

# Title IX Sexual Harassment Grievance Process Training for Decision Makers

Fall 2021

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# Policies and Grievance Procedures

## Nondiscrimination Policy

- Discrimination and Harassment Grievance Procedure
- Title IX Sexual Harassment Grievance Process

## Student Standards of Conduct

- Student Sexual Misconduct Policy & Procedure
- Student Accountability Process

## Anti-Bullying Policy

- Anti-Bullying Complaint Procedure

## Anti-Bias Policy

## Other Related Policies

- Employee and Volunteer Sexual Misconduct Policy (Employee Handbook)
- Romantic Relationships policies (Employee & Faculty Handbooks)



# Options for Complainants and Third-Party Reporters

## Inquiries

- Dr. Hartley
- Dr. Jordan
- Dr. Mayo
- Trista Truemper
- Human Resources

## Reporting

- Report a Concern form
- Responsible employees
- Campus or local law enforcement

## Confidential Resources

- Pastoral counselors
- Professional counselors
- Health care providers
- Local & national advocates



# Reporting Expectations for Students, Employees, and Volunteers



## Reporting Responsibilities webpage

General expectations for reporting and how to respond to disclosures



## Reporting Expectations for Employees, Volunteers, and Students Leaders

Formal policy with specific instructions and expectations for employees and student employees



# Response to Reports of Sexual Harassment & Misconduct

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The University's procedures for responding to notification of sexual misconduct are intended to eliminate the misconduct, prevent its recurrence, and address its effects.

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Upon receipt of a report of sexual misconduct, the University's initial response will consist of notifying the appropriate University officials, providing information and support to alleged victims of sexual misconduct, and taking steps to promote the safety of the campus.



# Response Team Structure

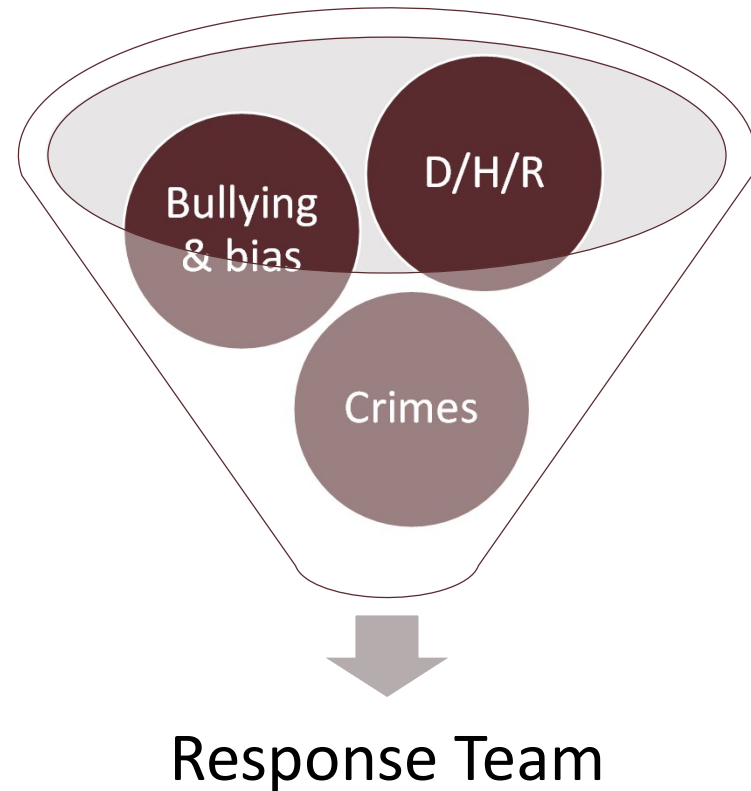
## Core members

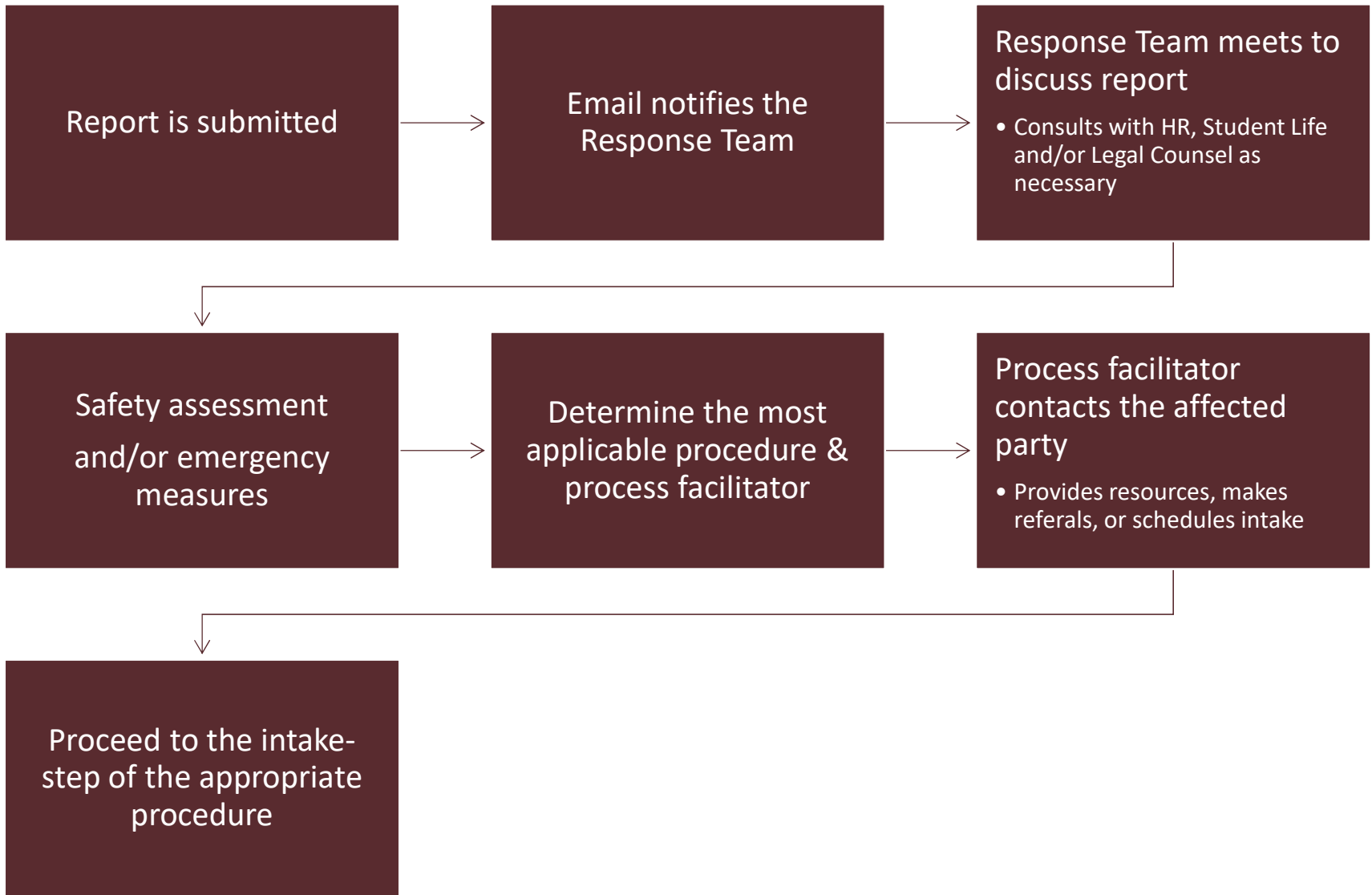
- Sandra Mayo
- Trista Truemper
- Cheryl Michaels

HR, Student Life, legal will be additionally consulted as necessary



## “Report a Concern” form





# Title IX Sexual Harassment Grievance Process (TSHGP): Purpose

The University's procedures for institutional disciplinary action in cases of sexual misconduct are intended to include a prompt, fair, equitable, and impartial process from the initial investigation to the final result.

The TSHGP is intended to satisfy the requirements imposed by Title IX and 34 CFR 106.45 with respect to formal complaints of sexual harassment, as defined in 34 CFR 106.





Section 106.45(a) of the Final Rule states:

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



### Treating the parties equitably

- Resources and support
- No stereotypes based on the party's status as a complainant or respondent
- Notice of allegations
- Presumption respondent did not violate policy unless and until a determination is made after the hearing

### Separation of roles

- Independent investigation
- Title IX Coordinator cannot be the decision maker
- Bias and conflict of interest concerns

### Procedural requirements

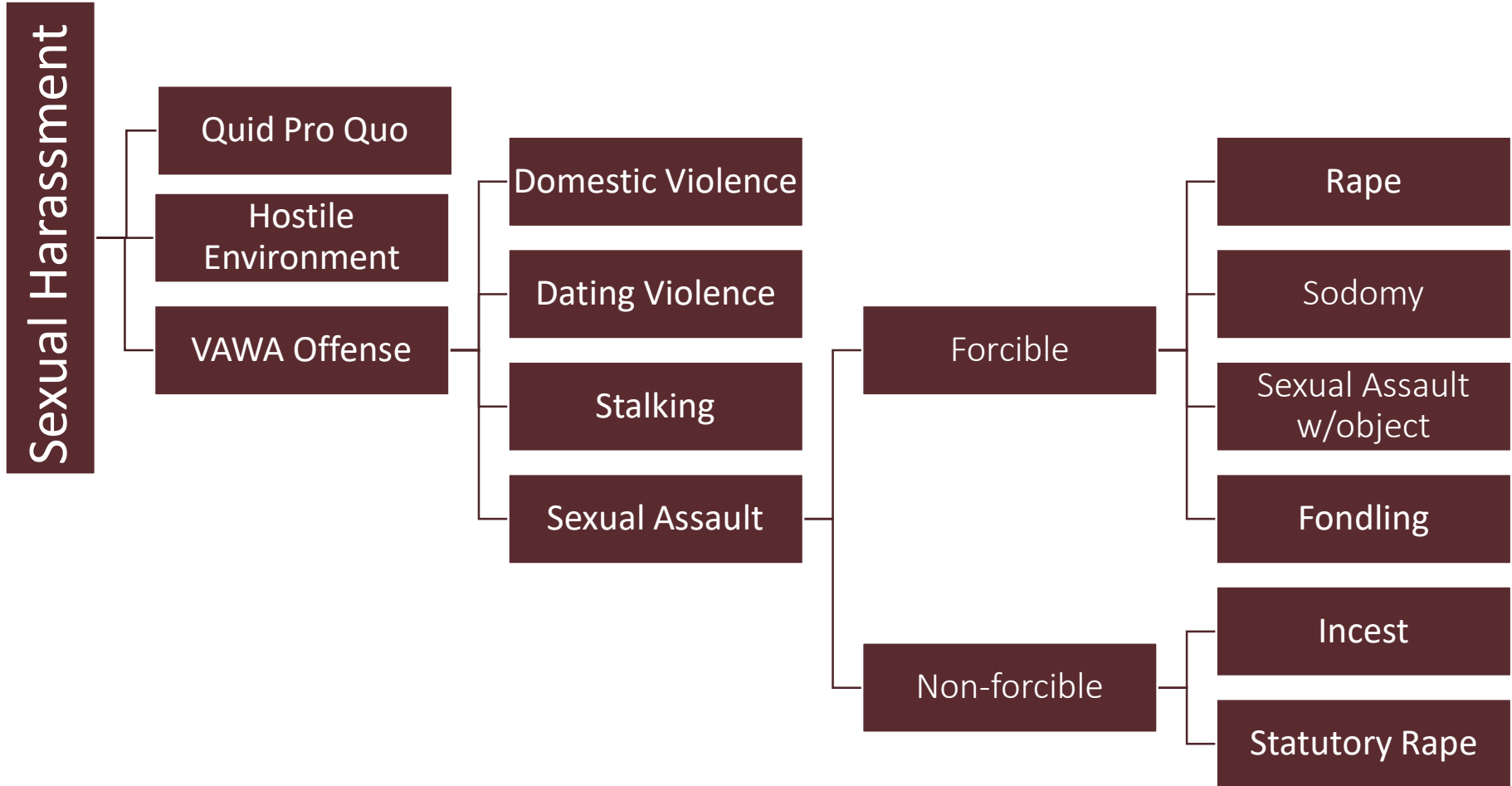
- Jurisdictional requirements
- Criteria for dismissal of complaints under the TSHGP
- Appeals

# TSHGP: Sexual Harassment Definition

**“Sexual Harassment”** means conduct on the basis of sex that satisfies one or more of the following:

- An employee of SPU conditioning the provision of an aid, benefit, or service of SPU on an individual's participation in unwelcome sexual conduct;
- Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to SPU’s education program or activity; or
- A VAWA Offense.
  - “VAWA Offense” means “sexual assault” as defined in 20 U.S.C. 1092(f)(6)(A)(v), “dating violence” as defined in 34 U.S.C. 12291(a)(10), “domestic violence” as defined in 34 U.S.C. 12291(a)(8), or “stalking” as defined in 34 U.S.C. 12291(a)(30).





# SPU Definition of Consent in SPU Sexual Misconduct Policy

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Freely and affirmatively communicated willingness to participate in sexual activity, expressed by clear, unambiguous words or actions. It is the responsibility of the initiator of the sexual activity to ensure that she or he has the other person's Consent to engage in sexual activity.

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Consent must be present throughout the sexual activity by all parties involved. At any time, a participant can communicate that she or he no longer Consents to continuing the activity.

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Consent may never be obtained through the use of force, coercion, or intimidation or if the victim is mentally or physically disabled or incapacitated, including through the use of drugs or alcohol.

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Individuals cannot assume Consent because of the existence of a previous dating or sexual relationship. The use of alcohol or drugs does not diminish a person's responsibility to obtain Consent for sexual activity.



## **Force, Coercion & Incapacitation:** Sample Excerpts from WSU (WAC 504-26-221)

- **Force:** Force is the use of physical violence, physical force, threat, or intimidation to overcome resistance or gain consent to sexual activity.
- **Coercion:** Coercion is unreasonable pressure for sexual activity. When an individual makes it clear through words or actions that the individual does not want to engage in sexual contact, wants to stop, or does not want to go past a certain point of sexual interaction, continued pressure beyond that point may be coercive. Other examples of coercion may include using blackmail or extortion to overcome resistance or gain consent to sexual activity.
- **Incapacitation:** Even if words or conduct alone seem to imply consent, sexual activity is nonconsensual when:
  - The person is asleep, unconscious, or physically unable to communicate their unwillingness to engage in sexual activity; or
  - A reasonable person would or should know that the other person lacks the mental capacity at the time of the sexual activity to be able to understand the nature or consequences of the act, whether that incapacity is produced by illness, defect, the influence of alcohol or another substance, or some other cause.



# TSHGP: Definitions – Decision Maker

## “Decision Maker” means:

- If the Respondent is a residential undergraduate student, the Director of Residence Life (or designee);
- If the Respondent is a non-residential undergraduate student, the Dean of Students for Community Life (or designee);
- If the Respondent is a graduate student, the Vice Provost for Academic Affairs (or designee);
- If the Respondent is an employee (other than a student employee), the employee’s Area Vice President (or designee); and
- If the Respondent does not fit into any of the preceding categories, an individual designated by the Title IX Coordinator.



# TSHGP: Definitions – Appeal Reviewer

## “Appeal Reviewer” means:

- In an appeal of a determination of responsibility:
  - If the Respondent is a residential undergraduate student, the Dean of Students for Community Life (or designee);
  - If the Respondent is a non-residential undergraduate student, the Vice Provost for Student Formation and Community Engagement (or designee);
  - If the Respondent is a graduate student, the Provost (or designee);
  - If the Respondent is an employee (other than a student employee), the President (or designee); and
  - If the Respondent does not fit into any of the preceding categories, an individual designated by the Title IX Coordinator.



# TSHGP: Definitions – Other Terms

Complainant

Formal  
Complaint

Respondent

Informal  
Process  
Facilitator

Area Vice  
President

Business Day



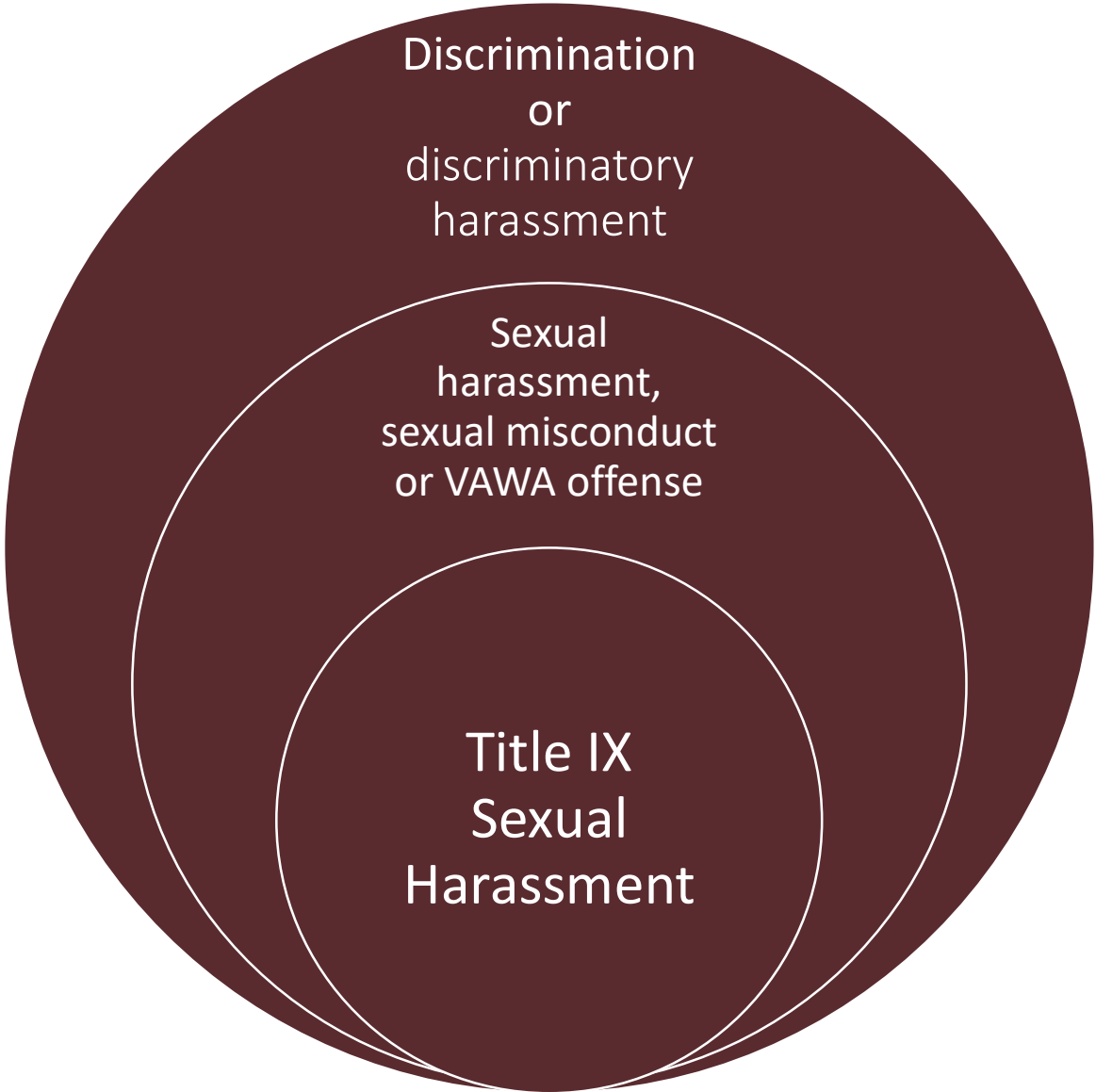


## TSHGP: Scope

A Formal Complaint may only be filed under this TSHGP if it meets all of the following criteria:

- a. The conduct that is alleged would meet the definition of Sexual Harassment if true;
- b. The conduct is alleged to have occurred within the United States;
- c. The conduct is alleged to have occurred in an SPU education program or activity that the Complainant is participating in or attempting to participate in;
- d. The Respondent is an individual that is participating in an SPU education program or activity; and
- e. The individual making the Formal Complaint is the Complainant, the Title IX Coordinator, or the Deputy Title IX Coordinator for Students.





# TSHGP: Scope

What is an  
SPU  
education  
program or  
activity?



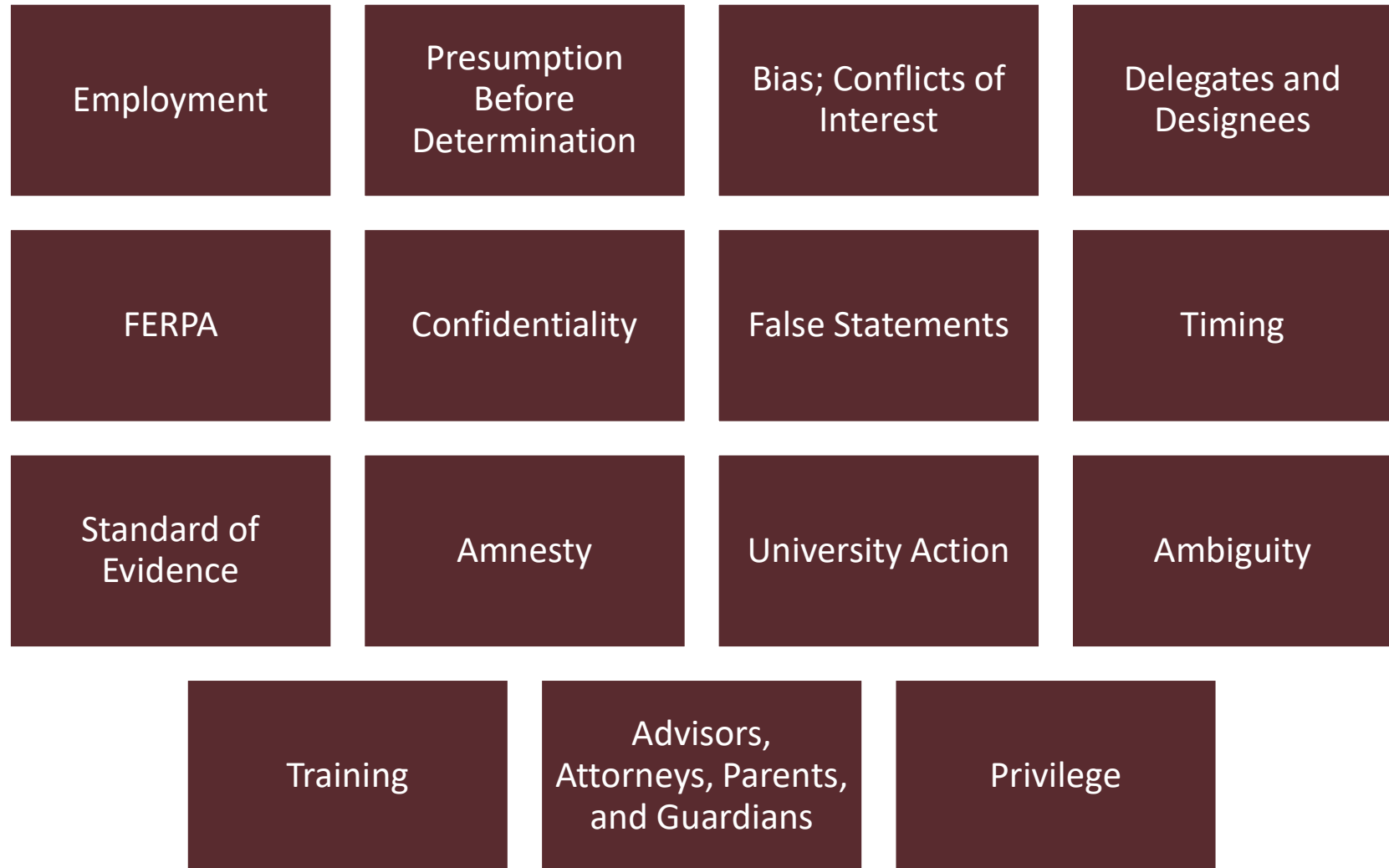
## **Title IX (20 USC 1687)**

*For the purposes of this subchapter, the term "program or activity" and the term "program" mean all of the operations of -  
... a college, university, or other postsecondary institution, or a public system of higher education...*

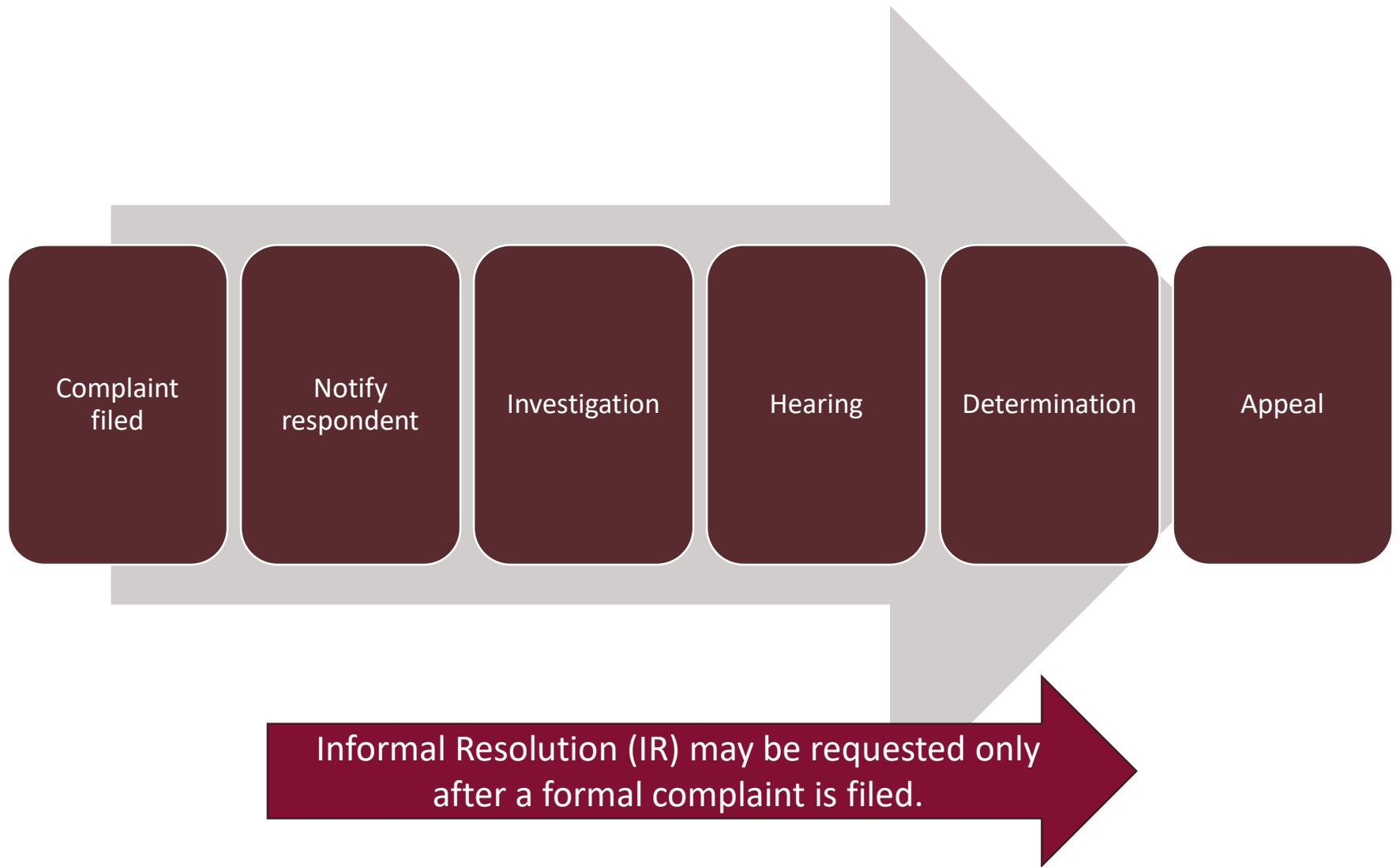
## **U.S. Department of Education**

*Some key issue areas in which recipients have Title IX obligations are: recruitment, admissions, and counseling; financial assistance; athletics; sex-based harassment; treatment of pregnant and parenting students; discipline; single-sex education; and employment.*

# TSHGP: Principles and Parameters



# TSHGP: Formal Complaint Process (FCP)



# TSHGP: Possible Pre-Complaint Actions



EMERGENCY  
REMOVAL



ADMINISTRATIVE  
LEAVE



NO-CONTACT  
DIRECTIVE



# TSHGP: Filing Formal Complaint



Formal complaints should be filed with the Title IX Coordinator



The Title IX Coordinator can file a complaint



The complaint should include at least basic information about the allegations



The Title IX Coordinator will evaluate whether the complaint falls within the scope of the TSHGP



# TSHGP: Dismissal of Formal Complaint

## Mandatory

- Formal complaints that do not meet the criteria for the TSHGP will be dismissed (but could be evaluated under a different grievance procedure).

## Permissive

- A formal complaint can be dismissed if:
  - a Complainant withdraws the complaint;
  - the Respondent is no longer a student or employee at SPU; or
  - specific circumstances prevent the University from gathering evidence sufficient to reach a determination.

## Appeal of Dismissal

- Either party may appeal the dismissal of a Formal Complaint by sending a written appeal to the Title IX Coordinator.
  - Must meet the criteria for TSHGP appeals
    - New evidence
    - Conflict of interest or bias
    - Procedural irregularity





# TSHGP: Notifying Respondent



The Title IX Coordinator will send the Complainant and Respondent a notice of formal complaint within five business days of receiving the complaint



The notice of formal complaint will contain information required by regulation and SPU policy (see Section VII.2. of the TSHGP)



The Respondent will have five business days to provide a written response



# TSHGP – FCP: Investigation

The Title IX Coordinator will appoint one or more Investigators (e.g., an SPU employee or a third-party).

Investigations involve gathering relevant evidence “directly related to the allegations raised in a formal complaint.”

The burden of proof and the burden of gathering evidence is on SPU, not the parties.

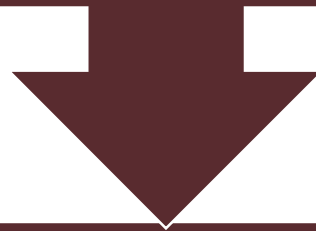
SPU will provide an equal opportunity for the parties to:

- Present witnesses and other relevant evidence;
- Have others present (e.g., have an Advisor at meetings);
- Inspect and review relevant evidence gathered in the investigation (even if SPU does not intend to rely on such evidence); and
- Access evidence during any hearing, including for purposes of cross-examination.



# TSHGP – FCP: Two-Step Review Process

The parties will have at least 10 days to review any evidence directly related to the allegations that was gathered during the investigation. Parties have a right to submit a written response which the investigator will consider prior to completing the investigative report during that 10-day period.



The investigator will create an investigative report that fairly summarizes the relevant evidence, and at least 10 days prior to the hearing, send to the parties and advisors, the investigative report for review and written response.



## TSHGP – FCP: Live Hearings and Cross Examination

After the investigative report is completed, the Title IX Coordinator will schedule a live hearing.

- Live hearings may be conducted in-person or virtually.
- The Decision Maker will facilitate the live hearing.
- Cross-examination must be conducted directly, orally, and in real time by the party's Advisor of choice and never by a party personally.
- If a party does not have an Advisor present, SPU will provide an Advisor to the party free of charge to conduct cross-examination.



# Example Hearing Agenda



Opening remarks



Introduction of the complaint



Presentation of the investigative report



Questioning



Final remarks



## TSHGP – FCP: Live Hearings and Cross Examination

**Only relevant cross-examination and other questions may be asked of a party or witness.**



The Decision Maker may question any party or witness



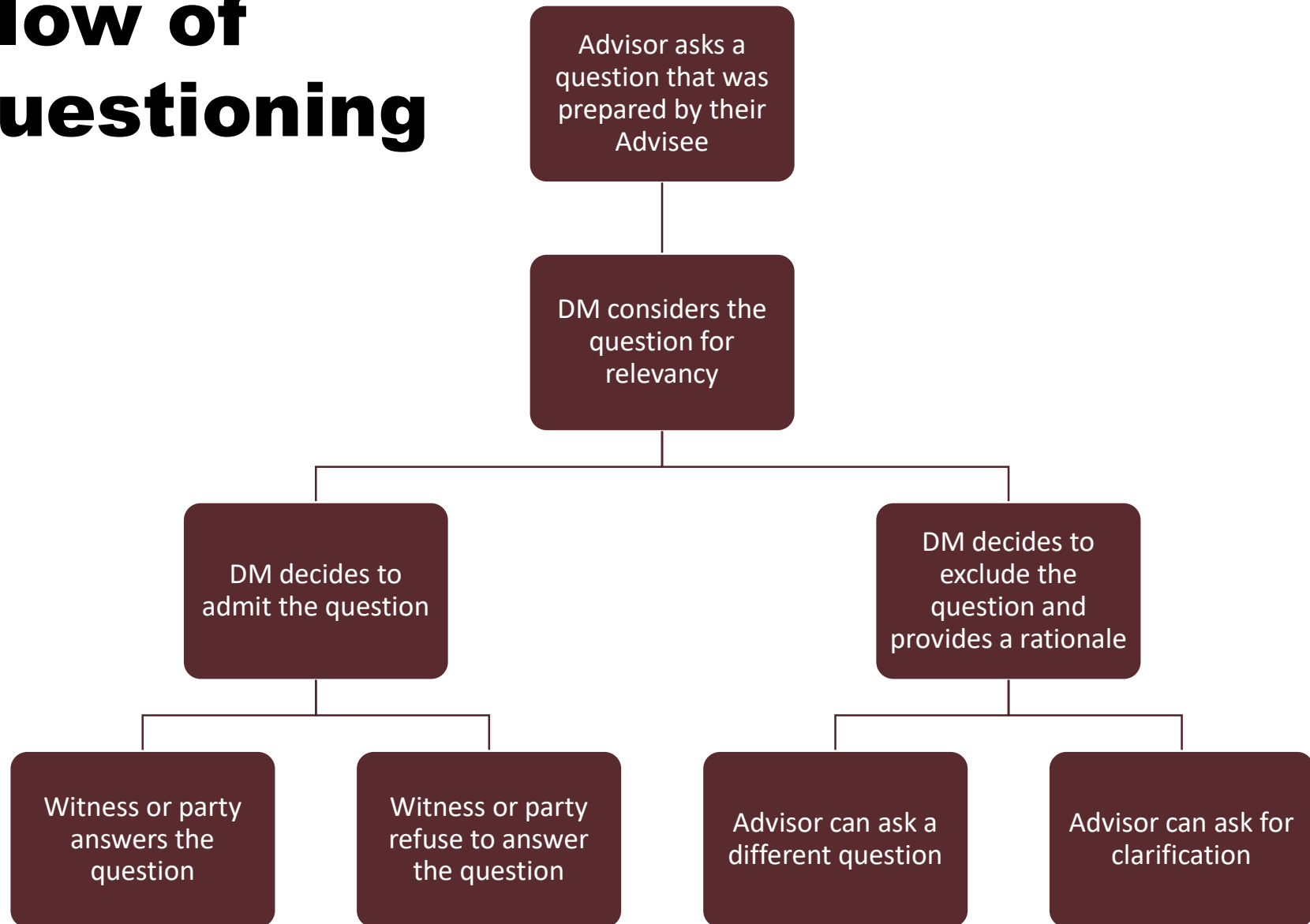
The Decision Maker must allow each party's Advisor to question parties and witnesses, including questions that challenge credibility.



Before a question is answered, the Decision Maker must first determine whether the question is relevant and explain any decision to exclude a question as not relevant.



# Flow of questioning



## TSHGP – FCP: Live Hearings and Cross Examination (cont'd)

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If a party or witness does not submit to cross-examination at the live hearing, the Decision Maker must not rely on any statement of that party or witness in reaching a determination regarding responsibility. (more on this later)

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The Decision Maker cannot draw an inference about the determination regarding responsibility based solely on a party's or witness's absence from the live hearing or refusal to answer questions.

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The University will create an audio or audiovisual recording, or transcript, of any live hearing and make it available to the parties for inspection and review.

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In general, no additional investigation will be performed after a live hearing. However, if a Decision Maker determines that additional investigation should be performed, each party will be provided with an opportunity to review the additional evidence.





# TSHGP – FCP: Determination

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The Decision Maker will make a written determination regarding responsibility using a preponderance of the evidence standard following the final live hearing.

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The Decision Maker will make an objective evaluation of all relevant evidence, including both inculpatory and exculpatory evidence, and will not base any credibility determination on a person's status as a Complainant, Respondent, or witness.

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The Decision Maker will attempt to issue the written determination within ten Business Days of the conclusion of the final live hearing.

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The Decision Maker will provide the written determination to the Complainant and Respondent simultaneously. The written determination must include certain prescribed information (see Section XI.3. of the TSHGP).

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If a Respondent is found to have committed Sexual Harassment, SPU will provide remedies to a Complainant and may impose disciplinary sanctions on the Respondent. Remedies must be designed to restore or preserve equal access to SPU's education program or activity.



## TSHGP – FCP: Appeal

Each Complainant and Respondent may appeal:

- A determination regarding responsibility; and
- A dismissal of a formal complaint or any allegations therein.

An appeal may only be made on the following bases:

- Procedural irregularity that affected the outcome of the matter;
- New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter;
- The Title IX Coordinator, an Investigator, or the Decision Maker had a conflict of interest or bias for or against Complainants or Respondents generally or the individual Complainant or Respondent that affected the outcome of the matter; and
- Solely with respect to an appeal of a dismissal of a Formal Complaint or any allegations therein, the rationale given for the dismissal of the Formal Complaint is not consistent with the standard for dismissal in this TSHGP.



# TSHGP: Record-keeping

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SPU must maintain records for each Sexual Harassment investigation for at least seven years (e.g., audio or audio-visual recordings or transcripts, disciplinary sanctions, remedies, appeal, informal resolutions, training materials for process administrators).

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SPU must also maintain records of actions taken in response to a report of Sexual Harassment for at least seven years even if a Formal Complaint is not filed.

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SPU will make the training materials used to train the Title IX Coordinator, any Deputy Title IX Coordinator, Investigators, Decision Makers, Appeal Reviewers, and Informal Process Facilitators publicly available on its [website](#).



# TSHGP: Retaliation

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The University strictly prohibits any retaliation against any person who files a complaint or otherwise participates in an investigation or proceeding under this TSHGP.

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Retaliation can be any type of adverse or negative action taken toward a person who filed a complaint or otherwise participated in an investigation or proceeding.

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Any person who commits retaliation may be subject to disciplinary action, up to and including dismissal from the University (for students) or termination of employment (for employees).



# Retaliation

The Title IX Coordinator will coordinate an appropriate level of investigation into the alleged retaliation.



Alleged retaliation by a student will be addressed through the Student Accountability Process or in connection with an existing complaint proceeding.



Alleged retaliation by an employee will be addressed in connection with an existing complaint proceeding, through a separate proceeding under the DHGP, or directly by the accused employee's direct supervisor.



# TSHGP: Informal Resolution

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**At any time after a Formal Complaint** is filed and prior to reaching a determination regarding responsibility, the University may offer to facilitate an informal resolution process that does not involve a full investigation and adjudication.

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**The University will not require** the two parties to participate in an informal resolution process.

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Also, the **University will not offer** or facilitate an informal resolution process to resolve allegations that an employee engaged in Sexual Harassment against a student.

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One option for an informal resolution process may be mediation.



# How to Conduct an Investigation and Grievance Process: In General

Identification and location of sources of information

Gathering of information

- Interviews
- Physical evidence (e.g., weapon, book, food)
- Documentary evidence (e.g., police report, performance review, floorplan)
- Electronic evidence (e.g., video, card access logs, screen shots)

Collation and analysis of gathered information

Evaluation of information in terms of material that is directly related and relevant

Written summary of investigation

- May include credibility analysis



# How to Conduct an Investigation and Grievance Process: Protecting the Safety of the Parties

Collaborative personal safety planning

Safety measures:

- Are supportive measures
- Are available to both parties (possibly witnesses too)
- Examples
  - No-contact directive
  - Arrangements for in-person classes (e.g., seating in opposite sides of the room)
  - Emergency removal (if criteria met)
  - Office of Safety and Security assistance with obtaining a court issued protection order
  - Safety escorts

Confidentiality

Presumption that respondent is not responsible





# How to Conduct an Investigation and Grievance Process: Promoting Accountability

Goals: Accountability within the process and accountability of individuals

## Accountability within process:

- Written procedures available to both parties
- Training for administrators (required by Clery Act & Title IX)
- TIX Coordinator provides oversight
- Decision Maker asks questions, requests investigation, evaluates evidence
- Document analysis (e.g., in reports, in decisions)
- Appeal opportunity
- Retain records
- Bias / conflict of interest requirements

## Accountability of individuals:

- Cross-examination during live hearings
- Immediate steps to address retaliation
- Remedies and disciplinary sanctions



# How to Serve Impartially and Promote Impartial Investigations and Adjudications

## Key Concepts

- Prejudgment of the facts at issue
  - Prohibition on sex stereotypes
  - Avoiding inferences – allegations involving sexual conduct, sexual history, or drugs and/or alcohol use
  - Avoiding inferences – party status
- Conflicts of interest
  - No *per se* conflicts of interest outlined in the regulations
  - Actual vs perceived
- Bias
  - Obligation under Title IX to treat each person as an individual, not as a member of a class
  - All protected classes



# How to Serve Impartially and Promote Impartial Investigations and Adjudications

## Promoting Impartiality

- Presumption of non-responsibility
- Equitable treatment of Respondents and Complainants
- Objective evaluation of all relevant evidence
- No single-investigator models
- Self-disclosure of any potential conflict of interest



# Technology for Live Hearings



Decision Makers can decide to hold live hearings in-person or virtually.



If either party asks for a hearing to be virtual, SPU will allow the parties to be in separate rooms and use technology that allows participants to simultaneously see and hear the person answering questions.



Title IX regulations require that Decision Makers receive training on any technology to be used at a live hearing.



# Relevance of Questions and Evidence: In General

## Requirement

- Decision Makers must receive training on issues of relevance of questions and evidence, including when questions and evidence about the Complainant's sexual predisposition or prior sexual behavior are not relevant.

## Definitions

- Title IX Regulations: No definition provided for “relevance.”
- Federal Rule of Evidence 401: “Evidence is relevant if:
  - (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and
  - (b) the fact is of consequence in determining the action.”
- Merriam Webster (one prong): “affording evidence tending to prove or disprove the matter at issue or under discussion.”

## Questions to consider

- Is the evidence directly related to the allegation?
- Does the evidence help prove or disprove the allegation?



## Examples – Relevancy

### Relevant

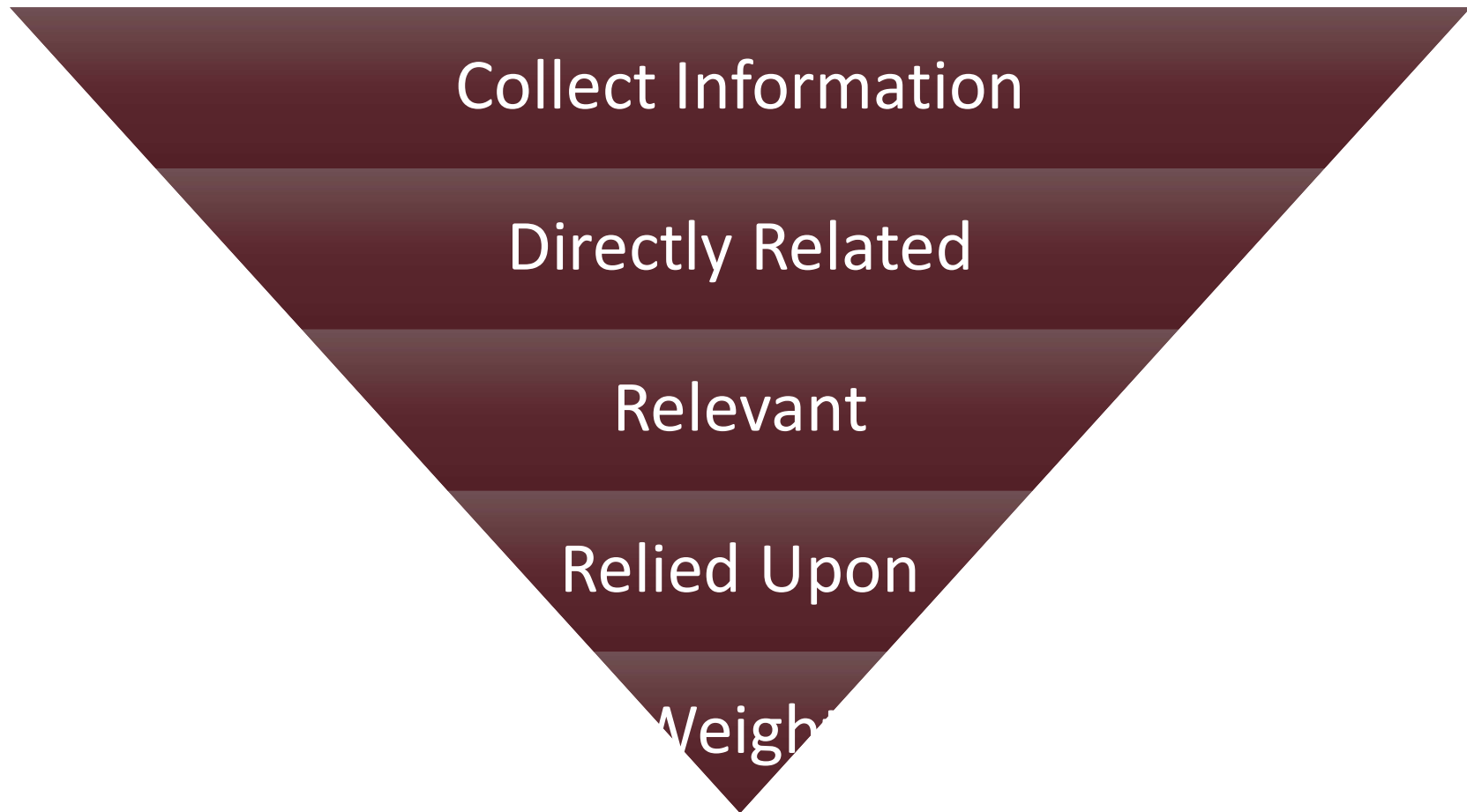
- Student A has accused Student B of sexual assault by having sex with Student A while Student A was incapacitated by alcohol consumption after a party. Advisor for Student B asks Student A: “Did you send any text messages or make any phone calls during the party?”

### Not relevant

- Student A has accused Student B of sexual assault. Advisor for Student A asks Student B: “Were you convicted for driving under the influence when you were a sophomore in high school?”



# Relevance of Questions and Evidence: Getting to a Determination



## Inculpatory & Exculpatory Evidence

### Which evidence is considered?

- Decision Makers must make an objective evaluation of all relevant evidence, including both inculpatory and exculpatory evidence.
- Inculpatory: implying or imputing guilt; tending to incriminate.
- Exculpatory: tending or serving to clear from alleged guilt or fault.





## Examples – Inculpatory vs Exculpatory Evidence

### Inculpatory Evidence

- A text message sent the day after an incident from the respondent stating: “I never should have forced you to have sex with me after you said ‘no.’ I’m so sorry for what I did.”

### Exculpatory Evidence

- A text message sent the day after an incident from the complainant stating: “I know that I said ‘yes’ at the time. And I knew what I was doing. But now I feel like you just used me as a one-night-stand.”



# Sexual Predisposition & Prior Sexual Behavior

## Is Sexual History Considered?

- Generally, no—Questions and evidence of a Complainant's sexual predisposition or prior sexual behavior are relevant only if:
  - They are offered to prove that someone other than the Respondent committed the conduct alleged by the Complainant, or
  - They concern specific incidents of the Complainant's prior sexual behavior with the Respondent and are offered to prove consent.



## Examples – Considering Sexual History

### Impermissible

- Student A has accused a faculty member of sexual harassment. Advisor of the faculty member asks Student A: “How many men did you sleep with in the month before you claimed the faculty member sexually harassed you?”

### Permissible

- Student A has accused Student B of sexual assault. Student A testified that Student B had intercourse with Student A without using a condom which Student A would never have agreed to because Student A always requires protection. Advisor of Student B asks Student A: “But didn’t you have unprotected sex with Student B a week prior? And didn’t you tell Student B it was ‘okay’ that Student B didn’t wear a condom?”



# Relevance of Questions and Evidence

## Repetitive Questions

- Questions that are duplicative or repetitive may be deemed not relevant and excluded.

## Privilege

- SPU's grievance process may not require or permit questions or evidence that seek disclosure of information protected by legal privilege, unless the person holding the privilege has waived the privilege.



## Examples – Privileged Information

### Permissible Use

- Student who makes a report of sexual assault executes a HIPAA-compliant release requesting and authorizing the hospital to provide a copy of her SANE/SART examination to the investigator.

### Impermissible Use

- Respondent tells investigator he met with an attorney the day after the alleged sexual assault. The investigator demands that the respondent reveal what he told his attorney. When the respondent declines, the investigator states he will note that in the report and advise the hearing panel to draw inference against the respondent for failing to cooperate.



# Does any testimony get excluded?

## Part 106.45(b)(i)

- Yes – Decision maker must exclude the statements of any party or witness who refuses to submit to cross-examination from the other party's advisor

## Cardona Decision

- The court vacated the part of 34 C.F.R. § 106.45(b)(6)(i) that prohibits a decision-maker from relying on statements that are not subject to cross-examination during the hearing: “If a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility....”



## Examples – 106.45(b)(6)(i)

### Excluded

- Witness gives statement to investigator that witness observed complainant right before alleged sexual assault. Witness told the investigator that complainant was too drunk to stand up. Witness fails to attend hearing. Investigator is prepared to relay what witness told investigator.

### Not excluded

- Witness answers questions from hearing officer. After consulting with complainant, advisor for complainant says that the advisor has no questions for witnesses. Advisor for respondent then proceeds to cross-examine witness.



# Questions?





A photograph of a university campus during autumn. The scene features a large, leafy tree in the foreground on the left, a paved walkway, and several multi-story brick buildings in the background. The sky is overcast, and the overall lighting is soft. The word "Conclusion" is overlaid in white text in the center of the image.

# Conclusion



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