

Decision Making in the Sexual and Gender Based Misconduct Resolution Process

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Title IX

No person in the United States shall, based on 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.

Other Laws and Regulations to Consider in the Resolution Process

VAWA Section 304

- Require institutions to describe each type of disciplinary proceeding used by the institution; the steps, anticipated timelines, and decision-making process for each type of disciplinary proceeding; how to file a disciplinary complaint; and how the institution determines which type of proceeding to use based on the circumstances of an allegation of dating violence, domestic violence, sexual assault, or stalking;
- Require institutions to list all of the possible sanctions that the institution may impose

Other Laws and Regulations to Consider in the Resolution Process

VAWA Section 304 Cont.

- Require institutions to provide for a prompt, fair, and impartial disciplinary proceeding in which: (1) Officials are appropriately trained and do not have a conflict of interest or bias for or against the accuser or the accused; (2) the accuser and the accused have equal opportunities to have others present, including an advisor of their choice; (3) the accuser and the accused receive simultaneous notification, in writing, of the result of the proceeding and any available appeal procedures; (4) the proceeding is completed in a reasonably prompt timeframe; (5) the accuser and accused are given timely notice of meetings at which one or the other or both may be present; and (6) the accuser, the accused, and appropriate officials are given timely and equal access to information that will be used during informal and formal disciplinary meetings and hearings;

Guiding Values When Resolving an Allegation of Sexual or Gender Based Misconduct

An investigation should be **thorough**, **reliable**, and **impartial**.

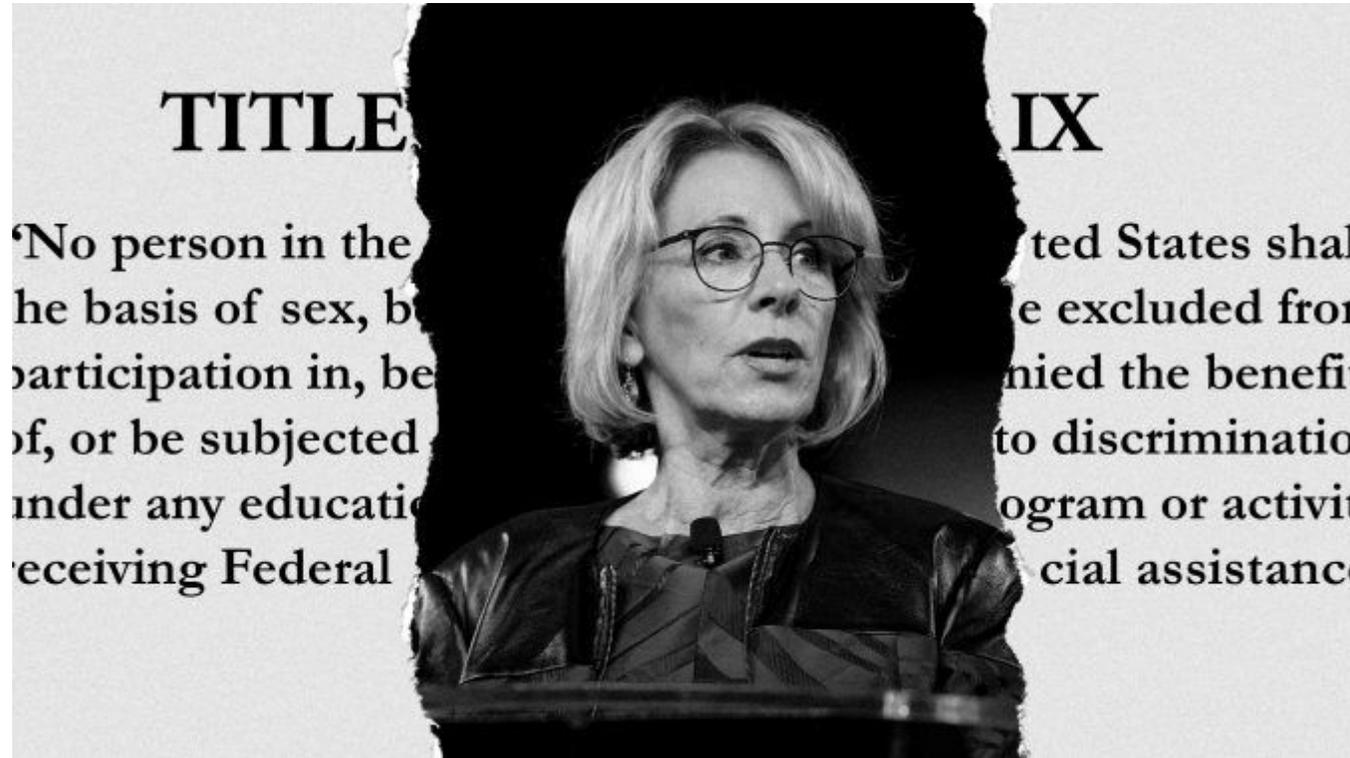
The resolution process should be **prompt**, **effective**, and **equitable**.

Remedies should not act unreasonably to **end the discrimination**, not act unreasonably to **prevent recurrence**, and act equitably to **remedy effects**.

Role of a Decision Maker

- Determine whether or not a Respondent has violated Norwich policy
- Stay separate from the intake/investigation process
- Ensure a fair and consistent process
- Provide a just result
- Uphold Norwich University Policy
- Represent the resolution process

The 2020 Title IX Regulations



Understanding the Focus on Due Process

- Rights-based protections that accompany disciplinary action by an institution with respect to students, employees, or others
- Due process looks different depending on context – a criminal court, a civil court, and an administrative resolution process all have different rights
- From a legal lens, due process analysis and protections have historically focused on the rights of the respondent
- OCR makes the argument that perceptions of due process can influence how legitimate a process' outcome is

Procedural Due Process

- Consistent, thorough, and procedurally sound review of all allegations
- Substantial compliance with written policies and procedures
- Policies and procedures are in compliance with all laws and regulations, and afford all required rights
- In practice,
 - Clear, written notice of the allegations
 - Opportunity to present witnesses and evidence to the Decision Maker

Substantive Due Process

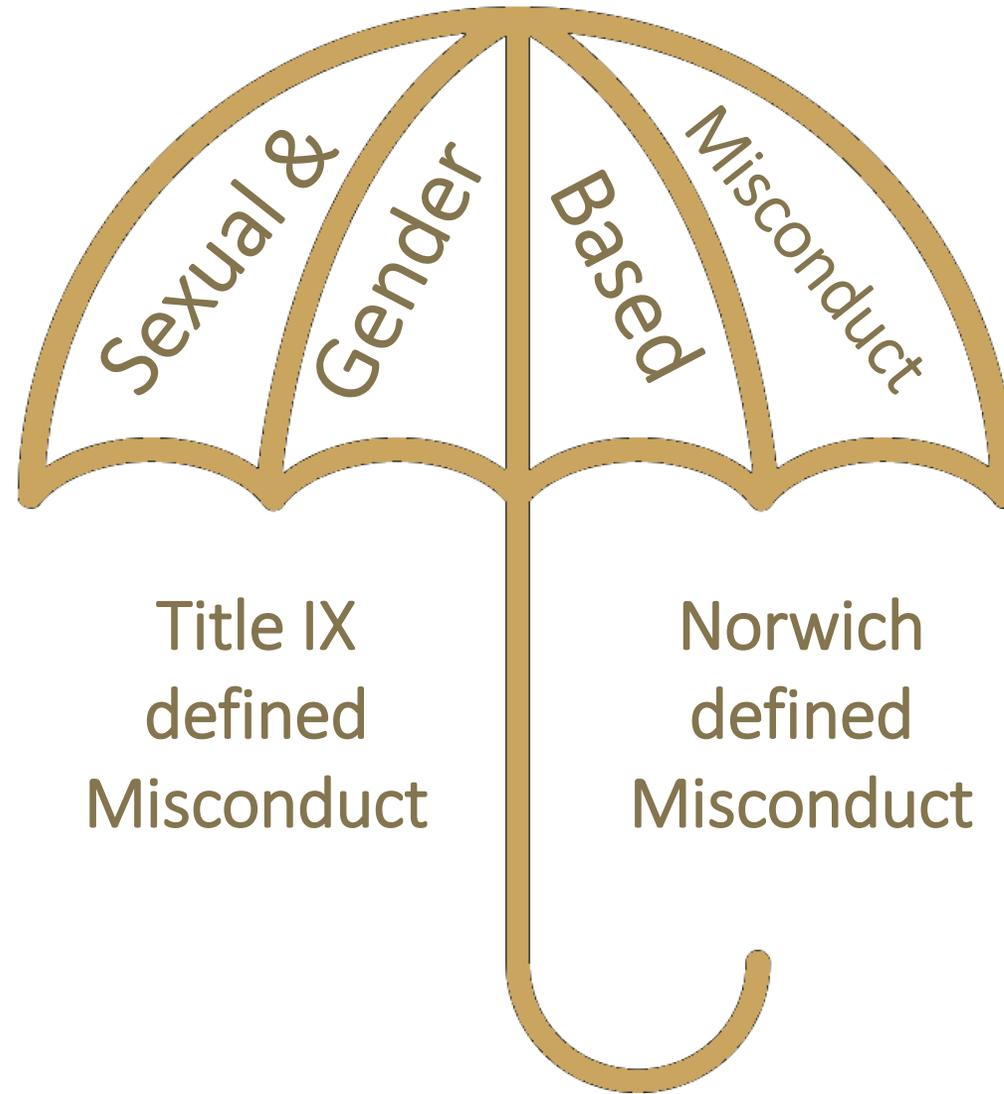
A decision must

- Be appropriately impartial and fair in both finding and sanction
- Be neither arbitrary nor capricious
- Be based on a fundamentally fair policy
- Be made in good faith (i.e. without malice, ill-will, conflict of interest, or bias)
- Be based on the evidence

Policy Definitions & Jurisdiction

- Where does Title IX apply?
- Where does the Norwich Sexual and Gender Based Misconduct Policy apply?
- What are the prohibited behaviors under the Sexual and Gender Based Misconduct Policy?

The



Policy

Where does Title IX apply?

- In the scope of Norwich's education program or activity.
- The Department of Education's Office for Civil Rights (OCR) says that the goal of Title IX's non-discrimination mandate is to ensure that "federal funds are not used to support discriminatory practices in **education programs or activities**"

What case law is OCR drawing on to define education program or activity?

- *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 639 (1999).

In *Davis*, the Supreme Court framed the question in that case as whether a recipient of Federal financial assistance may be liable for damages under Title IX, for failure to respond to peer-on-peer sexual harassment in the recipient's program or activity.

“Moreover, because the harassment must occur ‘under’ ‘the operations of’ a funding recipient ... the harassment must take place in a context subject to the school district’s control. . . . These factors combine to limit a recipient’s damages liability to circumstances wherein the recipient exercises substantial control over both the harasser and the context in which the known harassment occurs.”

Defining Education Program or Activity

Norwich University's education program or activity is defined as circumstances where we **exercise substantial control over both the harasser and the context** in which the harassment occurs.

This includes all on campus and Norwich owned spaces.

Defining Education Program or Activity

OCR further clarifies context; stating that it is additionally “locations, events, or circumstances over which the [institution] exercised substantial control... and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.”

Example:

- This would include a house that is not owned by Norwich, but is owned by an officially recognized club or association.

Education Program of Activity in the Off-Campus Setting

Title IX obligations extend to sexual harassment incidents that occur off campus if any of three conditions are met:

1. if the off-campus incident occurs as part of the University's "operations"
2. if the recipient exercised substantial control over the respondent and the context of alleged sexual harassment that occurred off campus;
3. or if a sexual harassment incident occurs at an off-campus building owned or controlled by a student organization officially recognized by a postsecondary institution

Title IX does not apply outside of the United States.

*this applies irrespective of whether or not Norwich has exercised substantial control over the respondent and the context of the harassment

Where does the Sexual and Gender Based Misconduct Policy apply?

- In addition to the jurisdictional requirements of Title IX, the SGBM policy also applies beyond Norwich's education program or activity
- This policy may also be applicable to the effects of off-campus misconduct that effectively deprive someone of access to Norwich University's educational program or activities. The University may also extend jurisdiction to off-campus and/or to online conduct when the Title IX Coordinator determines that the conduct affects a substantial Norwich University interest.

Where does the Sexual and Gender Based Misconduct Policy apply?

- Regardless of where the conduct allegedly occurred, the University will review complaints to determine whether the alleged conduct occurred in the context of its employment or educational program or activity and/or has continuing effects on campus or in an off-campus sponsored program or activity. A substantial Norwich University interest includes
 - Any action that constitutes a criminal offense as defined by law. This includes, but is not limited to, single or repeat violations of any local, state, or federal law;
 - Any situation in which it is determined that the Respondent poses an immediate threat to the physical health or safety of any student or other individual;
 - Any situation that significantly impinges upon the rights, property, or achievements of oneself or others or significantly breaches the peace and/or causes social disorder; and/or
 - Any situation that is detrimental to the educational interests or mission of the University.

Where does the Sexual and Gender Based Misconduct Policy apply?

- If the Respondent is unknown or is not a member of the Norwich community, the Title IX Coordinator will assist the Complainant in identifying appropriate campus and local resources and support options and/or, when criminal conduct is alleged, in contacting local or campus law enforcement if the individual would like to file a police report.

Prohibited Behaviors

- **Sexual Harassment (Title IX and Non-Title IX)** (i.e., Quid Pro Quo Sexual Harassment, Severe, Pervasive and Objectively Offensive Sexual Harassment, Sexual Assault, and Domestic Violence, Dating Violence and sex-based Stalking); and
- **Sexual Misconduct** (i.e., Sexual Misconduct, Sex or Gender Based Discrimination, Sexual Exploitation as defined below, and Retaliation).

Sexual Harassment

- Acts of sexual harassment as defined by regulations issued by the Department of Education in May 2020 (“May 2020 Title IX regulations”) may be committed by any person upon any other person, regardless of the sex, sexual orientation, and/or gender identity of those involved.
- Title IX Sexual Harassment as an umbrella category includes the offenses of sexual harassment, sexual assault, domestic violence, dating violence, and stalking on the basis of sex.

Sexual Harassment: Sexual Harassment

Unwelcome conduct (on the basis of sex) determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the University's education program or activity

“Severe”

- Physical is more likely to be severe without need for repetition
- Assess whether accompanied by threats of violence
- Assess whether there is a degree of embarrassment or humiliation

“Pervasive”

- Widespread
- Openly practiced
- Well-known among students or employees
- Occurring in public spaces
- “harassment is pervasive when incidents of harassment occur either in concert or with regularity” (2001 rescinded guidance)
- Frequency of conduct is often a variable in assessing pervasiveness (look to intensity and duration)
- Unreasonable interference with school or job

“Objectively Offensive”

- Reasonable person standard in context
- “I know it when I see it”
 - Ages of those involved
 - Number of persons involved
 - Frequency
 - Severity
 - Physically threatening
 - Humiliation
 - Intimidation
 - Ridicule
 - Abusive

Sexual Harassment: Totality of the Circumstances

- Sexual harassment is a high bar, when looking to see if sexual harassment has occurred, consider:
 - The nature, pervasiveness, and severity of the conduct
 - Whether the conduct was reasonably physically threatening
 - Whether the conduct was objectively and subjectively humiliating
 - The objective and subjective reasonable effect on the Complainant's mental or emotional state
 - Was there an effective denial of education or employment access?
 - If proven to be sexual harassment, a discriminatory effect is presumed

Sexual Harassment: Totality of the Circumstances

- Whether the conduct was directed at more than one person
- Whether a reasonable person would see/experience/determine the conduct to be severe, pervasive, and objectively offensive (SPOO)
 - A reasonable person sits in the shoes of the complainant but is not the complainant
- Whether the statement only amounts to utterance of an epithet that is offensive or offends by discourtesy or rudeness, and thus is not SPOO
- Whether the speech or conduct deserves the protection of academic freedom or the First Amendment, and thus is not SPOO

Putting it All Together

- The role of the Decision Maker is to determine whether all the elements are present when determining whether or not sexual harassment occurred
- When the conduct does not meet all of the elements, then the Respondent is “not responsible”

Sexual Harassment: Quid Pro Quo

- An employee of the University conditioning the provision of an aid, benefit, or service of the University on an individual's participation in unwelcome sexual conduct

Sexual Harassment: Sexual Assault

- **Title IX Sexual Assault**, which is conduct defined as follows by the FBI NIBRS program definitions incorporated by reference into the May 2020 Title IX regulations, and which occurs in a program or activity of the University in the United States:
 - **Rape**
 - The carnal knowledge of a person (i.e., penile-vaginal penetration), without the consent of that person, including instances where the person is incapable of giving consent because of their age or because of their temporary or permanent mental or physical incapacity (it should be noted that either females or males could be complainants under this definition);
 - Oral or anal sexual intercourse (i.e., penile penetration) with another person, without the consent of that person, including instances where the person is incapable of giving consent because of their age or because of their temporary or permanent mental or physical incapacity;
 - To use an object or instrument (e.g., an inanimate object or body part other than a penis) to unlawfully penetrate, however slightly, the genital or anal opening of the body of another person, without the consent of that person, including instances where the person is incapable of giving consent because of their age or because of their temporary or permanent mental or physical incapacity;
 - Both completed rape and attempted rape are prohibited by this policy.

Sexual Harassment: Sexual Assault

- **Fondling:** The touching of the private body parts of another person for the purpose of sexual gratification, without the consent of that person, including instances where the person is incapable of giving consent because of their age or because of their temporary or permanent mental or physical incapacity (for purposes of this definition, “private body parts” includes breasts, buttocks, or genitals, whether clothed or unclothed);
- **Incest:** Sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by Vermont law; or
- **Statutory Rape:** Sexual intercourse with a person who is under the statutory age of consent (which in Vermont is generally 16, but which is raised to 18 in circumstances where the Respondent is the younger person’s guardian).

Sexual Harassment: Dating Violence

- violence,
- on the basis of sex,
- committed by a person,
- who is in or has been in a social relationship of a romantic or intimate nature with the Complainant.
 - The existence of such a relationship shall be determined based on the Complainant's statement and with consideration of the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship. For the purposes of this definition—
 - Dating violence includes, but is not limited to, sexual or physical abuse or the threat of such abuse.
 - Dating violence does not include acts covered under the definition of domestic violence.

Sexual Harassment: Domestic Violence

- violence,
- on the basis of sex,
- committed by a current or former spouse or intimate partner of the Complainant,
- by a person with whom the Complainant shares a child in common, or
- by a person who is cohabitating with, or has cohabitated with, the Complainant as a spouse or intimate partner, or
- by a person similarly situated to a spouse of the Complainant under the domestic or family violence laws of the state of Vermont, or
- by any other person against an adult or youth Complainant who is protected from that person's acts under the domestic or family violence laws of the state of Vermont

To categorize an incident as Domestic Violence, the relationship between the Respondent and the Complainant must be more than just two people living together as roommates. The people cohabitating must be current or former spouses or have an intimate relationship.

Sexual Harassment: Stalking

- engaging in a course of conduct,
- on the basis of sex,
- directed at a specific person, that
 - would cause a reasonable person to fear for the person's safety, or
 - the safety of others; or
 - Suffer substantial emotional distress.

For the purposes of this definition - Course of conduct means two or more acts, including, but not limited to, acts in which the Respondent directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person's property. Reasonable person means a reasonable person under similar circumstances and with similar identities to the Complainant. Substantial emotional distress means significant mental suffering or anguish that may but does not necessarily require medical or other professional treatment or counseling.

What is the difference between Title IX and Non-Title IX Sexual Harassment?

- Title IX Sexual Harassment is Sexual Harassment that happens in Norwich's education program or activity
- Non-Title IX Sexual Harassment is Sexual Harassment that happens outside of Norwich's educational program or activity, but that the University still has an interest in addressing

Sexual Misconduct: Sexual Misconduct

- unwelcome sexual advances, requests for sexual favors, and other verbal, visual, or physical conduct of a sexual nature that does not meet the above definition of Title IX or Non-Title IX Sexual Harassment, when directly impacting the Complainant's employment, education, living environment, or participation in Norwich sponsored activities or programs.

Sexual Misconduct: Sexual Exploitation

occurs through an act or omission to act that involves a member of the Norwich University community taking non-consensual, unjust, humiliating, or abusive sexual advantage of another, and that does not meet the definition of Title IX or Non-Title IX Sexual Harassment stated above. Examples of behavior that could constitute sexual exploitation include but are not limited to the following:

- Prostituting another person;
- Recording or capturing through any means images (e.g., video, photograph) or audio of another person's sexual activity, intimate body parts, or nudity without that person's knowledge and consent;
- Distributing or sharing images (e.g., video, photograph) or audio of another person's sexual activity, intimate body parts, or nudity without that person's consent;
- Viewing another person's sexual activity, intimate body parts, or nudity in a place where that person would have a reasonable expectation of privacy, without that person's consent; or
- Engaging in sexual behavior with knowledge of an illness or disease (HIV or STD) that could be transmitted by the behavior, without disclosing that to the other person prior to the sexual relations.

Sexual Misconduct: Discrimination

- occurs by treating someone unfavorably or different because of that person's sex, that does not fit the definition of Title IX or n Sexual Harassment stated above. This can include but is not limited to discrimination on the basis of sexual orientation, gender, gender identity, transgender status, or sex.

Sexual Misconduct: Retaliation

- Retaliation means intimidating, threatening, coercing, or discriminating against any individual for the purpose of interfering with any right or privilege secured by Title IX or its implementing regulations or this policy, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing regarding Prohibited Conduct (including both Title IX Sexual Harassment and Non-Title IX Misconduct). Retaliation is strictly prohibited.

Deeper Dive: Retaliation

- Intimidation, threats, coercion, or discrimination, including charges against an individual for code of conduct violations that do not involve sex discrimination or sexual harassment, but arise out of the same facts or circumstances as a report or complaint of sex discrimination, or a report or formal complaint of sexual harassment, for the purpose of interfering with any right or privilege secured by Title IX or its implementing regulations, constitute retaliation, as do any adverse action taken against a person because they have made a good faith report of Prohibited Conduct or participated in any proceeding under this Policy

Deeper Dive: Retaliation

- Charging an individual with a code of conduct violation for making a materially false statement in bad faith in the course of a grievance process under this policy does not constitute prohibited retaliation, provided, however, that a determination regarding responsibility is not alone sufficient to establish that any party made a materially false statement in bad faith.
- The exercise of rights protected under the First Amendment does not constitute retaliation

Protected Activities Under Title IX

- Reporting sex discrimination/harassment
- Filing a discrimination complaint
- Assisting someone in reporting discrimination or filing a complaint
- Participating in any manner in an investigation, including as a witness
- Protesting any form of sex discrimination

Determining a Retaliation Claim

- Establishing retaliation requires proving motive – an intent to retaliate
 - Someone's intention is rarely displayed openly, rather, it is about whether a retaliatory motive can be inferred from the evidence
 - Gather details is crucial

Determining a Retaliation Claim

- The following elements establish an inference of retaliation:
 1. Did the individual engage in a protected activity?
 - a) Usually straight forward
 - b) Unless there is a question of reasonableness of belief or manner
 2. Was the individual subsequently subjected to adverse action?
 3. Do the circumstances suggest a connection between the protected activity and the adverse action?
 - a) Did the individual accused of retaliation know about the protected activity?
 - b) How soon after the protected activity did the adverse action occur?
- If these three elements are not shown, there is not a finding of retaliation

Determining a Retaliation Claim

- Definition of adverse action:
 - Significantly disadvantages or restricts the individual as to their status as students or employees, or their ability to gain the benefits or opportunities of the program, or
 - Precluded from their discrimination claims, or
 - Reasonably acted, or could act, as a deterrent to further protected activity
 - The U.S. Supreme court and federal courts have defined adverse action very broadly

Consent

- Consent for sexual activity is clear indication, either through verbal or physical actions, that parties are willing and active participants in the sexual activity. Such authorization must be free of force, threat, intimidation or coercion, and must be given actively and knowingly in a state of mind that is conscious and rational and not compromised by alcohol or drug incapacitation. Only a person of legal age can consent.
- Consent may be withdrawn by either party at any time. Recognizing the dynamic nature of sexual activity, individuals choosing to engage in sexual activity must evaluate consent in an ongoing manner and communicate clearly throughout the stages of sexual activity. Once consent is withdrawn, the sexual activity must cease immediately, and all parties must obtain mutually expressed or clearly stated consent before continuing further sexual activity.
- Consent to one form of sexual contact does not constitute consent to all forms of sexual contact, nor does consent to sexual activity with one person constitute consent to activity with any other person. Each participant in a sexual encounter must consent to each form of sexual contact with each participant.

Overview of the 3 Consent Questions

- Was force used by the Respondent to obtain sexual access?
- Was the Complainant incapacitated?
 - Did the Respondent know? OR
 - Should they have known that the Complainant was incapacitated?
- What clear words or actions by the Complainant gave the Respondent permission for the specific sexual activity that took place?

Force

There are four types of force to consider:

1. Physical violence – hitting, restraining, pushing, kicking, etc.
2. Threats – anything that gets the other person to do something they wouldn't ordinarily have done absent the threat
3. Intimidation – an implied threat that menaces or causes reasonable fear
4. Coercion – the application of an unreasonable amount of pressure for sexual access.

Consider:

- Isolation
- Frequency
- Intensity
- Duration

Because consent must be freely given, consent cannot be obtained through any type of force.

Incapacity

Incapacitation due to alcohol or drugs is where an individual cannot make an informed and rational decision to engage in sexual activity because she/he lacks conscious knowledge of the nature of the act (e.g., to understand the who, what, when, where, why or how of the sexual interaction) and/or is physically helpless. An individual is incapacitated, and therefore unable to give consent, if she/he is asleep, unconscious or otherwise unaware that sexual activity is occurring.

Where alcohol or other drugs are involved, incapacitation is a state beyond drunkenness or intoxication. The impact of alcohol and other drugs varies from person to person; however, warning signs that a person may be approaching incapacitation may include slurred speech, vomiting, unsteady gait, odor of alcohol, combativeness or emotional volatility.

In evaluating whether a lack of consent due to incapacitation is present in a particular case, the University will use the objective standard of whether the Respondent knew or whether a sober, reasonable person in the Respondent's position should have been known, based on reasonably apparent indications of incapacitation, that the other person was incapacitated. A Respondent's own impairment or incapacitation will not be recognized as an excuse for their engaging in sexual contact without consent.

Incapacity Analysis

- First, was the Complainant incapacitated at the time of sex?
 - Could the Complainant make rational, reasonable, decisions?
 - Could the Complainant appreciate the situation and address it consciously such that any consent was informed
 - Knowing the who what where when why and how
- Second, did the Respondent know of the incapacity?
- OR should the Respondent have known from all the circumstances?

Behavioral Cues

- Evidence of incapacity may be taken from context clues in the relevant evidence, such as:
 - Slurred speech
 - The smell of alcohol on the breath in combination with other factors
 - Shaky equilibrium/stumbling
 - Outrageous or unusual behavior
 - Passing out
 - Throwing up
 - Appearing disoriented
 - Unconsciousness
 - Known blackout
 - All though memory is absent in black out, verbal and motor skills are still functioning

Knowledge Construct

- The evidence might also include contextual information to analyze any behaviors by the Complainant that seem “out of the norm” as part of a determination by incapacity
 - Did the Respondent know the Complainant previously?
 - If so, was the Complainant acting very differently from previous similar situations?
 - Review what the Respondent observed the Complainant consuming
 - Determine if the Respondent provided any of the alcohol to the Complainant
 - Consider other relevant behavioral cues
- What if the Respondent experiences memory loss, too?
 - Failing to remember the details of reported misconduct does not negate potential responsibility

Final Incapacity Analysis

- In the Complainant was not incapacitated, move on the question three of the Consent construct
- If the Complainant was incapacitated, but:
 - The Respondent did not know it AND
 - The Respondent could not have reasonably known it then the policy was not violated for this reason, move onto question three
- If the Complainant was incapacitated, and:
 - The Respondent knew it or caused it then there is evidence to determine that a policy violation occurred
 - The Respondent could or should have know it then there is evidence to determine that a policy violation occurred

Consent Question 3

- What clear words or actions by the Complainant gave the Respondent permission for each sexual act as it took place?
- The definition of consent does not vary based on a participant's sex, sexual orientation, gender identity, or gender expression

Consent: Rules to Remember

- No means no, but nothing also mean no. Silence and passivity do not equal consent
- To be valid, consent must be given immediately prior to or contemporaneously with the sexual or intimate activity.
- Consent can be withdrawn at anytime, as long as that withdrawal is clearly communicated – verbally or non-verbally – by the person withdrawing it.

When is there a hearing?

- When some or all of the allegations are of prohibited behavior that would fall under the definition of Title IX Sexual Harassment
 - When this is the case, all allegations are considered in the formal hearing process

Prior to the Hearing



The Intake



**NORWICH
UNIVERSITY®**

Expect Challenge. Achieve Distinction.

Discrimination and Sexual Misconduct Reporting Form

Thank you for submitting a report to the Title IX Office. *If this is an emergency that involves an imminent risk of harm to self or others, please contact the Northfield police by dialing 911 prior to filling out this referral form.*

Please provide our office with as much detail about the incident as possible, including providing a working phone number, email address, and first and last name so that we may follow up with you if necessary. *You may submit a report anonymously. If you do so, please understand that our ability to respond to this incident is extremely limited if no complainant is listed.*

Please note, reports will typically be reviewed the following business day. This online report will not notify the police.

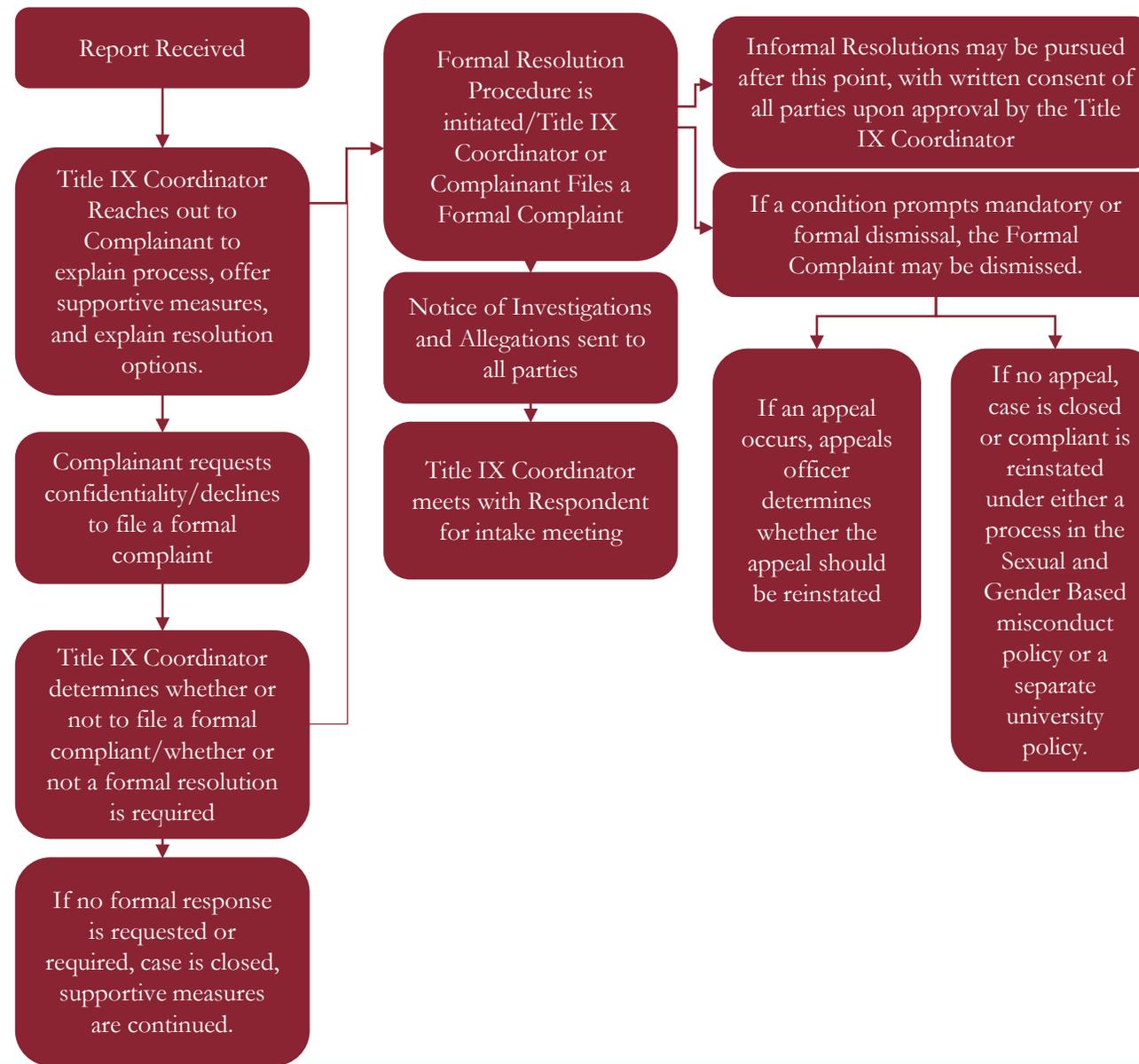


A Formal Complaint vs a Report

- A report is a notification of any type, with a variety of information made to the Title IX Office via a mandatory reporter, the online reporting form, or an email or call to the Title IX Coordinator
- A Formal Complaint is a specific document that includes sufficient information about the allegations that has been signed by the Complainant or the Title IX Coordinator.

A Formal Complaint automatically triggers notice to the Respondent.

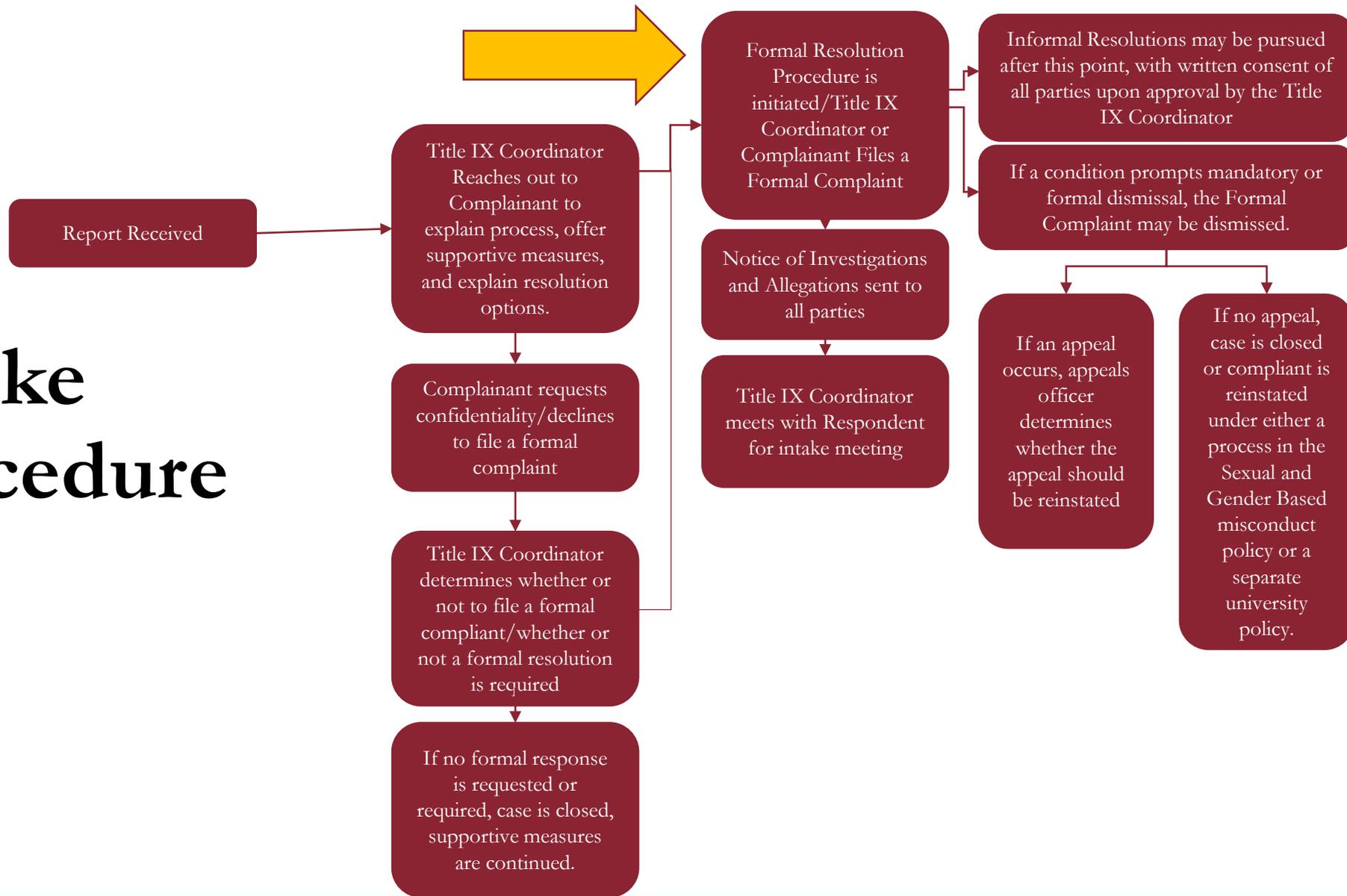
Intake Procedure



Supportive Measures

- Mutual No Contact Orders restricting encounters and communications between the parties;
- Academic accommodations, including but not limited to deadline extensions, excused absences, incompletes, course changes or late drops, or other arrangements as appropriate;
- Residential accommodations, including but not limited to arranging for new housing, or providing temporary housing options, as appropriate;
- Changing transportation, working arrangements, or providing other employment accommodations, as appropriate;
- Campus escort services and safety planning steps;
- Assisting the individual in accessing support services, including, as available, victim advocacy, academic support, counseling, disability, health or mental health services, visa and immigration assistance, student financial aid services, and legal assistance both on and off campus, as applicable;
- Informing the individual of the right to report a crime to local law enforcement and/or seek orders of protection, restraining orders, or relief from abuse orders

Intake Procedure



Presumption of Non-Responsibility

- The University operates with the presumption that the Respondent is not responsible for the reported misconduct unless and until, through the applicable resolution process, the Respondent is determined to be responsible for a policy violation by a preponderance of the evidence.
- The burden of proof is on the University, not a party or witness

Advisors

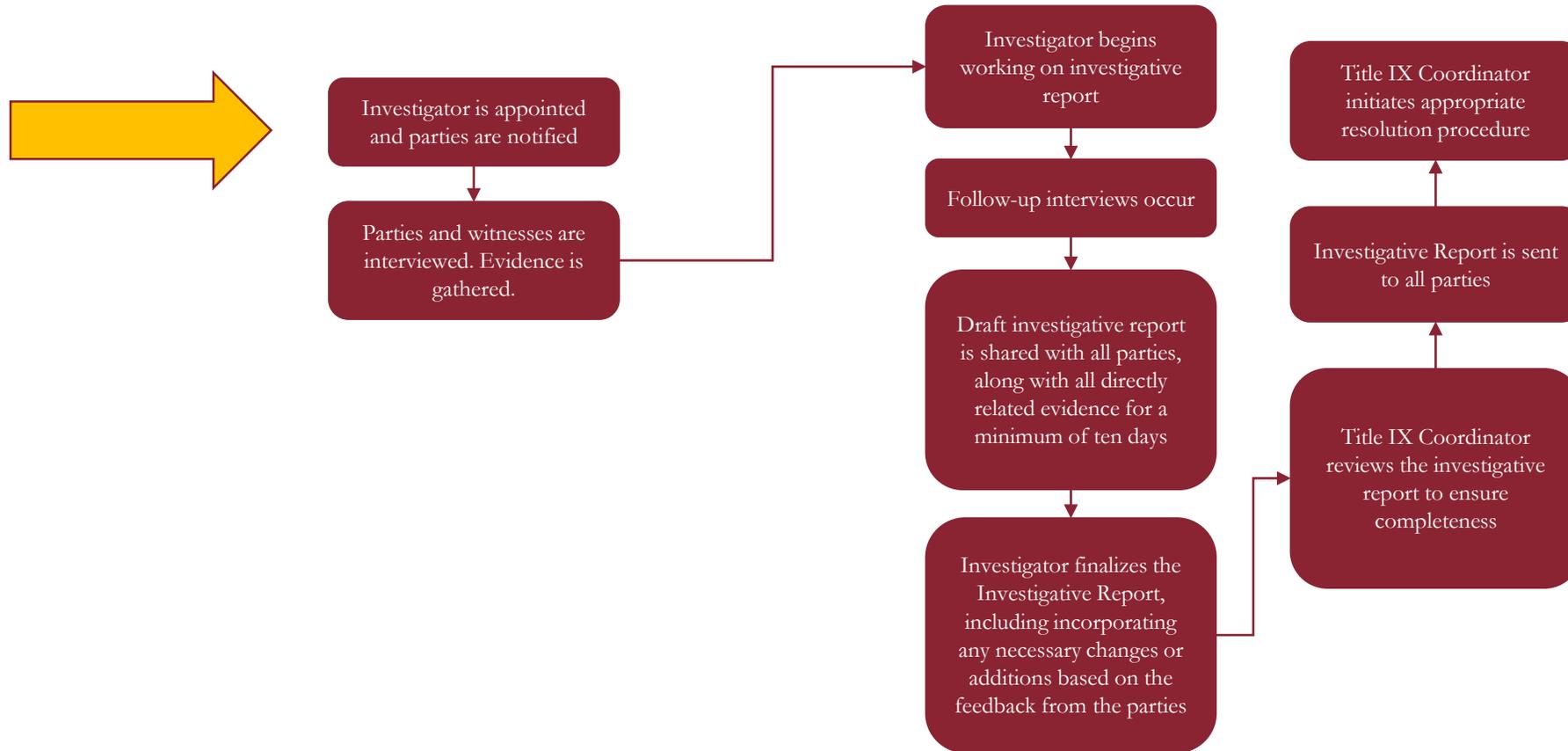
- All parties are entitled to an Advisor of their choosing to guide and accompany them throughout a complaint resolution process. The Advisor may be a friend, mentor, family member, attorney or any other supporter a party chooses to advise them. The University maintains a pool (non-attorney) advisors who are available to the parties that will be distributed through the intake process. No University official is required to serve as an Advisor if they do not choose to do so.
- The parties may be accompanied by their Advisor in all meetings and interviews at which the party is entitled to be present, including intake, interviews, hearings, and appeals. The University cannot guarantee equal advisory rights.
- All Advisors are subject to the same requirements, whether they are attorneys or not. Advisors are not permitted to speak for, represent, appear in lieu of anyone, address any other party other than the one they are advising, or otherwise actively participate directly in a meeting, interview, or other proceeding with an exception related to cross-examination during the Sexual Harassment procedure outlined below. Advisors may communicate with their advisee in a manner that is not disruptive to the meeting or proceeding at hand.

Informal Resolutions

Reports that fall within the scope of this policy may be resolved without a formal investigation and resolution process, in one of two circumstances, as follows:

- When the parties agree to resolve the matter through an alternate resolution mechanism; or
- When the Respondent accepts responsibility for violating policy, and desires to accept a sanction and end the resolution process.

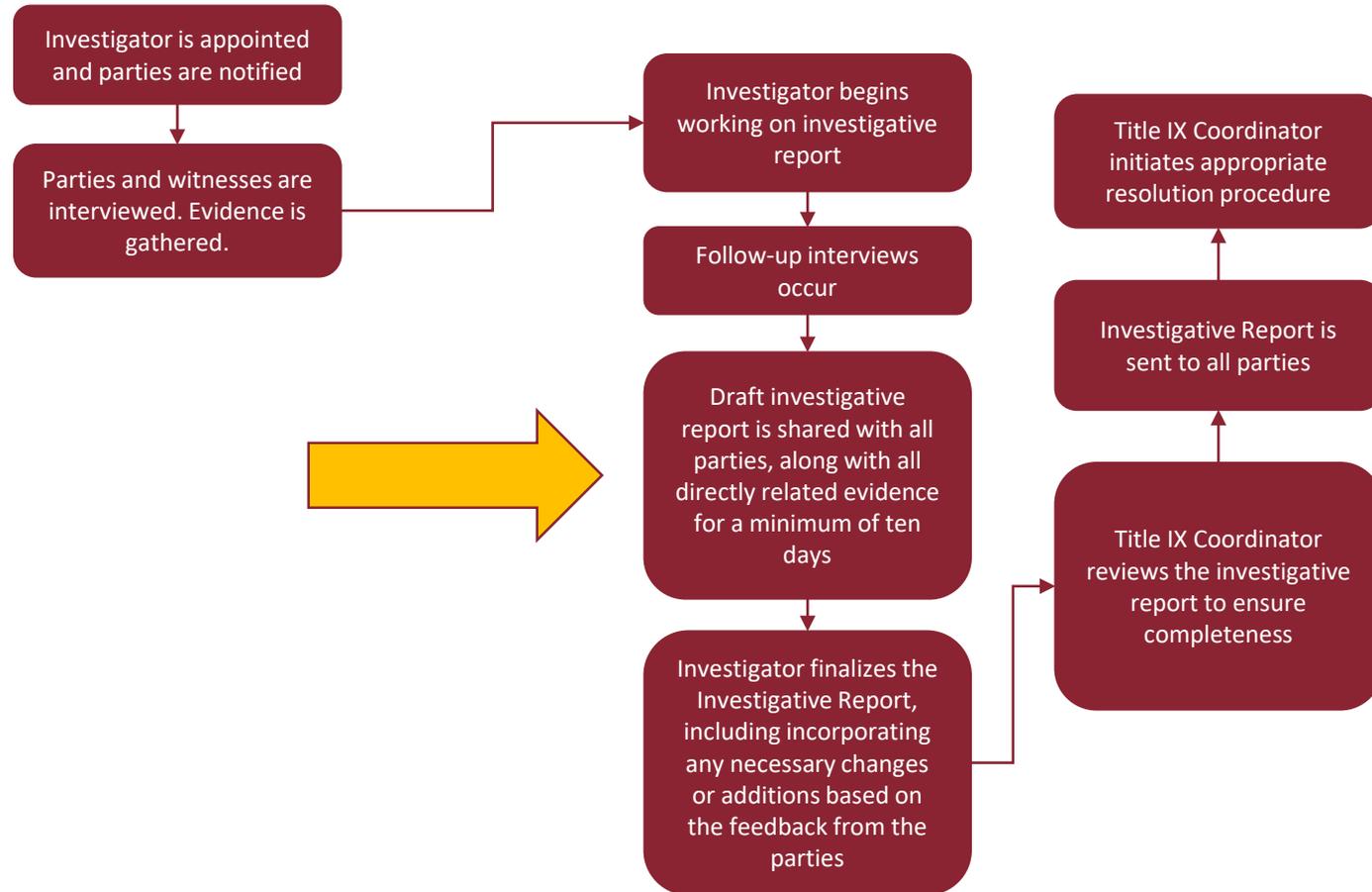
Investigative Procedure



Civil Rights Investigations VS Criminal

- A civil rights investigator is:
 - looking for both inculpatory and exculpatory evidence.
 - Not trying to ‘build a case against someone’
 - Impartial and Neutral

Investigative Procedure



The First Review of the Investigative Report

- 10 business days (2 weeks) for review
- Parties should review the report for the following
 - Was everyone the party wanted interviewed, interviewed?
 - Does the party want any other questions asked of any other party or witness?
 - Does the party want to submit any other evidence for the investigator to review?
 - Has the investigator sorted all of the evidence correctly?

Deeper Dive: Understanding Relevance and Credibility

Evidence In a SGBM Investigation

- Formal federal rules of evidence do not apply, OCR has crafted specific evidence rules
- If the information helps to prove or disprove a fact at issue it should be admitted
- If credible, it should be considered
 - Evidence is any information presented with the intent to prove what took place
 - Certain types of evidence may be relevant to the credibility of the witness, but not to the alleged policy violation directly

Ask Yourself

Is it relevant?



Is it credible/can it
be relied on?



Will I rely on it as
evidence in the
written
determination?

Relevance

- FRE 401 Evidence is relevant if:
 - It has any tendency to make a fact more or less probable than it would be without evidence; and
 - The fact is of consequence in determining the action
- This is a low threshold – it does not take much for something to be considered relevant

Relevance

- Evidence is generally considered relevant if it has value in proving or disproving a fact at issue
 - Regarding an alleged policy violation
 - Regarding a party or witness's credibility

Evidence In a SGBM Investigation

- No restriction on parties discussing case or gathering evidence
- All parties have the equal opportunity to
 - Present witnesses, including experts
 - Present evidence
 - Inspect all evidence, including evidence not used to support determination

Rape Shield

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

Evidence

Not Relevant

- Alex was wearing a red shirt on the night of the incident
- Sam saw someone wearing orange pants running away from the room that the incident happened in

Relevant

- Alex was wearing a red shirt on the night of the incident
- Sam saw someone in a red shirt running away from the room that the incident happened in

Privileged Information

- Unless permission is given, privileged information is also not relevant
- Records made or maintained by a
 - Physician
 - Psychiatrist
 - Psychologist
- Questions or evidence that seek disclosure of information protected under a legally recognized privilege must not be asked without permission

A note about introducing evidence

- Don't introduce it if you don't want the other party to dig into it
- Example: A complainant wants to submit their medical records to evidence a negative impact on their mental health. Before they do so, they should know that, whatever they submit, will be made available to the respondent/the respondent's advisor

Different Types of Evidence

- Primary Evidence
 - Authentic, relevant, tangible
 - Firsthand, uninvolved, unimpaired witness reports
- Secondary or Tertiary Evidence
 - Secondhand reports (rumors)
 - Relevant, tangible evidence that cannot be authenticated
- “Anti-Evidence”
 - Fabricated or tainted evidence

Circumstantial Evidence

- Evidence may be direct or circumstantial. Direct evidence is direct proof of a fact, such as a testimony by a witness about what that witness personally saw or heard or did. Circumstantial evidence is indirect evidence; that is, it is proof of one or more facts from which one can find another fact.
- You are to consider both direct and circumstantial evidence. Either can be used to prove any fact. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. It is for you to decide how much weight to give any evidence.

Evaluating the Evidence for Credibility

What is credibility?

- Accuracy and reliability of a piece of information
- Ultimately up to the Decision Maker to decide
- ‘Credible’ is not synonymous with ‘truthful’

Factors to Evaluate Credibility On:

- The opportunity and ability of the party/witness to see or hear or know the evidence/fact
- The party/witnesses memory (is there anything that may be affecting their ability to recall)
- The party/witnesses manner while testifying
- The party/witnesses interest in the outcome of the case, if any*
- The party/witnesses bias or prejudice, if any
- Whether or not other evidence corroborated or contradicted the party/witness testimony
- The reasonableness of the party/witnesses testimony in light of the available evidence
- Any other factors that bear on believability/inherent plausibility

More Credibility Factors: Corroborating Evidence

- This is one of the strongest indicators of credibility
- It is independent, objective authentication
 - Party says they went to dinner, and provides a receipt
 - Party describes text conversation, and provides screen shots
- Not simply alignment with friendly witnesses
 - Pay attention to allegiances

More Credibility Factors: Inherent Plausibility

- Does what the party describes make sense?
- Would a reasonable person in the same scenario do the same things?
- Are there other more likely alternatives based on the evidence?

More Credibility Factors: Motive to Falsify

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

*the Investigator, Decision Maker(s), and Title IX Coordinator will not make assumptions based on someone's status as a complainant or respondent (for example, the respondent is NOT assumed to be motivated to lie because they are the respondent)

More Credibility Factors: Past Record

- Is there evidence or records of past misconduct?
- Are there determinations of responsibility for substantially similar conduct?

More Credibility Factors: Demeanor

- Is the party uncomfortable, uncooperative, or resistant?
- Certain lines of questioning lead to agitation or argument?
- Be careful!! While humans are great at identifying non-verbal cues, they struggle to accurately explain them.
 - There are a multitude of reasons someone may be stressed/angry/sad/scared while participating in an investigation
- When someone's demeanor changes, that is a sign to ask more questions, and not a chance to make an assumption

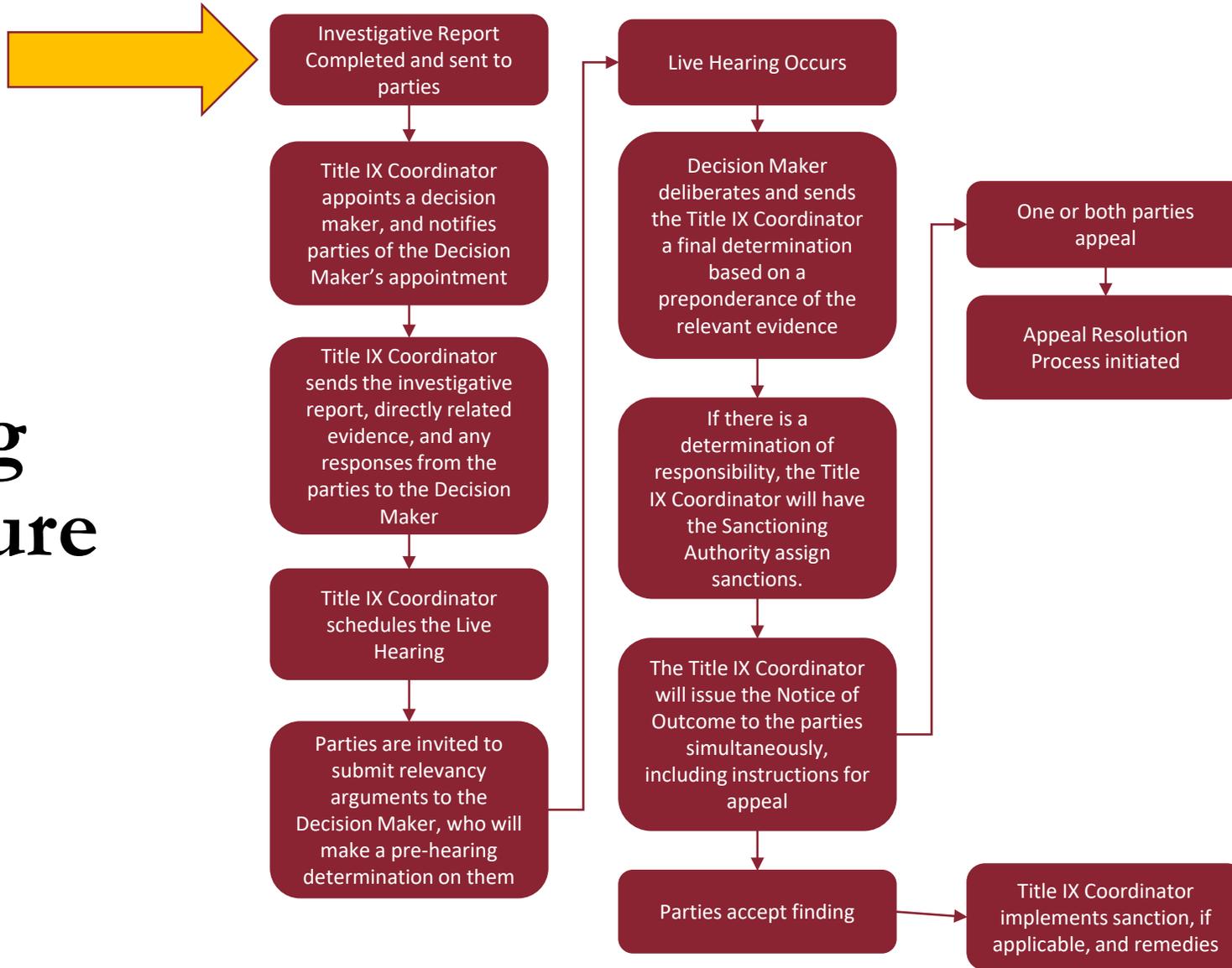
Credibility in the Investigative Report

- The investigator is not going to make a determination as to whether or not someone's testimony or evidence was credible
- There will however be a documentation of factors that can add to or detract from someone's credibility, and it is up to the Decision Maker to ultimately judge credibility

A Note on Evaluating Credibility

- Sometimes a witness may say something that is not consistent with something else they have said. Sometimes different witnesses will give different versions of what happened. People often forget things or make mistakes in what they remember. Also, two people may see the same event but remember it differently. You may consider these differences, but do not decide that testimony is untrue just because it differs from other testimony.
- However, if you decide that a witness has deliberately testified untruthfully about something important, you may choose not to believe anything the witness said. On the other hand, if you think the witness has testified untruthfully about some things but told the truth about others, you may accept the part you think is true and ignore the rest.
- The weight of the evidence as to a fact does not necessarily depend on the number of witnesses who testify. What is important is how believable the witnesses were, and how much weight you think their testimony deserves.

Formal Hearing Procedure



Prior to the Hearing Preparation

Review

- the investigative report and relevant and directly related evidence
- The written Notice of Allegations
- The policies alleged to have been violated

What you will get:

- Relevant and Directly Related Evidence in the form of the Investigative Report and a separate folder

What will be in the investigative report?

Background Information

- General Background
 - Who's who? Major players, not all witnesses
- Complaint
 - Summarize what the formal complaint/report said
 - Summarize any related or cross complaints
 - Including timing of additional complaints
- Investigation
 - Who was interviewed, when, who they are (background only provided if it has not been provided before)
 - Evidence they provided
 - Where the recordings/transcripts live for each interview and how the transcripts (an, as applicable) the recording are referred to throughout the report
 - Evidence Collection
 - Each piece of evidence should include information about:
 - Where was the evidence obtained?
 - If applicable, how is the evidence organized?
 - How is that piece of evidence named/referred to in the report

What will be in the investigative report?

Evidence/Facts

- This section is essentially the layout of the whole story. Pulled from evidence/transcripts
- “Unless otherwise noted, the facts stated herein were reported in material ways consistently among the witnesses and by reference to the evidence. Where, however, a material fact was presented differently by different witnesses, I provide an overview of the evidence obtained, both corroborative of and contradictory to the underlying allegation”
- Start from beginning/present evidence chronologically
- Can start with some background if helpful
 - JH and SC have a shared 150-person class, but otherwise did not know each other before the first incident reported”
- Use subheadings to guide the readers through the events
 - “Pre-incident Interactions Between JH and SC”
 - “The First Reported Incident
- Neutral narrative
- Acknowledge conflicts in varying accounts
 - JH states that she and SC had never met before the first incident
 - By contrast, SC indicates that she and JH sat next to each other in their shared class and chatted regularly after class. On one occasion, SC said she and JH got coffee at Insight Roasters

What will be in the investigative report?

Analysis

- Issue – what is the issue in this case
- Rule – what is the policy definitions
- Facts – how do the facts in this case relate to the rule in this case

This is the section that helps focus the hearing, and helps the decision maker understand how all the facts play together. The policy/rule in play will come from the initial notice of allegations and any sent out thereafter

- Example:
- Issue: JH is alleged to stalk SC
- Rule: Stalking is the repeated following, watching, or harassing of a specific person that would cause a reasonable person to (a) fear for their safety or the safety of others, or (b) suffer substantial emotional distress.
- Rule element: Stalking is the repeated follow, watching, or harassing of a specific person...
- Facts supporting or contradicting that these actions happened
- Rule element: ...that would cause a reasonable person to (a) fear for their safety or the safety of others, or (b) suffer substantial emotional distress
- Facts contradicting or supporting this element

Where all elements materially agree, no issue BUT where they diverge, address contradictory and corroborative evidence

What will **NOT** be in the investigative report?

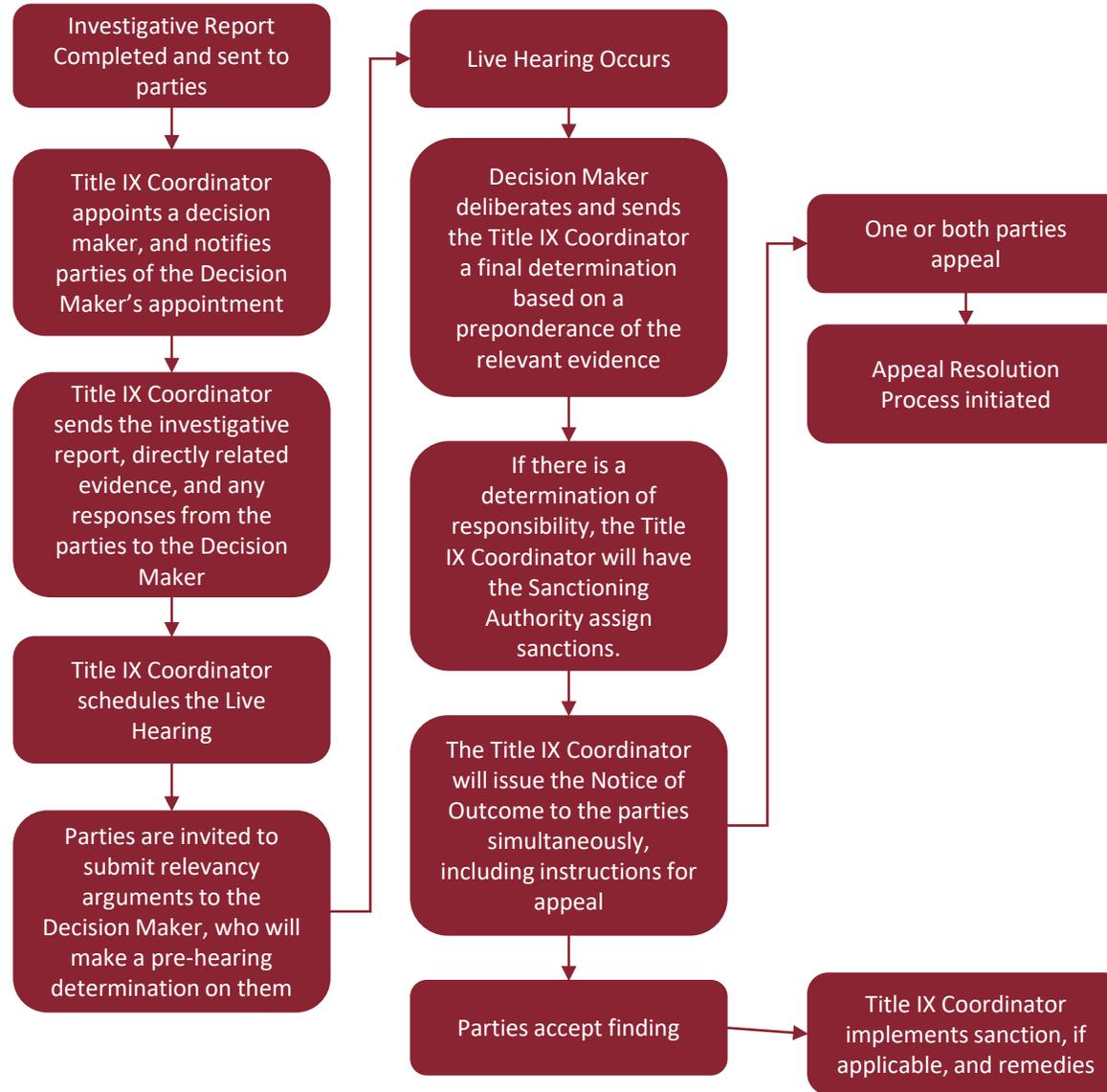
Conclusions as to whether or not a policy was violated or as to whether or not a party was or was not credible.

Facts will be outlined showing that someone's statements or provided evidence should be considered more or less credible, but that credibility is not about the person over all but should instead be considered on a fact-by-fact basis.

Preparing for the Hearing

- Make final decisions around relevant evidence
- Review the report and create questions

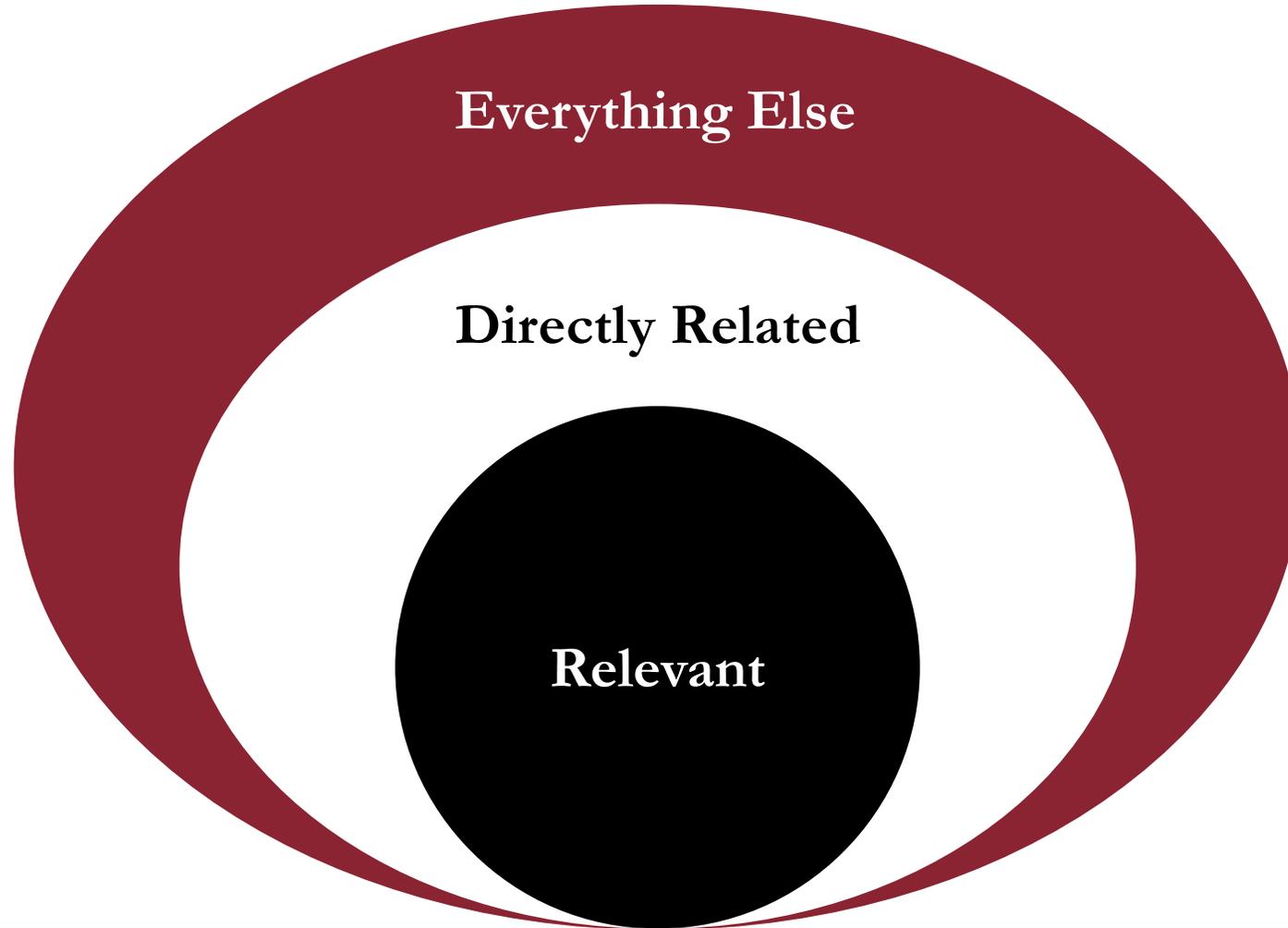
Formal Hearing Procedure



The Second Review of the Investigative Report

- 10 business days (2 weeks) for review
- Parties should review the report for the following:
 - Has the investigator identified all evidence (either as relevant or only directly related) the way the party wants?
 - The party should make all final arguments about whether or not something is relevant (and why it is or is not relevant) in a written argument to the Decision Maker
 - The Decision Maker has the final say on whether or not evidence is relevant, and will issue a decision prior to the hearing

Evidence In a SGBM Investigation



When determining whether or not evidence is relevant...

- Focus on the policy – if the evidence connects back to a policy element, either directly or through impacting the reliability of another piece of evidence, it is likely relevant
- Use a policy or credibility grid!

Questioning Guidelines

- The goal of questioning in the hearing is to ensure that the Decision Maker understands the information and evidence in the investigative report
- Use your questions to fill in gaps, elicit details, and eliminate vagueness
- Your goal is not:
 - Satisfying curiosity
 - Chasing the rabbit into Wonderland
- Do not expect the ‘gotcha’ moment

If you still have a question, ask yourself:

- Is the answer already in the report or documentation that I have been provided?
 - If not, why not? Ask the investigator
- What do I need to know to answer the question?
 - Who is the best person to ask this of?
- Why do I need to know it?
 - If it is not going to help you decide if a policy was violated or not then it is not a good question (though you may not know that until you hear the answer).
- What is the best way to ask the question?
- Are you the best person to ask this question?

Asking Good Questions

- Generally use open ended questions and try to avoid closed ended questions
- Don't ask compound questions
- Don't ask multiple choice questions
- Avoid suggesting an answer in your question

Closed vs. Open Ended Questions

Did you know ... ?	How do you know ... ?
Do you normally ... ?	How do you normally ... ?
Did you see that?	What just happened? What was that?
Do you like this?	What would you most want to change about ... ? Which things did you like the best about ... ?

Asking an Open Ended Question

- Start open questions with “how” or with words that begin with “w,” such as “what,” “when,” “where,” “which,” and “who.”
- Don’t start questions with “was” (an exception to the “w” tip) or other forms of the verbs “to be” and “to do.”
- In general, avoid “why” questions, because human nature leads people to make up a rational reason even when they don’t have one. We normally ask “why” only about ratings, to tease out more open-ended feedback. Say “Please tell me more about that,” instead.
- Aim to collect stories instead of one- or two-word answers.
- Even when you must ask closed-ended questions, you can ask an open-ended question at the end, such as, “What else would you like to say about that?”

Questioning Skills

- Listen carefully and adapt follow-up questions
- Work from your prepared outline but stay flexible
- Seek to clarify terms (when the report is silent) that can have multiple meanings such as “hooked up,” “drunk,” “sex,” “acted weird,” “sketchy,” or “had a few drinks.”
- Be cognizant of what was heard, what can be assumed, and what was witnessed
- Be aware of your own body language. Stay neutral, even if you hear something you dislike or distrust

Questioning Tips

- Restate/summarize what was said. Helps validate that you are listening and helps ensure that you understand what is being said.
- Consider using these phrases:
 - “so it sounds like...”
 - “tell me more...”
 - “walk me through”
 - “help me understand”
- Frame questions neutrally
- Be on the lookout for “cued” responses or rehearsed answers
- Handle emotions sensitively and tactfully
- Observe body language but don’t read into it too much

Final Thoughts

- Generally, a question or piece of evidence is relevant if it falls onto one of the two worksheets used in this training.
- The evaluation of whether or not there was a policy violation should be determined by using these documents

Preventing Bias and Conflict of Interest in the Resolution Process

The first step to asking a relevant question is to have an unbiased and impartial approach to reviewing the evidence

Defining Explicit and Implicit Bias

Implicit bias refers to the *attitudes* or *stereotypes* that affect our understanding, actions, and decisions in an *unconscious* manner

As opposed to explicit bias, which are attitudes held at a *conscious* level

Blair, 2002; Rudman, 2004; Staats & Patton, 2013

“If you can read this paragraph, it’s because our minds are very good at putting together pieces of information in a way that is easy for us to make sense of. Our minds do this automatically, without our conscious control.”

Defining Implicit Bias

The implicit associations we hold arise outside of conscious awareness; therefore *they do not necessarily align with our declared beliefs or even reflect stances we would explicitly endorse.*

-Kirwan Institute

Red

Blue

Orange

Brown

Blue

Orange

Red

Brown

Brown

Green

Red

Orange

Red

Brown

Orange

Red

Defining Implicit Bias

- Implicit biases are **pervasive**. Everyone possesses them, even people with avowed commitments to impartiality such as judges.
- Implicit and explicit biases are **related but distinct mental constructs**. They are not mutually exclusive and may even reinforce each other.
- The implicit associations we hold **do not necessarily align with our declared beliefs** or even reflect stances we would explicitly endorse.
- Implicit biases are **malleable**. Our brains are incredibly complex, and the implicit associations that we have formed can be gradually unlearned through a variety of debiasing techniques.

Defining Implicit Bias

Much of the literature suggests that these biases, which encompass both *favorable and unfavorable assessments*, are activated unconsciously, involuntarily and/or without one's awareness or intentional control.

-Kirwan Institute

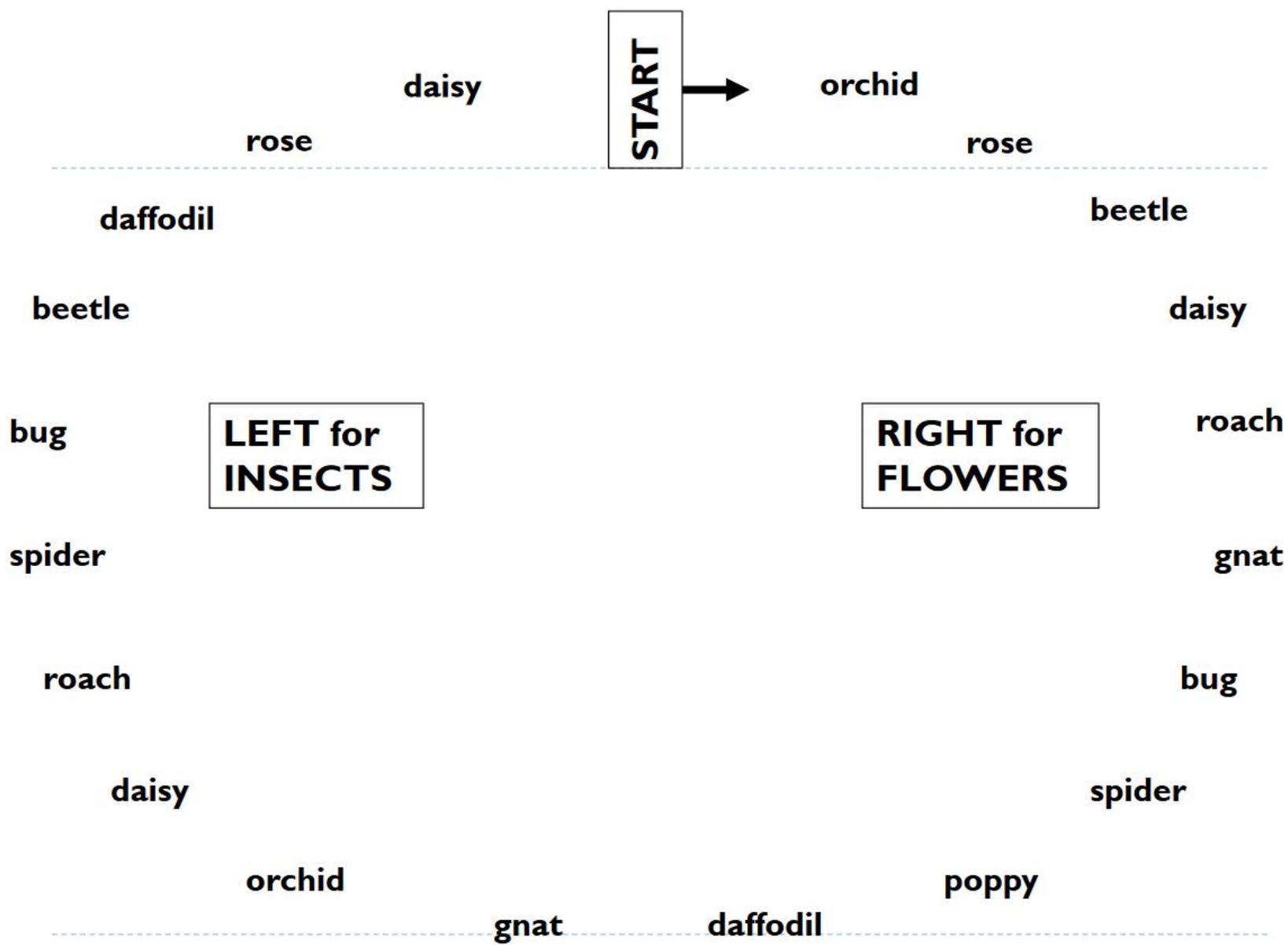
Where did the bias go?

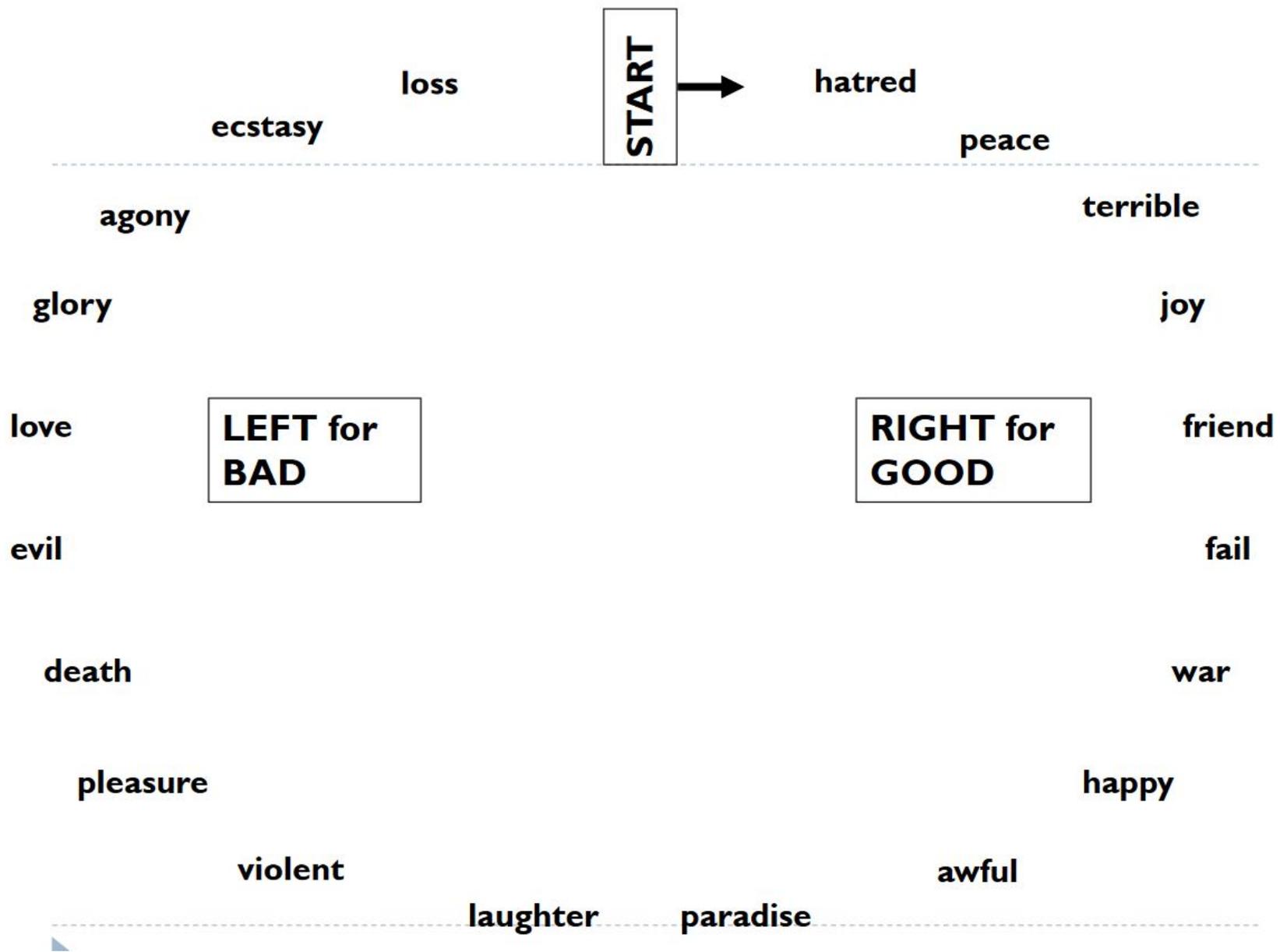
“a clear majority of Americans were telling pollsters in the early 1980s... that they opposed race discrimination in nearly all its forms... there is no reason to believe that most of them were lying”

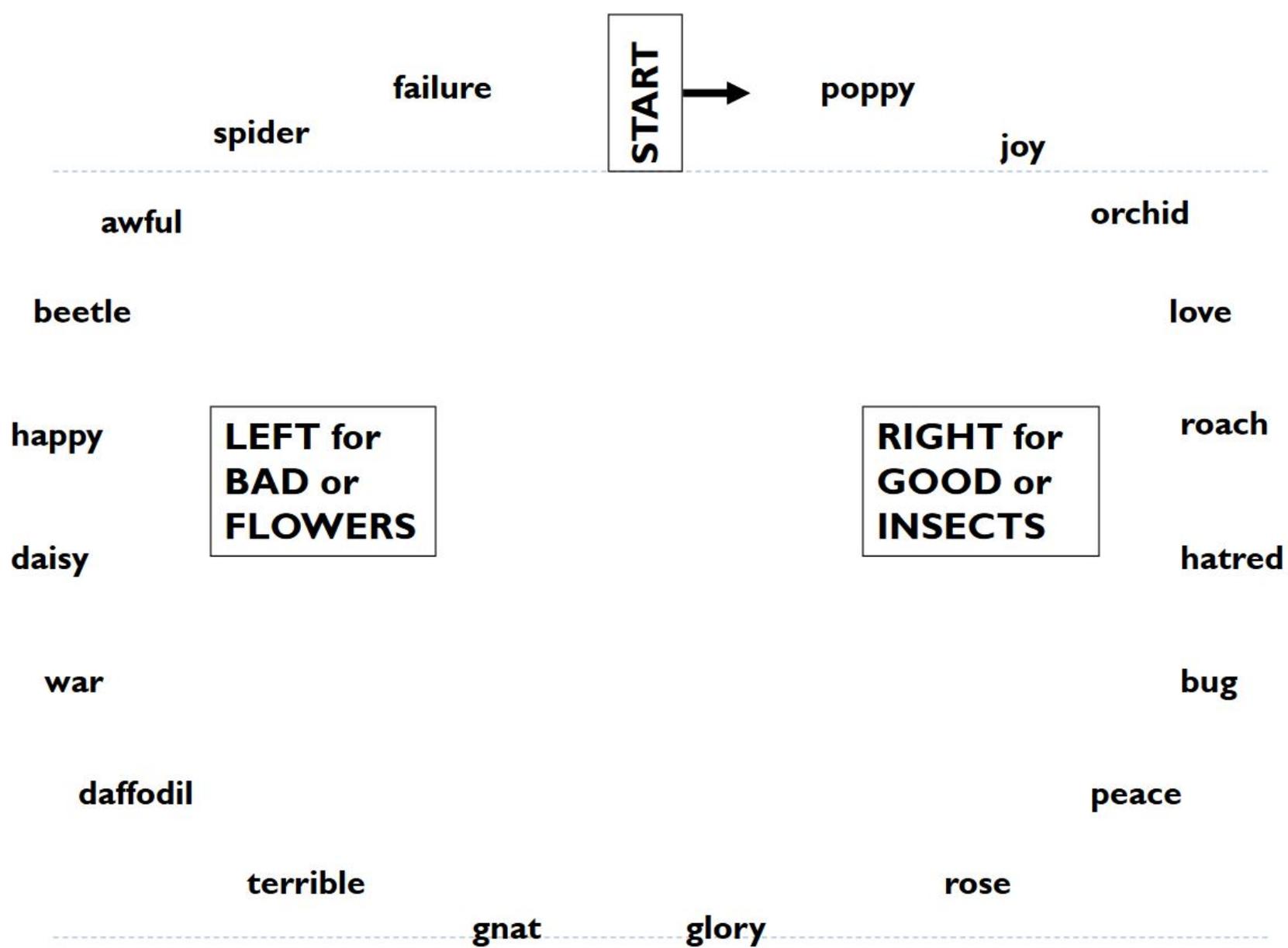
(Michelle Alexander, 2010)

The Implicit Association Test

An indirect way to measure social attitudes, that does not depend on self-reporting, the IAT is an association test that is based off the idea that making a response is easier when closely related items are on the same key







Impact of Implicit Bias

“Biases that we do not acknowledge but that persist, unchallenged, in the recesses of our minds, undoubtedly *shape our society*”

-Rudman, 2004

Impact of Implicit Bias



The IAT also predicted

- Voting Decisions (Acruri et al., 2008)
- Quality of Medical Care (Green et al., 2007)

In fact, research has show that implicit biases are *better predictors of behavior* than explicit biases that are self reported (even when negative biases are self-reported!)

(Agerstrom & Rooth, 2011; Hehman et al., 2017)

People aren't just hiding their true beliefs

We hold these negative implicit attitudes even about groups whose identities we share

The Kirwan Institutes IAT data has indicated that about 80% of white Americans have anti-black implicit bias, but so do about 40% of African-Americans.

Where do Implicit Biases come from?

- Social Media
- Observance of disparities between social groups
- Personal experience



A young man walks through chest deep flood water after **looting** a grocery store in New Orleans on Tuesday, Aug. 30, 2005. Flood waters continue to rise in New Orleans after Hurricane Katrina did extensive damage when it

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Two residents waded through chest-deep water after **finding** bread and soda from a local grocery store after Hurricane Katrina came through the area in New Orleans, Louisiana.(AFP/Getty Images/Chris Graythen)

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We see difference, and subtle social conditioning tries to tell us why

And personal experience can confirm or challenge our beliefs.



Implicit Bias is socially self-sustaining

Student Race and Gender	Emails Ignored		Meetings Denied	
	%	% Increase Relative to Caucasian Males	%	% Increase Relative to Caucasian Males
Caucasian Male	26.5%	N/A	52.4%	N/A
Caucasian Female	29.8%	12.5%	52.9%	1.1%
Black Male	32.5%	22.6%	61.3%	17.0%
Black Female	34.4%	29.8%	60.0%	14.6%
Hispanic Male	36.9%	39.2%	58.2%	11.1%
Hispanic Female	27.1%	2.3%	55.7%	6.3%
Indian Male	41.8%	57.7%	68.2%	30.2%
Indian Female	37.7%	42.3%	67.9%	29.7%
Chinese Male	36.7%	38.3%	66.8%	27.6%
Chinese Female	46.9%	77.0%	62.9%	20.2%

- It impacts whose emails we respond to (Milkman, Akinola, & Chugh, 2012)
- What level we expect people to perform at (van den Bergh et al., 2010)
- Who we are comfortable teaching (Jacoby-Senhor et al., 2009)

Preventing Implicit Bias From Impacting decision making

- Recognize that you have bias
- Create a plan
 - Have clear, fact based reasons for all decisions you make
 - Ask the right questions – avoid pre-judgment of facts in the creation of your questions
 - Make decisions in the right frame of mind
 - Hold each other and yourself accountable in a compassionate way
 - Be on the look out for common decision making short cuts that let implicit bias take the wheel

Be on the look out for Short Cuts

- Cloning
- Snap Judgments
- Negative Stereotypes
- Positive Stereotypes
- Wishful Thinking



Create space and energy for decision-making

Judges have been shown to grant more parole requests immediately after meal breaks than before

(Danziger et al. 2011)



Making the Decision without Bias

- Avoid prematurely labeling any party as the “most credible” until you have done a credibility analysis
- Utilize the policy elements grid and the credibility assessment tool to ensure that you are focusing on facts and evidence and not using assumptions or ‘gut feelings’ to drive your decisions
- Focus on specific facts when considering the credibility of someone’s statements – do not use sex stereotypes or myths about complainants or respondents to determine whether or not you think a statement is credible.
 - For example, DO NOT assume that a respondent is less credible because “they have more on the line and have an incentive to lie.” Formal investigations and hearings are high stakes for ALL involved, not just one party or the other.

What is a conflict of interest?

Dictionary

Search for a word 

 con·flict of in·ter·est

noun

a situation in which the concerns or aims of two different parties are incompatible.
"the conflict of interest between elected officials and corporate lobbyists"

- a situation in which a person is in a position to derive personal benefit from actions or decisions made in their official capacity.
"Watson quit his job after questions about a possible conflict of interest"

 Translations, word origin, and more definitions

Definitions from Oxford Languages

[Feedback](#)

What would a conflict of interest look like in the resolution process?

Personal Relationship Conflicts of Interest

- The Decision Maker is a coach of the athletic team that the complainant plays on
- The Appellate has a mentoring relationship with the respondent
- The Appellate is the direct supervisor of the complainant.

The Decision Maker and the Appellate should both consider recusing themselves from this case, as they are in a situation where they could derive a personal benefit from actions or decision made in their professional capacity.

In the first example, the Decision Maker knows the complainant, and is at risk of seeming like the decision they make are biased in favor of the complainant in order to keep a player on their team.

In the second example, the Appellate is a risk of making a biased decision due to their relationship with the respondent.

Similar to the second example, the Appellate's employment positionality relative to the complainant risks putting the Appellate in a position to make a biased decision.

What would a conflict of interest look like in the resolution process?

Administrative Process Conflicts of Interest

- The Decision Maker conducted the intake with the complainant
- The Decision Maker conducted the investigation
- The Appellate makes a decision on a dismissal appeal (deciding to overturn a TIX Coordinator's decision to dismiss for the purposes of TIX) and is then the Appellate for the Determination of Responsibility for that same case.

In the first two examples, the Decision Maker would need to recuse themselves, as the concerns/aims of a Decision Maker are different than those of someone conducting an intake or investigation. A Decision Maker's focus must be solely on weighing the evidence impartially and without bias. Title IX Regulations are clear that there should be a division between the intake/investigation phase, and the decision phase, explicitly stating that the Decision Maker cannot be the same person as the investigator.

In the third example, because the Appellate had already made an appeal decision in an early stage of the process, they should not be in the position to make a second decision in a later stage.

Questions to Ask Before You Participate

- Do I know either party and/or have a pre-existing relationship that will effect my ability to be an impartial actor in this process?
- Have I served in a different role in this specific process already?

Though the Title IX Coordinator will be vetting all participants in the resolution process, you should also evaluate every case for any conflict of interest and should not serve in a process where a conflict of interest is present.

Policy on Impartiality and Conflicts of Interest

IMPARTIALITY AND CONFLICT-OF-INTEREST

- The Title IX Staff act with impartiality and authority free from bias and conflicts of interest. The members of the Title IX Team are vetted and trained to ensure they are not biased for or against any party in a specific case, or for or against Complainants and/or Respondents, generally. The training that all Title IX staff receive can be reviewed at www.norwich.edu/title-ix.
- To raise any concern involving bias or conflict of interest by the Title IX Coordinator, contact the Senior Vice President for Student Affairs and Information Technology, Dr. Frank Vanecek. Concerns of bias or a potential conflict of interest by any other Title IX Team member should be raised with the Title IX Coordinator.

Questioning

- In order to have their statements (including to the investigator and in texts/other documents) a party must submit to cross examination
- In other words, the party must answer ALL relevant questions asked by the other party (if a party answers only 49 out of 50 relevant questions, then they have not submitted to cross)
- Questions asked by the Decision Maker that are not answered do NOT result in exclusion of statements

Formal Hearing Procedure



During the Hearing: Decorum

- Be professional, but not lawyerly or judge-like
 - This is not Law & Order, this is an administrative process
 - You are not cross-examining or interrogating, you are striving to determine whether the Respondent(s) violated the institutional policy
- Be respectful
 - Tone, Manner, Questioning
 - Sarcasm or being snide are never appropriate
 - Maintain your composure: Never allow emotion or frustration to show

During the Hearing: Decorum

- Work to establish a baseline of relaxed conversation for every in the room
- Maintain good eye contact: “listen with your eyes and your ears”
- Listen carefully to everything that is said
 - Try not to write too much when people are talking
 - If questioning, focus on the answer, rather than thinking about your next question
- Nod affirmatively
- Do not fidget, roll your eyes, or give a “knowing” look to another participant
- Do not look shocked, smug, stunned, or accusing

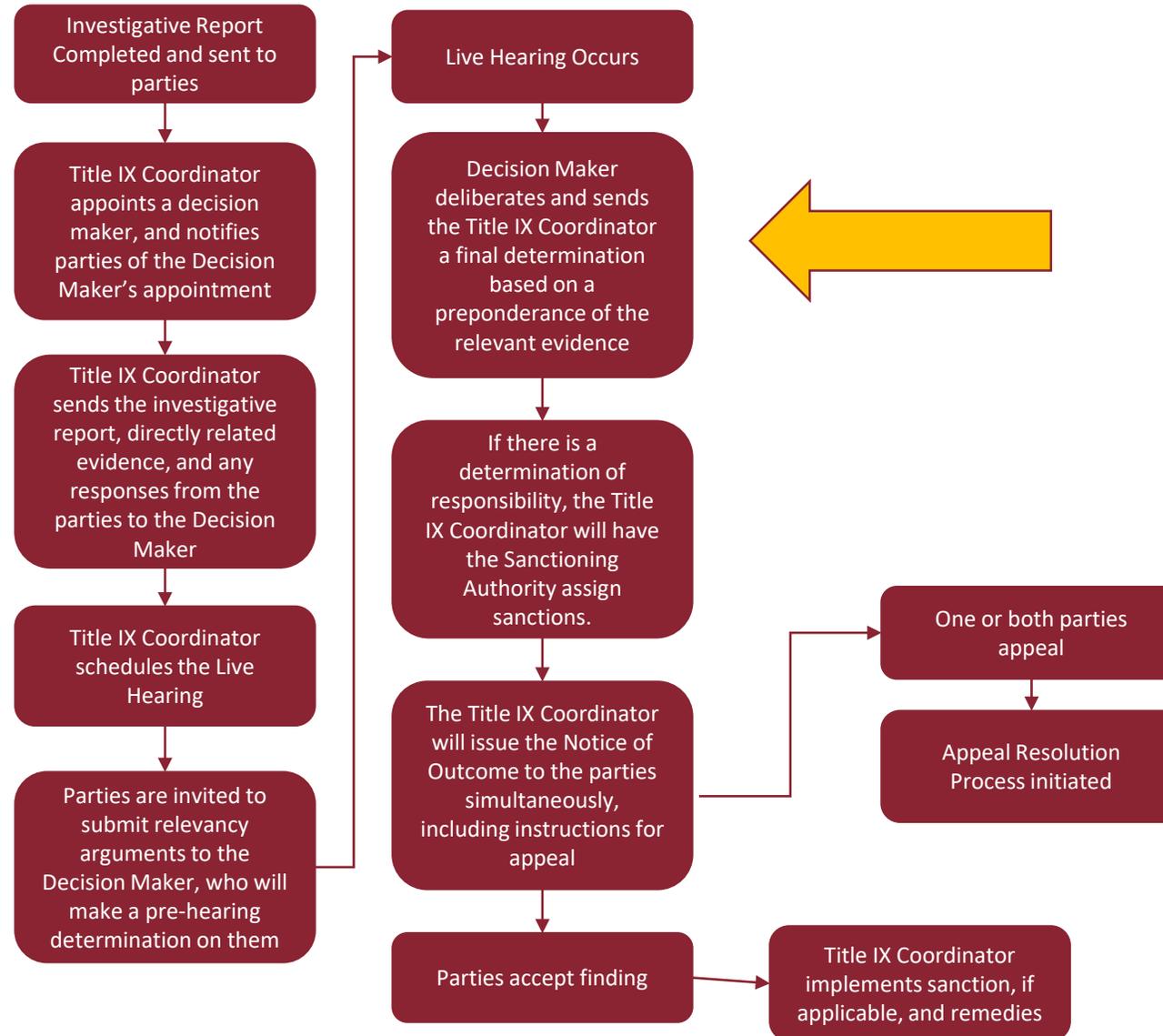
During the Hearing: Tips

- Recognize the need for flexibility with the order of statements and questioning, depending on the circumstances
- Be familiar with your institution's hearing procedures; review again before each hearing
- If a procedural question arises that must be addressed immediately, take a break to seek clarification
- Apply all appropriate institutional policies, procedures, and standards

During the Hearing: Tips

- Determine the relevance and appropriateness of questions. Pause after each question to “rule” on relevance. Must state rationale for the record
- Manage advisors as necessary, including cross-examination
- Recognize positional authority

Formal Hearing Procedure



Deliberation: The Process

- Only the Decision Maker(s) can attend the deliberations
 - Parties, witnesses, advisors, and others excused
- Do not record, and note taking is not recommended
- Use the policy element grids to break down the relevant definitions
- Assess all relevant evidence for reliability and credibility
- Determine whether or not there has been a violation of policy based on a preponderance of the evidence
- Withhold judgement until all relevant evidence has been considered

Deliberation: Preponderance of the Evidence Standard

- “More likely than not”
- The most equitable standard
- 50.1% (50% plus a feather)
- The “tipped scale”

Deliberations

- Must concretely articulate the rationale for and the evidence support its conclusions
- There is no specific order the allegations must be addressed in
- Ensure an impartial decision that is free from bias
- Decisions must be based only upon the facts, opinions, and circumstances provided in the investigation report or presented at the hearing
- Don not turn to any outside evidence

Deliberations

- Assess each element of policy and separate it out to determine if you have evidence that supports that a violation of that element is proven. Assess evidentiary weight.
- Ask yourself the following questions:
 - Is the question/policy element answered with fact?
 - Is the question/policy element answered with opinion?
 - Is the question/policy element answered with circumstantial evidence?

Findings vs. Sanctions

- Separate the finding from the sanction
 - Do not use impact-based rationales for findings (e.g. intent; impact on the Complainant; impact on the Respondent)
 - Use impact based rationales for sanctions only
- Complainant and Respondent should share impact statements if and only if the Respondent is found responsible for a policy violation
- The question of whether or not someone violated the policy should be distinct from factors that aggravate or mitigate the severity of the violation
- Be careful about not heightening the evidentiary standard for a finding because the sanctions might be more severe

Sanctioning

- Title IX and case law require:
 - Credibility should not have an impact on sanctioning
 - Not act unreasonably to bring an end to the discriminatory conduct
 - Not act unreasonably to prevent the future reoccurrence of the discriminatory conduct
 - Restore the complainant as best you can to their pre-deprivation status
- Sanctions for serious sexual misconduct should not be developmental as their primary purpose; they are intended to protect the Complainant and the community

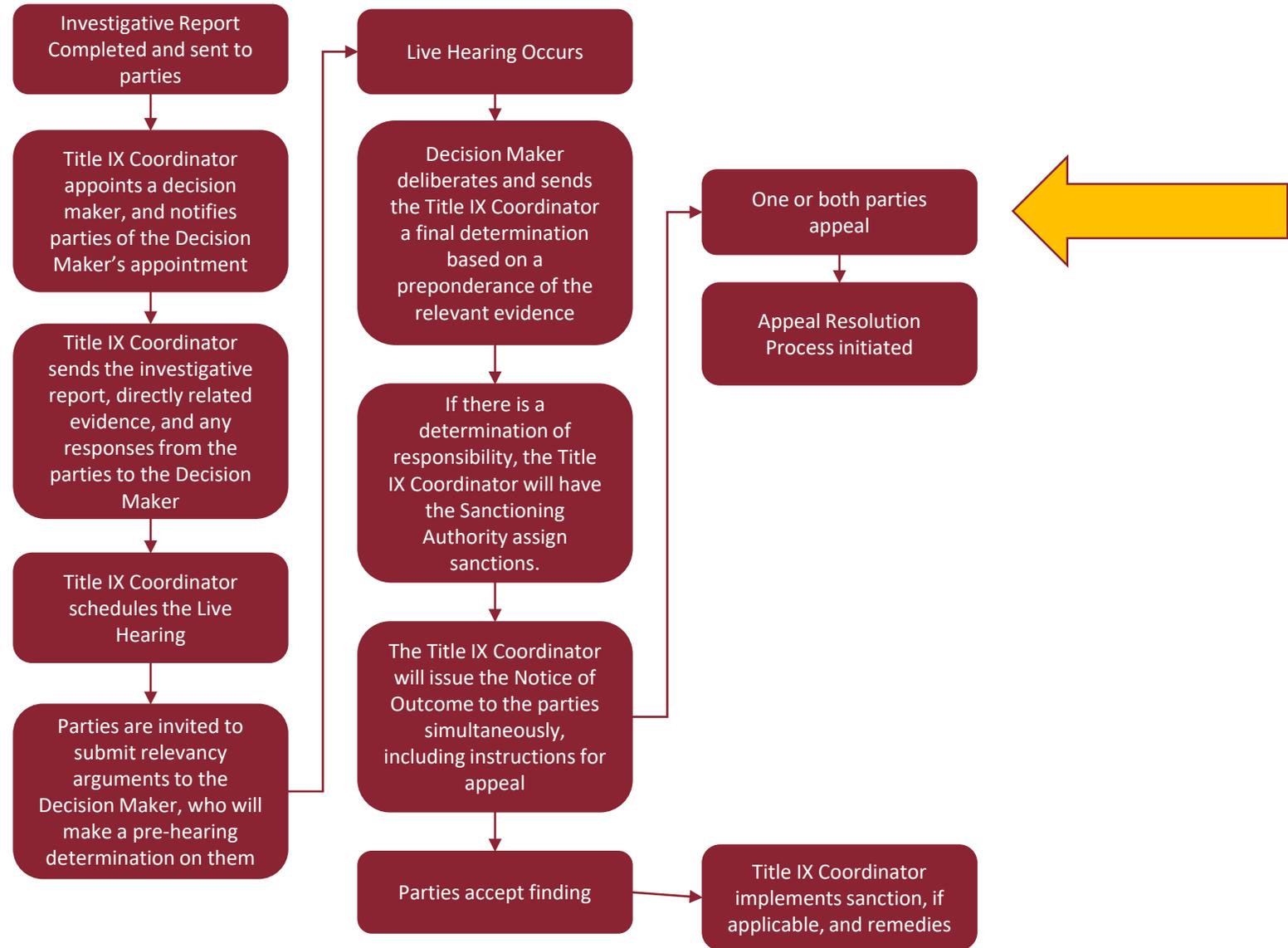
Written Determinations

- The Decision Maker will issue a written determination regarding responsibility that includes the following:
 - Sections of the policy alleged to have been violated
 - A description of the procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with the parties and witnesses, site visits, methods used to garner evidence, and hearings held
 - Statement of and rationale for the result as to each specific allegation
 - Should include findings of fact supporting the determination and conclusions regarding the application of the policy to the facts
 - Sanctions imposed on Respondent
 - Any remedies provided
 - Procedures and bases for appeal

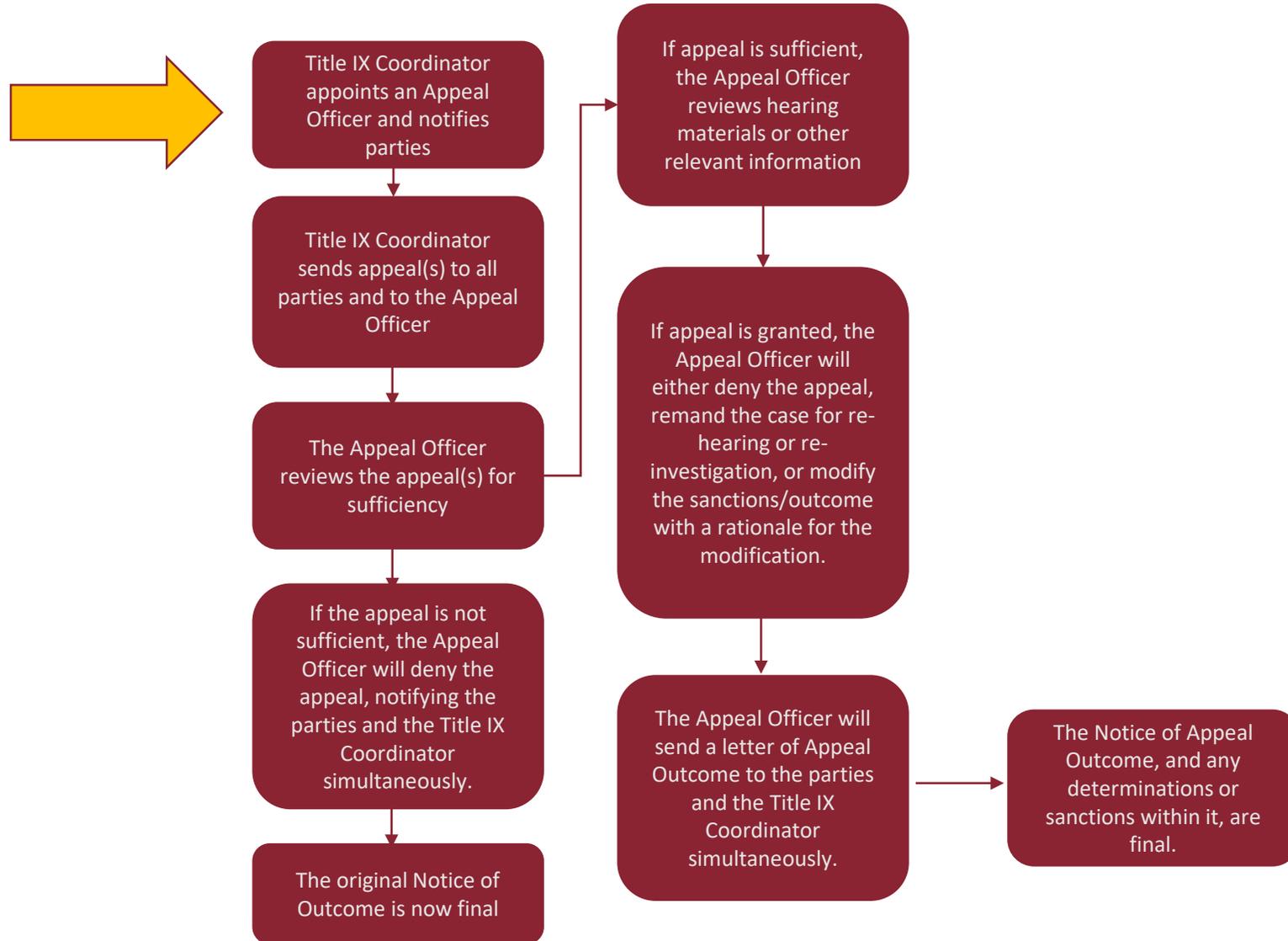
Written Determination

- The Decision Maker should author the written determination
 - Template will be provided
- The written determination should be provided to both parties at the same time
- The determination becomes final either on the date that the institution either provides the parties with the written determination of the result of the appeal, or if an appeal is not filed, the date on which an appeal would no longer be considered timely
- FERPA cannot be construed to conflict with or prevent compliance with Title IX

Appeals



Appeal Process



Baseline Regulatory Requirements for Appeals

- Notice
- Equal
- No prior involvement by Appeal Officer
- No Conflicts of Interest or Bias
- Adequately trained and prepared
- Reasonable, equal opportunity for written support/challenge
- Decision simultaneous and in writing
- Result and rationale in letter of outcome

Additional Regulatory Requirements

- Advisors (may be different from original advisors)
- Records maintained
- Supportive measures and/or accommodations
- Written determination is not final until appeal resolved or appeal deadline passes

Appeals

- When an appeal is filed, the other party must be notified and all appeal procedures must be implemented equally for all parties
- Give the parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome
- Appeals must be submitted in writing to the Title IX Coordinator within three (3) business days of receipt of the notification of the decision. An appeal will not be considered if submitted after the allotted 3 days have elapsed. The other party will be notified of the appeal and the grounds the appeal was filed under. Any sanctions imposed in the Notice of Outcome are stayed during the appeal process.

Grounds for Appeal

- All parties may appeal on the follow bases:
 - The introduction of new evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter;
 - That the evidence was/was not sufficient to support a policy violation;
 - The Title IX Coordinator, Investigator(s), or Decision-maker(s) had a conflict of interest or bias for or against Complainants or Respondents generally or the specific Complainant or Respondent that affected the outcome of the matter;
 - There was a procedural irregularity that affected the outcome of the matter; and/or
 - The sanctions were not appropriate to the violation.

Appeal Procedures

1. Upon delivery of the Notice of Outcome, both parties may submit an appeal to the Title IX Coordinator within 3 business days. Following receipt of a Notice of Dismissal for the Purposes of Title IX, the parties may submit an appeal to the Title IX Coordinator within 3 business days.
2. An appeal must articulate the specific ground(s) for the appeal and provide a statement and/or evidence in support of or challenging the responsibility determination or dismissal decision.
3. The Title IX Coordinator will promptly confirm receipt of the appeal and notify the other party of the filing of the appeal by distributing a written Notice of Appeal to both parties.
4. The Title IX Coordinator will determine if the appeal is timely. If the appeal is timely, the Title IX Coordinator will:
 - Appoint an Appeal Officer to decide the appeal. The Appeal Officer is independent of the previous process, including from any dismissal appeal that may have been heard earlier in the process.
 - Provide the identity and contact information for the Appeal Officer to the parties.
 - If both parties submit appeals (i.e., cross-appeals or counter-appeals), the same Appeal Officer will decide both appeals individually, but contemporaneously. The same Appeal Officer will decide any appeals arising from the same facts and circumstances.

Appeal Procedures

5. The parties shall have 24 hours to object to the appointment of the Appeal Officer, in writing, on bases of perceived bias or conflict of interest.
 - The bases of objection must be articulated in writing.
 - The Title IX Coordinator has the sole authority to determine whether to replace the Appeal Officer and that decision is final.
6. When the selection of the Appeal Officer is final, the Title IX Coordinator will provide the appeal to the Appeal Officer.
7. The parties are entitled to an advisor during the appeal process.
8. The Appeal Officer will review the appeal and determine whether it articulates a valid ground or grounds for appeal pursuant to the Appeals section of the Sexual and Gender Based Misconduct Policy.
9. If an appeal does not articulate a valid ground or grounds for appeal, the Appeal Officer will dismiss the appeal, in writing, for failing to articulate a valid ground for appeal. The Title IX Coordinator will communicate the dismissal decision to the parties simultaneously.

Appeal Procedures

10. If the Appeal Officer determines the appealing party has articulated valid grounds for appeal, the Appeal Officer will notify the parties simultaneously.
11. Following this notification, the non-appealing party has 2 business days to submit a written response to the appeal to the Appeal Officer, which will be provided to the appealing party.
12. An appeal of a determination on responsibility is not a review of the entire matter; rather, it is an objective review of the written documentation related to the investigatory and hearing processes and record of the Hearing, along with the appeal-related submissions authorized herein.
13. The Appeal Officer is to defer to the original findings and determination, remanding only when there is clear reason to do so, and modifying the outcome and sanction(s) only when there is a compelling justification to do so.
14. The Appeal Officer may take one of three possible actions on appeal:
 - Dismiss the appeal for failure to meet the grounds of appeal, upholding the initial outcome and sanction(s), if applicable.
 - Remand to the original investigator or hearing panel with specific instructions on the remanded issue(s).
 - Modify the outcome and/or sanction with a rationale supporting the modification.

Appeal Procedures

15. Within five (5) days of the date of the appeal, a Notice of Appeal Outcome will be sent to all parties and the Title IX Coordinator simultaneously including the decision on each approved ground and rationale for each decision. The Notice of Appeal Outcome will specify the finding on each ground for appeal, any specific instructions for remand or reconsideration, any sanctions that may result which the University is permitted to share according to state or federal law, and the rationale supporting the essential findings to the extent the University is permitted to share under state or federal law.
16. The Appeals Officer's decision is final and there are no further appeal options.
17. If a sanction is imposed, the Title IX Coordinator will coordinate the implementation of the sanction. The Title IX Coordinator will also coordinate and implement the remedies owed to the Complainant and implement any other long-term support measures, as necessary.

Appeals

- Not a “second bite of the apple”
- Deference to original Decision Maker
- Document-based – not a new hearing

Communicating Clearly

- Your writing has significant implications for your institution, legal risk, etc.
- Watch for bias in word choice
- Avoid charged or absolute language
- Written determination must be comprehensive but concise

Appeal Terminology

- **Appeals** are allowed or dismissed
- **Cases** are dismissed or remanded
- **Decisions** are upheld/affirmed, overturned/reversed, or modified
- **Sanctions** are modified/amended or vacated

Where to begin on an appeal

1. Familiarize yourself with the case, ensuring access to the full record
2. Thoroughly review the appeal request(s) and any response(s)
3. Review the case through the lens of the appellant
4. Review the case through the lens of the appellee
5. Review the case through the lens of the Decision Maker, Title IX Coordinator, Investigator, etc.
6. Keep the policy on hand and consult often
7. May seek information from key personnel
8. Decide appeal

Common Appellate Pitfalls

- Pre-judging the facts
- Splitting the baby
- Emotional tug
- Requiring more than the applicable standard of evidence

Remember

- No side emails or texts about case – all are discoverable
- Always think intentionally about comments you make and write – there is no place for casual banter around a Sexual and Gender Based Misconduct case
- All communications are ‘on the record’

Record Keeping

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