

# **Title IX Hearings for Dartmouth Title IX Implementers**

Presented By:

**Peter Lim, Member**

**Maureen Holland, Member**

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

**Gina Maisto Smith, Chair**

**Leslie M. Gomez, Vice Chair**

**Dartmouth College**

**November 7, 2022**



# Agenda

## Block 1

**Introductions, Orientation/Review, Foundational Concepts**

*10 minute break*

## Block 2

**Before the Hearing: Preparation, Practice Tips, and Logistics**

*10 minute break*

## Block 3

**During the Hearing: Relevance, Weight, and Credibility**

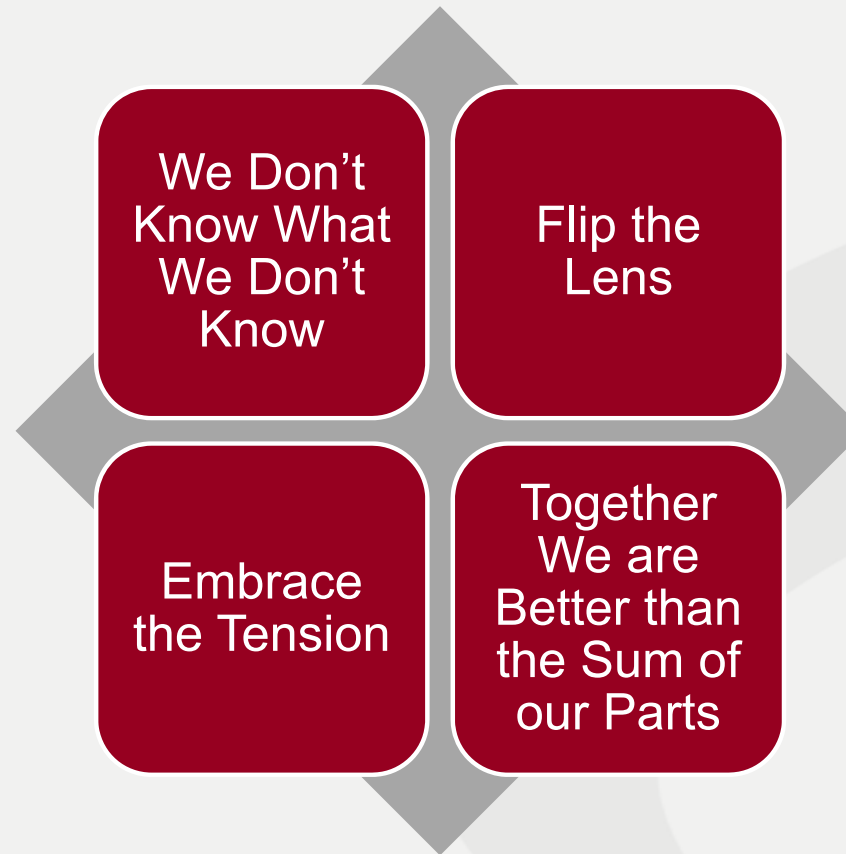
*10 minute break*

## Block 4

**After the Hearing: Deliberations, Outcome, Sanctions and Remedies**

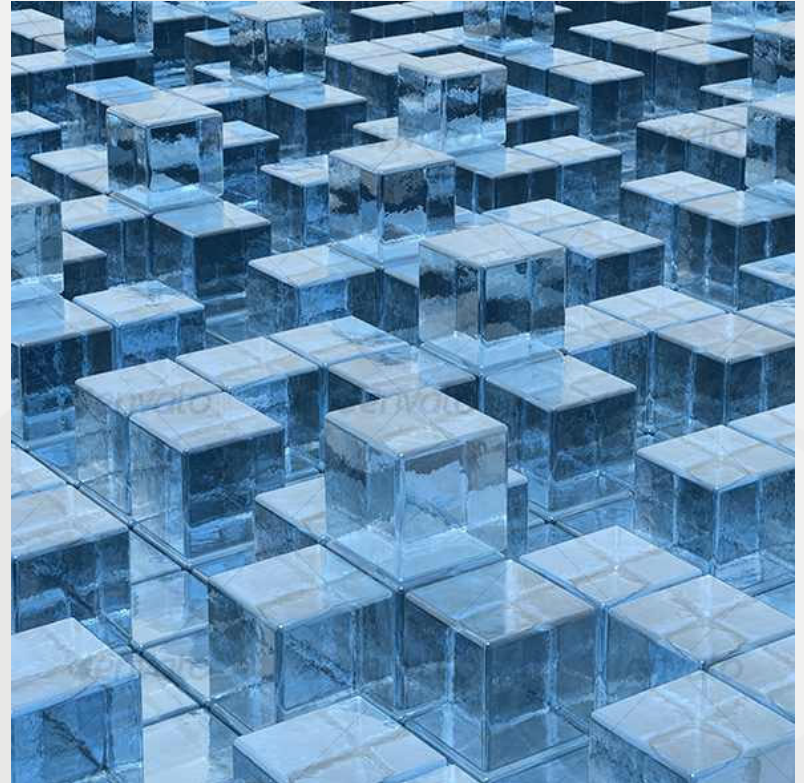
# INTRODUCTION

# Framing the Conversation

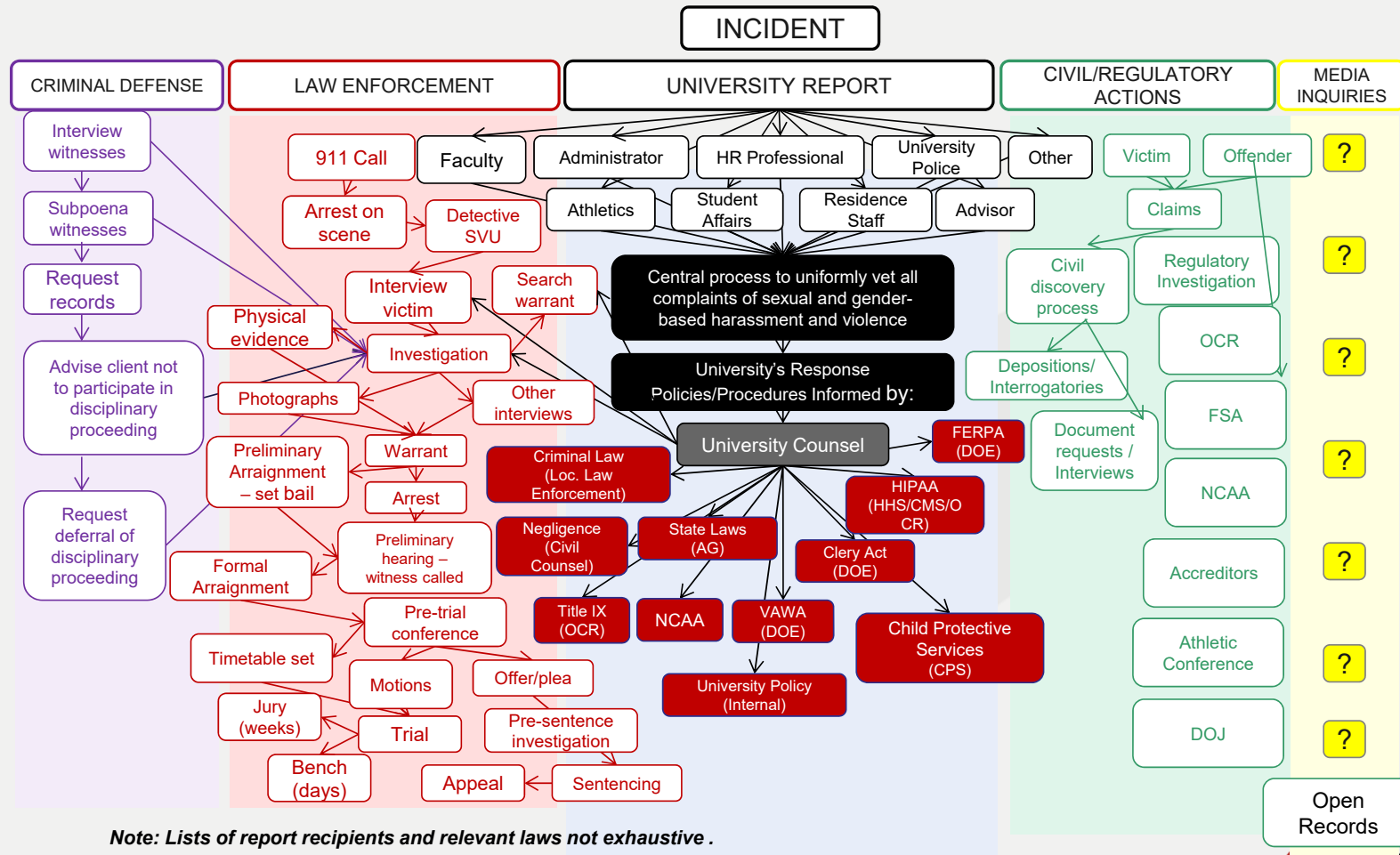


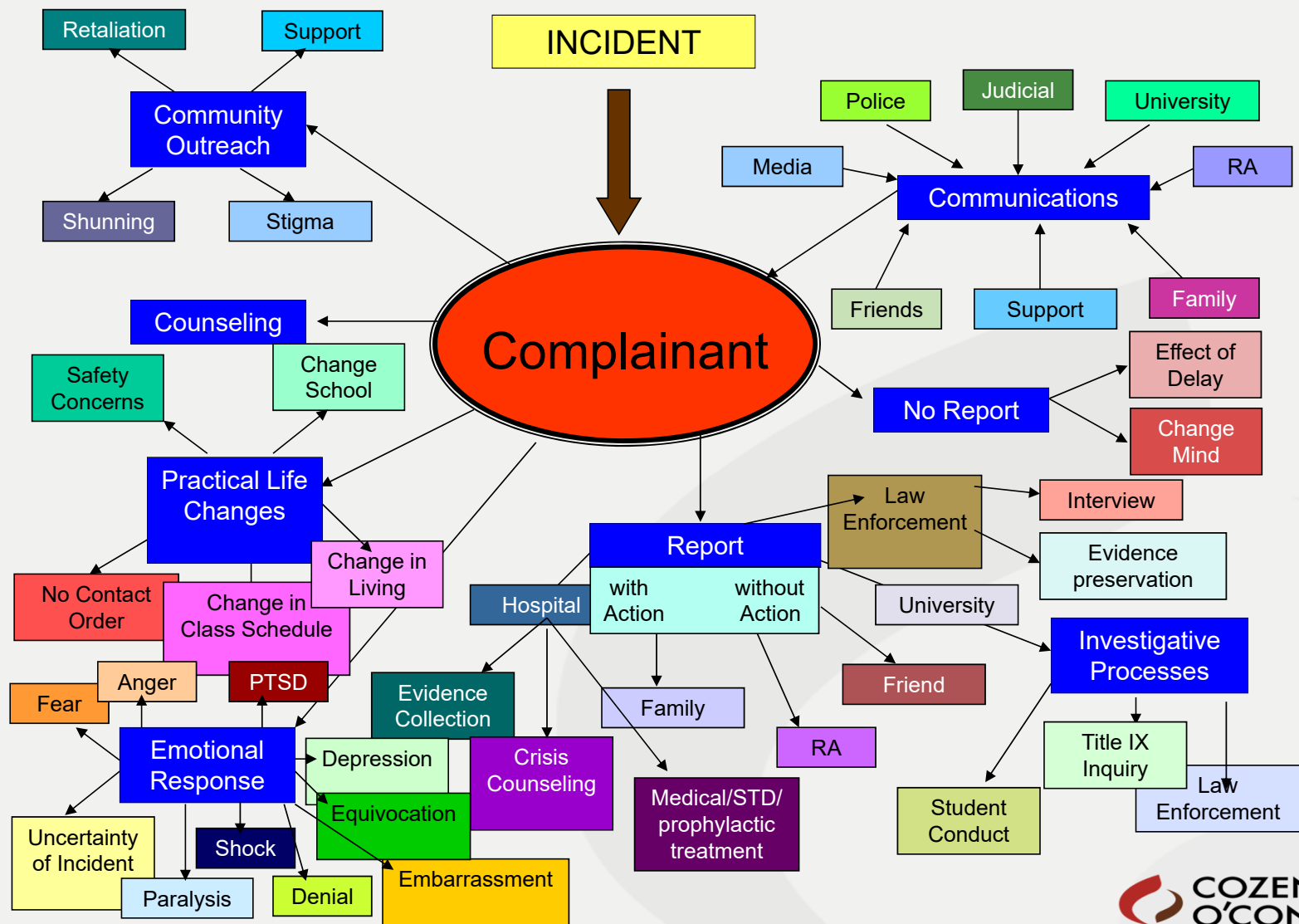
# The Context

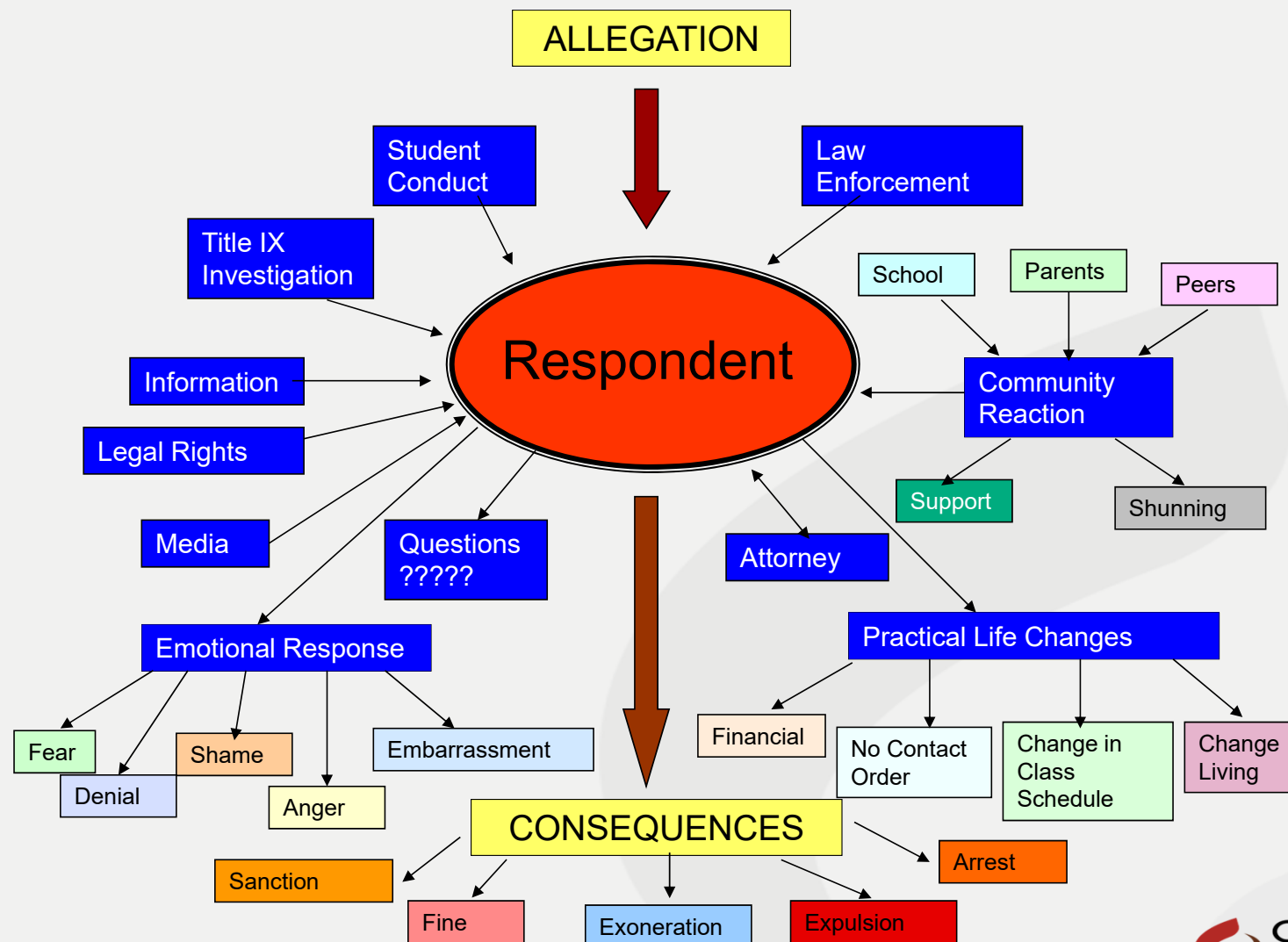
- Regulatory Framework
- Dynamics of Trauma & Sexual and Gender-Based Harassment and Violence
- Individual Culture, Climate, History, Resources, Policies, Procedures, Personnel and Values of the Institution



# The Challenge of the Context

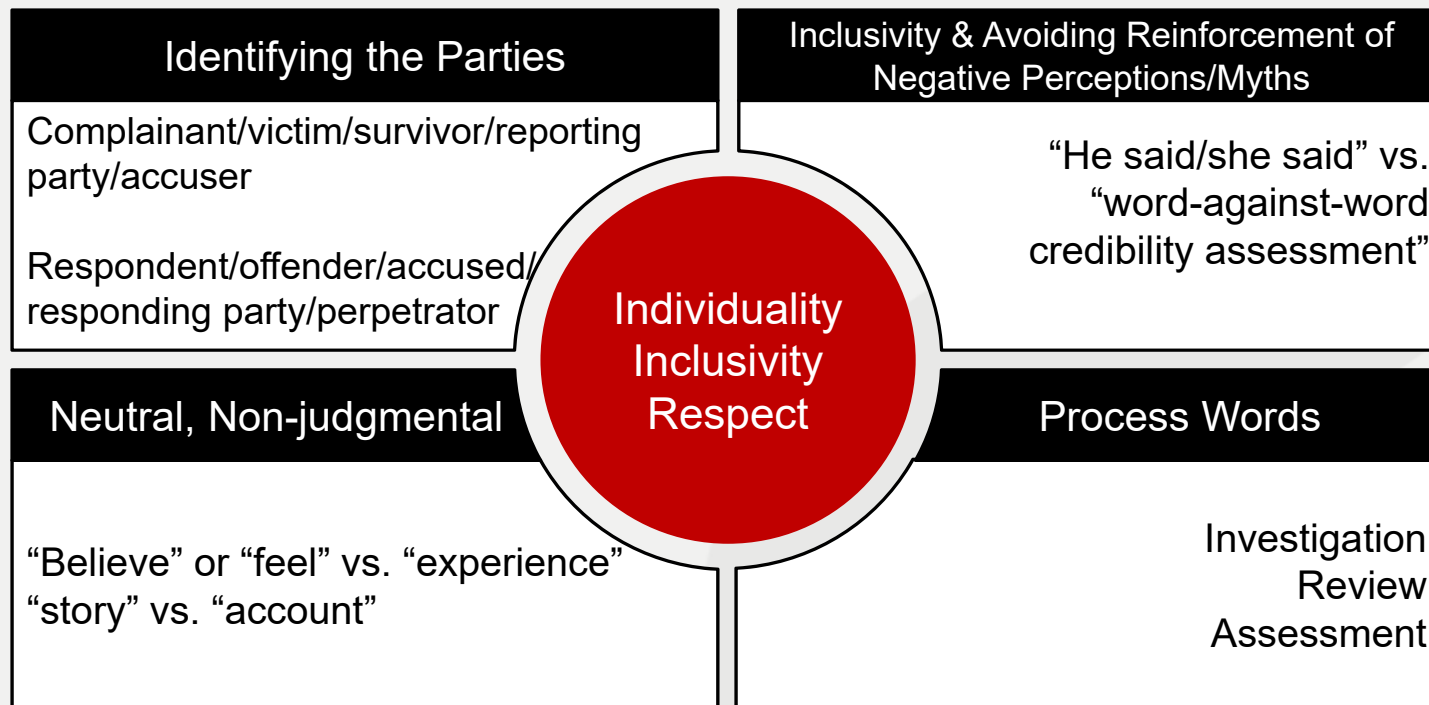








# Awareness of the Impact of Language

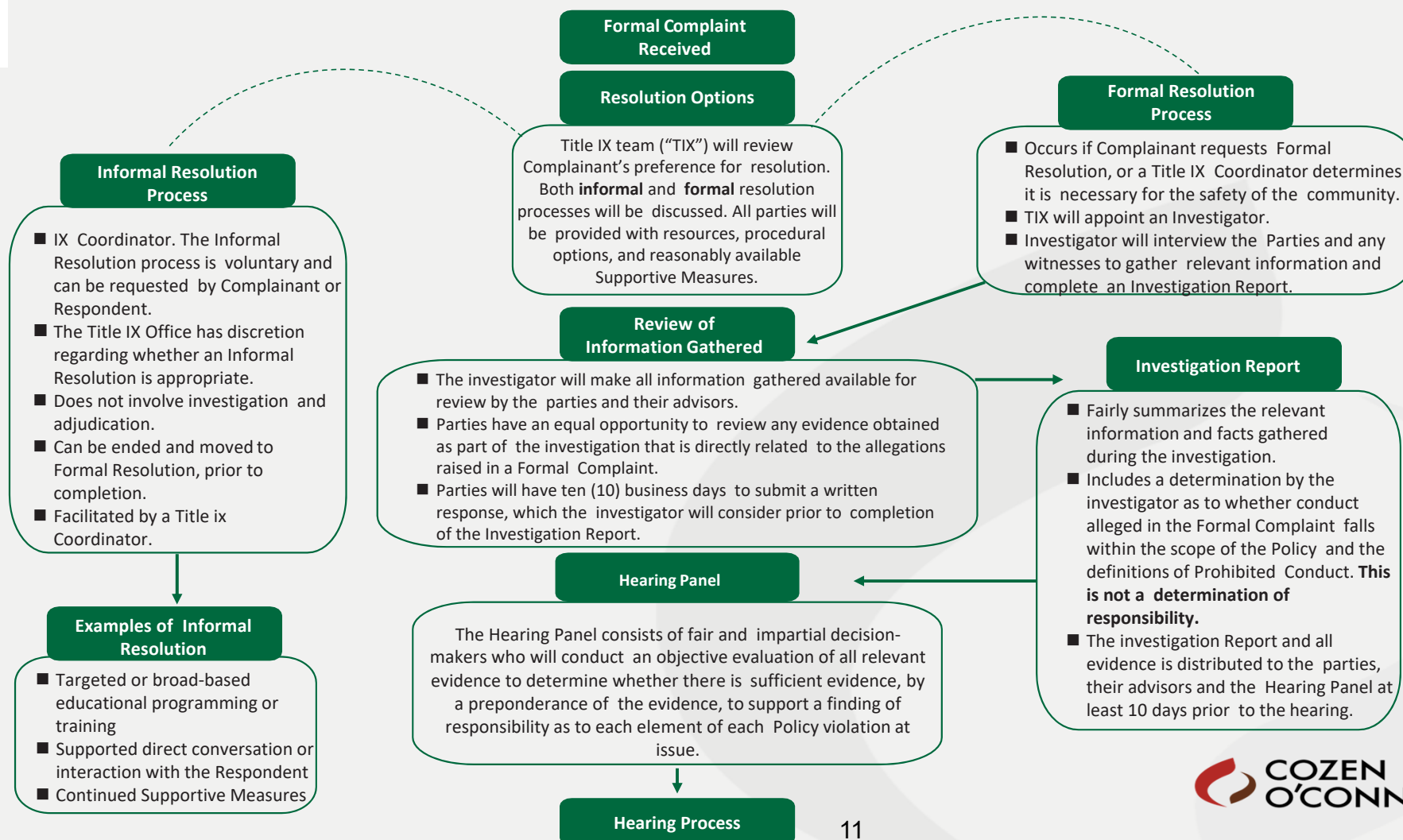


# **ORIENTATION & REVIEW**



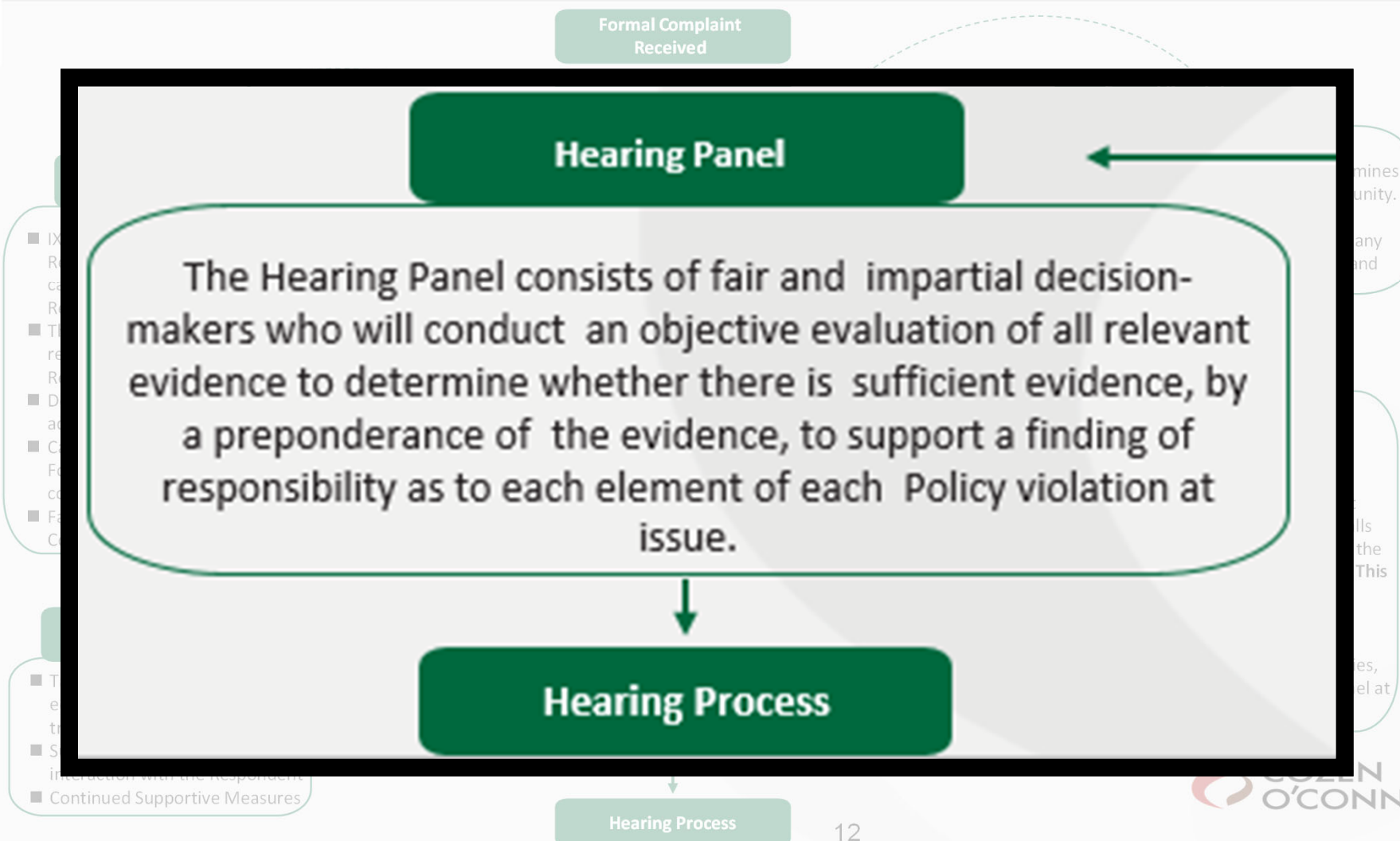
# PROCESS FOR RESOLVING REPORTS AGAINST STUDENTS

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





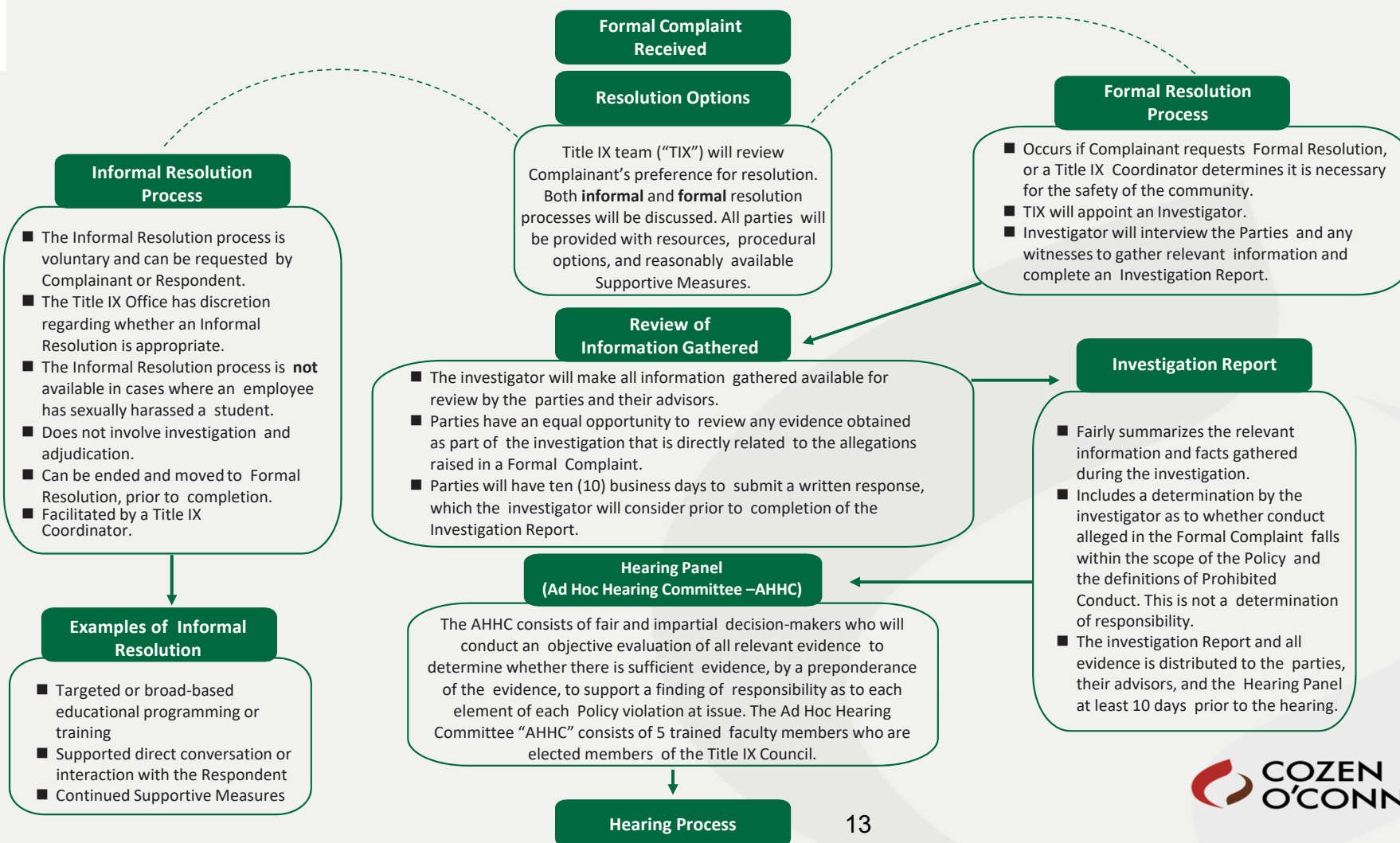
## PROCESS FOR RESOLVING REPORTS AGAINST STUDENTS Pursuant to the Dartmouth Sexual and Gender-Based Misconduct Policy





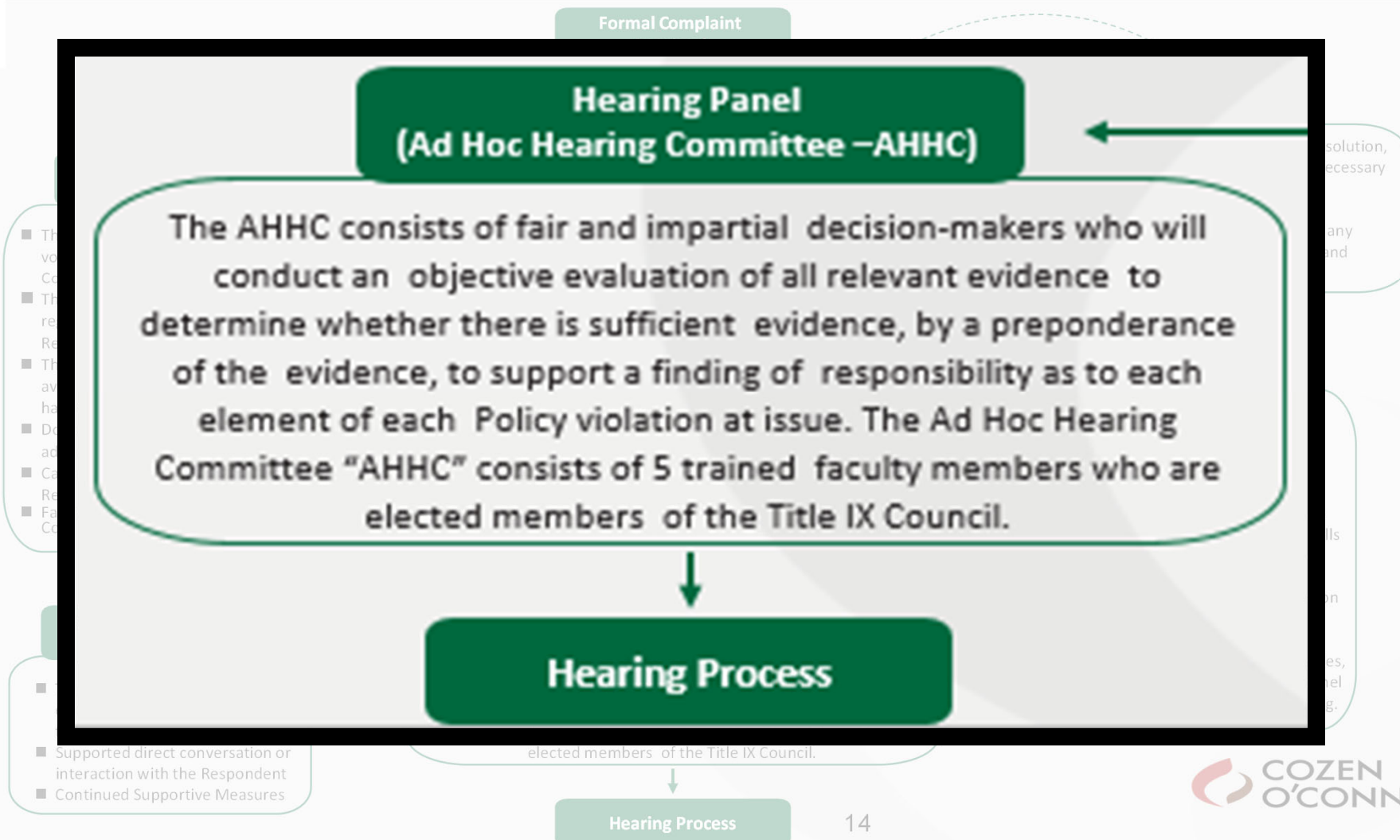
# PROCESS FOR RESOLVING REPORTS AGAINST FACULTY

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





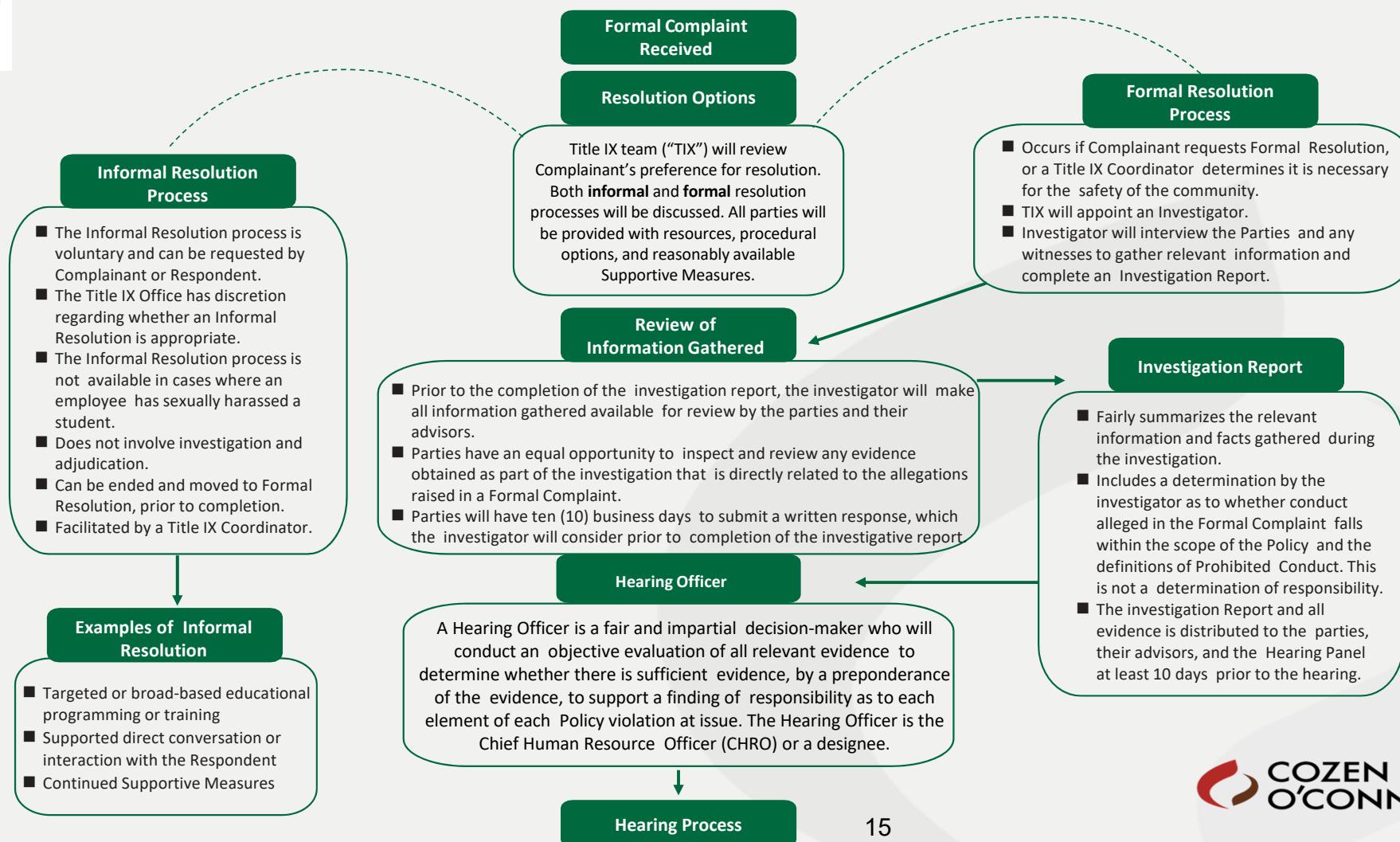
## PROCESS FOR RESOLVING REPORTS AGAINST FACULTY Pursuant to the Dartmouth Sexual and Gender-Based Misconduct Policy





# PROCESS FOR RESOLVING REPORTS AGAINST STAFF

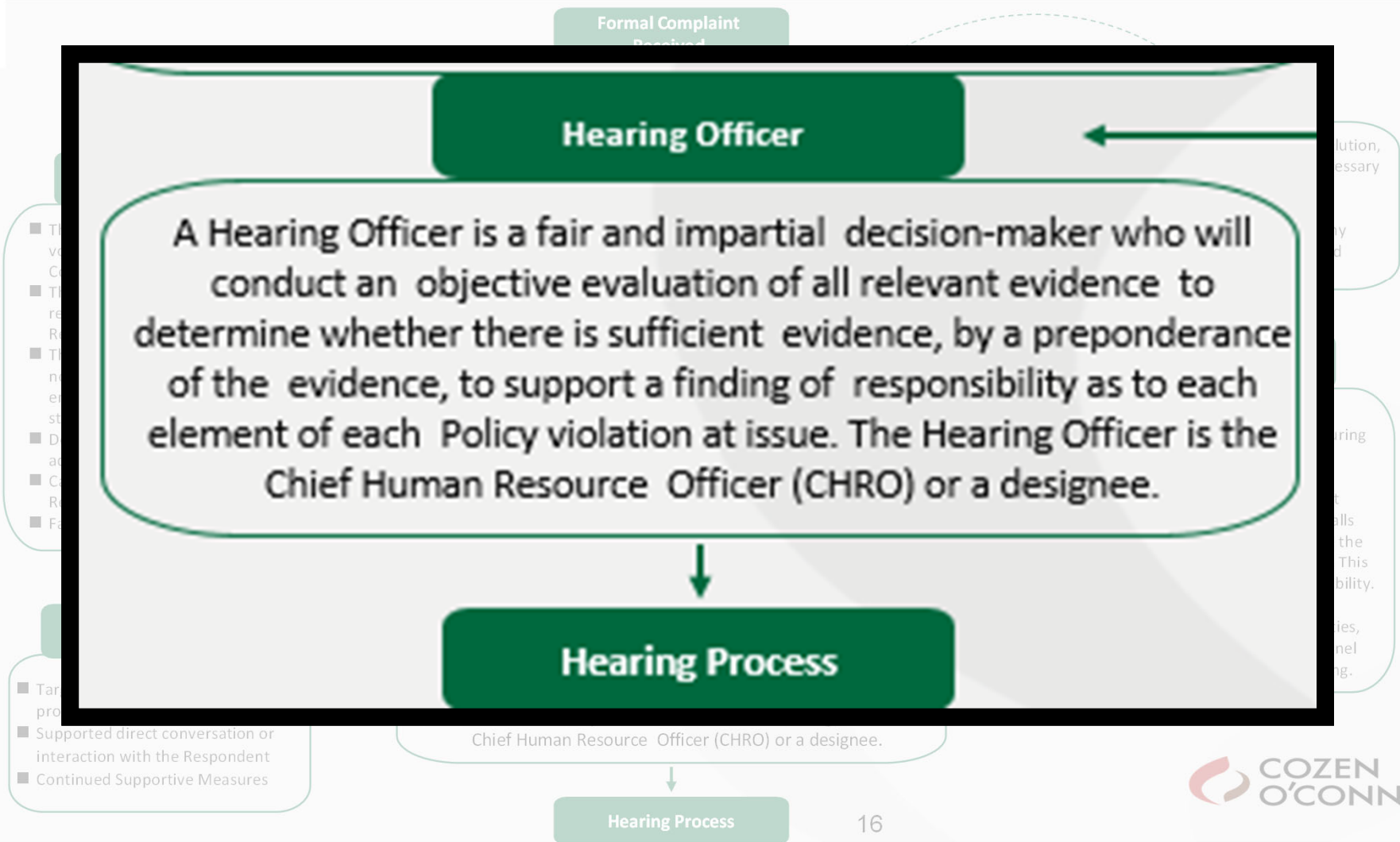
## Pursuant to the Dartmouth Sexual and Gender-Based Misconduct Policy







**PROCESS FOR RESOLVING REPORTS AGAINST STAFF**  
**Pursuant to the Dartmouth Sexual and Gender-Based Misconduct Policy**

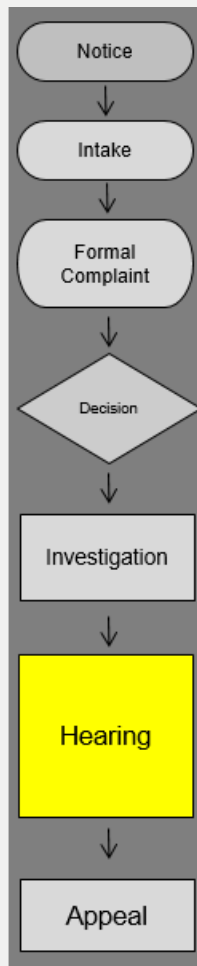




# **FOUNDATIONAL CONCEPTS**

# Live Hearing Required

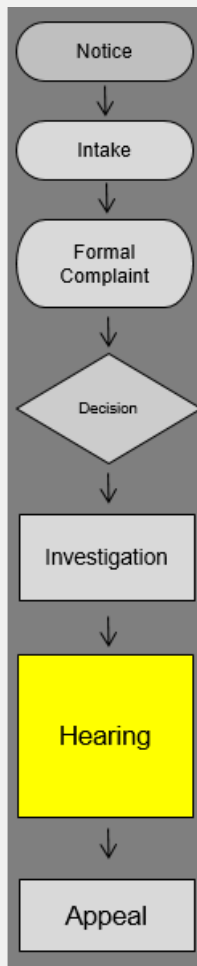
- For postsecondary institutions, the recipient's grievance process **must provide for a live hearing.**



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

# Transcript or Recording

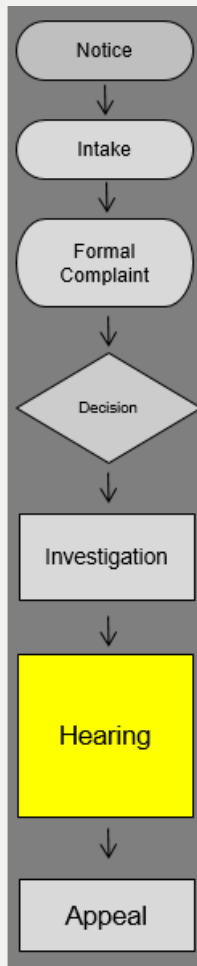
- Recipients must create an **audio or audiovisual recording, or transcript**, of any live hearing and make it available to the parties for inspection and review.



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

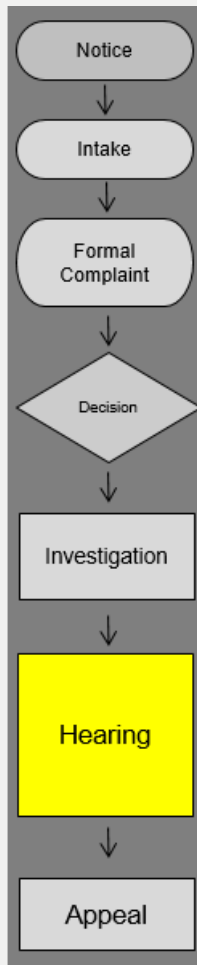
# Determine Relevance of Questions

- 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

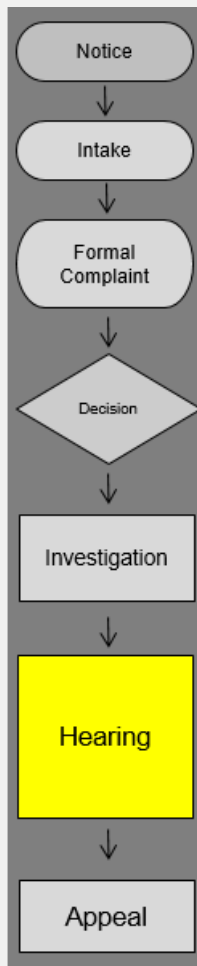


- The decision-maker(s) **must explain to the party proposing the questions any decision to exclude** a question as not relevant.

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

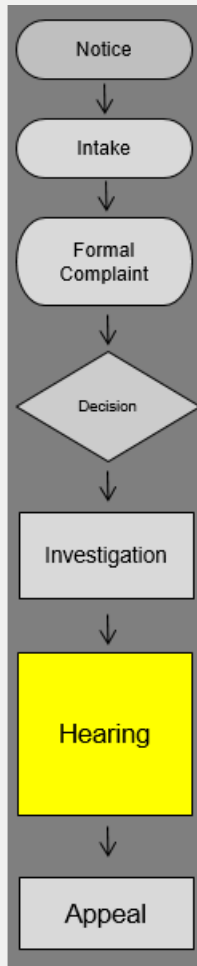
# Apply the Standard of Evidence

- 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)

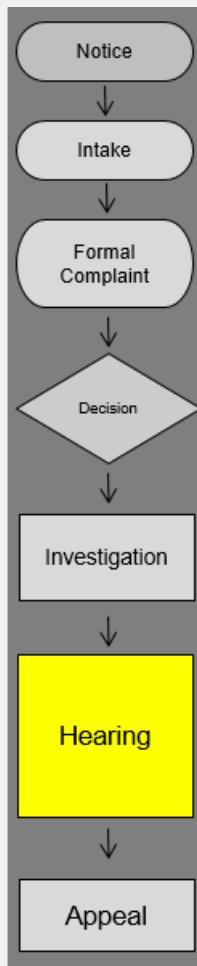
# Issue Written Determinations



- 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 regulations require the Title IX Coordinator and investigator to be different individuals from the decision-maker....
- § 106.45(b)(7)(i) prevents an investigator from actually making a determination regarding responsibility.

Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30372;  
§§ 106.45(b)(5)(vii); Preamble 85 F.R.30436

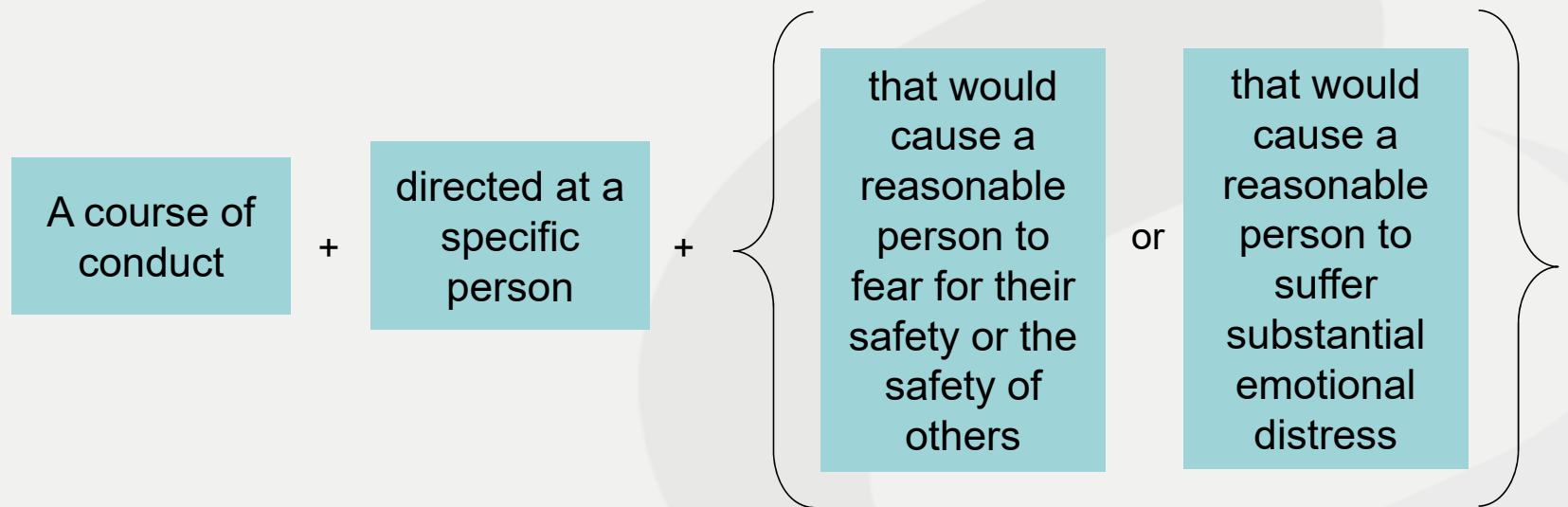


# **BEFORE THE HEARING: PREPARATION**

# Mapping the Policy Elements & Case Facts

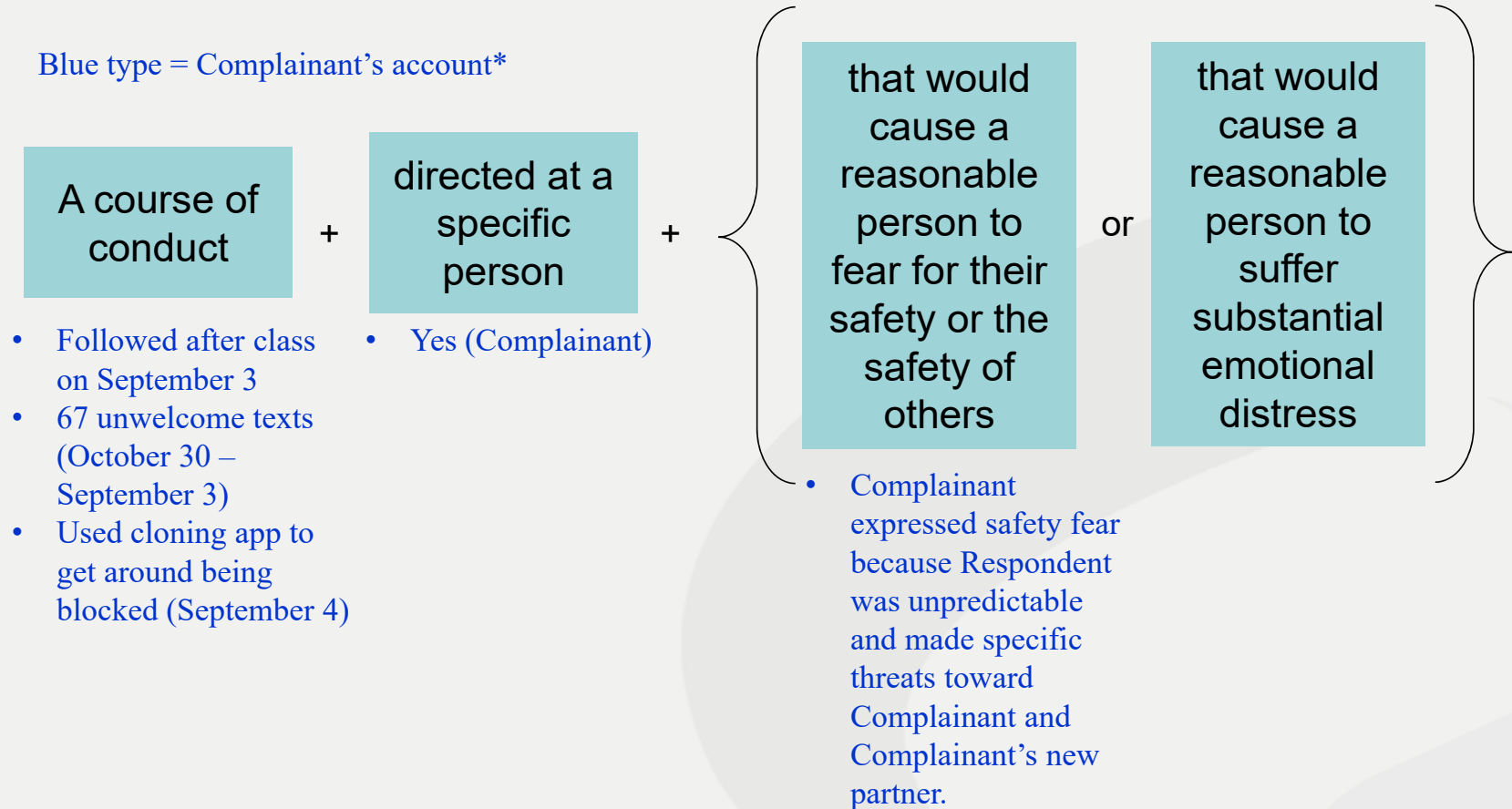
- **Stalking**

- ...[E]ngaging in a course of conduct directed at a specific person that would cause a reasonable person to fear for their safety or the safety of others or suffer substantial emotional distress.



# Mapping the Policy Elements & Case Facts

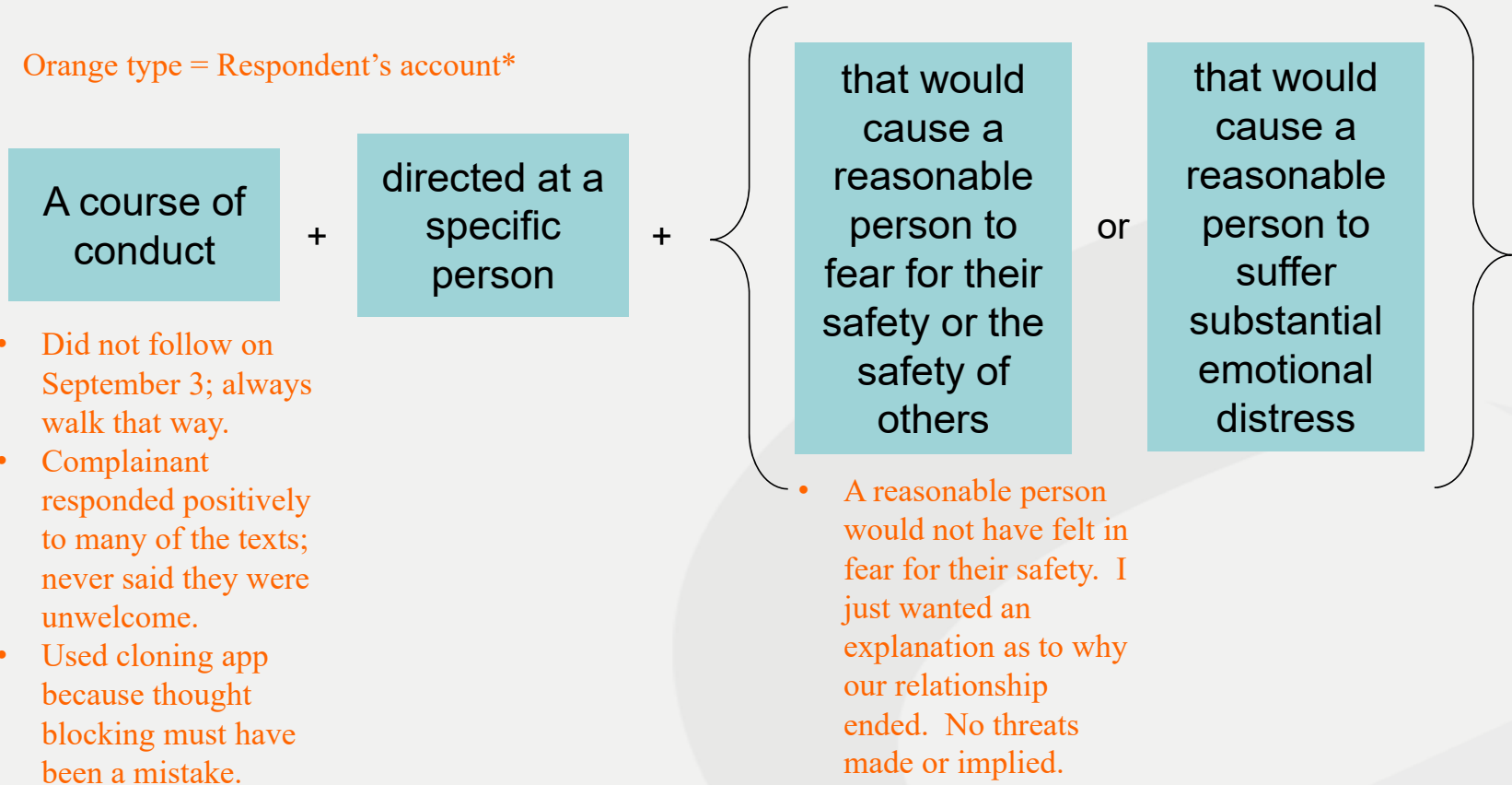
Blue type = Complainant's account\*



\* These case facts are fictional and were developed for training purposes

# Mapping the Policy Elements & Case Facts

Orange type = Respondent's account\*



\* These case facts are fictional and were developed for training purposes

# Witness Accounts

Witness Name	Relationship to Complainant	Relationship to Respondent	Relevant Information	Questions to Ask at Hearing
Sam J.	Acquaintance, in chemistry class together	Roommate	Left class with Complainant on September 3 and corroborated that Respondent followed Complainant. Said Respondent never walks that way.	<ol style="list-style-type: none"> <li>1. Did you and Respondent ever discuss that you saw him following Complainant after class?</li> <li>2. What was Complainant's demeanor when she said, "He's following me?"</li> </ol>
Alex B.	Friend	Friend	Saw Snapchat video of Complainant crying and reading Respondent's texts aloud. Complainant texted screenshots of Respondent's texts to witness.	<ol style="list-style-type: none"> <li>1. What is your relationship like now with Complainant and Respondent?</li> <li>2. Can you share your thought process around your decision to delete the screenshots Complainant sent you?</li> </ol>
Angel G.	Coach	None	Disclosure witness for Complainant. Complainant sent text to Coach at 3AM on September 4. Stated that Complainant missed 2 weeks of practice.	
NOTE: These case facts are fictional and were developed for training purposes				

# Preparation

- Review
  - Notice of Hearing
  - Investigation Report
  - Evidentiary Record
  - Parties' Responses to the Evidentiary Record and to the Investigation Report
  - Notice of Hearing (again)
  - Policy definitions as needed

# HEARING BASICS

# Live Hearing Requirement



- [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

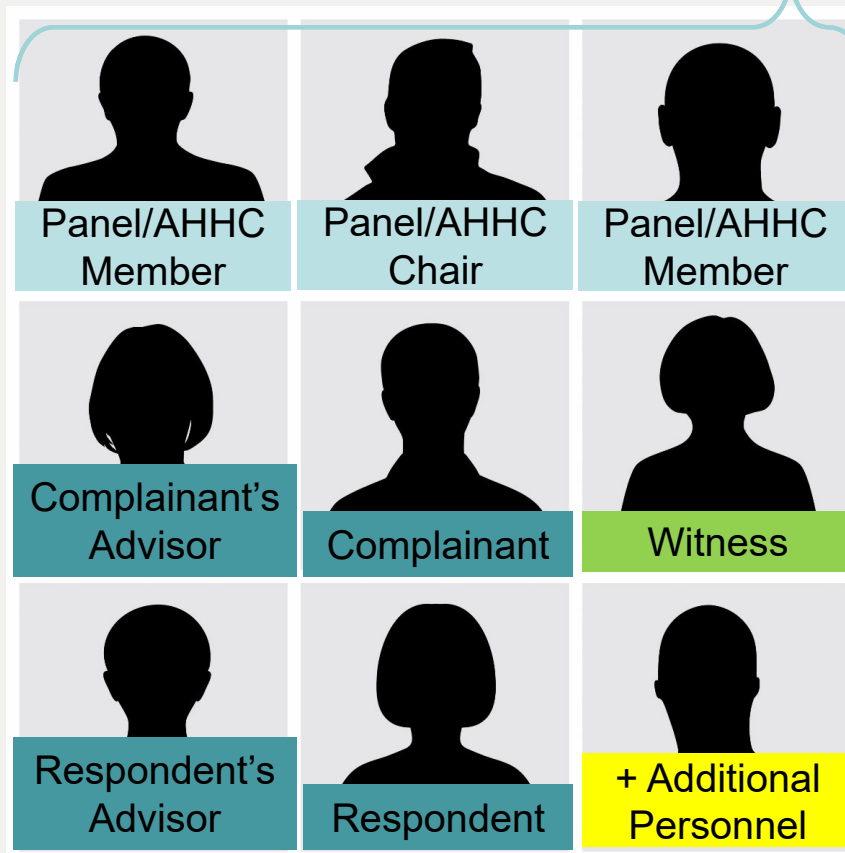


- Live hearings pursuant to this paragraph may be conducted with all parties physically present in the same geographic location or, at the recipient's direction, any or all parties, witnesses and other participants may appear at the live hearing **virtually, with technology** enabling participants simultaneously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

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

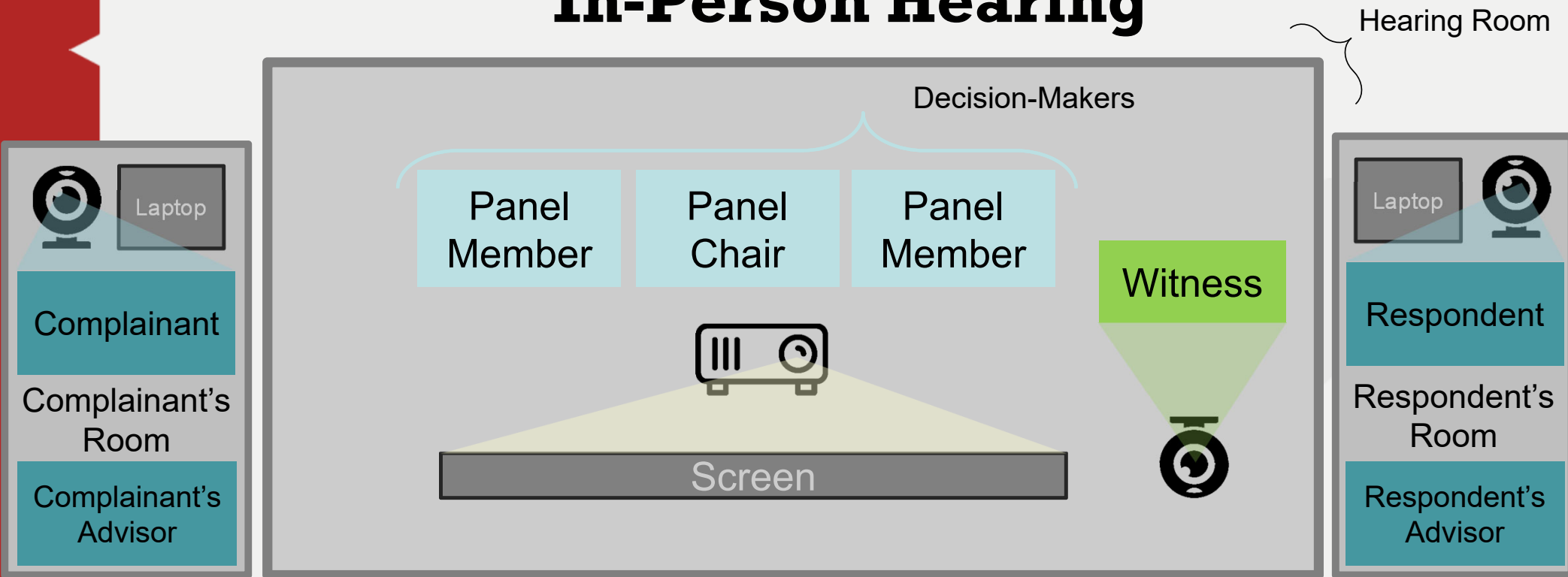
# Hearing Logistics

## Decision-Makers



- Squares may be arranged in a different order (this arrangement is for illustration only)
- Hearings involving Faculty Respondents are decided by a 5-member Ad Hoc Hearing Committee (AHHC), with one member serving as Chair. The AHHC may be assisted by a Hearing Coordinator.
- Hearings involving Student Respondents are decided by a 3-member Hearing Panel, with one member serving as Chair. The Panel may be assisted by a Hearing Coordinator.
- Hearings involving Staff Respondents are decided by a single Hearing Officer. The Hearing Officer may be assisted by a Hearing Coordinator.

# In-Person Hearing



- Physical room layout and seating arrangement may be adjusted to fit space/needs

# 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>

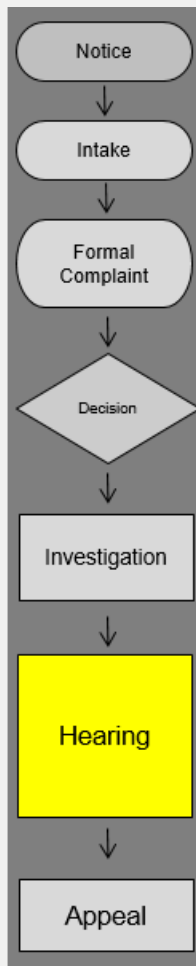
# Virtual Hearing Considerations



- 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)

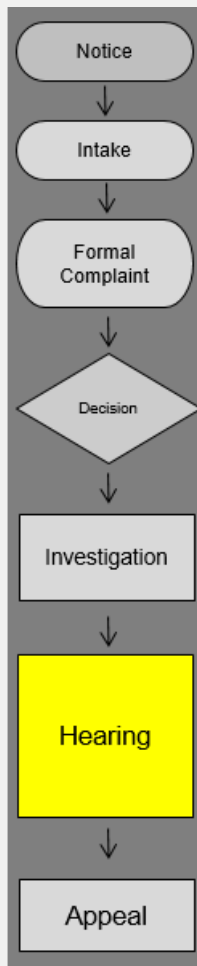
# Virtual Hearing Considerations



- 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

# **THE TWO HEARING FORMATS AT DARTMOUTH COLLEGE**



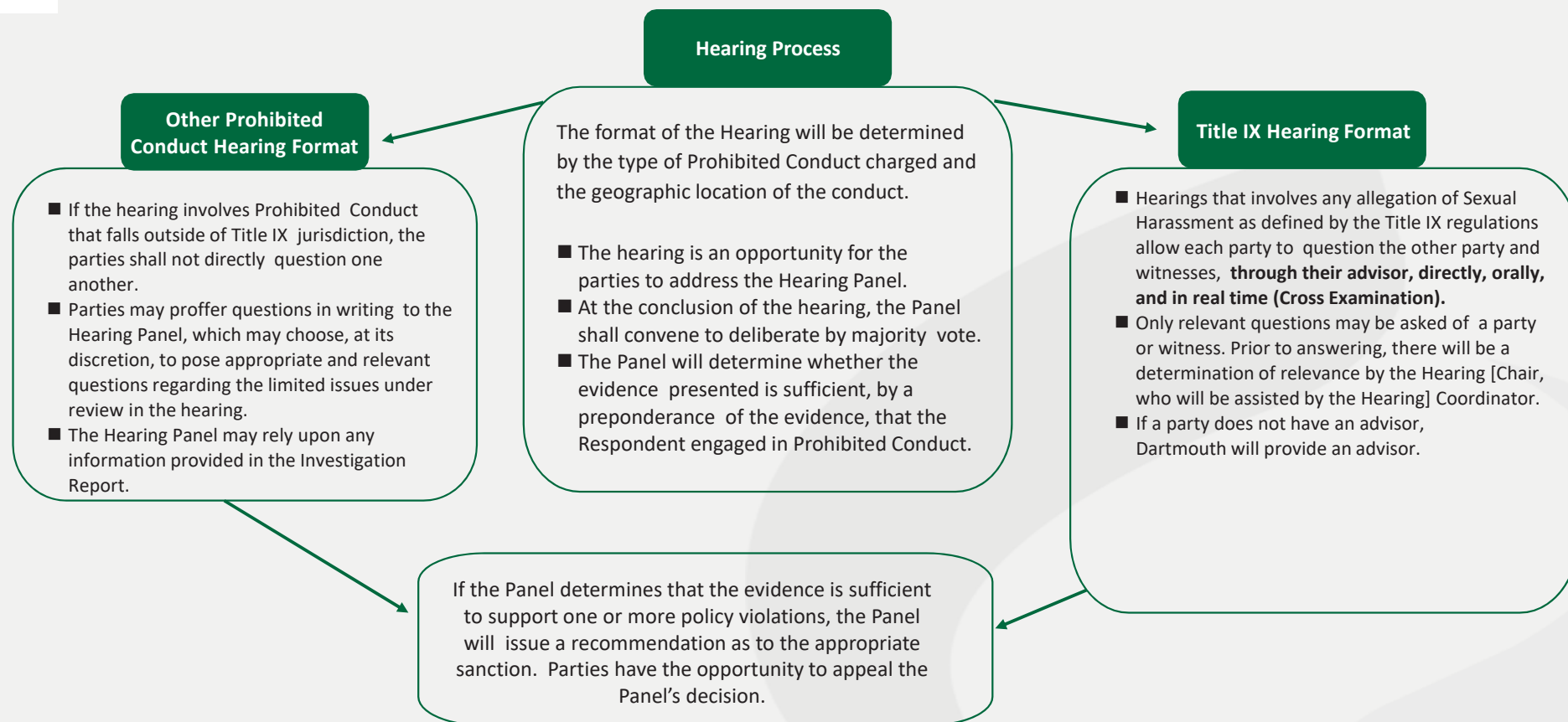


## **Included in the Processes for Resolving Complaints Against Students, Faculty and Staff: **Determining the Hearing Format****

- 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.
  - 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.
- The [Hearing Officer]/[Hearing Panel]/[AHHHC] 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]/[AHHHC]/[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]/[AHHHC]/[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]/[AHHHC]/[Hearing Officer] and parties to simultaneously see and hear the party or the witness answering questions.
- While each party is addressing the [Hearing Panel]/[AHHHC]/[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)****

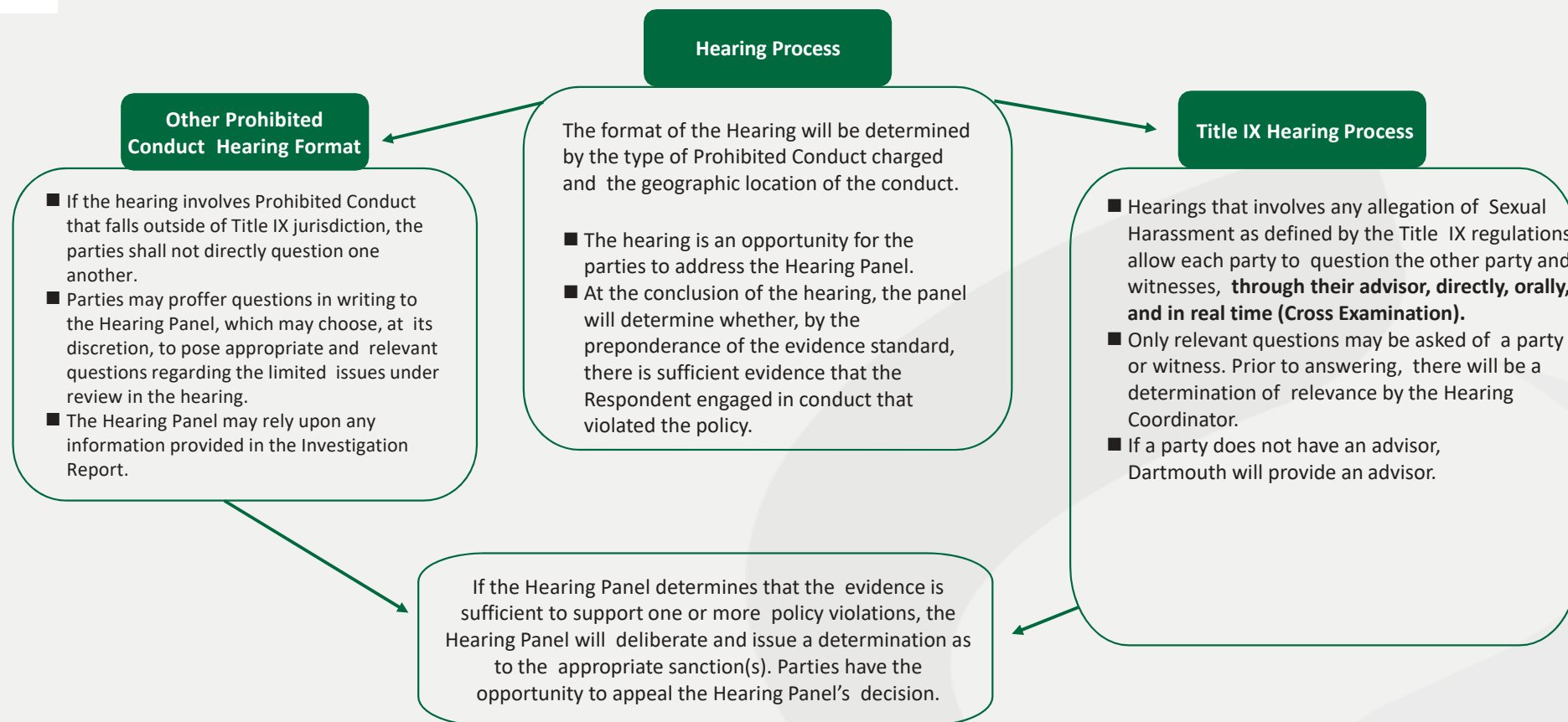
- Both the Complainant and the Respondent have a right to participate in the hearing, but participation is not mandatory: neither party is required to participate in the hearing in order for the hearing to proceed, and the Hearing Panel may not draw a negative or adverse inference from a party's decision 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\*



\*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**

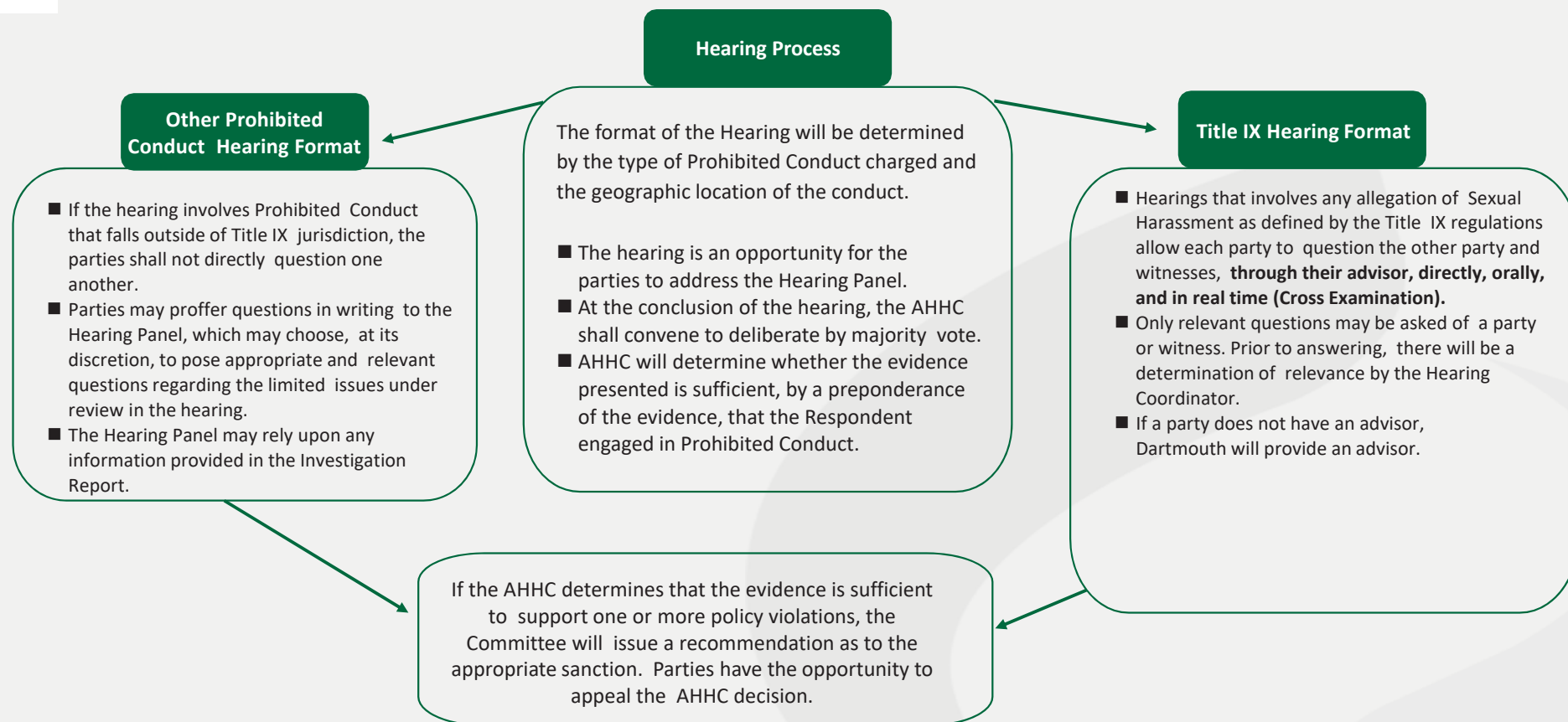
- The **Chair of the Hearing Panel** presides over the Hearing Panel and shall have equal voice and vote with the other members.
- The Chair may be assisted by an administrative, non-voting **Hearing Coordinator**, who will assist the Chair in the administration of the hearing process, including procedural 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**

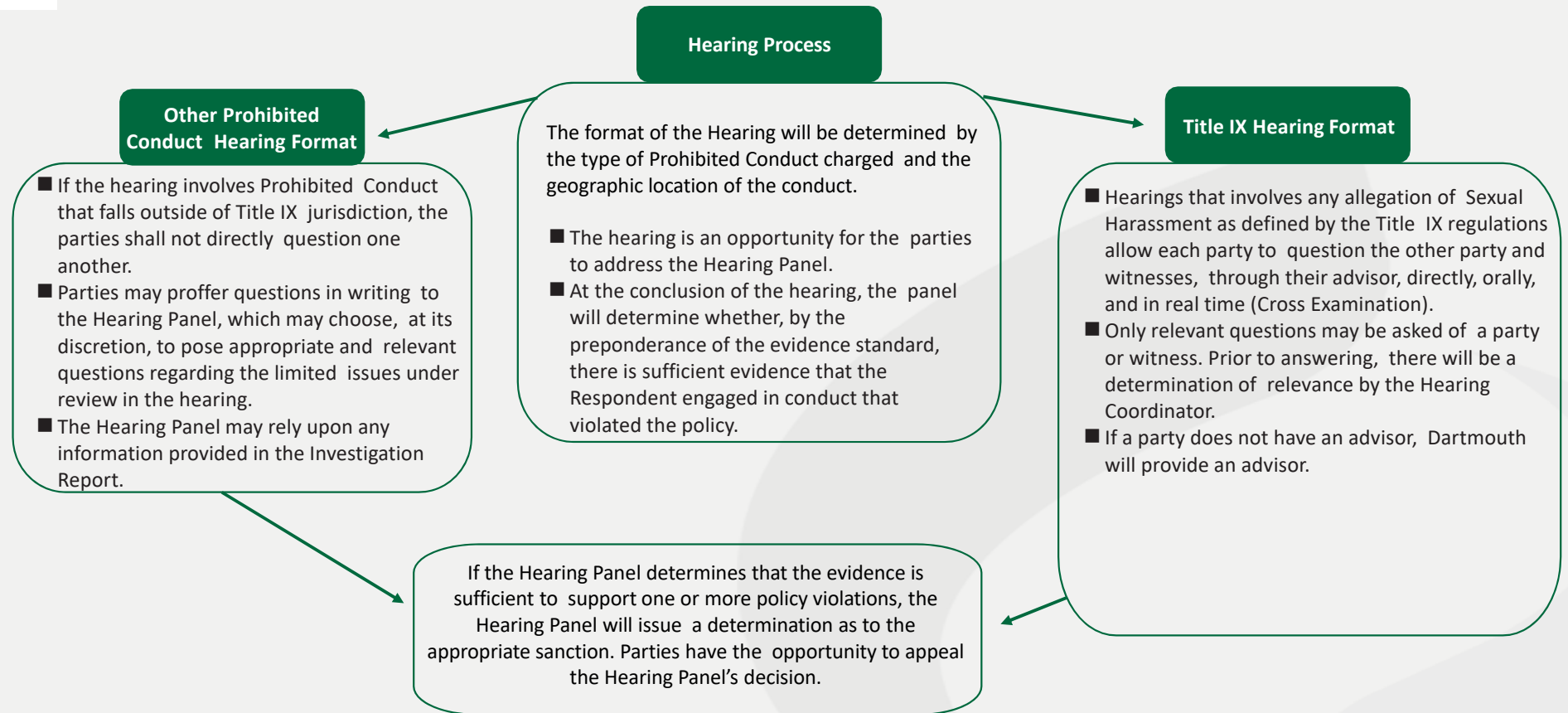
- The **Chair of the AHHC** presides over the hearing process and shall have equal voice and vote with the other members.
- The Chair will be assisted by an administrative, non-voting **Hearing Coordinator**, who will assist the Chair in the administration of the hearing process, including procedural 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.



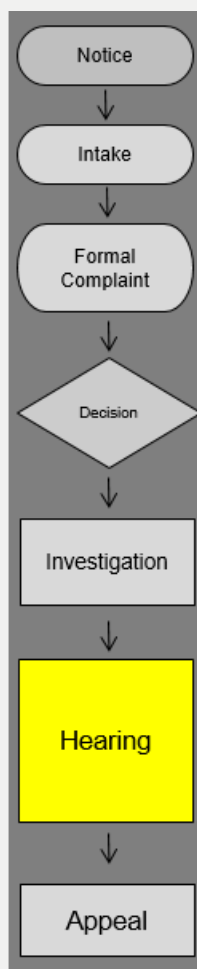
## **The Process for Resolving Complaints Against Staff:** **The Hearing Officer and the Hearing Coordinator**

- 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.

# ADVISORS



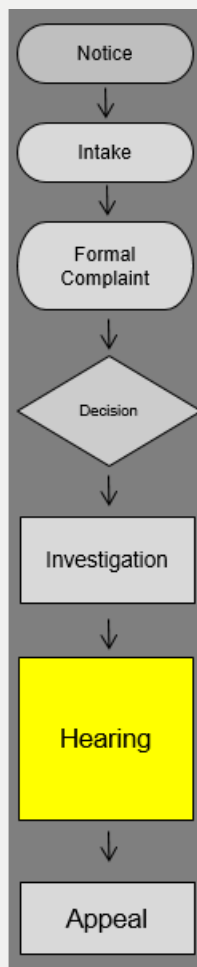
# Role of the Advisor



- 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)

# Role of the Advisor



- 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...

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 in the Party's Absence



- [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

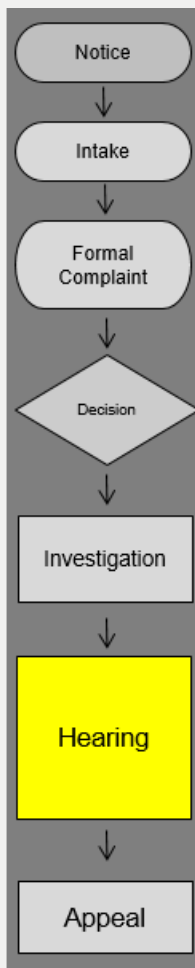
# Obligation to Provide an Advisor



- 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)

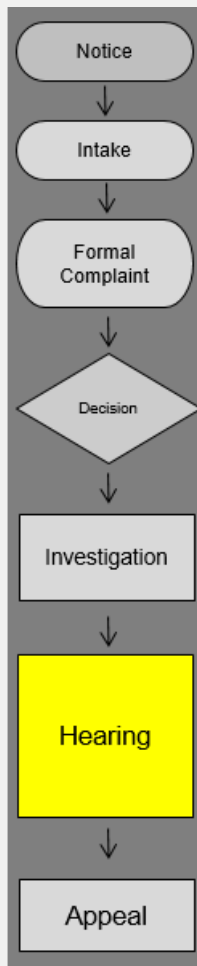
# Must Provide Advisor Even in Party's Absence



- [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

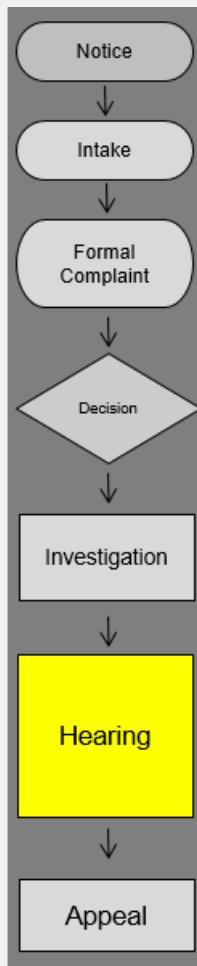
# Appearance Without an Advisor



- 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

# 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)

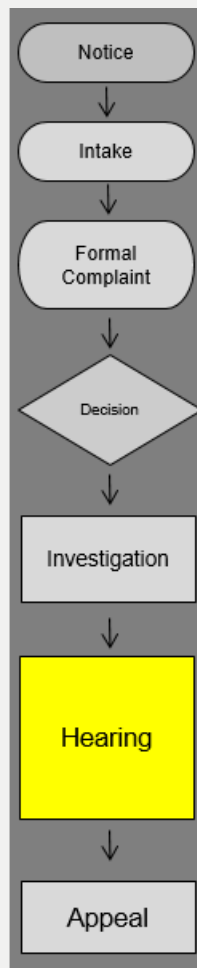
# Opportunity to Challenge Evidence



- 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

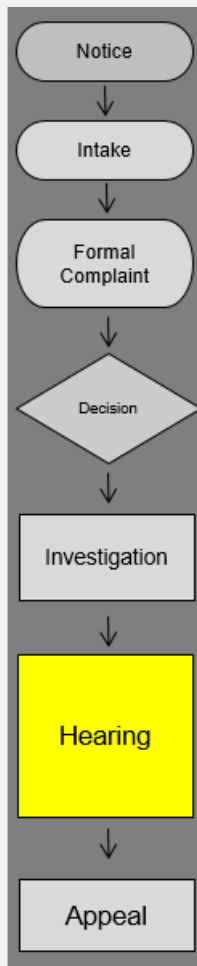
# Determinations Regarding Relevance



- 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

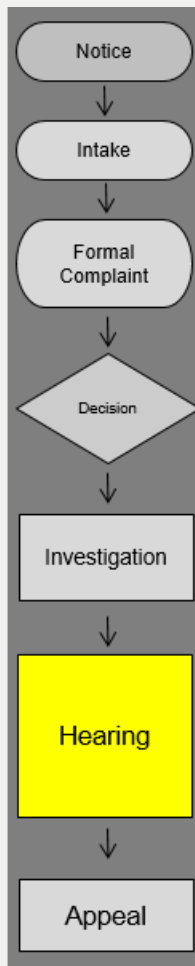
# Cross-Examination



- 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)

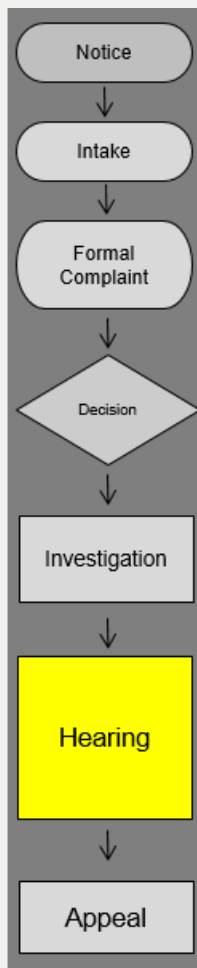
## “Pause” to Reinforce Decorum



- 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

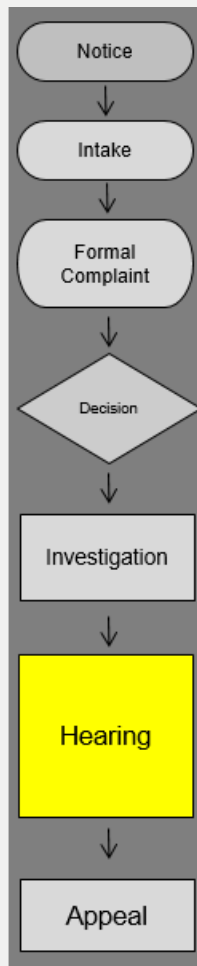


- Similarly, if an **advisor that the recipient provides** refuses to comply with a recipient's rules of decorum, the recipient may provide that party with a different advisor to conduct cross-examination on behalf of that party.
- This incentivizes a party to work with an advisor of choice in a manner 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

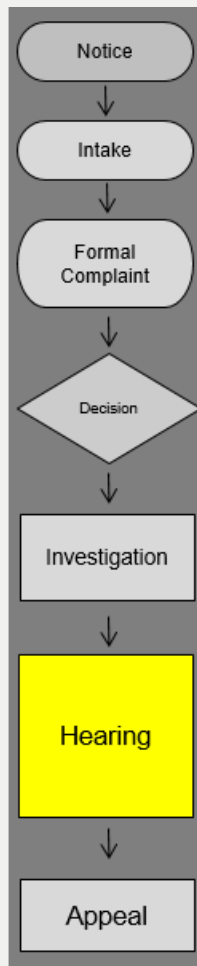
# Relevance

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



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

# Relevance



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

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

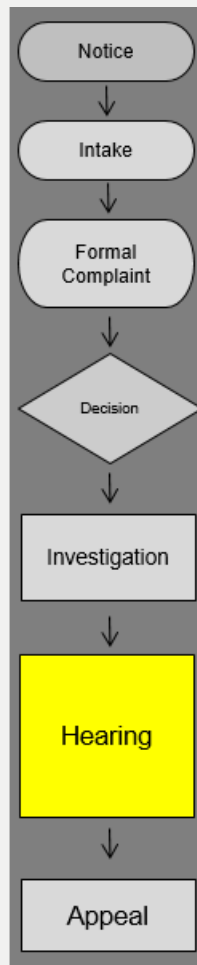
# Relevance



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

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

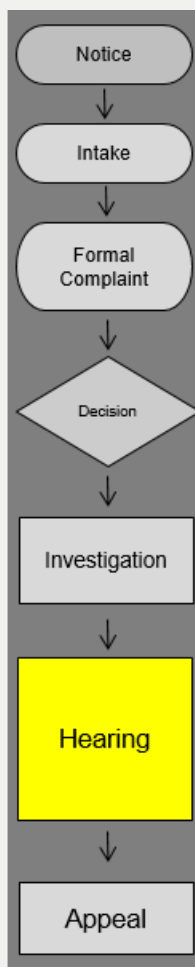
# Limitations on Relevance



- To that end, the Department has determined that recipients **must consider relevant evidence** with the following conditions:
  - a complainant’s prior sexual behavior is **irrelevant** (unless questions or evidence about prior sexual behavior meet one of two exceptions, as noted above);
  - information protected by any legally recognized privilege **cannot be used**; no party’s treatment records may be used without that party’s voluntary, written consent; and
  - The Department notes that where evidence is duplicative of other evidence, a recipient may deem the evidence **not relevant**.

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

# Privileged Information



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

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

# Privileged Information: Per Se Irrelevant



- In response to commenters' concerns that relevant questions might implicate information protected by attorney-client privilege, the final regulations add § 106.45(b)(1)(x) to bar the grievance process from requiring, allowing, relying on, **or otherwise using questions or evidence** that constitute, or seek disclosure of, information protected under a legally recognized privilege.

Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30361

## Relevance: Prior Sexual History



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

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



# Prior Sexual History

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



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

# Prior Sexual History: Motive



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

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

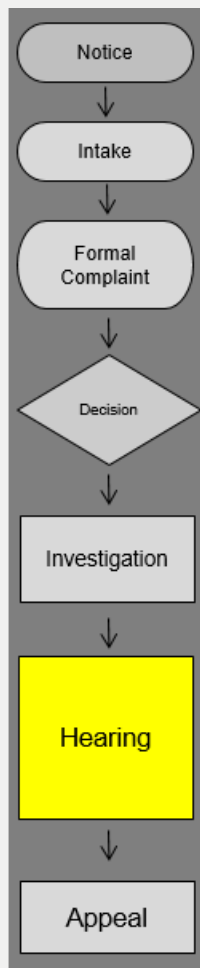
# Prior Sexual History: Per Se Irrelevant



- The final regulations clarify the rape shield language to state that **questions and evidence subject to the rape shield protections are “not relevant,”** and therefore the rape shield protections apply wherever the issue is whether evidence is relevant or not.

Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30353

# Prior or Subsequent Misconduct

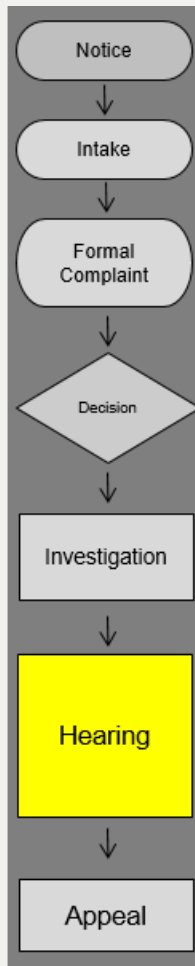


- The regulations do not prohibit the use of prior or subsequent misconduct
  - “Evidence of a pattern of inappropriate behavior by an alleged harasser” permitted if relevant
- Schools will need to determine if such conduct is:
  - Relevant
  - May be used in determining responsibility
  - May be used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

# Practical Considerations

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

# No Comprehensive Evidentiary Rules



- The Department desires to prescribe a grievance process adapted for an educational environment rather than a courtroom, and **declines to impose a comprehensive, detailed set of evidentiary rules** for resolution of contested allegations of sexual harassment under Title IX.
- Rather, the Department has carefully considered the procedures most needed to result in fair, accurate, and legitimate outcomes in Title IX grievance processes.

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

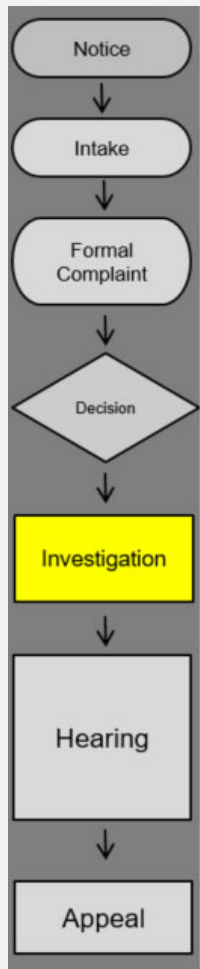
## Simplified Evidentiary Considerations



- Recipients are educational institutions that **should not be converted into *de facto* courtrooms.**
- The final regulations thus prescribe a process that **simplifies evidentiary complexities** while ensuring that determinations regarding responsibility result from **consideration of relevant, reliable evidence.**

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

# Flexibility to Adopt Rules

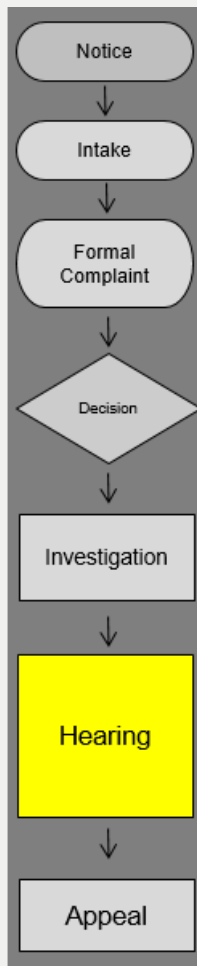


- “Within these evidentiary parameters **recipients retain the flexibility to adopt rules that govern how the recipient’s investigator** and decision-maker evaluate evidence and conduct the grievance process (so long as such rules apply equally to both parties).
- **Relevance is the standard that these 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.



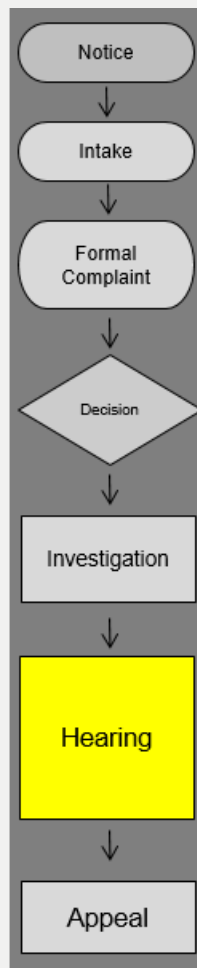
# Relevant Questions



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

Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30248; 30361

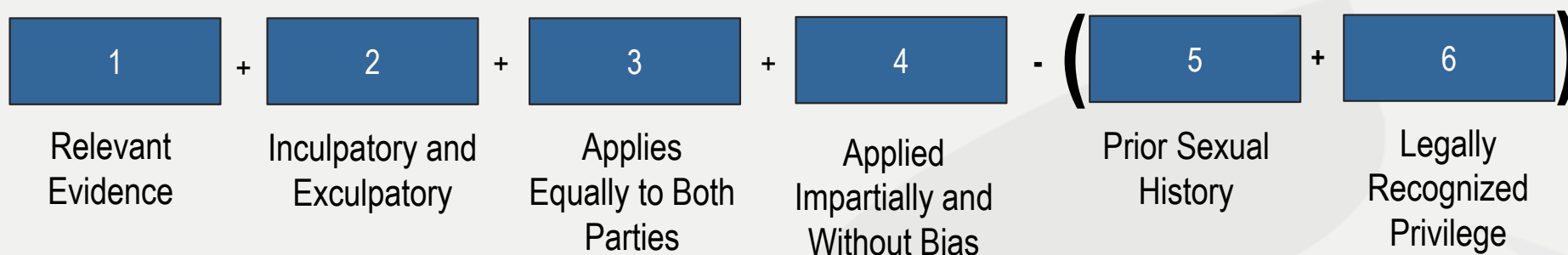
# Relevant Questions



- [T]he final regulations add § 106.45(b)(1)(x) to bar the grievance process from requiring, allowing, relying on, or **otherwise using questions or evidence** that constitute, or seek disclosure of, information protected under a legally recognized privilege.
- Additionally, questions that are **duplicative or repetitive** may fairly be deemed not relevant and thus excluded.

Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30361

# Evidentiary Rules Must Consider



# Relevance: Explaining Exclusion



- Before a complainant, respondent, or witness answers a cross-examination or other question, the decision-maker(s) must first determine whether the question is relevant and explain any decision to exclude a question as not relevant.
- **This provision does not require a decision-maker to give a lengthy or complicated explanation.**

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

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

# Relevance: Explaining Exclusion

- [I]t is sufficient, for example, for a decision-maker to explain that a question is irrelevant because the question calls for **prior sexual behavior** information without meeting one of the two exceptions, or because the question asks about a detail that is **not probative of any material fact** concerning the allegations. No lengthy or complicated exposition is required to satisfy this provision.



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

# Flexibility to Discuss Relevance



- The final regulations **do not preclude a recipient from adopting a rule** (applied equally to both parties) that does, or does not, **give parties or advisors the right to discuss the relevance determination with the decision-maker during the hearing.**
- If a recipient believes that arguments about a relevance determination during a hearing would unnecessarily protract the hearing or become uncomfortable for parties, the recipient **may adopt a rule that prevents parties and advisors from challenging the relevance determination (after receiving the decision-maker's explanation) during the hearing.**

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

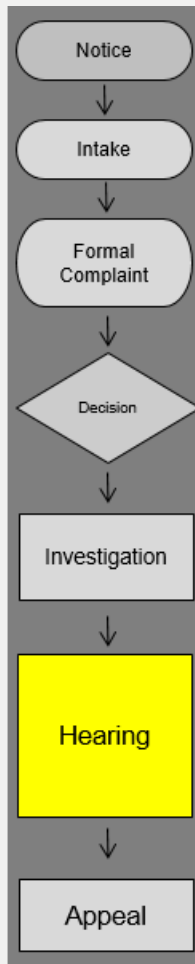
# Appeal of Relevance Determination

- Parties have the equal right to appeal on three bases including procedural irregularity that affects the outcome, so if a party disagrees with a decision-maker's relevance determination, the party has the **opportunity to challenge the relevance determination on appeal.**



Title IX Regulations, May 19, 2020; Preamble 85 F.R 30349, footnote 1340, citing § 106.45(b)(8)

# Appeal of Relevance Determination

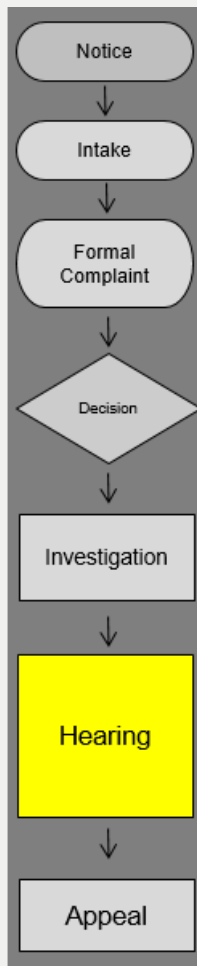


- Parties may appeal erroneous relevance determinations, if they affected the outcome, because § 106.45(b)(8) allows the parties equal appeal rights on grounds that include procedural irregularity that affected the outcome.
- However, asking the decision-maker to also explain the exclusion of questions during the hearing does not affect the parties' appeal rights and may reduce the number of instances in which a party feels the need to appeal on this basis because the decision-maker will have explained the decision during the hearing.

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



# 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.

# **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 its probable truth or accuracy
- 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



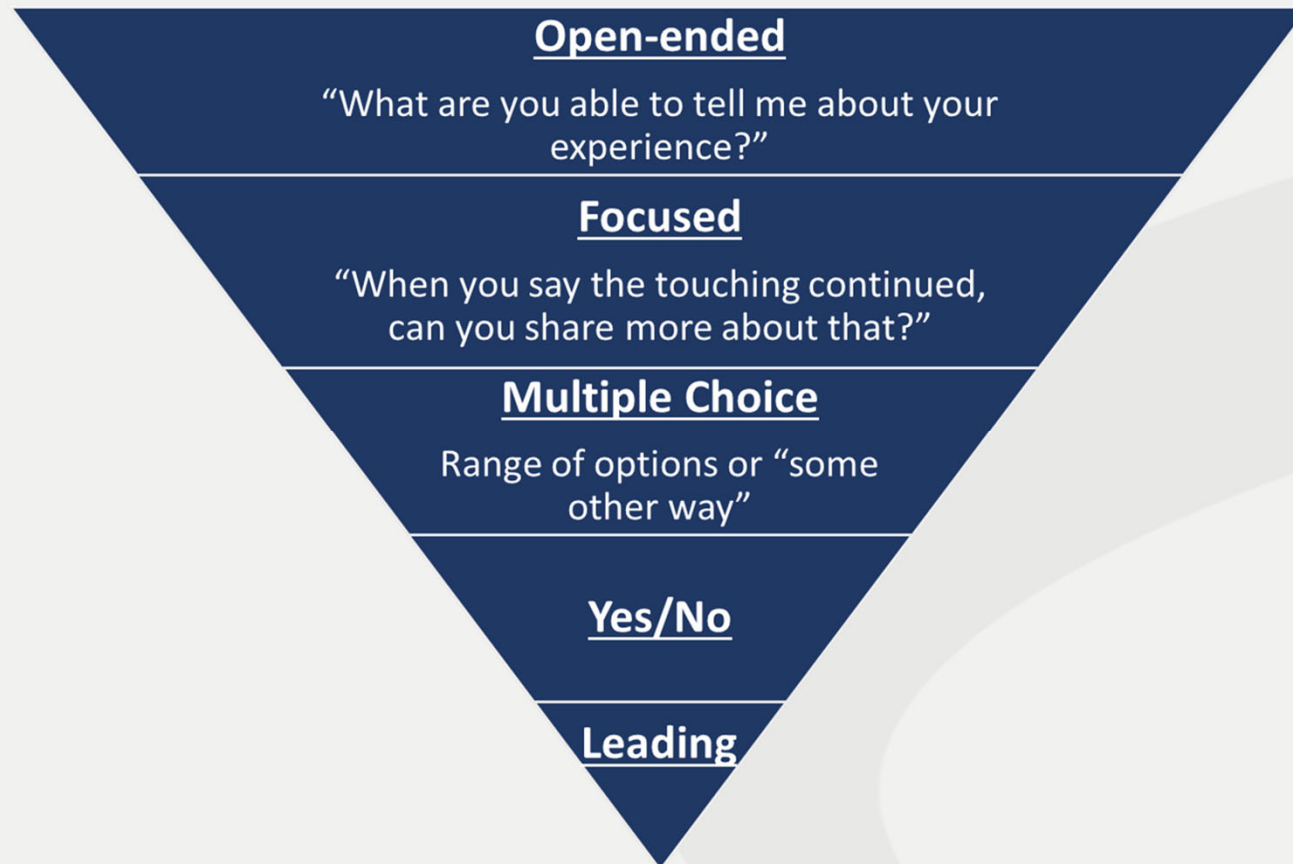
# Participation Techniques

- 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



# RELEVANCE

# Evidentiary Considerations

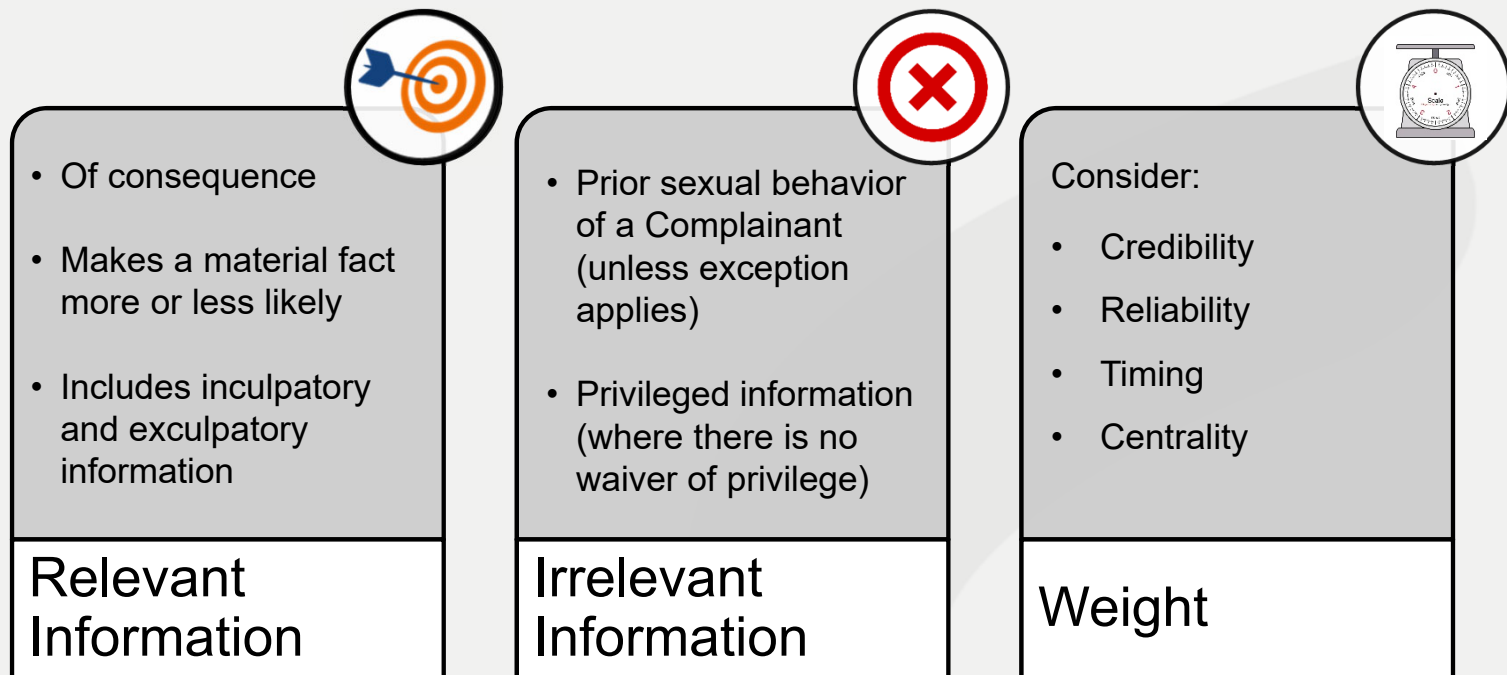
- Relevance
- Privileged Information & Records
- Prior Sexual History
- Prior or Subsequent Misconduct
- Setting Evidentiary Rules



## **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.

# Evidentiary Concepts



# Evidentiary Concepts

Relevance/Irrelevance addresses **whether** the Panel should consider the information.



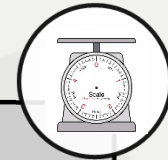
- Of consequence
- Makes a material fact more or less likely
- Includes inculpatory and exculpatory information

Relevant  
Information



- Prior sexual behavior of a Complainant (unless exception applies)
- Privileged information (where there is no waiver of privilege)

Irrelevant  
Information



Consider:

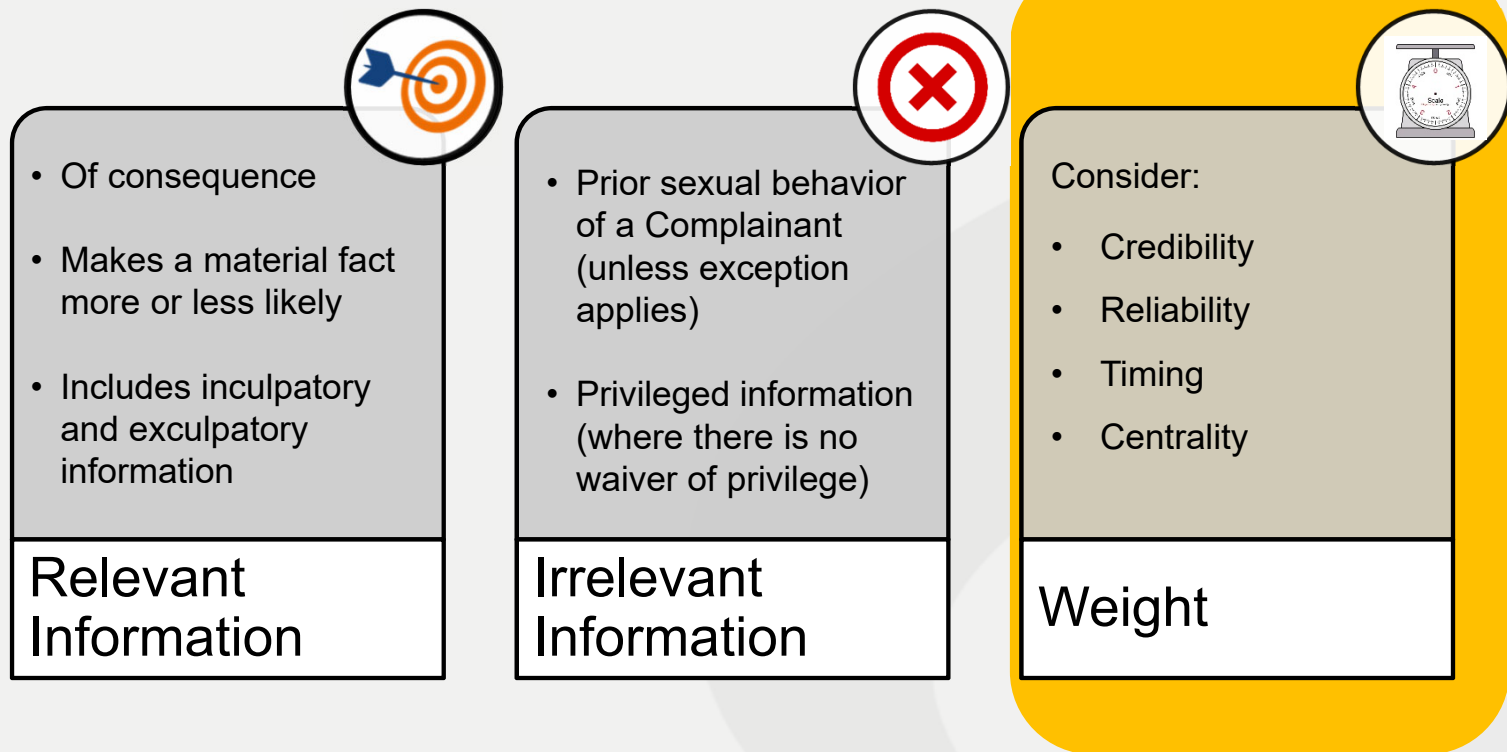
- Credibility
- Reliability
- Timing
- Centrality

Weight



# Evidentiary Concepts

Weight addresses **how and to what extent** the Panel should consider the information



# Per Se Irrelevant Information



- Prior sexual behavior of a Complainant (unless exception applies)
- Privileged information (where there is no waiver of privilege)

Irrelevant  
Information

- Questions and evidence about the **Complainant's sexual predisposition or prior sexual behavior** are not relevant, unless 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.
- Information protected by any **legally recognized privilege** cannot be used without that party's voluntary, written consent.

# Relevant Information



- Of consequence
- Makes a material fact more or less likely
- Includes inculpatory and exculpatory information

Relevant  
Information

- The investigation report fairly summarizes all relevant information.
- At the hearing, the parties have the opportunity to challenge the investigator's (implicit) determinations as to relevance.
- The parties and their advisors must have access to all of the information that the investigator gathered that is directly related to the allegations (broader category than what the investigator deemed relevant).
- In determining which questions to permit in the hearing, the Panel Chair must consider whether the question seeks relevant information.
- Blanket exclusions are no longer permitted. Instead, the Panel must be guided by relevance.

# Relevance of Prior or Subsequent Conduct

- Intent/knowledge/state of mind
- Motive
- Opportunity
- Lack of mistake
- Pattern
- Identity
- Information that is inextricably interwoven with the facts

# Framing Difficult Questions

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



## **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.



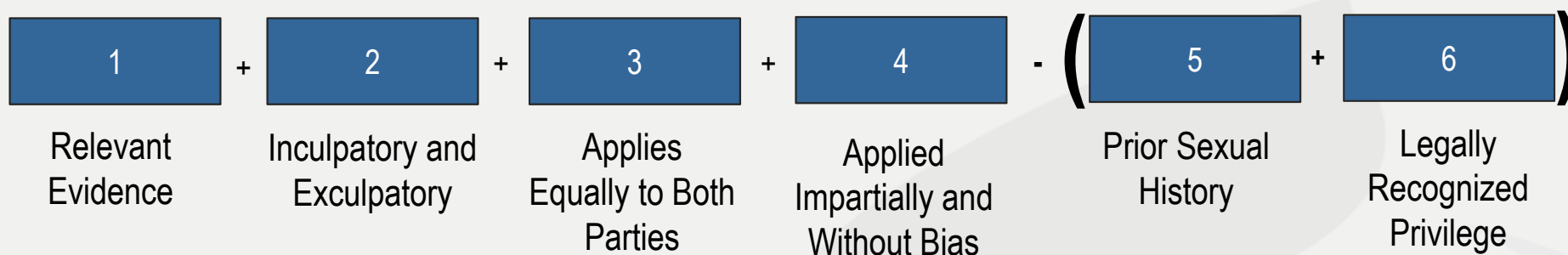
## **Included in the Processes for Resolving Complaints Against Students, Faculty and Staff: Relevance and Evidentiary Considerations**

### **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



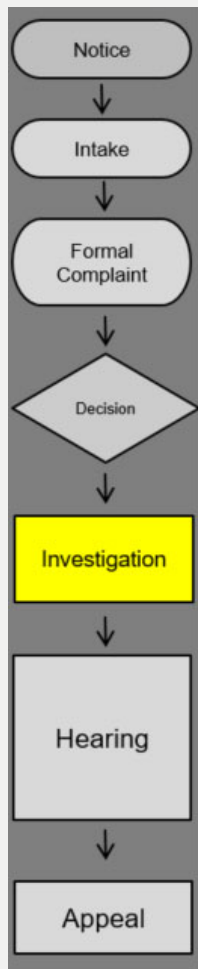
# **RECAP ON EVIDENTIARY CONSIDERATIONS**

# Evidentiary Considerations

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

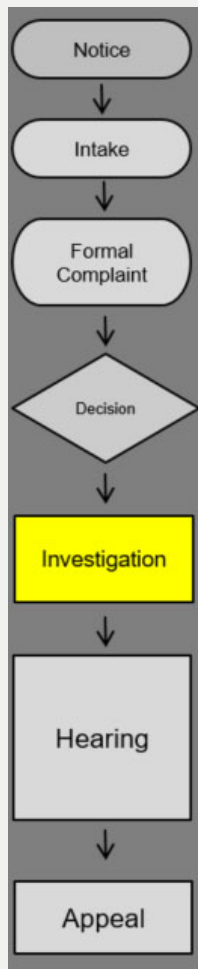
# Relevance

- 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



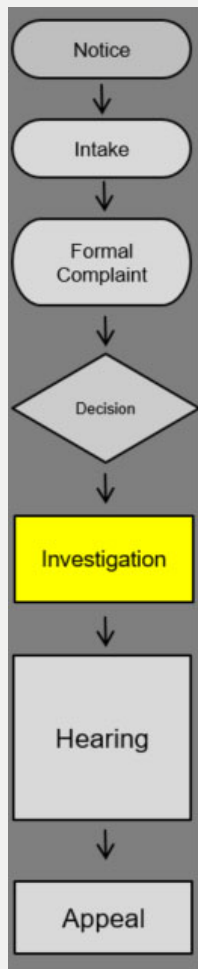
“While the proposed rules do not speak to

- 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

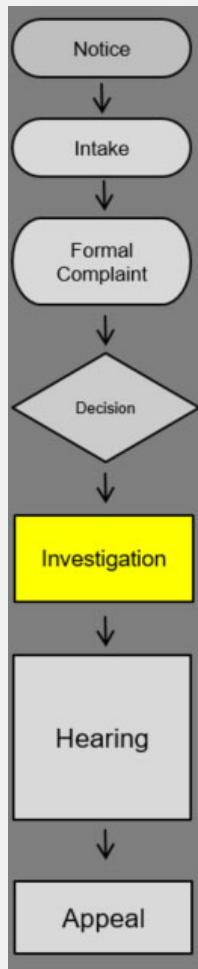
# Relevance



- 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

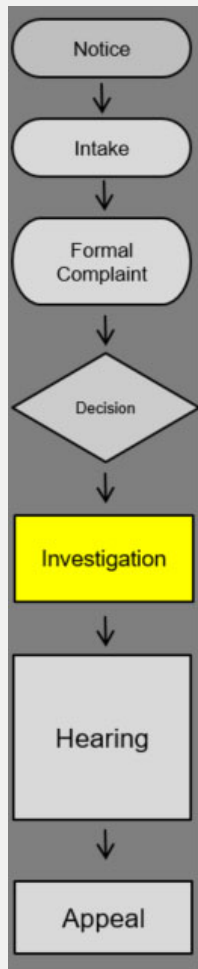
# Flexibility to Adopt Rules



- “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

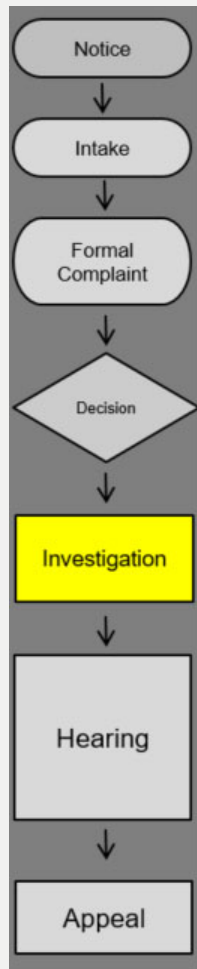




## **Included in the Processes for Resolving Complaints Against Students, Faculty and Staff: Relevance and Evidentiary Considerations**

- 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.

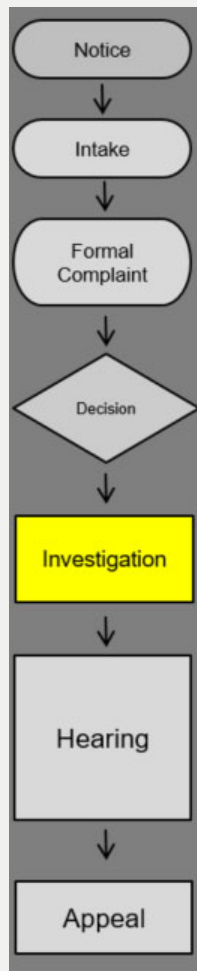
# Privileged Information



- 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

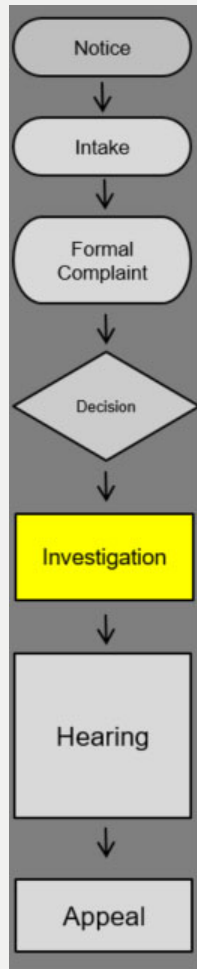
# Prior Sexual History



- 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

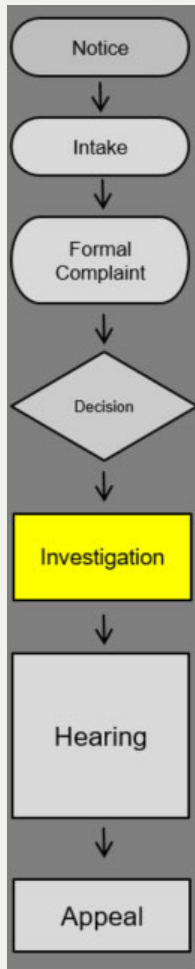
# Prior Sexual History



- 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.

# **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

(continued on next slide)

# 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?

(continued on next slide)

# 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

(continued on next slide)

# 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 (Recap)

- 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

<b>Dynamics of Sexual Assault</b>	Informed understanding of dynamics of sexual and gender-based harassment and interpersonal violence.
<b>Demeanor</b>	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?
<b>Interest / Motive / Bias</b>	Did the witness have any interest in the outcome of the case, bias, prejudice, or other motive that might affect his/her testimony?
<b>Detail</b>	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?
<b>Corroboration</b>	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?
<b>Common Sense</b>	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?

# **AFTER THE HEARING: 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.



**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 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.

# 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]/[AHHHC]/[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]/[AHHHC]/[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]/[AHHHC]/[Hearing Officer] and will consider the appropriateness of continuing Supportive Measures on an ongoing basis.

# **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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- These materials are meant to provide a framework for informed discussion, not to provide legal advice regarding specific institutions or contexts.
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