Title IX Training:

An Integrated and Coordinated Approach

Hosted By:
Independent Colleges of Indiana

Presented By:

Gina Maisto Smith, Maureen Holland, Cara Sawyer, Kendyl Gilmore, and Jeff Bourgeois

The Institutional Response Group | Cozen O'Connor
Gina Maisto Smith, Chair
Leslie M. Gomez, Vice Chair

June 17-20, 2024

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Independent
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UINDY


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at Notre Dame, Indiana


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ANDERSON UNIVERSITY


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Calumet College
OF ST. JOSEPH


University
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MARTIN
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ROSE-HULMAN
INSTITUTE OF TECHNOLOGY


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Institutional Response Group



Gina Maisto Smith



Leslie Gomez



Maureen Holland



Cara Sawyer



Jeff Bourgeois



Kendyl Gilmore

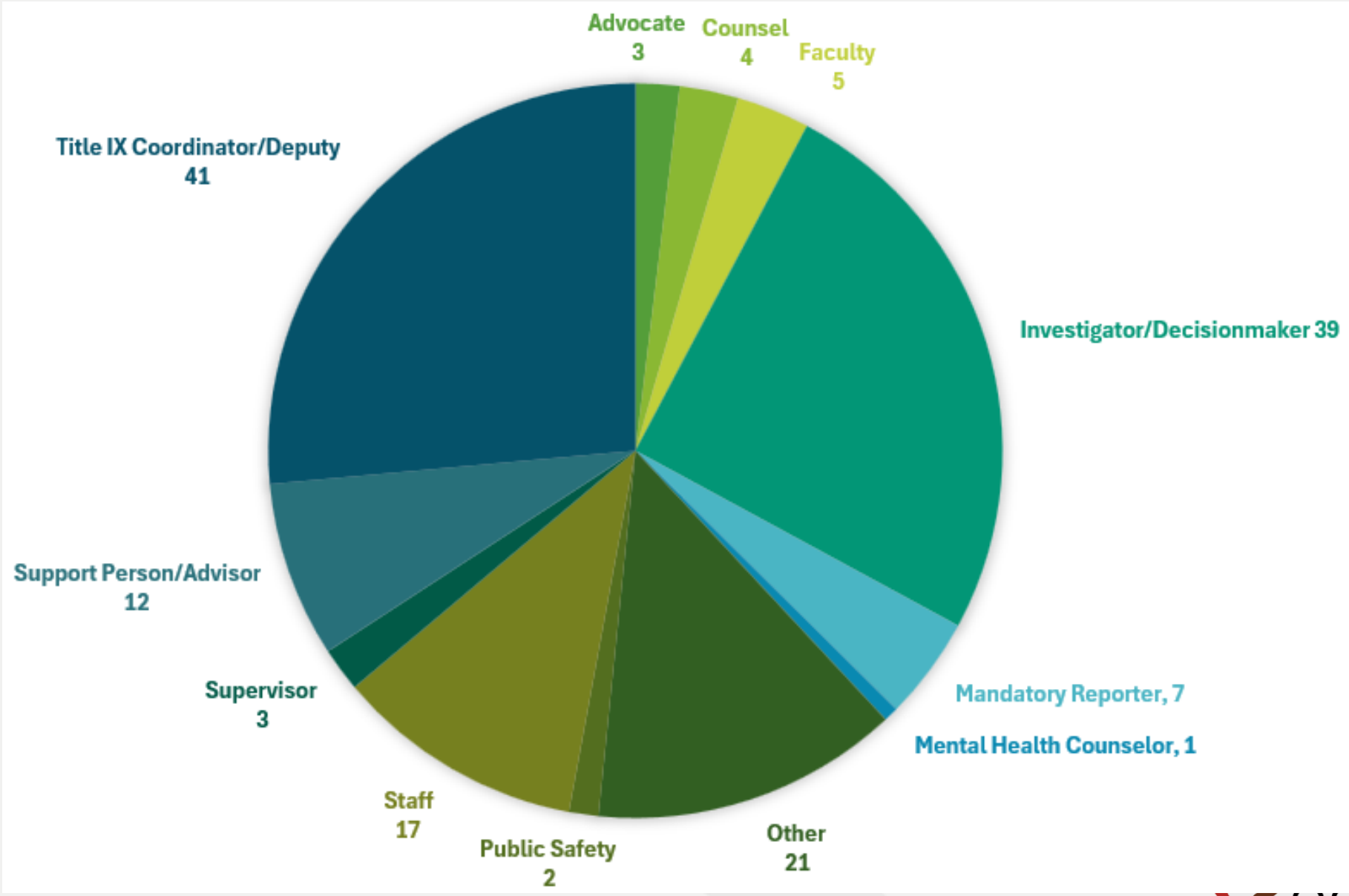


Adam Shapiro

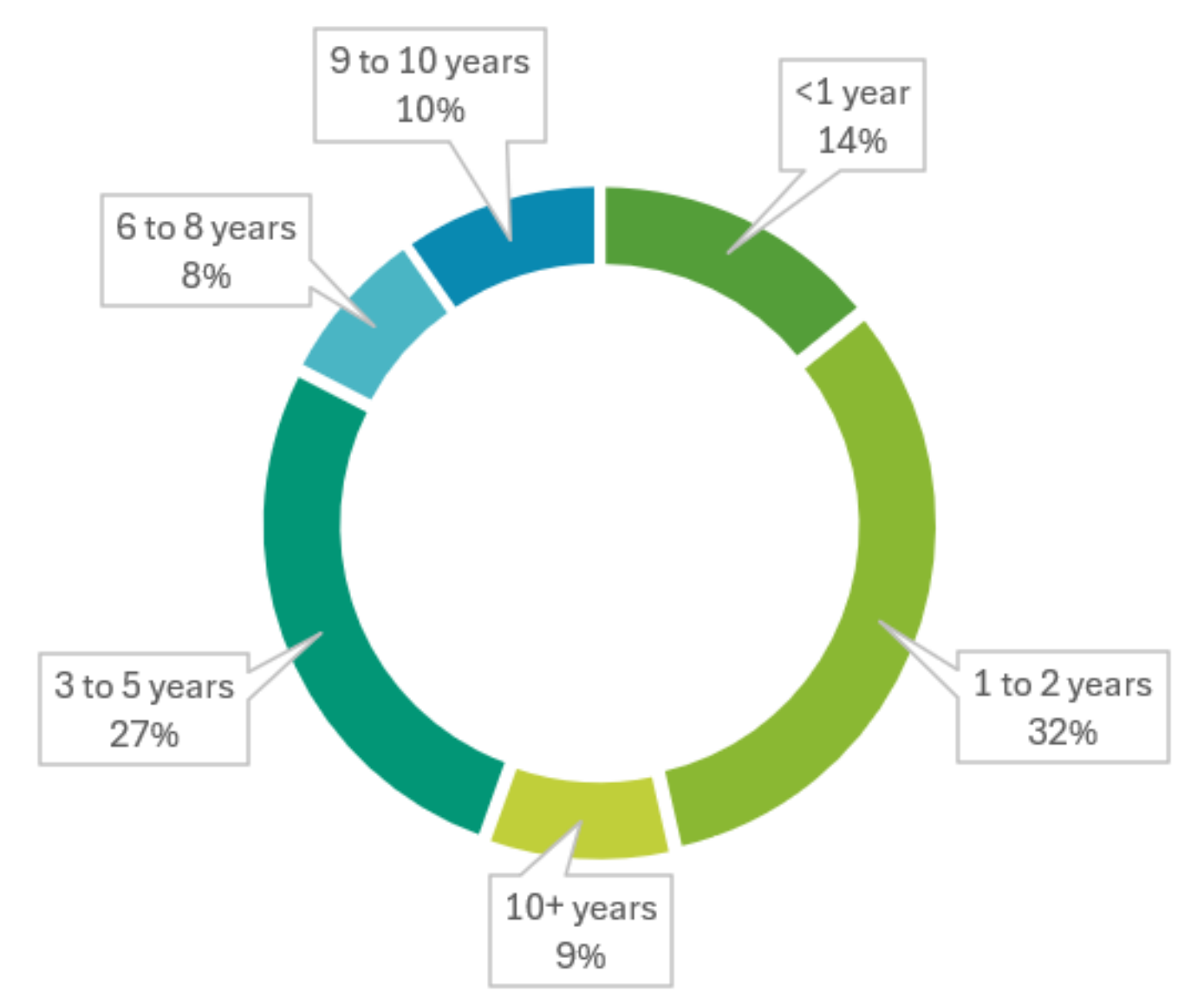
Institutional Response Group Paralegal and Administration Team:
Mary Beth McAndrews, Mary Sotos, Megan Lincoln, Jeanmarie McDonald, Lauren Smith

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Participants' Title IX Roles



Participants' Years of Experience



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Training Requirements and Objectives

A recipient must ensure that **TIX Coordinators and designees, Investigators, Decisionmakers, Informal Resolution Facilitators and others who are responsible for implementing the recipient's grievance procedures or have authority to modify or terminate supportive measures** receive training on:

- The obligation to address sex discrimination in the education program or activity;
- The scope of conduct that constitutes sex discrimination, including the definition of sex-based harassment;
- All applicable notification and information requirements under §§ 106.40(b)(2) (referrals of students experiencing pregnancy or related conditions) and 106.44 (response to sex discrimination)
- The recipient's obligations under § 106.44;
- The recipient's grievance procedures under § 106.45, and if applicable § 106.46;
- How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias; and
- The meaning and application of the term "relevant" in relation to questions and evidence, and the types of evidence that are impermissible regardless of relevance under § 106.45, and if applicable § 106.46.

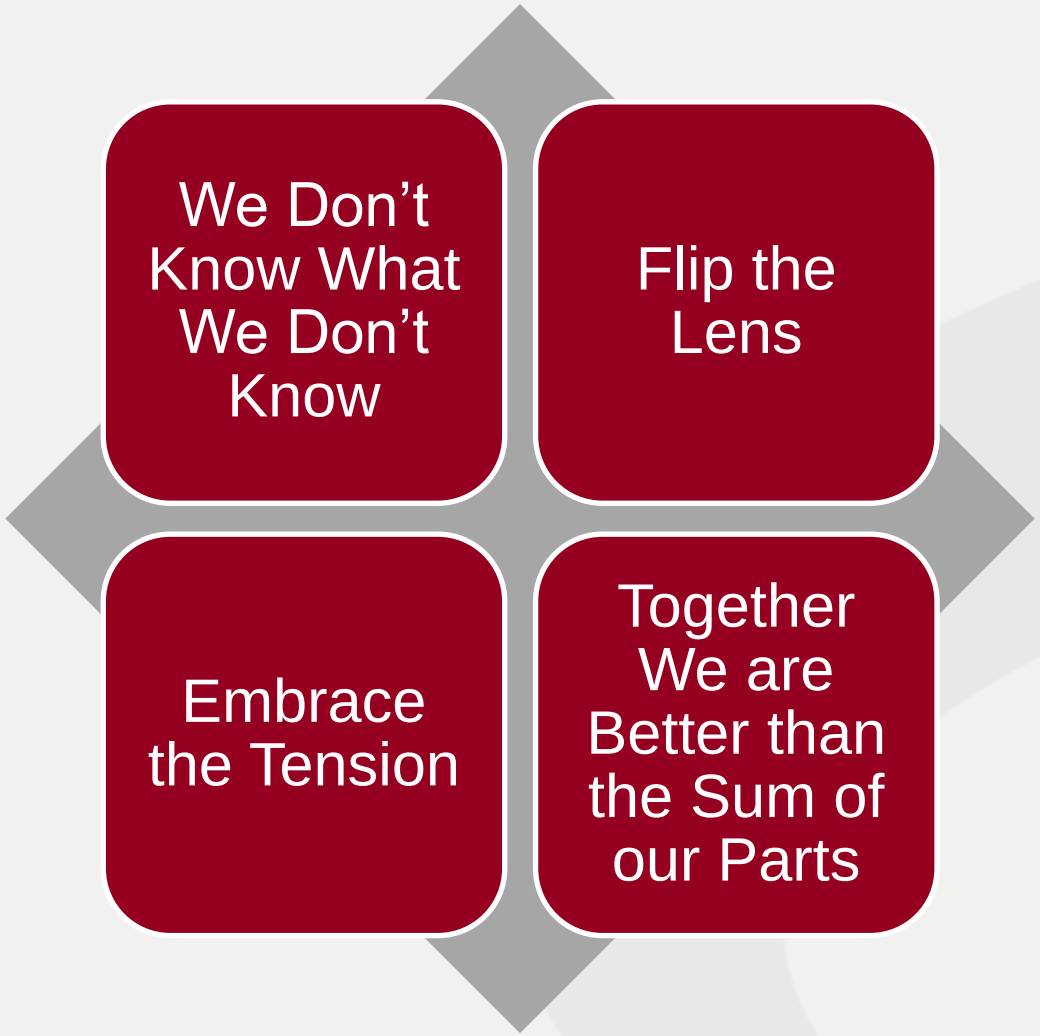
2024 Title IX Regulations § 106.8(d).

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FRAMING THE CONVERSATION

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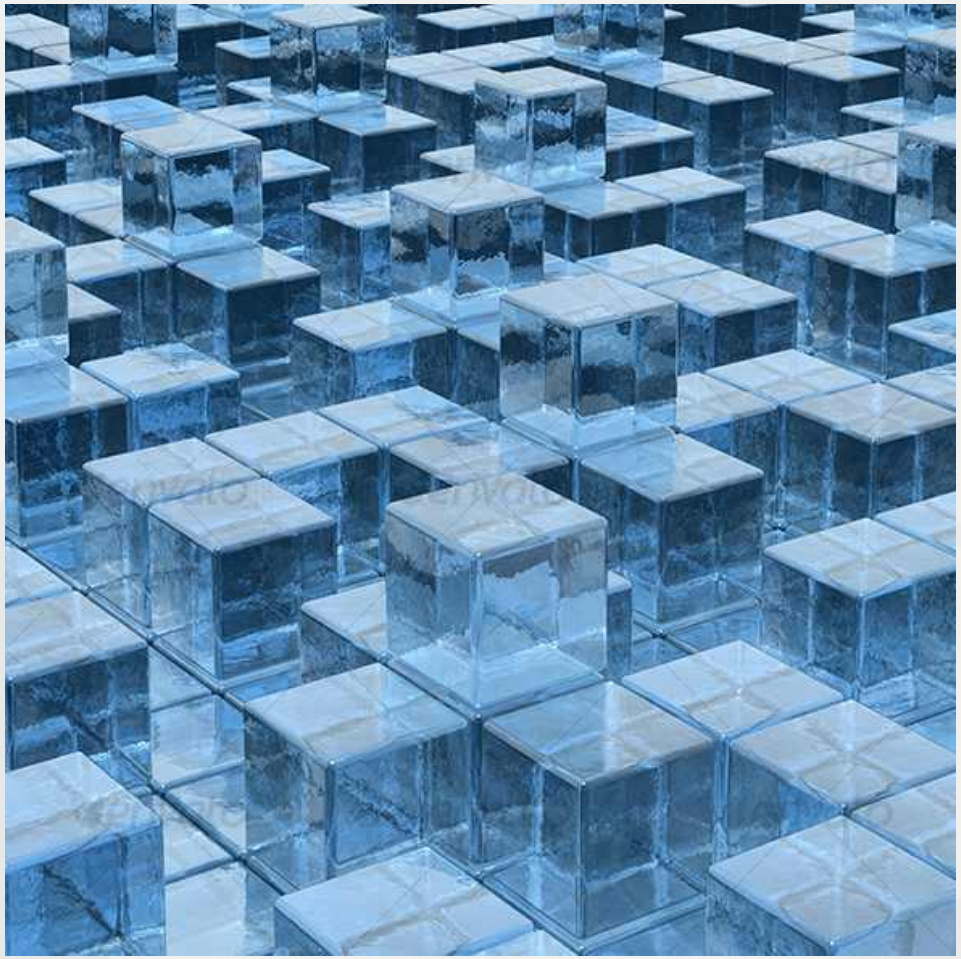
Framing the Conversation



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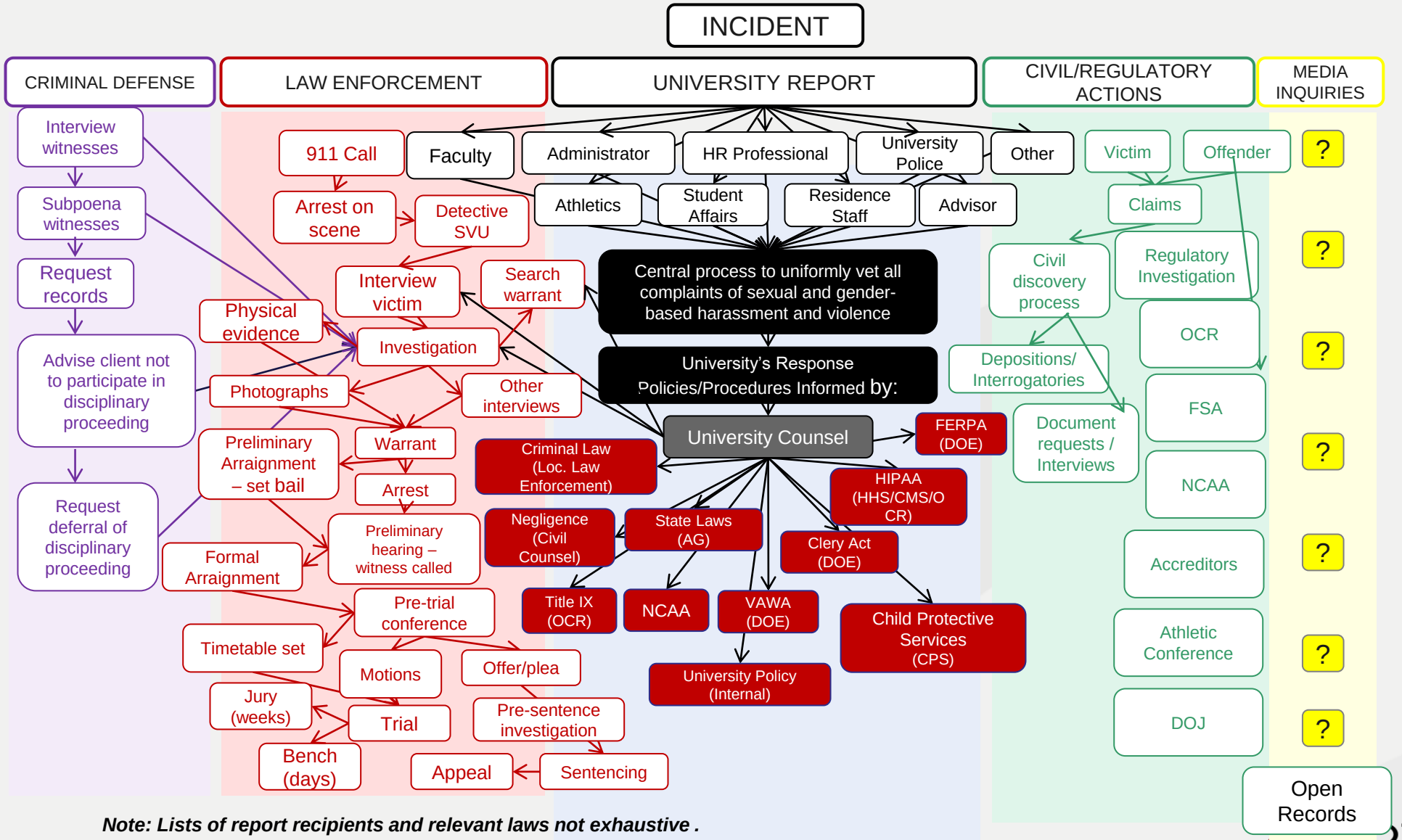
The Context

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



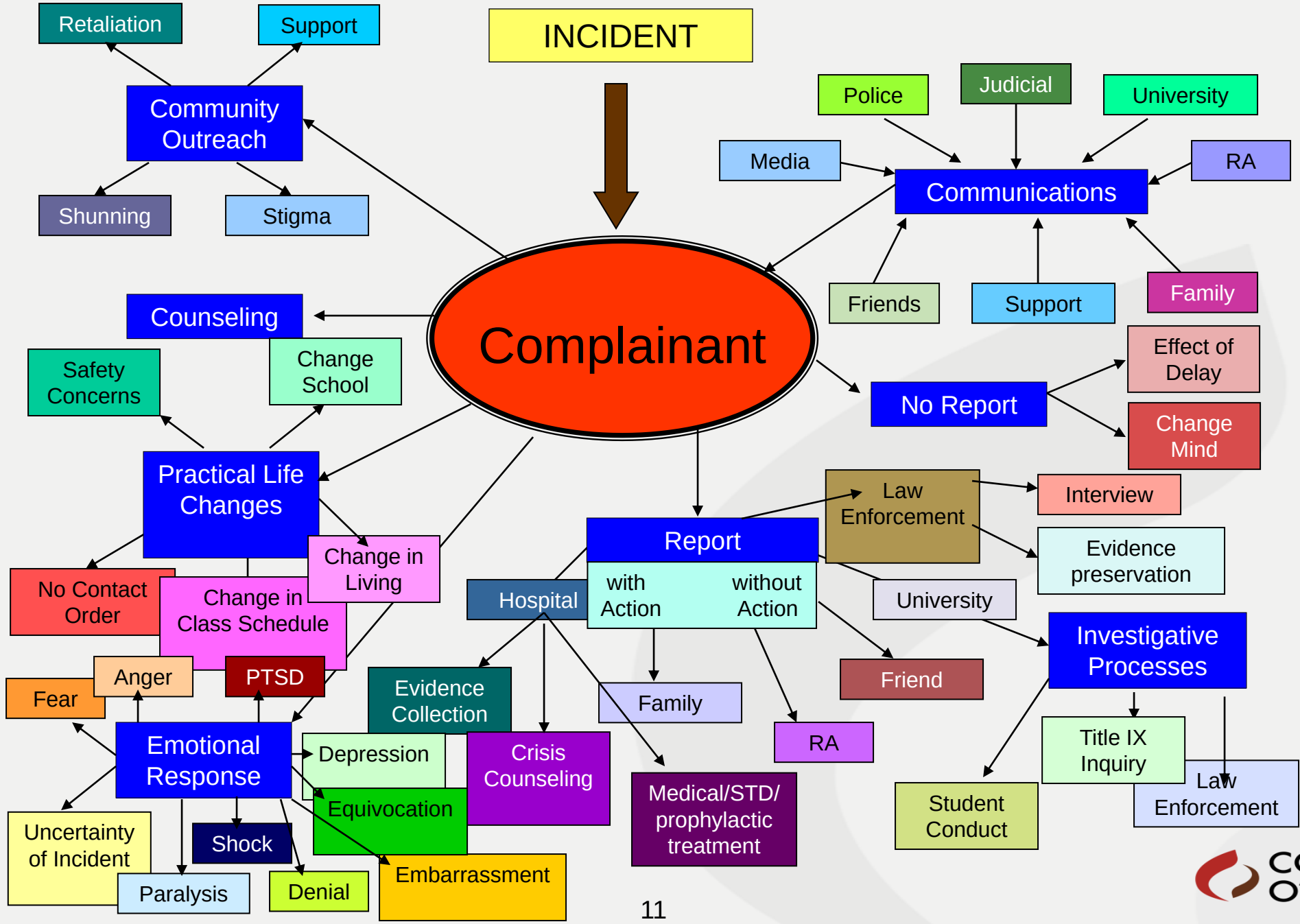
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The Challenge of the Context

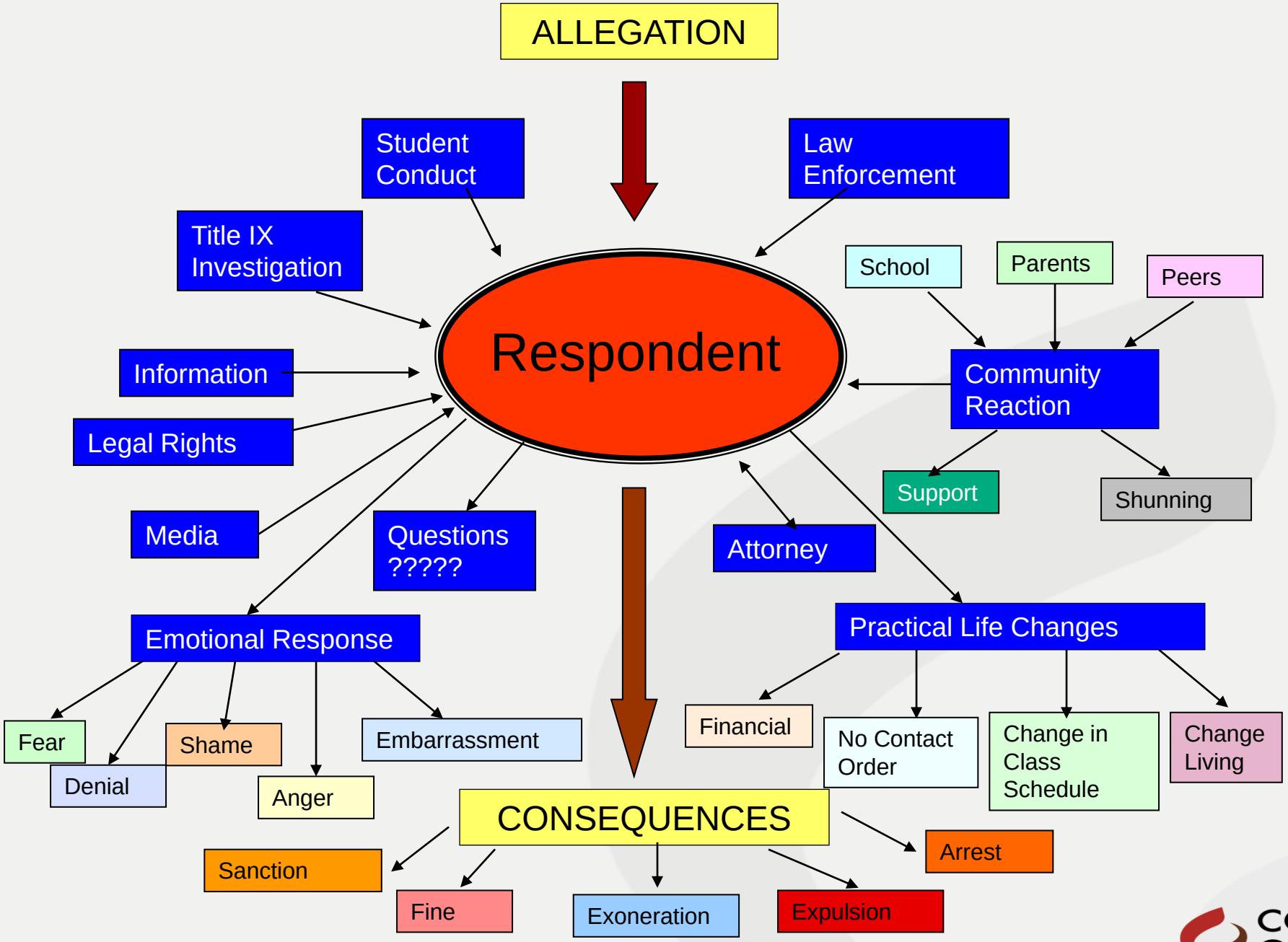


Note: Lists of report recipients and relevant laws not exhaustive .

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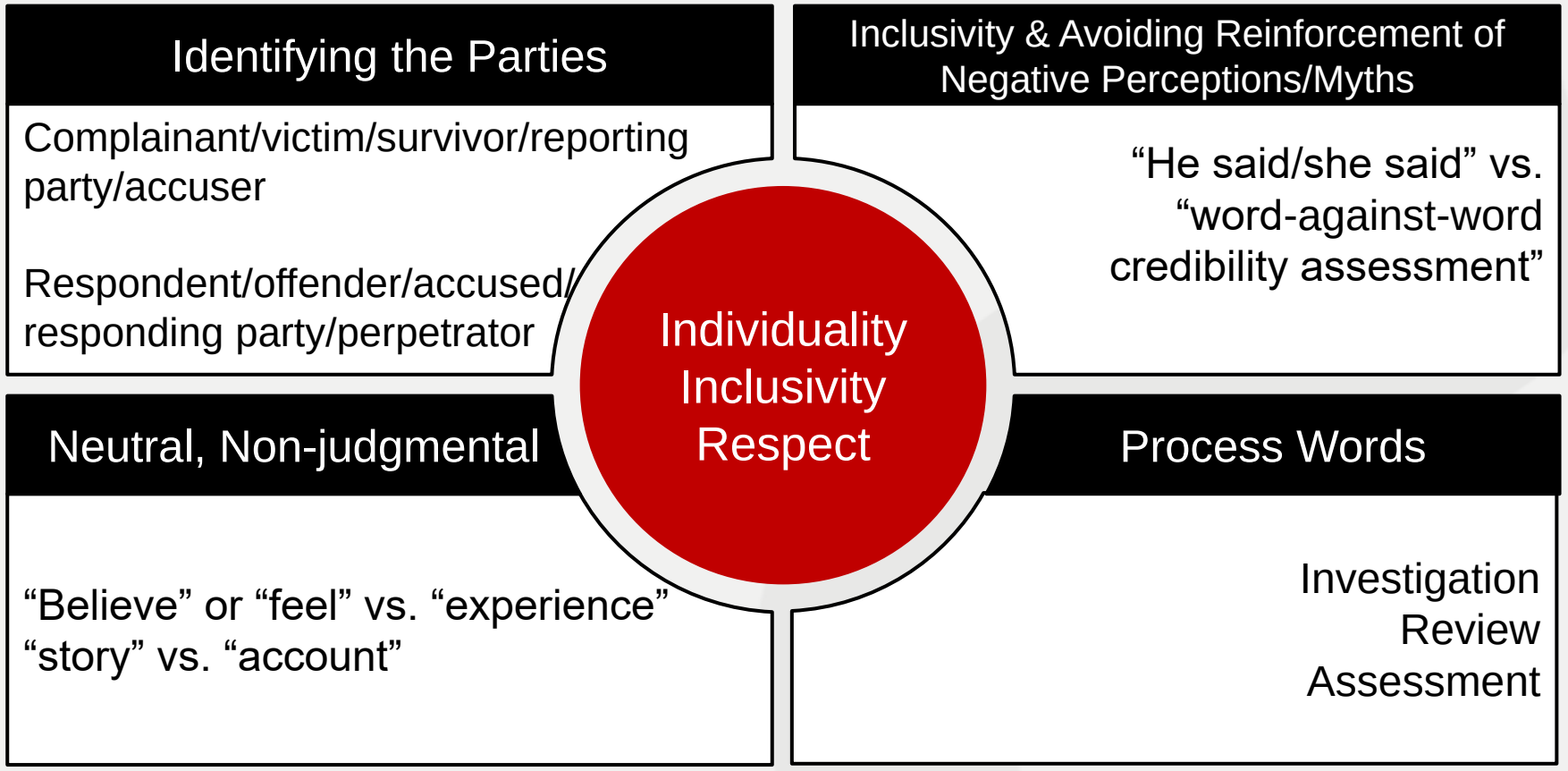


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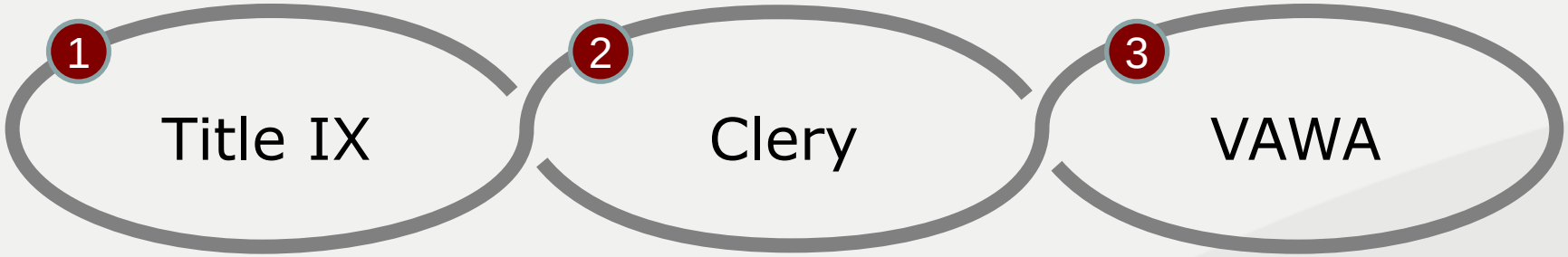

ALLEGATION
Student Conduct
Law Enforcement
Title IX Investigation
School
Parents
Peers
Respondent
Information
Community Reaction
Legal Rights
Support
Shunning
Media
Questions ?????
Attorney
Emotional Response
Practical Life Changes
Fear
Shame
Embarrassment
Financial
No Contact Order
Change in Class Schedule
Change Living
Denial
Anger
CONSEQUENCES
Arrest
Sanction
Fine
Exoneration
Expulsion

12

Awareness of the Impact of Language



Federal Regulatory Framework



Title IX of the Education Amendments of 1972

- Prohibits sex discrimination in educational institutions that receive federal funds

The Jeanne Clery Act (1990)

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

The Violence Against Women Reauthorization Act of 2013

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

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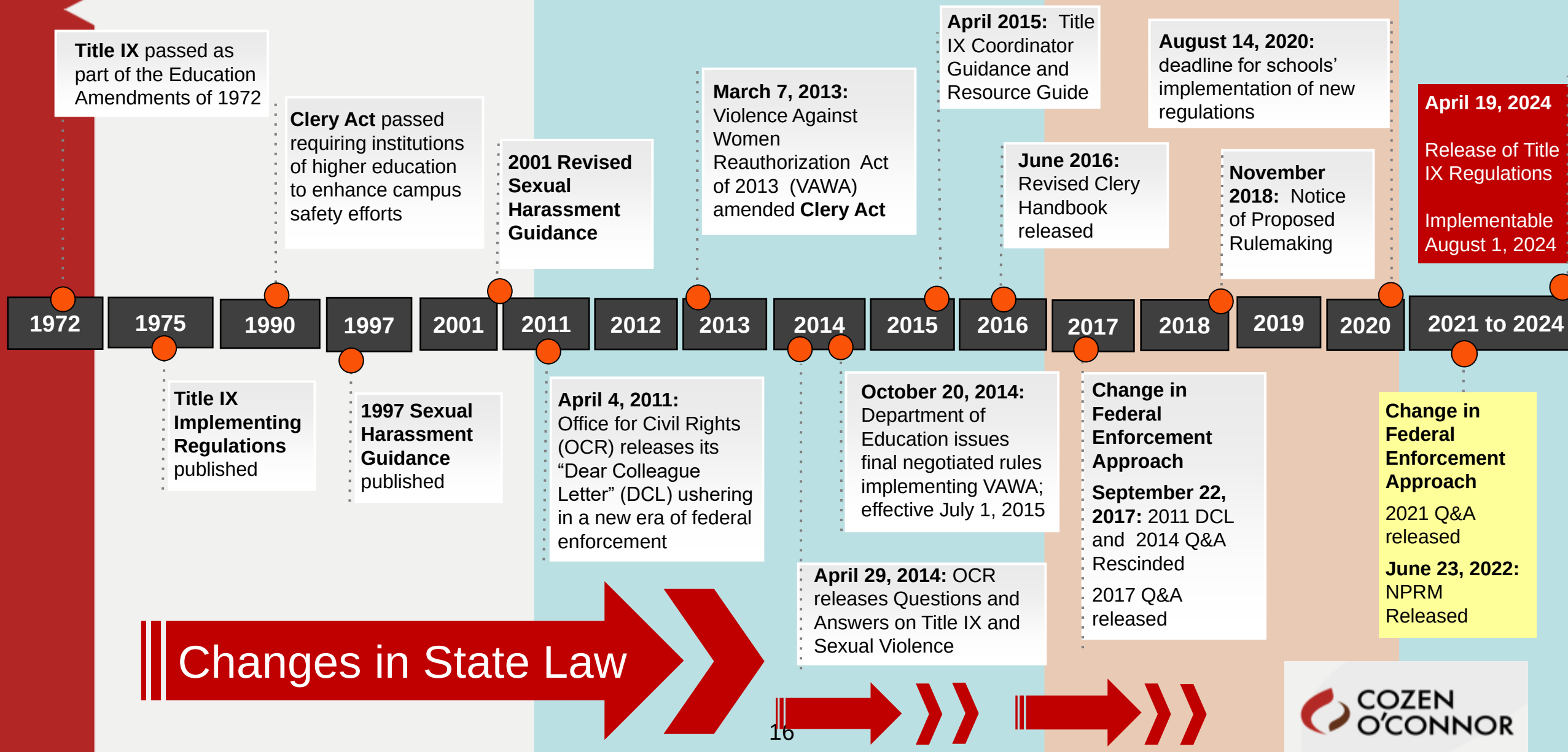
Implementation Rubric

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

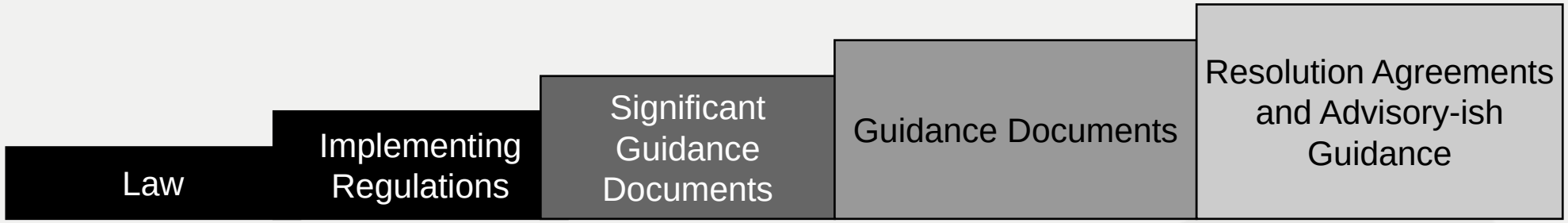


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Evolution of Federal Regulation and Guidance



The Hierarchy



- Title IX

- Title IX Implementing Regulations (2020)

- 2011 Dear Colleague Letter (Rescinded)
- 2014 Q&A (Rescinded)
- 2017 Q&A (Rescinded)
- Preamble to Title IX Implementing Regulations

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

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

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Approach to Mastery

- Legal
  - New definitions
  - Analysis and synthesis
- Procedural Requirements
  - Required elements
  - Attendant legal issues
- Practical Implementation
  - Communication
  - Customized considerations



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Our Goal



Bloom's Taxonomy:

- hierarchical model
- categorizes learning objectives
- varying levels of complexity, from basic knowledge and comprehension to advanced evaluation and creation.
- originally published in 1956 by Benjamin Bloom, an educational psychologist, along with
- Max Englehart, Edward Furst, Walter Hill, and David Krathwohl
- widely used by educators
- helping students progress from recalling facts to producing original work.

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Maintaining Calm



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Silver Lining



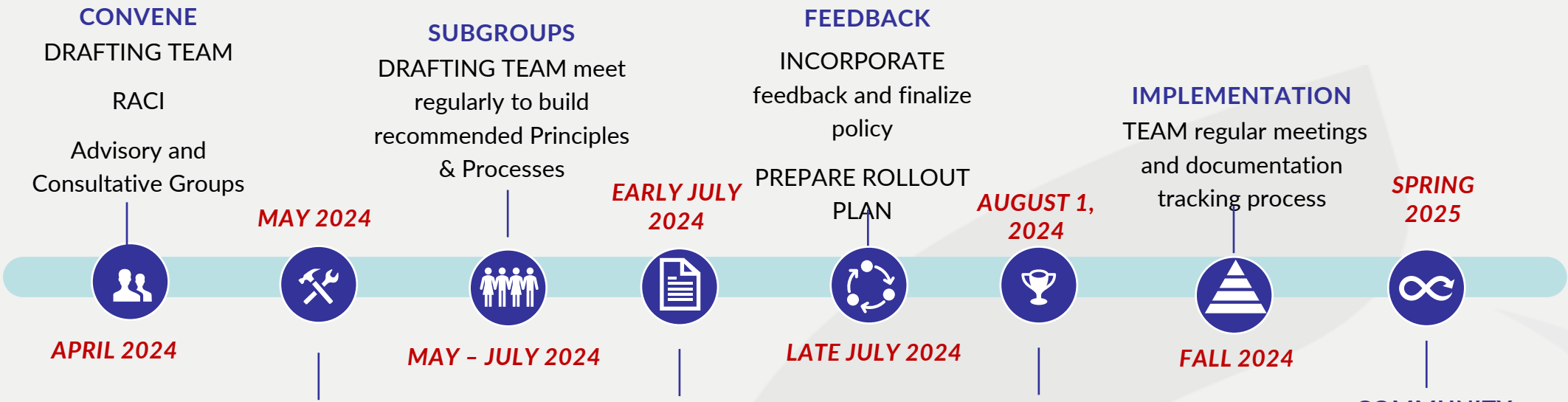
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Now What?



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August 1: 45 Days Away



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

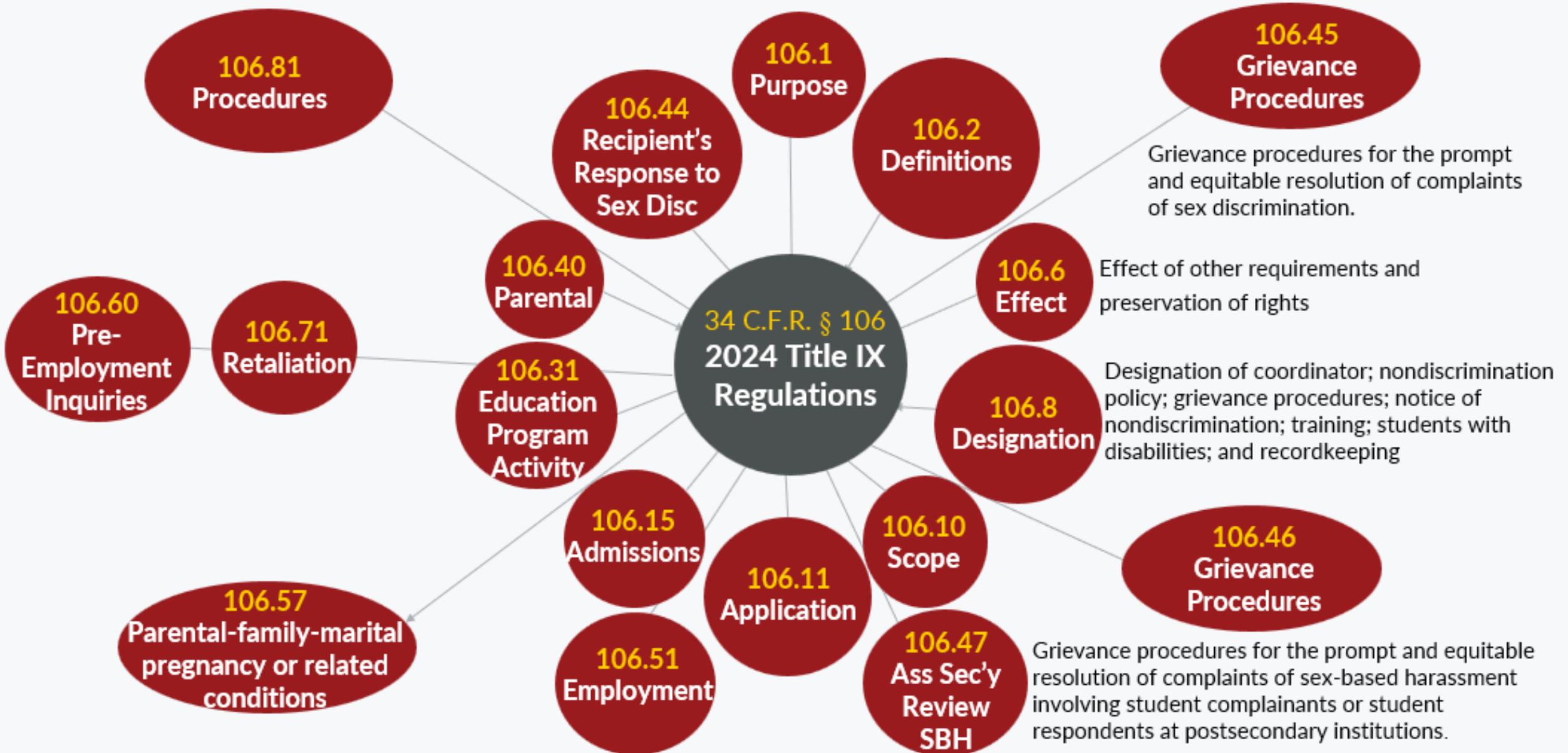
- Roll out training and education on new policies, procedures, and protocols
- Develop awareness campaign to educate community about resources, supports, and reporting options
- Create mechanism to gather feedback about gaps in process, questions or concerns

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HIGH LEVEL OVERVIEW OF 2024 REGULATIONS

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2024 Title IX Regulations




Postsecondary Institution
Sex Discrimination
Employee
Relevant
Student
Remedies
Student
Title IX
Sex-based Harassment
Respondent
Program or Activity
Program or Activity
Remedies
Party
Elementary School
Relevant
Complaint
Federal Financial Assistance
Disciplinary Sanctions
Student with a Disability
Sex Discrimination
Elementary School
Sex-based Harassment
Party
Disciplinary Sanctions
Complainant
Recipient
Sex Discrimination
Administrative Law Judge
Program or Activity
Federal Financial Assistance
Respondent
Elementary School
Recipient
Disciplinary Sanctions
Remedies
Sex Discrimination
Secondary School
Complainant Relevant
Program or Activity
Student
Administrative Law Judge
Administrative Law Judge
Secondary School
Federal Financial Assistance
Recipient
Employee
Complainant
Elementary School
Student
Sex-based Harassment
Title IX
Administrative Law Judge
Student
Respondent
Secondary School
Respondent
Party
Postsecondary Institution
Complaint
Recipient
Remedies
Sex Discrimination
Postsecondary Institution
Remedies
Party
Federal Financial Assistance
Sex-based Harassment
Complainant
Party
Disciplinary Sanctions
Title IX
Relevant
Title IX Complaint Respondent
Complainant
Employee
Complaint
Title IX
Complaint
Relevant
Secondary School
Employee
Recipient
Student with a Disability
Student with a Disability
Secondary School
Student with a Disability
Disciplinary Sanctions
Employee

2024 Title IX Regulations



Notice of Proposed Rules
Released on June 23, 2022

Release has been delayed several times

Most recent estimate is that the Regulations will be released May 2024.





Some Proposed changes :

- Shift in hostile environment definition
- Supportive measures can now burden a respondent
- Reporting obligations broadened
- Changes to grievance process
- Pregnancy or related concerns

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Overview: 2024 Title IX Regs By the Numbers

240,000	• COMMENTS RECEIVED • TOOK 2 YEARS TO RECONCILE
1,577	• TOTAL PAGES • PREAMBLE + FINAL RULE
04/19/24 08/01/24	• RELEASE DATE • IMPLEMENTATION DATE

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Understanding Title IX

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

20 USCA Sec. 1681

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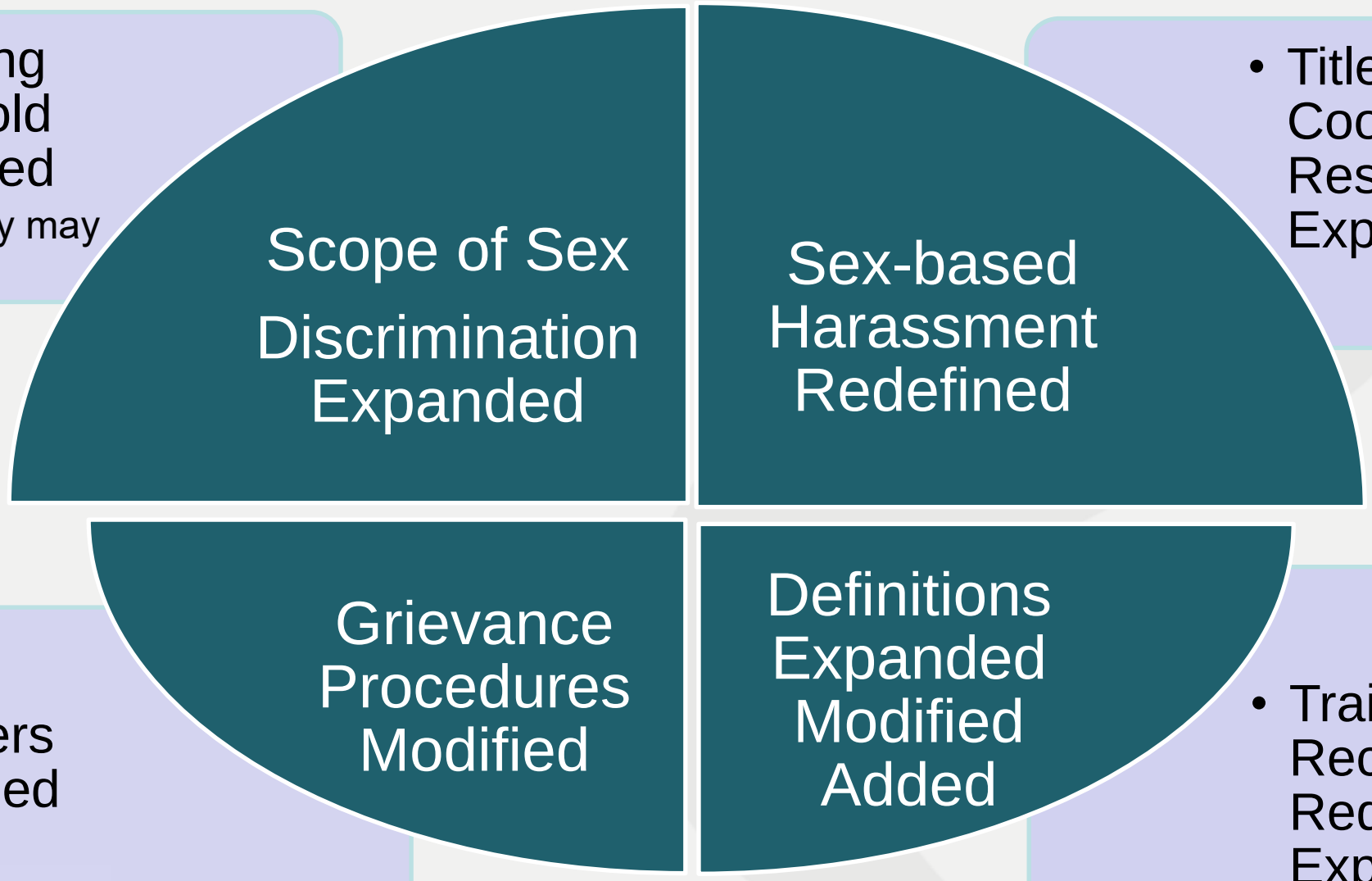
Embracing the New Language

- “Sex discrimination”
- “Sex-based harassment”
- “Pregnancy or related conditions”
- “Information that reasonably may constitute”
- “Designated as confidential”
- “Confidential employee”
- “**Prompt and effective** so that sex discrimination does not **continue or recur**”
- “Severe or pervasive”

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KEY PROVISIONS OF THE 2024 TITLE IX REGULATIONS

- Reporting Threshold Expanded
- "reasonably may constitute"

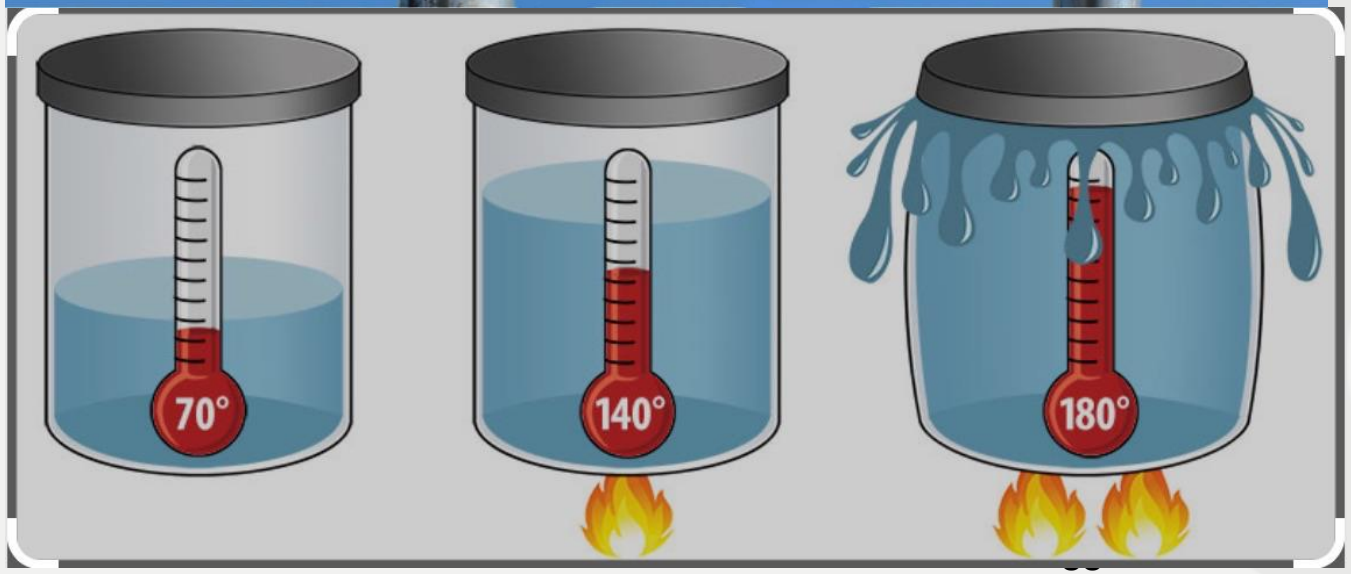


- Title IX Coordinator Responsibilities Expanded

- Reporters Expanded

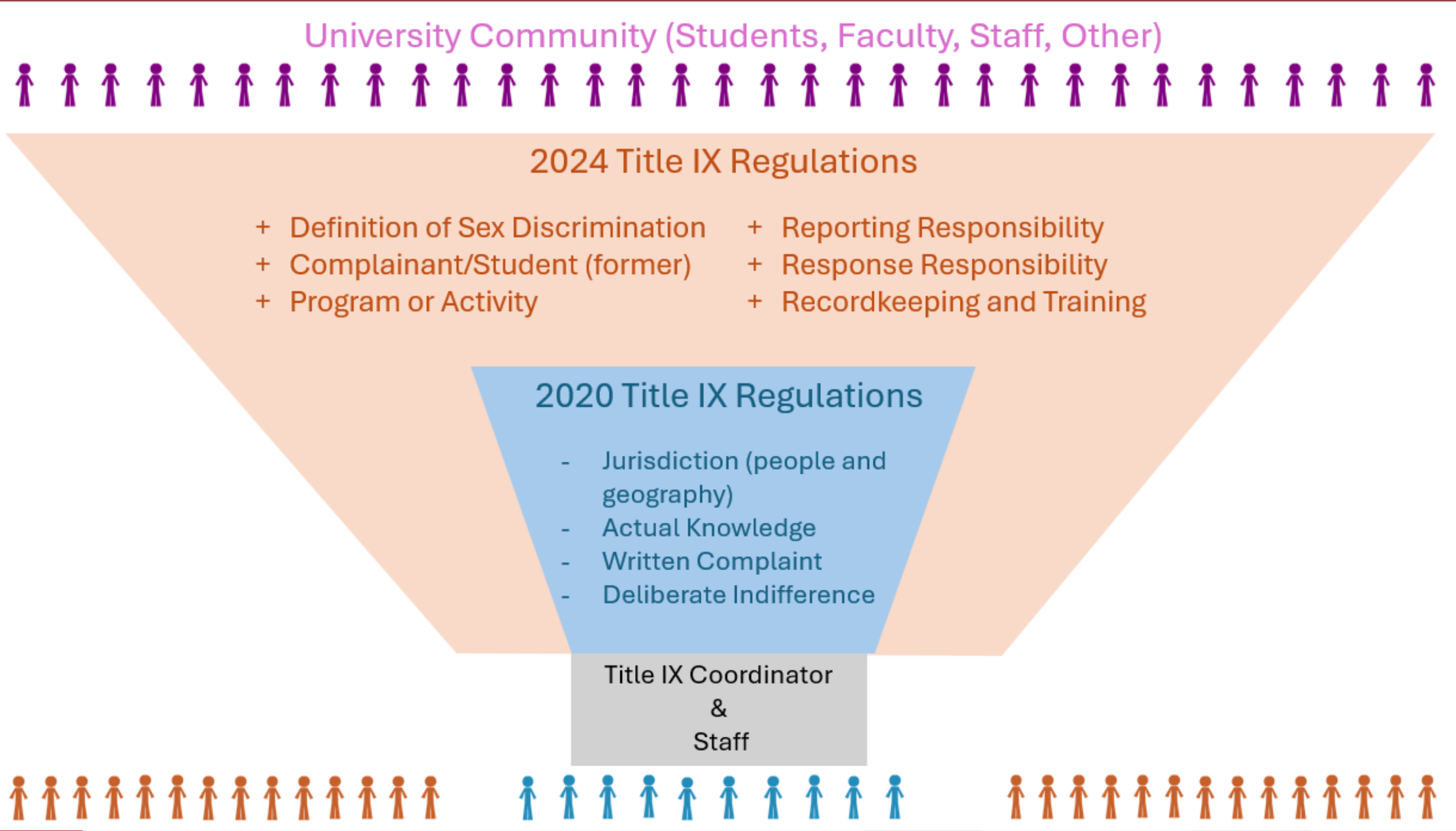
- Training and Recordkeeping Requirements Expanded





- Definitions
- Complainants
- Jurisdiction
- Reporters
- Threshold for Reporting
- Training
- Record-keeping
- Title IX Coordinators
- TIX Coordinator Responsibilities
- Complaints

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University Community (Students, Faculty, Staff, Other)
2024 Title IX Regulations
+ Definition of Sex Discrimination
+ Complainant/Student (former)
+ Program or Activity
+ Reporting Responsibility
+ Response Responsibility
+ Recordkeeping and Training
2020 Title IX Regulations
- Jurisdiction (people and geography)
- Actual Knowledge
- Written Complaint
- Deliberate Indifference
Title IX Coordinator
&
Staff

Application - § 106.11

- This part applies to every recipient and to all sex discrimination occurring under a recipient's education program or activity in the United States.

- For purposes of this section, conduct that occurs under a recipient's education program or activity includes but is not limited to conduct that occurs in a building owned or controlled by a student organization that is officially recognized by a postsecondary institution, and conduct that is subject to the recipient's disciplinary authority.

- A recipient has an obligation to address a sex- based hostile environment under its education program or activity, even when some conduct alleged to be contributing to the hostile environment occurred outside the recipient's education program or activity or outside the United States.

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Extraterritoriality - § 106.11

- The Department emphasizes that a recipient does not have an obligation under Title IX to address sex discrimination occurring outside of the United States.

- However, nothing in these regulations prohibits a recipient from responding as appropriate under its existing code of conduct or other policies pertaining to study abroad programs

- If, while investigating and addressing a hostile environment under its education program or activity in the United States, a recipient seeks information about conduct that occurred in another country, nothing in these regulations preempts applicable privacy laws. Preamble, pp. 208-209

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KEY PROVISIONS OF THE 2024 TITLE IX REGULATIONS



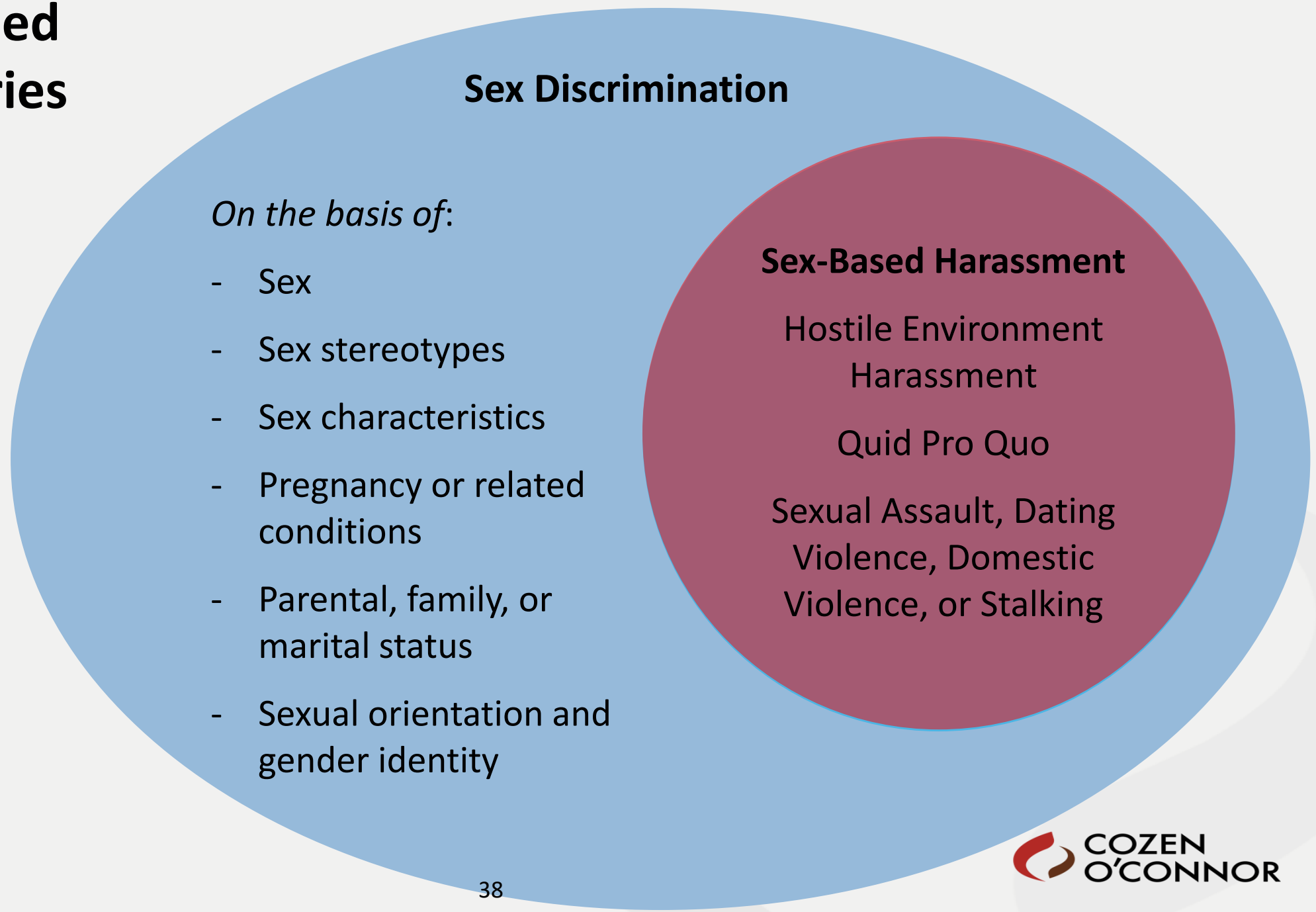
- Reporting Threshold Expanded
- "reasonably may constitute"

- Title IX Coordinator Responsibilities Expanded

- Reporters Expanded

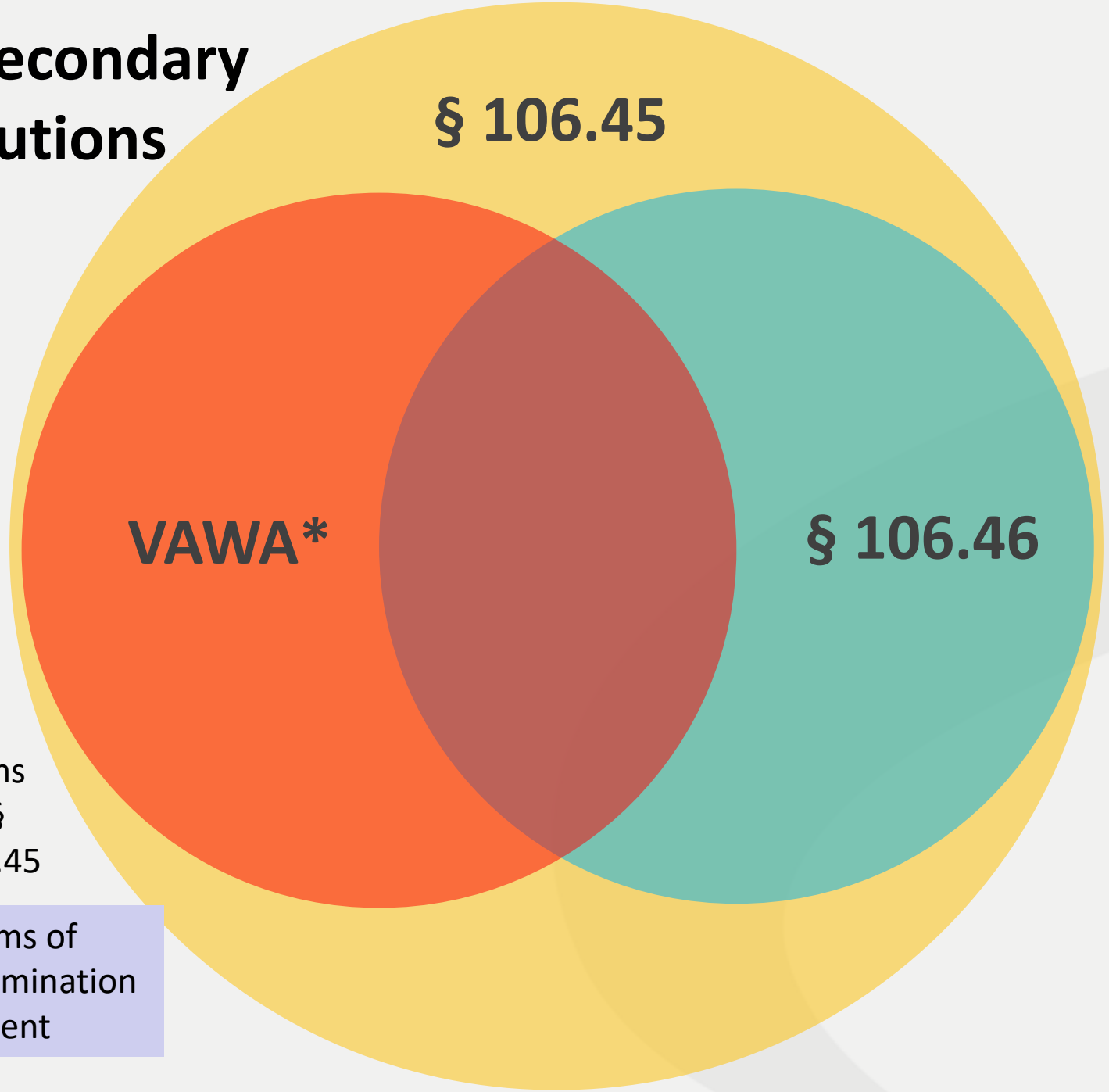
- Training and Recordkeeping Requirements Expanded

Expanded Categories



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At Postsecondary Institutions

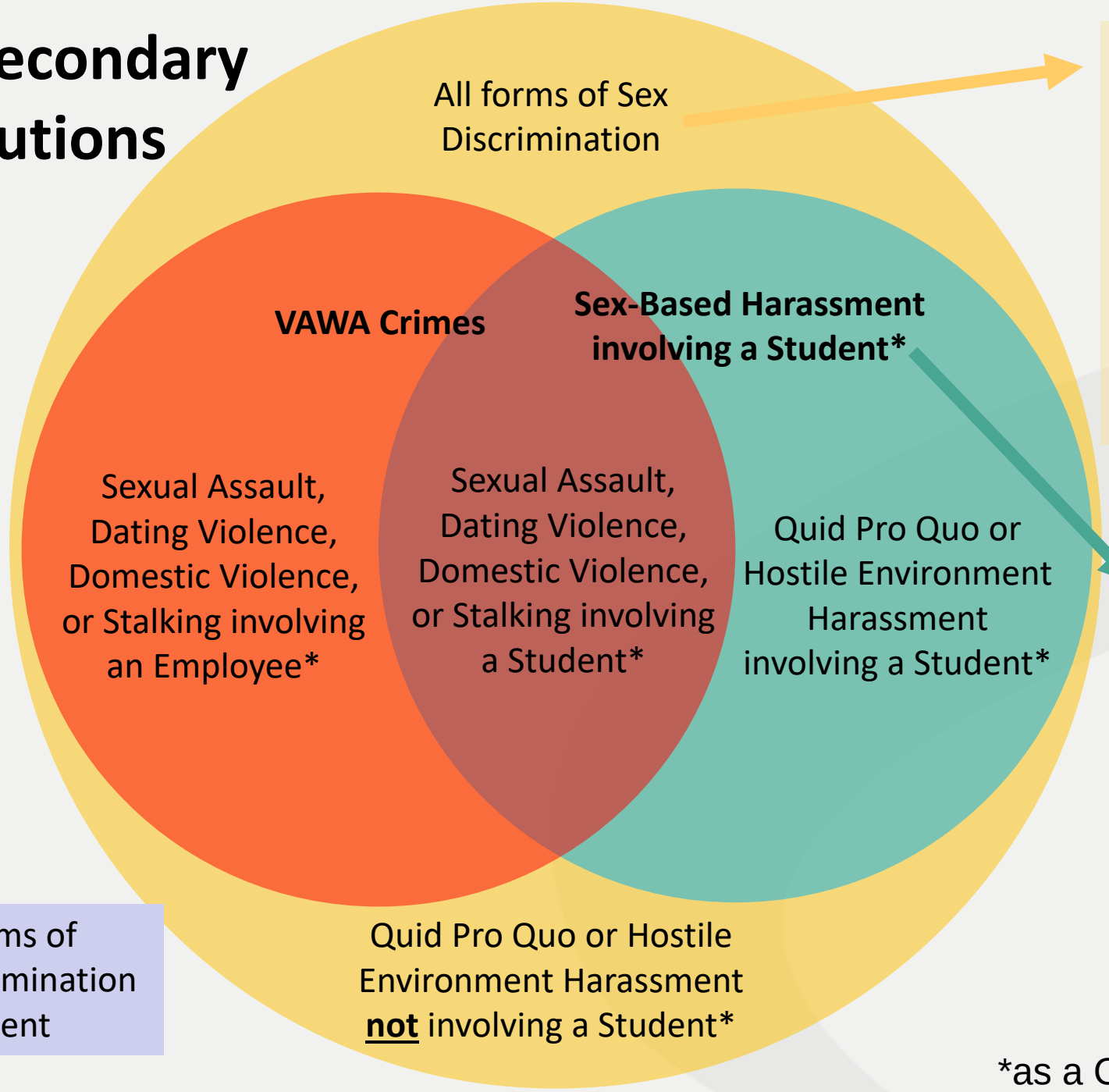


* VAWA provisions are covered in § 106.46, not § 106.45

All other forms of Prohibited Discrimination & Harassment

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At Postsecondary Institutions



Discrimination on the basis of sex, sex stereotypes, sex characteristics, pregnancy or related conditions, family/marital status, sexual orientation; and/or gender identity involving **students, employees, or third parties**

- Student-Student
- Student-Employee
- Employee-Student
- Student-Third Party
- Third Party-Student

All other forms of Prohibited Discrimination & Harassment

*as a Complainant or Respondent

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At Postsecondary Institutions

	Involving Students	Not Involving Students
Sex Discrimination[1]	§ 106.45	§ 106.45
Quid Pro Quo or Hostile Environment Harassment[2]	§ 106.45 + § 106.46	§ 106.45
Sexual Assault, Dating Violence, Domestic Violence, or Stalking[3]	§ 106.45 + § 106.46 + VAWA	§ 106.45 + VAWA
Other forms of Protected Class Discrimination and Harassment	(institutional choice)	(institutional choice)

[1] **Sex Discrimination** includes discrimination on the basis of sex, sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation and gender identity, Sex-Based Harassment (hostile environment and quid pro quo), sexual assault, dating violence, domestic violence, and stalking.

[2] **Quid Pro Quo Harassment** – an employee, agent, or other person authorized by the recipient to provide an aid, benefit, or service under the recipient's education program or activity explicitly or impliedly conditioning the provision of such an aid, benefit, or service on a person's participation in unwelcome sexual conduct. **Hostile Environment Harassment** – Unwelcome sex-based conduct that, based on the totality of the circumstances, is subjectively and objectively offensive and is so severe or pervasive that it limits or denies a person's ability to participate in or benefit from the recipient's education program or activity (i.e., creates a hostile environment). Whether a hostile environment has been created is a fact-specific inquiry that includes consideration of the following: (i) The degree to which the conduct affected the complainant's ability to access the recipient's education program or activity; (ii) The type, duration, and frequency of the conduct; (iii) The parties' ages, roles within the recipient's education program or activity, previous interactions, and other factor about each party that may be relevant to evaluating the effects of the conduct; (iv) The location of the conduct and the context in which the conduct occurred; and (v) Other sex-based harassment in the recipient's education program or activity.

[3] **Sexual Assault, Dating Violence, Domestic Violence, and Stalking** as defined in VAWA Amendments to the Clery Act.

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§ 106.45 Requirements

- Treat complainants and respondents equitably
- Title IX Coordinator, investigator, and decisionmaker must be free from conflicts of interest and bias
- Decisionmaker may be the same person as the Title IX Coordinator or the investigator
- Respondent is presumed not responsible
- Reasonably prompt time frames for major stages of the grievance procedures
- Allow for reasonable extensions for good cause with notice to the parties including the reason for the delay
- Take reasonable steps to protect privacy of parties/witnesses provided no restrictions re:
  - ability to obtain and present evidence;
  - consult with confidential resources, advisors, or family; or
  - prepare for or participate in the grievance procedures
- Require an objective evaluation of all relevant and not impermissible evidence
- Credibility determinations may not be based on a person's status as a complainant, respondent, or witness
- Exclude as impermissible:
  - (i) evidence protected under privilege or provided to a confidential employee, unless waived;
  - (ii) records by physician, psychologist, or other provider re: treatment, absent written consent;
  - (iii) evidence re: complainant's sexual interests or prior sexual conduct, unless offered to prove someone else committed the conduct or is re: prior contact b/t the parties to prove consent
- Notice of allegations that include:
  - (i) the grievance procedures; and
  - (ii) sufficient information available at the time to allow the parties to respond to the allegations;
    - Sufficient information includes identities of the parties; conduct alleged to constitute sex discrimination; and date(s) and location(s) of the alleged incident(s), if known;
  - (iii) prohibition against retaliation; and
  - (iv) statement that the parties are entitled to an equal opportunity to access the relevant and not impermissible evidence or an accurate description of the evidence (but if a description is used, must give access to the evidence upon request)
- If additional allegations are identified, must issue notice of additional allegations
- Discretionary dismissal allowed when:
  - (i) recipient is unable to identify the respondent;
  - (ii) respondent is not participating in the education program or activity and is not an employee;
  - (iii) complainant voluntarily withdraws the any/all allegations, the Title IX Coordinator declines to initiate a complaint, and without the withdrawn allegations the conduct would not constitute sex discrimination if proven; and
  - (iv) after reasonable efforts to clarify the allegations, recipient determines that the conduct alleged would not constitute sex discrimination
- Upon dismissal, notify complainant of basis and provide opportunity to appeal. If respondent has been notified of the allegations, must also notify the respondent of dismissal, basis, and that it may be appealed
- If dismissal is appealed, must: (i) notify the parties of the appeal;
  - (ii) implement appeal procedures equally for the parties;
  - (iii) ensure the decisionmaker on appeal did not take part in the investigation or dismissal of the complaint;
  - (iv) ensure the decisionmaker is trained as required;
  - (v) provide the parties a reasonable and equal opportunity to make a statement supporting or challenging the outcome; and
  - (vi) notify the parties of the result of the appeal and rationale
- A recipient who dismisses a complaint must:
  - (i) offer supportive measures to complainant;
  - (ii) if respondent has been notified, offer supportive measures to respondent;
  - (iii) require TIXC to take appropriate, prompt, effective steps to ensure S.D. does not continue or recur
- May consolidate if the allegations arise out of the same facts or circumstances
- Provide for the adequate, reliable, and impartial investigation of complaints
- Burden is on recipient, not parties, to gather sufficient evidence to determine whether sex discrimination occurred
- Parties have equal opportunities to present witnesses and other relevant and not impermissible evidence
- Review all evidence gathered and determine what is relevant and impermissible regardless of relevance
- Parties have equal opportunities to access relevant and not impermissible evidence in the following manner:
  - (i) recipient must provide parties equal opportunity to access relevant and not impermissible evidence or an accurate description (but if a description is used, must give access to the evidence upon request);
  - (ii) recipient must provide parties reasonable opportunity to respond to evidence/description of evidence;
  - (iii) recipient must take reasonable steps to prevent and address parties' unauthorized disclosure of information and evidence obtained solely through grievance procedures. Disclosures for purposes of administrative proceedings or litigation related to the complaint of sex discrimination are authorized
- Must provide a process enabling decisionmaker to question parties/witnesses to adequately assess credibility to the extent credibility is both in dispute and relevant to evaluating one or more allegations of sex discrimination
- Following an investigation and evaluation of all relevant and not impermissible evidence, a recipient must:
  - (i) use the preponderance standing, unless clear and convincing is used in all other comparable proceedings;
  - (ii) notify parties in writing of determination as to whether S.D. occurred, rationale, and appeal procedures;
  - (iii) if there is a determination that sex discrimination occurred, TIXC must (a) coordinate the provision and implementation of remedies to complainant and others identified as having had equal access to the E.P.A. limited or denied by sex discrimination, (b) coordinate implementation of sanctions on respondent, (c) take other appropriate prompt and effective steps to ensure S.D. does not continue or recur within the E.P.A.
  - (iv) not discipline a party/witness for false statements based solely on determination whether S.D. occurred
- A recipient must offer the parties an appeal process that, at a minimum, is the same as it offers in all other comparable proceedings (including proceedings relating to other discrimination complaints)
- May offer informal resolution

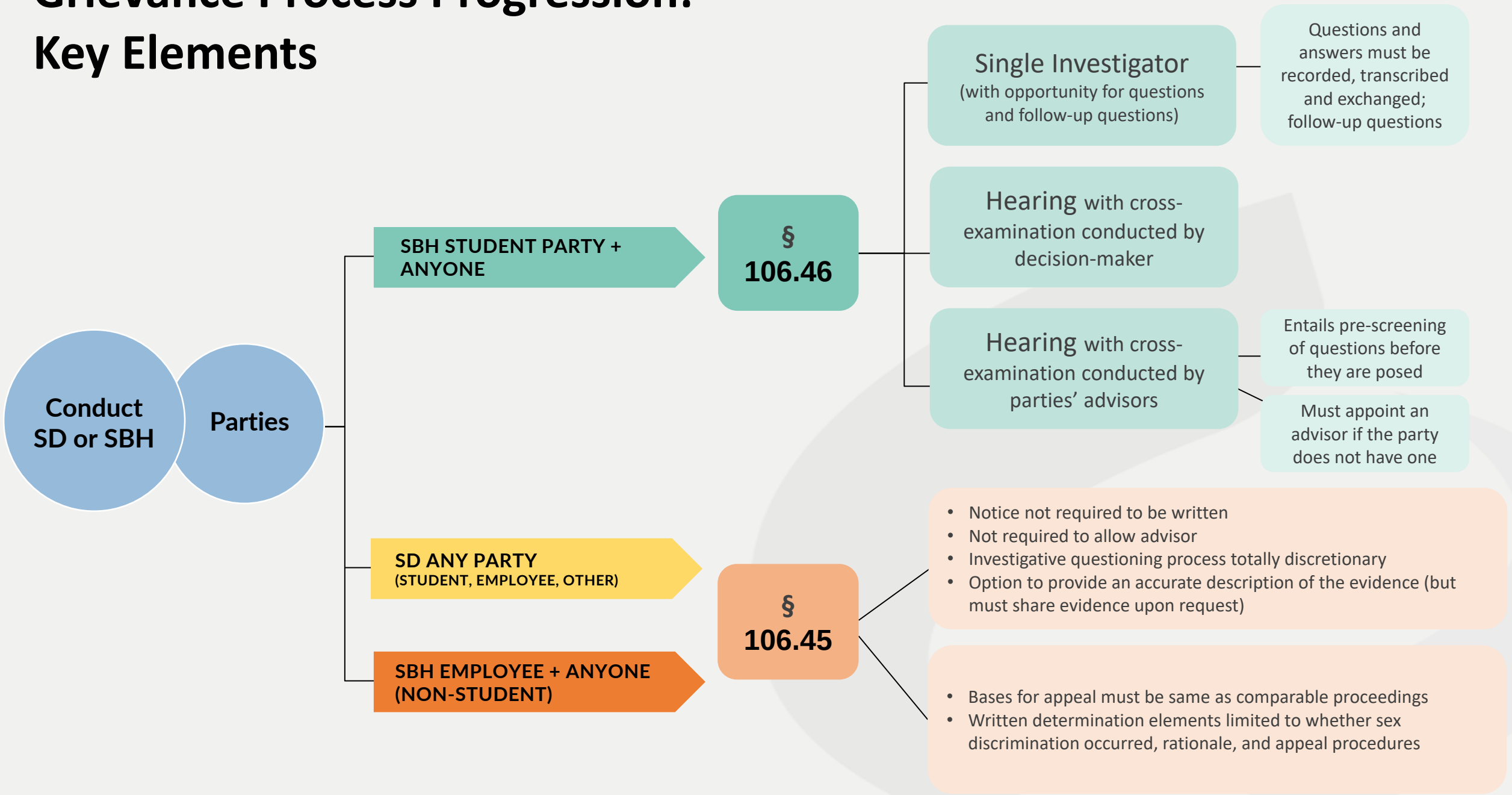
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- Written notice of allegations that include:
  - (i) the grievance procedures; and
  - (ii) sufficient information available at the time to allow the parties to respond to the allegations;
    - Sufficient information includes identities of the parties; conduct alleged to constitute sex discrimination; and date(s) and location(s) of the alleged incident(s), if known;
  - (iii) prohibition against retaliation; and
  - (iv) statement that the parties are entitled to an equal opportunity to access the relevant and not impermissible evidence or an investigative report ~~or accurate description of the evidence~~ (but if an investigative report ~~description~~ is used, must give access to the evidence upon request)
  - (v) respondent is presumed not responsible
  - **(vi) ability to have an advisor of choice**
  - **(vii) if applicable, that the institution's code of conduct prohibits knowingly making false statements**
- Written notice must be provided with sufficient time for the parties to prepare a response before any initial interview
- If additional allegations are identified, must issue written notice of additional allegations
- **May delay in issuing the notice of allegations if there are reasonable safety concerns**
- Discretionary dismissal allowed when:
  - (i) recipient is unable to identify the respondent;
  - (ii) respondent is not participating in the education program or activity and is not an employee;
  - (iii) complainant voluntarily withdraws the any/all allegations in writing, the Title IX Coordinator declines to initiate a complaint, and without the withdrawn allegations the conduct would not constitute sex discrimination if proven; and
  - (iv) after reasonable efforts to clarify the allegations, recipient determines that the conduct alleged would not constitute sex discrimination
- Upon dismissal, notify complainant in writing of basis and provide opportunity to appeal. If respondent has been notified of the allegations, must also notify the respondent in writing of dismissal, basis, and that it may be appealed
- If dismissal is appealed, must:
  - (i) notify the parties of the appeal in writing;
  - (ii) implement appeal procedures equally for the parties;
  - (iii) ensure the decisionmaker on appeal did not take part in the investigation or dismissal of the complaint;
  - (iv) ensure the decisionmaker is trained as required;
  - (v) provide the parties a reasonable and equal opportunity to make a statement supporting or challenging the outcome in writing; and
  - (vi) notify the parties of the result of the appeal and rationale in writing
- A recipient who dismisses a complaint must:
  - (i) offer supportive measures to complainant;
  - (ii) if respondent has been notified, offer supportive measures to respondent;
  - (iii) require TIXC to take appropriate, prompt, effective steps to ensure S.D. does not continue or recur
- May consolidate if the allegations arise out of the same facts or circumstances
- Provide for the adequate, reliable, and impartial investigation of complaints
- Must provide, to a party whose participation is invited or expected, written notice of the date, time, location, participants, and purpose of all meetings or proceedings with **sufficient time for the party to prepare to participate**
- **Must provide parties with same opportunities to be accompanied to any meeting/proceeding by an advisor of their choice, who may be but is not required to be an attorney, and not limit the choice or presence of advisor in any meeting/proceeding; may establish restrictions re: extent advisor may participate, as long applied equally to parties**
- Must provide same opportunities to have persons other than advisor of choice present during any meeting/proceeding
- Burden is on recipient, not parties, to gather sufficient evidence to determine whether sex discrimination occurred
- Parties have equal opportunities to present witnesses and other relevant and not impermissible evidence
- **Discretion to determine whether parties may present expert witnesses as long as applied equally to the parties**
- Review all evidence gathered and determine what is relevant and impermissible regardless of relevance
- Parties **and their advisors** have equal opportunities to access relevant and not impermissible evidence in the following manner:
  - (i) recipient must provide parties equal opportunity to access relevant and not impermissible evidence or an investigative report ~~an accurate description~~ (but if an investigative report ~~a description~~ is used, must give access to the evidence upon request);
    - **If an institution conducts a live hearing, it must provide the opportunity to review the evidence in advance of the live hearing; it is at the institution's discretion whether to provide the opportunity to respond prior to, during, or both prior to and during the live hearing;**
  - (ii) recipient must provide parties reasonable opportunity to respond to evidence/description of evidence;
  - (iii) recipient must take reasonable steps to prevent and address parties' unauthorized disclosure of information and evidence obtained solely through grievance procedures. Disclosures for purposes of administrative proceedings or litigation related to the complaint of sex discrimination are authorized
- **A postsecondary institution's sex-based harassment grievance procedures may, but need not, provide for a live hearing.**
  - If using a live hearing, it may conduct the live hearing with the parties physically present in the same geographic location.
  - At the institution's discretion, or upon the request of either party, the institution must conduct the hearing with the parties present in separate locations with technology enabling the decisionmaker and parties to simultaneously see and hear the person speaking.
  - Must create an audio/audiovisual recording or transcript, of any live hearing and make it available to the parties for inspection and review.
- Must provide a process enabling decisionmaker to question parties/witnesses to adequately assess credibility to the extent credibility is both in dispute and relevant to evaluating one or more allegations of sex discrimination
- **Questioning of parties and witnesses must take place consistent with the following provisions before determining whether sex-based harassment occurred:**
  - (i) Absent a live hearing, the process for proposing and asking relevant and not impermissible questions and follow-up questions of parties and witnesses, including questions challenging credibility, must allow:
    - (A) Investigator/decisionmaker to ask questions during individual meetings with a party/witness;
    - (B) Each party to propose questions they want asked of any party/witness, have those questions asked by investigator/decisionmaker during individual meetings, including follow-up meetings, with a party/witness; and
    - (C) Provide each party with an audio/audiovisual recording or transcript with enough time for the party to have a reasonable opportunity to propose follow-up questions.
  - (ii) If holding a live hearing, the process for proposing and asking relevant and not impermissible questions and follow-up questions of parties and witnesses, including questions challenging credibility, must allow the decisionmaker to ask such questions, and either:
    - (A) Allow each party to propose questions they want asked of any party/witness and have those questions asked by the decisionmaker; or
    - (B) Allow each party's advisor to ask any party or witness such questions. Such questioning must never be conducted by a party personally.
      - If a postsecondary institution permits advisor-conducted questioning and a party does not have an advisor, the postsecondary institution must provide the party with an advisor of the postsecondary institution's choice, without charge, for the purpose of advisor-conducted questioning. In those instances, the postsecondary institution must not appoint a confidential employee and may appoint, but is not required to appoint, an attorney to serve as an advisor.
- The decisionmaker must determine whether a proposed question is relevant and not impermissible **prior to the question being posed**, and must explain any decision to exclude a question as not relevant or impermissible. If a decisionmaker determines that a party's question is relevant and not impermissible, then the question must be asked except that a postsecondary institution must not permit questions that are unclear or harassing of the person being questioned. The decisionmaker must give a party an opportunity to clarify or revise a question that the decisionmaker has determined is unclear or harassing and, if the party sufficiently clarifies or revises a question, the question must be asked. A postsecondary institution may adopt and apply other reasonable rules regarding decorum, provided they apply equally to the parties.
- A decisionmaker may place less or no weight upon statements by a person who refuses to respond to relevant and not impermissible questions. The decisionmaker must not draw an inference about whether sex-based harassment occurred based solely on a person's refusal to respond to questions.
- Following an investigation and evaluation of all relevant and not impermissible evidence, a recipient must:
  - (i) use the preponderance standing, unless clear and convincing is used in all other comparable proceedings;
  - (ii) simultaneously notify parties in writing of determination as to whether sex-based harassment ~~S.D.~~ occurred, rationale, and appeal procedures;
    - (1) The written determination must include:
      - (i) A description of the alleged sex-based harassment;
      - (ii) Information about the policies and procedures that the postsecondary institution used to evaluate the allegations;
      - (iii) The decisionmaker's evaluation of the relevant and not impermissible evidence and determination whether S.B.H. occurred;
      - (iv) When the decisionmaker finds that sex-based harassment occurred, any sanctions the institution will impose on the respondent, whether remedies other than imposition of sanctions will be provided to the complainant, and, to the extent appropriate, other students identified by the postsecondary institution to be experiencing the effects of the sex-based harassment; and
      - (v) The postsecondary institution's procedures for the complainant and respondent to appeal.
    - (2) The determination regarding responsibility becomes final either on the date that the postsecondary institution provides the parties with the written determination of the result of any appeal, or, if no party appeals, the date on which an appeal would no longer be considered timely.
  - (iii) if there is a determination that sex discrimination occurred, TIXC must (a) coordinate the provision and implementation of remedies to complainant and others identified as having had equal access to the E.P.A. limited or denied by sex discrimination, (b) coordinate implementation of sanctions on respondent, (c) take other appropriate prompt and effective steps to ensure S.D. does not continue or recur within the E.P.A.
  - (iv) not discipline a party/witness for false statements based solely on determination whether S.D. occurred
- A recipient must offer the parties an appeal from a determination whether sex-based harassment occurred, and from an institution's dismissal of a complaint or any allegations therein, on the following bases: ~~process that, at a minimum, is the same as it offers in all other comparable proceedings (including proceedings relating to other discrimination complaints)~~
  - (i) Procedural irregularity that would change the outcome;
  - (ii) New evidence that would change the outcome and that was not reasonably available when the determination or dismissal was made; and
  - (iii) The Title IX Coordinator, investigator, or decisionmaker had a conflict of interest or bias that would change the outcome.
- A postsecondary institution may offer an appeal to the parties on additional bases, so long as the procedures and additional bases for appeal are equally available to all parties.
- May offer informal resolution. If informal resolution is offered, the institution must inform the parties in writing of the offer and their rights and responsibilities in the informal resolution process and otherwise comply with the provisions of § 106.44(k)(3) (related to informal resolution) in writing.

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Grievance Process Progression: Key Elements



2020 Requirements – Changed in 2024

- "Directly Related" – REMOVED
- Limited Jurisdiction and Scope – EXPANDED
- Required a Live Hearing – REMOVED
- Required Cross Examination by an Advisor – REMOVED
- Required Complainant Subjected to Cross-Examination – REMOVED
- Required Online Posting of Training Materials – REMOVED

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JUSTIFICATION FOR EXPANDED REPORTING OBLIGATIONS

"The Department shares the **serious concern** of stakeholders and commenters that the definition of actual knowledge in **the 2020 amendments could permit a recipient to ignore** sexual harassment simply because allegations of harassing conduct were not reported to "the right" employee."

Title IX Regulations, Preamble, p. 33561.

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JUSTIFICATION FOR EXPANDED REPORTING OBLIGATIONS

"Indeed the 2020 amendments **created a troubling gap** in implementing Title IX's prohibition on sex discrimination: a recipient's employee could have information about **possible sex discrimination** in a recipient's education program or activity, yet the recipient could have no obligation to take any action to address it **unless a formal complaint was filed** or the recipient's **Title IX Coordinator otherwise became aware** of it, **leaving conduct that violated Title IX to go unredressed by recipients."**

2024 Title IX Regulations, Preamble p. 33561

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JUSTIFICATION FOR EXPANDED REPORTING OBLIGATIONS

"The Department has concluded that **Title IX does not permit a recipient to act merely without deliberate indifference** and otherwise allow sex discrimination to occur. Rather, **in the administrative enforcement context**, in which the Department is responsible for ensuring that its own Federal funds are not used to further discrimination, the Department **expects recipients to fully effectuate Title IX**."

2024 Title IX Regulations, Preamble, p. 33561.

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26 GOP States File Suit Against the Department of Education over Changes to Title IX (May '24)



CLAIMS FOCUS ON

- **LGBTQ AND GENDER IDENTITY PROTECTIONS**
- **REMOVAL OF DUE PROCESS RIGHTS**
  - **LIVE HEARING**
  - **CROSS-EX**
  - **NO EXPERTS**

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Taking a Stand…

- On April 29th, Governor Abbott issued a letter indicating that the State of **Texas** would not comply with the USDE's effort to rewrite Title IX

- **Several other states, including Louisiana, Montana, Florida, South Carolina and Oklahoma, also said they will not comply with the new rule.**

Gov. Greg Abbott orders Texas to ignore Biden administration's new federal protections of LGBTQ+ students

The new Title IX rules expanded the definition of sex-based harassment. Texas is also suing the Biden administration to block the changes.

BY SNEHA DEY

APRIL 29, 2024 UPDATED: 12 PM CENTRAL SHARE



Texas Attorney General Ken Paxton sued the Biden administration Monday after it extended Title IX to LGBTQ students. Austin Price for The Texas Tribune

Current Challenges to the 2024 Regulations

- State of Alabama v. Cardona, No. 7:24-cv-00533-GMB (N.D. Ala. Apr. 29, 2024) (filed by Alabama, Florida, Georgia, South Carolina, Independent Women's Law Center, Independent Women's Network, Parents Defending Education, and Speech First, Inc.)

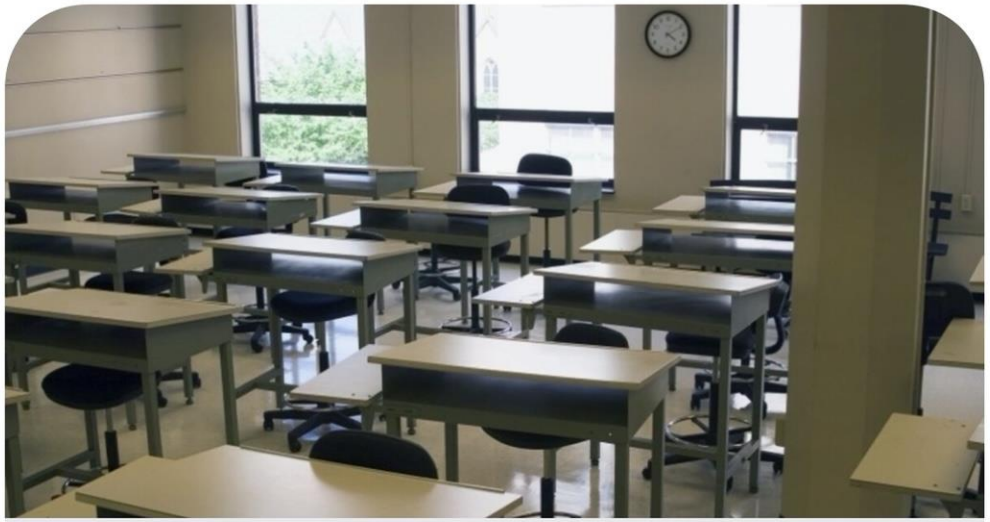
- State of Texas v. The United States of America, 2:24-cv-00086-Z (N.D. Tex. Apr. 29, 2024) (filed by Texas)

- State of Louisiana v. U.S. Dept. of Education, 3:24-cv-00563 (W.D. La. Apr. 29, 2024) (filed by Louisiana, Louisiana Dept. of Education, Mississippi, Montana, and Idaho)

- State of Tennessee v. Cardona, No. 2:24-cv-00072-DLB-CJS (E.D. Ky. Apr. 30, 2024) (filed by Tennessee, Kentucky, Ohio, **Indiana**, Virginia, and West Virginia)

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First Court Weighs In…



US District Court Enjoins New Title IX Rule in Louisiana, Mississippi, Montana, and Idaho, Blocking Enforcement of Federal Civil Rights Law f...

hrc.org

A federal judge in Louisiana is the first in the nation to block the Education Department's final Title IX rule, which prohibits discrimination based on gender identity and sexual orientation.

— The preliminary injunction blocks the Education Department's rule from taking effect in August in Louisiana, Mississippi, Montana and Idaho

— Western District of Louisiana Chief Judge Terry Doughty said Title IX, a federal education law that bars sex-based discrimination, "was written and intended to protect biological women from discrimination."

— "Such purpose makes it difficult to sincerely argue that, at the time of enactment, 'discrimination on the basis of sex' included gender identity, sex stereotypes, sexual orientation, or sex characteristics," wrote Doughty, a Trump appointee. "Enacting the changes in the Final Rule would subvert the original purpose of Title IX."

— The ruling effectively ties the agency's hands when it comes to enforcement action against schools in these states to protect transgender students from discrimination.

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Second Court Weighs In…

Preliminary injunction granted against Biden's Title IX rewrite

Alexandra Weaver 33 mins ago



(Getty Images)

CHARLESTON, W.Va. (WBOY) — A preliminary injunction has been granted in a lawsuit that West Virginia is a part of against the Biden Administration's

Injunction Granted

West Virginia, Tennessee and Kentucky led State of Tennessee, et al., V. Miguel Cardona, and Ohio, **Indiana** and Virginia joined as plaintiff states. The injunction is limited to the six plaintiff states.

"The new rule contravenes the plain text of Title IX by redefining 'sex' to include gender identity, violates government employees' First Amendment rights, and is the result of arbitrary and capricious rulemaking." Opinion, June 17, 2024, pp. 1-2.

"The Department would turn Title IX on its head by redefining 'sex' to include gender identity. But 'sex' and 'gender identity' do not mean the same thing. The Department's interpretation conflicts with the plain language of Title IX and therefore exceeds its authority to promulgate regulations under that statute." Opinion, June 17, 2024, pp. 91-92.

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THE CLERY ACT

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The Clery Act (As Amended by VAWA)

Core Tenets:

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

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VAWA: Prompt, Fair, and Impartial Investigation & Resolution

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

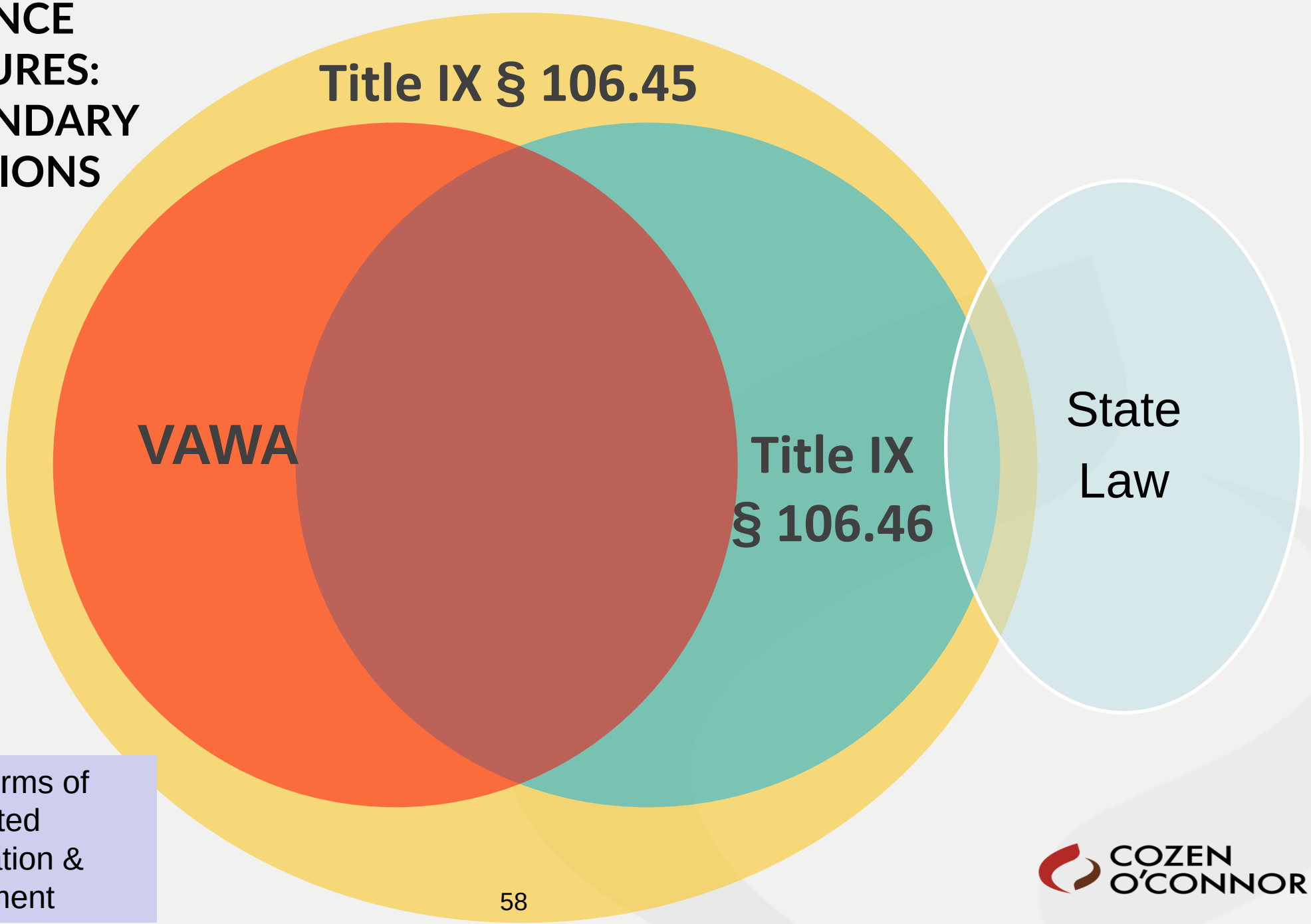
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VAWA: Prompt, Fair, and Impartial Investigation & Resolution

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

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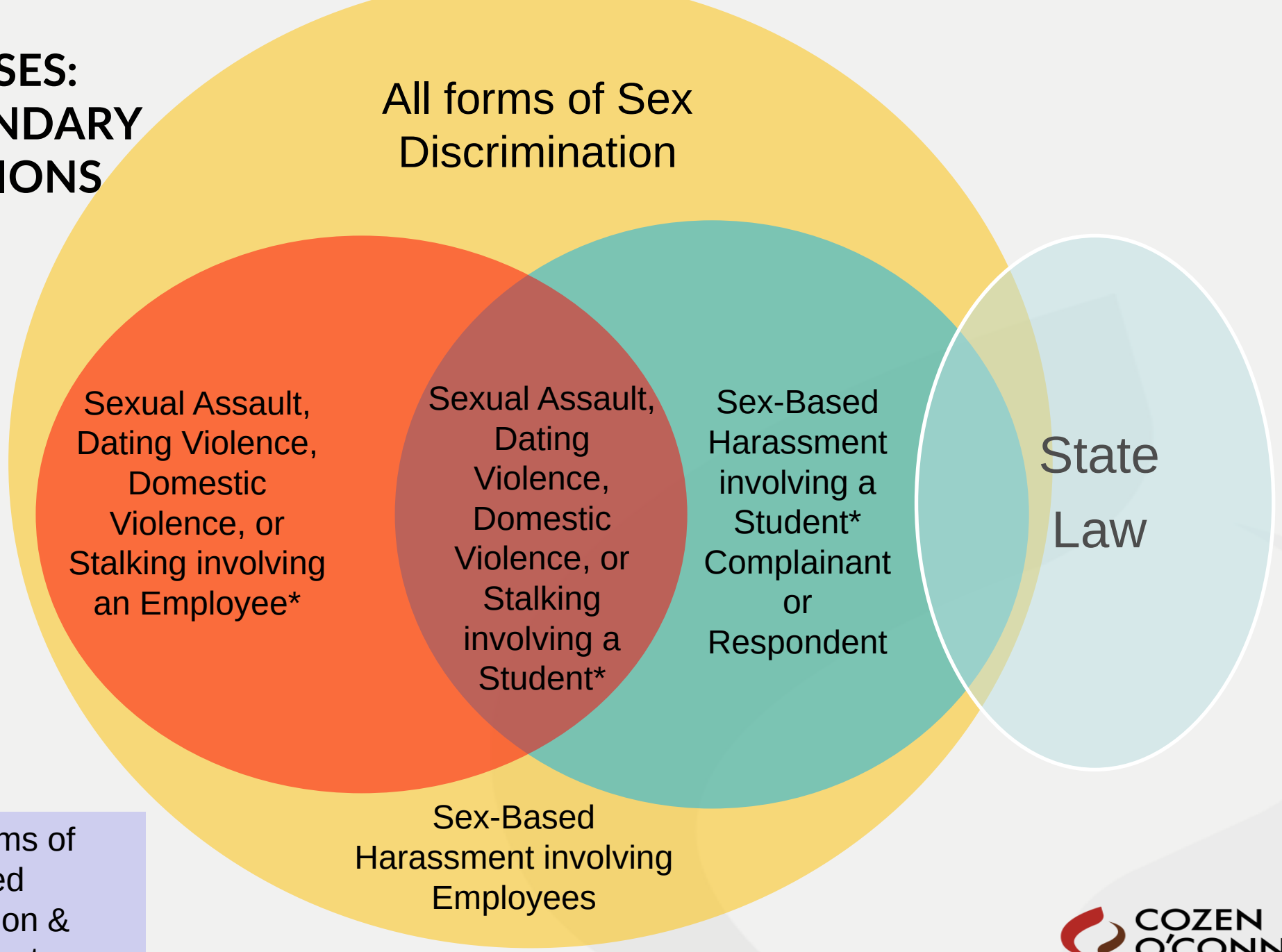
GRIEVANCE PROCEDURES: POSTSECONDARY INSTITUTIONS



All other forms of Prohibited Discrimination & Harassment

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PROCESSES: POSTSECONDARY INSTITUTIONS



All other forms of Prohibited Discrimination & Harassment

*as a Complainant or Respondent

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Students and 106.46

Accordingly, the Department continues to believe that the requirements of § 106.46 afford protections that are appropriate to the age, maturity, independence, needs, and context of students at postsecondary institutions.

- Younger
- Newly independent
- Would benefit from additional procedural requirements
- Not all can self advocate
- Not entitled to parent/guardian/other legal representative
- May lack additional rights that employees have

2024 Title IX Regulations, Preamble, p. 33640.

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Students and 106.46

The Department also views the additional provisions of § 106.46 as **necessary** to address postsecondary sex-based harassment complaints, which often allege conduct that is:

- highly personal and
- of a different nature than other types of alleged sex discrimination and
- which typically require greater participation by a complainant and respondent in grievance procedures than other complaints of sex discrimination.

2024 Title IX Regulations, Preamble, p. 33640.

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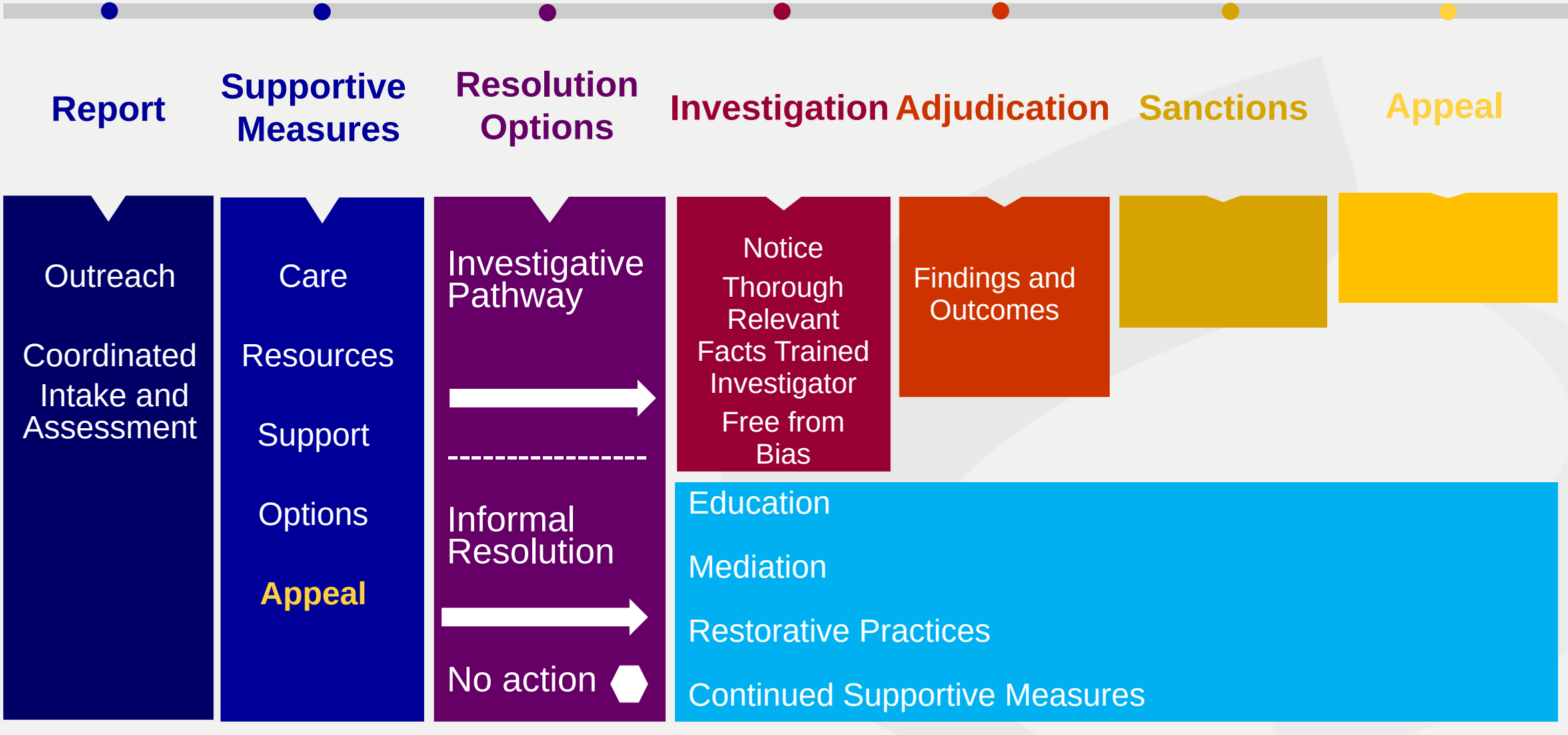
Students and 106.46

Affording additional procedural requirements for postsecondary students is also consistent with the Department's understanding of, and commitment to, **due process** as dictated by the particular circumstances.

2024 Title IX Regulations, Preamble, p. 33640.

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WHEN A REPORT IS MADE …



Penalties

- The Department disagrees that voluntary resolution agreements are inadequate to deter recipients from committing additional Title IX violations. In the Department's experience, these resolution agreements have proven effective in correcting Title IX violations. In addition, if a recipient fails to comply with a voluntary resolution agreement, the Department may take additional actions to address non-compliance with Title IX, including the **initiation of administrative proceedings to suspend, terminate, or refuse to grant or continue Federal financial assistance or refer the case to the U.S. Department of Justice** for judicial proceedings to enforce any rights of the United States. OCR details the entirety of its enforcement process, including the process the Department must follow prior to termination of Federal financial assistance, in its Case Processing Manual.

- The Department clarifies that recipients are bound by Title IX and this part as **a condition of their eligibility for Department funding**. The Department emphasizes that it cannot pursue termination of Federal financial assistance or refer a matter to the Department of Justice unless a recipient refuses to voluntarily correct a violation after the Department has notified the recipient of the violation. See 20 U.S.C. 1682; 34 CFR 100.8.

2024 Title IX Regulations Preamble, p. 33848

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Penalties

- In connection with suggestions regarding additional penalties for recipients for Title IX violations, the Department's enforcement authority under 20 U.S.C. 1682 and as set forth in 34 CFR 100.8 (incorporated in § 106.81) provides that **the Department may seek compliance "by the suspension or termination of or refusal to grant or to continue Federal financial assistance or by any other means authorized by law**." Remedial action required of a recipient for violating Title IX or these final regulations may therefore include any action consistent with 20 U.S.C. 1682, and may **include equitable and injunctive actions as well as financial compensation to a complainant, as necessary** under the specific facts of a case.

2024 Title IX Regulations Preamble, p. 33848.

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Preemption Reminder

- Section 106.6(b) makes clear in a simple and comprehensive statement that Title IX and its implementing regulations "**preempt any State or local law with which there is a conflict**."

2024 Title IX Regulations, Preamble, p. 33542

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2020 REGULATIONS REDUX

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2020 Regulations Formally Incorporate Sexual Harassment as a Form of Sex Discrimination

- Tile IX obligations related to **sexual harassment as a form of sex discrimination** had not been formally addressed in the regulations

- "These final regulations impose, for the first time, **legally binding rules** on recipients with respect to responding to sexual harassment."

2020 Title IX Regulations Executive Summary, 85 F.R. 30029

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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."

2020 Title IX Regulations Executive Summary, 85 F.R. 30030

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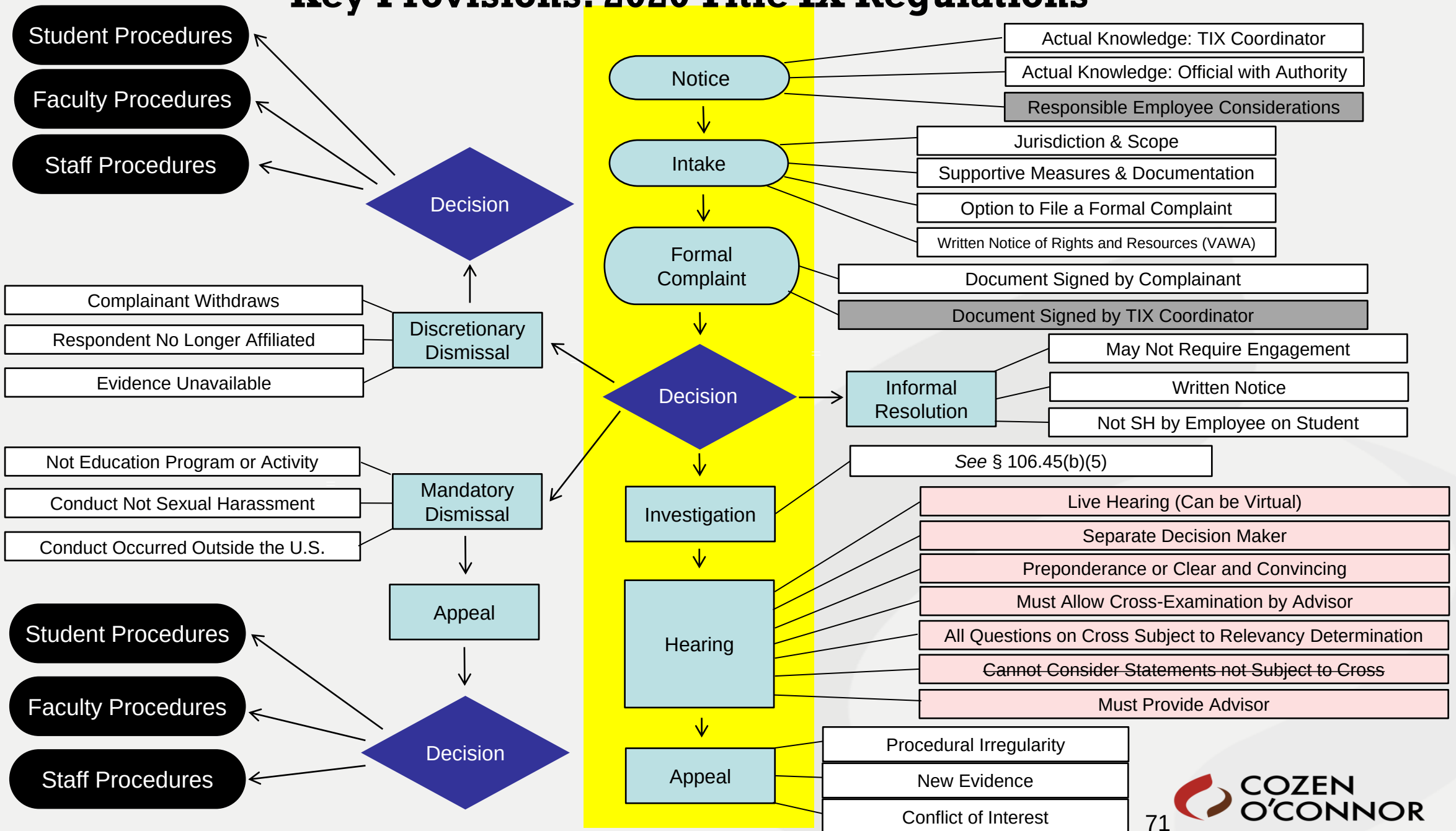
2020 Regulations: "Best Practices"

- "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."

2020 Title IX Regulations Executive Summary, 85 F.R. 30030

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Key Provisions: 2020 Title IX Regulations



2024 REGULATIONS: DEFINITIONS AND SCOPE

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Scope of Sex Discrimination

[“]Discrimination on the basis of sex[”] includes discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity.

2024 Title IX Regulations § 106.10

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Sex-Based Harassment Definition

"Sex-based harassment" means sexual harassment and other harassment on the basis of sex, including on the bases described in 34 CFR § 106.10, that is:

(1) Quid pro quo harassment;
(2) Hostile environment harassment;
or
(3) Specific offenses:
- (i) Sexual assault
- (ii) Dating violence
- (iii) Domestic violence
- (iv) Stalking

2024 Title IX Regulations § 106.10

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Application of Title IX

- Applies to every recipient's education program or activity that it operates including in admission and employment.
- Includes, but is not limited to:
  - conduct that occurs in a building owned or controlled by a student organization that is officially recognized by a postsecondary institution, and
  - conduct that is subject to the recipient's disciplinary authority.
- A recipient has an obligation to address a sex-based hostile environment under its education program or activity, even when some conduct alleged to be contributing to the hostile environment occurred outside the recipient's education program or activity or outside the United States.

2024 Title IX Regulations § 106.11

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2024 REGULATIONS: INSTITUTIONAL KNOWLEDGE

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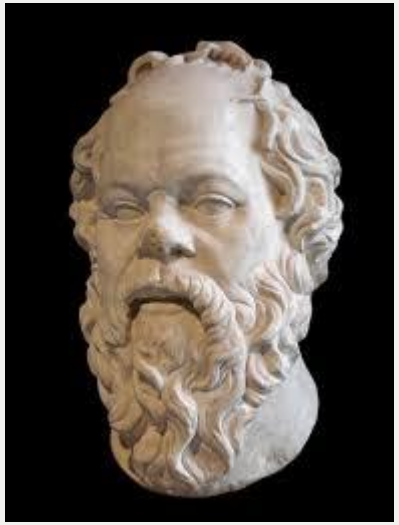
106.44(a): General

- A recipient with knowledge of conduct that reasonably may constitute sex discrimination in its education program or activity must respond promptly and effectively; and
- A recipient must also comply with this section to address sex discrimination in its education program or activity.

2024 Title IX Regulations § 106.44(a)

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What Is "Knowledge?"



- Actual knowledge is dead
- Not constructive (i.e., not "knew or should have known")
- Knowledge to any employee creates institutional duties
- "The recipient also has duties before [the Title IX Coordinator has knowledge of conduct that reasonably may constitute sex discrimination]"
  - Must require all non-confidential employees to comply with notification requirements
  - Must require all confidential employees to comply with § 106.44(d) (providing information about Title IX Coordinator identity and role)

2024 Title IX Regulations § 106.44(a)

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Barriers to Reporting 106.44(b)

- A recipient must require its Title IX Coordinator to:
  - Monitor the recipient's education program or activity for barriers to reporting information about conduct that reasonably may constitute sex discrimination
  - Take steps reasonably calculated to address such barriers

2024 Title IX Regulations § 106.44(b)

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Barriers to Reporting

- What do barriers look like?
  - Inaccessible complaint reporting process
  - Confusing grievance procedures that lack transparency
  - Difficult-to-reach Title IX Coordinators
  - Staff who discourage individuals from making reports
  - Poorly managed report and complaint processes
  - Grievance procedures in which individuals have little confidence due to delays or perceived bias

2024 Title IX Regulations § 106.44(b); Preamble p. 33564

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Monitoring Barriers

- What is monitoring?
  - Regular campus climate surveys
  - Seeking targeted feedback
  - Participating in public awareness events
  - Regularly publicizing and monitoring an email address designated for receiving anonymous feedback
  - Monitoring can be delegated
- Use multiple strategies to ensure identification of barriers for all populations, particularly those who may face additional barriers to reporting, including students with disabilities or persons with limited English proficiency.

2024 Title IX Regulations § 106.44(b); Preamble, p. 33547

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Monitoring Barriers

- What isn't monitoring?



- Not expected to monitor students' online activity, including social media
- Not required to monitor the academic discourse of students or teachers
- However, when you become aware…

2024 Title IX Regulations § 106.44(b)

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Addressing Barriers

- "Take Steps Reasonably Calculated to Address"
- Tailored to the specific impediments and obstacles identified, and choose strategies that work best given factors unique to institution
- Trainings
  - Targeted at a particular academic department or other subdivision
  - In-depth training for specific program staff
  - Widespread training for staff and students

2024 Title IX Regulations § 106.44(b); Preamble, p. 33565

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Addressing Barriers

- Other Examples
  - More frequent and prominent publication of the Title IX Coordinator's contact information
  - Relocation of the Title IX Coordinator's office to a more visible, central, and accessible location
  - Provision of adequate staff for the Title IX Coordinator's office
  - Enhanced training for employees with Title IX responsibilities, including training to ensure that they are free of conflicts of interest and do not discourage reporting
  - Development and circulation of user-friendly Title IX materials
- Can be delegated

2024 Title IX Regulations § 106.44(b); Preamble, p. 33565

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Prohibited Disclosures

- Must not disclose personally identifiable information, except:
  - When the recipient has obtained prior written consent
  - When the information is disclosed to a parent, guardian, or other authorized legal representative with the legal right to receive disclosures on behalf of the person whose personally identifiable information is at issue
  - As required by Federal law, Federal regulations, or Federal grants
  - To the extent not in conflict, with state mandatory reporting laws

2024 Title IX Regulations § 106.44(j)

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Prohibited Disclosures

- To carry out its Title IX duties:
  - A recipient may inform a professor of a supportive measure that a student is receiving that is related to the professor's classroom to ensure its implementation, but the recipient would not be permitted to disclose personally identifiable information about any related complaint of sex-based harassment that is not necessary to implement the supportive measure, unless the student whose personally identifiable information is at issue provided their prior written consent or one of the other exceptions is applicable.

2024 Title IX Regulations § 106.44(j)

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2024 REGULATIONS: REPORTING RESPONSIBILITIES

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Confidential Employees Revisited

- An employee of a recipient whose communications are privileged or confidential
- An employee designated as confidential to provide services to persons related to sex discrimination
  - "The Department declines to require recipients to designate confidential employees"
- An employee of a postsecondary institution who is conducting an Institutional Review Board-approved human-subjects research study designed to gather information about sex discrimination

2024 Title IX Regulations § 106.2(a)

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Nonconfidential Employees

- Any nonconfidential employee who either
  - Has authority to institute corrective measures on behalf of the recipient
  - Has responsibility for administrative leadership, teaching, or advising in the recipient's education program or activity
- Must notify the Title IX Coordinator when the employee has information about conduct that reasonably may constitute sex discrimination

2024 Title IX Regulations § 106.44(c)

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Nonconfidential Employees

- All other Nonconfidential Employees must either:
  - Notify the Title IX Coordinator when the employee has information about conduct that reasonably may constitute sex discrimination, OR
  - Provide the contact information of the Title IX Coordinator and information about how to make a complaint of sex discrimination

2024 Title IX Regulations § 106.44(c)

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Nonconfidential Employees

- Does not require more than stating that the Title IX Coordinator will provide information about the grievance procedures, supportive measures, and how to make a complaint of sex discrimination.
- The Department also notes that a recipient may delegate with oversight, but can not avoid compliance with § 106.44(c) by requiring reporting to an external third party, as it must still ensure that the report reaches the Title IX Coordinator.

2024 Title IX Regulations § 106.44(c)

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Nonconfidential Employees

- Speculative risk of an investigation of conduct that may not reasonably constitute sex discrimination outweighs [error in regulations?] the benefit of ensuring that the Title IX Coordinator learns of conduct
- The recipient can decide for the employee its reporting obligations or allow the employee to decide which of the two options
- Recipient can make mandatory reporting for all employees

2024 Title IX Regulations § 106.44(c)

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Nonconfidential Employees

- An employee who witnesses sex discrimination must report
- The requirements do not apply to an employee who has personally been subject to conduct that reasonably may constitute sex discrimination.
  - Designed to protect Complainant autonomy
- Employees must report even if it means disclosing the victim's orientation, gender identity, or pregnancy

2024 Title IX Regulations § 106.44(c)

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Confidential Employees

- The institution must provide contact information
  - Do not need to identify confidential employees
  - This does not apply to the survey definition
- Not required to designate or identify employees
- Must be an actual employee
- Might still have to report if required by other law and not in conflict with Title IX
- May **NOT** be appointed by the institution as advisors in a Title IX grievance procedure
  - § 106.46(f)(1)(ii)(B) "In the instances in which a postsecondary institution is required to appoint an advisor to ask questions at a live hearing, the postsecondary institution must not appoint a confidential employee"

2024 Title IX Regulations § 106.44(d)

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Confidential Employees

- Must explain status as a confidential employee and the circumstances they would not make a report to the Title IX Coordinator (must be in role as confidential employee)
- How to contact the Title IX Coordinator and make a complaint
- That the Title IX Coordinator may be able to offer supportive measures, initiate an informal resolution process or investigation under the grievance procedures
- Nothing prohibits Title IX Coordinator from delegating the ability for confidential employees to offer and coordinate supportive measures.
- How to enforce these obligations without breaching confidentiality? Self Attestation. Why risk a violation?
- Survey designation is exempt from these obligations.

2024 Title IX Regulations § 106.44(d)

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Confidential Employees

- Other Considerations
- Nothing prohibits a Title IX Coordinator from delegating the ability for confidential employees to offer and coordinate supportive measures
- Enforcement without breaching confidentiality?
- Self Attestation. Remember – failure to inform = violation
- Survey category is exempt from these obligations regarding the providing of this information

2024 Title IX Regulations § 106.44(d)

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POP QUIZ



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Question

- The Dean of Faber College, who has the authority to take corrective action by placing students and student organizations on “double secret probation” and to suspend or expel, learns of conduct that may reasonably constitute sexual discrimination.

- Must he report to the Title IX Coordinator?

2024 Title IX Regulations § 106.44(c)

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Answer



YES

2024 Title IX Regulations § 106.44(c)

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Question

- An adjunct professor of archaeology, rarely on campus due to frequent excursions retrieving artifacts for museums, learns of conduct that may reasonably constitute sex discrimination while escaping a pit of snakes.

- Must he report to the Title IX Coordinator?

2024 Title IX Regulations § 106.44(c)

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Answer



YES

2024 Title IX Regulations § 106.44(c)

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Question

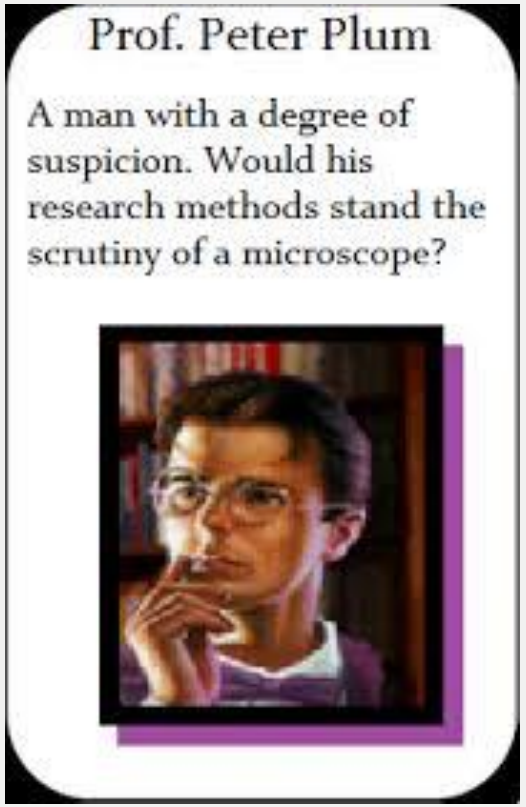
- After leaving the conservatory, tenured Professor Plum moves eight spaces into the campus library. Plum observes employee Colonel Mustard assaulting employee Mrs. Peacock with the Candlestick in the Library.

- Must Professor Plum report?
- What about Mrs. Peacock and Col. Mustard?

2024 Title IX Regulations § 106.44(c)

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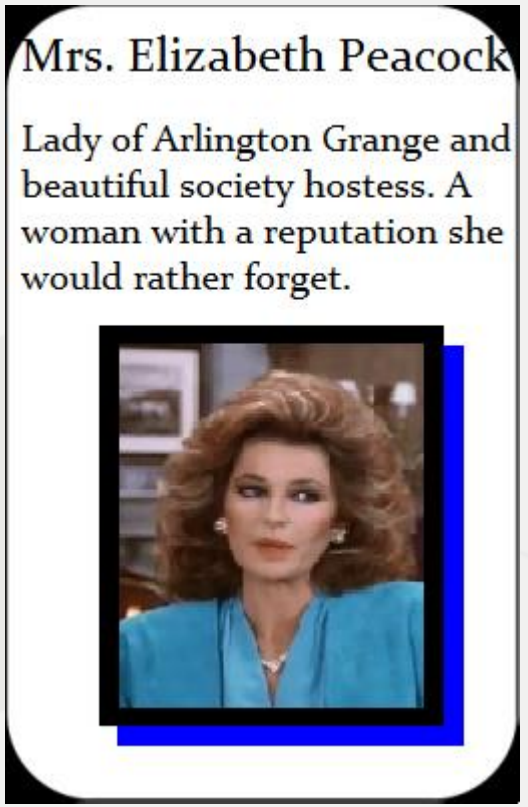
Answer



YES



YES



NO

2024 Title IX Regulations § 106.44(c)

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Question

- A janitor at MIT became a work study student after solving a math equation in the hallway. While inquiring of a fellow student whether they liked apples, he learned of conduct that may reasonably constitute sex discrimination.

- Must he report to the Title IX Coordinator?

2024 Title IX Regulations § 106.44(c)

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Work Study Students

- Student or Employee?
- Whether the primary relationship with the institution is to receive an education
- Whether the person learns of conduct while the person is performing employment-related work.
- May decide based on state employment laws
- Regardless, should provide notice about the circumstances when the student employee is subject to reporting requirements.



IT DEPENDS

2024 Title IX Regulations § 106.44(c)

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Public Awareness Events

- General Rule: a postsecondary institution is not obligated to act in response to information about sex-based harassment that is provided at an on-campus or online institution-sponsored public awareness event to raise awareness about sex-based harassment (e.g., Take Back the Night)
  - Even if the institution does not act, it must use the information to inform its efforts in preventing sex-based harassment, including specific trainings at particular programs where sex-based harassment might be occurring
  - Neither Title IX Coordinators nor employees are obligated to attend public awareness events, but if employees attend and learn information about sex-based harassment, they are obligated to report it to the Title IX Coordinator.
- Exception:
  - The institution is required to act if there is an imminent threat to the health or safety of the complainant, any students, employees, or other persons.

2024 Title IX Regulations § 106.44(e)

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Public Awareness Events

- For information about sex-based harassment that is provided at off-campus events, on social media, or in academic assignments, ordinary employee reporting obligations apply.
- Limited to sex-based harassment (not sex discrimination)
- Employees must report. The Title IX Coordinator will then evaluate whether there is an imminent threat.
- Information shared at a public awareness event may still trigger other state or federal reporting obligations.

2024 Title IX Regulations § 106.44(e)

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2024 REGULATIONS: COMPLAINTS

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What is a Sex Discrimination Complaint?

- An oral or written request to the recipient that objectively can be understood as a request for the recipient to investigate and make a determination about alleged discrimination under Title IX or its regulations.

2024 Title IX Regulations § 106.2

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Who Can Make a Complaint?

1. Student;
2. Employee;
3. Non-student or non-employee who was allegedly subjected to sex discrimination under Title IX at a time when individual was participating or attempting to participate in school's education program or activity;
4. Parent, guardian, or other legal representative with right to act on behalf of Complainant; and/or
5. Title IX Coordinator.

2024 Title IX Regulations § 106.45(a)(2)

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When a Complaint Advances

- A Complainant may make a complaint even if they have chosen to leave the institution as a result of that discrimination or for other reasons. §§ 106.2 and 106.45(a)(2).
- In the absence or withdrawal of a complaint, and in the absence or termination of an informal resolution process, the Title IX Coordinator may initiate a complaint if the conduct presents an imminent and serious threat to someone's health or safety or prevents the recipient from ensuring equal access based on sex to its education program or activity. § 106.44(f)(1)(v)–(vi).
  - Regarding the above, the Title IX Coordinator must make a fact-specific determination that considers certain factors. § 106.44(f)(1)(v)(A).

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Dismissal of a Complaint

- A recipient may dismiss a complaint of sex discrimination for any of the following reasons:
  - Inability to identify the Respondent;
  - The Respondent is not participating in the education program or activity and is not an employee;
  - Complainant voluntarily withdraws the allegations, the Title IX Coordinator declines to initiate a complaint, and without the withdrawn allegations, the conduct would not constitute sex discrimination even if proven; or
  - The conduct alleged—and as clarified through reasonable efforts—would not constitute sex discrimination even if proven.
- Steps upon dismissal:
  - Notification of the dismissal and rationale to the parties who know about the allegations
  - Must provide Complainant with opportunity to appeal dismissal

2024 Title IX Regulations §§ 106.45(d), 106.46(d)

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Agenda

- Recap on 2024 Sex-Based Harassment Hostile Environment Definition
- 2024 Regulations:
  - Supportive Measures, Emergency Removal, Administrative Leave
  - Grievance Process
  - Informal Resolution
  - Parental, Family, Marital Status, Pregnancy & R.C.
  - Training
  - Recordkeeping
  - Title IX Coordinator Responsibilities

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Hostile Environment under the Regulations

2020 Regulations

Unwelcome

Severe **and** pervasive

And Objectively offensive

2024 Regulations

Unwelcome

Severe **or** pervasive

Subjectively **and** objectively offensive

Denies **or** limits

Totality of circumstances

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2024 REGULATIONS: SUPPORTIVE MEASURES

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Supportive Measures

- Non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, without unreasonably burdening the complainant or respondent, and without fee or charge
- 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
- Provide support during grievance procedures or informal resolution

2024 Title IX Regulations § 106.44(g)

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Supportive Measures

- For allegations of sex discrimination other than sex-based harassment or retaliation, a recipient's provision of supportive measures does not require the recipient, its employee, or any other person authorized to provide aid, benefit, or service on the recipient's behalf to alter the alleged discriminatory conduct for the purpose of providing a supportive measure
- This change does not mean that a supportive measure provided to one party cannot impose any burden on the other party; rather, that supportive measures cannot impose an unreasonable burden on the other party.

2024 Title IX Regulations § 106.44(g)

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Supportive Measures

- May be delegated, but Title IX coordinator retains oversight
- Department declines to require confidential employees to be responsible for offering and coordinating supportive measures.
- The provision of supportive measures is part of a recipient's responsibilities under Title IX. As confidential employees must keep the information they receive confidential, they are not well situated to be responsible for offering and coordinating the provision of supportive measures through other offices or individuals on behalf of the recipient.

2024 Title IX Regulations § 106.44(g)

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Supportive Measures

Supportive measures may vary depending on reasonable availability

- Counseling
- Extensions of deadlines and other course-related adjustments
- Campus escort services
- Increased security and monitoring of certain areas of the campus
- Restrictions on contact applied to one or more parties
- Leaves of absence;
- Changes in class, work, housing, or extracurricular or any other activity, regardless of whether there is or is not a comparable alternative;
- Training and education programs related to sex-based harassment

2024 Title IX Regulations § 106.44(g)

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Supportive Measures

- Cannot be punitive or disciplinary
- Cannot unreasonably burden
  - May include changes in work schedules or work assignments that are not imposed for punitive reasons, so that the complainant and respondent are not working on the same projects or at the same time.
  - The Department declines to categorically prohibit involuntary changes to a complainant's or respondent's class schedule through supportive measures as it is possible that such changes may not constitute an unreasonable burden on a complainant or respondent.

2024 Title IX Regulations § 106.44(g)

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Supportive Measures

- No longer temporary
- Can enact for safer campus community
- Stay away measures and class registration delays, while a burden, likely preserve access to education program so not unreasonable burden
- If a party could show that a supportive measure that burdened them was intended to punish them because, for example, if the supportive measure did not remedy barriers to access for the other party, the recipient would need to terminate the supportive measure.

2024 Title IX Regulations § 106.44(g)

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Supportive Measures

- The Department recognizes that some actions used as supportive measures may also be available and employed as disciplinary sanctions after a determination of responsibility.

- Decline to give examples to encourage fact specific discretion but a recipient should not rely on its flexibility to provide supportive measures that burden a party at the expense of considering other supportive measures, including those that can be provided by the recipient without burden on either party.

2024 Title IX Regulations § 106.44(g)

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Supportive Measures

- A recipient may, as appropriate, modify or terminate supportive measures at the conclusion of the grievance procedures or at the conclusion of the informal resolution process, or the recipient may continue them beyond that point.

- Whether a supportive measure constitutes a reasonable burden may change following the conclusion of the grievance procedures, particularly following a determination of non-responsibility, and a recipient should consider whether such measures continue to meet the definition when evaluating whether to continue, modify or terminate

2024 Title IX Regulations § 106.44(g)

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Supportive Measures

- The completion of grievance procedures or the informal resolution process may constitute materially changed circumstances permitting a party to seek additional modification or termination of a supportive measure

- A finding of non-responsibility will often constitute materially changed circumstances that require modification or termination of a supportive measure

2024 Title IX Regulations § 106.44(g)

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Supportive Measures

- A recipient may consider the appropriateness of restrictions on contact in light of the following:
  - the need expressed by the complainant or respondent;
  - the ages of the parties involved;
  - the nature of the allegations and their continued effects on the complainant or respondent;
  - whether the parties continue to interact directly in the recipient's education program or activity, including through student employment, shared residence or dining facilities, class, or campus transportation; and
  - whether steps have already been taken to mitigate the harm from the parties' interactions, such as implementation of a civil protective order.

2024 Title IX Regulations § 106.44(g)

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Supportive Measures

- A recipient must provide a timely opportunity to seek, from an appropriate and impartial employee, modification or reversal of the recipient's decision to provide, deny, modify, or terminate supportive measures



2024 Title IX Regulations § 106.44(g)

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Supportive Measures

- The impartial employee must be someone other than the employee who made the challenged decision and must have authority to modify or reverse the decision
- A recipient must also provide a party with the opportunity to seek additional modification or termination of a supportive measure applicable to them if circumstances change materially

2024 Title IX Regulations § 106.44(g)

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Supportive Measures

- The Department provides a recipient flexibility concerning timing in order to account for the wide range of supportive measures available and to allow a recipient to take into account a party's interests as well as other concerns, such as circumstances in which offering such a review is impractical until after supportive measures have been provided.
- When a party believes that a supportive measure is ineffective upon implementation, or when circumstances have materially changed to render it ineffective, may seek modification
- Department seems to prefer that Title IX Coordinator delegate the providing of supportive measures

2024 Title IX Regulations § 106.44(g)

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Supportive Measures

- Whether a supportive measure is reasonably burdensome
- Whether a supportive measure is reasonably available
- Whether the supportive measure is being imposed for punitive or disciplinary reasons
- Whether the supportive measure is being imposed without fee or charge
- Whether the supportive measure is effective in meeting the purposes for which it is intended
  - Restore/preserve access to the education program/activity
  - Provide safety/support during the grievance procedures

2024 Title IX Regulations § 106.44(g)

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Supportive Measures

- A recipient must not disclose information about any supportive measures, including informing one party of supportive measures provided to another party, unless necessary
- For example, if one party is receiving counseling as a supportive measure, that should not be disclosed to another party.
- However, there are occasions where disclosure to the other party may be necessary, such as to tell one party that another party has moved to a new dorm in order to maintain the protections of an existing stay-away order.

2024 Title IX Regulations § 106.44(g)

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Supportive Measures

- If the complainant or respondent is a postsecondary student with a disability, the Title IX Coordinator may consult, as appropriate, with the individual or office that the recipient has designated to provide support to students with disabilities to determine how to comply with Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, in the implementation of supportive measures.

2024 Title IX Regulations § 106.44(g)

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Emergency Removal

- Before removal of a respondent from the recipient's education program or activity on an emergency basis, the recipient must:
  - Undertake an individualized safety and risk analysis
  - Determine that an imminent threat to the serious health or safety of any student or other individual arising from the allegations of sex discrimination justifies removal
  - provide the respondent with notice and an opportunity to challenge the decision immediately following the removal

2024 Title IX Regulations § 106.44(h)

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Emergency Removal

- Declines to limit the scope to sex-based harassment in order to give recipients flexibility to address circumstances in which conduct falls short of the definition of sex-based harassment but still poses an imminent and serious threat to the health or safety of members of a recipient's communities
- The Department notes recipients will satisfy the requirement if they have a process to conduct an analysis of safety and risk that is particular to the respondent and circumstances at issue, regardless of the words recipients use to describe their assessment.

2024 Title IX Regulations § 106.44(h)

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Emergency Removal

- No requirement to state a time, but it cannot be permanent.
- A recipient retains discretion to remove a respondent on an emergency basis from one or more parts of its education program or activity, as long as the recipient meets the other requirements.

2024 Title IX Regulations § 106.44(h)

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Administrative Leave

- Nothing in this subpart precludes a recipient from placing an employee respondent on administrative leave during the pendency of a grievance procedures
- 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.

2024 Title IX Regulations § 106.44(i)

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2024 REGULATIONS: GRIEVANCE PROCEDURES - OVERVIEW

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Overview of Significant Provisions

- Notice
- Jurisdiction & Scope
- Supportive Measures
- Formal Complaints
- Basic Requirements of Grievance Process
- Obligation to Investigate
- Pre-Investigation Considerations
- Written Notice of Allegations
- Consolidation of Formal Complaints
- Evidence Gathering
- Evidentiary Considerations
- Evidence Review, Investigative Report, the Promptness Requirement
- Role of the Decision-Maker and Advisor
- Cross-Examination
- Determination of Relevance
- Standard of Evidence
- Sanctions
- Written Determination and Appeal

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Impact of Final Regulations

What is (or Should be) the Same

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

What is Significantly Different

- Broader scope (sex discrimination)
- Grievance process for complaints of sex discrimination
- Live hearing optional
- Role of Title IX Coordinator
- Process depends on type of conduct and parties' relationship to the institution
- Option to use a single investigator model

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BASIC REQUIREMENTS OF GRIEVANCE PROCESSES

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Overview of Significant Provisions

- Notice
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- Obligation to Investigate
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- Standard of Evidence
- Sanctions
- Written Determination and Appeal

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Impact of Final Regulations

What is (or Should be) the Same

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

What is Significantly Different

- Live hearing requirement
- Role of Title IX Coordinator
- Investigative protocols depending on status of parties
- Option of Single Investigator Model

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Basic Requirements

- **§106.45**
- Applies to *complaints of sex discrimination*, including sex-based harassment when party is not a student

- **§ 106.46**
- Applies to *sex-based harassment complaints* when student is a party (either complainant or respondent) at a postsecondary institution
- Student-employee fact-based inquiry required
- Must incorporate the requirements of § 106.45

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Basic Requirements

- **Dismissals §106.45 and §106.46:**
  - **Recipient may dismiss a complaint of sex discrimination if:**
    - **Recipient cannot identify respondent following reasonable steps to do so;**
    - **Respondent is no longer employed or enrolled at recipient;**
    - **Complainant voluntarily withdraws any or all allegations* and the TIXC declines to initiate & without the complainant's allegations, the conduct would not constitute sex discrimination;**
    - **Recipient determines that even if proven, the conduct is not sex discrimination.**
    - **NOTE: Notice of basis of dismissal and appeal rights required to both complainant and respondent (if respondent was notified of allegations). Notice must be in writing if under §106.46(d)**

*Complainant's withdrawal of allegations must be in writing if under § 106.46(d) **[§106.46(d)(2)]**

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§ 106.45 Overview of Grievance Process

- Basic Requirements **§106.45(b)(1) – (8)**
- Implementers shall have no conflict of interest or bias **§106.45(b)(2)**
- Single investigator is acceptable **§106.45(b)(2)**
- Respondent is presumed not responsible **§106.45(b)(3)**
- Reasonable timeframes for major stages of the grievance procedures **§106.45(b)(4)**
- Requirement to evaluate relevant and not otherwise impermissible evidence **§106.45(b)(6)**
- Notice of allegations **§106.45(c)**
- Dismissals of complaints (permissive) **§ 106.45(d)**

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§ 106.45 Overview of Grievance Process

- Consolidation of complaints **§106.45(e)**
- Investigation of complaints(review of, and provision of evidence, other investigation requirements) **§106.45(f)**
- Assessing credibility **§106.45(g)**
- Standard of evidence **§106.45(h)(1)**
- Determination in writing to parties **§106.45(h)(2)**
- Sanctions and Remedies **§106.45(h)(3)**
- False statements/engaging in consensual sexual contact **§106.45(h)(5)**
- Additional provisions **§106.45(j)**
- Informal resolution **§106.45(k)**
- Sex-based harassment provisions **§106.45(l)**

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Basic Requirements

- **Adopt, publish, and *implement* grievance procedures consistent with the requirements of §106.45, and if applicable §106.46.** (emphasis added)

- Such procedures shall provide for the **prompt and equitable resolution of complaints made by students, employees, or *other individuals* who are participating or attempting to participate in the recipient's education program or activity, or by the Title IX Coordinator**, alleging conduct prohibited by Title IX or this part. (emphasis added)

2024 Title IX Regulations § 106.8 (b)(2)

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Basic Requirements

- **Treat the complainant and respondent equitably**.
- Implementers must be free from conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent
- Decisionmaker may be the same person as the Title IX Coordinator or investigator

Relevant 2024 Title IX Regulations Sections:
Equitable Treatment: §§ 106.8(b)(2), 106.44(f) (1)(i), and 106.45(b)(1)
Free from conflict of interest: §§ 106.44(k)(4), 106.45(b)(2),
Decisionmaker same as Title IX Coordinator or Investigator: §106.45 (b)(2)

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Basic Requirements

- **Include a presumption that the respondent is not responsible, until a determination of responsibility is made at the conclusion of the recipient's grievance procedures for complaints of sex discrimination.**
- **Establish reasonably prompt timeframes for major stages of the grievance procedures,** including a process to allow for extensions on **case-by-case basis for good cause** with notice and reasons.

Relevant 2024 Title IX Regulations Sections:
Presumption of non-responsibility: §106.45(b)(3)
Prompt timeframes: § 106.45(b)(4)

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Basic Requirements

- **Take reasonable steps to protect the privacy of parties and witnesses throughout the grievance process.**
- **Require objective evaluation of all evidence that is relevant and not otherwise impermissible** – including inculpatory and exculpatory evidence - and **provide that credibility determinations must not be based on a person's status as a complainant, respondent, or witness**

Relevant 2024 Title IX Regulations Sections:
Privacy protection: § 106.45(b)(5)
Objective evaluation of all relevant evidence: § 106.45(b)(6)

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Basic Requirements

- Exclude evidence of, and not allow questioning about:
  - evidence **protected under a privilege** or shared with a **confidential employee** (unless waived by person to whom privilege is owed);
  - records in connection with treatment for a party or witness (unless voluntary, written consent is provided);

Relevant 2024 Title IX Regulations Sections:
§§ 106.45(b)(7)(i),106.45(b)(7)(ii)

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Basic Requirements

- Exclude evidence of, and not allow questioning about (cont.):
  - evidence related to complainant's sexual interest or prior sexual activity
    - Unless evidence about the complainant's prior sexual conduct is **offered to prove someone other than the respondent committed the alleged conduct** or
    - Unless **evidence about specific incidents of prior sexual contact with the respondent is offered to prove consent**.

2024 Title IX Regulations §106.45(b)(7)(iii)

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Basic Requirements

- **If a recipient adopts grievance procedures that apply to the resolution of some, but not all, complaints articulate consistent principles for how the recipient will determine which procedures apply.**

2024 Title IX Regulations § 106.45(b)(8)

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Basic Requirements

- Notice of allegations are to be provided **upon initiation of the recipient's grievance procedures** to **parties whose identities are known.**
- Notice must include:
  - Recipient's grievance procedures under 106.45, and 106.46 (if applicable), and including any informal resolution process
  - Sufficient information to allow parties to respond to the allegations, this includes identities of the parties involved, conduct alleged, and date and location of the alleged incident, to the extent available to recipient.
  - Statement that retaliation is prohibited
  - Statement that parties are entitled to an equal opportunity to access the relevant and not otherwise impermissible evidence
- If recipient decides to investigate additional allegations by the respondent toward the complainant that were not previously included, or that were consolidated from a different complaint, **the recipient must provide notice of these additional allegations to the parties whose identities are known.**

2024 Title IX Regulations §§ 106.45(c)(1) and 106.45(c)(2)

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Basic Requirements

- Consolidation of Complaints:
  - A recipient may consolidate complaints against more than one respondent, or by more than one complainant against one or more respondents, or by one party against another party, when the allegations of sex discrimination arise out of the same facts or circumstances.
  - If one of the complaints consolidated includes a student party, at a postsecondary institution, the grievance procedures must comply with §106.46 as well as §106.45.

2024 Title IX Regulations § 106.45(e)

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Basic Requirements

- Recipient must provide for **adequate, reliable, and impartial investigation of complaints**:
  - Ensure burden is on recipient, not parties, to gather sufficient evidence
  - Provide an equal opportunity for parties to present fact witnesses and other inculpatory and exculpatory evidence that are relevant and not otherwise impermissible;
  - Review all evidence gathered and determine what evidence is relevant and what evidence is impermissible
  - Provide each party with equal opportunity to access the evidence that is relevant and not otherwise impermissible, in the following manner:
    - Provide equal opportunity to access either the relevant and not impermissible evidence, or an accurate description of the evidence. If recipient provides the latter, it must further provide parties with an equal opportunity to access the relevant and not otherwise impermissible evidence upon request by any party.
    - Must provide a reasonable opportunity to respond to the evidence or to the accurate description of the evidence.
    - Must take reasonable steps to prevent and address the parties' unauthorized disclosure of information and evidence obtained solely through the grievance procedures.

2024 Title IX Regulations § 106.45(f)(1) – (4)(iii)

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Basic Requirements

- Credibility Assessments:
  - **Recipient must provide a process that enables the decisionmaker to question parties and witnesses to adequately assess a party's or witness's credibility to the extent credibility is both in dispute and relevant to evaluating one or more allegations of sex discrimination.**

2024 Title IX Regulations §106.45(g)

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Basic Requirements

- Standard of Evidence:
  - Recipient must use the **preponderance of the evidence standard**, **unless clear & convincing is the standard that recipient uses in all other comparable proceedings**, including proceedings relating to other discrimination complaints, in which case the recipient may elect to use that standard.
  - Recipient must **notify the parties in writing** of the determination whether sex discrimination occurred under Title IX or this part and include rationale for the determination, and the procedures and permissible bases for appeal, if applicable.

2024 Title IX Regulations §106.45(h)(1) –(2)

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Basic Requirements

- Standard of Evidence (Cont.):
  - If determined that sex discrimination occurred, require **TIXC to coordinate the provision and implementation of remedies to a complainant and others** identified as having had equal access to the recipient's education program or activity limited or denied by sex discrimination, coordinate the imposition of any disciplinary sanctions on respondent, including notification of any such disciplinary sanctions to complainant, **and require the Title IX Coordinator to take other appropriate prompt and effective steps to ensure that sex discrimination does not continue or recur...**
  - A recipient may not impose discipline on a respondent **unless there is a determination at the conclusion of the recipient's grievance procedures that the respondent engaged in prohibited sex discrimination.**
  - Must comply with § 106.45 (and 106.46, if applicable) **before the imposition of any disciplinary sanctions against a respondent**;

2024 Title IX Regulations §106.45(h)(3) – (4)

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Basic Requirements

- Standard of Evidence (Cont.):
  - **The recipient must not discipline a party, witness, or others participating in a recipient's grievance procedures for making a false statement or for engaging in consensual sexual conduct based solely on the recipient's determination whether sex discrimination occurred.**

2024 Title IX Regulations §106.45(h)(5)

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Basic Requirements

- Appeals:
  - Recipient must offer an appeal process that is the same at minimum as it offers in all other comparable proceedings, if any, **including proceedings related to other discrimination complaints**.
  - For a complaint of **sex-based harassment involving a student complainant or student respondent, a postsecondary institution must also offer an appeal on the bases set out in § 106.46(i)(1)**

2024 Title IX Regulations § 106.45(i)

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Basic Requirements

- Additional Provisions:
  - Any additional provision adopted by recipient in its grievance procedures for handling sex discrimination complaints, **must apply equally to the parties**.

2024 Title IX Regulations §106.45(j)

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Basic Requirements

- Informal Resolution:
  - **In lieu of resolving a complaint through the recipient's grievance procedures, the parties may instead elect to participate in an informal resolution process under § 106.45(k) if provided by the recipient consistent with that paragraph.**

Basic Requirements

- Provisions limited to sex-based harassment complaints:
  - Specific to complaints alleging sex-based harassment, the grievance procedures must:
    - Describe **range of supportive measures** available to any party **under § 106.44(g);** and
    - **List, or describe the range of, the possible disciplinary sanctions that the recipient may impose and remedies that the recipient may provide following a determination that sex-based harassment occurred.**

2024 Title IX Regulations §106.45(l)(1)-(2)

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Hypothetical

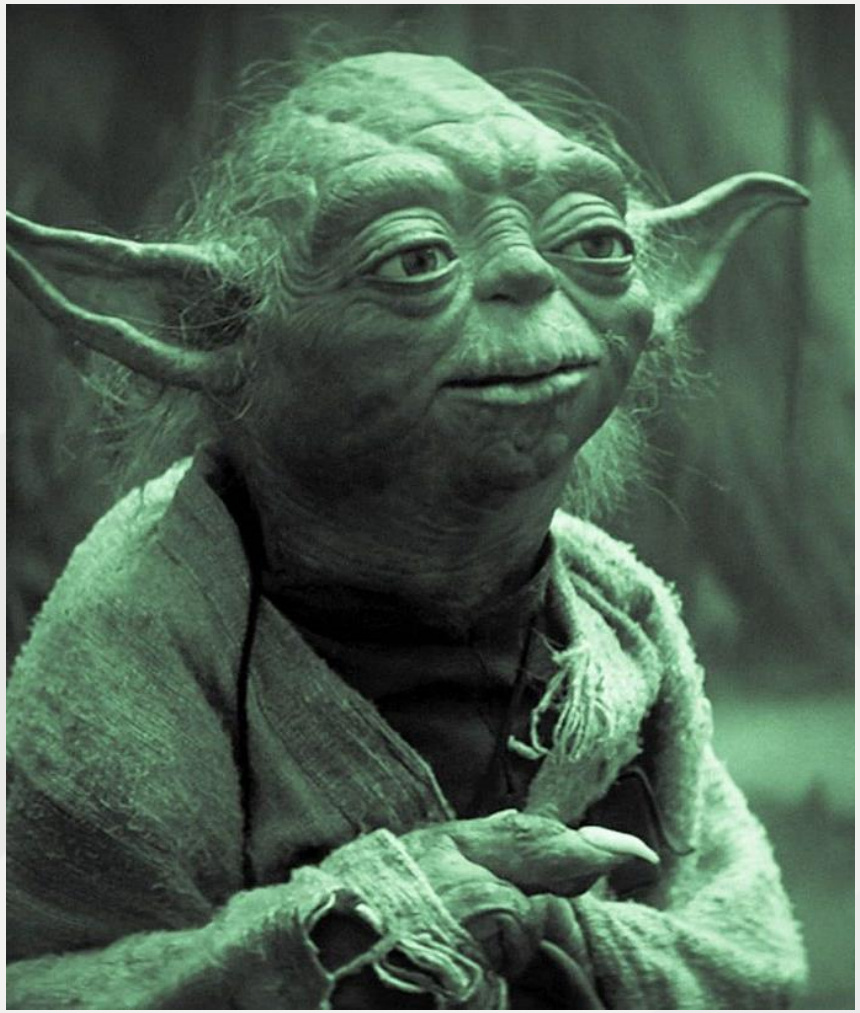
- Anakin and Obi Wan are studying abroad at the Jedi Academy. While there, Anakin turns to the “dark side” and engages in conduct that R.M.C. sex discrimination toward Obi Wan. When the parties return to James “Earlham” Jones College in Indiana, they are on the fencing team together. No new conduct that R.M.C S.D. occurs at Earlham, but Obi Wan experiences a sex-based hostile environment at Earlham solely as a result of what happened abroad at the Jedi Academy.

- What will happen if Obi Wan makes a report to the Earlham Title IX Coordinator?

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Answer

Initiate a process, Title IX Coordinator Yoda will.



While the conduct occurred outside the education program or activity and outside the United States, Earlham will have an obligation to address it if it created a hostile environment within the education program or activity.

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Plot Twist

What if the conduct at the Jedi Academy occurred in 2021 but was reported to Chancellor Yoda in 2024?



Answer: The 2024 Regulations are not retroactive and the 2020 Regulations required dismissal under Title IX for conduct that occurred outside the U.S. Yoda would “dismiss” for Title IX purposes and address under Earlham’s Non-Title IX Sexual Misconduct policy that existed in 2021.

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Hypothetical

- Peyton Manning plays on the “Colts” intramural team at University of Saint Francis. He makes a complaint that a player on the “Patriots” intramural team at USF engaged in conduct that reasonably constituted sex discrimination when covertly deflating footballs. Manning states he is afraid of playing against the student. To restore Manning’s access to the intramural program, the Title IX Coordinator bans the player from the league. The player challenges the measure as unreasonably burdensome and punitive. How will the appeals officer rule on the appeal?

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Answer

Brady will win on appeal. The supportive measures are unreasonably burdensome where Brady and Manning could be scheduled on different nights to play and both parties' access will be preserved.



Hypothetical

- A professor of paleontology and chaos theory at Hammond University is teaching a dinosaur lab. One of his students, Ellie Sattler, is pregnant. The professor refuses to give Sattler breaks during class, marks her tardy for frequent absences, and refuses to allow Sattler to put a needle into an amber orb to extract DNA from a mosquito, even though she had been the lead on that project all semester. Sattler makes a report to the Title IX Coordinator, noting the professor's frequent excuse for his conduct that "Life…finds a way…" What does the Coordinator do?

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Answer

- The Title IX Coordinator will arrange supportive measures for Sattler and will also address the report of sex discrimination by Sattler against the Professor under 106.45.



Hypothetical

Caitlin Clark, student at Olympic University, tries out for the women's basketball team. During the tryout, she is subjected to what reasonably may constitute sex-based harassment. She makes a complaint against the head coach of Olympic U. Women's basketball. What process will be followed?

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INDIANA
106.46

Hypothetical Part 2

Caitlin Clark decides to appeal the “Not Responsible” decision in favor of the Olympic U. coach. Her reasons are that the decision was that it was bad for women’s basketball as a whole. There were no procedural irregularities and there is no new evidence that was not available during the investigation or hearing process. Clark alleged bias on the part of the decisionmaker but did not state a basis other than her disagreement with the outcome. Will her appeal be successful?

What if the decisionmaker wore an Angel Reese jersey during the hearing?

Title IX Regulations § 106.44(f)

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Hypothetical Part 2

An appeal can only be made if there are procedural irregularities, new evidence presented that was not available at the time, or conflicts of interest or bias. Disagreement with the outcome is an insufficient basis.

However, with the additional information about the Angel Reese jersey, Clark may have a basis for an appeal based on bias, given her well-known rivalry with Reese.



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Hypothetical

Bruce, a 50 year old professor and expert in gamma radiation, was reported to have engaged in conduct that reasonably constituted sex discrimination involving a 19-year-old student. There have been multiple complaints about Bruce's conduct in the past, and many people do not like him when he's angry. The conduct in the report was severe and included smashing a building (of which there is a pattern). The entire incident was captured on surveillance video. The student is scared and refuses to participate.

What do you do?

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Analysis



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Analyze the Factors

This fact-specific determination must consider the following factors, at minimum:

1. The complainant's request not to proceed with initiation of a complaint (always weighs against)
2. The complainant's reasonable safety concerns
3. The risk that additional acts of sex discrimination would occur if a complaint is not initiated

…

2024 Title IX Regulations § 106.44(f)

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Analyze the Factors

4. The severity of the alleged sex discrimination, including whether the discrimination, if established, would require the removal of a respondent from campus or imposition of another disciplinary sanction to end the discrimination and prevent its recurrence
5. The age and relationship of the parties, including whether the respondent is an employee of the recipient;
6. The scope of the alleged sex discrimination, including information suggesting a pattern, ongoing sex discrimination, or sex discrimination alleged to have impacted multiple individuals;
7. The availability of evidence to assist a decisionmaker in determining whether sex discrimination occurred
8. Whether the recipient could end the alleged sex discrimination and prevent its recurrence without initiating its grievance procedures (for example, is it policy?)

2024 Title IX Regulations § 106.44(f)

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The Final Analysis

- After considering these and other relevant factors, the Title IX Coordinator must now determine
  - that the conduct "as alleged" presents an imminent and serious threat to the health or safety of the complainant or other person
  - OR
  - that the conduct as alleged prevents the recipient from ensuring equal access on the basis of sex to its education program or activity, the Title IX Coordinator may initiate a complaint.

2024 Title IX Regulations § 106.44(f)

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Plot Twist

What if the 19-year-old student asks the College to facilitate an informal resolution against Bruce?



2024 Title IX Regulations § 106.44(f)

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§ 106.46 Overview of Grievance Process

For sex-based harassment involving students in postsecondary institutions

- Written grievance procedures must include provisions that incorporate 106.45 and 106.46 **§106.46(a)**
- Student employee considerations **§106.46(b)**
- Notice **§106.46(c)** to include:
  - Respondent presumed not responsible **§106.46(c)(1)(i)**
  - Advisor of choice **§106.46(c)(1)(ii)**
  - Equal opportunity to access relevant and not otherwise impermissible evidence **§106.46(c)(1)(iii)**
  - If applicable, information about the institution's code of conduct that prohibits knowingly making false statements during the grievance procedure **§106.46(c)(1)(iv)**
- Dismissal **§106.45(d)**
- Investigation of complaints **§106.46(e)** must include:
  - Written notice of meetings with sufficient preparation time **§106.46(e)(1)**
  - Same opportunity to be accompanied by advisor **§106.46(e)(2)** or another person, if any **§106.46(e)(3)**
  - Allow for reasonable extension of timeframes on a case-by-case basis for good cause… **§106.46(e)(5)**
  - Equal opportunity to access evidence that is relevant and not otherwise impermissible **§106.46(e)(6)**
  - Must take reasonable steps to prevent and address the parties' and their advisors' unauthorized disclosure of evidence **§106.46(e)(6)(iii)**

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§ 106.46 Overview of Grievance Process

For sex-based harassment involving students in postsecondary institutions (cont.)

- Provide a process for decisionmaker to question parties and witnesses for credibility **§106.46(f)(1)**
- Provisions for proposing and asking questions when recipient does not hold a live hearing **§106.46(f)(1)(i)**
- Provisions for proposing and asking questions when recipient does hold a live hearing **§106.46(f)(1)(ii)**
- Procedures for the decisionmaker to evaluate the questions and limitations on questions**§106.46(f)(3)**
- Provisions for refusal to respond to questions and inferences based on refusal to respond to questions **§106.46(f)(4)**
- Live hearing procedures **§106.46(g)**
- Written determination and requirements **§106.46(h)**
- Appeals **§106.46(i)**
- Informal Resolution **§106.46(j)**

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Basic Requirements

Grievance procedures for sex-based harassment involving students in postsecondary institutions

- Written grievance procedures must include provisions that incorporate 106.45 and 106.46
- Fact-specific inquiry required to determine whether student-employee's **primary relationship with the institution is to receive an education**, in order for this section to apply.

2024 Title IX Regulations § 106.46(a)-(b)

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Basic Requirements

Grievance procedures for sex-based harassment involving students in postsecondary institutions

- Written notice of allegations required **upon initiation of the postsecondary institution's sex-based harassment grievance procedures under this section**.
- Written notice must include:
  - Information required under §106.45(c)(1)(i) – (iii)
  - Presumption of non-responsibility
  - Advisor of choice
  - Equal opportunity to access relevant and not otherwise impermissible evidence or an investigative report that accurately summarizes this evidence
  - Code of conduct prohibiting knowingly making false statements, if applicable
- Additional allegations must be noticed to all parties
- May delay based on **reasonable concerns for the safety of any person**

2024 Title IX Regulations § 106.46(c)(1)(i) – (iv); §106.45(c)(2); §106.45(c)(3)

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Basic Requirements

Grievance procedures for sex-based harassment involving students in postsecondary institutions

- Investigating complaints (advisors, timing):
  - Written notice and **sufficient time** for preparation required for **meetings and proceedings** to parties
  - Same opportunities to be accompanied to meetings and proceedings with **advisor of choice**;
  - If available, same opportunity to **have persons other than the advisor of choice at a meeting or proceeding**;
  - Equally apply determination as to allowance of expert witnesses
  - Must allow reasonable extension of **timeframes on case-by-case basis for good cause with written notice and reason for delay**

2024 Title IX Regulations § 106.46(e)(1) –(5)

COZEN O'CONNOR

Basic Requirements

Grievance procedures for sex-based harassment involving students in postsecondary institutions

- Investigating complaints (evidence):
- Recipient must provide **equal opportunity** for party and advisor to access relevant, not otherwise impermissible evidence (consistent with §§106.2 and 106.45(b)(7)), in the following manner:
  - **Equal opportunity to access either the relevant and not otherwise impermissible evidence, or the same written investigative report that accurately summarizes this evidence. If access to investigative report is provided, must also provide equal opportunity to access the relevant and not otherwise impermissible evidence upon the request of any party;**
  - Must provide **reasonable opportunity to review and respond to the evidence or the investigative report** prior to determination. If living hearing conducted, this opportunity to review the evidence must be in advance of the hearing; it is at the institution's discretion whether to provide **opportunity to respond prior to live hearing, during live hearing, or both prior to and during the live hearing.**

2024 Title IX Regulations § 106.46(e)(6)(i) –(ii)

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Basic Requirements

Grievance procedures for sex-based harassment involving students in postsecondary institutions

- Investigating complaints (unauthorized disclosures):

A postsecondary institution must take reasonable steps to prevent and address the parties' and their advisors' unauthorized disclosure of information and evidence obtained solely through the sex-based harassment grievance procedures.

- **Disclosures for purposes of administrative proceedings or litigation related to the complaint of sex-based harassment are authorized.**

2024 Title IX Regulations § 106.46(e)(6)(iii)

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Basic Requirements

Grievance procedures for sex-based harassment involving students in postsecondary institutions

- Credibility Assessments:
  - Postsecondary institution must provide a process that enables the decisionmaker to question parties and witnesses to adequately assess a party's or witness's credibility **to the extent credibility is both in dispute and relevant to evaluating one or more allegations of sex-based harassment**.
  - **May provide process that includes a hearing or does not include a hearing**

2024 Title IX Regulations § 106.46(f)

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Basic Requirements

Grievance procedures for sex-based harassment involving students in postsecondary institutions

- Credibility Assessments:
  - **When postsecondary institution chooses not to conduct a live hearing, the process must:**
    - **Allow the investigator or decisionmaker to ask such questions during individual meetings with a party or witness**;
    - **Allow each party to propose such questions that the party wants asked of any party or witness and have those questions asked by the investigator or decisionmaker during one or more individual meetings, including follow-up meetings, with a party or witness . . . And**
    - **Provide each party with an audio or audiovisual recording or transcript with enough time for the party to have a reasonable opportunity to propose follow-up questions.**

2024 Title IX Regulations § 106.46(f)(1)(i)(A) – (C)

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Basic Requirements

Grievance procedures for sex-based harassment involving students in postsecondary institutions

- Credibility Assessments:
  - **When postsecondary institution chooses to conduct a live hearing under paragraph (g) of 106.46, the process must allow the decisionmaker to ask relevant and not otherwise impermissible questions and follow-up questions of parties and witnesses, including questions challenging credibility, and either:**
    - **Allow each party to propose questions they want asked of any party or witness and have those questions asked by the decisionmaker; or**
    - **Allow each party's advisor to ask any party or witness such questions. Such questioning must never be conducted by a party personally.**
    - **If an institution permits advisor-conducted questioning and a party does not have an advisor to ask questions, the institution must provide the party with an advisor of the institution's choice, without charge for advisor-conducted questioning. In those instances, the institution must not appoint a confidential employee, and may appoint, but not required to appoint, an attorney to serve as an advisor.**

2024 Title IX Regulations § 106.46(f)(1)(ii)(A) – (B)

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Basic Requirements

Grievance procedures for sex-based harassment involving students in postsecondary institutions

- Procedures for decisionmaker to evaluate questions:
  - **A decisionmaker must determine whether a proposed question is relevant under §106.2 and not otherwise impermissible under §106.45(b)(7), prior to the question posed, and must explain any decision to exclude a question as not relevant or otherwise impermissible.**
    - If the decisionmaker determines **the question is relevant** and not otherwise impermissible, **then the question must be asked except:**
      - The institution must not permit **unclear** or **harassing** questions. The party must be provided an opportunity to clarify or revise the harassing or unclear question.
      - If the question is sufficiently revised or clarified, the question must be asked.
    - Other **reasonable rules regarding decorum** may be adopted and applied provided they are equally applied to the parties.

2024 Title IX Regulations § 106.46(f)(3)

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Basic Requirements

Grievance procedures for sex-based harassment involving students in postsecondary institutions

- Refusal to respond to questions and inferences therefrom:
  - **A decisionmaker may choose to place less or no weight upon statements by party/witness who refuses to respond to questions deemed relevant and not impermissible.**
  - **The decisionmaker must not draw an inference about whether sex-based harassment occurred based solely on a party's or witness's refusal to respond to such questions.**

2024 Title IX Regulations § 106.46(f)(4)

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Basic Requirements

Grievance procedures for sex-based harassment involving students in postsecondary institutions

- Live hearing procedures:
  - **A postsecondary institution's sex-based harassment grievance procedures may, but need not, provide for a live hearing.**
  - If conducting a live hearing:
    - May have parties physically present in the same geographic location
    - May, **or upon request of either party, it must**, conduct the live hearing with **parties physically present in separate locations, with technology enabling** the decisionmaker and parties to simultaneously see and hear the party or the witness that is speaking.
    - Must **create an audio or audiovisual recording or transcript, of any love hearing and make it available to the parties for inspection and review**.

2024 Title IX Regulations § 106.46(g)

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Basic Requirements

Grievance procedures for sex-based harassment involving students in postsecondary institutions

- Written determination:
  - **Postsecondary institution must provide the determination whether sex-based harassment occurred in writing to the parties simultaneously.**
  - The written determination must include:
    - **Description** of the alleged sex-based harassment;
    - Information about the **policies and procedures that the postsecondary institution used to evaluate the allegations;**
    - Decisionmaker's **evaluation of the relevant and not otherwise impermissible evidence and determination whether sex-based harassment occurred**;
    - When finding is that sex-based harassment occurred, **any disciplinary sanctions** the institution will impose on the respondent, **whether remedies other than the imposition of disciplinary sanctions** will be provided by the postsecondary institution to complainant, and if appropriate, **other students identified** as experiencing the effects of the sex-based harassment; and
    - **Procedures** for the complainant and respondent to appeal.
  - Determination regarding responsibility **becomes final either** on date parties are provided the **written determination of the result of any appeal**, or if no appeal, the **date on which the appeal would no longer be timely.**

2024 Title IX Regulations § 106.46(h)(1)(i) – (v); §106.45(h)(2)

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Basic Requirements

Grievance procedures for sex-based harassment involving students in postsecondary institutions

- Appeals:
  - **A postsecondary institution must offer the parties an appeal from a determination whether sex-based harassment occurred, and from a dismissal of a complaint or any allegations therein, on the following bases:**
    - Procedural irregularity that would change the outcome;
    - New evidence that would change the outcome and that was not reasonably available when the determination whether sex-based harassment occurred or dismissal was made; and
    - The TIXC, investigator, or decisionmaker had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that would change the outcome.
  - Additional bases may be offered for an appeal, so long as the procedures and additional bases are equally available to all parties.
  - As to all appeals, must comply with requirements in §106.45(d)(3)(i), (v), and (vi) in writing.

2024 Title IX Regulations § 106.46(i)(1) – (3)

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Basic Requirements

Grievance procedures for sex-based harassment involving students in postsecondary institutions

- Informal Resolution

If postsecondary institution offers or provides the parties to the grievance procedures under § 106.45and under §106.46 with an informal resolution process under §106.44(k), the postsecondary institution must inform the parties in writing of the offer and their rights and responsibilities in the informal resolution process and otherwise comply with the provisions of §106.44(k)(3) in writing.

2024 Title IX Regulations § 106.46(j)

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2024 REGULATIONS:
GRIEVANCE PROCEDURES - INVESTIGATIONS

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Investigation Requirements for All Sex Discrimination Complaints

- Burden on the recipient to gather evidence and decide what is relevant or impermissible. 34 CFR § 106.45(f)(1), (3)
  - "Relevant" means related to the allegations of sex discrimination under investigation as part of these grievance procedures. Questions are relevant when they seek evidence that may aid in showing whether the alleged sex discrimination occurred, and evidence is relevant when it may aid a decisionmaker in determining whether the alleged sex discrimination occurred.
- Objective evaluation of relevant evidence and the exclusion of impermissible evidence. 34 CFR § 106.45(b)(6)–(7)

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Investigation Requirements for All Sex Discrimination Complaints

- Exclusion of three types of evidence. 34 CFR §106.45(b)(7)
- Equal opportunity for the parties to present fact witnesses and other inculpatory or exculpatory evidence that is relevant and not otherwise impermissible. 34 CFR § 106.45(f)(2)
- Provide parties with an equal opportunity to access the relevant and not otherwise impermissible evidence or an accurate description of this evidence (and if the recipient provides access to a description, it must provide access to the underlying evidence upon the request of any party). 34 CFR § 106.45(f)(4)
- Must provide parties a reasonable opportunity to respond to evidence. 34 CFR § 106.45(f)(4)

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Additional Investigation Requirements for Sex-Based Harassment Complaints involving a Post-Secondary Student

- Discretion to permit parties to use expert witnesses. 34 CFR § 106.46(e)(4)
- Reasonable opportunity for the parties to review and respond to the evidence or investigative report. 34 CFR § 106.46(e)(6)
- If the school conducts a live hearing as part of its grievance procedures, then it: (i) Must provide this opportunity to review the evidence in advance of the live hearing, (ii) May decide whether to provide the opportunity to respond to the evidence before the live hearing, during the live hearing, or both before and during the live hearing. 34 CFR § 106.46(e)(6)
- Reasonable steps to prevent and address the parties' and their advisors' unauthorized disclosure of information and evidence obtained solely through the sex-based harassment grievance procedures. 34 CFR § 106.46(e)(6)

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2024 REGULATIONS:
GRIEVANCE PROCEDURES – RESOLUTIONS

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Core Requirements

- Grievance Process *must be completed* before any sanctions are imposed against a respondent that are not supportive measures.
- In contrast to informal resolution, the grievance process *may* result in remedies imposed against third parties such as student organizations to prevent recurrence of discrimination or harassment.

Impact of Graduation or Withdrawal

- Where a student graduates or withdraws, recipient may no longer be able to implement remedies affecting the respondent. However, the institution may still limit access to campus or to events, and address hostile environments in student organizations or with other third parties still within the jurisdiction of the institution.

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Additional Provisions Permitted

- Recipients may adopt provisions that are not explicitly included in the regulations as part of their grievance procedures, so long as those provisions apply equally to the parties.

2024 Title IX Regulations § 106.45(j)

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Collective Bargaining/ Shared Governance

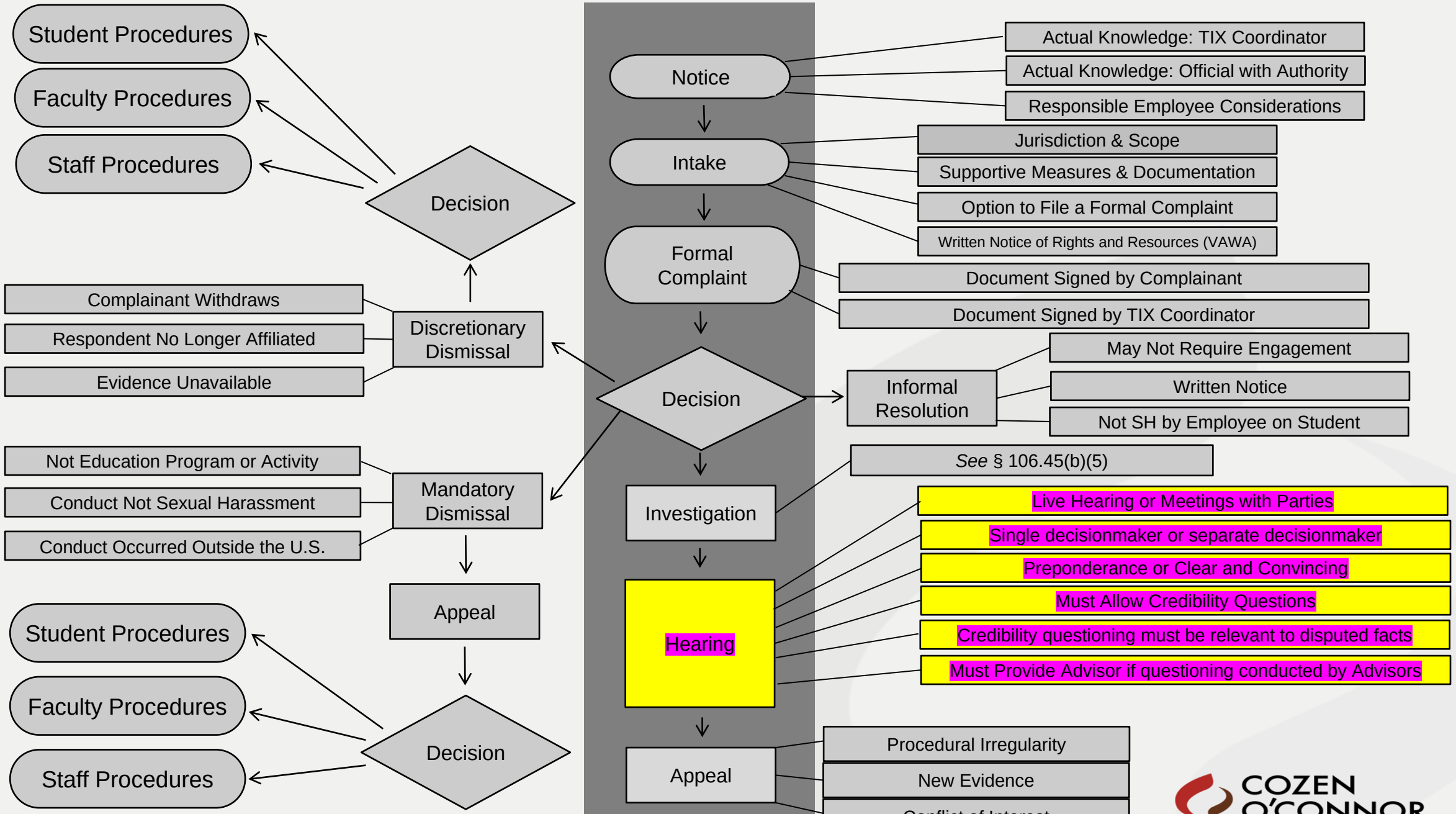
- Recipient may use shared governance and collective bargaining to adopt additional rules and practices beyond those required by the final regulations.
- Some employees have additional rights created by shared governance and collective bargaining agreements.
- Identical treatment is not always required in the application of any ***additional*** rules or practices. Employee parties may have distinct rights in a shared governance or collective bargaining agreement that are not applicable to parties who are not employees.

2024 Title IX Regulations § 106.45(j)

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2024 REGULATIONS: HEARING MODELS

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Student Procedures
Faculty Procedures
Staff Procedures
Decision
Complainant Withdraws
Respondent No Longer Affiliated
Evidence Unavailable
Discretionary Dismissal
Not Education Program or Activity
Conduct Not Sexual Harassment
Conduct Occurred Outside the U.S.
Mandatory Dismissal
Appeal
Student Procedures
Faculty Procedures
Staff Procedures
Decision
Notice
Intake
Formal Complaint
Decision
Investigation
Hearing
Appeal
Actual Knowledge: TIX Coordinator
Actual Knowledge: Official with Authority
Responsible Employee Considerations
Jurisdiction & Scope
Supportive Measures & Documentation
Option to File a Formal Complaint
Written Notice of Rights and Resources (VAWA)
Document Signed by Complainant
Document Signed by TIX Coordinator
Informal Resolution
May Not Require Engagement
Written Notice
Not SH by Employee on Student
See § 106.45(b)(5)
Live Hearing or Meetings with Parties
Single decisionmaker or separate decisionmaker
Preponderance or Clear and Convincing
Must Allow Credibility Questions
Credibility questioning must be relevant to disputed facts
Must Provide Advisor if questioning conducted by Advisors
Procedural Irregularity
New Evidence
Conflict of Interest

Core Requirements

- Postsecondary institutions must provide a process enabling the decisionmaker to question parties and witnesses to adequately assess a party's or witness's credibility **to the extent credibility is both in dispute and relevant to evaluating one or more allegations of sex-based harassment**.
- Questioning of the parties and witnesses must take place **before responsibility determination**.
- In cases involving students in postsecondary institutions, hearings must comply with procedures set forth in Section 106.46.

2024 Title IX Regulations § 106.45(f)

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Choice of Hearing Model

106.45 Grievance Procedures

For complaints at primary/secondary institutions **or** complaints at postsecondary institutions **not involving a student complainant or respondent**

106.46 Grievance Procedures

For complaints at **postsecondary** institutions involving **student complainants or respondents**

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Choice of Hearing Model

- All recipients (primary, secondary, and postsecondary) may **choose to offer a live hearing or a single investigator model**, so long as questions regarding credibility may be proposed and/or asked of the witnesses.

- Live hearings do not need to include both parties physically present in the same place.

- Transcripts or recordings are required

2024 Title IX Regulations § 106.45(f)

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§106.45: Primary and Secondary School Hearings

- Primary & Secondary, schools are *not required* to have live hearing under Title IX.
  - *Primary and Secondary schools serve students who "generally are not adults and lack the developmental ability of adults and the legal right to pursue their own interests. If an elementary school or secondary school chooses to hold a live hearing as part of its process for questioning parties and witnesses …it has discretion as to how to conduct such a hearing[.]"*
- Primary/Secondary schools should consult applicable education codes in the event suspension or expulsion proceedings require a hearing.

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State-by-State Hearing Requirements

- While the regulations do not require live hearing with cross examination, case law will determine whether they cross examination is mandatory on a state-by-state basis.
- No live hearing requirement is created by case law in Indiana, but breach of contract theories **may pose risk** for private institutions- clarity in policy drafting is essential
- No live cross examination requirement in public institutions.

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2024 REGULATIONS: RIGHTS OF PARTIES IN HEARING

Notice, Preparation, and Advisors

- Parties entitled to written notice with sufficient time to prepare
- Parties entitled to same opportunities to be accompanied by their advisor
- May not limit the choice/presence of the advisor, but; postsecondary institutions may establish restrictions on advisor participation for both parties
- Parties entitled to the same opportunities for support persons
- If questions are posed by advisors in live hearing, institution must provide advisor free of charge

2024 Title IX Regulations § 106.45(e)

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2024 REGULATIONS: LIVE HEARING PROCEDURES

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§ 106.46: Live Hearing Procedures in Postsecondary Settings

- Scope of requirement: Postsecondary institutions *may, but are not required to,* offer live hearings.
  - If a live hearing is offered, and the matter involves student complainants or respondents, hearings must be compliant with § 106.46(f)-(g).

§ 106.46(g): Live Hearing Procedures in Postsecondary Settings

- Hearings in postsecondary institutions may be offered on a case-by-case basis.
  - If a postsecondary institution opts to offer hearings for some, but not all, cases of sex-based harassment, it must articulate consistent principles for how it will decide when to offer a hearing.

§ 106.46(g): Live Hearing Procedures in Postsecondary Settings

- Live hearings may be in-person with all parties.
- Postsecondary institutions may exercise discretion to separate the parties, *or must do so at the request of either party*.
  - If parties are separated, technology must be used to enable decisionmaker and parties to simultaneously see and hear.
- A recording or transcript must be generated.

§ 106.46(f): Live Hearing Procedures in Postsecondary Settings

- When a postsecondary institution chooses to conduct a live hearing, it may ask relevant (not impermissible) questions either by:
  - Allowing each party to propose questions for the decisionmaker to ask of the witness or party, or
  - Allowing each party's advisor to ask the party or witness questions.
- Parties may never conduct questioning personally.

§ 106.46(f): Live Hearing Procedures in Postsecondary Settings

- If questioning is done by a party's advisor, the postsecondary institution must provide one free of charge.
  - This advisor may not be a confidential employee
  - This advisor may, but is not required to be, an attorney

§ 106.46(f): Relevance Determinations

- The decisionmaker must determine whether a proposed question is relevant under § 106.2 and not otherwise impermissible under § 106.45(b)(7), prior to the question being posed.
- The decisionmaker must ask any relevant and permissible question, unless it is unclear or harassing.
  - If a question is unclear or harassing, must give opportunity to revise.
- Decisionmaker must explain any decision to exclude a question.
- A postsecondary institution may also adopt other reasonable rules regarding decorum, provided they apply equally to the parties.

False Statements

- Institutions may not impose discipline for making a false statement based *solely* on the later determination as to whether sex discrimination occurred.

- Institutions may also not impose discipline for consensual sexual conduct based solely on whether sex discrimination occurred

2024 Title IX Regulations § 106.45(h)(5).

COZEN O'CONNOR

2024 REGULATIONS: WRITTEN DETERMINATION

COZEN O'CONNOR

Postsecondary Institutions: Written Determinations

- Institution must simultaneously provide written responsibility determination, including:
  - Description of sex-based harassment
  - Information about policies/procedures applied
  - Evaluation of relevant and permissible evidence
  - Disciplinary sanctions where responsibility finding is reached
  - Appeals procedures

COZEN O'CONNOR

Postsecondary Institutions: Written Determinations

- "Simultaneous" notification requirement contains some flexibility:
  - *"[T]he Department would not conclude a recipient failed to comply with Title IX because of a de minimis delay in notifications, such as a delay of a few minutes when sending email notifications to the parties."*

COZEN O'CONNOR

Postsecondary Institutions: Written Determinations

- The determination regarding responsibility becomes final either:
  - On the date that the postsecondary institution provides the parties with the written determination of the result of any appeal, or
  - If no party appeals, the date on which an appeal would no longer be considered timely.

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2024 REGULATIONS: APPEALS

COZEN O'CONNOR

Postsecondary Institutions: Appeals

- Postsecondary Institutions may provide any basis for appeal so long as the procedures and bases for appeal are available to all parties.
- Appeals must be permitted on the following bases:
  - Procedural irregularity that would *change* the outcome;
  - New evidence that would change the outcome and was not reasonably available at the time of the determination;
  - Conflict of interest/bias by Title IX Coordinator, investigator, or decisionmaker.

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Postsecondary Institutions: Appeals

- Notably, there is no requirement that postsecondary institutions permit appeals for decisions that are erroneous or against the weight of the evidence.
  - Institutions may choose to permit this basis for appeal if desired.

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Primary and Secondary Schools: Appeals

- Only a postsecondary institution that receives a complaint of sex-based harassment involving a student party must offer the parties an appeal consistent with § 106.46(i).
- Elementary and secondary schools must offer an appeals process that, at a minimum, is the same as it offers in comparable proceedings such as discrimination complaints.

COZEN O'CONNOR

Postsecondary Institutions: Appeals

- If the appeal involves a postsecondary institution's dismissal of a complaint, the recipient must:
  - Notify the parties of the appeal;
  - Provide the parties a reasonable and equal opportunity to make a statement in support of or challenging the outcome;
  - Notify the parties of the result of appeal and rationale.

2024 Title IX Regulations § 106.46(g)

COZEN O'CONNOR

2024 REGULATIONS: INFORMAL RESOLUTIONS

When Informal Resolutions are Available

- Informal resolution may be offered at ***any time prior to making a responsibility determination***.
- No formal complaint needed to pursue informal resolution.
- No informal resolution permitted where allegations include sex-based harassment of an elementary school or secondary school student by employee.
- No informal resolutions if this process would conflict with state or federal law.

2024 Title IX Regulations § 106.44(k)

COZEN O'CONNOR

Role of Discretion in Informal Resolution

- Recipients have discretion regarding when to offer Informal Resolution.
- Recipients may decline to offer Informal Resolution despite parties wishes.
- Recipients may decline Informal Resolution if conduct would present a future risk of harm to others.

2024 Title IX Regulations § 106.44(k)

COZEN O'CONNOR

Role of Discretion in Informal Resolution

- A recipient has “flexibility to structure a process to determine how it makes this assessment” as to risk of harm. However, they may wish to consider:
  - History of violent conduct.
  - Credible threats of harm to self or others.
  - Other allegations against the same respondent.

2024 Title IX Regulations § 106.44(k)

COZEN O'CONNOR

When Informal Resolutions are Available

- "[T]he proposed prohibition regarding allegations that an employee engaged in **sex discrimination** toward a student …would be overly broad…in some cases the parties and recipient may view informal resolution as a better avenue to mitigate power imbalances between a student and an employee… [The] prohibition [on informal resolution] is more appropriately limited to the context of sex-based harassment—in which there is a unique risk of physical harm and associated severe emotional trauma."

2024 Title IX Regulations § 106.44(k)

COZEN O'CONNOR

When Informal Resolutions are Available

- The 2024 Regulations remove prohibition on informal resolution in cases of sexual assault:
  - *"The Department acknowledges the commenters' concerns regarding mediation (including the Department's previous statements dissuading a recipient from using mediation to resolve an allegation of sexual assault), as well as the evidence of the potential benefits of restorative justice practices. In the last two decades, based on its enforcement experience, the Department has come to believe it should offer a recipient more flexibility in designing alternative procedures, and nothing prohibits a recipient from declining to offer mediation if it concludes such a process would be inappropriate."*

2024 Title IX Regulations § 106.44(k)

COZEN O'CONNOR

Voluntary Consent

- Institution may not “require or pressure” parties to participate in Informal Resolution, and may not make it a condition of continued enrollment or employment.
- Voluntary and informed consent must be obtained, but need not be in writing.

2024 Title IX Regulations § 106.44(k)

COZEN O'CONNOR

Voluntary Consent

- Informed consent to participate in informal resolution process may only be provided after the institution provides notice of:
  - The allegations;
  - Requirements of the informal resolution process;
  - The parties' right to withdraw from the process any time before agreeing to resolution;
  - Informal resolution as precluding later formal resolution;
  - Potential terms that may be requested or offered, and that these may bind only the parties;
  - The information that will be obtained and how the recipient may disclose it if grievance process is resumed.

2024 Title IX Regulations § 106.44(k)

COZEN O'CONNOR

The Role of Respondent Admissions

- Responsibility determinations may only be made at the conclusion of the grievance process.
- Admissions by the respondent, made in the informal resolution process, are *not* a "determination whether sex discrimination occurred."

2024 Title IX Regulations § 106.44(k)

COZEN O'CONNOR

Choice in Facilitator

- Facilitator of Informal Resolution may not be the same person as the investigator or decisionmaker in the formal grievance procedure.
- Facilitator must not have conflict of interest or bias for/against complainants or respondents generally, or any individual party.
- Facilitators must receive training in the rules and practices associated with informal resolution process, how to serve impartially, and how to avoid bias and conflict of interest.

2024 Title IX Regulations § 106.44(k); 106.8(d)(3)

COZEN O'CONNOR

Informal Resolution Remedies

- Institutions have discretion to provide remedies at conclusion of the informal resolution process.
- New Regulations provide non-exhaustive list of potential remedies, including:
  - Restrictions on contact
  - Restrictions on respondent's participation in programs/activities
  - Restrictions on attendance at specific events
  - Other restrictions the institution could have imposed at the conclusion of the formal grievance process

2024 Title IX Regulations § 106.44(k)

COZEN O'CONNOR

Third Party Remedies

- Informal resolution remedies may not be used to bind third parties who did not consent to participation.
  - For example, informal resolution against a member of a sorority or fraternity may not include training for the organization as a whole as a remedy following an informal resolution.

2024 Title IX Regulations § 106.44(k)

COZEN O'CONNOR

Breach of Informal Resolution Agreement

- Recipient may rescind resolution agreement when:
  - A party breaches a resolution agreement;
  - A party committed fraud in inducing the other party to agree to resolution;
  - The recipient has other “compelling reasons.”

2024 Title IX Regulations § 106.44(k)

COZEN O'CONNOR

2024 REGULATIONS: PARENTAL, FAMILY, MARITAL STATUS: PREGNANCY & RELATED CONDITIONS

COZEN O'CONNOR

Definitions

Pregnancy or related conditions means: (1) Pregnancy, childbirth, termination of pregnancy, or lactation; (2) Medical conditions related to pregnancy, childbirth, termination of pregnancy, or lactation; or (3) Recovery from pregnancy, childbirth, termination of pregnancy, lactation, or related medical conditions.

Definitions

Parental status …means the status of a person who, with respect to another person who is under the age of 18 or who is 18 or older but is incapable of self-care because of a physical or mental disability, is: A biological parent; An adoptive parent; A foster parent; A stepparent; A legal custodian or guardian; *In loco parentis* with respect to such a person; or Actively seeking legal custody, guardianship, visitation, or adoption of such a person.

Students: Core Requirements

- A recipient must not adopt or implement any policy, practice, or procedure concerning a student's current, potential, or past parental, family, or marital status that treats students differently on the basis of sex.
- A recipient must not discriminate in its education program or activity against any student based on the student's current, potential, or past pregnancy or related conditions.
- A recipient must treat pregnancy or related conditions in the same manner and under the same policies as any other temporary medical conditions with respect to medical benefits, etc.

2024 Title IX Regulations § 106.40(a)

COZEN O'CONNOR

Students: Admissions

- Recipient must treat pregnancy or related conditions in the same manner as any other temporary medical conditions.
- Recipient must not adopt any policies, practices, procedures re: parental, family, or marital status that treats persons differently on the basis of sex
- Discrimination on basis of current, potential, or past pregnancy/related condition is prohibited
- May not make pre-admission inquiries into marital status, including whether applicant is “Miss or Mrs.”

2024 Title IX Regulations § 106.40(a)

COZEN O'CONNOR

Students: Voluntary Separate Programs

- Institutions may allow students to participate voluntarily in a separate portion of the educational program or activity based on pregnancy or related conditions.
- If program is separate, it must be comparable to the program or activity offered to students without pregnancy or related conditions.

Students: Title IX Contact

- When any employee is notified of student's pregnancy or related condition, employee must promptly provide Title IX Coordinator's contact information and notice that Title IX Coordinator can act to prevent discrimination and ensure equal access to EPA.
  - Exception: reasonable belief that TIXC has been notified

2024 Title IX Regulations § 106.40(a)

COZEN O'CONNOR

Pregnancy and Related Conditions: Actions Required for Students

- Title IX Coordinator must coordinate the following actions:
  - Inform the student (or notifying party) of recipient's Title IX obligations
  - Make reasonable modifications to policies, practices, and procedures based on individualized needs
  - Provide voluntary access to separate and comparable portion of EPA
  - Allow voluntary leaves of absence for medically necessary period
  - Provide lactation space

2024 Title IX Regulations § 106.40(b)

COZEN O'CONNOR

Pregnancy and Related Conditions: "Reasonable Modifications" for Students

- Recipients must make reasonable modifications for pregnancy related conditions.
- Recipient must consult with student in determining what modifications are needed
- Modifications that would fundamentally alter nature of EPA are not "reasonable"
- Acceptance is at student's discretion

2024 Title IX Regulations § 106.40(b)

COZEN O'CONNOR

Pregnancy and Related Conditions: "Reasonable Modifications" for Students

- Reasonable modifications may include:
  - Breaks during class to attend to health needs associated with pregnancy or related conditions;
  - Intermittent absences to attend medical appointments;
  - Access to online or homebound education;
  - Changes in schedule or course sequence;
  - Extensions of time for coursework and rescheduling of tests and examinations;
  - Allowing a student to sit or stand, keep water nearby;
  - Counseling;
  - Changes in physical space or supplies
  - Elevator access; or
  - Other changes to policies, practices, or procedures.

2024 Title IX Regulations § 106.40(b)

COZEN O'CONNOR

Pregnancy and Related Conditions: Student Documentation

- Recipient may not require supporting documentation to obtain reasonable modifications unless it is "necessary and reasonable for the recipient to determine the reasonable modifications to make."
- Supporting documentation not necessary when:
  - Pregnancy related need is obvious (i.e. larger uniform)
  - Supporting documentation was previously provided
  - When reasonable modification involves carrying food or drink, or modifications of space
  - When the student has lactation needs
  - When the accommodation is available to non-pregnant students

2024 Title IX Regulations § 106.40(b)

COZEN O'CONNOR

Pregnancy and Related Conditions: Student Documentation

- Recipient may not require certification from healthcare provider that the student is physically able to participate in class, program, or extracurricular activity unless:
  - Certified level of physical ability is necessary for participation in class
  - All students must produce the same certification, and
  - Information obtained is not used as basis for discrimination

2024 Title IX Regulations § 106.40(b)

COZEN O'CONNOR

Pregnancy and Related Conditions: Employment

- A recipient must not adopt or implement any policy or take any employment action, on the basis of sex:
  - Concerning the current, potential, or past parental, family, or marital status of an employee or applicant for employment, which treats persons differently; or
  - That is based upon whether an employee or applicant is the head of household or principal wage earner

2024 Title IX Regulations § 106.57(a)

COZEN O'CONNOR

Pregnancy and Related Conditions: Employment

- A recipient must not discriminate against any employee or applicant for employment on the basis of current, potential, or past pregnancy or related conditions.
- Recipient must treat pregnancy as any other temporary medical conditions for all job-related purposes.

Pregnancy and Related Conditions: Employment

- If a recipient does not have a leave policy for employees, or if an employee does not have enough leave, unpaid leave must be permitted without pay for a reasonable period.
- Employee must be reinstated to prior status upon return.

2024 Title IX Regulations § 106.57(d)

COZEN O'CONNOR

Pregnancy and Related Conditions: Employment

- Recipients must provide reasonable break time for employee to pump or breastfeed as needed.
- Recipients must provide lactation space that is not the bathroom, and is clean, shielded from view, and free from intrusion.

2024 REGULATIONS: TRAINING

COZEN O'CONNOR

Training 106.8(d) - WHO

The recipient **must ensure** that the following **persons** receive training:

1. All employees
2. Investigators, decisionmakers, and other persons who are responsible for
   - implementing the recipient's grievance procedures (including advisors, grad students, contractors, volunteers, or third-party agents who are performing roles that are directly involved in carrying out the recipient's Title IX duties)
   - authority to modify or terminate supportive measures
3. Facilitators of informal resolution process
4. Title IX Coordinator and designees

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Training 106.8(d) WHEN

ALL TRAINING MUST BE PROVIDED:

- Promptly upon hiring
- When change of position alters duties under Title IX
- Annually thereafter.

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Training 106.8(d) WHAT

Training MUST be related to duties under Title IX

Training MUST NOT rely on sex stereotypes

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TRAINING 106.8(d) – CONTENT REQUIREMENTS

ALL EMPLOYEES - 1

(1)
-Recipient's obligation to address sex discrimination in its education program or activity;

-The scope of conduct that constitutes sex discrimination under Title IX, including SBH

-All applicable notification and information requirements under §§ 106.40(b)(2) and 106.44.1

INVESTIGATORS, DECISIONMAKERS OTHERS – 1 & 2

(2)
-The recipient's obligations under § 106.44;

-The recipient's grievance procedures under § 106.45, and if applicable § 106.46)

-How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias; and

-The meaning and application of the term "relevant" in relation to questions and
evidence, and the types of evidence that are impermissible regardless of relevance under § 106.45, and if applicable § 106.46

FACILITATORS OF INFORMAL RESOLUTION - 1 & 3

(3)
-Rules and practices associated with the recipient's informal resolution process

-and on how to serve impartially, including by avoiding conflicts of interest and bias

TITLE IX COORDINATOR & DESIGNEES - 1,2,3,&4

(4)
-Coordinate efforts, ultimate responsibility, ensure compliance

-106.40(3) specific actions to prevent discrimination related to parental, family, or marital status; pregnancy or related conditions

-106.44(f) -list of all TIX C responsibilities

-106.44(g) – re: provision of supportive measures

-Recordkeeping system

-106.8(f) Recordkeeping requirements

-Other training necessary to coordinate compliance

COZEN O'CONNOR

EMPLOYEE TRAINING: REPORTING RESPONSIBILITIES

- Under § 106.8(d)(1), a recipient will be required to train all employees on the **scope of conduct that constitutes sex discrimination under Title IX, including sex-based harassment**.

- "This training requirement will help recipients ensure that employees are able to recognize when information reported to them reasonably may constitute sex discrimination under Title IX."

- **"it is not necessary for the employee to have factual information that definitively indicates that sex discrimination occurred in order for the employee's notification requirements under § 106.44(c) to apply. 87 FR 41440. It would be enough for the employee to have information about conduct that could reasonably be understood to constitute sex discrimination under Title IX, including conduct that could constitute sex-based harassment." PREAMBLE 346**

COZEN O'CONNOR

TRAINING MATERIALS

- 106.8(f)(3) REQUIRES a recipient to make all materials used to provide training under § 106.8(d) available upon request for inspection by members of the public regardless of whether a recipient maintains a website.
- Under the 2020 amendments, the requirement for public inspection only applied to a recipient that did not maintain a website. 34 CFR 106.45(b)(10)(D).
- Requiring a recipient to make all training materials available upon request for inspection by members of the public is practicable and reasonable, especially in light of existing obligations that many recipients already have under public records laws.

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2024 REGULATIONS: RECORDKEEPING

COZEN O'CONNOR

2024 Title IX Regulations Record-keeping and Documentation Prescribed

106.8 (f) Recordkeeping. A recipient must maintain for a period of at least seven years:

- ***(1) For each complaint of sex discrimination, records documenting the informal resolution process under § 106.44(k) or the grievance procedures under § 106.45, and if applicable § 106.46, and the resulting outcome.***
- ***(2) For each notification the Title IX Coordinator receives of information about conduct that reasonably may constitute sex discrimination under Title IX or this part, including notifications under § 106.44(c)(1) or (2), records documenting the actions the recipient took to meet its obligations under § 106.44.***
- ***(3) All materials used to provide training under paragraph (d) of this section.***

A recipient must make these training materials available upon request for inspection by members of the public.

2024 Title IX Regulations: Documentation Prescribed

106.8 (f) Recordkeeping. A recipient must maintain for a period of at least seven years:

Each **complaint** of sex discrimination;

Records **documenting** the **informal resolution** process;

The **grievance** procedures; Outcomes;

Each **notification** the Title IX Coordinator receives of information about conduct that reasonably may constitute sex discrimination under Title IX …

OR this part, including notifications and **records documenting the actions** the recipient took

Maintain: All materials used to provide training under paragraph (d) of this section.

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Additional Documentation/Communication Requirements: Preamble

- Further, the Department notes that under § 106.8(f), a recipient must maintain records documenting its implementation of the requirements of § 106.46, including the **justification for any delay in providing the notice of allegations under § 106.46(c)(3).**

2024 Title IX Regulations, Preamble, p. 33717.

COZEN O'CONNOR

Additional Documentation/Communication Requirements Embedded in Language of the 2024 Regulations

- Reporting Responsibilities Expanded and must be documented
  - The final regulations at § 106.8(f)(2) require that for each notification the Title IX Coordinator receives about conduct that may reasonably constitute sex discrimination, including notifications under § 106.44(c)(1) or (2), a recipient must maintain records documenting the actions it took to meet its obligations in § 106.44, including its prompt and effective response.

2024 Title IX Regulations § 106.44(a)

COZEN O'CONNOR

Additional Documentation/Communication Requirements Embedded in Language of the 2024 Regulations

- **Reporting obligations expanded and bifurcated**
  - Any employee who is not a confidential employee and who either has **authority to institute corrective measures** on behalf of the recipient or has **responsibility for administrative leadership, teaching, or advising** in the recipient's education program or activity **must** notify Title IX Coordinator; and
  - All other employees **must** either contact Title IX Coordinator or provide contact information and information on how to make a complaint to anyone who provides the employee with information about conduct that reasonably may constitute sex discrimination.

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Additional Documentation/Communication Requirements Embedded in Language of the 2024 Regulations



Retention considerations (length of employment/pattern behaviors)



An oral description must be documented in some manner to comply with § 106.8(f)(1) (e.g., audio recording).

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Respondent - Pattern Evidence

- The Department agrees that other sex-based harassment may prompt a Title IX Coordinator to address broader concerns. The Department also clarifies that a respondent's past sex-based harassment of people other than the complainant would not be part of the analysis of whether current sex-based harassment by the respondent created a hostile environment for the complainant. However, as explained in the discussion of § 106.45(b)(7)(iii), such pattern evidence may be permissible for use in Title IX grievance procedures, as the recipient must objectively evaluate pattern evidence to the extent it is relevant, i.e., whether it is related to the allegations of sex-based harassment under investigation and may aid a decisionmaker in determining whether the alleged sex-based harassment occurred. Preamble, p. 144

COZEN O'CONNOR

Recordkeeping – The Why

- **The Department disagrees that the recordkeeping requirements are too burdensome or complex**.
  - It is appropriate to require a recipient to maintain records regarding complaints of sex discrimination, the actions the recipient took to meet its obligations in response to notification to the Title IX Coordinator of conduct that reasonably may be sex discrimination, and materials used to provide training under § 106.8(d).
  - Recordkeeping can reveal internal effective compliance practices and patterns of noncompliance, through which a recipient can assess its own Title IX compliance.
  - In addition, maintaining records for an appropriate period of time ensures that, during an investigation or compliance review, the Department can ascertain a recipient's compliance with the Title IX regulations. See 34 CFR 100.6(c), 100.7(a), 100.7(c) (incorporated through 34 CFR 106.81).

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2024 REGULATIONS:
TITLE IX COORDINATOR RESPONSIBILITIES

COZEN O'CONNOR

Title IX Coordinator – 106.44(a)

Coordinate the institution's compliance with Title IX obligations

- 106.44(f)
- Coordinate supportive measures
- Documentation and recordkeeping

Take specific actions upon notice of conduct that R.M.C. Sex Discrimination

- 106.44(f)(1)(i) through (vii)
- "in order to promptly and effectively end any sex discrimination in the E.P.A., prevent its recurrence, and remedy its effects."

NOT required to act if the alleged conduct could not constitute Sex Discrimination

- 106.44(f)(2)
- Evaluate known information
- Discretionary dismissal

COZEN O'CONNOR

Title IX Coordinator Requirements

- Coordinate the Recipient's compliance with Title IX
  - A recipient must require its Title IX Coordinator, when notified of conduct that reasonably may constitute sex discrimination under Title IX or this part, to take the following actions to promptly and effectively end any sex discrimination in its education program or activity, prevents its recurrence, and remedy its effects

2024 Title IX Regulations § 106.44(f)

COZEN O'CONNOR

Title IX Coordinator Requirements

- Treat the Complainant and Respondent equitably
- Offer and coordinate supportive measures
- Notify the Complainant or the reporter of grievance procedures and informal resolution process
- If a complaint is made, notify the Respondent of grievance procedures or informal resolution; also supportive measures
  - Initiate the grievance procedures or informal resolution process
  - In the absence of a complaint or withdrawal of any or all allegations in a complaint, and in the absence or termination of an informal resolution process …

2024 Title IX Regulations § 106.44(f)

COZEN O'CONNOR

Title IX Coordinator Requirements

- … The Title IX Coordinator must determine whether to initiate a complaint of sex discrimination.
  - This fact-specific determination must consider the following factors, at minimum:
    - » The complainant's request not to proceed with initiation of a complaint (always weighs against)
    - » The complainant's reasonable safety concerns
    - » The risk that additional acts of sex discrimination would occur if a complaint is not initiated

…

2024 Title IX Regulations § 106.44(f)

COZEN O'CONNOR

Title IX Coordinator Requirements

- The severity of the alleged sex discrimination, including whether the discrimination, if established, would require the removal of a respondent from campus or imposition of another disciplinary sanction to end the discrimination and prevent its recurrence
- The age and relationship of the parties, including whether the respondent is an employee of the recipient;
- The scope of the alleged sex discrimination, including information suggesting a pattern, ongoing sex discrimination, or sex discrimination alleged to have impacted multiple individuals;
- The availability of evidence to assist a decisionmaker in determining whether sex discrimination occurred
- Whether the recipient could end the alleged sex discrimination and prevent its recurrence without initiating its grievance procedures (for example, is it policy?)

2024 Title IX Regulations § 106.44(f)

COZEN O'CONNOR

Title IX Coordinator Requirements

- After considering these and other relevant factors, the Title IX Coordinator must now determine
  - that the conduct "as alleged" presents an imminent and serious threat to the health or safety of the complainant or other person
  - OR
  - that the conduct as alleged prevents the recipient from ensuring equal access on the basis of sex to its education program or activity, the Title IX Coordinator may initiate a complaint.

2024 Title IX Regulations § 106.44(f)

COZEN O'CONNOR

Title IX Coordinator Requirements

- Consider the impact of transfers or resignations
- “As alleged” - Don’t assess credibility, look purely at allegation
- If initiating a complaint, must notify complainant prior to doing so and address safety concerns, including supportive measures such as offering an escort

2024 Title IX Regulations § 106.44(f)

COZEN O’CONNOR

Title IX Coordinator Requirements

- Regardless of whether a complaint is initiated, Title IX Coordinators must take prompt and effective steps, in addition to steps necessary to effectuate the remedies provided to an individual complainant, if any, to ensure that sex discrimination does not continue or recur

- If no grievance procedures, prompt and effective steps are limited to non-disciplinary action
  - Training aimed at prevention of sex discrimination
  - Remedies (permitting complainant to retake a class)

- A Title IX Coordinator is not required to conduct process if they reasonably determine that the conduct as alleged could not constitute sex discrimination

2024 Title IX Regulations § 106.44(f)

COZEN O'CONNOR

Application - § 106.11

- This part applies to every recipient and to all sex discrimination occurring under a recipient's education program or activity in the United States.

- For purposes of this section, conduct that occurs under a recipient's education program or activity includes but is not limited to conduct that occurs in a building owned or controlled by a student organization that is officially recognized by a postsecondary institution, and conduct that is subject to the recipient's disciplinary authority.

- A recipient has an obligation to address a sex- based hostile environment under its education program or activity, even when some conduct alleged to be contributing to the hostile environment occurred outside the recipient's education program or activity or outside the United States.

COZEN O'CONNOR

Extraterritoriality - § 106.11

- The Department emphasizes that a recipient does not have an obligation under Title IX to address sex discrimination occurring outside of the United States.

- However, nothing in these regulations prohibits a recipient from responding as appropriate under its existing code of conduct or other policies pertaining to study abroad programs

- If, while investigating and addressing a hostile environment under its education program or activity in the United States, a recipient seeks information about conduct that occurred in another country, nothing in these regulations preempts applicable privacy laws. Preamble, pp. 208-209

COZEN O'CONNOR

VOLUNTARY RESOLUTION

- Under Title IX, the Department **cannot terminate**, refuse to grant, or refuse to continue Federal financial assistance to any recipient **until the Department has:**
  - made an express finding on the record of a failure to comply with a regulatory or statutory requirement,
  - notified the recipient
  - attempted to voluntarily resolve the noncompliance, and
  - provided an opportunity for hearing and judicial review.
- OCR is required to seek voluntary corrective action from the recipient before pursuing fund termination or other enforcement mechanisms. 20 U.S.C. 1682; 34 CFR 100.7(d), 100.8(c) (incorporated through § 106.81)

Preamble 309

COZEN O'CONNOR

Extraterritoriality under § 106.11.

- For additional discussion of study abroad programs, see the section on Extraterritoriality under § 106.11.

COZEN O'CONNOR

NOTICE OF NON DISCRIMINATION

- § 106.8(c)(1) - a recipient must provide a notice of nondiscrimination to **students; parents, guardians, or other authorized legal representatives of elementary school and secondary school students; employees; applicants for admission and employment; and all unions and professional organizations holding collective bargaining or professional agreements with the recipient.**
- The notice of nondiscrimination must include information on:
  - how to **report** information about conduct that may constitute sex discrimination under Title IX and
  - how to **make a complaint** of sex discrimination.
- A recipient may include information about employees' notification requirements and confidential employees, but the Department declines to require reporting protocols to be posted online, because it prefers to leave recipients with flexibility to meet these requirements.

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TITLE IX COORDINATOR RESPONSIBILITIES - Burden

- The Department **recognizes** that the final Title IX **regulations increase the scope** of the Title IX Coordinator's duties.
- Under § 106.8(a), a recipient **may have more than one** Title IX Coordinator, and a Title IX Coordinator may designate employees to carry out some of its obligations
- A recipient **must** designate one of its Title IX Coordinators
  - to **retain ultimate oversight** over those responsibilities
  - and ensure the recipient's **consistent compliance** with its responsibilities under Title IX. See § 106.8(a)(2).

106.8(a) Preamble 350

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TITLE IX COORDINATOR RESPONSIBILITIES - Burden

"To the extent § 106.44(c) places a burden associated with providing notifications under this provision on recipients, **such burdens are justified because the requirements will help** recipients meet their obligation to address sex discrimination in their education program or activity."

106.8(a) Preamble 350

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TITLE IX COORDINATOR RESPONSIBILITIES – Burden, Costs

- The Department **disagrees** that § 106.44(c) would impose an **undue and unworkable burden on recipients**, which could increase the cost of attendance in higher education.
- The Department has **considered the costs**, including potential litigation costs, in the Regulatory Impact Analysis and determined **the benefits of the notification requirements justify the costs**. The Department also has no reason to believe that the costs associated with § 106.44(c) are so great that they are likely to increase the overall cost of attending higher education institutions.

106.8(a) Preamble 350-51

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TITLE IX COORDINATOR RESPONSIBILITIES
Institutional Coordination

§ 106.44(f) Title IX Coordinator is responsible for **coordinating** the recipient's compliance with its obligations under Title IX and the Department's implementing regulations

- This added text indicates that the Title IX Coordinator's role stems from ***"the recipient's" obligations",*** emphasizing that it is the recipient that remains responsible for ensuring compliance with its obligations under Title IX.

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TITLE IX COORDINATOR RESPONSIBILITIES

Institutional Coordination

Coordinating the recipient's obligations ensures that Title IX Coordinators retain their unique oversight role and their ability to serve as a trusted institutional resource. Expanded scope of a Title IX Coordinator's duties and responsibilities supports this role.

These final regulations, including § 106.44(b), provide a role for a recipient's Title IX Coordinator that **centralizes duties, promotes accountability, and enables effective Title IX compliance**.

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TITLE IX COORDINATOR RESPONSIBILITIES – Institutional Coordination

Furthers centralized, accountable, and effective compliance with Title IX

106.8(a) Preamble 350-51

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TITLE IX COORDINATOR RESPONSIBILITIES – Institutional Coordination

- The Title IX Coordinator may have to work closely with many different members of the school community whose job responsibilities relate to the recipient's Title IX obligations, including:
  - administrators, counselors, athletic directors, advocates, and legal counsel.
  - These final regulations enable a recipient to ensure that all employees whose work relates to Title IX communicate with one another and have the necessary support.
  - § 106.8(c) and (d), which require a recipient to provide a notice of nondiscrimination and training for specific employees, and § 106.44(c), which clarifies that all employees have some notification responsibilities.

106.8(a) Preamble 350-51

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TITLE IX COORDINATOR RESPONSIBILITIES – Institutional Coordination

- The Department understands commenters' concerns about the **human capital needed** to comply with § 106.44(f) and other provisions of these final regulations.
- However, the Department is not persuaded that a Title IX Coordinator would not have the capacity to oversee other individuals or offices that may assist in performing any delegated Title IX Coordinator requirements.
- The Department understands from this experience that the human capital and other resources recipients devote to structuring Title IX compliance efforts vary greatly and often involve **coordination among offices such as the dean of students, office of academic affairs, office of student conduct, human resources office, counseling and psychological services, and the individual or office designated to provide support to students with disabilities**.
- **Coordinating these administrative structures is no different than the coordination required of other high-level employees and officials** who oversee other aspects of a recipient's operations, such as a dean or vice president of academic affairs. In some situations, it may be helpful to designate specific employees to coordinate on certain Title IX issues,

TITLE IX COORDINATOR RESPONSIBILITIES – Institutional Coordination - Collaboration

Department views "collaboration among employees to carry out Title IX obligations as critical to Title IX compliance"

- "in OCR's enforcement experience, recipients often encourage **cooperation** between a Title IX Coordinator and other employees to **ensure consistent enforcement** of recipient policies. The Title IX Coordinator may have to **work closely** with many different members of the school community whose job responsibilities relate to the recipient's Title IX obligations, including administrators, counselors, athletic directors, advocates, and legal counsel."
- These final regulations enable a recipient **to ensure** that all employees whose work relates to Title IX **communicate with one another and have the necessary support**.
  - for example, § 106.8(c) and (d), which require a recipient to provide a notice of nondiscrimination and training for specific employees, and
  - § 106.44(c), which clarifies that all employees have some notification responsibilities.

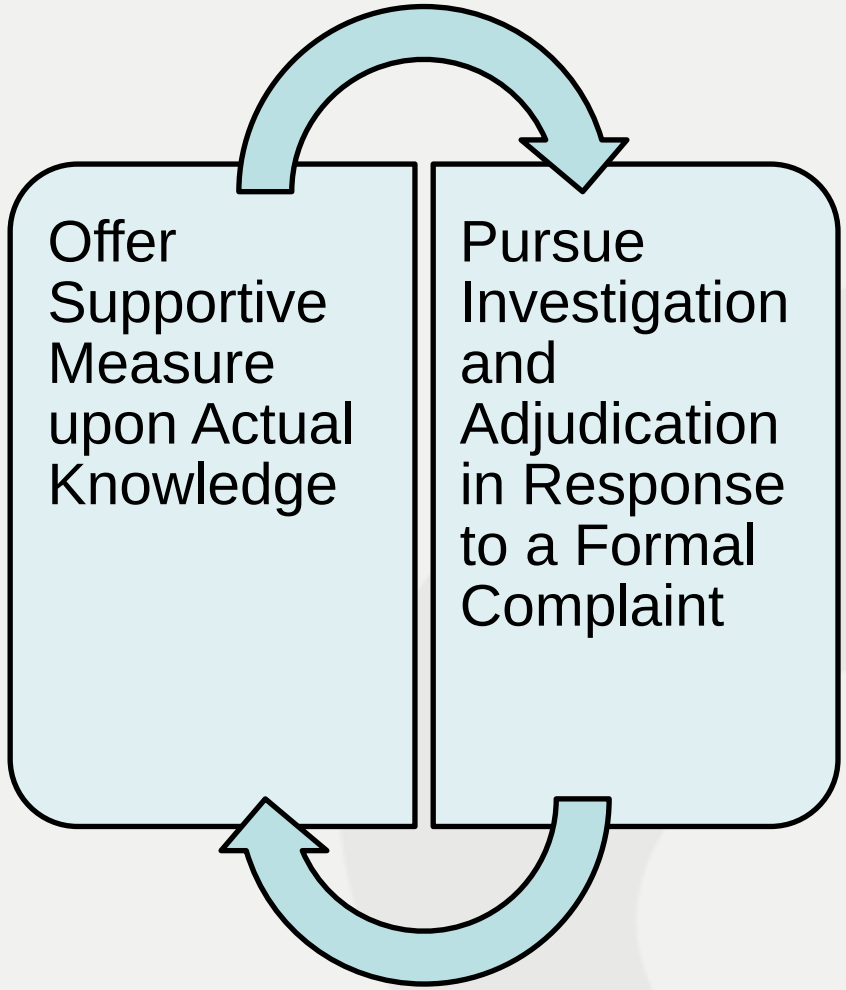
Preamble 426

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THE 2020 TITLE IX REGULATIONS

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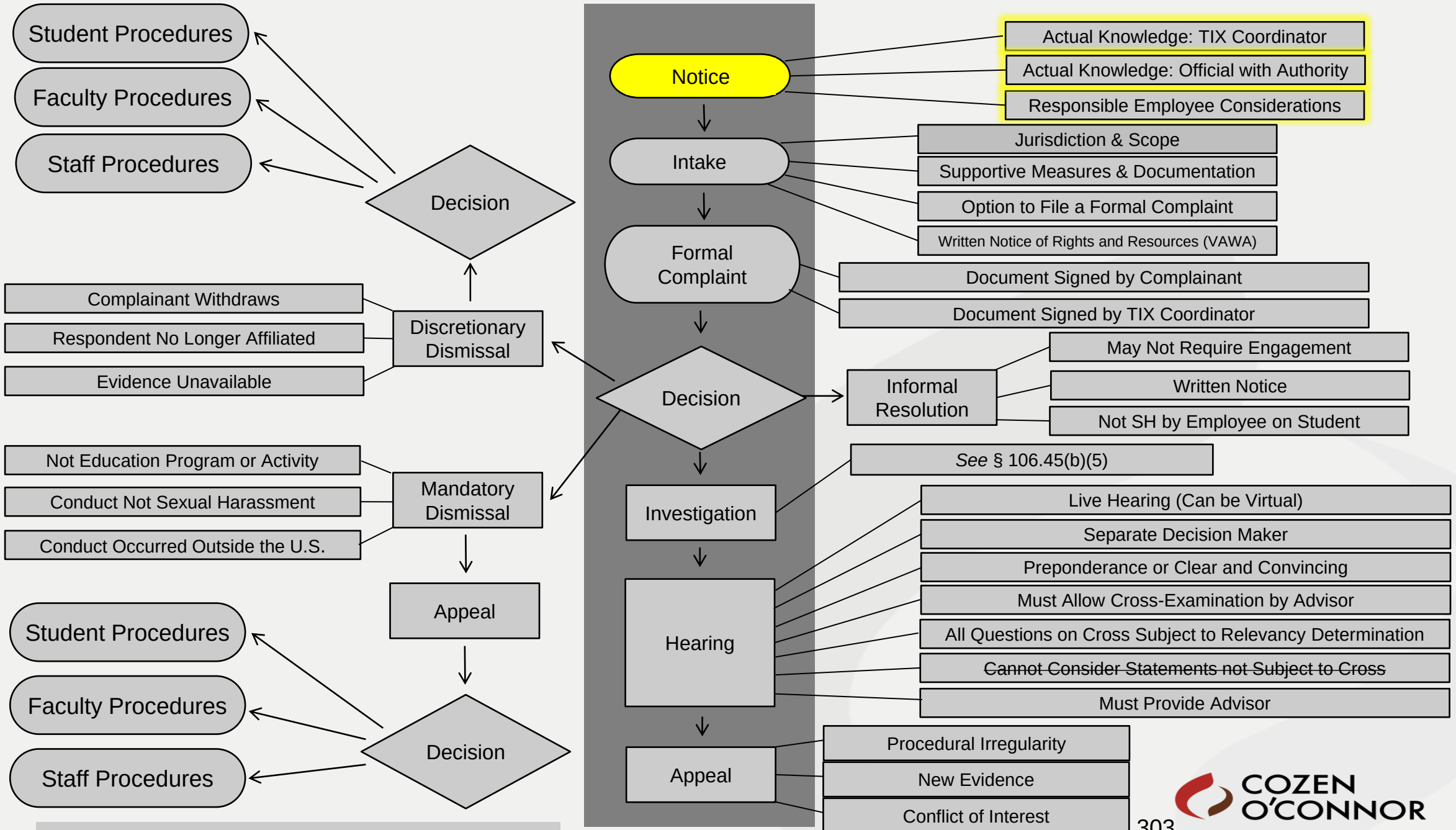
Understanding Two Key Provisions



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2020 REGULATIONS: NOTICE

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Key Provisions of Title IX Regulations issued May 6, 2020

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2020 Regulations: 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

2020 Title IX Regulations § 106.30(a)

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2020 Regulations: 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.

2020 Title IX Regulations § 106.30(a)

COZEN O'CONNOR

2020 Regulations: Notice

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.

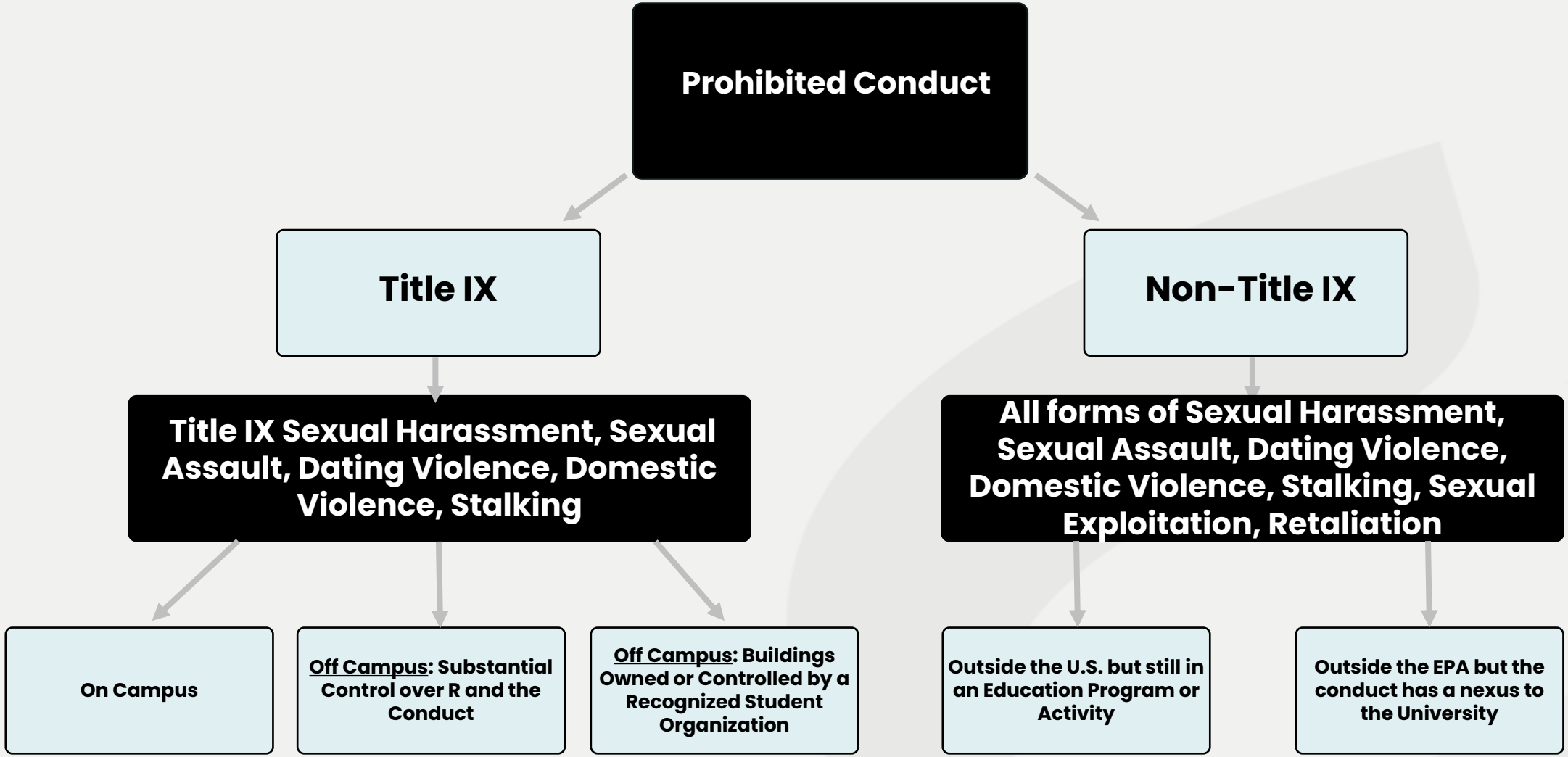
2020 Title IX Regulations § 106.44(a)

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2020 REGULATIONS: JURISDICTION AND SCOPE

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2020 Regulations: Title IX and "Non-Title IX"



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2020 Regulations: Jurisdiction - the E.P.A.

- "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

2020 Title IX Regulations § 106.44(a)

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2020 Regulations: 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 Regulations § 106.2(h)

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2020 Regulations: 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 § 106.8(d); Preamble, 85 F.R. 85 F.R. 30203

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2020 Regulations 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; Preamble 85 F.R. 30196

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2020 Regulations: 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; Preamble 85 F.R. 30198

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2020 Regulations: 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 § 106.30(a)

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2020 REGULATIONS: SUPPORTIVE MEASURES

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2020 Regulations: 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.

Title IX Regulations §§ 106.45(b)(3) and 106.45(b)(8)

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2020 Regulations: 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 § 106.30(a)

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2020 Regulations: 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 § 106.30(a)

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2020 Regulations: 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 § 106.30(a)

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2020 Regulations: 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 § § 106.45(b)(10)(i)-(ii)

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2020 Regulations: Emergency Removal

- 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 § 106.44(c)

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2020 Regulations: 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; Preamble 85 F.R. 30231

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2020 Regulations: 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; Preamble 85 F.R. 30348

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2020 Regulations: 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 § 106.44(d)

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2020 REGULATIONS: FORMAL COMPLAINTS

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2020 Regulations: 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 § 106.30(a)

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2020 Regulations: Formal Complaint - EPA

- 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; Preamble 85 F.R. 30198

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2020 Regulations: 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 § 106.30(a)

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2020 Formal Complaint: Mandatory 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 § 106.45(b)(3)

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2020 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 § 106.45(b)(3)

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2020 Regulations: Dismissals

- 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 §§ 106.45(b)(3) and 106.45(b)(8)

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2020 REGULATIONS: BASIC REQUIREMENTS OF GRIEVANCE PROCESSES

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2020 Regulations: 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)

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2020 Regulations: 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)

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2020 Regulations: 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)

2020 Regulations: 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 §§ 106.45(b)(1)(vii) and 106.45(b)(7)(i)

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2020 Regulations: 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)

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2020 REGULATIONS: INVESTIGATIONS

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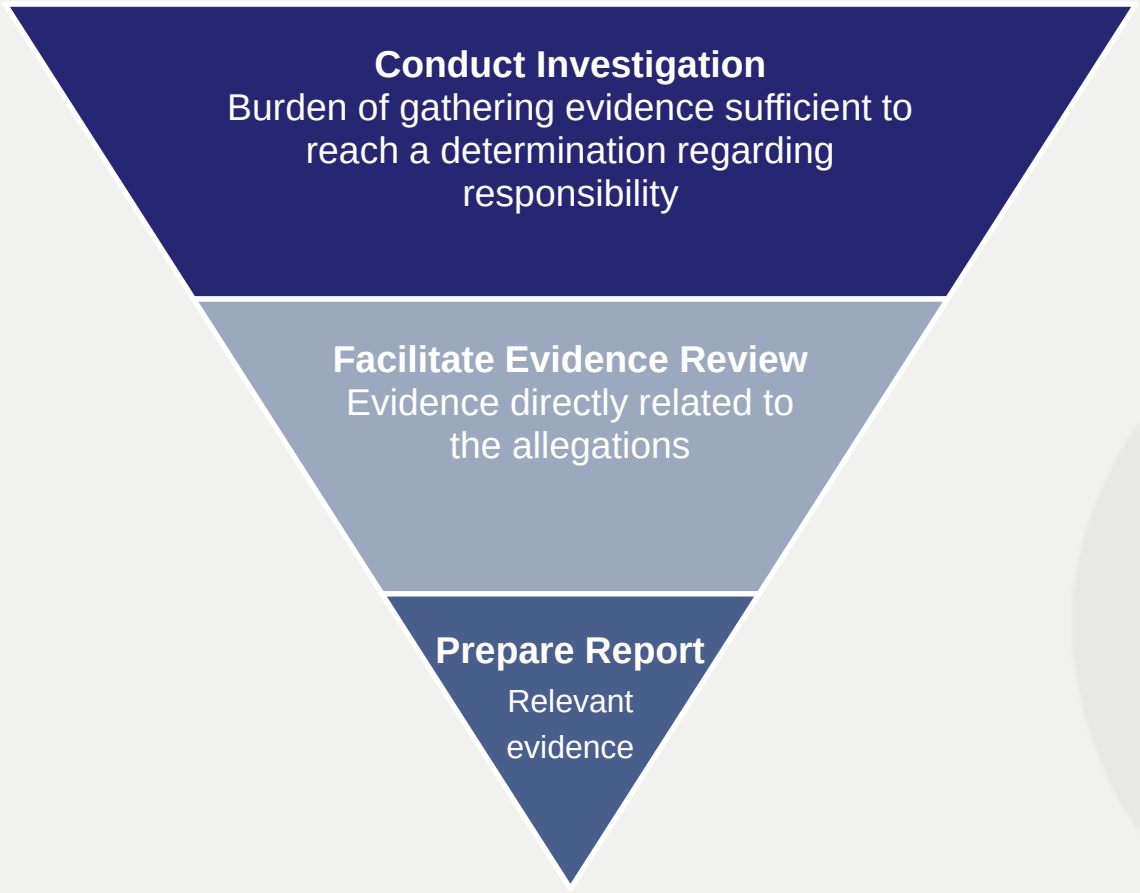
Investigative Principles

- Open-ended and thorough inquiry
- Equitable opportunities for the parties to participate
- The conduct of the investigation matters
- Separating intake/support from investigation
- Maintaining and reinforcing impartiality
  - Screening for conflicts of interest or bias
  - Attention to language and communications
- Trained and experienced investigators

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2020 Regulations: Setting the Stage - Investigations

Institutional Obligations



Parties' Opportunity to Participate

Investigation

- Opportunity to present witnesses and other inculpatory and exculpatory evidence
- No restrictions on ability to discuss allegations

Evidence Review

- Opportunity to inspect and review evidence
- Ability to submit a written response to the evidence

Report

- Ability to submit a written response to the investigative report
- Ability to provide context to the evidence and prepare for the hearing

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2020 Regulations: Investigations Overview

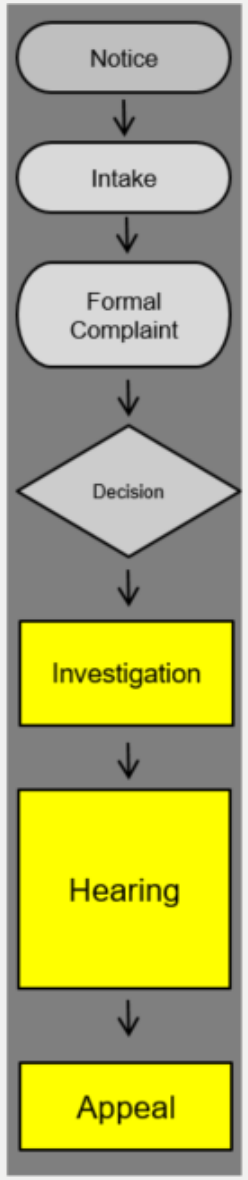
- Obligation to Investigate
- Basic Requirements of Grievance Processes
- Pre-Investigation Considerations
- Consolidation of Formal Complaints
- Investigation - Evidence Gathering
- Evidentiary Considerations
- Evidence Review
- Investigative Report
- Reasonably Prompt Time Frames

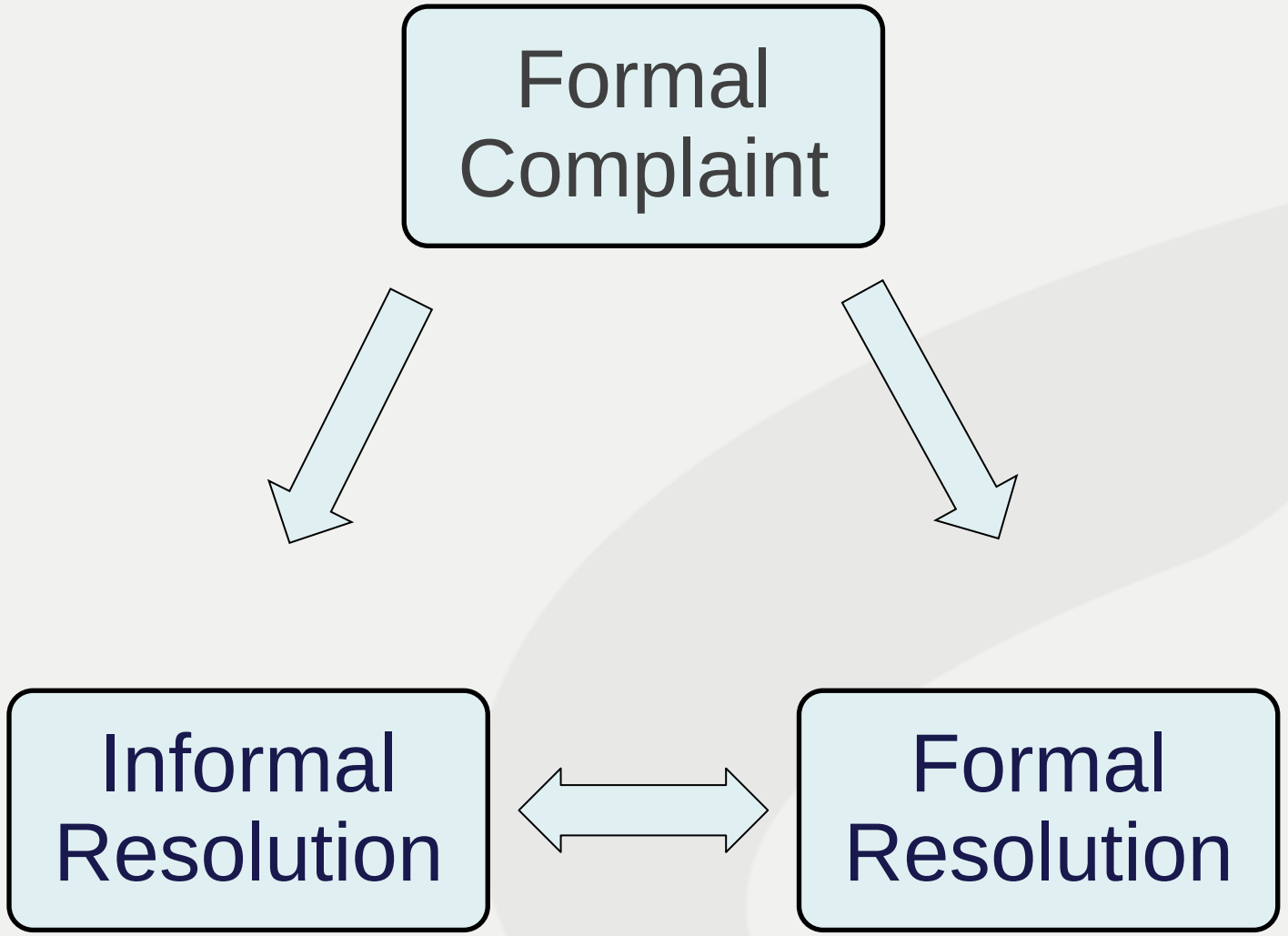
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2020 REGULATIONS: OBLIGATION TO INVESTIGATE

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2020 Regulations: Resolution Process





2020 Regulations: 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; Preamble, 85 F.R. 30282; 30219

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2020 Regulations: Reports vs. Formal Complaints

- The new regulations distinguish and separate a recipient's obligation to **respond to a report** of sexual harassment from a recipient's **obligation to investigate formal complaints** of sexual harassment
  - If students would like supportive measures but do not wish to initiate an investigation…they may make a report of sexual harassment.
  - If students would like supportive measures and also would like the recipient to initiate an investigation…they may file a formal complaint.

Title IX Regulations; Preamble 85 F.R. 30189

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2020 Regulations: Reinforcing Agency & Autonomy

- Balancing a recipient's obligation to respond to instances of sexual harassment with a complainant's autonomy
  - A rigid requirement such as an investigation in every circumstance may chill reporting of sexual harassment…
  - A student may receive supportive measures irrespective of whether the student files a formal complaint…these final regulations encourage students to report sexual harassment while allowing them to exercise some control over their report.

Title IX Regulations; Preamble 85 F.R. 30190

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2020 Regulations: The Obligation to Investigate

- Formal complaint:
  - A document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and
  - Requesting that the recipient investigate the allegation of sexual harassment
- Once a formal complaint is filed, a recipient **must** investigate the allegations in that complaint
  - The Department believes that where a complainant has chosen to file a formal complaint, or the Title IX Coordinator has decided to sign a formal complaint, the recipient must investigate those allegations regardless of the merits of the allegations. (emphasis in original)

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

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2020 Regulations: Investigation Requirements

Formal Complaint	Notice of Allegations	Investigation	Evidence Review	Written Responses to Evidence	Investigative Report	Written Responses to Report
Filed by Complainant or Signed by Title IX Coordinator	With sufficient Detail and time for a party to prepare for an initial interview	Thorough search for relevant facts and evidence Conducted by a trained investigator who is free from conflicts of interest or bias	Of any evidence that is directly related to the allegations	10-day review period Parties may submit written response	Fairly summarizes relevant evidence Includes inculpatory and exculpatory evidence	10-day review period Parties may submit written response

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2020 REGULATIONS: PRE-INVESTIGATION CONSIDERATIONS

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Pre-Investigation Considerations

- Choice of Investigator
  - Internal or external professional
  - Sufficient training and experience
  - Free from conflict of interest or bias
- Investigative Protocols
- Template Communications
- Notice of Allegations
- Consolidation of Formal Complaints

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Separating Support from Investigations

- Separate support/advocacy/intake functions from investigative/adjudicative functions to reduce potential for conflict of interest or perception of bias
- Conflation of roles can:
  - Impact thorough assessment of the facts
  - Create distrust/confusion by complainant
  - Give appearance of bias/lack of impartiality

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Separating Support from Investigations

- 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

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2020 Regulations: Removal of Bias or Conflict of Interest

- "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; Preamble, 85 F.R. 30235

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2020 Regulations: Written Notice of all Proceedings

- Written notice of all hearings, investigative interviews or other meetings
- With sufficient time for the party to prepare to participate
- Notice must include:
  - Date, time, location of proceeding
  - Participants invited or expected to attend
  - Purpose of the proceeding

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

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2020 Regulations: Written Notice of Allegations

- Must provide written notice of the allegations.
  - Sufficient time to prepare a response before any initial interview
  - Sufficient details known at the time
    - identities of the parties, if known;
    - the conduct alleged to constitute sexual harassment; and
    - the date and location of the alleged incident, if known.

Title IX Regulations § 106.45(b)(2); 85 F.R. 30576

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2020 Regulations: Written Notice of the Allegations

- Must state that:
  - the respondent is presumed not responsible for the alleged conduct
  - a determination regarding responsibility is made at the conclusion of the grievance process
- Must inform the parties:
  - they may have an advisor of their choice
  - they may inspect and review evidence gathered
  - of a prohibition against knowingly making false statements or knowingly submitting false information

Title IX Regulations § 106.45(b)(2); 85 F.R. 30576

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2020 Regulations: Written Notice of Allegations

- The notice of the allegations must:
  - Be provided with sufficient time for a party to prepare a response before an initial interview
    - While the initial notice must be sent “upon receipt” of a formal complaint, with “sufficient time” for a party to prepare for an initial interview, such provisions do not dictate a specific time frame for sending the notice, leaving recipients flexibility to, for instance, inquire of the complainant details about the allegations that should be included in the written notice that may have been omitted in the formal complaint.

Title IX Regulations §106.45(b)(2); Preamble 85 F.R. 30283

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2020 Regulations: Supplemental Notice

- If during the investigation, the recipient decides to investigate allegations about the complainant or respondent that are not included in the original notice, the recipient must provide notice of the additional allegations to the parties whose identities are known.
- The Preamble makes it clear that any supplemental notice must be in writing.
  - Although § 106.45(b)(2) requires subsequent written notice to the parties as the recipient discovers additional potential violations…

Title IX Regulations §106.45(b)(2)(ii); Preamble 85 F.R. 30283

COZEN O'CONNOR

2020 REGULATIONS: CONSOLIDATION OF FORMAL COMPLAINTS

COZEN O'CONNOR

2020 Regulations: Consolidation of Formal Complaints

- A recipient may consolidate formal complaints as to allegations of sexual harassment against more than one respondent, or by more than one complainant against one or more respondents, or by one party against the other party, where the allegations of sexual harassment arise out of the same facts or circumstances.

Title IX Regulations §106.45(b)(4); 85 F.R. 30576

COZEN O'CONNOR

2020 Regulations: Consolidation of Formal Complaints

- The requirement for the same facts and circumstances means that the multiple complainants' allegations are so intertwined that their allegations directly relate to all the parties.

Title IX Regulations; Preamble 85 F.R. 30436

COZEN O'CONNOR

2020 Regulations: Consolidation of Formal Complaints

- The Department believes that recipients and parties will benefit from knowing that recipients have discretion to consolidate formal complaints...
- Intended to give "discretion" to consolidate formal complaints that arise "out of the same facts or circumstances and involve more than one complainant, more than one respondent, or what amount to counter-complaints by one party against the other."

Title IX Regulations; Preamble 85 F.R. 30291

COZEN O'CONNOR

2020 Regulations: Consolidation of Formal Complaints

- If the respondent is facing an additional allegation, the respondent has a right to know what allegations have become part of the investigation for the same reasons the initial written notice of allegations is part of a fair process, and the complainant deserves to know whether additional allegations have (or have not) become part of the scope of the investigation.
- This information allows both parties to meaningfully participate during the investigation, for example by gathering and presenting inculpatory or exculpatory evidence (including fact and expert witnesses) relevant to each allegation under investigation.

Title IX Regulations; Preamble 85 F.R. 30283

COZEN O'CONNOR

Application to Specific Circumstances

- Multiple instances of a respondent engaging in misconduct towards the same complainant
- Multiple allegations by same complainant against same respondent
- Multiple allegations by different complainants against same respondent
- Respondent alleges complainant has engaged in past misconduct involving false reports

COZEN O'CONNOR

2020 REGULATIONS: EVIDENCE GATHERING

COZEN O'CONNOR

2020 Regulations: Burden of Gathering Evidence

- Ensure that the burden of proof and the burden of gathering evidence rests on the recipient and not on the parties
  - The recipient's burden is to gather evidence sufficient to reach a determination regarding responsibility

Title IX Regulations §106.45(b)(5)(i); 85 F.R. 30127, FN 562 .

COZEN O'CONNOR

2020 Regulations: Burden of Gathering Evidence

- Undertake a thorough search for relevant facts and evidence pertaining to a particular case, while operating under the constraints of conducting and concluding the investigation under designated, reasonably prompt time frames and without powers of subpoena.
- Such conditions limit the extensiveness or comprehensiveness of a recipient's efforts to gather evidence while reasonably expecting the recipient to gather evidence that is available.

Title IX Regulations; Preamble 85 F.R. 30292

COZEN O'CONNOR

2020 Regulations: Burden of Gathering Evidence

- The investigator is obligated to gather evidence directly related to the allegations whether or not the recipient intends to rely on such evidence (for instance, where evidence is directly related to the allegations but the recipient's investigator does not believe the evidence to be credible and thus does not intend to rely on it).

Title IX Regulations; Preamble 85 F.R. 30248-49.

COZEN O'CONNOR

2020 Regulations: Opportunity to Participate

- Not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence.

Title IX Regulations §106.45(b)(5)(ii) ; 85 F.R. 30422-23.

COZEN O'CONNOR

2020 Regulations: Witnesses & Evidence

- Provide an equal opportunity for the parties to present witnesses and evidence
  - Fact and expert witnesses
  - Inculpatory and exculpatory evidence

Title IX Regulations §106.45(b)(5)(iii); 85 F.R. 30576.

COZEN O'CONNOR

Practical Considerations for Remote Interviews

- Developing rapport
  - Allow additional time for the interview
  - Conversational language and tone
  - Avoid distractions
- Privacy considerations
  - Ensuring a private setting
  - Facilitating the presence of advisor of choice
- Sharing documents

COZEN O'CONNOR

2020 Regulations: Advisor of Choice

- Provide the parties with the same opportunities to have others present during any grievance proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice, who 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.

Title IX Regulations §106.45(b)(5)(iv); 85 F.R. 30576

COZEN O'CONNOR

2020 Regulations: Restrictions on Advisor Participation

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

Title IX Regulations; Preamble 85 F.R. 30298

COZEN O'CONNOR

2020 Regulations: Restrictions on Advisor Participation

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

Title IX Regulations; Preamble, 85 F.R. 30298

COZEN O'CONNOR

2020 Regulations: Training of Advisors Not Required

- The final regulations do not require training for advisors of choice. This is because the recipient is responsible for reaching an accurate determination regarding responsibility while remaining impartial, yet a party's ability to rely on assistance from an advisor should not be limited by imposing training requirements on advisors, who by definition need not be impartial because their function is to assist one particular party.

Title IX Regulations; Preamble 85 F.R. 30333

COZEN O'CONNOR

2020 Regulations: Training of Advisors Not Required

- To allow recipients to meet their obligations with as much flexibility as possible, the Department declines to require recipients to pre-screen a panel of assigned advisors from which a party could make a selection at a hearing, or to require provided advisors to receive training from the recipient.

Title IX Regulations; Preamble 85 F.R. 30340-41

COZEN O'CONNOR

2020 REGULATIONS: EVIDENTIARY CONSIDERATIONS

COZEN O'CONNOR

2020 Regulations: Evidentiary Considerations

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

COZEN O'CONNOR

2020 Regulations: 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 § 106.45(b)(1)(x); 85 F.R. 30361

COZEN O'CONNOR

2020 Regulations: Privileged Records

- Recipient cannot access, consider, disclose, or otherwise use a party's records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional's or paraprofessional's capacity, or assisting in that capacity, and which are made and maintained in connection with the provision of treatment to the party, unless the recipient obtains that party's voluntary, written consent to do so for a grievance process under this section.

Title IX Regulations § 106.45(b)(5)(i); 85 F.R. 30423

COZEN O'CONNOR

2020 Regulations: Relevance

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

Title IX Regulations; Preamble 85 F.R. 30247, FN 1018.

COZEN O'CONNOR

2020 Regulations: 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; 85 F.R. 30247

COZEN O'CONNOR

2020 Regulations: 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; 85 F.R. 30247

COZEN O'CONNOR

2020 Regulations: 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 §§ 106.45(b)(1)(iii) and 106.45(b)(6); 85 F.R. 30461

COZEN O'CONNOR

2020 Regulations: 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 §§ 106.45(b)(1)(iii) and 106.45(b)(6); Preamble 85 F.R. 30353

COZEN O'CONNOR

2020 Regulations: 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 §§ 106.45(b)(1)(iii) and 106.45(b)(6); Preamble, 85 F.R. 30351

COZEN O'CONNOR

2020 Regulations: 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

COZEN O'CONNOR

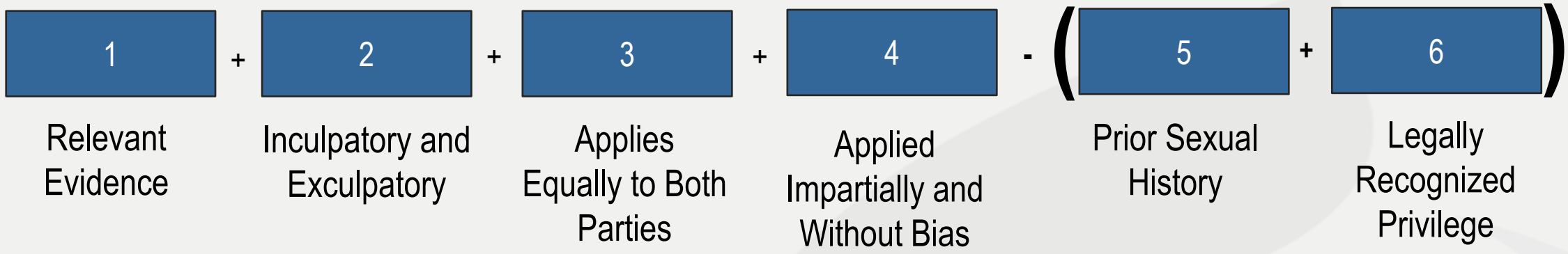
2020 Regulations: Flexibility to Adopt Rules

- "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.
- 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; Preamble 85 F.R. 30248

COZEN O'CONNOR

2020 Regulations: Evidentiary Rules Must Consider



COZEN O'CONNOR

2020 REGULATIONS: EVIDENCE REVIEW

COZEN O'CONNOR

2020 Regulations: 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 §§ 106.45(b)(5)(vi); 85 F.R. 30411

COZEN O'CONNOR

2020 Regulations: Evidence Review

- "Recipient must send to each party and the party's advisor, if any, the evidence subject to inspection and review in an electronic format or a hard copy, and the parties must have at least 10 days to submit a written response, which the investigator will consider prior to completion of the investigative report."

Title IX Regulations §§ 106.45(b)(5)(vi); 85 F.R. 30576

COZEN O'CONNOR

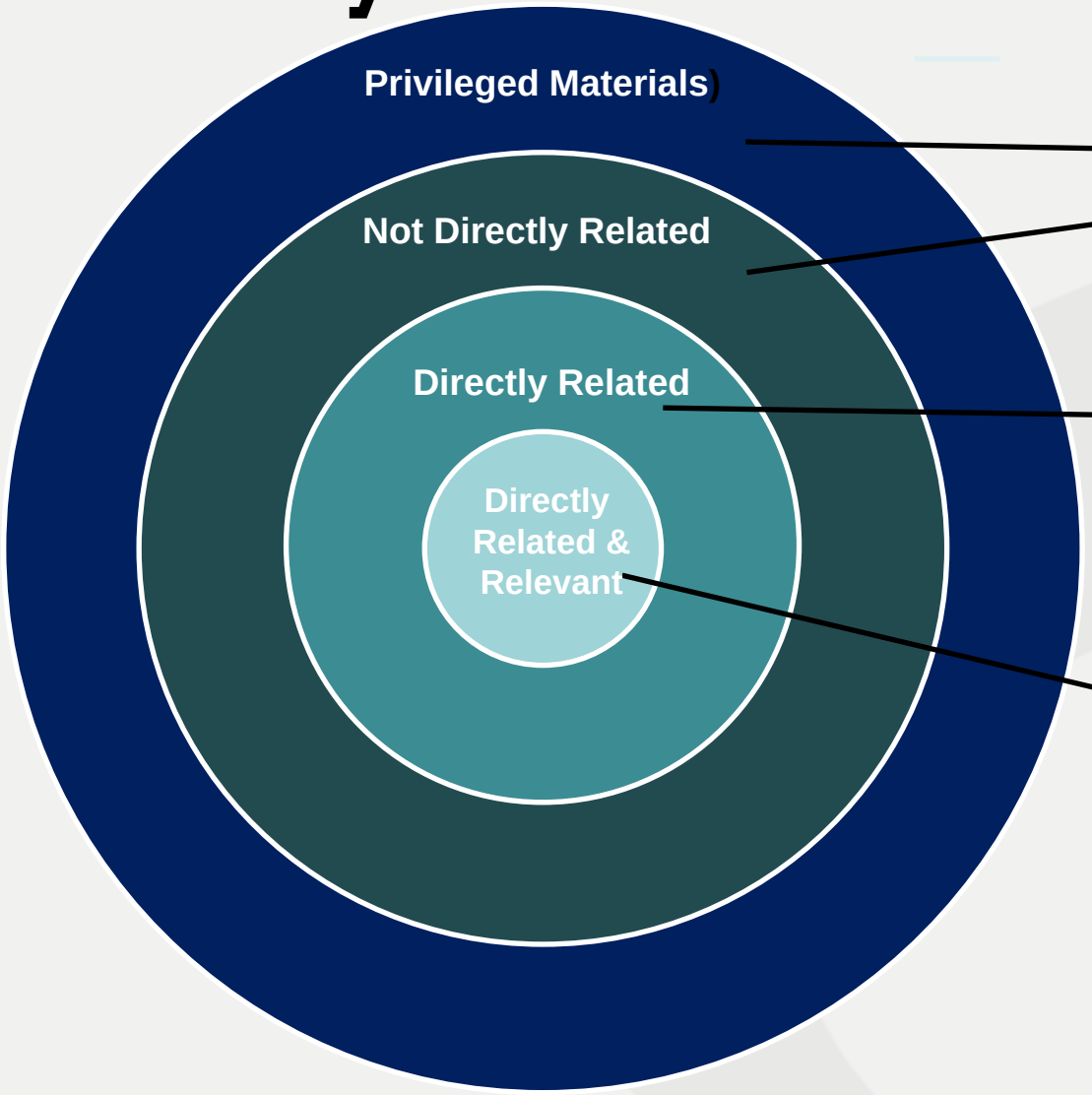
2020 Regulations: Evidence Review

- Allowing parties the opportunity to inspect this broader universe of evidence will further each party's own interests by identifying evidence either overlooked by the investigator or erroneously deemed relevant or irrelevant.

Title IX Regulations; Preamble 85 F.R. 30303

COZEN O'CONNOR

2020 Regulations: Evidentiary Levels for Inclusion



Don't include in Evidence Review or Investigative Report

Include in Evidence Review

Include in Evidence Review and Investigative Report

2020 Regulations: 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; Preamble 85 F.R. 30304, 30428.

COZEN O'CONNOR

2020 Regulations: 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 §106.45(b)(5)(vi); Preamble 85 F.R. 30304

COZEN O'CONNOR

2020 Regulations: 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; Preamble, 85 F.R. 30304, 30321.

COZEN O'CONNOR

2020 Regulations: Directly Related

- Redacting information within evidence (documents, interviews, medical records, etc.)
- May be redacted if:
  - Not directly related to the allegations
  - Privileged, or
  - Obtained without proper consent
- A recipient may permit or require the investigator to redact information … such as information protected by a legally recognized privilege … contained within documents … that are directly related to the allegations, before sending the evidence to the parties for inspection and review.

Title IX Regulations; Preamble 85 F.R. 30304

COZEN O'CONNOR

2020 Regulations: Directly Related

- Imposing restrictions on dissemination or use
  - Recipients may impose on the parties and party advisors restrictions or require a non-disclosure agreement not to disseminate or use any of the evidence for a purpose unrelated to the Title IX grievance process.
  - As long as doing so does not violate the regulations or law.

Title IX Regulations; Preamble 85 F.R. 30304.

COZEN O'CONNOR

2020 Regulations: Directly Related

- Exception for evidence that is obtained illegally, such as a wiretap violation
  - If a recipient knows that a recording is unlawfully created under State law, then the recipient should not share a copy of such unlawful recording. The Department is not requiring a recipient to disseminate any evidence that was illegally or unlawfully obtained.

Title IX Regulations; Preamble 85 F.R. 30427.

COZEN O'CONNOR

2020 Regulations: Scope of Parties' Review

- The parties may make corrections, provide appropriate context, and prepare their responses and defenses before a decision-maker reaches a determination regarding responsibility.
- If relevant evidence seems to be missing, a party can point that out to the investigator, and if it turns out that relevant evidence was destroyed by a party, the decision-maker can take that into account in assessing the credibility of parties, and the weight of evidence in the case.

Title IX Regulations; Preamble 85 F.R. 30305, 30300

COZEN O'CONNOR

2020 REGULATIONS: INVESTIGATIVE REPORT

COZEN O'CONNOR

2020 Regulations: Investigative Report

- Create an investigative report that fairly summarizes relevant evidence and
- 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, at least 10 days prior to the determination of responsibility (hearing)
  - This opportunity allows the parties to "effectively provide context to the evidence included in the report" and to "advance their own interests for consideration by the decision-maker."

Title IX Regulations §§ 106.45(b)(5)(vii); Preamble 85 F.R. 30254, 30307, 30309

COZEN O'CONNOR

2020 Regulations: Investigative Report

- The regulations do not address the specific contents of the investigative report other than specifying its core purpose of summarizing the relevant evidence.
- The Department takes no position here on such elements beyond what is required in these final regulations; namely, that the investigative report must fairly summarize relevant evidence.

Title IX Regulations §§ 106.45(b)(5)(vii); Preamble 85 F.R. 30310.

COZEN O'CONNOR

2020 Regulations: Investigative Report

- We note that the decision-maker must prepare a written determination regarding responsibility that must contain certain specific elements (for instance, a description of procedural steps taken during the investigation) and so a recipient may wish to instruct the investigator to include such matters in the investigative report, but these final regulations do not prescribe the contents of the investigative report other than specifying its core purpose of summarizing relevant evidence.

Title IX Regulations §§ 106.45(b)(5)(vii); Preamble 85 F.R. 3010.

COZEN O'CONNOR

2020 Regulations: Content for Written Determination

- 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 §§ 106.45(b)(5)(vii); Preamble 85 F.R. 30577

COZEN O'CONNOR

2020 Regulations: Investigative Report: Findings?

- 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.
- 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.

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

COZEN O'CONNOR

2020 Regulations: Investigative Report: Findings?

- § 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.

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

COZEN O'CONNOR

2020 Regulations: Revisiting Relevance

- Fairly summarizes the relevant evidence
- Investigator may redact information from the report
  - Recipients may permit or require the investigator to redact from the investigative report information that is not relevant, which is contained in documents or evidence that is relevant.

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

COZEN O'CONNOR

2020 Regulations: Investigative Report

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

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

COZEN O'CONNOR

2020 Regulations: Investigative Report

- At least 10 days prior to the determination of responsibility (hearing)
  - Without advance knowledge of the investigative report, the parties will be unable to effectively provide context to the evidence included in the report.
  - A valuable part of this process is giving the parties (and advisors who are providing assistance and advice to the parties) adequate time to review, assess, and respond to the investigative report in order to fairly prepare for the live hearing or submit arguments to a decision-maker where a hearing is not required or otherwise provided.

Title IX Regulations §§ 106.45(b)(5)(vii); Preamble 85 F.R. 30309 .

COZEN O'CONNOR

2020 Regulations: Investigative Report

- At least 10 days prior to the determination of responsibility (hearing)
  - 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 and to the decision-maker at any hearing held.

Title IX Regulations §§ 106.45(b)(5)(vii); Preamble 85 F.R. 30248-49

COZEN O'CONNOR

2020 REGULATIONS: REASONABLY PROMPT TIME FRAMES

COZEN O'CONNOR

2020 Regulations: Reasonably Prompt Time Frames

- The grievance process must include:
  - reasonably prompt time frames for conclusion of the grievance process, including reasonably prompt time frames for filing and resolving appeals and informal resolution processes if the recipient offers informal resolution processes
  - a process that allows for the temporary delay of the grievance process or the limited extension of time frames for good cause with written notice to the complainant and the respondent of the delay or extension and the reasons for the action

Title IX Regulations §106.45(b)(1)(v); 85 F.R. 30522, 30575

COZEN O'CONNOR

2020 Regulations: Reasonably Prompt Time Frames

- The grievance process must include:
  - reasonably prompt time frames for conclusion of the grievance process, including reasonably prompt time frames for filing and resolving appeals and informal resolution processes if the recipient offers informal resolution processes
  - a process that allows for the temporary delay of the grievance process or the limited extension of time frames for good cause with written notice to the complainant and the respondent of the delay or extension and the reasons for the action
- Good cause may include considerations such as:
  - the absence of a party, a party's advisor, or a witness;
  - concurrent law enforcement activity;
  - the need for language assistance or accommodation of disabilities

Title IX Regulations §106.45(b)(1)(v); 85 F.R. 30575

COZEN O'CONNOR

2020 Regulations: Reasonably Prompt Time Frames

- A recipient must resolve each formal complaint of sexual harassment according to the time frames the recipient has committed to in its grievance process.
- The Department believes that each recipient is in the best position to balance promptness with fairness and accuracy based on the recipient's unique attributes and the recipient's experience with its own student disciplinary proceedings, and thus requires recipients to include "reasonably prompt time frames" for conclusion of a grievance process that complies with these final regulations.

Title IX Regulations §106.45(b)(1)(v); Preamble 85 F.R. 30269

COZEN O'CONNOR

2020 REGULATIONS: OVERVIEW OF HEARING REQUIREMENTS

COZEN O'CONNOR

2020 REGULATIONS: ROLE OF DECISION-MAKER

COZEN O'CONNOR

2020 Regulations: 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 § 106.45(b)(6)

COZEN O'CONNOR

2020 Regulations: 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 § 106.45(b)(6)

COZEN O'CONNOR

2020 Regulations: 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 § 106.45(b)(7)

COZEN O'CONNOR

2020 Regulations: 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 § 106.45(b)(7)

COZEN O'CONNOR

2020 Regulations: 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; Preamble 85 F.R. 30372

COZEN O'CONNOR

2020 Regulations: Investigator May not Determine Responsibility

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

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

COZEN O'CONNOR

2020 Regulations: 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; Preamble 85 F.R. 30372

COZEN O'CONNOR

2020 Regulations: 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 §§ 106.45(b)(5)(vii); Preamble 85 F.R. 30308 & 30436

COZEN O'CONNOR

2020 Regulations: 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 §§ 106.45(b)(5)(vii); Preamble 85 F.R. 30308 & 30436

COZEN O'CONNOR

2020 REGULATIONS: ADVISOR OF CHOICE

COZEN O'CONNOR

2020 Regulations: 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 §106.45(b)(5)(iv); Preamble 85 F.R. 30328.

COZEN O'CONNOR

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

COZEN O'CONNOR

2020 Regulations: 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; Preamble, 85 F.R. 30299

COZEN O'CONNOR

2020 REGULATIONS: ROLE OF THE ADVISOR AT HEARING

COZEN O'CONNOR

2020 Regulations: 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 § 106.45(b)(6)

COZEN O'CONNOR

2020 Regulations: 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; Preamble, 85 F.R. 30336, 30577.

COZEN O'CONNOR

2020 Regulations: 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; Preamble 85 F.R. 30346

COZEN O'CONNOR

2020 Regulations: 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; Preamble, 85 F.R. 30298

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2020 Regulations: 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, Preamble, 85 F.R. 30298

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2020 Regulations: 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 § 106.45(b)(6)

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2020 Regulations: 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; Preamble 85 F.R. 30346

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2020 Regulations: 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; Preamble 85 F.R. 30342

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2020 Regulations: 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 85 F.R. 30342

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2020 Regulations: 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 § 106.45(b)(6)
Title IX Regulations 85 F.R. 30342

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2020 REGULATIONS: CROSS-EXAMINATION BY ADVISOR

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2020 Regulations: 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 § 106.45(b)(6)

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2020 Regulations: 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 § 106.45(b)(6)

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2020 Regulations: 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 § 106.45(b)(5)(vi); 85 F.R. 30411

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2020 Regulations: 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 § 106.45(b)(5)(vi)

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2020 Regulations: 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; Preamble 85 F.R. 30336

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2020 Regulations: 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; Preamble 85 F.R. 30319

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2020 Regulations: 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 § 106.45(b)(6)

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

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2020 Regulations: "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; Preamble 85 F.R. 30323-24

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2020 Regulations: 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; Preamble 85 F.R. 30320

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2020 Regulations: 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; Preamble 85 F.R. 30320

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2020 Regulations: 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; Preamble 85 F.R. 30342

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2020 Regulations: 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; Preamble 85 F.R. 30342

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2020 Regulations: Statements 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; Preamble 85 F.R. 30337

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2020 REGULATIONS: THE LIVE HEARING REQUIREMENT

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2020 Regulations: Live Hearing Required

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

Title IX Regulations § 106.45(b)(6)

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2020 Regulations: 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; Preamble 85 F.R. 30359 .

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2020 Regulations: 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 § 106.45(b)(6)

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2020 Regulations: 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 § 106.45(b)(6)

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2020 Regulations: 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; Preamble 85 F.R. 30321;

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2020 Regulations: 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; Preamble 85 F.R. 30348

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2020 Regulations: 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; Preamble 85 F.R. 30315

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2020 Regulations: 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; Preamble, 85 F.R. 30248

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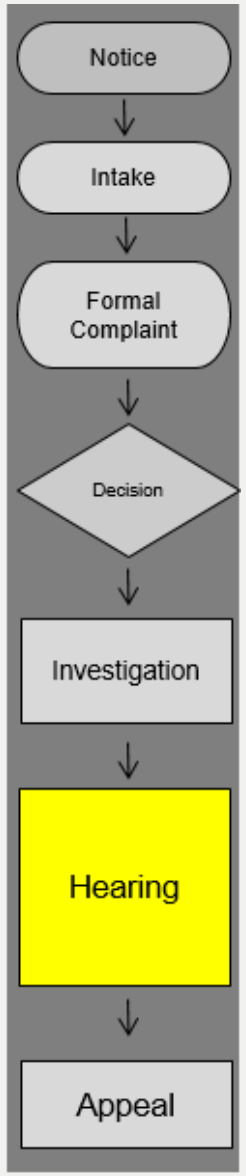
2020 Regulations: Relevance Limitation on Flexibility

- 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; Preamble, 85 F.R. 30248

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Participation by Parties and Witnesses

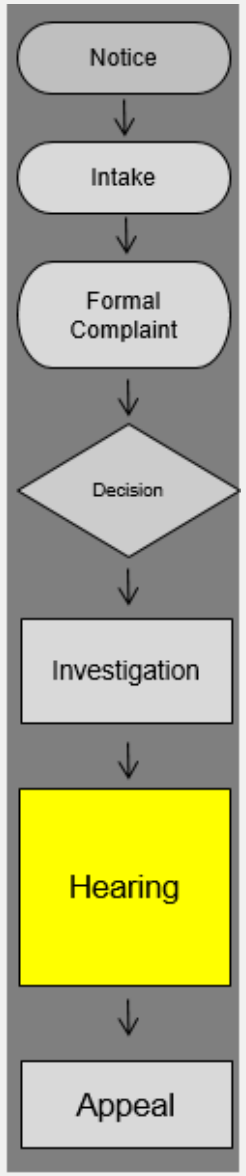


- The Department understands commenters concerns that **respondents, complainants, and witnesses may be absent from a hearing**, or may refuse to submit to cross-examination, for a variety of reasons, including a respondent's self-incrimination concerns regarding a related criminal proceeding, a complainant's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

Title IX Regulations; Preamble 85 F.R. 30346

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Participation by Parties and Witnesses

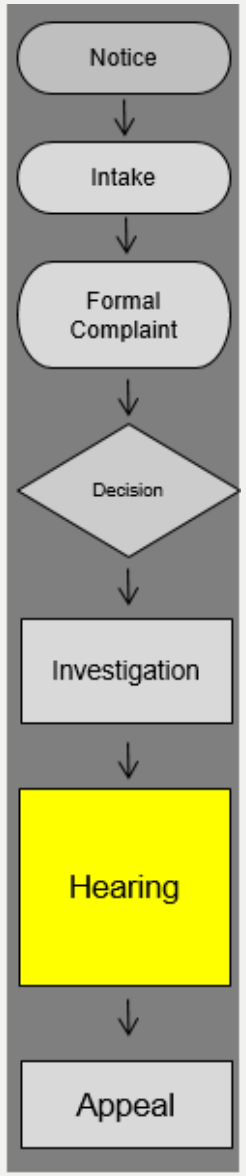


- In response to commenters' concerns, the Department has revised the proposed regulations as follows:
  - (1) We have revised § 106.45(b)(6)(i) to state that where a decision-maker must not rely on an absent or non-cross examined party or witness's statements, the decision-maker **cannot draw any inferences 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; Preamble 85 F.R. 30346

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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; Preamble 85 F.R. 30346

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2020 Regulations: 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; Preamble 85 F.R. 30346

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2020 Regulations: 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 § 106.45(b)(6)

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2020 REGULATIONS: STANDARD OF EVIDENCE

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2020 Regulations: 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 § 106.45(b)(6)

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2020 Regulations: 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; Preamble 85 F.R. 30388

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2020 Regulations: 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; Preamble 85 F.R. 30388

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Standard of Evidence



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

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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.

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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.

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2020 REGULATIONS: SANCTIONING

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2020 Regulations: 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 § 106.44 (a); § 106.45(b)(1)(vii); 85 F.R. 30575, 30395

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2020 Regulations: 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; Preamble 85 F.R. 30377, 30394

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2020 Regulations: 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; Preamble 85 F.R. 30377, 30394

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2020 Regulations: 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.

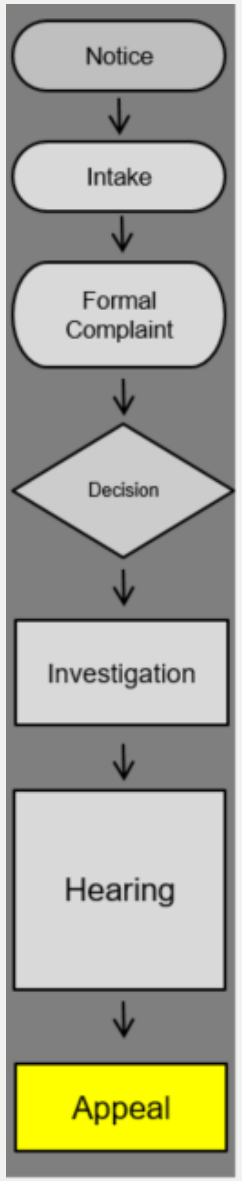
Title IX Regulations; Preamble 85 F.R. 30397

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2020 REGULATIONS: APPEALS

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Appeals



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

Title IX Regulations §106.45 (b)(8)

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2020 Regulations: Appeals

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

Title IX Regulations §106.45 (b)(8)

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INJUNCTION UPDATE

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Tennessee v. Cardona

- Bars the entirety of 2024 regulations from enforcement in Tennessee, Kentucky, Ohio, **Indiana**, Virginia, and West Virginia
  - "The US Department of Education … [is] ENJOINED and RESTRAINED from implementing, enacting, enforcing, or taking any action in any manner to enforce the [2024 regulations] … which [are] scheduled to take effect on August 1, 2024."
- Meaning: to the extent that the 2020 regulations and the 2024 regulations conflict, the new regulations *cannot be enacted.* The 2020 regulations are the law of the land states where *Tennessee v. Cardona* applies.

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Tennessee v. Cardona – Irreparable Harm

- The court held that requiring any enforcement in these states would constitute "irreparable harm."
  - "Some circuits have concluded that compliance costs do not quality as irreparable harm because they are an ordinary result of new government regulation. But the Sixth Circuit has declined to hold so broadly, concluding that it depends on the circumstances of the case. The plaintiffs have sufficiently demonstrated that **the compliance costs here are extraordinary due to the sweeping policy changes they are required to implement and the short timeframe in which they must do so**. And because the recovery of these costs would necessarily be barred, this factor weighs in favor of a finding of irreparable harm."

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Tennessee v. Cardona – Next Steps

1. The Department of Education could appeal the injunction to the Sixth Circuit, or
2. There could be a trial on the merits of the 2024 regulations

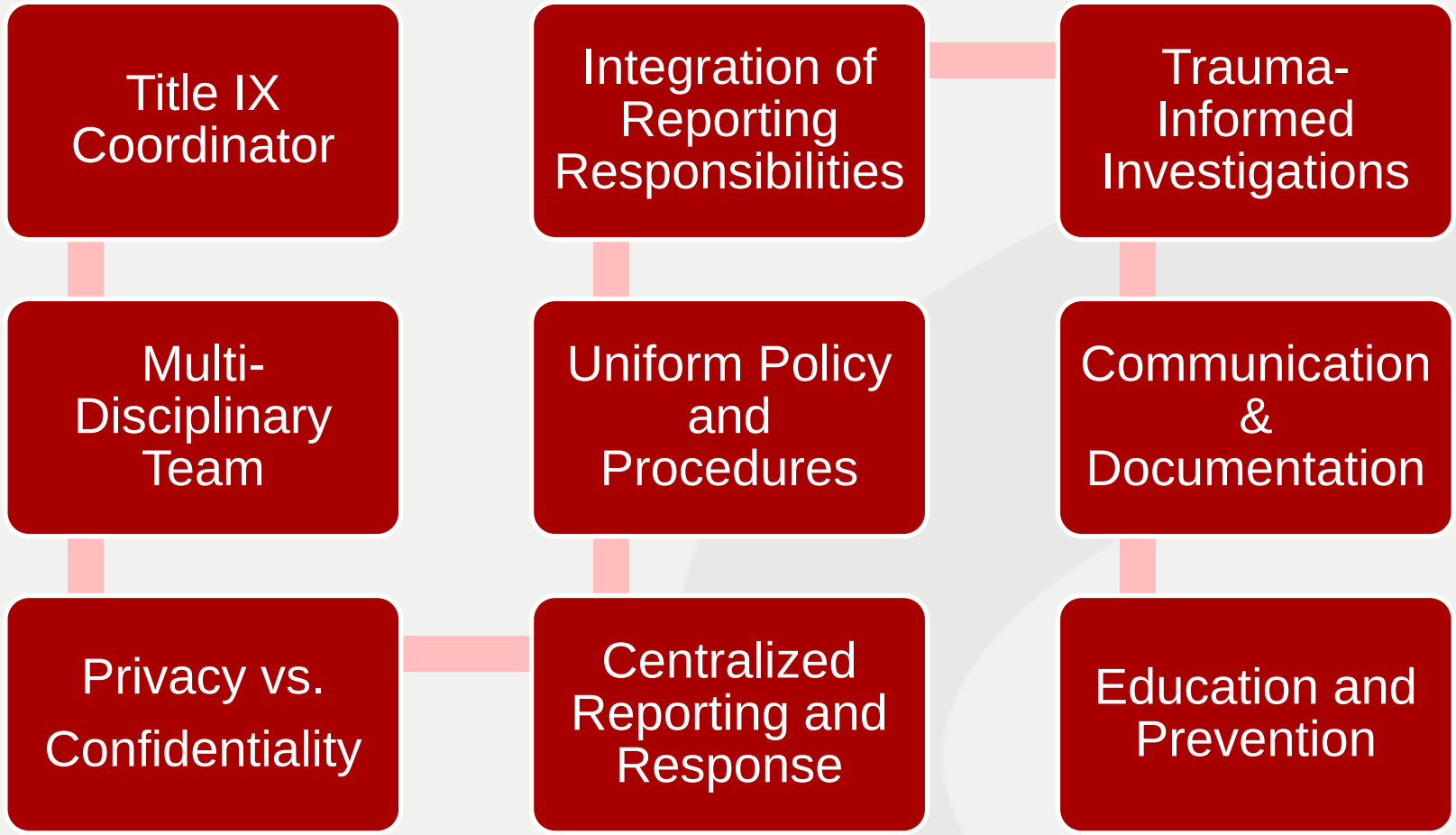
- If an appeal is filed, it is likely that it would be expedited given the looming implementation deadline

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EFFECTIVE PRACTICES

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Key Elements of Effective Practices



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Key Elements of Effective Practices

- Title IX Coordinator
  - Independent
  - Appropriately resourced
- Coordinated multi-disciplinary response team
  - Coordination of information
  - Coordination of personnel
- Privacy v. confidentiality
  - Distinction between confidential resources and reporting options
  - Informed reporting
- Integration of reporting responsibilities:
  - Responsible Employee
  - Campus Security Authority
  - Mandatory reporter of suspected child abuse

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Key Elements of Effective Practices

- Uniform policy and procedures for resolution:
  - Complainant autonomy/agency
  - Fair and impartial practices
  - Remedies-based options
  - Sanctions-based options
- Centralized reporting and review process
  - Consistent institutional responses
  - Tracking and monitoring of incidents and climate
- Trauma-informed investigations and practices
- Communication
  - Consistency and transparency
  - At the individual and community level
- Education, prevention and training programs

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The Title IX Coordinator

- Coordinates the recipient's compliance with Title IX
- Title IX coordinator must have appropriate authority, access, autonomy, and resources
- Oversees all Title IX complaints
- Identifies and addresses any patterns or systemic problems
- Meets with students and employees as needed
- Should not have other job responsibilities that may create a conflict
- A school may designate more than one coordinator
  - Must have clearly delineated responsibilities
  - Must have titles reflecting supporting role

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Personnel

- Individual
  - Personal preparation
  - Values-based approach
  - World class effort
  - Humility
  - Cultural competency
  - Warm-heartedness
  - Listen more, speak less
  - Be collaborative
- Structural
  - The gift of time
  - Tone at the top
  - Team building
  - Resources – budget, staffing, materials, professional development
  - Commitment and consistency
  - Clear expectations and enforcement
  - Development of compassionate compliance

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Policy Considerations

- Easily accessible, identifiable and locatable
- Uniform definitions and high level principles
- Consistent application across the institution
- Procedures may vary by respondent (student, staff, faculty, third party)
- Areas of concern:
  - Intersection between Title IX and Clery
  - Intersection with tenure processes
  - Intersection with collective bargaining agreements

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Privacy vs. Confidentiality

- Ensure policies clearly identify reporting options and support resources both on and off campus
- Delineate confidential resources vs. non-confidential reporting options in policy and training
- Ensure all employees are familiar with Title IX reporting expectations
- Offer clear and easy to follow guidance about what happens when a report is received
- Foster a climate that encourages reporting by providing consistency in message, policy, procedure, and outcome

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Confidential Resources

- Students or employees wishing to obtain confidential assistance may do so by speaking with professionals who are obligated by law to maintain confidentiality
- Confidential resources generally include medical providers, mental health providers, clergy, and rape crisis counselors
- Exceptions to confidentiality include:
  - Mandatory child abuse reporting
  - Tarasoff imminent risk of harm to self or others
  - State felony or sexual assault reporting

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Confidential Resources vs. Reporting Options

- Confidential Resources
  - Medical services
  - HIPAA
  - Mental health/counseling
  - Clergy
  - Rape crisis counselor
- Structural Challenges
  - Employees with multiple hats, e.g., counselor and administrator

- Reporting Options
  - Emergency for safety, physical, or emotional
  - Dedicated campus access points
    - Title IX
    - Campus safety/police
    - Student conduct
    - Human resources
  - To any school employee
  - Anonymous
  - Law enforcement

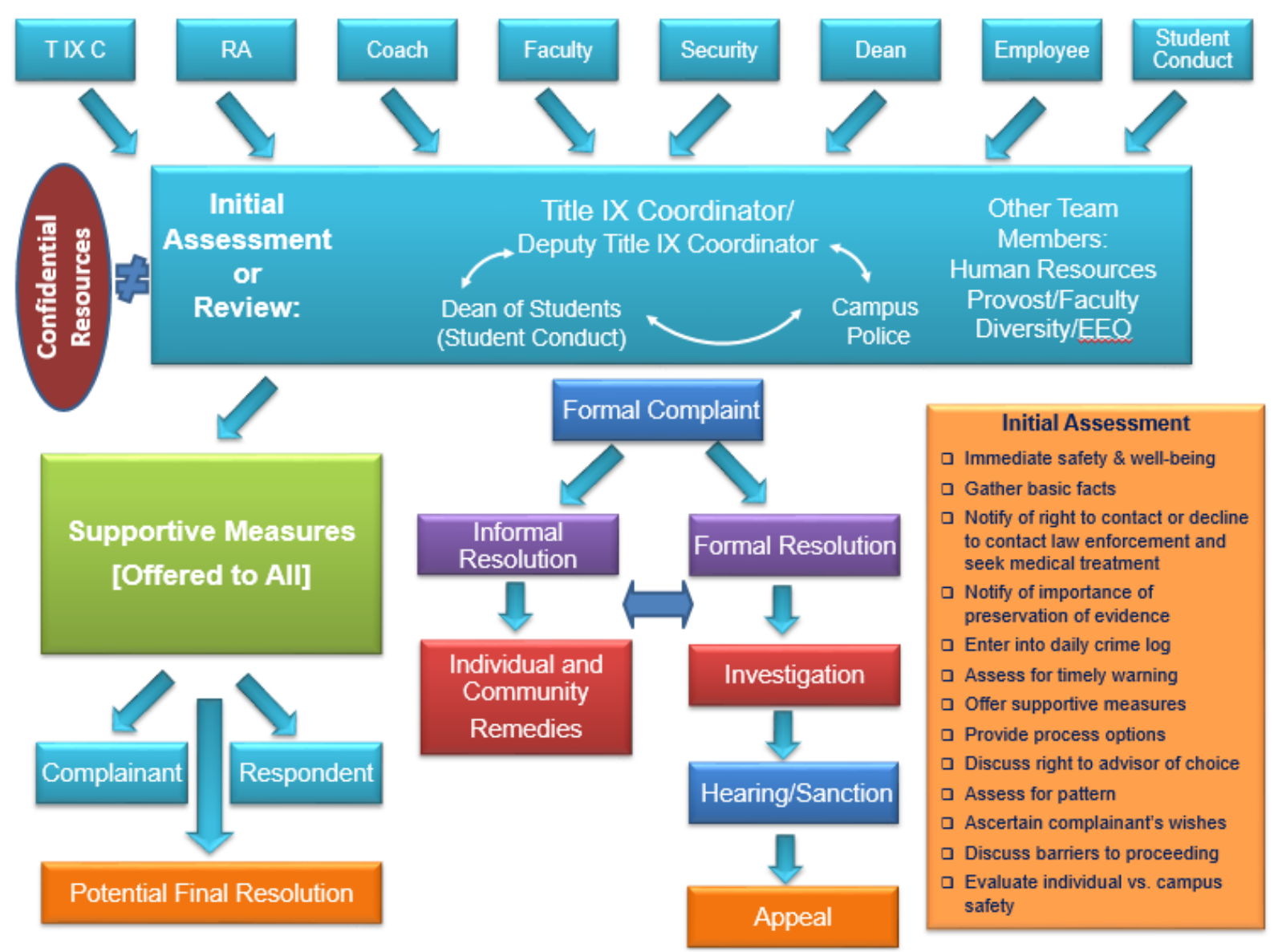
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Title IX Multi-Disciplinary Team

- Core stakeholders
  - Title IX Coordinator
  - Student conduct
  - Campus safety/police
  - Human resources
  - Dean of faculty
- Additional campus stakeholders
  - Counseling
  - Health center
  - Advocacy
- Community partners
  - Law enforcement
  - Prosecutor
  - Hospital/Medical Providers
  - Community crisis or advocacy centers
    - Rape Crisis Counselors
    - Domestic Violence Counselors

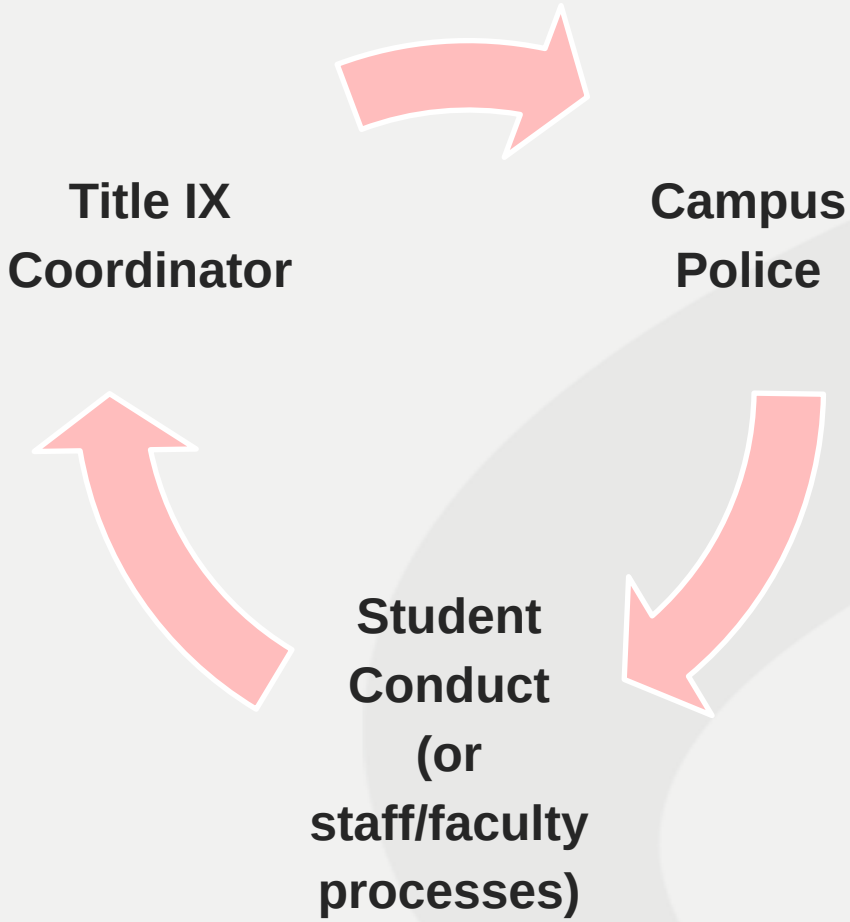
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Integration and Coordination



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Central Review Process Multi-disciplinary Team



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Centralized Review Process

- Coordination of information and personnel
  - Clearly delineated roles and responsibilities
  - Build in regular and open lines of communication
  - Sequence events in advance
- Separate support and advocacy from investigation and adjudication
- Design and use template communications
- Central tracking for patterns
- Documentation/records
- Ensure consistent implementation of:
  - Interim measures
  - Determination whether to proceed
  - Investigative practices
  - Sanctions
  - Community remedies
- Transparency in outcomes

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Title IX Intake and Assessment

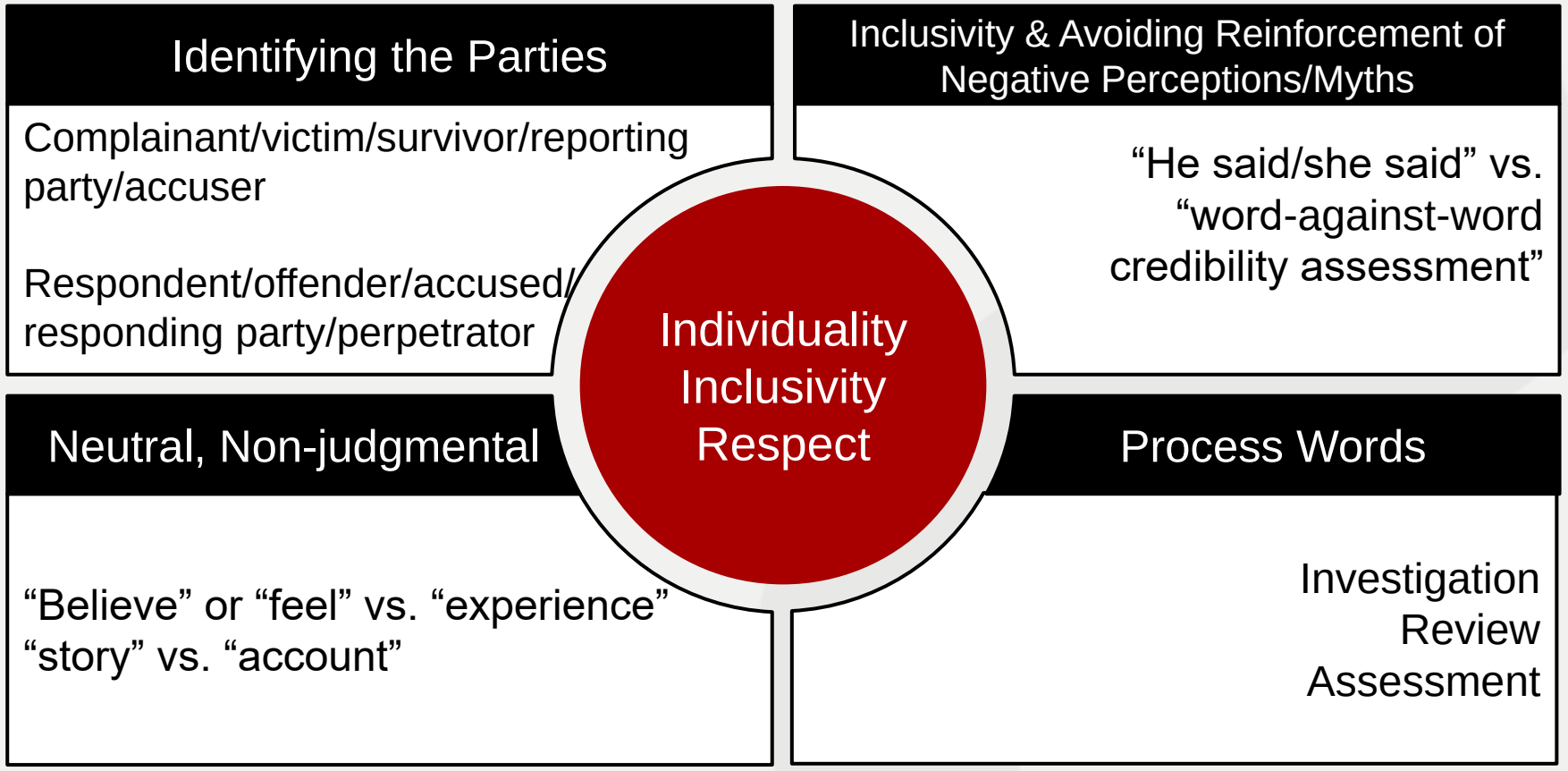
- Assess immediate safety and well-being
- Gather basic facts
- Notify of right to contact law enforcement and seek medical treatment
- Notify of importance of preservation of evidence
- Tend to Clery responsibilities:
  - Enter into daily crime log
  - Assess for timely warning
- Assess and implement interim measures
- Provide policies, process options, resources and supports
- Assess for pattern
- Ascertain complainant's wishes
- Discuss barriers to proceeding
- Evaluate individual vs. campus safety

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SERVING WITHOUT CONFLICT OF INTEREST OR BIAS

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Awareness of the Impact of Language



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Identifying Our Own Biases

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

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Diversity and Culture

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

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Case Evaluation

- Nature of sexual and gender-based harassment and violence
  - Delay in reporting
  - Barriers to reporting and proceeding with formal action
  - Reluctance to report to law enforcement
  - Word-against-word credibility
  - Often involve the use of alcohol or other drugs
  - Often involve people who are known to one another
- Evaluate in the context of all available information

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Disclosure

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

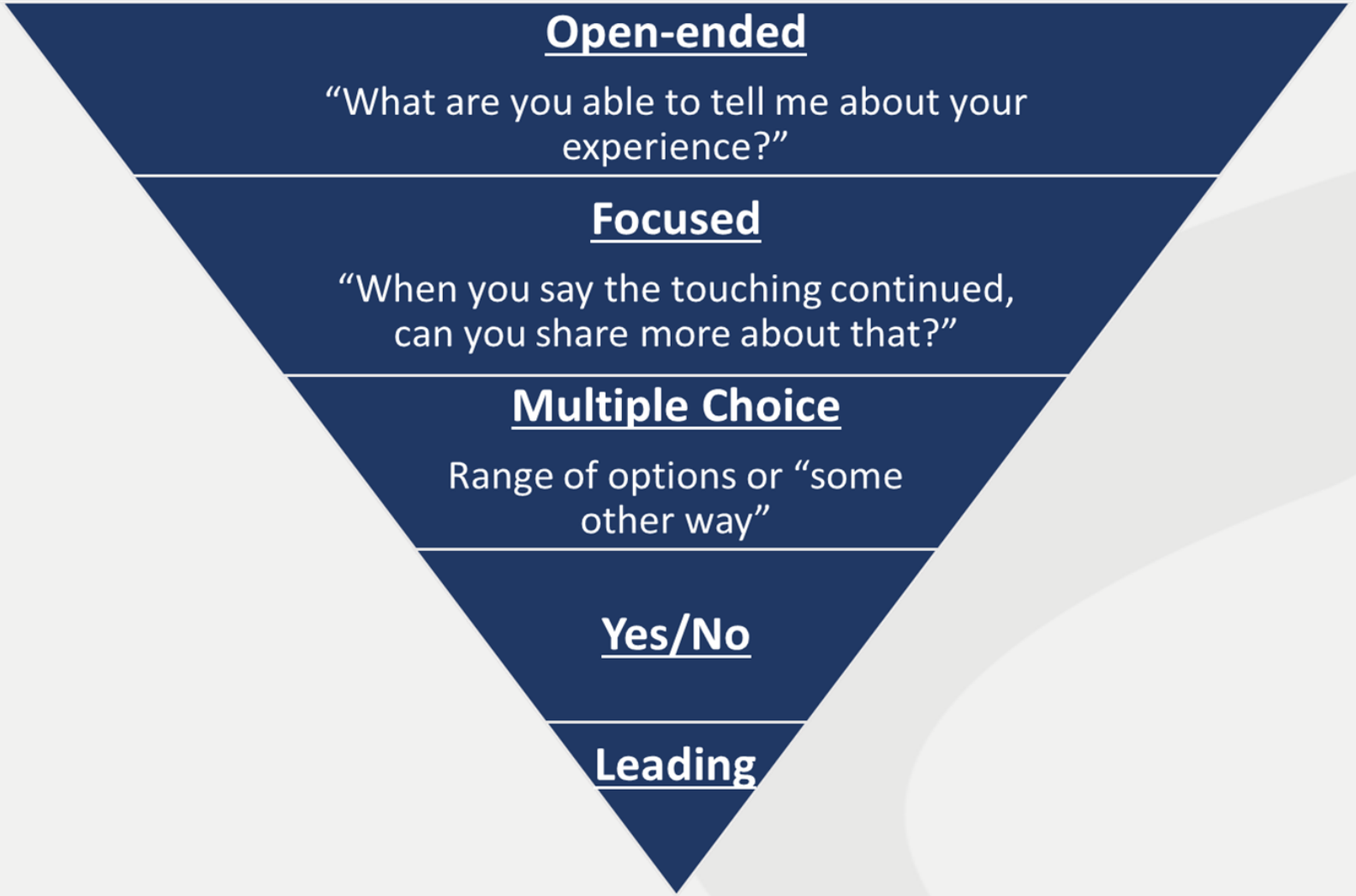
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Framing Difficult Questions

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

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The Continuum Approach



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ALCOHOL, DRUGS AND INCAPACITATION

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The Role of Alcohol

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

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The Role of Alcohol

- 80% to 90% of sexual assaults on campus are acquaintance rapes and involve drugs or alcohol.[1]
- “Nearly half of America’s 5.4 million full-time college students abuse drugs or drink alcohol on binges at least once a month.”[2]
- 90% of campus rapes are alcohol related.[3]

1. DOJ, National Institute of Justice, 2005.
2. National Center on Addition and Substance Abuse at Columbia University 2007.
3. Bureau of Justice Statistics, 2000, National Commission on Substance Abuse at Colleges and Universities

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Alcohol: Investigative Challenges

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

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Frame Questions Appropriately

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

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Get Detailed Information

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

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Get Detailed Information

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

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Get Detailed Information

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

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Get Detailed Information

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

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Get Detailed Information

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

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Considerations

Consideration	Why?
Avoid asking about intoxication on a scale (e.g. “from 1 to 10”)	• There is no universal understanding of what the numbers on the scale mean. • Instead, ask about the impacts of drugs or alcohol on a person physically, cognitively, verbally, and otherwise.
Avoid over-reliance on online BAC calculators in determining incapacity	• Without a blood or breath test, it is hard to pinpoint a person’s BAC, especially after the fact. • BAC is only one data point and does not correlate precisely to a person’s subjective experience or objective indicia of intoxication/incapacitation. • Use BAC when it is available; otherwise, rely on subjective and objective indicia of impairment.
Consider the observations of any sober witnesses with experience and/or training	• Medics, police, firefighters, and even trained security guards, volunteer EMS, and residence hall staff are generally sober, trained observers paying close attention. • May need to work with local agencies to secure participation and obtain records, if available.
Create and use a universal timeline	• Witness statements taken out of context do not help answer the critical question: whether the Respondent knew or should have known that the Complainant was incapacitated. • Create a visual timeline of events and highlight the timeframe the parties were in each other’s presence.

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Creating a Universal Timeline

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

Complainant	Source(s)		Respondent	Source(s)
Complainant (C) and A "pre-gamed" at B's apartment. C drank three 1.5-ounce shots Jim Beam and ate three slices of pizza. C, A and B walked from B's apartment to second "pre-game" at D's apartment. C drank 2 shots of Ciroc Peach and threw up in D's sink. D and A took photos and posted them on Instagram.	A interview B interview C interview D interview D's and A's photos w/ date/time	**8:00 PM**	Respondent (R) arrived at party by himself. R filled one 16-ounce cup with beer and drank it quickly.	R interview
		8:30 PM	R saw friends X, Y, Z. Z gave R keys to his Z's room where Z kept hard liquor. R retrieved a 750 ml bottle of Fireball whiskey and drank approximately ¼ of it himself over the course of about an hour and a half. X and Y each had about 2 shot glasses full. X took a video of R, X and Y drinking Fireball. X sent it in the soccer group chat and R responded to it with a GIF of a flaming meteor.	R interview X interview Y interview Z interview X's video Group chat
		9:00 PM		
C arrived at the soccer party with A, B, and D. D got C a 16-ounce cup of "jungle juice" which C drank slowly over the course of about an hour. (Z on the soccer team provided the jungle juice. Z said it contained 3 parts lemonade, 2 parts Sprite, 1 part gin).	C interview A interview B interview D interview Z interview	**9:30 PM**		
		10:00 PM		
C went upstairs alone to check out the view from the roof. As C was walking back downstairs, C took the last sip of the "jungle juice" and saw R. C texted C's mom, "hapy biray mom I love u so must" (C's mom's birthday was 2 months ago).	C interview C's texts	**10:30 PM**	R texted Z "thanks for the fireball. Let me know where I can meet you to give you your key back." R saw C coming down the stairs.	R interview R's texts
C reported a complete memory loss from about 10:30 until the next morning.	C interview	**11:00 PM**	C and R went upstairs into the bathroom. R's friend W walked in as they were kissing and undressing.	R interview W interview
A saw C leaving the bathroom with C's t-shirt on backwards. A escorted C home.	A interview	**11:30 PM**	Respondent left the bathroom and texted Z "I just got laid!"	R interview Z interview R's texts

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Considerations for Outcome Letter

- Lay out what each witness saw in chronological form
- Focus on what the Respondent knew or what a reasonable, sober person in Respondent's position would have known
- Pay close attention to what your reasonable, sober witnesses saw or did not see.
  - First responders: police, medics, student EMTs, public safety, RAs
  - Greek risk management officers "on duty" (but consider relationships/interest)

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Considerations for Outcome Letter

- Consider whether it is necessary to find that Complainant was or was not incapacitated
  - Where the information supports that Complainant credibly reported their own memory loss, consider the impact of a finding that Complainant "was not incapacitated."
  - Instead, may choose to write, "We find that there is insufficient evidence, by a preponderance of the evidence, to find that Respondent knew, or that a reasonable, sober person in Respondent's position would have known, of Complainant's potential incapacitation. We make that finding based on the following information…"

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INVESTIGATIVE RESOURCES

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Incident Response Checklist

- Introduction focusing on safety and wellbeing
- Communication regarding preservation of evidence
- Support with transportation to obtain medical services and/or law enforcement support
- Inform / discharge duties
  - Options
  - Protections
  - Services
  - Clery Act:
    - Importance of prompt complaint
    - Importance of gathering evidence
  - Title IX:
    - Confidentiality limitations
    - Facilitation of report to police

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Incident Report Form

- Time and date of report
- Time and date of incident
- Location of incident
- Information about the Complainant:
  - Name
  - Sex/Gender
  - Pronouns
  - Affiliation
  - Residence
- Respondent:
  - Name (if known)
  - Relationship to Complainant
  - Sex/Gender
  - Pronouns
  - Number of Respondents
- Information about the alleged conduct:
  - Coercion/force
  - Physical injury
  - Penetration
  - Sexual contact without penetration
  - Reported to police

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Investigation Checklist

- Place of occurrence
- Nature of occurrence
- Time of occurrence
- Time of reporting
- Alcohol or other drugs involved
- Physical Injury
- Name of accused; known or unknown
- Other crimes evidence/priors
- Complainant's description of event
- Names of witnesses
- Interviews of all parties
- Prior contacts between complainant and accused
- School records
- Intimidation attempts

- Physical evidence:
  - Injury / Medical Evidence - records
  - Security Monitoring Records / Visitor Logs / Audio-Video recordings
  - Telephone records
  - Voicemail
  - Text / E-mail / Social Media
  - Clothing / Tangible Objects
  - Any other physical / forensic evidence
- 911 Tape
- Photographs of the scene
- Photographs of injuries
- Advised re: law enforcement report
- Advised re: preservation and medical treatment
- Advised re: counseling
- Concerns regarding safety of community
- Discharge Title IX responsibilities
- Discharge Clery responsibilities
- Court / Cease & Desist Orders
- Protection Orders

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Investigation Checklist: Reporter

- Reports are consistent over time?
  - Is the complainant's account consistent?
  - Is timeline consistent?
  - Do allegations change ? If so, is there a reasonable explanation?
    - Over time?
    - During therapy?
    - With different interviewers?
    - In terms of content?
- Circumstances at time of report?
  - Where?
  - To whom?
  - When?
  - Why?
  - Demeanor?
  - Corroborated by witness?
- Any change in behavior/demeanor/routine after alleged incident?
- Explore past relationship:
  - Whether and how long he or she had known the accused?
  - Circumstances of their meeting
  - Extent of any previous relationship
  - Details of any relevant prior sexual contact with respondent
- Circumstances at time of prior disclosure(s)?
  - Where?
  - To Whom?
  - When?
  - Why?
  - Demeanor?

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Investigation Checklist: Reporter

- Overall credibility?
  - Ability to observe/remember?
  - Account impacted by:
    - Trauma/stress
    - Alcohol or other drugs
    - Passage of time
    - Influence of others
    - Barriers to participation
  - Demeanor?
    - At time of event?
    - At time of reporting?
    - As reported by other witnesses? If so, identify witnesses.
    - In interview?
- Secondary gain?
  - Financial?
  - Situational?
  - Occupational?
- Interests or bias?
- Details of description:
  - Central issues?
  - Peripheral issues?
- Corroboration?
- Do facts hang together? Why? Why not?

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Investigation Checklist: Respondent

- Other acts/behaviors relevant to intent?
  - Evidence of substance abuse?
    - If so, is it admitted?
  - Evidence of impulse control issues?
    - If so, is it admitted?
  - Admission of physically inappropriate behavior?
  - Admission of sexually inappropriate behavior?
  - Evidence of fabrication in record (not limited to allegation)?
- Overall Credibility
  - Demeanor?
  - Interest or bias?
  - Corroboration?
  - Do facts hang together? Why or Why no?
- Any witness intimidation?
- Past History
  - Evidence of other misconduct or disciplinary action?
    - Theft/misappropriation?
    - Legal history?
    - Substance abuse?
    - How did the accused respond to prior interventions
  - Evidence of problematic behavior
  - Troubled relationships?
  - History of previous sanctions?
  - History of treatment/intervention of inappropriate or concerning behaviors?
  - Previous concerns re: protection of others?

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Resources

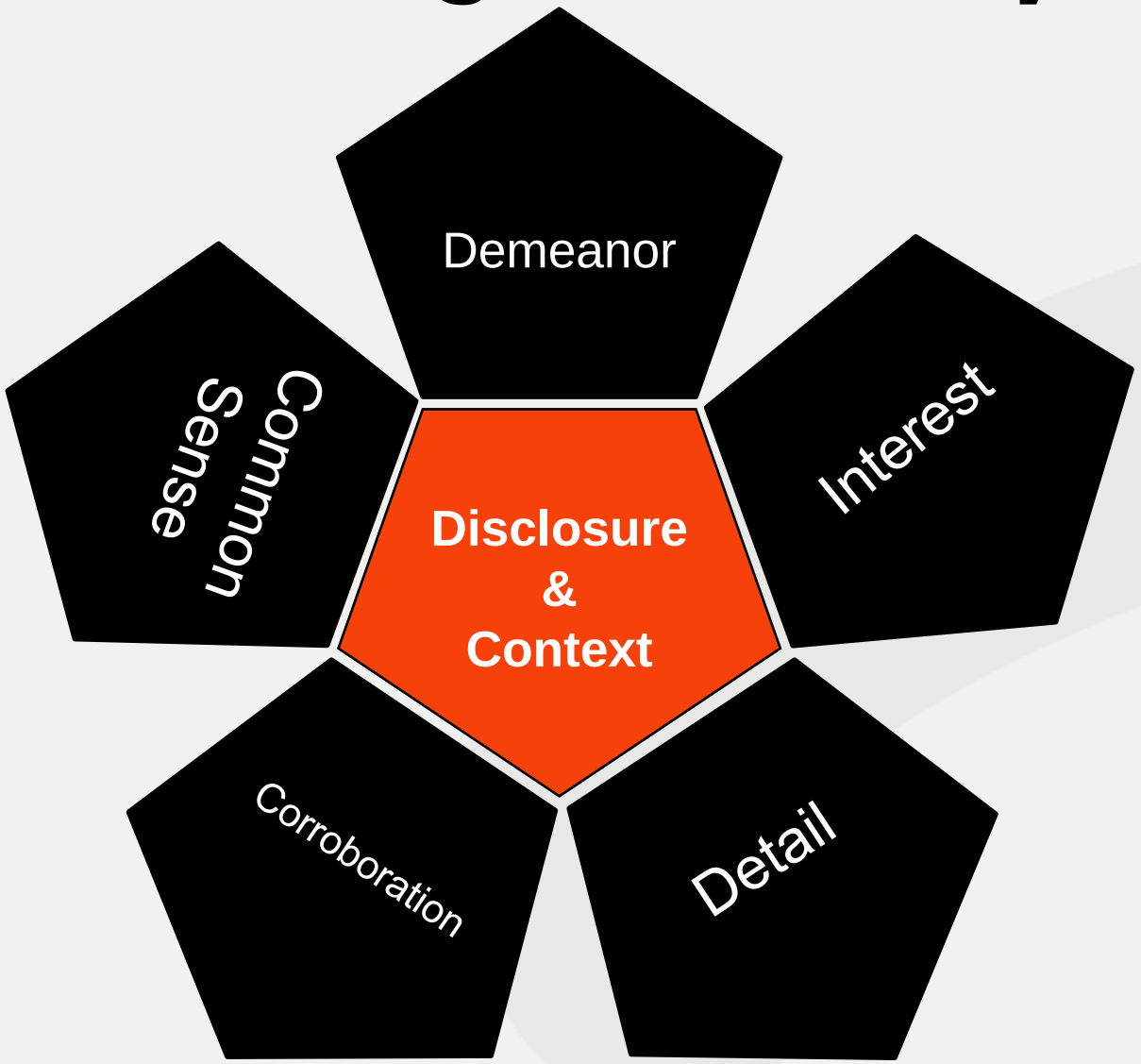
- As investigator, develop and be prepared to refer to:
  - Incident Response Checklist
  - Incident Report Form
  - Investigation Checklist
  - Investigation Checklist: Complainant
  - Investigation Checklist: Respondent

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EVALUATING CREDIBILITY

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Evaluating Credibility



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Credibility Factors

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

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Demeanor

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

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Demeanor

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

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Interest

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

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Interest

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

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Detail

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

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Corroboration

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

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Corroboration

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

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Evaluating Changes in Account

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

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Disclosure

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

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Synthesis

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

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Integrated Analysis

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

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Questions to Consider: Credibility Generally

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

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Questions to Consider: Detail

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

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Questions to Consider: Interest

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

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Questions to Consider: Demeanor

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

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Questions to Consider: Corroboration

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

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Questions to Consider: Common Sense

- Does it make sense?

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Credibility Considerations from OCR

1997 Sexual Harassment Guidance

If there is a dispute about whether harassment occurred or whether it was welcome -- in a case in which it is appropriate to consider whether the conduct could be welcome -- determinations should be made based on the **totality of the circumstances**. The following types of information may be helpful in resolving the dispute:

- **Statements by any witnesses** to the alleged incident.

...

(continued on next slide)

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Credibility Considerations from OCR

(1997 Sexual Harassment Guidance continued)

- **Evidence about the relative credibility** of the allegedly harassed student and the alleged harasser. For example, the level of **detail and consistency** of each person's account **should be compared** in an attempt to determine who is telling the truth. Another way to assess credibility is to see if **corroborative evidence is lacking where it should logically exist.** However, the absence of witnesses may indicate only the unwillingness of others to step forward, perhaps due to fear of the harasser or a desire not to get involved.

...

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Credibility Considerations from OCR

(1997 Sexual Harassment Guidance continued)

- **Evidence that the alleged harasser has been found to have harassed others** may support the credibility of the student claiming the harassment; conversely, the student's claim will be weakened if he or she has been found to have made **false allegations against other individuals.**

...

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Credibility Considerations from OCR

(1997 Sexual Harassment Guidance continued)

- Evidence of the allegedly harassed student's **reaction or behavior after the alleged harassment.**
  - For example, were there **witnesses who saw the student immediately after** the alleged incident who say that the student appeared to be upset?
  - However, it is important to note that **some students may respond to harassment in ways that do not manifest themselves right away,** but may surface several days or weeks after the harassment.
  - For example, **a student may initially show no signs** of having been harassed, but several weeks after the harassment, there may be significant changes in the student's behavior, including **difficulty concentrating on academic work, symptoms of depression, and a desire to avoid certain individuals and places at school.**

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Credibility Considerations from OCR

(1997 Sexual Harassment Guidance continued)

- Evidence about whether the student claiming harassment filed a complaint or **took other action to protest the conduct** soon after the alleged incident occurred. However, failure to immediately complain may merely reflect a fear of retaliation or a fear that the Claimant may not be believed rather than that the alleged harassment did not occur.

...

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Credibility Considerations from OCR

(1997 Sexual Harassment Guidance continued)

- Other **contemporaneous** evidence. For example, did the student claiming harassment write about the conduct, and his or her reaction to it, soon after it occurred (e.g., in a diary or letter)? Did the student tell others (friends, parents) about the conduct (and his or her reaction to it) soon after it occurred?

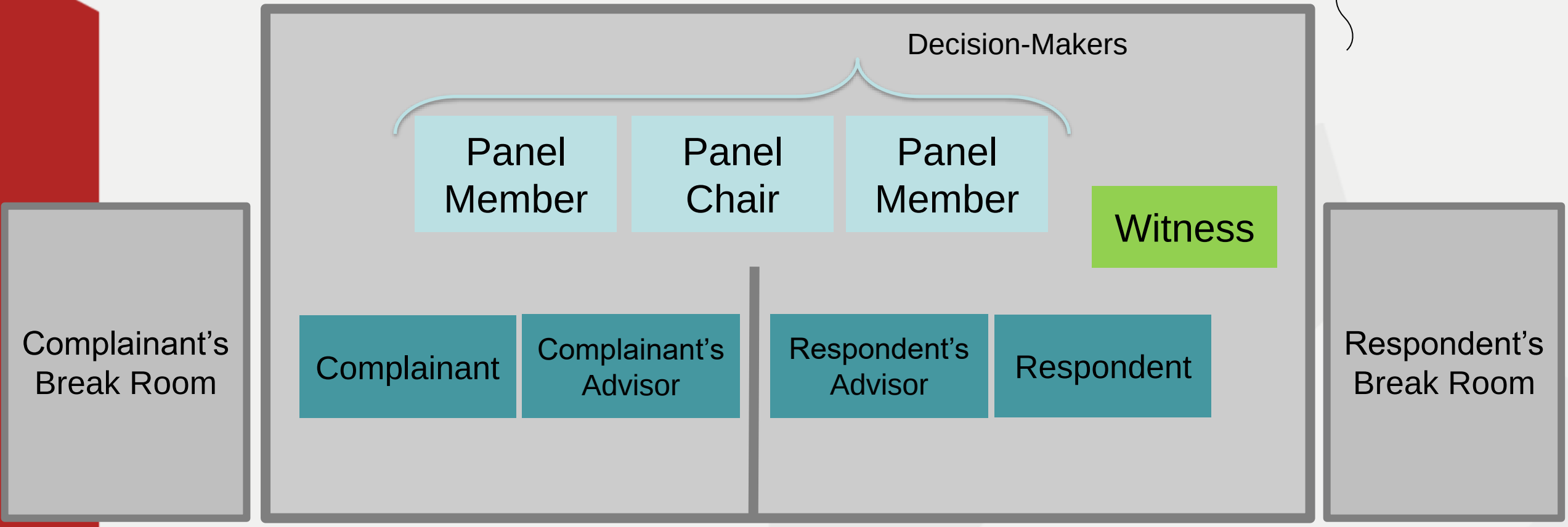
See 1997 Sexual Harassment Guidance

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HEARING BASICS

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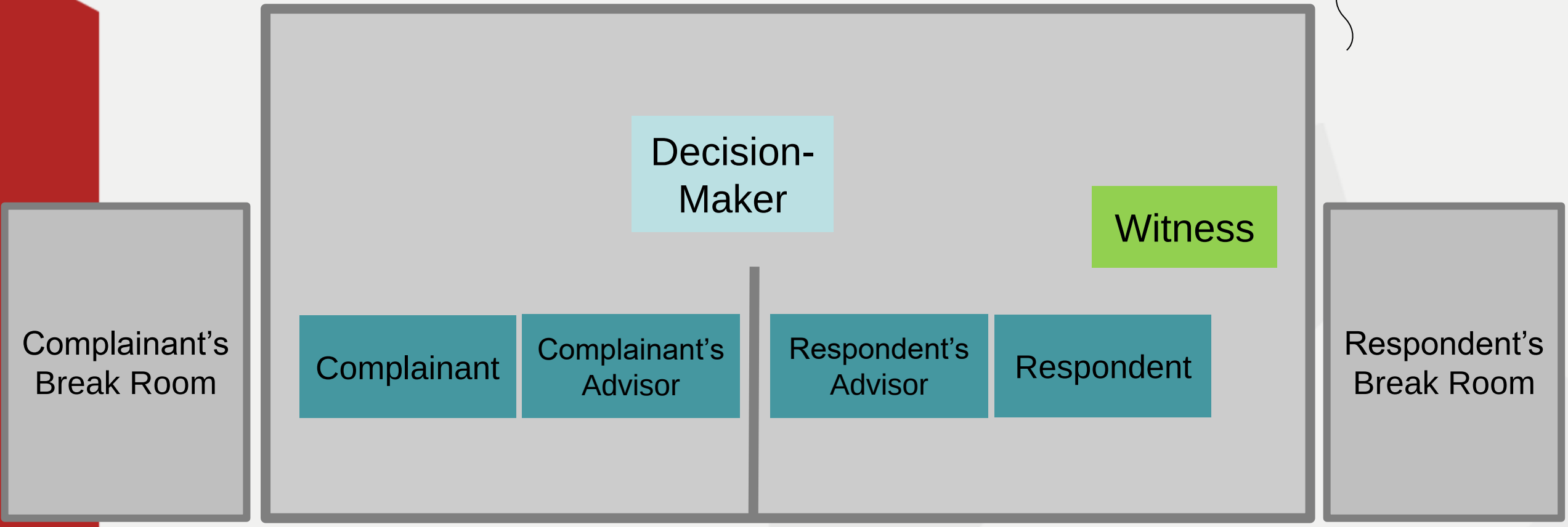
In-Person Hearing Option 1



- Physical room layout and seating arrangement may be adjusted to fit space/needs
- Partition between parties may be used to add physical separation

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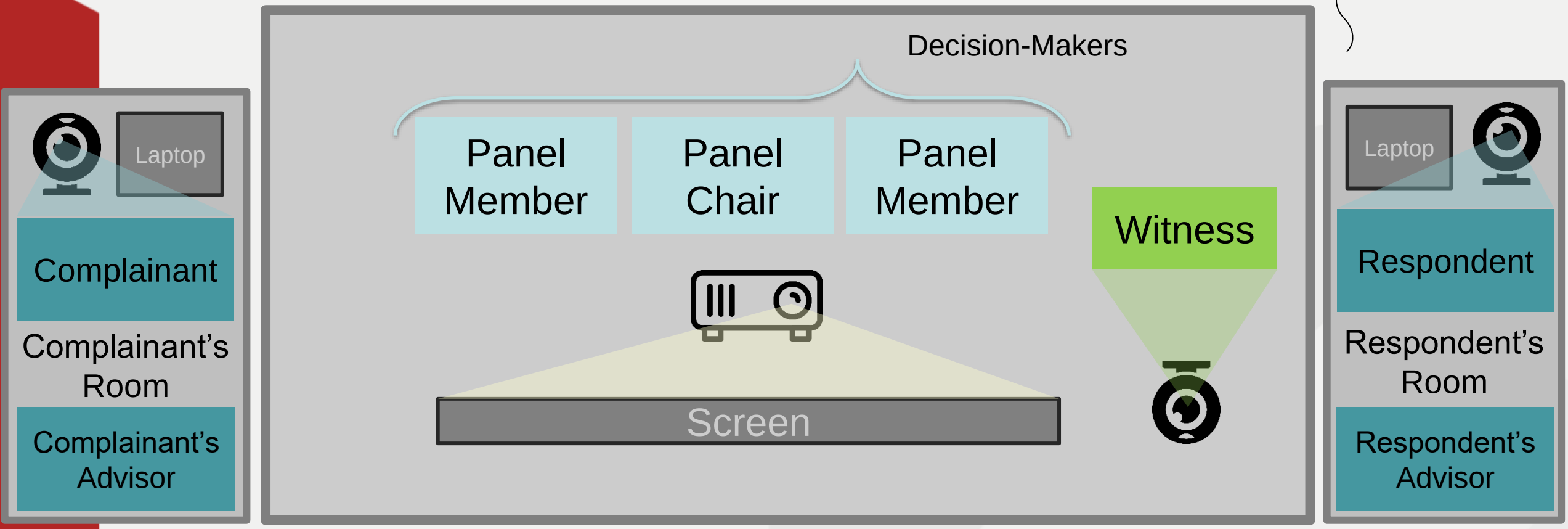
In-Person Hearing Option 2



- Physical room layout and seating arrangement may be adjusted to fit space/needs
- Partition between parties may be used to add physical separation

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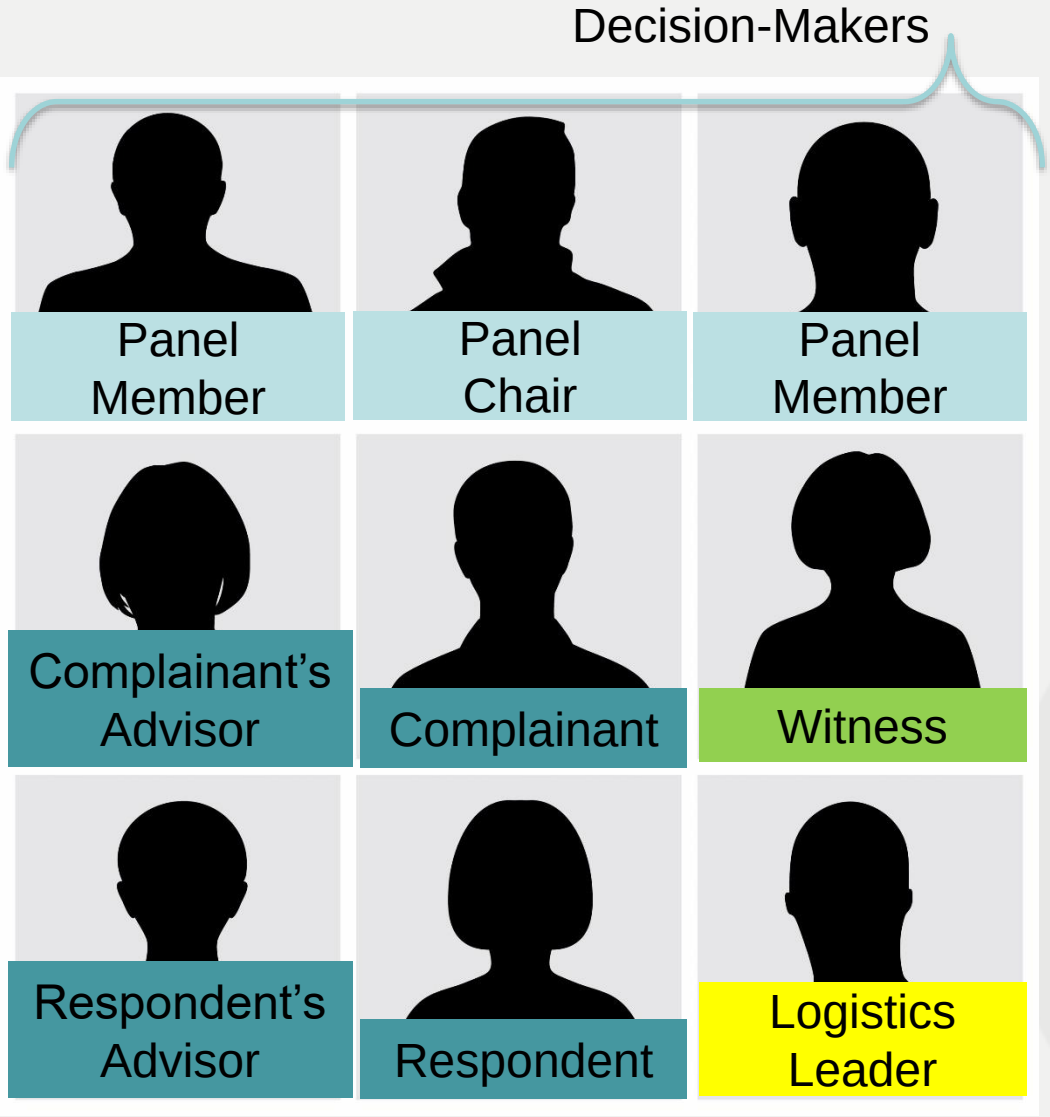
In-Person Hearing Option 3



- Physical room layout and seating arrangement may be adjusted to fit space/needs
- Panel may also be a sole decision maker (Option 4)

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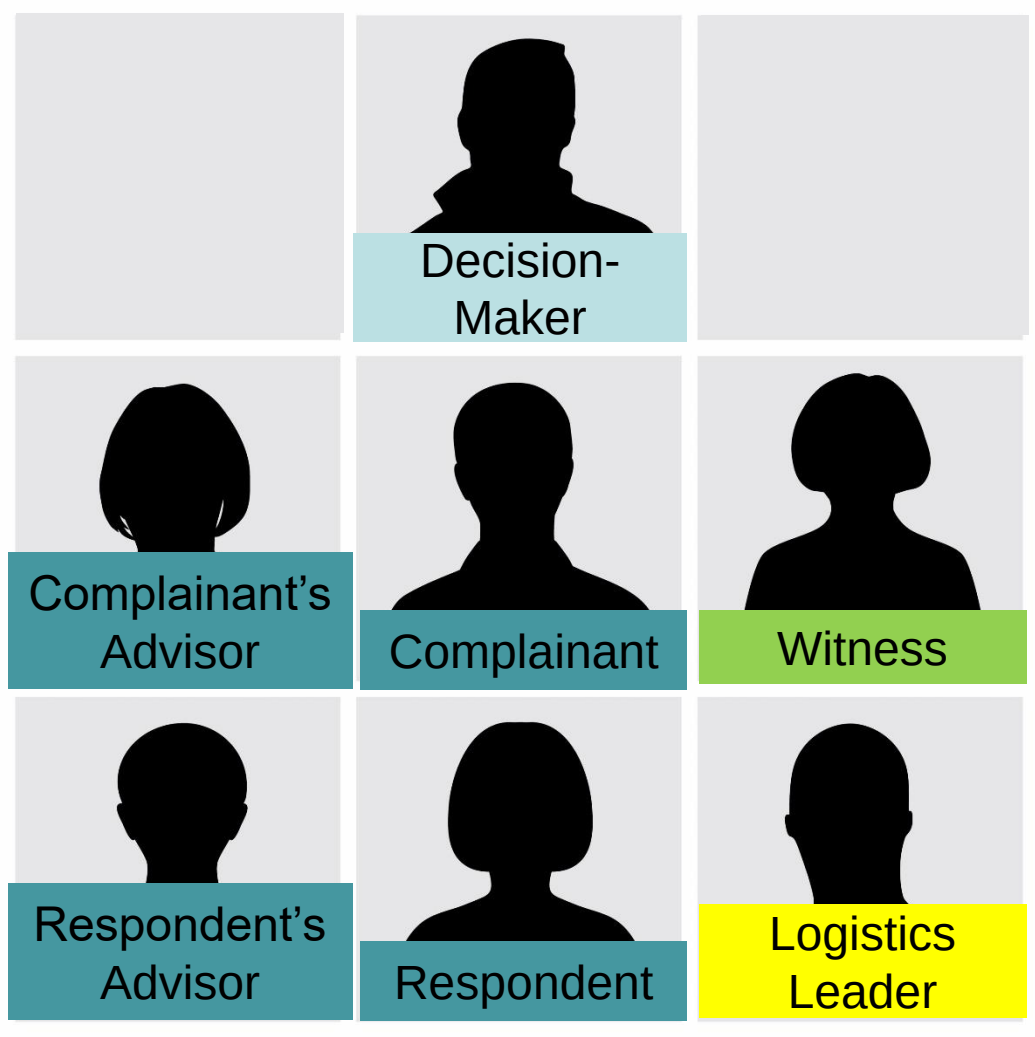
Remote Hearing Logistics



- Squares may be arranged in a different order (this arrangement is for illustration only)
- Logistics Leader should create virtual breakout rooms for Complainant/Advisor and Respondent/Advisor
- May wish to use the waiting room for witnesses to be taken in and out of the main room. Useful if the panel needs to confer privately
- Logistics Leader role:
  - Communicating with witnesses and alerting them by phone or email when it is their turn to log into the hearing
  - Putting parties/advisors into breakout rooms and pulling them back into the main room when the hearing is ready to resume
  - Basic tech assistance

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Remote Hearing Logistics



- Squares may be arranged in a different order (this arrangement is for illustration only)
- Logistics Leader should create virtual breakout rooms for Complainant/Advisor and Respondent/Advisor
- May wish to use the waiting room for witnesses to be taken in and out of the main room. Useful if the panel needs to confer privately
- Logistics Leader role:
  - Communicating with witnesses and alerting them by phone or email when it is their turn to log into the hearing
  - Putting parties/advisors into breakout rooms and pulling them back into the main room when the hearing is ready to resume
  - Basic tech assistance

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Technology Options

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

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PRE-HEARING PREPARATION

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Avoiding Conflicts of Interest

- Share parties' names with potential Panel Members
  - Invite panelists to identify any conflicts of interest
- Share potential Panel Members' names with parties
  - Invite parties to identify any conflicts of interest
- Remember that the obligation is to avoid conflicts of interest and bias either for or against a *particular* Complainant or Respondent or for or against Complainants or Respondents *generally*

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Know Your Policy

- Title IX Policies & Procedures
  - Definitions of prohibited conduct
  - Definitions of consent, incapacitation, etc.
- Rules of Decorum
- Questioning Procedures to be used

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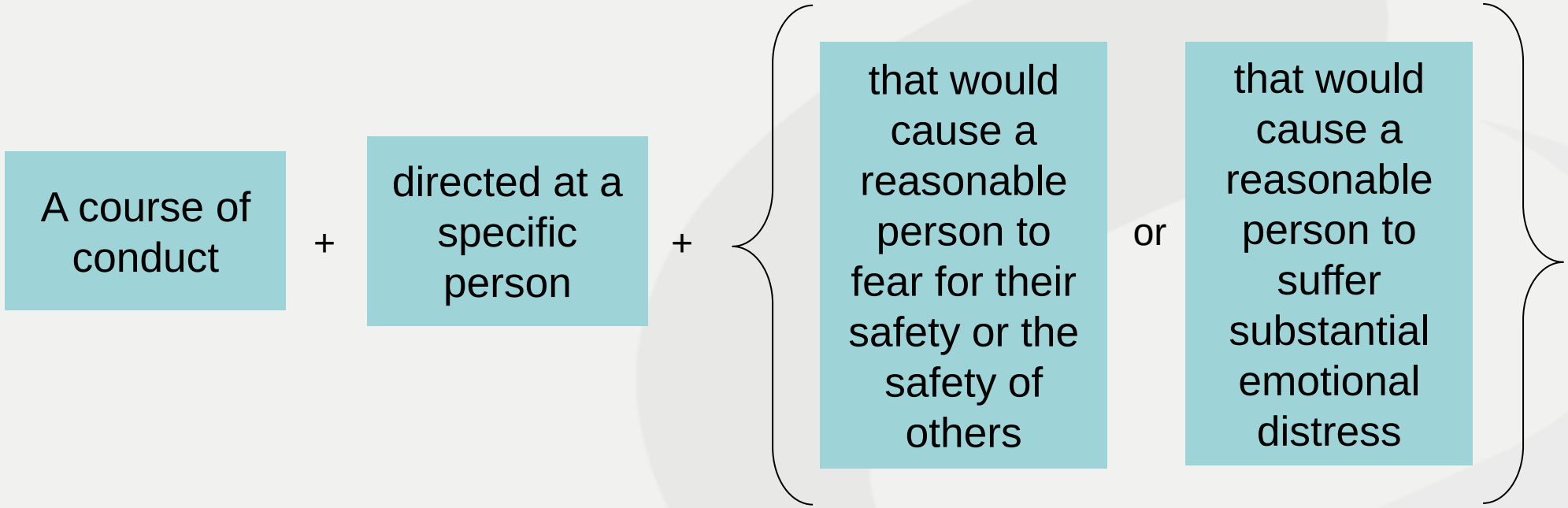
Before the Hearing

- Read the materials
- Understand the conduct that is prohibited
  - Elements
- Identify the issues in the case
  - Contact
  - Consent
  - Defenses
- Identify key witnesses and missing information

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Mapping the Policy Elements & Case Facts

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



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Mapping the Policy Elements & Case Facts

Blue type = Complainant's account

A course of conduct + directed at a specific person + { that would cause a reasonable person to fear for their safety or the safety of others **or** that would cause a reasonable person to suffer substantial emotional distress }

- Followed after class on September 3
- 67 unwelcome texts (October 30 – September 3)
- Used cloning app to get around being blocked (September 4)

- Yes (Complainant)

- Complainant expressed safety fear because Respondent was unpredictable and made specific threats toward Complainant and Complainant's new partner.

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

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Mapping the Policy Elements & Case Facts

Orange type = Respondent's account

A course of conduct +

- Did not follow on September 3; always walk that way.
- Complainant responded positively to many of the texts; never said they were unwelcome.
- Used cloning app because thought blocking must have been a mistake.

directed at a specific person +

- Yes (Complainant)

that would cause a reasonable person to fear for their safety or the safety of others or **that would cause a reasonable person to suffer substantial emotional distress**

- A reasonable person would not have felt in fear for their safety. I just wanted an explanation as to why our relationship ended. No threats made or implied.

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

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Witness Accounts

Witness Name	Relationship to Complainant	Relationship to Respondent	Relevant Information	Questions to Ask at Hearing
Sam	Acquaintance, in chemistry class together	Roommate	Left class with Complainant on September 3 and corroborated that Respondent followed Complainant. Said Respondent never walks that way.	1. Did you and Respondent ever discuss that you saw him following Complainant after class? 2. What was Complainant's demeanor when she said, "He's following me?"
Alex	Friend	Friend	Saw Snapchat video of Complainant crying and reading Respondent's texts aloud. Complainant texted screenshots of Respondent's texts to witness.	1. What is your relationship like now with Complainant and Respondent? 2. Can you share your thought process around your decision to delete the screenshots Complainant sent you?
Coach Jacobs	Coach	None	Disclosure witness for Complainant. Complainant sent text to Coach at 3AM on September 4. Stated that Complainant missed 2 weeks of practice.	

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

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HEARING PRACTICES

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Sample Hearing Overview

1. Panel Chair opens and establishes rules and expectations
2. Opening Statements
3. Panel questions Complainant
4. Cross-Examination of Complainant by Respondent's Advisor
5. Panel questions Respondent
6. Cross-Examination of Respondent by Complainant's Advisor
7. Panel questions Witness 1
8. Cross-Examination of Witness 1 by each party's Advisor

   [Repeat 7 and 8 for each witness]
9. Closing Statements

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Sample Outline of Introductory Remarks

- Hearing is being recorded
- Introduction of those present and their roles
- Remind all participants about the Rules of Decorum, Advisors' roles
- Hearing will include opening statements, questioning by the panel, and then questions from the parties
- Only those questions that seek relevant information may be asked
- The potential policy violation(s) at issue in the hearing are…
- Pursuant to our procedures, the Respondent is presumed to be not responsible. A finding of responsibility must be supported by a preponderance of the evidence.

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Sample Outline of Introductory Remarks

- If the Respondent is found responsible, the Panel will make a determination on the appropriate sanctions and remedies.
- Sanctions and remedies are designed to eliminate prohibited conduct, prevent its recurrence, remedy its effects, and restore or preserve the Complainant's equal access to education programs and activities while supporting the College's mission.
  - Sanctions may include educational, restorative, rehabilitative, and disciplinary components.
  - Some conduct is so egregious, harmful to the individuals involved, and/or so deleterious to the educational process that it requires severe sanctions including suspension or expulsion.
  - In determining the appropriate sanction, the hearing officer may consider factors including, but not limited to:
    - (List factors)

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Sample Outline of Introductory Remarks

- Statements made during the hearing are governed by the College's [honor code/code of conduct]. All College community members are expected to provide truthful information in any report or proceeding. Submitting or providing false or misleading information in bad faith or with a view toward personal gain or intentional harm to another is prohibited and subject to disciplinary action.
- Do you (parties and advisors) agree to uphold the Rules of Decorum?
- Any questions?
- (Addressing Complainant and Respondent individually) Do you promise that the statements you make during this hearing will be truthful?

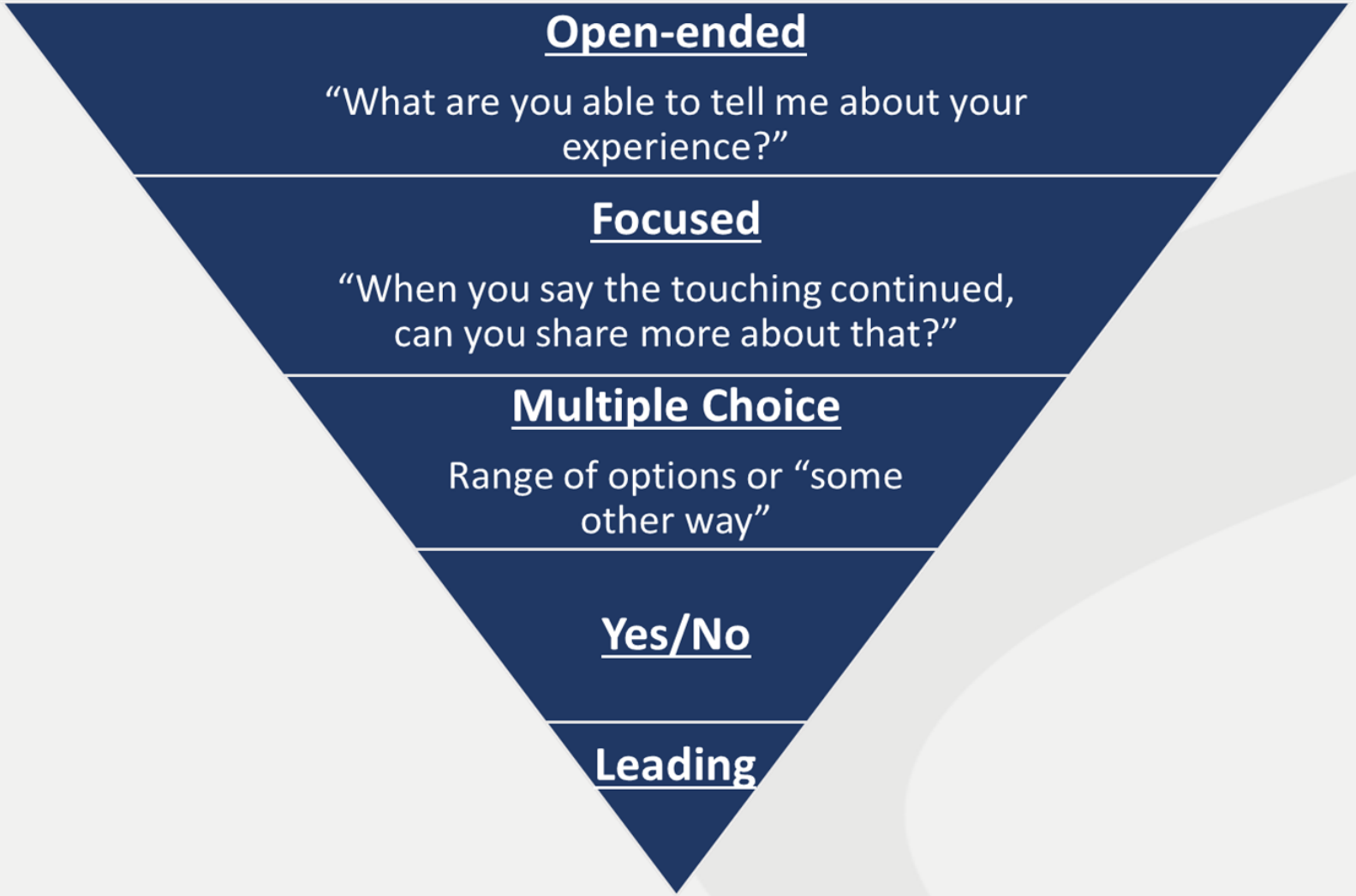
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What to Ask

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

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The Continuum Approach



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Questioning

- Recognize the impact of trauma and stress on memory
  - Allow the witness to give a narrative
  - Use open-ended free recall questions
  - Build in an opportunity for follow up

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Evidentiary Concepts



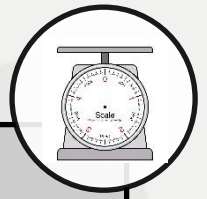
- Of consequence
- Makes a material fact more or less likely
- Includes inculpatory and exculpatory information

Relevant Information



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

Irrelevant Information



Consider:

- Credibility
- Reliability
- Timing
- Centrality

Weight

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Evidentiary Concepts

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



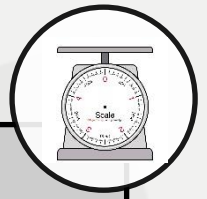
- Of consequence
- Makes a material fact more or less likely
- Includes inculpatory and exculpatory information

Relevant Information



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

Irrelevant Information



Consider:

- Credibility
- Reliability
- Timing
- Centrality

Weight

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Evidentiary Concepts

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



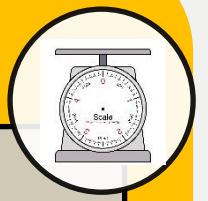
- Of consequence
- Makes a material fact more or less likely
- Includes inculpatory and exculpatory information

Relevant Information



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

Irrelevant Information



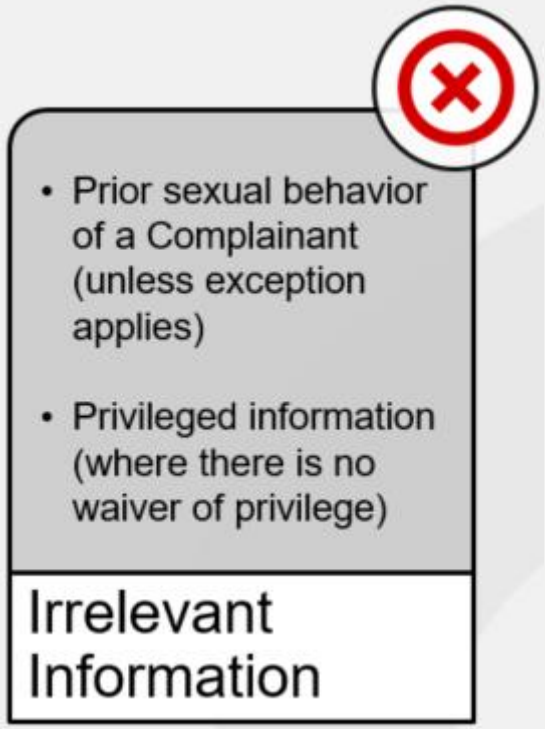
Consider:

- Credibility
- Reliability
- Timing
- Centrality

Weight

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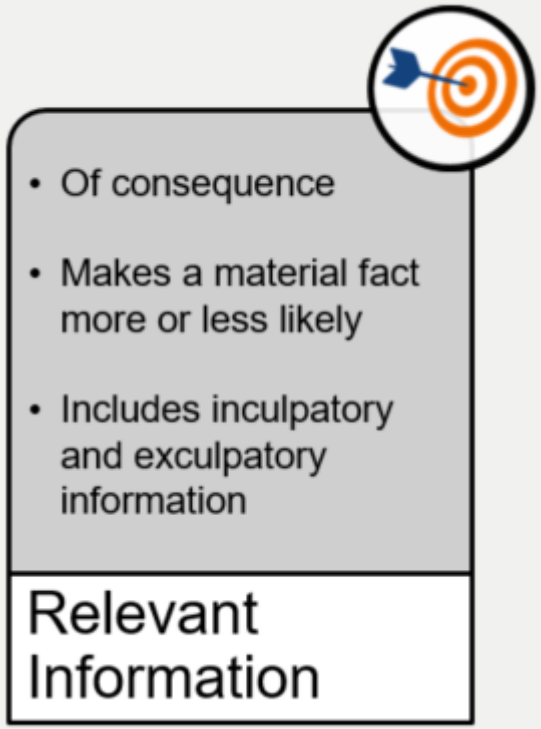
Per Se Irrelevant Information



- Questions and evidence about the **Complainant's sexual predisposition or prior sexual behavior** are not relevant, unless offered:
  - To prove that someone other than the respondent committed the conduct alleged by the complainant, or
  - To prove consent, if the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent.
- Information protected by any **legally recognized privilege** cannot be used without that party's voluntary, written consent.

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Relevant Information



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

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Relevance of Prior or Subsequent Conduct

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

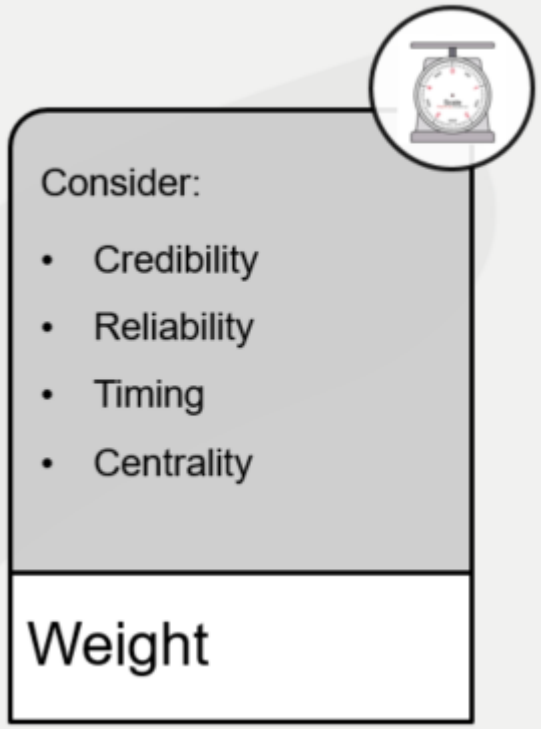
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Framing Difficult Questions

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

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Weight



- Weight is a distinct concept
- When considering what weight to give to a piece of information, consider:
  - Credibility factors
  - Quality and quantity
  - Overall importance to the determination (centrally important versus peripherally important)
  - Totality of the circumstances

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Hearing Panel Conduct

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

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Standard of Proof



Beyond a Reasonable Doubt

Clear and Convincing Evidence

Preponderance of the Evidence

Some Evidence

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Personal Presentation: Be Objective

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

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Personal Presentation: Be Professional

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

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DETERMINATION REGARDING RESPONSIBILITY

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Deliberation Techniques

- Discuss ground rules and manner of deliberation in advance
- Be respectful to your fellow panel members
- Each panelist has an equal voice, irrespective of role on campus
- Be willing to listen to the perspective of the other panelists

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Deliberation Techniques

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

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Determination Regarding Responsibility

- Includes:
  - All factual findings
  - Credibility determinations
  - Finding, by a preponderance of the evidence, of whether the conduct occurred
  - Finding of whether the conduct violated any institution policies
  - Recommendation for sanctions

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Determination Regarding Responsibility

- Begin with introduction of parties, relationship to one another relationship to the institution
- Describe when and how report was received
- Outline basic nature of report as presented by the complainant
- Outline response to the report by the respondent
- Specify policy violations at issue
- Outline information presented at hearing
- State finding and rationale for finding
- State recommended sanction and rationale (If applicable)

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Determination Regarding Responsibility

- Outline areas of agreement/disagreement (areas where the information is contested/not contested)
- Include timeline for synthesis and analysis of facts
- If making determinations of credibility or findings of fact:
  - Tie discussion and rationale to the elements of the potential policy violations
  - Identify the elements
  - Identify the evidence that supports/rebuts the establishment of the elements
  - Evaluate and analyze credibility factors

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Determination Regarding Responsibility

- When making the determination of responsibility
  - Make finding as to sufficiency, by a preponderance, to support finding of responsibility
    - Sufficient or insufficient
    - NOT a finding by a preponderance that event did not occur
  - Must provide rationale
    - Can be concise, but must communicate salient elements of finding
    - Again, comment on evidence, not the people
    - Avoid extraneous and tangential comments
    - Remain closely tied to the facts and reasonable inferences

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SANCTIONS

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Key Elements for Good Sanctioning

- Imposition of sanctions is designed to:
  - eliminate prohibited conduct, prevent its recurrence, and remedy its effects;
  - support the College's educational mission and federal obligations.

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Sanctioning Considerations

- Severity of conduct
- Prior policy violations
- Must be proportionate to the violation

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Key Elements for Good Sanctioning

- Sanctions may include:
  - educational, restorative, rehabilitative, and punitive components.
  - Some conduct, however, is so egregious in nature, harmful to the individuals involved , or so deleterious to the educational process that it requires severe sanctions, including suspension or expulsion.

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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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