

The New Title IX Regulations: Policies, Procedures, and Practical Implementation

Putting the Pieces Together by August 14, 2020

Presented By:

The Institutional Response Group | Cozen O'Connor

Gina Maisto Smith, Chair

Leslie Gomez, Vice Chair

June 8, 2020



A Message from Cozen O'Connor


We are living in unprecedented times. The words "I can't breathe" resonate over and over in our minds as we think about the tragic and heartbreaking events that have unfolded in the last several days in Minneapolis, Minnesota. The unjustified killing of George Floyd, is one example of how bias, hatred, and racism are still alive and prevalent in our country. This must stop.

Far too many black and brown people in this country are hurting as they continue to suffer the trauma of witnessing the repeated and unfettered killings of unarmed African-Americans in the United States. These tragic deaths are horrifying and remind us we have a long way to go. As a country, we should continue to honor the memories of these individuals by standing together against racism and lawlessness, and by continuing to fight peacefully for what is right.

Cozen O'Connor and our employees have a long history of unwavering personal and financial commitment to the protection of civil and human rights. But we can and will do better. We commit to do all we can to promote a just society for which we can all be proud. In the next several weeks, we will be rallying behind our colleagues of color and our communities by providing internal and external support, training, and education. Our firm will continue to offer pro bono legal services for matters that derive from civil rights' violations. Lastly, we will financially support social justice organizations committed to these ideals.

Cozen O'Connor will not stand on the sidelines in the race for justice and equality. We will work together, tirelessly, to ensure that we live in a society that reflects our morals and values, and supports our employees, partners, and clients every step of the way.

Michael J. Heller
Executive Chairman and Chief Executive Officer



Vincent R. McGuinness, Jr.
President and Managing Partner



Today's Webinar

Following an introductory webinar, *A First Look at the New Title IX Regulations*, this is the first in a series of webinars focusing on implementation hosted by Cozen O'Connor's Institutional Response Group (IRG). This webinar will:

- Explore **decision making frameworks** to implement the prescriptive and discretionary aspects of the regulations;
- Outline **policy frameworks** to effectively navigate the myriad policy components of the new regulations;
- Augment the frameworks with a discussion of the regulations through the use of **hypothetical scenarios** to bring key decisions to light; and
- Provide a sample **weekly project management plan** for effective implementation, community engagement and comprehensive communications.

Introducing the Webinar Series

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



Policy & Scope

Frameworks
jurisdiction, scope and
notice

K-12

Initial Assessment

Including, supportive
measures, emergency
removals, and formal
complaints

Investigations

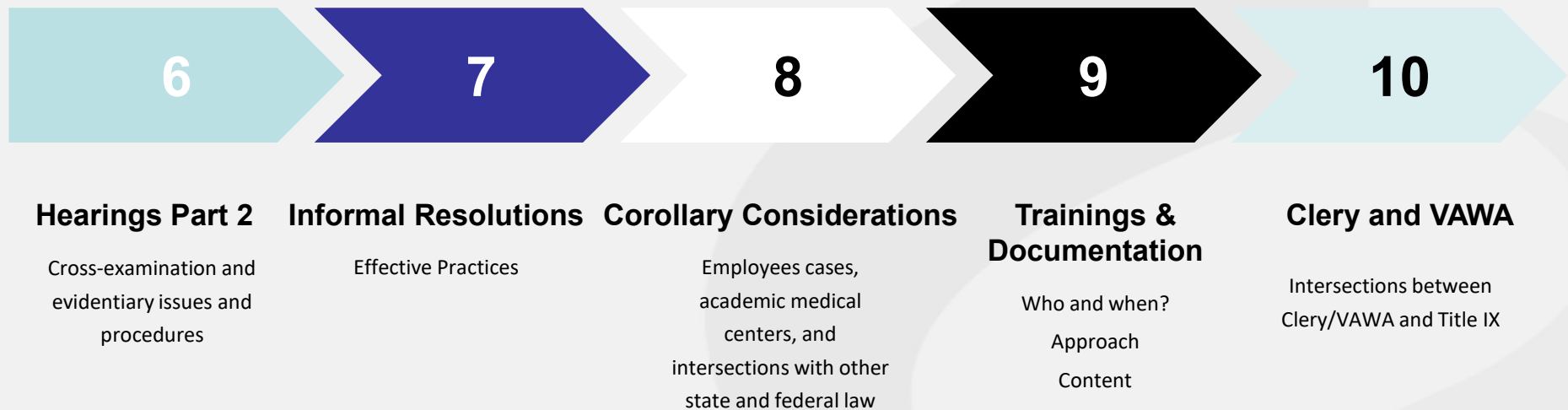
Adopting new protocols

Hearings Part 1

Adjudication procedures:
structure and format

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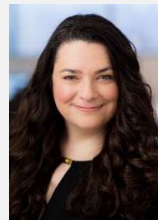
Institutional Response Group



Gina Maisto Smith
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Leslie Gomez
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Maureen P. Holland
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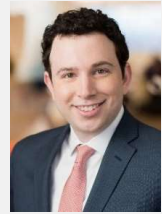
Devon Turner Riley
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Michael Stackow
Cozen O'Connor



Helen Park
Cozen O'Connor



Adam M. Shapiro
Cozen O'Connor



Peter C. Lim
Cozen O'Connor



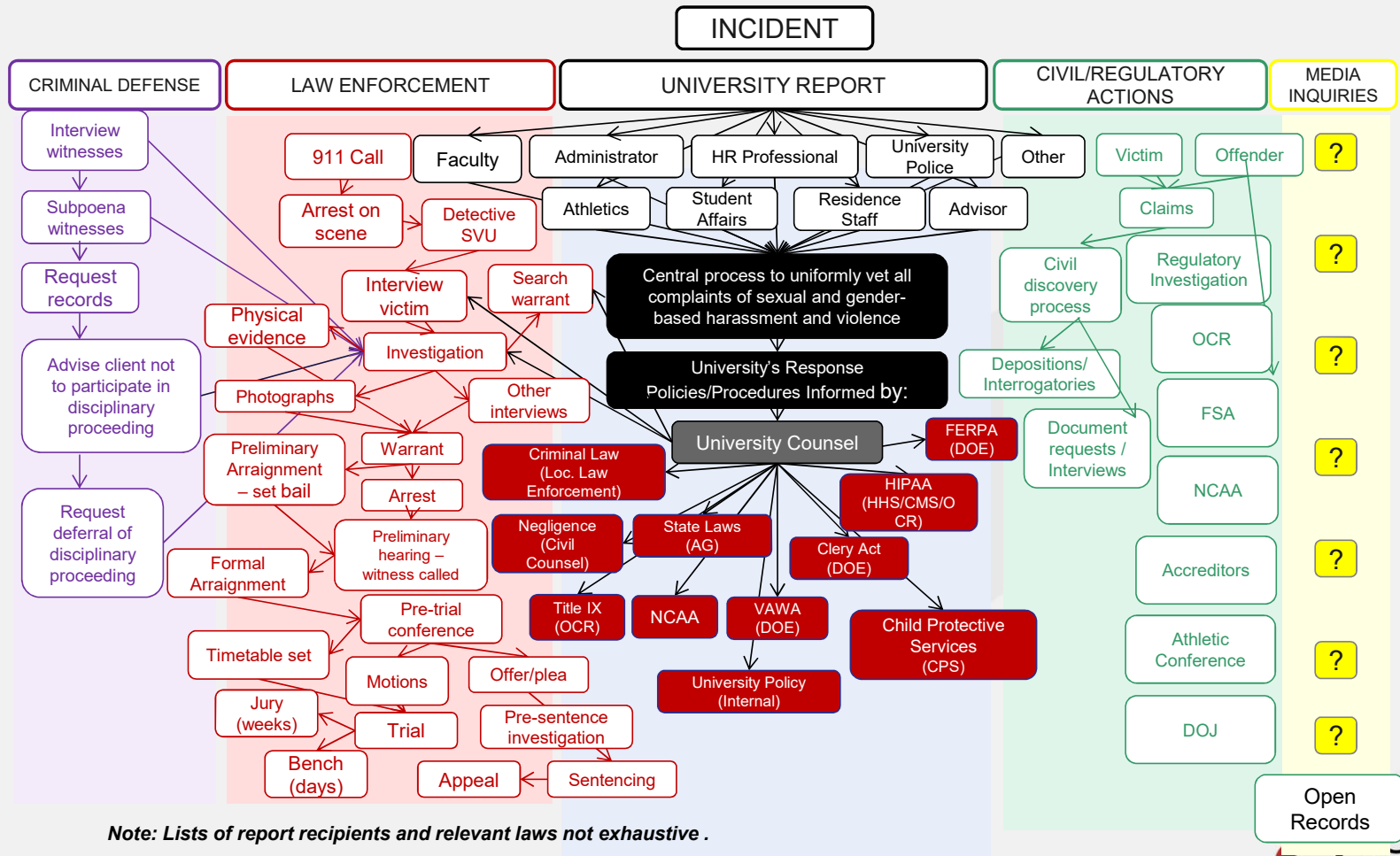
Joseph A. Tate, Jr.
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Christi Hurt
Margolis Healy

Institutional Response Group Paralegal and Administration Team:
Heather Dunn, Megan Lincoln, Braelyn Schenk, and Mary Sotos

The Challenge of the Context



Now What?



Silver Lining

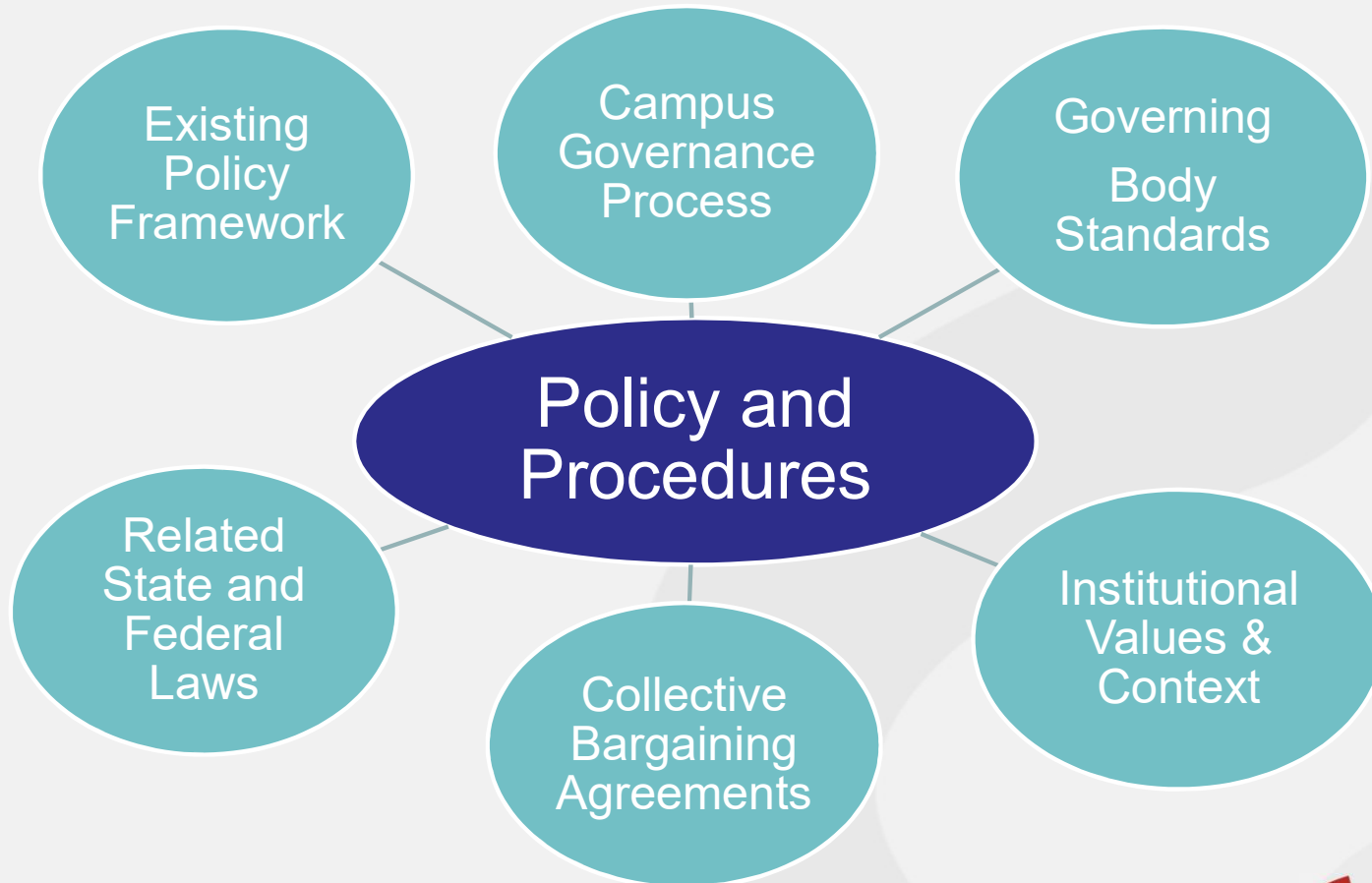


Maintaining Calm



Getty Images

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

Effective Preparation: Mapping Current State

- Policies and Procedures
 - Students
 - Faculty
 - Staff
- Current institutional Issues
- Implementers
- Training and Education
 - Students
 - Faculty
 - Staff
- Website
- Infrastructure/Systems
- Resources

Effective Preparation: Identify Delta

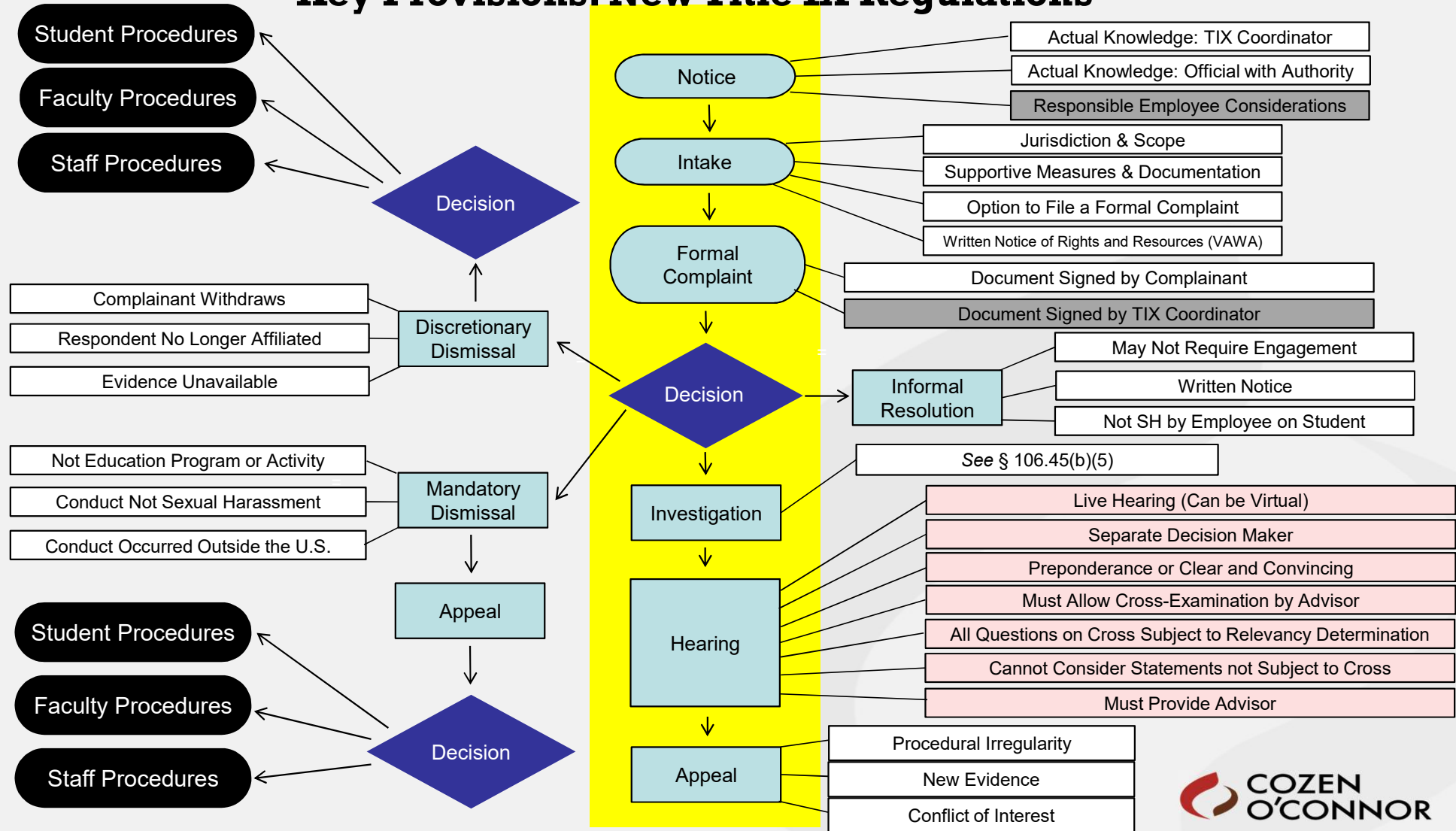
- Review new legal requirements
- Identify delta between current state of operation and new regulations
- Identify delta between current state of operation and effective, informed practices
- Identify key elements to inform design of future state
- Map implementation plan based on evidence, culture, and available resources

Implementation Rubric

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



Key Provisions: New Title IX Regulations



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



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.”

DECISION-MAKING FRAMEWORK

Framing Principles

1

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

2

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

3

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

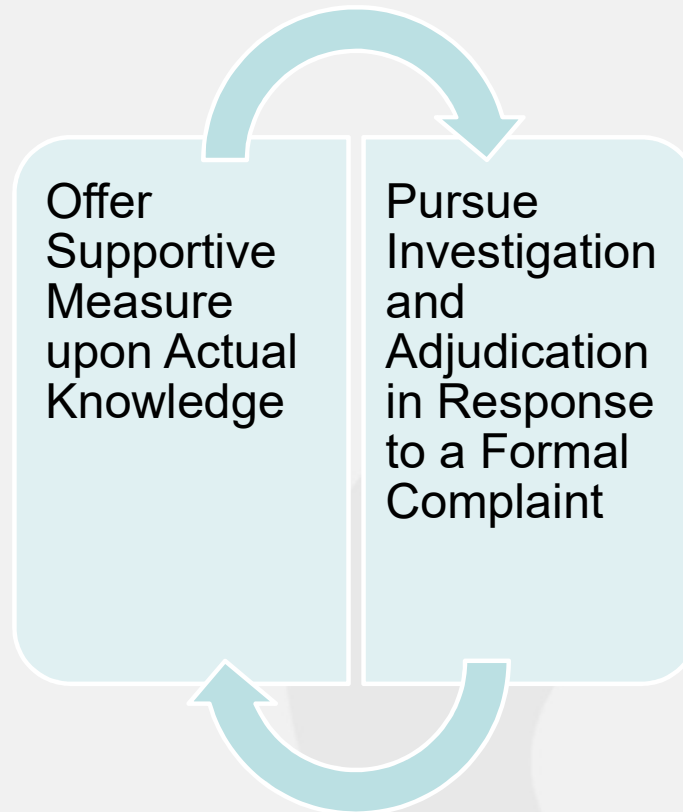
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“A recipient is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances.”

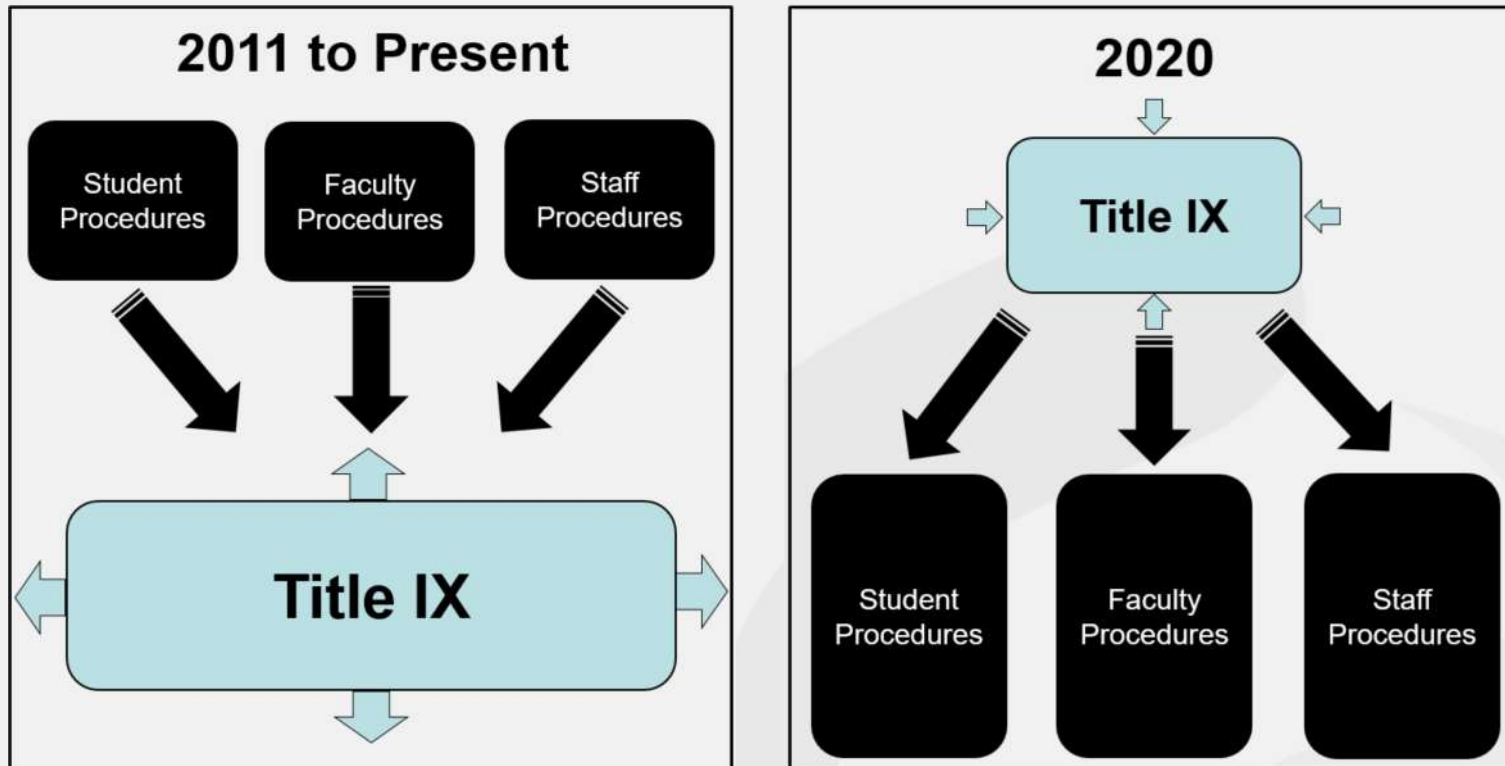
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“If the Assistant Secretary finds that a recipient has discriminated against persons on the basis of sex in an education program or activity under this part, or otherwise violated this part, such recipient must take such remedial action as the Assistant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

Understanding Two Key Provisions



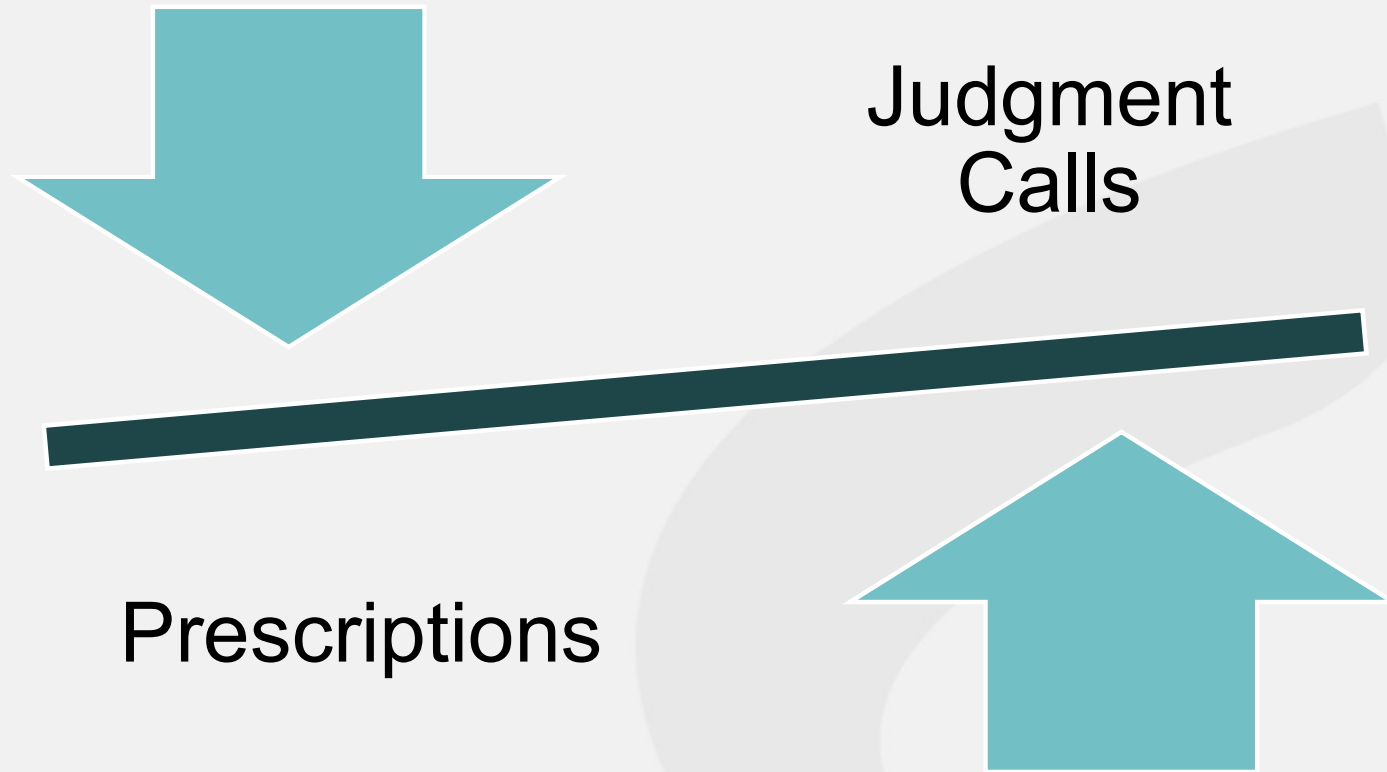
Impact of Jurisdictional Requirements



“We emphasize that nothing in these final regulations prevents recipients from initiating a student conduct proceeding [for sexual harassment no longer covered by Title IX].”

Title IX Regulations issued May 6, 2020; § 106.45(b)(3)(i). See also Preamble, at 46, 237, 241, 251, 258, 457, 472, 481, 482, 485, 496, 631, 636, 642, 645, 660, 681, 730, 907, 939, 962, 963, 964, 1302, 1333, 1516, 1518, 1524, 1558, 1572, 1575, 1578, 1591, 1595, 1689, 1764, 1796, 1826.

Balancing



Decision-Making Framework

Prescriptive Elements

- Required language of the regulations

Discretionary Elements

- Many details regarding implementation are left to the discretion of the institution

Key* Prescriptive/Required Elements

- Respond promptly in a manner that is not deliberately indifferent
- Treat complainants and respondents equitably
- Promptly contact Complainant to discuss supportive measures
- Follow a grievance process that complies with 106.45
- Apply equally to both parties any provisions, rules, or practices that a recipient adopts as part of its grievance process for handling formal complaints.

*Not a complete list of all prescriptive elements.

Key* Prescriptive/Required Elements

- Must provide written notice upon receipt of a formal complaint
- Must investigate the allegations in a formal complaint
- Dismiss the formal complaint under certain circumstances
- Ensure burden of proof and burden of gathering evidence rest on the recipient and not the parties
- Provide an equal opportunity for the parties to present witnesses and evidence
- Send to each party and the party's advisor the evidence subject to inspection and review
- Create an investigative report that fairly summarizes relevant evidence and send to party at least 10 days prior to hearing

*Not a complete list of all prescriptive elements.

Key* Prescriptive/Required Elements

- Provide for a live hearing
- Permit each party's advisor to ask the other party and any witnesses all relevant questions
- Allow cross-examination to be conducted directly, orally, and in real time by the party's advisor
- Provide advisor without fee or charge to conduct cross-examination at the hearing
- Not rely on any statement of a party or witness who does not submit to cross-examination

*Not a complete list of all prescriptive elements.

Key* Prescriptive/Required Elements

- Issue a written determination regarding responsibility
- Offer both parties an appeal from dismissal of formal complaint and from determination of responsibility
- Create and maintain records for seven years
- Document the basis for its conclusion that response was not deliberately indifferent

*Not a complete list of all prescriptive elements.

Key Discretionary Elements

- Policy and procedural framework
- Scope of conduct to be prohibited and addressed
 - Conduct beyond Title IX jurisdiction
 - Title VII sexual harassment
 - Outside of the United States
 - Outside of the education program or activity
 - How to adjudicate after mandatory dismissal
 - Accepting a formal complaint from Complainant not participating or seeking to participate in education program or activity
- Supportive measures
 - Process for challenging emergency removal
 - Factual predicate for use of more restrictive supportive measures

Key Discretionary Elements

- Employee reporting responsibilities
 - Officials with authority to impose corrective measures
 - Responsible employees
- Process considerations
 - Extend formal complaint to all complaints?
 - Provide advisor at all stages?
 - Permit cross-examination at all hearing types?
- When should the Title IX Coordinator file a formal complaint
 - Outline factors to be considered
 - Process for evaluating

Key Discretionary Elements

- Standard of evidence
 - Preponderance of the evidence or clear and convincing
- Decision-maker for hearing
 - Administrator
 - Panel
 - External professional
- Structure of the institutional response
- Personnel and staffing
- Designation of reasonably prompt timeframes
- Systems for documentation

POLICY FRAMEWORK OPTIONS

Model Policy Elements

- Statement of Institutional Values
- Scope & Jurisdiction
- Notice of Non-discrimination
- Role of the Title IX Coordinator
- Definitions of Prohibited Conduct
- Privacy vs. Confidentiality
- Reporting Options
- Confidential Resources
- Supportive Measures
- Education and Prevention

Model Procedural Elements*

- Reporting options
- Resources and supports
- Intake and outreach
- Initial assessment
- Filing a formal complaint
- Evaluating moving forward without a Complainant
- Investigative protocols
- Evidentiary considerations
- Standard of evidence
- Hearing or adjudication process
- Sanctions & remedies
- Written notice of outcome
- Appeal
- Coordination with law enforcement
- Role of the advisor
- Timeframes

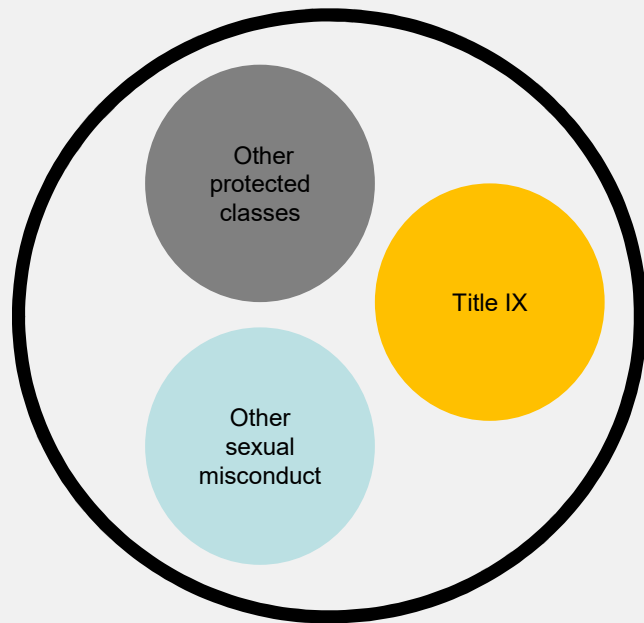
*Not a complete list of all elements.

Flexibility to Adopt Other Provisions

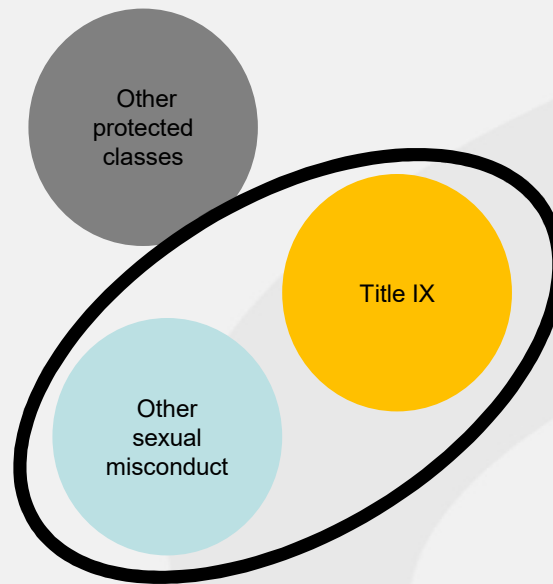
- For the purpose of addressing formal complaints of sexual harassment, a recipient's grievance process must comply with the requirements of this section.
- Any provisions, rules, or practices other than those required by this section that a recipient adopts as part of its grievance process for handling formal complaints of sexual harassment as defined in § 106.30, must apply equally to both parties.

Policy Framework Options

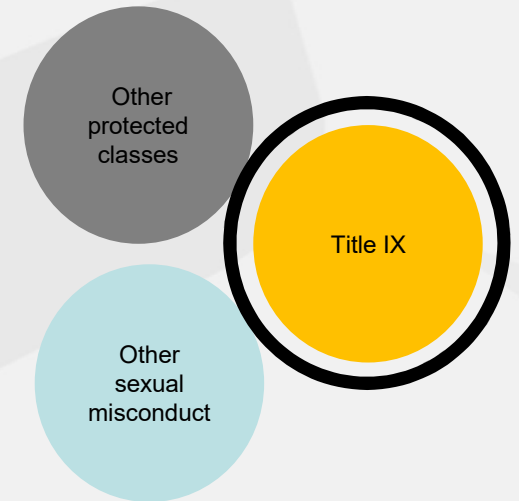
All Protected Classes



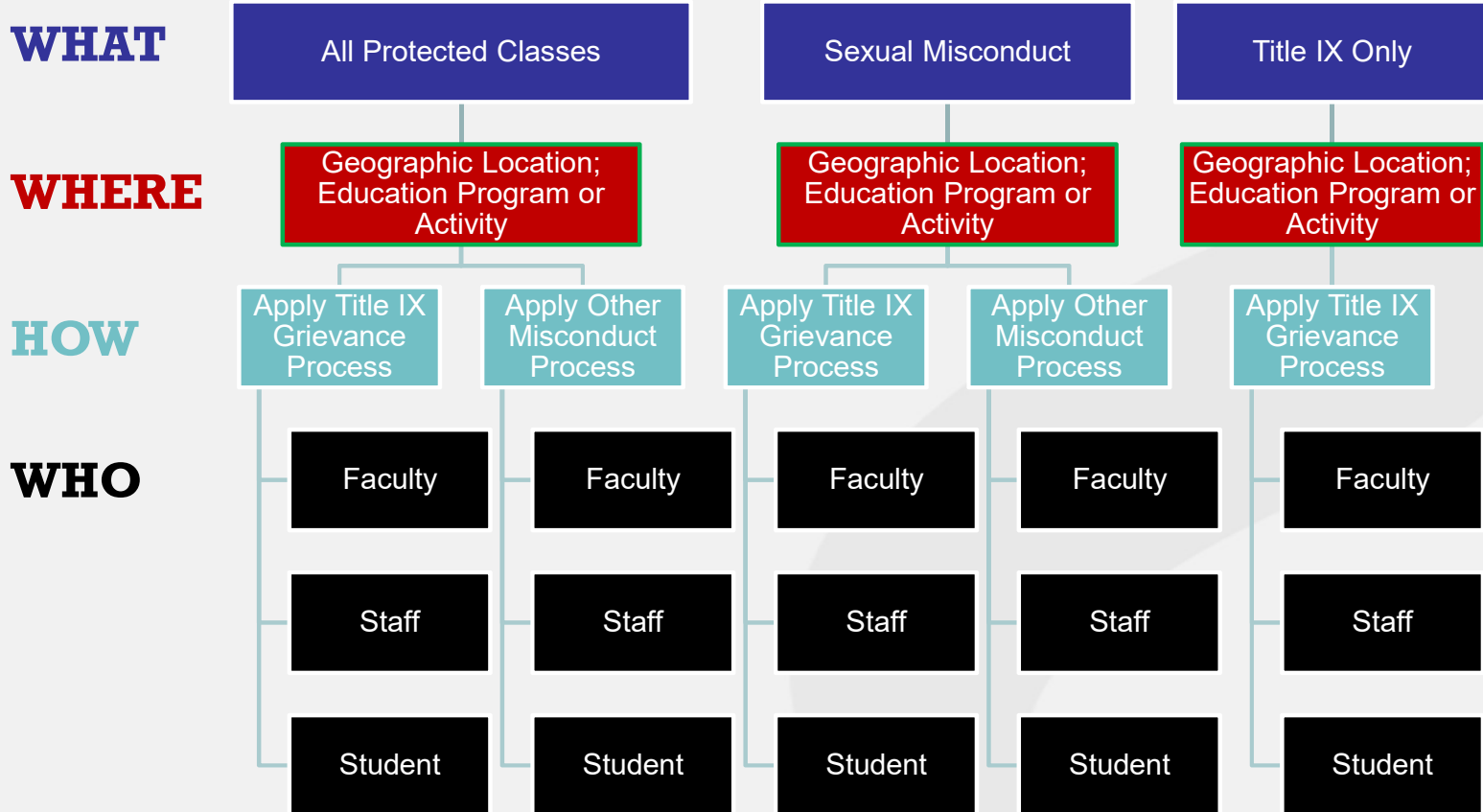
Sexual Misconduct



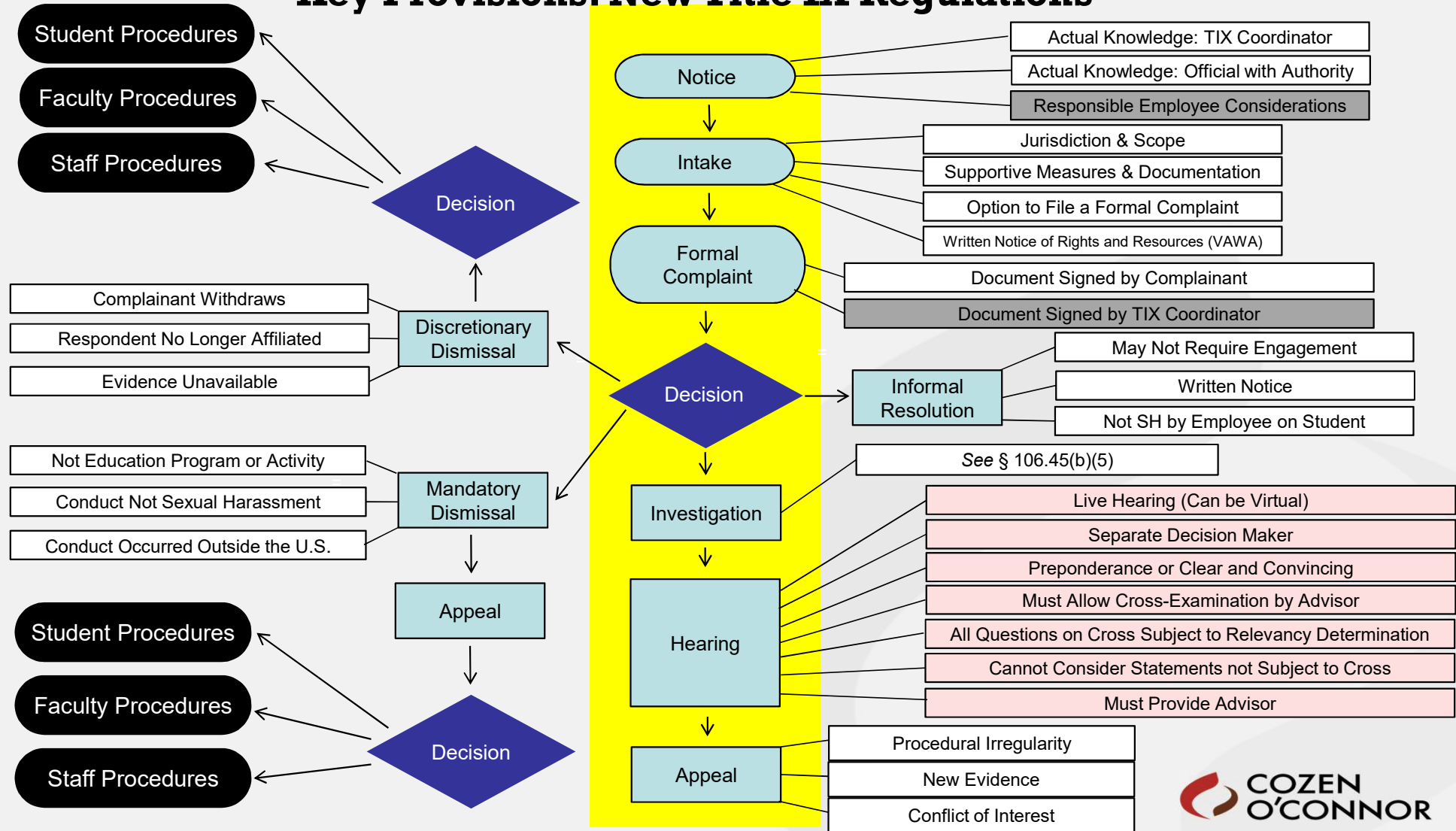
Title IX Only



Procedural Framework

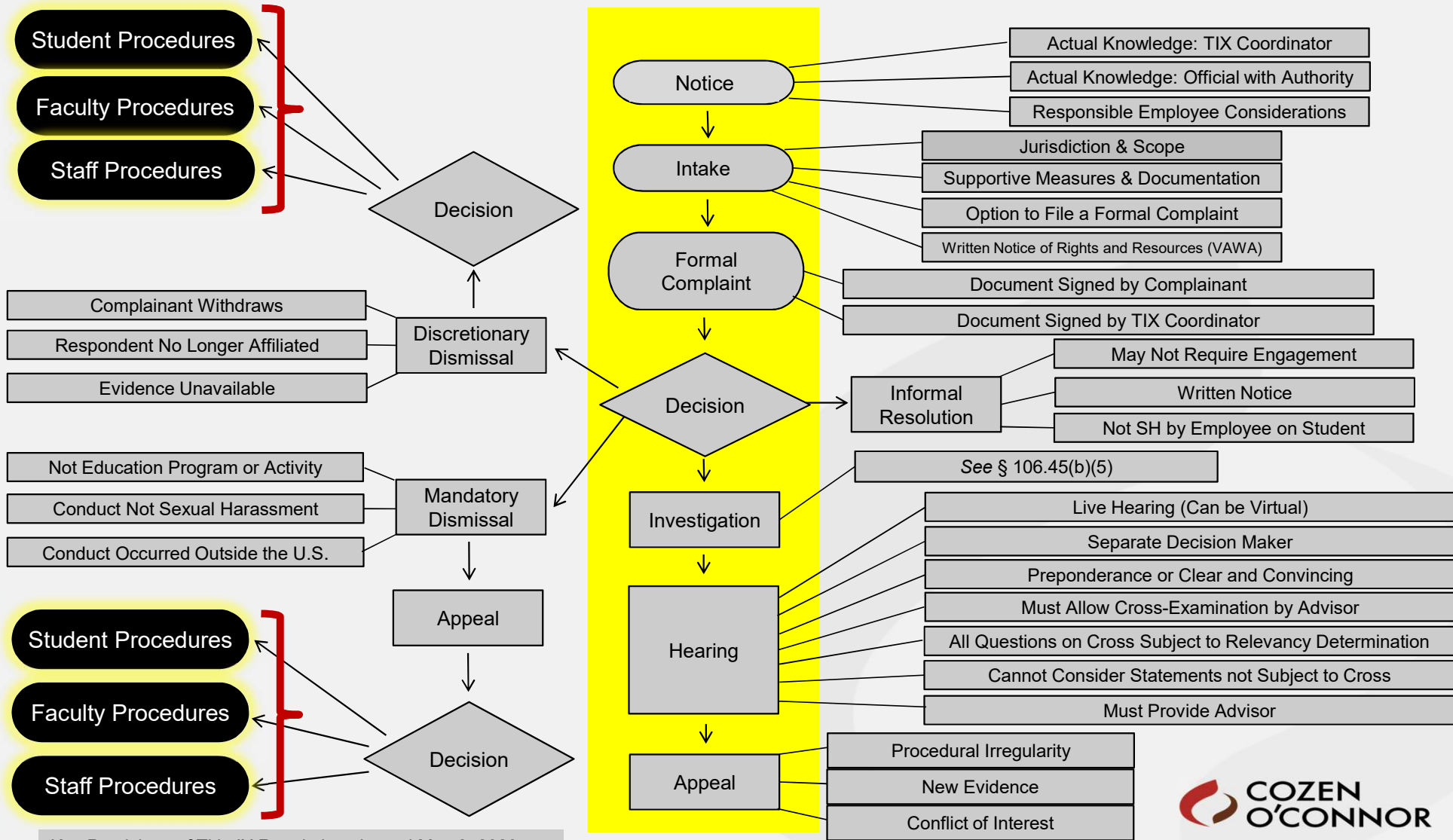


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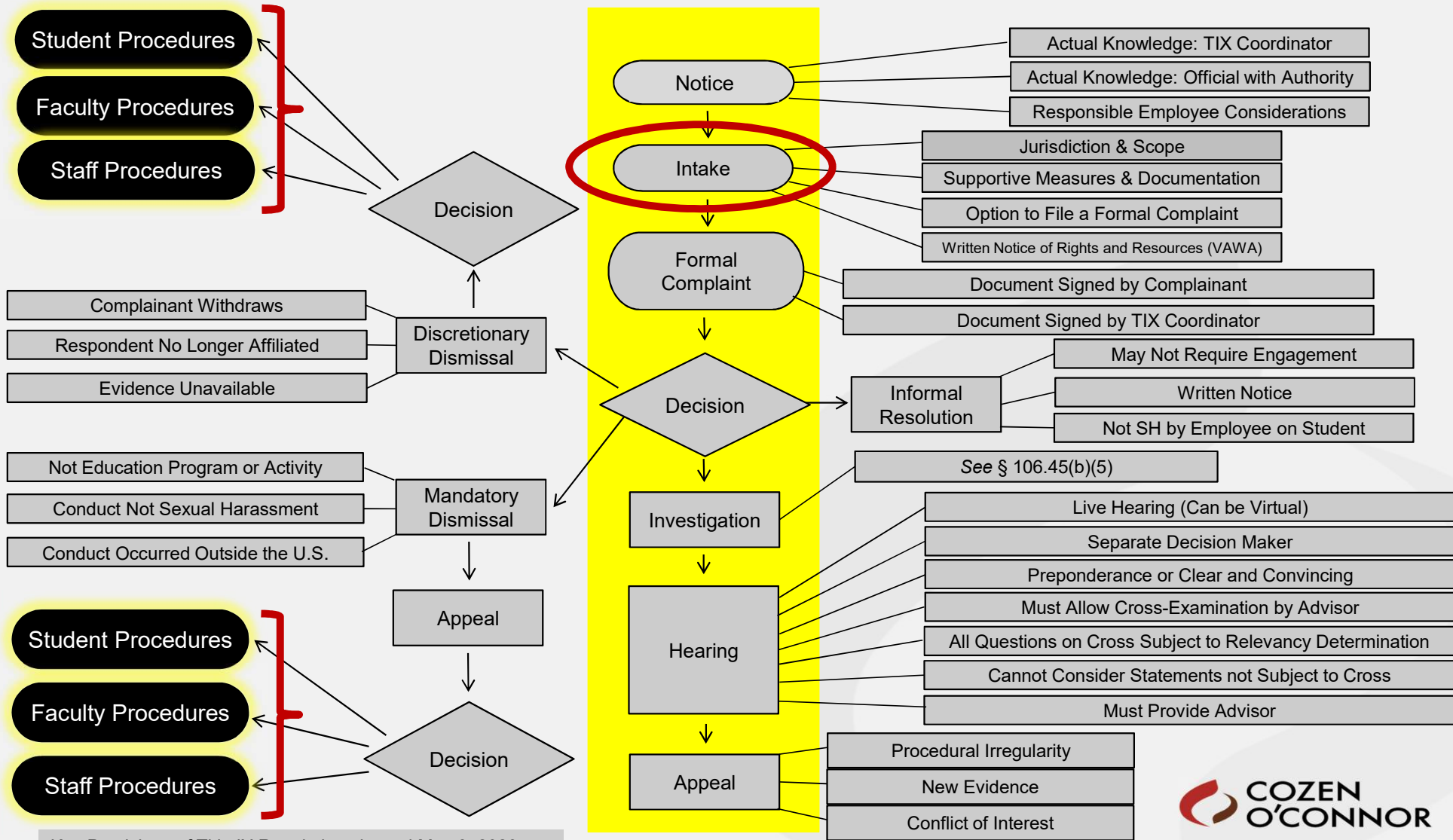
Key Provisions of Title IX Regulations issued May 6, 2020;





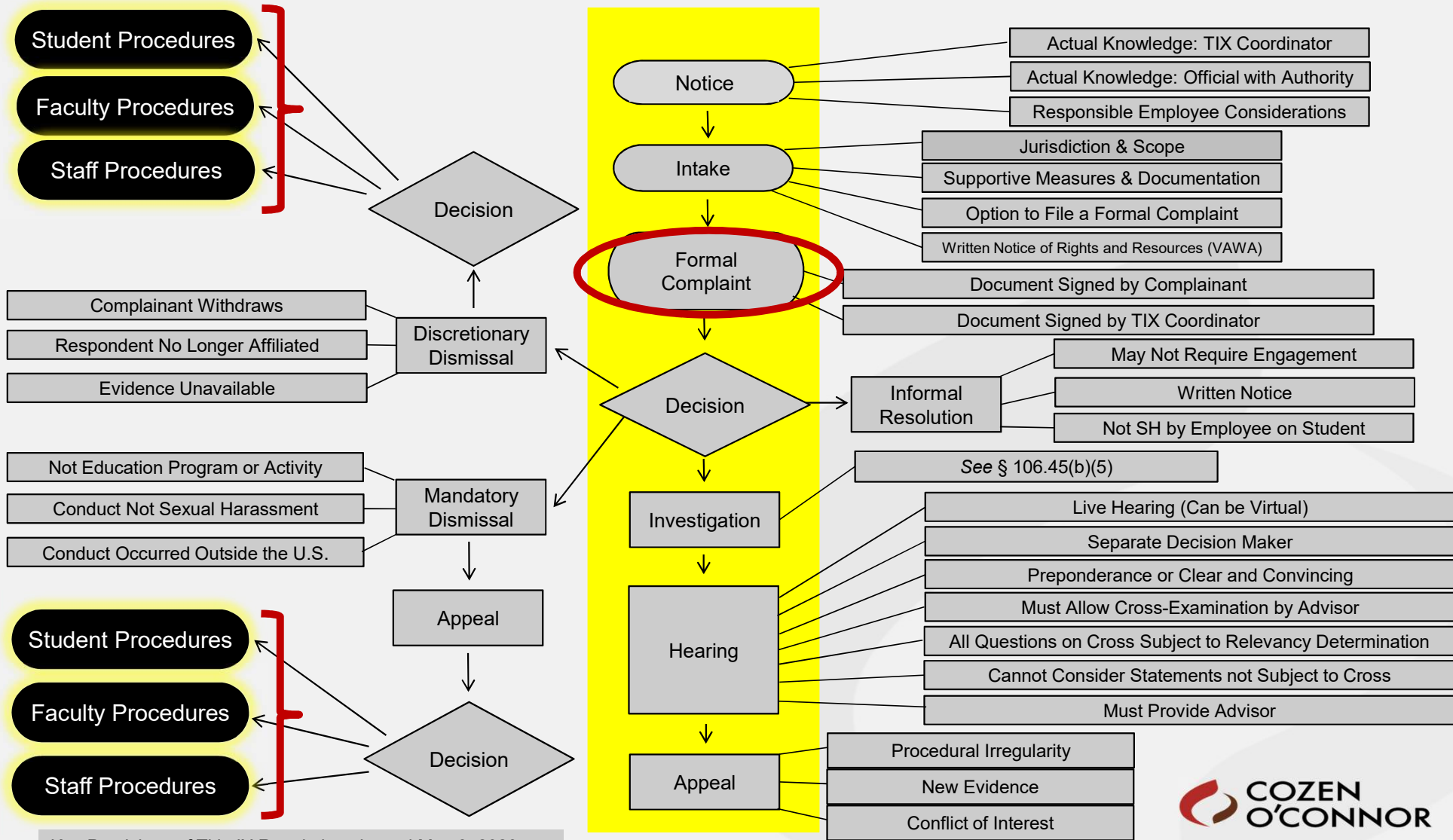
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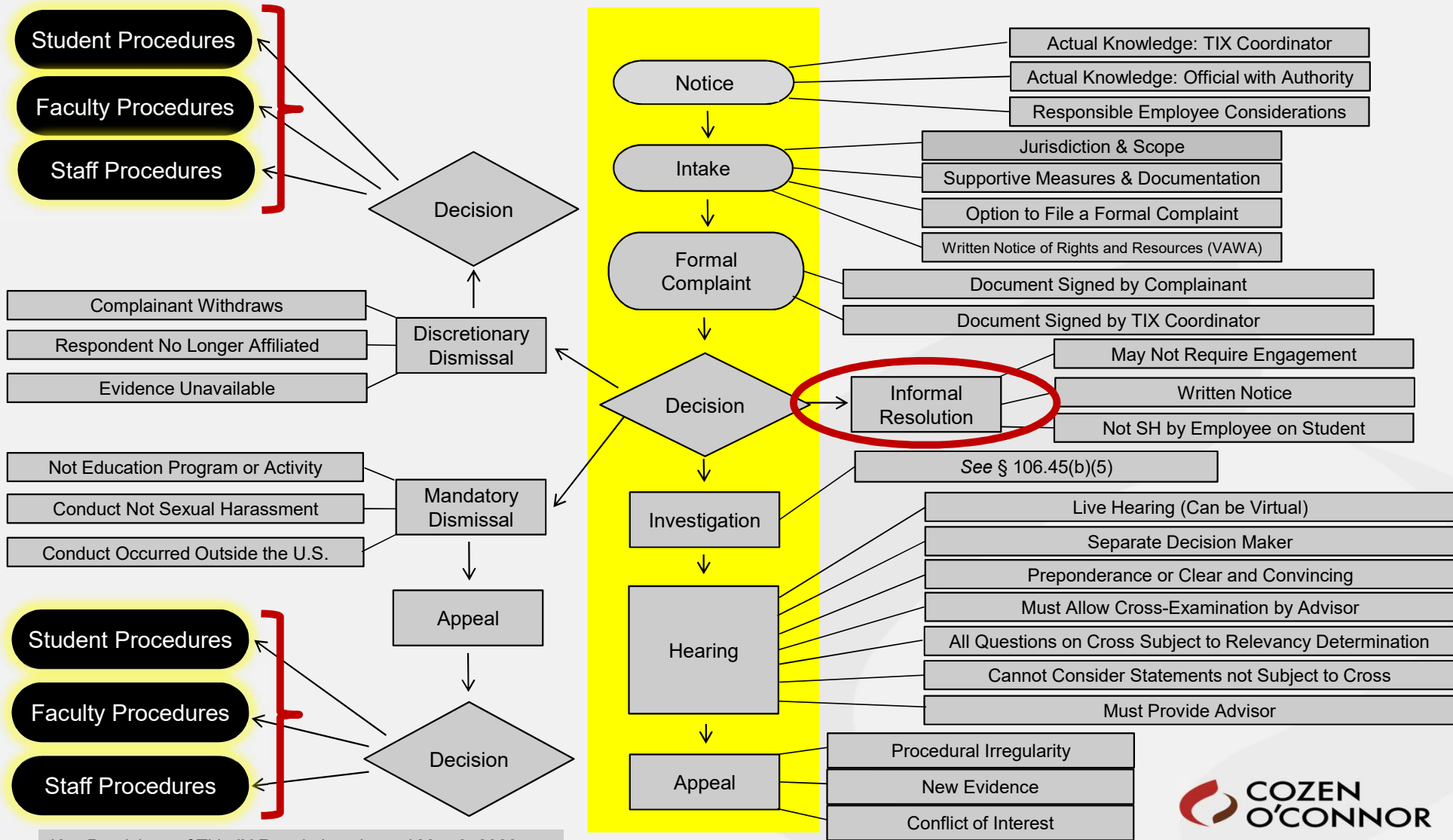


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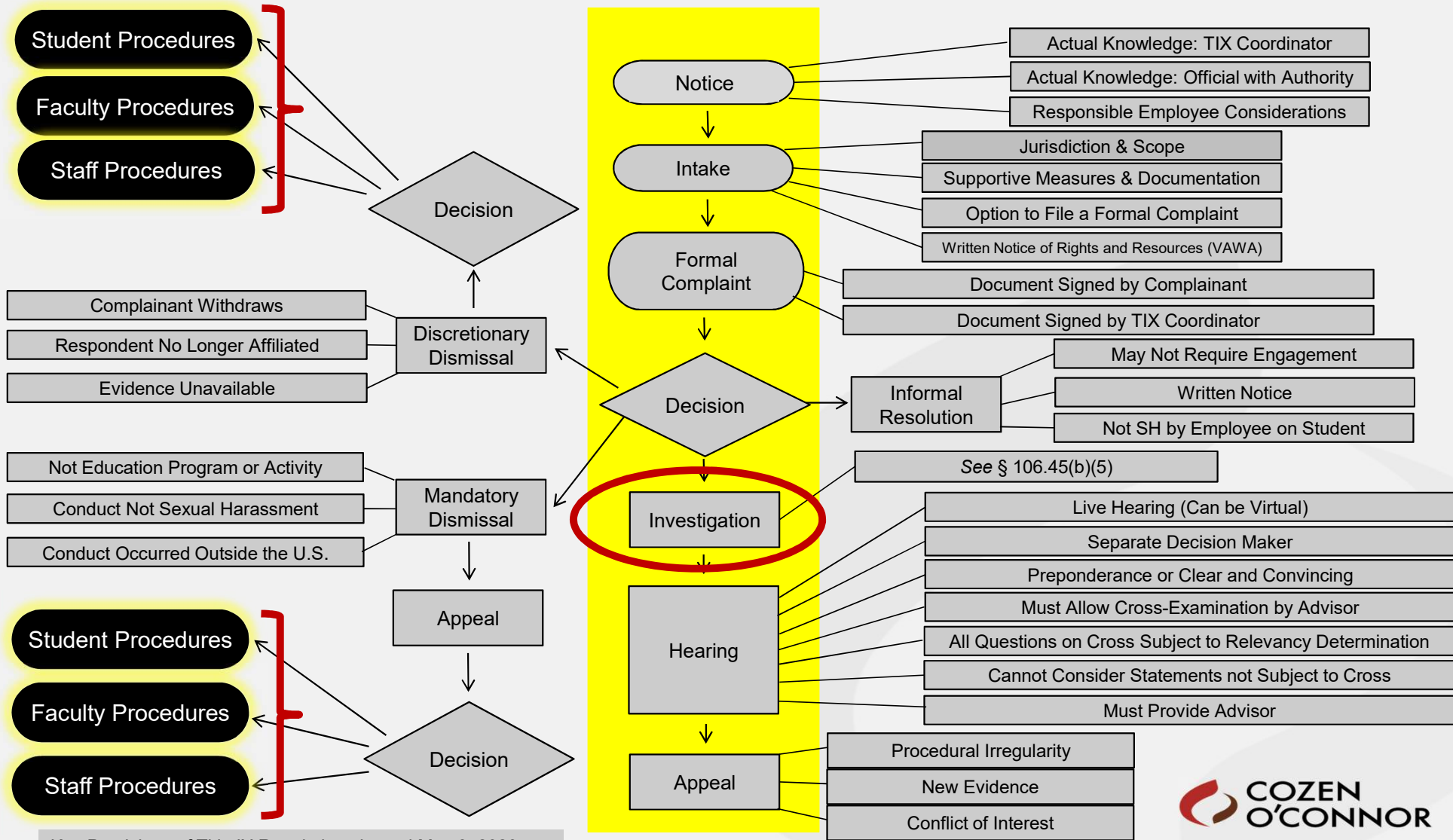


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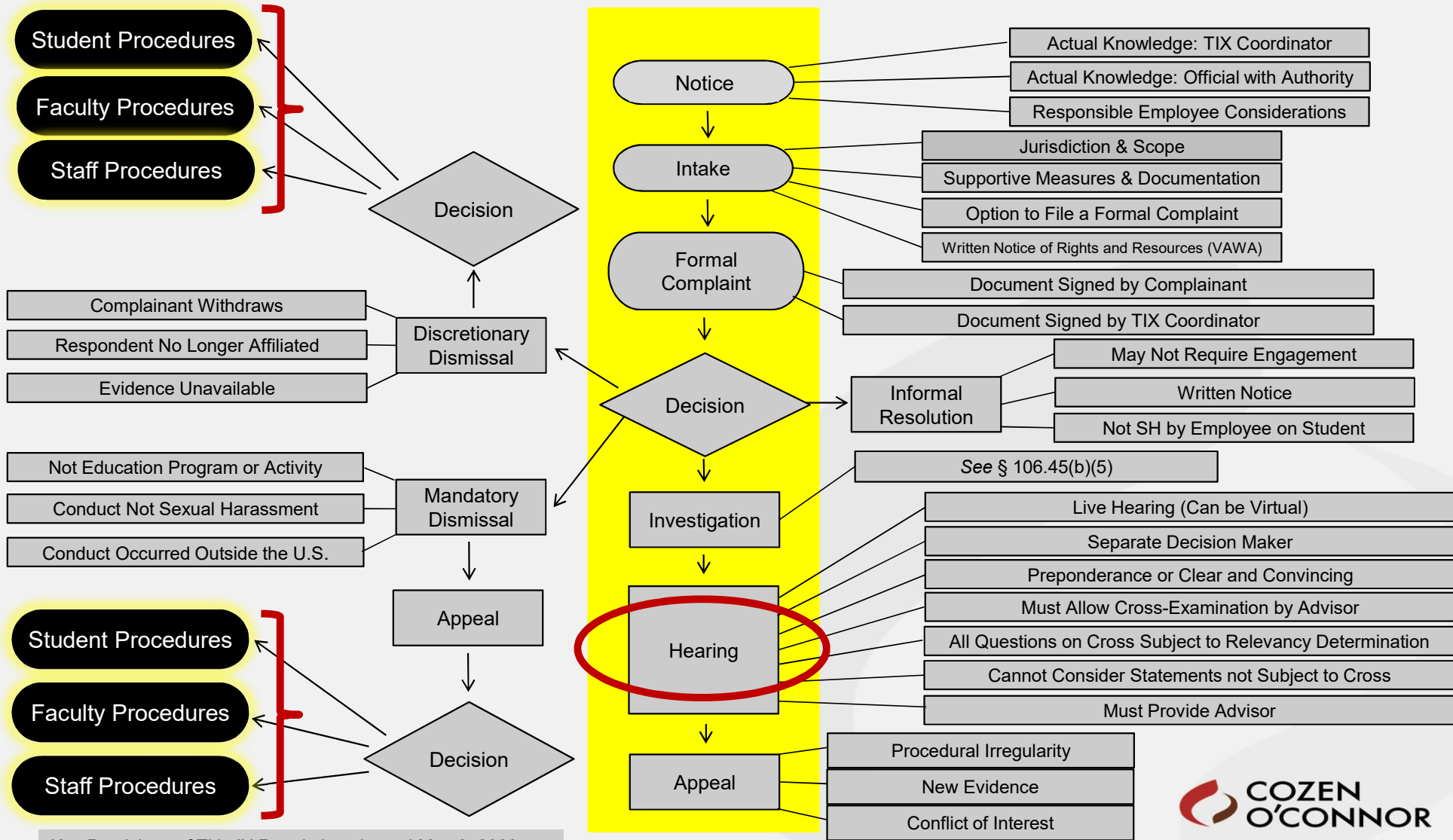
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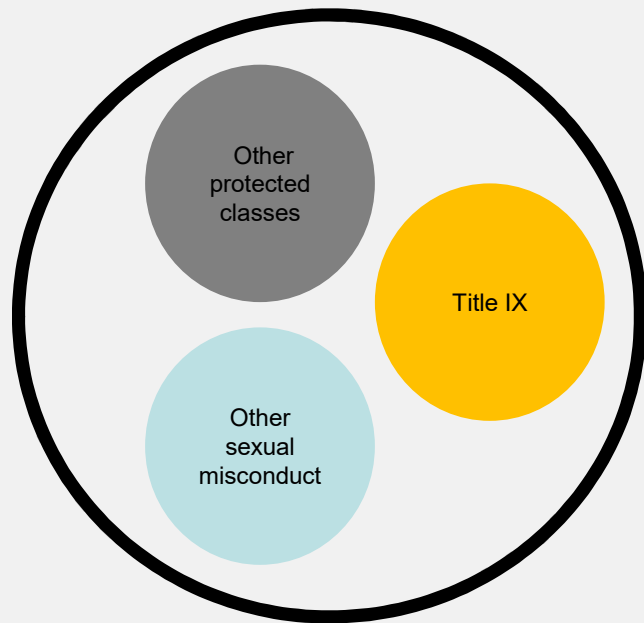


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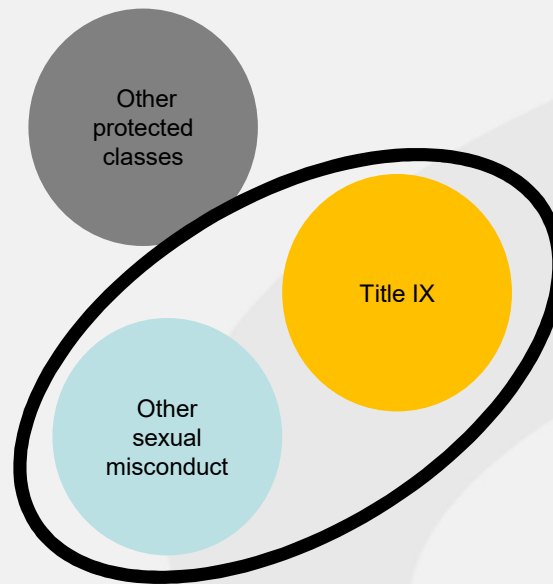


Policy Framework Options

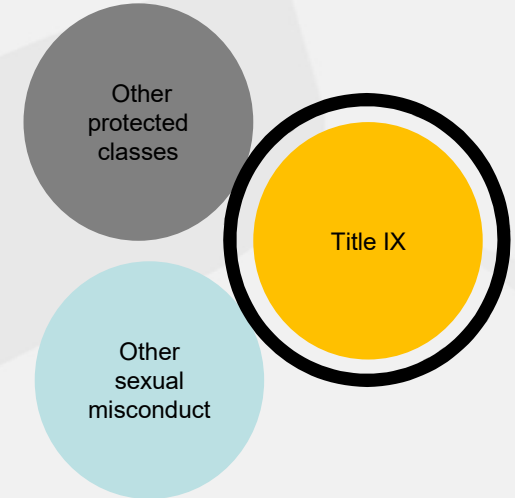
All Protected Classes

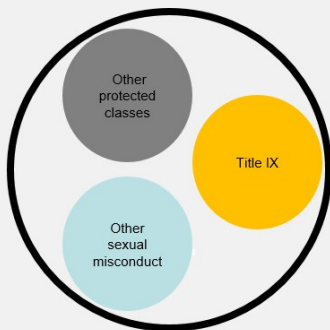


Sexual Misconduct



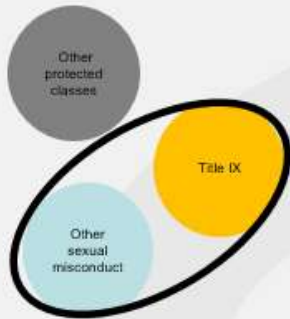
Title IX Only





All Protected Class Misconduct

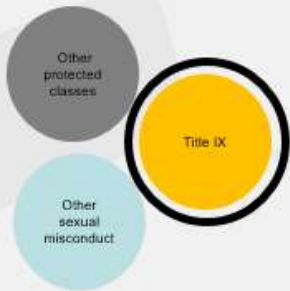
Challenges	Benefits
Additional process in cases where not legally required	Uniform approach to resolution for all civil rights and all sexual misconduct
Additional resources (e.g. advisors, hearing officers, appeal officers, time)	Message to community about equal importance of all forms of discrimination and harassment and awareness of intersectionality
Implications of expanded scope in terms of personnel (e.g. broader and more complex apparatus, timeliness of resolutions)	More streamlined process: fewer decision points
Elevates protected class misconduct over other misconduct (e.g. physical assault, honor code, other personnel matters)	Easier alignment when multiple protected classes are implicated



All Sexual Misconduct*

*Whether or not the conduct qualifies as Sexual Harassment as defined by the regulations

Challenges	Benefits
Additional process in cases where not legally required	Uniform approach to resolution for all instances of sexual misconduct
Additional resources (e.g. advisors, hearing officers, appeal officers, time)	Message to community about equal importance of all forms of sexual misconduct
Implications of expanded scope in terms of personnel (e.g. broader and more complex apparatus, timeliness of resolutions)	More streamlined process: fewer decision points
Community perception that school is applying Title IX prescriptive regulations too broadly (extends to cover additional conduct than is required under the law)	Parity between Title IX sexual harassment and other sexual misconduct, regardless of jurisdiction; accessible and user-friendly
Distinguishes sexual harassment from other protected classes	Continuity of practices (i.e. messaging to the community that the conduct we are addressing has not changed)



Only Title IX Sexual Harassment

Challenges	Benefits
Hyper-technical application of regulations that is inconsistent with value of treating all sexual misconduct equally	Ease of policy drafting
Less alignment with other processes; complex and discretionary decision-making throughout	Does only what is required under the law; narrowly tailored
Schools will need to determine how to regulate conduct beyond Title IX jurisdiction; continuing effects analysis	Narrows scope of changes needed; requires additional resources in the fewest number of cases
Still need to consider Title VII for employee conduct, necessitating parallel or tiered processes	Easier to explain changes to the community because changes are tied strictly to legal requirements

PRESSURE-TESTING TO GUIDE DECISION-MAKING

Consistent Elements Across All Matters

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



Pressure Test

- What
 - Conduct
- Where
 - Geographic location
 - Program/activity
- How
 - What grievance process
- Who
 - Parties (faculty, staff, student, other)



Scenario # 1

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

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Sexual Harassment (as defined by the regulation)

Directed against a person in the U.S.

Within the education program or activity

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Scenario # 4

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Scenario # 5

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

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Scenario # 6

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

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Directed against a person in the U.S.

Within the education program or activity

Scenario # 6

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

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

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

Scenario # 8

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

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

NEXT STEPS: UPDATING CAMPUS POLICIES AND PROCEDURES

Putting the Pieces Together



Effective Preparation: Designing Future State

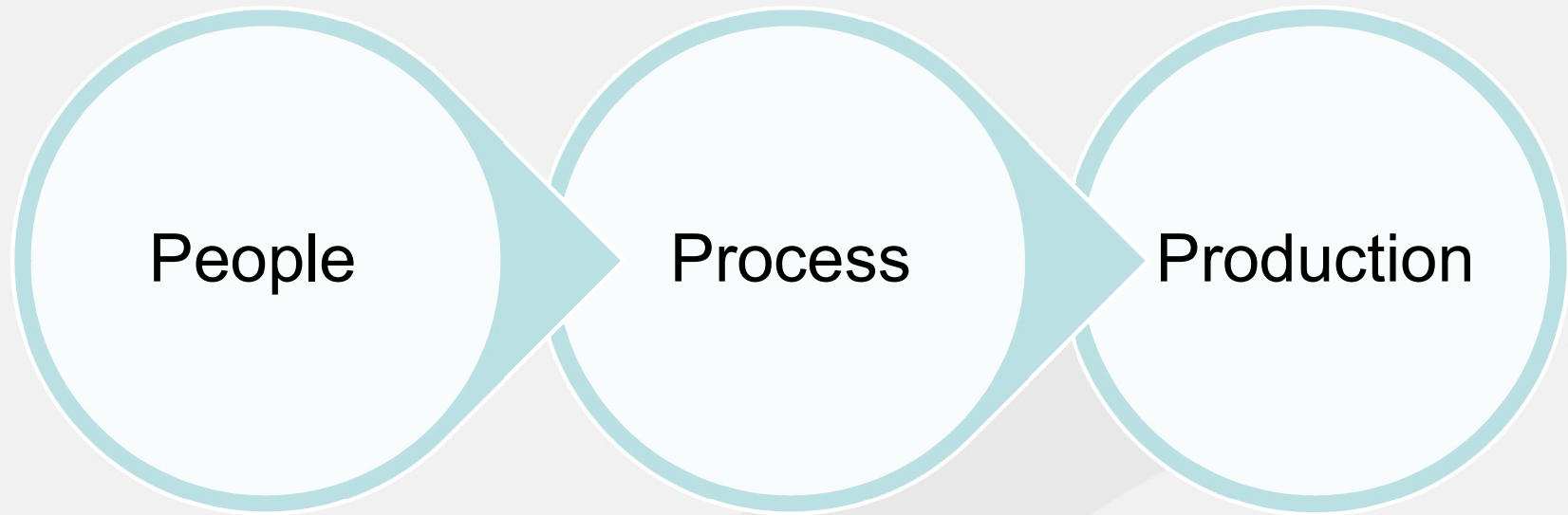
- Policies and Procedures
 - Document delta for project planning and measurable implementation
 - Appoint point person/team
 - Philosophical decision-making
 - Practical implementation
- Current institutional Issues
 - Coordination team
 - Communications – messaging
 - Audiences
- Implementers
 - Current staff
 - Future staffing needs

Effective Preparation: Designing Future State

- Training
 - Audiences
 - Frequency
 - Platforms
- Website
 - Consider centralized landing page
 - Remove outdated material
- Infrastructure and Systems
- Resources
 - Pan-institutional responsibilities
 - Sharing of costs
 - Creative funding and support

ROLLOUT CONSIDERATIONS

Designing Future State



People

Process

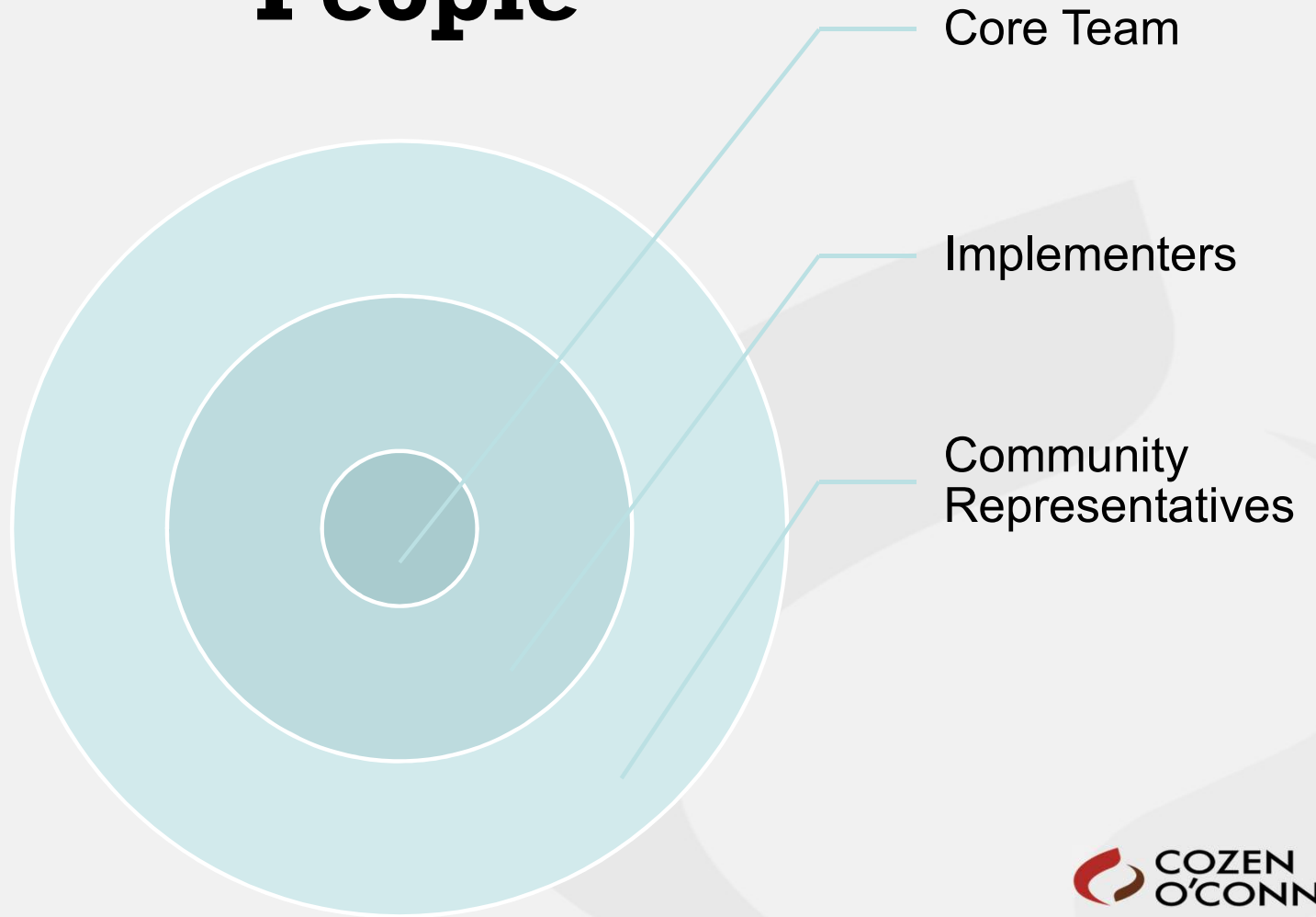
Production

Inputs

Decision-making
structure

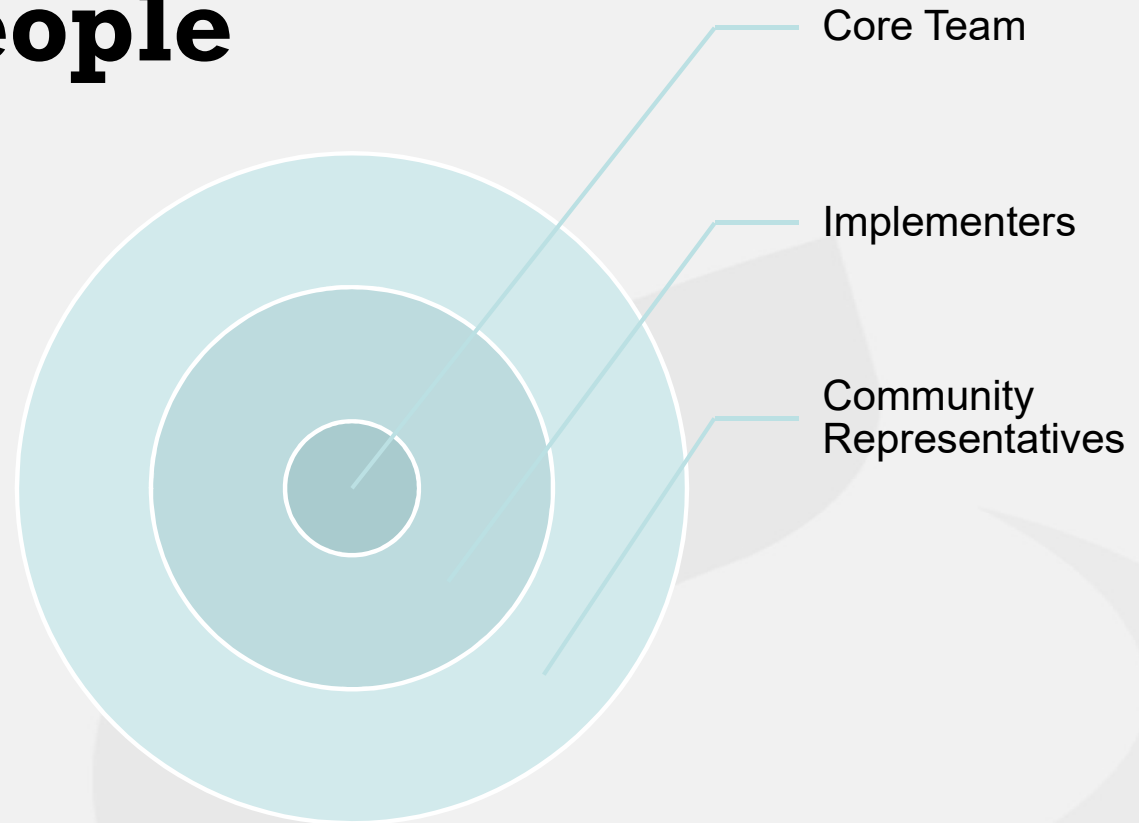
Outputs

People



People

- Who are the decision-makers?
- Who knows how this will work on the ground?
- Who needs to be an emissary for this work and inform practices/impacts on different constituent groups?



Process: Considerations

- Charge
- Remote Engagement
- Culture of Institution
- Levels of Community Engagement
- Facilitation/Chair
- Decision-Making (consensus, voting)
- Operational Ground Rules/Guidelines
- Continuing Work



Process: Getting Started

- Identify who you need to be involved, engaged, informed
- Determine structure (committee, task force, etc.)
 - Invitations
 - Meeting platform
 - Facilitator/Chair
- Set meetings (frequency and timing)
- Set timeline for progress (identify end points)
- Establish agendas (plan in advance)
- Additional issues (public meetings, etc.)

Products: Communications

Internal: Team

- **What** process plan is
- **Who** will be involved
- **What** the timeline is
- **Who** is communicating with media/community
- **Where** questions should be directed
- **What** can be shared

External: Community

- **What** they can expect
- **Who** is running point
- **What** the timeline is
- **Where** they can go for more information
- **How** they can give feedback

Messages

- Communicate core messages and changes to campus and community constituents, including what is not changing
- Frequency
- Method
- Expectations
- Any feedback loops

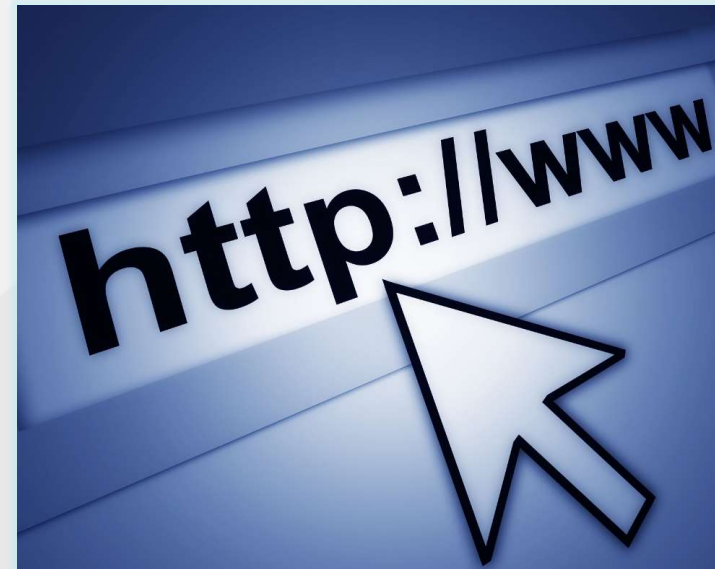
Products: Campus Education and Awareness Efforts

- Orientation
- Trainings (in person and online)
- Other policies
- Prevention efforts
- Advocacy groups
- Written materials
- Emissaries



Products: Websites and Online Presence

- Social media
- ALL webpages (double check links)
- Identify a communications subcommittee
- Need a webmaster: SEO functions
- Other connections (community, etc.)



WEEKLY PROJECT MANAGEMENT PLAN

Weekly Project Management Plan

10 Weeks To Go:

- Attend webinars from subject matter experts
- Form working group for planning and implementation
- Gather all current policies/procedures
- Identify where requirements in the new regulations differ from current practices
- Gather key stakeholder group and present key components of new regulations
- Assess resource needs, identify gaps and personnel re-alignment options
- Map key decisions to be made (e.g. responsible employees, evidentiary standard, non-Title IX cases)
- Plan key decision-making process with working group; incorporate stakeholder feedback

Weekly Project Management Plan

9 Weeks To Go:

- Gather info about training options, share options with working group, book/reserve training
- Inform IT/IS about records retention policy, technology needs, web publication requirement
- Draft realignment plan of current staff roles or initiate discussion about hiring/outsourcing

8 Weeks To Go:

- Share realignment or hiring/outsourcing plan with working group and key stakeholders
- Incorporate feedback into realignment/hiring/outsourcing plan, finalize, and present
- Review web and print materials and identify necessary updates

Weekly Project Management Plan

7 Weeks To Go:

- Review available template/model policies
- Draft new written policies and procedures
- Share draft policies and procedures with working group

6 Weeks To Go:

- Incorporate working group feedback into draft of policies and procedures
- Share draft policies and procedures with key stakeholder group for feedback
- Gather all templates, forms, handouts, signs, print materials and assess for accuracy/consistency

Weekly Project Management Plan

5 Weeks To Go:

- Incorporate stakeholder feedback into policies and procedures and finalize
- Update all templates, forms, handouts, and web and print materials, arrange printing
- Training – TIXC, investigators, decision-makers, appeals officers, informal resolution facilitators

4 Weeks To Go:

- Draft internal training and education for campus partners – residence life, student conduct, public safety, HR, provosts office, counseling center, faculty senate, responsible employees
- Draft awareness campaign to educate community about resources, supports, reporting options

Weekly Project Management Plan

3 Weeks To Go:

- Share draft awareness campaign and campus partner training with working group and key stakeholders; incorporate feedback and finalize
- Map rollout of awareness campaign (working with marketing/communications) and campus partner training (working with unit heads or IT/IS and communications if it will be online)

2 Weeks To Go:

- Roll out awareness campaign
- Roll out campus partner training

1 Week To Go:

- Continue to deliver training, gather feedback, and address community questions and concerns.

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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