

# **Title IX Training:**

## **An Integrated and Coordinated Approach**

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**Trinity College**

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# INTRODUCTIONS



# Training

A recipient must ensure that **TIX Coordinators, Investigators, Decision-Makers, and Facilitators of Informal Resolution** receive training on:

1

- The definition of sexual harassment in § 106.30;

2

- The scope of the College's education program and activities;

3

- How to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, as applicable; and

4

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

# Training

A recipient must ensure that **Decision-Makers** receive the following additional training:

5

- Any technology to be used at a live hearing; and

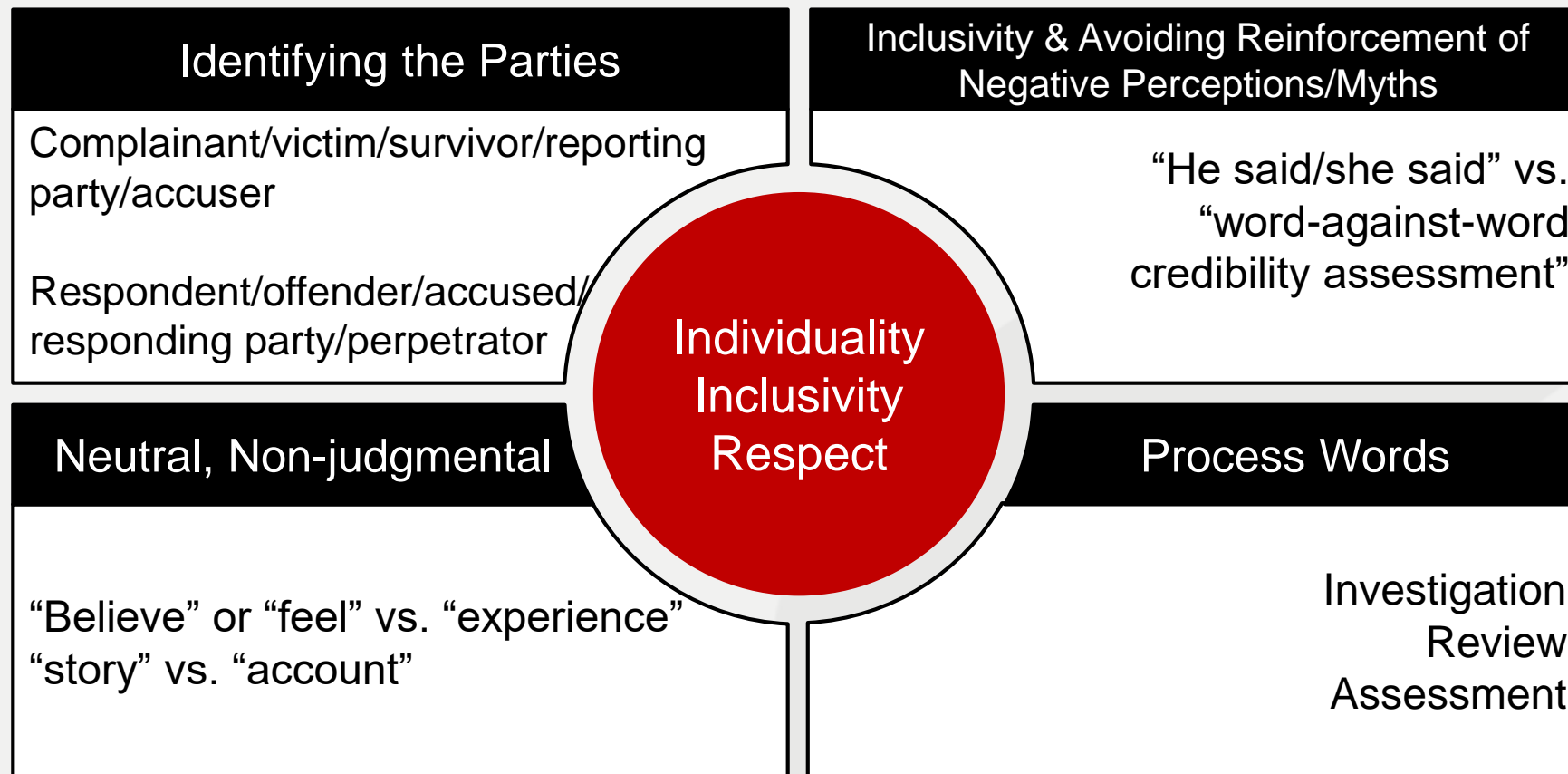
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- Issues of relevance of questions and evidence, including when questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, as set forth in paragraph (b)(6) of this section.

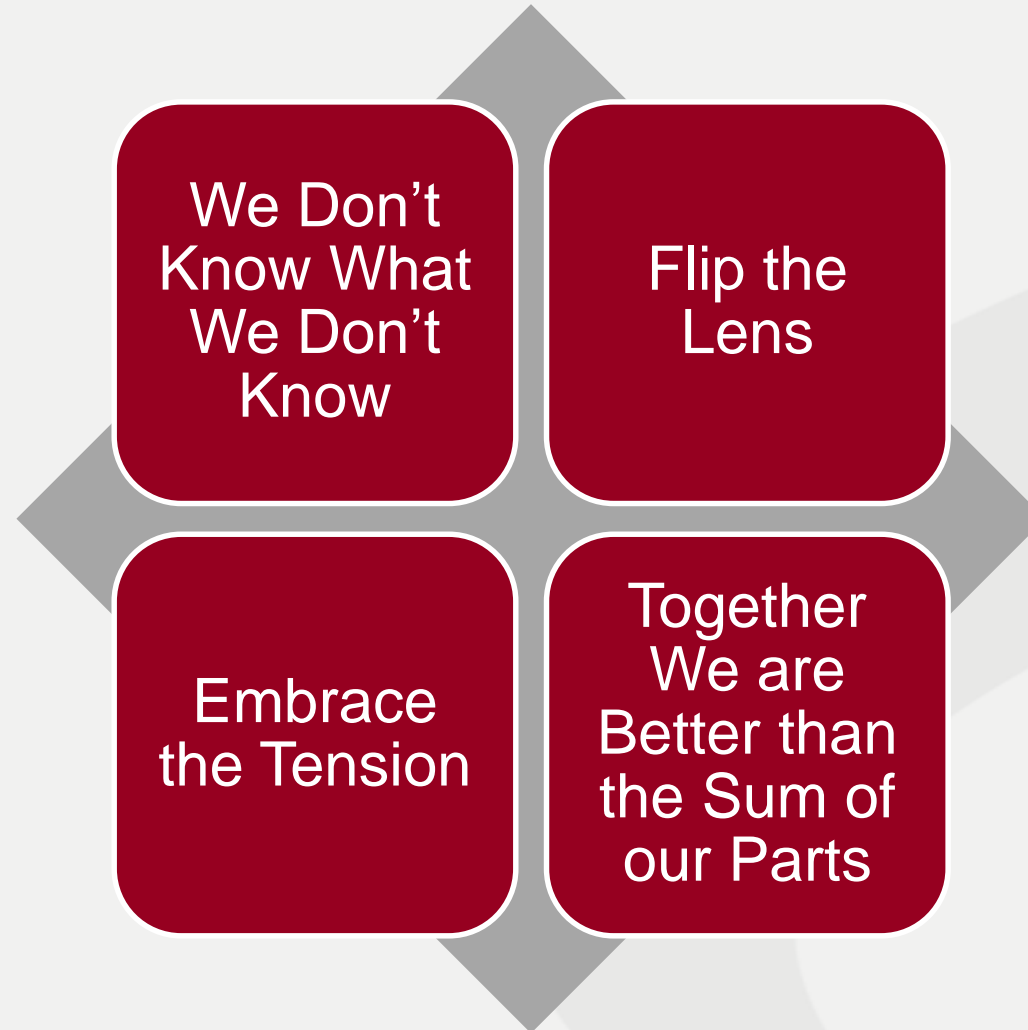
Any materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, must not rely on sex stereotypes and must promote impartial investigations and adjudications of formal complaints of sexual harassment

# THE CONTEXT

# Awareness of the Impact of Language

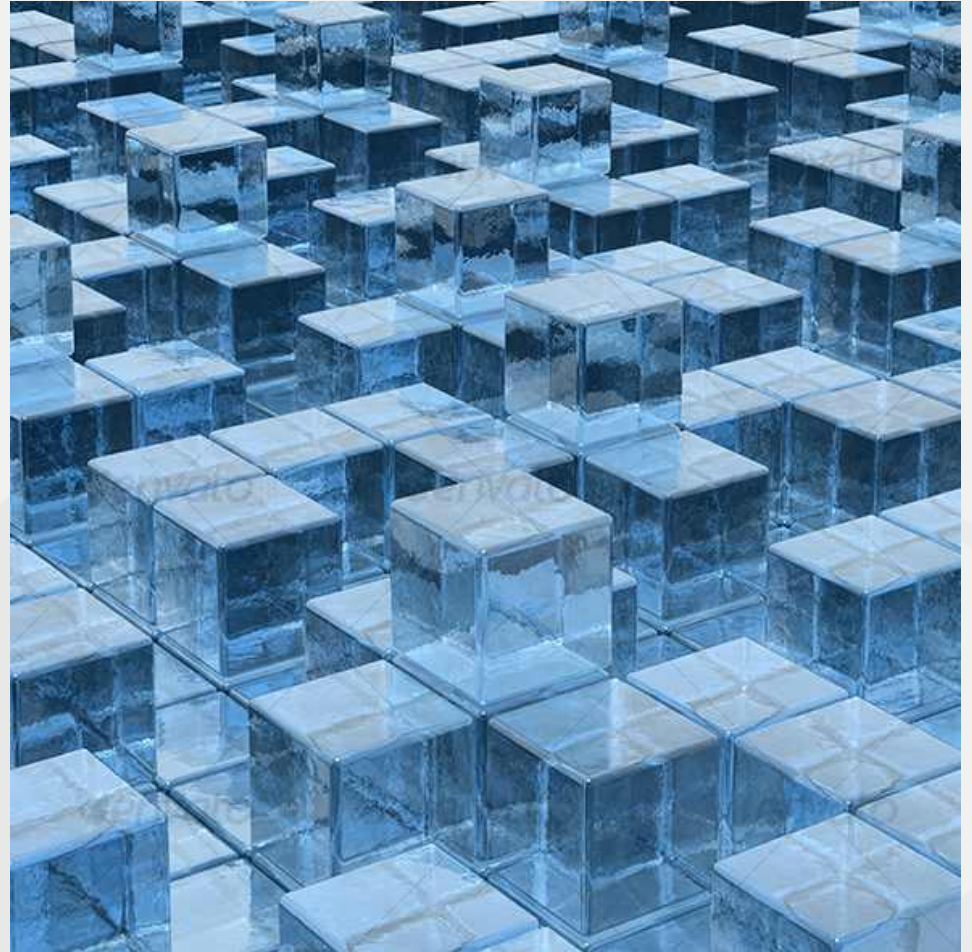


# Framing the Conversation



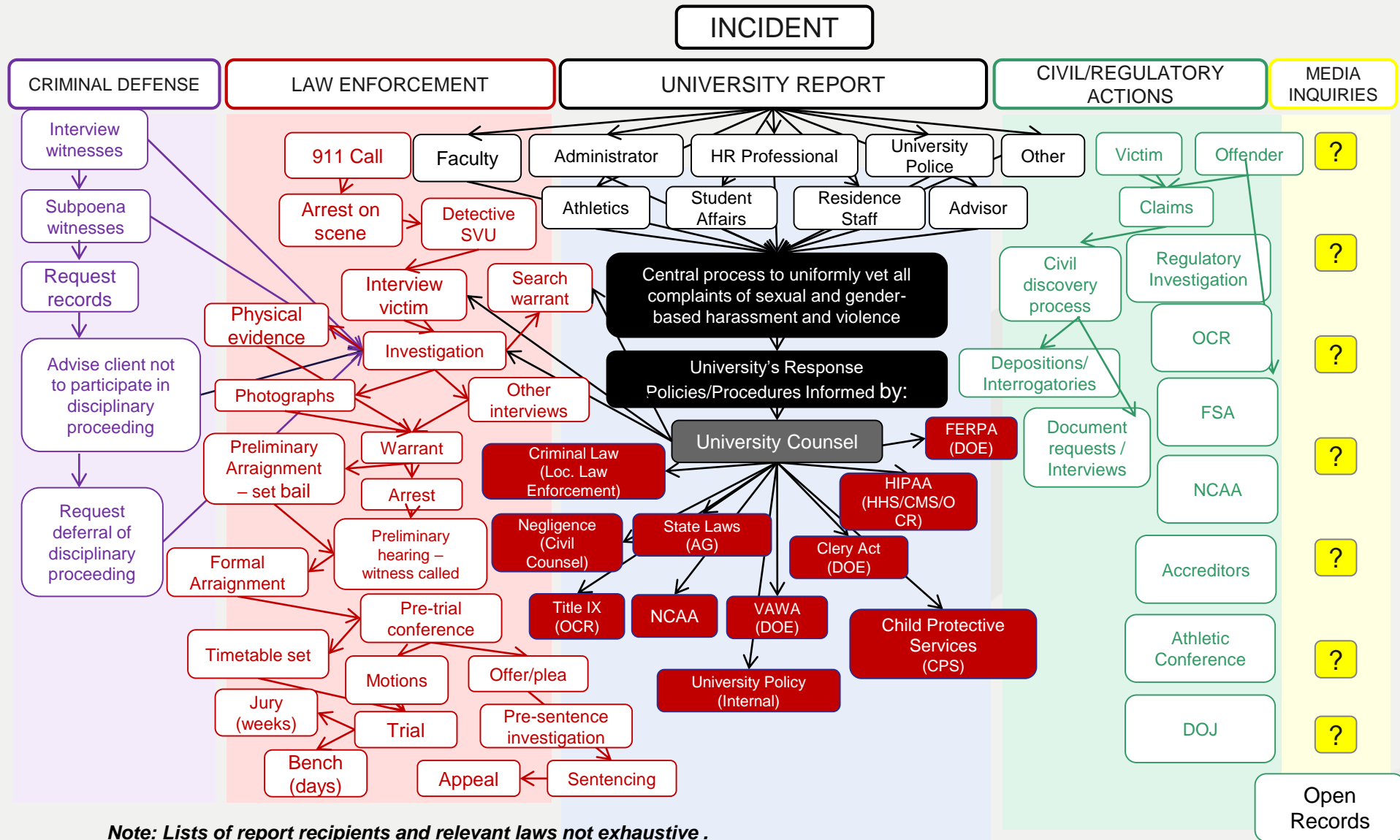
# The Context

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



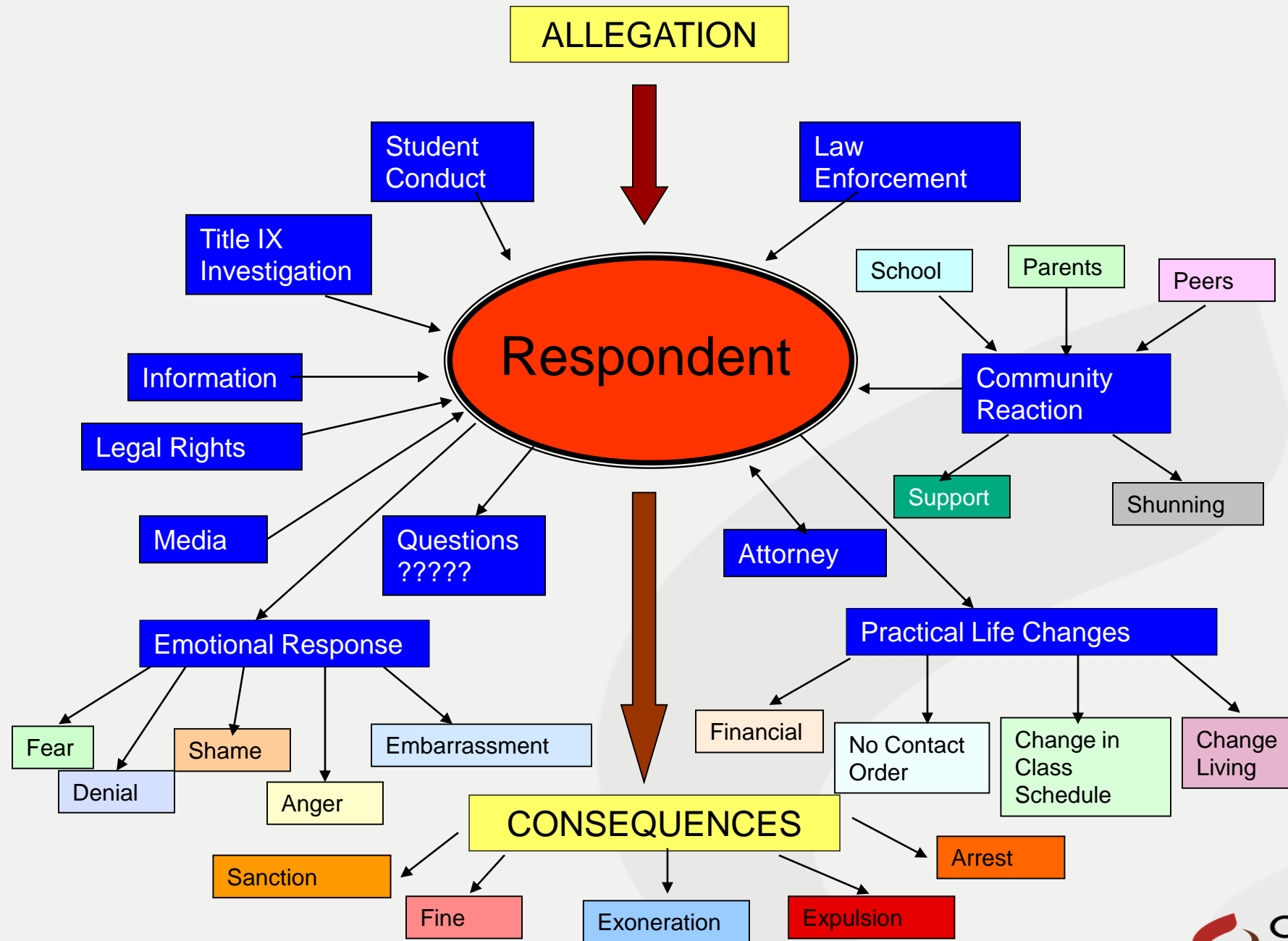


# The Challenge of the Context



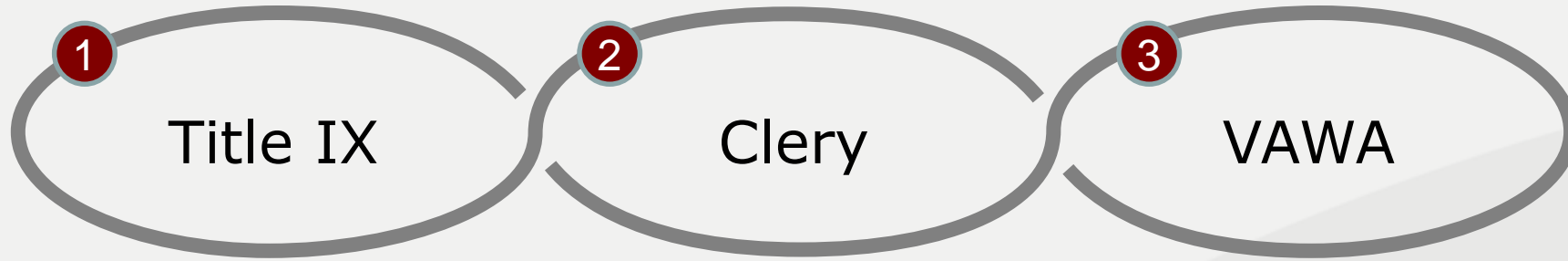
Note: Lists of report recipients and relevant laws not exhaustive.





# **TITLE IX AND THE CLERY ACT**

# 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

# 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: 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

# 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.



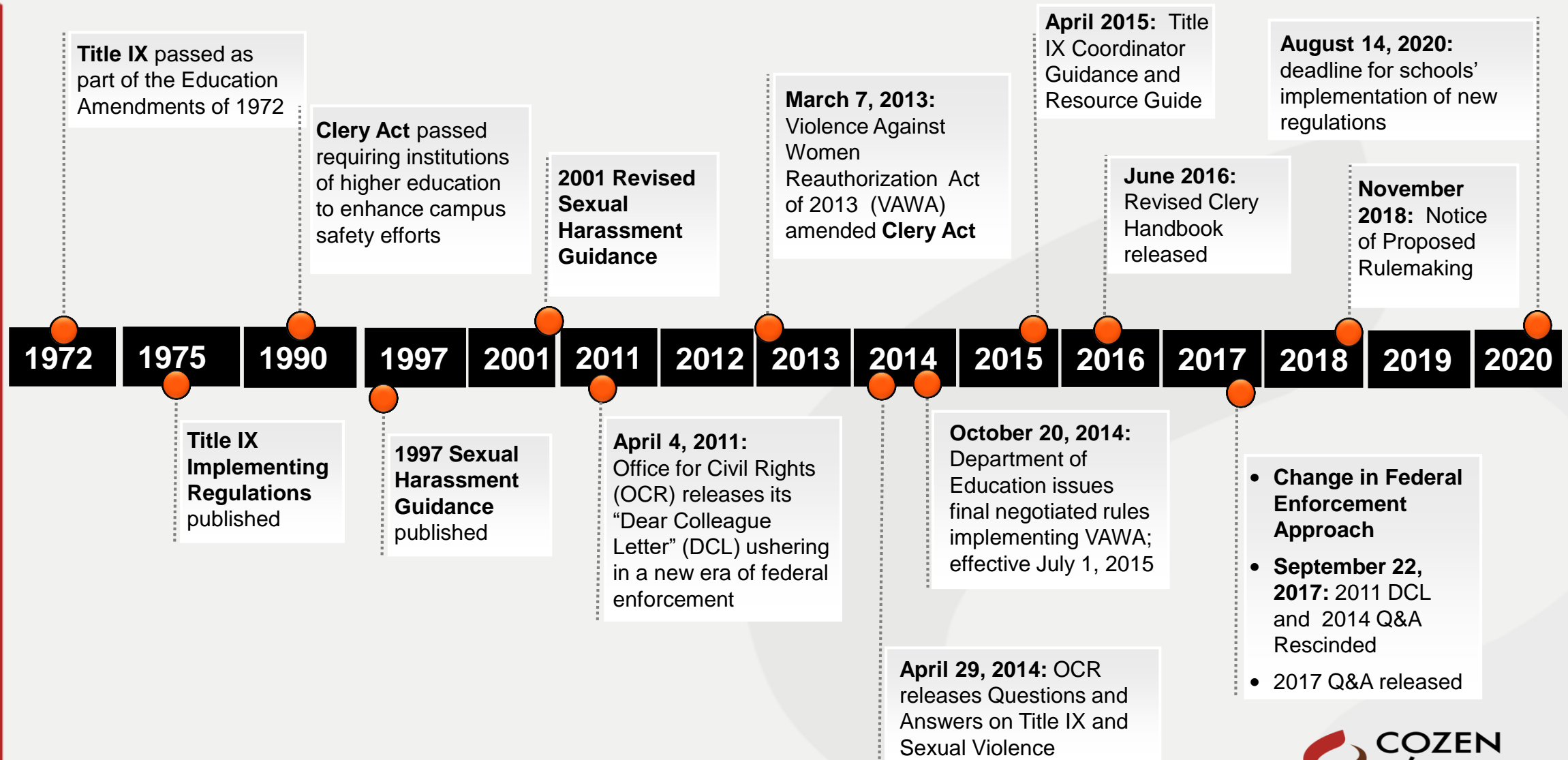
# Understanding Title IX

## The Law:

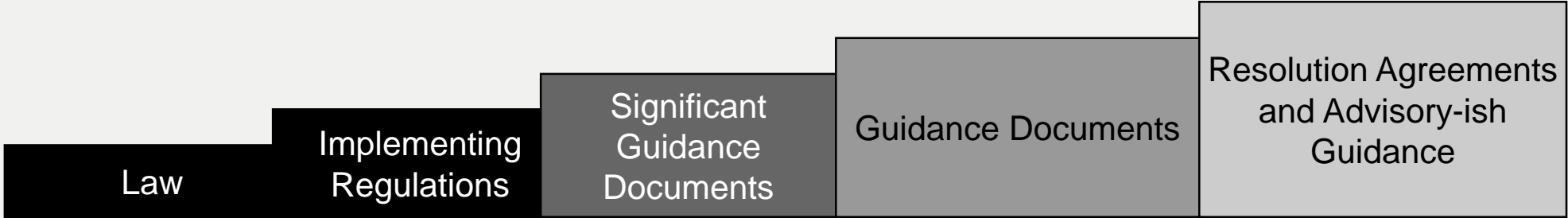
*“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”*

20 USC § 1681

# Evolution of Federal Legislation 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

# Limitations Under the New Title IX Regulations

## Regulations

The New Title IX Regulations

Trinity College Policy on Sexual Harassment

Sexual Harassment  
Definition Narrowed

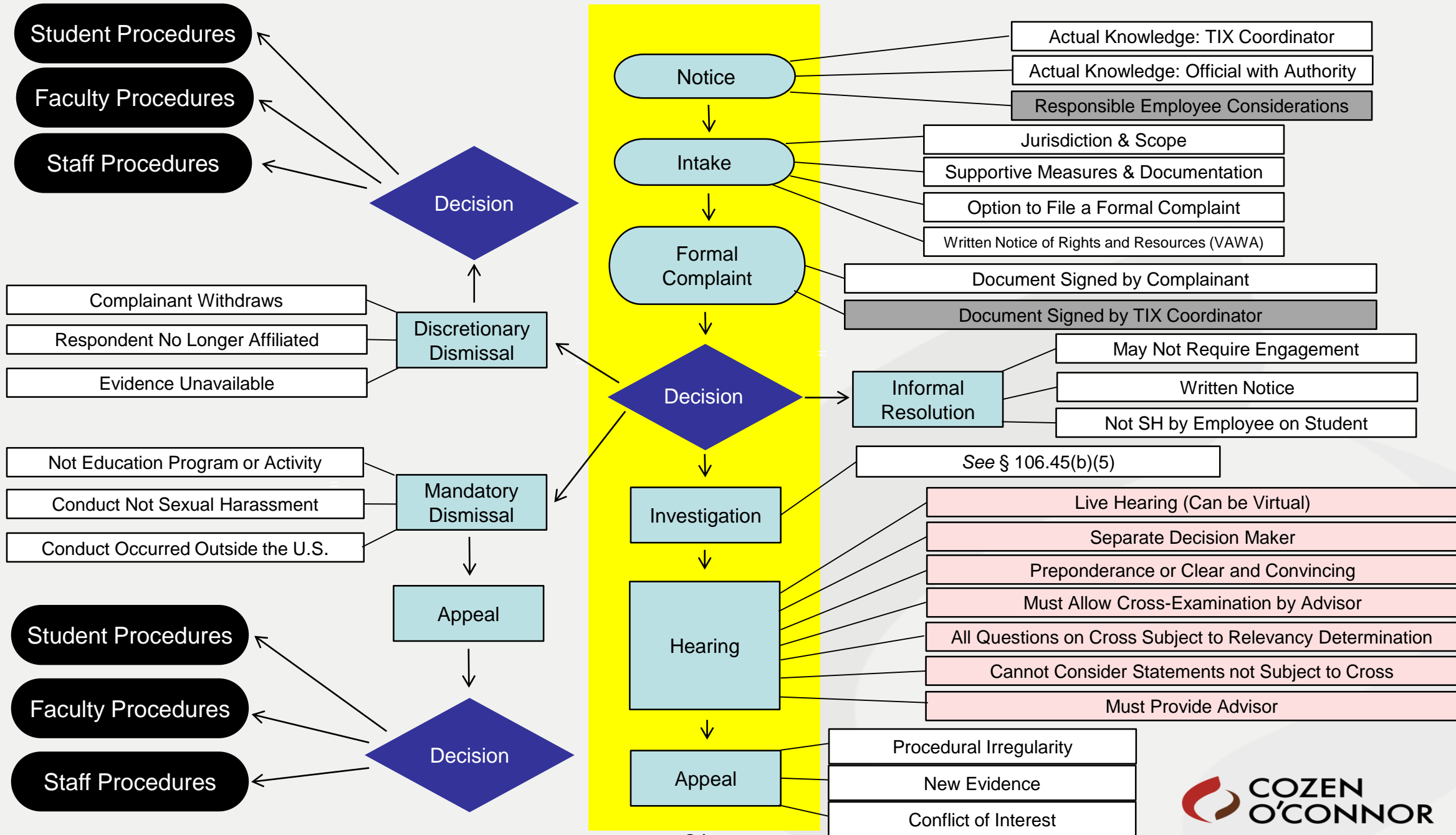
In the Domestic Education  
Program or Activity

Who May File - Definition of  
Complainant Narrowed

1) The new regulations narrow the definition of Sexual Harassment and require the College to dismiss when the alleged conduct does not meet the new definitions.

2) The new regulations require the College to dismiss a Formal Complaint when the conduct did not occur within in an education program or activity in the United States.

3) The new regulations require the College to dismiss if the Complainant is not participating in or attempting to participate in the education program or activity at the time the Formal Complaint is filed.



# Title IX

## Core Tenets:

## Definition of Sexual Harassment

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

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

# Title IX

## Core Tenets:

### Education Program or Activity

For the purposes of this section, §§ 106.30, and 106.45, “education program or activity” includes locations, events, or circumstances over which the recipient exercised **substantial control over both the respondent and the context** in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.

Title IX Regulations May 19, 2020; § 106.44(a)

# Your Institution

- “Procedures adopted by schools will vary considerably in detail, specificity, and components, reflecting differences in audiences, school sizes and administrative structures, State or local legal requirements, and past experience.”

*Department of Education Office for Civil Rights  
2001 Revised Sexual Harassment Guidance*

- Institutions have broad discretion in policies, procedures, structure and personnel



# **TRINITY COLLEGE POLICY ON SEXUAL HARASSMENT: PROHIBITED CONDUCT**

# Trinity College Policy on Sexual Harassment

## Scope of the Policy:

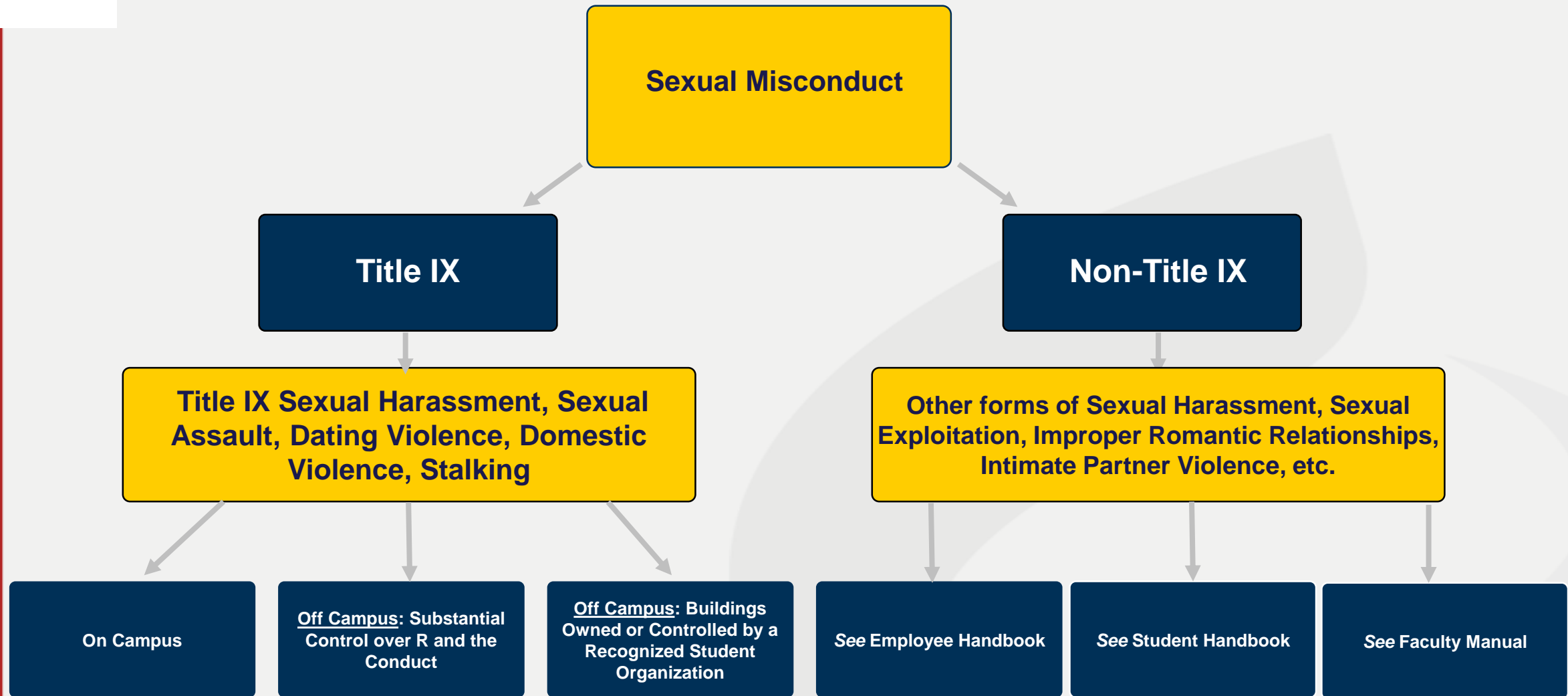


Applies to all College community members, regardless of the sexual orientation, gender expression, or gender identity of the parties involved, including students, faculty, staff, visitors, and independent contractors, as well as those who participate in the College's domestic programs and activities, whether on or off campus. Any such individual may make a report under this policy.

The College does not have jurisdiction to investigate reported incidents involving members of the College community that occurred prior to the individual being enrolled at or employed by the College when the incident did not occur on campus or in connection with the College's domestic program, activity, or employment.

Individuals who wish to report or file a complaint pertaining to sexual misconduct that falls outside the scope of this policy may do so under the Student Handbook or the Employee Handbook, as appropriate.

# Applicable Policies for Sexual Misconduct



# Trinity College Policy on Sexual Harassment

## Determining Jurisdiction:

The Title IX Coordinator or a Deputy Title IX Coordinator will determine if this policy should apply to a formal complaint. The sexual harassment investigation and adjudication process will apply when all of the following elements are met, in the reasonable determination of the Title IX Coordinator or a Deputy Title IX Coordinator:

- 1.The conduct is alleged to have occurred on or after August 14, 2020;
- 2.The conduct is alleged to have occurred in the United States;
- 3.The conduct is alleged to have occurred within the College’s education program or
- 4.activity; and
- 5.The alleged conduct, if true, would constitute sexual harassment as defined in this policy.

If all of the elements are met, the College will investigate the allegations according to the investigation and adjudication process set forth below.

# Trinity College Policy on Sexual Harassment

## Standing to File a Formal Complaint:

“A Complainant need not be a member of the College community so long as the Complainant at the time of the alleged sexual harassment was attempting to participate in the College’s education program or activity and the College has jurisdiction over the person accused of sexual harassment.”

## Personal Jurisdiction:

“The College does not have jurisdiction to investigate reported incidents involving members of the College community that occurred prior to the individual being enrolled at or employed by the College, [or] when the incident did not occur on campus or in connection with the College’s domestic program, activity, or employment.”

# Definitions of Sexual Harassment

The Policy defines “sexual harassment” as conduct on the basis of sex that must satisfy one or more of the following:

- Hostile Environment Sexual Harassment;
- Quid pro Quo Sexual Harassment; and
- Four specific offenses prohibited under the Clery Act, as amended by the Violence Against Women Act (VAWA) – Sexual Assault, Dating Violence, Domestic Violence, and Stalking.

# Definitions of Sexual Harassment

- *Hostile Environment Sexual Harassment:*
  - Hostile environment sexual harassment involves Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectionably offensive that it effectively denies a person equal access to an education program or activity.

# Definitions of Sexual Harassment

- *Quid Pro Quo Sexual Harassment:*
  - Quid pro Quo sexual harassment occurs when an employee conditions the provision of an aid, benefit, or service of the College on an individual's participation in unwelcome sexual conduct.
  - Only individuals with authority to grant or withhold employment or educational opportunities can engage in quid pro quo sexual harassment.



# Definitions of Sexual Harassment

## Sexual Assault

Sexual assault is any intentional sexual contact without consent, whether such contact directly touches skin or is through clothing. It includes any intentional sexual contact with the breasts, buttocks, groin, genitals, mouth, or other bodily orifice of another; or touching another with any of these body parts; or making someone touch someone else's or that person's own body parts; or any intentional bodily contact of a sexual nature, whether or not it involves the previously mentioned body parts; or disrobing or exposure of another without that person's consent. Sexual assault also includes attempted nonconsensual sexual intercourse.

# Definitions of Sexual Harassment

## Rape

Rape is a form of sexual assault involving sexual penetration without consent. Rape is defined as: (a) any sexual penetration of the vagina or anus, however slight, with any object or body part without consent; or (b) any penetration of the mouth, however slight, by any sex organ or any object used in a sexual manner without consent.

# Definitions of Sexual Harassment

## **Domestic Violence:**

Domestic violence is abusive behavior in any relationship that is used by one person to gain or maintain power and control over another person. It includes asserted violent misdemeanor and felony offenses committed by the victim's current or former spouse, current or former cohabitant (e.g., roommate), or person similarly situated under domestic or family violence law. Domestic violence can be physical, sexual, emotional, economic, or psychological actions or threats of actions that influence another person.

# Definitions of Sexual Harassment

## **Dating Violence:**

Dating violence is violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim. Whether there was such a relationship will be determined by the length, type, and frequency of the interaction.

# Definitions of Sexual Harassment

## Stalking

- Stalking involves a **course of conduct** directed at a specific person that would cause a reasonable person to suffer **substantial emotional distress** or to **fear for that person's own safety or that of another**.
- This includes cyberstalking, a particular form of stalking in which electronic media such as the Internet, social networks, blogs, texts, or other similar forms of contact are used to pursue, harass, or make unwelcome contact with another person. Stalking and cyberstalking may involve individuals who are known to one another or have an intimate or sexual relationship or may involve individuals not known to one another. For the purposes of this definition:

# Definitions of Sexual Harassment

For the purposes of the definition of **Stalking**:

- “**Course of conduct**” means two or more acts, including, but not limited to, acts in which the alleged stalker directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person’s property.
- “**Reasonable person**” means a prudent person who normally exercises due care under similar circumstances.
- “**Substantial emotional distress**” means significant mental suffering or anguish that may, but does not necessarily, require medical or other professional treatment or counseling.

# Affirmative Consent

Affirmative consent means an active, clear and voluntary agreement by a person to engage in sexual activity with another person. Affirmative consent is informed, freely and actively given, and communicated through mutually understandable words or actions that indicate a willingness to participate in mutually agreed upon sexual activity. It is the responsibility of each person to ensure that he or she has the affirmative consent of all persons engaged in the sexual activity and that such consent is sustained throughout the sexual activity.

# Affirmative Consent (cont'd)

Consent may never be given by minors, mentally disabled persons, those who are incapacitated, and those who are by law unable to give consent. **If a person is mentally or physically incapacitated or impaired so that such person cannot understand the fact, nature, or extent of the sexual situation, there is no consent; this includes impairment or incapacitation due to alcohol or drug consumption that meets this standard or being asleep or unconscious.**



# Affirmative Consent (cont'd)

Consent obtained by fraud or force (actual or implied) is not consent, whether that force is physical force, threats, intimidation, or verbal coercion. A lack of verbal or physical resistance alone does not meet the affirmative-consent standard and does not of itself indicate consent. Past consent on its own cannot be construed as current/future consent.

# Affirmative Consent (cont'd)

Moreover, consent may be **withdrawn** at any time. Consent to engage in sexual activity with one person does not imply consent to engage in sexual activity with another person. Consent to engage in one form of sexual activity does not imply consent to engage in other forms.

References to “consent” in this policy should be construed as meaning “affirmative consent.”

# INVESTIGATIONS

# Overview of Investigation Requirements



# Filing a Formal Complaint

## Definition

A written document:

- ❶ alleging sexual harassment within a domestic education program or activity of the College,
- ❷ by a respondent over whom the College has jurisdiction, and
- ❸ requesting initiation of the College's investigation and adjudication process.

## Triggers the formal or informal resolution process

Only a formal complaint signed by the victim of alleged sexual harassment or the Title IX Coordinator will initiate the College's investigation and adjudication grievance process.

# Written Notice of Allegations

1

- Notice of the institution's investigation and adjudication process and a hyperlink to a copy of the process;

2

- Notice of the allegations potentially constituting sexual harassment, and sufficient details known at the time the Notice is issued, such as the identities of the parties involved in the incident, if known, including the complainant;

3

- the conduct allegedly constituting sexual harassment; and the date and location of the alleged incident, if known;

4

- A statement that the Respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the investigation and adjudication process;

# More on the Written Notice of Allegations

5

- A statement that the parties may have an advisor of their choice, who may be, but is not required to be, an attorney.

6

- A statement that before the conclusion of the investigation, the parties may inspect and review evidence obtained as part of the investigation that is directly related to the allegations raised in the formal complaint, including the evidence upon which the College does not intend to rely in reaching a determination regarding responsibility, and evidence that both tends to prove or disprove the allegations, whether obtained from a party or other source.

7

- A statement that the Student Handbook prohibits knowingly making false statements or knowingly submitting false information during a College authorized investigation.

# Duty to Provide Ongoing Notice of Allegations

- If, in the course of an investigation, the College decides to investigate allegations about the Complainant or Respondent that are not included in the Notice of Allegations and are otherwise covered "sexual harassment" falling within the Sexual Harassment Policy, the College will notify the parties whose identities are known of the additional allegations by their institutional email accounts or other reasonable means.
- The parties will be provided sufficient time to review the additional allegations to prepare a response before any initial interview regarding those additional charges.





# Amnesty

- Where appropriate, the College will offer leniency with respect to other policy violations (e.g., minor drug or alcohol violations) that may be revealed as a result of a report of sexual harassment.
- The nature and scope of the leniency will depend on the particular circumstances involved.
- The Appropriate College Official and/or other supervisory authority, as appropriate, will have sole discretion in determining the appropriate course of action.

# The Parties' Rights During the Investigation and Hearing

1

- The parties will be afforded the same rights and opportunities, including the opportunity to present evidence and witnesses on their behalf.

2

- The Respondent is presumed not responsible for the charges unless found responsible following completion of the investigation and adjudication process.

3

- The parties are entitled to the same opportunities to have an adviser or support person of their choice.

4

- The College will support and help parties secure advisers, when needed.

5

- The parties are entitled to challenge the investigator(s), adjudicators on the basis of conflict of interest or bias.

# The College's Rules of the Investigation

The nature and scope of the investigation is within the discretion of the Title IX Coordinator or a Deputy Title IX Coordinator.

The investigator is authorized to contact any and all individuals with potentially relevant information and may interview such individuals on more than one occasion if necessary.

The Complainant and Respondent will be asked to identify all relevant evidence they would like the investigator to review, as well as witnesses they would like the investigator to interview.

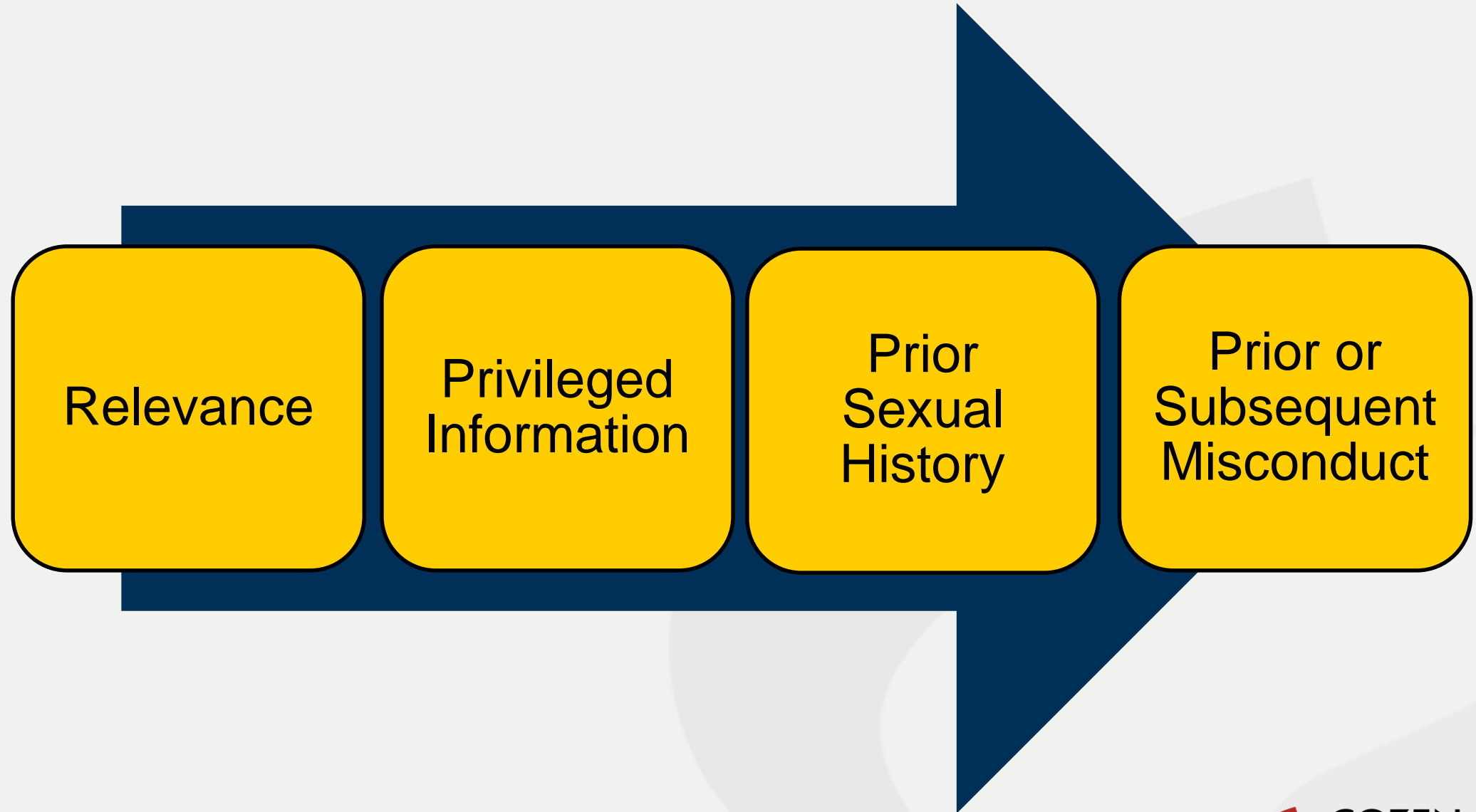
Both parties may provide, if they wish, a list of questions they would like the investigator to ask of particular witnesses or of each other.

It is the investigator's responsibility to gather relevant evidence to the extent reasonably available.

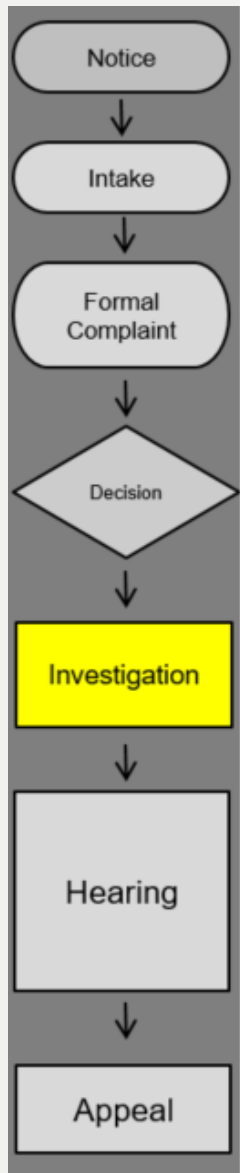
There is no requirement that a Complainant or Respondent share privileged or confidential medical and counseling records. However, where a party chooses to share medical or counseling records as part of the investigation, the records will be included in the investigation file and will be available to the other party.

In cases where an evidentiary or procedural question arises in connection with the investigation or adjudication process, the Title IX Coordinator, designated Deputy Title IX Coordinator, or Hearing Convener will decide the question.

# Evidentiary Considerations



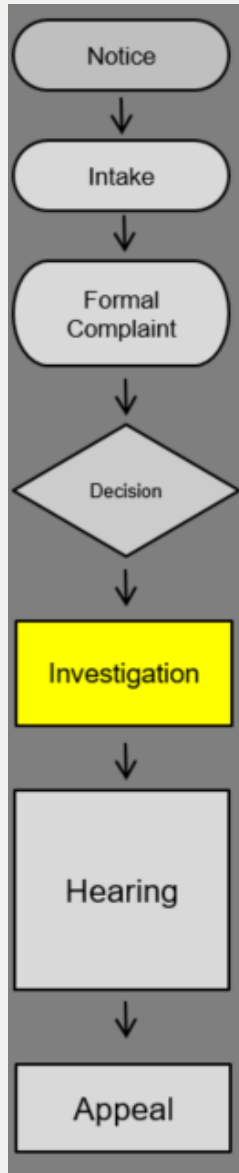
# Relevance



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

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

# Relevance



“While the proposed rules do not speak to

- 1 • admissibility of hearsay,
- 2 • prior bad acts,
- 3 • character evidence,
- 4 • polygraph (lie detector) results,
- 5 • standards for authentication of evidence,
- 6 • or similar issues concerning evidence, . . .

# Relevance

The final regulations require recipients to **gather and evaluate relevant evidence**, with the understanding that:

1

- This includes **both inculpatory and exculpatory evidence**, and

2

- The final regulations deem questions and evidence about a complainant's prior sexual behavior to be **irrelevant** with two exceptions, and

3

- Preclude use of any information protected by a **legally recognized privilege** (e.g., attorney-client)."

Notice

Intake

Formal  
Complaint

Decision

Investigation

Hearing

Appeal

# Privileged Information

“There is no requirement that a Complainant or Respondent share privileged or confidential medical and counseling records.

However, where a party chooses to share medical or counseling records as part of the investigation, the records will be included in the investigation file and will be available to the other party.”

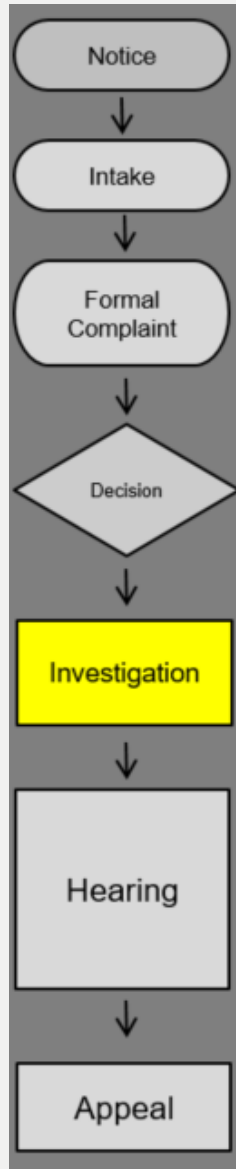


# The Complainant's Prior Sexual History



- Questions and evidence about the complainant's sexual predisposition or **prior sexual behavior** are not relevant, unless the complainant's prior sexual behavior is 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.

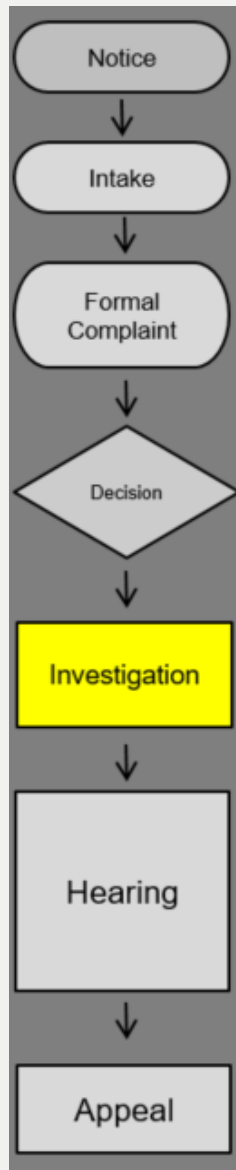
# The Complainant's Prior Sexual History



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

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

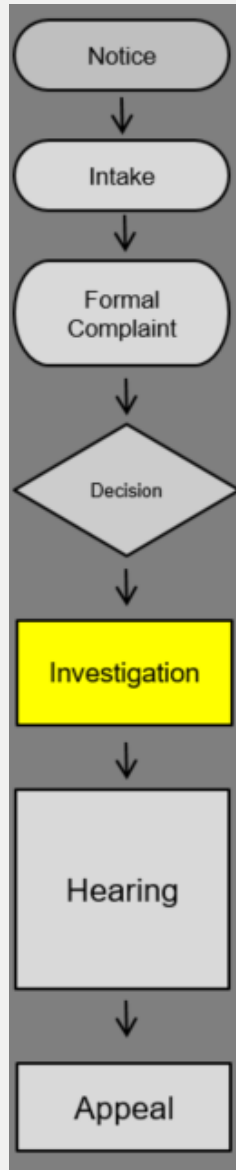
# Prior Sexual History ≠ Existing Dating Relationship



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

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

# Respondent's 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

# Practical Considerations

Prior or subsequent misconduct may be relevant to demonstrate:

1

- Intent/knowledge/state of mind

2

- Motive

3

- Opportunity

4

- Lack of mistake

5

- Pattern

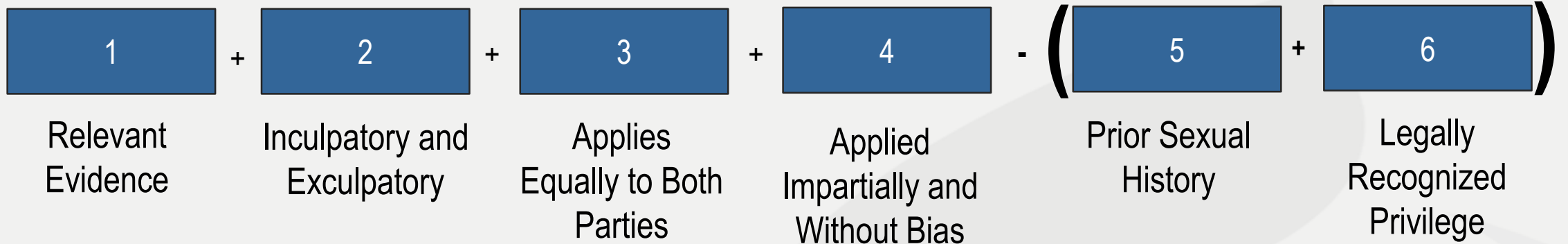
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- Identity

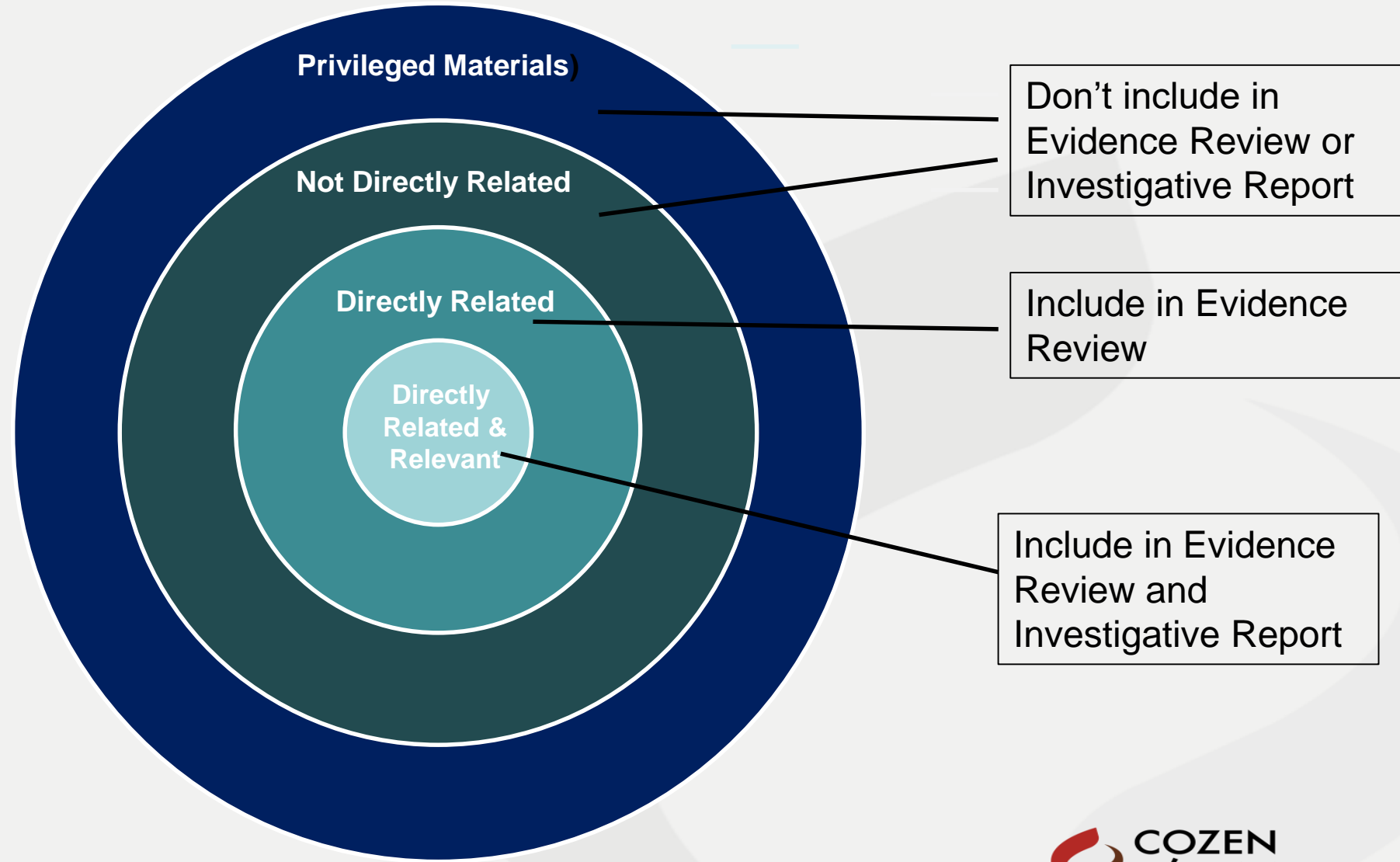
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- Information that is inextricably interwoven with the facts

# Evidentiary Rules Must Consider



# Evidentiary Levels for Inclusion



# Concluding the Investigation

The investigator will issue a preliminary investigation report and all directly related evidence to the Title IX Coordinator to share with the parties.

The parties have 10 days to submit a written response to the preliminary investigation report.

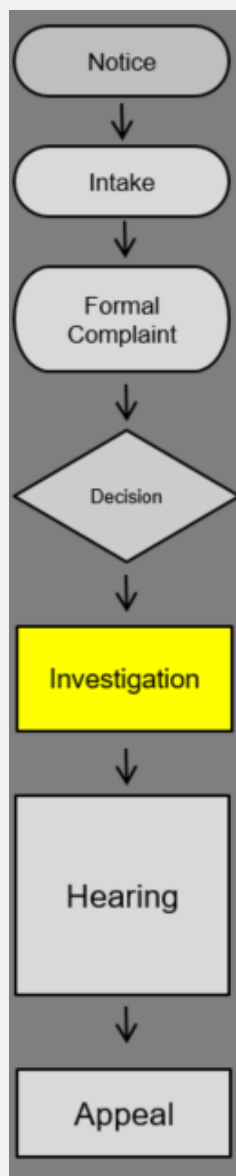
The investigator will consider the parties' written responses to the preliminary investigation report and assess next steps, which may include further investigation.

The investigator will then issue a final report to the Title IX Coordinator to share with the parties.

The parties have 10 days to submit a written response to the final report for consideration by the Administrative Hearing Panel.



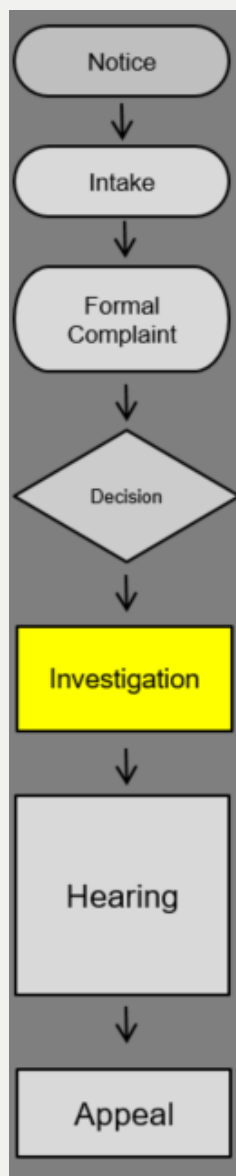
# Investigation Report



- Create an **investigation report** that fairly summarizes relevant evidence and
- Send to each party and the party’s advisor, if any, the investigation 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 May 19, 2020; §§ 106.45(b)(5)(vii); Preamble 85 F.R.30254, 30307, 30309

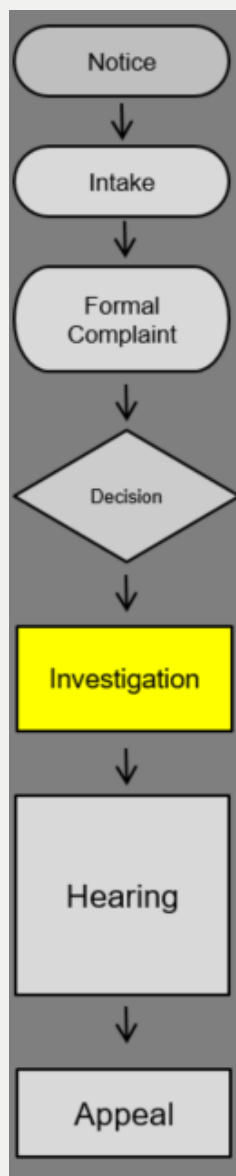
# Investigation Report



- “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 May 19, 2020; §§ 106.45(b)(5)(vii); Preamble 85 F.R.30310.

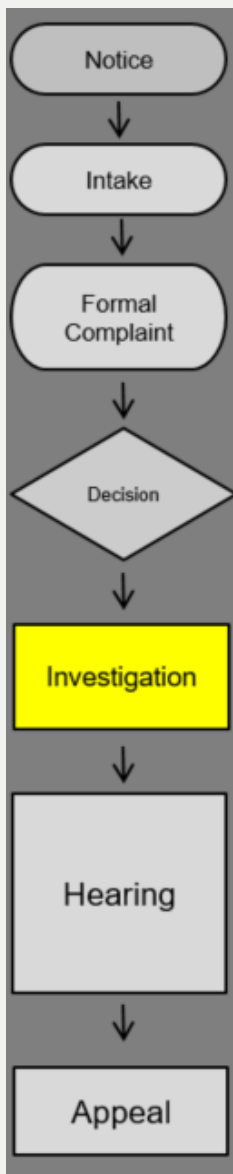
# Investigation Report



“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 May 19, 2020; §§ 106.45(b)(5)(vii); Preamble 85 F.R. 3010.

# Investigation Report



- Allow parties to provide a written response to the investigation 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).”

# **THE LIVE HEARING**

# What to Expect Before the Hearing

The TIX Coordinator shares the Investigator's final report with the parties

The parties have 10 days to submit a written response to the final report for consideration by the Hearing Panel

The TIX Coordinator will select an Administrative Hearing Panel

The parties will be notified of the proposed membership of the panel and have 3 business days to challenge for conflict of interest or bias

The Panel will receive the final report, all directly related evidence, and the parties' written submissions

# Proposed Content for the Notice of Hearing (1 of 2)

1

- The specific Policy violations that will be the subject of the hearing

2

- The date, time, and location of the hearing

3

- The names of the proposed panelists with instructions on how to challenge their participation on the basis of conflict of interest or bias

4

- A statement that all evidence that is directly related to the allegations, as shared in evidence review, will be available to enable each party an equal opportunity to refer to such evidence during the hearing, including for purposes of cross-examination

# Proposed Content for the Notice of Hearing (2 of 2)

5

- A statement that the parties have the right to have an advisor present at the hearing, who will conduct questioning on the party's behalf

6

- A statement that the College will provide a hearing advisor, without fee or charge, to conduct questioning on behalf of the party at the hearing, if the party does not already have an advisor present for the hearing

7

- Information regarding how to request that witnesses be present at the hearing

8

- Information about the hearing format

9

- Information regarding the right to request reasonable accommodations for disability or language diversity at the hearing





# The Administrative Hearing Panel

1

- The Administrative Hearing Panel will have **three members**, two of whom must be College employees.

2

- The pool of College employees who may serve will have received training regarding this policy and its investigation and adjudicate process.

3

- Whenever possible, in cases in which the Respondent is an employee, at least one member of the panel will be from the same job classification (i.e., staff or faculty).

4

- The third member of the panel will serve as the chair and Hearing Convener, and will have experience and training in the administration of sexual assault.

5

- The Hearing Convener need not be a member of the College community.

# Advance Hearing Preparation is Critical



Carefully review the Investigative Report

Review all of the evidence gathered during the investigation



Read the parties' responses to the Investigative Report to anticipate the arguments they will make at the hearing

Know the elements of all of the Policy violations at issue

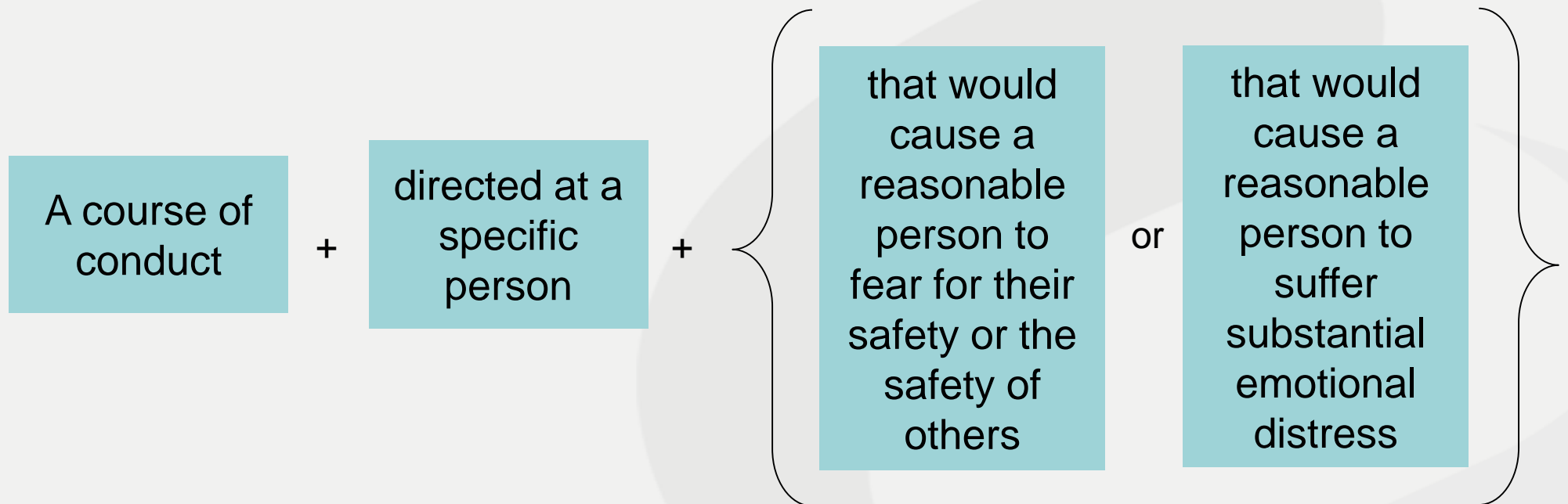


Identify gaps, issues, necessary witnesses, and prepare questions in advance of the hearing.

# Mapping the Policy Elements & Case Facts

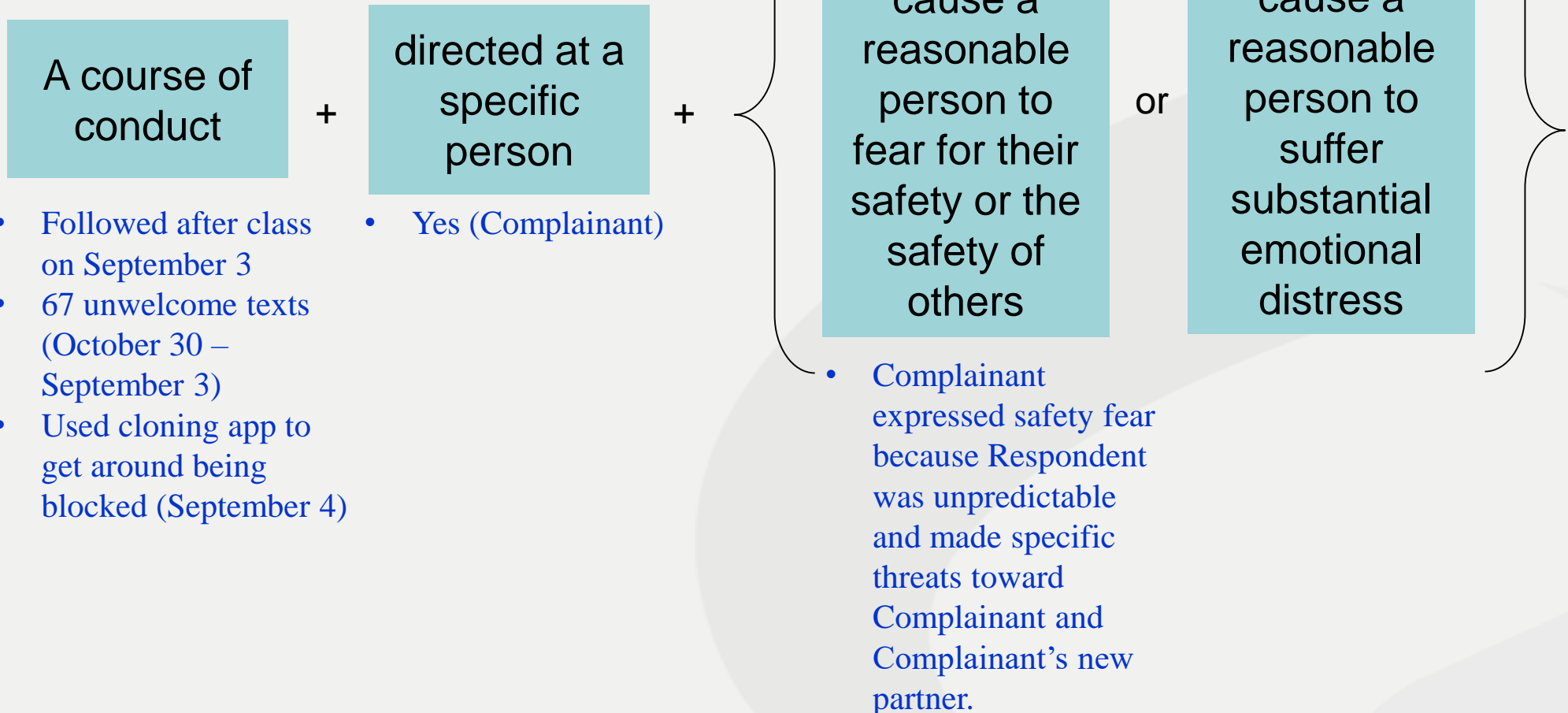
- **Stalking**

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



# Mapping the Policy Elements & Case Facts

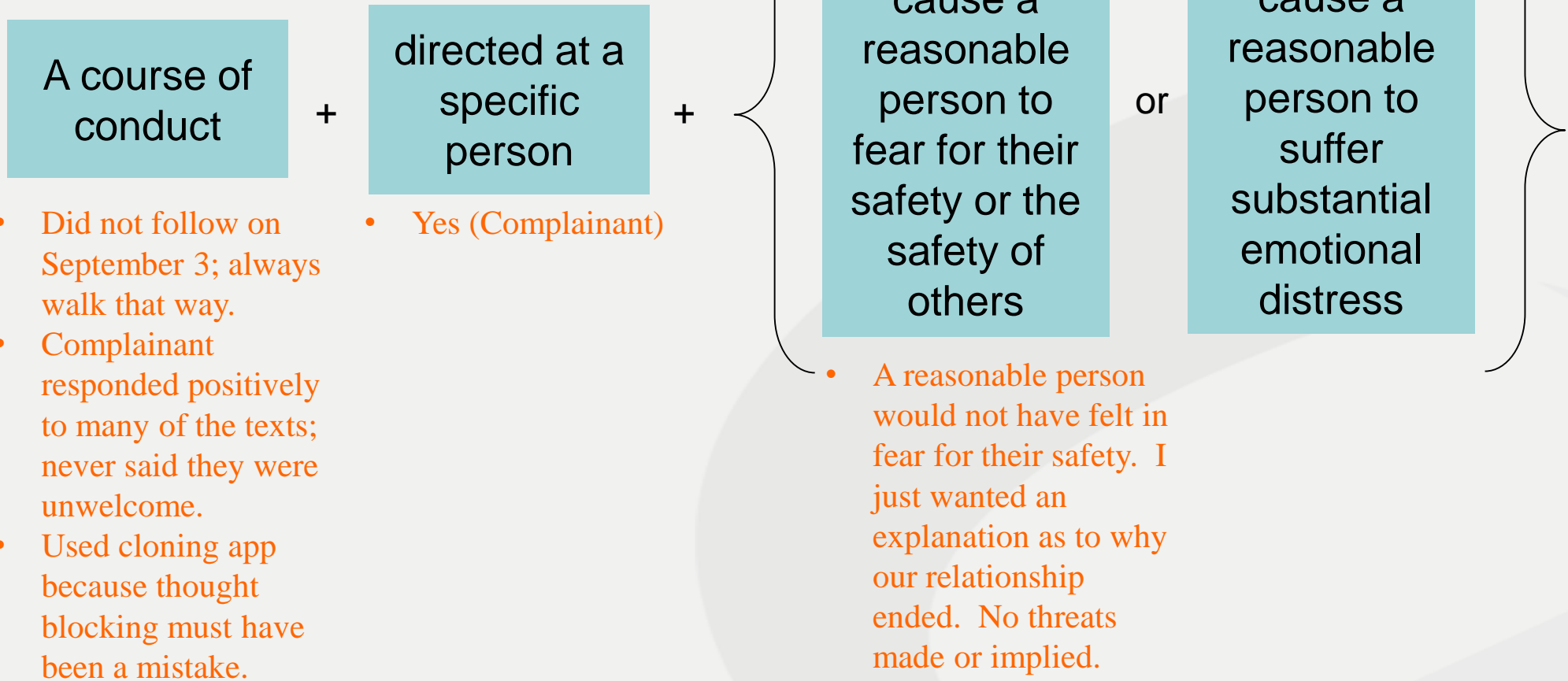
Blue type = Complainant's account\*



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

# Mapping the Policy Elements & Case Facts

Orange type = Respondent's account\*



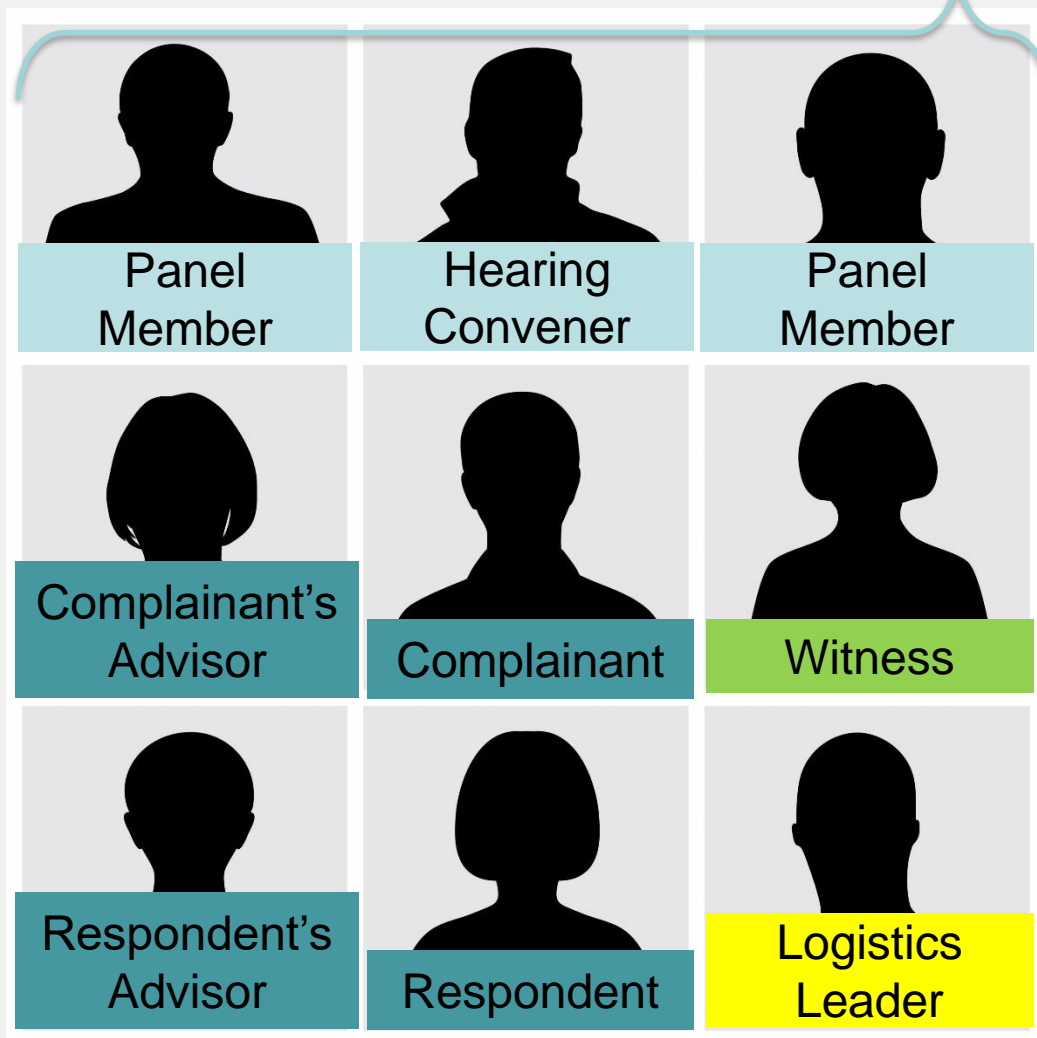
\* These case facts are fictional and were developed for training purposes

# Witness Accounts

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

# Hearing Logistics

## Decision-Makers



- 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

# The Role of the Administrative Hearing Panel

- Review the investigative report and any written statements provided by the parties in response to the investigative report, all exhibits, and any additional relevant evidence introduced at the hearing.
- Determine the format of the hearing.
- Provide all parties with an equitable opportunity to be heard and to reach a full and fair determination as to responsibility and imposition of any sanction, should there be a finding of responsibility.
- Determine the relevance of every question posed by the parties' advisors and briefly explain any decision to exclude a question as not relevant.\*

\*The Hearing Convener will decide whether questions are relevant on behalf of the Panel.



# The Role of the Administrative Hearing Panel

- Resolve all outstanding questions of fact, including the credibility of witnesses and the adequacy of the proof of the allegations, and render a decision.
- Reach credibility determinations if appropriate, but do not base credibility determinations on a person's status as a Complainant, Respondent, or witness.
- Prepare a written decision, which includes the finding of responsibility or non-responsibility and rationale for your decision.
- Determine sanction, if appropriate.



# The Logistics of the Hearing

The live hearing may be conducted with all parties physically present in the same geographic location, or,

At the College's discretion, any or all parties, witnesses, and other participants may appear at the live hearing virtually through electronic video conferencing.

This technology will enable participants simultaneously to see and hear each other.

All proceedings will be recorded through audiovisual recording or transcript.

That recording or transcript will be made available to the parties for inspection and review.

# The Hearing Format, Generally

1

- Opening statements from the Complainant and Respondent.

2

- The Complainant will respond to relevant questions from the Panel and then the Respondent's advisor.

3

- The Respondent will respond to relevant questions from the Panel and then the Complainant's advisor.

4

- The Panel will also hear from relevant witnesses, including the Investigator.

5

- Each party will have the opportunity to question the witnesses, including the Investigator, through their advisor of choice.

6

- After all parties and witnesses have been heard, the parties will have an opportunity to provide a closing statement.



# The Advisor of Choice

- Parties are permitted to have an advisor of their choice accompany them to a meeting or Hearing pursuant to the College's Policy on Sexual Harassment ("Policy").
- The advisor may be any person, including an attorney, but need not be an attorney.
- A party may decline to use an advisor for all stages of the formal or alternative resolution process, with the exception of the Hearing, where any questioning of the other party must be conducted by the party's advisor.
- If a party does not have an advisor for the hearing, the College will provide an advisor, free of charge.
- This College-appointed advisor may be, but is not required to be, an attorney, and will attend the Hearing and conduct questioning on behalf of that party.



# The Role of the Advisor (1 of 2)

1

May accompany their advisee to all meetings or proceedings related to the investigation and resolution of a report under the College's Policy.

2

May provide support and advice to the advisee at any Title IX-related meetings and proceedings.

3

May receive copies of all correspondence from the Title IX Office to the advisee with consent from the advisee.

4

May ***not*** speak on behalf of the advisee during any interview or meeting, except at the Hearing and only in the capacity of conducting cross-examination on behalf of the advisee.



# The Role of the Advisor (2 of 2)

5

May **not** submit written position statements on behalf of the advisee to be included in the record. All statements must be made directly by the advisee.

6

May **not** disrupt meetings or proceedings or fail to follow the rules of the Hearing, and in such cases, the advisor can be asked to leave.

7

Must have sufficient flexibility to attend interviews, receive documentation, and attend the Hearing (if desired by the advisee).

8

Should be knowledgeable about the College's Policy on Sexual Harassment and any other relevant policies and procedures.



# Rules of Decorum (1 of 2)

1

- Participants are expected to treat one another respectfully and conduct themselves professionally and in accordance with the Policy.

2

- All participants should speak one at a time and avoid talking over one another.

3

- Parties should wait until their allotted time to talk and not interrupt witnesses, the Hearing Officer, etc.

4

- Parties should have their statements and parties' advisors should have their questions prepared in advance of the hearing.



# Rules of Decorum (2 of 2)

5

- Parties and witnesses are not permitted to record the hearing.

6

- Parties and witnesses should not answer any question until the Hearing Officer has determined whether the question is relevant.

7

- Parties are permitted to consult with their advisors during the hearing.

8

- Advisors will be given one warning when their conduct violates these Rules and will be removed or dismissed from the hearing upon a second violation of these Rules.

9

- Parties and advisors should direct all inquiries about the hearing process should be directed to the Title IX Coordinator.



# The Mechanics of Cross-Examination

Each party will have the opportunity to question the other party, the witnesses, and the Investigator through their advisor of choice directly, verbally, and in real-time.

The College will make all evidence directly related to the allegations, as shared with the preliminary investigation report, available to the parties at the hearing to refer to such evidence during the hearing, including for purposes of cross-examination.

## The cadence of cross-examination at the Hearing:

Only relevant questions may be asked of a party or witness. Before a party or witness responds to a question, the **Hearing Convener** will first determine whether the question is relevant and briefly explain any decision to exclude a question as not relevant.

## Advisor to perform cross-examination:

If a party does not have an advisor present at the live hearing, the University will provide an advisor, free of charge, who may be, but is not required to be, an attorney, for questioning on behalf of that party.

# When the Proponent of a Statements Does Not Submit to Cross-Examination

If a party or witness does not submit to cross-examination at the live hearing, the [Administrative Hearing Panel] **must not rely on any statement** of that party or witness in reaching a determination regarding responsibility; provided, however, that the [Administrative Hearing Panel] 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.

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

# 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>

# **DELIBERATIONS**

# **THE HEARING SCRIPT**



# What to Expect After the Hearing

1

## Deliberate:

Resolve all outstanding questions of fact, including the credibility of witnesses and the adequacy of the proof of the allegations, and render a decision.

Apply the **preponderance of the evidence** standard.

2

If the Panel finds the Policy was ***not violated***:

Issue an Outcome Letter simultaneously to both parties that includes, among other items, the process for appeal.

If the Panel finds the Policy ***was violated***:

Proceed to #3

3

## Impact and Mitigation Statements:

The TIX Coordinator notifies the parties of the Panel's decision no later than 1 business day following the decision.

Both parties have 5 business days to submit statements for the Panel's consideration.

4

## Assign a Sanction:

The Panel reconvenes for sanction and is also provided with: (1) Respondent's prior disciplinary history, if any, and (2) sanctioning precedents in similar cases.

5

## Outcome Letter:

Issue an Outcome Letter simultaneously to both parties that includes, among other items, the process for appeal.

# **SANCTIONS**

# Discretion in Sanctioning

- Upon reaching a determination that a respondent is responsible for sexual harassment, the final regulations **do not restrict a recipient's discretion** to impose a disciplinary sanction against the respondent, including suspension, expulsion, or other removal from the recipient's education program or activity.

Title IX Regulations May 19, 2020, Preamble at 85 F.R. 30224



# Discretion in Sanctioning

- For reasons described elsewhere in this preamble, the Department **does not require any particular disciplinary sanctions** against respondents, because these Title IX regulations are focused on requiring remedies for victims, leaving disciplinary decisions to recipients' discretion.

Title IX Regulations May 19, 2020, Preamble at 85 F.R. 30262

# Discretion in Sanctioning

- The § 106.45 grievance process is designed for implementation by non-lawyer recipient officials, and the final regulations **do not intrude on a recipient's discretion** to use disciplinary sanctions as educational tools of behavior modification rather than, or in addition to, punitive measures.
- Similarly, these final regulations **do not impose a standard of proportionality** on disciplinary sanctions.

Title IX Regulations May 19, 2020, Preamble at 85 F.R. 30266, 30274

# Discretion in Sanctioning

- The Department has determined that administrative enforcement of Title IX does not require overriding recipients' discretion to make decisions regarding disciplinary sanctions, and thus these final regulations focus on ensuring that respondents are not punished or disciplined unless a fair process has determined responsibility, but respects the discretion of State and local educators to make disciplinary decisions pursuant to a recipient's own code of conduct.



# Policy on Sexual Harassment (**Sanctions**)

**Wide Range of Sanctions for Student Respondents:** “Students found to have committed sexual assault will most likely receive a sanction of suspension or expulsion.”

**Range of Sanctions for Staff Respondents:** Disciplinary action for staff employees is governed by existing policies in the *Employee Handbook* and/or collective bargaining agreements, as applicable, and may include verbal warnings, written warnings, written reprimands, suspension, termination of employment, or other action as deemed appropriate under the circumstances.

**Range of Sanctions for Faculty Respondents:** Disciplinary actions for faculty employees includes: treatment, admonition, censure, suspension and dismissal.

# APPEALS



# Policy on Sexual Harassment (**Appeals**)

## Appeals:

The Complainant and Respondent may appeal the outcome, subject to the limitations set forth below. The Title IX Coordinator or a Deputy Title IX Coordinator will provide written notification to the Complainant and the Respondent of any applicable appeal procedures at the time the Complainant and Respondent receive notice of the outcome decision. The purpose of an appeal is to allow the College to review and correct material errors in the adjudication process.



# Grounds for Appeal

1

- Discovery of new factual information that was not known or available at the time of the adjudication and the presentation of which would have affected the original outcome.

2

- Material procedural error that rendered the process fundamentally unfair;

3

- Abuse of discretion in the issuance of a sanction, meaning that the Administrative Panel imposed a sanction that was significantly disproportionate to the offense; or

4

- Evidence of bias in the process.



# Policy on Sexual Harassment (**Appeals**)

## Appeal Procedures:

An appeal must be made in writing and signed by the party filing the appeal.

- An appeal in which the Respondent is a **faculty employee** must be directed to the Vice President for Academic Affairs;
- An appeal in which the Respondent is a **student** must be directed to the Vice President for Student Success and Enrollment Management; and
- An appeal in which the Respondent is a **staff employee** must be directed to the Vice President for Finance and Operations. Any of these individuals may assign the appeal to a designee, so long as that person is appropriately trained and does not have a conflict of interest.





# Policy on Sexual Harassment (**Appeals**)

## Appeal Procedures (cont'd):

Appeals must be made within five (5) business days of receipt of the determination or within five (5) business days of receipt of the decision regarding sanctions and/or other actions and must include the grounds for appeal and an outline of any supporting evidence. Appeals transmitted via e-mail will be considered to be “in writing” for the purposes of this section.



# Policy on Sexual Harassment (**Appeals**)

## Appeal Procedures (cont'd):

If the appellate official determines that there are sufficient grounds to alter the prior decision, it is the responsibility of the appellate official to determine the scope of a new review and to award one of the following two forms of relief:

1. Return the case to the Title IX Coordinator or a Deputy Title IX Coordinator, with instructions for further investigation, if applicable, and consideration by the same or a different Administrative Panel; the decision about the composition of the panel, which shall be at the sole discretion of the appellate official; or
2. Return the case to the Title IX Coordinator or a Deputy Title IX Coordinator with instructions to appoint a different Administrative Panel to review the case.



# Policy on Sexual Harassment (**Appeals**)

## Appeal Procedures (cont'd):

Absent extenuating circumstances, the appellate official will notify the Complainant and Respondent of the appeal decision (i.e., whether the grounds for appeal have been adequately established) simultaneously in writing within fifteen (15) business days of receiving the appeal and will notify the Title IX Coordinator or a Deputy Title IX Coordinator in writing of instructions for any further action.



# Policy on Sexual Harassment (**Appeals**)

## Appeal Procedures (cont'd):

All decisions by the appellate official following a second review of the case are final. Absent extenuating circumstances, both parties will be notified of the final decision concurrently in writing within fifteen (15) business days of the deadline for the Complainant's or Respondent's response to the appeal but no later than one (1) business day following the decision, to the extent permitted by law.

# Use of Slides

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