

Title IX Training: For Appellate Authorities

Presented By:

The Institutional Response Group | Cozen O'Connor

Gina Maisto Smith, Chair

Leslie M. Gomez, Vice Chair

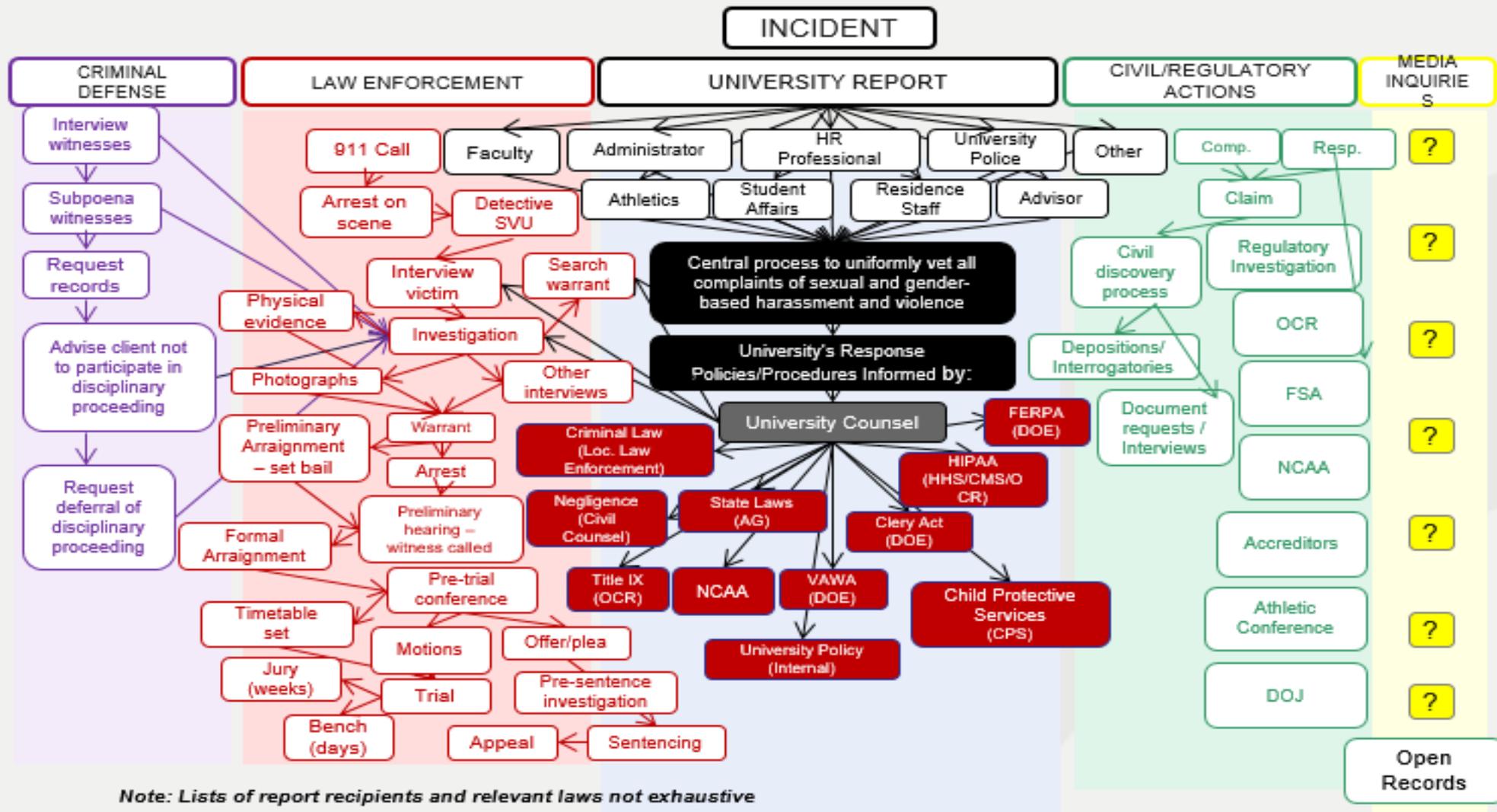
Peter C. Lim, Counsel

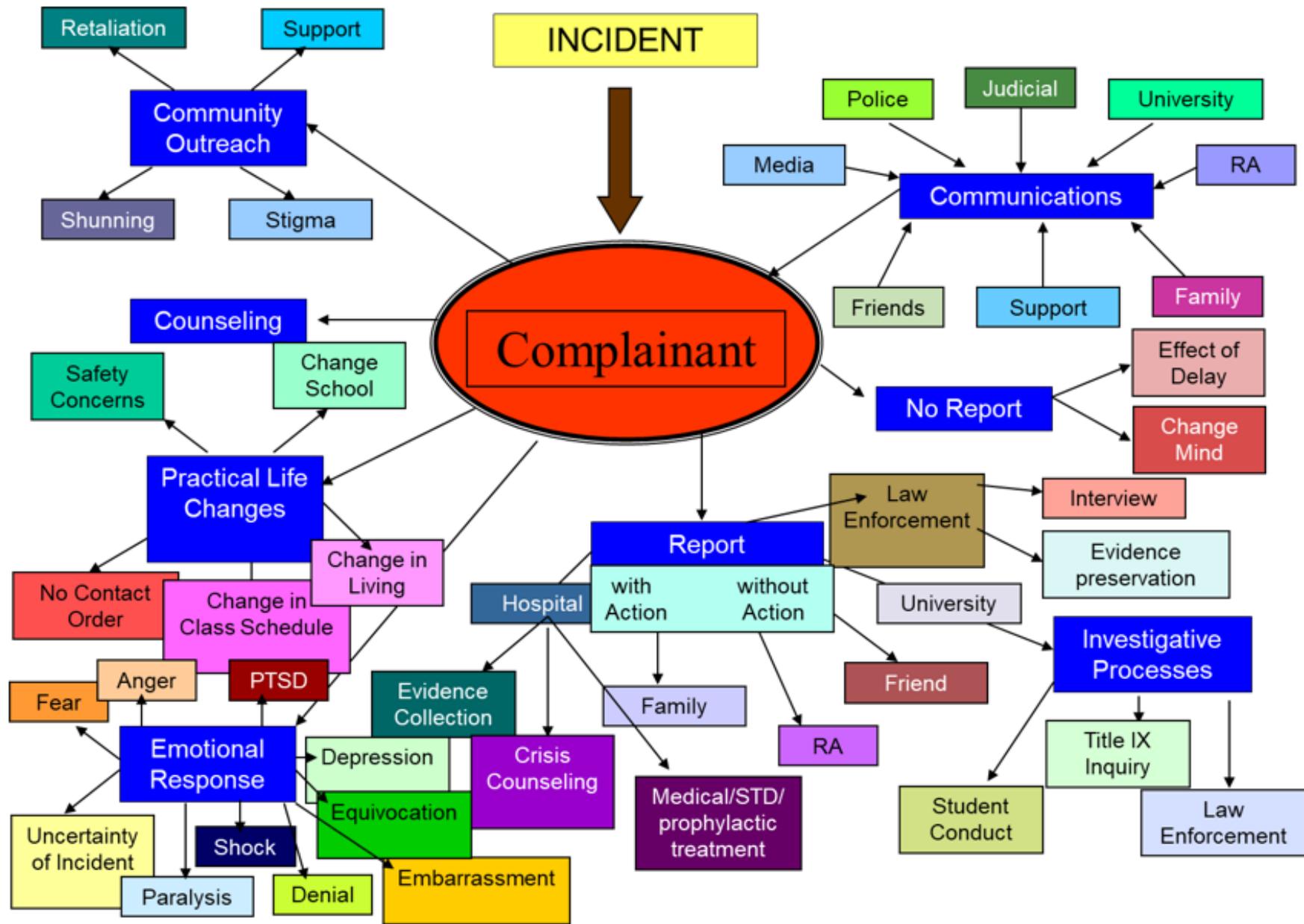
Dartmouth College

October 6-7, 2020

FRAMING THE CONTEXT

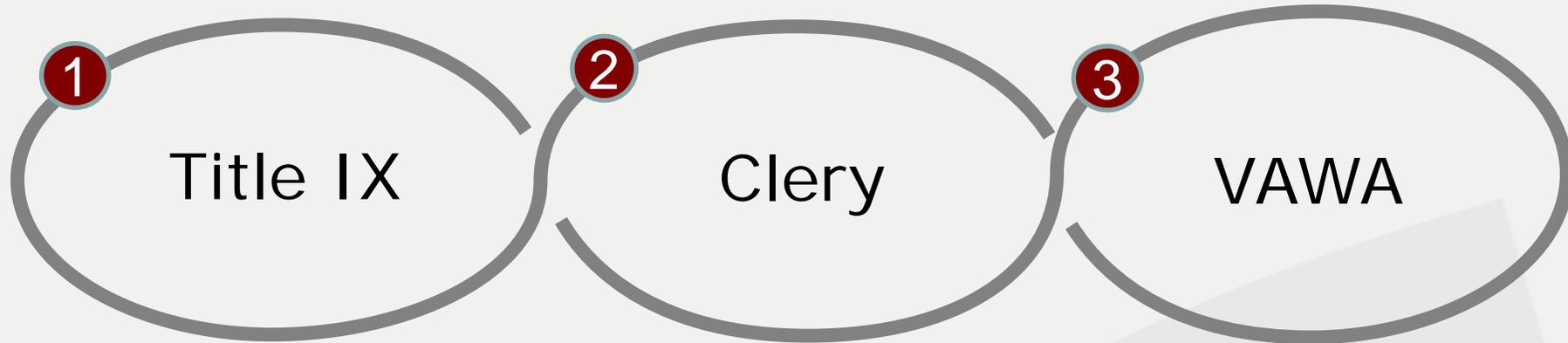
The Legal Context







Federal Regulatory Framework



Title IX of the Education Amendments of 1972

- Prohibits sex discrimination in educational institutions that receive federal funds

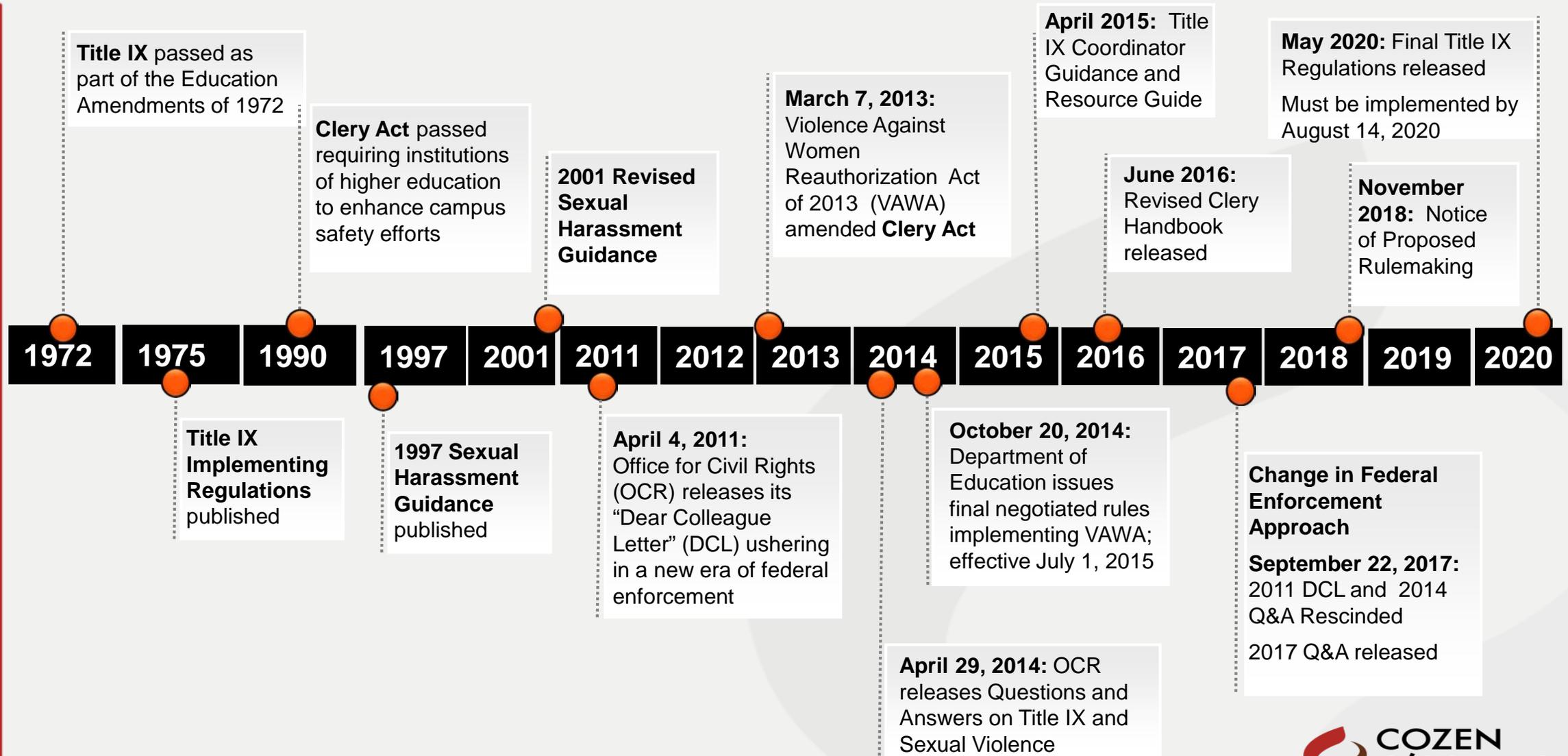
The Jeanne Clery Act (1990)

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

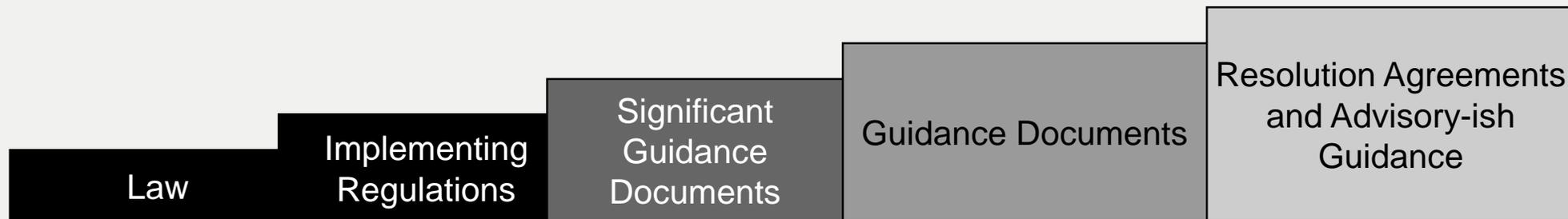
The Violence Against Women Reauthorization Act of 2013

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

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- 2011 Dear Colleague Letter (Rescinded)
- 2014 Q&A (Rescinded)
- 2017 Q&A (Rescinded)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- 2001 Revised Sexual Harassment Guidance (Rescinded)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 - Title IX Coordinator (Rescinded)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

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

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

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.

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

Regulations Formally Incorporate Sexual Harassment as a Form of Sex Discrimination

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

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

Regulations: “Legally Binding Obligations”

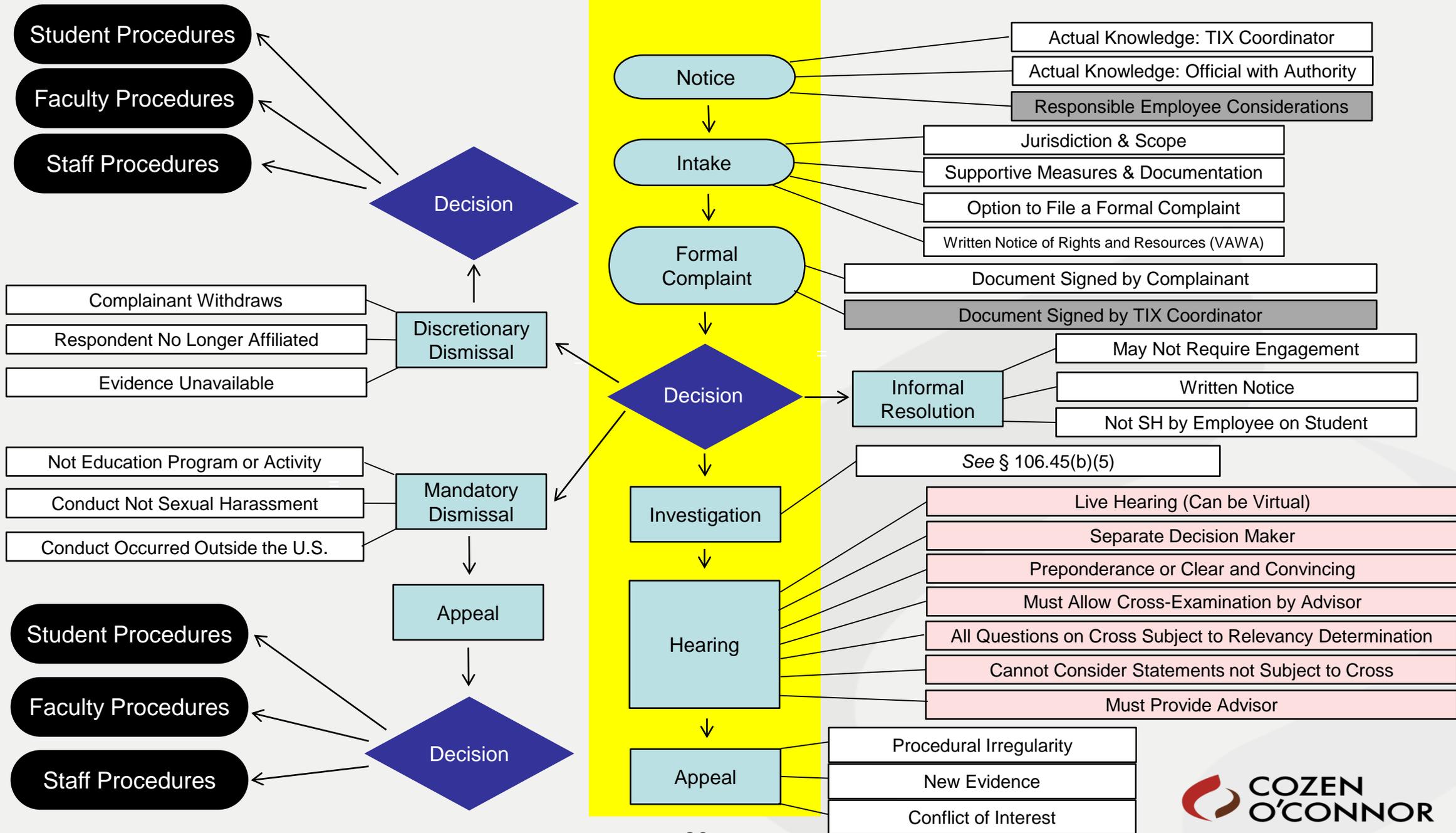
- “Because these final regulations represent the Department’s interpretation of a recipient’s legally binding obligations, **rather than best practices**, recommendations, or guidance, these final regulations focus on **precise legal compliance requirements** governing recipients.”

Regulations: “Best Practices”

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

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

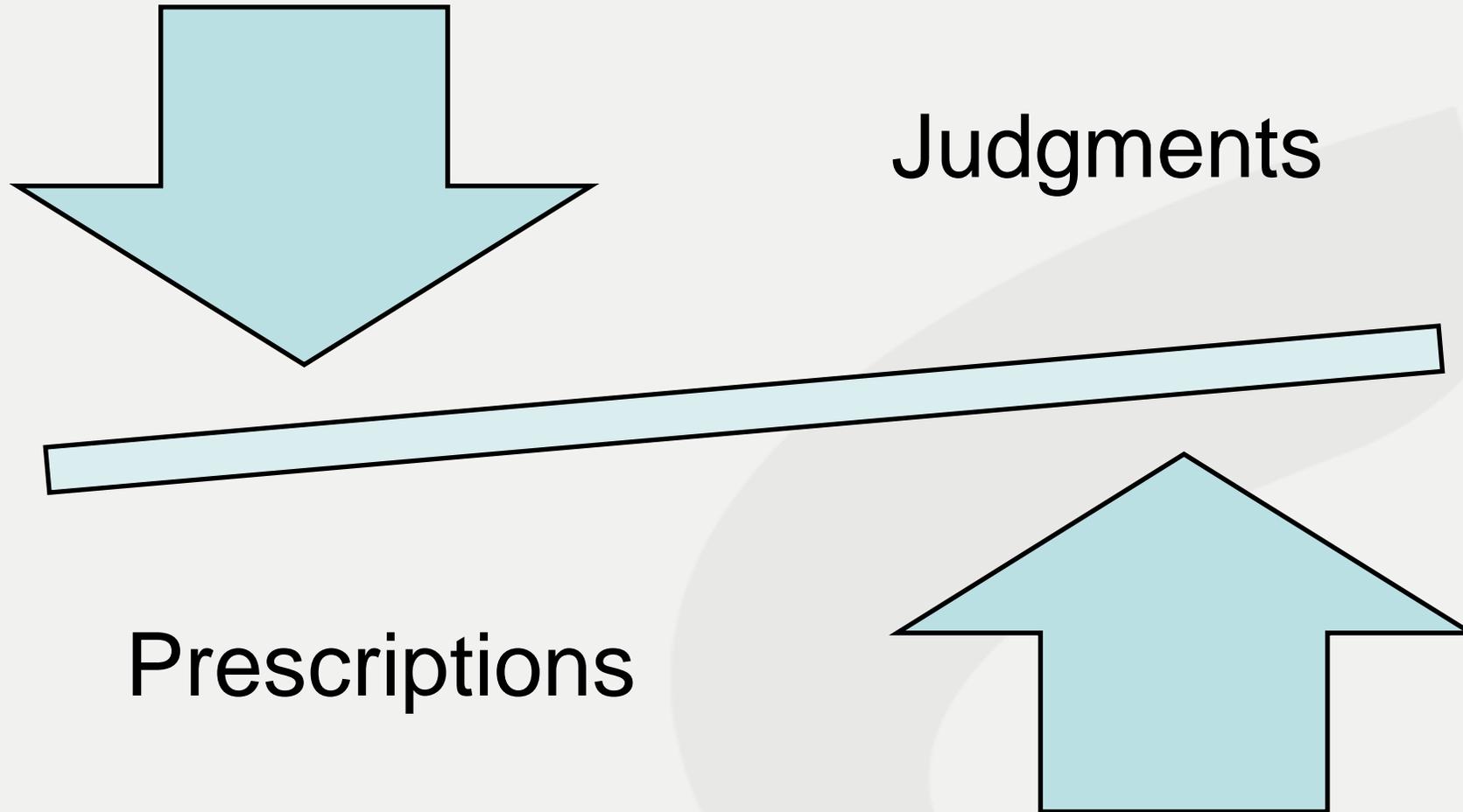
What is (or Should be) the Same

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

What is Significantly Different

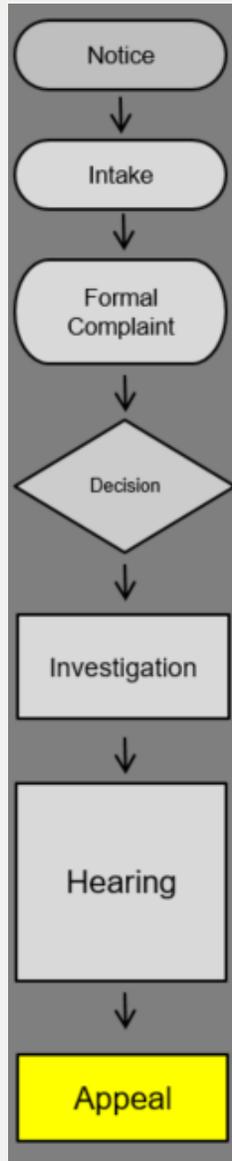
- Jurisdiction/scope
- Live hearing
- Cross examination by the advisor
- Proponent of a statement must be subject to cross-examination
- Recipient must provide advisor

Balancing



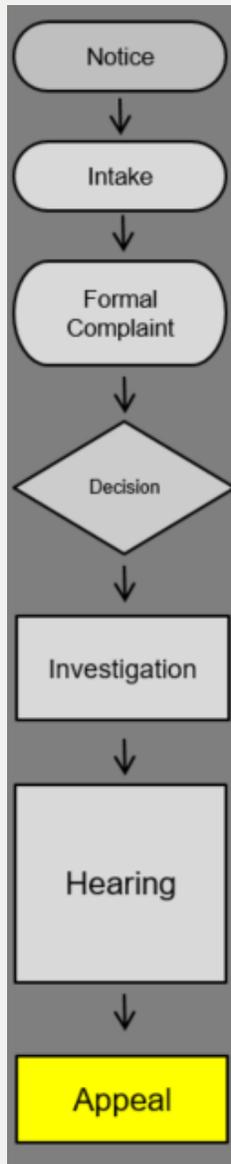
REGULATIONS RE: APPEALS

Appeals



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

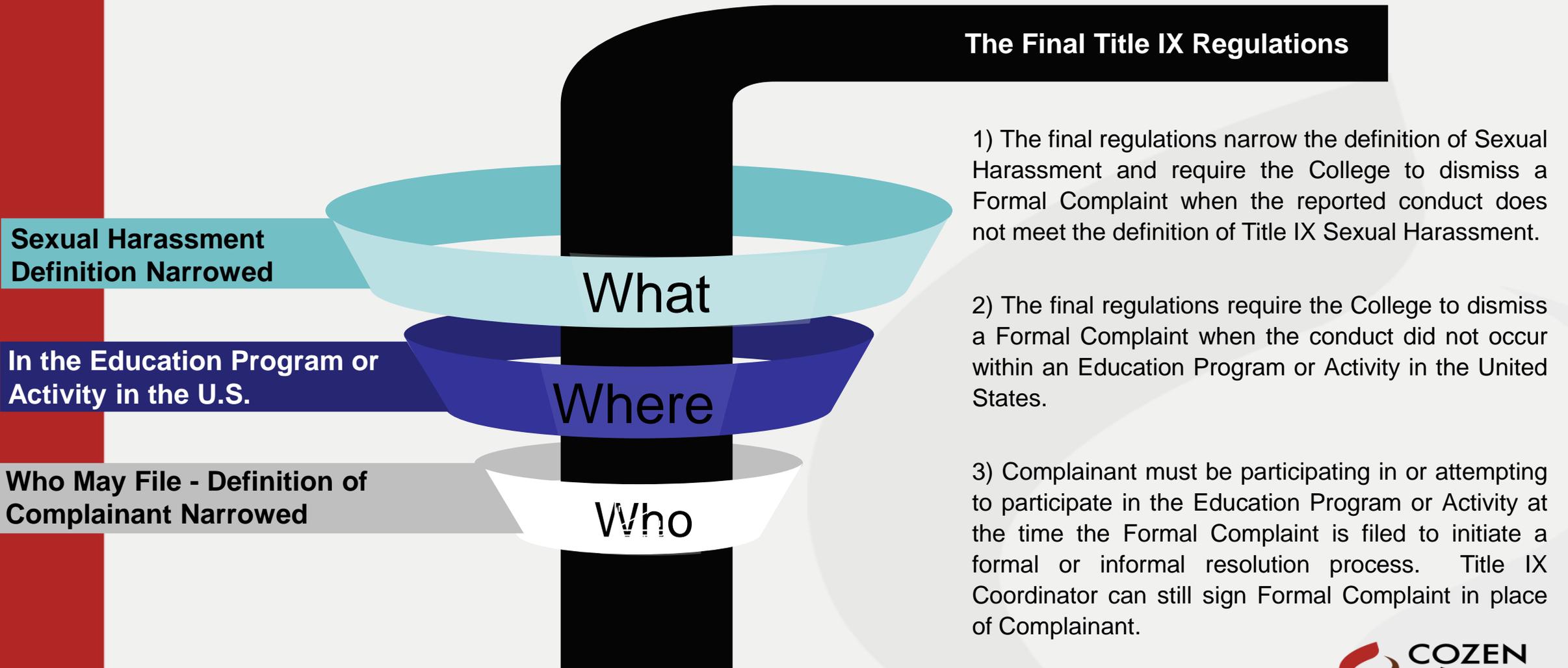
Appeals



- As to all appeals, the recipient must:
 - Notify the other party in writing when an appeal is filed and implement appeal procedures equally for both parties;
 - Ensure that the decision-maker(s) for the appeal is not the same person as the decision-maker(s) that reached the determination regarding responsibility or dismissal, the investigator(s), or the Title IX Coordinator;
 - Ensure that the decision-maker(s) for the appeal complies with the standards set forth in paragraph (b)(1)(iii) of this section [regarding no conflict of interest or bias, and properly trained];
 - Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging the outcome;
 - Issue a written decision describing the result of the appeal and the rationale for the result; and
 - Provide written decision simultaneously.

HIGHLIGHTS OF THE REGULATIONS

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

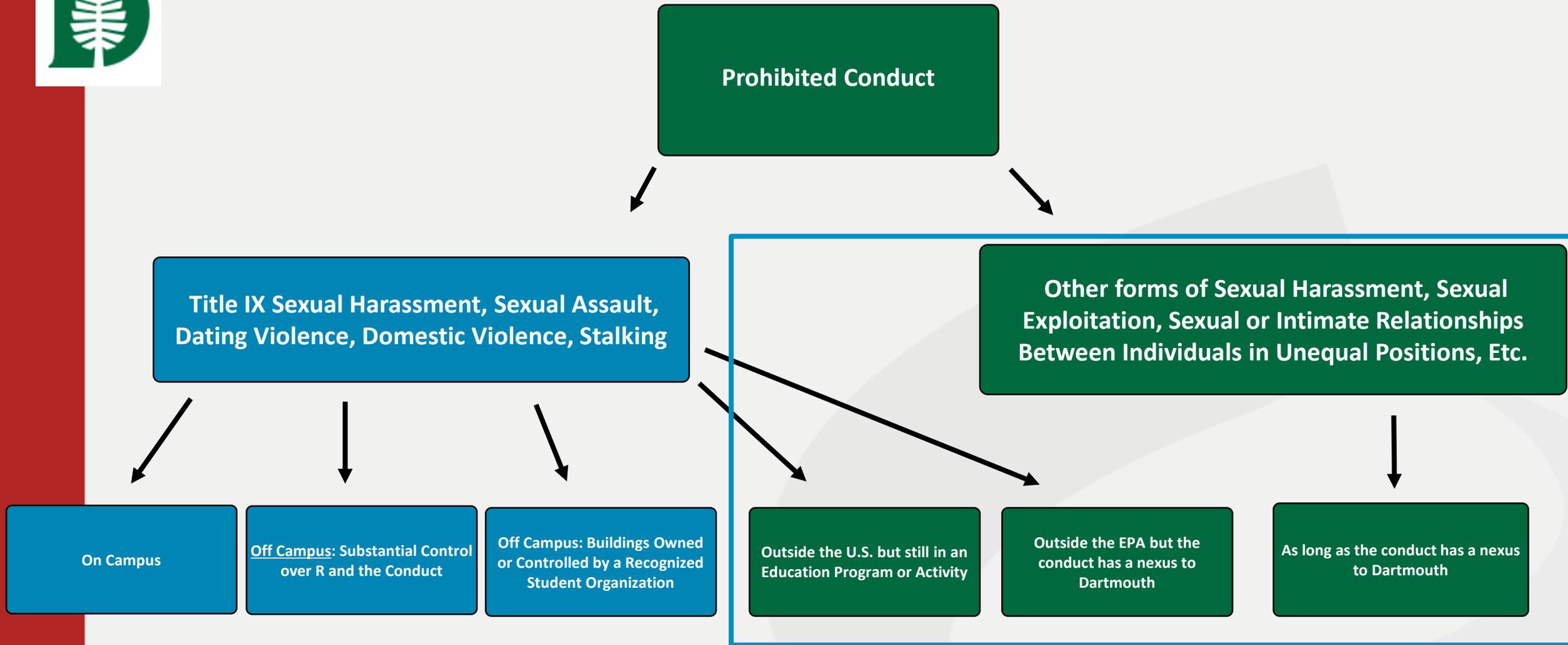
**Core
Tenets:**

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

DARTMOUTH'S SEXUAL AND GENDER- BASED MISCONDUCT POLICY



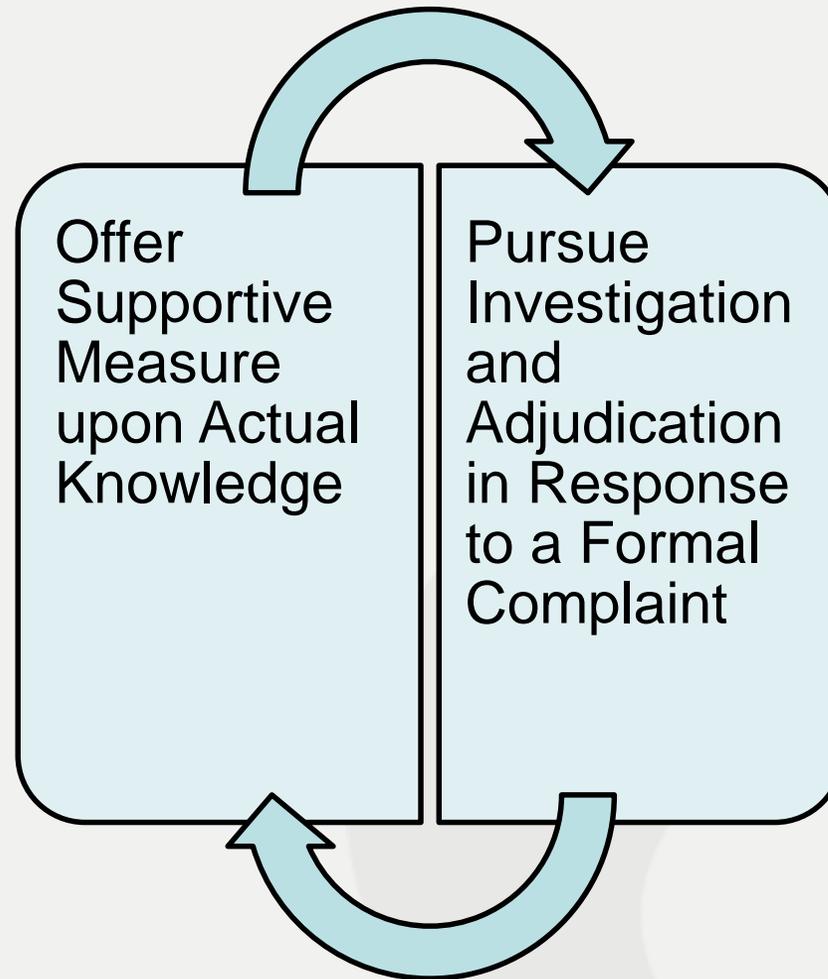
Mapping the Policy: Prohibited Conduct



■ Required by Title IX
□ Not Required by Title IX

REPORTS AND FORMAL COMPLAINTS

Understanding Two Key Provisions

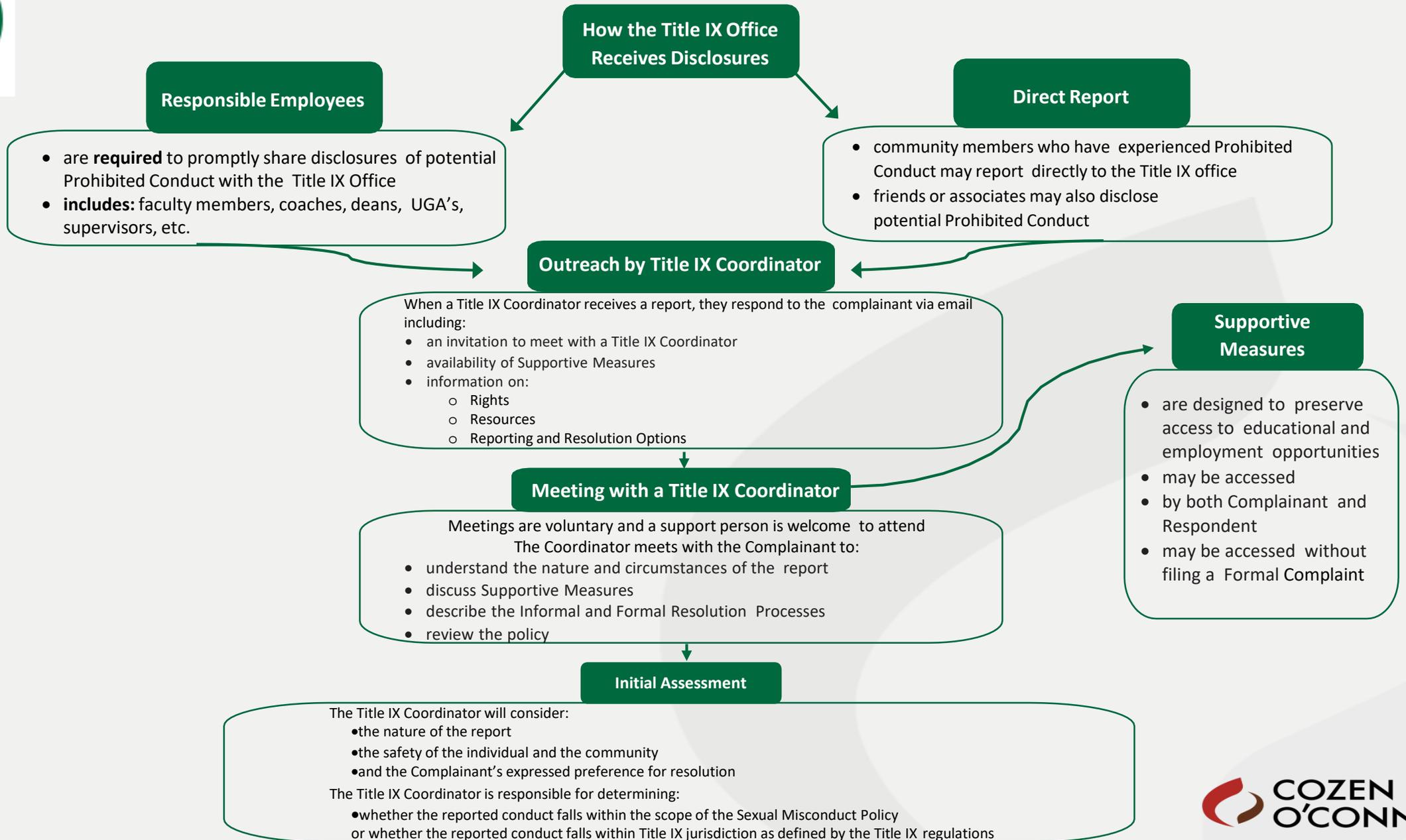


Reports vs. Formal Complaints

- 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.



Title IX Reporting and Assessment 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.

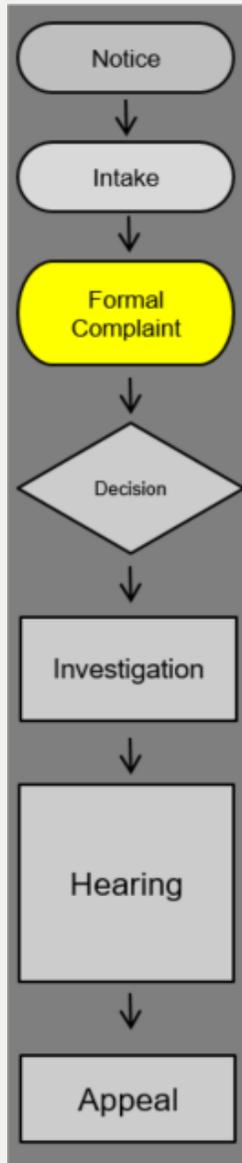
Informal Resolution

- 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

Formal Complaint

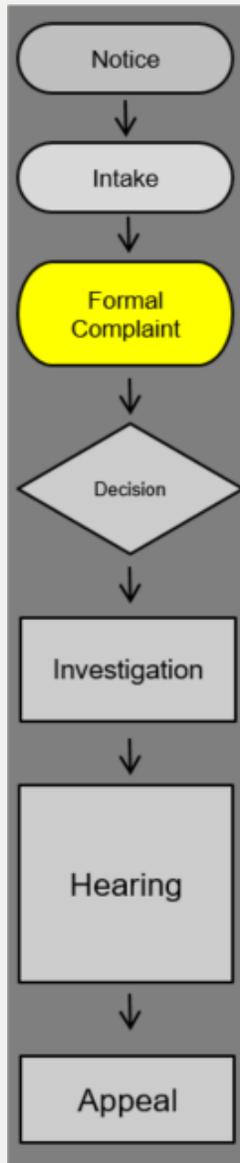


Definition: Document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the recipient investigate the allegation of sexual harassment.

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: 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)

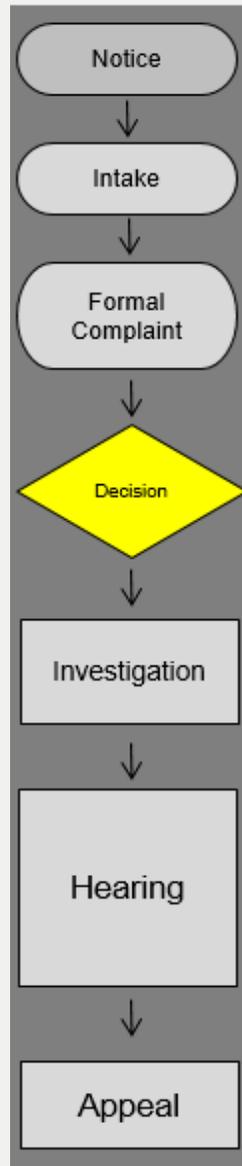
Formal Complaint: Mandatory Dismissal

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

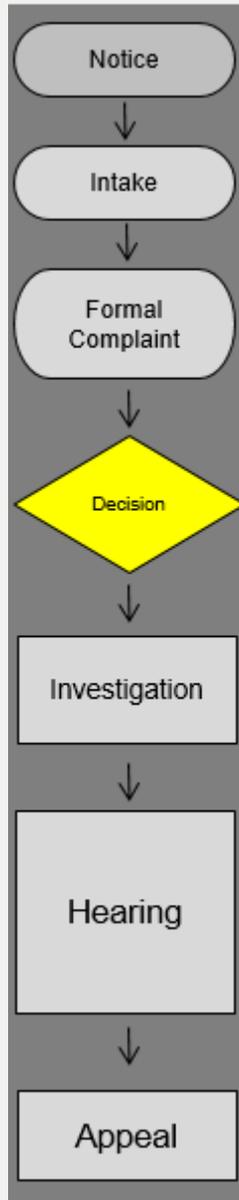
Title IX Regulations issued May 6, 2020; § 106.45(b)(3)



Formal Complaint: Discretionary Dismissal

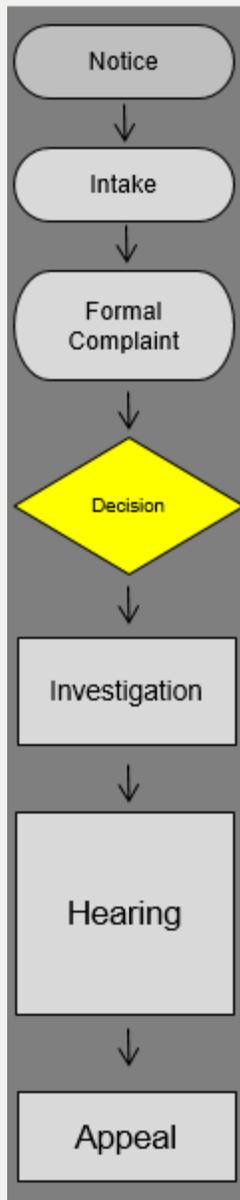
The recipient may dismiss the Formal Complaint or any allegations therein if:

- 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

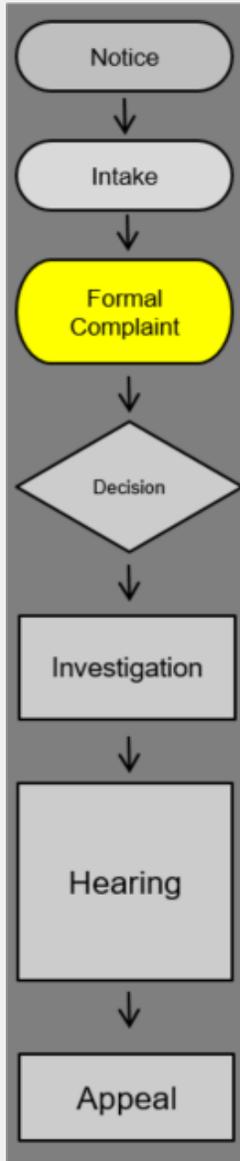


Upon a dismissal required or permitted, the recipient must promptly send **written notice** of the dismissal and reason(s) therefor simultaneously to the parties.

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)

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



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.



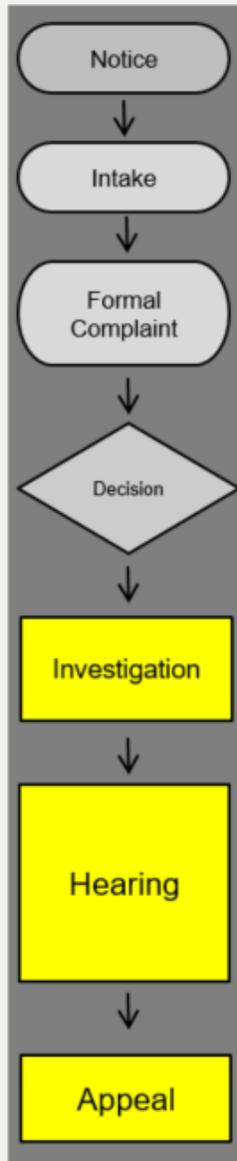
Included in the Processes for Resolving Complaints Against Students, Faculty and Staff: **Consolidation of Formal Complaints**

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.

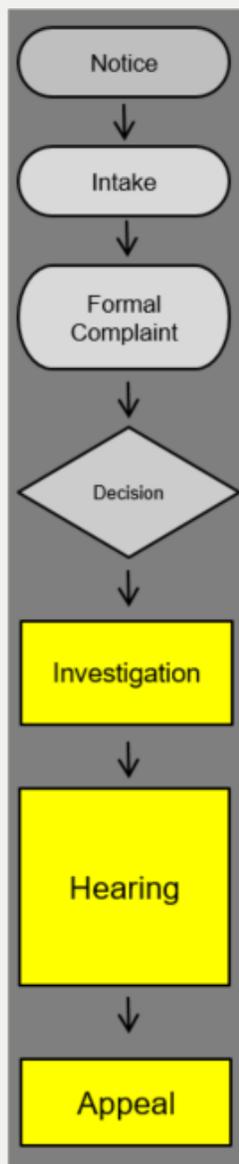
BASIC REQUIREMENTS OF GRIEVANCE PROCESS

Grievance Process: The Basics



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

Basic Requirements



- 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

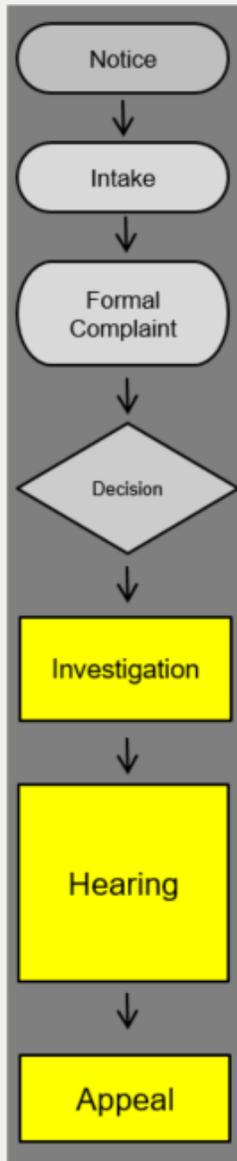
Relevant Regulations Sections:

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

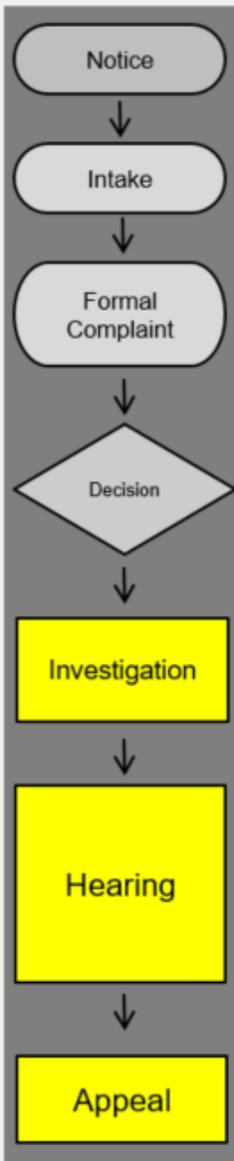
Relevant Regulations Sections:

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

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

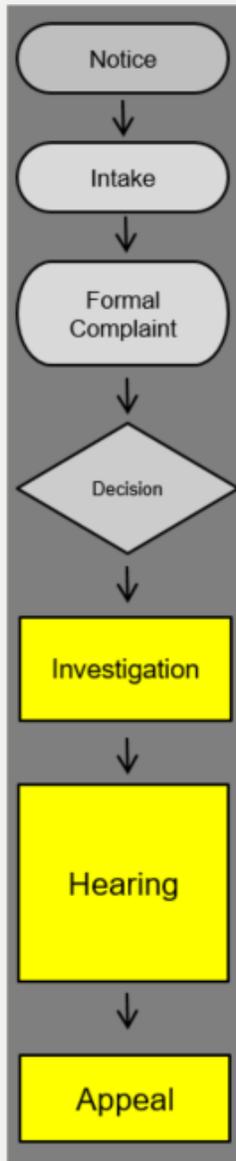
Basic Requirements



- 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)

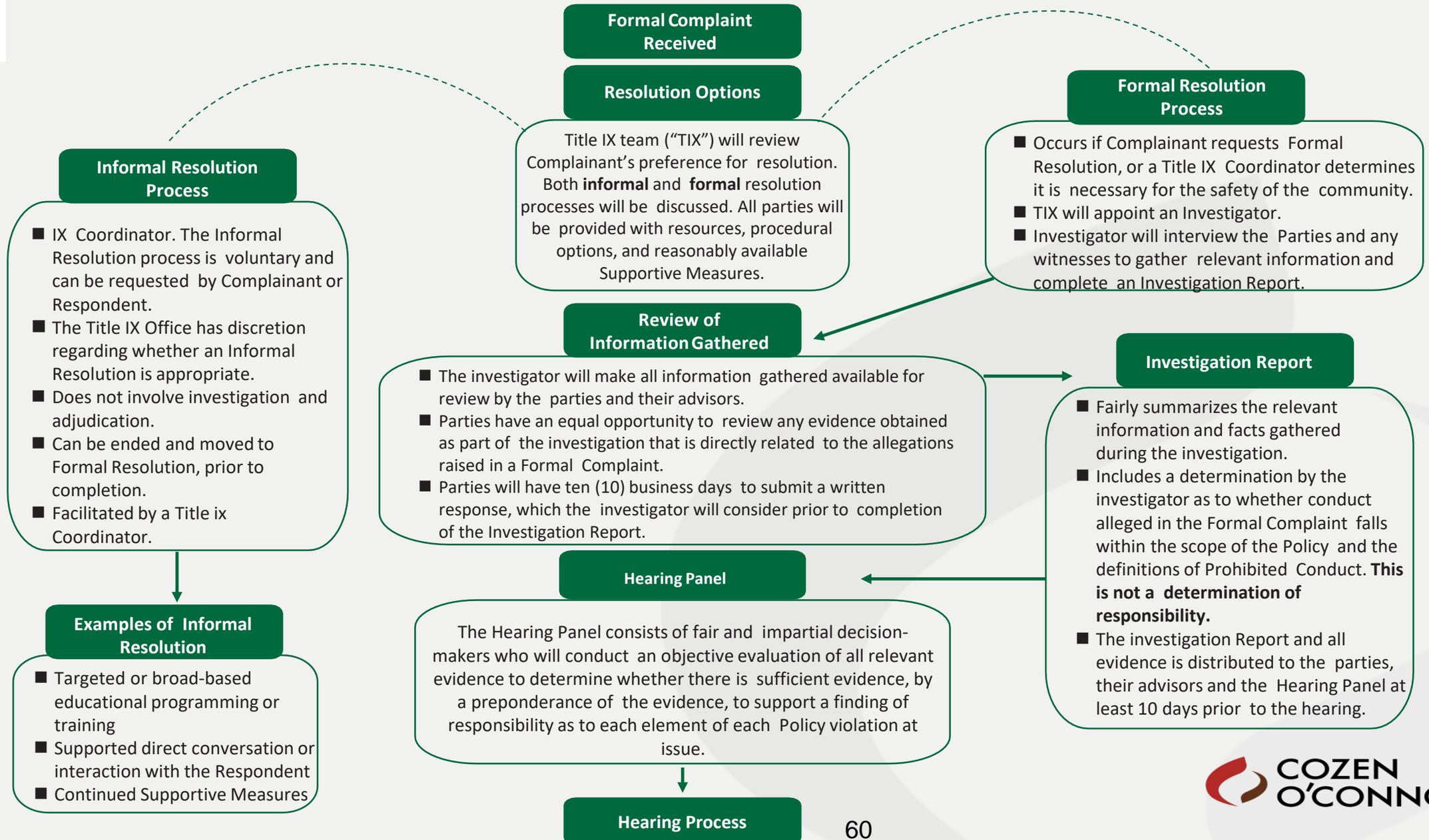
Range of Supportive Measures: § 106.45(b)(1)(ix)

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



PROCESS FOR RESOLVING REPORTS AGAINST STUDENTS

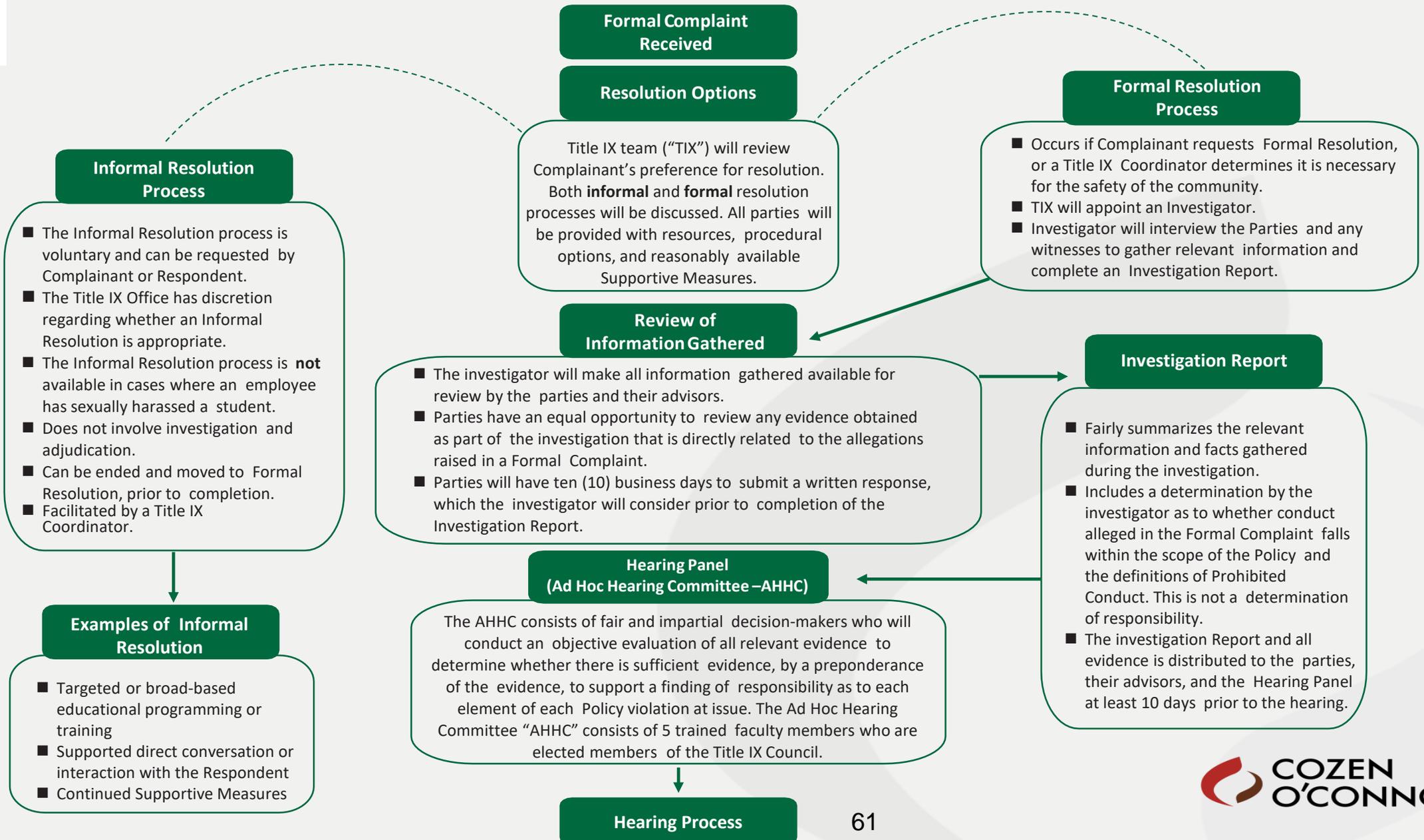
Pursuant to the Dartmouth Sexual and Gender-Based Misconduct Policy*





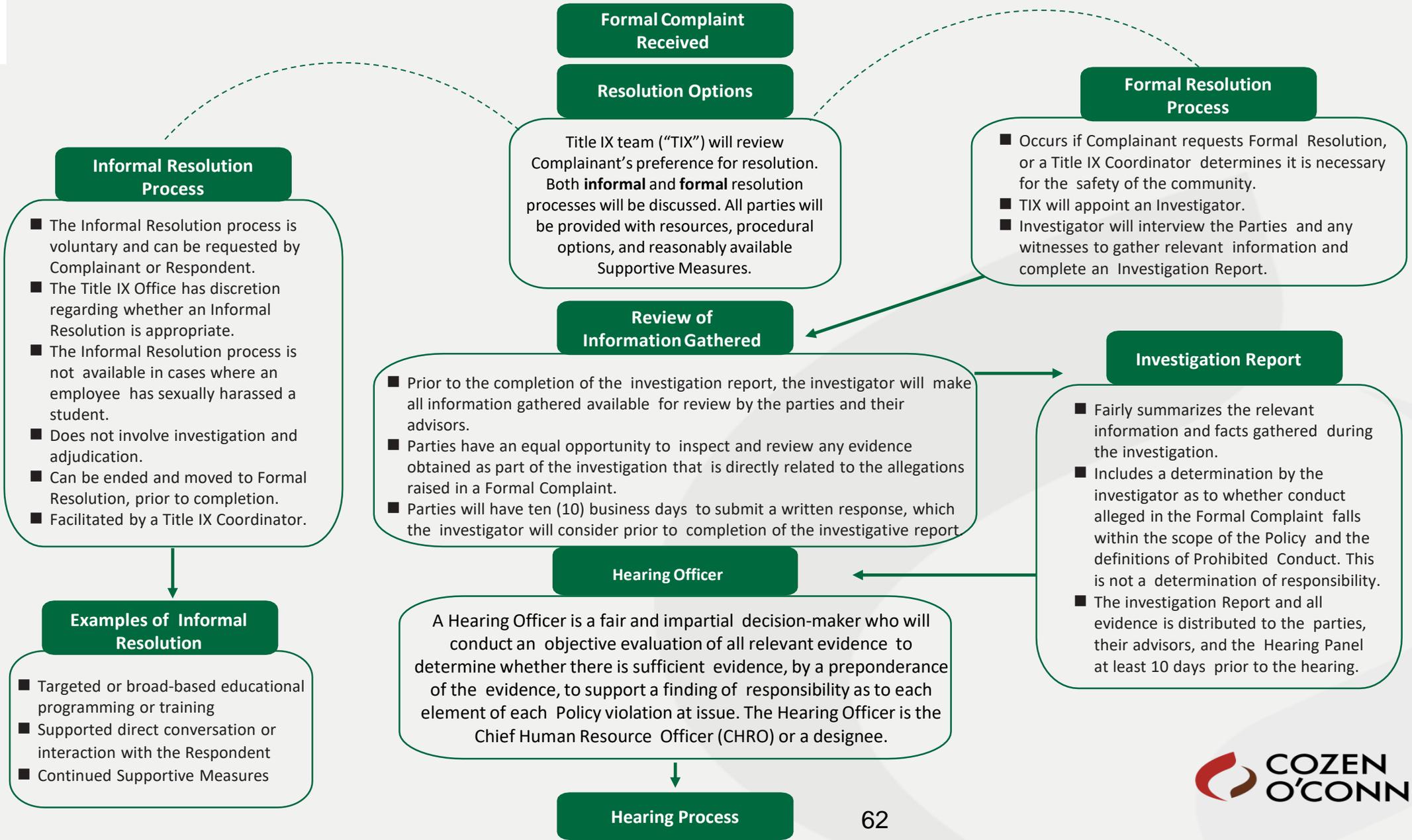
PROCESS FOR RESOLVING REPORTS AGAINST FACULTY

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*



INVESTIGATION



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)**

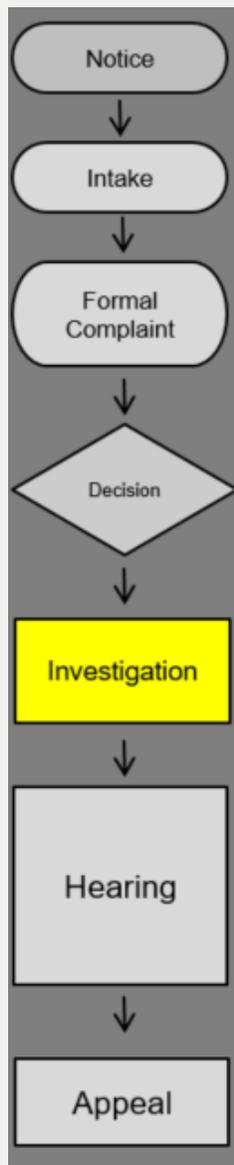
- to timely written notice of meetings at which their presence will be requested or required, including the purpose of the meeting and participants, with sufficient time to prepare;
- to notice of the hearing;
- to question the other party during the hearing, either through the party's Advisor or through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



Dartmouth Investigation Process



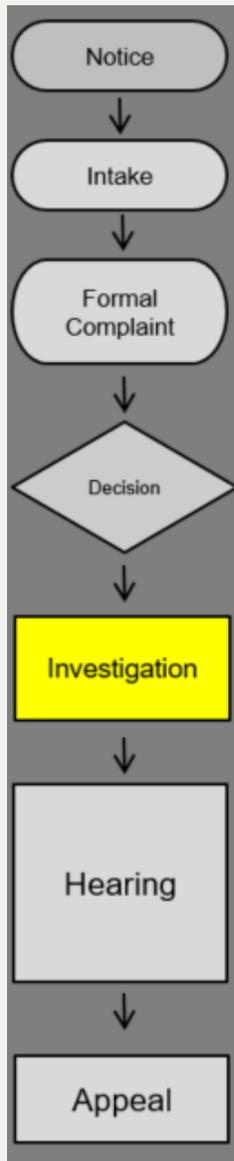
Written Notice of Allegations



- 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:

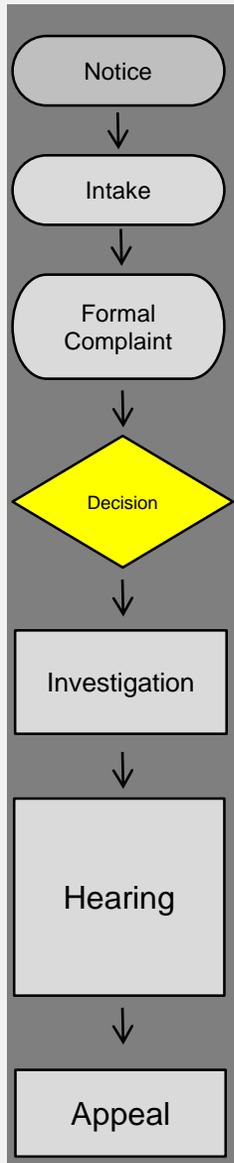
- the respondent is presumed not responsible for the alleged conduct
- a determination regarding responsibility is made at the conclusion of the grievance process

– 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

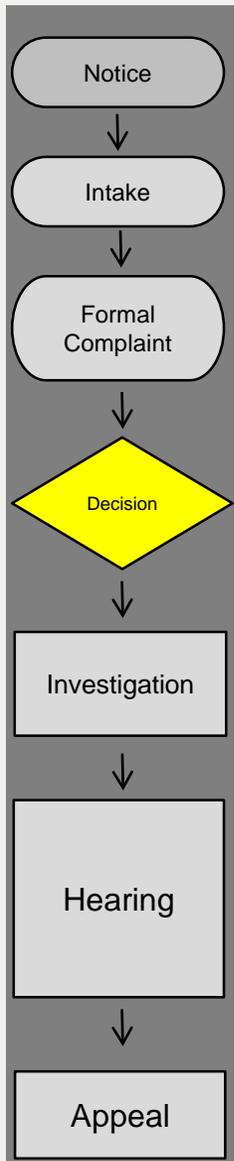
Written Notice of Allegations



- 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

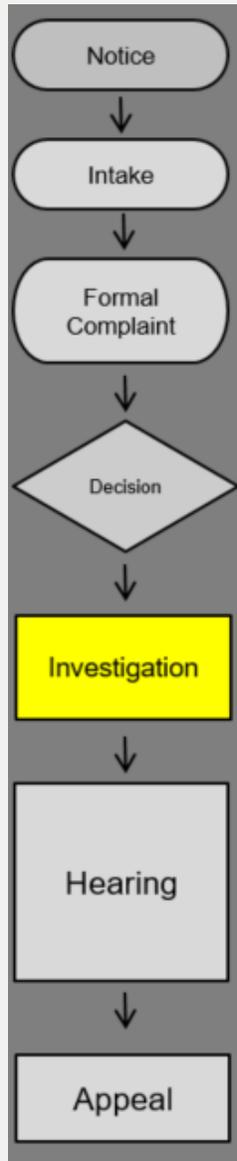
Supplemental Notice



- 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

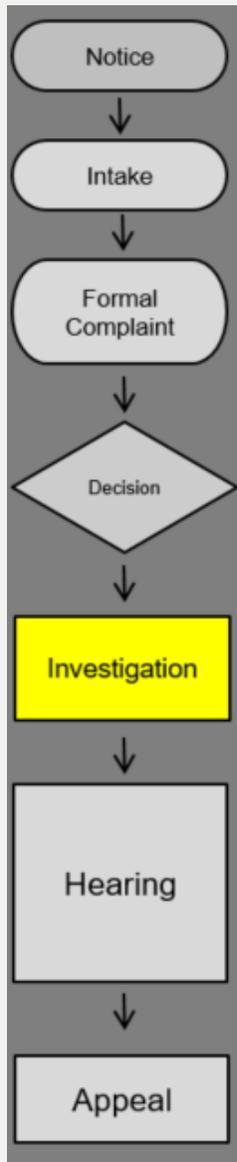
Title IX Regulations May 19 2020; §106.45(b)(5)(v) 85 F.R. 30424

Evidentiary Considerations

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

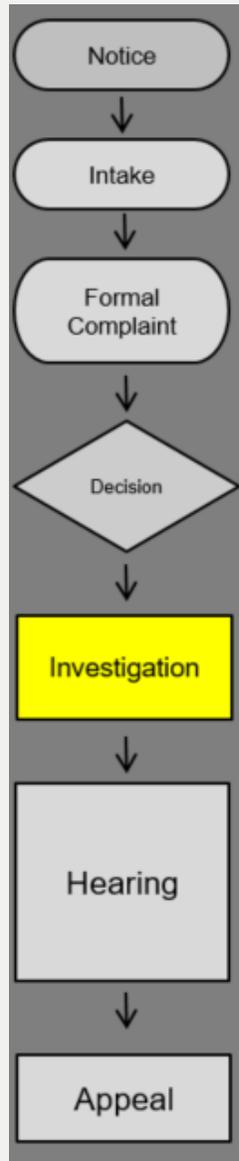
Relevance

- 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

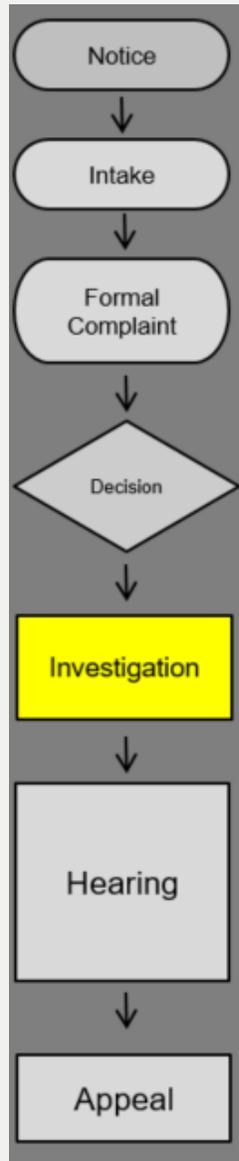
Flexibility to Adopt Rules



- “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

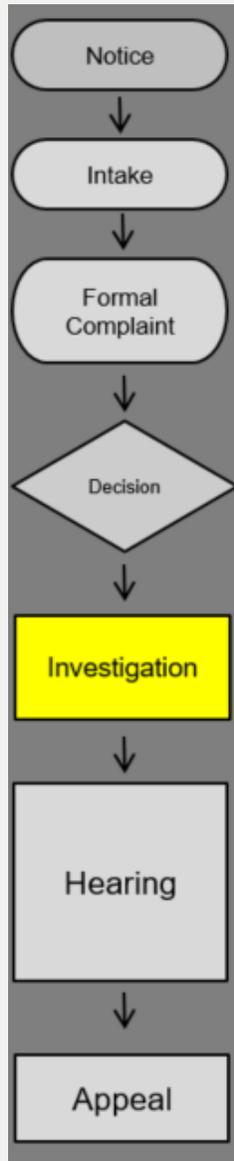
Title IX Regulations May 19, 2020; Preamble at 30361



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.

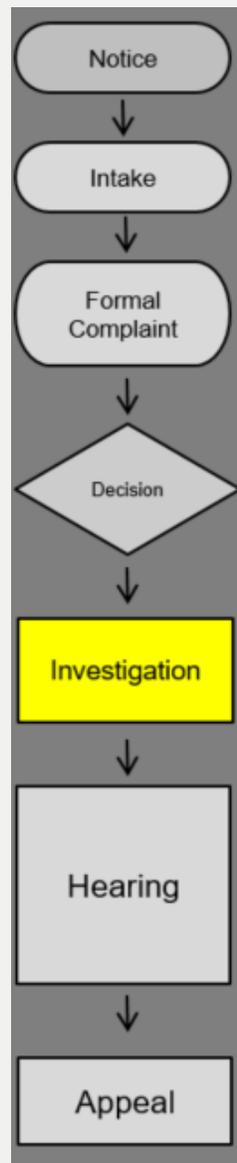
Privileged Information



- 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

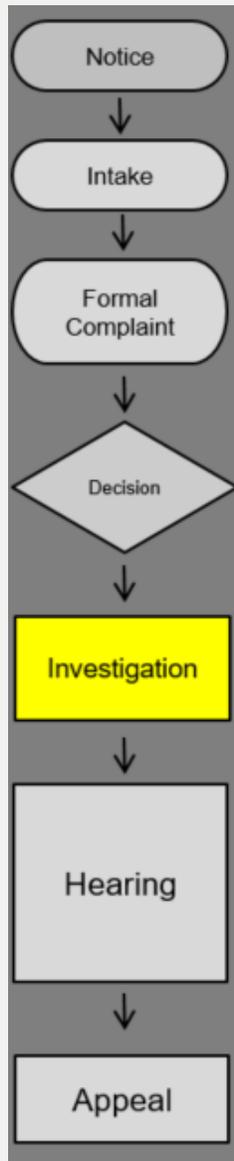
Prior Sexual History



- 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

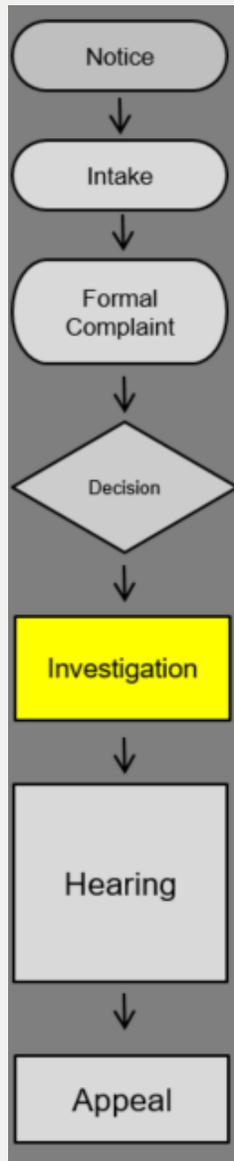
Prior Sexual History



- 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

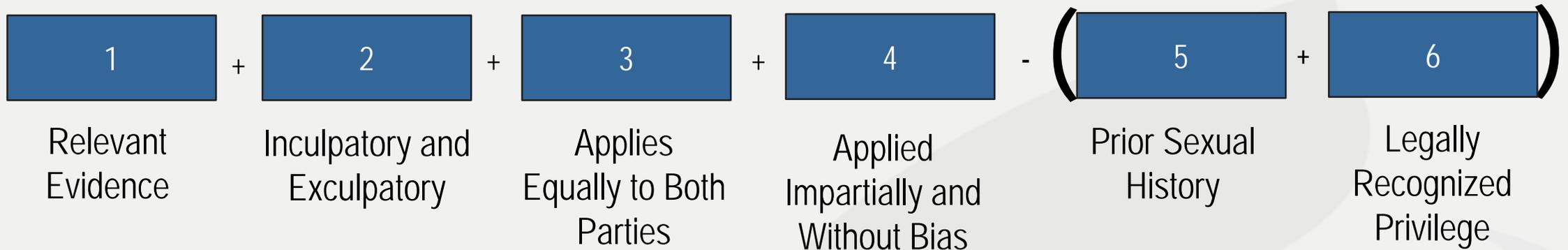


Included in the Processes for Resolving Complaints Against Students, Faculty and Staff: **Relevance and Evidentiary Considerations**

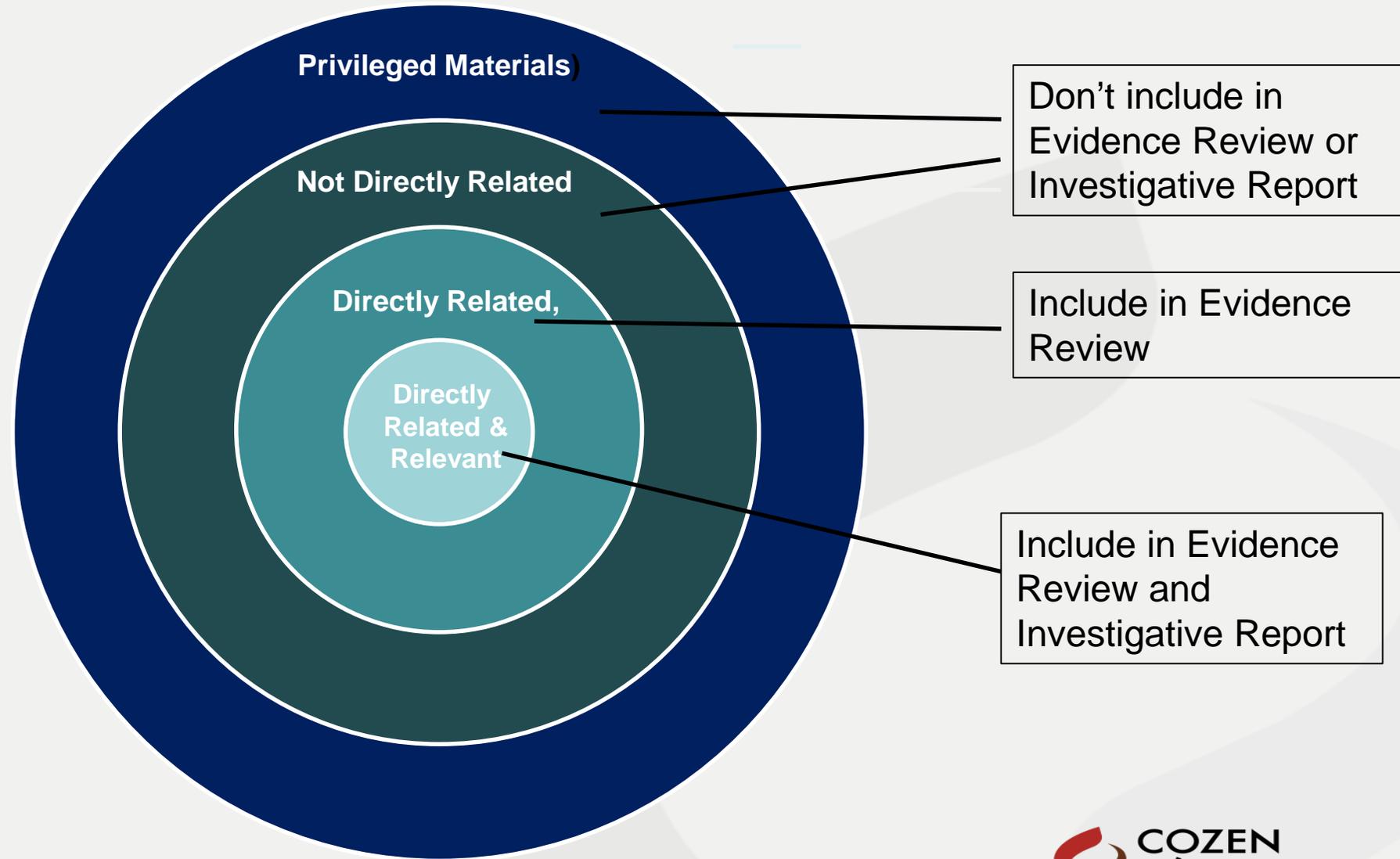
Prior or Subsequent Conduct of the Respondent:

- 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

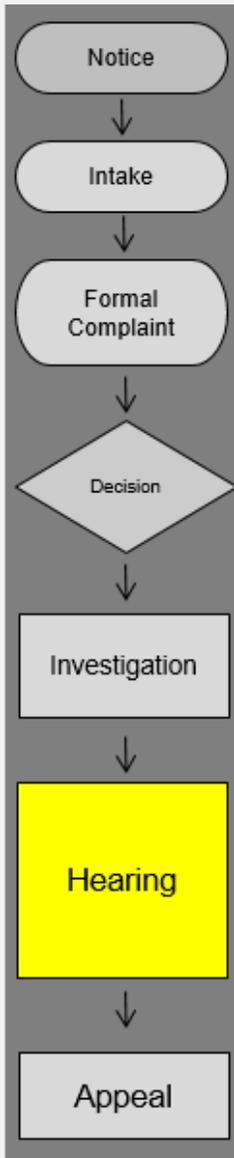


HEARINGS

THE FINAL TITLE IX REGULATIONS

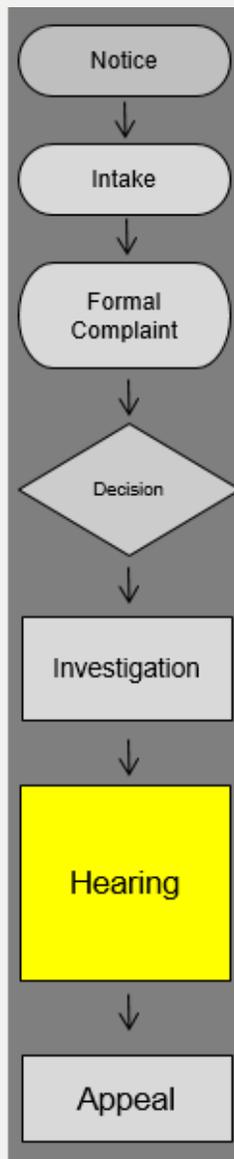
Hearings

- 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)

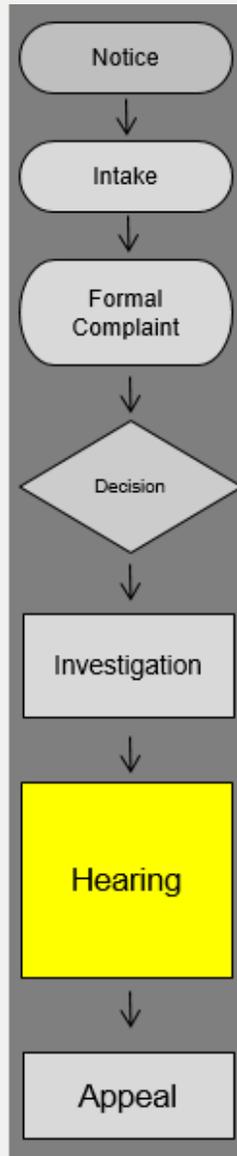
Live Hearing Required



- [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 .

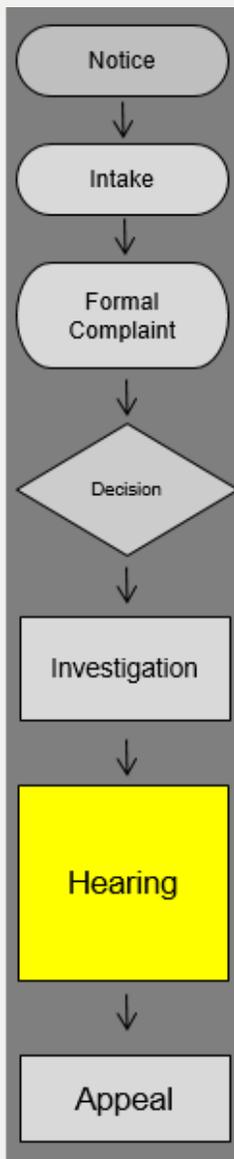
Role of the Advisor



- 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)

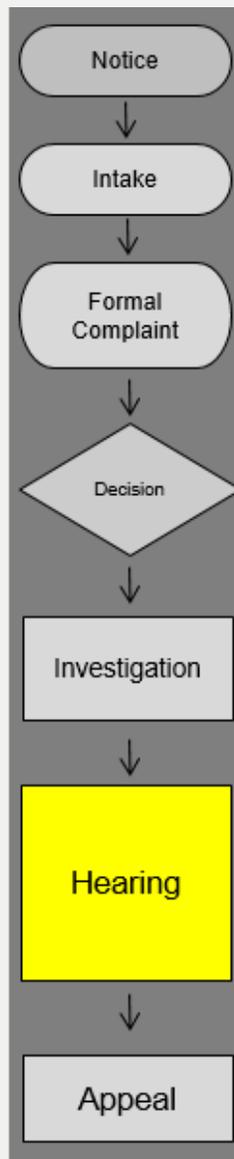
Obligation to Provide an Advisor



- 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)

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)

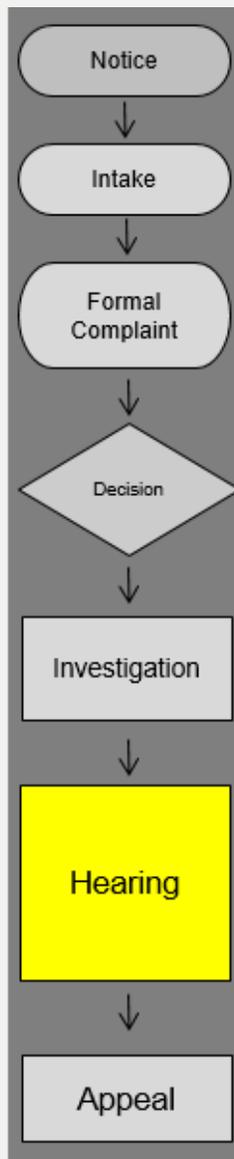
Cross-Examination



- 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)

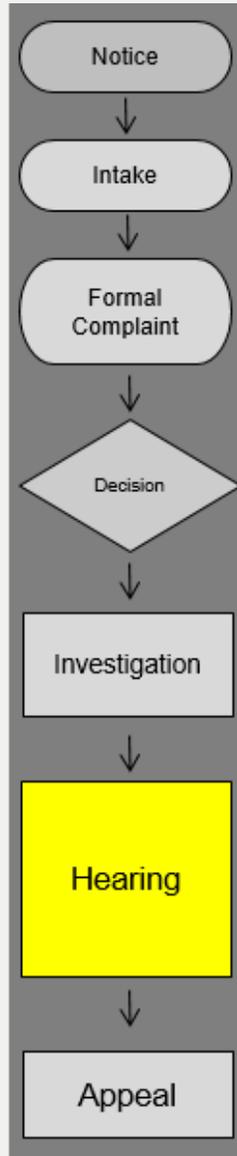
Exclusion of Statement



- 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

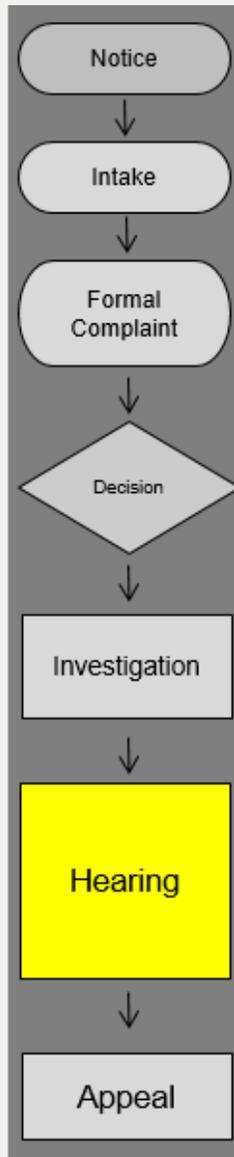
Apply the Standard of Evidence



- 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)



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.

THE TWO HEARING FORMATS AT DARTMOUTH COLLEGE

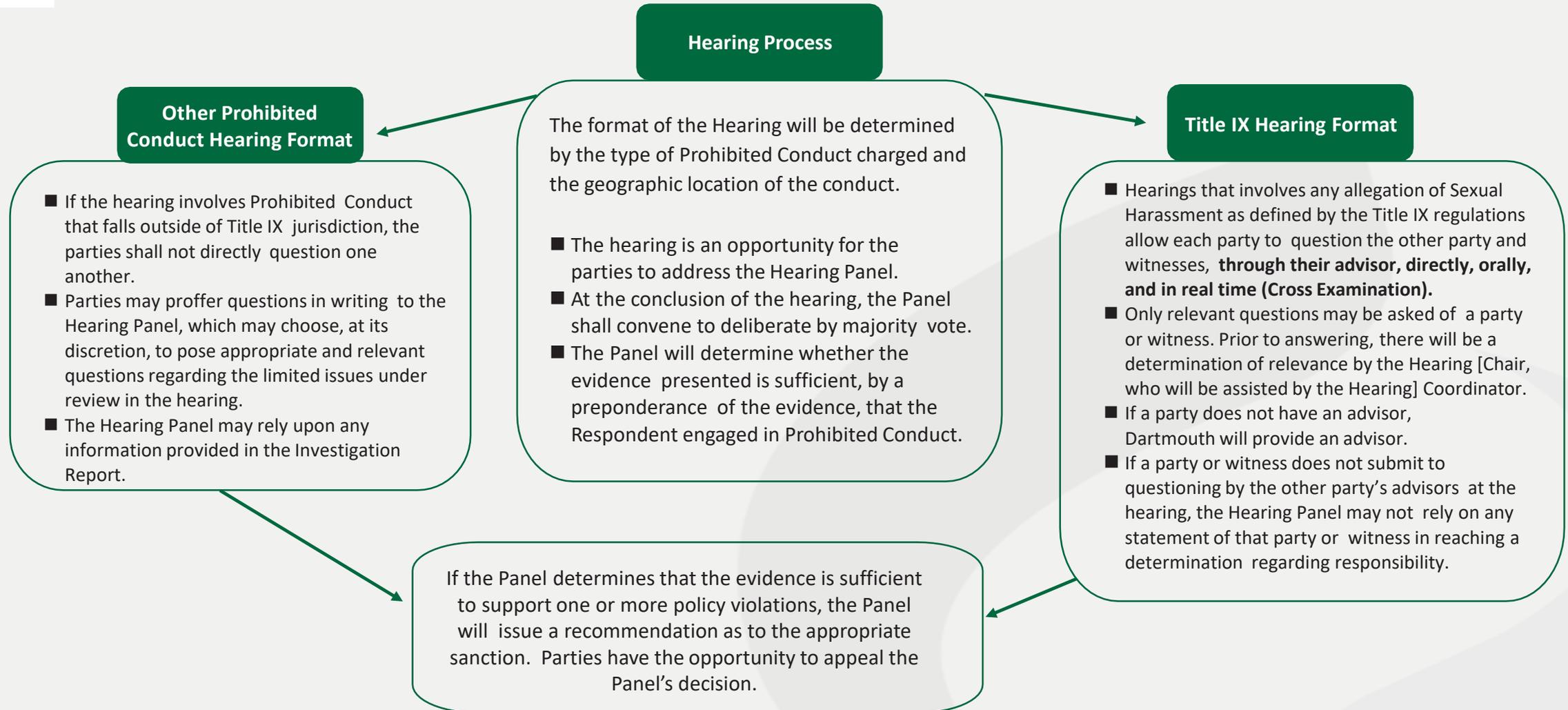


Included in the Processes for Resolving Complaints Against Students, Faculty and Staff: **Determining the Hearing Format**

- 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.

APPEALS FOR STUDENT AND STAFF RESPONDENTS



Included in the Processes for Resolving Complaints Against Students and Staff: **Appeals**

Both parties have the right to appeal the dismissal of the Formal Complaint, the final determination of responsibility and/or the resulting sanction based on the following limited grounds:

- **Procedural irregularity** that affected the outcome of the matter and/or sanction;
- **New evidence**, not reasonably available at the time of the hearing regarding responsibility or dismissal of the Formal Complaint, that could affect the outcome of the matter; or
- The Title IX Coordinator, investigator(s), or the hearing officer had a **conflict of interest or bias** for or against Complainants or Respondents generally or the individual Complainant or Respondent that affected the outcome of the matter.



Included in the Processes for Resolving Complaints Against Students and Staff: **Appeals**

- A concise written request for appeal must be submitted to the Title IX Coordinator within three (3) business days following delivery of the notice of the outcome.
- Each party may respond in writing to any appeal submitted by the other party. Written responses must be submitted within three (3) business days following delivery of the notice of the written appeal. Written requests for appeal submitted by one party will be shared with the other party.
- **Appeals are reviewed by a designated Appellate Authority.** Either party may challenge the Appellate Authority on the basis of conflict of interest or bias.



Included in the Processes for Resolving Complaints Against Students and Staff:

Appeals

- The Appellate Authority's responsibility will be strictly limited to determining the issues on appeal. If any of the appellate issues are substantiated by the Appellate Authority, the appeal will be granted. If the appeal is denied, the matter is closed.
- The Appellate Authority will notify the parties in writing of its decision **within 10 days**.



Included in the Processes for Resolving Complaints Against Students and Staff: **Appeals**

If the appeal is granted:

- **due to a procedural irregularity**, the matter shall be heard by a new hearing officer, or the Appellate Authority may remand the matter for further process to remedy the error (based on the nature of the procedural error);
- **due to the discovery of new evidence** not reasonably available at the time of the initial hearing, the matter will be returned to the same hearing officer that originally heard the matter for reconsideration in light of the new evidence;
- **due to bias or conflict of interest**, the matter will be remanded for further action consistent with the appellate finding.



Included in the Processes for Resolving Complaints Against Students and Staff: **Appeals**

- In the event of a reconsideration, the Appellate Authority will give the [Hearing Panel]/[hearing officer] instructions in writing regarding the nature and extent of its reconsideration.
- The [Hearing Panel]/[hearing officer] will act promptly to reconsider the matter consistent with those instructions.
- Following reconsideration, the finding of the [Hearing Panel]/[hearing officer] will be final and not subject to further appeal.
- The [Hearing Panel]/[hearing officer] will **notify the parties in writing of the outcome** consistent with the time frames set forth in the hearing process.



The Process for Resolving Complaints Against Students: **The Appellate Authority**

- For cases involving **undergraduate Respondents**, the Title IX Coordinator shall have the discretion to designate as the Appellate Authority an administrator with appropriate training to serve as an informed and impartial decision-maker.



The Process for Resolving Complaints Against Students: The Appellate Authority

- For cases involving **graduate or professional student Respondents**, the Appellate Authority shall be designated as follows:
 - For **M.S./PhD students**, the Dean of the Guarini School of Graduate and Advanced Studies shall serve as the Appellate Authority.
 - For **all other graduate and professional students**, the Dean of the relevant School shall serve as the Appellate Authority.



The Process for Resolving Complaints Against Staff: The Appellate Authority

For cases involving Respondents who are Staff Members, the Title IX Coordinator shall have the discretion to designate as the Appellate Authority an administrator with appropriate training to serve as an informed and impartial decision-maker.

APPEALS FOR FACULTY RESPONDENTS



Process for Resolving Complaints Against Faculty: **Appeals**

The AHHC's Written Notice of Outcome shall include notification of the right to submit written statements challenging the AHHC's finding and sanction (if any) on the following grounds:

- **Procedural irregularity** that affected the outcome of the matter and/or sanction;
- **New evidence**, not reasonably available at the time of the hearing regarding responsibility or dismissal of the Formal Complaint, that could affect the outcome of the matter; or
- The Title IX Coordinator, investigator(s), or the hearing officer had a **conflict of interest or bias** for or against Complainants or Respondents generally or the individual Complainant or Respondent that affected the outcome of the matter.



Process for Resolving Complaints Against Faculty: **Appeals**

- A concise written challenge describing either or both of the above grounds must be submitted **to the Provost** within three (3) business days following delivery of the Written Notice of Outcome.
- Each party may respond in writing to any appeal submitted by the other party. Written responses must be submitted within three (3) business days following delivery of the notice of the written appeal.
- Written requests for appeal submitted by one party will be shared with the other party.



Process for Resolving Complaints Against Faculty: **Appeals**

- The Provost will review the AHHC's finding and sanction (if any) and rationale and any part of the record before the AHHC – including but not limited to the transcript of the hearing – that the Provost deems appropriate.
- The Provost will also review the parties' written submissions raising issues on appeal and make a determination.
- If the Provost decides to overturn any aspect of the AHHC's finding or sanction, the Provost shall convene the Deans of the four faculties in person or by virtual means for a consultation. Based on that consultation, the Provost shall reach a decision.



Process for Resolving Complaints Against Faculty: **Appeals**

- If the Provost finds **procedural irregularity** the Provost shall remand the matter for further process to remedy the error (based on the nature of the procedural error) and the matter shall be heard by a new AHHC.
- If the Provost finds that **new evidence** not reasonably available at the time of the hearing would have materially affected the AHHC's recommendation, the Provost will return the matter to the same AHHC that originally heard the matter for reconsideration in light of the new evidence, and will give the AHHC instructions in writing regarding the nature and extent of that reconsideration.
- If the Provost finds the Title IX Coordinator, investigator(s), or any member of the AHHC had a **conflict of interest or bias** for or against Complainants or Respondents generally or the individual Complainant or Respondent that affected the outcome of the matter, the Provost will remand the matter for further action consistent with the appellate finding.



Process for Resolving Complaints Against Faculty: **Appeals**

- Following reconsideration, the determination of the AHHC will be final and not subject to further appeal, with the exception of a determination including a sanction of termination of a Respondent's term or tenured appointment, which shall then move as a recommendation to the President as described below.
- The AHHC will notify the parties in writing of the outcome.



Process for Resolving Complaints Against Faculty: Review by the President and Board of Trustees

- Any recommendation by the Provost to terminate a Respondent's term appointment or to terminate a Respondent's tenured employment will be considered by the **President** along with the report and recommendation of the AHHC and any part of the record before the AHHC – including but not limited to the transcript of the hearing – that the President deems appropriate.
- If the President agrees that the circumstances require a recommendation of termination of a term appointment or termination of tenured employment, the President shall so recommend in writing to the **Board of Trustees**.



Process for Resolving Complaints Against Faculty: **Appeals**

- The Provost will provide a written determination of outcome the appeal (if applicable) to the parties within ten (10) days.
- If the Provost determines that there is adequate cause for the termination of a term appointment or tenured employment and that such should be the sanction, then such a determination will be a recommendation to the President that such sanction be imposed, and the Provost shall notify the Parties and the Dean in writing of such recommendation.
- Otherwise, the Provost shall notify the Parties and the Dean in writing of the finding of responsibility and the sanction.
- The Provost's decision shall be final and the sanction shall be imposed, with the exception of a termination of a term appointment or tenured employment, in which instance the Provost's recommendation shall move to the President as described below.



Process for Resolving Complaints Against Faculty: Review by the President and Board of Trustees

- The manner of the review of the President's recommendation of termination by the Board of Trustees will be determined by the Board Chair in consultation with the Chairs of the Academic Affairs Committee and the Audit Committee and implemented consistent with the requirements of Title IX and the Clery Act.
- The Board's review shall be limited to a review of the President's recommendation of termination and may take into account all relevant information from the existing record of the matter, but shall not include a review of the underlying finding of responsibility or consideration of information not contained in the existing record of the matter.



Process for Resolving Complaints Against Faculty: Review by the President and Board of Trustees

- Rather, the Board will evaluate the appropriateness and the proportionality of the sanction as it relates to the specific policy violations found.
- The Board shall make a final decision about the sanction, notifying the parties, the Dean, the Provost, and the President in writing.
- If the President does not agree with the Provost's termination recommendation, the President shall return the case to the Provost with a written direction to impose a lesser sanction than termination, and the Provost shall notify the Parties and the Dean in writing of the finding of responsibility and the sanction.

Use of Slides

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