

# **The New Title IX Regulations: Practical Implications for K-12 Schools**

Presented By:

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

**Gina Maisto Smith, Chair**

**Leslie Gomez, Vice Chair**

**June 15, 2020**



# Today's Webinar

- Following an introductory *webinar*, A First Look at the New Title IX Regulations, this is the second in a series of webinars focusing on implementation.
- This webinar will:
  - Review **basic requirements of Title IX** for K-12 schools
  - Introduce the **new Title IX regulations**, effective August 14, 2020
  - Outline **effective practices** in responding to reports of sexual harassment, sexual assault, dating violence, domestic violence, and stalking in the K-12 context

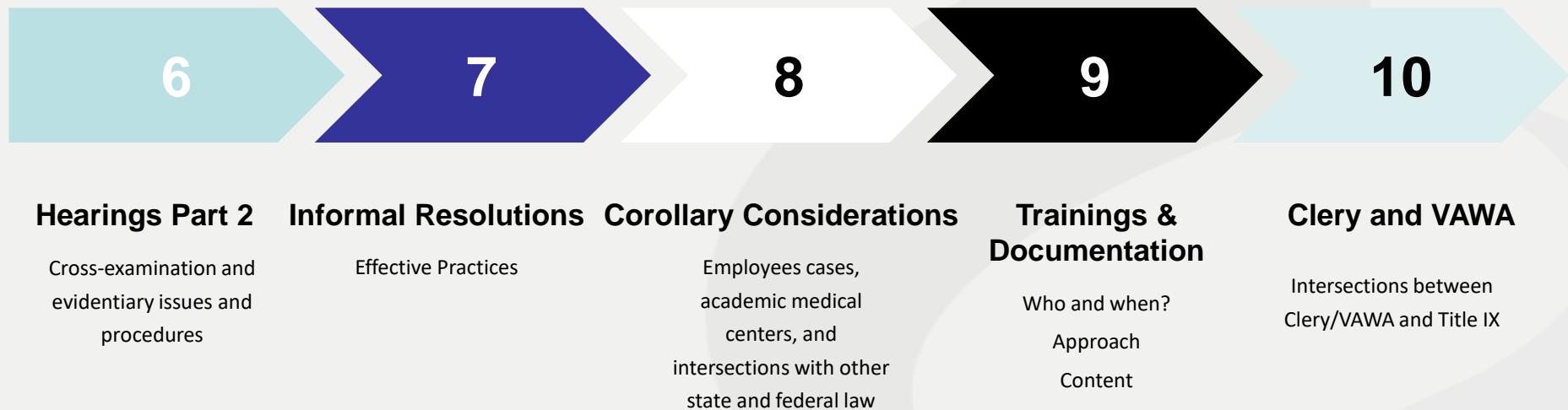
# Introducing the Webinar Series

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



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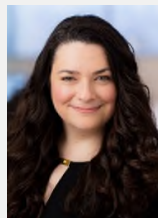
# Institutional Response Group



**Gina Maisto Smith**  
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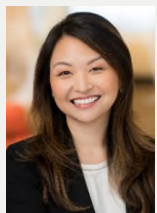
**Maureen P. Holland**  
Cozen O'Connor



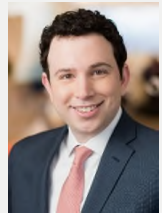
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Heather Dunn, Megan Lincoln, Braelyn Schenk, and Mary Sotos

# Margolis Healy and Associates

- National thought leaders in K-12 safety, security and emergency preparedness for public, private and independent schools across the country
- Given the honor in 2013 by then Attorney General Holder to develop and manage the Congressionally funded, first ever National Center for Campus Public Safety
- Provides clients with reasonable and actionable security solutions that can lead to program efficiencies and cost savings
- Provides assessments focused on building or enhancing existing systems, including access control, visitor management, security staffing and behavioral threat assessment
- Provides full range of school safety planning, training and exercises, and support tailored for each school's unique culture and climate



For more information:  
Margolis Healy Solutions for Safe Schools:  
<https://www.margolishealy.com/k-12>

# **FRAMING THE CONVERSATION**

## Dedication: To Those We Serve



*My Head is Full of Children*



*Many People on My Mind*

©Kiki Suarez



# Framing the Conversation

We Don't  
Know What  
We Don't  
Know

Flip the  
Lens

Embrace  
the Tension

Together  
We are  
Better than  
the Sum of  
our Parts

# The National Paradigm



Increased awareness of and attention to child abuse and sexual violence

Extensive media coverage of high profile case  
Organized social media  
First person advocacy



Evolving legal and regulatory framework

Child protective services laws  
Civil and criminal statutes of limitations

# The National Paradigm



Shifting and heightened expectations for institutional responses



Impact of trends and practices in higher education



Challenge in implementing complex and pan-institutional responsibilities in a traditionally siloed environment

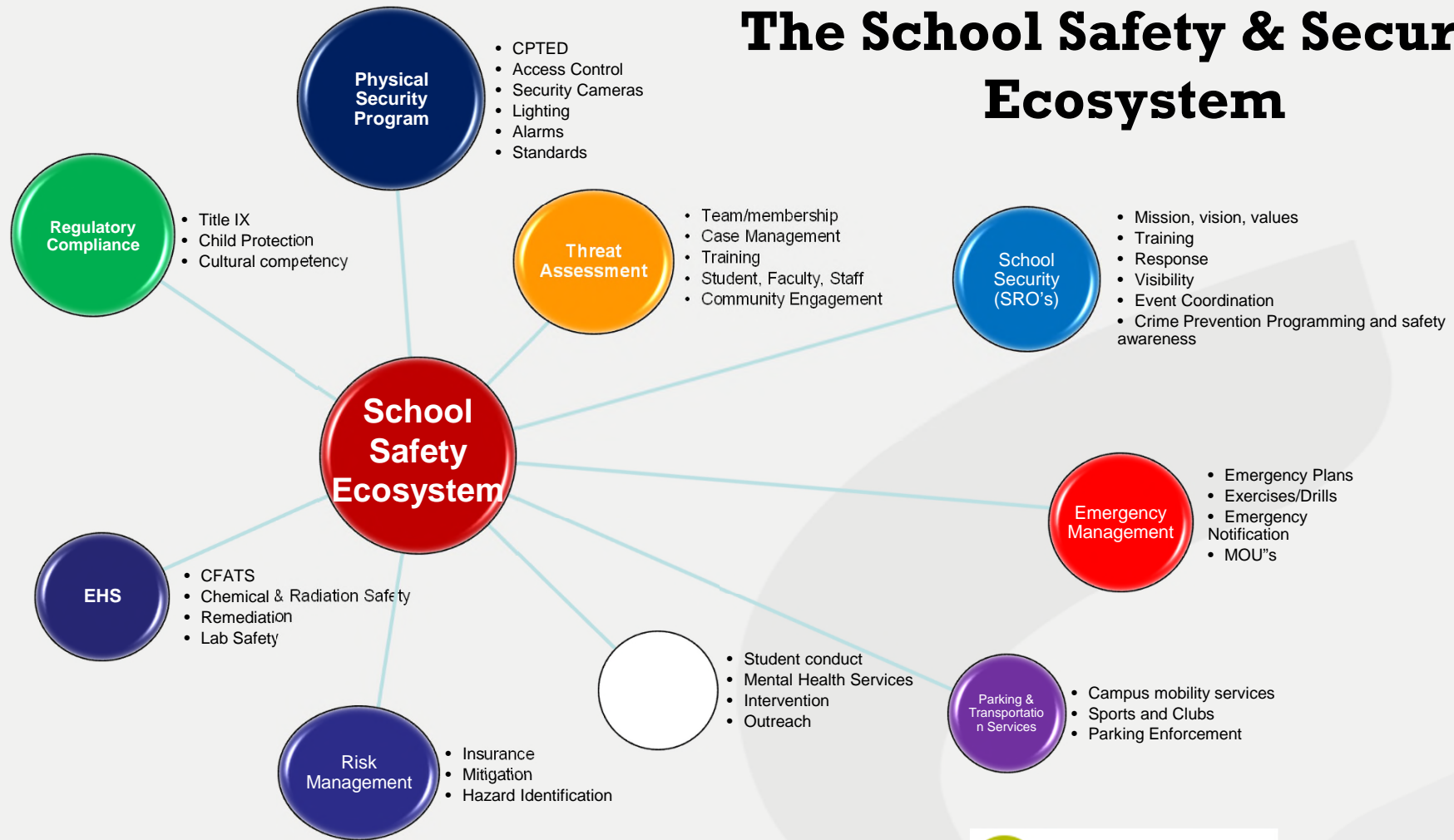
# **The Elementary and Secondary School Context**

- Educate students at a wide range of ages and developmental levels, with different degrees of understanding of sexuality, communication abilities, and understanding of the impact of their actions on others
- Students often feel deep trust and connection with their teachers and other administrators, which enriches the educational experience but also creates risks and vulnerabilities in light of the differentials in power and authority

# **The Elementary and Secondary School Context**

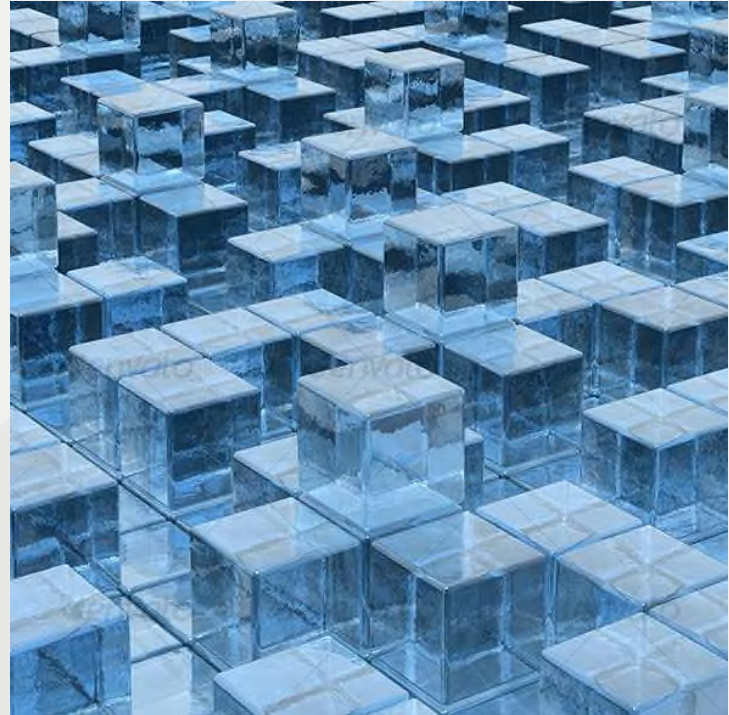
- School systems are decentralized organizations where management and oversight are often diffuse, making it harder to maintain complex accountability mechanisms and consistent behavioral norms
- Must consider interplay of federally-mandated processes with mandatory child abuse reporting laws and other state licensing regulations
- Resource and staffing challenges

# The School Safety & Security Ecosystem

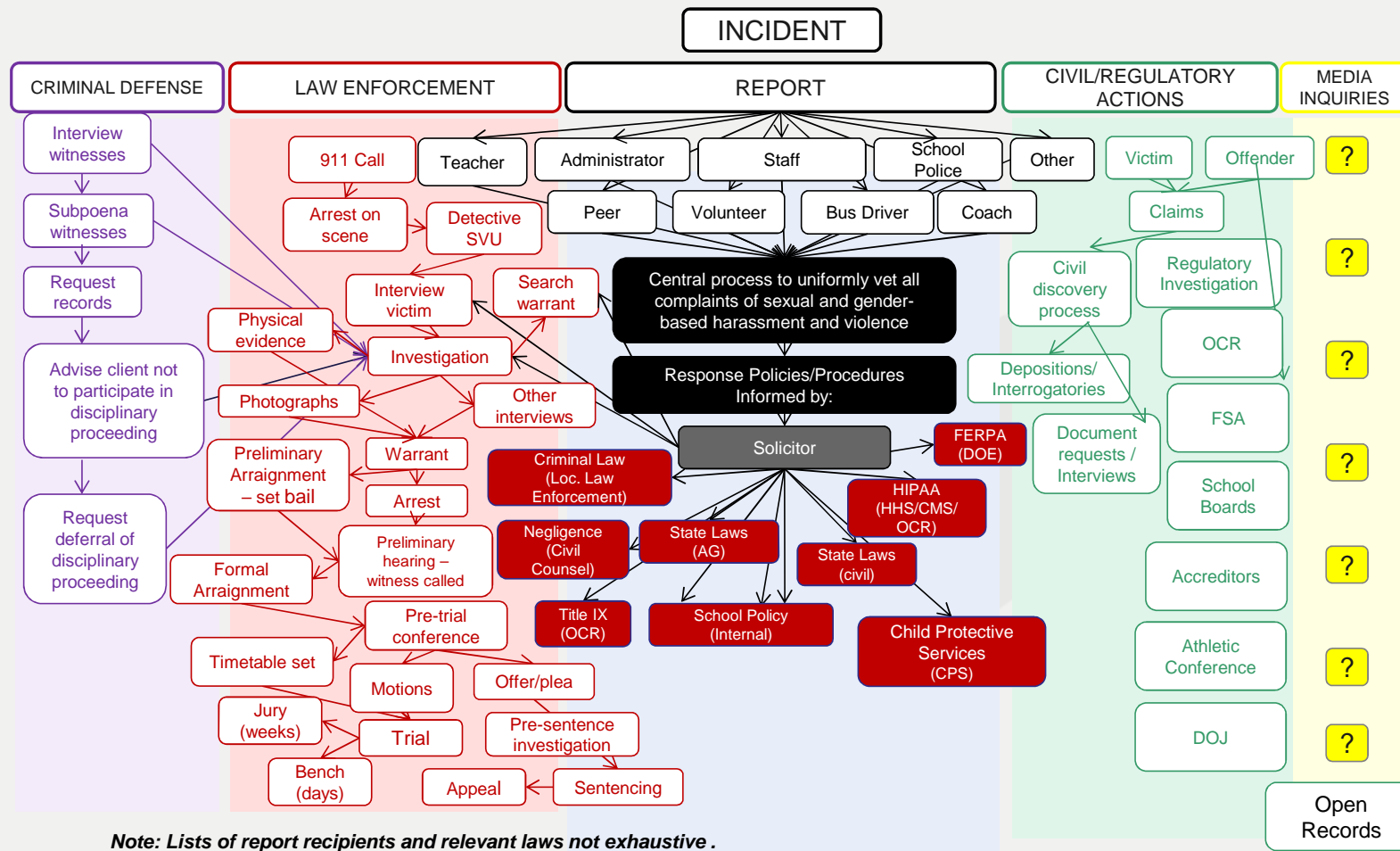


# The Context

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



## The Challenge of the Context – K-12





# Regulatory Framework

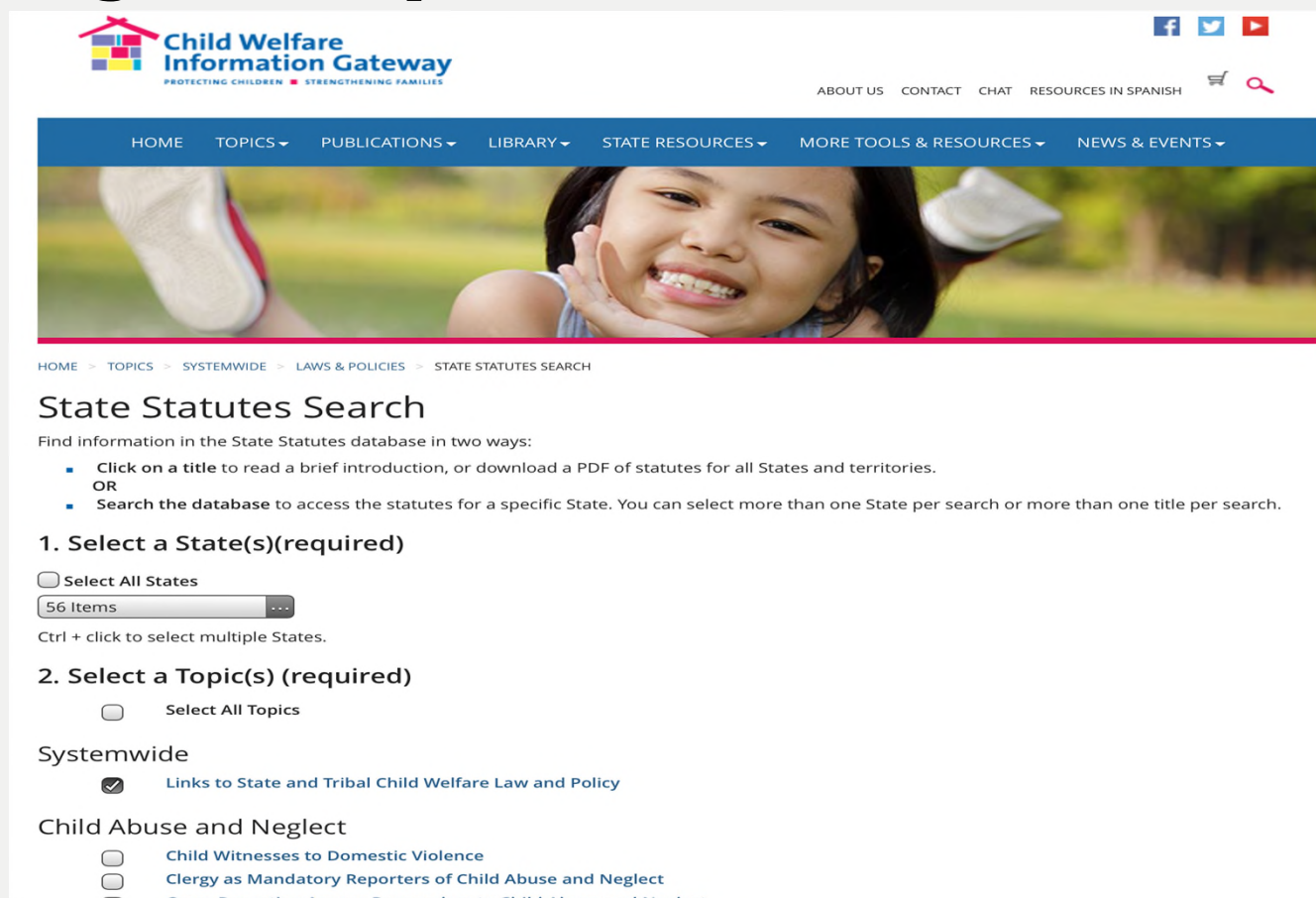
- State child protective services laws
  - Mandated screening and background clearances
  - Mandated training and education
  - Mandated reporting of child abuse and student abuse
  - Sharing of personnel information
- Regulations re: youth-serving programs
  - Supervision and ratios
  - Reporting of injury or abuse
- State education statutes
- Federal and state criminal statutes re: child pornography and sex offenses
- Civil liability and common law (duty, breach, causation, negligence and other considerations)

# Mandatory Reporter Laws

- Most states require professionals likely to come into contact with children to report suspected abuse or neglect
- About 18 states require anyone to report suspected abuse or neglect
- [https://www.childwelfare.gov/systemwide/laws\\_policies/state/index.cfm?event=stateStatutes.processSearch](https://www.childwelfare.gov/systemwide/laws_policies/state/index.cfm?event=stateStatutes.processSearch)
- [https://www.childwelfare.gov/systemwide/laws\\_policies/statutes/manda.pdf](https://www.childwelfare.gov/systemwide/laws_policies/statutes/manda.pdf)



# Regulatory Framework - Matrix



The screenshot shows the Child Welfare Information Gateway website. The header includes the logo, navigation links (HOME, TOPICS, PUBLICATIONS, LIBRARY, STATE RESOURCES, MORE TOOLS & RESOURCES, NEWS & EVENTS), and social media icons. The main content area is titled "State Statutes Search" and provides instructions on how to find information in the database. It includes a section for selecting states and topics, with a list of systemwide and child abuse and neglect topics.

**Child Welfare Information Gateway**  
PROTECTING CHILDREN • STRENGTHENING FAMILIES

ABOUT US CONTACT CHAT RESOURCES IN SPANISH

HOME TOPICS PUBLICATIONS LIBRARY STATE RESOURCES MORE TOOLS & RESOURCES NEWS & EVENTS

HOME > TOPICS > SYSTEMWIDE > LAWS & POLICIES > STATE STATUTES SEARCH

## State Statutes Search

Find information in the State Statutes database in two ways:

- Click on a title to read a brief introduction, or download a PDF of statutes for all States and territories.
- OR
- Search the database to access the statutes for a specific State. You can select more than one State per search or more than one title per search.

### 1. Select a State(s)(required)

☐ Select All States

56 Items

Ctrl + click to select multiple States.

### 2. Select a Topic(s) (required)

☐ Select All Topics

#### Systemwide

☒ Links to State and Tribal Child Welfare Law and Policy

#### Child Abuse and Neglect

- ☐ Child Witnesses to Domestic Violence
- ☐ Clergy as Mandatory Reporters of Child Abuse and Neglect
- ☐ Cross-Reporting Among Responders to Child Abuse and Neglect

# Mandatory Reporter Laws

- Based on SUSPICION not PROOF
- Records are always confidential
- Report can usually be anonymous
- Reporter's identity is usually confidential
- Good faith immunity
- Often criminal liability for failure to report
- Practical considerations:
  - Who makes the report?
  - Where will the report be stored?
- When in doubt, report it out

# Types of Child Abuse

- Sexual Abuse
- Physical Abuse
- Emotional Abuse
- Imminent Risk of Physical Injury or Sexual Abuse
- Serious Physical Neglect
- Abuse by parent or caregiver
- Abuse by a family member or friend
- Abuse by person in authority (teacher, administrator, coach)
- Abuse by another student
- Abuse by stranger

# Nature of Child Abuse

- Occurs across all ages, races, genders and socioeconomic classes
- No institution – or individual – is immune
- Most often committed by a parent or caregiver, or by someone trusted and known by the parent and child
- Often achieved by exploiting vulnerabilities
  - Age, disability, isolation, power differential
- Significant barriers to reporting for the child – and for adults

# Nature of Child Abuse

- In sexual abuse cases, often little to no physical or forensic evidence
- Decisions often based on credibility assessment
- Often accompanied by a delay in reporting
- Likelihood of repeat offenders and undetected predators
- Concerns over false reports
- Many misconceptions and barriers to understanding the dynamics

# Grooming

- Gradual and specific process used by the offender to select and target a victim & minimize risk of disclosure
- Behaviors of an adult that may cross emotional or physical boundaries with a minor in order to:
  - Build trust
  - Facilitate access to the minor
  - Shape the minor's perception of the conduct
  - Discourage reporting
- Early behaviors, which may mimic healthy and appropriate behaviors, later escalate into a pattern of conduct or series of encroachments that facilitate the abuse



# Grooming

- Grooming also involves shaping the perception of the child's parents, the institution and the community



# Barriers to Reporting

## Why Children Don't Disclose

- Threats
- Loss of trust
- Confusion
- Low self-esteem
- Feelings of shame or guilt
- Unaware that acts are inappropriate
- Fear of being removed from supports
- Fear of being disbelieved
- Taught to trust and obey adults
- May not have anyone to tell

## Why Adults Don't Report

- Confusion or uncertainty about reporting responsibilities
- Ignorance of warning signs
- Fear of inadequate response
- Do not want to become involved
- Fearful of repercussions
- Concern that reporting may violate professional obligations
- Fear of not being taken seriously
- Relationships that blur understanding

# Policy Frameworks in the K-12 Context

- Broad range of intersecting policies
  - Student code of conduct
  - Employee handbook
    - Title VII policy re: sexual harassment
    - Sexual abuse prevention and response
  - Mandatory reporting of suspected abuse
  - Supervision and ratios
  - Professional boundaries
  - IT and responsible use policies



# Reporting of Boundary Violations

- Set clear expectations and guidelines for professional boundaries
- Provide specific procedures for reporting of conduct that is concerning, but does not rise to the level of suspected abuse or neglect
- Build and reinforce pathways for routine and consistent responses
- Ensure consistent and centralized documentation of concerns
- Take investigative or remedial steps
- Utilize external professionals



# **TITLE IX IN THE K-12 CONTEXT**

# Title IX

*“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 education program or activity receiving Federal financial assistance.”*

20 USCA Sec. 1681(a)

June 23, 1972

## OCR K-12 Initiative

- On February 26, 2020, Ken Marcus, the Assistant Secretary for Civil Rights, announced that Secretary Betsy DeVos has directed OCR **to ensure that school districts understand their obligations under federal law and are prepared to respond effectively to student complaints of sexual harassment and assault**, including sexual acts perpetrated upon students by teachers, staff, and other school personnel
- Focus is **teacher-on-student** or **staff-on-student** sexual harassment and assault

## OCR K-12 Initiative

- OCR announced an initiative “**to examine the problem of sexual assault** in public elementary and secondary schools.”
- OCR **will be conducting widespread “compliance reviews”** at K–12 schools and school districts
  - To examine how sexual assault cases, including sexual incidents involving teachers and school staff, are handled under Title IX; and,
  - To identify compliance concerns and work with schools to correct any identified noncompliance



# OCR K-12 Initiative

- **Raising Public Awareness and Support**
  - Providing technical assistance, training opportunities, and other resources to school districts to raise awareness of these issues
- **Undertaking Data Quality Reviews**
  - Partnering with the National Center for Education Statistics (NCES) to help school districts accurately report sexual offenses through the Civil Rights Data Collection (CRDC) and conducting quality reviews of that data
- **Adding New Questions to the CRDC**
  - A proposal to collect more detailed data from schools on sexual assault, especially acts perpetrated by a school or staff member

## New Title IX Regulations

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

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

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

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

# Regulations: “Legally Binding Obligations”

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

## Regulations: “Best Practices”

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

Title IX Regulations issued May 6, 2020; Executive Summary, p. 18

# Title IX - Core Elements

- Title IX Coordinator
- Notice of Non-Discrimination
- Prompt and Equitable Grievance Procedures

## Regulations Promulgated in 1975

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

## 2020 Final Regulations

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

# Core Elements

## 1. Designate and Authorize a Title IX Coordinator

- Notify all students, parents/guardians, employees, unions, and job applicants of the Title IX Coordinator's name or title and contact information, including email address
- Permit reporting at any time (including non-business hours) via phone or email

# Core Elements

## 2. Disseminate Notice of Non-Discrimination

- Notify all students, parents/guardians, employees, unions, and job applicants of non-discrimination provision.
- State that inquiries about the application of Title IX may be addressed to the Title IX Coordinator, the Assistant Secretary for Civil Rights, or both.



# Core Elements

## 3. Adopt and Publish Grievance Procedures

- Procedures must provide for the prompt and equitable resolution of student and employee complaints
- Notify all students, parents/guardians, employees, unions, and job applicants of grievance procedures including:
  - How to file a report or complaint
  - How the district/school will respond

# **SHIFT IN APPROACH & FRAMING PRINCIPLES**

# Framing Principles

1

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

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

# Framing Principles

2

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

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

## Framing Principles

3

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

# Framing Principles

4

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

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

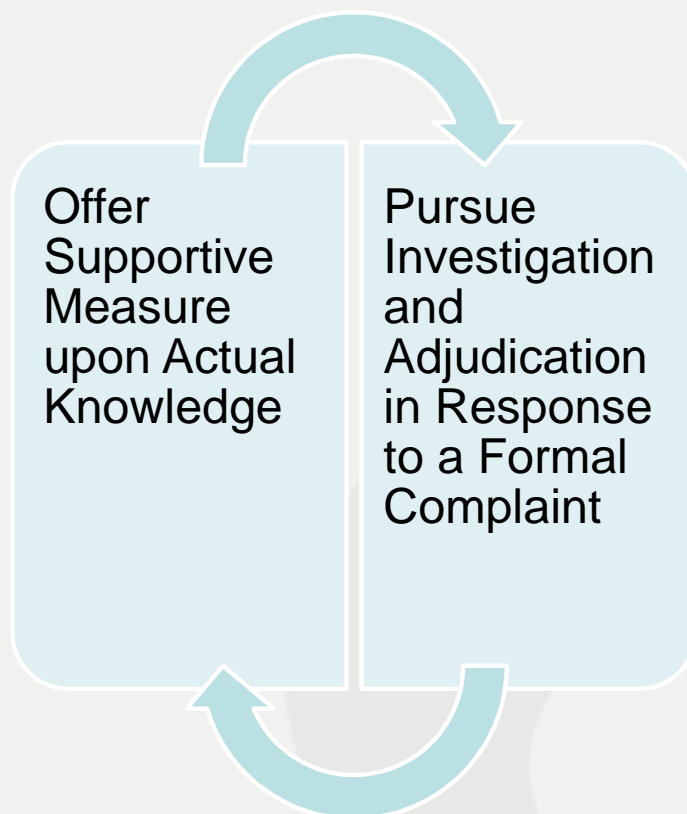
## Framing Principles

5

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

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

# Understanding Two Key Provisions





# Key Provisions: New Title IX Regulations – K-12

## Postsecondary Institutions

- Notice
  - Notice comes from the **Title IX Coordinator or any official who has authority to institute corrective measures on behalf of the school** having actual knowledge of sexual harassment.
- Hearing
  - **Must** adjudicate formal complaints through a live hearing with cross-examination by the party's advisor.

## K-12 Institutions

- Notice
  - Notice comes from **any employee** having actual knowledge of sexual harassment
- Hearing
  - **May** adjudicate formal complaints through a hearing or a written exchange of questions.

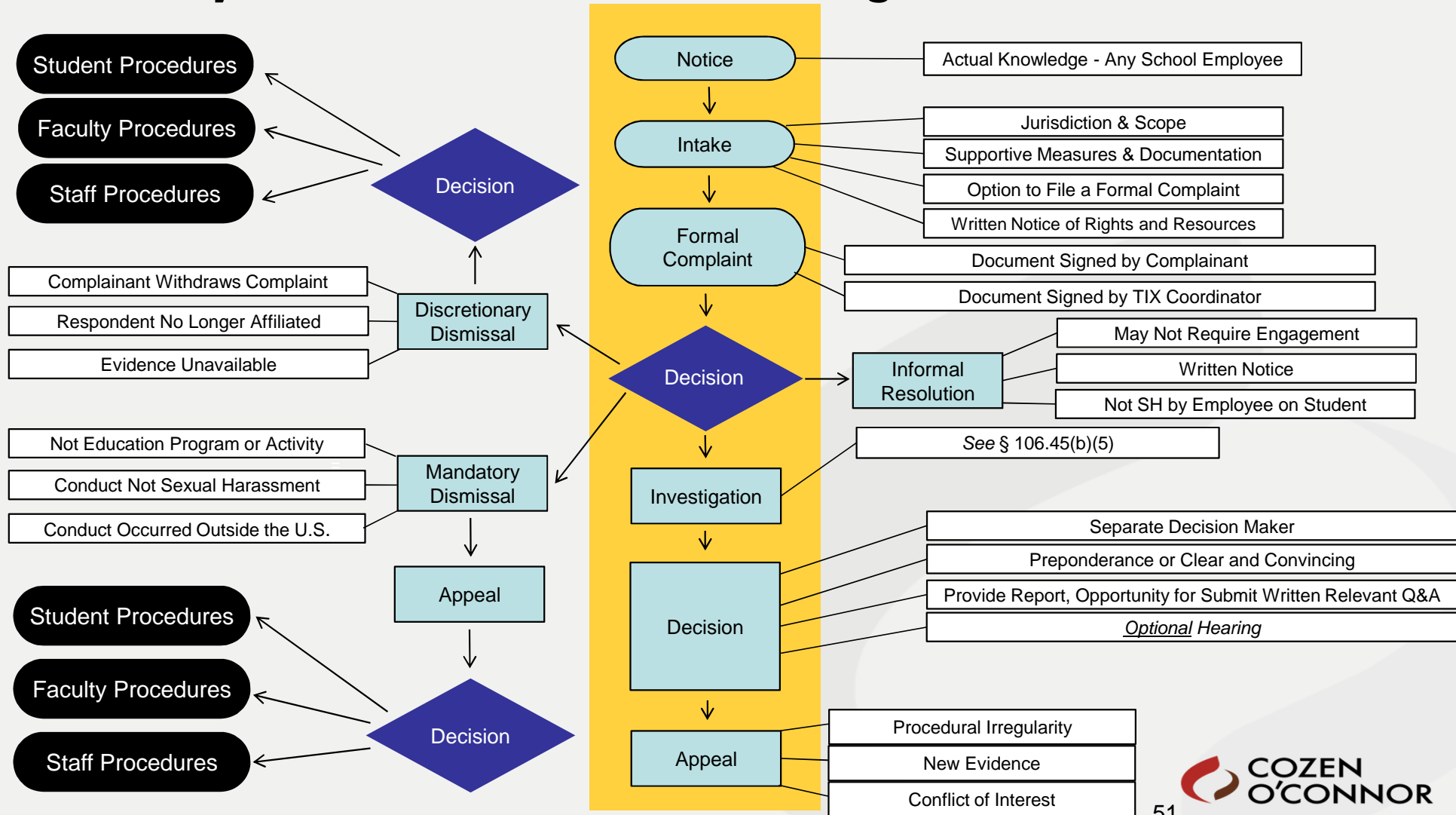
Title IX Regulations issued May 6, 2020; § 106.6(g), § 106.30(a), § 106.45(b)(6)(ii).

# **Rights of Parents in K-12 Context**

- Retain the legal rights to act on behalf of their child
- File formal complaints on their child's behalf
- Request supportive measures
- Accompany student to meetings, interviews and hearings
- Inspect and review the evidence gathered (in addition to FERPA rights)
- Write out the questions and answers for the student
- Along with parent or guardian participation, student may still have an advisor of their choice

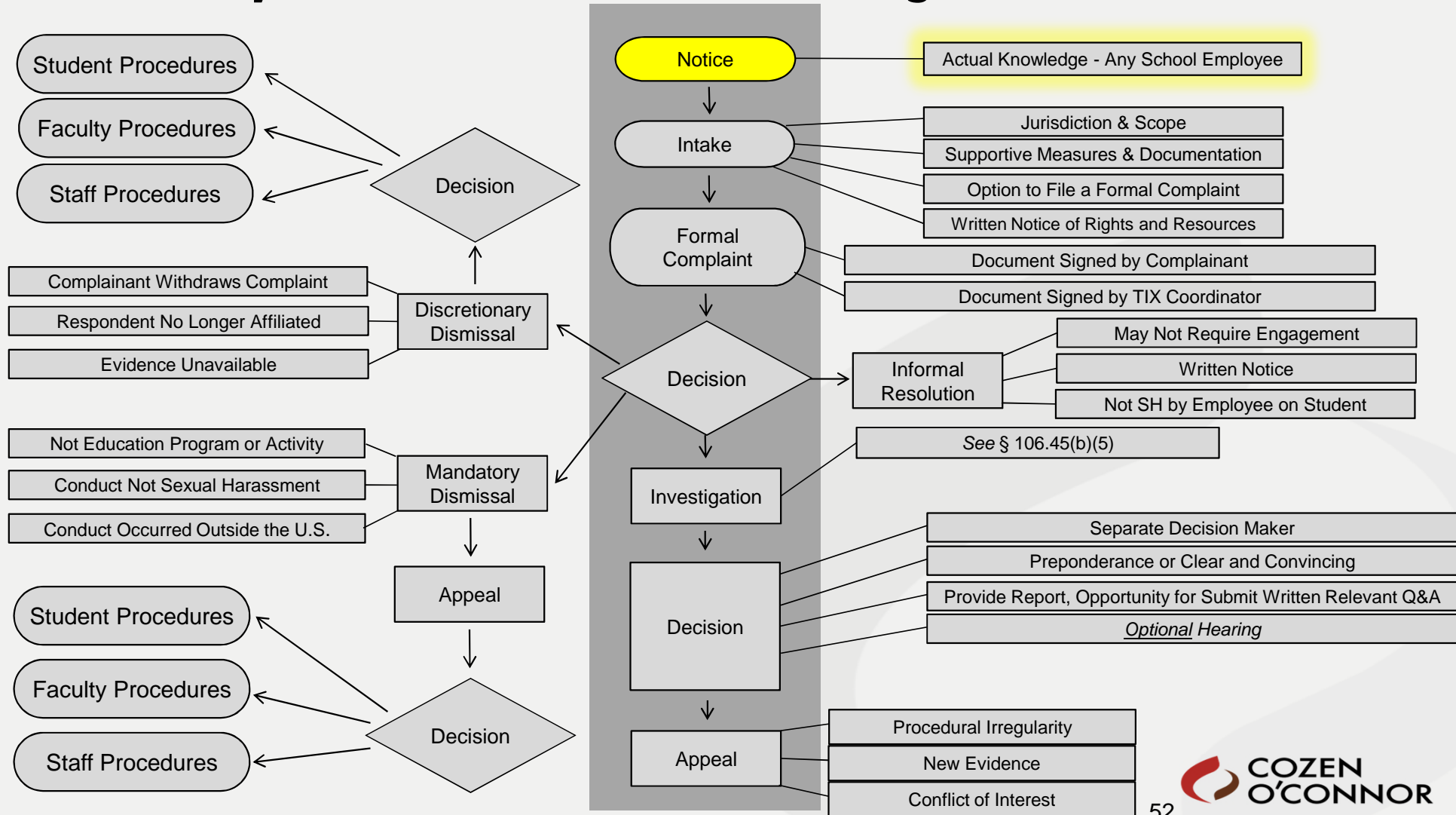
Title IX Regulations issued May 6, 2020; § 106.6(g), § 106.30(a), § 106.45(b)(6)(ii); Preamble at 1564-1565.

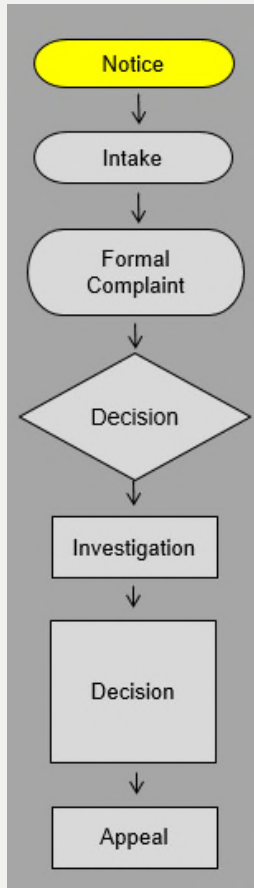
# Key Provisions: New Title IX Regulations – K-12



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

# Key Provisions: New Title IX Regulations – K-12





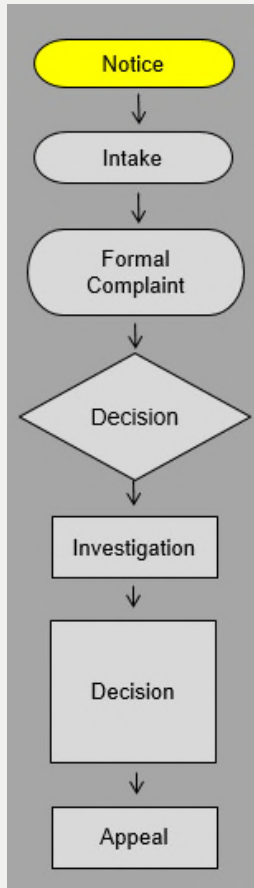
## Notice

- 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**
- **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

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

# Notice

- What about volunteers or independent contractors?
  - 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.

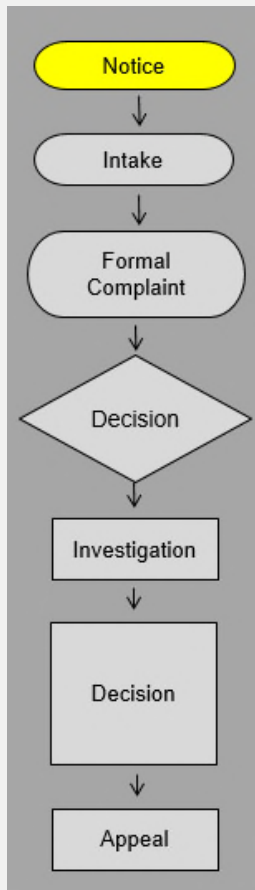


Title IX Regulations issued May 6, 2020; § 106.30(a)

# Notice: Institutional Response

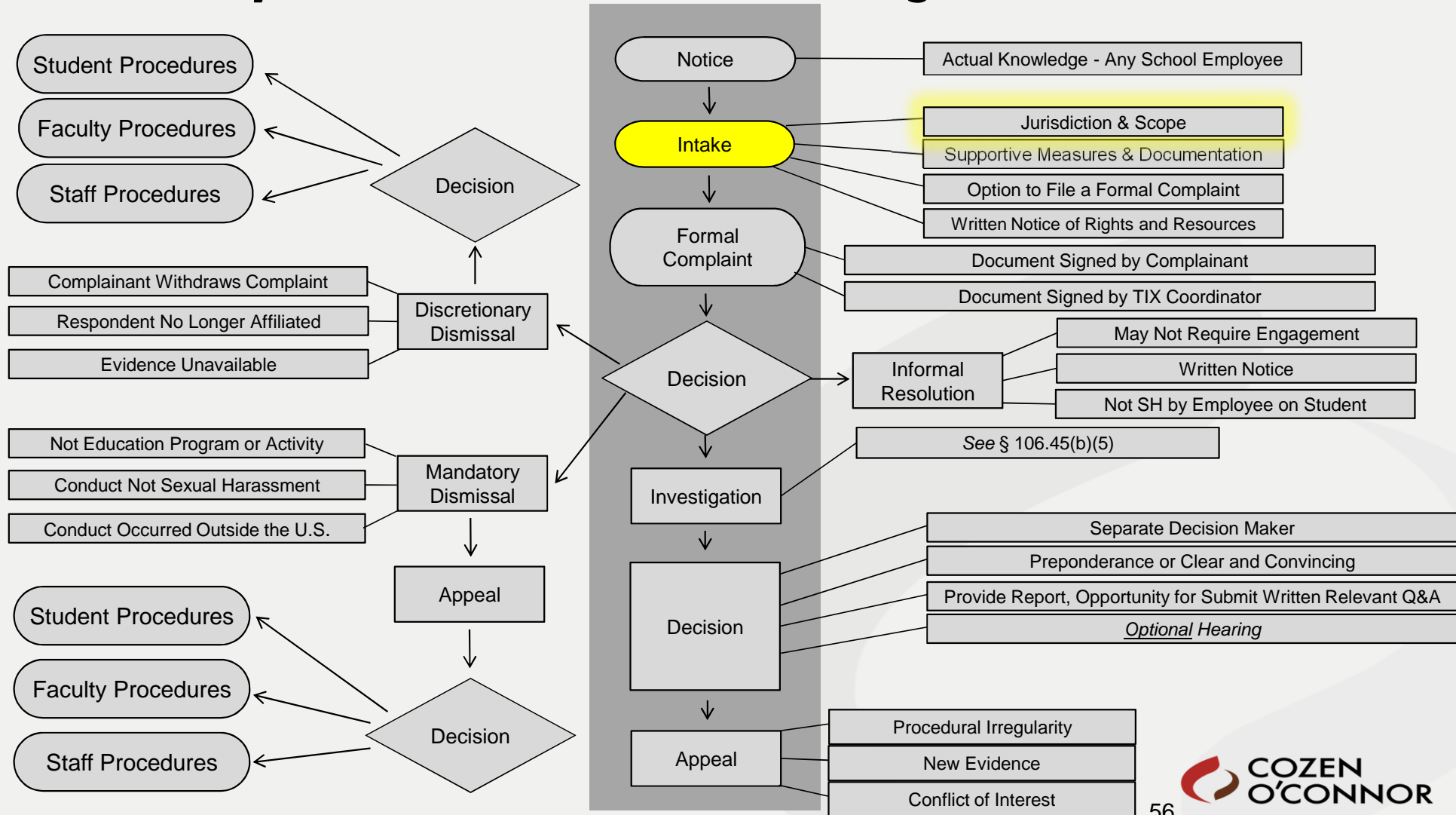
When a school has **notice**, the Title IX Coordinator must:

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.



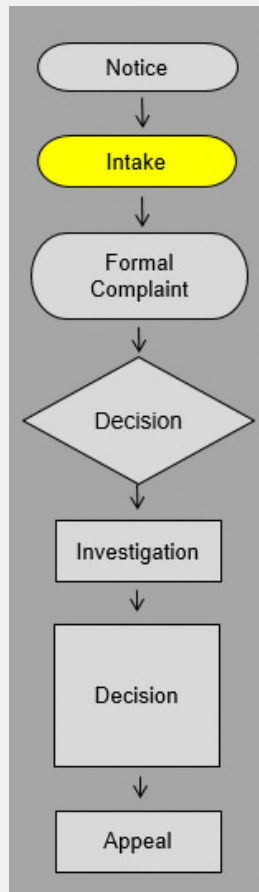
Title IX Regulations issued May 6, 2020; § 106.44(a)

# Key Provisions: New Title IX Regulations – K-12



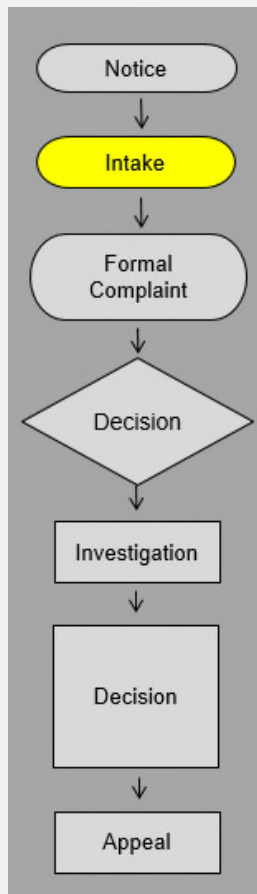


# Jurisdiction: Who



- Title IX 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)



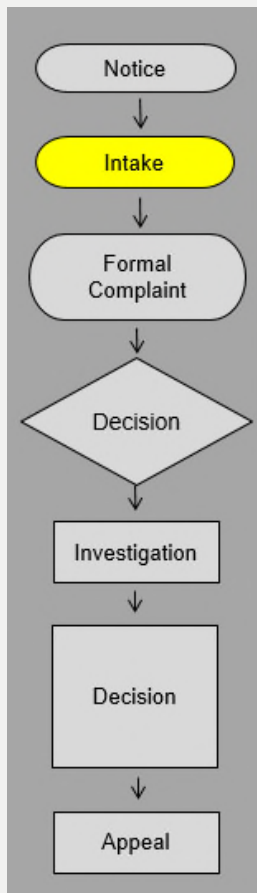
## Jurisdiction: Education Program or Activity

- “**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

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

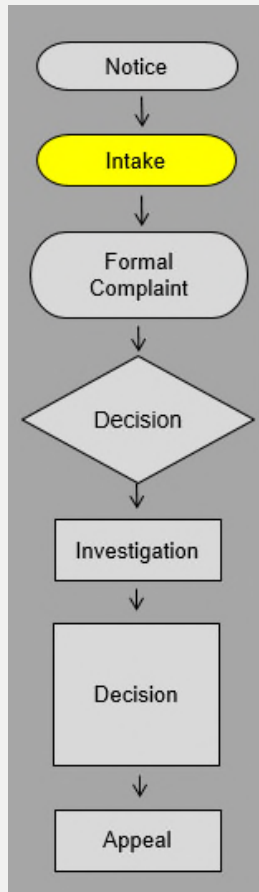
# Jurisdiction: Where

- 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

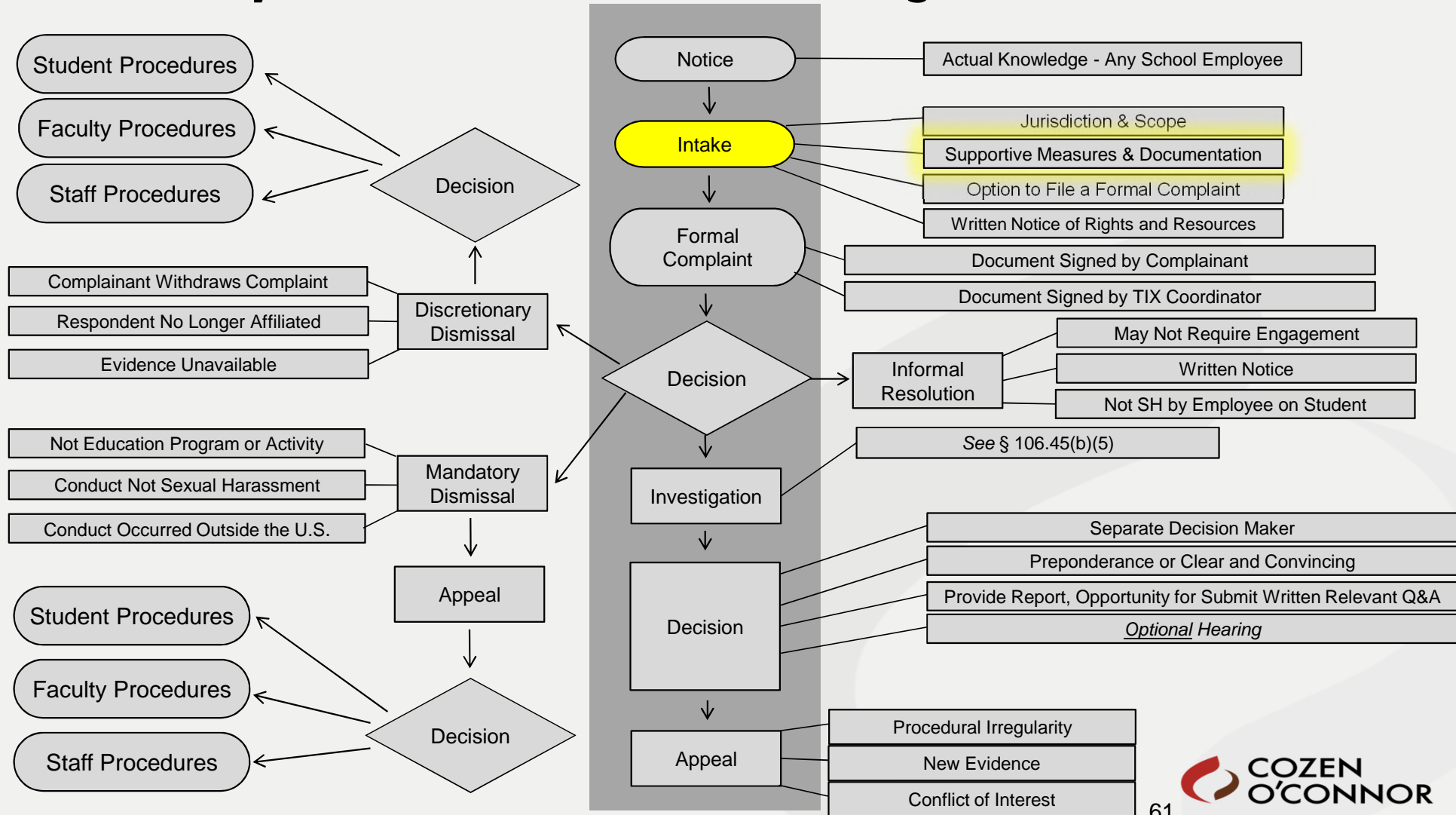
# Jurisdiction: What



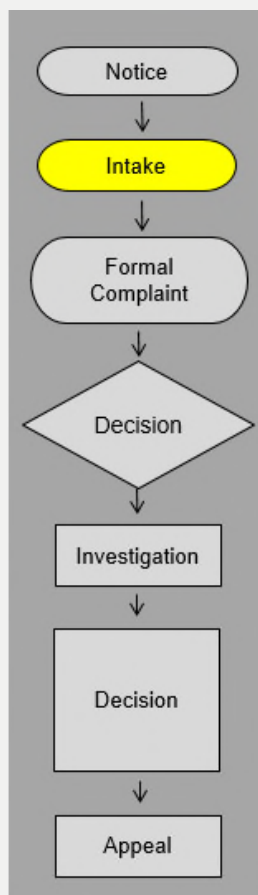
- Narrowed & expanded definition of sexual harassment
  - Quid pro quo by employee
  - Unwelcome conduct determined by a reasonable person to be so **severe, pervasive, and objectively** offensive that it **effectively denies** a person equal access to the recipient's education program or activity
 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

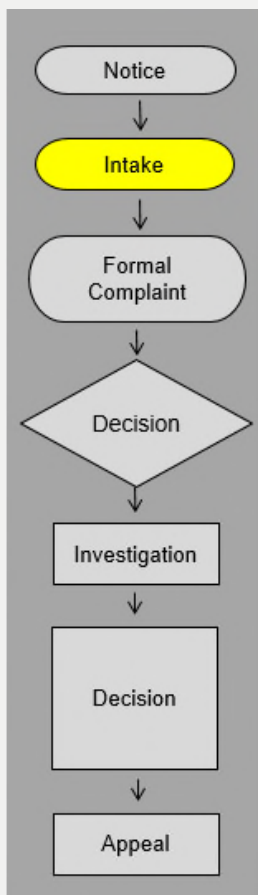
# Key Provisions: New Title IX Regulations – K-12



# 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.
- The Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures.

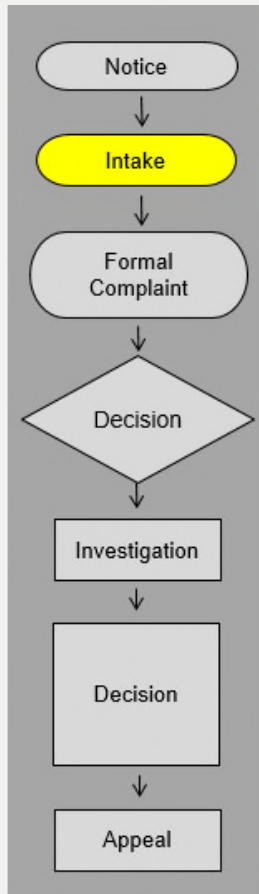


## Offering Supportive Measures

- 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 Coordinator must document actions taken.

Title IX Regulations issued May 6, 2020; §§ 106.45(b)(3), (b)(8), and (b)(10)(i) (ii).

# Emergency Removal for Students

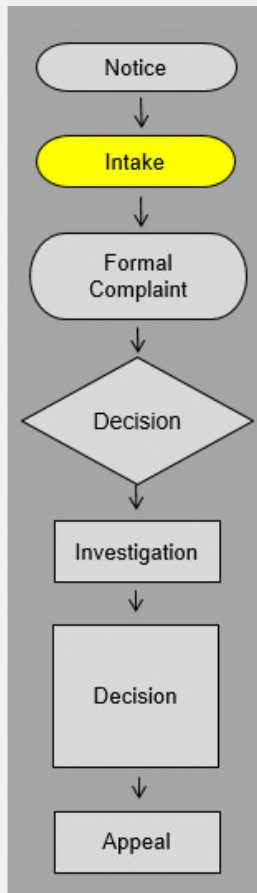


- Must undertake an individualized safety and risk analysis and determine that an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal
- Must provide the respondent with notice and an opportunity to challenge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

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

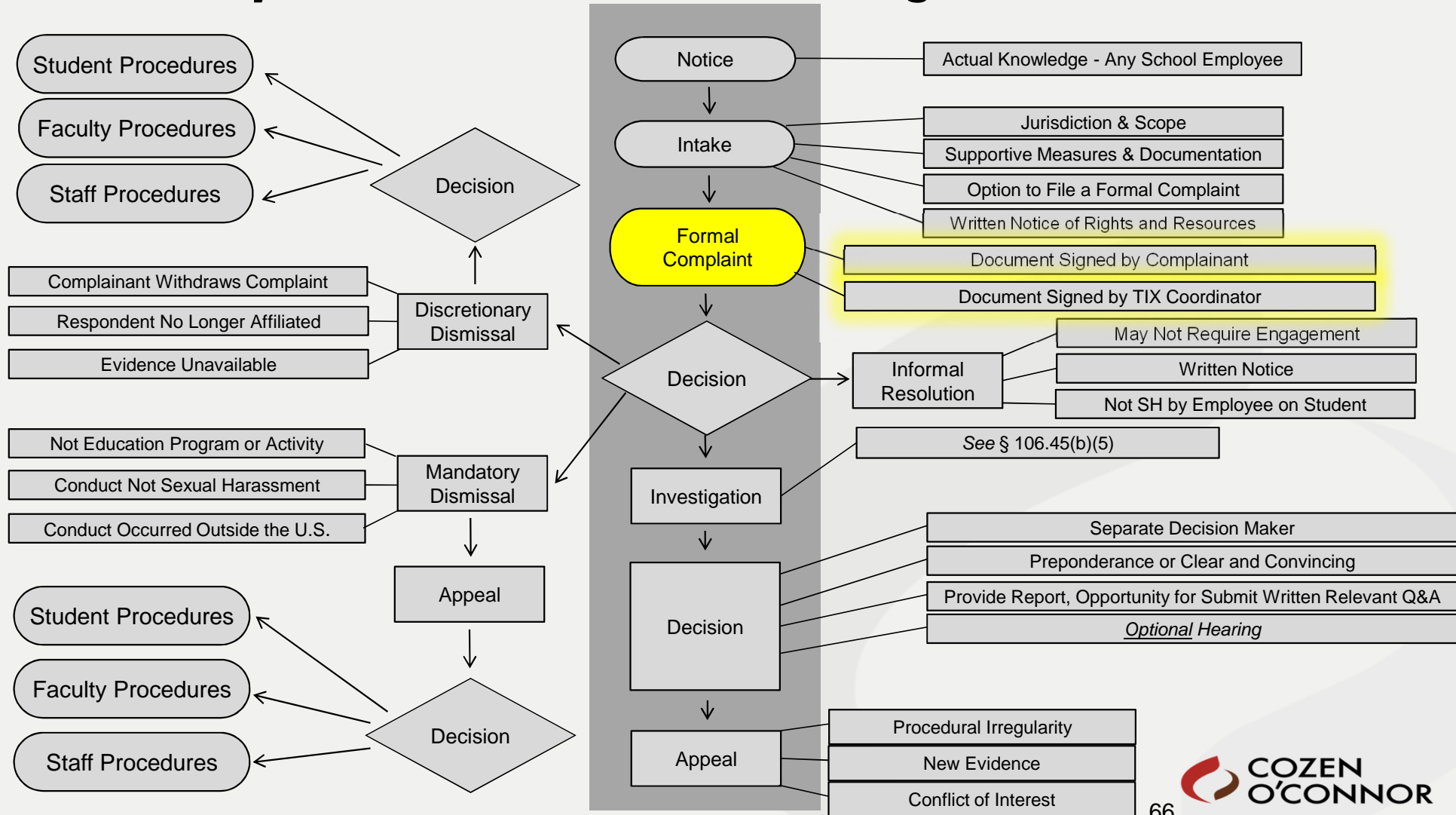


# Administrative Leave



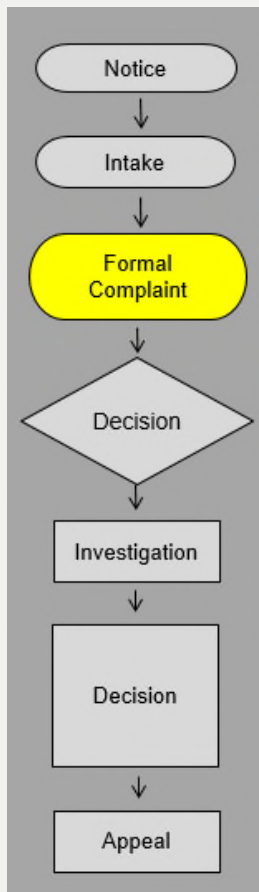
- Nothing in this subpart precludes a recipient from placing a non-student **employee respondent** on administrative leave during the pendency of a grievance process that complies with § 106.45.
- This provision may not be construed to modify any rights under Section 504 of the Rehabilitation Act of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

# Key Provisions: New Title IX Regulations – K-12



# 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

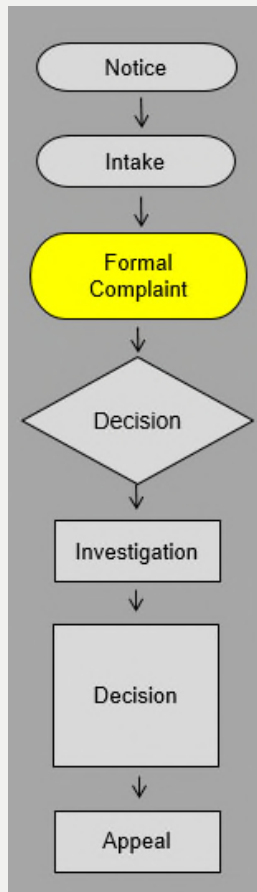


Title IX Regulations issued May 6, 2020; § 106.30(a)

# Formal Complaint

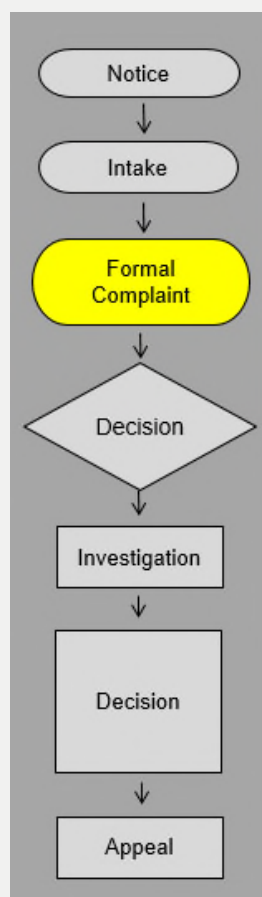
Upon receipt of a **formal complaint**, the institution:

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



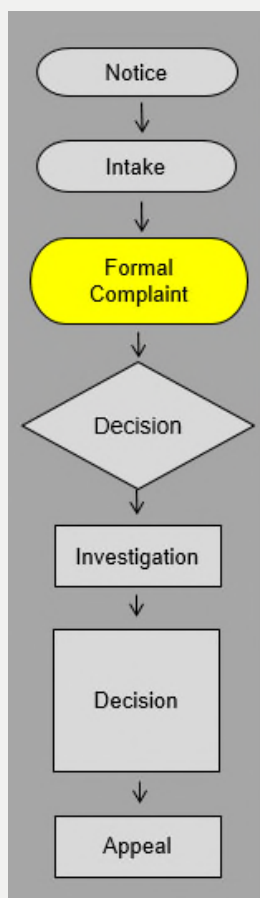
Title IX Regulations issued May 6, 2020; § 106.30(a)

# Formal Complaint: Required Dismissal



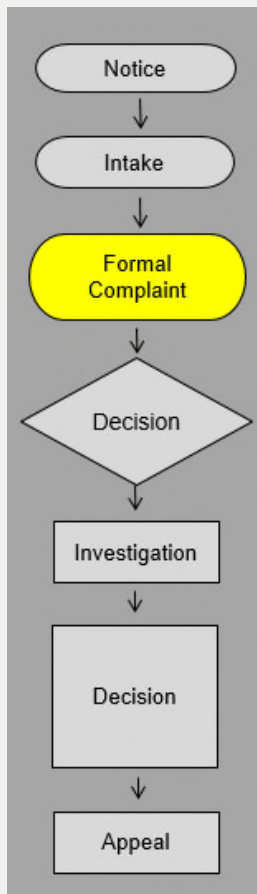
- **Must** dismiss if:
  - Conduct would not constitute sexual harassment even if proved,
  - Conduct did not occur in the recipient's education program or activity, or
  - Conduct did not occur against a person in the United States.
- Such a dismissal does not preclude action under another provision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

# 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.

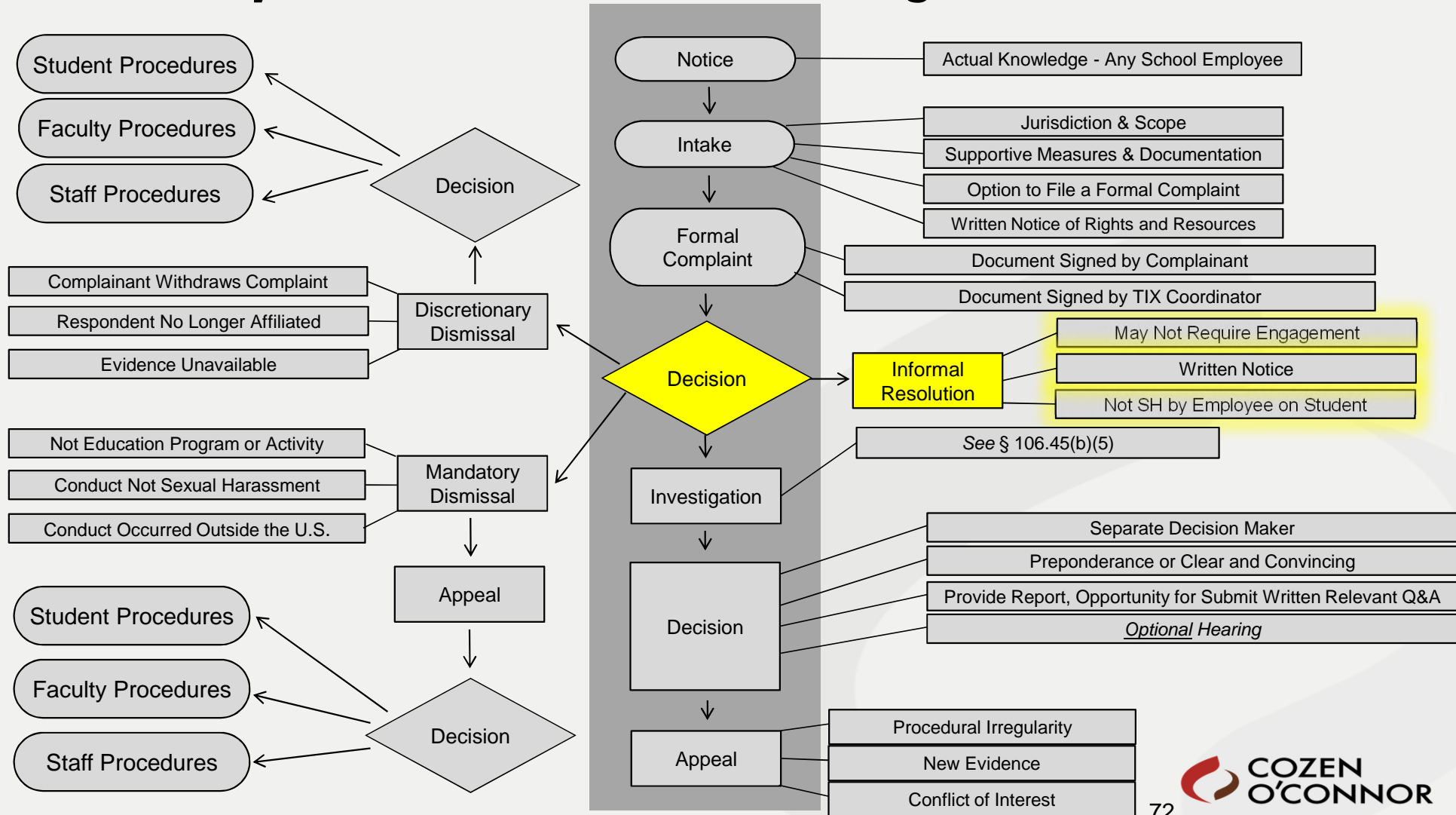
# Formal Complaint: Dismissal



- 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

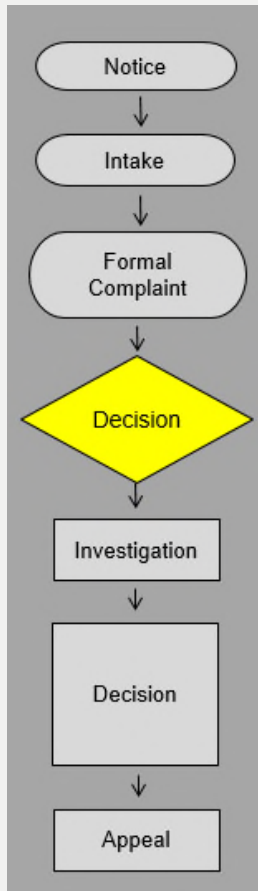
Title IX Regulations issued May 6, 2020; §§ 106.45(b)(3) and 106.45(b)(8)

# Key Provisions: New Title IX Regulations – K-12





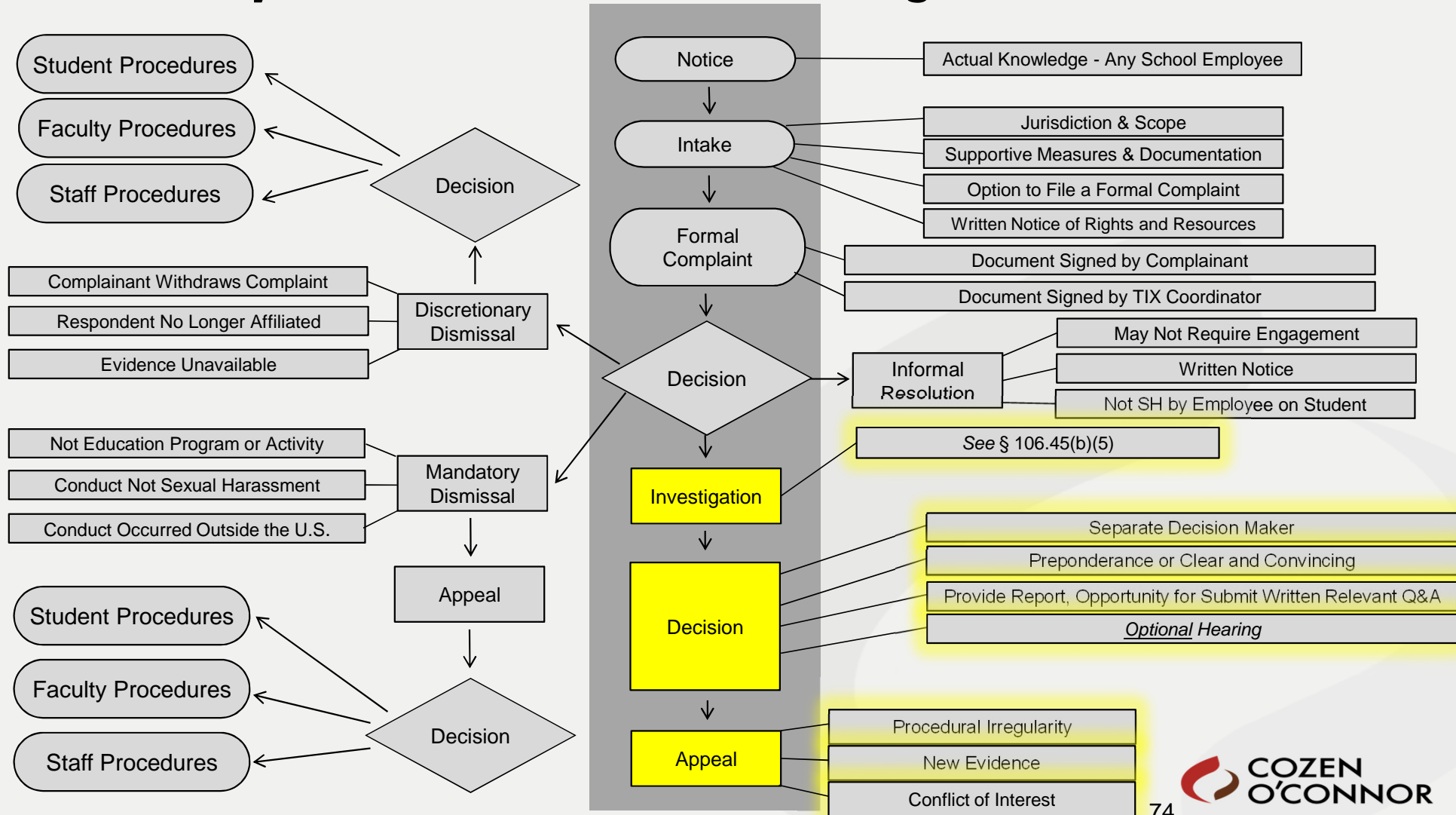
# Informal Resolution



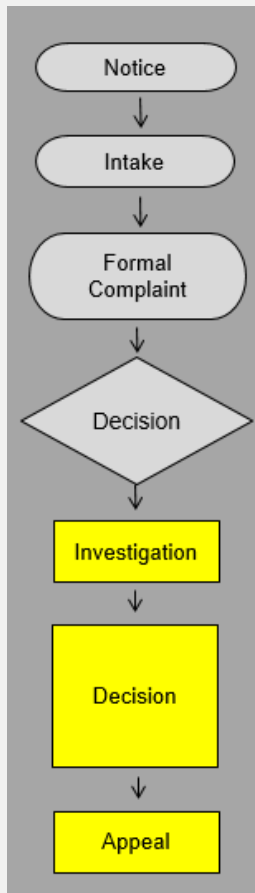
- May not require waiver of right to investigation and adjudication of formal complaints
- May not require parties to participate in an informal resolution process
- May not offer an informal resolution process unless a formal complaint is filed
- Must obtain the parties' voluntary, written consent to the informal resolution process
- Cannot offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student

Title IX Regulations issued May 6, 2020; § 106.45(b)(9)

# Key Provisions: New Title IX Regulations – K-12



# Basic Requirements of Grievance Process



- **Treat complainants and respondents equitably**
- Require an objective evaluation of all relevant evidence
- Implementers must be trained and free from conflict or bias
- Presumption of non-responsibility
- Reasonably prompt time frames

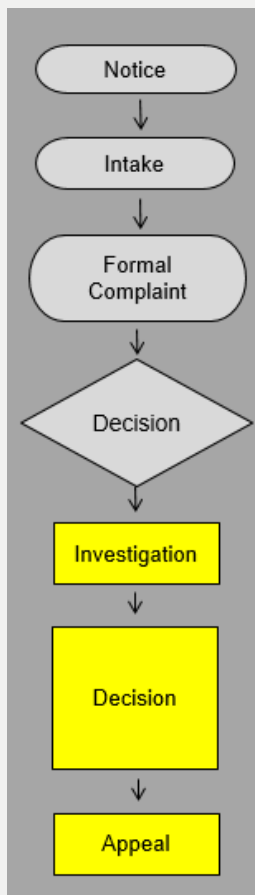
## Relevant Regulations Sections:

Equitable Treatment: §§ 106.44(a) and 106.45(b)(1)(i)

Objective evaluation of all relevant evidence: § 106.45(b)(1)(ii)

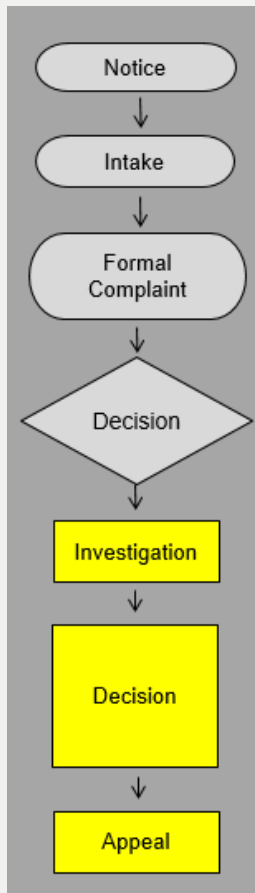
Training and avoidance of conflicts or bias: § 106.45(b)(1)(iii)

# Basic Requirements of Grievance Process



- Describe the range (or list) of possible disciplinary sanctions and remedies
- State whether the **standard of evidence** to be used to determine responsibility is the preponderance of the evidence standard or the clear and convincing evidence standard
- Include the procedures and permissible bases for the complainant and respondent to appeal
- Describe the range of supportive measures available

# Basic Requirements of Grievance Process



- Include the procedures and permissible bases for the complainant and respondent to appeal
- Describe the range of supportive measures available
- Not require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, **information protected under a legally recognized privilege**, unless the person holding such privilege has waived the privilege

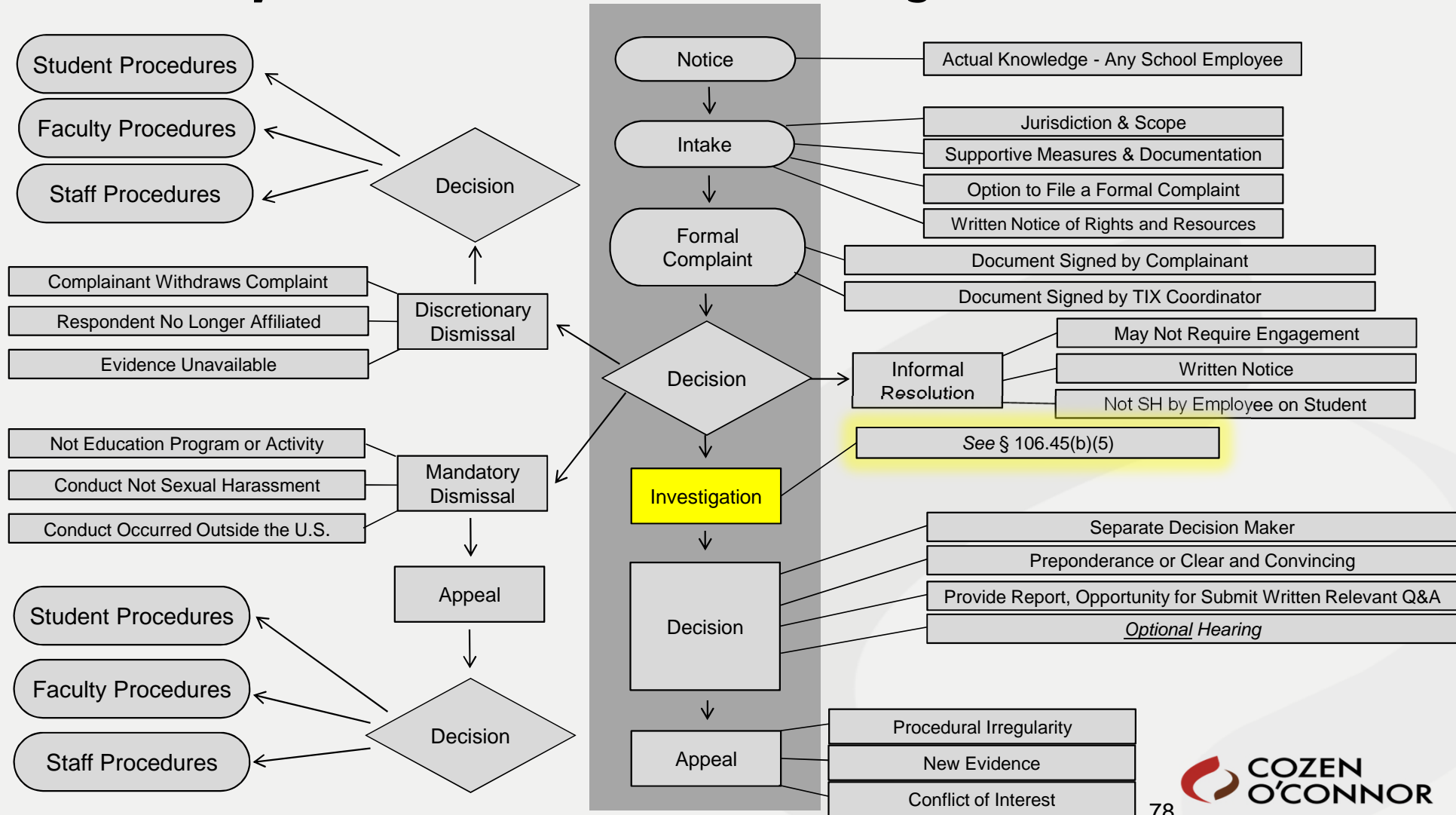
Relevant Regulations Sections:

Appeal: §§ 106.45(b)(1)(viii) and 106.45(b)(7)(ii)(F)

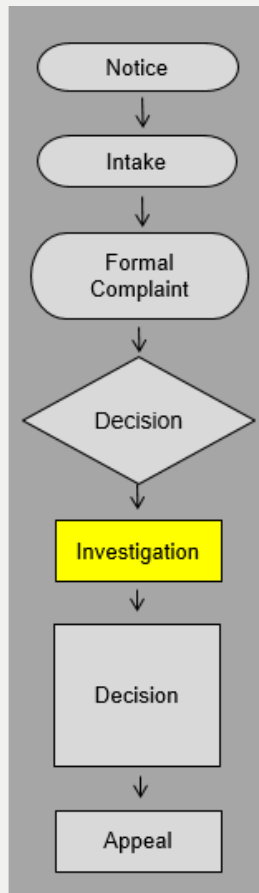
Range of Supportive Measures: § 106.45(b)(1)(ix)

Waiver of Privilege: § 106.45(b)(1)(x)

# Key Provisions: New Title IX Regulations – K-12



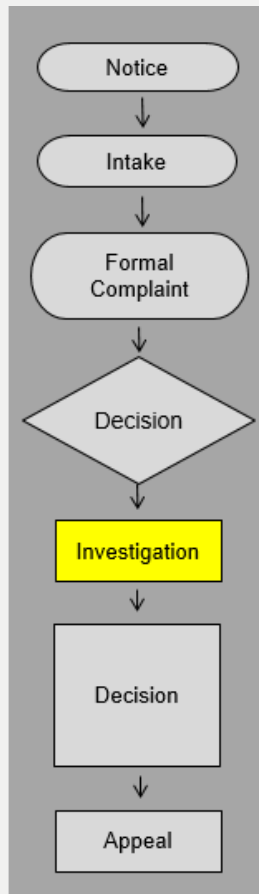
# Obligation to Investigate



- Separation of the recipient's obligation to respond to a report of sexual harassment from the recipient's obligation to investigate formal complaints of sexual harassment.
  - See discussion in Preamble at 598-599.
- The recipient **must** investigate the allegations in a formal complaint.

Title IX Regulations issued May 6, 2020; Preamble at 598-599;  
§ 106.45(b)(3) .

# Written Notice to Parties

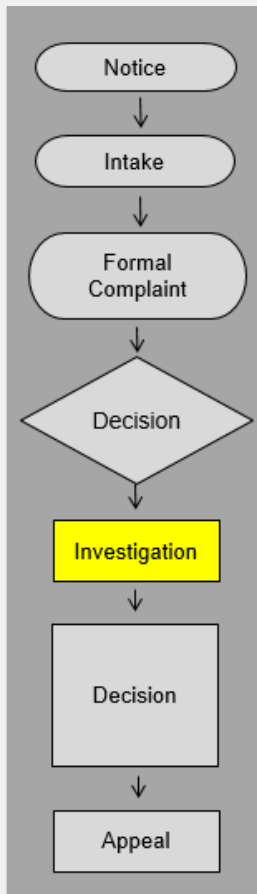


- Must provide written notice of the recipient's grievance process, including any informal resolution process.
- Must provide written notice of the allegations.
  - Sufficient time to prepare a response before any initial interview
  - Sufficient details known at the time
- Must provide supplemental notice of additional allegations

Title IX Regulations issued May 6, 2020; § 106.45(b)(2)



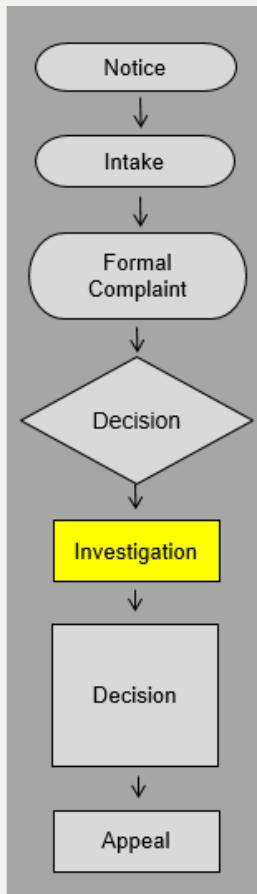
# Investigations



- Ensure that the burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rest on the recipient and not on the parties.
- Provide written notice of the date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings, with sufficient time for the party to prepare to participate.

Title IX Regulations issued May 6, 2020; § 106.45(b)(5); 106.45(b)(5)(v)

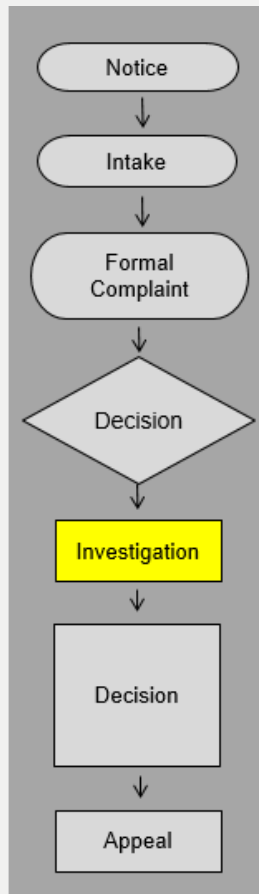
# Investigations



- Provide an equal opportunity for the parties to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence.
- Not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence.
- Provide the parties with the same opportunities to have others present during any grievance proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice, who may be, but is not required to be, an attorney.

Title IX Regulations issued May 6, 2020; §§ 106.45(b)(5)(ii)-(iv)

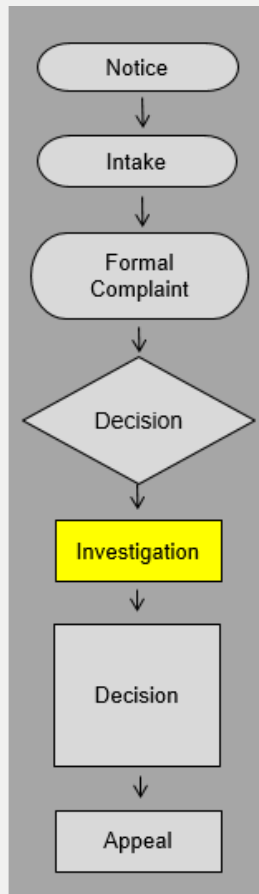
# Investigations



- Provide both parties an **equal opportunity to inspect and review any evidence** obtained as part of the investigation that is **directly related to the allegations** raised in a formal complaint so that each party can meaningfully respond to the evidence prior to conclusion of the investigation.
  - Evidence that is “directly related to the allegations” may encompass a broader universe of evidence than evidence that is “relevant.”
  - Allowing parties the opportunity to inspect this broader universe of evidence will further each party’s own interests by identifying evidence either overlooked by the investigator or erroneously deemed relevant or irrelevant.

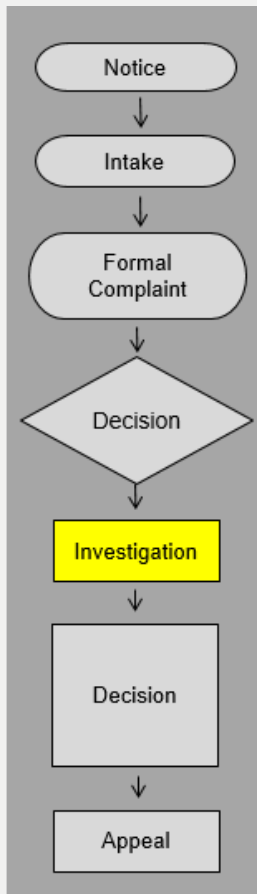
Title IX Regulations issued May 6, 2020; §§ 106.45(b)(5)(vi); Preamble at 1041, 1015

# Investigations



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

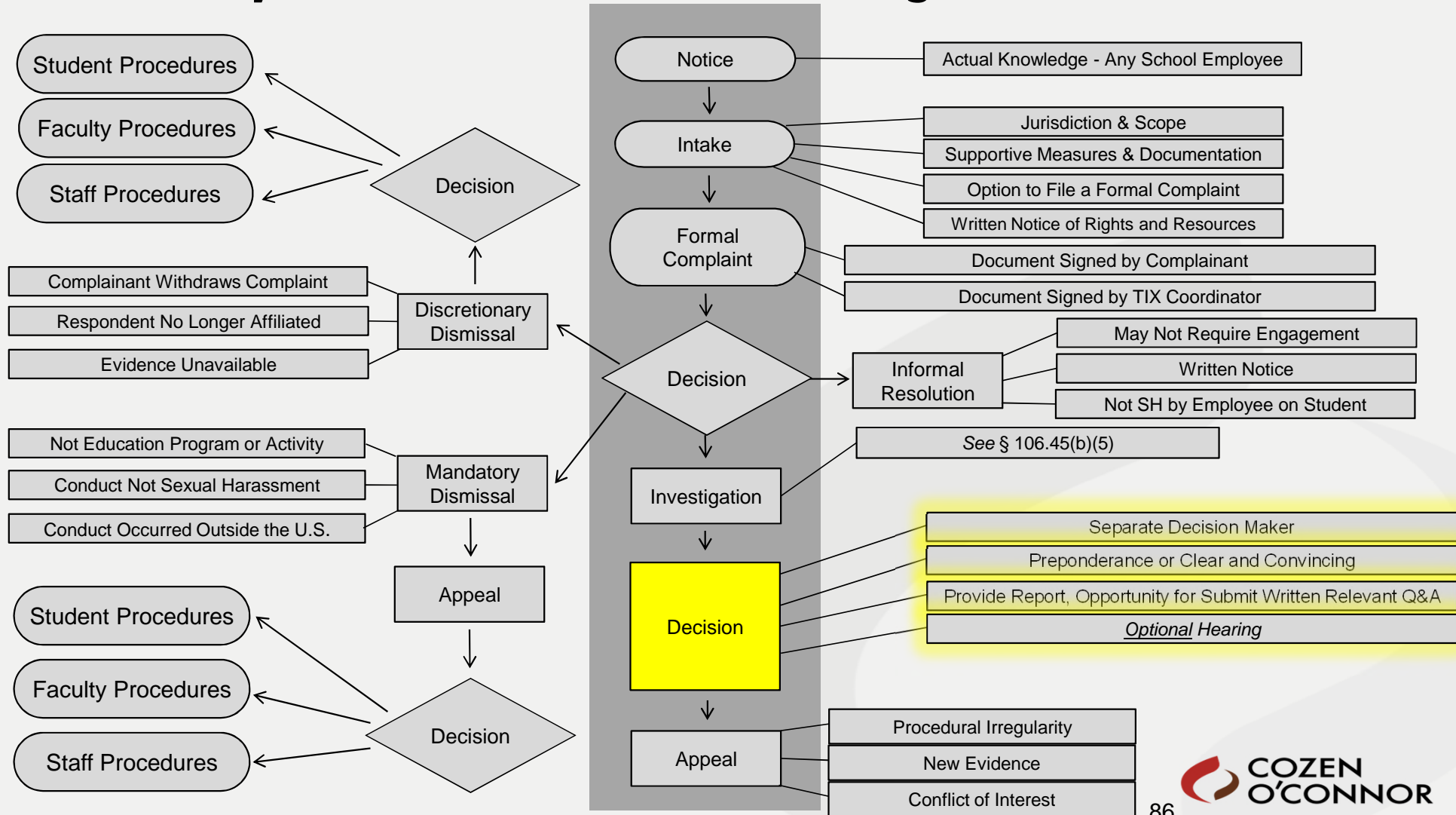
# Investigations



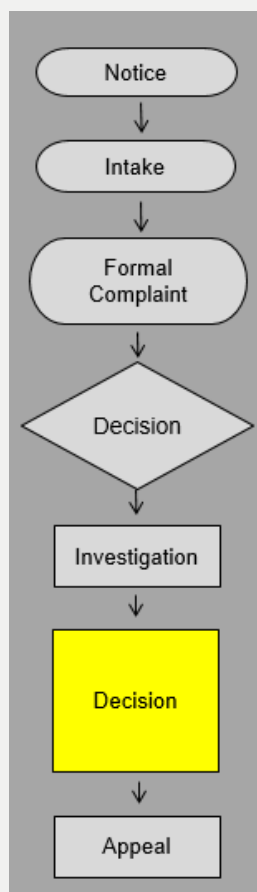
- Create an **investigative report** that fairly summarizes relevant evidence and
- Send to each party and the party's advisor, if any, the investigative report in an electronic format or a hard copy, for their review and written response, **at least 10 days prior** to the determination of responsibility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

Title IX Regulations issued May 6, 2020; §§ 106.45(b)(5)(vii); Preamble at 1037

# Key Provisions: New Title IX Regulations – K-12



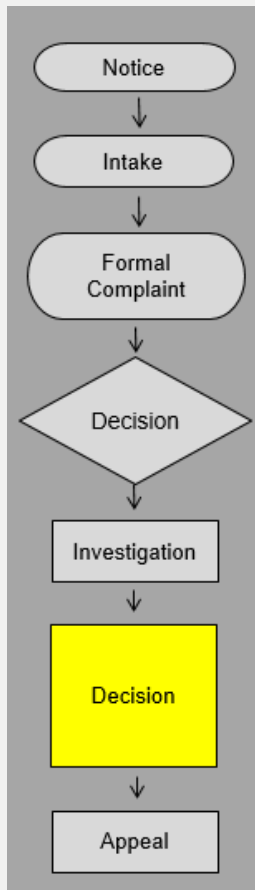
# Decision



- Decision-maker(s), **cannot be the same person(s)** as the Title IX Coordinator or the investigator(s)
- Must issue a **simultaneous written determination** regarding responsibility, including
  - Identification of the allegations
  - Description of the procedural steps taken from the receipt of the formal complaint through the determination
  - Findings of fact supporting the determination
  - Conclusions regarding the application of the recipient's code of conduct to the facts
  - Rationale
  - Appeal procedures

# Decision

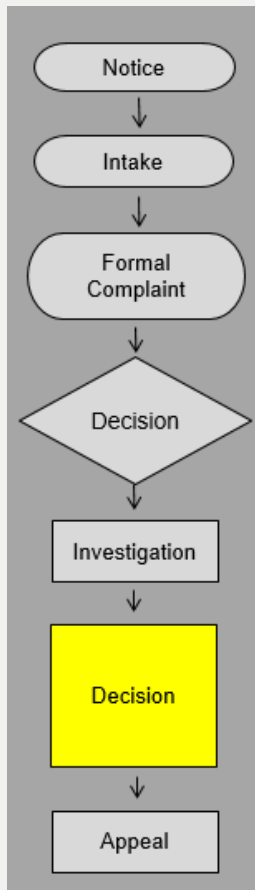
- For recipients that are elementary and secondary schools, and other recipients that are not postsecondary institutions, the recipient's grievance process **may, but need not, provide for a hearing.**



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



# Decision

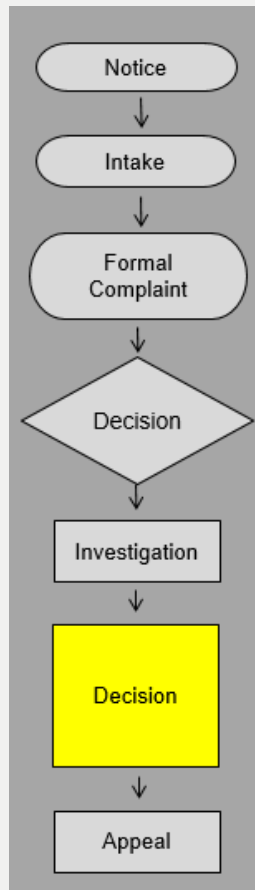


- Elementary and secondary schools have “significant discretion” whether to adjudicate formal complaints through a hearing or a written exchange of questions.
- “The Department desires to leave elementary and secondary schools as much flexibility as possible to apply procedures that fit the needs of the recipient’s educational environment.”
- Discretion is only limited by the requirement that “any rules adopted by a recipient must apply equally to both parties.”

Title IX Regulations issued May 6, 2020; Preamble at 1240-1241)

# Decision

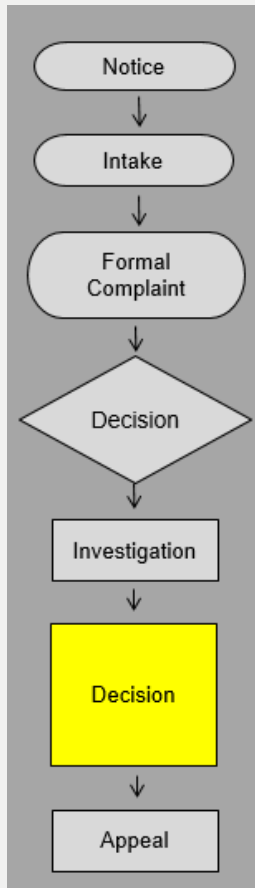
- “Therefore, the recipient has flexibility to make a hearing available on a case by case basis, for example where the Title IX Coordinator determines a hearing is needed, so long as the grievance process . . . clearly identifies the circumstances under which a hearing may, or may not, be held.”



Title IX Regulations issued May 6, 2020; Preamble at 1239)

# Decision

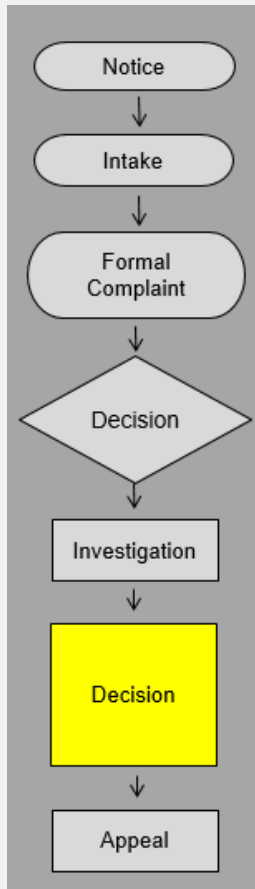
- With or without a hearing, after [sending] the investigative report to the parties ... and before reaching a determination regarding responsibility, the decision-maker **must afford each party the opportunity to submit written, relevant questions** that a party wants asked of any party or witness, provide each party with the answers, and allow for additional, limited follow-up questions from each party.



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

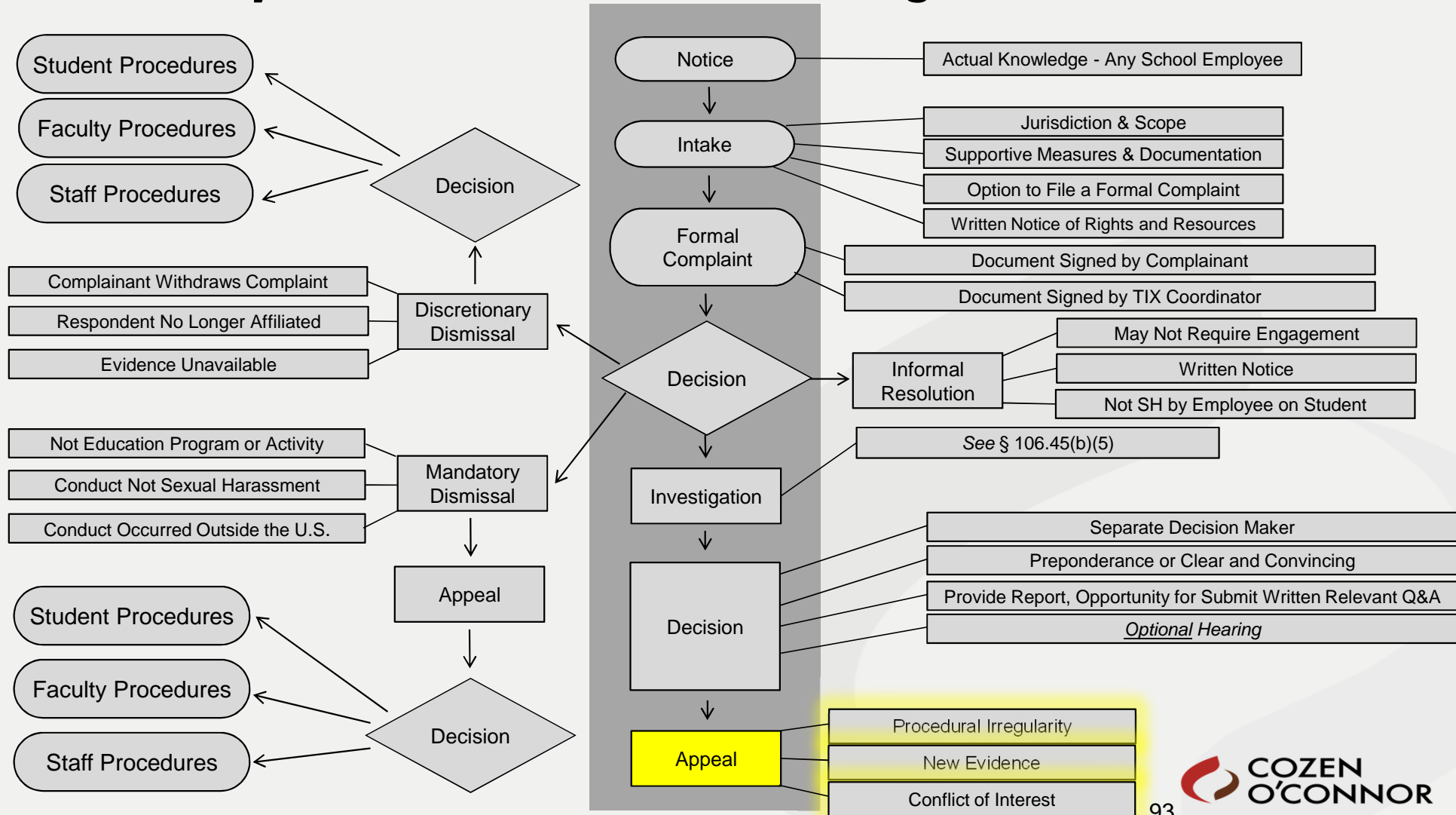
# Decision

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

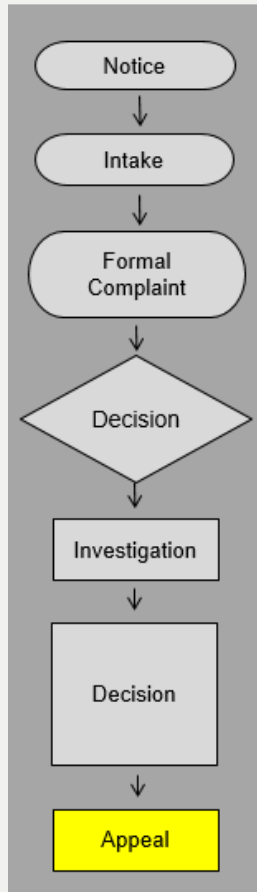


Title IX Regulations issued May 6, 2020; § 106.45(b)(6)(ii)

# Key Provisions: New Title IX Regulations – K-12



# Appeals



- Recipient must offer both parties an appeal from a determination regarding responsibility, and from a recipient's dismissal of a formal complaint or any allegations therein, on specified 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
  - 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.
  - A recipient may offer an appeal equally to both parties on **additional bases**.

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

# Training

- A recipient must ensure that **Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution** process, receive training on:
  - The definition of sexual harassment in § 106.30
  - The scope of the recipient's education program or activity
  - How to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, as applicable
  - How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias
- A recipient must ensure that **decision-makers** receive training on:
  - Any technology to be used at a live hearing (if offered)
  - 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, as set forth in paragraph (b)(6) of this section.

# Training

- A recipient also must ensure that **investigators** receive training on:
  - Issues of relevance to create an investigative report that fairly summarizes relevant evidence
- Any **materials** used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, must not rely on sex stereotypes and must promote impartial investigations and adjudications of formal complaints of sexual harassment



# Retaliation

- No recipient or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by title IX or this part, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under this part

Title IX Regulations issued May 6, 2020; § 106.71(a)

# Retaliation

- The exercise of rights protected under the First Amendment does not constitute retaliation
- Charging an individual with a code of conduct violation for making a materially false statement in bad faith in the course of a grievance proceeding under this part does not constitute retaliation

Title IX Regulations issued May 6, 2020; § 106.71(b)

# Documentation

- Must maintain records for 7 years
- Must make training materials publicly available on website
- Must maintain records of any actions, including any supportive measures, taken in response to a report or formal complaint of sexual harassment

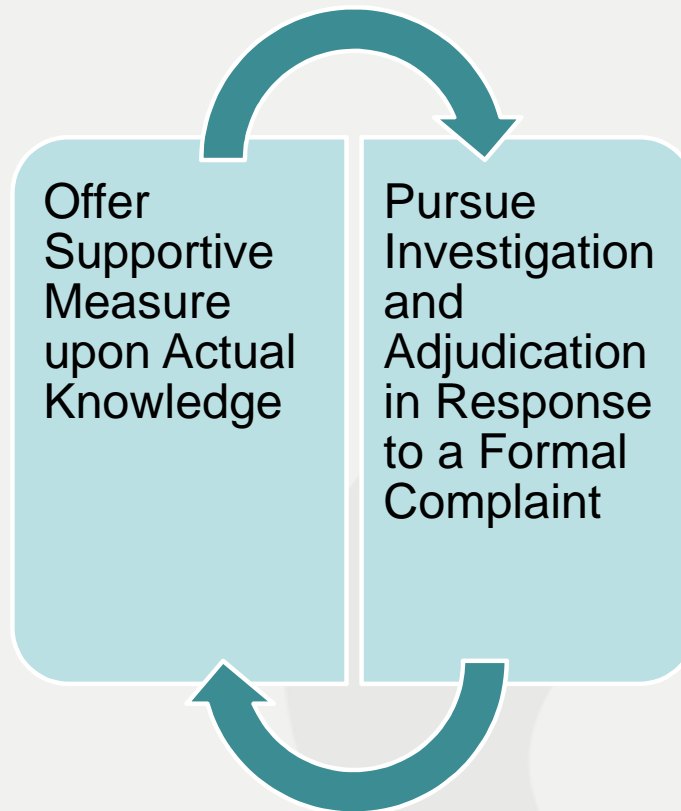
Title IX Regulations issued May 6, 2020; § 106.45(b)(10)(i)

# Documentation

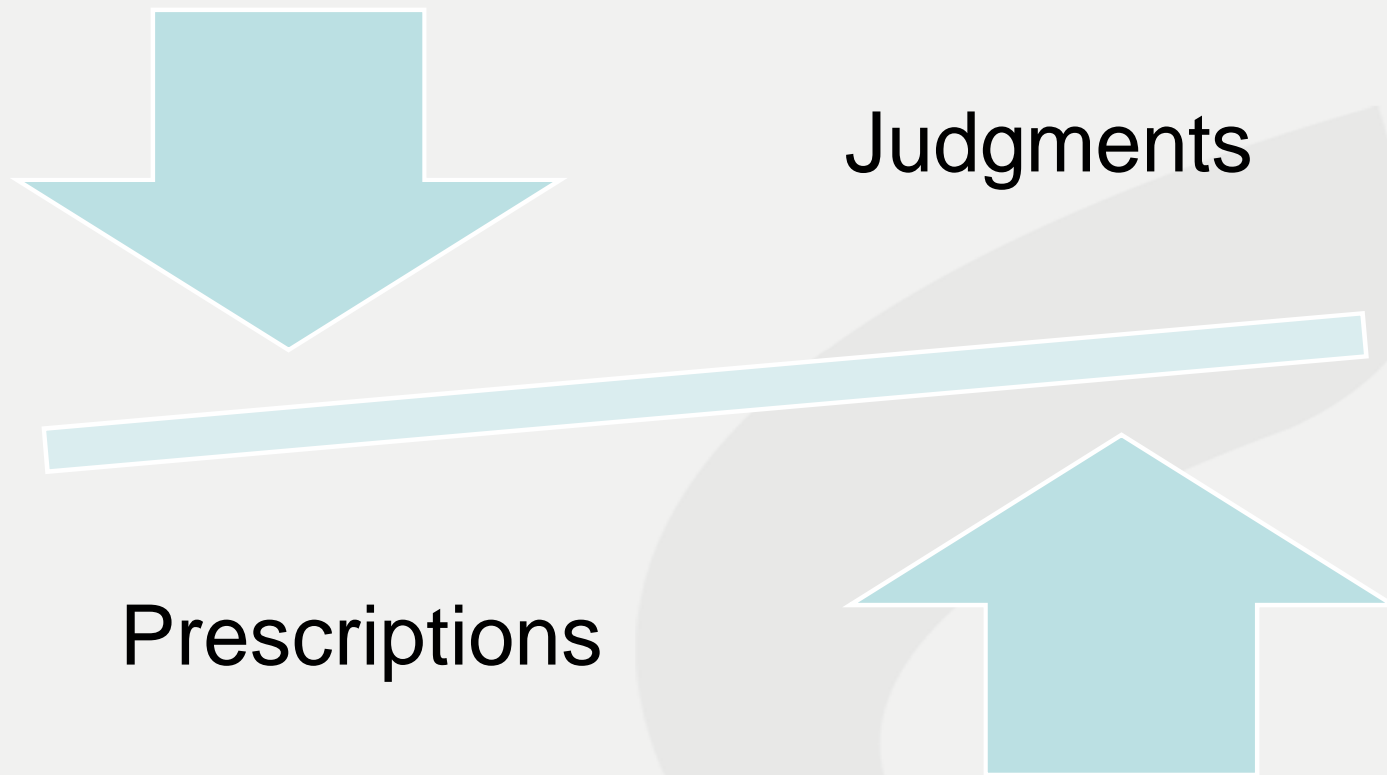
- Must document the basis for its conclusion that its response was not deliberately indifferent, and document that it has taken measures designed to restore or preserve equal access to the recipient's education program or activity
- If a recipient does not provide a complainant with supportive measures, 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)(ii)

# Recap of Two Key Provisions



# Balancing

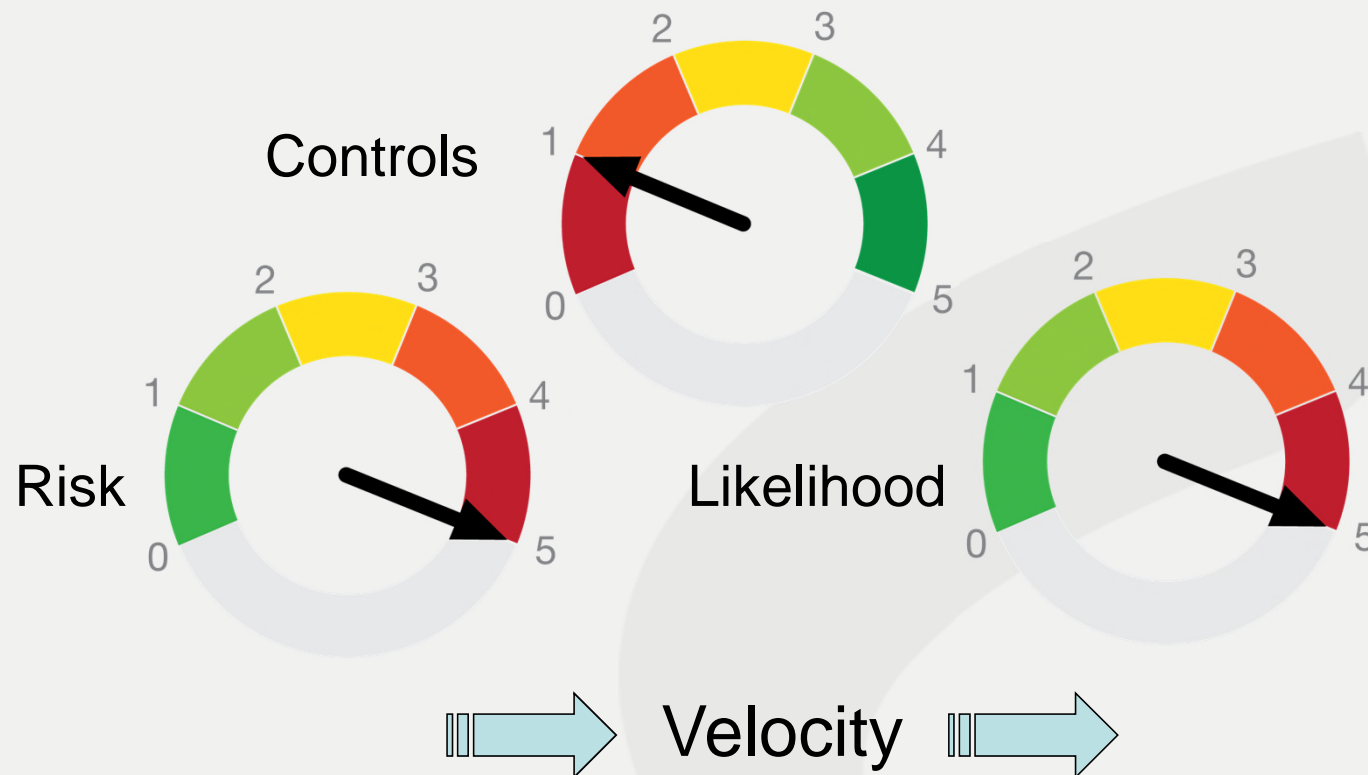


Prescriptions

Judgments

# **EFFECTIVE PRACTICES**

# Risk Management

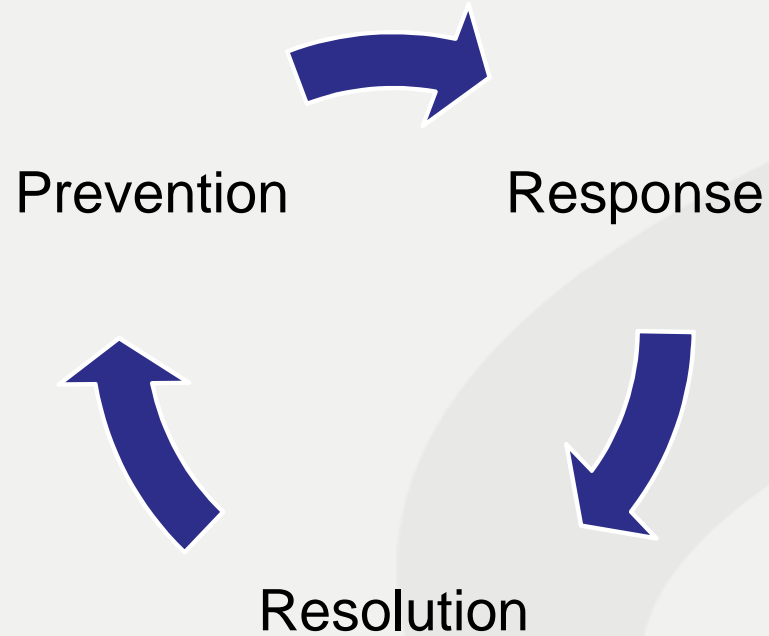




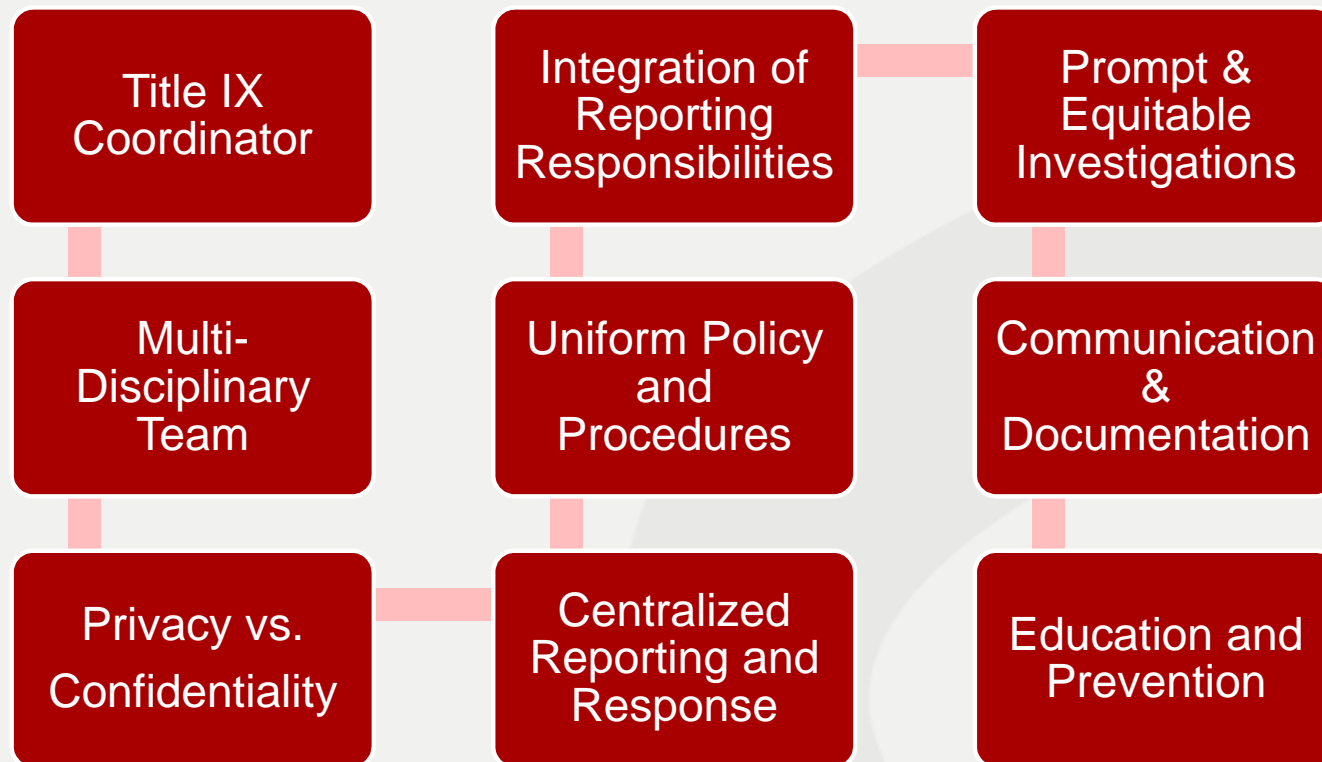
# Implementation Rubric

- Evaluate the facts and context in light of:
  - Law
  - Regulations
  - Education experience
  - District and School Values
- Make iterative decisions with fidelity to core principles
- Document and show your work

# Create a Culture of Responsibility and Accountability



# Key Elements of Effective Practices



# Centralized Reporting

- Sharing of reports by employees is imperative to:
  - Ensure consistent responses by the school to allow the entity to carry out its Title IX and Title VII obligations
  - Prevent a wide variety of ad hoc responses that may result in not treating all complaints fairly or equitably
  - Prevent misconduct from continuing unchecked without providing the institution with the opportunity to respond and take corrective action as is appropriate
  - Protect school from legal liability for failure to respond or for future acts

# Centralized Reporting

- Critical questions:
  - What gets “reported up” to Principal? To Title IX or Deputy Title IX Coordinator?
  - Do frontline employees have competence and judgement?
  - How do you respond with timely and proportional response while still satisfying Title IX obligation to share all reports with Title IX Coordinator for centralized response?

# Centralized Reporting

- Values/interests to consider:
  - Misbehavior and deviation from norms occur frequently in school – they are normal and developmentally appropriate
  - Need to avoid over-processing of low-level incidents that can be effectively dealt with in the moment they occur
  - But also need to ensure leadership engagement when incidents occur that may be impacting students' education (e.g., creating a hostile environment)

# Centralized Review Process

- Coordination of information and personnel
  - Clearly delineated roles and responsibilities
  - Build in regular and open lines of communication
  - Sequence events in advance
- Separate support and advocacy from investigation and adjudication
- Template communications
- Central tracking for patterns
- Documentation/records
- Ensure consistent implementation:
  - Supportive measures
  - Investigative protocols
  - Sanctions
  - Community remedies
- Transparency in outcomes

# Effective Practices

- Pragmatism
- Proactive Preparation
- Physical Plant
- Personnel
- Policies and Procedures
- Practices and Protocols
- Prevention
- Partnerships
- Permission



# Pragmatism

- A reasonable and logical way of doing things or of thinking about problems that is based on responding to specific circumstances instead of on ideas and theories
- Embrace the reality that it happens here
- Respond in the same, reasonable common sense manner you respond to other significant issues
- Prioritize values - student and employee welfare, school safety, diverse and inclusive community and institutional integrity

# Proactive Preparation

- Leadership
- Tone at the top
- Culture of reporting, accountability and responsibility
- Shared responsibility
- Consistency of leading with values
- Commitment to informed communication that is as transparent as possible
- Be careful not to confuse institutional integrity with institutional reputation

# Proactive Preparation

- Appoint individual responsible for
  - Policy
  - Training
  - Implementation of procedures
  - Systems/record-keeping
  - Oversight
  - Identification of all applicable laws and regulations and oversight of process for implementation
- Ownership rather than diffusion of responsibility
- Ensure coordination with Board and senior leadership

# Physical Plant

- Security
- Access
- Lighting
- Physical plant:
  - Areas of isolation
  - Cyber-safety
- Areas of vulnerability
  - Transitions
  - Transportation to and from school
  - Travel with sports teams, administrators or other parents
  - One on one contact
  - Locker rooms
  - Summer camps

# Personnel

- Precautionary measures
  - Hiring protocols
  - Background checks
  - Reference checks
- Job descriptions that provide clarity and role definition
- Periodic evaluations and assessments
- Training requirements
- Documentation of concerns
- Timely and responsive corrective action

# Employee Policies

- Policies
  - Clear definitions of prohibited conduct and behavioral expectations
  - Clear reporting structure
  - Prohibition against retaliation
- Prohibition against fraternization and dating of students

# Protection of Minors Policies

- Protection of Minors Policies
  - Limits on nature and scope of contact
  - Set appropriate boundaries
    - Safe supervision and ratio
    - “Rule of Three”
    - Manner and mode of contact
  - Bystander intervention/engagement
  - Culture of care requires reporting

# Mandatory Reporter Policies

- Mandatory reporting of suspected child abuse
  - Institutional reporting
  - How to identify
  - What to do/what not to do
  - Option to call hotline directly?
  - Circle back to reporter
  - Timeliness
  - Record keeping
  - Forms
  - Enforcement and accountability for failure to report



# Technology Policies

- IT and Responsible Use Policies
  - Email
  - Social media
  - Photographs
  - Educational sites

# Protocols

- Internal protocols re: coordination of information
- Multi-disciplinary response team
  - Site level
  - District level
- Centralized reporting and response
- Supportive measures (individual and community)
- Consistent application of policy and procedures to avoid ad hoc responses
- Documentation
- Track patterns and address climate

# Prevention and Education

- Training and education for staff
  - Mandatory reporting
  - Identifying and recognizing prohibited conduct
  - Professional boundaries
  - Centralized reporting
  - Policies and procedures
- Training and education for students
  - Resources and policies
  - Consent
  - Alcohol and other drugs
  - Interpersonal violence
  - Social media
  - Bystander Intervention
  - Safety planning and permission

# Prevention and Education

- Constituencies
  - Students
  - Parents
  - Staff
  - Volunteers
- Considerations
  - State law requirements
  - Frequency
  - Modality
  - Effectiveness

# Partnerships

- Establish relationships with community partners
  - Law enforcement
  - District Attorney
  - Child welfare agencies
  - Domestic violence or sexual assault advocacy centers
  - Child advocacy centers
- Partnerships with parents

# Permission

- Give permission to students and staff to speak up
- Overcome insular loyalty
- Build relationships of trust
- Identify resources
- Ensure parental permission

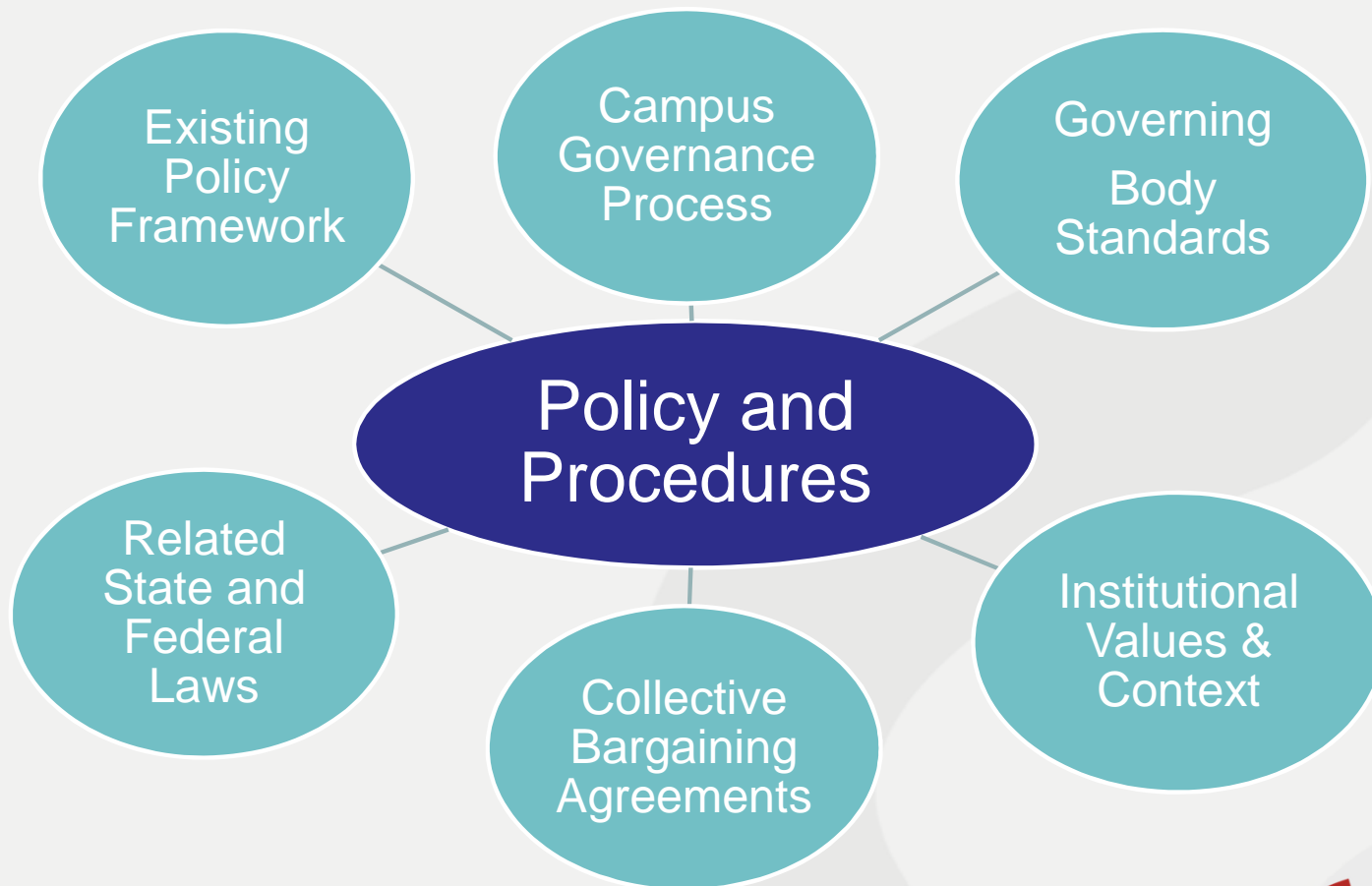
# **NEXT STEPS: UPDATING POLICIES AND PROCEDURES**

# Putting the Pieces Together





# Decision-Making Considerations



# Approach to Implementation

## Crafting

- Gather key stakeholders and current policies and procedures
- Form working group for planning and implementation
- Review new legal requirements and compare with current practices

## Drafting

- Update written policies, procedures, templates and forms
- Prepare communications plan and draft communications to constituent groups
- Review web and print materials to ensure consistent messaging

## Staffing

- Realign current roles or recruit/hire to fulfill all required functions
- Ensure all staff members receive training; maintain training materials for publication online
- Reinforce partnerships with key units and ensure consistent protocols for case referrals

## Grafting

- Roll out training and education on new policies, procedures, and protocols
- Develop awareness campaign to educate community about resources, supports, and reporting options
- Create mechanism to gather feedback about gaps in process, questions or concerns

# Implementation Rubric

- Law
- Regulations
- Guidance
- Preamble and commentary
- OCR webinars, charts, blog
- Policy
- K-12 education experience
- Institutional values



# Articulating Institutional Values

- Make iterative decisions with fidelity to core principles
  - Child protection
  - Openness and transparency
  - Partnership with parents and caregivers
  - Partnership with and reliance on external authorities

# 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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