

# TRAINING

# Training

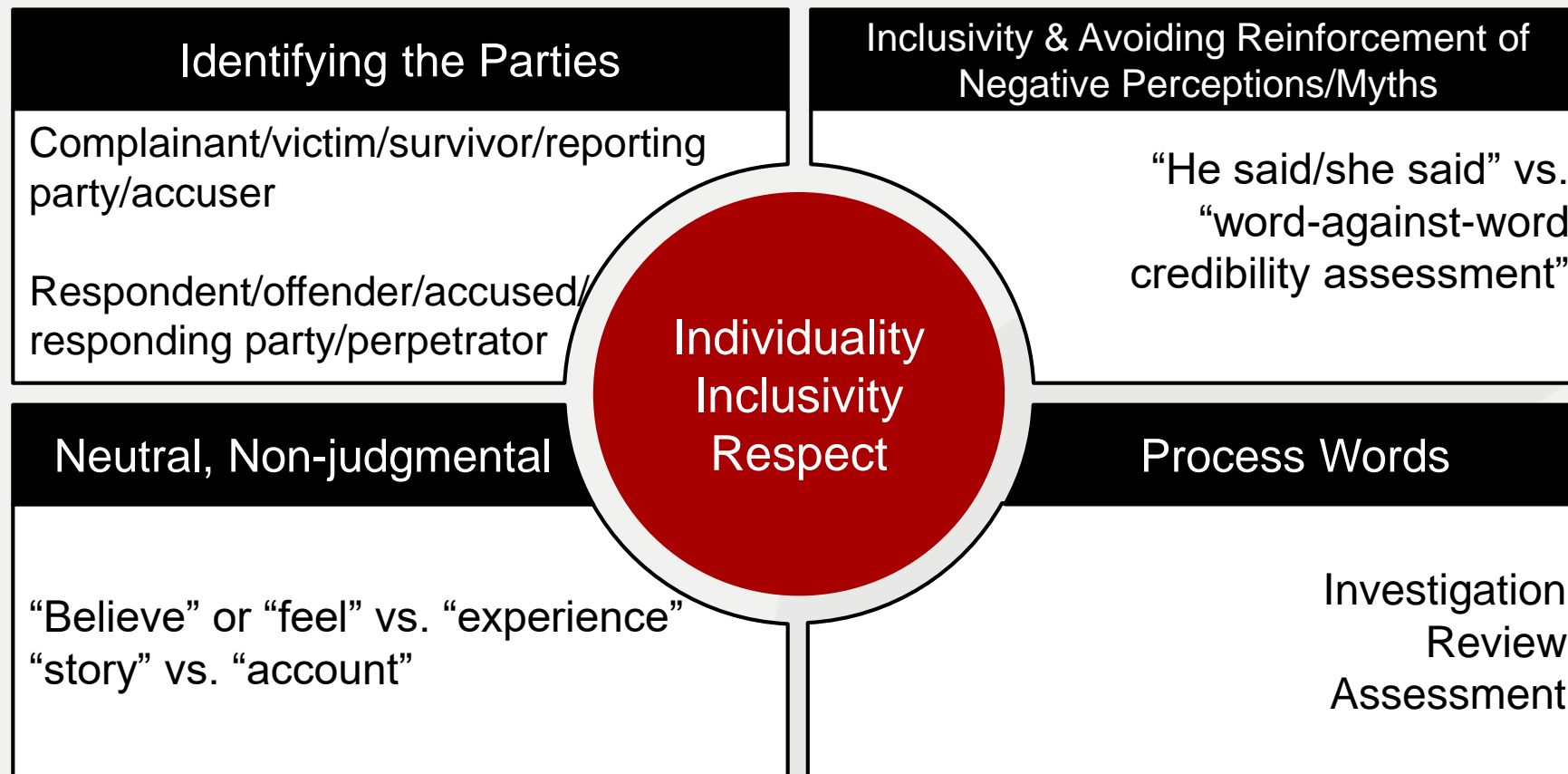
- A recipient must ensure that **Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution** process, receive training on:
  - The definition of sexual harassment in § 106.30
  - The scope of the recipient's education program or activity
  - How to conduct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

# Training

- A recipient also must ensure that investigators receive training on:
  - Issues of relevance to create an investigative report that fairly summarizes relevant evidence
- Any materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, must not rely on sex stereotypes and must promote impartial investigations and adjudications of formal complaints of sexual harassment

# **SERVING WITHOUT CONFLICT OF INTEREST OR BIAS**

# Awareness of the Impact of Language



# 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

# 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

# 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



# 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

# Framing Difficult Questions

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

# **ALCOHOL, DRUGS AND INCAPACITATION**

# 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

# The Role of Alcohol

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

1. DOJ, National Institute of Justice, 2005.

2. National Center on Addiction and Substance Abuse at Columbia University 2007.

3. Bureau of Justice Statistics, 2000, National Commission on Substance Abuse at Colleges and Universities

# 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

# 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

# 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)



# 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

# 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

# Get Detailed Information

- Others' 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

# 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

# Considerations

Avoid	Why?	Try this instead
Asking about intoxication on a scale (e.g. "from 1-10")	There is no universal understanding of what the numbers on the scale mean	Asking about the impacts of alcohol on a person physically, cognitively, verbally, and otherwise; Asking for specific observations regarding conduct
Committing to a determining a specific BAC	It is very difficult to pinpoint a person's BAC after the fact. Additionally, 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 in medical records. Otherwise, avoid attempting to pinpoint the BAC and rely instead on the subjective and objective indicia of intoxication/incapacitation.
Failing to obtain or ignoring medical evidence or observations of first responders, when they are available	Such witnesses are (generally) sober, trained observers who are paying close attention to the parties and surroundings. Their observations are critical, but it may necessitate coordination with external law enforcement or medical personnel.	Be attendant to mentions of first responders or medical personnel and try to obtain as much information about them as you can. Witnesses may remember, for example, that the EMT was female and had short brown hair. Work with your local agencies to identify such personnel and ascertain whether they can be made available for an interview.
Failing to fully contextualize witnesses' observations through use of a 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 that shows the parties' alcohol consumption, witness observations, and the alleged incident. Circle or highlight the timeframe when the parties were in each other's presences.

# 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 and C "pre-gamed" at A's apartment. Drank 3 shots Jim Beam and ate chips and guacamole. Walked from A's apartment to second "pre-game" at B's apartment. Drank 2 shots of Ciroc Peach and threw up in B's sink.	C interview A interview B interview C's photos w/ date/time	8:00 PM	Respondent arrived at party by himself. Filled one 16-ounce cup with beer and drank it quickly.	R interview
		8:30 PM	Saw friends X, Y, Z. Z gave Respondent keys to his room where Z kept hard liquor. Respondent retrieved a 750 ml bottle of Fireball 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.	R interview X interview Y interview Z interview
		9:00 PM		
Complainant arrived at party with A, B, C. Complainant's friend D got her a 16-ounce cup of "jungle juice" which she drank slowly over the course of about an hour.	C interview A interview B interview D interview	9:30 PM		
		10:00 PM		
Complainant went upstairs to check out the view from the roof. As she was walking back downstairs, she took the last sip of her "jungle juice" and saw Respondent. Complainant texted her mom, "addfa."	C interview C's texts C's photos w/ date/time	10:30 PM	Respondent texted Z "thanks for the fireball. Let me know where I can meet you to give you your key back." Respondent saw Complainant coming down the stairs.	R interview R's texts
Complainant reported a complete memory loss from about 10:30 until the next morning.	C interview	11:00 PM	Complainant and Respondent went upstairs into the bathroom. Respondent's friend W walked in as they were kissing and undressing.	R interview W interview
Complainant's friend A saw her leaving the bathroom with her shirt on backwards. A escorted Complainant home.	A interview	11:30 PM	Respondent left the bathroom and texted Z "I just got laid!"	R interview Z interview R's texts

# **BREAKOUT 9: CREATE A UNIVERSAL TIMELINE**

# **INVESTIGATIVE RESOURCES**



# 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 / DCL:
    - Confidentiality limitations
    - Facilitation of report to police

# Incident Report Form

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

# Investigation Checklist

- Complainant's name or anonymity requested
- Place of occurrence
- Nature of occurrence
- Time of occurrence
- Time of reporting
- Alcohol involved: 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

# 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?

# Investigation Checklist: Reporter

- Overall credibility?
  - Cognitive impairment?
  - Evidence of psychosis?
  - Evidence of coaching?
  - Current situation impacted by results of conclusions?
- Demeanor?
  - At time of event?
  - At time of reporting?
  - As reported by other witnesses?  
If so, identify witnesses.
  - In our interview?
- Secondary gain?
  - Financial?
  - Situational?
  - Occupational?
- Interests or bias?
- Details of description:
  - Central issues?
  - Peripheral issues?
- Corroboration?
- Do facts hang together? Why? Why not?

# Investigation Checklist: Respondent

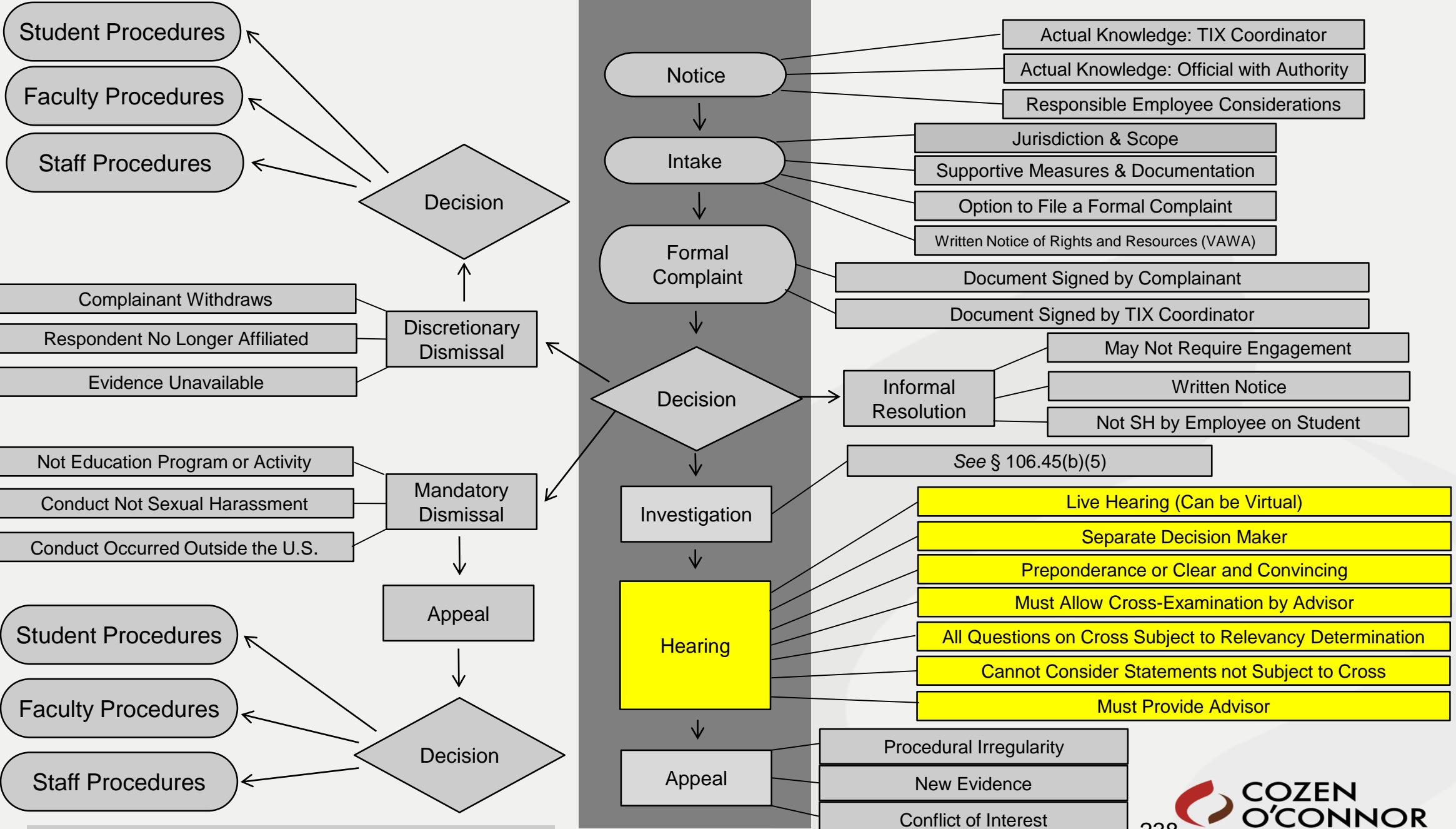
- Other acts/behaviors relevant to intent?
  - Evidence of substance abuse?
    - If so, is it admitted?
  - Evidence of impulse control issues?
    - If so, is it admitted?
  - Admission of physically inappropriate behavior?
  - Admission of sexually inappropriate behavior?
  - Evidence of fabrication 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?

# Resources

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

# **OVERVIEW OF HEARING REQUIREMENTS**



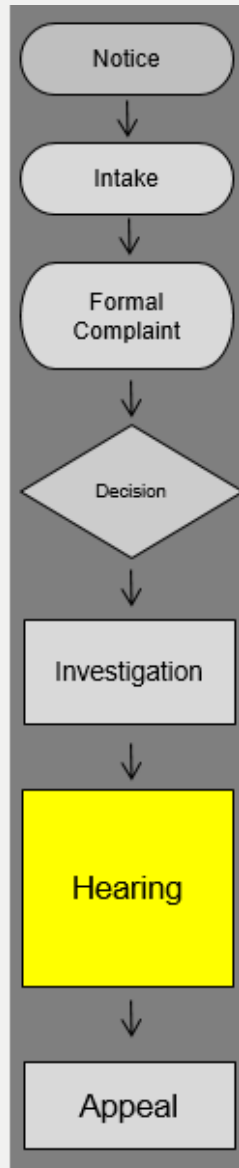


# Let's Take a Poll

- Question 1: Prior to the new regulations, did your school use a hearing to resolve allegations of sexual misconduct? [Yes/No]
- Question 2: If your school used a hearing, were the parties permitted to appear at the hearing to provide testimony? [Yes/No]
- Question 3: If your school used a hearing, were the parties permitted to provide witnesses at the hearing? [Yes/No]
- Question 4: If your school used a hearing, were the parties permitted to question the other party and/or witnesses in some format? [Yes/No]
- Question 5: If your school used a hearing, did it include live cross-examination? [Yes/No]

# **ROLE OF DECISION-MAKER**

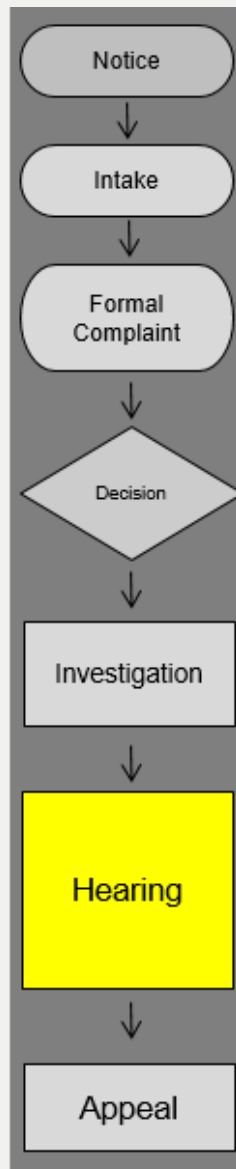
# Determine Relevance of Questions



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

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

# Explain Decisions to Exclude Questions

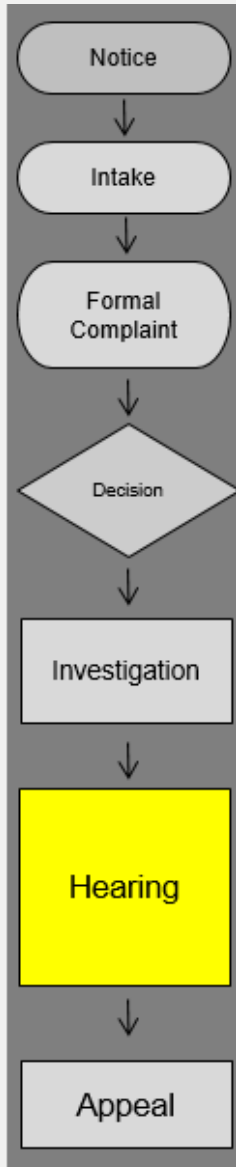


- The decision-maker(s) must explain to the party proposing the questions **any decision to exclude** a question as not relevant.

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

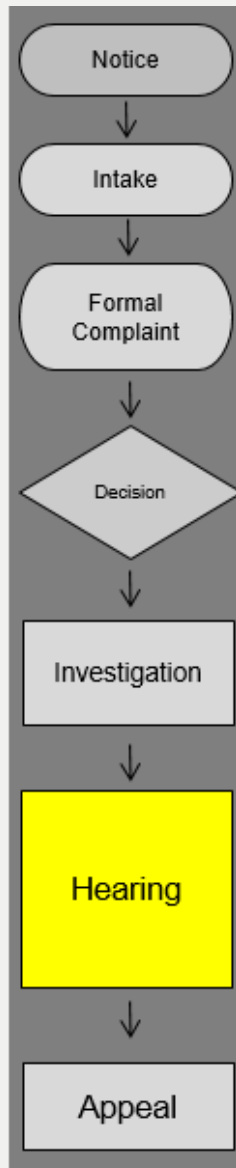
# Apply the Standard of Evidence

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



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

# Issue Written Determinations

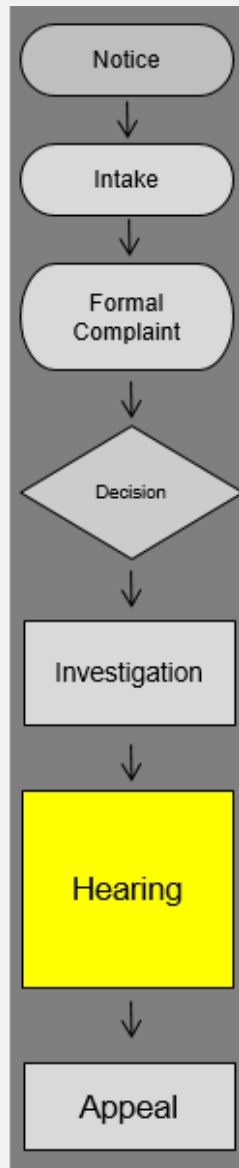


- The decision-maker(s) ... must issue a simultaneous written determination regarding responsibility, including
  - Identification of the allegations
  - Description of the procedural steps taken from the receipt of the formal complaint through the determination
  - Findings of fact supporting the determination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

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

# Separate Decision-Maker

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

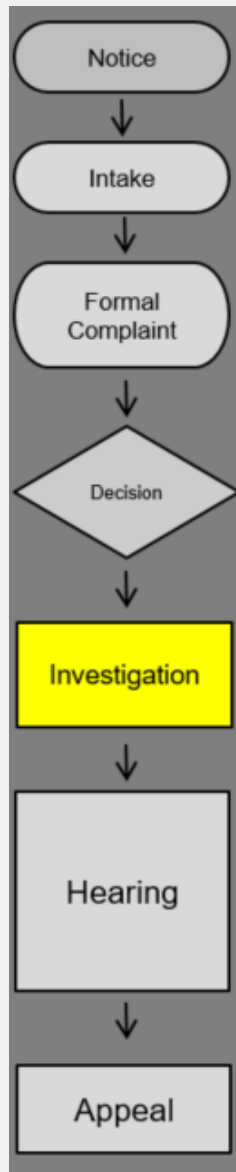


Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30372



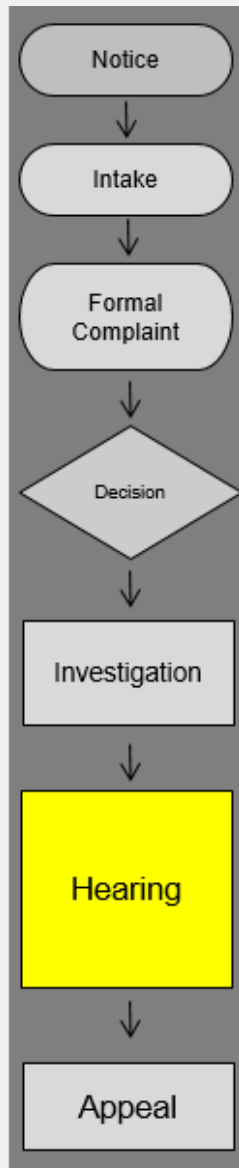
# Investigator May not Determine Responsibility

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



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

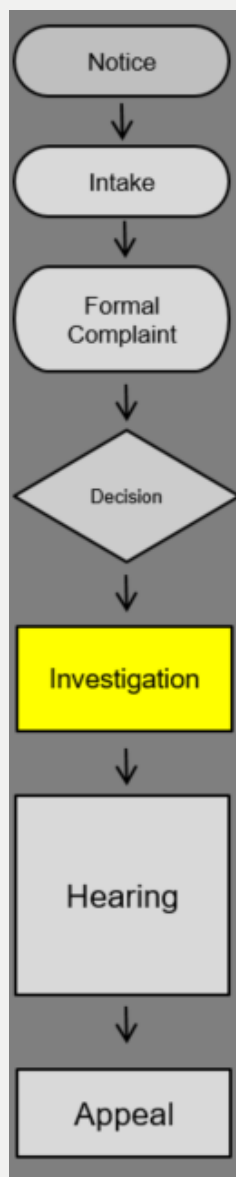
# Decision-Maker Must Determine Responsibility



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

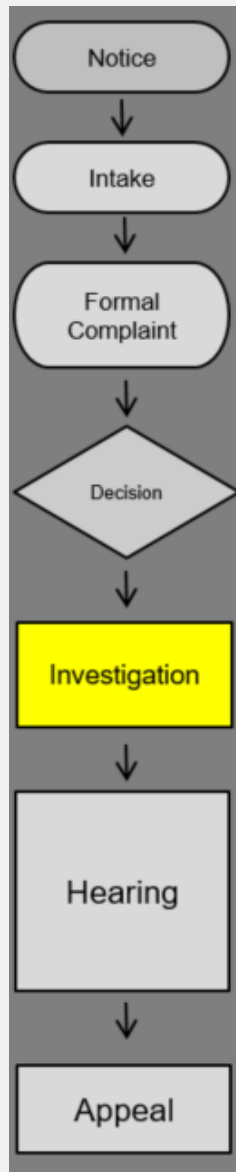
Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30372

# Independent Obligation to Evaluate Evidence



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

# Independent Obligation to Evaluate Credibility

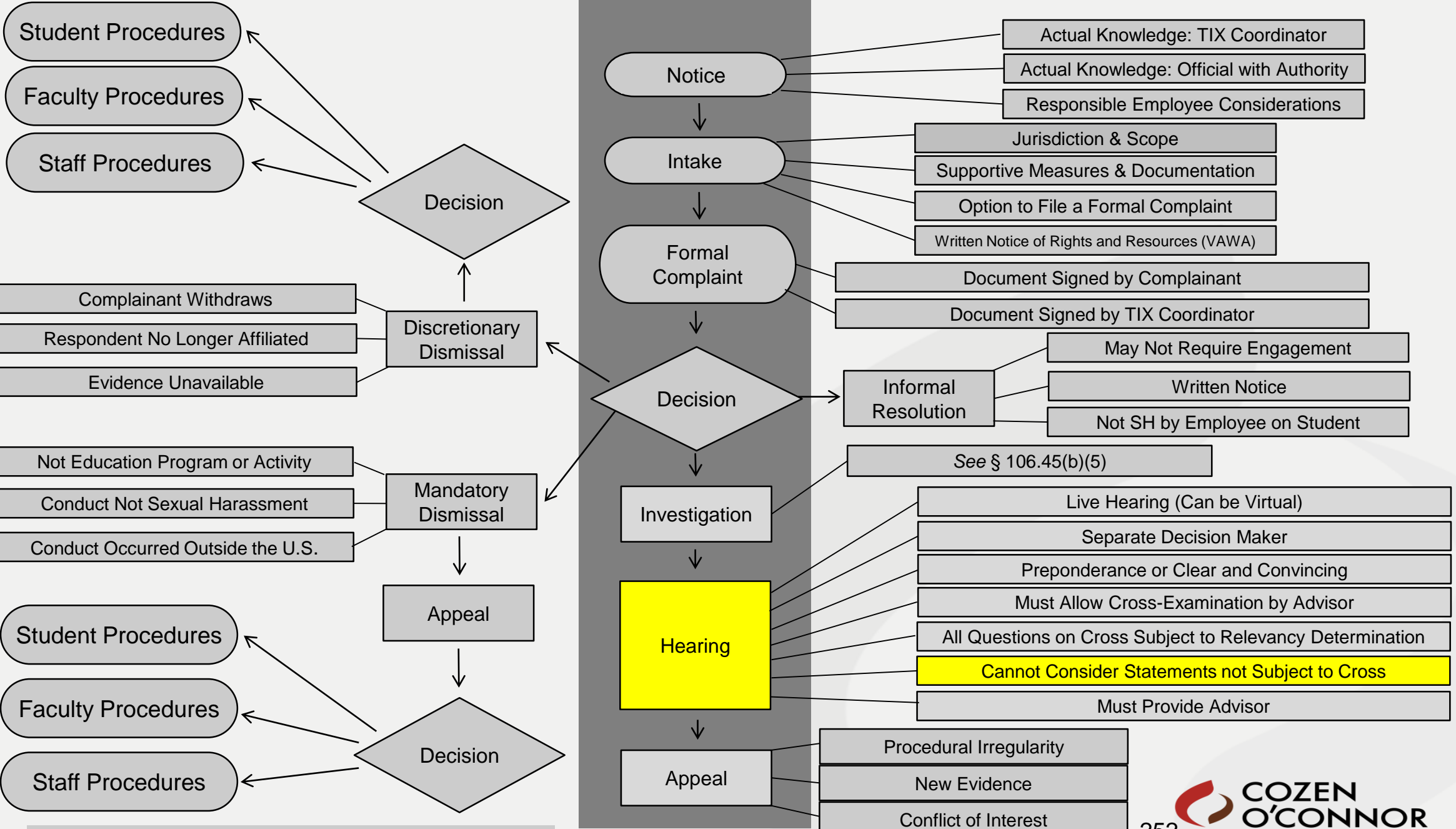


- If a recipient chooses to include a **credibility analysis** in its investigative report, the recipient must be cautious not to violate § 106.45(b)(7)(i), prohibiting the decision-maker from being the same person as the Title IX Coordinator or the investigator.
- If an investigator's determination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

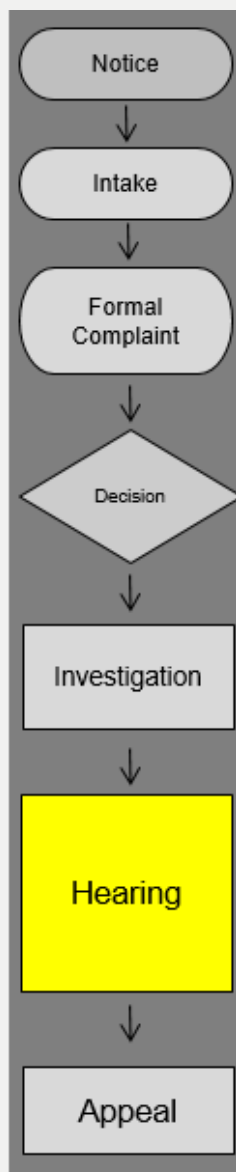
# Practical Considerations & Effective Practices

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

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



# Exclusion of Statement



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

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



# Exclusion of Statement

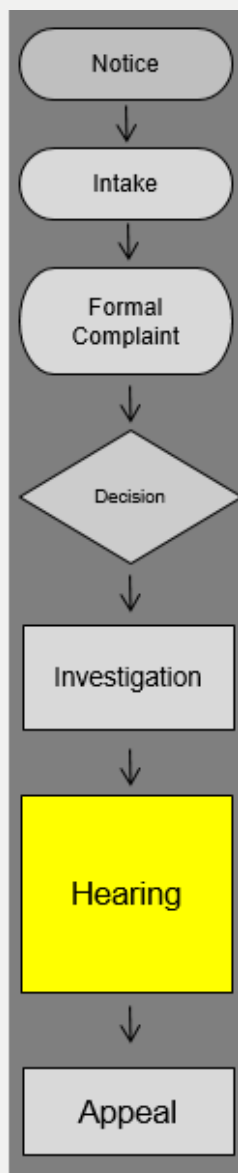


- [I]n the postsecondary context, **only statements that have been tested for credibility** will be considered by the decision-maker in reaching a determination regarding responsibility.
- Because party and witness statements so often raise **credibility** questions in the context of sexual harassment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

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

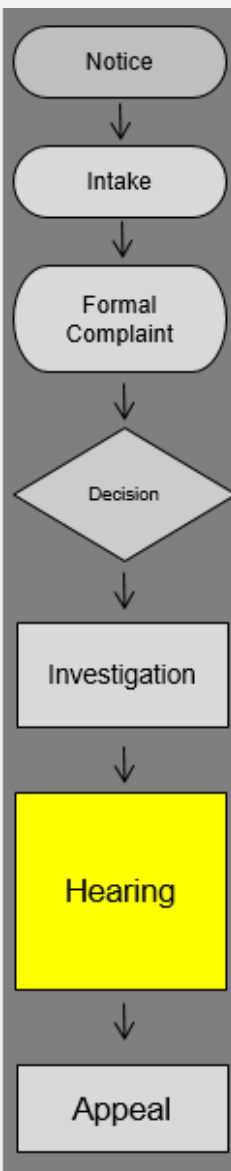
# Exclusion of Statement

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



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

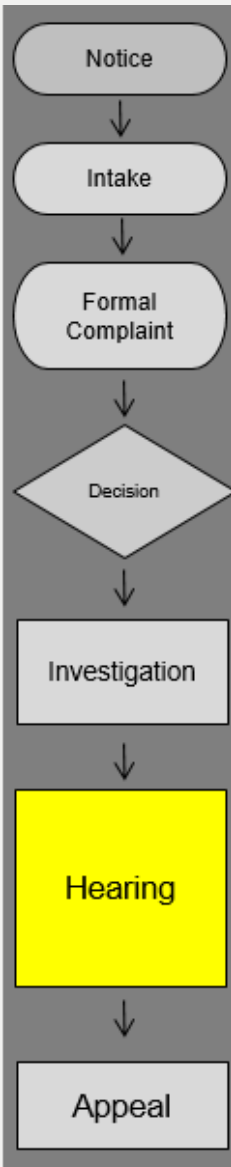
# Exclusion of Statement



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

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

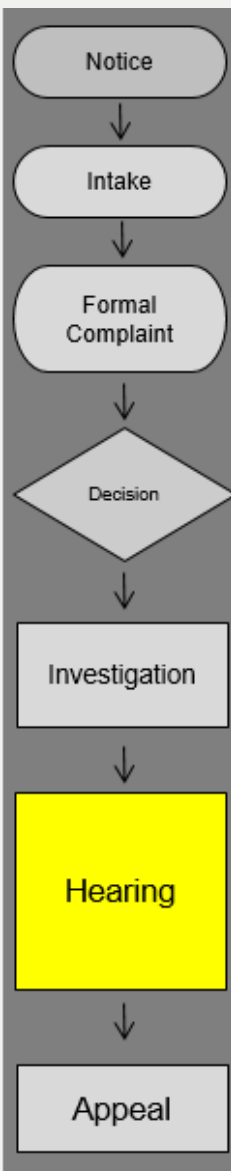
# Exclusion of Statement



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

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

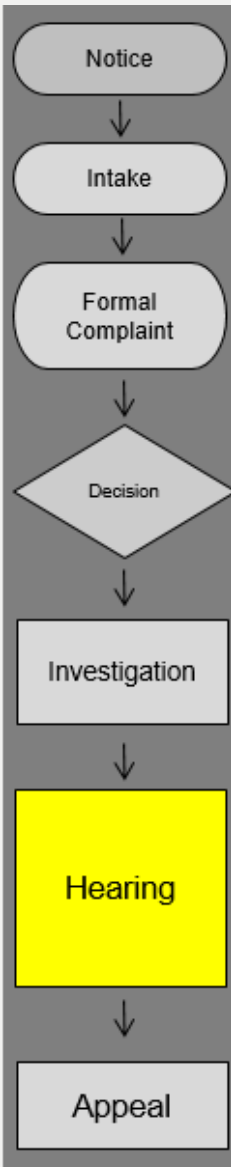
# Exclusion of Statement



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

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

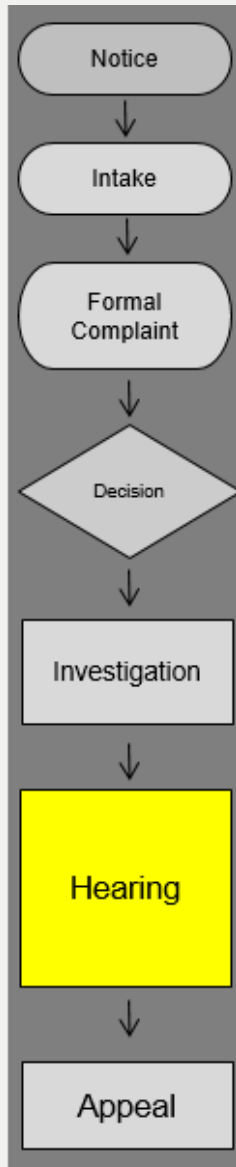
# Submit to Cross-Examination



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

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

# Submit to Cross-Examination



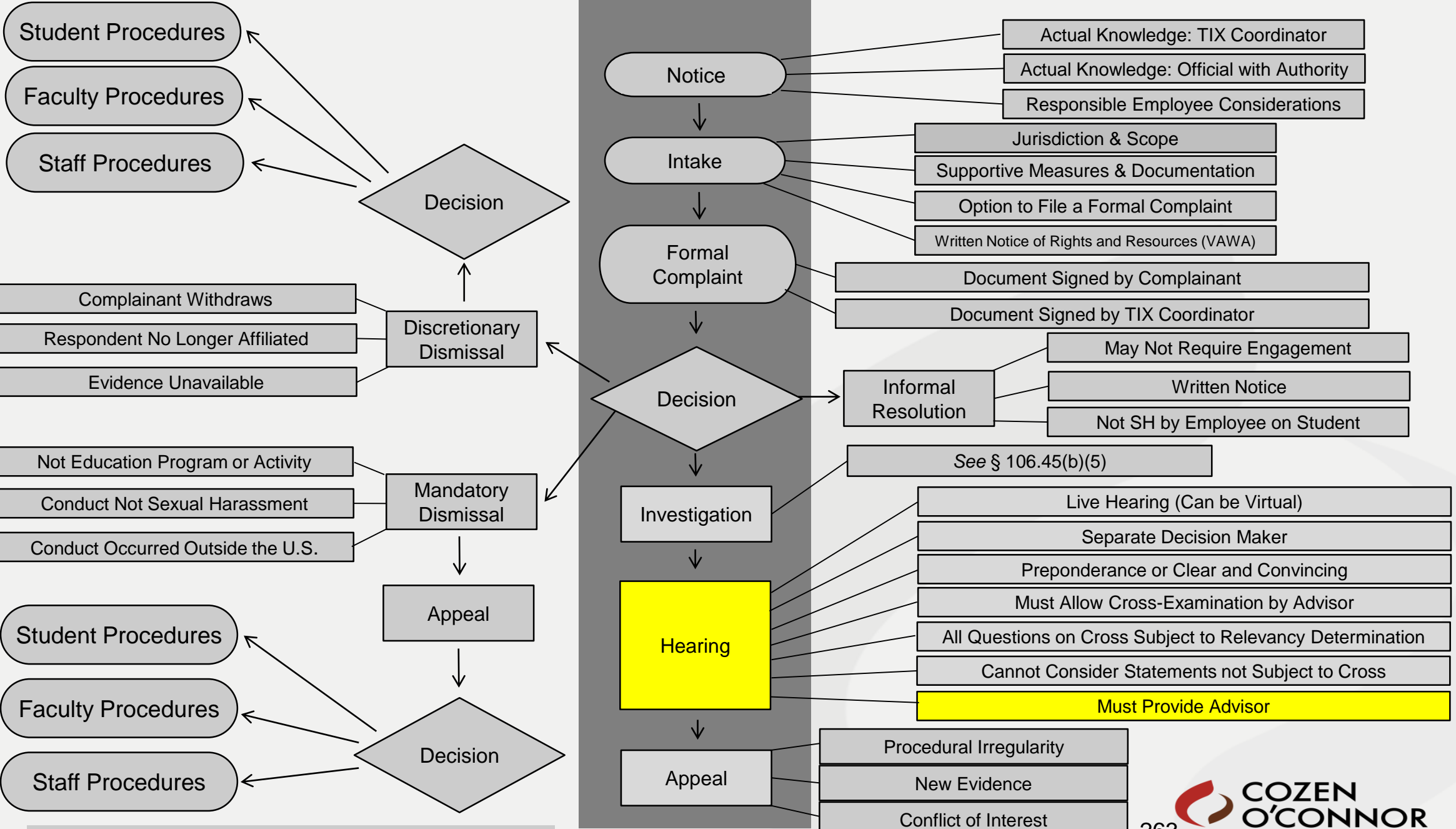
- This provision requires a party or witness to “submit to cross-examination” to avoid exclusion of their statements; the same exclusion of statements **does not apply to a party or witness’s refusal to answer questions posed by the decision-maker.**
- If a party or witness **refuses to respond to a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

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

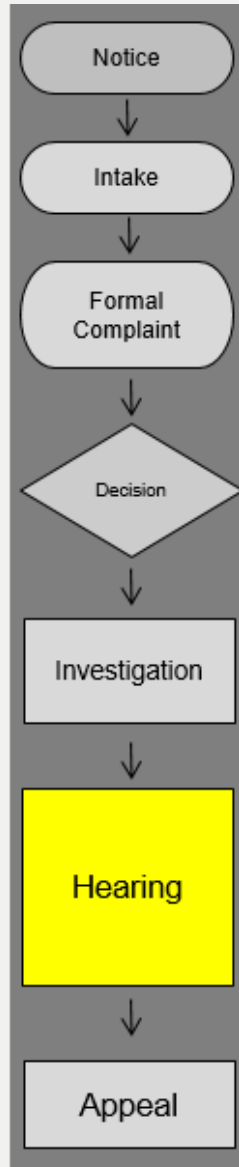
# **BREAKOUT EXERCISE # 10**



# **ADVISOR OF CHOICE**



# Title IX: Advisor of Choice

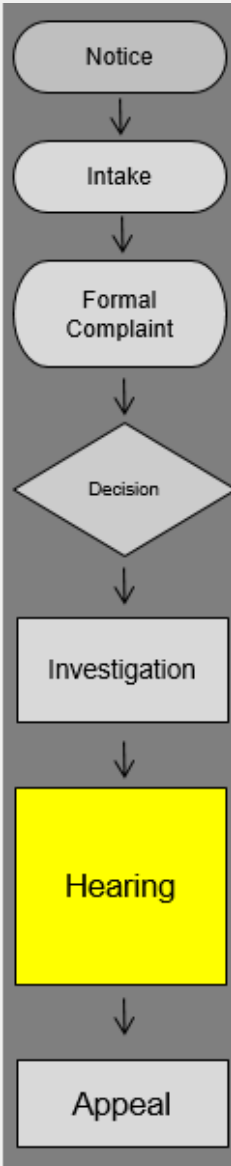


- Parties must have the same opportunities to ... be accompanied to any related meeting or proceeding by **an advisor of their choice**.
- The advisor may be, but is not required to be, **an attorney**.
- A recipient **may establish restrictions** on advisors' participation, as long as the restrictions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

# 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

# No Limit as to Conflicts of Interest

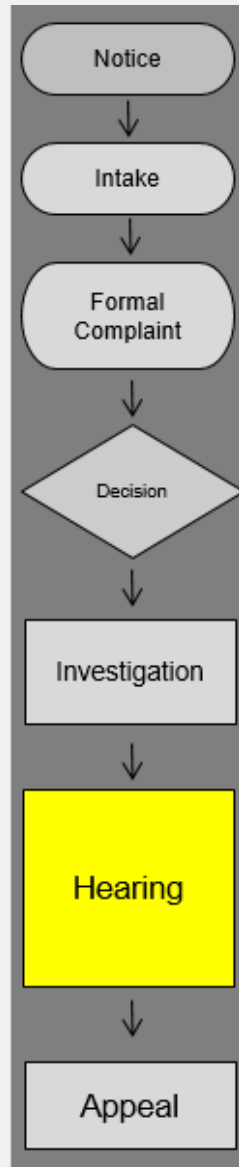


- The Department notes that the 106.45 (b)(1)(iii) prohibition of Title IX personnel having conflicts of interest or bias **does not apply to party advisors** (including advisors provided to a party by a post secondary institution as required under 106.45(b)(6)(i)) and thus, **the existence of a possible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

Title IX Regulations May 19, 2020; Preamble at 30299

# **ROLE OF THE ADVISOR AT HEARING**

# Role of the Advisor



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

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

# Advisor's Role at the Hearing

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

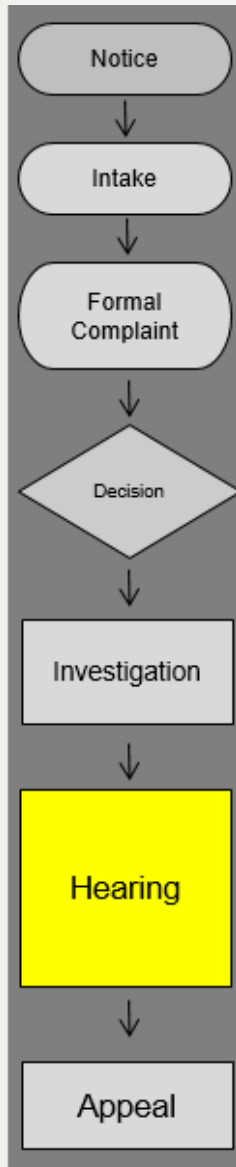


Title IX Regulations, May 19, 2020; Preamble, 85 F.R. 30336, 30577.



# Cross-Examination by Advisor

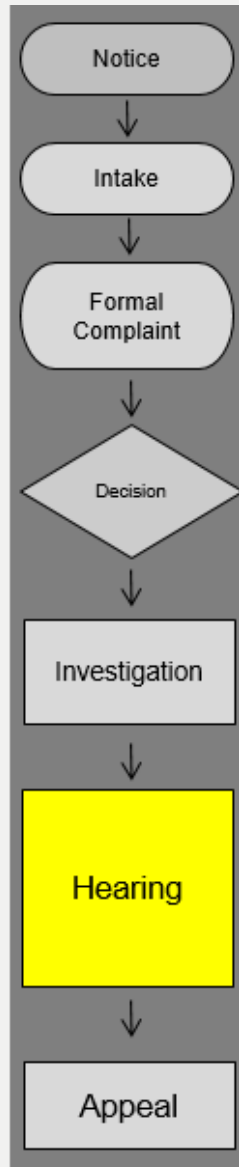
- [A] party's advisor may appear and conduct cross-examination **even when the party whom they are advising does not appear.**



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

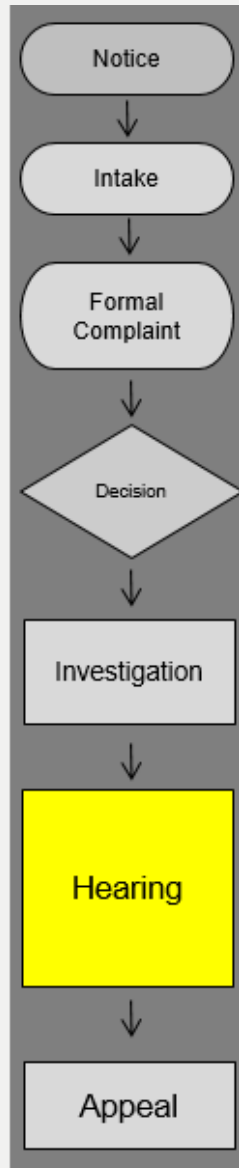
# Discretion as to Advisor's Role

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



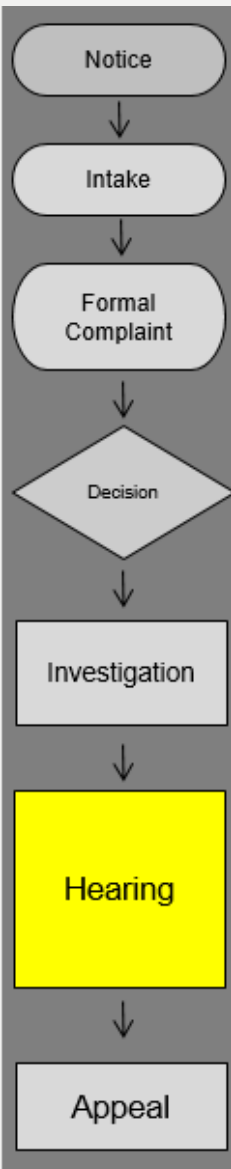
# Discretion as to Advisor's Role

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



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

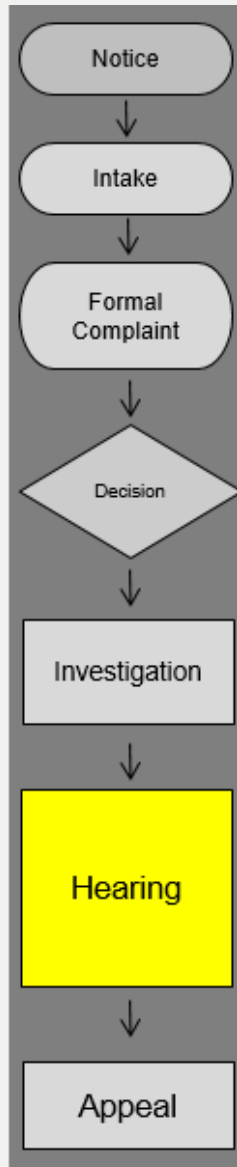
# Obligation to Provide an Advisor



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

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

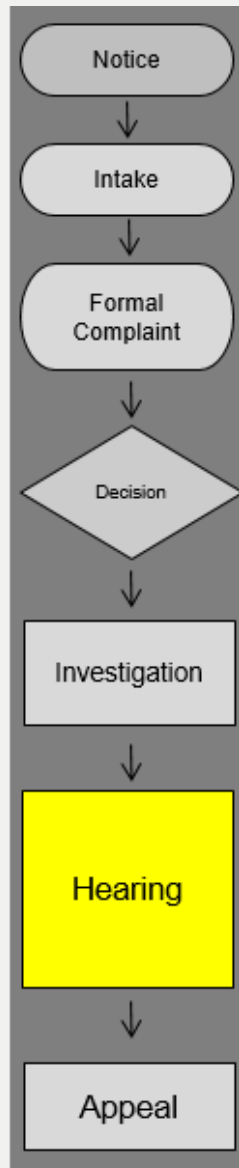
# Must Provide Advisor Even in Party's Absence



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

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

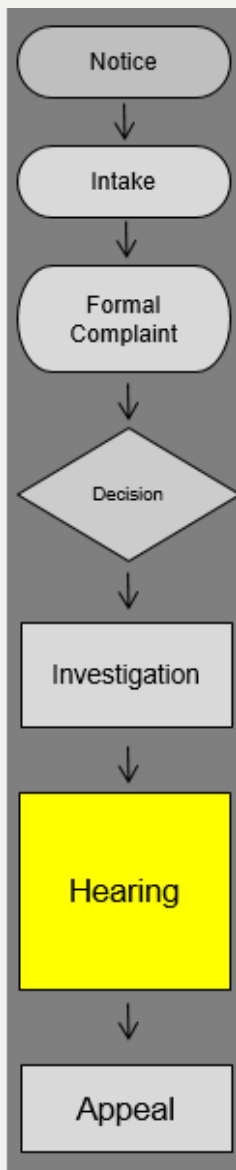
# Appearance Without an Advisor



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

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

# Refusal to Conduct Cross-Examination

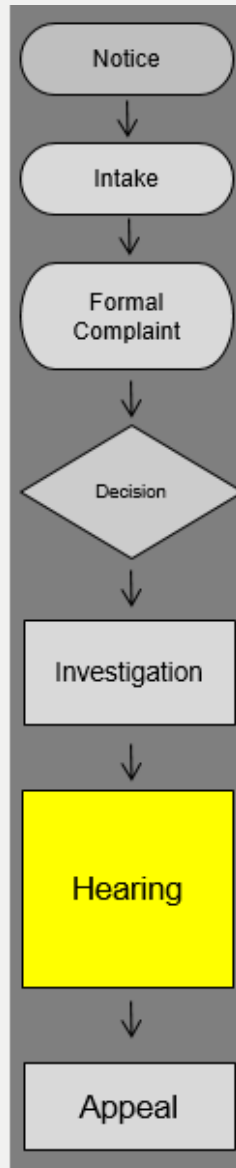


- A party cannot “fire” an assigned advisor during the hearing, **but if the party correctly asserts that the assigned advisor is refusing to “conduct cross-examination on the party’s behalf” then the recipient is obligated to provide the party an advisor to perform that function, whether that means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

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

# Party Cannot Conduct Own Cross-Examination

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



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

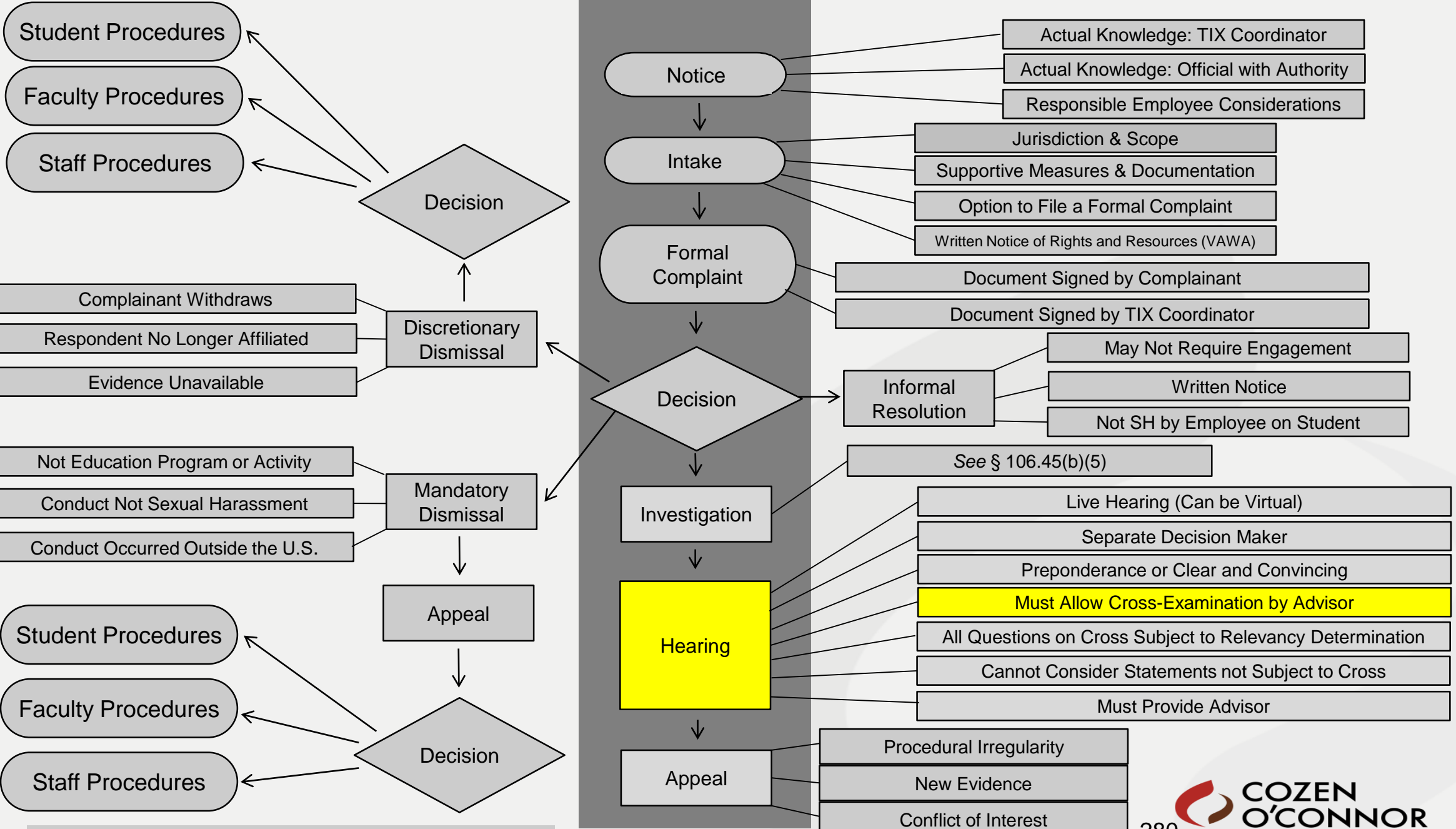
Title IX Regulations, May 19, 2020; 85 F.R. 30342



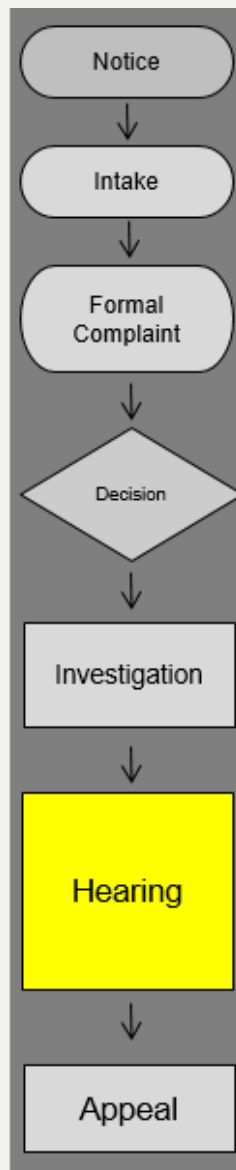
# Practical Considerations & Effective Practices

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

# **CROSS-EXAMINATION BY ADVISOR**



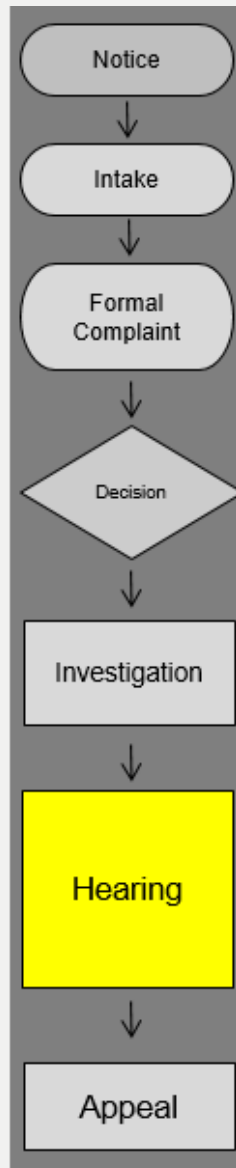
# Cross-Examination



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

Title IX Regulations, May 19, 2020; § 106.45(b)(6)  
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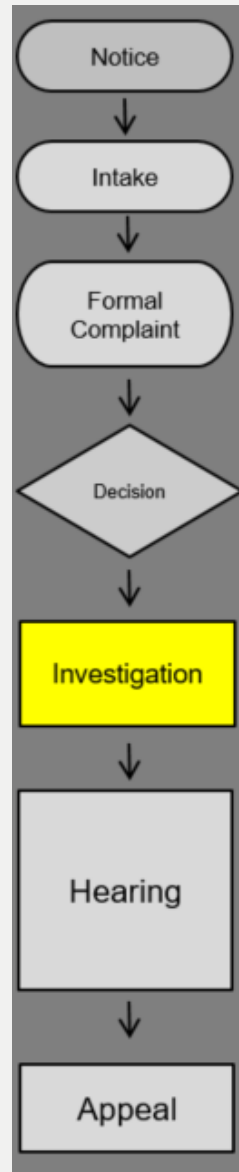
# Cross-Examination



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

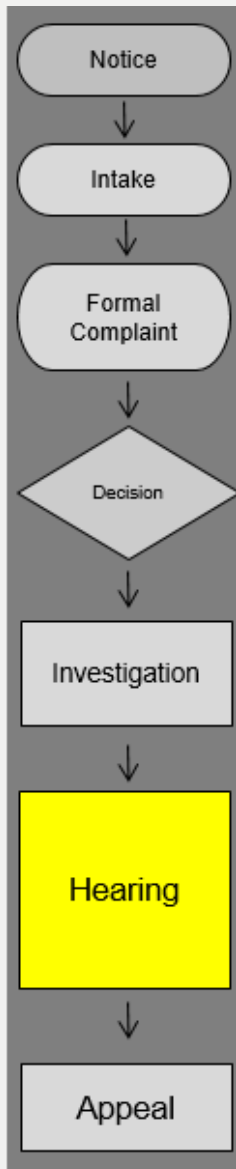
Title IX Regulations, May 19, 2020; § 106.45(b)(6)

# Recap on Evidence Review



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

# Availability of Evidence at the Hearing



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

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

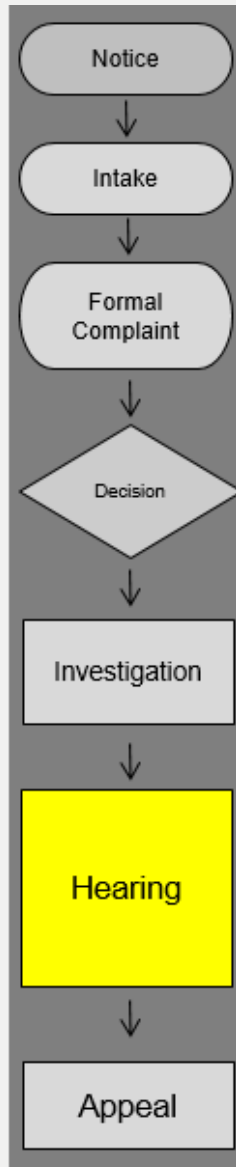
# Opportunity to Challenge Evidence



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



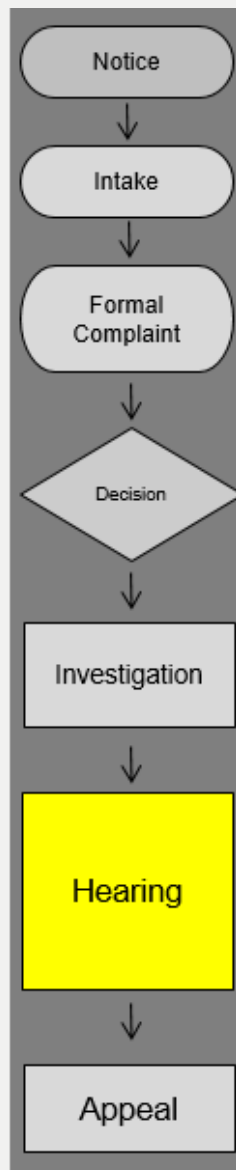
# Questions to Advance a Party's Interest



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

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

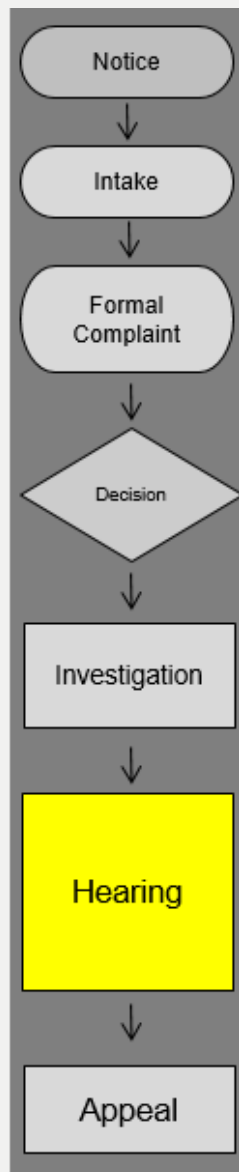
# Cross-Examination



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

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

# Determinations Regarding Relevance



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

Title IX Regulations, May 19, 2020; § 106.45(b)(6)  
Title IX Regulations, May 19, 2020; 288 preamble 85 F.R. 30343

# “Pause” to Reinforce Decorum



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

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

# Rules of Decorum



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

# Rules of Decorum



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

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

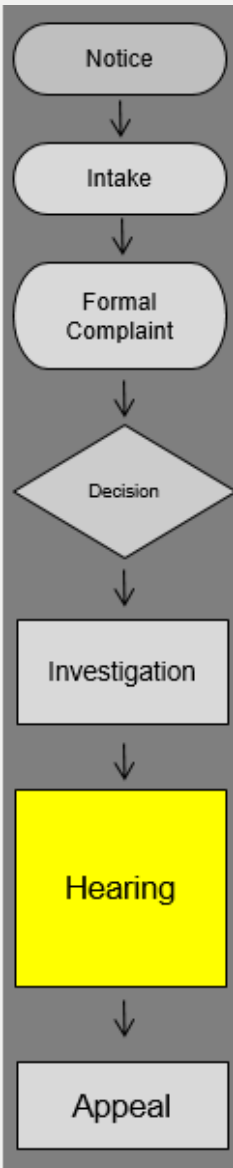
# Training Not Required for Advisors



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

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

# May Not Impose Training Requirements

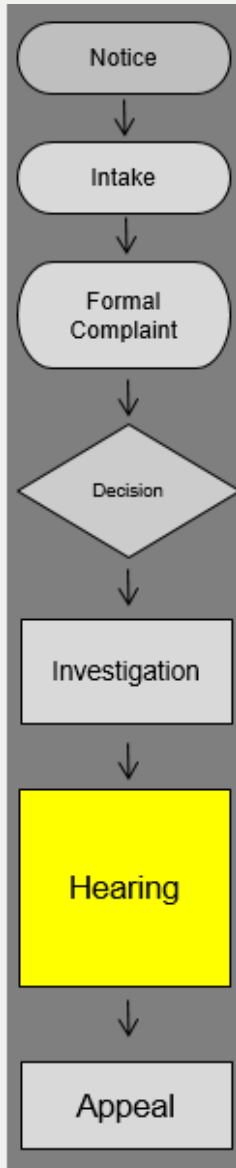


- Recipients may not impose training or competency assessments on advisors of choice selected by parties, but nothing in the final regulations prevents a recipient from training and assessing the competency of its own employees whom the recipient may desire to appoint as party advisors.

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



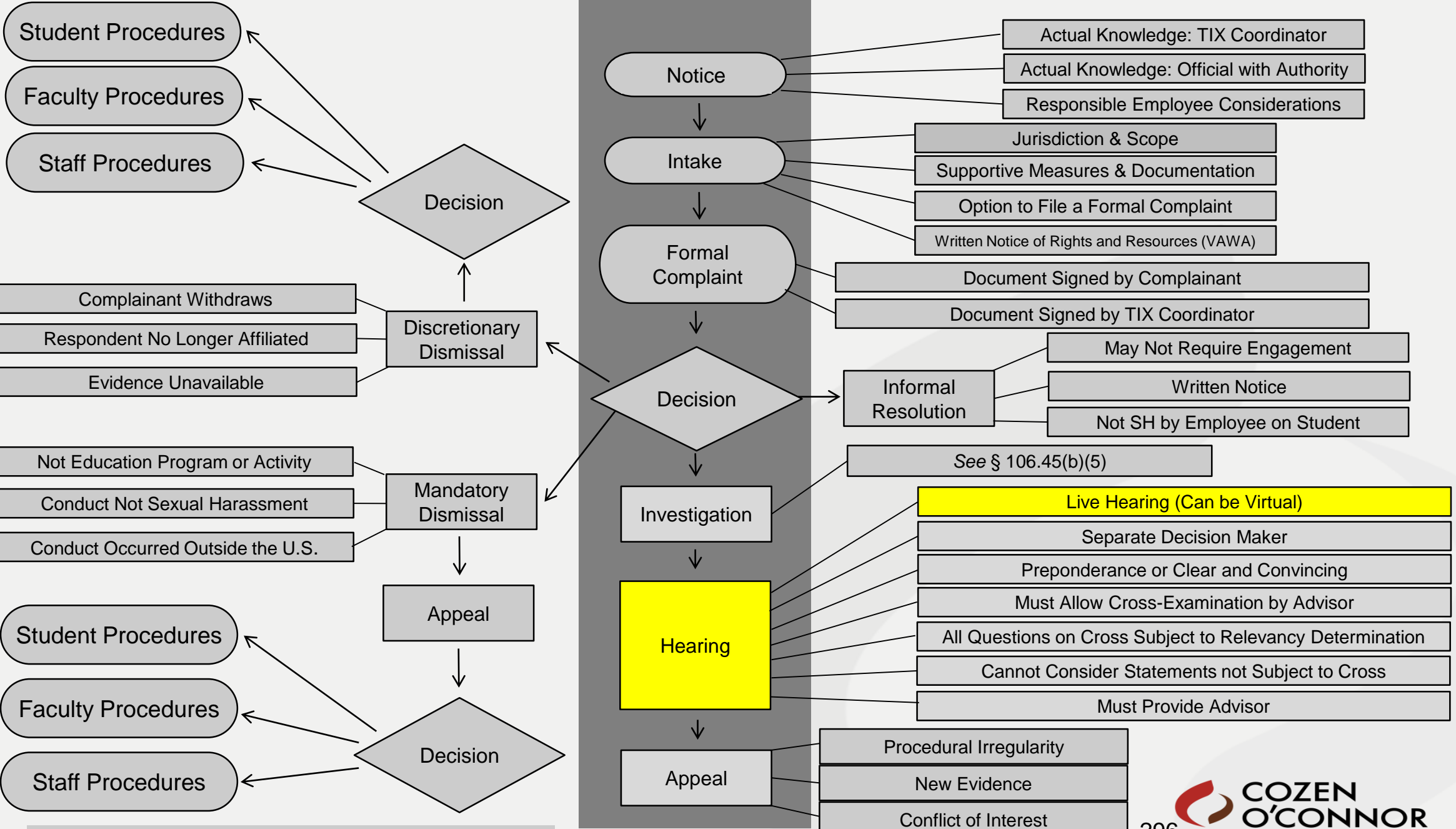
# Statements Made During Informal Resolution



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

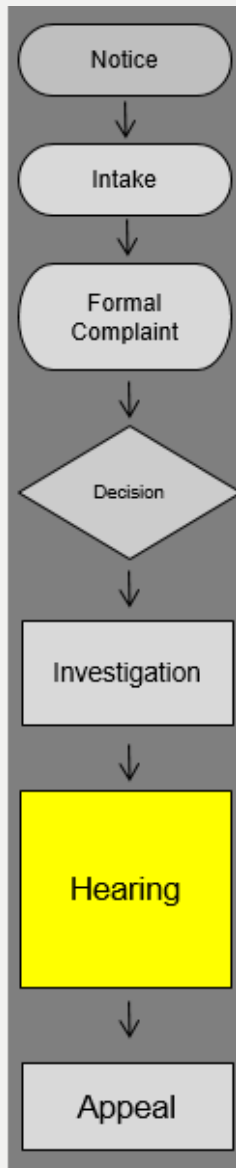
Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30337

# **THE LIVE HEARING REQUIREMENT**



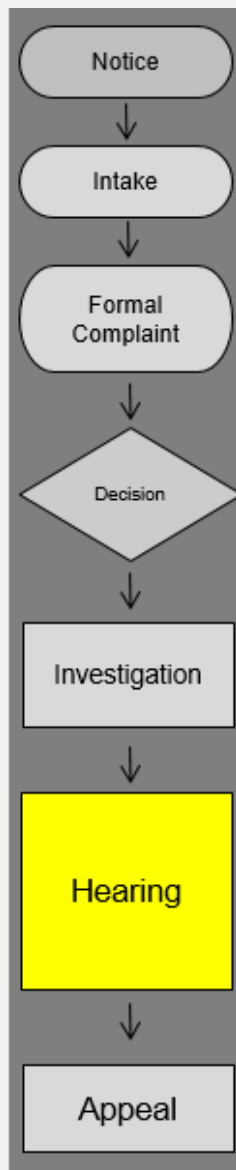
# Live Hearing Required

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



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

# Live Hearing Required

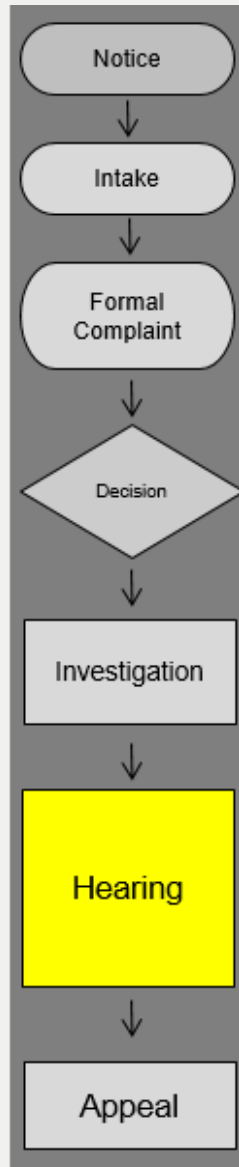


- [A] live hearing gives both parties the most meaningful, transparent opportunity to present their views of the case to the decision-maker, **reducing the likelihood of biased decisions, improving the accuracy of outcomes, and increasing party and public confidence in the fairness and reliability**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

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

# Option to Use Technology

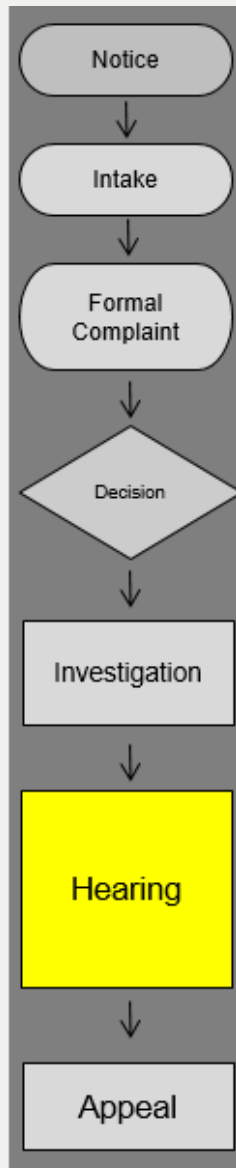
- Live hearings pursuant to this paragraph may be conducted with all parties physically present in the same geographic location or, at the recipient's direction, any or all parties, witnesses and other participants may appear at the live hearing **virtually, with technology** enabling participants simultaneously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



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

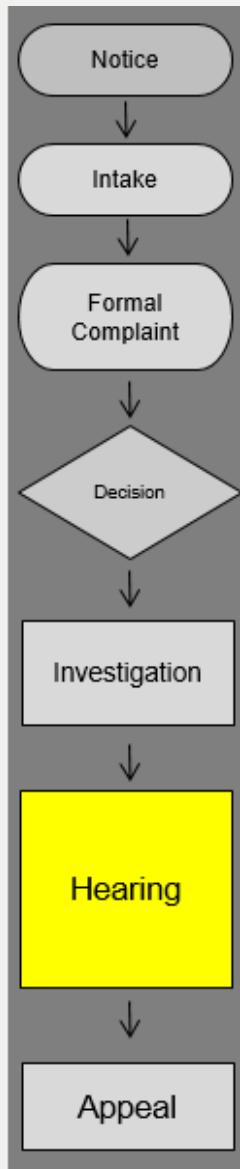
# Virtual Hearing Considerations

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



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

# Virtual Hearing Considerations

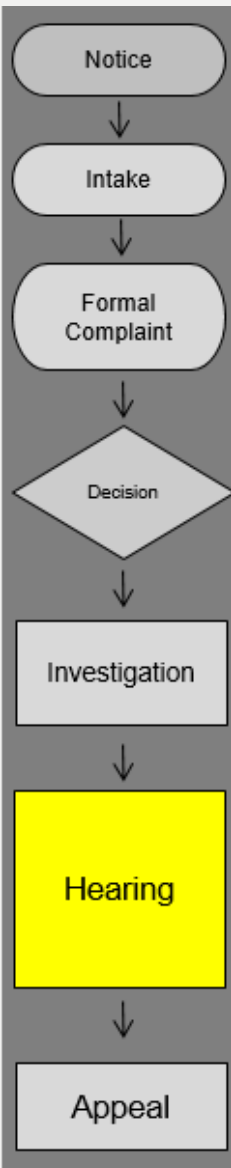


- The Department agrees with commenters who asserted that cross-examination provides opportunity for a decision-maker to assess credibility based on a number of factors, **including evaluation of body language and demeanor**, specific details, inherent plausibility, internal consistency, and corroborative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

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



# Virtual Hearing Considerations

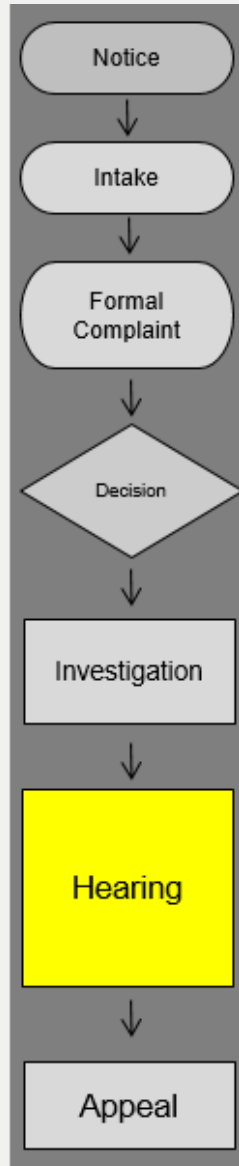


- The final regulations grant recipients discretion to allow participants, including witnesses, to appear at a live hearing virtually; however, **technology must enable all participants to see and hear other participants**, so a telephonic appearance would not be sufficient to comply with §106.45(b)(6)(i).

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

# Flexibility to Adopt Rules

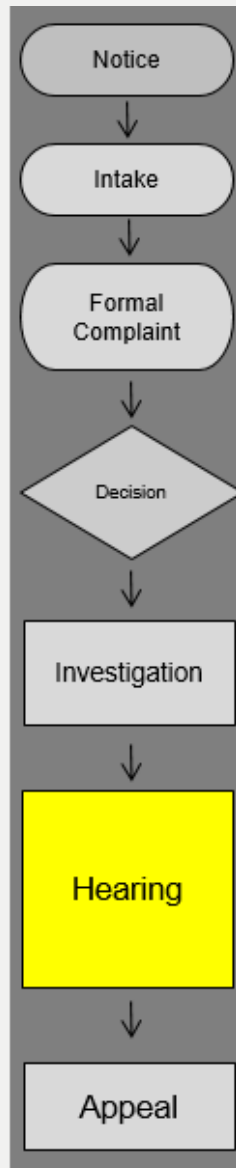
- Recipients may adopt rules that govern the **conduct and decorum** of participants at live hearings so long as such rules comply with these final regulations and apply equally to both parties.



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

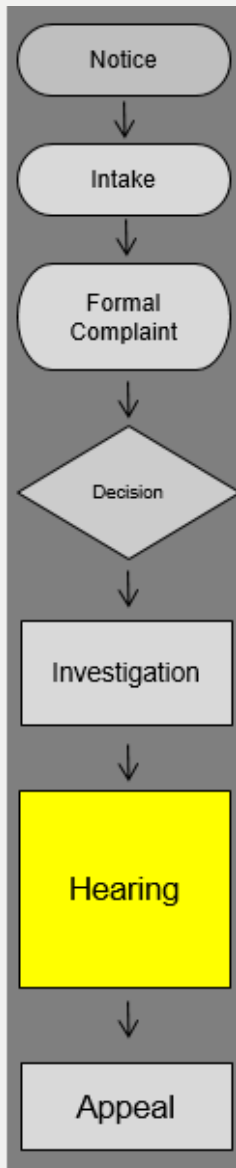
# Flexibility to Adopt Rules

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



Title IX Regulations May 19, 2020; Preamble at 30248

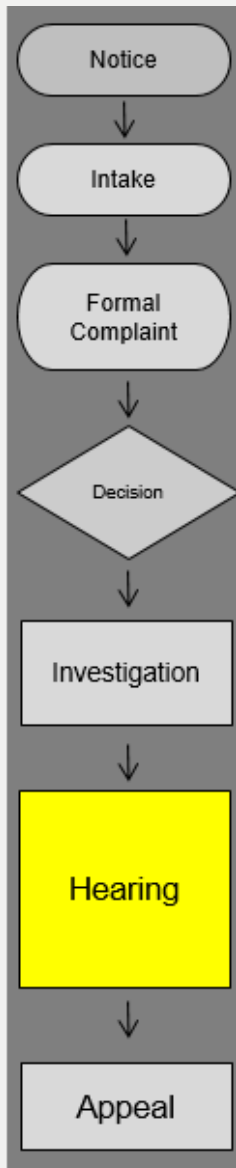
# Relevance Limitation on Flexibility



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

Title IX Regulations May 19, 2020; Preamble at 30248

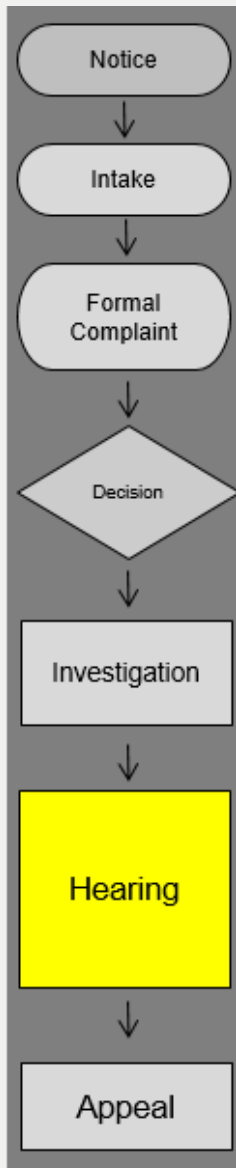
# Participation by Parties and Witnesses



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

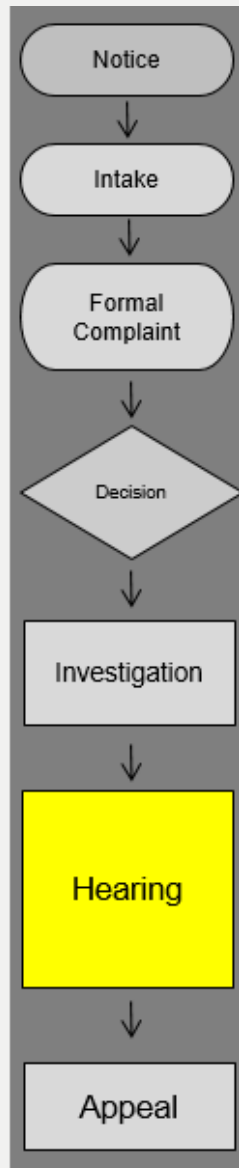
Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30346

# Participation by Parties and Witnesses



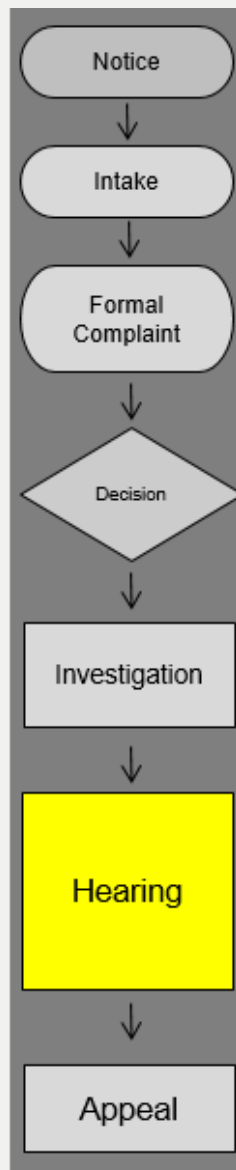
- In response to commenters' concerns, the Department has revised the proposed regulations as follows:
  - (1) We have revised § 106.45(b)(6)(i) to state that where a decision-maker must not rely on an absent or non-cross examined party or witness's statements, the decision-maker **cannot draw any inferences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

# 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.

# Participation by the Complainant



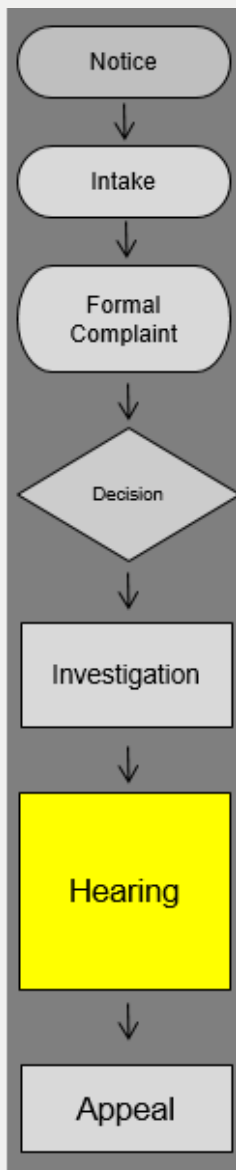
- Where a grievance process is initiated because the Title IX Coordinator, and not the complainant, signed the formal complaint, the complainant who did not wish to initiate a grievance process **remains under no obligation to then participate in the grievance process**, and the Department does not believe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

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



# Transcript or Recording

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

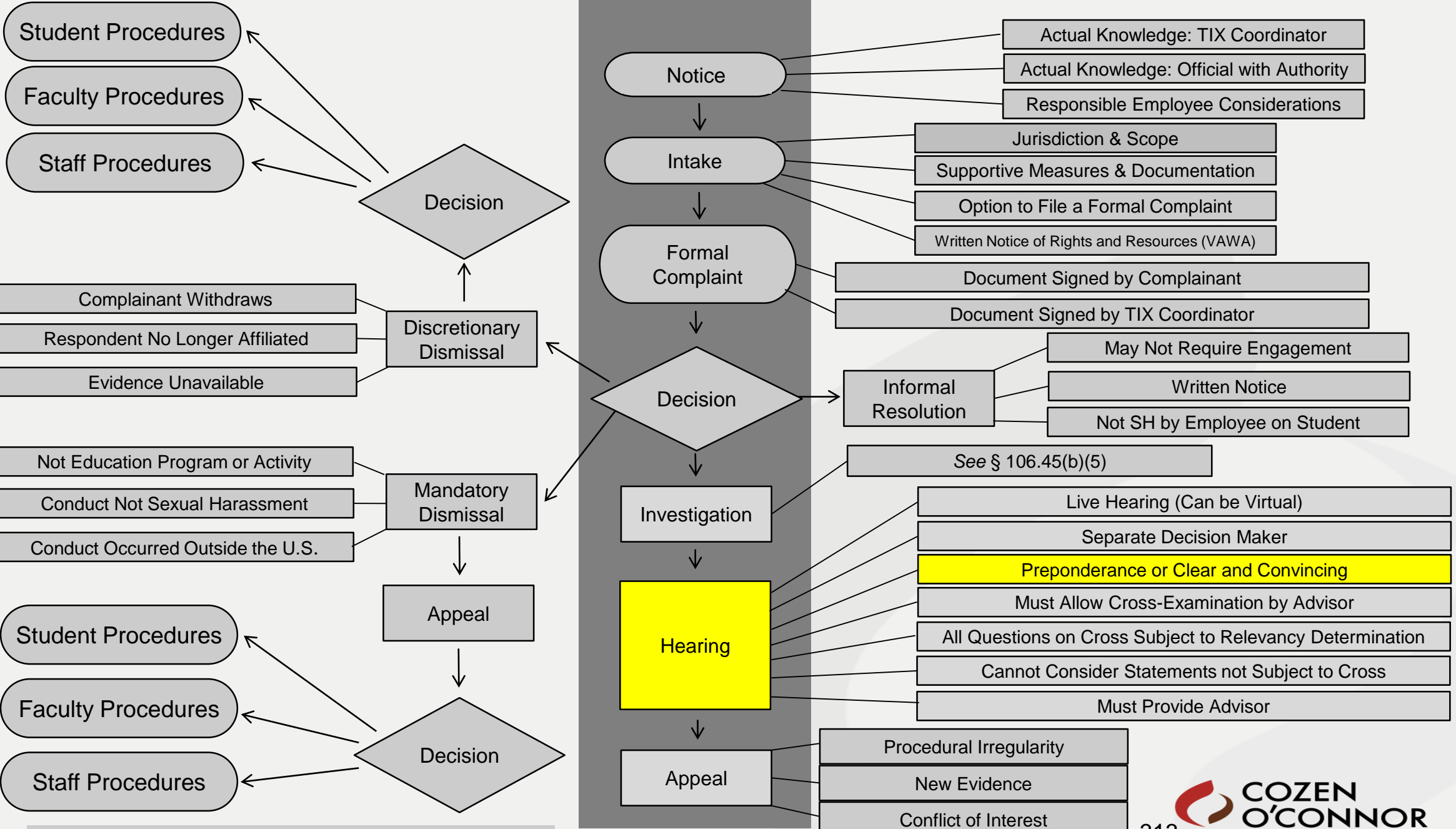


Title IX Regulations, May 19, 2020; § 106.45(b)(6)

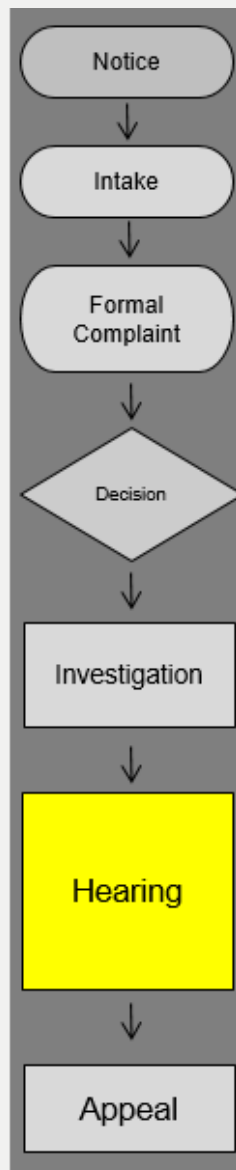
# Practical Considerations & Effective Practices

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

# **STANDARD OF EVIDENCE**



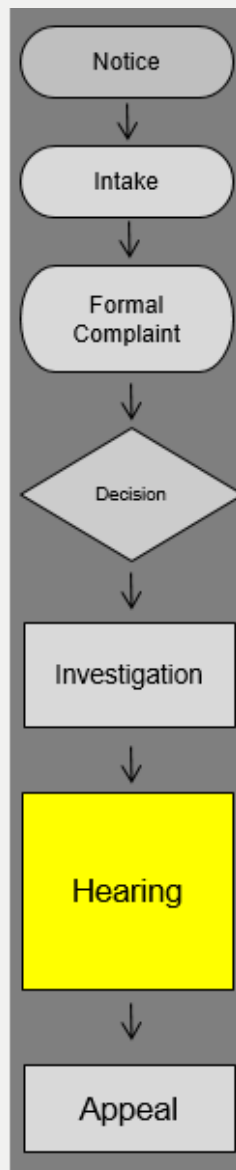
# Standard of Evidence



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

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

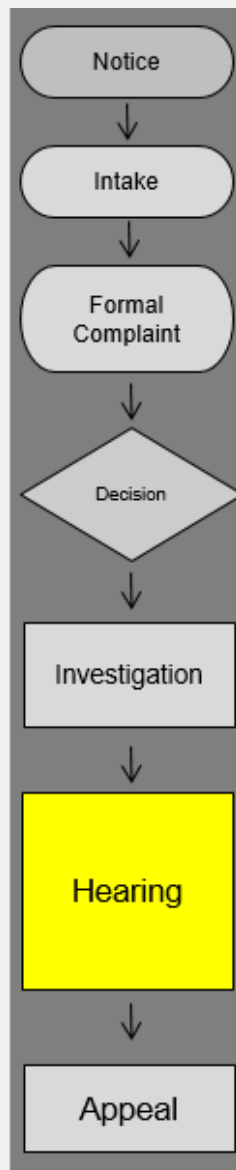
# Standard of Evidence



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

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

# Standard of Evidence



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

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

# Standard of Evidence



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



# Clear and Convincing\*

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

\* Based on common usage.

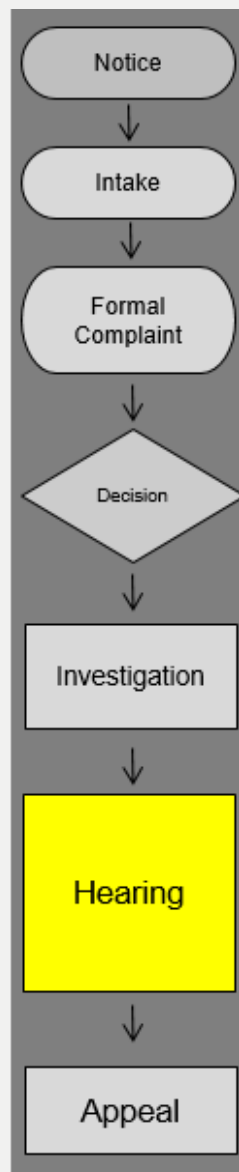
# Preponderance of the Evidence\*

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

\* Based on common usage.

# **SANCTIONING**

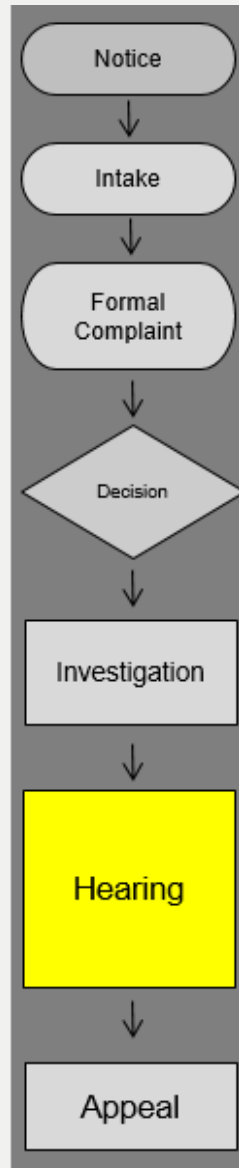
# Sanctioning



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

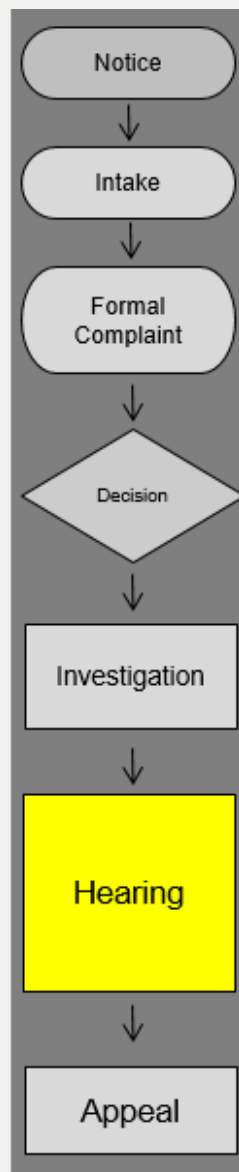
Title IX Regulations May 19, 2020 § 106.44 (a); § 106.45(b)(1)(vii) 85 F.R. 30575, 30395

# Discretion in Sanctioning



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

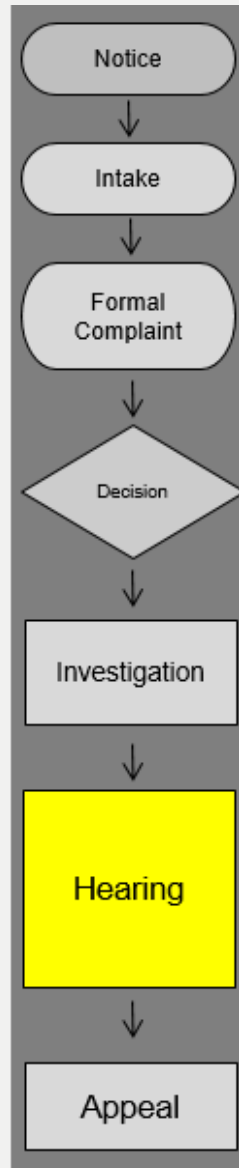
# Educational Purpose



- 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.

# 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.



# **EVALUATING CREDIBILITY**



# Evaluating Credibility



# Credibility Factors

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

# Demeanor

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

# Demeanor

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

# Interest

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

# Interest

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

# Detail

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

# Corroboration

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



# Corroboration

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

# Evaluating Changes in Account

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

# Disclosure

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

# Synthesis

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

# Integrated Analysis

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

# Questions to Consider: Credibility Generally

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

# Questions to Consider: Detail

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

# Questions to Consider: Interest

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



# Questions to Consider: Demeanor

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

# Questions to Consider: Corroboration

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

# Questions to Consider: Common Sense

- Does it make sense?

# 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)

# 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.

...

# 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.**

# 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

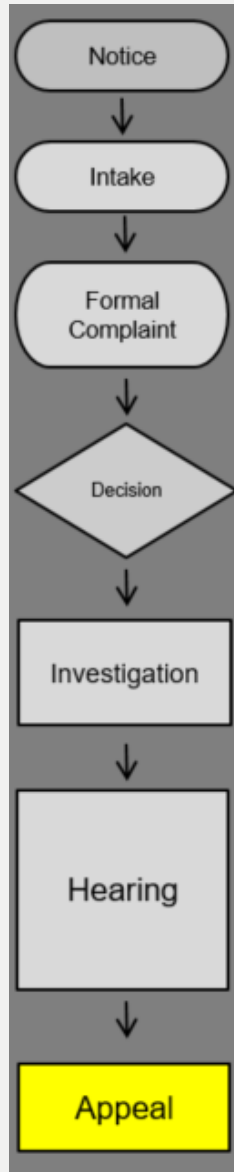
(1997 Sexual Harassment Guidance continued)

- 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](#)

# APPEALS

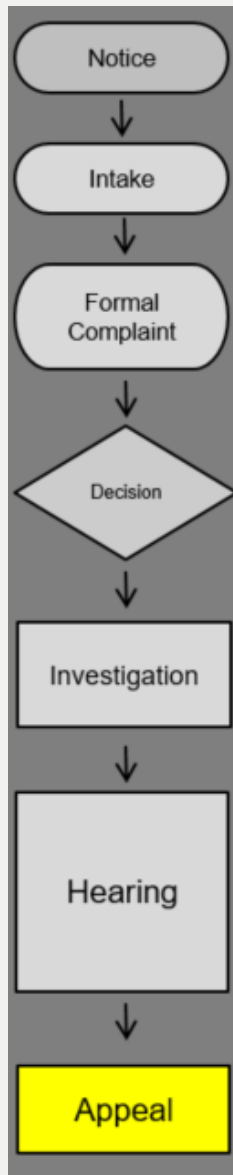
# Appeals



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

Title IX Regulations May 19, 2020 §106.45 (b)(8)

# 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 May 19, 2020 §106.45 (b)(8)

# Use of Slides

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