

The New Title IX Regulations: Initial Assessment: Notice, Jurisdiction, Supportive Measures and Formal Complaints

Presented By:

The Institutional Response Group | Cozen O'Connor

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June 29, 2020

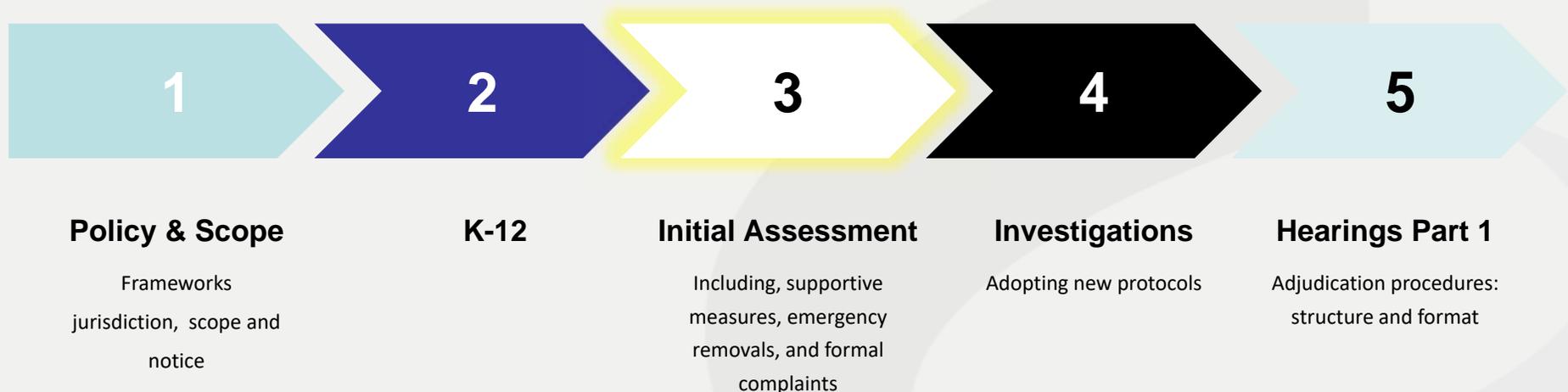


Today's Webinar

- Following an introductory webinar, A First Look at the New Title IX Regulations, this is the third in a series of webinars focusing on implementation.
- This webinar will:
 - Provide an **overview** of initial assessment or intake and outreach processes
 - Outline the **legally-required elements** for intake processes under the new Title IX regulations, and
 - Share **effective practices** in conducting initial assessments and intake processes

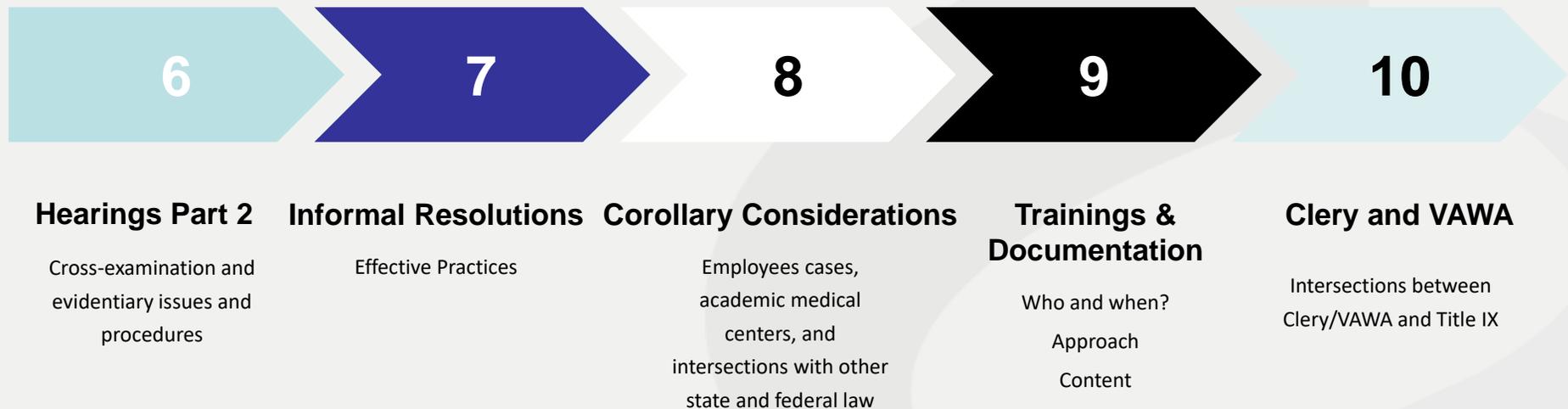
Introducing the Webinar Series

Subsequent IRG webinars will focus on specific aspects of the regulations, as written and as applied, including:



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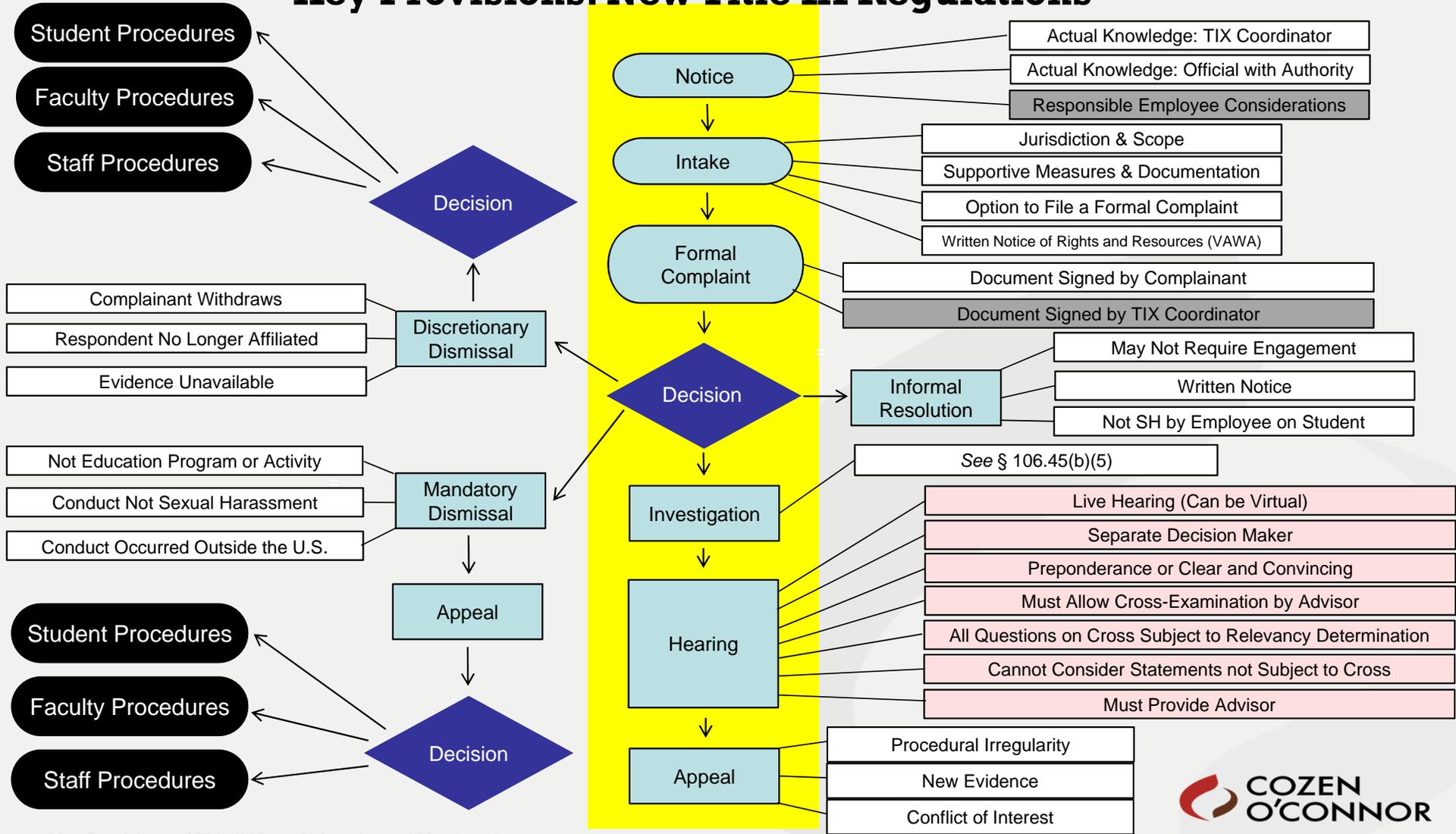
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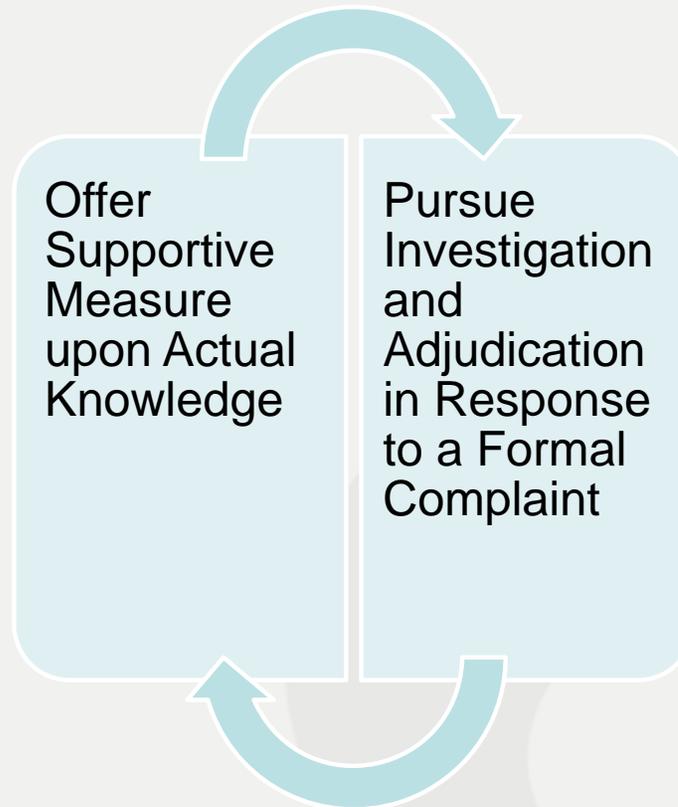
Key Provisions: New Title IX Regulations



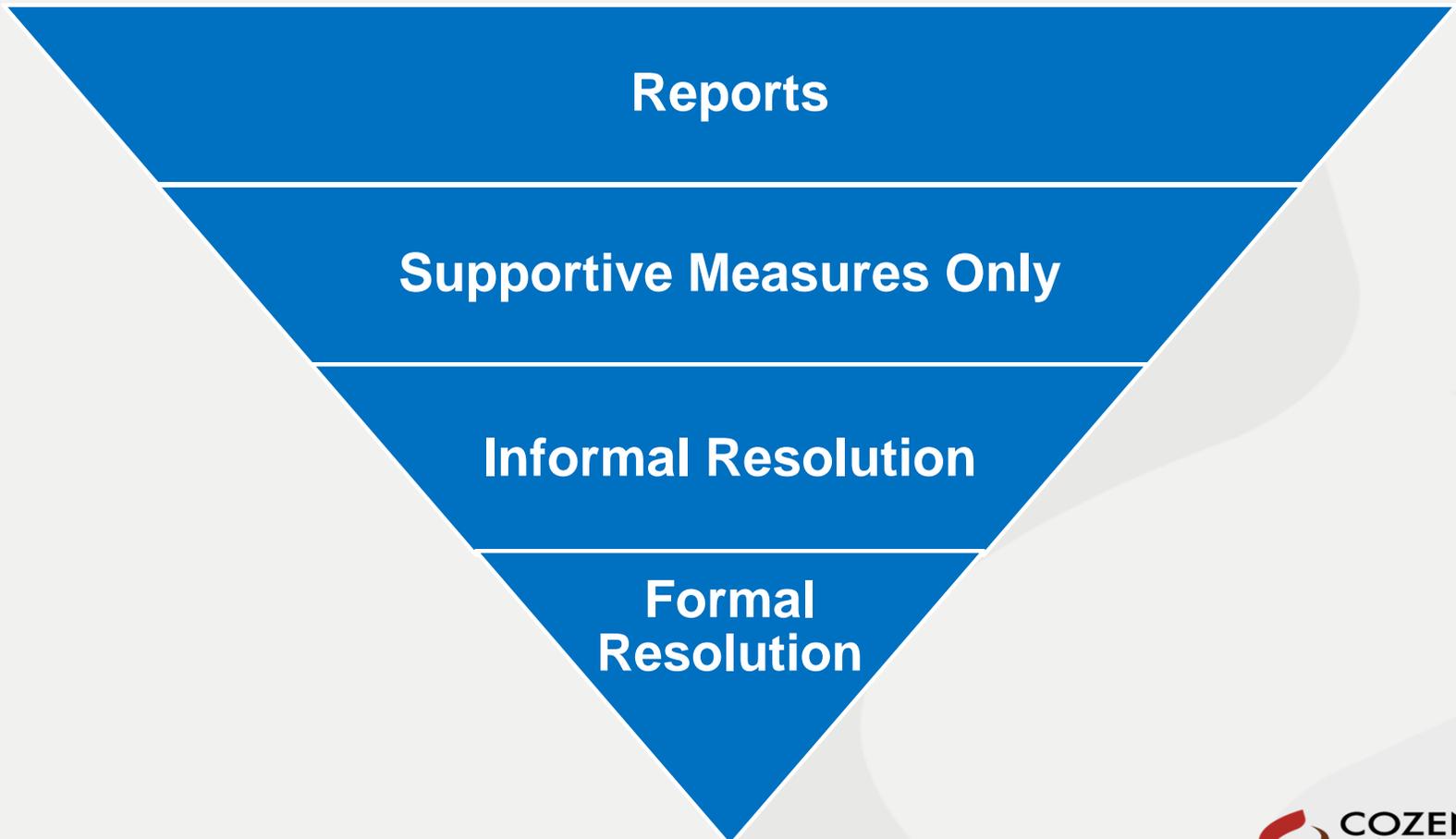
Key Provisions of Title IX Regulations issued May 6, 2020;



Understanding Two Key Provisions



The Importance of Intake and Outreach



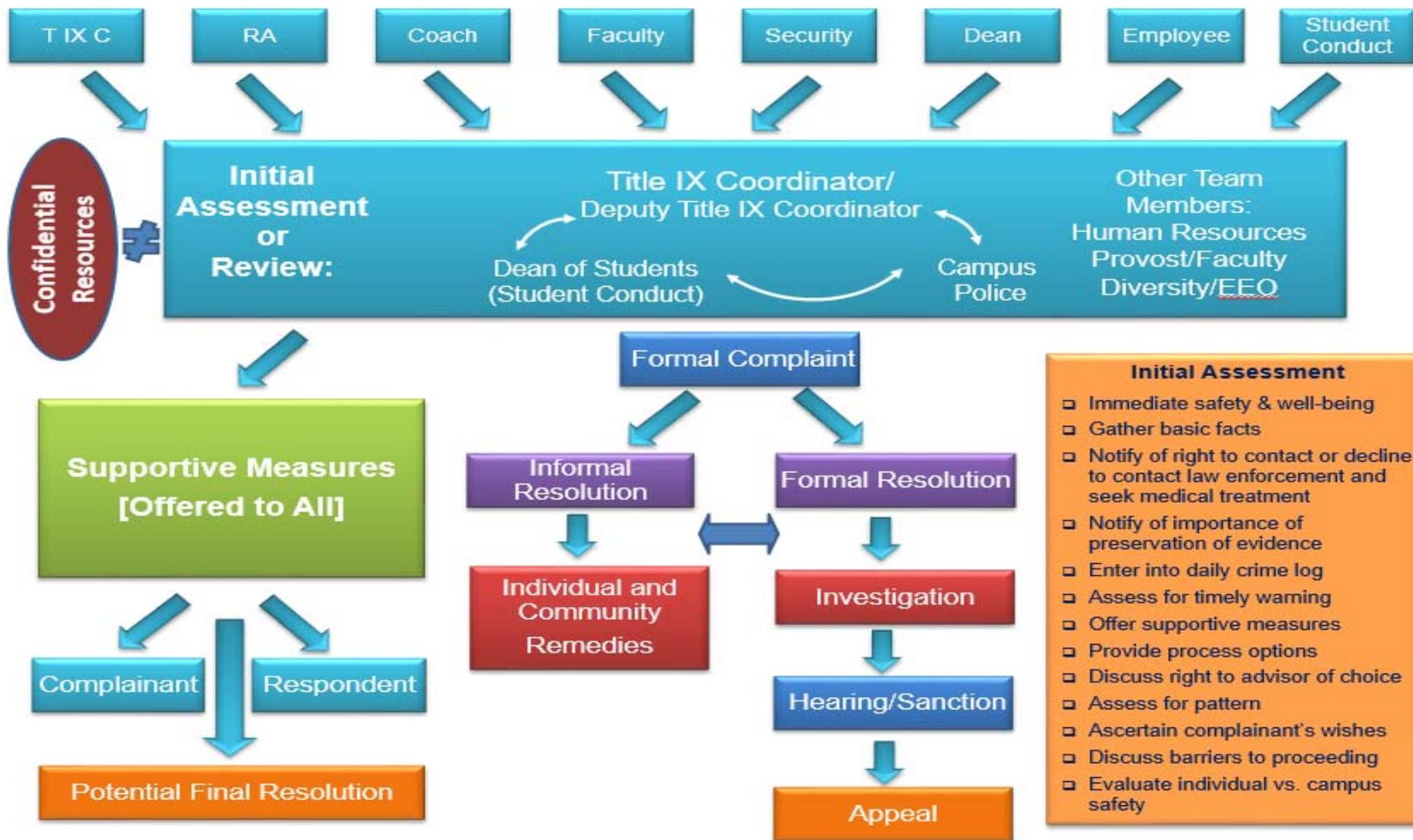
Intake and Outreach

- Opportunity to re-envision this critical step in the process
 - Foster increased reporting
 - Respond in a compassionate and effective manner
 - Engender trust in personnel and processes
 - Assess effectiveness of current intake functions
 - Conduct gap assessment
- Aspire to ready accessible information about resources and policies
- Increase accessibility of and participation in investigation and resolution processes

The Importance of Intake and Outreach

- The Department's adaptations of the three-part Gebser/Davis framework achieve important policy objectives that arise in the context of a school's response to reports, allegations, or incidents of sexual harassment in a school's education program or activity, including respect freedom of speech and academic freedom, **respect for complainants' autonomy, protection of complainants' equal educational access while respecting the decisions of...educators to determine appropriate supportive measures, remedies,** and disciplinary sanctions, consistency with constitutional due process and fundamental fairness, and clear legal obligations that enable robust administrative enforcement of Title IX violations.

Title IX Regulations issued May 6, 2020, Preamble p. 61; Final Regulations May 19, 2020, 85 F.R. 30035 (footnotes omitted)



Intake and Initial Assessment

- Assess immediate safety and well-being
- Gather basic facts
- Advise of right to notify or decline to notify 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 supportive measures
- Provide policies, process options, resources and supports
- Assess for pattern
- Ascertain complainant's wishes
- Discuss barriers to proceeding
- Evaluate individual vs. campus safety

Importance of Getting Everything Central

- Allow for real-time triage and safety assessment
- Provide consistent access to supportive measures
- Provide accurate information about resolution options
- Track and assess for pattern among individuals, groups, programs, locations
- Ensure informed and sensitive information-gathering
- Ensure legal compliance with Title IX regulations
- Fulfill institutional values to reduce sexual and gender-based harassment and violence

Centralized Review Process

- Coordinate personnel and processes
 - Clearly delineated roles and responsibilities
 - Build in regular and open lines of communication
 - Sequence events in advance
- Remove conflict of interest and reduce bias
- Separate support and advocacy from investigation and adjudication
- Develop and use template communications
- Central tracking for patterns
- Documentation/records
- Ensure consistent implementation of:
 - Supportive measures
 - Investigation protocols
 - Sanctioning & remedies
- Reinforce neutrality and impartiality

Fostering Increased Reporting

- Understand general and specific barriers to reporting
- Provide clear and accessible information to ensure complainants and others understand the decisions involved in reporting
 - Privacy vs. confidentiality
 - Reporting options vs. confidential resources
 - What happens when a report is made
 - Respecting complainant agency and autonomy
- Set clear guidelines for employee reporting obligations

Fostering Increased Reporting

- Demystify the process
- Provide multiple pathways for reporting including online, phone, appointment, walk-in
- Consider location and accessibility of office
 - Centrally-located
 - Private
- Offer to meet where and when the complainant is most comfortable
- Be a visibly invested member of the community
 - Attending non-Title IX functions
 - Speaking and training opportunities

Core Elements of Initial Assessment

- Provide written information about resources and rights under the Clery Act (or analogous state law)
- Provide reasonably available supportive measures
- Consider the complainant's wishes with respect to supportive measures and how to proceed
- Balance complainant agency and autonomy with broader campus safety and Title IX obligations
- Gather all relevant information to inform the institutional response
- Evaluate jurisdiction to proceed with formal complaint
- Document all relevant and required information

VAWA Requirements

- Statement of policy re: procedures victims should follow if a crime of dating violence, domestic violence, sexual assault, or stalking has occurred, including written information about:
 - the importance of preserving evidence
 - how and to whom the alleged offense should be reported
 - options regarding notifying law enforcement and campus authorities about alleged offenses, including the option to be assisted by campus authorities in notifying law enforcement authorities or to decline to notify authorities
 - information on individual rights and the school's responsibilities regarding orders of protection, no contact orders, restraining orders, or similar lawful orders issued by a criminal, civil or tribal court.

20 U.S.C. § 1092 (f)(8)(B)(iii); 34 C.F.R. § 668.46(b)(11)(ii); 34 C.F.R. § 668.46(b)11.

VAWA Requirements

- Notify individuals in writing of resources and rights:
 - the range of interim measures available that are available regardless of whether an individual chooses to report an alleged crime to campus police or law enforcement
 - on and off campus counseling, health, mental health, victim advocacy and legal assistance programs
 - an explanation of the procedural options, including alternative resolutions and investigative resolutions
 - the right to be accompanied at any meeting by an advisor of choice
 - the policy prohibiting retaliation and how to report acts of retaliation

34 C.F.R. 668.46(b)(11)(ii)

Separating Support from Investigations

- Separate support/advocacy/intake functions from investigative/adjudicative functions to reduce potential for conflict of interest or perception of bias
- Reinforce neutrality in language and communications
- Ensure sufficient resources for timely response
- Consider creative models for separation of intake from support from investigation from decision-making

Separating Support from Investigations

- “Section 106.44(c) does not preclude a recipient from using Title IX personnel trained under §106.45(b)(1)(iii) to make the emergency removal decision or conduct a post-removal challenge proceeding, but **if involvement with the emergency removal process results in bias or conflict of interest for or against the complainant or respondent, §106.45(b)(1)(iii) would preclude such personnel from serving in those roles during a grievance process.**”

Title IX Regulations May 19, 2020, Preamble, 85 F.R. 30235.

Complainant Agency & Autonomy

- Balancing competing considerations
 - Agency and autonomy of an adult complainant/victim/survivor
 - Legally required procedural protections
 - Broader responsibility to campus safety
- Addressing the needs of an individual reporting sexual or gender-based harassment or violence while determining an appropriate institutional response requires expertise and attention

Complainant Agency & Autonomy

- “The final regulations promote clarity as to recipient’s legal obligations, and **promote respect for each complainant’s autonomy**, by distinguishing between a complainant’s report of sexual harassment, on the one hand, and the filing of a formal complaint that has initiated a grievance process against a respondent, on the other hand.”
- “The Department acknowledges that **a recipient should respect the complainant’s autonomy and wishes** with respect to a formal complaint and grievance process **to the extent possible.**”

Title IX Regulations May 19, 2020, Preamble, 85 F.R. 30282; 30219.

Assessing for Pattern

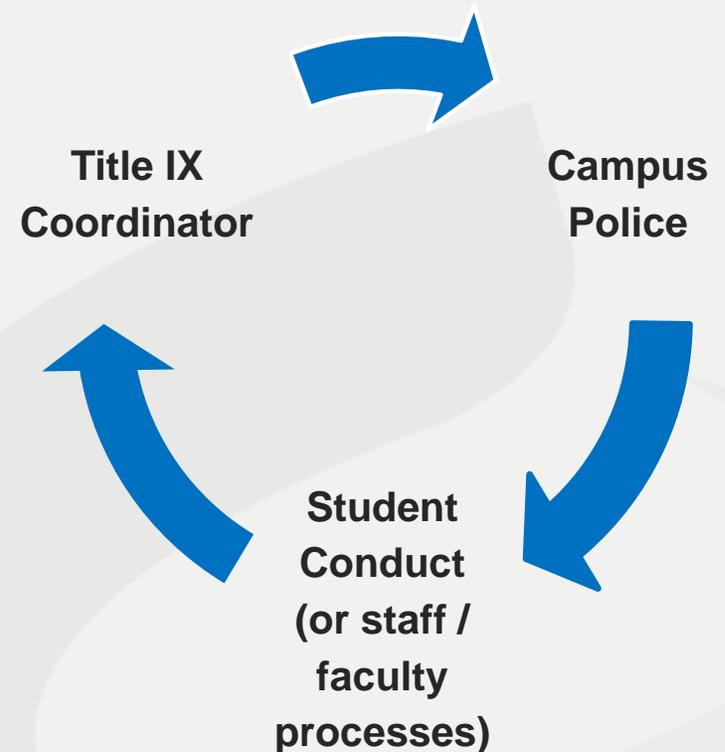
- People
 - Are the complainant or respondent parties in another current or prior matter?
 - Are the complainant or respondent involved in an organization, department, or team that is part of a current or prior matter?
- Locations
 - Has the location of the incident come up in a prior matter?
- Conduct
 - Does the conduct itself suggest a need for further training or education on a specific topic?
- Potential Sources of Information:
 - Title IX
 - Student Conduct
 - Campus Police
 - Human Resources
 - Threat Assessment
 - Supervisor
 - Personnel File
 - Provost
 - External Law Enforcement
 - Other
- Document All Results
 - Including no records found

Importance of Training

- Regulations require training for Title IX Coordinator, Investigator, Decision-Maker, Facilitator of Informal Resolution Process:
 - The definition of Sexual Harassment under § 106.30
 - The scope of the University's education program or activity
 - How to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes
 - How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias
- For Decision-Makers
 - Issues of relevance of questions and evidence, including when questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant
- For Investigators
 - Issues of relevance to create an investigative report that fairly summarizes relevant evidence

Importance of Coordination

- Multi-disciplinary perspectives
- Integration with threat assessment
- Working with campus partners
 - Robust gathering of information
 - Seamless access to supportive measures
 - Foster increased cooperation
- Promote routine sharing of information
- Consider consistent information in each report
- Reinforce clear decision-making authority



Title IX Multi-Disciplinary Team

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

Importance of Documentation

- Checklists for consistency
- Intake and initial assessment forms
- Opening and closing case management checklists, forms and templates
- Template communications/memory markers
- Texts, telephone calls, and in person/Zoom meetings
- Customizing existing data and case management systems

Importance of Documentation

- “Tyranny of temporal compression”
- Final regulations require seven-year retention period for:
 - All sexual harassment investigations including hearing recording/transcript, disciplinary sanctions imposed on respondent, remedies provided to complaint
 - Appeals and results of appeals
 - Informal resolutions and results therefrom
 - All materials used to train Title IX Coordinators, investigators, decision-makers, and informal resolution facilitators (and post on website)

Importance of Documentation

- Final regulations require seven-year retention period for:
 - For each response required under § 106.44 (includes supportive measures, formal complaint, emergency removal, and administrative leave), 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.

Case Management and Documentation

- Efforts to contact complainant
- Supportive measures
- Reasonableness of measures designed to restore or preserve equal access to education program or activity
- Jurisdiction
- Decision to move forward with formal complaint
- Pattern assessment
- Core elements for each critical determination:
 - Identify decision-maker(s)
 - Outline key factors
 - Outline steps taken
 - Communicate to parties
- Documentation must capture:
 - Emails
 - Telephone calls
 - In person meetings
 - Text messages

Sample Checklists

<ul style="list-style-type: none"> - whether the report reveals a p drugs or alcohol) at a given lo _____ - the complainant's interest in t impact of such actions on the _____ - whether the College possesses _____ - fairness considerations for bo _____ - the College's obligation to pro _____ - any other available and relev <ul style="list-style-type: none"> o Multiple Respondents o Is a group, team, or or o Serial Behavior? o Threatened violence o o Physical violence? o Drugs or intoxicants? o Was C unconscious or o Was C under 18? o If yes, then end o Is Complainant or Res o Has individual commu o Any other aggravating 	<p style="text-align: center;">Assessment Tool for Evaluating a Complainant's Request Not to Pursue Disciplinary Action</p> <p>Complainant: _____ Assessment Completed by: _____ Respondent: _____ Date Assessment Completed: _____ Date of reported incident: _____</p> <p>Steps to perform:</p> <ul style="list-style-type: none"> <input type="checkbox"/> Criminal records check <ul style="list-style-type: none"> o Safety and Security or local law enforcement <input type="checkbox"/> Prior TIX history check <ul style="list-style-type: none"> o For students, TIX records o For employees, do records check in TIX, HR, VPAA/Provost, and anywhere else employee records are kept <input type="checkbox"/> Prior other conduct history check <ul style="list-style-type: none"> o Dean of Students' Office o HR o VPAA/Provost o Supervisor/Chair/Dean <p>The Title IX Coordinator will balance the complainant's request against the following factors in reaching a determination on whether the request can be honored:</p> <ul style="list-style-type: none"> - the totality of the known circumstances _____ - the nature and scope of the alleged conduct, including whether the reported behavior involves the use of a weapon; _____ - the respective ages and roles of the complainant and respondent; _____ - the risk posed to any individual or to the campus community by not proceeding, including the risk of additional violence; _____ - whether there have been other reports of other prohibited conduct or other misconduct by the respondent; _____
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Sample Checklists

Interim Measures Assessment Team (IMAT) Worksheet

Form completed by:
 Form completed on (date):
 IMAT convened on (date):
 IMAT members present/on phone:

Case Information

Name of Respondent:
 Prior contact with campus police?
 Prior contact with Student Conduct?
 Other prior concerns?

Allegation(s):

Has there been press/social media about this incident?¹

Safety:
 Was the incident isolated or part of a broader pattern?
 Did the incident involve a weapon?
 Did the incident involve force or violence?
 Did the incident involve drugging or over-serving Complainant?
 Is Respondent in a position of power or authority over Complainant?
 Does Respondent pose a threat of future harm to Complainant or others?
 Has the Respondent disregarded any prior campus or law enforcement directives?

Complainant's wishes regarding interim measures, if known:
 (Pull Complainant's class schedule / local address to assess overlap)

Respondent's wishes regarding interim measures, if known:
 (Pull Respondent's class schedule / local address to assess overlap)

¹ If so, inform Media & Communications about interim measures.

Remedial Interim Measures Implemented (*non-restrictive on Respondent*)

Remedial Measure	Implemented?
Offered C access to medical services/SAFE exam	
Offered C access to counseling	
Offered C access to academic support	
Offered C assistance with rescheduling exams/assignments	
Offered C referral to OALA for long-term academic accommodations	
Offered C class schedule changes, transfers or withdrawals	
Offered C change in work assignment or schedule	
Offered C change to campus housing	
Offered C assistance navigating off-campus housing concerns	
Offered C escort and other safety planning steps	
Offered C a No Contact Directive	
Offered C a referral to legal resources (protective order, visa, immigration concerns)	
Offered C a referral to resources to assist with financial aid	
Other	

Protective Interim Measures Implemented (*restrictions imposed on Respondent*)

Protective Measure	Implemented?
Changed or restricted R's class schedule ²	
Changed or restricted R's work schedule or job assignment ³	
Changed or restricted R's campus housing ⁴	
Restricted R's access to any area(s) of campus (dining hall, parking areas, etc.) ⁵	
Restricted R's ability to participate in Baylor activities ⁶	
Prohibited R from representing the university as a student leader, athlete, musician, or the like ⁷	
Interim campus restriction (can <i>only</i> be on campus to attend class)	
Interim suspension (no classes, no ability to be on campus) ⁸	

² Advise academic department, professors, Provost's office, Registrar of measure; R may need assistance navigating whether suspension qualifies for a refund and whether it should be counted as an Incomplete, Withdrawal, etc. Refer R as appropriate.

³ Advise R's supervisor. If R is a graduate student, contact Assistant Dean for Graduate Studies. If R is a student worker, contact the appropriate office. If R is a staff member, contact HR. If R is faculty, contact the Provost and the academic department. If R is employed by a vendor, contact that vendor's HR.

⁴ Contact residence life and campus police.

⁵ Contact appropriate authority and campus police.

⁶ Contact Student Life and the advisor for that activity.

⁷ Contact Student Life, residence life (if R lived on campus) and campus police.

⁸ Contact campus police, Student Life, residence life (if R lived on campus), academic department, professors, Provost's office, and Registrar.

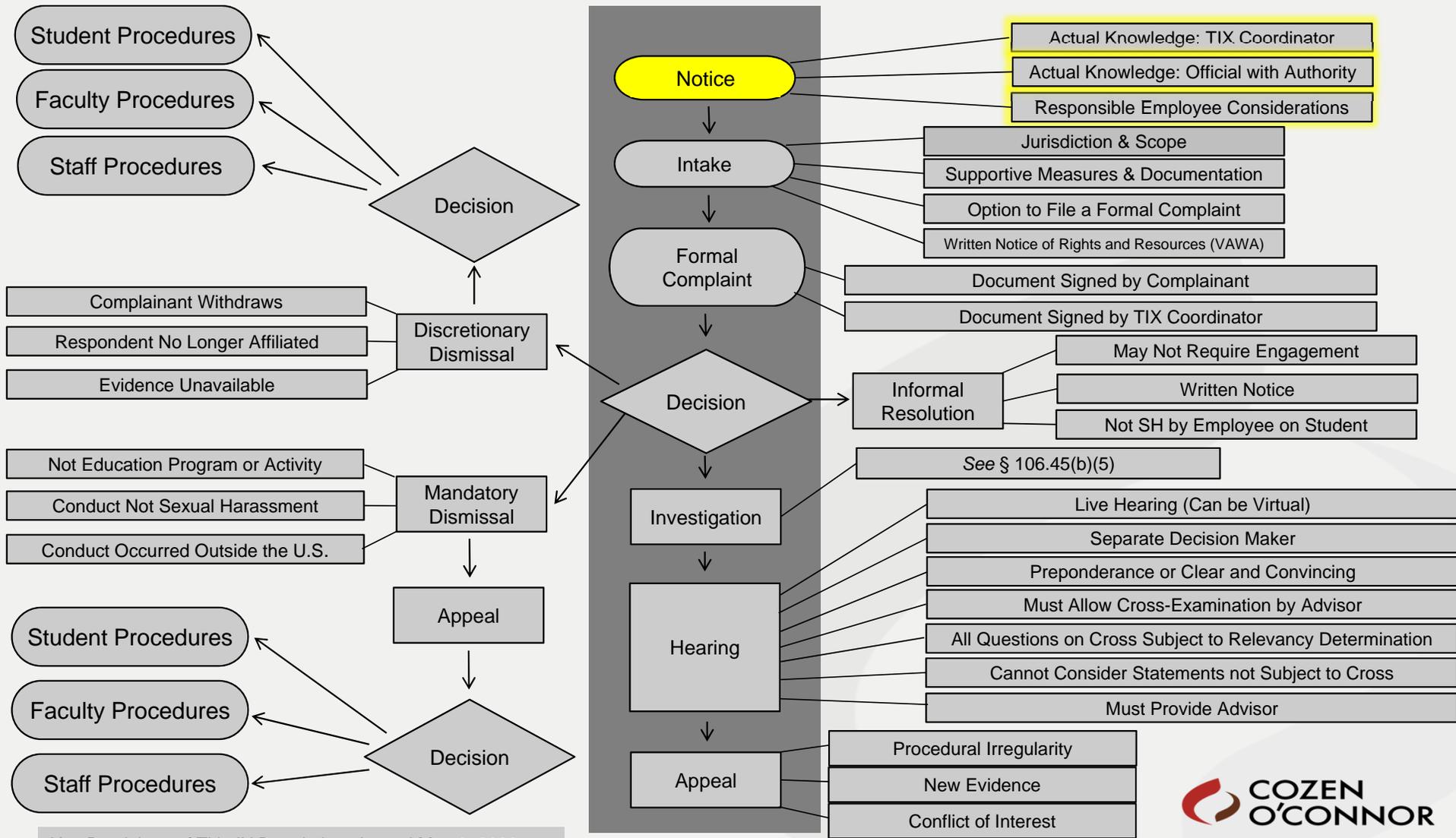
Tending to the Individual

- Tend to the individual through:
 - Implementing appropriate supportive measures and revisiting effectiveness of measures periodically
 - Practices and communications informed by an understanding of the impacts of trauma and the dynamics of sexual and gender-based harassment and violence
 - Routine and periodic communications
 - Ensuring appropriate support through an advocate, advisor, or support person
 - Adhering to time frames and communicating regarding delays

Communications

- Identify contact person for the parties to avoid the need to coordinate with multiple departments
- Ensure regular and timely communications re: next steps, expectations, timing and delays
- Check in!!
- Follow up in person meetings and telephone calls with written memory markers
- Use sensitive and informed tone and content
- Teach and use common and consistent language among team members

NOTICE

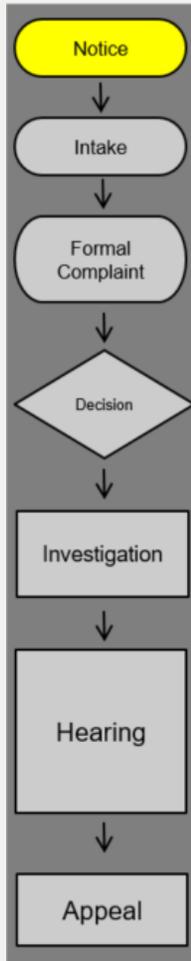


Key Provisions of Title IX Regulations issued May 6, 2020;

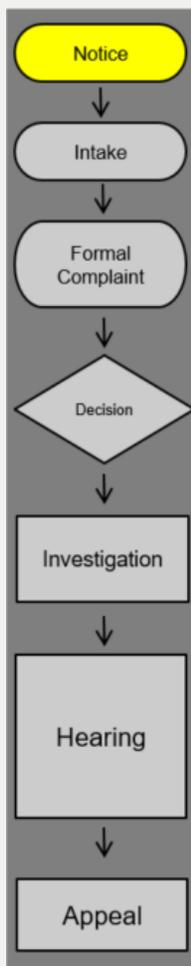


Notice

- 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



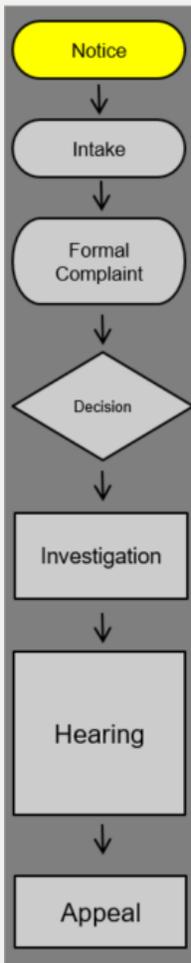
Title IX Regulations issued May 6, 2020; § 106.30(a)



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.

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

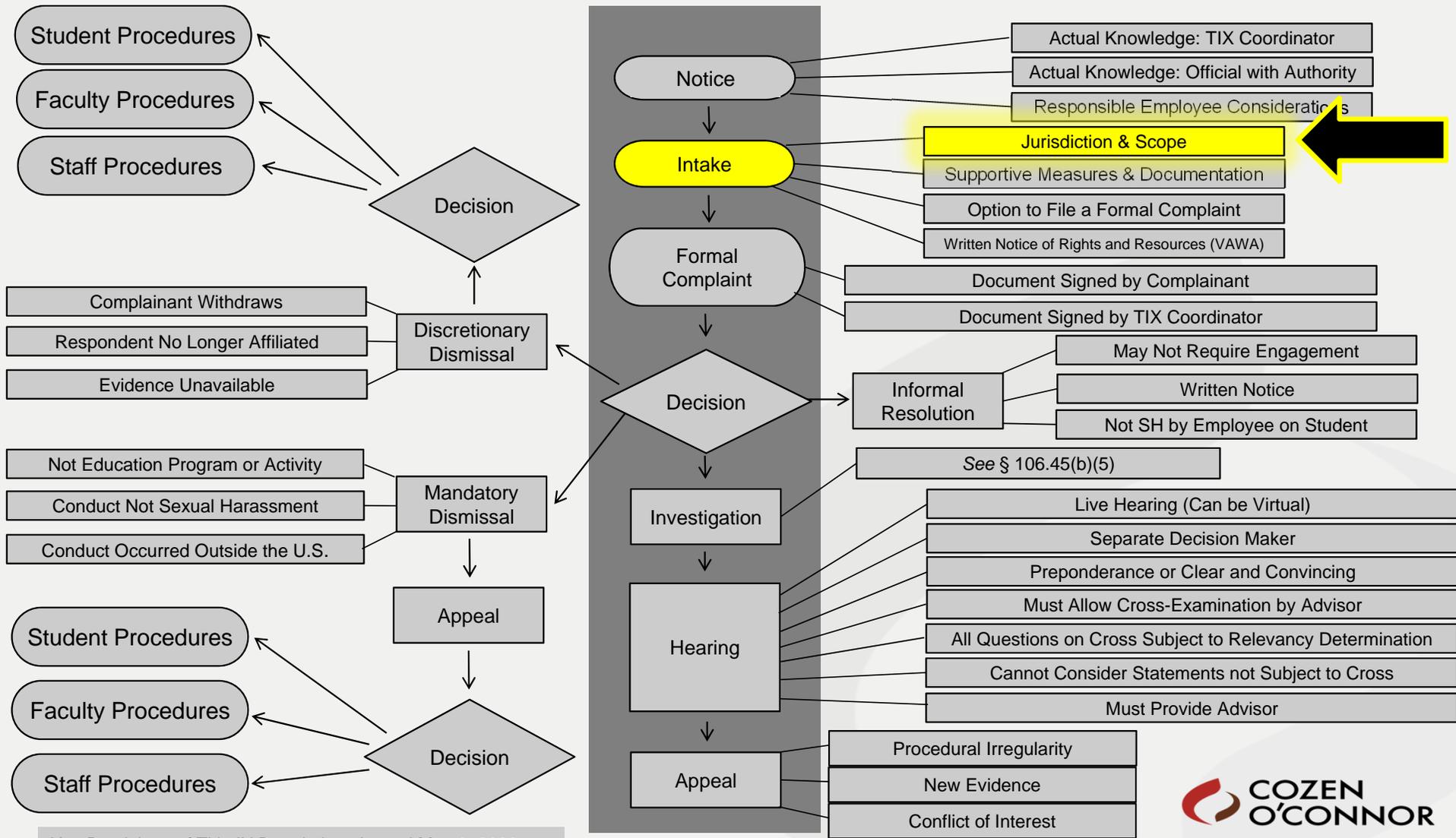
Practical Considerations & Challenges

- Who are your officials with authority to institute corrective measures?
 - Title IX Coordinator and Deputy Title IX Coordinators
 - Those who generally have authority to institute any corrective measures for anyone in the institution (supervisors, dean of students, HR administrators, etc.)
 - Those individuals that have particular authority over a program or activity of students (coach, etc.)
- Responsible employee considerations

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



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



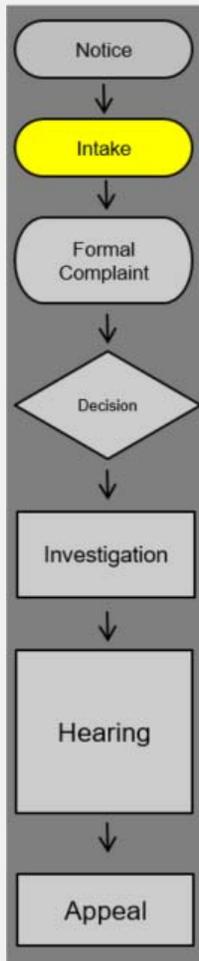
Jurisdiction: Framing Principle

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)

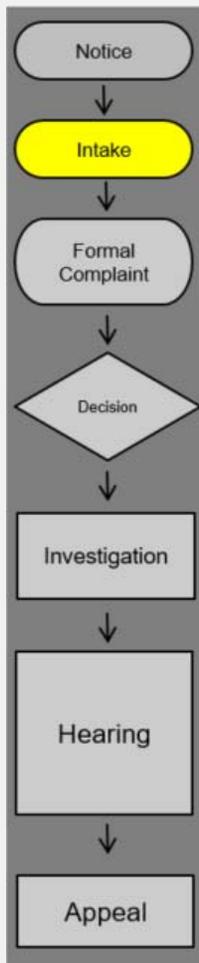
Jurisdiction: Who



- 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

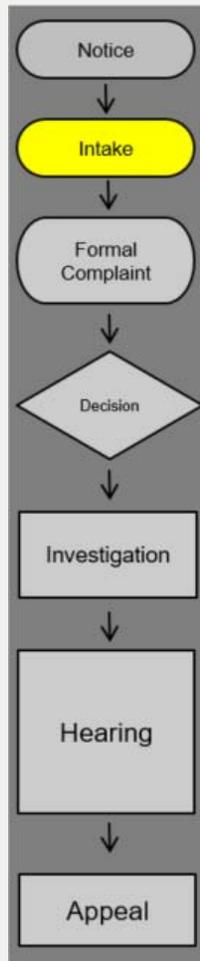


- Applies only to sex discrimination occurring **against a person in the United States** in an education program or activity
 - “The Department reiterates that the ‘education program or activity’ limitation in the final regulations
 - does not create or apply a geographic test
 - does not draw a line 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

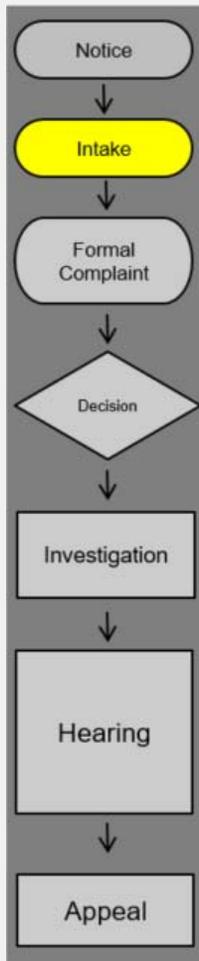
Jurisdiction: On Campus

- “[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

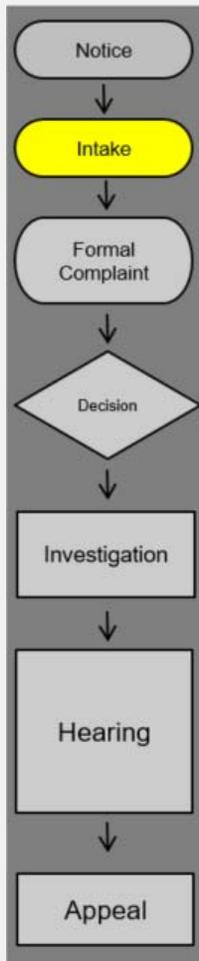
Jurisdiction: Off Campus



- “[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).”

Title IX Regulations issued May 6, 2020; Preamble at 624-5

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.**”

Title IX Regulations issued May 6, 2020; Preamble at 631

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

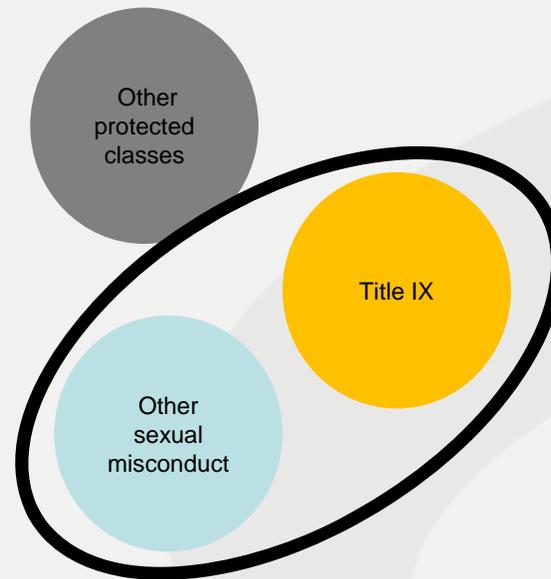
Title IX Regulations issued May 6, 2020; § 106.30(a)

Policy Framework Options

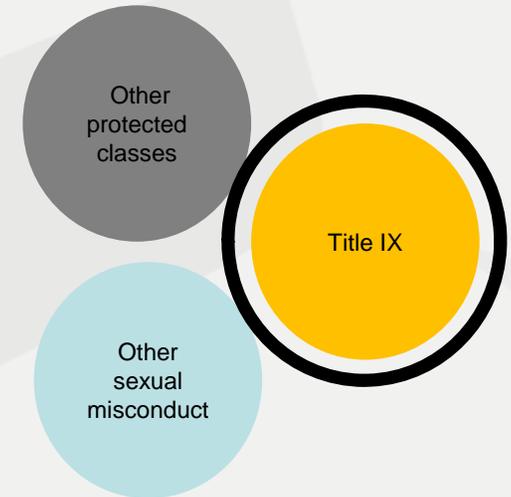
All Protected Classes



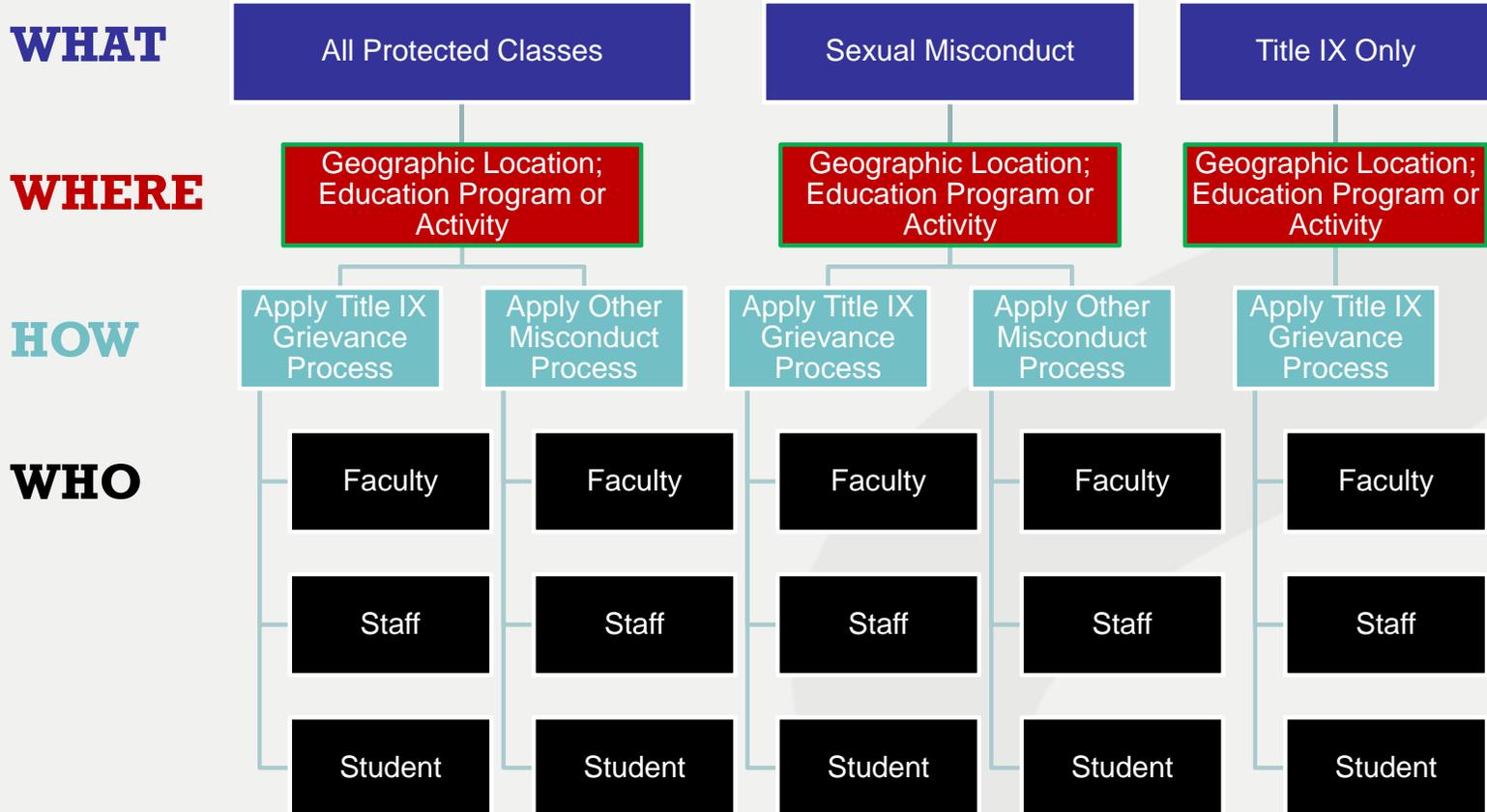
Sexual Misconduct



Title IX Only



Procedural Framework



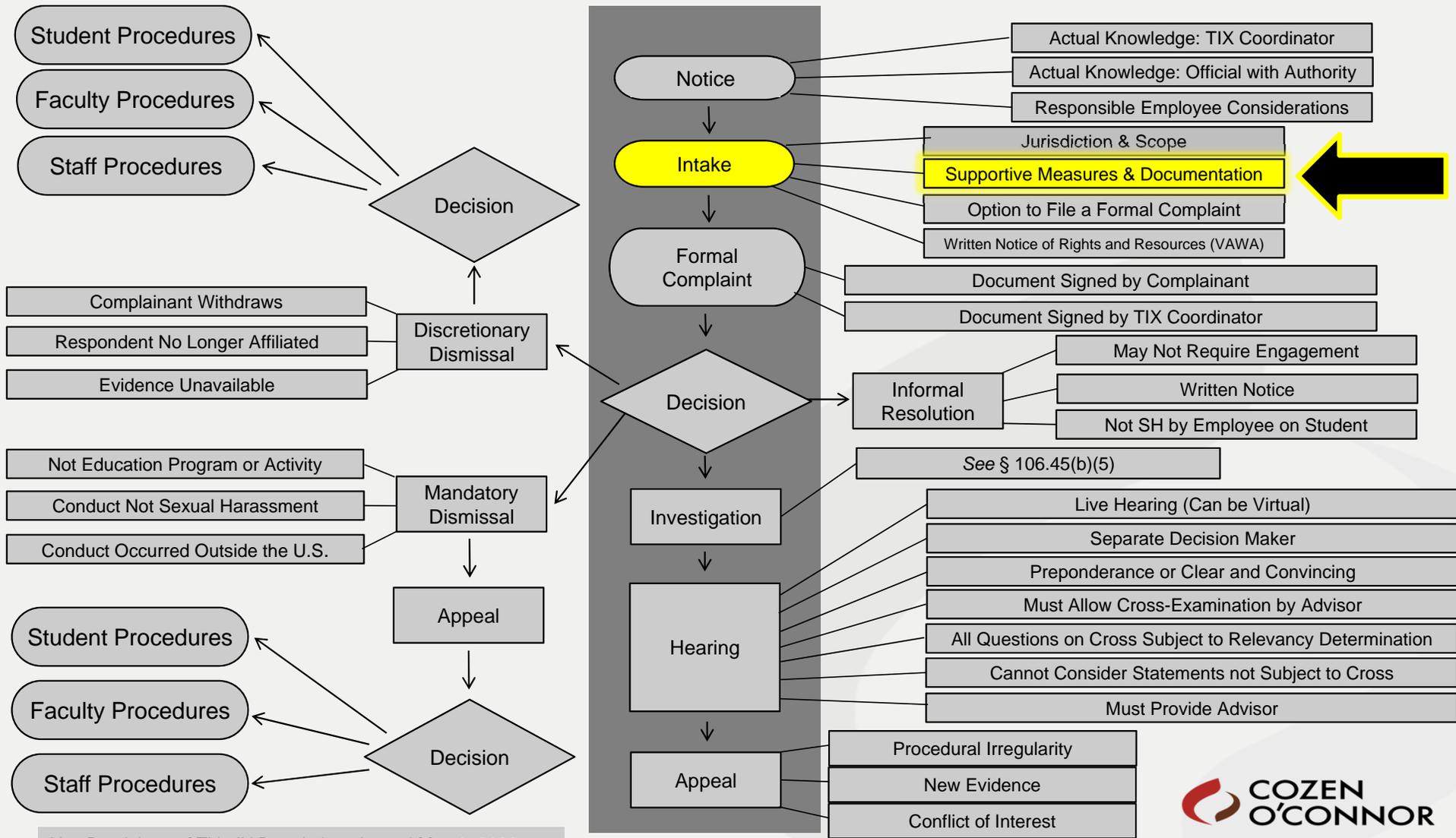
Practical Considerations & Challenges

- Building in jurisdiction questions into the initial assessment
- Communicating jurisdiction and scope to complainants
 - In-person meeting
 - Written follow-up
 - Use of flow chart or other visual aid
- Implications of mandatory and discretionary dismissal of formal complaints

Sample Jurisdiction Questions

- Based on reasonably available information at the time of intake, the Title IX Coordinator's inquiry will include assessing whether:
 - The reported conduct occurred within the University's Education Program or Activity, which requires:
 - The University to have substantial control over the Respondent; and
 - The University to have substantial control over the context in which the conduct is reported to have occurred; or
 - The conduct occurred in a building owned or controlled by a student organization that is officially recognized by the University
 - The reported conduct occurred in the United States; and,
 - The facts set forth by the report, if substantiated, would constitute a violation of Title IX Sexual Harassment as defined by the Title IX regulations.
- May also consider
 - The facts set forth by the report, if substantiated, would constitute a violation of Prohibited Conduct as defined by the policy.

SUPPORTIVE MEASURES



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

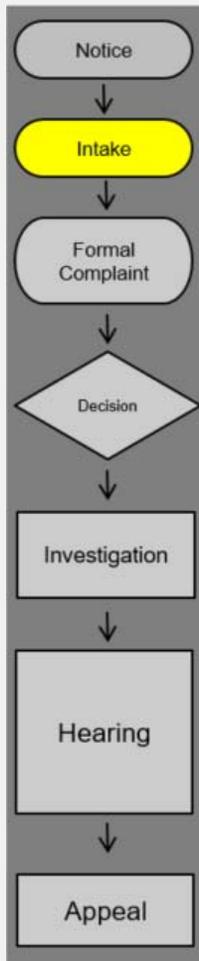


Framing Principles

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.”

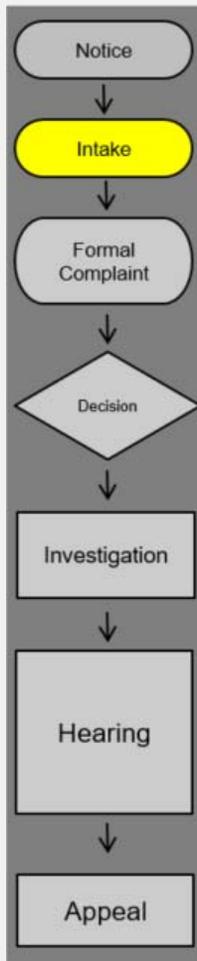
Offering Supportive Measures



- 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.

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

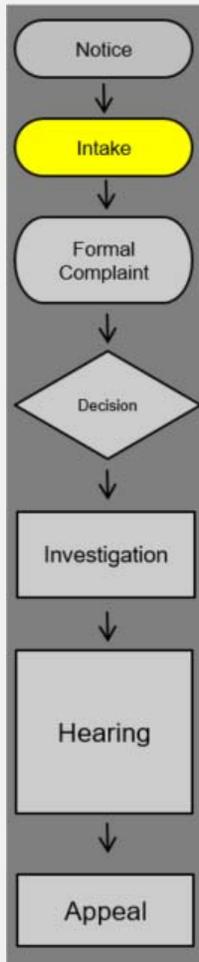
Supportive Measures



- 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)

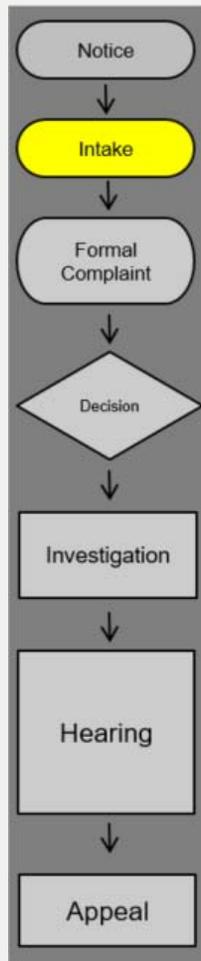
Supportive Measures



- 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)

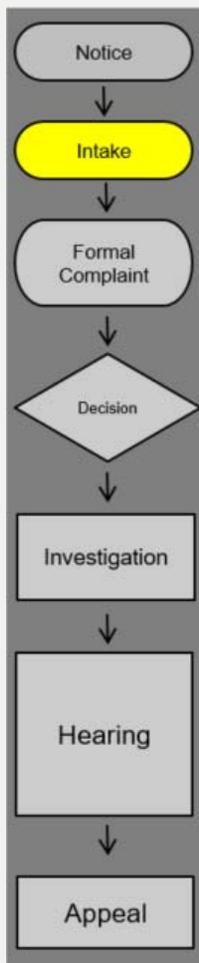
Supportive Measures



- 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)

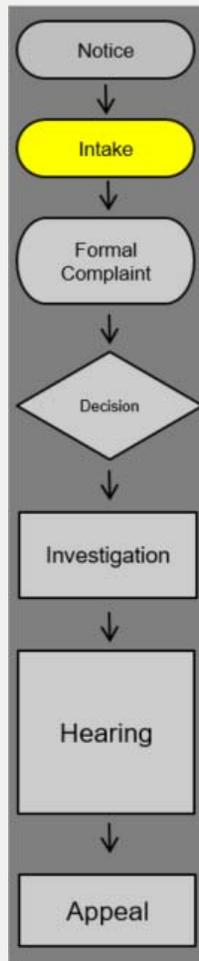
Supportive Measures



- The Department does not equate the trauma experienced by a sexual harassment victim with the experience of a person accused of sexual harassment.
- Nonetheless, the Department acknowledges that a grievance process may be difficult and stressful for both parties.
- Further, supportive measures may be offered to complainants and respondents . . . and §106.45(b)(5)(iv) requires recipients to provide both parties the same opportunity to select an advisor of the party's choice.
- These provisions recognize that the stress of participating in a grievance process affects both complainants and respondents and may necessitate support and assistance for both parties.”

Title IX Regulations May 19, 2020, Preamble, 85 F.R. 30103 footnote 477.

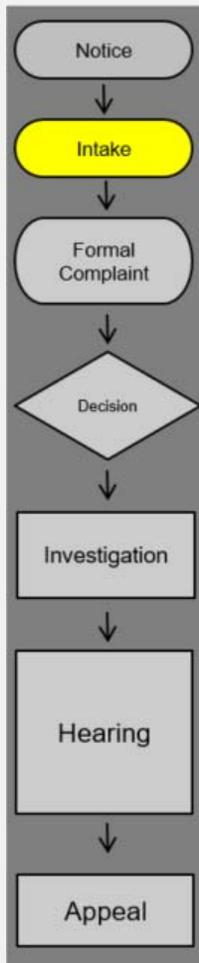
Supportive Measures



- “Whether an action **“unreasonably burdens”** a respondent is **fact-specific**, but should be evaluated in light of the **nature and purpose** of the benefits, opportunities, programs and activities, of the recipient in which the respondent is participating, and the **extent to which an action taken as a supportive measure would result in the respondent forgoing** benefits, opportunities, programs, or activities in which the respondent has been participating.”

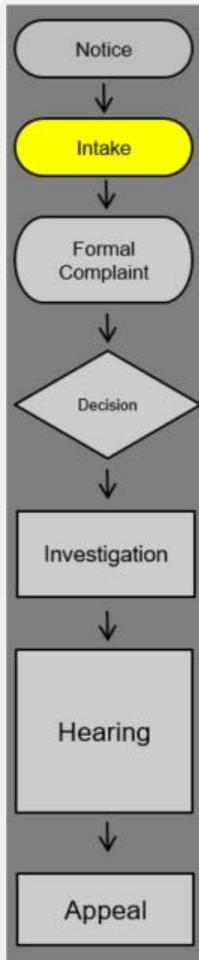
Title IX Regulations May 19, 2020, Preamble, 85 F.R. 30231.

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)

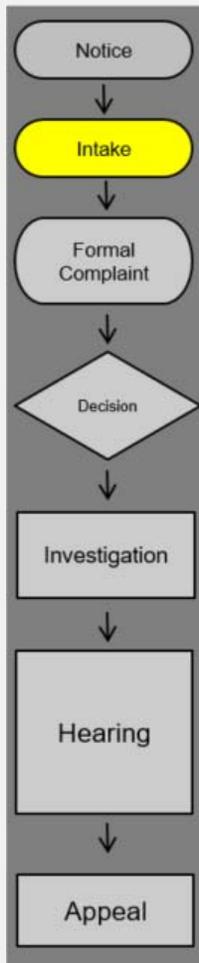


Emergency Removal for Students

- 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)

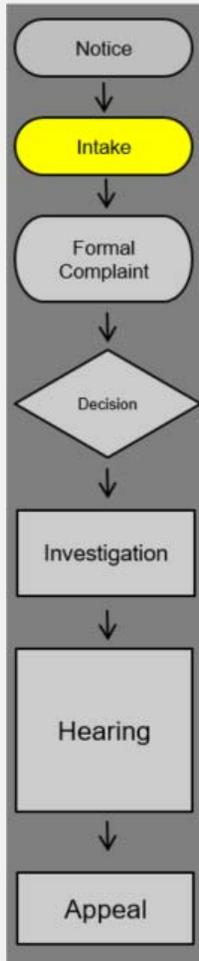
Emergency Removal



- 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

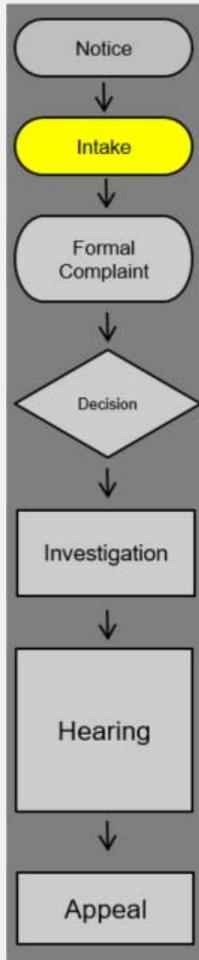
Emergency Removal



- “Supportive measures are intended to address restoration and preservation of equal educational access, while § 106.44(c) is **intended to apply to genuine emergencies that justify essentially punishing a respondent** (by separating the respondent from educational opportunities and benefits) arising out of sexual harassment allegations **without having fairly, reliably determined whether the respondent is responsible** for the alleged sexual harassment.”

Title IX Regulations May 19, 2020, Preamble, 85 F.R. 30225.

Emergency Removal



- “We appreciate the opportunity to clarify that, where the standards for emergency removal are met under § 106.44(c), the recipient has discretion whether to remove the respondent from *all the recipient’s education programs and activities, or to narrow the removal to certain classes, teams, clubs, organizations, or activities.*”

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

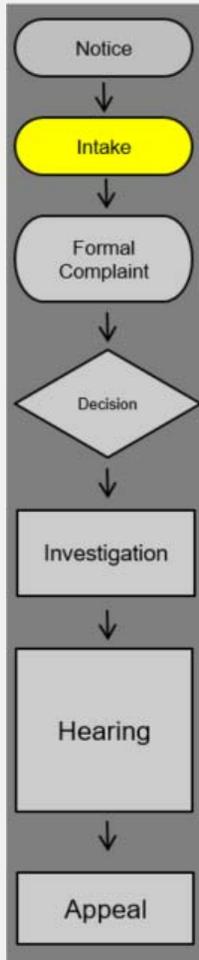
Emergency Removal



- “The Department **declines to put any temporal limitation** on the length of a valid emergency removal, although nothing in the final regulations precludes a recipient from **periodically assessing** whether an immediate threat to physical health or safety is ongoing or has dissipated.”

Title IX Regulations May 19, 2020, Preamble, 85 F.R. 30230.

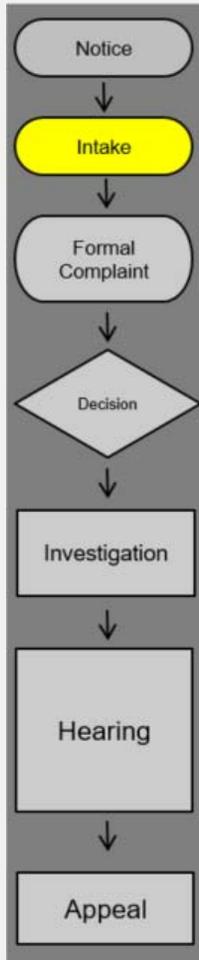
Emergency Removal



- “We acknowledge that a recipient could remove a respondent under § 106.44(c) without a formal complaint having triggered the § 106.45 grievance process; in such situations, the requirements in § 106.44(c) giving the respondent notice and opportunity to be heard post-removal suffice to protect a respondent from a removal without a fair process for challenging that outcome, and the Department **does not believe it is necessary to require periodic review** of the removal decision.”

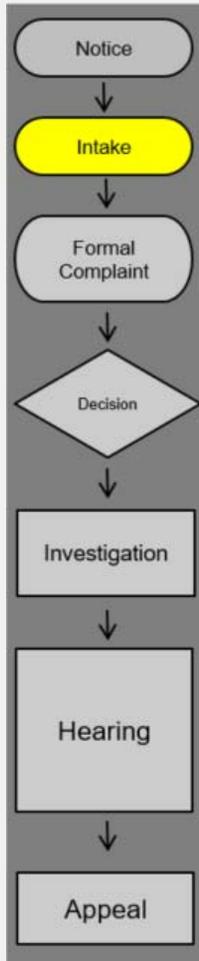
Title IX Regulations May 19, 2020, Preamble, 85 F.R 30226.

Emergency Removal



- “Emergency removal under § 106.44(c) is not a substitute for reaching a determination as to a respondent’s responsibility for the sexual harassment allegations; rather, emergency removal is for the purpose of addressing imminent threats posed to any person’s physical health or safety, which might arise out of the sexual harassment allegations.”

Administrative Leave



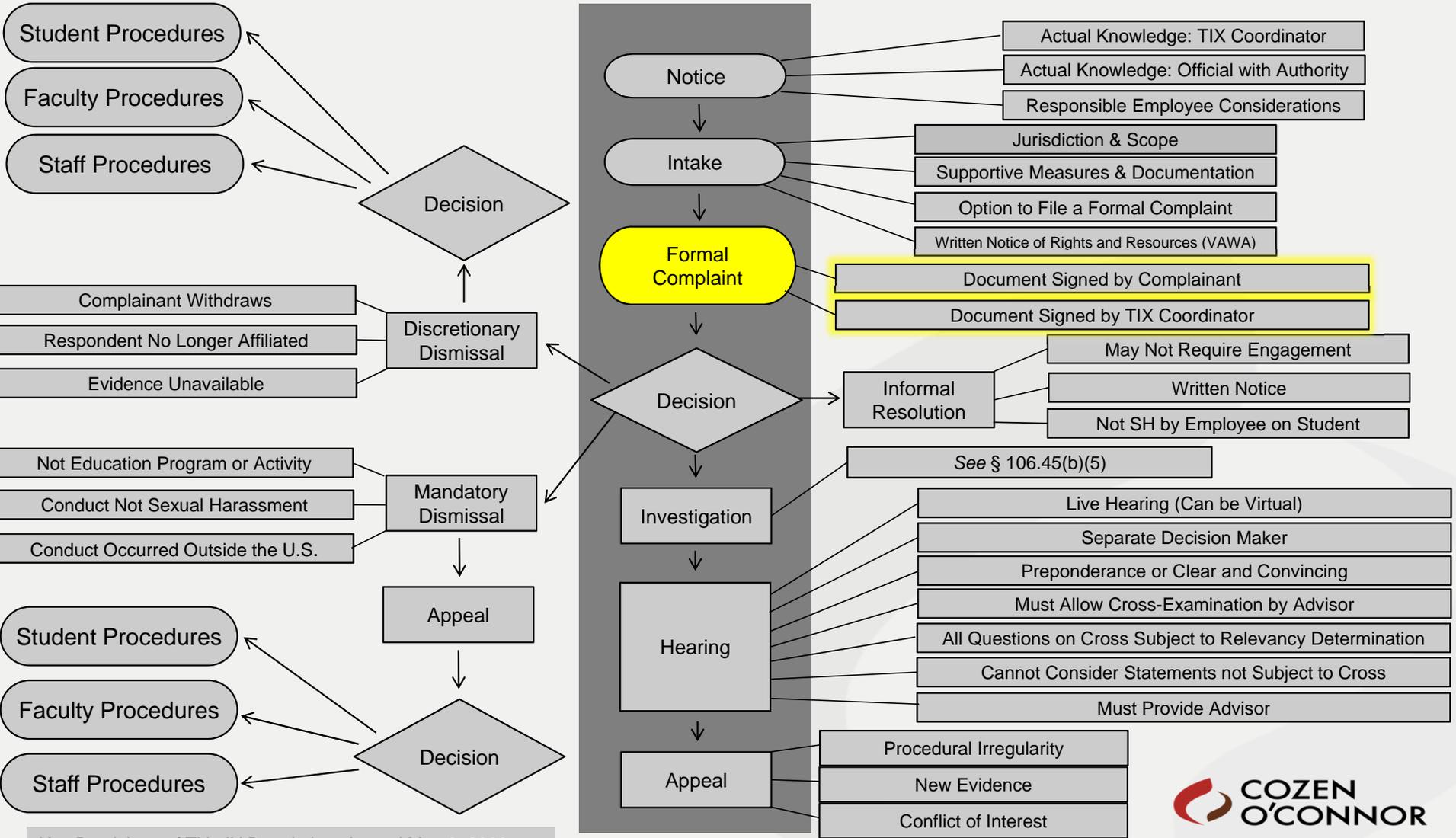
- Nothing in this subpart precludes a recipient from placing a non-student employee respondent on administrative leave during the pendency of a grievance process that complies with § 106.45.
- This provision may not be construed to modify any rights under Section 504 of the Rehabilitation Act of 1973 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?
- Understanding core concepts
 - “Appropriate, as reasonably available”
 - “Protect safety or deter sexual harassment”
 - “Not unreasonably burden the other party”
- Do you need a heightened process for imposing more restrictive measures
- What supportive measures do you have to offer to a non-student/non-employee?

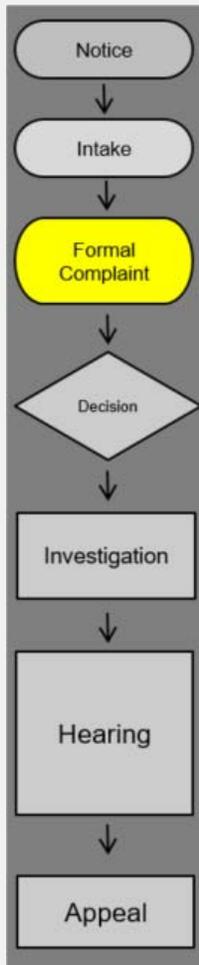
FORMAL COMPLAINTS



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



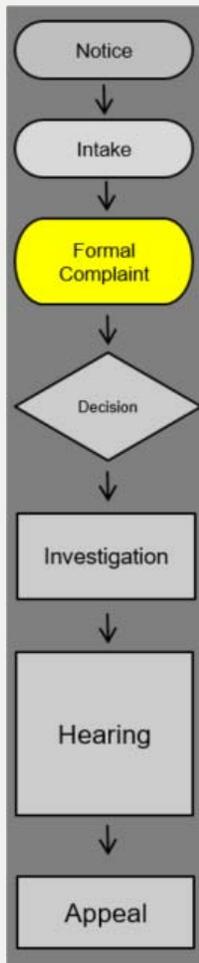
Formal Complaint



- 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)

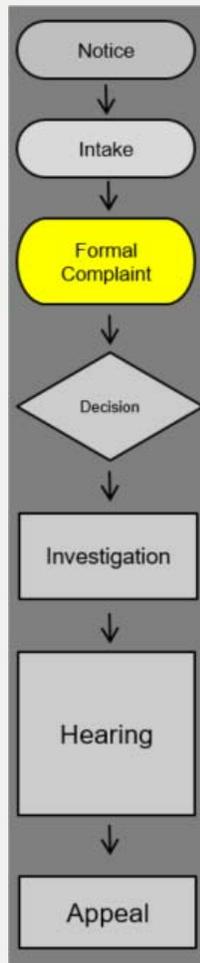
Formal Complaint: Program or Activity



- 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

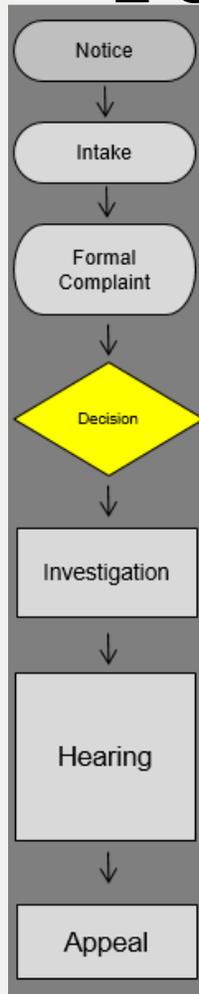


Upon receipt of a **formal complaint**, the institution:

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)

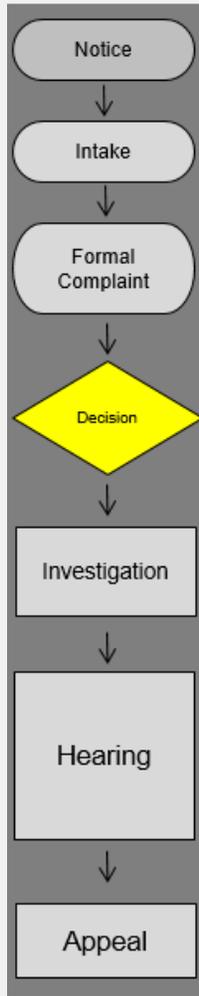
Formal Complaint: Required Dismissal



- **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

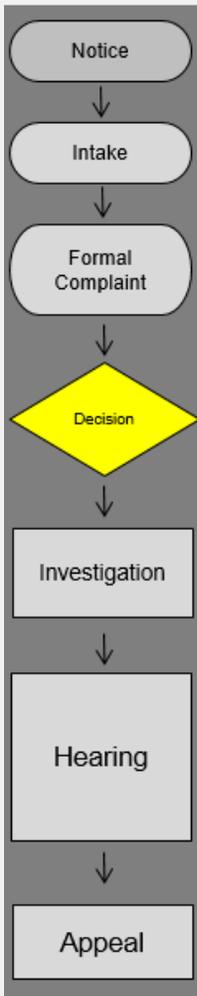
Title IX Regulations issued May 6, 2020; § 106.45(b)(3)

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

- Do you expand the concept of formal complaint to non-Title IX sexual misconduct?
- How to remove the barrier of the formal complaint
- Can the Title IX Coordinator file a formal complaint on behalf of a non-student, non-employee who is not seeking to participate in the educational program or activity?

Obligation to Third Parties

- “Like the ‘no person’ language in the Title IX statute, the final regulations **place no restriction on the identity of a complainant** (§106.30 defines complainant to mean “an individual who is alleged to be the victim of conduct that could constitute sexual harassment”), **obligating a recipient to respond to such a complainant regardless of the complainant’s relationship to the recipient.**”

Title IX Regulations May 19, 2020, Preamble, 85 F.R. 30197-30198.

Obligations to Third Parties

- “These final regulations require a recipient to respond to sexual harassment whenever the recipient has notice of sexual harassment that occurred in the recipient’s own education program or activity, **regardless of whether the complainant or respondent is an enrolled student or an employee of the recipient.**”
- The manner in which a recipient must, or may, respond to the sexual harassment incident **may differ based on whether the complainant or respondent are students, or employees, of the recipient.**

Title IX Regulations May 19, 2020, Preamble, 85 F.R. 30488.

Obligations to Third Parties

- “We have, however, revised the § 106.30 definition of formal complaint to state that at the time of filing a formal complaint, the **complainant must be participating in or attempting to participate in the recipient’s education program or activity.**”
- “This ensures that a recipient is **not required to expend resources** investigating allegations in circumstances where the complainant has no affiliation with the recipient, yet refrains from imposing a time limit on a complainant’s decision to file a formal complaint.”

Title IX Regulations May 19, 2020, Preamble, 85 F.R. 30220.

Obligations to Third Parties

- “The Department believes these provisions help address commenters’ concerns about being forced to expend resources **investigating situations where one or both parties have no affiliation with the recipient**, without arbitrarily or unreasonably imposing a deadline on complainants, in recognition that complainants sometimes do not report or desire to pursue a formal process in the immediate aftermath of a sexual harassment incident.”

Title IX Regulations May 19, 2020, Preamble, 85 F.R. 30220.

When Might a Title IX Coordinator File a Formal Complaint

- Complainant's identity is unknown
- Serial sexual predator
- Multiple reports against the same respondent but no complainant wishes to file a complaint
- Respondent is not affiliated with the institution but commits sexual harassment in the recipient's education program or activity

Title IX Regulations May 19, 2020, Preamble, 85 F.R. 30133; 30131;
30210; 30488

Traditional OCR Approach

When weighing a student's request for confidentiality that could preclude a **meaningful** investigation or potential discipline of the respondent, a school should consider a range of factors:

-
- Seriousness
 - Pattern or other harassment complaints
 - Respective ages of the parties
 - The alleged harasser's rights to receive information about the allegations if the information is maintained by the school as an "education record" under FERPA
 - Weapon
 - Threats to repeat
 - One or more prior sexual assaults committed by respondent
 - Pattern of perpetration (e.g., via illicit use of drugs or alcohol, at a given location, or by a particular group)
 - History of arrests or records indicating a history of violence
 - Multiple respondents
 - Whether the school possesses other means to obtain relevant evidence (e.g., security cameras or personnel, physical evidence)

Effective Practices

- Develop criteria that assess risk factors
- Communicate criteria clearly in policy, resources and online content
- Document information considered
- Document rationale for decision-making

Practical Considerations & Challenges

- Impacts of mandatory and discretionary dismissal
- Checkpoints in process for evaluating dismissal
 - Implications where processes are different
 - Implications where processes are the same
- Appeal from dismissal
- Written notice of how institution will proceed at the conclusion of initial assessment

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.

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SCENARIOS

Scenario # 1

An RA was doing rounds and passed by one of their resident's whiteboards outside their room. They noticed that someone wrote, "You're a B----" on the whiteboard in permanent marker. When the RA asked the resident about it, they said, "Oh, that was my ex. It's whatever."

- ✘ Sexual Harassment (as defined by the regulation)
- ✓ Directed against a person in the U.S.
- ✓ Within the education program or activity

Scenario # 2

A student reports that a professor routinely gives lower grades to men based on gender. The reporting student says she has been the professor's TA for the last 2 years and cannot be silent anymore.

- ✗ Sexual Harassment (as defined by the regulation)
- ✓ Directed against a person in the U.S.
- ✓ Within the education program or activity

Scenario # 3

At a university soccer game, a number of soccer players smacked one another's buttocks when running on and off the field.

- ✗ Sexual Harassment (as defined by the regulation)
- ✓ Directed against a person in the U.S.
- ✓ Within the education program or activity

Scenario # 4

Zoe and Rachel are both PhD students and are married. They live off-campus in a private apartment. Zoe report that, sometimes when Rachel gets drunk, she hits Zoe. Zoe says it has only ever happened at their apartment.

- ✓ Sexual Harassment (as defined by the regulation)
- ✓ Directed against a person in the U.S.
- ✗ Within the education program or activity

Scenario # 5

A student, Nikole, works out at the café on campus. It is open to the public. Simon is a local who often patronizes the café. Simon has made it clear that he has a crush on Nikole. Somehow, Simon got Nikole's phone number and has been sending her incessant text messages. Simon also pieced together Nikole's schedule and has started to show up outside of buildings when she's leaving class. One time, she even saw him waiting for her outside her dorm. She has asked him to leave her alone, but he won't stop texting and showing up.

- ✓ Sexual Harassment (as defined by the regulation)
- ✓ Directed against a person in the U.S.
- ✗ Within the education program or activity

Scenario # 6

Garrett and Stefan are both undergrad students at your school and are part of the same study abroad program in Madrid. Not only does your school sponsor the study-abroad program and provide all the faculty for it, but the Madrid campus is actually wholly owned and operated by your school. One night in Madrid, in their on-campus dorm room, Stefan sexually assaulted Garrett.

- ✓ Sexual Harassment (as defined by the regulation)
- ✗ Directed against a person in the U.S.
- ✓ Within the education program or activity

Scenario # 7

A former faculty member, Jill, reported that, during her time at your institution three years ago, she was subjected to repeated unwelcome hugs and flirtatious comments from Rob—a fellow faculty member who still works at your school. Jill has no current affiliation with your institution. For the last three years, she has worked at another school.

- ✓ Sexual Harassment (as defined by the regulation)
- ✓ Directed against a person in the U.S.
- ✓ Within the education program or activity

BUT... at the time of making the formal complaint, Jill is not participating in or attempting to participate in the education program or activity of your school.

Scenario # 8

An employee, Alan, reported that his supervisor, Elyse, openly and graphically discussed her sex life in the workplace including showing explicit photos and videos from dating websites and expressed a preference for men of a particular race. Alan said that, when discussing online dating, Elyse once commented that she “swipes left” on men of Alan’s race because she “doesn’t trust” them. Alan said he felt targeted by Elyse based on his race and sex. Things came to a head recently when Elyse wrote Alan up for lateness. Alan is the only person of his race in the department. Alan said that even though everyone runs late, he was the only one Elyse reprimanded.

- ✓ Sexual Harassment (as defined by the regulation)
- ✓ Directed against a person in the U.S.
- ✓ Within the education program or activity

BUT... the report involves Title IX *and* non-Title IX conduct