

Title IX Training:

For Implementers, Investigators, and Decision-Makers

Presented By:

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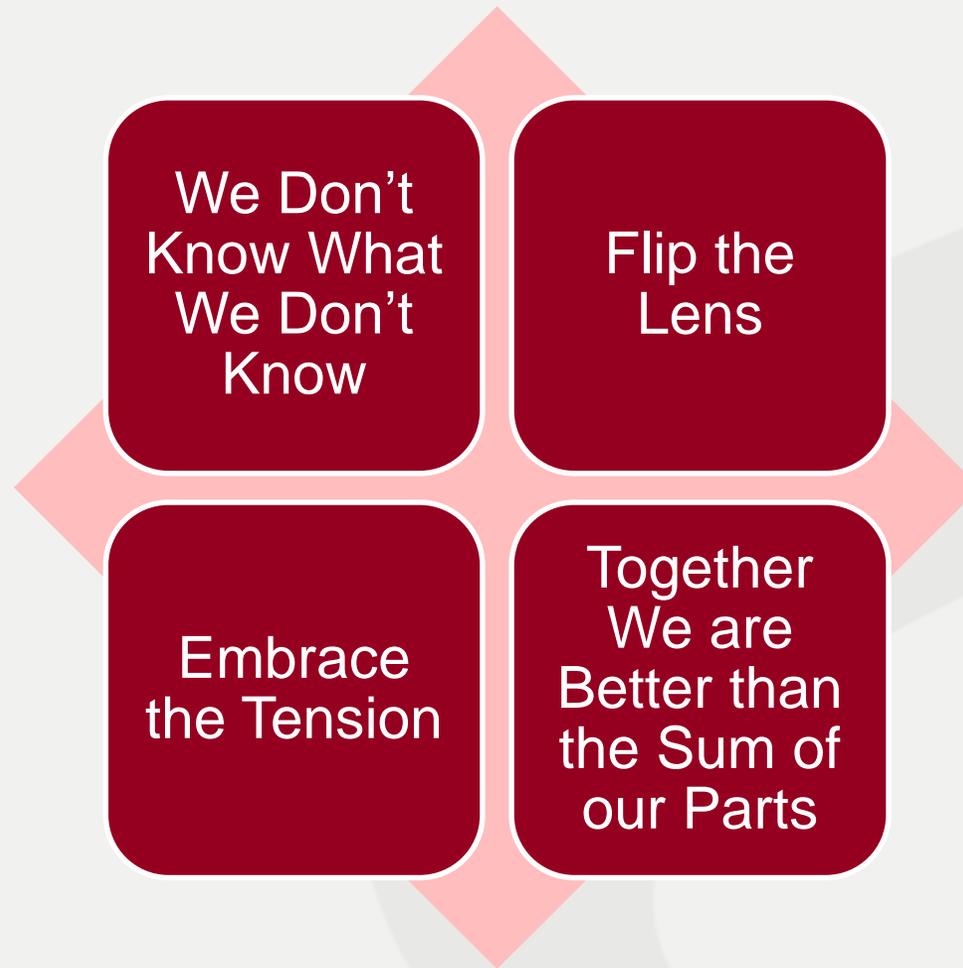
October 6-7, 2020

INTRODUCTION



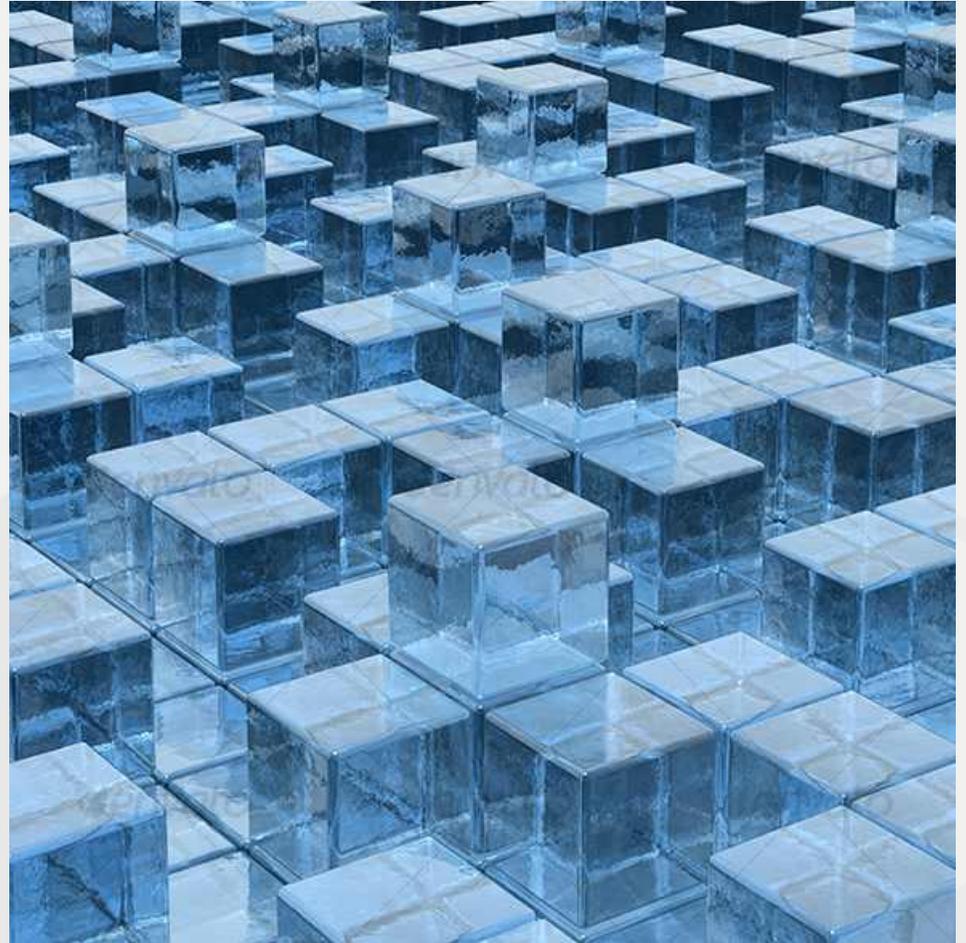
FRAMING THE CONTEXT

Framing the Conversation

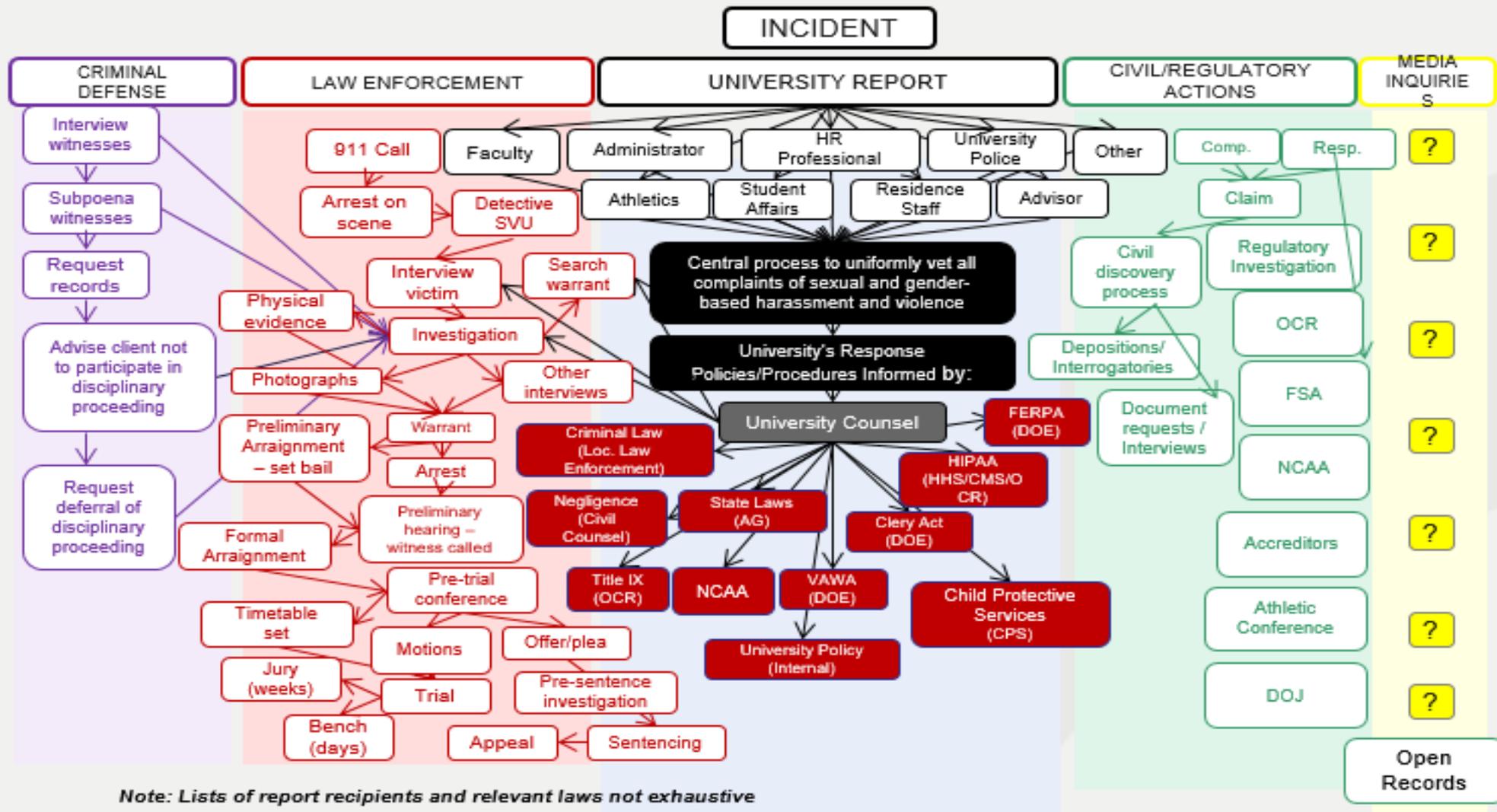


The Context

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

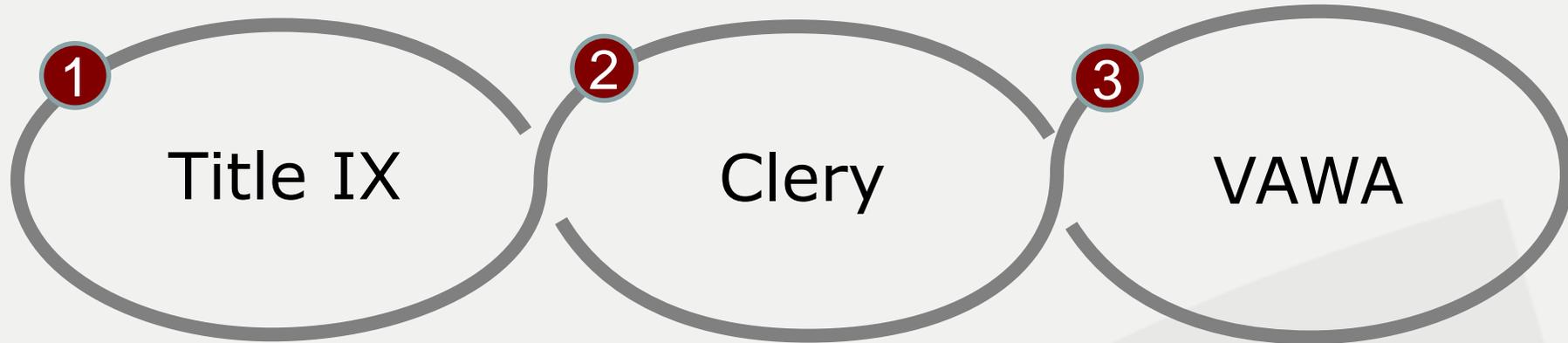


The Legal Context





Federal Regulatory Framework



Title IX of the Education Amendments of 1972

- Prohibits sex discrimination in educational institutions that receive federal funds

The Jeanne Clery Act (1990)

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

The Violence Against Women Reauthorization Act of 2013

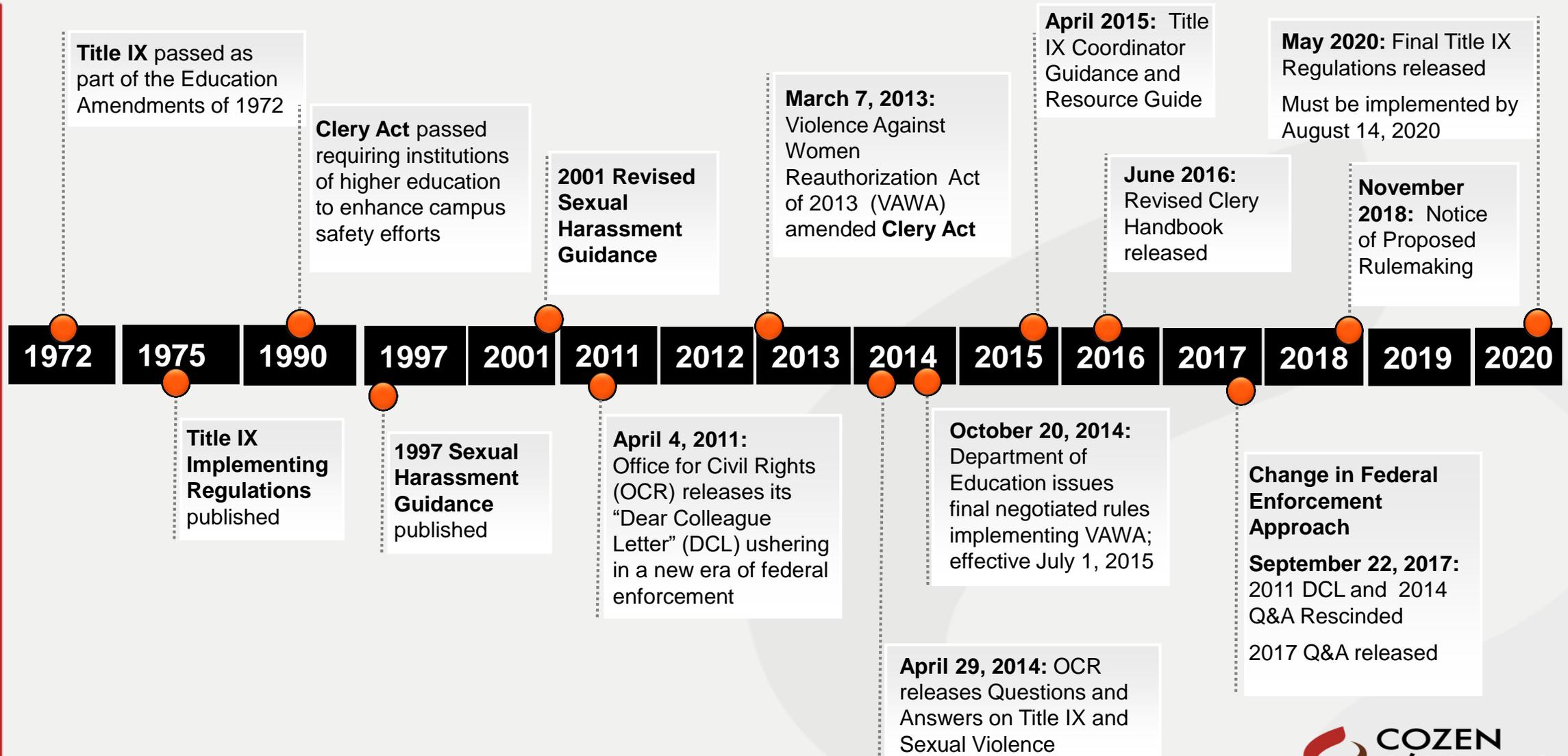
- Amends Clery to expand sexual assault requirements and include dating violence, domestic violence, and stalking; applies to all students and employees

Implementation Rubric

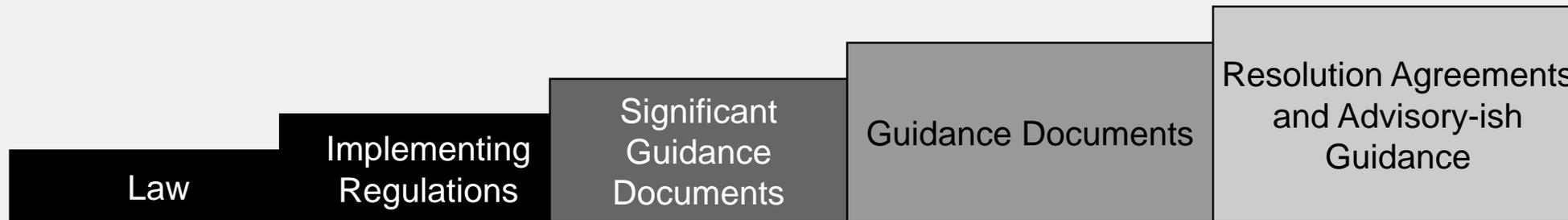
- Law
- Regulations
- Guidance
- Preamble and commentary
- OCR webinars, charts, blog
- Policy
- Higher education experience
- Institutional values



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 (Rescinded)
- Preamble to Title IX Implementing Regulations

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

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

RECENT CASE LAW

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. 4th 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.

THE CLERY ACT

The Clery Act (As Amended by VAWA)

Core Tenets:

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

VAWA: Prompt, Fair, and Impartial Investigation & Resolution

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

VAWA: Prompt, Fair, and Impartial Investigation & Resolution

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

TITLE IX AND THE NEW REGULATIONS

Understanding Title IX

The Law:

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

20 USC § 1681

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 as of **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.”

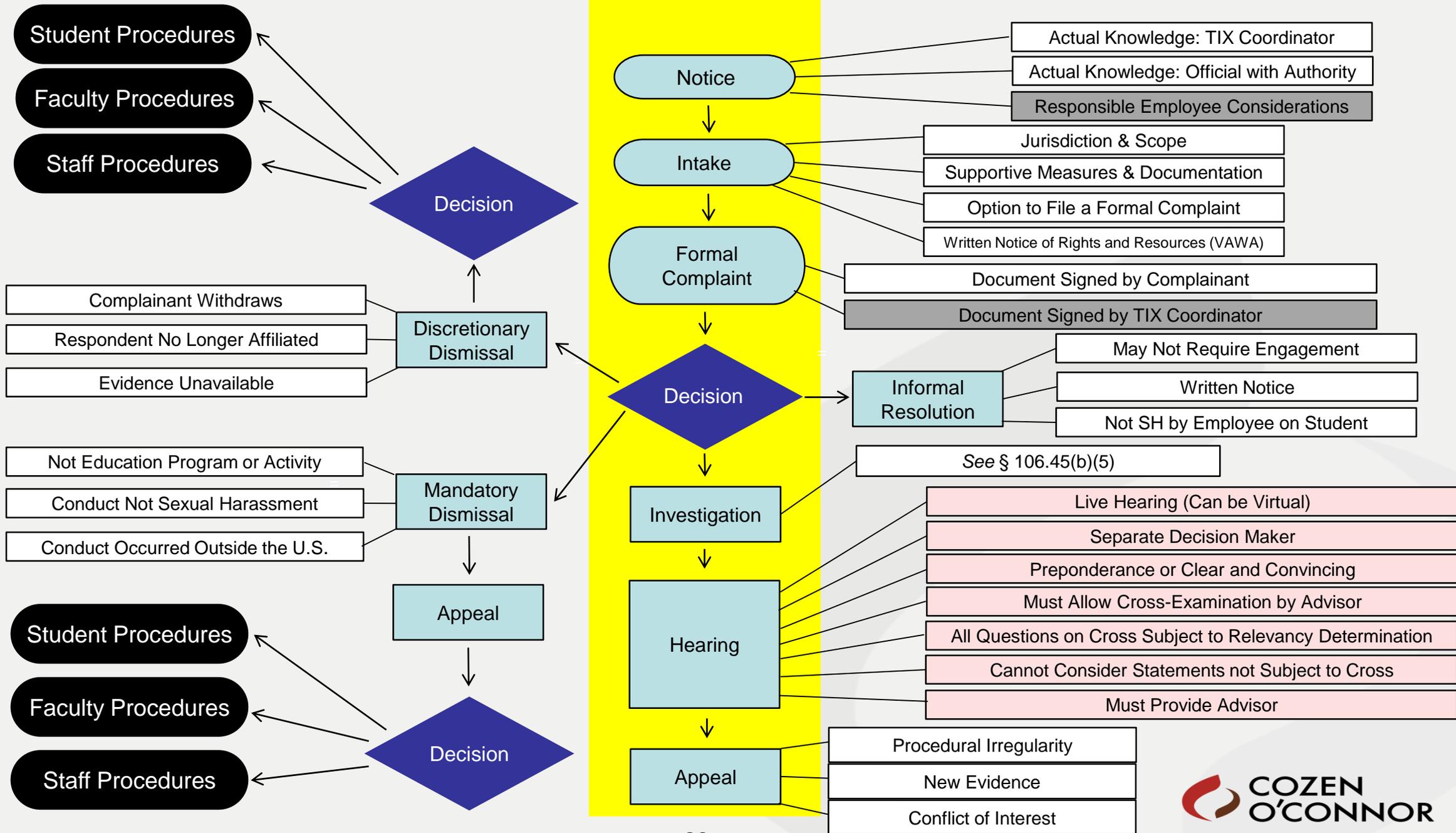
Title IX Regulations issued May 6, 2020; Executive Summary, pp. 15-16

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.”

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

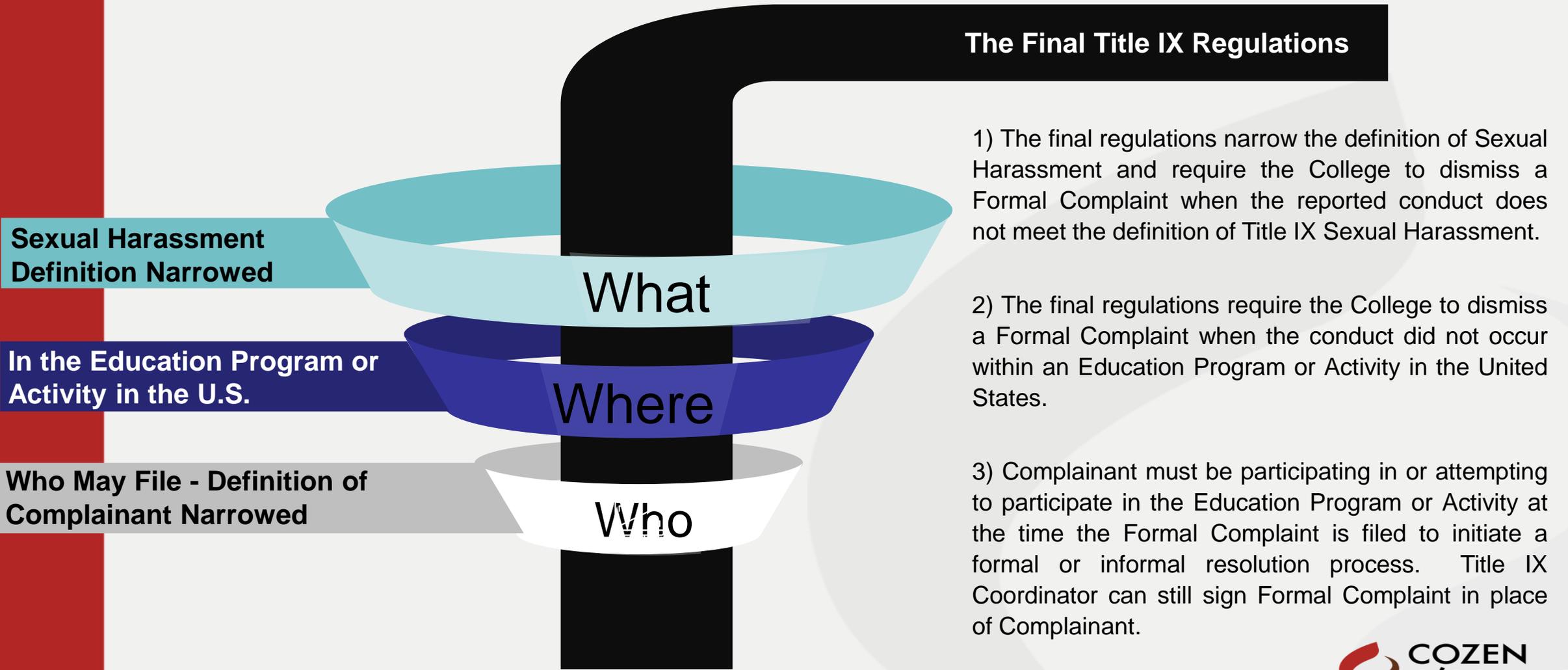
- Jurisdiction/scope
- Live hearing
- Cross examination by the advisor
- Proponent of a statement must be subject to cross-examination
- Recipient must provide advisor

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.”

SCOPE AND JURISDICTION

Narrowing of Scope and Jurisdiction Under the Final Title IX Regulations



The Scope of the New Title IX Regulations

Core Tenets:

Definition of Sexual Harassment

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

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

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

Title IX: Jurisdiction

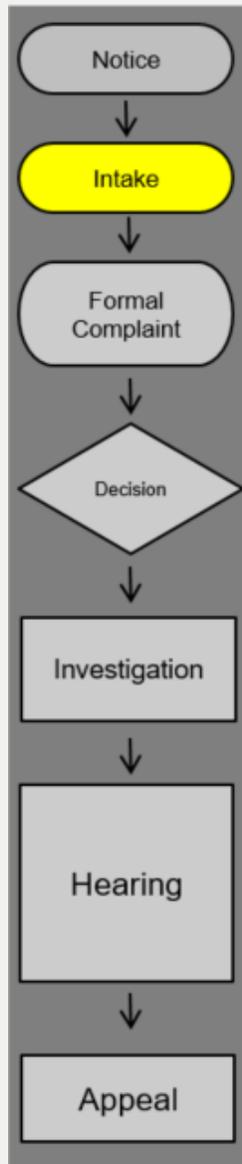
The Education Program or Activity

- **Education program or activity**” includes:
 - Locations, events, or circumstances over which the recipient exercised **substantial control** over both
 - 1) the Respondent, and
 - 2) the context in which the sexual harassment occurs
 - Any building **owned or controlled by a student organization that is officially recognized** by a postsecondary institution

**Core
Tenets:**

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

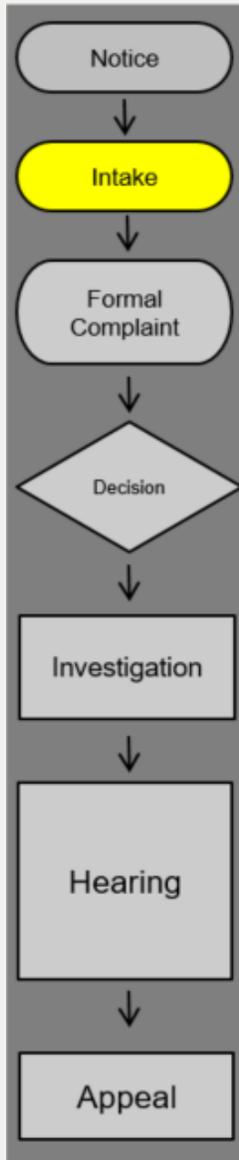
Jurisdiction: Where



- 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

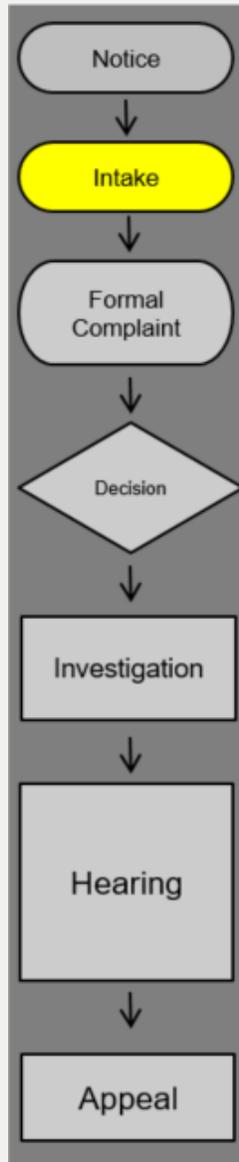
Jurisdiction: On Campus



“[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.***”

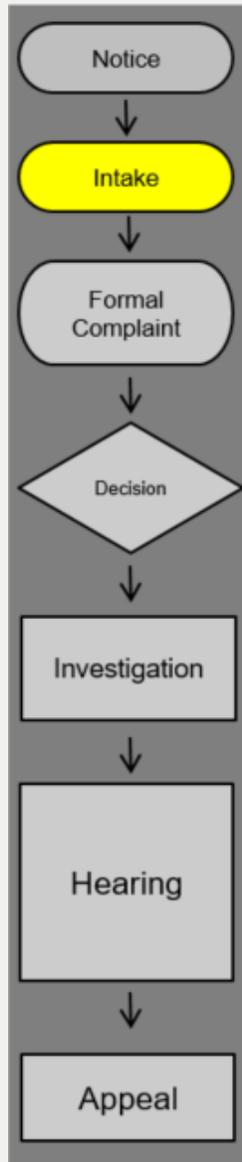
Title IX Regulations issued May 6, 2020; Preamble at 624

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).”

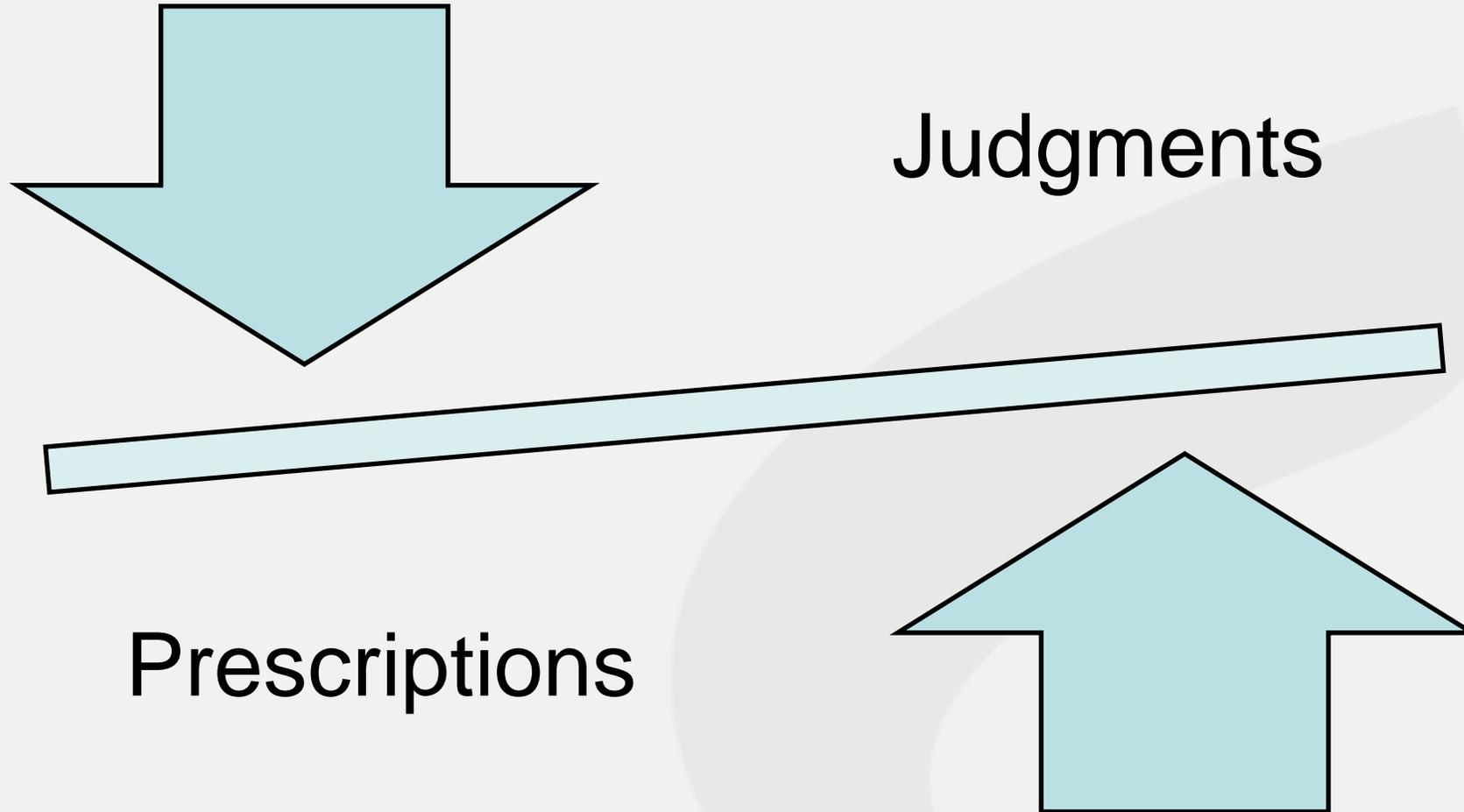
Jurisdiction: Course of Conduct



- “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.**”

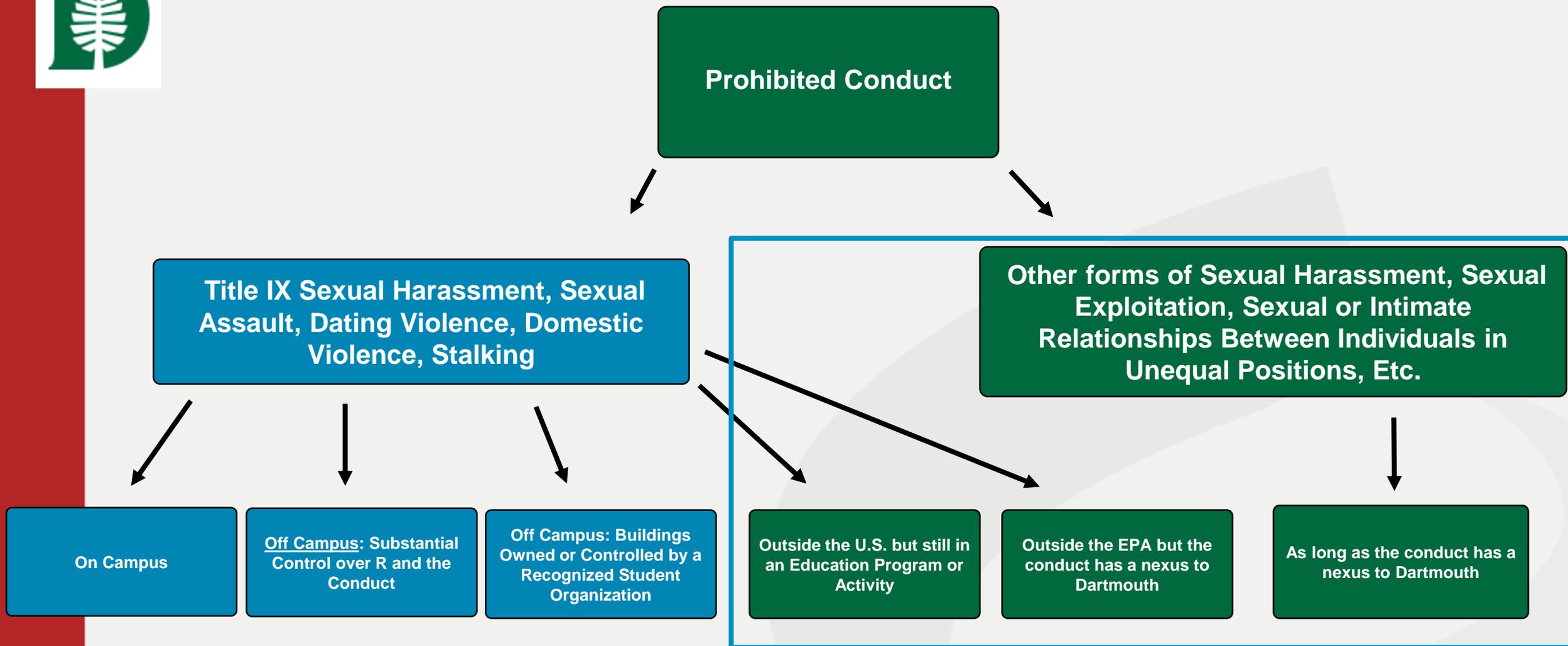
DARTMOUTH'S SEXUAL AND GENDER- BASED MISCONDUCT POLICY

Balancing





Mapping the Policy: Prohibited Conduct



■ Required by Title IX
□ Not Required by Title IX



Prohibited Conduct: Sexual Harassment

Sexual Harassment: Sexual Harassment includes two distinct, but overlapping definitions and the specific form of Sexual Harassment may impact the nature of the hearing used in the formal resolution process.



Prohibited Conduct: Title IX Sexual Harassment

The **Title IX regulations define Sexual Harassment** as conduct on the basis of sex that must satisfy one or more of the following:

- (a) A Dartmouth employee conditions the provision of an aid, benefit, or service of Dartmouth on an individual's participating in unwelcome sexual conduct; or
- (b) Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to Dartmouth's education program or activity;
- (c) Sexual Assault, Dating Violence, Domestic Violence, Stalking, and Retaliation, as defined below.



Prohibited Conduct: Sexual and Gender-Based Harassment

Sexual Harassment also includes:

- (a) Any unwelcome sexual advance, request for sexual favors, or other unwanted conduct of a sexual nature, whether verbal, non-verbal, graphic, physical, electronic, or otherwise (*sexual harassment*); or,
- (b) Any act of intimidation or hostility, whether verbal or non-verbal, graphic, physical, or otherwise based on sex or gender, sexual orientation, gender identity, or gender expression, even if the acts do not involve conduct of a sexual nature (*gender-based harassment*);



Prohibited Conduct: Sexual and Gender-Based Harassment (cont'd)

With sexual and gender-based harassment, one or more of the following conditions must be present:

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



Prohibited Conduct: Sexual and Gender-Based Harassment (cont'd)

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

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



Prohibited Conduct: Sexual Assault

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

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



Prohibited Conduct: Dating and Domestic Violence

Dating and Domestic Violence includes any act of violence against a Complainant who is or has been involved in a sexual, dating, domestic, or other intimate relationship with the Respondent, or against a person with whom the Respondent has sought to have such a relationship, as follows:



Prohibited Conduct: Domestic Violence

Domestic Violence includes any act of violence committed by a current or former spouse or intimate partner of the Complainant, by:

- (a) A person with whom the Complainant shares a child in common, by a person who is cohabitating with, or has cohabitated with, the Complainant as a spouse or intimate partner,
- (b) A person similarly situated to a spouse of the Complainant under New Hampshire state law, or
- (c) Any other person against an adult or minor Complainant who is protected from that person's acts under New Hampshire state law;



Prohibited Conduct: Dating Violence

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

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



Prohibited Conduct: Stalking

Stalking occurs when a person engages in a course of conduct directed at a specific person under circumstances that would either:

- Cause a reasonable person to fear for their own safety or the safety of others, or
- Suffer substantial emotional distress.

Course of conduct means two or more instances including but not limited to unwelcome acts in which an individual directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person's property.

Substantial emotional distress means significant mental suffering or anguish.

Stalking includes the concept of cyber-stalking, a particular form of stalking in which electronic media such as the internet, social networks, blogs, cell phones, texts, or other similar devices or forms of contact are used.



Prohibited Conduct: Sexual Exploitation

Sexual Exploitation is intentionally taking sexual advantage of another person without consent.

It may involve use of one's own or another individual's nudity or sexuality.

Examples of Sexual Exploitation include, but are not limited to:

- (a) voyeurism (such as watching or taking pictures, videos, or audio recordings of another person in a state of undress without their consent or of another person engaging in a sexual act without the consent of all parties);
- (b) disseminating, streaming, or posting images, pictures or video of another in a state of undress or of a sexual nature without the person's consent;
- (c) knowingly exposing one's genitals to another person without consent;
- (d) prostituting another individual; or
- (e) knowingly exposing another individual to a sexually transmitted infection or virus without the other individual's knowledge and consent.



Prohibited Conduct: Provision of Alcohol and/or Drugs

The provision of alcohol and/or other drugs to an individual for the purpose of committing or facilitating Prohibited Conduct under this policy is also in and of itself a form of Prohibited Conduct.

Such behavior may include provision of a drink or food which contains alcohol and/or other drugs without the knowledge of the individual to whom it is being provided or other actions taken with the intention of impairing the senses, judgment, and/or physical and mental ability of another person in order to engage in other forms of Prohibited Conduct.

An individual does not have to engage in sexual activity with another person to be found responsible for the prohibited provision of alcohol and/or other drugs.



Prohibited Conduct: Retaliation

Retaliation means any adverse action, intimidation, threat, coercion or discrimination against an individual for:

- (a) the purpose of interfering with any right or privilege secured by Title IX or its regulations, or
- (b) because the individual has made a report or Formal Complaint of Prohibited Conduct, testified, assisted, or participated or refused to participate in any manner in any investigation, proceeding or hearing under this policy.

Retaliation includes such conduct through associates or agents of a Complainant, Respondent, Reporting Party, or participant in any investigation or proceeding related to this policy.



Consent, Coercion or Force, and Incapacitation

Consent is an affirmative and willing agreement to engage in specific forms of sexual contact with another person. Consent requires an outward demonstration, through mutually understandable words or actions, indicating that an individual has freely chosen to engage in sexual contact. Consent cannot be obtained through:

- the use of coercion or force; or
- by taking advantage of the incapacitation of another individual.

Silence, passivity, or the absence of resistance does not imply consent. It is important not to make assumptions; if confusion or ambiguity arises during a sexual interaction, it is essential that each participant stop and clarify the other's willingness to continue.



Consent, Coercion or Force, and Incapacitation

- **Consent can be withdrawn at any time.** When consent is withdrawn and outwardly communicated as such, sexual activity must cease.
- **Prior consent does not imply current or future consent;** even in the context of an ongoing relationship, consent must be sought and freely given for each instance of sexual contact.
- An essential element of consent is that it be freely given. **Freely given consent might not be present, or may not even be possible, in relationships of a sexual or intimate nature between individuals where one individual has power, supervision or authority over another.** More information, policy and guidance regarding such relationships can be found in VIII below.



Consent, Coercion or Force, and Incapacitation

In evaluating whether consent was given, **consideration will be given to the totality of the facts and circumstances**, including but not limited to:

- the extent to which a Complainant affirmatively uses words or actions indicating a willingness to engage in sexual contact, free from intimidation, fear, or coercion;
- whether a reasonable person in the Respondent's position would have understood such person's words and acts as an expression of consent; and
- whether there are any circumstances, known or reasonably apparent to the Respondent, demonstrating incapacitation or lack of consent.



Consent, Coercion or Force, and Incapacitation

Coercion is verbal and/or physical conduct, including manipulation, intimidation, unwanted contact, and express or implied threats of physical, emotional, or other harm, that would reasonably place an individual in fear of immediate or future harm and that is employed to compel someone to engage in sexual contact.

Force is the use or threat of physical violence or intimidation to overcome an individual's freedom of will, to choose whether or not to participate in sexual contact.



Consent, Coercion or Force, and Incapacitation

Incapacitation:

An individual who is incapacitated lacks the ability to make informed judgments and cannot consent to sexual contact. **Incapacitation is the inability, temporarily or permanently, to give consent because an individual is mentally and/or physically helpless, asleep, unconscious, or unaware that sexual activity is occurring.**

- Mentally helpless means a person is rendered temporarily incapable of appraising or controlling one's own conduct.
- Physically helpless means a person is physically unable to verbally or otherwise communicate consent or unwillingness to an act.

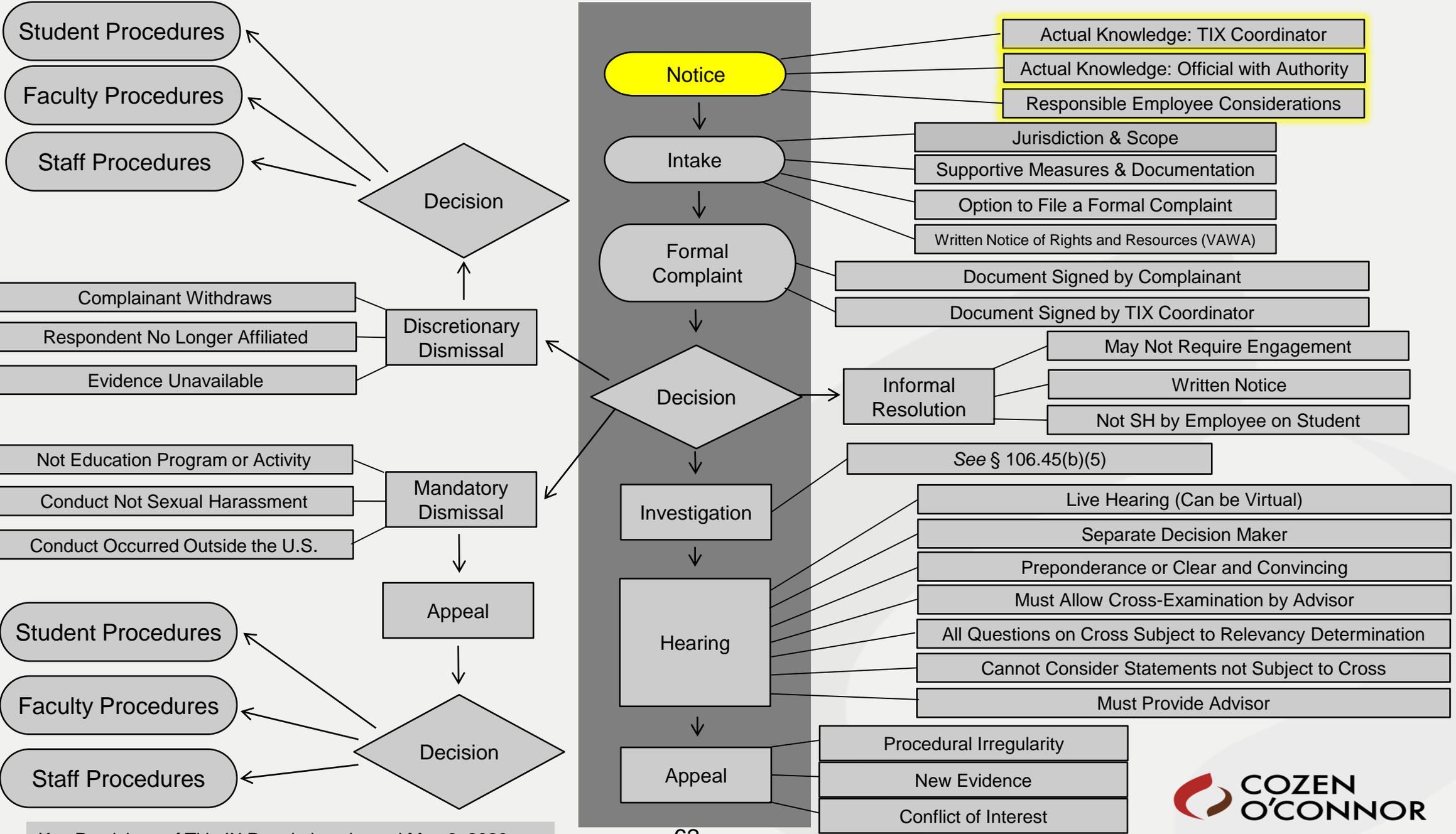


Consent, Coercion or Force, and Incapacitation

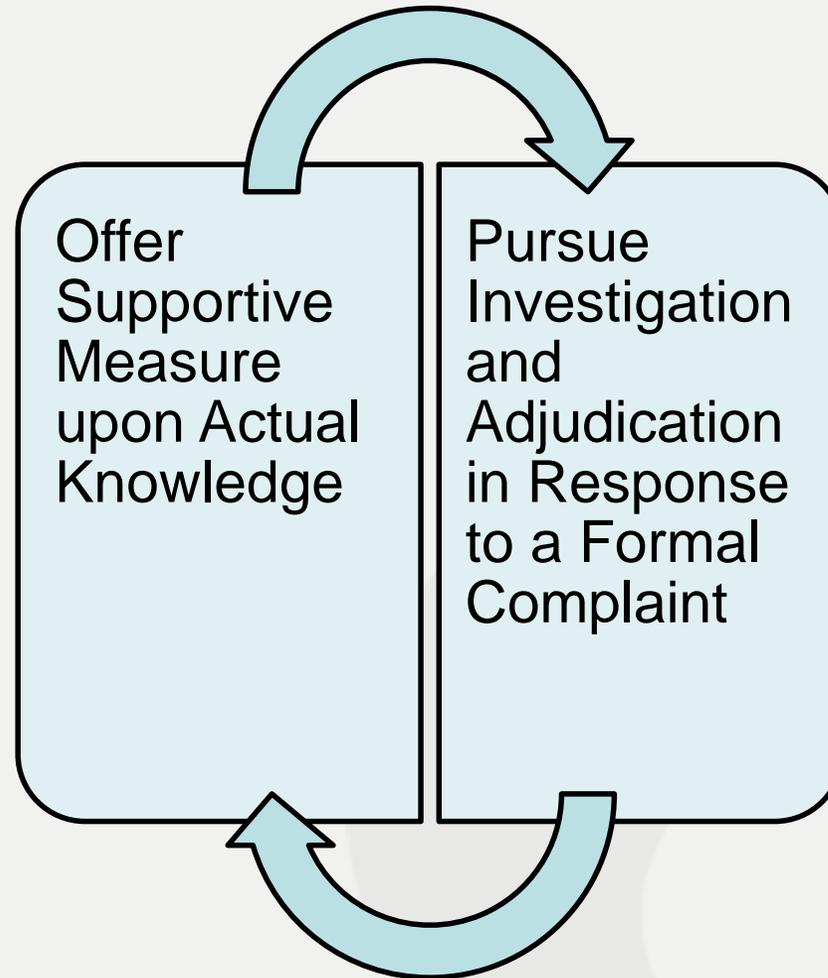
Incapacitation:

Where alcohol or other drugs are involved, incapacitation is a state beyond impairment or intoxication. Where alcohol or other drugs are involved, evaluating incapacitation requires an assessment of how the consumption of alcohol and/or drugs affects a person's decision-making ability; awareness of consequences; ability to make informed, rational judgments; capacity to appreciate the nature and quality of the act; or level of consciousness. The assessment is based on objectively and reasonably apparent indications of incapacitation when viewed from the perspective of a sober, reasonable person.

RESPONDING TO A REPORT OF PROHIBITED CONDUCT



Understanding Two Key Provisions



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.

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

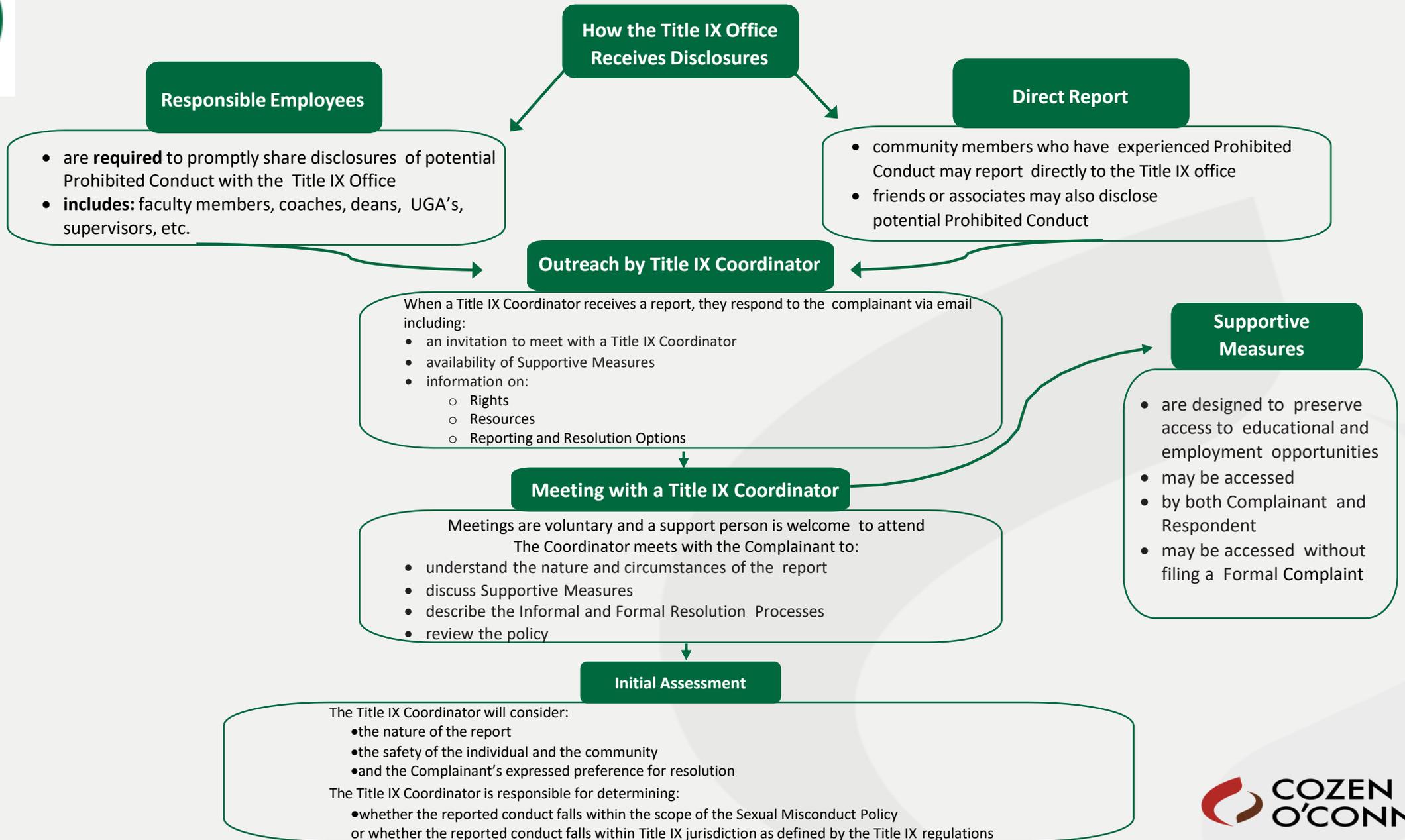
The Obligation to Investigate

- 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)

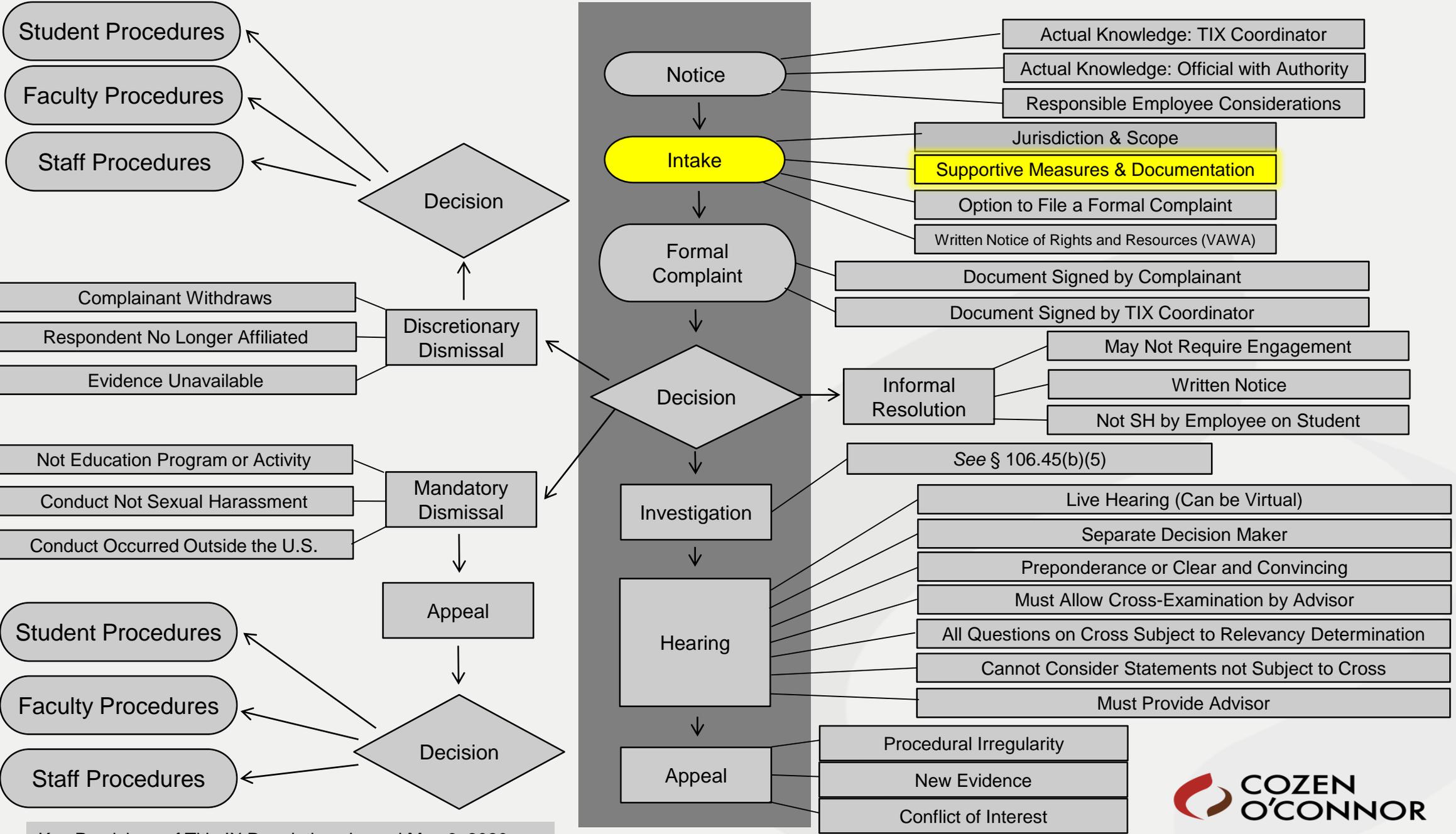
Title IX Regulations May 19, 2020 §106.30 Definitions and §106.45(b)(3)
Dismissal of a formal complaint; 85 F.R. 30574



Title IX Reporting and Assessment Process

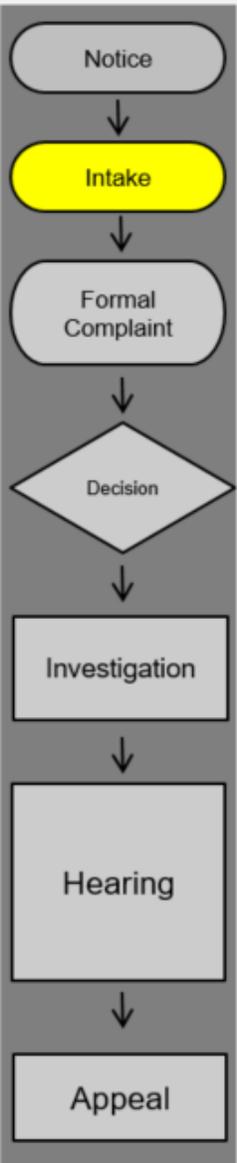


SUPPORTIVE MEASURES



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

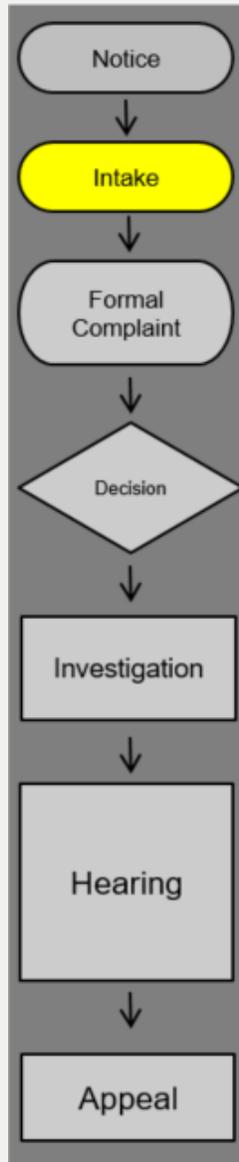




Offering Supportive Measures

- 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.

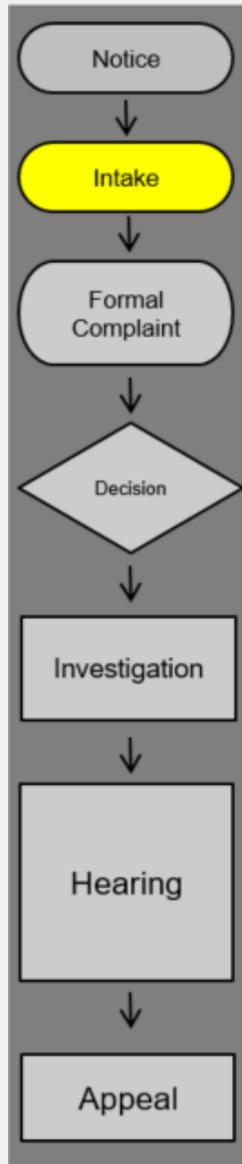
Supportive Measures



- 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)

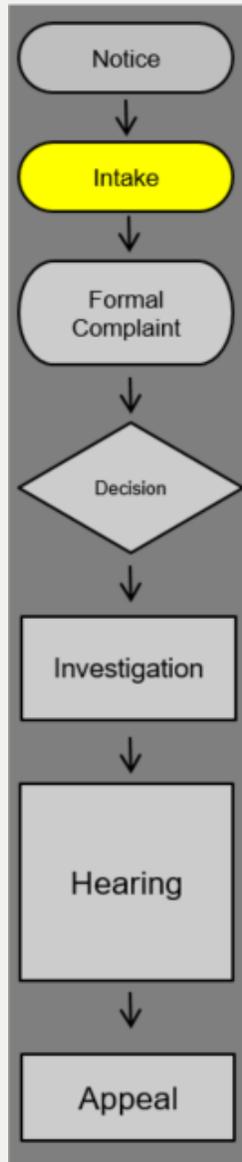
Supportive Measures



- 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)

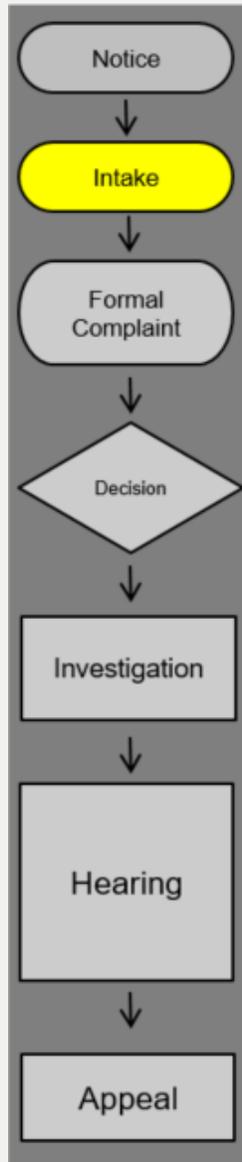
Supportive Measures



- 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)



Sexual and Gender Based Misconduct Policy

Supportive Measures are available regardless of whether the Complainant or Title IX Coordinator file a Formal Complaint and may include:

- Facilitating access to counseling and medical services;
- Guidance in obtaining a sexual assault forensic examination;
- Assistance in arranging rescheduling of exams and assignments and extensions of deadlines;
- Academic supports;
- Assistance in requesting accommodations through the appropriate office, if the Complainant or Respondent qualifies as an individual with a disability;
- Changes in the Complainant's or Respondent's class schedule (including the ability to transfer course sections or withdraw from a course), work schedule, or job assignment, including teaching, research, and service responsibilities;
- Change in the Complainant's or Respondent's campus housing;



Sexual and Gender Based Misconduct Policy

Supportive Measures are available regardless of whether the Complainant or Title IX Coordinator file a Formal Complaint and may include (**cont'd**):

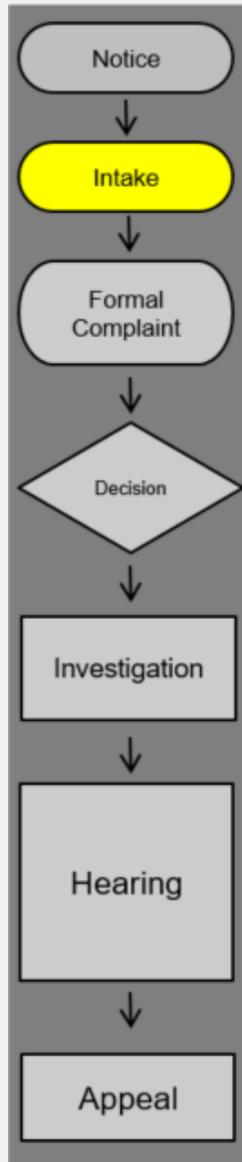
- Escort and other safety planning steps;
- Imposition of a "no contact order," an administrative remedy designed to curtail contact and communications between two or more individuals;
- Voluntary leave of absence;
- Referral to resources to assist in obtaining a protective order;
- Referral to resources to assist with any financial aid, visa, or immigration concerns; or
- Any other Supportive Measure that does not unreasonably interfere with either party's access to education or employment opportunities can be used to achieve the goals of this policy.



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.

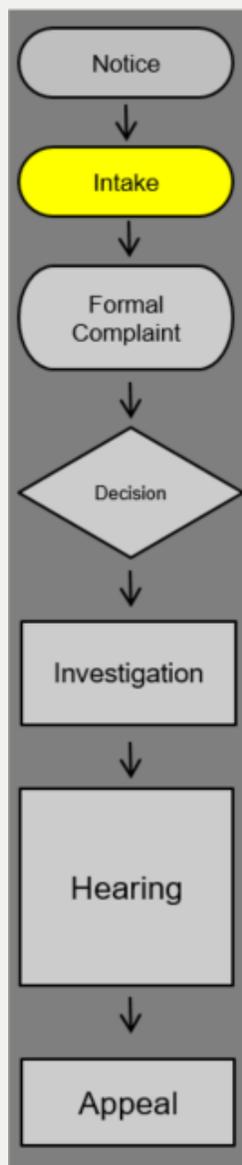
Emergency Removal for Students



- 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)

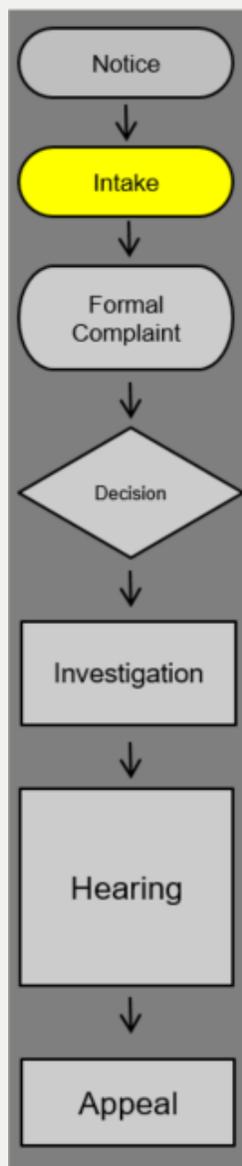
Emergency Removal



- 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.

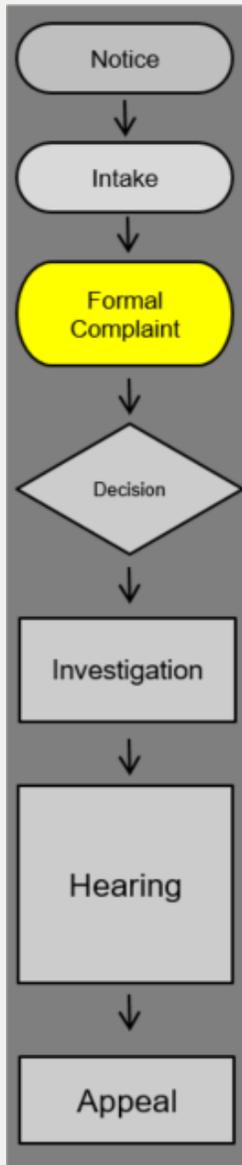
Title IX Regulations issued May 6, 2020; Preamble at 1176-1177



Process for Resolving Complaints Against Students

- Dartmouth may remove a Student Respondent on an emergency basis from Dartmouth property or employment, education or research programs, or activities.
- Before imposing an **emergency removal**, Dartmouth will undertake an **individualized analysis of safety and risk** for the campus community to determine whether the Respondent's presence in the program or activity poses an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal.
- Student Respondent may **challenge** any emergency removal to a neutral, impartial administrator or external professional within 72 hours.

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)



Process for Resolving Reports Against Faculty

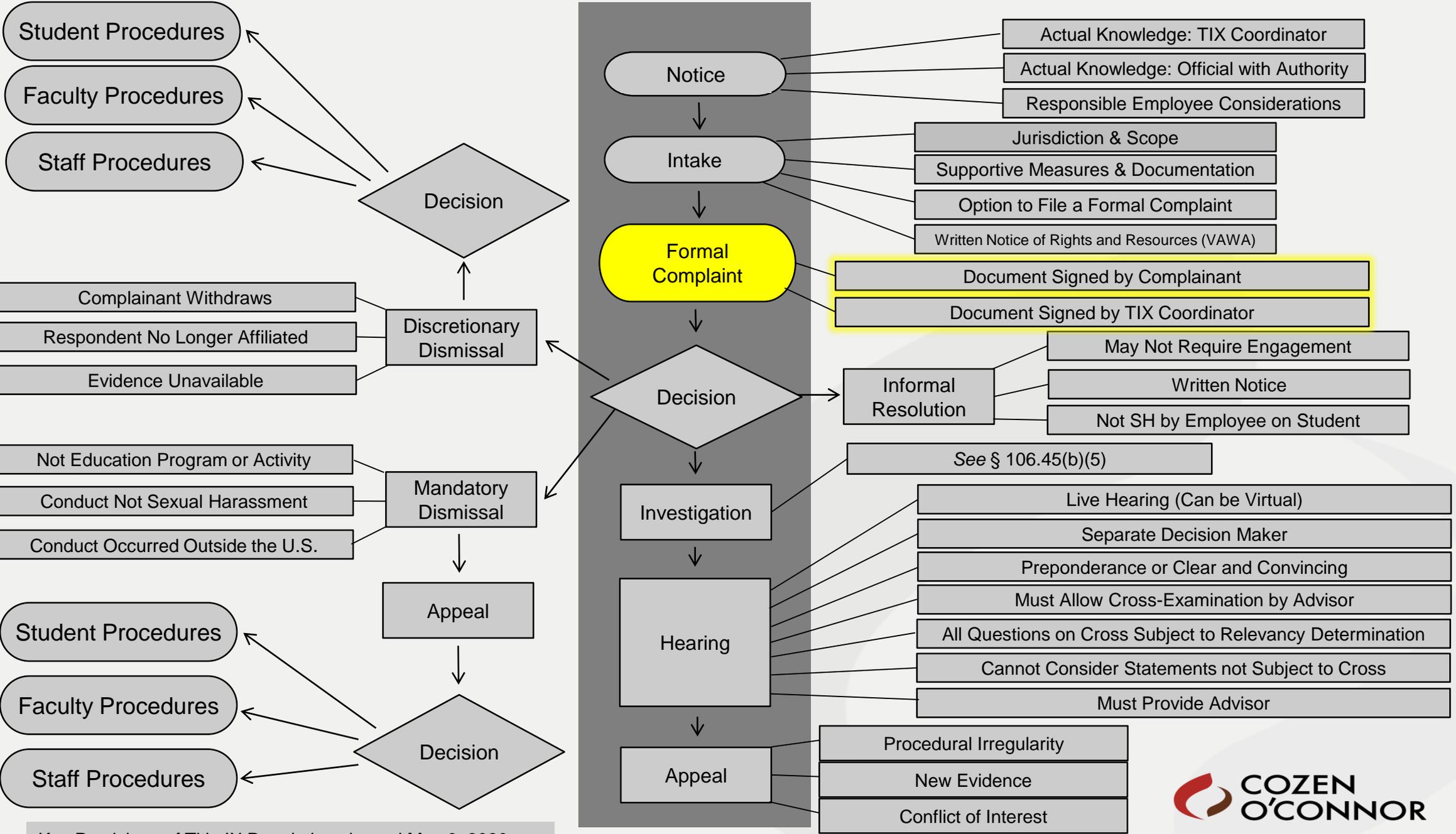
- Dartmouth may remove a Faculty Respondent from campus property, place the Faculty Respondent on paid or unpaid **administrative leave**, or assign a material change in work responsibilities.
- Before taking any of these actions, Dartmouth shall undertake an individualized analysis of physical safety and risk for the campus community and risk to the integrity of any investigation of a report, and shall provide the Respondent with written notice of the proposed action and an opportunity to **challenge** the proposed action.
- The Title IX Coordinator and the Dean will consult to evaluate whether the proposed action is reasonable and appropriate, and **the Dean will decide whether to impose the proposed action.**



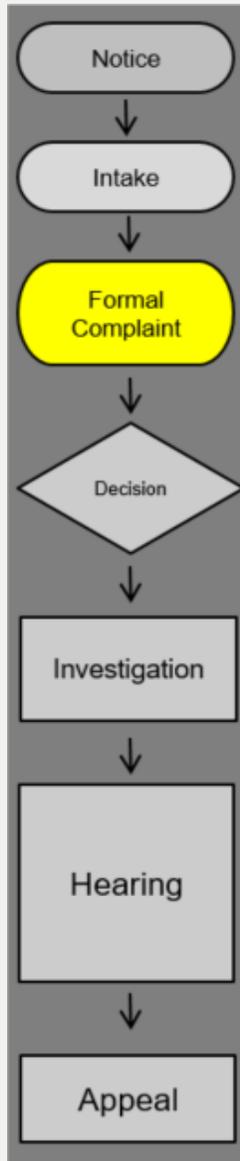
Process for Resolving Reports Against Staff

Dartmouth may place a Staff Member Respondent on paid or unpaid **administrative leave**, remove a Staff Member Respondent from campus property, or assign a material change in work responsibilities at any point during a formal resolution process.

FORMAL COMPLAINTS



Formal Complaint

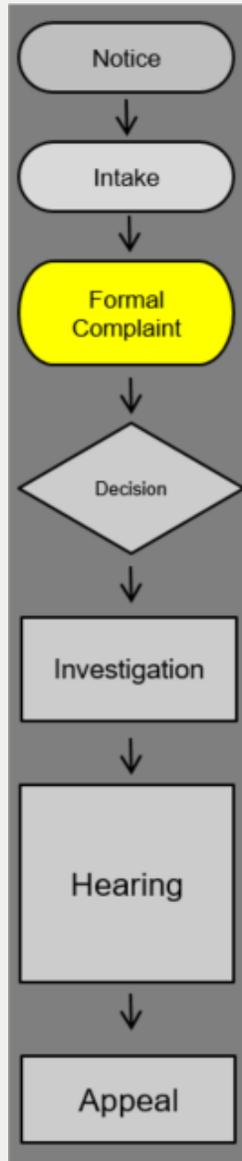


Definition: Document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the recipient investigate the allegation of sexual harassment.

Standing to File: 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: Standing to File a Formal Complaint



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 standing 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



Title IX Formal Complaint Form (Part 1 of 3)



DARTMOUTH

Title IX Formal Complaint Form

In order to resolve a complaint of Sexual Harassment by either Informal or Formal Resolution, a Complainant must file and sign a Formal Complaint. A Formal Complaint can be withdrawn at any time.

Supportive Measures are available through the Title IX Office and *do not* require the filing of a Formal Complaint. Please contact the office at titleix@dartmouth.edu or 603-646-0922 for more information.

Complainant Information

[Enable additional features by logging in.](#)

Your full name:

Your phone number:

Your email address:

Your Formal Complaint (Required):



Title IX Formal Complaint Form (Part 2 of 3)

Urgency of this report *(Required)*:

Date of incident *(Required)*: 

Time of incident:

Location of incident *(Required)*:

Specific location:

Respondent(s) Name

Name or Organization

[Add another party](#)



Title IX Formal Complaint Form (Part 3 of 3)

Formal Complaint

Please tell us your complaint. *(Required)*

What is the best way for us to reach you regarding this complaint and the resolution processes? *(Required)*

Please sign this document by entering your name below. *(Required)*

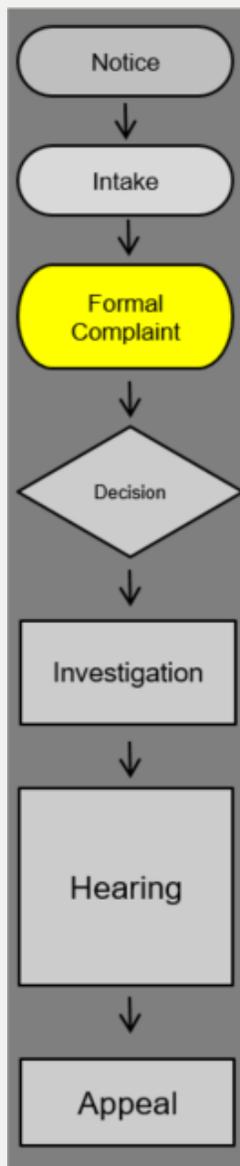
Supporting Documentation

Photos, video, email, and other supporting documents may be attached below. 5GB maximum total size.

Attachments require time to upload, so please be patient after submitting this form.

Email me a copy of this report

Formal Complaint: Response Required



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)

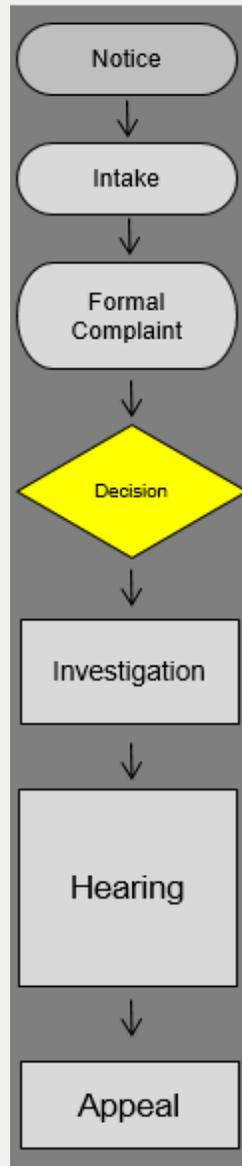
Formal Complaint: Mandatory Dismissal

The recipient must dismiss the Formal Complaint if:

- The conduct would not constitute sexual harassment even if proved,
- The conduct did not occur in the recipient's education program or activity, or
- The 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

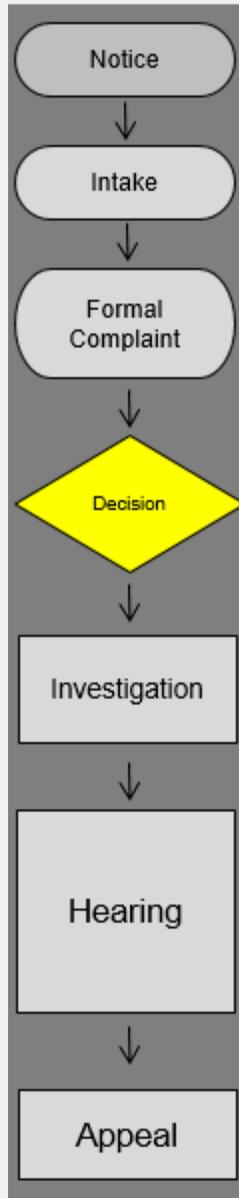
Title IX Regulations issued May 6, 2020; § 106.45(b)(3)



Formal Complaint: Discretionary Dismissal

The recipient 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.

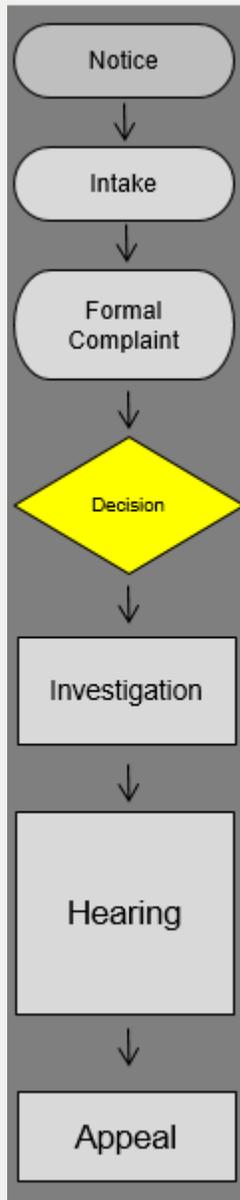


Title IX Regulations issued May 6, 2020; § 106.45(b)(3)

Dismissal of Formal Complaint: Appeal

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)



Mandatory Dismissal of the Formal Complaint

The Title IX Coordinator **must dismiss** some or all of the allegations in the Formal Complaint if:

- 1) the conduct alleged, even if substantiated, would not constitute sexual harassment as defined in the Title IX regulations;
- 2) the conduct did not occur within Dartmouth's education program or activity; or,
- 3) the conduct did not occur against a person in the United States.



Discretionary Dismissal of the Formal Complaint

The Title IX Coordinator **may dismiss** the Formal Complaint or any allegations therein if:

- 1) the Complainant notifies the Title IX Coordinator in writing that they would like to withdraw the Formal Complaint or any allegation therein;
- 2) the Respondent is no longer enrolled or employed by Dartmouth; or
- 3) specific circumstances prevent Dartmouth from gathering sufficient evidence to reach a determination on the merits.



Dismissal of Formal Complaint: Timing

The Title IX Coordinator has the discretion to dismiss some or all of the allegations in a Formal Complaint at any time if, throughout the initial assessment, investigation, or hearing of a Formal Complaint, it becomes apparent that the conduct:

- (a) even if substantiated, would not constitute sexual harassment as defined by the Title IX regulations,
- (b) did not occur in a Dartmouth Education Program or Activity, or
- (c) did not occur against a person in the United States.

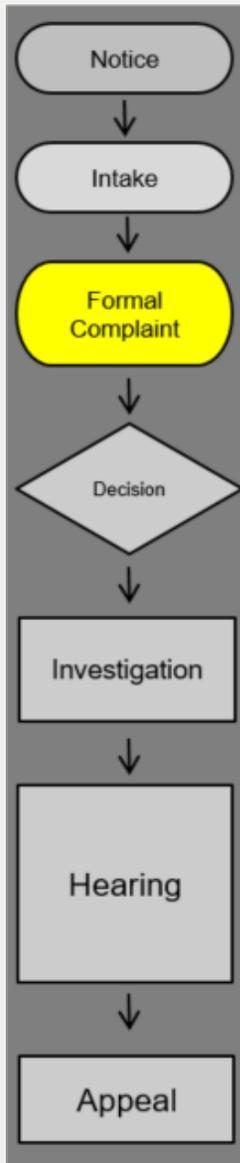


Dismissal of Formal Complaint: Discretion to Proceed and Appeal

- If the Title IX Coordinator dismisses the Formal Complaint with respect to Title IX sexual harassment, **the Title IX Coordinator may determine that sufficient cause exists to move forward with the resolution of the remaining allegations if the conduct reported in those allegations, if true, would constitute Prohibited Conduct outside the Title IX regulations (Other Prohibited Conduct Hearing Process).**
- If some or all of the allegations in the Formal Complaint have been dismissed, the parties will receive written information about how to **appeal** the dismissal of the Formal Complaint.

CONSOLIDATION OF FORMAL COMPLAINTS

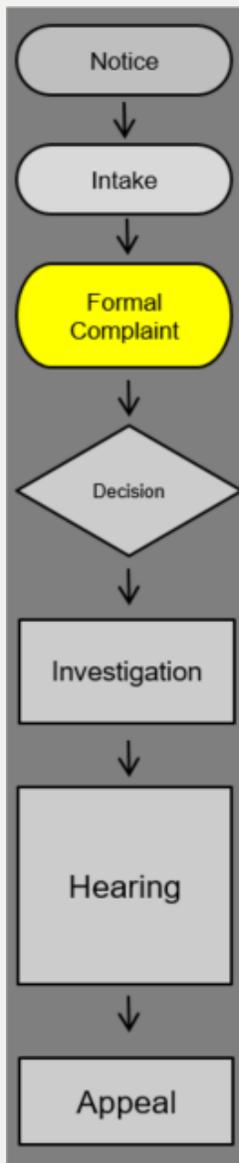
Consolidation of Formal Complaints



- 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

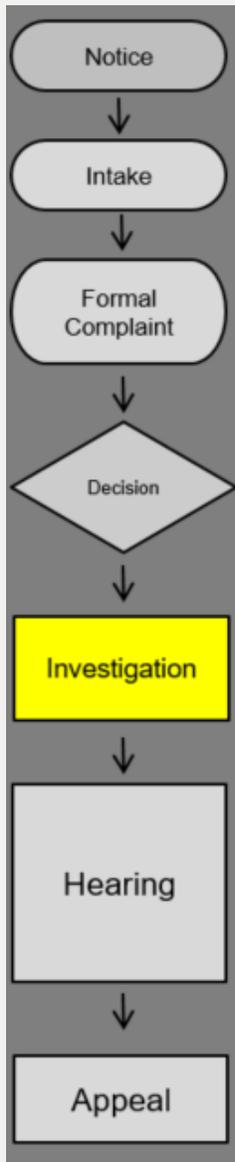
Consolidation of Formal Complaints



- 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

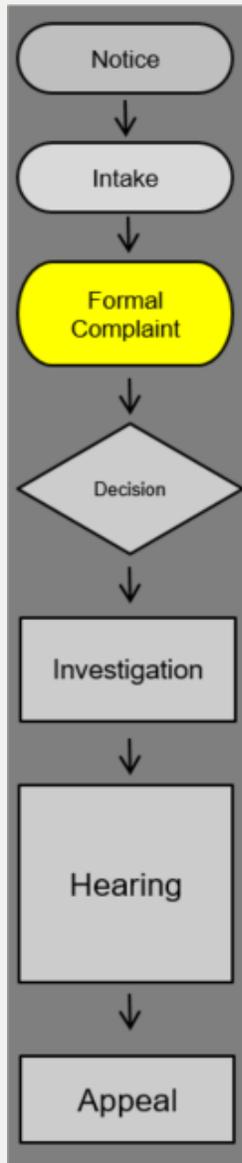
Consolidation of Formal Complaints



- 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

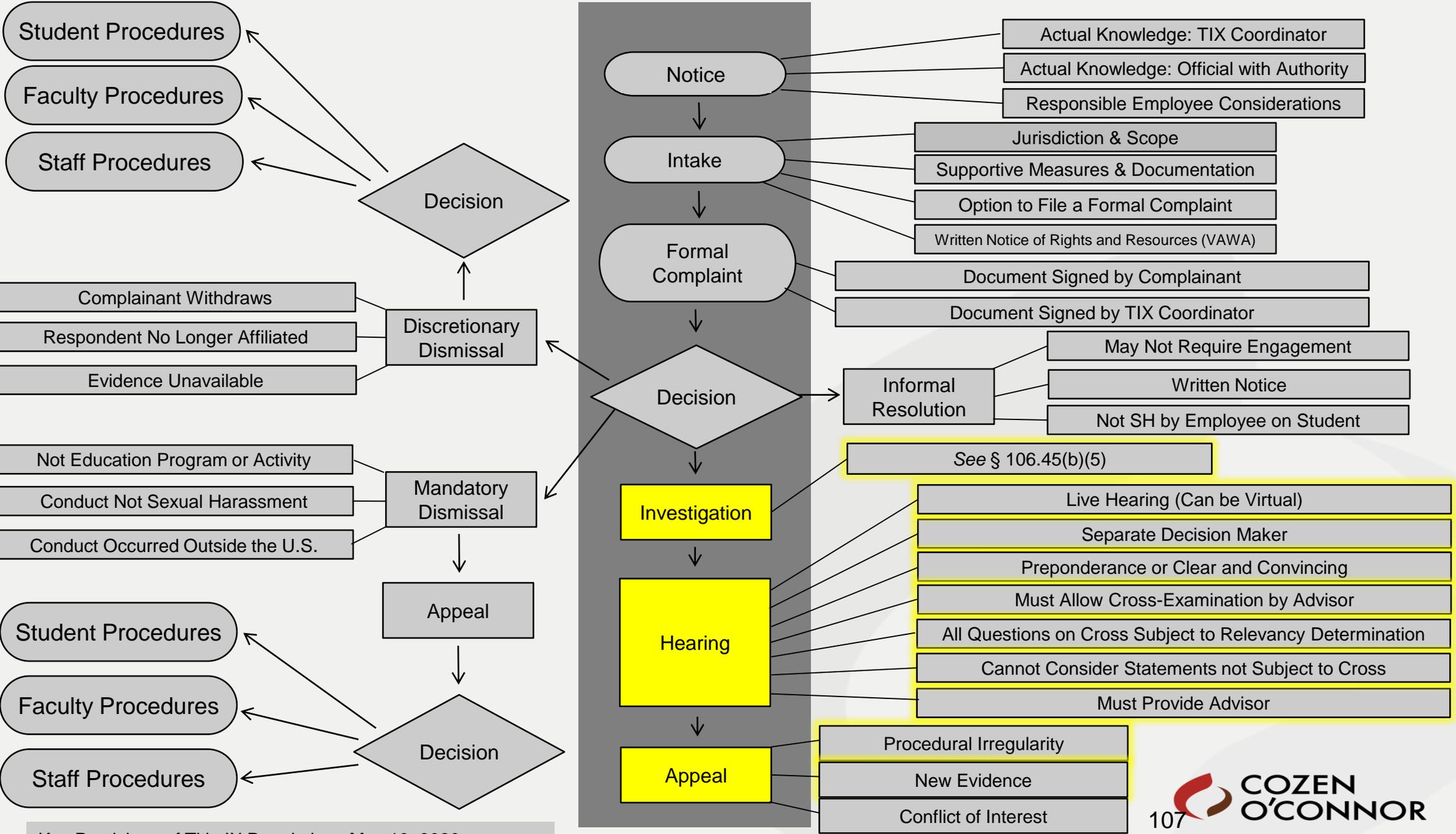


Included in the Processes for Resolving Complaints Against Students, Faculty and Staff: **Consolidation of Formal Complaints**

Dartmouth may consolidate Formal Complaints:

- 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 Prohibited Conduct arise out of the same facts or circumstances.

BASIC REQUIREMENTS OF GRIEVANCE PROCESS



Options Under Dartmouth's Sexual and Gender-Based Misconduct Policy

Supportive Measures Only

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

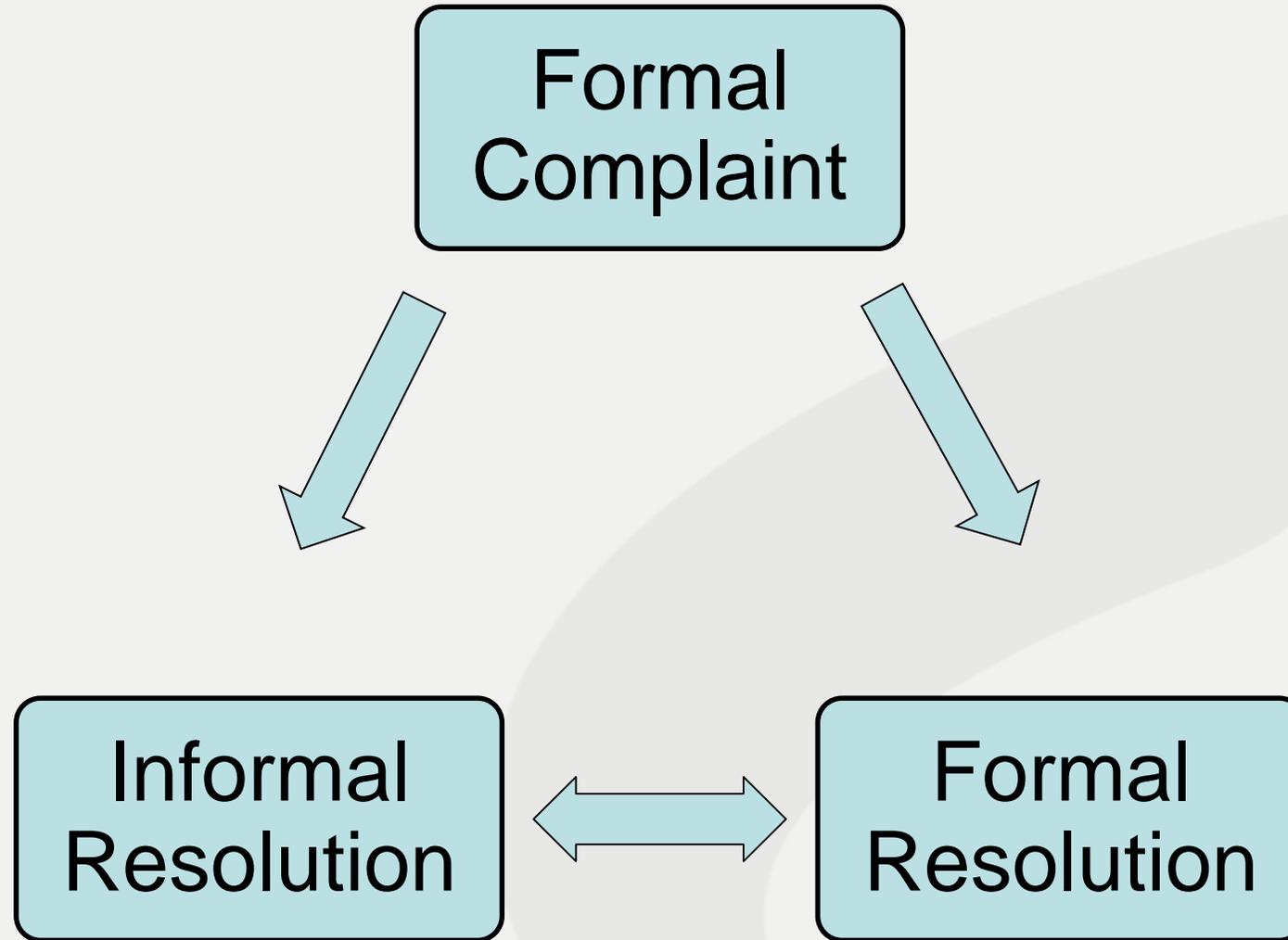
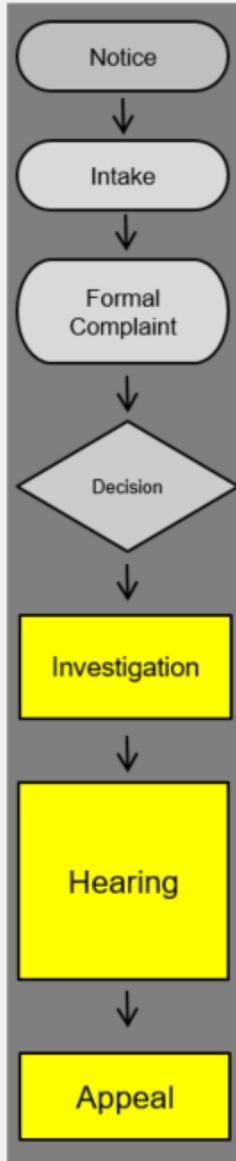
Informal Resolution

- Initiated with the filing of a **Formal Complaint**
- Must give **written notice** to the parties as described in § 106.45(b)(9)
- Either party can request, but both parties must give **voluntary written consent**
- Facilitated by a Title IX Coordinator
- Not available to address allegations that an employee sexually harassed a student

Formal Resolution

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

Resolution Process



Title IX

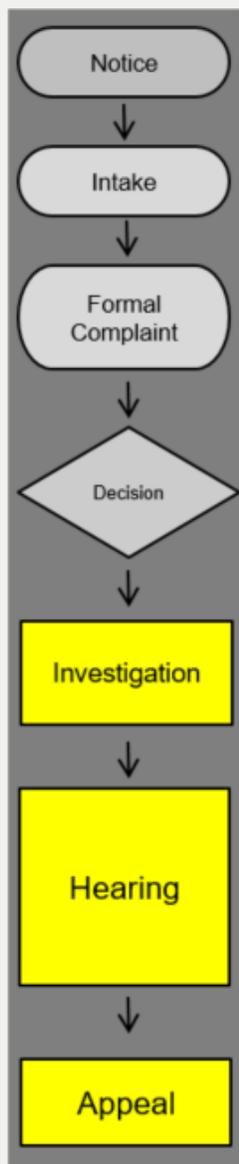
Response to Sexual Harassment

Core Tenets:

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

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

Basic Requirements



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

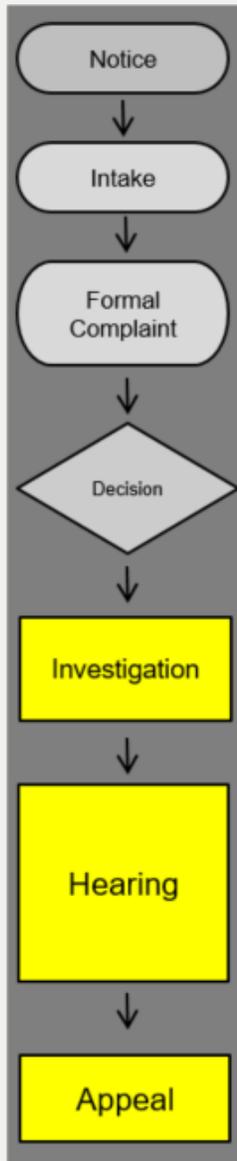
Relevant Regulations Sections:

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

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

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

Basic Requirements



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

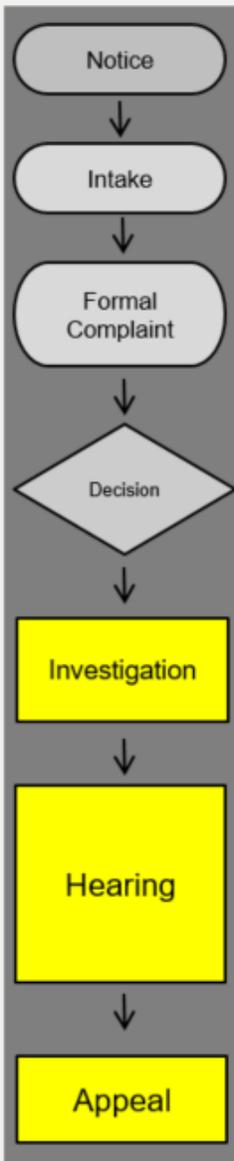
Relevant Regulations Sections:

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

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

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

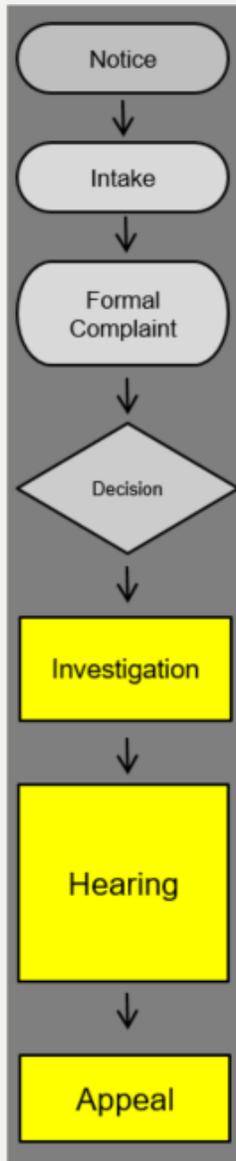
Basic Requirements



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

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

Basic Requirements



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

Relevant Regulations Sections:

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

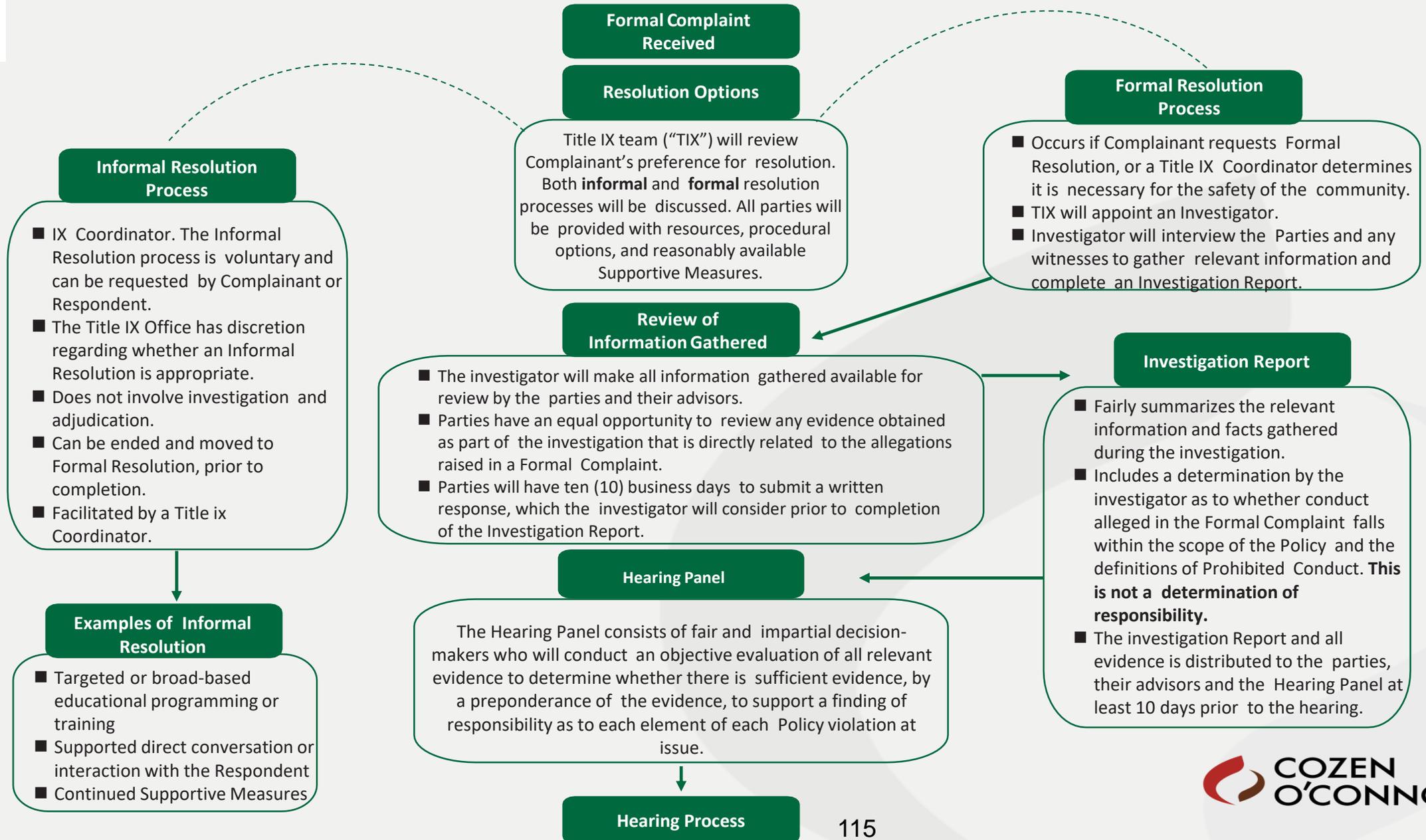
Range of Supportive Measures: § 106.45(b)(1)(ix)

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



PROCESS FOR RESOLVING REPORTS AGAINST STUDENTS

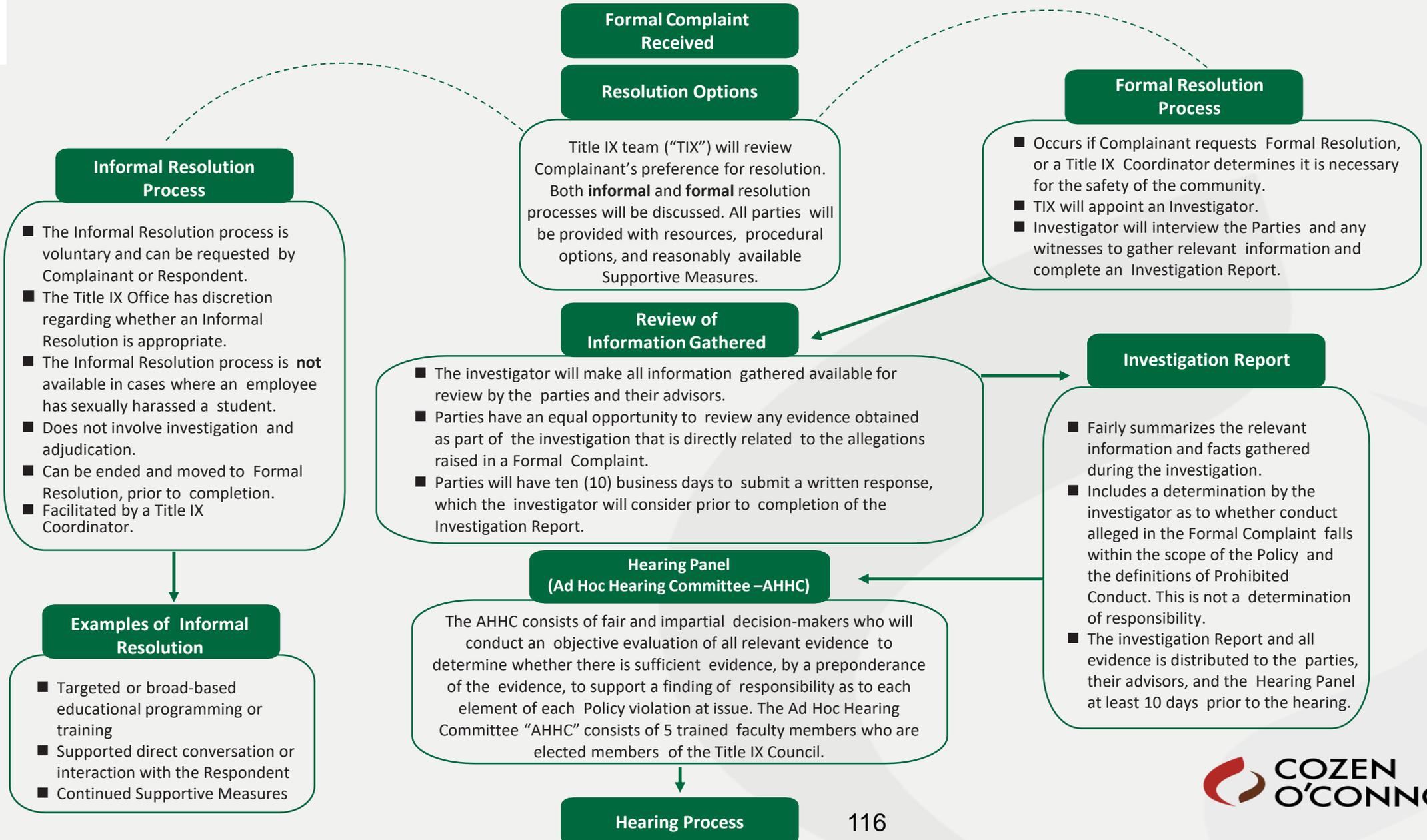
Pursuant to the Dartmouth Sexual and Gender-Based Misconduct Policy*





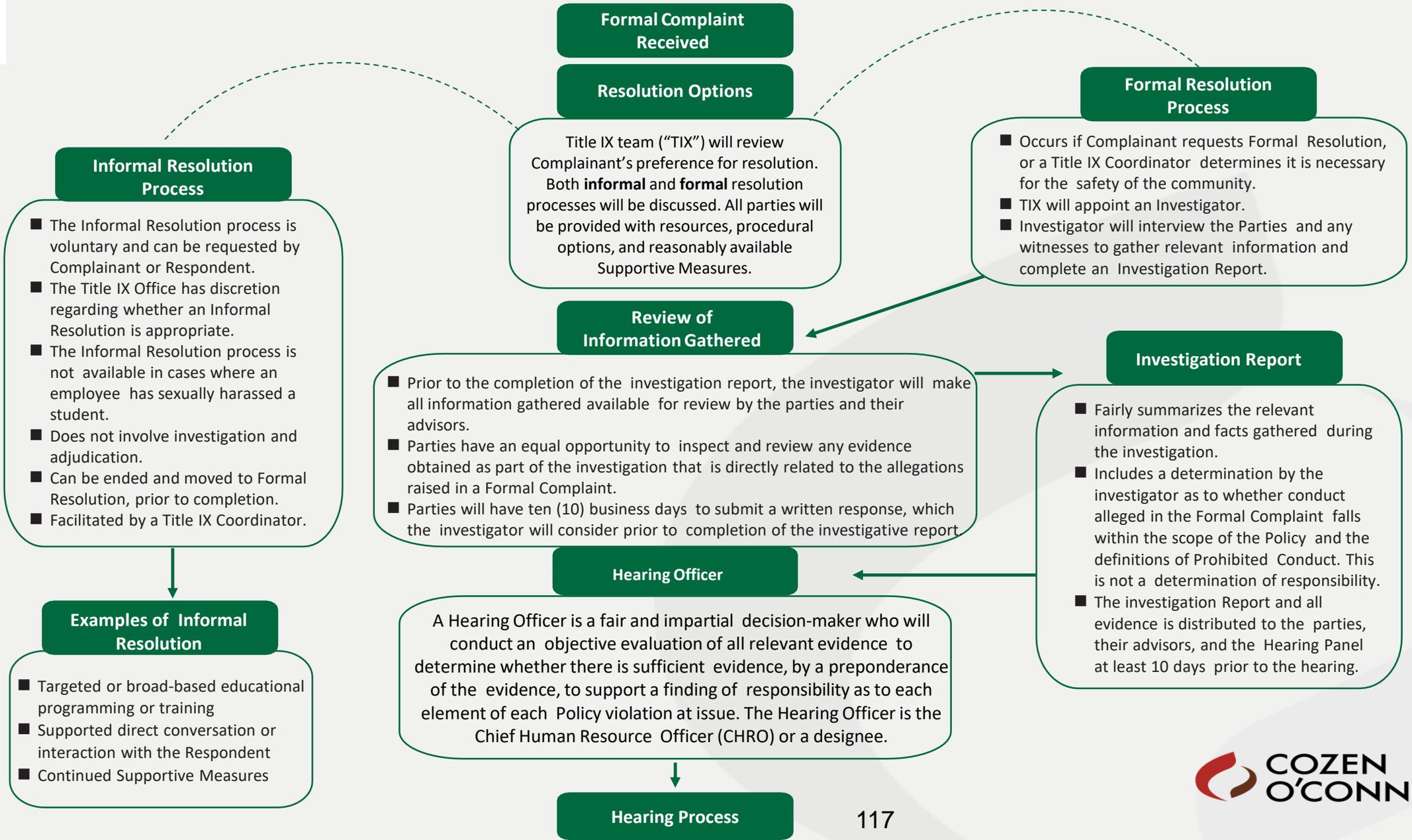
PROCESS FOR RESOLVING REPORTS AGAINST FACULTY

Pursuant to the Dartmouth Sexual and Gender-Based Misconduct Policy*



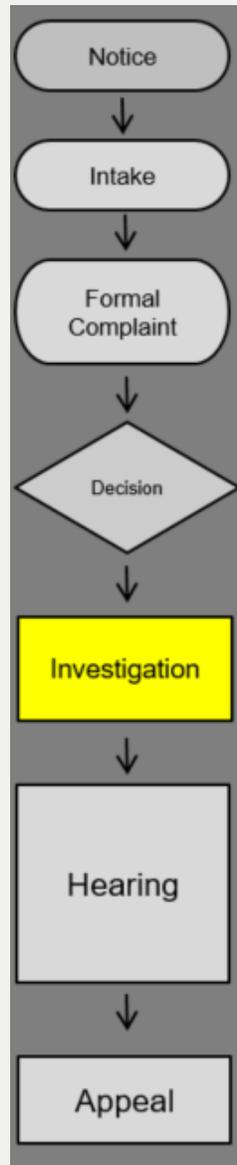
PROCESS FOR RESOLVING REPORTS AGAINST STAFF

Pursuant to the Dartmouth Sexual and Gender-Based Misconduct Policy*



ADVISOR OF CHOICE

Title IX: 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.
- 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.”

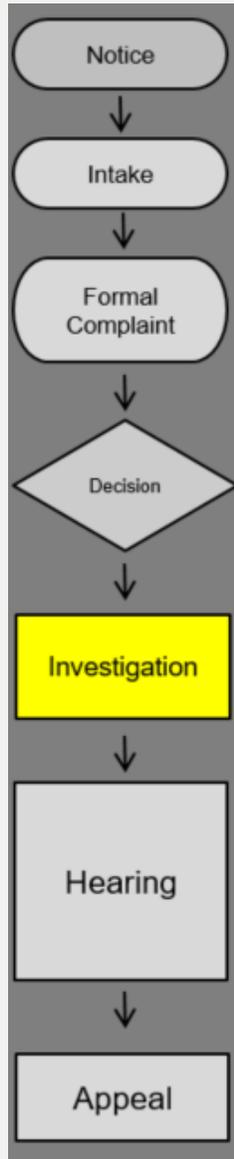
Title IX Regulations May 19, 2020; §106.45(b)(5)(iv);
Preamble 85 F.R. 30328.

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

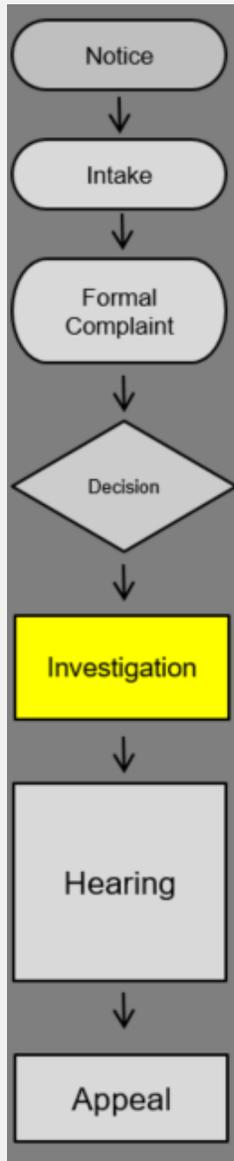
No Limit as to Conflicts of Interest



- 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

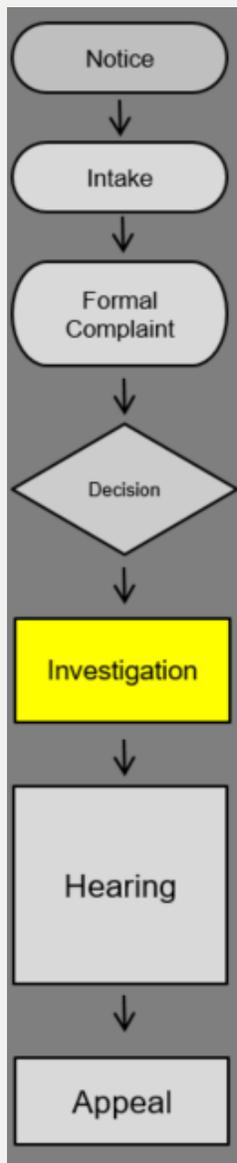
Restrictions on Advisor Participation



- 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

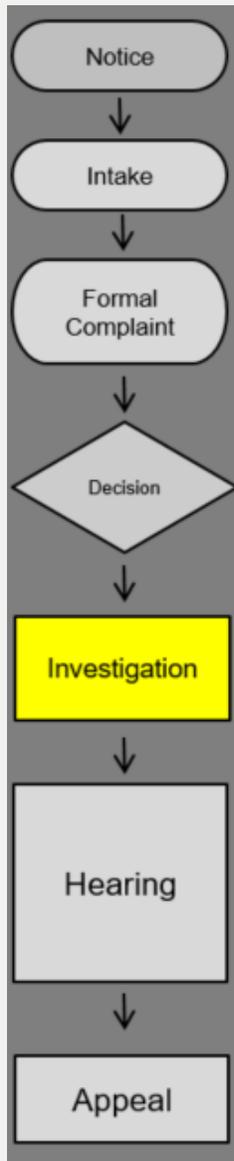
Restrictions on Advisor Participation



- “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

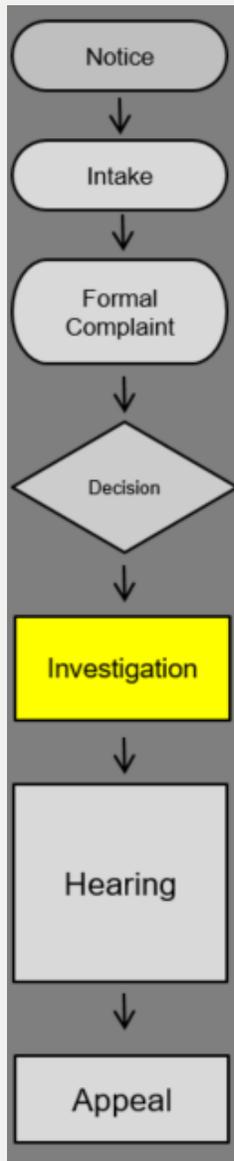
Training of Advisors Not Required



- 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



Included in the Processes for Resolving Complaints Against Students, Faculty and Staff: **Advisors**

- Complainants and Respondents are entitled to be accompanied and assisted by an Advisor of their choosing at both formal and informal meetings, investigation interviews and, if applicable, a subsequent panel hearing.
- There is no requirement that the Advisor be an individual from the Dartmouth community. Generally, Advisors may not participate in the process or speak on behalf of the Complainant or Respondent, although Advisors are permitted to conduct cross-examination of the parties and witnesses during a panel hearing under the Title IX Hearing Process.
- In addition, Advisors may ask to suspend any meetings, interviews, or hearings briefly to provide consultation; Dartmouth retains the discretion to deny such requests if they are excessive, burdensome, or otherwise unreasonable.

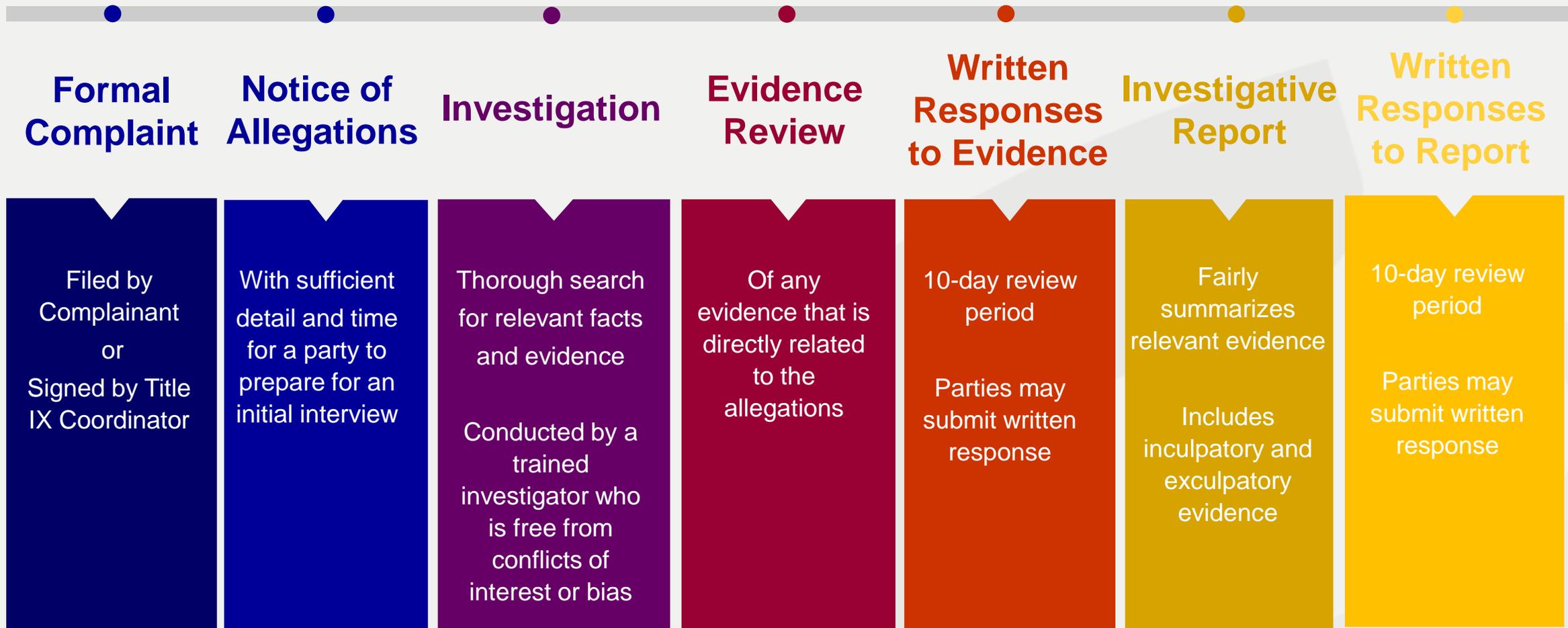


Included in the Processes for Resolving Complaints Against Students, Faculty and Staff: **Advisors** (cont'd)

- Advisors may not also be fact witnesses in the investigation.
- Complainants and Respondents may choose to have an attorney serve as their Advisor, but adjustments to the process, including scheduling of interviews or hearings, will not be made for any Advisors, including attorneys, if they unduly delay the process.
- If a party does not have an Advisor and the matter is proceeding to a panel hearing under the Title IX Hearing Process, Dartmouth will provide an Advisor, without fee or charge, to the party for the sole purpose of conducting questioning at the hearing on behalf of that party.

INVESTIGATION

Overview of Investigation Requirements





Included in the Processes for Resolving Complaints Against Students, Faculty and Staff: **Expectations for the Parties**

During the investigation and resolution process, both the Complainant and Respondent have equal rights, including:

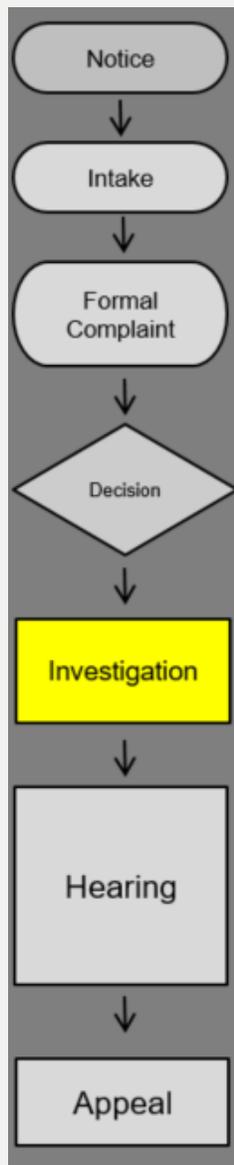
- the opportunity to receive a written notice of investigation;
- to participate in the investigation;
- to review and present information and evidence;
- to be accompanied by an advisor of their choice to any meeting;
- to timely and equal access to all information gathered that is directly related to the allegations in the Formal Complaint, as well as the information contained in the investigation report that will be used in disciplinary proceedings;



Included in the Processes for Resolving Complaints Against Students, Faculty and Staff: **Expectations for the Parties (cont'd)**

- to timely written notice of meetings at which their presence will be requested or required, including the purpose of the meeting and participants, with sufficient time to prepare;
- to notice of the hearing;
- to question the other party during the hearing, either through the party's Advisor or through the Hearing Coordinator/Chair;
- to simultaneous written notice of the outcome, sanction, and rationale; and
- to appeal the outcome.

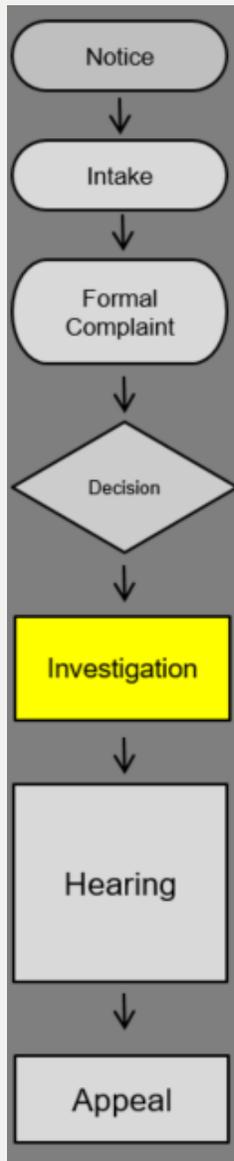
Written Notice of Allegations



- 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:

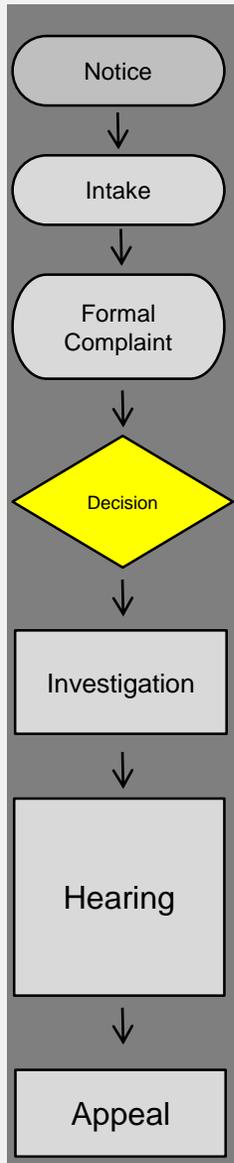
- the respondent is presumed not responsible for the alleged conduct
- a determination regarding responsibility is made at the conclusion of the grievance process

– 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

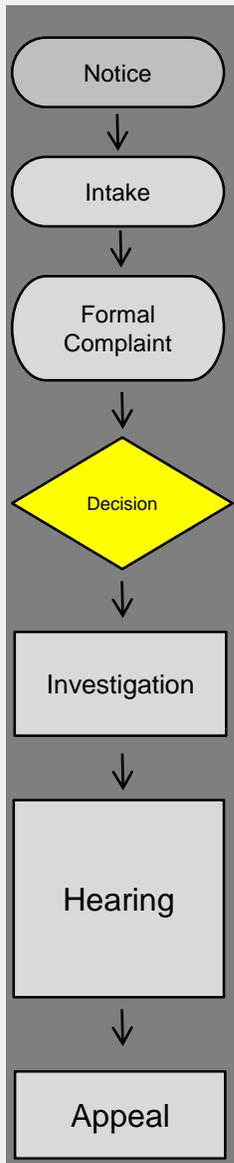
Written Notice of Allegations



- 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

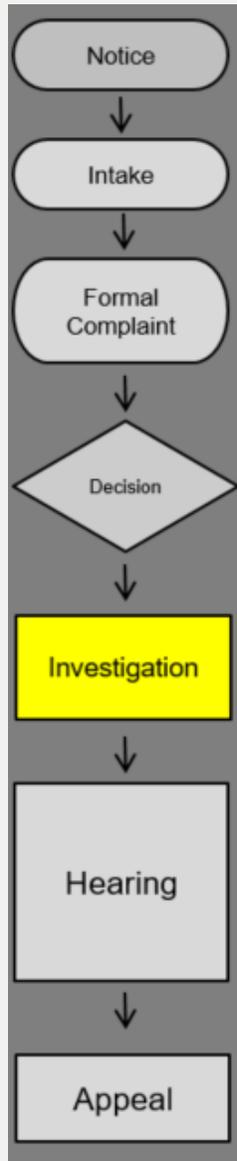
Supplemental Notice



- 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

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

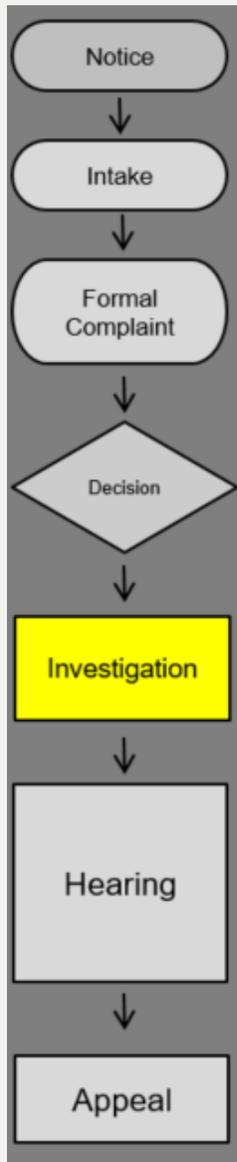
Title IX Regulations May 19 2020; §106.45(b)(5)(v) 85 F.R. 30424

Evidentiary Considerations

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

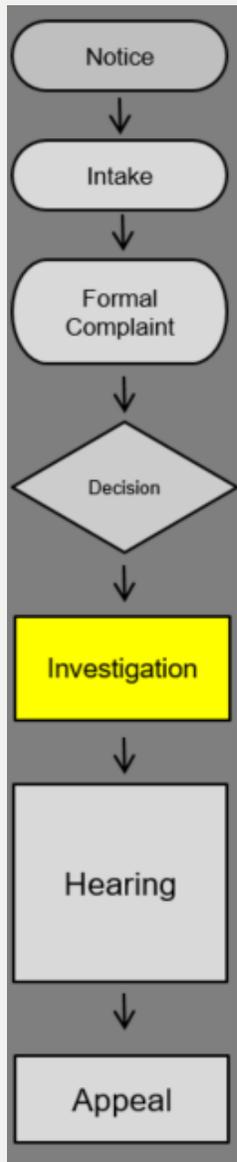
Relevance

- 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



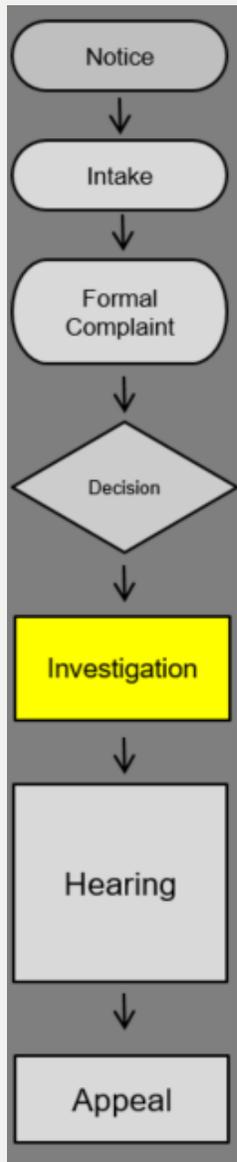
“While the proposed rules do not speak to

- 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

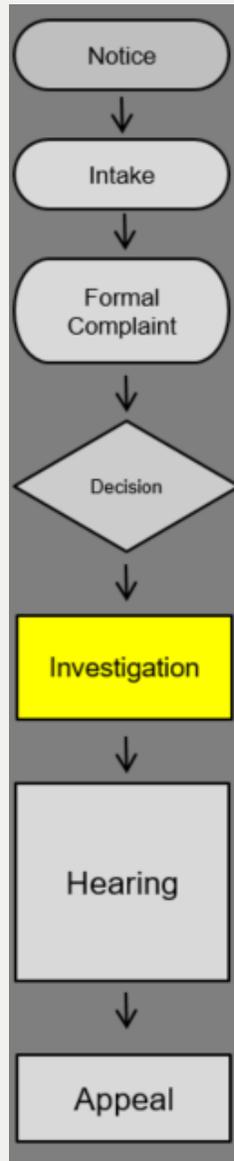
Relevance



- 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

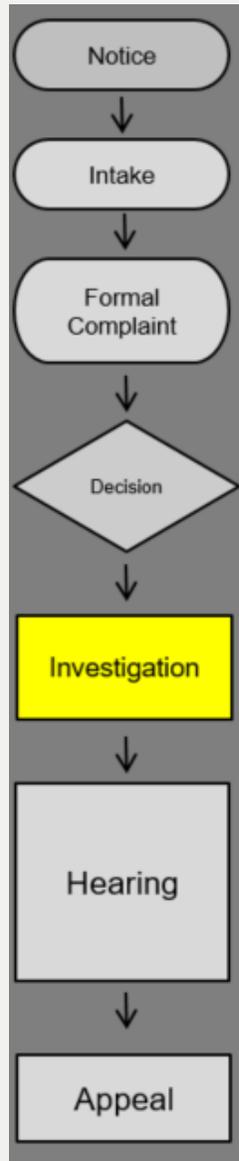
Flexibility to Adopt Rules



- “Within these evidentiary parameters recipients retain the flexibility to adopt rules that govern how the recipient’s investigator and decision-maker evaluate evidence and conduct the grievance process (so long as such rules apply equally to both parties).
- **Relevance is the standard that these final regulations require**, and any evidentiary rules that a recipient chooses must respect this standard of relevance.

Title IX Regulations May 19, 2020; Preamble at 30248

Flexibility to Adopt Rules – Except



- For example, a recipient may not adopt a rule **excluding relevant evidence** because such relevant evidence may be **unduly prejudicial, concern prior bad acts, or constitute character evidence.**
- A recipient's additional evidentiary rules may not, for **example, exclude *relevant* cross-examination questions even if the recipient believes the questions assume facts not in evidence or are misleading.**

Title IX Regulations May 19, 2020; Preamble at 30248

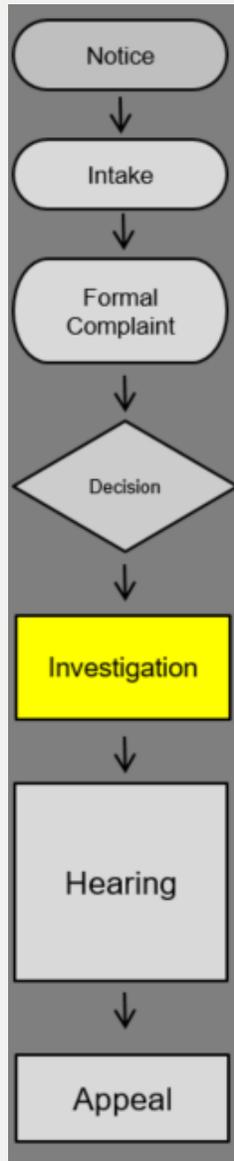
Title IX Regulations May 19, 2020; Preamble at 30361



Included in the Processes for Resolving Complaints Against Students, Faculty and Staff: **Relevance and Evidentiary Considerations**

- Dartmouth will not restrict the ability of either party to gather and present relevant evidence.
- Evidence is **relevant** if it makes a material fact more or less probable than it would be without the evidence.
- In general, the investigator has the discretion to determine the relevance and probative value of information proffered or received.

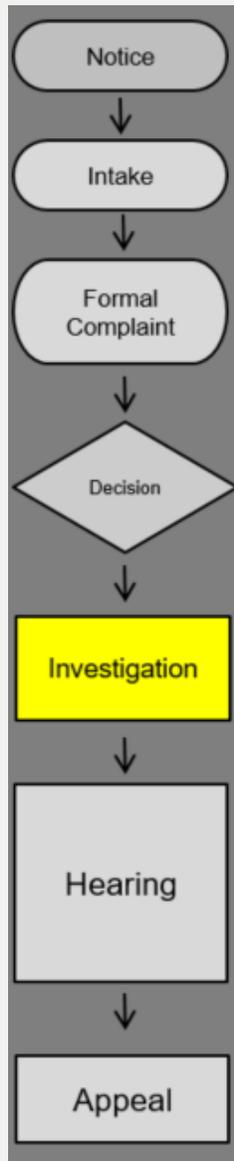
Privileged Information



- 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

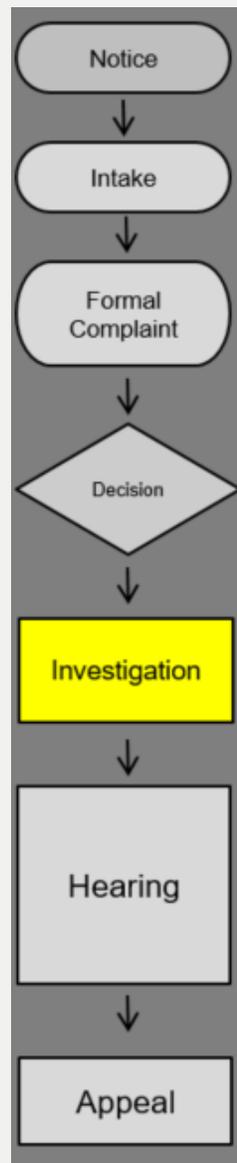
Prior Sexual History



- 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

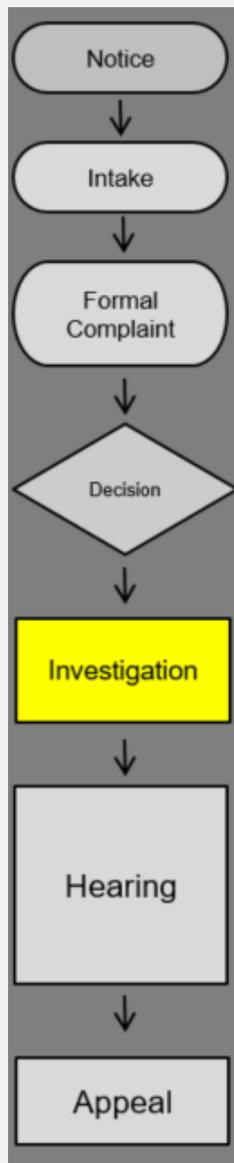
Prior Sexual History



- 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



Included in the Processes for Resolving Complaints Against Students, Faculty and Staff: **Relevance and Evidentiary Considerations**

Prior Sexual History of the Parties:

- An individual's character or reputation with respect to other sexual activity is not relevant and will not be considered as evidence. Similarly, an individual's prior or subsequent sexual activity is typically not relevant and will only be considered as evidence under limited circumstances.
- Prior sexual history may be relevant to explain the presence of a physical injury or to help resolve other questions raised in the investigation.
- It may also be relevant to show that someone other than the Respondent committed the conduct alleged by the Complainant.
- The investigator will determine the relevance of this information and both parties will be informed in writing if evidence of prior sexual history is deemed relevant.



Included in the Processes for Resolving Complaints Against Students, Faculty and Staff: **Relevance and Evidentiary Considerations**

Prior Sexual History Between the Parties:

- Where the parties have a prior sexual relationship, and the existence of consent is at issue, the sexual history between the parties *may* be relevant to help understand the manner and nature of communications between the parties and the context of the relationship, which may have bearing on whether consent was sought and given during the incident in question.
- Even in the context of a relationship, however, consent to one sexual act does not, by itself, constitute consent to another sexual act, and consent on one occasion does not, by itself, constitute consent on a subsequent occasion.
- The investigator will determine the relevance of this information and both parties will be informed if evidence of prior sexual history is deemed relevant.

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

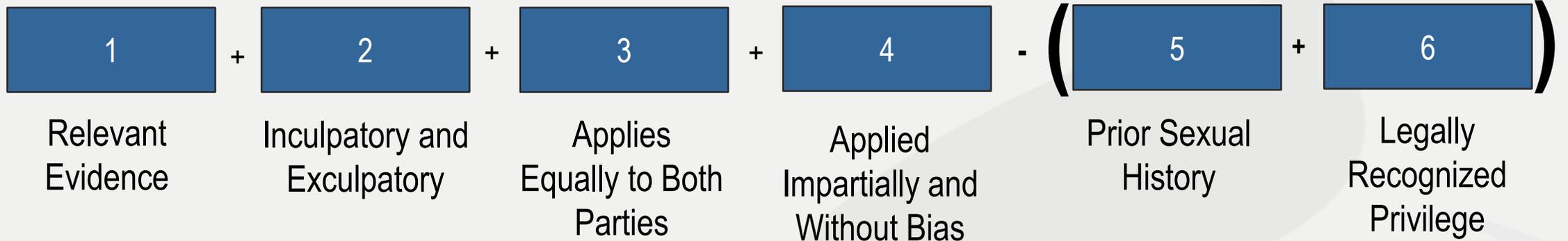


Included in the Processes for Resolving Complaints Against Students, Faculty and Staff: **Relevance and Evidentiary Considerations**

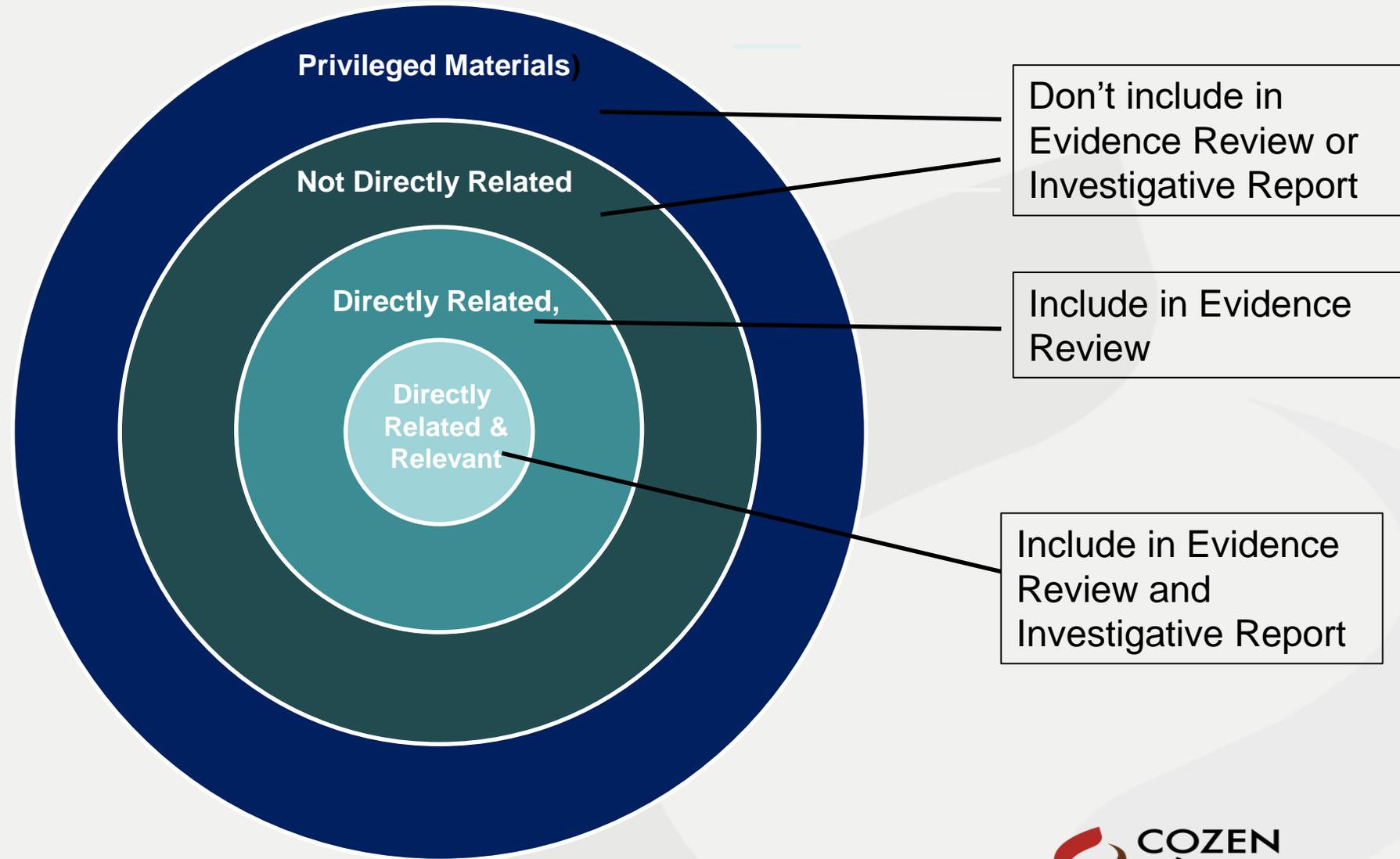
Prior or Subsequent Conduct of the Respondent:

- Prior or subsequent conduct of the Respondent may be considered in determining pattern, knowledge, intent, motive, or absence of mistake.
- For example, evidence of a pattern of prohibited conduct by the Respondent, either before or after the incident in question, **regardless of whether there has been a prior finding of a policy violation**, may be deemed relevant to the determination of responsibility for the prohibited conduct under investigation.
- The determination of relevance of pattern evidence will be based on an assessment of **whether the previous or subsequent conduct was substantially similar to the conduct under investigation or indicates a pattern of similar prohibited conduct so distinctive and so closely resembling either party's account of the encounter as to tend to prove a material fact may be considered.**
- The investigator will determine the relevance of this information and both parties will be informed if evidence of prior or subsequent conduct is deemed relevant.

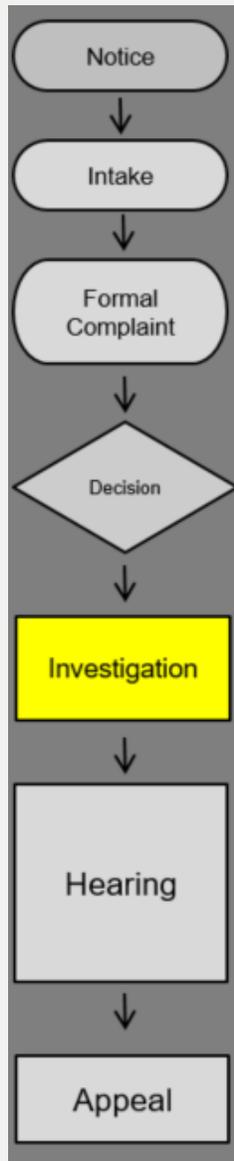
Evidentiary Rules Must Consider



Evidentiary Levels for Inclusion



Investigative Report



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

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



Dartmouth Investigation Process



SERVING WITHOUT CONFLICT OF INTEREST OR BIAS

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

Identifying Our Own Biases

- What does sexual assault look like?
- Over-identifying with complainant or respondent
 - I would have...
 - If it was me...
 - That could have been me...
 - What were they thinking when...
 - What did they think was going to happen?
- Culture/diversity/world view

Diversity and Culture

- Sensitivity to language and bias in a variety of communities
 - LGBTQ+
 - Cultural differences
 - Race
 - Insular groups
 - 504/disability
 - Neurodiversity
- Reporting barriers
- Communication differences/impediments

INVESTIGATIVE PROTOCOLS

Role of the Investigator

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

Developing an Investigative Plan

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

Gathering Background Documents

- Available information about the report, including:
 - Notes from initial report
 - Notice of investigation
 - Intake notes (or relevant portions)
 - Law enforcement records
- Any information that has an “expiration date,” such as:
 - Security camera footage
 - Parties’ social media?
 - Snap stories or Instagram stories

Developing an Investigative Plan

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

Developing an Investigative Plan

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

Building a Timeline

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

Maintaining a Case Log

- Maintain a chronological log of the investigation including dates/times of interviews, meetings, requests for evidence, receipt of evidence, and all other key events
- Ensure that the investigation is completed within the institution's time frame

INTERVIEW PROTOCOLS

Initial Communications

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

Initial Communications

- Identify and address barriers to participation by:
 - Communicating care through tone and word choice
 - Using inclusive language
 - Addressing disability accommodations and interpreter services
 - Encouraging the use of available supports/resources
- Non-responsiveness
 - Make at least 3 attempts at outreach using at least 2 different modes before concluding that someone is intentionally not responding
 - Think about other avenues/people for outreach

Initial Communications

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

Before You Begin

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

The Interview Preamble

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

Forensic Interviewing Overview

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

Narrative and Follow Up

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

Narrative and Follow Up

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

Corroboration

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

Questioning Techniques

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

Questioning Techniques

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

Questioning Techniques

- Focus on sensory details
- Pay attention to emotional cues and responses
- Look for any evidence of motive/bias/interest, even where not immediately apparent
- Listen for “ring of truth” answers
- Rely upon maps, photos, charts where available
- Create running timeline
- Pay close attention to the circumstances of the disclosure

The Continuum Approach

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

Some Useful Phrases

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

Informed and Effective Communication

- Using open and conversational communication style
 - Not a “gotcha”
- Listen – don’t assume!
- Embrace the uncomfortable, the pause, and the silence
 - Take a break
 - Offer reassurance
 - Reschedule
- Support the witness by:
 - Demonstrating desire to understand
 - Using reflective listening
 - Avoiding emphasis on “you”
 - Explaining the purpose of the questions
 - Allowing a support person to be present

Investigative Considerations

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

Delay in Reporting

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

Disclosure

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

Recantation

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

Framing Difficult Questions

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

Closing the Interview

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

Documenting Interviews

- Verbatim quotes
- Importance of documenting questions when seeking clarification
- Pros and cons of recording interviews
- Note changes in demeanor, tone or engagement

Documenting Interviews

- Maintain interview documentation in investigation file
- Remember that students have a right to view their educational record
- Professionalism
- Precision
- Clear and accessible language

Principles to Remember

- Use memory markers
- Think about how to ensure that the witness statement is accurate/complete
- Conduct a follow-up interview for clarification when necessary
- Prepare an amended NOI when necessary
- Send notices of extensions for good cause
- Document all missing information and attempts to get
- Synthesize and assess for gaps before closure

ALCOHOL, DRUGS AND INCAPACITATION

The Role of Alcohol

- Central nervous system depressant
- Impairs cognition and psychomotor skills
- Progressively impairs all body functions
- Decreases inhibitions
- Impairs perceptions
- May cause blackouts or loss of consciousness
- May cause memory loss
- Effects exacerbated when mixed with other drugs
- Intoxication breeds vulnerability
- A person may be less likely to think someone is trying to sexually assault him/her
- A person intent on harming another may not need to use physical force
- A person may not realize incident has occurred
- A person may delay in reporting for multiple reasons
- No toxicological evidence of BAC/impairment level due to delay in report

Alcohol: Investigative Challenges

- Lack of memory
- Inability to give detail
- Person may have been unconscious or in and out of consciousness
- Delay in reporting because:
 - May not know event occurred
 - May not recognize it as lack of consent
 - Feeling of “contributory negligence”
 - Concerns over conduct policy consequences



Know Your Policy

Incapacitation:

- Where alcohol or other drugs are involved, incapacitation is a state beyond impairment or intoxication. Where alcohol or other drugs are involved, evaluating incapacitation requires an assessment of how the consumption of alcohol and/or drugs affects a person's decision-making ability; awareness of consequences; ability to make informed, rational judgments; capacity to appreciate the nature and quality of the act; or level of consciousness. The assessment is based on objectively and reasonably apparent indications of incapacitation when viewed from the perspective of a sober, reasonable person.

Frame Questions Appropriately

- Be aware that questions about drugs and alcohol are often subject to misinterpretation
- Explain amnesty
- Commit to clarity on why you are asking
- Explain the reasons for your questions
 - Assessing for incapacitation
 - Evaluating the “lens” through which the party or witness observed the events (opportunity to see, hear, understand, and remember)
- Explain that you will ask similar questions of all witnesses
- Invite the witness to ask questions before you go further

Get Detailed Information

- Timeframe of consumption (first drink, last drink, spacing)
- Number of drinks
- For each drink:
 - Type (beer, wine, liquor – with specific brand, if possible)
 - Was it mixed with anything? Who mixed it?
 - How was it served? (Bar or restaurant will lead to more available information)

Get Detailed Information

- List of others present and when they were there
- Other factors that affect the impact of alcohol:
 - Food consumed before, during, and after and whether food intake was normal or abnormal for the person
 - Height and weight
 - Medications
 - Different sleep patterns
 - Illness
 - Low hydration
 - History of blackouts

Get Detailed Information

- Complainant's internal experience of their own intoxication (subjective)
 - Loss of consciousness/lack of memory – get the “bookends” of memory
 - Physical impairments – walking, standing, sitting, grasping, keeping head upright, ability to text, ability to remove one's own clothing, incontinence, vomiting
 - Cognitive impairments – dizzy, foggy, sleepy, giggly, hyperactive, sluggish, nonsensical
 - Verbal impairments – slurring, inability to talk, volume regulation
 - Any other effects

Get Detailed Information

- Others' observations of Complainant (objective)
 - Observations of Complainant's consumption – when, where, what, who else was there?
 - Physical impairments
 - Cognitive impairments
 - Verbal impairments
 - Any other effects

Get Detailed Information

- Other information that can establish timeline, assist in assessing level of impairment, and can provide corroboration of either party's account:
 - History of relationship between the parties
 - Witness's knowledge of Complainant's sober behavior
 - Parties' communications or interactions with each other (compare pre- and post-incident)
 - Parties' descriptions of the incident to others – context, content, demeanor
 - Text/social media messages sent before, during, and after the incident

Considerations

Avoid	Why?	Try this instead
Asking about intoxication on a scale (e.g. "from 1-10")	There is no universal understanding of what the numbers on the scale mean	Asking about the impacts of alcohol on a person physically, cognitively, verbally, and otherwise; Asking for specific observations regarding conduct
Committing to a determining a specific BAC	It is very difficult to pinpoint a person's BAC after the fact. Additionally, BAC is only one data point and does not correlate precisely to a person's subjective experience or objective indicia of intoxication/incapacitation.	Use BAC when it is available in medical records. Otherwise, avoid attempting to pinpoint the BAC and rely instead on the subjective and objective indicia of intoxication/incapacitation.
Failing to obtain or ignoring medical evidence or observations of first responders, when they are available	Such witnesses are (generally) sober, trained observers who are paying close attention to the parties and surroundings. Their observations are critical, but it may necessitate coordination with external law enforcement or medical personnel.	Be attendant to mentions of first responders or medical personnel and try to obtain as much information about them as you can. Witnesses may remember, for example, that the EMT was female and had short brown hair. Work with your local agencies to identify such personnel and ascertain whether they can be made available for an interview.
Failing to fully contextualize witnesses' observations through use of a timeline	Witness statements taken out of context do not help answer the critical question: whether the Respondent knew or should have known that the Complainant was incapacitated.	Create a visual timeline of events that shows the parties' alcohol consumption, witness observations, and the alleged incident. Circle or highlight the timeframe when the parties were in each other's presences.

Creating a Universal Timeline

- Using information gathered in the investigation, create a timeline that captures both parties' actions and show the timeframe when they were in the same place (below in blue)

Complainant	Source(s)		Respondent	Source(s)
Complainant and C "pre-gamed" at A's apartment. Drank 3 shots Jim Beam and ate chips and guacamole. Walked from A's apartment to second "pre-game" at B's apartment. Drank 2 shots of Ciroc Peach and threw up in B's sink.	C interview A interview B interview C's photos w/ date/time	8:00 PM	Respondent arrived at party by himself. Filled one 16-ounce cup with beer and drank it quickly.	R interview
		8:30 PM	Saw friends X, Y, Z. Z gave Respondent keys to his room where Z kept hard liquor. Respondent retrieved a 750 ml bottle of Fireball and drank approximately ¼ of it himself over the course of about an hour and a half. X and Y each had about 2 shot glasses full.	R interview X interview Y interview Z interview
		9:00 PM		
Complainant arrived at party with A, B, C. Complainant's friend D got her a 16-ounce cup of "jungle juice" which she drank slowly over the course of about an hour.	C interview A interview B interview D interview	9:30 PM		
		10:00 PM		
Complainant went upstairs to check out the view from the roof. As she was walking back downstairs, she took the last sip of her "jungle juice" and saw Respondent. Complainant texted her mom, "addfa."	C interview C's texts C's photos w/ date/time	10:30 PM	Respondent texted Z "thanks for the fireball. Let me know where I can meet you to give you your key back." Respondent saw Complainant coming down the stairs.	R interview R's texts
Complainant reported a complete memory loss from about 10:30 until the next morning.	C interview	11:00 PM	Complainant and Respondent went upstairs into the bathroom. Respondent's friend W walked in as they were kissing and undressing.	R interview W interview
Complainant's friend A saw her leaving the bathroom with her shirt on backwards. A escorted Complainant home.	A interview	11:30 PM	Respondent left the bathroom and texted Z "I just got laid!"	R interview Z interview R's texts

EVALUATING CREDIBILITY

Evaluating Credibility



Credibility Factors

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

Demeanor

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

Demeanor

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

Interest

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

Interest

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

Detail

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

Corroboration

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

Corroboration

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

Evaluating Changes in Account

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

Disclosure

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

Synthesis

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

Integrated Analysis

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

Questions to Consider: Credibility Generally

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

Questions to Consider: Detail

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

Questions to Consider: Interest

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

Questions to Consider: Demeanor

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

Questions to Consider: Corroboration

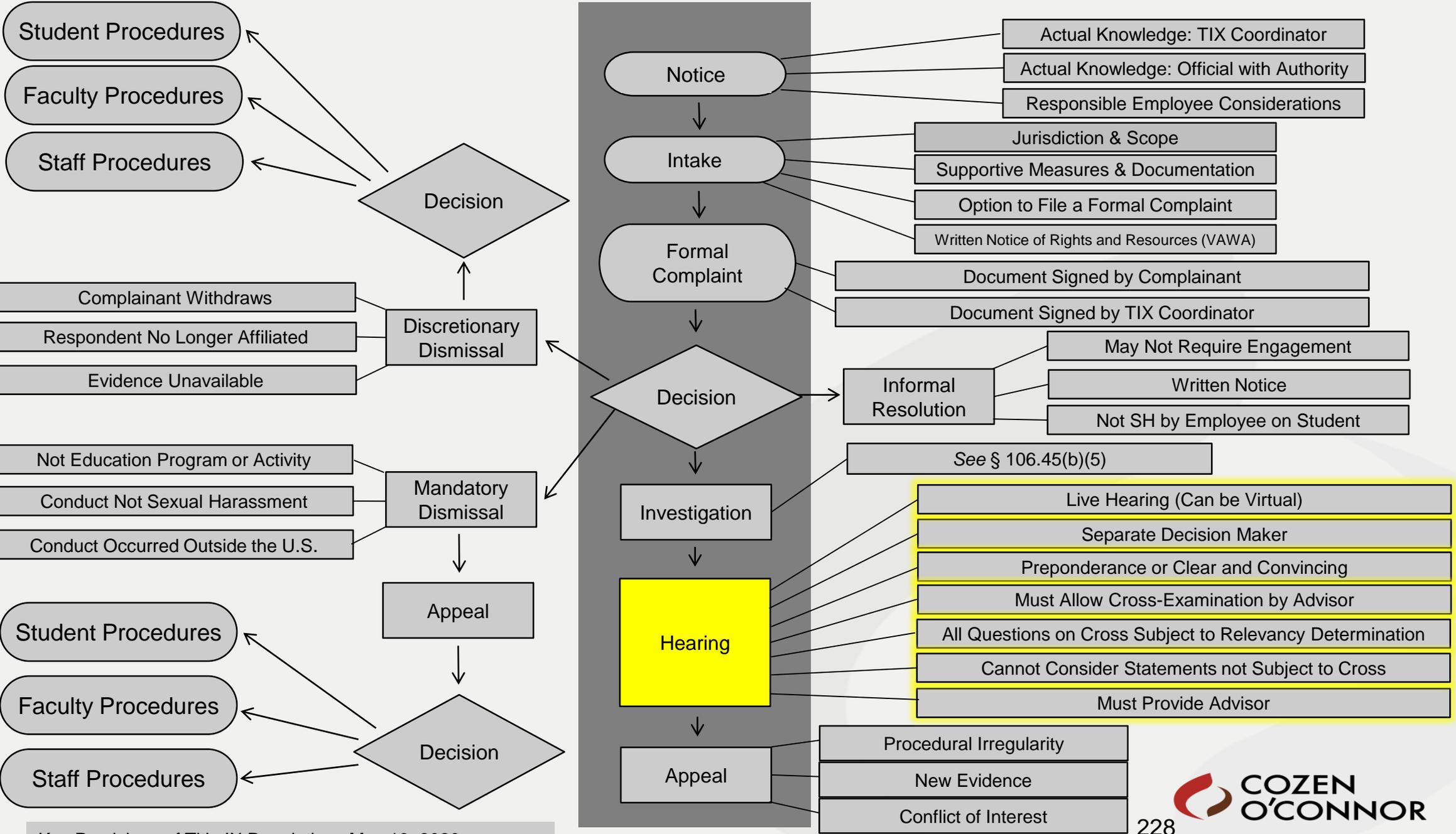
- How well did the testimony of the witness square with the other evidence in the case, including the testimony of other witnesses?
- Was it contradicted or supported by the other testimony and evidence?

Questions to Consider: Common Sense

- Does it make sense?

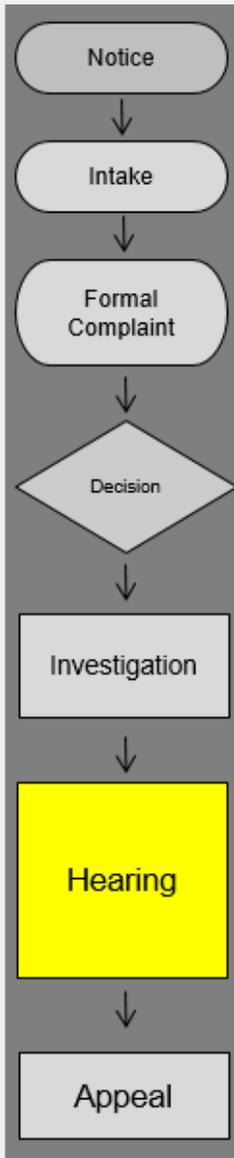
HEARINGS

THE FINAL TITLE IX REGULATIONS



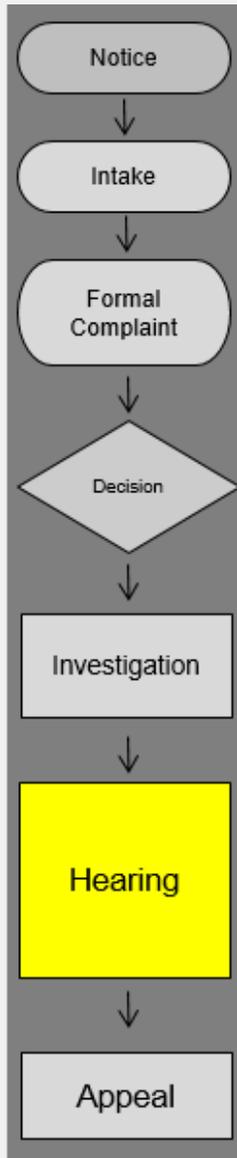
Hearings

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



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

Hearings

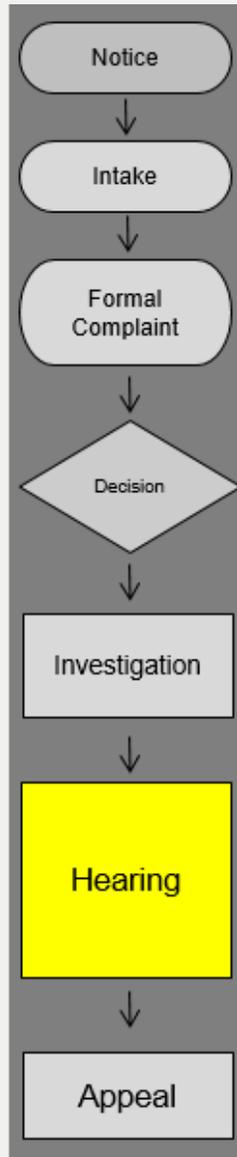


- Only relevant cross-examination and other questions may be asked of a party or witness.
- If a party does not have an advisor present at the live hearing, the recipient must provide without fee or charge to that party, an advisor of the recipient's choice, who may be, but is not required to be, an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

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

ROLE OF THE DECISION MAKER(S)/HEARING PANEL

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)

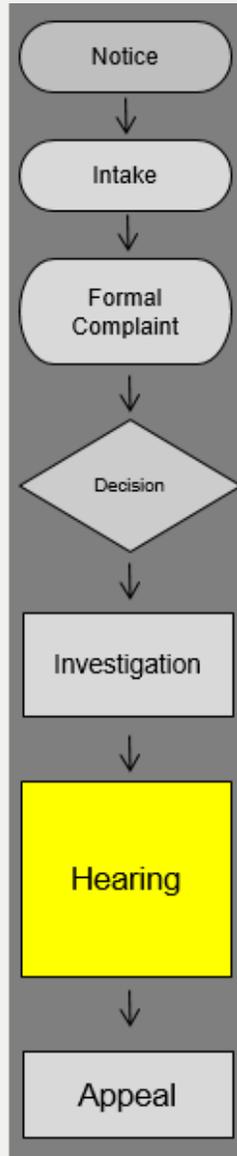
Explain Decisions to Exclude Questions



- 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)

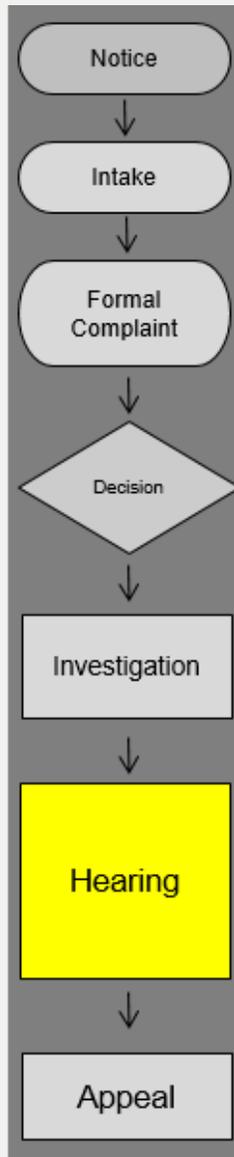
Apply the Standard of Evidence



- 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)

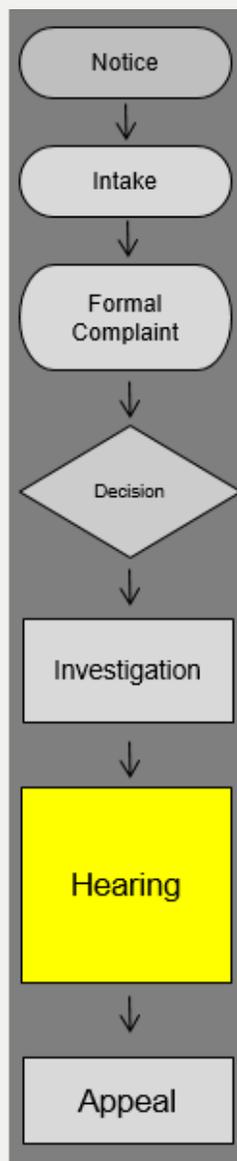
Issue Written Determinations



- 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)

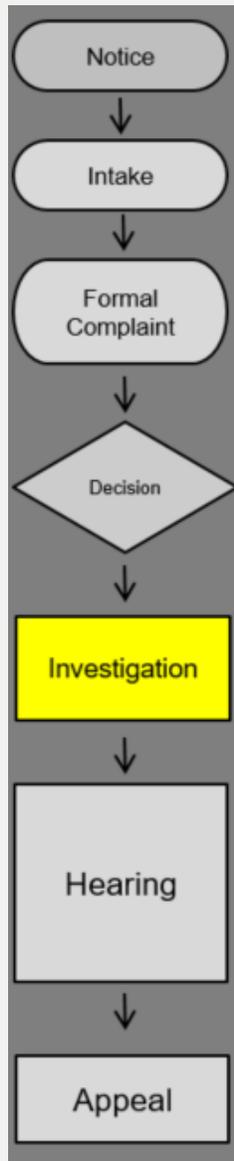
Separate Decision-Maker



- 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

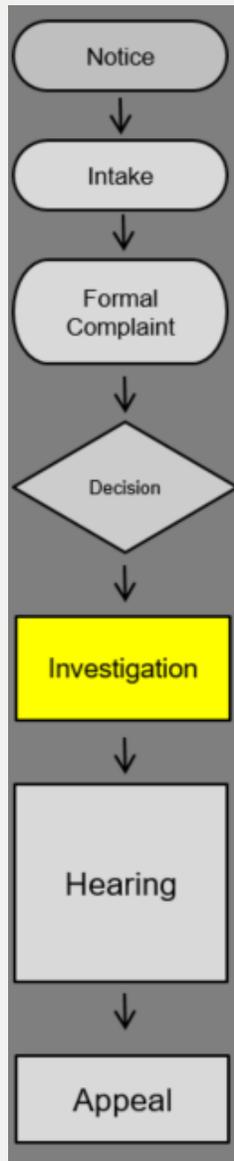
Decision-Maker Must Determine Responsibility



- 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

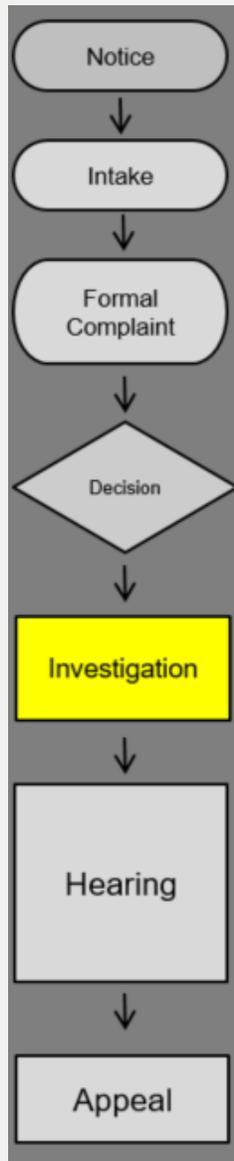
Independent Obligation to Evaluate Evidence



- 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

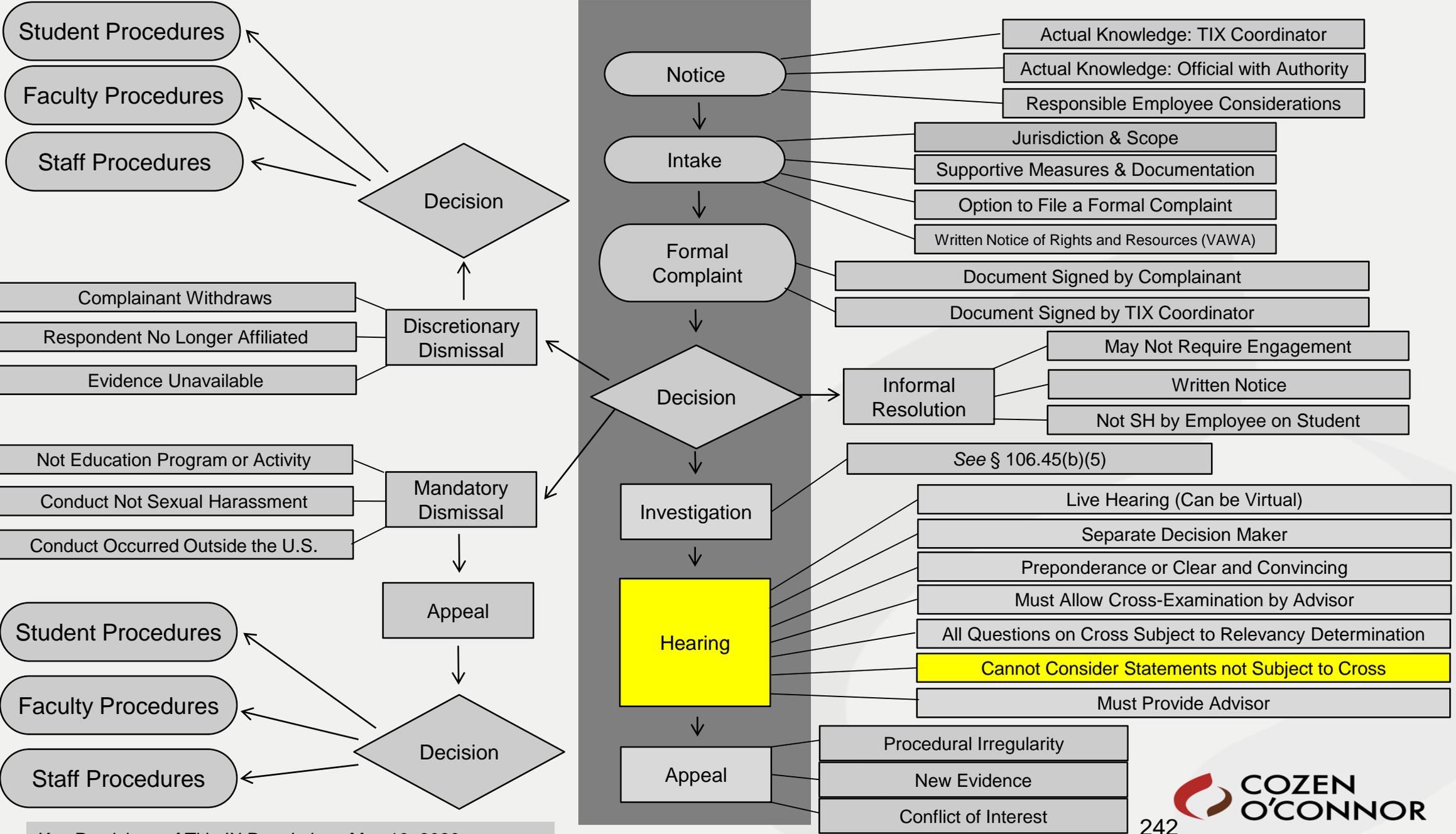
Independent Obligation to Evaluate Credibility



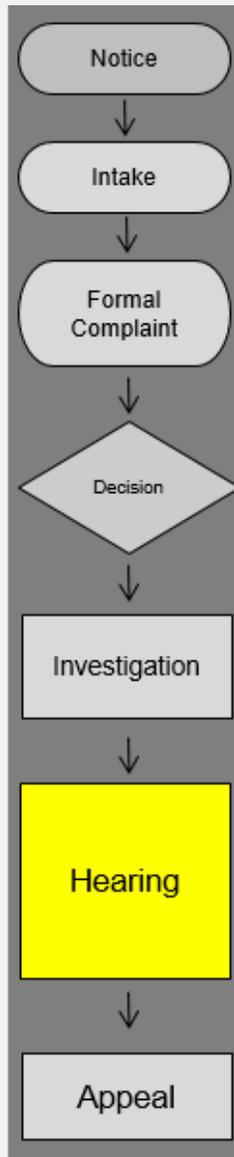
- If a recipient chooses to include a **credibility analysis** in its investigative report, the recipient must be cautious not to violate § 106.45(b)(7)(i), prohibiting the decision-maker from being the same person as the Title IX Coordinator or the investigator
- If an investigator's determination regarding 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

EXCLUSION OF STATEMENTS NOT SUBJECT TO CROSS-EXAMINATION



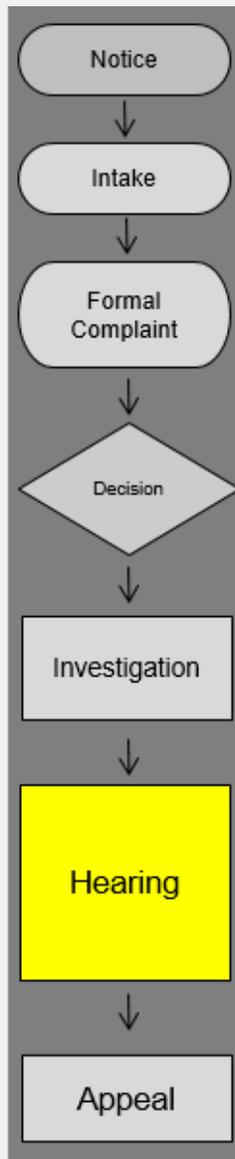
Exclusion of Statement



- 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

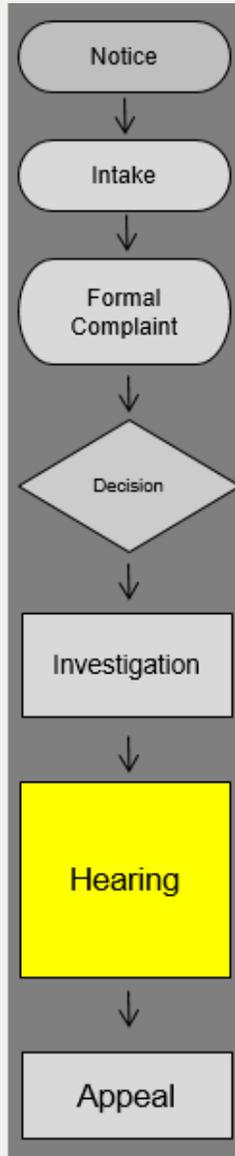
Exclusion of Statement



- [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

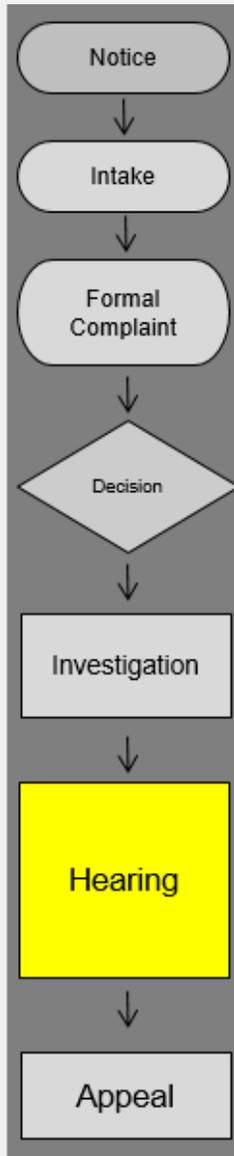
Exclusion of Statement



- 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

Bright Line Rule



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

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

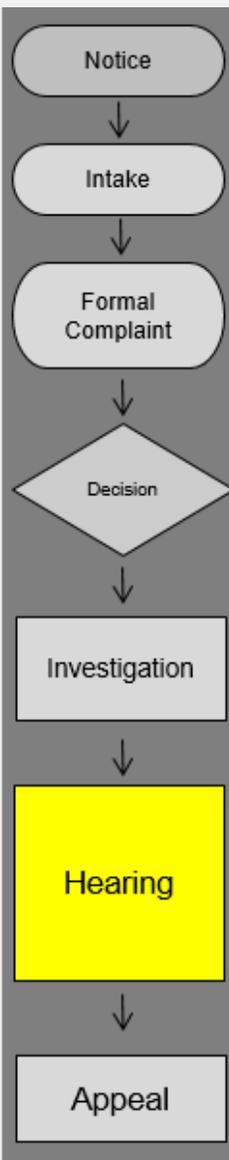
Exclusion of Statement



- 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

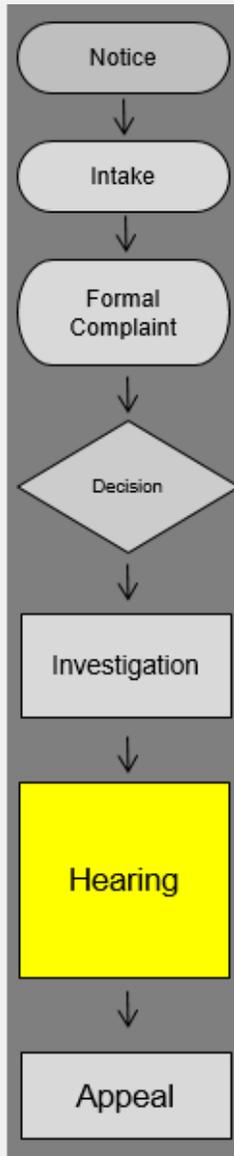
Tested for Credibility



- 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 nonappearance 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 (cont'd)



- 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.

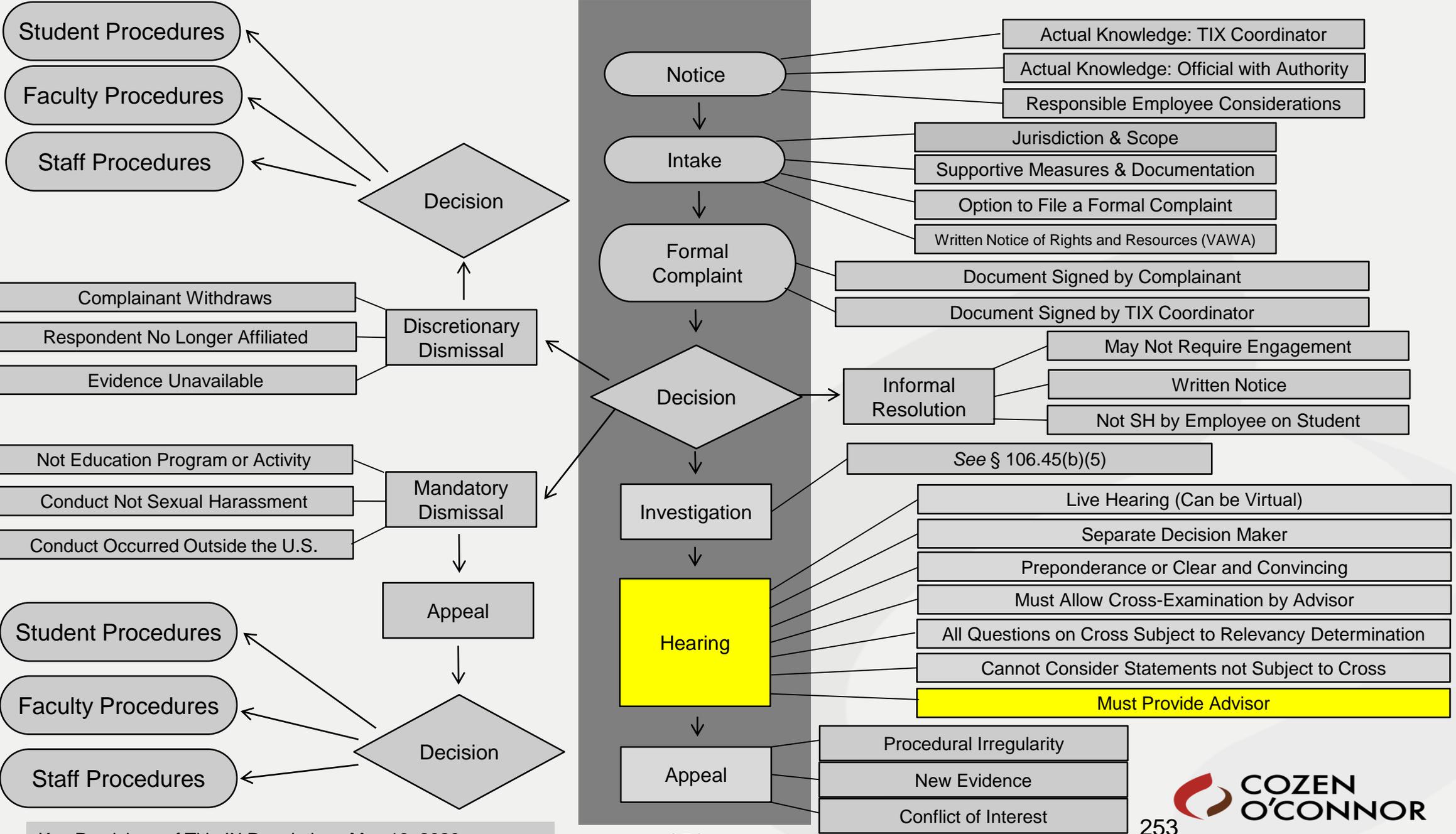
Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30349

When the Title IX Coordinator Signs the Formal Complaint



- 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.

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)

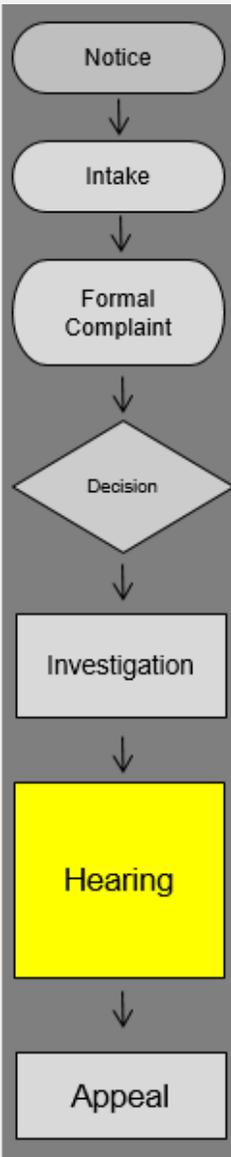
Advisor's Role at the Hearing



- 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.

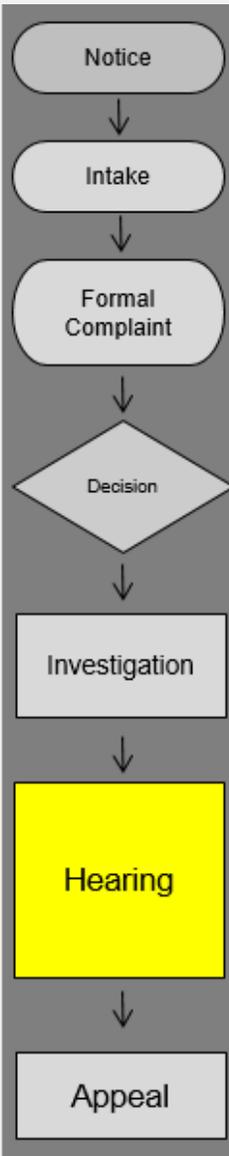
No Limit as to Conflicts of Interest



- 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

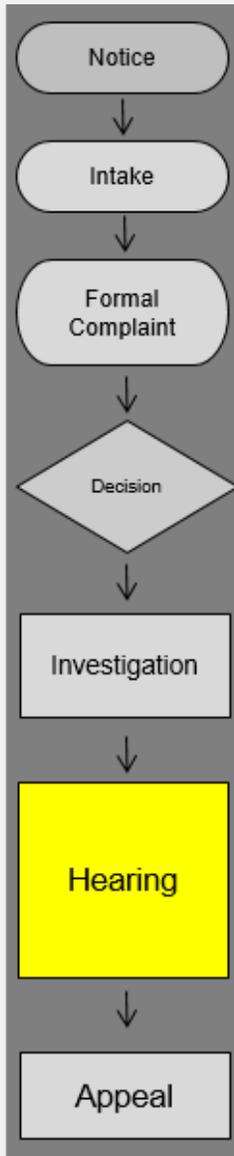
Cross-Examination by Advisor



- [A] party's advisor may appear and conduct cross-examination **even when the party whom they are advising does not appear.**

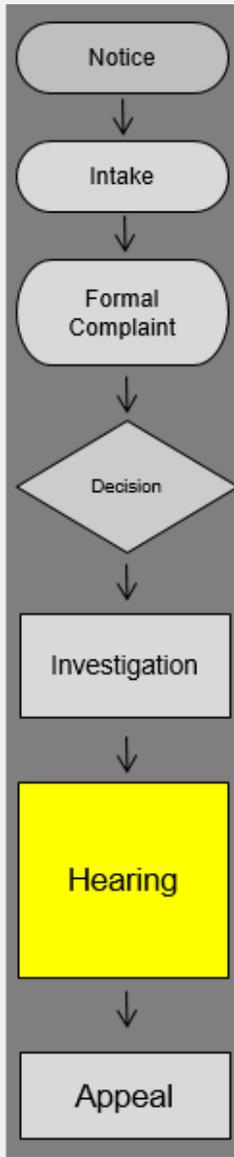
Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30346

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.

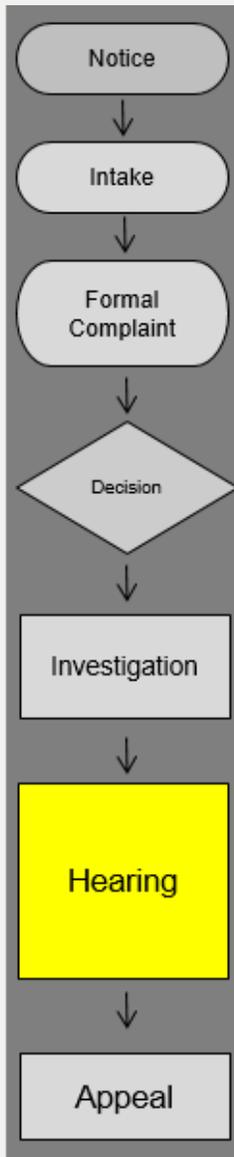
Discretion as to Advisor's Role



- 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.

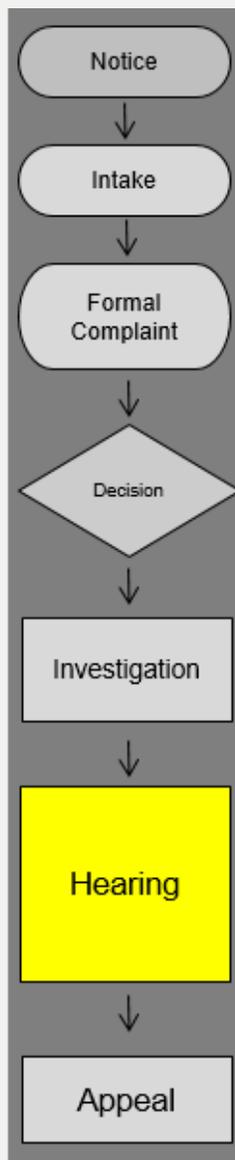
Obligation to Provide an Advisor



- 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)

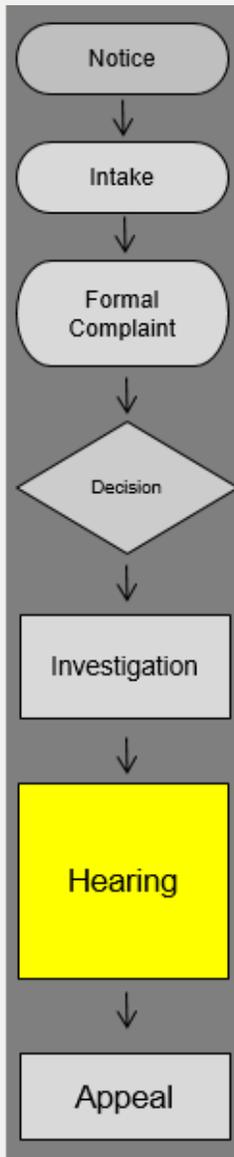
Must Provide Advisor Even in Party's Absence



- [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

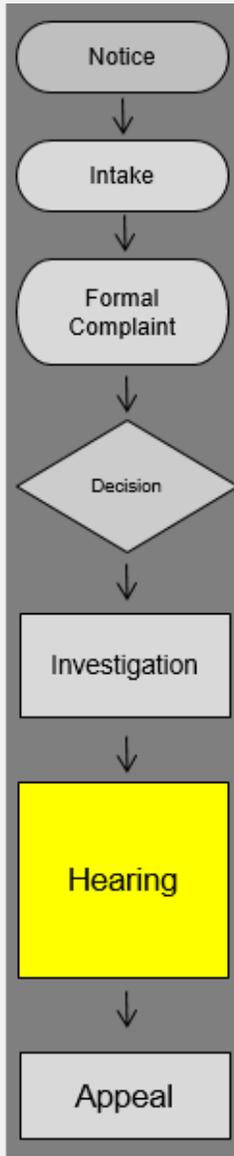
Refusal to Conduct Cross-Examination



- 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



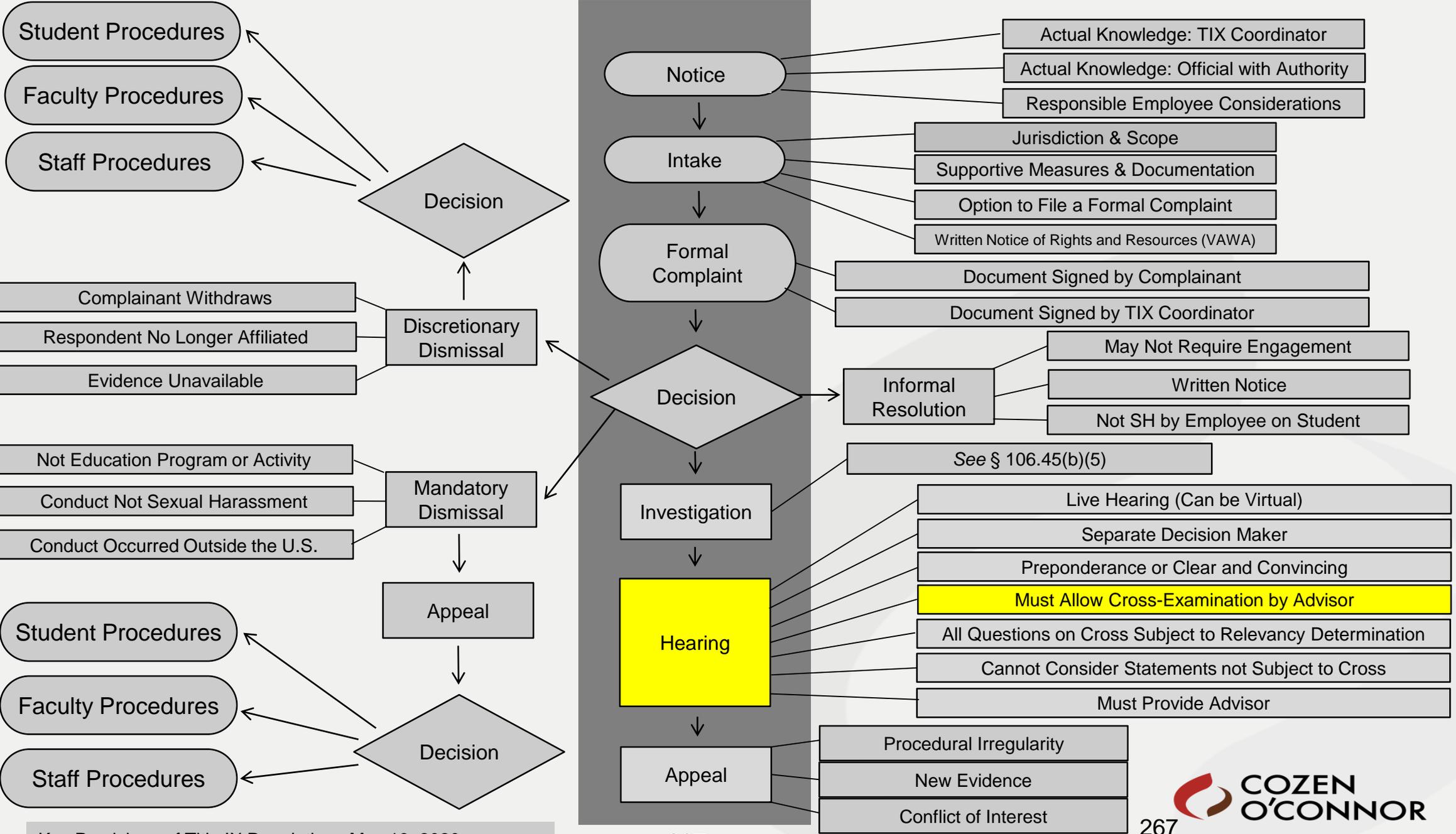
- If a party to whom the recipient assigns an advisor **refuses to work with the advisor** when the advisor is willing to conduct cross-examination on the party's behalf, then for reasons described above **that party has no right of self-representation with respect to conducting cross-examination**, 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)

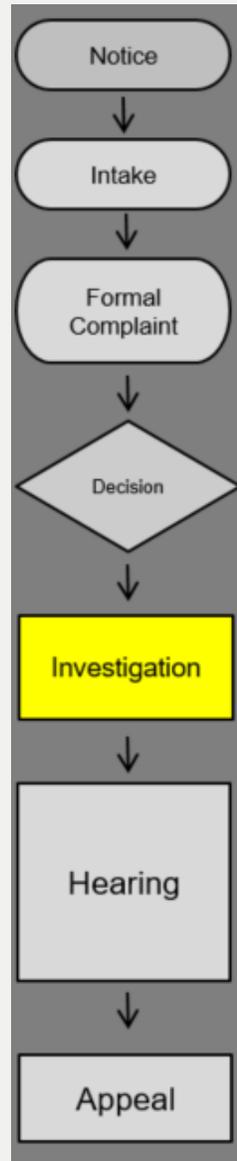
Cross-Examination



- 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)

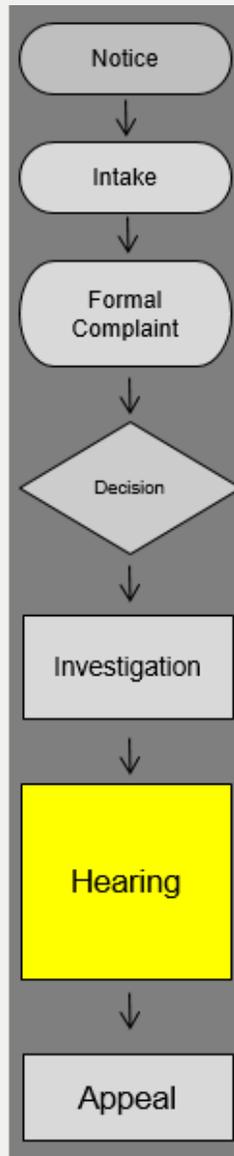
Recap on Evidence Review



- “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

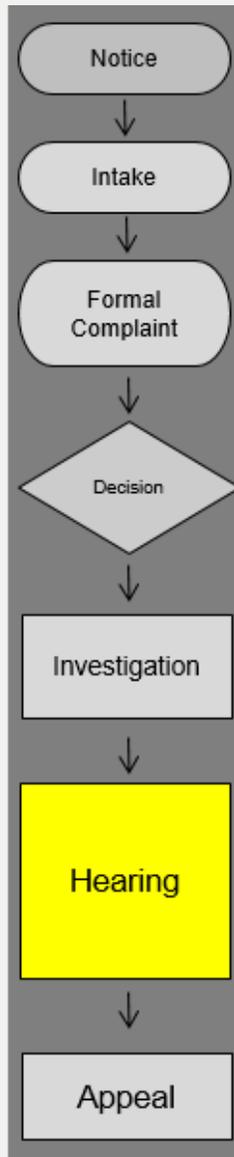
Availability of Evidence at the Hearing



- 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

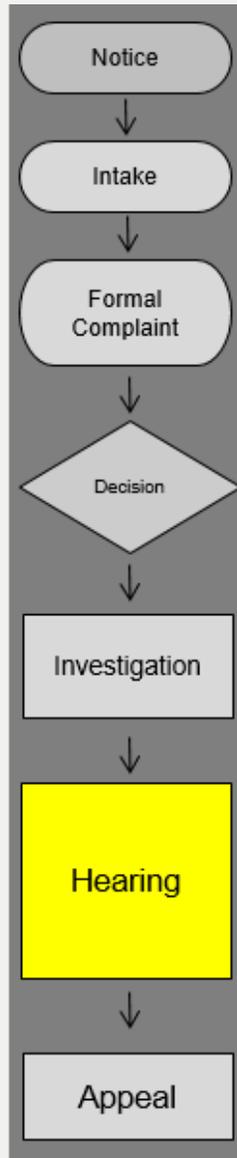
Cross-Examination



- 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

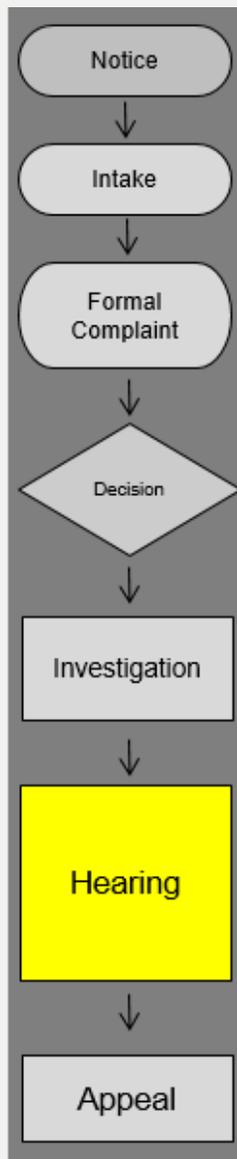


- The final regulations **do not preclude a recipient from adopting a rule** (applied equally to both parties) that does, or does not, **give parties or advisors the right to discuss the relevance determination with the decision-maker during the hearing.**
- If a recipient believes that arguments about 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; § 106.45(b)(6)

Title IX Regulations, May 19, 2020; Preamble 85 F.R 30343

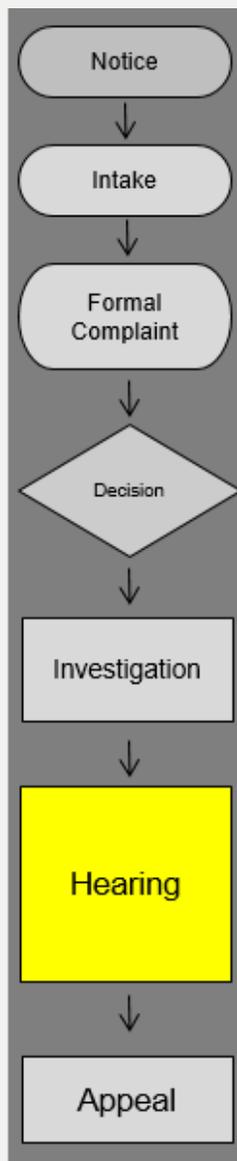
“Pause” to Reinforce Decorum



- 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

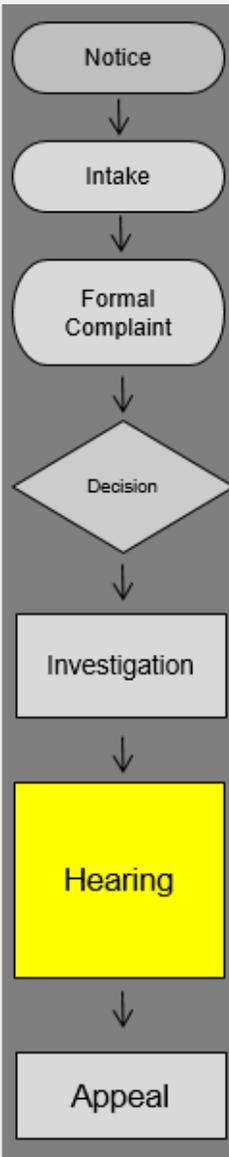
Rules of Decorum



- 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

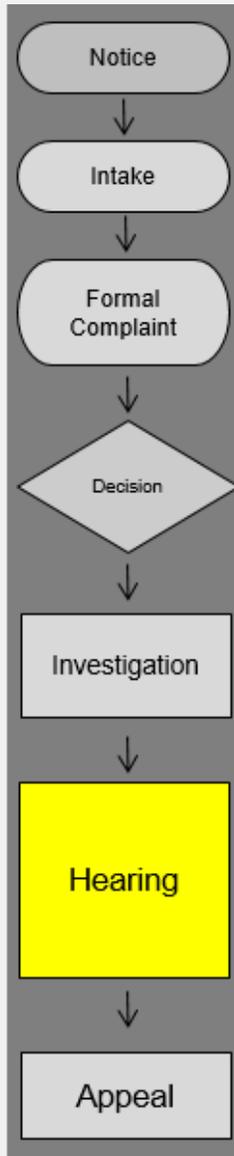
Training Not Required for Advisors



- 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

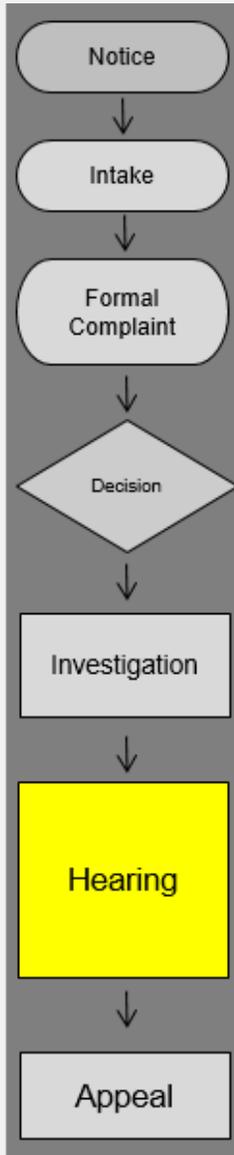
May Not Impose Training Requirements



- 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

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).**

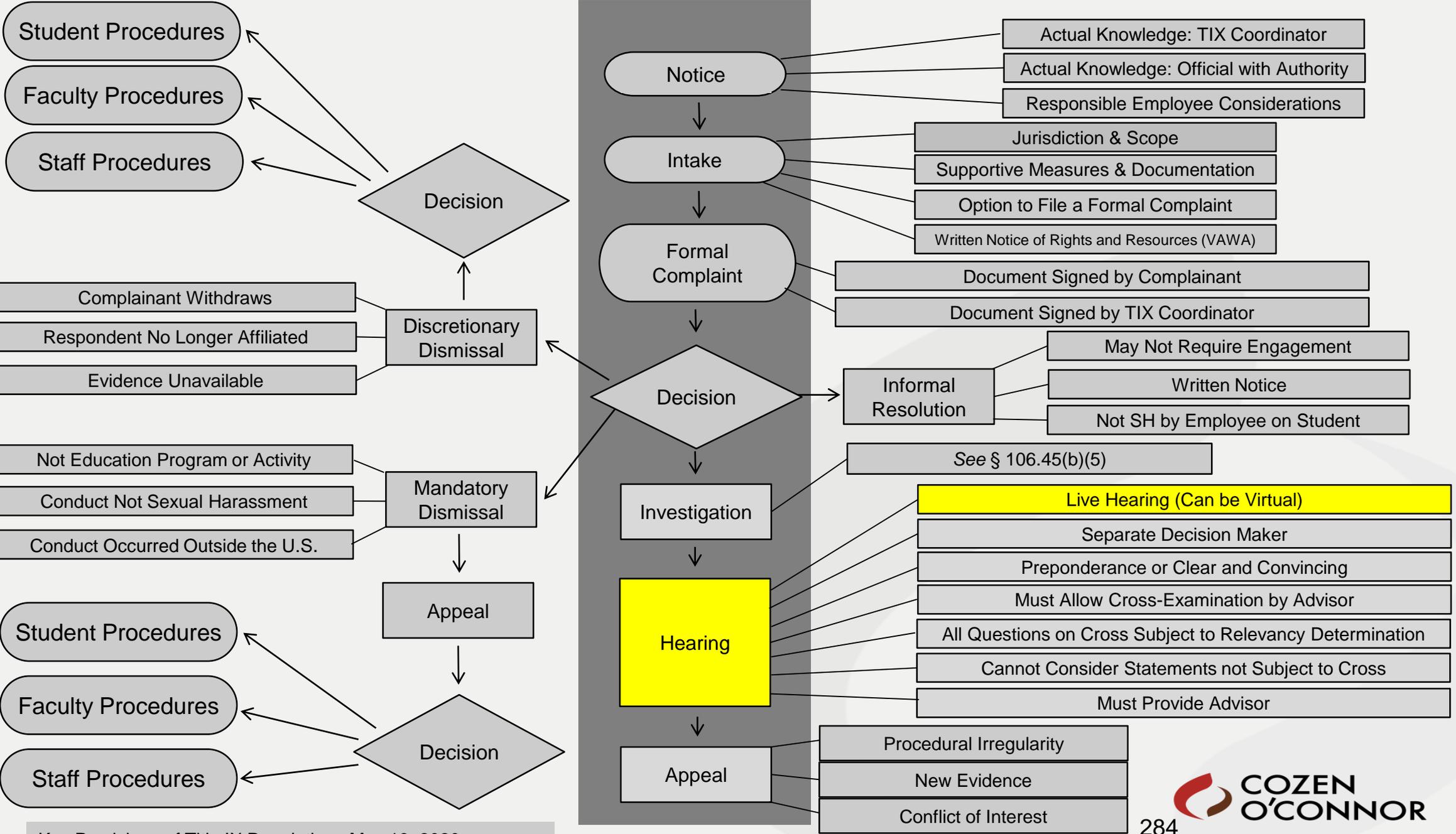
Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30337



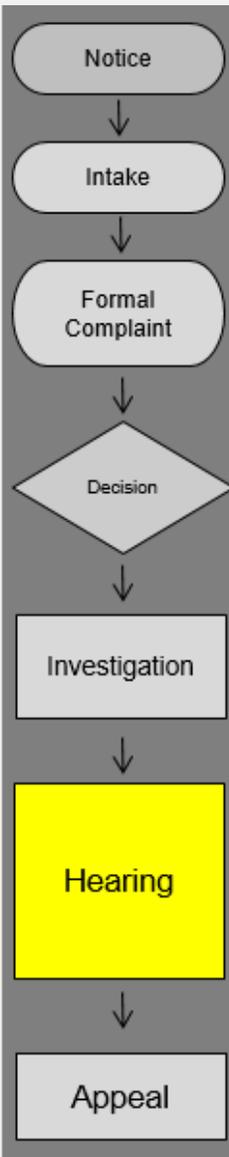
Included in the Processes for Resolving Complaints Against Students, Faculty and Staff: Statements Made During Informal Resolution

- The informal resolution process is not available to resolve allegations that an employee sexually harassed a student.
- An informal resolution process is voluntary, and a Complainant or Respondent (if participating) can ask to end the informal resolution process at any time before its completion.
- Before the completion of an informal resolution process, or if the resolution is not successfully concluded, the parties may request and Dartmouth may pursue the formal resolution process.
- **If an informal resolution process is ended by request, any information obtained may be used in a subsequent formal resolution process and hearing.**

THE LIVE HEARING REQUIREMENT



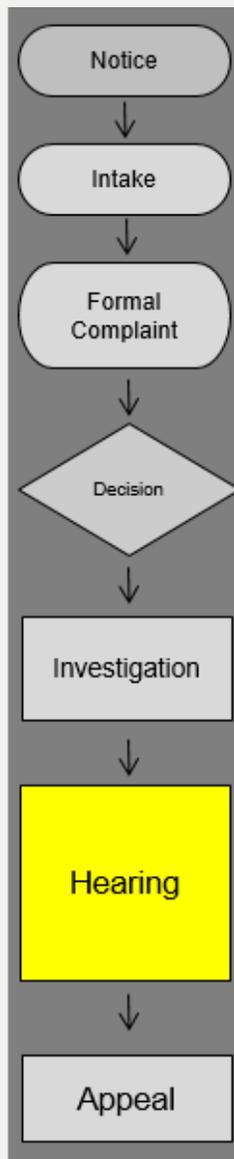
Live Hearing Required



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

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

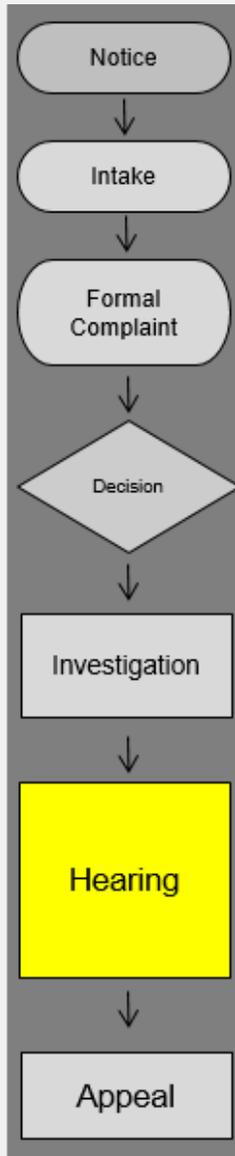
Live Hearing Required



- [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)

Technology Options

- Zoom
 - Ability to see and hear in real time
 - Breakout rooms
 - Recording
- Below are links to the zoom training videos:
 - The basics of meeting controls: <https://support.zoom.us/hc/en-us/articles/201362603-What-Are-the-Host-Controls->
 - Break Out Rooms: <https://support.zoom.us/hc/en-us/articles/206476093-Getting-Started-with-Video-Breakout-Rooms>

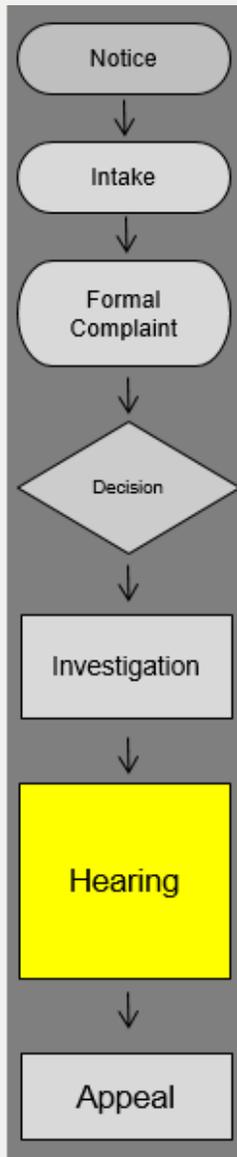
Virtual Hearing Considerations



- 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)

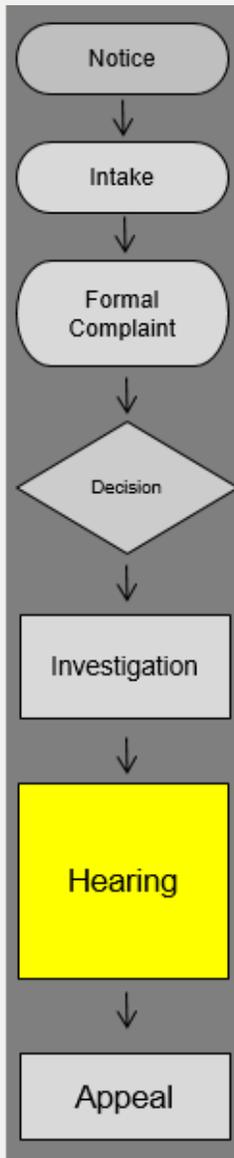
Virtual Hearing Considerations



- 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;

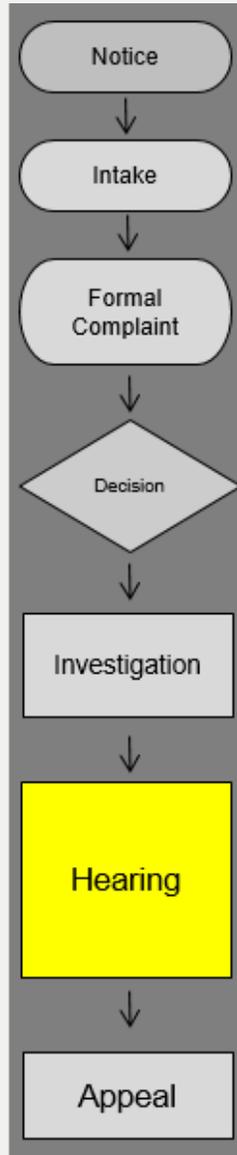
Virtual Hearing Considerations



- 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

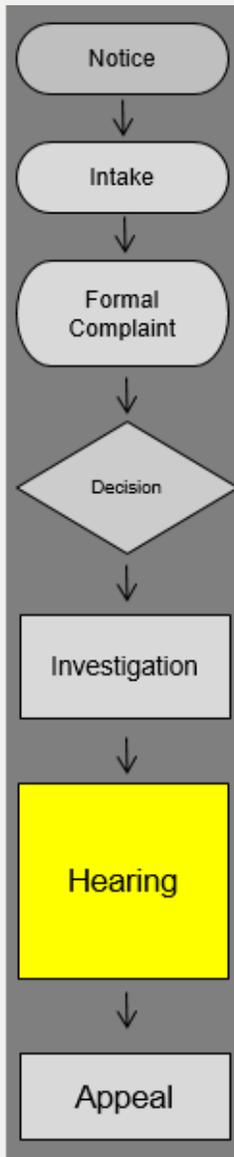
Flexibility to Adopt Rules



- 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.

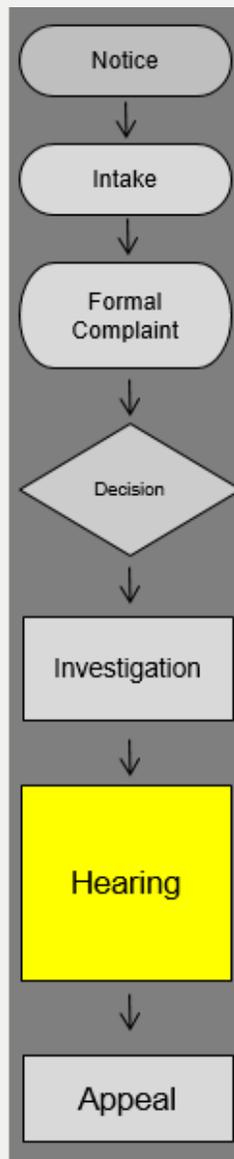
Flexibility to Adopt Rules



- 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

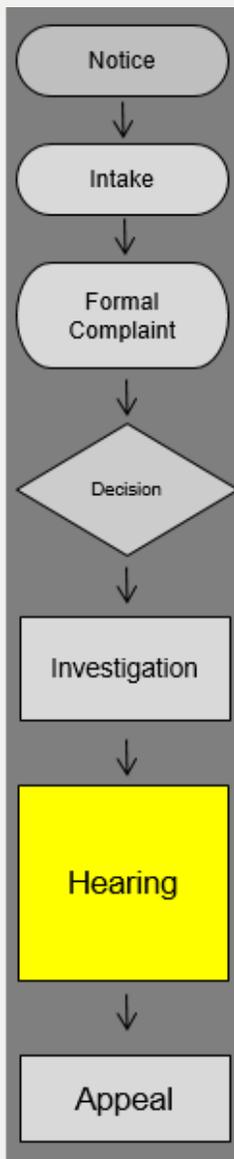
Participation by Parties and Witnesses



- 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.

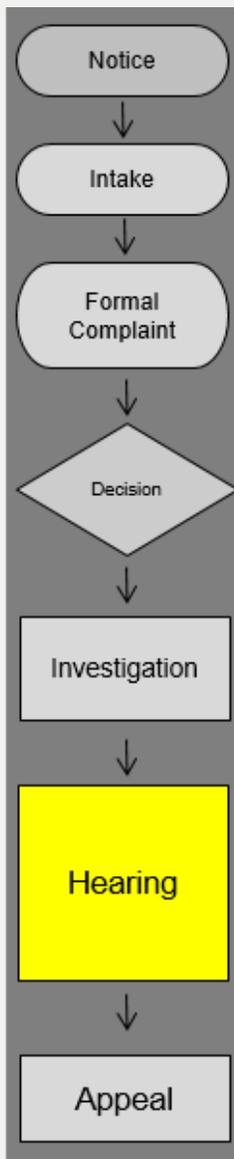
Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30346

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.

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

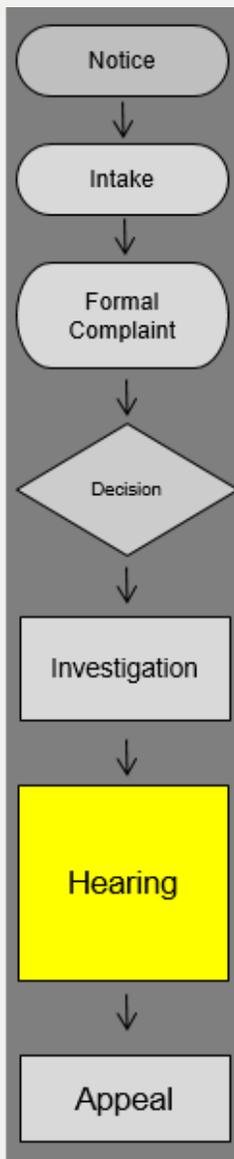
Participation by the Complainant



- 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

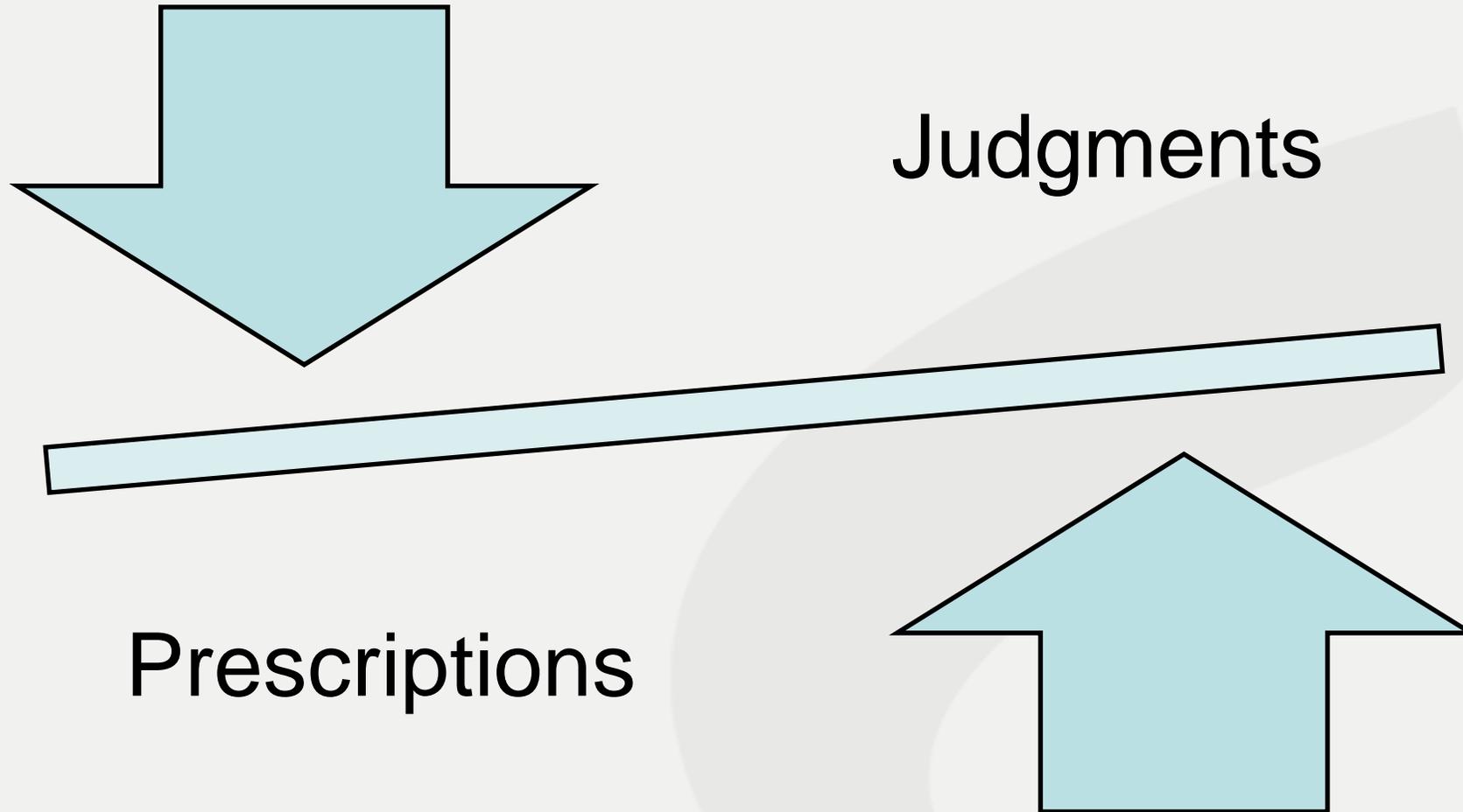


- Recipients must create an **audio or audiovisual recording, or transcript**, of any live hearing and make it available to the parties for inspection and review.

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

THE TWO HEARING FORMATS AT DARTMOUTH COLLEGE

Balancing



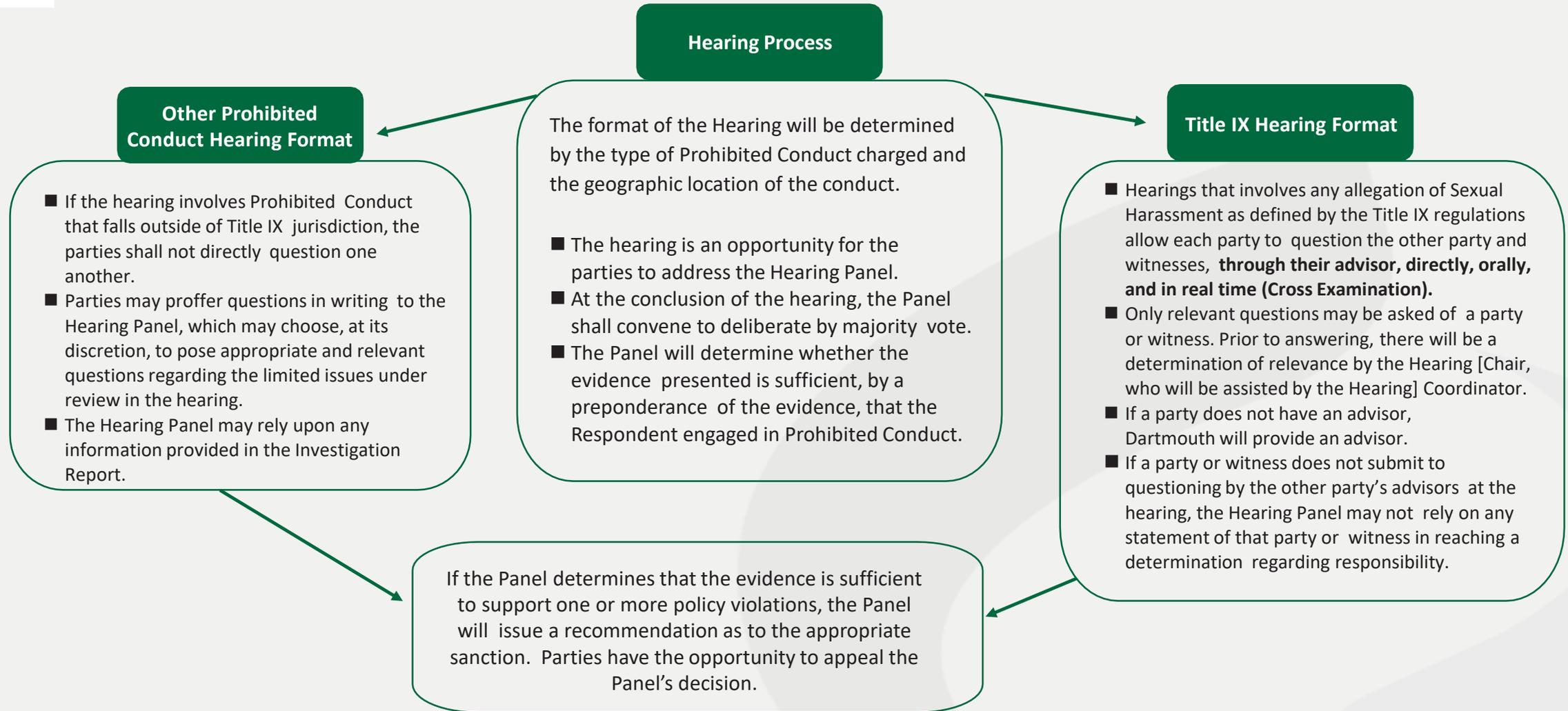


Included in the Processes for Resolving Complaints Against Students, Faculty and Staff: **Determining the Hearing Format**

- The format of the Hearing will be determined by the type of Prohibited Conduct charged and the geographic location of the conduct.
 - For hearings that involve any allegation of sexual harassment as defined by the Title IX regulations, even where there are additional allegations not captured by the Title IX regulations, the hearing will include cross-examination by the party's advisor, to be conducted directly, orally and in real-time, as well as limitations on the use of statements that have not been subject to cross-examination.
 - For hearings that involve only Prohibited Conduct that falls outside of Title IX jurisdiction, the parties will have the opportunity to submit questions through the Hearing Coordinator and Chair of the Hearing Panel, and the Hearing Panel may consider any information provided in the final investigation report that the Hearing Panel finds reliable and credible.



Hearing Processes Pursuant to the Dartmouth Sexual and Gender-Based Misconduct Policy



*Please refer to full policy and procedures at: <https://sexual-respect.dartmouth.edu/compliance/dartmouth-policies-procedures>



TITLE IX HEARING PROCESS

THE FIRST OF TWO HEARING FORMATS

What's the Conduct?

Following the Investigator's jurisdictional assessment, does the conduct alleged constitute any of the following:

1. Title IX Sexual Harassment
2. Sexual Assault
3. Dating Violence
4. Domestic Violence
5. Stalking

Where did it Occur?

Did the conduct alleged occur in the United States?

In Dartmouth's Education Program or Activity?

On campus or off campus when:

1. Substantial control over both the respondent and the context in which the conduct occurred; or
2. In a building owned or controlled by a recognized student organization.

If 'YES' to these 3 questions:

Title IX Hearing Process



Included in the Processes for Resolving Complaints Against Students, Faculty and Staff: **Title IX Hearing Process**

- In a hearing that involves any allegation of sexual harassment as defined by the Title IX regulations, even where there are additional allegations not captured by the Title IX regulations, **each party may question the other party and witnesses, through their advisor, directly, orally, and in real time.**
- Only relevant questions may be asked of a party or witness. **Before a Complainant, Respondent, or witness responds to a question, the [Chair]/[Hearing Officer], in consultation with the Hearing Coordinator, will first determine whether the question is relevant and explain any decision to exclude a question as not relevant.**
- The [Chair]/[Hearing Officer] and Hearing Coordinator will be guided by the same relevance considerations set forth in Section VI.A.8 of this process.



Included in the Processes for Resolving Complaints Against Students, Faculty and Staff: **Title IX Hearing Process (cont'd)**

- If a party does not have an advisor present at the live hearing, **Dartmouth will provide an advisor, free of charge**, who may be, but is not required to be, an attorney, for questioning on behalf of that party.
- **If a party or witness does not submit to questioning by the other party's advisors at the hearing, the [Hearing Officer]/[Hearing Panel]/[AHHC] may not rely on any statement of that party or witness in reaching a determination regarding responsibility.**
- The [Hearing Officer]/[Hearing Panel]/[AHHC] may not draw any inference from the decision of a party or witness to not participate at the hearing.



Included in the Processes for Resolving Complaints Against Students, Faculty and Staff: Other Prohibited Conduct Hearing Format

- In a hearing that involves Prohibited Conduct that falls outside of Title IX jurisdiction, the parties shall not directly question one another, although they may proffer questions for the [Hearing Officer]/[Hearing Panel]/[AHHC], who may choose, in their discretion, to pose appropriate and relevant questions regarding the limited issues under review in the hearing.
- In reaching a determination, the [Hearing Officer]/[Hearing Panel]/[AHHC] may rely upon any information provided in the investigative report, including the statements provided in the investigation report that the hearing officer finds reliable and credible.
- The [Hearing Officer]/[Hearing Panel]/[AHHC] may not draw any inference from the decision of a party or witness to not participate at the hearing.

DARTMOUTH HEARING PROTOCOLS



Included in the Processes for Resolving Complaints Against Students, Faculty and Staff: **Notice of Hearing**

The Title IX Coordinator or designee will provide the Complainant and Respondent with a written notice of hearing.

The **notice of hearing** will include:

- (a) the specific policy violations that will be the subject of the hearing;
- (b) the date time, and location of the hearing;
- (c) the names of the hearing panel members;
- (d) **how to challenge participation by the hearing panelists on the basis of conflict of interest or bias;**
- (e) the right to have an advisor present at the hearing and conduct cross-examination on the party's behalf under the Title IX Hearing Process;
- (f) that Dartmouth will provide an advisor, without fee or charge, to conduct cross-examination on behalf of the party at the Title IX Hearing Process if the party does not have an advisor present for the Title IX Hearing Process;
- (g) how to request that witnesses be present at the hearing;
- (h) and, **information about the specific hearing format** for sexual harassment as defined by the Title IX regulations and/or other Prohibited Conduct.



Included in the Processes for Resolving Complaints Against Students, Faculty and Staff: **The Mechanics of the Hearing**

- The hearing is an opportunity for the parties to address the [Hearing Panel]/[AHHC]/[Hearing Officer].
- The parties may address any information in the investigative report, supplemental statements submitted in response to the investigative report or, at the time of sanction, provide verbal impact and mitigation statements.
- Dartmouth will make all evidence gathered available to the parties at the hearing to give each party equal opportunity to refer to such evidence during the hearing, including for purposes of cross-examination.
- In reaching a determination, the [Hearing Panel]/[AHHC]/[Hearing Officer] will meet with the Complainant, Respondent, investigator, and any relevant witnesses, but the [Hearing Panel]/[AHHC]/[Hearing Officer] may not conduct its own investigation.



Included in the Processes for Resolving Complaints Against Students, Faculty and Staff: **The Mechanics of the Hearing (cont'd)**

- The [Hearing Panel]/[AHHC]/[Hearing Officer] has the discretion to determine the format for the hearing and its deliberations.
- Typically, the parties will have an opportunity to provide an **opening statement** to the [Hearing Panel]/[AHHC]/[Hearing Officer].
- **Each party will then have an opportunity to address the [Hearing Panel]/[AHHC]/[Hearing Officer]** and respond to questions by the [Hearing Panel]/[AHHC]/[Hearing Officer], or as described below, the other party's advisor.
- The [Hearing Panel]/[AHHC]/[Hearing Officer] will also hear from **relevant witnesses**, including the investigator.



Included in the Processes for Resolving Complaints Against Students, Faculty and Staff: **The Mechanics of the Hearing (cont'd)**

- Each party will have the opportunity to question the other party, the witnesses, and the investigator, either by submitting questions through the [Hearing Panel]/[AHHC]/[Hearing Officer] or, as described below, through their advisor of choice.
- After all parties and witnesses have been heard, the parties will have an opportunity to provide a **closing statement**.
- At the conclusion of the hearing, the panel will **deliberate** in private to determine whether there is sufficient evidence, by a preponderance of the evidence, that Respondent engaged in conduct that violated the policy. If the [Hearing Panel]/[AHHC]/[Hearing Officer] determines the Respondent violated the policy, it will determine an appropriate sanction(s).



**Included in the Processes for Resolving Complaints
Against Students, Faculty and Staff:
The Mechanics of the Hearing (cont'd)**

- The hearing will be audio-recorded; the [Hearing Panel's]/[AHHC's]/[Hearing Officer's] deliberations will not be recorded and shall remain private. Neither the parties, nor any participants or observers, will be permitted to make any audio or video recordings.
- The [Hearing Panel]/[AHHC]/[Hearing Officer] may convene remotely or in person to conduct the hearing and its deliberations.



Included in the Processes for Resolving Complaints Against Students, Faculty and Staff: **The Mechanics of the Hearing (cont'd)**

- The hearing will be live and require the participants to simultaneously see and hear each other. Hearings may be conducted with all parties physically present in the same geographic location, or at the request of either party, the hearing can occur with the parties located in separate rooms with technology enabling the [Hearing Panel]/[AHHC]/[Hearing Officer] and parties to simultaneously see and hear the party or the witness answering questions.
- While each party is addressing the [Hearing Panel]/[AHHC]/[Hearing Officer], the other party shall participate in the hearing remotely.



**Included in the Processes for Resolving Complaints
Against Students, Faculty and Staff:
The Mechanics of the Hearing (cont'd)**

- Both the Complainant and the Respondent have a right to participate in the hearing, but participation is not mandatory: neither party is required to participate in the hearing in order for the hearing to proceed, and the Hearing Panel may not draw a negative or adverse inference from a party's decision not to participate.
- The Complainant and the Respondent both have the right to be heard by the Hearing Panel and may each decide whether to exercise that right in person or remotely.

**PROCESS FOR RESOLVING
COMPLAINTS AGAINST STUDENTS:
THE HEARING PANEL**



PROCESS FOR RESOLVING REPORTS AGAINST STUDENTS

Pursuant to the Dartmouth Sexual and Gender-Based Misconduct Policy*

Hearing Process

Other Prohibited Conduct Hearing Format

- If the hearing involves Prohibited Conduct that falls outside of Title IX jurisdiction, the parties shall not directly question one another.
- Parties may proffer questions in writing to the Hearing Panel, which may choose, at its discretion, to pose appropriate and relevant questions regarding the limited issues under review in the hearing.
- The Hearing Panel may rely upon any information provided in the Investigation Report.

The format of the Hearing will be determined by the type of Prohibited Conduct charged and the geographic location of the conduct.

- The hearing is an opportunity for the parties to address the Hearing Panel.
- At the conclusion of the hearing, the panel will determine whether, by the preponderance of the evidence standard, there is sufficient evidence that the Respondent engaged in conduct that violated the policy.

Title IX Hearing Process

- Hearings that involves any allegation of Sexual Harassment as defined by the Title IX regulations allow each party to question the other party and witnesses, **through their advisor, directly, orally, and in real time (Cross Examination)**.
- Only relevant questions may be asked of a party or witness. Prior to answering, there will be a determination of relevance by the Hearing Coordinator.
- If a party does not have an advisor, Dartmouth will provide an advisor.
- If a party or witness does not submit to questioning by the other party's advisors at the hearing, the Hearing Panel may not rely on any statement of that party or witness in reaching a determination regarding responsibility.

If the Hearing Panel determines that the evidence is sufficient to support one or more policy violations, the Hearing Panel will deliberate and issue a determination as to the appropriate sanction(s). Parties have the opportunity to appeal the Hearing Panel's decision.

*Please refer to full policy and procedures at: <https://sexual-respect.dartmouth.edu/compliance/dartmouth-policies-procedures>



The Process for Resolving Complaints Against Students: The Role of the Hearing Panel

- A Hearing Panel consists of **fair and impartial decision-makers** who will conduct an objective evaluation of all relevant evidence, including both inculpatory or exculpatory evidence.
- The **role of the Hearing Panel** is to provide all parties with an equitable opportunity to be heard; to serve as a safeguard on the reliability and accuracy of the investigative process; to give appropriate consideration to victim impact and mitigating factors; and to reach a full and fair determination of any sanction, should there be a finding of responsibility.
- All **members of the Hearing Panel will have received appropriate training** to participate as informed and impartial decision-makers; this training will include the content provided to investigators, as well training on any technology to be used at a live hearing and on issues of relevance of questions and evidence, including questions about prior sexual history.
- The Hearing Panel may reach credibility determinations but may not base credibility determinations on a person's status as a Complainant, Respondent or witness.



The Process for Resolving Complaints Against Students: **The Hearing Panel**

A Hearing Panel comprises **three Dartmouth Employees**, identified as follows, whom the Title IX Coordinator or designee shall convene:

- The Director of Community Standards and Accountability or designee;
- The Dean responsible for Student Affairs designated by the Dean of the College (if the Respondent is an undergraduate) or designated by the Dean of the Respondent's School; and
- A trained staff member, who holds an appointment outside the Complainant's and Respondent's declared majors or areas of concentration or School, as applicable.



The Process for Resolving Complaints Against Students: Role of the Chair and the Hearing Coordinator

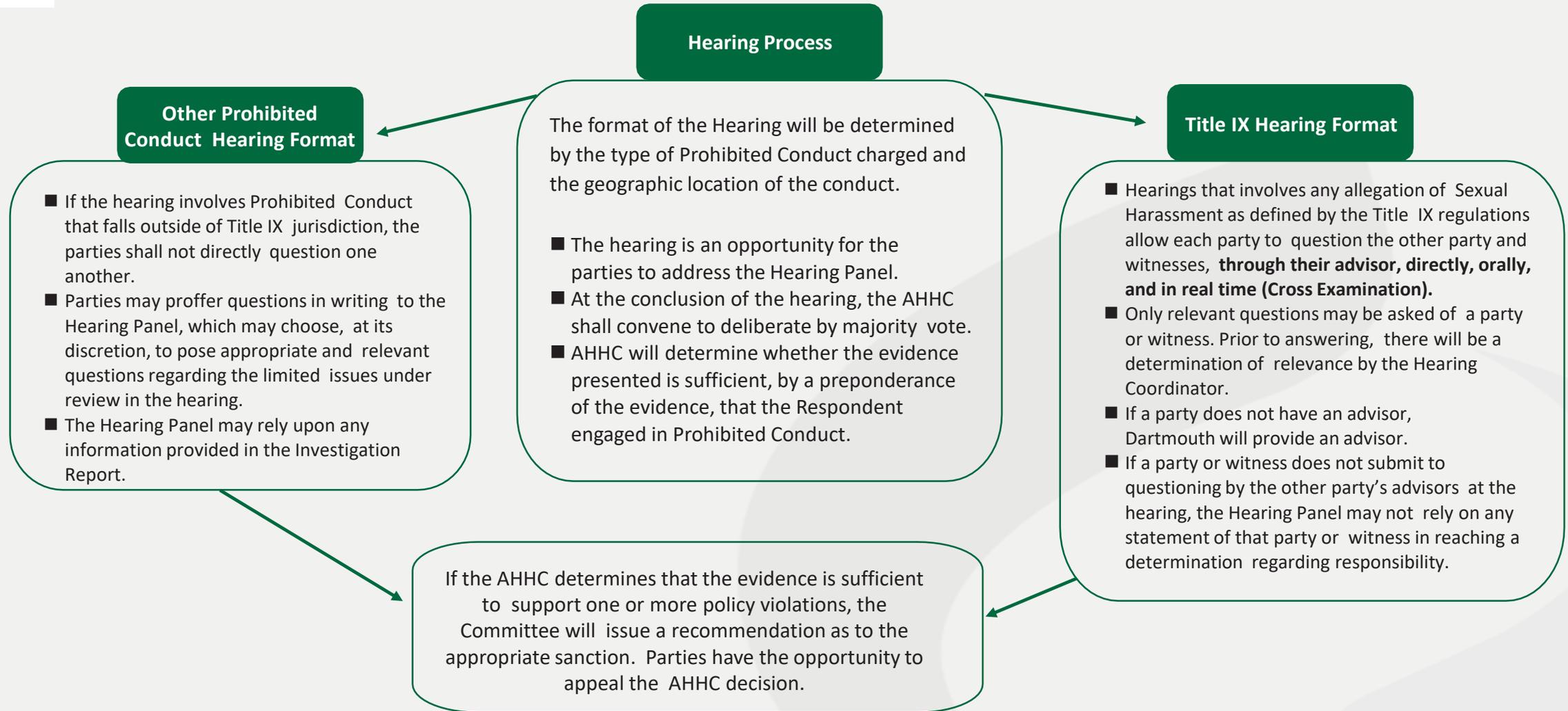
- The **Chair of the Hearing Panel** presides over the Hearing Panel and shall have equal voice and vote with the other members.
- The Chair may be assisted by an administrative, non-voting **Hearing Coordinator**, who will assist the Chair in the administration of the hearing process, including procedural matters and decisions leading up to the hearing, determinations about information that will be considered or not, appropriate and inappropriate lines of questioning based on relevance, and the overall decorum and conduct of the proceedings.
- The Hearing Coordinator may be a Dartmouth employee or an external professional.
- The Chair, in consultation with the Hearing Coordinator, is also responsible for delivering any communications on behalf of the Hearing Panel, with appropriate input from other Hearing Panel members.

**PROCESS FOR RESOLVING
COMPLAINTS AGAINST FACULTY:
THE AD HOC HEARING COMMITTEE**



PROCESS FOR RESOLVING REPORTS AGAINST FACULTY

Pursuant to the Dartmouth Sexual and Gender-Based Misconduct Policy*



*Please refer to full policy and procedures at: <https://sexual-respect.dartmouth.edu/compliance/dartmouth-policies-procedures>



The Process for Resolving Complaints Against Faculty: **The Title IX Council and the AHHC**

- The Title IX Council consists of **fair and impartial decision-makers** who will conduct an objective evaluation of all relevant evidence, including both inculpatory or exculpatory evidence.
- Members of the Title IX Council shall consist of **twenty-four elected members of the General Faculty**, including fifteen members from the Faculty of Arts and Sciences and three members from each of the other three faculties, serving staggered three-year terms.
- All members of **the Title IX Council will have received appropriate training** to participate as informed and impartial decision-makers; this training will include the content provided to investigators, as well training on any technology to be used at a live hearing and on issues of relevance of questions and evidence, including questions about prior sexual history.



The Process for Resolving Complaints Against Faculty: **The Title IX Council and the AHHC (cont'd)**

- The **role of the AHHC** is to provide all parties with an equitable opportunity to be heard; to serve as a safeguard on the reliability and accuracy of the investigative process; to give appropriate consideration to victim impact and mitigating factors; and to reach a full and fair determination of any sanction, should there be a finding of responsibility.
- For the purpose of constituting an AHHC for a Complaint against a Respondent, the Chair of the Title IX Council, after consultation with the Title IX Coordinator and the Dean, will appoint an **Ad Hoc Hearing Committee ("AHHC") consisting of five (5) Faculty Members from the Title IX Council.**
- Based on such consultation, the AHHC may or may not include members from the Respondent's School.
- **The Title IX Coordinator or designee shall identify one member of the AHHC as the Chair.**
- The AHHC members must have no prior experience with the parties, witnesses or incident(s) in question that would present any actual conflict of interest.



The Process for Resolving Complaints Against Faculty: **The Scope of the Hearing**

The AHHC will determine:

- (a)** whether there is sufficient evidence, by a preponderance of the evidence, to support the finding of responsibility as to each element of each Policy violation at issue.
- (b)** If the AHHC determines that the evidence is sufficient to support one or more policy violations, the AHHC will issue a determination as to the appropriate sanction.



The Process for Resolving Complaints Against Faculty: Role of the Chair and the Hearing Coordinator

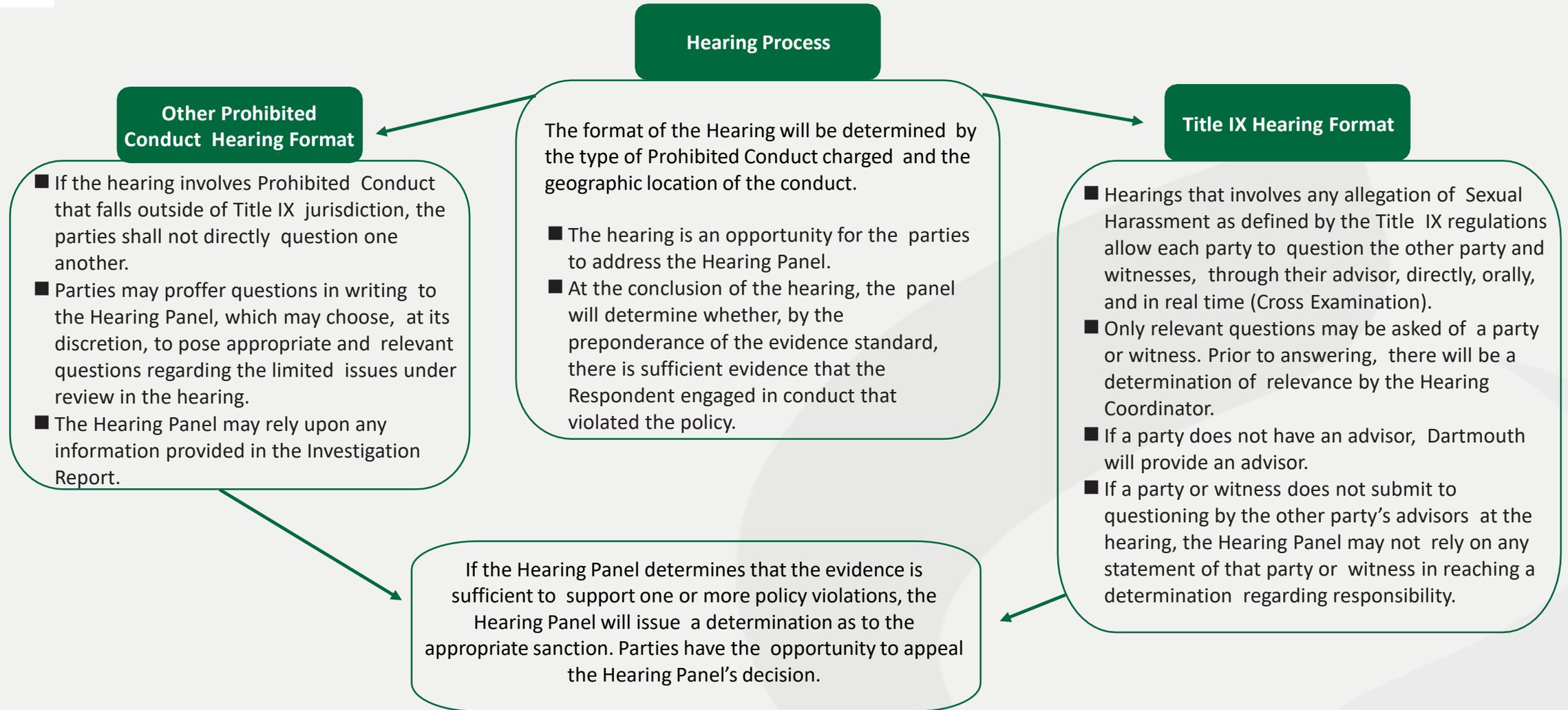
- The **Chair of the AHHC** presides over the hearing process and shall have equal voice and vote with the other members.
- The Chair will be assisted by an administrative, non-voting **Hearing Coordinator**, who will assist the Chair in the administration of the hearing process, including procedural matters and decisions leading up to the hearing, determinations about information that will be considered or not, appropriate and inappropriate lines of questioning based on relevance, and the overall decorum and conduct of the proceedings.
- The Hearing Coordinator may be a Dartmouth employee or an external professional.
- The Chair, in consultation with the Hearing Coordinator, is also responsible for delivering any communications on behalf of the AHHC, with appropriate input from other AHHC members.

**PROCESS FOR RESOLVING
COMPLAINTS AGAINST STAFF:
THE HEARING OFFICER**



PROCESS FOR RESOLVING REPORTS AGAINST STAFF

Pursuant to the Dartmouth Sexual and Gender-Based Misconduct Policy*



*Please refer to full policy and procedures at: <https://sexual-respect.dartmouth.edu/compliance/dartmouth-policies-procedures>



The Process for Resolving Complaints Against Staff: The Hearing Officer

- The Chief Human Resources Officer (CHRO) or designee serves as the **hearing officer** under this process.
- The hearing officer is a fair and impartial decision-maker who will conduct an objective evaluation of all relevant evidence, including both inculpatory and exculpatory evidence.
- The role of the hearing officer is to provide all parties with an equitable opportunity to be heard at the hearing; to serve as a safeguard on the reliability and accuracy of the investigative process; to give appropriate consideration to victim impact and mitigating factors; and to reach a full and fair determination of any sanction, should there be a finding of responsibility.



The Process for Resolving Complaints Against Staff: The Hearing Officer (cont'd)

- The hearing officer will have received **appropriate training to participate as an informed and impartial decision-maker**; this training will include the content provided to investigators, as well as training on any technology to be used at a live hearing and on issues of relevance of questions and evidence, including questions about prior sexual history.
- The hearing officer may reach credibility determinations but may not base credibility determinations on a person's status as a Complainant, Respondent or witness.
- The **Complainant and Respondent may raise a challenge for actual bias or conflict of interest** as it relates to the hearing officer to the Title IX Coordinator before the review begins.
- The Title IX Coordinator shall render a determination in writing, which shall be final.



The Process for Resolving Complaints Against Staff: **The Scope of the Hearing**

The hearing officer will determine:

- (a) whether there is sufficient evidence, by a preponderance of the evidence, to support a finding of responsibility as to each element of each Policy violation at issue.
- (b) If there is a finding of responsibility for any violations, the hearing officer will issue a determination as to the appropriate sanction. The hearing officer may consult with the Respondent's supervisor, division or department head, the HR representative, or the Title IX Coordinator in determining the appropriate sanction.



The Process for Resolving Complaints Against Staff: The Hearing Officer and the Hearing Coordinator

- The hearing officer may be assisted by an administrative, non-voting **Hearing Coordinator**, who will assist the hearing officer in the administration of the hearing process, including procedural matters and decisions leading up to the hearing, drafting communications related to the hearing, determinations about information that will be considered or not, appropriate and inappropriate lines of questioning based on relevance, and the overall decorum and conduct of the proceedings.
- The Hearing Coordinator may be a Dartmouth employee or an external professional.

HEARINGS PRACTICAL IMPLEMENTATION

Personal Preparation: Be Objective

- Identify and set aside personal biases and prejudices
- Be careful to avoid making assumptions as to how a person “should” react
- Avoid putting oneself in the shoes of the complainant or the respondent
- Recognize emotional impact, if any, but do not allow emotion to impact fair and impartial fact-finding

Personal Preparation: Be Professional

- Maintain an appropriate demeanor at all times
- Be polite and respectful to all parties
- Maintain appropriate sensitivity to presentation of difficult information
- Prepare for the hearing by reading and annotating all materials
 - Outline areas of inquiry
 - Consider wording of questions ahead of time

Standard of Proof



Beyond a Reasonable Doubt

Clear and Convincing Evidence

Preponderance of the Evidence

Some Evidence

The Preponderance of the Evidence Standard

- More likely to be true than not
- More probable than not
- The greater weight of the evidence
- Tipping the scale ever so slightly
- 51 %
- Based on the more convincing evidence and it's probable truth or accuracy, not on the amount
- Quality of the evidence, not quantity
- NOT beyond a reasonable doubt

Advisors

- Advisors have a speaking role
- Establish rules of decorum and conduct in the hearing via opening instructions
- Establish tone of professionalism and respectful treatment of parties and advisors
- Promptly and firmly redirect advisors who do not abide by the guidelines you set forth

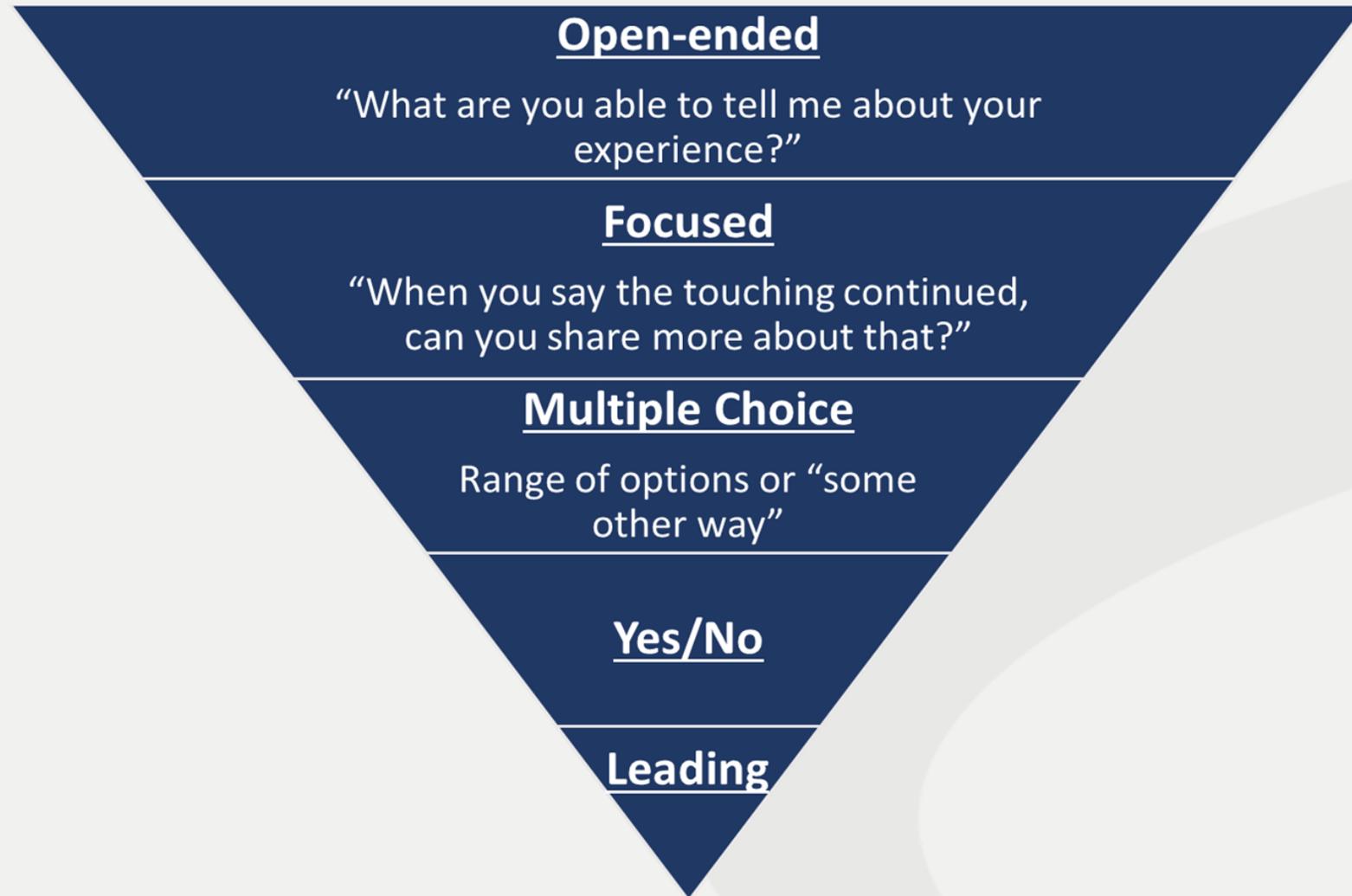
Participation Techniques

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

What to Ask

- Do I need to know the information?
- When questions arise, it can be helpful to walk yourself through the following set of questions:
 - Will an answer to my question help me decide the appropriate outcome or sanction?
 - Will getting an answer to this question influence my decision?

The Continuum Approach



DELIBERATIONS

Deliberation Techniques

- Gather all documents and exhibits in advance
- Use cross-referencing grids/matrices
- Identify specific elements of alleged misconduct from policy definitions
- Begin by identifying areas of agreement as to evidence
- Identify conflicts and prioritize
- Discuss each conflict individually
- Articulate your position and support it from the evidence



The Process for Resolving Complaints Against Students: Determination by the Hearing Panel

- After the Hearing Panel has concluded its review of the Final Investigative Report and any additional information provided during the hearing, the Hearing Panel shall convene to deliberate and render a determination.
- The Hearing Panel shall deliberate to determine whether the evidence presented establishes, by a preponderance of the evidence, that the Respondent engaged in Prohibited Conduct in violation of this policy.
- If the Hearing Panel determines that the Respondent is responsible for one or more violations of the Policy or other applicable Dartmouth policies, it will then deliberate as to an appropriate sanction as described below.
- If the Hearing Panel determines that the Respondent is not responsible for one or more violations of the Policy or other applicable Dartmouth policies, the Chair shall prepare a written decision and rationale on behalf of the Hearing Panel, which shall be provided simultaneously to the parties and the Title IX Coordinator.



The Process for Resolving Complaints Against Faculty: **Determination by the AHHC**

- After the AHHC has concluded its review of the investigative report and any additional information provided during the hearing, the AHHC shall convene to **deliberate by majority vote** to determine whether the evidence presented is sufficient, by a preponderance of the evidence, to support a finding that the Respondent engaged in Prohibited Conduct in violation of this policy.
- If the AHHC reaches a determination that the Respondent is responsible for one or more violations of the Policy or other applicable Dartmouth policies, the AHHC will then determine an appropriate sanction.
- In reaching this determination, the AHHC may consult with the Title IX Coordinator or the Respondent's Dean.



The Process for Resolving Complaints Against Staff: Determination by the Hearing Officer

- After the hearing officer has concluded its review of the investigation report and any additional information provided during the hearing, the hearing officer shall render a determination.
- The hearing officer shall determine whether the evidence presented establishes, by a preponderance of the evidence, that the Respondent engaged in Prohibited Conduct in violation of this policy.
- If the hearing officer determines that the Respondent is responsible for one or more violations of the Policy or other applicable Dartmouth policies, the hearing officer will determine an appropriate sanction as described below.
- If the hearing officer determines that the Respondent is not responsible for one or more violations of the Policy or other applicable Dartmouth policies, the hearing officer shall prepare a written decision and rationale, which shall be provided simultaneously to the parties and the Title IX Coordinator.

SANCTIONS

Discretion in Sanctioning

- Upon reaching a determination that a respondent is responsible for sexual harassment, the final regulations **do not restrict a recipient's discretion** to impose a disciplinary sanction against the respondent, including suspension, expulsion, or other removal from the recipient's education program or activity.

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

Discretion in Sanctioning

- For reasons described elsewhere in this preamble, the Department **does not require any particular disciplinary sanctions** against respondents, because these Title IX regulations are focused on requiring remedies for victims, leaving disciplinary decisions to recipients' discretion.

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

Discretion in Sanctioning

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

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

Discretion in Sanctioning

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

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

SANCTIONS FOR STUDENT RESPONDENTS



The Process for Resolving Complaints Against Students:

The Sanctioning Process and Decision

- If the Hearing Panel determines that the Respondent is responsible for one or more violations of the Policy or other applicable Dartmouth policies, then, following the hearing on the finding of responsibility, the Hearing Panel will then deliberate as to an appropriate sanction.
- The Policy prohibits a broad range of conduct, all of which is serious in nature. In keeping with Dartmouth's commitment to foster an environment that is safe, inclusive, and free from discrimination and harassment, the **Hearing Panel has great latitude in the imposition of sanctions** tailored to the facts and circumstances of each report, the impact of the conduct on the Complainant and surrounding community, and accountability for the Respondent.
- Sanctions should support Dartmouth's educational mission and federal obligations. Sanctions may include educational, restorative, rehabilitative, and punitive components.
- Some conduct, however, is so egregious in nature, harmful to the individuals involved, or so deleterious to the educational process that it requires severe sanctions, including suspension or separation from Dartmouth.



The Process for Resolving Complaints Against Students: The Sanctioning Process and Decision (cont'd)

- The Hearing Panel may solicit information from the Complainant, the Respondent, the Title IX Coordinator, and any other Dartmouth administrator who can provide information relevant to a determination regarding potential sanctions, including information about, any previous violations of Dartmouth policies.
- The Hearing Panel may also review any written **impact or mitigation statement** submitted by the Complainant or Respondent.



The Process for Resolving Complaints Against Students:

The Sanctioning Process and Decision (cont'd)

In determining the appropriate sanction, the Hearing Panel shall consider the following factors:

- the nature and context of the conduct at issue;
- the impact of the conduct on the Complainant;
- the impact or implications of the conduct on the community or Dartmouth;
- prior misconduct for which the Respondent has been found responsible, including the Respondent's relevant prior discipline history, both at Dartmouth or elsewhere (if available), including criminal convictions;
- whether the Respondent has accepted responsibility for the conduct;
- maintenance of a safe and respectful environment conducive to learning, including whether there is a continued hostile environment on campus caused by the Respondent's conduct;
- the presence or absence of bias as a motivation for the Respondent's conduct;
- protection of Dartmouth community requiring extended protective measures or other sanctions; and
- any other mitigating, aggravating, or compelling circumstances in order to reach a just and appropriate resolution in each case.



The Process for Resolving Complaints Against Students:

The Sanctioning Process and Decision (cont'd)

Sanctions may be imposed individually or in combination. For violations of this policy, the following sanctions may be imposed:

- fine;
- restitution;
- educational/counseling requirement;
- warning;
- reprimand;
- Dartmouth probation;
- no-contact order;
- restriction from specific Dartmouth programs or activities;
- housing restriction/relocation;
- restriction from Dartmouth employment;
- suspension;
- separation/expulsion;
- organizational loss of Dartmouth recognition;
- organizational removal from Dartmouth-owned housing; or
- loss of organizational insurance coverage.



The Process for Resolving Complaints Against Students: **The Sanctioning Process and Decision (cont'd)**

The sanction shall be **separation/expulsion** from Dartmouth where:

- the finding of responsibility reflects that the Respondent, by use of physical force, threat, or providing alcohol or drugs to the Complainant with the intention to induce a state of incapacitation, engaged in either
 - any form of sexual penetration (anal, oral, or vaginal), however slight, by a body part or object; or
 - oral-genital, oral-anal, or genital-genital contact; or
 - the finding of responsibility reflects that the Respondent engaged in any form of sexual penetration, oral-genital contact, oral-anal contact, or genital-genital contact, as described above, and was motivated by bias on account of race, color, religion, sex, age, sexual orientation, gender identity or expression, national origin, disability, or military/veteran status; or
 - the Respondent has previously been found responsible for Sexual Assault.



The Process for Resolving Complaints Against Students: The Sanctioning Process and Decision (cont'd)

- **Sanctions will be imposed immediately.** If a Respondent is found responsible and the sanction includes separation, they will be immediately removed from campus residentially and (depending on circumstances, and at the discretion of the Title IX Office, consulting as necessary with other members of the Title IX Team, if a Team has been appointed) either severely restricted in their movements on campus (e.g. only able to attend classes and labs) or in Dartmouth's Education Program or Activity or barred completely during the entirety of the appeal process.
- In cases adjudicated prior to the last day of classes, if the final sanction is separation from Dartmouth (i.e. suspension, suspension with conditions, or expulsion), the granting of credit for the semester and/or the awarding of a degree will be at the discretion of Dartmouth.
- At any time, for example, for cases where the outcome has not been determined prior to the last day of classes, Dartmouth may place an administrative hold on the Respondent's transcript, make a transcript notification, or defer or withhold the award of the Respondent's degree.

SANCTIONS FOR FACULTY RESPONDENTS



The Process for Resolving Complaints Against Faculty: **The Sanctioning Process and Decision**

- The AHHC may determine that one or more sanctions should be imposed, including, but not limited to, oral or written warning, disciplinary probation, suspension, termination of a term appointment or tenured employment, training, guidance, adjustment of supervisory or evaluative responsibilities, and measures to protect health and safety.
- In reaching a recommendation of termination of a term appointment or tenured employment, as the gravest of sanctions with irrevocable consequences for a Respondent's academic career, the AHHC must carefully consider and explain why a lesser sanction is insufficient to achieve the goals of imposing sanctions as described above.



The Process for Resolving Complaints Against Faculty: The Sanctioning Process and Decision (cont'd)

- The AHHC may solicit information from the Complainant, the Respondent, and any other Dartmouth administrator who can provide information relevant to a determination regarding potential sanctions, including information about, any previous violations of Dartmouth policies.
- The AHHC may also review any written **impact or mitigation statement** submitted by the Complainant or Respondent.



The Process for Resolving Complaints Against Faculty: The Sanctioning Process and Decision (cont'd)

In determining the appropriate sanction, the AHHC shall consider the following factors:

- the nature and context of the conduct at issue;
- the impact of the conduct on the Complainant;
- the impact or implications of the conduct on the community or Dartmouth;
- prior misconduct for which the Respondent has been found responsible, including the Respondent's relevant prior discipline history, both at Dartmouth or elsewhere (if available), including criminal convictions;
- whether the Respondent has accepted responsibility for the conduct;
- maintenance of a safe and respectful environment conducive to learning, including whether there is a continued hostile environment on campus caused by the Respondent's conduct;
- the presence or absence of bias as a motivation for the Respondent's conduct;
- protection of Dartmouth community requiring extended protective measures or other sanctions; and
- any other mitigating, aggravating, or compelling circumstances in order to reach a just and appropriate resolution in each case.

SANCTIONS FOR STAFF RESPONDENTS



The Process for Resolving Complaints Against Staff: The Sanctioning Process and Decision

- If the hearing officer determines that the Respondent is responsible for one or more violations of the Policy or other applicable Dartmouth policies, the hearing officer will then determine an appropriate sanction. In reaching this determination, the hearing officer may consult with the Title IX Coordinator, the HR representative or the Respondent's division or department head.
- The Policy prohibits a broad range of conduct, all of which is serious in nature. In keeping with Dartmouth's commitment to foster an environment that is safe, inclusive, and free from discrimination and harassment, **the hearing officer has great latitude in the imposition of sanctions** tailored to the facts and circumstances of each report, the impact of the conduct on the Complainant and surrounding community, and accountability for the Respondent.
- Sanctions should support Dartmouth's educational mission and federal obligations.
- Some conduct, however, is so egregious in nature, harmful to the individuals involved, or so deleterious to the educational process that it requires severe sanctions, including suspension or separation from Dartmouth.



The Process for Resolving Complaints Against Staff: The Sanctioning Process and Decision (cont'd)

- The hearing officer may solicit information from the Complainant, the Respondent, and any other Dartmouth administrator who can provide information relevant to a determination regarding potential sanctions, including information about, any previous violations of Dartmouth policies.
- The hearing officer may also review any written **impact or mitigation statement** submitted by the Complainant or Respondent



The Process for Resolving Complaints Against Staff: The Sanctioning Process and Decision (cont'd)

In determining the appropriate sanction, the hearing officer shall consider the following factors:

- the nature and context of the conduct at issue;
- the impact of the conduct on the Complainant;
- the impact or implications of the conduct on the community or Dartmouth;
- prior misconduct for which the Respondent has been found responsible, including the Respondent's relevant prior discipline history, both at Dartmouth or elsewhere (if available), including criminal convictions;
- whether the Respondent has accepted responsibility for the conduct;
- maintenance of a safe and respectful environment conducive to learning, including whether there is a continued hostile environment on campus caused by the Respondent's conduct;
- the presence or absence of bias as a motivation for the Respondent's conduct;
- protection of Dartmouth community requiring extended protective measures or other sanctions; and
- any other mitigating, aggravating, or compelling circumstances in order to reach a just and appropriate resolution in each case.



The Process for Resolving Complaints Against Staff: The Sanctioning Process and Decision (cont'd)

Sanctions will be imposed immediately. If a Respondent is found responsible and the sanction includes separation, they (depending on circumstances, and at the discretion of the Title IX Office, consulting as necessary with other members of the Title IX Team, if a Team has been appointed) will either be severely restricted in their movements on campus or barred completely during the entirety of the appeal process.

REMEDIES TO THE COMPLAINANT



Included in the Processes for Resolving Complaints Against Students, Faculty and Staff: **Remedies**

- Regardless of the outcome, the [Hearing Panel]/[AHHC]/[Hearing Officer] may recommend to the Title IX Coordinator additional remedies for the Complainant to address the effects of the conduct on the Complainant, restore or preserve the Complainant's access to Dartmouth programs and activities, and restore to the Complainant, to the extent possible, benefits and opportunities lost as a result of the Prohibited Conduct.
- The [Hearing Panel]/[AHHC]/[Hearing Officer] may also identify remedies to address the effects of the conduct on Dartmouth community.
- The Title IX Coordinator will review the remedies recommended by the [Hearing Panel]/[AHHC]/[Hearing Officer] and will consider the appropriateness of continuing Supportive Measures on an ongoing basis.

WRITTEN NOTICE OF OUTCOME



**Included in the Processes for Resolving Complaints
Against Students, Faculty and Staff:
Written Notice of Outcome**

- The [Chair]/[hearing officer] will prepare the written decision and rationale, including the finding of responsibility or non-responsibility, and, if applicable, the sanction and rationale.
- For Student and Staff Respondents: The [Chair]/[hearing officer] will issue the written notice of outcome to the Complainant, the Respondent, and the Title IX Coordinator within ten (10) business days following the conclusion of the deliberations.
- For Faculty Respondents: The Chair will issue the written notice of outcome to the Provost for consideration, with copies to the Parties, the Respondent's Dean, and the Title IX Coordinator within ten (10) days of the hearing.



Included in the Processes for Resolving Complaints Against Students, Faculty and Staff: **Written Notice of Outcome**

The **notice of outcome** will include:

- Identification of the allegations potentially constituting Prohibited Conduct;
- A description of the procedural steps taken from the receipt of the Formal Complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held;
- Findings of fact supporting the determination;
- Conclusions regarding the application of the Policy to the facts;
- A statement of, and rationale for, the result as to each alleged policy violation, including a determination regarding responsibility, any disciplinary sanctions, and whether remedies designed to restore or preserve equal access to the recipient's education program or activity will be provided to the Complainant; and
- The procedures and permissible bases for the Complainant and Respondent to appeal.