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

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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

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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

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Introducing the Webinar Series

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

Hearings Part 2

Cross-examination and evidentiary issues and procedures

Informal Resolutions

Effective Practices

Corollary Considerations

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

Trainings & Documentation

Who and when?

Approach

Content

Clery and VAWA

Intersections between Clery/VAWA and Title IX

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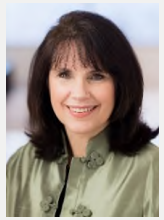
Institutional Response Group



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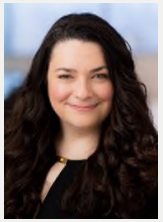

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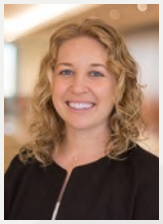

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Michael Stackow
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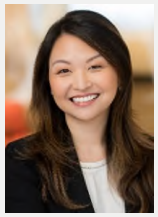

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Adam M. Shapiro
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Peter C. Lim
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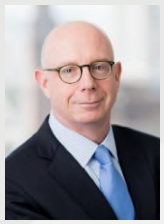

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FRAMING THE CONTEXT

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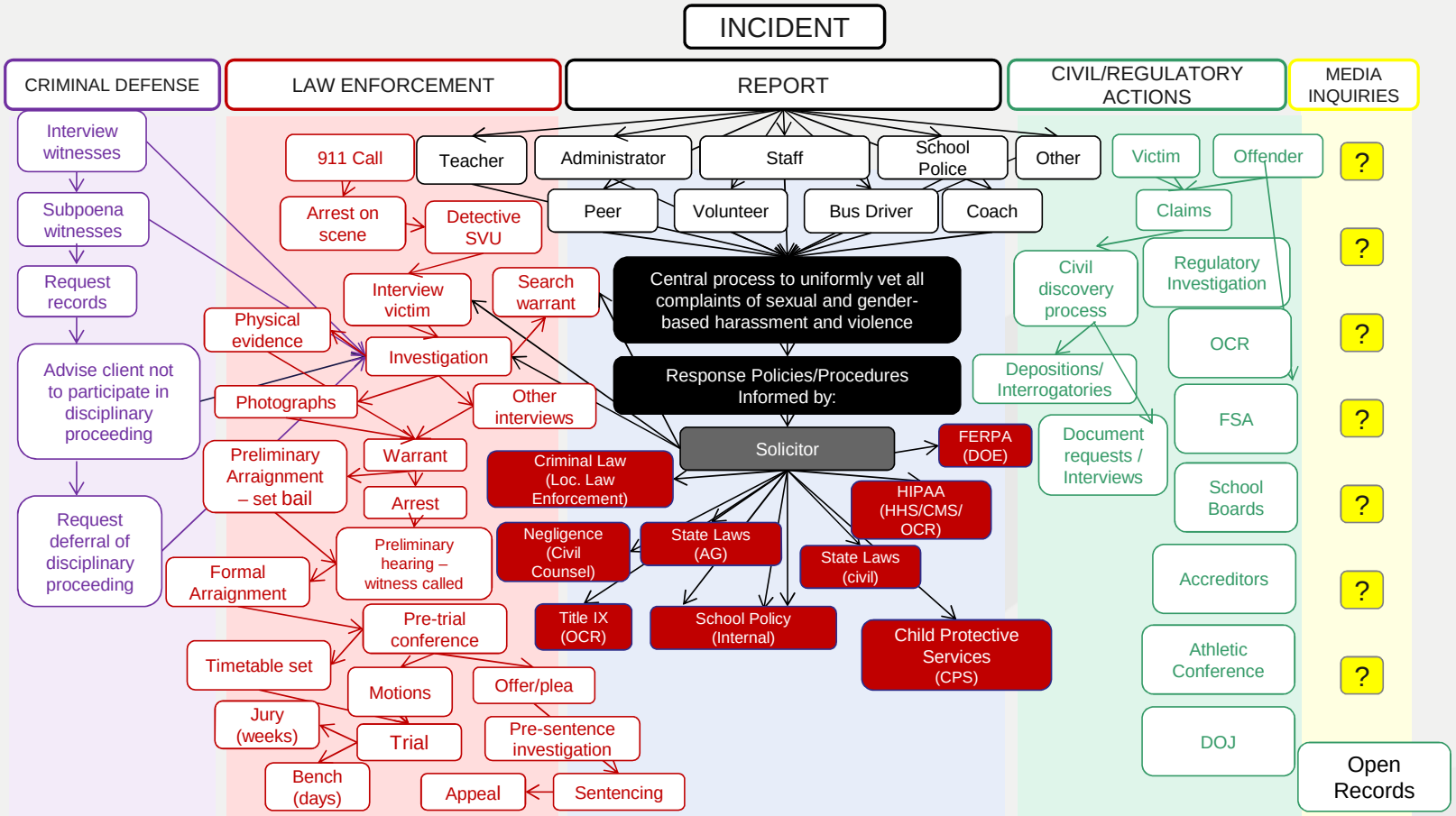

Note: Lists of report recipients and relevant laws not exhaustive .

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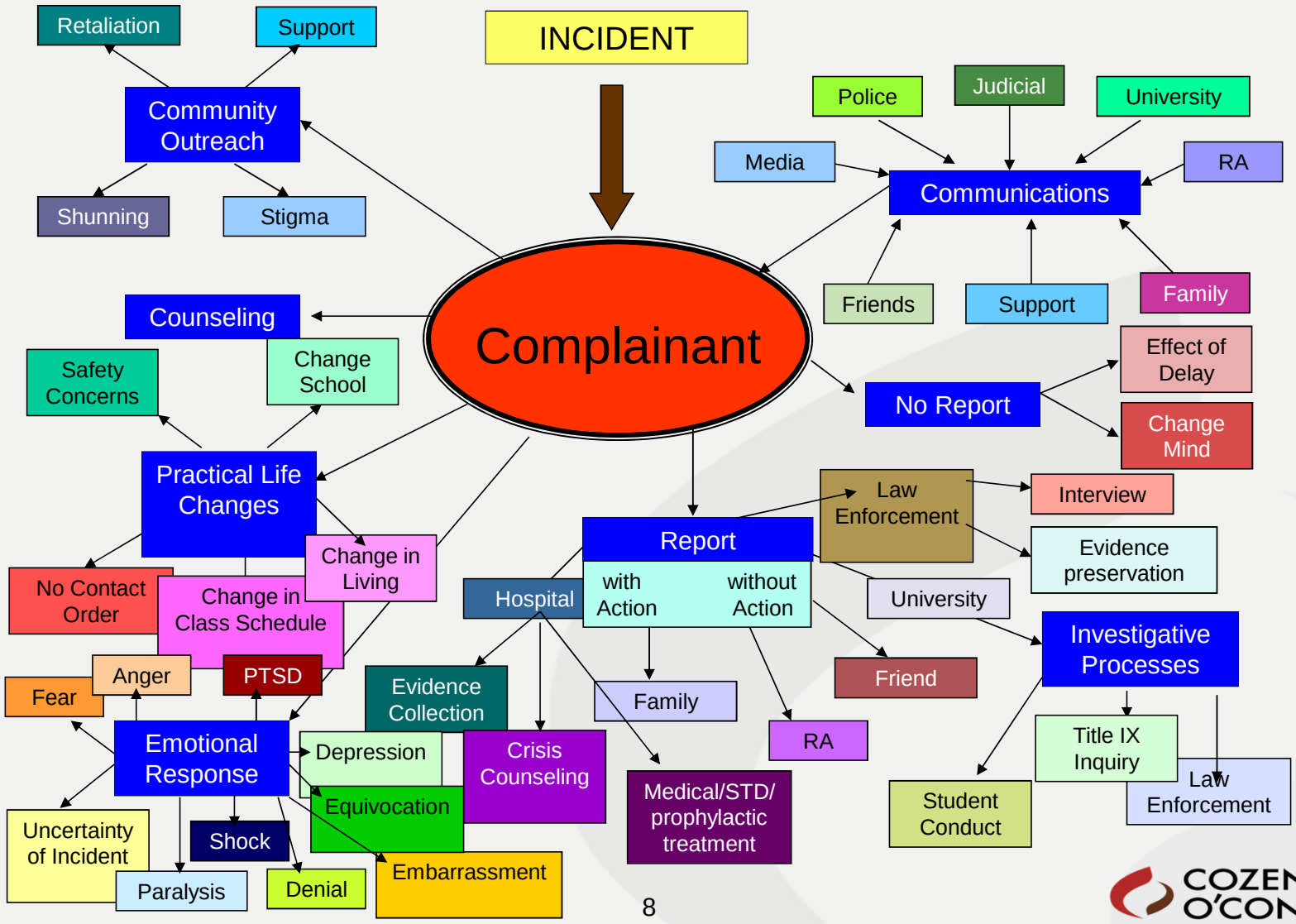

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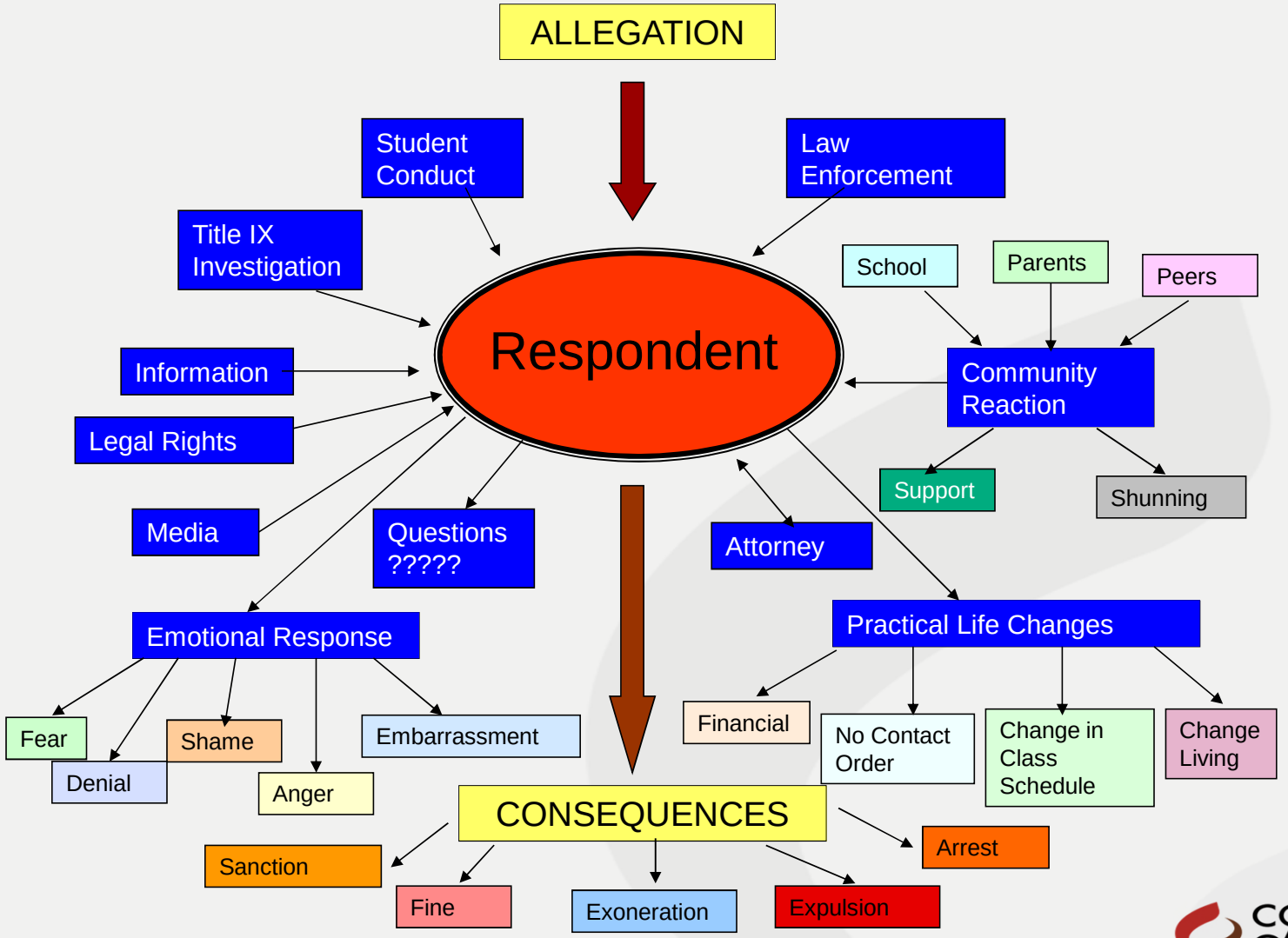

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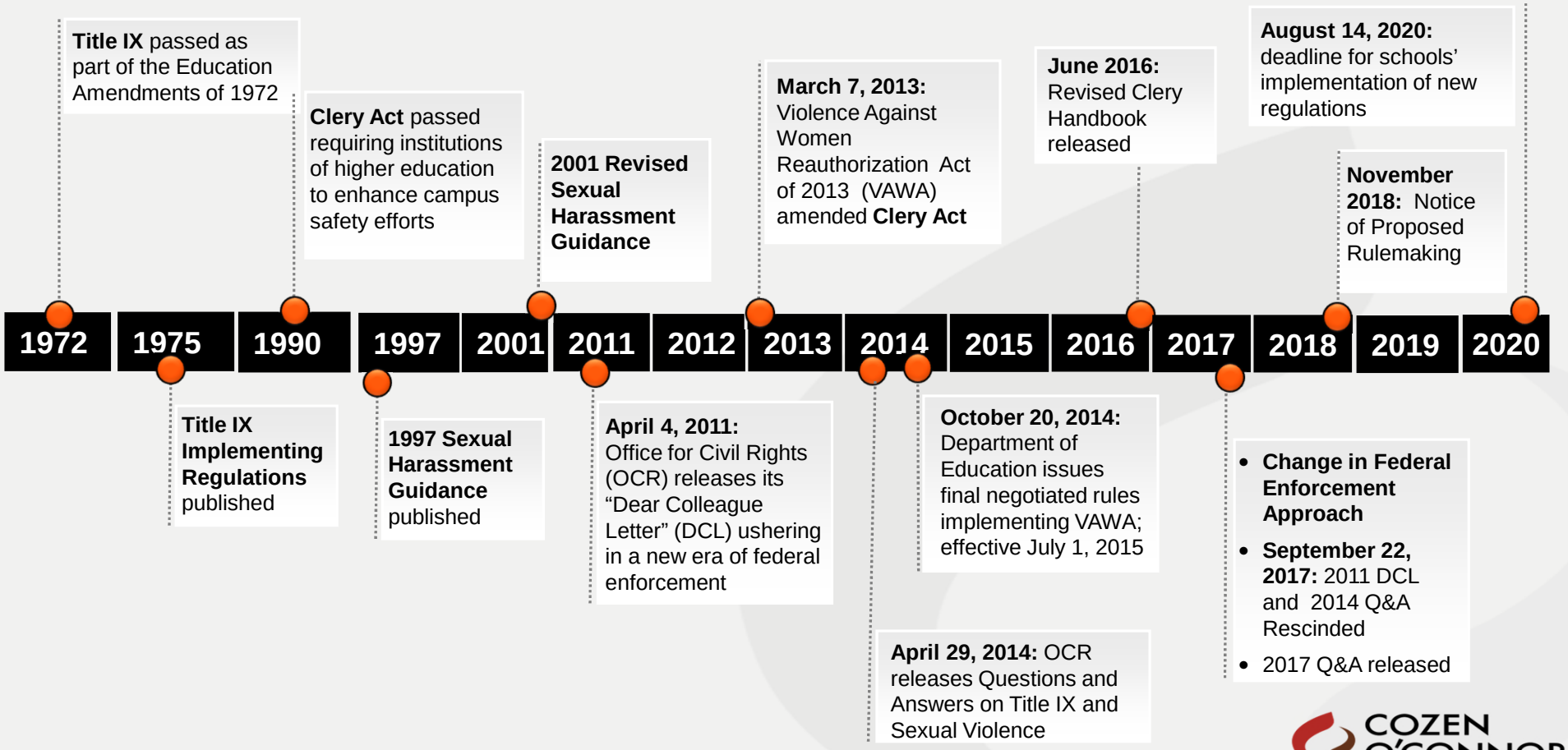
Evolution of Federal Legislation and Guidance



Silver Linings

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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.

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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.

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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.

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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.

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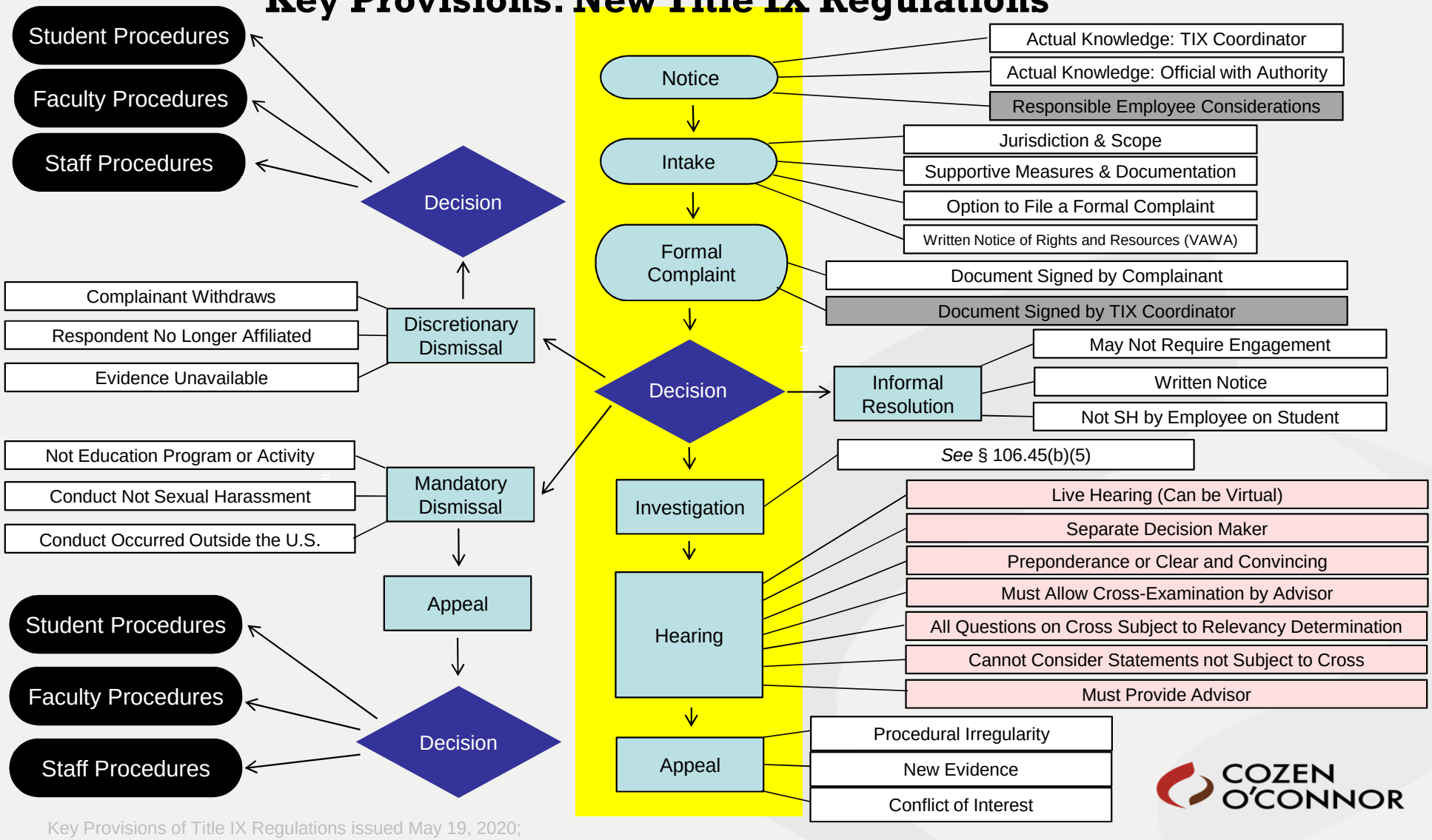
Maintaining Calm

Getty Images

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."

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

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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 May 19, 2020; Preamble, 85 F.R. 30030

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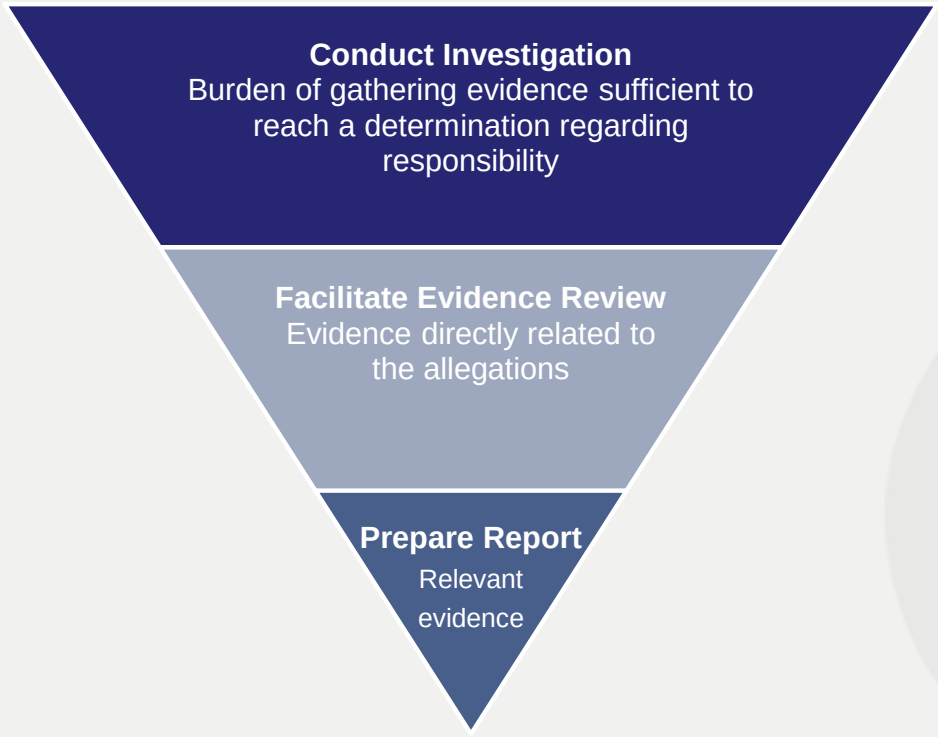
Setting the Stage - Investigations

Institutional Obligations



Parties' Opportunity to Participate

Investigation

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

Evidence Review

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

Report

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

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Overview

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

OBLIGATION TO INVESTIGATE

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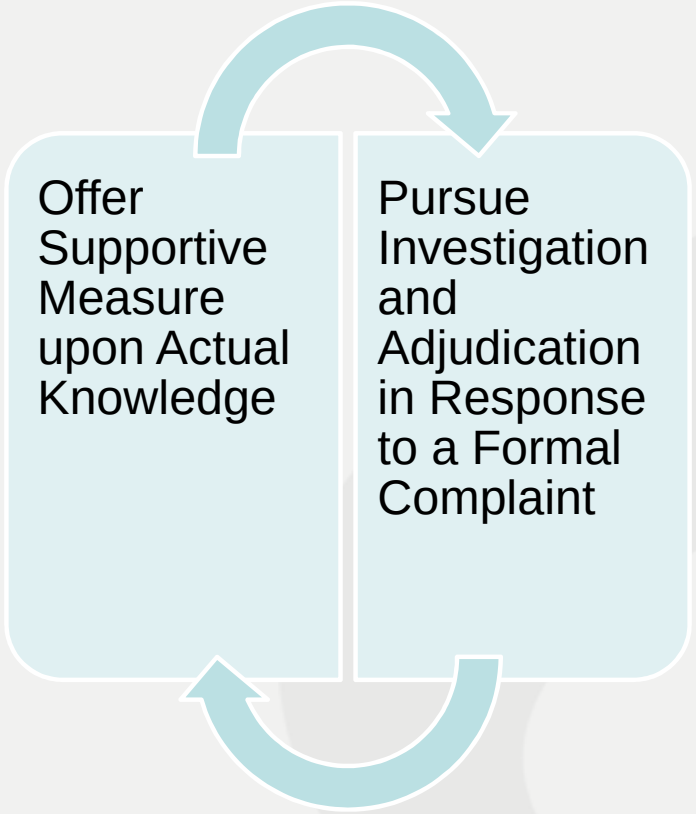
Understanding Two Key Provisions



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Complainant Agency & Autonomy

- "The final regulations promote clarity as to recipient's legal obligations, and **promote respect for each complainant's autonomy**, by distinguishing between a complainant's report of sexual harassment, on the one hand, and the filing of a formal complaint that has initiated a grievance process against a respondent, on the other hand."

- "The Department acknowledges that **a recipient should respect the complainant's autonomy and wishes** with respect to a formal complaint and grievance process **to the extent possible**."

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

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Reports vs. Formal Complaints

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

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

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Reinforcing Agency & Autonomy

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

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

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The Obligation to Investigate

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

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

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BASIC REQUIREMENTS OF GRIEVANCE PROCESSES

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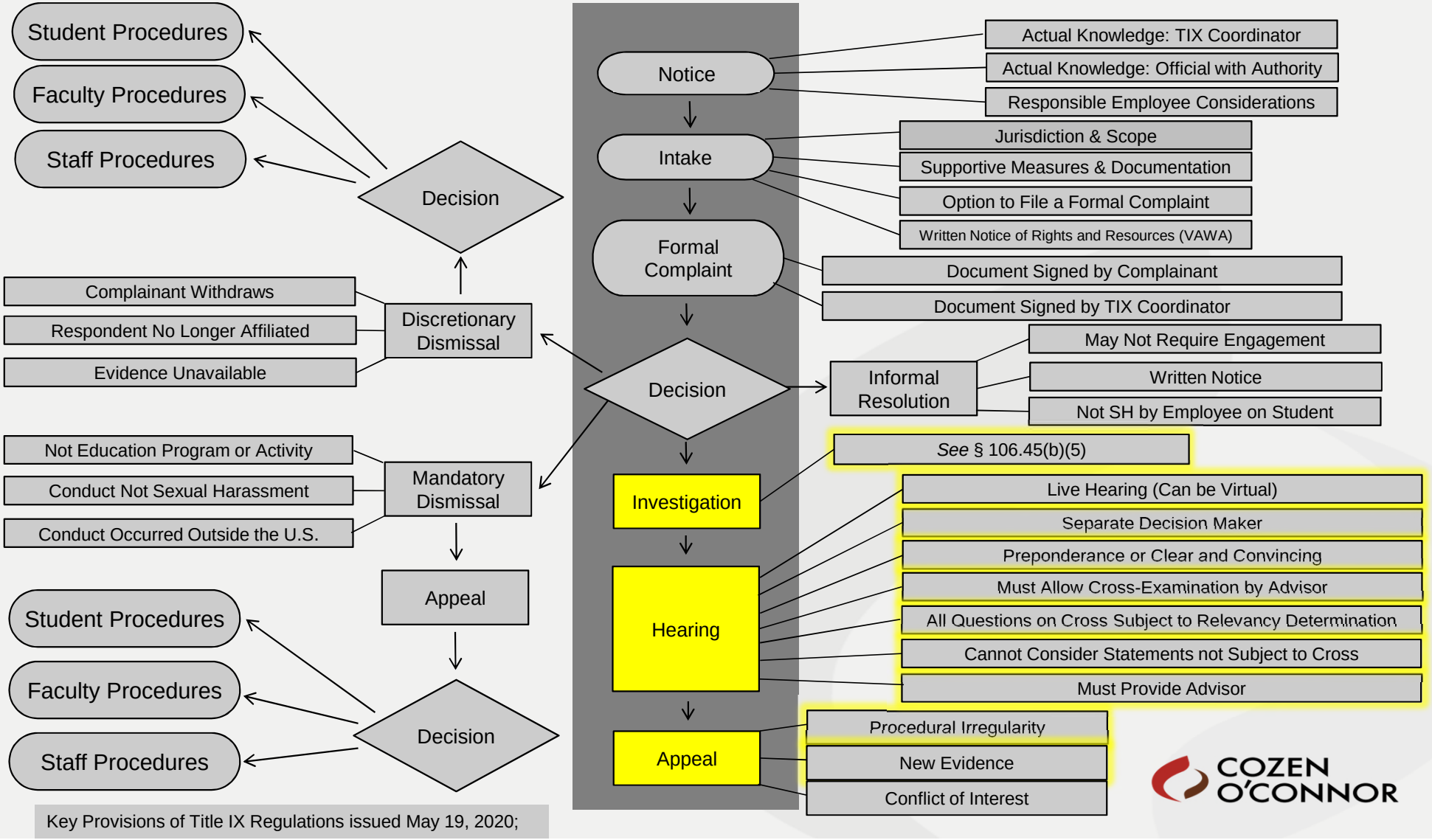
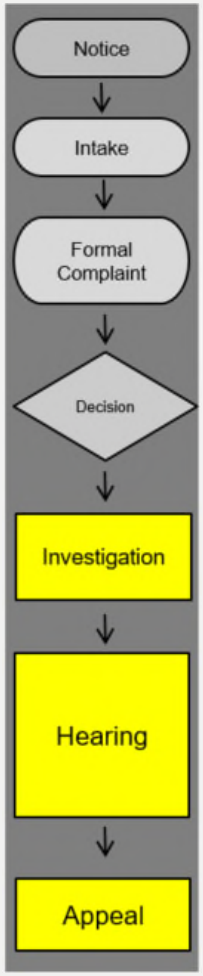


Key Provisions of Title IX Regulations issued May 19, 2020;

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)

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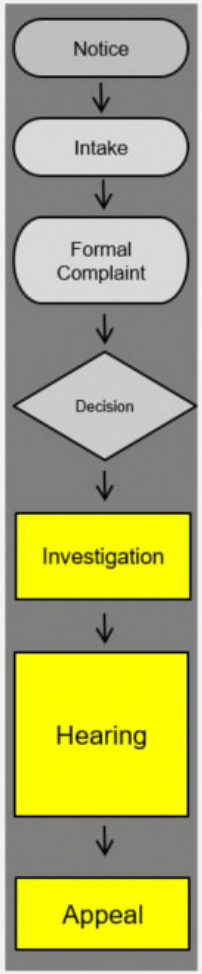
Basic Requirements



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

Relevant Regulations Sections:
Equitable Treatment: §§ 106.44(a) and 106.45(b)(1)(i)
Objective evaluation of all relevant evidence: § 106.45(b)(1)(ii)
Training and avoidance of conflicts or bias: § 106.45(b)(1)(iii)

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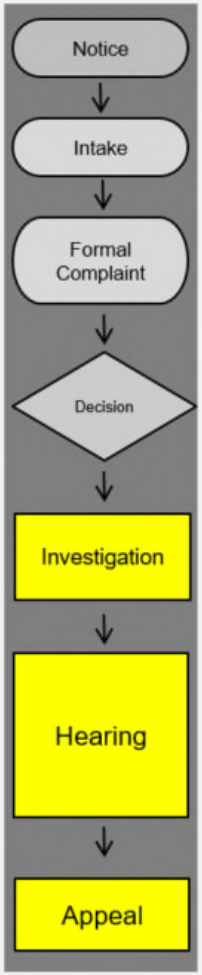
Basic Requirements



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

Relevant Regulations Sections:
Equitable Treatment: §§ 106.44(a) and 106.45(b)(1)(i)
Objective evaluation of all relevant evidence: § 106.45(b)(1)(ii)
Training and avoidance of conflicts or bias: § 106.45(b)(1)(iii)

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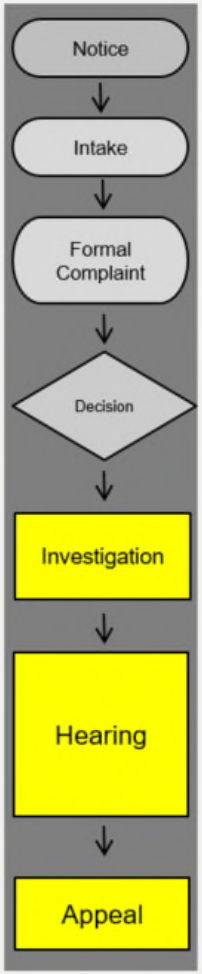
Basic Requirements



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

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

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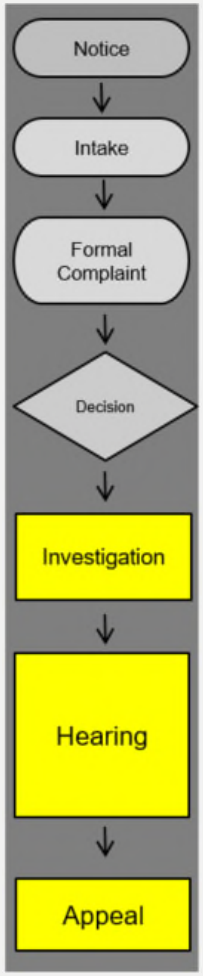
Basic Requirements



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

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

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PRE-INVESTIGATION CONSIDERATIONS

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Pre-Investigation Considerations

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

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

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Separating Support from Investigations

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

Removal of Bias or Conflict of Interest

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

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

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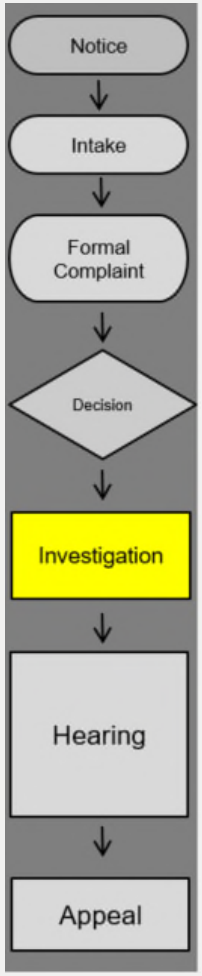
Written Notice of all Proceedings



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

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

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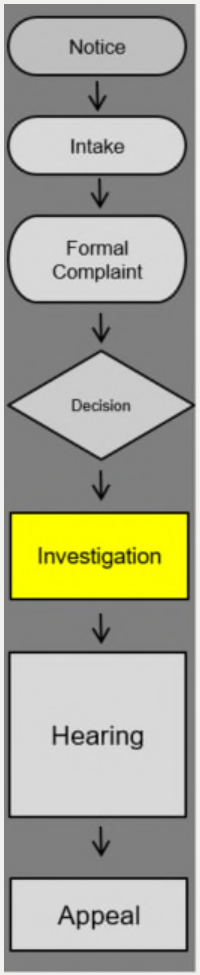
Written Notice of Allegations



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

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

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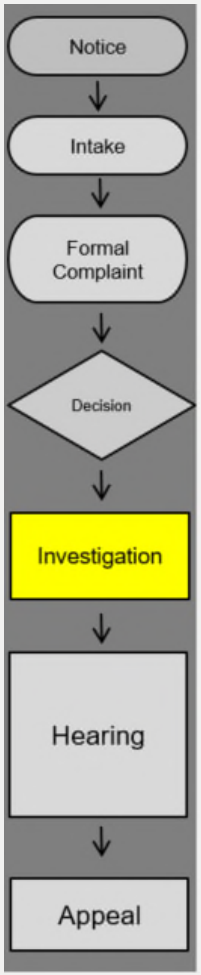
Written Notice of the Allegations



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

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

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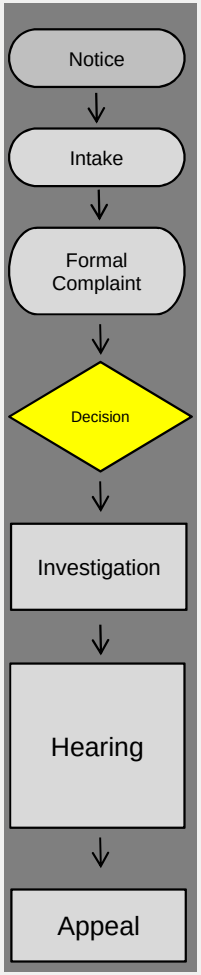
Written Notice of Allegations



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

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

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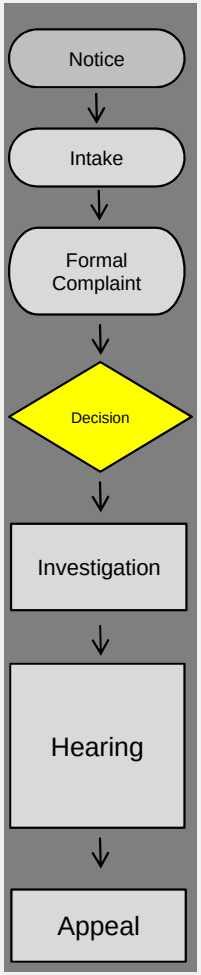
Supplemental Notice



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

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

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Practical Considerations

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

CONSOLIDATION OF FORMAL COMPLAINTS

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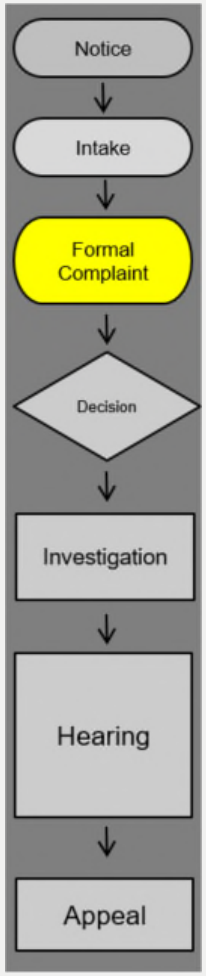
Consolidation of Formal Complaints



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

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

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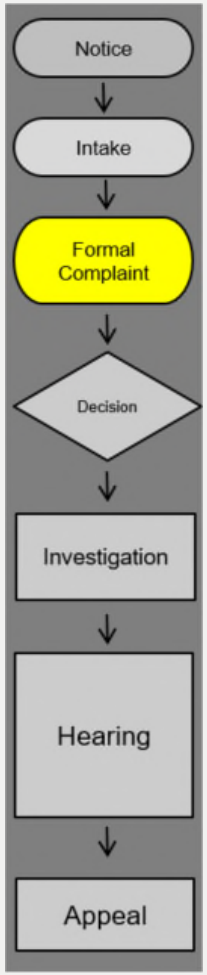
Consolidation of Formal Complaints



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

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

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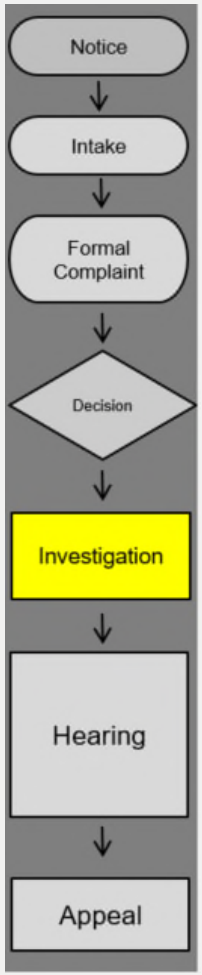
Consolidation of Formal Complaints



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

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

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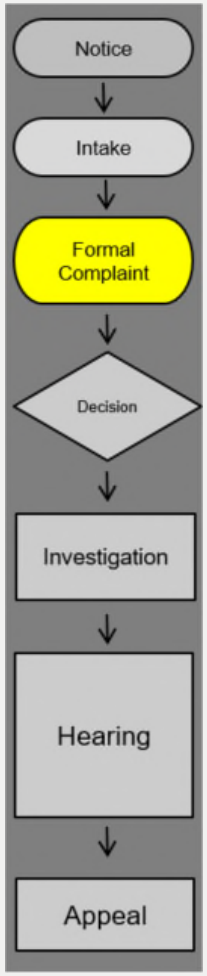
Consolidation of Formal Complaints



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

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

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Application to Specific Circumstances

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

Practical Considerations

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

INVESTIGATIONS

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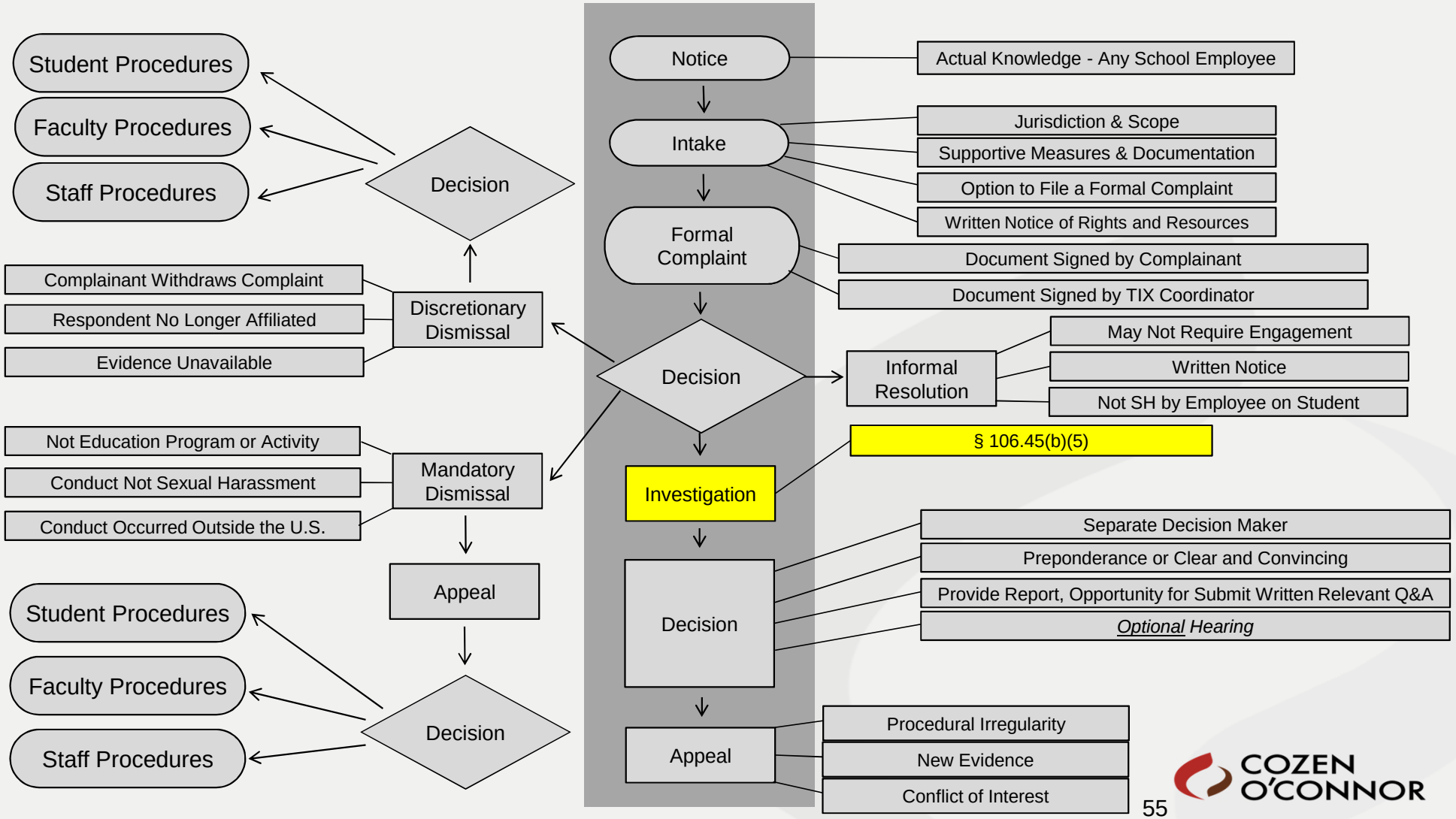
Notice
Actual Knowledge - Any School Employee
Intake
Jurisdiction & Scope
Supportive Measures & Documentation
Option to File a Formal Complaint
Written Notice of Rights and Resources
Formal Complaint
Document Signed by Complainant
Document Signed by TIX Coordinator
Decision
Informal Resolution
May Not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

EVIDENCE GATHERING

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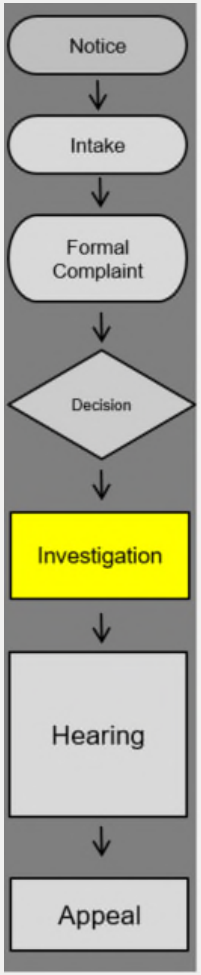
Burden of Gathering Evidence



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

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

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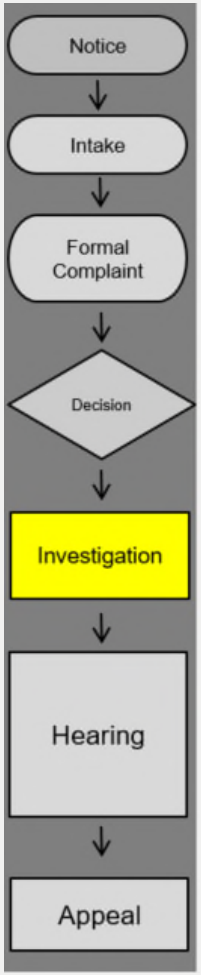
Burden of Gathering Evidence



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

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

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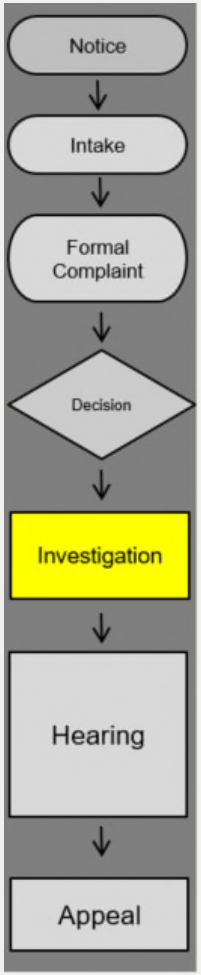
Burden of Gathering Evidence



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

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

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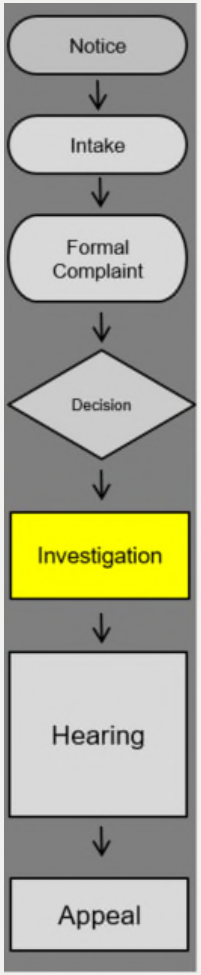
Opportunity to Participate



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

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

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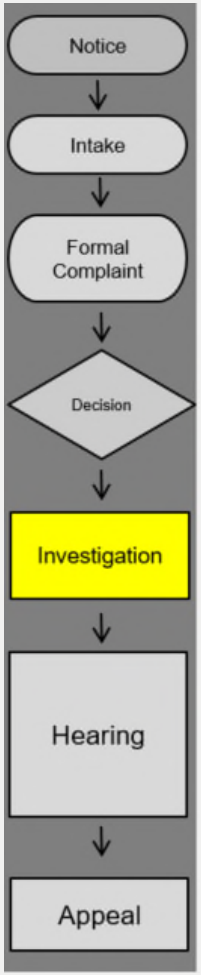
Witnesses & Evidence



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

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

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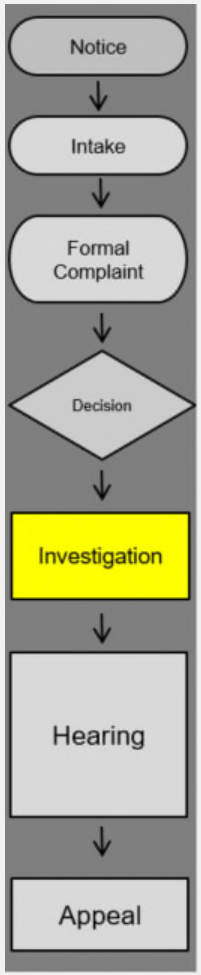
Practical Considerations & Effective Practices

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

Practical Considerations for Remote Interviews

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

Advisor of Choice



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

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

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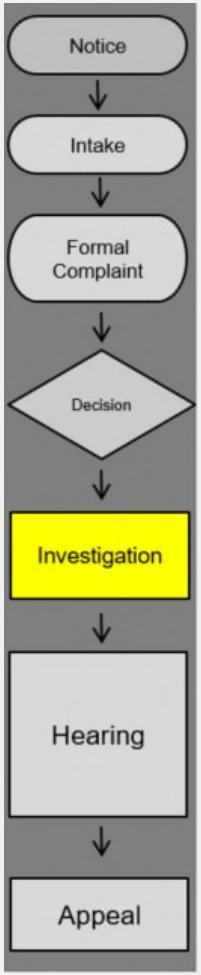
Restrictions on Advisor Participation



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

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

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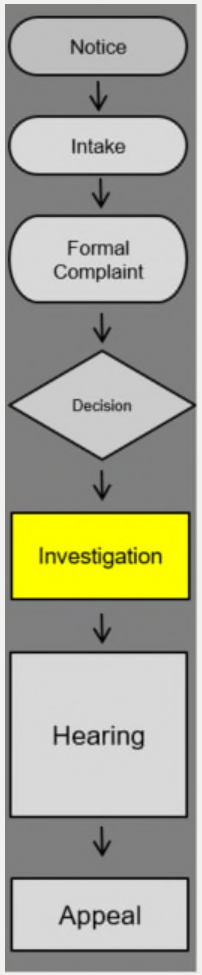
Restrictions on Advisor Participation



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

Title IX Regulations May 19 2020; Preamble at 30298.

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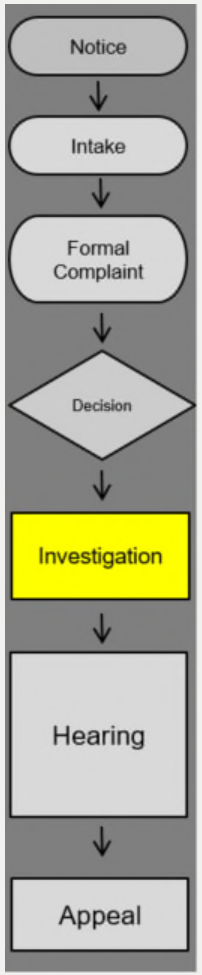
Training of Advisors Not Required



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

Title IX Regulations May 19 2020; Preamble at 30333.

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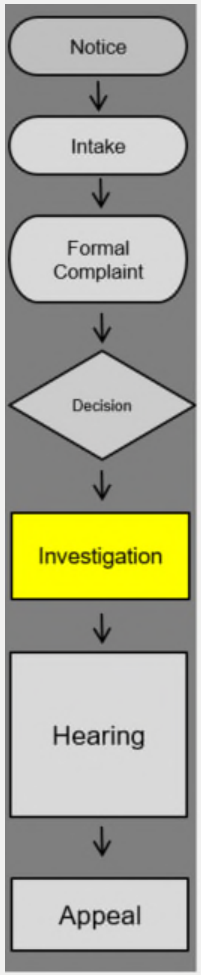
Training of Advisors Not Required



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

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

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Practical Considerations & Effective Practices

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

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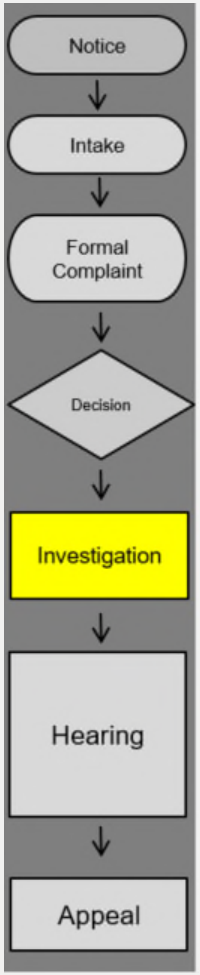
Evidentiary Considerations

- 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

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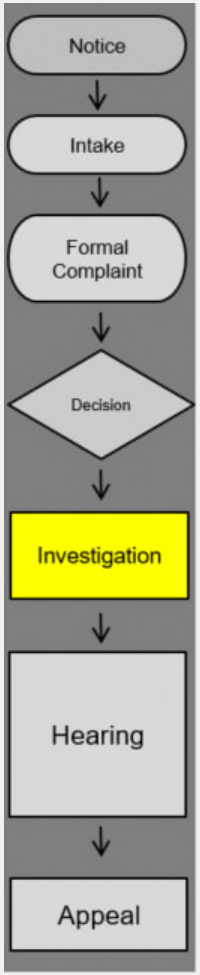
Privileged Records



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

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

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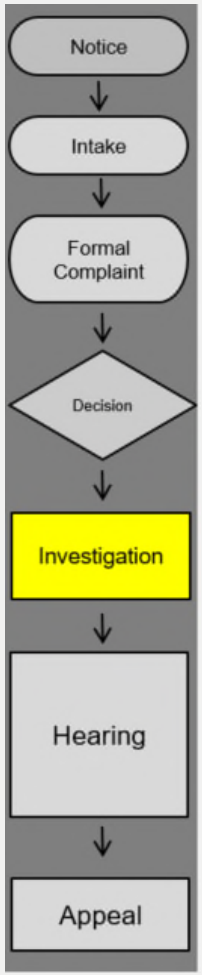
Relevance



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

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

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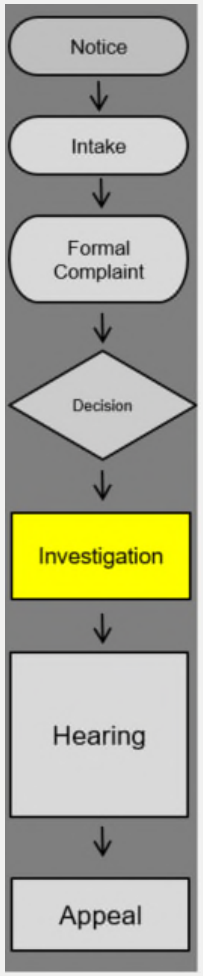
Relevance



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

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

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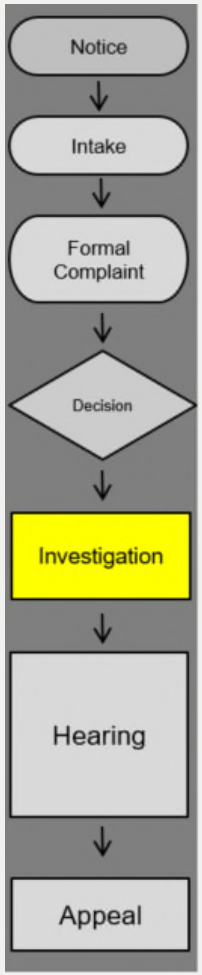
Relevance



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

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

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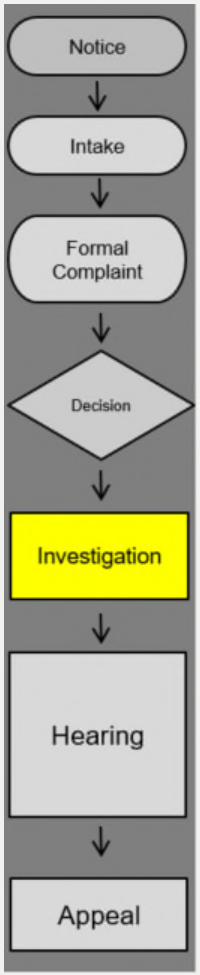
Prior Sexual History



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

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

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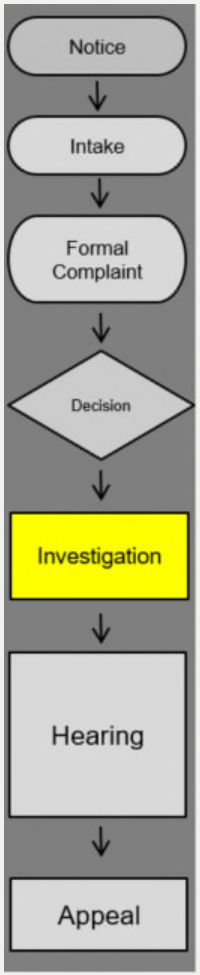
Prior Sexual History



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

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

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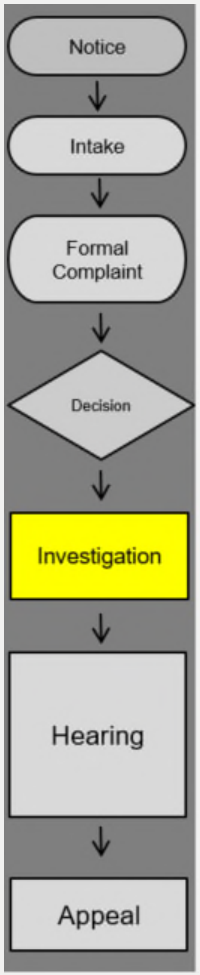
Prior Sexual History: Motive



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

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

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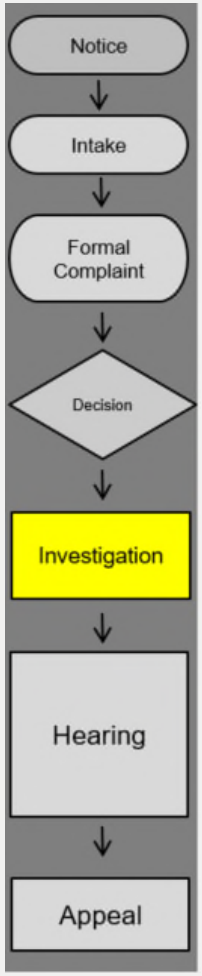
Prior or Subsequent Misconduct

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

Practical Considerations

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

Flexibility to Adopt Rules



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

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

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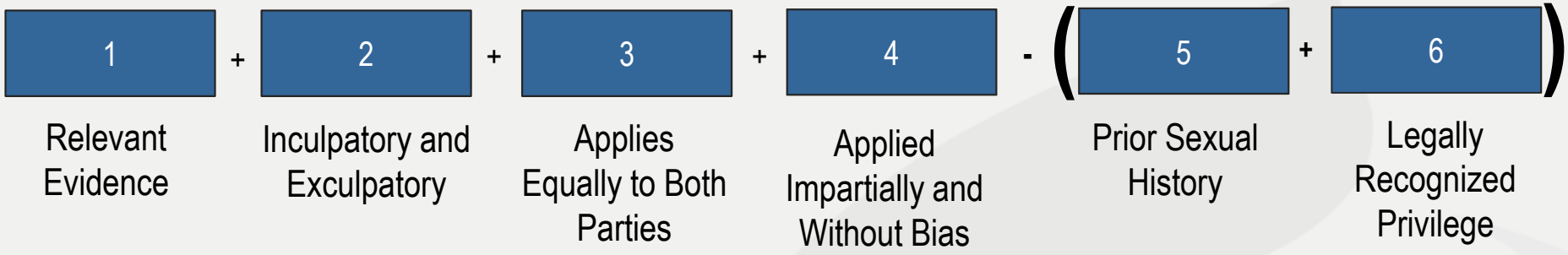
Evidentiary Rules Must Consider



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EVIDENCE REVIEW

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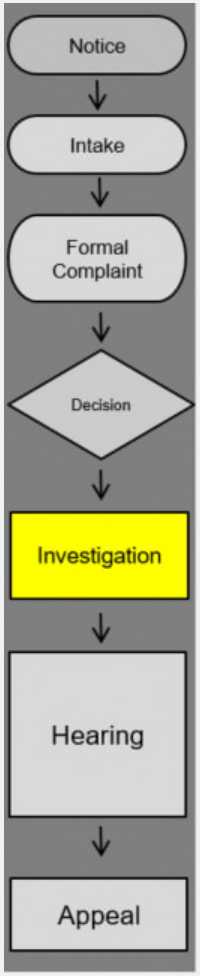
Evidence Review



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

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

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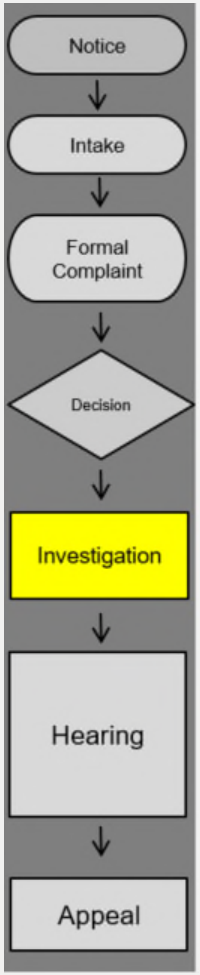
Evidence Review



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

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

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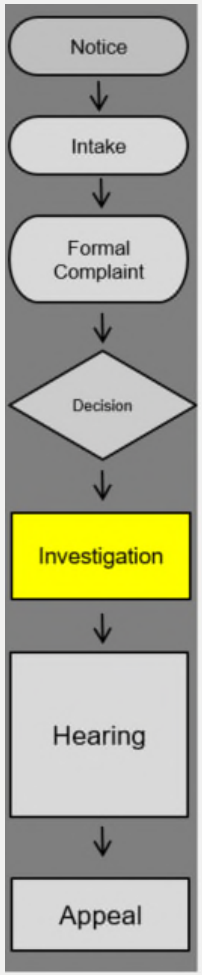
Evidence Review



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

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

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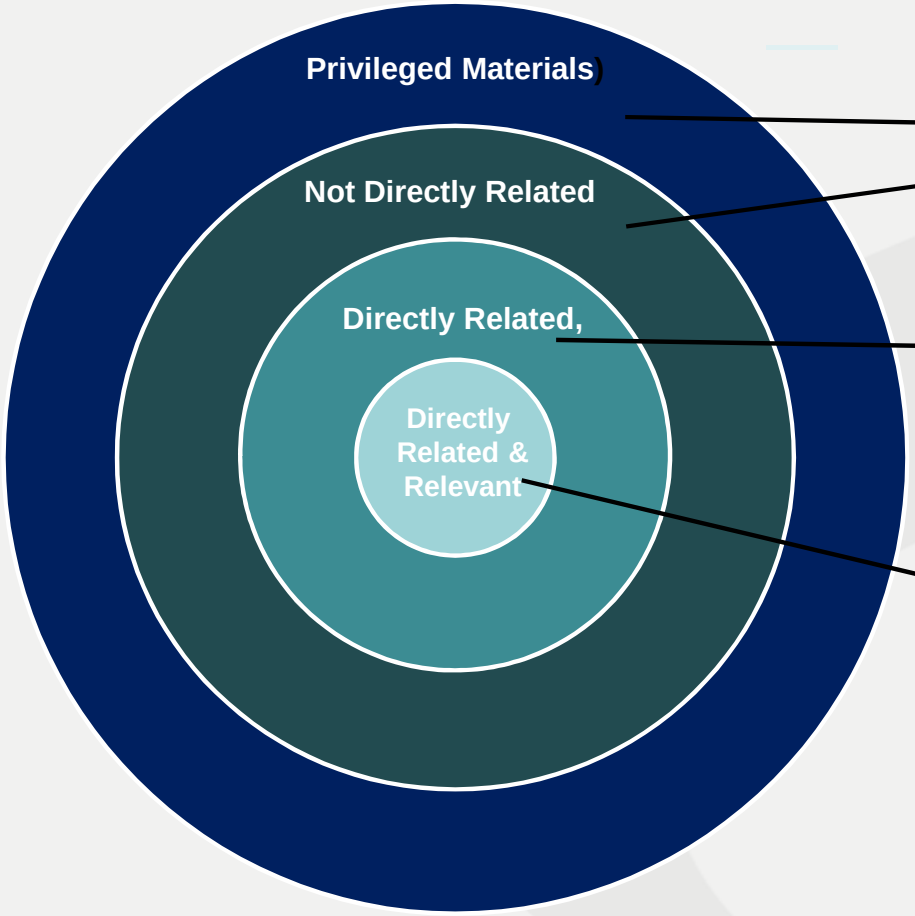
Evidentiary Levels for Inclusion

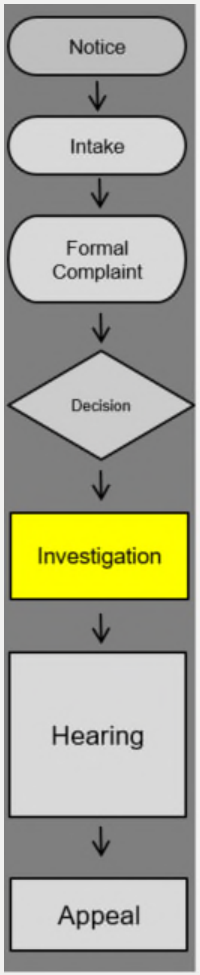


Don't include in Evidence Review or Investigative Report

Include in Evidence Review

Include in Evidence Review and Investigative Report

Directly Related



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

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

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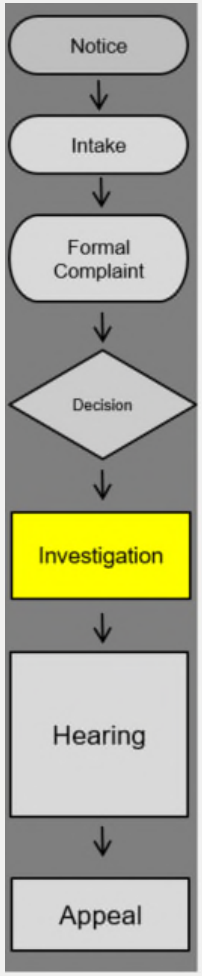
Directly Related



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

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

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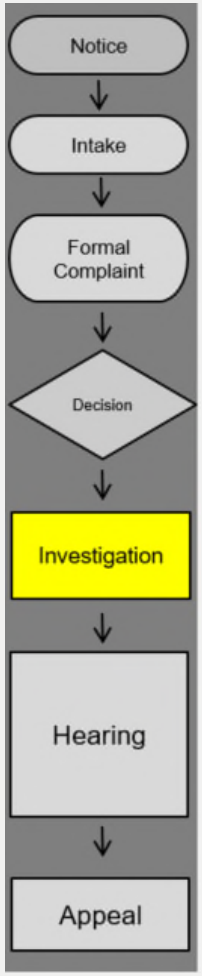
Directly Related vs. Relevant



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

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

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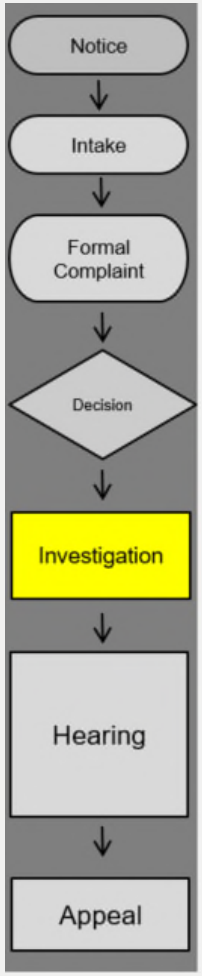
Directly Related



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

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

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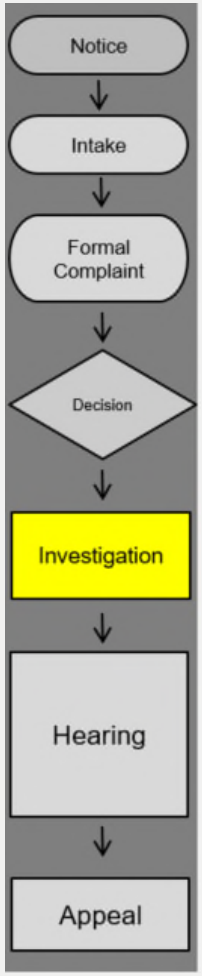
Directly Related



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

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

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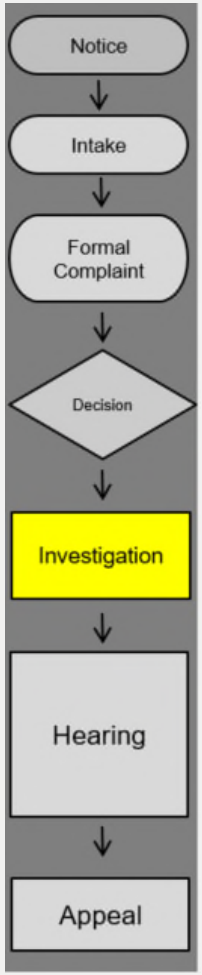
Directly Related



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

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

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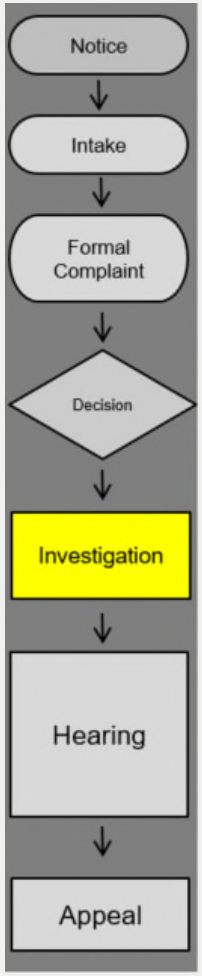
Scope of Parties' Review



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

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

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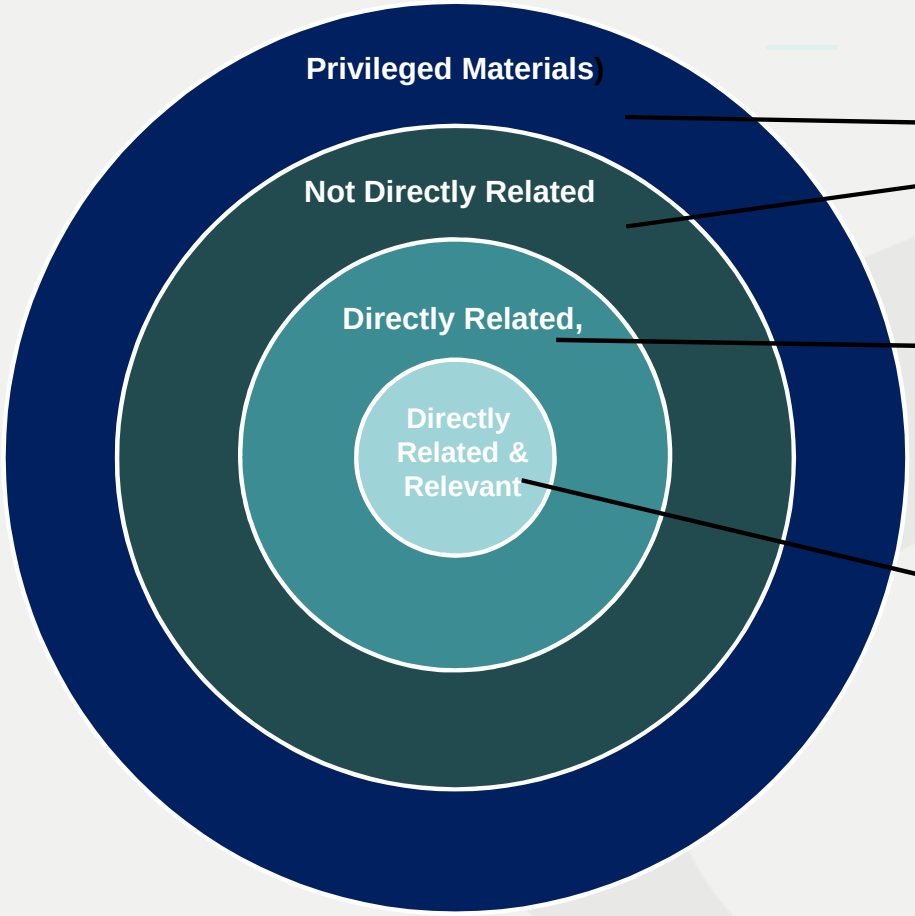
Evidentiary Levels for Inclusion



Don't include in Evidence Review or Investigative Report

Include in Evidence Review

Include in Evidence Review and Investigative Report

INVESTIGATIVE REPORT

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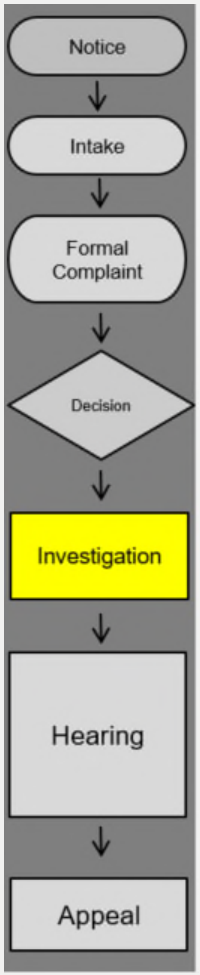
Investigative Report



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

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

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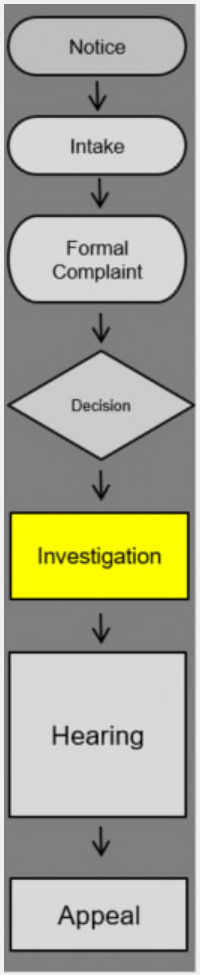
Investigative Report



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

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

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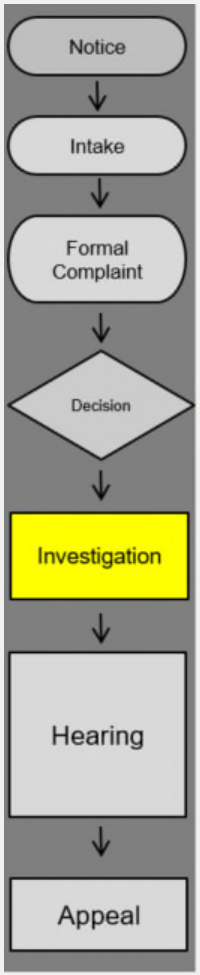
Investigative Report



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

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

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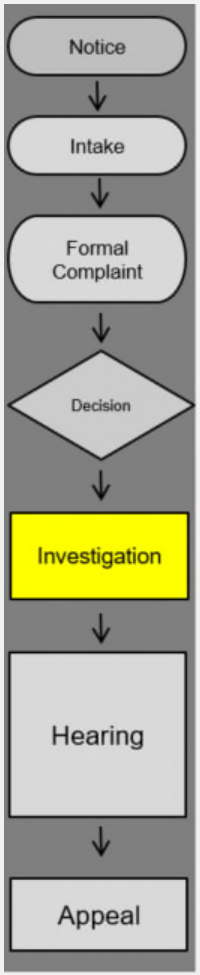
Content for Written Determination



- 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

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

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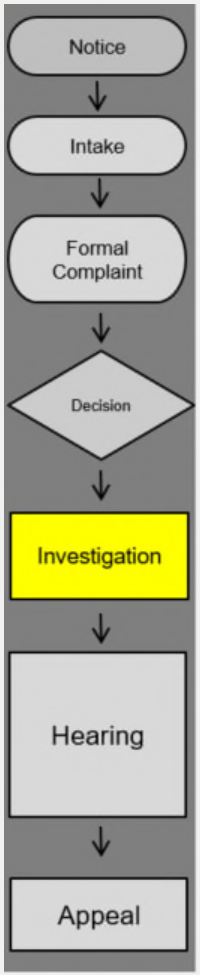
Investigative Report: Findings?



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

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

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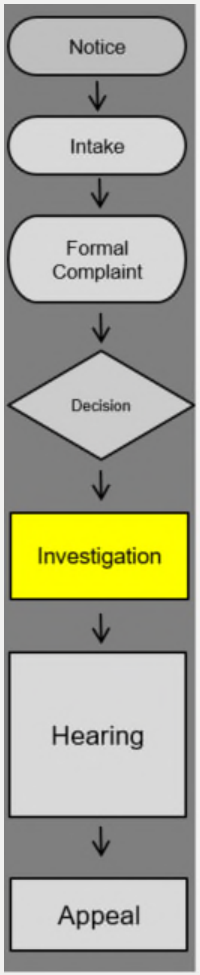
Investigative Report: Findings?



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

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

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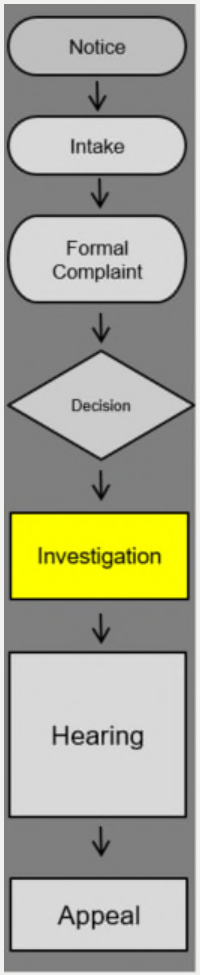
Revisiting Relevance



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

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

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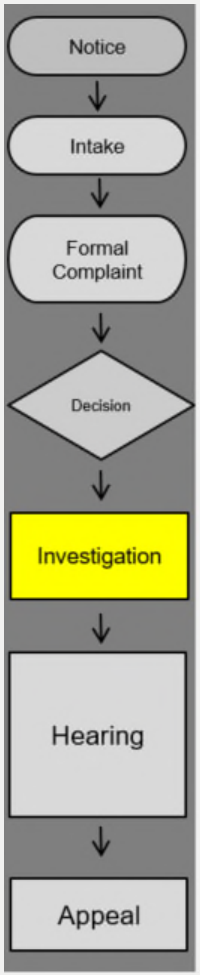
Investigative Report



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

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

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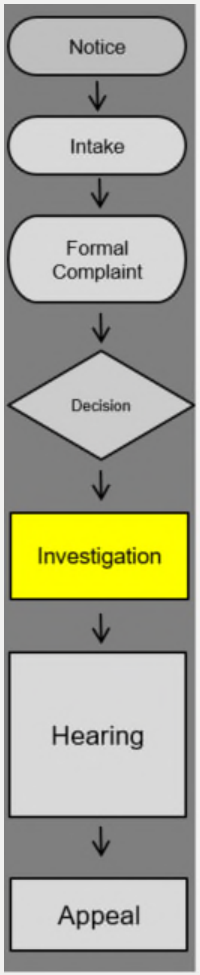
Investigative Report



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

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

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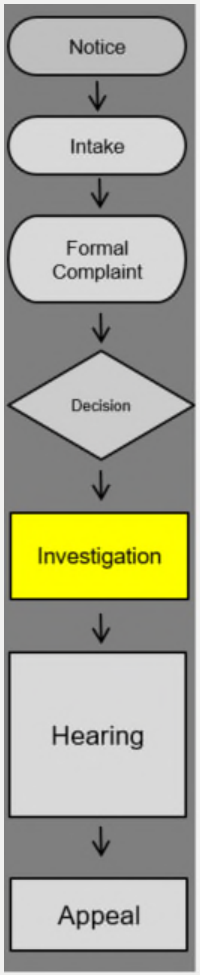
Investigative Report



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

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

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Practical Considerations & Effective Practices

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

REASONABLY PROMPT TIME FRAMES

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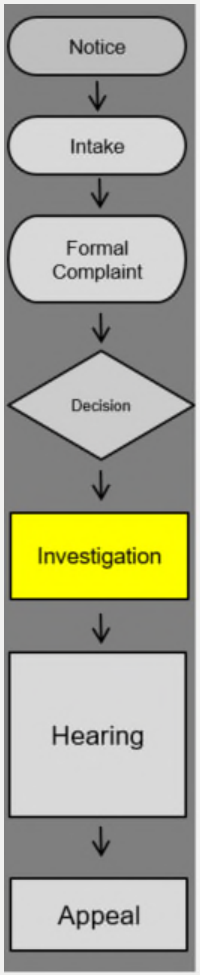
Reasonably Prompt Time Frames



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

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

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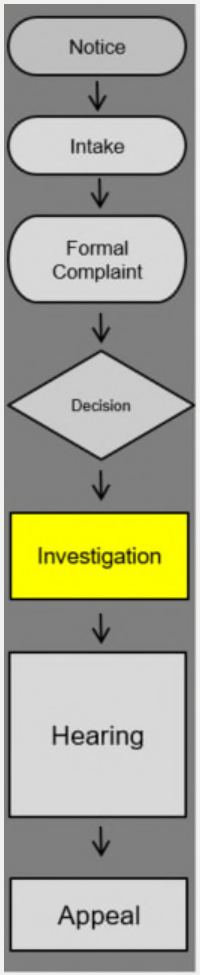
Reasonably Prompt Time Frames



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

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

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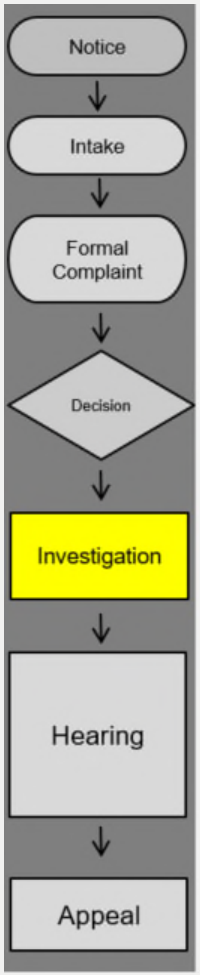
Reasonably Prompt Time Frames



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

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

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TRAINING

Training

- A recipient must ensure that **Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution** process, receive training on:
  - The definition of sexual harassment in § 106.30
  - The scope of the recipient's education program or activity
  - How to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, as applicable
  - How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias

- A recipient must ensure that **decision-makers** receive training on:
  - Any technology to be used at a live hearing
  - Issues of relevance of questions and evidence, including when questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, as set forth in paragraph (b)(6) of this section.

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

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Training

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

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

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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.
-

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