

Informal Resolution Facilitation Training University of Scranton

Presented By:

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March 22, 2022



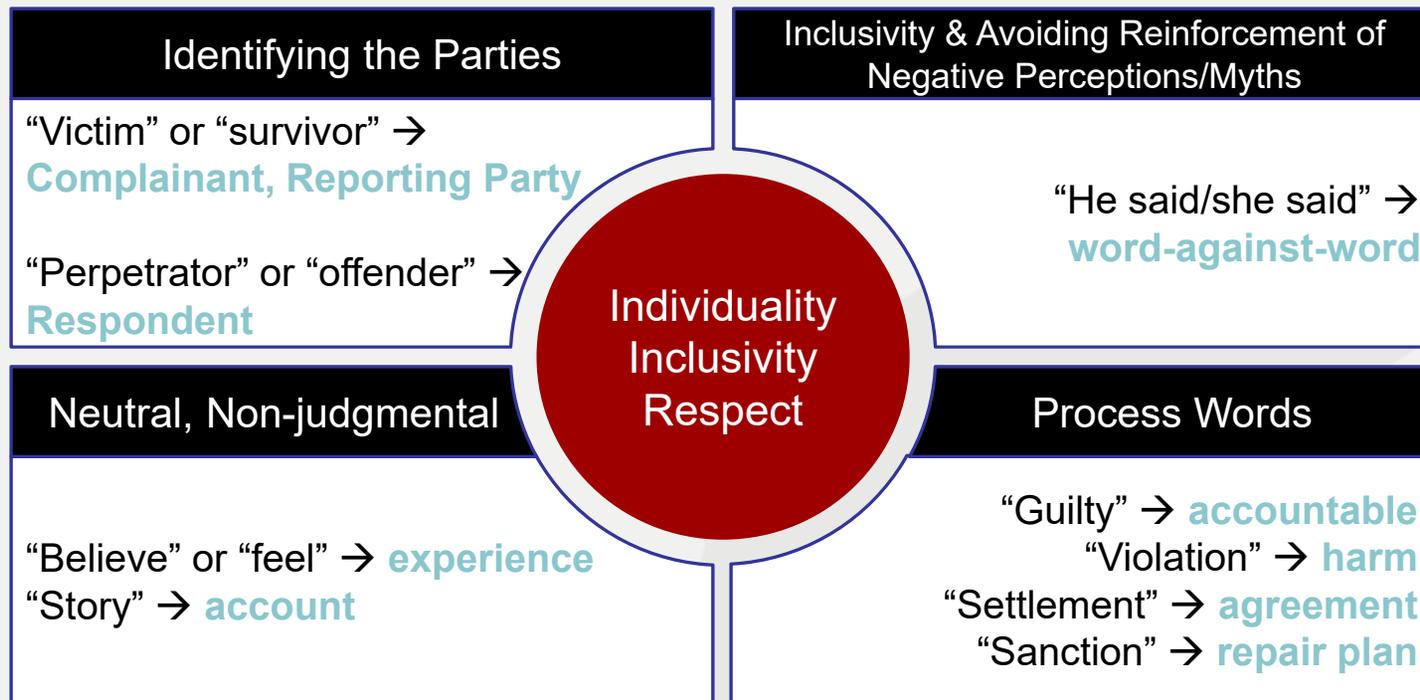
INTRODUCTION



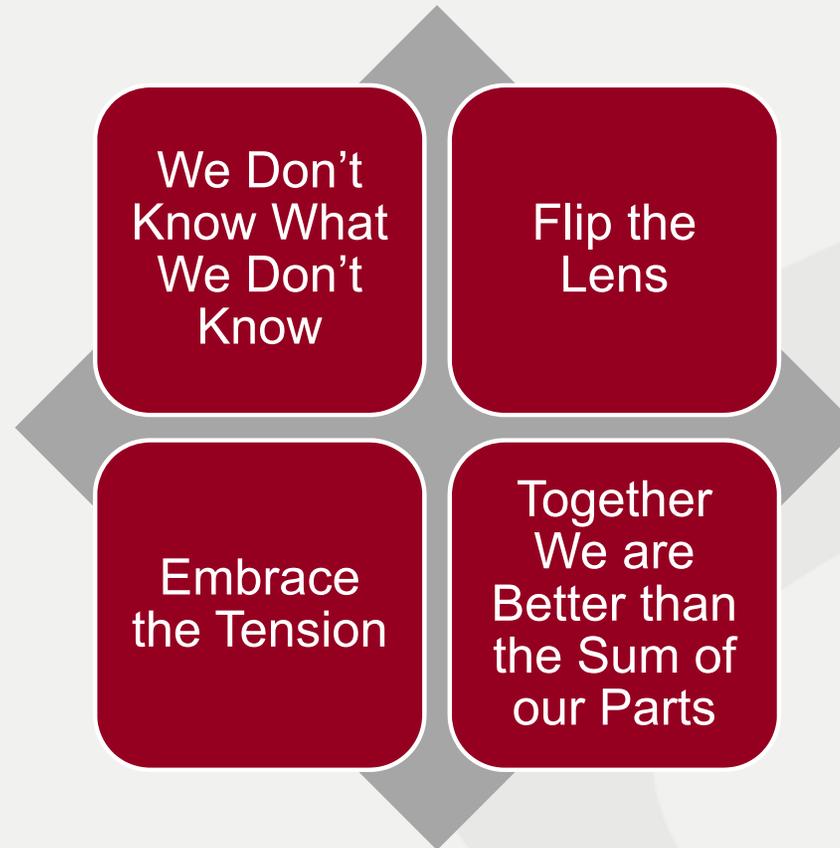
Training Agenda

Morning – Informational	Afternoon – Skill-Building
8:30 – 9:30 AM <ul style="list-style-type: none">• Introduction & Dynamics	1:00 – 2:00 PM <ul style="list-style-type: none">• Identifying and practicing core competencies
<i>5 minute break</i>	<i>5 minute break</i>
9:30 – 10:30 AM <ul style="list-style-type: none">• Process Options – <i>formal resolution</i>	2:00 – 3:00 PM <ul style="list-style-type: none">• Workshopping shuttle diplomacy and facilitated dialogues
<i>5 minute break</i>	<i>5 minute break</i>
10:30 – 11:30 AM <ul style="list-style-type: none">• Process Options – <i>informal resolution</i>	3:00 – 4:00 PM <ul style="list-style-type: none">• Putting it into practice
<i>5 minute break</i>	<i>5 minute break</i>
11:30 AM – 12:30 PM <ul style="list-style-type: none">• Informal Resolution key principles• 12:30 – 1:00 PM lunch break	4:00 – 4:30 PM (last 30 minutes) <ul style="list-style-type: none">• Wrap up• Q&A

Awareness of the Impact of Language

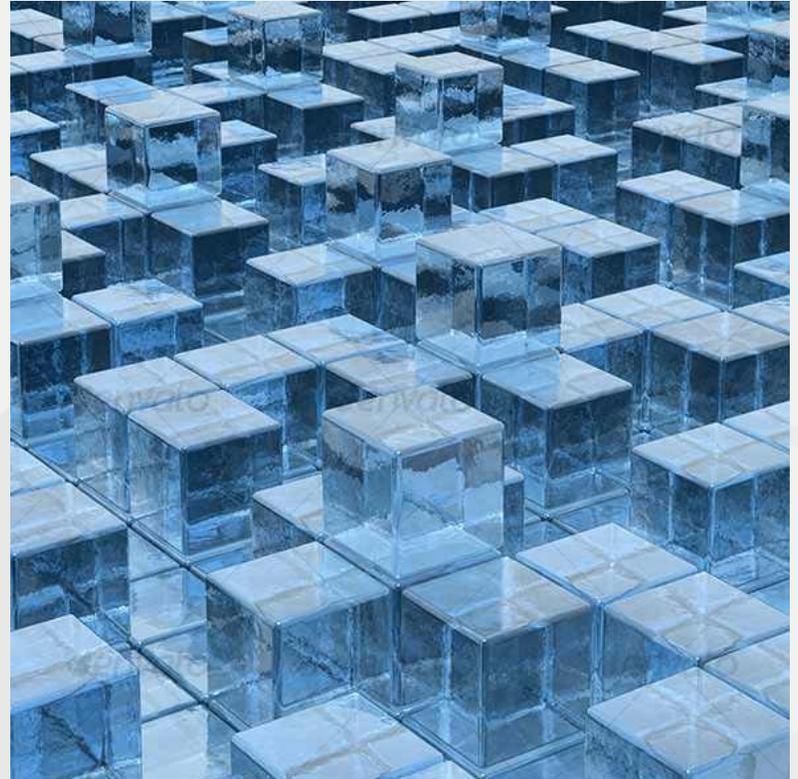


Framing the Conversation

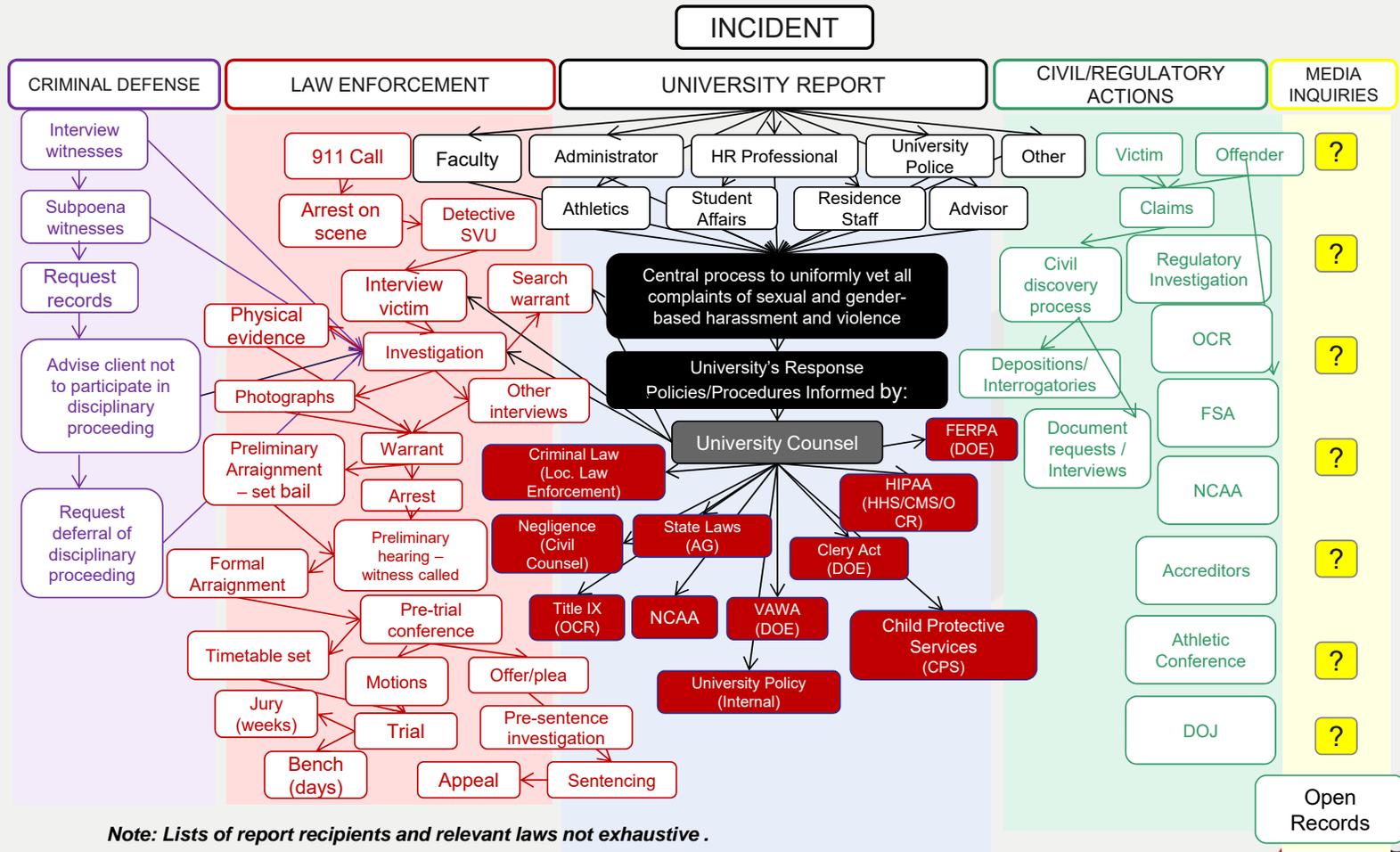


The Context

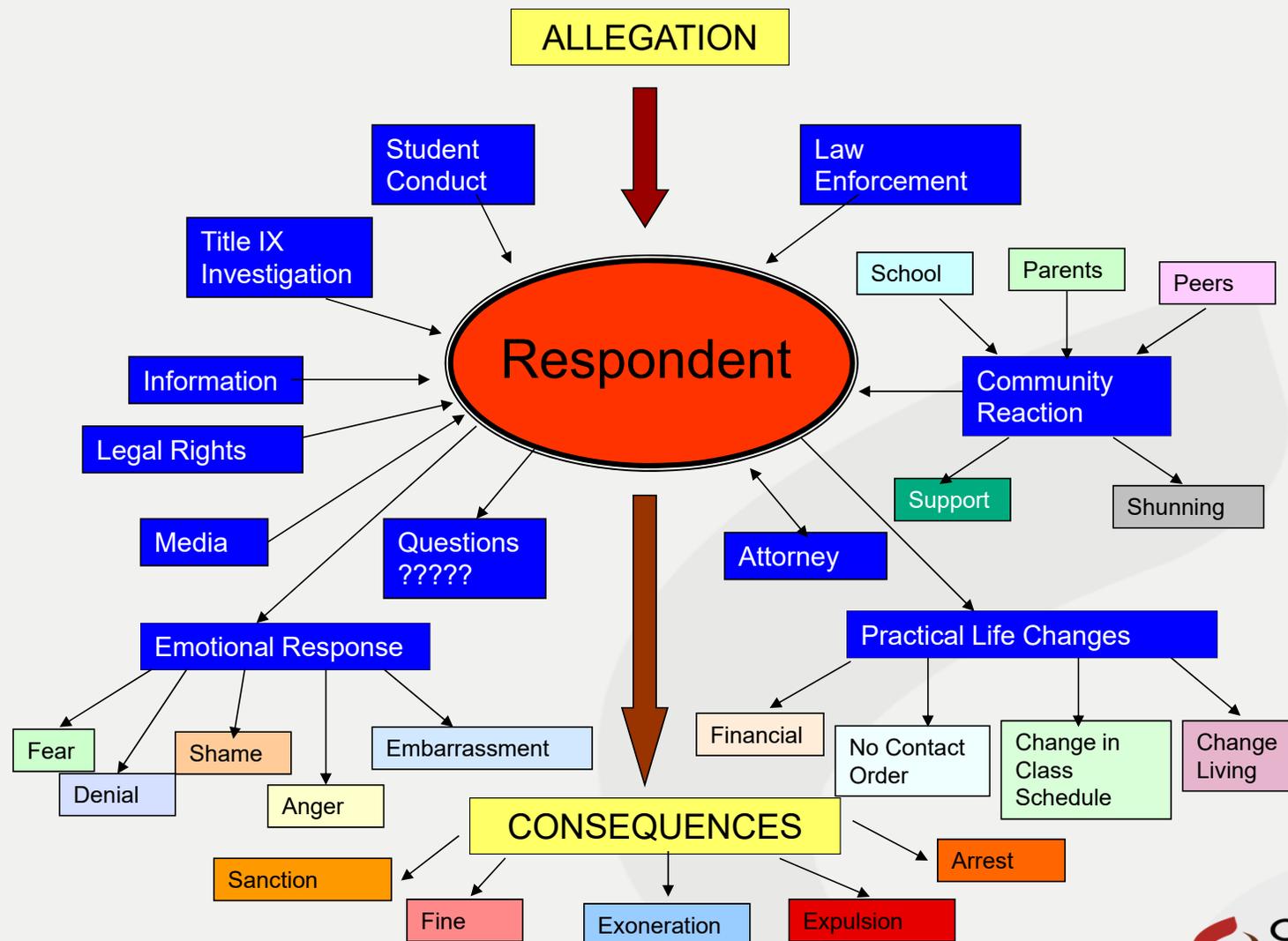
- Regulatory Framework
- Dynamics of Trauma & Sexual and Gender-Based Harassment and Violence
- Individual Culture, Climate, History, Resources, Policies, Procedures, Personnel and Values of the Institution



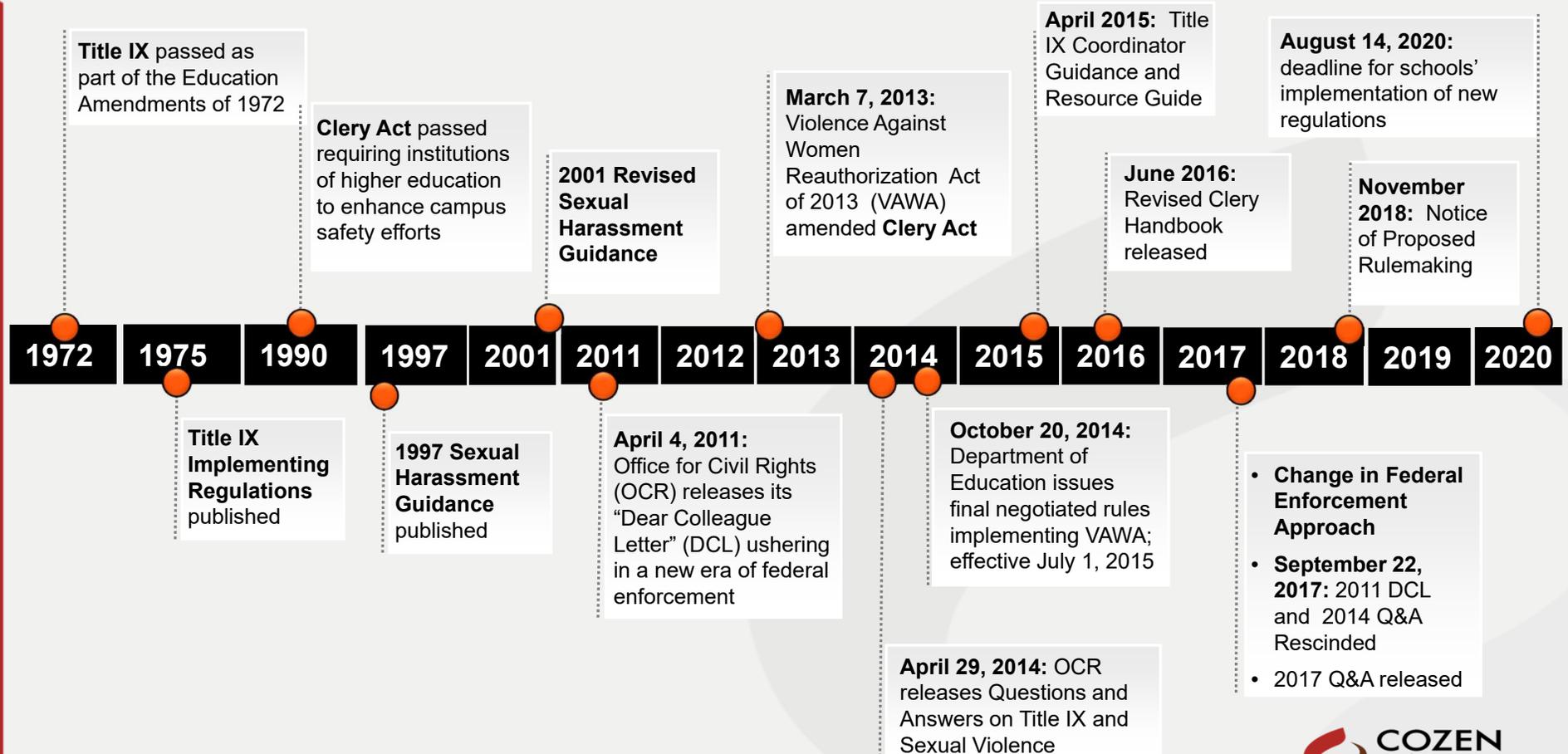
The Challenge of the Context







Evolution of Federal Legislation and Guidance



**SETTING THE CONTEXT:
DYNAMICS OF SEXUAL AND GENDER-
BASED HARASSMENT AND VIOLENCE**

Nature of the Conduct

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

Potential Impacts of Trauma

- APA DSM-5 defines trauma as: “Exposure to actual or threatened death, serious injury, or sexual violence in one (or more) of the following ways: directly experiencing the traumatic event(s)”
- During a traumatic event, the brain may detect a threat to survival
- The body may respond to this threat by producing hormones that can affect a person’s reaction to the event, during and after
- It may also affect a person’s ability:
 - To remember details (some details may be sharp, others not - central versus peripheral)
 - To recount incident (memory of sexual assault may be fragmented and impaired)
 - To provide a chronological account
- Key Takeaway: It is always improper to base a finding of responsibility on whether the Complainant appears to exhibit effects of trauma.

Key Takeaways

- Individuals respond to trauma differently. Our role is never to conclude that a person has or has not experienced trauma.
- We learn about the potential impacts of trauma so that we avoid improper prejudgments about a person or the information they share.
- Just as it is improper to cede decision making to statistics, it is improper to base a finding of responsibility on whether the Complainant appears to exhibit effects of trauma.
- While we do not typically think of Respondents experiencing potential neurobiological impacts of trauma, they may experience stressors that impact the way they present themselves and how they share information. We should avoid improper prejudgments about all people and the information they share.
- Again, each individual case must be evaluated on its facts.

Reactive Coping Mechanisms

- Understand that people's reactions are unique
- While many responses fall within an expected range, any response must be understood in the context of the individual's circumstances, coping mechanisms, and available resources and supports

Reactive Coping Mechanisms

- Limited or no verbal or physical resistance
 - Fear, feeling unable to move/act
 - Disbelief, denial, dissociation
 - Belief that resistance would escalate the conduct
- After the event
 - Shock/disbelief
 - Rush to normalization
 - Anticipating others' reactions

Reactive Coping Mechanisms

- Questioning of event and actions
 - I should/shouldn't have
 - Why did/didn't I
- Effect of complainant's own misconceptions
 - I was drinking
 - I consented to some of the acts
 - I put myself in that position
 - Not enough force/no weapon used
 - Not a stranger
 - I have been abused before – it must just be me

Delay in Reporting

- Delay in reporting
 - Expectation of prompt/fresh complaint
 - Did the person understand the significance of the act?
- Consider barriers to reporting
 - Ask the why without judgment
 - Help me understand . . .

Barriers to Reporting

- Fear of not being believed
- Fear of retaliation
- Fear a loss of privacy
- Fear of being blamed
- Incident may be trivialized
- Incident may be minimized
- Power differential
- Preservation of dignity
- Cultural, religious, family or other influences
- Processing of incident not linear
- Uncertainty about process
- Self-doubt:
 - Who to tell?
 - How to report?
 - When to report?
 - Why report?
- Ensure process for reporting that is:
 - Known to victims
 - Convenient
 - Professional
 - Trauma-informed
 - Private

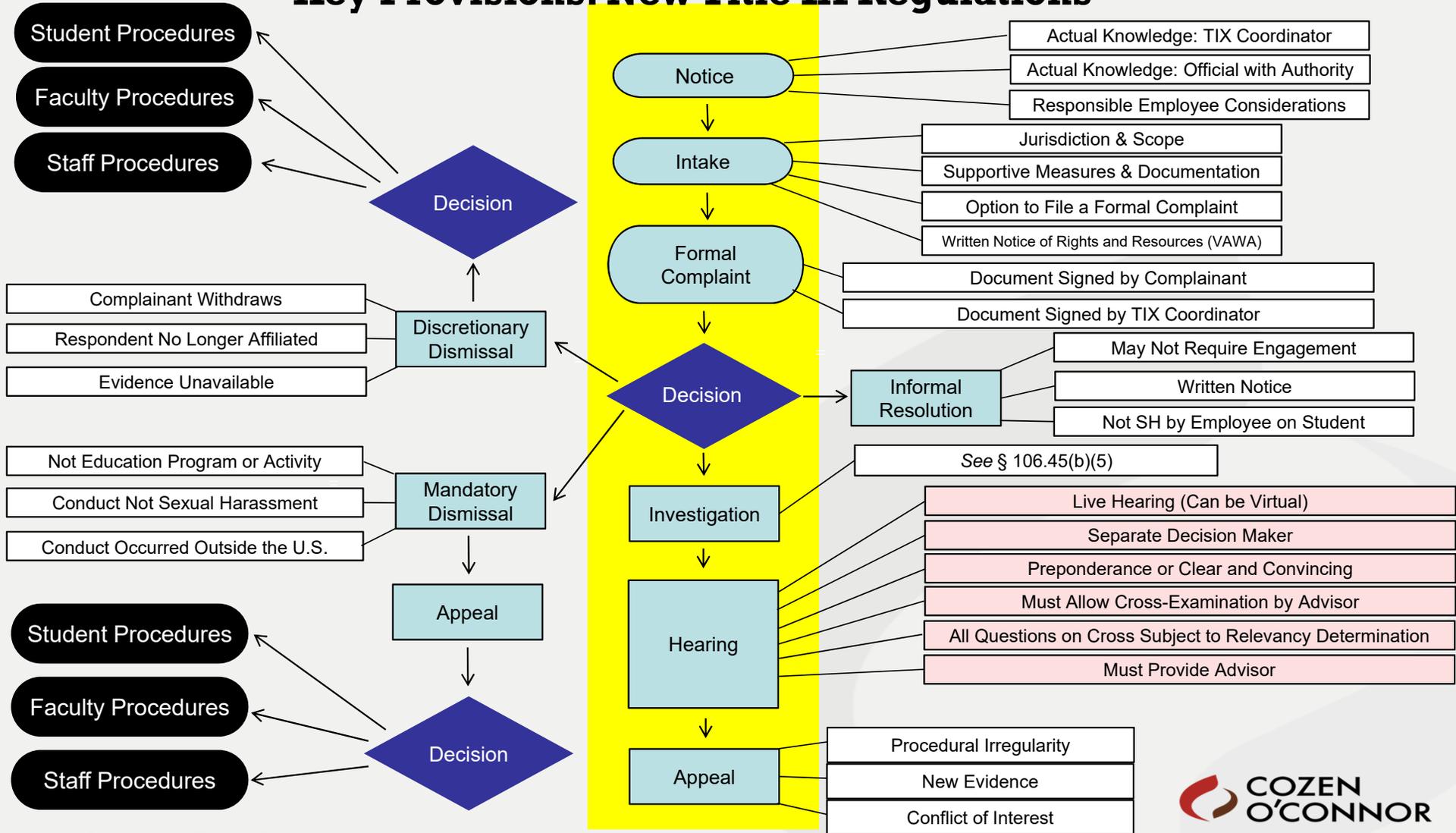
False Reports

- Statistics vary
 - Definitions, credibility of review, criteria, sample
- False report vs. unsubstantiated report



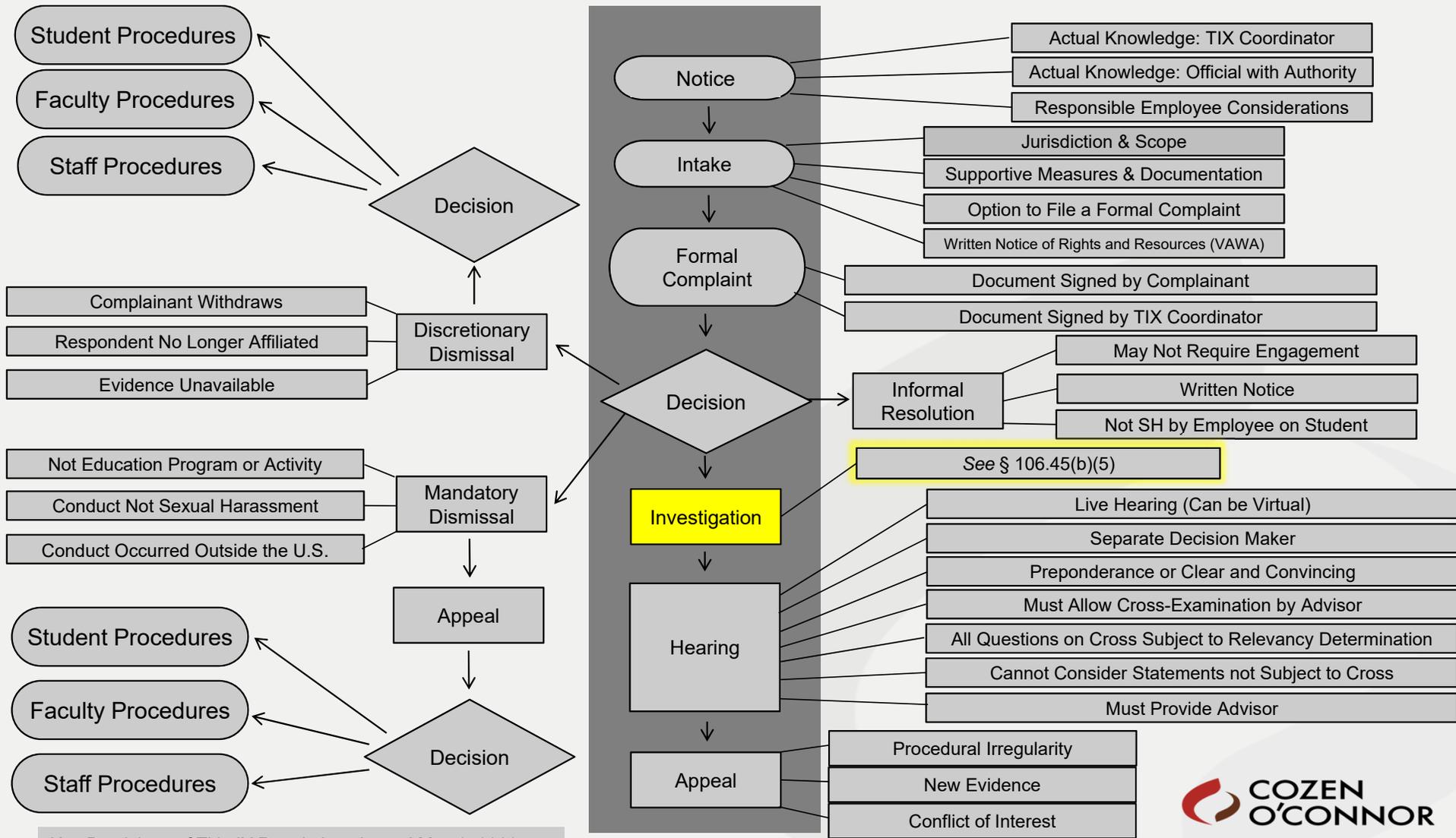
FORMAL RESOLUTION

Key Provisions: New Title IX Regulations



Key Provisions of Title IX Regulations issued May 6, 2020





Key Provisions of Title IX Regulations issued May 6, 2020;



Investigation Requirements



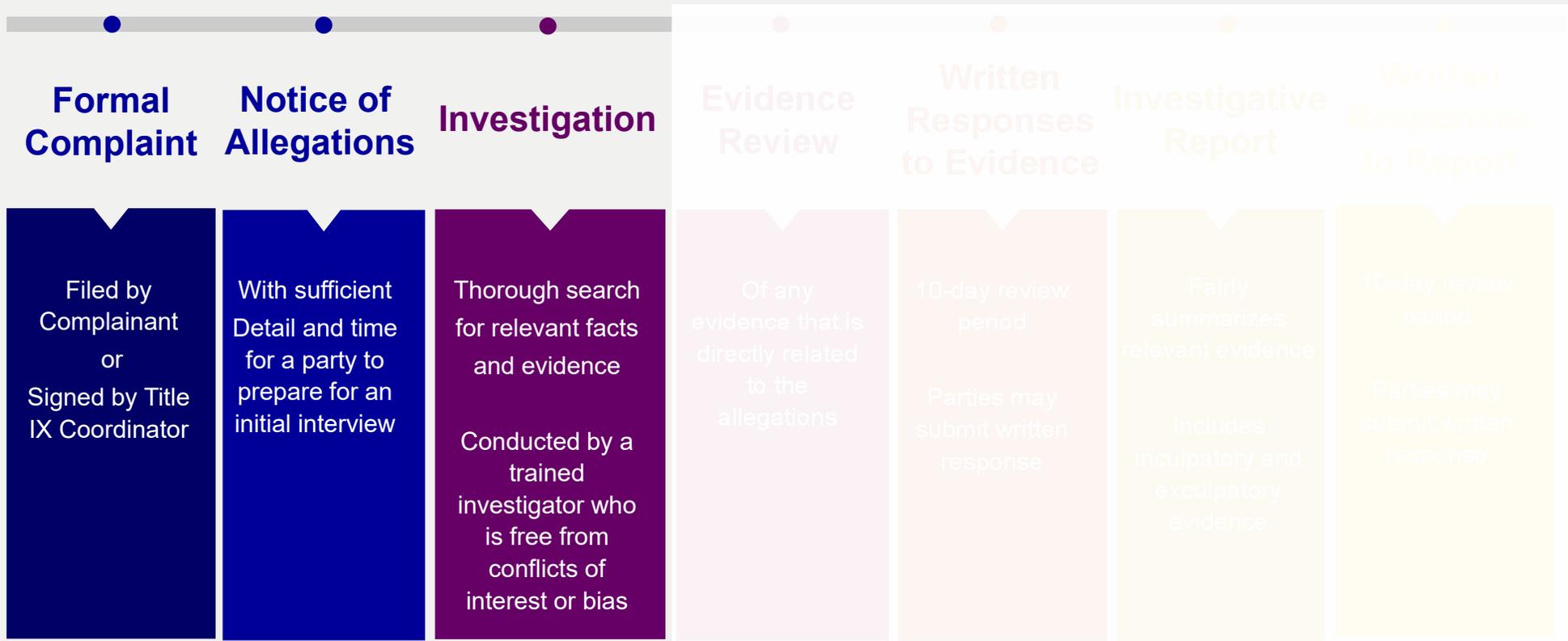
Investigation Requirements



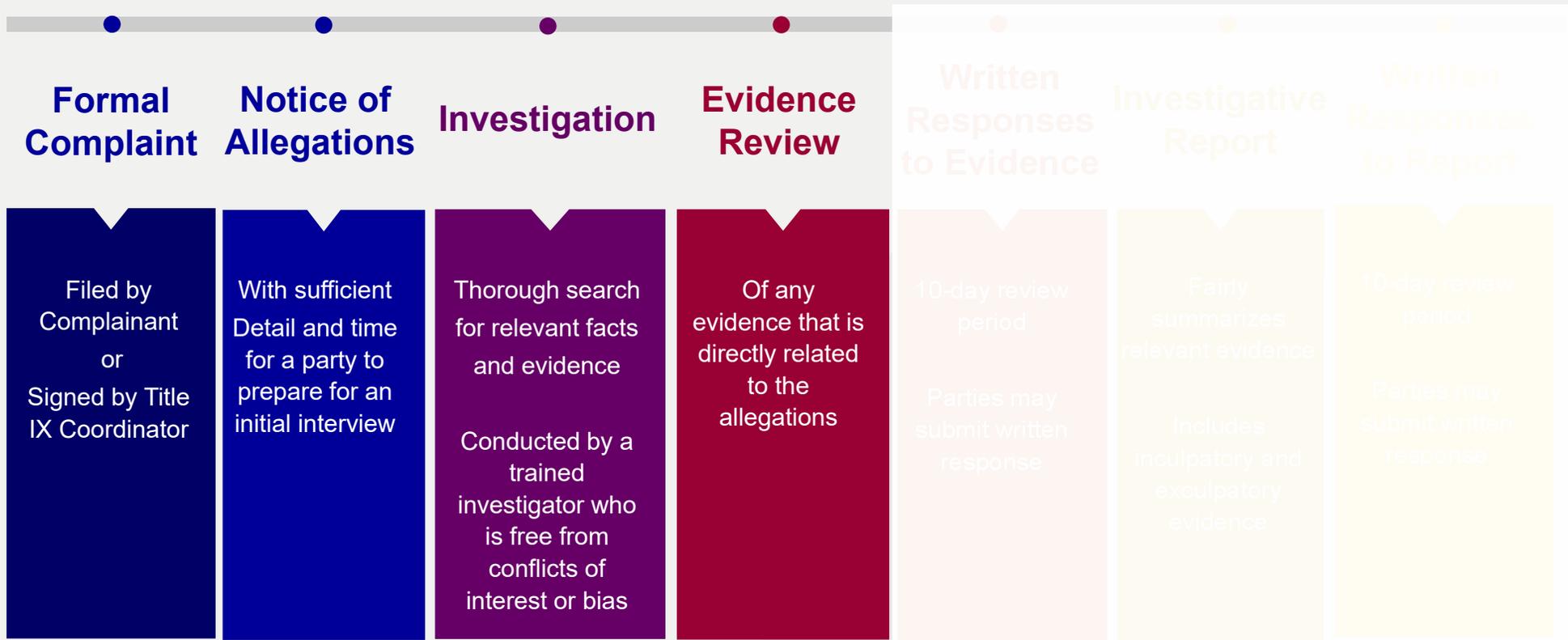
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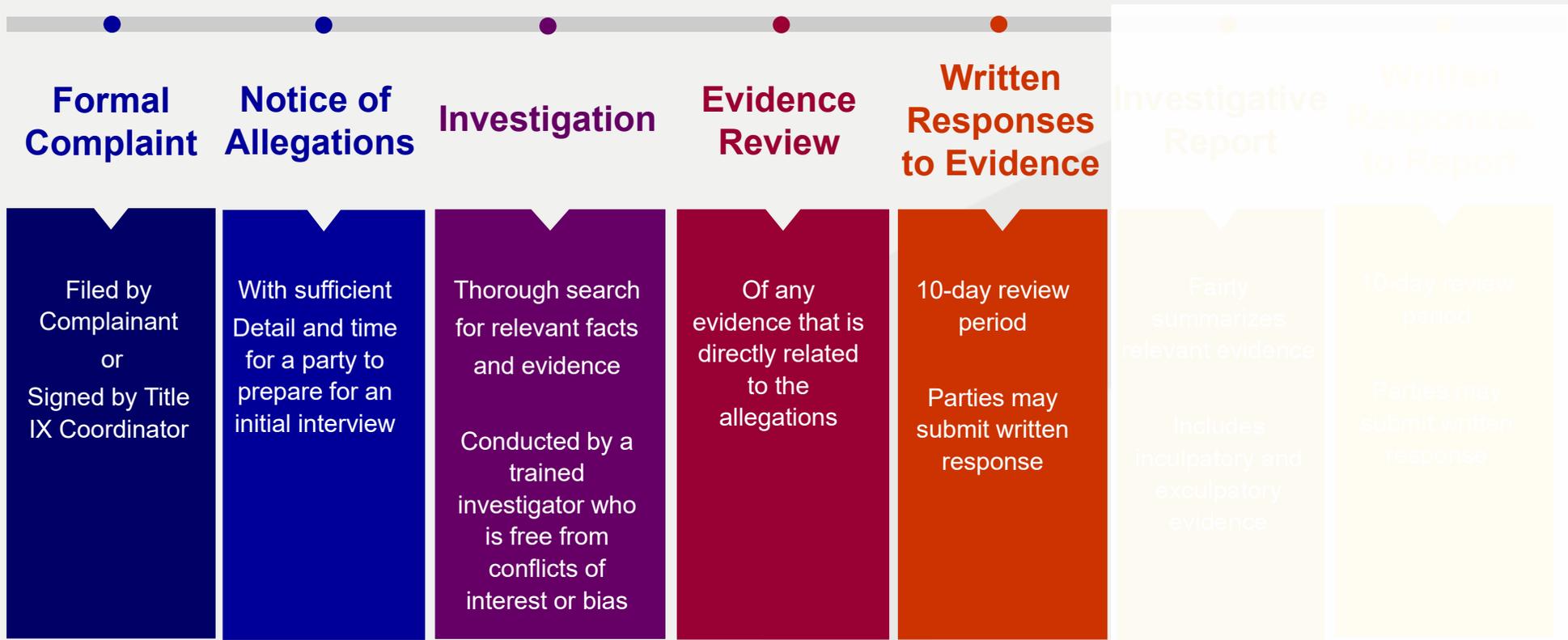
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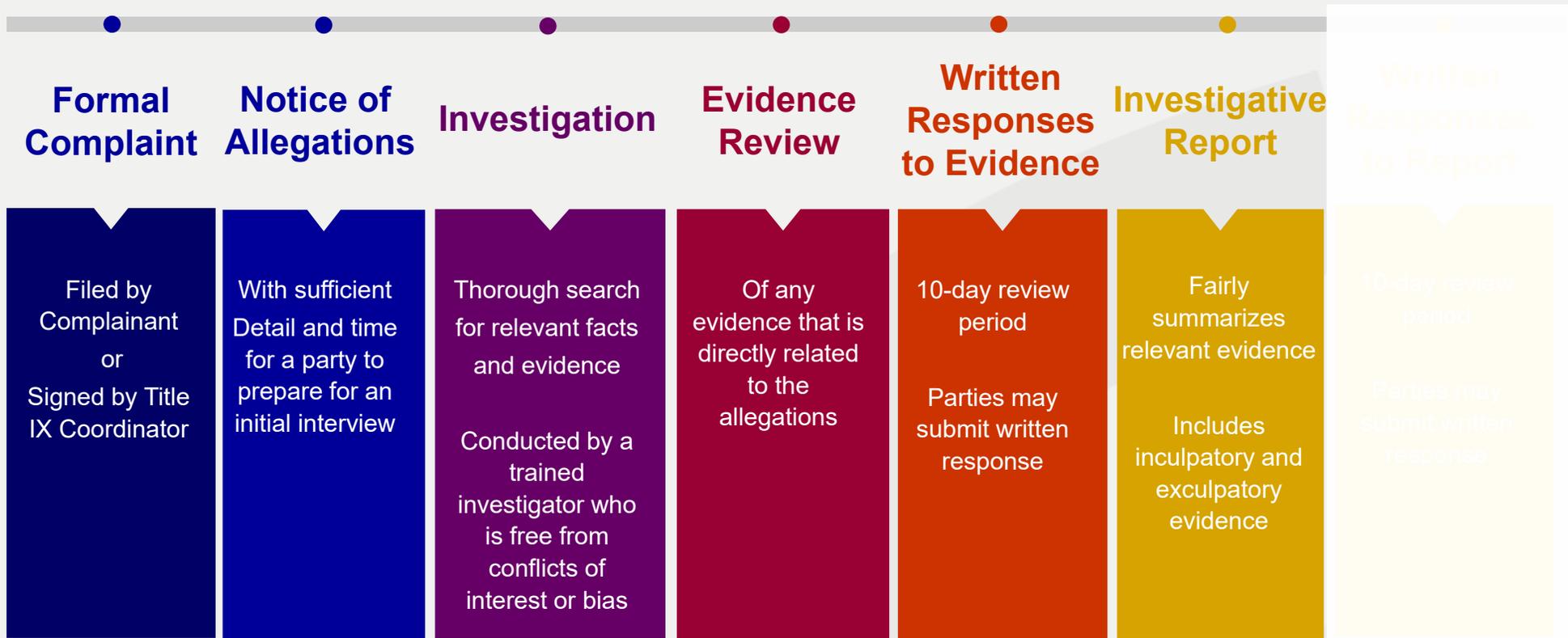
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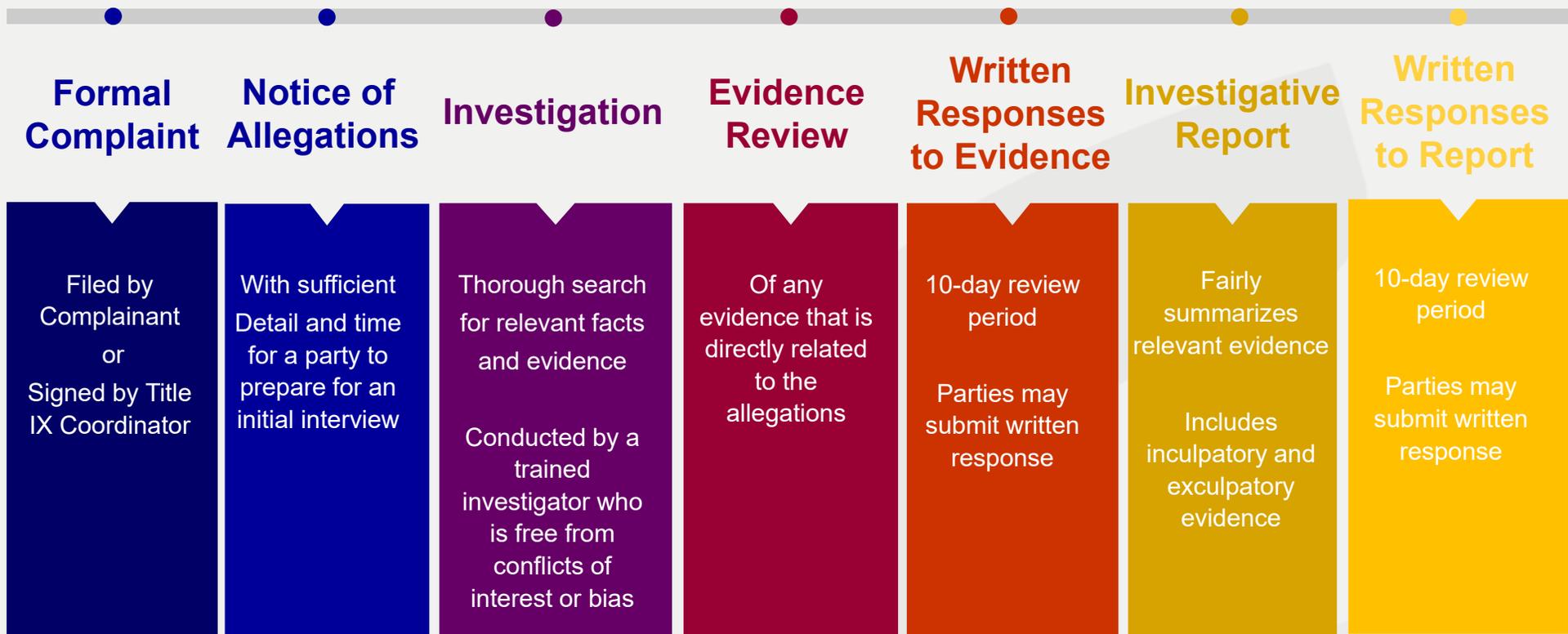
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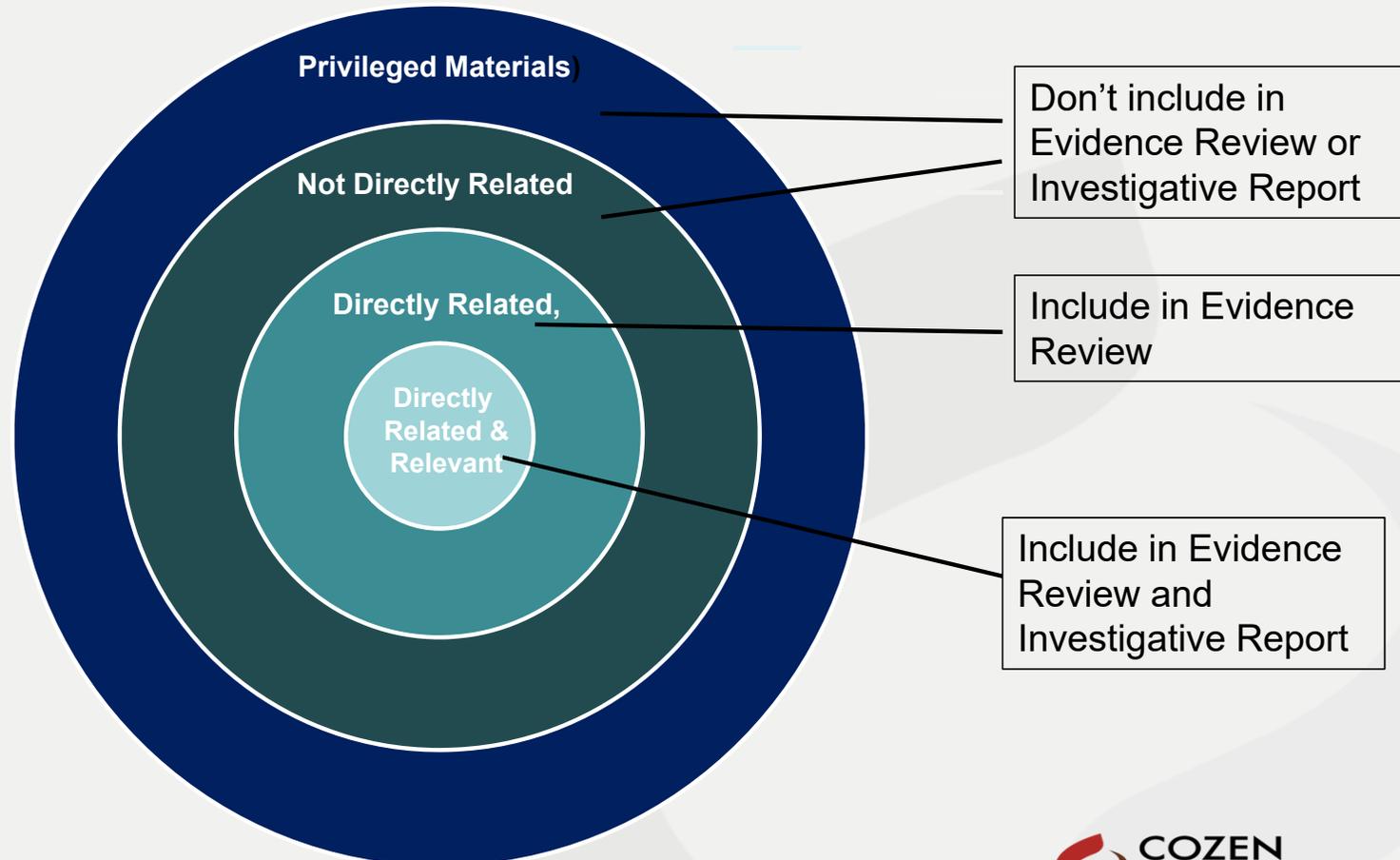
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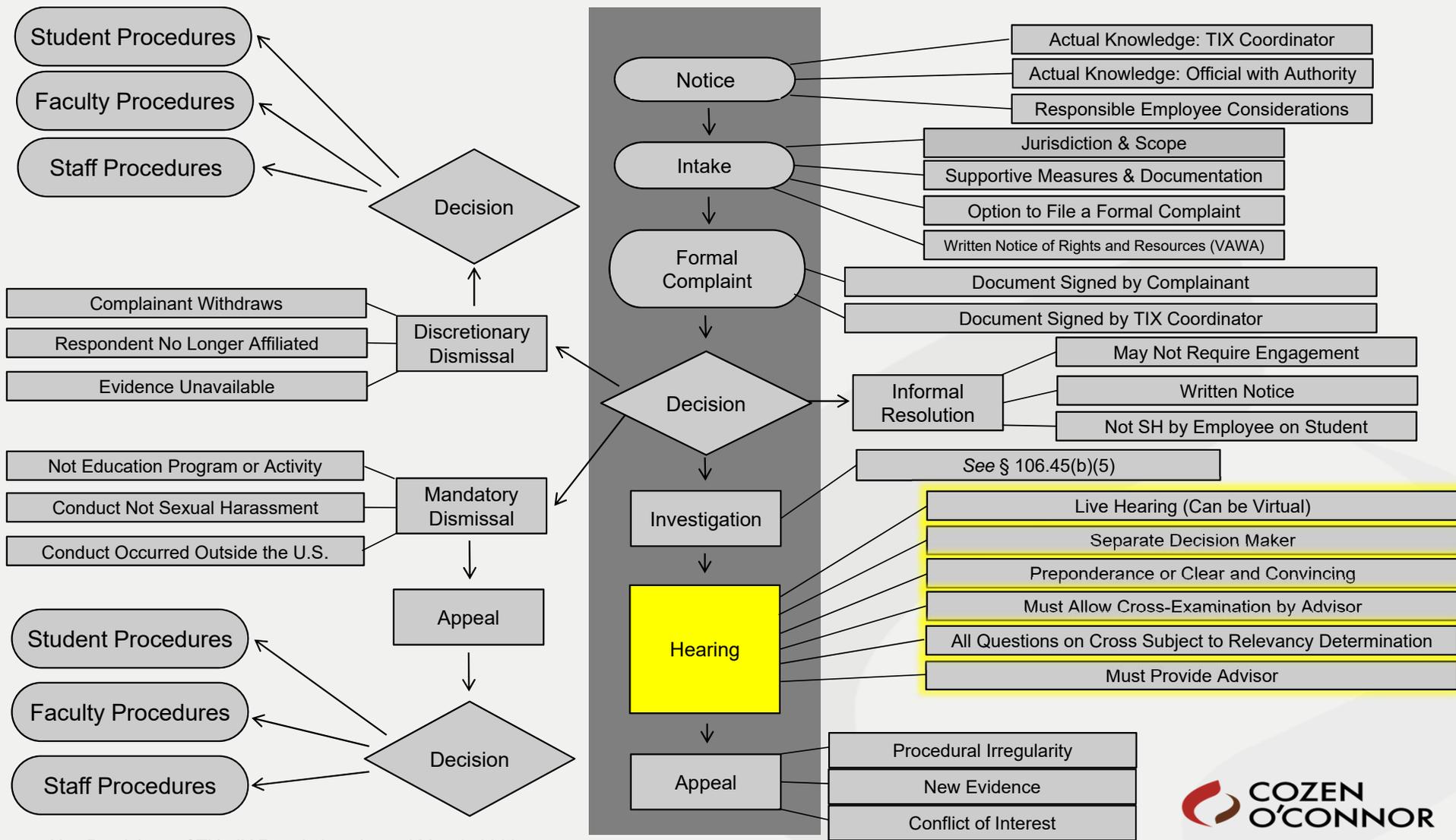


Investigation Requirements



Evidentiary Levels for Inclusion



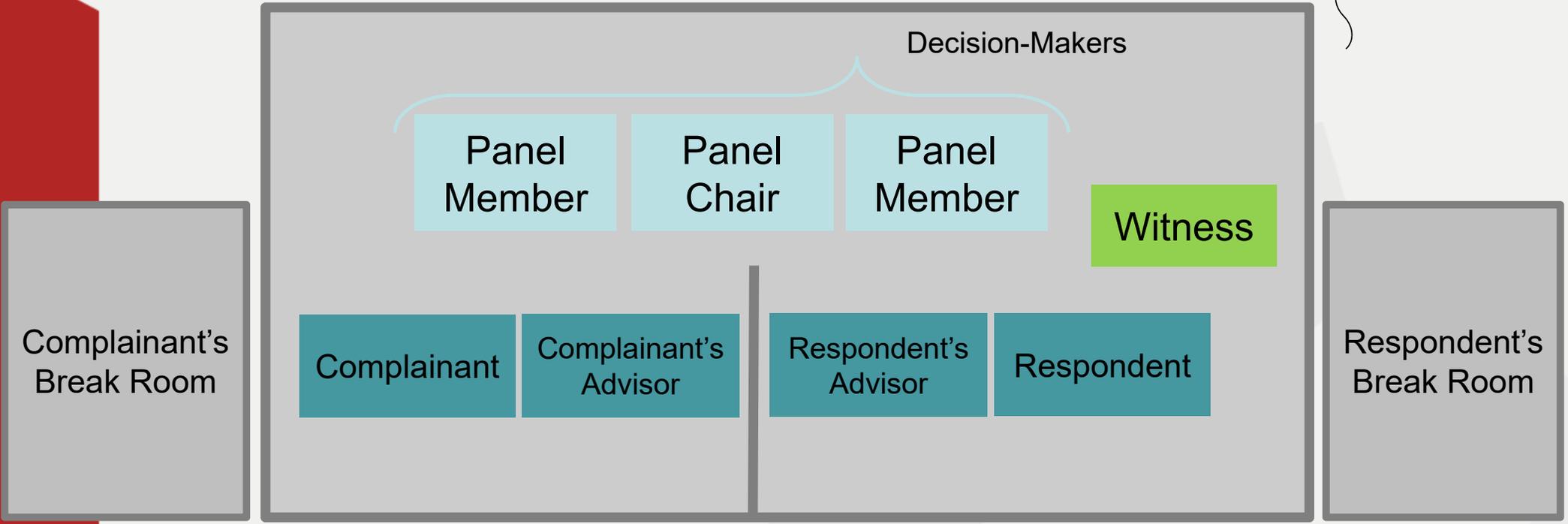


Key Provisions of Title IX Regulations issued May 6, 2020



In-Person Hearing Option 1

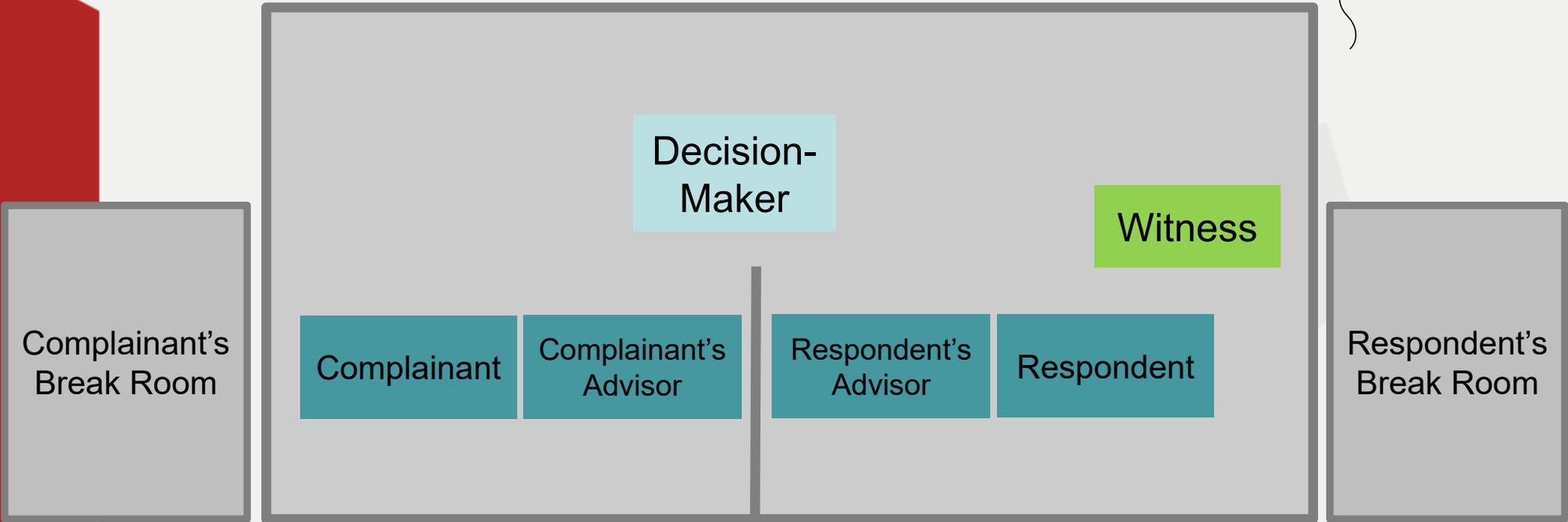
Hearing Room



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

In-Person Hearing Option 2

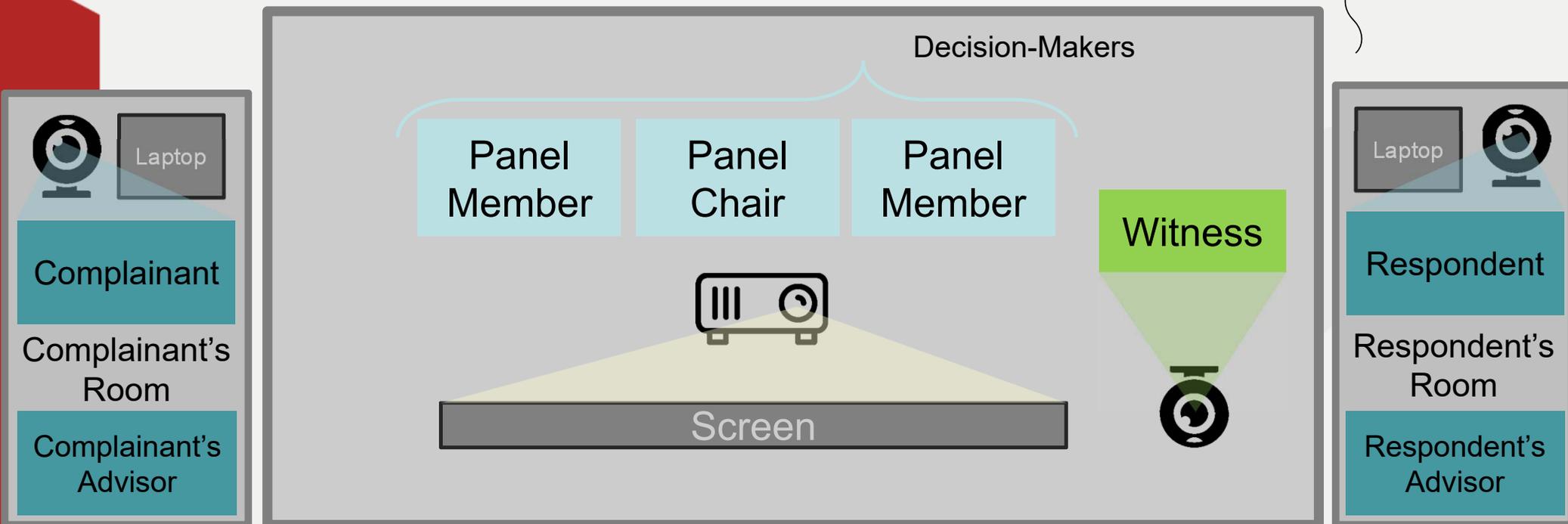
Hearing Room



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In-Person Hearing Option 3

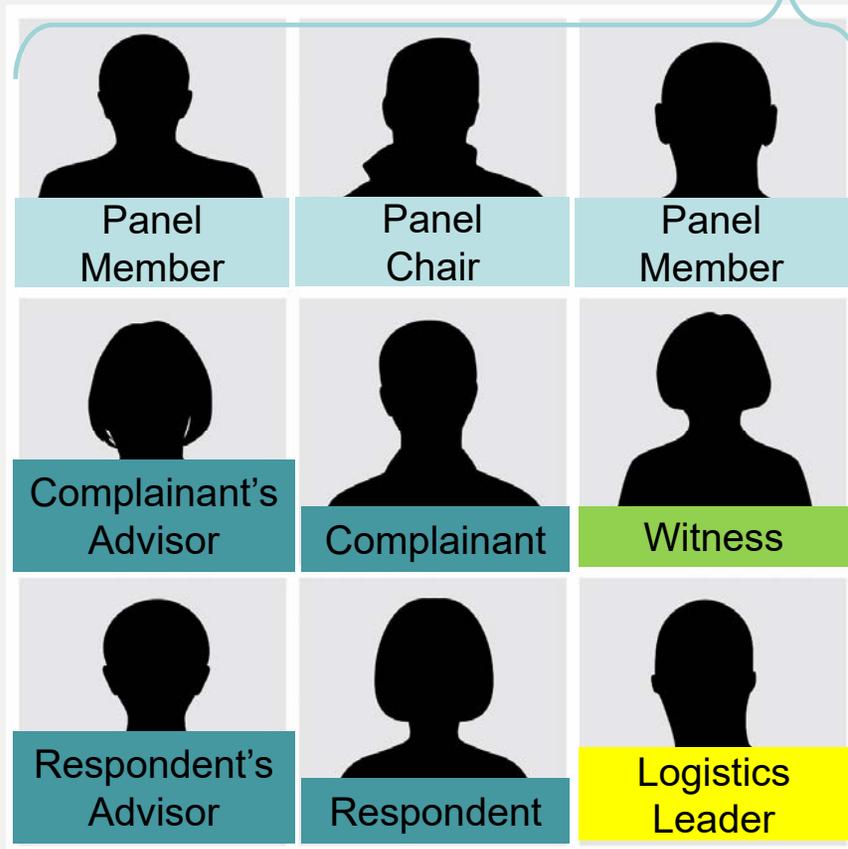
Hearing Room



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

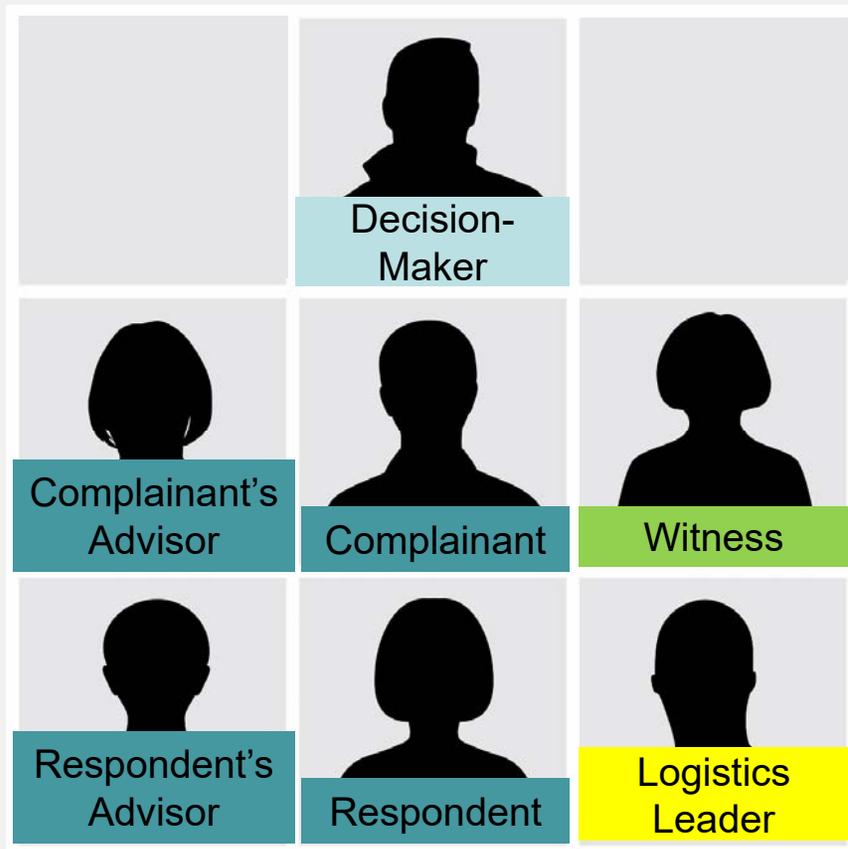
Remote Hearing Logistics

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

Remote Hearing Logistics

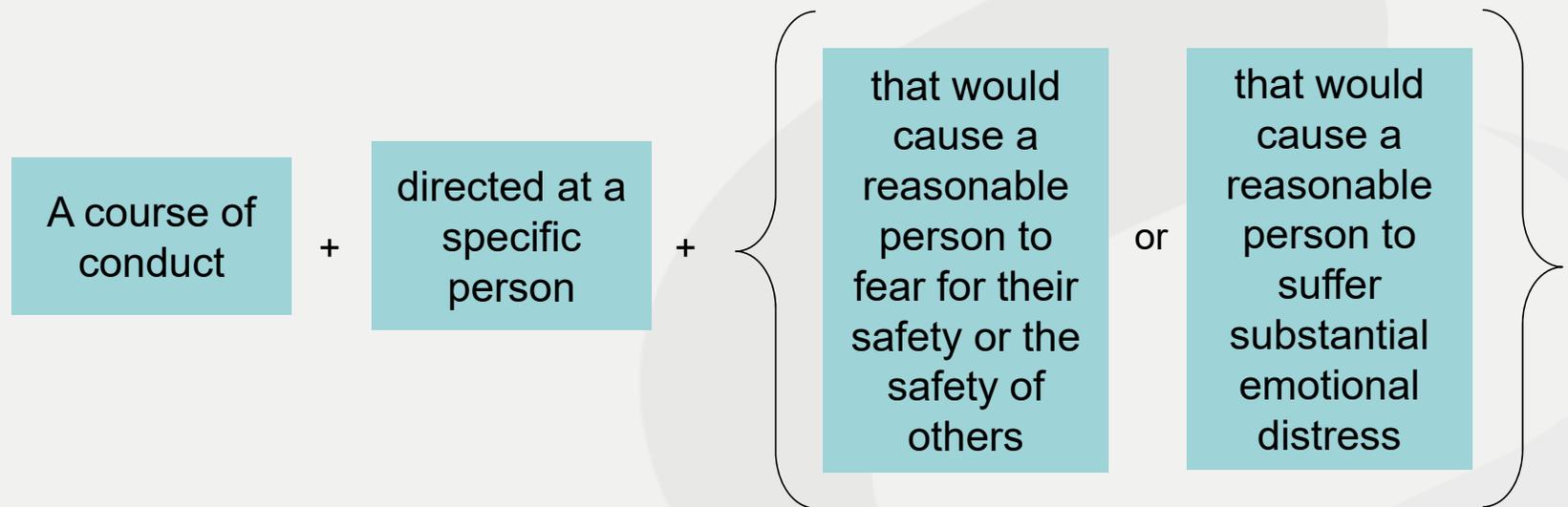


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Mapping the Policy Elements & Case Facts

- **Stalking**

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



Mapping the Policy Elements & Case Facts

Blue type = Complainant's account*

A course of conduct

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

+

directed at a specific person

- Yes (Complainant)

+

that would cause a reasonable person to fear for their safety or the safety of others

or

that would cause a reasonable person to suffer substantial emotional distress

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

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

Mapping the Policy Elements & Case Facts

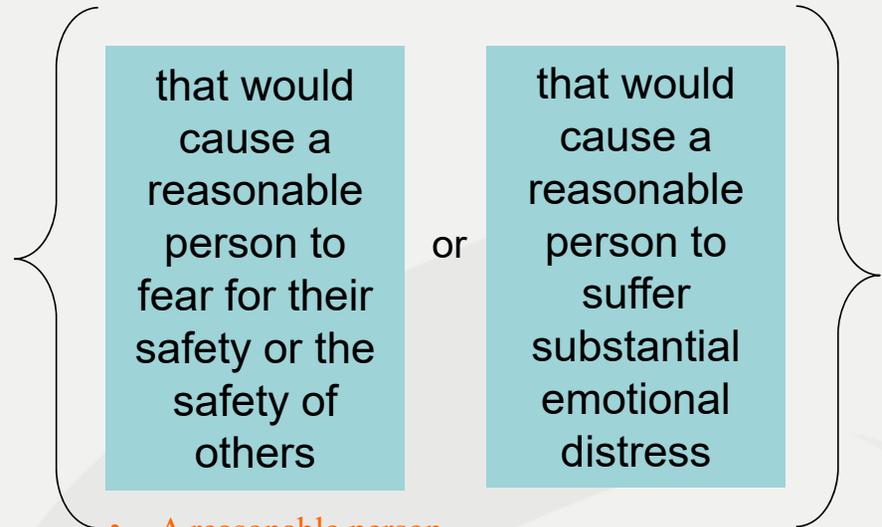
Orange type = Respondent's account*

A course of
conduct

+

directed at a
specific
person

+



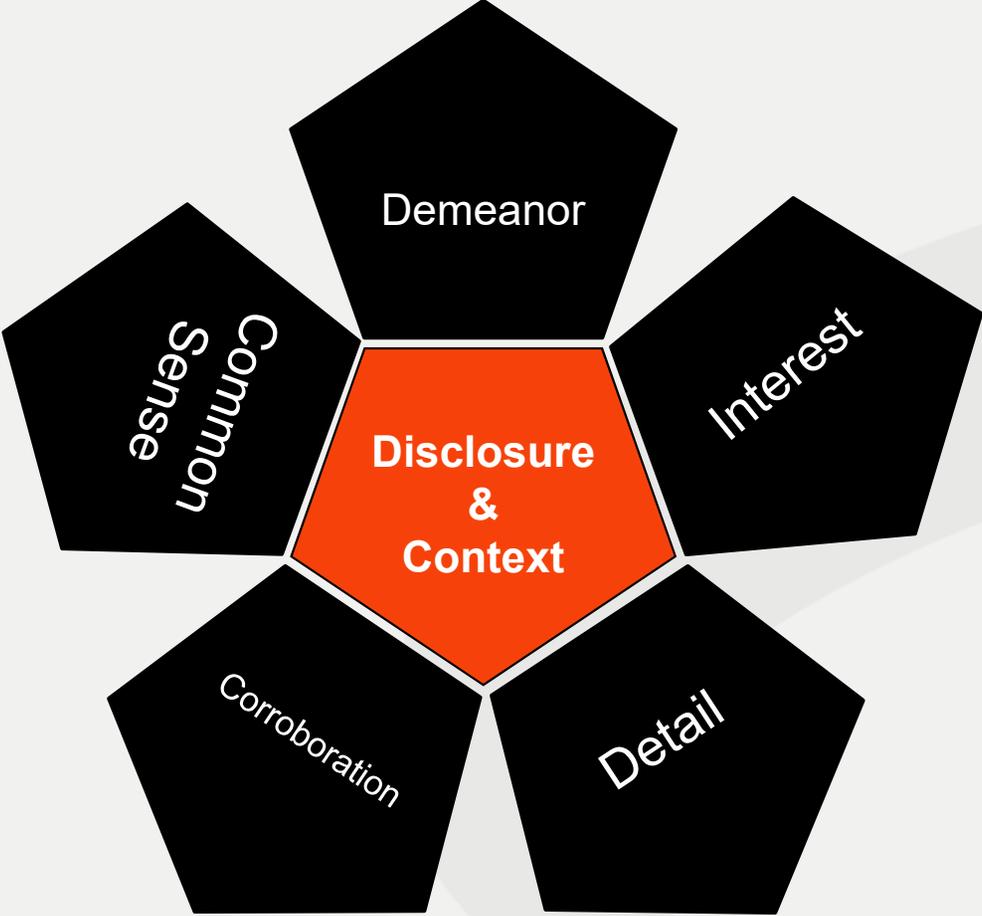
- Did not follow on September 3; always walk that way.
- Complainant responded positively to many of the texts; never said they were unwelcome.
- Used cloning app because thought blocking must have been a mistake.

- Yes (Complainant)

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

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

Evaluating Credibility



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 its probable truth or accuracy, not on the amount
- Quality of the evidence, not quantity
- NOT beyond a reasonable doubt

* Based on common usage.

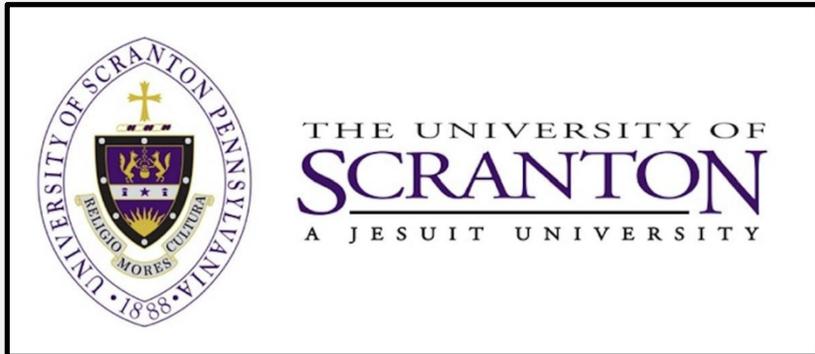
INFORMAL RESOLUTION

Training: Definition of Sexual Harassment

- [Schools] must ensure that ... any person who facilitates an informal resolution process receive[s] training on the **definition of sexual harassment** in § 106.30, the scope of the recipient's education program or activity, how to conduct informal resolution processes ... and how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias.

Title IX Regulations issued May 6, 2020; § 106.45(b)(1)(iii)

Definitions of Title IX Sexual Harassment



1. Title IX Quid Pro Quo Sexual Harassment
2. Title IX Sexual Harassment
3. Title IX Sexual Assault
4. Title IX Sexual Exploitation
5. Title IX Dating Violence or Domestic Violence
6. Title IX Stalking

1. Title IX Quid Pro Quo Sexual Harassment

- Quid Pro Quo Sexual harassment is defined as **any employee of the University that conditions the provision of an aid, benefit, or service of the University on a complainant's participation in unwelcome sexual conduct.**
- Unwelcome sexual conduct **includes, but is not limited to:** any unwelcome sexual advance, request for sexual favors, or other unwanted conduct of a sexual nature, whether verbal, non-verbal, graphic, physical, or otherwise.



2. Title IX Sexual Harassment

- Title IX Sexual Harassment is defined as unwelcome conduct of a sexual nature determined by a reasonable person to be so **severe, pervasive, and objectively offensive** that it **effectively denies** a person equal access to the University's education program or activity.



3. Title IX Sexual Assault

- Title IX Sexual Assault is defined as any attempted or actual sexual act directed against another person, without consent of the complainant, including instances where the victim is incapable of giving consent.
- Sexual assault is the **penetration, no matter how slight**, of the vagina or anus, with a body part (e.g., finger, hand or penis), or object, or oral penetration by a sex organ of another person, **without consent** of the complainant.
- Title IX sexual assault also includes sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law, or sexual intercourse with a person who is under the statutory age of consent.



4. Title IX Sexual Exploitation

- Title IX Sexual Exploitation is defined as the **touching of the private body parts (breasts, buttocks, groin, genitals, or other intimate part of a body) of another person for the purpose of sexual gratification, without consent** of the victim, including instances where the victim is incapable of giving consent because of their age or because of their temporary or permanent mental incapacity.



5. Title IX Dating Violence

- Title IX Dating Violence is defined as violence committed by a person who **is or has been in a social relationship of a romantic or intimate nature** with the Complainant. The existence of such a relationship shall be determined based on the Complainant's statement and with consideration of the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship. For purposes of this definition, dating violence **includes, but is not limited to, sexual or physical abuse, or the threat** of such abuse. Dating violence does not include acts covered under the definition of domestic violence.



5. Title IX Domestic Violence

Title IX domestic violence is defined as violence committed:

- By a **current or former spouse or intimate partner** of the complainant
- By a person with whom the complainant **shares a child**
- By a person who is **cohabitating with, or has cohabitated with**, the complainant as a spouse or intimate partner
- By a person similarly situated to a spouse of the complainant under the domestic violence laws of the jurisdiction in which the crime of violence occurred
- By any other person against an adult or youth complainant who is protected from that person's acts under the domestic or family violence laws of the jurisdiction in which the crime of violence occurred.

To categorize an incident as domestic violence, the relationship between the respondent and the complainant **must be more than just two people living together**. The people cohabitating must be current or former spouses or have an intimate relationship.



University of Scranton November 2020
Sexual Harassment & Sexual Misconduct Policy, p. 17

6. Title IX Stalking

- Stalking is defined as engaging in a course of conduct on the basis of sex directed at a specific person that would cause a reasonable person to:
 - **Fear** for that person's safety or the safety of others; or
 - **Suffer substantial emotional distress.** For the purpose of this definition:
- **Course of conduct** means two or more acts, including but not limited to, acts in which the stalker directly, indirectly, or through third parties, by an 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 person under the similar circumstances and with similar identities as the complainant.
- **Substantial emotional distress** means significant mental suffering or anguish that may not necessarily require medical or other professional treatment or counseling.
- Stalking also includes the concept of cyber stalking...
- Stalking may or may not involve people who are known to one another



Training: Scope of Education Program

- [Schools] must ensure that ... any person who facilitates an informal resolution process receive[s] training on the definition of sexual harassment in § 106.30, the **scope of the recipient's education program or activity**, how to conduct informal resolution processes ... and how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias.

Title IX Regulations issued May 6, 2020; § 106.45(b)(1)(iii)

Education Program or Activity

- “Education program or activity” includes:
 - Locations, events, or circumstances over which the recipient exercised substantial control over both
 - the respondent and
 - the context in which the sexual harassment occurs, and
 - Any building owned or controlled by a student organization that is officially recognized by a postsecondary institution

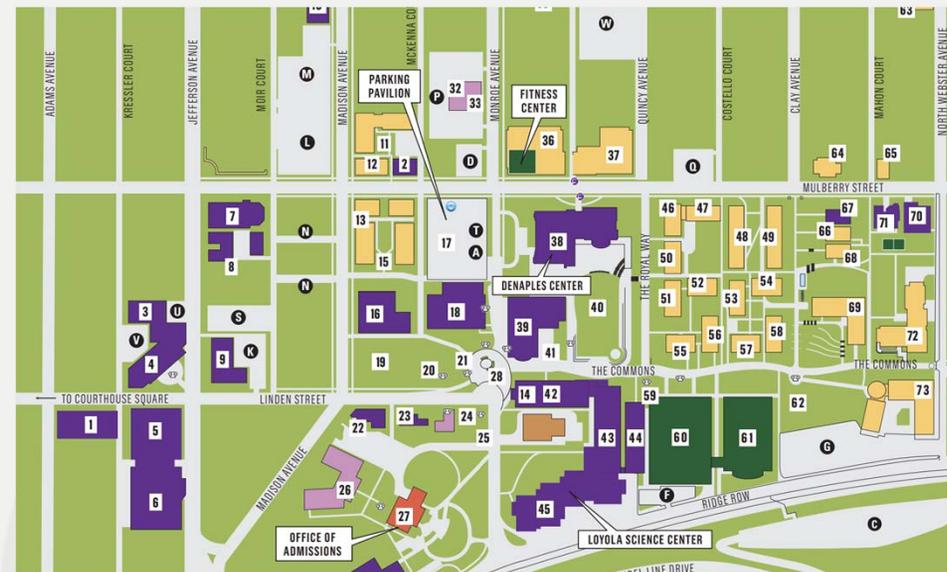
Jurisdiction: Where

- Applies only to sex discrimination occurring **against a person in the United States** in an education program or activity
 - “The Department reiterates that the ‘education program or activity’ limitation in the final regulations
 - does not create or apply a geographic test
 - does not draw a line between ‘off campus’ and ‘on campus,’ and
 - does not create a distinction between sexual harassment occurring in person versus online.”

Title IX Regulations issued May 6, 2020; § 106.8(d); Preamble at 649

Jurisdiction: On Campus

- “[A]ll of the operations’ of a recipient (per existing statutory and regulatory provisions), and the additional ‘substantial control’ language in these final regulations, **clearly include all incidents of sexual harassment occurring on a recipient’s campus.**”



Title IX Regulations issued May 6, 2020; Preamble at 624

Jurisdiction: Off Campus

- “[T]he statutory and regulatory definitions of program or activity along with the revised language in § 106.44(a) clarify that a recipient’s Title IX obligations extend to sexual harassment incidents that occur off campus if any of three conditions are met:
 - if the off-campus incident occurs as part of the recipient’s **‘operations’** pursuant to 20 U.S.C. 1687 and 34 CFR 106.2(h);
 - if the recipient **exercised substantial control over the respondent and the context of alleged sexual harassment** that occurred off campus pursuant to § 106.44(a); or
 - if a sexual harassment incident occurs at an off-campus building **owned or controlled by a student organization officially recognized** by a postsecondary institution pursuant to §106.44(a).”

Training: Conducting Informal Resolutions

- [Schools] must ensure that ... any person who facilitates an informal resolution process receive[s] training on the definition of sexual harassment in § 106.30, the scope of the recipient's education program or activity, **how to conduct informal resolution processes** ... and how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias.

Title IX Regulations issued May 6, 2020; § 106.45(b)(1)(iii)

Training: Impartiality

- [Schools] must ensure that ... any person who facilitates an informal resolution process receive[s] training on the definition of sexual harassment in § 106.30, the scope of the recipient's education program or activity, how to conduct informal resolution processes ... and how to **serve impartially**, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias.

Title IX Regulations issued May 6, 2020; § 106.45(b)(1)(iii)

Training Materials: Impartiality

- Any materials used to train ... 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.

Title IX Regulations issued May 6, 2020; § 106.45(b)(1)(iii)

Reasonably Prompt Timeframes

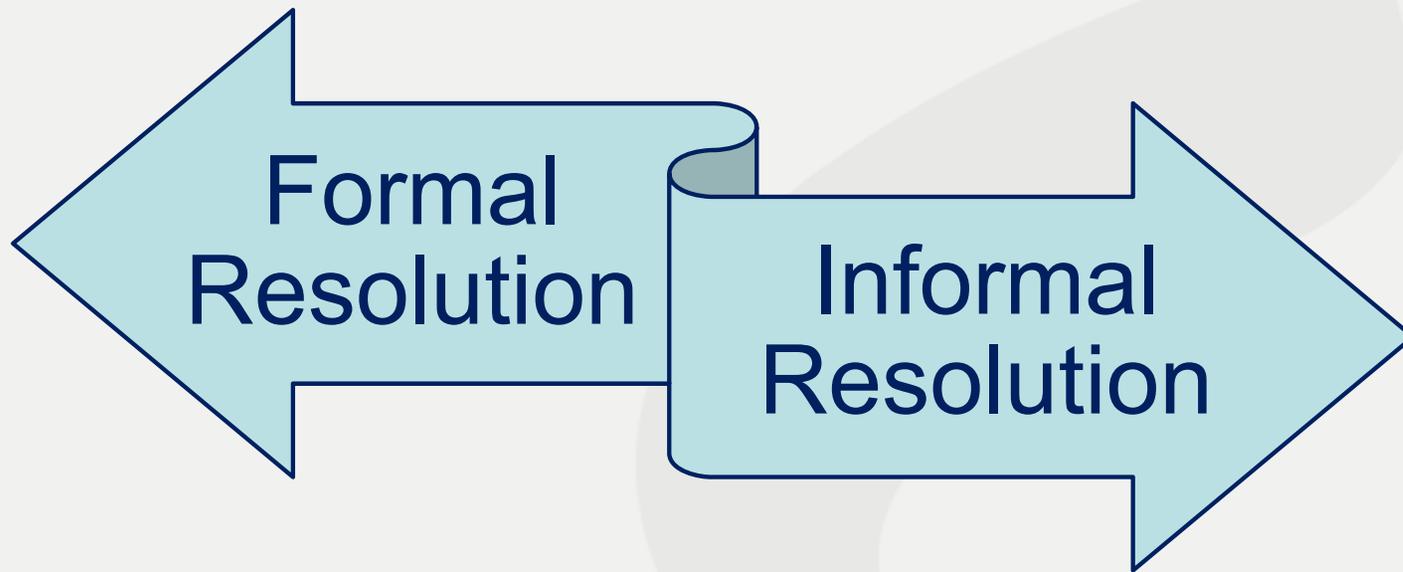


- A [school's process must include **reasonably prompt time frames** for conclusion of the process, including ... informal resolution processes ... and a process that allows for the **temporary delay** ... or the limited extension of time frames for good cause with written notice to the complainant and the respondent of the delay or extension and the reasons for the action.

Title IX Regulations issued May 6, 2020; § 106.45(b)(1)(v)

No Waiver of Formal Process

- May not require waiver of right to investigation and adjudication of formal complaints



Title IX Regulations issued May 6, 2020; § 106.45(b)(9)

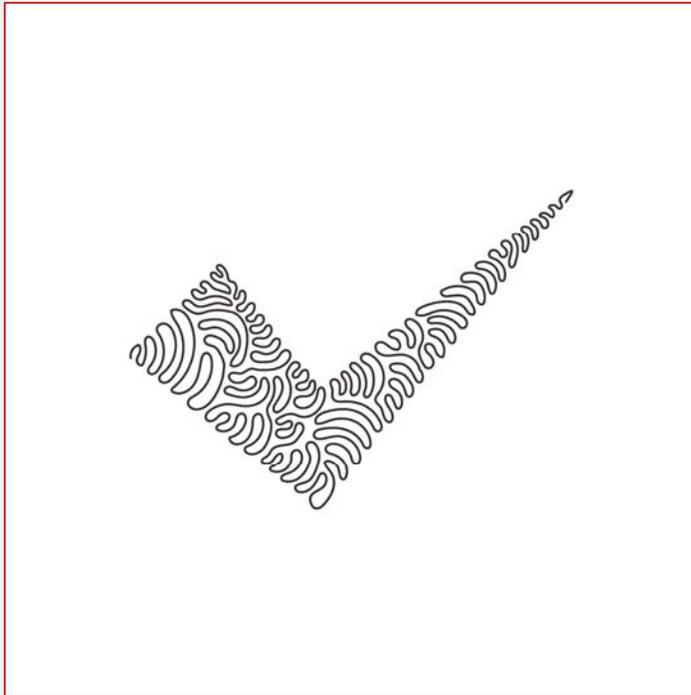
Parties' Participation Must Be Voluntary

- May not require the parties to participate in an informal resolution process
- Must obtain the parties' voluntary, written consent to the informal resolution process



Title IX Regulations issued May 6, 2020; § 106.45(b)(9)

Formal Complaint Required



- May not offer an informal resolution process unless a formal complaint is filed

Title IX Regulations issued May 6, 2020; § 106.45(b)(9)

Do Not Use in Employee-to-Student Cases

- Cannot offer or facilitate an informal resolution process to resolve allegations that an **employee sexually harassed a student**



Title IX Regulations issued May 6, 2020; § 106.45(b)(9)

Written Notice

- At any time prior to reaching a determination of responsibility the recipient may facilitate an informal resolution process, such as mediation, provided:
- Provides to the parties a **written notice** disclosing
 - Allegations
 - Requirements of the informal resolution process
 - Circumstances under which it precludes formal complaint
 - Can withdraw and resume formal complaint prior to agreeing to resolution
 - Consequences

No Conflicts of Interest or Bias

- Person(s) designated by [schools] to facilitate an informal resolution process are required to **not have a conflict of interest or bias** for or against complainants or respondents generally or an individual complainant or respondent.

Title IX Regulations issued May 6, 2020; § 106.45(b)(1)(iii)

INFORMAL RESOLUTION: KEY PRINCIPLES

Key Principles

- Parties are entering the informal resolution process with the expectation and trust that the matter will be addressed with the same level of **care and attention** as in the formal resolution process
- From your perspective, the matter will take a **significant investment** of time, patience, and planning.



Key Principles



- Starting place is that the Complainant has experienced harm
- Different from investigative process which starts with a blank page
- The focus is identifying and addressing harms
- Not necessarily an “admission of guilt” but an acknowledgement of accountability for the harm

IDENTIFYING AND PRACTICING CORE COMPETENCIES

Identifying Harms and Needs

- Emotional harm
 - Impaired sense of safety
 - Anxiety, depression
 - Difficulty focusing
 - Loss of sense of self
- Material harm
 - Damaged property
 - Financial loss
 - Loss of housing
- Physical harm
 - Pain and injury
 - Need for treatment
 - Medical expenses
- Relational harm
 - Loss of friendships, social connections
 - Loss of ability to tend to others' needs

How Can Harm Be Repaired?

- Emotional harm
 - Acknowledgement
 - Apology
 - Accountability
- Material harm
 - Repair
 - Restitution
 - Recovery
- Physical harm
 - Restitution
 - No Contact Agreement
- Relational harm
 - Acknowledgement to others
 - Apology
 - Reintegration

Moving from Harms to Needs to Actions

Harms

- What happened?
- What was the impact?

Needs

- Because of this harm, what do you find yourself needing?

Actions

- What can be done to meet this need?

WORKSHOP: SHUTTLE DIPLOMACY AND FACILITATED DIALOGUE

PUTTING IT INTO PRACTICE

Q&A

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.