

HUSCH BLACKWELL

KBOR Title IX Summer Meeting

July 2024

What is the “new” Title IX regulation?

- A series of revisions and additions to 34 C.F.R. Part 106 that address several issues, including:
 - The scope of sex discrimination and sex-based harassment covered by Title IX
 - The procedures and requirements for addressing complaints of sex discrimination and sex-based harassment
 - Specific content on accommodating pregnancy and pregnancy related conditions

When is the new regulation supposed to take effect?

- August 1, 2024
- Those portions of the regulation that govern response to specific instances of sex discrimination and sex-based harassment apply only to incidents that allegedly occurred on or after August 1, 2024
- Earlier incidents are governed by regulations that were in place at the time the misconduct allegedly occurred

Example

On August 24, 2024, a student is sexually assaulted by a peer in a residence hall on the university's campus. The incident is reported to the Title IX Coordinator the following day.

The new regulations govern the institution's response to this report, including its investigation and determination.



Example

On August 24, 2024, a student reports that they were sexually assaulted by a peer in a residence hall on the university's campus and that the assault occurred on May 2, 2024.

The August 2020 regulations govern the institution's response to this report, including its investigation and determination.



What is the state of litigation? (as of 7/24/2024)

- Multiple injunctions imposed affecting 15 states
- One injunction affecting hundreds of K-12 and higher education institutions
- Several injunction requests pending
- Two circuits have refused to stay injunctions
- Supreme Court review is pending



What do the injunctions do?

- Preclude the Department of Education from implementing and enforcing the regulation
- Do not directly order schools to do anything
- But effect of an injunction is that August 2020 regulations remain fully in place
- And underlying legal rulings in injunction orders construing Title IX have practical consequences

What about the District of Kansas injunction?

- Enjoins the Department of Education from implementing or applying the regulation against Kansas, Alaska, Utah, and Wyoming; and
- Any school attended by a member of Young America's Foundation or Female Athletes United; and
- Any school attended by children of members of Moms for Liberty

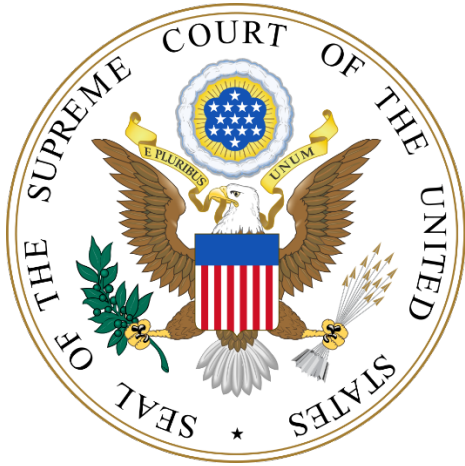
What is the reasoning of the Kansas injunction?

- Title IX's definition of "sex" is rooted in biological distinctions between males and females and does not include gender identity
- Department of Education cannot pass on a "major question" throughout regulation; Congress must speak
- Regulation violates the Spending Clause; states did not clearly condition their receipt of federal funds on non-discrimination to include gender identity
- Standard for sexual harassment is impermissibly vague and overbroad in violation of the First Amendment

“As the Department would have it, sex means sex except when gender identity comes until play. Not only is this an illogical distinction forbidden by Title IX's exclusions, but it would also constitute the very type of sex discrimination Title IX prohibits by privileging transgender persons with the ability to abide by their biological sex or not in order to take advantage of preferred benefits or services.”
Texas, --- F. Supp. 3d at ----, 2024 WL 2947022, at

Kansas v. United States Dep't of Educ., No. 24-4041-JWB, 2024 WL 3273285, at *16
(D. Kan. July 2, 2024)

When will the Supreme Court act?



- July 22 Department of Education seeks emergency relief from Sixth and Fifth Circuit denials of stay
- July 26 by noon States must respond
- Supreme Court decision as early as afternoon of July 26

What should institutions do today?

- Continue work on revised policy to implement if needed
- Prepare modified training for employees to implement if needed



What does implementation look like if necessary?

- Publish amended Title IX policy
- Implement revised employee training
- Implement revised student training
- Update collateral websites, pamphlets, and educational materials, etc.
- Update hearing procedures, investigation protocols, record keeping practices, etc.

Significant Revisions for Discussion

What is included in an education program or activity?

- Any operation of the institution, regardless of location
- Buildings owned or controlled by the institution
- Buildings owned or controlled by an officially recognized student organization (higher education only)
- **Conduct that is subject to the institution's disciplinary authority**
- **The exercise of institutional power or authority by employees and agents regardless of location**

Example

A college's student code of conduct prohibits various forms of misconduct and applies to students' actions regardless of their location. For example, the school has used the code to discipline students for using drugs and engaging in underage drinking in their own private apartments.



What about misconduct that happens abroad?



- Title IX only requires response to sex discrimination and sex-based harassment “in the United States”
- But institutions must address a “sex-based hostile environment” in their programs and activities even when some contributory conduct occurred abroad

Programmatic
Discrimination

Individualized
Discrimination

Sex-Based Harassment

Example

An institution's business school creates a special mentorship program that pairs female students with a female mentor who is a successful business executive. Only female students are allowed to participate. The program significantly improves the odds of a participant receiving a job on graduation. In addition to the mentor relationship, the program includes special seminars held on campus, paid travel to a national summit, a small scholarship, and a plaque awarded to the participant at the program's conclusion.



What's the difference between sexual conduct and conduct that is on the basis of sex?

- “Sexual” means the conduct itself has a sexual nature
- “On the basis of sex” means the conduct is targeted at a person because of their sex

Example

Calvin repeatedly tells jokes to Jean about how women are “stupid,” denigrates Jean’s own mental ability as a woman in front of others, and makes incessant, mocking comments to Jean about cooking, cleaning, and raising babies.



Can employees be compelled to serve as witnesses?

“Nothing in this definition [of retaliation] . . . precludes a recipient from requiring an employee or other person authorized by a recipient to provide aid, benefit, or service . . . to participate as a witness in, or otherwise assist with, an investigation, proceeding, or hearing under this part.”

New Title IX Regulation

Example

A faculty member who was at a conference in a neighboring city observed a colleague check into a hotel with a student. The student later made a complaint of quid pro quo harassment against the colleague, and the faculty member is identified as a relevant witness. The faculty member does not want to testify and is concerned that doing so will anger other faculty who are allied with the colleague.

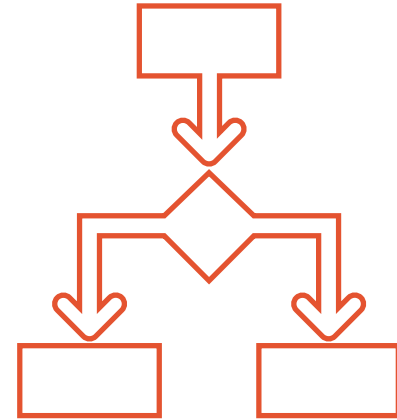


Which employees must report to the Title IX Coordinator?

- All non-confidential employees at K-12 institutions
- In higher education, all non-confidential:
 - Employees with authority to institute corrective measures
 - Administrators
 - Faculty and other teachers
 - Advisors

What about non-confidential employees who are not mandatory reporters?

- They must
 - Make a report to the Title IX Coordinator, or
 - Provide contact information for the Title IX Coordinator, and information about how to make a complaint to anyone who provides information about conduct that reasonably could be sex discrimination or sex-based harassment



Example

John works as a custodian in a residence hall. One day while John is sweeping the tile in a hallway, he sees student Marco run by being angrily chased by student Alex. As Alex passes by John, Alex looks at John as he exclaims “that dude just grabbed my junk!”



What if a party disagrees with a supportive measure decision?

- Institution must provide either party a “timely opportunity” to seek modification or reversal of supportive measure decision applicable to that party
- Appeal goes to an “appropriate and impartial employee” who was not the initial decisionmaker

What if circumstances change?

- Institution must provide a party with the opportunity to seek modification or termination of supportive measures applicable to them
- If circumstances change materially

Example

Kline reports that Cletus fondled Kline several months ago at an on-campus party. Kline believes a no-contact order is unnecessary because Cletus now lives off campus and Kline rarely sees them. After Cletus is notified of the complaint, Cletus threatens Kline via text message and begins to regularly appear outside Kline's academic building.



Who can make a complaint?

- The alleged victim
- A parent, guardian, or other authorized legal representative with the legal right to act on behalf of an alleged victim
- For sex discrimination other than sex-based harassment, any student or employee, or other person who was participating or attempting to participate at the time of the alleged discrimination, and
- The Title IX Coordinator, subject to certain factors

Example

A 16-year-old high school student is participating in a summer enrichment program on the university's campus. While on campus, the student is sexually harassed by another program participant. The student's mother may make a complaint of sex-based harassment.



Example

An assistant coach believes that members of women's sports teams are being discriminated against by receiving poor quality food, old uniforms, few training opportunities, and insufficient facilities, relative to men's teams. The assistant coach can file a complaint, even though it is the players who are allegedly being discriminated against.



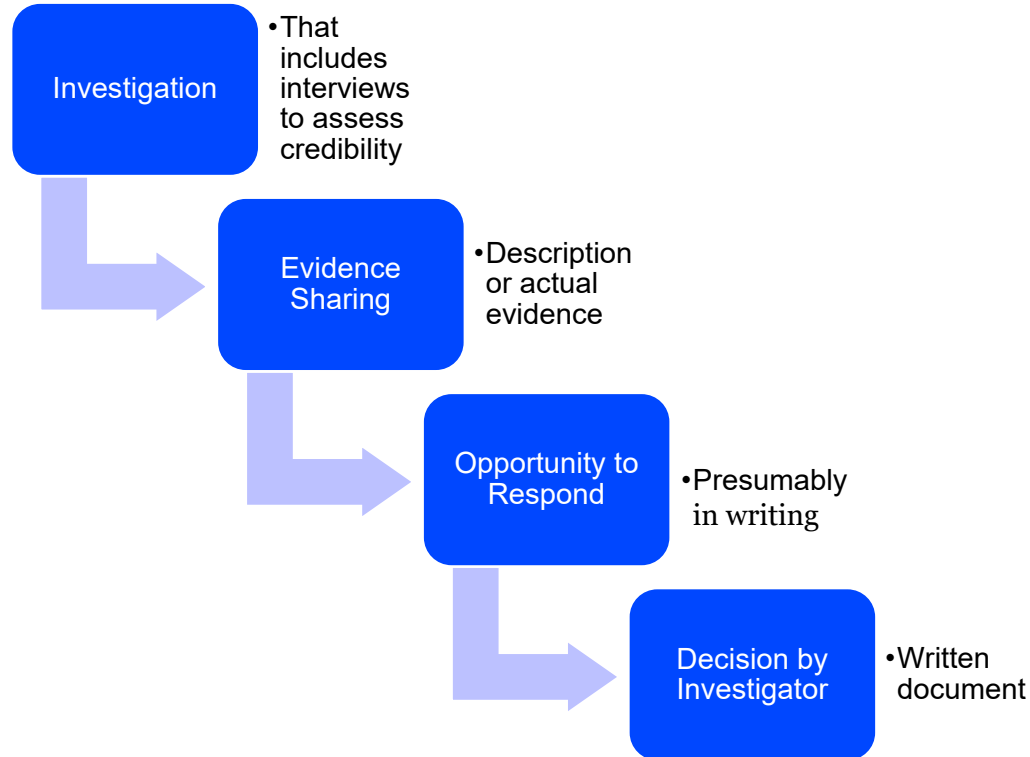
What are the two grievance processes?

- General grievance process in § 160.45
- Minimum grievance process that applies to
- All sex discrimination and sex-based harassment except that covered by *46
- Augmented grievance process in § 160.46
- Applies additional requirements to cases with
- Sex-based harassment involving a college or university student as a complainant or respondent

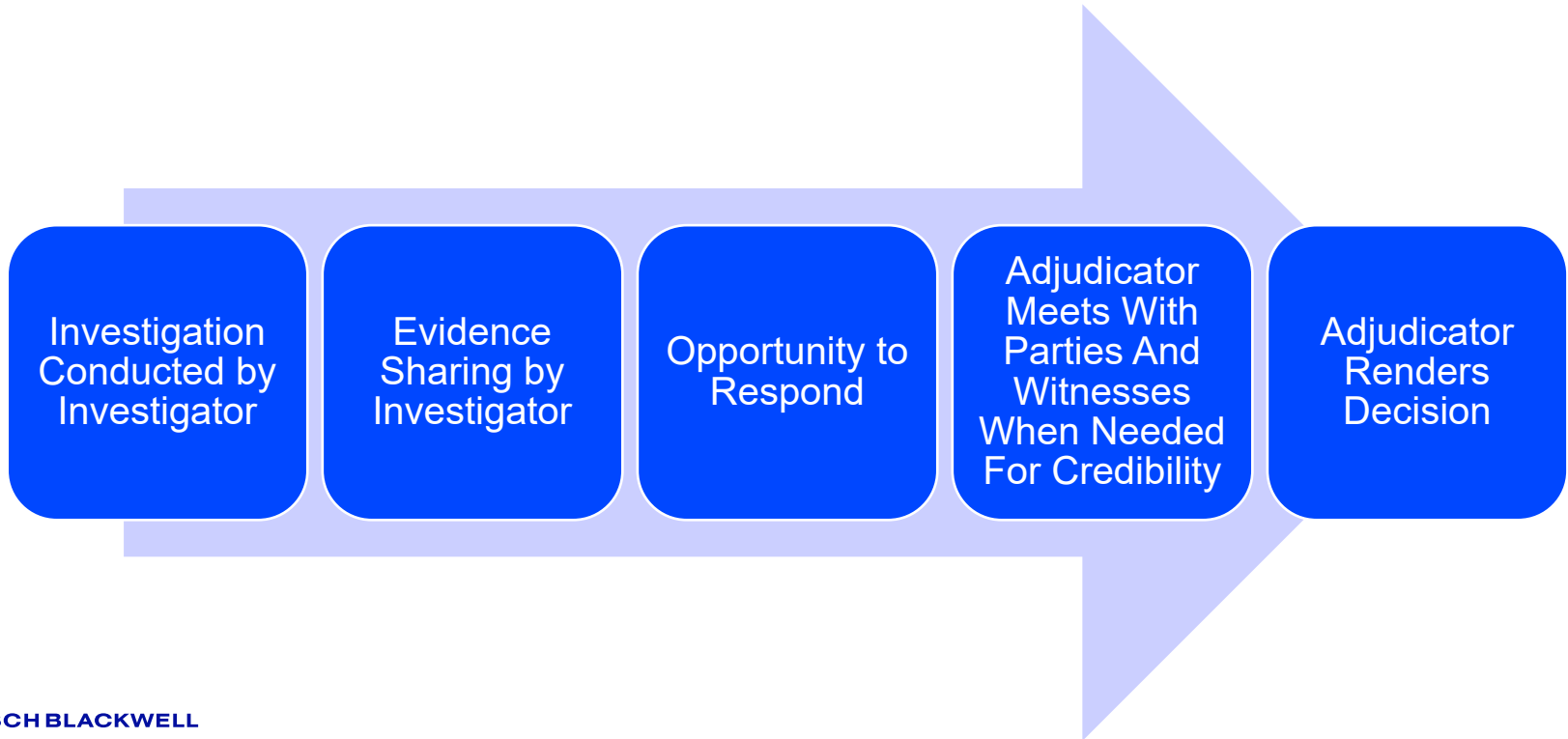
Who is the decision-maker under the *45 process?

- The person who determines whether or not the allegations are supported under the standard of evidence
- The decision-maker can be “the same person as the Title IX Coordinator or investigator”

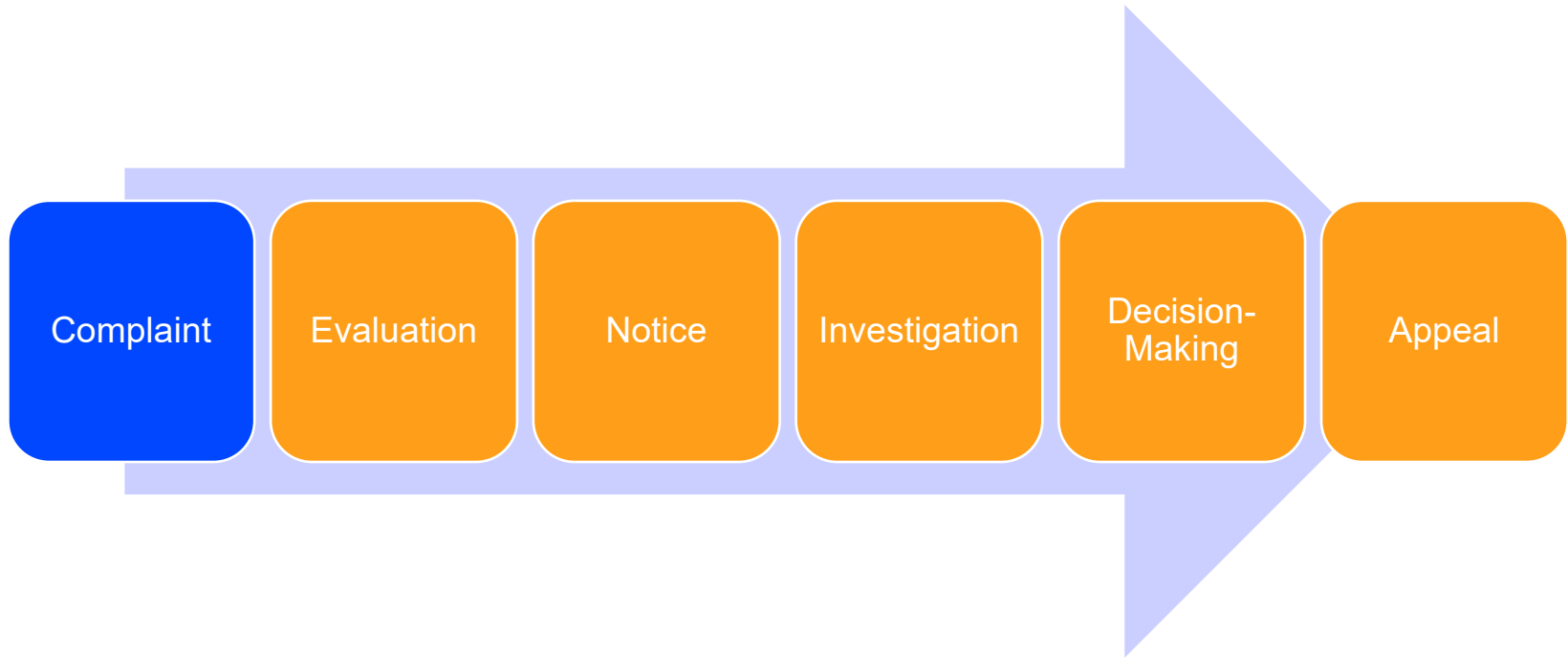
Can you have a *45 “single person” model?



Can you have a *45 “two person” model?



Where do the *46 procedures have augmented requirements?



Live Hearing Option Under *46

How would the live hearing work?

- A decision-maker (a single hearing officer or hearing panel) runs the hearing
- Synchronous and contemporaneous participation by the parties
- Physically present in the same location or with live virtual technology
- Institution must keep an audio or audiovisual recording, or a transcript

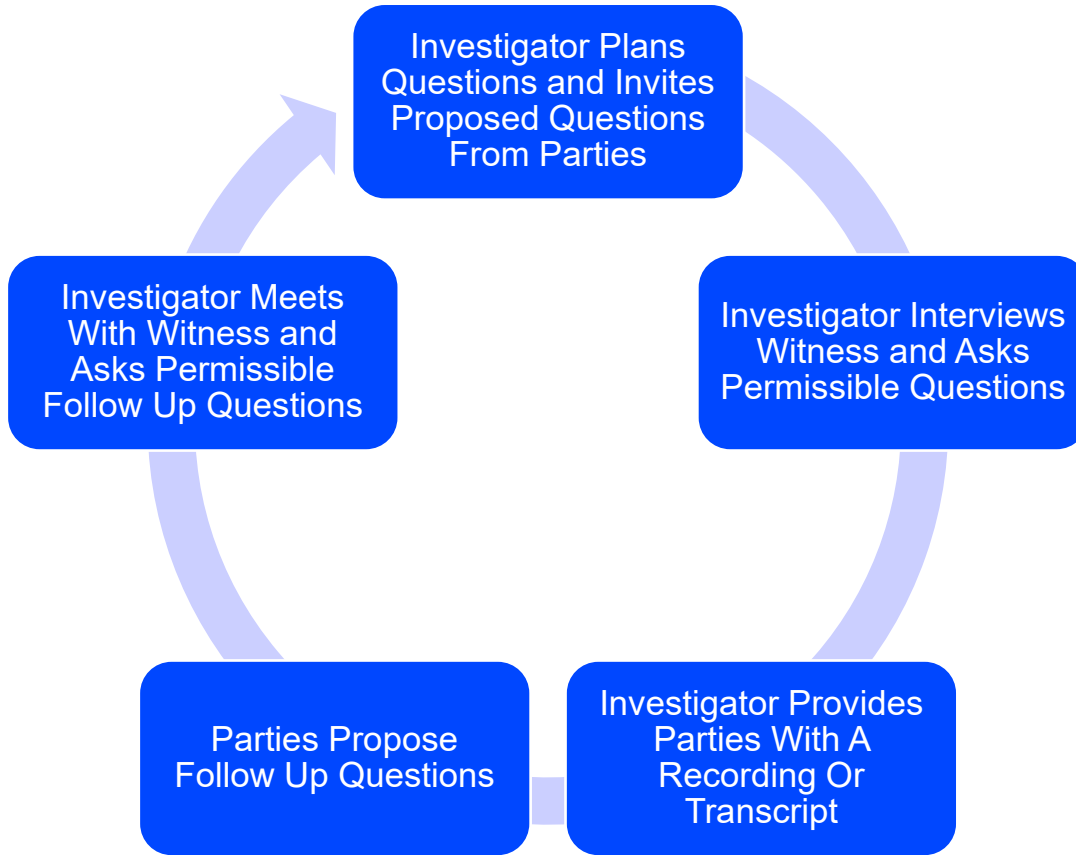
How do parties ask questions?

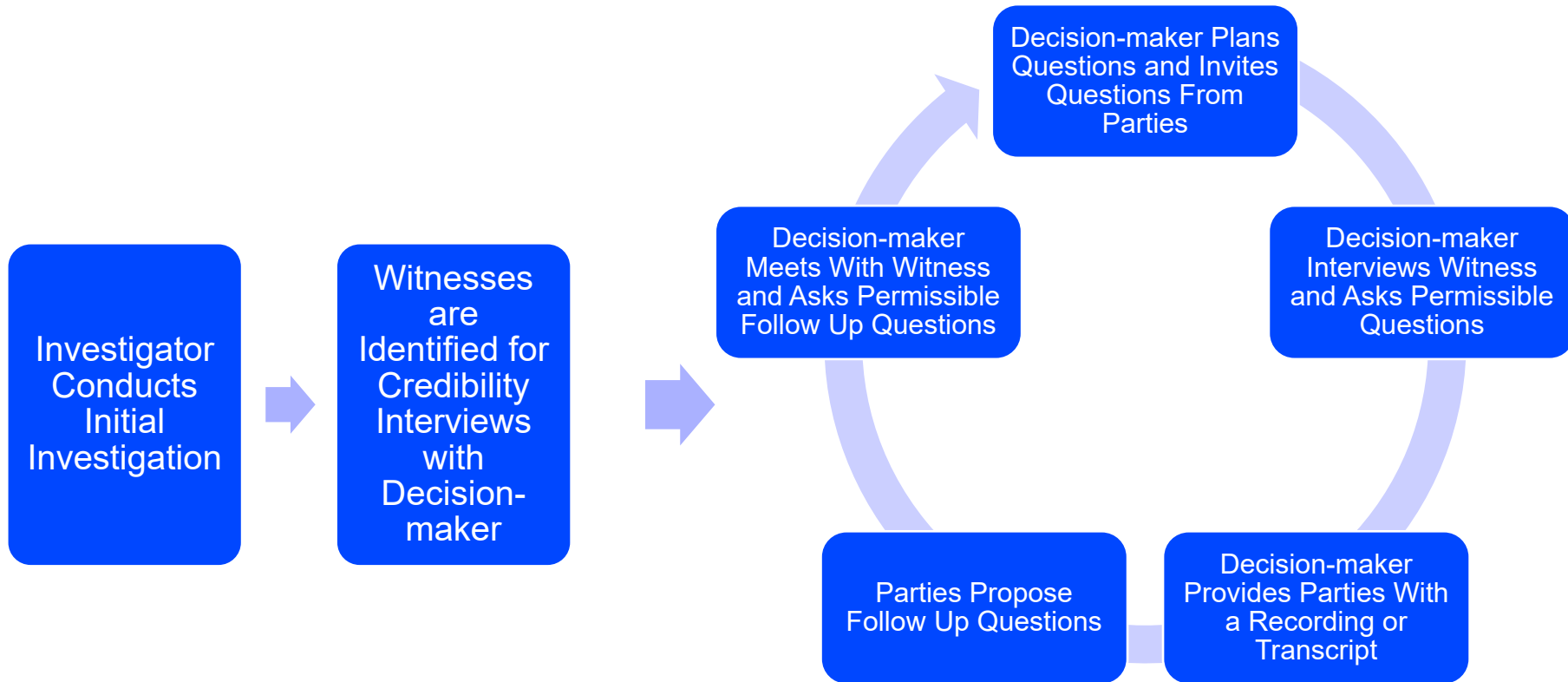
- **Option 1:**
- Each party's advisor asks questions
- Never the party themselves
- If a party lacks an advisor, institution must provide one
- Similar to August 2020 regulations
- **Option 2**
- Allow each party to propose questions that they want asked
- Questions are then asked by the decision-maker after being screened
- Under this option, advisors are passive

Asynchronous, Iterative Option Under *46

How does the asynchronous, iterative process work?

- Instead of a live hearing
- Investigator or decision-maker asks questions of parties and witnesses, that the investigator or decision-maker wants to ask, in individual meetings
- Each party is allowed to propose questions the party wants the investigator or decision-maker to ask, and have those questions asked, if appropriate
- Investigator or decision-maker must then provide parties with a recording or transcript of the interview with enough time for the party to propose follow-up questions
- And then a follow-up interview must occur where the appropriate follow-up questions are asked
- All questions still must be relevant, not otherwise-impermissible, clear, and not harassing





When can informal resolution it be used?



- Any time prior to a final determination under a grievance process
- Unless the accusation is that an employee engaged in sex-based harassment of a K-12 student or informal resolution would conflict with federal, state, or local law

Are there reporting obligations for the needs of pregnant students?

- When student informs employee of student's pregnancy or related condition
- Employee must promptly provide student with Title IX Coordinator's contact information and inform student of Title IX Coordinator's ability to prevent sex discrimination and ensure equal access



What are some common examples of reasonable pregnancy accommodations?

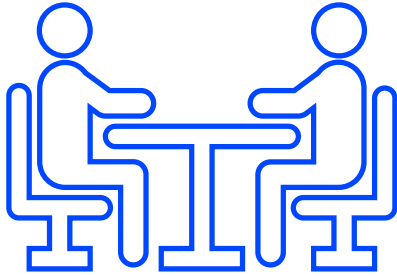
- Breaks during class to express breast milk or breast feed
- Breaks to attend to pregnancy related needs, including eating, drinking, or using the restroom
- Intermittent absences to attend appointments
- Access to online or homebound education
- Changes in schedule or course sequences
- Extensions of time and rescheduling
- Counseling

Must a school provide lactation space?

- Must provide access to lactation space, other than a bathroom, that is clean and private
- Space must be available both for expressing breast milk or for breastfeeding, as needed



Who is responsible for ensuring accommodations?



- The Title IX Coordinator must “coordinate these actions”
- Title IX Coordinator must ensure that student is provided notification of protections against discrimination and various pregnancy related rights

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