



# TITLE IX TRAINING

**DELAWARE VALLEY UNIVERSITY**  
**AUGUST 4, 2020**

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# TODAY'S AGENDA

- Overview of Title IX, VAWA, and Clery Act
- General Policy Requirements
- Scope of Title IX Regulations
- University's Duty to Respond
- Supportive Measures
- Confidentiality Issues
- Grievance Process: Formal Complaint
- Informal Resolution Process

# TODAY'S AGENDA

- Formal Resolution Process
  - Investigation
  - Hearing
  - Relevance
  - Deliberations, Outcomes, and Sanctions
  - Appeals
- Unique Aspects of Sexual Misconduct Cases



# OVERVIEW OF TITLE IX, VAWA, AND CLERY

# TITLE IX: OVERVIEW

- “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.”

# TITLE IX: OVERVIEW

- Prohibits sex-based discrimination in ***educational programs and activities*** that receive federal financial assistance (including Delaware Valley University)
- Applies to conduct by students, employees (which includes all faculty, staff and administrators), independent contractors, and volunteers
- Enforced by the U.S. Dep't of Education's Office for Civil Rights (OCR).

# TITLE IX: OVERVIEW

- Not just athletics...



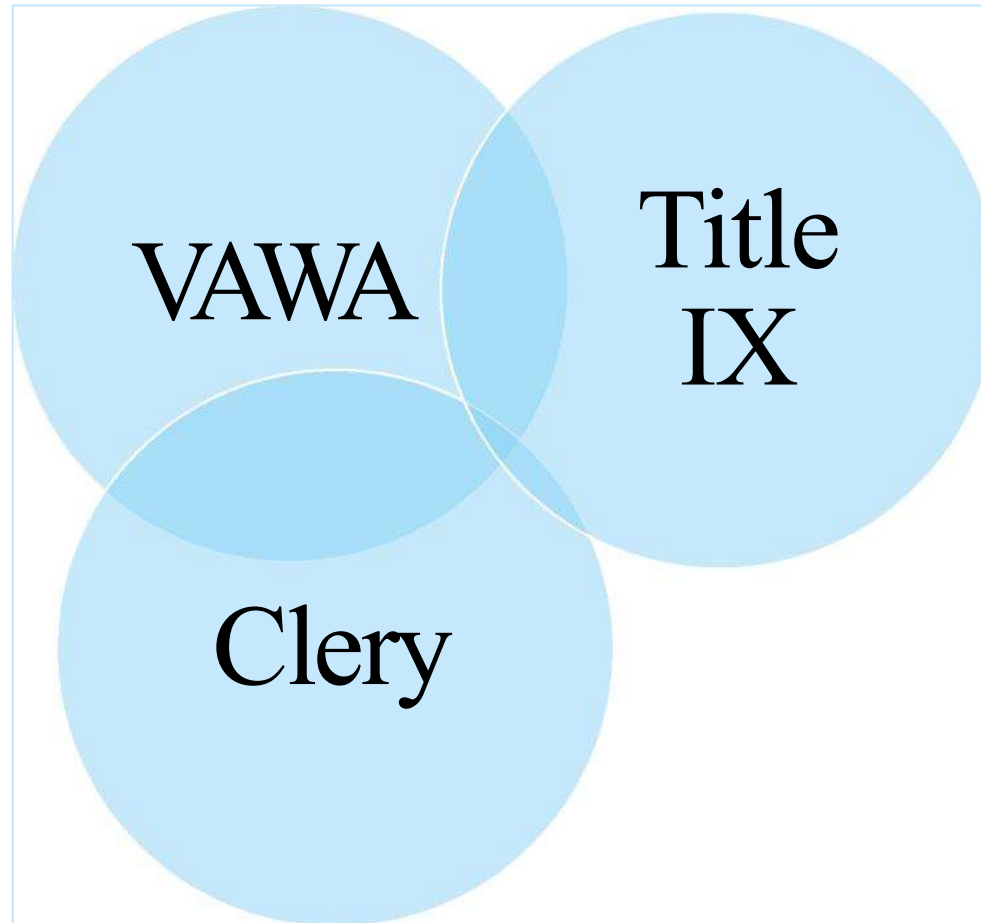
- Sexual harassment and sexual assault are forms of sex discrimination prohibited by Title IX.

# TITLE IX: OVERVIEW

- Title IX includes:
  - Athletics
  - Sexual harassment
  - Sexual assault
  - Sex discrimination
  - Housing
  - Recruitment, admissions
  - Financial aid
  - Pay rates
  - Benefits
  - Leaves of absence
  - Pregnant/parenting students
  - Safety
  - Vocational counseling
  - Awards
  - Employment
  - Sexual Orientation & Gender identity



# TITLE IX, VAWA, CLERY ACT



# VAWA / CAMPUS SAVE ACT

The Campus SaVE Act amended the Clery Act to increase transparency requirements for higher education institutions, guarantee rights for survivors, form disciplinary standards, and require education prevention programs campus-wide.

The Campus SaVE Act is a provision of the Violence Against Women Act (VAWA).

# VAWA / SAVE / CLERY

- Violence Against Women Act
  - Application not limited to women
- VAWA amended the Clery Act
  - Clery Act requires colleges and universities maintain and report campus crime and security statistics and information
  - VAWA adds Dating, Domestic Violence, Stalking, Hate Crimes
- Specified crimes
- Timely reports
- Procedural protection

# VAWA: PROCEDURAL PROTECTIONS

- Must provide written notice of rights & resources after report (which often occurs before a formal complaint)
- Information about preservation of evidence
- Statement of evidentiary standard
- Identify all sanctions or protective measures
- Advisor of choice
- Simultaneous written notifications
- Training that protects safety of victim and promotes accountability



# **GENERAL POLICY REQUIREMENTS**

# NOTICE OF NONDISCRIMINATION

- Must be widely disseminated - notify applicants for admission and employment, students, employees, unions or professional organizations with collective bargaining agreements
- Must provide coordinator's contact information, including email address
  - Must be on website as well as any handbooks or catalogs distributed to people entitled to notification

# NOTICE OF NONDISCRIMINATION

- Must state that:
  - Institution cannot discriminate on the basis of sex under Title IX
  - The anti-discrimination protections extend to admission and employment
  - Inquiries can be sent to Title IX coordinator or Assistant Secretary at DOE or both
- Must be on website and any handbooks or catalogs given to applicants for admission and employment, students, employees, unions or professional organizations with collective bargaining agreements

# TITLE IX COORDINATOR

Oversees the institutional response to Title IX reports and complaints; identifies and addresses any patterns or systemic problems.



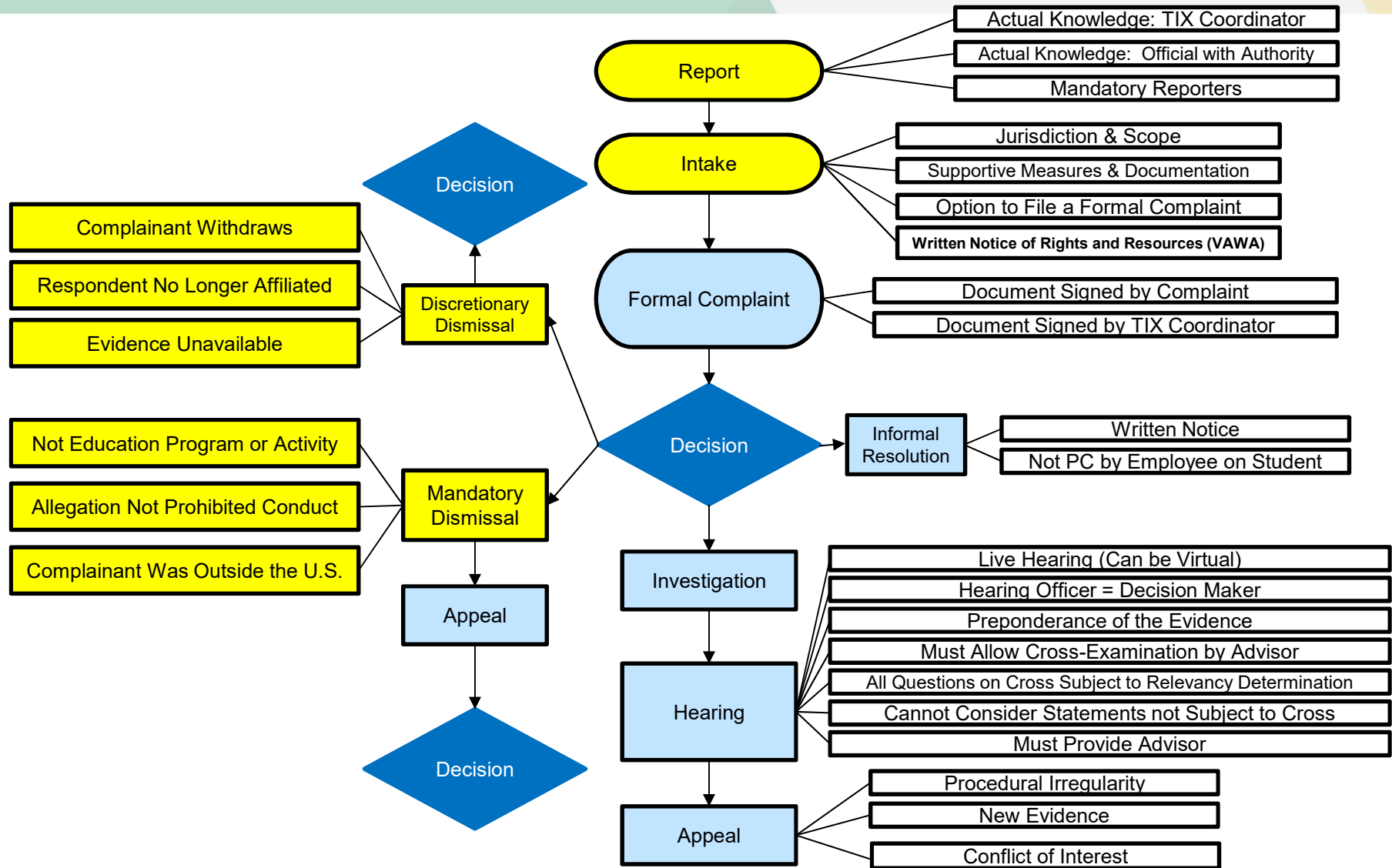
# TITLE IX COORDINATOR

- Must understand:
  - the requirements of Title IX, including sexual violence
  - the institution's policies and procedures on sex discrimination
- Must be aware of all Title IX complaints in the institution.
- Should not have other job responsibilities that create a conflict of interest.
  - technically may serve as investigator, but recommend not doing so



# SCOPE OF TITLE IX REGULATIONS

# TITLE IX DECISION PROCESS



# SCOPE OF REGULATIONS

- Does the conduct fall under the purview of Title IX:
  - Did this occur within an ***educational program or activity***?
  - Would the allegations, if true, constitute ***sexual harassment (Prohibited Conduct)*** under Title IX?
  - Was the alleged conduct against a person in the U.S.?
  - Was the Complainant participating or attempting to participate in the education program or activity at the time of filing the complaint?

# EDUCATIONAL PROGRAMS AND ACTIVITIES

- Include:
  - All University operations;
  - Locations, events, or circumstances over which the University exercises substantial control over both the Respondent and the context in which the Prohibited Conduct occurs; and
  - Buildings, on or off campus, owned or controlled by student organizations officially recognized by the University

# EDUCATIONAL PROGRAMS AND ACTIVITIES

- University's "operations" include:
  - Computer and internet networks, digital platforms, and computer hardware or software owned, operated or used in the University's operations
  - May include a student using a personal device to perpetrate online sexual harassment during class time

# SEXUAL HARASSMENT / PROHIBITED CONDUCT

- Prohibited Conduct includes:
  - *Quid pro quo* sexual harassment (if the alleged perpetrator is an employee)
  - Hostile Environment Harassment
  - Sexual Assault
  - Dating violence
  - Domestic violence
  - Stalking
  - Retaliation

# POLICY DEFINITIONS: *QUID PRO QUO* HARASSMENT

- **Who?** University employee, independent contractor, or volunteer
- **What?** Conditions the provision of University aid, benefit, or service on individual's participation in unwelcome sexual conduct.
- Examples “**aid, benefit or service**”
  - Term or condition of employment, promotion
  - Evaluation of academic work
  - Participation in a University program



# POLICY DEFINITIONS: *QUID PRO QUO* HARASSMENT

- **“Unwelcome sexual conduct”** includes:
  - Unwelcome sexual advance;
  - Unwelcome request for sexual favors; or
  - Unwelcome verbal, physical, electronic or other conduct of sexual nature

...that targets a University community member because of their sex

# POLICY DEFINITIONS: HOSTILE ENVIRONMENT HARASSMENT

- **Who?** University employee, independent contractor, volunteer, or student
- **What?** Engages in sexual conduct to be:
  - so severe, [and] pervasive, and objectively offensive
  - that it effectively denies a person equal access to the University's education program or activity
- Determined by a ***reasonable person*** (standing in the shoes of the Complainant)

# POLICY DEFINITIONS: HOSTILE ENVIRONMENT HARASSMENT

- **Severe:** Nature of the unwelcome acts (physical, verbal, both), not merely an offensive utterance, etc.
- **Pervasive:** More than once; pattern
- **Objectively Offensive:** Determined by a *reasonable person*, standing in the shoes of the Complainant
  - Who is this reasonable person?
    - Fictional person with an ordinary degree of reason, prudence, care, foresight, or intelligence

# WHAT IS “OBJECTIVELY OFFENSIVE?”

- Davis v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 652 (1999)
  - **Denies equal access to program/activity:** “It is not necessary . . . to show physical exclusion to demonstrate that students have been deprived by the actions of another student or students of an educational opportunity on the basis of sex.”
  - **Standing in shoes of Complainant:** Have to take into account developmental stage of people involved
    - In elementary school, teasing and name-calling not sufficient to rise to the level of hostile environment harassment

# POLICY DEFINITIONS: SEXUAL ASSAULT

- Non-consensual intercourse/penetration (Sexual Assault I)
  - Engaging in any sexual intercourse with another person without effective consent. Intercourse includes acts of oral, vaginal, or anal penetration, however slight, by an object or body part.
  - One instance is sufficient.

# POLICY DEFINITIONS: SEXUAL ASSAULT (CONT'D)

- Non-consensual contact (Sex. Assault II)
  - Engaging, or attempting to engage in any touching or contact, however slight, of a sexual nature without effective consent.
  - Includes: kissing, and other intentional contact with the breasts, buttock, groin or genitals or touching another with any of these body parts, or forcing another to touch you or themselves with any of these body parts.
  - Includes attempted non-consensual sexual intercourse (Sexual Assault I).
  - One instance is sufficient.

# POLICY DEFINITIONS: DATING VIOLENCE

- Includes: Sexual or physical abuse or the threat of such abuse committed by an individual who is or has been in a social relationship of romantic or intimate nature with Complainant.
- Consider:
  - (i) the length of the relationship; and/or
  - (ii) the type of relationship; and
  - (iii) the frequency of interaction between the persons involved in the relationship.
- One instance is sufficient.

# POLICY DEFINITIONS: DOMESTIC VIOLENCE

- Includes felony or misdemeanor crimes of violence committed by someone who:
  - (i) is a current or former spouse or intimate partner of the Complainant;
  - (ii) shares a child in common with the Complainant;
  - (iii) is or was cohabitating with the Complainant as a spouse or intimate partner; or
  - (iv) is similarly situated to a spouse of the Complainant under the domestic or family violence laws of Pennsylvania.
- Includes felonies or misdemeanor crimes of violence against an adult or youth Complainant who is protected from that person's acts under the domestic or family violence laws of Pennsylvania.
- One instance is sufficient.



# POLICY DEFINITIONS: STALKING

- Course of conduct directed at a specific Complainant that would cause a reasonable person to:
  - (i) fear for his/her/their safety or the safety of others; or
  - (ii) suffer substantial emotional distress.
- Includes cyber-stalking
  - Electronic media (the internet, social media and networks, blogs, cell phones, texts, or other similar devices or forms of contact) is used to pursue, harass, or to make unwelcome contact with another person.

# RETALIATION

- Title IX prohibits retaliation for, in relation to a Title IX investigation, proceeding, or hearing:
  - making a report or complaint,
  - testifying,
  - assisting,
  - participating, or
  - refusing to participate

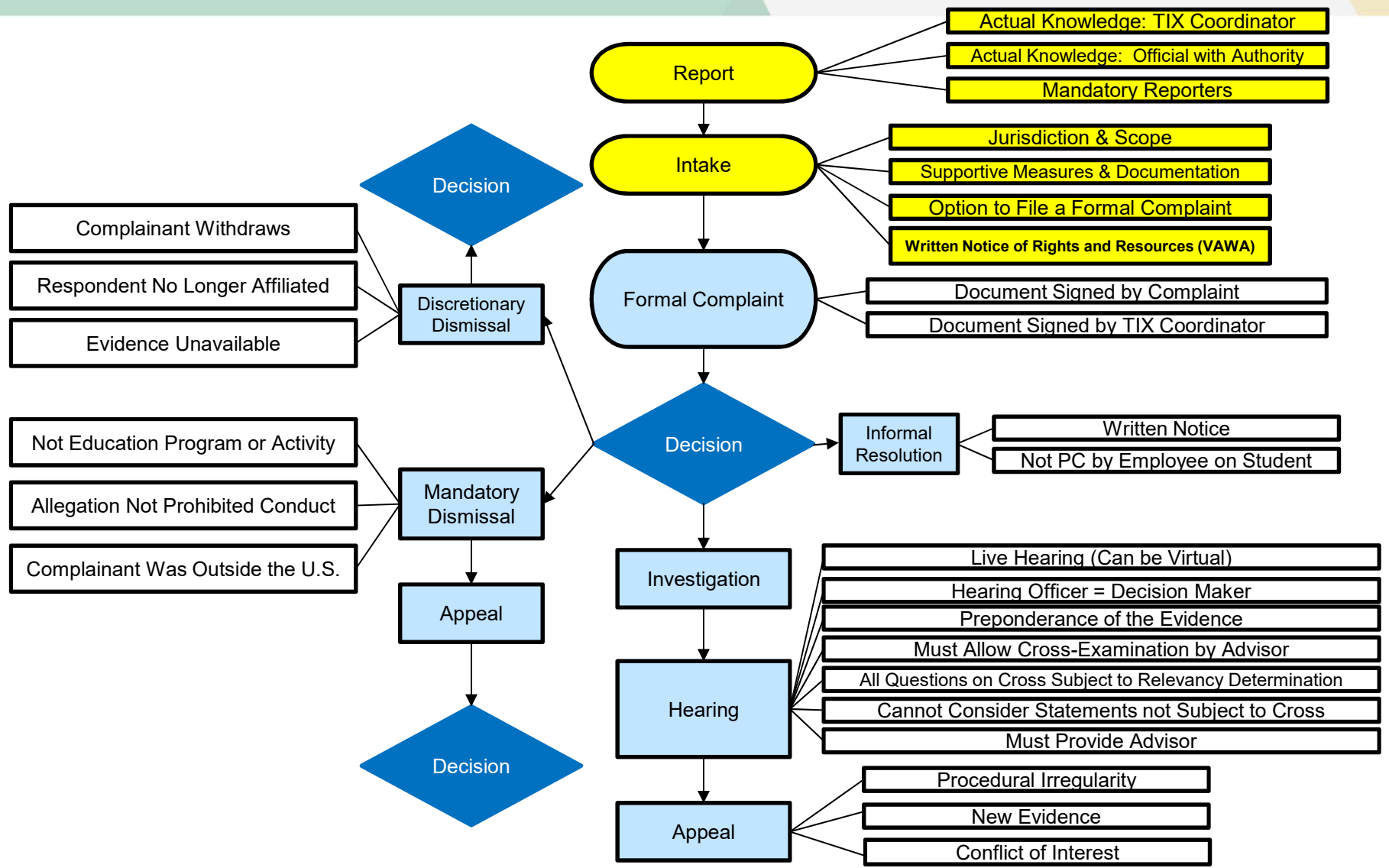
# RETALIATION (CONT'D)

- Retaliation includes:
  - Intimidation
  - Threats
  - Coercion
  - Discrimination



# UNIVERSITY'S DUTY TO RESPOND

# TITLE IX DECISION PROCESS



# ROLES ON CAMPUS

- Roles on campus impact University's duty to respond. Roles include:
  - Confidential Resources
  - Mandatory Reporters
  - Privacy Personnel
  - Officials with Authority

# CONFIDENTIAL RESOURCES

- Can provide **confidentiality**, support, advice, and options without any obligation to report the allegation
  - Except where there is: (i) an imminent risk of harm to someone in the University community; and/or (ii) reasonable suspicion of child abuse
- Reports to a confidential resource **do not** trigger the University's duty to respond with supportive measures (*i.e.*, no "actual knowledge")
- Confidential resources
  - Counseling Services (on-campus) in Elson Hall
  - Health Services (on-campus) in Elson Hall
  - Network of Victim Assistance (off-campus)

# MANDATORY REPORTERS

- Does not trigger Title IX obligation to take action that is not deliberately indifferent  
BUT
  - Under the policy, must report to Title IX Coordinator, who then must take such action



# WHO ARE MANDATORY REPORTERS?

- Presidents and vice presidents of the University
- Associate and assistant vice presidents, Deans (and associates and assistant deans)
- Directors and associate or assistant directors
- Coaches and assistant coaches of athletic teams, and athletic department personnel except for certified athletic trainers
- Administrators with supervisory responsibilities (directors, work-study supervisors), which shall not include faculty
- Public Safety
- Human Resources personnel
- Residence Life professional staff
- Resident Assistants (RAs)
- Student Involvement professional staff

# PRIVACY PERSONNEL

- Can provide **private** advice and support.
- Not required to report specific, personally identifying information (except for imminent risk of harm or suspicion of child abuse).
- Do have an obligation to report that something has occurred, without specifics or names.
- Anyone listed as an “Official with Authority” is specifically excluded from this category.

# WHO ARE PRIVACY PERSONNEL?

- Faculty
- Advisors to student organizations
- Admission, financial aid, bursar, registrar and finance personnel
- Staff at the Center for Student Professional Development (“CSPD”)
- Academic affairs/support (tutoring, learning support, student success)
- Certified athletic trainers
- Dining and facilities staff
- Custodial and facilities staff
- Administrative assistants and clerical staff

# OFFICIALS WITH AUTHORITY

- Officials with Authority are, by virtue of their positions at the University, empowered to take corrective measures to redress Prohibited Conduct.
- Their receipt of a report of Prohibited Conduct imputes actual knowledge to the University.
- The University's response must not be **“deliberately indifferent.”**

# WHO ARE OFFICIALS WITH AUTHORITY?

- Presidents and vice presidents of the University
- Associate and assistant VPs, Deans and associate / assistant deans
- Directors and associate or assistant directors
- Human Resources personnel
- Deputy Title IX Coordinator
- Title IX Designees
- Members of the CRT

# DELIBERATELY INDIFFERENT STANDARD

- Intentional failure to act in a situation where remedial action is required
- Actions that can avoid deliberate indifference:
  - Contact the Complainant to:
    - discuss the availability of supportive measures;
    - consider the Complainant's wishes with respect to supportive measures;
    - inform the Complainant of the availability of such measures, even in the absence of a formal complaint; and
    - explain the process for filing a formal complaint.
  - Provide written notice of rights and resources

# REPORTING SCENARIOS

- An undergraduate student tells a classmate that a peer sexually assaulted her while walking across campus one evening.
- An undergraduate student tells a professor that a peer sexually assaulted her while walking across campus one evening.
- An undergraduate student tells a dean that a peer sexually assaulted her while walking across campus one evening.
- An undergraduate emails the Title IX Coordinator that a peer sexually assaulted her while walking across campus one evening.



# SUPPORTIVE MEASURES



# SUPPORTIVE MEASURES

- Follow a report of Prohibited Conduct, even in the absence of a formal complaint
- Designed to restore or preserve equal access to the recipient's education program or activity without unreasonably burdening the other party
  - Presumption that Respondents are not responsible
- Document all supportive measures (including what measures offered, which were declined, etc.)
- Revisit the need for supportive measures throughout the process

# SUPPORTIVE MEASURES (CONT'D)

- Should be kept confidential to the extent possible while still providing the supportive measures
- Emergency Removal is permissible given an individualized safety and risk analysis, and the opportunity for the Respondent to challenge the decision
- Respondent employees may be placed on hiatus if grievance process pending

# SUPPORTIVE MEASURES (CONT'D)

- May include:
  - Mutual no-contact directives between the parties
  - Changes in class schedules
  - Extensions of deadlines or other course-related adjustments
  - Withdrawal from classes with no penalty
  - Changes in work or living arrangements
  - Modifications of work or class schedules
  - Counseling or other supportive services
  - Medical services
  - Academic support services
  - Escort services to ensure safe movement on campus
  - Leaves of absence
  - Increased security and monitoring of certain areas of the campus

# SUPPORTIVE MEASURES (CONT'D)

- Key Questions in Supportive Measures
  - Who implements?
  - Who documents?
  - Type
  - Duration
  - Effectiveness
  - Adjustments

# ADVISORS

- Family member
- Lawyer
- Friend
- Other individuals with whom the party has a trusted relationship



# CONFIDENTIALITY ISSUES

# LIMITS ON CONFIDENTIALITY

- The University can take steps to institute supportive measures without revealing identity of Complainant to Respondent
- May not institute a formal complaint and retain anonymity of Complainant
  - Unless the Title IX coordinator initiates the complaint and the identity is unknown
- Inform complainants to what extent supportive measures may compromise anonymity

# OVERRIDING REQUESTS FOR ANONYMITY/ FILING A COMPLAINT WITHOUT PERMISSION OF COMPLAINANT

- May only be done when:
  - Complainant promptly contacted to discuss the availability of supportive measures;
  - the Complainant's wishes with respect to such measures were considered; and
  - the Complainant has been informed of the process for filing a formal complaint.



# WHAT IS FERPA?

- Family Educational Rights and Privacy Act
  - Enforced by the U.S. Department of Education, Family Policy Compliance Office
- Information should only be shared with individuals responsible for handling the school's response.
- The identities of complainants (and respondents, and witnesses) should be kept confidential from anyone not involved in the grievance process.

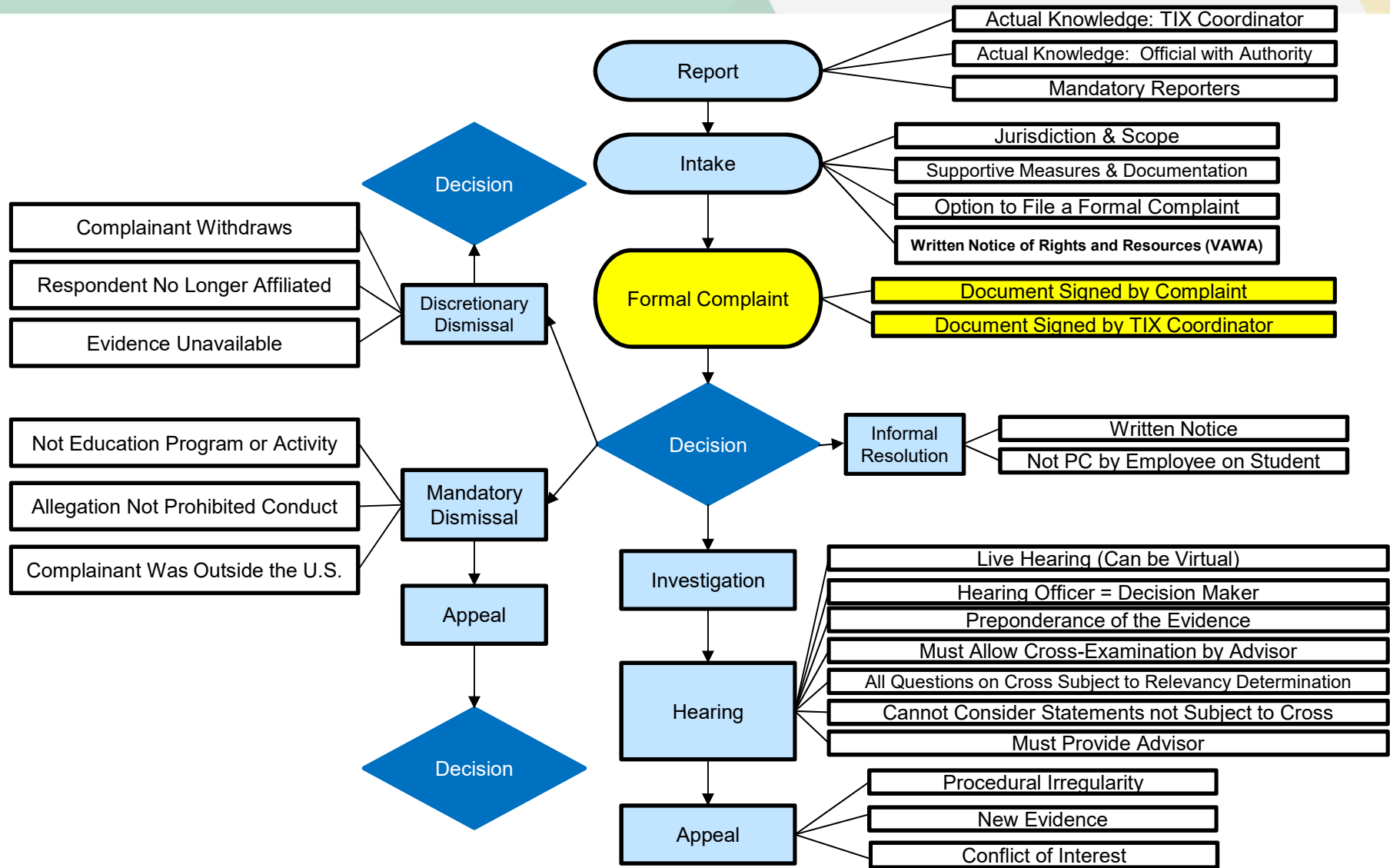
# FERPA DISCLOSURES

- What does FERPA say about disclosures in cases that involve violent crimes and sex offenses?
  - a postsecondary institution may disclose only the final results of the disciplinary proceeding to a victim of an alleged perpetrator of a crime of violence or a non-forcible sex offense. The institution may disclose to the victim the final results of the disciplinary proceeding regardless of whether the institution concluded a violation was committed.  
<https://studentprivacy.ed.gov/frequently-asked-questions>



# **GRIEVANCE PROCESS: FORMAL COMPLAINT**

# TITLE IX DECISION PROCESS



# FORMAL COMPLAINT

- May be initiated by the Title IX coordinator or the complainant
- If complainant files, the Title IX coordinator must decide whether the reported conduct falls under the purview of Title IX:
  - Did this occur within an educational program or activity?
  - Would the allegations, if true, constitute sexual harassment under Title IX?
  - Was the alleged conduct against a person in the U.S.?
  - Was the Complainant participating or attempting to participate in the education program or activity at the time of filing the complaint?

# CONTENTS OF FORMAL COMPLAINT

- A formal complaint must:
  - allege Prohibited Conduct
  - be made by a person who (i) allegedly experienced the conduct complained of, and (ii) is participating or attempting to participate in a program or activity,
  - be a document that “indicates the complainant is the person filing,”
  - be made against a Respondent, and
  - request an investigation

# FORMAL COMPLAINT

- At any point, the Title IX coordinator may dismiss the formal complaint if:
  - The Complainant requests dismissal
  - The Complainant un-enrolls or is no longer employed by Delaware Valley
  - The Coordinator determines that it will not be possible to gather sufficient evidence to make a determination
- University generally seeks to resolve complaints within 60 calendar days, excluding appeal

# TIMING

- Reasonably prompt time frames required
- 60 calendar days
  - Calendar v. business
- Documentation, notice of any extensions for good cause
- Status updates to parties



# TIMING (CONT'D)

- Extensions of time for good cause
  - May include:
    - Absence of a party
    - Absence of a party's advisor
    - Brief delays due to concurrent law enforcement activity
    - Need for language assistance or accommodation of someone with disabilities
    - School breaks
    - Availability of witnesses
    - New allegations

# NOTICE OF ALLEGATIONS

- Includes:
  - Explanation of grievance process and options for informal resolution (if appropriate)
  - Identities of the parties involved in the incident, if known;
  - Conduct allegedly constituting Prohibited Conduct, and the date and location of the alleged incident, if known
  - Statement that Respondent is presumed not responsible until determination at conclusion of process

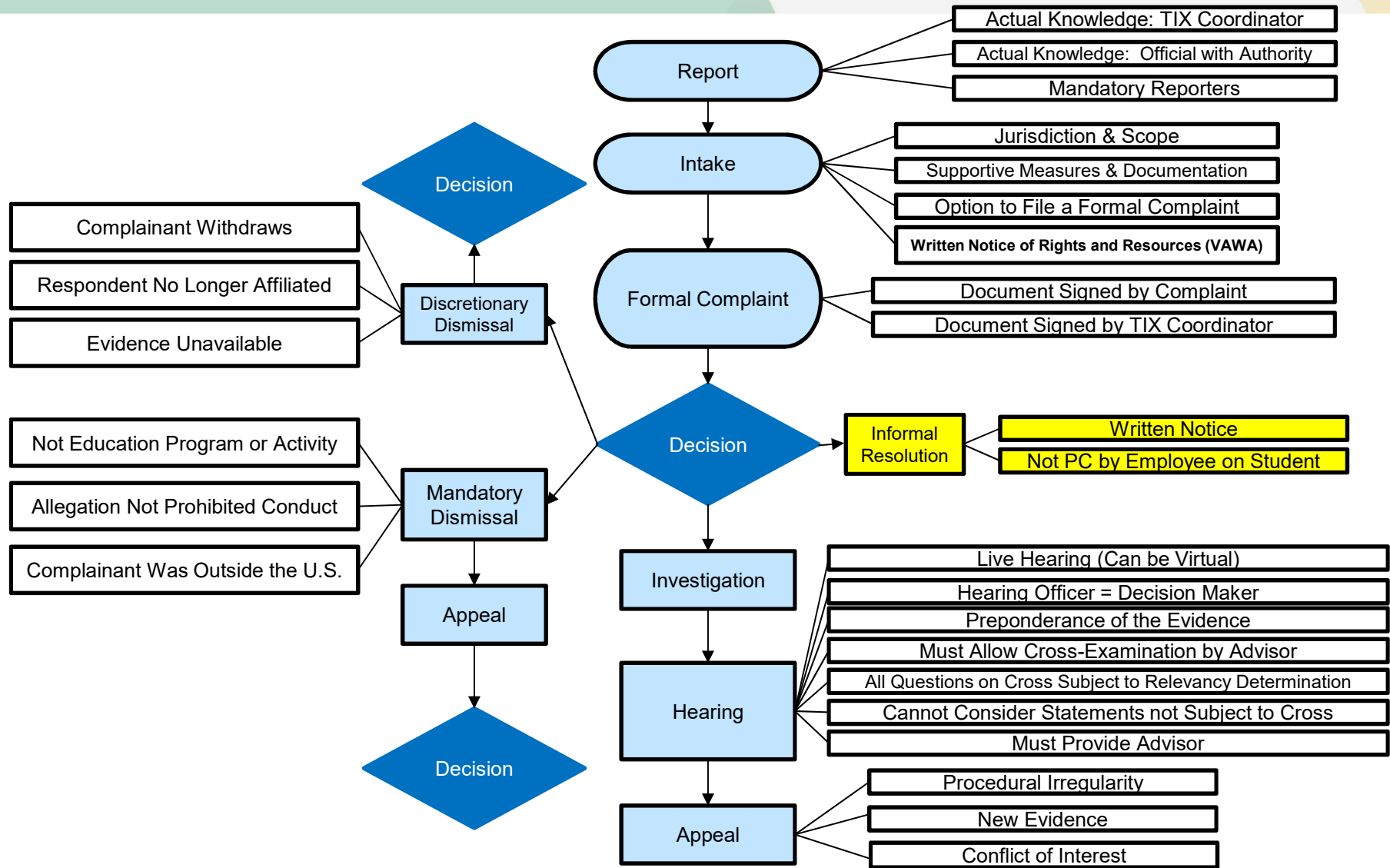
# NOTICE OF ALLEGATIONS (CONT'D)

- Reminder that parties may have an advisor of their choice, who may be an attorney
- Information about right to inspect and review evidence from the investigation
- Inform of any provision of code of conduct that prohibits making false statements/submitting false information
- Must give notice again if additional claims or counter-claims are added during investigation



# INFORMAL RESOLUTION PROCESS

# TITLE IX DECISION PROCESS



# INFORMAL RESOLUTION: WHEN?

- Not required under the regulations
- University reserves the right to recommend for or against informal resolution
  - Evaluate whether informal resolution will maintain safety and welfare of University community
- Voluntary process; parties may withdraw at any time to resume formal process
- Never available when student is Complainant and Respondent is employee/independent contractor/volunteer in position of authority vis-a-vis Complainant

# INFORMAL RESOLUTION: NOTICE

- Parties receive written notice of:
  - The allegations and names of parties
  - Options for informal resolution format
  - Right to resume formal grievance process at any point prior to formal resolution
  - Right to advisor and advisor's role
  - Parties' statements not admissible in formal grievance process unless also made outside of informal resolution
  - Records that could be part of informal process

# INFORMAL RESOLUTION: ROLES

- Advisors
  - Parties may select or University will appoint
  - Parties may consult w/ advisors about whether to engage in informal process and about proposed resolution
  - Advisors may attend, but not participate
  - Facilitator may ask advisors to step out
- Facilitators may include Title IX Coordinator or designee, Director of HR, or outside party
- Facilitators may not serve as investigator or witness if matter proceeds in formal process



# INFORMAL RESOLUTION: OPTIONS

- Mediation
- Restorative Justice
- Arbitration

# INFORMAL OPTION: MEDIATION

- Complainant and Respondent discuss dispute with a trained, impartial third party (the mediator) who assists in reaching a resolution
- The mediator cannot choose the resolution, the Complainant and Respondent choose the resolution

# MEDIATION ELEMENTS

- Introduction: Mediator documents who is there, lays ground rules
- Each party provides an account of what happened
- Complainant and Respondent, jointly or in separate meetings, discuss possible solutions
- Terms of resolution are written and reviewed by advisors

# INFORMAL RESOLUTION: OTHER OPTIONS

- Restorative Justice
  - Requires the acceptance of responsibility as a precondition of participation
  - Seeks to understand the harm caused and how reoccurrence may be prevented
- Arbitration
  - Most formal option
  - Typically facilitated by outside party
  - Likely to include written submissions and oral statements by parties

# INFORMAL RESOLUTION: PROPOSED RESOLUTIONS

- Resolutions may include:
  - No Contact Order;
  - Educational programming or training;
  - Increased monitoring or security at relevant locations; and/or
  - Any other remedy to transform environment, prevent recurrence, and/or remedy effects.
- May result in disciplinary measures designed to punish Respondent.

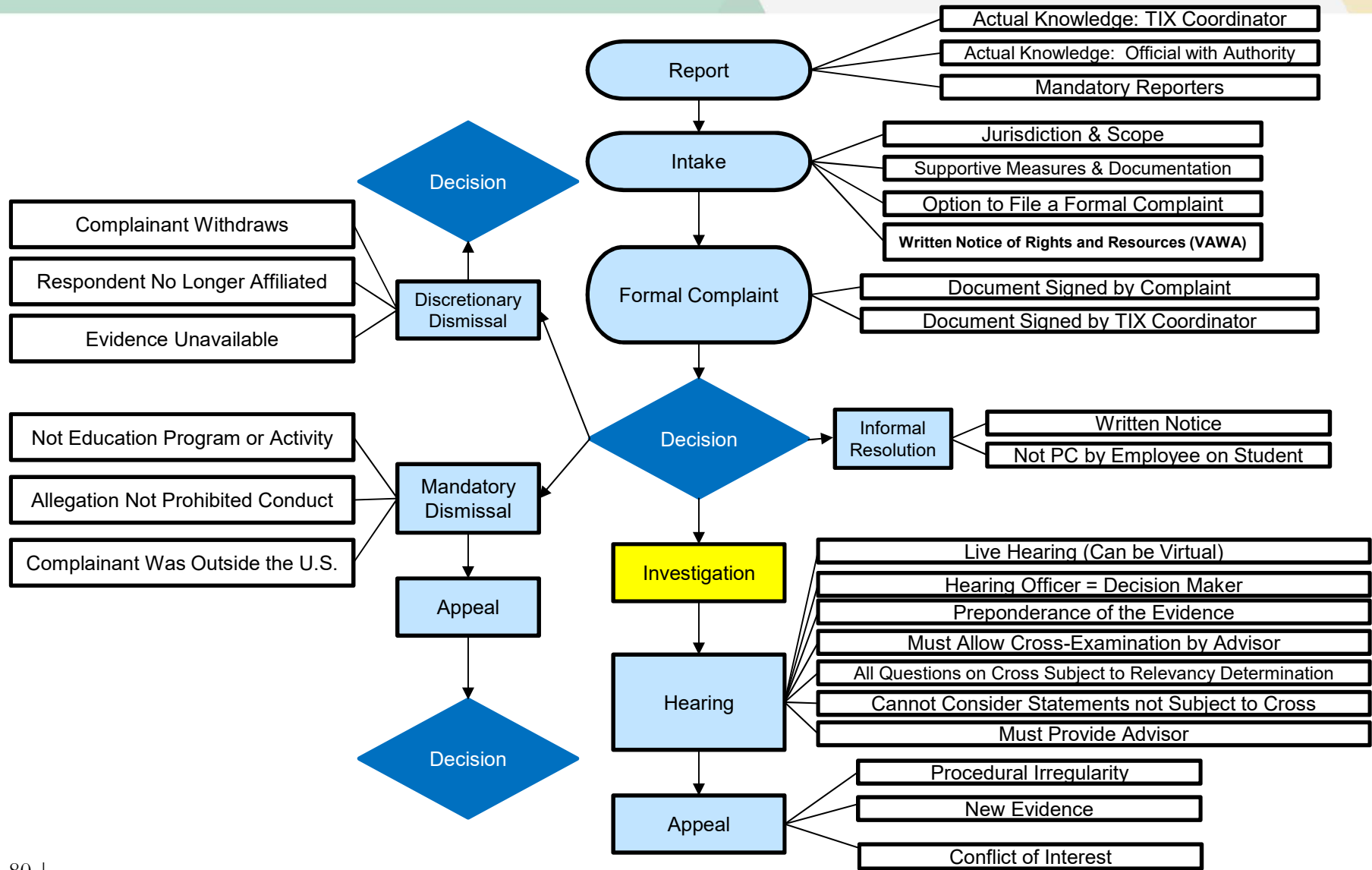
# INFORMAL RESOLUTION: AGREEMENTS

- University and parties will treat agreements as contracts.
- Parties may negotiate the terms.
- Once executed, legally binding according to its terms.
- May not include confidentiality provisions.



# FORMAL RESOLUTION PROCESS: INVESTIGATIONS

# TITLE IX DECISION PROCESS





# INVESTIGATION: OVERVIEW

- Investigation includes:
  - Gather facts
  - Draft report
  - Share “directly related” evidence and draft report with parties and advisors
  - Parties respond in writing
  - Finalize report
- Burden of proof and gathering evidence on the University
  - Not the Complainant or the Respondent

# PROCESS – INVESTIGATION

- Opportunity for parties to present evidence and identify witnesses
  - Don't restrict ability of parties to discuss allegations or to gather and present evidence
- Right to be accompanied by advisor
- Send notice of interviews with enough time to prepare

# TYPES OF EVIDENCE

- Witness interviews and examinations
- Written documents and submissions
- Prior witness statements
- Medical records
  - Written, voluntary consent
  - Include only relevant portions
- Social media posts

# TYPES OF EVIDENCE (CONT'D)

- Texts/emails
- Phone records
- Photos, videos, surveillance cameras
- Security logs / key card logs / visitor logs
- Direct vs. circumstantial
  - Direct = seeing a person drink 10 shots of rum
  - Circumstantial = a person stumbling and slurring speech

# INTERVIEW CONSIDERATIONS

- Location, safety, privacy
- Timing
- Advisors
  - Cannot limit choice of advisor or limit participation of advisor for one party but not the other
- Interruptions
- Impact of trauma
- Post-interview support/counseling

# INTERVIEW CONSIDERATIONS (CONT'D)

- Reluctant witnesses
- Witnesses suggested by parties
  - In deciding whether to interview a suggested witness, investigators should consider if the witness has direct, credible information related to one or more allegations
- When do you have enough information to stop?
  - Thoroughness
  - Fairness
  - Timeliness

# INTERVIEW CONSIDERATIONS (CONT'D)

- Notetaking
- Recording?
- Documentation
- Use of timelines
- Credibility assessments

# REPORT OF INVESTIGATION: ELEMENTS

- Investigative Report summarizes all relevant evidence, which is narrower than what was “directly related.” Includes:
  - Relevant evidence related to the allegation(s);
  - Interview statements/summaries from each party and, if applicable, any witnesses;
  - A credibility assessment of each party and witnesses;
  - A listing of all undisputed facts between the parties;



# REPORT OF INVESTIGATION: ELEMENTS (CONT'D)

- A listing of all facts in dispute between the parties; and
- Recommended findings or conclusions from the investigator based on the evidence.
- Apply the “preponderance of the evidence” standard

# WEIGHING EVIDENCE

- Evidence that is contemporaneous
- Evidence that does not appear to be motivated by bias
- Evidence that reflects first-hand knowledge of events
- Documentary evidence
- Credible testimony

# AVOIDING BIAS

- Do not prejudge facts
- Start from presumption of not responsible until a finding of responsibility is made
- Avoid conflicts of interest
- No bias towards or against the Complainants or Respondents generally or one party specifically
- Avoid bias in sex stereotypes (including on basis of sexual orientation and gender identity)

# QUESTIONING BEST PRACTICES

- Am I treating the parties in a fair, respectful manner?
- Am I giving the parties an equal opportunity to present evidence?
- Is the process unfolding in a fair, impartial manner?
- Is my question designed to obtain information about a possible policy violation?
- How will the answer to my question help me understand whether a possible policy violation has occurred?

## QUESTIONING BEST PRACTICES (CONT'D)

- Is this question about me or about the decision about responsibility?
- Could my words or actions be interpreted as blaming the Complainant?
- Could my words or actions suggest that I am pre-disposed to find the Respondent responsible?
- Do we need to take a “time out”?

# QUESTIONING TECHNIQUES

- Encourage narrative
- Avoid leading questions (these will likely be asked on cross)
- Avoid complicated, multi-part questions
- Try not to interrupt
- Clarify terms used by witnesses

# QUESTIONING TECHNIQUES (CONT'D)

- Verbal v. non-verbal communication:
  - Tone, volume
  - Non-judgment
  - Posture, eye contact
- Rapport
- Where appropriate, ask open-ended questions
- Give time to respond

# MAKING CREDIBILITY DETERMINATIONS

- Cannot be based on stereotypes, biases, or generalizations
- Demeanor
- First-hand knowledge
- Inconsistent statements (current or prior)
- Contradictory or consistent information
- Motive
- Common sense



# POLICY DEFINITIONS: CONSENT

- Consent means giving permission for sexual activity to occur.
- Must be informed, knowing and voluntary prior to and during sexual activity.
- Consent is active, not passive
- Demonstrated through clear and mutually understood gestures and words that signal a willingness to engage in sexual activity.
- Silence, passivity, lack of resistance cannot be interpreted as consent.
- Obtaining consent is the responsibility of the individual who wishes to initiate sexual activity.

# CONSENT (CONT'D)

- Consent may be withdrawn
- Consent is not coerced
- Assent shall not constitute consent if it is given by a person who, is unable to lawfully give consent because of:
  - youth,
  - disability,
  - intoxication,
  - or other condition

# EVIDENCE ON CONSENT

- Questioning complainants, respondents, and witnesses about consent:
  - Questions that don't sound like blaming Complainant
  - Probing a Respondent about facts and circumstances that conveyed consent was given
  - Maximizing information from witnesses in word-against-word
- Role of contemporaneous evidence: obtaining, analyzing, probing

# THE PREPONDERANCE STANDARD

- Beyond a reasonable doubt
- Clear and convincing
- **Preponderance of the evidence**
- Some evidence

# THE PREPONDERANCE STANDARD (CONT'D)

- More likely than not – presumption is non-responsibility
- Tipping the scale slightly
- What does 50/50 look like?
- What does it take to get over 50%?
  - Quality, not quantity
  - Are we really looking for more than a preponderance?

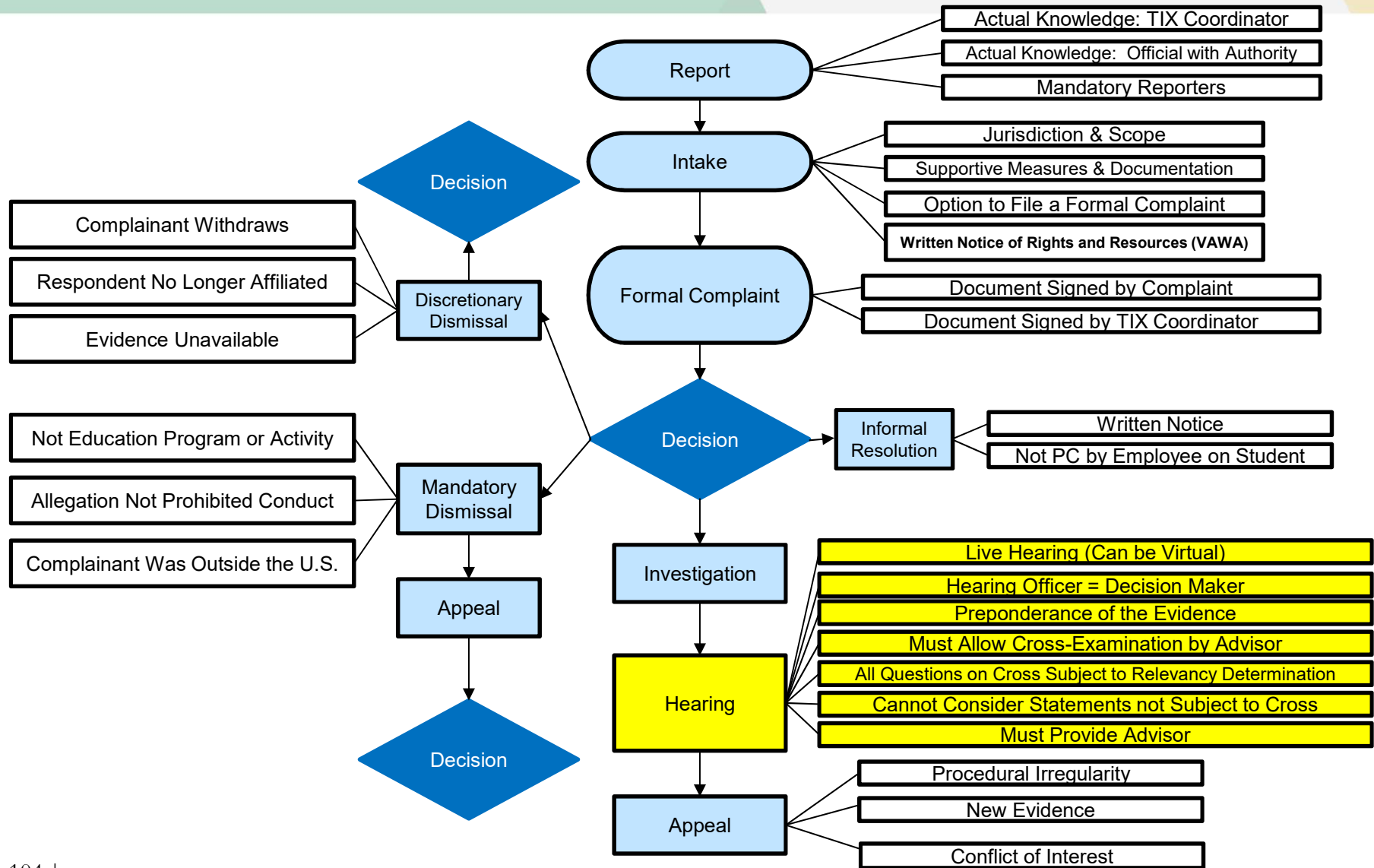
# PROCESS: INVESTIGATION

- 15 calendar days prior to hearing, Title IX Coordinator will send each party and party's advisor:
  - All evidence collected that is directly related to the allegations raised
    - Include evidence upon which the recipient does not intend to rely in reaching a determination regarding responsibility
    - Include inculpatory and exculpatory evidence whether obtained from a party or other source
  - Copy of the draft investigative report
- Parties have 10 calendar days to submit written response with corrections, context, challenging evidence, missing evidence, etc.
- Investigator will consider responses prior to completion of the investigative report.



# FORMAL RESOLUTION PROCESS: HEARINGS

# TITLE IX DECISION PROCESS





# ROLE OF HEARING OFFICER

- Under University's Policy, Hearing Officer is also Decision Maker
- Likely will be outside party
- Hearing Officer must be:
  - Objective, unbiased, free of conflicts
  - Fact-finder
  - Professional
  - Active listener
  - Analytical

# PRE-HEARING REQUIREMENTS

- Witness lists
  - Parties submit lists seven days before hearing
  - Hearing Officer shares witness lists with other party three days before hearing
- Hearing advisors
  - Parties notify Hearing Officer of selected advisors. If none, University will appoint free of charge.
- May not submit questions in advance of hearing

# HEARING FORMAT

- Investigator presents information and recommendation from the Investigative Report
- Opening Statements by parties
- Direct examination of parties
- Cross-examination of parties
- Direct examination of witnesses
- Cross examination of witnesses
- Closing Statements by parties

# HEARING REQUIREMENTS

- Live and in real time, but may be virtual. Must be virtual at request of either party.
- Audio or audiovisual recording or transcript of the live hearing
  - Available to the Complainant and Respondent to inspect and review following the hearing.
- Cross-examination: Each party's advisor will directly and orally pose questions to the opposing party or witness in real time, including questions challenging credibility.

# TECHNOLOGY THAT WILL BE USED AT THE HEARING

- Zoom (for virtual hearings)
  - For tutorials on specific functionalities:  
<https://support.zoom.us/hc/en-us/articles/206618765-Zoom-video-tutorials>
  - Privacy considerations
    - Require meeting password
    - Enable waiting room feature
    - Disable “join before host”
    - Lock meeting after all attendees have joined
  - Check Zoom website for best practices as they evolve



# RELEVANCE

# RELEVANT EVIDENCE

- Tends to make the existence of a material fact more or less probable than without the evidence
- Not relevant information includes:
  - Statements protected by a legally-recognized privilege;
  - Any party's medical, psychological, or counseling records, unless the person has given voluntary, written consent;
  - Party or witness statements not subject to cross examination at a live hearing;
  - Questions about Complainant's sexual predisposition; and
  - Duplicative evidence.

# RELEVANT EVIDENCE (CONT'D)

- Relevant evidence will not be excluded, even if:
  - Unduly prejudicial to one party;
  - Related to prior bad acts; and/or
  - Suggests a party acted in accordance with a particular character trait or patterned behavior.
- University will not use evidence it reasonably knows was illegally obtained under local, state, or federal law.



# RAPE SHIELD

- Questions about Complainant's prior sexual history are irrelevant unless:
  - offered to prove that someone other than the Respondent committed the conduct; or
  - concern specific incidents of the Complainant's prior sexual behavior with respect to Respondent and are offered to prove consent
- Such protections do not apply to Respondents.

# OBJECTIONS AS TO RELEVANCE

- Following an advisor objection:
  - Party or witness refrains from answering.
  - Hearing Officer will direct advisors to state relevance position on the record.
  - If deemed relevant, the party or witness will answer the question.
  - If deemed not relevant, Hearing Officer will explain reason for excluding question.
  - Adverse rulings may be raised on appeal.

# CROSS EXAMINATION AT LIVE HEARING

- Right to cross examine through advisors
- If advisor/party declines to cross examine, Hearing Officer will make note of waiver
- If a party or witness does not attend the hearing or submit to cross, Hearing Officer will not rely on any statement of that party or witness in reaching a determination as to responsibility.
  - No inference as to responsibility based solely on the party or witness's absence from the live hearing or refusal to answer questions.

# EVIDENCE NOT SUBJECT TO CROSS

- If evidence includes statements from individuals not subject to cross, Hearing Officer will not consider such statements in the final determination.
- Examples include statements within:
  - SANE reports
  - Police reports
  - Medical records

# EVIDENCE NOT SUBJECT TO CROSS (CONT'D)

- If Title IX Coordinator signs complaint and Complainant does not participate, Hearing Officer will not consider Complainant's statements.
- Exceptions:
  - May consider text messages/emails where one communicating individual submits to cross, even if other does not.
  - Where video evidence shows underlying incident, except if video evidence contains statement not subject to cross



# **DELIBERATIONS, OUTCOMES, AND SANCTIONS**

# DELIBERATIONS

- Identifying allegations and issues
- Immediately following the hearing there are two phases of deliberation: first, determine responsibility; second, if responsibility is found, determine remedies and any sanctions
- Weighing relevant evidence against:
  - Corroboration
  - Inconsistencies

# OUTCOME

- Hearing Officer will evaluate admissible, relevant evidence for weight or credibility
- Written final determination as to responsibility
  - Within seven days of the conclusion of the hearing
  - Simultaneously communicated to parties
  - Determination is final only after expiration of time to appeal or after appellate decision
  - University will maintain supportive measures through the same time period



# WRITTEN DETERMINATION

- Written determination will contain:
  - Identification of the allegations potentially constituting Prohibited Conduct;
  - Description of the procedural steps taken from the receipt of the formal complaint through the determination;
  - Relevant policy sections;
  - Findings of fact supporting the determination;
  - Conclusions regarding the application of Prohibited Conduct to the facts,
  - Evidentiary basis for conclusions;

# WRITTEN DETERMINATION (CONT'D)

- Written determination also will contain:
  - A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility;
  - Disciplinary sanctions imposed on Respondent;
  - Whether University will provide Complainant with remedies to restore or preserve equal access to education program or activity. Do not include a description of the remedies; and
  - Procedures and permissible bases for appeal.

# SANCTIONS

- Do not take effect until after the final determination of responsibility, including appeal.
- No requirement to impose particular sanctions based on a particular final outcome or apply a certain standard of proportionality.
- Determination of sanctions may be based upon number of factors, including:
  - Harm suffered by Complainant;
  - Any ongoing risk to Complainant or community posed by Respondent;
  - Impact of violation on University community or property;
  - Any previous conduct violations; and
  - Any mitigating or aggravating circumstances.

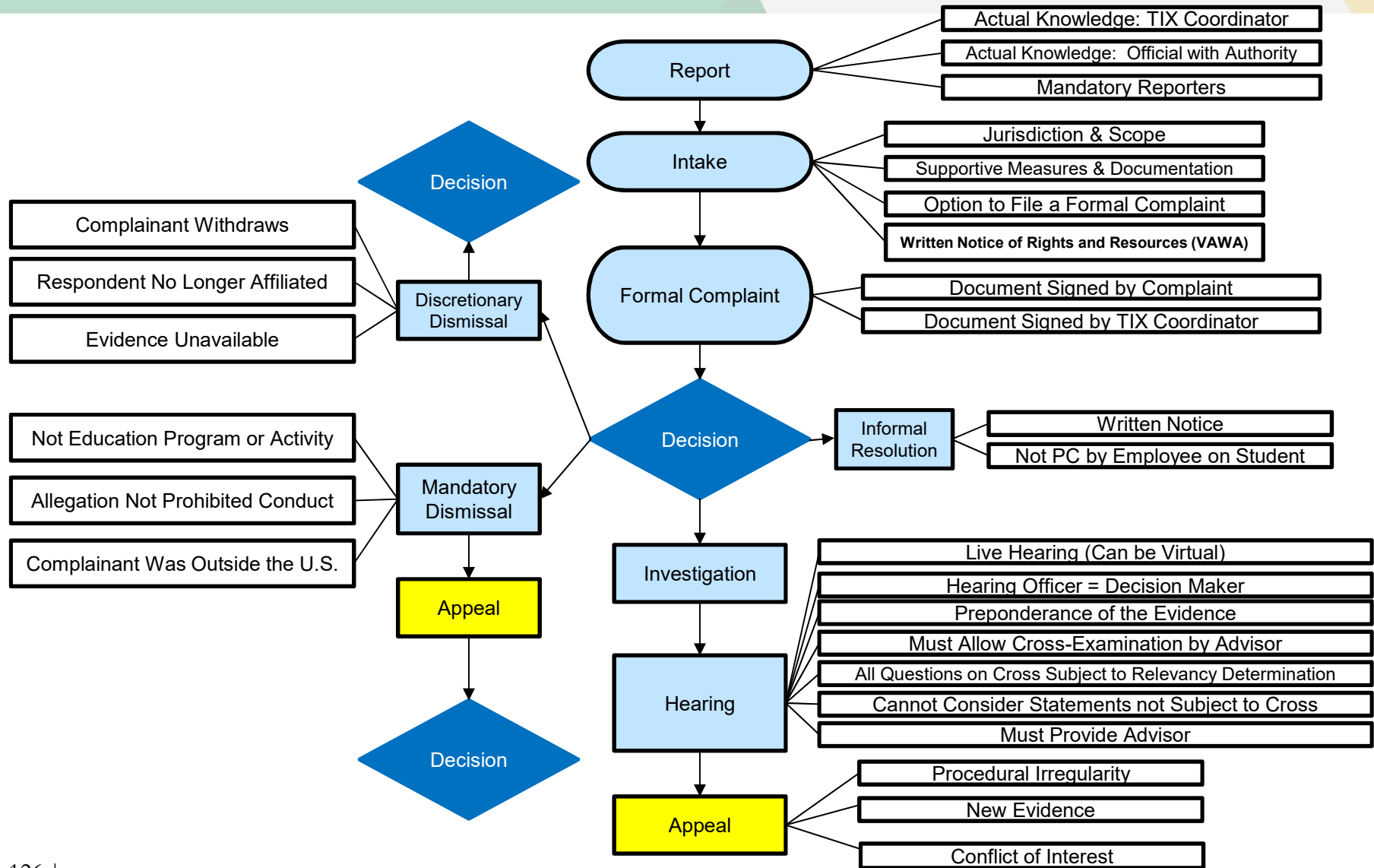
# SANCTIONS (CONT'D)

- Sanctions may include:
  - Education
  - Warning
  - Probation
  - Restrictive Probation
  - No Contact Order
  - Assessment
  - Suspension
  - Expulsion



# APPEALS

# TITLE IX DECISION PROCESS



# APPEALS

- Either party may appeal
  - Determination of responsibility, or
  - Dismissal of formal complaint
- The other party submits written response to the appeal
- Appellate Decision-Maker issues written opinion describing outcome of appeal and rationale

# APPEALS

- Bases for appeal:
  - Procedural irregularity that impacted outcome
    - E.g., failure to objectively evaluate all relevant evidence; erroneous relevance determination that affected outcome
  - New evidence that was not reasonably available when decision for dismissal or responsibility was made
  - Title IX coordinator, investigators, or decision-makers had a conflict of interest or bias generally or as to particular Respondent or Complainant and impacted the outcome



# APPEALS

- Appeals must be:
  - Made in writing;
  - Include the basis(es) for appeal and any related statement challenging the outcome; and
  - Be delivered via electronic mail within seven business days of decision.
- Appellate Decision-Maker must not be biased or conflicted generally, or in regards to particular Complainant or Respondent



# UNIQUE ASPECTS OF SEXUAL MISCONDUCT CASES

# TRAUMA INFORMED INVESTIGATIONS

- Effects of trauma – negative thoughts/emotions, concentration, sleep, appetite, startle response, detachment
- PTSD – nightmares, flashbacks, avoidance
- Counterintuitive behaviors – delays in reporting, resumption of normal activities, recantation

# DRUGS, ALCOHOL, SEX

- Party(ies) under the influence
- Consent, incapacitation
- Drug-facilitated sexual assault
- Parties may know each other
- Prior consensual relationship
- Power dynamics

# INTOXICATION V. INCAPACITATION

- Intoxication
  - Use of drugs or alcohol that causes a physical or mental impairment.
- Incapacitation
  - Occurs due to the use of drugs or alcohol, when a person is asleep or unconscious, or because of an intellectual or other disability that prevents the student from having the capacity to give consent.

# INTOXICATION V. INCAPACITATION

- Questioning complainants, respondents, and witnesses:
  - What the Complainant is able to remember
  - What the Respondent saw and how that compares to what witnesses saw
  - Detailed description of quantity, type, timing of consumption
  - Tolerance and frequency of consumption
  - Source of drugs/alcohol, location of consumption/incident
  - Activities engaged in
  - Food consumption
  - Size, sex assigned at birth

# QUESTIONS

