

# **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**

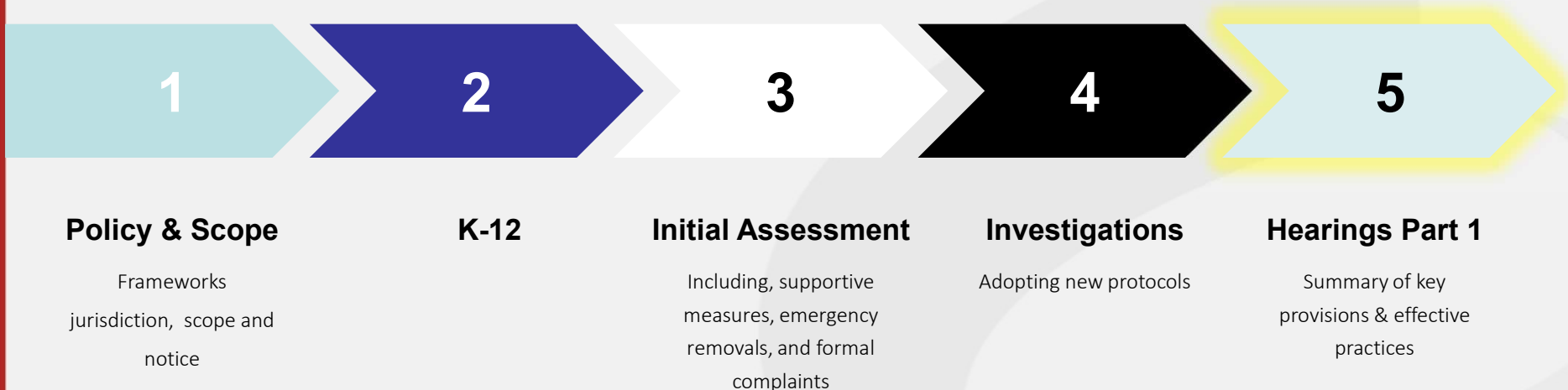


# Today's Webinar

- 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:



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6

## Hearings Part 2

Summary of key provisions & effective practices

7

## Informal Resolutions

Effective Practices

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## Trainings & Documentation

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## Clery and VAWA

Intersections between Clery/VAWA and Title IX

# Institutional Response Group



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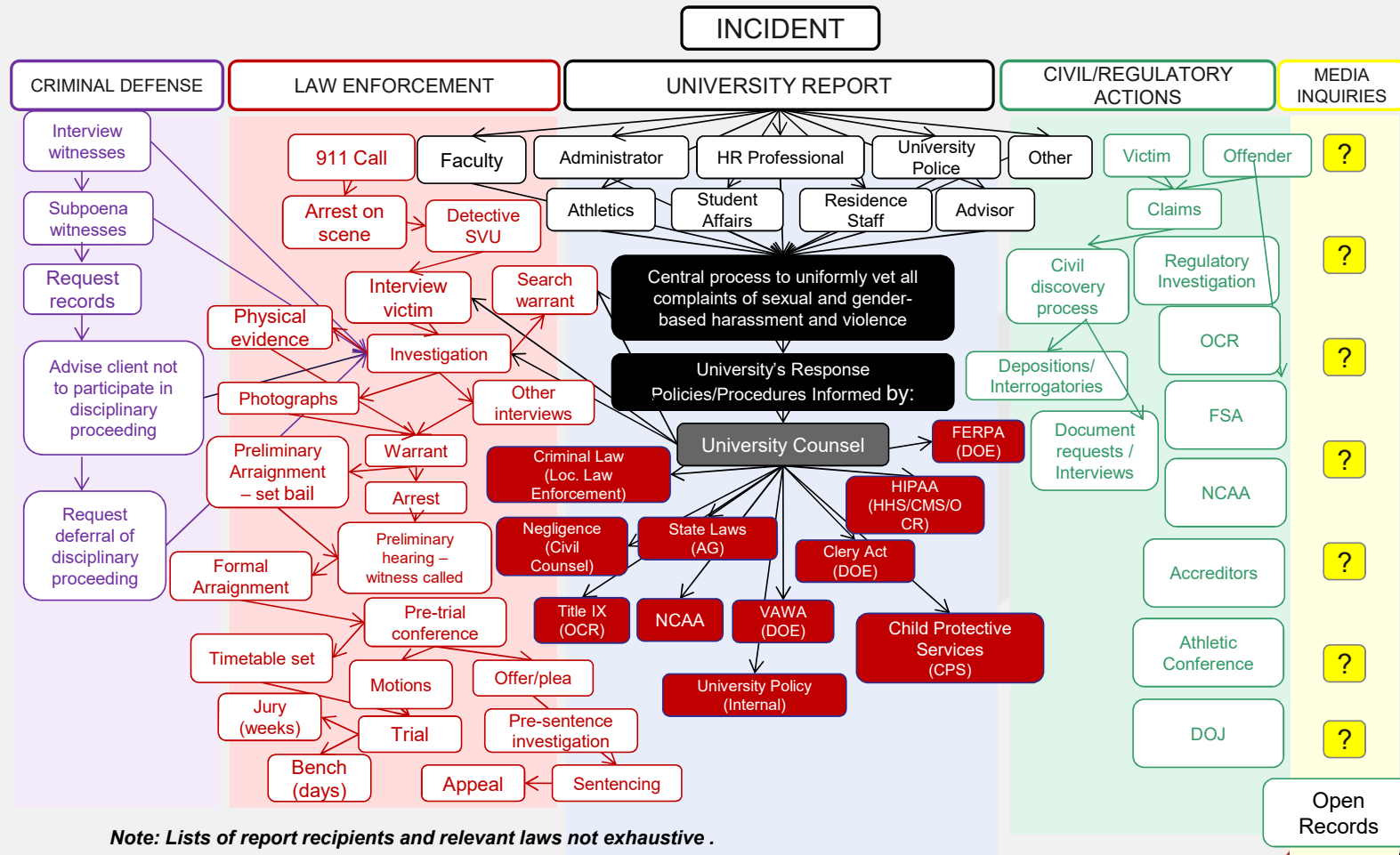


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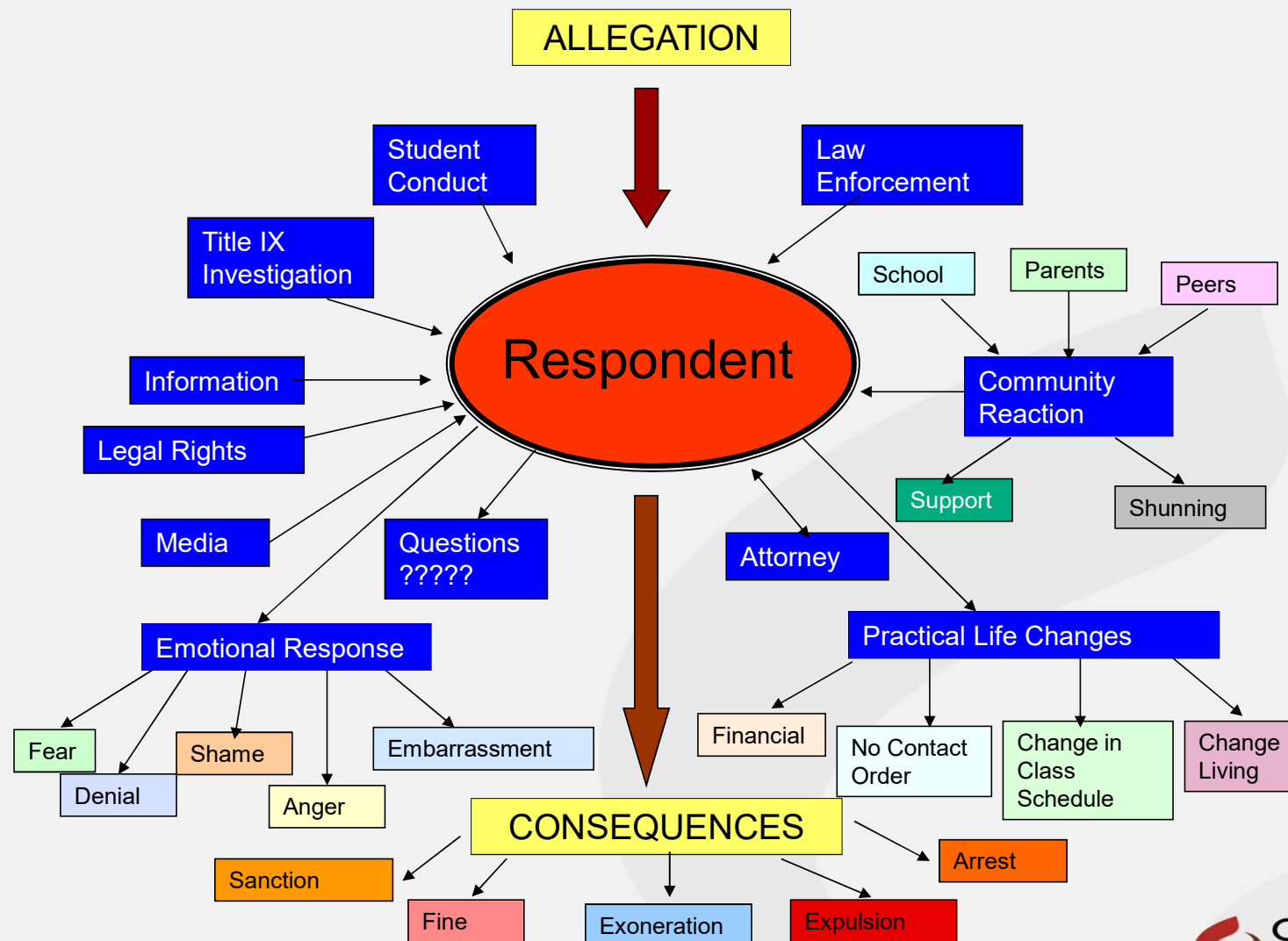
# **FRAMING THE CONTEXT**

# The Challenge of the Context







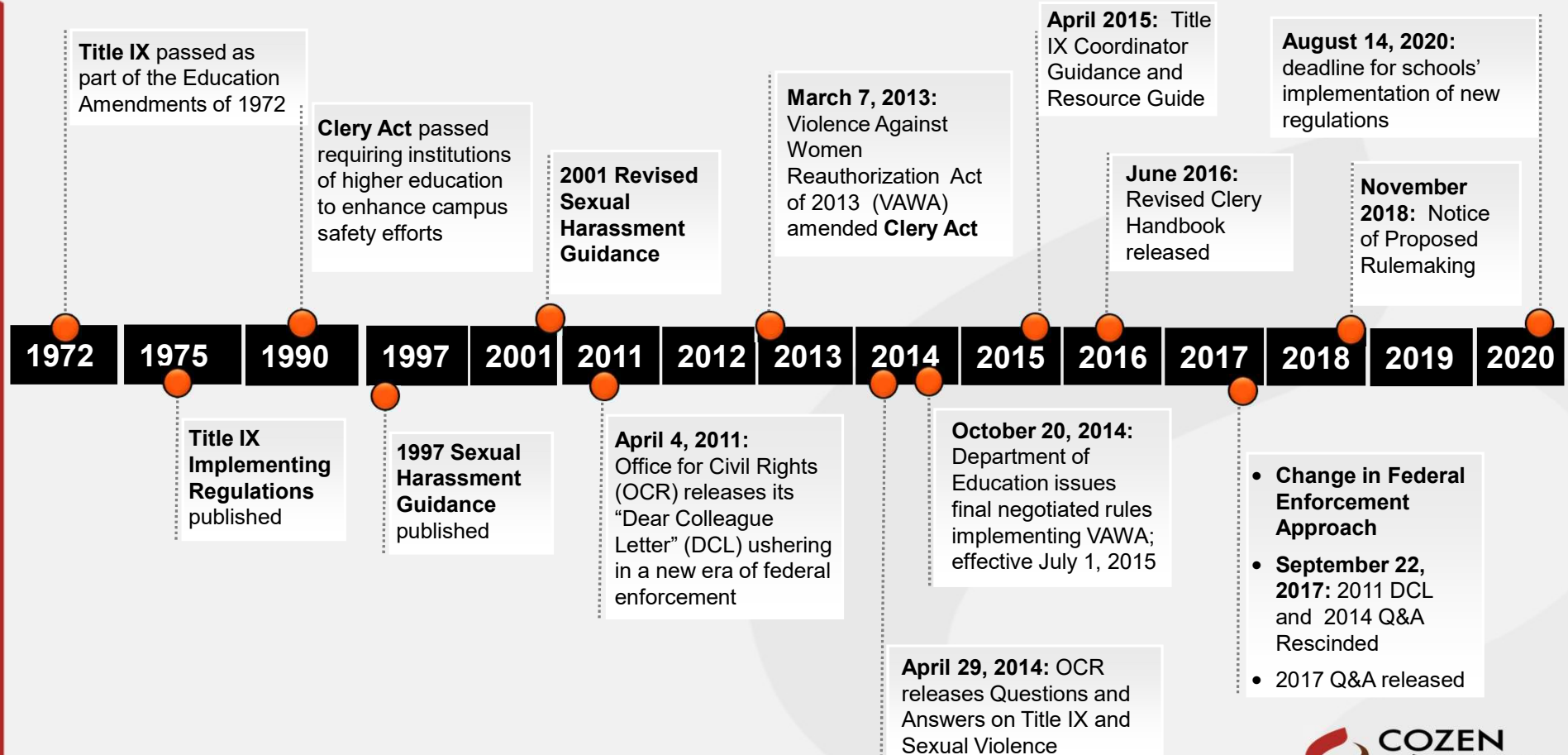


# Implementation Rubric

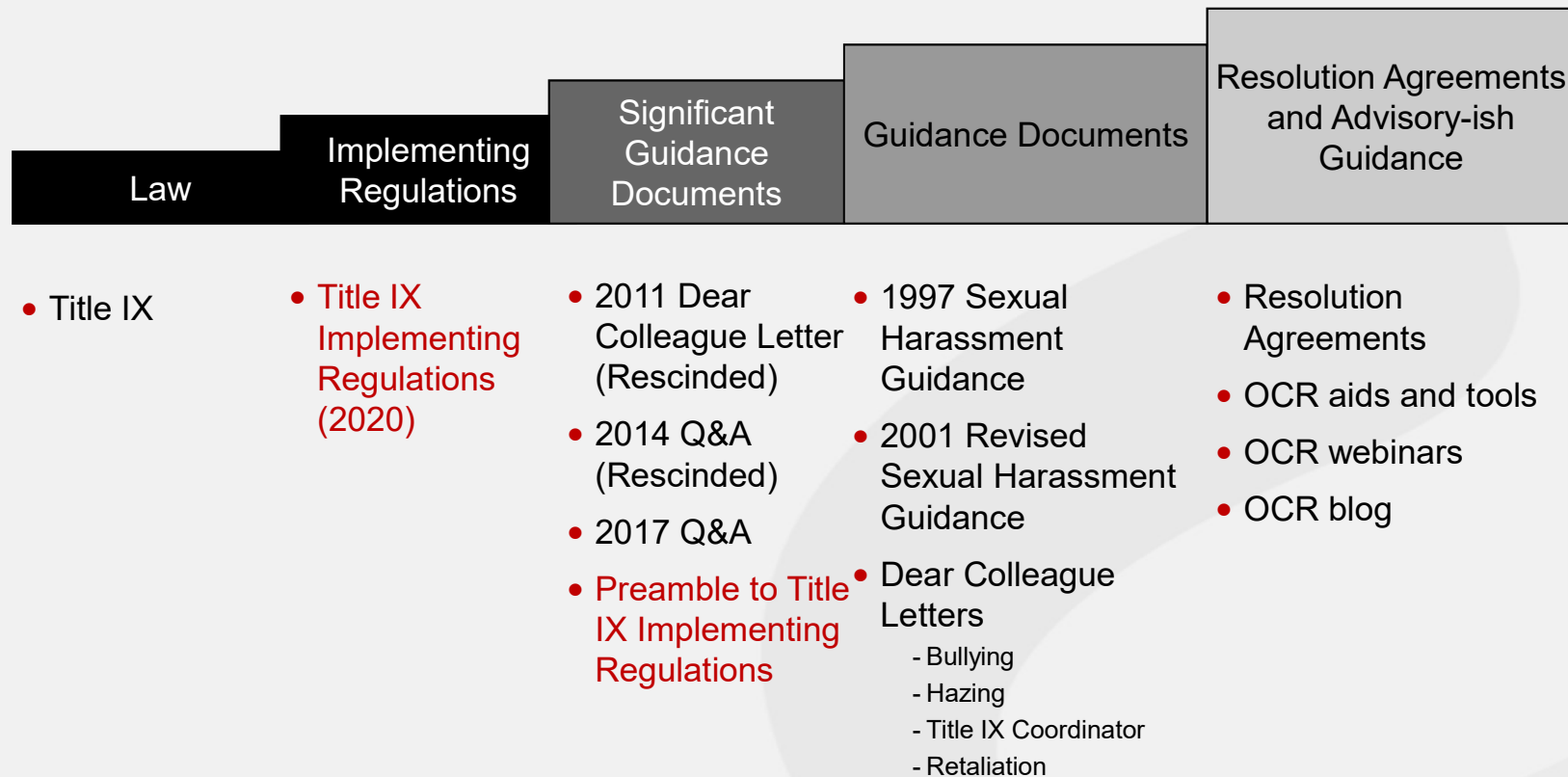
- Law
- Regulations
- Guidance
- Preamble and commentary
- OCR webinars, charts, blog
- Policy
- Higher education experience
- Institutional values



# 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

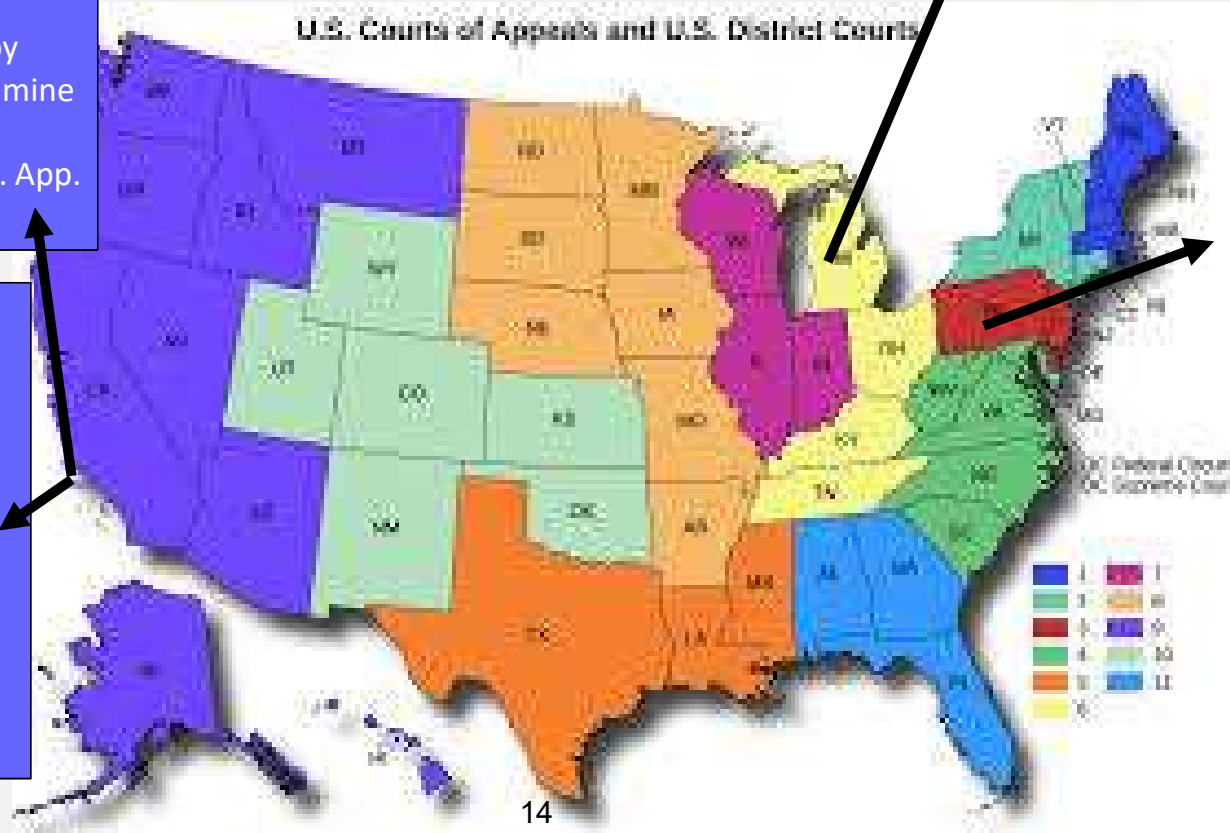
# Recent Court Cases

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.” *Boormeester 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.

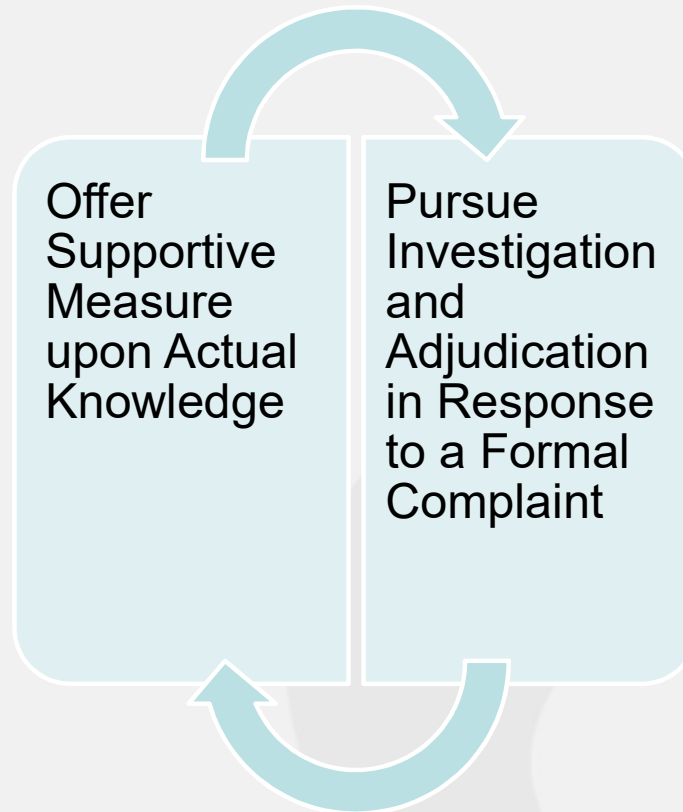
**Doe v. Purdue University**: Investigation report must be provided to the parties prior to the hearing and must include summaries of both inculpatory and exculpatory evidence.

2020

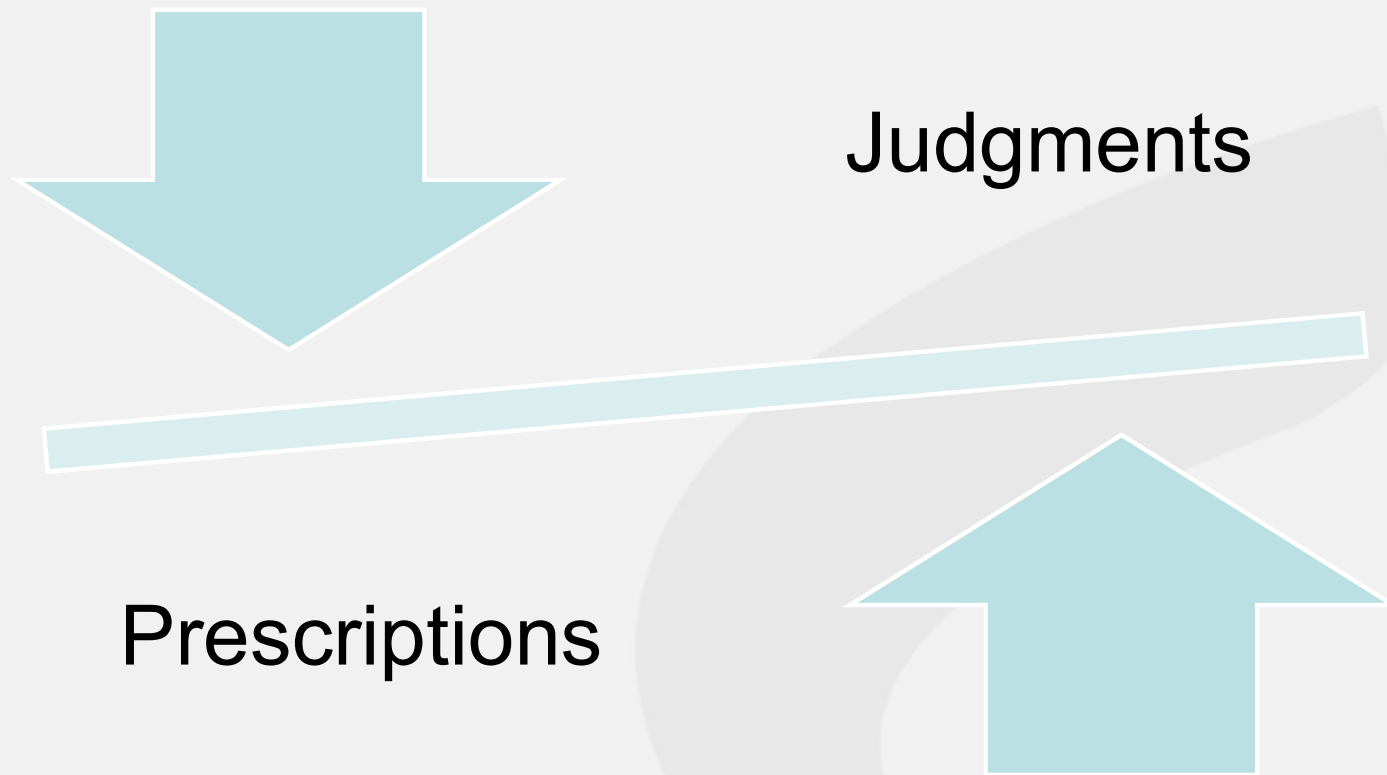
**Boermeester v. Carry**: In a DV case, the state court ruled, "...procedures were unfair because they denied Respondent a meaningful opportunity to cross-examine critical witnesses at an in-person hearing."

**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



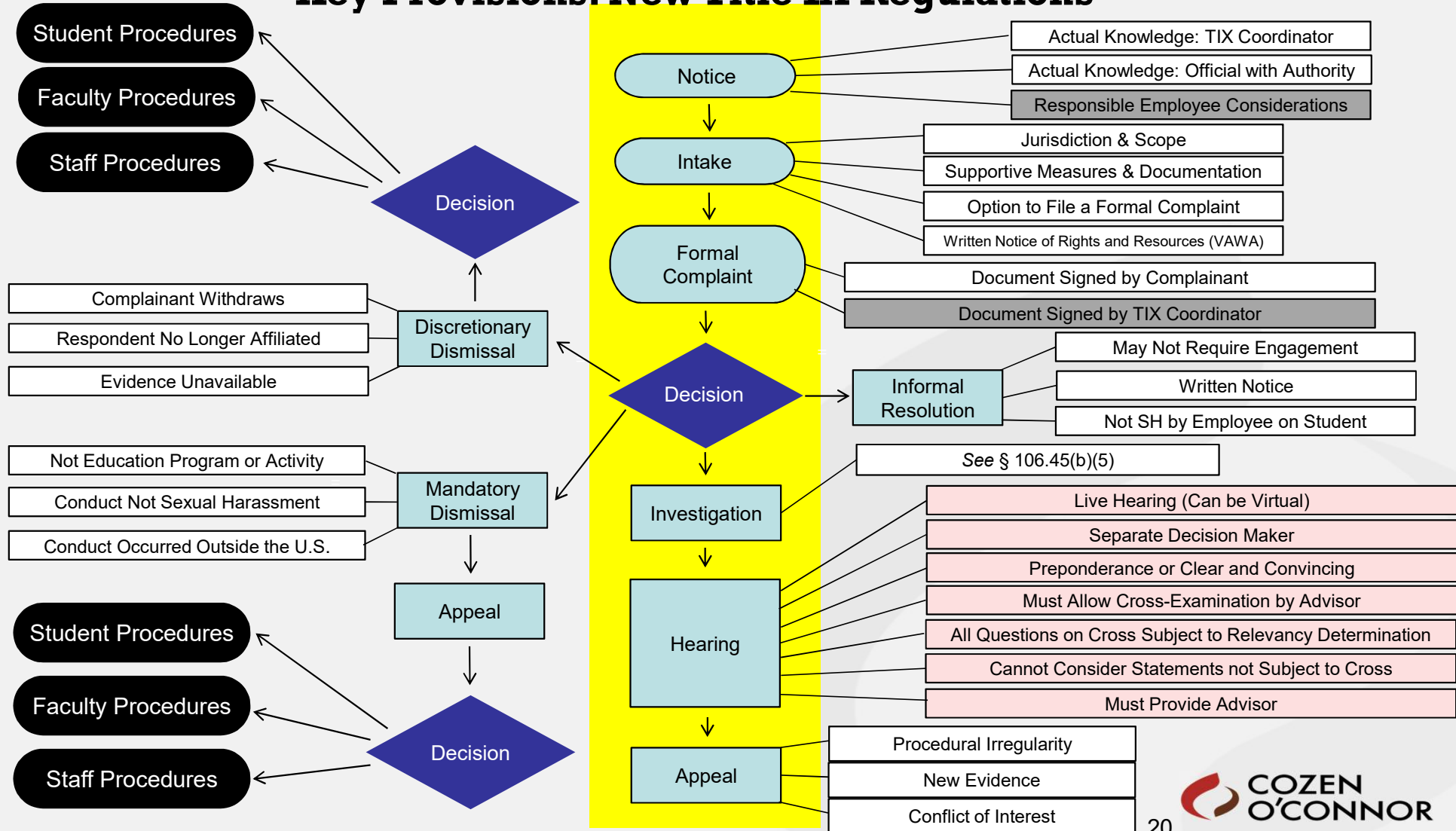
# Balancing



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

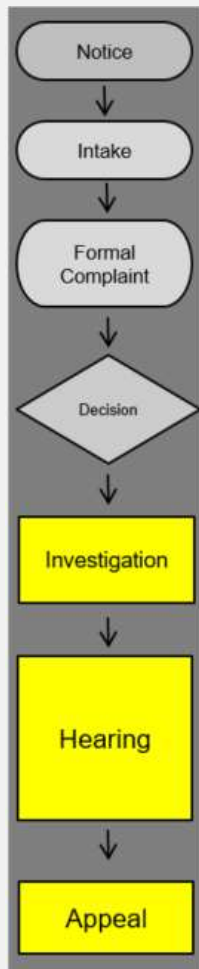
## Regulations: “Best Practices”

- “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**

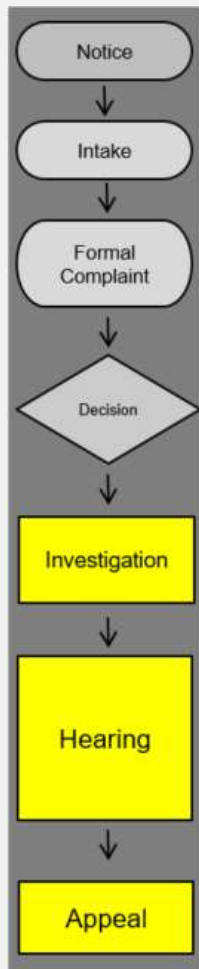
# Grievance Process: The Basics



- 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

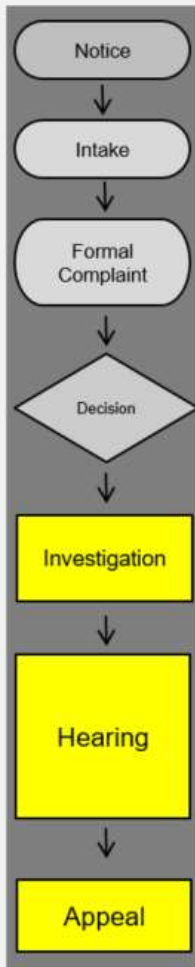


- **Treat complainants and respondents equitably** by providing **remedies** to a complainant where a determination of responsibility for sexual harassment has been made against the respondent, and by following a **grievance process** that complies with this section before the imposition of any disciplinary 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

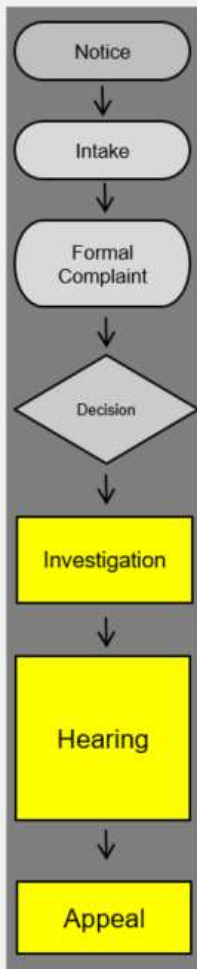
Relevant Regulations Sections:

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

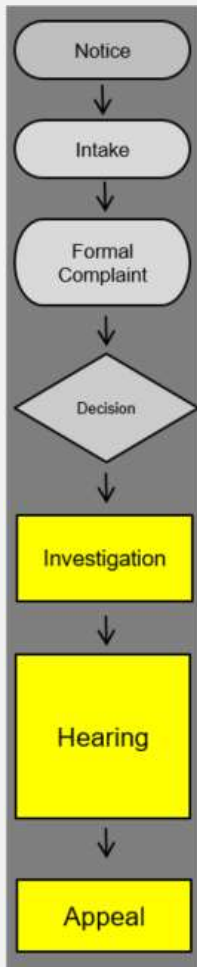
Relevant Regulations Sections:

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)

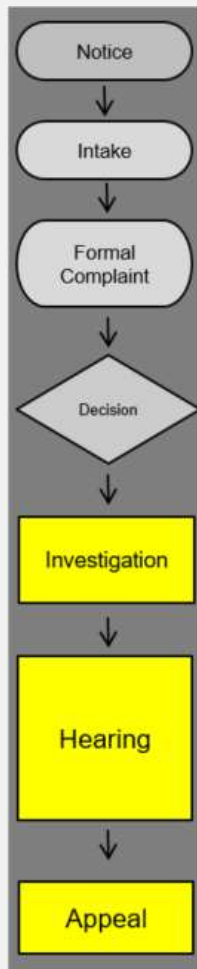
# Basic Requirements



- 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

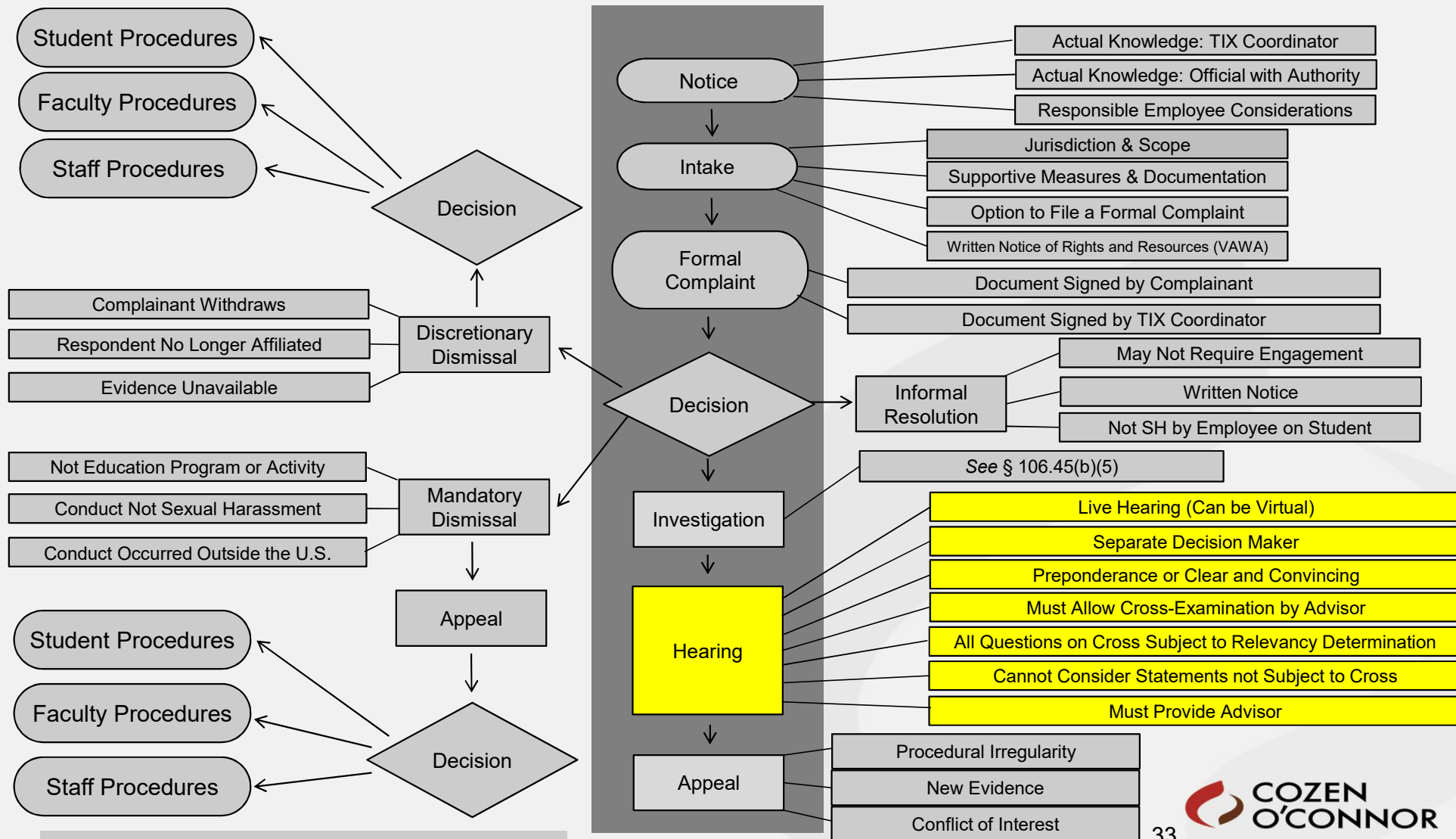
- Formal Complaint
- Notice of Allegations
- Investigation
- Evidence Review
  - Review and response period
- Investigative Report
  - Review and response period

# Recap of Investigation Requirements



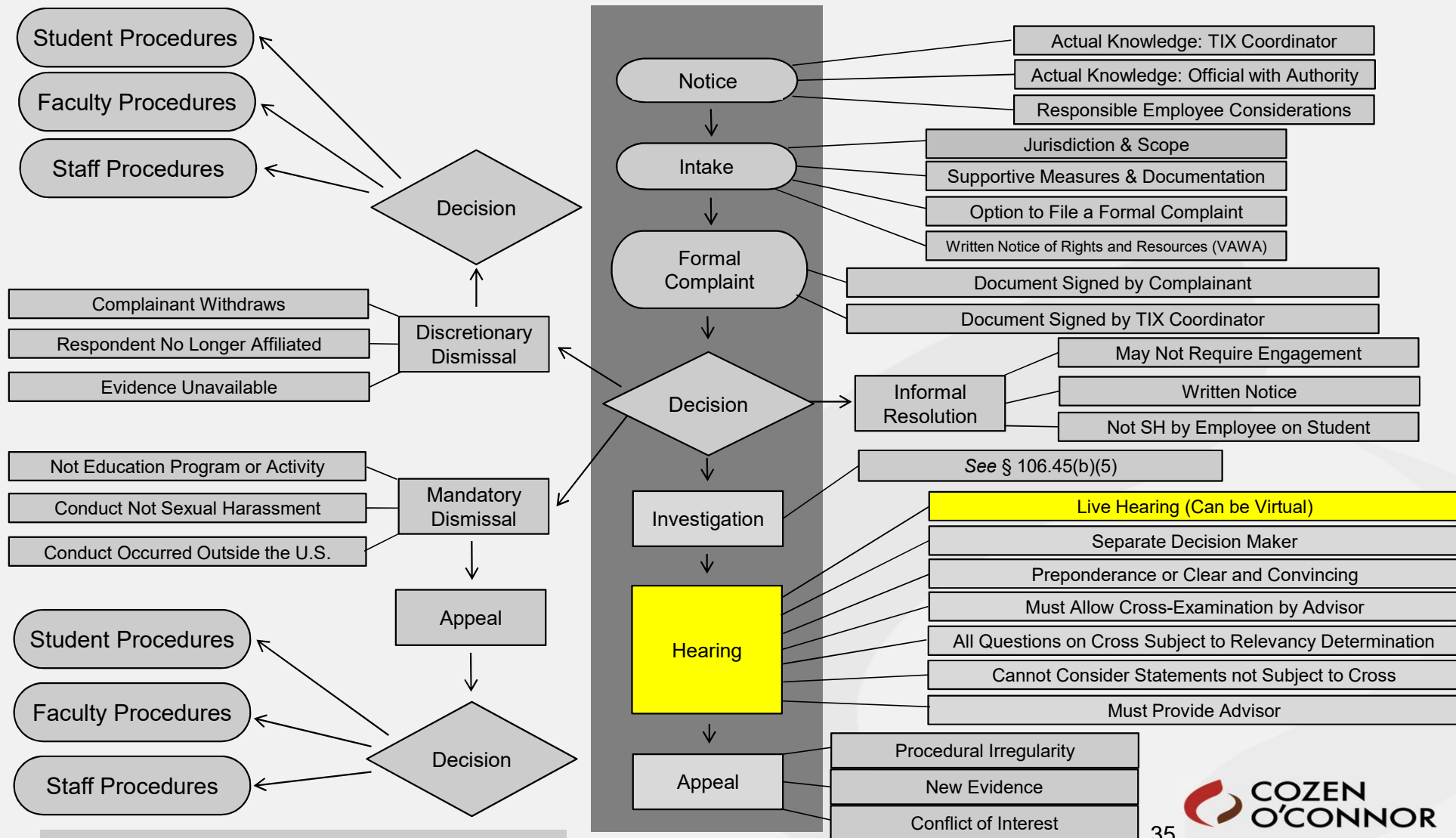
# **OVERVIEW OF HEARING REQUIREMENTS**





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)

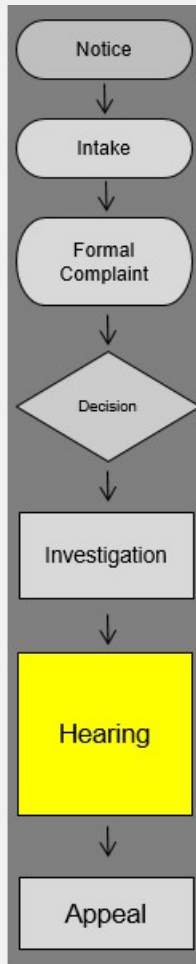
# Virtual Hearing Considerations



- 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.

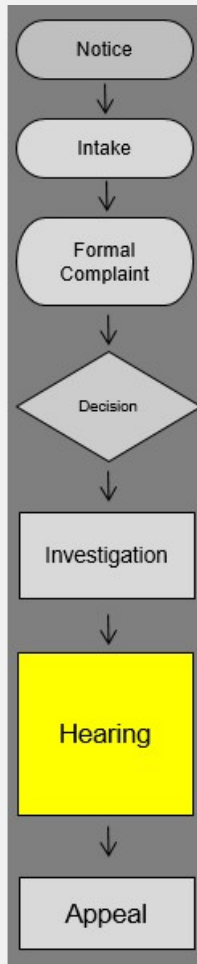
# Flexibility to Adopt Rules

- 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



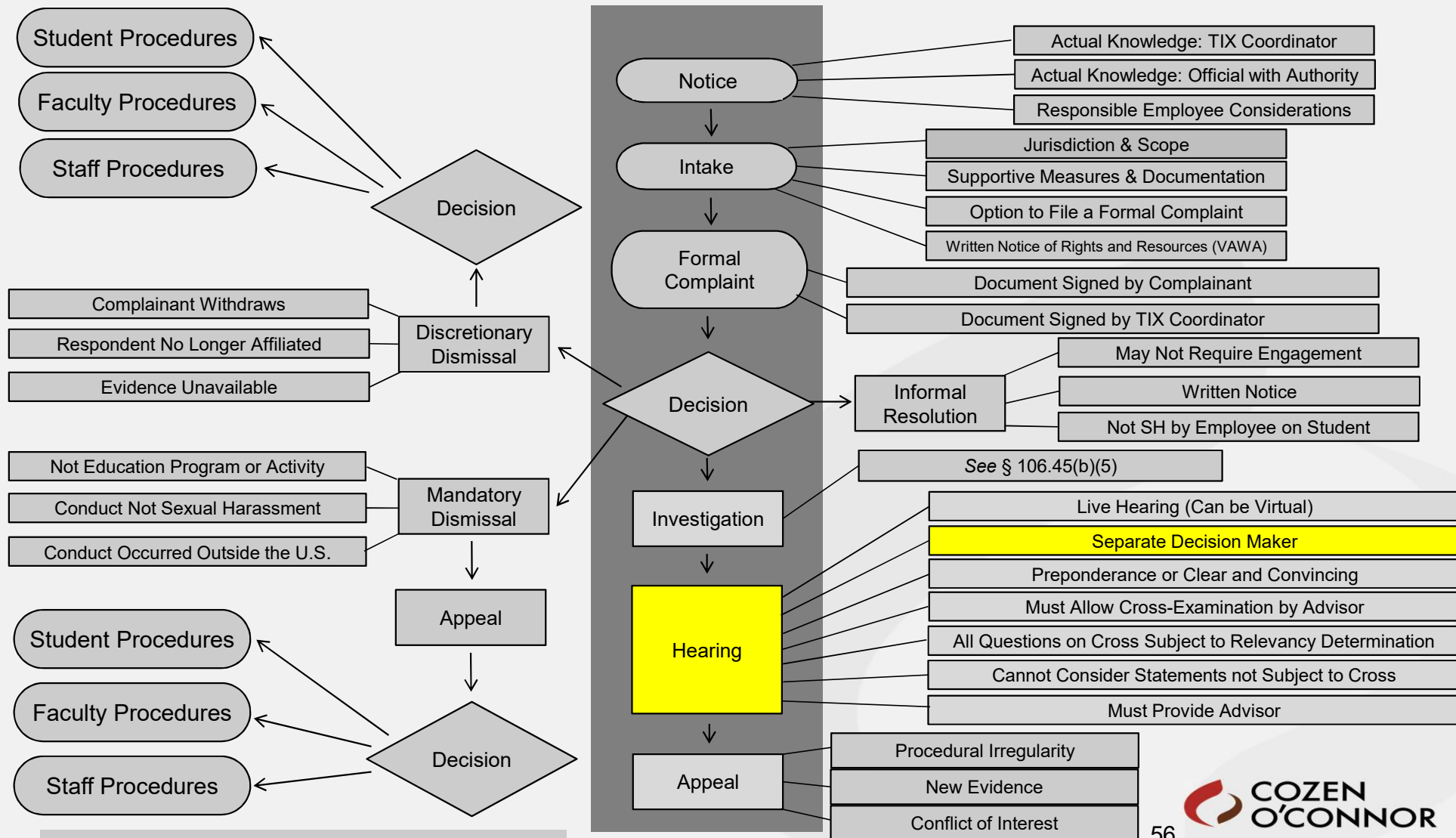
- As to recipients that are not postsecondary institutions, the Department has revised § 106.45(b)(6)(ii) to provide that the recipient *may* require a live hearing and *must* afford each party the opportunity to submit written questions, provide each party with the answers, and allow for additional,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

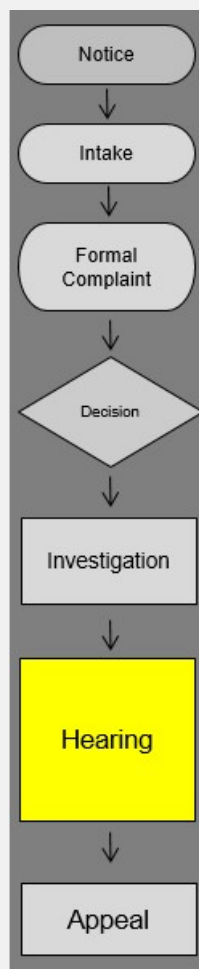


- The decision-maker(s) must explain to the party proposing the questions **any decision to exclude** a question as not relevant.

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

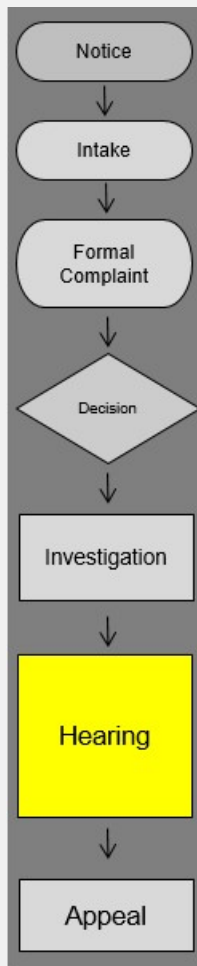
# Apply the Standard of Evidence

- 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)

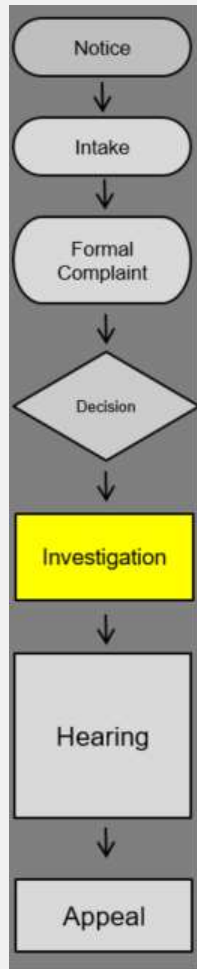
# Separate Decision-Maker



- 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

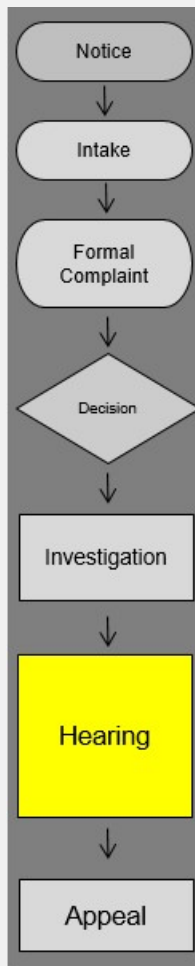
# Investigator May not Determine Responsibility



- § 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

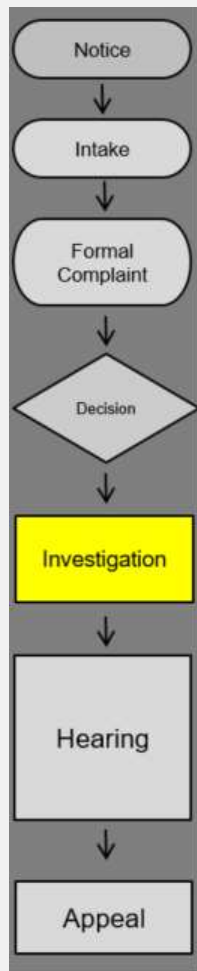
# Decision-Maker Must Determine Responsibility



- 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

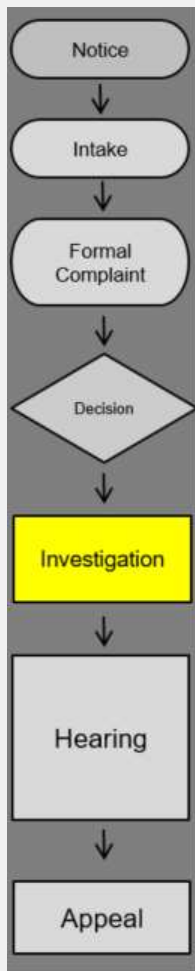


- The Department does not wish to prohibit the investigator from including recommended findings or conclusions in the investigative report.
- However, the decision-maker is under an **independent obligation to objectively evaluate relevant evidence**, and thus cannot simply defer to recommendations made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



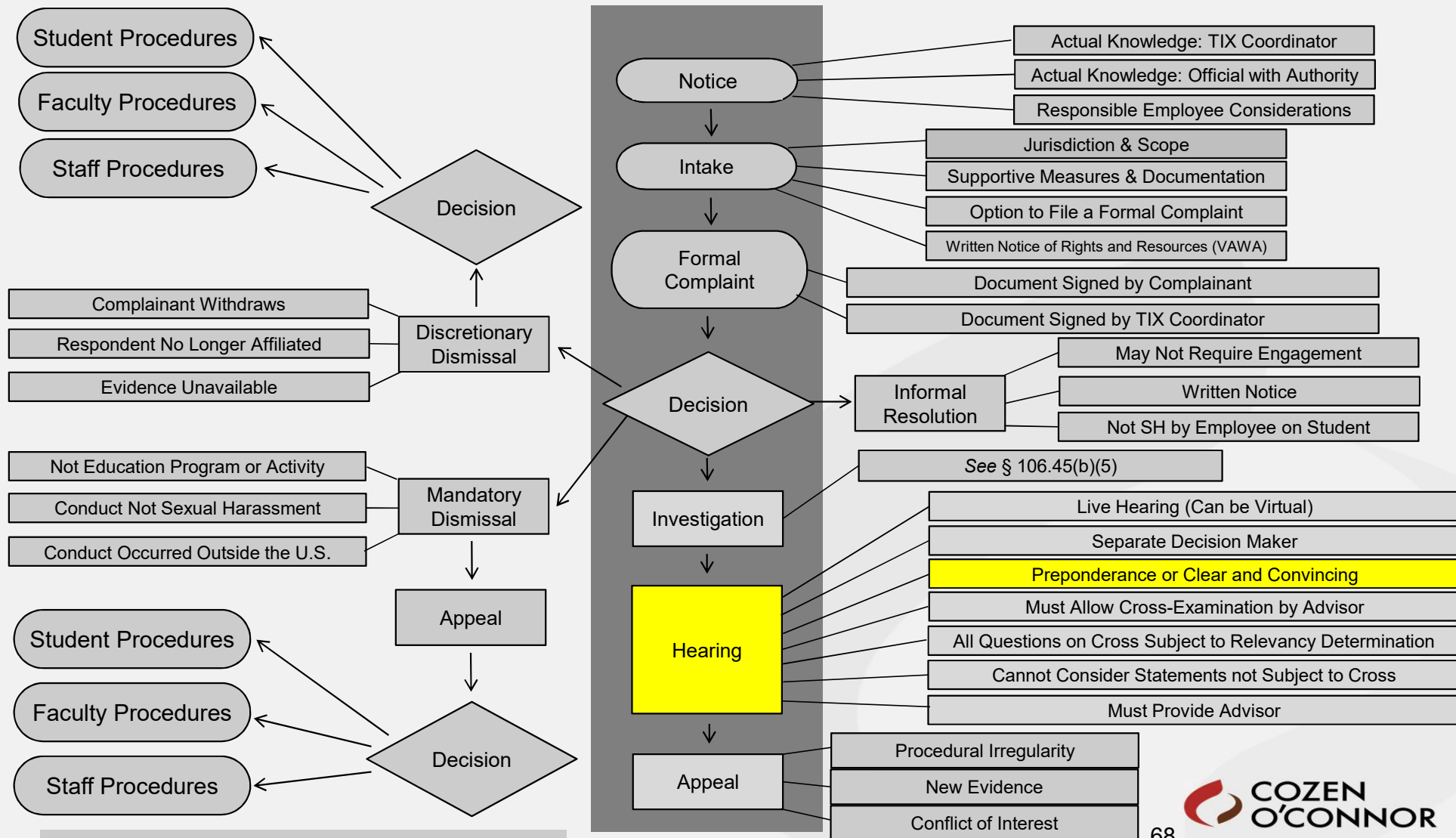
- If a recipient chooses to include a **credibility analysis** in its investigative report, the recipient must be cautious not to violate § 106.45(b)(7)(i), prohibiting the decision-maker from being the same person as the Title IX Coordinator or the investigator.
- If an investigator's determination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

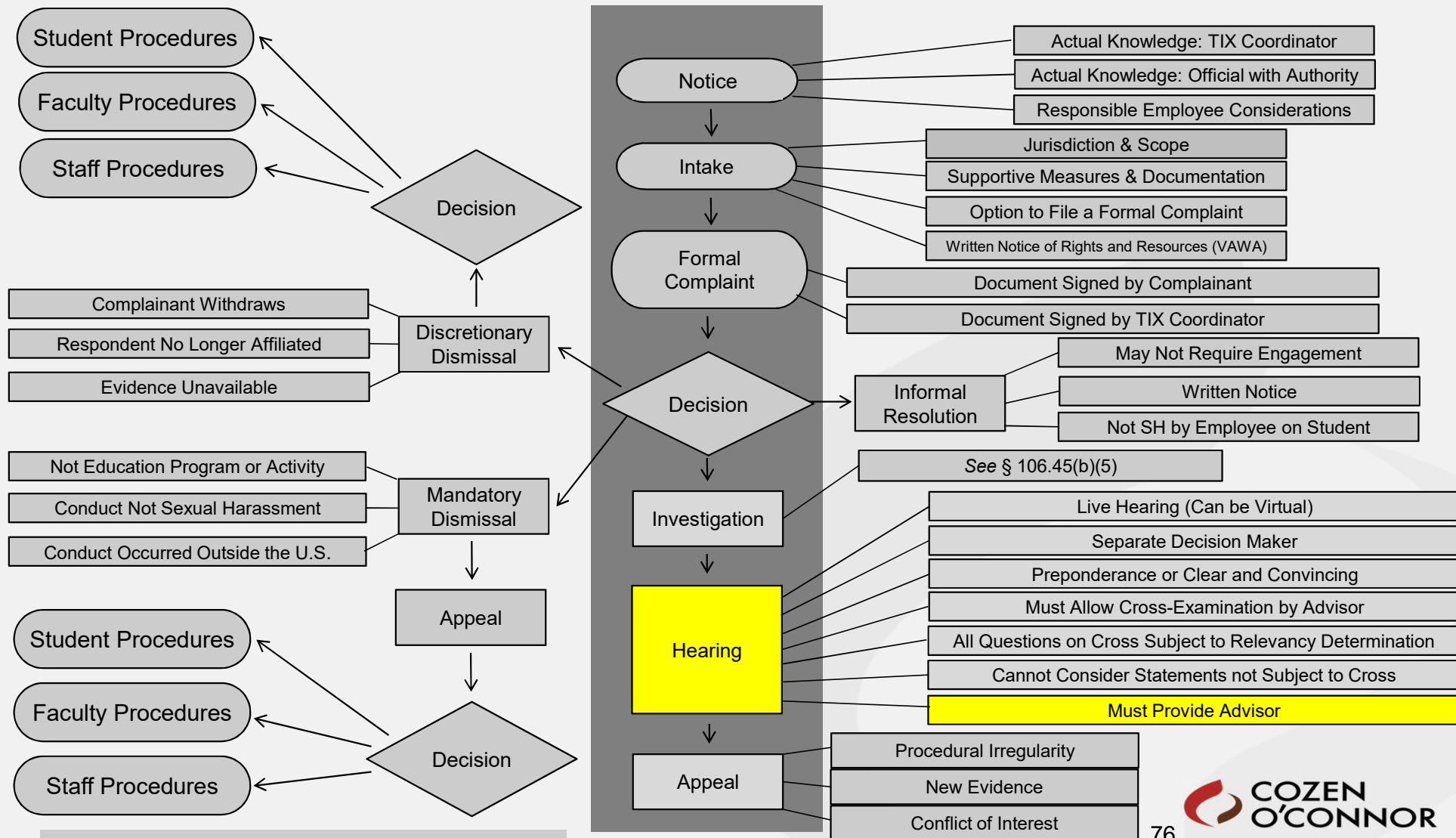
\* Based on common usage.

# **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.

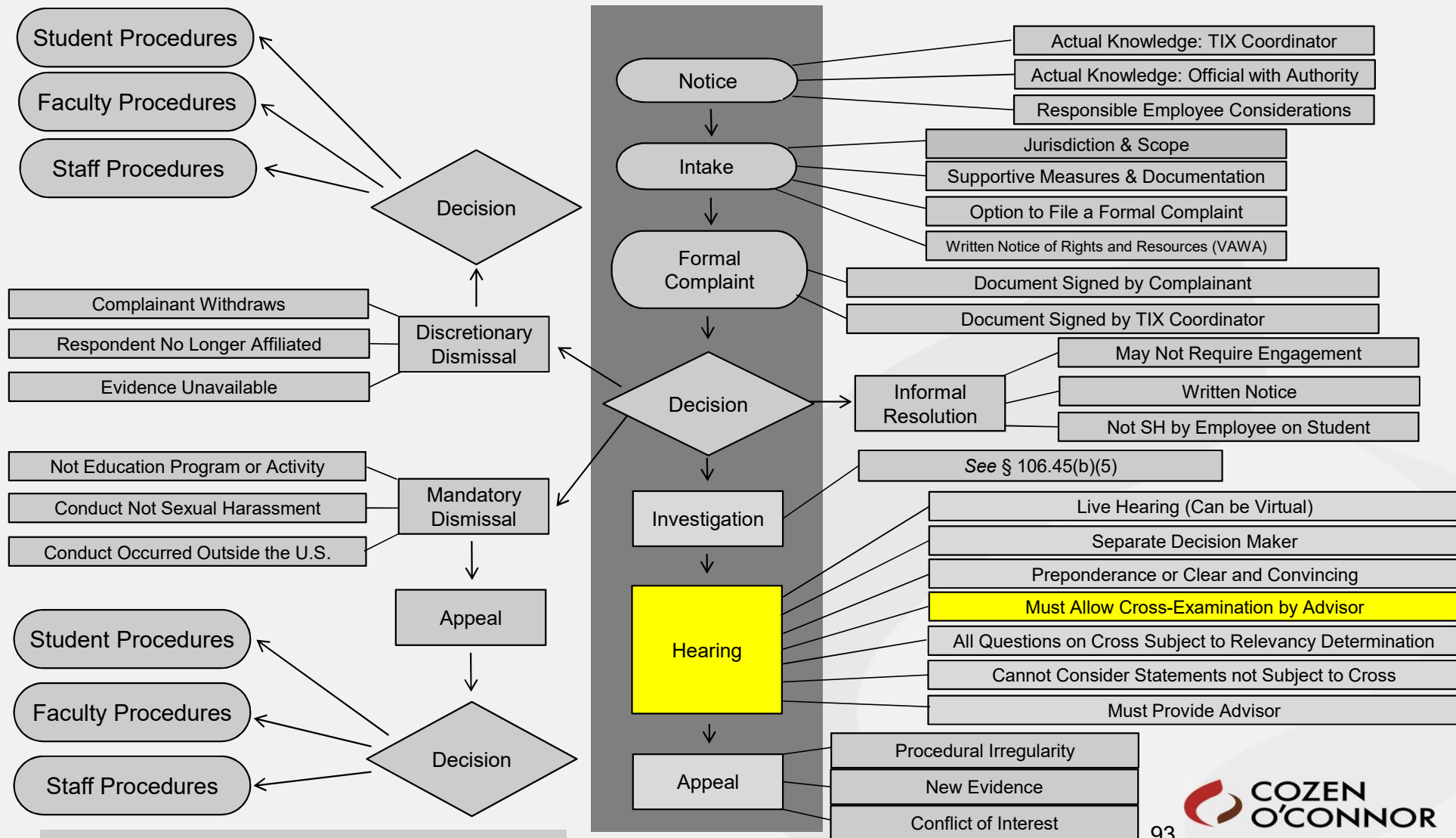
Title IX Regulations, May 19, 2020; § 106.45(b)(6)

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

# Practical Considerations & Effective Practices

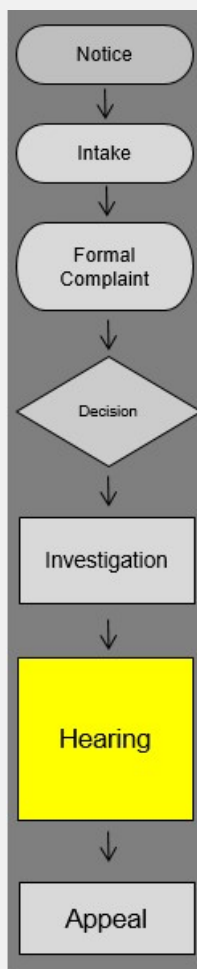
- Process meeting to discuss policy, decorum, and expectations
- Considerations for advisors:
  - Review policy in advance
  - Acknowledge decorum expectations
  - Acknowledge privacy protections regarding documents
- Consider the importance of continuity in process re: advisor given requirement to provide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

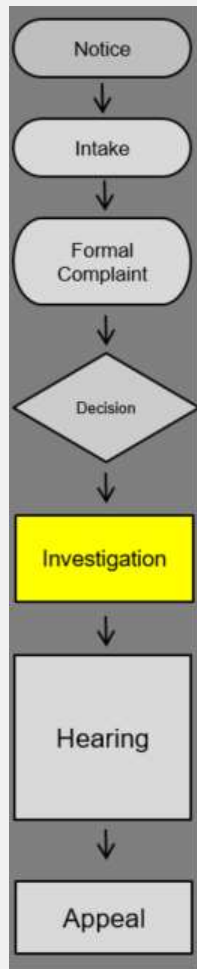
# Cross-Examination



- 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



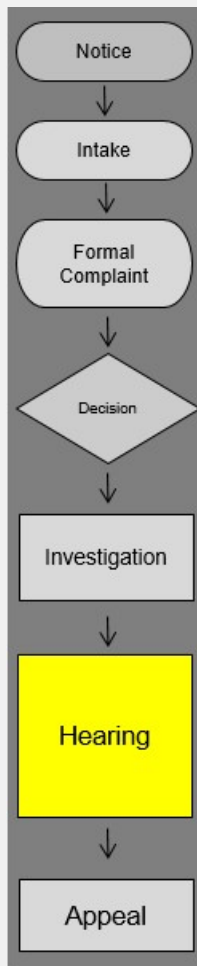
# Availability of Evidence at the Hearing



- 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)

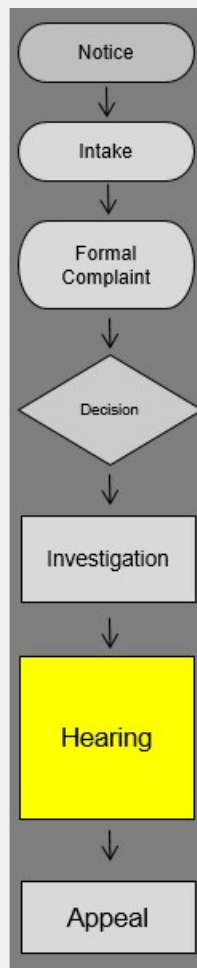
# Opportunity to Challenge Evidence



- 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)

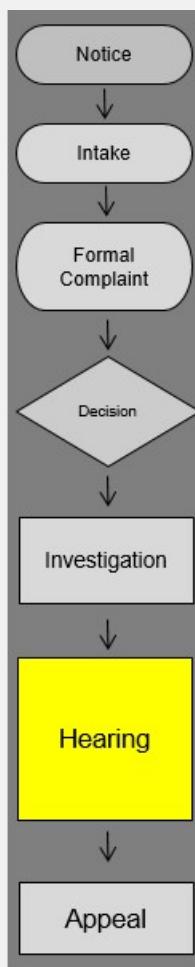
# Determinations Regarding Relevance



- 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; 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

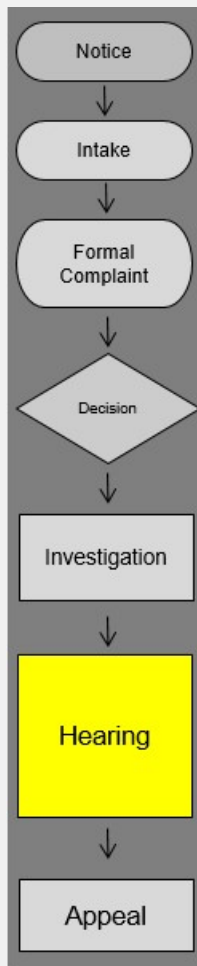
# Rules of Decorum



- 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

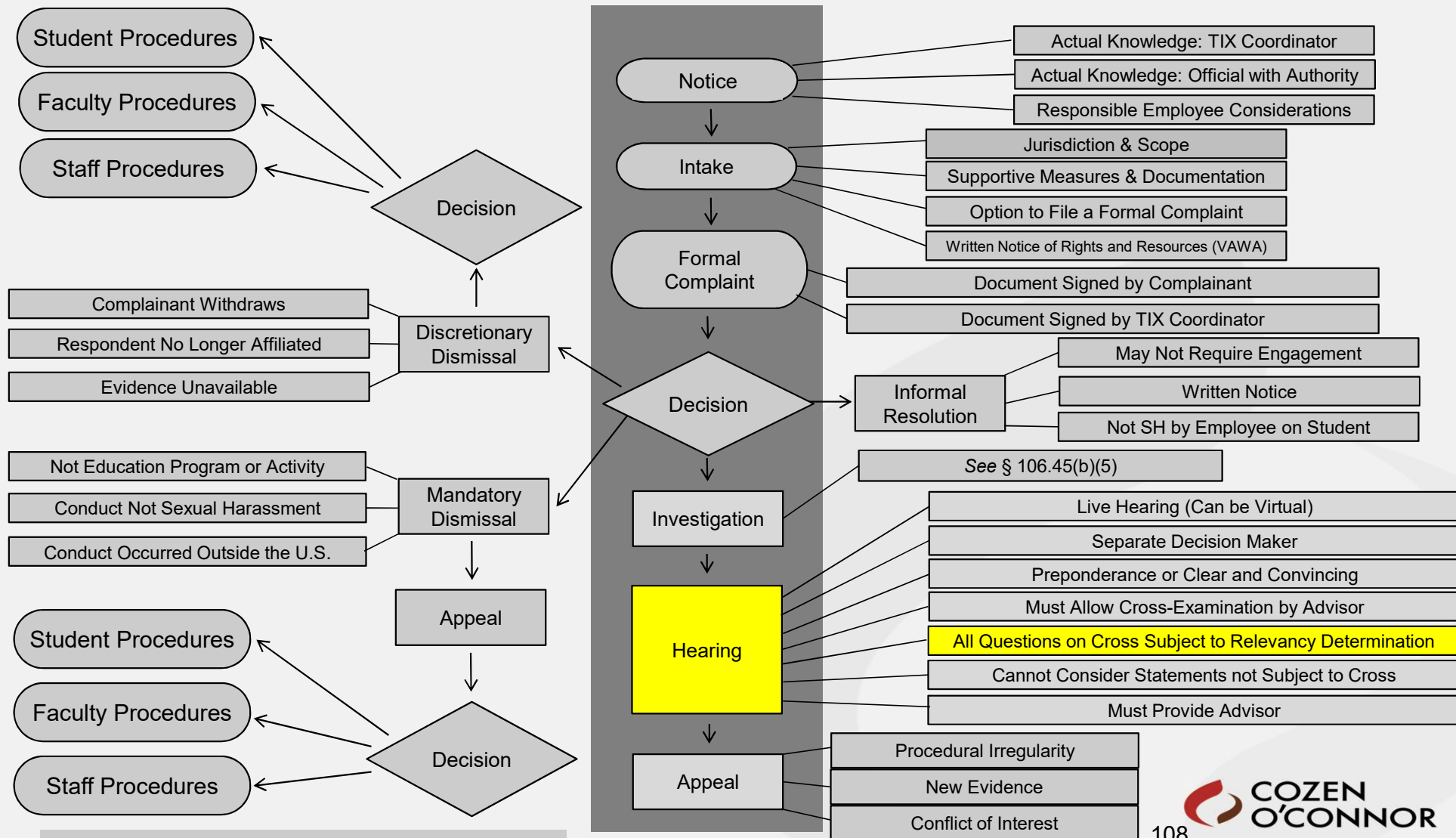
# May Not Impose Training Requirements



- 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.



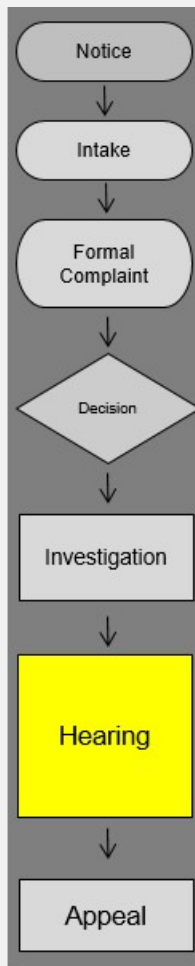
# Limitations on Relevance



- 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



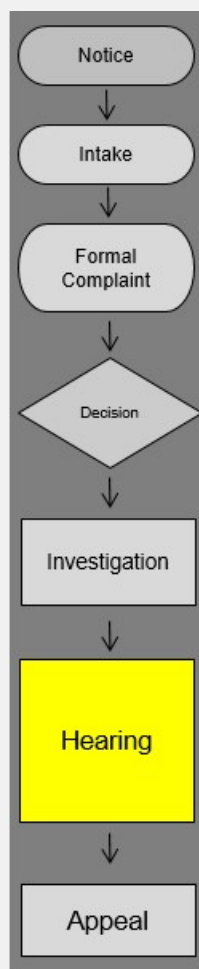
- The regulations do not prohibit the use of prior or subsequent misconduct
  - “Evidence of a pattern of inappropriate behavior by an alleged harasser” permitted if relevant
- Schools will need to determine if such conduct is:
  - Relevant
  - May be used in determining responsibility
  - May be used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

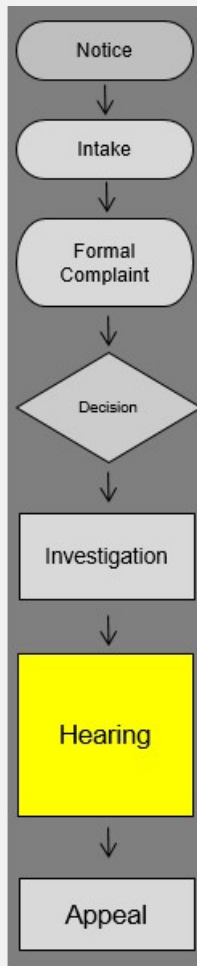


- Recipients are educational institutions that **should not be converted into *de facto* courtrooms.**
- The final regulations thus prescribe a process that **simplifies evidentiary complexities** while ensuring that determinations regarding responsibility result from **consideration of relevant, reliable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

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

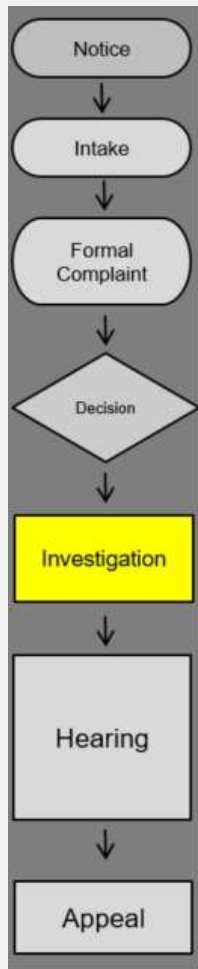
## Relevant and Reliable Evidence

- 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

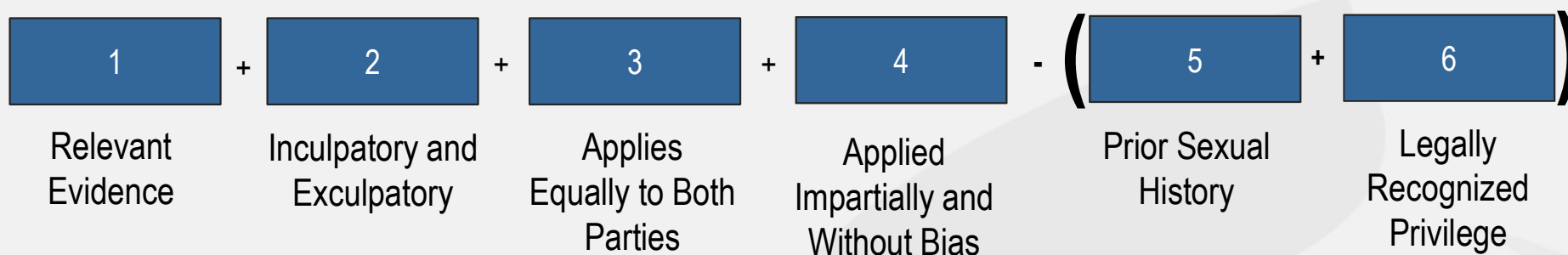
# Flexibility to Adopt Rules



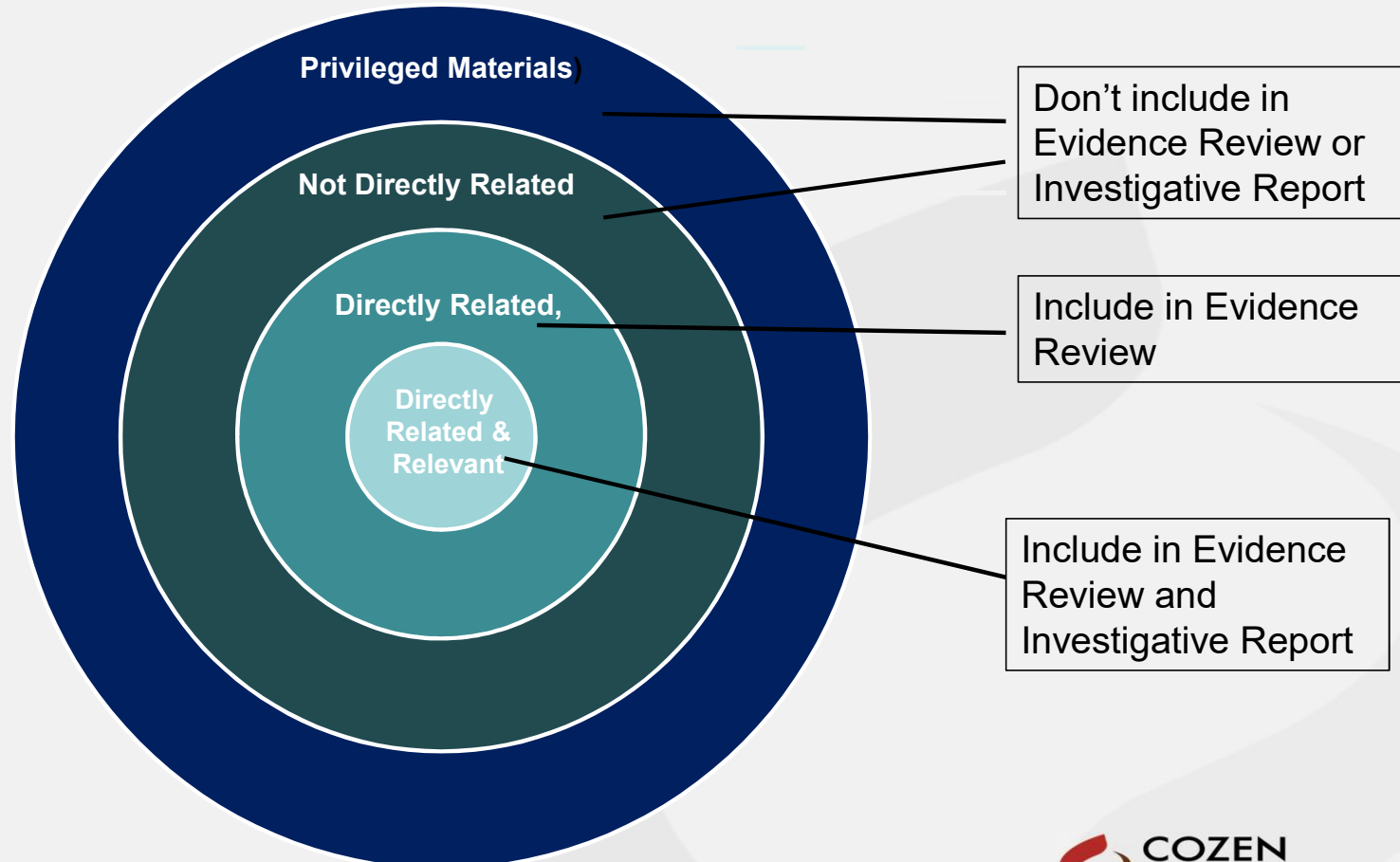
- “Within these evidentiary parameters **recipients retain the flexibility to adopt rules that govern how the recipient’s investigator** and decision-maker evaluate evidence and conduct the grievance process (so long as such rules apply equally to both parties).
- **Relevance is the standard that these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

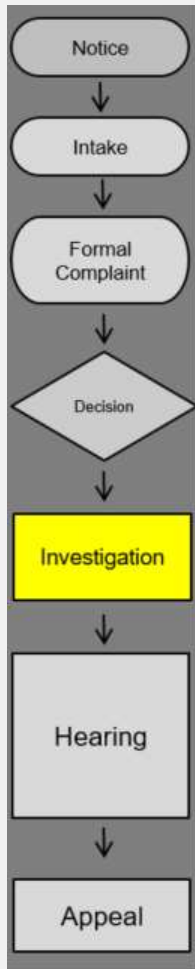
# Evidentiary Rules Must Consider



# Evidentiary Levels for Inclusion



# Directly Related



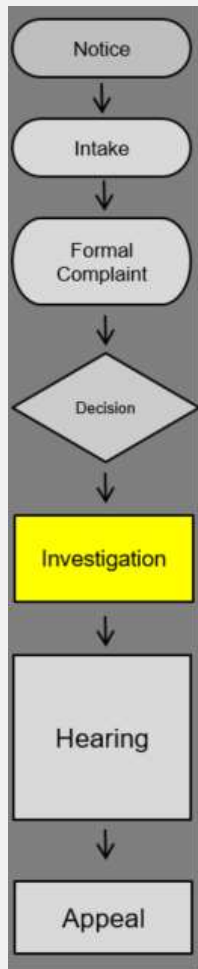
- Not defined in the regulations or the Preamble
  - The Department declines to define certain terms such as “evidence directly related to the allegations,” as these terms should be interpreted using their plain and ordinary meaning.
- “Directly related” aligns with the requirements in FERPA
  - The 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.



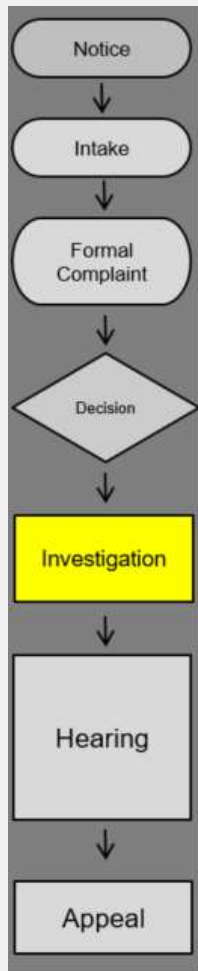
# Directly Related

- [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.

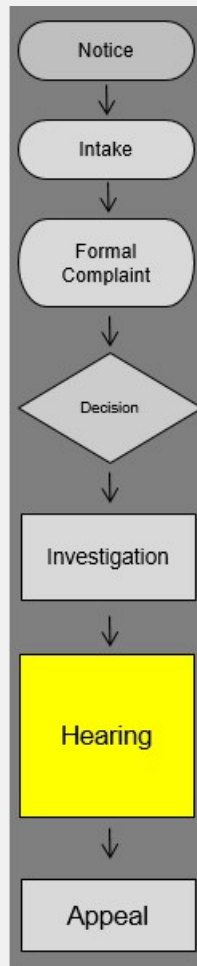
# Relevant Questions



- 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

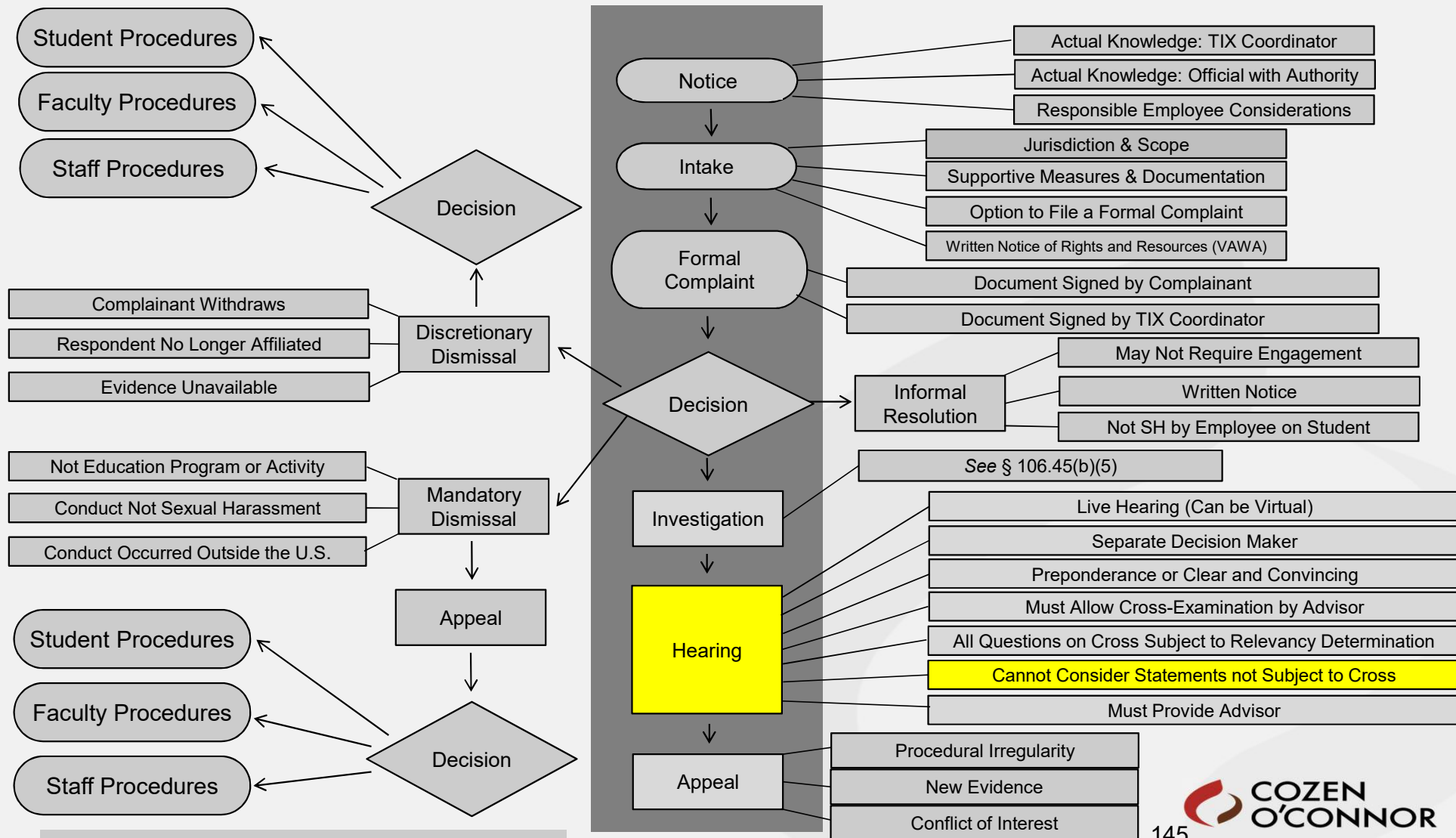


- **Relevance is the standard that these final regulations require, and any evidentiary rules that a recipient chooses must respect this standard of relevance.**
- For example, a recipient may not adopt a rule excluding relevant evidence because such relevant evidence may be unduly prejudicial, concern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

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

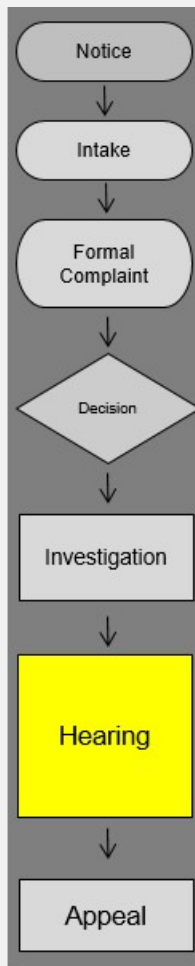
# **EXCLUSION OF STATEMENTS NOT SUBJECT TO CROSS-EXAMINATION**





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**

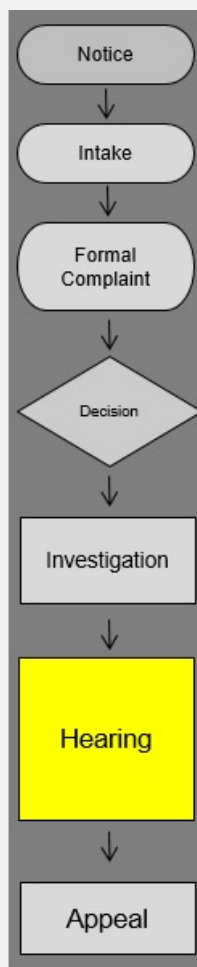
# Sanctioning



- 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

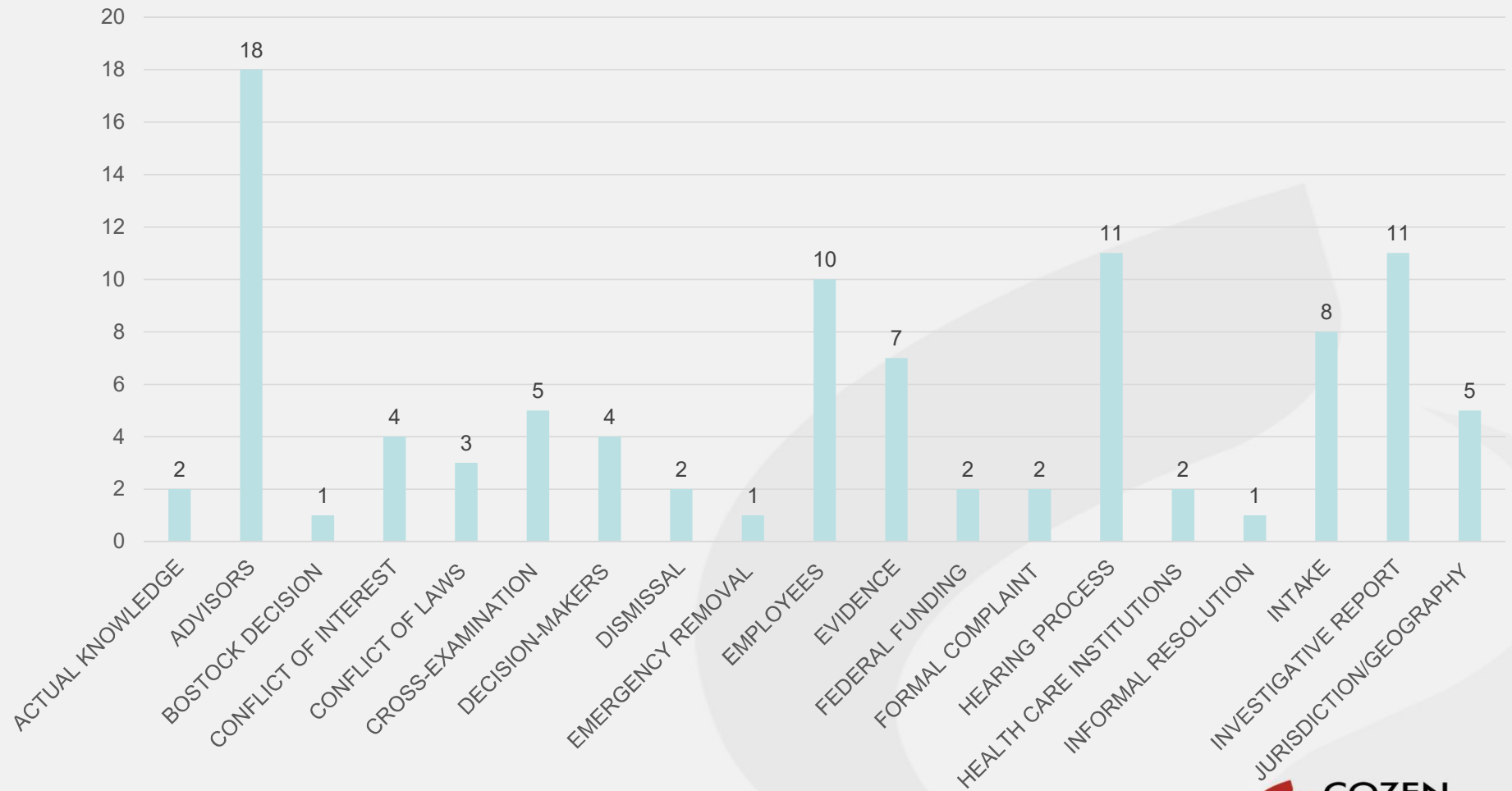
# Training

- 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.

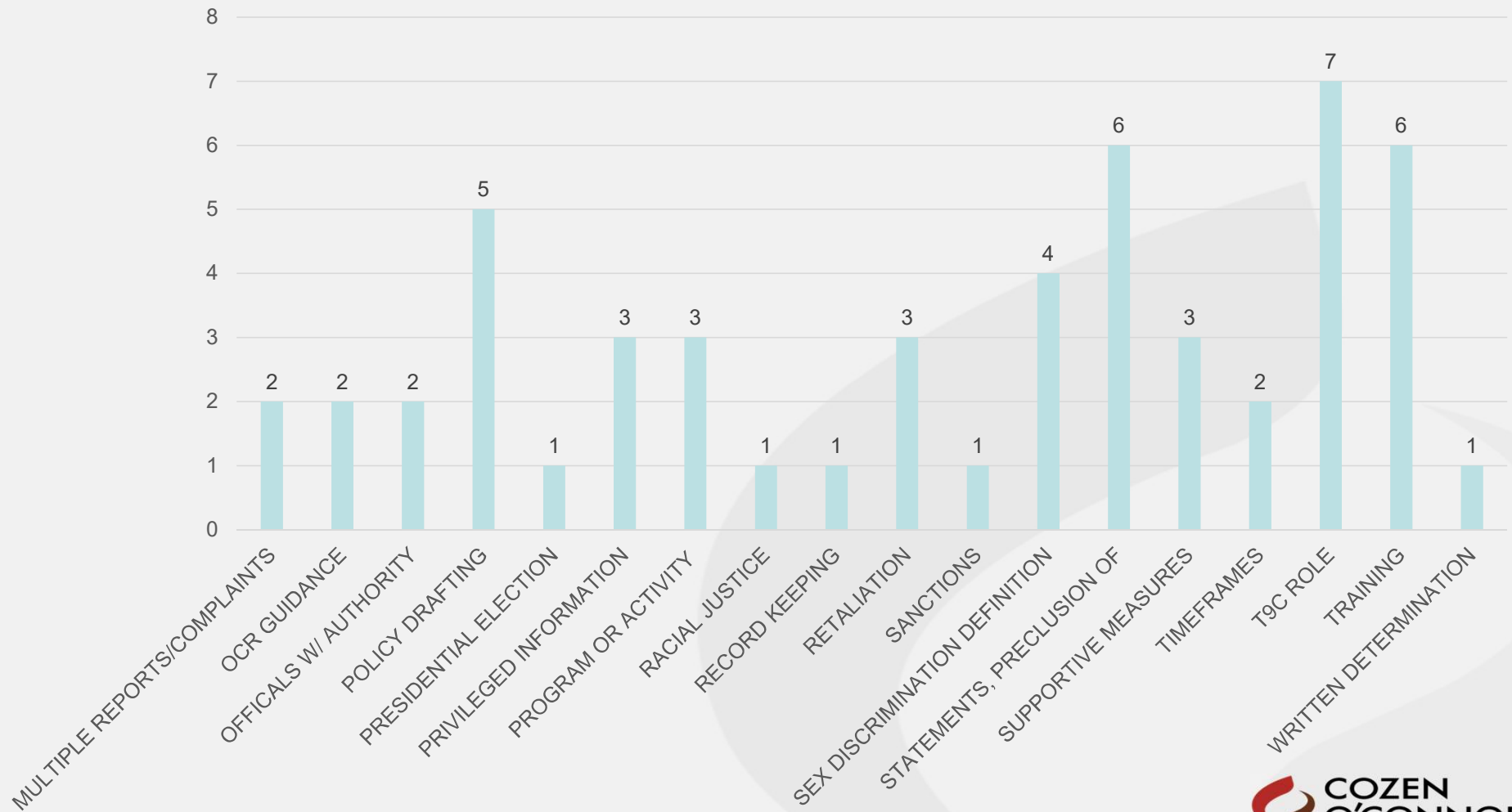


# WEBINAR QUESTIONS

## CATEGORIES OF WEBINAR QUESTIONS



## CATEGORIES OF WEBINAR QUESTIONS



## **Role of the Title IX Coordinator**

- May the Title IX Coordinator be the investigator?
- May the Title IX Coordinator be the decision-maker?
- May the Title IX Coordinator facilitate an informal resolution?

# Regulations

- The decision-maker(s), who cannot be the same person(s) as the Title IX Coordinator or the investigator(s), must issue a written determination regarding responsibility.

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

# Preamble

- The Title IX Coordinator may serve as the investigator, but not the decision maker.
  - For example, although the investigator may not be the same person as the decision-maker under § 106.45(b)(7)(i), these final regulations **do not preclude the Title IX Coordinator from also serving as the recipient's investigator as long as the Title IX Coordinator does not have a conflict of interest or bias** for or against complainants or respondents generally or an individual complainant or respondent under § 106.45(b)(1)(iii).

Title IX Regulations May 19, 2020; §106.45(b)(2); Preamble 85 F.R. 30557

# Preamble

- The Title IX Coordinator may facilitate an informal resolution.
  - These final regulations do not require a recipient to provide an informal resolution process pursuant to § 106.45(b)(9) and do not preclude the Title IX Coordinator from serving as the person designated by a recipient to facilitate an informal resolution process.

Title IX Regulations May 19, 2020; §106.45(b)(2); Preamble 85 F.R. 30558

## 2015 DCL on Title IX Coordinators

- Title IX does not categorically exclude particular employees from serving as Title IX coordinators. However, when designating a Title IX coordinator, a recipient should be careful to avoid designating an employee whose other job responsibilities may create a conflict of interest. For example, designating a disciplinary board member, general counsel, dean of students, superintendent, principal, or athletics director as the Title IX coordinator may pose a conflict of interest.

April 2015 Dear Colleague Letter on Title IX Coordinators available at:

<https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201504-title-ix-coordinators.pdf>.





# Conflicts of Interest

- When might a conflict of interest exist?
- Will you address the problem of appointing Title IX Coordinators who might have a conflict of interest? For example, would it be appropriate to appoint a Superintendent, Assistant Superintendent, HR director, or Business Manager as Title IX Coordinator? What does it mean to have a conflict of interest?

# Regulations

- Require that any individual designated by a recipient as a Title IX Coordinator, investigator, decision-maker, or any person designated by a recipient to facilitate an informal resolution process, **not have a conflict of interest or bias** for or against complainants or respondents generally or an individual complainant or respondent.

Title IX Regulations, May 19, 2020; § 106.45(b)(1)(iii)

# Regulations

- 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, and **how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias.**

Title IX Regulations, May 19, 2020; § 106.45(b)(1)(iii)

# Preamble

- The Department declines to state whether particular professional experiences or affiliations do or do not constitute *per se* violations of § 106.45(b)(1)(iii).
- The Department declines to narrow or widen this provision by specifying whether conflicts of interest or bias must be “actual” or “perceived,” and declines to adopt an “appearance of bias” standard.

## Other Guidance

- Excerpts from Candace Jackson's May 8, 2020 NACUA interview.
- On the absence of per se conflicts:
  - “This should be a fact specific analysis so that we leave recipients as much flexibility as possible to utilize personnel without automatically having people excluded on grounds of bias or conflicts of interest. You do need to be looking for specific concrete reasons why it would be reasonable to conclude that someone was exhibit bias or serving under a conflict of interest.”

## Other Guidance

- Excerpts from Candace Jackson's May 8, 2020 NACUA interview.
- On past professional experience:
  - “Let's say that you want to have somebody as a Title IX coordinator or the decision maker who, you know, their past professional life was a victim advocate or on the flip side was a defense attorney, that prior professional experience should not automatically make anybody conclude that somebody is biased or can't serve impartially.”

# Scope of the Investigator's Role

- What information should the investigation report contain?
- Can it include a credibility assessment and/or recommended findings?
- Would the investigative report include an analysis of evidence, credibility and findings?

# Regulations

- Create an investigative report that fairly summarizes relevant evidence and, at least 10 days prior to a hearing (if a hearing is required under this section or otherwise provided) or other time of determination regarding responsibility, send to each party and the party's advisor, if any, the investigative report in an electronic format or a hard copy, for their review and written response.

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



# Preamble

- 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; Preamble 85 F.R 30308

# Preamble

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

# Retaliation and Required Participation

- Retaliation in the new regulations includes action because a person refused to participate in investigation, proceeding or hearing.
- Doesn't that mean that you can't require anyone, employee or student, to participate?

# Regulations

- No recipient or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by title IX or this part, or because the individual has made a report or complaint, testified, assisted, or **participated or refused to participate** in any manner in an investigation, proceeding, or hearing under this part.

Title IX Regulations May 19, 2020 §106.70.

# Preamble

- The final regulations have removed proposed § 106.44(b)(2) [from the NPRM] and revised the § 106.30 definition of “complainant” such that in combination, those revisions ensure that the final regulations do not require a Title IX Coordinator to initiate a grievance process over the wishes of a complainant, and **never require a complainant to become a party or to participate in a grievance process.**

Title IX Regulations May 19, 2020; Preamble 85 F.R. 30243.

## Preamble

- We have added § 106.71 prohibiting retaliation and **expressly protecting any person's right *not* to participate** in a Title IX proceeding.
- § 106.71 protects all parties (and witnesses, and other individuals) from retaliation for exercising rights under Title IX.

# Preamble

- Nothing in these final regulations purports to authorize recipients to compel witness participation in a grievance process, and § 106.71(a) protects every individual from retaliation for participating or refusing to participate in a Title IX proceeding.

# Preamble

- The final regulations add § 106.71 prohibiting retaliation and including under prohibited actions those taken to dissuade a complainant from reporting or filing and those taken to punish a complainant (or anyone else) from refusing to participate in a Title IX proceeding.



## **Restrictions on the Parties**

- The regulations prohibit a school from restricting the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence.
- Can a school impose any restrictions on the ability of the parties to discuss the allegations?

# Regulations

- § 106.45(b)(5): When investigating a formal complaint and throughout the grievance process, a recipient must
  - (iii) Not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence

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

# Preamble

- As discussed in this preamble at § 106.45(b)(5)(iii), the parties have a right to discuss the allegations under investigation, but this right does not preclude a recipient from warning the parties not to discuss or disseminate the allegations in a manner that constitutes retaliation or unlawful tortious conduct.

# Preamble

- § 106.45(b)(5)(iii) is not unlimited in scope; by its terms, this provision stops a recipient from restricting parties' ability to discuss "the allegations under investigation."
- This provision does not, therefore, apply to discussion of information that does not consist of "the allegations under investigation" (for example, evidence related to the allegations that has been collected and exchanged between the parties and their advisors during the investigation under § 106.45(b)(5)(vi), or the investigative report summarizing relevant evidence sent to the parties and their advisors under § 106.45(b)(5)(vii).

## Directly Related vs. Relevant

- What type of evidence might be “directly related to the allegations” but not relevant?
- Unless otherwise specifically prohibited by the regulations, is it a better practice to err on the side of determining that evidence is relevant and then let the decision-makers address the full evaluation of evidence in the written determination?
- Can you please give an example - any example! - of information that would be directly related, but not relevant?

# Regulations

- 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, including the evidence upon which the recipient does not intend to rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence whether obtained from a party or other source, 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)

# Regulations

- Create an investigative report that fairly summarizes **relevant** evidence and, at least 10 days prior to a hearing (if a hearing is required under this section or otherwise provided) or other time of determination regarding responsibility, send to each party and the party's advisor, if any, the investigative report in an electronic format or a hard copy, for their review and written response.

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

# Preamble

- A party who believes the investigator reached the wrong conclusion about the relevance of the evidence may argue again to the decision-maker (i.e., as part of the party's response to the investigative report, and/or at a live hearing) about whether the evidence is actually relevant.
- Recipients must also give the parties meaningful opportunity to understand what evidence the recipient collects and believes is relevant, so the parties can advance their own interests for consideration by the decision-maker.

Title IX Regulations, May 19, 2020; Preamble 85 F.R 30304 and 30309.



# Preamble

- A recipient has some discretion to determine whether evidence obtained as part of an investigation is directly related to allegations raised in a formal complaint...

Title IX Regulations, May 19, 2020; Preamble 85 F.R 30423.

# Preamble

- The parties then have equal opportunity to review the investigative report; if a party disagrees with an investigator's determination about relevance, the party can make that argument in the party's written response to the investigative report under §106.45(b)(5)(vii) and to the decision-maker at any hearing held; either way the decision-maker is obligated to objectively evaluate all relevant evidence and the parties have the opportunity to argue about what is relevant (and about the persuasiveness of relevant evidence).

Title IX Regulations, May 19, 2020; Preamble 85 F.R 30248-49.

# Submit to Cross-Examination

- What does it mean to “submit to cross-examination?”
- For example, if upon cross-examination, a party refuses to answer one question, are all questions and supporting evidence out, or may the decision-maker still consider the information provided that was subjected to cross-examination?

# Regulations

- 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)(i).

# Preamble

- “[S]ubmit to cross-examination” means answering those cross-examination questions that are relevant; the decision-maker is required to make relevance determinations regarding cross-examination in real time during the hearing in part to ensure that parties and witnesses do not feel compelled to answer irrelevant questions for fear of their statements being excluded.

# Advisors and Decorum

- Can you exclude a party's advisor of choice because they violated the recipient's standards of decorum?

# Preamble

- If a party's advisor of choice refuses to comply with a recipient's rules of decorum ... the recipient may require the party to use a different advisor.
- 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.

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

# Preamble

- [A]ny ... rules adopted by a recipient must ensure that all relevant questions and evidence are admitted and considered. ... Thus, for example, where the substance of a question is relevant, but **the manner in which an advisor attempts to ask the question is harassing, intimidating, or abusive** (for example, the advisor yells, screams, or physically “leans in” to the witness’s personal space), the recipient **may appropriately, evenhandedly enforce rules of decorum** that require relevant questions to be asked in a **respectful, non-abusive** manner.

Title IX Regulations May 19, 2020; Preamble 85 F.R. 30331.



# Use of Slides

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