

# **Title IX Investigator Training**

**San José State University**

Presented By:

**Maureen Holland, Member**

**Peter C. Lim, Member**

**The Institutional Response Group | Cozen O'Connor**

**Gina Maisto Smith, Chair**

**Leslie M. Gomez, Vice Chair**

**April 7, 2023**



# Learning Objectives

1

- Required steps of a Title IX investigation

2

- Pre-investigation considerations

3

- Serving impartially - avoiding conflicts of interest and bias

4

- Interviewing techniques

5

- Evidentiary considerations

6

- Alcohol, drugs, and incapacitation

7

- Preparing the final investigation report

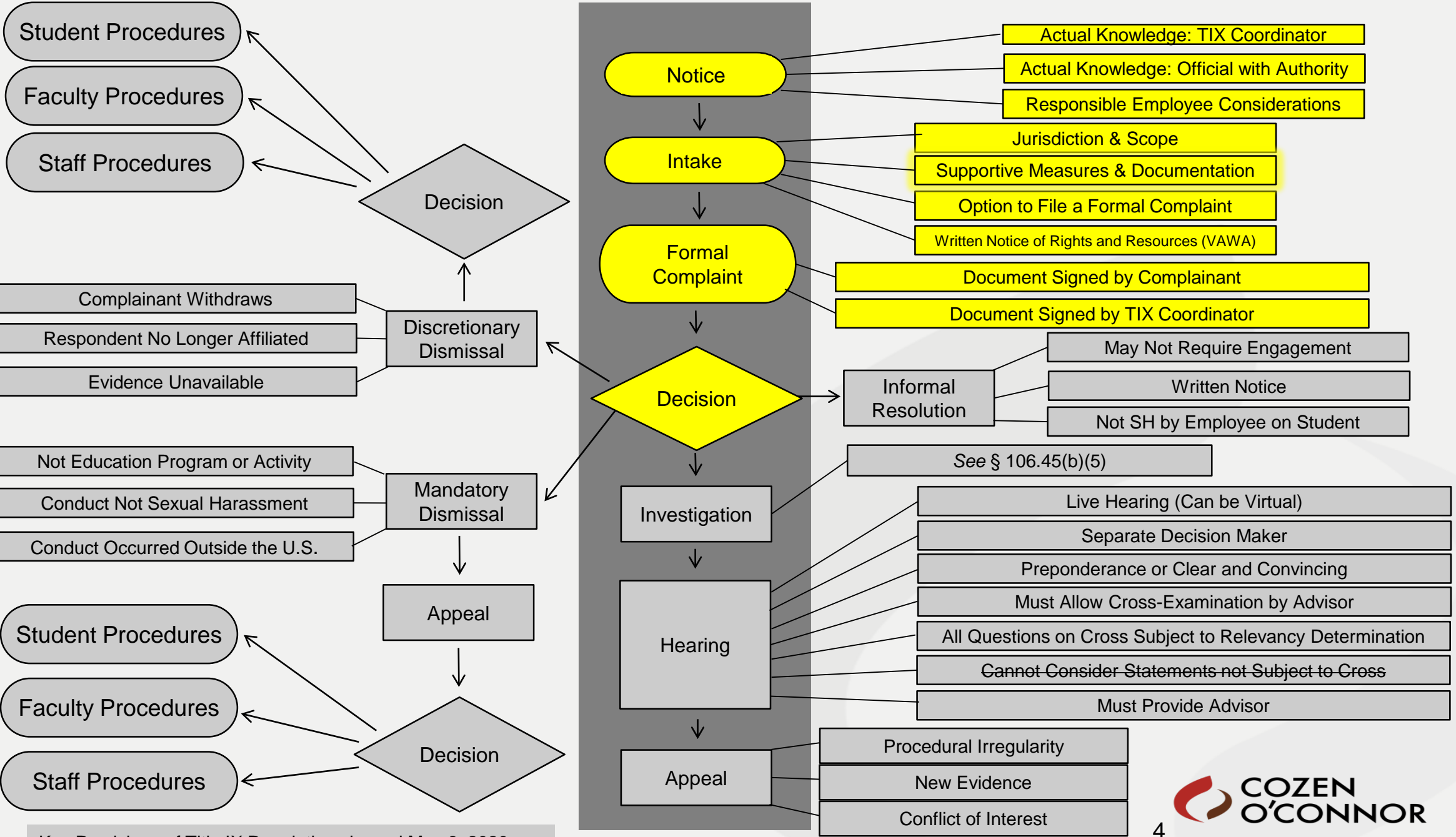
8

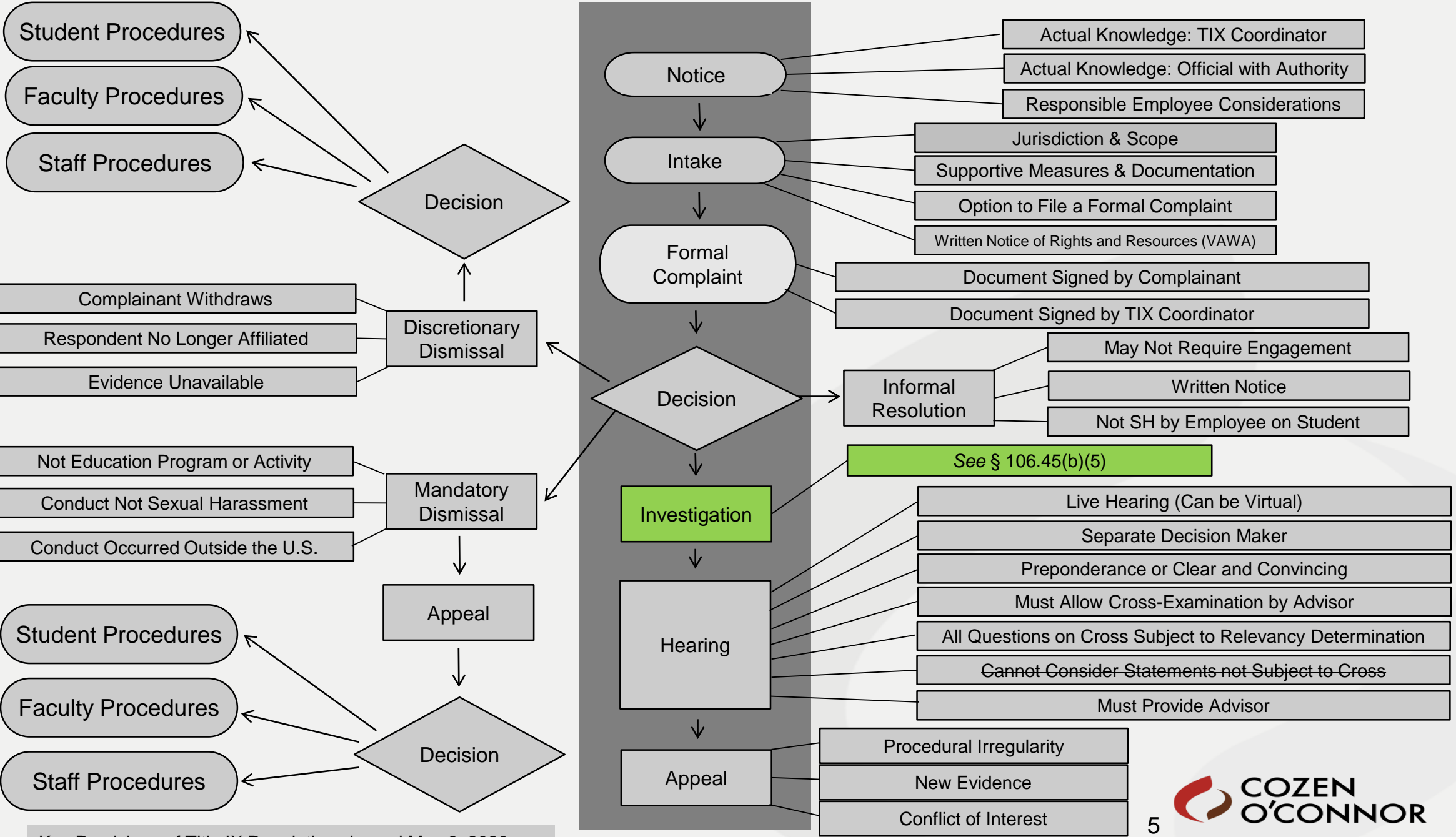
- Evaluating credibility

9

- Report writing workshop

# **BUILDING FROM OUR LAST DISCUSSION**



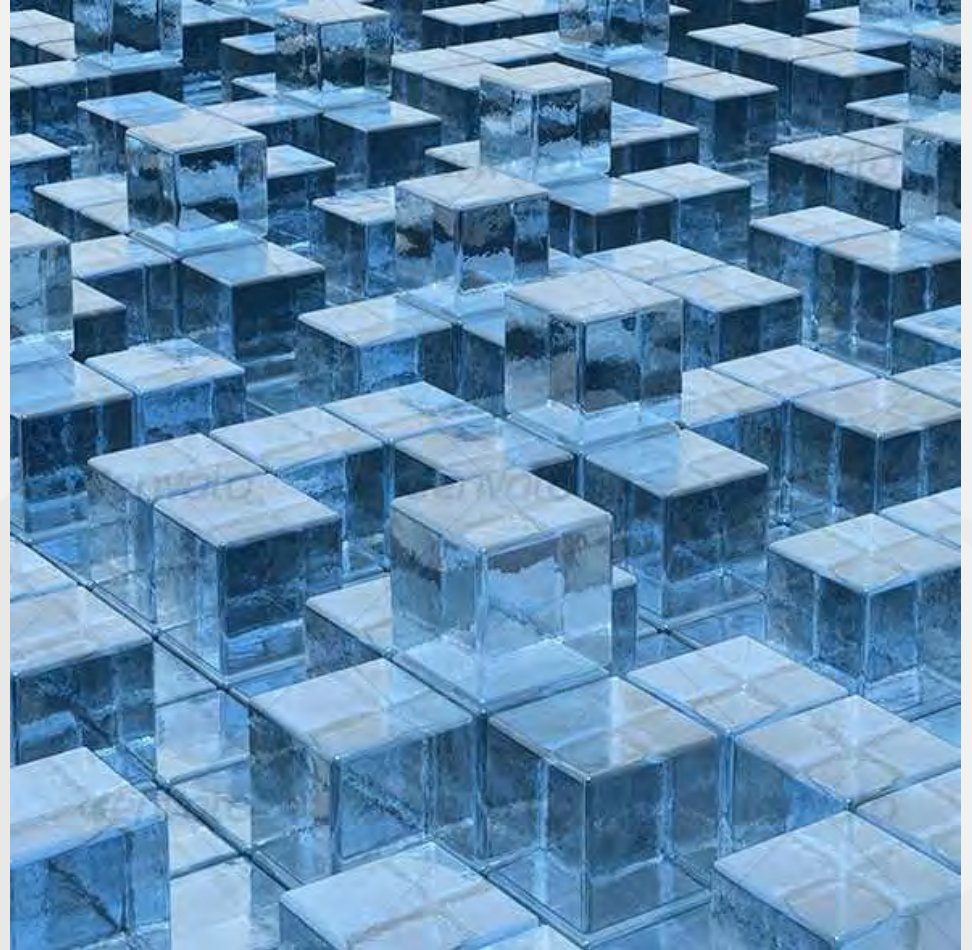




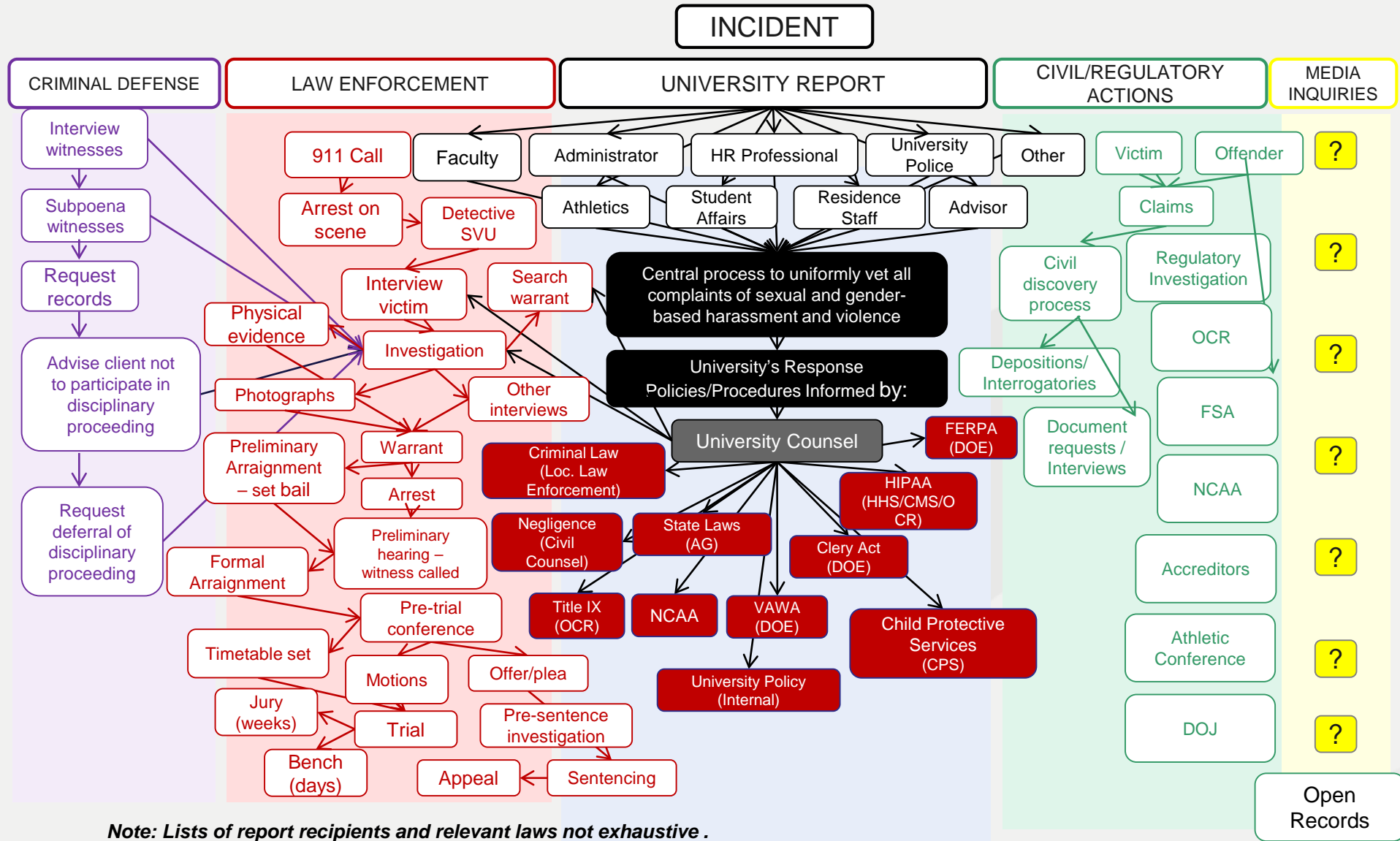
# **QUICK RECAP: FRAMING THE CONTEXT**

# 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

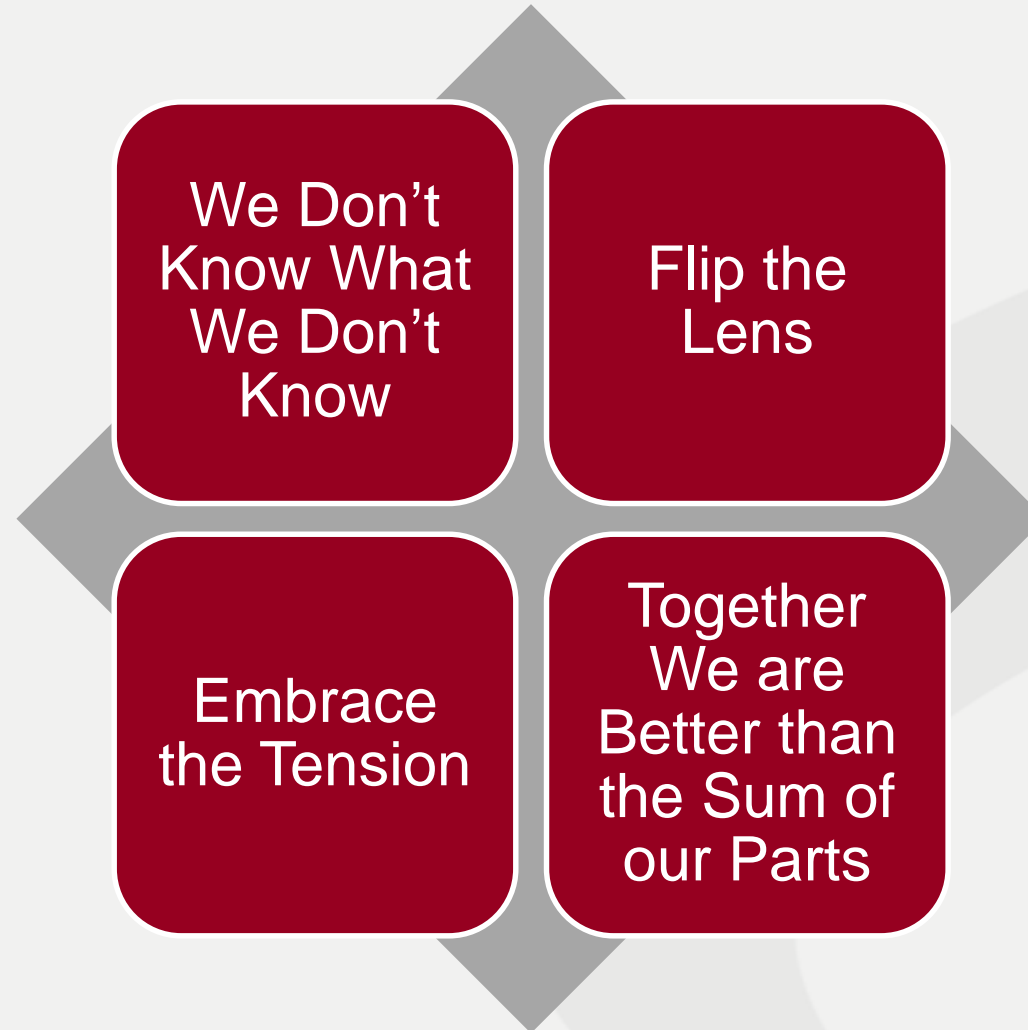


# The Challenge of the Context

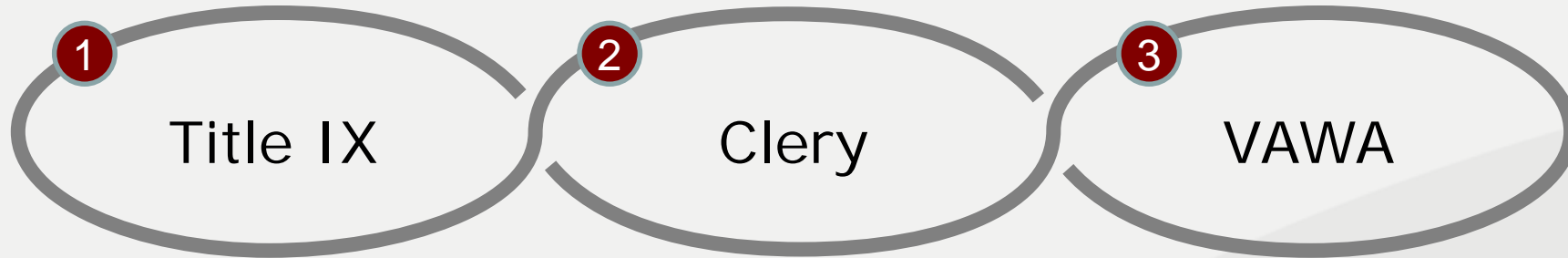




# Framing the Conversation



# Federal Regulatory Framework



***Title IX of the Education Amendments of 1972***

- Prohibits sex discrimination in educational institutions that receive federal funds

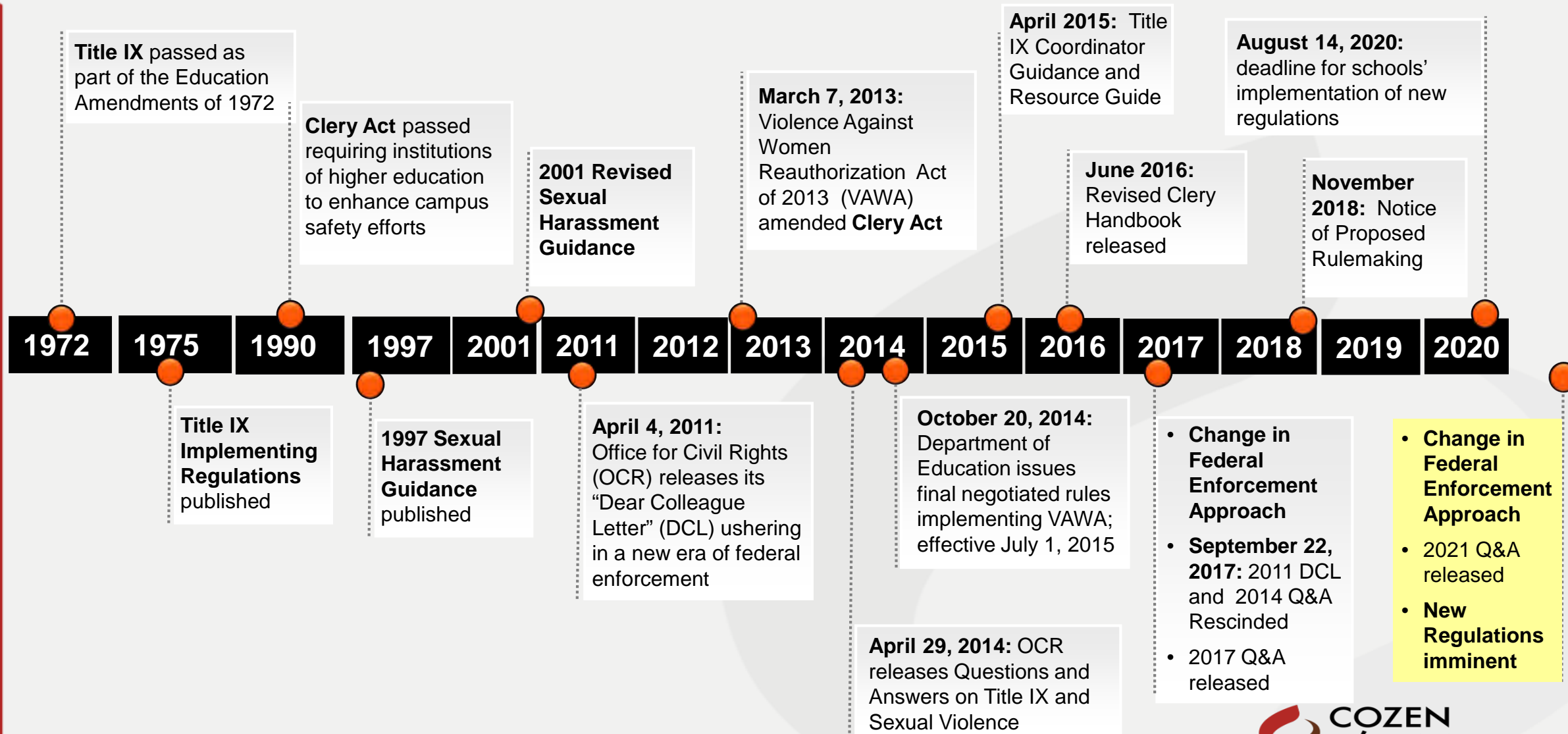
***The Jeanne Clery Act (1990)***

- 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

# Evolution of Federal Legislation and Guidance



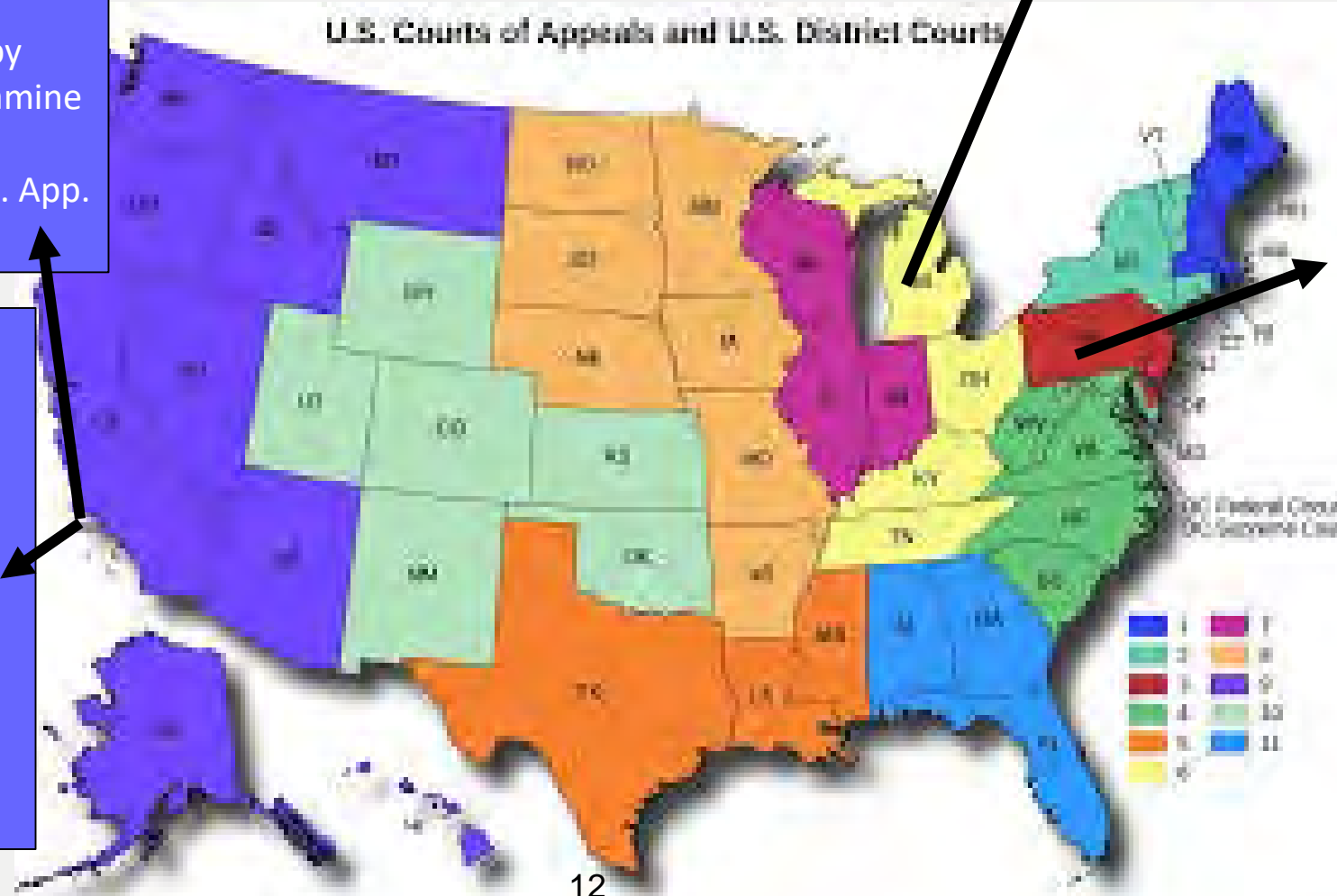
# Recent Court Cases

“If credibility is in dispute and material to the outcome, due process requires cross-examination.”  
*Doe v. Baum* 903 F.3d 575, 585 (6th Cir. 2018)

When a student accused of sexual misconduct faces severe disciplinary sanctions, and the credibility of witnesses (whether the accusing student, other witnesses, or both) is central to the adjudication of the allegation, fundamental fairness requires, at a minimum, that the university provide a mechanism by which the accused may cross-examine those witnesses.” *Doe v. Allee*, 242 Cal. Rptr. 3d 109, 136 (Cal. Ct. App. 2019)

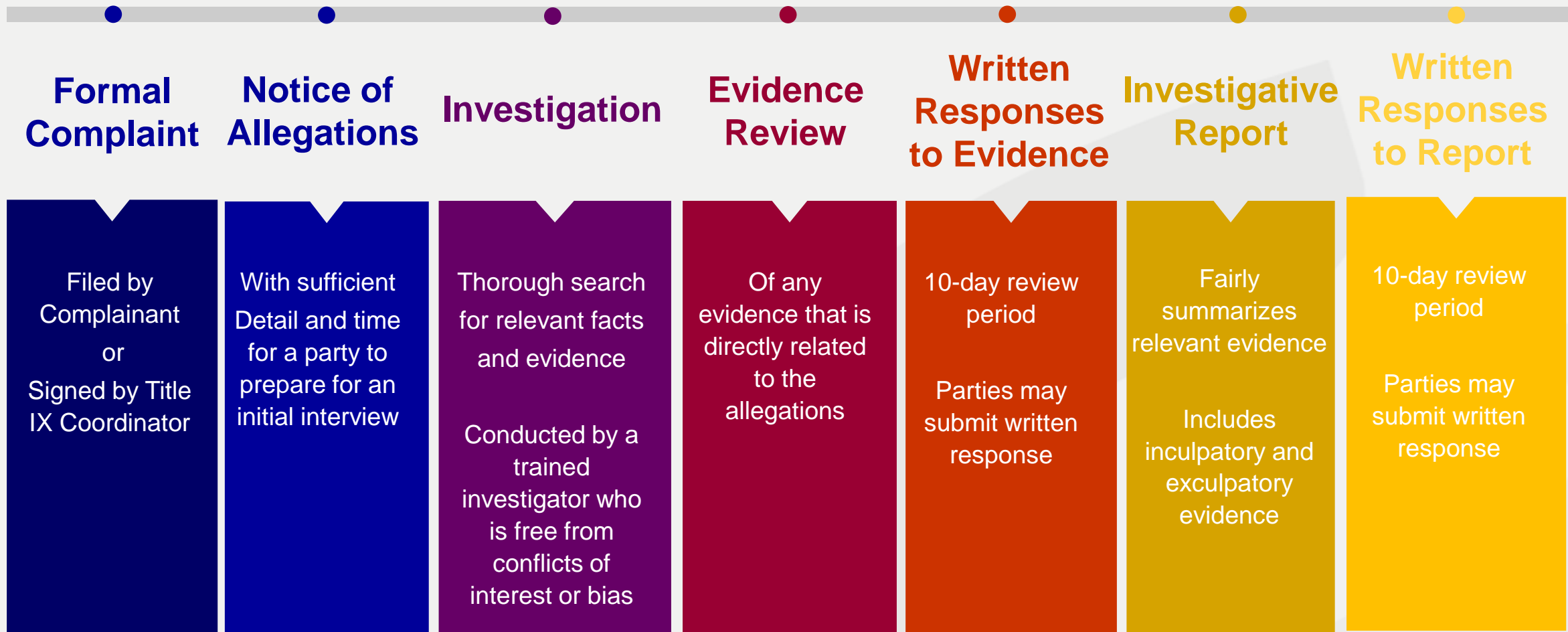
In a DV case, the state court ruled, “...procedures were unfair because they denied Respondent a meaningful opportunity to cross-examine critical witnesses at an in-person hearing.” *Boermeester v Carry*, No. B290675, 2020 WL 2764406 at \*1 (Cal. Ct. App. May 28, 2020)

“[N]otions of fairness in Pennsylvania law include providing the accused with a chance to test witness credibility through some form of cross-examination and a live, adversarial hearing during which he or she can put on a defense and challenge evidence against him or her.”  
*Doe v. Univ. of the Sciences*, No. 19-2966, 2020 WL 2786840 at\*5 (3d Cir. May 29, 2020)



# INVESTIGATIONS

# Investigation Milestones



# Investigative Principles

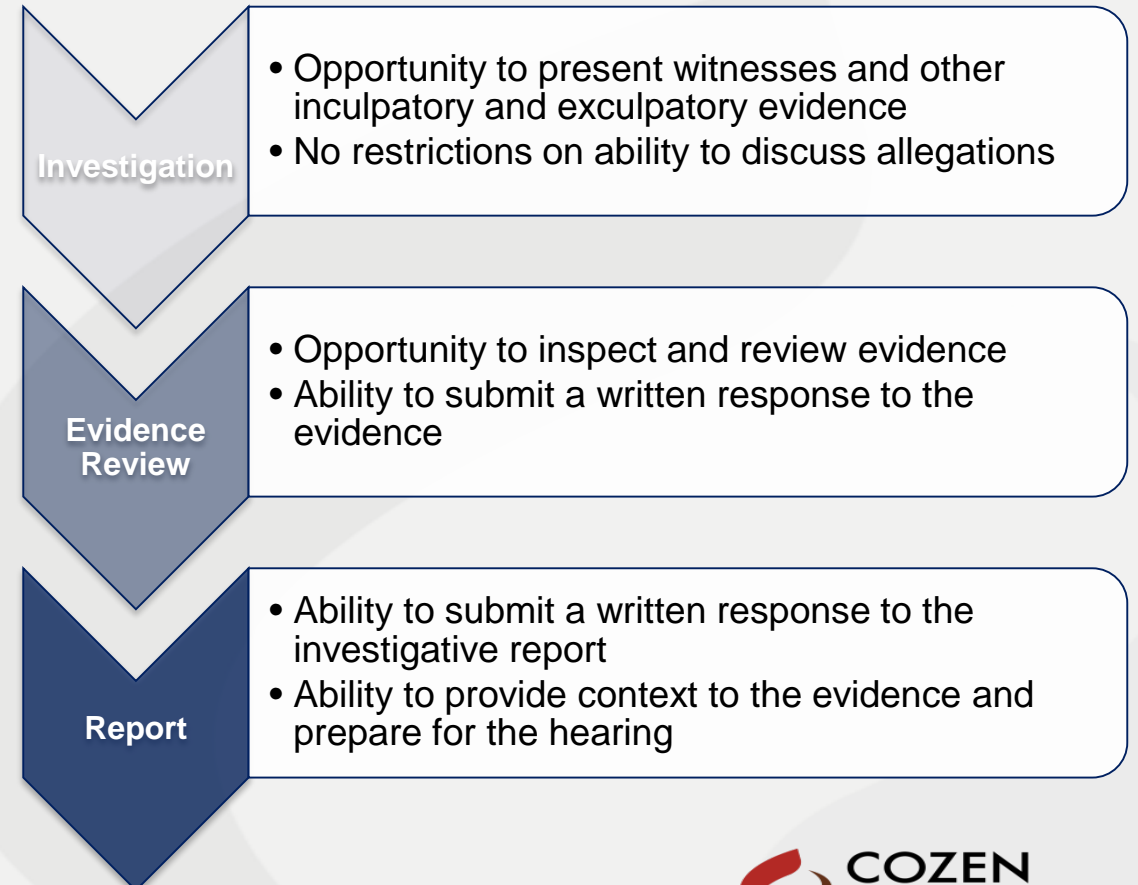
- Open-ended and thorough inquiry
- Equitable opportunities for the parties to participate
- The conduct of the investigation matters
- Separating intake/support from investigation
- Maintaining and reinforcing impartiality
  - Screening for conflicts of interest or bias
  - Attention to language and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

# Setting the Stage - Investigations

## Institutional Obligations



## Parties' Opportunity to Participate



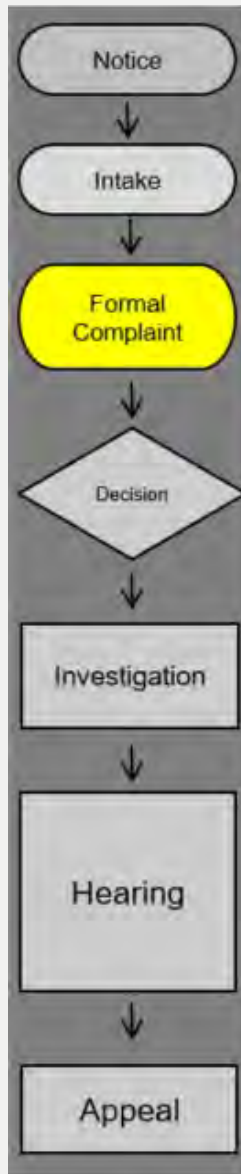


# **PRE-INVESTIGATION CONSIDERATIONS: CONSOLIDATION OF FORMAL COMPLAINTS**

# Investigation Milestones



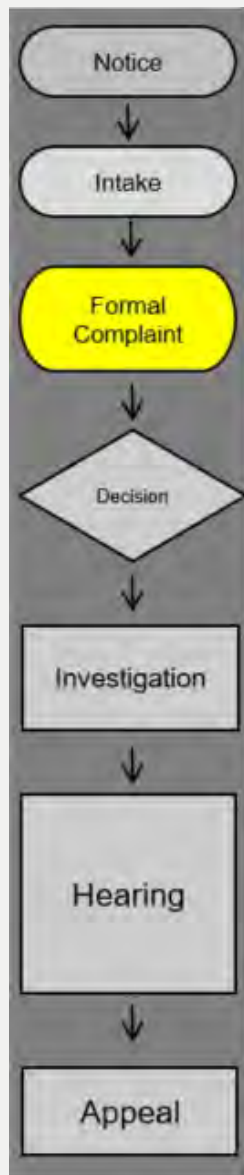
# Consolidation of Formal Complaints



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

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

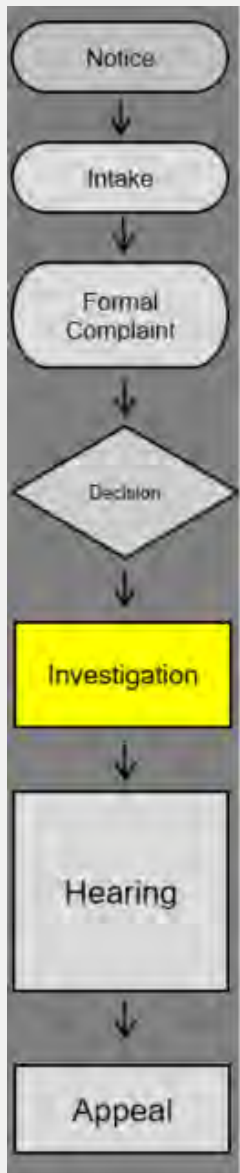
# Consolidation of Formal Complaints



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

Title IX Regulations; Preamble 85 F.R. 30436

# Consolidation of Formal Complaints



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

Title IX Regulations; Preamble 85 F.R. 30291

# Application to Specific Circumstances

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

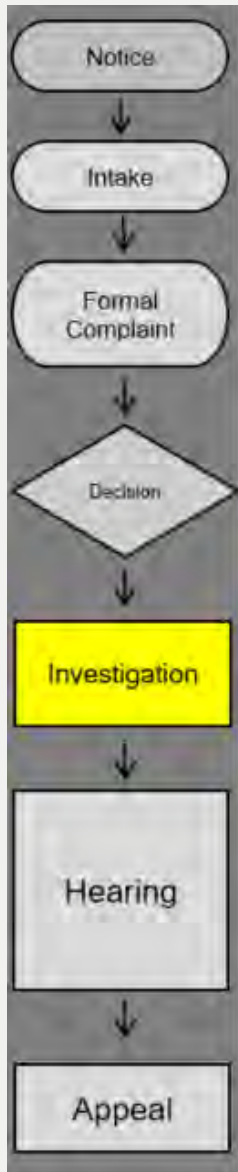
# **PRE-INVESTIGATION CONSIDERATIONS: DRAFTING THE NOTICE OF ALLEGATIONS**

# Investigation Milestones





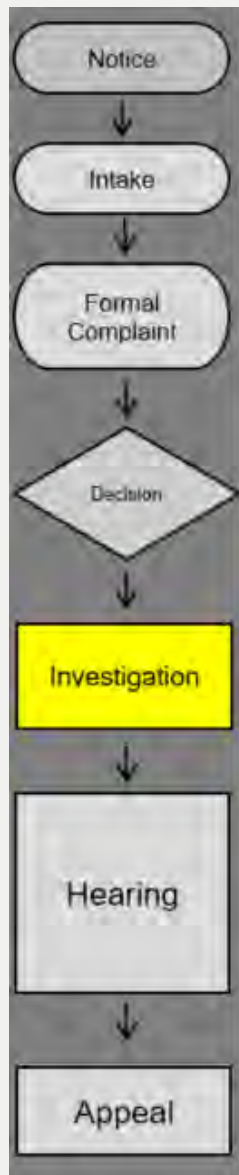
# Written Notice of all Proceedings



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

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

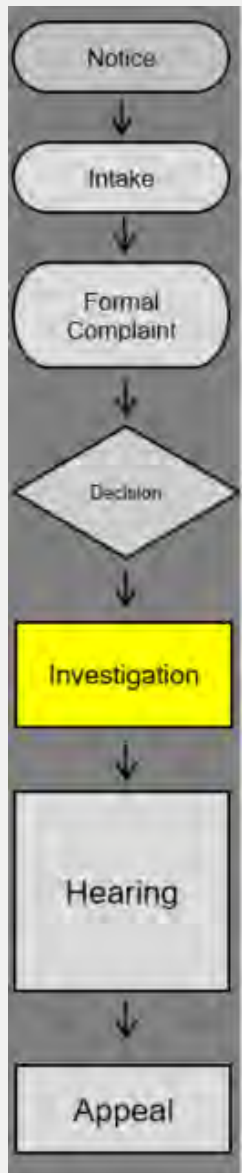
# Written Notice of Allegations



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

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

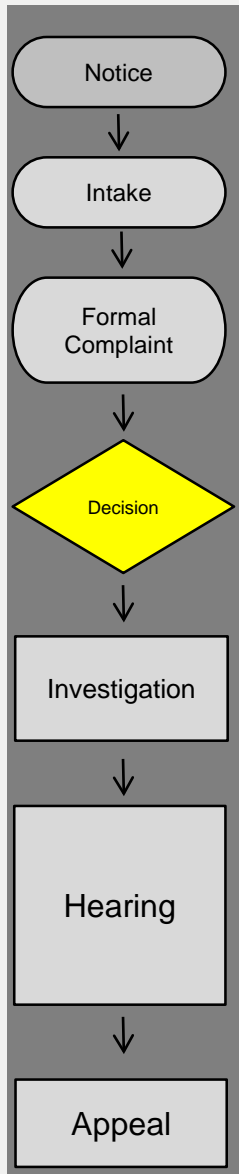
# Written Notice of the Allegations



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

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

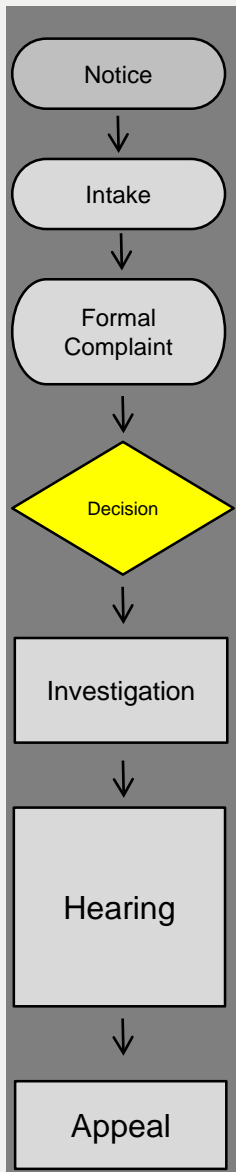
# Written Notice of Allegations



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

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

# Supplemental Notice



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

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

# Practical Considerations

- Checkpoints for additional policy violations
  - Post complainant interview
  - Post respondent interview
  - Post evidence review
- Procedural due process: “Notice”
- Consider similar checkpoints for mandatory dismissal of the formal complaint

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

# Investigation Milestones

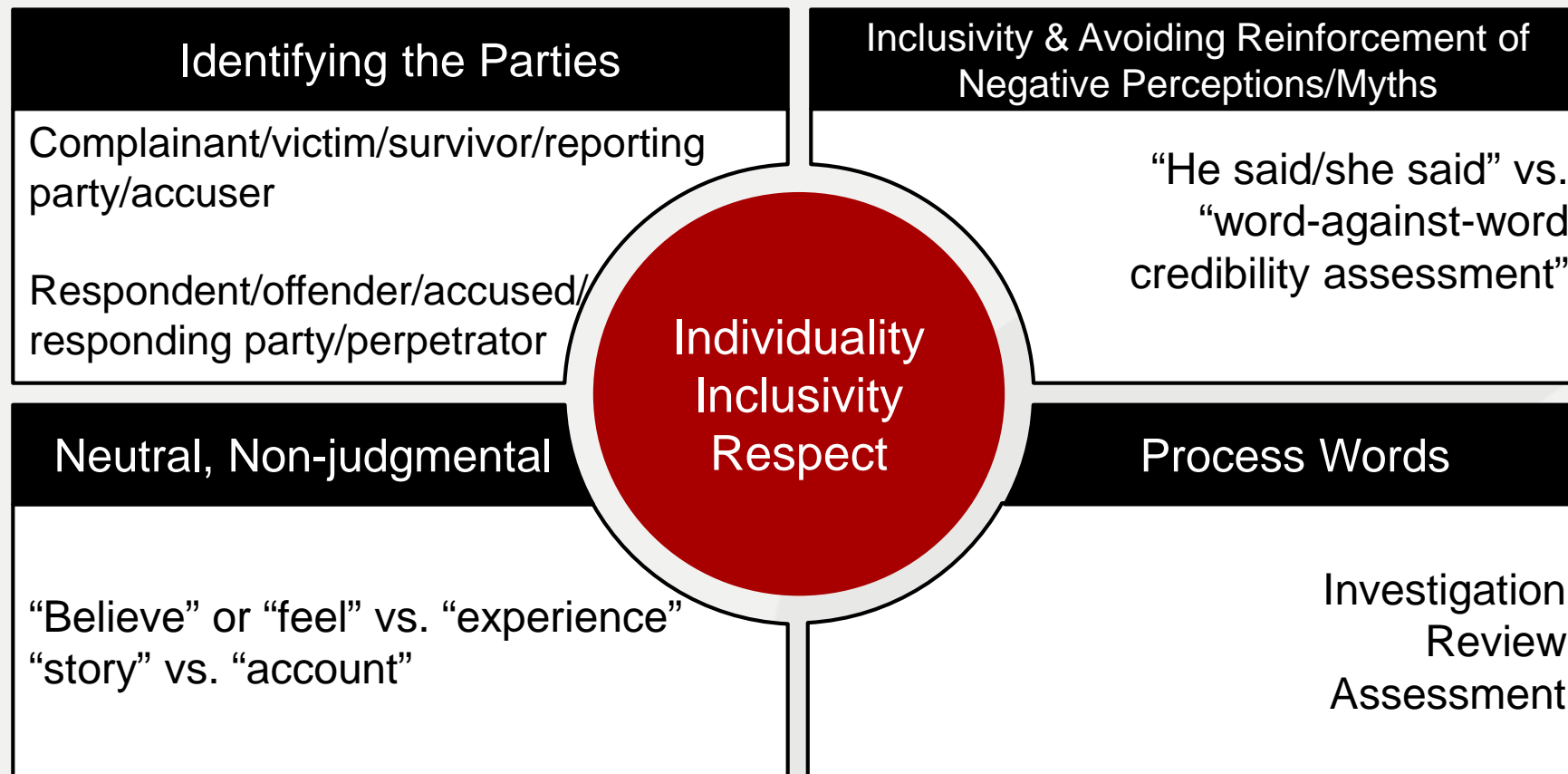




# Personal Presentation: Be Objective

- Identify and set aside personal biases and prejudices
- Be careful to avoid making assumptions as to how a person “should” react
- Avoid putting oneself in the shoes of the complainant or the respondent
- Recognize emotional impact, if any, but do not allow emotion to impact fair and impartial fact-finding
- Be alert to your non-verbal communication
- Pay attention to tone of voice and volume level
- Avoid asking questions that imply a value judgment
- Maintain attentive posture and good eye contact
- Exercise reflective listening in framing next question

# Awareness of the Impact of Language



# 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

# Identifying Our Own Biases

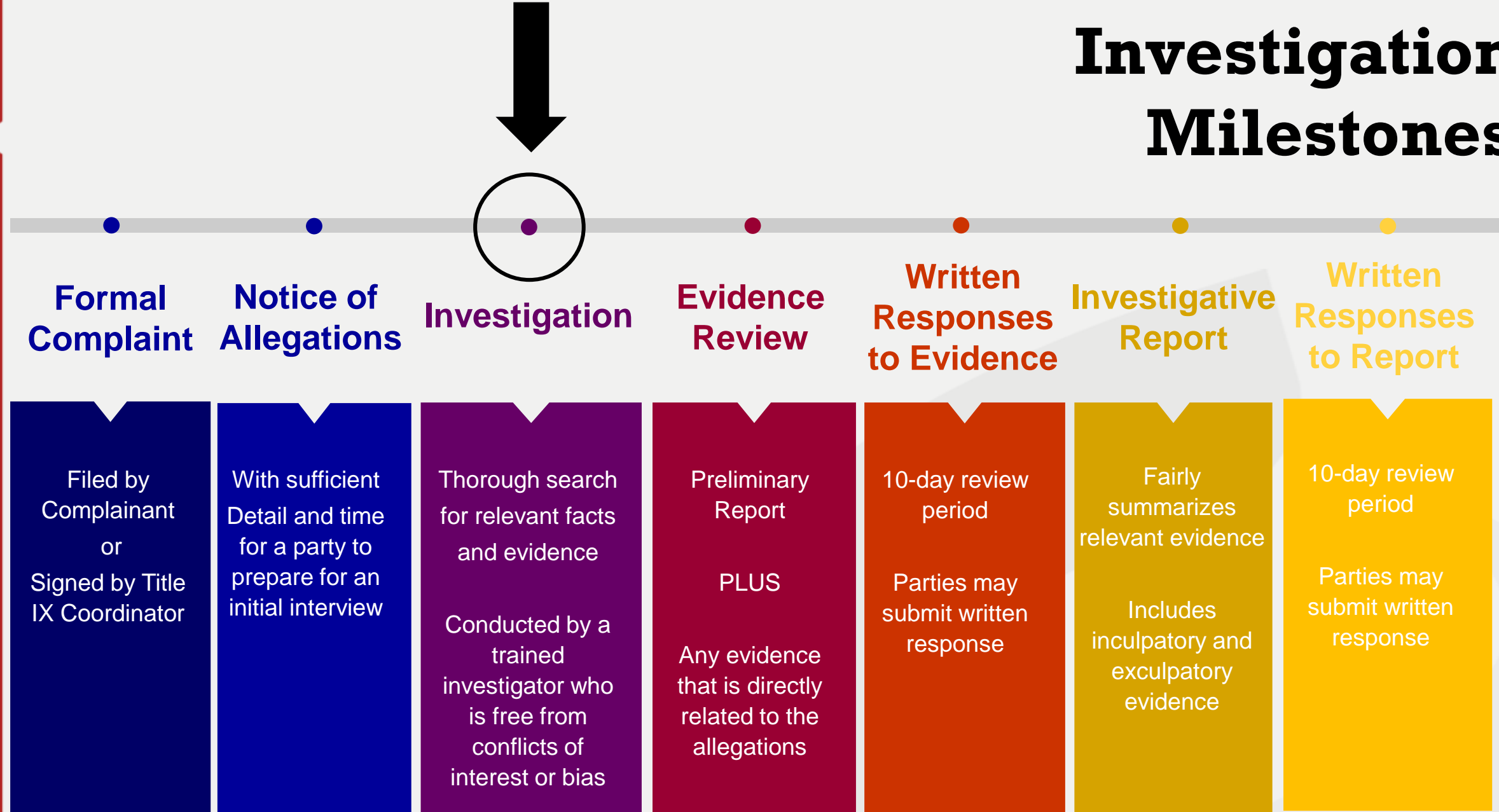
- What does sexual assault look like?
- Over-identifying with complainant or respondent
  - I would have...
  - If it was me...
  - That could have been me...
  - What were they thinking when...
  - What did they think was going to happen?
- Culture/diversity/world view

# 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

# QUESTIONING

# Investigation Milestones



# Framing Difficult Questions

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



# Questioning

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

# What to Ask

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

# The Continuum Approach



# Disclosures

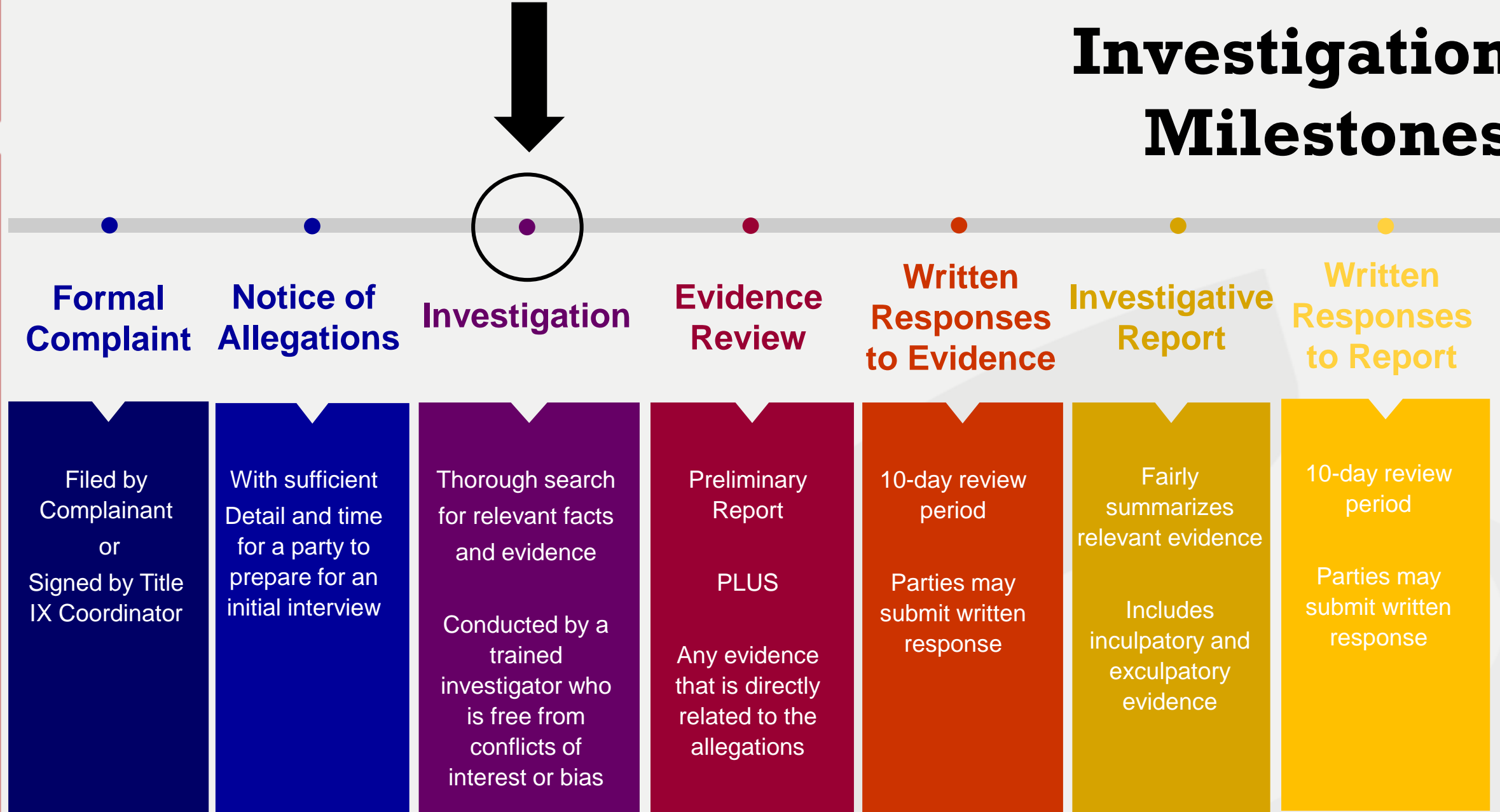
- A process where an individual reveals abuse or assault
- On-going, not a one time event
- Stages of Disclosure:
  - Denial
  - Tentative
  - Active
  - Recantation
  - Reaffirmation
- Triggers for Disclosure
  - Accidental – person's secret is found out
  - Purposeful – person makes decision to tell

# Questions for Disclosure Witnesses

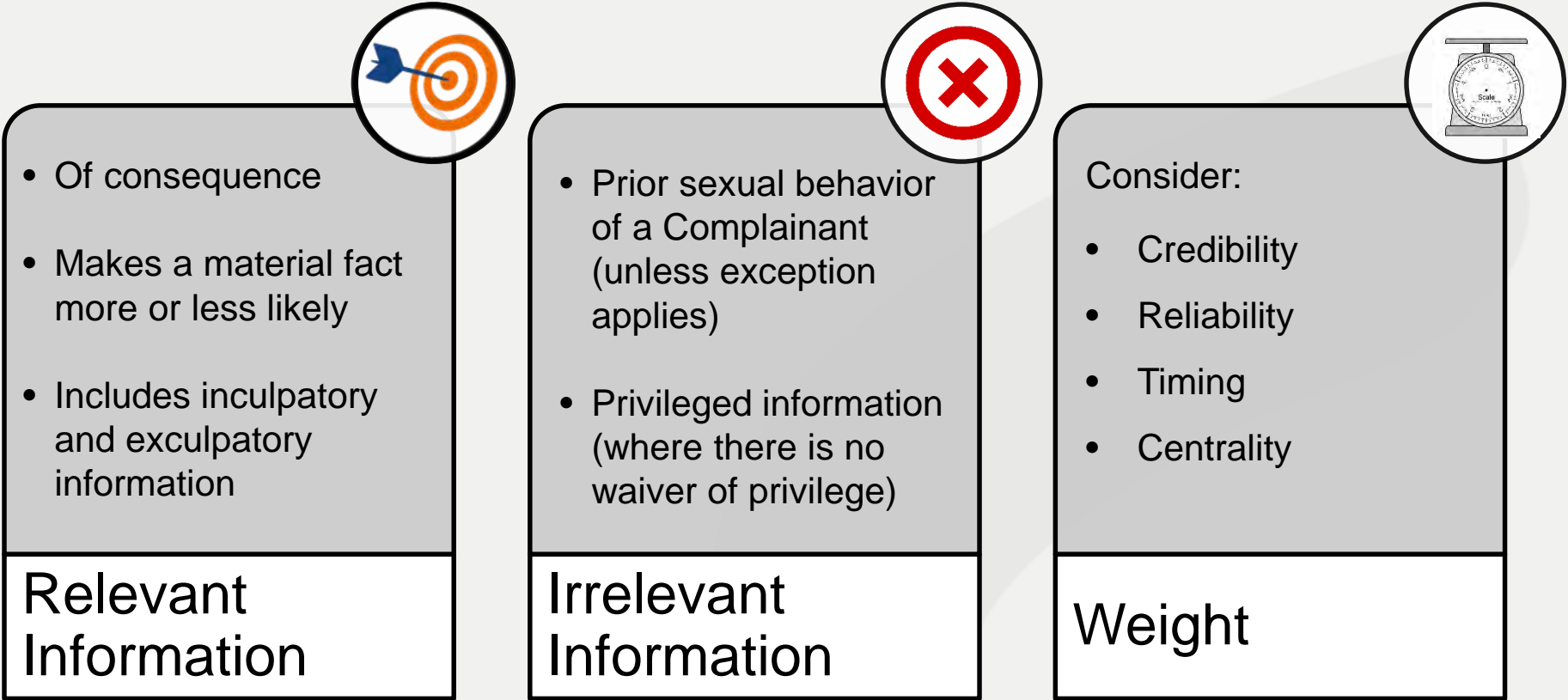
- Relationship to the Complainant/Respondent
- The timing of the disclosure
- The details of the disclosure
- The circumstances of the disclosure
- The Complainant's/Respondent's demeanor during the disclosure
- Potential changes in Complainant's/Respondent's demeanor following the incident

# **EVIDENTIARY CONSIDERATIONS**

# Investigation Milestones



# Evidentiary Concepts





# Evidentiary Concepts

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



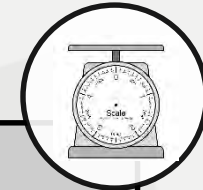
- Of consequence
- Makes a material fact more or less likely
- Includes inculpatory and exculpatory information

Relevant Information



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


Irrelevant Information



- Consider:
- Credibility
  - Reliability
  - Timing
  - Centrality


Weight

# Evidentiary Concepts



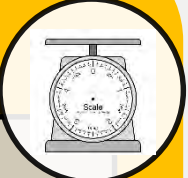
- Of consequence
- Makes a material fact more or less likely
- Includes inculpatory and exculpatory information

Relevant Information



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

Irrelevant Information



Consider:

- Credibility
- Reliability
- Timing
- Centrality

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

Weight

# Per Se Irrelevant Information

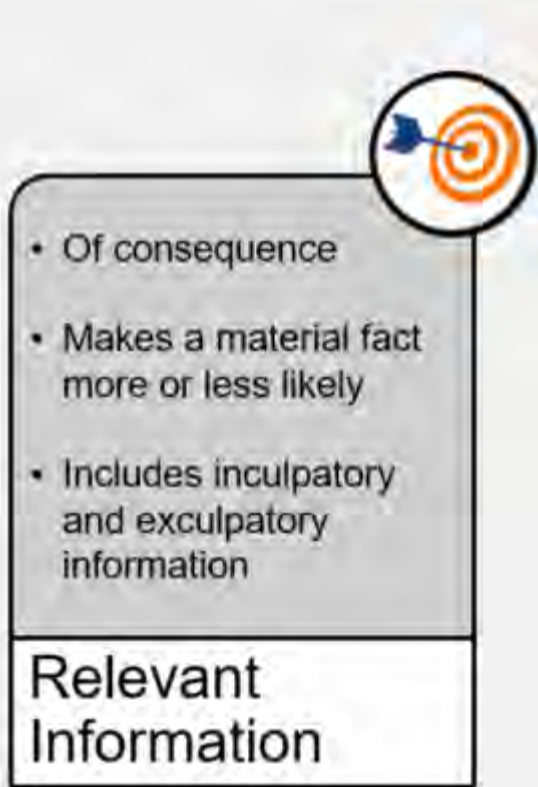


- Prior sexual behavior of a Complainant (unless exception applies)
- Privileged information (where there is no waiver of privilege)

Irrelevant Information

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

# Relevant Information



- The investigation report must fairly summarize all relevant information.

However -

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

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

# Relevant Information



- “While the proposed rules do not speak to
  - admissibility of hearsay,
  - prior bad acts,
  - character evidence,
  - polygraph (lie detector) results,
  - standards for authentication of evidence,
  - or similar issues concerning evidence,
- the final regulations require recipients to **gather and evaluate relevant evidence**, with the understanding that this includes **both inculpatory and exculpatory evidence**, and . . .

# Relevant Information



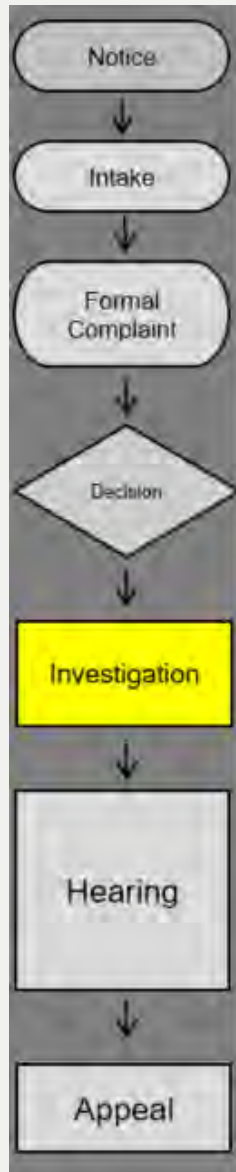
- Of consequence
- Makes a material fact more or less likely
- Includes inculpatory and exculpatory information

Relevant Information

- the final regulations deem questions and evidence about a complainant's prior sexual behavior to be **irrelevant** with two exceptions, and
- preclude use of any information protected by a **legally recognized privilege** (e.g., attorney-client)."

Title IX Regulations; 85 F.R. 30247

# Privileged Information

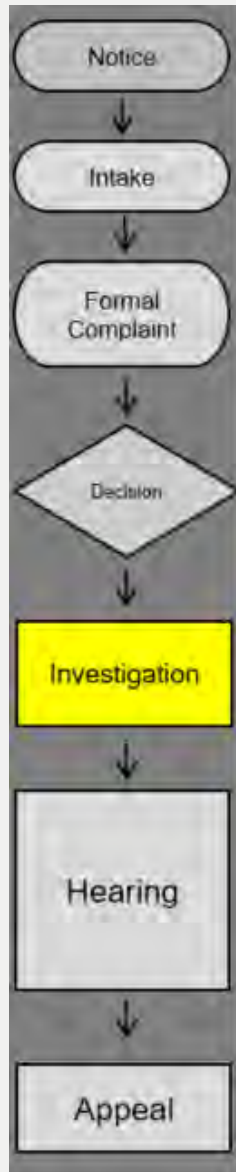


- Not require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, **information protected under a legally recognized privilege**, unless the person holding such privilege has waived the privilege

Title IX Regulations § 106.45(b)(1)(x); 85 F.R. 30361



# Privileged Records

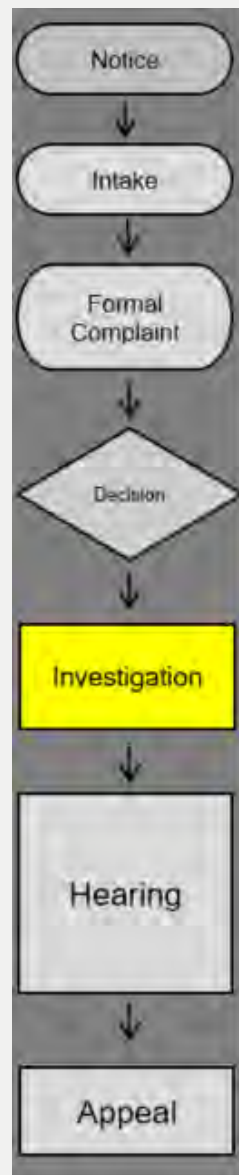


- Recipient cannot access, consider, disclose, or otherwise use a party's records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional's or paraprofessional's capacity, or assisting in that capacity, and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

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



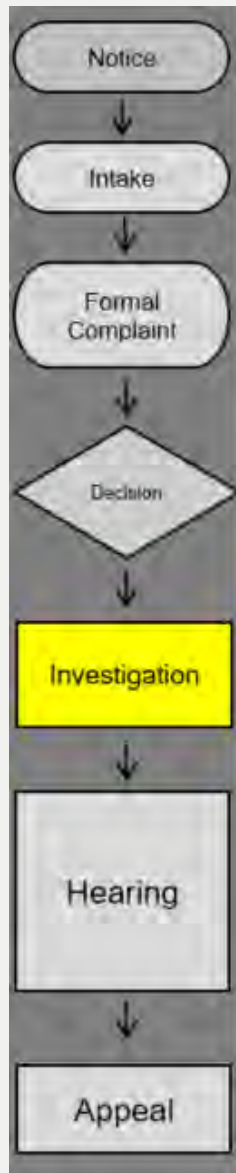
# Prior Sexual History



- Questions and evidence about the complainant's sexual predisposition or **prior sexual behavior** are not relevant, unless such questions and evidence about the complainant's prior sexual behavior are offered:
  - To prove that someone other than the respondent committed the conduct alleged by the complainant, or
  - To prove consent, if the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent.

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

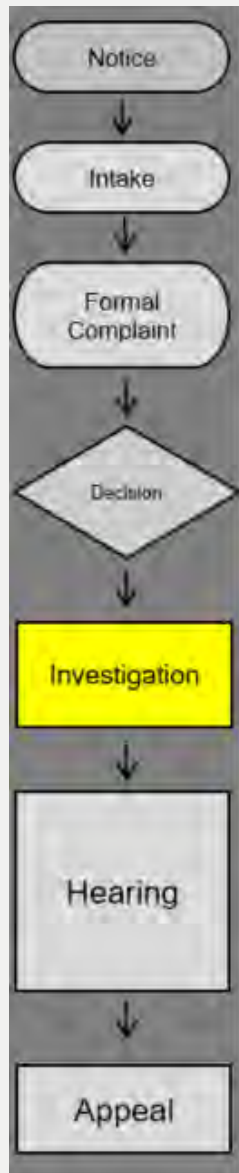
# Prior Sexual History



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

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

# Prior Sexual History: Motive



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

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

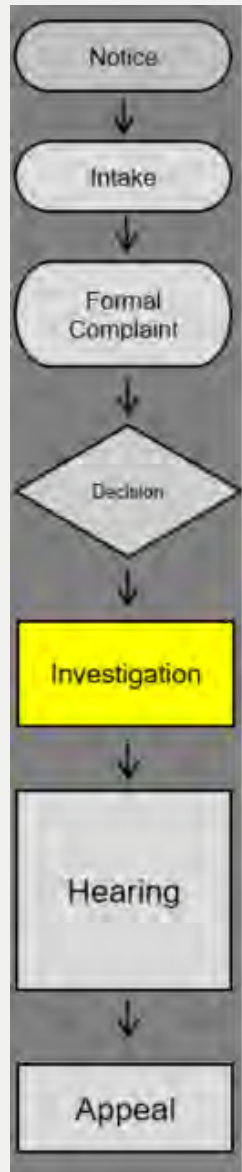
# Prior or Subsequent Misconduct

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

# Relevance of Prior or Subsequent Conduct

- Prior or subsequent misconduct may be relevant to demonstrate:
  - Intent/knowledge/state of mind
  - Motive
  - Opportunity
  - Lack of mistake
  - Pattern
  - Identity
  - Information that is inextricably interwoven with the facts
- Consider prejudicial vs. probative value

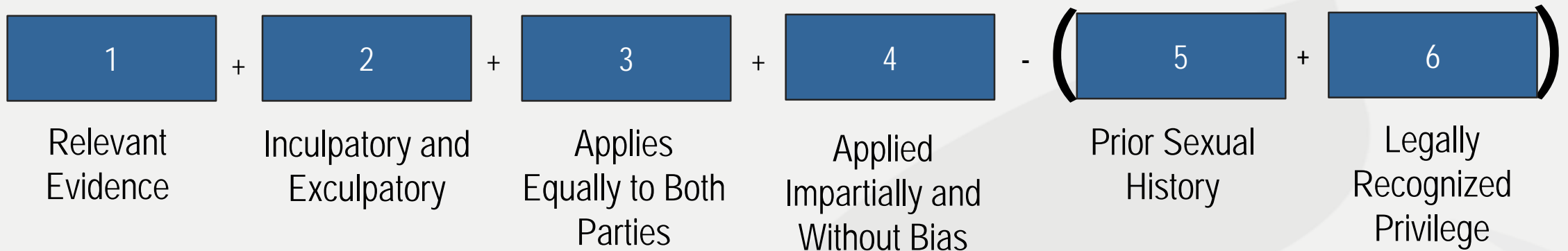
# Flexibility to Adopt Rules



- “Within these evidentiary parameters **recipients retain the flexibility to adopt rules that govern how the recipient’s investigator** and decision-maker evaluate evidence and conduct the grievance process (so long as such rules apply equally to both parties).
- **Relevance is the standard that these final regulations require**, and any evidentiary rules that a recipient chooses must respect this standard of relevance.
- For example, a recipient **may not adopt a rule excluding relevant evidence** because such relevant evidence may be **unduly prejudicial, concern prior bad acts, or constitute character evidence.**”

Title IX Regulations; Preamble 85 F.R. 30248

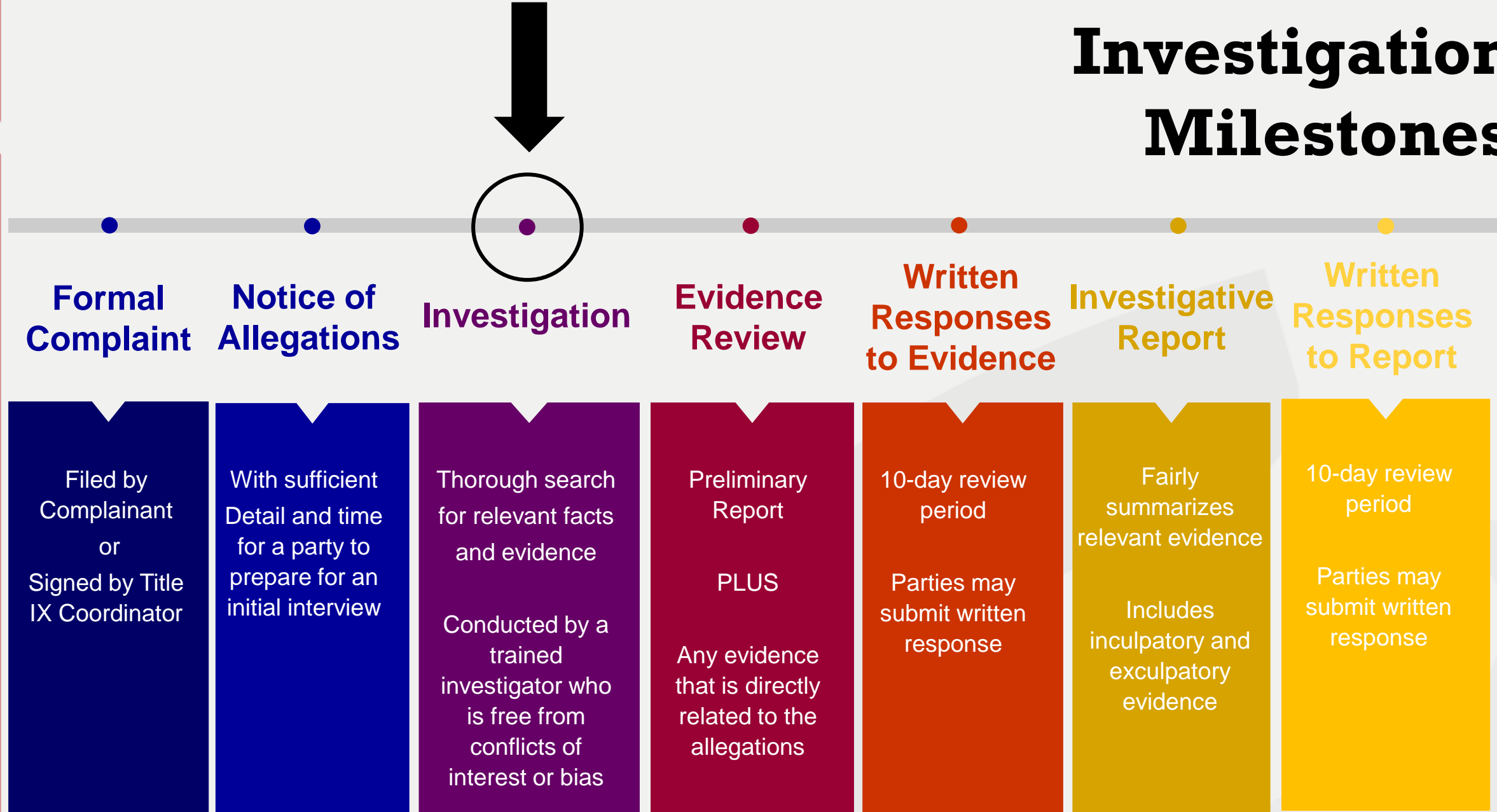
# Evidentiary Rules Must Consider



# **ALCOHOL, DRUGS AND INCAPACITATION**



# Investigation Milestones



# 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 Addition 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

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

# 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

Consideration	Why?
Avoid asking about intoxication on a scale (e.g. “from 1 to 10”)	<ul style="list-style-type: none"> <li>• There is no universal understanding of what the numbers on the scale mean.</li> <li>• Instead, ask about the impacts of drugs or alcohol on a person physically, cognitively, verbally, and otherwise.</li> </ul>
Avoid over-reliance on online BAC calculators in determining incapacity	<ul style="list-style-type: none"> <li>• Without a blood or breath test, it is hard to pinpoint a person’s BAC, especially after the fact.</li> <li>• BAC is only one data point and does not correlate precisely to a person’s subjective experience or objective indicia of intoxication/incapacitation.</li> <li>• Use BAC when it is available; otherwise, rely on subjective and objective indicia of impairment.</li> </ul>
Consider the observations of any sober witnesses with experience and/or training	<ul style="list-style-type: none"> <li>• Medics, police, firefighters, and even trained security guards, volunteer EMS, and residence hall staff are generally sober, trained observers paying close attention.</li> <li>• May need to work with local agencies to secure participation and obtain records, if available.</li> </ul>
Create and use a universal timeline	<ul style="list-style-type: none"> <li>• 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.</li> <li>• Create a visual timeline of events and highlight the timeframe the parties were in each other’s presence.</li> </ul>

# Creating a Universal Timeline

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

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

# Considerations for the Report

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

# Considerations for the Report

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

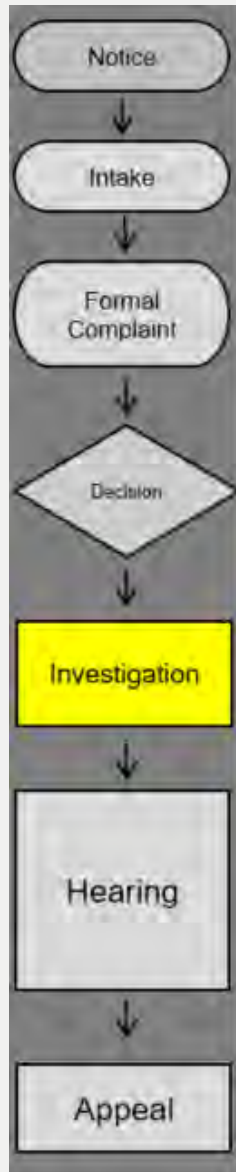
# **EVIDENCE REVIEW**

# Investigation Milestones





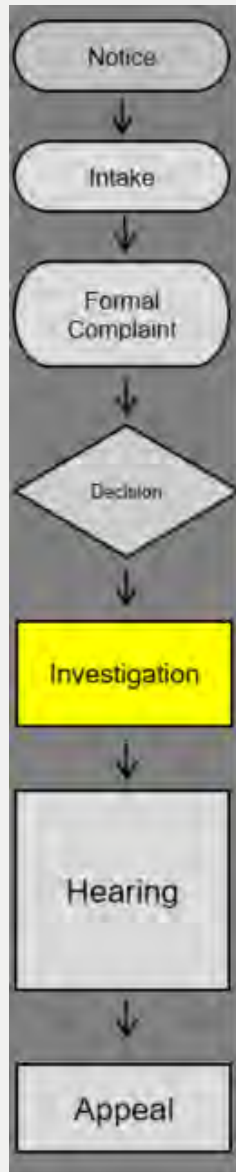
# Evidence Review



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

Title IX Regulations §§ 106.45(b)(5)(vi); 85 F.R. 30411

# Evidence Review

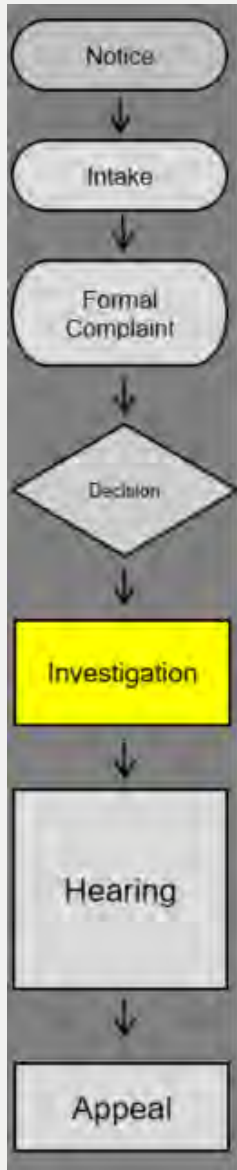


- “Recipient must send to each party and the party’s advisor, if any, **the evidence subject to inspection and review** in an electronic format or a hard copy, and the parties must have at least **10 days to submit a written response**, which the investigator will consider prior to completion of the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

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

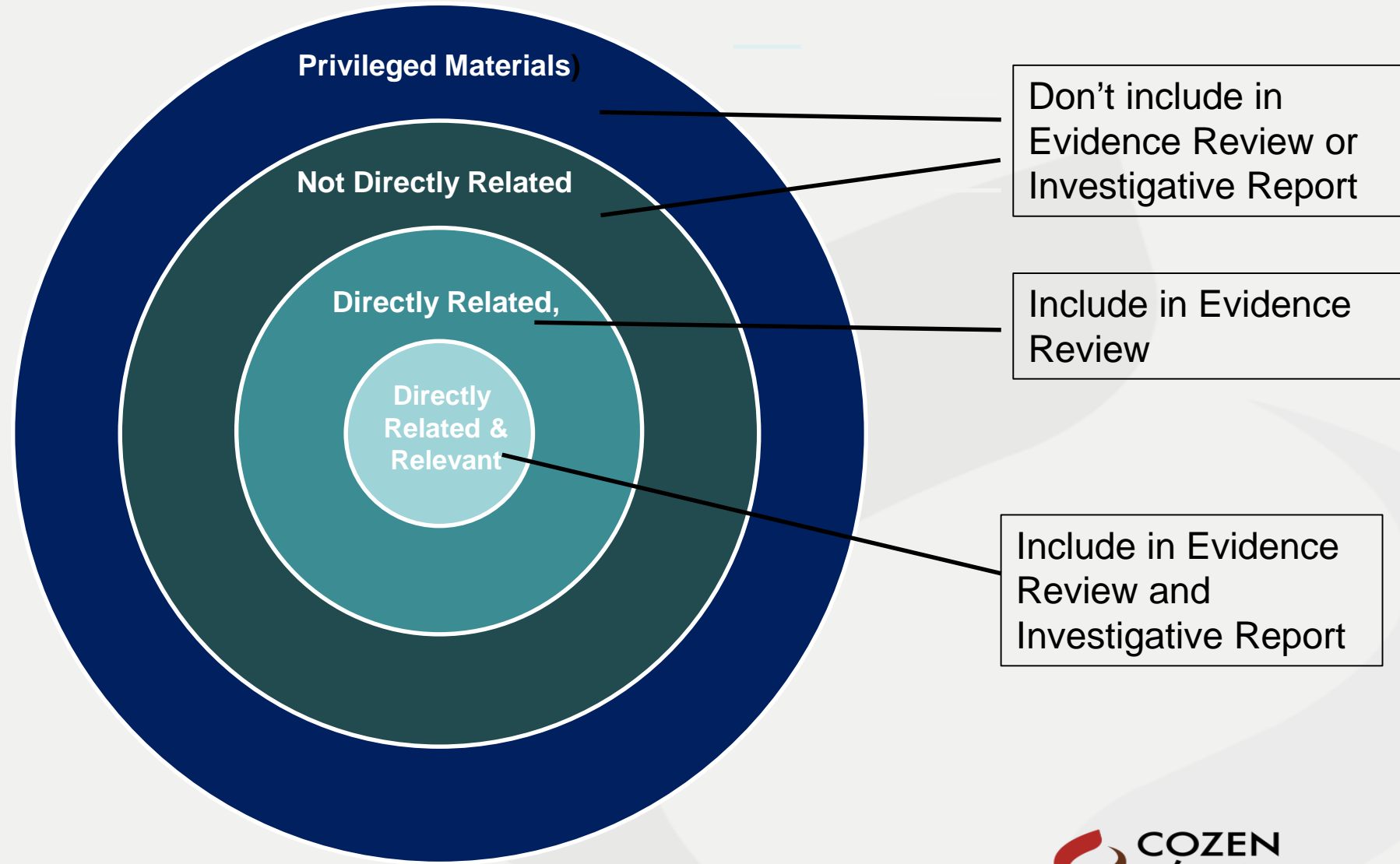
# Evidence Review

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

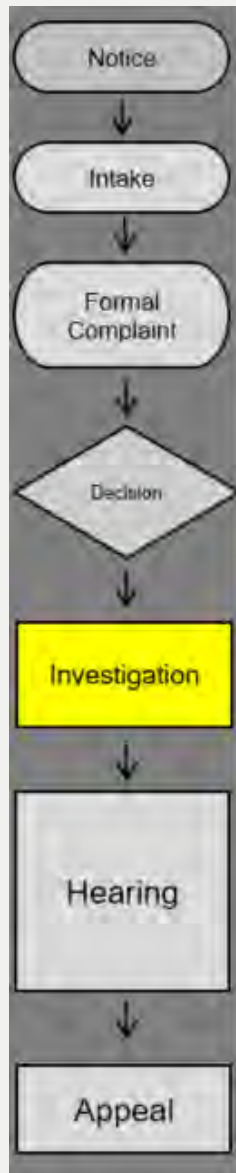


Title IX Regulations; Preamble 85 F.R. 30303

# Evidentiary Levels for Inclusion



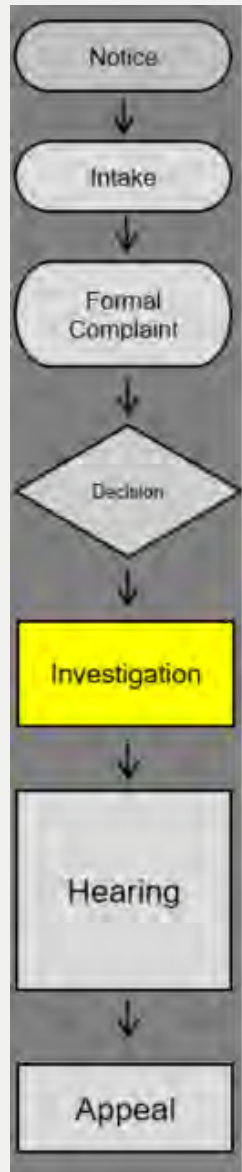
# Directly Related



- Not defined in the regulations or the Preamble
  - The Department declines to define certain terms such as “evidence directly related to the allegations,” as these terms should be interpreted using their plain and ordinary meaning.
- “Directly related” aligns with the requirements in FERPA
  - The Department previously noted that the “directly related to” requirement in § 106.45(b)(vi) aligns with FERPA.
  - For example, the regulations implementing FERPA define education records as records that are “directly related to a student” pursuant to § 99.3.
- Left to the discretion of the school
  - [T]he school has some discretion to determine what evidence is directly related to the allegations in a formal complaint.

Title IX Regulations; Preamble 85 F.R. 30304, 30428.

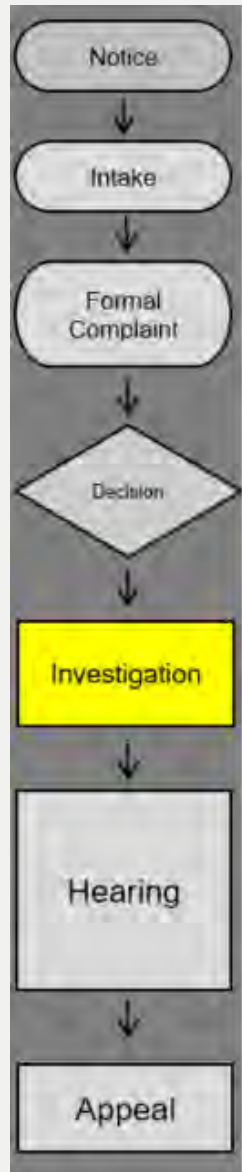
# Directly Related



- [T]he universe of that exchanged evidence should include all evidence (inculpatory and exculpatory) that relates to the allegations under investigation, without the investigator having screened out evidence related to the allegations that the investigator does not believe is relevant.

Title IX Regulations §106.45(b)(5)(vi); Preamble 85 F.R. 30304

# Directly Related vs. Relevant

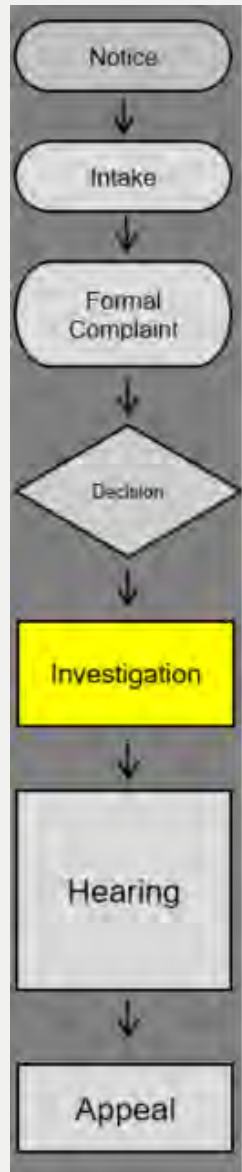


- Evidence that is “directly related to the allegations” may encompass a broader universe of evidence than evidence that is “relevant.”
- The Department does not believe that determinations about whether certain questions or evidence are relevant or directly related to the allegations at issue requires legal training and that such factual determinations reasonably can be made by layperson recipient officials impartially applying logic and common sense.

Title IX Regulations; Preamble, 85 F.R. 30304, 30321.



# Directly Related

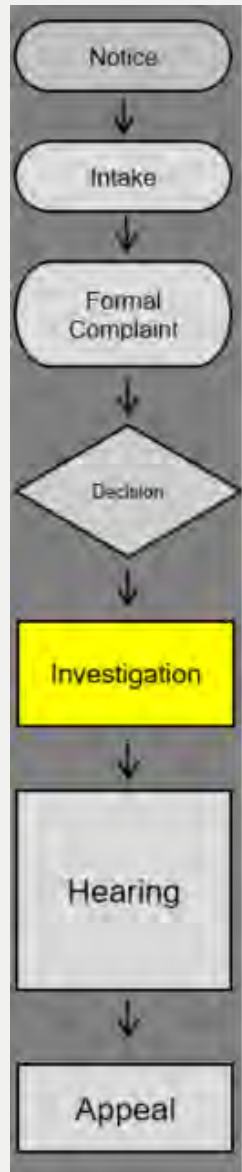


- Redacting information within evidence (documents, interviews, medical records, etc.)
- May be redacted if:
  - Not directly related to the allegations
  - Privileged, or
  - Obtained without proper consent
- A recipient may permit or require the investigator to redact information ... such as information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

Title IX Regulations; Preamble 85 F.R. 30304



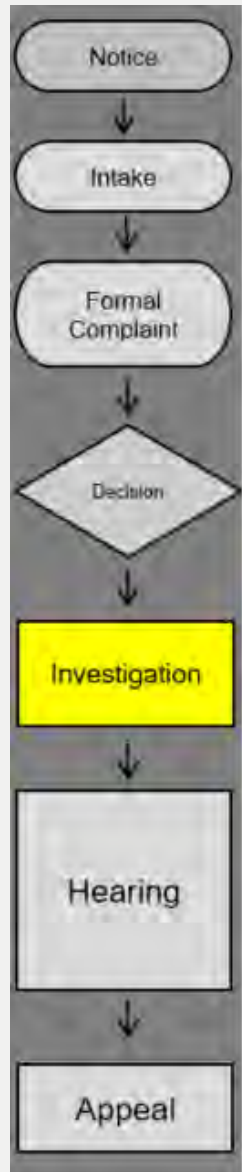
# Directly Related



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

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

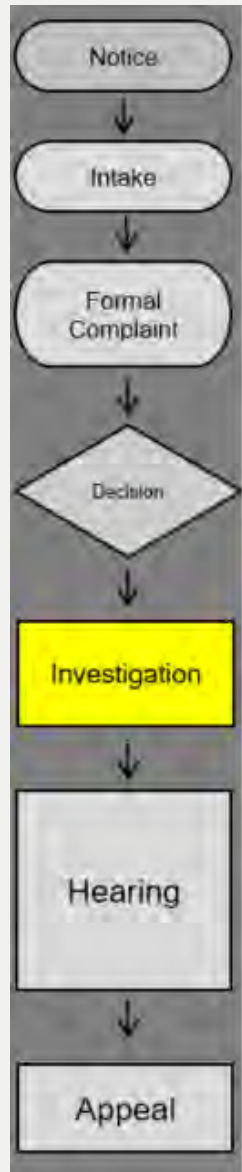
# Directly Related



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

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

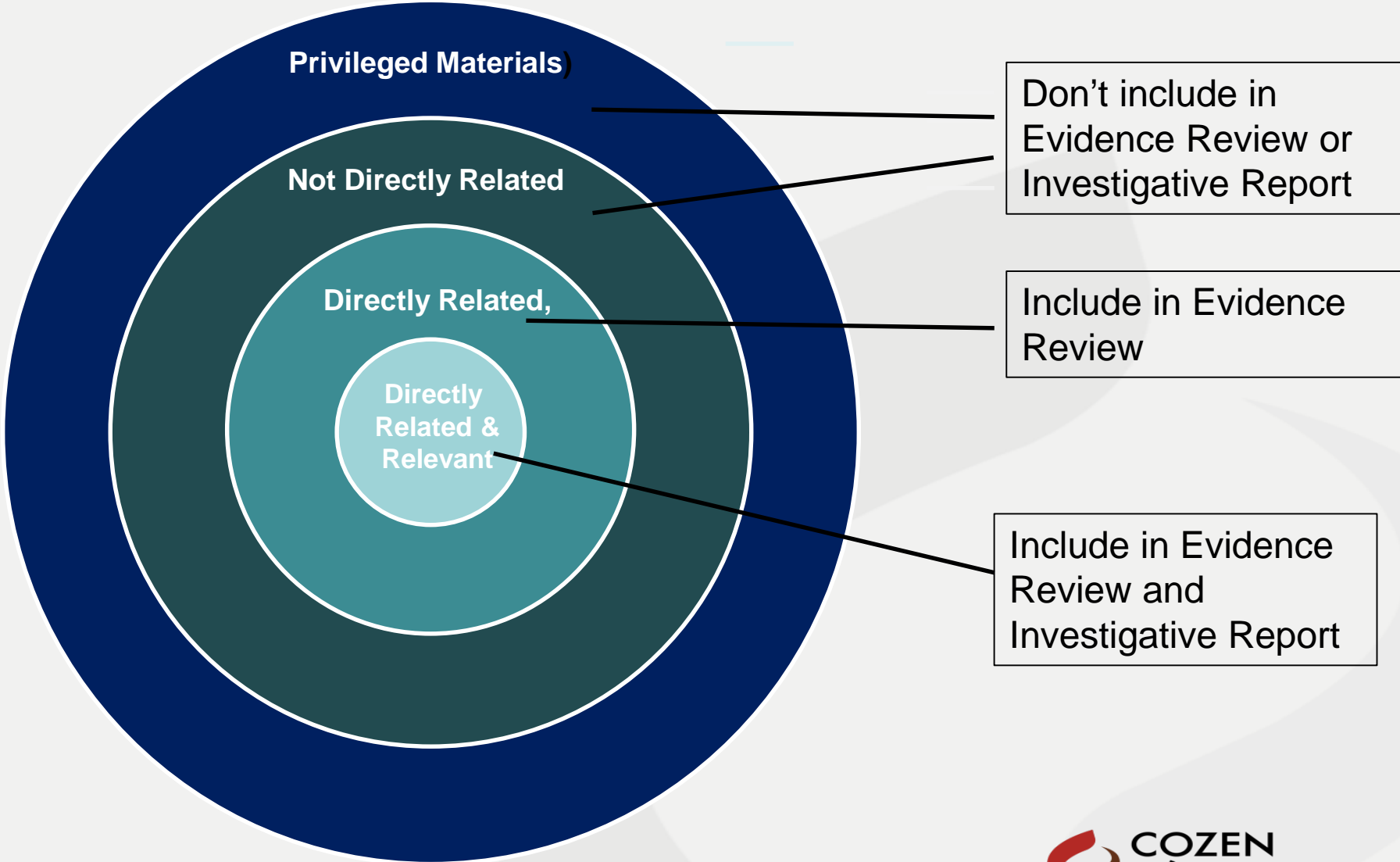
# Scope of Parties' Review



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

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

# Recap of Evidentiary Levels for Inclusion

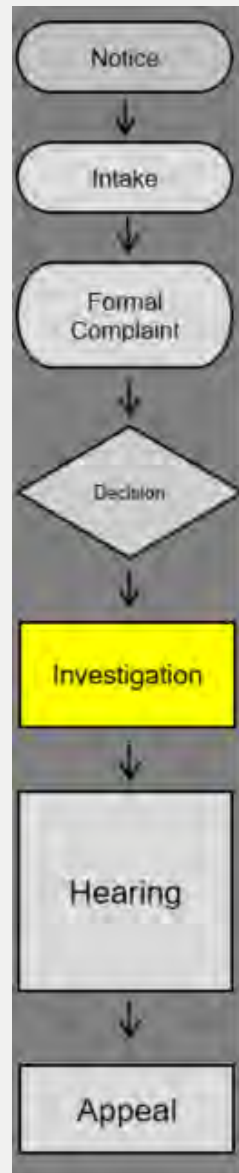


# **INVESTIGATIVE REPORT**

# Investigation Milestones



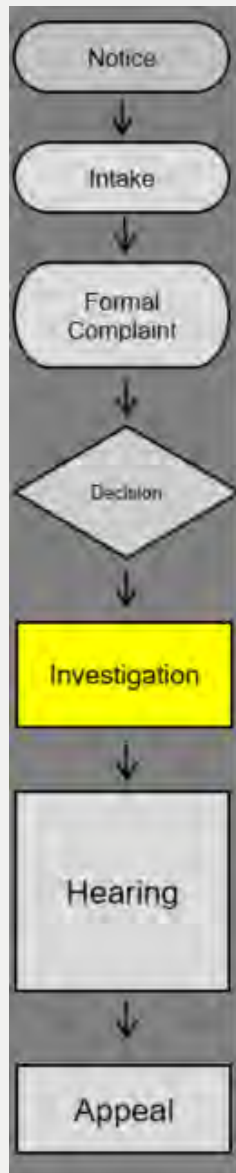
# Investigative Report



- Create an **investigative report** that fairly summarizes relevant evidence and
- Send to each party and the party’s advisor, if any, the investigative report in an electronic format or a hard copy, for their review and written response, **at least 10 days prior** to the determination of responsibility (hearing)
  - This opportunity allows the parties to “effectively provide context to the evidence included in the report” and to “advance their own interests for consideration by the decision-maker.”

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

# Investigative Report

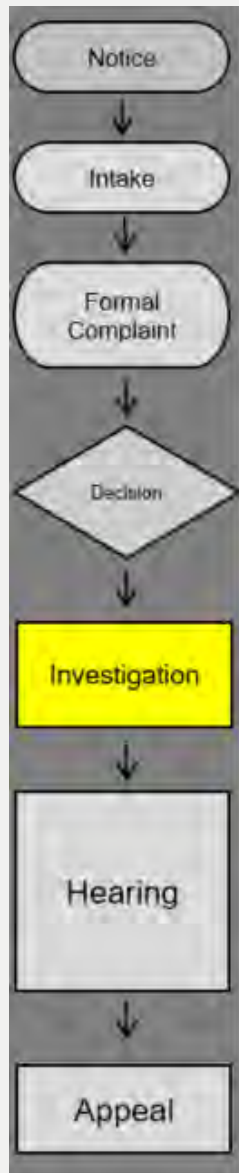


- The regulations do not address the specific contents of the investigative report other than specifying its core purpose of summarizing the relevant evidence.
- The Department takes no position here on such elements beyond what is required in these final regulations; namely, that the investigative report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

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



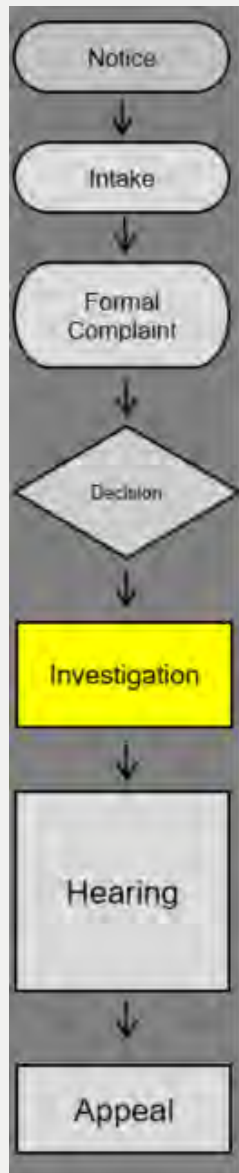
# Investigative Report



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

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

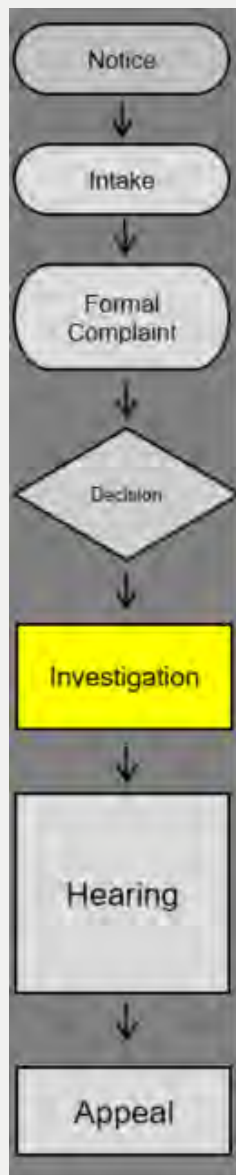
# Content for Written Determination



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

Title IX Regulations §§ 106.45(b)(5)(vii); Preamble 85 F.R. 30577

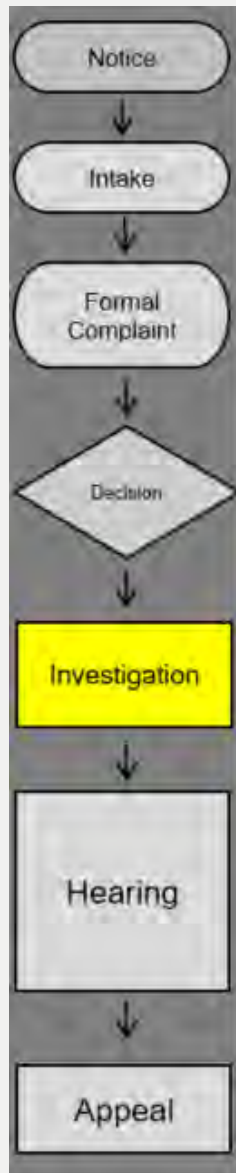
# Revisiting Relevance



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

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

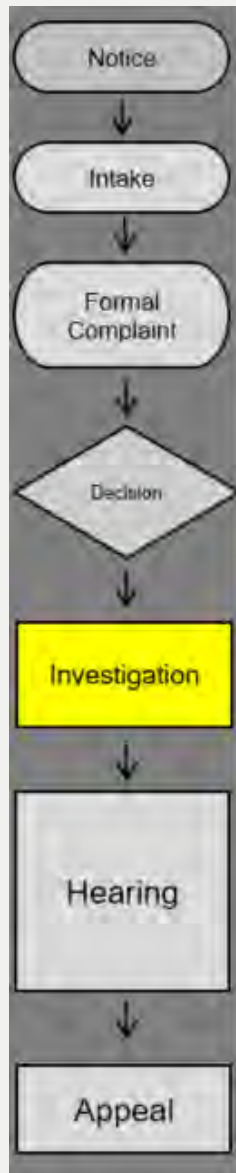
# Investigative Report



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

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

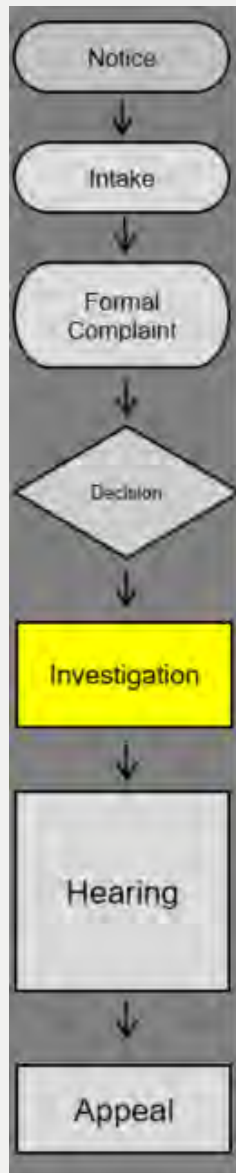
# Investigative Report



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

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

# Investigative Report



- At least 10 days prior to the determination of responsibility (hearing)
  - The parties then have equal opportunity to review the investigative report; if a party disagrees with an investigator's determination about relevance, the party can make that argument in the party's written response to the investigative report and to the decision-maker at any hearing held.

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

# Practical Considerations & Effective Practices

- Use template format with consistent language and content across investigations
- Language: balanced, neutral and non-judgmental
- Avoid declarative credibility language
  - “Unreliable” vs. insufficient information
  - Recognize perspective of the parties
  - Comment on the evidence, not the parties
- Use of verbatim quotes
- Leave sufficient time for writing, editing, proof reading and review by a fresh set of eyes

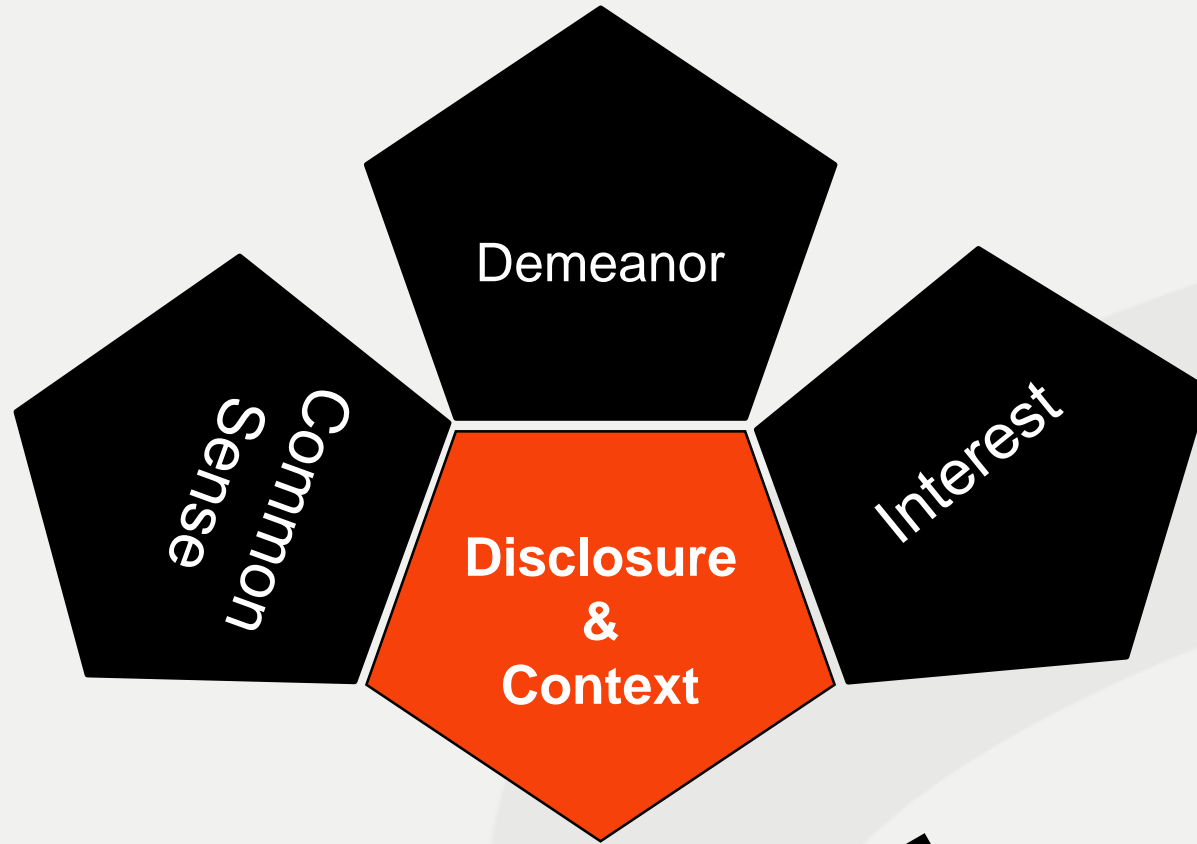
# **EVALUATING CREDIBILITY**



# Investigation Milestones



# Evaluating Credibility



Corroboration

Detail

# 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.**

...

# 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.

...

# 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

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

# Investigation Checklist

- Place of occurrence
- Nature of occurrence
- Time of occurrence
- Time of reporting
- Alcohol or other drugs involved
- Physical Injury
- Name of accused; known or unknown
- Other crimes evidence/priors
- Complainant's description of event
- Names of witnesses
- Interviews of all parties
- Prior contacts between complainant and accused
- School records
- Intimidation attempts
- Physical evidence:
  - Injury / Medical Evidence - records
  - Security Monitoring Records / Visitor Logs / Audio-Video recordings
  - Telephone records
  - Voicemail
  - Text / E-mail / Social Media
  - Clothing / Tangible Objects
  - Any other physical / forensic evidence
- 911 Tape
- Photographs of the scene
- Photographs of injuries
- Advised re: law enforcement report
- Advised re: preservation and medical treatment
- Advised re: counseling
- Concerns regarding safety of community
- Discharge Title IX responsibilities
- Discharge Clery responsibilities
- Court / Cease & Desist Orders
- Protection Orders

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



# 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

# 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.