



LOS ANGELES COMMUNITY COLLEGE DISTRICT TITLE IX TRAINING

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FACULTY



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OVERVIEW OF TITLE IX

- Text of the Law
- The IX Commandments
- The Process
- 1P2P

TITLE IX

20 U.S.C. § 1681 & 34 C.F.R. PART 106 (1972)



“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving federal financial assistance.”



THE IX COMMANDMENTS

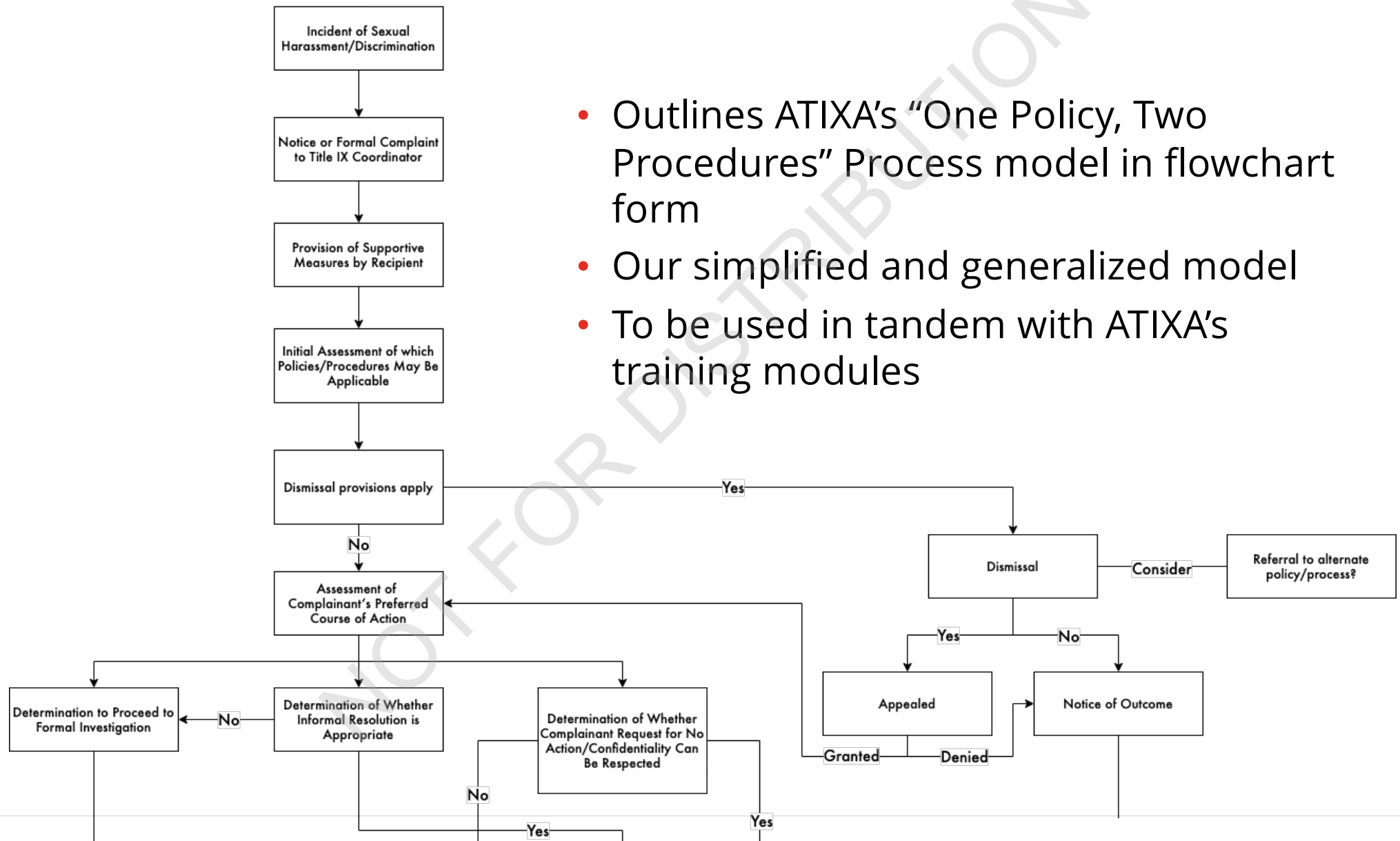


Thorough	Reliable	Impartial	Investigation (+prompt & fair – VAWA Sec. 304)
Prompt	Effective	Equitable	Process
Not act unreasonably to stop discrimination	Not act unreasonabl y to prevent recurrence	Act equitably to remedy effects	Remedies

THE PROCESS

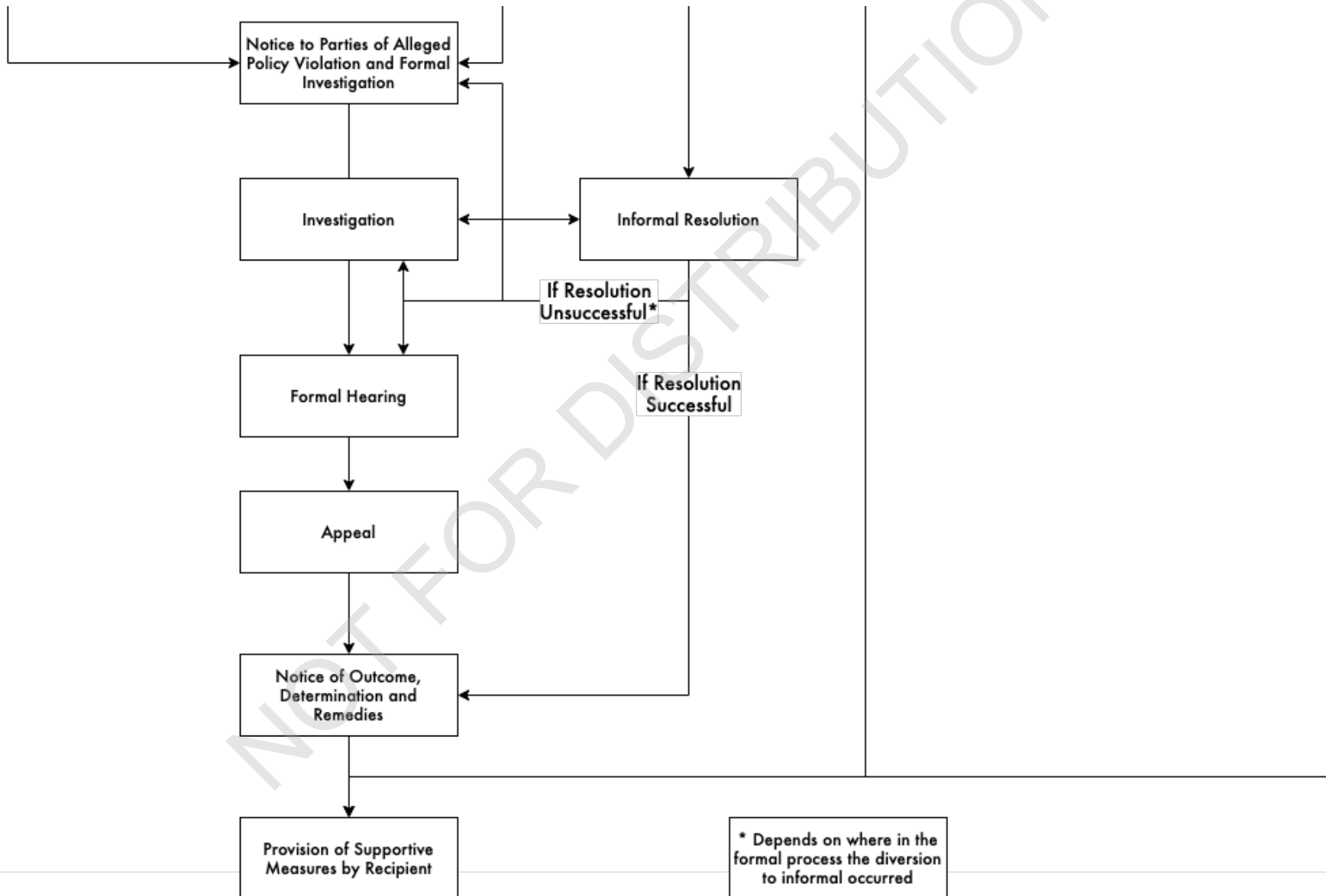


ONE POLICY, TWO PROCEDURES (1P2P) FLOWCHART (PART ONE)



- Outlines ATIXA's "One Policy, Two Procedures" Process model in flowchart form
- Our simplified and generalized model
- To be used in tandem with ATIXA's training modules

ONE POLICY, TWO PROCEDURES (1P2P) FLOWCHART (PART TWO)



REGULATORY CHANGES

- Grievance Procedures
- Jurisdiction
- Notice to Institution / Notice to Parties
- Definition of Sexual Harassment
- Supportive Measures
- Formal Investigation and Hearing
- Due Process Elements

2020 OCR TITLE IX REGULATIONS



- Effective and enforceable August 14th, 2020
 - Amend the Code of Federal Regs. and have force and effect of law
 - Some provisions already mandated by due process case law in some jurisdictions
 - Intervening variables (litigation and election) may impact enforcement in the shorter or longer term
 - Lawsuits against regs anticipated from:
 - SSAIS, ACLU, NWLC, etc.
- Regulations are significant, legalistic, surprisingly prescriptive, very due-process heavy, and go well beyond what any court has required under 5th/14th Amendment case law.

COMMITMENT BEYOND COMPLIANCE



- Industry standards = the floor
- Best practices = the ceiling
- Statutes, case law and federal regulations set the floor
- Some states have laws that exceed federal requirements and do not conflict with 2020 Regs. Where they do conflict, regulations control.
- Aiming for the floor = doing the bare minimum
 - Will continue the cycle of inequity and unfairness; activists won't stand for it
- Civil rights issues demand more than the bare minimum
- Effect of new “not deliberately indifferent” OCR standard is to institutionalize deference, rather than encourage excellence

SHIFTING TERMINOLOGY



- You = Recipient
- Various titles = Title IX Coordinator
- Reporting Party = Complainant
- Responding Party = Respondent
- Resolution = Grievance Process
- ATIXA model policy offenses NCSL/NCSI = sexual assault
- Intimate Partner Violence = Dating and domestic violence

OCR definitions of these offenses must be adopted:

- OCR definition of Sexual Harassment, Clery Act definition of sexual assault, and VAWA definitions of domestic/dating violence and stalking.
- How will recipients exceed the floor OCR is setting with these terms/definitions?

GRIEVANCE PROCEDURES



- Must include:
 - Presumption that responding party is not responsible until determination is reached
 - “Reasonably prompt” timeframes
 - Requirement to set specific timelines for major stages of the grievance process now gone
 - Range of possible sanctions and remedies (mirrors Clery Act mandate)
 - Description of standard of evidence
 - Bases and procedures for appeal
 - Appeal now required, equitably, on three grounds
 - Range of supportive measures available to all parties
 - Note shift from “interim measures” terminology

PROMPTNESS



- Reasonably prompt timeframes for the conclusion of the grievance process, including reasonably prompt timeframes for filing and resolving appeals
- Concurrent law enforcement investigation does **not** relieve the burden of the school to investigate
- Temporary delays for “good cause” and with written notice of the delay to parties
 - Complexity of the investigation
 - Concurrent law enforcement investigation with time-dependent release of evidence
 - Delays for administrative needs are insufficient

NEUTRALITY, CONFLICT OF INTEREST, OBJECTIVITY



- Grievance process must treat parties “equitably”
 - Must be designed to restore or preserve access to education programs
 - Must include enhanced due process protections before disciplinary sanctions are imposed
- Prohibits conflict-of-interest or bias with coordinators, investigators, and decision-makers against parties generally or against an individual party
- All relevant evidence obtained must be **objectively** evaluated
- Mandates training on appropriate investigation, hearing, evidence, credibility, bias, conflict of interest

JURISDICTIONAL ISSUES



- Emphasizes the *Davis* standard
 - Control over the harasser and the context of the harassment
 - “education program or activity” means...
 - locations, events, or circumstances under substantial control
 - any building owned or controlled by an officially recognized student organization
- Regulations specify “harassment...against a person in the United States”
 - Off-campus conduct, study abroad programs, or school-sponsored international trips – “nothing in these final regulations would prevent...”

JURISDICTIONAL ISSUES



- The definition of sexual harassment arguably covers the in-program effects of out-of-program misconduct (though not the misconduct itself)
- 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
 - OCR adopts in the discussion a fairly broad definition of what could constitute attempting to participate

- Distinct procedural steps - **actual knowledge** and **formal complaint**
 - Actual knowledge = notice of sexual harassment [or allegations] to the TIXC
 - Formal complaint = document filed by a complainant or signed by TIXC alleging sexual harassment against a respondent and requesting investigation
 - TIXC is not party when signing formal complaint
- Constructive notice/respondent superior – insufficient under TIX, but can be acted upon discretionarily by a recipient
- **Actual knowledge** triggers the obligation to offer supportive measures, explain grievance process
- **Formal complaint** triggers the obligation to investigate
- Multiple reports mandate for TIXC to file complaint – provision removed from final regs

“APPROPRIATE SCHOOL OFFICIALS”



- Shift in “Responsible Employee” designations.
- Previous definition
 - Who has the authority to take action to redress the harassment; or
 - Who has the duty to report harassment or other types of misconduct to appropriate officials; or
 - A student could reasonably believe has this authority or responsibility
- New definition
 - Title IX Coordinator
 - Any official of the recipient who has authority to institute corrective measures on behalf of the recipient
 - Any employee of an elementary and secondary school

“APPROPRIATE SCHOOL OFFICIALS”



- Change tracks the *Davis* standard for actual notice
- Therefore, a report must go to Title IX Coordinator or any official who has the authority to institute corrective measures
 - Most faculty in higher education **do not** have sufficient authority
 - Knowledge by employee who is harasser does not constitute actual knowledge by employer/recipient
- Restricts OCR enforcement mandate for responsible employees, but IHEs have discretion to keep current policies or define a broader mandated reporter requirement

“DELIBERATE INDIFFERENCE” STANDARD



- A recipient with **actual knowledge** of sexual harassment in an education program or activity of a recipient in the United States must respond in a manner that is **not deliberately indifferent**

“NOT DELIBERATELY INDIFFERENT”



- Mandatory steps upon notice (§ 106.44)
 - Promptly contact the complainant to discuss the availability of supportive measures
 - With or without filing formal complaint, inform complainant of supportive measures and respect complainant’s wishes
 - Explain to the complainant the process for filing a formal complaint
- Mandatory steps upon formal complaint (§ 106.45)
 - Follow detailed grievance process requirements
 - Offer informal resolution options
 - Dismiss complaint if no jurisdiction or no *prima facie* sexual harassment allegation

DEFINITION OF SEXUAL HARASSMENT



- Sexual Harassment is conduct on the basis of sex meeting one of the following conditions:
 - An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;
 - 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; or
 - "Sexual assault" as defined in 20 U.S.C. 1092(f)(6)(A)(v), "dating violence" as defined in 34 U.S.C. 12291(a)(10), "domestic violence" as defined in 34 U.S.C. 12291(a)(8), or "stalking" as defined in 34 U.S.C. 12291(a)(30).

SUPPORTIVE MEASURES



- Previously referred to by OCR as “interim measures”
- Non-disciplinary, non-punitive individualized services for all parties
- Must not unreasonably burden the parties, must protect the safety of all parties and educational environment, must deter harassment
- Must be offered to complainant upon notice of sexual harassment
- Must be available before, after, or in lieu of formal complaint
- 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 campus, etc.

EMERGENCY REMOVAL



- May remove a responding party from a recipient's education program or activity on an emergency basis, provided that the school:
 - Undertakes an individualized safety and risk analysis,
 - Determines that an immediate threat to the *physical* health or safety of students or employees justifies removal, and
 - Provides the responding party with notice and an opportunity to challenge the decision immediately following the removal
- May place a non-student employee responding party on administrative leave during the pendency of an investigation under current procedures for doing so

NOTICE TO PARTIES



- Upon receipt of formal complaint, must provide written notice to the parties:
 - Relevant grievance procedures
 - Allegations with sufficient details: identity of parties, implicated policies, date, location if known
 - Statement that responding party is presumed not responsible
 - Parties may request to inspect and review relevant evidence
 - Sufficient time to prepare a response
- Ongoing notice
 - Any reasonable delay for good cause
 - Any additional allegations
 - All hearings, interviews, and meetings requiring attendance with sufficient time to prepare

ADVISOR OF CHOICE



- Advisor can be anyone – no restrictions in proposed regulations (though the advisor has a choice in the matter)
- Must allow advisor to be present at all meetings, interviews, hearings
 - May not restrict who may serve as advisor
 - May restrict advisor participation as long as applied equally to all parties
- If a party does not have an advisor to conduct cross-examination at hearing, the IHE must provide one
 - No fee or charge
 - Advisor of recipient's choice
 - May be an attorney
 - Can't be "fired" by party, but can be nullified by non-cooperation

BURDEN OF PROOF ON SCHOOL TO GATHER EVIDENCE



- Procedures should clearly articulate that the burden of proof and burden of gathering evidence rests with the school, not the parties
 - So it's not required that a respondent prove welcomeness or consent, the recipient must prove unwelcomeness or non-consent
- “Sufficient to reach a determination”
- Equal opportunity to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence
- Evidence collected by law enforcement *or any other source*
- Contracted/outsources investigators do not absolve the school of responsibility for this provision

PARTY ACCESS TO EVIDENCE/REPORT



- Regulations mandate creation of an investigation report
 - Report fairly summarizes all relevant evidence
 - What should go into a report? See our recent [blog](#) on this topic.
- Prior to the completion of the report, all evidence related to allegations must be provided to parties
 - Parties must have at least 10 days to review and submit written responses prior to finalizing investigation report
 - Parties must receive finalized report to review and submit written responses 10 days prior to hearing
 - Essential to develop a clear protocol and workflow for these steps

LIVE HEARING/QUESTIONING



- Mandated live hearing for higher education
- Parties and witnesses must attend hearing and submit to live, advisor-led cross-examination
 - Otherwise **all statements** submitted by absent party must be excluded
- Hearing administrator may not be Title IX Coordinator, the investigator, or the appeals officer
- Provisions for separate rooms, video-based hearing
 - Must be able to clearly hear and see other parties

LIVE HEARING/QUESTIONING



- **Must allow live cross-examination** to be conducted exclusively by each party's advisor
 - Verbal, direct, in real time
- Each party must be permitted to ask the other party and all witnesses all relevant questions and follow-up questions
 - Including questions challenging credibility
- Each question must be cleared by hearing administrator after being posed
- Questions deemed irrelevant may be excluded with rationale provided (other bases for exclusion allowed? Options other than exclusion?)
- Must exclude complainant's sexual disposition or prior sexual behavior unless specifically relevant

DUE PROCESS: EVIDENCE



- **All** relevant and reasonably available evidence must be considered – inculpatory and exculpatory
- No restrictions on discussing case or gathering evidence
- Equal opportunity to:
 - Present witnesses
 - Present evidence
 - Inspect all evidence, including evidence not used to support determination
- No limits on types/amount of evidence which may be offered, except must be relevant and respect “rape shield” provision
- Includes all evidence directly related to the investigation, even evidence that determination does not, or will not, rely upon

STANDARD OF PROOF

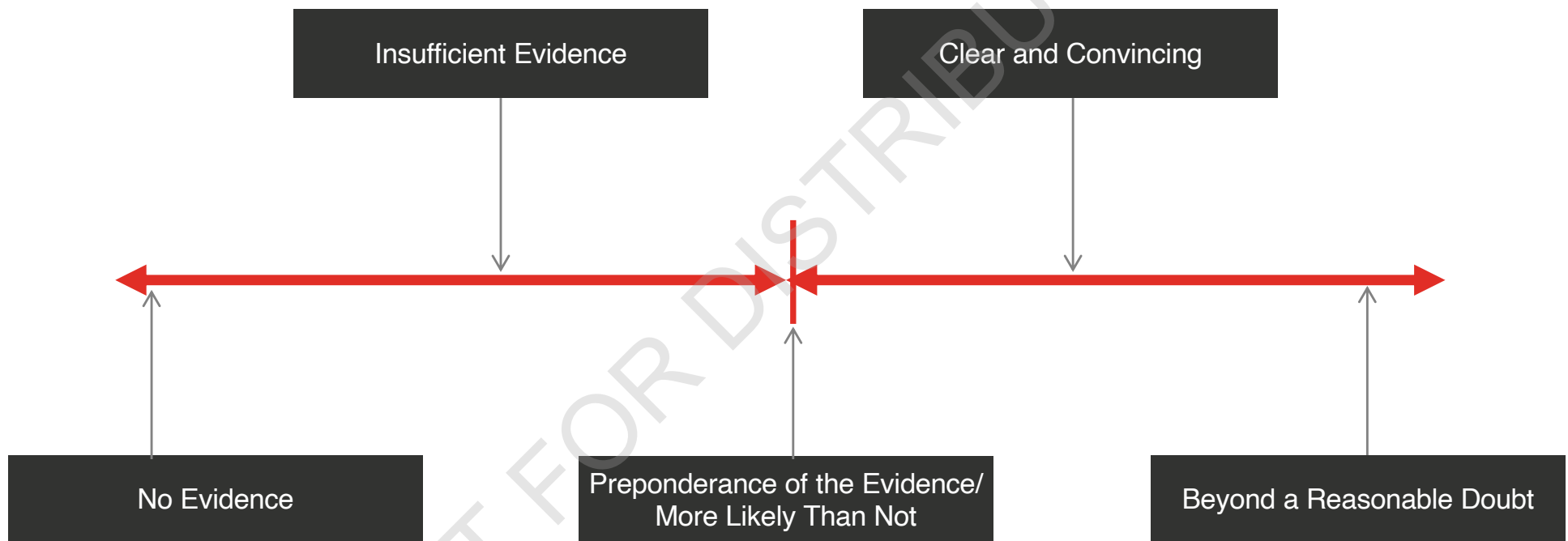


- Current industry standard is preponderance of the evidence
- OCR says recipients must now apply either the preponderance of the evidence standard or the clear and convincing evidence standard
- Standard of evidence must be consistent for all formal complaints of sexual harassment, regardless of policy or underlying statutory authority
- Must also apply the same standard of evidence for complaints against students as for complaints against employees, including faculty

UNDERSTANDING EVIDENCE THRESHOLDS



EVIDENTIARY STANDARDS



WRITTEN DETERMINATIONS



- Required elements for written determinations:
 - Allegations potentially constituting sexual harassment (§ 106.30)
 - All procedural steps taken
 - Findings of fact supporting the determination
 - A determination on each allegation regarding responsibility, any disciplinary sanctions, remedies
 - The recipient's procedures and permissible bases for the complainant and respondent to appeal.
 - Document how recipient's response was not deliberately indifferent

APPEALS



- Must offer equitable appeal based on determination or dismissal of any allegations
- All parties receive notification of any appeal
- Opportunity for all parties to support or oppose outcome
- Written decision with rationale delivered simultaneously to the parties
- Appeal decision-maker cannot have had any other role in the investigation or resolution process
- “Reasonably prompt” timeframe for producing appeal decision

OCR ENFORCEMENT



- OCR will continue to administratively enforce by:
 - Conducting investigations based on complaints filed with the U.S. Dept. of Education.
 - Narrower in scope than previous Obama-era practice
 - Engaging in “voluntary compliance” reviews and investigations
- Compensatory requirements (counseling, tuition, etc.) can be imposed.
- May include equitable and injunctive actions as well as financial compensation to victims of discrimination or regulatory violations
- OCR still retains authority to withhold federal funding; however, this power is rarely used.

MANDATORY DISMISSAL OF FORMAL COMPLAINT - 2020 REGS



- **The TIXC must dismiss the complaint if:**
 - The conduct alleged in the formal complaint would not constitute sexual harassment as defined (in § 106.30), even if proved;
 - Did not occur in the recipient's education program or activity;
 - Did not occur against a person in the United States; or
 - Complainant was not participating or attempting to participate in recipient's program at time of complaint.
- Written notice of dismissal to parties required
 - Dismissal of formal complaint may be appealed
- **Upon dismissal, the recipient may institute action under another provision of the code of conduct or other policies.**

DISCRETIONARY DISMISSAL OF FORMAL COMPLAINT - 2020 REGS

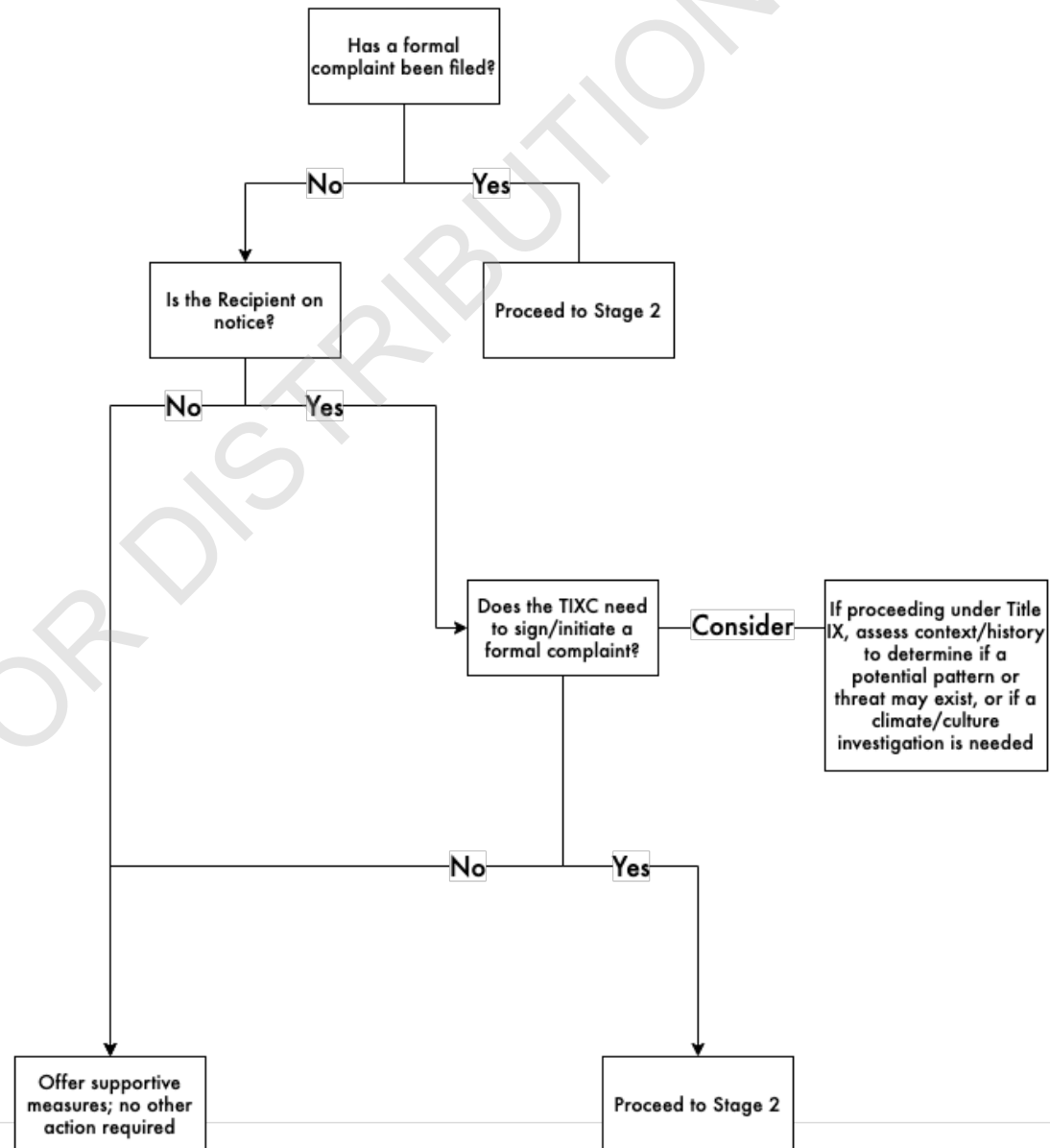


- TIXC **may** dismiss a complaint or any allegations at any time during the investigation or hearing if:
 - Complainant notifies the Title IX Coordinator in writing that the Complainant would like to withdraw the formal complaint or any allegations therein;
 - The Respondent is no longer enrolled or employed by the recipient; or
 - Specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein
- Written notice to parties required
- Parties may appeal a dismissal.

MANDATORY/DISCRETIONARY DISMISSAL FLOWCHART (STAGE ONE)



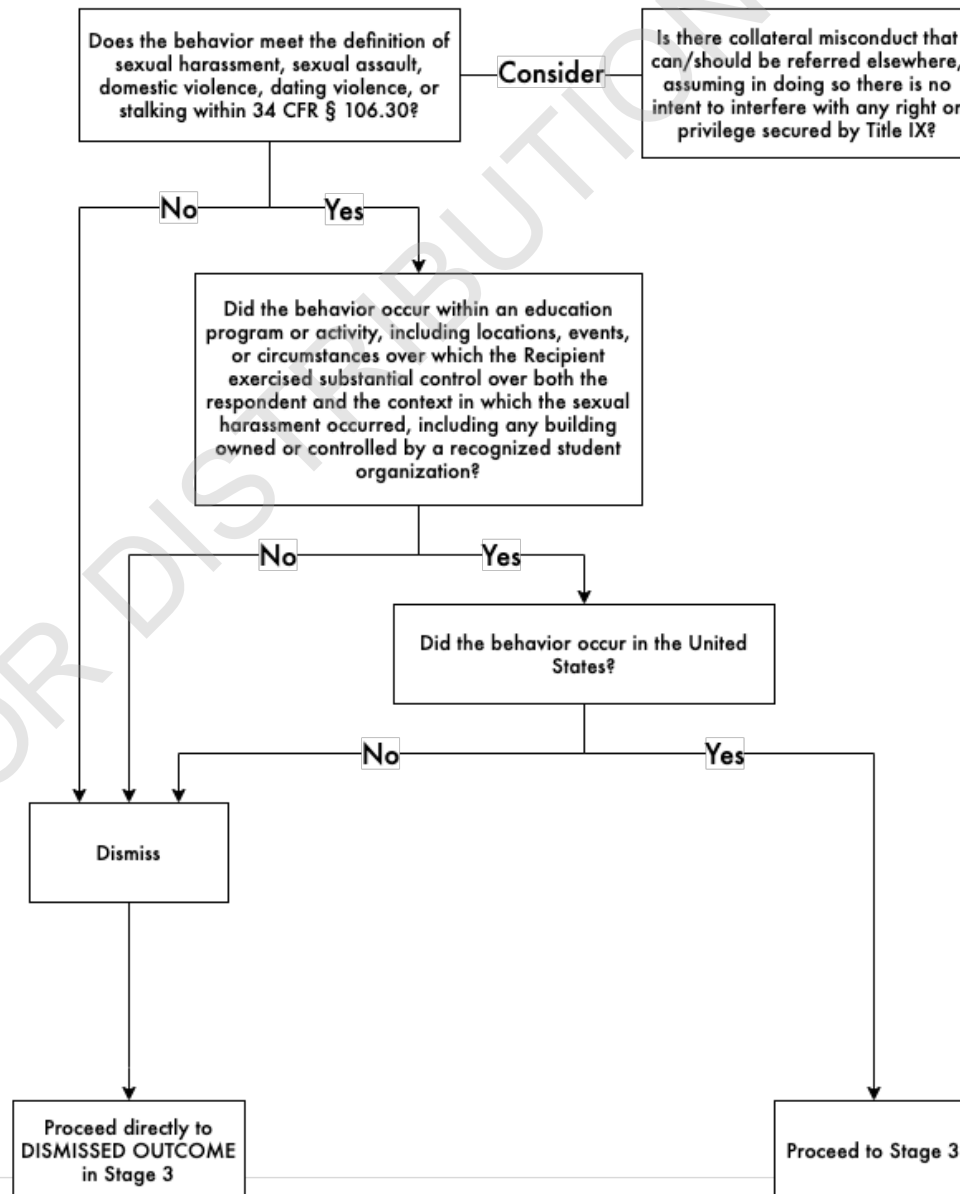
- Three-stage process for Mandatory/Discretionary dismissal during an Initial Assessment under § 106.30 and § 106.45



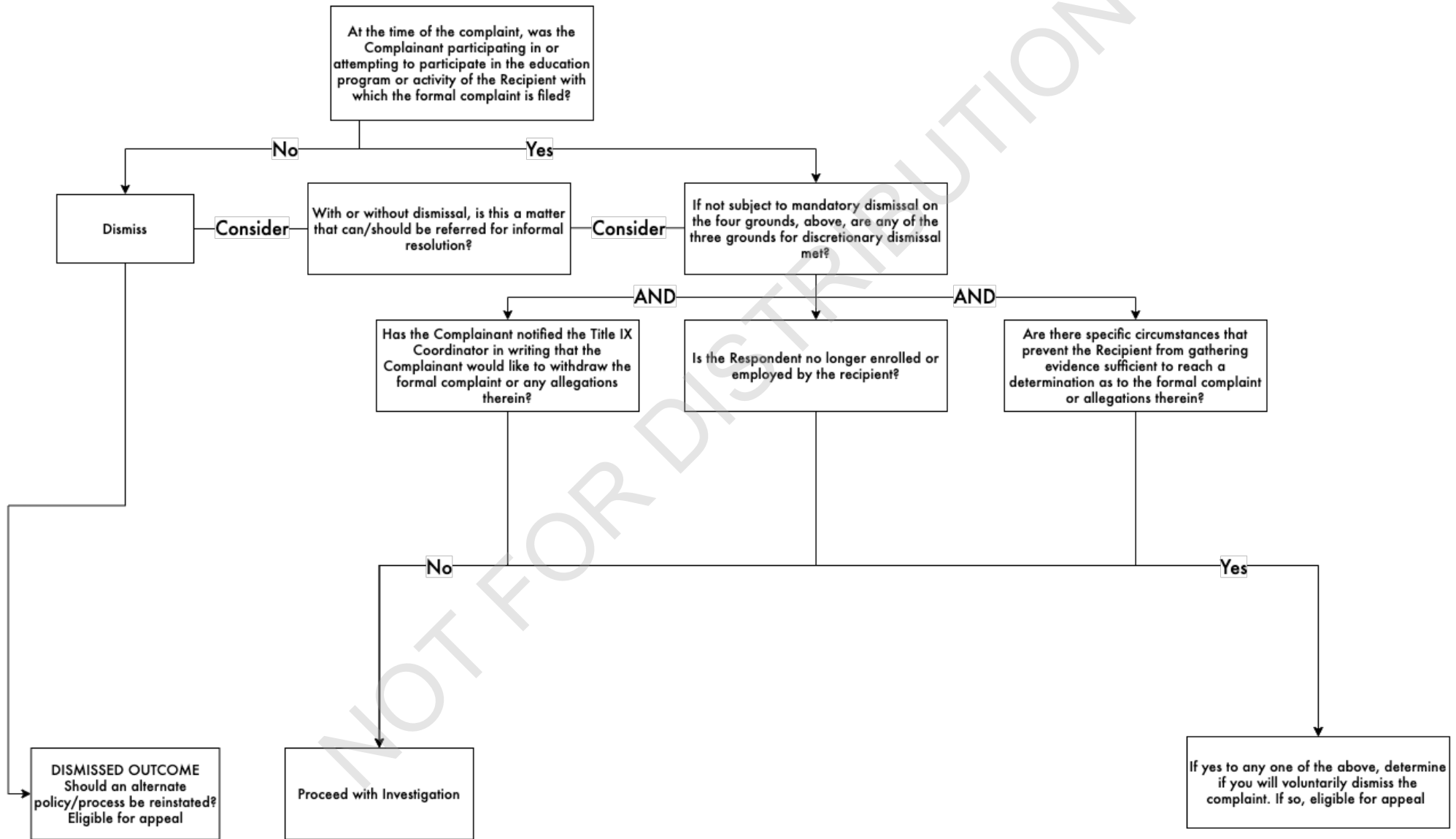
MANDATORY/DISCRETIONARY DISMISSAL FLOWCHART (STAGE TWO)



- Three-stage process for Mandatory/Discretionary dismissal during an Initial Assessment under § 106.30 and § 106.45



MANDATORY/DISCRETIONARY DISMISSAL FLOWCHART (STAGE THREE)



INFORMAL RESOLUTION

-
- Considerations
 - Requirements

INFORMAL RESOLUTION OPTIONS



- School and parties will determine when informal resolution is appropriate
 - “[I]n responding to sexual harassment, it is important to take into account the needs of the parties involved in each individual case, some of whom may prefer not to go through a formal complaint process.”
- Does not preclude certain offenses from informal resolution
- DOES preclude informal resolution for allegations that an employee harassed a student, so presumably, employee-on employee informal resolution is permissible.

REQUIREMENTS OF INFORMAL RESOLUTION OPTIONS



- Informal resolution allowed at any time prior to a final determination at discretion of TIXC
 - Formal complaint is required
- Must provide detailed notice to the parties:
 - Allegations
 - Requirements of the process
 - Circumstances which would preclude formal resolution
 - Consequences of participation
- Must obtain voluntary, written consent

INFORMAL RESOLUTION



The Title IX Coordinator may look to the following factors to assess whether Informal Resolution is appropriate, or which form of Informal Resolution may be most successful for the parties:

- Amenability of the parties to Informal Resolution;
- Likelihood of potential resolution, taking into account any power dynamics between the parties;
- Motivation of the parties to participate;
- Civility of the parties;
- Cleared violence risk assessment/ongoing risk analysis;
- Whether an emergency removal is needed;

INFORMAL RESOLUTION (CONTD.)



The Title IX Coordinator may look to the following factors to assess whether Informal Resolution is appropriate, or which form of Informal Resolution may be most successful for the parties:

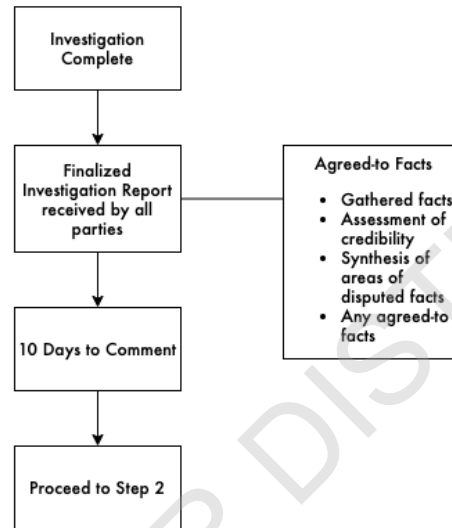
- Skill of the Informal Resolution facilitator with this type of complaint;
- Complexity of complaint;
- Emotional investment/intelligence of the parties;
- Rationality of the parties;
- Goals of the parties;
- Adequate time to invest in Informal Resolution (resources, staff, etc).

INFORMAL RESOLUTION

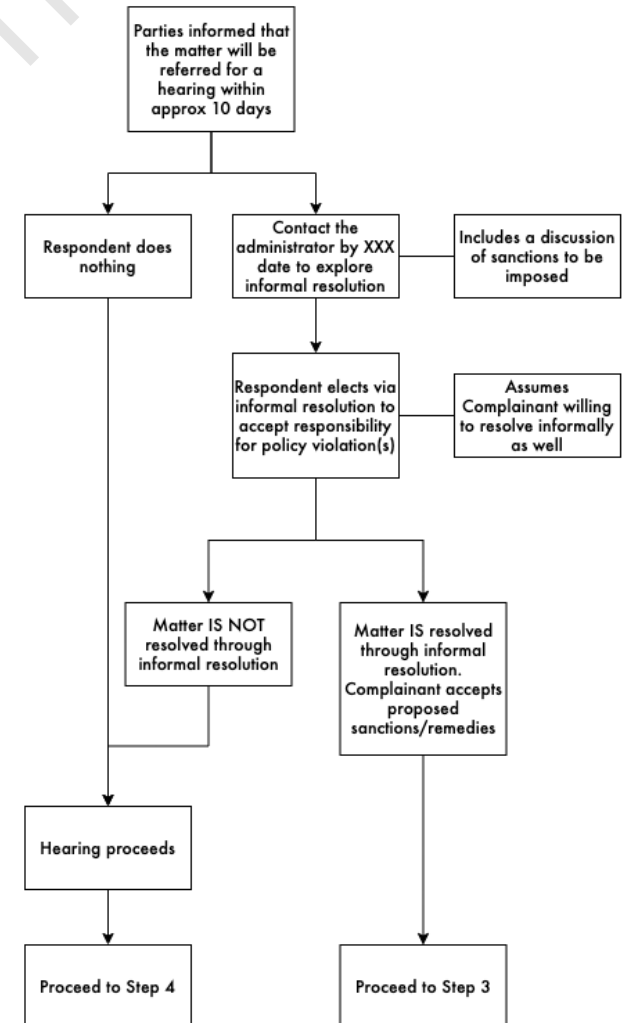
FLOWCHART (STEPS 1-2)



Step 1



Step 2

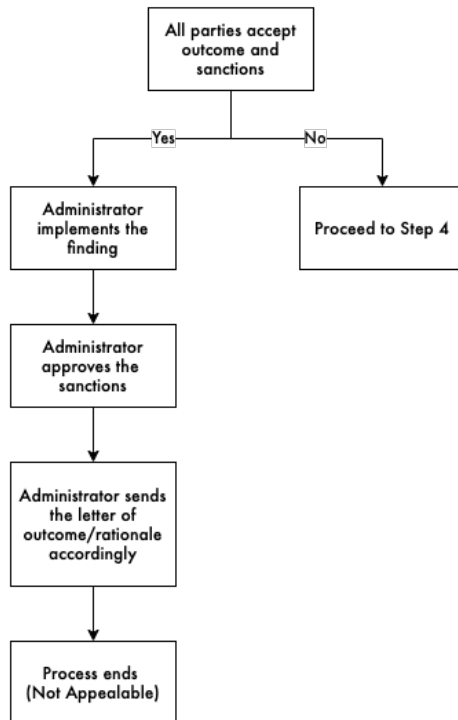


- A 5-Step outline of the process for facilitating Informal Resolution between the Investigation and Hearing steps in the process.

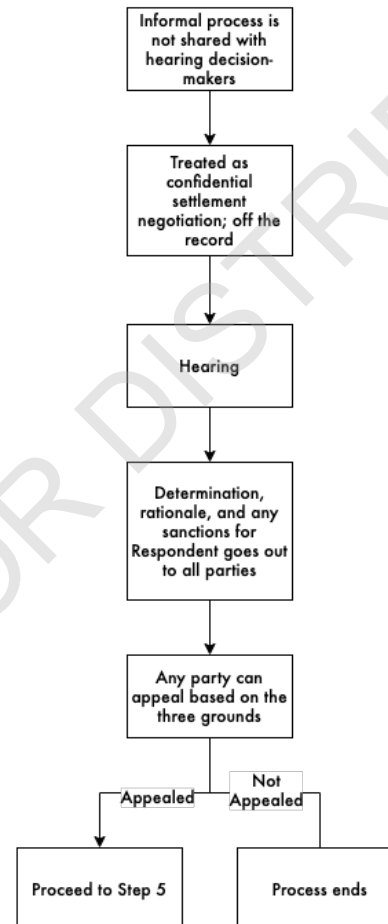
INFORMAL RESOLUTION FLOWCHART (STEPS 3-5)



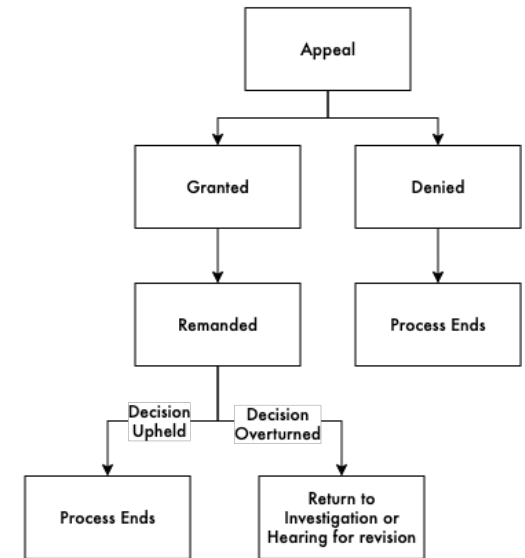
Step 3



Step 4



Step 5



HIT THE G.A.S.

- Gather Evidence
- Assess Credibility
- Synthesize the Information

GATHER THE EVIDENCE



- Collect the evidence from all sources
- Organize it according to the investigation strategy and allegations
 - Chronology
 - Geography
 - Policy prohibitions
 - Alleged violations
- Summarize evidence in a written report
- This the fact-gathering function. It's a function all investigators have performed since at least 2011, and it's not new or different as a result of regulations.

ASSESS CREDIBILITY



- Accuracy and reliability of information
- “Credible” is not synonymous with “truthful”
- Memory errors, evasion, misleading *may* impact
- Primary factors: corroboration and consistency
- Avoid *too much* focus on irrelevant inconsistencies
- Source + content + plausibility
- Trauma-informed approach should be consistent

COMMON ERRORS IN ASSESSING CREDIBILITY



- Misplaced emphasis on nonverbal indicators of deception such as nervousness/anxiety
- Misplaced emphasis on inconsistency of information provided by an interviewee
 - Research shows truthful memory recall includes the natural omission or subsequent recollection of details
- Confusion about memory
 - Stress and emotion may lead to enhancement of memory or to the disruption of encoding and retrieval processes

COMMON ERRORS IN ASSESSING CREDIBILITY



- Misplaced focus on the status of the parties
 - No scientific studies support the notion of neurobiological response differences between perpetrators and victims
- Bias in interviews
 - Presumptions of guilt can influence credibility assessments

INTERVIEW TACTICS



- Reverse Chronological Order
- Use of a Model Statement
- Asking unexpected questions
- Asking the individual to recall information in unexpected ways, e.g. sketch
- Asking interviewees for details that the investigator can check
 - Truth tellers generally add more “checkable” details
 - Liars provide details that are difficult to verify
- The Funnel

CREDIBILITY ASSESSMENTS IN INVESTIGATION REPORTS



- Indicate where to look to the decision-maker without rendering conclusions or making findings related to credibility.
- NOT GOOD
~~"The decision-maker should find Mark to be unbelievable in his testimony about having received consent for the following reasons..."~~
- GOOD
"Mark's testimony about X contrasts with Mariana's testimony about X, and the accounts of Witness 1 and Witness 7 aligned with Mariana's testimony, not Mark's, during the investigation."

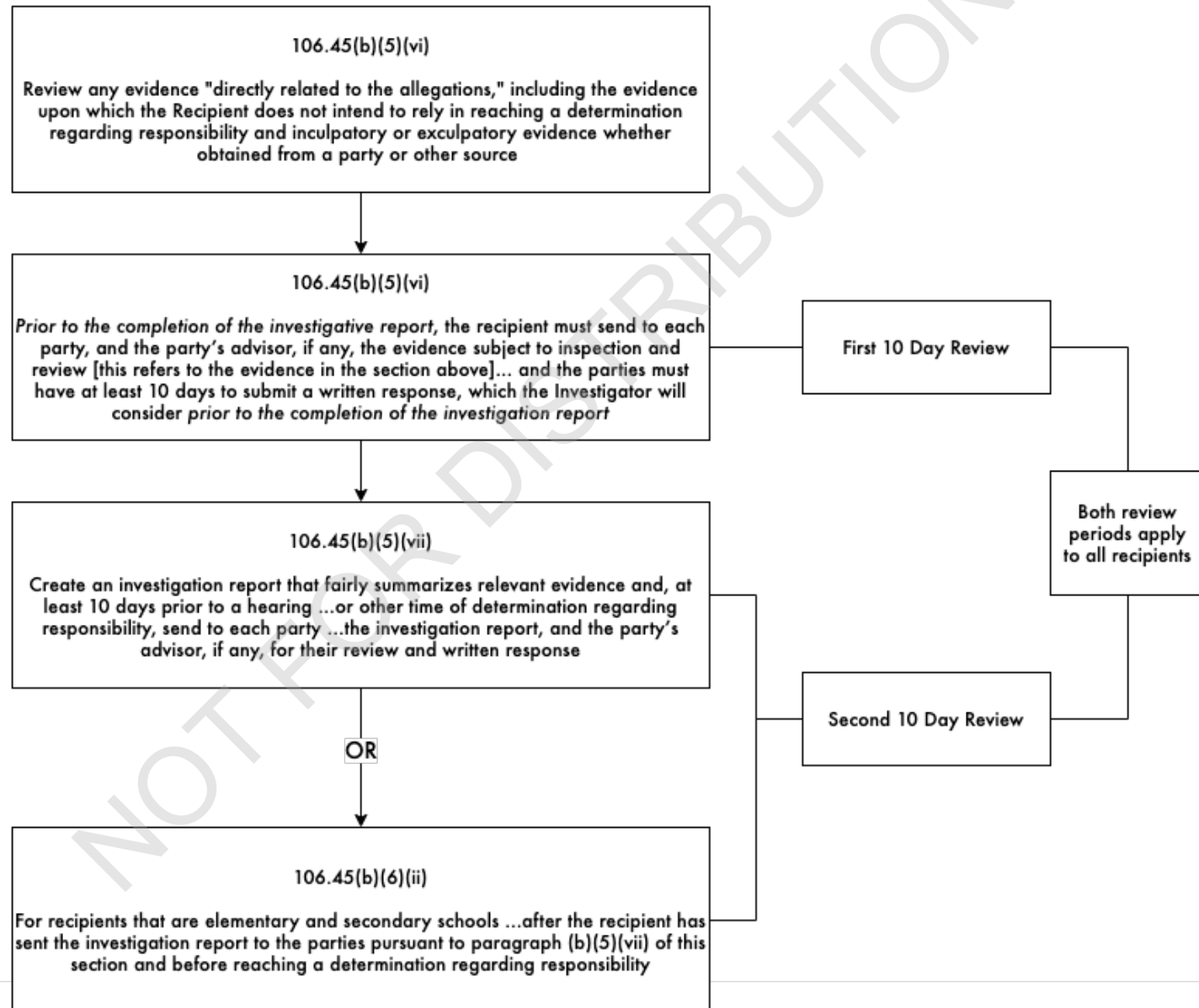
SYNTHESIZE AREAS OF DISPUTE



- Examine only actions that have a direct relation to the situation under review or a pattern of incidents.
- Narrow the scope to areas in dispute or disagreement between the parties.
 - Two lists: contested and uncontested facts
- Use evidentiary and report review periods to clarify disputed facts
- Present evidence in report organized around facts relating to alleged policy violations
- Contested facts will form the bulk of the decision-maker's work in making a determination.

INVESTIGATION - § 106.45(B)(5)

FLOWCHART



IMPORTANCE OF THE REPORT



- Decision process:
 - Investigator refers the investigation report to the decision-makers without determination.
 - Investigator ≠ Decision-maker.
- Importance of investigation report.
 - Highlight the relationships between different pieces of evidence
 - Contradictory, corroborating, (in)consistencies, etc.
 - Your opinion is not controlling, but you want to point the decision-makers toward decisive or corroborating evidence without telling them how to interpret it.

EVIDENCE AND REPORT REVIEW BY PARTIES, PART 1 - 2020 REGS.



Prior to the completion of the Investigation Report...

- Evidence directly related to allegations must:
 - Be sent to each party and advisor
 - Be in an electronic format or hard copy
 - Include evidence upon which the Recipient does not intend to rely
 - Include exculpatory and inculpatory evidence
 - Be made available at any hearing
- After sending the evidence, the investigator must:
 - Allow 10 days for written response
 - Consider response prior to completion of report

EVIDENCE AND REPORT REVIEW BY PARTIES, PART 2 - 2020 REGS.



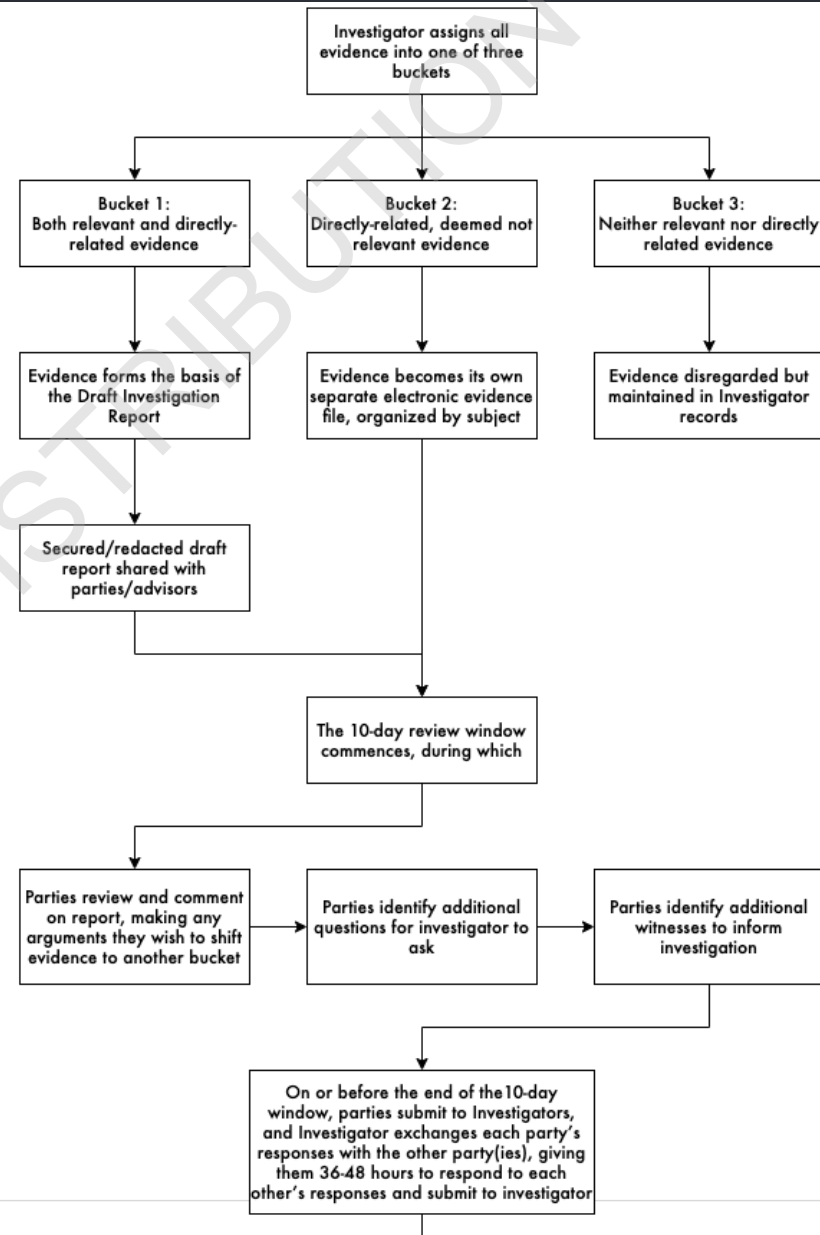
At least 10 Days Prior to Hearing...

- The final Investigation Report summarizing relevant evidence must be sent:
 - To each party and advisor
 - In an electronic format or hard copy
 - For the parties' review and written response
- Best Practice: Provide the investigative report to the TIXC and/or legal counsel to review for completeness prior to being shared with the parties

FINALIZING THE INVESTIGATION REPORT FLOWCHART (PART ONE)



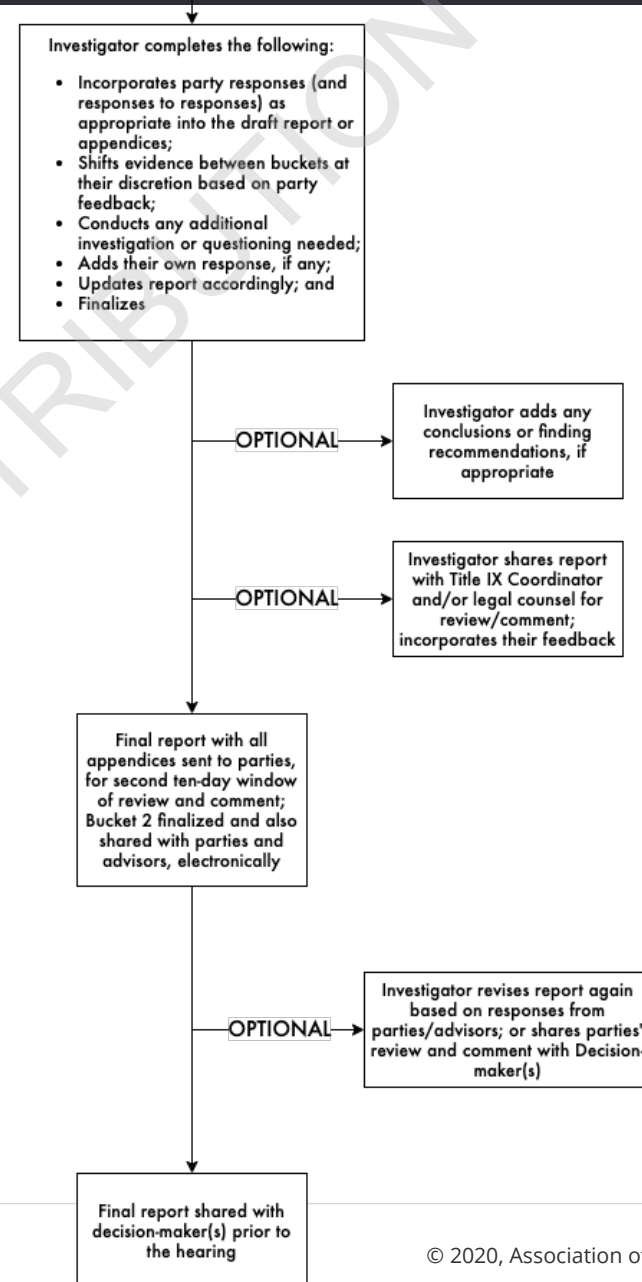
- These are the steps to finalizing your Investigation Report, once drafted.
- Optional steps also included
- Incorporates the '3 Buckets' of evidence



FINALIZING THE INVESTIGATION REPORT FLOWCHART (PART TWO)



- These are the steps to finalizing your Investigation Report, once drafted.
- Optional steps also included
- Incorporates the '3 Buckets' of evidence



DECISION-MAKING SKILLS

- Understanding Evidence
- Relevance
- Reliability/Credibility
- Cross-Examination
- Analyzing the Information

UNDERSTANDING EVIDENCE



- The formal federal rules of evidence do not apply in Title IX hearings, but rules crafted by OCR for Title IX cases do.
- If the information helps to prove or disprove a fact at issue, it should be admitted.
- If credible, it should be considered.
 - Evidence is any kind of information presented with the intent to prove what took place.
 - Certain types of evidence may be relevant to the credibility of the witness, but not to the alleged policy violation directly.

- No restriction on parties discussing case or gathering evidence
- Equal opportunity to:
 - Present witnesses, including experts
 - Present evidence
 - Inspect all evidence, including evidence not used to support determination
- No limits on types/amount of evidence that may be offered except that it must be relevant.
- Parties may have access to all gathered evidence that “directly relates” to the allegations available for reference and use at the hearing, but they must make the case for its relevance.

ASK YOURSELF



Is it **relevant**?



Is it **reliable**?
(Is it credible?)



Will we **rely** upon
it as evidence
supporting a
rationale/the
written
determination?

RELEVANCE



- Evidence is generally considered *relevant* if it has value in proving or disproving a fact at issue.
 - Regarding alleged policy violation and/or
 - Regarding a party or witness's credibility.
- The investigator will have made initial relevance “decisions” by including evidence in the investigation report...
- But relevance is ultimately up to the decision-maker, who is not bound by the investigator's judgment.
- **All** relevant evidence must be objectively evaluated and considered – inculpatory and

- If the investigator indicates an opinion on credibility, outcome, whether policy was violated, how evidence should be weighed, etc., that opinion or recommendation is not binding on the decision-maker.
- The decision-maker may consider it, but has to be objective and independent, and is free to accept or reject any recommendation of the investigator (or ask them not to make one)
 - Should you ask for it or ask the investigator to clarify their recommendations?

UNDERSTANDING EVIDENCE



- Decision-maker may consider and assign weight to different types of evidence, when relevant and credible:
 - Documentary evidence (e.g. supportive writings or documents).
 - Electronic evidence (e.g. photos, text messages, and videos).
 - Real evidence (i.e. physical objects).
 - Direct or testimonial evidence (e.g. personal observation or experience).
 - Circumstantial evidence (i.e. not eyewitness, but compelling).
 - Hearsay evidence (e.g. statement made outside the hearing, but presented as important information).
- Decision-makers should typically disregard:
 - Character evidence (generally of little value or relevance).
 - Impact statements (typically only relevant in sanctioning).

SPECIFIC EVIDENCE ISSUES UNDER THE TITLE IX REGULATIONS



- Evidence of the Complainant's prior sexual behavior or predisposition is explicitly and categorically **not relevant** except for two limited exceptions:
 - Offered to prove that someone other than the Respondent committed the conduct alleged, or
 - Concerns specific incidents of the Complainant's sexual behavior with respect to the Respondent and is offered to prove consent
- Even if admitted/introduced by the Complainant.
- Does not apply to Respondent's prior sexual behavior or predisposition.

ADDITIONAL EVIDENCE RESTRICTIONS IN TITLE IX REGULATIONS



Additional permissions required for:

- Records made or maintained by a:
 - Physician
 - Psychiatrist
 - Psychologist
- Questions or evidence that seek disclosure of information protected under a legally recognized privilege must not be asked without permission.
 - This is complex in practice because you won't know to ask for permission unless you ask about the records first.

QUESTIONING



- Your goal is to ensure that you understand information contained in the report:
 - Relevant facts about what happened during the incident
 - Any related events
 - Any corroborating information
- Use your questions to elicit details, eliminate vagueness, fill in the gaps where information seems to be missing.
- Your goal is not:
 - Satisfying your curiosity
 - Chasing the rabbit into Wonderland
- Do not expect the “Gotcha” moment. That is not your role. You are not prosecutorial.

IF YOU STILL HAVE TO ASK A QUESTION, ASK YOURSELF



- **Is the answer already in the report or documentation I have been provided?**
 - If not, why not? (Ask the Investigator this!)
 - You still will need to ask it again but keep the report in mind.
- **What do I need to know?**
 - Who is the best person to ask this of? Usually it will be the Investigator, first, and then the original source, if available; it may be good to ask the investigator if they asked it already and what answer they got.
- **Why do I need to know it?**
 - If it is not going to help you decide whether a policy was violated or not and you can explain how, then it is not a good question (though you may not know this until you hear the answer).

QUESTIONING & CROSS-EXAMINATION



- The live hearing requirement for higher education allows the parties to ask (direct and) cross-examination questions of the other party and all witnesses through their advisor.
 - Advisor of choice or an advisor provided by the institution, at no cost to the parties.
- Such cross-examination must be conducted directly, orally, and in real time by the party's advisor and never by a party personally.
- Permit relevant questions and follow-up questions, including those challenging credibility. You may want an advisor to explain why they think a question is relevant or will lead to a relevant answer.
- Decision-maker must first determine whether a question is relevant and direct party to answer.
 - Must explain any decision to exclude a question as not relevant

QUESTIONING & CROSS-EXAMINATION



- If the advisor seeks to ask a question that is potentially answered in the investigation report, that question should typically be permitted if relevant.
- If the question has already been answered by a witness or party at the hearing, the decision-maker or chair may deny the question as “irrelevant because it has already been answered,” or may ask the advisor why posing the question again is expected to lead to relevant evidence.

QUESTIONING & CROSS-EXAMINATION



- If a party or witness does not submit to cross-examination at the live hearing, policy must clarify that the decision-maker(s) must not rely on any statement of that party or witness (from the investigation or hearing) in reaching a determination regarding responsibility.
 - This can be question-specific if a witness declines to answer questions about a particular statement, topic, or evidence.
- The decision-maker(s) cannot draw an inference about the determination regarding responsibility based solely on a party's or witness's absence from the live hearing or refusal to answer cross-examination or other questions.
 - What is an inference and how does it work?

CREDIBILITY



- Inherent plausibility
 - “Does this make sense?”
 - Be careful of bias influencing sense of “logical”
- Motive to falsify
 - Do they have a reason to lie?
- Corroboration
 - Aligned testimony and/or physical evidence
- Past record
 - Is there a history of similar behavior?
- Demeanor
 - Do they seem to be lying or telling the truth?

*Enforcement Guidance
on Vicarious Employer
Liability for Unlawful
Harassment by
Supervisors*

EEOC (1999)

FACTORS TO CONSIDER FOR CREDIBILITY



Corroborating evidence

- Strongest indicator of credibility
- Independent, objective authentication
 - Party says they went to dinner, provides receipt
 - Party describes text conversation, provides screenshots
- Corroboration of central vs. environmental facts
- Not simply alignment with friendly witnesses

FACTORS TO CONSIDER FOR CREDIBILITY



Corroborating evidence

- Can include contemporaneous witness accounts
 - More “separate” the witness, greater the credibility boost
- Outcry witnesses
 - Does what party said then line up with what they say now?
- Pay attention to allegiances
 - Friends, roommates, teammates, group membership
 - This can work both directions (ex. the honest roommate)

Inherent plausibility

- Does what the party described make sense?
 - Consideration of environmental factors, trauma, relationships
- Is it believable on its face?
- “Plausibility” is a function of “likeliness”
 - Would a reasonable person in the same scenario do the same things? Why or why not?
 - Are there more likely alternatives based on the evidence?

FACTORS TO CONSIDER FOR CREDIBILITY



Inherent plausibility

- Is the party's statement consistent with the evidence?
- Is their physical location or proximity reasonable?
 - Could they have heard what they said they heard?
 - Were there other impediments? (darkness, obstructions)
- How good is their memory?
 - Temporal proximity based on age of allegations
 - "I think" "I'm pretty sure" "It would make sense"

FACTORS TO CONSIDER FOR CREDIBILITY



Motive to falsify

- Does the party have a reason to lie?
- What's at stake if the allegations are true?
 - Think academic or career implications
 - Also personal or relationship consequences
- What if the allegations are false?
 - Other pressures on the reporting party – failing grades, dramatic changes in social/personal life, other academic implications
- Reliance on written document during testimony

FACTORS TO CONSIDER FOR CREDIBILITY



Past record

- Is there evidence or records of past misconduct?
- Are there determinations of responsibility for substantially similar misconduct?
- Check record for past allegations
 - Even if found “not responsible,” may evidence pattern or proclivity
- Written/verbal statements, pre-existing relationship

FACTORS TO CONSIDER FOR CREDIBILITY



Demeanor

- Is the party uncomfortable, uncooperative, resistant?
- Certain lines of questioning – agitated, argumentative
- BE VERY CAREFUL
 - Humans are excellent at picking up non-verbal cues
 - Human are terrible at spotting liars (roughly equivalent to polygraph)
- Look for indications of discomfort or resistance
- Make a note to dive deeper, discover source

CREDIBILITY ASSESSMENTS IN INVESTIGATION REPORTS



- Under the 2020 regs, investigators may or may not assess credibility with or without rendering conclusions or making findings related to credibility but will help to roadmap where decision-makers should look for information critical to a determination.
- Language in an investigation report may look like this:
 - “Decision-makers will want to carefully review Mary’s testimony as to whether the conduct was welcome, in light of the testimony of W1.”
 - “Decision-makers may wish to focus on reconciling the testimony offered by Joe and by Witness 2 with respect to who engaged in the conduct first.”

CREDIBILITY IN THE HEARING



- Distinguish performance/presentation skills from believability.
 - Make sure key witnesses will be present.
 - Make sure evidence has been verified.
- If any evidence/testimony must be subject to credibility assessment, and the evidence isn't available or the witness/party does not participate, it may violate due process to consider that evidence/testimony and give it weight.
- 2020 regs are quite clear such evidence may not be considered if it relates to a statement previously made. Other evidence can be considered.
- What will the effect of that be on the process/decision?

CREDIBILITY DETERMINATIONS POST-HEARING



- The decision-maker determines the greater weight of credibility on each key point in which credibility is at issue.
- First, narrow to the contested facts, and then make a credibility analysis (by the standard of proof) for each.
- Then, weight the overall credibility based on the sum total of each contested fact.
- Credibility exists on a 100 point scale.
- When you write the final determination letter, focus on what facts, opinion, and/or circumstantial evidence supports your conclusion. Offer a cogent and detailed rationale.

MAKING A DECISION

- Deliberations
- Analyzing Information and Making Findings
- Sanctioning
- Written Determination

OVERVIEW OF THE DELIBERATION PROCESS



- Only decision-makers attend the deliberations.
 - Parties, witnesses, advisors, and others excused.
 - If Title IX Coordinator is present, they do not participate and only serve as a resource to the decision-makers.
 - ATIXA recommends they not participate. Same with legal counsel.
- Do not record; recommend against taking notes.
- Parse the policy again; remind yourselves of the elements that compose each and every allegation.
- Assess credibility of evidence and assess statements as factual, opinion-based, or circumstantial.
- Determine whether it is more likely than not that policy has been violated.

Foundation for Decisions

- Decisions must be based only upon the facts, opinions, and circumstances provided in the investigation report or presented at the hearing.
- Do not turn to any outside “evidence.”
- Assess each element in the policy (e.g. intent, sexual contact, voluntary, etc.), separate it out and determine if you have evidence that supports that a violation of that element is proven. Assess evidentiary weight. Measure with the following questions:
 - Is the question answered with fact(s)?
 - Is the question answered with opinion(s)?
 - Is the question answered with circumstantial evidence?

Findings, Impact Information, and Sanctions

- Separate the "Finding" from the "Sanction."
 - Do not use impact-based rationales for findings (e.g.: intent; impact on the Complainant; impact on the Respondent, etc.)
 - Use impact-based rationales for sanctions only.
- Complainant and Respondent should share impact statement(s) only if and after the Respondent is found in violation.
- Understand that the question of whether someone violated the policy should be distinct from factors that aggravate or mitigate the severity of the violation.
- Be careful about not heightening the evidentiary standard for a finding because the sanctions may be more severe.

SANCTIONING IN SEXUAL MISCONDUCT CASES



- Title IX and case law require:
 - Decision-maker should also decide sanction if credibility will influence the sanction
 - Not act unreasonably to bring an end to the discriminatory conduct (Stop)
 - Not act unreasonably to prevent the future reoccurrence of the discriminatory conduct (Prevent)
 - Restore the Complainant as best you can to their pre-deprivation status (Remedy)
- This may create a clash if the other sanctions only focus on educational and developmental aspects.
- Sanctions for serious sexual misconduct should not be developmental as their primary purpose; they are intended to protect the Complainant and the community.

COMMON STUDENT SANCTIONS



- Warning
- Probation
- Loss of privileges
- Counseling
- No contact
- Residence hall relocation, suspension, or expulsion
- Limited access to campus
- Service hours
- Online education
- Parental notification
- Alcohol and drug assessment, and counseling
- Discretionary sanctions
- College suspension
- College expulsion

COMMON EMPLOYEE SANCTIONS



- Warning – verbal; written.
- Probation.
- Performance improvement/management process.
- Training
- Counseling.
- Loss of privileges.
- Reduction in pay.
- Loss of annual raise.
- Discretionary sanctions.
- Loss of supervisory or oversight responsibilities.
- Paid or unpaid leave.
- Suspension.
- Termination.

WRITTEN DETERMINATIONS



- Decision-maker issues a written determination regarding responsibility that includes the following:
 - Sections of the policy alleged to have been violated
 - 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, site visits, methods used to gather other evidence, and hearings held
 - Statement of and rationale for the result as to each specific allegation
 - Should include findings of fact supporting the determination and conclusions regarding the application of the policy to the facts
 - Sanctions imposed on Respondent
 - Any remedies provided to the Complainant designed to restore or preserve access to the education program or activity
 - Procedures and bases for any appeal

WRITTEN DETERMINATIONS: LOGISTICS



- The decision-maker should author the written determination.
 - May follow a template provided by the Title IX Coordinator.
- The written determination should be provided to the parties simultaneously.
 - Follows existing VAWA/Clery requirements for higher education institutions, but now extends both to reach sexual harassment cases.
- The determination becomes final either on the date that the recipient provides the parties with the written determination of the result of the appeal, or if an appeal is not filed, the date on which an appeal would no longer be considered timely.
- FERPA cannot be construed to conflict with or prevent compliance with Title IX.
- Will this letter be reviewed by the Coordinator and/or legal

APPEALS

- Elements under the 2020 Regulations
- Grounds for Appeal
- Process Flowchart
- Other ATIXA Recommendations

APPEALS



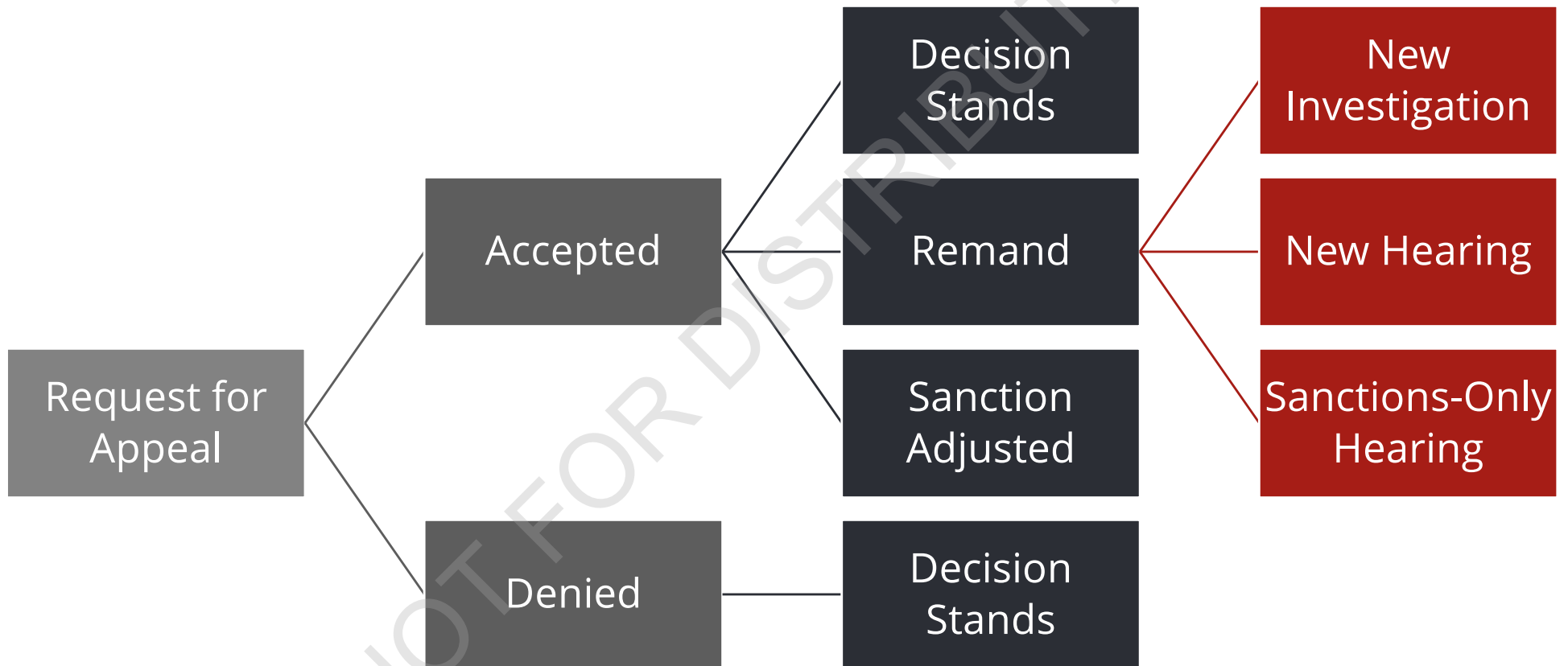
- The appeal decision-maker may be an individual or a panel.
 - Cannot be the Title IX Coordinator.
 - Cannot be the investigator or decision-maker in the original grievance process.
 - Recipient may run a pool of decision-makers who sometimes serve as hearing or appeal decision-makers
 - Recipient may have dedicated appeal decision-makers.
- When an appeal is filed, must notify the other party and implement appeal procedures equally for all parties.
- Give the parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome.

GROUNDINGS FOR AN APPEAL



- All parties may appeal from a determination regarding responsibility, and from a recipient's dismissal of a formal complaint or any allegations therein, on the following bases:
 - Procedural irregularity that affected the outcome of the matter
 - 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; and
 - 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
 - Other additional bases (sanction?), as long as applied to the parties, equitably.

APPEALS: THE PROCESS



APPEALS: OTHER ATIXA RECOMMENDATIONS



- One level of appeal.
- Short window to request an appeal.
 - May always grant an extension if necessary
- Document-based and recording review.
 - NOT de novo
 - In other words, not a “second-bite of the apple.”
- Deference to original hearing authority.

BIAS, CONFLICTS OF INTEREST, AND RECUSAL

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**Remember, you have no
“side” other than the
integrity of the process!**

BIAS



- Among the most significant problems for hearing decision-makers
- Bias can represent any variable that improperly influences a finding and/or sanction
- There are many forms of bias and prejudice that can impact decisions and sanctions:
 - Pre-determined outcome
 - Partisan approach by investigators in questioning, findings, or report
 - Partisan approach by hearing board members in questioning, findings, or sanction
 - Intervention by senior-level institutional officials
 - Not staying in your lane
 - Improper application of institutional procedures
 - Improper application of institutional policies
 - Confirmation bias
 - Implicit bias
 - Animus of any kind

BIAS AND CONFLICT OF INTEREST



- Conflicts of interest and bias are expressly prohibited in the 2020 Title IX regulations.
- Types of conflicts/bias:
 - Wearing too many hats in the process
 - Legal counsel as investigator or decision-maker
 - Decision-makers who are not impartial
 - Biased training materials; reliance on sex stereotypes
- Simply knowing a student or an employee is typically not sufficient to create a conflict of interest if objectivity not compromised.
- Also, having disciplined a student or employee previously is often not enough to create a conflict of interest.

RECUSAL



- Decision-makers may determine that they need to recuse themselves from hearing a particular case or a party might seek a decision-maker's recusal.
- This is why having an alternate decision-maker on hand is always wise.
- Your policy should define the process and circumstances by which a party may seek to recuse a decision-maker.
- Typically the Title IX Coordinator determines whether or not to honor the request.
- If you yourself discern that you are not able to hear a case impartially, please let your Title IX Coordinator know immediately.

RECORD-KEEPING AND DOCUMENTATION

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RECORD-KEEPING AND DOCUMENTATION



- Certain records must be created, retained, and available to the parties for at least **seven** years:
 - Sexual harassment investigation including any responsibility determination, any disciplinary sanctions imposed, and any remedies implemented
 - Any appeal and related result(s)
 - Any informal resolution implemented
 - Any supportive measures implemented
 - **For each formal complaint, must document the basis for why the institutional response was not deliberately indifferent**
- For each conclusion, must document the rationale for its determination
- Must document measures taken to preserve/restore access to education programs/activity

QUESTIONS?

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