



# Utah System of Higher Education Training

*August 2024*

Martha Compton

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**GRAND RIVER | SOLUTIONS**



# MEET YOUR FACILITATORS



Martha Compton

Regional Director of Client Relations and Engagement

Martha Compton has over 20 years of experience in higher education, specifically investigating and resolving student conduct, sexual misconduct, and interpersonal violence matters. Martha is a nationally recognized expert in student conduct and has held leadership positions within the Association for Student Conduct Administration, including President. She is frequently sought after as a trainer, and has trained hundreds of individuals across the country on developing policy and conducting thorough and impartial investigations and hearings.



Darci Heroy

Regional Director of Client Relations and Engagement

Darci Heroy is a Regional Director of Client Relations and Engagement responsible for coordinating and developing collaborative relationships with educational institutions around the West Coast, Pacific Northwest, and Mountain states. Her insights from over fifteen years in the fields of labor and employment, equity compliance, and higher education have provided her with in-depth knowledge of the unique complexities and opportunities of institutional cultures.

# GETTING TO KNOW YOU



1. Name, pronouns if you wish to share
2. Your role at the institution
3. How long you have been doing Title IX work



# DAY 1 AGENDA

Big Picture + Overview

2020 Regulations: Scope and Geography,  
Definitions

Serving Impartially, Reporting Channels

Training Requirements

Employee Reporting Obligations

Responding to Reports and Intakes

Pregnancy and Parenting

# **TITLE IX REGULATIONS DEFINITIONS AND SCOPE 2020**



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## Title IX of the Education Amendments Act of 1972

"No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."

20 U.S.C. § 1681 (1972).



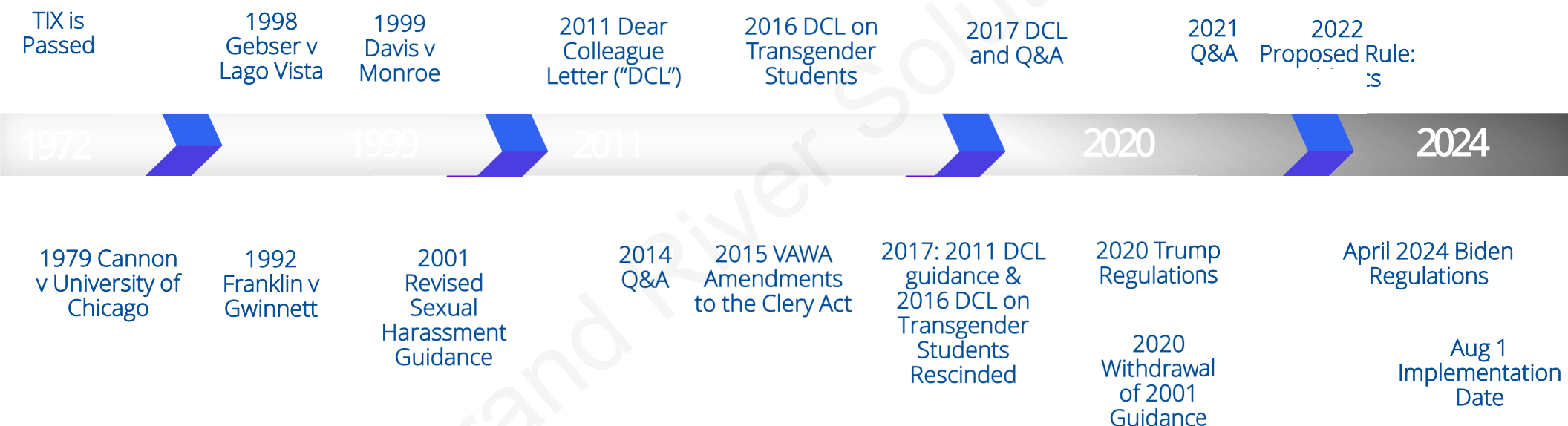
# TITLE IX APPLIES TO ALL FORMS OF SEX DISCRIMINATION

- Sexual Harassment
- Achievement Awards
- Athletics
- Benefits
- Financial Aid
- Leaves of absence and re-entry policies
- Opportunities to join groups
- Pay rates
- Recruitment
- Retention Rates
- Safety
- Screening Exams
- Sign-on Bonuses
- Student and Employee Benefits
- Thesis Approvals
- Vocational or College Counseling
- Research opportunities



# The History of Title IX

## *A Timeline*



# SINCE 1975...



Recipients have been required to . . .

- Notify students (defined to include persons who have gained admission) of their nondiscrimination policies and to resolve student complaints of sex discrimination.
- Maintain nondiscrimination notices and adopt and publish grievance procedures
- Prohibit discrimination based on pregnancy or related conditions
- Prohibit sex-based distinctions based on parental, family, or marital status
- Prohibit discrimination on the basis of sex in employment
- Balance equity with promptness



# THE TITLE IX REGULATIONS

## SEXUAL HARASSMENT ONLY

1

Narrows the definition of sexual harassment;

2

Narrows the scope of the institution's educational program or activity;

3

Narrows eligibility to file a complaint;

4

Develops procedural requirements for the investigation and adjudication of sexual harassment complaints, only.

# SEXUAL HARASSMENT: DEFINED IN 1996, 2001, & 2011 GUIDANCE

Sexual harassment means conduct on the basis of sex that satisfies one or more of the following:

- (1) Conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;
- (2) Unwelcome conduct determined by a reasonable person to be so **severe, pervasive, OR objectively offensive** that it **effectively denies** a person equal access to the recipient's education program or activity; or
- (3) Sexual assault is a form of sexual harassment

\*Dating Violence, Domestic Violence, Stalking not included pre 2020 regulations.

# SEXUAL HARASSMENT: SECTION 106.30

Sexual harassment means conduct on the basis of sex that satisfies one or more of the following:

- (1) An **employee** of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;
- (2) Unwelcome conduct determined by a reasonable person to be so **severe, pervasive, and objectively offensive** that it **effectively denies** a person equal access to the recipient's education program or activity; or
- (3) "**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).





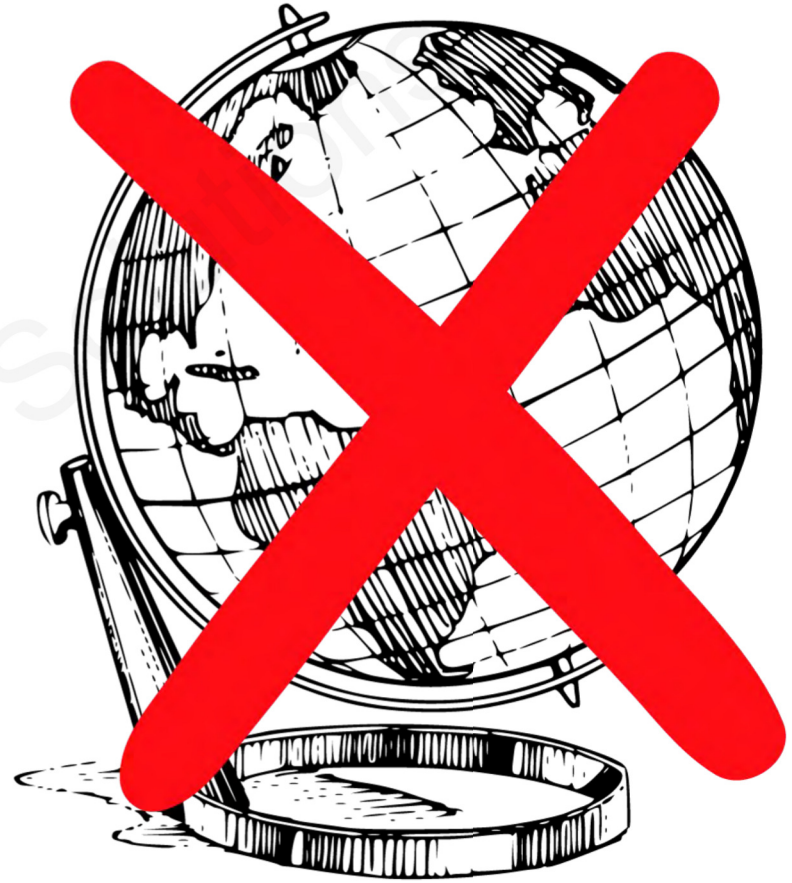
## COVERED GEOGRAPHY

Includes locations, events, or circumstances over which the recipient exercised **substantial control** over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.

- ✓ On campus or in a building owned or controlled
- ✓ Off-campus incident that occurs as part of the institution's operations
- ✓ Institution exercised substantial control over the respondent and the context of alleged sexual harassment that occurred off campus pursuant to § 106.44(a); or
- ✓ the incident of sexual harassment occurs at an off-campus building owned or controlled by a student organization officially recognized by a postsecondary institution

# NOT COVERED GEOGRAPHY

- x Off campus conduct, even if it has an impact on the educational program or activity;
- x Conduct that occurs outside of the United States.



# COVERED INDIVIDUALS

ELIGIBILITY FOR TITLE IX'S PROTECTIONS:

**“At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed.” 34 C.F.R. § 106.30**

- Applicant
- Enrolled or Employed
- Accepted or Hired



# GEOGRAPHY

2020

Inside U.S.

On-campus

Off-campus if part of P&A

May include online conduct

Building owned or controlled by institution

Building owned or controlled by recognized organization

Places where we have substantial control over respondent and context

2024

Inside U.S.

On-campus

Off-campus if part of P&A

May include online conduct

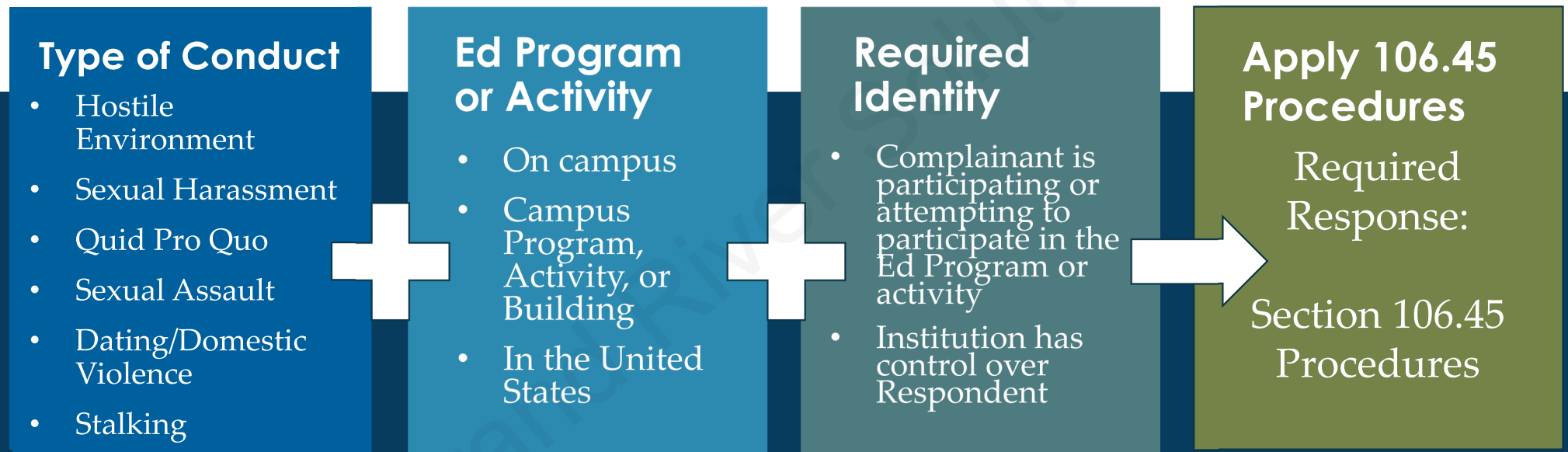
Buildings? Substantial control?

Flexibility to focus on disciplinary authority

Conduct outside of Title IX jurisdiction may contribute to hostile environment

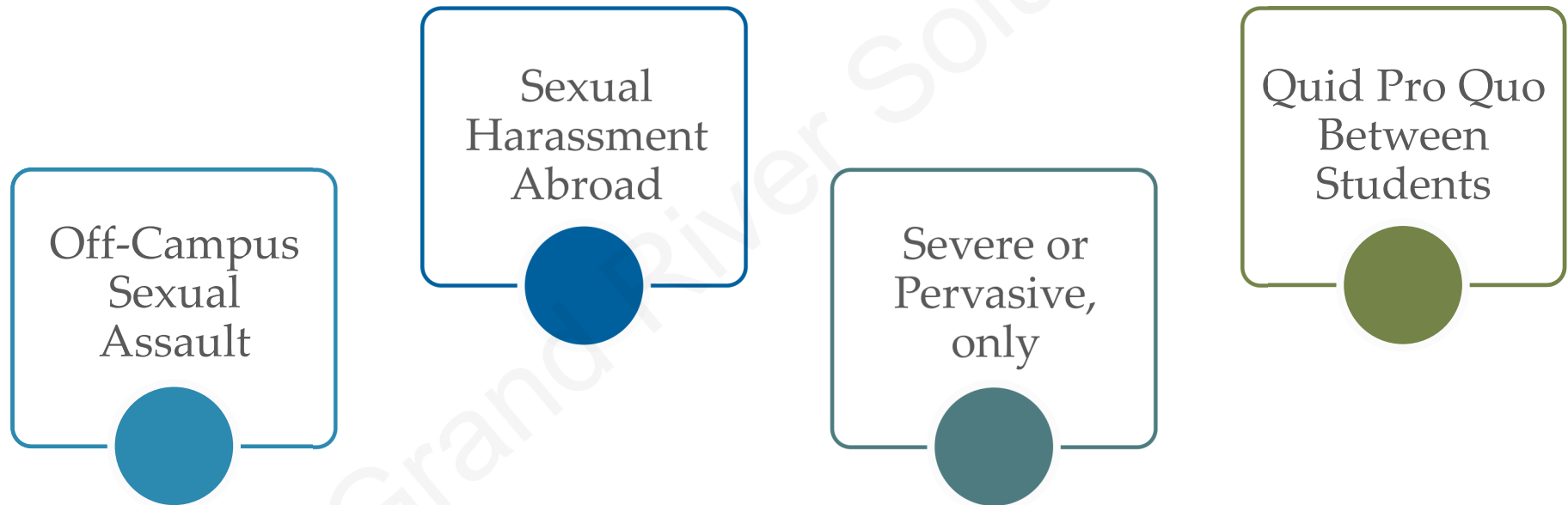


# TITLE IX APPLICATION (POST-MAY 2020)



# CONDUCT FALLING OUTSIDE THE SCOPE OF TITLE IX

- Apply other institutional policies and procedures
- Ensure that those policies and procedures comply with VAWA/Clery, other intersecting federal and state laws



# ACTUAL NOTICE

Institution must respond when it has:

"Actual Knowledge..."

When "an official of the recipient who has authority to institute corrective measures" has notice, e.g., Title IX Coordinator

...of "sexual harassment that occurred within the school's "education program or activity..."

- "includes locations, events, or circumstances over which the recipient exercised substantial control" over the respondent and the context in which the sexual harassment occurred
- Fact specific inquiry focused on control, sponsorship, applicable rules, etc.

...against a "person in the United States"

So, not in the study abroad context

A Narrowed Scope of Institutional Responsibility



# MAIN CHANGES FOR 2024

Creates framework to respond to sex discrimination other than sexual harassment

Updated training required for all employees

Not strictly limited by geography; impact matters

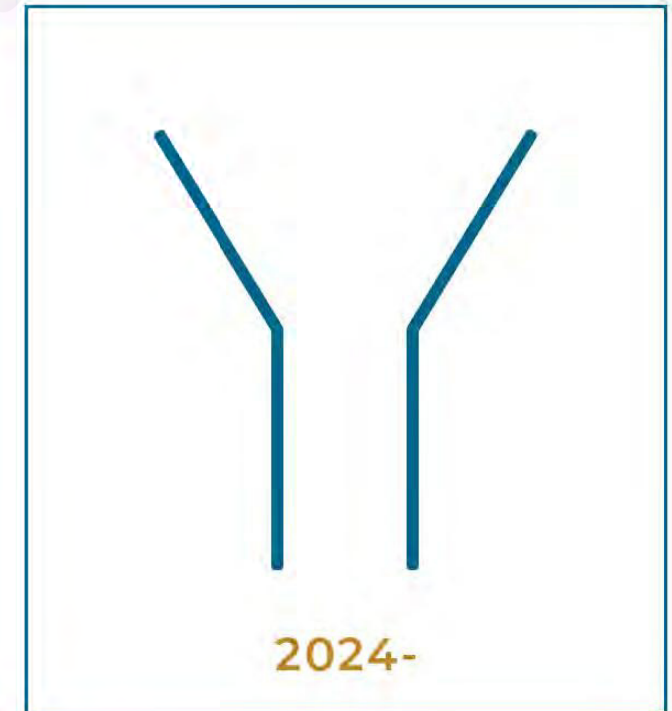
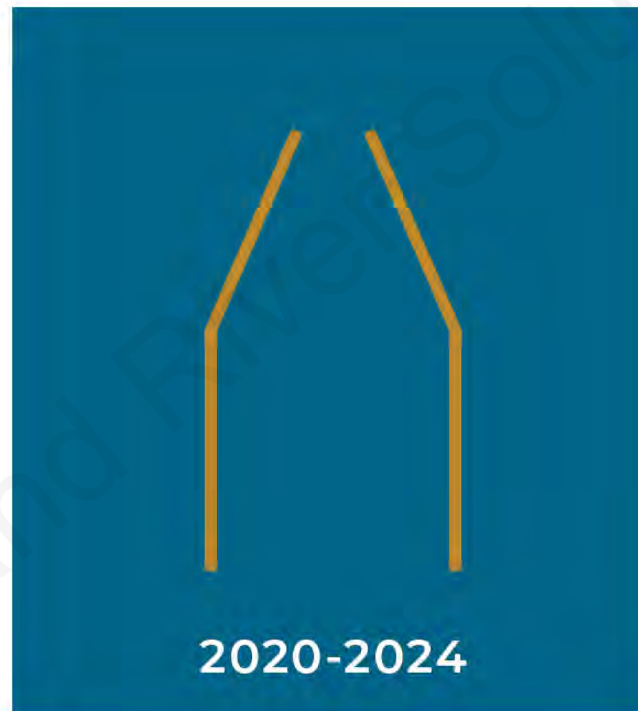
Expands employee reporting obligations

Requires prompt and effective action to end sex discrimination and prevent its recurrence

# BIG PICTURE: SHIFTING THE TIX FUNNEL SHAPE

Top of Funnel: Access to TIX Policy

Bottom of Funnel: Process Due



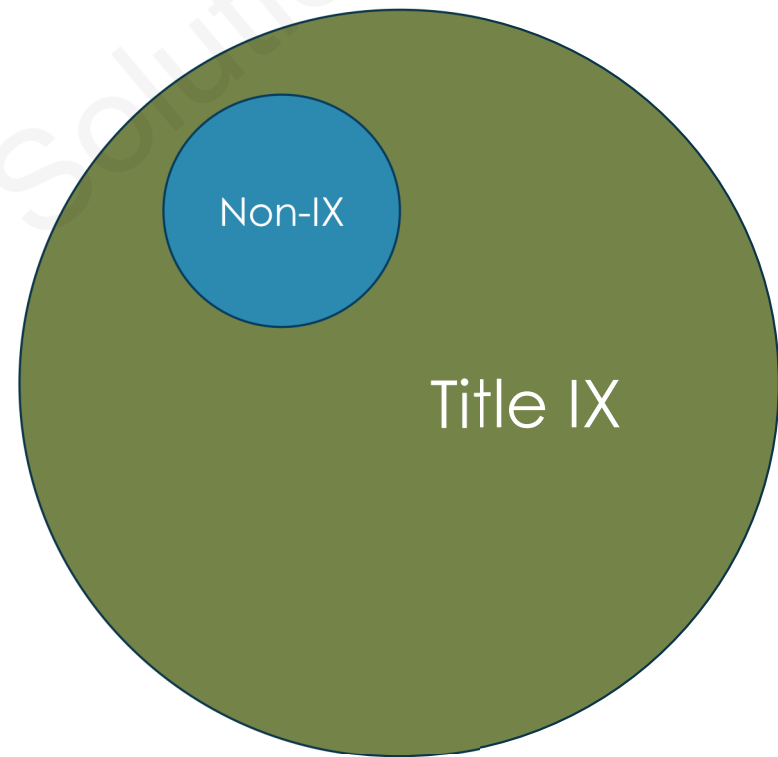


# WHICH POLICY APPLIES?

2020



2024



# ACTION PLAN - FOR QUICK PIVOT

Review your policy landscape

Update/adopt compliant policies

Retrain your implementation staff

Prepare to train all employees

Refresh community-facing materials

# INTERSECTION WITH OTHER LAWS



# SOURCES OF COMPLIANCE OBLIGATION

Title IX Final Regulations

Violence Against  
Women Act

Other, Intersecting  
Federal Laws

State Law

Institutional Policies

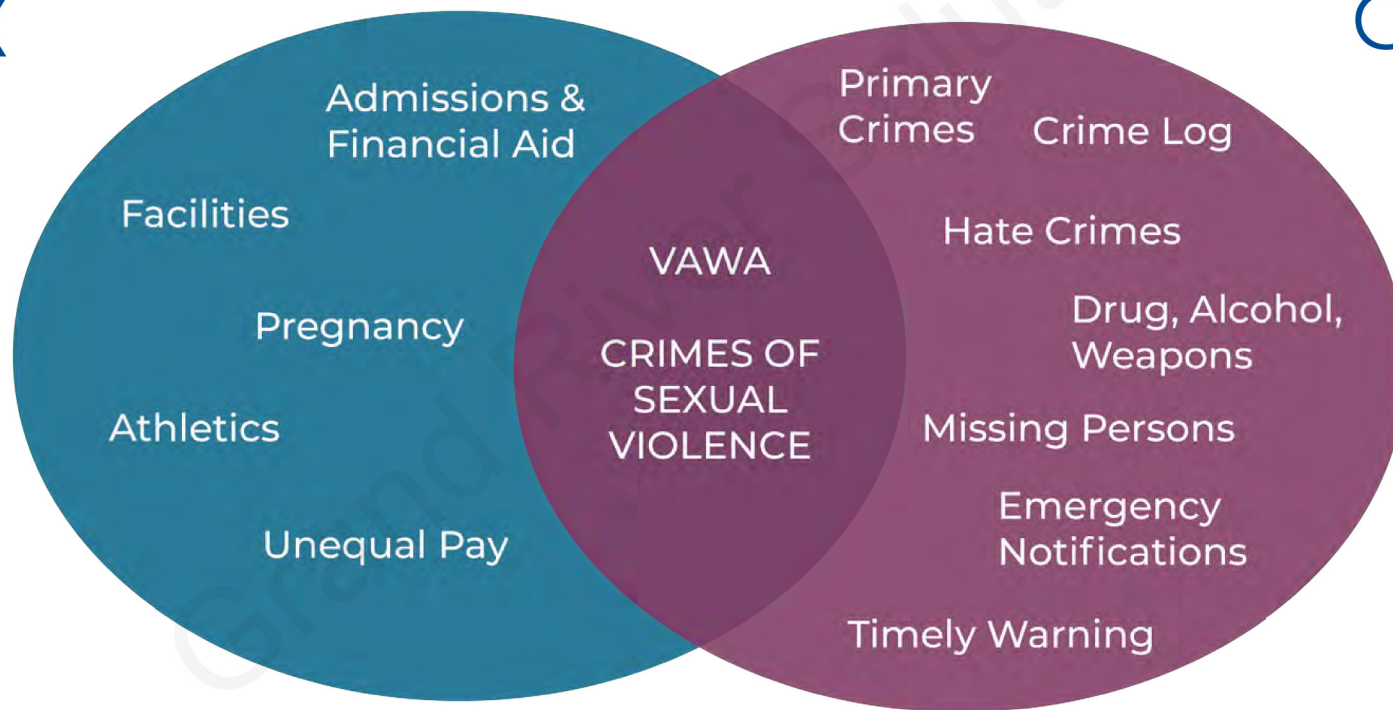
Resolution Agreements

# OVERLAPS

The Clery Act is not Title IX  
2013 VAWA amended the Clery Act (they are not separate).

Title IX

Clery Act





# VAWA AND CLERY RESPONSE

stalking, as required by paragraph (k) of this section; and

(vii) A statement that, when a student or employee reports to the institution that the student or employee has been a victim of dating violence, domestic violence, sexual assault, or stalking, whether the offense occurred on or off campus, the institution will provide the student or employee a written explanation of the student's or employee's rights and options, as described in paragraphs (b)(11)(ii) through (vi) of this section.

(12) A statement advising the campus community where law enforcement

- Title IX (historically) and VAWA response are not based on geography, they are based on identity (usually).
- Title IX (current) response and Clery counting are based on geography

# VAWA AND INVESTIGATION/DETERMINATION PROCEDURES

- Fair disciplinary procedures (institutional response)
- Fair, prompt, impartial investigation and resolution
- Procedures must be conducted by “officials” who receive “annual training.”
- Advisors of choice
- Must publish the standard of evidence (whatever it may be)
- List all sanctions for VAWA crimes

# REQUIRES PUBLICATION OF ALL AVAILABLE SANCTIONS

- \*Not a range\* (ignore prior OCR statements, since withdrawn, that institutions can use a range).
- Must specifically list all available sanctions for:
- Domestic violence; Dating violence; Sexual assault; Stalking
- **For suspension, list ALL possible suspension lengths.**
- **These standards apply to student discipline and faculty/staff discipline.**

# PROVIDING WRITTEN NOTICE

Must notify victim in writing about:

Sanctions, protective measures;

Evidence preservation;

How to report the offense, on and off campus, and assistance with reporting;

Availability of orders of protection, no contact orders, etc.;

Interim remedies, including options for and assistance with changing academic, living, transportation, and working situations, if requested and reasonably available;

Procedures for institutional disciplinary proceedings.

# PROVIDING WRITTEN NOTICE

- Written policy provided to all students and employees about awareness programs, confidentiality, support and resources, and disciplinary procedures
- Simultaneous written notice of outcome





# VIOLENCE AGAINST WOMEN ACT

## In short:

- Training, training, training...
- Awareness programs
- Bystander intervention training
- Ongoing prevention and awareness campaigns
- Primary prevention programs
- Risk reduction training (this is the one I often see not included)





# VAWA CRIMES, TITLE IX VIOLATIONS, AND STATE LAW

- Thinking about overlaps: some state laws and Title IX adopt Clery definitions (sort of); some use very different definitions (especially for sexual harassment)
- Multiple obligations may stem from a specific report; whose role to address each element of the federal and state obligations?
- Note also overlap with Clery Act hate crime definitions
- Who does it apply to? Only between employees? Only involving employees?
- Importance of record-keeping, information-sharing, and getting on same page

# FMLA, PUMP ACT, PWFA, SIMILAR STATE LAWS

- Intersection with Title IX and pregnancy or related conditions, including lactation, leaves of absence related.
- For student-employees, consider all applicable laws.



# LITIGATION PENDING

- Ongoing injunction on ED "NOI" implementing Bostock
- Several new lawsuits challenging 2024 Title IX regulations brought by at least 15 states

## Issues:

- Whether *Bostock* applies in Title IX context
- Whether ED had authority to issue these Title IX regulations
- Whether ED can preempt state laws concerning LGBTQIA+ rights

# OTHER REQUIREMENTS OF THE 2020 REGULATIONS

Designation of a Title IX Coordinator

Dissemination of policy

Separation of Responsibilities

Training and posting of training

Impartiality

Record Keeping

# ROLE OF THE TITLE IX COORDINATOR

02





# FINAL RULE, SECTION 106.8

Designation of Coordinator,  
Dissemination of Policy, and  
Adoption of Grievance Procedures

**“Each recipient must designate and authorize at least one employee to coordinate its efforts to comply with its responsibilities under this part, which employee must be referred to as the Title IX Coordinator.”**

## **Additionally:**

- The recipient must notify [everyone] of the name or title, office address, email address, and telephone number of the coordinator(s).
- Any person may report in person, by mail/email, telephone using the contact information.
- Reports can be made at anytime.



# FINAL RULE, SECTION 106.8 (a)

The institution must notify applicants and all members of the community of the Title IX Coordinator's:

1. **Name or Title**
2. **Office address**
3. **Email address**
4. **Phone number**

Any person may report , at any time, sex discrimination, including sexual harassment in person, by mail, by telephone, by email, or any other means using the contact information listed



# “RESPONSIBILITIES REQUIRED UNDER TITLE IX AND THE REGULATIONS”

- Serve as the primary pathway for receipt of reports of sex discrimination and sexual harassment;
- Upon receipt of a report, promptly contact the complainant to discuss the availability of supportive measures and to explain the process of filing a formal complaint;
- Coordinate the effective implementation of supportive measures;
- Where a report is made, but a formal complaint is not filed by the complainant, determine whether a formal complaint should be filed and sign that formal complaint;
- Effective implementation of any remedies imposed by a decision maker at the conclusion of a grievance process.

# RESPONSIBILITIES OFTEN DELEGATED TO THE TITLE IX COORDINATOR

- Ensuring that the institutional policies and procedures are compliant with Title IX
- Ensuring dissemination of the policy
- Overseeing the grievance process to ensure it is compliant
- Coordinating a compliant grievance process
- Staffing various roles
- Ensuring training requirements are met
- Record keeping
- Compliance with intersecting federal and state laws
- Education and prevention efforts

# THE THREE ESSENTIAL FUNCTIONS OF TITLE IX COMPLIANCE

01

Response



02

Education &  
Prevention



03

Compliance



# A SUCCESSFUL TITLE IX COORDINATOR...

C

Understands the Importance of **Consistency**

A

**Adheres** to policies and procedures

R

**Records** or documents everything

E

**Engages** meaningfully with the community

S

**Strategically** plans for success



# SUCCESSFUL COORDINATORS APPROACH ALL ASPECTS OF THE WORK...

**Impartially**



**Utilizing  
Best  
Practices**



**With  
Empathy**



# IMPARTIALITY

## Avoiding Prejudgment and Bias

“The Department’s interest in ensuring impartial Title IX proceedings that avoid prejudgment of the facts at issue necessitates a broad prohibition on sex stereotypes so that decisions are made on the basis of individualized facts and not on stereotypical notions of what “men” or “women” do or do not do.” 85 Fed. Reg. 30254 (May 19, 2020).



# IMPARTIALITY: AVOIDING PREJUDGMENT AND BIAS

Do not rely on cultural  
“rape myths”

Do not rely on cultural  
stereotypes about how  
men or women  
purportedly behave

Do not rely on gender-  
specific research data or  
theories to decide or make  
inferences of relevance or  
credibility in particular  
cases

Recognize that anyone,  
regardless of sex, gender,  
gender identity or sexual  
orientation, can be a victim  
or perpetrator of sexual  
assault or other violence

Avoid any perception of  
bias in favor of or against  
complainants or  
respondents generally

Employ interview and  
intake approaches that  
demonstrate a  
commitment to  
impartiality

# IMPARTIALITY

## *Avoiding Bias*

- “Department encourages [schools] to apply an objective (whether a reasonable person would believe bias exists), common sense approach to evaluating whether a particular person serving in a Title IX role is biased” WHILE
- “exercising caution not to apply generalizations that might unreasonably conclude that bias exists (for example, assuming that all self-professed feminists, or self-described survivors, are biased against men, or that a male is incapable of being sensitive to women, or that prior work as a victim advocate, or as a defense attorney, renders the person biased for or against complainants or respondents”

# IMPARTIALITY

## Avoiding Conflicts of Interest

- Simply having an affiliation with an institution in itself is NOT a conflict of interest:
  - “ Department’s authority is over schools, not individual investigators and other personnel, so Department will focus on holding school’s responsible for impartial end result of process, without labeling certain administrative relationships as per se involving conflicts of interest. ”

# IMPARTIALITY

Avoiding Prejudgment, Bias, and Conflicts of Interest

## Bottom Line

- Follow facts of every individual case
- Investigate in manner that will not allow even a perception of prejudgment or bias for or against any party



# THE REQUIREMENT OF IMPARTIALITY



## SECTION 106.45(B)(1)(III)

The grievance process must require that any individual designated by the recipient as Title IX Coordinator, investigator, decision maker, or facilitator of informal resolution not to have a conflict of interest or bias.

1. For or against complainants or respondents generally, or
2. An individual complainant or respondent

# WHAT CONSTITUTES BIAS?

Conduct a fact-specific, objective inquiry based in common sense to determine bias.

## **This Includes:**

- Decision-making that is grounded in stereotypes
- Different treatment based on a person's sex or other protected characteristic
- A decision based on something other than the facts

## **IMPERMISSIBLE BIAS**

Making a decision, determination, or finding that is based on something other than the evidence and specific facts of the case.

# CONFLICT OF INTEREST



# AVOIDING PREJUDGMENT OF THE FACTS

Requires that the Title IX professional refrain from making a judgement on individual facts, the allegations, or whether a policy violation occurred until they have had the opportunity to consider all of the evidence.



# AN IMPARTIAL INVESTIGATION IS...



Not influenced by  
bias or conflict of  
interest.



Committed to decisions  
based on an objective  
view of the facts and  
evidence as you know  
them and as they evolve.



Truth seeking, not  
"your truth"  
confirming.

# EMPLOYEE REPORTING OBLIGATIONS & TRAINING



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# CONFIDENTIAL EMPLOYEES

While not in the Regulations, beware the dangers of designating anyone who is not privileged as being a "confidential employee."

Don't do it.

Seriously.

# TRAINING

## 2020

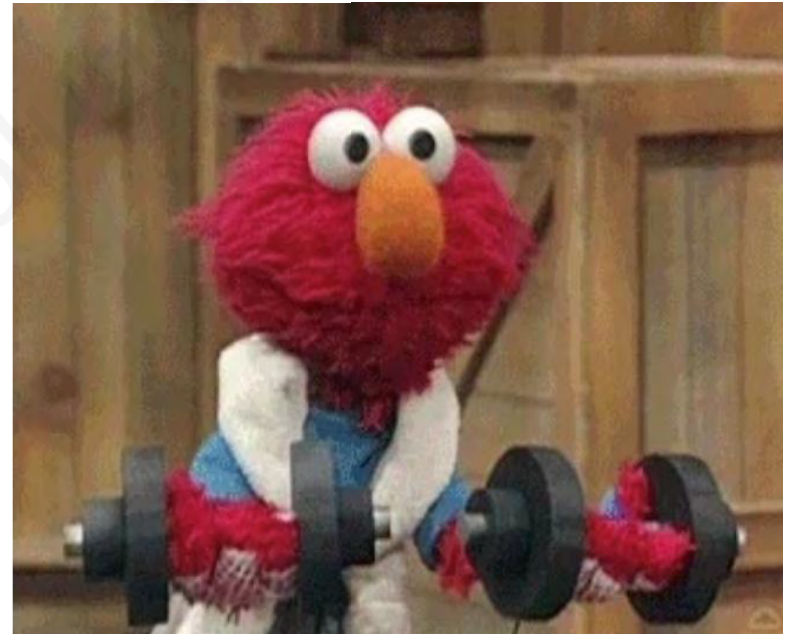
- One time
- Coordinators, investigators, decisionmaker, informal resolutions
- Core TIX Response
- Offer training?

## 2024

- Annual
- Coordinators, investigators, decisionmaker, informal resolutions, appeals, second look
- All employees (but different)
- Complete training!
- (more) consistent with VAWA

# UPDATED TRAINING REQUIREMENTS

- When employees change roles
- Additional topics for those implementing grievance procedures, specific to their roles.
- No required training for students (who aren't also employees); but VAWA!



# DON'T SLEEP ON VAWA TRAINING: RESPONSE



- Annual training for all officials who conduct any part of a prompt, fair, and impartial response from the initial investigation to the final result. At minimum, this includes investigators, hearing officers, and appeal officers (likely intake):
  - Issues related to dating violence, domestic violence, sexual assault, and stalking
  - How to conduct an investigation and hearing process that protects the safety of victims and promotes accountability



# BUT...DON'T SLEEP ON VAWA TRAINING: PREVENTION

**Education programs shall include “primary prevention and awareness programs for all incoming students and new employees,” which shall include:**

- statement prohibiting domestic violence, dating violence, sexual assault, & stalking;
- definition of domestic violence, dating violence, sexual assault, & stalking in the applicable jurisdiction;
- definition of consent, in reference to sexual activity, in the applicable jurisdiction;
- safe and positive options for bystander intervention that may be carried out by an individual to prevent harm or intervene in cases of a risk of domestic violence, dating violence, sexual assault, or stalking;
- information on risk reduction to recognize warning signs of abusive behavior and how to avoid potential attacks; and
- ongoing prevention and awareness campaigns for students and faculty on all of the above (subject to regulations and ED guidance).

# WHAT IS THE TRAINING CONTENT?

- **Start with the practical, what makes logical sense.**
- **People implementing these grievance procedures need training on how to perform the role**
- **Everyone else also need training to understand their response obligations**
  - Reporting to the coordinator
  - Giving information to disclosing parties if they are confidential or exempt from internal reporting
  - They need to know how to respond to a student who directly informs them of pregnancy or related conditions
  - They need to know what sex discrimination is in order to recognize it!

# TRAINING & EDUCATION

Educating ourselves and our communities

04

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# SOURCES OF TRAINING REQUIREMENTS



Title IX Final Regulations



Violence Against Women Act



State Law



Resolution Agreements

# TRAINING AND EDUCATION: TWO AREAS OF FOCUS

01



Institutional Response to Sex Discrimination

02



Prevention Education

# INSTITUTIONAL RESPONSE TRAINING

1. Institutional Policies and Procedures
2. Prohibited Conduct
3. Options for Confidential Support
4. The Identify, Role, and Requirements of the Responsible Employee
5. Options and methods for Reporting
6. The Grievance Process
7. The Role of the Title IX Coordinator



**A REALLY  
IMPORTANT MOMENT.  
LISTEN UP.  
IT'S OKAY...**



To not know the answer to every question thrown your way



To say, "I don't know," "I'd like to think about that," "I'll get back to you," "Thank you for sharing your perspective."



To decline to answer a question



To recognize and assert your expertise



# WHO MUST RECEIVE TRAINING?

## Title IX Staff\*

- Coordinators
- Investigators
- Decision Makers (hearings and appeals)
- Facilitators of Informal Resolution

## Faculty

- New faculty
- Existing faculty
- Adjunct Faculty
- Supervising faculty

## Students

- New Students
- Existing Students
- Specialized populations
- Student staff

## Staff

- New/existing staff
- Senior leadership
- Public Safety/campus law enforcement
- Health care workers

\*“Those who are charged with ensuring a prompt, fair, and impartial investigation and result.” (VAWA)

# COMMUNITY PARTNERS?

Boards of Trustees

Law Enforcement

Advocacy Groups

Health Care Providers

Attorneys

Media

# TRAINING FOR TITLE IX STAFF



The scope of the institution's education program or activity (i.e., its Title IX "jurisdiction")

How to conduct the grievance process

How to serve impartially

The technology to be used at a live hearing \*

Issues of relevance of questions and evidence \*

Rape shield protections; and, \*

Issues of relevance in creating an investigation report. \*

A photograph of three women in a modern office environment. In the foreground, a woman with vibrant red hair, wearing a blue and white striped long-sleeved shirt, is smiling broadly at the camera while sitting at a dark wooden table. She has her hands near a laptop. Behind her, two other women are also smiling. One woman with dark hair is pointing at a tablet, and another woman with dark hair is looking towards the camera. The table is cluttered with various items including a laptop, a tablet, a red mug, a glass of water, and some papers. The background is a bright, out-of-focus office space with a large window and a dark rectangular object on the wall.

# RESPONSIBLE EMPLOYEES

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# SPECIAL CONSIDERATIONS FOR TRAINING & EDUCATION

Explaining the  
narrowed scope of  
Title IX

Explaining the  
institutional decision  
for two  
processes/procedures

Responsible Employee  
challenges

Burden of proof  
challenges

Length of Training

Time for  
questions/community  
processing

# PREVENTION EDUCATION: TITLE IX REGULATIONS



"And while the Department does not mandate educational curricula, nothing in the final regulations impedes recipients' discretion to provide students (or employees) with educational information."

85 Fed. Reg. 30063 (May 19, 2020).



# PREVENTION EDUCATION: VIOLENCE AGAINST WOMEN ACT (VAWA)

A primary prevention and awareness program [which includes bystander intervention] aims to prevent dating violence, domestic violence, sexual assault, and stalking.

Ongoing prevention and awareness campaigns.





# ELEMENTS OF ANNUAL TRAINING STRATEGY

- Identify population to be trained
- Determine topic
- Schedule the training
- How will you deliver the training
- Partnerships
- Communications
- Community input/feedback
- Engagement as passive education



# RECEIPT OF REPORTS

Actual Knowledge, Report Response,  
Initial Assessments, and Supportive  
Measures

01

# INFRASTRUCTURE FOR REPORTING



# INITIAL RESPONSE REQUIREMENTS



1. Receipt of Report

2. Outreach/Response from Title IX Coordinator

3. Support Measures, whether or not Formal Complaint is filed

4. How to File

5. Options for Resolution

# RECEIVING REPORTS AND INITIATING THE RESPONSE



1. Review the report



2. Determine the appropriate initial response



3. Promptly initiate that response



4. Document/record the receipt of the report and the response thereto

# INITIAL OUTREACH

- First: Safety
- Email: Create Forms
- Phone
- In person: Use RA, Campus Safety
- Follow Up Emails



# SCENARIO: EMERGENCY REMOVAL OF STUDENT

- High threshold
- Not a determination of responsibility
- Whether or not grievance is underway
- Individualized
- Immediate threat (physical)
- Opportunity to challenge





## THE TITLE IX OFFICE RECEIVES THE FOLLOWING ANONYMOUS REPORT VIA YOUR INSTITUTION'S ONLINE REPORTING FORM:

"Riley Smith is in trouble. I live on their floor in River Hall and I constantly hear fighting and crying coming from their room at night. Every time I see Riley with their partner, they seem really submissive and nervous and I have noticed bruises on Riley the mornings after the biggest fights. The RA and Riley's partner are friend and so the RA doesn't do anything about it. It's getting so bad that some of the other people on the floor are talking about intervening, but we are afraid of Riley's partner too."

## THE TITLE IX OFFICE RECEIVES THE FOLLOWING EMAIL FROM A RESPONSIBLE EMPLOYEE:

“My name is Professor Jones. One of my students shared that they were raped last weekend at a party by another student. They don’t want the school starting an investigation, and so I am not going to share their name or the details with you. They are thinking about talking to the police but are not sure who to contact. Can you please provide me with information that I can share with the student?”

# COMPLAINANT INTAKE & SUPPORTIVE MEASURES

02

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# INITIAL MEETING WITH THE COMPLAINANT

- Prepare for the meeting
- Select appropriate space
- Build trust and rapport; empower
- Explain your role
- Discuss available support
- Options for reporting
- Answer questions
- Evidence collection/preservation
- Conclude with a discussion of next steps



# SUPPORTIVE MEASURES

Non-Disciplinary

May not  
unreasonably  
burden the other  
party

Designed to restore  
or preserve equal  
access

Non-punitive

As appropriate and  
reasonably  
available

Confidential

# EXAMPLES OF SUPPORTIVE MEASURES

- Assistance obtaining access to counseling, advocacy, or medical services;
- Assistance obtaining access to academic support and requesting academic modifications and supportive measures;
- Changes in class schedules;
- Assistance requesting changes in work schedules, job assignments, or other work accommodations;
- Changes in campus housing;
- Safety escorts;
- Leaves of absence;
- Mutual restrictions on contact between the Parties (“No-contact” orders).



# **“MUTUAL RESTRICTIONS ON CONTACT BETWEEN THE PARTIES”**





# POST MEETING TASKS

Document the meeting

Send a summary email  
with resources, options,  
next steps

Follow up

Make connections

Provide the supportive  
measures

Document supportive  
measures requested,  
provided, and not  
provided. Where not  
provided, indicate why.

# HOW TO PROCEED?

## Support-Based Only

No formal process



## Alternative/ Informal

Signed agreement;  
Voluntary;  
What records?



## Formal/ Investigation/ Hearing

All requirements of 106.45



# SUPPORT BASED-BASED RESOLUTION

3(a)



# SUPPORT- BASED

- Supportive Measures
- Targeted Education
- Educational Conversations

# RESOLUTIONS



# PREGNANCY



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# PARENTAL, FAMILY, OR MARITAL STATUS

Regs address the treatment of applicants, students:

- Cannot adopt a policy, practice, or procedure, or take any employment action "concerning the current, potential, or past parental, family, or marital status of a student [or employee] or applicant that treats persons differently on the basis of sex" or "is based upon whether an employee or applicant is the head of household or principal wage earner " in their family unit





# PARENTAL, FAMILY, OR MARITAL STATUS

- Can an institution offer married men financial aid, but as a practice decline to offer financial aid to women who are married?
- May a department exercise a preference to only hire women who do not have kids?

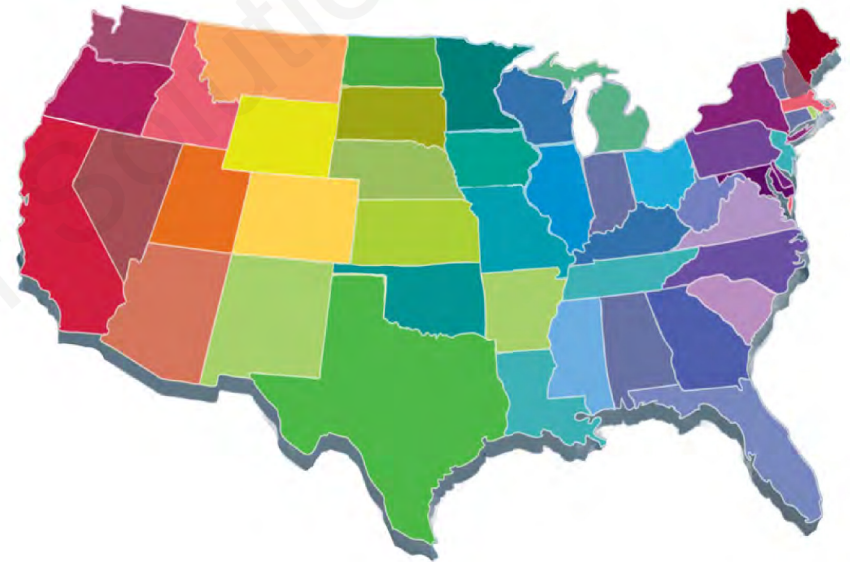




# NOT NECESSARILY NEW, BUT CLARIFIED

§ 106.40

- Depending on state law, not necessarily new, but clarified
- More people will find new for students
- Reasonable Modifications
- Voluntary leaves or separate but comparable programs
- Lactation spaces
- Comparable treatment to other medical conditions



# PREGNANCY AND RELATED CONDITIONS

- Since 1975, "pregnancy **and** related conditions" includes "pregnancy, childbirth, false pregnancy, termination of pregnancy or recovery therefrom[.]"
- Section 106.2 (2024), "pregnancy **or** related conditions" includes:
  - (1) Pregnancy, childbirth, termination of pregnancy, or lactation;
  - (2) Medical conditions related to pregnancy, childbirth, termination of pregnancy, or lactation; or
  - (3) Recovery from pregnancy, childbirth, termination of pregnancy, lactation, or related medical conditions.

# NOTICE AND REQUIRED RESPONSE

§ 106.40

When a student\* informs any employee of the student's pregnancy or related conditions...the employee promptly:

- (1) provides the Title IX Coordinator's contact information and
- (2) informs that person that the Title IX Coordinator can coordinate specific actions to prevent sex discrimination and ensure the student's equal access....



# PREGNANCY ACCOMMODATIONS

- if a recipient provides an applicant who is recovering from back surgery an extension of time for a medically necessary period to submit a required application essay, it must do the same for a student who is recovering from childbirth



# TERMINATION OF PREGNANCY

- Consistent with the definition included in 1975 regulations: the end of pregnancy in any manner, including, miscarriage, stillbirth, or abortion

Examples of potential discrimination from Preamble:

- a high school may not exclude a student from participating in the student council solely because the student has had an abortion
- a college may not deny a professor a raise just because it learned she planned to have an abortion



# QUESTION:

- A student in a science program asks a faculty member if they can be excluded from a series of lab sessions involving in chemicals that may be harmful for pregnant people. The instructor is insistent that they must complete these labs in order to not fail the class:
  - As Title IX Coordinator, what are your next steps?
  - Who else are you bringing into the conversation?
  - How can we be creative to ensure equal access for this student?



# FORMAL COMPLAINT & NOTICE REQUIREMENTS

03(b)

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## FORMAL COMPLAINT FILED

**By Complainant**

**By the Title IX  
Coordinator**



# FACTORS TO CONSIDER WHEN DETERMINING WHETHER TO FILE A FORMAL COMPLAINT



Allegations of  
Violence

Threats

Use of  
Weapons

Serial  
predation

# A FORMAL COMPLAINT MUST INCLUDE

The Complainant's digital or physical signature, or an indication that the Complainant is the person filing the Formal Complaint;

---

An allegation of Prohibited Conduct as defined under this Policy. This may include: Where the incident(s) occurred; what incident(s) occurred; when the incident(s) occurred;

---

Identity of Respondent, if known;

---

A request for a resolution or investigation.

---

# DISMISSING COMPLAINTS

## Mandatory

- Not sexual harassment
- Did not occur in program or activity
- Not against person in the U.S.

## *Discretionary*

- Complainant withdraws complaint
- Respondent no longer enrolled/employed
- School unable to collect sufficient info

**CAN PROCEED  
UNDER OTHER  
POLICY**



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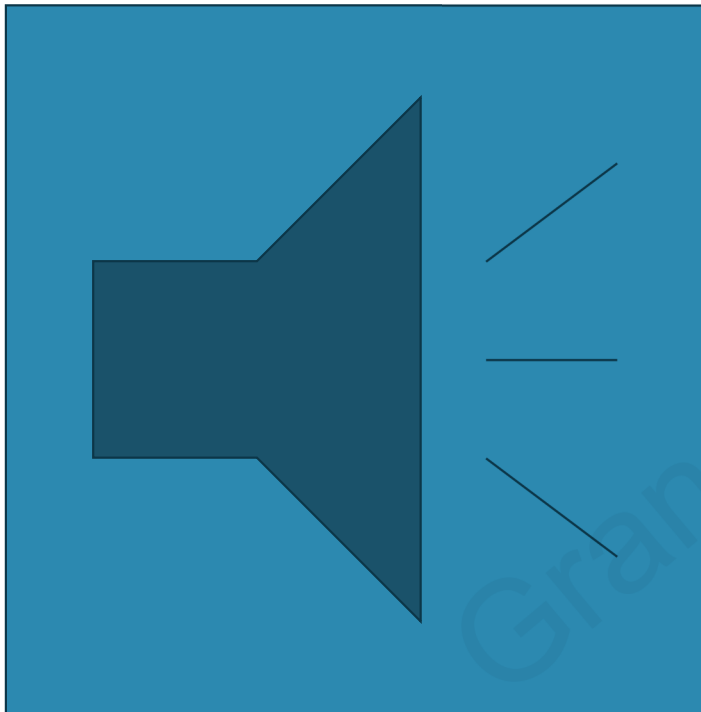
# NOTICE OF ALLEGATION REQUIREMENTS (1)

- Notice of the allegations, including sufficient details known at the time and with sufficient time to prepare a response before any initial interview. Sufficient details include:
  - the identities of the parties involved in the incident, if known,
  - the conduct allegedly constituting sexual harassment under § 106.30,
  - and the date and location of the alleged incident, if known.
- The written notice must include a statement that the respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the grievance process.

## NOTICE OF ALLEGATION REQUIREMENTS (2)

- The written notice must inform the parties that they may have an advisor of their choice, who may be, but is not required to be, an attorney, under paragraph (b)(5)(iv) of this section, and may inspect and review evidence under paragraph (b)(5)(vi) of this section.
- The written notice must inform the parties of any provision in the recipient's code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process

# NOTIFYING THE RESPONDENT



FIRST- SAFETY

Make sure Support Available

Written Notification Meetings and Sufficient Time to Prepare

Don't Send on a Friday

Don't send at 5pm

How will you notify?

Consider impact of notification on Respondent



# ADVISOR OF CHOICE

The advisor  
can be  
anyone,  
including an  
attorney

Institutions  
cannot place  
restrictions on  
who can  
serve

No training  
required

Institution must  
provide advisor  
for the purposes  
of  
questioning only.

# INITIAL MEETING WITH RESPONDENT

- Prepare for the meeting
- Select appropriate space
- Build trust and rapport; empower
- Explain your role
- Discuss available supportive measures
- Supportive measures that were provided to complainant that impact them
- Answer questions
- Evidence collection/preservation
- Conclude with a discussion of next steps



# POST MEETING TASKS

Document the meeting

Send a summary email with  
resources, options, next  
steps

Follow up

Make connections

Provide the supportive  
measures

Document supportive  
measures requested,  
provided, and not provided.  
Where not provided,  
indicate why.

# FORMAL COMPLAINT RESOLUTION

## Informal Resolution

- Formal Complaint Required
- Parties must agree
- Can withdraw from process
- Alternate Resolution/Mediation  
*Formal Resolution*
- No appeal

- Investigation and Adjudication process in compliance with Section 106.45

# ALTERNATIVE RESOLUTION

03(c)



# ALTERNATIVE RESOLUTION REQUIREMENTS

- Formal Complaint must be filed
- Participation in an alternative resolution must be voluntary
- Must occur prior to resolution via a formal process
- Parties must be permitted to withdraw and seek formal resolution
- Voluntary, written consent to the alternative resolution must be obtained
- Facilitators of alternative resolution must be trained



# ALTERNATIVE RESOLUTION NOTICE REQUIREMENTS

- The allegations,
- The requirements of the alternative/informal resolution process including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations, provided, however, that at any time prior to agreeing to a resolution, any party has the right to withdraw from the alternative resolution process
- And resume the grievance process with respect to the formal complaint, and any consequences resulting from participating in the alternative resolution process, including the records that will be maintained or could be shared;







# **FACILITATORS OF ALTERNATIVE RESOLUTION AS WITNESSES**

**INFORMAL/ALTERNATIVE  
RESOLUTION IS PROHIBITED TO  
RESOLVE ALLEGATIONS THAT AN  
EMPLOYEE SEXUALLY HARASSED  
A STUDENT.**





# TITLE IX COORDINATOR'S ROLE

## In the Investigation

- Title IX Coordinator is permitted to conduct the investigation, though this is not favored
- If conducting the investigation, do so in accordance with the applicable institutional policy
- If not conducting the investigation, may serve as a support to the investigators
- May serve as a resource to the parties



# TITLE IX COORDINATOR'S ROLE

## In the Adjudication

- Title IX Coordinator may not serve as the decision maker
- May serve to support the decision maker(s)
- May participate in the hearing to provide logistical support to decision makers
- Responsible for effective implementation of remedies imposed

# TITLE IX COORDINATOR'S ROLE

## In the Appeal



- Title IX Coordinator may not serve as an appellate reviewer
- May serve to support the appellate reviewer/panel
- May provide logistical support
- May coordinate implementation of appellate findings, where appropriate.
- Responsible for effective implementation of remedies imposed



# CONDUCTING FAIR AND THOROUGH TRAUMA-INFORMED INVESTIGATIONS

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# TITLE IX'S REQUIREMENTS

01

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# PROCEDURAL REQUIREMENTS FOR INVESTIGATIONS

Notice to BOTH parties

Equal Opportunity to Present Evidence

An advisor of choice

Written notification of meetings, etc., and sufficient time to prepare

Opportunity to review all directly related evidence, and 10 days to submit a written response to the evidence prior to completion of the report

Report summarizing relevant evidence and 10-day review of report prior to hearing



# NOTICE REQUIREMENTS

- Notice of the allegations, including sufficient details known at the time and with sufficient time to prepare a response before any initial interview. Sufficient details include:
  - the identities of the parties involved in the incident, if known,
  - the conduct allegedly constituting sexual harassment under § 106.30,
  - and the date and location of the alleged incident, if known.
- The written notice must include a statement that the respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the grievance process.
- The written notice must inform the parties that they may have an advisor of their choice, who may be, but is not required to be, an attorney, under paragraph (b)(5)(iv) of this section, and may inspect and review evidence under paragraph (b)(5)(vi) of this section.
- The written notice must inform the parties of any provision in the recipient's code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process

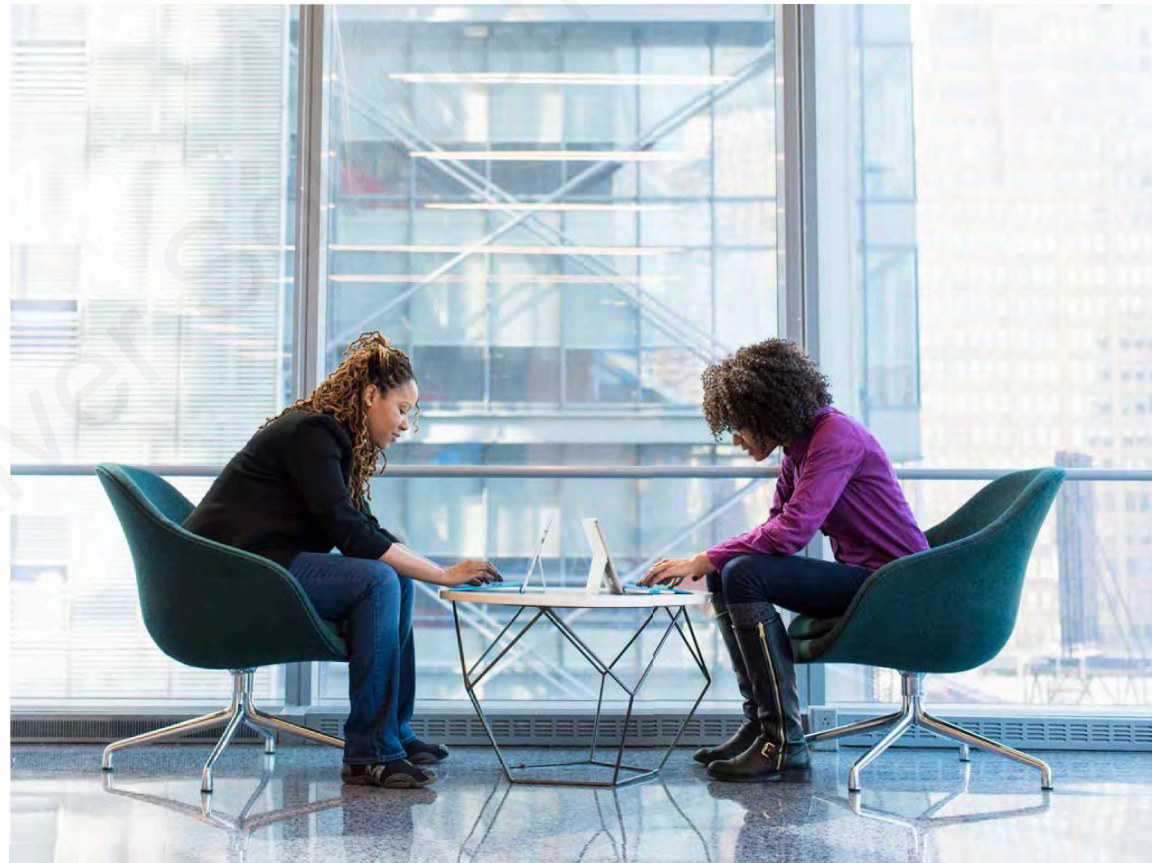
# ADVISOR OF CHOICE DURING THE INVESTIGATION

The advisor can be anyone, including an attorney or a witness.

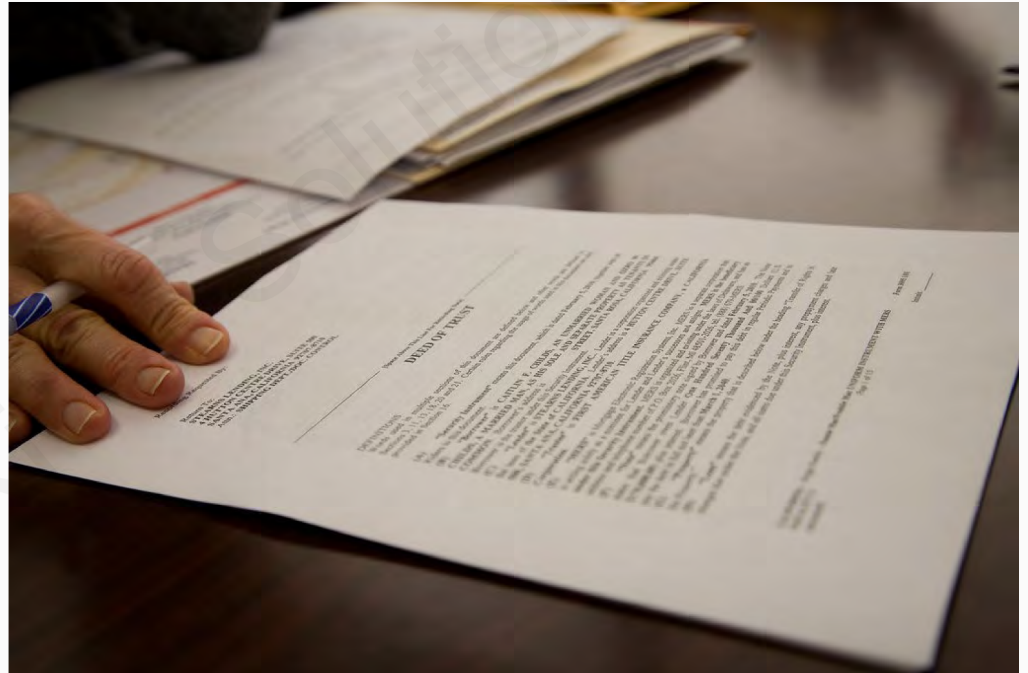
Institutions cannot place restrictions on who can serve.

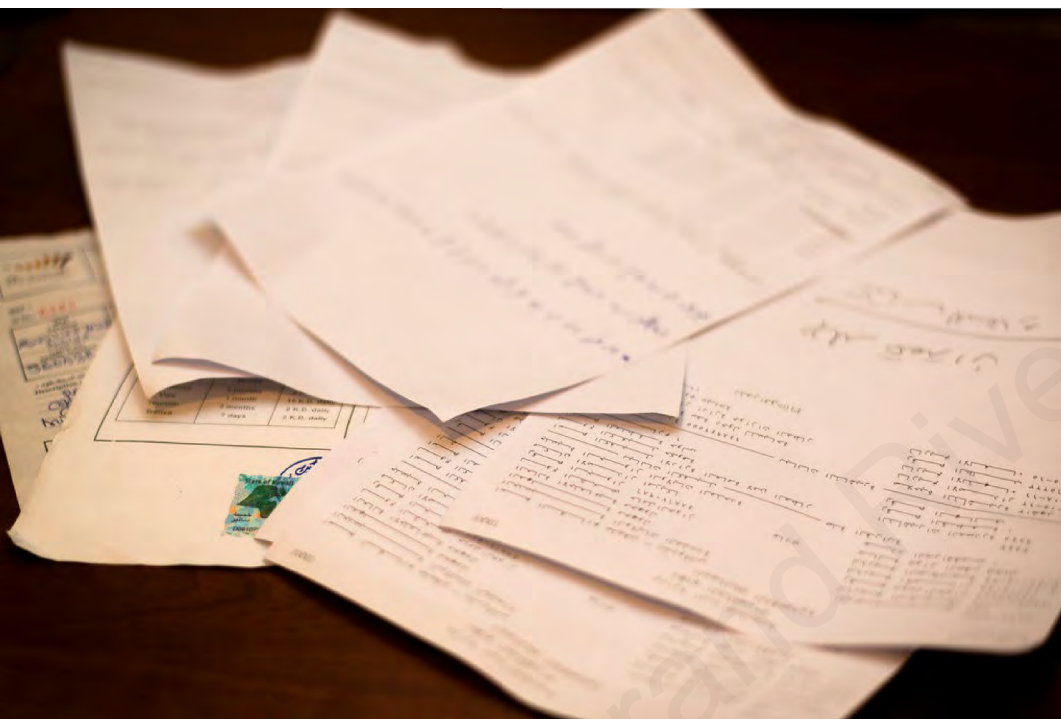
Institutions can create rules and guidelines for participation in the investigation.

No specific training is required.



# WRITTEN NOTIFICATION OF MEETINGS AND SUFFICIENT TIME TO PREPARE





# EQUAL OPPORTUNITY TO PRESENT EVIDENCE

# EVIDENCE REVIEW

Parties must have equal opportunity to inspect and review evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint.

Parties have 10 days to provide a written response.

# INVESTIGATIVE REPORT AND REVIEW



After reviewing and considering the comments on the evidence, the investigator will generate a report that summarizes the relevant evidence.



That report will be shared with the parties and the parties will have another opportunity to respond in writing.



The hearing must occur at least 10 days after the release of the final report.



**“DIRECTLY  
RELATED” AND  
“RELEVANT  
EVIDENCE”**



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# DIRECTLY RELATED EVIDENCE

- Regulations do not define “Directly Related” Evidence.
- Preamble states it should be interpreted using its plain and ordinary meaning.
- Term is broader than:
  - “all relevant evidence” as otherwise used in Title IX regulations, and
  - “any information that will be used during informal and formal disciplinary meetings and hearings” as used in Clery Act
- Includes evidence upon which the school does not intend to rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence whether obtained from a party or other source.

# “RELEVANT” EVIDENCE

The Department declines to define “relevant”, indicating that term “should be interpreted using [its] plain and ordinary meaning.”

See, e.g., Federal Rule of Evidence 401 Test for Relevant Evidence:

“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.”

# EVIDENCE THAT IS NOT “RELEVANT”

- “Questions and evidence about the complainant’s sexual predisposition or prior sexual behavior are not relevant,
  - unless such questions and evidence about the complainant’s prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or
  - if the questions and evidence concern specific incidents of the complainant’s prior sexual behavior with respect to the respondent and are offered to prove consent.”
- “require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege.”
- Physical and mental health records and attorney-client privileged communications would fit within scope of this prohibition.

# WHO DECIDES?

Department emphasizes repeatedly in Preamble that investigators have discretion to determine relevance at this stage of the process.

- Subject to parties' right to argue upon review of "directly related" evidence that certain information not included in investigative report is relevant and should be given more weight.

Investigators will have to balance discretionary decisions not to summarize certain evidence in report against:

- Each party's right to argue their case, and
- Fact that decisions regarding responsibility will be made at hearing, not investigation stage.

# THE INVESTIGATOR

Can be the Title IX Coordinator, although that is disfavored.

The Investigator may not be a decision maker.

Must be trained in accordance with the requirements in the regulations.

Must conduct the investigation in an impartial manner, avoiding bias/pre-judgment, and conflicts of interest.

# TRAUMA INFORMED PRACTICES

In the preamble, the Department permits the use of trauma informed practices and recognizes that trauma informed practices can be used in an impartial and non-biased manner.

Trauma informed practices must be applied equally to all genders.

# THE PROPER APPLICATION OF TRAUMA INFORMED PRACTICES

02

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TRAUMA INFORMED  
PRACTICES  
PROVIDE TOOLS &  
TECHNIQUES FOR  
INTERVIEWING AND  
ENGAGING WITH  
THE COMPLAINANT,  
RESPONDENT, AND  
WITNESSES.



Format/Structure of the  
Interview



Format of Questions



Approach to  
Clarification

# TRAUMA INFORMED PRACTICES ARE DESIGNED TO:

Encourage thorough  
and complete  
investigations

Assist with  
recollection

Assist with  
recounting

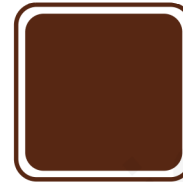
Reduce potential for  
false information

Minimize unnecessary  
re-traumatization

Reduce Bias

# MISAPPLICATION OF TRAUMA INFORMED PRACTICES

It is a misapplication of trauma informed principles to allow potential evidence of trauma to:



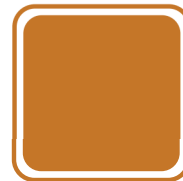
1. Influence the interpretation of a specific item of evidence;



2. Substitute for missing evidence;



3. To serve as a justification for not doing a full and thorough investigation;



4. Cause a biased belief in the veracity of one or more party.

# THE IMPORTANCE OF UNDERSTANDING THE POTENTIAL IMPACT OF TRAUMA

03

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# TRAUMA

An event that is experienced as terrifying, horrifying, or threatening and that is coupled with an actual or perceived lack of control.

# EXAMPLES OF EVENTS THAT MIGHT TRIGGER A TRAUMATIC RESPONSE

Sexual Assault

Physical Assault by a Stranger

Physical Assault by an Intimate Partner

A Car Accident

Accident that causes serious injury or death

Robbery

Significant medical event

When trauma occurs, there are very real changes in brain function that may affect a person's ability to make memory and to recount their experience.



# COMMON CHARACTERISTICS OF DISCLOSURES BY A TRAUMA BRAIN

Inconsistent

Non-linear

Fragmented

Lacking in detail

New information  
added

Affect is  
unexpected

Historically, the seemingly inconsistent behaviors that frequently accompany disclosures of sexual assault and interpersonal violence resulted in the belief that the victim was being dishonest.

Inconsistencies  
Lack of Detail  
Non-Linear  
Fragmented  
New Information



Viewed as  
Not Credible

# THE HISTORICAL CONCLUSION...

False Report  
Regretted Sex  
Not Provable



Investigation  
Closed

**WHEN AN  
INVESTIGATOR USES  
“TRAUMA-  
INFORMED” TOOLS,  
THEY ARE LESS  
LIKELY TO:**



Conclude, without  
a thorough  
investigation



Act on basis of bias



Retraumatize



Jeopardize future  
reporting

# THE FUTURE



An understanding of trauma and its potential impact should encourage investigators to keep an open mind, and it should prevent investigators from immediately interpreting seemingly inconsistent behaviors with deception. An understanding of trauma provides another explanation for these seemingly inconsistent behaviors.

This is essential to a fair and thorough investigation.

## WHEN PRESENTED WITH THE FOLLOWING CHARACTERISTICS IN A DISCLOSURE,

Inconsistencies  
Lack of Detail  
Non-Linear  
Fragmented  
New Information

**An investigator who understands trauma will....**



CONTINUE THEIR  
INVESTIGATION.

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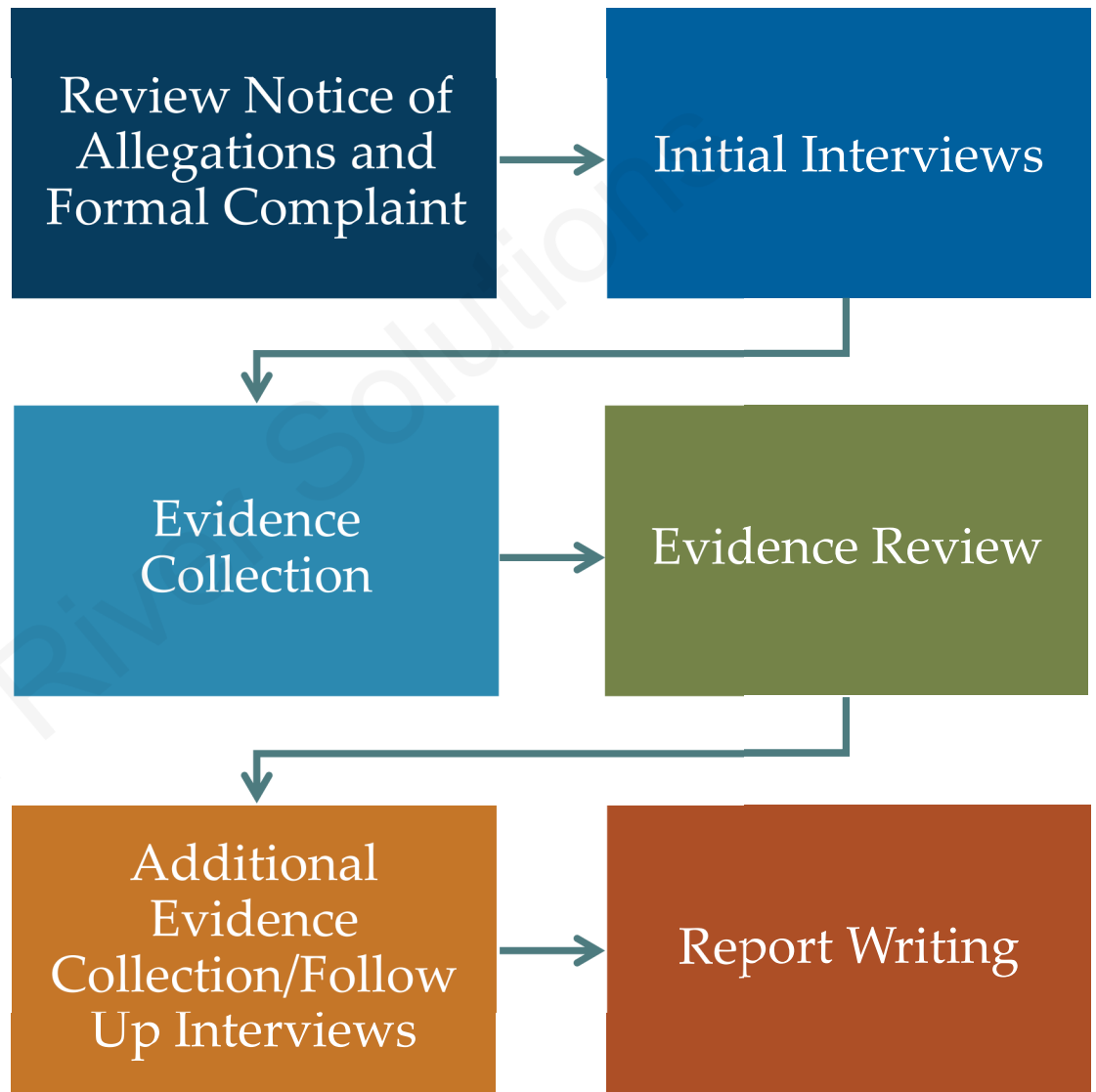
# DEVELOPING AN INVESTIGATIVE STRATEGY

04

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# ESSENTIAL STEPS OF AN INVESTIGATION



# UNDERSTAND THE SCOPE OF THE INVESTIGATION



Review the Notice of Allegations and the Formal Complaint



Ask questions if unsure

# IDENTIFY THE CLAIMS AND WHAT NEEDS TO BE PROVEN

- What will the decision maker be asked to decide?
- What does the formal complaint allege?
- What are the elements of each act of prohibited conduct alleged?

# RAPE

Definition: The penetration, no matter how slight, of the vagina or anus, with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim.

## Questions to ask:

1. Did Respondent penetrate Complainant's vagina or anus? •
2. Without Complainant's affirmative consent?
  - *What is the ground for lack of consent?*
    1. Did respondent fail to seek and obtain Complainant's affirmative consent?
    2. Did Respondent force Complainant?
    3. Did Respondent coerce Complainant?
    4. Was Complainant incapacitated and therefore incapable of consent?

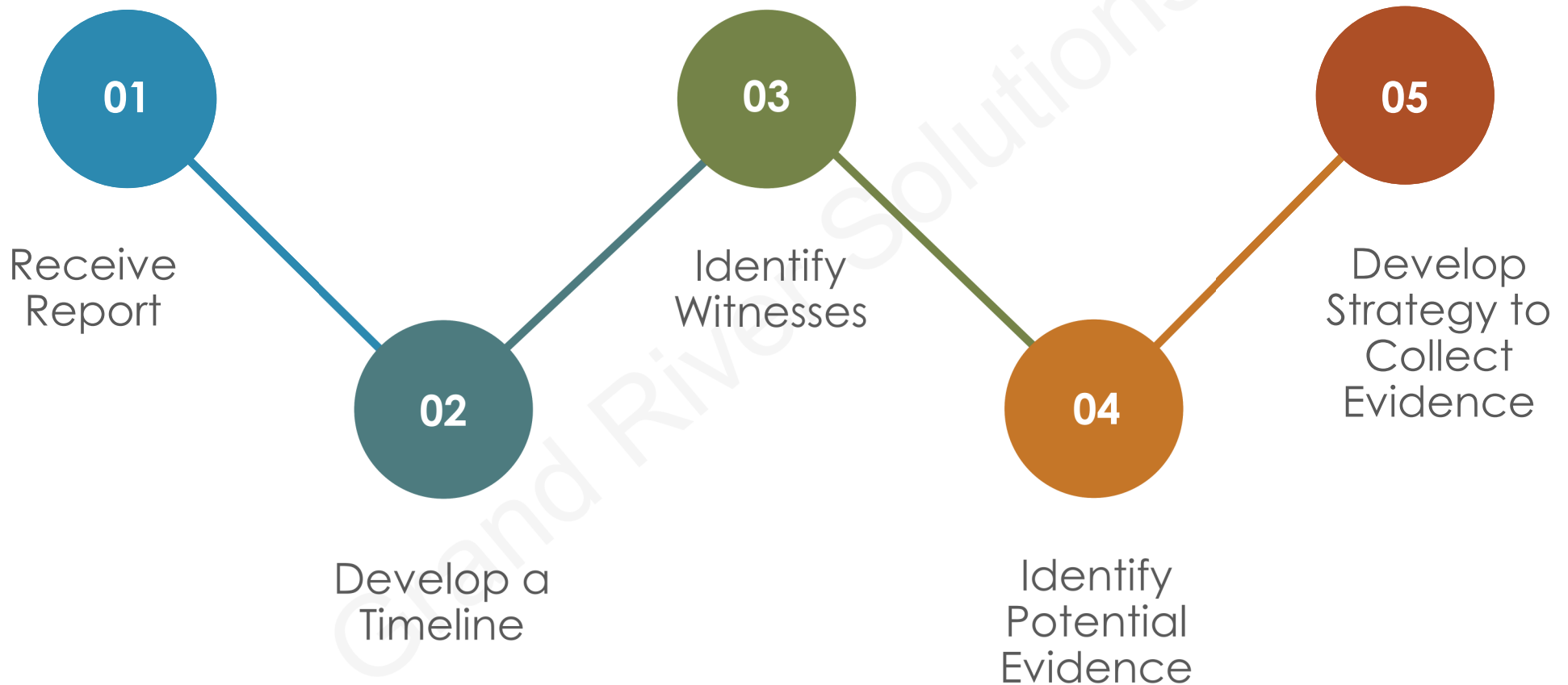
# STALKING

Definition: Engaging in a course of conduct 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.

## Questions to Ask:

1. Did Respondent engage in a course of conduct?
2. Was that course of conduct directed at Complainant?
3. Would Respondent's conduct cause a reasonable person to either
  - a. *Fear for their safety or the safety of others, or*
  - b. *Suffer substantial emotional distress?*

## THE PROCESS: DEVELOPING AN INVESTIGATIVE STRATEGY





# INVESTIGATION TIMELINE

## Prior History

- Between the Parties?
- Of the Parties?

## Incident

- Consent?
- Type of Contact?
- Injuries?

## Pre-Incident

- Communications?
- Interactions?
- Conduct?

## Post Incident

- Behaviors?
- Communications?

# The Importance of Organization



# INVESTIGATIVE INTERVIEWS

05

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# INTERVIEW OBJECTIVES



## Listen

Allow interviewee to share their experience



## Evidence Preservation

Text messages

Photographs

Names and contact info for witnesses

## Connect

Build rapport

Build trust

Empower



## Clarify

Understand what you have heard

Seek additional information



# PRIOR TO THE INTERVIEW

- | Secure an appropriate meeting location
  - | Allow for enough time to conclude the meeting
  - | If interviewing a party, inform them of their right to have an advisor present
  - | Prepare for the meeting
- | Provide written notice of the meeting

# EXPECTATIONS

What they should expect of you:

- That you are neutral
- That you will listen, what they are saying is important to you
- That you will keep the information they share private
- What you will do with recording/notes
- That you may have to ask difficult questions
- Patience, respect, and appreciation
- This will not be their only opportunity to speak with you
- Prepare the parties for follow up interviews and the “shift”

What you expect of them:

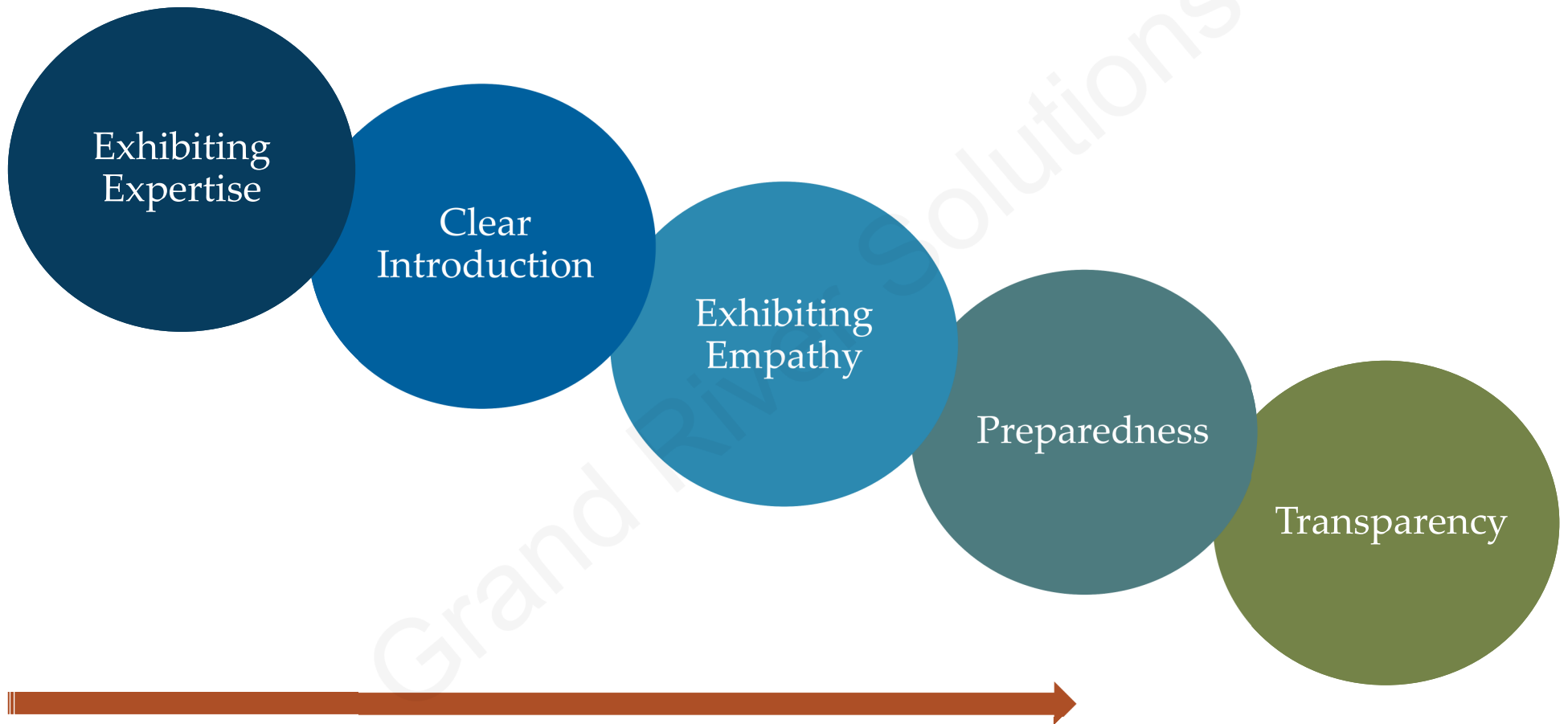
- Honesty
- That they will seek clarity if needed (give them permission to do so)
- That they won't guess or fill in blanks



## HOW DO WE...

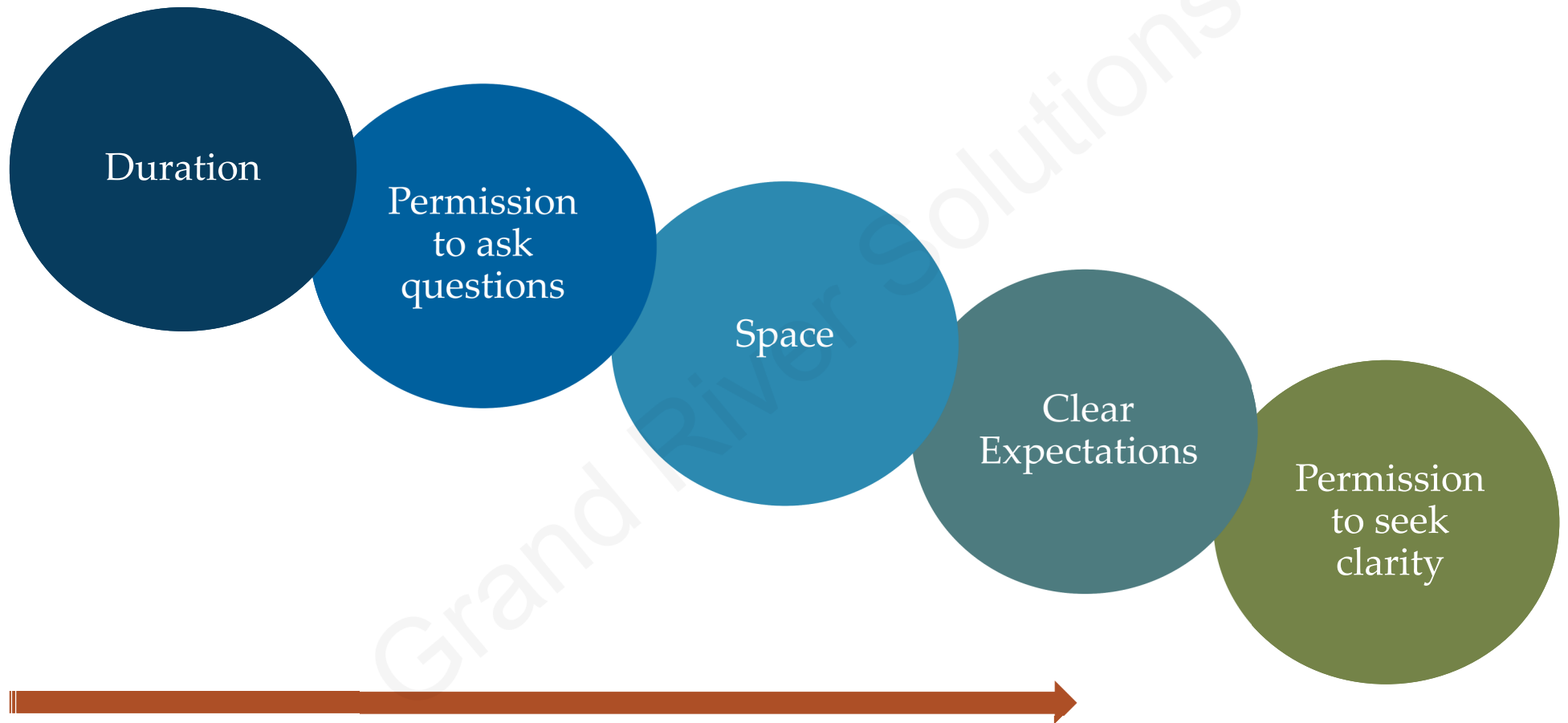
- Build Rapport and Trust?
- Empower?

# RAPPORT AND TRUST





# EMPOWERMENT



# INVESTIGATIVE INTERVIEWS

1. Start by eliciting a narrative

2. Listen

3. Interview for Clarification

4. Listen

5. Avoid leading or blaming questions, interrogation

# START INTERVIEW BY ELICITING A NARRATIVE

- “Help me understand your experience?”
- “What are you able to tell me about your experience?”
- “Start where you are comfortable and share what you are able to remember.”

Allow the person to speak uninterrupted. This takes patience.

## ASK QUESTIONS THAT ARE INTENDED TO CLARIFY AND MORE DEEPLY EXPLORE THE INFORMATION AND DETAILS PROVIDED BY THE PERSON IN THEIR NARRATIVE.

### Do Ask:

Interview for clarification

Help me understand?

Can you tell me more about...?

Is there anything else you can share about...?

### Avoid

Interrogation

Questions that blame

Questions that imply doubt

Leading questions

# CAPTURE THE ENTIRE EXPERIENCE

- Ask about the physical and emotional reactions to the incident.
- Conclude with very open-ended questions:
  - What was the most difficult part of this experience for you?
  - Is there something that stands out/that you just can't stop thinking about?
  - Is there anything more that you would like me to know?

# THE BEFORE

At some point during the interview, it is also important to explore the prior history, if any, between the complainant and the respondent, and the history of the parties, individually.



# AND THE AFTER

It is also important to explore the events following the incident. Oftentimes, the best evidence is produced after the incident.

- The parties' psychological reactions
- Changes in behavior
- Witnesses to the psychological reaction;  
    “Has anyone expressed concern about you since the assault?”
- Communication/contact between the complainant and respondent

# DAY TWO AGENDA

- Investigative Interviews  
Continued
- Evidence Collection and  
Assessment
- The Investigative Report  
and Record





# QUICK REVIEW



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# INVESTIGATIVE INTERVIEWS: CONTINUED

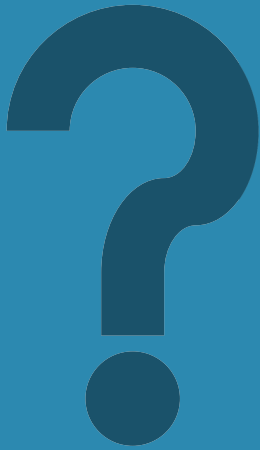
01

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# THROUGHOUT THE INTERVIEW



Explain questions, especially the difficult ones.

How much did you drink?

**What they hear:** this is your fault because you were drinking.

Do not ask leading questions.

Watch your tone.

Do not rush.

Listen.

Pay attention to and document information.

Document questions asked.

## AT THE CONCLUSION OF THE INTERVIEW

Discussion submission of evidence.

Explain statement review process.

Explain next steps in the process.

Keep the lines of communication open.

Review available support, privacy requirements, and prohibition against retaliation.

## AFTER THE INTERVIEW: ACTIONS

Memorialize the interview in writing: notes,  
summary  
transcript.

---

Provide opportunity for the party or witness to review it.

---

Provide opportunity for party or witness to provide a response.

---

Incorporate the response.

---

# A NOTE ABOUT WITNESS SUMMARIES

- The reader of any report should not know of the investigator's presence in the report; for example, report should not say "I then asked . . ."
- Use interviewee's words and put the words in quotes if it is their words
- Avoid conclusory words, or words that suggest that the investigator has an opinion about the information offered

# AFTER THE INTERVIEW: REFLECTION



Reflect.

Is there something you missed or forgot to ask?



Do you need clarity on any of the information shared?



Has this interview revealed additional evidence that you want to explore or collect?



Has evidence of additional policy violations been shared?

# FOLLOW UP INTERVIEWS

- Seek Clarification
- Explore Inconsistencies
- Explore contradictions
- Explore difficult issues
- Opportunity to respond



# FOLLOW UP INTERVIEW APPROACH

01

Explain the purpose of the follow up

02

Set the stage for the topics you will be covering

03

Prepare the interviewee for “the shift”

04

Do not avoid asking the hard questions

# THE “HARD” QUESTIONS

Details about the sexual conduct

Seemingly inconsistent behaviors

Inconsistent evidence/information

What they were wearing

Alcohol or drug consumption

Probing into reports of lack of memory

# HOW TO ASK THE HARD QUESTIONS

- **Lay a foundation for the questions**
  - Explain why you are asking it
  - Share the evidence that you are asking about, or that you are seeking a response to
- **Be deliberate and mindful in your questions**
  - “Can you tell me what you were thinking when...”
  - “Help me understand what you were feeling when...”
  - “Are you able to tell me more about...”

## WHAT QUESTIONS DO YOU HAVE FOR QUINN?

“Casey and I have been friends for a few weeks. On Friday night, we were hanging out alone in my room, watching a movie. We started to make out, and I was ok with that. After making out for a while, Casey started touching me down there. Then Casey tried to have sex with me. Casey knew that I didn’t want to have sex but kept trying anyway. Casey was being really coercive, and so I just went along with it. Casey raped me and I want Casey to be held accountable.”

## WHAT QUESTIONS DO YOU HAVE FOR BARRI?

“When I got to the party, I was already lit. I kept letting Marc get me drinks anyway. At some point, I just kinda don’t remember anything. And then I woke up in Marc’s bed and it was morning. I had all my clothes on, but I know someone had sex with me. I could feel it. I just wanted to go, so I did. Before I left Marc woke up and tried to talk to me but I wasn’t hearing it. He looked guilty and I could tell he felt bad.”

## WHAT QUESTIONS DO YOU HAVE FOR COLIN?

“Pat and I have been together for about a month and have been intimate for the last two weeks. We went out with my friends on Friday night and Pat got really drunk. At some point we ran into my ex and Pat was really jealous, so we left. When we got back to my place, I thought things were fine. We started hooking up and all of a sudden Pat's mood changed. Pat got really aggressive and choked me. He was so angry and I was so scared.”

# EVIDENCE COLLECTION AND ASSESSMENT

02

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## EVIDENCE:

“Something (including testimony, documents, tangible objects) that tends to prove or disprove the existence of an alleged fact; anything presented to the senses and offered to prove the existence or non-existence of a fact.”

-Black's Law Dictionary



# TYPES OF EVIDENCE

## Direct Evidence

Evidence that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption.

## Circumstantial Evidence

Evidence based on inference and not on personal knowledge or observation.

## Corroborating Evidence

Evidence that differs from but strengthens or confirms what other evidence shows

# EVIDENCE

Testimony

Text  
Messages

Social Media  
Posts and  
Messages

Emails

Surveillance

Videos

Photographs

Police Body  
Camera  
Footage

Swipe Records

Medical  
Records

Phone Records

Audio Recordings

# EVIDENCE COLLECTION

- Identify the items of evidence that you would like to obtain.
- Develop an intentional strategy for obtaining that evidence.
- Overcome barriers to evidence collection.
- Considerations about collecting certain types of evidence.

**A THOROUGH INVESTIGATION**  
is more than evidence collection

# EVALUATING THE EVIDENCE

01

**Is it relevant?**

Is the evidence important, or of consequence, to the fact-finding process?

02

**Is it authentic?**

Is the item what it purports to be?

03

**Is it credible/reliable?**

Is the evidence worthy of belief and can the decision maker rely on it?

04

**What weight, if any, should it be given?**

How important is the evidence to the fact-finding process?

# A THOROUGH INVESTIGATION PERMITS THE DECISION MAKER TO ASSESS

- Relevance
- Credibility
- Reliability
- Authenticity
- Weight



## “RELEVANT” EVIDENCE

The Department declines to define “relevant”, indicating that term “should be interpreted using [its] plain and ordinary meaning.”

See, e.g., Federal Rule of Evidence 401 Test for Relevant Evidence:

“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.”

# EVIDENCE THAT IS NOT “RELEVANT”

“Questions and evidence about the complainant’s sexual predisposition or prior sexual behavior are not relevant,

- unless such questions and evidence about the complainant’s prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or
- if the questions and evidence concern specific incidents of the complainant’s prior sexual behavior with respect to the respondent and are offered to prove consent.”

“require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege.”

- Physical and mental health records and attorney-client privileged communications would fit within scope of this prohibition



# ASSESSING RELEVANCE

## Why Does it Matter?

- Unsure about the relevance about a particular item of evidence? Ask the person who has proffered it.
- Character Evidence
- Polygraph Evidence
- Opinion Evidence

# OPINION EVIDENCE

When might it be relevant?

How do you establish a foundation for opinion evidence so that the reliability of the opinion can be assessed?



# OPINION EVIDENCE: TRY IT!

You are investigating an allegation that Casey had sex with Taylor when Taylor was incapacitated. You interview several witnesses, one of whom made the following statement:

“I got to the party pretty late, and Taylor was already lit.”

“Taylor was wasted. Like totally messed up. There is no way they could have given permission for sex”

# ASSESSING AUTHENTICITY

Investigating the products of the Investigation



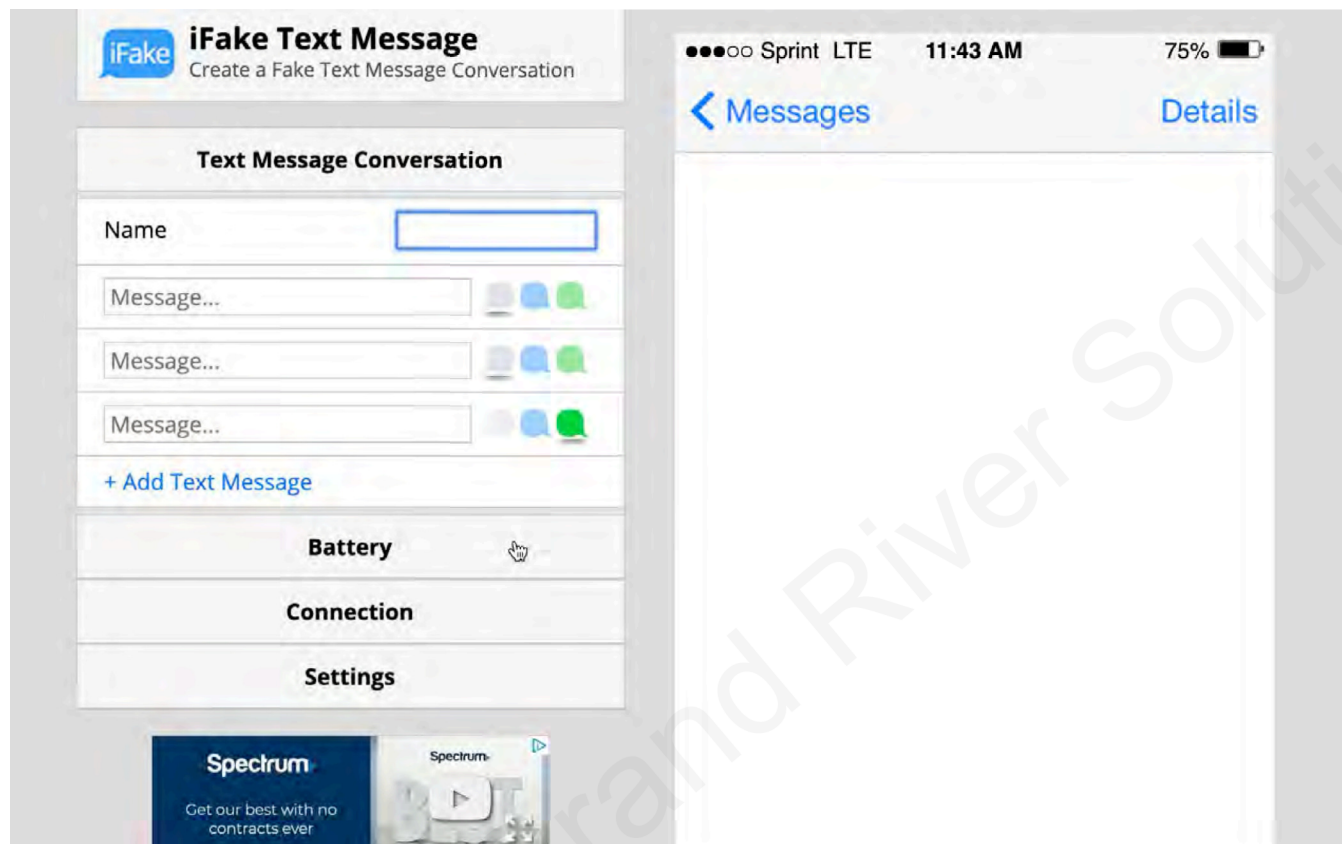
Never assume that an item of evidence is authentic.



Ask questions, request proof.



Investigate the authenticity if necessary.

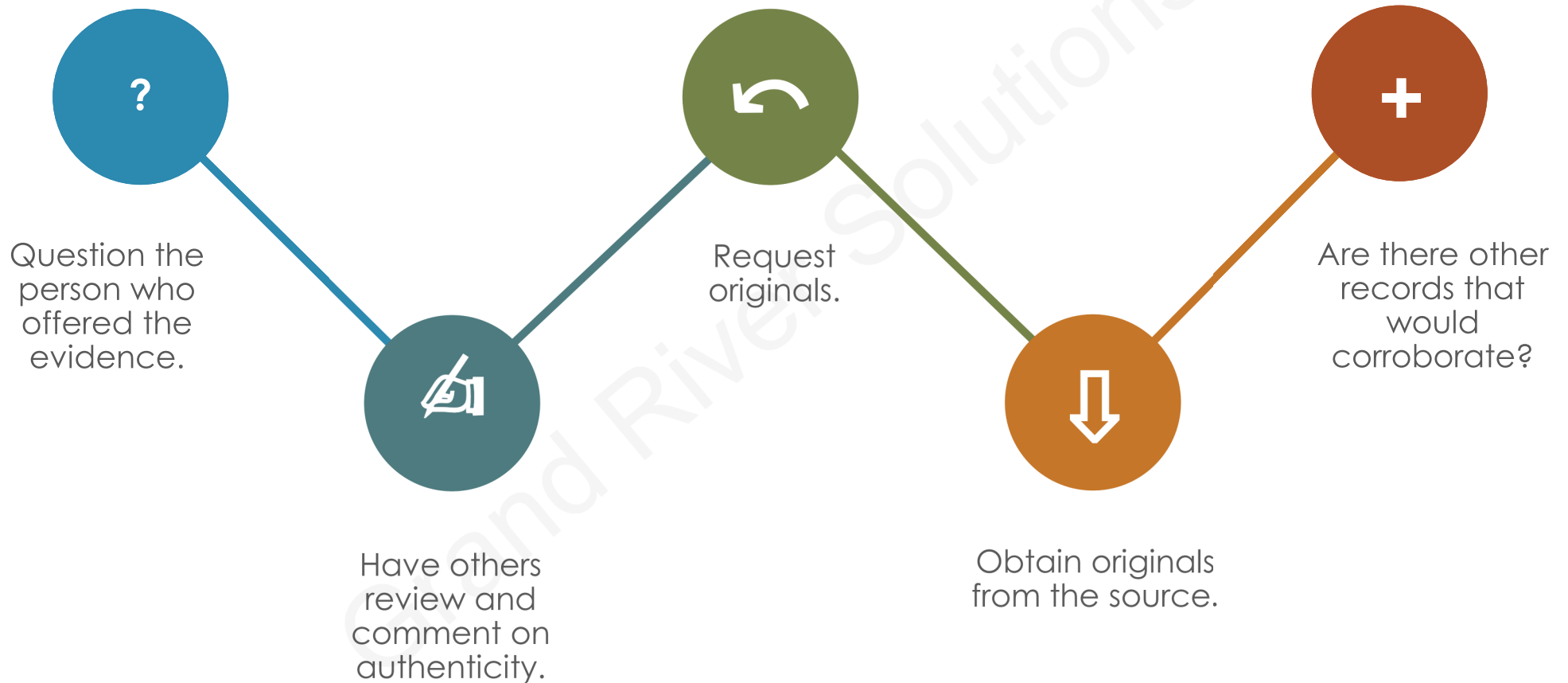


# FAKE TEXT MESSAGES

---

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# IS IT AUTHENTIC?



# ASSESSING CREDIBILITY AND RELIABILITY

No formula exists, but  
consider the following:

Sufficiency of  
detail and  
specificity

Ability to recollect  
events

Material  
Omission

Internal  
Consistency

Inherent  
Plausibility

Motive to  
falsify

Corroboration

# BARRIERS TO EVIDENCE COLLECTION



Non-participating parties

Uncooperative witnesses

Uncooperative advisors

Identity of party or witness unknown

Refusal to share materials

Materials lost or no longer accessible

Difficult topics



# THE INVESTIGATIVE REPORT AND RECORD

03

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At the conclusion of the investigation, we must create an investigative report that fairly summarizes relevant evidence.



# RELEVANCY STANDARD

## Relevant Evidence

- “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.”

## Irrelevant Evidence

- Prior sexual history of complainant, with two exceptions:
  - Legally recognized and un-waived privilege.
  - Records related to medical, psychiatric, psychological treatment

# WHO DECIDES?

- Department emphasizes repeatedly in Preamble that investigators have discretion to determine relevance
  - Subject to parties' right to argue upon review of "directly related" evidence that certain information not included in investigative report is relevant and should be given more weight
- Investigators will have to balance discretionary decisions not to summarize certain evidence in report against:
  - Each party's right to argue their case, and
  - Fact that decisions regarding responsibility will be made at hearing, not investigation stage



# REDACTIONS

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# ADDITIONAL REQUIREMENTS

Share the report with the parties and their advisors

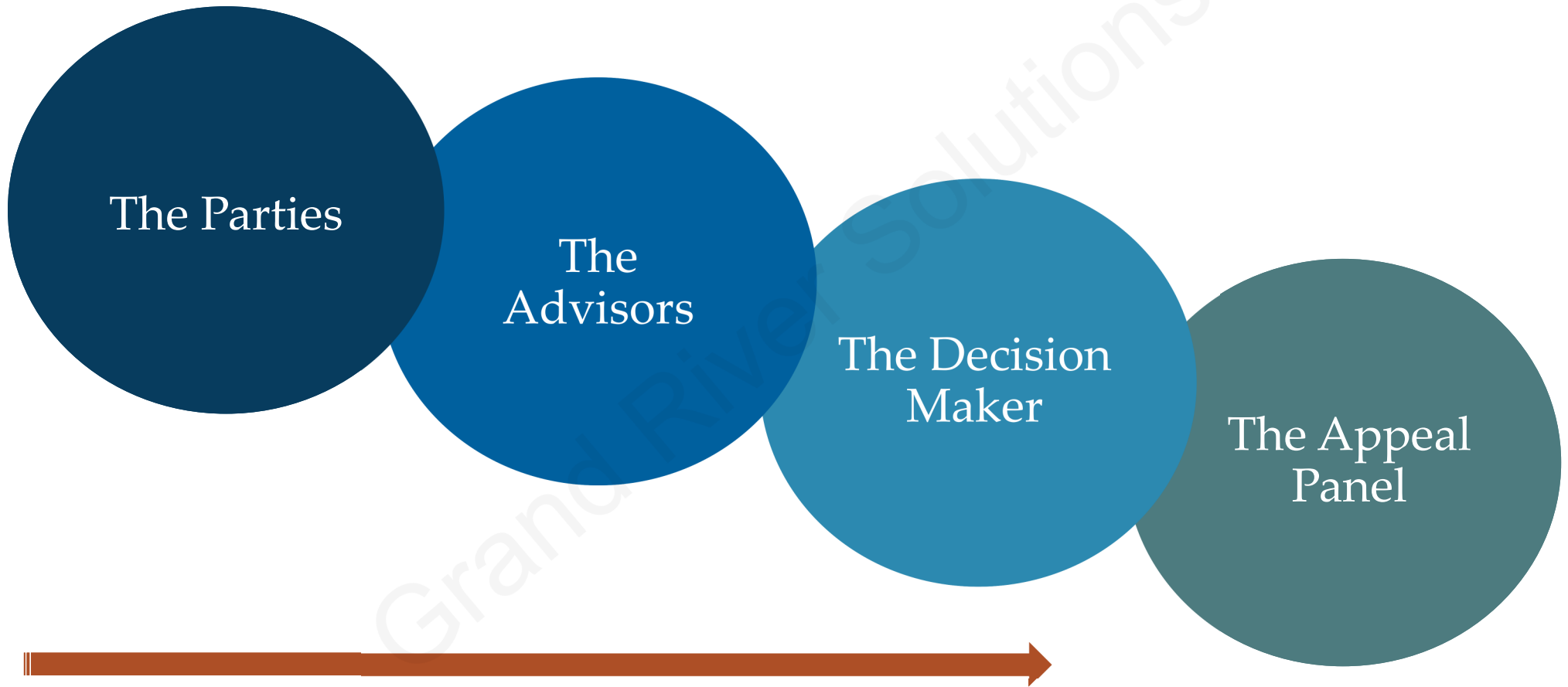
In electronic format or hard copy

At least 10 days prior to the hearing

# THE PURPOSE OF THE REPORT

- To allow for advance review
- To allow for advance preparation
  - By the Decision Maker
  - By the Parties
- Reduce likelihood of bias in the final outcome

# INTENDED RECIPIENTS





# OTHER RECIPIENTS?

- Friends of the parties
- Parents
- Law enforcement
- Attorneys
- Judges
- Media
- Social Media



# ESSENTIAL ELEMENTS

Intentionally organized to enhance comprehension

Factually accurate

Concise

Without editorial or opinion

Consistent format

# REPORT AND EVIDENCE FILE

## Summary of the Evidence



## Compilation of the Evidence



# THE EVIDENCE FILE

Compiles the  
evidence

Organized intentionally and  
consistently

Divided into  
Appendices

Attached to  
the report

Includes a  
procedural  
timeline

# EXAMPLE OF APPENDICES

- Appendix A
  - Contains all of the party/witness testimony (e.g., transcripts, statements summaries, etc.) that the investigator deems relevant
- Appendix B
  - Contains all of the documentary evidence (e.g., text messages, SANE reports, photographs, etc.) that the investigator deems relevant
- Appendix C
  - Contains the remaining evidence deemed irrelevant by the investigator, but that is directly related to the allegations in the formal complaint
- Appendix D
  - The procedural timeline

# STRUCTURE OF THE REPORT

- Overview of the Investigation
- Statement of Jurisdiction
- Identity of Investigators
- Objective of the Investigation and the Investigation Report
- Prohibited Conduct Alleged
- Witnesses
- Evidence Collected
- Summary of Evidence
- Conclusion

# REPORT STRUCTURE

## Overview

In this section, provide a very brief overview of the case. Include:

- the names of the parties,
- the applicable policy(ies)
- the prohibited conduct alleged,
- the date, time, and location of the conduct,
- a brief description of the alleged misconduct

# REPORT STRUCTURE

## Statement of Jurisdiction

1. Cite Jurisdictional Elements
2. State all grounds for Jurisdiction



# REPORT STRUCTURE

Identify  
Investigators

1. Identify the investigators by name
2. Investigator's training belongs in file, not in report

# REPORT STRUCTURE

## Objective of the Investigation & Report

1. This language should mirror the language in your policy or procedures.
2. State the objective of the investigation
3. Briefly state that all procedural steps were followed
4. Describe the purpose of the report.

# REPORT STRUCTURE

## Prohibited Conduct Alleged

1. List the allegations of prohibited conduct in the formal complaint
2. Include definitions of prohibited conduct from the institution's policy/procedures

# REPORT STRUCTURE

## List Witnesses

- List those witnesses that were interviewed
- List witnesses that were identified, but not interviewed
- Simple List
- Detailed List

## EXAMPLE OF A DETAILED LIST

Witness Name	Witness identified by:	Information offered
John Doe	Reporting Party	Mr. Doe is the Reporting Party's best friend. He was with the Reporting Party the night of the reported incident.
Jane Doe	Investigators	Jane Doe is the Responding Party's roommate. It is believed that she saw the Reporting Party leave the Responding Party's residence immediately following the reported incident.

# REPORT STRUCTURE

## Evidence Collected

- The final Title IX regulations require that all evidence obtained as part of the investigation that is directly related to the allegations in the formal complaint be shared with the parties and “made available at any hearing to give each party equal opportunity to refer to such evidence during the hearing including for the purposes of cross-examination.”
- In this section, list the Evidence or Refer to Appendices

# REPORT STRUCTURE

## Summary of Evidence

- In this section, include a summary of all relevant evidence. This section can be organized in several ways. It is important that, however organized, the evidence is summarized clearly and accurately, and without opinion or bias. In this section, the writer should cite the evidence and information in the Appendices.

# REPORT STRUCTURE

## Conclusion

- In this section, summarize next steps in the process, including any procedural pre-requisites for moving the matter forward to a hearing.



## CONNECT WITH US

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## WE LOVE FEEDBACK

Your Opinion Is Invaluable!

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# HEARINGS IN A POST REGULATORY WORLD

Day One

Jessica Brown & Davis Crow

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# ABOUT US

## Vision

We exist to create safe and equitable work and educational environments.

## Mission

To bring systemic change to how school districts and institutions of higher education address their Clery Act & Title IX obligations.

## Core Values

- Responsive Partnership
- Innovation
- Accountability
- Transformation
- Integrity

# AGENDA

● | Title IX Requirements for Hearings

● | Hearing Overview

● | Pre-Hearing Tasks

● | Developing Questions

● | The Hearing

● | Practical Application

# TITLE IX REQUIREMENTS FOR HEARINGS

01

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## Title IX of the Education Amendments Act of 1972

"No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."

20 U.S.C. § 1681 (1972).



# SEXUAL HARASSMENT: SECTION 106.30

Sexual harassment means conduct on the basis of sex that satisfies one or more of the following:

- (1) An **employee** of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;
- (2) Unwelcome conduct determined by a reasonable person to be so **severe, pervasive, and objectively offensive** that it **effectively denies** a person equal access to the recipient's education program or activity; or
- (3) "**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).



## AND... ONLY COVERED, IF:

### Place of Conduct

- On campus **OR**
- Campus Program, Activity, Building, **AND**
- In the United States

### Required Identity

- Complainant participating/attempting to participate in Program or Activity, **AND**
- Control over Respondent

# PROCEDURAL REQUIREMENTS FOR INVESTIGATIONS

Notice to BOTH parties

Equal Opportunity to  
Present Evidence

An advisor of choice

Written notification of  
meetings, etc., and  
sufficient time to prepare

Opportunity to review all  
directly related evidence,  
and 10 days to submit a  
written response to the  
evidence prior to  
completion of the report

Report summarizing  
relevant evidence and 10-  
day review of report prior  
to hearing

# PROCEDURAL REQUIREMENTS FOR HEARINGS

Must be live, but can be conducted remotely

No Compelling participation

Standard of proof used may be preponderance of the evidence or clear and convincing; standard must be the same for student and employee matters

Cross examination must be permitted and must be conducted by advisor of choice or provided by the institution

Decision maker determines relevancy of questions and evidence offered

Written decision must be issued that includes finding and sanction

# HEARING TECHNOLOGY: REQUIREMENTS AND CONSIDERATIONS



If hearings cannot be in person, or if someone chooses to participate remotely, must have a remote participation platform available.

All hearings must be recorded.

Participants must be able to communicate with decision makers and advisors during the hearing

# THE REQUIREMENT OF IMPARTIALITY

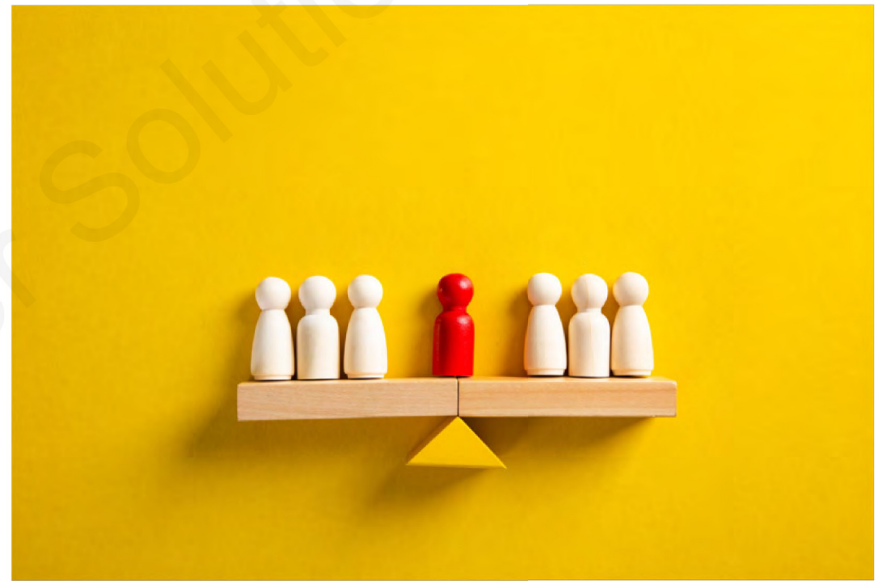


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## SECTION 106.45(b)(1)(iii)

The grievance process must require that any individual designated by the recipient as Title IX Coordinator, investigator, decision-maker, or facilitator of informal resolution not to have a conflict of interest or bias:

- For or against complaints or respondents generally, or
- An individual complainant or respondent



## ACTIVITY: IS THERE A CONFLICT OF INTEREST?

**Complainant:** Alex, a senior student and President of the Student Government Association (SGA) at a small liberal arts college.

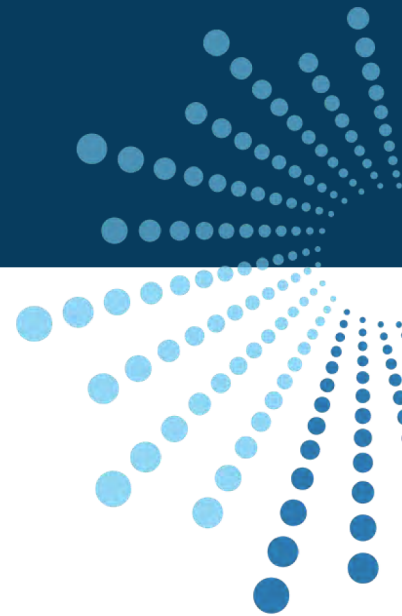
**Respondent:** Jack, a junior student, and member of the college's basketball team.

**Hearing Officer:** Dean Thompson, who is the Dean of Students but also Alex's direct supervisor as the SGA advisor.

**Additional Context:** Dean Thompson has a close professional and mentoring relationship with Alex, having worked with them extensively on SGA projects and initiatives. Additionally, Dean Thompson has a vested interest in maintaining a positive relationship with Alex, as the SGA President plays a crucial role in representing student interests and collaborating with college administrators.

# HEARING OVERVIEW

02



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# WHAT IS THE PURPOSE OF A HEARING?



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# PURPOSE OF THE HEARING

1. Review and Assess Evidence

2. Make Findings of Fact

3. Determine Responsibility/ Findings of Responsibility

4. Determine Sanction and Remedy

# PROCESS PARTICIPANTS

- The Parties:
  - Complainant
  - Respondent
- Advisors
- Hearing Facilitator/Coordinator
- Decision Maker (s)
  - Hearing Chair
- Investigator



# THE PARTICIPANTS

## The Parties

### Complainant

An individual who is alleged to be the victim of conduct that could constitute sexual harassment.

### Respondent

An individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.

# THE PARTICIPANTS

## Advisors

There are two types of Advisors



Advisor: throughout the whole process



Hearing Advisor: hearing, for purposes of asking questions

# THE PARTICIPANTS

## Advisors

- Can be anyone, including a lawyer, a parent, a friend, and a witness
- No particular training or experience required (institutionally appointed advisors should be trained)
- Can accompany their advisees at all meetings, interviews, and the hearing
- Advisors should help the Parties prepare for each meeting and are expected to advise ethically, with integrity, and in good faith
- May not speak on behalf of their advisee or otherwise participate, except that the advisor will conduct cross examination at the hearing.
- Advisors are expected to advise their advisees without disrupting proceedings



# THE PARTICIPANTS

## **Advisors:** Prohibited Behavior

An Advisor who oversteps their role as defined by the policy should be warned once. If the Advisor continues to disrupt or otherwise fails to respect the limits of the Advisor role, the meeting may be ended, or other appropriate measures implemented. Subsequently, the Title IX Coordinator has the ability determine how to address the Advisor's non-compliance and future role.





# THE PARTICIPANTS

## The Hearing Facilitator/Coordinator

- Manages the recording, witness logistics, party logistics, curation of documents, separation of the parties, and other administrative elements of the hearing process
- Non-Voting
- Optional, not required





# THE PARTICIPANTS

## Decision Maker or Makers

### Decision Maker

One-person.

### Decision Maker Panel

A panel.

Requires a hearing chair.

# THE PARTICIPANTS

## The Decision-Makers

- **A panel**
- Questions the parties and witnesses at the hearing
- Determines responsibility
- Determines sanction, where appropriate



# THE PARTICIPANTS

## The Hearing Chair

- Is a decision-maker
- Answers all procedural questions
- Makes rulings regarding relevancy of evidence, questions posed during cross examination
- Maintains decorum
- Prepares the written deliberation statement
- Assists in preparing the Notice of Outcome



# THE PARTICIPANTS

## The Decision Maker

- One person
- Questions the parties and witnesses at the hearing
- Determines responsibility
- Determines sanction, where appropriate
- Answers all procedural questions
- Makes rulings regarding relevancy of evidence, questions posed during cross examination
- Maintains decorum
- Prepares the written deliberation statement
- Assists in preparing the Notice of Outcome





# THE PARTICIPANTS

## The Investigator

- Can present a summary of the final investigation report, including items that are contested and those that are not;
- Submits to questioning by the Decisionmaker(s) and the parties (through their Advisors).
- Can be present during the entire hearing process, but not during deliberations.
- Questions about their opinions on credibility, recommended findings, or determinations, are prohibited. If such information is introduced, the Chair will direct that it be disregarded.



# PRE-HEARING TASKS: HEARING PANEL & CHAIR

03

What should be done in advance of the hearing?

# THE INVESTIGATION IS COMPLETE!



## Rapid Fire #1

It is time to schedule the hearing...

Using the chat box:  
share your “To Do” List  
for coordinating the  
hearing.



# RAPID FIRE RECAP

Arranging for space

Arranging  
technology

Scheduling pre-  
hearing meetings  
with parties &  
advisors

Scheduling  
prehearing  
meetings of  
the panel

Providing  
report and  
record to  
panel and  
parties

Scheduling  
the hearing

Conflict  
checks

Call for  
written  
submissions

Accommodations

Other considerations?



# PRE-HEARING MEETINGS

- Review the Logistics for the Hearing
- Set expectations
  - Format
  - Roles of the parties
  - Participation
- Decorum
- Impact of not following rules
- Cross Examination/Questioning Format & Expectations



# DECISION MAKER OR HEARING PANEL AS A WHOLE



Review  
evidence  
and report

Review applicable policy  
and procedures

Preliminary  
analysis of  
the  
evidence

Determine  
areas for  
further  
exploration

Develop  
questions  
of your  
own

# YOU AND YOUR TEAM DID A GREAT JOB SCHEDULING THE HEARING AND ARRANGING ALL THE LOGISTICS!

- It is now one week prior to the hearing. You have already received and reviewed the report and record and you will be meeting with the rest of the panel (or spending some quiet time by yourself) to prepare for the hearing.

## Rapid Fire #2

Use the chat box to share what you plan to discuss/think about during the prehearing meeting.



# RAPID FIRE RECAP



Development  
of  
introductory  
comments

Initial discussion of  
the evidence

Areas for  
further  
exploration

List of  
questions for  
the parties  
and the  
witnesses

Anticipation  
of potential  
issues

Logistics

Review of  
any written  
submissions  
by the  
parties

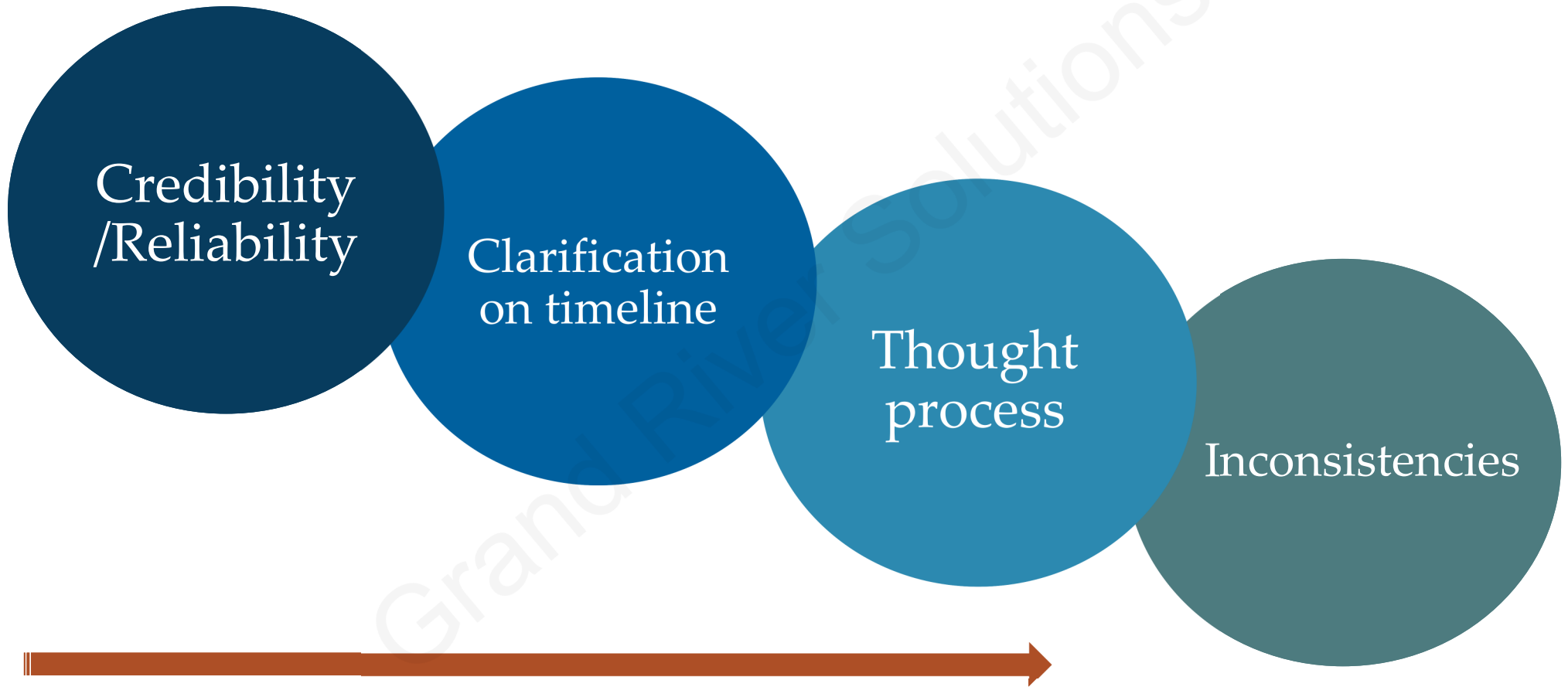
Other  
considerations?

# PRE-HEARING TASKS: DEVELOPING QUESTIONS

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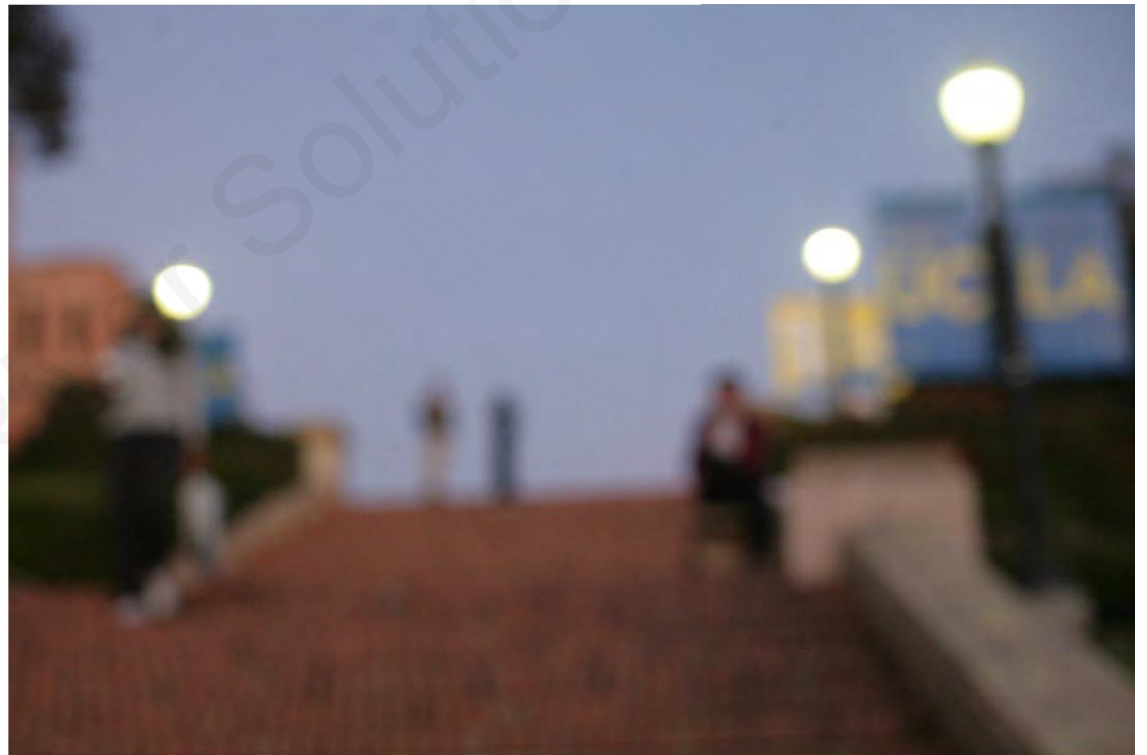
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# COMMON AREAS OF EXPLORATION



# COMMON AREAS OF WHERE CLARITY OR ADDITIONAL INFORMATION IS NEEDED

- Credibility
- Reliability
- Timeliness
- Inconsistencies
- Details about the alleged misconduct
- Facts related to the elements of the alleged policy violation
- Relevancy of certain items of evidence
- Factual basis for opinions





# CHARLIE AND RAMONA HYPOTHETICAL ACTIVITY

You will read a short hypothetical & policy definition and then answer:

- What are the elements of the policy?
- Develop questions addressing each of the policy elements based upon the facts you know and what you need to find out at the hearing.
- What areas of concern/exploration do you have? Why are you asking?





## WHAT FACTS DO I KNOW?

- The investigative report indicates:
  - *Student Jane was a TA for Prof. John Doe. Due to Jane's position, she and Prof. Doe spent a lot of time alone in Prof. Doe's office and lab.*
  - *Jane reported that "on more than one occasion" while alone with Prof. Doe in his office, Prof. Doe hugged her for "longer than [she] was comfortable with."*
  - *Prof. Doe told Investigator: "I'm a huggy guy." I treat my students like family, but there is never anything sexual implied when I hug a friend or student.*
  - *Jane said that in October and November Prof. Doe touched her knee and moved his hand up her leg touching her thigh while they were working alone in the lab. Jane said she "froze" in the moment, but after each instance she went home and cried.*
  - *Prof. Doe denied that this happened and said "at most" he may have accidentally grazed Jane's leg while they were working.*

# POLICY ANALYSIS

- Break down the policy into elements
- Organize the facts by the element to which they relate



# THE HEARING

04



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# ORDER OF PROCEEDINGS

1. Introductions and instructions by the Chair; Opening Statements

2. Presentation by Investigator

3. Presentation of information and questioning of the parties and witnesses

4. Closing Statements

5. Deliberation & Determination

# OPENING INTRODUCTIONS AND INSTRUCTIONS BY THE CHAIR

- The University has a script for this portion of the proceedings, and it should be used.
- Introduction of the participants.
- Overview of the procedures.
- Overall goal: manage expectations.
- Be prepared to answer questions.



# OPENING STATEMENTS

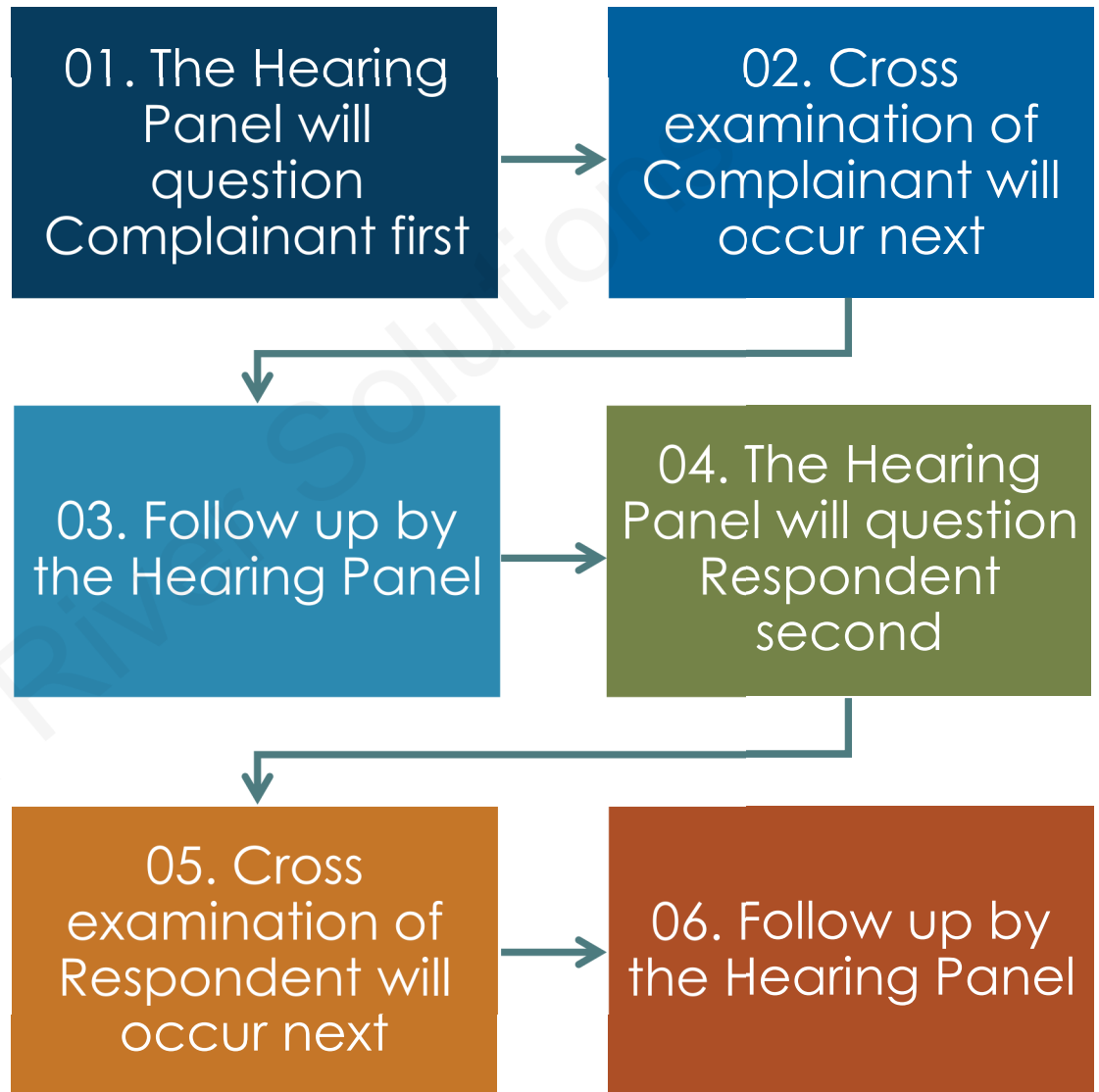
*Optional: Not required by the regulations; institution may choose to allow.*

- Prior to questioning beginning during the hearing, each party may be given the opportunity to make an opening statement.
- Intended to be a brief summary of the points the party would like to highlight.
- Directed to the Decision Maker and only the Decision Maker.
- Both parties should give opening statement before either is questioned.
- Typically, the complainant goes first.

# PRESENTATION OF INFORMATION & QUESTIONING OF THE PARTIES



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# QUESTIONING OF THE WITNESSES

01

The Chair will determine the order of questioning of witnesses

02

The Hearing Panel will question first

03

Advisor cross-examination will occur next (suggested: Complainant's advisor followed by Respondent's advisor)

04

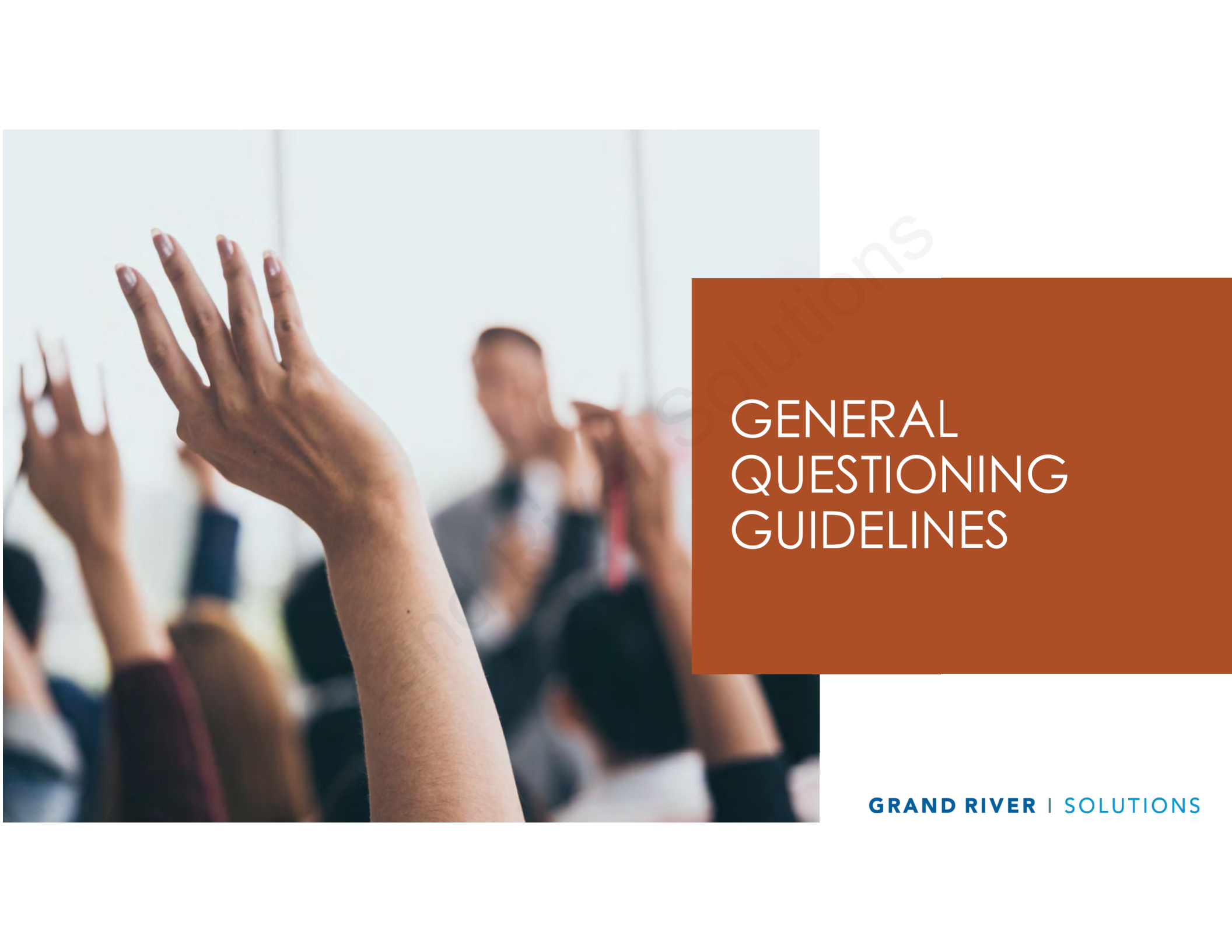
Follow up by the Hearing Panel



# CLOSING STATEMENTS

Prior to the conclusion of the hearing, each party will have the opportunity to make a closing statement.

- Intended to be a brief summary of the points the party would like to highlight.
- Directed to the Decision Maker and only the Decision Maker
- Not time to introduce new information or evidence.



# GENERAL QUESTIONING GUIDELINES

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# FORMAT OF QUESTIONING

The Hearing Panel or the advisor will remain seated during questioning

Questions will be posed orally

Questions must be relevant

# WHEN QUESTIONING....

- Be efficient
- Be prepared to go down a road that you hadn't considered or anticipated exploring.
- Explore areas where additional information or clarity is needed.
- Take your time. Be thoughtful. Take breaks if you need it.
- Listen to the answers.



# FOUNDATIONAL QUESTIONS TO ALWAYS CONSIDER ASKING

Were you interviewed?

Did you see the interview notes?

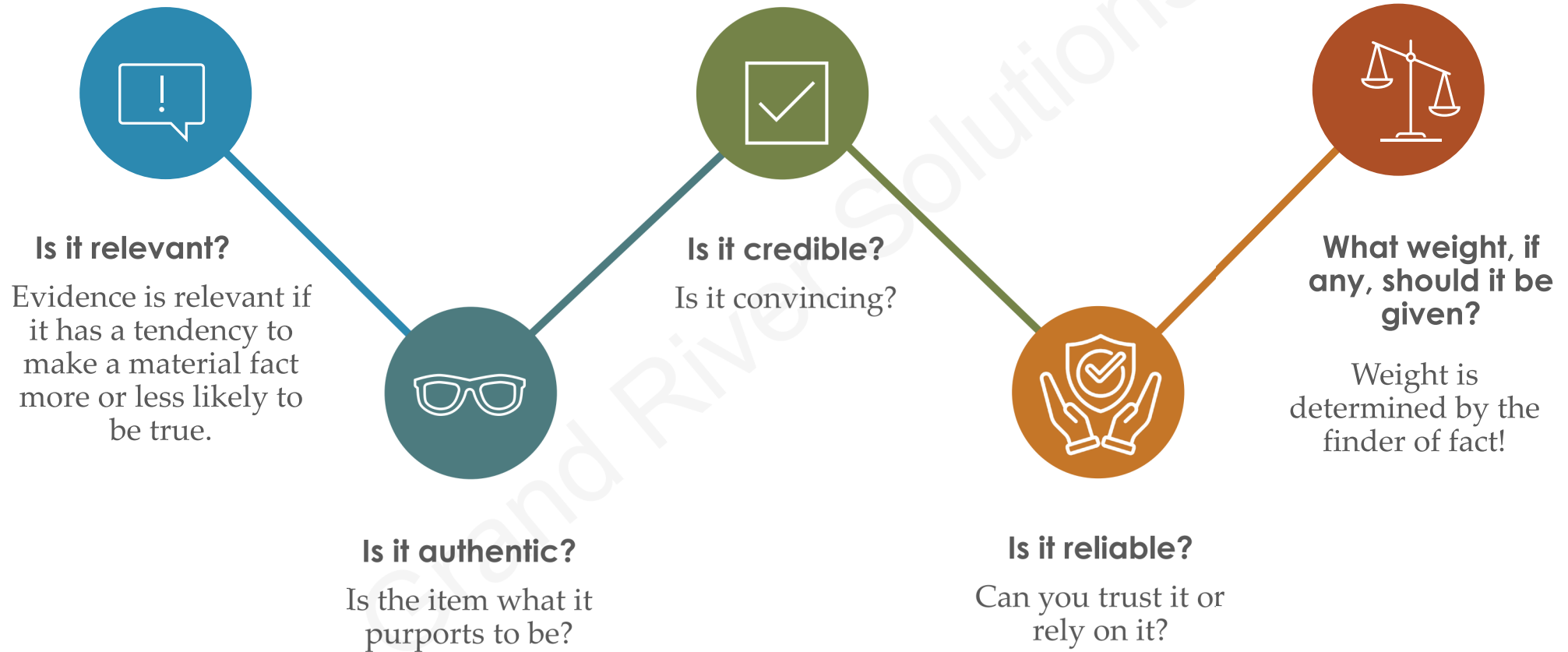
Did the notes reflect your recollection at the time?

As you sit here today, has anything changed?

Did you review your notes before coming to this hearing?

Did you speak with any one about your testimony today prior to this hearing?

# EVIDENTIARY CONSIDERATIONS DURING QUESTIONING





# WHEN ARE QUESTIONS RELEVANT?

- Logical connection between the evidence and facts at issue
- Assists in coming to the conclusion – it is “of consequence”
- Tends to make a fact more or less probable than it would be without that evidence



# IRRELEVANT AND IMPERMISSIBLE QUESTIONS



Information protected by an un-waived legal privilege

Medical treatment and care

Unduly repetitious or duplicative questions

Information that otherwise irrelevant

Complainant's prior sexual history, with limited exceptions.



# QUESTIONING TO ASSESS RELIABILITY

- Inherent plausibility
- Logic
- Corroboration
- Other indication of reliability



# QUESTIONING TO ASSESS CREDIBILITY

NO FORMULA EXISTS, BUT CONSIDER ASKING QUESTIONS ABOUT THE FOLLOWING:

Opportunity to view

Ability to recall

Motive to fabricate

Plausibility

Consistency

Coaching

# CREDIBILITY VERSUS RELIABILITY

- **Reliability**

- I can trust the consistency of the person's account of their truth.
- It is probably true and I can rely on it.

- **Credibility**

- I trust their account based on their tone and reliability.
- They are honest and believable.
- It might not be true, but it is worthy of belief.
- It is convincingly true.
- The witness is sincere and speaking their real truth.

# OPINION EVIDENCE

When might it be relevant?

How do you establish a foundation for opinion evidence so that the reliability of the opinion can be assessed?



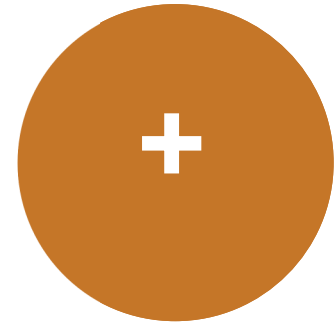
# IS IT AUTHENTIC?



Question the person who offered the evidence.



Have others review and comment on authenticity.



Are there other records that would corroborate?

TRAUMA-INFORMED  
PRACTICES PROVIDE  
TOOLS & TECHNIQUES  
FOR ENGAGING WITH  
THE COMPLAINANT,  
RESPONDENT, AND  
WITNESSES.



Format/Structure of the  
Hearing



Format of Questions



Approach to  
Clarification



# WHAT ARE SOME DIFFICULT QUESTIONS YOU STRUGGLE WITH ASKING?



# THE “HARD” QUESTIONS

Details about the sexual  
conduct

Seemingly inconsistent  
behaviors

Inconsistent  
evidence/information

What they were wearing

Alcohol or drug  
consumption

Probing into reports of lack  
of memory



# HOW TO ASK THE HARD QUESTIONS

- **Lay a foundation for the questions**
  - Explain why you are asking it
  - Share the evidence that you are asking about, or that you are seeking a response to
- **Be deliberate and mindful in your questions**
  - “Can you tell me what you were thinking when...”
  - “Help me understand what you were feeling when...”
  - “Are you able to tell me more about...”



# SPECIAL CONSIDERATIONS FOR QUESTIONING THE INVESTIGATOR

- The Investigator's participation in the hearing is as a fact witness;
- Questions directed towards the Investigator shall be limited to facts collected by the Investigator pertinent to the Investigation;
- Neither the Advisors nor the Decision-maker(s) should ask the Investigator(s) their opinions on credibility, recommended findings, or determinations;
- The Investigators, Advisors, and parties will refrain from discussion of or questions about these assessments. If such information is introduced, the Chair will direct that it be disregarded.

# SPECIAL CONSIDERATIONS FOR PANELS

If a panel, decide in advance who will take the lead on questioning

Go topic by topic

Ask other panelists if they have questions before moving on

Do not speak over each other

Pay attention to the questions of other panelists

Ok to take breaks to consult with each other, to reflect, to consult with the TIXC or counsel



# TITLE IX HEARINGS IN A POST REGULATORY WORLD

Day 2

Davis Crow & Jessica Brown

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# OUTSTANDING QUESTIONS FROM DAY ONE



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# OVERVIEW OF DAY TWO

- | Advisor Questioning
- | Deliberations
- | Practical Application
- | Questions



# BREAK OUT! #1

All groups: Areas or topics that you would like to explore further in the hearing



Say hi!



Pick a scribe



Discuss

**Group 1:** Questions for Complainant and Witnesses Professor McPhee

**Group 2:** Questions for Respondent and Witness Taylor

**Group 3:** Questions for Witness Tom and Witness Charlie

# REPORT OUT



**Group 1:** Questions for Complainant and Witnesses Professor McPhee



**Group 2:** Questions for Respondent and Witness Taylor



**Group 3:** Questions for Witness Tom and Witness Charlie



# THE DECISION MAKER'S ROLE IN ADVISOR QUESTIONING



05

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# CROSS EXAMINATION

## WHO DOES IT?

1

Must be conducted by the advisor

2

If party does not appear or does not participate, advisor can appear and cross

3

If party does not have an advisor, institution must provide one

# THE ROLE OF THE DECISION MAKER DURING QUESTIONING BY THE ADVISORS

- After the Advisor poses a question, the proceeding will pause to allow the Chair to consider it.
- Chair will determine whether the question will be permitted, disallowed, or rephrased. The Chair may explore arguments regarding relevance with the Advisors.
- The Chair will limit or disallow questions on the basis that they are irrelevant, unduly repetitious (and thus irrelevant), or abusive.
- The Chair will state their decision on the question for the record and advise the Party/Witness to whom the question was directed, accordingly. The Chair will explain any decision to exclude a question as not relevant, or to reframe it for relevance.
- The Chair has final say on all questions and determinations of relevance. The parties and their advisors are not permitted to make objections during the hearing. If they feel that ruling is incorrect, the proper forum to raise that objection is on appeal.

# THE PARTICIPANTS

## **Advisors:** Prohibited Behavior

An Advisor who oversteps their role as defined by the policy should be warned once. If the Advisor continues to disrupt or otherwise fails to respect the limits of the Advisor role, the meeting may be ended, or other appropriate measures implemented. Subsequently, the Title IX Coordinator has the ability determine how to address the Advisor's non-compliance and future role.



# WHEN ASSESSING RELEVANCE, THE DECISION MAKER CAN:

- Ask the person who posed the question why their question is relevant
- Take a break
- Ask their own questions of the party/witness



# RELEVANT VS. IRRELEVANT



Logical connection  
between the  
evidence and facts  
at issue



Assists in coming to  
the conclusion – it is  
“of consequence”



Tends to make a fact  
more or less probable  
than it would be  
without that evidence

## BREAK OUT! #2

All groups: Review questions and determine whether they are relevant and allowed to be asked or irrelevant/impermissible



Say hi again!



Pick a scribe



Discuss

**Group 1:** Questions for Complainant and Witnesses Professor McPhee

**Group 2:** Questions for Respondent and Witness Taylor

**Group 3:** Questions for Witness Tom and Witness Charlie

# REPORT OUT



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# **GROUP 1** QUESTIONS SUBMITTED BY **RESPONDENT'S** ADVISOR

## Questions for Complainant

1. Isn't it true you found Alex attractive after you first met?
2. You wanted to hook up with Alex, didn't you?
3. You made this complaint only because you wanted your boyfriend's attention, isn't that true?
4. You kept calling Alex and asking him for help because you couldn't finish your part of the project without him, isn't that true?
5. You told the investigator you imagined seeing Alex everywhere. Where do you think you saw him?
6. Why were you always thinking of Alex?
7. And how often do you hallucinate?
8. How often has this happened in the past?
9. Why did you ask your boyfriend to walk you to your car when you knew you were supposed to meet Alex there?
10. You said you were frightened by seeing Alex in the parking garage. Did he have a weapon? Did he try to touch you? Did he try to hit you? Describe each and every way he tried to attack you that night.

# **GROUP 2** QUESTIONS SUBMITTED BY **COMPLAINANT'S** ADVISOR

## Questions for Respondent

1. Do you keep stalking Stevie because you're OCD?
2. Have you ever been removed from another group project because you could not get along with others?
3. When you first talked to Stevie about your girlfriend breaking up with you, who was your girlfriend, or did you make that up just so you could talk to Stevie?
4. Why did you keep offering to work with Taylor in person instead of by Zoom?
5. Did you have a thing for Taylor?
6. Did you and Taylor ever end up hooking up?

# **GROUP 3** QUESTIONS SUBMITTED BY **COMPLAINANT'S** ADVISOR

## Questions for Tom

1. Can you think of any reason for Alex to be hanging out in the garage with flowers, other than to frighten Stevie?
2. Alex was pretty creepy, wasn't he?
3. Did you see him throw an object at Stevie?
4. Do you believe he was acting in self-defense when he threw the object?
5. You said Stevie is really pretty and guys hit on her a lot. Don't you think someone who has had a lot of male attention would be in the best position to know which kind of male attention is acceptable, and when it is stalking?

# GROUP 1

QUESTIONS SUBMITTED BY **COMPLAINANT'S** ADVISOR

## Questions for Witness Professor McPhee

- 1. Why didn't you tell Alex to stop stalking Stevie?**
- 2. Weren't you supposed to forward Stevie's Title IX Complaint to the Coordinator, and don't you think that if you had done so, she would have been spared his stalking?**

# **GROUP 2** QUESTIONS SUBMITTED BY **COMPLAINANT'S ADVISOR**

## Questions for Taylor

1. Did Alex seem fixated on Stevie when you were all part of the class project?
2. Did Alex insist that the two of you work together in person instead of online?
3. How often did he force you to work in person with him after classes?
4. Were you afraid of him?

# GROUP 3

QUESTIONS SUBMITTED BY **RESPONDENT'S** ADVISOR

## Questions for Tom

1. When you saw Alex in the parking garage, were you frightened?
2. What, specifically, did Alex do that was frightening?
3. Does Stevie always overreact?
4. What, specifically, did Alex throw at her?

# GROUP 1

QUESTIONS SUBMITTED BY **RESPONDENT'S** ADVISOR

## Questions for Witness Professor McPhee

1. What grade did she have up to the project and what grade did she get on the project?
2. Isn't it true that Stevie was doing poorly in class?
3. After she made this complaint, did she get some special treatment or accommodation in your class?
4. Isn't it true that, once you told her she would have to do the work, she suddenly made up a story about Alex to paint him in a bad light?
5. Isn't it true that, before she told you this lie, you had no reason to think poorly of Alex?

# GROUP 2

QUESTIONS SUBMITTED BY **RESPONDENT'S** ADVISOR

## Questions for Taylor

1. Were you frustrated when working on the group project? Why?
2. Why did you think Alex was more frustrated than others?
3. Why did you think he was “taking it out” on Stevie if he was frustrated with the whole group?
4. Are you and Stevie friends?
5. Did Stevie tell you what to say in the investigation? If so, what?
6. Are you one of those “Believe all victims” people?



# **GROUP 3** QUESTIONS SUBMITTED BY **COMPLAINANT'S ADVISOR**

## Questions for Witness Charlie

1. So are you the one who suggested Alex stalk Stevie's social media to find a food or drink she liked?
2. Why do you think Stevie and Alex had a plan to get together one night and talk? Do you know for sure that there were confirmed plans?
3. What proof did Alex give you to prove there was a real plan, and not an imaginary one?
4. You said Stevie was "rude" because you could not do a lot of work on the group project. What did you mean by that?
5. How long have you known Alex?
6. Isn't it true you just don't like Stevie?
7. Have you ever been accused of sexual harassment or stalking?
8. Isn't it true that you would say anything to support a guy who has been accused?

# GROUP 3

QUESTIONS SUBMITTED BY **RESPONDENT'S** ADVISOR

Questions for Witness Charlie

- No Questions

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# AFTER THE HEARING

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# Deliberations

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# PREPONDERANCE OF THE EVIDENCE

- Standard of proof by which determinations of responsibility are made
- **"More likely than not"**
- It does not mean that an allegation must be found to be 100% true or accurate
- **A finding of responsibility =**
  - There was sufficient reliable, credible evidence to support a finding, by a preponderance of the evidence, that the policy was violated
- **A finding of not responsible =**
  - There was not sufficient reliable, credible evidence to support a finding, by a preponderance of the evidence, that the policy was violated



# WEIGHING THE EVIDENCE & MAKING A DETERMINATION

1. Evaluate the relevant evidence collected to determine what weight, if any, you will afford that item of evidence in your final determination;
2. Apply the standard of proof and the evidence to each element of the alleged policy violation;
3. Make a determination as to whether or not there has been a policy violation.



# FINDINGS OF FACT

- **A "finding of fact"**

- The decision whether events, actions, or conduct occurred, **or** a piece of evidence is what it purports to be
- Based on available evidence and information
- Determined by a preponderance of evidence standard
- Determined by the fact finder(s)

- **For example...**

- Complainant reports that they and Respondent ate ice cream prior to the incident
- Respondent says that they did not eat ice cream
- Witness 1 produces a timestamped photo of Respondent eating ice cream

- **Next steps?**

# POLICY ANALYSIS

- Break down the policy into elements
- Organize the facts by the element to which they relate





# ALLEGATION: FONDLING

**Fondling** is the:

- ☐ touching of the private body parts of another person
- ☐ for the purpose of sexual gratification,
- ☐ Forcibly and/or without the consent of the Complainant,
  - ☐ including instances where the Complainant is incapable of giving consent because of their age or **because of their temporary or permanent mental or physical incapacity.**

# ANALYSIS GRID

Touching of the private body parts of another person	For the purpose of sexual gratification	Without consent due to lack of capacity
<p><b>Undisputed:</b> Complainant and Respondent agree that there was contact between Respondent's hand and Complainant's vagina.</p>	<p>Respondent acknowledges and admits this element in their statement with investigators.</p> <p><i>"We were hooking up. Complainant started kissing me and was really into it. It went from there. Complainant guided my hand down her pants..."</i></p>	<p><b>Complainant:</b> drank more than 12 drinks, vomited, no recall <b>Respondent:</b> C was aware and participating <b>Witness 1:</b> observed C vomit <b>Witness 2:</b> C was playing beer pong and could barely stand <b>Witness 3:</b> C was drunk but seemed fine <b>Witness 4:</b> carried C to the basement couch and left her there to sleep it off.</p>

# ANALYSIS GRID

Touching of the private body parts of another person	For the purpose of sexual gratification	Without consent due to lack of capacity
<p><b>Undisputed:</b> Complainant and Respondent agree that there was contact between Respondent's hand and Complainant's vagina.</p> <div></div>	<p>Respondent acknowledges and admits this element in their statement with investigator.</p> <div></div> <p><i>"We were looking up. Complainant started kissing me and was really into it. It went from there. Complainant guided my hand down her pants..."</i></p>	<p><b>Complainant:</b> drank more than 12 drinks, vomited, no recall <b>Respondent:</b> C was aware and participating <b>Witness 1:</b> observed C vomit <b>Witness 2:</b> C was playing keepy uppy and could barely stand <b>Witness 3:</b> C drank but seemed fine <b>Witness 4:</b> carried C to the basement couch and left her there to sleep it off.</p> <div></div>

# DID YOU ALSO ANALYZE...?

On campus?

Program or Activity?

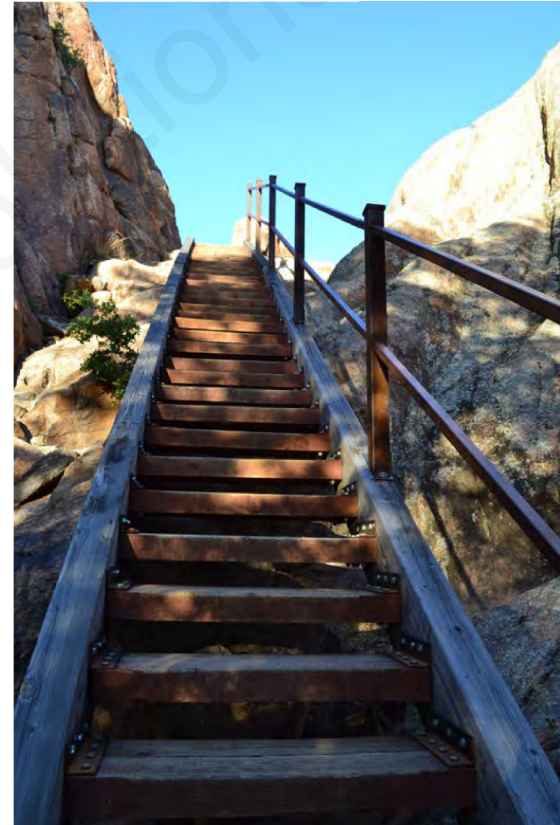
In a building owned/controlled by a recognized student organization?

Substantial control over respondent and context?

Complainant was attempting to access program/activity?

# GOALS OF SANCTIONS/DISCIPLINE

1. End the harassment
  2. Prevent its recurrence
  3. Remedy the harm
- What steps would be reasonably calculated to end harassment and prevent recurrence?



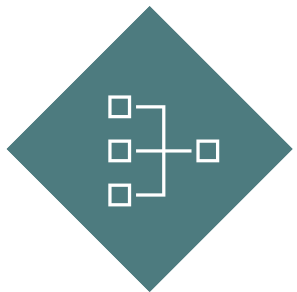
# SANCTIONING



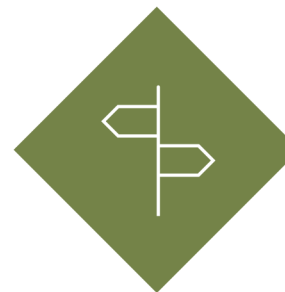
State Law



Learning Environment



System Policy



Measures Available

# THE SANCTION DOES NOT UNDO THE FINDING

- No lesser sanction if you disagree with findings
- Sanctioning officer must assume findings are correct

# DETERMINING THE PROPER SANCTION

- Consistency
- Foreseeability of repeated conduct
- Past conduct
- Does bias creep in?
- Remorse?
- Victim impact?





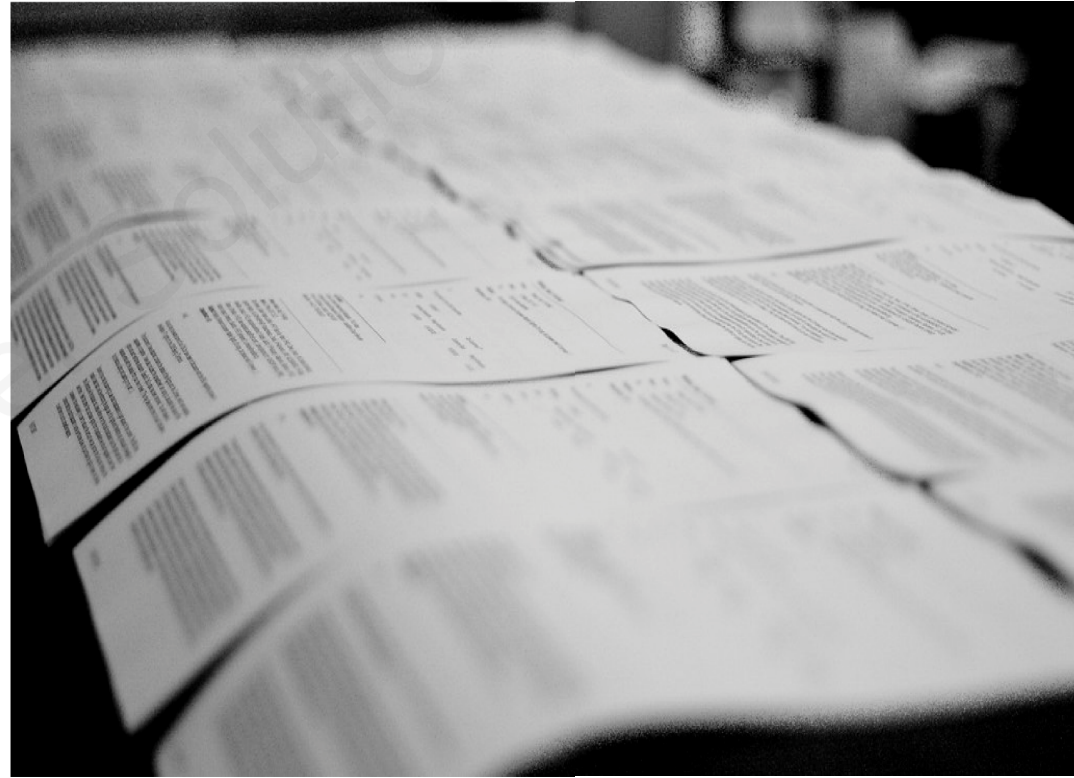
# AGGRAVATING CIRCUMSTANCES

- Premeditation
- Predation
- Physical violence
- Repeated violation
- Multiple policy violations in one incident
- Harm to others, impact on complainant and/or community
- Did the behavior continue after intervention?
- Effort to conceal or hide the incident?
- Refusal to attend past trainings
- Past failures to comply with directives



# FINAL REPORT

- The allegations
- Description of all procedural steps
- Findings of fact
- Conclusion of application of facts to the policy
- Rationale for each allegation
- Sanctions and remedies
- Procedure for appeal



# THE FINAL DETERMINATION SHOULD STAND ON ITS OWN



- S** Simple and Easy to Comprehend
- T** Transparent/Clear
- A** Accurate
- N** Neutral/Unbiased
- D** Draw Attention to Significant Evidence and Issues

# ADVISOR'S ROLE POST-HEARING

- May meet with their advisee to review decision and respond to procedural questions.
- Institutionally-appointed advisors typically do not advise nor assist the party in developing an appeal.
- Advisor of choice may assist in advising party whether or not to appeal and in the drafting of an appeal.



# PRACTICAL APPLICATION

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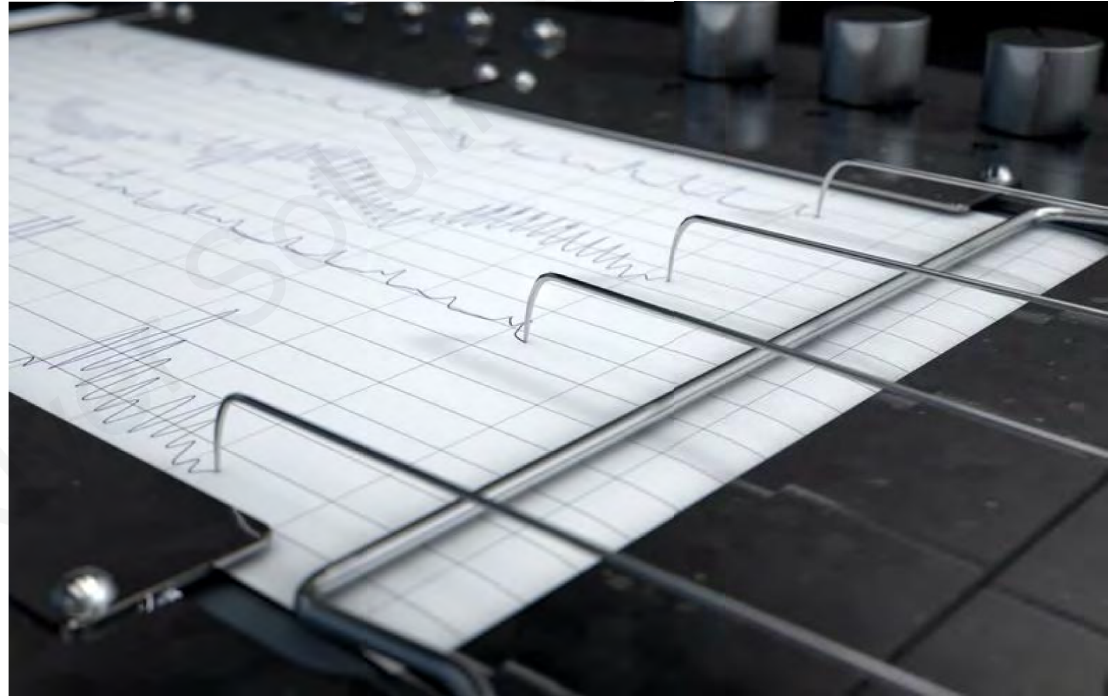
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# SCENARIO 1

Respondent provides a polygraph report to investigators wherein it is concluded that Respondent is not being deceptive when denying the allegations.

- **The Investigator determines the report is irrelevant. Must the Investigator share the report with the decision maker?**

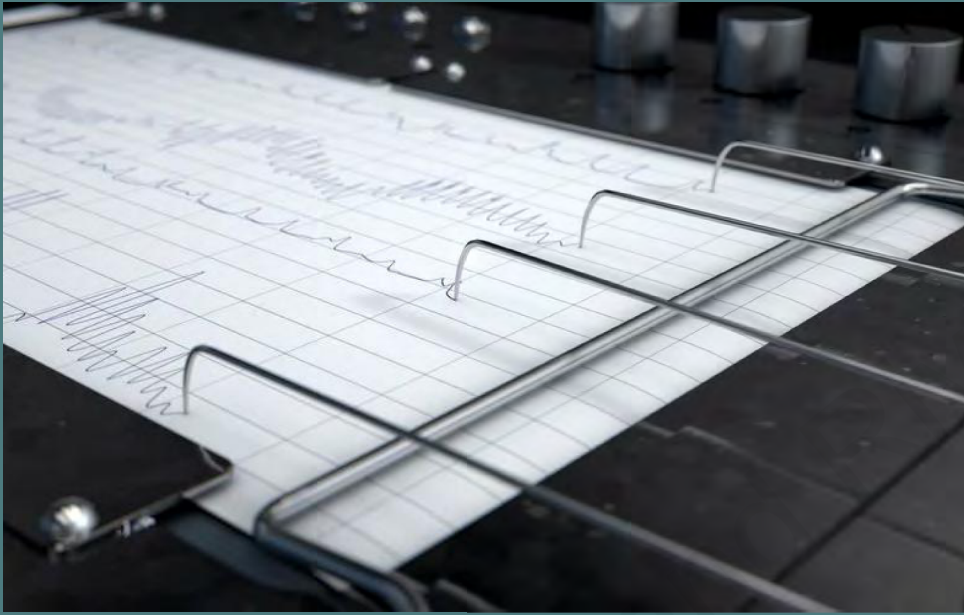


## SCENARIO 2



- Respondent appears at the hearing with Witness 7. Respondent would like Witness 7 to provide information testimony about text messages between them and Complainant that indicate that Complainant has made the allegations up.
- **Can the HP hear from Witness 7 at the hearing?**

## SCENARIO 3



Respondent provides a polygraph report to Investigators wherein it is concluded that Respondent is not being deceptive when denying the allegations. The polygrapher appears and answers all relevant questions on cross.

**Must the Hearing Panel find Respondent not responsible because of the findings in the report?**



## SCENARIO 4



During the hearing, the Complainant becomes upset, shuts down, and stops answering question.

**If you are the Hearing Chair, how do you respond?**

# THANK YOU!

## CONNECT WITH US

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## WE LOVE FEEDBACK

Your Opinion Is Invaluable!

Decision Maker Training for  
Internal GRS Team January 2024



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# APPEALS

Davis Crow & Jody Shipper

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# MEET YOUR FACILITATORS



**Davis Crow**

Senior Solutions Specialist with Grand River Solutions, Davis works as an investigator, decision maker, hearing panel chair, and appeals officer, and provides trainings, specializing in Title IX, Title VII, and the Americans with Disabilities Act. Davis has a J.D. from Stetson University College of Law and a M.Ed. University of Mississippi.



**Jody Shipper**

Co-Founder & Managing Director of Grand River Solutions, Jody Shipper is a nationally-recognized subject-matter expert with more than 20 years of experience in Title IX and related fields. She is known for her insight into best-in-class programming, policies, and community outreach aimed at addressing sexual misconduct on campus. She lectures extensively throughout the U.S.



# THE BASIC TENETS

Dear Appeals Officer . . .

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# EVIDENCE: GATHERING, WEIGHING, ANALYZING

Avoiding Common Errors



# ALL APPEALS

Trauma-Informed

Each in their lane: The limits of an appeal officer's task

Fundamental Fairness

Due Process

Follow Your Process



# THE RIGHT TO APPEAL?

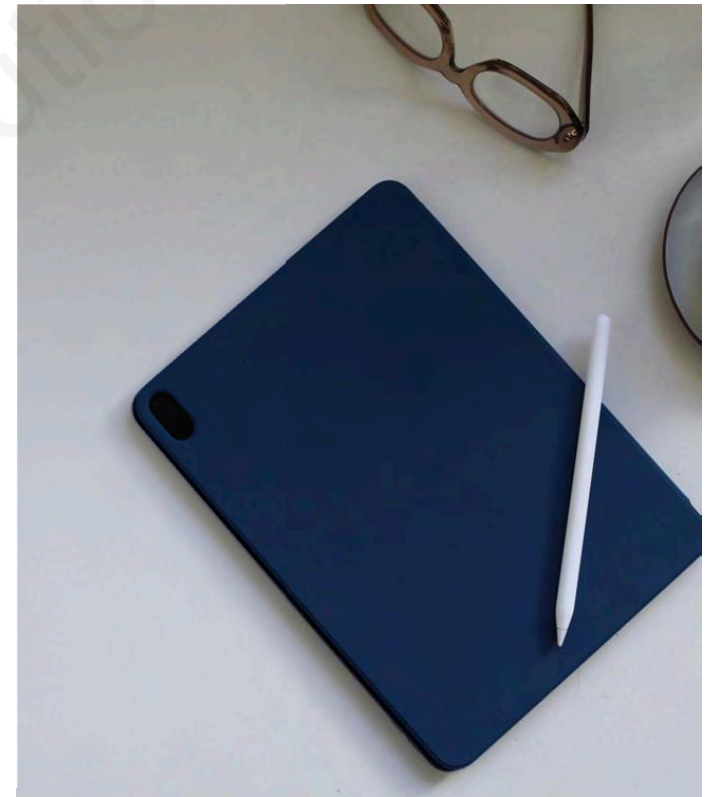
Both the complainant and respondent have the right to:



- Appeal the same things in the same way to the same person(s);
- Receive information about the appeal process;
- Appeal a sanction;
- Have all aspects of the process be the same for each party;
- Have their appeal reviewed and decided upon;
- Receive notice of the outcome of the appeal.

# SANCTIONS AND INTERIM MEASURES DURING APPEAL PROCESS

- Maintaining or changing interim measures during the process
- Communicating and documenting sanctions and interim measures
- Deciding whether to impose sanctions during the process
  - Pros and Cons



# DUE PROCESS DURING THE APPEAL PROCESS

## Equal Rights and Fair Process for Each Party

- Using regular, published procedures
- Grounds for appeal
- Who is reviewing or hearing the appeal

# BEFORE THE APPEAL

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# NOTIFICATION OF THE APPEALS PROCESS

Who Gets Notified	What They are Notified Of
<ul style="list-style-type: none"><li>• Complainant</li><li>• Respondent</li><li>• Student Conduct?</li><li>• Human Resources?</li><li>• Academic</li><li>• Personnel?</li></ul>	<ul style="list-style-type: none"><li>• Allegations</li><li>• Investigation Outcome</li><li>• Applicable Policy</li><li>• Appeals Process</li><li>• Timeline</li><li>• Links</li><li>• Dates</li><li>• How to submit</li></ul>

# WHOSE JOB IS IT?

Receive the appeals

Determine whether the grounds for appeal have been met

Notify the person(s) responsible for reviewing the appeal

Arrange the logistics for the appeal

Communicate with complainant and respondent and advisors and witnesses as appropriate

# WHOSE JOB IS IT ? (CONTINUED)

- Communicate the decision
  - Complainant and Respondent
  - Title IX
- Document retention
- Determine remedies



# DE NOVO APPEALS?

We Are Never, EVER,  
going back to this



# DIFFERENCES IN RESPONSIBILITY

## RESOLUTIONS

- Investigate, Hearing
- Determine What Happened
  - Findings of Fact
  - Findings of Policy

SANCTION

## APPEAL

- Review the Appeal
- Determine Whether Grounds for Appeal Have Been Met
- Make Decision Regarding Merits of Appeal

# DIFFERENCES IN BURDEN

COLLEGE/  
UNIVERSITY



Error correction

COMPLAINANT  
RESPONDENT



Persuade and point out error with  
supporting evidence or facts

# HAS THE BURDEN BEEN MET?

Review the information provided by Complainant and/or Respondent and determine whether it contains sufficient information concerning the grounds for appeal and the reasons related to those grounds

This step is **not** to decide the merits of the appeal, but to identify the nature and scope of the issues to be addressed.

## **WAS AN APPEAL FILED?**

Review the information provided by Complainant and/or Respondent and determine whether it contains sufficient information concerning the grounds for appeal and the reasons related to those grounds.

This step is not to decide the merits of the appeal, but to identify the nature and scope of the issues to be addressed.

## IN THEIR APPEAL, RESPONDENT WRITES:

- I have new evidence not previously available to me. Having read the hearing officer's report, I now know the hearing officer was biased (new evidence) because the hearing officer found against me, and there is no way that any unbiased hearing officer would have properly weighed the evidence and come to any conclusion other than the fact that complainant was lying.
- The hearing officer failed to call 1 key witness. The Title IX coordinator should have been questioned, and she could have explained that Complainant was given a free pass and allowed to drop out of organic chem after it was obvious Complainant was going to fail. This would have proven that Complainant made up the complaint and filed only to avoid failing a difficult class.

## WHAT DOES THIS MEAN?

- You are reviewing the appeal for what it says, not how it is said.
- You are identifying what the party says went wrong in the process or whether the party has identified new information and IF the party has articulated that what went wrong or what is new, if true, would have led to a different outcome.



# COMMON CHALLENGES

## Non-Participating Parties

- Bias/conflict of interest
- Error

## Uncooperative Witnesses

## Uncooperative Advisors

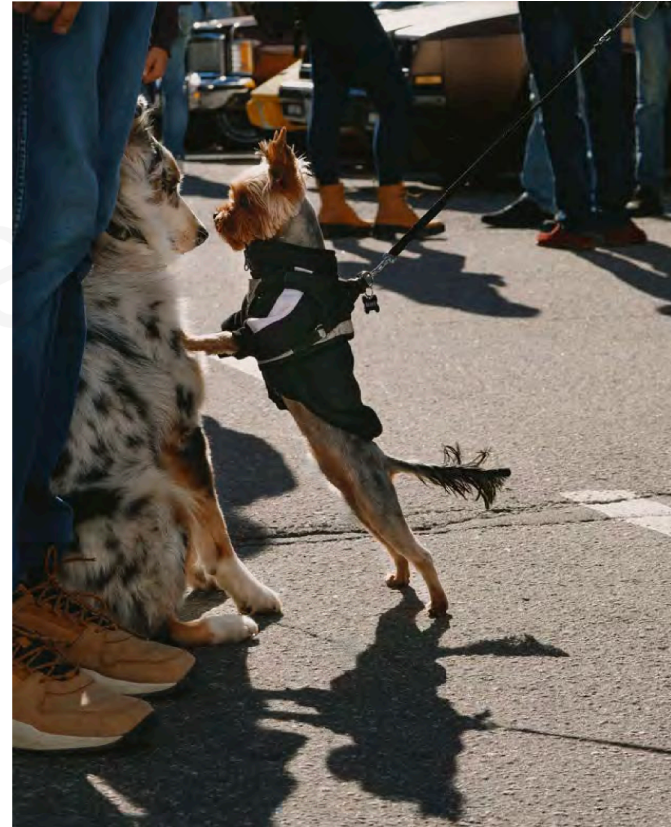
# DEAR APPEALS OFFICER...

- I am the victim of a false accusation...
- The police were not contacted and I was not charged by law enforcement with a crime
- After the supposed sexual assault, she sent me a friend request on Instagram and asked me to dance at a party
- No one listened to my explanation or reviewed the evidence so they could see that I was falsely accused.



# DOES THIS MEET ANY GROUNDS FOR APPEAL?

- Procedural error?
- Bias/conflict of interest?
- New evidence?



# NEW EVIDENCE: WHAT WOULD YOU DO?



Appeal states there is  
new evidence...

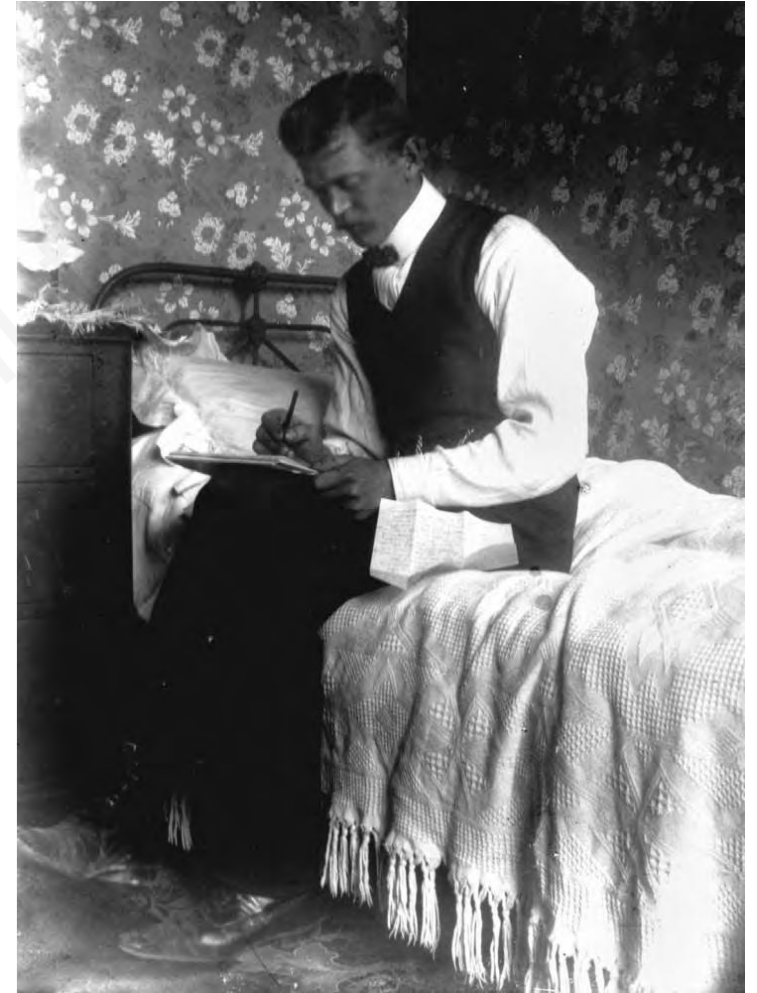
Evidence not provided with the appeal

How do you know it is new?

It is new but is it relevant and reliable?

# DEAR APPEALS OFFICER...

I am the victim of a false accusation. Something went terribly wrong.....



# PROCEDURAL ERROR: THE DECISION WAS UNREASONABLE

The decision was unreasonable based on the evidence.

- I am the victim of a false accusation
- There was no crime
- She initiated it, not me
- We were both drunk

# PROCEDURAL ERROR

There was a procedural error in the process that materially affected the outcome.

- Someone was not interviewed
- I was not allowed to cross-examine the complainant
- Burden was put onto me to prove consent

# DENIAL OF A PROCESS YOU DON'T OFFER

Cross examination

Representation

Discovery

Subpoena / compel witnesses

# WHEN A RESPONDENT REFUSES TO PARTICIPATE IN THE PROCESS BUT CLAIMS DUE PROCESS IS VIOLATED

“The Plaintiff waived his right to challenge the process resulting in his expulsion by failing to participate in the process afforded him.”

- Herrell v. Benson



# WHEN EXCEPTIONS TO PROCESS OCCURS

Some examples

University brings the case against one if its own

Recusal of a member of a panel

Changing composition of a panel



# BIAS

- What constitutes bias?
- The investigator was biased against me because...
- The investigator was biased against (complainants/respondents generally) because . . .



# ALLEGATIONS FOR BIAS

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“Pro-victim bias does not equate to anti-male bias.”  
-Doe v. University of Colorado

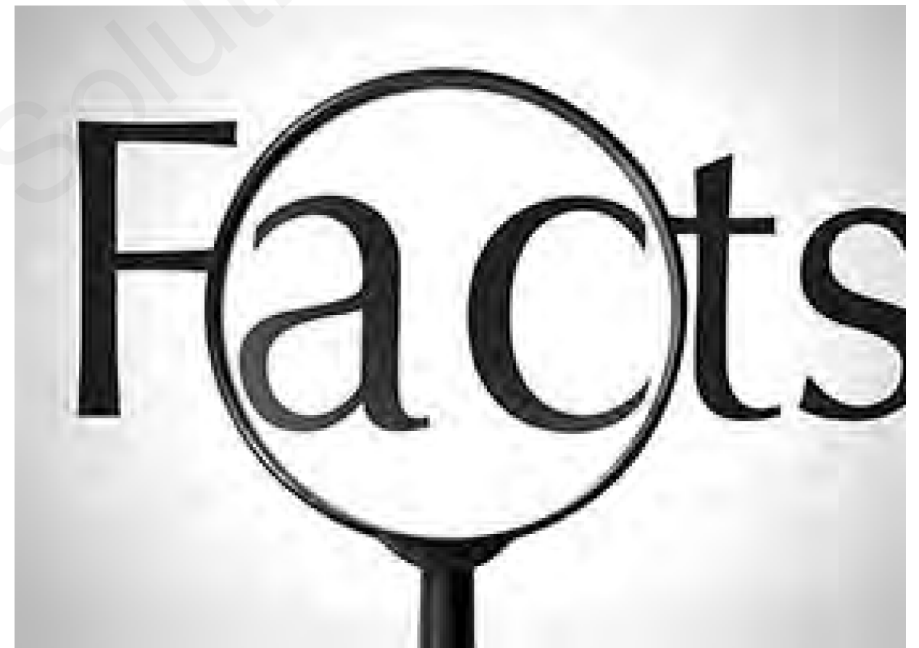
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Anti-violence bias does not equate to anti-male bias.

# ALLEGATIONS OF BIAS AS THE BASIS FOR APPEAL

An allegation of bias without factual support “no longer passes muster”.

-Doe v. University of Colorado



# NEW INFORMATION

- Is it really new?
- If it is new, would it change the findings/outcome
- Who investigates new information?



# COMMON ERRORS

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# SOMETIMES INSTITUTIONS DO THE WRONG THING



- Missing deadlines for providing materials
- Misunderstanding of consent or incapacitation
- Errors at a hearing

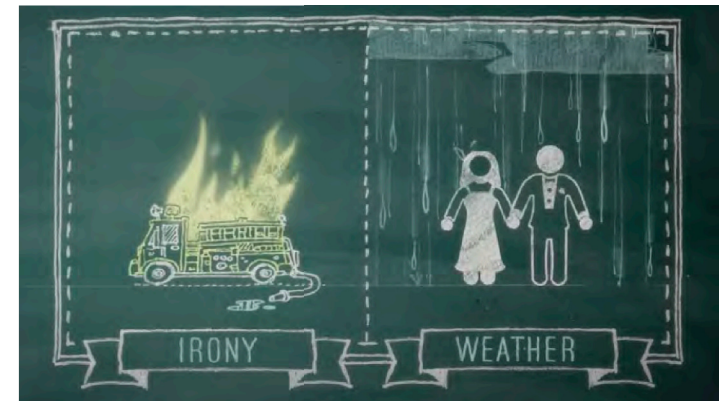
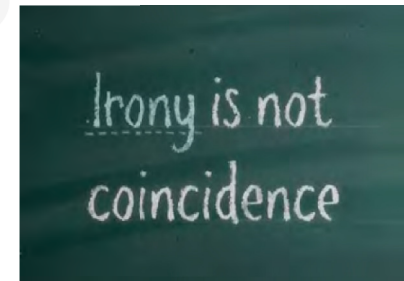
# DETERMINING CREDIBILITY ON APPEAL

If Complainant does not participate, can you judge credibility?

Do you need to see demeanor to note credibility?

# EVIDENCE – KNOWING WHAT TO CONSIDER

- Drunk vs. Intoxicated vs. Incapacitated
  - Language matters
  - Clarity and consistency of application
- Who has to prove consent?
- Know the language of your policy



Courtesy Weird Al's Word Crimes



# CROSS COMPLAINTS



- Was it handled?
- How was it handled?
- When raised for first time in the appeal, what is your process?
- Who handles?

# APPEALS PANELS THAT EXCEED THEIR AUTHORITY



- Stay In Your Lane
- How Do You Know
- How To Correct

# TREATING THE PARTIES DIFFERENTLY

1. He filed an appeal, argued there was a procedural error because he did not agree with the panel's interpretation of a text message. Appeal granted, determination overturned. She then filed an appeal on basis that appeal panel exceeded their authority, her request to file an appeal was denied. **What did the court say?**
2. Hearing chair did not inform parties that a key witness was her student, nor that he had discussed the case (in brief) with the witness prior to her first interview. **What did the court say?**

## **WHY SHOW YOUR WORK:**

### **WHEN A JUDGE HAS A DIFFERENT DEFINITION OF CONSENT**

“Because she removed her own shirt when Respondent suggested having sex, there was insufficient proof of a lack of affirmative consent.” Haug v. SUNY Potsdam, 2018

As the Complainant did not report the rape, and did not initially think she had been raped . . . more likely there was an erroneous outcome due to gender. Doe v. Dordt University, 2022

# LESSER-INCLUDED CHARGES ON APPEAL

**There are no lesser-included charges**

Reflects lack of notice and opportunity to respond.

- Powell v. St. Joseph's University
- Doe v. U.S.C.



# SANCTIONS ARE NOW WRONG BECAUSE FINDING WAS WRONG

Does appeals officer determine new sanction, or send case back for appropriate determinations?



# CAN A SANCTION INCREASE ON APPEAL?

- A. In response to Complainant's appeal?
- B. Sua sponte (meaning, just on their own determining it was not sufficient) ?

# LANGUAGE MATTERS WHEN WRITING APPEAL RESPONSE

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Drunk vs. Intoxicated vs.  
Incapacitated

Language matters

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Clarity and consistency of application

---

Who has to prove consent?

---

Know the language of your policy



# HOW MUCH INFORMATION TO PROVIDE ON APPEAL?

The appellate officer's failure to plainly articulate why he granted the appeal, which resulted in a new hearing that found the respondent in violation, was "perplexing" to the reviewing court, along with the appellate officer's ad hoc decision to request an independent Title IX opinion prepared in the course of determining the appeal.

# COMMUNICATIONS ERRORS

- Communicate the decision
  - Complainant and Respondent
  - Title IX
- Interim measures
- No contact directives
- Remedial measures
- Sanctions



# APPELLATE OFFICER/PANEL MAY NOT...



Substitute their own findings for the findings of the decision maker



Engage in fact-finding/weigh new evidence



Correct procedural errors on their own

QUESTIONS?



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