

Title IX Regulations: Required Training Program

Providence College

August, 2020

Training Agenda

Title IX Regulations § 106.45(b)(1)(iii)

- The definition of sexual harassment
- The scope of the College's education program or activity
- Conducting an investigation and grievance process, including hearings, appeals, alternative (informal) resolutions, as applicable
- Serving impartially, including by avoiding prejudgment of fact, conflicts of interest, and bias
- Technology used at a live hearing
- Issues of relevance: questions and evidence, including application of rape-shield protections
- Issues of relevance: fair summary of relevant evidence in investigative report

Final Regulations = New Law

- **Source:** Official ED publication May 19, 2020
- **Effective Date:** August 14, 2020
- **Impact:** Legal obligations & interpretative guidance
- **Scope:** All aspects of institutional response to sexual harassment (sex discrimination)
- **Application:** Students AND Employees

Title IX of the Education Amendments of 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 education program or activity
receiving Federal financial assistance.”

20 U.S.C. § 1681, et. seq,
and its implementing regulations, 34 C.F.R. Part 106

New Title IX Rule – Big Picture:

Major Provisions

- Jurisdiction and scope of “Sexual Harassment”
- Documentation and records
- Live Hearing governed by specific procedures
- Advisor role at Hearing
- Provide Advisor to fulfill role at Hearing (if needed)
- Consequences of not submitting to cross-examination at Live Hearing

Title IX Jurisdiction – Big Picture

Possessing certain information imposes certain duties.

When the College has...

1. actual knowledge of
2. sexual harassment
3. in a College education program or activity
4. against a person in the United States

→ must respond in a manner that is

→ not deliberately indifferent

“clearly unreasonable in light of known circumstances”

New Title IX Rule – Overview of Governing Principles

- Treat the parties equitably.
- No one is presumed responsible unless found “responsible” after an equitable process.
- An equitable process includes testing the credibility of, and statements provided by, witnesses and the parties.
- No bias or conflict of interest: Title IX Coordinator; Investigator, Decision-Makers; Facilitator of Alternative Resolution

Jurisdiction –

Overview of Response Duties

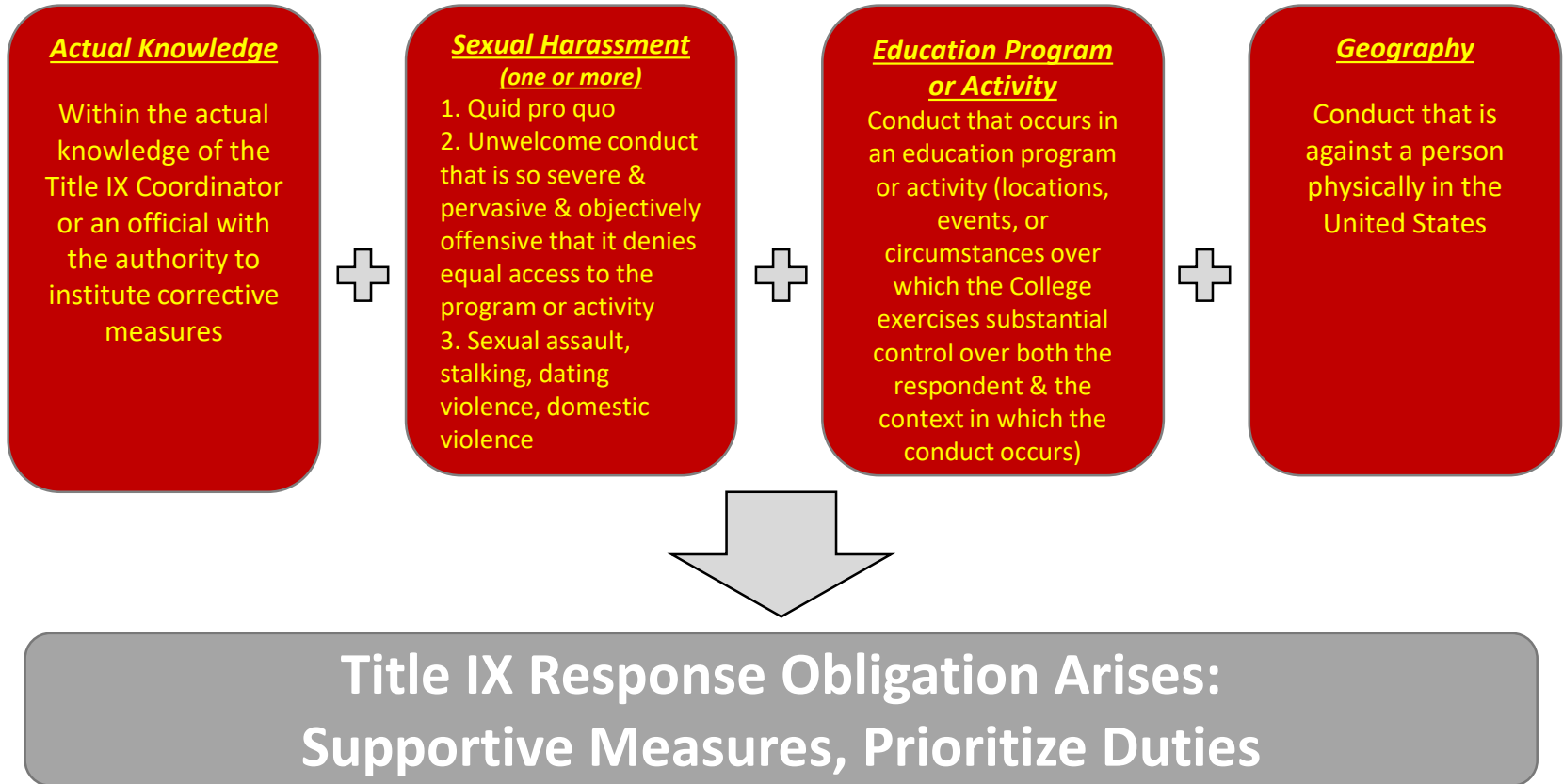
Actual knowledge of a report

- Intake Meeting – Intake Letter
 - Offer supportive measures
 - Explain and offer formal complaint process

Actual knowledge of a formal complaint § 106.45

- Investigation
 - Dismissal analysis (or prior if warranted)
- Possible alternative resolution agreement
- Live hearing, written decision, appeal
- If “responsible,” sanctions AND measures to restore or preserve equal access to education program or activity
- Detailed documentation
 - 7-year records retention period

Title IX Jurisdiction



Jurisdiction –

“Actual Knowledge”

“Officials with Authority” (OWA) – employees who have authority to take corrective action

- “Actual Knowledge” from any person via any means
 - Oral or written, personal observation, anonymous letter, social media post, other
- **MUST report the “knowledge” to Title IX Coordinator**
- The mere obligation to report sexual harassment (*Mandatory Reporting Policy*) does not qualify an employee as one who has authority to take correction measures on the College’s behalf.

REMINDER: Reporting Duties – Title IX and/or Non-Title IX

- **Title IX Duty**...but there are additional reporting duties → who, what, when, where, how
- **Disclosures and Reports:**
 - Confidential resources for students to receive support
 - Employee/Agent reports of student harassment – Policy
 - Supervisor reports of employee harassment – Policy
 - Clery Act crime reports – Campus Security Authorities
 - **CSA also may be OWA**
 - Timely-Warning/Crime Alert assessment – Public Safety
 - Assault, child abuse, child pornography – external report

Jurisdiction –

“Education Program or Activity”

Scope – ALL of the College’s operations

- ▶ Substantial control over respondent and context
- ▶ On campus, residential halls (hybrid housing)
- ▶ Computer and internet networks, digital platforms, hardware or software owned, operated, or used
- ▶ Academic, alumni, athletic, student and employee events, ministries, organizations, trips

Preamble: NO bright-line geographical test, and off-campus sexual harassment is not categorically excluded from Title IX protection (regarding “substantial control over respondent & context”)

Jurisdiction – “Education Program or Activity”

Participant, or attempting to participate, in education program or activity:

- Applicant – student or employee
- Desire to re-enroll if College responds adequately to a complaint
- Intent to participate in events for alumni

Jurisdiction –

“Title IX Sexual Harassment”

1. Quid pro quo - Employee conditions provision of an aid, benefit, or service on a person's participation in unwelcome sexual conduct (“this for that”)

- ▶ Power Differential; Abuse of Power
- ▶ Employee → Employee
- ▶ Employee → Student

Jurisdiction –

“Title IX Sexual Harassment”

2. Unwelcome sex-based conduct, determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the education program or activity
 - “Equal” access denied; not complete access
 - Verbal conduct only if serious enough to be “abusive”
 - Intent is not a necessary element
 - Includes different sex and same-sex
 - Possibly “sexual exploitation” or “complicity” (see Policy)
 - Possibly sex stereotyping

Common-sense analysis of what constitutes severe, pervasive, and objectively offensive

Jurisdiction –

“Title IX Sexual Harassment”

- “Severe & pervasive & objectively offensive” # 2.
- “Denied equal access” – Either physically excluded OR the harassment “undermines and detracts from” the complainant’s educational experience to such a degree that access to resources and opportunities are effectively denied.
- Consider speech in the educational context and Academic Freedom

Jurisdiction –

“Title IX Sexual Harassment”

3. Sexual Assault, Dating Violence, Domestic Violence, Stalking

— Sexual Assault means an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the FBI, as defined below. (Clery Act)

Rape – The carnal knowledge of a person, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity;

Jurisdiction –

“Title IX Sexual Harassment”

Sodomy – Oral or anal sexual intercourse with another person, without the consent of the victim, including instances where the victim is incapable of giving consent because of hi/her age or because of his/her temporary or permanent mental or physical incapacity;

Sexual Assault with an Object – To use an object or instrument to unlawfully penetrate, however slightly, the genital or anal opening of the body of another person, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity;

Jurisdiction –

“Title IX Sexual Harassment”

Fondling - The touching of the private body parts of another person for the purpose of sexual gratification, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age, or because of his/her temporary or permanent mental or physical incapacity;

Incest – Non-forcible sexual intercourse between persons who are related to each other within the degrees where marriage is prohibited by law;

Statutory Rape – Non-forcible sexual intercourse with a person who is under the statutory age of consent (16 in R.I.).

Jurisdiction –

“Title IX Sexual Harassment”

“Dating Violence – Violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim, and where the existence of such a relationship is determined based on consideration of the following factors: the length, type, and frequency of interaction between the person involved in the relationship.” (Violence Against Women Act-VAWA)

Jurisdiction –

“Title IX Sexual Harassment”

“Domestic Violence – Includes felony or misdemeanor crimes of violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with the victim as a spouse or intimate partner, by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction receiving grant monies under VAWA, or by any other person against an adult or youth victim who is protected from that person’s acts under the domestic or family violence laws of the jurisdiction.” (VAWA)

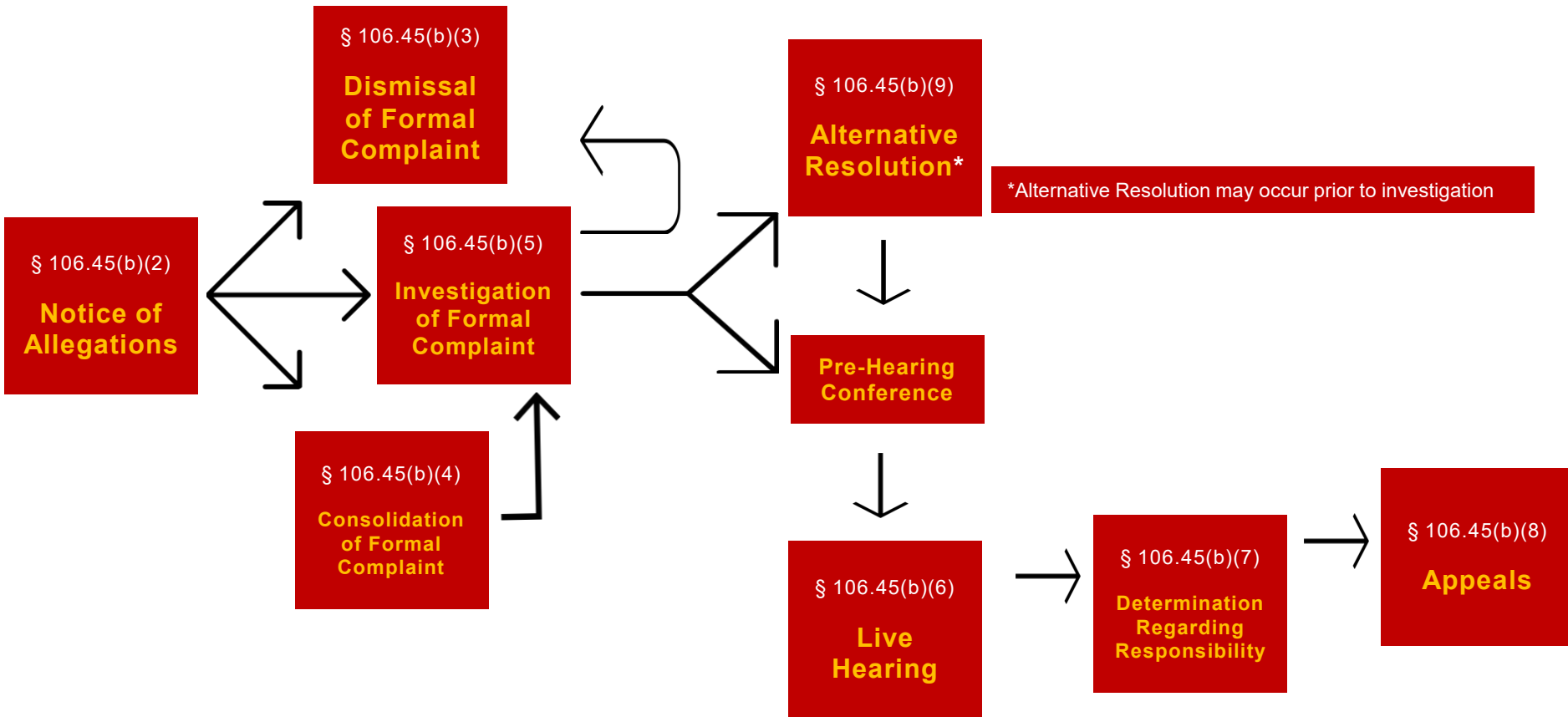
Jurisdiction –

“Title IX Sexual Harassment”

“Stalking on the basis of sex – Engaging in a course of conduct directed at a specific person that would cause a reasonable person to fear for his or her safety or the safety of others; or, suffer substantial emotional distress.” (VAWA)

Includes Cyberstalking

§ 106.45 Grievance Process for Formal Complaints of Sexual Harassment



Response Duties – “Actual Knowledge”

“Supportive Measures”

- Non-disciplinary or punitive
- Offered to both parties
 - Reporting party at Intake
 - Responding party whenever informed of the report
- Restore or preserve equal access to program or activity
- No formal complaint necessary
- Confidentiality
- If none – “not clearly unreasonable in light of known circumstances”

- Measures for non-students and non-employees

Response Duties –

“Actual Knowledge”

“Supportive Measures” – individualized and interactive

- Medical & mental health services
- Academic accommodations
- Work or class schedule modifications
- Campus escort services
- Mutual No-Contact Directive (one-way = limited use)
- Changes in work or housing locations
- Voluntary leaves of absence
- Increased security and monitoring of campus areas

- ADA, Section 504 considerations

- Assistance in filing complaint with law enforcement

Response Discretion – “Actual Knowledge”

“Emergency Removal” – case-by-case assessment

- *Immediate threat* to *physical health or safety* of *anyone*
- Threat arises from the allegations of sexual harassment
- Immediate notice and opportunity to challenge
 - Not a 106.45 process
 - Reporting party not a process participant
- Can be imposed anytime
- Timeframe open-ended
- Can include “No Trespass” and/or “No-Contact Directive”

- Timely Warning-Crime Alert assessment

- Circumstances warranting this action?

Response Discretion – “Actual Knowledge”

“Administrative Leave” – case-by-case assessment

- After a Formal Complaint is filed, § 106.45 process
- Timely Warning-Crime Alert assessment
- Circumstances warranting this action?

Response Duties – “Formal Complaint”

Signed document describing the claims filed by complainant (reporting party) who is a participant in a program or activity (or attempting to)

IF:

NO “Title IX Jurisdiction,” MUST dismiss complaint

Parties have opportunity to **appeal** dismissal

Next steps, if any?

Response Discretion – “Formal Complaint”

Where complainant files signed Formal Complaint:

Title IX Coordinator **MAY dismiss** the complaint

IF:

- ▶ Complainant requests to withdraw complaint
- ▶ Respondent no longer is enrolled or employed
- ▶ Specific circumstances prevent gathering evidence sufficient to reach a determination

Parties have opportunity to **appeal** dismissal

Response Discretion – “Formal Complaint”

[OR] Signed complaint filed by Title IX Coordinator

- Discretionary, after thoughtful consideration
- Factors include a pattern of alleged conduct (a history or multiple complainants who do not file)
- Use of violence, weapons
- Where reporter is a third party who cannot file
- Identity of respondent is unknown

Response Discretion – “Formal Complaint” - Consolidation

Title IX Coordinator may consolidate complaints:

- Multiple complainants and one respondent
- Multiple respondents and one complainant
- Cross-complaints

IF:

allegations arise out of same facts or circumstances,
i.e., the allegations are so intertwined that they
directly relate to all parties

Response Duties –

Other Conduct Prohibitions

"Retaliation – Title IX prohibits intimidation, threats, coercion, or discrimination against any individual for the purpose of interfering with any right or privilege secured by Title IX and its implementing regulations or because an individual has made a report or complaint, testified, assisted, participated in or refused to participate in any manner in an investigation, proceeding, or hearing under the institution's policy."

Response Duties – Other Conduct Prohibitions

Making a Materially False Statement in Bad Faith –
Providing or submitting false or misleading information in bad faith, with a motive to obtain personal advantage or to cause intentional harm to another person in connection with an incident of sexual misconduct.

Response Duties – Consent, Incapacitation (new Rule does not define either)

- Sexual activity is consensual when it involves mutually understandable words and/or actions that indicate a willingness to engage in specific sexual activity;
- When it is knowing and voluntary; and,
- When persons are not incapacitated.
- Consent can be withdrawn at any time; once withdrawn, activity must stop.
- Prior consent does not imply current or future consent, even in the context of a relationship.
- Physical force, verbal threats, intimidation, or coercion cannot be used to obtain consent.
- Consent is automatically withdrawn if the person who provided it becomes incapacitated. [See College Policy]

Response Duties – Incapacitation, Consent (new Rule does not define either)

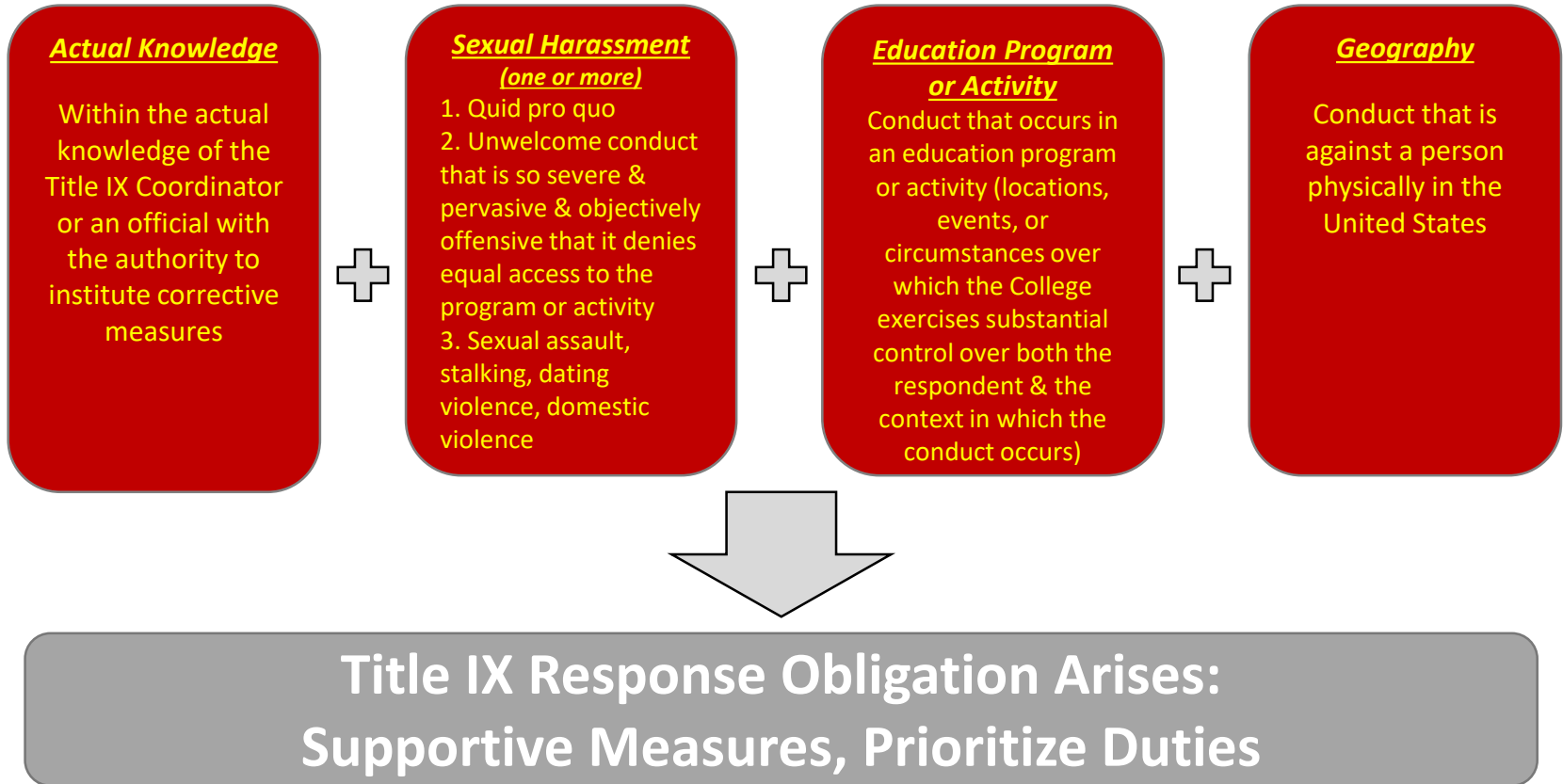
- Does a person have the capacity to appreciate the fact that the situation is sexual, or to appreciate (rationally and reasonably) the nature and/or extent of the situation?
- If there is a factual finding that a person was incapacitated (e.g., by alcohol and/or a drug),
 - Did the person initiating sexual activity know of the incapacitation?
 - If not, should a sober, reasonable person in same situation have known of the incapacitation?

[See College Policy]

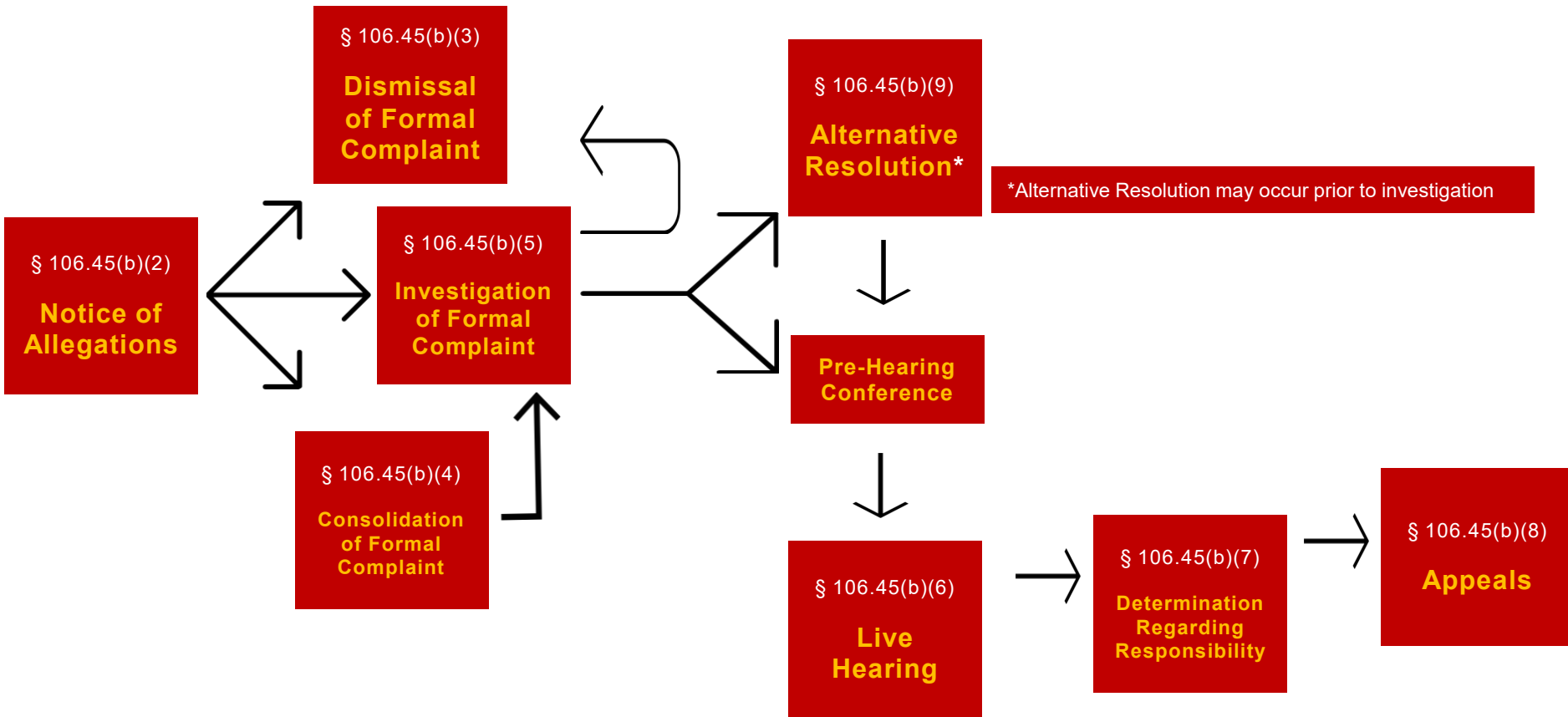
Jurisdictional & Process Review Questions

- No Formal Complaint?
 - Not severe, pervasive, and objectively offensive?
 - Not in an education program or activity? Not in U.S.?
 - One complaint: some conduct does not occur in a program or activity and other conduct does?
 - Unwelcome conduct on the basis of another protected class?
 - Others?
-
- Complexities; carefully consider known facts

Title IX Jurisdiction



§ 106.45 Grievance Process for Formal Complaints of Sexual Harassment



Terminology and Language

- The Parties

- ▶ Title IX Rule – “complainant” & “respondent”

- ▶ Clery Act – “victim” & “accused”

- ▶ College – “reporting party” & “responding party”

Terminology and Language

- Empathetic and Non-Adversarial Language (exs.)
 - ▶ “Not Responsible” ≠ “Innocent” & “Responsible” ≠ “Guilty”
 - ▶ “Code” or “Policy” ≠ “Law”
 - ▶ “Experience” ≠ Believe or Feel
 - ▶ “Account” ≠ “Story”
 - ▶ Word vs. word credibility assessment ≠ “he said, she said”
 - ▶ “Help me/us understand...” ≠ “Why didn’t you...”
OR “How could you...”
 - ▶ Pronouns that are gender-inclusive (as applicable)

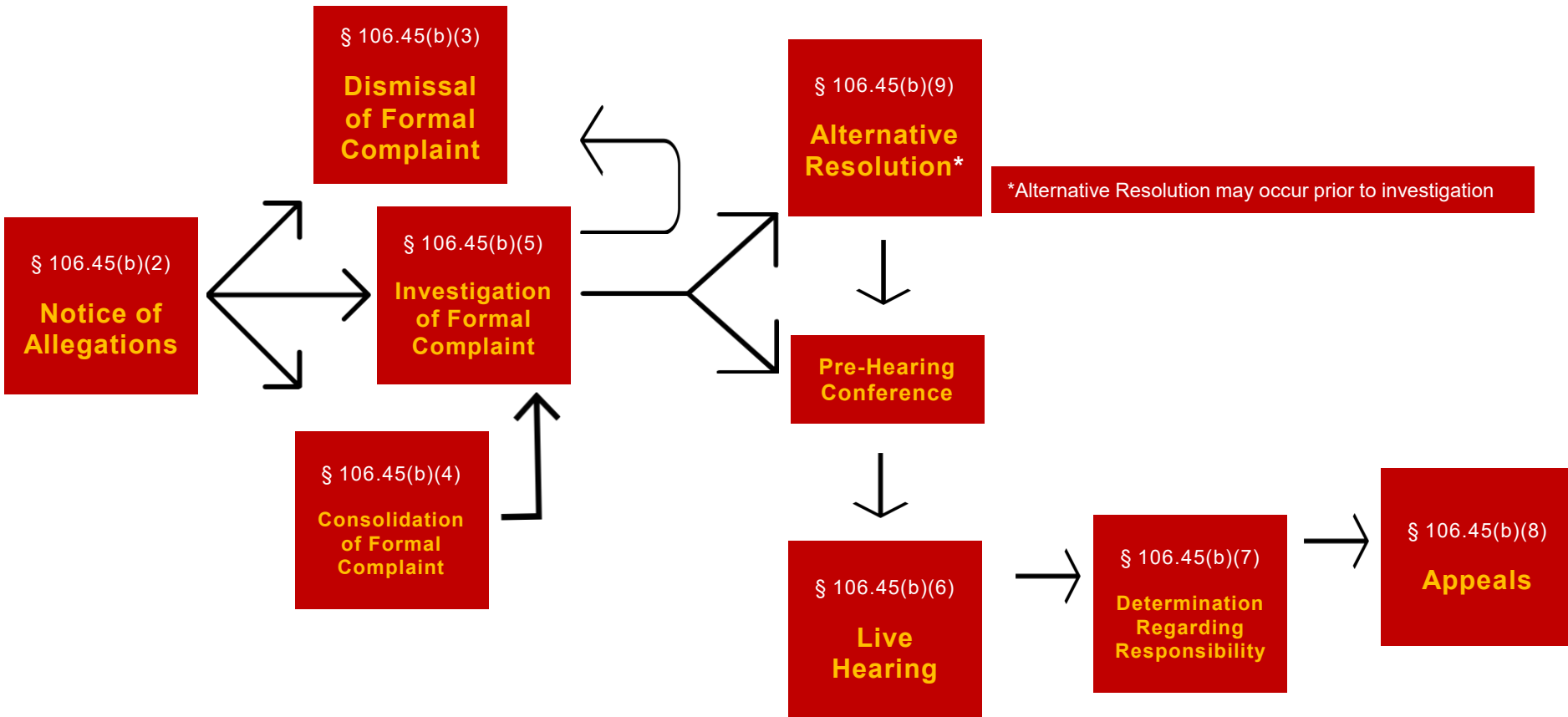
§ 106.45 Process – Alternative (Informal) Resolution

- Formal Complaint must be pending
- Not available when a student accuses an employee
- Informed and voluntary consent by both parties and the College; any party may withdraw
- Must participate in preparatory meetings
- Agreements are signed and enforceable
- Broad latitude: Can include apology, sanctions, admission of responsibility, professional treatment, educational component, NCD, § 106.45 alteration

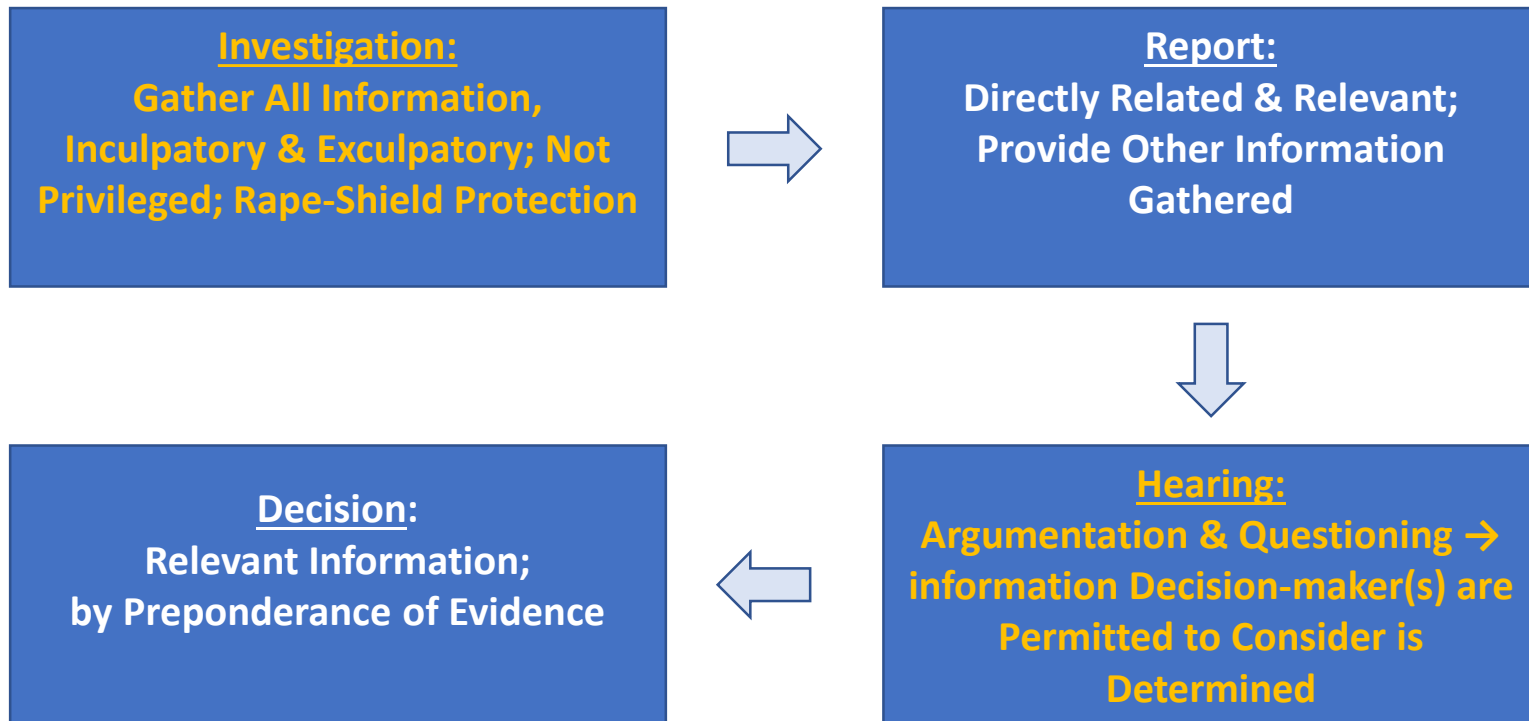
Facilitating Alternative Resolution

- Neutral; empathetic; listen intently; emotional expressions
- Possibly identify wishes, needs, external pressures, any misconceptions, the other's experience, mutual benefits, areas of compromise
- Prompt; yet pause for illness, crises, exams, etc.
- In-person meetings, shuttle diplomacy, virtual, email
- Allow for involvement by advisors or personal attorneys
- Preclude statements made by parties from use in any hearing
- Preclude Facilitator from being a witness in any hearing

§ 106.45 Grievance Process for Formal Complaints of Sexual Harassment



Evidence – Big Picture



§ 106.45 Process – Investigation

- Investigator is a neutral fact-gatherer
- Burden of proof and of gathering evidence sufficient to reach a determination is on the College
- Parties have equal opportunity to submit factual and corroborating information, to identify witnesses (**fact and expert**), and other **inculpatory and exculpatory evidence**
- Parties have the right to have an advisor of choice at any meeting, proceeding, or hearing

§ 106.45 Process – Investigation

Gathering facts:

- “Directly related to the allegations” and “relevant”
– Apply plain and ordinary meaning, logic and common sense
- “‘Directly related’ may encompass a broader universe of evidence than evidence that is ‘relevant’”
- “Inculpatory” evidence tends to support claims
- “Exculpatory” evidence tends not to support claims
- Expert evidence may be directly related to/relevant

§ 106.45 Process –

Investigation

- Health, medical, treatment records, and privileged communications, are protected unless consent to disclose is given or the privilege is waived.
- Sexual history may not be used to prove character or reputation.
- Prior sexual history and practices are not relevant unless:
 - Information is offered to prove that someone other than the responding party committed to alleged conduct; or,
 - If questions and evidence concern specific incidents of a person's prior sexual behavior with the responding party and is offered to prove consent.

§ 106.45 Process – Investigation

- Equal opportunity to review evidence that is **directly related to the allegations**, including evidence College does not intend to rely on in reaching a determination, and **inculpatory and exculpatory evidence**
- Parties have at least 10 days to submit response
- Final Report fairly summarizes relevant evidence
- Final Report to parties at least 10 days prior to the live hearing so that parties can “effectively provide context to the evidence included in the report” and “advance their own interests for consideration by the decision-maker” (Preamble)

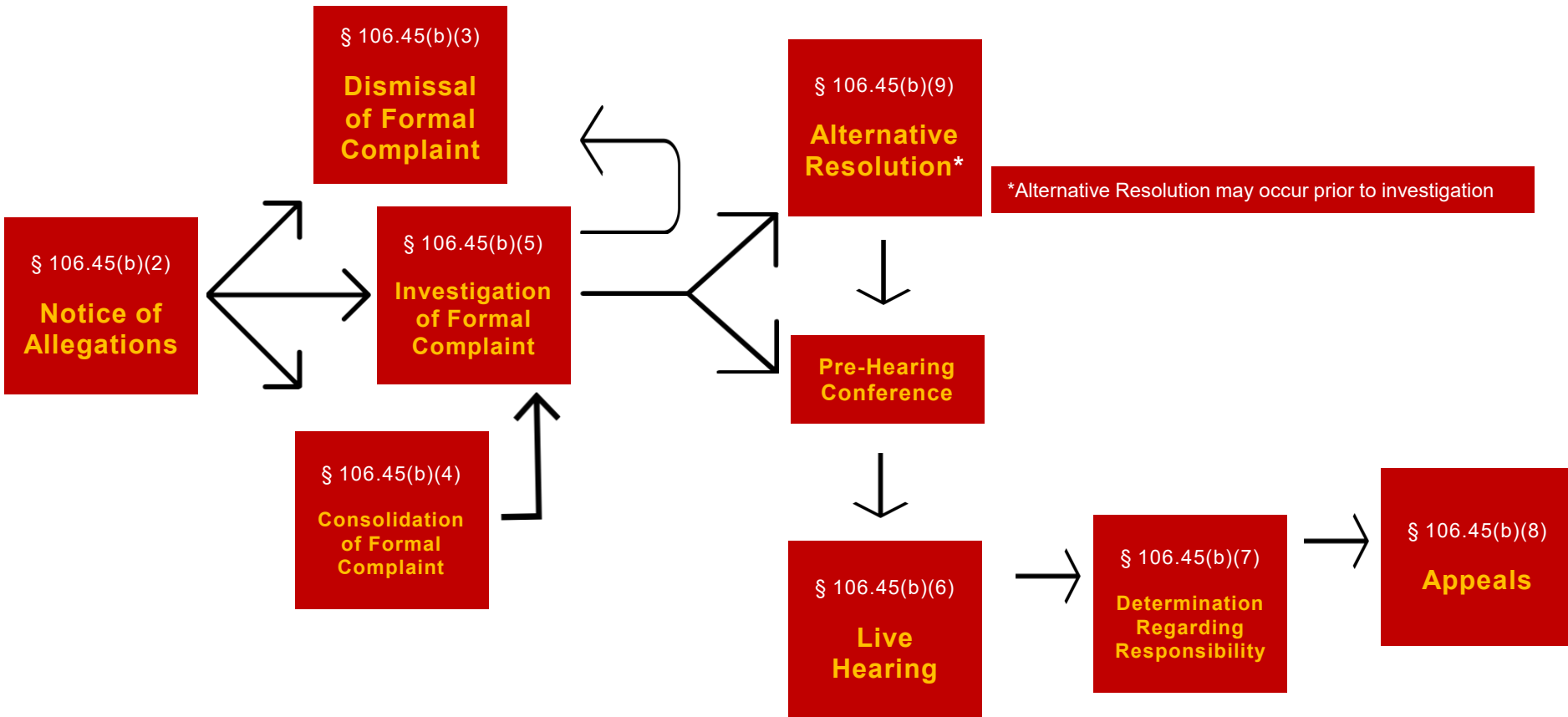
Investigation – Gathering Information

First Responder Reports, Statements

Minimal facts interview/statement (specific training)

- What happened?
 - Who? (Do not insist on a name)
 - Where is this person(s) now?
 - When?
 - Where?
 - Extraordinary circumstances?
-
- Risk and safety assessments
 - Mitigation and safety plans
 - Documentation/report

§ 106.45 Grievance Process for Formal Complaints of Sexual Harassment



§ 106.45 Process –

Hearing: Big Picture

Can we create and enforce rules of decorum?

Can we create an evidentiary code on relevancy to guide the parties (and advisors)?

Who can be called as witnesses?

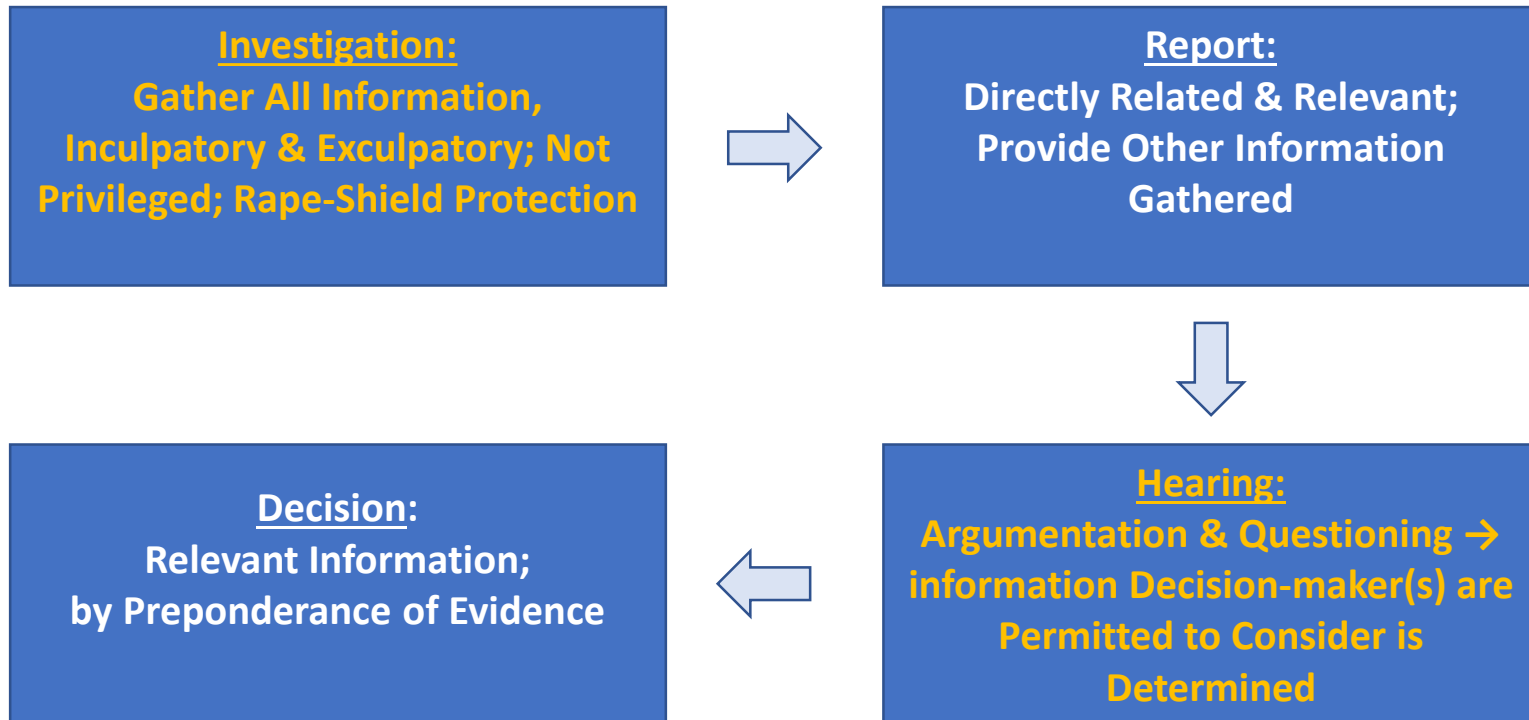
Who can ask questions of whom?

How will cross-examination occur?

Can witnesses be compelled to participate?

What evidence can decision-maker(s) consider?

Evidence – Big Picture



§ 106.45 Process –

Live Hearing Overview

- In person; separate space; everyone virtual/remote
- Expert witnesses and character evidence permitted
- Decision-makers ask questions of witnesses and parties
- Each party's advisor is permitted to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility.

§ 106.45 Process –

Live Hearing

- Cross-examination by advisors is done directly, orally, and in real time.
- If one party attends the hearing but the other party does not, the latter party's advisor may attend and conduct cross-examination.
- If a party does not have an advisor at the hearing, College will provide, without fee or charge, an advisor of the College's choice, who may be, but is not required to be, an attorney, to ask cross-examination questions on behalf of that party.

§ 106.45 Process –

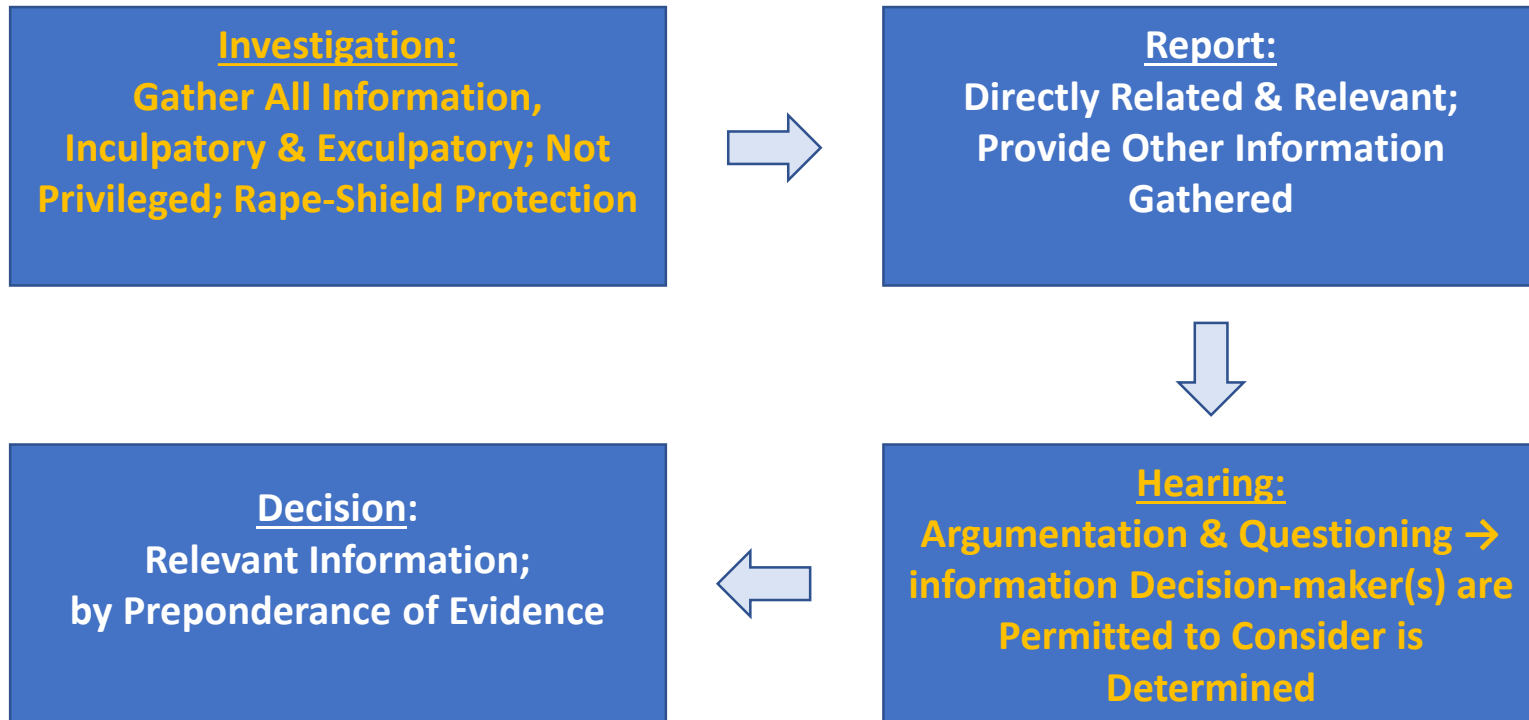
Live Hearing

- Before any question from an advisor can be answered, the decision-maker decides whether it is relevant and explains a decision to exclude it
- If a party or witness does not **submit to cross-examination**, any **statement** of that party may not be relied on in deciding the case
- Decision-maker cannot draw an inference regarding responsibility based solely on a person's absence from the hearing or refusal to answer cross-examination or other questions

§ 106.45 Process – Live Hearing and “Statements”

- Hearing rules on evidence promote fairness and accuracy;
- Cross-examination is a truth-seeking device;
- Any person who makes a statement at any time that is directly related to the allegations, including if the statement is in a document or report, must submit to cross-examination; and,
- Unless statements are tested for credibility by the parties, they are not sufficiently reliable for decision-maker(s) to consider as “relevant evidence.” (Preamble)

Evidence – Big Picture



§ 106.45 Process –

Decision-Maker(s) Deliberate

- Carefully consider all admissible evidence (statements, documents, reports, exhibits) for details, inherent plausibility, consistency, corroboration (if it exists), etc.
- When facts are in dispute, evaluate and assign weight to the evidence, and assess credibility to determine what happened between the parties. How reliable, significant, and persuasive is the evidence?
- Apply the relevant Policy definitions to the facts based on the preponderance of evidence standard of proof.

§ 106.45 Process – Standard of Evidentiary Proof

Preponderance of Evidence

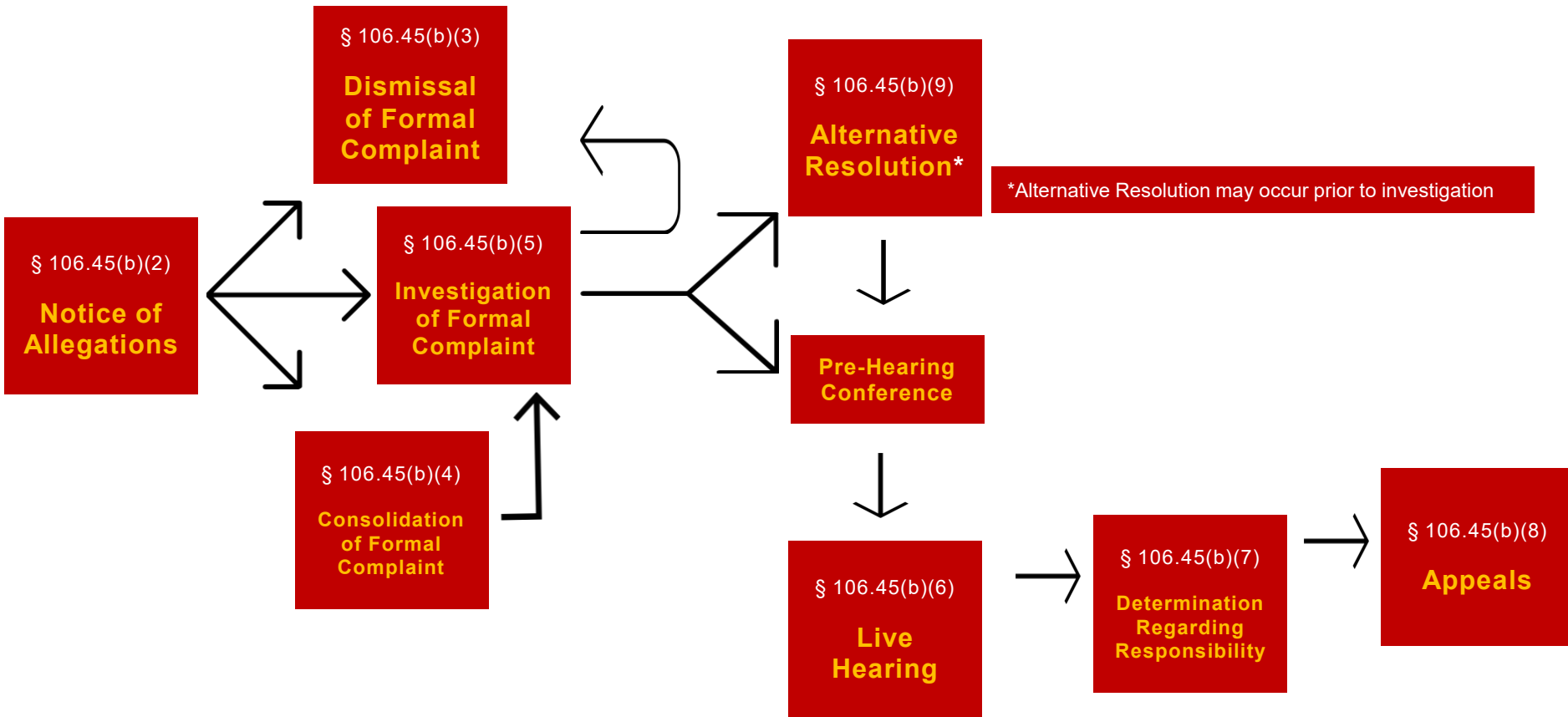
- More likely or probable to be true than not
- Quality of evidence, not quantity
- Greater weight of credible evidence – 51%

Clear and Convincing Evidence

- Highly and substantially more probable to be true than not
- Form belief or conviction in the factuality of the evidence

Beyond a Reasonable Doubt

§ 106.45 Grievance Process for Formal Complaints of Sexual Harassment



§ 106.45 Process – Determination of Responsibility

Parties must simultaneously receive an **Outcome Letter** that includes:

- Description of allegations potentially constituting sexual harassment;
- Description of the procedural steps in the case;
- Findings of fact supporting the decision;
- Conclusions regarding the application of the Policy/Code to the facts;
- Statement of, and rationale for, the result for each charge, to include the finding, any sanctions and any remedial measures provided; and,
- Procedures and grounds for appeal.

§ 106.45 Process – Appeals

- Equal opportunity to appeal
- **Grounds – Mandatory:**
 - Procedural error (prejudicial, not merely harmless)
 - New information that could have affected the outcome had it been available and presented to decision-maker(s)
 - Conflict of interest or bias: Title IX Coordinator, investigator, decision-maker(s)
- **Discretionary:** Excessive or inappropriate sanction(s)
- **Dismissal of Formal Complaint** – same grounds and process
- **Outcome:** grant or deny appeal; modify findings and/or sanctions; remand the case for further proceedings

Considerations for Appeal Decision-Makers

- **Procedural Irregularity** – significant prejudice that affected the outcome
 - Information and/or questions included or excluded from consideration by investigator and/or decision-maker(s)
- **New Information** – it could have affected the outcome had decision-maker(s) known about it
 - Not reasonably available before the decision
- **Conflict of Interest or Bias**
 - **For or against individuals on account of sex/gender**
 - **For or against complainants or respondents**
 - **For or against the individual complainant or respondent**

Serving Impartially

Decision-Maker(s) and Investigator(s) Should:

- Manage process ethically, with empathy and reciprocity
- Be open-minded – not prejudge the facts
- Avoid sex or gender stereotyping, myths, bias
- Demonstrate professional and neutral demeanor
- Be a careful reader, active listener, and be attentive to and seek details about all relevant issues
- Be a thoughtful inquirer

Serving Impartially

Decision-Maker(s) and Investigator Should:

- Ask neutral, non-judgmental, open-ended questions, and focused follow-up questions
- Provide sufficient context for questions
- Ask witnesses about their “statements” to discern accuracy, completeness, consistency, reliability
- Draw inferences that are reasonable
- Make a reasoned decision on each charge

Relevancy –

Bias-Free Credibility Assessments

§ 106.45(b)(1)(ii) “Require an objective evaluation of all relevant evidence – including both inculpatory and exculpatory - and provide that **credibility determinations may not be based on a person’s status as a complainant, respondent, or witness...**”

(iii) “**...not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent.**”

Relevancy – Bias-Free Credibility Assessments: Factors to Consider

Answers to cross-examination questions may be influenced by accumulated stress and/or stress in the moment.

Also, consider this language in the Preamble:

Serving impartially without prejudice means protecting parties “from being unfairly judged due to inability to recount each specific detail of an incident in sequence, whether such inability is due to trauma, the effects of drugs or alcohol, or simple fallibility of human memory.”