarify that the final regulations **require the Title IX Coordinator and investigator to be different individuals from the decision-maker**, but nothing in the final regulations requires the Title IX Coordinator to be an individual different from the investigator.



Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30372

# Investigator May not Determine Responsibility



- § 106.45(b)(7)(i) prevents an investigator from actually making a determination regarding responsibility.

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

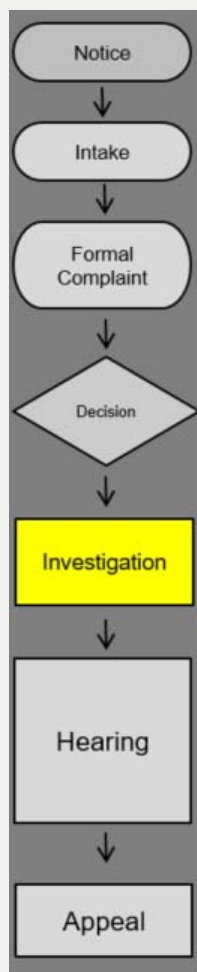
# Decision-Maker Must Determine Responsibility



- Nothing in the final regulations prevents Title IX Coordinators from offering recommendations regarding responsibility to the decision-maker for consideration, but the final regulations **require the ultimate determination regarding responsibility to be reached by an individual (i.e., the decision-maker) who did not participate in the case as an investigator or Title IX Coordinator.**

Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30372

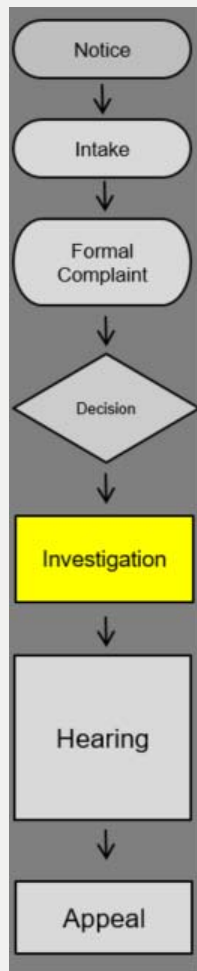
# Independent Obligation to Evaluate Evidence



- 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.

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

# Independent Obligation to Evaluate Credibility



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

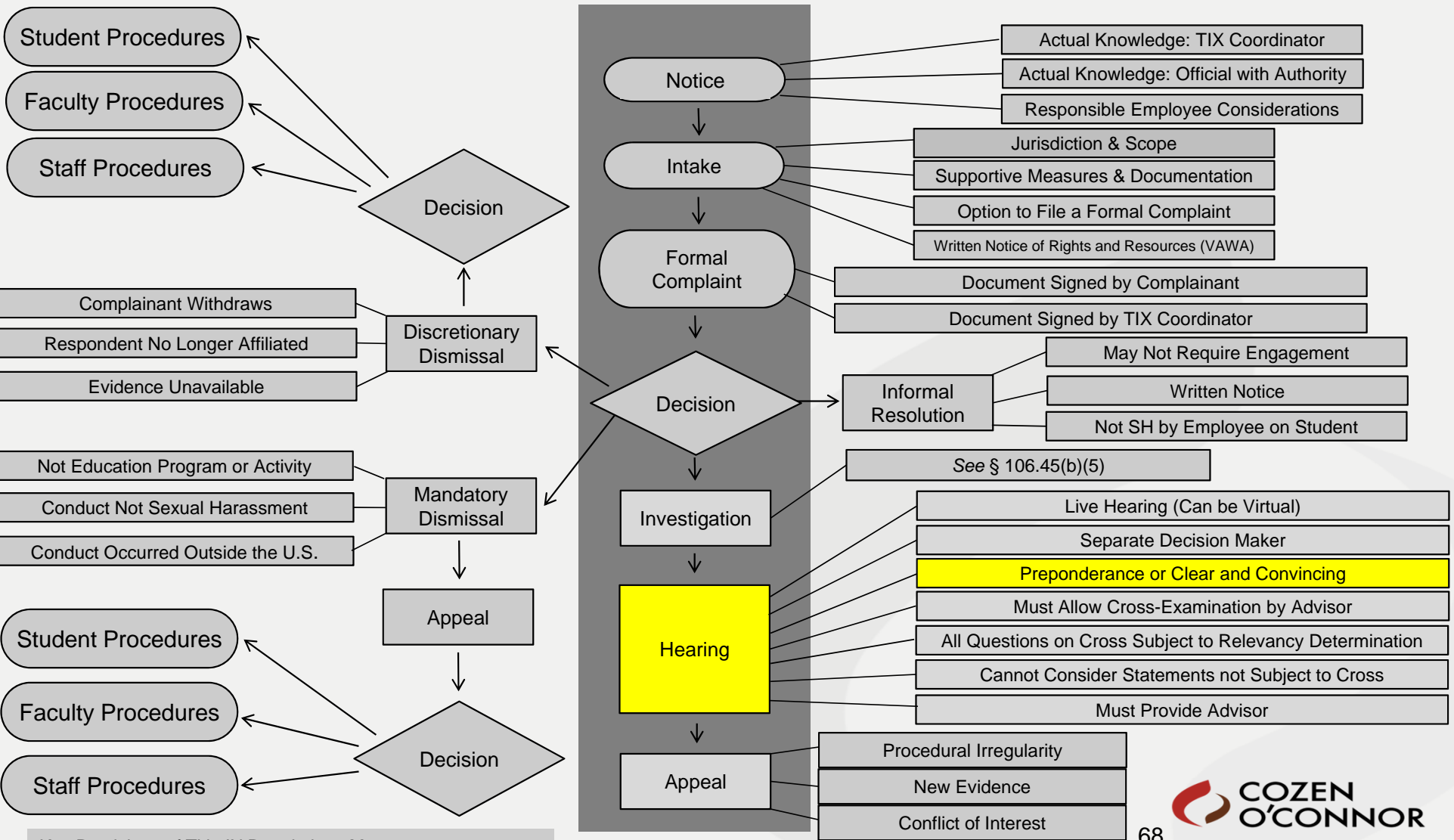
Title IX Regulations May 19, 2020; §§ 106.45(b)(5)(vii); Preamble 85 F.R.30308 & 30436

# Practical Considerations & Effective Practices

- Choice of decision-maker(s)
  - Hearing panel vs. sole adjudicator
  - External professional vs. internal administrator
- Decision-maker on sanction
  - Can be same or different from decision-maker on finding
- Use of Hearing Coordinator?
- Whether to have investigator make recommended findings or include a credibility analysis

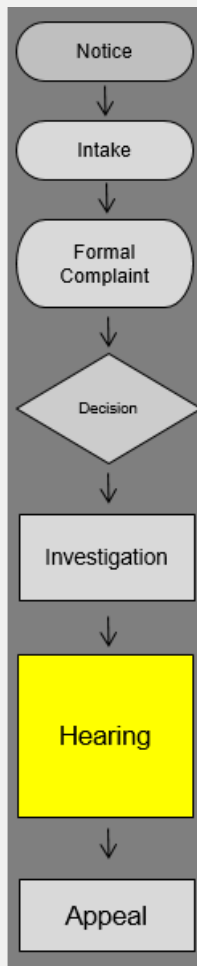


# **STANDARD OF EVIDENCE**



Key Provisions of Title IX Regulations May 19, 2020

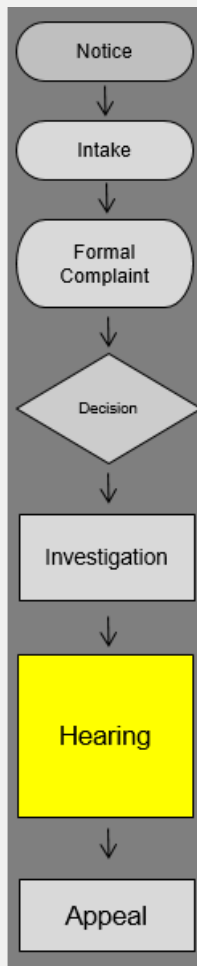
# Standard of Evidence



- [T]he recipient must apply the same standard of evidence to student and employee matters, using either the clear and convincing standard or the preponderance of the evidence standard.
- The recipient must apply the same standard of evidence to all formal complaints of sexual harassment.

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

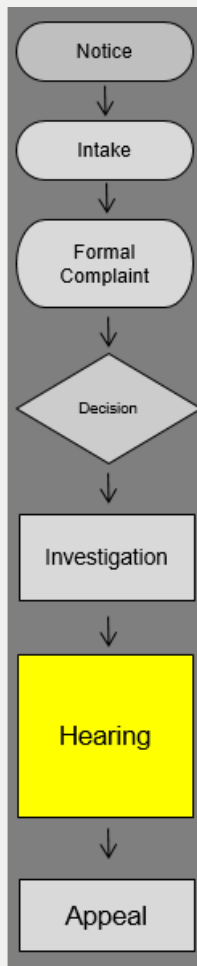
# Standard of Evidence



- For reasons described above, the Department has determined that the approach to the standard of evidence contained in § 106.45(b)(1)(vii) and § 106.45(b)(7)(i) of the final regulations represents the **most effective way of legally obligating recipients to select a standard of evidence** for use in resolving formal complaints of sexual harassment under Title IX to ensure a fair, reliable grievance process **without unnecessarily mandating that a recipient select one standard over the other.**

Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30388.

# Standard of Evidence



- In short, under the final regulations the **same standard of evidence will apply to all formal complaints of sexual harassment** under Title IX responded to by a particular recipient, **whether the respondent is a student or employee.**

Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30388.

# Standard of Evidence



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

# Clear and Convincing\*

- The evidence is highly and substantially more likely to be true than untrue
- The fact finder must be convinced that the contention is highly probable
- Proof which requires more than a preponderance of the evidence but less than proof beyond a reasonable doubt
- Clear and convincing proof will be shown where the truth of the facts asserted is highly probable
- Quality of the evidence, not quantity
- NOT beyond a reasonable doubt

\* Based on common usage.

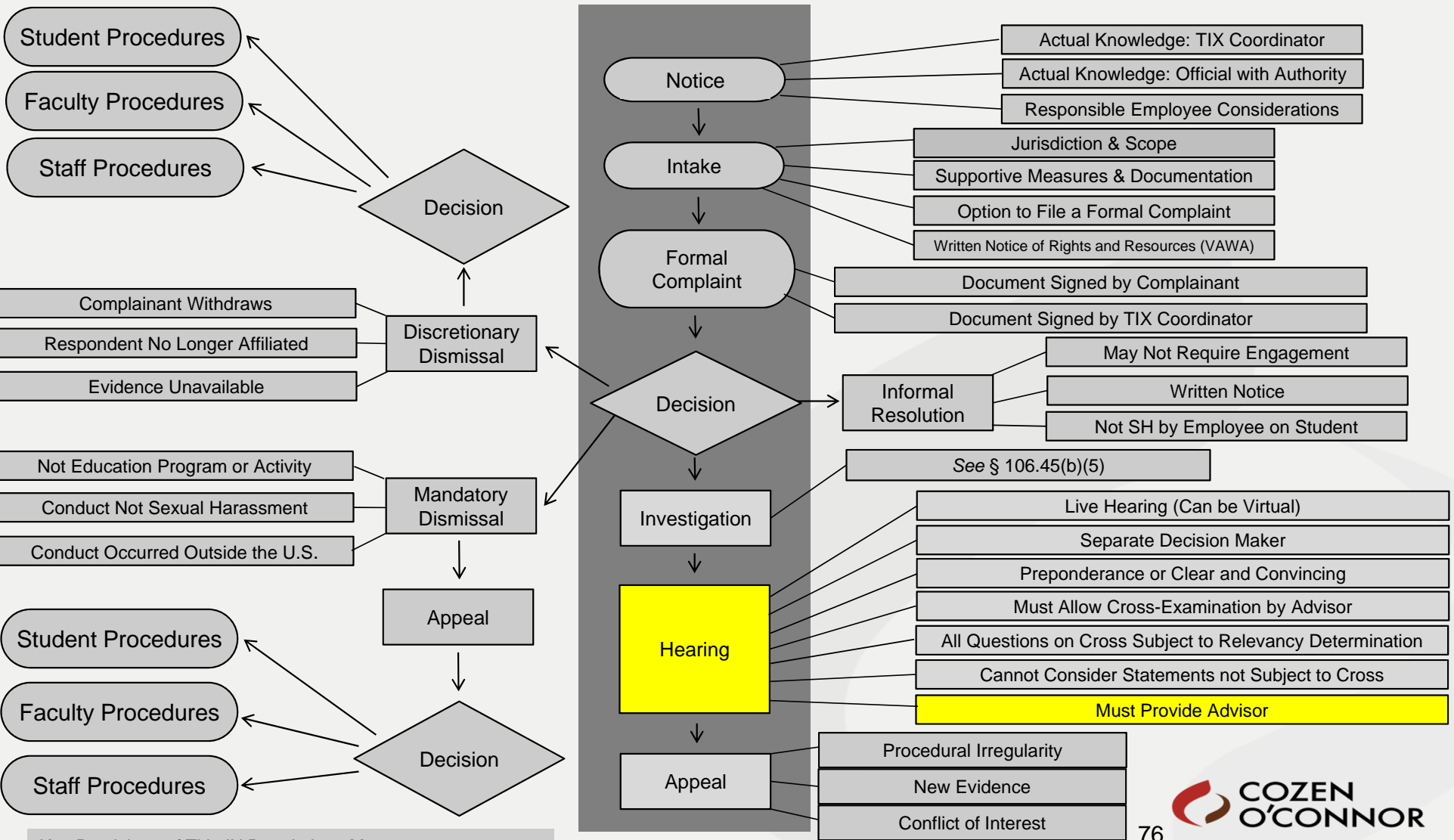
# Preponderance of the Evidence\*

- More likely to be true than not
- More probable than not
- The greater weight of the evidence
- Tipping the scale ever so slightly
- 51 %
- Based on the more convincing evidence and its probable truth or accuracy, not on the amount
- Quality of the evidence, not quantity
- NOT beyond a reasonable doubt

\* Based on common usage.

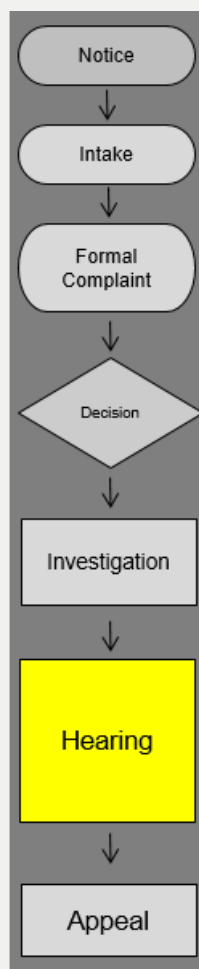


# ADVISOR OF CHOICE



Key Provisions of Title IX Regulations May 19, 2020

## Title IX: Advisor of Choice



- Parties must have the same opportunities to ... be accompanied to any related meeting or proceeding by **an advisor of their choice**.
- The advisor 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.
- “[T]he role of an advisor is to assist and advise the party.”

Title IX Regulations May 19, 2020; §106.45(b)(5)(iv);  
Preamble 85 F.R. 30328.

## **VAWA: Advisor of Choice**

- Provide the accuser and the accused with the same opportunities to have others present during any institutional disciplinary proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the **advisor of their choice**
- **Not limit the choice of advisor** or presence for either the accuser or the accused in any meeting or institutional disciplinary proceeding
- However, the institution **may establish restrictions regarding the extent to which the advisor may participate in the proceedings**, as long as the restrictions apply equally to both parties

Violence Against Women Reauthorization Act § 668.46(k)(2)(iii)-(iv); 79 F.R. 62789

# No Limit as to Conflicts of Interest



- The Department notes that the 106.45 (b)(1)(iii) prohibition of Title IX personnel having conflicts of interest or bias **does not apply to party advisors** (including advisors provided to a party by a post secondary institution as required under 106.45(b)(6)(i)) and thus, **the existence of a possible conflict of interest where an advisor is assisting one party and also expected to give a statements as a witness does not violate the final regulations.**

Title IX Regulations May 19, 2020; Preamble at 30299

# **ROLE OF THE ADVISOR AT HEARING**

# Role of the Advisor

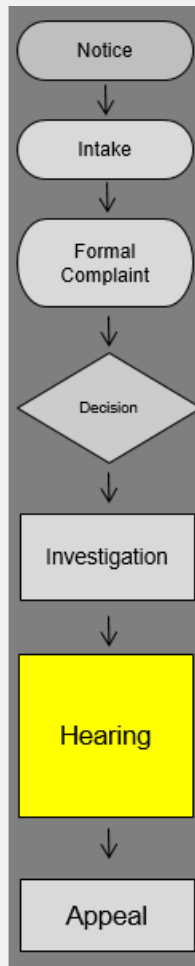


- At the live hearing, the decision-maker(s) must permit each party's advisor to **ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility.**

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

## Advisor's Role at the Hearing

- Such cross-examination at the live hearing must be conducted directly, orally, and in real time by the party's advisor of choice and never by a party personally, **notwithstanding the discretion of the recipient under paragraph (b)(5)(iv) of this section to otherwise restrict the extent to which advisors may participate in the proceedings.**



Title IX Regulations, May 19, 2020; Preamble, 85 F.R. 30336, 30577.



# Cross-Examination by Advisor

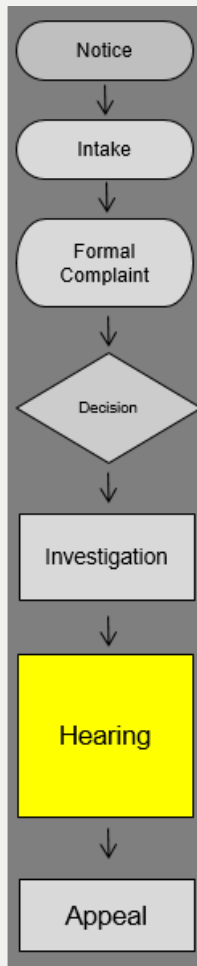
- [A] party's advisor may appear and conduct cross-examination **even when the party whom they are advising does not appear.**



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

## Discretion as to Advisor's Role

- 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, 85 F.R. 30298.

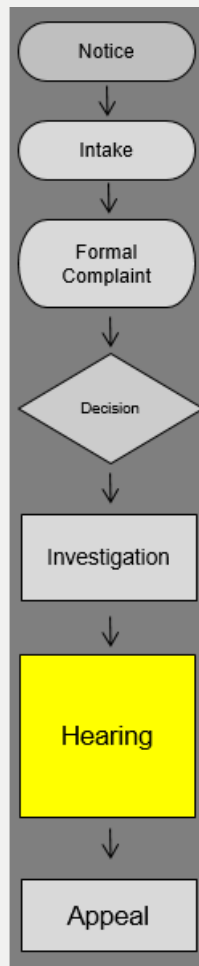
## Discretion as to Advisor's Role

- 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.

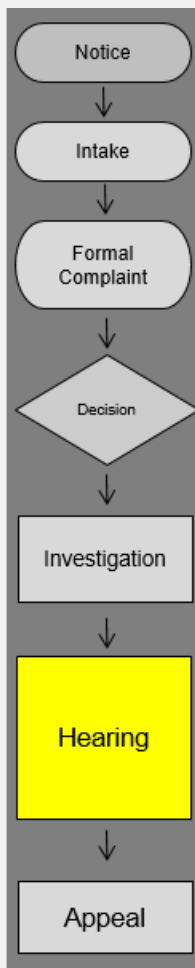
# Obligation to Provide an Advisor



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

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

# Must Provide Advisor Even in Party's Absence



- [W]here one party does not appear and that party's advisor of choice does not appear, a recipient-provided advisor **must still cross-examine the other, appearing party "on behalf of" the non-appearing party**, resulting in consideration of the appearing party's statements but not the non-appearing party's statements (without any inference being drawn based on the non-appearance).

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

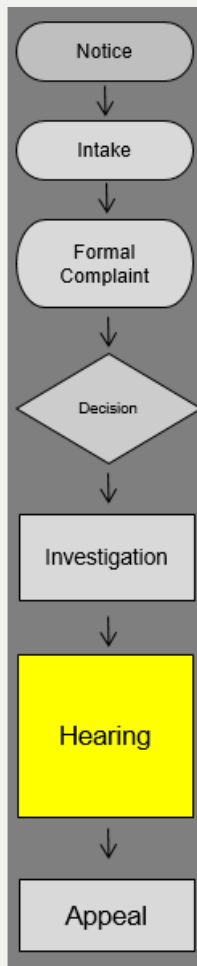
# Appearance Without an Advisor

- The final regulations do not preclude recipients from adopting a rule that requires parties to inform the recipient in advance of a hearing whether the party intends to bring an advisor of choice to the hearing; but **if a party then appears at a hearing without an advisor** the recipient would need to **stop the hearing as necessary to permit the recipient to assign an advisor** to that party to conduct cross-examination.



Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30342

# Refusal to Conduct Cross-Examination



- A party cannot “fire” an assigned advisor during the hearing, **but if the party correctly asserts that the assigned advisor is refusing to “conduct cross-examination on the party’s behalf” then the recipient is obligated to provide the party an advisor to perform that function, whether that means counseling the assigned advisor to perform that role, or stopping the hearing to assign a different advisor. ...**

Title IX Regulations, May 19, 2020; 85 F.R. 30342

# Party Cannot Conduct Own Cross-Examination



- If a party to whom the recipient assigns an advisor **refuses to work with the advisor** when the advisor is willing to conduct cross-examination on the party's behalf, then for reasons described above **that party has no right of self-representation with respect to conducting cross-examination**, and that party would not be able to pose any cross-examination questions.

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

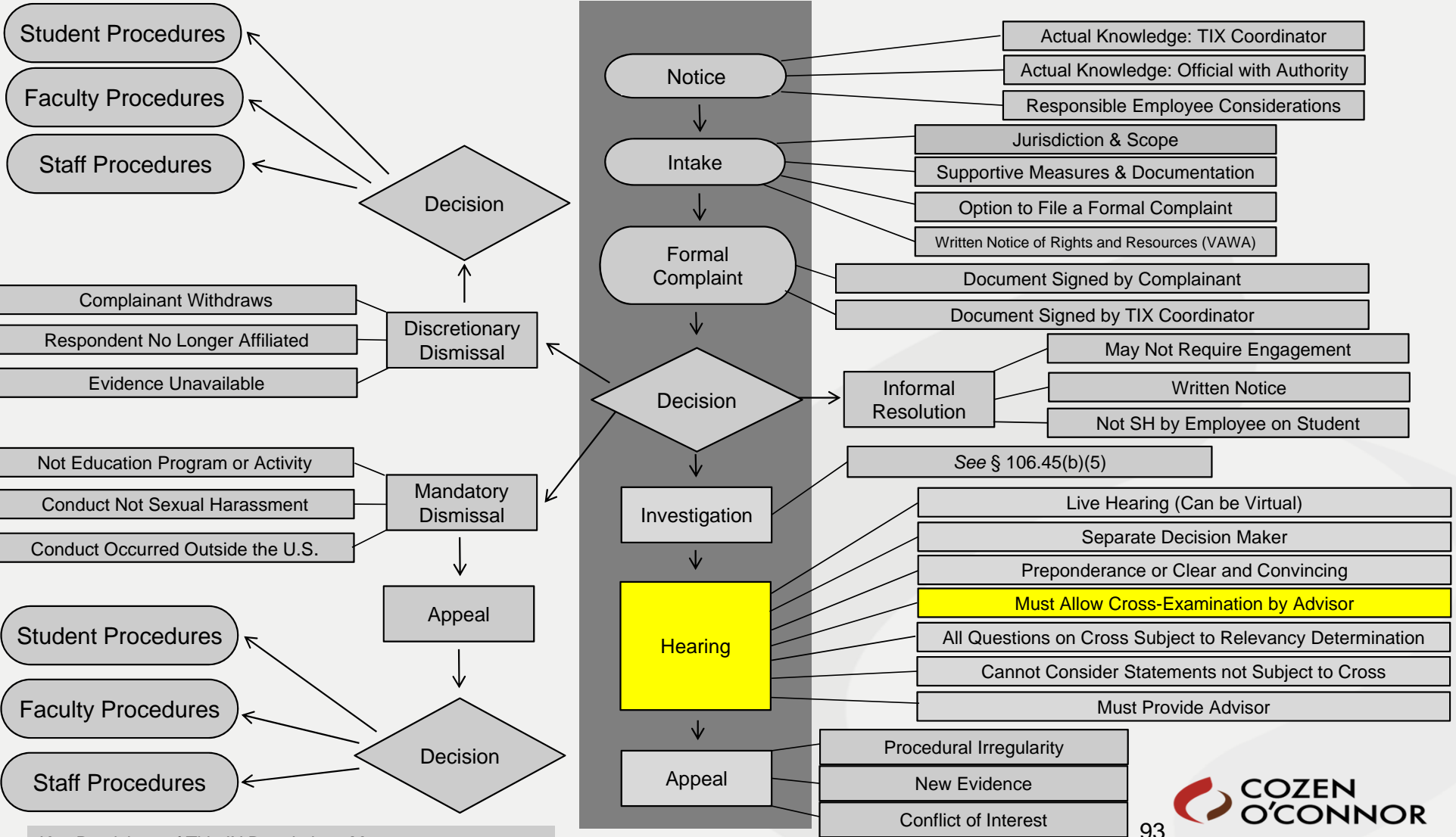
Title IX Regulations, May 19, 2020; 85 F.R. 30342



# 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

# **CROSS-EXAMINATION BY ADVISOR**



Key Provisions of Title IX Regulations May 19, 2020

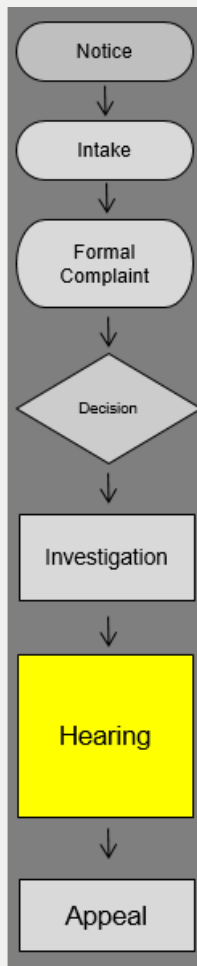
# Cross-Examination



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

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

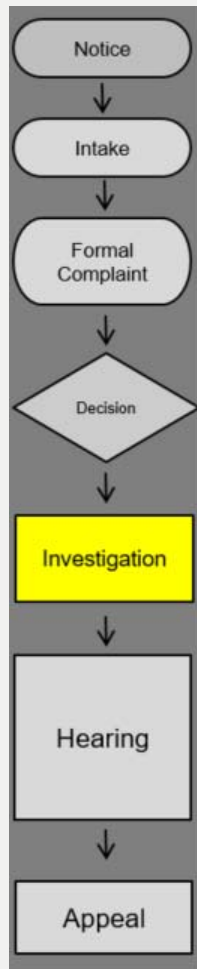
# Cross-Examination



- Such cross-examination at the live hearing must be conducted **directly, orally, and in real time** by the party's advisor of choice and never by a party personally, notwithstanding the discretion of the recipient under paragraph (b)(5)(iv) of this section to otherwise restrict the extent to which advisors may participate in the proceedings.

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

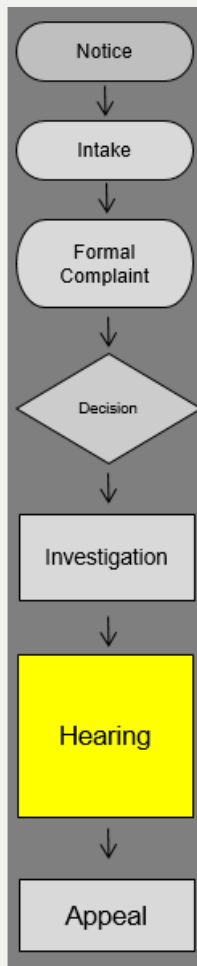
## Recap on Evidence Review



- “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

# Availability of Evidence at the Hearing



- The recipient must make all such evidence subject to the parties' inspection and review [directly related evidence shared at the evidence review] available at any hearing to give each party equal opportunity to refer to such evidence during the hearing, including for purposes of cross-examination.

Title IX Regulations, May 19, 2020; § 106.45(b)(5)(vi)

# Opportunity to Challenge Evidence



- Cross-examination in the § 106.45 grievance process is intended to give both parties equal opportunity to meaningfully challenge the plausibility, reliability, credibility, and consistency of the other party and witnesses so that the outcome of each individual case is more likely to be factually accurate, reducing the likelihood of either type of erroneous outcome (i.e., inaccurately finding a respondent to be responsible, or inaccurately finding a respondent to be non-responsible).

Title IX Regulations, May 19, 2020, Preamble 85 F.R. 30336



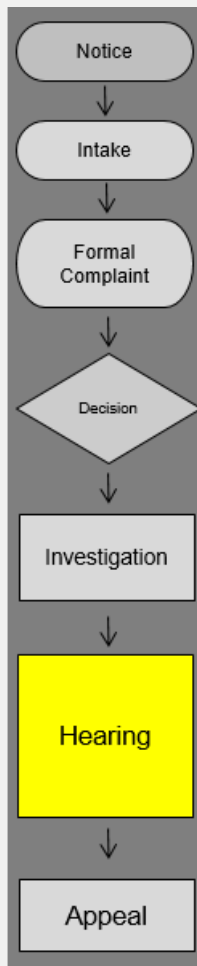
# Questions to Advance a Party's Interest



- The Department clarifies here that conducting cross-examination **consists simply of posing questions intended to advance the asking party's perspective with respect to the specific allegations at issue**; no legal or other training or expertise can or should be required to ask factual questions in the context of a Title IX grievance process.

Title IX Regulations, May 19, 2020, Preamble 85 F.R. 30319

# Cross-Examination



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

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

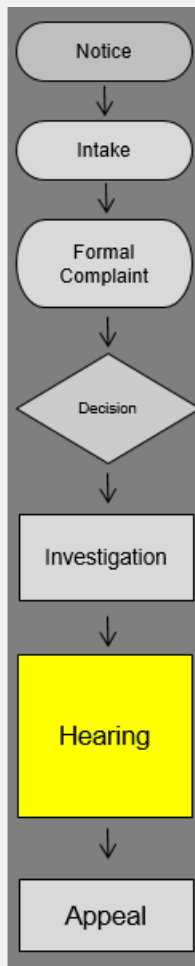
# Determinations Regarding Relevance



- The final regulations **do not preclude a recipient from adopting a rule** (applied equally to both parties) that does, or does not, **give parties or advisors the right to discuss the relevance determination with the decision-maker during the hearing.**
- If a recipient believes that arguments about a relevance determination during a hearing would unnecessarily protract the hearing or become uncomfortable for parties, **the recipient may adopt a rule that prevents parties and advisors from challenging the relevance determination (after receiving the decision-maker’s explanation) during the hearing.**

Title IX Regulations, May 19, 2020; § 106.45(b)(6)  
Title IX Regulations, May 19, 2020; Preamble 85 F.R 30343

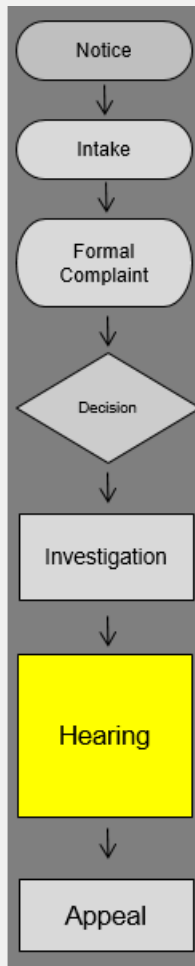
# “Pause” to Reinforce Decorum



- We have also revised § 106.45(b)(6)(i) in a manner that **builds in a “pause” to the cross-examination process**; before a party or witness answers a cross-examination question, the decision-maker must determine if the question is relevant.
- This **helps ensure that content of cross-examination remains focused only on relevant questions** and that the **pace of cross-examination** does not place undue pressure on a party or witness to answer immediately.

Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30323-24

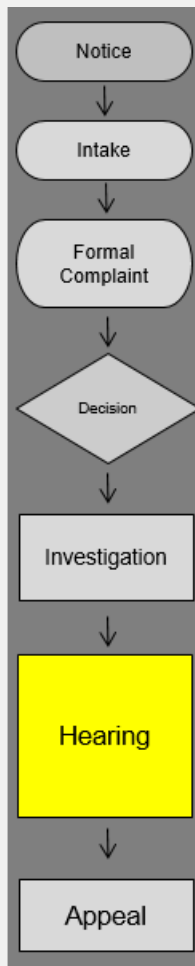
# Rules of Decorum



- The final regulations do not preclude a recipient from enforcing rules of decorum that **ensure all participants, including parties and advisors, participate respectfully and non-abusively during a hearing.**
- If a party's advisor of choice refuses to comply with a recipient's rules of decorum (for example, by insisting on yelling at the other party), the recipient may require the party to use a different advisor.

Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30320

# Rules of Decorum



- Similarly, if an advisor that the recipient provides refuses to comply with a recipient's rules of decorum, the recipient may provide that party with a different advisor to conduct cross-examination on behalf of that party.
- This incentivizes a party to work with an advisor of choice in a manner that complies with a recipient's rules that govern the conduct of a hearing, and incentivizes recipients to appoint advisors who also will comply with such rules, so that hearings are conducted with **respect for all participants**.

Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30320

# Training Not Required for Advisors

- The Department **declines to require training for assigned advisors** because the goal of this provision is not to make parties “feel adequately represented” but rather to ensure that the parties have the opportunity for their own view of the case to be probed in front of the decision-maker.



Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30342

# May Not Impose Training Requirements

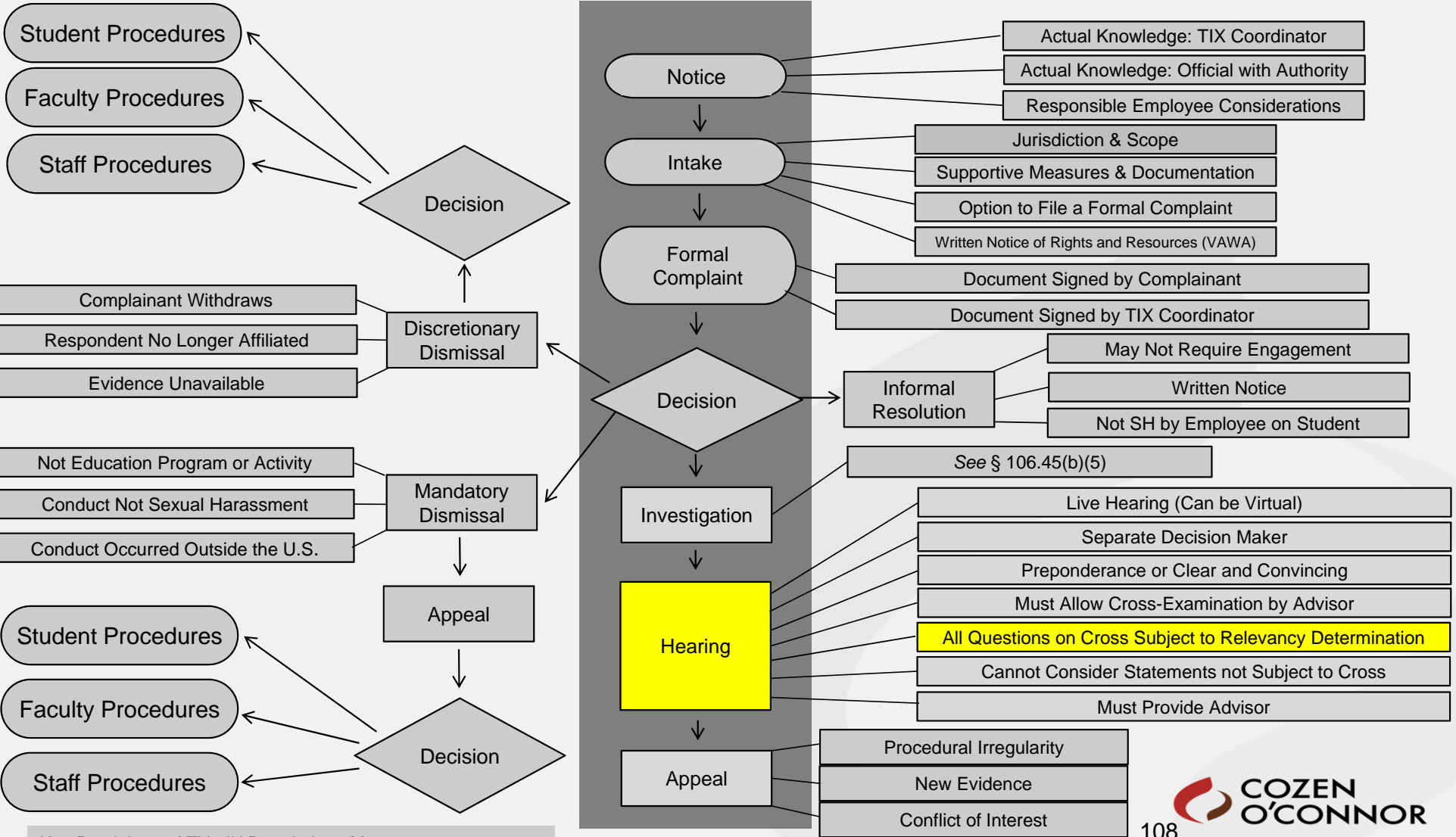


- Recipients may not impose training or competency assessments on advisors of choice selected by parties, but nothing in the final regulations prevents a recipient from training and assessing the competency of its own employees whom the recipient may desire to appoint as party advisors.

Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30342

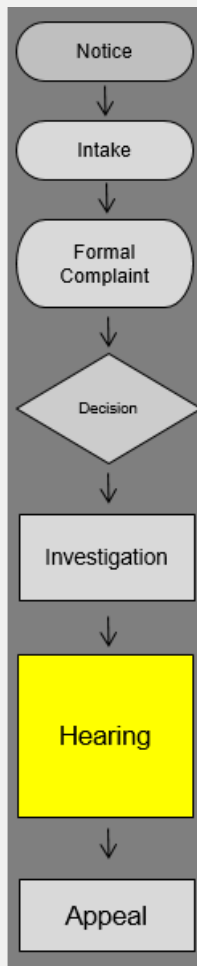


# RELEVANCE



Key Provisions of Title IX Regulations May 19, 2020

# Questions Must be Relevant



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

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

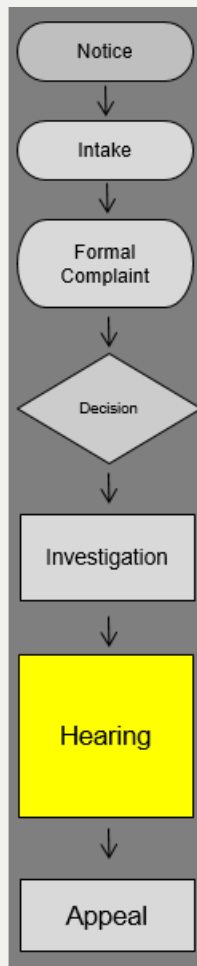
# Relevance

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



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

# Relevance



- While the proposed rules do not speak to
  - admissibility of hearsay,
  - prior bad acts,
  - character evidence,
  - polygraph (lie detector) results,
  - standards for authentication of evidence,
  - or similar issues concerning evidence,
- the final regulations require recipients to **gather and evaluate relevant evidence**, with the understanding that . . .

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

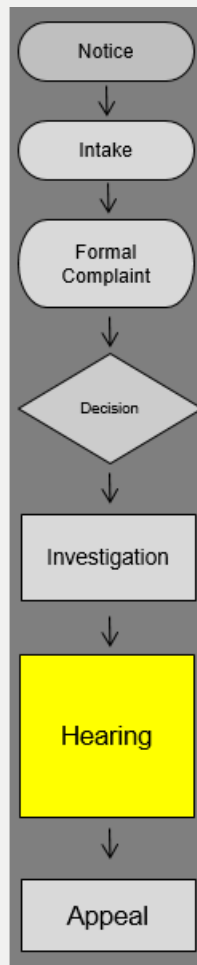
# Relevance



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

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

# Limitations on Relevance



- To that end, the Department has determined that recipients **must consider relevant evidence** with the following conditions:
  - a complainant’s prior sexual behavior is **irrelevant** (unless questions or evidence about prior sexual behavior meet one of two exceptions, as noted above);
  - information protected by any legally recognized privilege **cannot be used**; no party’s treatment records may be used without that party’s voluntary, written consent; and
  - statements not subject to cross-examination in postsecondary institutions **cannot be relied on** by the decision-maker.
  - The Department notes that where evidence is duplicative of other evidence, a recipient may deem the evidence **not relevant**.

Title IX Regulations, May 19, 2020, Preamble 85 F.R. 30337

# Privileged Information

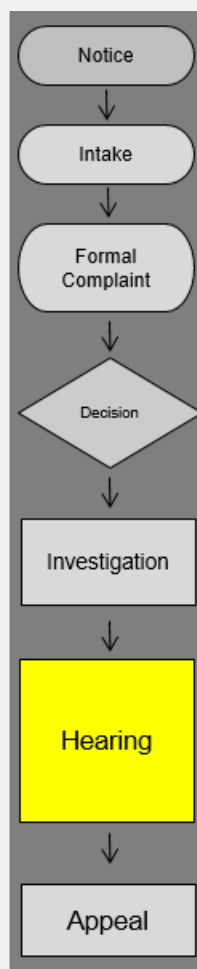


- Not require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, **information protected under a legally recognized privilege**, unless the person holding such privilege has waived the privilege

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



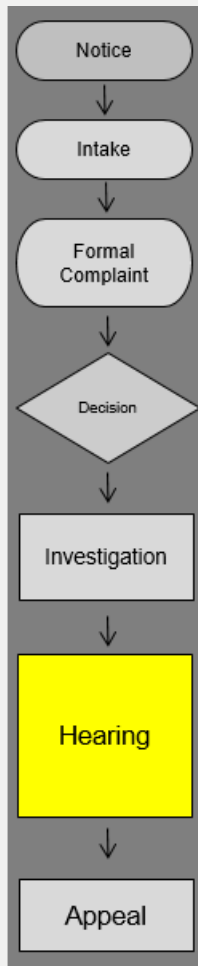
# Privileged Information: Per Se Irrelevant



- In response to commenters' concerns that relevant questions might implicate information protected by attorney-client privilege, the final regulations add § 106.45(b)(1)(x) to bar the grievance process from requiring, allowing, relying on, **or otherwise using questions or evidence** that constitute, or seek disclosure of, information protected under a legally recognized privilege.

Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30361

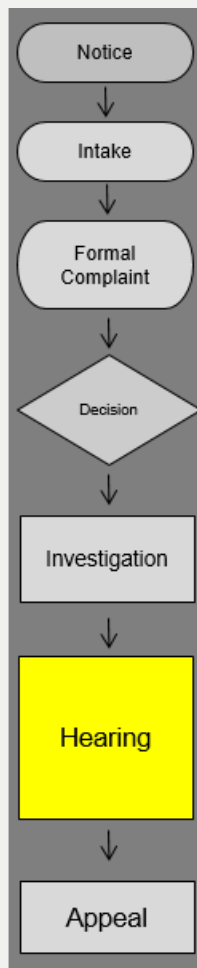
## Relevance: Prior Sexual History



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

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

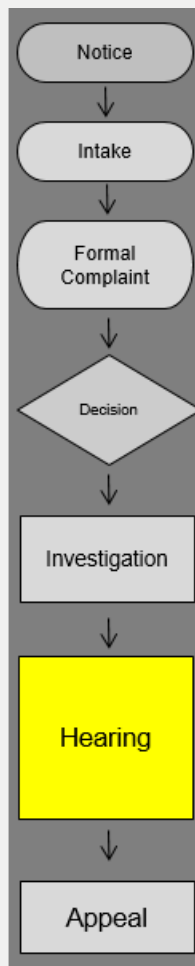
# Prior Sexual History



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

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

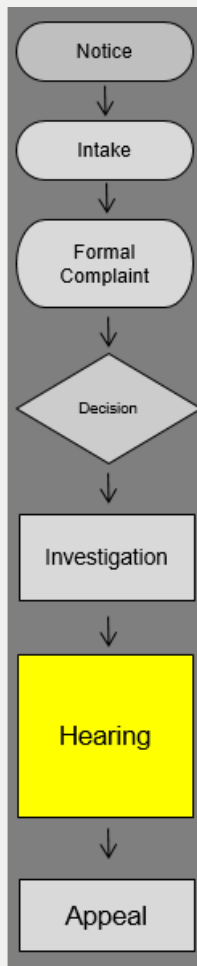
# Prior Sexual History: Motive



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

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

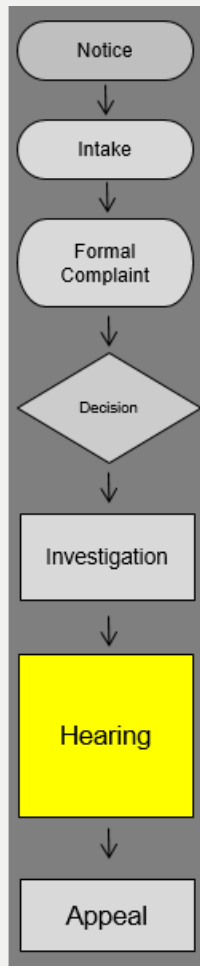
# Prior Sexual History: Per Se Irrelevant



- The final regulations clarify the rape shield language to state that **questions and evidence subject to the rape shield protections are “not relevant,”** and therefore the rape shield protections apply wherever the issue is whether evidence is relevant or not.

Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30353

# 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

# No Comprehensive Evidentiary Rules



- The Department desires to prescribe a grievance process adapted for an educational environment rather than a courtroom, and **declines to impose a comprehensive, detailed set of evidentiary rules** for resolution of contested allegations of sexual harassment under Title IX.
- Rather, the Department has carefully considered the procedures most needed to result in fair, accurate, and legitimate outcomes in Title IX grievance processes.

Title IX Regulations, May 19, 2020, Preamble 85 F.R. 30337



## Simplified Evidentiary Considerations

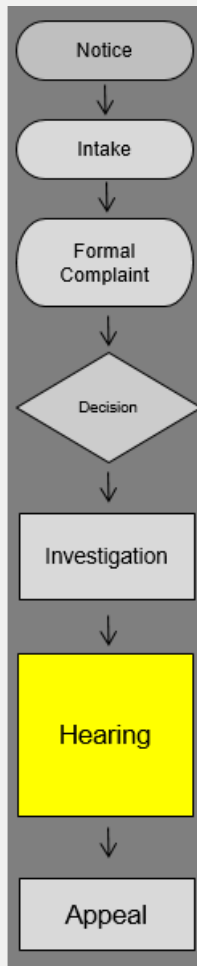


- Recipients are educational institutions that **should not be converted into *de facto* courtrooms.**
- The final regulations thus prescribe a process that **simplifies evidentiary complexities** while ensuring that determinations regarding responsibility result from **consideration of relevant, reliable evidence.**

Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30348

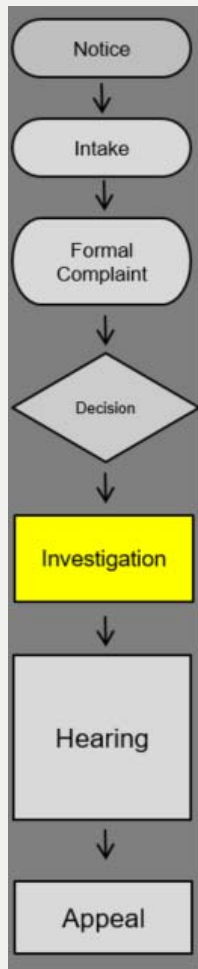
## Relevant and Reliable Evidence

- The Department believes that the final regulations strike the appropriate balance for a postsecondary institution context between **ensuring that only relevant and reliable evidence is considered** while not over-legalizing the grievance process.



Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30348

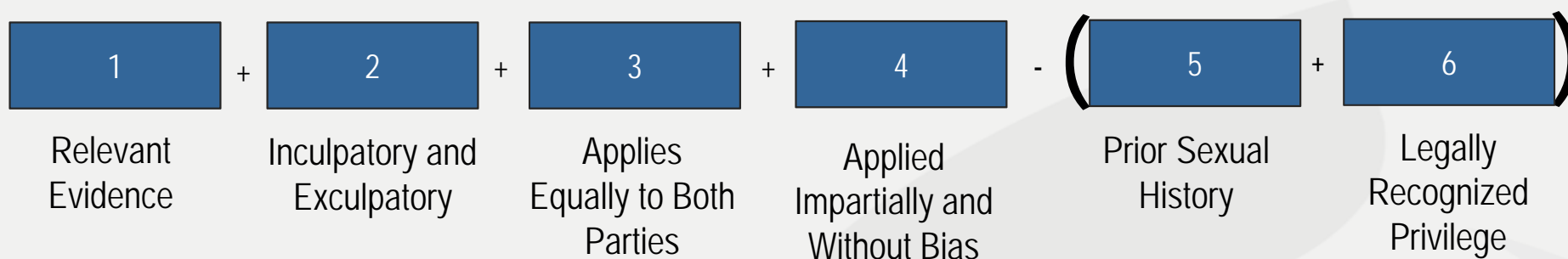
# Flexibility to Adopt Rules



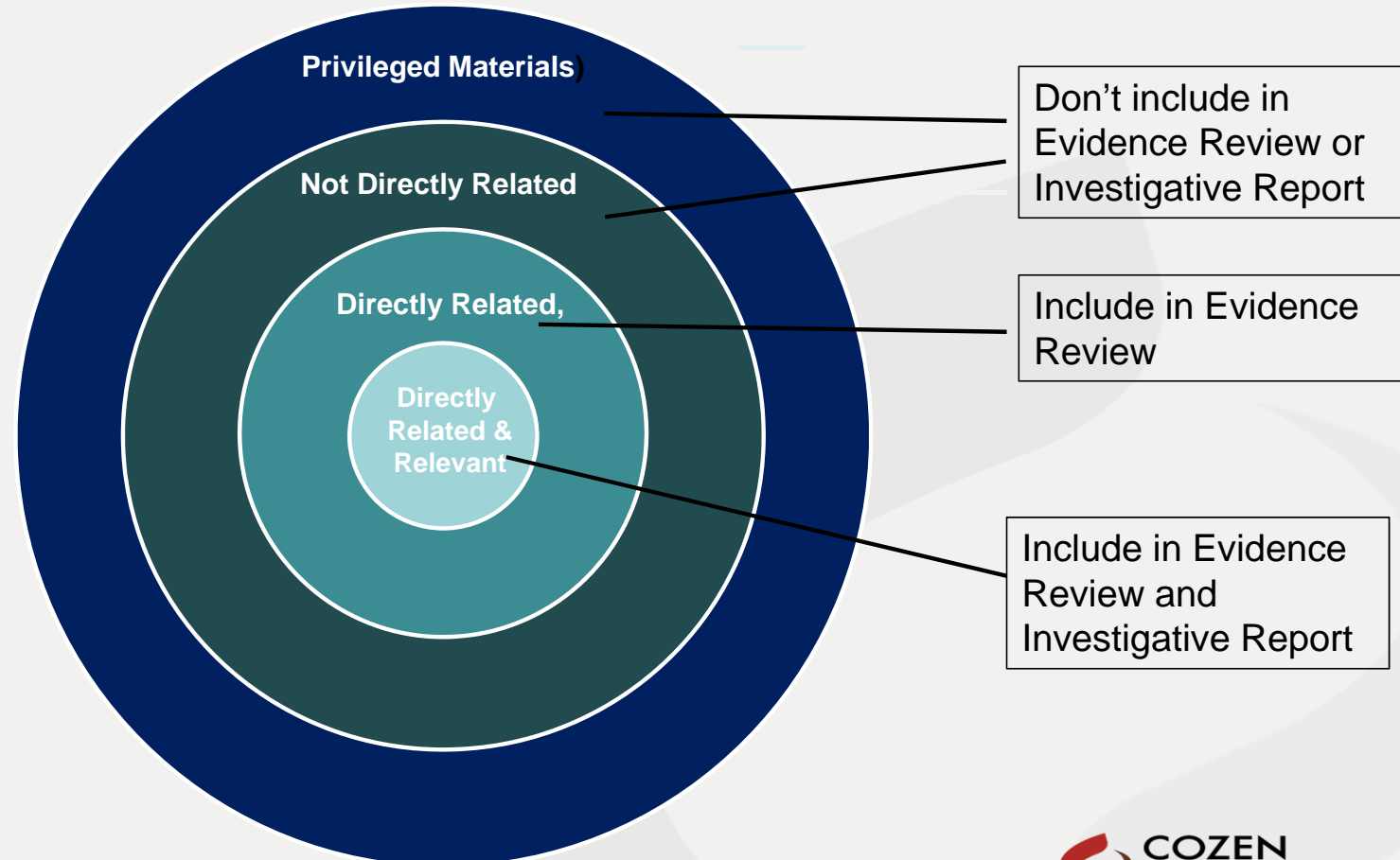
- “Within these evidentiary parameters **recipients retain the flexibility to adopt rules that govern how the recipient’s investigator** and decision-maker evaluate evidence and conduct the grievance process (so long as such rules apply equally to both parties).
- **Relevance is the standard that these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

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

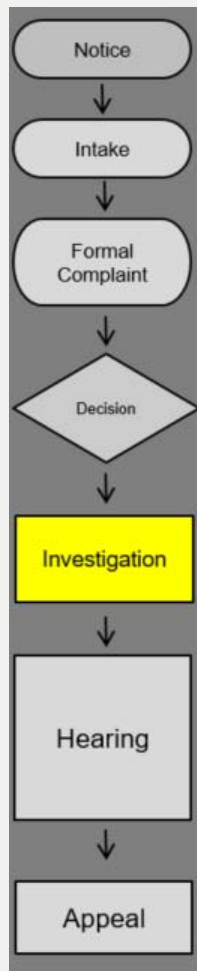
# Evidentiary Rules Must Consider



# Evidentiary Levels for Inclusion



# Directly Related

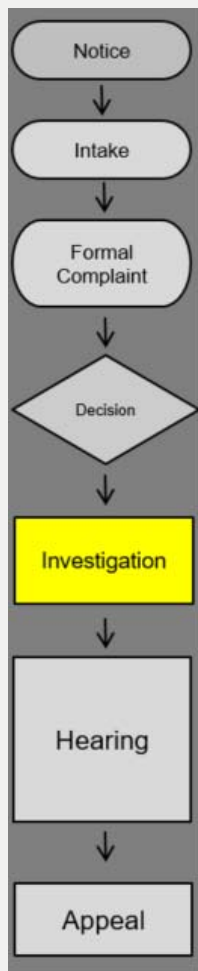


- Not defined in the regulations or the Preamble
  - The Department declines to define certain terms such as “evidence directly related to the allegations,” as these terms should be interpreted using their plain and ordinary meaning.
- “Directly related” aligns with the requirements in FERPA
  - The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

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

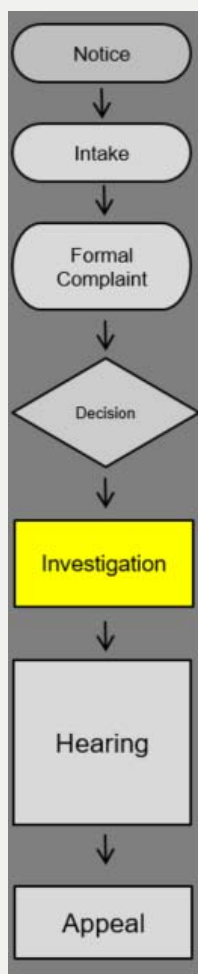
# Directly Related

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



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

## Directly Related vs. Relevant

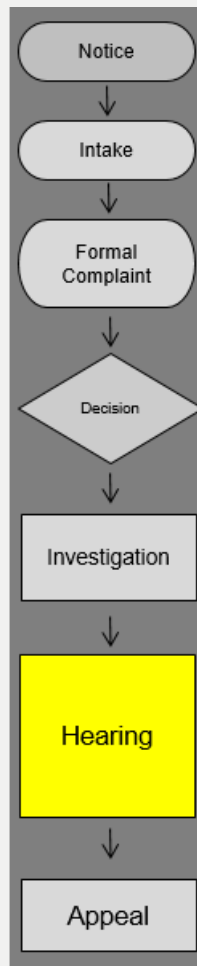


- Evidence that is “directly related to the allegations” may encompass a broader universe of evidence than evidence that is “relevant.”
- The Department does not believe that determinations about whether certain questions or evidence are relevant or directly related to the allegations at issue requires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

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



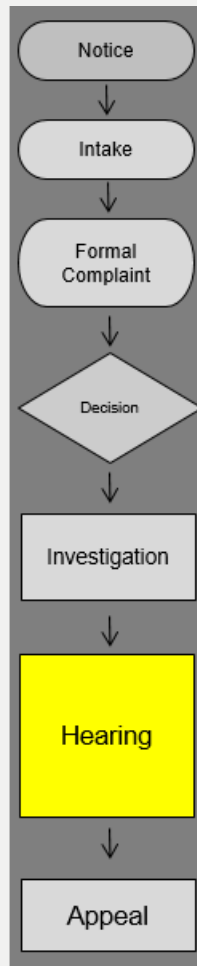
# Relevant Questions



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

Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30248; 30361

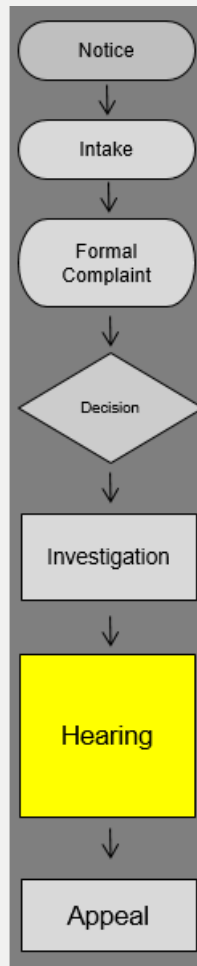
# Relevant Questions



- [T]he final regulations add § 106.45(b)(1)(x) to bar the grievance process from requiring, allowing, relying on, or **otherwise using questions or evidence** that constitute, or seek disclosure of, information protected under a legally recognized privilege.
- Additionally, questions that are **duplicative or repetitive** may fairly be deemed not relevant and thus excluded.

Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30361

# Relevance: Explaining Exclusion



- Before a complainant, respondent, or witness answers a cross-examination or other question, the decision-maker(s) must first determine whether the question is relevant and explain any decision to exclude a question as not relevant.
- This provision **does not require a decision-maker to give a lengthy or complicated explanation.**

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

Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30343

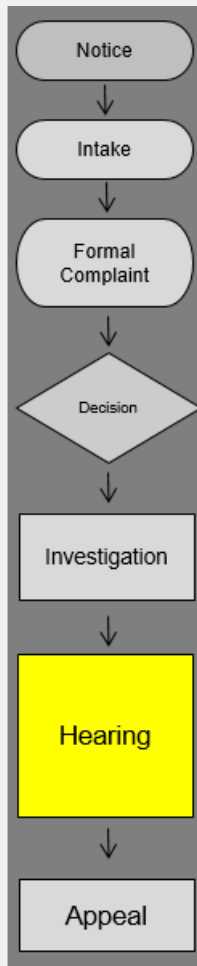
## Relevance: Explaining Exclusion

- [I]t is sufficient, for example, for a decision-maker to explain that a question is irrelevant because the question calls for **prior sexual behavior** information without meeting one of the two exceptions, or because the question asks about a detail that is **not probative of any material fact** concerning the allegations. No lengthy or complicated exposition is required to satisfy this provision.



Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30343

# Flexibility to Discuss Relevance



- The final regulations **do not preclude a recipient from adopting a rule** (applied equally to both parties) that does, or does not, **give parties or advisors the right to discuss the relevance determination with the decision-maker during the hearing.**
- If a recipient believes that arguments about a relevance determination during a hearing would unnecessarily protract the hearing or become uncomfortable for parties, the recipient **may adopt a rule that prevents parties and advisors from challenging the relevance determination (after receiving the decision-maker’s explanation) during the hearing.**

Title IX Regulations, May 19, 2020; Preamble 85 F.R 30343

# Appeal of Relevance Determination

- Parties have the equal right to appeal on three bases including procedural irregularity that affects the outcome, so if a party disagrees with a decision-maker's relevance determination, the party has the **opportunity to challenge the relevance determination on appeal.**



Title IX Regulations, May 19, 2020; Preamble 85 F.R 30349, footnote 1340, citing § 106.45(b)(8)

# Appeal of Relevance Determination



- Parties may appeal erroneous relevance determinations, if they affected the outcome, because § 106.45(b)(8) allows the parties equal appeal rights on grounds that include procedural irregularity that affected the outcome.
- However, asking the decision-maker to also explain the exclusion of questions during the hearing does not affect the parties' appeal rights and may reduce the number of instances in which a party feels the need to appeal on this basis because the decision-maker will have explained the decision during the hearing.

Title IX Regulations, May 19, 2020; Preamble 85 F.R 30343

# Practical Considerations & Effective Practices

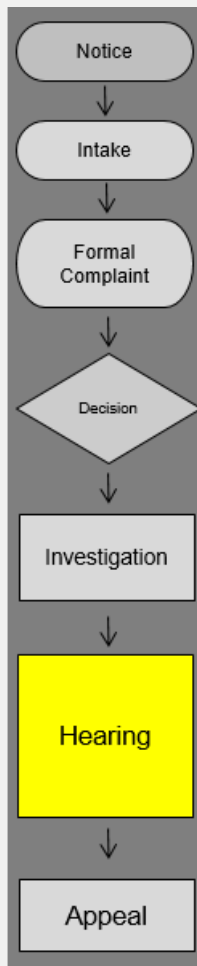
- Use of a hearing coordinator to support timely determinations by the decision-maker regarding relevance
- How to enable panels to make real-time relevancy determination on cross-examination questions
- Whether to permit discussion of relevancy during the live hearing, or whether to defer the opportunity to challenge to the appeal
- Upon appeal, permitting the decision-maker to augment their reasoning for disallowing a question



# Walking through an Example

- Can you adopt a rule excluding subsequent use of statements made during informal resolution?

# Statements Made During Informal Resolution



- The regulations permit a recipient to facilitate an informal resolution, provided that the recipient provides the parties written notice disclosing:
  - The allegations,
  - The requirements of the informal resolution process,
  - The circumstances under which it precludes the parties from resuming the formal complaint, provided that at any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and resume the grievance process, and
  - Any **consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared.**

Title IX Regulations, May 19, 2020; § 106.45(b)(9)

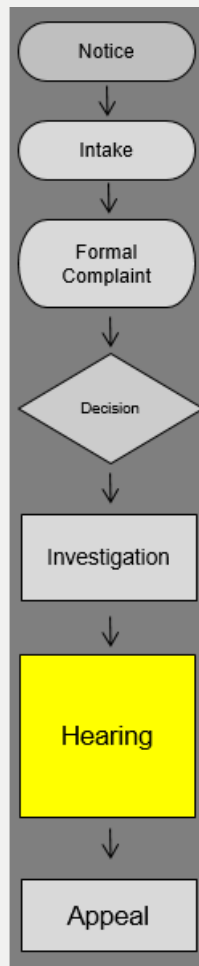
# Statements Made During Informal Resolution



- The Department appreciates commenters' concerns that comprehensive rules of evidence adopted in civil and criminal courts throughout the U.S. legal system apply detailed, complex rules to certain types of evidence resulting in **exclusion of evidence that is otherwise relevant to further certain public policy values (e.g., exclusion of statements made during settlement negotiations, exclusion of hearsay subject to specifically-defined exceptions, exclusion of character or prior bad act evidence subject to certain exceptions, exclusion of relevant evidence when its probative value is substantially outweighed by risk of prejudice, and other admissibility rules).**

Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30337

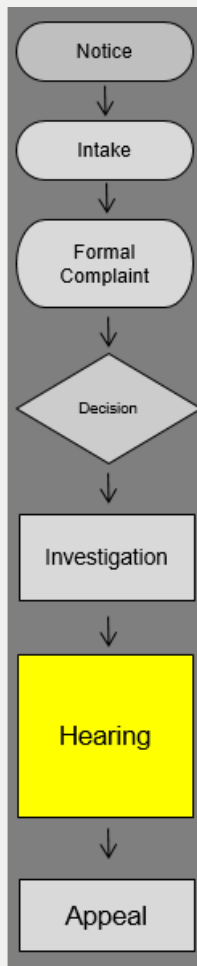
# Statements Made During Informal Resolution



- With respect to **informal resolution facilitators potentially serving as witnesses** in subsequent formal grievance processes, we leave this possibility open to recipients.
- If recipients were to accept such witnesses, then the **Department would expect this possibility to be clearly disclosed to the parties** as part of the § 106.45(b)(9)(i) requirement in the final regulations to provide a written notice disclosing any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared.

Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30400-30401

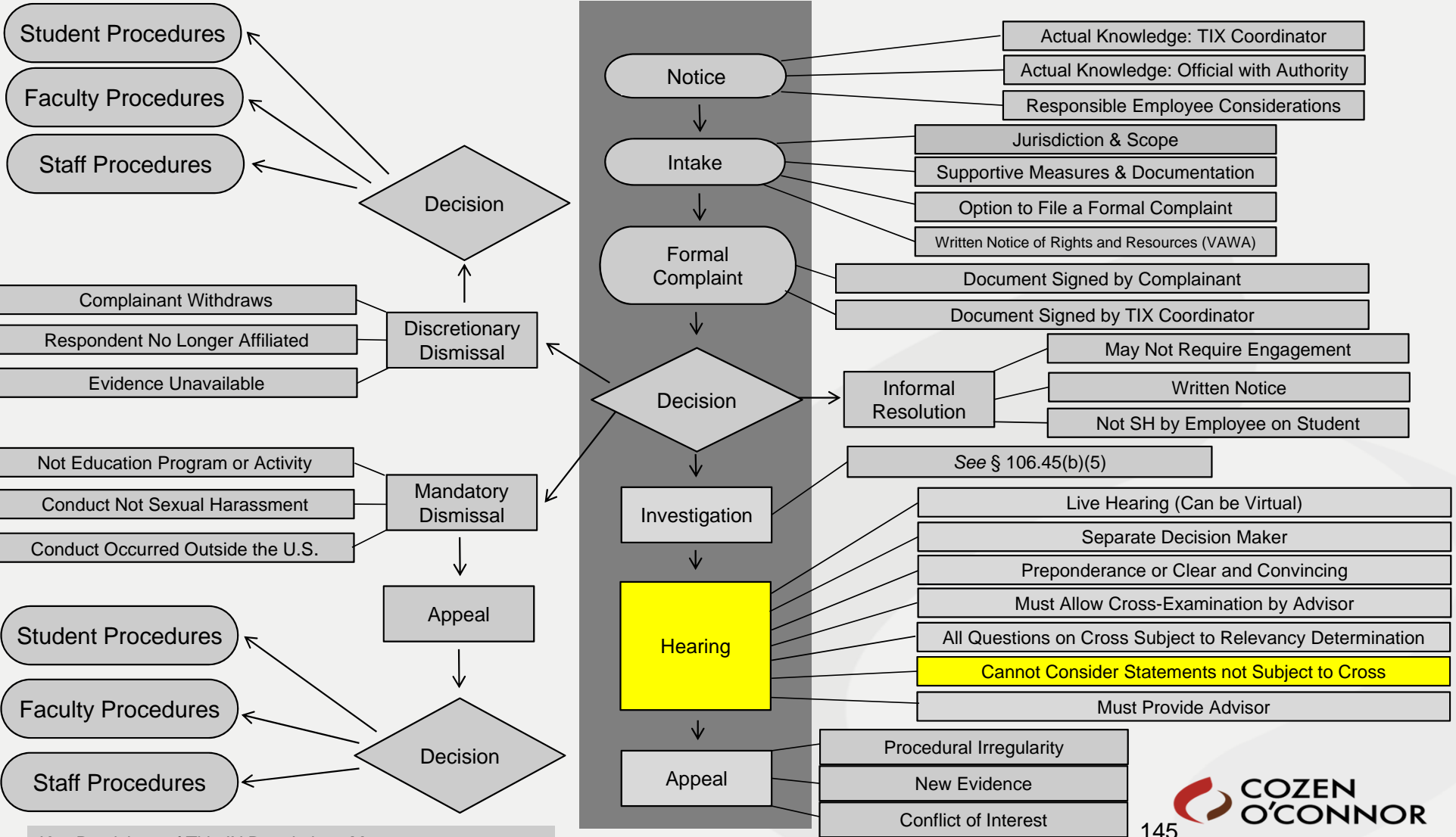
# Statements Made During Informal Resolution



- **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 85 F.R. 30247-30248

# **EXCLUSION OF STATEMENTS NOT SUBJECT TO CROSS-EXAMINATION**



Key Provisions of Title IX Regulations May 19, 2020

# Exclusion of Statement

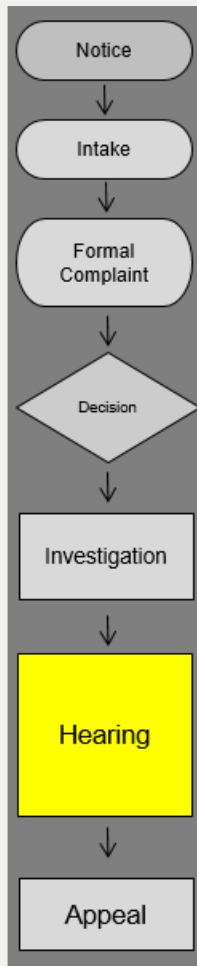


- If a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) **must not rely on any statement of that party or witness** in reaching a determination regarding responsibility; provided, however, that the decision-maker(s) cannot draw an inference about the determination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

Title IX Regulations, May 19, 2020; § 106.45(b)(6) 85 F.R. 30577



# Exclusion of Statement

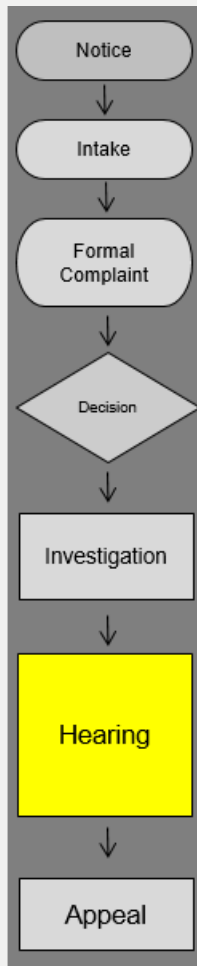


- [I]n the postsecondary context, **only statements that have been tested for credibility** will be considered by the decision-maker in reaching a determination regarding responsibility.
- Because party and witness statements so often raise **credibility** questions in the context of sexual harassment allegations, the **decision-maker must consider only those statements that have benefitted from the truth-seeking function of cross-examination.**

Title IX Regulations, May 19, 2020; Preamble 85 F.R 30345; 30348

# Exclusion of Statement

- The prohibition on reliance on “statements” applies not only to statements made during the hearing, but also to **any statement of the party or witness** who does not submit to cross-examination.



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

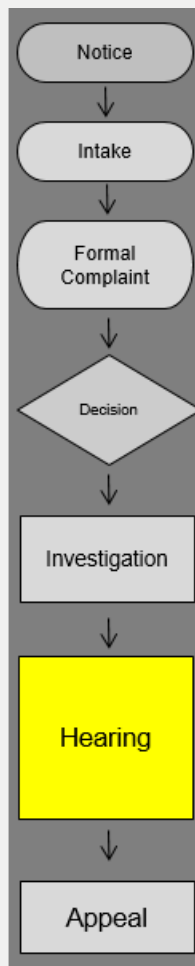
# Exclusion of Statement



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

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

# Exclusion of Statement



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

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

# Exclusion of Statement



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

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

# Submit to Cross-Examination



- Commenters suggested making this provision more precise by replacing “does not submit to cross-examination” with “does not appear for cross-examination.”
- Commenters asserted that parties should have the right to “waive a question” without the party’s entire statement being disregarded.
- The Department appreciates the opportunity to clarify here that to “**submit to cross-examination**” means answering those cross-examination questions that are relevant.

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

# Submit to Cross-Examination



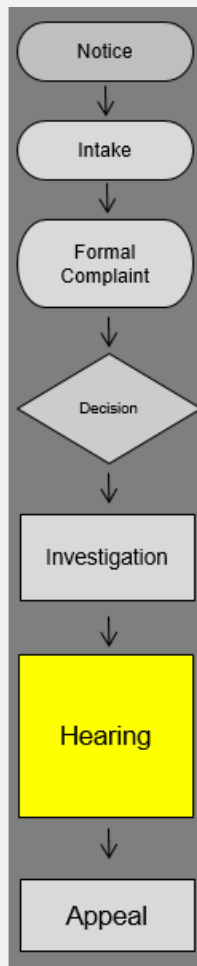
- This provision requires a party or witness to “submit to cross-examination” to avoid exclusion of their statements; the same exclusion of statements **does not apply to a party or witness’s refusal to answer questions posed by the decision-maker.**
- If a party or witness **refuses to respond to a decision-maker’s questions**, the decision-maker is not precluded from relying on that party or witness’s statements.

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

# **SANCTIONING**



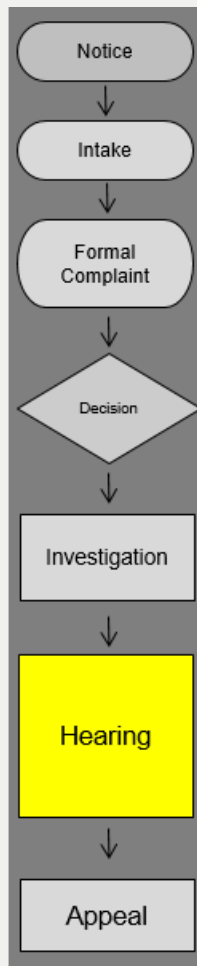
# Sanctioning



- An equitable response for a respondent means a grievance process that complies with § 106.45 before the imposition of any disciplinary sanctions or other actions that are not supportive measures, as defined in § 106.30.
- The grievance process must describe the range of possible disciplinary sanctions and remedies.

Title IX Regulations May 19, 2020 § 106.44 (a); § 106.45(b)(1)(vii) 85 F.R. 30575, 30395

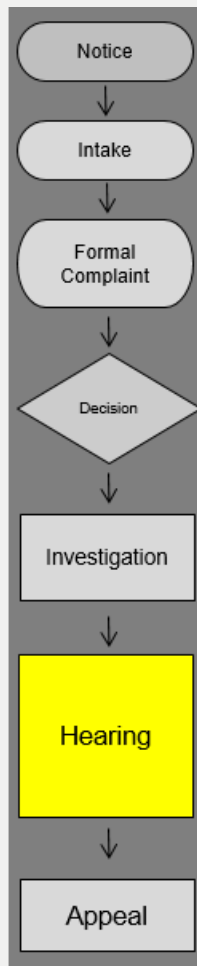
# Discretion in Sanctioning



- The Department does not wish to dictate to recipients the sanctions that should be imposed when a respondent is found responsible for sexual harassment as each formal complaint of sexual harassment presents unique facts and circumstances.
- As previously stated, the Department believes that teachers and local school leaders with unique knowledge of the school climate and student body, are best positioned to make disciplinary decisions.

Title IX Regulations May 19, 2020; Preamble 85 F.R. 30377, 30394

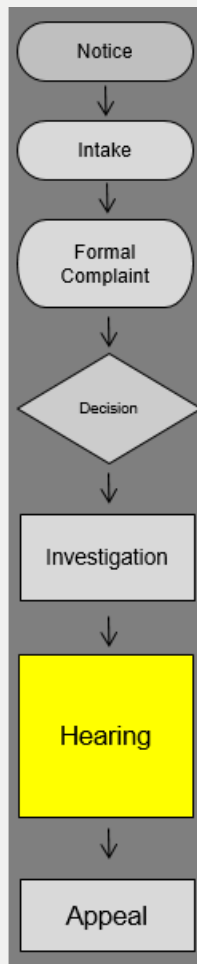
# Educational Purpose



- Because the final regulations do not require particular disciplinary sanctions, the final regulations do not preclude a recipient from imposing student discipline as part of an “educational purpose” that may differ from the purpose for which a recipient imposes employee discipline.

# Appeal of Sanction

- The Department notes that under the final regulations, whether the parties can appeal based solely on the severity of sanctions is left to the recipient's discretion, though if the recipient allows appeals on that basis, both parties must have equal opportunity to appeal on that basis.



Title IX Regulations May 19, 2020; Preamble 85 F.R. 30397

# TRAINING

# 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.

# Use of Slides

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

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# **The New Title IX Regulations: Live Hearings – Part 2 of 2**

Presented By:

**The Institutional Response Group | Cozen O'Connor**

**Gina Maisto Smith, Chair**

**Leslie M. Gomez, Vice Chair**

**August 3, 2020**

# Today's Webinar

- Following an introductory webinar, A First Look at the New Title IX Regulations, this is the fifth in a series of webinars focusing on implementation.
- This webinar will:
  - Provide an **overview** of live hearings and decision-making
  - Outline the **legally-required elements** for live hearings, and
  - Set the context for further discussion on **effective practices** in conducting live hearings and decision-making

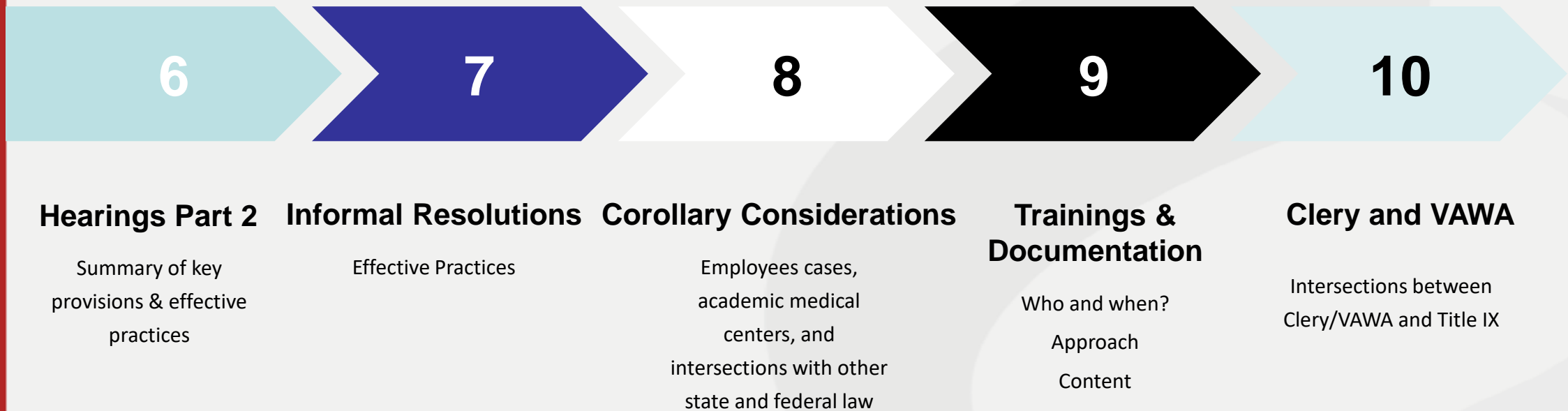
# Introducing the Webinar Series

Subsequent IRG webinars will focus on specific aspects of the regulations, as written and as applied, including:

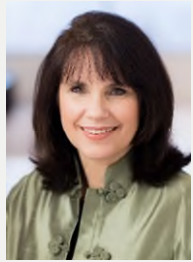


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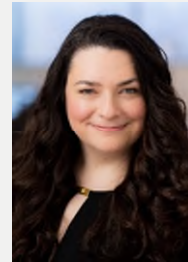
# Institutional Response Group



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Cozen O'Connor



**Leslie Gomez**  
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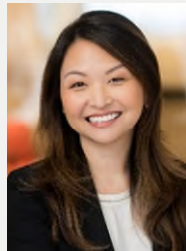
**Maureen P. Holland**  
Cozen O'Connor



**Devon Turner Riley**  
Cozen O'Connor



**Michael Stackow**  
Cozen O'Connor



**Helen Park**  
Cozen O'Connor



**Adam M. Shapiro**  
Cozen O'Connor



**Peter C. Lim**  
Cozen O'Connor



**Joseph A. Tate, Jr.**  
Cozen O'Connor

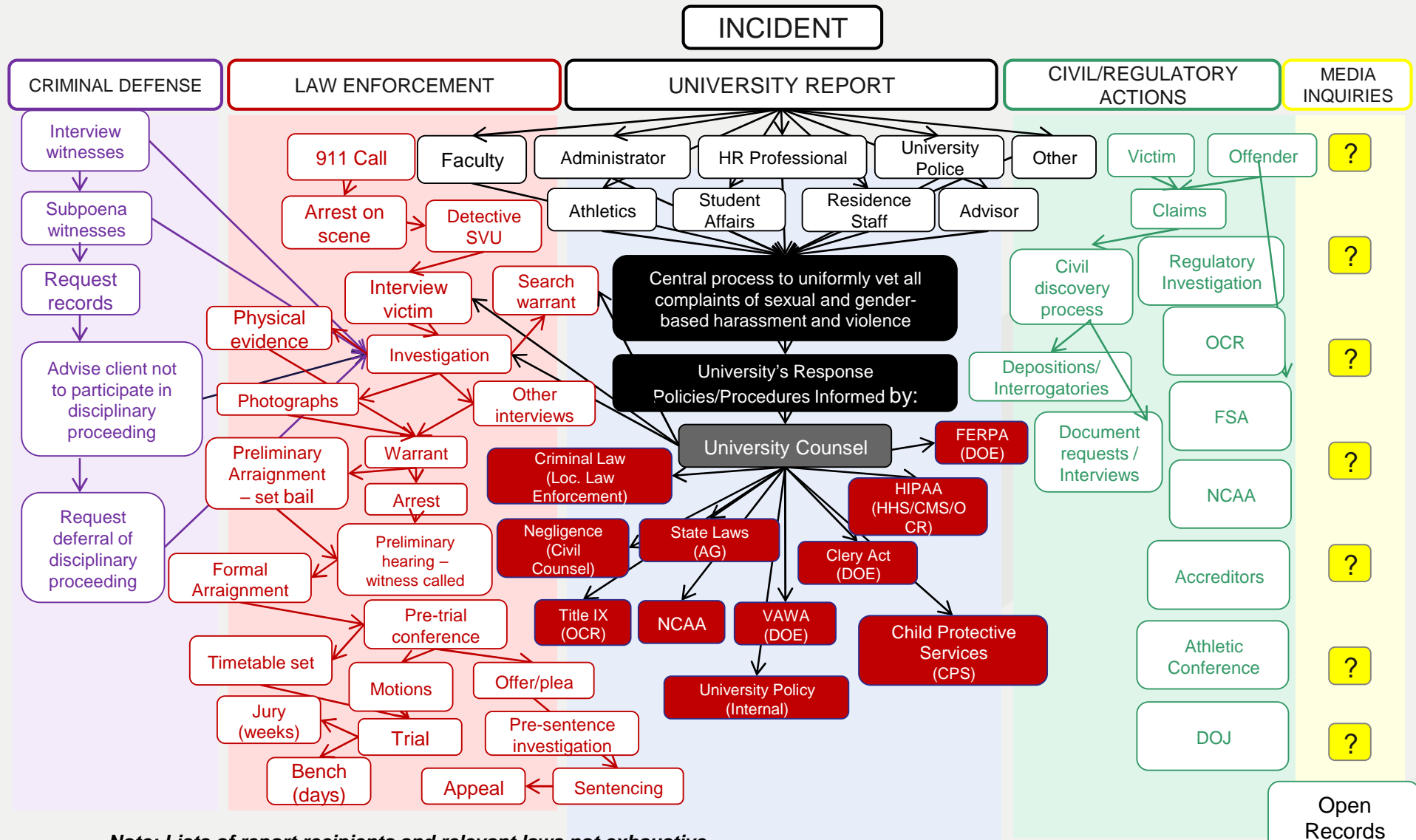


**Christi Hurt**  
Margolis Healy

**Institutional Response Group Paralegal and Administration Team:**  
Heather Dunn, Megan Lincoln, Braelyn Schenk, and Mary Sotos

# FRAMING THE CONTEXT

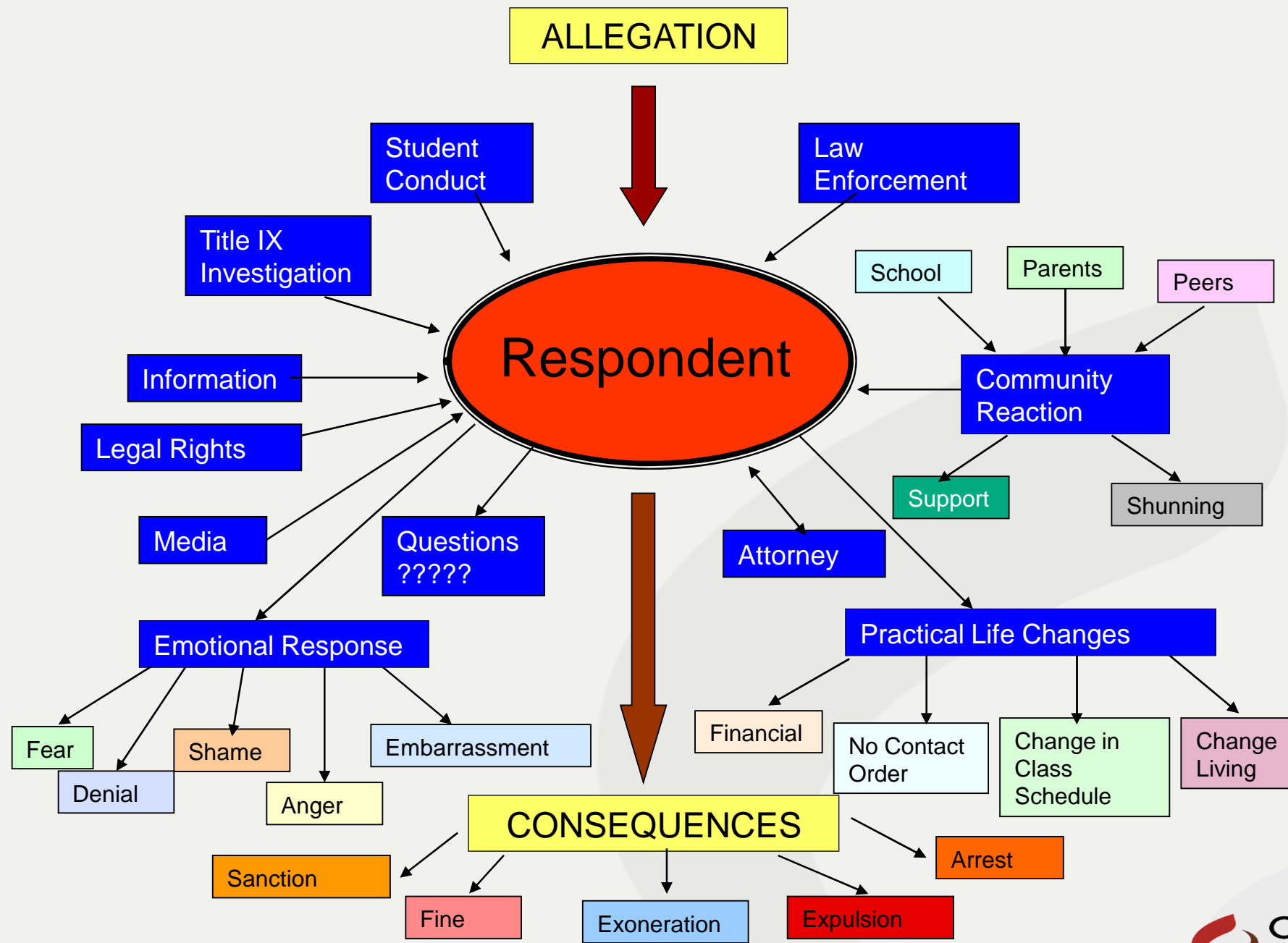
# The Challenge of the Context



Note: Lists of report recipients and relevant laws not exhaustive.





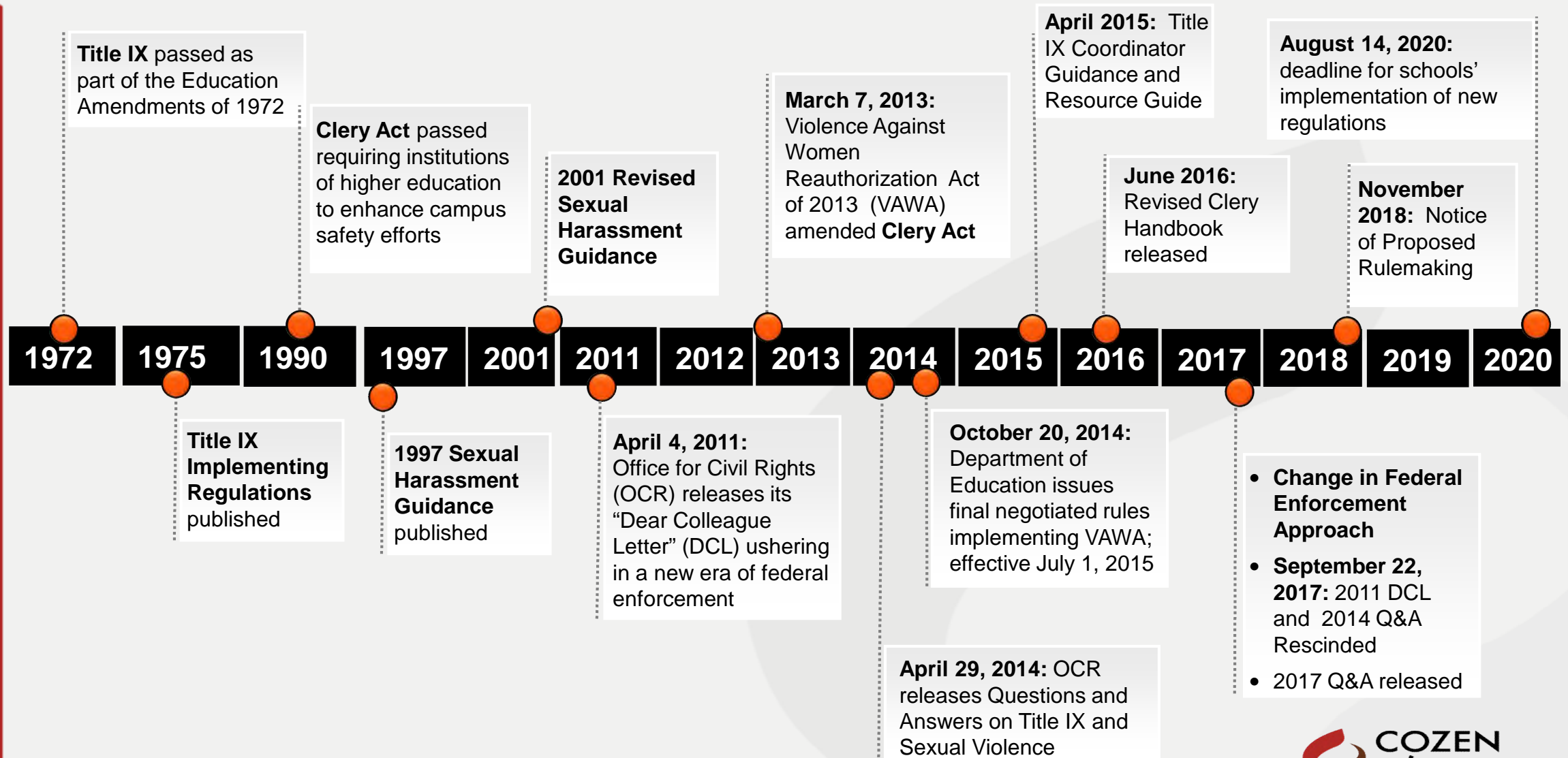


# Implementation Rubric

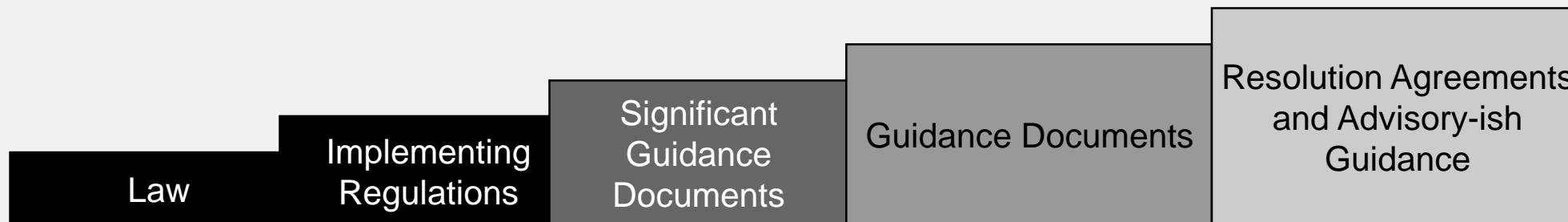
- Law
- Regulations
- Guidance
- Preamble and commentary
- OCR webinars, charts, blog
- Policy
- Higher education experience
- Institutional values



# Evolution of Federal Legislation and Guidance



# 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

- 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

# Guidance

- Preamble
  - Explains the basis and purpose for the final rule
  - Serves a guidance function
- Preamble on Prior Guidance
  - “The 2017 Q&A along with the 2001 Guidance, and not the withdrawn 2011 Dear Colleague Letter, remain the baseline against which these final regulations make further changes to enforcement of Title IX obligations.”
  - “Title IX policies and procedures that recipients have in place due to following the 2001 Guidance and the withdrawn 2011 Dear Colleague Letter remain viable policies and procedures for recipients to adopt while complying with these final regulations.”

Title IX Regulations issued May 6, 2020; Preamble at 17, 18

# Recent Court Cases

“If credibility is in dispute and material to the outcome, due process requires cross-examination.”  
*Doe v. Baum* 903 F.3d 575, 585 (6th Cir. 2018)

When a student accused of sexual misconduct faces severe disciplinary sanctions, and the credibility of witnesses (whether the accusing student, other witnesses, or both) is central to the adjudication of the allegation, fundamental fairness requires, at a minimum, that the university provide a mechanism by which the accused may cross-examine those witnesses.” *Doe v. Allee*, 242 Cal. Rptr. 3d 109, 136 (Cal. Ct. App. 2019)

In a DV case, the state court ruled, “...procedures were unfair because they denied Respondent a meaningful opportunity to cross-examine critical witnesses at an in-person hearing.” *Boermeester v Carry*, No. B290675, 2020 WL 2764406 at \*1 (Cal. Ct. App. May 28, 2020)

“[N]otions of fairness in Pennsylvania law include providing the accused with a chance to test witness credibility through some form of cross-examination and a live, adversarial hearing during which he or she can put on a defense and challenge evidence against him or her.”  
*Doe v. Univ. of the Sciences*, No. 19-2966, 2020 WL 2786840 at\*5 (3d Cir. May 29, 2020)



# The Courts on Due Process and Fundamental Fairness

**Doe v. Brandeis University**: 177 F.Supp.3d 561 (D. Mass. March 31, 2016).

**Doe v. Regents of the University of California**: 5 Cal. App. 5th 1055 (Cal. App. Ct. Nov. 22, 2016), review denied (Feb. 15, 2017).

**Doe v. Claremont McKenna College**: 25 Cal. App. 5th 1055, (Cal. Ct. App. 2018).

**Doe v. Allee (USC)**: 30 Cal. App. 5th 1036, (Cal. Ct. App. 2019).

**Doe v. Purdue University**: 2:17-cv-00033 (U.S. District Court of Appeals for the Seventh Circuit, June 28, 2019)

2016

**Doe. Rectors and Visitors of GMU**: 149 F. Supp. 3d 602 (E.D. Va. February 25, 2016) Memorandum Opinion.

**Doe v. University of Southern California**: 146 Cal. App. 4<sup>th</sup> 221 (Cal. App. Ct. April 5, 2016).

2017

**Doe v. Trustees of Boston College**: 2016 WL 5799297 (D. Mass. October 4, 2016)

2018

**Doe v. Baum**: 903 F.3d 575 (6th Cir. 2018).

2019

**Doe v. Rhodes College**: 2:19-cv-02336 (Western Dist. Tennessee, June 14, 2019).

2020

**Boermeester v. Carry**: No. B290675, 2020 WL 2764406 at \*1 (Cal. Ct. App. May 28, 2020).

**Doe v. Univ. of the Sciences**: No. 19-2966, 2020 WL 2786840 (3d Cir. May 29, 2020).



# The Courts on Due Process and Fundamental Fairness

**Doe v. Brandeis University**: Basic fairness requires the university to provide an accused student with: (1) notice of charges, (2) the right to counsel, (3) the opportunity to confront the accuser, (4) cross-examination of evidence or witness statements, and an effective appeal.

**Doe v. Regents of the University of California**

**Doe v. Claremont McKenna College**: When the respondent faces a severe penalty and the case turns on credibility, the process must provide for a hearing where the respondent may question, if even indirectly, the complainant.

2016

**Doe. Rectors and Visitors of GMU**: A university provide an accused student with notice of the full scope of charges.

**Doe v. University of Southern California**: A university must provide an accused student with supplemental notice if the charges against the respondent change or expand.

2017

**Doe v. Trustees of Boston College**

2018

**Doe v. Baum**: When credibility is at issue, the Due Process Clause mandates that a university provide accused students a hearing with the opportunity to conduct cross-examination.



# The Courts on Due Process and Fundamental Fairness

**Doe v. Allee (USC)**: Fundamental fairness requires, at a minimum, that the university provide a mechanism by which the accused may cross-examine those witnesses, directly or indirectly, at a hearing before a neutral adjudicator with the power to find facts and make credibility assessments independently.

**Doe v. Purdue University**: Investigation report must be provided to the parties prior to the hearing and must include summaries of both inculpatory and exculpatory evidence.

2019

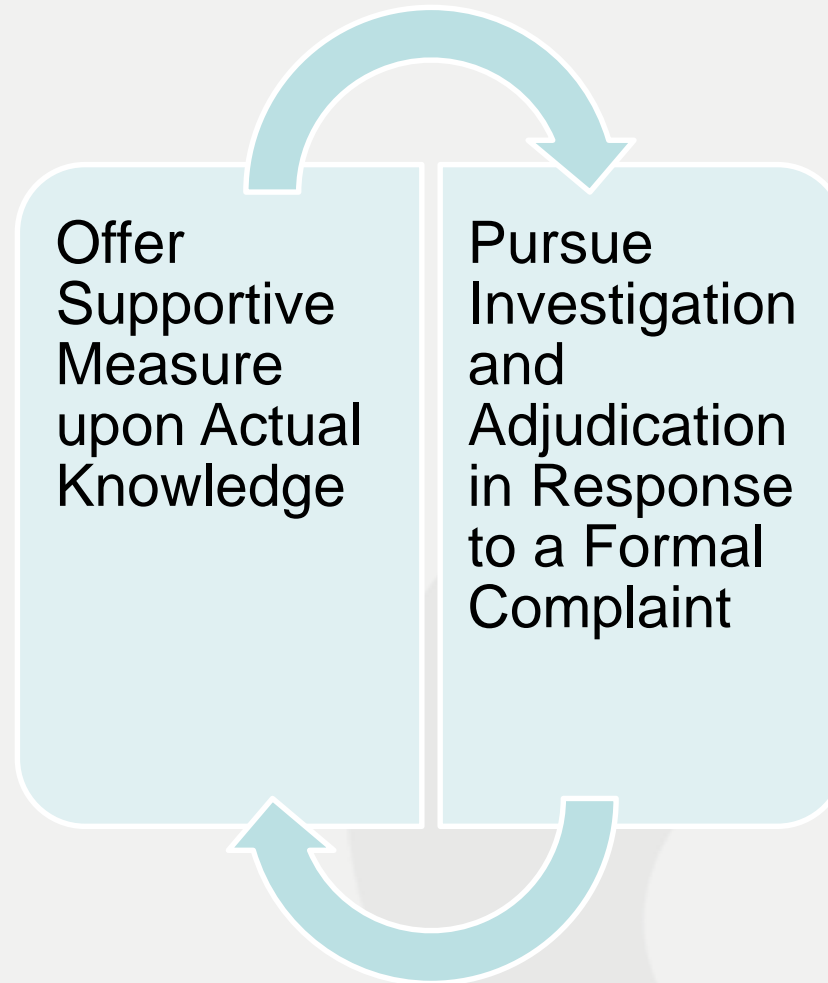
**Doe v. Rhodes College**: An accused student must be afforded the opportunity to question the complainant and review all relevant evidence prior to the hearing.

2020

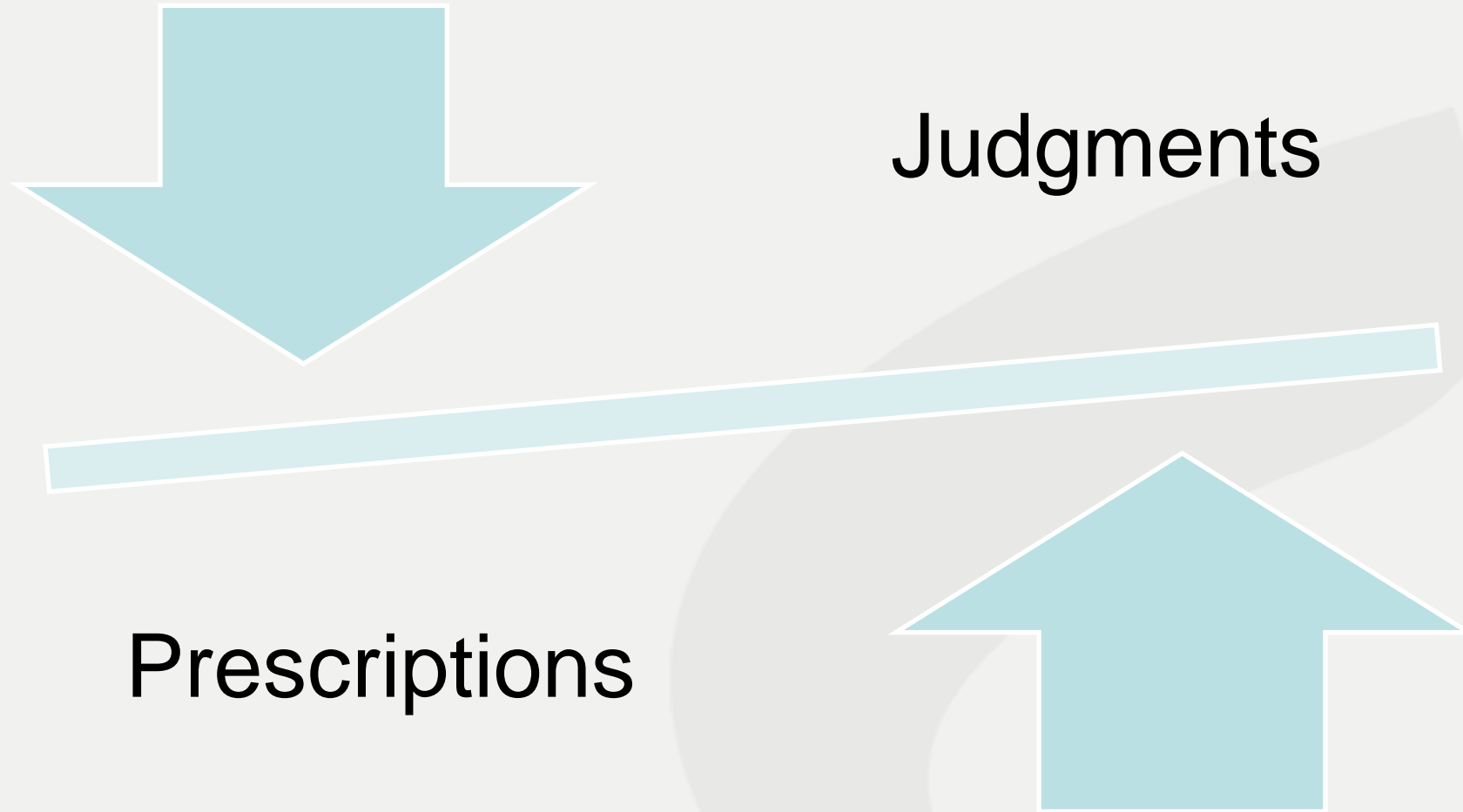
**Boermeester v. Carry**: In a DV case, the state court ruled, "...procedures were unfair because they denied Respondent a meaningful opportunity to cross-examine critical witnesses at an in-person hearing."

**Doe v. Univ. of the Sciences**: Notions of fairness include providing the accused with some form of cross-examination and a live, adversarial hearing during which he or she can put on a defense and challenge the evidence.

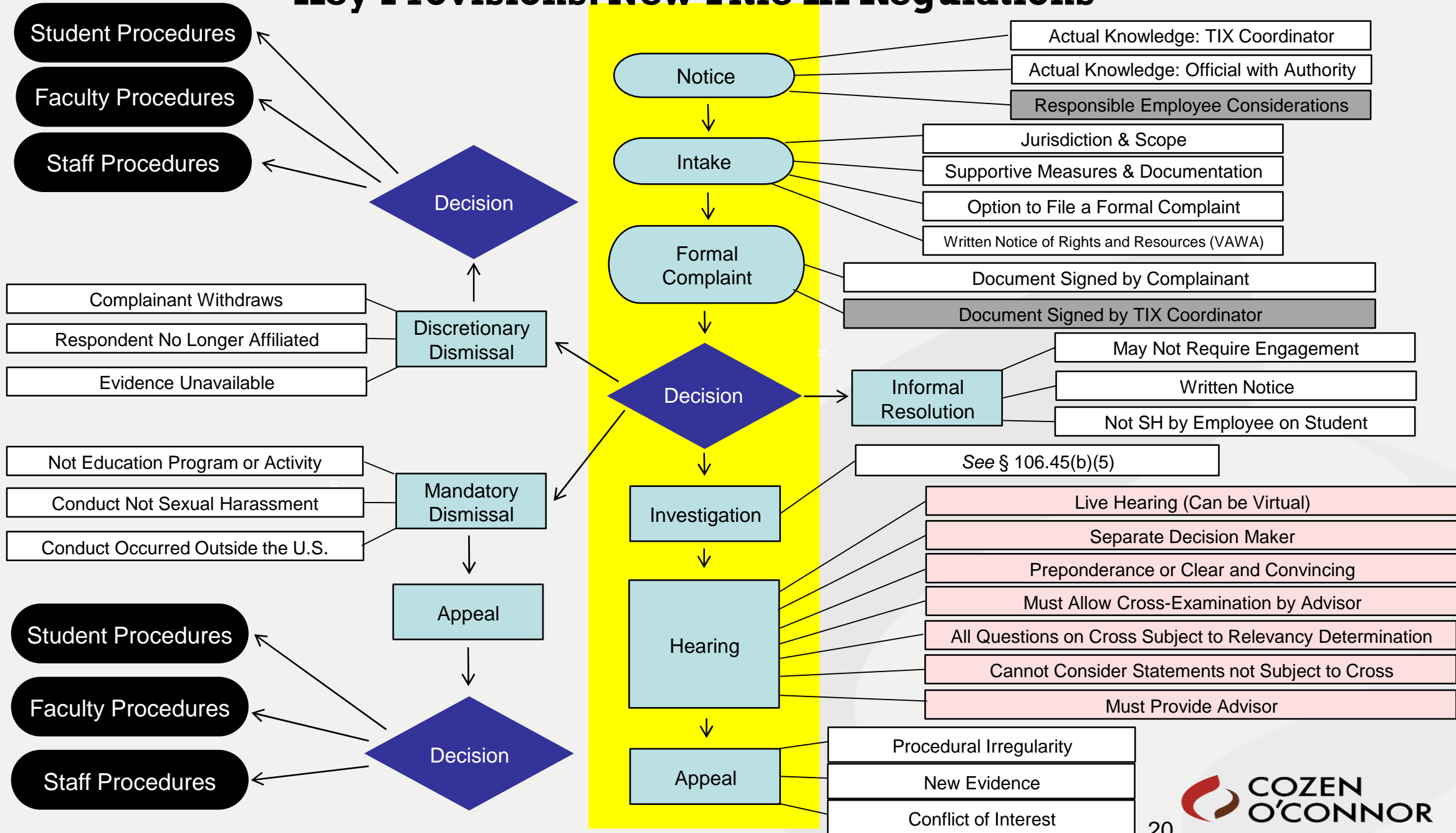
# Understanding Two Key Provisions



# Balancing



# Key Provisions: New Title IX Regulations



# Regulations: “Legally Binding Obligations”

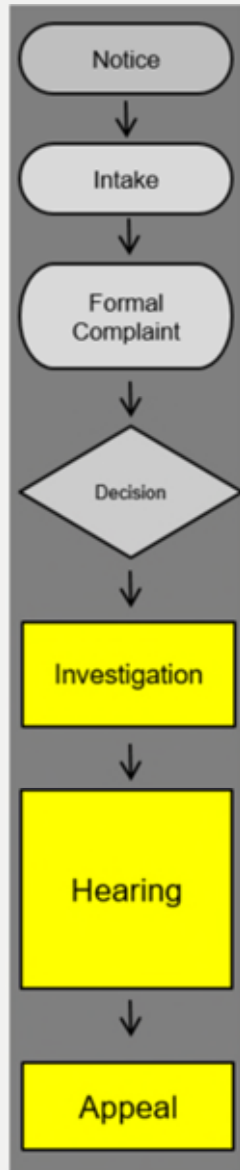
- “Because these final regulations represent the Department’s interpretation of a recipient’s legally binding obligations, **rather than best practices**, recommendations, or guidance, these final regulations focus on **precise legal compliance requirements** governing recipients.”

# Regulations: “Best Practices”

- “These final regulations leave recipients the **flexibility to choose to follow best practices and recommendations** contained in the Department’s guidance, or similarly, best practices and recommendations made by non-Department sources, such as Title IX consultancy firms, legal and social sciences scholars, victim advocacy organizations, civil libertarians and due process advocates and other experts.”

# **BASIC REQUIREMENTS OF GRIEVANCE PROCESSES**

# Grievance Process: The Basics



- Treat parties equitably
- Presumption of non-responsibility
- Reasonably prompt time frames with extensions for good cause
- Practitioners trained and free from conflict of interest and bias
- Uniform standard of evidence
- Restricted use of privileged information
- Objective evaluation of all relevant evidence
- Credibility determinations not based on person's status
- Range of supportive measures, remedies and sanctions
- Remedies only following a finding of responsibility
- Sanctions only following § 106.45 grievance process
- Designated appeal grounds



# Basic Requirements

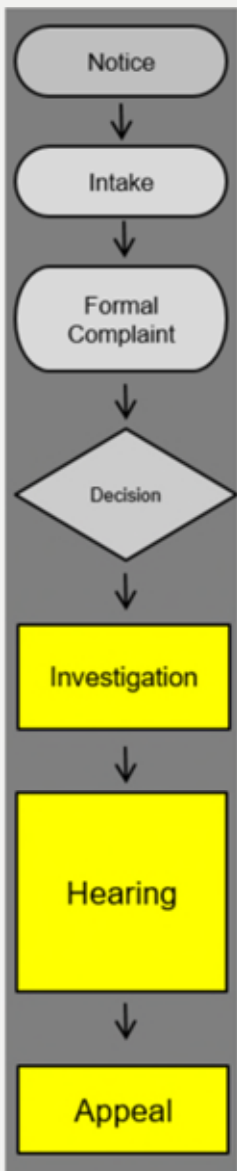


- **Treat complainants and respondents equitably** by providing **remedies** to a complainant where a determination of responsibility for sexual harassment has been made against the respondent, and by following a **grievance process** that complies with this section before the imposition of any disciplinary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

Relevant Regulations Sections:

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

# Basic Requirements



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

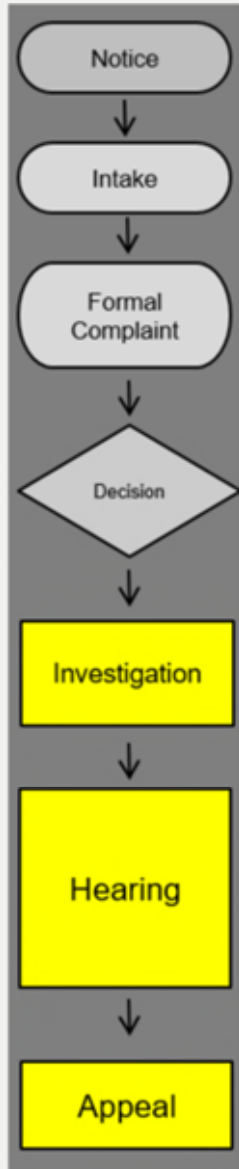
Relevant Regulations Sections:

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

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

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

# Basic Requirements



- **Presumption that the respondent is not responsible** for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process
- 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

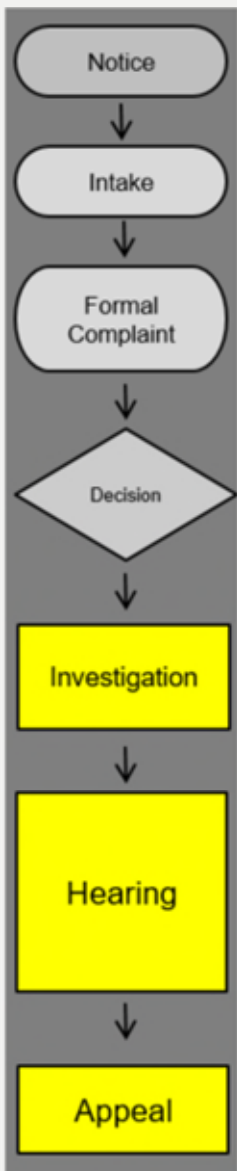
Relevant Regulations Sections:

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)

# 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)

# 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)

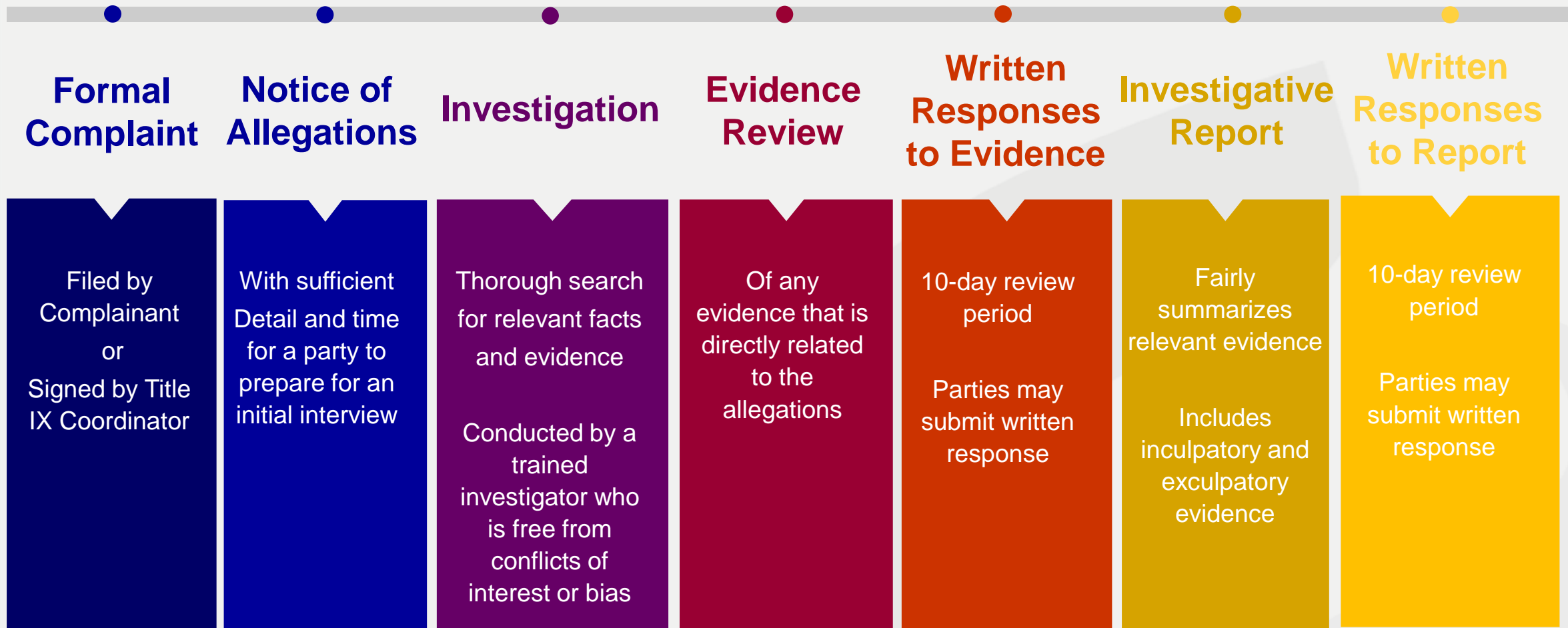
Range of Supportive Measures: § 106.45(b)(1)(ix)

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

# Recap of Investigation Requirements

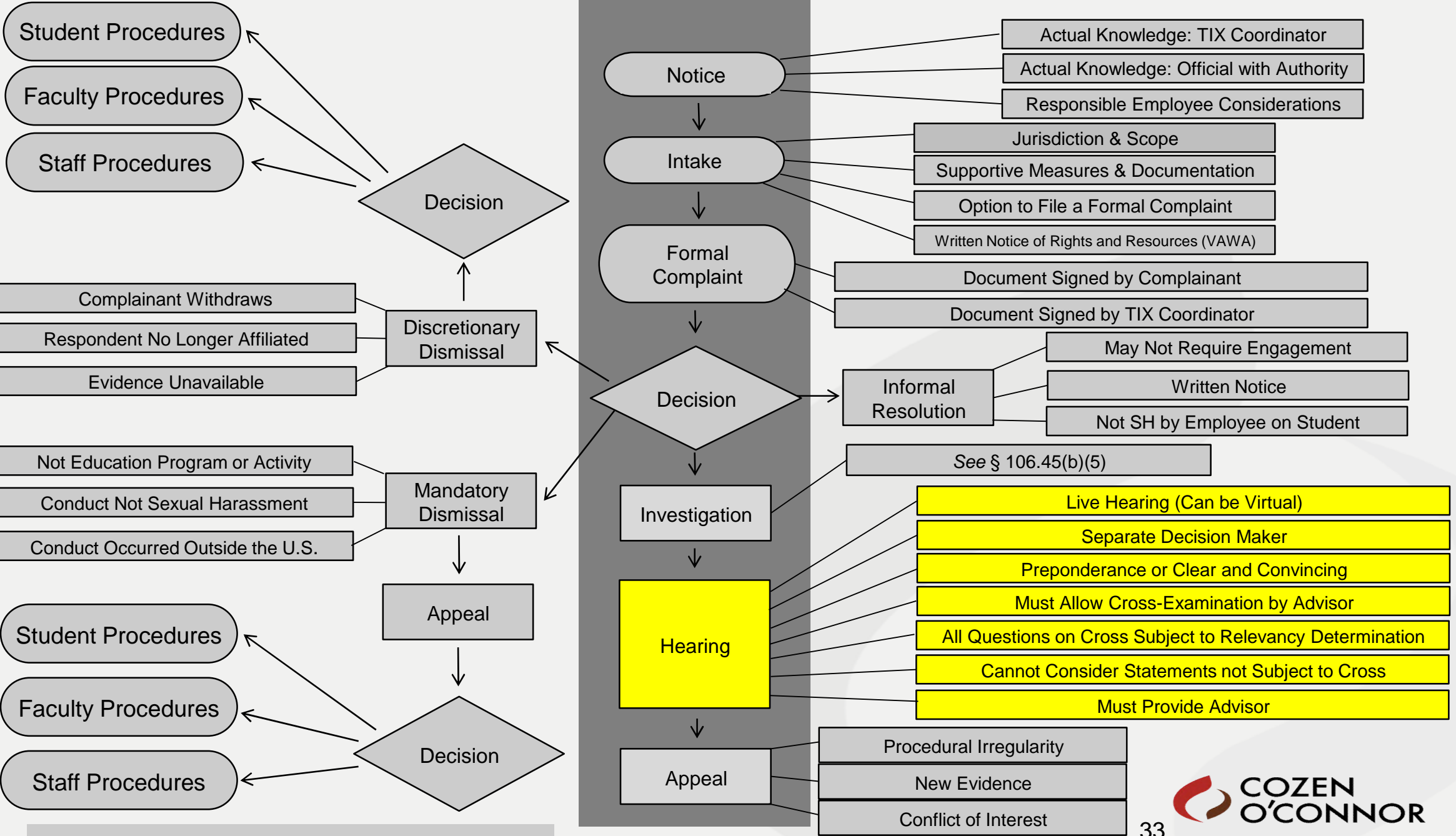
- Formal Complaint
- Notice of Allegations
- Investigation
- Evidence Review
  - Review and response period
- Investigative Report
  - Review and response period

# Recap of Investigation Requirements

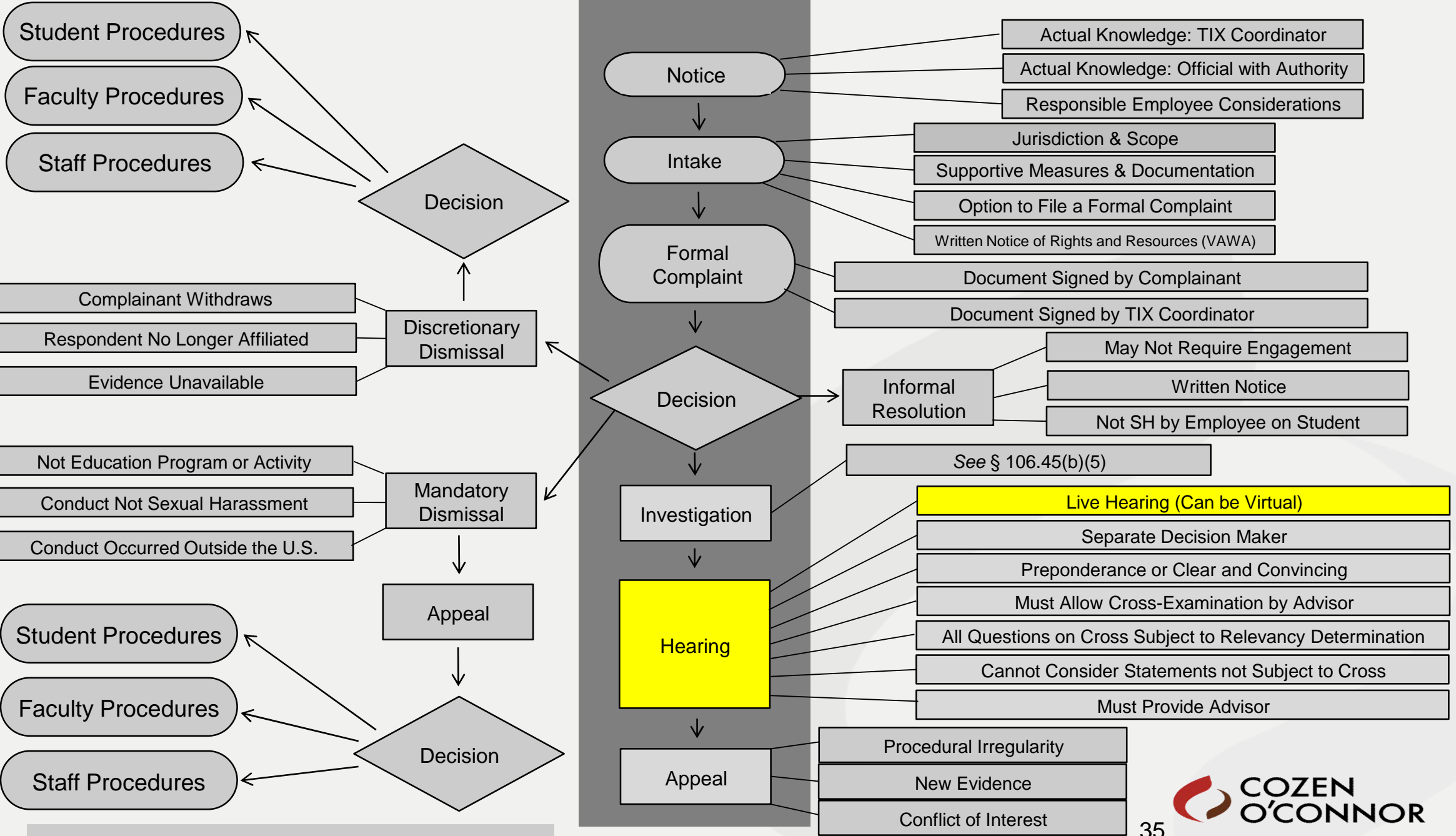


# **OVERVIEW OF HEARING REQUIREMENTS**





# **THE LIVE HEARING REQUIREMENT**



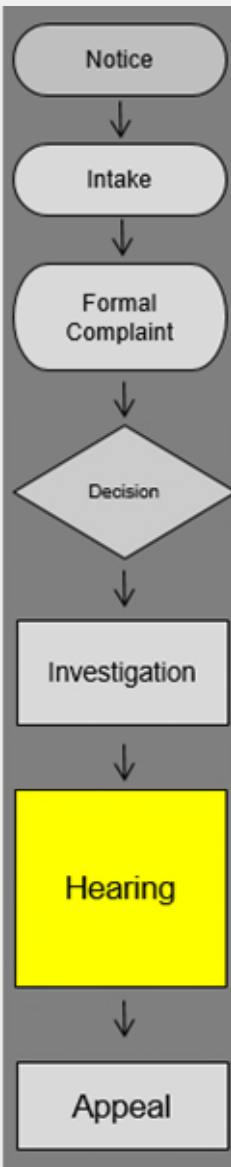
# Live Hearing Required

- For postsecondary institutions, the recipient's grievance process **must provide for a live hearing.**



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

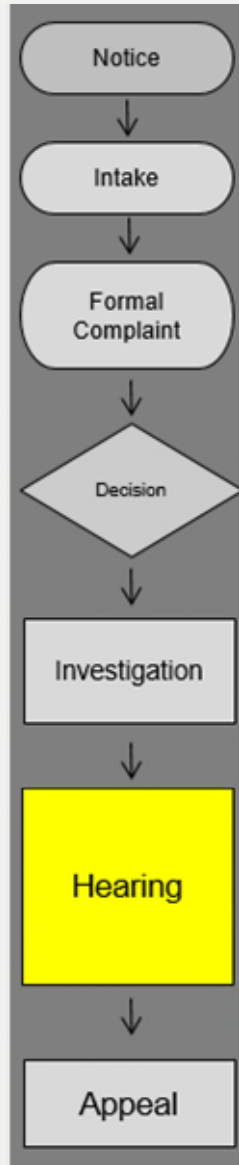
# Live Hearing Required



- [A] live hearing gives both parties the most meaningful, transparent opportunity to present their views of the case to the decision-maker, **reducing the likelihood of biased decisions, improving the accuracy of outcomes, and increasing party and public confidence in the fairness and reliability** of outcomes of Title IX adjudications.

Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30359 .

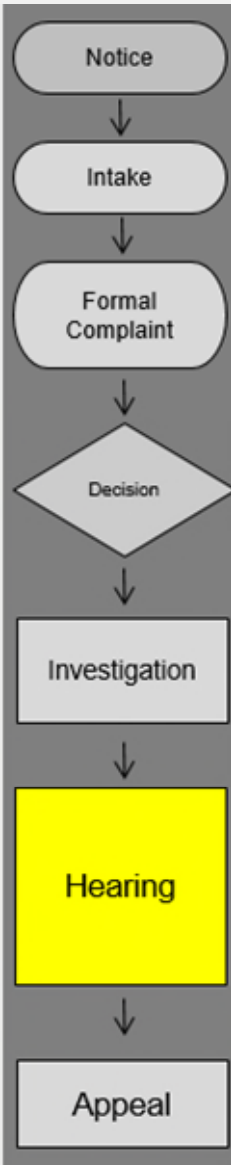
# Option to Use Technology



- Live hearings pursuant to this paragraph may be conducted with all parties physically present in the same geographic location or, at the recipient's direction, any or all parties, witnesses and other participants may appear at the live hearing **virtually, with technology** enabling participants simultaneously to see and hear each other.

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

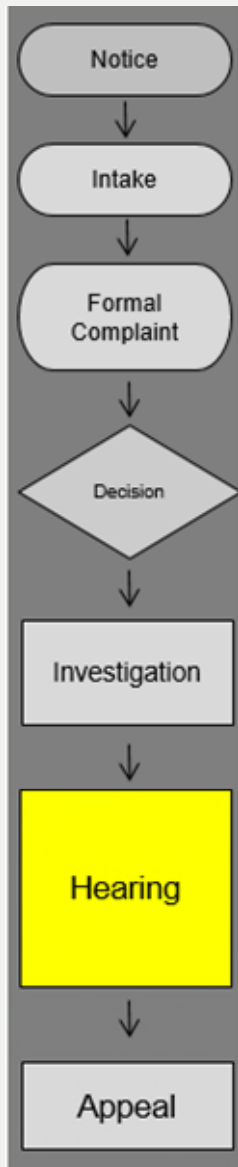
# Virtual Hearing Considerations



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

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

# Virtual Hearing Considerations

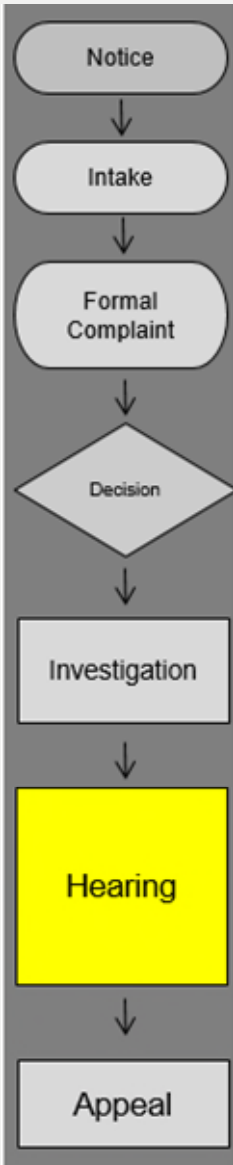


- The Department agrees with commenters who asserted that cross-examination provides opportunity for a decision-maker to assess credibility based on a number of factors, **including evaluation of body language and demeanor**, specific details, inherent plausibility, internal consistency, and corroborative evidence.

Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30321;



# Virtual Hearing Considerations

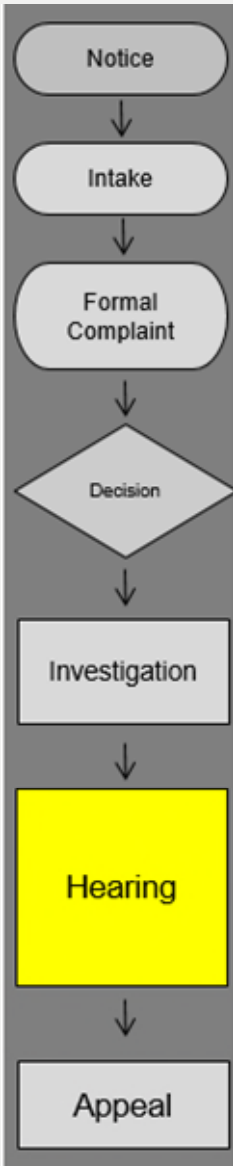


- The final regulations grant recipients discretion to allow participants, including witnesses, to appear at a live hearing virtually; however, **technology must enable all participants to see and hear other participants**, so a telephonic appearance would not be sufficient to comply with §106.45(b)(6)(i).

Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30348

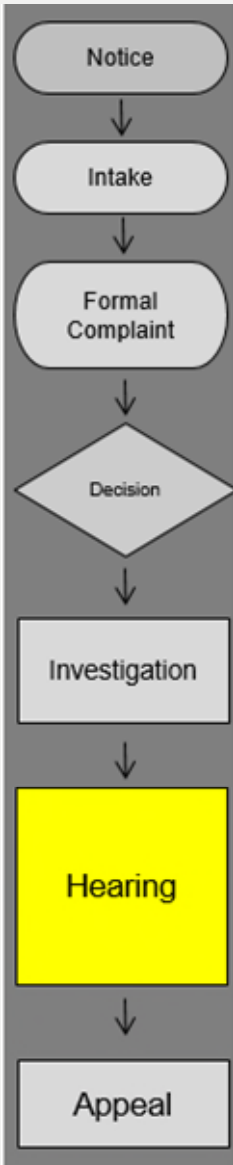
# Flexibility to Adopt Rules

- Recipients may adopt rules that govern the **conduct and decorum** of participants at live hearings so long as such rules comply with these final regulations and apply equally to both parties.



Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30315.

# 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).

Title IX Regulations May 19, 2020; Preamble at 30248

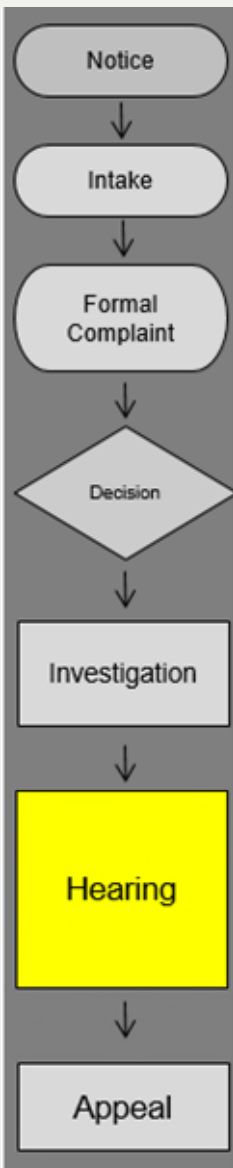
# Relevance Limitation on Flexibility



- **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

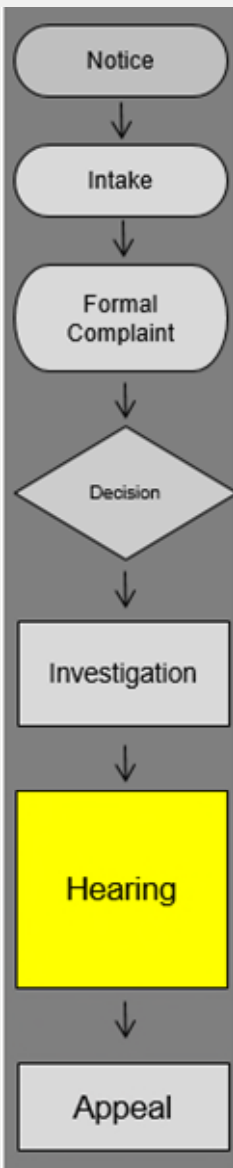
# Participation by Parties and Witnesses



- The Department understands commenters concerns that **respondents, complainants, and witnesses may be absent from a hearing**, or may refuse to submit to cross-examination, for a variety of reasons, including a respondent's self-incrimination concerns regarding a related criminal proceeding, a complainant's reluctance to be cross-examined, or a witness studying abroad, among many other reasons.

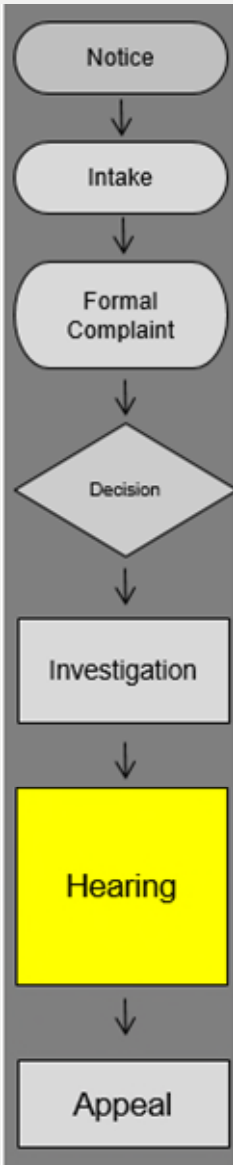
Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30346

# Participation by Parties and Witnesses



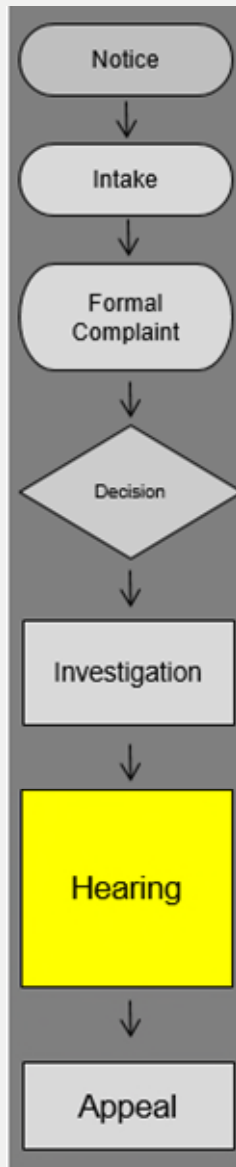
- In response to commenters' concerns, the Department has revised the proposed regulations as follows:
  - (1) We have revised § 106.45(b)(6)(i) to state that where a decision-maker must not rely on an absent or non-cross examined party or witness's statements, the decision-maker **cannot draw any inferences about the determination regarding responsibility based on such absence or refusal** to be cross-examined;
  - (2) We have revised § 106.45(b)(6)(i) to grant a recipient discretion to hold the entire hearing **virtually using technology** that enables any or all participants to appear remotely;

# Participation by Parties and Witnesses



- (3) § 106.71 **expressly prohibits retaliation** against any party, witness, or other person exercising rights under Title IX, including the right to participate or refuse to participate in a grievance process;
- (4) § 106.45(b)(3)(ii) grants a recipient **discretion to dismiss a formal complaint**, or allegations therein, where the complainant notifies the Title IX Coordinator in writing that the **complainant wishes to withdraw** the allegations, or **the respondent is no longer enrolled or employed** by the recipient, or **specific circumstances prevent the recipient from gathering evidence** sufficient to reach a determination.
- These changes address many of the concerns raised by commenters stemming from reasons why parties or witnesses may not wish to participate and the consequences of non-participation.

# Participation by the Complainant



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

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



# Transcript or Recording



- Recipients must create an **audio or audiovisual recording, or transcript**, of any live hearing and make it available to the parties for inspection and review.

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

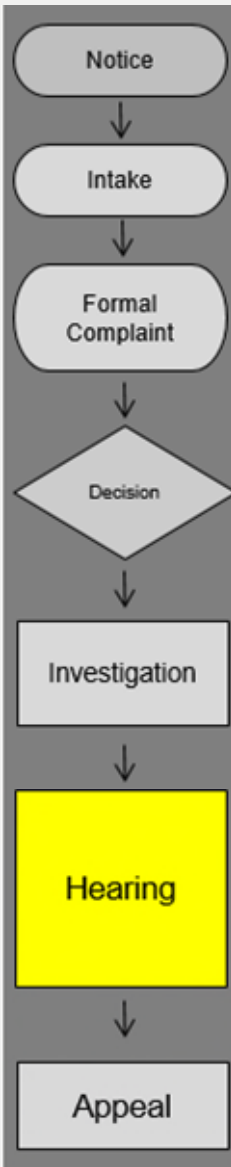
# Applicability to K-12 Schools

- 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.**



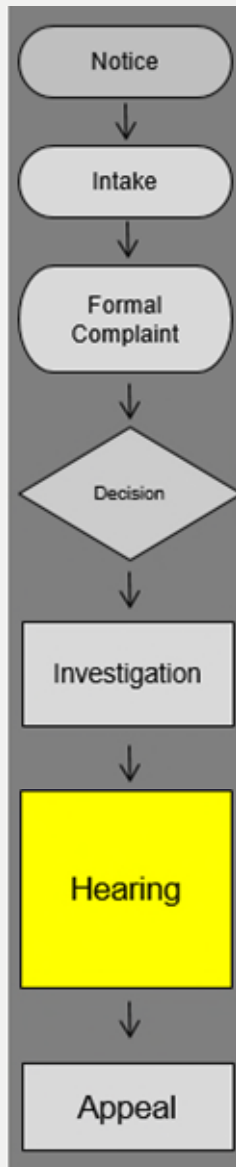
Title IX Regulations, May 19, 2020; § 106.45(b)(6)(ii)

# Academic Medical Centers



- **Academic medical centers are not postsecondary institutions**, although an academic medical center may be affiliated with ... or even considered part of the same entity as the postsecondary institution.
- Through this revision, the Department is giving entities like academic medical centers **greater flexibility** in determining the appropriate process for a formal complaint.

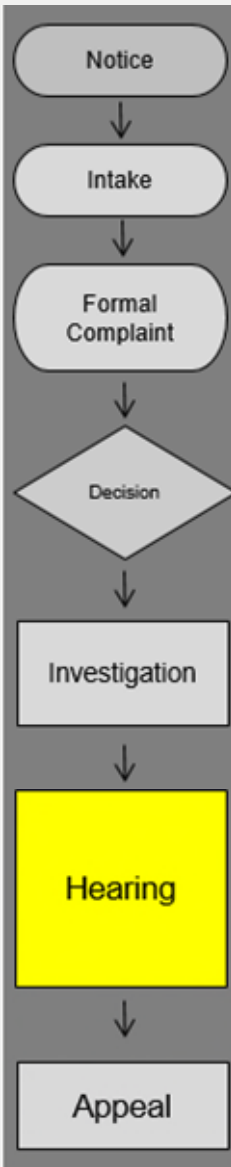
# Non-Postsecondary Institutions



- 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 party wants asked of any party or witness, **provide each party with the answers**, and **allow for additional, limited follow-up questions.**

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

# Non-Postsecondary Institutions

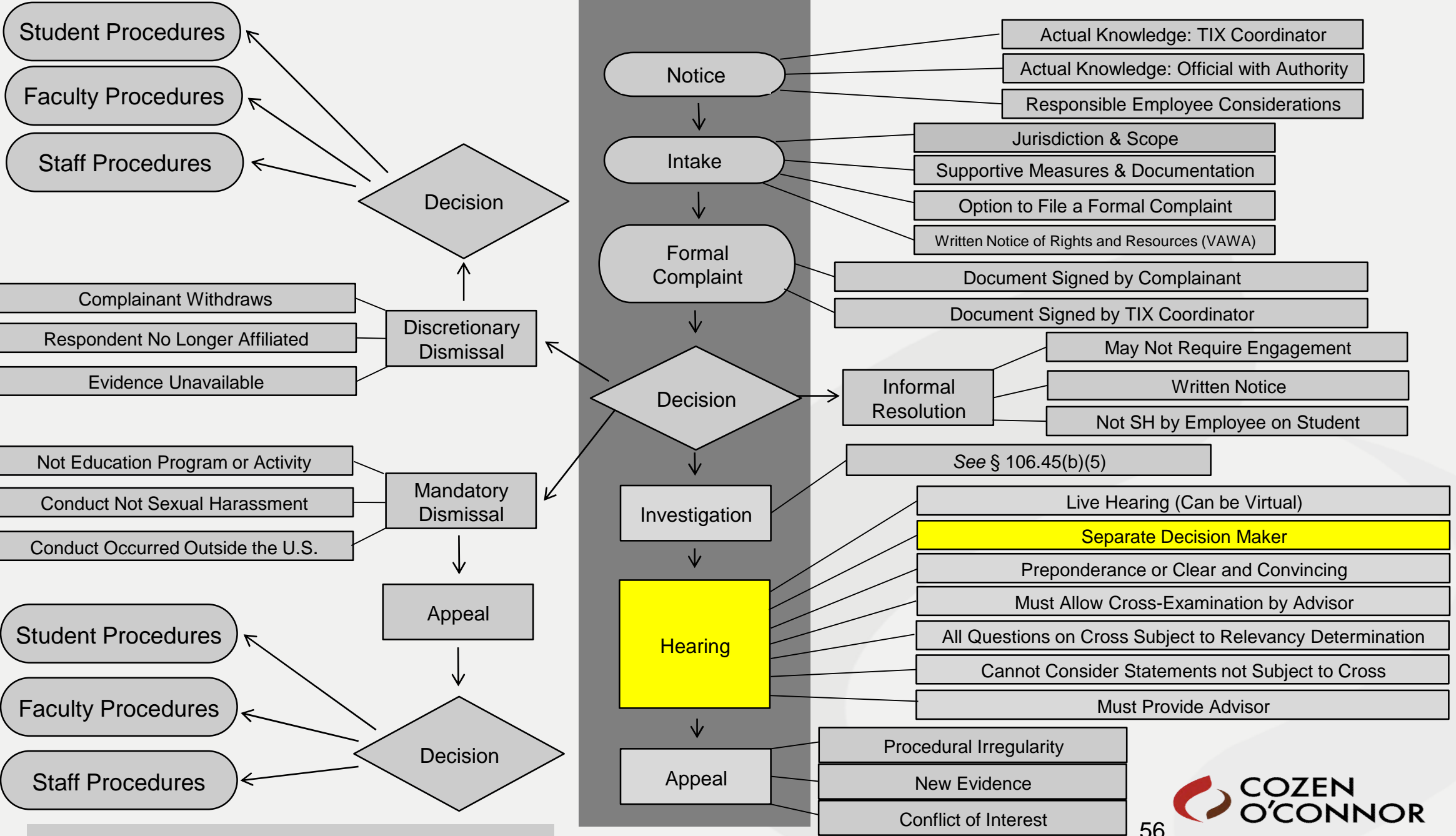


- As to recipients that are not postsecondary institutions, the Department has revised § 106.45(b)(6)(ii) to provide that the recipient *may* require a live hearing and *must* afford each party the opportunity to submit written questions, provide each party with the answers, and allow for additional, limited follow-up questions from each party.

# Practical Considerations & Effective Practices

- Impact of requirement that parties and/or witnesses participate in the hearing
  - Party vs. witness
  - Student vs. employee
- Decisions re: technology
- Recording versus transcription
- Procedures for non-postsecondary institutions

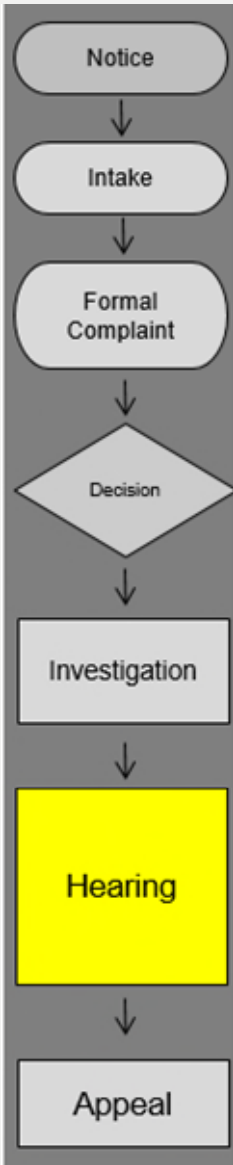
# **ROLE OF DECISION-MAKER**





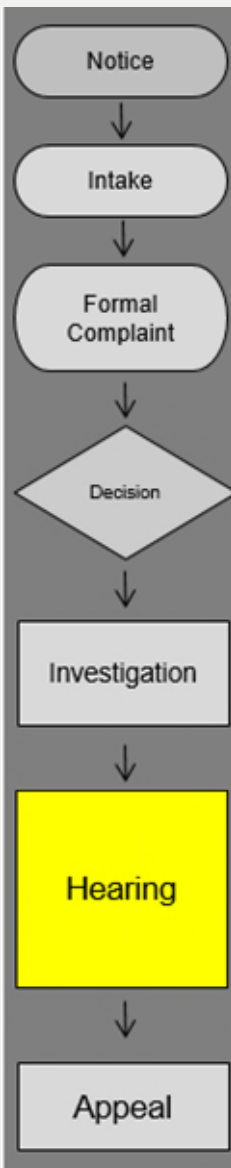
# Determine Relevance of Questions

- Before a complainant, respondent, or witness answers a cross-examination or other question, the decision-maker(s) must **first determine whether the question is relevant ...**



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

# Explain Decisions to Exclude Questions

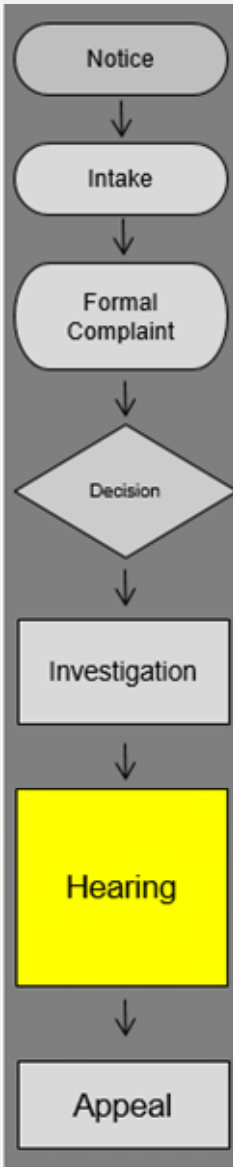


- The decision-maker(s) must explain to the party proposing the questions **any decision to exclude** a question as not relevant.

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

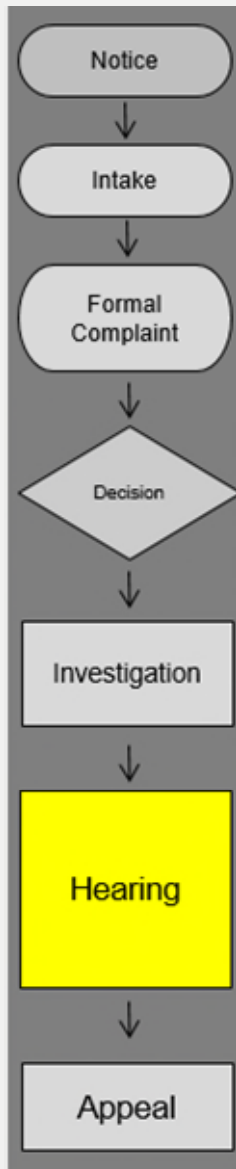
# Apply the Standard of Evidence

- To reach [a] determination, the recipient must apply the standard of evidence described in paragraph (b)(1)(vii) of this section.



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

# Issue Written Determinations

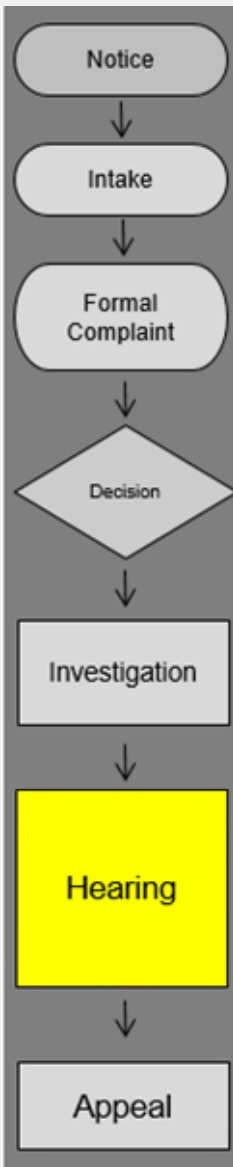


- The decision-maker(s) ... must issue a simultaneous written determination regarding responsibility, including
  - Identification of the allegations
  - Description of the procedural steps taken from the receipt of the formal complaint through the determination
  - Findings of fact supporting the determination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

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

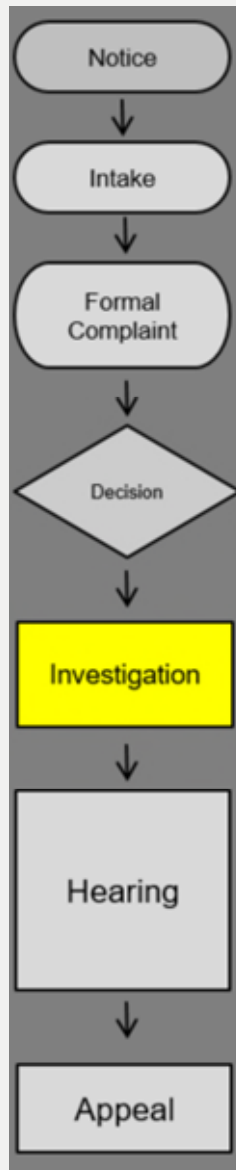
# Separate Decision-Maker

- The Department wishes to clarify that the final regulations **require the Title IX Coordinator and investigator to be different individuals from the decision-maker**, but nothing in the final regulations requires the Title IX Coordinator to be an individual different from the investigator.



Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30372

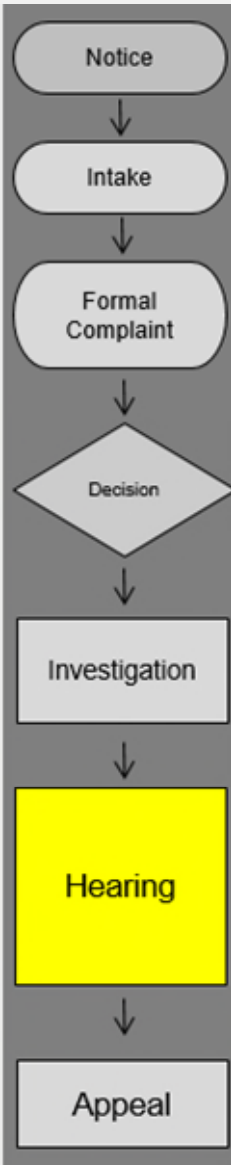
# Investigator May not Determine Responsibility



- § 106.45(b)(7)(i) prevents an investigator from actually making a determination regarding responsibility.

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

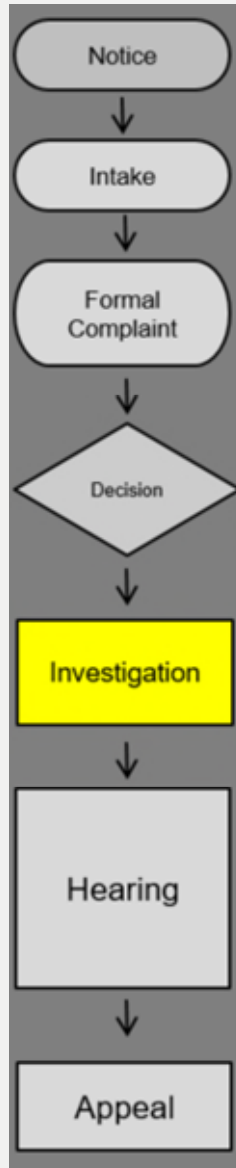
# Decision-Maker Must Determine Responsibility



- Nothing in the final regulations prevents Title IX Coordinators from offering recommendations regarding responsibility to the decision-maker for consideration, but the final regulations **require the ultimate determination regarding responsibility to be reached by an individual (i.e., the decision-maker) who did not participate in the case as an investigator or Title IX Coordinator.**

Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30372

# Independent Obligation to Evaluate Evidence

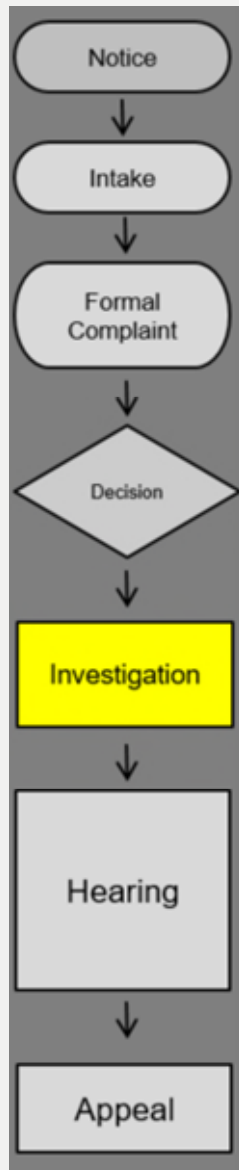


- The Department does not wish to prohibit the investigator from including recommended findings or conclusions in the investigative report.
- However, the decision-maker is under an **independent obligation to objectively evaluate relevant evidence**, and thus cannot simply defer to recommendations made by the investigator in the investigative report.

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



# Independent Obligation to Evaluate Credibility



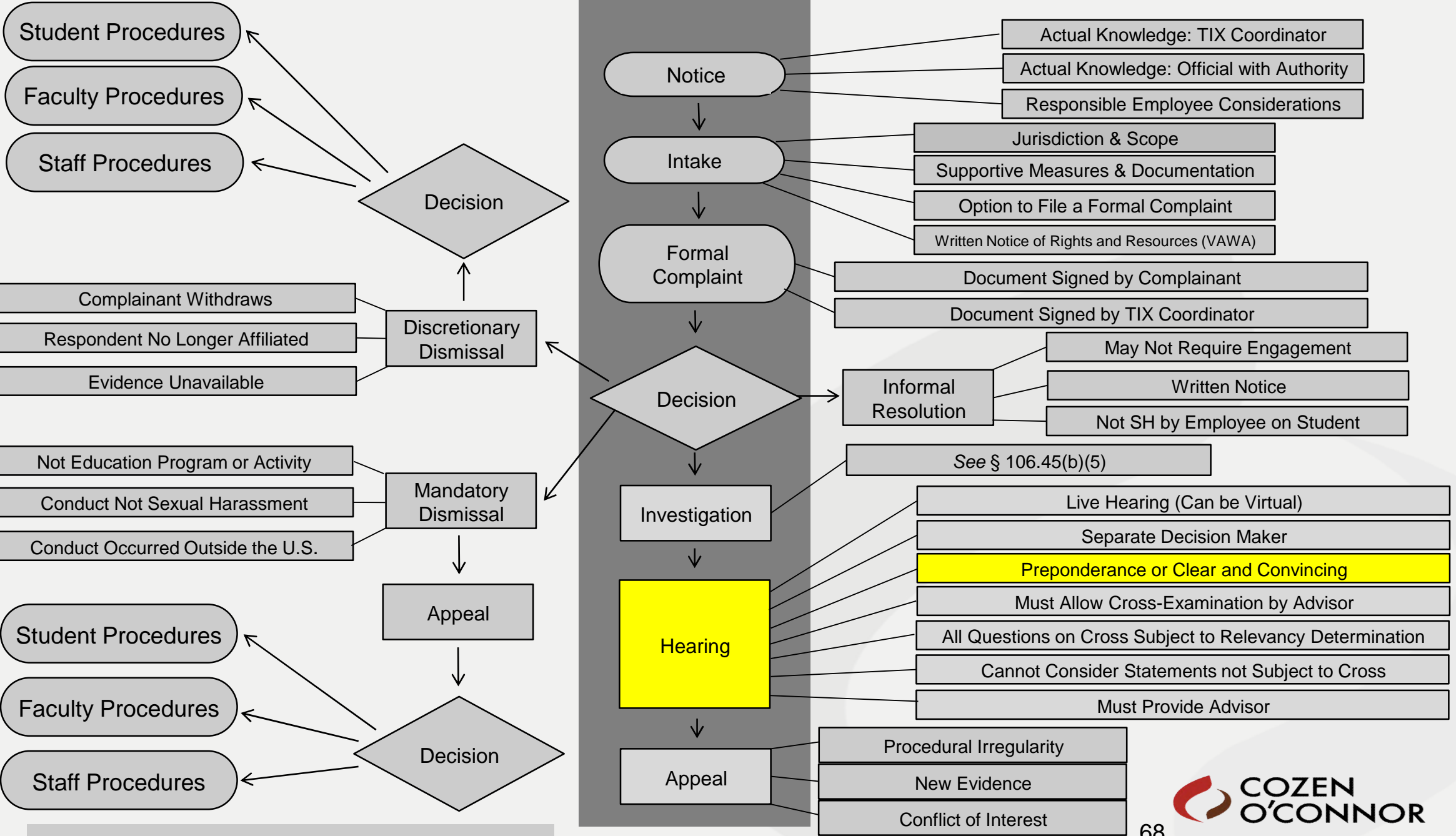
- If a recipient chooses to include a **credibility analysis** in its investigative report, the recipient must be cautious not to violate § 106.45(b)(7)(i), prohibiting the decision-maker from being the same person as the Title IX Coordinator or the investigator.
- If an investigator's determination 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.30308 & 30436

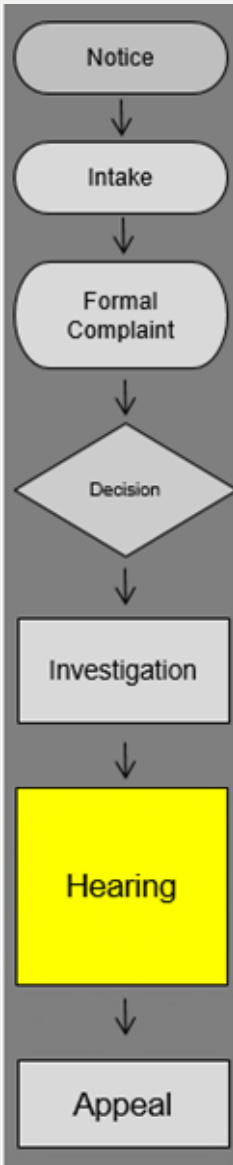
# Practical Considerations & Effective Practices

- Choice of decision-maker(s)
  - Hearing panel vs. sole adjudicator
  - External professional vs. internal administrator
- Decision-maker on sanction
  - Can be same or different from decision-maker on finding
- Use of Hearing Coordinator?
- Whether to have investigator make recommended findings or include a credibility analysis

# **STANDARD OF EVIDENCE**



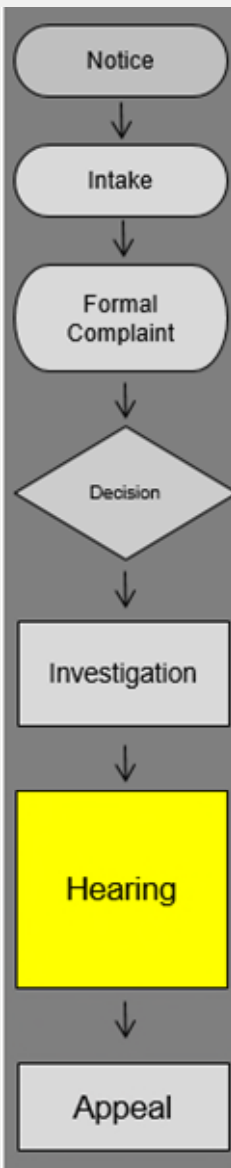
# Standard of Evidence



- [T]he recipient must apply the same standard of evidence to student and employee matters, using either the clear and convincing standard or the preponderance of the evidence standard.
- The recipient must apply the same standard of evidence to all formal complaints of sexual harassment.

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

# Standard of Evidence



- For reasons described above, the Department has determined that the approach to the standard of evidence contained in § 106.45(b)(1)(vii) and § 106.45(b)(7)(i) of the final regulations represents the **most effective way of legally obligating recipients to select a standard of evidence** for use in resolving formal complaints of sexual harassment under Title IX to ensure a fair, reliable grievance process **without unnecessarily mandating that a recipient select one standard over the other.**

Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30388.

# Standard of Evidence

- In short, under the final regulations the **same standard of evidence will apply to all formal complaints of sexual harassment** under Title IX responded to by a particular recipient, **whether the respondent is a student or employee.**



Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30388.

# Standard of Evidence



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



# Clear and Convincing\*

- The evidence is highly and substantially more likely to be true than untrue
- The fact finder must be convinced that the contention is highly probable
- Proof which requires more than a preponderance of the evidence but less than proof beyond a reasonable doubt
- Clear and convincing proof will be shown where the truth of the facts asserted is highly probable
- Quality of the evidence, not quantity
- NOT beyond a reasonable doubt

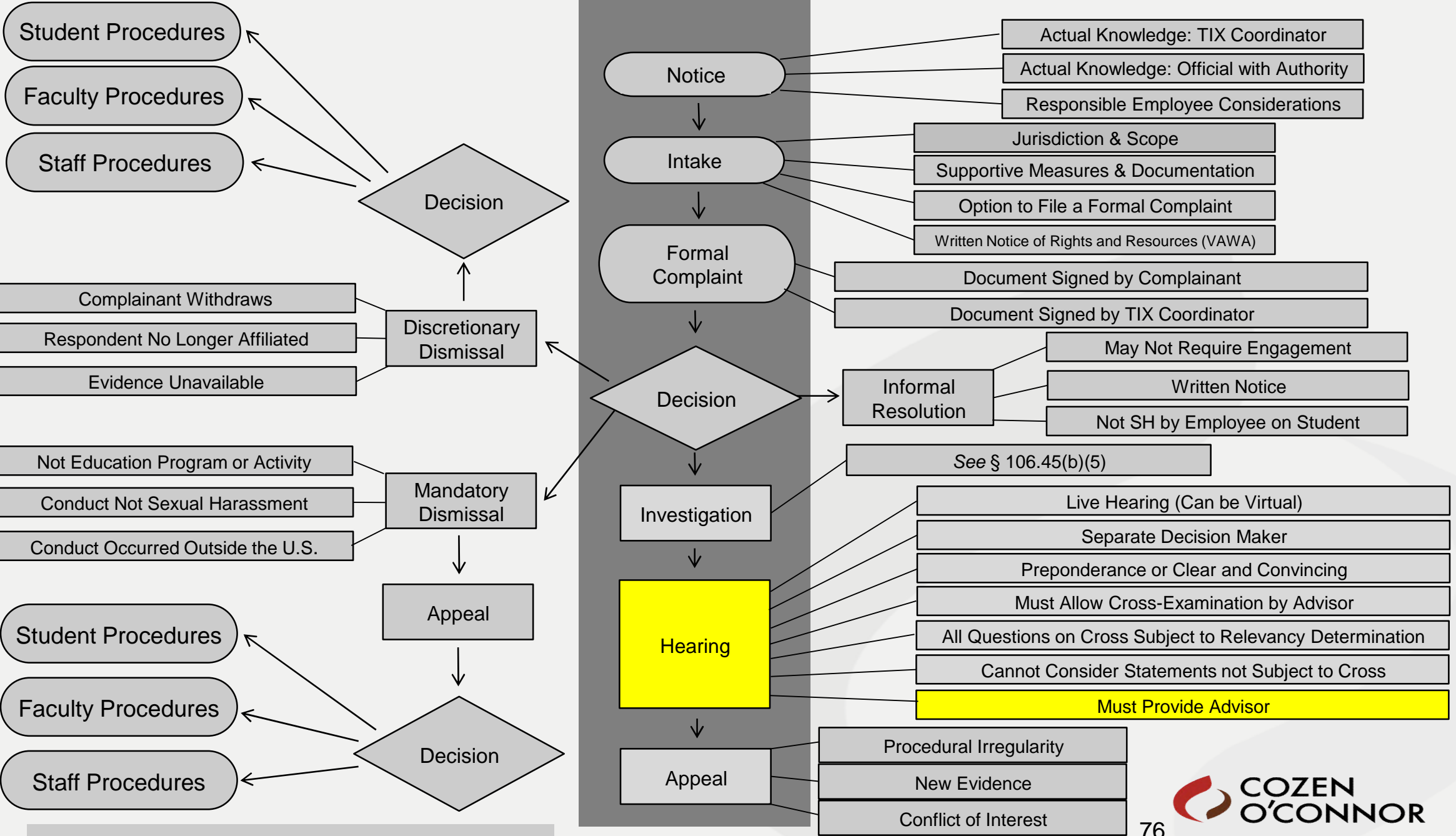
\* Based on common usage.

# Preponderance of the Evidence\*

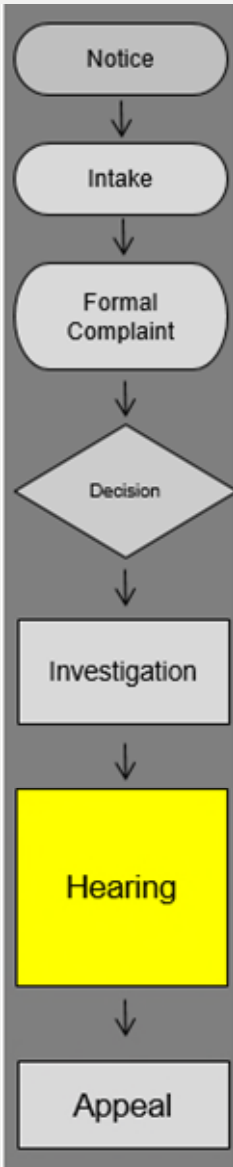
- More likely to be true than not
- More probable than not
- The greater weight of the evidence
- Tipping the scale ever so slightly
- 51 %
- Based on the more convincing evidence and it's probable truth or accuracy, not on the amount
- Quality of the evidence, not quantity
- NOT beyond a reasonable doubt

\* Based on common usage.

# **ADVISOR OF CHOICE**



# Title IX: Advisor of Choice



- Parties must have the same opportunities to ... be accompanied to any related meeting or proceeding by **an advisor of their choice**.
- The advisor 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.
- “[T]he role of an advisor is to assist and advise the party.”

Title IX Regulations May 19, 2020; §106.45(b)(5)(iv);  
Preamble 85 F.R. 30328.

# VAWA: Advisor of Choice

- Provide the accuser and the accused with the same opportunities to have others present during any institutional disciplinary proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the **advisor of their choice**
- **Not limit the choice of advisor** or presence for either the accuser or the accused in any meeting or institutional disciplinary proceeding
- However, the institution **may establish restrictions regarding the extent to which the advisor may participate in the proceedings**, as long as the restrictions apply equally to both parties

Violence Against Women Reauthorization Act § 668.46(k)(2)(iii)-(iv); 79 F.R. 62789

# No Limit as to Conflicts of Interest



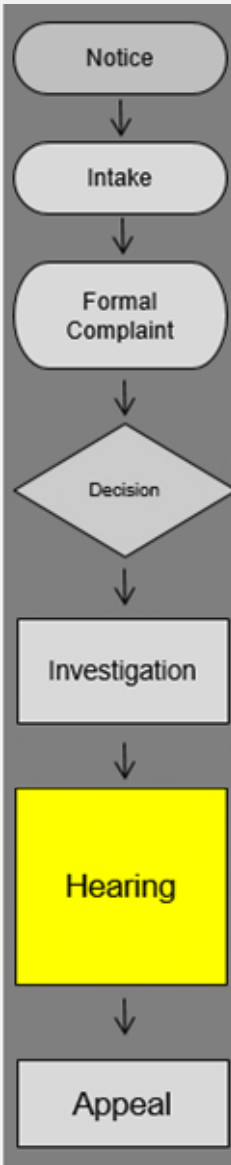
- The Department notes that the 106.45 (b)(1)(iii) prohibition of Title IX personnel having conflicts of interest or bias **does not apply to party advisors** (including advisors provided to a party by a post secondary institution as required under 106.45(b)(6)(i)) and thus, **the existence of a possible conflict of interest where an advisor is assisting one party and also expected to give a statements as a witness does not violate the final regulations.**

Title IX Regulations May 19, 2020; Preamble at 30299

# **ROLE OF THE ADVISOR AT HEARING**



# Role of the Advisor

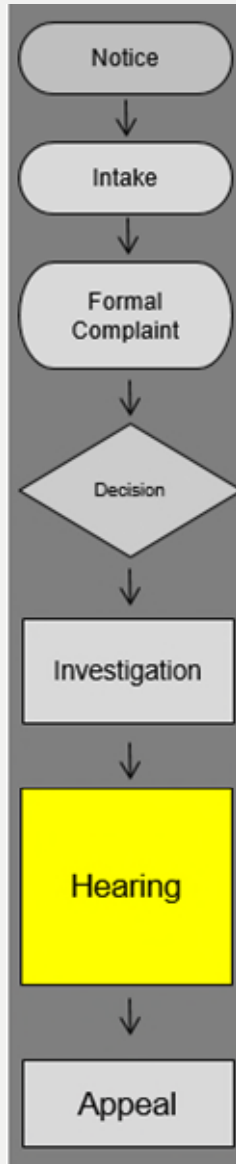


- At the live hearing, the decision-maker(s) must permit each party's advisor to **ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility.**

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

# Advisor's Role at the Hearing

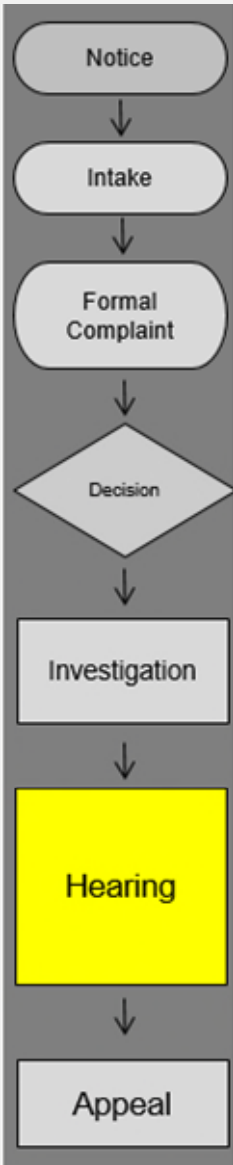
- Such cross-examination at the live hearing must be conducted directly, orally, and in real time by the party's advisor of choice and never by a party personally, **notwithstanding the discretion of the recipient under paragraph (b)(5)(iv) of this section to otherwise restrict the extent to which advisors may participate in the proceedings.**



Title IX Regulations, May 19, 2020; Preamble, 85 F.R. 30336, 30577.

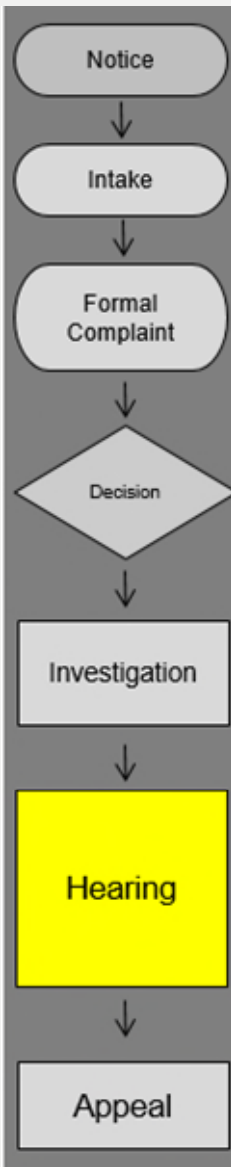
# Cross-Examination by Advisor

- [A] party's advisor may appear and conduct cross-examination **even when the party whom they are advising does not appear.**



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

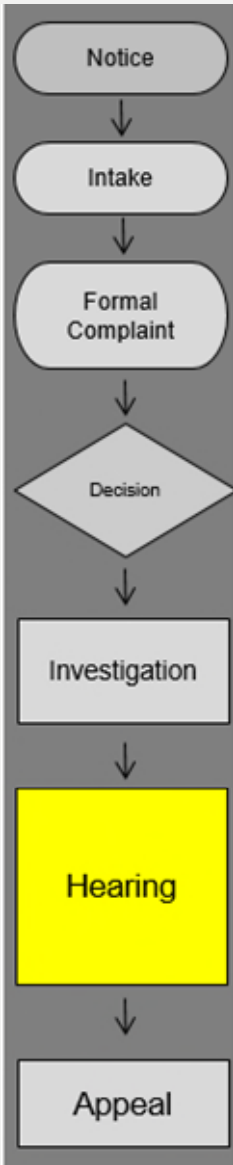
# Discretion as to Advisor's Role



- 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.

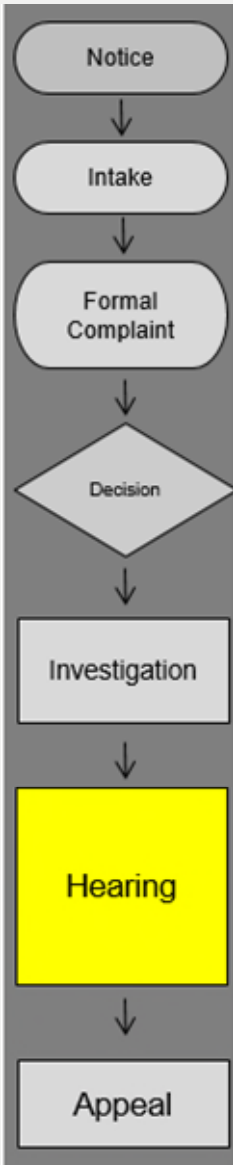
# Discretion as to Advisor's Role

- 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.

# Obligation to Provide an Advisor



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

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

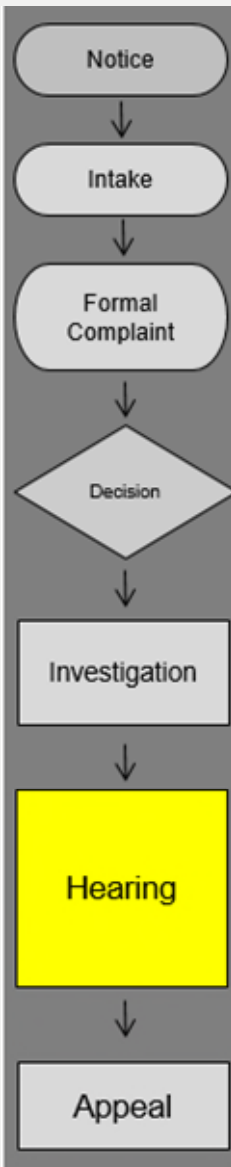
# Must Provide Advisor Even in Party's Absence



- [W]here one party does not appear and that party's advisor of choice does not appear, a recipient-provided advisor **must still cross-examine the other, appearing party "on behalf of" the non-appearing party**, resulting in consideration of the appearing party's statements but not the non-appearing party's statements (without any inference being drawn based on the non-appearance).

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

# Appearance Without an Advisor

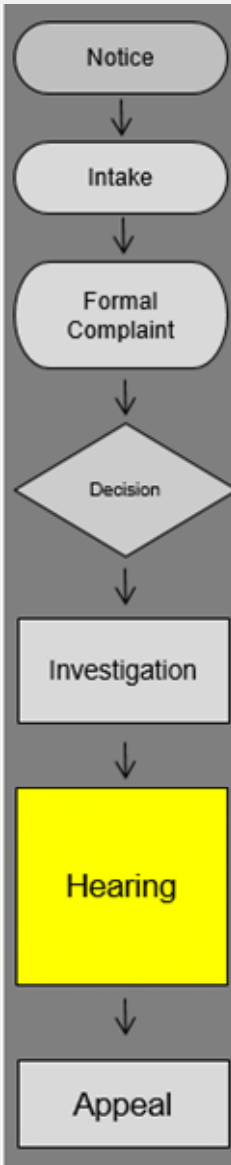


- The final regulations do not preclude recipients from adopting a rule that requires parties to inform the recipient in advance of a hearing whether the party intends to bring an advisor of choice to the hearing; but **if a party then appears at a hearing without an advisor** the recipient would need to **stop the hearing as necessary to permit the recipient to assign an advisor** to that party to conduct cross-examination.

Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30342



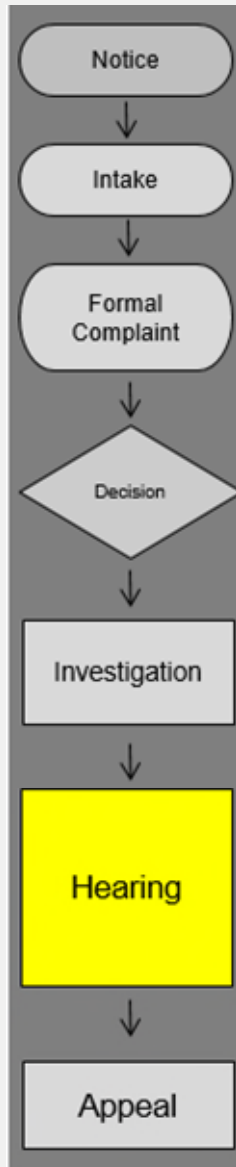
# Refusal to Conduct Cross-Examination



- A party cannot “fire” an assigned advisor during the hearing, **but if the party correctly asserts that the assigned advisor is refusing to “conduct cross-examination on the party’s behalf” then the recipient is obligated to provide the party an advisor to perform that function,** whether that means counseling the assigned advisor to perform that role, or stopping the hearing to assign a different advisor. ...

Title IX Regulations, May 19, 2020; 85 F.R. 30342

# Party Cannot Conduct Own Cross-Examination



- If a party to whom the recipient assigns an advisor **refuses to work with the advisor** when the advisor is willing to conduct cross-examination on the party's behalf, then for reasons described above **that party has no right of self-representation with respect to conducting cross-examination**, and that party would not be able to pose any cross-examination questions.

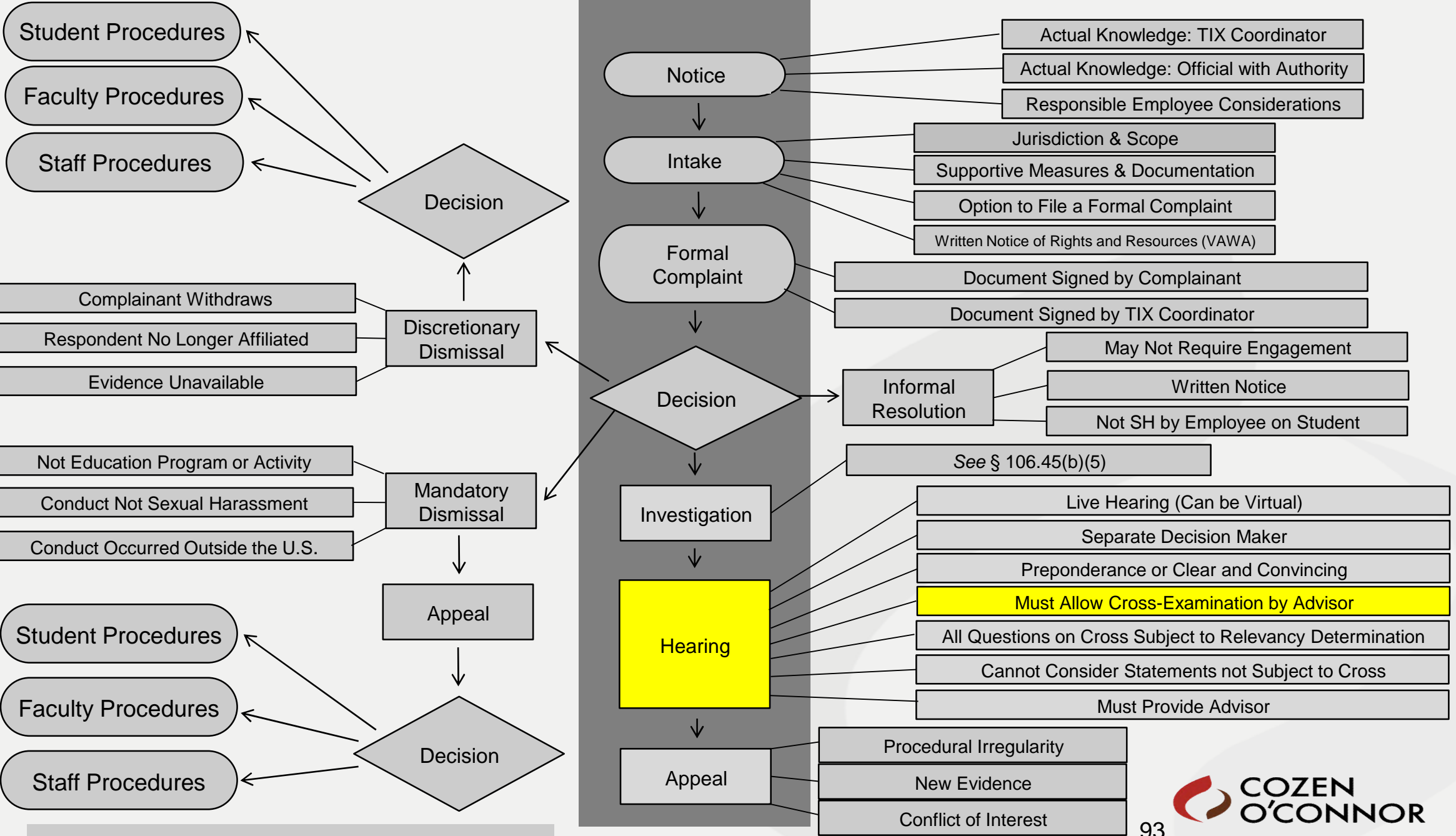
Title IX Regulations, May 19, 2020; § 106.45(b)(6)

Title IX Regulations, May 19, 2020; 85 F.R. 30342

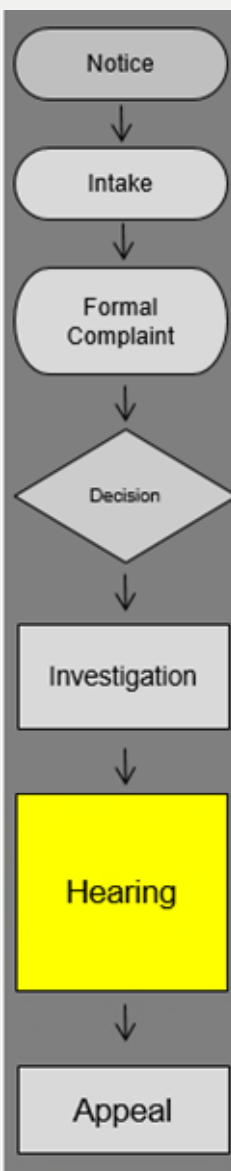
# Practical Considerations & Effective Practices

- 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

# **CROSS-EXAMINATION BY ADVISOR**



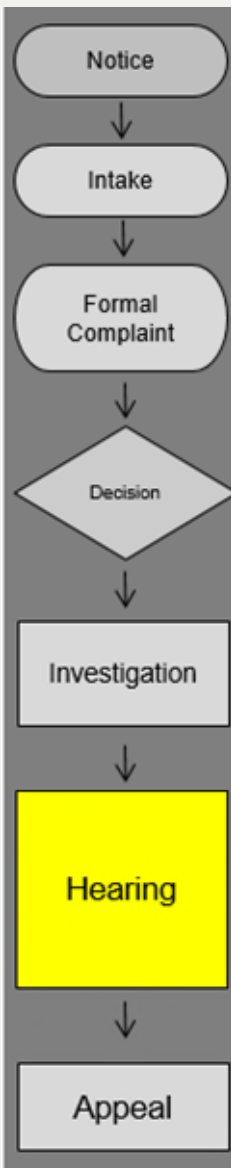
# Cross-Examination



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

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

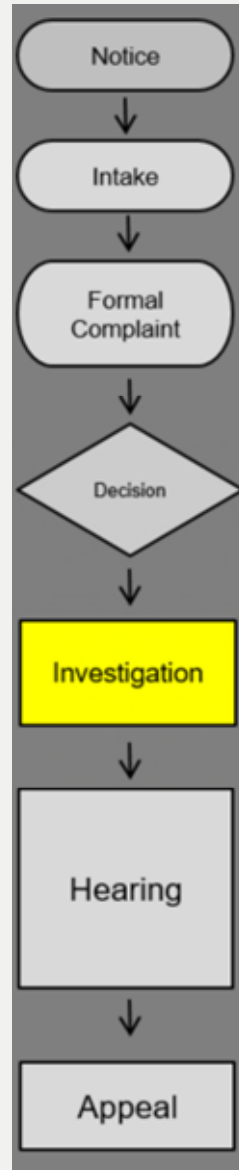
# Cross-Examination



- Such cross-examination at the live hearing must be conducted **directly, orally, and in real time** by the party's advisor of choice and never by a party personally, notwithstanding the discretion of the recipient under paragraph (b)(5)(iv) of this section to otherwise restrict the extent to which advisors may participate in the proceedings.

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

# Recap on Evidence Review

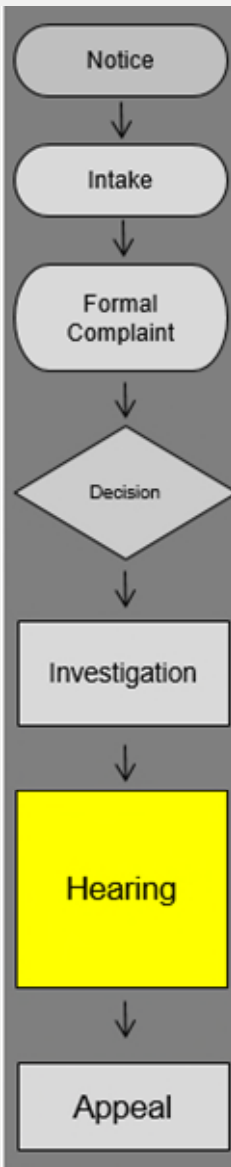


- “Provide both parties an **equal opportunity to inspect and review any evidence** obtained as part of the investigation that is **directly related to the allegations** raised in a formal complaint so that each party can meaningfully respond to the evidence prior to conclusion of the investigation.”

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



# Availability of Evidence at the Hearing



- The recipient must make all such evidence subject to the parties' inspection and review [directly related evidence shared at the evidence review] available at any hearing to give each party equal opportunity to refer to such evidence during the hearing, including for purposes of cross-examination.

Title IX Regulations, May 19, 2020; § 106.45(b)(5)(vi)

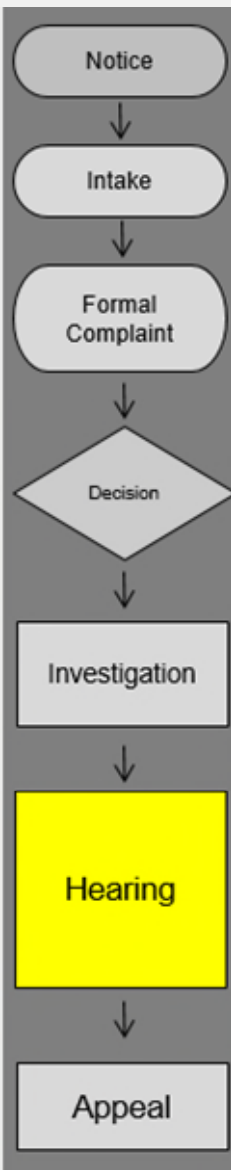
# Opportunity to Challenge Evidence



- Cross-examination in the § 106.45 grievance process is **intended to give both parties equal opportunity to meaningfully challenge the plausibility, reliability, credibility, and consistency of the other party and witnesses** so that the outcome of each individual case is **more likely to be factually accurate, reducing the likelihood of either type of erroneous outcome** (i.e., inaccurately finding a respondent to be responsible, or inaccurately finding a respondent to be non-responsible).

Title IX Regulations, May 19, 2020, Preamble 85 F.R. 30336

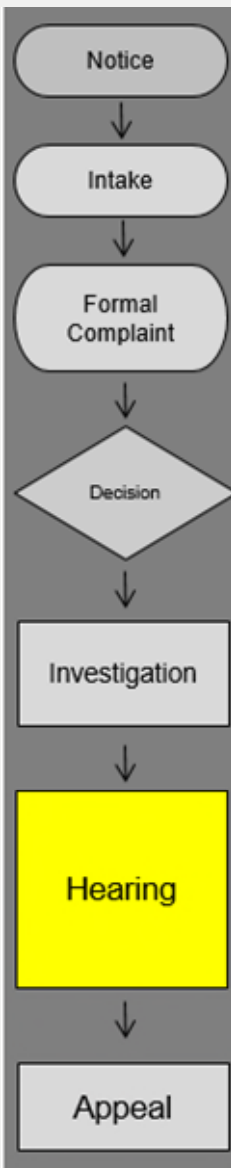
# Questions to Advance a Party's Interest



- The Department clarifies here that conducting cross-examination **consists simply of posing questions intended to advance the asking party's perspective with respect to the specific allegations at issue**; no legal or other training or expertise can or should be required to ask factual questions in the context of a Title IX grievance process.

Title IX Regulations, May 19, 2020, Preamble 85 F.R. 30319

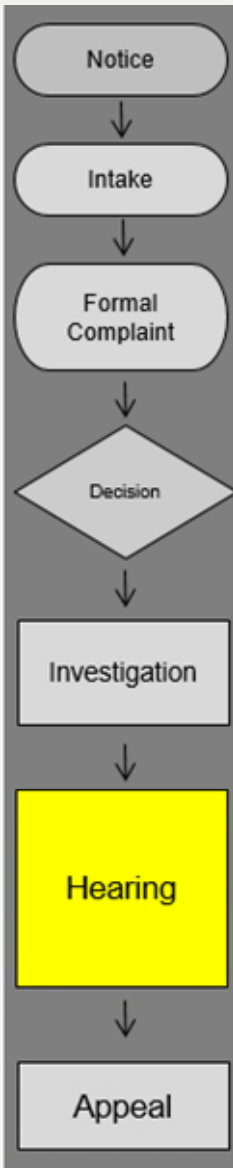
# Cross-Examination



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

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

# Determinations Regarding Relevance



- The final regulations **do not preclude a recipient from adopting a rule** (applied equally to both parties) that does, or does not, **give parties or advisors the right to discuss the relevance determination with the decision-maker during the hearing.**
- If a recipient believes that arguments about a relevance determination during a hearing would unnecessarily protract the hearing or become uncomfortable for parties, **the recipient may adopt a rule that prevents parties and advisors from challenging the relevance determination (after receiving the decision-maker’s explanation) during the hearing.**

Title IX Regulations, May 19, 2020; Preamble 85 F.R 30343

# “Pause” to Reinforce Decorum



- We have also revised § 106.45(b)(6)(i) in a manner that **builds in a “pause” to the cross-examination process**; before a party or witness answers a cross-examination question, the decision-maker must determine if the question is relevant.
- This **helps ensure that content of cross-examination remains focused only on relevant questions** and that the **pace of cross-examination** does not place undue pressure on a party or witness to answer immediately.

Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30323-24

# Rules of Decorum



- The final regulations do not preclude a recipient from enforcing rules of decorum that **ensure all participants, including parties and advisors, participate respectfully and non-abusively during a hearing.**
- If a party's advisor of choice refuses to comply with a recipient's rules of decorum (for example, by insisting on yelling at the other party), the recipient may require the party to use a different advisor.

Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30320

# Rules of Decorum



- Similarly, if an advisor that the recipient provides refuses to comply with a recipient's rules of decorum, the recipient may provide that party with a different advisor to conduct cross-examination on behalf of that party.
- This incentivizes a party to work with an advisor of choice in a manner that complies with a recipient's rules that govern the conduct of a hearing, and incentivizes recipients to appoint advisors who also will comply with such rules, so that hearings are conducted with **respect for all participants**.

Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30320



# Training Not Required for Advisors

- The Department **declines to require training for assigned advisors** because the goal of this provision is not to make parties “feel adequately represented” but rather to ensure that the parties have the opportunity for their own view of the case to be probed in front of the decision-maker.



Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30342

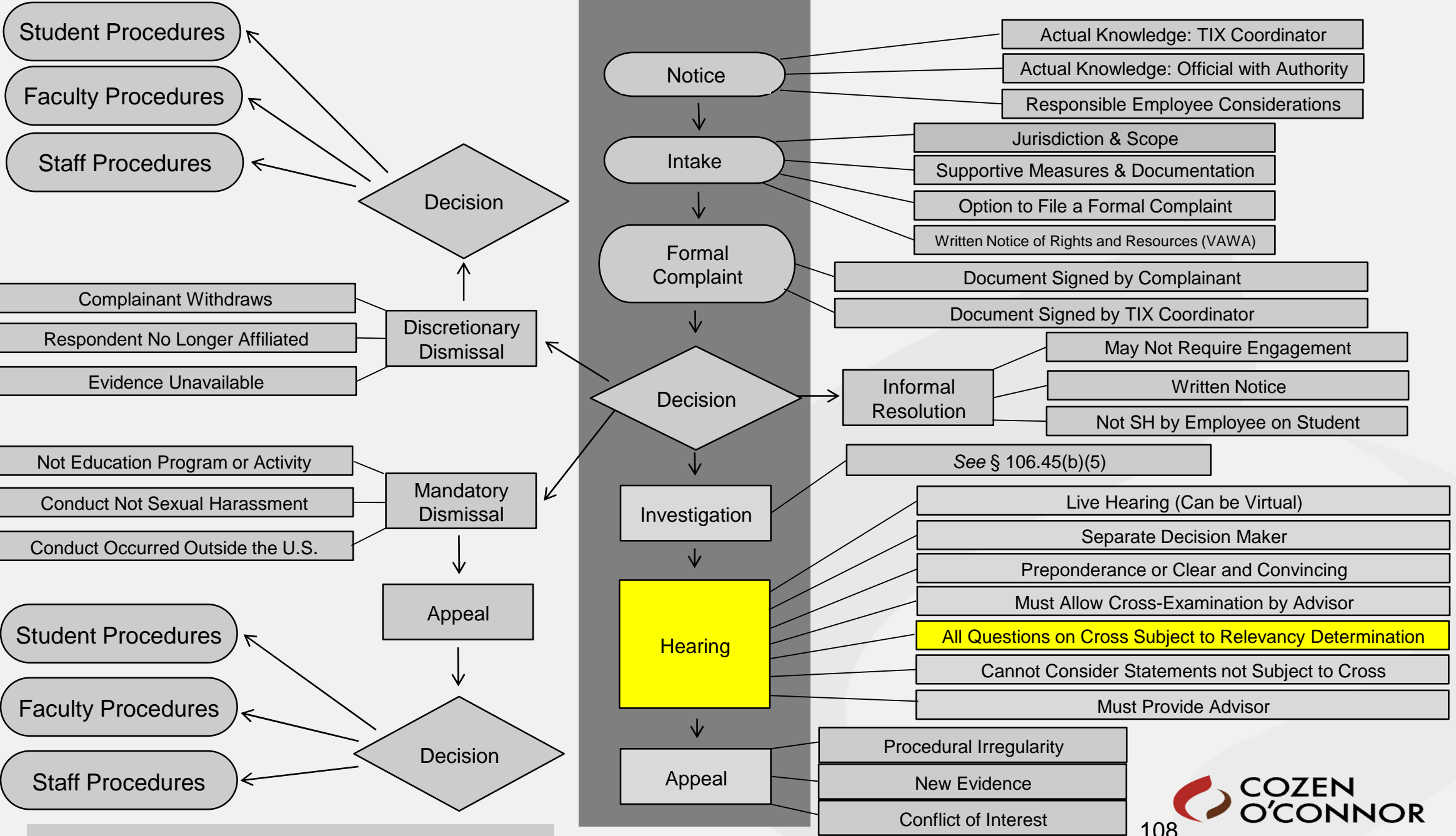
# May Not Impose Training Requirements



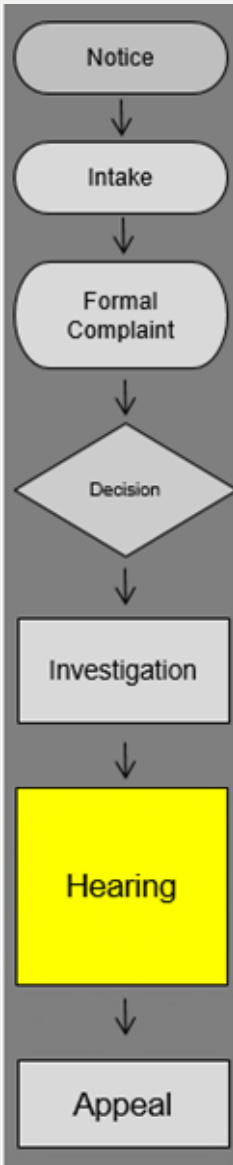
- Recipients may not impose training or competency assessments on advisors of choice selected by parties, but nothing in the final regulations prevents a recipient from training and assessing the competency of its own employees whom the recipient may desire to appoint as party advisors.

Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30342

# RELEVANCE



# Questions Must be Relevant



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

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

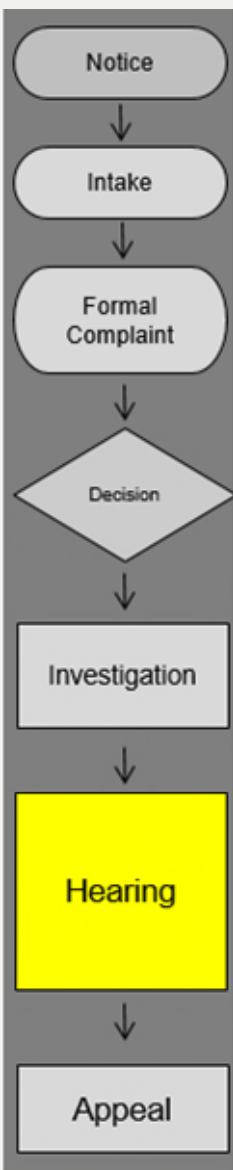
# Relevance

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



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

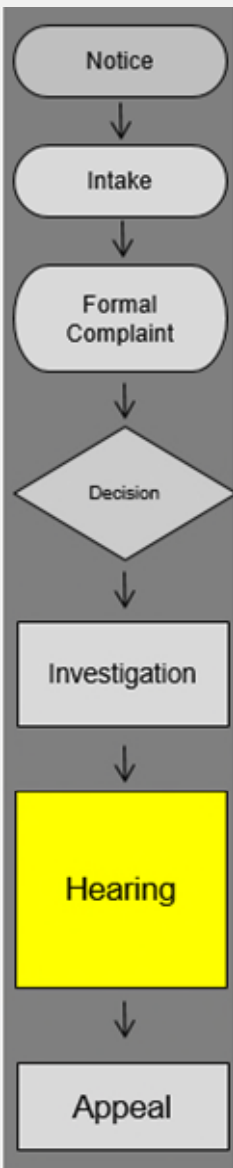
# Relevance



- While the proposed rules do not speak to
  - admissibility of hearsay,
  - prior bad acts,
  - character evidence,
  - polygraph (lie detector) results,
  - standards for authentication of evidence,
  - or similar issues concerning evidence,
- the final regulations require recipients to **gather and evaluate relevant evidence**, with the understanding that . . .

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

# Relevance

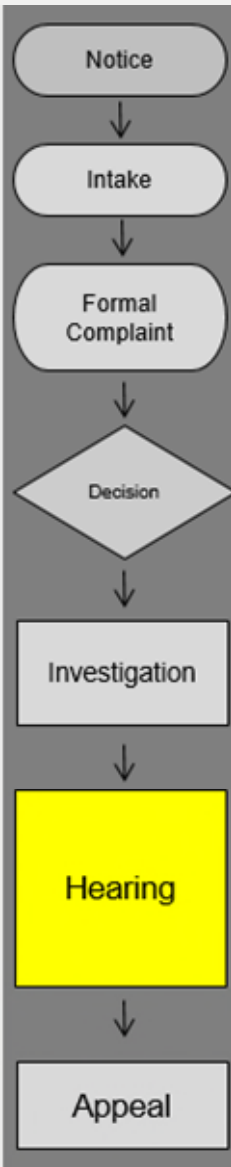


- this includes **both inculpatory and exculpatory evidence**, and
- the final regulations deem questions and evidence about a complainant's prior sexual behavior to be **irrelevant** with two exceptions, and
- preclude use of any information protected by a **legally recognized privilege** (e.g., attorney-client).

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



# Limitations on Relevance



- To that end, the Department has determined that recipients **must consider relevant evidence** with the following conditions:
  - a complainant’s prior sexual behavior is **irrelevant** (unless questions or evidence about prior sexual behavior meet one of two exceptions, as noted above);
  - information protected by any legally recognized privilege **cannot be used**; no party’s treatment records may be used without that party’s voluntary, written consent; and
  - statements not subject to cross-examination in postsecondary institutions **cannot be relied on** by the decision-maker.
  - The Department notes that where evidence is duplicative of other evidence, a recipient may deem the evidence **not relevant**.

Title IX Regulations, May 19, 2020, Preamble 85 F.R. 30337

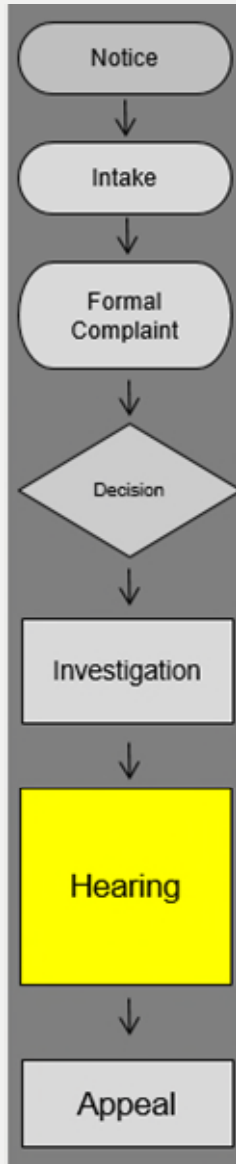
# Privileged Information

- 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

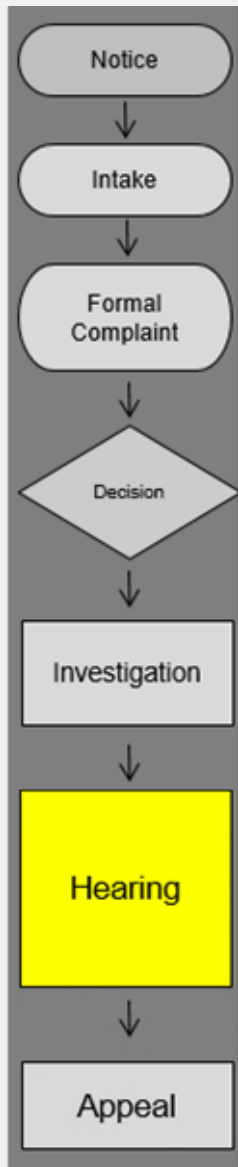
# Privileged Information: Per Se Irrelevant



- In response to commenters' concerns that relevant questions might implicate information protected by attorney-client privilege, the final regulations add § 106.45(b)(1)(x) to bar the grievance process from requiring, allowing, relying on, **or otherwise using questions or evidence** that constitute, or seek disclosure of, information protected under a legally recognized privilege.

Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30361

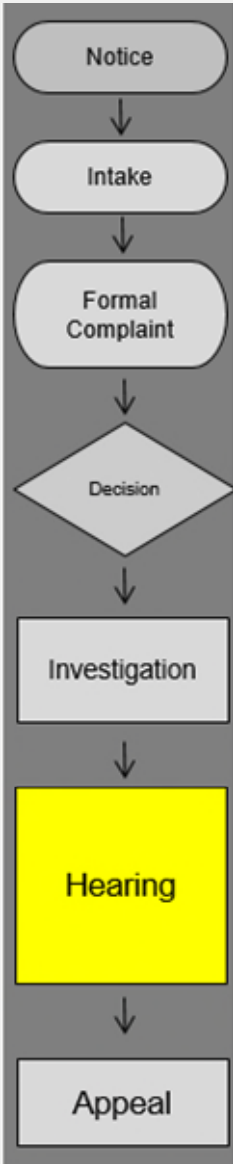
# Relevance: Prior Sexual History



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

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

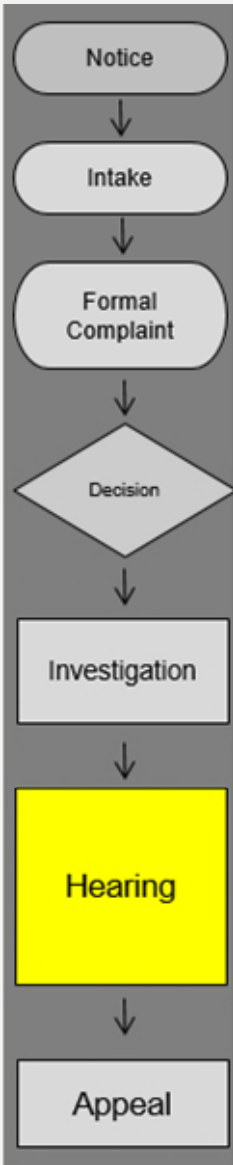
# Prior Sexual History



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

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

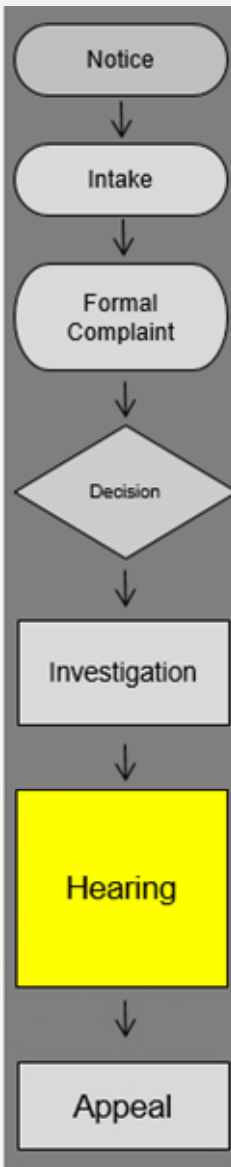
# Prior Sexual History: Motive



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

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

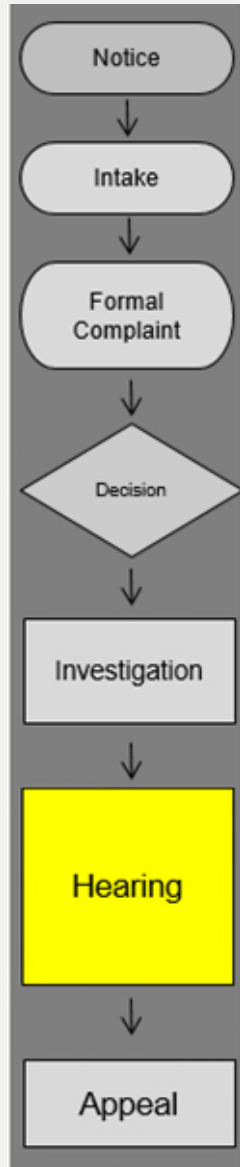
# Prior Sexual History: Per Se Irrelevant



- The final regulations clarify the rape shield language to state that **questions and evidence subject to the rape shield protections are “not relevant,”** and therefore the rape shield protections apply wherever the issue is whether evidence is relevant or not.

Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30353

# Prior or Subsequent Misconduct



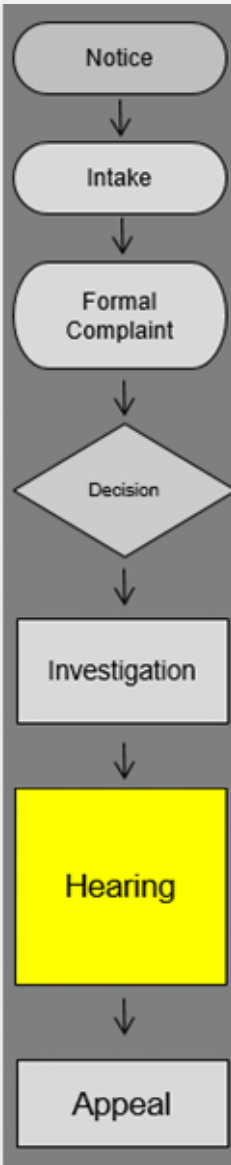
- The regulations do not prohibit the use of prior or subsequent misconduct
  - “Evidence of a pattern of inappropriate behavior by an alleged harasser” permitted if relevant
- Schools will need to determine if such conduct is:
  - Relevant
  - May be used in determining responsibility
  - May be used 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

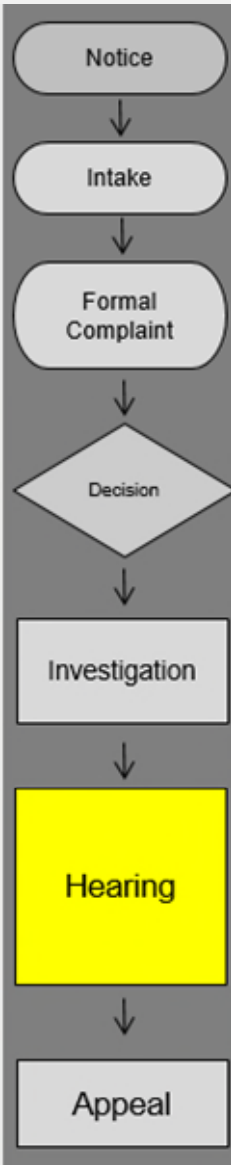
# No Comprehensive Evidentiary Rules



- The Department desires to prescribe a grievance process adapted for an educational environment rather than a courtroom, and **declines to impose a comprehensive, detailed set of evidentiary rules** for resolution of contested allegations of sexual harassment under Title IX.
- Rather, the Department has carefully considered the procedures most needed to result in fair, accurate, and legitimate outcomes in Title IX grievance processes.

Title IX Regulations, May 19, 2020, Preamble 85 F.R. 30337

# Simplified Evidentiary Considerations

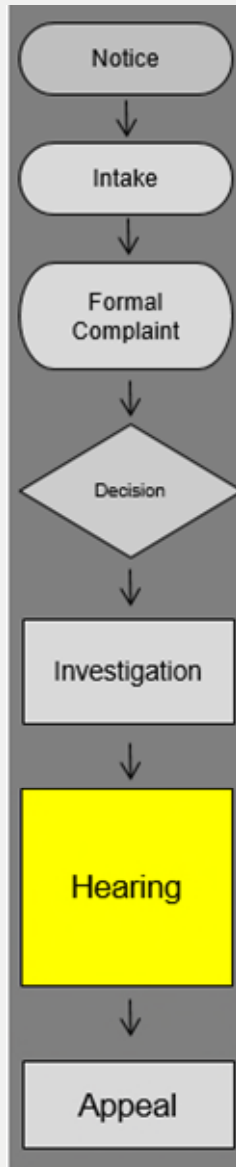


- Recipients are educational institutions that **should not be converted into *de facto* courtrooms.**
- The final regulations thus prescribe a process that **simplifies evidentiary complexities** while ensuring that determinations regarding responsibility result from **consideration of relevant, reliable evidence.**

Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30348

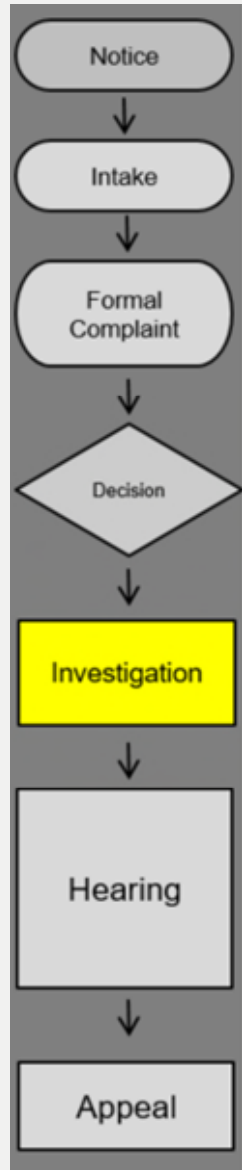
# Relevant and Reliable Evidence

- The Department believes that the final regulations strike the appropriate balance for a postsecondary institution context between **ensuring that only relevant and reliable evidence is considered** while not over-legalizing the grievance process.



Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30348

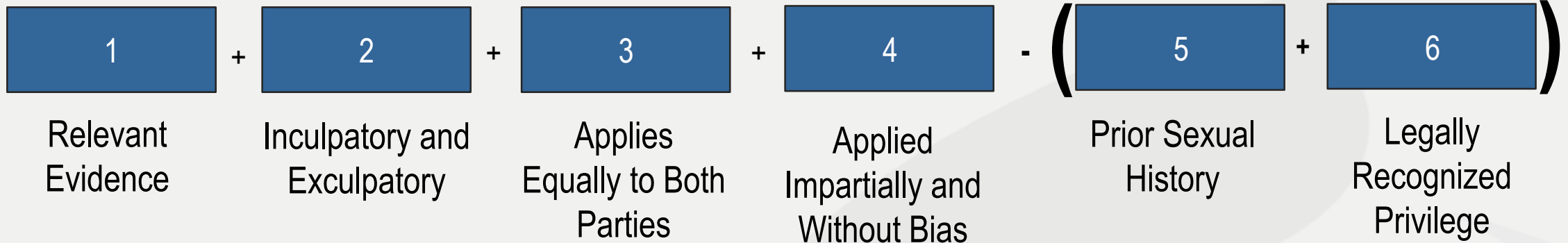
# Flexibility to Adopt Rules



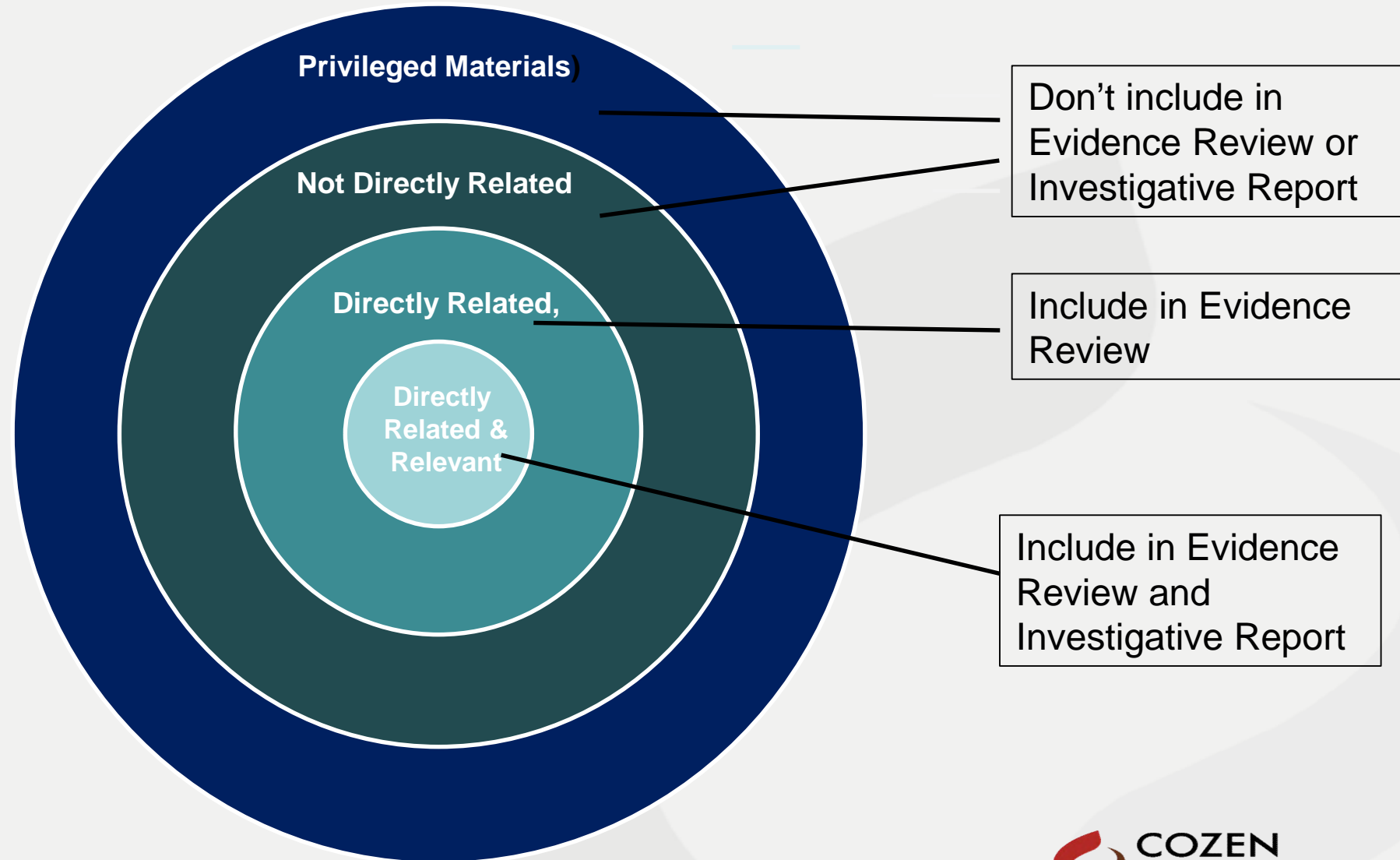
- “Within these evidentiary parameters **recipients retain the flexibility to adopt rules that govern how the recipient’s investigator and decision-maker evaluate evidence and conduct the grievance process** (so long as such rules apply equally to both parties).
- **Relevance is the standard that these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

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

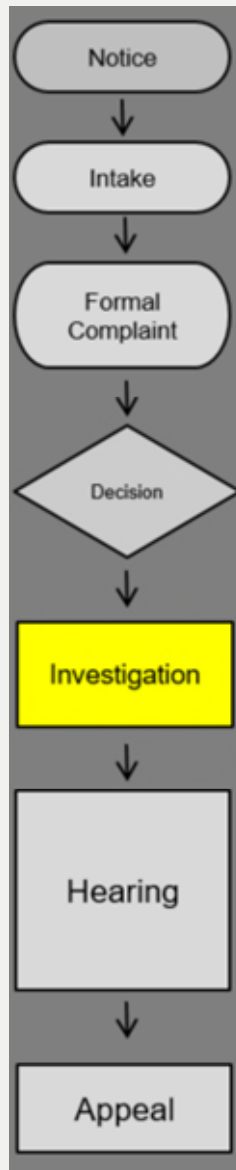
# Evidentiary Rules Must Consider



# Evidentiary Levels for Inclusion



# Directly Related



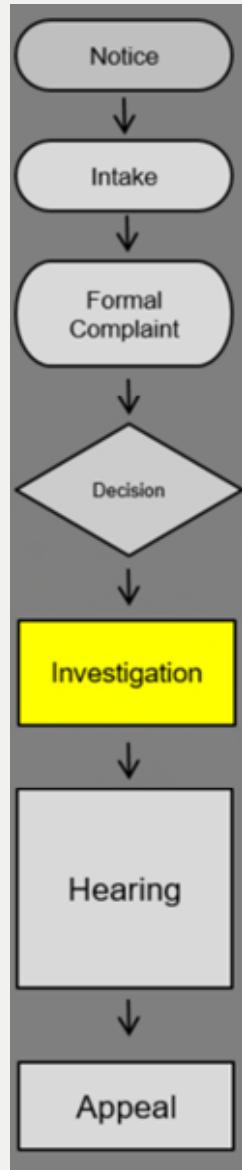
- Not defined in the regulations or the Preamble
  - The Department declines to define certain terms such as “evidence directly related to the allegations,” as these terms should be interpreted using their plain and ordinary meaning.
- “Directly related” aligns with the requirements in FERPA
  - The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

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



# Directly Related

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



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

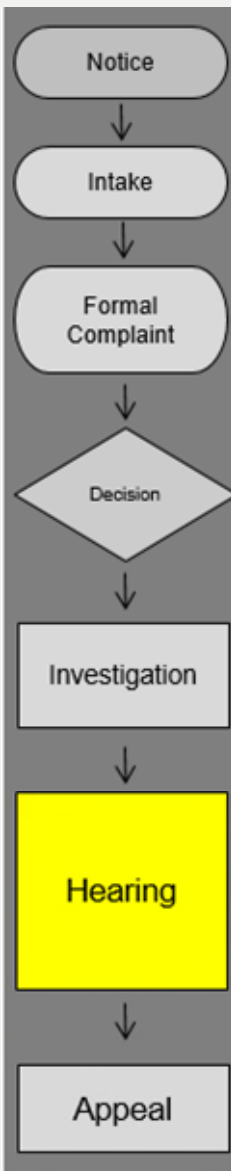
# Directly Related vs. Relevant



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

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

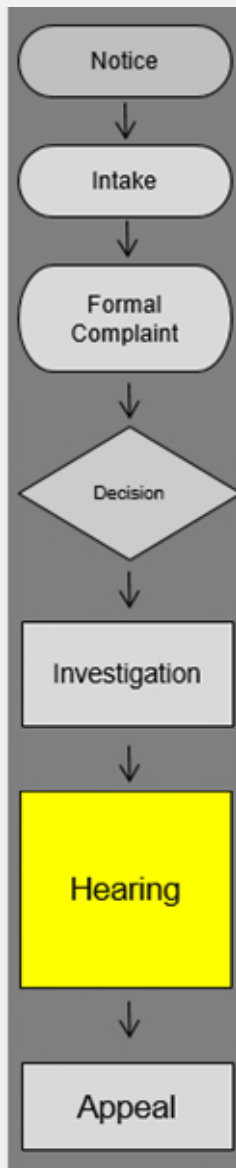
# Relevant Questions



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

Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30248; 30361

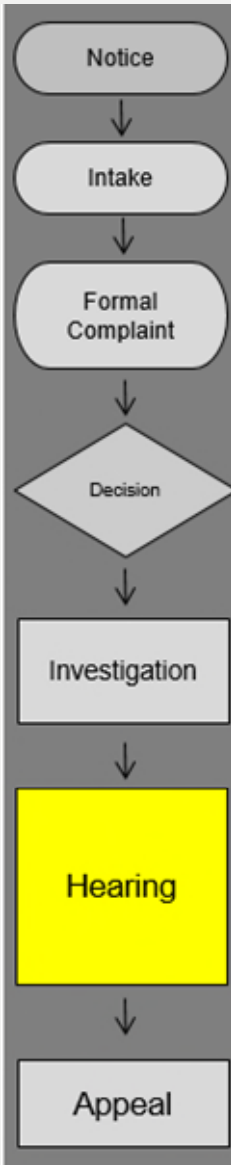
# Relevant Questions



- [T]he final regulations add § 106.45(b)(1)(x) to bar the grievance process from requiring, allowing, relying on, or **otherwise using questions or evidence** that constitute, or seek disclosure of, information protected under a legally recognized privilege.
- Additionally, questions that are **duplicative or repetitive** may fairly be deemed not relevant and thus excluded.

Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30361

# Relevance: Explaining Exclusion

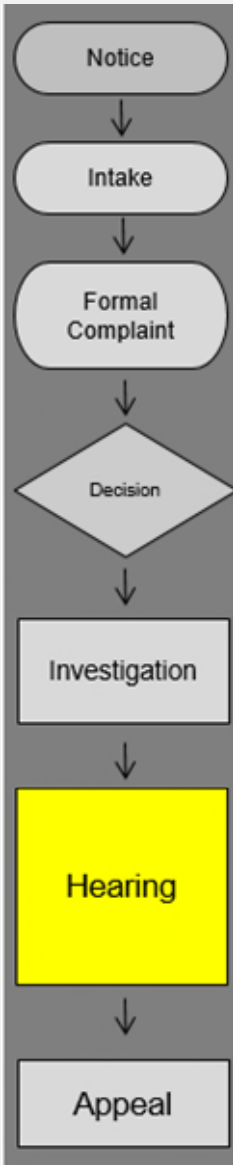


- Before a complainant, respondent, or witness answers a cross-examination or other question, the decision-maker(s) must first determine whether the question is relevant and explain any decision to exclude a question as not relevant.
- This provision **does not require a decision-maker to give a lengthy or complicated explanation.**

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

Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30343

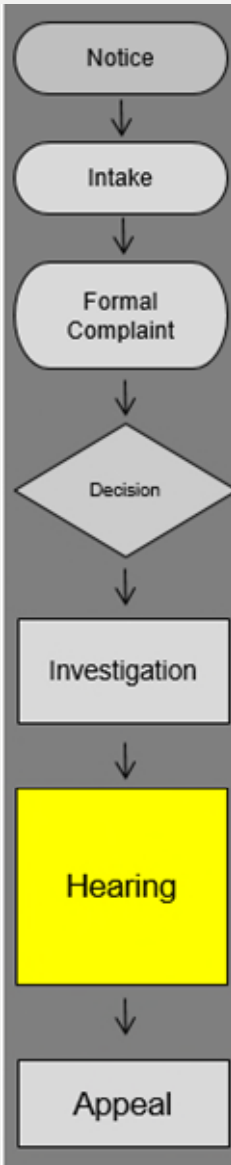
# Relevance: Explaining Exclusion



- [I]t is sufficient, for example, for a decision-maker to explain that a question is irrelevant because the question calls for **prior sexual behavior** information without meeting one of the two exceptions, or because the question asks about a detail that is **not probative of any material fact** concerning the allegations. No lengthy or complicated exposition is required to satisfy this provision.

Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30343

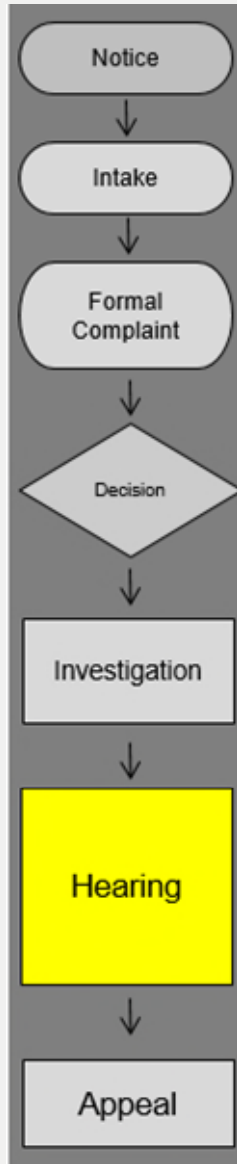
# Flexibility to Discuss Relevance



- The final regulations **do not preclude a recipient from adopting a rule** (applied equally to both parties) that does, or does not, **give parties or advisors the right to discuss the relevance determination with the decision-maker during the hearing.**
- If a recipient believes that arguments about a relevance determination during a hearing would unnecessarily protract the hearing or become uncomfortable for parties, the recipient **may adopt a rule that prevents parties and advisors from challenging the relevance determination (after receiving the decision-maker's explanation) during the hearing.**

# Appeal of Relevance Determination

- Parties have the equal right to appeal on three bases including procedural irregularity that affects the outcome, so if a party disagrees with a decision-maker's relevance determination, the party has the **opportunity to challenge the relevance determination on appeal.**



Title IX Regulations, May 19, 2020; Preamble 85 F.R 30349, footnote 1340, citing § 106.45(b)(8)



# Appeal of Relevance Determination



- Parties may appeal erroneous relevance determinations, if they affected the outcome, because § 106.45(b)(8) allows the parties equal appeal rights on grounds that include procedural irregularity that affected the outcome.
- However, asking the decision-maker to also explain the exclusion of questions during the hearing does not affect the parties' appeal rights and may reduce the number of instances in which a party feels the need to appeal on this basis because the decision-maker will have explained the decision during the hearing.

Title IX Regulations, May 19, 2020; Preamble 85 F.R 30343

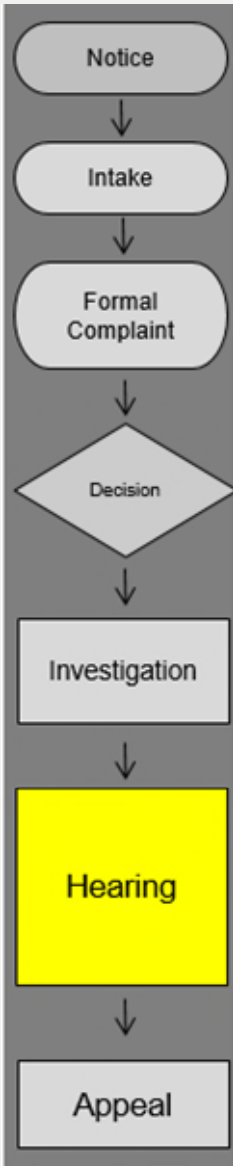
# Practical Considerations & Effective Practices

- Use of a hearing coordinator to support timely determinations by the decision-maker regarding relevance
- How to enable panels to make real-time relevancy determination on cross-examination questions
- Whether to permit discussion of relevancy during the live hearing, or whether to defer the opportunity to challenge to the appeal
- Upon appeal, permitting the decision-maker to augment their reasoning for disallowing a question

# Walking through an Example

- Can you adopt a rule excluding subsequent use of statements made during informal resolution?

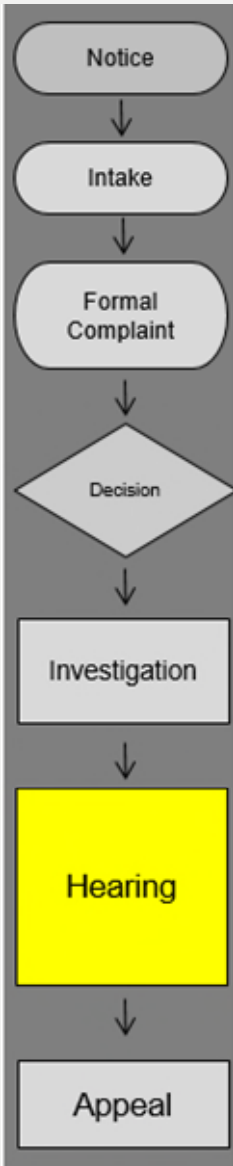
# Statements Made During Informal Resolution



- The regulations permit a recipient to facilitate an informal resolution, provided that the recipient provides the parties written notice disclosing:
  - The allegations,
  - The requirements of the informal resolution process,
  - The circumstances under which it precludes the parties from resuming the formal complaint, provided that at any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and resume the grievance process, and
  - Any **consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared.**

Title IX Regulations, May 19, 2020; § 106.45(b)(9)

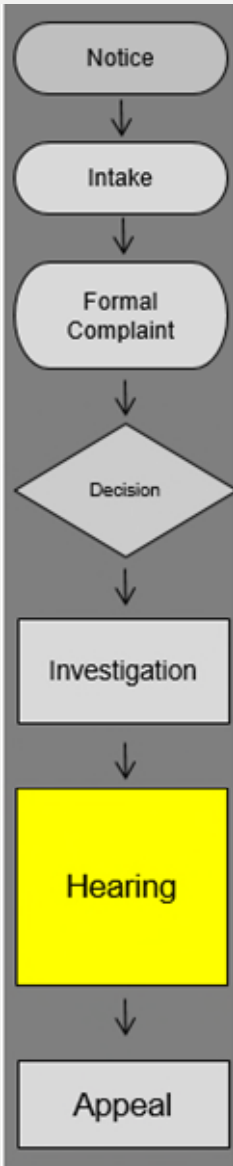
# Statements Made During Informal Resolution



- The Department appreciates commenters' concerns that comprehensive rules of evidence adopted in civil and criminal courts throughout the U.S. legal system apply detailed, complex rules to certain types of evidence resulting in **exclusion of evidence that is otherwise relevant to further certain public policy values (e.g., exclusion of statements made during settlement negotiations, exclusion of hearsay subject to specifically-defined exceptions, exclusion of character or prior bad act evidence subject to certain exceptions, exclusion of relevant evidence when its probative value is substantially outweighed by risk of prejudice, and other admissibility rules).**

Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30337

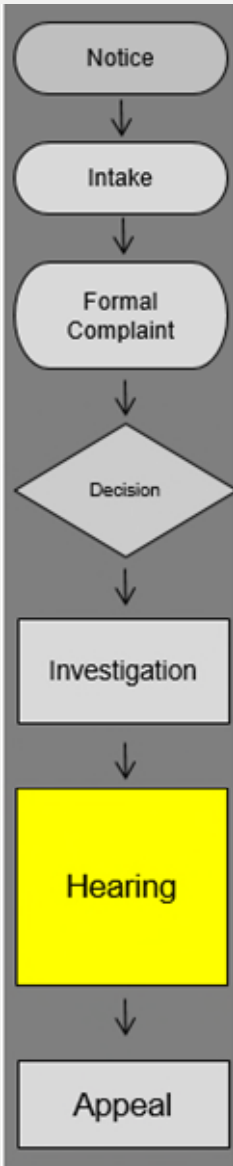
# Statements Made During Informal Resolution



- With respect to **informal resolution facilitators potentially serving as witnesses** in subsequent formal grievance processes, we leave this possibility open to recipients.
- If recipients were to accept such witnesses, then the **Department would expect this possibility to be clearly disclosed to the parties** as part of the § 106.45(b)(9)(i) requirement in the final regulations to provide a written notice disclosing any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared.

Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30400-30401

# Statements Made During Informal Resolution

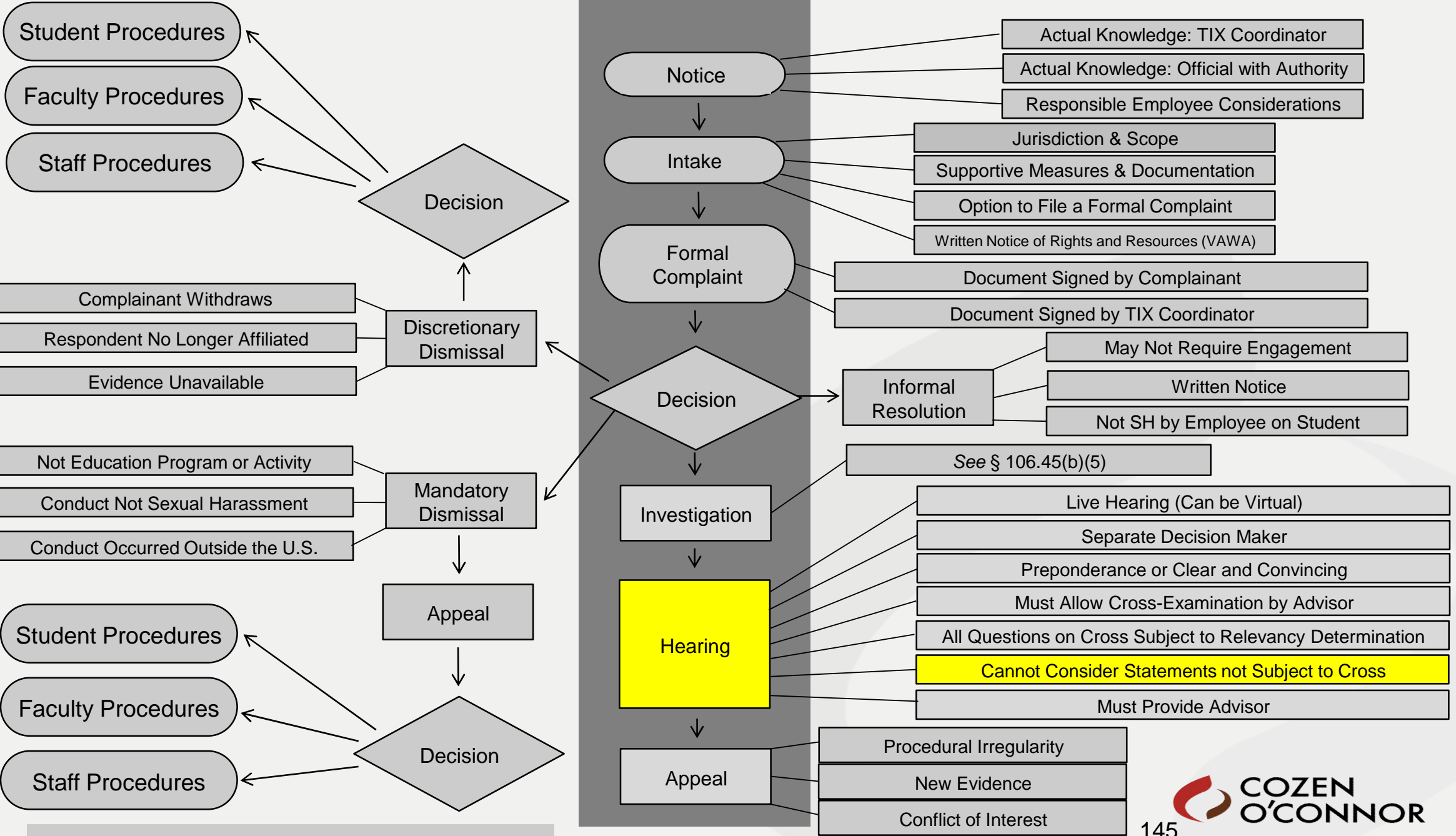


- **Relevance is the standard that these final regulations require, and any evidentiary rules that a recipient chooses must respect this standard of relevance.**
- For example, a recipient may not adopt a rule excluding relevant evidence because such relevant evidence may be unduly prejudicial, concern prior bad acts, or constitute character evidence.

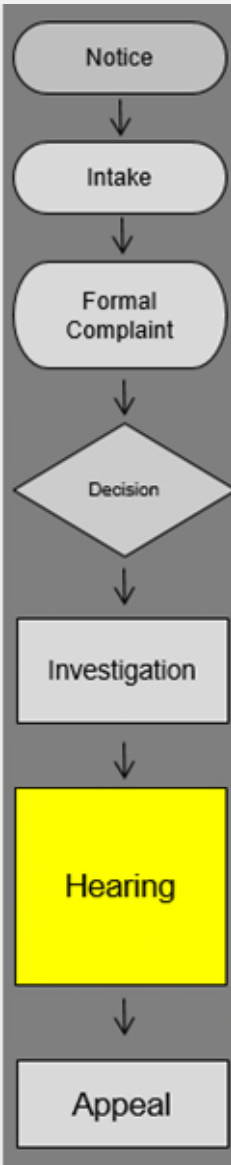
Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30247-30248

# **EXCLUSION OF STATEMENTS NOT SUBJECT TO CROSS-EXAMINATION**





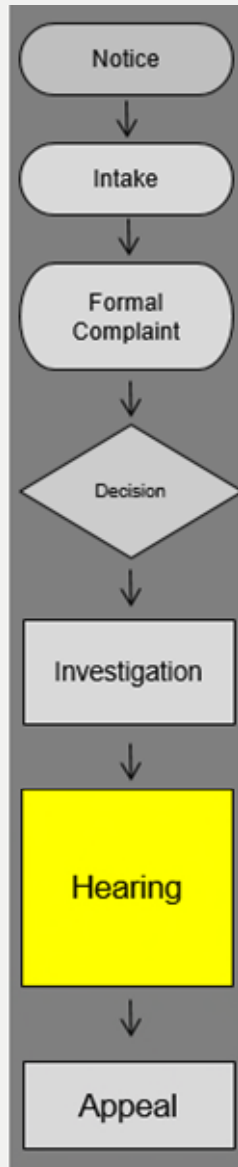
# Exclusion of Statement



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

Title IX Regulations, May 19, 2020; § 106.45(b)(6) 85 F.R. 30577

# Exclusion of Statement



- [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.
- Because party and witness statements so often raise **credibility** questions in the context of sexual harassment allegations, the **decision-maker must consider only those statements that have benefitted from the truth-seeking function of cross-examination.**

Title IX Regulations, May 19, 2020; Preamble 85 F.R 30345; 30348

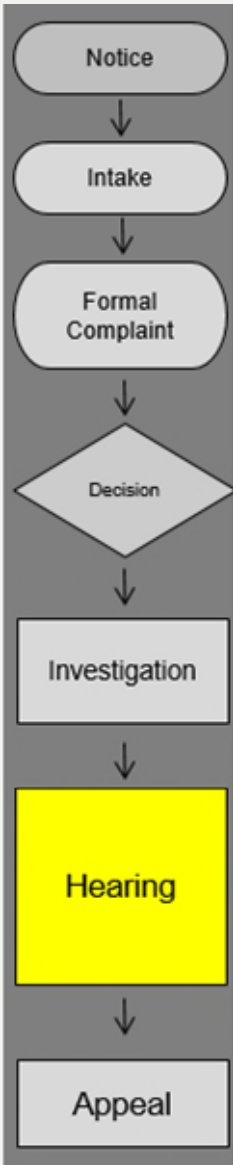
# Exclusion of Statement

- The prohibition on reliance on “statements” applies not only to statements made during the hearing, but also to **any statement of the party or witness** who does not submit to cross-examination.



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

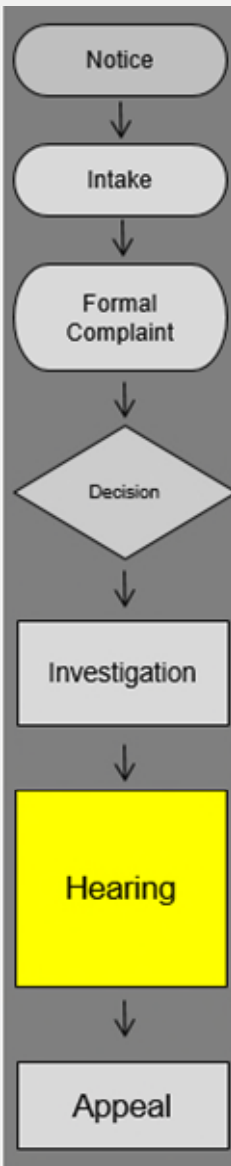
# Exclusion of Statement



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

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

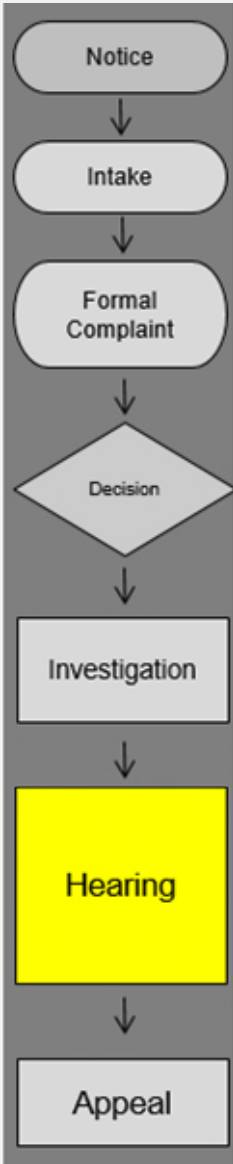
# Exclusion of Statement



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

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

# Exclusion of Statement

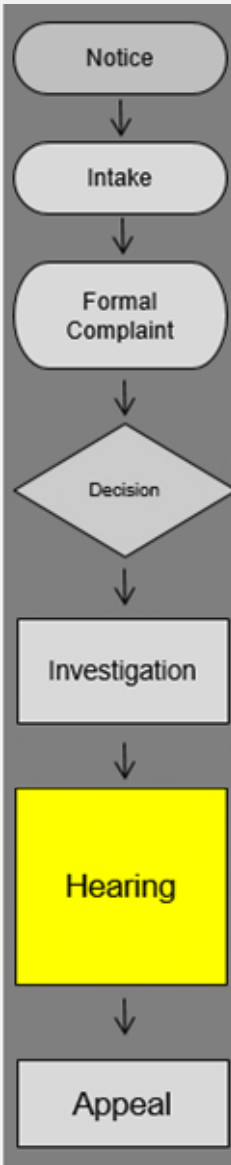


- Probing the **credibility and reliability** of *statements* asserted by witnesses contained in such evidence requires the parties to have the opportunity to cross-examine the witnesses making the statements.
- Where a Title IX sexual harassment allegation **does not turn on the credibility of the parties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

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



# Submit to Cross-Examination

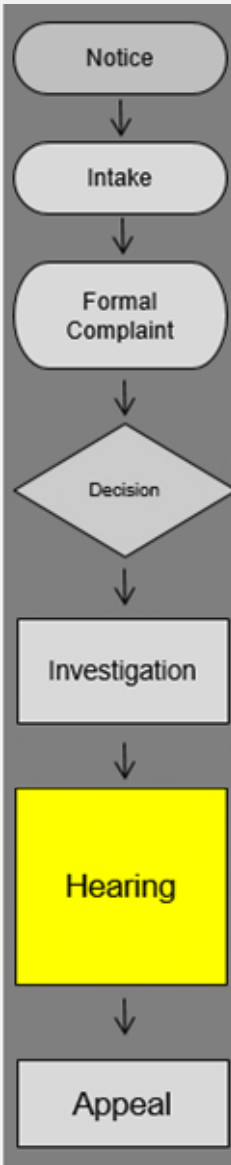


- Commenters suggested making this provision more precise by replacing “does not submit to cross-examination” with “does not appear for cross-examination.”
- Commenters asserted that parties should have the right to “waive a question” without the party’s entire statement being disregarded.
- The Department appreciates the opportunity to clarify here that to “**submit to cross-examination**” means answering those cross-examination questions that are relevant.

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



# Submit to Cross-Examination



- This provision requires a party or witness to “submit to cross-examination” to avoid exclusion of their statements; the same exclusion of statements **does not apply to a party or witness’s refusal to answer questions posed by the decision-maker.**
- If a party or witness **refuses to respond to a decision-maker’s questions**, the decision-maker is not precluded from relying on that party or witness’s statements.

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

# **SANCTIONING**

# Sanctioning



- An equitable response for a respondent means a grievance process that complies with § 106.45 before the imposition of any disciplinary sanctions or other actions that are not supportive measures, as defined in § 106.30.
- The grievance process must describe the range of possible disciplinary sanctions and remedies.

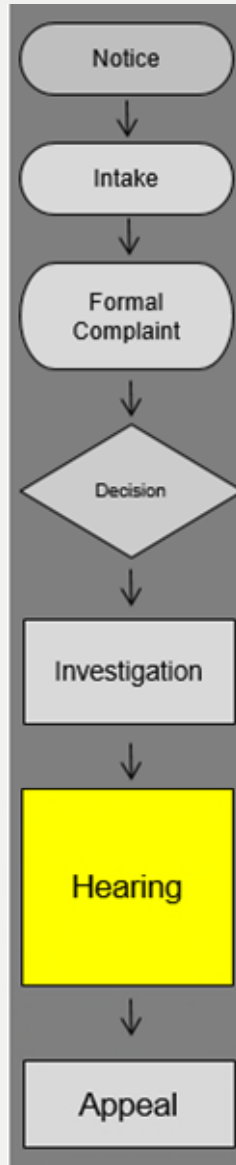
Title IX Regulations May 19, 2020 § 106.44 (a); § 106.45(b)(1)(vii) 85 F.R. 30575, 30395

# Discretion in Sanctioning



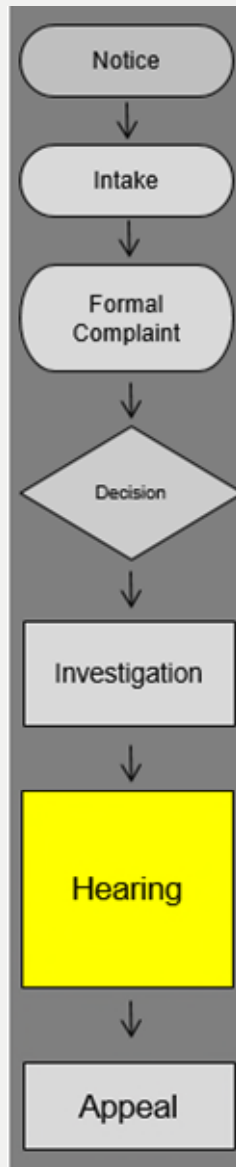
- The Department does not wish to dictate to recipients the sanctions that should be imposed when a respondent is found responsible for sexual harassment as each formal complaint of sexual harassment presents unique facts and circumstances.
- As previously stated, the Department believes that teachers and local school leaders with unique knowledge of the school climate and student body, are best positioned to make disciplinary decisions.

# Educational Purpose



- Because the final regulations do not require particular disciplinary sanctions, the final regulations do not preclude a recipient from imposing student discipline as part of an “educational purpose” that may differ from the purpose for which a recipient imposes employee discipline.

# Appeal of Sanction



- The Department notes that under the final regulations, whether the parties can appeal based solely on the severity of sanctions is left to the recipient's discretion, though if the recipient allows appeals on that basis, both parties must have equal opportunity to appeal on that basis.

# TRAINING

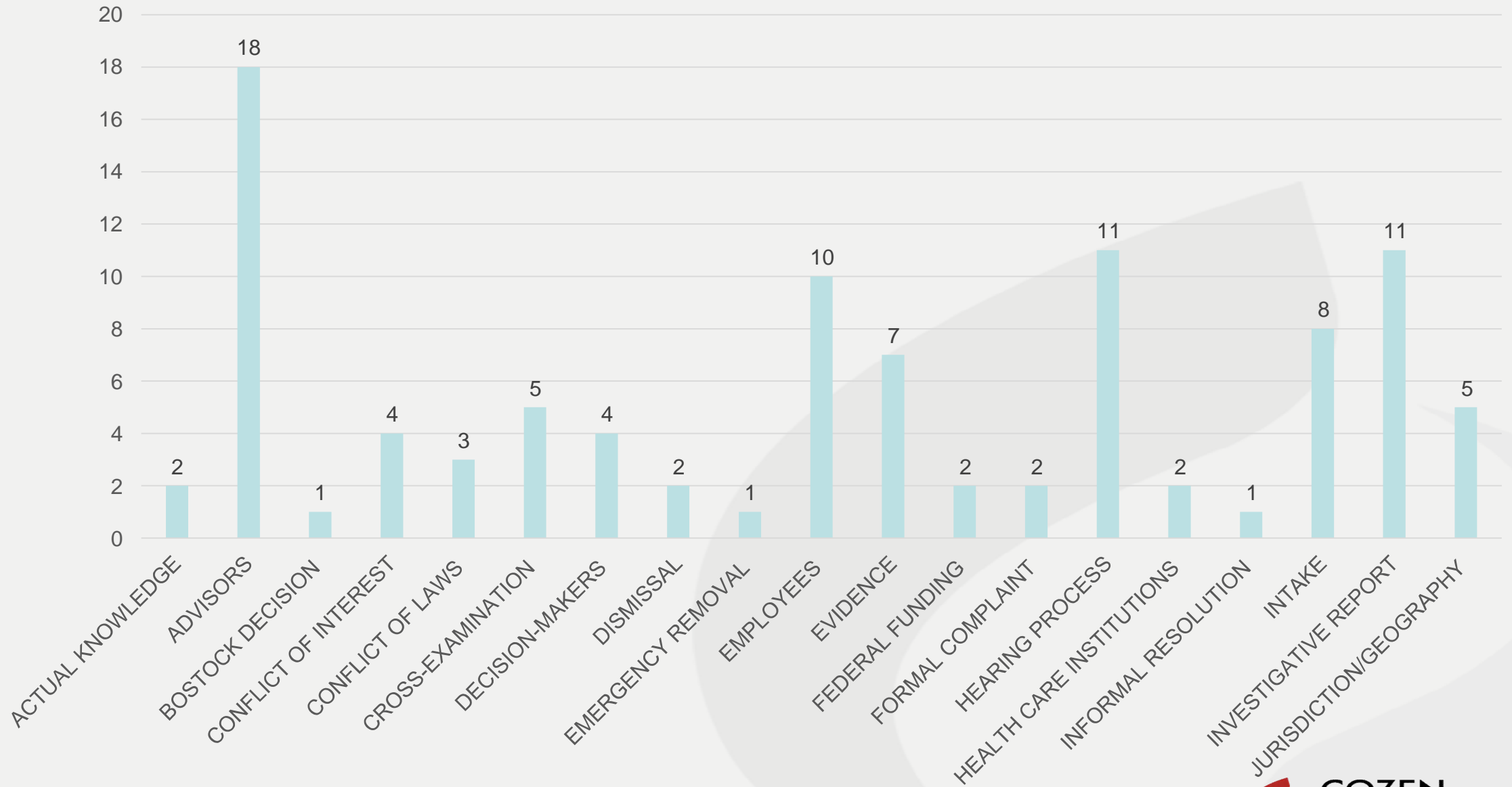
# Training

- 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.

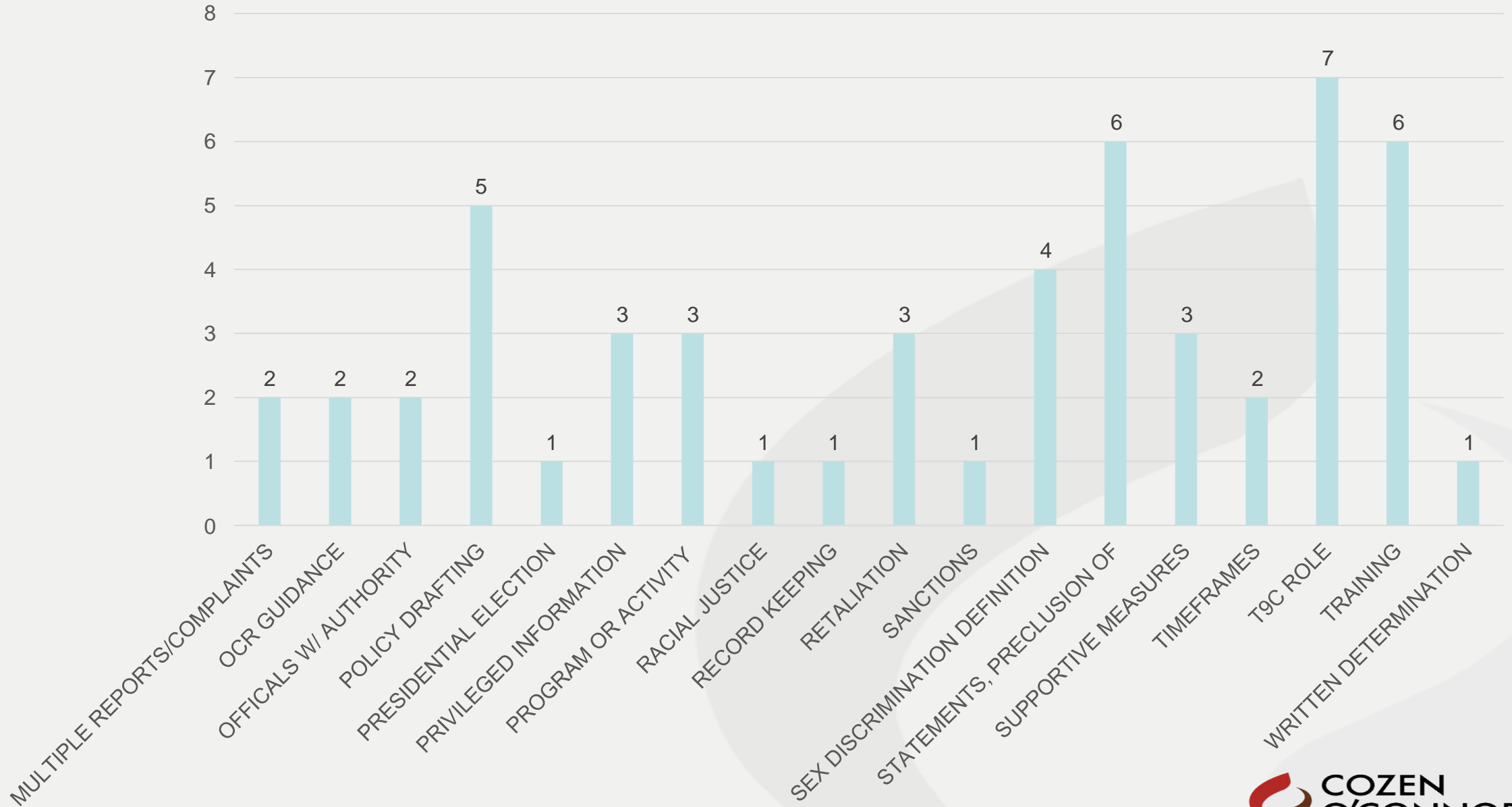


# WEBINAR QUESTIONS

## CATEGORIES OF WEBINAR QUESTIONS



# CATEGORIES OF WEBINAR QUESTIONS



# Role of the Title IX Coordinator

- May the Title IX Coordinator be the investigator?
- May the Title IX Coordinator be the decision-maker?
- May the Title IX Coordinator facilitate an informal resolution?

# Regulations

- The decision-maker(s), who cannot be the same person(s) as the Title IX Coordinator or the investigator(s), must issue a written determination regarding responsibility.

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

# Preamble

- The Title IX Coordinator may serve as the investigator, but not the decision maker.
  - For example, although the investigator may not be the same person as the decision-maker under § 106.45(b)(7)(i), these final regulations **do not preclude the Title IX Coordinator from also serving as the recipient’s investigator as long as the Title IX Coordinator does not have a conflict of interest or bias** for or against complainants or respondents generally or an individual complainant or respondent under § 106.45(b)(1)(iii).

Title IX Regulations May 19, 2020; §106.45(b)(2); Preamble 85 F.R. 30557

# Preamble

- The Title IX Coordinator may facilitate an informal resolution.
  - These final regulations do not require a recipient to provide an informal resolution process pursuant to § 106.45(b)(9) and do not preclude the Title IX Coordinator from serving as the person designated by a recipient to facilitate an informal resolution process.

# 2015 DCL on Title IX Coordinators

- Title IX does not categorically exclude particular employees from serving as Title IX coordinators. However, when designating a Title IX coordinator, a recipient should be careful to avoid designating an employee whose other job responsibilities may create a conflict of interest. For example, designating a disciplinary board member, general counsel, dean of students, superintendent, principal, or athletics director as the Title IX coordinator may pose a conflict of interest.

April 2015 Dear Colleague Letter on Title IX Coordinators available at:  
<https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201504-title-ix-coordinators.pdf>.



# Conflicts of Interest

- When might a conflict of interest exist?
- Will you address the problem of appointing Title IX Coordinators who might have a conflict of interest? For example, would it be appropriate to appoint a Superintendent, Assistant Superintendent, HR director, or Business Manager as Title IX Coordinator? What does it mean to have a conflict of interest?

# Regulations

- Require that any individual designated by a recipient as a Title IX Coordinator, investigator, decision-maker, or any person designated by a recipient to facilitate an informal resolution process, **not have a conflict of interest or bias** for or against complainants or respondents generally or an individual complainant or respondent.

Title IX Regulations, May 19, 2020; § 106.45(b)(1)(iii)

# Regulations

- 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, and **how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias.**

Title IX Regulations, May 19, 2020; § 106.45(b)(1)(iii)

# Preamble

- The Department declines to state whether particular professional experiences or affiliations do or do not constitute *per se* violations of § 106.45(b)(1)(iii).
- The Department declines to narrow or widen this provision by specifying whether conflicts of interest or bias must be “actual” or “perceived,” and declines to adopt an “appearance of bias” standard.

# Other Guidance

- Excerpts from Candace Jackson’s May 8, 2020 NACUA interview.
- On the absence of per se conflicts:
  - “This should be a fact specific analysis so that we leave recipients as much flexibility as possible to utilize personnel without automatically having people excluded on grounds of bias or conflicts of interest. You do need to be looking for specific concrete reasons why it would be reasonable to conclude that someone was exhibit bias or serving under a conflict of interest.”

# Other Guidance

- Excerpts from Candace Jackson’s May 8, 2020 NACUA interview.
- On past professional experience:
  - “Let’s say that you want to have somebody as a Title IX coordinator or the decision maker who, you know, their past professional life was a victim advocate or on the flip side was a defense attorney, that prior professional experience should not automatically make anybody conclude that somebody is biased or can’t serve impartially.”

# Scope of the Investigator's Role

- What information should the investigation report contain?
- Can it include a credibility assessment and/or recommended findings?
- Would the investigative report include an analysis of evidence, credibility and findings?

# Regulations

- Create an investigative report that fairly summarizes relevant evidence and, at least 10 days prior to a hearing (if a hearing is required under this section or otherwise provided) or other time of determination regarding responsibility, 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.

Title IX Regulations, May 19, 2020; § 106.45(b)(5)(vii)



# Preamble

- 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.

# Preamble

- 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.
- Section 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.

# Retaliation and Required Participation

- Retaliation in the new regulations includes action because a person refused to participate in investigation, proceeding or hearing.
- Doesn't that mean that you can't require anyone, employee or student, to participate?

# Regulations

- No recipient or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by title IX or this part, or because the individual has made a report or complaint, testified, assisted, or **participated or refused to participate** in any manner in an investigation, proceeding, or hearing under this part.

Title IX Regulations May 19, 2020 §106.70.

# Preamble

- The final regulations have removed proposed § 106.44(b)(2) [from the NPRM] and revised the § 106.30 definition of “complainant” such that in combination, those revisions ensure that the final regulations do not require a Title IX Coordinator to initiate a grievance process over the wishes of a complainant, and **never require a complainant to become a party or to participate in a grievance process.**

Title IX Regulations May 19, 2020; Preamble 85 F.R. 30243.

# Preamble

- We have added § 106.71 prohibiting retaliation and **expressly protecting any person's right *not to participate*** in a Title IX proceeding.
- § 106.71 protects all parties (and witnesses, and other individuals) from retaliation for exercising rights under Title IX.

# Preamble

- Nothing in these final regulations purports to authorize recipients to compel witness participation in a grievance process, and § 106.71(a) protects every individual from retaliation for participating or refusing to participate in a Title IX proceeding.

# Preamble

- The final regulations add § 106.71 prohibiting retaliation and including under prohibited actions those taken to dissuade a complainant from reporting or filing and those taken to punish a complainant (or anyone else) from refusing to participate in a Title IX proceeding.



# Restrictions on the Parties

- The regulations prohibit a school from restricting the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence.
- Can a school impose any restrictions on the ability of the parties to discuss the allegations?

# Regulations

- § 106.45(b)(5): When investigating a formal complaint and throughout the grievance process, a recipient must
  - (iii) Not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence

# Preamble

- As discussed in this preamble at § 106.45(b)(5)(iii), the parties have a right to discuss the allegations under investigation, but this right does not preclude a recipient from warning the parties not to discuss or disseminate the allegations in a manner that constitutes retaliation or unlawful tortious conduct.

# Preamble

- § 106.45(b)(5)(iii) is not unlimited in scope; by its terms, this provision stops a recipient from restricting parties' ability to discuss "the allegations under investigation."
- This provision does not, therefore, apply to discussion of information that does not consist of "the allegations under investigation" (for example, evidence related to the allegations that has been collected and exchanged between the parties and their advisors during the investigation under § 106.45(b)(5)(vi), or the investigative report summarizing relevant evidence sent to the parties and their advisors under § 106.45(b)(5)(vii).

# Directly Related vs. Relevant

- What type of evidence might be “directly related to the allegations” but not relevant?
- Unless otherwise specifically prohibited by the regulations, is it a better practice to err on the side of determining that evidence is relevant and then let the decision-makers address the full evaluation of evidence in the written determination?
- Can you please give an example - any example! - of information that would be directly related, but not relevant?

# Regulations

- 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, including the evidence upon which the recipient does not intend to rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence whether obtained from a party or other source, so that each party can meaningfully respond to the evidence prior to conclusion of the investigation.

# Regulations

- Create an investigative report that fairly summarizes **relevant** evidence and, at least 10 days prior to a hearing (if a hearing is required under this section or otherwise provided) or other time of determination regarding responsibility, 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.

Title IX Regulations, May 19, 2020; § 106.45(b)(5)(vii)

# Preamble

- A party who believes the investigator reached the wrong conclusion about the relevance of the evidence may argue again to the decision-maker (i.e., as part of the party's response to the investigative report, and/or at a live hearing) about whether the evidence is actually relevant.
- 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.

Title IX Regulations, May 19, 2020; Preamble 85 F.R 30304 and 30309.



# Preamble

- A recipient has some discretion to determine whether evidence obtained as part of an investigation is directly related to allegations raised in a formal complaint...

Title IX Regulations, May 19, 2020; Preamble 85 F.R 30423.

# Preamble

- 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 under §106.45(b)(5)(vii) and to the decision-maker at any hearing held; either way 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).

# Submit to Cross-Examination

- What does it mean to “submit to cross-examination?”
- For example, if upon cross-examination, a party refuses to answer one question, are all questions and supporting evidence out, or may the decision-maker still consider the information provided that was subjected to cross-examination?

# Regulations

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

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

# Preamble

- “[S]ubmit to cross-examination” means answering those cross-examination questions that are relevant; the decision-maker is required to make relevance determinations regarding cross-examination in real time during the hearing in part to ensure that parties and witnesses do not feel compelled to answer irrelevant questions for fear of their statements being excluded.

# Advisors and Decorum

- Can you exclude a party's advisor of choice because they violated the recipient's standards of decorum?

# Preamble

- If a party's advisor of choice refuses to comply with a recipient's rules of decorum ... the recipient may require the party to use a different advisor.
- Similarly, if an advisor that the recipient provides refuses to comply with a recipient's rules of decorum, the recipient may provide that party with a different advisor to conduct cross-examination on behalf of that party.

Title IX Regulations May 19, 2020; Preamble 85 F.R. 30320.

# Preamble

- [A]ny ... rules adopted by a recipient must ensure that all relevant questions and evidence are admitted and considered. ...Thus, for example, where the substance of a question is relevant, but **the manner in which an advisor attempts to ask the question is harassing, intimidating, or abusive** (for example, the advisor yells, screams, or physically “leans in” to the witness’s personal space), the recipient **may appropriately, evenhandedly enforce rules of decorum** that require relevant questions to be asked in a **respectful, non-abusive** manner.



# 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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