

TRAUMA-INFORMED SEXUAL ASSAULT INVESTIGATION AND ADJUDICATION INSTITUTE

2016 ANNUAL CONFERENCE AT
GEORGE WASHINGTON UNIVERSITY
JULY 18–22, 2016



THE NATIONAL CENTER FOR
CAMPUS PUBLIC SAFETY

TRAUMA-INFORMED SEXUAL ASSAULT INVESTIGATION AND ADJUDICATION INSTITUTE

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Mindfulness for Beginners: Reclaiming the Present Moment – and Your Life, Jon Kabat-Zinn (Recommended Book)	
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PART I: SEMINAR MATERIALS

Agenda and Curriculum Overview

TRAUMA-INFORMED SEXUAL ASSAULT INVESTIGATION AND ADJUDICATION INSTITUTE

DAY 1 (8:30 A.M. – 5:00 P.M.)

Module 1: Welcome

Module 2: Overview of Title IX and Clery Act and Institutional Obligations Module 3: Community Coordination

Module 4: The Culture in Which We Live: Understanding the Rape Narrative Module 5: Impact of Language

DAY 2 (8:30 A.M. – 5:00 P.M.)

Module 6: Understanding the Effects of Trauma

Module 7: Sexual Assault First Response: First Impressions Matter Module 8: Interviewing the Complainant

Module 9: Overcoming the Complexities of Sexual Violence: Offender Realities

DAY 3 (8:30 A.M. – 5:00 P.M.)

Module 10: Interviewing the Respondent

Module 11: Sexual Assault: Investigative Strategies Module 12: Report Writing and Assessment

DAY 4 (8:30 A.M. – 5:00 P.M.)

Module 13: Adjudication: Protecting Complainants, Promoting Accountability, Respecting Rights Module 14: Adjudication: Appeals and Logistics

Module 15: Mandatory Training to Comply with OCR Guidance and the Clery Act

Module 16: Institutional Support and Self Care: Taking Care of Yourself So You Can Take Care of Others Module 17: Program Close

Optional Q&A Session (4:00 p.m. – 5:00 p.m.)

JULY 22 (8:30 A.M. – 5:00 P.M.)

DRAFT SCHEDULE OF PRESENTERS

APPLYING THE BEST AVAILABLE RESEARCH EVIDENCE TO BUILD COMPREHENSIVE STRATEGIES FOR SEXUAL VIOLENCE PREVENTION

Presenter: Dr. Kathleen C. Basile, CDC

Eliminating sexual violence on college campuses and in communities requires a comprehensive approach to primary prevention based on the best available research evidence. The CDC, in partnership with our federal and local partners, is committed to advancing the science of sexual violence prevention to inform the development of more effective strategies. This workshop will provide an overview of the latest knowledge related to sexual violence, including risk and protective factors, evidence-based strategies, and the need for comprehensive, multi-level approaches that address the complexities of this problem. Participants will have an opportunity to think about ways to apply this knowledge to build a comprehensive prevention plan for their campus or community.

SERVING SURVIVORS OF CAMPUS SEXUAL ASSAULT AT THE INTERSECTION OF THE CLERY ACT AND TITLE IX PRESENTERS:

Lindy Aldrich, Victim Rights Law Center

Alison Kiss, Clery Center

Billie Matelevich-Hoang, OVC TTAC.

The panel will focus on the Intersections of the Clery Act and Title IX, co-presented by members of the Victim Rights Law Center (VRLC) and the Clery Center for Security On Campus. These two perspectives will be presented in conjunction with a victim advocate who could discuss how to best provide victim services while navigating the two sets of requirements. The presentation will include references to the relevant archived webinars that have been offered by the OVC Training and Technical Assistance Center (OVC TTAC) as well as new webinars currently in development. The resources and strategies highlighted during this panel would also incorporate Victim Law, and other OVC training and technical options for the audience.

TITLE IX AND SEXUAL VIOLENCE: AN IN-DEPTH OVERVIEW OF SCHOOLS' OBLIGATIONS UNDER TITLE IX TO ADDRESS SEXUAL VIOLENCE

Rachel Gettler, OCR

Colleen Phillips or Whitney Pellegrino, CRT

The federal government is committed to assisting schools across the country as they work to address sexual violence on campus. Although progress has been made, there still remains confusion regarding schools' obligations under Title IX. This session will provide participants with information regarding schools' obligations under Title IX to address sexual violence. Topics will include notice, responsible employees, investigation and adjudication, remedies, confidentiality, and the differences between Title IX and the Clery Act..)



**End Violence Against Women International
(EVAWI)**

Understanding the Neurobiology of Trauma and Implications for Interviewing Victims

**Christopher Wilson, Psy.D.
Kimberly A. Lonsway, Ph.D.
Sergeant Joanne Archambault (Ret.)**

Contributions by James Hopper, Ph.D.

November 2016

This project was supported by Grant No. 2013-TA-AX-K021 awarded by the Office on Violence Against Women, U.S. Department of Justice. The opinions, findings, conclusions, and recommendations expressed in this publication are those of the author(s) and do not necessarily reflect the views of the Department of Justice, Office on Violence Against Women.

Dr. Christopher Wilson is a licensed psychologist and nationally recognized speaker and trainer from Portland, Oregon. For the past 16 years he's worked with victims and perpetrators of crime. He currently has a small private practice of individual clients, conducts psychological evaluations for the Oregon Department of Human Services, and trains nationwide on a variety of issues including sexual assault, domestic violence, and the neurobiology of trauma. His audiences have included judges, attorneys, civilian, campus, and military law enforcement officers, college and university Title IX administrators and investigators, victim advocates, and mental health professionals. He has provided training for organizations across the country including the US Department of Justice, the US Department of the Interior, the US Navy, the US Marine Corps, the US Army, the US Office for Victims of Crime, and the National Crime Victim Law Institute. Dr. Wilson is also a trainer for the US Army's Special Victims Unit Investigation Course, and two nationally recognized programs: Legal Momentum, providing training for the judiciary, and the You Have Options Program.



Dr. Kimberly A. Lonsway has served as the Director of Research for EVAWI since 2004. Her research focuses on sexual violence and the criminal justice and community response system. She has written over 60 published articles, book chapters, technical reports, government reports, and commissioned documents - in addition to numerous training modules, bulletins, and other resources. She has volunteered for over fifteen years as a victim advocate and in 2012, she was awarded the first-ever Volunteer of the Decade Award from the Sexual Assault Recovery and Prevention (SARP) Center in San Luis Obispo, CA. She earned her Ph.D. in the Department of Psychology at the University of Illinois, Urbana-Champaign.



Sgt. Joanne Archambault (Retired, San Diego Police Department) is the Chief Executive Officer for EVAWI. Prior to founding EVAWI, Sgt. Archambault worked for the San Diego Police Department for almost 23 years, in a wide variety of assignments. During the last 10 years of her service, she supervised the Sex Crimes Unit, which had 13 detectives and was responsible for investigating approximately 1,000 felony sexual assaults within the City of San Diego each year. Sgt. Archambault has provided training for tens of thousands of practitioners, policymakers and others – both across the country and around the world. She has been instrumental in creating system-level change through individual contacts, as well as policy initiatives and recommendations for best practice.



Dr. James W. Hopper is an independent consultant and Teaching Associate in Psychology at Harvard Medical School. For over 25 years Dr. Hopper's research, clinical and consulting work has focused on the psychological and biological effects of child abuse, sexual assault and other traumatic experiences. As a clinician Dr. Hopper works with adults who have experienced abuse as children and assault as adults. In his forensic work, both criminal and civil, he testifies on short- and long-term impacts of child abuse and sexual assault. Dr. Hopper was a founding board member and longtime advisor to 1in6 and served on the Peace Corps Sexual Assault Advisory Council. He consults and teaches nationally and internationally to military and civilian investigators, prosecutors, victim advocates, commanders and higher education administrators.



Introduction

Within the last century, the development of fingerprint technology, and then the discovery of DNA, both revolutionized the way law enforcement investigates crime. Both dictated widespread changes and adaptations in the practice of investigations, specifically with regard to suspect identification. Now new scientific advances have the potential to transform the way law enforcement conducts victim interviews, indeed, how victims are perceived. Specifically, neuroscience suggests that many common victim responses are actually the results of fear and trauma – not deception, as they have frequently been interpreted. Also, the way victims recount their experience often raises suspicion in the minds of investigators, prosecutors, judges, and the general public, including jurors, as well as their own friends and family members.

This can be illustrated with case examples, such as Julie M., a local university student whose sexual assault was included in a report published by Human Rights Watch (2013). She was “forced to perform oral sex by a stranger,” and then “went to the hospital the next day and reported to the police” (p. 132). However, when police asked her to describe the assailant, she was unable to describe him in any detail. Julie M. felt like the police did not believe her, in part because she could not provide a specific description. Her case was subsequently closed (Human Rights Watch, 2013).

How can you not remember?
How can we believe you?

Or the case of Jane Doe, also described in the Human Rights Watch report, who was sexually assaulted by a stranger after going out with friends. When she could not remember the name of the bar, the police reportedly questioned whether the report was legitimate (2013, p. 132).

Then there is the victim who described to Sgt. Joanne Archambault how her report was handled by the detective assigned to her case. When she remembered a detail the day after her sexual assault, she called the detective to share the information. However, this raised such suspicion with the detective, she hesitated to offer any more information that came to mind.

Well you didn't say anything
about this yesterday, and you're
bringing this up now?

The examples go on and on. In too many cases, across the country and around the world, victims of sexual assault and other crimes have been subjected to interview techniques that are at best ineffective – and at worst inappropriate or even abusive. Yet neuroscience research is now fostering a better understanding of the impact that trauma has on crime victims, and this has the potential to yield a number of critical improvements in the way interviews are conducted.

At the same time, attention of policymakers and the public has increasingly focused on the low rates of reporting, investigation, prosecution, and conviction for sexual assault. One critical step in changing this reality is to improve the way victims are interviewed. Better interviews will result in more thorough investigations that can effectively exclude suspects, and support referrals for prosecution with a better chance to hold more offenders accountable. This training bulletin is designed to assist in this effort.

The material included in this bulletin is drawn from a considerable body of research, including the publications and other resources in the Reference and Resource List at the end of the document. However, it is important to recognize that this list is simply a *representative sample* of publications in the field, not a *comprehensive list*.

Defining Trauma

Before we can make sense of the neuroscience of trauma, and the implications for victim interviewing, we need to define the concept of trauma, understand a little bit more about the brain, and explore how we as humans have evolved to respond to threat and attack. For the purpose of this training bulletin, *trauma* is defined as an event that combines fear, horror, or terror with actual or perceived lack of control. Trauma is often a life-changing event with negative, sometimes lifelong consequences.

In the past, all we had was an experiential definition of trauma. Due to scientific limitations, we were never able to talk about it beyond an individual's subjective experience. With recent advances, however, we are now able to understand changes in the brain that occur both at the time of a traumatic incident, and in many cases in the days, weeks, months, and even years afterward. In other words, we used to be limited to "soft science" (i.e., social science) when describing the nature and impact of trauma. However, we can now have that discussion using "hard science" (i.e., changes in the brain during and following trauma).

At the same time, trauma remains a fundamentally subjective event – what is traumatic to one person may not be for another, because what's fearful or terrifying to me, may not be for you. What I experience as a lack of control, you may not. The distinction lies both in the "hard wiring" or conditioning of our brains, as well as the cumulative impact of learning and life experiences.

Brain Basics

As we begin talking about "hard science" and the brain, there are a few disclaimers worth mentioning. First, when describing particular structures in the brain, we will be simplifying their function considerably. Each structure in the brain is involved in any number of functions, but we're only going to be discussing a limited number of these functions here. To illustrate, you're going to learn about the amygdala's involvement in our response to threat, but the amygdala is involved in a lot more than threat responses.

Second, while we can talk about the brain with more certainty than at any other point in history, we still have to consider that not every brain reacts the same way. Individual differences (including the results of nature as well as nurture) exert a significant influence on how the brain responds. This is why you'll often see the phrases "for the most part" or "most of the time," rather than more definitive language. What we will be describing are common victim reactions and behaviors, rather than absolutes.

Finally, keep in mind that the discussion becomes even more complicated when you add drugs or alcohol into the mix. As complicated as brains are when they respond to trauma and threat, there are additional factors when substances are involved.

So, with these disclaimers out of the way, let's talk about the brain.

Neural Networks or Brain Circuitry

The brain is made up of billions of cells called *neurons*. These neurons pass information between each other, and then to the rest of our body, chemically and electrically. They often “fire” in groups that can be described as *neural networks* or *brain circuitry*,¹ and as you can imagine, this can be extremely complex at the micro-level. However, there are two main things we want you to understand about brain circuitry for the purpose of this training material.

They're Automatic

First, it's important to understand that many responses to trauma (both during a sexual assault and afterward) are often automatic – the result of neurons firing in patterns that you can't just “wish away” or logically “think away.” In fact, many of the circuits that condition our responses to trauma have been ingrained or “baked” into the brain.

They Protect Us from Attack

Second, if you believe in evolution, these circuits can be seen as the result of an evolutionary process developed to protect human beings from attacks by predators, long before we had access to advanced weaponry. If you believe in intelligent design, they can be seen as part of the incredibly intelligent design that is the human brain.

They're Here to Stay

Moreover, the patterns in which brain circuits fire don't just go away. Whether they are patterns developed through evolution, or established through repetitive behaviors (like habits), we often fall back on them even after years of inactivity. Take the story of an 86-year old former paratrooper who stumbled down some stairs on his way to the kitchen. Instead of falling and breaking his hip, he “dropped and rolled” just like he was taught to do 66 years earlier. He didn't think about it, he just did it. In this case, his brain circuitry served as a blessing. But for those who are sexually assaulted, these circuits and habitual responses can increase their vulnerability and undermine their credibility.

We will talk more about this later, but at this point, suffice it to say that automatic responses, whether established through training, habit learning, or other processes activated during a sexual assault

¹ People use different terms to describe a number of related concepts, including *neural networks*, *brain circuitry*, *neural circuits*, etc. While there may be subtle differences in how these terms are used by scientists, they are used interchangeably for the purpose of this training material. In other words, the terms can be understood as essentially meaning the same things for the purposes discussed here.

will not “go away,” simply because the assault ended. This is true regardless of whether the assault ended minutes ago – or if it was weeks, months, or years before. This is the same reason why veterans are often startled by the sound of a car backfiring, and they react with terror as if shots were fired. This can be seen moments after leaving the battlefield, or years after their combat service – even if they have received treatment for PTSD. Their automatic responses don’t simply “disappear,” just because the battle, or even the war ended.

The same is true for all of us: Brain circuitry that is activated during a traumatic event will often continue to guide our responses for years to come, perhaps all of our lives.

Prefrontal Cortex

Now let’s look at some other brain structures that will help you to understand the impact of trauma on human behavior and memory. We’ll begin with the prefrontal cortex.



Physical Location

To get a sense of where this region is in the brain, make a fist with your thumb on the *inside* of your fingers and hold your arm up. While it’s a rough three-dimensional diagram, it’s a pretty good one. Your forearm is your spinal cord. Your elbow is the base of your spine. Your palm just below your thumb is the base of the brain. Your thumb represents something called your limbic system (which we’ll discuss in a bit), and the two fingernails of your middle and ring finger are your *prefrontal cortex*.

Logical Thinking and Planning

Most folks who have heard of the prefrontal cortex are aware that it plays a role in our *ability to think logically and plan*. When you thought about what you had to do at work today, you were largely using your prefrontal cortex. When you decided to read this training bulletin, or made plans to get married, prepared to buy a car, etc. ... all those decisions involved a logical decision and some planning, which heavily involve your prefrontal cortex. These are critical functions that are important to understand.

Integrating Memories into “Stories”

The second function has to do with memory. When it comes to memories of events – like the time you took your son to his first fireworks display, or hosted a party for your daughter’s third birthday – you will tell others about these memories as if they were stories. Granted, the older you get, the less of the story you may remember, but for the most part, our telling of events will typically have a beginning, middle, and end. So when you are asked, “What happened at the birthday party?” you may not put everything in chronological order, but you probably could, if the person you were talking to asked you to do that. In fact, you may not even respond to the question with a narrative description at all, but instead offer a basic summary (“It was great!”). That summary will typically be based on your ability to think about the party, evaluate your overall impression of what happened, and then put together a story of the event.

Yet these memories do not become stories (in the way we typically think of them) until the prefrontal cortex gets involved. Initially they're just points of "data" – a collection of sights, sounds, smells, tastes, bodily sensations, and emotions. The prefrontal cortex plays a crucial role in integrating those various data points and weaving them into a coherent account or narrative. This narrative is then what we produce when talking about a "memory" of an event, and it is what we expect people to produce when we ask them about an event they may remember. For example, it is what investigators typically expect to hear when interviewing a victim of a sexual assault. This is why they often react with suspicion when a victim doesn't produce this type of memory or "story," with a logical flow and a clear beginning, middle, and end.

Controlling Attention

The third role the prefrontal cortex plays is in helping us to *control attention*. With the assistance of your prefrontal cortex, you are typically able to decide what you want to focus on ... whether it is a sunset, a conversation, or a training bulletin on the brain and trauma. This is called *top-down attention*. Why is it important for you to understand this? Because memory itself is a function of attention: If you're not focused on something, it probably won't get encoded into memory, so you won't remember it.

For example, if you're sitting in a training workshop and your phone rings, your prefrontal cortex is involved in the ability to shift your attention from the workshop to make the decision to get up, leave the workshop, and take the call. To be clear, it may be habitual for you to look down at your phone when it rings, but the decision to focus on the call and decide whether to attend to it largely involves your prefrontal cortex.

Summary of the Prefrontal Cortex

So, to summarize briefly, the prefrontal cortex plays a role in three functions for our purposes: (1) Controlling our attention, (2) Integrating memory data into narrative "stories," and (3) Planning/making logical (or rational) decisions.

Limbic System

Now, let's turn our attention to the *limbic system*, which includes a number of brain structures but can roughly be represented by your thumb, if you are still holding your folded fist in the air. In fact, all of the parts of the brain that are located below your fingers are called "sub-cortical," which means they are not part of the "thinking brain."

Defense Circuitry

One primary function associated with the limbic system is our *defense circuitry*. Remember those terms, *neural network* and *brain circuitry*? Well, the limbic system is part of our brain circuitry for defending ourselves against attack, which includes detecting threats in the environment and responding to them.

Whenever you respond to a perceived threat, it's going to involve the limbic system; it may not be something you are able to consciously think about or make logical decisions about. In fact, while we're reacting to a threat, our prefrontal cortex may not even get involved. But, we will talk more about that later. For now, it is enough to know that the limbic system is involved in our defense circuitry, and therefore our responses to threat will often not be logical, reasoned, or thought-out.

Memory Encoding

The second function involving the limbic system is *memory encoding*. Earlier, we described how memory begins as a collection of data points in the form of sights, sounds, smells, tastes, bodily sensations, and emotions. The limbic system plays a role in encoding those data points with context and associations that make it possible for the prefrontal cortex to later recall the data points in the context of a coherent narrative.

Mess with the limbic system and you mess with the part of the brain that encodes data with the context and associations that help us tell the story of our memories.

Emotions

The final function of the limbic system that we will discuss is its role in *emotion*. You may have heard the phrase, "Emotions have no logic." This saying is not entirely accurate in terms of neuroscience, but it comes from the fact that emotions get traction not in the prefrontal cortex (or logic center of our brains) but in the limbic system.

As Chris Wilson often jokes in trainings, all you have to do is look at any 45-year-old man to know that *having* emotions and *being aware* of those emotions are two very different things! The *having* of emotion has more to do with the limbic system, while the *awareness* of that emotion comes from other brain systems. This is why you can sometimes see another person looking very sad or angry, but when you ask them whether they are feeling this way, they may genuinely say "no." Of course, it is also possible they are lying, but for now, we just want to recognize that people sometimes have emotional experiences without conscious awareness.

Summary of the Limbic System

So, to summarize the limbic system for our purposes, it plays a role in three primary functions: (1) Emotion, (2) Memory encoding, and (3) Defense circuitry.

The Brain and Threat or Fear

Now we will turn our attention to exploring how the brain responds to threat and fear. This is critical for understanding the impact on behavior, memory, and later recall.

Ready State: Vigilance

One primary role of the brain is to protect us by predicting what may or may not happen in the environment and to detect any threat to our survival. The technical term for this is *vigilance*. While many of us associate vigilance with post-traumatic stress and hyper-vigilance, we are all vigilant to some degree, all the time. When you and your kids are walking through a crowded mall, for example, you are more vigilant than when you are sitting at home in your living room. To be clear, you are still vigilant when you are sitting on your couch at home. It's just that you are less vigilant than you might be at the mall.

Similarly, a patrol officer driving on duty will be more vigilant than a civilian driving to the store. Both are still vigilant, it's just that the higher level of vigilance in the officer will likely lead to picking up subtler cues in the environment suggesting the presence of a potential threat. This will lead to a relatively quicker response to the threat, which is why officers are trained to be more vigilant than civilians!

Interestingly, our vigilance isn't conscious most of the time – vigilance is a function of our brain circuitry that gets used so often we don't have to think about it. The brain is constantly scanning the environment to detect anything that does not fit with what is predicted to be there, so we can identify potential threats, take measures to protect ourselves, and remain safe whenever possible.

The Amygdala: Early Warning System

The brain then has an early warning system that detects potential threats in the environment – even before it can determine what to do about them. One way to visualize this early warning system is to remember the old TV show, *Lost in Space*. If you've never seen the show, the plot line is pretty simple: A family flies around in a space ship (which actually appears to be two paper plates, glued together and suspended by a string, with 1960s special effects at their very best). Together, the family lands on various planets, and inevitably their 10-year old son, Will, wanders off and gets himself into trouble. As you may remember, Will had a robot who accompanied him and warned him of potential danger by flapping his vacuum cleaner tube arms and saying, "Danger, Danger, Will Robinson!" Young Will then had a chance to respond to the threat (or in some cases get rescued), thanks to the robot companion who recognized the danger ahead of time.

As trivial as this example may sound, it's a great illustration of what's going on in your brain in the context of a potential threat. Your amygdala is your "Danger, Will Robinson" robot; It alerts the brain to danger in the environment, even before you are consciously aware of it. Some people also think of the amygdala like a smoke alarm, alerting you to the potential of a fire that could destroy your home and even endanger your life.

In other words, the amygdala plays an important role in the defense circuitry, triggering chemicals to be released into your brain and body, preparing you to react to the threat. (Sometimes this preparation takes place in only a fraction of a second!) We aren't going to focus on those chemicals and the various roles they play here – but there are a number of sources of additional information

listed in the References and Resources at the end of this training bulletin. For our purpose here, it is enough to know that the amygdala triggers a cascade of responses to an identified threat in the environment. Where is the amygdala located? In your thumb, which is part of the limbic system, not the “thinking part” of the brain.

Scanning and Response

Once a threat has been identified, we scan the environment to allow another part of our brain (*the hippocampus*) to help us compare what’s in the environment with what we know are indicators of either safety or danger. Essentially, the hippocampus provides us with “maps” of safety and danger that we can use to assess the threat.

Here’s an illustration. When a fire alarm goes off, what do you automatically do? First, you may freeze briefly and pay attention. Do you smell smoke? Do you hear a fire truck approaching? Do you see others exiting the building? Or is it simply a false alarm? Of course, you should always exit the building following the safety plan, regardless of whether or not the alarm is real. But chances are, you’re going to participate in a routine safety drill with a much lower heart rate than you would if the environment suggested that the threat is real, and there really is a fire.

As an aside, one of the fascinating dynamics of our defense circuitry has to do with this process of freezing and scanning the environment. Imagine you are sitting at home and you hear a noise outside, or a knock on the front door. For most of us, those sounds don’t evoke fear or indicate threat, so our reaction is typically to approach to find out more (assuming the knock on the door is not a salesperson). In other words, we head outside to see what the commotion is all about, or we walk to the front door to see who is there. But if the sound we hear is associated with fear or threat, instead of approaching the sound, most of us simply freeze and scan the environment. You can probably remember a time when you had this reaction. It’s as though we have a built-in mechanism for not rushing blindly into a potentially dangerous situation.

If our scan of the environment indicates that the threat is legitimate, we respond accordingly – but we often do so without logical thinking or planning. This is so we can respond efficiently. To illustrate this point, imagine yourself facing someone you believe to be armed. If you see that person reaching for his/her waistband, it will not be efficient for you to engage in a process of thinking, questioning, or wondering. Efficiency equals instantly reacting – and relying on training that has ingrained brain circuitry and habitual behaviors that allow you to act without thinking. That’s why the prefrontal cortex may not be involved when we respond to a threat. It would slow us down and potentially distract us, placing us in even more danger. This makes sense from an evolutionary standpoint: If a predator is coming at you, and you stop to think, you’ll end up as lunch.

Learning from Experience

Once a threat has passed, we can engage our prefrontal cortex in the process of taking action to minimize risk, as well as integrating the experience into our existing maps of safety and danger. Other

parts of the brain are also involved, but this process of integration allows us to learn from the experience.

Let's explore an example that brings this point to life. Imagine you are at the top of a skyscraper in Chicago, Los Angeles, New York, or any major city in the United States. Just for fun, picture yourself leaning against the glass window to peer down to the street below. As you're looking down, and commenting that the people down there look like ants, imagine that you hear a loud BOOM and feel the floor shake. The first part of your defense network to respond to this event is your "Danger, Will Robinson" robot. Your amygdala fires in recognition of a potential threat in the environment, and your defense circuitry responds by triggering a release of chemicals that will help you deal with that threat. Next, you scan the environment to assess the threat, aided by your hippocampus, which compares what you are seeing, smelling, and hearing with your existing maps of safety and danger. You do all of this without thinking.

For the purpose of this example, let's say that you don't hear any alarms or smell any smoke, and when you look at the people around you, they all appear to be calm. In fact, they are continuing to engage in conversations that have nothing to do with the noise you heard. At this point, your brain determines that this is an environment consistent with a map of safety, thanks in large part to your hippocampus. So, the chemicals that were released begin to re-absorb into your system, and your prefrontal cortex can take action based on your conscious processing of the event.

Most of us are very well aware of the events of September 11, 2001, so we might respond to this situation by heading down the stairs to the street, in an effort to minimize our risk. It is a particularly poignant aspect of 9/11 to realize that most of the people who were in the floors above the first plane did not have a map of danger that alerted them to the risk. This is because they had no similar experience to learn from; nothing like that had ever happened before, so many of the people on the floors high above the impact of the first plane didn't find out about the situation until they heard it on the news or were called by a loved one. On the other hand, we will never forget the events of that day, so we are likely to head for the stairs, just in case. That's one role of the prefrontal cortex: To help us learn from experience and take action to minimize risk.

Summary: Response to Threat

So before we move on, let's summarize what we have covered with respect to threat and fear. First, the brain is constantly vigilant, trying to detect potential danger and anything that doesn't fit with our predictions of what will happen in our environment. The specific level of vigilance will depend on our previous experiences as well as the environment, but even in the safest environments, our defense circuitry remains vigilant to some degree. Then, when a threat is perceived by the brain, our amygdala signals "Danger Will Robinson!" In other words, our internal smoke alarm goes off.

We respond by freezing and scanning the environment, and thanks to the hippocampus, we compare what's in the environment with our existing maps of safety and danger. If the environment is consistent with a map of danger, we respond to the threat largely without thinking or planning.

If the environment is consistent with a map of safety, however, we can engage our prefrontal cortex and either take action to minimize risk and/or integrate the experience into our maps of safety and danger to continue learning.

Ramifications for a Traumatized Brain

Now let's examine the impact of trauma on the brain. Inherent in the definition of trauma is the requirement that something about the event is threatening, so our defense circuitry may take control over how we react. This dynamic has a number of important ramifications.

Prefrontal Cortex Impaired

First, think back to how the brain deals with threat in general – it senses danger, often freezing briefly while scanning the environment, assessing the threat, and then reacting or responding to that threat. In particular, remember that the prefrontal cortex may not come into play until the threat has passed (depending how severe the threat is, and how long it lasts). This fact is supported by research, but it also makes sense anecdotally.

For example, most of us have experienced periods of extreme stress at some point in our lives, so we are familiar with the struggle we might have experienced when trying to think clearly. The research shows a significant difference between a situation that is highly stressful and a situation that is both stressful and *involves threat, danger and/or fear*. The difference is that you can sometimes use stress reduction techniques to regain your ability to think clearly in a high stress situation, if it is not dangerous. Introduce threat or fear into that situation, however, and the dynamic changes dramatically.

Chris Wilson gives a concrete example:

In the fall of 2015, I was invited to give a talk on this very subject of the neurobiology of trauma, at a conference in Texas. When I give these talks, I bring my own computer, and I try to make sure I have enough time before my presentation to test whether the videos and audio clips will play on their system. Unfortunately, for this particular talk I didn't have that opportunity. So when I went to play my first video, it started without any audio.

As my stress level began to rise, I figured I would do my best to describe what folks would be hearing, using a bit of humor. Then a voice came over the sound system, and said, "Dr. Wilson, will you please restart your computer?" I remember thinking in my head, "Well, see, I'm sort of in the middle of something," but I also realized this might actually work. So, I restarted my computer, and within a few seconds, I was asked to enter my password. It's a password I knew well. Very well. And for the life of me, I could not retrieve it from memory. That's how stressed out I was. My prefrontal cortex, which is used to deliberately search for and retrieve information from memory, was gone.

Fortunately, I was able to face away from the audience, close my eyes, go to my “happy place,” and remember my password. That’s the difference between a highly stressful situation and a traumatic situation. Had there been a threat present in the environment that was activating my defense network, I would not have been able to close my eyes and regain the functioning of my prefrontal cortex. If there had been a real threat in that environment (e.g., someone holding a gun to my head while I tried to retrieve my computer password), I would have likely continued to struggle to recall my password, and lost my ability to think logically, plan or problem solve the situation.

Keep in mind that an impaired prefrontal cortex also means that we lose the ability to control our attention and encode memory data into an integrated narrative. But for now, we will focus on the ramifications of not being able to plan and think logically.

Habitual Behavior

So, what are we left with when our prefrontal cortex is impaired and we have lost much or all of our ability to plan and think logically?” One answer is habit.

The power of habit can be demonstrated by any number of examples, but one comes from law enforcement. At a recent training, Chris Wilson was speaking with two Minnesota State Troopers who informed him that their procedures for the use of tasers had changed over the years. They explained that initially they were taught to discharge their tasers upon starting their shift, with a short one-second burst, just to confirm that they were operational. However, at the time, a taser needed to be triggered for about five seconds in order to operate properly. When those officers went into the field, and their prefrontal cortex was impaired in the face of a serious threat, their habitual behaviors kicked in from their training, and they attempted to trigger their tasers using the same one-second burst they had been repeating at the start of every shift. Once the administration realized this was happening, they changed their officers’ training, so they had to discharge their tasers at the start of each shift for a full five seconds. That solved the problem because it instilled a new, more effective habitual behavior

Since that time, taser technology has continued to evolve, so they now only need a one-second burst to fully function. However, the example illustrates the power of habit in determining our behavior. When we find ourselves in a traumatic situation, we often respond to a threat without the benefit of our prefrontal cortex, so our brain reverts to behaviors that are habitual and ingrained, rather than those based on logical planning or thought. In addition, our brain may respond with a variety of survival reflexes, which are often characterized as “fight or flight,” but are better described as a “defense cascade.”

The Reaction Formerly Known as “Fight or Flight”

If you ask people how human beings respond to threats in the environment, many will use the phrase “fight or flight.” Unfortunately, as popular as the saying is, it doesn’t accurately represent the full range of possible responses.

In fact, research now suggests that our response can be categorized as a *defense cascade*, which very often begins with a freeze response (Kozłowska, 2015). This freeze response can be confused with two survival reflexes (called tonic immobility and collapsed immobility), where the victim is literally unable to move part or all of their body (including the parts that are needed to speak). But, being unable to move is not part of the freeze response we are describing here. With this more typical freeze response, we have the ability to move, and in fact, part of this response is about preparing to move (e.g., take some sort of action, in order to protect our survival).

Hiding from Detection

The freeze response developed through evolution serves several important purposes. One is to prevent detection by a predator. Just think of the proverbial deer in the headlights. The reason the deer freezes is because the car is identified as a threat, and the deer's response was developed to respond to their primary threat, which is a predator. If that deer was in the forest, and a mountain lion entered the vicinity, the frozen deer may not be seen by the mountain lion. The mountain lion's attention might even be drawn to a deer that has not yet frozen, because predatory instincts evolved to detect movement. Unfortunately, this "freeze" response that evolved to protect the deer from the mountain lion leaves it completely unprotected against the threat of a car approaching at 60 mph.

You can even see this freeze reflex reflected in conscious responses to threatening situations. If you think back to a time when you were afraid as a child that the "boogeyman" was in your closet, what did you do? Most of us instinctively held very still, so the boogeyman wouldn't see us. This can be a conscious strategy, in which case it is *not* the freeze response we are talking about here – because the freeze response originates in your thumb and doesn't involve the thinking part of the brain. However, it is interesting that the conscious strategy reflects this instinct.

We see this very same freeze response across many different species, and it makes a lot of sense on the most fundamental level: If the predator can't see the prey, the predator won't attack.

Assess and Respond

Another purpose of the freeze response is to provide an opportunity to assess the threat and potentially spring into action. Think of it as a stance of readiness to respond. To illustrate, picture a rabbit eating grass in a park when approached by a child. Most often, the rabbit freezes, and the child moves closer thinking, "Wow, the bunny is going to let me touch him!" However, if the child continues to approach, the rabbit will take off, and the child will be disappointed. But if the child then sees a squirrel and wanders away, the rabbit will notice the threat has receded and likely go back to eating grass.

In humans too, our defense circuitry detects a threat and our bodies automatically freeze, so our brains can take a moment to assess the environment in the same basic way the rabbit does: It primes the five senses to compare what's in the environment with our existing mental maps of safety and threat. Then, if our appraisal suggests that the environment is safe, we continue going about our business. However, if our appraisal indicates an attack, our brain responds by continuing to involve

our defense circuitry – and our prefrontal cortex may be left out of the equation, for the most part, until the threat passes.

Not Really “Fight or Flight”

This is where the common misconception of “fight or flight” comes into play. People tend to assume that we get to choose one option or the other, and we think we know what we would choose if we found ourselves in a threatening situation. However, based on our understanding of the brain’s functioning in trauma, it is now clear that there is often no choice involved – at least on a conscious level. Why? Because when the defense circuitry takes over, the part of the brain that makes logical choices is impaired.

It’s not that human beings *can’t* think in such a situation – it’s just that our thoughts are often habitual and/or simplistic (e.g., “He’s gonna kill me,” “I’d rather be dead,” or “I just want this to be over”). Few people have habitual thoughts or behaviors that will be of any use to them when they might have an option to flee an assault.

Not “Either/Or”

Second, it is not a matter of “either/or” when it comes to our defense circuitry. Instead, research indicates that we have a cascade of responses, which very often involve freezing first (if only very briefly), and then fleeing or fighting (or becoming immobilized, as described below), depending on the context.

When we are prey, our defense circuitry is more likely to select the flee response. This response was selected by evolution (or designed) to keep us alive, back in a time when human beings were more often prey than predator. Without a gun or other weapon you might have today, how effective it would be to “fight” a grizzly bear? Answer: Not very.

In fact, for most people, our instinct in this situation would be to flee. This is why hikers in Alaska are told *not* to flee if they come across a grizzly bear. Instead, they are taught to avoid eye contact by looking down and slowly backing away, waving their arms and speaking softly, to make it clear that they are wholly uninteresting and unappetizing human beings. This strategy has more to do with bears than humans, but what is important for our purpose is that the instinct is for humans to run or flee, not to approach and fight against a grizzly bear. This is all about survival, and it is based on our history as prey, back when weapons weren’t available to level the playing field.

Trauma Response and Sexual Assault

This is where we will begin applying what we’ve learned about the neurobiology of trauma to the specific context of sexual assault. Some of the implications will also apply to other forms of traumatic experience, including intimate partner violence, crimes against persons (e.g., assault with a deadly weapon), and officer-involved shootings.

Victims Often Don't "Choose"

The first point is that victims of sexual assault, as well as other traumatic crimes, often don't get to "choose" between fight or flight. Sexual assault victims are often questioned about their "decision" not to flee when others perceive that there was an opportunity to do so. However, without the ability to think logically and analyze options rationally, what may appear to be an "easy" escape route (for example, when the perpetrator goes to the bathroom) might not be as easy as it seems. Remember, the part of the brain that would do that work for the victim is most likely impaired by the traumatic response.

Some victims will also become immobilized by one of three automatic reflexes that prevent them from fleeing. In other words, they are often gripped by a reaction that is beyond any conscious control.

Three Survival Reflexes

Sexual assault victims are also often asked why they didn't "fight back." To consider the question is natural, but another way to make sense of a victim's response is to think about offender dynamics and how they impact the brain. We know most offenders (and certainly those who are acquainted or even intimate with the victim) do not announce their intention to commit a sexual assault. Instead, they "play nice" and work hard to initially avoid giving any indication that they represent a threat. This process activates what we call our *attachment circuitry*, which allows us to connect emotionally with other human beings. What's crucial to understanding the dynamic of most sexual assaults is that activating this attachment circuitry both *creates confusion in the brain* and *suppresses our defense circuitry*.

So, when the perpetrator begins to push the victim's boundaries and engage in behaviors that activate the victim's defense circuitry, it creates a neurobiological conflict that is confusing to the brain. The same person who activated the victim's attachment circuitry is now also activating their defense circuitry. Furthermore, the combination of the defense circuitry being dampened, and the sense of confusion victims experience, can often intensify the experience of fear when the victim realizes, "This is really happening to me."

This terrifying realization, if not necessarily reflected in words, is often experienced at a visceral or gut level. This combination of confusion and fear can then trigger a powerful sense of mental defeat, where the victim's brain appraises the sexual assault as inevitable and escape as impossible. Remember, the logical part of the brain may not be active at this point, so this perception of inescapability is all that matters.

Essentially, the perpetrator has spun a psychological web that can entangle the victim and trigger survival reflexes – some of which allow victims to "flee" mentally when their brain perceives that they cannot flee physically. Reflex is a key concept here. These responses take place automatically, in much the same way your leg kicks forward when the doctor taps your knee with the little hammer. We will describe three of them here.

Dissociation

The first of these three survival reflexes is *dissociation*. This is a coping mechanism that involves the brain “disconnecting” from the circuitry that keeps us aware of what’s happening inside our bodies.

We all have brain circuitry that helps us recognize physical sensations. This is what allows us to detect when we have tension in our neck, or tightness in our chest, for example. However, when our defense circuitry is running the show, and our brain does not perceive any way to escape a threat, dissociation is a way of disconnecting from this experience. This makes sense on a fundamental level, because one way for the brain to cope with the experience of being sexually assaulted is to shut off the circuit that allows us to be aware of what is happening to our bodies.

Dissociation is seen in many victims of trauma, not just sexual assault victims. In fact, it was first observed and documented among soldiers. It is a survival mechanism, and it can look like someone is “spaced out.” During an interview, for example, a victim may simply stare off into space while being either non-responsive, or minimally responsive, to questions or other stimuli. This is a potential indicator of trauma, but it can be easily misinterpreted as intoxication, belligerence, deception, or an unwillingness to cooperate.

Tonic Immobility

The second of these survival reflexes is called *tonic immobility*. This response was first studied in the animal kingdom, and scientists believe it emerged a very long time ago in the evolutionary process. It can be seen in sharks, for example. If you turn a shark upside down and immobilize it, it will become frozen with fear (though we wouldn’t recommend trying this on your next trip to Hawaii). With people, it essentially involves being unable to move or talk. The person might still be alert and aware, or they might be experiencing dissociation at the same time, which disconnects them from being aware of what is happening with their bodies. In the context of a sexual assault, this means that some victims will describe being unable to move, talk or cry out during the assault, even though they were aware of what was happening to their body.

This is a particularly important dynamic to understand because many victims who experience tonic immobility are totally “present” for, and tormented by, the horrifying bodily sensations and emotions of being sexually assaulted. While some dissociate while in a state of tonic immobility, and thus mentally “flee” the experience of the assault, many do not. This must be clear, because it explains some of the memories and narrative accounts victims give that do not otherwise “make sense.” For example, the victim who can recall being sexually assaulted and adds, “I tried to scream, but I couldn’t” or “I couldn’t move. I tried to push him away, but I couldn’t move.” Without understanding tonic immobility these responses can be difficult to understand and then inaccurately interpreted as consent. It also helps to foster simple human compassion, to recognize how terrible it must be for victims to be physically helpless while they are being sexually assaulted with no understanding of why their body is responding that way.

Four specific conditions are known to trigger tonic immobility: (1) Extreme fear, (2) Physical contact with the perpetrator, (3) Physical restraint, and (4) The perception of inescapability. The state of tonic immobility involves a “waxy mobility” in the limbs, where the person’s limbs are rigid or stiff, but still able to be positioned. The person may also experience periods of fixed or unfocused staring, sensations of coldness, and numbness or insensitivity to pain. They may have intermittent periods where their eyes are closed. While the person in a state of tonic immobility may initially have an elevated heart rate and high blood pressure, this tends to progressively decrease over time.

Episodes of tonic immobility usually occur after a failed struggle or an attempt to flee. They can last anywhere from seconds to hours, and they often terminate rather suddenly. Research suggests that tonic immobility occurs in anywhere from 12-52% of sexual assaults (Galliano, Noble, Travis, & Peuchl, 1993; Heidt, Marx, & Forsyth, 2005).

Collapsed Immobility

The third survival reflex is called *collapsed immobility*. It is also seen in the animal kingdom and is often described as “playing possum,” which erroneously suggests a conscious choice that is not actually available to the person (or animal) at the time.

While some victims may consciously “play possum” by remaining still as a strategy, collapsed immobility describes a reflexive response that is not under the person’s conscious control. For example, child victims often explain that they pretend to be asleep in their bed while being molested by a family member. However, this could either be a conscious strategy on their part (truly “pretending”), or they could actually be experiencing tonic or collapsed immobility and simply calling it “pretending” as their best attempt to make sense of what happened.

The same four conditions that can trigger tonic immobility may also trigger collapsed immobility: (1) Extreme fear, (2) Physical contact with the perpetrator, (3) Physical restraint, and (4) The perception of inescapability. Also like tonic immobility, it has a sudden *onset*, but the *offset* is usually more gradual. In general, the individual experiencing collapsed immobility cannot speak or move and will exhibit a general loss of muscle tone. Heart rate and blood pressure will also decrease, which results in less oxygen getting to the brain. This can produce faintness or even passing out.

This response of immobility and loss of muscle tone originally evolved to deprive a predator’s brain of the stimuli that trigger the killing and eating of prey; resistance is needed in order to stimulate these responses. However, among human beings this immobility and loss of muscle tone is unlikely to alter a person’s motivation to sexually assault, and will almost certainly make it easier for the perpetrator to commit the crime. In fact, the victim’s physical response may later be framed as an indication that he/she consented to the sexual acts, and this is true not only for the suspect, but also by others making determinations (investigators, prosecutors, judges, jurors, even the general public). The response is also confusing to many victims, who do not understand why they reacted the way they did, and they often blame themselves for not physically resisting or attempting to escape during the sexual assault.

Some victims who experience collapsed immobility may even describe it as “blacking out.” This is because they are trying to explain responses they do not understand, and a blackout may be the best way they can think of to describe their confusing experience. Unfortunately, this might only further confuse investigators who, without the type of training provided here, may logically assume the victim is referring to a blackout induced by drug or alcohol use. This information on its own might be used to challenge a victim’s credibility, but their credibility may be damaged even more if the statement is challenged by evidence such as a negative toxicology report indicating that the victim could not have experienced a substance-induced blackout.

Summary of Survival Reflexes

So, to summarize, some people respond to a traumatic event, when they perceive escape as impossible and resistance as futile, with one of three extreme but relatively common survival reflexes: (1) Dissociation, (2) Tonic immobility, or (3) Collapsed immobility.

Self-Protection Habits

At this point, we would like you to think back to the discussion about habitual behavior. Remember the examples of the taser and the former paratrooper? Keep both in mind for this next section. In particular, we would like you to remember that behaviors we engage in repeatedly create neural pathways that are at the root of habitual behavior; this is behavior we engage in without thinking about it. It’s also the behavior we fall back on when under stress or attack.

To take this out of the realm of trauma, consider whether you know anyone who still drives a car with a standard transmission (a stick shift). If you ask them what happens when they rent a car for the weekend – which will inevitably have an automatic transmission – they will tell you that their left foot spends the weekend reaching for a clutch that isn’t there. This is habitual behavior.

With that in mind, let’s think about habitual behaviors victims might have for dealing with being sexually assaulted. Here are a few possibilities: Maybe the victim was physically or sexually abused in childhood, and reflexively responded by dissociating or entering a state of tonic or collapsed immobility. Or perhaps the person observed his or her parents fighting on a regular basis, and developed a pattern of becoming incredibly quiet or, as one person described, “invisible.” The victim may even have played the role of peacekeeper in the family, learning to say and do anything to try to “smooth over” potential conflict. Alternatively, the victim may have been living with an abusive spouse for years and consequently developed habitual responses for protection that include becoming submissive and complying with whatever demands are made by the abuser.

Of course, the victim may have also grown up being taught never to act rudely, for fear of “upsetting the apple cart” or making others feel uncomfortable. These are all examples of habitual behaviors that victims may use on a daily basis to navigate threatening situations at home or work, particularly for women. As researchers have long noted, girls in most societies are raised to be wives and mothers, and to preserve relationships, almost at any cost to themselves (e.g., Chodorow, 1978).

In fact, girls and women are typically socialized to respond to unwanted sexual advances with various forms of polite resistance, without actually coming out and saying “no.” These habitual responses may be effective if the other person accepts the implicit refusal, but they will not work with someone who does not care about the victim’s experience or needs in that moment. The bottom line is this: When faced with the threat of a sexual assault, victims cannot simply cancel out habitual responses developed over the course of a lifetime to defuse conflicts and preserve relationships. It is impossible for the brain to relay that this time you won’t use the techniques you’ve been using all your life to deal with fear, threat, or potential conflict.

Attachment vs. Defense Circuitry

Now let’s go back to the confusion and trauma often experienced during a sexual assault, because there is a complicated process involved worth highlighting. We already mentioned that many victims experience confusion when they suddenly transition from thinking that everything is fine to realizing that they are being sexually assaulted. However, in many scenarios this switch isn’t actually sudden – it is the result of a process resembling the grooming of children by sexual predators.

You may already know that people who sexually abuse children often groom them over a period of time, in order to normalize their sexualized behavior. This may happen over weeks, months, or even years before any significant sexual contact takes place. Yet the same type of general process often takes place among those who sexually assault adolescents and adults. It is just more of an accelerated process, which may take place over the course of a single evening.

For example, the perpetrator may start by touching the victim, which might be perfectly fine, or it could be uncomfortable for the victim. This could include the perpetrator brushing up against the breast of the victim to judge her response, or even “innocently” putting an arm around the victim’s shoulders. If this action is comfortable for the victim, it activates the attachment circuitry, and dampens the defense circuitry. This makes it more difficult for the victim to perceive that the behavior is actually threatening.

Then as the behavior escalates, and moves into more uncomfortable territory, the defense circuitry may be activated, and the prefrontal cortex may give way to habitual behaviors to try to manage the interaction. This may not include explicitly setting a boundary or saying “no” outright – because this may feel uncomfortable, if not impossible, for some victims. Plus, implicit refusal may be more the norm than the exception in sexual situations, where people often communicate “no” using nonverbal behaviors such as pushing the other person away with their hands.

This type of habitual response may be particularly likely among those who were abused or witnessed abuse as children. Although some people may be skeptical that experiencing or even witnessing abuse in childhood can determine the way a person responds to being sexually assaulted later in life, this is exactly what happens, based on how the brain works. As described earlier, you can’t simply turn off automatic or habitual responses – even when you want to. Those who have been abused, or witnessed abuse as children, very often have deeply ingrained, passive responses to conflict, consistent with a child’s inability to fight back against an adult perpetrator. Remember the example

of the paratrooper who still rolled when he fell at the age of 86? A habitual response that hasn't been used in years, even decades, can suddenly emerge and take over during a sexual assault, just as it can in other traumatic or threatening situations.

Habitual Speech Patterns

One more note about habitual behavior and trauma: The part of the brain that helps us plan our speech is called Broca's Area. It's located in the prefrontal cortex, and research shows that it becomes impaired during traumatic events, sometimes to the point of being essentially "offline." This makes sense given what we have already learned. However, it is particularly relevant here, because many victims can only express simple statements or "habitual speech" during a sexual assault, when their prefrontal cortex (particularly Broca's area) is impaired by trauma. So, they may make simple exclamations like, "no," "stop," or "quit it," but then again, they may not. Remember that habitual behaviors in a sexual situation frequently relate to implicit refusals (e.g., nonverbal behaviors) rather than explicit refusals (e.g., saying "no").

A great example of this is seen at the conclusion of the film "Captain Phillips," where the character played by Tom Hanks is rescued after having been kidnapped, held captive, and subjected to various forms of abuse by Somali pirates. Despite the terror he experienced over a period of many hours, he nonetheless managed to remain calm and make a number of strategic decisions to keep himself, and his shipmates, alive. When he is finally safe, he is examined by a trauma nurse who asks, "What's going on?" He says, "I'm okay," but then emerges from the dissociative state and collapses into sobbing. His verbal response was likely a habitual one, because he could not express the impact of trauma until his brain appraised the situation as safe, and then he let go.

Another illustration is seen in a case that Chris Wilson worked on clinically. It involved a woman who was anally raped by her intimate partner. In therapy, she was deeply disturbed by the fact that throughout the rape, she only uttered the phrase, "Are you sure this is okay?" She never said anything like, "Stop, you're hurting me," or "No, I told you I don't want to," to make it clear that she did not want to have anal sex. Over the course of therapy, she realized this was a phrase she used frequently, in childhood and adolescence, whenever she was in a situation where friends or siblings were engaging in misbehavior. It took learning about the neurobiology of trauma for her to realize that this was just her brain doing what brains do when we experience a traumatic situation and revert to habitual speech.

Other examples include cases where victims have said things like, "You're married," or "I have to be home soon." As noted above, these types of statements may be effective if the other person is willing to listen to the polite, implicit, "no." However, when the other person is not willing to listen or respect the refusal, for any number of reasons, this habitual response will be utterly ineffective.

To summarize, when logic shuts down, and the ability to plan speech has been turned off, all we may be left with are old patterns of habitual speech. Those patterns rarely include verbal protests or explicit boundary setting while being sexually assaulted. Unfortunately, this is exactly the opposite of what many expect. Many people think that a victim of sexual assault will protest vociferously and

resist to the utmost, if it is “really a rape.” If not, many people question whether the victim consented and “wanted it” after all.

It is important to keep all of this in mind when trying to make sense of how victims respond verbally to being sexually assaulted. A victim’s verbal response may not make sense “logically,” unless you consider the fact that Broca’s Area often isn’t available to help victims plan their speech, and the habitual speech they fall back may be ineffective with someone who doesn’t care about a polite or implied “no.”

Trauma, Attention and Memory

We have now described responses that sexual assault victims often experience. This can include extreme yet relatively common survival reflexes such as dissociation, tonic immobility, or collapsed immobility. It can also include habitual self-protection behaviors and/or habitual speech patterns that may have developed from a lifetime of socialization or victimization in childhood and/or adulthood. While gender socialization often inhibits assertive responses among girls and women, it also harms men and boys who often believe they could have prevented their sexual assault if only they were “man enough.”

At this point, we will continue this discussion by exploring the impacts of trauma on attention and memory.

Bottom-Up vs. Top-Down Processing

One key effect of the defense circuitry has to do with attention. When we are not dealing with a threat, and our prefrontal cortex is fully functioning, we generally have conscious control of where we place our attention. If your phone rings across the room while you are reading this training bulletin, you will instantly be faced with a choice. You can either choose to get up, walk across the room, and answer the phone – or you can ignore it and continue reading this material. The prefrontal cortex is intimately involved in this decision. We call this *top-down processing* or *top-down attention*.

However, if you encounter a threat, the chemicals released to deal with the threat will impair your prefrontal cortex. You will therefore lose the ability to consciously control your attention; it will be focused, by the defense circuitry, on surviving or coping with the threat. This makes sense, because our brains deal with major threats in very rapid, hard-wired or habitual ways, not with the relatively slow reasoning processes of the prefrontal cortex. This defense circuitry-controlled attention is an example of *bottom-up attention*.

When we cannot control our focus of attention, the defense circuitry typically has us focus on one of two things: (1) Things that will allow us to survive the threat, or (2) Things that will help us cope with or withstand the threat. Whatever they are, the things we focus on are called *central details*. Everything else is called *peripheral details*.

Weapon Focus Effect

In the case of a crime involving a weapon, we often see bottom-up attention manifest as a central focus on that weapon. This is referred to as the *weapon focus effect*. The victim or witness may be able to give you an enormous amount of detail about the weapon, but little or nothing about anything else, including information that might help identify a suspect or determine exactly what happened. What color was the perpetrator's jacket? No idea, but the knife was huge. What direction did he go when he left the scene? Not sure, but I remember that knife was really long. Clearly, the weapon was a central detail. Just about everything else was peripheral. When we think about it, this makes sense because keeping track of the weapon may be crucial to survival.

To highlight this point, you can listen to this interview with a Green Bay police officer who was involved in a shooting. During the interview, the officer clearly remembers details about the size of the suspect's gun, the motion of the perpetrator's hand while reaching for the gun, and the experience of firing his own weapon as fast as he could. However, he cannot remember other basic details like whether he changed his position during the event or how many shots he fired. Again, this makes sense. Knowledge of the suspect's gun was crucial to survival and therefore a central detail. Firing his weapon as frequently as he could was also crucial to survival, and therefore a central detail. The number of times he actually fired was not as important, so the brain didn't focus on this in the moment. It focused on getting the job done. Similarly, whether the officer changed positions was perhaps not as crucial to his survival. These were both peripheral details, and as a result, the officer could not remember them.

Central vs. Peripheral Details

Since the majority of sexual assaults do not involve a weapon other than the suspect's hands and body (as well as alcohol and drugs), it's impossible to know exactly what victims will focus on, and therefore we cannot predict in advance what will be central versus peripheral details in their attention and memory. In fact, the victim may not focus on the details of the attack at all, including what sexual acts took place. In an effort to cope with the threat, the victim may focus on something else entirely. A classic example of this is a victim who stares at something (e.g., a painting on the wall) while dissociating during the sexual assault – and can then describe it in great detail later – but can tell you very little about the actual assault itself. This is important to understand, because dissociation can also potentially help to corroborate a lack of consent.

Bottom-up attention may also mean that there are “important” details missing from the victim's account of the sexual assault. For example, a New York detective told Chris Wilson about a stranger rape case involving a suspect who was described by the victim with sufficient detail that officers were able to find and arrest him. Once they did, however, they noticed that he had a large tattoo of the New York Yankees on his face, but the victim had not described any tattoos. The arresting officers called the detective, expressing doubt that this was the perpetrator because, “How in the world could she not notice that he had a huge New York Yankees tattoo on his face?” The detective explained that he didn't know about central and peripheral details at the time, but he knew “in his gut” that this was their guy. He said that after receiving training, he understood why the victim hadn't described the

tattoo: It wasn't central to her survival, so her brain didn't focus on it, and therefore it wasn't encoded into her memory. This is an excellent illustration of the power of bottom-up processing and attention. It also brings up important points to consider when interviewing victims: What investigators often believe *should* be central to a victim can, in fact, be peripheral. Moreover, it is critical to understand what the central details are *for each particular victim*, based on what she/he personally experienced during a sexual assault.

Bottom-Up Attention and Memory

Now let's look more specifically at memory and how it is affected by bottom-up attention – the type of attention involved in a traumatic event. Memory starts with attention: What we don't pay attention to, we don't remember. For example, if you're in the car with your kids, having a conversation about school, you will typically switch back and forth between focusing on the road and the conversation. You will do this with the involvement of your prefrontal cortex. But if, all of a sudden, another car cuts across your lane directly in front of you, that threat will command your attention – and this won't be a conscious choice by your prefrontal cortex. It will be dictated by your defense circuitry: This is bottom-up attention. In the moment you are slamming on your breaks and swerving into the emergency lane to avoid a collision, you will not be listening to your kids, and you probably won't remember what they said about their homework. You will only be able to turn your attention back to your children when the threat is over.

All of this has clear implications for sexual assault. It means that the reason victims often fail to remember specific details about their assault is because those details were not central to them, and their survival, at the moment; they were therefore peripheral details. If the detail was peripheral, it wasn't attended to by the victim's brain, and the likelihood of it being encoded into memory drops significantly.

This distinction is very important for law enforcement interviews, because central details are more resistant to change over time. Peripheral details are much more likely to fluctuate as time passes (e.g., the specific color of the sheets, or the exact location of the assault). Peripheral details are also more likely to be influenced (or even created) as a result of leading questions, including questions from investigators not trained to avoid them. This takes training, practice and effort, because we all tend to ask leading questions, even during "normal" conversations. One reason is because they speed up the process: Leading questions "get right to the point." This may not be a concern for everyday conversations, but it can create significant problems during a law enforcement interview. Investigators need to slow down the process to give victims time to respond without feeling rushed.

Even an investigator who avoids leading questions will face the reality that there is no way to know which details of an assault are peripheral or central to the victim. This creates a problem when investigators ask questions about details that were peripheral and therefore less likely to be encoded in the victim's memory. If victims do not know the answer, or if they provide an answer that is later called into question, this can significantly damage their perceived credibility. For example, if a male victim reports that the perpetrator's hand was on his neck, it would be natural to want to know which hand it was, how long it was on his neck, and whether it restricted his breathing. However, none of

these may have been central details to the victim, in which case they may not have been encoded in his memory. Yet this can be difficult for investigators to understand: “How could someone not remember such basic details of their assault?”

Unfortunately, when victims do not know the answer to a question, they often feel ashamed of not being able to make a useful contribution to the investigation. They may even feel that they failed the investigator, or worse, that they failed themselves. As a result, many victims “fill in” gaps in their memories based on what they think (must have) happened or even imagined happened as they strain to recall what the investigator is asking for. In this case, it is critical to understand that victims are not lying or deliberately “making things up.” They are simply doing what people do all the time when they are sincerely trying to remember things that are not entirely clear or “filled out” in their memory. They are filling in gaps, often without even fully realizing that’s what they’re doing, because it’s such a common thing that people do all the time.

Investigators often inadvertently focus on peripheral details – because, again, there is no way to know up front which details are central versus peripheral. They can then find the investigation derailed by inaccuracies or inconsistencies that surface because they asked for information not sufficiently encoded in the victim’s memory. On the other hand, details that were central to the victim’s experience are more likely to be strongly encoded in the victim’s memory. This is partly because some of the same chemicals that impair the prefrontal cortex during a traumatic experience also help to “burn into memory” whatever was a central detail during the assault. Central details are also more important to understanding the incident from the victim’s perspective, and they are less likely to change over time. It is therefore important for investigators to conduct interviews to elicit details that were central to the victim’s experience.

This is illustrated with some notes that were written by a detective, explaining to his commander why he believed a particular victim was lying about her sexual assault. She was later prosecuted for filing a false report.

My initial questions to [the victim] were to provide me with a detailed account of the assault. Her response was very abbreviated and when I asked her to be more specific, she would pause and appear to ‘retrieve’ the answer. She had difficulty in answering my questions when I asked her for specific details. She would appear to pause and or stall and then ultimately provide an answer.

Much of my interview turned into a question and answer session where I now believe my questions lead her to an answer.

*I asked where her legs were during the vaginal assault and if they were out, or wrapped around the suspect, and then she said that he had asked her to wrap her legs around him. **She didn’t mention this [earlier]. I asked her, and she said, “yes.” WHY?*

Without an understanding of how trauma affects memory, investigators such as this will question the credibility of victim responses, and thus the legitimacy of their reports.

The Hippocampus

Now let's delve into the process of how memories get encoded and try to make sense of situations where a victim can provide numerous details about some aspect of the sexual assault, but very few details about other aspects. This most likely will be due to the functioning of the hippocampus, which plays an integral role in encoding memories.

An easy way to remember the role of the hippocampus is to say, "If you saw a hippo on campus, you'd remember!"



As mentioned during Brain Basics, memories initially consist of data points (including thoughts, sensations, etc.) that need to be encoded in order to be consolidated and stored as memories, if they are going to be recalled later. The process is aided by the hippocampus, which normally encodes memory data with contextual and temporal information (like a time stamp); this allows it to be recalled later as a meaningful narrative that has some logical structure as well as a beginning, middle, and end.

Flashbulb Memories

We used to think that the hippocampus essentially shut down during a traumatic event. However, a great deal of research now indicates that the hippocampus goes through two distinct stages during a traumatic event like a sexual assault.

First, when the defense circuitry kicks in, and bottom-up processing and attention take over, it's as though the hippocampus says, "Oh geez, this is really important." It immediately goes into overdrive, to encode as much data into memory as it can. It also gets to work on consolidating or storing away whatever information had already been encoded into short-term memory before the fear kicked in. This information is drawn from a memory "buffer" that lasts about 30 seconds. The phenomenon is sometimes described as a *flashbulb memory*, and it explains why victims will often have a high level of detail in their account of the initial moments of a sexual assault or other traumatic event.

Fragmented Memories

After a while – and the amount of time varies for each person and situation, from just a few seconds to minutes – the hippocampus shifts into a different mode, where it focuses on consolidating everything that was absorbed and was already being consolidated during that initial flashbulb phase. As a result, the hippocampus goes into a *fragmented* or *refractory mode* where it has fewer resources available for encoding new information, especially more complex information associated with context and time sequence.

These fragments are often encoded without contextual details such as the timing of events, which explains why many victims can remember sounds, smells, sights, bodily sensations, and emotions,

as well as other aspects of an assault, but cannot put them in sequential order or tell you when they occurred. Why would the hippocampus do this? Because these memory functioning modes help us *predict and avoid future attacks*, by encoding information about what happened just before and at the beginning of a predatory attack we survived.

Once again, there is a reason why our brains do what they do during trauma, even if it makes it difficult later on – for example, when being interviewed by law enforcement.

Sensing and Tracking Time

In addition to the hippocampus switching modes, there are a few other memory factors to keep in mind. For example, our ability to sense and track time – over a period of seconds, minutes, hours, or even days – is also impaired during a traumatic event. This is because tracking how long a traumatic experience lasts is not typically central to surviving, and paying attention to its duration may only make the experience worse. Thus, the passage of time is not likely to be a relevant dimension of the situation, and victims of sexual assault may have a very difficult time accurately judging how long specific events lasted.

Again, this is illustrated with notes from the detective explaining to his commander why he believed a victim was lying in her report of a home invasion and sexual assault.

I repeatedly asked [the victim] about the amount of time the suspect was present with her. She said that she was positive that he was there for at least 45 minutes and maybe up to 1 hour. She stated that her alarm clock was set for 4am and that it went off right when the suspect was beginning the assault. She said the suspect hit the snooze alarm repeatedly 5-6 times and the snooze timer is 9 minute increments.

Anal assault lasted 30-60 seconds

Oral assault lasted 5-6 minutes

Vaginal assault lasted 3 minutes

In the closet 10-15minutes (?)

Total time suspect accounted for approximately 20 minutes. No explanation for the remainder of the 20 -35 minutes that she claims the suspect was present.

It is critical that investigators not ask victims questions that are legally irrelevant and virtually impossible for them to answer, such as: “How long did he have his penis in your vagina?” To further illustrate how ridiculous this question is for victims, it is helpful to compare it to the experience of a police officer involved in a high-speed pursuit.

As Joanne Archambault describes, most officers have been involved in a high-speed pursuit sometime during their career, so it is easy to imagine how they might respond if their sergeant asked them immediately afterward about specific details: “How long did it take you to reach the suspect once you jumped out of your car?” “How long did the foot chase last?” “How long did it take for your cover officer to show up?” Most officers would consider the sergeant crazy for asking such questions, or wonder if the sergeant was trying to show that the officer was in violation of department policies (in other words, “out to get them”). The same is true for victims. Questions about how long the assault lasted can be perceived as indicating doubt about whether the assault even occurred, and will often “set them up for failure” because the questions are difficult if not impossible for them to answer. This information is simply not available in their memory.

Integrating Memories

When it comes time for the prefrontal cortex to integrate all the cognitive and sensory data encoded during a traumatic event into a narrative account – for example, when a sexual assault victim is being interviewed by a law enforcement investigator – the process is a bit like putting a puzzle together. Think about the process that most of us follow when we put together a puzzle. First, we look at the box to get a frame of reference: “What’s this supposed to look like?” Then we lay out all the pieces on the table in front of us, turn them all right side up, and start looking for edges and corners. If we find a piece that’s difficult to place, we can look at the box and use that frame of reference to put the piece in the right place.

Victims of sexual assault do not have the benefit of this type of process. First, they don’t typically have a frame of reference to help them remember what happened, even if they have been sexually assaulted before, because no two assaults are identical. Furthermore, the only other person who was typically there – the suspect – describes it in a very different way (either by denying it happened, or saying the victim consented).

Second, because the hippocampus goes from flashbulb to fragmentary mode, victims will not typically have all the pieces of the puzzle at their disposal, and not all the pieces will include time stamping information. As such, there is frequently no narrative available in their memory to help put the pieces together, and there are gaps in the logical sequence of events (in the form of missing or upside-down puzzle pieces). This means that such “missing pieces” will not normally be included in the victim’s account of the experience, unless the interviewer asks sensory-based questions that could trigger these elements of the experience.

Third, when victims are asked about peripheral details, they often do their best to answer based on what they can remember – or their assumptions about what happened. While it is considered standard practice for investigators to tell victims, “It’s okay if you can’t remember something,” the reality is that it often *doesn’t* feel okay to victims. They typically want to remember, and they want to be able to answer the investigator’s questions. Questions that ask victims about peripheral details can therefore result in inaccuracies and inconsistencies that will almost inevitably be used to cast doubt on the victim’s credibility later.

The implications for interviewing are clear: Law enforcement investigators must provide victims with the time, space, and the right prompts to help victims talk about their puzzle pieces without any pressure to put them together. The pieces may eventually come together, particularly when the victim's memory is supplemented with other evidence and information developed during the course of the investigation. However, a skilled interviewer must accept the fact that victims may be left with a collection of pieces they can never put together into a coherent puzzle on their own.

Most critical, an understanding of the neurobiology of trauma means that investigators need to let go of the goal of putting the puzzle together *during the interview*. Trying to accomplish this will lead the investigator to press the victim for peripheral details, which are more likely to be inaccurate or inconsistent. Perceptions about these inaccuracies and inconsistencies will then be used to cast doubt on the credibility of the victim's statement and the validity of the report itself.

Trauma, Memory and Long-Term Impact

Recalling and Relaying Traumatic Memories

When it comes to sexual assault, we must remember that memory is a very complex process. A number of factors affect which elements of an experience are likely to be encoded, consolidated, and stored in memory, along with contextual and temporal information. To be able to produce the type of narrative we typically think of as a memory, a person has to be able to recall the information and place it in some type of meaningful sequence or context. The trauma informed interviewer understands that victims of sexual assault will rarely be able to give an account that matches the type of narrative we typically demand because of the way we think about memory.

We now understand that a traumatic experience constitutes a collection of puzzle pieces that very often cannot be placed together consistently. The initial recall of the experience will often appear disjointed ("all over the place") and as such, may seem hard to believe. However, if we think of the process of recall as peeling away layers of the experience, it may help to understand traumatic memory.

This doesn't mean that memories are actually "layered" in any neurobiological sense. But for victims; it can sometimes feel that they are peeling away layers of their memory, as more puzzle pieces emerge during a trauma-informed interview. While the initial layer may seem incredibly disjointed, helping the victim to access more layers can clarify the experience without asking questions that ask for peripheral data.

"Layers" of Memory: Cues for Recall

When first asked about an incident, for example, many victims will give you a "first layer" account, based on the question you asked and the elements of their experience associated with that particular question. It is crucial to understand that the victim's response may actually serve as a cue for other memories or elements of the experience. Some of these cues may be smells, sounds, sights, or

other sensory data that do not have an obvious association with the information the victim just provided, or the question just asked. This response can thus prompt additional questions from the investigator, which peel back additional “layers” of the victim’s memory.

Let’s be more concrete. Many investigators ask questions about what sexual assault victims can remember seeing, smelling, hearing, feeling, etc. These questions may sound irrelevant, but they may have been encoded in the victim’s memory and associated with other data that may be critical. So, finding out that the victim remembers smelling a specific cologne, or the odor of a particular brand of cigarettes, could in some cases be directly relevant for the investigation (for example, if it helps lead to the identification of a possible suspect). However, the smell might also serve as a cue for the recall of another “layer” of details, such as images, sounds, and/or body sensations that are associated with the memory of that smell. This explains why such sensory-based questions can be very important.

Implications for Law Enforcement Interviews

An illustration is seen in a case that a detective described to Chris Wilson, where a female victim mentioned seeing a water bottle under the bed. The detective said that if he had this training prior to that investigation, he would have asked her to tell him more about the water bottle. At the time, he suspected that she was dissociating during the sexual assault, but he did not fully appreciate the implications, including the fact that a prompt about the water bottle might have led to other important details being recalled. Instead, the detective said he only treated the water bottle as potential evidence that he was never able to physically obtain or corroborate.

In this scenario, it’s natural to follow up on the statement about the water bottle with questions like: “What did the water bottle look like?” or “Exactly where was the water bottle under the bed?” However, these types of questions can be problematic for two reasons. First, the answers may be peripheral to the victim and could change over time. Because the victim proactively offered the memory of the water bottle, we can presume that it was a central detail in the victim’s experience, but there is no way to know if the answers to these other questions will also be central details. Second, these questions require the victim to think about the water bottle in a particular way, which may actually get in the way of the victim’s ability to retrieve additional memories that might be associated with the water bottle.

Consistent with neuroscience and forensic interviewing techniques, the most effective response would simply be to say, “Tell me more about the water bottle,” and then pause and wait for a response. For example, the victim may have a memory of something the suspect said while she was looking at the water bottle, or she may remember seeing it through a kind of tunnel vision (which would suggest a dissociative experience). Each memory may prompt another memory – from remembering the water bottle, to remembering something the perpetrator said or did. It is impossible to predict what may be associated with any particular memory. Therefore, the skilled interviewer will use simple prompts to keep the victim talking about central details which provides an opportunity to gather puzzle pieces that may not otherwise be collected.

It is important to remember that direct questions may ask about information that was peripheral to the victim's experience and therefore encoded poorly or not at all in memory. As a result, the victim may begin to feel stressed about not being able to answer. Even if they are reassured that it is okay to not remember certain aspects of the assault, many victims believe they should be able to remember simple details like the location of a water bottle. This stress can then affect their prefrontal cortex and further hinder their ability to recall other memories. A trauma-informed approach includes asking questions that allow central details to emerge, without pushing the victim for peripheral details that aren't available.

Finally, it is important to think about how it feels for victims to talk with a law enforcement professional about their experience of being sexually assaulted. This can be incredibly stressful, and this factor alone makes recall more challenging, because stress affects the prefrontal cortex. It is crucial for investigators to keep this in mind and work hard to create a safe environment – both physically and emotionally – for the victim interview. Victims need to feel welcomed, accepted, and believed, to feel safe enough to disclose the details of their sexual assault. If stress made it difficult for Chris Wilson to remember a simple computer password, just imagine how much it can interfere with a victim's ability to recall details of their sexual assault.

From Memory to Disclosure

Let's now move beyond memory recall and begin exploring what a victim actually discloses – particularly in the context of a law enforcement interview. In some cases, victims censor details or leave things out because they don't think they are important. In others, they are embarrassed or ashamed by certain aspects of the event. They may believe they will be in trouble if they talk about a particular part of the experience. While this may not seem like part of the memory and investigation process, it is because it won't matter what victims remember if it simply stays in their head.

Information can only assist an investigation if the victim shares it with law enforcement (or other professionals connected with the investigation, such as forensic examiners).

In addition, trauma victims often feel very vulnerable in an interview. This vulnerability alone creates a level of stress that can impair one's ability to recall memories. If they do not feel comfortable with the interviewer, or in the interview setting, they will be unlikely to share memories that only increase that sense of vulnerability.

Long-Term Impacts of Trauma

Before concluding this training bulletin, we address one final topic: the long-term impacts of trauma on human responses and behaviors. This is critical to integrate all of the information we have covered so far. We will therefore cover this topic in the same basic order we initially used to talk about the defense circuitry, starting with the amygdala (your "Danger, Will Robinson" robot).

Amygdala Increasingly Sensitized

When we experience a traumatic event, the amygdala is sensitized, so afterward, it will fire in response to stimuli (like a smell or a sound) associated with that trauma, even if the association is not a close one. The amygdala becomes hyper-sensitive, as if saying, “I’m going to protect you first, and you can ask questions later.”

Perhaps you’ve heard stories about members of the military coming back from combat experiences overseas and finding themselves triggered by a stimulus that their brain associates with mortal danger. For example, men and women who’ve returned from combat and are walking downtown, only to find themselves suddenly falling to the ground, because a car door slammed shut or a car backfired. In this type of situation, their amygdala says, “That’s close enough to the sound of a mortar shell, or an IED, or gunfire, so we’re going to take that threat seriously and you can figure the rest out later.”

This is the neurobiology of trauma being “triggered.” The trigger can be a sensory cue or a contextual cue (e.g., a road that resembles one on which an IED exploded) that needs only to vaguely relate to the initial trauma. One part of the amygdala says, “Close enough!” and sends a signal to another part of the amygdala that sends the signal for how to respond (e.g., hitting the deck), just to be safe. Trauma can interfere with the brain’s ability to differentiate between the sound of a car door and the sound of a mortar shell, IED, or gunfire. It’s almost as if those sounds have all been lumped together into a collection of danger signals.

Heightened Level of Vigilance

The brain also becomes more vigilant after a traumatic incident, in an attempt to protect us. It then becomes far more sensitive to any potential indicators of threat in the environment, even things not previously associated with the trauma. Unfortunately, this can lead to a vicious cycle, where a person becomes more reactive to potential triggers, which means the amygdala has more opportunities to react and over-react in response to more and more stimuli (like the car door) and situations (like a crowded room) that don’t actually represent a threat.

Decreased Ability to Assess Safety

Another long-term consequence of trauma can be a decreased ability to access our hippocampus for maps of safety or danger. This explains why some people who become triggered lose their ability to simply look around, recognize that they are not back in the traumatic experience, and calm themselves. For example, when victims are testifying on the stand, and they are triggered by describing the assault, they might not be able to look around, scan all the cues from the courtroom environment, and realize that they are actually physically safe.

In an interview, this can mean that victims who are triggered may not be able to ground themselves in the present and recognize that the interview room is a safe environment and the interviewer is not going to hurt them. This is one of the many reasons why it is important to include victim advocates in

the interview process. In this case, it would be best to take a break to give the victim time to talk to the victim advocate in hopes that the situation can be de-escalated. It's always a good rule for investigators to do whatever they can to prevent additional harm to the victim.

Physical vs. Mental “Reality”

It is also important to remember that the brain doesn't necessarily respond differently to something that is in your mind versus the physical world. For example, we can take a picture of the brain while you describe a photograph you are looking at. Then, we can remove the photo and take a picture of your brain while you describe the photo from memory, essentially seeing it in your “mind's eye.” Fascinatingly, the two photos of your brain will be essentially identical. In real life, this is how neuroscience explains why your mouth waters when someone mentions your favorite food: Your brain and body don't always respond differently just because the stimulus is internal versus external. This can include re-living, or re-experiencing, something that happened in the past.

Chris Wilson provides an illustration:

I often tell about a dream I had that involved “candy day” as a young child. Each week, my sister and I were given five cents on Saturday morning, to buy five pieces of candy at the Andover Candy Shop – and later CVS. (What a sad day that was when we lost our candy store!) My sister, however, would buy only two pieces of candy, and save her remaining pennies for a periodic Snickers bar. Without fail, she would eat the Snickers bar over the course of the next two or three weeks, letting me know that she would love to share the Snickers bar with me, but unfortunately it had her germs on it.

One Friday night, I dreamt that on the way down to the candy store I found ... of all things ... a quarter! The dream fast-forwarded to me holding a Snickers bar while walking out of the CVS. I remember the dream like it was yesterday. The sky had light clouds floating in the sky, and a shaft of sunlight burst through just as I opened the wrapper on the Snickers bar. As you have probably guessed, my alarm went off before I ever got to taste a bite. As I rolled over to turn off the alarm, my cheek met with a puddle of cold drool on my pillow. Obviously, my brain had no idea that the Snickers bar wasn't real, and it notified my salivary glands to prepare for its imminent arrival!

This is very important to understand because it is possible that a victim is triggered into re-experiencing a traumatic memory during an interview. Just as Chris Wilson's brain acted as if the Snickers bar was real, victims who are triggered experience the current threat as real. They aren't always able to look around, assess the environment as safe, and calm down. This is because the activation of their amygdala (Danger, Will Robinson!) and impairment of the prefrontal cortex has limited their ability to compare what is in the environment with their “maps” of safety and danger.

This is also why, in the moment the victim is triggered, the brain reacts as though the threat is immediate. This is not a sign of weakness or mental illness: It's just the brain doing what the brain does when an individual has experienced trauma but not yet recovered from that experience. In fact,

this phenomenon has been observed in members of the military coming home from combat, back to World War I.

Summary and Conclusion

At this point, we want to summarize what we have learned so far, about the impact of trauma on victim responses, memories, and recall – and connect it with sexual assault.

First, a sexual assault victim is typically operating from the position where the defense circuitry is in control of their responses. As such, the victim's attention and thoughts are generally driven by the perpetrator's behavior, while the victim's behavior is determined largely by survival responses and habits – whether from childhood, adolescence, or adulthood.

This also means that the ability to give an account of the incident will be impaired. Most victims will, at some point, have difficulty talking about “what happened next” during the sexual assault and their interview will include details that they are unable to sequence. Without an understanding of the neurobiology of trauma, an account that includes some or all of these characteristics might be viewed as inconsistent, inaccurate or unreliable. It might even be reasonable to question whether the victim is lying about the sexual assault.

If you don't know anything about dissociation, tonic immobility, or collapsed immobility, for example, you might wonder why a victim did not resist the assault – and question whether the sexual acts were consensual. Similarly, if you don't understand the functioning of the hippocampus and the distinction between top-down versus bottom-up attention, you might question why the victim can't remember what seems like basic or crucial details about the assault. If you don't understand that the hippocampus often lapses into a fragmented or refractory mode after an initial super-encoding (or “flashbulb”) mode, it won't make sense when a victim is able to tell you a great deal about the initial moments of the sexual assault, but very little about “what happened next.” These dynamics explain victim behaviors that might not otherwise make sense, and this understanding can improve the way professionals respond to sexual assault.

Ultimately, better interviews are essential to improve law enforcement investigations and criminal prosecutions, in sexual assaults as well as other cases involving traumatized victims and witnesses. Just as fingerprints and DNA transformed the way crimes are investigated, an understanding of neuroscience and the impact of trauma can transform the way victims are interviewed. We hope this training material will help to fuel this transformation. With an understanding of how the brain responds to trauma, and an appreciation for how trauma affects memory encoding, storage and recall, we now have the potential to become truly “trauma informed” in our interviewing practices.

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Acknowledgements

Special thanks are due to the following experts, who provided valuable feedback and meaningful contributions during the development of this training bulletin:

Rebecca Campbell, PhD
Professor, Department of Psychology, Michigan State University
East Lansing, MI

Roger Canaff, JD
Expert, Child Protection and Special Victims Advocate, Author, Public Speaker
New York, NY

Elizabeth Donegan, Sergeant
Supervisor, Sex Offender Apprehension and Registration (SOAR) Unit
Austin Police Department
Austin, TX

Catherine Garcia
District Attorney Investigator, San Diego District Attorney's Office
San Diego, CA

David Lisak, Ph.D.
Forensic Consultant, Trainer, Lecturer, Founder of The Bristlecone Project
Placitas, NM

Richard Mankewich, Sergeant
Major Case / Sex Crimes, Orange County Sheriff's Office
Clermont, FL

Ronald Reid, Detective Sergeant (Retired, Washington DC Metropolitan Police)
RKR Consulting
Clinton, MD

This project is supported by Grant No. 2013-TA-AX-K045 awarded by the Office on Violence Against Women, U.S. Department of Justice. The opinions, findings, conclusions, and recommendations expressed in this publication are those of the author(s) and do not necessarily reflect the views of the Department of Justice, Office on Violence Against Women.

AN OVERVIEW OF THE NEW TITLE IX REGULATIONS AND THEIR IMPLICATIONS FOR COLLEGES AND UNIVERSITIES

May 12, 2020



INTRO/ HOUSEKEEPING/ DISCLAIMER

Courtney Bullard

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PRACTITIONERS

REGULATIONS VS. GUIDANCE

[The] final regulations represent the Department's interpretation of a recipient's legally binding obligations, rather than best practices, recommendations, or guidance... [and] focus on precise legal compliance requirements governing recipients. p. 18

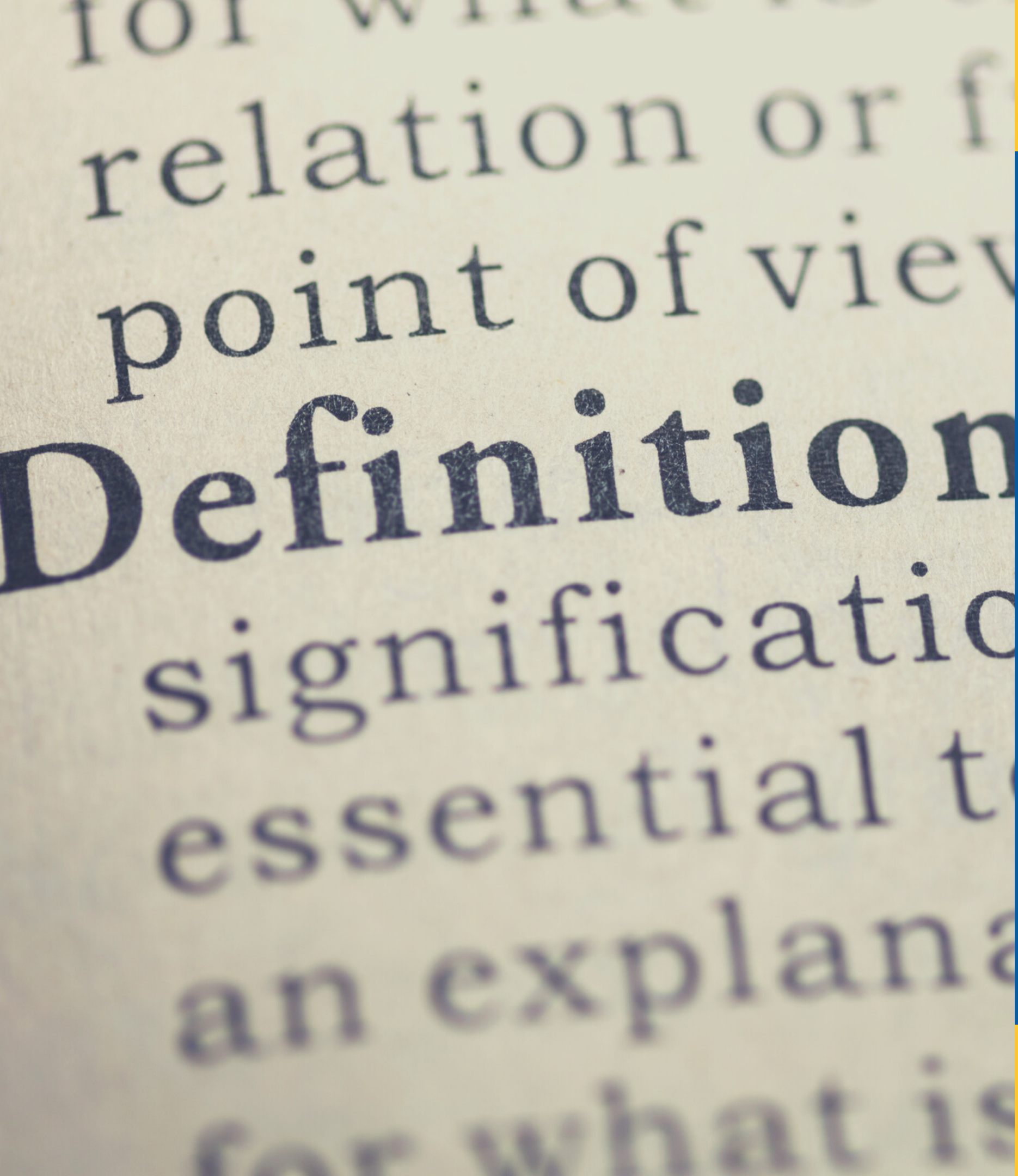


How to Read the Regulations

- Preamble vs. Regulations

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DEFINED TERMS

- Actual Knowledge
- Complainant/Respondent
- Formal Complaint
- Sexual Harassment
- Supportive Measures
- Elementary and Secondary School
- Postsecondary Institution

THEMES

- Supportive Measures
- Training
- Conflicts of Interest
- Due Process Guardrails
- Formal Process/Informal Process
- Hearings
- Jurisdiction
- Advisors





Role of Title IX Coordinator

Like 2001 Guidance, the final regulations incentivize institutions to train employees

- no mandate to train all employees
- require robust, specific training for Title IX Coordinator



Sexual Harassment

- **Conduct on the basis of sex that satisfies one or more of the following:**
 - **An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;**
 - **Unwelcome conduct determined by a reasonable person to be so severe, pervasive AND objectively offensive that it effectively denies a person equal access to the recipient's education program or activity; or**
 - **"Sexual Assault," "Dating Violence," "Domestic Violence" or "Stalking" as defined in the Clery Act.**

Actual Knowledge

Actual knowledge means notice of sexual harassment or allegations of sexual harassment to a recipient's Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient

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RESPONSIBLE EMPLOYEES

- NOT defined in the regulations-replaced with Title IX Coordinator
- Official authority to institute corrective measures
- Discretion to give authority outside of the Title IX Coordinator
- CSA's ONLY a responsible employee if designated as an official with authority
- Obligation to report or inform on how to report, or having been trained to do so, does not qualify someone has having ability to institute corrective measures
- Discretion to decide which employees MUST, MAY, or only with student's consent report sexual harassment to Title IX Coordinator





JURISDICTION

Education Program or Activity

- Locations, events, or circumstances (operations)
- institution exercised substantial control
 - over both the respondent AND the context in which the sexual harassment occurs
- Includes any building owned or controlled by student organization that is OFFICIALLY RECOGNIZED by institution
- Includes online sexual harassment but it must be analyzed to determine if it occurs in education program or activity
- Does not create or apply a geographic test, does not draw a line between “off campus” and “on campus,” and does not create a distinction between sexual harassment occurring in person versus online.

Jurisdiction Continued

- No single factor to determine exercise of substantial control
- Distinguishable from Clery definitions of non-campus building or property
- May require organization to abide by Title IX policies and procedures
- May have to bifurcate conduct

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Supportive Measures

What

- defined term and intentional deviation from "interim measures" individualized services provided to a complainant or respondent that are non-punitive, non-disciplinary, and do not unreasonably burden the other party yet are designed to restore or preserve a person's equal access to education
- Non-disciplinary
- non punitive
- individualized services
- interactive process

Offered

- to complainant and respondent (can be refused)
- as appropriate
- as reasonably available
- without fee or charge

When

- promptly
- before or after the filing of formal complaint **OR**
- where no formal complaint has been filed



SUPPORTIVE MEASURES CONTINUED

Purpose:

- restoring or preserving equal access
- protecting safety
- deterring sexual harassment

Burden: remains on the institution not the parties

Not: punitive or disciplinary

Confidential: as much as possible

Document: when provided, when not provided and why

Title IX Coordinator: ultimately responsible for effective implementation, but others can also implement

Examples: in section 106.3



Formal Complaint

- Document (paper, email, or online submission)
 - Signed by Complainant (digital signature is okay) or Title IX Coordinator
 - Alleging sexual harassment, against the respondent AND requesting that institution investigate.
- Complainant must be participating in, or attempting to participate in an education program or activity of the institution/district with which the formal complaint is filed.

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DISMISSAL OF A FORMAL COMPLAINT

MUST Dismiss if:

- Would not constitute sexual harassment as defined in regulations
- Did not occur in education program or activity
- Did not occur against a person in the U.S.
 - *May act under another provision of code of conduct

May Dismiss if:

- Complainant notifies Title IX Coordinator in writing that Complainant would like to withdraw formal complainant or allegations
- Respondent is no longer enrolled or employed by institution
- Specific circumstances prevent the institution from gathering evidence sufficient to reach a determination

*Must promptly send written notice of dismissal and reasons for dismissal simultaneously to parties

Response to a Formal Complaint (Grievance Process)

- Treat parties equitably
- Require an objective evaluation of all relevant evidence (inculpatory and exculpatory)
- No conflict of interest or bias by Title IX Coordinator, investigator, decision-maker or facilitator of informal resolution process
- Trained Title IX Team
- Presumption that respondent is not responsible
- Include reasonably prompt time frames for process and appeals with written notice for limited extensions with good cause (may include absence of party, witness, or advisor, law enforcement activity or the need for language/accommodation of disability)
- Describe range of sanctions and remedies
- Standard of evidence (same for students and employees)
- Procedures and permissible bases for appeals
- Notice of Allegations containing specific information as outlined in regulations



Investigation of Formal Complaint

MUST

- Ensure that burden of proof and burden of gathering evidence with institution, not parties (no medical or counseling records w/o written consent of party)
- Provide equal opportunity to present witnesses (including EXPERT), and inculpatory/exculpatory evidence
- Not restrict ability of either party to discuss the allegations or to gather/present relevant evidence
- Provide opportunity for both parties to have advisor (can be attorney and can restrict the extent to which advisor can participate in the process)
- Provide written notice of date, time, location, participants and purpose of all hearings, investigative interviews, or other meetings with sufficient time to prepare to participate
- Provide equal opportunity to inspect and review evidence obtained as part of investigation (even if not relied on)- sent to party AND advisor (electronic or hard copy) with 10 days to respond prior to completion of investigative report.
- Create investigative report that fairly summarizes relevant evidence
- Provide report to parties AND advisors 10 days prior to hearing for review and written response.



Hearings

- **Live Hearing (in same room or using technology in separate rooms- not only via telephone)**
 - **Permit ADVISOR to ask the other party and witnesses RELEVANT questions (including those challenging credibility)**
- **Cross-Examination**
 - **Directly, orally, in real time by ADVISOR**
 - **If a party or witness does not submit to cross-examination, the decision-maker(s) must not rely on any statement of that party or witness**
- **Recording (audio, visual, or transcript) made available to parties for inspection and review**
- **Written determination regarding responsibility and sanctions with rationale**
- **Decision provided to parties simultaneously**
- **Effective implementation of remedies (Title IX Coordinator)**



DECISION-MAKERS AT HEARING

- **RELEVANCY-** Must determine and articulate the relevancy of the questions and explanation of any decision to exclude a question as not relevant
 - Evidentiary Gatekeeper
 - BEFORE THE QUESTION IS ANSWERED
 - Not based on Rules of Evidence/ Legal Standard

APPEALS

- **MUST offer both parties an appeal re: responsibility, recipient dismissal of formal complaint, or any allegations on following bases:**
 - **Procedural irregularity that affected the outcome of the matter**
 - **New Evidence**
 - **Conflict of Interest or Bias by Title IX Coordinator, Investigator(s), Decision-Maker(s)- generally toward complainants or respondent or toward specific party**
 - **May include additional bases**





Burden of Proof

- Discretion of Institution
- Must be Consistent Throughout ALL Processes ie. Faculty, Staff and Students
- Campus/District Specific



Advisors

- Permitted for all parties
- May participate in process with limitations as set by institution
- If a party does not have an advisor present at the live hearing, the institution **MUST** provide advisor of the institution's choice (without fee or charge to the party) who may, but does not have to be an attorney
- Conduct cross-examination
- Removed the Alignment language



INFORMAL RESOLUTIONS

May NOT:

- Be required/condition of enrollment or employment
- Be offered unless Formal Complaint is filed
- Be offered or facilitated when allegations of employee sexually harassing student

May:

- Be facilitated at any time after Formal Complaint and prior to determination regarding responsibility
- Expel if agreed to in Informal Resolution
- Provide Informal Resolution Process (NOT REQUIRED TO PROVIDE)

Must:

- Provide information regarding Informal Resolution Process in initial Notice of Allegations
- Provide parties written notice of informal resolution with
 - allegations
 - requirements of process (including what information/documents will be shared)
 - circumstances which presume Formal Complaint arising from same allegations
 - right to withdraw/resume grievance process
 - consequences-including records kept/shared
- Obtain voluntary, written consent
- Have reasonably prompt time frames

INFORMAL RESOLUTIONS CONTINUED

Facilitators

- MUST be trained and free from conflicts of interest/bias
- MAY be Title IX Coordinator

Types:

- Arbitration
- Mediation
- Restorative justice
- Other?

Defining this concept may have the unintended effect of limiting parties' freedom to choose the resolution option that is best for them, and recipient flexibility to craft resolution processes that serve the unique educational needs of their communities





Deliberate Indifference

"Clearly unreasonable in light of the circumstances"

- **Must promptly offer supportive measures**
- **Cannot impose discipline without a formal process**
- **Must investigate allegations in a formal complaint**

Training, Training, Training

REQUIRED

- Title IX Coordinator (robust), Investigators, Decision-Makers, Informal Resolution Facilitators, Appellate Decision-Makers
- Decision-Makers- training on technology issues
- At least 8 hours (assumed) of training with additional each subsequent year
- Publish trainings on website (if have one)
- Maintain training materials for 7 years

NOT REQUIRED:

- Training for Advisors (but assess competency of employees who you want to appoint as advisors)
- Live Training (can be virtual/online)
- Un-training of responsible employees

May

- Train on trauma informed techniques
- Train advisors on cross-examination
- Train others involved in process





**Title IX
Coordinator**



Investigator(s)



**Decision-
Maker(s)**



**Appellate
Member(s)**



**Informal
Resolution
Facilitators?**



**Responsible
Employees**



OTHER

- Retaliation
- Emergency Removal
- ADA and Title IX
- Delay of Investigations Due to Law Enforcement
- Recordkeeping
- Confidentiality/Gag Orders
- Title VII and Title IX
- Current Open Investigations
- Online Harassment
- Due Process
- First Amendment/Academic Freedom
- Removal of Safe Harbor



Positives

- **Flexibility**
- **"Will not Second Guess"**
- **Deliberate Indifference standard that will place institutions/school districts in violation is higher and clearer**



ACTION ITEMS

- Acknowledge New Regulations to campus community
- Meetings with leadership to explain needs and next step
- Begin identifying process and people
- Publication
- Training and implementation





Be Patient

There is a lot of work to be done, but it is most important that it is done correctly. Right NOT Rushed.





UPCOMING ICS EVENTS



SAVE
THE
DATE

- Breakdown and Implementation of the New Title IX Regulations
(May 27 AND June 9)
- Investigator
 - Level 1 (June 23-24)
 - Level 2 (May 21 and July 7)
- Decision Maker/Adjudicator
 - Level 1 (June 11-12)
 - Level 2 (June 18)



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The Impact of Title IX Regulations on Faculty and Employees

1

Agenda

Understanding Title IX and Title VII Procedures

Legal Principles Guiding Procedural Options



Decision Points – Options to Consider



2

Understanding Title IX and Title VII Procedures

New Title IX Regulations – Employees

- Impose additional procedural requirements
- Only for allegations meeting new sexual harassment definition
- Expressly contemplate “dual” compliance approach with Title IX and Title VII



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When Do IX Obligations Kick In?

- “A recipient with actual knowledge of sexual harassment in an **education program or activity** of the recipient against a person in the United States, must respond promptly in a manner that is not deliberately indifferent.”
- “‘education program or activity’ includes locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.”

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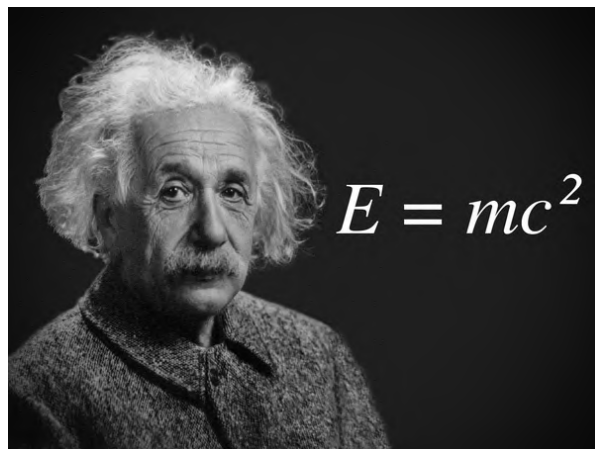
Hearing = “Formal Complaint” + “Sexual Harassment”

Formal complaint:

- “document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent **and** requesting that the recipient investigate the allegation of sexual harassment.”

“At the time of filing” complainant must:

- be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed.”



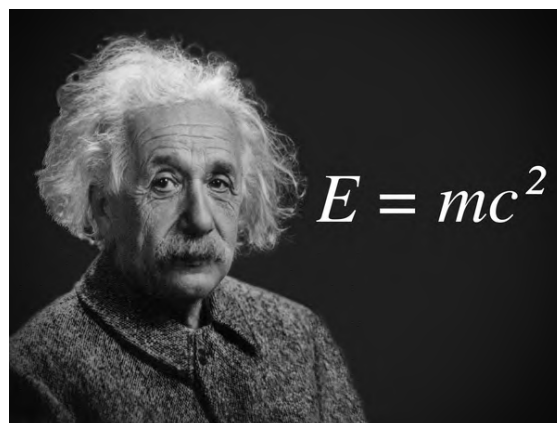
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Hearing = “Formal Complaint” + “Sexual Harassment”

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

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



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Live Hearing Required



“If a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility; provided, however, that the decision-maker(s) cannot draw an inference about the determination regarding responsibility based solely on a party’s or witness’s absence from the live hearing or refusal to answer cross-examination or other questions.”

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Some Relevant Comments From Preamble

- Title IX regulations apply to employee claims of sex harassment.
- “The Department is aware that Title VII imposes different obligations with respect to sexual harassment, including a different definition, and recipients that are subject to both Title VII and Title IX will need to comply with both sets of obligations. . . . there is no inherent conflict between Title VII and Title IX.”
- “These regulations do not preclude a recipient from enforcing a code of conduct that is separate and apart from what Title IX requires, such as a code of conduct that may address what Title VII requires. Accordingly, recipients may proactively address conduct prohibited under Title VII, when the conduct does not meet the definition of sexual harassment in § 106.30, under the recipient’s own code of conduct, as these final regulations apply only to sexual harassment as defined in § 106.30.”
- “These final regulations do not preclude a recipients’ obligation to honor additional rights negotiated by faculty in any collective bargaining agreement or employment contract, and **such contracts must comply with these final regulations.**”

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“No Inherent Conflict”?

Common Title VII Response Now

- Typically resolved by internal investigation
- Initiated by formal or informal complaint or constructive knowledge
- No advisor required
- Resolution does not require active complainant
- May or may not result in formal report

Title IX Regs Requirements

- Discipline requires regimented investigation & hearing process
- Formal complaint only
- Advisor entitled to participate in hearing
- Need participating complainant
- Requires formal report & other documentation

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Legal Principles

Title VII:

- Institution must promptly and thoroughly investigate when it knows **or should have known** about sexual harassment & take reasonable steps to prevent and promptly correct
- Harassment definition: severe **or** pervasive
- Don't have to wait until harassment becomes unlawful
- No hearing requirement in Title VII
- No hearsay rules in Title VII which would allow employers to disregard statements secured during investigation
- Employment-at-will: employer can determine why and how of separation

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Legal Principles

- Private Right of Action
 - Circuit split – several circuits limit employees to damages claims pursuant to Title VII
 - Title IX violations subject only to administrative enforcement (in some circuits)
- Subject Matter Scope
 - Title IX regulations limited to allegations of sexual harassment (under new definition)
 - Title VII applies to sexual harassment plus other discrimination, including sex, race, color, religion, or national origin

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Practical Considerations

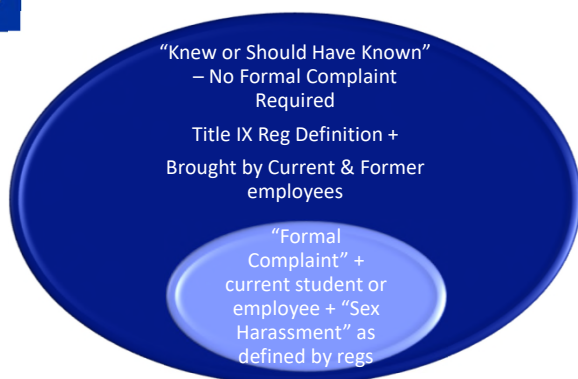
- Faculty and Unionized Employees
 - Many already have existing procedures for addressing discrimination/harassment issues
 - Lack control to unilaterally adjust
 - DOE: “can be renegotiated”
- Title IX process: **expert witnesses**
 - Entirely new
 - Complicated

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Two Broad Categories



1. VII obligations but no IX obligations (**easy**: no need to follow IX policies)
 - Learn of discrimination but no formal complaint
 - Discrimination does not meet IX definition of SH
 - Complainant no longer employed or a student
2. Parallel VII and IX obligations (**complicated**)
 - Quid pro quo, "severe and pervasive," VAWA crimes
 - Complainant currently employed or a student
 - Formal complaint

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Hypothetical One

- Employee A complains to HR that co-worker Employee B sexually propositioned A on one occasion at work.
- Employee B denies the allegation.
- Employee C corroborates A's account.

1. Is IX implicated here?
2. Would a typical VII harassment policy cover this?
3. How should institution respond in satisfying obligations under VII and IX?

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Hypothetical Two

- Employee A goes to HR to express concerns that Supervisor is making sexual comments to Employee B on a regular basis.
 - HR reaches out to Employee B who confirms the sexual comments but says, “I don’t want you to do anything about it. I’m not filing a formal complaint.”
1. Is IX implicated here?
 2. Is VII implicated here?
 3. How should institution respond in satisfying obligations under VII and IX?

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Institutional Decision Points

1. Will we apply IX rules/procedures to all allegations of sex discrimination (or other types of discrimination) regardless of whether they are technically covered by IX regs, or only to allegations of IX harassment?
2. Assuming we have different rules/procedures, how will we clarify nature of sexual harassment allegations as much as possible at the outset of handling?
3. How will we handle sex harassment claims in the absence of a “formal complaint”?
4. How will we handle complaints from former students/employees?

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Hypothetical Three

- Employee A reports that Dean repeatedly sexually touched Employee A & that this sexual touching was witnessed by Employee B.
 - HR interviews Employee B who confirms that Dean has repeatedly touched Employee A in a sexual and unwelcomed way. Employee B, though, says he does not want to get involved and will not participate in any sort of hearing. Fearful of the Dean, Employee A also refuses to participate in any hearing.
 - How should HR respond in satisfying obligations under VII and IX?
1. Is IX implicated here?
 2. Is VII implicated here?
 3. What is likely result of IX hearing process?
 4. Are there VII concerns with this?
 5. How to reconcile?

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Institutional Decision Points

1. If a respondent is cleared of a Title IX violation, will school still consider disciplining pursuant to Title VII?
2. What if reason for no IX finding is absence of witnesses at hearing (but investigation uncovered facts supporting discipline)?
3. If answer to (1) is “yes,” how will this be memorialized in policy?
4. If answer to (1) is “yes,” how will process unfold?

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H-B

Hypothetical Four

- Employee A claims Supervisor is subjecting A to pervasive and severe racial **and** sex harassment.
 - During interviews, Employees B, C, D, and E corroborate the claim with extensive, consistent detail.
 - At the hearing, Employee A fails to appear, only Employee B testifies, and panel decides “not responsible”
 - Investigative report clearly supports finding of severe or pervasive, unwelcome sexual conduct.
1. Is IX implicated here?
 2. Is VII implicated here?
 3. How do you proceed as a practical matter?

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Institutional Decision Points

1. Will there be separate tracks running at same time? VII before IX? IX before VII?
2. How will we memorialize in policy?



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Potential Option

- Determine if allegations meet IX sex harassment definition, from current student/employee, with formal complaint
 - If definitely “no,” dismiss from IX process, but consider Title VII process or other applicable code of conduct
 - If “yes,” apply IX procedures
- At close of investigation (either process), contemplate employment action if warranted (IX allows administrative leave)
- If IX process applies, conduct hearing and evaluate Title VII determination at close of such process
- Add some IX process to Title VII (e.g., advisor presence, share evidence via preliminary report)

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Other Questions

1. If employee refuses to participate in HR investigation of Title VII claim, can that employee be subject to discipline?

Retaliation: “intimidation, threats, coercion or discrimination, including charges against an individual for code of conduct violations conduct violations that do not involve sex discrimination or sexual harassment, but arise out of the same facts or circumstances as a report or complaint of sex discrimination, or a report or formal complaint of sexual harassment, for the purpose of interfering with any right or privilege secured by title IX or this part, constitutes retaliation”

2. Can parties be instructed to not discuss investigation with others?

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Other Questions

- 3. “At will” employment – still exist when sexual harassment is at issue?
- 4. State law

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Final Title IX Regulations and Their Effect on Your Campus

May 11, 2020

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1



What happened?

- Culmination of rulemaking process began in November 2018
- Final rule issued that is effective August 14, 2020
- Final rule has the force of a federal regulation
- Compliance with the rule is mandatory, not advisory, as with Dear Colleague Letters



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What will the regulation do?

- Set the standard for administrative enforcement of Title IX
- Will not alter standards for lawsuits seeking money damages for violation of Title IX
- Will necessitate changes in institutional Title IX policy and practices
- Will not alter institutional policies governing other forms of protected-status harassment

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When do we need to comply?

- As of now, regulation is effective August 14, 2020
- As of now, non-compliance as of August 14, 2020 could result in an administrative finding of non-compliance
- Litigation challenging the regulation is imminent
- Potential that federal court injunctions may alter the effective date for all or portions of the regulation

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Programmatic Scope

- Title IX obligations apply to “sexual harassment” in an education program or activity
 - Includes on campus
 - Includes education program or activity off-campus
 - Includes houses owned or controlled by university-recognized student organizations
 - Does not apply to off-campus, private settings, that are not an education program or activity
- Decision points

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Example

Student A reports that Student B sexually assaulted Student A three weeks ago, off-campus in a private apartment complex in an adjacent town. No university student-organizations or employees are involved. There is no claim of any additional misconduct occurring on campus or in university programs or activities.

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Temporal Scope

- “Formal complaint” can be filed by an alleged victim (i.e., a “complainant”) or the Title IX Coordinator
- An alleged victim can file a formal complaint only if:
 - The complainant is participating in education programs or activities; or
 - Is attempting to participate in education programs or activities
- May close a case if the respondent is permanently separated from the institution
- Decision points

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Example

Title IX Coordinator receives a complaint from Alumnus A who graduated in 2019. Alumnus A reports that Student B, who is currently a junior, groped Alumnus A’s genitals without consent at a party hosted at a fraternity house in the fall of 2018. The fraternity is recognized by the university. Alumnus A is in a graduate program at a different university located several states away.

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Application to Employees

- The regulation's mandatory requirements for investigation and grievance procedures apply to cases involving students and employees
 - Regulation does not distinguish between at-will employees or those under an employment contract
 - Regulation does not distinguish between classes of faculty
 - Regulation does not supplant other institutional obligations under Title VII or other employment laws
- Decision points

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Example

At-will custodial worker is accused of sexually harassing a female student in the hallway. The custodial worker was placed on an improvement plan a month ago for being late to work. He has complied with the improvement plan. But for the accusation of sexual harassment, the institution would have continued to employ the custodial worker. Now it is considering terminating his employment.

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Actual Knowledge

- An institution's response obligations are triggered when it has "actual knowledge"
 - Defined as notice to an official with authority to take corrective action
 - Once actual knowledge is triggered, Title IX Coordinator must promptly reach out to alleged victim and offer support services
 - Actual knowledge does not necessarily trigger obligation to conduct formal investigation and hearing process
- Decision points

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Example

A clerk in the college's library overhears Student A tell Student B that Student A was raped in the dormitory last weekend. The clerk observes Student A crying, telling Student B that she hasn't been able to attend class, and that she's planning to file a "Title IX Complaint."

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Supportive Measures

- Must be offered to an alleged victim once an institution has actual knowledge of potential harassment
 - Must be offered also to respondent once a formal complaint is filed
 - Ambiguity as to whether support services must be offered to respondent before formal complaint is filed
 - Non-disciplinary in nature; no-disciplinary measures until end of investigation and grievance process
 - Title IX Coordinator has responsibility to oversee offering and implementation
- Decision points

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Interim Removals

- Permissible for students only when individualized assessment finds
 - Immediate threat
 - To the physical health or safety of any student or other individual arising from the allegations of sexual harassment
- Must be given opportunity to challenge immediately after the removal
- Employees can be placed on administrative leave
- Decision points

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Example

Formal complaint is filed against Student A accusing Student A of repeatedly contacting Student A's former girlfriend, Student B, trolling her on social media, trying to communicate with her via friends, and texting her cell phone. Student B indicates she is suffering extreme emotional distress as a result of Student A's actions and wants Student A removed from campus pending an investigation.

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Investigation Process

- Preliminary investigation required to identify alleged victim if not apparent from report
- Formal investigation triggered by "formal complaint"
 - Detailed written notice
 - Equal opportunity to present evidence and witnesses (including experts)
 - Access to the evidence
 - Opportunity to view written report pre-hearing
- Decision points

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Example

During investigation, respondent hires an expert who will opine that complainant was not incapacitated at the time of an alleged sexual assault. The complainant does not have an expert and cannot afford one. The investigator is dubious about the purported expert's credentials and the reliability of his claimed methodology.

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Hearing Process

- Formal hearing administered by “decision-maker(s)”
 - Each party's advisor has the right to ask relevant questions and cross-examine witnesses and parties
 - Institution must provide advisor (does not have to be a lawyer) to a party who does not have one
 - “Decision-maker(s)” must make contemporaneous rulings on relevancy and objections and explain their rationale
 - Testimony of persons who refuse to submit to cross-examination is excluded
 - “Decision-maker(s)” must issue written decision with rationale
- Decision points

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Standard of Evidence

- May use preponderance or clear and convincing
 - Standard must be used uniformly for all cases regardless of respondent
 - There is a presumption that the respondent did not violate the policy
 - The institution bears the burden of proof and of collecting relevant information
- Decision points

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Appeals

- Must be offered to both parties on the following grounds
 - Procedural irregularity that affected the outcome
 - New evidence not reasonably available that could affect the outcome
 - Conflict of interest by institutional participants that affected the outcome
- Non-appealing party must be given a chance to respond
- Decision points

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Informal Resolution

- Permissible only after a formal complaint is filed
 - Parties must provide voluntary, written consent after receiving detailed notice of allegations and explanation of informal resolution process
 - Cannot compel students to agree to informal resolution as a condition of enrollment
 - Never permitted where accusation is that employee sexually harassed a student
- Decision points

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Example

Student A makes a verbal report to Title IX Coordinator that Student B is sexually harassing Student A by repeatedly and persistently pursuing a romantic relationship with Student A despite being told “no.” Title IX Coordinator contacts Student B and suggests this could be informally resolved by Student B apologizing to Student A, leaving her alone, and participating in personal coaching.

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Training

- Training required for all institutional participants in the process
 - Training must be non-biased and not rely on stereotypes
 - Training for institutional participants in a given case must be retained for seven years
 - Training documents must be posted on institution's website
- Decision points

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Records Preservation

- Complete records of every case kept for a period of seven years
 - Formal cases
 - Informal resolutions
 - Cases where only supportive measures are provided (must include rationale for not proceeding formally)
- Parties have right to access the records
- Decision points

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Religious Exemption

- Religious exemption is now fully self-executing
 - Not-necessary to seek pre-approval from ED although that is still an option for schools that want assurance
 - Exemption can be claimed by institution “controlled by” a religious organization where aspect of the regulation conflicts with religious tenants of the organization
- Decision points

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Example

College controlled by a church denomination believes that sexual harassment is a grave sin and that utmost sensitivity and grace should be shown to alleged victims. Church denomination has developed its own protocols for investigating reports of sexual harassment that do not permit cross-examination. Church believes cross-examination is inconsistent with its Biblical obligations in responding to reports of abuse.

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FERPA

- Regulation indicates that Title IX explicitly pre-empts FERPA to the extent of any conflict between the two
- Eliminates need to seek FERPA waivers to the extent information is being shared for a reason mandated by the regulation
- Decision points

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Preemption of State Law

- Regulation preempts state and local laws to the extent those laws are inconsistent with the regulation's definition of sexual harassment and its mandates for the investigation and grievance process
- Decision points

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Example

College is located in a state that passed a law defining sexual harassment for purposes of institutional Title IX policy as “Any unwelcome conduct of a sexual nature.” State law also precludes any direct cross-examination of complainant by the respondent or the respondent’s representatives.

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Questions



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SUMMARY OF FINAL TITLE IX REGULATION

This summary is based on the Department of Education’s (“ED”) Final Rule dated May 6, 2020, and is specifically targeted at those aspects of the regulation applicable to colleges and universities (often referred to in the regulation as “recipients”).

The final regulation and attendant commentary exceeds 2,000 pages. This document may be revised or supplemented as time permits deeper analysis.

Key Conceptual Elements

- The final regulation is largely consistent with the proposed regulation published in 2018. Core provisions such as the requirement for live hearings and cross-examination remain. The final regulation is heavily focused on elements of due process, including notice of allegations, access to evidence, the right to confront witnesses and accusers, and the right to appeal. It mandates that formal complaints of sexual harassment be resolved pursuant to elaborate processes that will necessitate greater expertise, training, documentation and investments by institutions of higher education. Note: As used throughout this summary, and consistent with the final regulation itself, the term “sexual harassment” includes *quid pro quo* harassment, hostile environment harassment, sexual assault, domestic violence, dating violence and stalking.
- The starting point for the final regulation is the Supreme Court’s “deliberate indifference” framework for Title IX civil liability as explained in the *Gebser* and *Davis* cases. Under the *Gebser/Davis* standard, an institution is liable in a civil suit under Title IX only if: (1) it has actual knowledge of sexual harassment occurring in a setting where the institution exercises substantial control over the alleged harasser and the context in which the alleged harassment occurs; (2) the institution’s response is deliberately indifferent (i.e., clearly unreasonable); and (3) as a result of the institution’s deliberate indifference, it subjects its students to sex discrimination in its education programs and activities. The standards in the regulation for triggering institutional response, assessing the adequacy of an institution’s response, the programmatic reach of Title IX and the definition of sexual harassment are all derived from the civil liability standards articulated in *Gebser/Davis*.
- The final regulation contains numerous provisions designed to incorporate constitutional protections into the Title IX framework, including constitutional protections for Free Speech, Due Process and Religious Liberty, all of which are specifically addressed in the final regulation.
- The regulation permits formal complaints that initiate the grievance process to be filed only by an alleged victim or the Title IX Coordinator. However, it also

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includes the important caveat that, at the time of making a complaint, an alleged victim must be participating in or attempting to participate in the institution's education program or activity. Effectively, this means an institution will have discretion not to initiate the Title IX grievance process for complaints made by former students or employees.

- Unlike the proposed regulation, the final regulation takes pains to prevent institutions from prospectively contracting with their students and employees to waive the regulation's provisions as a condition of admission or employment, as the case may be. However, the regulation does not prohibit parties from *voluntarily* waiving their rights to the elaborate grievance process required by the regulation. As a result, institutions arguably may, in addition to having a fully-compliant grievance process, create an alternative and more streamlined investigation and adjudication process to be used only if the parties voluntarily consent to it and if its use does not amount to deliberate indifference (i.e., is "clearly unreasonable" in light of the "known circumstances").
- The final regulation preserves considerable space for the use of dispute resolution measures, such as mediation or restorative justice, if the parties voluntarily consent to such informal resolution in lieu of a formal investigation and hearing. However, the regulation does not permit the use of informal resolution, or any punitive measures whatsoever, against a respondent until a formal complaint is filed.
- The final regulation, including its detailed investigation and hearing procedures, applies with respect to complaints against students and employees. Those institutions (of which there are many) who presently utilize more streamlined procedures for addressing concerns of sexual harassment by employees will now be required to comply with the processes specified in the regulation. This will likely result in substantially increased burdens for institutions and sets up a conceptual conflict between Title IX and state-law principles of "at will" employment.
- The regulation imposes onerous record preservation requirements that many institutions are likely ill-prepared to handle without significant investment in technology and training. The regulation also requires institutions to publish all training received by all institutional Title IX actors, which could have the potential to expand into a bureaucratic burden of unintended proportions.
- The final regulation contains provisions that explicitly foreclose state and local efforts to force schools to adopt investigation and grievance provisions that are contrary to the Title IX regulation itself. Thus, any state or local efforts to prohibit cross-examination in cases covered by the Title IX regulation, for example, are

preempted by the Title IX regulation.

- The regulation makes clear that discriminatory treatment of a complainant or respondent as part of a grievance process may itself be a prohibited form of sex discrimination under Title IX.

Programmatic Application

- The regulation clarifies that Title IX applies to an institution's "education program or activity," which includes physical locations and events over which the institution exercises "substantial control over both the respondent and the context in which the sexual harassment occurs." This clarifies that an institution's Title IX obligations are not limited to activities on campus but also to activities occurring off campus that are part of an institution's "education program or activity."
- The regulation explicitly clarifies that the phrase "education program or activity" includes "any building owned or controlled by a student organization that is officially recognized" by a college or university. Although the regulation does not explain what the term "officially recognized" means, this section presumably means that fraternity and sorority houses will be covered by Title IX at many institutions.
- The regulation and comments clarify that Title IX does not apply to sexual harassment that occurs off-campus, in a private setting, and that is not part of the institution's education program or activity. For example, if a student were subject to an isolated act of sexual harassment by a fellow student, during the summer, in their hometown away from campus, the regulation clarifies that Title IX does not apply and an institution may not process the claim under its Title IX policy. Whether the institution chooses to address such off-campus, non-programmatic conduct through another policy, such as a student code of conduct, is up to the institution.
- The final regulation makes one important limitation to the programmatic application of Title IX: The regulation sets a bright line rule that Title IX does not apply to sexual harassment that occurs outside the geographic boundaries of the United States. See below for a further discussion of this point.

Definition of Sexual Harassment

- The regulation explains that sexual harassment consists of *quid pro quo* harassment, hostile environment harassment, sexual assault, dating violence, domestic violence and stalking.

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- In defining hostile environment harassment, the regulation adopts the following definition: “conduct on the basis of sex” that is “unwelcome conduct determined by a reasonable person to be so severe, pervasive and objectively offensive that it effectively denies a person equal access to the recipient’s education program or activity.” By using the conjunctive “and”, this definition requires the hostile environment to be severe, pervasive and objectively offensive, rather than the Title VII definition of hostile environment, which uses the disjunctive “or.” This could create a significant conflict where an employee files a complaint under a Title IX grievance process, and the employee also requests action by a human resources department under Title VII.
- Related to the definition of sexual harassment, the regulation clarifies that it does not impose a mandatory definition of “consent” for purposes of sexual assault. This means schools retain discretion to set their own definitions, which may be influenced by state and/or local law.

Notice of Sexual Harassment

- An institution must respond promptly and in a manner that is not “deliberately indifferent” when it has “actual knowledge” of sexual harassment. For colleges and universities, “actual knowledge” essentially tracks the Supreme Court’s definition from the *Gebser* and *Davis* cases as being when an institutional official with authority to institute corrective measures on behalf of the institution (which includes Title IX Coordinators) has notice of sexual harassment. The final regulation, unlike the proposed regulation and *Gebser/Davis*, however, extends the “actual knowledge” test to also include the situation where “any employee of an elementary or secondary school” has actual knowledge of sexual harassment. Colleges and universities that operate laboratory K-12 schools will need to be aware of this distinction.
- The regulation also clarifies that “knowledge” refers both to “notice of sexual harassment or allegations of sexual harassment.” This means an official with corrective authority cannot claim they lacked “actual knowledge” of conduct or allegations reported to them on the basis that they did not directly observe the conduct at issue.
- The definition of “actual knowledge” effectively means all employees of K-12 institutions must report sexual harassment to a Title IX Coordinator but that—unless state or local law sets a broader reporting requirement—colleges and universities have discretion to relax mandatory reporting policies such that only certain officials who have authority to take corrective action (such as human resources, student life, campus safety and residence life officials) must report sexual harassment to the Title IX Coordinator.

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- Upon receiving actual knowledge of sexual harassment, the Title IX Coordinator must promptly contact the alleged victim (defined as a “complainant”) to discuss the availability of supportive measures, consider the alleged victim’s wishes with respect to supportive measures, inform the alleged victim that supportive measures are available irrespective of whether the alleged victim files a formal complaint, and explain the process for filing a formal complaint.

Supportive Measures

- The regulation explains that, upon receiving actual knowledge of sexual harassment, an institution must promptly contact the alleged victim and offer “supportive measures.” In the event a formal complaint is filed and an investigation is commenced, the supportive measures must also be offered to the respondent. The regulation is ambiguous as to whether an institution must offer and provide supportive measures to a respondent before a formal complaint is filed.
- Supportive measures are “non-disciplinary” in nature, as are those that are “reasonably available” “without fee or charge” and are “designed to restore or preserve equal access” to the institution’s education programs and activities “without unreasonably burdening the other party.”
- The regulation gives various examples of supportive measures including “mutual restrictions on contact between parties,” which implies the regulation either does not permit or disfavors no contact orders that apply only to one party.
- The Title IX Coordinator is responsible for coordinating “effective implementation” of supportive measures. However, commentary clarifies that institutions may continue to designate individuals as deputy Title IX Coordinators to assist in these responsibilities.

Interim Removal

- The regulation clarifies that an institution still has the ability to remove a respondent “on an emergency basis” provided that the institution makes an “individualized safety and risk analysis, determines that an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal, and provides the respondent with notice and an opportunity to challenge the decision immediately after the removal.”

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- Effectively, this sets a high bar for interim suspensions and precludes them as routine matters of course. The reference to “*physical* health or safety” also implies that interim removal may not be appropriate in cases involving non-physical misconduct, such as verbal harassment, and will instead be reserved for more serious cases involving actual or threatened physical contact (i.e., sexual assault, dating violence or domestic violence) or post-report threats or acts of physical violence.
- The regulation clarifies that, in the case of a non-student employee respondent, an institution retains broad discretion to place the respondent on administrative leave pending the outcome of the grievance process.

Grievance Process (generally)

- Whereas the proposed regulation created a “safe harbor” grievance process, compliance with which would have ensured an institution that it would *not* be deemed deliberately indifferent by ED, the final regulation does not include a safe harbor. Instead, it contains mandatory elements to a grievance process that each institution must follow. These elements are conceptualized in three phases: investigation, hearing and appeal.
- All three phases of the grievance process must meet certain qualitative elements, including:
 - Complainants (i.e., alleged victims) and respondents (i.e., alleged perpetrators) must be treated equitably.
 - There must be an objective evaluation of all relevant evidence, including both inculpatory and exculpatory evidence.
 - There can be no presumptions of credibility based on a party’s status as complainant, respondent or witness.
 - All institutional participants (e.g., Title IX Coordinator, investigator(s) and decision-maker(s)) in the process must be free of a conflict of interest or bias.
 - There must be a presumption that the respondent is “not responsible for the alleged conduct” until a determination is made at the conclusion of the process. This presumption must be stated in the initial written notice provided after a formal complaint is made.

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- There must be reasonably prompt timeframes for completion of various phases of the process, including delays (after written notice to the parties) only based on “good cause.” However, the regulation does not specify a total number of days by which the grievance process must be completed.
- The procedures must specify the range of, or articulate a specific list of, potential disciplinary sanctions and remedies.
- The procedures must specify the standard of evidence to be used (either preponderance of the evidence or clear and convincing) and use the same standard for cases against students as well as cases against employees, including faculty. In other words, an institution cannot use a preponderance of the evidence standard for students, while using a clear and convincing standard for tenured faculty.
- The institution must not utilize procedures that invade legally recognized privileges (e.g., attorney-client, priest-penitent, patient-counselor, etc.) unless the party holding the privilege has waived it.

Investigation

- The regulation clarifies that an institution’s formal obligation to investigate a report of sexual harassment under its grievance procedures is triggered by the filing of a “formal complaint.” A formal complaint is a physical or electronic document signed by an alleged victim of sexual harassment or the Title IX Coordinator specifically requesting an investigation. There is an important caveat, however. “[A]t the time of filing a formal complaint,” the alleged victim “must be participating in or attempt to participate in the school’s education program or activity.” Thus, for example, an alleged victim who graduated a year prior, has moved away and is not seeking to be readmitted cannot initiate a Title IX investigation through a formal complaint.
- A parent, friend or other third-party could not file a formal complaint on behalf of an alleged victim at a college or university and cause a Title IX investigation to be initiated. Instead, the alleged victim would have to sign or otherwise ascribe to a physical or electronic written document requesting an investigation. A Title IX Coordinator could file a formal complaint based on a report made by a parent, friend or third-party only after consulting with the alleged victim and only if filing an institution complaint is not clearly unreasonable under the facts and circumstances.
- Whereas the proposed regulation provided a number of factors to be considered by the Title IX Coordinator in determining whether to file a formal complaint if the

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alleged victim did not wish to do so, the new regulation provides no guidance other than requiring that the Title IX Coordinator's decision must not be "clearly unreasonable." Presumably, Title IX Coordinators will continue to rely on factors articulated in prior guidance and caselaw, such as the severity of the conduct at issue, the risk the conduct may be repeated, the availability of evidence, etc. For example, where a Title IX Coordinator has received multiple reports of serious misconduct against the same respondent, it is likely not clearly unreasonable for the Title IX Coordinator to sign a formal complaint even though no particular alleged victim wishes to do so.

- Once a formal complaint is made, the institution must provide written notice to the parties of the investigation, describe the process to be utilized and disclose "sufficient details" regarding the complaint, including, if known, the identities of the parties, the conduct at issue and the date and location of the alleged incident. This written notice must include a statement that the respondent is presumed not responsible and that a determination will not be made until the conclusion of the grievance process. The notice must also advise the parties of their right to an advisor of their choice, who may be an attorney. The institution must also apprise them of any prohibitions on making false statements.
- If the scope of the investigation expands, the institution must issue a supplemental written notice providing additional details that also meet this standard.
- At any point in the investigation, if the institution determines that the conduct alleged in the formal complaint, if assumed true:
 - Does not constitute sexual harassment;
 - Did not occur in the institution's education program or activity; or
 - Did not occur against a person in the United States

then the institution *must* dismiss the complaint for purposes of its Title IX grievance procedure. The institution has discretion to address such conduct under another policy, such as a student code of conduct, if it wishes to.

- Apart from these mandatory dismissal provisions, the regulation states that an institution *may* dismiss a formal complaint at any time if:
 - The complainant would like to withdraw the complaint;
 - The respondent is no longer enrolled or employed by the institution; or
 - Specific circumstances prevent the institution from gathering evidence sufficient to reach a determination.

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These voluntary dismissal provisions appear to permit an institution to close an investigation in a case, for example, where a respondent withdraws from the institution under an agreement never to return or in a case where an employee subject to a report of sexual harassment enters into a voluntary separation agreement or is terminated for reasons other than the reported sexual harassment itself.

- The regulation clarifies that an institution may consolidate multiple complaints involving different persons when they arise from the same facts or circumstances. This is an important clarification that resolves ambiguity in prior guidance.
- During the investigation, the burden of proof and burden of gathering evidence rests on the institution. Notably, the institution is prohibited from accessing a party's health, psychiatric or counseling records without written consent.
- During the investigation, the parties must have equal opportunity to present witnesses, including both fact and expert witnesses, together with other inculpatory and exculpatory evidence. The inclusion of expert witnesses is a significant change from existing practice and raises the possibility that complainants or respondents with the financial ability to pay an expert could be at a significant advantage.
- During the investigation, the institution may not restrict the ability of either party to discuss the allegations or to gather and present relevant evidence. This directive means it is likely impermissible to prohibit the parties from communicating with witnesses or the media during the investigation or grievance process.
- The regulation clarifies that parties have the equal right to be accompanied by an advisor of their choice to interviews and meetings and that the advisor may, but does not have to be, an attorney. The institution retains the ability to limit the role of the advisor in interviews and meetings as long as it does so equally for both parties. It cannot, however, limit the advisor's role in cross-examining the other party and witnesses at the hearing (discussed further below).
- The regulation requires the institution to provide written notice to the parties and witnesses of any interview, meeting or hearing that the individual is expected to attend, with sufficient time for the party to prepare to participate, to include: the date, time and location; the participants; and the purpose. The guidance does not further clarify what "sufficient time" means; presumably, that is a qualitative standard that will vary depending on the complexity of the allegations at issue and other circumstances.

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- The institution must give the parties equal opportunity to inspect and review any evidence gathered during the investigation directly related to the allegations raised in the formal complaint, including inculpatory and exculpatory evidence and evidence the institution does not intend to rely upon in the hearing. Access must be given so that each party “can meaningfully respond to the evidence prior to the conclusion of the investigation.” At a minimum, the institution must send the evidence to the party and the party’s advisor in electronic form and give them at least 10 days to submit a written response, which the investigator must consider before finalizing the investigation. The institution must make the evidence available again at any hearing, including for use in cross-examination.
- The investigation must result in an investigation report that “fairly summarizes” the investigation that must be completed at least 10 days prior to the hearing and sent to each party and their advisor.

Hearing

- For all colleges and universities, the investigation must be followed by a live hearing during which a “decision-maker” must permit each party’s advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those bearing on credibility.
- Cross-examination must be conducted “directly, orally and in real time” by the party’s advisor of choice and “never by a party personally.” This precludes institutions from requiring that cross-examination be conducted by pre-submitted written questions or that questions be posed by a hearing panel chair.
- If a party is unable to obtain an advisor, the institution must provide one free of charge for the purpose of conducting cross-examination for the party. The advisor provided does not have to be, but may be, an attorney.
- While the hearing must be “live,” the regulation states that, at either party’s request, the institution must provide the parties with separate rooms and use technology so the decision-maker and parties may simultaneously see and hear the questions.
- At the hearing, the decision-maker has the responsibility to determine the relevancy of questions and explain in real time any decision not to permit a question.
- The final regulation formalizes prior guidance that questioning concerning a complainant’s sexual history is generally not permitted, subject to narrow

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exceptions similar to those utilized under the rape shield provisions of the Federal Rules of Evidence.

- If a party or witness refuses to submit to cross-examination, then the institution is required to ignore that person's statement and reach a decision based on the remaining body of relevant evidence. The institution is not, however, permitted to draw an adverse inference based on the mere fact that an individual refused to submit to cross-examination.
- The institution must make an audio or video recording of the hearing, or a transcript, and make it available to the parties for inspection and review.
- The regulation does not specify the nature of the "decision-maker(s)" who conducts the hearing, except to specify that it cannot be the same person as the Title IX Coordinator or the investigator. Presumably, the regulation's use of both the singular or plural indicates the decision-maker could be a single person—similar to a judge—or a hearing panel—similar to a jury. The inability of the Title IX Coordinator or investigator to serve as the decision-maker effectively forecloses the use of any "single-investigator" or "civil rights" model of adjudication.
- After the hearing, the decision-maker must issue a written determination of responsibility applying the institution's chosen standard of evidence. The written determination must have several required elements, including:
 - Identification of the allegations at issue;
 - Description of the procedural steps taken throughout the case;
 - Findings of fact supporting the determination;
 - Conclusions regarding application of the Title IX policy;
 - A statement and rationale as to the determination for each allegation;
 - A statement of any disciplinary sanctions and whether any remedies will be provided to the complainant; and
 - A description of the procedures and permissible grounds for appeal.
- The institution must provide the written determination to the parties at the same time. Under the regulation, the written determination becomes final upon the earlier of when: (i) the parties are notified of the determination on appeal; or (ii) the time to file an appeal has passed with neither party appealing.

Appeal

- Unlike the proposed regulation, which merely permitted appeals and specified the elements of any appeal, the final regulation mandates that either party be

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allowed to appeal the determination, or any dismissal of the complaint, on the following grounds:

- Procedural irregularity that affected the outcome (this effectively incorporates the concept of “prejudicial error” versus “harmless error”);
- New evidence not reasonably available “that could affect the outcome”; and
- Conflict of interest or bias by the institutional participants that affected the outcome.

Although the regulation does not specify that an appeal may be based on a challenge to the weight of the evidence, the regulation does not foreclose other permitted grounds for appeal as long as they are equally available to both parties. So, presumably, an institution could choose to add this or other grounds in addition to the three mandatory grounds for appeal.

- The non-appealing party must be notified of the appeal and allowed to submit a written statement in response.
- The appeal decision-maker(s) cannot be the same as the hearing decision-maker(s). Nor can the appeal decision-maker(s) be the Title IX Coordinator or the investigator who worked on the case.
- The appeal must conclude with a written decision describing the appeal and the rationale for the result that is provided to the parties simultaneously.

Informal Resolution

- Only after a formal complaint is filed, the regulation permits the voluntary use of an informal resolution process at any time prior to a final determination. The parties must provide their voluntary consent in writing to participate in such a process.
- Prior to commencing an informal resolution process, the institution must have provided the parties with the required written notice of the allegations and also describing the parameters of the informal resolution process. The notice must include a statement that a party is permitted to withdraw from the informal resolution process and resume the formal process at any time prior to a resolution being reached. This implies that the institution may explicitly foreclose a party’s ability to re-initiate the formal process after he or she has agreed to an informal resolution of the formal complaint.

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- The regulation prohibits informal resolution in any case where an employee is accused of sexually harassing a student.
- The regulation specifically prohibits an institution from requiring parties to waive their right to a formal process and agree to informal resolution, as a condition to enrollment or employment. In other words, institutions cannot circumvent the Title IX rule by requiring students to waive their rights prospectively in order to be admitted.

Retaliation

- The regulation includes considerable additional detail on Title IX's prohibition against retaliation, including that persons protected from retaliation include persons who "made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing."
- The regulation also clarifies that retaliation includes intimidations, threats, coercion, discrimination and bringing code of conduct charges for actions that do not involve sexual harassment but arise from the same facts or circumstances as a formal grievance complaint, if the conduct charges are brought "for the purpose of interfering" with a person's Title IX rights. This interpretation of retaliation creates considerable risk for some religious institutions that may seek to enforce provisions of their student conduct codes prohibiting consensual sexual conduct, if such consensual sexual conduct was reported in the context of reporting an act of sexual harassment.
- The regulation requires an institution to maintain the confidentiality of complainants, respondents and witnesses except as permitted by FERPA, as required by law or as necessary to comply with the directives of the Title IX regulation itself.
- The regulation specifies that complaints of retaliation may be subject to the same grievance procedures as complaints of sexual harassment.
- The regulation explicitly states that the exercise of rights under the First Amendment (free speech) is not retaliation.
- The regulation clarifies that bringing conduct charges against someone for making a materially false statement in bad faith, even if made during the course of a Title IX investigation, is not retaliation.

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Title IX Coordinator

- The person designated by an institution to serve as Title IX Coordinator must carry the actual title “Title IX Coordinator.”
- The regulation expands an institution’s notification obligations, such that the institution must notify applicants for admission and employment, students, parents, legal guardians, employees and unions of the Title IX Coordinator’s name and contact information.
- Any person may make a report to the Title IX Coordinator by person, by mail, by telephone, by email or by other specified means. A complaint “may be made at any time” by email or telephone. To comply with this requirement, Title IX Coordinators will need to either carry cell phones or ensure their phone systems have voicemail capability to capture reports made after hours.

Training

- The regulation requires that all Title IX Coordinators, investigators, decision-makers and informal resolution facilitators receive training on various relevant aspects of the institution’s Title IX policy and grievance process, including definitions of sexual harassment; the scope of the institution’s education programs and activities; how to conduct investigations, hearings, appeals and informal resolutions (as applicable); and how to serve “impartially, including by avoiding prejudice of the facts at issue, conflicts of interest and bias.”
- The training for decision-makers must include training on relevant technology to be used at any live hearing, relevance and the permissible use of sexual history.
- The training provided to various institutional actors must be free of “sex stereotypes” and must promote “impartial investigations.”

FERPA

- The regulation clarifies that an institution’s obligations under FERPA do not “obviate[]” or “alleviate[]” any of the obligations in the Title IX regulation.
- Effectively, this means that to the extent there is a conflict between FERPA and the Title IX regulation, an institution must comply with the Title IX regulation.

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Religious Exemption

- The new regulation makes clear that the statutory exemption for religious institutions contained in 20 U.S.C. § 1681(a)(3) is self-executing and a school need not notify OCR in advance of its claimed exemption, although it may do so in order to seek assurance of its exemption. The proposed regulation would permit an institution to assert a religious objection during the pendency of an OCR investigation.
- The existing Title IX regulation contained at 34 C.F.R. § 106.12(a) states that “this part does not apply to an educational institution which is controlled by a religious organization to the extent application of this part would not be consistent with the religious tenets of such organization.” This religious exemption’s reference to “this part” refers to the entirety of 34 C.F.R. § 106, which includes all the directives and mandates issued by ED in the new final regulation.

Constitutional Protections

- The regulation explicitly states that nothing in the regulation requires a private or public college to restrict any rights that would be protected from government action under the First Amendment (Freedom of Speech), the Due Process Clauses of the Fifth and Fourteenth Amendments or “any other rights guaranteed against government action by the U.S. Constitution.”
- Effectively, this means that, for public institutions, Title IX policies and processes must be applied in a manner consistent with constitutional rights.
- For private institutions, this means that institutions cannot claim that Title IX requires them to adopt policies and procedures that, if adopted at a public institution, would be unconstitutional. However, as private actors, such institutions could adopt policies limiting speech, due process, etc. on the basis of other rationales, provided, however, that such private institutions must meet the minimal due process requirements imbedded in the Title IX regulation itself.

Application to Employees

- The regulation explicitly states that it does not limit any of the rights of an employee under Title VII of the Civil Rights Act of 1964.
- Otherwise, the regulation applies with equal force to sexual harassment complaints brought by employees or filed against employees, effectively mandating an elaborate grievance process for any employee accused of sexual

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misconduct. It is not immediately clear how this regulation will impact an institution's ability to immediately terminate an at-will employee.

- While the regulation purports to prohibit an institution from conditioning employment on a waiver by an employee of their rights under the regulation, it is unclear whether the regulation would prohibit an institution from requiring employees to arbitrate their claims pursuant to the Federal Arbitration Act. Litigation on this point seems likely.

Recordkeeping

- The regulation requires an institution to maintain the complete records of each phase relating to the resolution of a formal complaint for a period of seven years, including any records of informal resolution.
- The institution must also retain "all" materials used to train institutional participants in the various phases of the resolution process, including the Title IX Coordinator, investigators and decision-makers.
- Institutions must make all such training materials available on their website or, if they do not maintain a website, must make them available subject to inspection. It is not clear whether this requirement applies to training that occurs after the effective date of the regulation (August 14, 2020), or whether it encompasses prior trainings.
- For each instance where an institution receives a report of sexual harassment but where a formal complaint is not filed, the institution must maintain, for a period of seven years, a record of all actions taken, including all supportive measures provided.
- For each such case, the institution must include documentation of its rationale for why the actions it took were not deliberately indifferent. This means that, if an alleged victim decides not to file a formal complaint, and the Title IX Coordinator decides not to file a formal complaint, the documentation must explain why the Title IX Coordinator's decision was not clearly unreasonable.

Preemption of State Law

- The regulation specifies that to the extent of a conflict between state or local law and Title IX, "the obligation to comply with §§ 106.30, 106.44, and 106.45 is not obviated or alleviated by state or local law."

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- Sections 106.30, 106.44 and 106.45 are the provisions of the final Title IX regulation that define “sexual harassment”, dictate the institution’s required response to reports, and specify required procedures for the grievance process, including live hearings with cross-examination.
- Effectively, these provisions mean that the Title IX regulation preempts any state or local laws that conflict with its core provisions, including but not limited to any attempt by state or local government to prohibit cross-examination in Title IX hearings.

Extraterritorial Application Limited

- The regulation clarifies that the obligation to adopt and utilize Title IX grievance procedures applies only with respect to sex discrimination “occurring against a person in the United States.”
- Consistent with the language in the proposed regulation, this would appear to limit application of the Title IX regulation only to sexual harassment occurring in the geographic boundaries of the United States.

Severability

- The final regulation includes a severability clause such that if a court strikes down any particular part of the regulation, the remaining portions remain in effect.
- This provision is ED’s attempt to preserve as much of the regulation as possible should litigants be successful at challenging the enforceability of particular provisions, such as the cross-examination requirement.

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NACUANOTES

National Association of College and University Attorneys February 8, 2018 | Vol. 16 No. 5

TOPIC:

Promoting Fairness in Trauma-Informed Investigation Training

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INTRODUCTION:

In recent years, many colleges and universities have recognized that the quality of their sexual assault and intimate partner violence (“IPV”) investigations can be enhanced if they take into account the potential neurobiological effects of trauma when conducting those investigations. Institutions have sought and received training for their investigators and adjudicators on these issues, consistent with specific 2014 recommendations from the Department of Education’s Office for Civil Rights (“OCR”) and general training requirements imposed by the 2013 Violence Against Women Reauthorization Act Amendments to the Clery Act. Recent court decisions, a 2017 OCR Q&A document regarding Title IX, and media commentary have all emphasized, however, that the content of training will be analyzed closely, and that training for investigators and adjudicators, including trauma-informed training, should be presented in a manner that is fully balanced and promotes fairness for both complainants and respondents. Counsel can play a crucial role in vetting the content of training programs with these considerations in mind.

This NACUANOTE summarizes the state of the law and some of the public and scholarly discourse on these issues, and offers suggestions for college and university counsel and their clients who are designing and/or selecting investigation training programs.

DISCUSSION:

1. Federal Pronouncements and State Laws Regarding Trauma-Informed Training

In April, 2014, the OCR issued Questions and Answers on Title IX and Sexual Violence (“2014 Q&A”).^[2] Among many other issues, the 2014 Q&A stated that certain trauma-related topics should be covered in training. Specifically, the 2014 Q&A advised that “[t]raining for employees should include practical information about . . . the impact of trauma on victims,”^[3] and that training for “[a]ll persons involved in implementing a school’s grievance procedures . . . should include information on working with and interviewing persons subjected to sexual violence; . . . [and] the effects of trauma, including neurobiological change.”^[4]

Also in April, 2014, the White House issued *Not Alone: The First Report of the White House Task Force to Protect Students From Sexual Assault*.^[5] This non-binding advisory document provided more detailed suggestions about what college and university investigators and adjudicators should know about trauma, and why,^[6] and indicated that a Department of Justice-funded entity, the National Center for Campus Public Safety, would create a trauma-informed training program for campus officials involved in investigating and adjudicating sexual assault, domestic violence, dating violence and stalking cases.^[7]

The Preamble to the 2013 Violence Against Women Reauthorization Act regulations also mentions trauma-related training. According to the Preamble, “commenters believed that proper training will minimize reliance on stereotypes about victims’ behavior and will ensure that officials are educated on the effects of trauma.”^[8] In response, the Department of Education noted that it “appreciate[d] the support of commenters and agree[d] that ensuring that officials are properly trained will greatly assist in protecting the safety of victims and in promoting accountability.”^[9]

Further, several recent OCR Resolution Agreements and Determination Letters require the affected institutions to conduct training for various campus constituencies regarding the effects of trauma and/or the impact of trauma on students who experience sexual misconduct.^[10]

On September 22, 2017, OCR issued a Dear Colleague Letter (“2017 DCL”)^[11] that withdrew OCR’s 2011 Dear Colleague Letter on Sexual Violence^[12] and the 2014 Q&A.^[13] OCR also issued a new “Q&A on Campus Sexual Misconduct” (“2017 Q&A”) on that date.^[14] Among many other things, the 2017 Q&A contained the following statement: “Training materials or investigative techniques and approaches that apply sex stereotypes or generalizations may violate Title IX and should be avoided so that the investigation proceeds objectively and impartially.”^[15] When asked to clarify remarks made during a September 28, 2017 NACUA Briefing about whether the concept of trauma-informed training and awareness continues to be meaningful to OCR in light of the 2017 Q&A, Acting Assistant Secretary of Education Candice Jackson responded in part as follows:

While trauma-informed approaches that are grounded in science benefit sexual violence investigations, trauma-informed techniques should be undertaken contemporaneously with a rigorous commitment to a fair process for all parties. Trauma-informed investigation techniques that bleed over into a presumption of bias detract from the fundamental tenets of fairness and impartiality that are hallmarks of student disciplinary proceedings.^[16]

It remains to be seen whether these issues will be addressed specifically in the regulations that are expected to be issued following the notice and comment rulemaking process announced in the 2017 DCL.

Several states (for example, California, Illinois and New York) have mandated trauma-informed training through their state higher education sexual assault response laws,[\[17\]](#) and it would not be surprising if other states adopted similar requirements in the future. Institutions in those states will obviously have to be particularly attentive to the need to strike the appropriate balance between providing trauma-informed training as required by state law, while promoting fairness to all parties to avoid plausible claims that their procedures are biased based on gender in violation of Title IX. The suggestions in Section 5 below should assist such institutions in meeting both of these goals simultaneously.

2. Theories Typically Covered in Trauma-Informed Training

Trauma-informed investigation and adjudication training programs usually include discussion of theories regarding the potential neurobiological effects of trauma.[\[18\]](#) Typically, there is discussion of how chemicals such as catecholamines, corticosteroids, oxytocin and endogenous opioids may be released into the bloodstream as a result of trauma, and that these substances can interfere with the functioning of those portions of the brain (e.g., the hippocampus and amygdala) that are involved with the encoding of memory. The theory is that individuals who have experienced a traumatic event, therefore, may not be able to recall details of the event in a chronological manner; that they may not be able to recall some details at all; that their ability to recall details may improve over time; and that their affect when describing the event may initially seem evasive or counterintuitive (e.g., laughing, smiling, or seeming emotionless). Presenters may also discuss how hormone-driven responses to traumatic situations may include fighting, fleeing, or freezing (which may or may not be equated with a less-instantaneous state known as “tonic immobility”).[\[19\]](#)

Presentations regarding these issues may also address how traditional law enforcement interview approaches have been unsupportive and skeptical of individuals who may have experienced a traumatic event, and have failed to account for these potential neurobiological effects of trauma. Such presentations also often describe how the potential effects of trauma were sometimes misperceived by police officers as attempts at evasion or falsification, which caused some officers to unfairly doubt the veracity of reporting parties.[\[20\]](#)

Trauma-informed training program participants also often learn that interview approaches such as the Forensic Experiential Trauma Interview (“FETI”) technique have been developed to account for the potential effects of trauma on memory, by focusing on what a witness is able to recall about their experience and related sensory details, rather than demanding that the witness “start at the beginning” and recount all of the details of the event in a complete, linear manner.[\[21\]](#) Training often includes examples of how trauma-informed interview techniques have resulted in better outcomes and more thorough investigations in the criminal justice context, because reporting parties are encouraged to attempt to provide the information that they are able to provide, rather than abandoning the process in frustration because they cannot immediately convince a skeptical police officer by providing a seamless narrative of the relevant events.

Complementary topics that are often addressed in trauma-informed training programs include: that a delay between the time of an event and when it is reported is common; that

“counterintuitive” behaviors such as a reporting party’s continuing to have contact with the alleged perpetrator after a reported sexual assault or intimate partner violence incident is also common; that investigators should avoid phrasing questions in a victim-blaming manner (e.g., “why didn’t you call for help, fight back or run away?”); and that interviewing complainants in a respectful, professional, non-judgmental manner can result in their engaging more effectively in the investigation and adjudication process.

While beyond the scope of this NACUANOTE, the potential effects of alcohol and other substances on memory should also be a topic of interest to college and university investigators and adjudicators.[\[22\]](#)

3. Media and Scholarly Critique of These Theories

In September 2017, the second story of a three-part series regarding campus sexual assault adjudications, “The Bad Science Behind Campus Response to Sexual Assault,” was published in *The Atlantic*.[\[23\]](#) The premise of the article is that the trauma-informed, neurobiology-focused approach advocated by OCR’s 2014 guidance is grounded in “bad science.”

Specifically, the *Atlantic* story cites presentations by Rebecca Campbell, Ph.D. that are summarized above. The story’s author, Emily Yoffe, takes particular issue with Dr. Campbell’s assertion in those presentations that while hormones released during trauma may impair an individual’s ability to remember traumatic events in a chronological manner, “[w]hat we know from the research is that the laying-down of that memory is accurate and the recall of it is accurate.” Ms. Yoffe also critiques Dr. Campbell’s conflating of a human’s momentary “freeze” response to danger with “tonic immobility,” that is, the “playing dead” mechanism of prey animals. Ms. Yoffe quoted psychology professors and a psychiatrist who disagreed with those assertions.[\[24\]](#)

Ms. Yoffe also interviewed Dr. Campbell, and reported that Dr. Campbell said that the goal of her work on neurobiology was to give law enforcement officers a more nuanced understanding of how a sexual-trauma victim might behave. Ms. Yoffe reported further that Dr. Campbell said that using her work generally “as a guide for campus investigations and adjudications—and particularly to support the idea that no matter how a complainant behaves, she is almost certainly telling the truth—was unintended . . . and ‘would be an overreach.’”[\[25\]](#)

The *Atlantic* article also quotes Richard McNally, Ph.D., and his book *Remembering Trauma*.[\[26\]](#) Relying upon a broad review and interpretation of hundreds of psychology and neuroscience research papers and other resources, Dr. McNally makes many relevant arguments in *Remembering Trauma*. For example, in Dr. McNally’s view: “[a]s with all extremely negative emotional events, stress hormones interacting with an activated amygdala enhance the hippocampus’s capacity to establish vivid, relatively durable memories of the experience—or at least its salient, central features [such that] [h]igh levels of emotional stress enhance explicit, declarative memory for the trauma itself; they do not impair it.”[\[27\]](#) Dr. McNally also argues that theories suggesting that “manifestations of traumatic memory ‘are invariable and do not change over time’” are “plagued by conceptual and empirical problems.”[\[28\]](#) Dr. McNally’s book pre-dates Dr. Campbell’s popular presentations on these issues, so it of course does not comment directly on the Campbell presentations. Ms. Yoffe did quote Dr. McNally as stating in response to Dr. Campbell’s assertions that “because assaults do not occur in the laboratory, ‘there is no direct evidence’ of any precise or particular cascade of physiological effects during one, ‘nor is there going to be.’”[\[29\]](#)

The *Atlantic* article should, of course, be placed in context as a media critique, not as a peer-reviewed research paper. It is noteworthy that Jim Hopper, Ph.D., a psychologist who presents regularly regarding trauma-related issues, posted a direct response to the *Atlantic* article on *Psychology Today's* web site.^[30] In the post, Dr. Hopper cites research papers that he argues demonstrate that trauma can cause reflexive behaviors (such as “tonic immobility”) and habit-based behaviors in humans, and that trauma (whether caused by sexual assault, combat, or a police-involved shooting) can also cause fragmentation of memory.^[31] He notes astutely, however, that gaps and inconsistencies in memory “are never, on their own, proof of *anyone's* credibility, innocence, or guilt.”^[32]

Different audiences may find the *Atlantic* article to be either persuasive, neutral, or result-oriented, but at the very least, the conversation it prompted demonstrates that there are grounds for difference of opinion regarding the potential neurobiological effects of trauma. Title IX and Clery Act-related training programs should acknowledge this, as discussed below.

4. Trauma and Training-Related Issues in the Courts

A few relatively recent court decisions have addressed trauma and training-related issues. Where there was no plausible connection between the alleged inadequacy of training programs and alleged gender bias, courts have rejected challenges to training programs.^[33]

On the other hand, where plausible training-related gender-bias or fairness arguments have been raised, courts have shown a greater willingness to scrutinize the content of training programs. The court's decision in *Doe v. Brown University*^[34] provides one example. Following a bench trial, the court in that case held that the male plaintiff-respondent was entitled to a new disciplinary hearing because the University's process did not comport with contractual “reasonable expectation” requirements for several reasons. The court focused primarily on the University's use of a consent standard that was not yet in effect at the time of the incident in question,^[35] but it also cited a trauma-related training issue. Specifically, the court noted that a Title IX panel member essentially refused to consider exculpatory text messages sent and statements made by the complainant after the incident. The panel member testified at trial that she did so in part because of training she received from a sexual harassment and assault resources and education advocate, who had informed panelists that survivors of sexual assault sometimes exhibit “counterintuitive” behaviors (e.g., “not being able to recount a consistent set of facts,” or communicating or interacting with someone who has assaulted them after the assault).^[36] The panel member testified that she therefore concluded that “it was beyond [her] degree of expertise to assess [the complainant's] post-encounter conduct . . . because of a possibility that it was a response to trauma.”^[37]

The court stated: “It appears that what happened here was that a training presentation was given that resulted in at least one panelist completely disregarding an entire category of evidence,” which the court viewed as “clearly com[ing] close to” the level of arbitrary and capricious conduct.^[38] The court emphasized that while it was not suggesting that the University could not train fact-finders on the effects of trauma, it should remind them that all evidence presented had been deemed relevant, and that as fact-finders, they were capable of and obligated to consider all evidence.^[39] These observations are not surprising, particularly given the exculpatory nature of the complainant's text messages and statements, and the panel member's apparent complete disregard of them.

A more surprising and more generally concerning ruling was issued in *Doe v. University of Pennsylvania*.^[40] In that case, the court denied the University's motion to dismiss the male

plaintiff-respondent's contract-based claim, reasoning that hearing panel members had not been trained "appropriately" because, accepting all of the plaintiff's allegations of bias as true, they had been trained with, among other materials, a document called *Sexual Misconduct Complaints: 17 Tips for Student Discipline Adjudicators*.^[41] The court accepted as true for purposes of the motion to dismiss the plaintiff's allegations that the *17 Tips* document "encourage[s] investigators and adjudicators to believe the accuser, disregard weaknesses and contradictions in the accuser's story, and presume the accused's guilt." While it must be emphasized that this was only a ruling on a motion to dismiss,^[42] it is nonetheless surprising because the *17 Tips* document discusses how trauma may affect survivors of sexual violence; it does not assert that all survivors of trauma experience all of the referenced effects, nor does it assert that contradictions in a complainant's account should be ignored, or that memories of trauma are infallibly accurate.^[43]

Doe v. The Ohio State University^[44] is another case that demonstrates the reluctance of some courts to dismiss claims by plaintiff-respondents that target trauma-informed training programs. In *Doe*, the male plaintiff-respondent alleged that hearing panel members "received training on sexual misconduct and how to prevent sexual assault but did not receive any training on the due process rights of students accused of sexual misconduct," and that training included "presentations and videos that had the effect of biasing the panel members in favor of victims and prejudicing the panel members against men accused of sexual misconduct."^[45] Emphasizing that it was required to accept all of the plaintiff's allegations regarding a "one-sided training process" as true under the motion to dismiss standard, the court held that these allegations plausibly stated a claim that the panel members were unconstitutionally biased. The court's related comments suggested that if the University were to produce evidence at a later stage in the case that it had also trained panel members on the importance of due process and otherwise addressed the relevant issues in a balanced manner, the court's assessment of the appropriateness of the training would be considerably different.^[46]

Other relatively recent cases illustrate that the content of training programs may be consequential, particularly at the motion to dismiss stage where all of the plaintiff's allegations must be accepted as true.^[47]

Finally, a case that does not involve a challenge to training programs, but that does involve trauma-related issues, is worth noting. In a December 2016 decision, in a case related to a lawsuit mentioned in the *Atlantic* story, a state court judge vacated the University of Oregon's finding that a male student was responsible for sexual assault, in part because the University's investigator allegedly relied, inappropriately, upon an undisclosed expert opinion to the effect that inconsistencies in the complainant's account were attributable to the effects of trauma. It was significant to the court that the plaintiff was given no opportunity to challenge the veracity or applicability of that expert opinion during the disciplinary process.^[48] A federal court lawsuit involving the same parties (in which the complaint makes allegations about the "trauma expert"-related issue and many other issues) was also filed.^[49]

5. Promoting Fairness to All Parties Through Trauma-Informed Investigation Training

Trauma-informed concepts can promote fairness to all parties if presented and applied appropriately, but institutions of higher education should take critical court decisions and media commentaries seriously in order to avoid the real or perceived unfairness that may result from a misapplication of those concepts in campus sexual assault investigations and disciplinary proceedings. Fortunately, institutions can train investigators to use trauma-informed

techniques, in accordance with promising practice and applicable state laws, while demonstrably promoting fairness to all parties and avoiding “sex stereotypes or generalizations,” consistent with the 2017 OCR Q&A.

So how can colleges and universities integrate trauma-informed approaches into investigation and adjudication training in a way that promotes fairness? Some recommendations follow.

A. Emphasize how institutions should—and should not—apply information about the potential effects of trauma

First, colleges and universities should be precise about exactly how information about the potential effects of trauma should—and should not—be applied.

While there are differences of opinion among scientists regarding the ways in which trauma may affect memory, colleges and universities should recognize that campus investigators and adjudicators do not need to determine scientifically whether a witness was traumatized or by what, or precisely what effects trauma may or may not have in a particular case. Rather, they need to understand the potential effects of trauma so that they can check their personal biases and avoid the uncritical assumption that individuals who report sexual assault are necessarily “lying” if they cannot remember every detail of the incident in a chronological manner. If investigators and adjudicators understand that non-linear or partial recall may be related to potential trauma, they can avoid biased, snap judgments, move forward objectively, and gather information about what the reporting party is able to recall. However, if an investigation yields evidence of behaviors that may be related to trauma, that should not be understood as establishing that institutional policy was necessarily violated, nor should the presence of such issues cause fact-finders to accept everything a complainant is able to recall as absolutely “true,” or to fail to seek clarification of inconsistencies.

Through this approach, fact-finders should not substitute scientific theories for evidence, and they must not abdicate their fact-finding responsibility, when determining whether a policy violation occurred in a particular case. If information about the potential effects of trauma is applied only to this limited extent, decisions will ultimately be based on an objective assessment of the facts of each case, rather than presumptions derived from familiarity, or lack of familiarity, with scientific theories.

B. Emphasize the neutral role played by college and university investigators and adjudicators

Some trauma-informed training draws from interview techniques and approaches used in the criminal justice system. While that is not necessarily inappropriate, training for college and university investigators and adjudicators should emphasize that police officers and prosecutors work to establish probable cause and advocate for criminal convictions, but they do not determine as ultimate fact-finders whether the law was violated. By contrast, campus fact-finders and decision-makers must maintain complete neutrality at all times in evaluating reported violations of institutional policies. Colleges and universities are not responsible for correcting any actual or perceived historical failings in the criminal justice system’s response to sexual assault, and if campus training program participants learn how trauma-informed principles have been applied by law enforcement to correct those failings, without also learning how such principles need to be adapted to the distinct context of campus disciplinary proceedings, then unfairness to respondents, real or perceived, could result.

For example, it should be emphasized in training that while it would not be appropriate for a neutral fact-finder to be actively “supportive” of either a complainant or a respondent in a campus disciplinary proceeding (that role can be played by counselors and advocates, on or off campus), fact-finders can learn from the trauma-informed approach yet maintain impartiality by treating all parties and witnesses in a professional, respectful, non-judgmental manner. If any materials or information drawn from the criminal justice context are used in campus training, they should be vetted to determine if they employ “victim”, “survivor” and “suspect” terms that are often used in that context. If they do, the campus training materials should explicitly make a point about the importance of language, note the differences between the criminal justice and higher education contexts, and emphasize that more neutral “complainant and respondent” or “reporting and responding party” terms should be used in the higher education context. Finally, colleges and universities should be very cautious about adopting as institutional policy the branding or curricula of trauma-informed programs developed for police officers given, again, the distinctly different objectives of law enforcement, on the one hand, and campus sexual misconduct investigators and adjudicators, on the other.[\[50\]](#)

C. Emphasize how to apply a trauma-informed interview approach in an even-handed, fair manner

Probably the single most important practical reason why investigators need to learn about the potential effects of trauma is so they can understand the basis for employing trauma-informed interview approaches that encourage witnesses to share what they are able to recall about their experience, including any available sensory impressions, without demanding that they recall every aspect in a chronological manner. These techniques can result in the creation of a fuller portrait of what occurred, while avoiding the frustration and withdrawal from the process that might occur if the complainant is initially asked to provide a seamless, richly detailed, chronological narrative. Approaching interviews in this manner initially would not prejudice respondents in any way, so long as investigators and adjudicators also follow up as necessary and seek appropriate clarification, as discussed below.

Further, training programs should emphasize that it is both equitable and appropriate to use the same basic initial interview approach with complainants and respondents. While the open-ended FETI technique described in footnote 20 above was developed primarily to gather a more robust evidentiary portrait of how individuals experienced a potentially traumatic event, respondents (who are likely experiencing significant stress during an interview, if not the effects of trauma) can also be given the same opportunity to describe what they are able to remember about the experience, to describe their thought process and sensory perceptions, and to respond to respectfully-phrased clarifying questions regarding any inconsistencies.[\[51\]](#)

D. Emphasize that interviewing for clarification is crucial

Training should emphasize that investigators and adjudicators must be vigilant to seek clarification of inconsistencies and “counterintuitive” behaviors from both parties. At the outset, discussion of inconsistencies and counterintuitive behaviors should begin with a qualification that not all inconsistencies and counterintuitive behaviors are necessarily driven by trauma-related hormones, or trauma-related memory issues; indeed, some inconsistencies and counterintuitive behaviors may bear on a witness’s credibility. While such behaviors may present in circumstances involving sexual assault or IPV, the existence of these behaviors neither warrants categorical dismissal of a complainant’s account nor an automatic finding of a policy violation.

For example, a complainant's delay in reporting may or may not be probative of whether a policy violation occurred, but if the issue seems potentially relevant to an investigator or a respondent, a complainant can certainly be asked respectfully about their thought process with regard to reporting the incident when they chose to do so. As another example, if a complainant has engaged in apparently "normal" communications with a respondent after a reported assault, it is perfectly appropriate for an investigator, in a non-judgmental way, to ask the complainant to "help the investigator understand" the complainant's thought process in doing so. This approach can also be used to inquire about differences in how a complainant has described the incident on different occasions, or about differences between a complainant's account and the observations of other witnesses. Fact-finders can then consider the evidence of potentially inconsistent accounts or counterintuitive behavior, and the complainant's explanation of that behavior, along with all of the other evidence gathered in the investigation. The most important point to be made in training regarding these issues is that general statements about how some complainants may behave as a result of trauma or related issues should not be substituted for a fact-finder's assessment of the specific evidence in a particular case.

E. Model a gender-neutral approach in trauma-informed training

While much of the public discourse regarding campus adjudications in this area presumes that every case involves the reported assault of a cisgender heterosexual female complainant by a cisgender heterosexual male respondent, we know from our experience in higher education that that is not an accurate presumption. Obviously, any person of any sexual orientation or gender identity can be a victim or a perpetrator of sexual assault, IPV or stalking, and anyone can be affected negatively by trauma.^[52] Demonstrating an institutional understanding of this fact in trauma-informed training has several benefits.

First, helping investigators and adjudicators understand how sexual violence impacts LGBTQIA individuals statistically will better prepare them for the range of cases they are likely to work on, and should help them identify and address any personal biases they have that may undermine their ability to serve impartially.^[53] From a more individual perspective, there are many videos available on YouTube that address the experiences of male victims of sexual assault, IPV and stalking; these can also help to better prepare training participants to handle all cases in a fair, balanced manner.

Second, using gender-neutral terminology throughout training (i.e., either using gender-neutral pronouns and/or alternating which gender-specific pronouns are used for complainants and respondents in examples and case studies) can further reinforce that anyone can be a victim or perpetrator. Doing so can also further reinforce that the institution does not view sexual assault, IPV or stalking as gender-binary issues, and endeavors to treat all parties fairly, without bias on the basis of gender.

Third, related to the previous point, while higher education cannot control the binary assumptions that dominate so much of the current public discourse about institutional responses to sexual assault, modeling a gender-neutral approach in training that we do control can emphasize that colleges and universities are not "anti-male" when it comes to these cases; instead, they are, of course, "anti-sexual assault," "anti-IPV", and "anti-stalking." As noted above, an analogous point was made convincingly in *Gomes v. Univ. of Maine Sys.*,^[54] in which the court observed in rejecting a plaintiff-respondent's bias claim that "[t]here is not exactly a constituency in favor of sexual assault, and it is difficult to imagine a proper member of the Hearing Committee not firmly against it. It is another matter altogether to assert that,

because someone is against sexual assault, she would be unable to be a fair and neutral judge as to whether a sexual assault had happened in the first place.”

A similar rationale has been adopted in several recent court decisions that rejected the claims of plaintiff-respondents who were found not responsible for sexual assault, but nonetheless filed suit against their school, claiming that the school’s alleged lack of response to post-adjudication harassment by the complainant violated Title IX. In several such cases, the courts held that the alleged harassment was based on the perception that the respondent committed sexual assault, not *per se* because the respondent was male.^[55] The rationale of such cases also supports the point that an institution’s taking a trauma-informed approach towards complainants should not in any way be seen as evidence of gender bias against males, because, again, not all complainants are female, not all respondents are male, and a trauma-informed approach facilitates the gathering of information in a balanced manner from all individuals, not just from women, who report sexual assault or IPV.^[56] Further reinforcing such points by modeling gender-neutrality in training can only help the larger effort to establish that institutions are opposed to sexual and other violence, but are not “opposed to” a substantial portion of their students simply because they are male.

F. Emphasize the need for procedural fairness

Trauma-informed interview and investigation approaches should be presented as one important part of a larger system, which includes robust procedural protections for both parties provided pursuant to constitutional, Clery Act, state common law, and self-imposed contractual requirements, as applicable. Investigators and adjudicators who participate in training regarding trauma and related issues should also participate in training regarding institutional procedural requirements, which should emphasize as a matter of equity and legal mandate that all of the institution’s students are entitled to the level of fair process provided for in institutional policies. Institutions should be able to demonstrate that their training programs reflect their simultaneous commitment to trauma-informed approaches and procedural fairness.^[57] Documentation regarding the substance of each training (e.g., PowerPoint slides, instruction manuals, distributed policies, etc.) should be maintained accordingly.

G. If any information is provided regarding “perpetrator behavior”, emphasize the difference between convicted criminal defendants or admitted perpetrators, and respondents in individual cases

As noted above, providing information about “typical perpetrator behaviors” in campus training programs can be controversial, and carries some risk that respondents and courts will conclude that an institution’s doing so may have engendered bias against respondents in particular cases.^[58] If an institution concludes that it must include such information or it has done so in the past, it would be best to emphasize that information about general characteristics of “perpetrators of sexual violence” is drawn from research based on convicted criminal defendants or admitted perpetrators of sexual assault, and that participants should never presume that statistics about or general characteristics of such individuals are necessarily representative of the behavior of a respondent in a particular case, or of the behavior of any predictable percentage of the respondents who will be involved in the institution’s cases. Instead, participants should be encouraged to decide each case based on the evidence gathered, not on any inference from general statistics.

H. Ensure that all institutional publications convey a consistent message

Once an institution has honed its training programs so that they describe a fair, trauma-informed approach, it should ensure that all of its publications convey a consistent message about that approach. A chain is only as strong as its weakest link, and if an outdated institutional publication or web page conveys a message that may be perceived as biased, it is fair to assume that it will be cited in opposition to a motion to dismiss a plaintiff-respondent's Title IX or fairness-based contract or other claims. The institution may ultimately be able to demonstrate the overall fairness of its training program and publications, but it is advisable to proactively eliminate outliers that would lend any support to a claim of unfairness or bias.

I. If an institution's overall training program could benefit from the suggestions offered here, enhance the program accordingly

If upon counsel's review it appears that not all aspects of an institution's past training efforts have placed trauma-informed concepts in context and promoted fairness to all parties as discussed above, the institution could consider enhancing its program to incorporate some or all of the suggestions made here. Courts should reasonably review an institution's training program as a whole, rather than focusing exclusively on past presentations or dated, individual PowerPoint slides when assessing the fairness of the program. There is no reason why subsequent presentations cannot correct any misperceptions arguably created by earlier presentations, so that the institution's overall program is ultimately, and demonstrably, fair and balanced.

CONCLUSION:

Applying the lessons learned from scientific research on the neurobiological effects of trauma can enhance the quality of college and university investigations and adjudications of sexual assault, IPV and stalking. All parties can benefit if trauma-informed training is provided in a manner that is fair, balanced, nuanced, and adapted appropriately to the context of college and university investigations and disciplinary proceedings, and that avoids "sex stereotypes and generalizations." Given the complexity of these issues and the importance of training as a matter of substance and potential litigation risk, counsel can play a crucial role in ensuring that their institution's training programs are truly fair and trauma-informed.

END NOTES:

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[2] See U.S. Dep.'t of Educ. Office for Civil Rights, ["Questions and Answers on Title IX and Sexual Violence."](#) (Apr. 29, 2014) (archived information).

[3] *Id.* at Answer J-1.

[4] *Id.* at Answer J-3.

[5] See White House Task Force to Protect Students from Sexual Assault, [“Not Alone: The First Report of the White House Task Force to Protect Students from Sexual Assault,”](#) (Apr. 2014) [hereinafter “*Not Alone* Task Force Report”].

[6] The *Not Alone* Task Force Report states on this point:

Sexual assault can be hard to understand. Some common victim responses (like not physically resisting or yelling for help) may seem counter-intuitive to those unfamiliar with sexual victimization. New research has also found that the trauma associated with rape or sexual assault can interfere with parts of the brain that control memory – and, as a result, a victim may have impaired verbal skills, short term memory loss, memory fragmentation, and delayed recall. This can make understanding what happened challenging.

Specialized training, thus, is crucial. School officials and investigators need to understand how sexual assault occurs, how it’s perpetrated, and how victims might naturally respond both during and after an assault.

Not Alone Task Force Report at 13.

[7] *Id.* The National Center subsequently developed this program and coordinated presentations of it throughout the United States.

[8] Department of Education, Violence Against Women Act, Final Rule, 79 Fed. Reg. 62773 (Oct. 20, 2014) (codified at 34 C.F.R. Pt. 668).

[9] *Id.*

[10] See, e.g., Elmira College Resolution Agreement, OCR Case No. 02-14-2316 (December 14, 2016); City University of New York, Hunter College Resolution Agreement, OCR Case No. 02-13-2052 (October 27, 2016); Wesley College Resolution Agreement, OCR Complaint No. 03-15-2329 (September 30, 2016); Frostburg State University Resolution Agreement, OCR Complaint Nos. 03-13-2328 and 03-15-2032 (September 6, 2016); Princeton University Resolution Agreement, Case No. 02-11-2025 (October 12, 2014). See also Minot State University Resolution Agreement, OCR Complaint No. 05-14-2061 (July 7, 2016) (indicating that training for identified university officials will include instruction on “how to interview and interact with complainants in a way that is trauma-informed, sensitive and respectful.”); Michigan State University Resolution Agreement, OCR Docket Nos. 15-11-2098 and 15-14-2113 (Aug. 28, 2015) (same).

[11] U.S. Dep’t of Educ. Office for Civil Rights, [“Dear Colleague” Letter Withdrawing the Department’s 2011 “Dear Colleague” Letter and 2014 Q&A](#) (Sept. 22, 2017).

[12] U.S. Dep’t of Educ. Office for Civil Rights, [“Dear Colleague” Letter on Sexual Violence](#) (Apr. 4, 2011) (archived information).

[13] U.S. Dep’t of Educ. Office for Civil Rights, [“Questions and Answers on Title IX and Sexual Violence,”](#) (Apr. 29, 2014) (archived information).

[14] See U.S. Dep't of Educ. Office for Civil Rights, [“Q&A on Campus Sexual Misconduct”](#) (Sept. 2017) [hereinafter “Q&A”].

[15] *Id.* at Answer 6. See also *id.* at Answer 8 (“Decision-making techniques or approaches that apply sex stereotypes or generalizations may violate Title IX and should be avoided so that the adjudication proceeds objectively and impartially.”).

[16] See [“Developments in Title IX, Part 2: A Conversation with OCR Acting Assistant Secretary Candice Jackson,”](#) (NACUA Briefing Sept. 28, 2017) (last accessed on Feb. 6, 2018) (clarified via email exchange between Candice Jackson and Kathleen Santora on 12/06/17).

[17] See Cal. Educ. Code § 67386(b)(12) (West 2014) (requiring institutions that participate in state student financial aid programs to provide a “comprehensive, trauma-informed training program for campus officials involved in investigating and adjudicating sexual assault, domestic violence, dating violence, and stalking cases.”); 110 ILCS 155 (West 2015) (requiring higher education institutions to provide trauma-informed response training annually to campus officials involved in the receipt of sexual assault reports and provision of related resources; the law defines “trauma-informed response” as “a response involving an understanding of the complexities of sexual violence, domestic violence, dating violence, or stalking through training centered on the neurobiological impact of trauma, the influence of societal myths and stereotypes surrounding sexual violence, domestic violence, dating violence, or stalking, and understanding the behavior of perpetrators”); New York Education Law § 6444(5)(c)(ii) (2015) (providing that students have the right to have complaints “investigated and adjudicated in an impartial, timely, and thorough manner by individuals who receive annual training in conducting investigations of sexual violence, the effects of trauma, . . .”).

[18] The *Diagnostic and Statistical Manual of Mental Disorders* (5th ed., DSM–5, American Psychiatric Association, 2013), at page 271, defines “trauma” as follows: “Exposure to actual or threatened death, serious injury, or sexual violence in one (or more) of the following ways: directly experiencing the traumatic event(s); witnessing, in person, the traumatic event(s) as it occurred to others; learning that the traumatic event(s) occurred to a close family member or close friend (in case of actual or threatened death of a family member or friend, the event(s) must have been violent or accidental); or experiencing repeated or extreme exposure to aversive details of the traumatic event(s).”

[19] Presentations and interviews of Rebecca Campbell, Ph.D., a Professor of Psychology at Michigan State University (whose Ph.D. is in economic-community psychology), are cited routinely on these topics. See, e.g., Rebecca Campbell, Ph.D., [“The Neurobiology of Sexual Assault”](#) (National Institute for Justice Research for the Real World Seminar, Dec. 3, 2012).

[20] See [“Interview with Dr. Rebecca Campbell on the Neurobiology of Sexual Assault, Part I: Telling the Difference Between Trauma Versus Lying”](#) (National Institute of Justice). See also Armstrong, K. and Miller, T.C., [“When Sexual Assault Victims Are Charged With Lying,”](#) *New York Times Sunday Review* (Nov. 24, 2017) (providing anecdotal accounts of victims who were charged with lying about sexual assaults which were later proven by independent evidence to have occurred, and discussing trauma-informed approaches that some law enforcement agencies are adopting to help prevent such occurrences).

[21] The FETI technique was developed by Russell W. Strand (Retired Senior Special Agent and Retired Chief, Behavioral Sciences Education & Training Division, United States Army Military Police School). See, e.g., Russell W. Strand, [“The Forensic Experiential Trauma Interview \(FETI\).”](#) In sum, the FETI technique involves: the interviewer’s first asking the witness “what are you able to tell me about your experience?”; listening patiently and allowing the witness to share whatever they are able to share initially; asking the witness to “tell the investigator more” about a topic area without aggressively cross-examining the witness or demanding a chronological account; asking about the witness’s feelings and thought process during the experience; asking the witness what sensory information they are able to

recall; asking about the witness's physical and emotional reaction to the experience; asking what was the most difficult part of the experience and what the witness cannot forget about the experience; then circling back to seek clarification of important or potentially contradictory points, after the witness has been encouraged to share their experience as completely as they are able to through the open-ended interview approach described here. See *id.* at 3.

[22] See Aaron M. White, "[What Happened? Alcohol, Memory Blackouts, and the Brain](#)" (National Institute on Alcohol Abuse and Alcoholism, July 2004) (summarizing numerous research studies regarding alcohol-related "blackouts" in memory, including studies which focus on common drinking patterns of some college students and memory-related effects).

[23] See Emily Yoffe, "[The Bad Science Behind Campus Response to Sexual Assault](#)," *The Atlantic* (Sept. 8, 2017) [hereinafter, "*Atlantic Article*"].

[24] *Id.*

[25] *Id.*

[26] McNally, Richard J., *Remembering Trauma* (Belknap Press, 2005).

[27] *Id.* at 276. See also *id.* at 77, 180.

[28] *Id.* at 179.

[29] *Atlantic Article*.

[30] See Jim Hopper, "[Sexual Assault and Neuroscience: Alarmist Claims vs. Facts](#)," *Psychology Today* (posted January 22, 2018).

[31] *Id.*

[32] *Id.* (emphasis in original).

[33] See, e.g., *Doe v. Colgate Univ.*, 2017 WL 4990629, **14-15 (N.D.N.Y. Oct. 31, 2017) (slip copy) (granting summary judgment to University on male plaintiff-respondent's training-related Title IX claims, because allegedly biased strategies advocated by outside training provider were not implemented by the University, and because University's internal training program did not support inference of anti-male bias) (appeal pending); *Mancini v. Rollins College*, 2017 WL 3088102, *6 (M.D. Fla. Jul. 20, 2017) (slip copy) (while allowing male plaintiff-respondent's Title IX erroneous outcome allegations to move forward on other grounds at the motion to dismiss stage, court held that plaintiff's allegations of inadequate training failed "to support an inference of gender bias by [the college] because there is no logical connection between an inadequately trained investigator and gender bias. Logically, an untrained investigator would pose similar problems and risks to both parties—regardless of sex. Thus, the Training Allegations are entitled to no weight in the gender bias analysis."); *Doe v. Trustees of Boston College*, 2016 WL 5799297, **12, 17-18 (D. Mass. Oct. 4, 2016) (ruling on cross-motions for summary judgment, court rejected male plaintiff-respondent's contract-based argument that hearing board members had to have investigation training equivalent to that of police officers, because contract language did not support that claim; court also rejected expert witness's arguments that training was inadequate because it did not cover all topics that the expert claimed it should have, while noting that the college had "ramped up" training in response to an internal report that it needed to do so, and had thereafter provided training that included, among other things, information on "understanding rape trauma") (appeal pending).

[34] 210 F.Supp.3d 310 (D.R.I. 2016).

[35] *Id.* at 331.

[36] *Id.* at 318. According to the court, the University stated that it provided such training to comply with OCR guidance to the effect that “decision-makers in Title IX processes should understand the potential impacts of trauma.” *Id.*

[37] *Id.* at 327.

[38] *Id.* at 342.

[39] *Id.* The court also suggested that “if certain evidence could be considered counterintuitive such that expertise may be helpful in order for the fact-finder to properly consider it, this could be presented through the investigator, which in turn would give both parties the notice and opportunity to deal with it.” *Id.*

[40] --- F.Supp.3d ---, 2017 WL 4049033 (E.D. Pa. Sept. 13, 2017).

[41] *Id.* at *10. The court’s opinion noted that the “17 Tips” document can be found at the following URL: <https://www.legalmomentum.org/resources/guide-university-discipline-panels-sexual-violence> (*Sexual Misconduct Complaint: 17 Tips for Student Discipline Adjudicators* (2012) (“17 Tips”)). Given the court’s ruling, it is noteworthy that the 17 Tips document is framed as a suggested resource that was designed to be adapted for use at other campuses. 17 Tips at 1. Therefore, institutions that have adapted it for use in their programs should follow the progress of the *University of Pennsylvania* case closely.

[42] Notably, several experienced, highly skilled NACUA members were involved in the creation of the 17 Tips document and/or the litigation of the *Doe v. Univ. of Pennsylvania* case, so it is reasonable to hope that subsequent rulings in later stages of the case, which will not involve the extremely high motion to dismiss standard, will be more positive.

[43] 17 Tips at 11-12. See also *Doe v. Univ. of Pennsylvania*, 2017 WL 4049033, *10 (noting that the 17 Tips document “warns against victim blaming; advises of the potential for profound, long-lasting, psychological injury to victims; explains that major trauma to victims may result in fragmented recall, which may result in victims “recount[ing] a sexual assault somewhat differently from one retelling to the next”; warns that a victim’s “flat affect [at a hearing] does not, by itself, show that no assault occurred”; and cites studies suggesting that false accusations of rape are not common.”). The 17 Tips document’s summary of research findings regarding “typical” rapists is relatively more direct. *Id.* at **13-14 (noting that the 17 Tips document “advises that the alleged perpetrator may have many ‘apparent positive attributes such as talent, charm, and maturity’ but that these attributes ‘are generally irrelevant to whether the respondent engaged in nonconsensual sexual activity,’” and “also warns that a ‘typical rapist operates within ordinary social conventions to identify and groom victims’ and states that ‘strategically isolating potential victims[] can show the premeditation commonly exhibited by serial offenders.’”).

[44] 219 F.Supp.3d 645 (S.D. Ohio 2016).

[45] *Id.* at 658. The court cited the plaintiff’s allegations that “the panel members were presented statistical evidence that ‘22–57% of college men report perpetrating a form of sexual aggressive behavior,’ that ‘[c]ollege men view verbal coercion and administration of alcohol or drugs as permissible means to obtain sex play or sexual intercourse,’ that ‘[r]epeat perpetrators are aware of myths and how to present [as] empathic,’ and that ‘[s]ex offenders are experts in rationalizing behavior.’” *Id.*

[46] *Id.* Specifically, the court emphasized that it did “not mean to say that any of [the University’s] training is untrue or not worthwhile or that the university’s alleged goal of aiding victims and creating a safer campus community should not be lauded. Indeed, ‘[t]here is not exactly a constituency in favor of sexual assault, and it is difficult to imagine a proper member of the Hearing Committee not firmly against it. It is another matter altogether to assert that, because someone is against sexual assault, she would be unable to be a fair and neutral judge as to whether a sexual assault had happened in the first place.’” *Id.*

(quoting *Gomes v. Univ. of Maine Sys.*, 365 F.Supp.2d 6, 31–32 (D. Me. 2005)). *But see Doe v. Univ. of Cincinnati*, 173 F.Supp.3d 586, 602 (S.D. Ohio 2016) (quoting the *Gomes* language quoted immediately above in the *Ohio State* case, the court dismissed plaintiff-respondent's constitutional claim regarding training and observed: "It should be a laudable goal for a university to raise the awareness of its faculty and staff to sexual assault and to increase their sensitivity to the particular problems that victims of sexual violence experience in coming forward to make complaints. Plaintiffs do not cite any authority for the repeated implication in their complaint that a university must balance its sexual assault training with training on the due process rights of the accused in order to avoid a claim that its disciplinary procedures are biased."'). *See also Neal v. Colorado State Univ.-Pueblo*, 2017 WL 633045, *13 (D. Colo. Feb. 16, 2017) (criticizing the *Doe v. Univ. of Cincinnati* analysis for drawing inferences against the plaintiff that should not be drawn under the motion to dismiss standard).

[47] *See, e.g., Doe v. Washington and Lee Univ.*, 2015 WL 4647996, *10 (W.D. Va. Aug. 5, 2015) (court denied University's motion to dismiss male plaintiff-respondent's Title IX claim because, among other things, the University's Title IX Coordinator had allegedly endorsed during a presentation a web-published article that "posited that sexual assault occurs whenever a woman has consensual sex with a man and regrets it because she had internal reservations that she did not outwardly express."').

[48] *Doe v. University of Oregon*, Lane County Circuit Court, 16CV30413 (Conover, J., Dec. 13, 2016) (official audio recording of court's ruling from the bench obtained from court clerk's office).

[49] *John Doe v. Univ. of Oregon et al.*, Case No. 6:17-cv-01103-AA (D. Or.).

[50] *See, e.g.,* Armstrong, K. and Miller, T.C., "[When Sexual Assault Victims Are Charged With Lying](#)," *New York Times Sunday Review* (Nov. 24, 2017) (noting the utilization of and controversy surrounding the "Start By Believing" campaign in the law enforcement context, which could be viewed as potentially biased if adopted as college or university policy).

[51] Indeed, Russell Strand, developer of the FETI technique, suggests that the technique can be used effectively in suspect interviews even in the criminal justice context. *See* Russell Strand, "[Turning the Case Upside Down—Rethinking the Art and Science of Suspect Interviews—Suspect FETI](#)" (webinar) (Battered Women's Justice Project, January 2017).

[52] *See Nungesser v. Columbia Univ.*, 169 F.Supp.3d 353, 365 n.8 (S.D.N.Y. 2016) (court rejected as a matter of law and logic the argument that "falsely accusing a male of being a 'rapist' is inherently gender based" because "[p]ersons of any gender may be perpetrators, or victims, of sexual assault." (citing *Haley v. Virginia Commonwealth Univ.*, 948 F.Supp. 573, 579 (E.D. Va. 1996) ("allegations [that] at best reflect a bias against people accused of sexual harassment and in favor of victims [] indicate nothing about gender discrimination.")); Lara Stemple and Ilan H. Meyer, "[The Sexual Victimization of Men in America: New Data Challenge Old Assumptions](#)," 104 Am. J. Of Public Health, e19 (June 2014) ("noting that although the idea of female perpetrators sexually assaulting male victims is 'politically unpalatable,' studies have found that up to 46% of male victims report a female perpetrator") (parenthetical notes in *Nungesser*). *See also* Jessica A. Turchik, "[Sexual Victimization Among Male College Students: Assault Severity, Sexual Functioning, and Health Risk Behaviors](#)," *Psych. of Men & Masculinity*, Vol. 13, No. 3, 243-255 (2012) (describing survey of 299 male college students who were asked whether they had experienced at least one sexual victimization experience since age 16; 48.8% reported no such experiences, 21.7% reported unwanted sexual contact, 12.4% reported sexual coercion, and 17.1% reported completed rape; 48.4% of these experiences involved female perpetrators, 5.6% involved male perpetrators, and 3% involved perpetrators of both sexes).

[53] [The 2010 Findings on Victimization by Sexual Orientation](#), a sub-report on data gathered through the CDC's National Intimate Partner Sexual Violence Survey, is, for example, an excellent resource from a large data sample that addresses sexual violence among LGBT individuals.

[54] 365 F.Supp.2d at 31–32.

[55] See *Nungesser v. Columbia Univ.*, 169 F.Supp.3d at 364-67 (finding that harassment based on being perceived as a rapist was not “sex-based” for Title IX purposes, because the assumption that everything that follows from a sexual act is necessarily “sex-based” “rests on a logical fallacy”); *Nungesser v. Columbia Univ.*, 244 F.Supp.3d 345, 366-67 (S.D.N.Y. 2017) (dismissing amended complaint on similar rationale); *Doe v. Univ. of Chicago*, 2017 WL 4163960, *7 (N.D. Ill. Sep. 20, 2017) (male plaintiff-respondent claimed that university was deliberately indifferent to harassment he suffered due to perception that he committed sexual assault; court granted motion to dismiss that Title IX claim because “a false accusation of sexual assault is not, without more, harassment based on sex, notwithstanding the sexual content of the accusation.”) (citing *Nungesser*, 169 F.Supp.3d at 365; *Doe v. Univ. of Massachusetts-Amherst*, 2015 WL 4306521, at *9 (D. Mass. Jul. 14, 2015)); *Doe v. Columbia College Chicago*, 2017 WL 4804982, *7 (N.D. Ill. Oct. 25, 2017) (dismissing Title IX claim that college was “deliberately indifferent” to harassment of male plaintiff-respondent by other students who considered him to be a “rapist”, based on rationale of *Nungesser* and *Univ. of Chicago*).

[56] See also *Doe v. Univ. of Colorado, Boulder*, 255 F.Supp.3d 1064, 1074-75 (D. Colo. 2017) (listing cases that rejected male plaintiff-respondents’ Title IX claims, because those allegations “largely tend to show, if anything, pro-victim bias, which does not equate to anti-male bias”).

[57] See *Doe v. Ohio State Univ.*, 219 F.Supp.3d at 658 (as noted above, court did not question the substantive appropriateness of information about sexual assault and perpetrator behavior in university’s training program, but denied motion to dismiss because it had to assume at the motion to dismiss stage that “the panel members received only the training Doe alleges and no training or direction on their role as fair and neutral judges.”).

[58] See, e.g., *Doe v. Univ. of Pennsylvania*, 2017 WL 4049033, **13-14 (cited in footnote 41 above regarding discussion of “typical rapist” characteristics in *17 Tips* document); *Doe v. Ohio State Univ.*, 219 F.Supp.3d at 658 (court denied motion to dismiss in part because of allegations that training contained generalizations regarding manipulative characteristics of “repeat perpetrators” and “sex offenders”).

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

Presented By:

The Institutional Response Group | Cozen O'Connor

Gina Maisto Smith, Chair

Leslie M. Gomez, Vice Chair

July 20, 2020

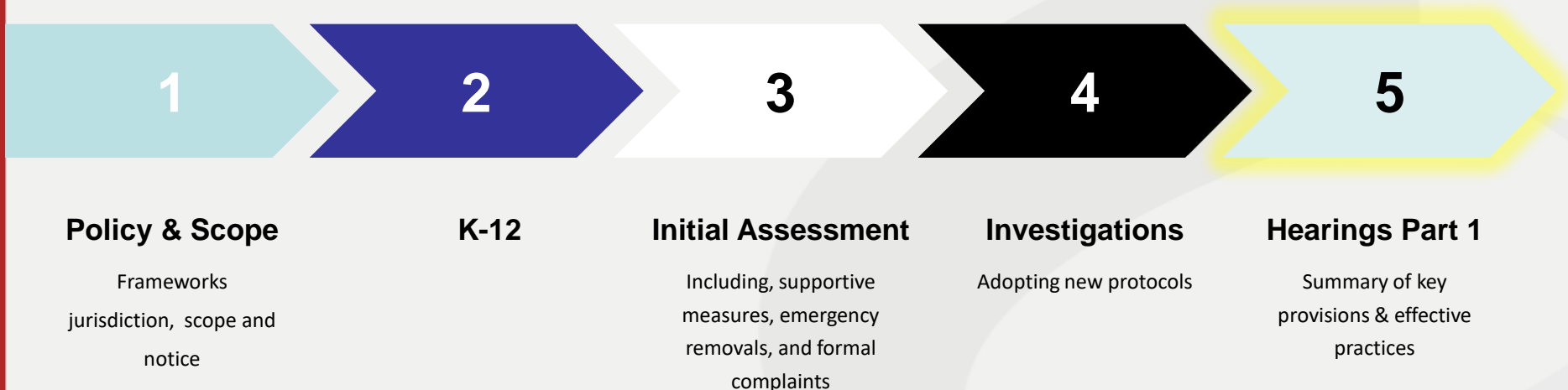


Today's Webinar

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

Introducing the Webinar Series

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



Introducing the Webinar Series

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

6

Hearings Part 2

Summary of key provisions & effective practices

7

Informal Resolutions

Effective Practices

8

Corollary Considerations

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

9

Trainings & Documentation

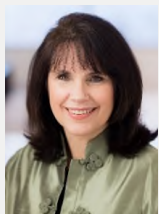
Who and when?
Approach
Content

10

Clery and VAWA

Intersections between Clery/VAWA and Title IX

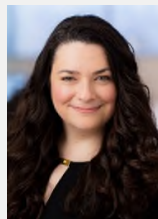
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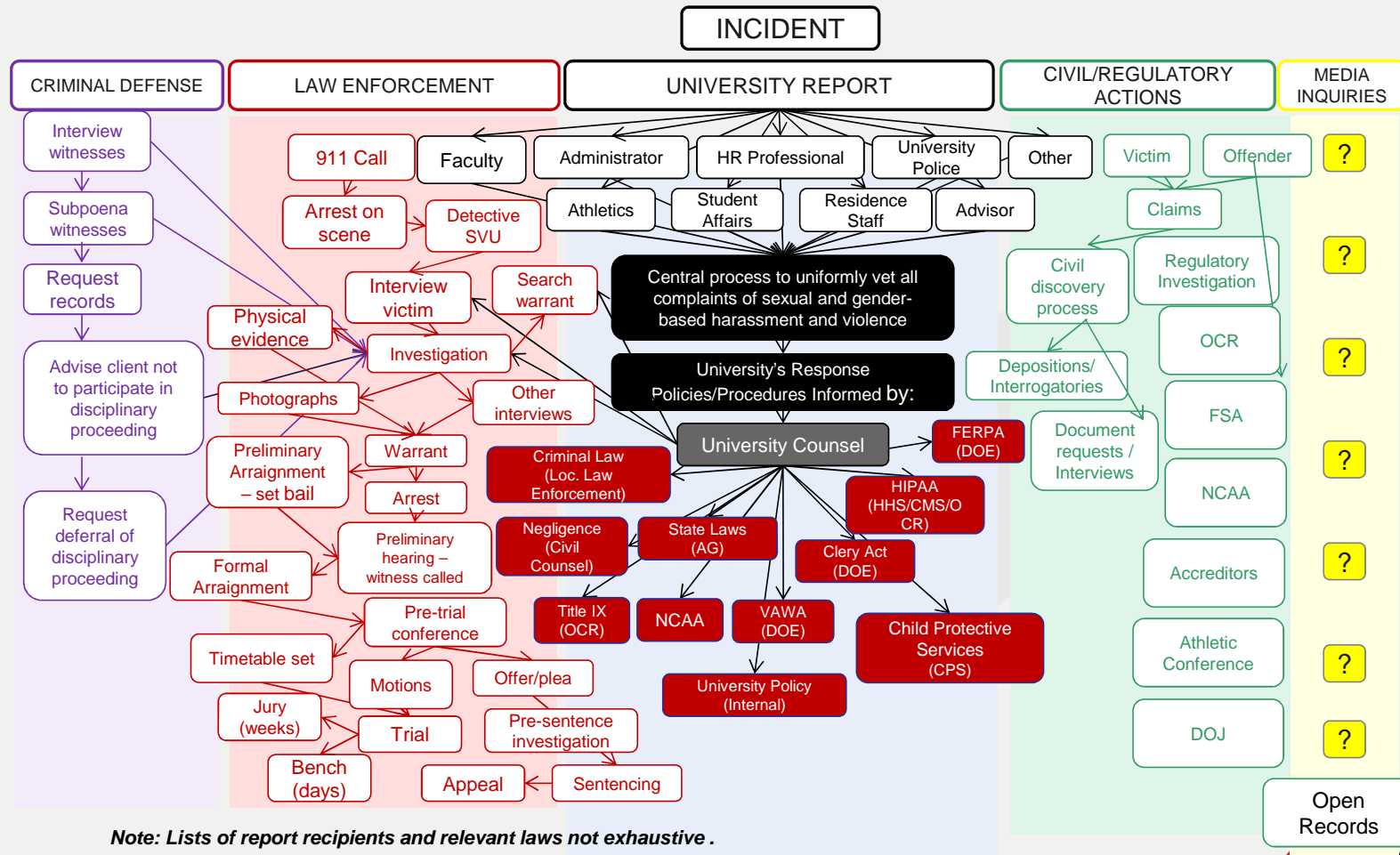


Christi Hurt
Margolis Healy

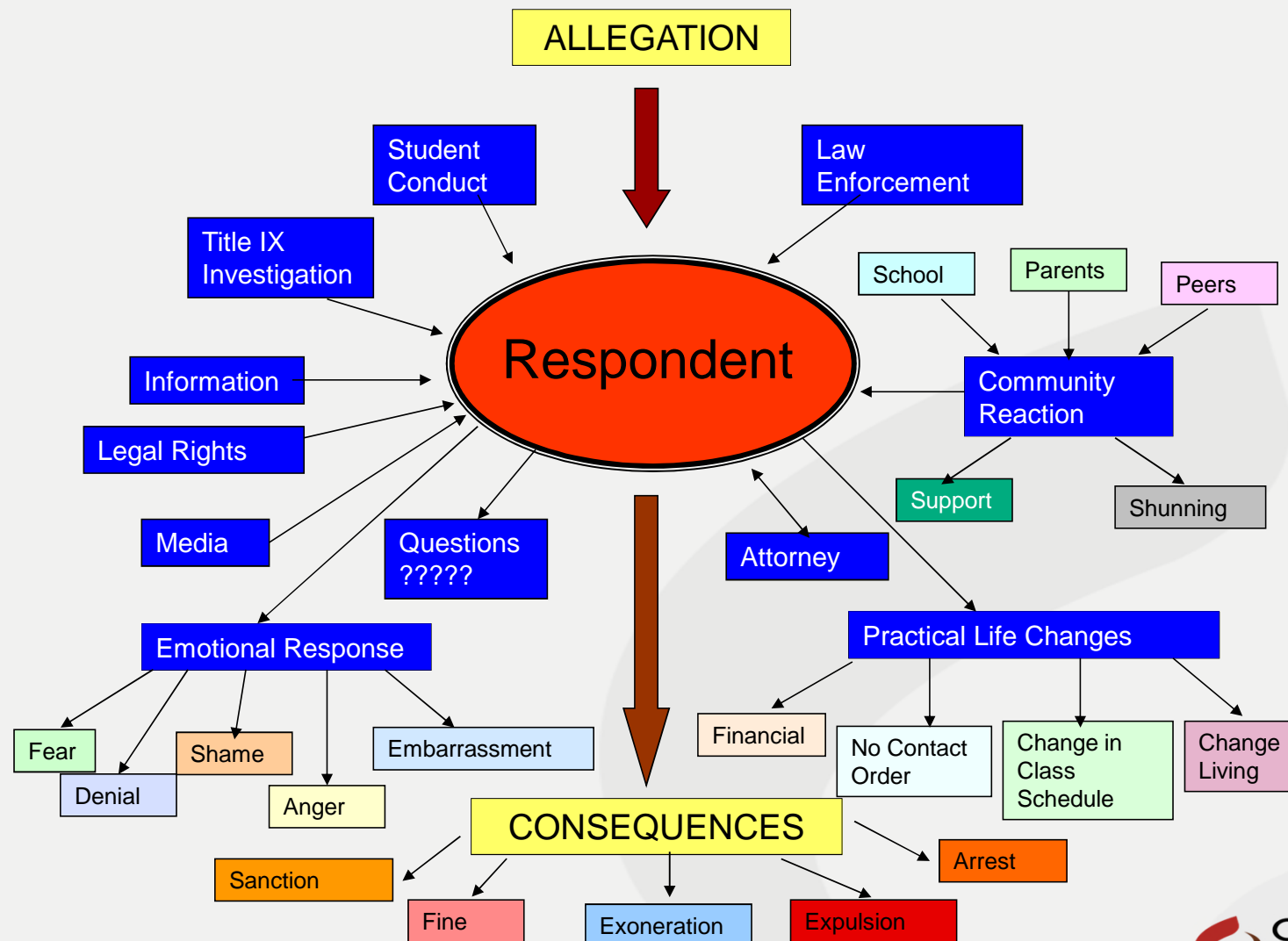
Institutional Response Group Paralegal and Administration Team:
Heather Dunn, Megan Lincoln, Braelyn Schenk, and Mary Sotos

FRAMING THE CONTEXT

The Challenge of the Context





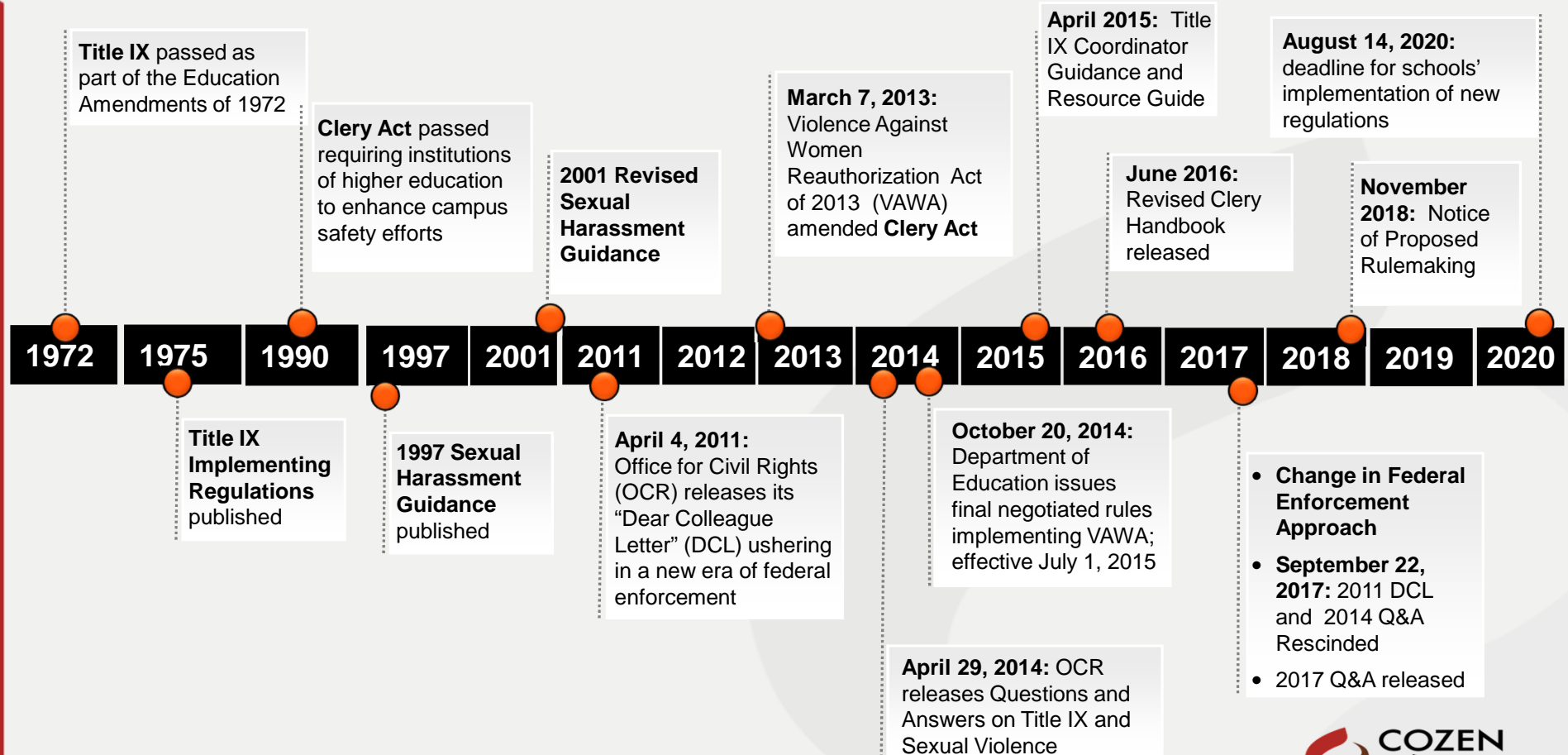


Implementation Rubric

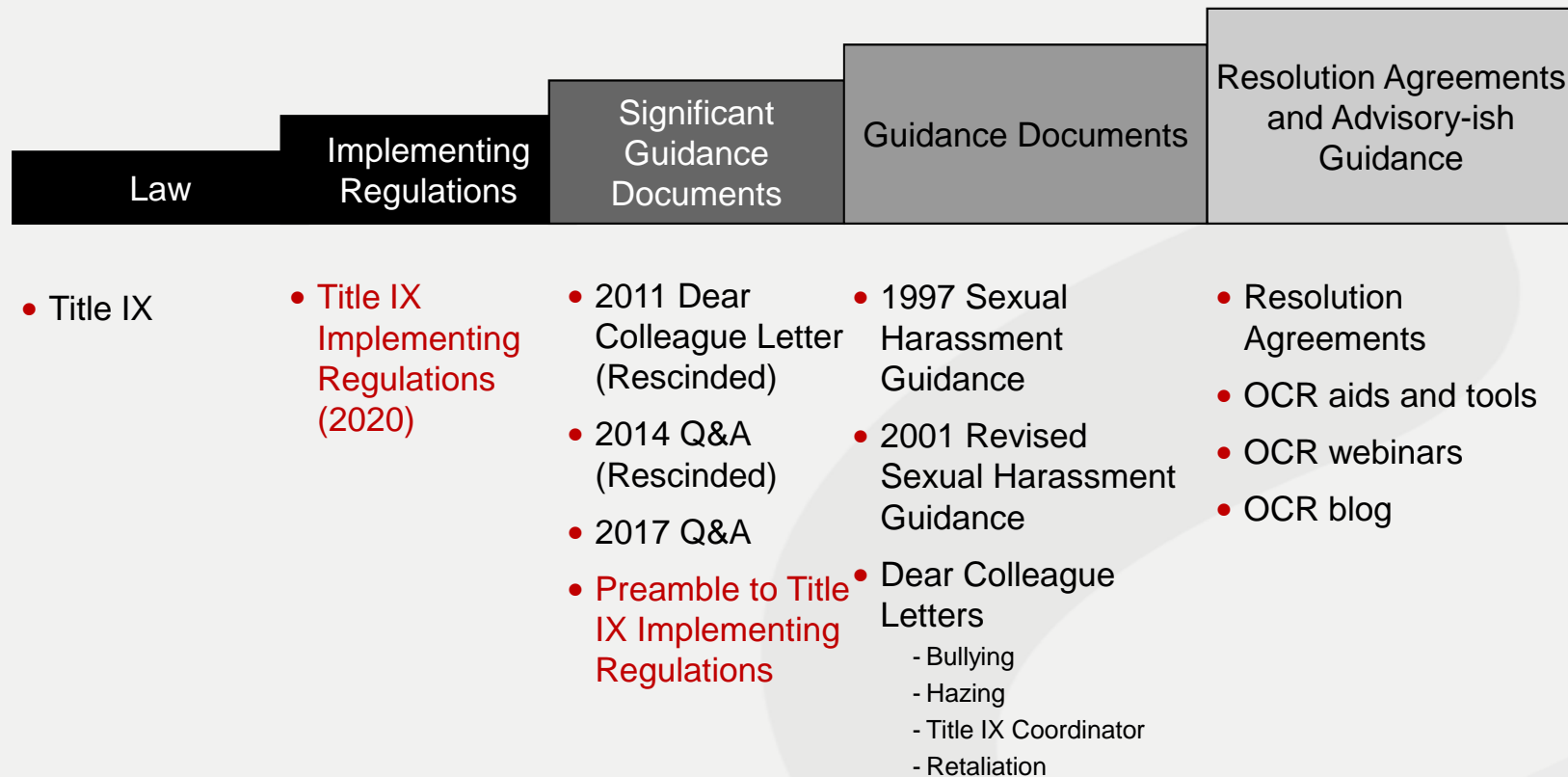
- Law
- Regulations
- Guidance
- Preamble and commentary
- OCR webinars, charts, blog
- Policy
- Higher education experience
- Institutional values



Evolution of Federal Legislation and Guidance



The Hierarchy



Guidance

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

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

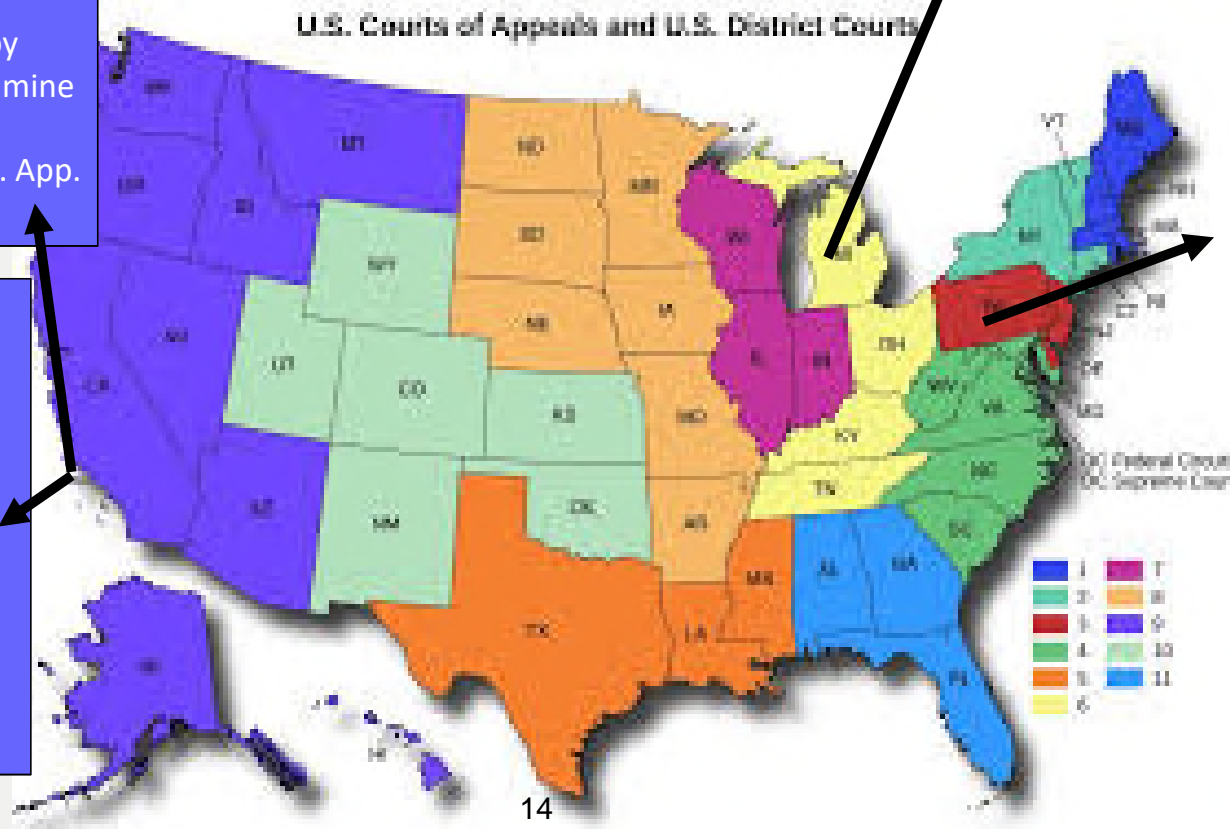
Recent Court Cases

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

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

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

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



The Courts on Due Process and Fundamental Fairness

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

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

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

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

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

2016

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

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

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

2017

2018

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

2019

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

2020

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

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

The Courts on Due Process and Fundamental Fairness

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

Doe v. Regents of the University of California

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

2016

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

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

2017

Doe v. Trustees of Boston College

2018

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

The Courts on Due Process and Fundamental Fairness

2019

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

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

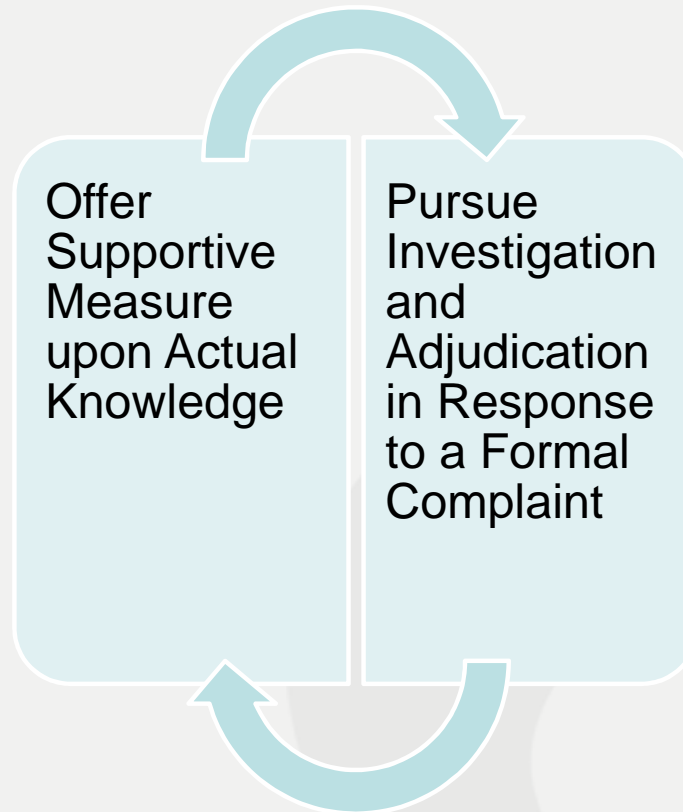
Doe v. Purdue University: Investigation report must be provided to the parties prior to the hearing and must include summaries of both inculpatory and exculpatory evidence.

2020

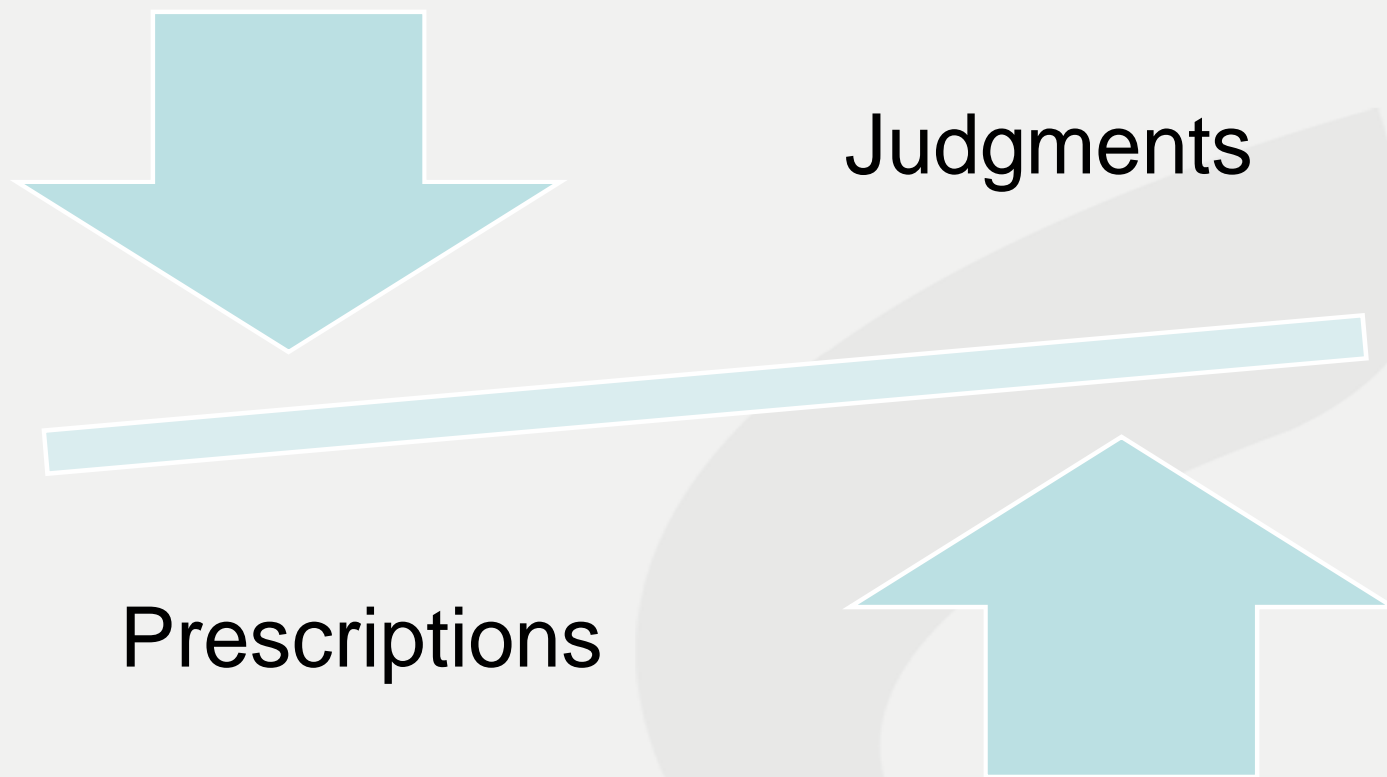
Boermeester v. Carry: In a DV case, the state court ruled, "...procedures were unfair because they denied Respondent a meaningful opportunity to cross-examine critical witnesses at an in-person hearing."

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

Understanding Two Key Provisions



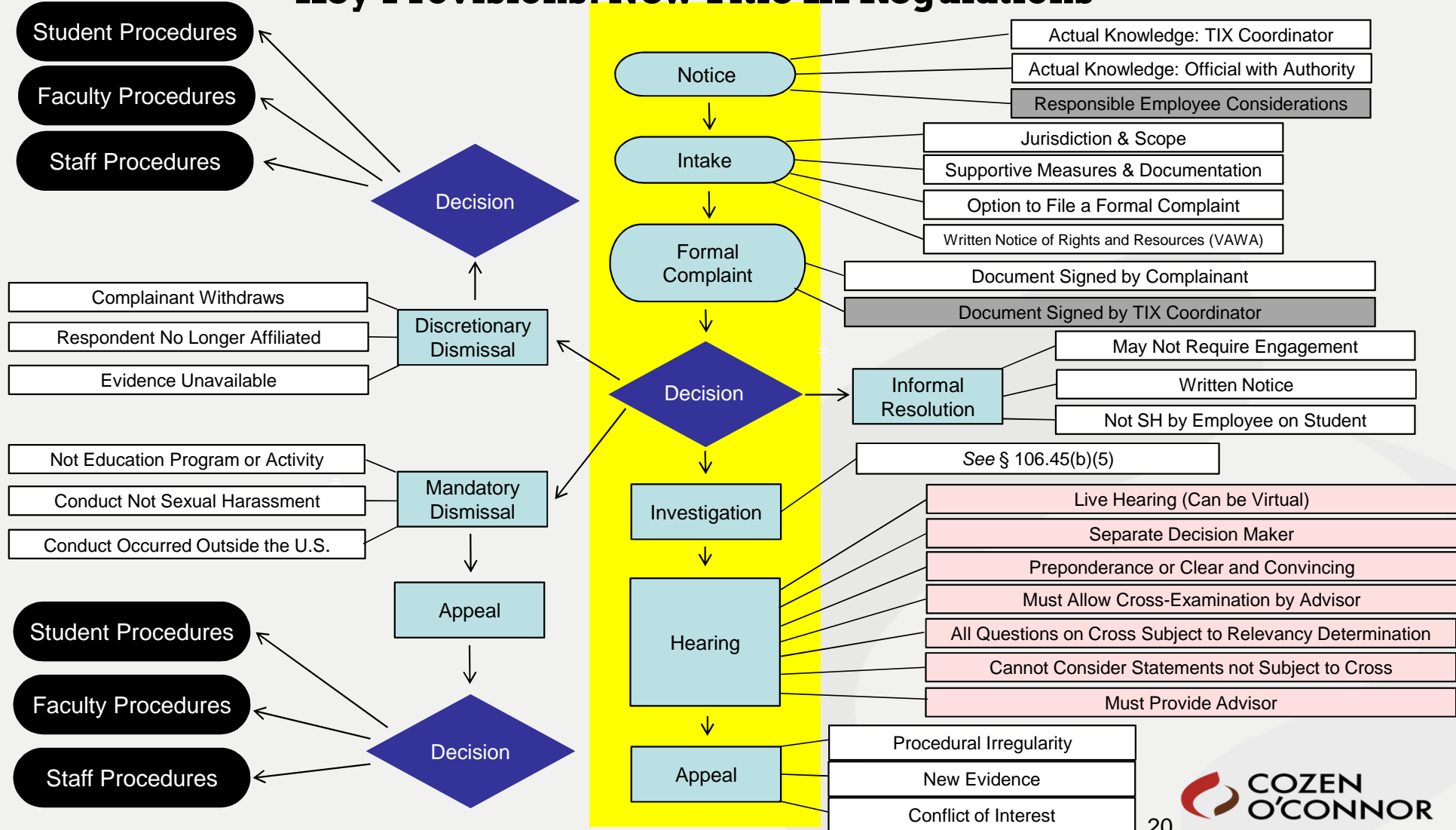
Balancing



Prescriptions

Judgments

Key Provisions: New Title IX Regulations



Key Provisions of Title IX Regulations May 19, 2020

Regulations: “Legally Binding Obligations”

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

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

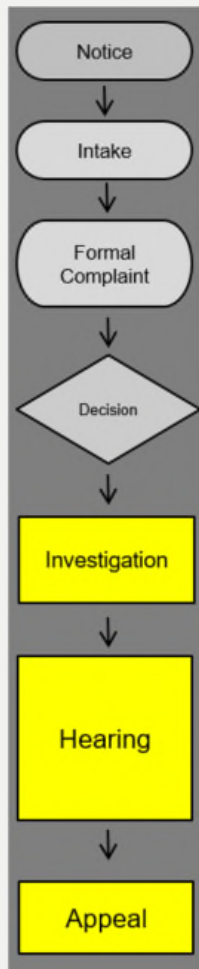
Regulations: “Best Practices”

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

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

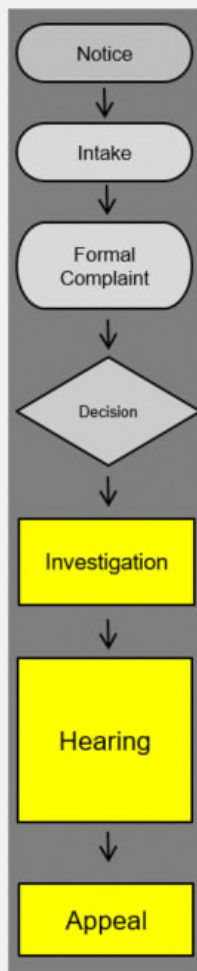
BASIC REQUIREMENTS OF GRIEVANCE PROCESSES

Grievance Process: The Basics



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

Basic Requirements

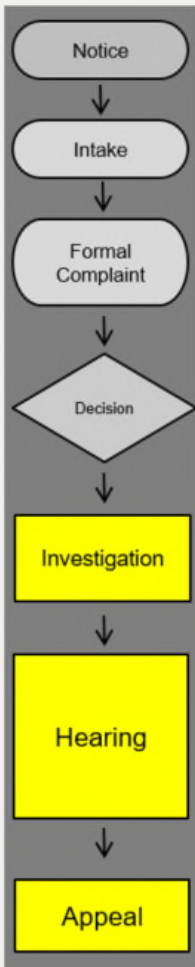


- **Treat complainants and respondents equitably** by providing **remedies** to a complainant where a determination of responsibility for sexual harassment has been made against the respondent, and by following a **grievance process** that complies with this section before the imposition of any disciplinary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

Relevant Regulations Sections:

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

Basic Requirements



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

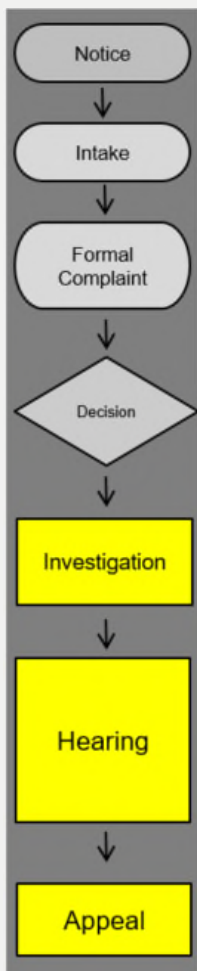
Relevant Regulations Sections:

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

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

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

Basic Requirements



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

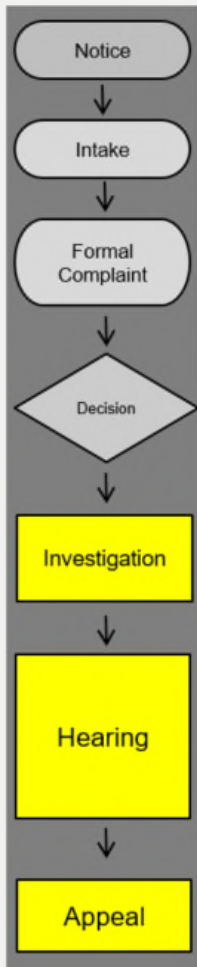
Relevant Regulations Sections:

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

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

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

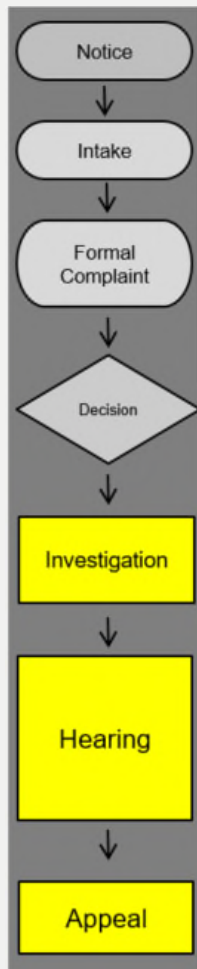
Basic Requirements



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

Title IX Regulations May 19 2020; §§ 106.45(b)(1)(vii) and 106.45(b)(7)(i)

Basic Requirements



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

Relevant Regulations Sections:

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

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

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

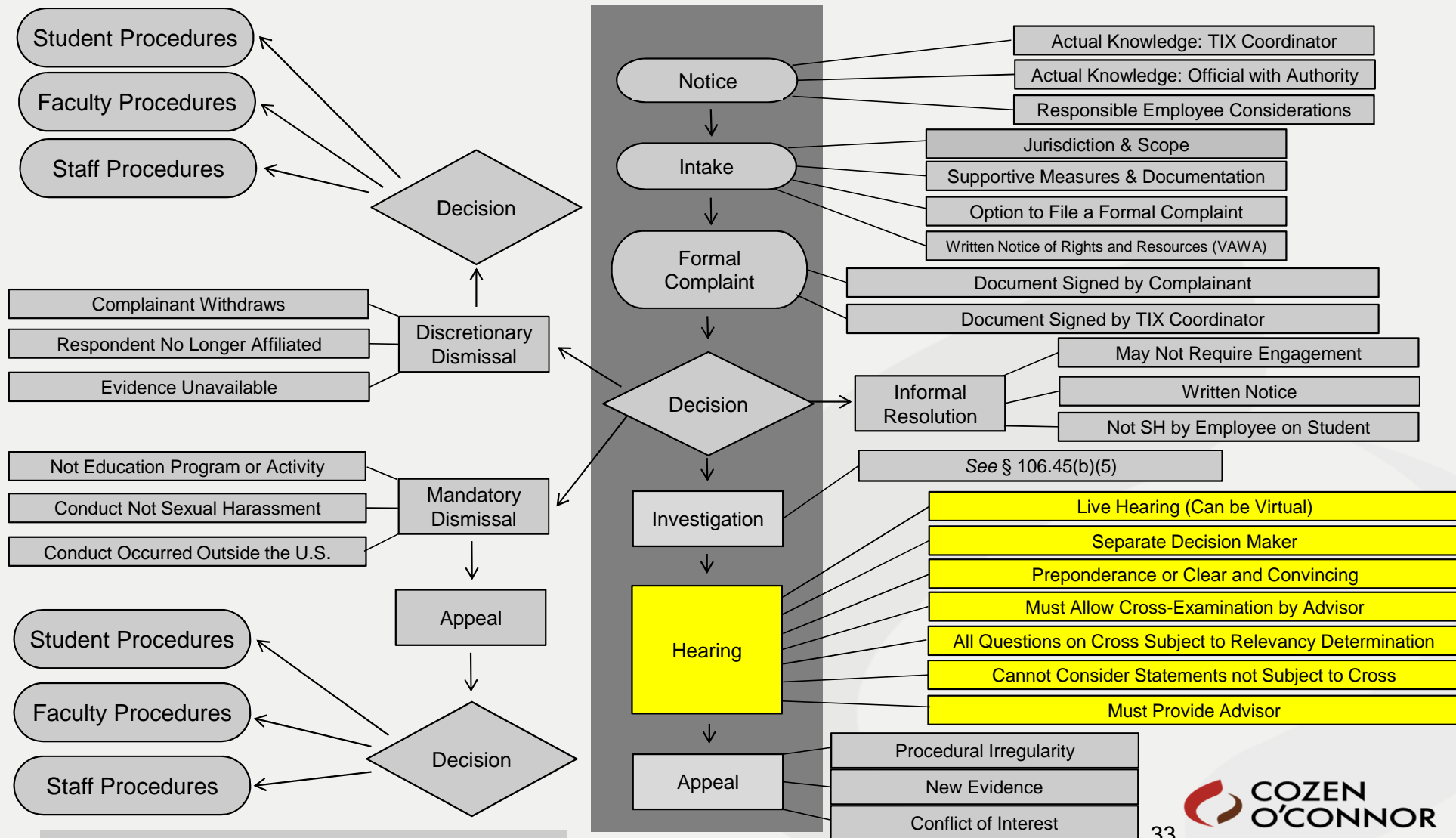
Recap of Investigation Requirements

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

Recap of Investigation Requirements

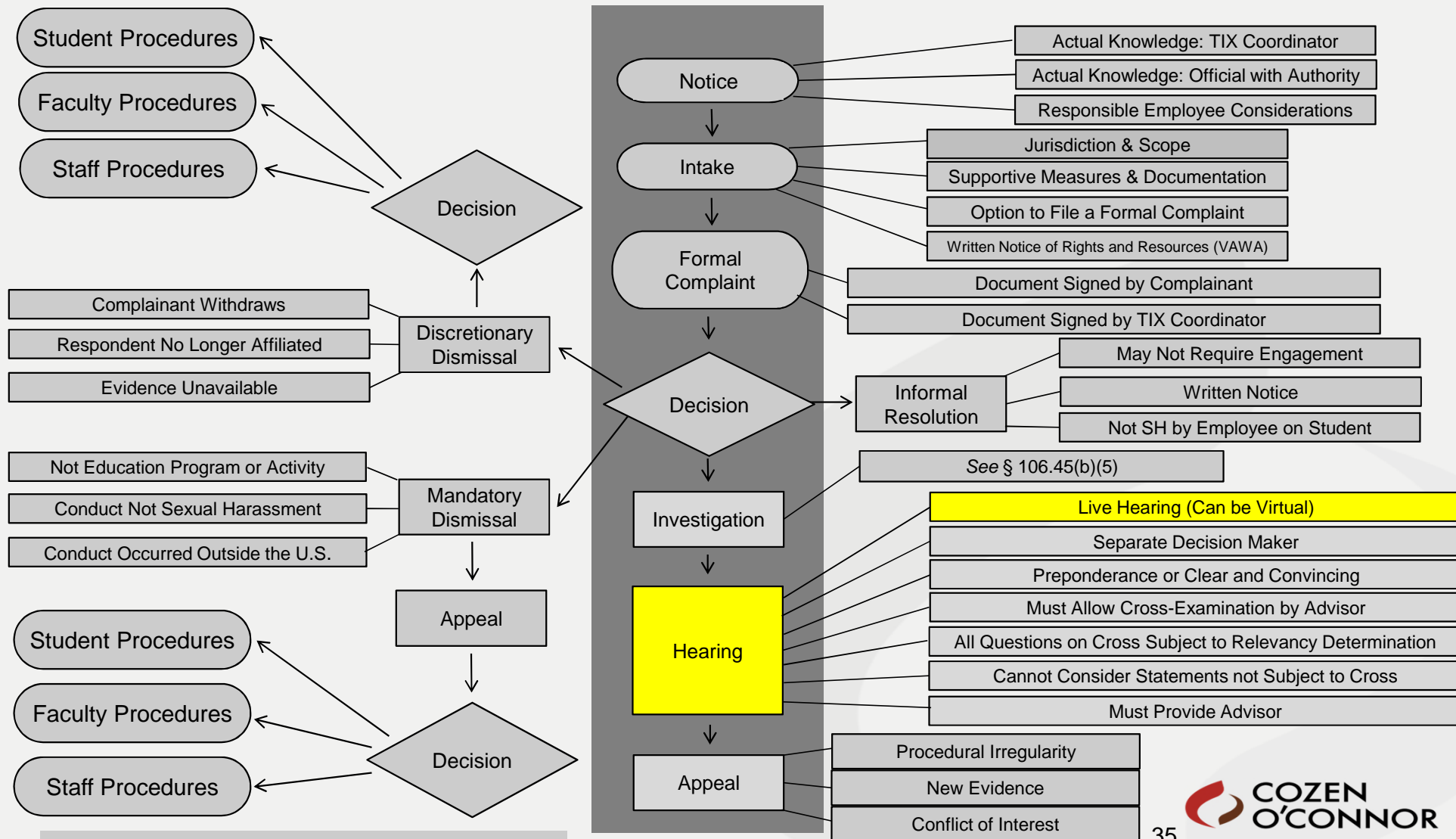


OVERVIEW OF HEARING REQUIREMENTS



Key Provisions of Title IX Regulations May 19, 2020

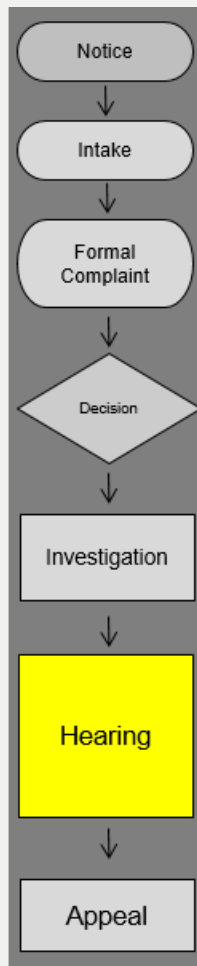
THE LIVE HEARING REQUIREMENT



Key Provisions of Title IX Regulations May 19, 2020

Live Hearing Required

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



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

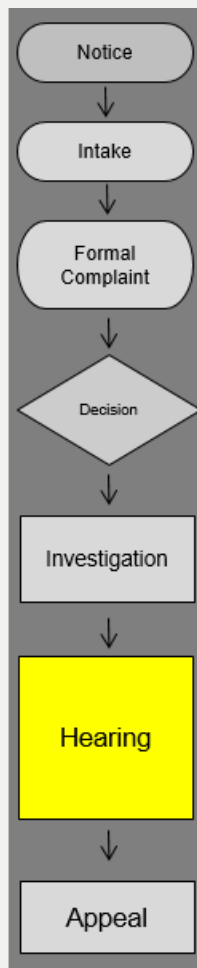
Live Hearing Required



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

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

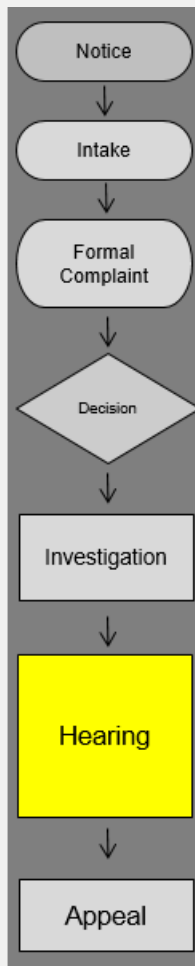
Option to Use Technology



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

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

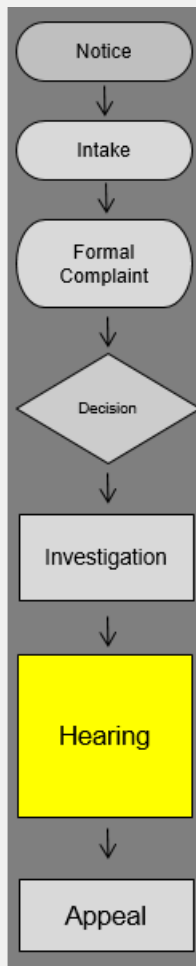
Virtual Hearing Considerations



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

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

Virtual Hearing Considerations



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

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

Virtual Hearing Considerations

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



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

Flexibility to Adopt Rules

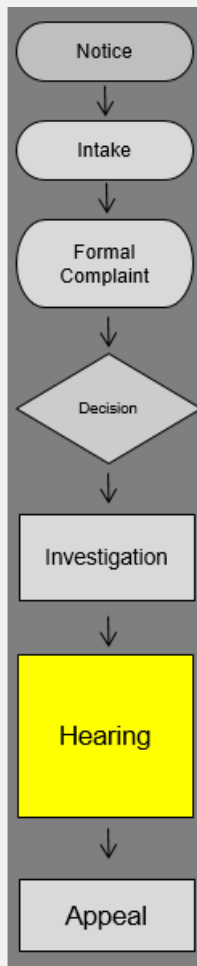
- Recipients may adopt rules that govern the **conduct and decorum** of participants at live hearings so long as such rules comply with these final regulations and apply equally to both parties.



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

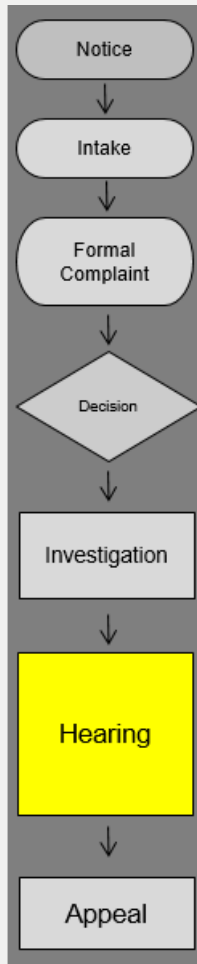
Flexibility to Adopt Rules

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



Title IX Regulations May 19, 2020; Preamble at 30248

Relevance Limitation on Flexibility



- **Relevance is the standard that these final regulations require**, and any evidentiary rules that a recipient chooses must respect this standard of relevance.
- For example, a recipient **may not adopt a rule excluding relevant evidence** because such relevant evidence may be **unduly prejudicial, concern prior bad acts, or constitute character evidence**.

Title IX Regulations May 19, 2020; Preamble at 30248

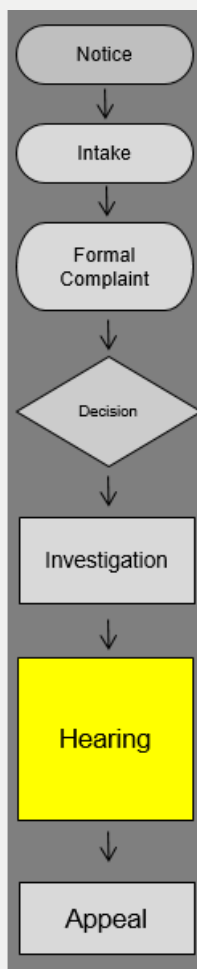
Participation by Parties and Witnesses



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

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

Participation by Parties and Witnesses



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

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

Participation by Parties and Witnesses



- (3) § 106.71 **expressly prohibits retaliation** against any party, witness, or other person exercising rights under Title IX, including the right to participate or refuse to participate in a grievance process;
- (4) § 106.45(b)(3)(ii) grants a recipient **discretion to dismiss a formal complaint**, or allegations therein, where the complainant notifies the Title IX Coordinator in writing that the **complainant wishes to withdraw** the allegations, or **the respondent is no longer enrolled or employed** by the recipient, or **specific circumstances prevent the recipient from gathering evidence** sufficient to reach a determination.
- These changes address many of the concerns raised by commenters stemming from reasons why parties or witnesses may not wish to participate and the consequences of non-participation.

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

Participation by the Complainant



- Where a grievance process is initiated because the Title IX Coordinator, and not the complainant, signed the formal complaint, the complainant who did not wish to initiate a grievance process **remains under no obligation to then participate in the grievance process**, and the Department does not believe that exclusion of the complainant's statements in such a scenario is unfair to the complainant, who did not wish to file a formal complaint in the first place yet remains eligible to receive supportive measures protecting the complainant's equal access to education.

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

Transcript or Recording

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



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

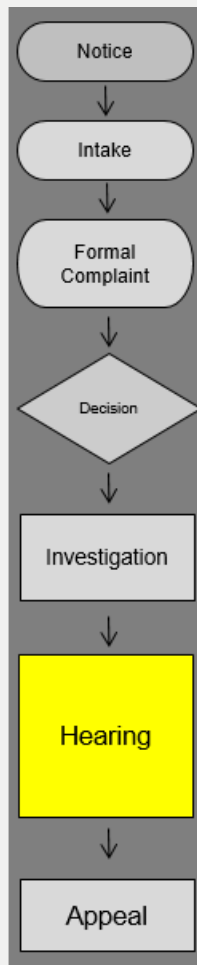
Applicability to K-12 Schools

- For recipients that are elementary and secondary schools, and other recipients that are not postsecondary institutions, the recipient's grievance process **may, but need not, provide for a hearing.**



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

Academic Medical Centers



- **Academic medical centers are not postsecondary institutions**, although an academic medical center may be affiliated with ... or even considered part of the same entity as the postsecondary institution.
- Through this revision, the Department is giving entities like academic medical centers **greater flexibility** in determining the appropriate process for a formal complaint.

Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30446

Non-Postsecondary Institutions



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

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

Non-Postsecondary Institutions

- As to recipients that are not postsecondary institutions, the Department has revised § 106.45(b)(6)(ii) to provide that the recipient *may* require a live hearing and *must* afford each party the opportunity to submit written questions, provide each party with the answers, and allow for additional, limited follow-up questions from each party.

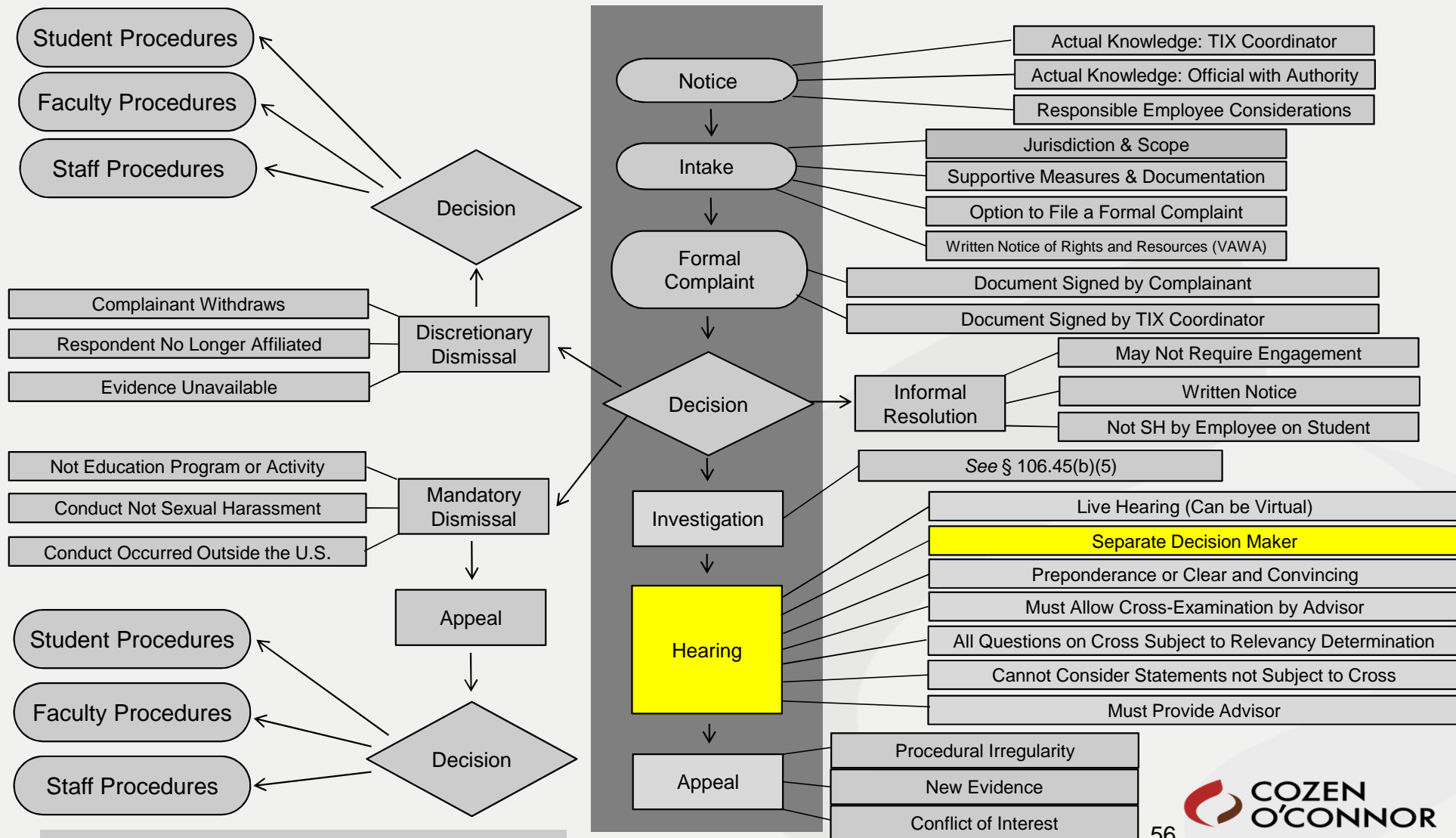


Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30446

Practical Considerations & Effective Practices

- Impact of requirement that parties and/or witnesses participate in the hearing
 - Party vs. witness
 - Student vs. employee
- Decisions re: technology
- Recording versus transcription
- Procedures for non-postsecondary institutions

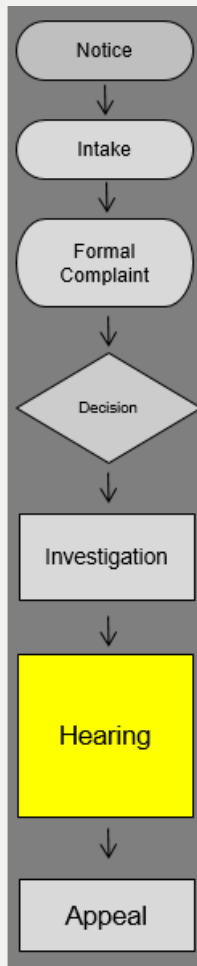
ROLE OF DECISION-MAKER



Key Provisions of Title IX Regulations May 19, 2020

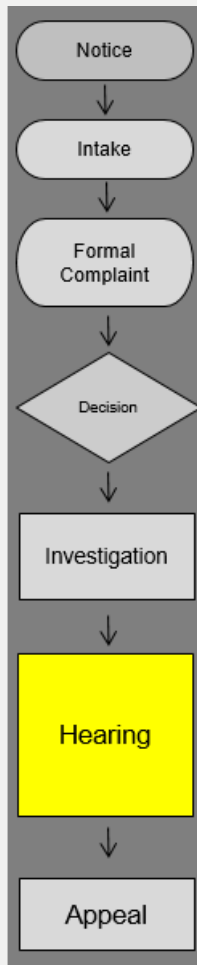
Determine Relevance of Questions

- Before a complainant, respondent, or witness answers a cross-examination or other question, the decision-maker(s) must **first determine whether the question is relevant ...**



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

Explain Decisions to Exclude Questions

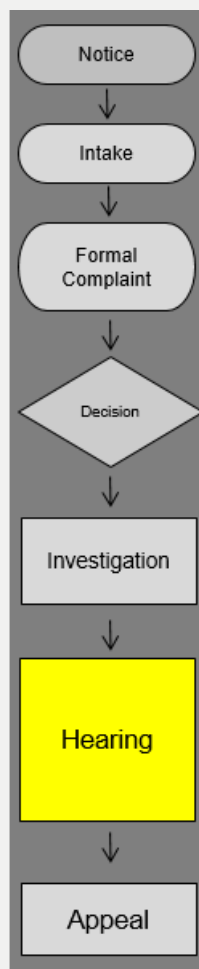


- The decision-maker(s) must explain to the party proposing the questions **any decision to exclude** a question as not relevant.

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

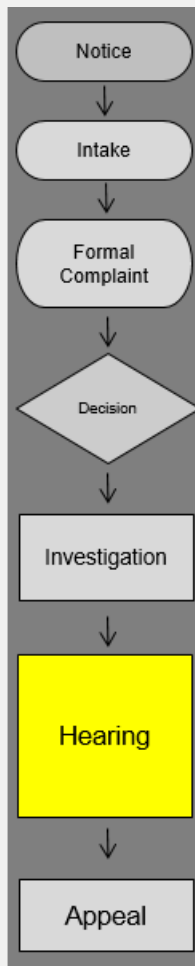
Apply the Standard of Evidence

- To reach [a] determination, the recipient must apply the standard of evidence described in paragraph (b)(1)(vii) of this section.



Title IX Regulations, May 19, 2020; § 106.45(b)(7)

Issue Written Determinations

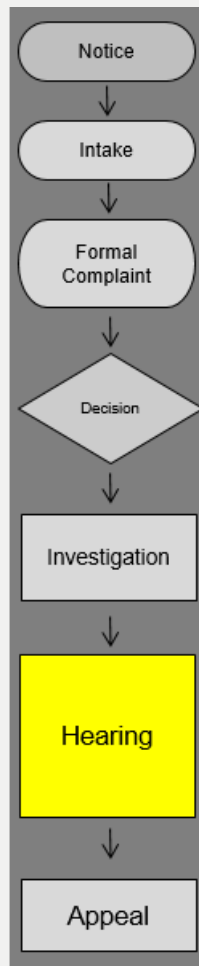


- The decision-maker(s) ... must issue a simultaneous written determination regarding responsibility, including
 - Identification of the allegations
 - Description of the procedural steps taken from the receipt of the formal complaint through the determination
 - Findings of fact supporting the determination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

Title IX Regulations, May 19, 2020; § 106.45(b)(7)

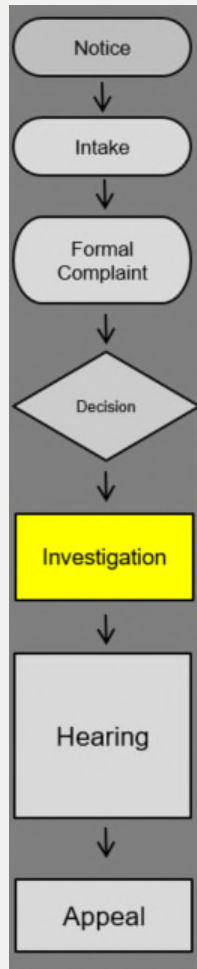
Separate Decision-Maker

- The Department wishes to clarify that the final regulations **require the Title IX Coordinator and investigator to be different individuals from the decision-maker**, but nothing in the final regulations requires the Title IX Coordinator to be an individual different from the investigator.



Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30372

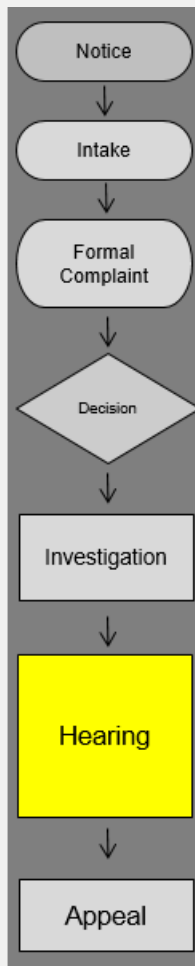
Investigator May not Determine Responsibility



- § 106.45(b)(7)(i) prevents an investigator from actually making a determination regarding responsibility.

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

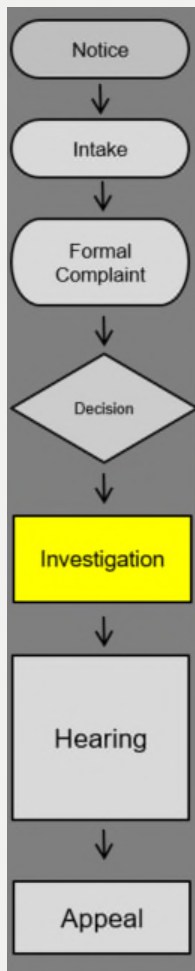
Decision-Maker Must Determine Responsibility



- Nothing in the final regulations prevents Title IX Coordinators from offering recommendations regarding responsibility to the decision-maker for consideration, but the final regulations **require the ultimate determination regarding responsibility to be reached by an individual (i.e., the decision-maker) who did not participate in the case as an investigator or Title IX Coordinator.**

Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30372

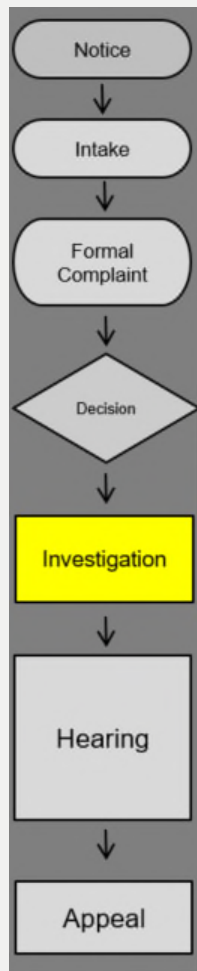
Independent Obligation to Evaluate Evidence



- The Department does not wish to prohibit the investigator from including recommended findings or conclusions in the investigative report.
- However, the decision-maker is under an **independent obligation to objectively evaluate relevant evidence**, and thus cannot simply defer to recommendations made by the investigator in the investigative report.

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

Independent Obligation to Evaluate Credibility



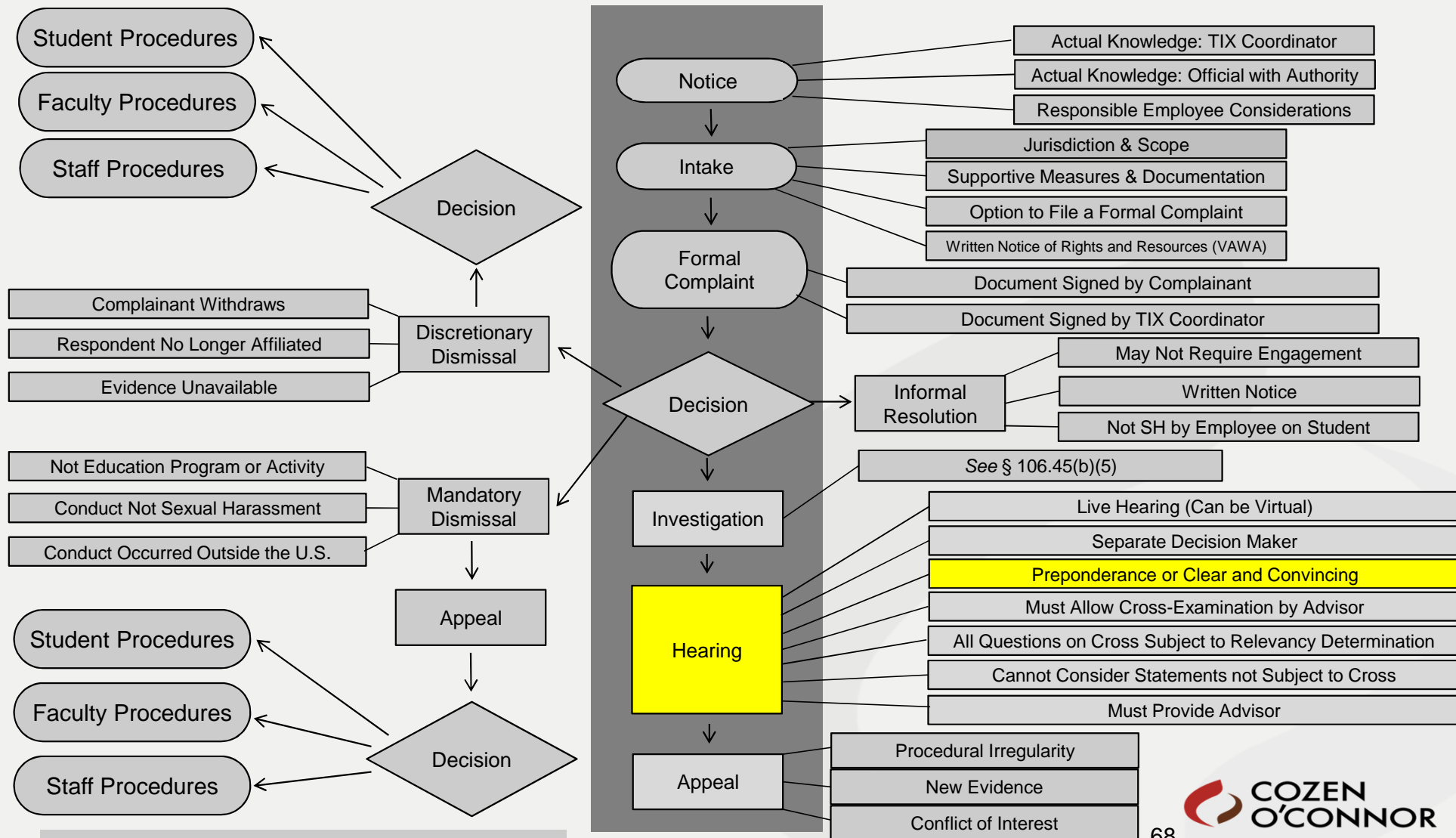
- If a recipient chooses to include a **credibility analysis** in its investigative report, the recipient must be cautious not to violate § 106.45(b)(7)(i), prohibiting the decision-maker from being the same person as the Title IX Coordinator or the investigator.
- If an investigator's determination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

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

Practical Considerations & Effective Practices

- Choice of decision-maker(s)
 - Hearing panel vs. sole adjudicator
 - External professional vs. internal administrator
- Decision-maker on sanction
 - Can be same or different from decision-maker on finding
- Use of Hearing Coordinator?
- Whether to have investigator make recommended findings or include a credibility analysis

STANDARD OF EVIDENCE



Key Provisions of Title IX Regulations May 19, 2020

Standard of Evidence



- [T]he recipient must apply the same standard of evidence to student and employee matters, using either the clear and convincing standard or the preponderance of the evidence standard.
- The recipient must apply the same standard of evidence to all formal complaints of sexual harassment.

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

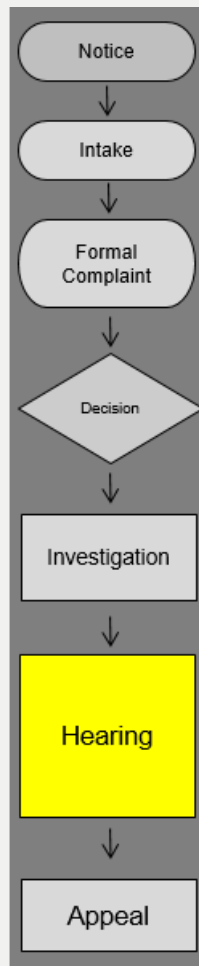
Standard of Evidence



- For reasons described above, the Department has determined that the approach to the standard of evidence contained in § 106.45(b)(1)(vii) and § 106.45(b)(7)(i) of the final regulations represents the **most effective way of legally obligating recipients to select a standard of evidence** for use in resolving formal complaints of sexual harassment under Title IX to ensure a fair, reliable grievance process **without unnecessarily mandating that a recipient select one standard over the other.**

Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30388.

Standard of Evidence



- In short, under the final regulations the **same standard of evidence will apply to all formal complaints of sexual harassment** under Title IX responded to by a particular recipient, **whether the respondent is a student or employee.**

Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30388.

Standard of Evidence



- Beyond a Reasonable Doubt
- Clear and Convincing Evidence
- Preponderance of the Evidence
- Some Evidence

Clear and Convincing*

- The evidence is highly and substantially more likely to be true than untrue
- The fact finder must be convinced that the contention is highly probable
- Proof which requires more than a preponderance of the evidence but less than proof beyond a reasonable doubt
- Clear and convincing proof will be shown where the truth of the facts asserted is highly probable
- Quality of the evidence, not quantity
- NOT beyond a reasonable doubt

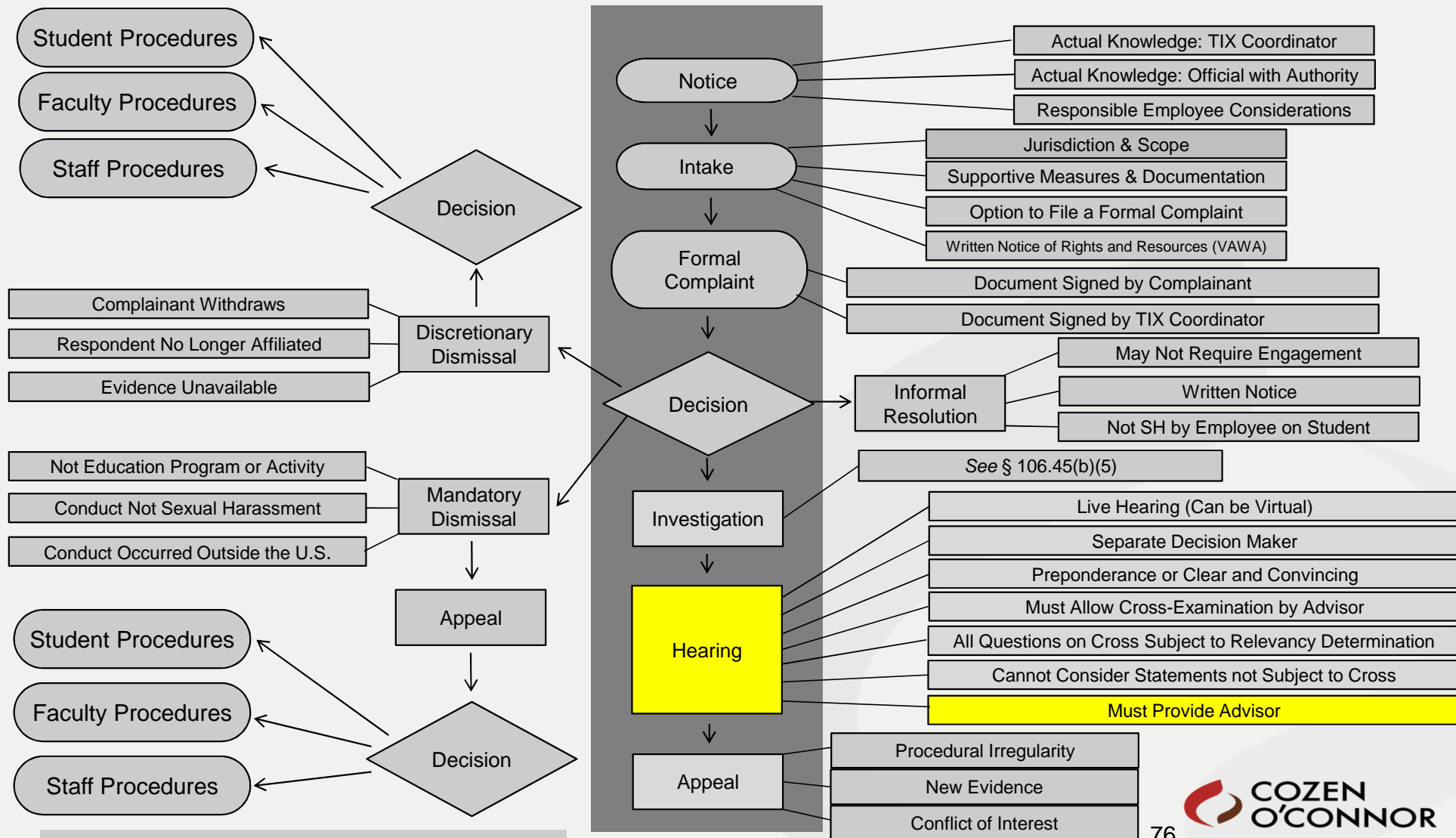
* Based on common usage.

Preponderance of the Evidence*

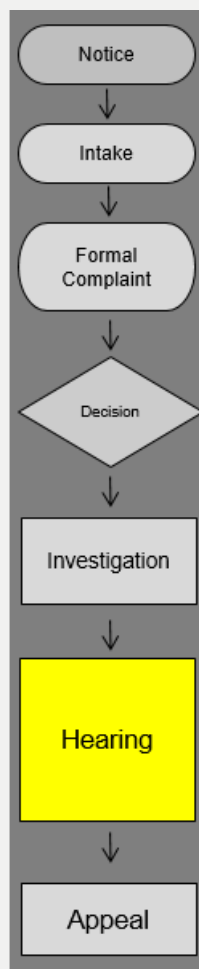
- More likely to be true than not
- More probable than not
- The greater weight of the evidence
- Tipping the scale ever so slightly
- 51 %
- Based on the more convincing evidence and it's probable truth or accuracy, not on the amount
- Quality of the evidence, not quantity
- NOT beyond a reasonable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

* Based on common usage.

ADVISOR OF CHOICE



Title IX: Advisor of Choice



- Parties must have the same opportunities to ... be accompanied to any related meeting or proceeding by **an advisor of their choice**.
- The advisor may be, but is not required to be, **an attorney**.
- A recipient **may establish restrictions** on advisors' participation, as long as the restrictions apply equally to both parties.
- “[T]he role of an advisor is to assist and advise the party.”

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

VAWA: Advisor of Choice

- Provide the accuser and the accused with the same opportunities to have others present during any institutional disciplinary proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the **advisor of their choice**
- **Not limit the choice of advisor** or presence for either the accuser or the accused in any meeting or institutional disciplinary proceeding
- However, the institution **may establish restrictions regarding the extent to which the advisor may participate in the proceedings**, as long as the restrictions apply equally to both parties

Violence Against Women Reauthorization Act § 668.46(k)(2)(iii)-(iv); 79 F.R. 62789

No Limit as to Conflicts of Interest



- The Department notes that the 106.45 (b)(1)(iii) prohibition of Title IX personnel having conflicts of interest or bias **does not apply to party advisors** (including advisors provided to a party by a post secondary institution as required under 106.45(b)(6)(i)) and thus, **the existence of a possible conflict of interest where an advisor is assisting one party and also expected to give a statements as a witness does not violate the final regulations.**

Title IX Regulations May 19, 2020; Preamble at 30299

ROLE OF THE ADVISOR AT HEARING

Role of the Advisor

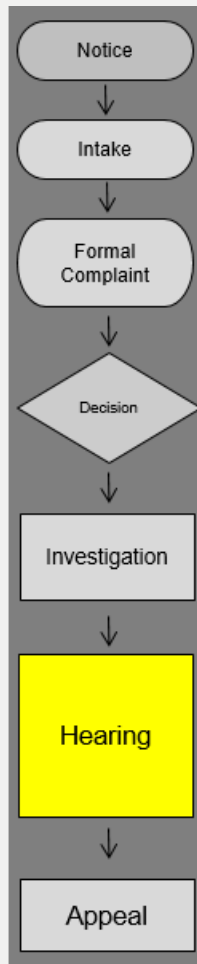


- At the live hearing, the decision-maker(s) must permit each party's advisor to **ask the other party and any witnesses all relevant questions and follow-up questions**, including those challenging credibility.

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

Advisor's Role at the Hearing

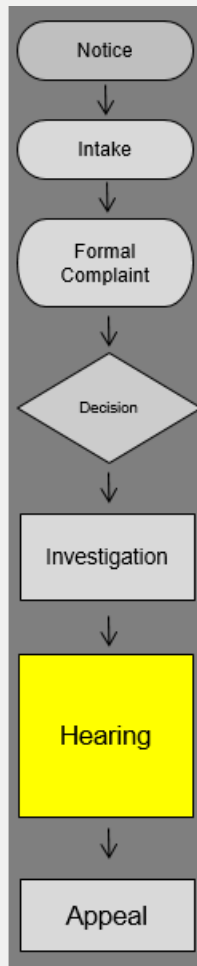
- Such cross-examination at the live hearing must be conducted directly, orally, and in real time by the party's advisor of choice and never by a party personally, **notwithstanding the discretion of the recipient under paragraph (b)(5)(iv) of this section to otherwise restrict the extent to which advisors may participate in the proceedings.**



Title IX Regulations, May 19, 2020; Preamble, 85 F.R. 30336, 30577.

Cross-Examination by Advisor

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



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

Discretion as to Advisor's Role

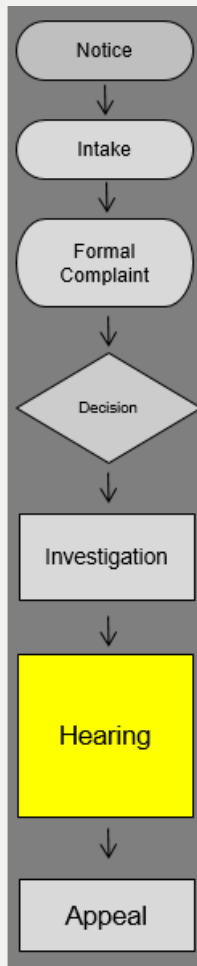


- Section 106.45(b)(5)(iv) (allowing recipients to place restrictions on active participation by party advisors) and the revised introductory sentence to § 106.45(b) (requiring any rules a recipient adopts for its grievance process other than rules required under § 106.45 to apply equally to both parties)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

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

Discretion as to Advisor's Role

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



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

Obligation to Provide an Advisor



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

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

Must Provide Advisor Even in Party's Absence



- [W]here one party does not appear and that party's advisor of choice does not appear, a recipient-provided advisor **must still cross-examine the other, appearing party “on behalf of” the non-appearing party**, resulting in consideration of the appearing party's statements but not the non-appearing party's statements (without any inference being drawn based on the non-appearance).

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

Appearance Without an Advisor



- The final regulations do not preclude recipients from adopting a rule that requires parties to inform the recipient in advance of a hearing whether the party intends to bring an advisor of choice to the hearing; but **if a party then appears at a hearing without an advisor** the recipient would need to **stop the hearing as necessary to permit the recipient to assign an advisor** to that party to conduct cross-examination.

Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30342

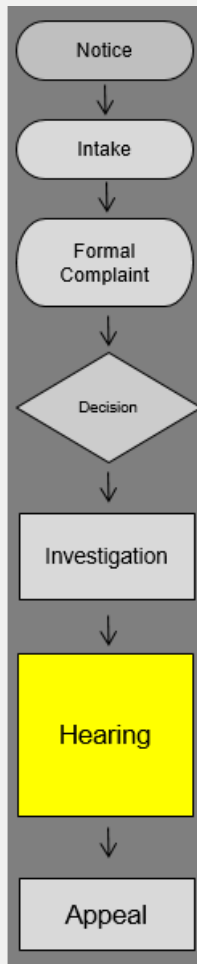
Refusal to Conduct Cross-Examination



- A party cannot “fire” an assigned advisor during the hearing, **but if the party correctly asserts that the assigned advisor is refusing to “conduct cross-examination on the party’s behalf” then the recipient is obligated to provide the party an advisor to perform that function,** whether that means counseling the assigned advisor to perform that role, or stopping the hearing to assign a different advisor. ...

Title IX Regulations, May 19, 2020; 85 F.R. 30342

Party Cannot Conduct Own Cross-Examination



- If a party to whom the recipient assigns an advisor **refuses to work with the advisor** when the advisor is willing to conduct cross-examination on the party's behalf, then for reasons described above **that party has no right of self-representation with respect to conducting cross-examination**, and that party would not be able to pose any cross-examination questions.

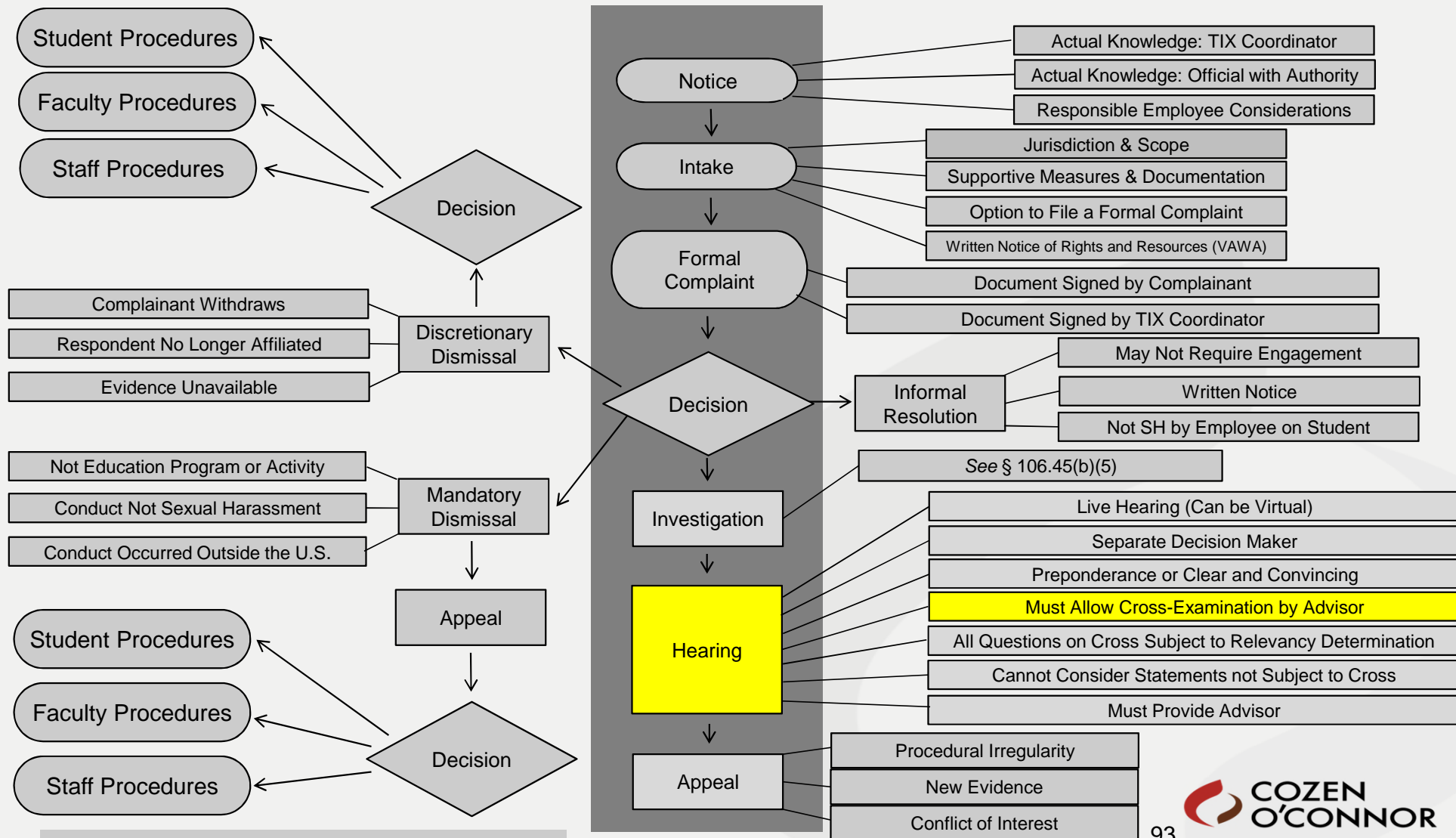
Title IX Regulations, May 19, 2020; § 106.45(b)(6)

Title IX Regulations, May 19, 2020; 85 F.R. 30342

Practical Considerations & Effective Practices

- Process meeting to discuss policy, decorum, and expectations
- Considerations for advisors:
 - Review policy in advance
 - Acknowledge decorum expectations
 - Acknowledge privacy protections regarding documents
- Consider the importance of continuity in process re: advisor given requirement to provide an advisor at the hearing

CROSS-EXAMINATION BY ADVISOR



Key Provisions of Title IX Regulations May 19, 2020

Cross-Examination



- At the live hearing, the decision-maker(s) must permit each party's advisor to **ask the other party and any witnesses all relevant questions** and follow-up questions, including those challenging credibility.

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

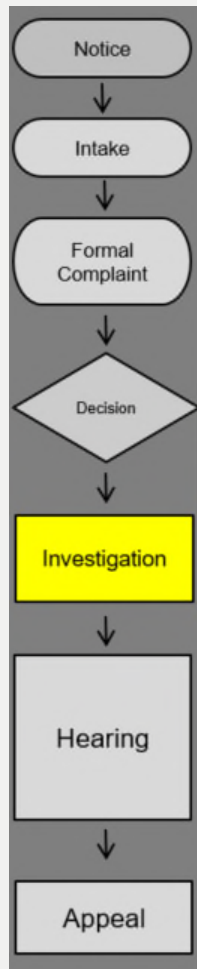
Cross-Examination



- Such cross-examination at the live hearing must be conducted **directly, orally, and in real time** by the party's advisor of choice and never by a party personally, notwithstanding the discretion of the recipient under paragraph (b)(5)(iv) of this section to otherwise restrict the extent to which advisors may participate in the proceedings.

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

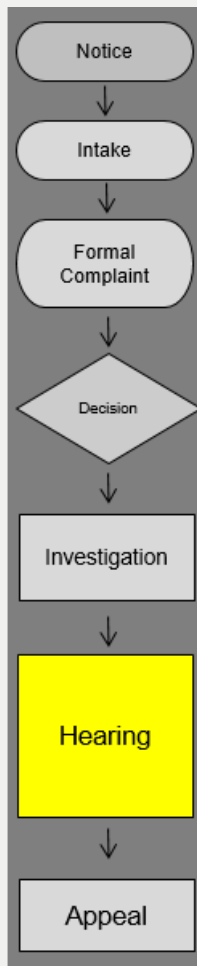
Recap on Evidence Review



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

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

Availability of Evidence at the Hearing



- The recipient must make all such evidence subject to the parties' inspection and review [directly related evidence shared at the evidence review] available at any hearing to give each party equal opportunity to refer to such evidence during the hearing, including for purposes of cross-examination.

Title IX Regulations, May 19, 2020; § 106.45(b)(5)(vi)

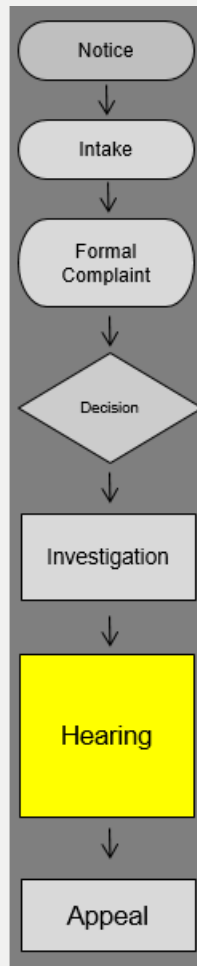
Opportunity to Challenge Evidence



- Cross-examination in the § 106.45 grievance process is **intended to give both parties equal opportunity to meaningfully challenge the plausibility, reliability, credibility, and consistency of the other party and witnesses** so that the outcome of each individual case is **more likely to be factually accurate, reducing the likelihood of either type of erroneous outcome** (i.e., inaccurately finding a respondent to be responsible, or inaccurately finding a respondent to be non-responsible).

Title IX Regulations, May 19, 2020, Preamble 85 F.R. 30336

Questions to Advance a Party's Interest



- The Department clarifies here that conducting cross-examination **consists simply of posing questions intended to advance the asking party's perspective with respect to the specific allegations at issue**; no legal or other training or expertise can or should be required to ask factual questions in the context of a Title IX grievance process.

Title IX Regulations, May 19, 2020, Preamble 85 F.R. 30319

Cross-Examination



- Only **relevant** cross-examination and other questions may be asked of a party or witness.
- Before a complainant, respondent, or witness answers a cross-examination or other question, the decision-maker(s) must **first determine whether the question is relevant ...**
- The decision-maker(s) must explain to the party proposing the questions **any decision to exclude** a question as not relevant.

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

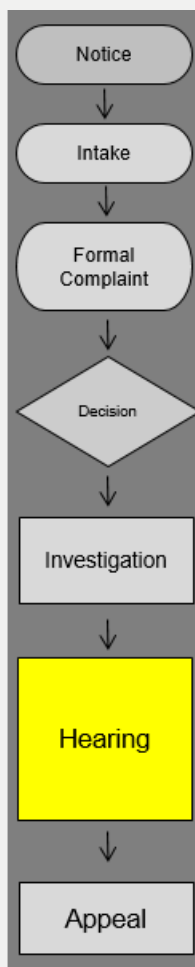
Determinations Regarding Relevance



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

Title IX Regulations, May 19, 2020; § 106.45(b)(6)
Title IX Regulations, May 19, 2020; Preamble 85 F.R 30343

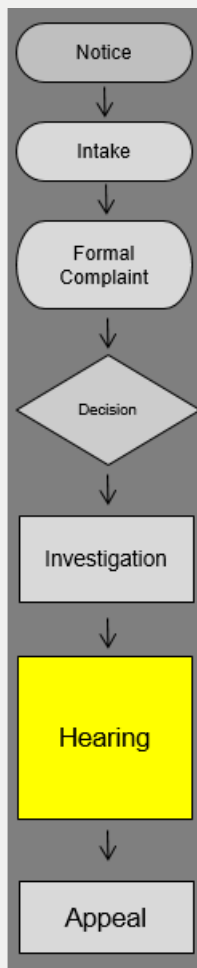
“Pause” to Reinforce Decorum



- We have also revised § 106.45(b)(6)(i) in a manner that **builds in a “pause” to the cross-examination process**; before a party or witness answers a cross-examination question, the decision-maker must determine if the question is relevant.
- This **helps ensure that content of cross-examination remains focused only on relevant questions** and that the **pace of cross-examination** does not place undue pressure on a party or witness to answer immediately.

Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30323-24

Rules of Decorum



- The final regulations do not preclude a recipient from enforcing rules of decorum that **ensure all participants, including parties and advisors, participate respectfully and non-abusively during a hearing.**
- If a party's advisor of choice refuses to comply with a recipient's rules of decorum (for example, by insisting on yelling at the other party), the recipient may require the party to use a different advisor.

Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30320

Rules of Decorum



- Similarly, if **an advisor that the recipient provides** refuses to comply with a recipient's rules of decorum, the recipient may provide that party with a different advisor to conduct cross-examination on behalf of that party.
- This incentivizes a party to work with an advisor of choice in a manner that complies with a recipient's rules that govern the conduct of a hearing, and incentivizes recipients to appoint advisors who also will comply with such rules, so that hearings are conducted with **respect for all participants**.

Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30320

Training Not Required for Advisors



- The Department **declines to require training for assigned advisors** because the goal of this provision is not to make parties “feel adequately represented” but rather to ensure that the parties have the opportunity for their own view of the case to be probed in front of the decision-maker.

Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30342

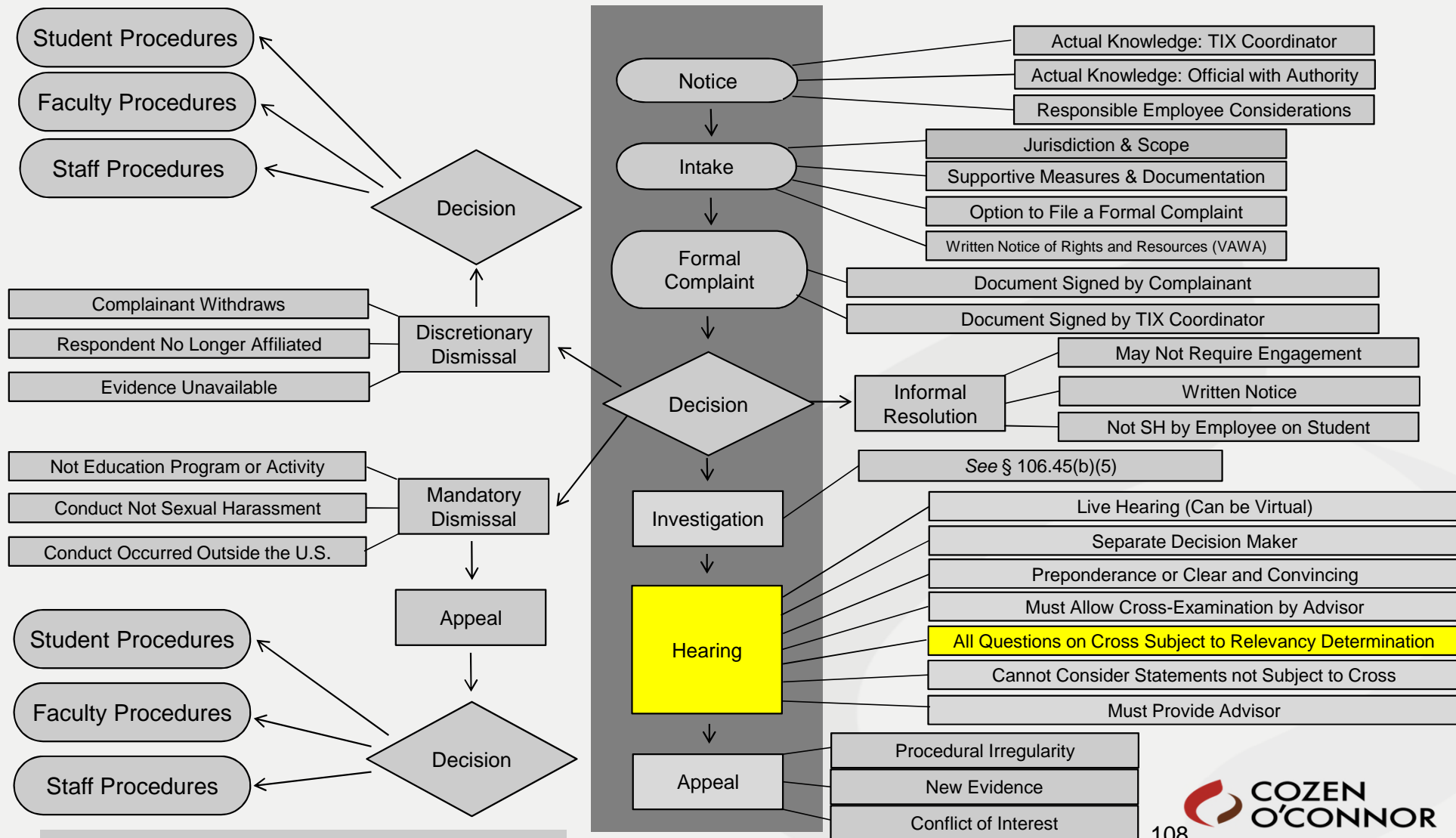
May Not Impose Training Requirements



- Recipients may not impose training or competency assessments on advisors of choice selected by parties, but nothing in the final regulations prevents a recipient from training and assessing the competency of its own employees whom the recipient may desire to appoint as party advisors.

Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30342

RELEVANCE



Key Provisions of Title IX Regulations May 19, 2020

Questions Must be Relevant

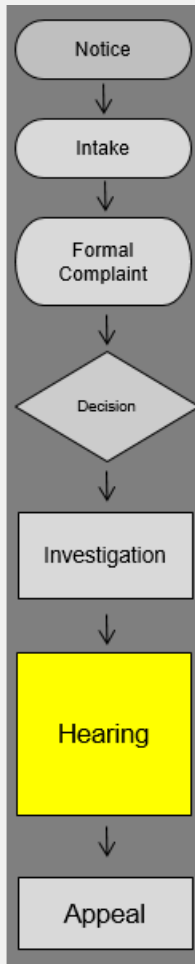


- Only **relevant** cross-examination and other questions may be asked of a party or witness.
- Before a complainant, respondent, or witness answers a cross-examination or other question, the decision-maker(s) must **first determine whether the question is relevant ...**
- The decision-maker(s) must explain to the party proposing the questions **any decision to exclude** a question as not relevant.

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

Relevance

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



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

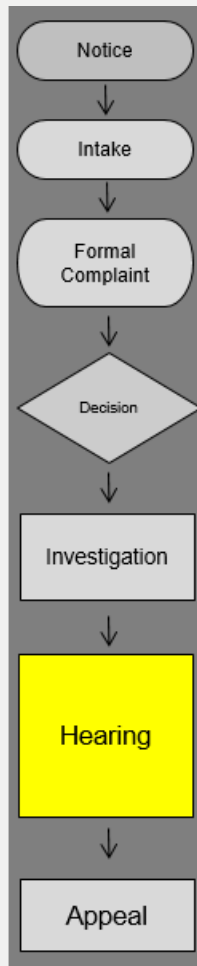
Relevance



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

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

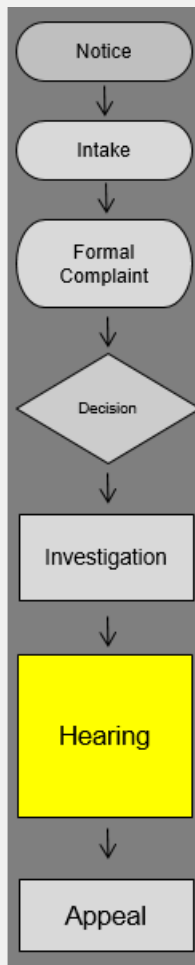
Relevance



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

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

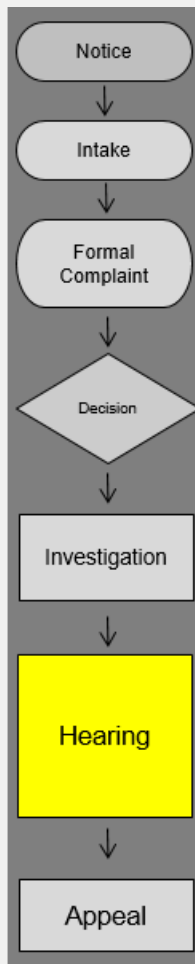
Limitations on Relevance



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

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

Privileged Information



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

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

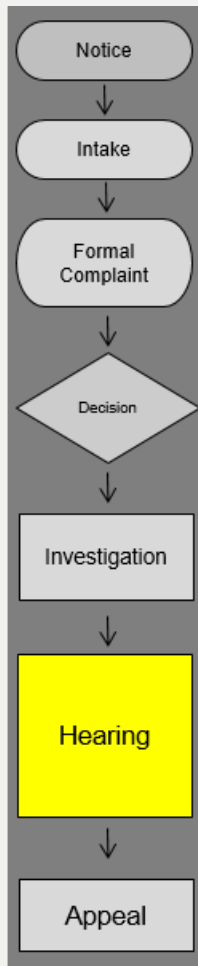
Privileged Information: Per Se Irrelevant



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

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

Relevance: Prior Sexual History



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

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

Prior Sexual History

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



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

Prior Sexual History: Motive



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

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

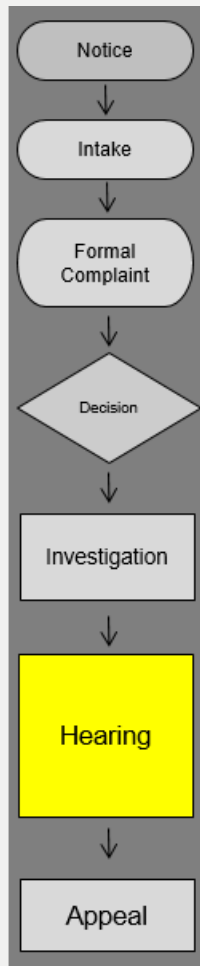
Prior Sexual History: Per Se Irrelevant



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

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

Prior or Subsequent Misconduct

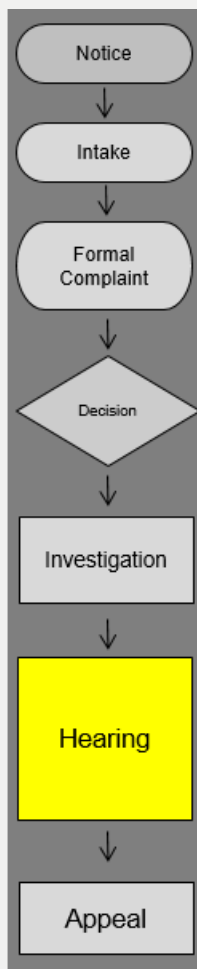


- The regulations do not prohibit the use of prior or subsequent misconduct
 - “Evidence of a pattern of inappropriate behavior by an alleged harasser” permitted if relevant
- Schools will need to determine if such conduct is:
 - Relevant
 - May be used in determining responsibility
 - May be used in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

Practical Considerations

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

No Comprehensive Evidentiary Rules



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

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

Simplified Evidentiary Considerations

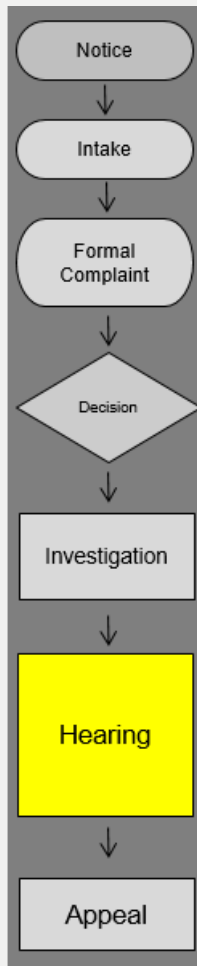


- Recipients are educational institutions that **should not be converted into *de facto* courtrooms.**
- The final regulations thus prescribe a process that **simplifies evidentiary complexities** while ensuring that determinations regarding responsibility result from **consideration of relevant, reliable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

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

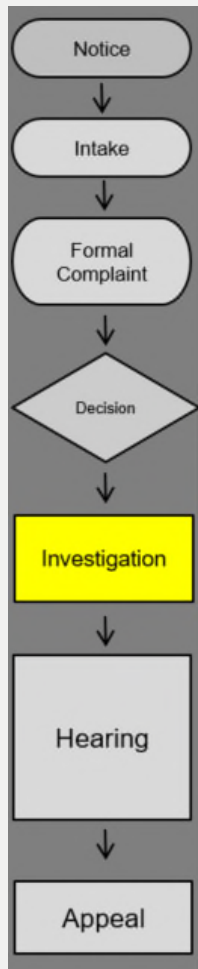
Relevant and Reliable Evidence

- The Department believes that the final regulations strike the appropriate balance for a postsecondary institution context between **ensuring that only relevant and reliable evidence is considered** while not over-legalizing the grievance process.



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

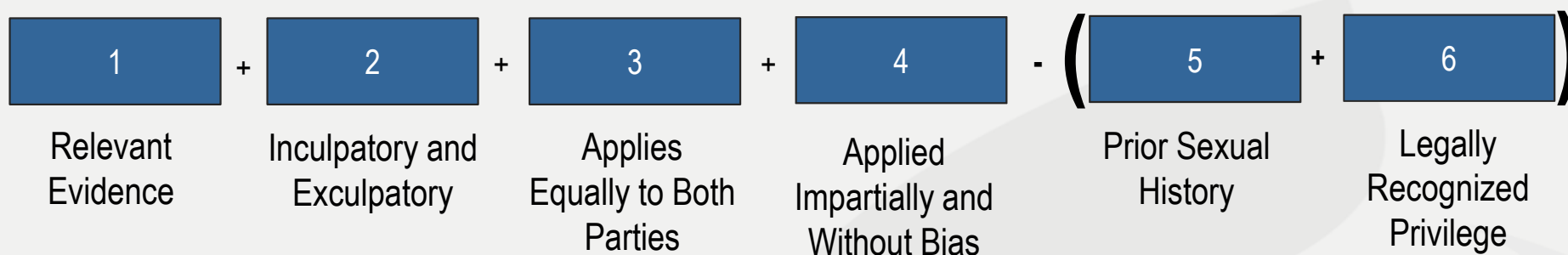
Flexibility to Adopt Rules



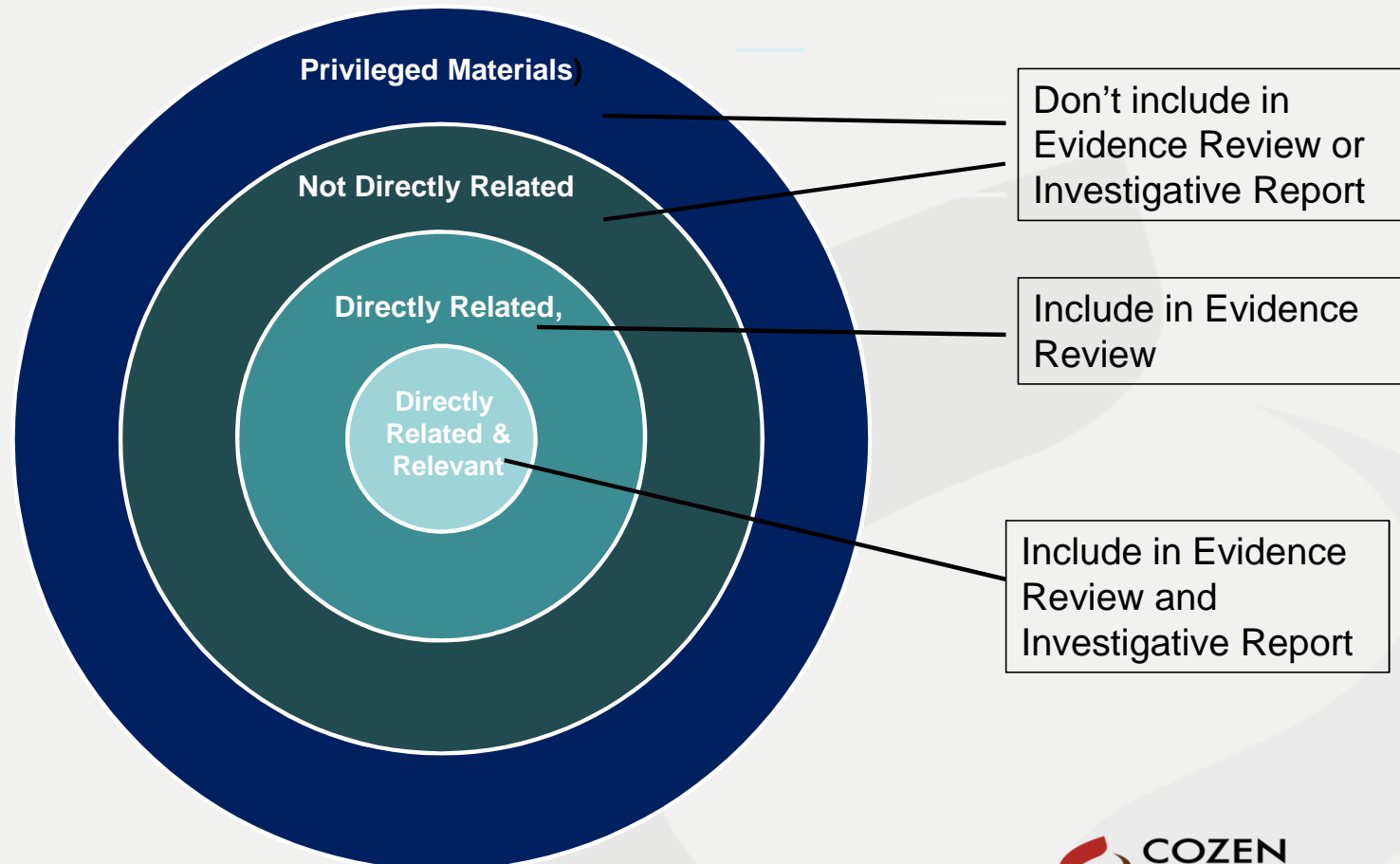
- “Within these evidentiary parameters **recipients retain the flexibility to adopt rules that govern how the recipient’s investigator** and decision-maker evaluate evidence and conduct the grievance process (so long as such rules apply equally to both parties).
- **Relevance is the standard that these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

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

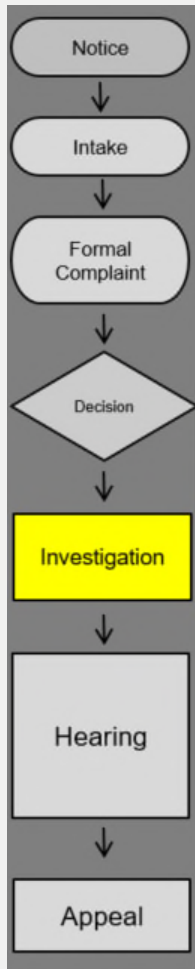
Evidentiary Rules Must Consider



Evidentiary Levels for Inclusion



Directly Related

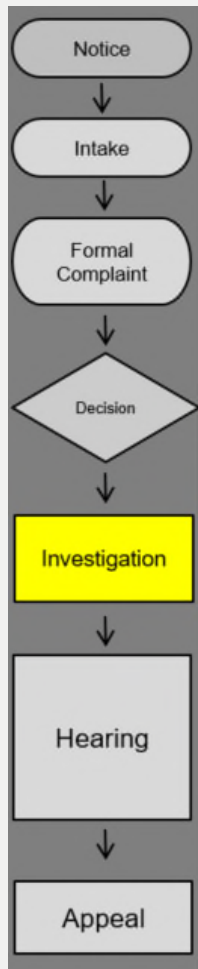


- Not defined in the regulations or the Preamble
 - The Department declines to define certain terms such as “evidence directly related to the allegations,” as these terms should be interpreted using their plain and ordinary meaning.
- “Directly related” aligns with the requirements in FERPA
 - The Department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

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

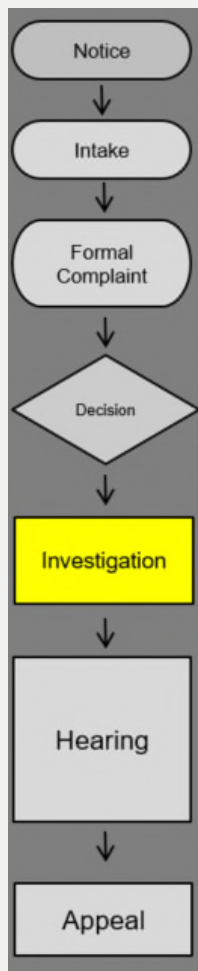
Directly Related

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



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

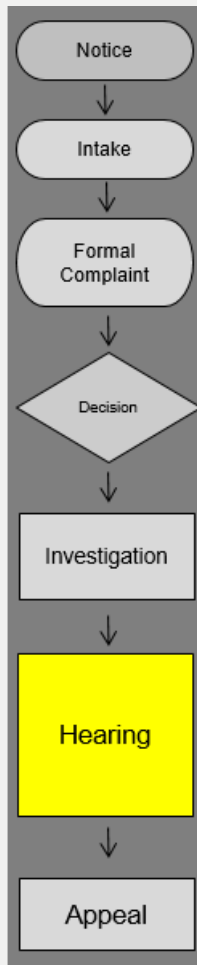
Directly Related vs. Relevant



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

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

Relevant Questions



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

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

Relevant Questions



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

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

Relevance: Explaining Exclusion



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

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

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

Relevance: Explaining Exclusion

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



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

Flexibility to Discuss Relevance



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

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

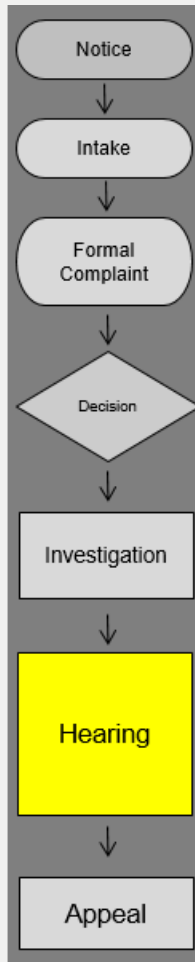
Appeal of Relevance Determination

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



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

Appeal of Relevance Determination



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

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

Practical Considerations & Effective Practices

- Use of a hearing coordinator to support timely determinations by the decision-maker regarding relevance
- How to enable panels to make real-time relevancy determination on cross-examination questions
- Whether to permit discussion of relevancy during the live hearing, or whether to defer the opportunity to challenge to the appeal
- Upon appeal, permitting the decision-maker to augment their reasoning for disallowing a question

Walking through an Example

- Can you adopt a rule excluding subsequent use of statements made during informal resolution?

Statements Made During Informal Resolution



- The regulations permit a recipient to facilitate an informal resolution, provided that the recipient provides the parties written notice disclosing:
 - The allegations,
 - The requirements of the informal resolution process,
 - The circumstances under which it precludes the parties from resuming the formal complaint, provided that at any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and resume the grievance process, and
 - Any **consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared.**

Title IX Regulations, May 19, 2020; § 106.45(b)(9)

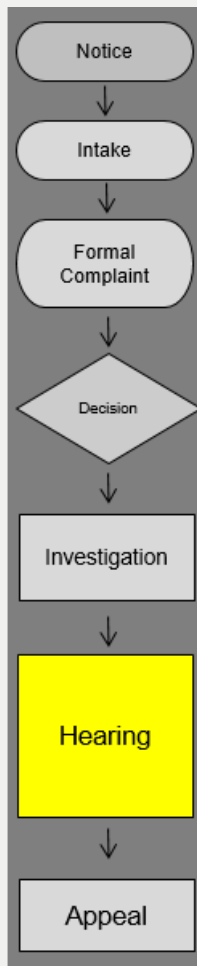
Statements Made During Informal Resolution



- The Department appreciates commenters' concerns that comprehensive rules of evidence adopted in civil and criminal courts throughout the U.S. legal system apply detailed, complex rules to certain types of evidence resulting in **exclusion of evidence that is otherwise relevant to further certain public policy values (e.g., exclusion of statements made during settlement negotiations, exclusion of hearsay subject to specifically-defined exceptions, exclusion of character or prior bad act evidence subject to certain exceptions, exclusion of relevant evidence when its probative value is substantially outweighed by risk of prejudice, and other admissibility rules).**

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

Statements Made During Informal Resolution



- With respect to **informal resolution facilitators potentially serving as witnesses** in subsequent formal grievance processes, we leave this possibility open to recipients.
- If recipients were to accept such witnesses, then the **Department would expect this possibility to be clearly disclosed to the parties** as part of the § 106.45(b)(9)(i) requirement in the final regulations to provide a written notice disclosing any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared.

Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30400-30401

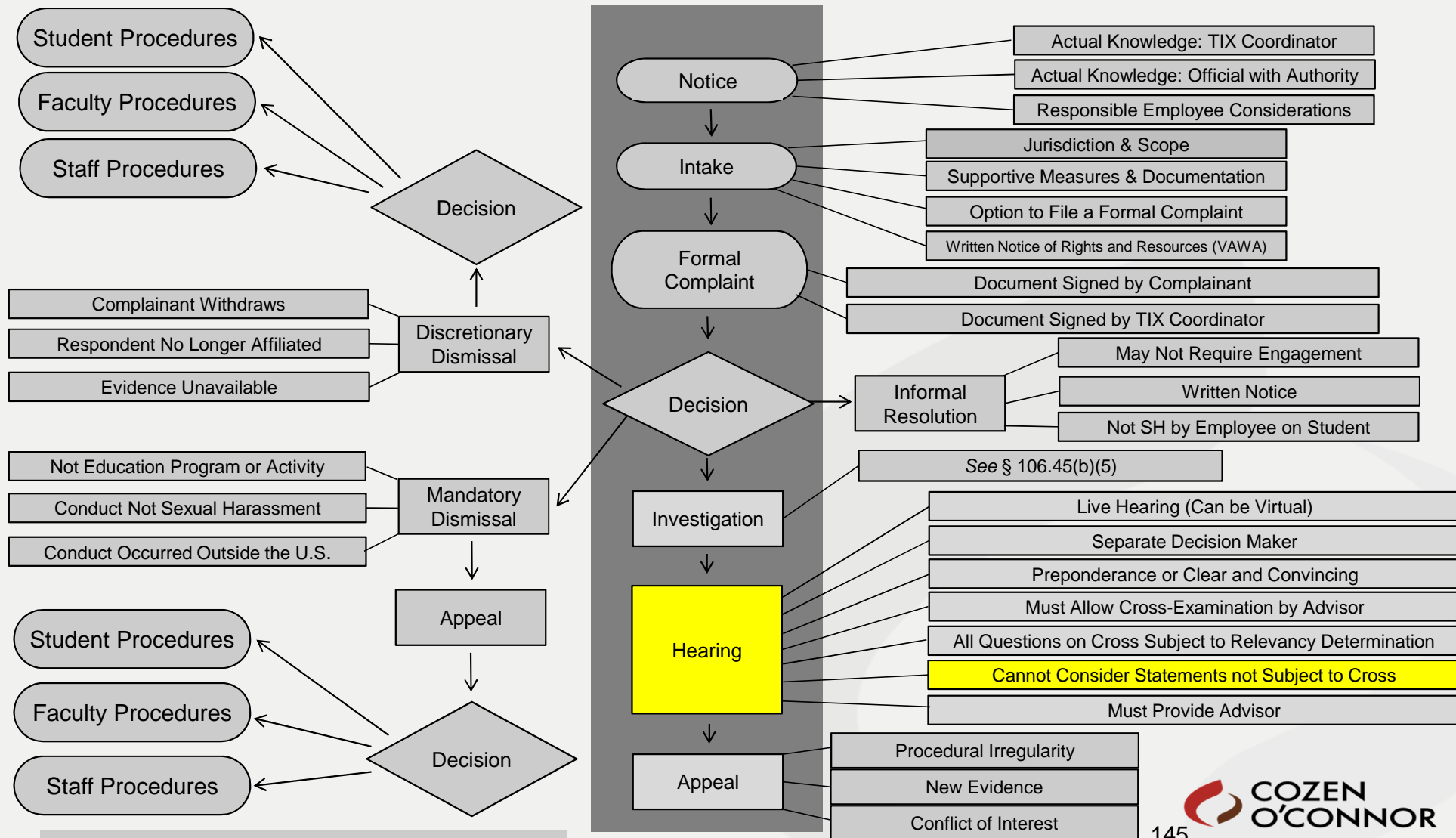
Statements Made During Informal Resolution



- **Relevance is the standard that these final regulations require, and any evidentiary rules that a recipient chooses must respect this standard of relevance.**
- For example, a recipient may not adopt a rule excluding relevant evidence because such relevant evidence may be unduly prejudicial, concern prior bad acts, or constitute character evidence.

Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30247-30248

EXCLUSION OF STATEMENTS NOT SUBJECT TO CROSS-EXAMINATION



Key Provisions of Title IX Regulations May 19, 2020

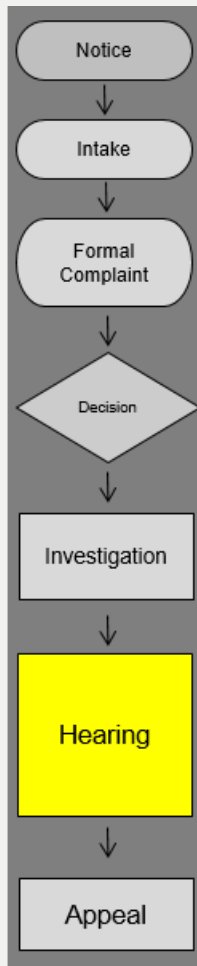
Exclusion of Statement



- If a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) **must not rely on any statement of that party or witness** in reaching a determination regarding responsibility; provided, however, that the decision-maker(s) cannot draw an inference about the determination regarding responsibility based solely on a party's or witness's absence from the live hearing or refusal to answer cross-examination or other questions.

Title IX Regulations, May 19, 2020; § 106.45(b)(6) 85 F.R. 30577

Exclusion of Statement



- [I]n the postsecondary context, **only statements that have been tested for credibility** will be considered by the decision-maker in reaching a determination regarding responsibility.
- Because party and witness statements so often raise **credibility** questions in the context of sexual harassment allegations, the **decision-maker must consider only those statements that have benefitted from the truth-seeking function of cross-examination.**

Title IX Regulations, May 19, 2020; Preamble 85 F.R 30345; 30348

Exclusion of Statement

- The prohibition on reliance on “statements” applies not only to statements made during the hearing, but also to ***any statement of the party or witness*** who does not submit to cross-examination.



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

Exclusion of Statement



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

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

Exclusion of Statement



- Reliance on party and witness statements that have not been tested for credibility via cross-examination undermines **party and public confidence** in the fairness and accuracy of the determinations reached by postsecondary institutions.
- This provision **need not result in failure to consider relevant evidence** because parties and witnesses retain the opportunity to have their own statements considered, by submitting to cross-examination.

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

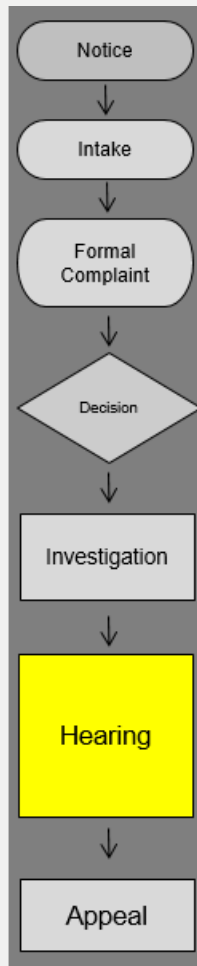
Exclusion of Statement



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

Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30349, 30345

Submit to Cross-Examination



- Commenters suggested making this provision more precise by replacing “does not submit to cross-examination” with “does not appear for cross-examination.”
- Commenters asserted that parties should have the right to “waive a question” without the party’s entire statement being disregarded.
- The Department appreciates the opportunity to clarify here that to “**submit to cross-examination**” means answering those cross-examination questions that are relevant.

Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30345; 30349

Submit to Cross-Examination



- This provision requires a party or witness to “submit to cross-examination” to avoid exclusion of their statements; the same exclusion of statements **does not apply to a party or witness’s refusal to answer questions posed by the decision-maker.**
- If a party or witness **refuses to respond to a decision-maker’s questions**, the decision-maker is not precluded from relying on that party or witness’s statements.

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

SANCTIONING

Sanctioning



- An equitable response for a respondent means a grievance process that complies with § 106.45 before the imposition of any disciplinary sanctions or other actions that are not supportive measures, as defined in § 106.30.
- The grievance process must describe the range of possible disciplinary sanctions and remedies.

Title IX Regulations May 19, 2020 § 106.44 (a); § 106.45(b)(1)(vii) 85 F.R. 30575, 30395

Discretion in Sanctioning



- The Department does not wish to dictate to recipients the sanctions that should be imposed when a respondent is found responsible for sexual harassment as each formal complaint of sexual harassment presents unique facts and circumstances.
- As previously stated, the Department believes that teachers and local school leaders with unique knowledge of the school climate and student body, are best positioned to make disciplinary decisions.

Title IX Regulations May 19, 2020; Preamble 85 F.R. 30377, 30394

Educational Purpose



- Because the final regulations do not require particular disciplinary sanctions, the final regulations do not preclude a recipient from imposing student discipline as part of an “educational purpose” that may differ from the purpose for which a recipient imposes employee discipline.

Title IX Regulations May 19, 2020; Preamble 85 F.R. 30377, 30394

Appeal of Sanction

- The Department notes that under the final regulations, whether the parties can appeal based solely on the severity of sanctions is left to the recipient's discretion, though if the recipient allows appeals on that basis, both parties must have equal opportunity to appeal on that basis.



Title IX Regulations May 19, 2020; Preamble 85 F.R. 30397

TRAINING

Training

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

Use of Slides

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

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METHODOLOGY

OPEN WITH EMPATHY

Meet the Participant where they are

WHAT ARE YOU ABLE TO TELL ME ABOUT YOUR EXPERIENCE?

TELL ME MORE ABOUT...

HELP ME UNDERSTAND YOUR THOUGHTS WHEN...

WHAT ARE YOU ABLE TO REMEMBER ABOUT...

Sight/smell/sound/taste/touch/body sensation

WHAT WERE YOUR REACTIONS TO THIS EXPERIENCE?

Emotionally/physically

WHAT WAS THE MOST DIFFICULT PART OF THIS FOR YOU?

WHAT, IF ANYTHING, CAN'T YOU FORGET?

HOW HAS THIS EXPERIENCE IMPACTED YOU?

CLARIFY other information and details using FETI methodology

CLOSURE

Prepare for future information sharing

REMEMBER:

- Provide brain-based cues or prompts more than questions
- Keep it short and simple
- The information provided by the participant determines your cue, prompt or question
- Don't use the methodology as a check-list or in a specific order

NEVER AGAIN 10 for Practitioners

1. Interruption

2. Leading/Assumptive Questions

A question worded to suggest the proper or desired answer.

Example: What weapon did she have?/ You were at the party, weren't you?

3. Why Questions

4. Confrontational Questions

Example: But you said.../ Witnesses said they saw

5. Yes/No Questions and Choice Questions

Example: Can you... or Was the car red or blue?

6. Compound Questions

Two questions asked at the same time. Example: Where did you meet and what time did you get there?

7. Sequencing Paraphrasing (A restatement; giving the meaning in another form; restating or rewording), Rephrasing (To phrase again or differently) or Repeating

8. Sequencing (Next/After/Before)

9. Minimizing

Example: Tell me a little bit about...

10. Sharing Personal Information, Advice or Opinions

Be aware of judgment and/or bias that could influence the participant's willingness to share their experience with you.



Where to Start:

A Guide to Safety Planning with Victims of Campus Sexual Violence



VRLC's "Where to Start" series is a resource for administrators seeking to address sexual violence at higher education institutions across the country. As campus sexual violence has risen to the forefront of our national consciousness, institutions are looking for help to address it adequately. This has led to a desire for quick answers and "one size fits all" solutions. However, in VRLC's experience working with victims as well as institutions nationally, this approach often fails to meet the needs of both victims and campus administrators. Every campus is unique, as is each jurisdiction, Indian tribe, or territory, thus the information in this series serves as a guide. It is intended to begin a conversation on your campus which will help you identify current gaps and decisions you need to make in order to close those gaps. The goal of the series is to create an informed, appropriate, and consistent response to sexual violence on your campus that contemplates the size, culture, resources, and specific needs of your institution. As you begin to utilize this series, please keep in mind that the information provided is not legal advice and that you should always consult with a local attorney, your general counsel, or jurisdiction laws if you have questions.

Before you begin... This guide is focused specifically on the unique needs of student victims of sexual violence attending colleges and universities. The VRLC delivers trauma-informed legal representation that recognizes the significant impact sexual violence has on college students. Drawing on our experience working with hundreds of campus sexual violence victims and training a diverse range of schools, we have created these materials to provide higher education administrators (e.g. student conduct staff, sexual assault advocates, and public safety officers) the tools they need to understand and address victims' safety needs following a traumatic event. The information herein will help assist administrators and advocates in addressing the safety needs of victims of sexual violence.

What is Safety Planning and why is it important?

Whether it is a single incident or an ongoing pattern, sexual violence can undermine a victim's physical and emotional safety. Safety is feeling and being protected against physical, social, spiritual, financial, and emotional or psychological harm. A safety plan consists of practical strategies that help a victim assess situations that may be physically or emotionally dangerous and assists victims in developing strategies to respond if they feel unsafe. College and university administrators play an important role in helping victims create a safety plan because they have a specialized knowledge of the campus environment. Unfortunately,

constructing and implementing a safety plan cannot ensure that an individual will not face violence again; its goal is to help victims be as safe as possible given the unique campus environment.

Sexual violence is a deeply traumatizing event that can have a devastating impact on a victim's life. When working with victims of sexual violence, it is important to understand the ways in which trauma can impact a victim's decision-making. Restoring a victim's sense of safety after sexual violence can be challenging. Long after the assault, a victim may continue to experience a fear response triggered by any number of reminders of their sexual violence (e.g., places, situations, and people). Fear and anxiety might be related to the situation, the setting, or circumstances in which the assault took place, such as certain music, their residence hall, or even certain smells. Some victims become so fearful that they greatly restrict their activities, even to the point that they are unable to leave their homes or be left alone. Understanding the impact of trauma on victims' choices, reactions, and decision-making can help you create a better safety plan that meets a victim's needs.

Note on language: This document was written as gender neutral to reflect the importance of inclusivity to the movement to end sexual violence. In lieu of a gender neutral pronoun, we use "their" or "they" (although not grammatically correct) to embody the important and conscious effort to respect all individuals and the ways in which they choose to identify their gender.

Creating a safety plan that meets the specific needs of students in a campus environment presents unique challenges and opportunities. Individuals on campus that work or interact with victims play an important role in helping victims create a safety plan because they have a specialized knowledge of the campus environment. Each campus environment is shaped by its culture, academics, location (e.g., small town versus city), the size and layout of the campus, and the overall resources available to students. Students are often entirely dependent on the college or university to create a safe learning environment and address their physical, emotional, and academic safety. They often have limited or no access to money, they may be far from their parents, they may not have a car, they often have assigned housing, as well as rigid class schedules. For commuter campuses, victims still face the danger that an accused person knows their class schedule, where they park, and other study, housing, and work locations. While the campus environment poses safety risks for victims, it also increases the opportunity and responsibility for schools to provide options for victims that help them stay safe.

Victim-Centered Safety Planning... Remember, victims know their lives best. Ask victims about their specific safety concerns and what they need to keep themselves safe. Your actions and reactions empower and support victims to make the best choices possible by providing the information they need. Present victims with options and then help them think through the implications of those options. One way to begin is to provide an overview of the topic areas that a typical safety plan may address and let them determine which areas to discuss and in what order.

Privacy considerations:

Before beginning any safety assessment, you must first consider what steps can and should be taken to protect the sensitive information you will be discussing with a campus sexual violence victim. In many cases, sexual assault victims' first priority is safeguarding their privacy, even if doing so means that certain safety measures are not an option. For example, a campus victim may decline to seek a civil protection order or refuse to disclose the assault to residential life, friends, or school officials, even though doing so may make them safer.

Campus safety tip: Before safety planning with victims, you should review your own confidentiality policies and practices. Consider whether you are a “responsible employee” for Title IX purposes or a Campus Security Authority for Clery Act purposes and discuss the implications with the victim.

Administrators and school employees: Upon receiving a disclosure, it is important that you explain whether you are able to respect a victim's request for confidentiality. You should discuss with the victim who you are required to notify and how much information you need to share. This will allow the victim to make appropriate and informed decisions about who else they disclose or report the assault to and how much information they give at that time. Make sure you understand whether you are considered a “responsible employee” for Title IX purposes or a Campus Security Authority for Clery Act purposes, and inform students if you are required to report disclosures and/or reports of sexual assault, and to whom such reports must be made. In addition, your school has specific obligations under Family Educational Rights and Privacy Act (FERPA) and the Clery Act. Familiarize yourself with FERPA and the Clery Act and be prepared to discuss FERPA protections and Clery Act obligations with the victim. You can direct any questions you may have to your general counsel.

Keep in mind that student records could potentially be used against the victim in court. Notes (as well as personal testimony based on verbal conversations) that are in a victim's education record regarding mental health, contact with the accused person, or other disclosures could be subpoenaed in a civil or criminal case.¹

Familiarize yourself with Title IX, the April 2011 “Dear Colleague Letter”, and the April 2014 Questions and Answers on Title IX guide. These documents delineate specific requirements for schools following a sexual assault and provide guidance on Title IX requirements. Knowledge on protecting a victim's confidentiality in the context of Title IX will assist you in discussing safety options.

Advocates: Advocates could include staff from a campus women's or health center or a campus-based sexual assault advocate. While certain jurisdictions protect the privacy of communications between advocates and victims of sexual assault, campus-based advocates may or may not be covered by these jurisdictions' privilege laws. Privilege is jurisdiction-specific, thus advocates should familiarize themselves with their jurisdiction's privilege laws. There is an “absolute” Victim-Advocate Privilege in a few jurisdictions, but, in most jurisdictions, advocates have limited or no privilege. Advocates should understand how jurisdiction's law applies to their work and direct questions to an attorney in their

¹ A subpoena is a court order to compel testimony or the production of evidence, such as a victim's school record.

jurisdiction or the school's general counsel regarding victims' privacy rights. Make sure that victims understand whether and to what extent their communications with school advocates are protected and what that means for them.

Licensed Professionals: Upon receiving a disclosure, some campus professionals, such as mental health counselors, health center employees, or social workers, are not required to report incidents of sexual violence to the Title IX Coordinator in a way that identifies the student.² These campus professionals should look at the confidentiality and disclosure obligations, ethical guidelines, and best practices dictated by their profession. Whether or not your profession has statutory privilege will be specific to your jurisdiction's laws. Consult with regulatory bodies within your profession or an attorney in your jurisdiction if you have questions specific to your profession's confidentiality.

Safety assessment:

Each victim's circumstance is unique and, as such, each safety plan should be tailored to meet the individual's needs while simultaneously assessing the campus environment. A safety plan for campus victims identifies ways to enhance safety in various situations, including while a victim is in their residence hall, class, the dining hall, in social situations, or in case of an emergency.

Assess what questions to ask and when to ask them: Your initial conversation with a victim will likely provide the information you need to begin a safety assessment (e.g., the circumstances around the assault and immediate safety concerns). The victim should determine when to begin a discussion around safety planning and which issues to prioritize. For some, this discussion will take place during your initial conversation with the victim, while for others, it could occur at a subsequent meeting.

Campus safety tip: Be on the lookout for indicators that a victim is being harassed or stalked after an assault. However, given societal misunderstandings, victims may not describe the behavior they are experiencing as stalking. For instance, the accused student may be calling or texting the victim hundreds of times, or showing up outside of the victim's classes or other places the victim frequents on campus.

After addressing safety generally, help the victim assess the specific risk the accused person poses and evaluate the nature and severity of risk by identifying the following:

- Threats to the victim's physical safety by the accused person or their friends;
- Stalking and harassing the victim or their friends or teammates in person or through social media;
- Threats to others, such as the victim's friends, roommates, teammates, or family members;
- Any other threats, such as reporting the victim to immigration authorities, sharing videos or pictures of the victim, posting pictures or statements online, "outing" a victim who identifies as lesbian, gay, bisexual, transgender, or queer/questioning (LGBTQ).

² "Questions and Answers on Title IX and Sexual Violence" (April 2014), U.S. Department of Education Office for Civil Rights, 22-4. Available at <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>.

Identify campus and/or population-specific safety concerns: Every victim presents different issues and safety concerns. A victim who identifies with one or more traditionally marginalized or underserved communities may have distinct safety planning needs. Therefore, it is important to be aware of specific safety concerns that may be relevant to:

- Victims with disabilities (physical and/or cognitive)
- Older adults [Note: Many schools have non-traditional students, who may be older]
- Minors [Note: While most college students are adults, some students may be younger]
- Victims who identify as lesbian, gay, bisexual, transgender, or queer/questioning (LGBTQ)
- Non-U.S. citizens or students in the country on student visas
- Students from immigrant communities
- Students of color
- Students living in poverty
- Students who are homeless [Note: Students may have campus housing but not permanent housing when school is not in session]
- Students who are geographically isolated, such as those living in rural communities or the school is in a rural community
- Students who are a part of insular, isolated groups/communities, such as some religious sects
- Students who are members of religious organizations and/or have religious beliefs
- Students who are linguistically isolated
- Students who have been trafficked or sexually exploited
- Students who are military service members or part of a military student organization, such as ROTC.

Campus safety tip: Student victims with disabilities may have protections and accommodations under Section 504 of the Rehabilitation Act and the Americans with Disabilities Act. These federal laws may be useful when discussing accommodation options with the victim.

Campus safety tip: Some campus victims may be in the country on a student visa. This may leave them vulnerable to threats from the accused regarding their immigration status.

Be conscious of gendered pronouns. Not all victims are female, nor are all accused people male. Not all victims are sexually assaulted by a person of the opposite sex. Not all same-sex sexual assaults involve people who identify as LGBTQ. Some victims may prefer to be referred to by a pronoun that is different than their perceived biological sex. Be conscious of your use of gender pronouns and if you need clarification, ask.

Consider the victim's emotional safety. If you feel unqualified or that it is inappropriate for you to discuss these issues, refer the victim to a sexual assault advocate or counselor who can. Make sure to keep an up-to-date list of community resources and services available to sexual assault victims in your area.

Addressing threats to a sexual assault victim's emotional safety can be just as important as addressing physical safety concerns. After an assault, victims may develop harmful coping mechanisms (e.g., substance abuse or other addictions, cutting/self-mutilation, eating disorders, increased risk-taking, other high-risk behaviors).

Victims who experience trauma-induced mental health conditions (e.g., depression, anxiety, and suicidality), may isolate themselves from friends and/or family, or feel unsafe in their own bodies.

For those who do feel qualified and will be discussing these issues with victims, we have included some suggestions for addressing emotional safety.

Campus safety tip: Before asking about suicidality and/or other forms of self-harm, discuss with the victim any mandatory reporting obligations you may have. Information about self-harm or other potentially harmful coping mechanisms can be used to discredit the victim in both criminal and civil legal cases. If your records are not protected by an absolute privilege, it is critical to have record-keeping policies that reflect sexual assault victims' need for privacy.

Safety planning is an ongoing process. It's not always a one-time conversation. Your initial conversation with the victim should give you a sense of their immediate safety needs, which, in turn, will help you and the victim identify safety issues that require immediate attention and those that can be addressed in subsequent meetings. Over time, new concerns may arise that require adjusting the safety plan. For many victims of sexual trauma, enhancing emotional, mental, physical, and economic safety will be a consideration for years after the assault. Encourage victims to let you know when their needs or circumstances change and work with them to modify their safety plans to accommodate those changes.

Assist with implementing the plan. Victims may need assistance in implementing their safety plans. This may include the victim considering whether to alert a professor, coach, work supervisor or advisor regarding the current situation. Take time to ensure that the victim understands the plan and that the information is captured in a way that makes the most sense to the victim.

The following list of questions is designed to guide you as you and the victim engage in safety planning. It is not a checklist. Use what you know about the victim's experience to determine which questions are relevant and appropriate. Avoid asking questions that are not applicable. This list is not exhaustive; additional questions may be required to address the victim's individual situation. Do not ask questions because you are curious. Keep in mind that victims know what is best for them and what will make them safe, so always follow their lead. Victims may neither have nor want to share the answers to all the questions you ask. And that's okay.

Immediate physical safety

- Is the accused person a classmate or a person in a position of authority at the school (e.g., a teacher, advisor, residence hall director, coach)?
- When do you see the accused person? In your residence or dining halls? Are there things the school could do to help make you feel safer, such as switching classes, switching residence halls, providing safe meal times in dining halls, etc.?

- What information, if any, does the accused person have about where you live, study, or about other places you go on a regular basis?
- Has the accused person threatened you, either directly or in other ways (e.g., threatened to tell other people, get you fired from your campus job, report you to campus police for drinking or using drugs, “out” you as LGBTQ, post pictures or statements online)?
- Has the accused person contacted you since the assault? If so, in what ways and how often?
- Has the accused person stalked or harassed you, your friends, or your teammates? [Note: Remember, students may not identify certain behavior as stalking. Pay close attention to behaviors they describe or explain to them what stalking behavior looks like.]
- Are you considering reporting the assault to campus police or law enforcement?
- Do you fear retaliation if you report to law enforcement? What kinds and by whom?
- Do you have a civil restraining order or other type of protection order against the accused person? If not, do you think some type of protection order would be helpful?
- If your campus issues No Contact Orders: would some type of order from the school be helpful?
- Are you considering reporting the accused person in order to initiate disciplinary proceedings?
- Do you have any injuries or other health concerns as a result of the violence? If so, have you been able to receive medical care?
- Do you have a cell phone you can use if you need to call for help?
- Do you have a plan in case of emergencies (e.g., if you were in danger or needed medical attention, who you would call, where you would go, how you would get there)?
- Are there things that you or others can do that would make you feel safer at school (e.g., a change in class schedule, provide bus service to/from the school, taking a leave of absence, change your residence hall, move your locker, provide an escort, change practice or meeting times, create “safe” dining hall hours, designate a “safe” parking space)?
- Are you aware of our school’s counseling, mental health, medical, or student services for victims of sexual assault? If not, would you like me to tell you about services available to you from the school or in the community?

Campus safety tip: Schools should ensure complainants are aware of their Title IX rights and any available resources, such as counseling, health, and mental health services, and their right to file a complaint with local law enforcement.

Campus safety tip: Your school may have No Contact Orders (NCOs) available to students. When available, a civil protection order (CPO) can also be a valuable safety measure. Find out if your jurisdiction has this protection and if there are local resources they can access to assist them in obtaining a CPO.

- Have you read through the campus sexual violence policy? Would it be helpful to look through it together?

Campus safety tip: Some victims may find sexual assault to be so overwhelming and traumatic that they are suicidal. Be alert for victims who implicitly or explicitly mention that they are thinking of hurting themselves or taking their life. If, based on your conversation with a victim, you believe this may be a possibility, do not be afraid to ask them directly. People don't get the idea to hurt themselves simply from someone mentioning it. Your school may provide training to administrators and staff on how to address suicidal students. Familiarize yourself with protocols for staff to follow if they determine a student is a danger to themselves or others. These policies should be consistent with victims' privacy rights and the school's other privacy obligations.

Safety and technology

- Does the accused person know your phone number? Your email address?
- Does the accused person know any of your passwords?
- Do you have any social media accounts (e.g., Facebook, Instagram, Snapchat, Google+, Twitter, and LinkedIn)? Are you "friends" with the accused person? Is anyone in your social media network "friends" with the accused person? Do you know how to block the accused person and their contacts from accessing you via these avenues?
- Have you reviewed your privacy settings (e.g., on shared computers, social media sites) since the assault? Can you adjust those settings to keep your personal information more secure?
- Has the accused person or their friends contacted you using these mediums? If so, can you gather (and retain) evidence of this contact (e.g., phone records, screen shots, saving voicemails, text messages)?
- Has the accused person or their friends posted anything about you online? What was posted? Is the post still online?
- Have you searched for your name on the internet? If so, does any private information (e.g. home address, phone number) show up? Do you need help removing this information?

Campus safety tip: The issuance of and enforcement of restraining orders as well as school No Contact Orders may require various forms of evidence to ensure victim safety. Encourage the victim to save any electronic records that might be relevant to the assault, including texts, emails, Facebook posts, or other electronic messages sent to or from the accused student before or after the assault.

Campus Safety Tip: Harassment may occur through social media, or other electronic means by peers or faculty. Assess whether the harassment is sexual in nature, as this may qualify as sexual harassment and have implications for the school under Title IX.

Safe housing

- What kind of housing do you live in (e.g., apartment, residence hall, house)?
- Who owns the building where you live (e.g., the school, private landlord, you)?
- Do you live alone or share your housing? Do you know the people with whom you share your housing?
- Does the accused have a key or access card to your housing?
- Are you physically safe inside your housing? Do your windows and doors lock? Do you have lights outside? What is the security like for entering and exiting your building/house?
- Who could you stay with if you needed to leave your on or off campus housing? Do you have friends or family nearby? Who else on campus or in the community do you know and trust? How would you contact them?
- Would it be safer to move to new housing? Would you like to discuss the possibility of moving to new housing? Do you need help finding a new place to stay?
- Can you think of other things you can do to feel safer where you live?

Campus safety tip: If your school requires students to live on campus, consider the implications of forcing a victim remain on campus and ways to mitigate any potential harm.

Safety in extracurricular activities

- Are you or the accused person involved in Greek life? Do you have specific concerns about threats, harassment, or other interactions with any of the fraternities or sororities on campus? Are you experiencing any retaliation from members of Greek life?
- Are you involved in student groups or clubs? Do you have any concerns about particular members of these groups? Are you being threatened or harassed by any group members? Are you experiencing any retaliation from group members?
- Do you play on any campus sports teams? Do you have any concerns with regards to teammates, coaches, etc.? Are you being threatened or harassed by any of your teammates or coaches? Are you experiencing any retaliation from your teammates or coaches?
- Does your club, team, fraternity or sorority have a contact list or listserv that members may access?

Safe campus workplace

- Are you currently employed? If yes, is this off campus or on campus employment?
- Does the accused person work on campus? Does the job allow the accused person to access your information (e.g., Registrar, Dean's Office)?

- Is the accused person a coworker or a person who has authority over you at your campus job (e.g., is the accused person your supervisor)?
- Does where you or the accused person work impact your ability to access campus services, such as the dining hall, the library, or your residence hall? (e.g., the accused person works in the library, is the victim's resident advisor(RA))
- Does anyone else at your campus job know about the assault?
- Would an accommodation to have a different employment location, timing, or position make you feel safer?

Safe community

- Do you see the accused person when you are off campus? If yes, where (e.g., at the grocery store, the mall, local restaurants, religious services)?
- How do you get to the places you need to go to (e.g., school, the mall, religious services, places you study, the movies, friends' houses or residence halls, restaurants)?
- Is there someone you trust who can accompany you to the places you need to go?
- If you were approached by the accused person in an off campus location, do you know where you could go to be safe?
- Does the accused person know your transportation routes?
- Are you comfortable using the school's transportation (e.g., campus bus systems, shuttles)?
- Does the accused person use the same transportation you do, such as the train or bus? If so, are there other ways you could get where you need to go? Do you always have access to a vehicle or have a friend who could drive you?

Providing additional support

The following are ways in which you might further support victims' safety, as appropriate to your role, school policies, etc.:

- Provide a list of resources both on and off campus (e.g. campus health center, campus counseling center, rape crisis centers, campus women's or health centers, taxi/car services, support groups, mental health specialists, healthcare providers, law enforcement, and addiction counselors).
- Work with community-based sexual assault advocates to provide training to appropriate campus administrators, faculty, and staff on campus sexual violence.
 - Collaborate closely with community-based sexual assault advocates/counselors to ensure that victims have access to free, confidential services off campus.

- Develop and provide training specific to appropriate campus administrators, faculty, and staff on the campus disciplinary process, Title IX, Clery Act, VAWA Amendments to the Clery Act, and victims' education and privacy rights.
- If your school does not have a sexual assault policy, begin the process of developing a policy that meets the needs of your school. Encourage students to provide input.
- Remember, when a victim reaches out, you may be one of the first people they tell about their assault. Compassion, validation, and support send an important message to that victim. Furthermore, by creating safe spaces and people for campus victims to disclose to, you begin to truly address the issue of sexual violence at your school.

Other resources:

- The VRLC has additional resources and information available on our website, www.victimrights.org.
- Stalking Resource Center: <http://www.victimsofcrime.org/our-programs/stalking-resource-center>
- White House, Not Alone: www.notalone.gov



IACP

Sexual Assault Incident Reports

INVESTIGATIVE STRATEGIES

The following guidelines and interview strategies are based upon national best practices regarding sexual assault incident investigations and were developed in collaboration with local, state, and federal law enforcement, prosecutors, advocates, medical, and forensic professionals. The goal of these guidelines is to support officers and departments in preparing sexual assault cases for successful prosecution through detailed case documentation and thorough investigations.

NOTE: These guidelines are not intended for use when the victim is a minor.



Standardizing Case Coding and Clearance Practices

Throughout the country sexual assault cases are coded according to different criteria using varied terminology, resulting in confusion and miscommunication within the criminal justice system about these crimes. With the goal of building stronger sexual assault cases and attaining higher rates of prosecution, uniformity in case coding terminology and reporting procedures will create common professional standards.

Assign a tracking number for every reported sexual assault offense and document each report in writing.

- Even if an incident does not meet the elements of a sexual offense, a written report should be saved as an information report. Preserving information reports affords potential pattern identification with serial offenders, a return to cases as more information develops, and promotes supervisory review.

All reports should be taken as valid unless evidence proves otherwise.

- Do not rush to decide if a report is an information or crime report. This decision should be based on evidence collected through the investigation.
- A report should not be labeled “false” or unfounded as a result of the initial victim interview or perceived victim reaction to the sexual assault.
- Victims of sexual assault may recant or decline prosecution for various reasons (e.g. fear of retaliation by the offender, concern about not being believed, hesitancy regarding the criminal justice system, and loss of privacy). A victim’s reluctance to participate is neither indicative of a false report nor reason to forego a strong, evidence-based investigation.
- Case coding and clearance decisions should be based on careful analysis of evidence identified through an investigation.

Case Cleared: An open case is investigated and proceeds through the criminal justice system, or no formal charges are issued due to elements beyond law enforcement control (i.e. death of offender, prosecutor declines to take the case after an offender has been identified, offender is arrested but will be prosecuted in a different jurisdiction).

Case Inactivated/Unsubstantiated Report: A case is removed from the active caseload but remains technically open pending possible future investigative developments.

Information Report: Incident that does not currently meet the elements of a crime but the information is filed/preserved for future evidence or criminal connections.

Case Unfounded: An investigation shows that an offense was not committed or attempted. Cases can be coded as unfounded because they are either baseless or false.

Unfounded, baseless: A case does not meet the elements of a crime or was improperly coded as a sexual assault.

Unfounded, false: Evidence obtained through an investigation shows that a crime was not committed or attempted.

Report Writing

Strong sexual assault cases require strong written reports. A thorough report will identify on-scene evidence and document details from the victim's and suspect's accounts of the incident. This will assist those investigating to overcome consent challenges and serve to refresh memories for court testimony. A high level of detail in the report and in the officer narrative will help move a case towards prosecution.

When writing the report:

Ask the victim to describe the assault, listing as many details and feelings as possible.

- It is critical to capture the details necessary to establish elements such as premeditation/grooming behavior by the perpetrator, coercion, threats and/or force, and traumatic reaction during and after the incident (e.g. demeanor, emotional response, changes in routines or habits).
- Document the elements of the crime by asking the victim to tell you what they thought, felt, and feared at the time of the assault.
 - What was the victim experiencing before, during, and after the sexual assault?
 - What did the victim see, smell, taste, hear, or touch during the incident?
- Document the victim's condition as observed.
- Fully document fear by recording all fight, flight, or freeze reactions the victim exhibited. For example, the victim may describe feeling unable to move.
- Silence is not consent. "No" or resistance is communicated through more than just words. Detail and corroborate what "No" looked or felt like for the individual victim in your report (e.g. looking away, closing eyes, positioning or moving body).

- Create a timeline to show trauma/post-assault behavior of the victim in context of previous behavior. For example, document dramatic physical changes such as weight loss/gain or reported changes in daily routines and/or work performance.

Document all information given by the victim, even if it does not cast them in the best light.

- The reality is that victims who may be judged as unreliable witnesses may have been chosen by the perpetrator for that reason.
- Use the victim's exact words and place those words in quotations. Do not sanitize or "clean-up" the language used by the victim. Altered language may be used against the victim or officer in court.
- Every effort should be made to exclude officer opinion in the written report and to avoid asking leading questions. This can compromise the integrity of the entire report and the credibility of the victim and officer. It is normal for a victim to not know or remember complete details; do not try to fill in the gaps for them.
- If the victim was incapacitated as a result of voluntary alcohol or drug use, show why this is an issue of increased vulnerability rather than culpability.

Report Writing Considerations and Potential Suspect Defenses

The following are four common sexual assault defenses and strategies to counter these defenses in the written case report.

Denial: Collect and document evidence to establish that (nonconsensual) sexual contact did occur

Identity: Collect and preserve DNA samples from the victim and suspect, and other physical evidence from the crime scene(s); document witness statements

Consent: Document fear, force, threat, coercion and/or inability to consent

Impeachment by Contradiction: Document any changes in victim/witness statements, especially as additional details are recalled following the initial trauma/shock of the assault

NOTE: Because the majority of sexual assaults are perpetrated by someone the victim knows (even if just briefly or casually), the difficulties in prosecution are not based upon whether the correct suspect has been identified or sexual contact occurred. The burden for the prosecution is proving that the **act was non-consensual** (i.e. the perpetrator claims that the contact was consensual).

If the facts obtained from the investigation indicate use of force by the perpetrator, document using language that reflects this.

- If at some point a consensual encounter turned non-consensual, ask the victim to describe details about how and when the perpetrator's behavior changed.
- Documentation should reflect a lack of consent. Avoid wording that implies consent. For instance, "he forced his penis into her vagina" denotes lack of consent while "he had sex with her" implies consensual intercourse.
- In documenting force, be specific. "He threatened me" is vague. List the specific threats that were made, tones used, gestures and/or looks given.
- Victims may not be able to resist physically. This may be an indicator of force or fear and should be documented.
- Perpetrators of sexual assault generally use only as much violence as needed to attain submission. Force

or violence may not be overt if the perpetrator can commit the crime by using lesser means (i.e. a weapon isn't needed when you can use threats, alcohol, etc.)

- The mere presence of a perpetrator and/or the verbal tactics they employ can be seen as force and should be documented as such. An example of this is the *Use of Force Continuum* utilized by law enforcement that starts with the mere presence of an officer, followed by verbal commands. Should an individual comply with either of these, no additional force would be needed or justified.

If your department has specialized investigators:

- The first responder should conduct a preliminary interview gathering just enough information to determine whether the elements of a crime have been met and by whom.
- The in-depth interview should be left to the investigator in order to decrease account repetition and reduce the possibility of inconsistent information that could be used against the victim's credibility in court.

Victim Interview

Due to the particularly intimate and intrusive nature of sexual assault, the interview process may be difficult both for the victim and the officer. Recognize the significance the victim's initial contact with first responders and investigators will have on their trust in the criminal justice system. The treatment the victim receives during the interview may impact the victim's decision to go forward with the case.

To gather information from the victim, it is important to:

Respect the victim's immediate priorities.

- Attend to the victim's immediate health and safety concerns and questions about reporting and the criminal justice process before beginning the interview.
- Victims have a right to accept or decline all services. This does not mean that a thorough investigation should not be conducted.
- Help victims gain back a sense of control by involving them in the decision of when and where to hold the interview.

Build a rapport with the victim.

- Victims may know little about the investigative process and may find the criminal justice system confusing, intimidating, or even frightening. Explain all processes during each step of the interview and investigation. This creates transparency and trust for the victim while helping to restore the victim's sense of control.

- Assure the victim that they will not be judged and that the information reported is being taken seriously.
- Victims of sexual assault often blame themselves. Reassure victims that, regardless of their behavior, no one has the right to sexually assault them.

Ask the victim if they would like to have a support person present for the interview.

- It is best practice to allow victims to have an advocate or a support person of their choosing present during the medical exam and/or law enforcement interview. Ask the victim privately who they would like present and take action to support their wishes.
- While victims are entitled to have someone with them during the interview, look for signs of:
 - Hesitation from the victim in revealing all of the details of the assault in front of someone with whom they are close, like a spouse or parent.
 - Controlling or intimidating behavior by the support person towards the victim.
- Provide victims with written contact information for community referrals.

Forensic Medical Exam Payment

Under a provision of the VAWA Reauthorization Act of 2005 (U.S.C.A. § 3796gg), states must ensure that victims of sexual assault have access to a forensic medical exam, free of charge or with full reimbursement, even if the victim chooses not to report the crime to the police or otherwise participate with law enforcement authorities or the criminal justice system.

To be eligible for VAWA S.T.O.P. formula grant funds, all states must be able to certify in good faith that they are in compliance with the statutory eligibility requirements within VAWA on or before January 5, 2009.

Information about this 2005 statute and additional up-to-date information is available at: www.mcasa.org/C/4/C4.htm or at www.ovw.usdoj.gov/docs/FAQ_FINAL_nov_21_07.pdf

Recognize the impact of trauma and how this affects an individual's behavior.

- People react differently to trauma. Lack of emotion or the presence of emotion is not an indicator of the legitimacy of the assault, and either is common.
- Research shows that most victims of sexual assault never make a report to law enforcement. Of the victims who report, the majority do so after some delay. A delay in reporting should never deter a thorough investigation. A skillful prosecutor will be able to overcome any disadvantage a delay in reporting might cause when making the case in court.
- Most victims experience continuing trauma which may affect their physical, emotional, social, and economic state of being.
- Victims may experience difficulty remembering all the details of the sexual assault due to traumatic response. This does not mean they are lying or leaving out details intentionally. Often with time and as trauma recedes, details will emerge.
- After sufficient time to conduct a thorough investigation, schedule a follow-up interview to gather any information the victim may have missed or not recalled earlier and to ask about or clarify additional information learned.
 - Unless there are exigent circumstances requiring an arrest or identification, delaying the follow-up interview will generally enhance the investigation and the quality of information obtained.

Do not polygraph victims.

- The practice of submitting victims of sexual assault to a polygraph exam intimidates victims and destroys the trust victims and the community have with law enforcement. Polygraphing negatively affects law enforcement's chance to successfully investigate sexual assault crimes.

- It is important to note that the 2005 federal Violence Against Women Act has mandated that jurisdictions will no longer be eligible for S.T.O.P. formula grant funds if their policy or practice is to ask or require adult, youth, or child victims of sexual assault to submit to a polygraph examination or other truth telling device as a condition for taking the report, proceeding with the investigation of the crime, or pursuing charges.

Provide victims with information on how to obtain medical treatment and undergo a forensic exam.

- Explain the medical significance of a sexual assault forensic examination, including testing for sexually transmitted infections and HIV.
- Notify the victim of locations where a sexual assault forensic examination is available in the community. If department policy allows, transport the victim to the local rape crisis center or hospital.
- Should a victim initially decline a forensic medical examination, provide information as to where the victim may obtain an exam at a later time.
- Physical evidence can be collected up to 120 hours (in some states) following a sexual assault. The victim should be advised, however, that critical physical evidence and documentation of injuries may be lost with a delayed exam.

Do not pressure the victim to make any decisions regarding participation in the investigation or prosecution during the initial interview or initial stages of the investigation.

- Sexual assault victims are often reluctant to actively participate with case proceedings. Document any information the victim shares, as this may aid in the identification and apprehension of a serial offender.

- A victim's right to change their mind regarding moving forward with the investigation and prosecution should only be constrained by the statute of limitations. Even then, the victim may serve as a witness in another case involving the same suspect, so an interview and investigation should always be conducted.
- Pressuring a reluctant victim to sign a form stating that they are not interested in prosecution and will not hold the agency accountable for stopping the investigation is poor practice and is potentially damaging to an agency.
- Victim follow-up builds trust with victims and sends a message to the community about the seriousness with which an agency handles sexual assault crimes.

Suspect Interrogation

While investigative emphasis has historically focused on the victim's behavior, the reality of these crimes is that the suspect is often known to the victim and thus can be identified easily. An effective investigation will concentrate on gathering as much evidence as possible on the suspect.

Focus the investigation on the suspect rather than the victim.

- As with other crimes, focus should remain on the suspect, not on the victim's character, behavior, or credibility.
- If the suspect invokes the constitutional right to remain silent, investigating officers must still evaluate the circumstances of the assault in order to anticipate the suspect's defense strategy.

Allow the suspect ample opportunity to give an account of the incident.

- Many perpetrators of sexual assault will provide information in an attempt to justify their actions.

- Pretext phone calls are a strong tool to be considered when the victim and suspect know each other. The transcript from a monitored call can provide useful evidence as facts are corroborated and the suspect makes admissions or gives improbable statements. (*See Resources, page 8*)

Obtain consent or acquire a court order to secure a suspect forensic exam for probative evidence.

- Like the victim, the suspect's body carries evidence and can potentially confirm aspects of the victim's account (e.g. identifying marks, injuries).
- In some jurisdictions, a suspect forensic exam can be done incident to arrest or by requesting a court order for non-testimonial evidence.

Non-Stranger Sexual Assault

It is important for law enforcement to recognize that "stranger rape" (when the perpetrator is a complete stranger to the victim) is not the norm. 2005 Bureau of Justice Statistics indicate that 73% of reported female rape or sexual assault victims were assaulted by someone they knew. A non-stranger can be anyone who is in some way known to the victim. While it may be someone with whom the victim has had a long-standing relationship or friendship, it could also be someone who has made himself known to the victim within hours of the assault or someone who has established a casual acquaintance.

Investigation

Strong sexual assault investigations are supported by physical evidence and do not rely solely on the victim or the perceived credibility of the victim. Remember, the overall intent of any investigation is to be fair, balanced, and thorough. Gather all physical and testimonial evidence.

Build trust by partnering with the victim, showing respect, and remaining non-judgmental.

- A victim-centered approach will aid the interview process and allow for as much evidence to be gathered as possible.
- In most cases the suspect is familiar to the victim, so the victim may be able provide corroborating details and evidence.
- Remind the victim that, due to the nature of trauma, it is typical not to remember all of the details of the sexual assault. Think out loud with the victim to identify new information in the victim's account that may be used as evidence. This process may help jog additional memories.

Thoroughly investigate and document the suspect's conduct prior to the assault.

- Grooming behavior which may be indicative of premeditation is often used to test, select, and isolate victims and to make the potential victim feel comfortable and able to trust the perpetrator.
 - Why did the suspect choose this victim?
What might make her/him less credible and/or more vulnerable?
 - How did the suspect create a situation to build trust?
 - Did the suspect monitor the victim physically or through electronic means?
 - What was the role of alcohol and/or drugs?
 - Did the suspect isolate or attempt to isolate the victim?
 - Why was the specific location for the assault chosen?
- Sexual assault cases are typically portrayed as “he said/she said” but in reality are often “he said/**they said**” cases. Perpetrators of this crime frequently have a history of acts of sexual violence. Previously unreported offenses may be found by interviewing the suspect's social circles, current and former partners.

- Prior victims should be interviewed and their statements included in the current investigation.

Do not overlook the importance of witness statements/testimony.

- Victims will often confide in someone (e.g. a close friend). These individuals are considered “outcry witnesses” and their statement can provide powerful corroboration.
- Suspects often boast or brag about their sexual encounters to a friend or friends. These individuals are also considered “outcry witness” and their statement(s) can provide powerful corroboration of the details of the assault.

Keep in mind the co-occurring nature of violence against women crimes. What other crimes may have been committed?

- Sexual assault may occur in the context of domestic violence.
- Monitoring and surveillance are often pre-cursors to sexual assault. Look to see if stalking charges may apply.
- Remain open to the possibility of drug-facilitated sexual assault. Victims of a drug-facilitated assault may report black-outs, gaps in time and memory, and a general uncertainty as to whether or not an assault occurred.
- Additional crimes to look for include: theft, property damage, false imprisonment, human trafficking, kidnapping, abduction, administering an illegal substance, poisoning, witness tampering, etc.

Ensure every report, including every information report, is reviewed.

- Establish and train officers on guidelines and procedures adopted by the agency.
- Create a system to review the coding and clearing of sexual assault cases with particular attention to reports determined to be false or unfounded.

Working With Vulnerable Populations

Predators prey upon the vulnerabilities of others; therefore, victimization is often higher among certain populations. When investigating a sexual assault, be aware of particular issues that may face certain populations (i.e. age, culture, disabilities, gender, language) and how this might affect the way a victim makes decisions and responds to law enforcement.

Examples of vulnerable populations include:

- American Indians
- Immigrants, documented and undocumented
- Individuals in prostitution
- Individuals with disabilities
- Individuals with substance addictions
- Individuals with limited English proficiency
- Individuals who have previously been sexually assaulted
- Lesbian, gay, bisexual, transgender individuals
- Minors
- Senior citizens

A few tips to keep in mind:

- Not all disabilities are visible. Victims may have physical, sensory, or mental disabilities, or a combination of disabilities.
- Culture can influence how people view or understand “sexual assault” and feel about law enforcement. Be aware that beliefs about gender, sexuality, sexual orientation, race, religion, etc. may vary greatly between cultures.
- Questions about sexual assault are very intimate and may be difficult to discuss. Such a personal violation may create feelings of embarrassment and shame. These feelings may be intensified in some cultures such as those where the loss of virginity prior to marriage can be socially devastating.
- American Indian communities may have their own laws regarding sexual assault in addition to or in place of relevant state or federal laws.
- If English is not the victim's first language, offer to arrange unbiased, independent translation. Do not rely on family members, children, the suspect, or any other associated parties to serve as an interpreter.
- Those who are lesbian, gay, bisexual and transgender identified may have specific privacy needs depending on whether the individual is “out” to others in their lives. Sensitivity and awareness about the particular obstacles and barriers victims of same-sex sexual assault face in reporting is of critical importance.

IACP Resources

To obtain electronic or printed copies of the following resources at no cost, visit **www.theiacp.org** or email **stopviolence@theiacp.org**.

Tools

- IACP Sexual Assault Supplemental Report Form, 2008

Model Policy

- Investigating Sexual Assault, IACP Model Policy & Concepts and Issues Paper, 2005

Training Keys

- “Investigating Sexual Assault Part I: Elements of Sexual Assault & Initial Response”, IACP Training Key # 571, 2004
- “Investigating Sexual Assault Part II: Investigative Procedures”, IACP Training Key # 572, 2004
- “Investigating Sexual Assault Part III: Investigative Strategy & Prosecution”, IACP Training Key # 573, 2004
- “Pretext Phone Calls in Sexual Assault Investigations”, IACP Training Key # 574, 2004

Every effort has been made to ensure that this document reflects the most current thinking and comprehensive information on the crime of sexual assault. A wide array of feedback was solicited, and many subject matter experts contributed their knowledge. In particular, we appreciate and acknowledge the contributions of: Joanne Archambault, Kim Lonsway, and Anne Munch.

This project was supported by grant no. 2005-WT-AX-K077 awarded by the Office on Violence Against Women, U.S. Department of Justice. The opinions, findings, conclusions, and recommendations expressed in this publication are those of the author(s) and do not necessarily reflect the views of the Department of Justice, Office on Violence Against Women

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

Presented By:

The Institutional Response Group | Cozen O'Connor

Gina Maisto Smith, Chair

Leslie Gomez, Vice Chair

June 29, 2020



Today's Webinar

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

TRAUMA-INFORMED SEXUAL ASSAULT INVESTIGATION AND ADJUDICATION INSTITUTE

2016 ANNUAL CONFERENCE AT
GEORGE WASHINGTON UNIVERSITY
JULY 18–22, 2016



THE NATIONAL CENTER FOR
CAMPUS PUBLIC SAFETY

TRAUMA-INFORMED SEXUAL ASSAULT INVESTIGATION AND ADJUDICATION INSTITUTE

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Doe v. Temple University, Not Cited (E.D. Pa 09/03/2014) WL 4375613	406
Trauma and Recovery: The aftermath of violence – from domestic abuse to political terror, Judy Herman, MD (Recommended Book)	
The Body Keeps Score: Brain, Mind, and Body in the Healing of Trauma, Bessel VanderKolk (Recommended Book)	
In an Unspoken Voice: How the Body Releases Trauma and Restores Goodness, Peter Levine (Recommended Book)	
Mindfulness for Beginners: Reclaiming the Present Moment – and Your Life, Jon Kabat-Zinn (Recommended Book)	
Gratitude Works! A 21-day Program for Creating Emotional Prosperity, Robert Emmons (Recommended Book)	
The Relaxation and Stress Reduction Workbook, Martha Davis (Recommended Book)	

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PART I: SEMINAR MATERIALS

Agenda and Curriculum Overview

TRAUMA-INFORMED SEXUAL ASSAULT INVESTIGATION AND ADJUDICATION INSTITUTE

DAY 1 (8:30 A.M. – 5:00 P.M.)

Module 1: Welcome

Module 2: Overview of Title IX and Clery Act and Institutional Obligations Module 3: Community Coordination

Module 4: The Culture in Which We Live: Understanding the Rape Narrative Module 5: Impact of Language

DAY 2 (8:30 A.M. – 5:00 P.M.)

Module 6: Understanding the Effects of Trauma

Module 7: Sexual Assault First Response: First Impressions Matter Module 8: Interviewing the Complainant

Module 9: Overcoming the Complexities of Sexual Violence: Offender Realities

DAY 3 (8:30 A.M. – 5:00 P.M.)

Module 10: Interviewing the Respondent

Module 11: Sexual Assault: Investigative Strategies Module 12: Report Writing and Assessment

DAY 4 (8:30 A.M. – 5:00 P.M.)

Module 13: Adjudication: Protecting Complainants, Promoting Accountability, Respecting Rights Module 14: Adjudication: Appeals and Logistics

Module 15: Mandatory Training to Comply with OCR Guidance and the Clery Act

Module 16: Institutional Support and Self Care: Taking Care of Yourself So You Can Take Care of Others Module 17: Program Close

Optional Q&A Session (4:00 p.m. – 5:00 p.m.)

JULY 22 (8:30 A.M. – 5:00 P.M.)

DRAFT SCHEDULE OF PRESENTERS

APPLYING THE BEST AVAILABLE RESEARCH EVIDENCE TO BUILD COMPREHENSIVE STRATEGIES FOR SEXUAL VIOLENCE PREVENTION

Presenter: Dr. Kathleen C. Basile, CDC

Eliminating sexual violence on college campuses and in communities requires a comprehensive approach to primary prevention based on the best available research evidence. The CDC, in partnership with our federal and local partners, is committed to advancing the science of sexual violence prevention to inform the development of more effective strategies. This workshop will provide an overview of the latest knowledge related to sexual violence, including risk and protective factors, evidence-based strategies, and the need for comprehensive, multi-level approaches that address the complexities of this problem. Participants will have an opportunity to think about ways to apply this knowledge to build a comprehensive prevention plan for their campus or community.

SERVING SURVIVORS OF CAMPUS SEXUAL ASSAULT AT THE INTERSECTION OF THE CLERY ACT AND TITLE IX PRESENTERS:

Lindy Aldrich, Victim Rights Law Center

Alison Kiss, Clery Center

Billie Matelevich-Hoang, OVC TTAC.

The panel will focus on the Intersections of the Clery Act and Title IX, co-presented by members of the Victim Rights Law Center (VRLC) and the Clery Center for Security On Campus. These two perspectives will be presented in conjunction with a victim advocate who could discuss how to best provide victim services while navigating the two sets of requirements. The presentation will include references to the relevant archived webinars that have been offered by the OVC Training and Technical Assistance Center (OVC TTAC) as well as new webinars currently in development. The resources and strategies highlighted during this panel would also incorporate Victim Law, and other OVC training and technical options for the audience.

TITLE IX AND SEXUAL VIOLENCE: AN IN-DEPTH OVERVIEW OF SCHOOLS' OBLIGATIONS UNDER TITLE IX TO ADDRESS SEXUAL VIOLENCE

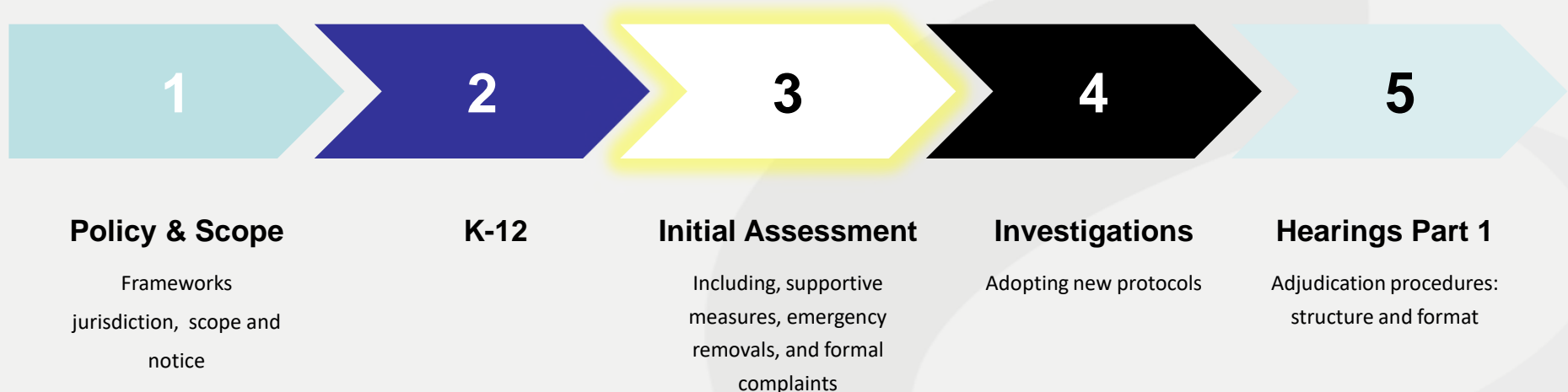
Rachel Gettler, OCR

Colleen Phillips or Whitney Pellegrino, CRT

The federal government is committed to assisting schools across the country as they work to address sexual violence on campus. Although progress has been made, there still remains confusion regarding schools' obligations under Title IX. This session will provide participants with information regarding schools' obligations under Title IX to address sexual violence. Topics will include notice, responsible employees, investigation and adjudication, remedies, confidentiality, and the differences between Title IX and the Clery Act..)

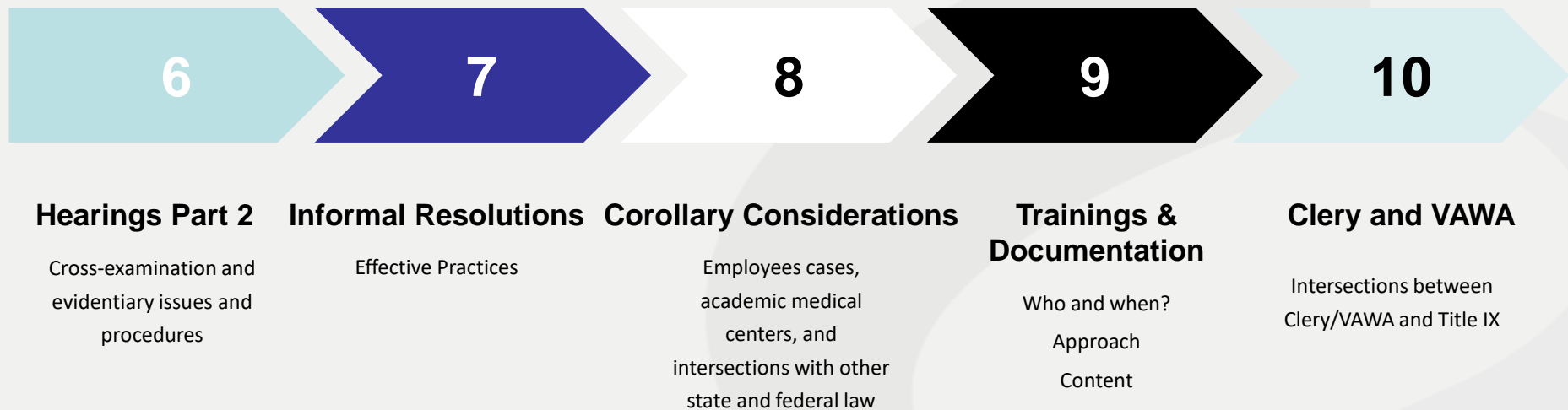
Introducing the Webinar Series

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



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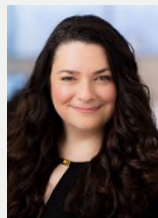
Institutional Response Group



Gina Maisto Smith
Cozen O'Connor



Leslie Gomez
Cozen O'Connor



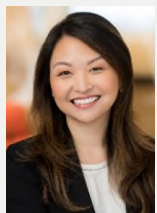
Maureen P. Holland
Cozen O'Connor



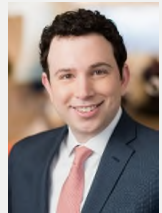
Devon Turner Riley
Cozen O'Connor



Michael Stackow
Cozen O'Connor



Helen Park
Cozen O'Connor



Adam M. Shapiro
Cozen O'Connor



Peter C. Lim
Cozen O'Connor



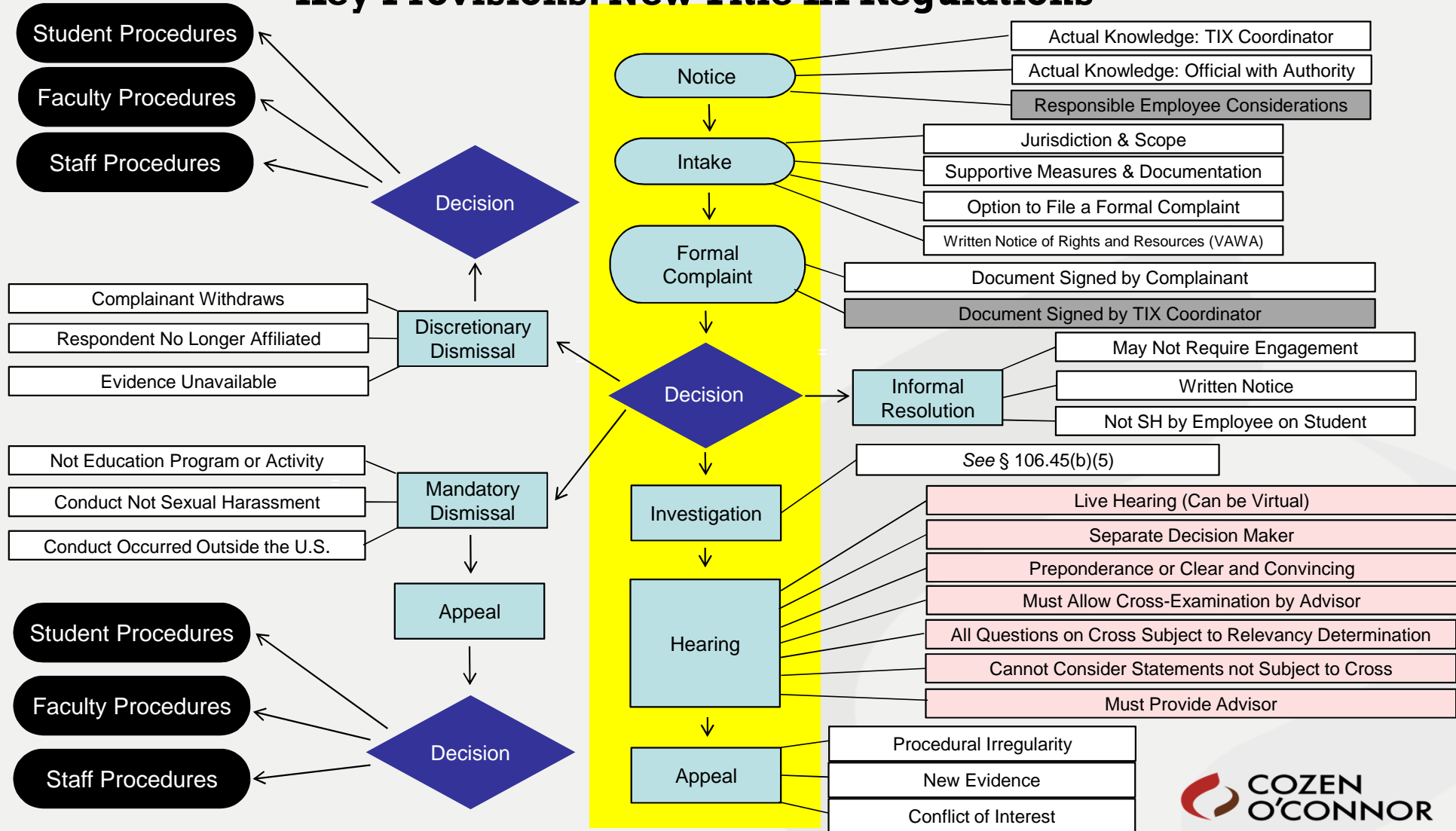
Joseph A. Tate, Jr.
Cozen O'Connor



Christi Hurt
Margolis Healy

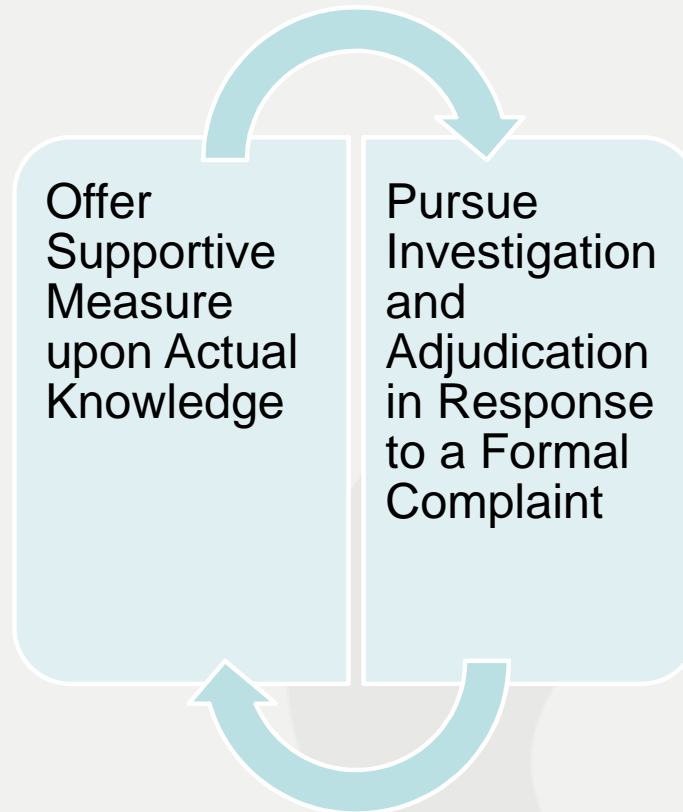
Institutional Response Group Paralegal and Administration Team:
Heather Dunn, Megan Lincoln, Braelyn Schenk, and Mary Sotos

Key Provisions: New Title IX Regulations

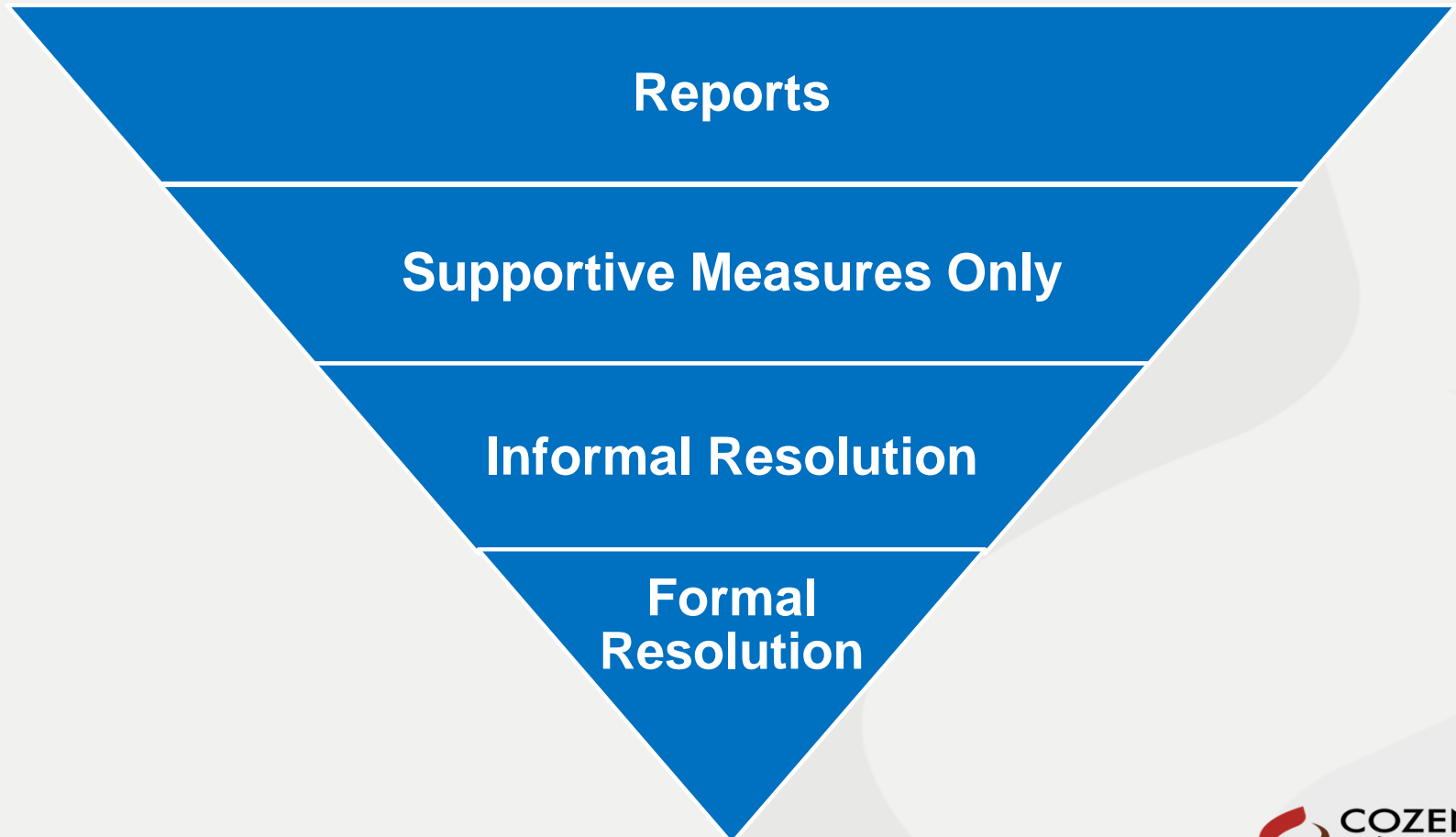


Key Provisions of Title IX Regulations issued May 6, 2020;

Understanding Two Key Provisions



The Importance of Intake and Outreach



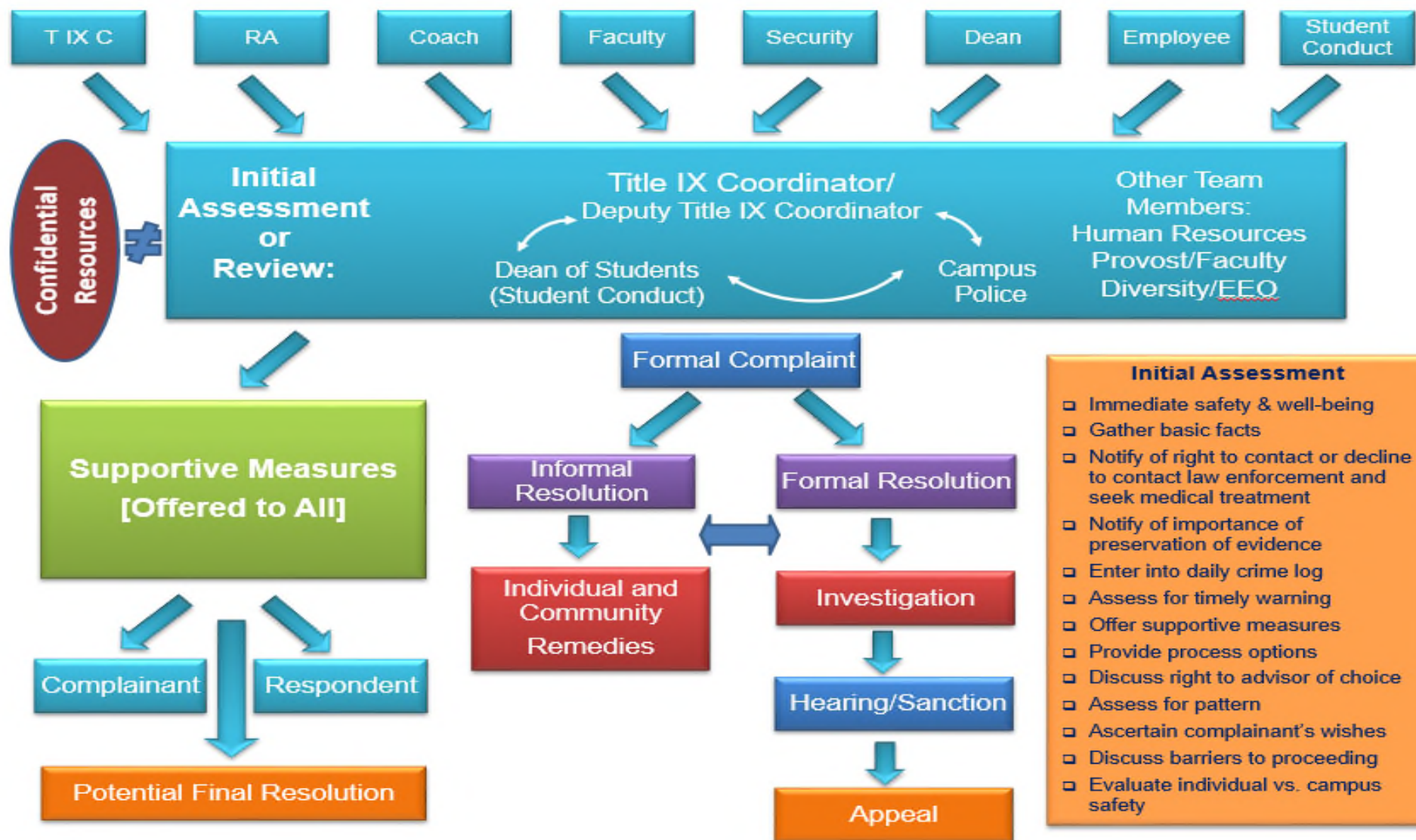
Intake and Outreach

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

The Importance of Intake and Outreach

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

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



Intake and Initial Assessment

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

Importance of Getting Everything Central

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

Centralized Review Process

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

Fostering Increased Reporting

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

Fostering Increased Reporting

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

Core Elements of Initial Assessment

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

VAWA Requirements

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

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

VAWA Requirements

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

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

Separating Support from Investigations

- Separate support/advocacy/intake functions from investigative/adjudicative functions to reduce potential for conflict of interest or perception of bias
- Reinforce neutrality in language and communications
- Ensure sufficient resources for timely response
- Consider creative models for separation of intake from support from investigation from decision-making

Separating Support from Investigations

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

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

Complainant Agency & Autonomy

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

Complainant Agency & Autonomy

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

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

Assessing for Pattern

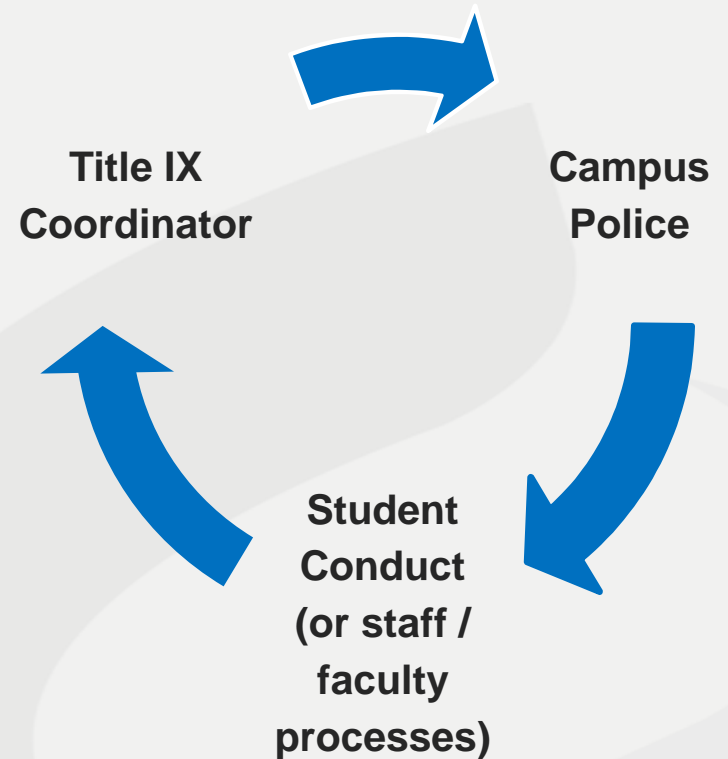
- People
 - Are the complainant or respondent parties in another current or prior matter?
 - Are the complainant or respondent involved in an organization, department, or team that is part of a current or prior matter?
- Locations
 - Has the location of the incident come up in a prior matter?
- Conduct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

Importance of Training

- Regulations require training for Title IX Coordinator, Investigator, Decision-Maker, Facilitator of Informal Resolution Process:
 - The definition of Sexual Harassment under § 106.30
 - The scope of the University's education program or activity
 - How to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes
 - How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias
- For Decision-Makers
 - Issues of relevance of questions and evidence, including when questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant
- For Investigators
 - Issues of relevance to create an investigative report that fairly summarizes relevant evidence

Importance of Coordination

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



Title IX Multi-Disciplinary Team

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

Importance of Documentation

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

Importance of Documentation

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

Importance of Documentation

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

Case Management and Documentation

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

Sample Checklists

<p>U.S. Department of Education Party wants to http://www.ed.gov</p> <p>The Party requested the following:</p> <p>_____ Personal Support</p> <p>_____ Academic Support specify: _____</p> <p>_____ Other Interim</p> <p>_____ The Party request</p> <p>By signing below, I signify that I agree with the above. If the Party had any questions, I will contact the Party with my contact information at any time.</p> <p>_____ Signature</p> <p>_____ Printed Name</p> <p>_____ Signature</p> <p>_____ Printed Name</p>	<p>_____ Standard of Review determining whether the Party is more likely than not</p> <p>_____ Right to Notification regarding the time to request updates, have the right to request updates, outcome, sanction, and</p> <p>_____ Resolution & Remedies of the policy occurs is designed to eliminate while supporting the Party may include education, conduct, however, deleterious to the education or expulsion. The Party disciplinary probation, expulsion. The University outcomes, to include University housing, may also include academic retaking a class with</p> <p>_____ Timing. The Party University will seek 60 calendar days from the timeframe for good be required for good comply with a request witnesses; or for calendar, University and extent of the all</p> <p>_____ Amnesty. The Party reports of conduct action against student (underage or illegal investigation of property or safety of any educational discussion drug use.</p> <p>_____ Additional Information their rights, or if the</p>	<p>_____ counseling, medical who are confidential</p> <p>_____ Privacy. The Party individuals who gender-based harassment confidential, the</p> <p>_____ Process Options:</p> <p>_____ Formal Investigation right to a prompt the University. The both parties—information, suggestion hearing panel, a decision in the attention of the the investigation interviewed.</p> <p>_____ Informal/Voluntary investigation and resolution, while supportive, education informed that is not involve taking instituting support counseling or other and community extracurricular, hostile environment</p> <p>_____ Other possible based education respondent, and resolution used, will not compel or to participate voluntary, may</p> <p>_____ Preserving Evidence evidence that documents, photographs, consent of the a</p>	<p>_____ experience; protect broader University process; and determine maintain continued restrictive action are available regarding disciplinary action.</p> <p>_____ Medical Attention strongly encourage obtain medical assessment for physical "forensic exam" to local resources that</p> <p>_____ First Hospital XXX Blank St (123) 123-456</p> <p>_____ Second Hospital XXX Blank St (123) 123-456</p> <p>_____ Anti-Retaliation Statement retaliation by individual may take strong resolve over the individual words taken against Protected activity is complaint; opposing reasonably believed or words taken against proceedings under to, adverse action of person (under similar in protected activity</p> <p>_____ Right to Advisor of his/her choice including any meeting person, including a investigation. The Party or in any manner de</p> <p>_____ Confidential Support campus confidential</p>	<p align="center">TITLE IX OFFICE INTAKE / CHECKLIST FORM</p> <p>Meeting Date: _____ Meeting Time: _____ AM / PM</p> <p>Meeting Location: _____</p> <p>Name: _____ ID: _____</p> <p>Phone: _____ Email: _____</p> <p>Date of Birth: _____ Was Party a minor at the time of the incident? _____</p> <p>Location of Incident: _____ Date of Incident: _____</p> <p>Other Party's Name: _____ Phone: _____</p> <p>Has the individual filed a police report? _____</p> <p>Title IX Staff Member(s): _____</p> <p>Basic Incident Summary: _____ _____ _____</p> <p>How did the Party connect with the Title IX Office? _____ _____ _____</p> <p>I acknowledge that in meeting with the Party, the following information was discussed, and the Party was given the opportunity to ask questions:</p> <p>_____ Title IX Coordinator. The Party was informed that the University's Title IX Coordinator is XXX and that he can be reached at <u>email address</u>. The Party was instructed that they may contact them at any time.</p> <p>_____ Policy Document. The Party was provided with a copy of the applicable Policy/<u>ies</u> and Procedures and had the opportunity to ask questions about them.</p> <p>_____ Law Enforcement. The Party was informed that they have the right to choose to report an incident to law enforcement or to decline to report to law enforcement. The Party was informed of their right to participate in the Title IX resolution process, or file criminal charges through the appropriate police department, or both. The Party was informed that a criminal investigation does not relieve the University of its duties under Title IX to respond promptly and effectively to such complaints.</p> <p>_____ Interim Measures. The Party was instructed about their ability to request and receive reasonable and appropriate interim measures designed to preserve the Party's educational</p> <p align="right">Page 1 of 5</p>
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Sample Checklists

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

Interim Measures Assessment Team (IMAT) Worksheet

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

Case Information

Name of Respondent:

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

Allegation(s):

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

Safety:

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

Complainant's wishes regarding interim measures, if known:

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

Respondent's wishes regarding interim measures, if known:

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

¹ If so, inform Media & Communications about interim measures.

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

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

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

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

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

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

⁴ Contact residence life and campus police.

⁵ Contact appropriate authority and campus police.

⁶ Contact Student Life and the advisor for that activity.

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

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

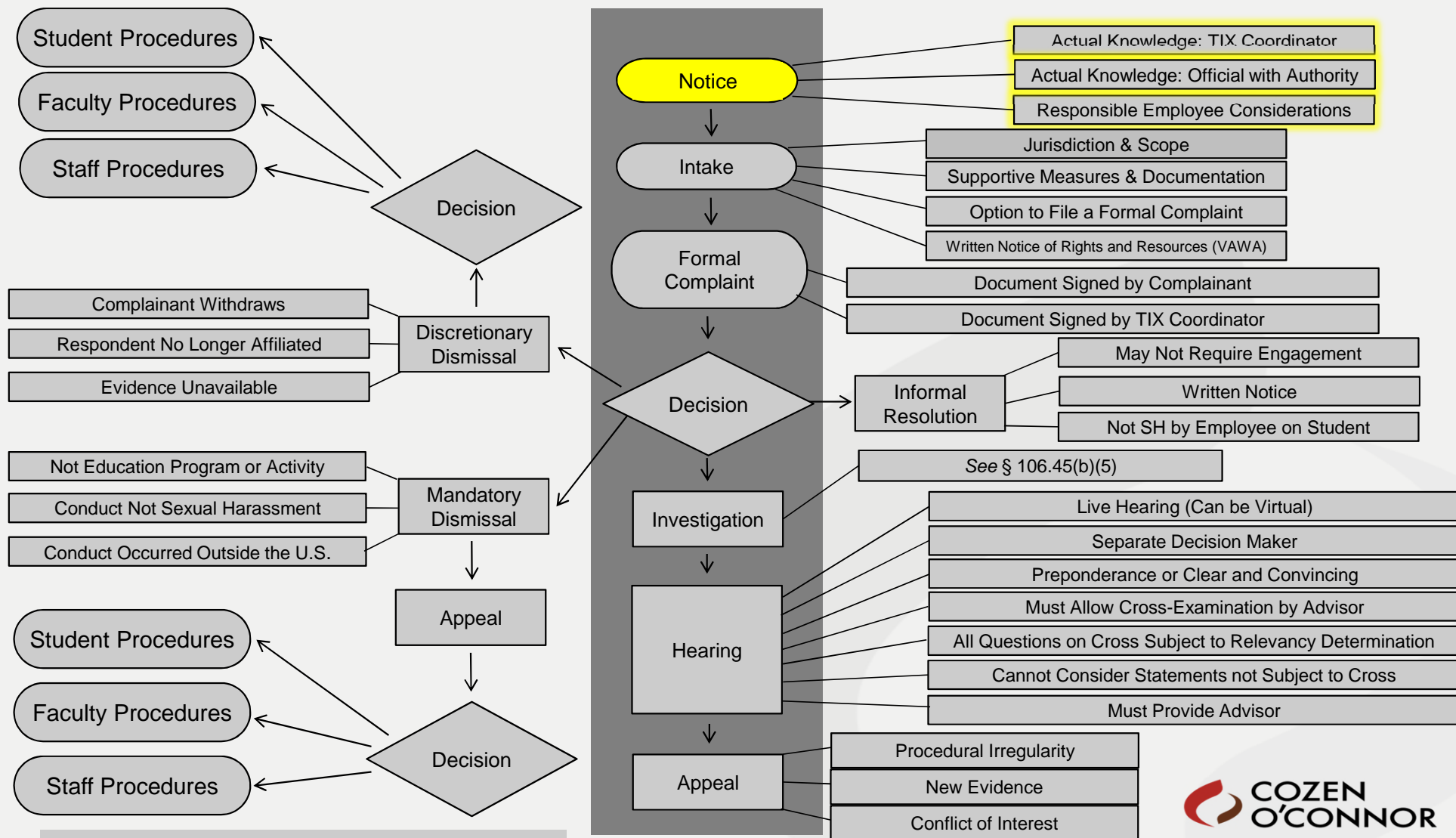
Tending to the Individual

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

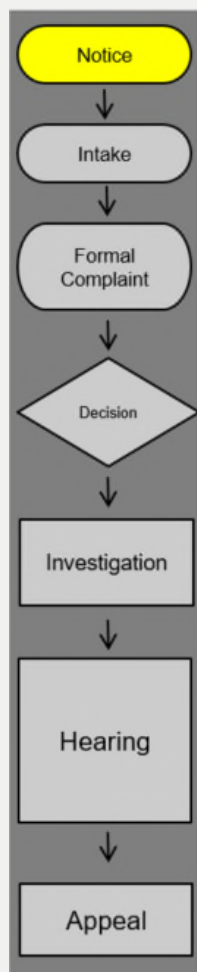
Communications

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

NOTICE



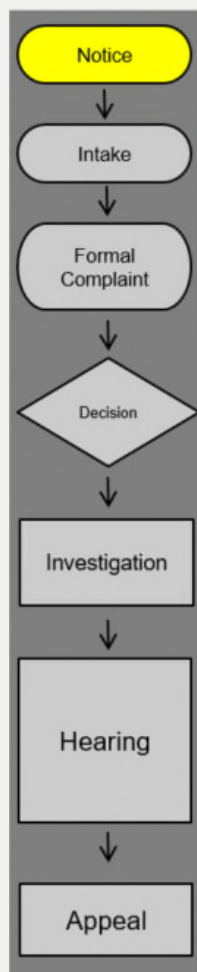
Key Provisions of Title IX Regulations issued May 6, 2020;



Notice

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

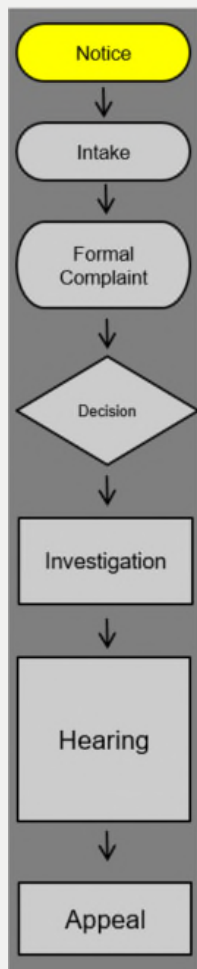
Title IX Regulations issued May 6, 2020; § 106.30(a)



Notice

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

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



Notice: Institutional Response

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

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

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

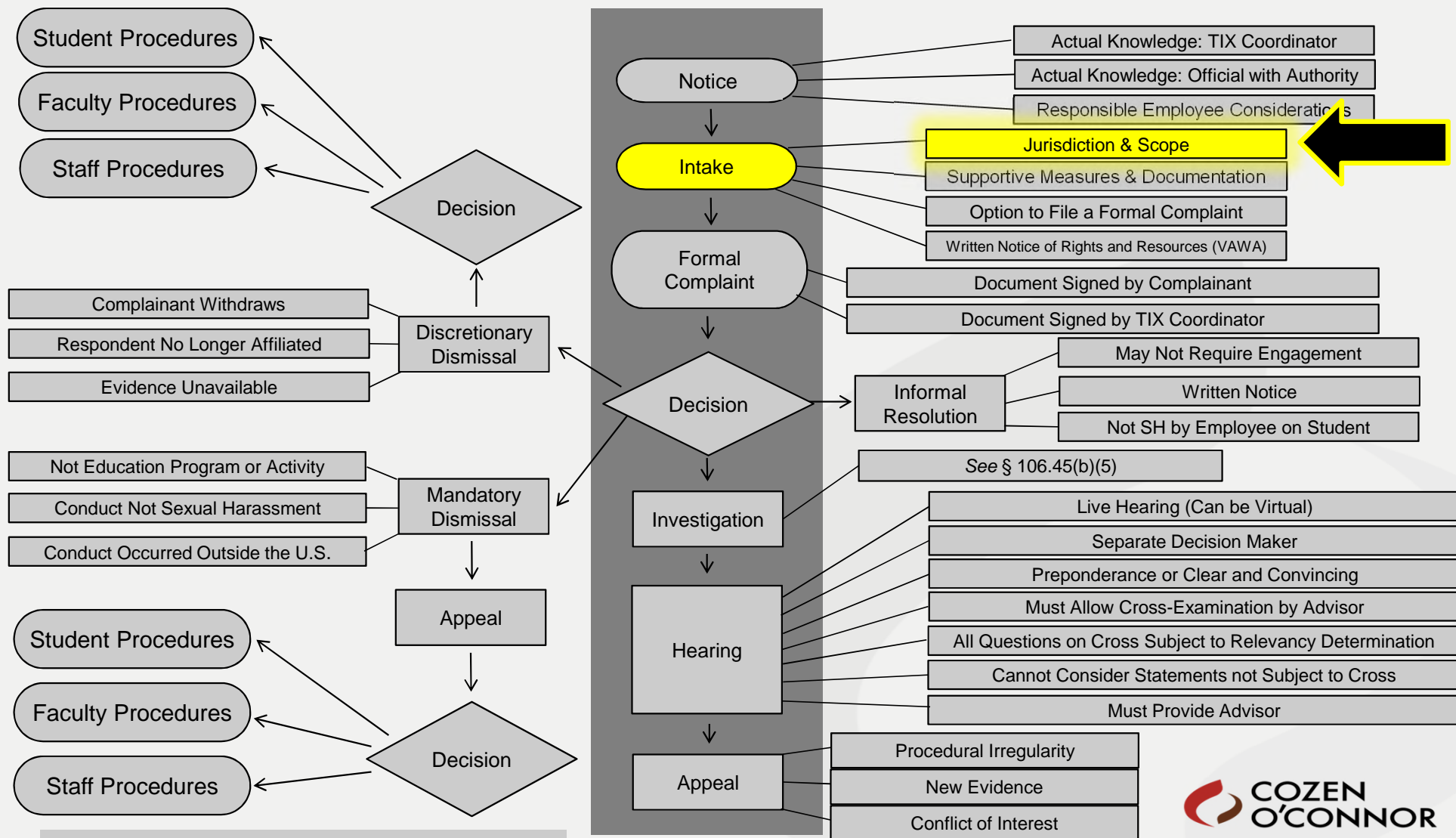
Practical Considerations & Challenges

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

Practical Considerations & Challenges

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

JURISDICTION AND SCOPE



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

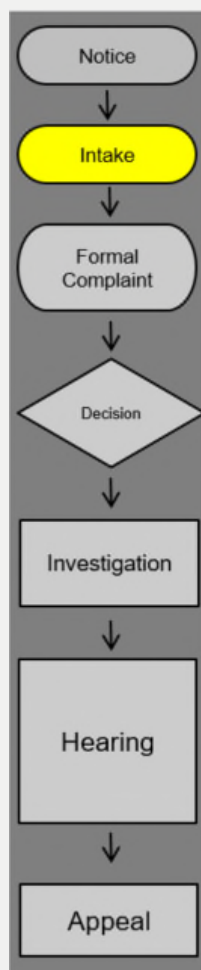
Jurisdiction: Framing Principle

2

“A recipient with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States, must respond promptly in a manner that is not deliberately indifferent.”

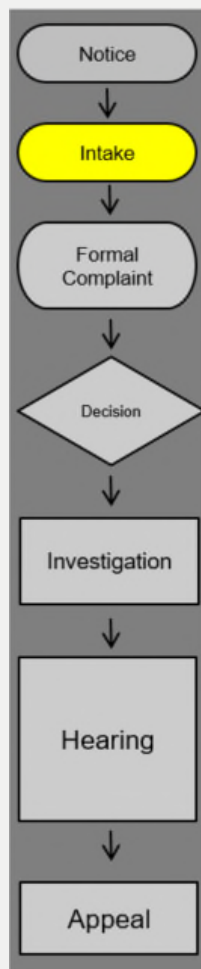
Title IX Regulations issued May 6, 2020; § 106.45(a)

Jurisdiction: Education Program or Activity



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

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

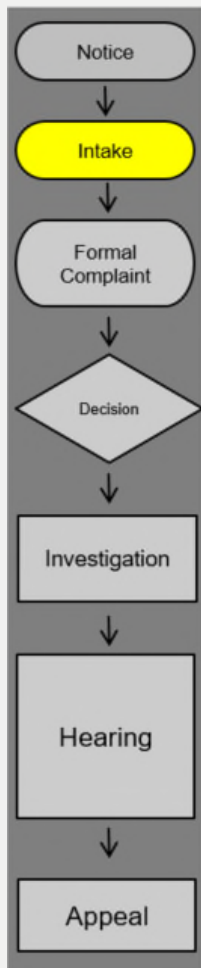


Jurisdiction: Who

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

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

Jurisdiction: Where

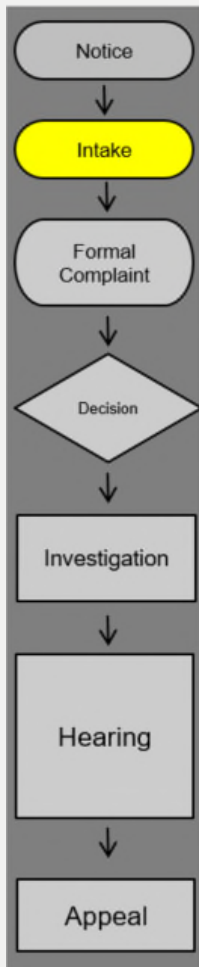


- Applies only to sex discrimination occurring **against a person in the United States** in an education program or activity
 - “The Department reiterates that the ‘education program or activity’ limitation in the final regulations
 - does not create or apply a geographic test
 - does not draw a line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

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

Jurisdiction: On Campus

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



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

Jurisdiction: Off Campus



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

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



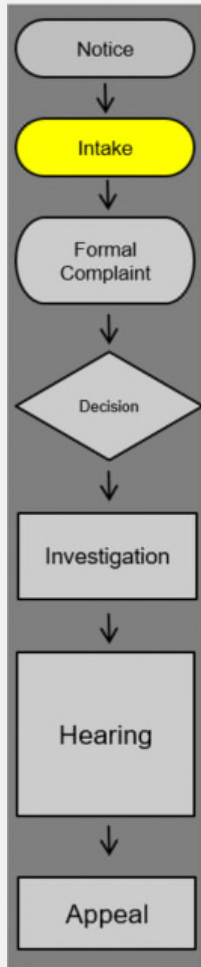
Jurisdiction: Course of Conduct

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

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

Jurisdiction: What

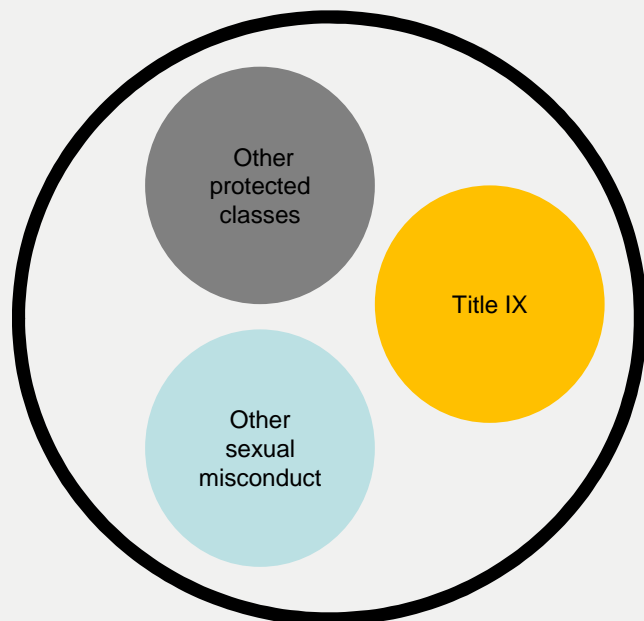
- Narrowed & expanded definition of sexual harassment
 - Quid pro quo
 - Unwelcome conduct determined by a reasonable person to be so **severe, pervasive, and objectively** offensive that it **effectively denies** a person equal access to the recipient's education program or activity
 - Inclusion of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



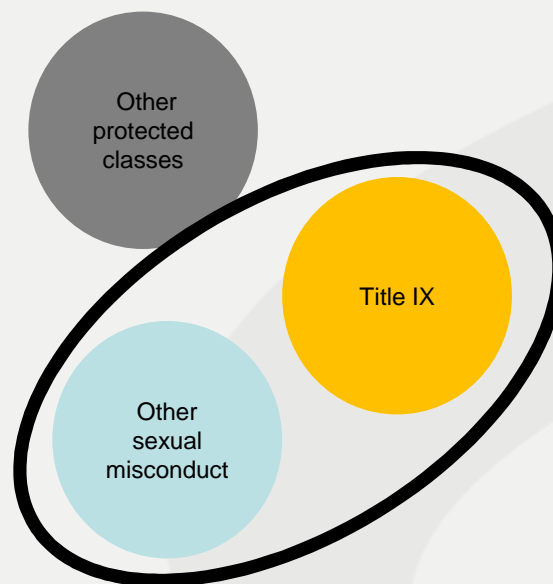
Title IX Regulations issued May 6, 2020; § 106.30(a)

Policy Framework Options

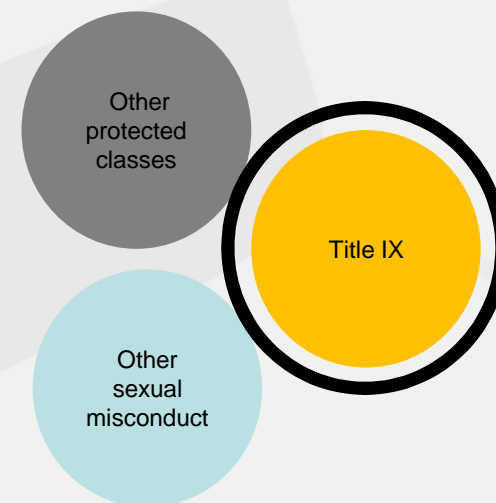
All Protected Classes



Sexual Misconduct



Title IX Only



Procedural Framework

WHAT

All Protected Classes

Sexual Misconduct

Title IX Only

WHERE

Geographic Location;
Education Program or
Activity

Geographic Location;
Education Program or
Activity

Geographic Location;
Education Program or
Activity

HOW

Apply Title IX
Grievance
Process

Apply Other
Misconduct
Process

Apply Title IX
Grievance
Process

Apply Other
Misconduct
Process

Apply Title IX
Grievance
Process

WHO

Faculty

Faculty

Faculty

Faculty

Faculty

Staff

Staff

Staff

Staff

Staff

Student

Student

Student

Student

Student

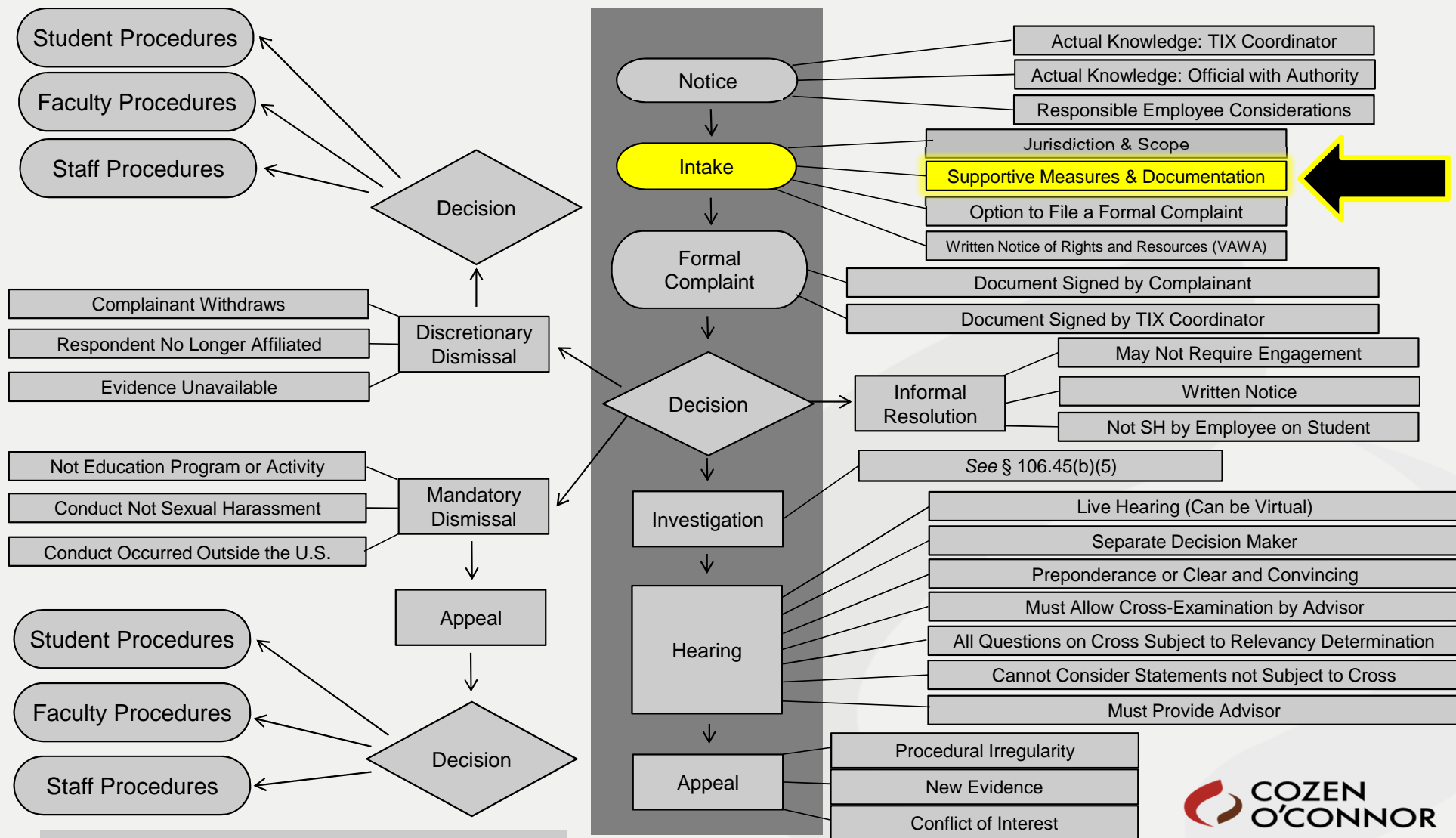
Practical Considerations & Challenges

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

Sample Jurisdiction Questions

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

SUPPORTIVE MEASURES

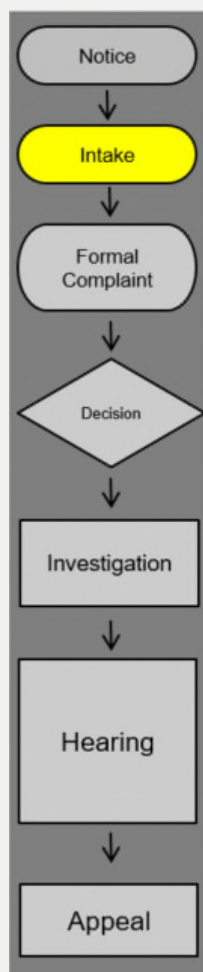


Key Provisions of Title IX Regulations issued May 6, 2020;

Framing Principles

3

“A recipient’s response must treat complainants and respondents equitably by **offering supportive measures** as defined in § 106.30 to a complainant, and by following a grievance process that complies with § 106.45 before the imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in § 106.30, against a respondent.”



Offering Supportive Measures

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

Supportive Measures



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

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

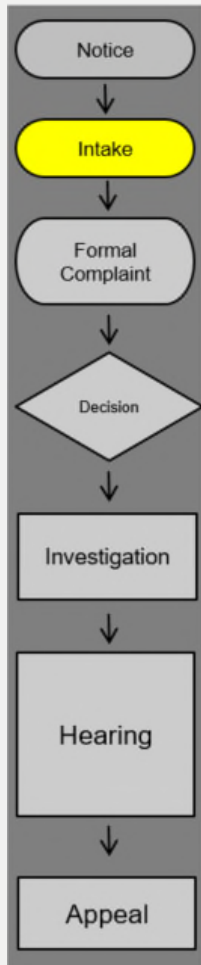
Supportive Measures

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



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

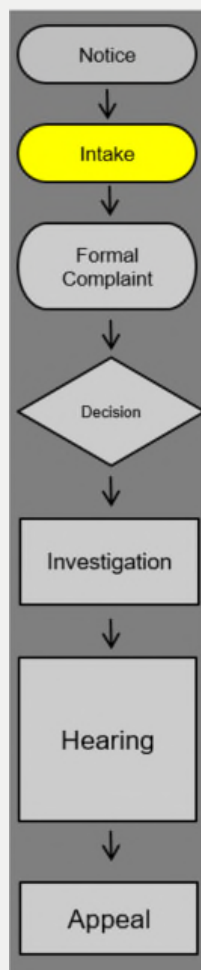
Supportive Measures



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

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

Supportive Measures

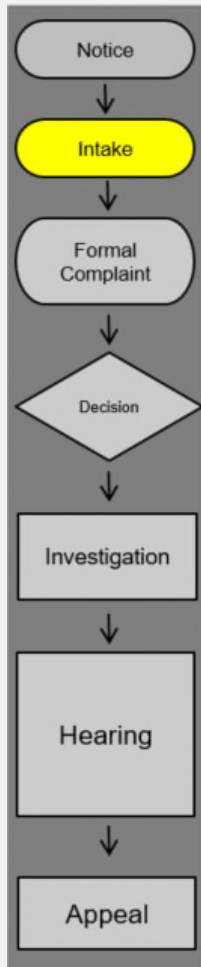


- The Department does not equate the trauma experienced by a sexual harassment victim with the experience of a person accused of sexual harassment.
- Nonetheless, the Department acknowledges that a grievance process may be difficult and stressful for both parties.
- Further, supportive measures may be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

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

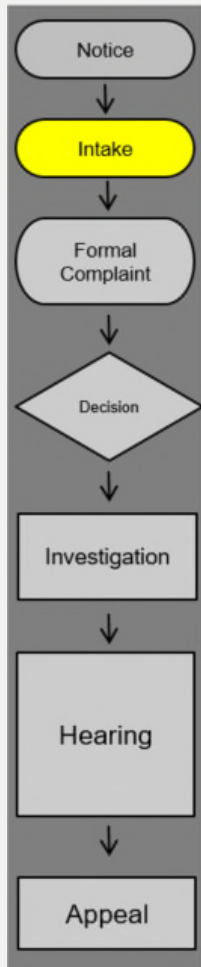
Supportive Measures

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



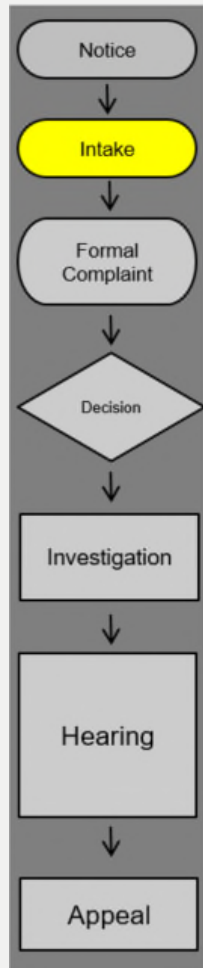
Title IX Regulations May 19, 2020, Preamble, 85 F.R. 30231.

Documentation



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

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



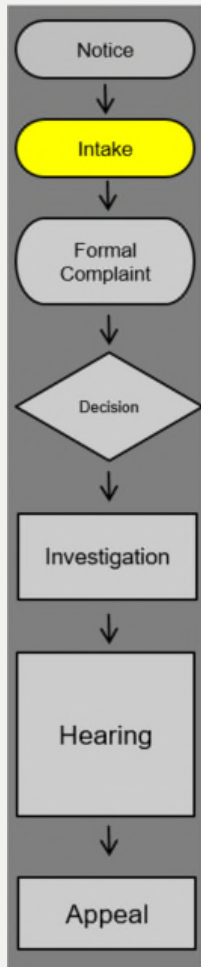
Emergency Removal for Students

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

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

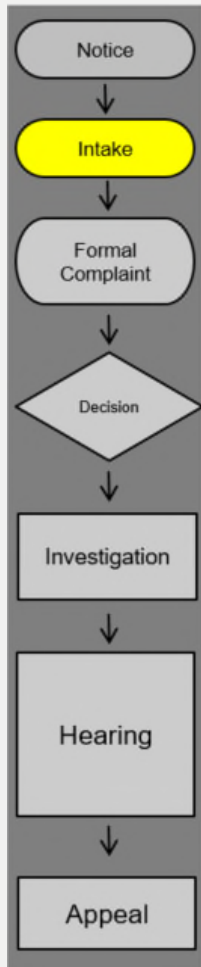
Emergency Removal

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



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

Emergency Removal

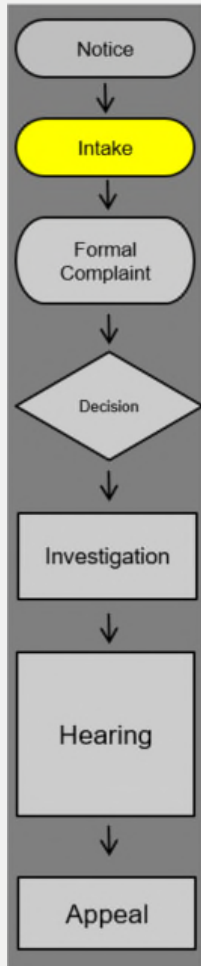


- “Supportive measures are intended to address restoration and preservation of equal educational access, while § 106.44(c) is **intended to apply to genuine emergencies that justify essentially punishing a respondent** (by separating the respondent from educational opportunities and benefits) arising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

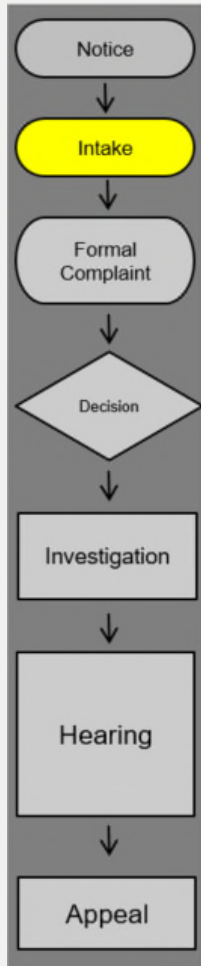
Title IX Regulations May 19, 2020, Preamble, 85 F.R. 30225.

Emergency Removal

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



Emergency Removal

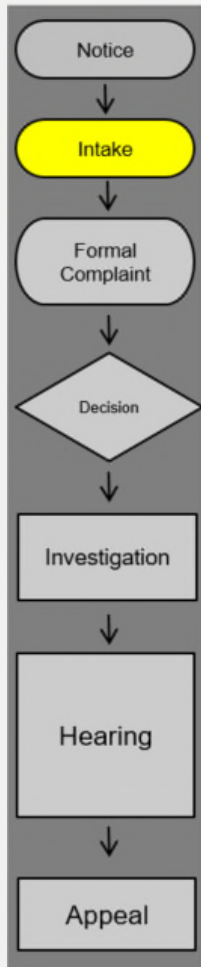


- The Department notes that the final regulations expressly allow a recipient to remove a respondent on an emergency basis and do not prescribe cross-examination as a necessary procedure during the post-removal opportunity to challenge the removal.
- Recipients may also implement supportive measures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

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

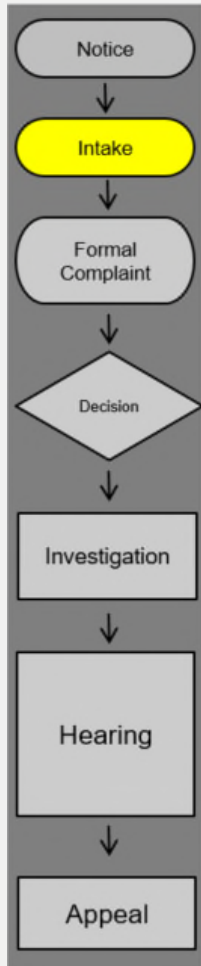
Emergency Removal

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



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

Emergency Removal

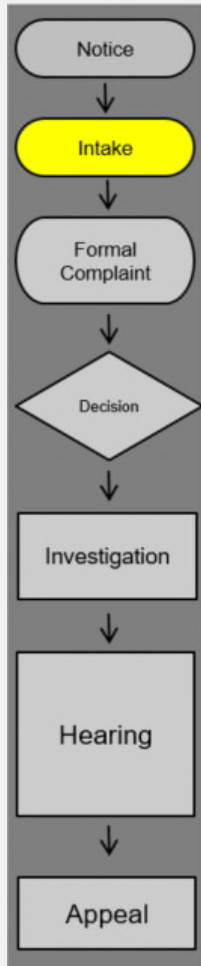


- “We acknowledge that a recipient could remove a respondent under § 106.44(c) without a formal complaint having triggered the § 106.45 grievance process; in such situations, the requirements in § 106.44(c) giving the respondent notice and opportunity to be heard post-removal suffice to protect a respondent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

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

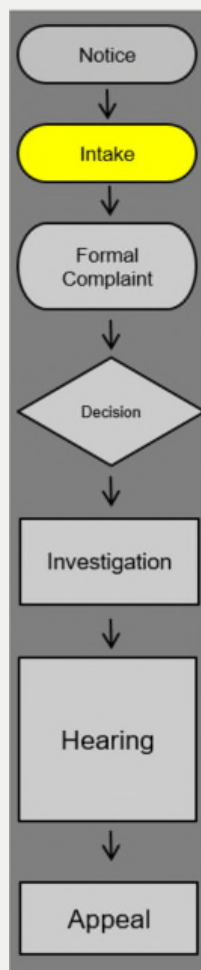
Emergency Removal

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



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

Administrative Leave



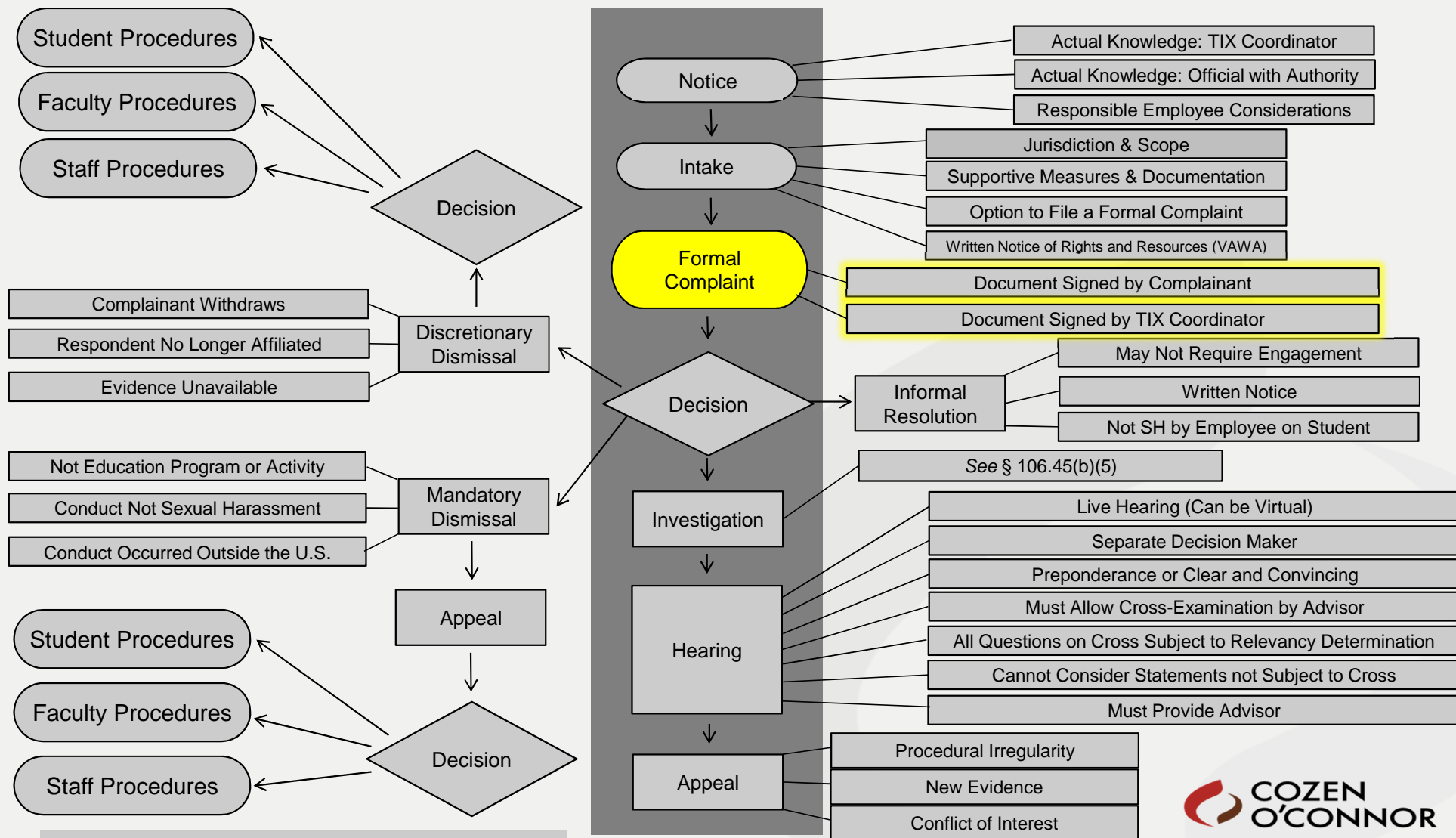
- Nothing in this subpart precludes a recipient from placing a non-student employee respondent on administrative leave during the pendency of a grievance process that complies with § 106.45.
- This provision may not be construed to modify any rights under Section 504 of the Rehabilitation Act of 1973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

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

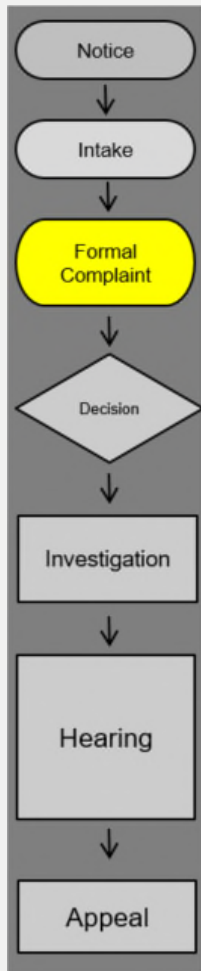
Practical Considerations & Challenges

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

FORMAL COMPLAINTS



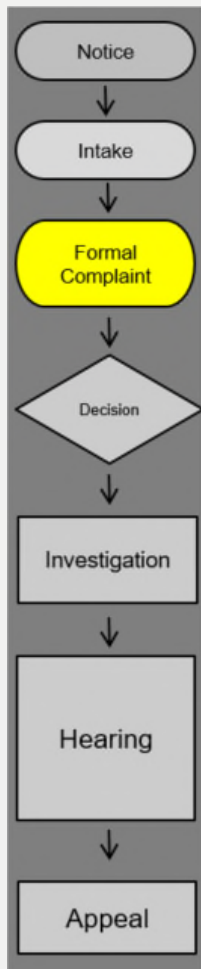
Formal Complaint



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

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

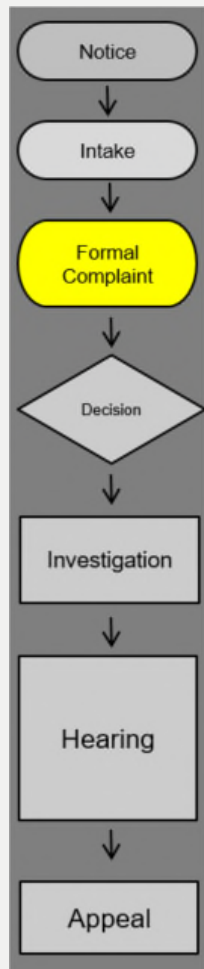
Formal Complaint: Program or Activity



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

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

Formal Complaint: Institutional Response

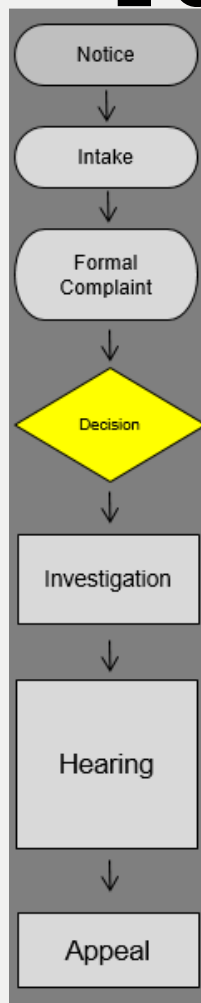


Upon receipt of a **formal complaint**, the institution:

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

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

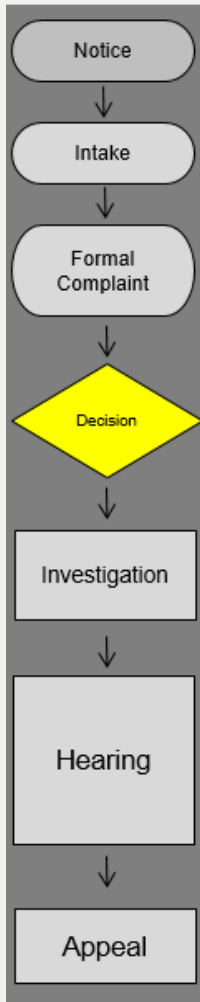
Formal Complaint: Required Dismissal



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

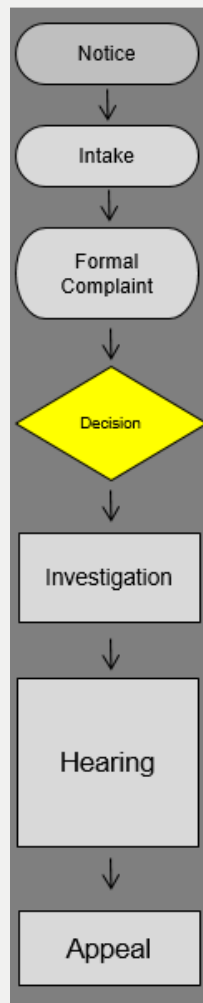
Title IX Regulations issued May 6, 2020; § 106.45(b)(3)

Formal Complaint: Discretionary Dismissal



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

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



Dismissal of Formal Complaint

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

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

Practical Considerations & Challenges

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

Obligation to Third Parties

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

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

Obligations to Third Parties

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

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

Obligations to Third Parties

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

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

Obligations to Third Parties

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

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

When Might a Title IX Coordinator File a Formal Complaint

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

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

Traditional OCR Approach

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

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

Effective Practices

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

Practical Considerations & Challenges

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

Use of Slides

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

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SCENARIOS

Scenario # 1

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

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

Scenario # 2

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

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

Scenario # 3

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

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

Scenario # 4

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

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

Scenario # 5

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

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

Scenario # 6

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

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

Scenario # 7

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

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

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

Scenario # 8

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

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

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

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

Putting the Pieces Together by August 14, 2020

Presented By:

The Institutional Response Group | Cozen O'Connor

Gina Maisto Smith, Chair

Leslie Gomez, Vice Chair

June 8, 2020



A Message from Cozen O'Connor

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

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

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

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

Michael J. Heller
Executive Chairman and Chief Executive Officer



Vincent R. McGuinness, Jr.
President and Managing Partner



Today's Webinar

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

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

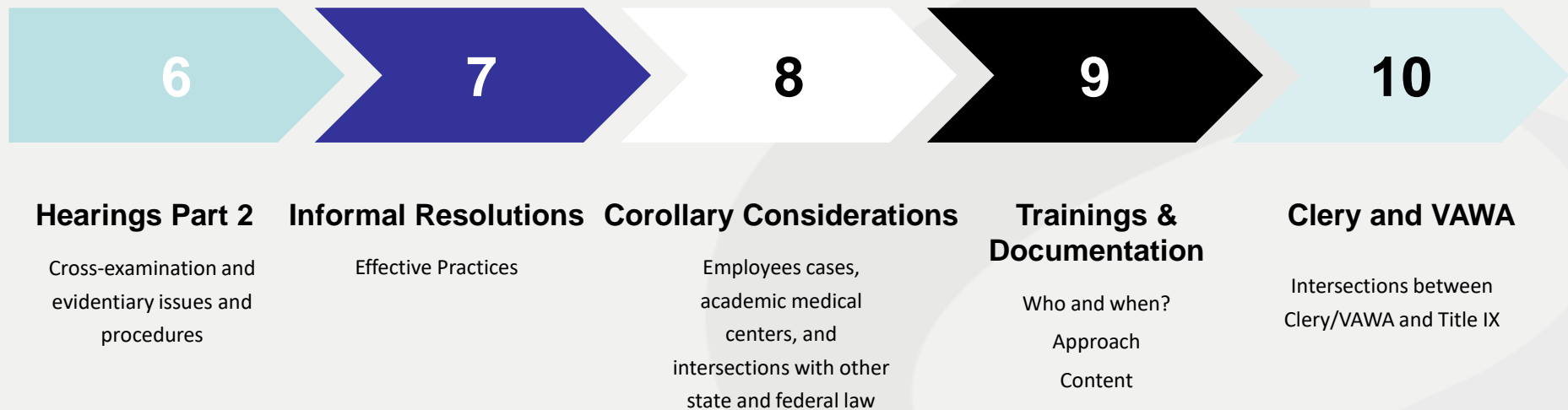
Introducing the Webinar Series

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



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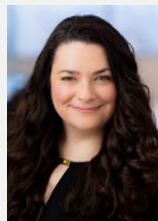
Institutional Response Group



Gina Maisto Smith
Cozen O'Connor



Leslie Gomez
Cozen O'Connor



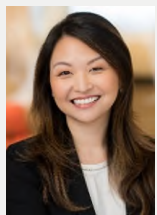
Maureen P. Holland
Cozen O'Connor



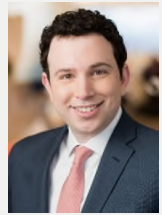
Devon Turner Riley
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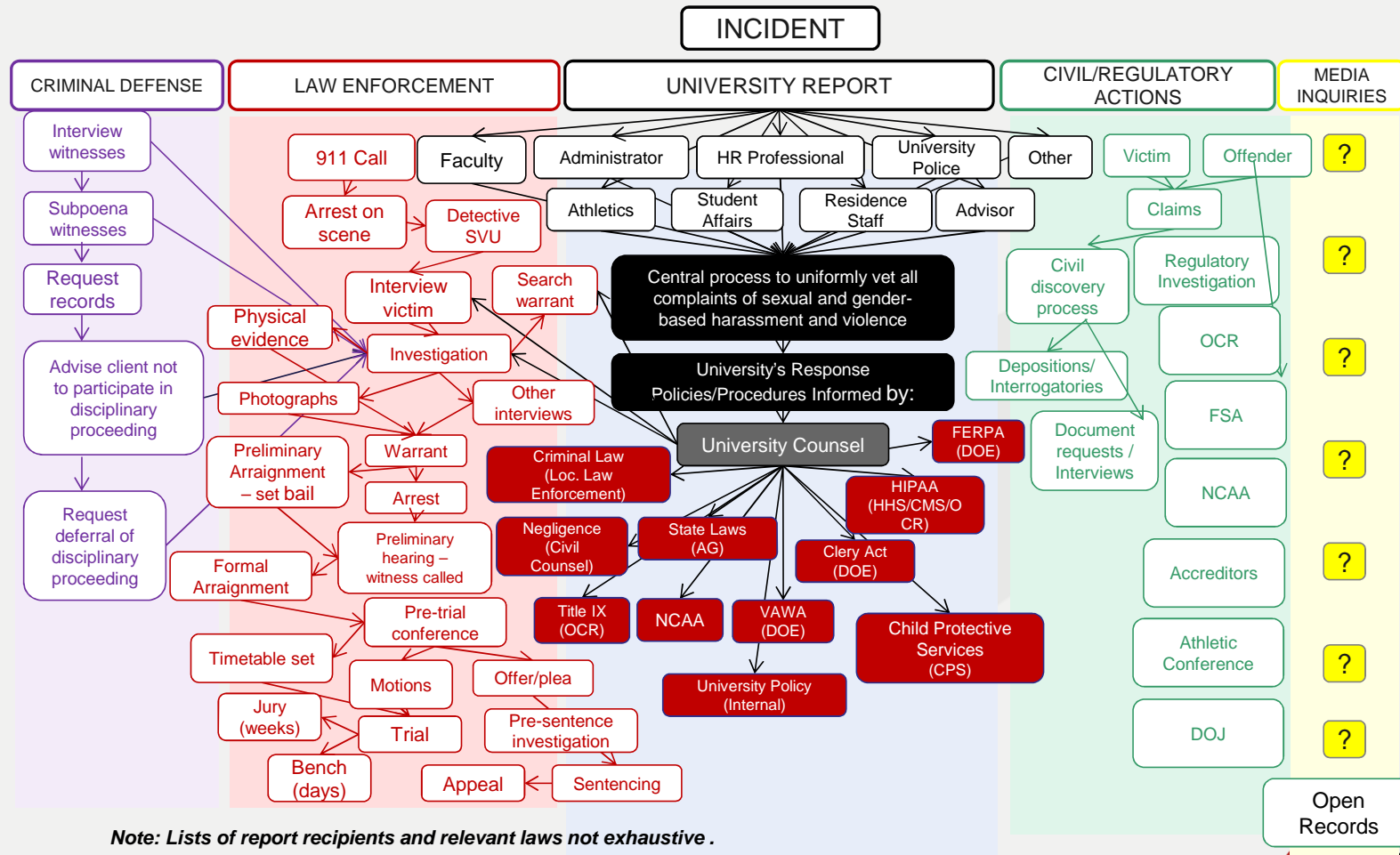


Christi Hurt
Margolis Healy

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



The Challenge of the Context



Now What?



Silver Lining

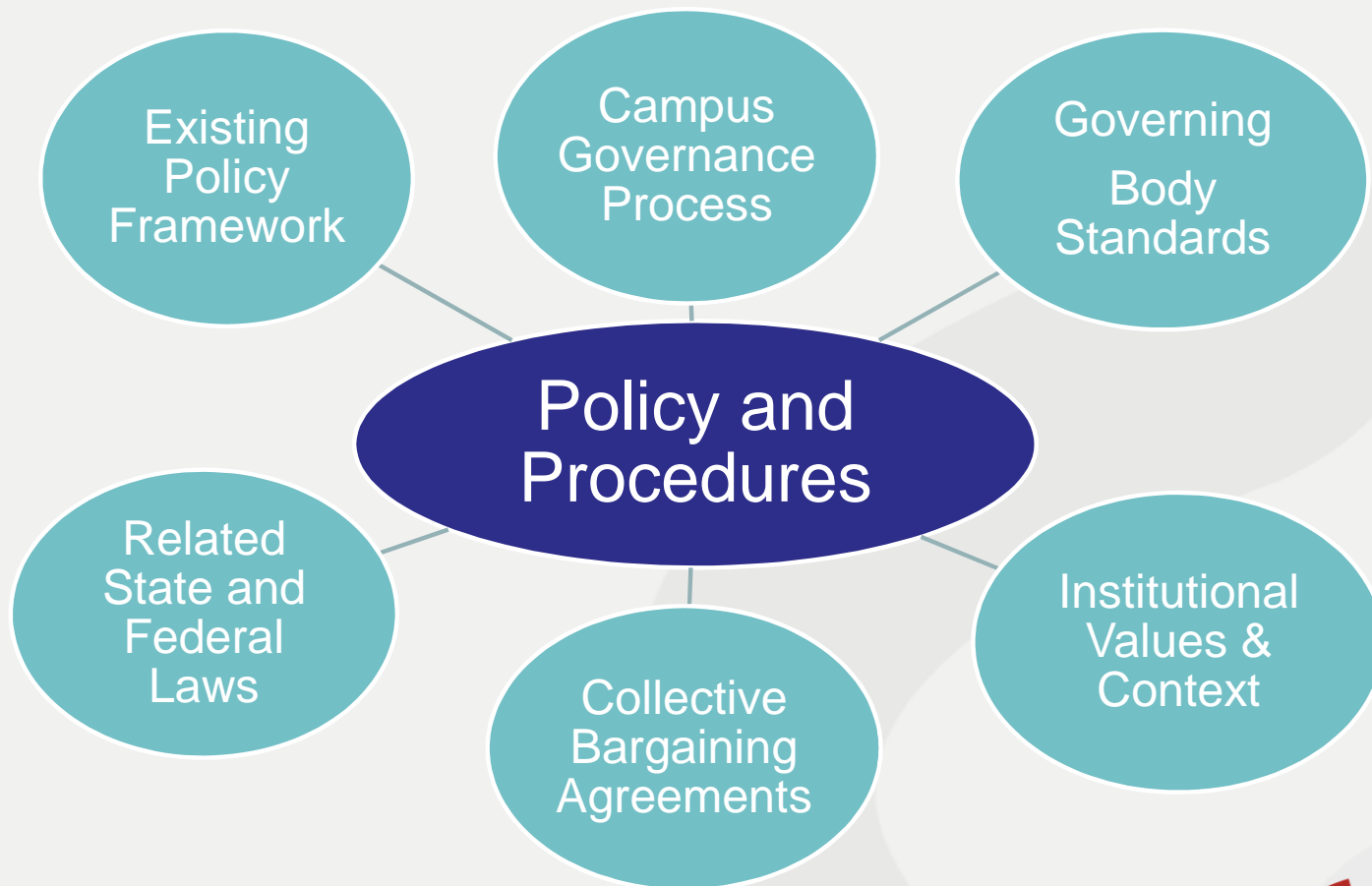


Maintaining Calm



Getty Images

Decision-Making Considerations



Approach to Implementation

Crafting

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

Drafting

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

Staffing

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

Grafting

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

Effective Preparation: Mapping Current State

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

Effective Preparation: Identify Delta

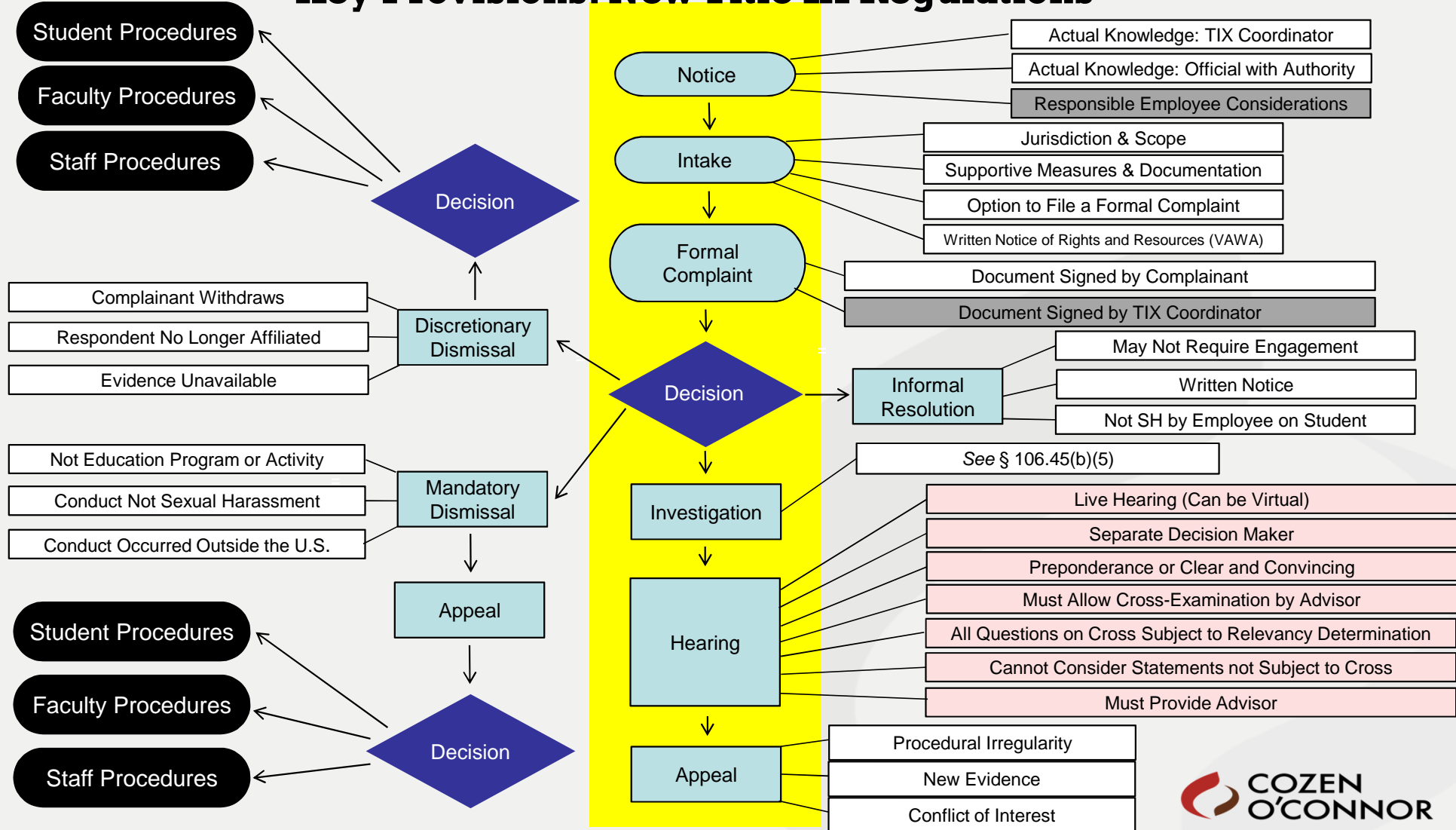
- Review new legal requirements
- Identify delta between current state of operation and new regulations
- Identify delta between current state of operation and effective, informed practices
- Identify key elements to inform design of future state
- Map implementation plan based on evidence, culture,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

Implementation Rubric

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



Key Provisions: New Title IX Regulations



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

Regulations: “Legally Binding Obligations”

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

Regulations: “Best Practices”

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

Title IX Regulations issued May 6, 2020; Executive Summary, p. 18

DECISION-MAKING FRAMEWORK

Framing Principles

1

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

2

“A recipient with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States, must respond promptly in a manner that is not deliberately indifferent.”

3

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

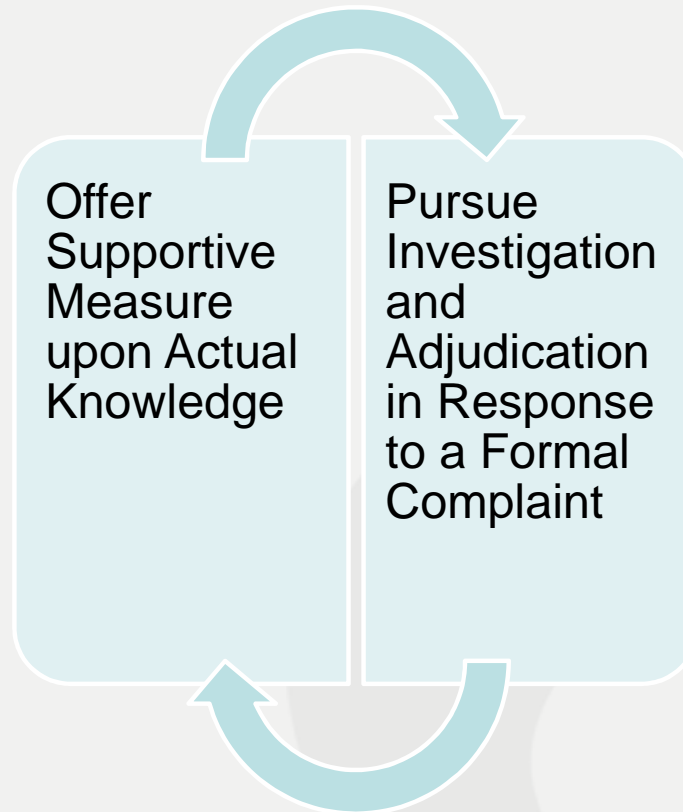
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“A recipient is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances.”

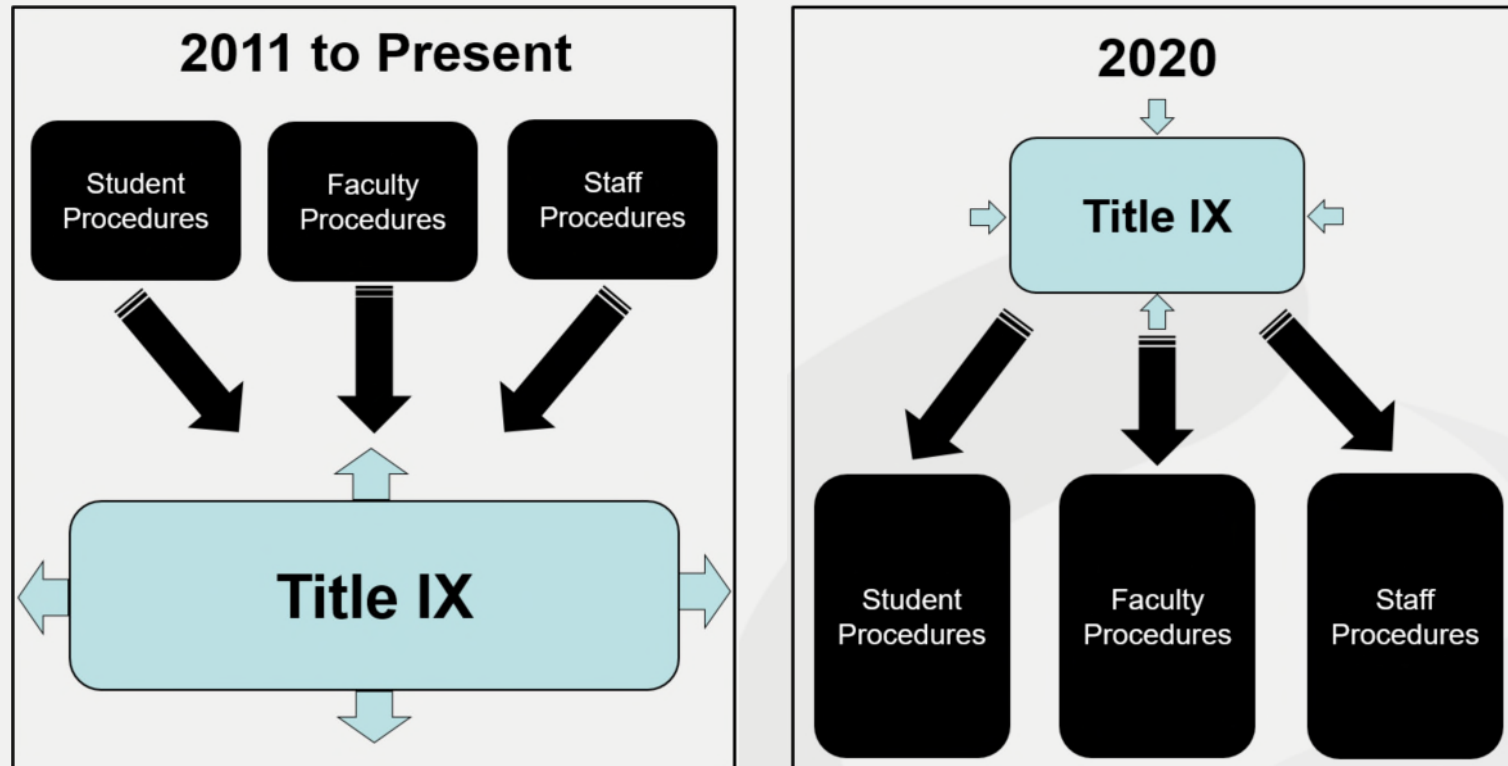
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“If the Assistant Secretary finds that a recipient has discriminated against persons on the basis of sex in an education program or activity under this part, or otherwise violated this part, such recipient must take such remedial action as the Assistant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

Understanding Two Key Provisions



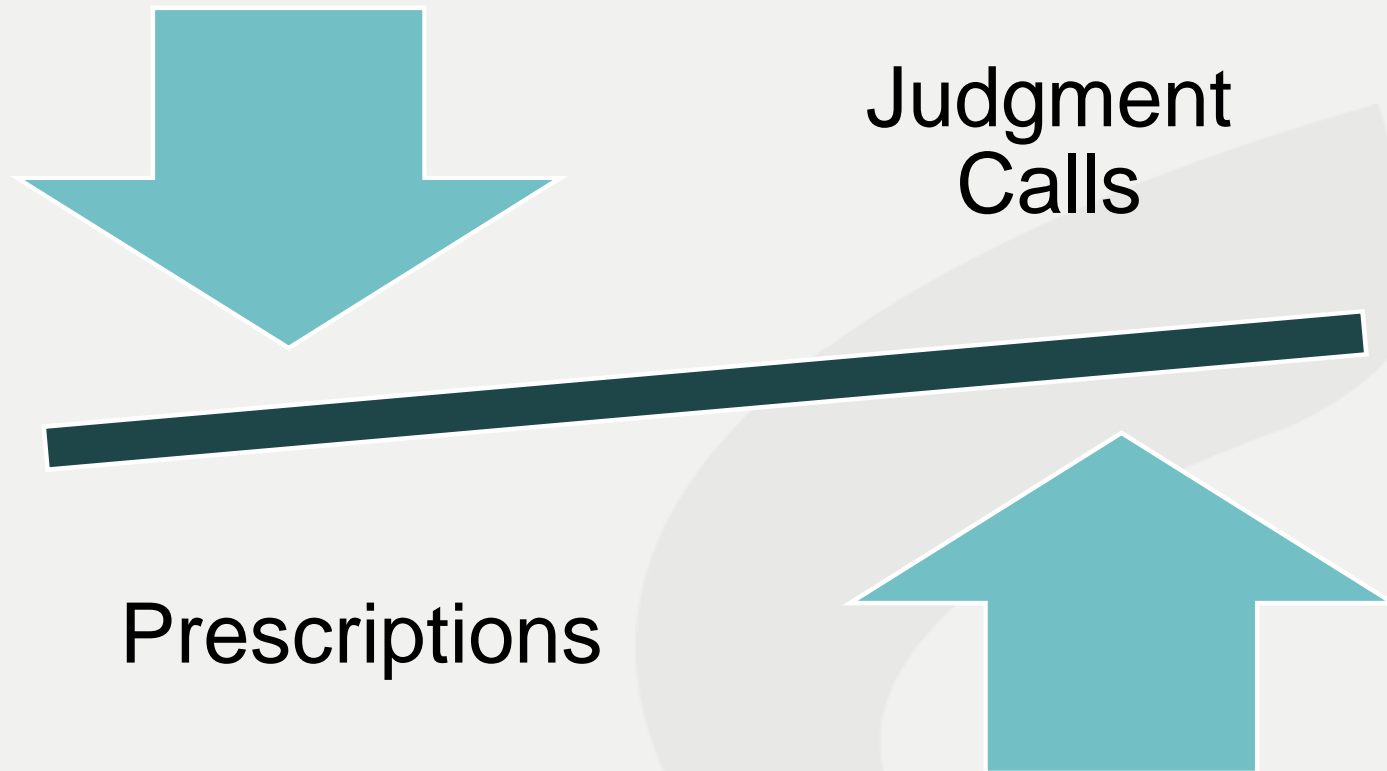
Impact of Jurisdictional Requirements



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

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

Balancing



Prescriptions

Judgment
Calls

Decision-Making Framework

Prescriptive Elements

- Required language of the regulations

Discretionary Elements

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

Key* Prescriptive/Required Elements

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

*Not a complete list of all prescriptive elements.

Key* Prescriptive/Required Elements

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

*Not a complete list of all prescriptive elements.

Key* Prescriptive/Required Elements

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

*Not a complete list of all prescriptive elements.

Key* Prescriptive/Required Elements

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

*Not a complete list of all prescriptive elements.

Key Discretionary Elements

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

Key Discretionary Elements

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

Key Discretionary Elements

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

POLICY FRAMEWORK OPTIONS

Model Policy Elements

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

Model Procedural Elements*

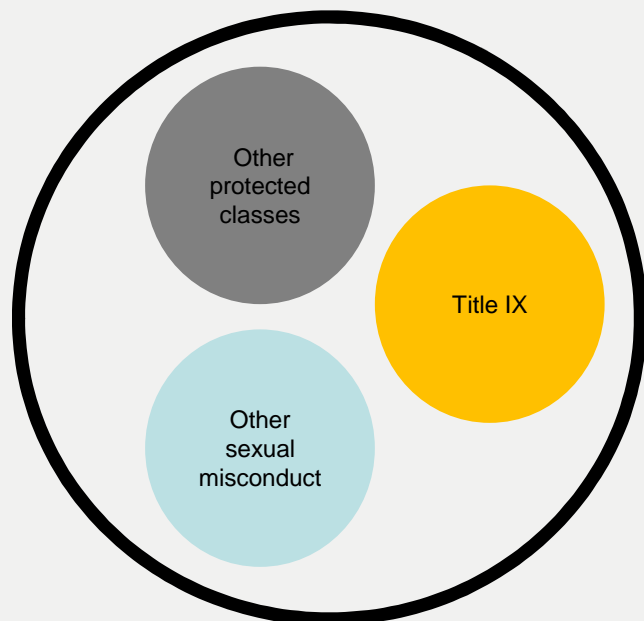
- Reporting options
- Resources and supports
- Intake and outreach
- Initial assessment
- Filing a formal complaint
- Evaluating moving forward without a Complainant
- Investigative protocols
- Evidentiary considerations
- Standard of evidence
- Hearing or adjudication process
- Sanctions & remedies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

*Not a complete list of all elements.

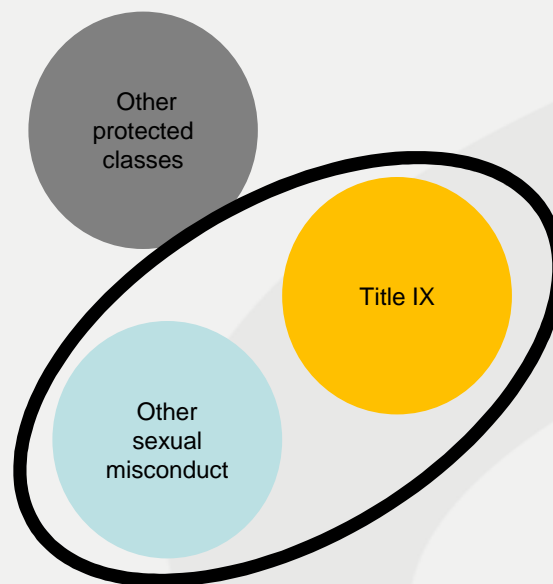
- Any provisions, rules, or practices other than those required by this section that a recipient adopts as part of its grievance process for handling formal complaints of sexual harassment as defined in § 106.30, must apply equally to both parties.

Policy Framework Options

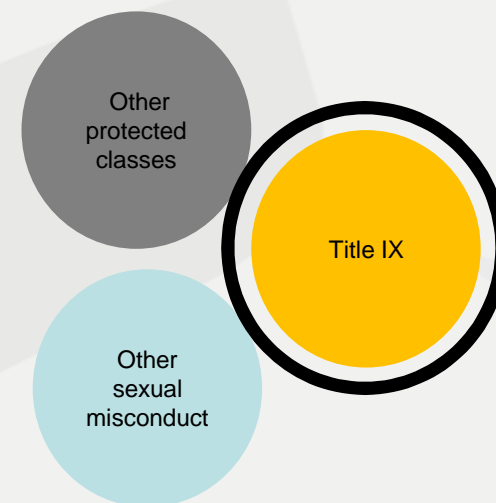
All Protected Classes



Sexual Misconduct



Title IX Only



Procedural Framework

WHAT

All Protected Classes

Sexual Misconduct

Title IX Only

WHERE

Geographic Location;
Education Program or
Activity

Geographic Location;
Education Program or
Activity

Geographic Location;
Education Program or
Activity

HOW

Apply Title IX
Grievance
Process

Apply Other
Misconduct
Process

Apply Title IX
Grievance
Process

Apply Other
Misconduct
Process

Apply Title IX
Grievance
Process

WHO

Faculty

Faculty

Faculty

Faculty

Faculty

Staff

Staff

Staff

Staff

Staff

Student

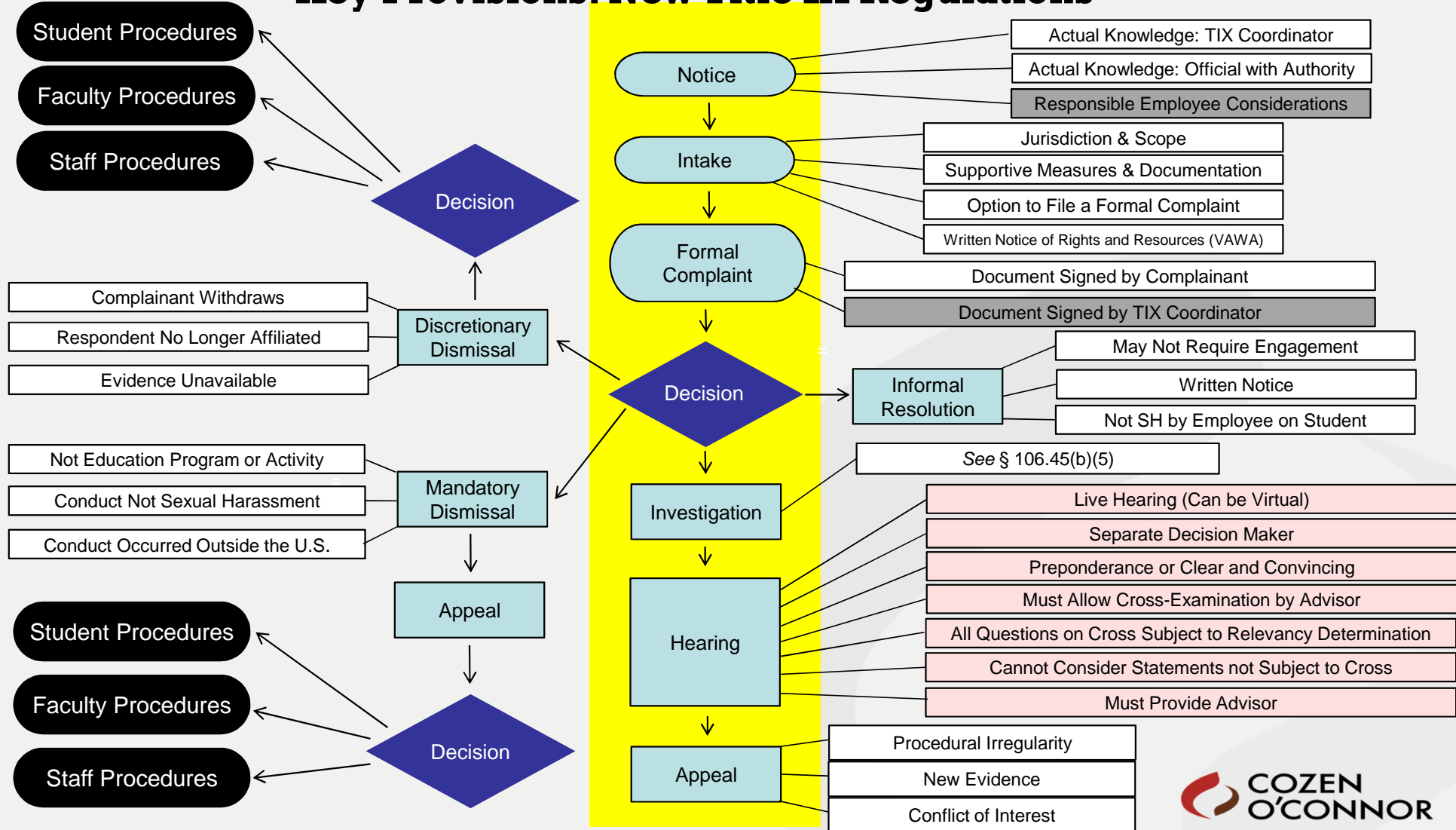
Student

Student

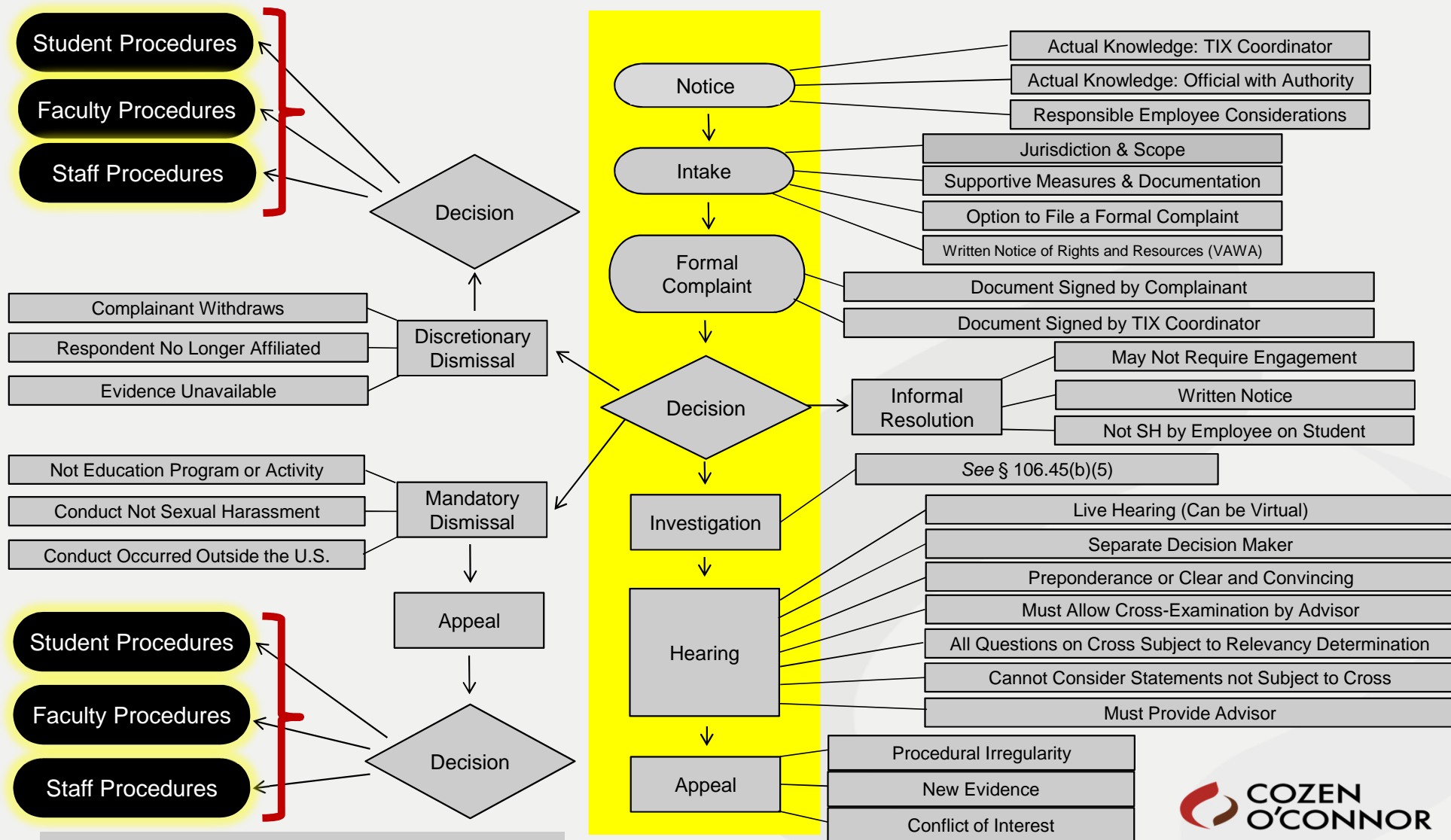
Student

Student

Key Provisions: New Title IX Regulations



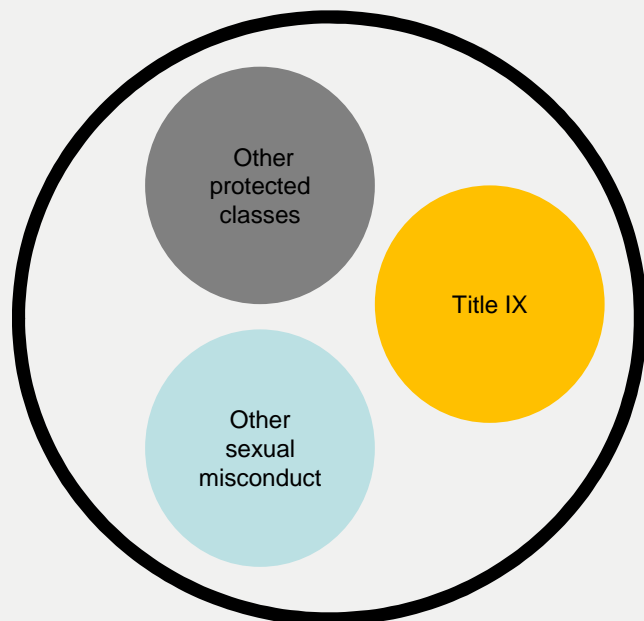
Key Provisions of Title IX Regulations issued May 6, 2020;



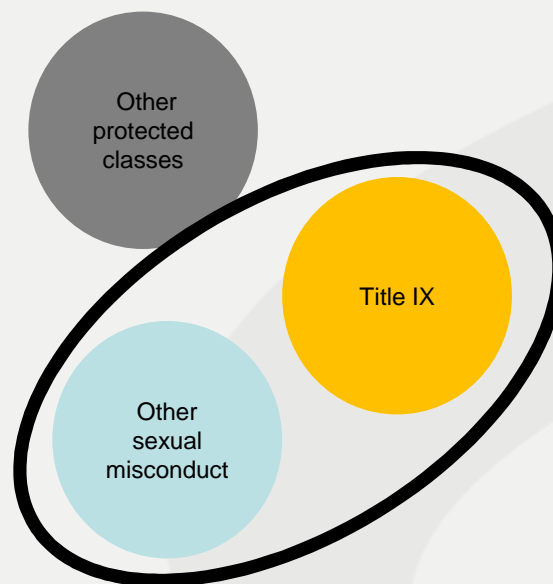
Key Provisions of Title IX Regulations issued May 6, 2020;

Policy Framework Options

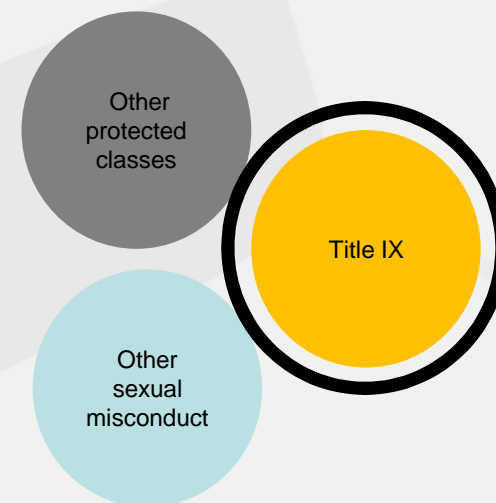
All Protected Classes

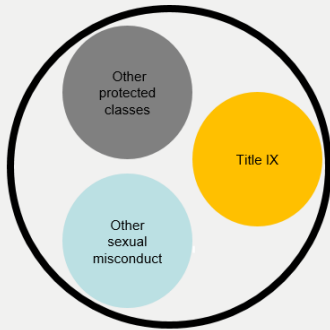


Sexual Misconduct



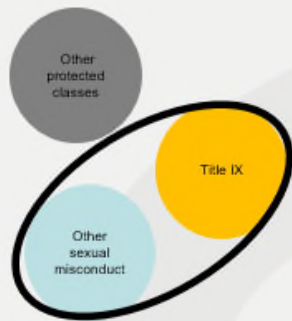
Title IX Only





All Protected Class Misconduct

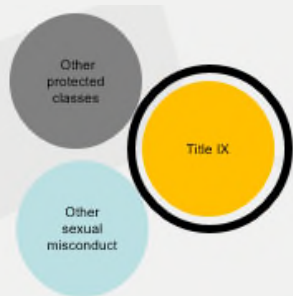
Challenges	Benefits
Additional process in cases where not legally required	Uniform approach to resolution for all civil rights and all sexual misconduct
Additional resources (e.g. advisors, hearing officers, appeal officers, time)	Message to community about equal importance of all forms of discrimination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



All Sexual Misconduct*

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

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



Only Title IX Sexual Harassment

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

PRESSURE-TESTING TO GUIDE DECISION-MAKING

Consistent Elements Across All Matters

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



Pressure Test

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



Scenario # 1

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

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

Scenario # 2

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

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

Scenario # 3

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

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

Scenario # 4

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

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

Scenario # 5

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

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

Scenario # 6

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

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

Scenario # 7

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

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

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

Scenario # 8

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

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

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

NEXT STEPS: UPDATING CAMPUS POLICIES AND PROCEDURES

Putting the Pieces Together



Effective Preparation: Designing Future State

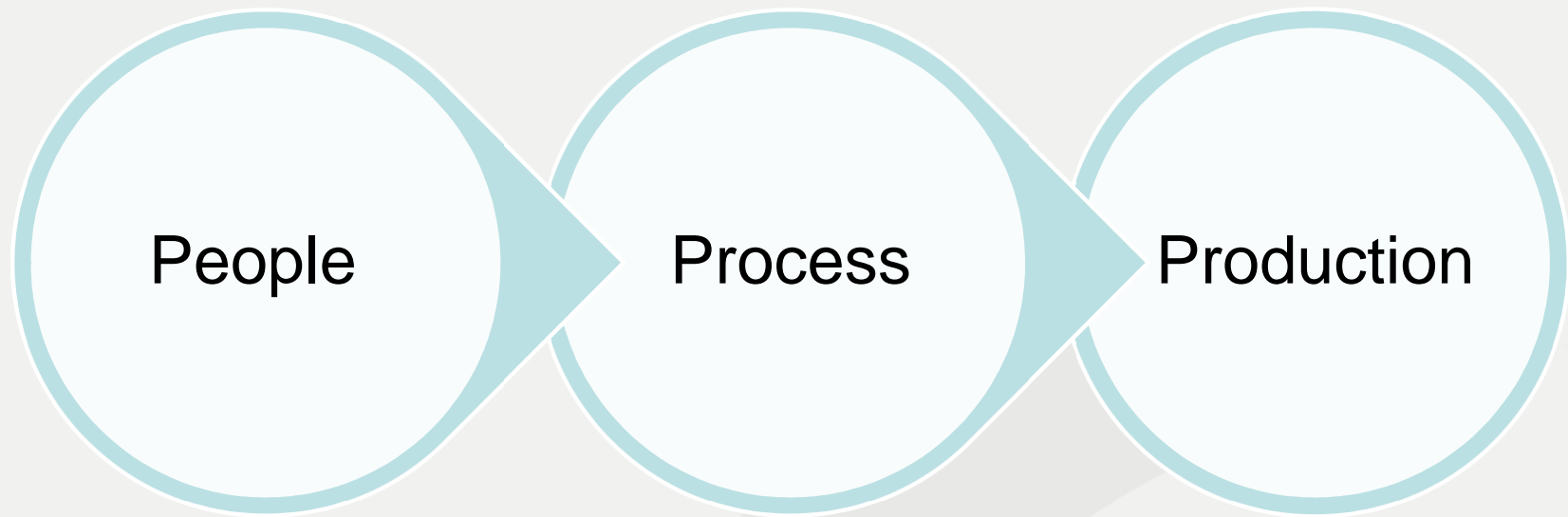
- Policies and Procedures
 - Document delta for project planning and measurable implementation
 - Appoint point person/team
 - Philosophical decision-making
 - Practical implementation
- Current institutional Issues
 - Coordination team
 - Communications – messaging
 - Audiences
- Implementers
 - Current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

Effective Preparation: Designing Future State

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

ROLLOUT CONSIDERATIONS

Designing Future State



People

Process

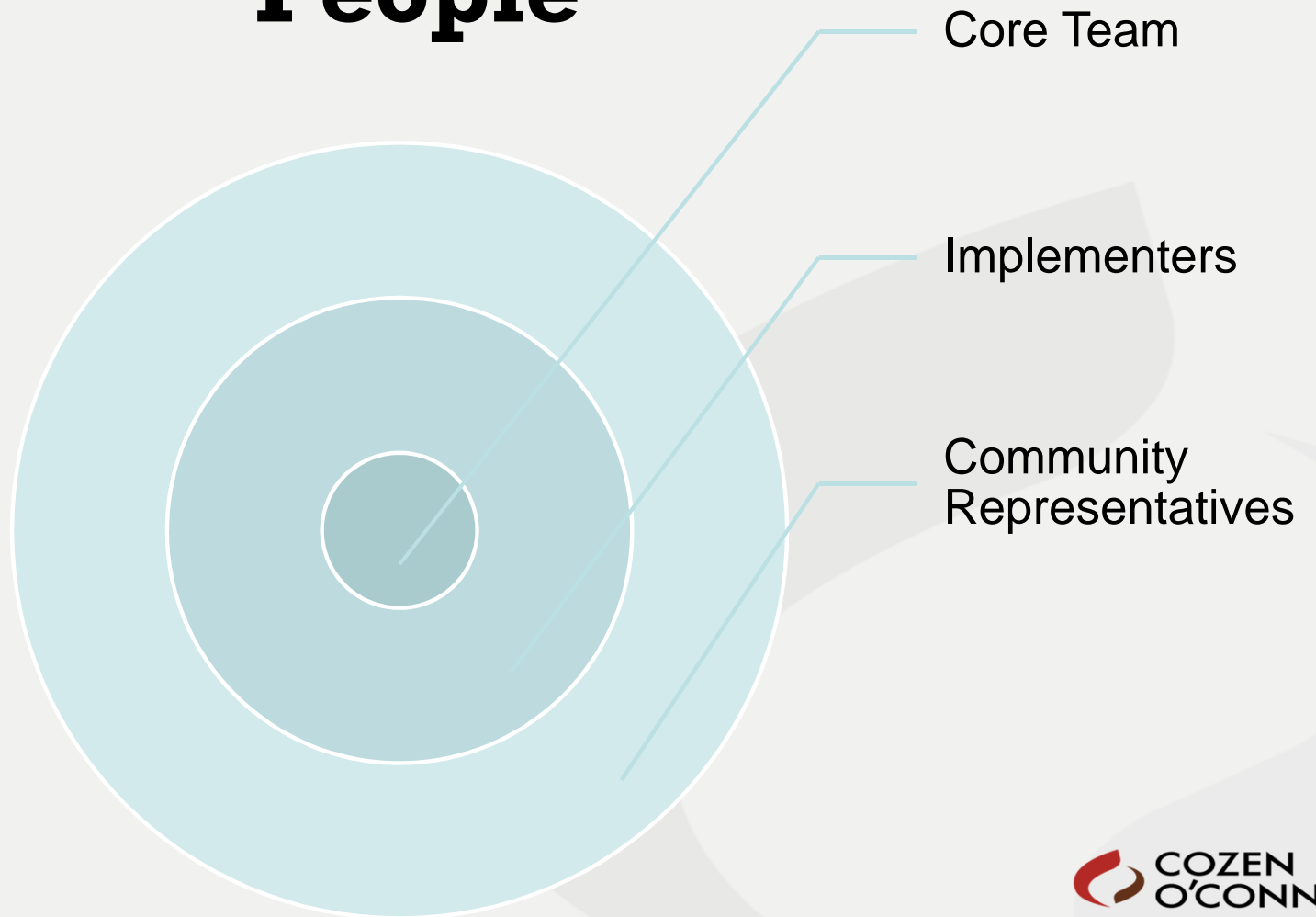
Production

Inputs

Decision-making
structure

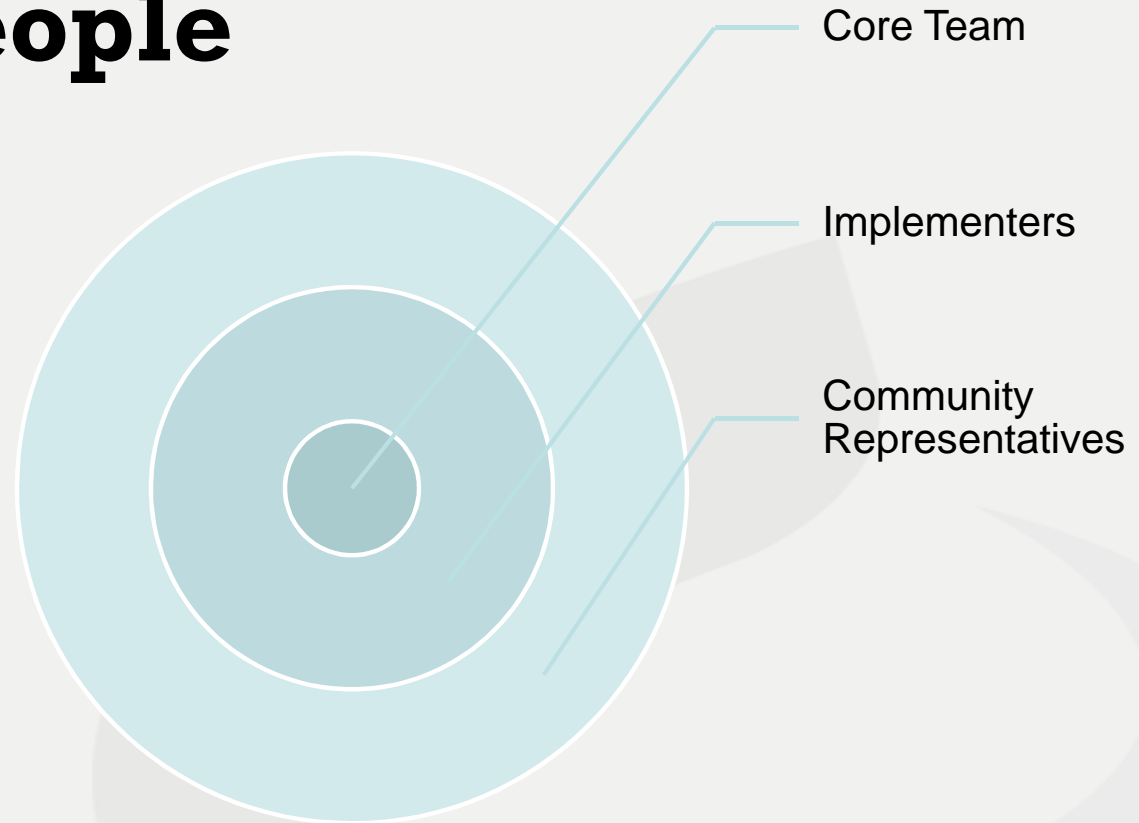
Outputs

People



People

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



Process: Considerations

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



Process: Getting Started

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

Products: Communications

Internal: Team

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

External: Community

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

Messages

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

Products: Campus Education and Awareness Efforts

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



Products: Websites and Online Presence

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



WEEKLY PROJECT MANAGEMENT PLAN

Weekly Project Management Plan

10 Weeks To Go:

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

Weekly Project Management Plan

9 Weeks To Go:

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

8 Weeks To Go:

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

Weekly Project Management Plan

7 Weeks To Go:

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

6 Weeks To Go:

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

Weekly Project Management Plan

5 Weeks To Go:

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

4 Weeks To Go:

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

Weekly Project Management Plan

3 Weeks To Go:

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

2 Weeks To Go:

- ☐ Roll out awareness campaign
- ☐ Roll out campus partner training

1 Week To Go:

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

Use of Slides

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

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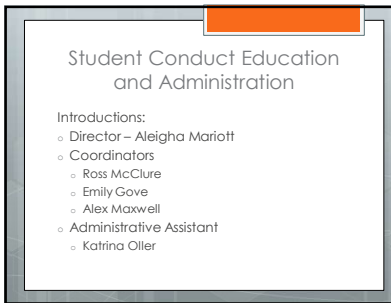
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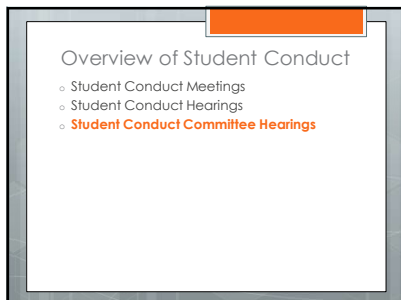
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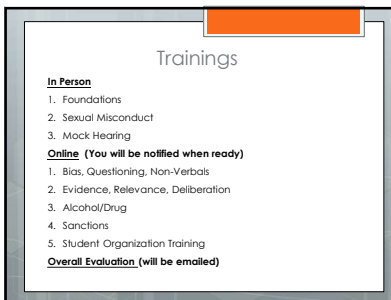
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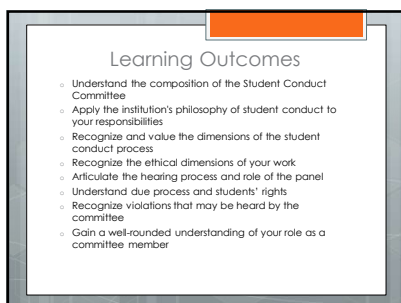
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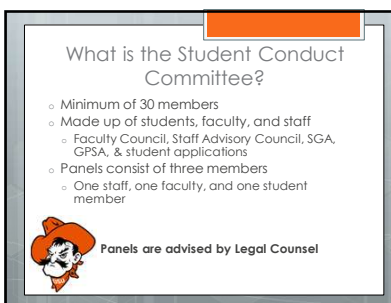
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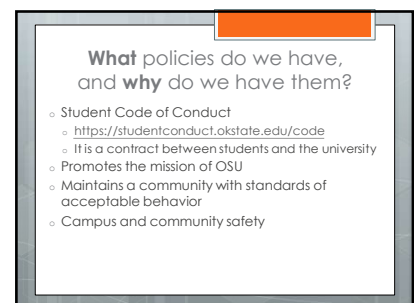
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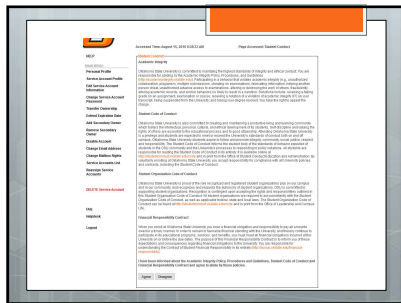
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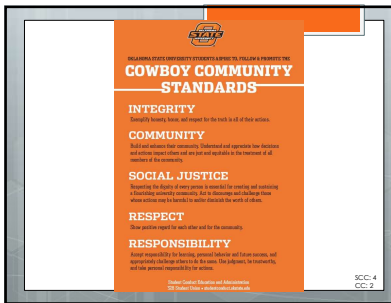
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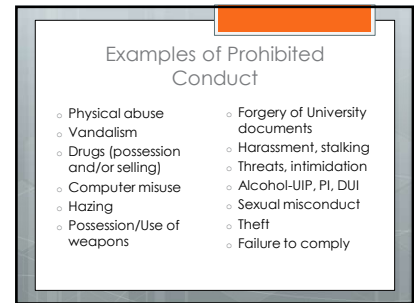
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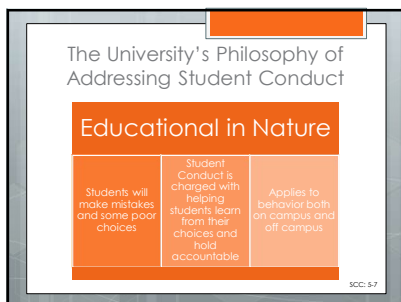
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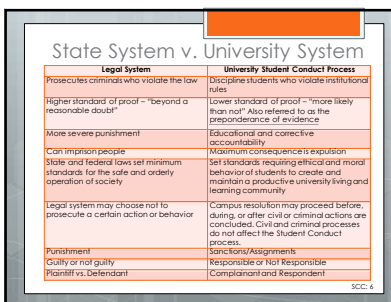
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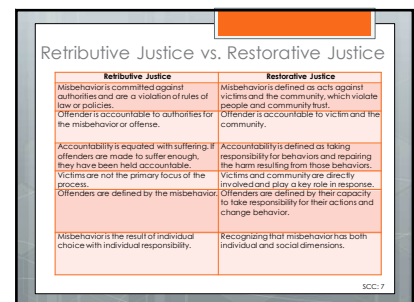
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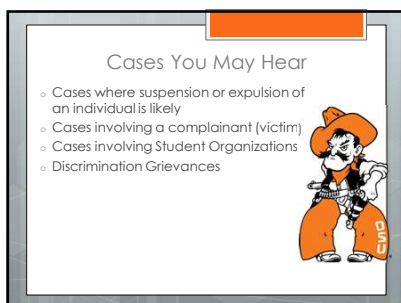
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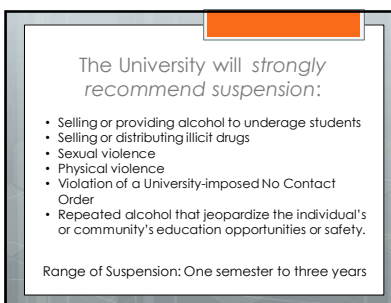
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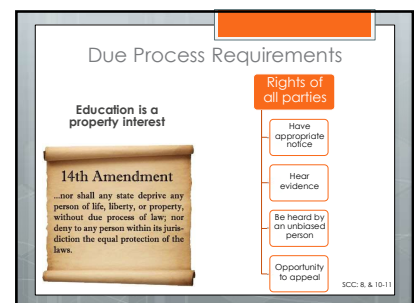
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16



17



18

Student Rights in the Conduct Process

- A written notice of the alleged violation(s);
- An explanation of the student conduct process upon request;
- Have no violation assumed;
- A timely hearing;
- Be accompanied by an advisor during the conduct process.
- Have access to the information and documents to be presented at the hearing in advance.
- Be present during the entire proceeding, except during deliberation;

SCC: 9
CC: 12-13

19

Student Rights in the Conduct Process

- The respondent and complainant can question any party or witness present, either directly or indirectly, at the discretion of Hearing Panel Chair.
- Present material witnesses (those with firsthand knowledge of the incident). The respondent and complainant are responsible for contacting and arranging for the attendance of their own witnesses in all cases.
- The respondent will receive a written notification of the outcome of the hearing; the complainant can receive written notification of the outcome of the hearing when permitted by federal law.
- An avenue for appeal from a hearing.

SCC: 9
CC: 12-13

20

Your role as a hearing panel member

- Uphold the **institution's policies**
- Hold students accountable for nonacademic behavior
- Balance the *needs and interests* of the individual with those of the university community

21

With great power comes great responsibility

Understand power dynamics present:

- Power difference between students and the Panel
- Perceived power difference between members of the Panel
- Power difference between the complainant and the respondent

Be aware of the power and influence you have in the process. Treat all with respect.

22

Ethical standards of committee members

- Maintain absolute **confidentiality**
- Family Educational Rights and Privacy Act
- Media
- Refrain from making accusations or statements that cannot be supported
- **Do not participate in a hearing where you feel you cannot be fair and impartial**
- All Panel decisions must be upheld by the entire Panel, even if there are dissenting opinions
- Make your decision based on the facts and information presented in the case.



SCC: 14

23

Your Responsibilities: Before the Hearing

- Do not do research students in advance of the hearing, such as Google, LinkedIn, Banner, STAR, etc.
- Review all hearing materials in advance for the hearing thoroughly (72 hours prior)
- Prepare open-ended questions
- Arrive 15 minutes before the hearing and be fully present during the hearing

SCC: 22

24

Your Responsibilities: During the Hearing

- Approach each case with the mindset that the student is not in violation until you are persuaded otherwise by information presented at the hearing
- At times, this can be challenging when the complainant or respondent is not present
- **Listen** carefully to each person and withhold judgement until all available information is presented and considered
- Engage in a meaningful discussion of the facts of the case

SCC: 22

25

Your Responsibilities: After the Hearing

- Actively participate in deliberations but refrain from dominating
- Be creative and thorough in your discussion related to sanctioning
- Assist in the development of a written opinion
- Remain confidential and united in the Committee's decision

SCC: 22

26

Selection & Notification of Upcoming Hearing

- Must complete trainings to be selected.
- To avoid bias, we consider:
 - Academic college, student organization involvement, and gender balance.
- We will email or call to ask if you can serve at a certain date and time. Please respond ASAP. If we don't hear back within 24 hours we will ask another person.
- We typically schedule 4 hours for a hearing.

27

Role of Student Conduct & Panel Advisor

- The Student Conduct representative is present as a non-voting participant. Their role will be to:
 - Facilitate dialogue between the Hearing Panel and the students involved,
 - Ensure appropriate participation from participating advisors, and
 - Answer procedural questions as needed.
- A member of Legal Counsel is present to serve as a non-voting advisor to the Hearing Panel.

CC: 16

28

Role of Student's Advisor

- Any person selected by a complaining or responding student
- Their role:
 - Support the student
 - Consult with the student
 - Suggest questions for student to ask
 - Assist student in clarifying their response
 - Participate to the extent the student may

CC: 17

29

Role of Student's Advisor

Advisors May NOT:

- Delay, disrupt, or interfere with the proceedings.
- Present information not relevant to the issues being discussed at the Hearing.
- Disrespect others in the hearing by badgering or harassing the other student(s) involved including, but not limited to, making victim blaming statements.

CC: 17

30

Role of Student's Advisor

Advisors are expected to:

- Act in a professional and courteous manner.
- Be mindful that the Student Conduct process is educational in nature, not penal.

CC: 17

31

What if...

In hearings, participation is a privilege which, if abused, may be withdrawn by the Student Conduct Representative or Hearing Panel Chair. If the privilege is withdrawn, the advisor may continue to advise the student, but may not participate directly in the hearing. If the advisor fails to act in accordance with hearing procedure and with the standards set forth herein, the Hearing Officer or Panel Chair may require the advisor to leave the hearing.

CC: 17

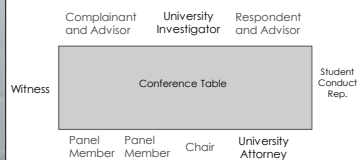
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Hearing Materials

- Hearing File (Provided in a binder at the hearing and put online for review)
 - University's Information
 - Complainant Information
 - Respondent's Information
- Process Outline
- Hearing Script
- Precedence
- Student Conduct Committee Manual

33

Hearing Set-Up



SCC: 34

34

Hearing Process

- I. Chair calls to order
- II. Introductions
- III. Opening statements
- IV. Presentation of information
 - A. University Investigative Report (only when University completes an investigative report)
 - B. Complainant presents information
 - C. Respondent presents information
- V. Closing Statements
- VI. Panel Deliberation-all parties excused

SCC: 25-29
CC: 18-19

35

Chair calls to order

- Starts audio recorder and begins script
 - Date, time, location

"Good afternoon, my name is [____], and I will be serving as the chair of the Student Conduct Committee Hearing. My role is to oversee the Student Conduct Committee Hearing that will be conducted today. Please note that today's hearing is being electronically recorded, so please speak clearly for the recorder. This recording represents the sole official verbatim record of the Student Conduct Committee Hearing and is the property of this institution."

SCC: 25

36

Introductions

"At this time, I will ask the members of the Hearing Panel to introduce themselves.

- Would the Hearing panel members introduce themselves?
- Would the Hearing panel advisor introduce herself?
- Would the Student Conduct representative please introduce themselves?
- Would the complainant introduce themselves?
- Would the complainant's advisor introduce themselves (if present)?
- Would the respondent introduce themselves?
- Would the respondent's advisor introduce themselves (if present)?
- Would any witnesses introduce themselves (if present)?
- Would the University Investigator please introduce themselves (if applicable)?"

SCC: 28

37

Introductory Proceedings

- Honesty Statement
- Dismissal of Witnesses
- Announcement of Allegations
- Preliminary Matters

SCC: 26-27

38

Opening statements

At this time, we will begin the portion of the hearing during which information is presented for consideration in determining if the respondent has or has not violated the Student Code.

The complainant and the respondent will be provided the opportunity to share introductory remarks, known as an opening statement. You are not required to do so.

Would the complainant like to make an opening statement? If so, please proceed.
Complainant makes opening statement.

Would the respondent like to make an opening statement? If so, please proceed.
Respondent makes opening statement.

SCC: 27

39

Presentation of Information

- University Investigator
- Complainant Presents Information
 - Witnesses
 - Questions from Respondent and Panel
- Respondent Presents Information
 - Witnesses
 - Questions from Complainant and Panel
- Last questions
 - How has the situation affected you?
 - If found responsible, what do you believe to be an appropriate outcome and consequences for these allegations?

SCC: 37-38

40

Closing Statements

At this time, the complainant and the respondent will be provided the opportunity to make concluding remarks, known as closing statements. You are not required to do so.

Are there any questions before we proceed?

Would the complainant in this case like to make a closing statement? If so, please proceed.

Would the respondent in this case like to make concluding remarks? If so, please proceed.

VII. Closing
Thank you for attending today's proceeding.

A decision letter will be sent to you via certified U.S. mail to your local address within two business days. You may also pick up a copy of the decision letter in 328 Student Union during the same times. You are also permitted to file an appeal of the hearing within seven business days. More information about the appeal process is in section V of the Code of Conduct.

Thank you again. At this time, all parties are excused so that the panel can deliberate.


Turn audio recorder off.

SCC: 29

41

Deliberation

- Everyone leaves except the panel and the university advisor
- Online trainings will be available
- Evidence
 - Relevant?
 - Reasonable?
 - Creditable?
- Different types of evidence



SCC: 29

42

Fact Finding

- The evidence must support a determination that 'it is more likely than not' that a violation occurred.
- The facts of the case are those events, circumstances, incidents, or actions that you believe to be true in light of the evidence and testimony you have heard.

SCC: 39-40

43

Fact Finding

- The first question asked should be "What happened?"
- The findings of fact should provide an account of the incident in question.
- Weigh all the information to determine if there are sufficient facts to support the allegation(s).

SCC: 39-40

44

Fact Finding

- In cases where there are several allegations, review each allegation for supporting facts.
- List numerically the facts that were agreed upon. State these facts as concretely as possible, eliminating personal opinion or conjecture.

SCC: 39-40

45

Determination

- Determine whether or not the respondent violated the Student Code of Conduct, "Responsible" or "Not Responsible."
- Determine appropriate sanctions according to the violations, conduct history, and demeanor of the student.

SCC: 44.50

46

Preponderance of the Evidence

- "More likely than not"
- 50.1%
- 50% and a feather
- Different than the law-Clear and Convincing and Beyond a Reasonable Doubt
- You don't have to be 100% sure

SCC: 6
CC: 11

47

Outcome Form

Panel members (sign below decisions, were rendered after considering the information presented):

1
2
3
4
5
6
7

Findings:
Section III (17): Physical violence of any nature against any person, on or off campus. This includes fighting, assault, battery, the use of a knife, gun, or other weapon, physical abuse, restraining or threatening someone against their will, suicide or self-harming behavior, or any other action that threatens or endangers the physical health or safety of any person or causes substantial emotional distress to any person.

Findings (check one):
Responsible _____
Not Responsible _____

Comments: The panel has the opportunity to add any rationale to the hearing outcome letter. The letter will read: "Following this panel's findings, the hearing panel found you responsible/not responsible for violating the Student Code of Conduct as charged above. The panel stated the following about each of the charges."

SCC: 51

48

Student's conduct history

- If a student is found responsible, you will be informed of any history they have at the university.
- A transcript is also provided.
- History is utilized when determining most efficient and educational sanctions.

49

Precedence

- Information on similar cases where students have been **suspended**
- Provides insight on consistency of suspension

Sexual Misconduct	Spring 2018	None	Student was found responsible for exposing self to nude delivery person	Suspended for one year
Sexual Harassment	Spring 2018	None	Student was found responsible for sexually harassing/harassing 11 women	Suspended for two years
Sexual Misconduct	Spring 2018	None	Student was found responsible for engaging in sex with an incapacitated person (sleeping pill)	Suspended for one year

50

Rationale Statements

- A rationale is the "thinking portion" of why you made the decision you did. The facts and rationale become part of the permanent record and is provided to all parties in a letter.
- A rationale is provided for the outcome and sanctions, if applicable.

SCC: 33

51

Rationale statements are important because

- They serve as an educational tool for the student.
- It includes what we want students to learn from the outcome.
- Violence Against Women Act & Clery requires a rationale for results and sanction
- Challenges your own perceptions as a hearing panel member
- Used in appeal proceeding

SCC: 33

52

Approaches to writing rationale statements

- Stating the facts that supports the decision
- Address each charge
- Can mention previous precedent
 - If you deviate from precedent provide details on why
- Any mitigating or aggravating factors should be clearly presented.

SCC: 33

53

Examples Rationale Statements

- The rationale for this sanction takes into consideration several factors. I considered _____ as aggravating factors. I considered _____ as mitigating factors.
- This sanction is consistent with _____.
- The rationale for this sanction takes into consideration _____.
- Due to the severity of your behavior...

SCC: 33

54

[illegible]

55

Letters sent to students

- We quote in the Outcome Letter to students what is written for sanctions and rationale
- The more clear, specific, and detailed, the better

FINDINGS

After taking all information and testimony into consideration and deliberating, the Hearing Panel has made the following finding of fact. Recall that all information is considered using the preponderance of the information, a more likely than not standard. Specific facts regarding the alleged provision(s) are detailed below.

- 1.
- 2.
- 3.


Following from these facts, the Hearing Panel found you not responsible for violating the above provision(s) of the Student Code of Conduct. The Panel stated the following about each of the charges:

[***** Insert Finding Rationale Here *****]

56

Self Care

- Secondary Trauma
- Who you can talk to
 - Dr. Tamra Richardson
 - Student Counseling Center
 - Other panel members




You can't pour from an empty cup.
Take care of yourself first.

The image shows a white ceramic mug on a dark surface. The mug is empty except for a small amount of liquid at the bottom. The text is printed on the side of the mug in a simple, sans-serif font.

57

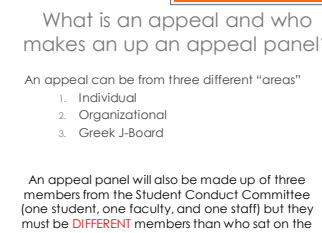
Questions?

58



Appeal Process

59



What is an appeal and who makes an appeal panel?

- 1. Individual
- 2. Organizational
- 3. Greek J-Board

An appeal can be from three different "areas"

An appeal panel will also be made up of three members from the Student Conduct Committee (one student, one faculty, and one staff) but they must be **DIFFERENT** members than who sat on the original hearing's panel

60

[illegible]

61

Page 1 of 1

Appeal Form

Instructions:

Send the completed form and supporting materials for each ground outlined below.

Ground 1: The housing was not suitable for occupation due to overcrowding.

What you must provide:

- 1. A copy of the Housing Act 1985, section 869.
- 2. A copy of the Housing Act 1985, section 870.

How you can obtain the ground if you wish:

Ground 2: The housing was not suitable for occupation due to the state of the premises being unfit for occupation and the housing was not suitable for occupation due to the state of the premises being unfit for occupation.

What you must provide:

- 1. A copy of the Housing Act 1985, section 869.
- 2. A copy of the Housing Act 1985, section 870.

How you can obtain the ground if you wish:

Ground 3: The housing was not suitable for occupation due to the state of the premises being unfit for occupation and the housing was not suitable for occupation due to the state of the premises being unfit for occupation.

What you must provide:

- 1. A copy of the Housing Act 1985, section 869.
- 2. A copy of the Housing Act 1985, section 870.

How you can obtain the ground if you wish:

62

Appeal Criteria #1

- The hearing was not conducted in conformity with prescribed procedures, and **substantial** prejudice to the complainant or the respondent resulted
- If the Appeal Panel finds the previous hearing was not conducted as prescribed and had substantial prejudice, the matter may be remanded to a new hearing.

CC: 23-34

63

Appeal Criteria #2

- New information that could **substantially** affect the outcome of the previous lower hearing has been discovered **since** that hearing.
- The information must not have been available at the time of the original hearing.
- Failure to present information that was available is not grounds for an appeal under this provision.
- If the Appeal Panel is presented with new information that could not have been presented at the original hearing, the matter may be resubmitted to the original hearing body.

CC: 23-24

64

Appeal Criteria #3

- The sanction is not appropriate for the violation

This provision is intended to be utilized when a determined sanction is inherently inconsistent with university procedures or precedent. Simple dissatisfaction with a sanction is not grounds for overturning a sanction under this provision.

If the Appeal Panel finds that the sanction is inappropriate for the violation, the Appeal Panel may recommend the sanction be modified by the Vice President for Student Affairs and state the reasons for that recommendations.

CC: 23-24

65

Responses from opposing party or investigator

- If there is an opposing party or university investigator involved in the case will be given seven days to provide a written response to the appeal.

66

Burden of Proof

Does the student prove a modification is needed?

The burden of proof is on the **appellant**. The appellant must show that one or more of the listed grounds for appeal has merit!

67

Reviewing the Record

File will include...

- All evidence from prior hearing
- Previous hearing decision/rationale
- Student's appeal opposing party's response to appeal
- Precedence
- Past discipline history
- Transcript
- Audio recording will be available at the appeal.
- The students involved in the case are not present

What to Examine...

- Facts and evidence
- Previous panel's rationale
- Procedures
- Appropriateness of sanction based on precedence, history and severity

68

Decision Time

- Based on your review of what occurred and the student's argument for changes based on reasons provided in grounds for appeal make a decision to
 - uphold,
 - modify, or
 - remand
- Important to write a thorough rationale for your decision
- Making modifications: Changes should be based on significant errors, problems, or new evidence

69

Appeal Panel Outcome Form

OKLAHOMA STATE UNIVERSITY
Appeal Panel Outcome Form

<p>APPELLANT</p> <p>Name: _____</p> <p>Student ID: _____</p> <p>Advisor: _____</p> <p>Advisor Email: _____</p> <p>Advisor Phone: _____</p> <p>Advisor Address: _____</p> <p>Advisor City: _____ State: _____ Zip: _____</p> <p>Advisor Country: _____</p> <p>Advisor Title: _____</p> <p>Advisor Signature: _____</p> <p>Advisor Date: _____</p>		<p>APPEAL PANEL</p> <p>Name: _____</p> <p>Student ID: _____</p> <p>Advisor: _____</p> <p>Advisor Email: _____</p> <p>Advisor Phone: _____</p> <p>Advisor Address: _____</p> <p>Advisor City: _____ State: _____ Zip: _____</p> <p>Advisor Country: _____</p> <p>Advisor Title: _____</p> <p>Advisor Signature: _____</p> <p>Advisor Date: _____</p>
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70

Appeal Statements

- Deviation from procedures was not substantial nor did it result in prejudice to the student.
- There were no deviation from the procedures.
- Information presented was not new and was available at the time of the original hearing.
- The new information provided does not change the behavior that occurred. The Student Code of Conduct addresses prohibited conduct and not criminal charges. The criminal process or outcome does not have bearing on the Student Conduct process.

71

Appeal Statements

- The outcome is consistent with precedence.
- There is no precedence available for this type of incident, but we believe this outcome is appropriate based on the facts of the case.

72

Questions?

73

What If I Am The Chair of A Panel?

74

Prehearing Suggestions

Hearing Panel members should convene 15 minutes in advance of the scheduled hearing time to become acquainted with each other and to consider the following:

1. Check if Hearing Panel members have reviewed the case file
2. Check for unclear evidence and possible discrepancies
3. Review the time sequence of events
4. Ask panel members what questions they would like to ask. Decide who should ask the questions and in what order. (However, Panel members are free to ask questions at any time during the hearing.) Remember that open-ended questions garner more information
5. Make sure room arrangement is suitable for discussion. Can all parties see each other?

75

Your responsibilities as the Chair

- 1) Work with the panel before a hearing to develop areas of questioning
- 2) Ensure that guidelines for operational procedures are followed
- 3) Initiate each aspect of the hearing by providing necessary leadership and direction
- 4) Monitoring appropriateness and relevance of questions asked by the panel and all participants while allowing panel members to do most of the questioning.

SCC-23

76

Your responsibilities as the Chair

- 5) Leading a closed discussion with panel members to determine the facts of the case after having allowed ample time for individual deliberation and input; discussion will include findings, possible actions and appropriate disciplinary sanctions
- 6) Preparing the written decision of the panel including the findings of fact, the disciplinary action taken, and the panel rationale.

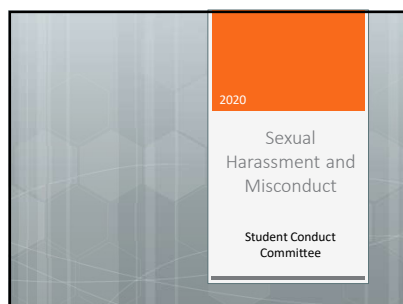
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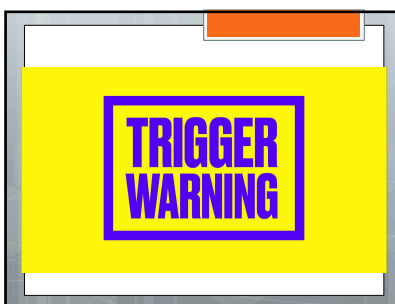
Other items to note

- Dealing with disruptions
- Sidebars
- Deliberation (just a quick reminder)
 - Determining findings of facts
 - Filling out decision form

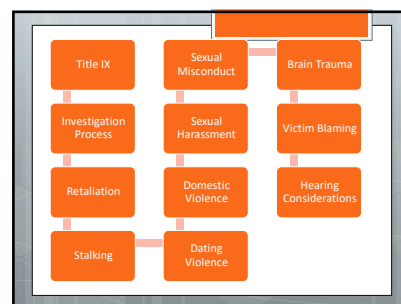
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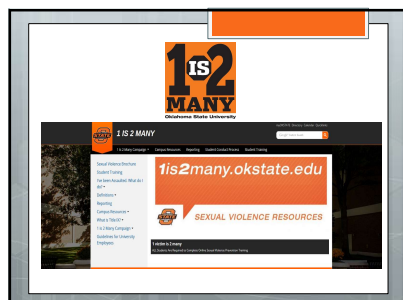
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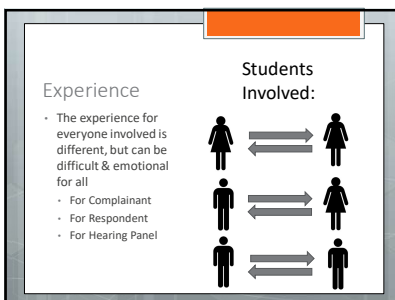
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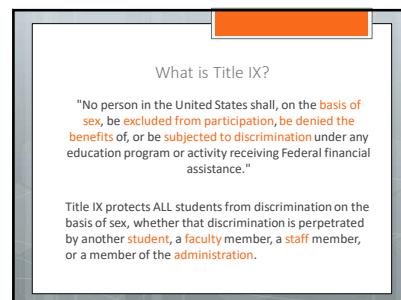
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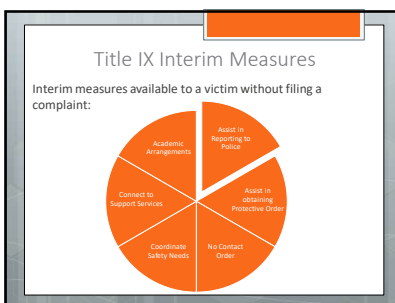
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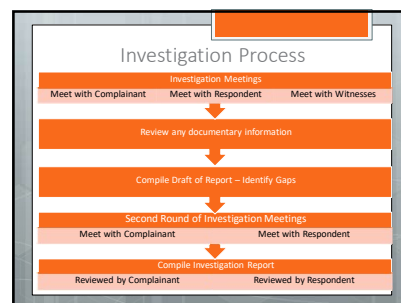
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8



9

Retaliation

The university will not tolerate retaliation against a person who, acting in good faith, brings a complaint forward.
Board of Regents for the Oklahoma Agricultural and Mechanical Colleges Policy Manual, 3.11 Non-Retaliation.

10

Stalking

- Stalking refers to one who engages in a course of conduct directed at a specific person that would cause a reasonable person to fear for his or her safety or the safety of others or suffer substantial emotional distress.
 - Course of conduct
 - Reasonable person
 - Substantial emotional distress

11

Facts about Stalking

- 78% of stalkers use more than one means of approach.
- CDC reports that 1 in 6 women have been stalked during their lifetime; 1 in 19 men have been stalked during their lifetime.
- Stalking can occur by anyone, someone that is known casually, a current boyfriend or girlfriend, someone dated in the past or a stranger.

12

What stalking might look like

- Following
- Unsolicited visits or communication
- Using online social media inappropriately
- Damaging property
- Showing up at places an intended victim frequents
- Sending unsolicited mail, e-mail, texts and pictures
- Creating a website about a target of stalking
- Sending unsolicited gifts
- Stealing things that belong to an intended victim
- Calling repeatedly



13

Considerations

- What was the course of conduct and the frequency?
- How and why did the victim fear for their safety?
- How and why did the victim suffer emotional distress?
- Would a reasonable person feel the same?
- Does the preponderance of the evidence support the fear or emotional distress?

14

Dating Violence

Dating violence is committed by a person who is or has been in a social relationship of a romantic or intimate nature with another person. The existence of such a relationship shall be determined based on consideration of the following factors:

- length of relationship,
- type of relationship,
- and frequency of interaction between the persons involved in the relationship.

Dating violence includes, but is not limited to: sexual or physical abuse or the threat of such abuse. Dating violence does not include acts that meet the definition of domestic violence.

15

Domestic Violence

Domestic violence is a **crime of violence** committed by a:

- current or former spouse or intimate partner of the victim;
- person with whom the victim shares a child in common;
- person who is cohabitating with or has cohabited with the victim as a spouse or intimate partner;
- person similarly situated to a spouse of the victim.

Domestic violence is a pattern of abusive behavior in any relationship that is used by one partner to gain or maintain power and control over another intimate partner. Domestic violence can be physical, sexual, emotional, economic, or psychological actions, or threat of actions that influence another person.

16

What DV might look like

- Controlling behavior:
- Not letting victim spend time with friends
 - Calling or texting victim frequently to find out location, who they are with, and what they are wearing
 - Telling victim what to wear
 - Having to be with victim all the time
 - Checking phone/social media
 - Deprivation of physical/economic resources
- Verbal and emotional abuse:
- Calling names
 - Jealousy
 - Belittling
 - Threats to harm victim, someone in their family, or self (if victim don't do what they want)

17

What DV might look like

Physical abuse:

- Shoving
- Punching
- Slapping
- Pinching
- Hitting
- Kicking
- Hair pulling
- Strangling



Sexual abuse:

- Unwanted touching and kissing
- Forcing victim to have sex
- Not letting victim use birth control
- Forcing victim to do other sexual things

18

Choking vs. Strangulation

- | | |
|---|--|
| Choking <ul style="list-style-type: none"> Obstruction of a persons airway, caused by an internal object within the body. | Strangulation <ul style="list-style-type: none"> A form of asphyxia characterized by closure of the blood vessels and air passages of the neck as a result of external pressure on the neck. |
|---|--|

19



20

Important Note About Strangulation

A study of 300 cases of strangulation survivors conducted by the San Diego City Attorney's Office revealed that in 50% of the cases there were no visible markings to the neck and 35 % had only minor injuries.

21

Considerations for DV

- Nature of relationship
- Pattern of control versus isolated incident(s)
- Escalation over time
- Was there a reasonable fear of violence?

22

Sexual Harassment

Making unwelcome sexual advances, requests for sexual favors, and other verbal or physical contact or communication of a sexual nature when:

- Submission to such conduct or communication is made either explicitly or implicitly a term or condition of educational benefits, employment, academic evaluations or other academic opportunities;
- Submission to or rejection of such conduct or communication by an individual is used as the basis for an employment decision or academic decision affecting such individual; or
- Such conduct is sufficiently severe, pervasive or persistent, and both subjectively and objectively offensive, that it has the effect of creating an intimidating, hostile or offensive environment which negatively affects an individual's academic or employment environment.

23

Important Note About Sexual Harassment

Sexual harassment does not include verbal expressions or written materials that are relevant and appropriately related to course subject matter or curriculum, and this policy shall not abridge academic freedom or the university's educational mission.

24

Forms of Sexual Harassment

- Quid Pro Quo → "This for That"
 - Exchange of sexual favor for benefit in workplace or educational environment.
- Hostile Environment
 - Subjective **AND** Objective
 - Sufficiently Severe, Pervasive, **OR** Persistent

25

What sexual harassment might look like

- Student hangs nude male photos in her room that are visible to all of her roommates
- Resident consistently has their significant other spend the night and they use the single gender shower together and engage in intercourse
- Repeatedly asking for a date from a person who is not interested.
- Stating, indicating, or implying in any manner that benefits will be gained or lost based on response to sexual advances.
- Asking about someone else's personal, social or sexual life or about their sexual fantasies, preferences or history, or discussing your own.

26

What sexual harassment might look like

Offensive physical contact:

- Massaging a person's neck or shoulders
- Touching a person's clothing, hair or body - hugging, kissing, patting or stroking a person's body
- Touching or rubbing oneself in a sexual manner around or in the view of another person
- Brushing up against another person
- Tearing, pulling or yanking a person's clothing
- Sexual assault or other sexual contact

27

Considerations

- Subjective **AND** Objective
- Sufficiently Severe, Pervasive, **OR** Persistent
 - **Severe** - How bad is it?
 - **Pervasive** - How wide spread is it?
 - **Persistent** - How frequent is it?

28

Sexual Misconduct

Engaging in non-consensual contact of a sexual nature. Sexual misconduct may vary in its severity and consists of a range of behavior or attempted behavior including, but not limited to, the following examples of prohibited conduct:

- Unwelcome Sexual Touching
- Exposure
- Non-Consensual Sexual Assault
- Forced Sexual Assault

29

Effective Consent

Effective consent is:

- informed,
- freely and actively given,
- using mutually understandable words or actions that indicate a willingness to participate in mutually agreed upon sexual activity.
- Example of mutual actions: who took clothes off of who; oral sex

Consent is not effective if obtained from an individual who is incapable of giving consent due to:

- lack of consciousness,
- age,
- mental disability or
- incapacitation due to ingestion of drugs or alcohol.

30

Effective Consent

- Initiators of sexual activity are responsible for obtaining effective consent.
- Silence or passivity is not effective consent.
- The use of intimidation, coercion, threats, force or violence negates any consent obtained
 - Consent is based on choice.
 - Going along with something because of wanting to fit in, feeling bad, or being deceived is not consent.
 - Having gotten consent at times in the past **does NOT mean** that you have consent now and in the future.

<https://www.youtube.com/watch?v=kjhafxrZBGs>
For more information, visit: <https://t1s2many.okstate.edu/consent>

31

Three considerations regarding sexual misconduct

1. Was force used by the accused individual to obtain sexual access?
 - Physical Violence
 - Threats
 - Intimidation
 - Coercion
2. Was the victim incapacitated and did the individual know, or should they have known that the alleged victim was incapacitated (alcohol, drugs, asleep, etc.)?
3. What clear words or actions by the complainant gave the alleged individual permission for the specific sexual activity that took place?

32

1. Force

- Was force used by the accused individual to obtain sexual access?
 - Physical Violence
 - Threats
 - Intimidation
 - Coercion
- Because consent must be freely and actively given, it cannot be obtained through any type of force.

33

2. Incapacitation

- What was the form of incapacity?
 - Alcohol or Drugs
 - Not impaired, not under the influence, not drunk, but incapacitated
 - Administered voluntarily or without victim's knowledge
 - Rape drugs involved
 - Mental/cognitive impairment
 - Injury
 - Sleep

34

Incapacitation

- Was the complainant incapacitated at the time of sexual contact?
 - Could complainant make rational, reasonable decisions?
 - Could complainant appreciate the situation and address it consciously (knowing who, what, when, where, why, and how)?
- Did the respondent know of the incapacity?
 - Or should the respondent have known from the circumstances (would a reasonable person have known)?

35

Incapacitation

People reach incapacitation in different ways. Some factors to consider:

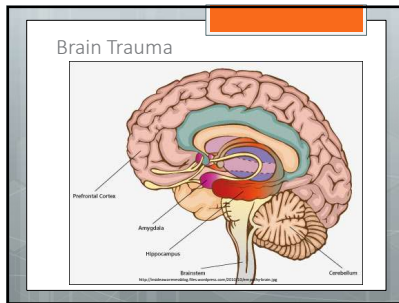
- Body weight, height, size
- Tolerance for alcohol and other drugs
- Amount and type consumed
- Amount of food intake prior
- Voluntaryness of consumption
- Vomiting
- Propensity for blacking-out
- Genetics
- WE DON'T USE BAC Charts

Context clues:

- Sober party may know how much the other party consumed
- Slurred speech
- Bloodshot eyes
- Smell of alcohol on the breath
- Shaky equilibrium
- Vomiting
- Outragous or unusual behavior
- Unconsciousness

None of these, except for unconsciousness, necessarily equates with incapacitation

36



46

Prefrontal Cortex

Cognitive part of the brain that includes higher order mental processes.

Attention Memory
Language Learning
Reasoning Problem Solving

Records interrogative/narrative information (who, what, where, when, why)

When trauma occurs: **prefrontal cortex shuts down** and the more primitive portions of the brain take over and record the event in memory

47

The Amygdala

Stores emotional memories

Responsible for regulating safety:

- heart rate
- blood pressure
- nervous system

Monitors incoming stimuli for threats

Large release of cortisol

Activates "Fight-Flight-Freeze" response

The illustration shows three stick figures in different states: one running (Fight), one running away (Flight), and one standing still (Freeze).

48

The Hippocampus

Stores cognitive memory

Functions like a computer memory chip

Highly sensitive to the stress hormone Cortisol

Hippocampus **shuts down** during traumatic event or *trauma reminders*

When the Hippocampus shuts down it is hard for an individual to remember details.

49

There is No Typical Response

- Memory may be disjointed
- Memory may come back slowly and in fragments
- Disjointed memory may not be a sign of dishonesty

The illustration shows several interlocking puzzle pieces, some of which are missing, symbolizing disjointed memory.

50

Victim Blaming

- One of the biggest sources of victim blaming is the way we talk about it
- Language surrounding abuse and sexual assault immediately puts our attention on the victim instead of the perpetrator
- Common Victim Blaming Statements:
 - "She provoked him"
 - "They both have problems"
 - "She shouldn't have continued to date him."
 - "She was drunk"
- Tone, non-verbals, body language matters

<https://www.youtube.com/watch?v=Op14XhETfBw>

51

Victim Blaming in Questions

Do NOT ask:

- "What were you wearing?"
- "Did you try to run away?"
- "Why didn't you fight back?"

Instead ask:

- "What did you do then?"
- "How did you respond when they kissed you?"

<http://inspirationhipabuse.org/educates/avoiding-victim-blaming/>

52

Relevance

- It is appropriate and necessary to ask participants on the relevance of their questions.
 - "Before the other participant answers your question, could you please define how that question is relevant to the issue being addressed today?"
- Any panel member can ask for relevance clarification.
- The Chair makes the final decision on relevance
- Disregard testimony if you discover it is irrelevant after it is said.

53

Relevance - Past Sexual History

- The panel may, at its discretion, exclude information regarding the past sexual history of the complainant from discussion during the hearing.
 - Consent to prior sexual encounters does not apply to future sexual encounters.
- The past sexual history of the complainant with persons other than the respondent shall be presumed irrelevant.

54

Sanctioning

- Purposes:
 - Restore and protect the victim
 - Protect the campus community
 - Reinforce community standards
 - Educate and aid in understanding impact of actions, deter violations

Suspension is sometimes **necessary** to reinforce community standards and to protect others

55

Sanctioning

- Appropriate sanctions:
 - Suspension should be considered
 - Expulsion can be considered
 - Loss of campus privileges (should not serve in leadership positions)
 - Living restrictions- not on campus
 - No Contact Order
 - Alcohol education

56

Clarifying Points

- Intentional use of alcohol/drugs by the respondent is not an excuse for violation of the sexual misconduct policy.
- Attempts to commit policy violations should be treated as if the violation were completed.
- Generally, intent of the respondent is not considered.
- Sexual misconduct: In the absence of any type of force, a capable complainant's unreasonable failure to communicate their expectations to the other party may be grounds for departure from standard sanctions but is not, alone, grounds for a finding of not responsible.

57

Activity

What information is relevant vs. irrelevant?

Questions asked by Panel members:

- Have you ever been sexually involved with James before this incident?
- Andrew, why did you not attend the party?
- James, what were your expectations when you went to Andrew's room?
- Andrew, did James ask you to stop?
- James, did you ask Andrew to stop or say "no"?
- James, how many men have you engaged in sexual activity with in the past?

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Materials from The Sexual Misconduct Judicial Training Manual by Brett Sokolow, J.D. Copyright 2000, NCHERM, www.ncherp.org as well as *Student Rights and Responsibilities* document

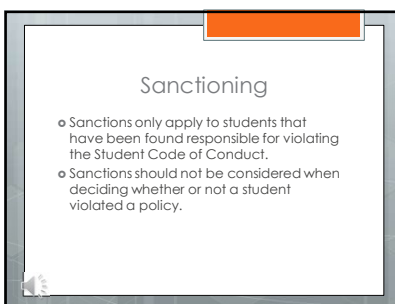
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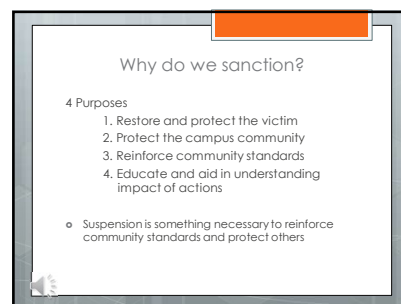
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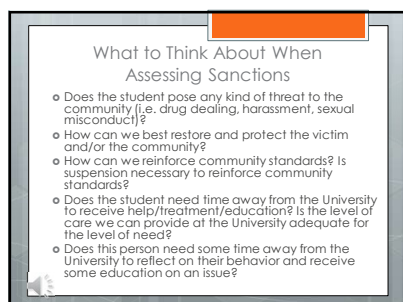
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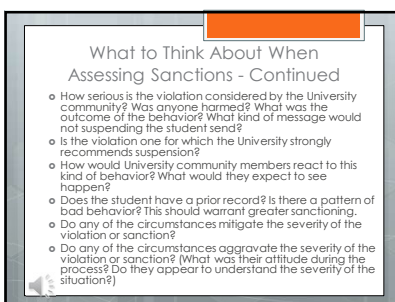
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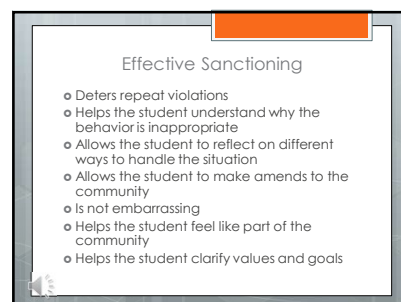
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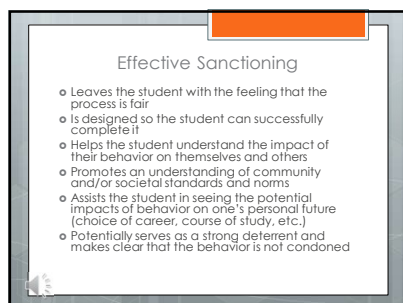
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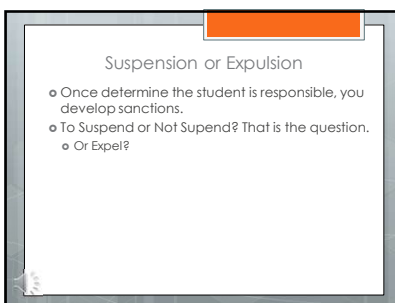
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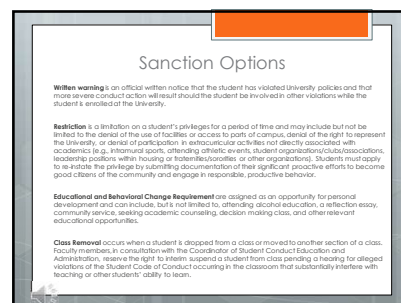
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Sanction Options Continued

No Contact Order is an absolute prohibition from contact with specified person or persons in any form whatsoever, including but not limited to contact in person, by phone, electronically, or through another person. A No Contact Order may be implemented as an interim measure for issues regarding sexual violence or other Title IX issues. Violating a No Contact Order may result in suspension from the University.

Restitution is compensation for the damage caused to the University or any person's property on campus. This is not a fine but rather a repayment for labor costs and/or value of property destroyed, damaged, consumed, or stolen.

Residence Hall Status Change: The following sanctions may include:

Restrictions on visitation to specified buildings or all University housing.

Reassignment to another University housing facility as determined by Residential Life staff.

Suspension from a University housing facility for a specified period of time, after which the student is eligible to return. Conditions for returning may be specified.

Removal from living in or visiting any University housing facility.

10

Sanction Options Continued

Conduct Probation is a specified period of time during which the student is placed on formal notice that he/she is not in good standing with the University and that further violations of University regulations will subject him/her to suspension or expulsion from the University.

Parental Notification Oklahoma State University reserves the right to notify the parents/guardians of dependent students regarding any conduct situation, particularly alcohol and other drug violations. The University may also notify parents/guardians of non-dependent students who are under the age of 21 of alcohol and/or other drug violations. Parental notification may also be utilized discretionarily by administrators when permitted by FERPA or consent of the student.

11

Educational and Behavioral Change Requirement

Educational and Behavioral Change Requirement are assigned as an opportunity for personal development and can include, but is not limited to, attending alcohol education, a reflection essay, community service, seeking academic counseling, decision making class, and other relevant educational opportunities.

- Alcohol/Drug Assessment
- Social Host Education/Reflection
- Campus Involvement
- Career Assessment
- Community Service
- Counseling Referral (we can not require)
- Resume/Cover Letter
- Retool
- Success Coach
- Tutoring
- Decision Making Class
- Anger Reflective Essay
- Behavior Contract
- Behavior Reflective Essay
- Community Impact Essay
- Personal Autobiography
- Police Officer Interview
- Project Implicit
- Respect for Differences Essay

12

Writing Facts & Rationale

- Rationales are required for both a responsible decision and sanctions.
- Rationale provide reasons for your decision and sanctions.
- All assigned sanctions should have a strong rationale behind them.
- Articulating why the panel thinks a certain sanction is appropriate is a required step in the hearing process.

13

STUDENT CONDUCT VIOLATION HEARING FINDING, RATIONALE AND SANCTION FORM	
Date of Hearing:	
Respondent's Name:	
Facts (List below upon which decisions were rendered after considering the information presented)	
1.	
2.	
3.	
4.	
5.	
6.	
7.	
Findings	
Section 1.01 Sexual Misconduct: Engaging in non-consensual contact of a sexual nature. Sexual misconduct may vary in its severity and consists of a range of behavior or attempted behavior including but not limited to the following examples of prohibited conduct:	
a. Unwelcome sexual touching: Touching an unwelcome or non-consensual person's intimate parts (such as genitalia, groin, breast, buttocks, mouth, or clothing covering genitalia) touching an unwelcome person with force or non-consensual parts, or touching an unwelcome person to touch another's intimate parts.	
b. Exposure: Engaging in indecent exposure, voyeurism or non-consensual sharing of sexually explicit images.	
c. Non-consensual sexual assault: Penetrating any bodily opening of an unwelcome or non-consensual person with any object or bodily part.	
d. Forced sexual assault: Penetrating any bodily opening of an unwelcome or non-consensual person with any object or bodily part that is committed either by force, threat, intimidation or through exploitation of another's mental or physical condition (such as lack of consciousness, incapacitation due to ingestion of drugs or alcohol, age or mental disability) of which the respondent was aware or should have been aware.	
Effective consent is informed, freely and actively given, using mutually understandable words or actions that indicate a willingness to participate in mutually agreed upon sexual activity. Mutual or implied consent is responsible for obtaining effective consent. Silence or passivity is not effective consent. The use of intimidation, coercion, threats, force or violence negates any consent obtained. Consent is not effective if obtained from an individual who is incapable of giving consent due to lack of consciousness, age, mental disability or incapacitation due to ingestion of drugs or alcohol.	

14

Finding (Check One)	
Responsible	
Not Responsible	

Comments: The panel has the opportunity to add any details to the hearing outcome below. The panel will not follow these facts. The hearing panel must provide responsible responses for using the Student Code of Conduct as charged above. The panel should list the following about each of the charges.

15

IF APPLICABLE: Recommended Sanctions to be Imposed (with completion dates AND/Or Write Rationale)

Sanction	Specific Notes	Due Date

Rationale for Sanctions: The hearing panel should provide a statement to be entered into the hearing outcome table. This section should describe the investigation, the findings, and the rationale for the panel's decision. The rationale for this section takes into consideration SJC and is consistent with previous ABC violations or the rationale for this section takes into consideration several factors. The panel considers SJC as appropriate factor. The panel considers SJC as appropriate factor.

Responsible Submit:

- (1) _____ (Chair/Faculty Panel Member)
 (2) _____ (Staff Panel Member)
 (3) _____ (Student Panel Member)

16

Case Studies

- Students have been found responsible for all of the following cases.
- What sanctions do you provide?

17

Jake was found responsible for attacking two students as they were returning from the bars on the Strip.
 Jake states he heard them say something racially discriminating but this was flatly denied by both victims.
 Jake knows karate and struck both men in the head with kicks.
 Both victims went to the hospital for treatment for cuts and bruises.
 One of the victims was kept overnight for a concussion.
 The victims and Jake were all intoxicated at the time of the incident.
 Jake has no priors.

18

Possible Sanctions

- Alcohol Education
- Behavior Reflection Essay
- Apology Letter
- Recommendation for counseling

19

Nate, while intoxicated, entered the room of another resident.
He believed this was his girlfriend's room.
He went to the bed and began fondling the woman he states he thought was his girlfriend.
She woke up and screamed.
He left the room.
He has been found responsible for unauthorized presence in a residence hall room and sexual misconduct.
Criminal charges are pending.
Nate has no priors.

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Possible Sanctions

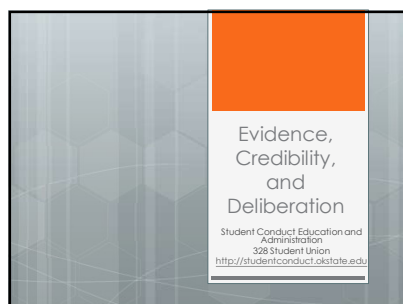
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|--|--|
| <ul style="list-style-type: none"> ◦ Responsible (Suspension) ◦ Suspension for a period of one to three years. ◦ Sexual Misconduct Training before re-enrollment ◦ No Contact Order when returning if victim is still a student ◦ Banned from Campus Housing ◦ Alcohol education | <ul style="list-style-type: none"> ◦ Responsible (Not Suspension) ◦ No Contact Order for duration of enrollment ◦ Sexual Misconduct Training ◦ Banned from Campus Housing ◦ Probation for duration of enrollment ◦ Alcohol education ◦ Reflection |
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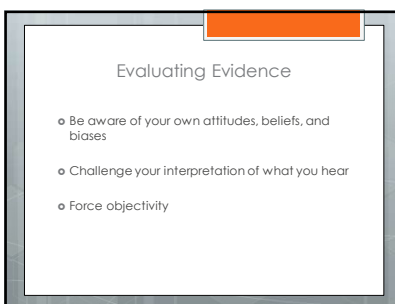
Conclusion

- Sanctions should be educational in nature and sometimes suspension is necessary.
- The panel can rely on precedence and each other to determine appropriate sanction.
- Rationale for sanctions must be clear.
- Sanctions should give students an opportunity to reflect and learn from their behavior.

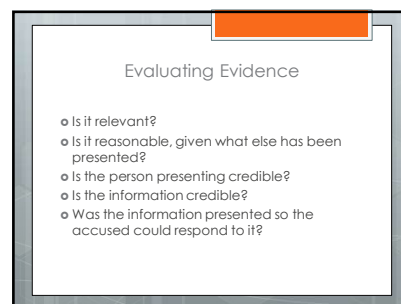
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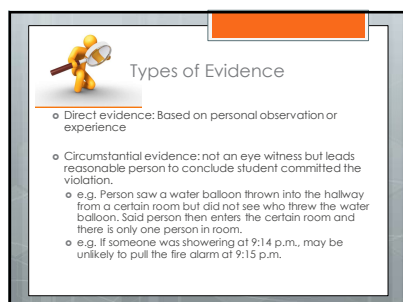
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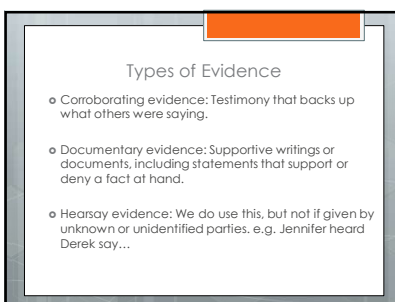
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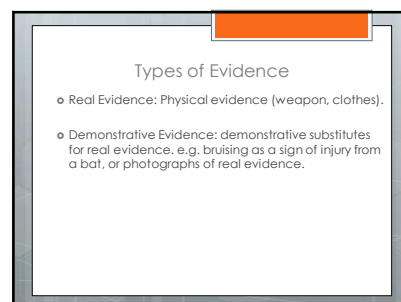
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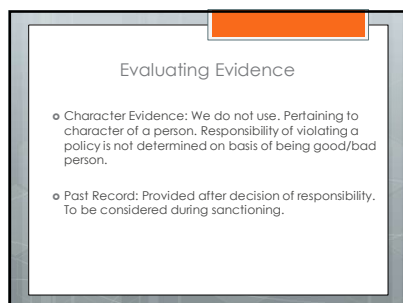
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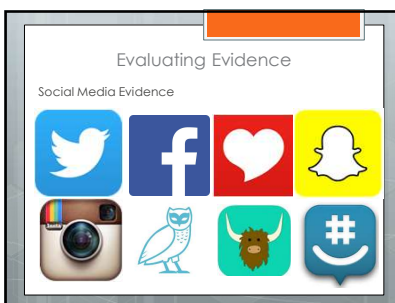
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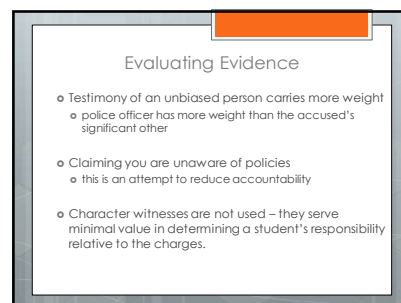
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Weighing Credibility

Things to consider.....

- Motive
- Ability to commit the violation
- Threats or expressions denoting intent
- Concealing one's identity
- Fabricating or destroying evidence
- Resisting arrest or documentation, running away

10

Weighing Credibility

Things to consider.....

- Are they believable, worthy of credit?
- Demeanor
 - 1) *Non-cooperation*: abrupt, short answers, refusal to answer—could indicate fear or retaliation, anger or frustration, desire to hide something—"You seem reluctant to answer these questions. Can you tell us what makes you reluctant?"
 - 2) *Lower the lights*: embellish or go beyond scope of questions to relate the story—"Because this complaint is very complicated, could you please limit your statements to answering specific questions or describing the incident in question?"
 - 3) *Axe to grind*: has a hidden agenda, wants to nail someone—"You seem to have concerns that go beyond the scope of this hearing, perhaps you can discuss those at a different time."
 - 4) *Tries to please*: trying to give the right answer—"Well, I'm not sure what you want me to say," looking to the person they want to please before answering.

11

Weighing Credibility

Things to consider.....

- Logic: Are there inconsistencies in their story? Does their story change?
- Expertise: Expertise of a police officer who is trained in assessing intoxication and encountered hundreds of drunk people, saying "John seemed intoxicated" is very credible. Conflicting testimony of a party guest who was also drunk and says, "John seemed sober" is less credible. Expertise need not be "trained" or "professional": e.g. Jill would know more about friend Amy's drinking habits than Bill, who just met her.

12

Relevance

- Only deliberate on evidence relevant to issue being tried at hearing
- Test for relevance: will this statement prove/disprove an issue in the hearing?

FOCUS ON THE ISSUE AT HAND

rel-e-vance *n.*
• Pertinence to the matter at hand.
 Relevance is a term used to describe how pertinent, connected, or applicable some information is to a given matter.

13

Deliberation

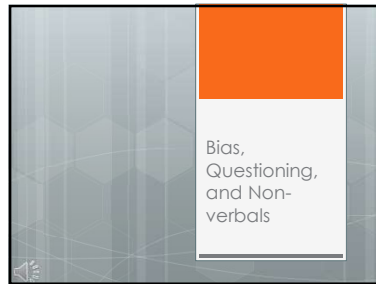
- Weigh all information to determine if sufficient **facts** support the allegation
- Only deliberate on **relevant** evidence
- Only information introduced to all parties may be used in deliberation
- In cases of multiple allegations, review each and find the facts, then vote separately on each
- Do not discuss sanctioning until a finding of responsibility is rendered
- **Speak up!** You are involved in this process because what you have to say matters. **ASK IT! SAY IT!**

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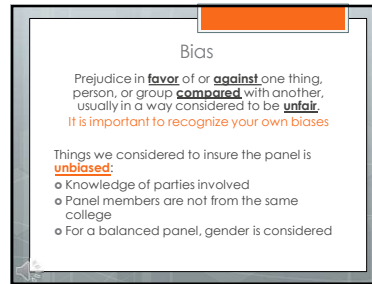
Preponderance of Evidence

- Apply the "more likely than not" standard to each allegation
- You must be 50.01% sure that the student violated the policy to find them responsible.
- You do not need to be 100 percent sure or even 75 percent sure, just more than 50 percent sure.

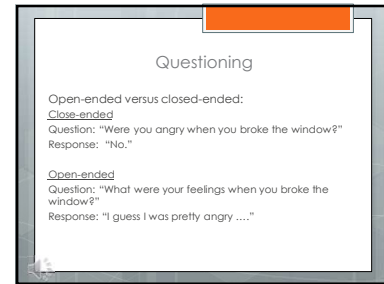
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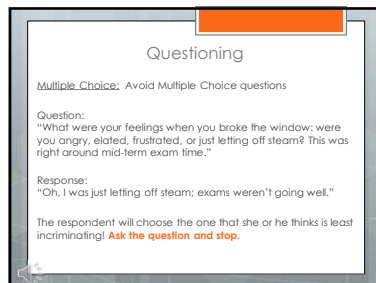
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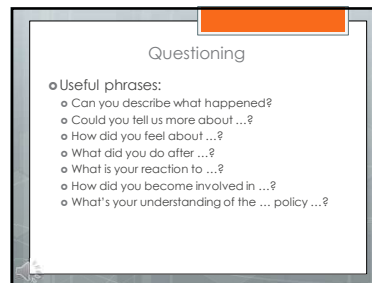
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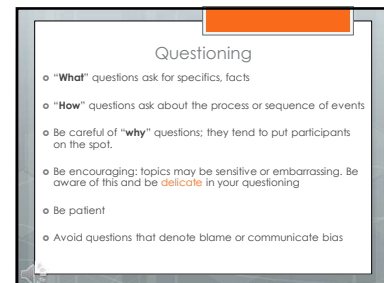
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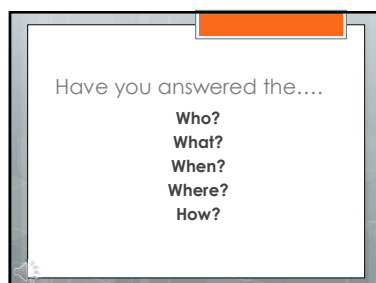
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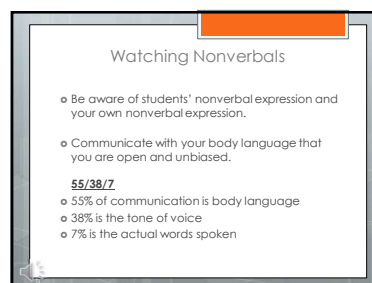
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Tips for paying attention to the speaker

- o Lean forward slightly
- o Make eye contact with the person speaking
- o Acknowledge what is being said by nodding or "um hum" sounds
- o Thank the person when they finish speaking

(©Lee E. Bird, St. Cloud State University, 1993)

10

During the Hearing

Monitor the student's body language for discomfort
(e.g., crying, fidgeting, wringing hands, avoidance of eye contact, shaking, etc.)

When a student communicates with body language that they are uncomfortable or upset, it may be an appropriate time to ask if they would like to take a break.

Students may want to take a break after particularly difficult sections of the interview; for example, after describing the details of the sexual acts involved in the assault. Breaks often help students regain composure and prepare for the remaining questions.

Skipping and returning to questions
Allow the student to temporarily skip questions that may upset them too much to answer at the moment. These questions may be returned to later in the interview.

11

During the Hearing

Be sensitive to the embarrassing nature of the information the student is providing

Using sexual language
When a student uses a word or phrase to describe a sexual act, be sure to clarify what they mean by it.

12

During the Hearing

Exploring Inconsistencies
Address inconsistencies in the student's statement by exploring them gently and compassionately. Simply point out the inconsistency and ask the student to clarify.

"I thought you said that you met in class but later you said that you met at a frat party. Can you clarify that for me?"

"I'm sorry, but I'm confused. I thought you said you didn't call for help that night."

13

During the Hearing

Explain the purpose of questions to avoid the appearance of judging the student
Be careful not to convey any judgment about the student's actions.

Students (and their advisors) are carefully watching panel members for signs that they are being doubted or blamed.

Adv. question that might play into this suspicion needs to be carefully explained to students to reassure them and ensure their continued cooperation.

14

During the Hearing

Normalize the student's difficulty responding to questions
Assure the student that there may be some questions that they do not have answers to. Assure them that this is perfectly normal and in no way reflects the strength or validity of the claim.

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Other Considerations

Presentation of Charges
o If one party is less able to present information, you may need to help them bring out the truth through questions, being patient, etc.

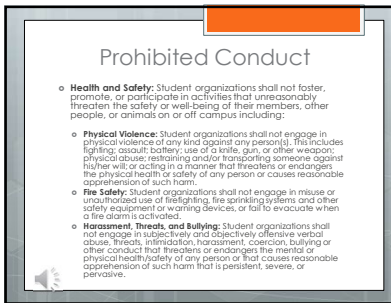
Confidentiality/Privacy
o Refrain from disclosing unnecessary information in front of witnesses

Impact Statements
o Usually given during/prior to closing statements-can be considered in the sanctioning stage.

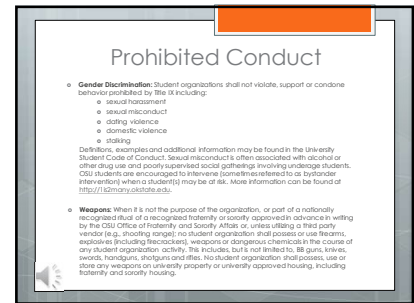
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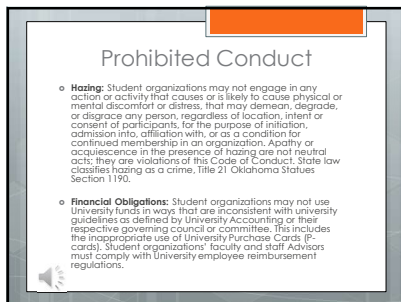
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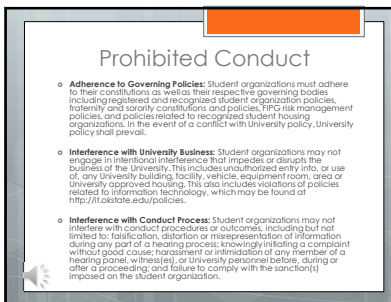
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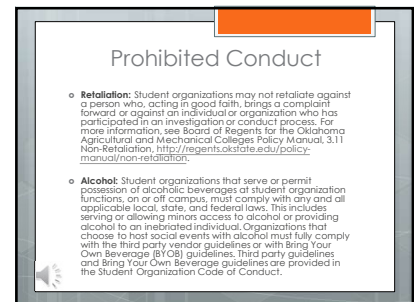
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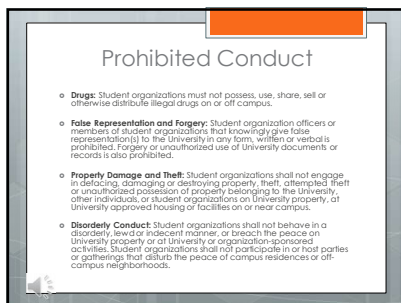
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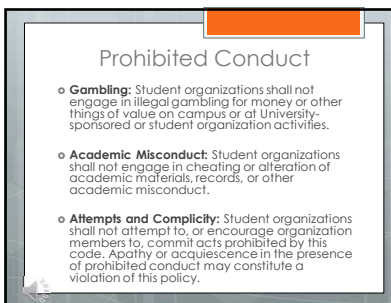
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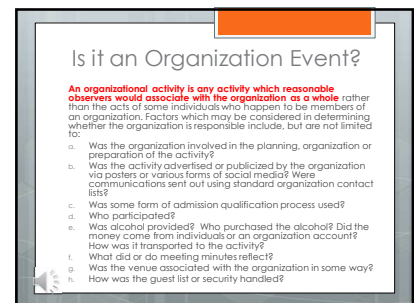
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Student Organization Conduct Process Options

- A. Judicial Board
- B. Administrative Meeting
- C. Student Conduct Committee

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Panel Make Up

The Hearing Panel will be selected by the Office of Student Conduct Education and Administration and consist of three (3) members; one (1) to be selected from the available panel of faculty/staff members, one (1) to be selected from the available panel of students and one (1) to be a faculty/staff advisor of a similar student organization. A chairperson will be selected from within the Hearing Panel.

11

Advisor Participation

The officer of the student organization may be accompanied and assisted at the hearing by an advisor of the organization's choice. The student organization must provide the name of the advisor to the Office of Student Conduct Education and Administration at least twenty-four (24) hours before the hearing. The advisor may participate directly to the same extent as the representative officer could. Such direct participation is a privilege which, if abused, may be withdrawn by the Chair of the Hearing Panel. If the privilege is withdrawn, the advisor may continue to advise the representative officer. If an advisor fails to act in accordance with hearing procedure, the Chair may bar the advisor from the hearing.

12

Hearing Outline

1. Purpose of the hearing provided by the Chair of the hearing panel.
2. University investigator will present the investigation report
3. The complainant will present information and call witnesses.
4. The respondent will present information and call witnesses.
5. The complainant may make a closing statement.
6. The respondent may make a closing statement.
7. All parties are dismissed for hearing panel deliberation.

13

Additional Rule

Procedural rules not inconsistent with these procedures may be established by the Hearing Panel from time to time to fulfill its functions in an orderly manner.

A copy of such procedural rules will be provided to the student organization along with the notice of hearing.

14

Sanctions

Educational and Behavioral Change Requirements are assigned as an opportunity for personal development and can include but are not limited to a written plan for reconstruction of the organization, class/workshop attendance, educational projects, and service learning experiences.

Restiction of Privileges: Restrictions placed upon a student organization which limits University privileges for a specified period of time. These restrictions may include, but are not limited to, the University prohibiting the organization from:

- a) Representing the University in any capacity.
- b) Receiving awards or recognitions from the University.
- c) Maintaining an office or other assigned space on University property.
- d) Receiving or retaining University funds.
- e) Participating in intramural sports.
- f) Being a sponsor, co-sponsor and/or participant in any social event or other activity (often referred to as social probation).
- g) Sponsoring speaker(s) or guest(s) on campus.
- h) Using University vehicles.
- i) Using University facilities.
- j) Advertising on campus for organizational activities.
- k) Soliciting and/or selling any items on campus.

15

Sanctions

Suspension of Organizational Recognition: The denial of privileges of a recognized organization for a designated period of time, which will be no less than one semester. Any organization whose recognition is suspended must:

- a) Cease all organizational activities.
- b) Vacate any appointed or elected office with that organization's governing body for the duration of the period of suspension.
- c) Surrender balances of all organizational funds granted by Student Government.
- d) Vacate office or housing space assigned by the University from the date of the notice of suspension. Space vacated due to suspension may be reassigned to other eligible University organizations. In the case of housing, individual members will be reassigned provided space is available. There will be no University Housing contract cancellations.

Revocation of Organizational Recognition: Permanently excludes the organization from the University without any recourse to reapply for recognition. Any organization whose recognition is permanently revoked must:

- a) Cease all organizational activities.
- b) Vacate any appointed or elected office.
- c) Surrender balances of all organizational funds granted by Student Government.
- d) Vacate office or housing space assigned by the University from the date of the notice of revocation. Space vacated due to revocation may be reassigned to other eligible University organizations. In the case of housing, individual members will be reassigned provided space is available. There will be no University Housing contract cancellations.

16

Appeal

- Decisions by the Hearing Panel may be appealed to the President of the University or their designee, who shall consult with the Vice President for Student Affairs.

17

Hazing

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Hazing Definition

Student organizations may not engage in any action or activity that causes or is likely to cause physical or mental discomfort or distress, that may demean, degrade, or disgrace any person, regardless of location, **intent or consent of participants** for the purpose of initiation, admission into, affiliation with, or as a condition for continued membership in an organization. **Apathy or acquiescence** in the presence of hazing are not neutral acts; they are violations of this Code of Conduct. State law classifies hazing as a crime, Title 21 Oklahoma Statutes Section 1190.

19

Where Hazing Occurs

- Any organization/group
 - Fraternities/Sororities
 - Military/ROTC
 - Band (drummers)
 - Athletic teams
 - High school groups



20

Subtle Hazing

Behaviors that emphasize a power imbalance between new members/rookies and other members of the group or team, termed "subtle hazing" because these types of hazing are often taken-for-granted or accepted as "harmless" or meaningless. Subtle hazing typically involves activities or attitudes that breach reasonable standards of mutual respect and place new members/rookies on the receiving end of ridicule, embarrassment, and/or humiliation tactics. New members/rookies often feel the need to endure subtle hazing to feel like part of the group or team.

21

Examples of Subtle Hazing

- Deception
- Assigning demerits
- Silence periods with implied threats for violation
- Deprivation of privileges granted to other members
- Requiring new members/rookies to perform duties not assigned to other members
- Line-ups and drills/tests on meaningless information
- Name calling
- Requiring new members/rookies to refer to other members with titles (e.g. "Mr.", "Miss") while they are identified with demeaning terms
- Expecting certain items to always be in one's possession
- Socially isolating new members/rookies

22

Harassment Hazing

Behaviors that cause emotional anguish or physical discomfort in order to feel like part of the group. Harassment hazing confuses, frustrates, and causes undue stress for new members/rookies. (Some types of harassment hazing can also be considered violent hazing).

23

Examples of Harassment Hazing

- Verbal abuse
- Threats or implied threats
- Asking new members to wear embarrassing or humiliating attire
- Stunt or skit nights with degrading, crude, or humiliating acts
- Sleep deprivation
- Sexual simulations
- Being expected to harass others
- Expecting new members/rookies to be deprived of maintaining a normal schedule of bodily cleanliness.
- Expecting new members/rookies to perform personal service to other members such as carrying books, errands, cooking, cleaning etc

24

Violent of Hazing

Behaviors that have the potential to cause physical and/or emotional, or psychological harm.



25

Examples of Violent Hazing

- Forced or coerced alcohol or other drug consumption
- Beating, paddling, or other forms of assault
- Branding
- Forced or coerced ingestion of vile substances or concoctions
- Burning
- Expecting abuse or mistreatment of animals
- Public nudity
- Expecting illegal activity
- Bondage
- Abductions/kidnaps
- Exposure to cold weather or extreme heat without appropriate protection
- Water intoxication

26

Alcohol and Hazing

Alcohol plays 2 major roles in hazing:

1. **Consumption by current members**
 - "Strategic disinhibition"
 - Enhance the fun
 - Reduce anxiety or guilt
 - Provide a sense of "insurance" against culpability
2. **Consumption by new members**
 - "Social lubricant"
 - Impact judgment
 - Decrease power
 - Privilege



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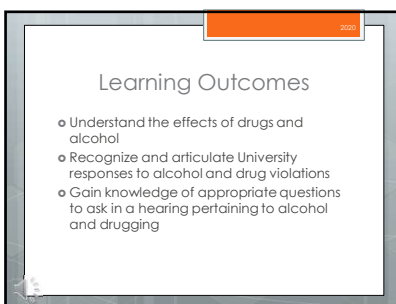
Sorority Hazing

Sorority Hazing can be a little different than hazing in other organizations:

- "Every morning pledges brought the day's cafeteria menu and a weather report to the sisters who wanted them. They decorated posters, stayed up late to write lyrics to songs about pledging, and created portraits of each sister. Mostly, pledges had to clean the members' room and living quarters. 'We were essentially slaves to the sisters'" (Nuwer, 2000, p. 143).
- "Pairs of pledges interviewed members. They sat on the floor while the interviewee talked to them from a couch, as if they were royalty" (Nuwer, 2000, p. 142).
- While in a so-called line-up, "members barraged pledges with conflicting orders. One member told a pledge to look down, not at her. Another member screamed at the pledge for not meeting her eyes when they talked. (Nuwer, 2000, p. 142).



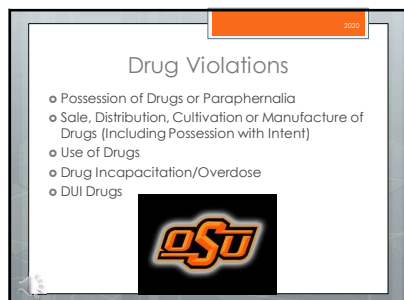
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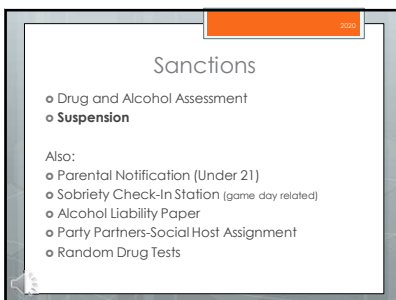
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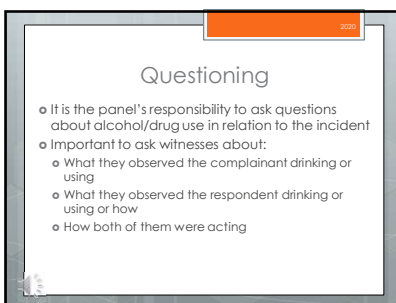
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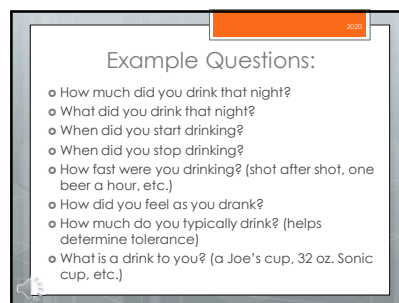
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What's a standard drink?

- 12 oz. Beer
- 10 oz. Microbrew
- 10 oz. Wine cooler
- 8 oz. Malt Liquor
- 4 oz. Wine
- 2 1/2 oz. Fortified wine
- 1 1/4 oz. 80 proof Hard Alcohol
- 1 oz. 100 proof Hard Alcohol




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BAC

Blood Alcohol Concentration- Measure of how much alcohol is in one's blood.

$0.08\% = 8/10,000$

For every 10,000 drops of blood there are 8 drops of alcohol.



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BAC

Factors affecting Blood Alcohol Level

- Time - People burn off a very predictable .015% from their BAC per hour
- Weight
- Gender
- Amount and Type of Alcohol

Factors affecting absorption and oxidation of alcohol

- Food in stomach
- What one is drinking
- Rate of consumption
- Effervescence (Bubbles)

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Effects of Alcohol on Women

	90 lbs	110 lbs	120 lbs	140 lbs	160 lbs	180 lbs	200 lbs	220 lbs	Drinks
ONLY SAFE	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0
DRIVING LIMIT	0.05	0.05	0.04	0.03	0.03	0.03	0.02	0.02	1
IMPAIRMENT BEGINS	0.10	0.09	0.08	0.07	0.06	0.05	0.05	0.04	2
DRIVING SKILLS SIGNIFICANTLY AFFECTED	0.15	0.14	0.11	0.09	0.08	0.07	0.06	0.06	3
LEGALLY INTOXICATED	0.20	0.18	0.15	0.13	0.11	0.10	0.09	0.08	4
	0.25	0.23	0.19	0.16	0.14	0.13	0.11	0.10	5
	0.30	0.27	0.23	0.20	0.17	0.15	0.14	0.12	6
	0.35	0.32	0.26	0.23	0.20	0.18	0.16	0.14	7
	0.40	0.36	0.30	0.26	0.23	0.20	0.18	0.17	8

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Effects of Alcohol on Men

	110 lbs	120 lbs	140 lbs	160 lbs	180 lbs	200 lbs	220 lbs	240 lbs	Drinks
ONLY SAFE	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0
DRIVING LIMIT	0.04	0.03	0.03	0.02	0.02	0.02	0.02	0.02	1
IMPAIRMENT BEGINS	0.08	0.06	0.05	0.05	0.04	0.04	0.03	0.03	2
DRIVING SKILLS SIGNIFICANTLY AFFECTED	0.11	0.09	0.08	0.07	0.06	0.06	0.05	0.05	3
LEGALLY INTOXICATED	0.15	0.12	0.11	0.09	0.08	0.08	0.07	0.06	4
	0.19	0.16	0.13	0.12	0.11	0.09	0.08	0.08	5
	0.23	0.19	0.16	0.14	0.13	0.11	0.11	0.09	6
	0.26	0.22	0.19	0.16	0.15	0.13	0.12	0.11	7
	0.30	0.26	0.21	0.19	0.17	0.15	0.14	0.13	8

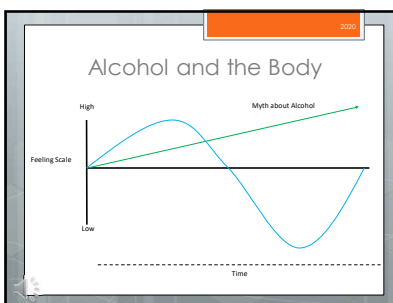
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Level	Effects
.02%	Start to feel some effects at first drink
.04%	Most people begin to feel relaxed
.06%	Judgment is somewhat impaired; people are less able to make rational decisions about their capabilities, for example, driving
.08%	Definite impairment of muscle coordination and driving skills. Increase risk of nausea and slurred speech.
.10%	Although reaction time is affected after the first drink, there is a clear deterioration of reaction time and control.
.15%	Balance and movement impaired. Risk of blackouts, accidents, nausea, passing out and hangovers
.30%	Many people lose consciousness
.40%	Most people lose consciousness, some die.
.45%	Breathing stops; death occurs.

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Marijuana

Most used illegal drug in the United States

- THC is the active ingredient
- Other drugs can be mixed with Marijuana
- Effects include: distorted perception, trouble with thinking and problem solving, and loss of motor coordination

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Adderall

Abused to create concentration and focus so that students can study for longer periods of time

- Can also be used as a recreational drug
- Causes cardiovascular problems
 - Heightened risk of stroke long term
- Sudden stop in use can result in severe depression and irritability

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Oxycodone

Painkiller mostly abused for recreational use to provide feelings of euphoria

- Can also be abused after a patient is taken off of prescription because of perceived dependence
- Some side effects include mood swings and liver damage
- 9% of all Americans will abuse opiates

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Rohypnol

Depresses the central nervous system


- When used with alcohol, Rohypnol causes amnesia
 - Combination is used to severely impair prospective victims
- Effects last 2 – 8 hours

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Steroids

Abused to build muscle mass

- Used in cycles of weeks and months (Cycling)
- Multiple steroids used at once for best results (Stacking)
- Long term side effects include cancer, heart/liver disease, and aggressive behavior



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