

# **Title IX Training:**

## **An Integrated and Coordinated Approach**

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**September 16 - 18, 2020**





# INTRODUCTION



Hello  
my name is

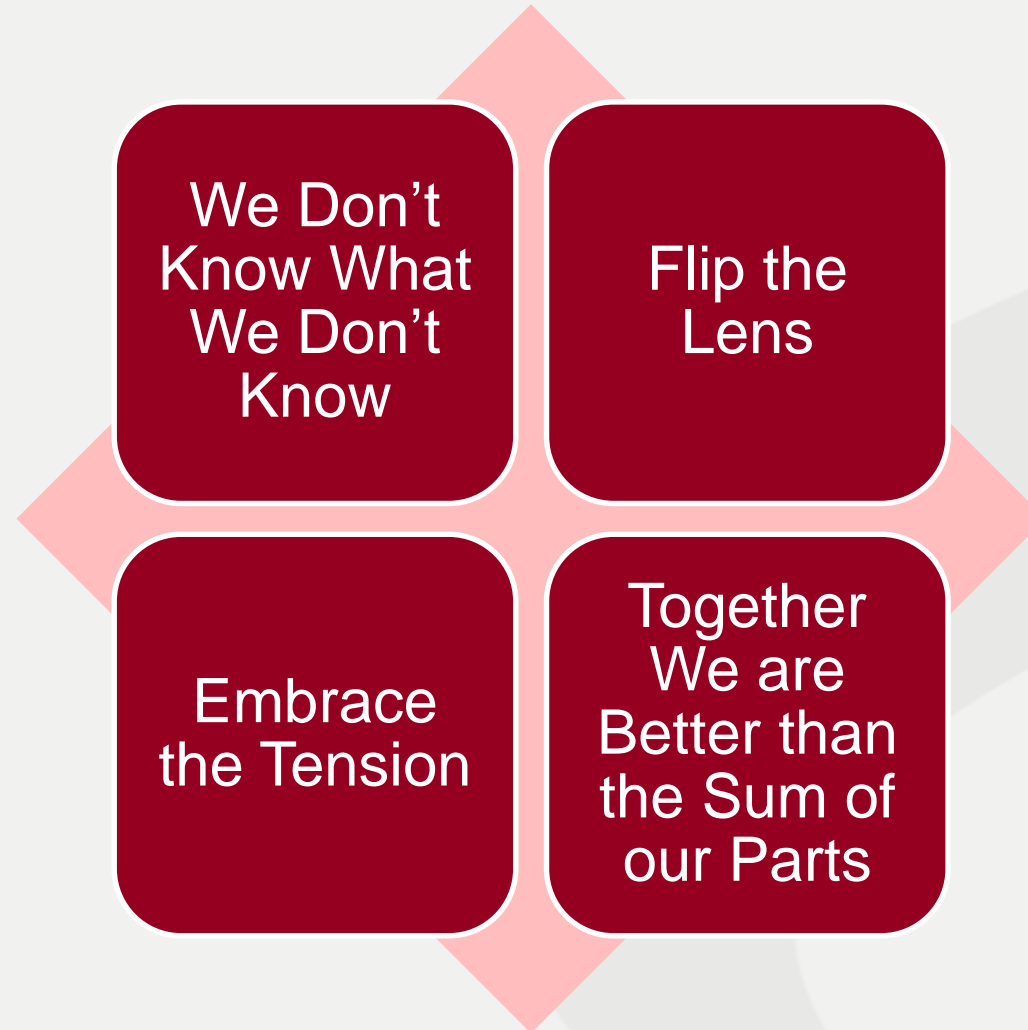


Thank you to our hosts



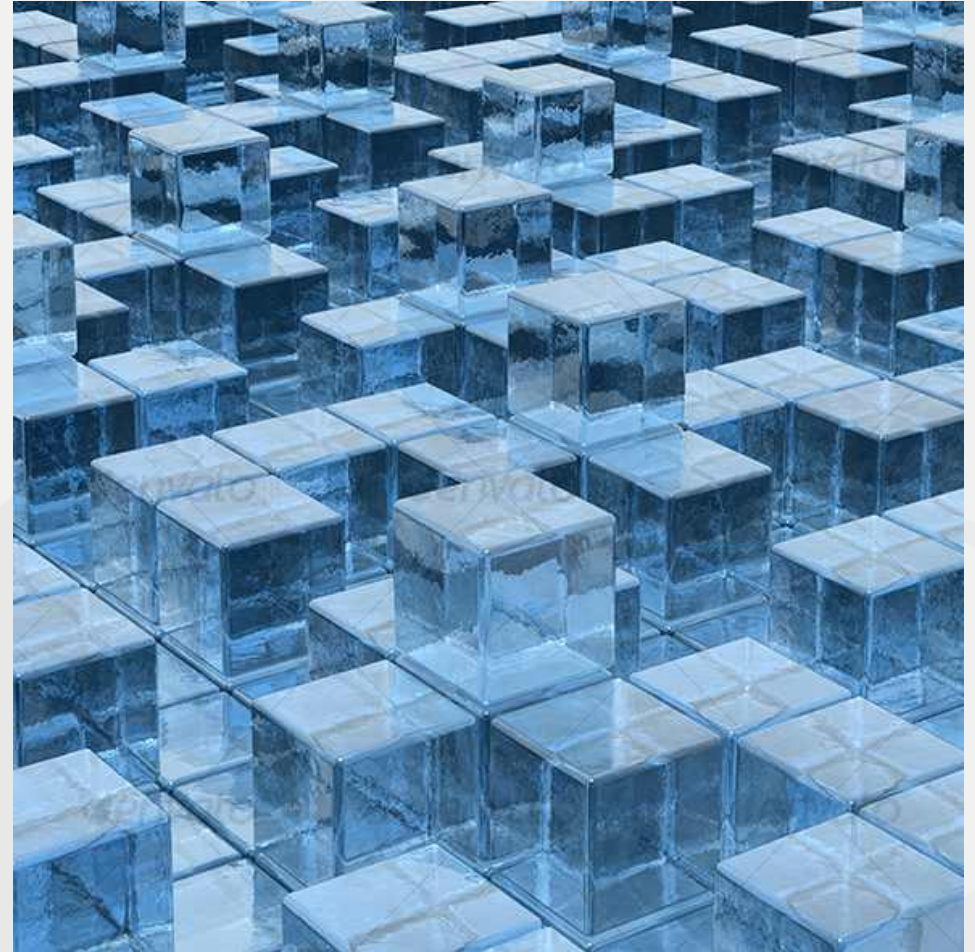
# **FRAMING THE CONTEXT**

# Framing the Conversation



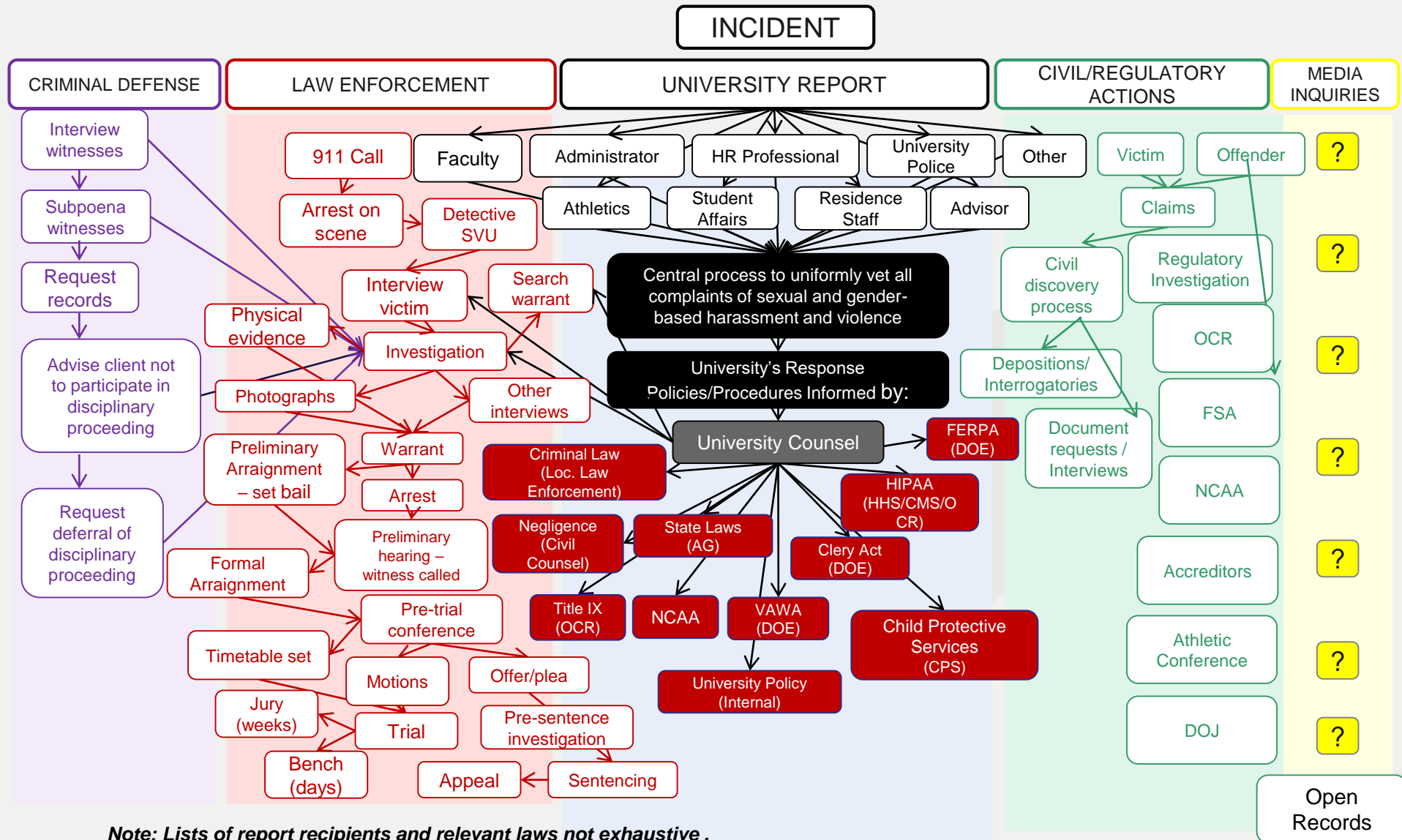
# The Context

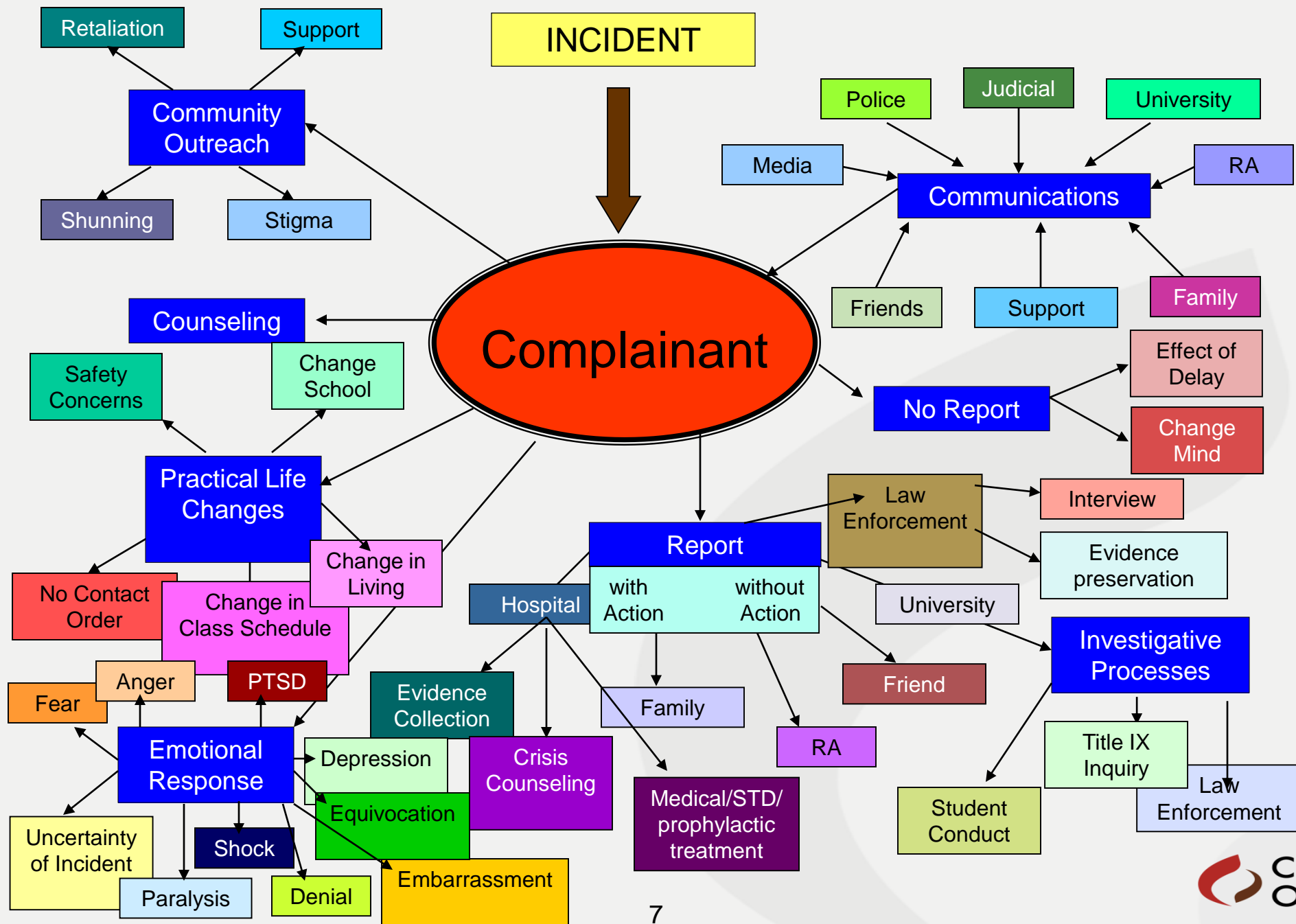
- Regulatory Framework
- Dynamics of Trauma & Sexual and Gender-Based Harassment and Violence
- Individual Culture, Climate, History, Resources, Policies, Procedures, Personnel and Values of the Institution

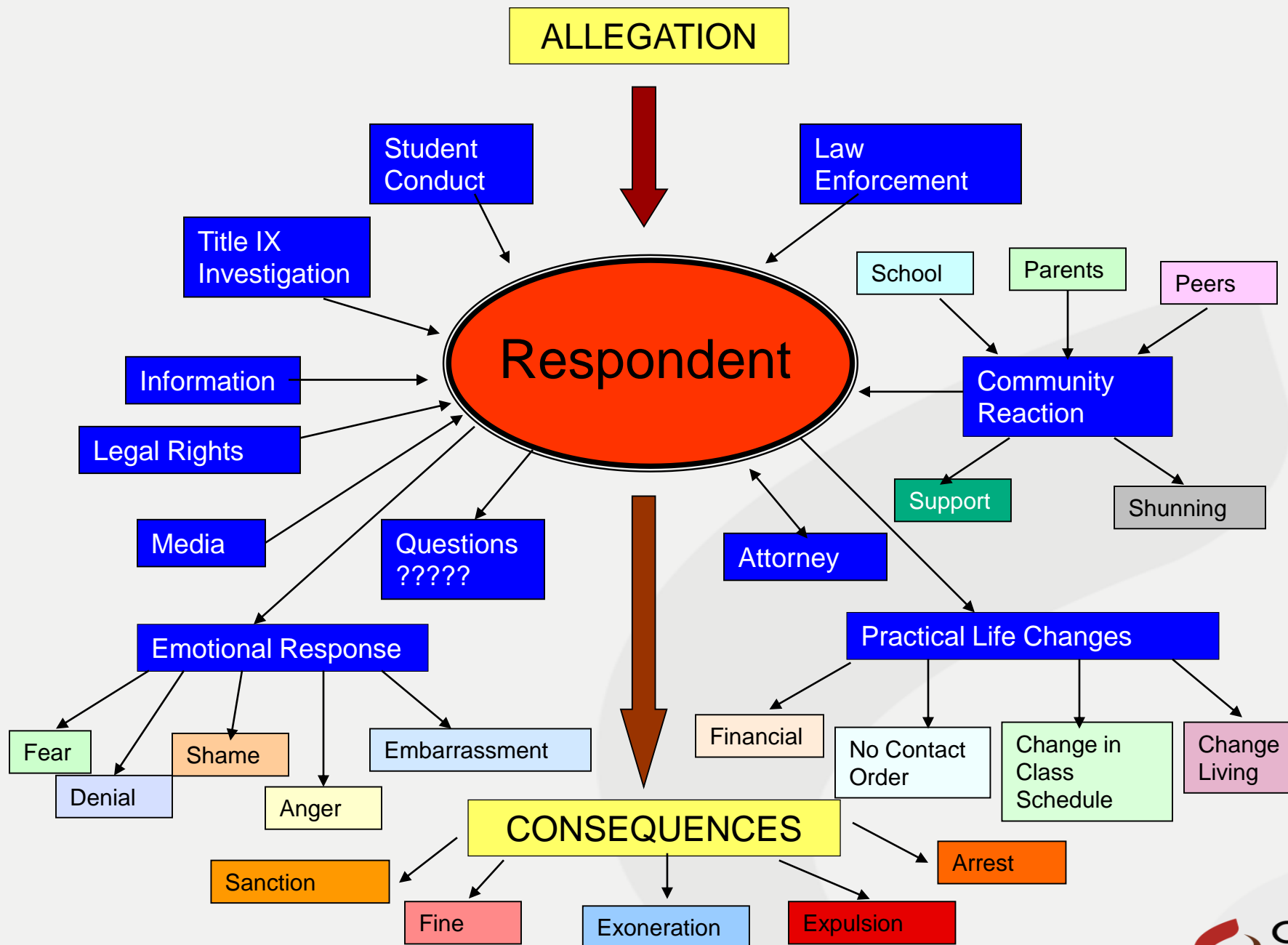




# The Challenge of the Context

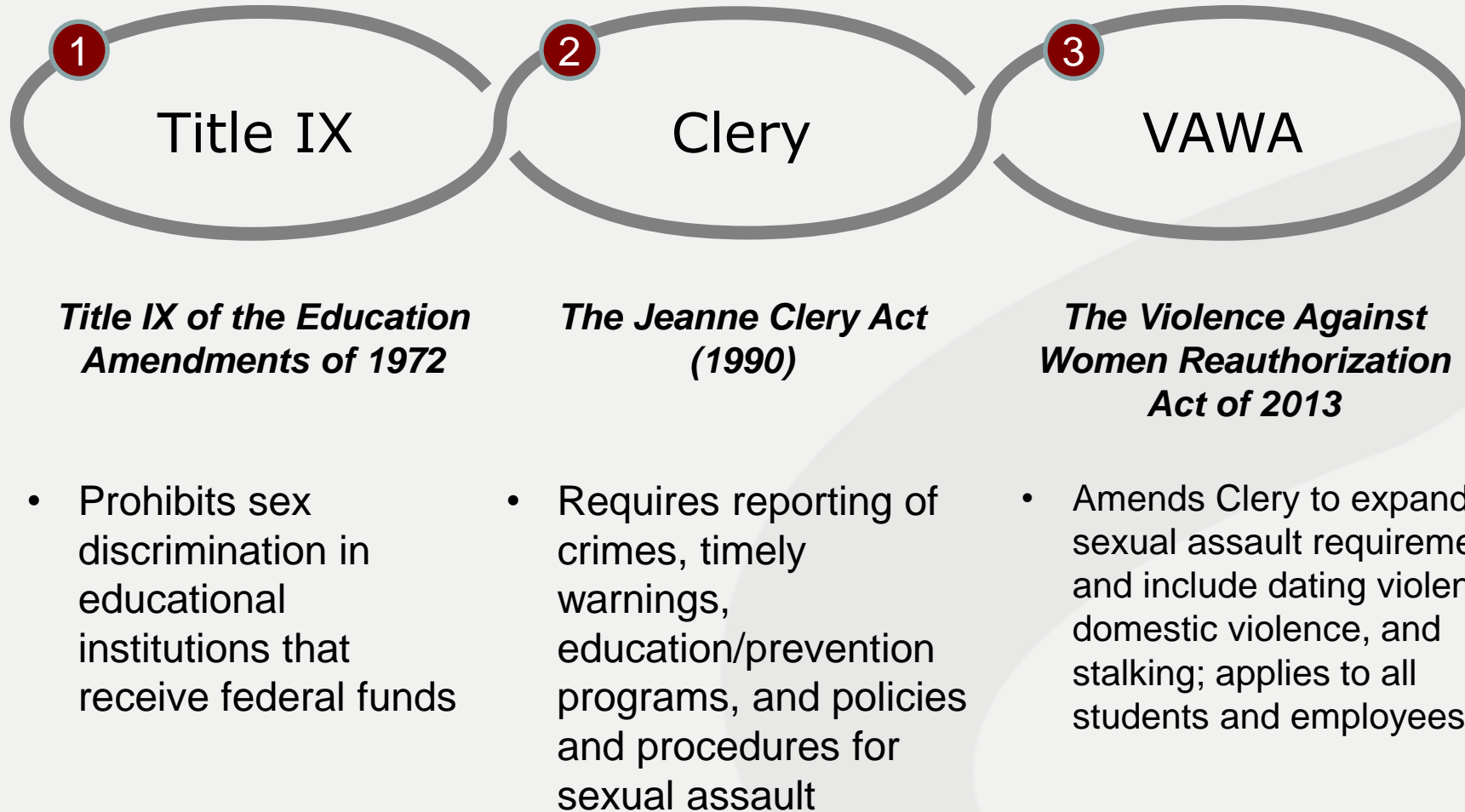








# Federal Regulatory Framework

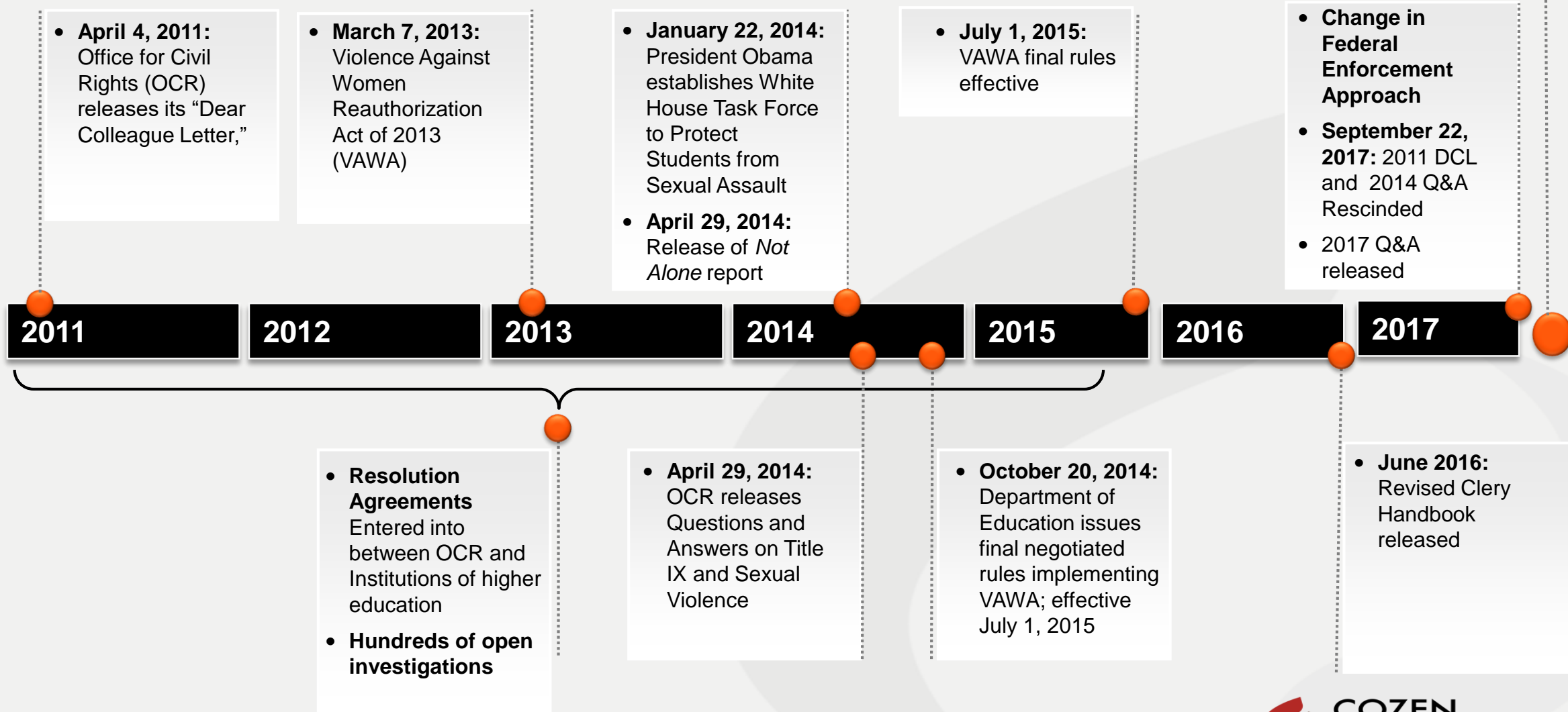


# Implementation Rubric

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

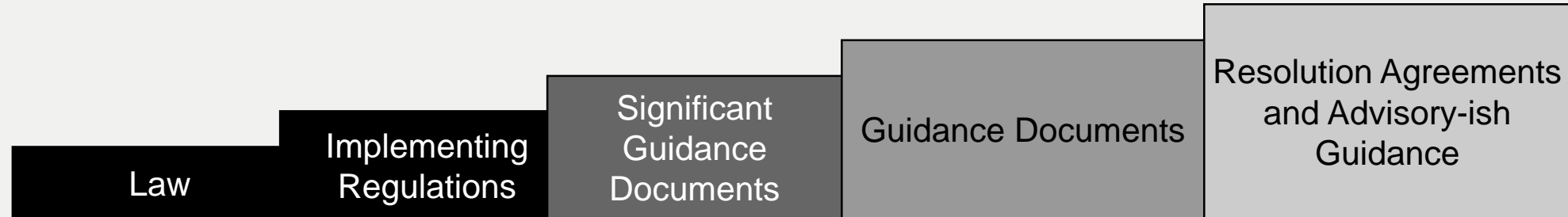


# Evolution of Federal Guidance, Legislation and Enforcement Efforts



- **November 2018:** OCR releases Proposed Rule

# 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- 2011 Dear Colleague Letter (Rescinded)
- 2014 Q&A (Rescinded)
- 2017 Q&A (Rescinded)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- 2001 Revised Sexual Harassment Guidance (Rescinded)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 (Rescinded)
  - Retaliation

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

# Recent Court Cases

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.” *Boormeester v Carry*, No. B290675, 2020 WL 2764406 at \*1 (Cal. Ct. App. May 28, 2020)

“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)

“[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)



# The Courts on Due Process and Fundamental Fairness

**Doe v. Brandeis University**: 177 F.Supp.3d 561 (D. Mass. March 31, 2016).

**Doe v. Regents of the University of California**: 5 Cal. App. 5th 1055 (Cal. App. Ct. Nov. 22, 2016), review denied (Feb. 15, 2017).

**Doe v. Claremont McKenna College**: 25 Cal. App. 5th 1055, (Cal. Ct. App. 2018).

**Doe v. Allee (USC)**: 30 Cal. App. 5th 1036, (Cal. Ct. App. 2019).

**Doe v. Purdue University**: 2:17-cv-00033 (U.S. District Court of Appeals for the Seventh Circuit, June 28, 2019)

2016

**Doe. Rectors and Visitors of GMU**: 149 F. Supp. 3d 602 (E.D. Va. February 25, 2016) Memorandum Opinion.

**Doe v. University of Southern California**: 146 Cal. App. 4th 221 (Cal. App. Ct. April 5, 2016).

2017

**Doe v. Trustees of Boston College**: 2016 WL 5799297 (D. Mass. October 4, 2016)

2018

**Doe v. Baum**: 903 F.3d 575 (6th Cir. 2018).

2019

**Doe v. Rhodes College**: 2:19-cv-02336 (Western Dist. Tennessee, June 14, 2019).

2020

**Boormeester v. Carry**: No. B290675, 2020 WL 2764406 at \*1 (Cal. Ct. App. May 28, 2020).

**Doe v. Univ. of the Sciences**: No. 19-2966, 2020 WL 2786840 (3d Cir. May 29, 2020).



# The Courts on Due Process and Fundamental Fairness

**Doe v. Brandeis University**: Basic fairness requires the university to provide an accused student with: (1) notice of charges, (2) the right to counsel, (3) the opportunity to confront the accuser, (4) cross-examination of evidence or witness statements, and an effective appeal.

**Doe v. Regents of the University of California**

**Doe v. Claremont McKenna College**: When the respondent faces a severe penalty and the case turns on credibility, the process must provide for a hearing where the respondent may question, if even indirectly, the complainant.

2016

**Doe. Rectors and Visitors of GMU**: A university provide an accused student with notice of the full scope of charges.

**Doe v. University of Southern California**: A university must provide an accused student with supplemental notice if the charges against the respondent change or expand.

2017

**Doe v. Trustees of Boston College**

2018

**Doe v. Baum**: When credibility is at issue, the Due Process Clause mandates that a university provide accused students a hearing with the opportunity to conduct cross-examination.

# The Courts on Due Process and Fundamental Fairness

**Doe v. Allee (USC)**: Fundamental fairness requires, at a minimum, that the university provide a mechanism by which the accused may cross-examine those witnesses, directly or indirectly, at a hearing before a neutral adjudicator with the power to find facts and make credibility assessments independently.

**Doe v. Purdue University**: Investigation report must be provided to the parties prior to the hearing and must include summaries of both inculpatory and exculpatory evidence.

2019

**Doe v. Rhodes College**: An accused student must be afforded the opportunity to question the complainant and review all relevant evidence prior to the hearing.

2020

**Boormeester v. Carry**: 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."

**Doe v. Univ. of the Sciences**: Notions of fairness include providing the accused with some form of cross-examination and a live, adversarial hearing during which he or she can put on a defense and challenge the evidence.

# **THE CLERY ACT**

# 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



# **THE NEW TITLE IX REGULATIONS**

# New Title IX Regulations

- 2033 page document issued by the U.S. Department of Education, Office for Civil Rights (OCR) on May 6, 2020
- Includes significant resource materials: a preamble, executive summary, overview of public comments, discussion of directed questions, regulatory impact analysis and other content
- Final regulations are located at page 2008-2033
- Official version (2082 pages) were released May 19, 2020
- Regulations must be implemented as of **August 14, 2020**

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

- Title IX obligations related to **sexual harassment as a form of sex discrimination** had not been formally addressed in the regulations
- “These final regulations impose, for the first time, **legally binding rules** on recipients with respect to responding to sexual harassment.”

Title IX Regulations issued May 6, 2020; Executive Summary, pp. 15-16

# Regulations: “Legally Binding Obligations”

- “Because these final regulations represent the Department’s interpretation of a recipient’s legally binding obligations, **rather than best practices**, recommendations, or guidance, these final regulations focus on **precise legal compliance requirements** governing recipients.”

# Regulations: “Best Practices”

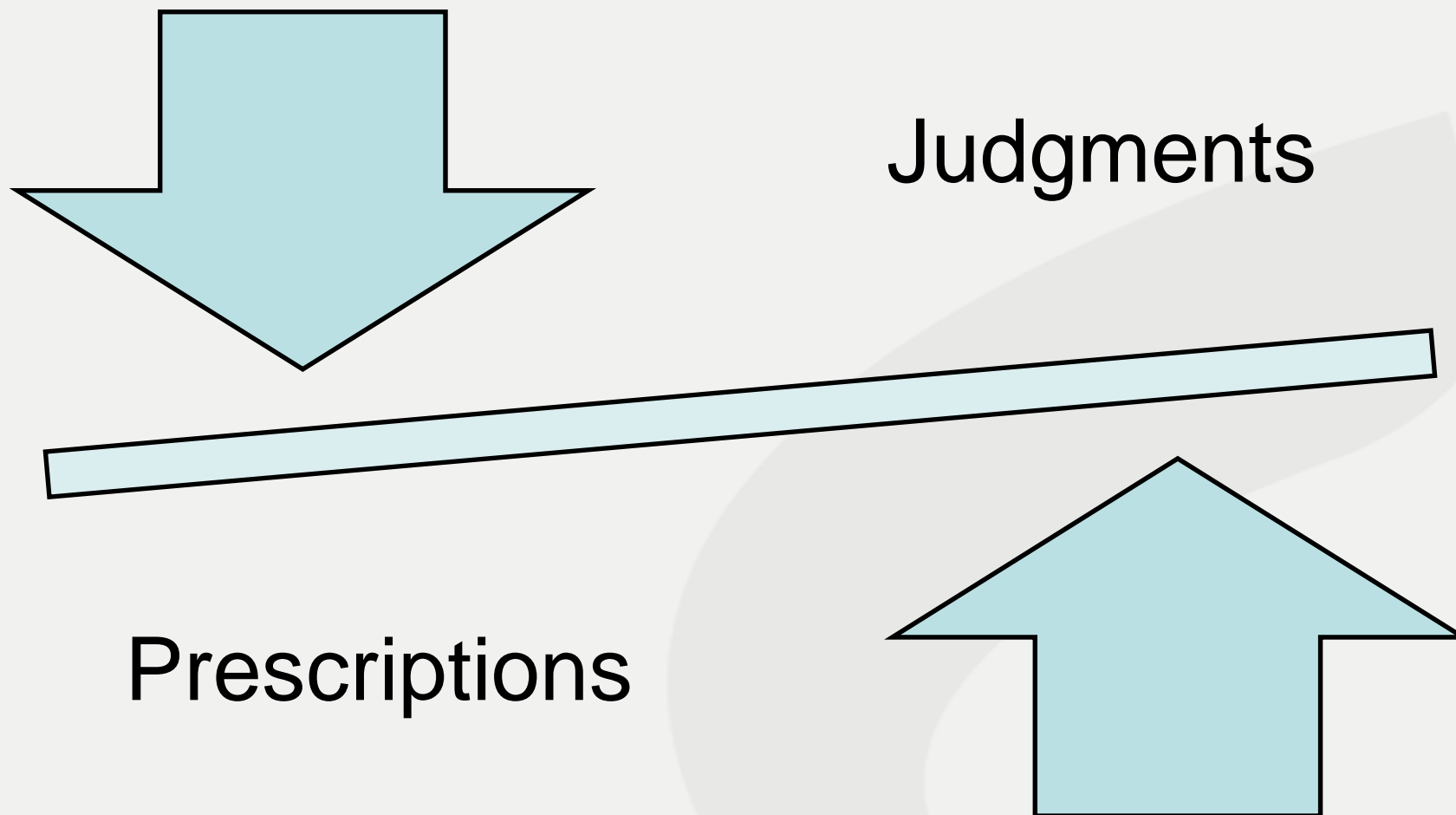
- “These final regulations leave recipients the **flexibility to choose to follow best practices and recommendations** contained in the Department’s guidance, or similarly, best practices and recommendations made by non-Department sources, such as Title IX consultancy firms, legal and social sciences scholars, victim advocacy organizations, civil libertarians and due process advocates and other experts.”

# Guidance

- Preamble
  - Explains the basis and purpose for the final rule
  - Serves a guidance function
- Preamble on Prior Guidance
  - “The 2017 Q&A along with the 2001 Guidance, and not the withdrawn 2011 Dear Colleague Letter, remain the baseline against which these final regulations make further changes to enforcement of Title IX obligations.”
  - “Title IX policies and procedures that recipients have in place due to following the 2001 Guidance and the withdrawn 2011 Dear Colleague Letter remain viable policies and procedures for recipients to adopt while complying with these final regulations.”
- OCR’s Policy Guidance Portal available at:  
<https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/rr/policyguidance/index.html>



# Balancing



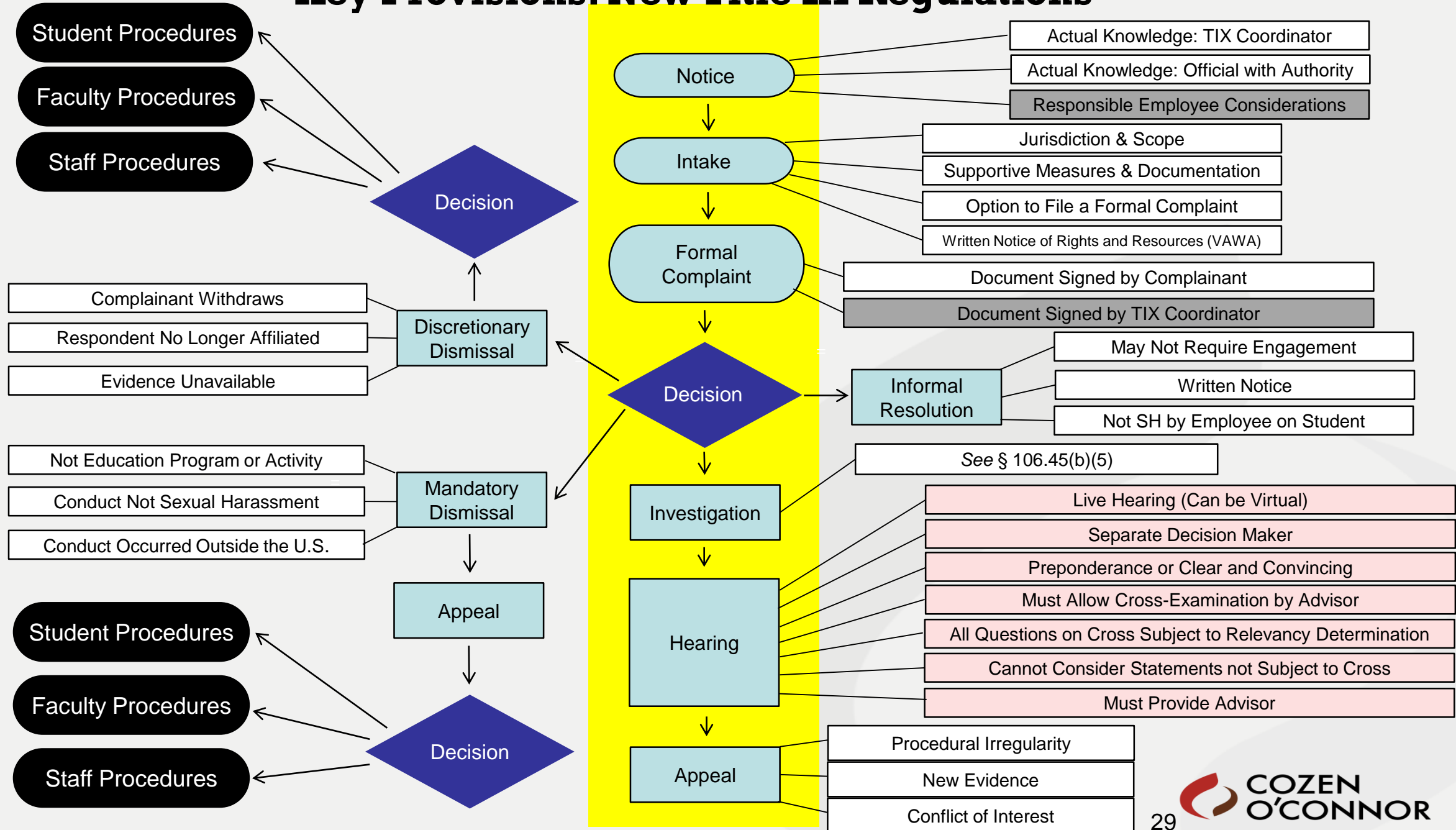
Prescriptions

Judgments

# Overview of Significant Provisions

- Jurisdiction & Scope
- Notice
- Formal Complaint & Dismissal
- Supportive Measures
- Emergency Removal
- Basic Requirements of Grievance Process
- Written Notice to Parties
- Consolidation
- Investigations
- Hearings
- Determination of Responsibility
- Appeals
- Informal Resolution
- Documentation
- Retaliation
- Training

# Key Provisions: New Title IX Regulations



# Impact of Final Regulations

## What is (or Should be) the Same

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

## What is Significantly Different

- Jurisdiction/scope
- Live hearing
- Cross examination by the advisor
- Proponent of a statement must be subject to cross-examination
- Recipient must provide advisor

# **THE BIG THREE**

# Implementing Regulations

## Regulations Promulgated in 1975

- Designation of responsible employee
- Complaint procedure of recipient
- Notification of policy

## 2020 Final Regulations

- Designation of coordinator
- Adoption of grievance procedures
- Dissemination of policy

### Relevant Regulations Sections:

Title IX Coordinator: §§ 106.8(a) and 106.8(b)(2)(i)

Notice of Non-Discrimination: § 106.8(b)

Grievance Procedures: § 106.8(c)



# Designation of Coordinator

- Each recipient must designate and authorize at least one employee to coordinate its efforts to comply with its responsibilities under this part, its responsibilities under this part, which employee must be referred to as the “Title IX Coordinator.”
- Any person may report sex discrimination, including sexual harassment (whether or not the person reporting is the person alleged to be the victim of conduct that could constitute sex discrimination or sexual harassment) . . .

# Dissemination of Policy

- Each recipient must notify persons entitled to a notification under paragraph (a) of this section that the recipient does not discriminate on the basis of sex in the education program or activity that it operates, and that it is required by title IX and this part not to discriminate in such a manner.
- Such notification must state that the requirement not to discriminate in the education program or activity extends to admission (unless subpart C of this part does not apply) and employment, and that inquiries about the application of title IX and this part to such recipient may be referred to the recipient's Title IX Coordinator, or to the Assistant Secretary, or both.

# Adopt Grievance Procedures

- . A recipient must adopt and publish grievance procedures that provide for the prompt and equitable resolution of student and employee complaints alleging any action that would be prohibited by this part and a grievance process that complies with § 106.45 for formal complaints as defined in § 106.30.
- A recipient must provide to persons entitled to a notification under paragraph (a) of this section notice of the recipient's grievance procedures and grievance process, including how to report or file a complaint of sex discrimination, how to report or file a formal complaint of sexual harassment, and how the recipient will respond.

# **SHIFT IN APPROACH & FRAMING PRINCIPLES**

# Framing Principles

1

“A recipient’s treatment of a complainant or a respondent in response to a formal complaint of sexual harassment may constitute discrimination on the basis of sex under title IX.”

2

“A recipient with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States, must respond promptly in a manner that is not deliberately indifferent.”

3

“A recipient’s response must treat complainants and respondents equitably by offering supportive measures . . . to a complainant, and by following a grievance process . . . before the imposition of any disciplinary sanctions or other actions that are not supportive measures . . . against a respondent.”

4

“A recipient is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances.”

5

“If the Assistant Secretary finds that a recipient has discriminated against persons on the basis of sex in an education program or activity under this part, or otherwise violated this part, such recipient must take such remedial action as the Assistant Secretary deems necessary to remedy the violation.”

# Framing Principles

1

“A recipient’s treatment of a complainant or a respondent in response to a formal complaint of sexual harassment may constitute discrimination on the basis of sex under title IX.”

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

# Framing Principles

2

“A recipient with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States, must respond promptly in a manner that is not deliberately indifferent.”

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

# Framing Principles

3

“A recipient’s response must treat complainants and respondents equitably by offering supportive measures as defined in § 106.30 to a complainant, and by following a grievance process that complies with § 106.45 before the imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in § 106.30, against a respondent.”



# Framing Principles

4

“A recipient is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances.”

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

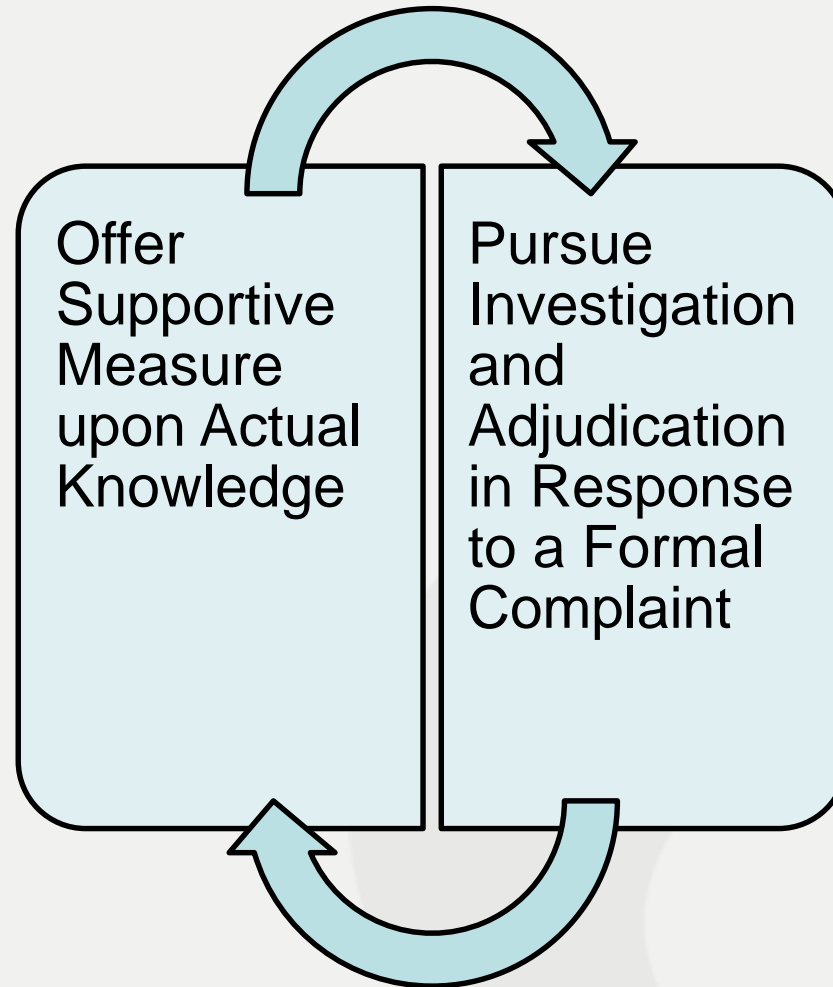
# Framing Principles

5

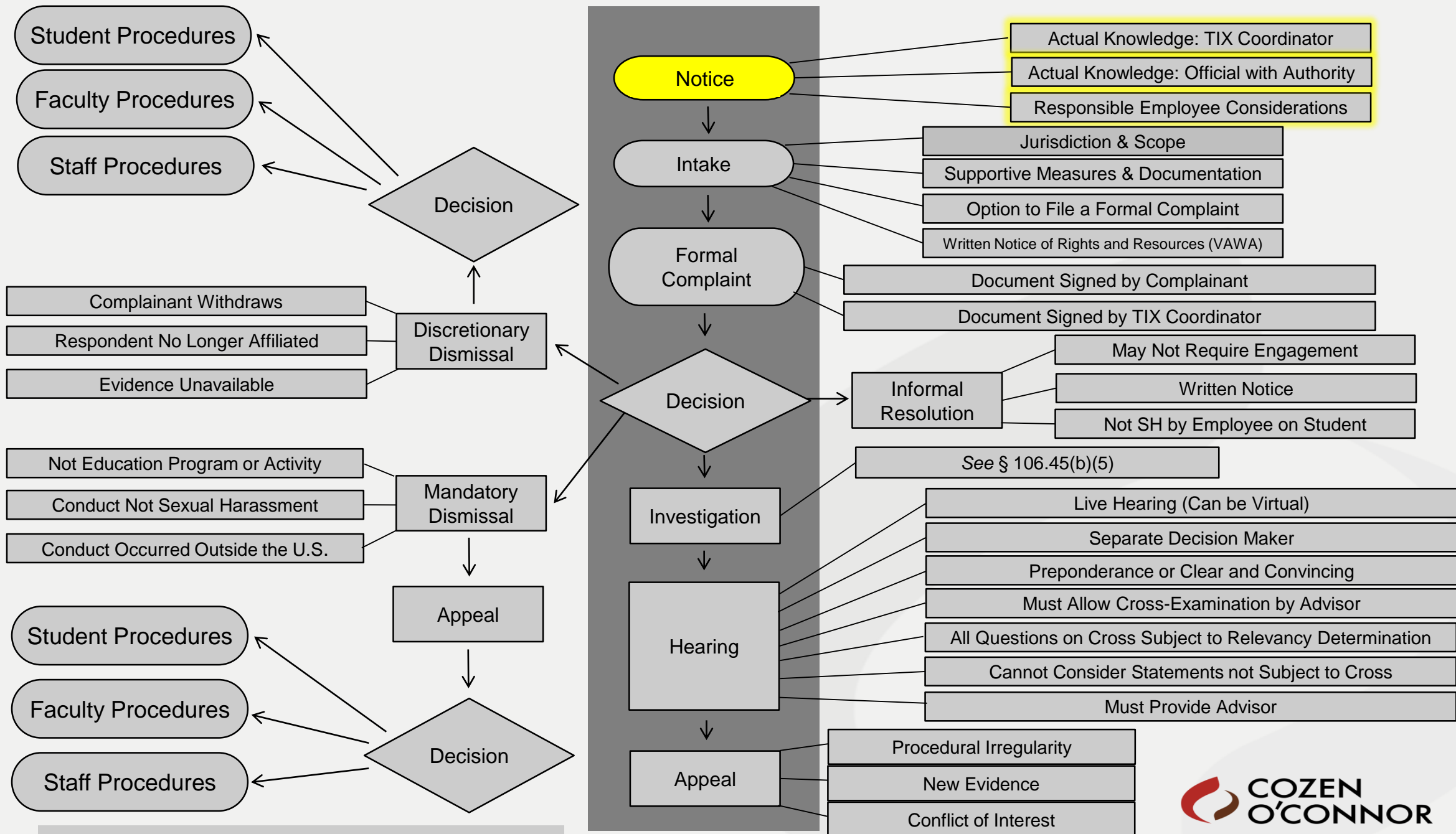
“If the Assistant Secretary finds that a recipient has discriminated against persons on the basis of sex in an education program or activity under this part, or otherwise violated this part, such recipient must take such remedial action as the Assistant Secretary deems necessary to remedy the violation.”

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

# Understanding Two Key Provisions



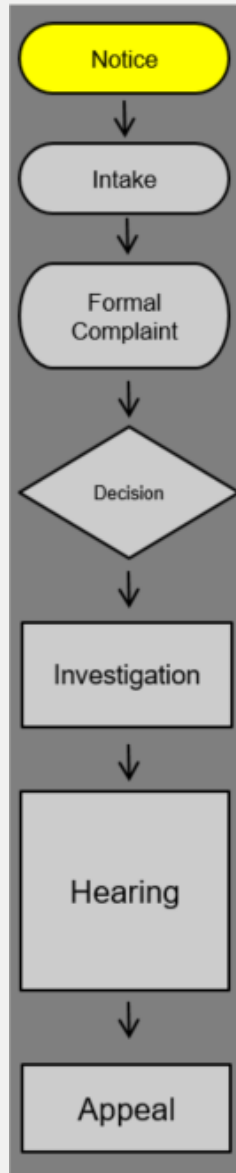
# NOTICE



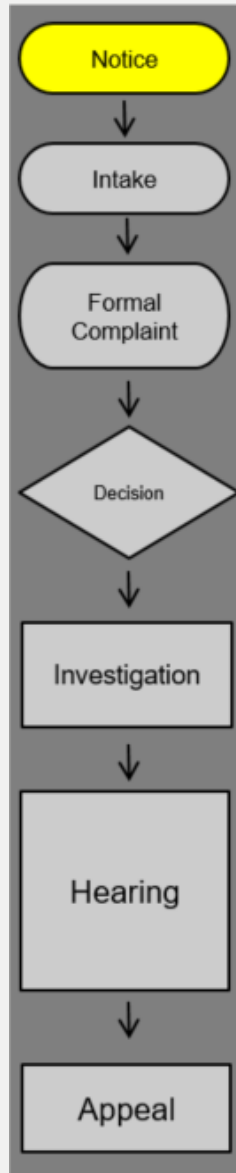
Key Provisions of Title IX Regulations issued May 6, 2020;

# Notice

- Notice to the **Title IX Coordinator** or any official of the recipient who has **authority to institute corrective measures** on behalf of the recipient, or to any employee of an elementary or secondary school



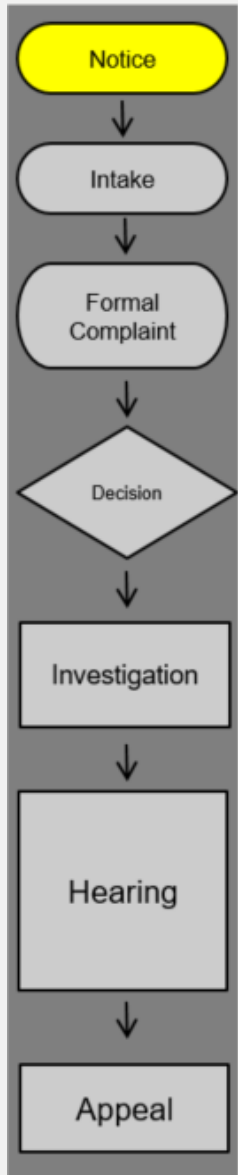
Title IX Regulations issued May 6, 2020; § 106.30(a)



# Notice

- **Actual knowledge**, not constructive notice or vicarious liability
  - Can come from personal observation, hearing about it from a complainant or third-party, receiving a written or oral complaint, or by any other means
- The mere ability or obligation to report sexual harassment or to inform a student about how to report sexual harassment, or having been trained to do so, does not qualify an individual as one who has authority to institute corrective measures on behalf of the recipient.

Title IX Regulations issued May 6, 2020; § 106.30(a)



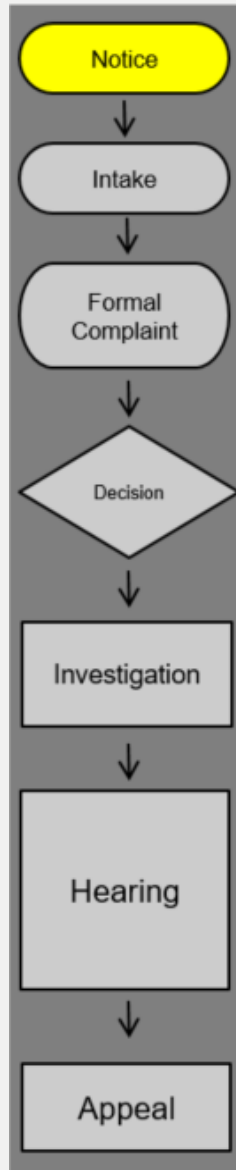
# Notice: Institutional Response

When a school has **notice**, the Title IX Coordinator must:

1. Promptly contact the complainant to discuss the availability of supportive measures
2. Consider the complainant's wishes with respect to supportive measures
3. Inform the complainant of the availability of supportive measures with or without the filing of a formal complaint
4. Explain to the complainant the process for filing a formal complaint.

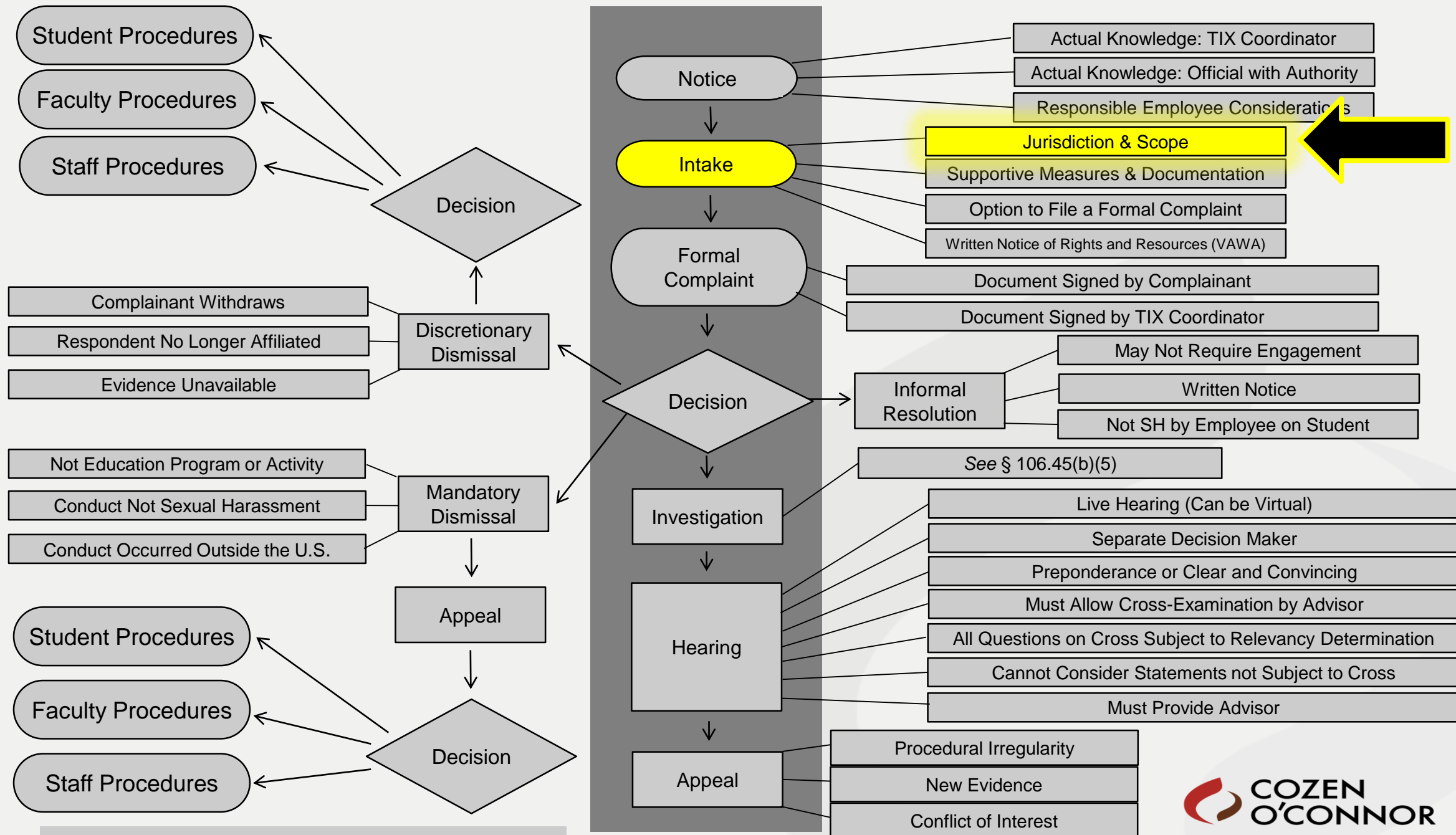


# Practical Considerations & Challenges

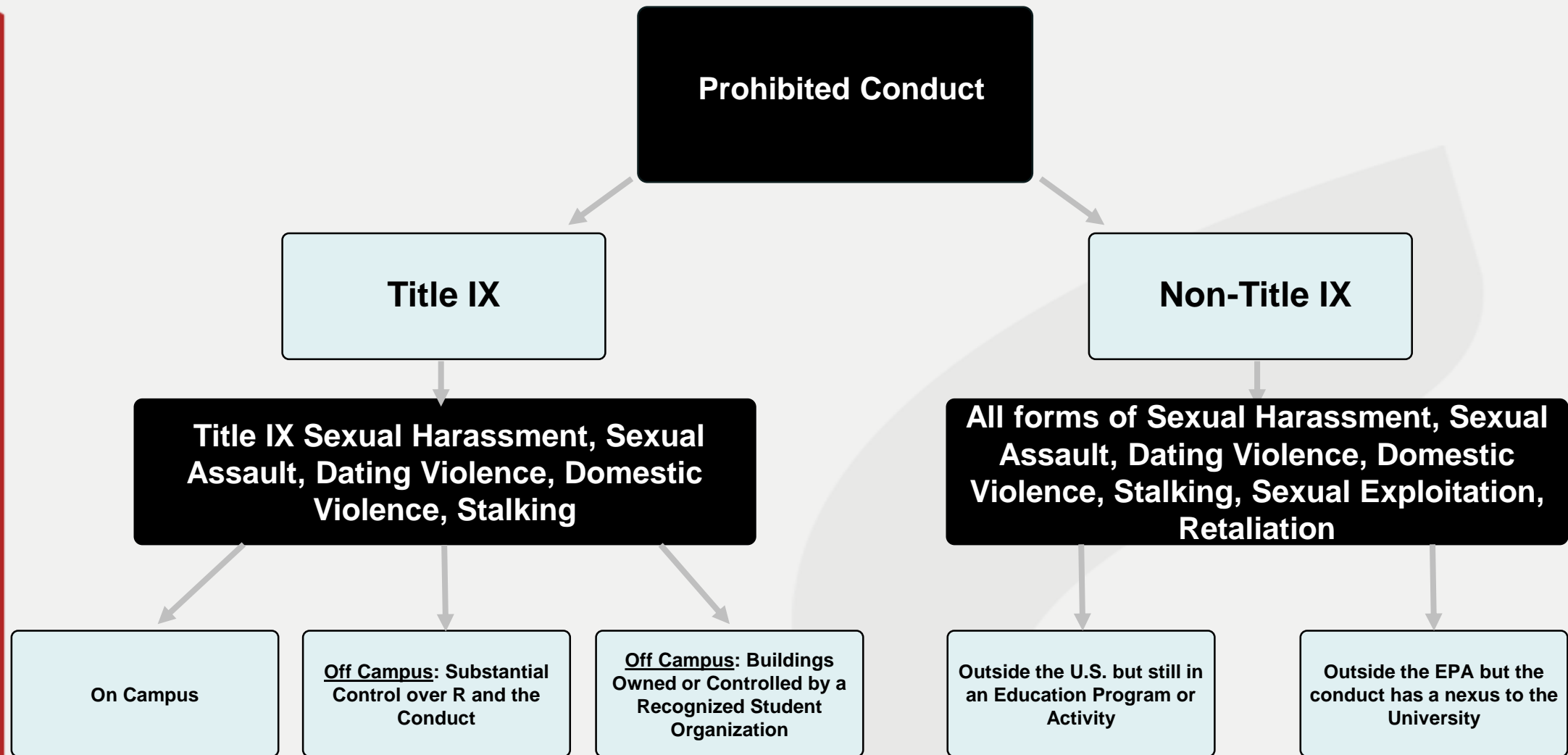


- Responsible Employee
  - Higher education institutions have the option to continue to designate responsible employees and require reporting
  - How should an institution decide whether to maintain or move away from responsible employee reporting?
- Centralized Reporting
  - Because responsible employee reporting is no longer required, how can institutions ensure they have necessary information to assess for repeat instances of sexual harassment by a person or within a group?
- Training and Resetting Expectations

# **JURISDICTION AND SCOPE**



# What is Prohibited Conduct?



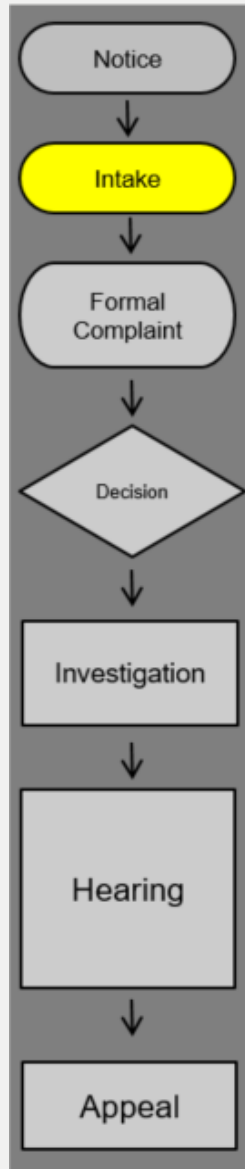
# Jurisdiction: Framing Principle

2

“A recipient with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States, must respond promptly in a manner that is not deliberately indifferent.”

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

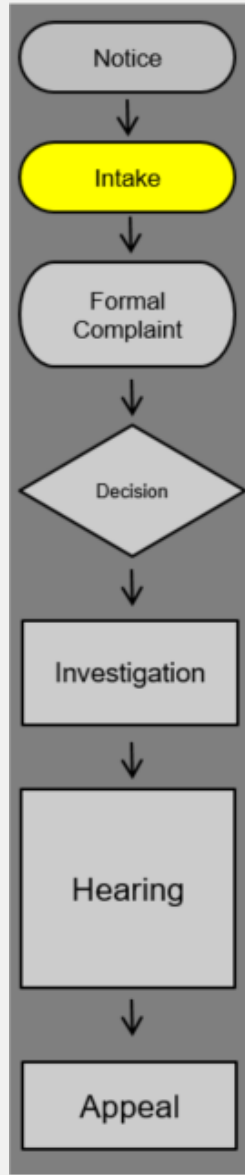
# Jurisdiction: Education Program or Activity



- “**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

Title IX Regulations issued May 6, 2020; § 106.44(a)

# Jurisdiction: Who

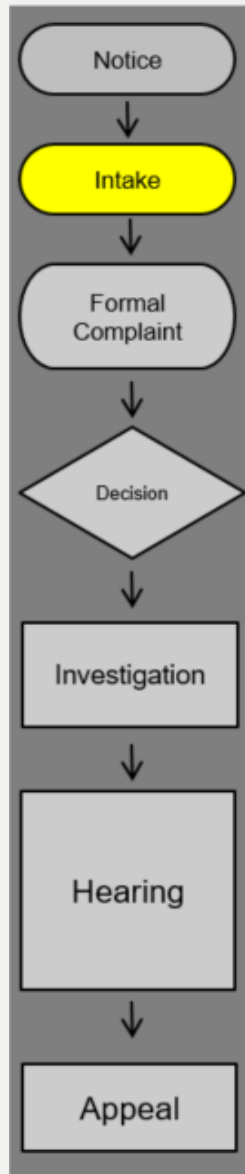


- Title IX statute applies to **any person**, in the United States, on the basis of sex, who is excluded from participation in, denied the benefits of, or is subjected to discrimination **under any education program or activity** receiving federal financial assistance.
- **Program or activity and program** means all of the operations of—
  - A college, university, or other postsecondary institution, or a public system of higher education; or
  - A local educational agency (as defined in 20 U.S.C. 8801), system of vocational education, or other school system

Title IX of the Education Amendments of 1972; § 20 U.S.C. 1681;  
Title IX Implementing Regulations; § 106.2(h)

# 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.”

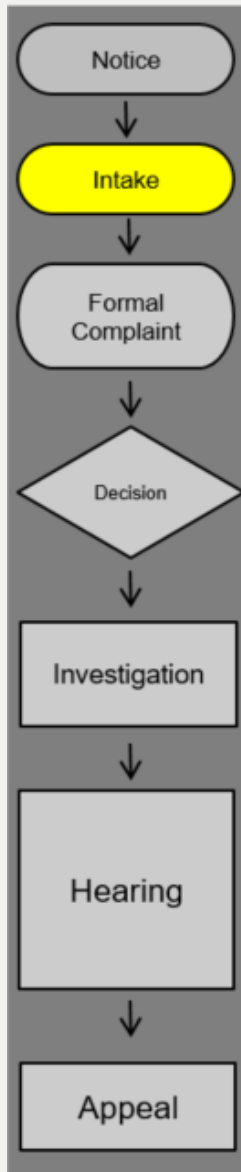


Title IX Regulations issued May 6, 2020; § 106.8(d); Preamble at 649



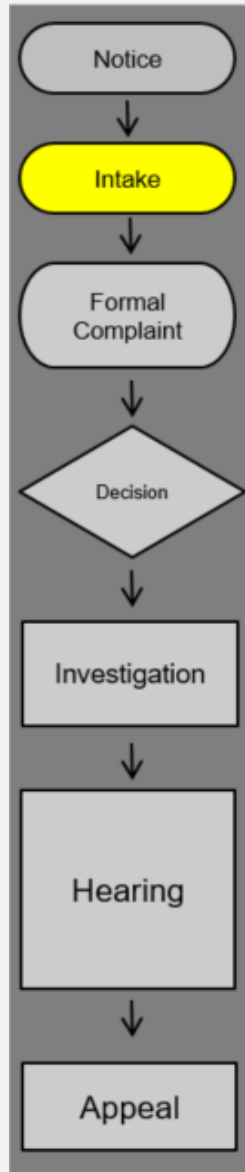
# Jurisdiction: On Campus

“[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.”



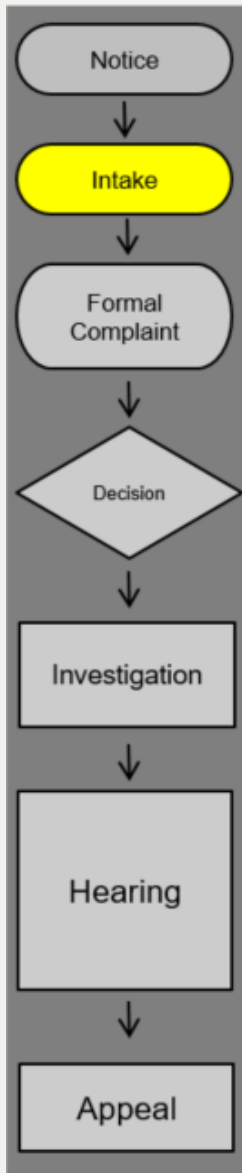
Title IX Regulations issued May 6, 2020; Preamble at 624

# Jurisdiction: Off Campus



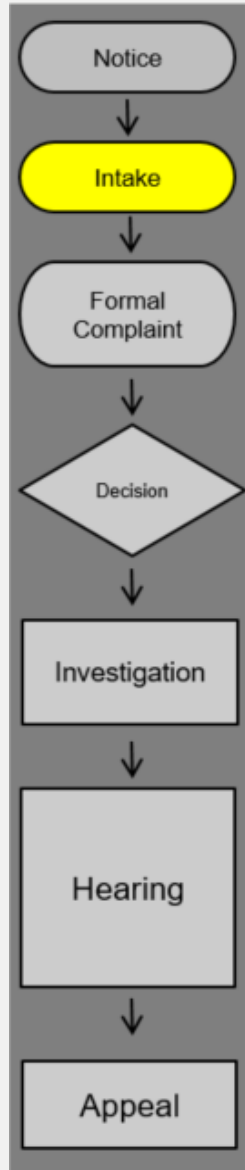
- “[T]he statutory and regulatory definitions of program or activity along with the revised language in § 106.44(a) clarify that a recipient’s Title IX obligations extend to sexual harassment incidents that occur off campus **if any of three** conditions are met:
  - if the off-campus incident occurs 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).”

# Jurisdiction: Course of Conduct



- “In situations involving some allegations of conduct that occurred in an education program or activity, and some allegations of conduct that did not, the recipient **must investigate the allegations of conduct that occurred in the recipient’s education program or activity**, and nothing in the final regulations precludes the recipient from choosing to **also address allegations of conduct outside the recipient’s education program or activity**. ”
- For example, if a student is sexually assaulted outside of an education program or activity but subsequently suffers Title IX sexual harassment in an education program or activity, then these final regulations apply to the latter act of sexual harassment, and the **recipient may choose to address the prior assault through its own code of conduct.**”

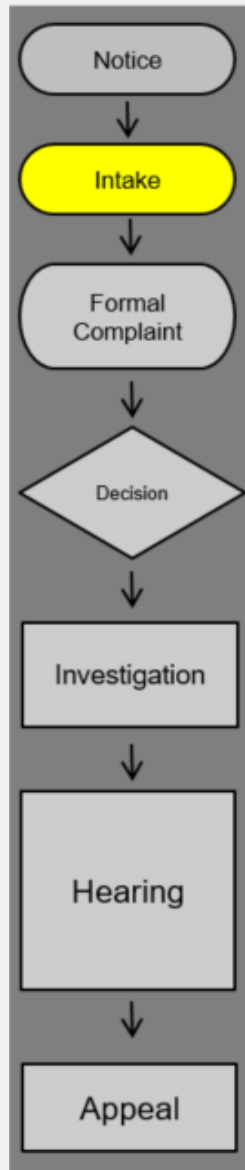
# Jurisdiction: What



- Narrowed & expanded definition of sexual harassment
  - Quid pro quo
  - Unwelcome conduct determined by a reasonable person to be so **severe, pervasive, and objectively** offensive that it **effectively denies** a person equal access to the recipient's education program or activity
  - Inclusion of sexual assault, dating violence, domestic violence, and stalking as a form of sexual harassment

Title IX Regulations issued May 6, 2020; § 106.30(a)

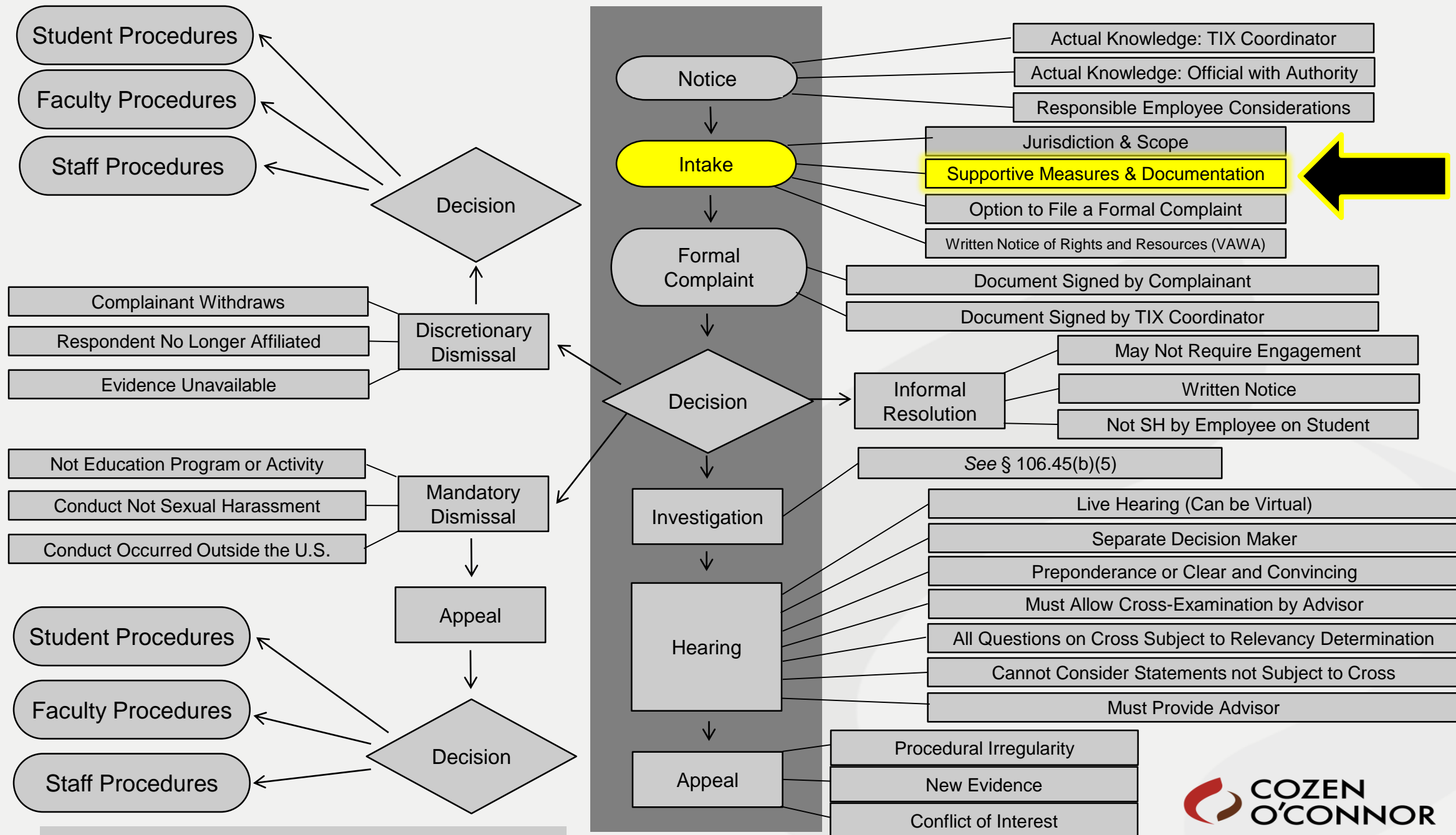
# Practical Considerations & Challenges



- Policy frameworks
  - How to incorporate non-Title IX conduct
  - How to address other forms of discrimination and harassment
- Coordinating with other conduct codes
  - When can you proceed under another code?
  - When is the jurisdiction determination made?
    - Threshold during initial assessment?
    - Charging decision following investigation
- What about retaliation?

# **BREAKOUT 1: JURISDICTIONAL ANALYSIS**

# **SUPPORTIVE MEASURES**





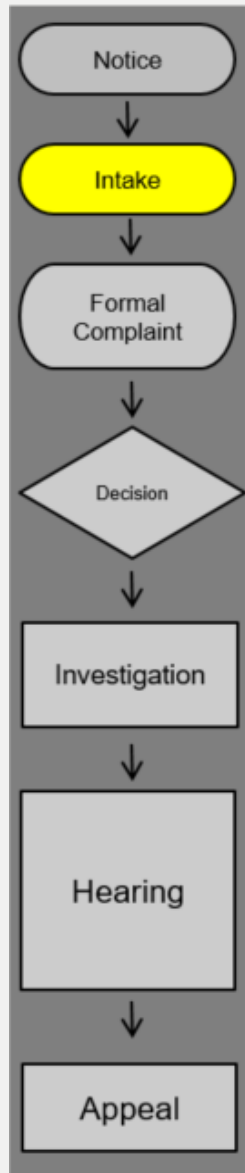
# Framing Principles

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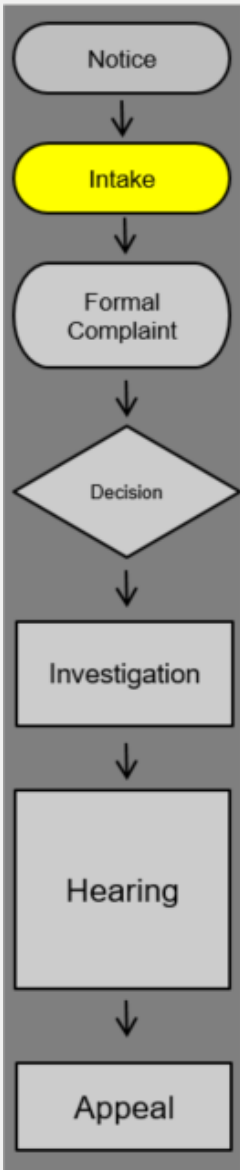
“A recipient’s response must treat complainants and respondents equitably by **offering supportive measures** as defined in § 106.30 to a complainant, and by following a grievance process that complies with § 106.45 before the imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in § 106.30, against a respondent.”

# Offering Supportive Measures

- The Title IX Coordinator must promptly contact the complainant to:
  - Discuss the **availability** of supportive measures as defined in § 106.30,
  - Consider the **complainant's wishes** with respect to supportive measures,
  - Inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and
  - Explain to the complainant the process for filing a formal complaint.



# Supportive Measures

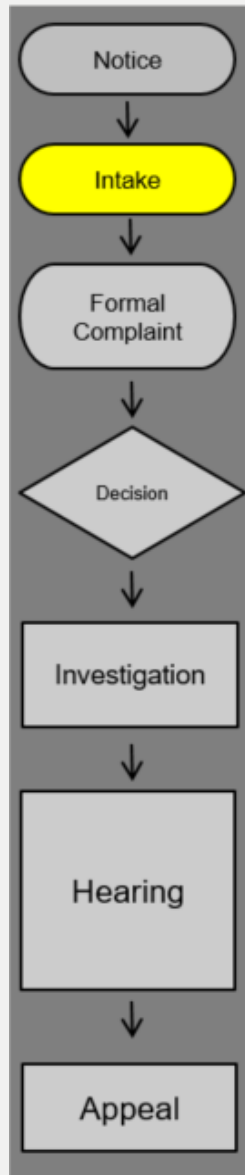


- Non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed.
- Designed to restore or preserve equal access to the recipient's education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the recipient's educational environment, or deter sexual harassment.

Title IX Regulations issued May 6, 2020; § 106.30(a)

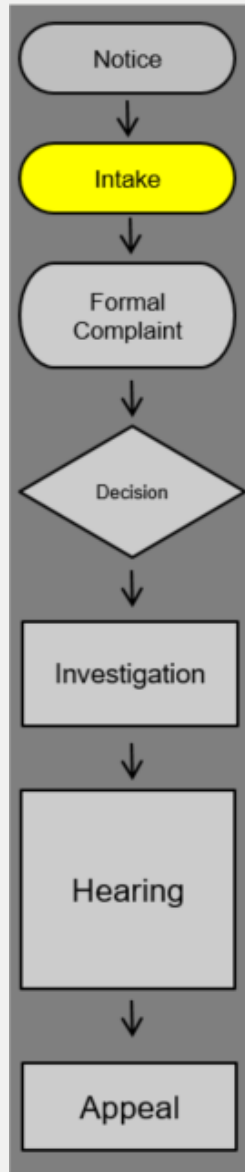
# Supportive Measures

- May include counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of the campus, and other similar measures.



Title IX Regulations issued May 6, 2020; § 106.30(a)

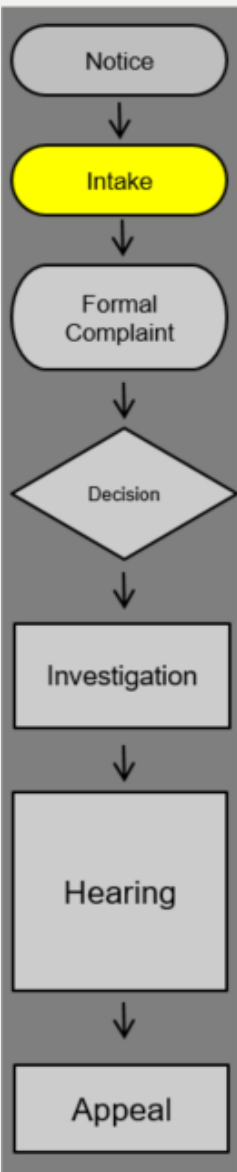
# Supportive Measures



- Must maintain as confidential any supportive measures provided to the complainant or respondent, to the extent that maintaining such confidentiality would not impair the ability of the recipient to provide the supportive measures.
- The Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures.

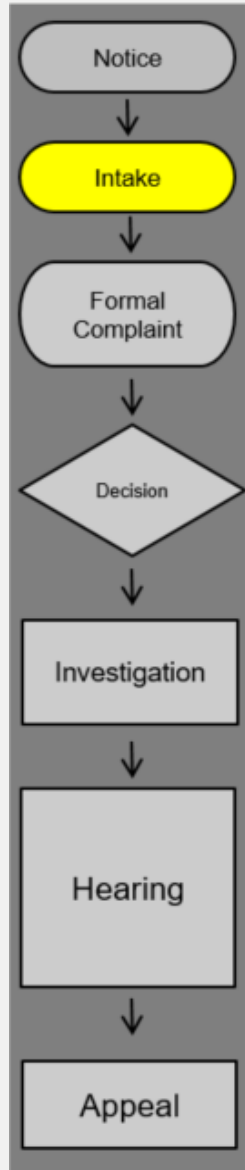
Title IX Regulations issued May 6, 2020; § 106.30(a)

# Documentation



- Must maintain records of any actions, including any supportive measures, taken in response to a report or formal complaint of sexual harassment
- Must document the basis for its conclusion that its response was not deliberately indifferent, and document that it has taken measures designed to restore or preserve equal access to the recipient's education program or activity
- If a recipient does not provide a complainant with supportive measures, then the recipient must document the reasons why such a response was not clearly unreasonable in light of the known circumstances

Title IX Regulations issued May 6, 2020; § § 106.45(b)(10)(i) (ii)



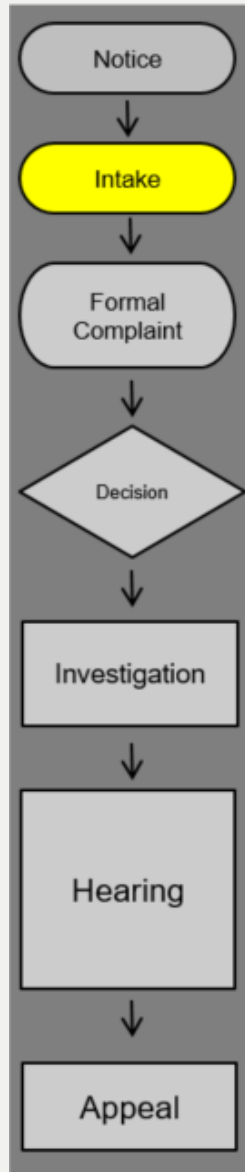
# Emergency Removal for Students

- Must undertake an individualized safety and risk analysis and determine that an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal
- Must provide the respondent with notice and an opportunity to challenge the decision immediately following the removal

Title IX Regulations issued May 6, 2020; § 106.44(c)

# Emergency Removal

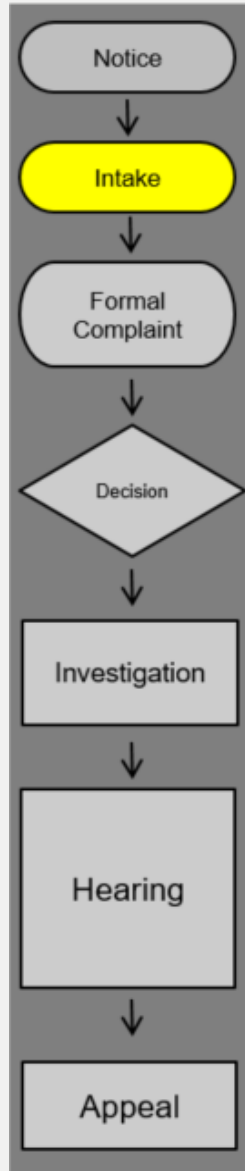
- Where a respondent poses an immediate threat to the physical health or safety of the complainant (or anyone else), § 106.44(c) allows emergency removals of respondents prior to the conclusion of a grievance process (or even where no grievance process is pending), thus protecting the safety of a recipient's community where an immediate threat exist.



Title IX Regulations issued May 6, 2020; Preamble at 566



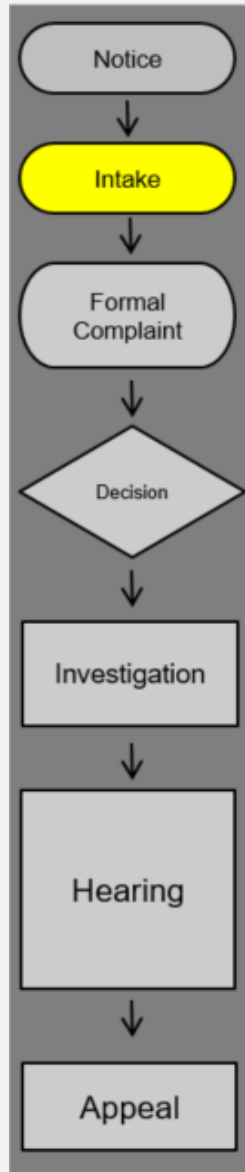
# Emergency Removal



- The Department notes that the final regulations expressly allow a recipient to remove a respondent on an emergency basis and do not prescribe cross-examination as a necessary procedure during the post-removal opportunity to challenge the removal.
- Recipients may also implement supportive measures that restrict students' or employees' contact or communication with others.
- Recipients thus have avenues for addressing serial predator situations even where no victim chooses to participate in a grievance process.

Title IX Regulations issued May 6, 2020; Preamble at 1176-1177

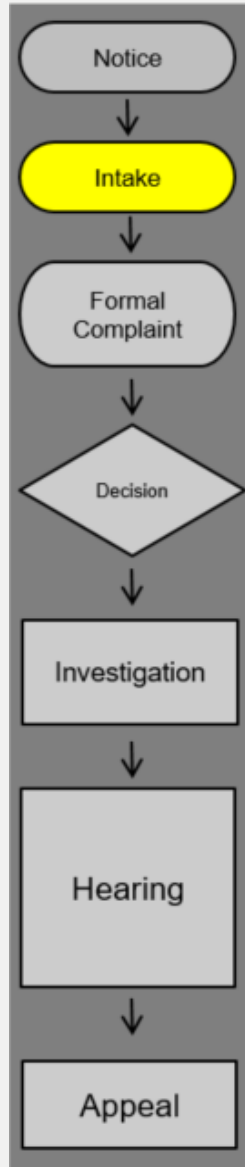
# Administrative Leave



- Nothing in this subpart precludes a recipient from placing a non-student employee respondent on administrative leave during the pendency of a grievance process that complies with § 106.45.
- This provision may not be construed to modify any rights under Section 504 of the Rehabilitation Act of 1973 or the Americans with Disabilities Act.

Title IX Regulations issued May 6, 2020; § 106.44(d)

# Practical Considerations & Challenges

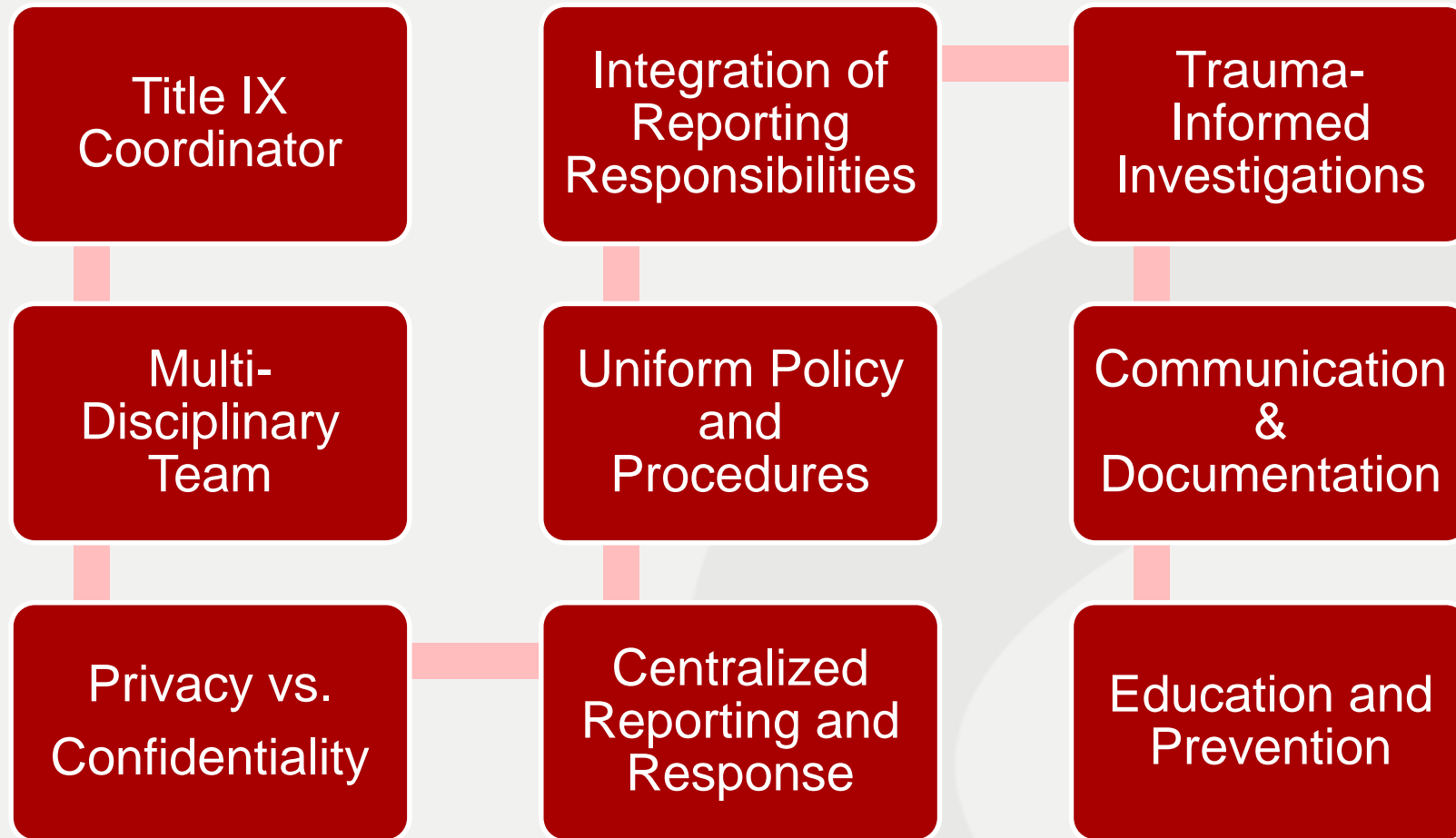


- Limited scope allowable for emergency removal
  - Can you remove under code of conduct for lesser standard?
- What are the criteria for appropriate and reasonably available?
- What are measures to protect safety or deter sexual harassment?
- What supportive measures do you have to offer to a non-student/non-employee?
- Ensuring accurate documentation

# **BREAKOUT 2: SUPPORTIVE MEASURES**

# **EFFECTIVE PRACTICES**

# Key Elements of Effective Practices



# Key Elements of Effective Practices

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

# Key Elements of Effective Practices

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



# The Title IX Coordinator

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

# Personnel

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

# Title IX Multi-Disciplinary Team

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

# Policy Considerations

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

# Privacy vs. Confidentiality

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

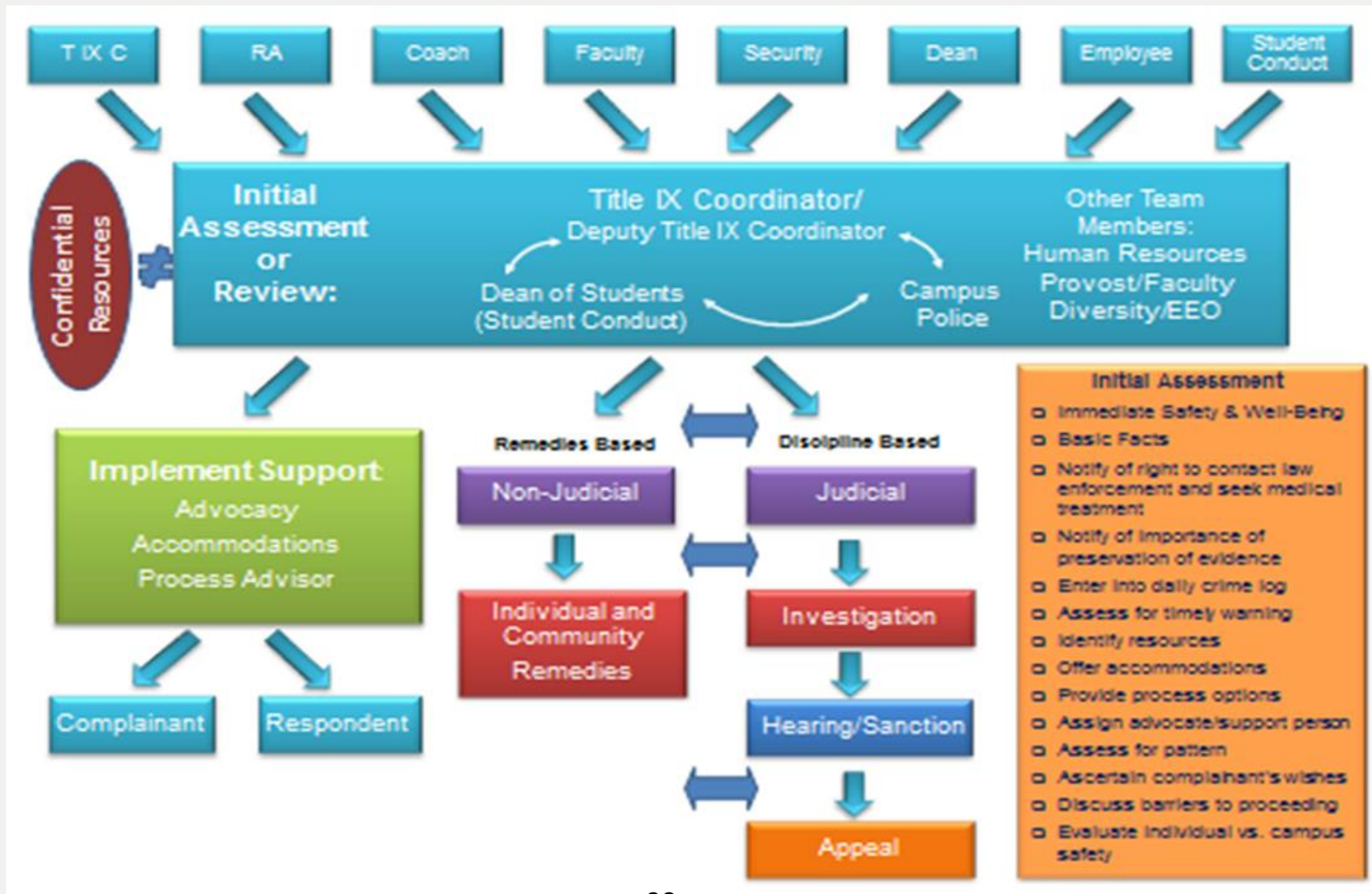
# Confidential Resources

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

# Confidential Resources vs. Reporting Options

- Confidential Resources
  - Medical services
  - HIPAA
  - Mental health/counseling
  - Clergy
  - Rape crisis counselor
- Structural Challenges
  - Employees with multiple hats, e.g., counselor and administrator
- Reporting Options
  - Emergency for safety, physical, or emotional
  - Dedicated campus access points
    - Title IX
    - Campus safety/police
    - Student conduct
    - Human resources
  - To any school employee
  - Anonymous
  - Law enforcement

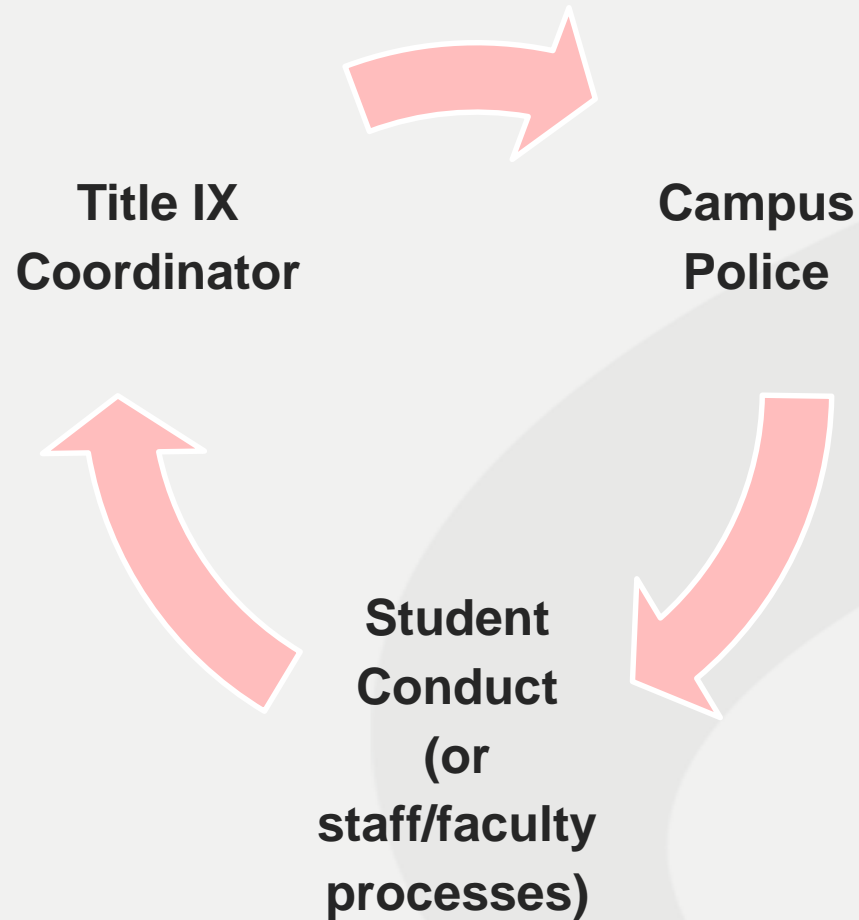
# Integration and Coordination





# Central Review Process

## Multi-disciplinary Team



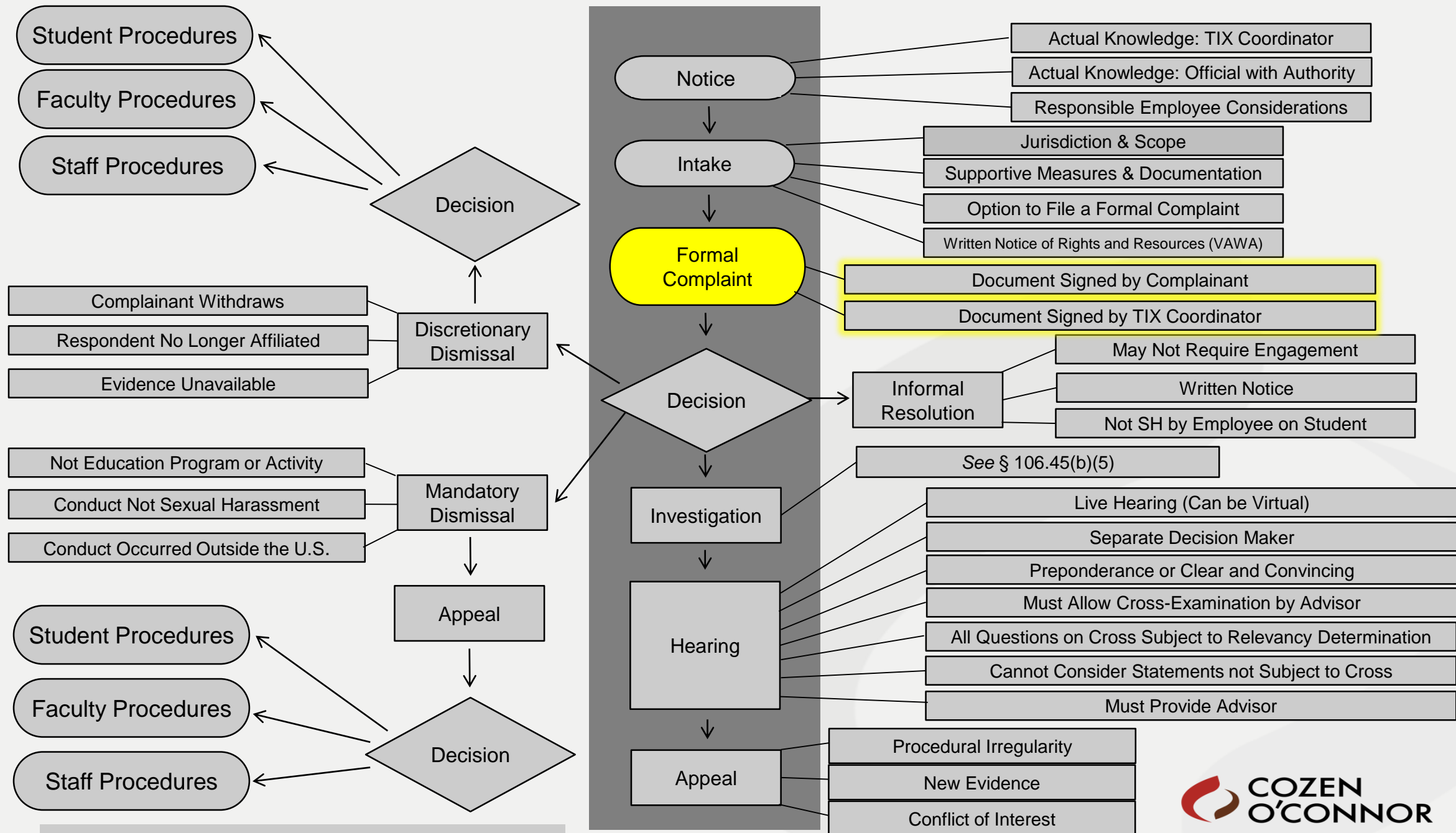
# Centralized Review Process

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

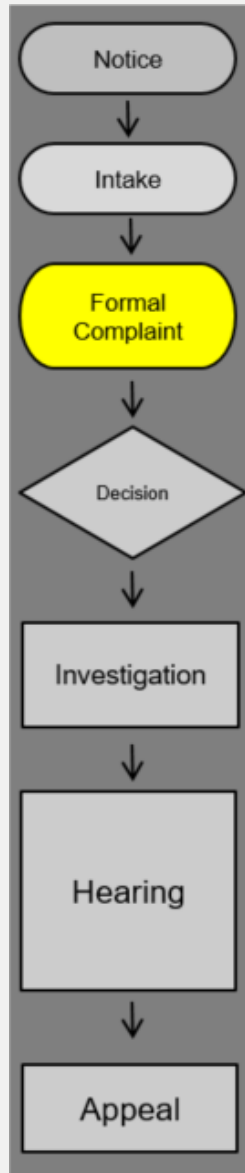
# Title IX Intake and Assessment

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

# **FORMAL COMPLAINTS**



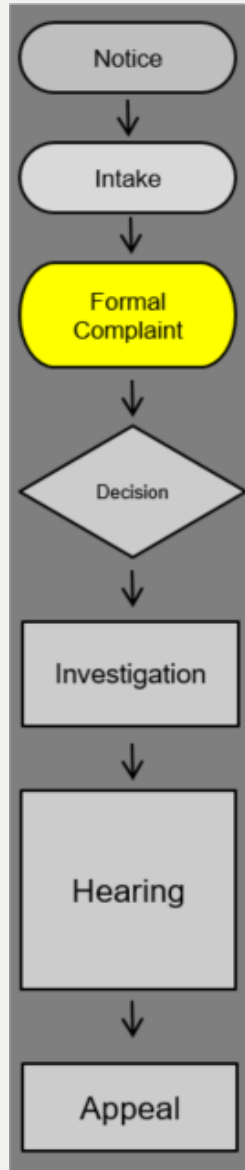
# Formal Complaint



- Document filed by a complainant or signed by the Title IX Coordinator
- At the time of filing a formal complaint, a complainant **must be participating in or attempting to participate in** the education program or activity of the recipient with which the formal complaint is filed

Title IX Regulations issued May 6, 2020; § 106.30(a)

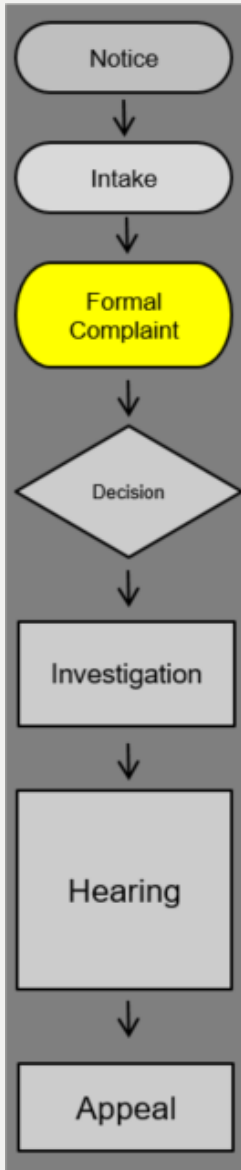
# Formal Complaint: Program or Activity



- The following may constitute “**attempting to participate**” in the recipient’s education program or activity:
  - Applying (or intending to apply) for admission
  - Indicating a desire to re-enroll if the recipient appropriately responds to sexual harassment allegations
  - Intending to remain involved in alumni programs
- “[The ‘education program or activity’ requirement] prevents recipients from being legally obligated to investigate **allegations made by complainants who have no relationship with the recipient**, yet still protects those complainants by requiring the recipient to respond promptly in a non-deliberately indifferent manner.”

Title IX Regulations issued May 6, 2020; Preamble, see pp. 225, 411, 629

# Formal Complaint: Institutional Response

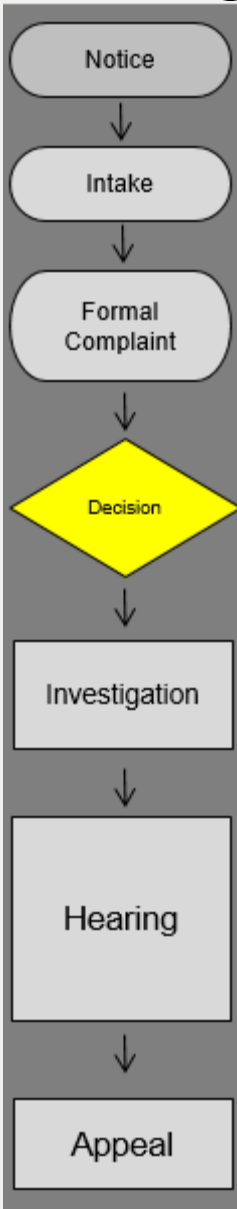


- Upon receipt of a **formal complaint**, the institution:
1. Must complete the actions required upon receiving notice, if not already completed,
  2. Must evaluate jurisdiction and required/discretionary dismissal,
  3. Should assess appropriate supportive measures for both parties,
  4. Should evaluate the need for any other measures, including emergency removal/administrative leave,
  5. Must initiate a grievance process that complies with § 106.45

Title IX Regulations issued May 6, 2020; § 106.30(a)



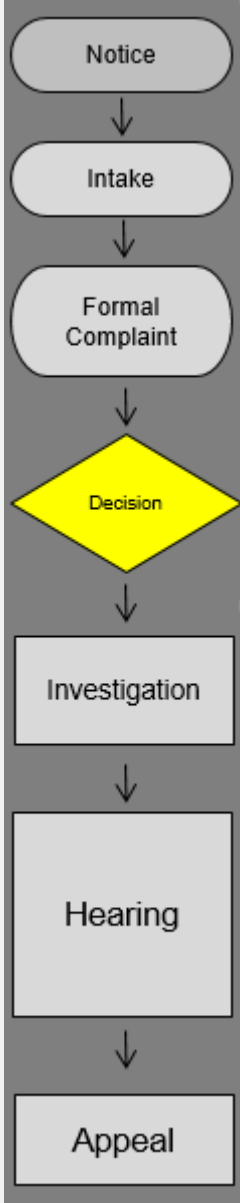
# Formal Complaint: Required Dismissal



- **Must dismiss if:**
  - Conduct would not constitute sexual harassment even if proved,
  - Conduct did not occur in the recipient's education program or activity, or
  - Conduct did not occur against a person in the United States.
- Such a dismissal does not preclude action under another provision of the recipient's code of conduct

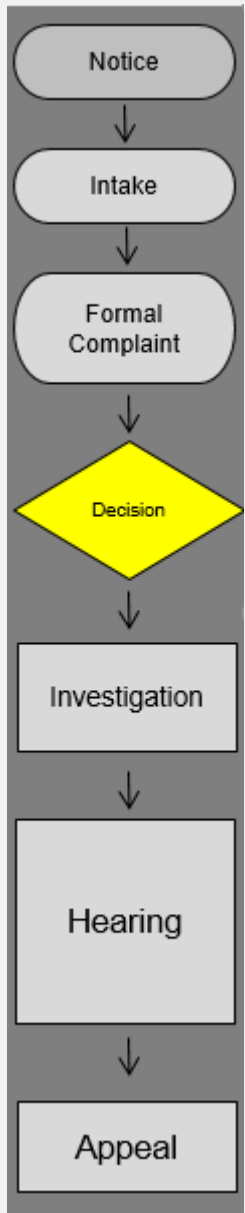
Title IX Regulations issued May 6, 2020; § 106.45(b)(3)

# Formal Complaint: Discretionary Dismissal



- **May** dismiss the formal complaint or any allegations therein if:
  - A complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the formal complaint or any allegations,
  - The respondent is no longer enrolled or employed by the recipient, or
  - Specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination.

Title IX Regulations issued May 6, 2020; § 106.45(b)(3)

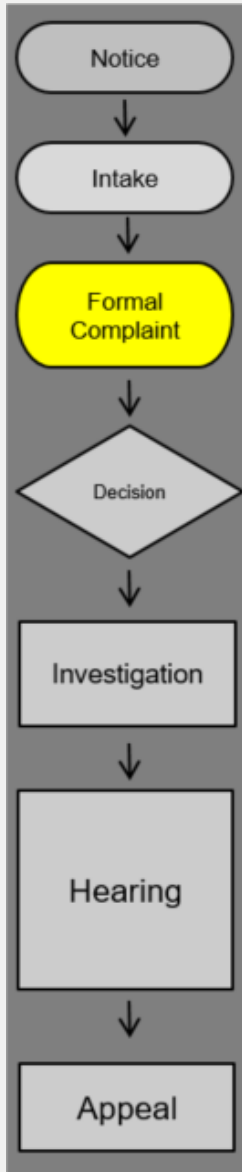


# Dismissal of Formal Complaint

- Upon a dismissal required or permitted, the recipient must promptly send **written notice** of the dismissal and reason(s) therefor simultaneously to the parties
- Must offer both parties an **appeal** from a recipient's dismissal of a formal complaint or any allegations therein

Title IX Regulations issued May 6, 2020; §§ 106.45(b)(3) and 106.45(b)(8)

# Practical Considerations & Challenges



- Criteria for when the Title IX Coordinator files the formal complaint
- Process for evaluating dismissal
- Appeal from dismissal
- Proceeding under other policies
  - Policy frameworks
  - When is charging under a code of conduct retaliation?
- Timing of analysis for dismissal

