

Hearing Panel Training

Western University of Health Sciences

Presented By:

Devon Riley, Member

Maureen Holland, Member

The Institutional Response Group | Cozen O'Connor

Gina Maisto Smith, Chair

Leslie M. Gomez, Vice Chair

Western University of Health Sciences

June 6, 2023



Agenda

Block 1

Introductions, Orientation/Review, Foundational Concepts

10-minute break

Block 2

Before the Hearing: Preparation, Practice Tips, and Logistics

10-minute break

Block 3

During the Hearing: Relevance, Weight, and Credibility

10-minute break

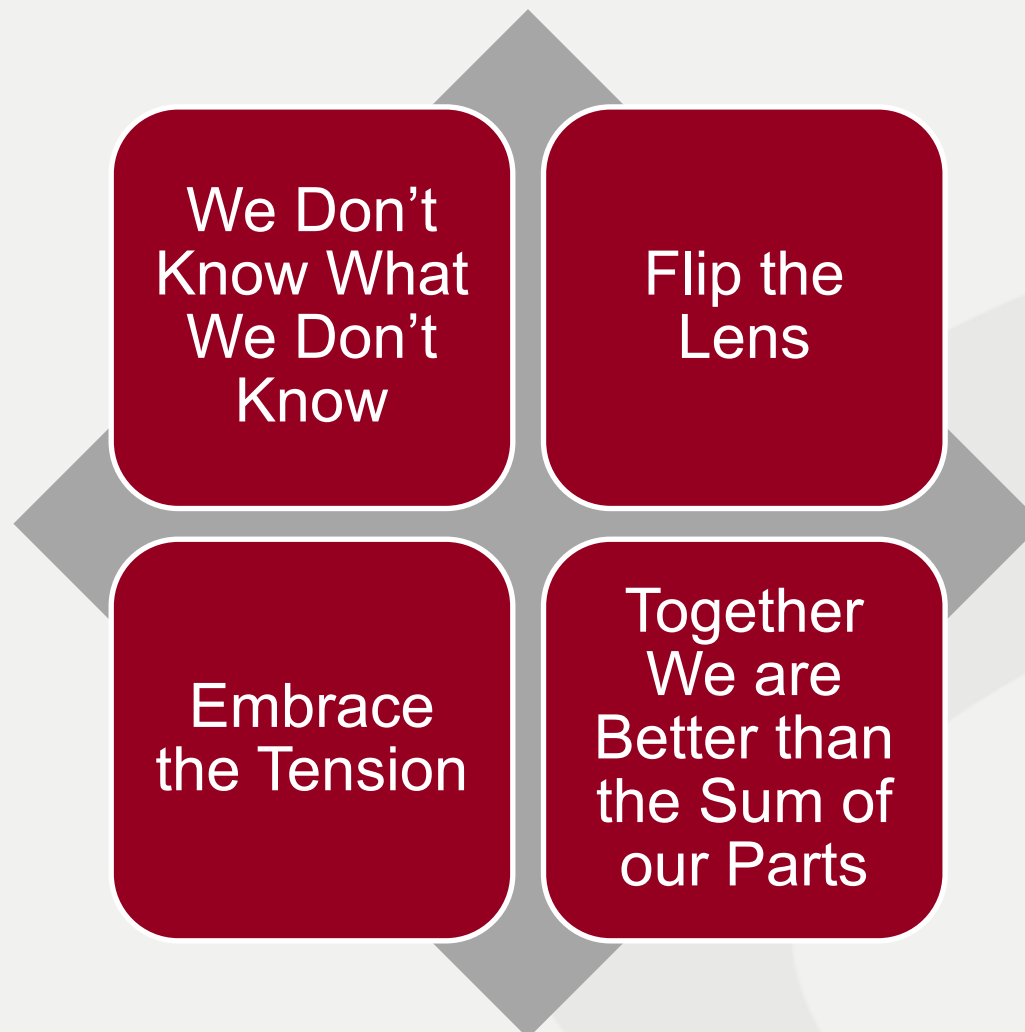
Block 4

After the Hearing: Deliberations, Outcome, Sanctions and Remedies



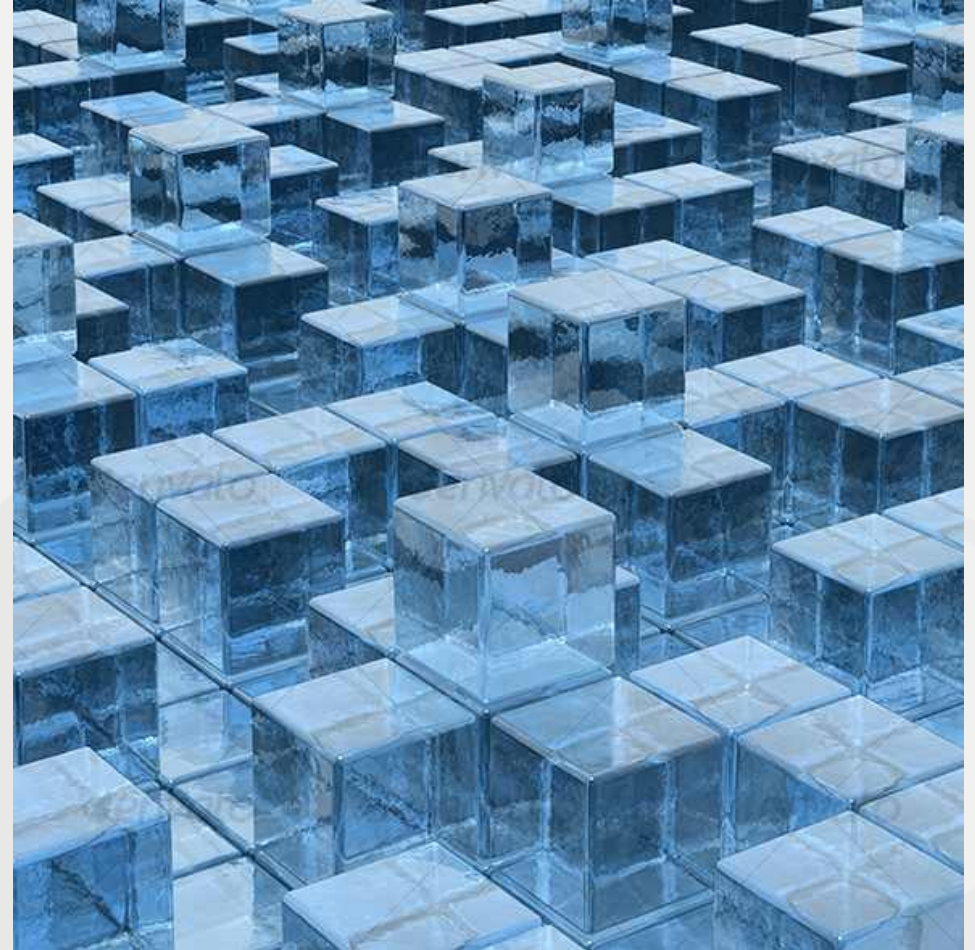
INTRODUCTION

Framing the Conversation

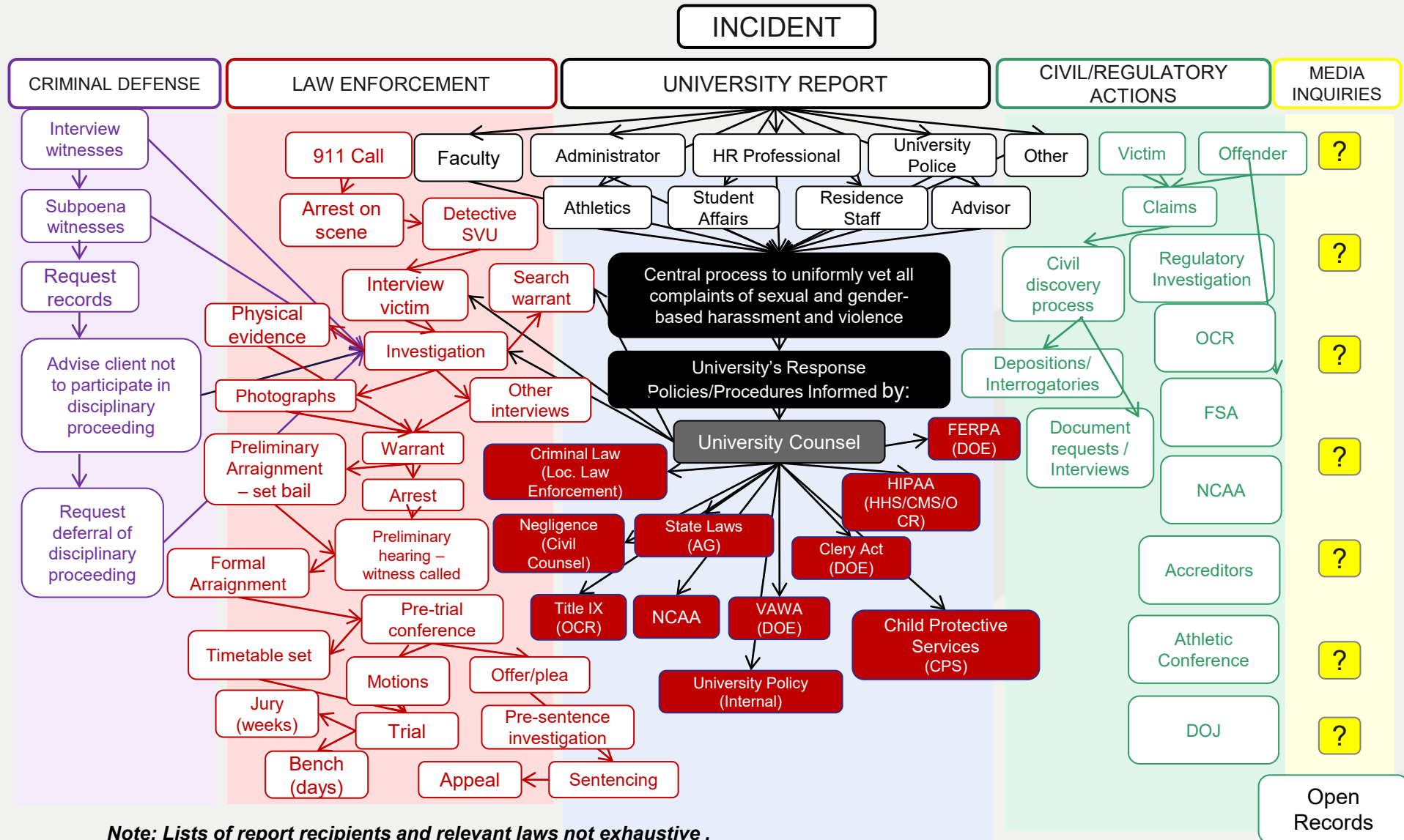


The Context

- 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



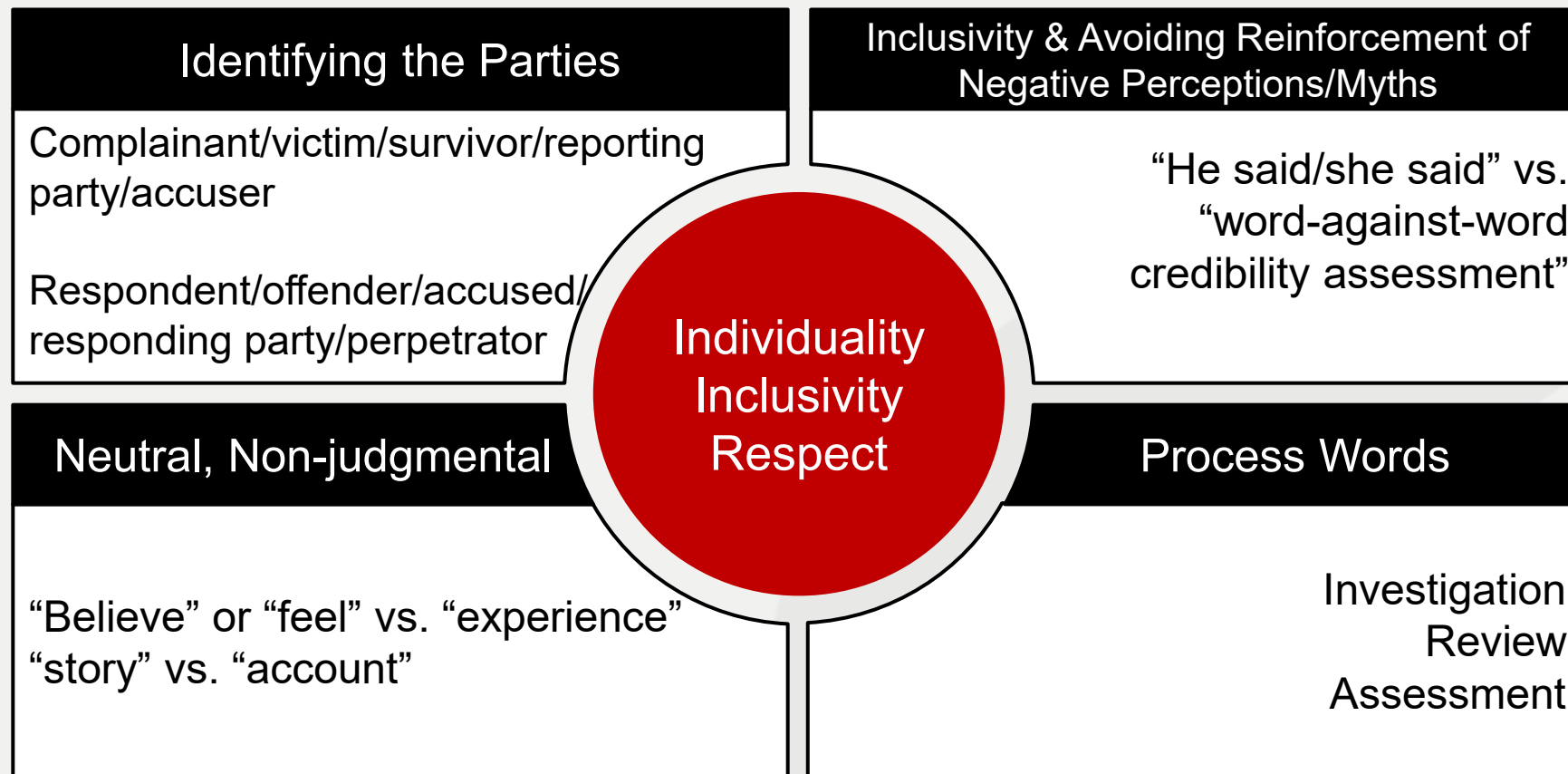
The Challenge of the Context





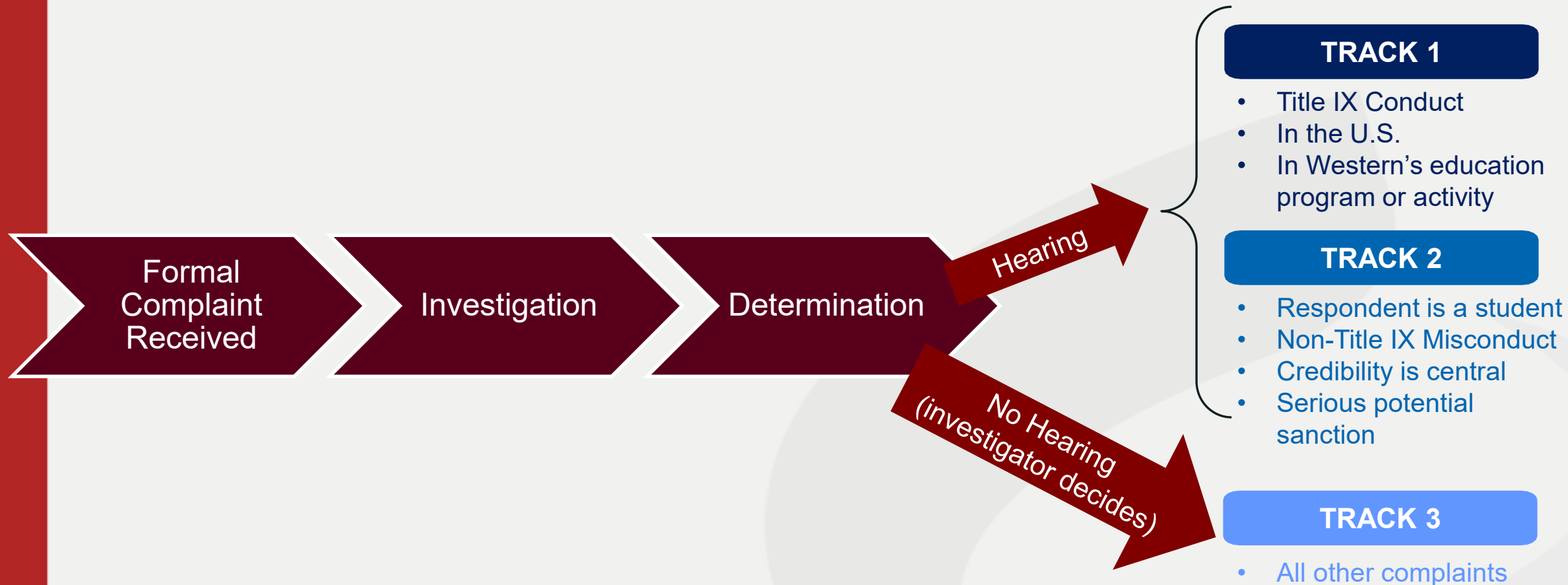


Awareness of the Impact of Language



ORIENTATION & REVIEW

3-Track Hearing Process Under Western University's SIM Policy



3-Track Hearing Process

Under Western University's SIM Policy

TRACK 1

- The Hearing is led by a Panel Chair
- The Determination is reached by either one Decision-Maker or a Panel of Decision-Makers
- Parties may be accompanied by an advisor and a support person
- Parties have the same opportunities to present evidence
- Only relevant questions may be asked
- Limits on questions/evidence about sexual disposition, prior sexual behavior, and information protected by a legally recognized privilege

TRACK 2



3-Track Hearing Process Under Western University's SIM Policy

TRACK 1

- Questions are asked in real time by each party's advisor
- If a party does not have an advisor at the hearing, the University will appoint one without fee or charge

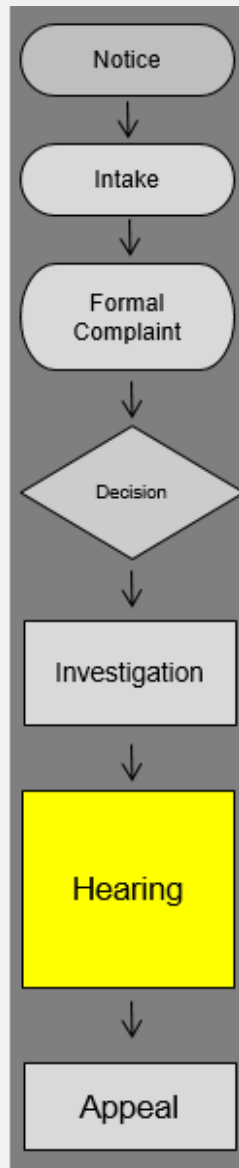
TRACK 2

- The parties submit proposed questions to the Panel in advance of the Hearing
- Questions are asked in real time by the Panel Chair
- The Panel may choose to rephrase or prohibit questions if they are irrelevant, repetitive, or harassing.

FOUNDATIONAL CONCEPTS

Live Hearing Required

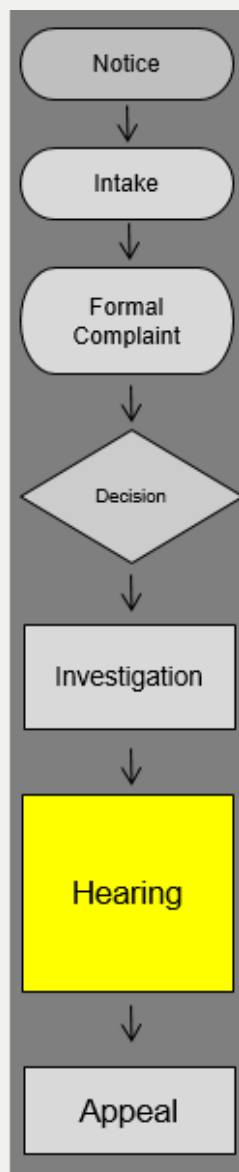
- For postsecondary institutions, the recipient's grievance process **must provide for a live hearing.**



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

Transcript or Recording

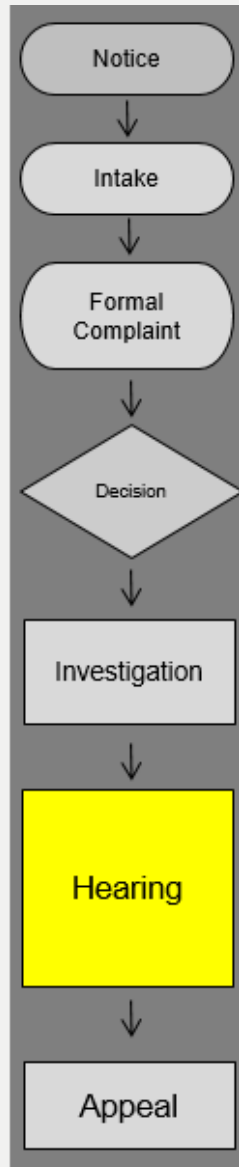
- Recipients must create an **audio or audiovisual recording, or transcript**, of any live hearing and make it available to the parties for inspection and review.



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

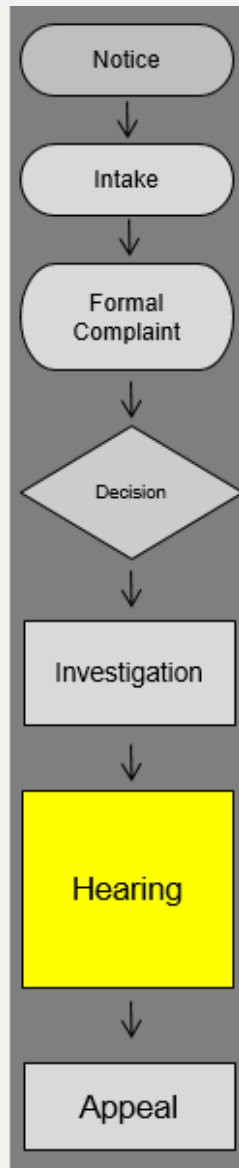
Determine Relevance of Questions

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



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

Explain Decisions to Exclude Questions

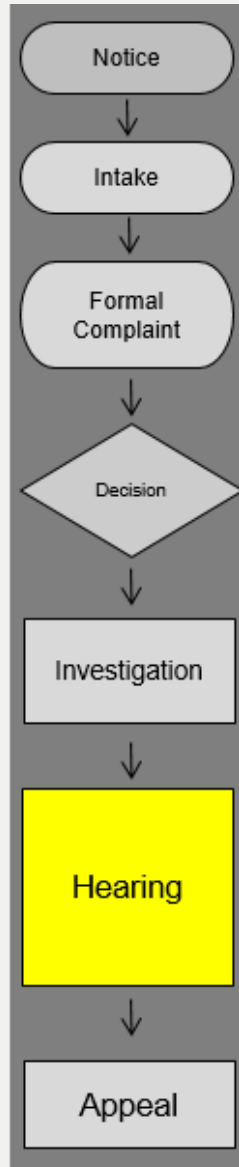


- The decision-maker(s) **must explain to the party proposing the questions any decision to exclude** a question as not relevant.

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

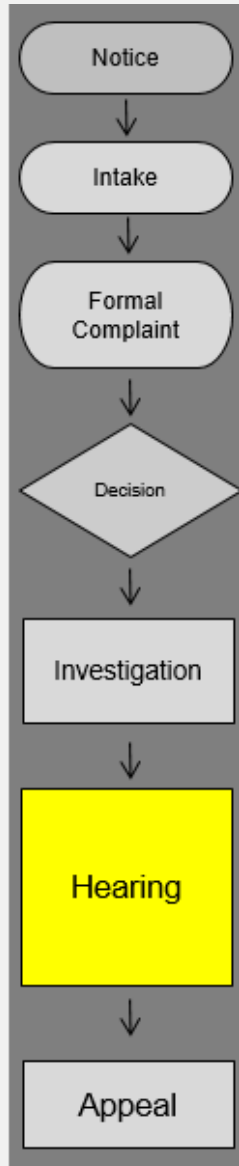
Apply the Standard of Evidence

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



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

Issue Written Determinations



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

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

Separate Decision-Maker



- The regulations require the Title IX Coordinator and investigator to be different individuals from the decision-maker....
- § 106.45(b)(7)(i) prevents an investigator from actually making a determination regarding responsibility.

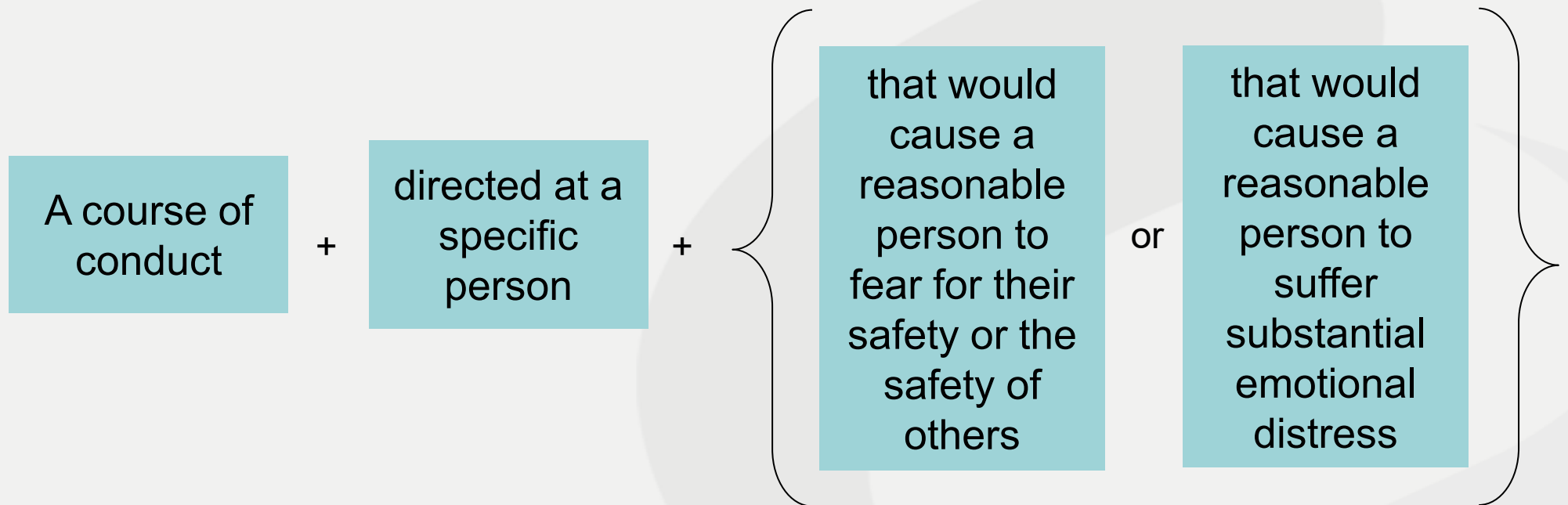
Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30372;
§§ 106.45(b)(5)(vii); Preamble 85 F.R.30436

BEFORE THE HEARING: PREPARATION

Mapping the Policy Elements & Case Facts

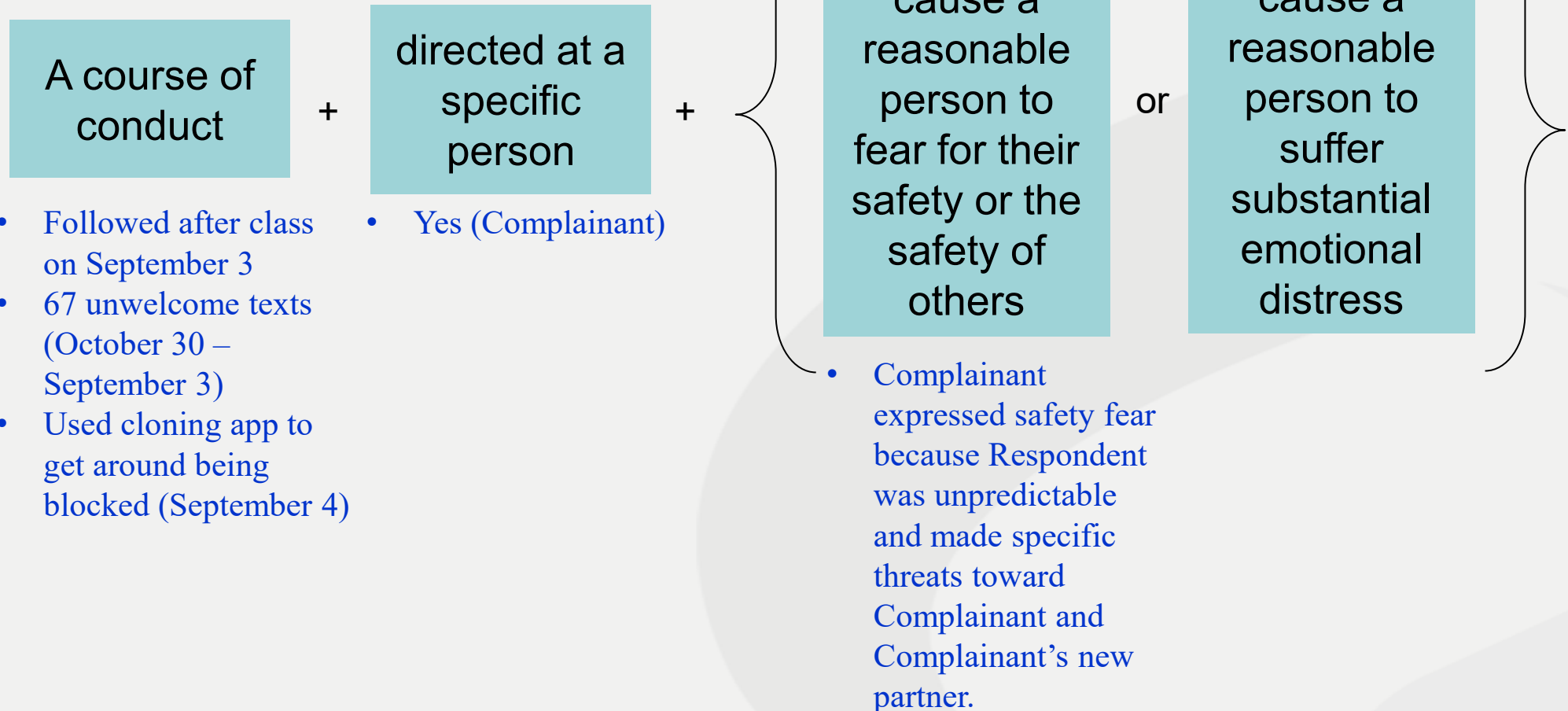
- **Stalking**

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



Mapping the Policy Elements & Case Facts

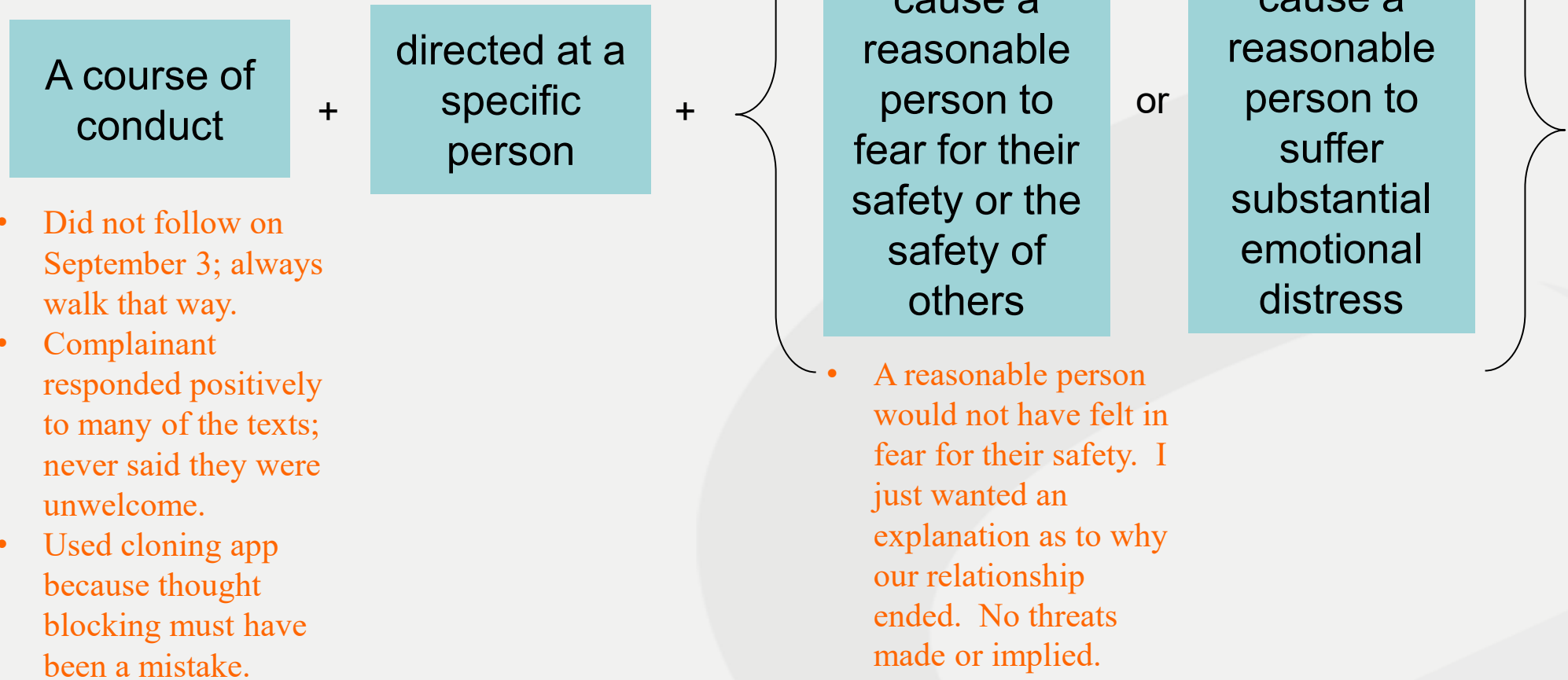
Blue type = Complainant's account*



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

Mapping the Policy Elements & Case Facts

Orange type = Respondent's account*



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

Witness Accounts

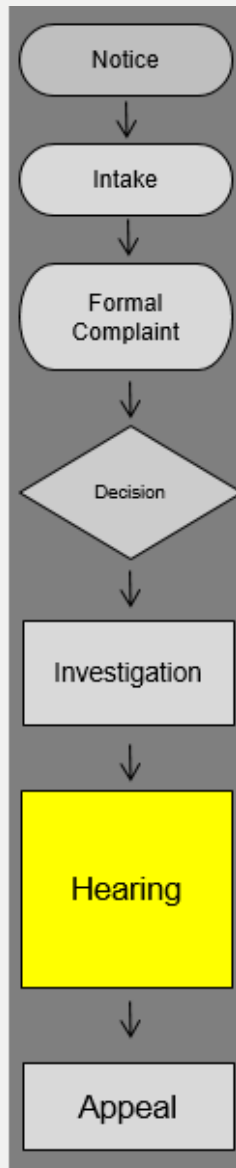
Witness Name	Relationship to Complainant	Relationship to Respondent	Relevant Information	Questions to Ask at Hearing
Sam J.	Acquaintance, in chemistry class together	Roommate	Left class with Complainant on September 3 and corroborated that Respondent followed Complainant. Said Respondent never walks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

Preparation

- Review
 - Notice of Hearing
 - Investigation Report
 - Evidentiary Record
 - Parties' Responses to the Evidentiary Record and to the Investigation Report
 - Notice of Hearing (again)
 - Policy definitions as needed

HEARING BASICS

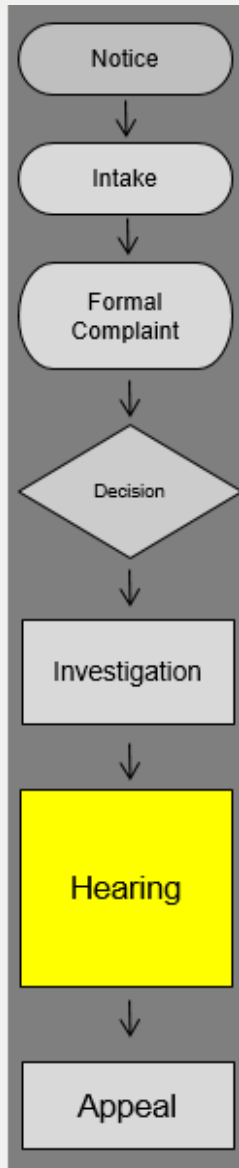
Live Hearing Requirement



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

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

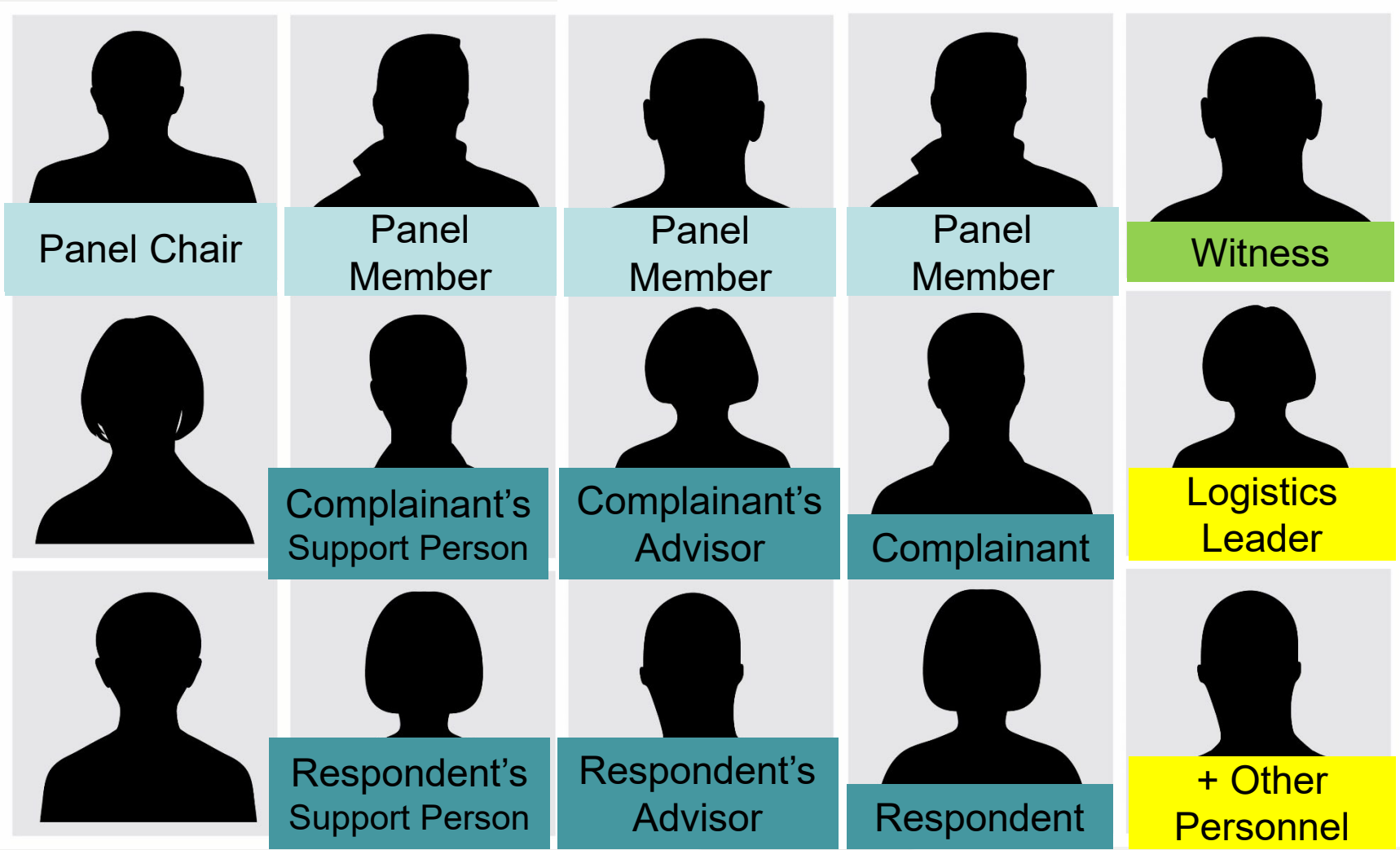
Option to Use Technology



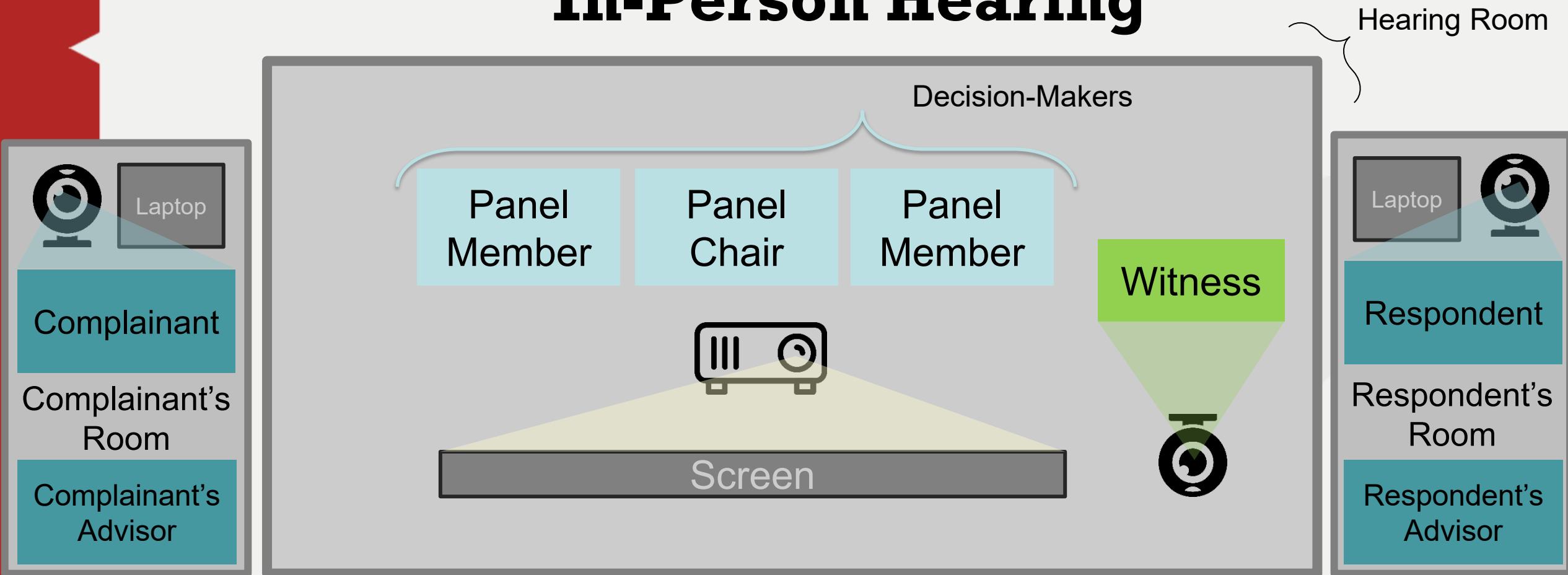
- Live hearings pursuant to this paragraph may be conducted with all parties physically present in the same geographic location or, at the recipient's direction, any or all parties, witnesses and other participants may appear at the live hearing **virtually, with technology** enabling participants simultaneously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

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

Hearing Logistics



In-Person Hearing

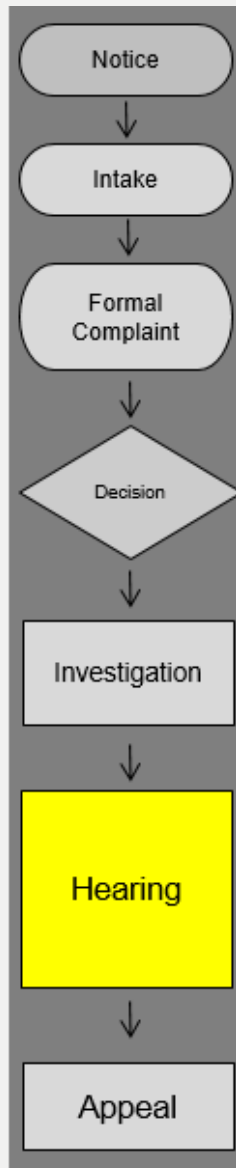


- Physical room layout and seating arrangement may be adjusted to fit space/needs

Technology Options

- Zoom
 - Ability to see and hear in real time
 - Breakout rooms
 - Recording
- Below are links to the Zoom training videos:
 - The basics of meeting controls: <https://support.zoom.us/hc/en-us/articles/201362603-What-Are-the-Host-Controls->
 - Break Out Rooms: <https://support.zoom.us/hc/en-us/articles/206476093-Getting-Started-with-Video-Breakout-Rooms>

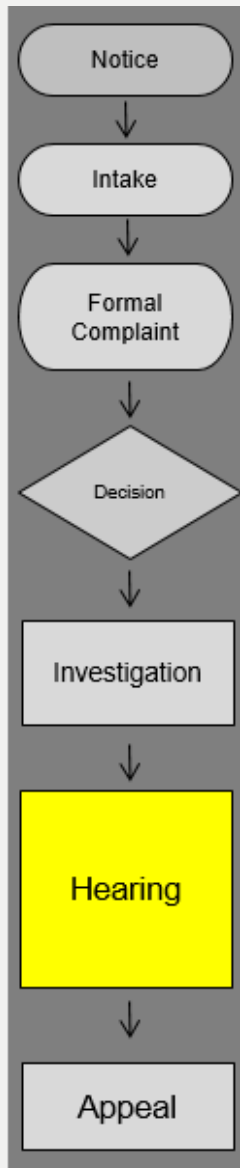
Virtual Hearing Considerations



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

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

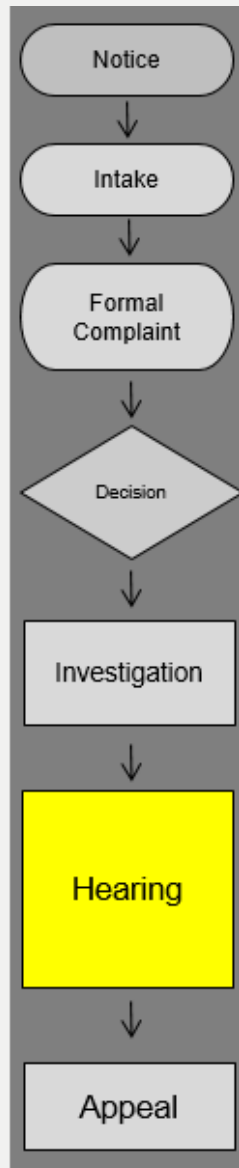
Virtual Hearing Considerations



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

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

Virtual Hearing Considerations



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

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

HEARING PROTOCOLS

Hearing Principles

- The hearing is an opportunity for the parties to address the decision-maker(s).
- Prior to the hearing, the decision-maker(s) will have familiarized themselves with the facts of the case and will have **read the investigation report** in advance.

Hearing Principles

- During the hearing, **the parties may address** any information in the investigative report, supplemental statements submitted in response to the investigative report and, prior to the conclusion of the hearing, submit an **impact statement** to the Title IX Coordinator to be made available to the decision-maker(s) only if there is a finding of responsibility.

Hearing Principles

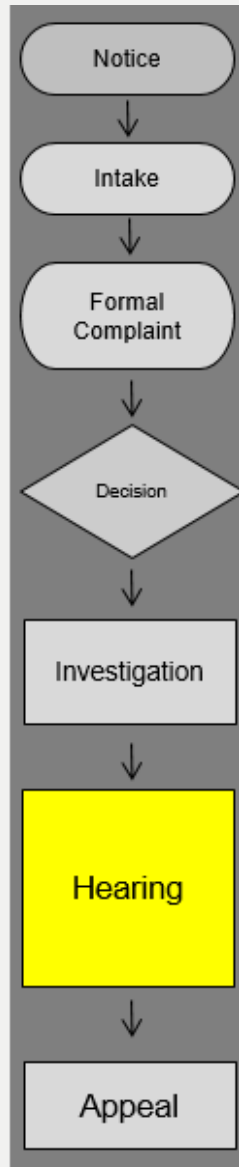
- WesternU will make all evidence gathered **available to the parties at the hearing** to give each party equal opportunity to refer to such evidence during the hearing, including for purposes of questioning.

Hearing Mechanics

- **Opening statements**
- **Investigator presents** their report
- **Questioning of the investigator** by the panel and the parties
- **Questioning of the parties** by the panel and then by the other party's advisor/the panel chair
- **Questioning of witnesses** by the panel and then by the parties' advisors/the panel chair
- **Closing statements**

ADVISORS (TRACK 1)

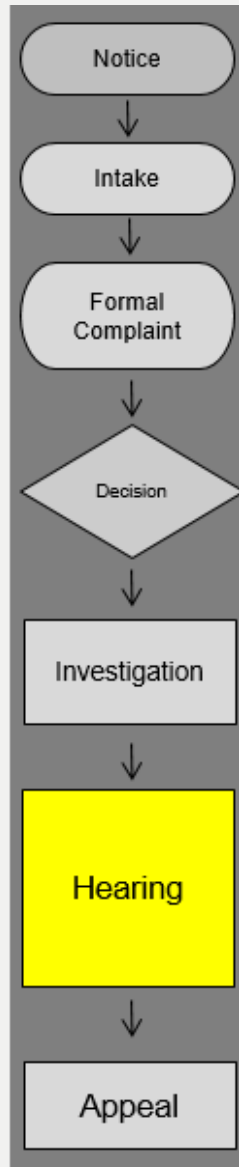
Role of the Advisor



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

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

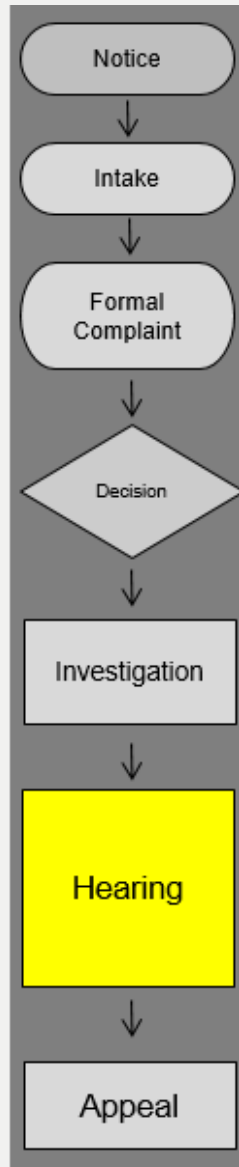
Role of the Advisor



- Such cross-examination at the live hearing must be conducted directly, orally, and in real time by the party's advisor of choice and never by a party personally...

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

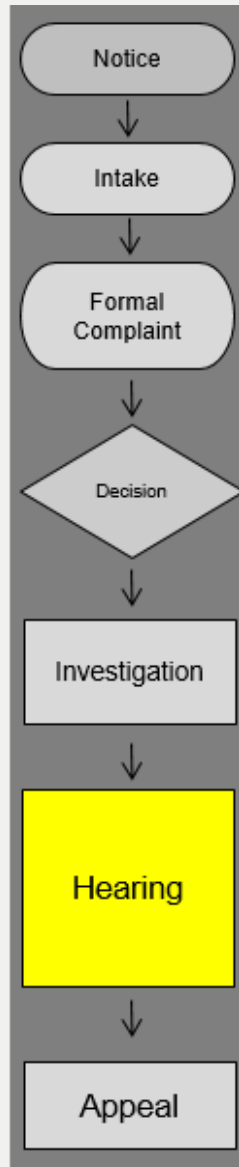
No Limit as to Conflicts of Interest



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

Title IX Regulations May 19, 2020; Preamble at 30299

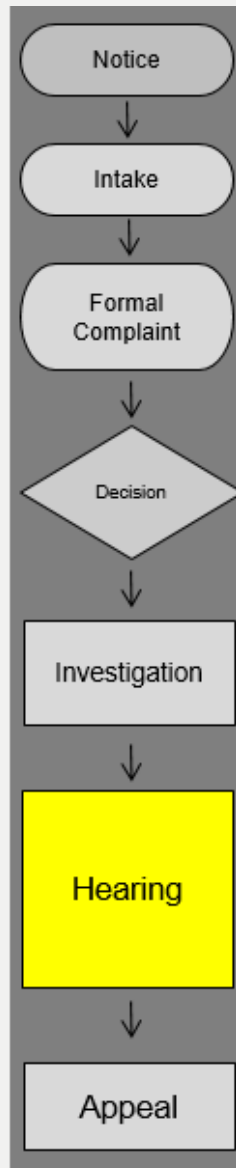
Cross-Examination in the Party's Absence



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

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

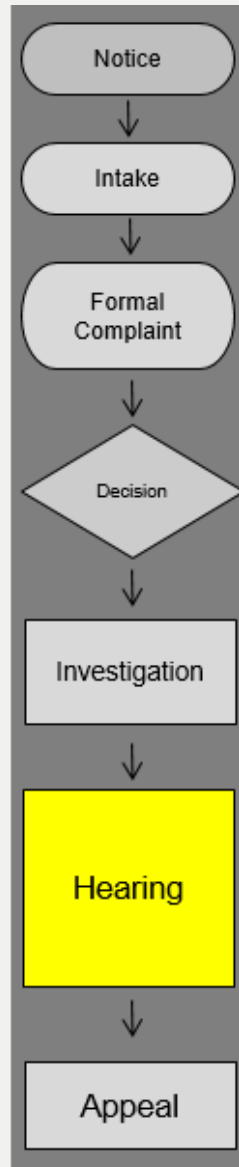
Obligation to Provide an Advisor



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

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

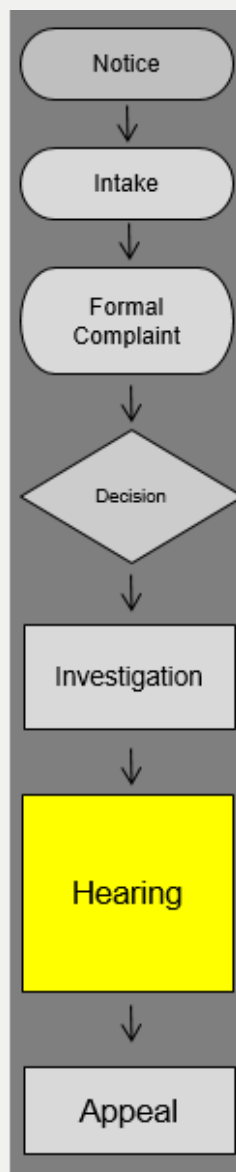
Must Provide Advisor Even in Party's Absence



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

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

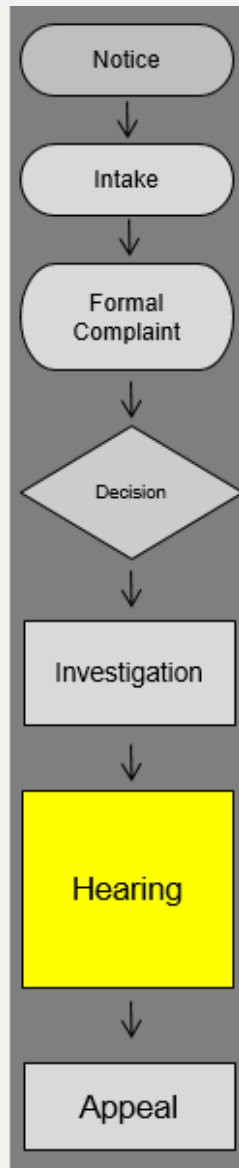
Appearance Without an Advisor



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

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

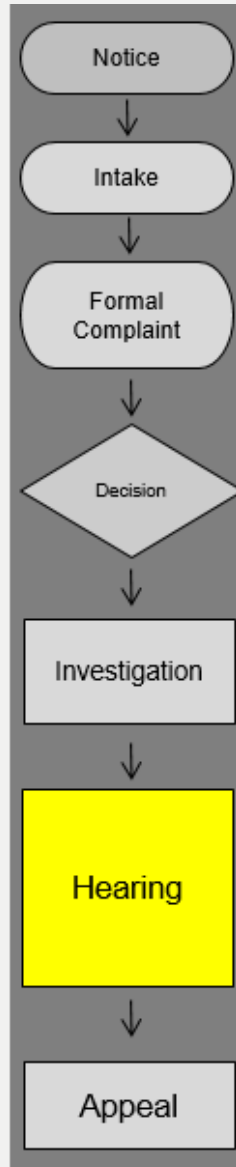
Refusal to Conduct Cross-Examination



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

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

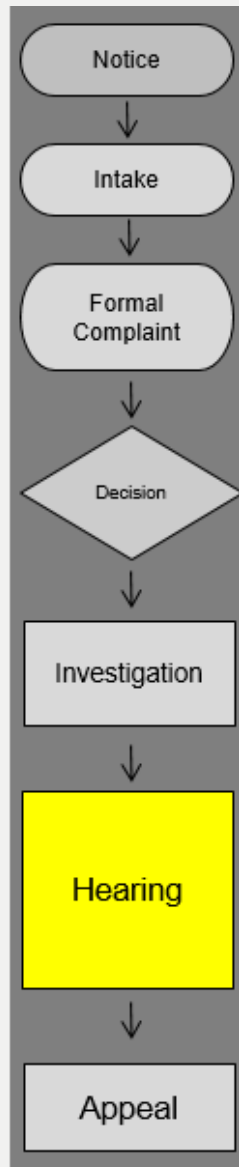
Party Cannot Conduct Own Cross-Examination



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

Title IX Regulations, May 19, 2020; § 106.45(b)(6)
Title IX Regulations, May 19, 2020; 85 F.R. 30342

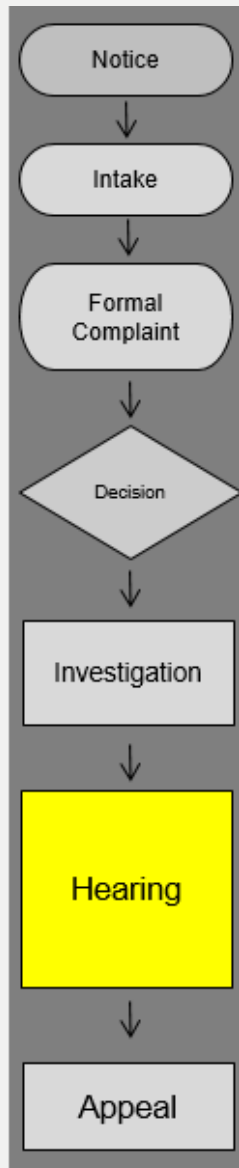
Availability of Evidence at the Hearing



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

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

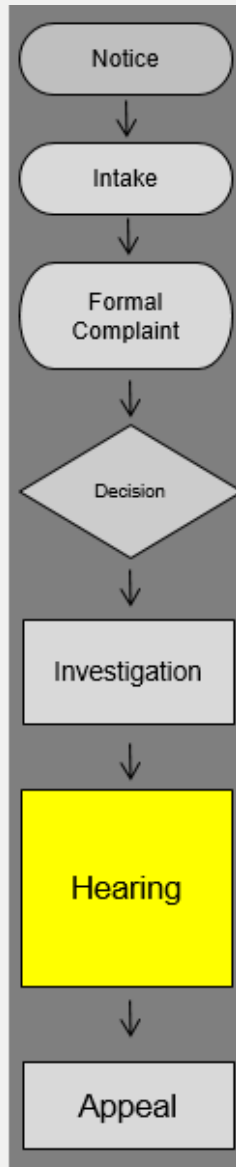
Opportunity to Challenge Evidence



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

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

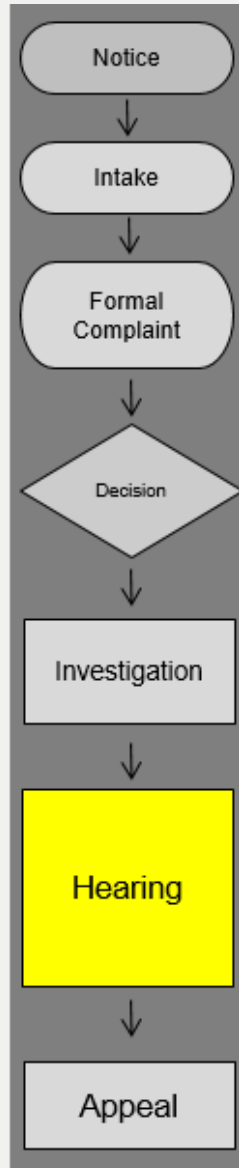
Questions to Advance a Party's Interest



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

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

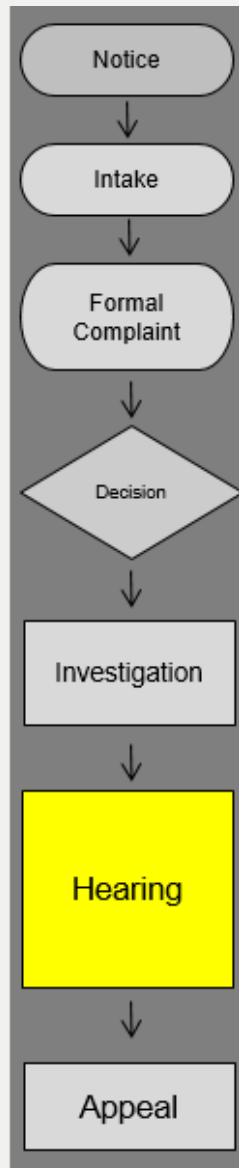
Determinations Regarding Relevance



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

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

Cross-Examination



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

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

“Pause” to Reinforce Decorum



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

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

Rules of Decorum



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

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

Rules of Decorum

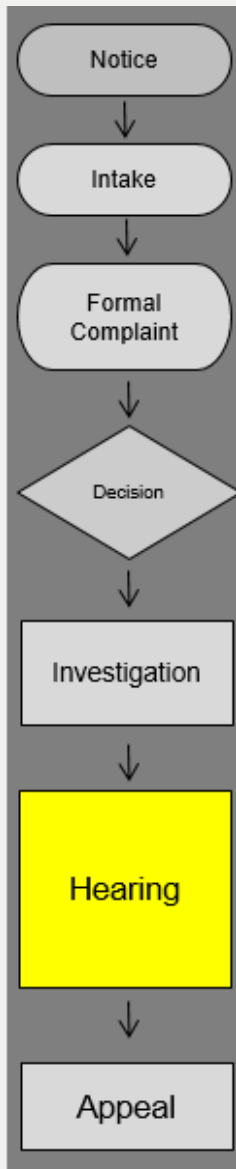


- Similarly, if an **advisor that the recipient provides** refuses to comply with a recipient's rules of decorum, the recipient may provide that party with a different advisor to conduct cross-examination on behalf of that party.
- This incentivizes a party to work with an advisor of choice in a manner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

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

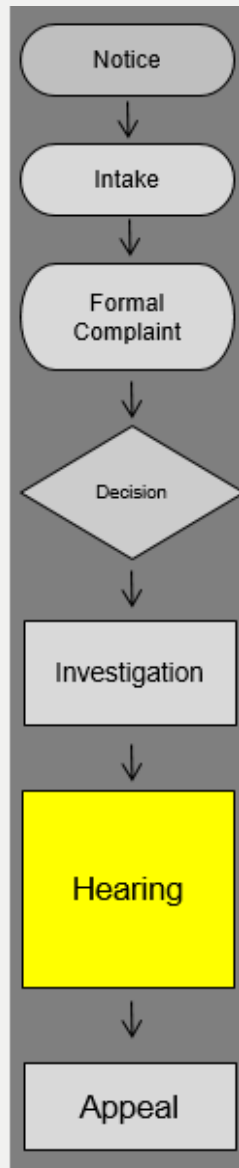
Relevance

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



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

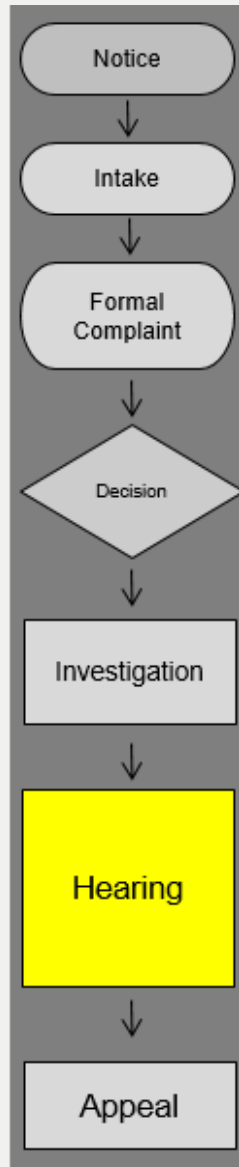
Relevance



- While the proposed rules do not speak to
 - 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 . . .

Title IX Regulations May 19, 2020; Preamble at 30247, footnotes omitted.

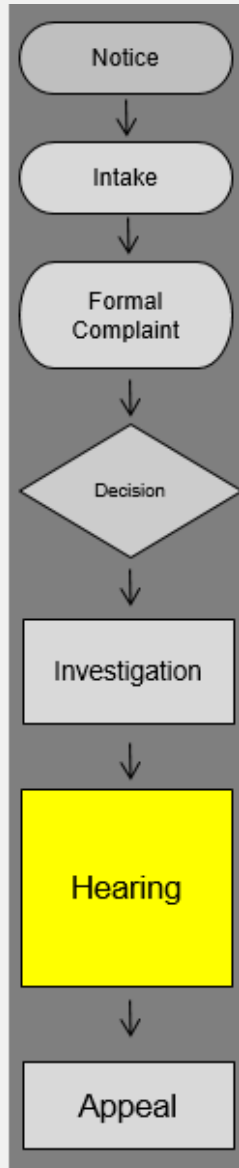
Relevance



- this includes **both inculpatory and exculpatory evidence**, and
- 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 May 19, 2020; Preamble at 30247, footnotes omitted.

Limitations on Relevance

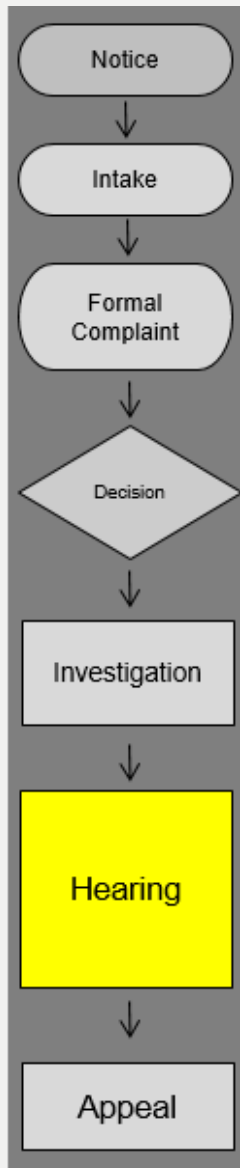


- To that end, the Department has determined that recipients **must consider relevant evidence** with the following conditions:
 - a complainant’s prior sexual behavior is **irrelevant** (unless questions or evidence about prior sexual behavior meet one of two exceptions, as noted above);
 - information protected by any legally recognized privilege **cannot be used**; no party’s treatment records may be used without that party’s voluntary, written consent; and
 - The Department notes that where evidence is duplicative of other evidence, a recipient may deem the evidence **not relevant**.

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

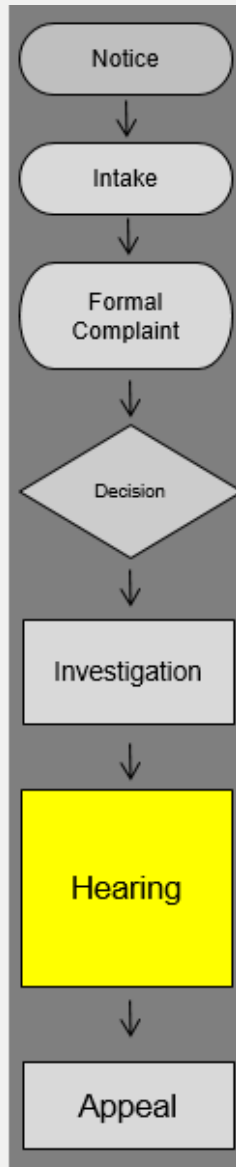
Privileged Information

- 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 May 19, 2020; § 106.45(b)(1)(x) 85 F.R.30361

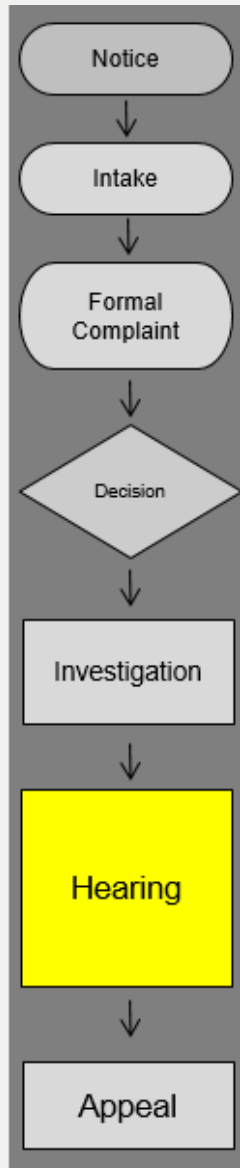
Privileged Information: Per Se Irrelevant



- In response to commenters' concerns that relevant questions might implicate information protected by attorney-client privilege, the final regulations add § 106.45(b)(1)(x) to bar the grievance process from requiring, allowing, relying on, **or otherwise using questions or evidence** that constitute, or seek disclosure of, information protected under a legally recognized privilege.

Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30361

Relevance: Prior Sexual History

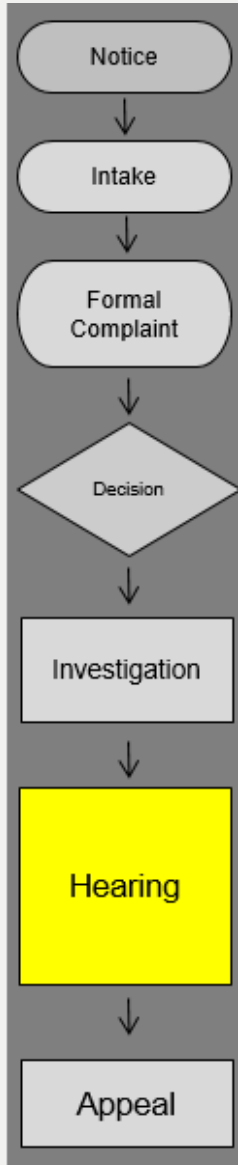


- Questions and evidence about the complainant's sexual predisposition or **prior sexual behavior are not relevant, unless** such questions and evidence about the complainant's prior sexual behavior are offered:
 - To prove that someone other than the respondent committed the conduct alleged by the complainant, 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 May 19, 2020; §§ 106.45(b)(1)(iii) and 106.45(b)(6) 85 F.R.30461

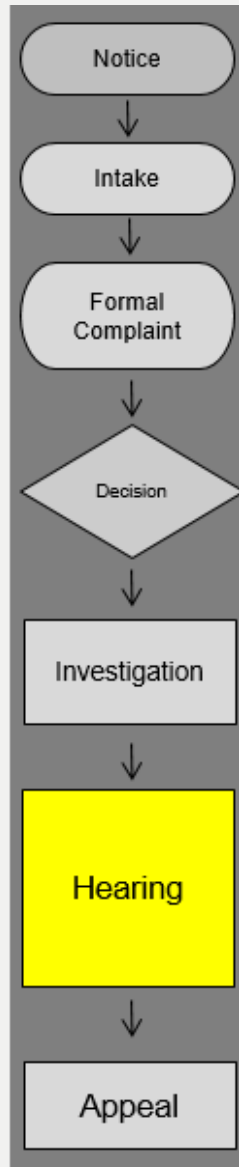
Prior Sexual History

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

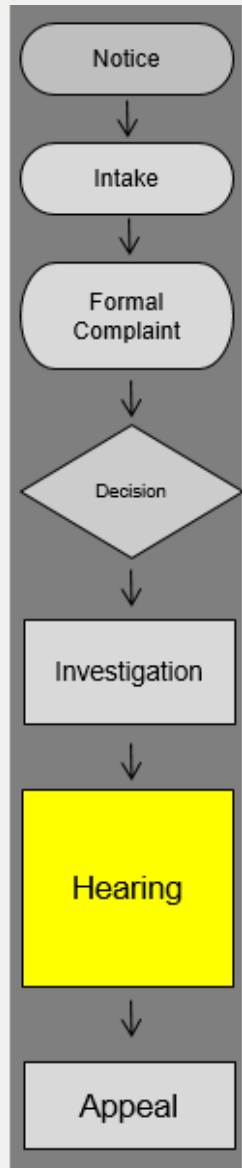
Prior Sexual History: Per Se Irrelevant



- The final regulations clarify the rape shield language to state that **questions and evidence subject to the rape shield protections are “not relevant,”** and therefore the rape shield protections apply wherever the issue is whether evidence is relevant or not.

Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30353

Prior or Subsequent Misconduct

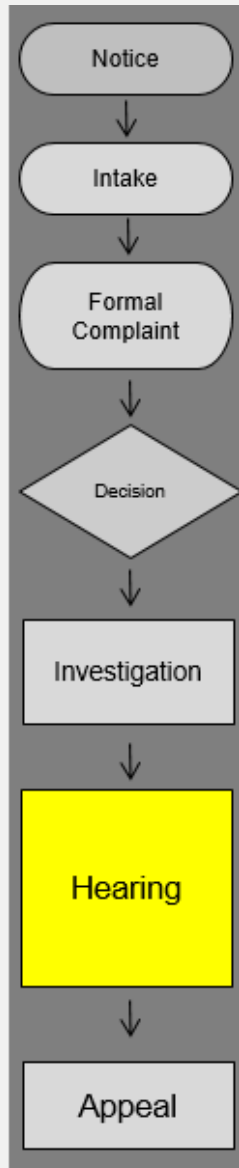


- The regulations do not prohibit the use of prior or subsequent misconduct
 - “Evidence of a pattern of inappropriate behavior by an alleged harasser” permitted if relevant
- Schools will need to determine if such conduct is:
 - Relevant
 - May be used in determining responsibility
 - May be used in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

Practical Considerations

- 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

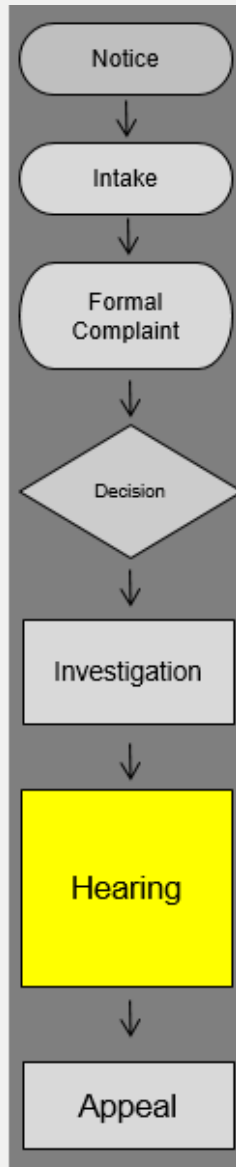
No Comprehensive Evidentiary Rules



- The Department desires to prescribe a grievance process adapted for an educational environment rather than a courtroom, and **declines to impose a comprehensive, detailed set of evidentiary rules** for resolution of contested allegations of sexual harassment under Title IX.
- Rather, the Department has carefully considered the procedures most needed to result in fair, accurate, and legitimate outcomes in Title IX grievance processes.

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

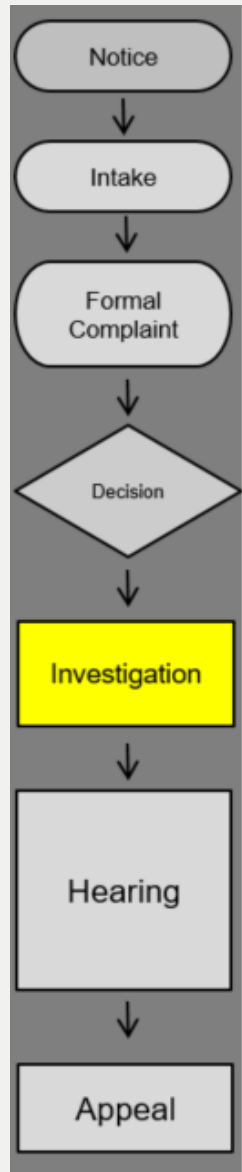
Simplified Evidentiary Considerations



- Recipients are educational institutions that **should not be converted into *de facto* courtrooms.**
- The final regulations thus prescribe a process that **simplifies evidentiary complexities** while ensuring that determinations regarding responsibility result from **consideration of relevant, reliable evidence.**

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

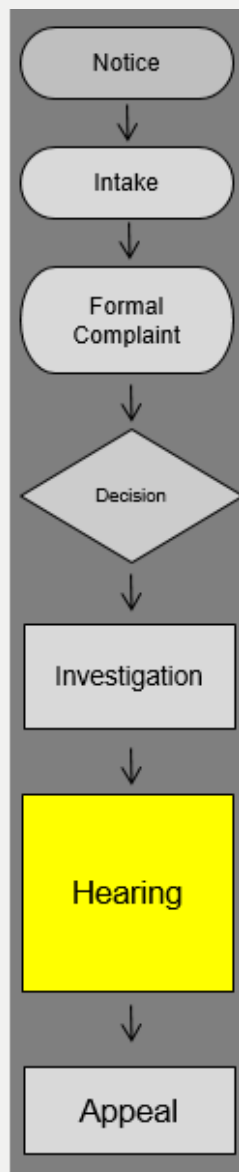
Flexibility to Adopt Rules



- “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.

Title IX Regulations May 19, 2020; Preamble at 30248.

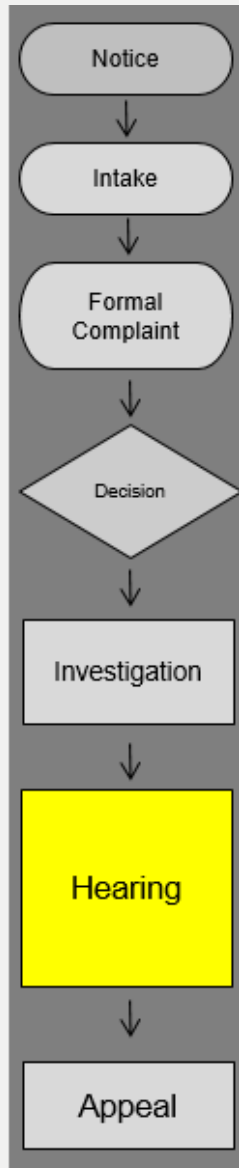
Relevant Questions



- ... 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**.
- A recipient's additional evidentiary rules may not, for example, **exclude *relevant cross-examination questions*** even if the recipient believes the questions **assume facts not in evidence or are misleading**.

Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30248; 30361

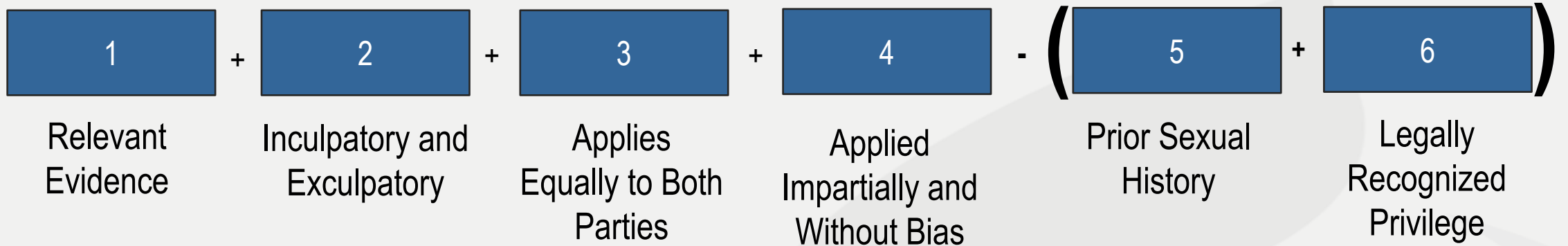
Relevant Questions



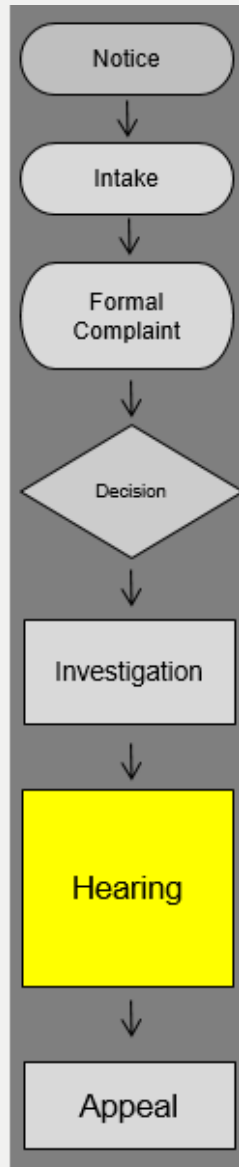
- [T]he final regulations add § 106.45(b)(1)(x) to bar the grievance process from requiring, allowing, relying on, or **otherwise using questions or evidence** that constitute, or seek disclosure of, information protected under a legally recognized privilege.
- Additionally, questions that are **duplicative or repetitive** may fairly be deemed not relevant and thus excluded.

Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30361

Evidentiary Rules Must Consider



Relevance: Explaining Exclusion



- Before a complainant, respondent, or witness answers a cross-examination or other question, the decision-maker(s) must first determine whether the question is relevant and explain any decision to exclude a question as not relevant.
- **This provision does not require a decision-maker to give a lengthy or complicated explanation.**

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

Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30343

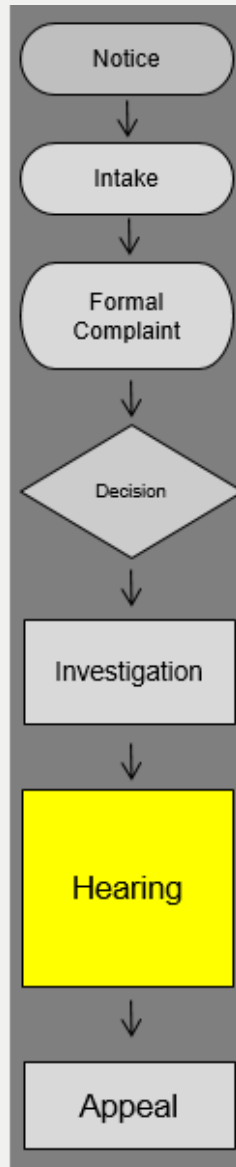
Relevance: Explaining Exclusion



- **[I]t is sufficient, for example, for a decision-maker to explain that a question is irrelevant because the question calls for **prior sexual behavior** information without meeting one of the two exceptions, or because the question asks about a detail that is **not probative of any material fact** concerning the allegations. No lengthy or complicated exposition is required to satisfy this provision.**

Title IX Regulations, May 19, 2020; Preamble 85 F.R. 30343

Flexibility to Discuss Relevance



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

Title IX Regulations, May 19, 2020; Preamble 85 F.R 30343

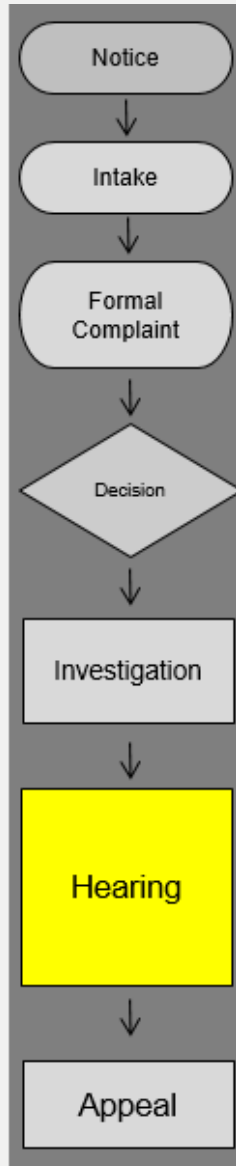
Appeal of Relevance Determination

- Parties have the equal right to appeal on three bases including procedural irregularity that affects the outcome, so if a party disagrees with a decision-maker's relevance determination, the party has the **opportunity to challenge the relevance determination on appeal.**



Title IX Regulations, May 19, 2020; Preamble 85 F.R 30349, footnote 1340, citing § 106.45(b)(8)

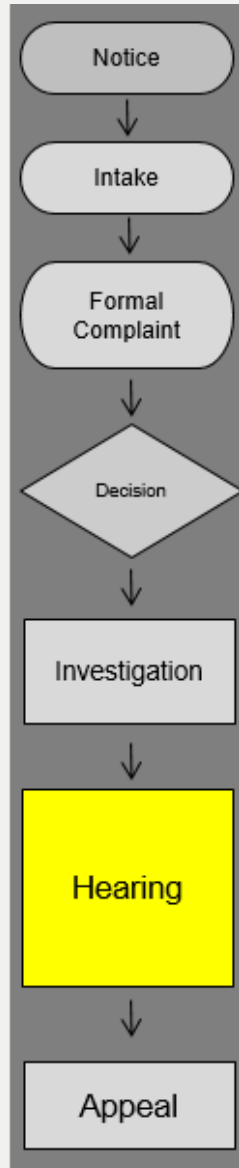
Appeal of Relevance Determination



- Parties may appeal erroneous relevance determinations, if they affected the outcome, because § 106.45(b)(8) allows the parties equal appeal rights on grounds that include procedural irregularity that affected the outcome.
- However, asking the decision-maker to also explain the exclusion of questions during the hearing does not affect the parties' appeal rights and may reduce the number of instances in which a party feels the need to appeal on this basis because the decision-maker will have explained the decision during the hearing.

Title IX Regulations, May 19, 2020; Preamble 85 F.R 30343

Statements Made During Informal Resolution



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

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

HEARINGS PRACTICAL IMPLEMENTATION

Personal Preparation: 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

Personal Preparation: Be Professional

- Maintain an appropriate demeanor at all times
- Be polite and respectful to all parties
- Maintain appropriate sensitivity to presentation of difficult information
- Prepare for the hearing by reading and annotating all materials
 - Outline areas of inquiry
 - Consider wording of questions ahead of time

Standard of Proof



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

The Preponderance of the Evidence Standard

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

Advisors

- Advisors have a speaking role
- Establish rules of decorum and conduct in the hearing via opening instructions
- Establish tone of professionalism and respectful treatment of parties and advisors
- Promptly and firmly redirect advisors who do not abide by the guidelines you set forth

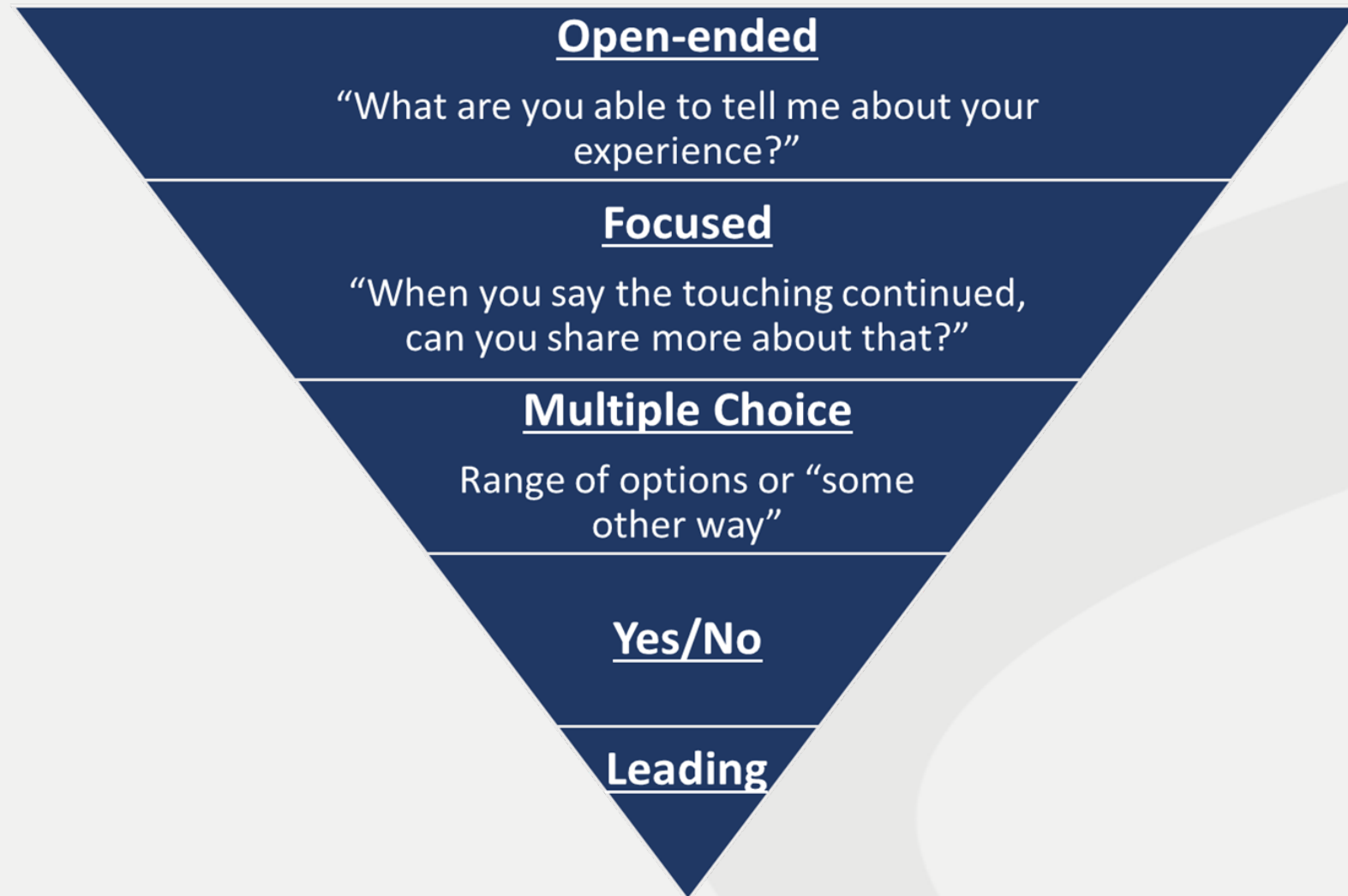
Participation Techniques

- 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

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

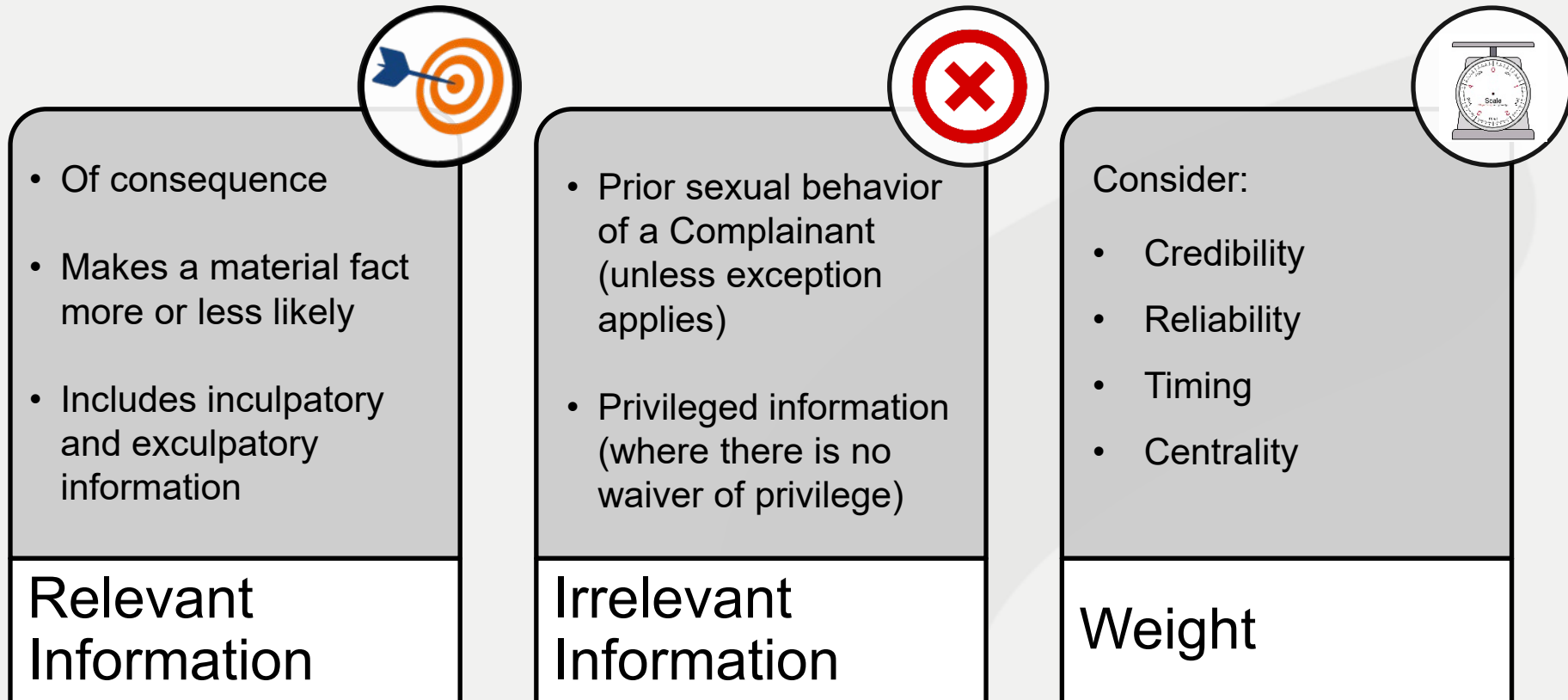


RELEVANCE

Evidentiary Considerations

- Relevance
- Privileged Information & Records
- Prior Sexual History
- Prior or Subsequent Misconduct
- Setting Evidentiary Rules

Evidentiary Concepts



Evidentiary Concepts

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



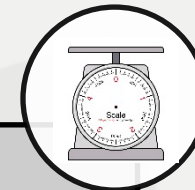
- Of consequence
- Makes a material fact more or less likely
- Includes inculpatory and exculpatory information

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

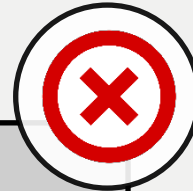
Evidentiary Concepts

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



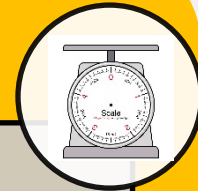
- Of consequence
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- Includes inculpatory and exculpatory information

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

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



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

Relevant
Information

- The investigation report fairly summarizes all relevant information.
- At the hearing, the parties have the opportunity to challenge the investigator's (implicit) determinations as to relevance.
- The parties and their advisors must have access to all of the information that the investigator gathered that is directly related to the allegations (broader category than what the investigator deemed relevant).
- In determining which questions to permit in the hearing, the Panel Chair must consider whether the question seeks relevant information.
- Blanket exclusions are no longer permitted. Instead, the Panel must be guided by relevance.

Relevance of Prior or Subsequent Conduct

- Intent/knowledge/state of mind
- Motive
- Opportunity
- Lack of mistake
- Pattern
- Identity
- Information that is inextricably interwoven with the facts

Framing Difficult Questions

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

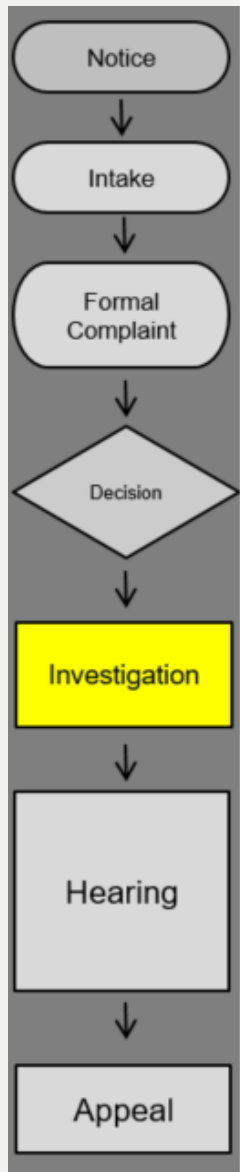
RECAP ON EVIDENTIARY CONSIDERATIONS

Evidentiary Considerations

- Relevance
- Privileged Information & Records
- Prior Sexual History
- Prior or Subsequent Misconduct
- Setting Evidentiary Rules

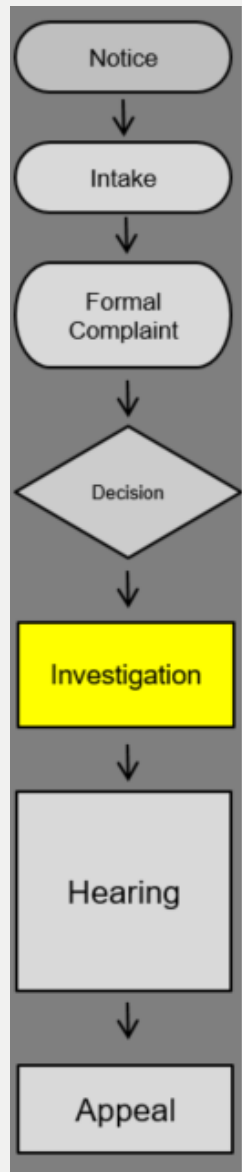
Relevance

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



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

Relevance



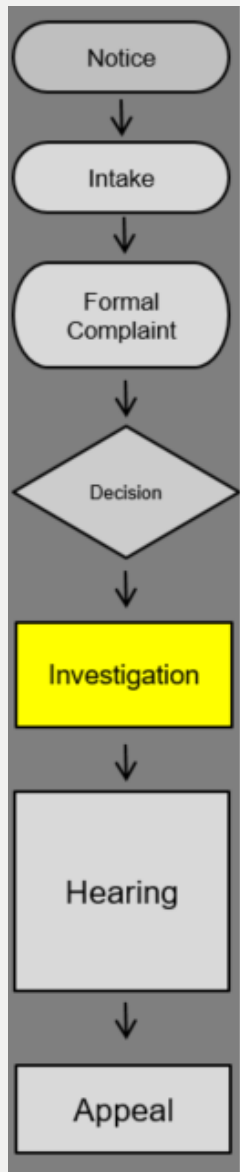
“While the proposed rules do not speak to

- 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 . . .

Title IX Regulations May 19, 2020; Preamble at 30247, footnotes omitted

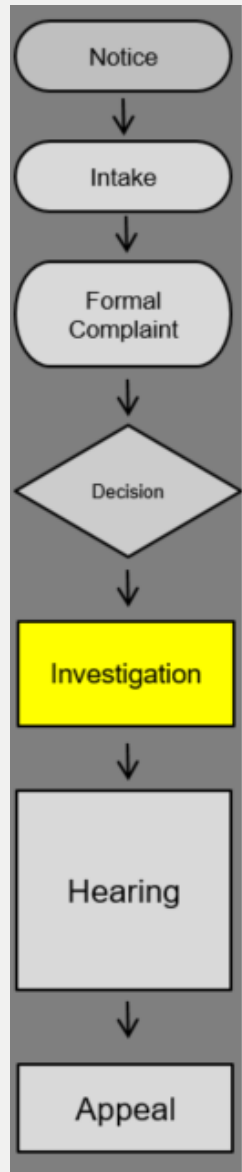
Relevance



- this includes **both inculpatory and exculpatory evidence**, and
- 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 May 19, 2020; Preamble at 30247, footnotes omitted

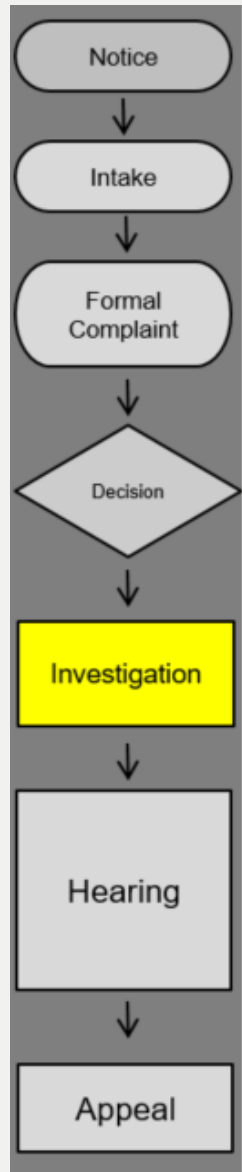
Flexibility to Adopt Rules



- “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.

Title IX Regulations May 19, 2020; Preamble at 30248

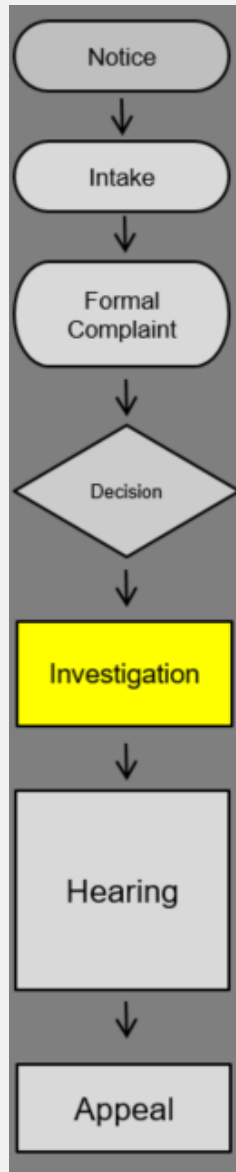
Flexibility to Adopt Rules – Except



- 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**.
- A recipient's additional evidentiary rules may not, for example, exclude *relevant* cross-examination questions even if the recipient believes the questions assume facts not in evidence or are misleading.

Title IX Regulations May 19, 2020; Preamble at 30248
Title IX Regulations May 19, 2020; Preamble at 30361

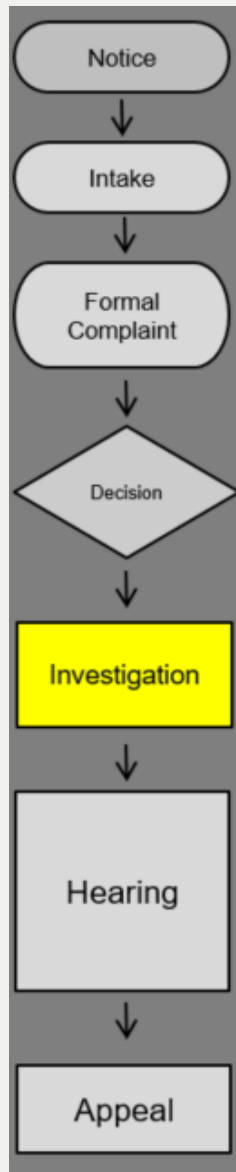
Privileged Information



- 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 May 19, 2020; § 106.45(b)(1)(x) 85 F.R.30361

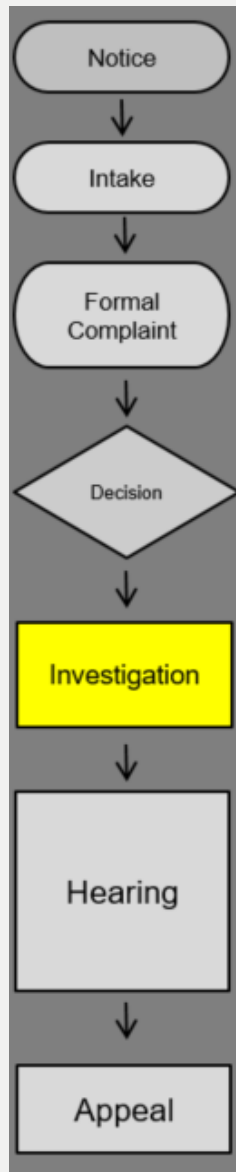
Prior Sexual History



- 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 May 19, 2020; §§ 106.45(b)(1)(iii) and 106.45(b)(6) 85 F.R.30461

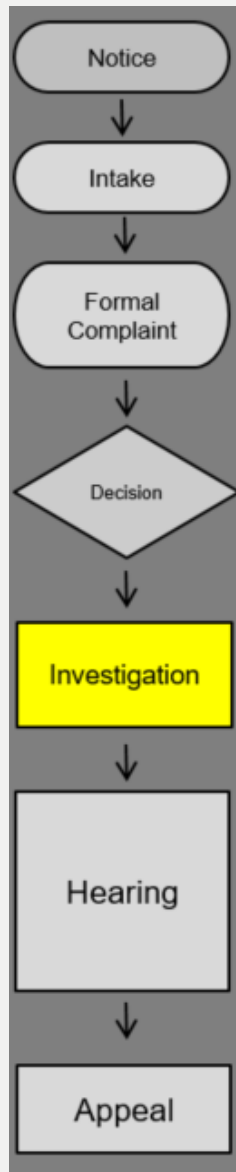
Prior Sexual History



- 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 May 19, 2020; §§ 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 May 19, 2020; §§ 106.45(b)(1)(iii) and 106.45(b)(6);
Preamble at 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

EVALUATING CREDIBILITY

Evaluating Credibility



Credibility Factors

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

Demeanor

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

(continued on next slide)

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?

(continued on next slide)

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

(continued on next slide)

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 (Recap)

- 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

Dynamics of Sexual Assault	Informed understanding of dynamics of sexual and gender-based harassment and interpersonal violence.
Demeanor	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?
Interest / Motive / Bias	Did the witness have any interest in the outcome of the case, bias, prejudice, or other motive that might affect his/her testimony?
Detail	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?
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?
Common Sense	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?

AFTER THE HEARING: DELIBERATIONS

Deliberation Techniques

- Gather all documents and exhibits in advance
- Use cross-referencing grids/matrices
- Identify specific elements of alleged misconduct from policy definitions
- Begin by identifying areas of agreement as to evidence
- Identify conflicts and prioritize
- Discuss each conflict individually
- Articulate your position and support it from the evidence

Notice of Outcome

- The Hearing Panel, will issue a written notice informing both parties simultaneously of their determination regarding responsibility within ten (10) business days from the conclusion of a Title IX Hearing (inclusive of deliberations), barring extenuating circumstances. The possible outcomes for each alleged violation are as follows: a) Responsible or b) Not Responsible.

Notice of Outcome

- To reach this determination, WesternU will apply the Standard of Evidence and include the following:
 - i. Identification of the allegations potentially constituting Prohibited Conduct
 - ii. A description of the procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, methods used to gather other evidence, and hearings held.
 - iii. Findings of fact supporting the determination.

Notice of Outcome

- To reach this determination, WesternU will apply the Standard of Evidence and include the following:
 - iv. Conclusions regarding the application of the WesternU conduct policies, as applicable.
 - v. A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions the recipient imposes on the Respondent, and, if applicable, whether remedies designed to restore or preserve equal access to the recipient's education program or activity will be provided by the recipient to the Complainant; and
 - vi. The recipient's procedures and permissible bases for the Complainant and Respondent to appeal.

Notice of Outcome

- The determination regarding responsibility becomes final either on the date that the recipient provides the parties with the written determination of the result of the appeal, if an appeal is filed, or if an appeal is not filed, the date on which an appeal would no longer be considered timely. The imposition of sanctions will take effect immediately and will not be stayed pending the resolution of any appeal.

SANCTIONS

Discretion in Sanctioning

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

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

Discretion in Sanctioning

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

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

Discretion in Sanctioning

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

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

Discretion in Sanctioning

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

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

SANCTIONING

Sanctioning

- In determining an appropriate sanction, the decision maker(s) may work collaboratively with the appropriate stakeholders to appropriate sanctions for violations of this policy. Sanctions may be imposed independently or in combination with other sanctions or corrective actions and can be assigned to an individual student(s) / employee(s) or groups of student(s) / employee(s).

Sanctioning Considerations

- The nature and relative seriousness of the conduct (if a respondent is found responsible for multiple violations, this should be reflected in the sanction).
- Aggravating, mitigating, or compelling information provided during or contemporaneously with the grievance process
- The impact of the respondent's actions on the individuals personally affected, the WesternU community, and WesternU's principles, namely the value of Humanism.

Sanctioning Considerations

- A Respondent's previous disciplinary record (a violation of any sort at WesternU or elsewhere, may be taken into account when considering a sanction for the current violation.
- Whether the respondent represents a foreseeable risk of harm to others.
- What is needed to ameliorate any potential threat to the WesternU community.

Sanctioning Considerations

- Any identified gaps in learning outcomes or professional development deficiencies exposed by the conduct for students/employees.
- Any other factor that is reasonably dictated by the standards of fairness and equity Any other factor needed to reach a just and appropriate resolution in the case.



Sanctions Examples in SIM Policy

Students	Employees	Third-Parties
Required assessments, treatment, or educational workshops/training	Warning – verbal or written	No-contact directive
Probation	Performance Improvement or Management Process	Restriction of University privileges
Suspension	Required counseling	Restrictions, limitations, or bans on access to campus property
Dismissal	Required training or education	Discontinuation of relationship or association
	Probation	Referral for action under another policy
	Loss of Oversight or Supervisory Responsibility	
	Suspension with or without pay	
	Termination	

APPEALS

Appeals

- Must be filed within 7 business days of receipt of decision
- Bases for appeal:
 - i. Procedural irregularity that affected the outcome of the matter; or
 - ii. New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; or
 - iii. The Title IX Coordinator, Investigator(s), or decision-maker(s) had a conflict of interest or bias for or against Complainants or Respondents generally or the individual Complainant or Respondent that affected the outcome of the matter; or
 - iv. The determination of responsibility was arbitrary or capricious.

Appeal Process

- Upon review of a received appeal, WesternU must notify the other party in writing when an appeal is filed and implement appeal procedures equally for both parties. WesternU must:
 - i. Ensure that the decision-maker(s) for the appeal is not the same person as the decision-maker(s) that reached the determination regarding responsibility or dismissal, the Investigator(s), or the Title IX Coordinator;
 - ii. Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome;
 - iii. Issue a written decision describing the result of the appeal and the rationale for the result; and
 - iv. Provide the decision simultaneously to both parties.

Appeal Process

- Appeal decisions will be issued within 15 business days from receipt of the document, barring extenuating circumstances.
- The Appeal Officer's decision will be the final decision of the University.
- A student may remain in class or on clinical assignments / rotations pending the outcome of appeals, except in cases of summary suspension.

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.