

How the New Rule Changes — and Doesn't Change - the Process of Investigation



WAKE FOREST
UNIVERSITY

This training provides general legal advice about certain topics related to the U.S. Department of Education's regulation and enforcement of Title IX of the Education Amendments Act of 1972 and specifically with respect to the Title IX regulatory changes released on May 6, 2020 and effective on August 14, 2020.

This is a quickly-evolving area, and substantial changes to applicable law, rules, regulations, and enforcement policies in the near term seem likely. We assume no responsibility to update this training video notwithstanding changes in the law.

Please note that this presentation does not address state or local laws, rules, or regulations which may be material in evaluating the subject matter of this training. Finally, this presentation offers general guidance about its topic and does not offer specific legal advice about any particular circumstance, investigation, hearing, or matter.

- I. Where we are: Context and Framework
- II. A Shrinking Scope: What's In and What's Out
-BREAK -
- III. Top Ten Things to Know about Investigations
under the New Rule
-BREAK -
- IV. Investigation Nuts & Bolts

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.



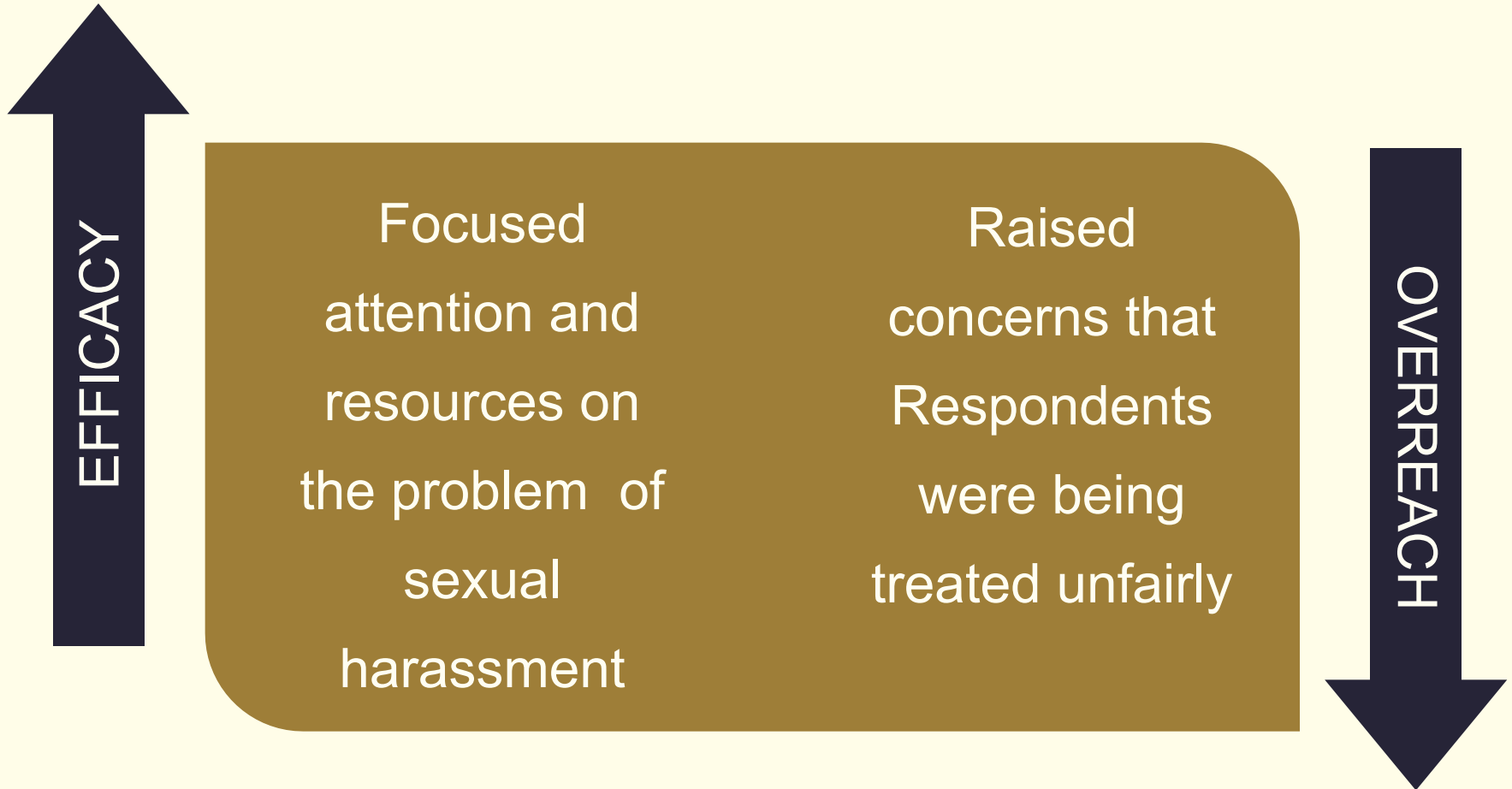
Prohibitions or Limitations
on Participation Based on
Sex

Unequal Funding of Men's
and Women's Athletics

Pregnancy
Discrimination

- Sexual Harassment
- Sexual Assault
- Stalking
- Domestic/Dating Violence
- Verbal/expressive

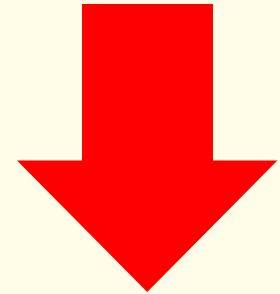




It did not change the law.

- The Title IX process is now legally mandated.
- A Final Rule is not easily made or unmade.

Final Rule released: May 6, 2020



Compliance deadline: August 14, 2020

**Title IX under
Obama-era
Guidance**

**Title IX
under
Final Rule**

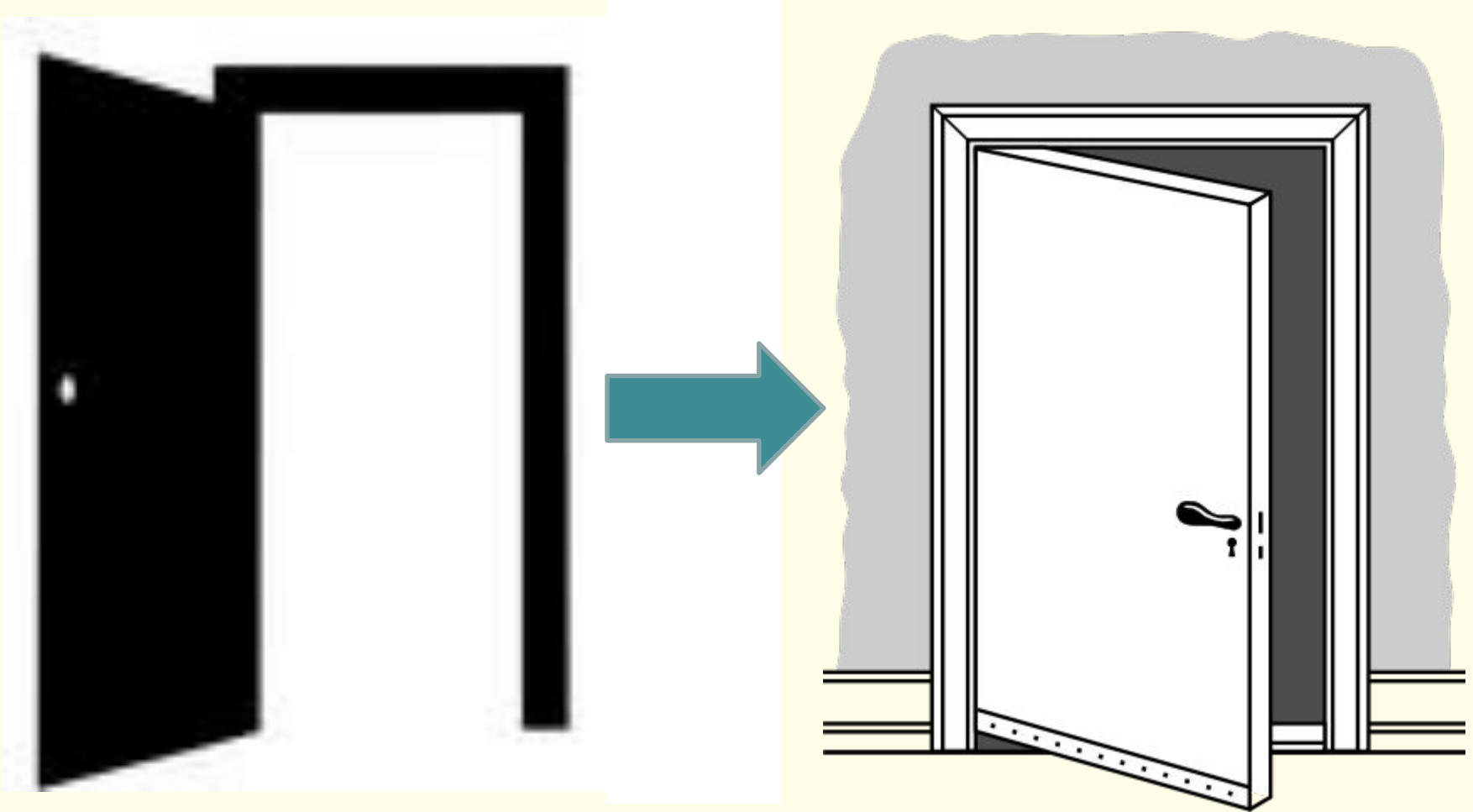
1. Narrow the scope of incidents that fall within the law

2. Recalibrate the procedural balance between complainants and respondents





Grievance Initiation: A Shrinking Scope



The Title IX Coordinator must promptly:

- 1 Contact the Complainant to discuss the availability of supportive measures
- 2 Inform the Complainant that supportive measures are available whether they file a complaint or not
- 3 Consider the Complainant's wishes with respect to supportive measures
- 4 Explain the process for filing a formal complaint, the grievance process, and any informal resolution options

Document

TIME FOR A DISMISSAL ANALYSIS



1. **Who** is the complainant?
2. **Where** did the incident(s) take place?
3. **What** type of conduct occurred?



Title IX Sexual Harassment (TIXSH)

Forms of harassment on the basis of sex that fall within the Final Rule's definition of sexual harassment and jurisdictional scope. These cases must be handled in accordance with the Final Rule.



Other Sexual Harassment (OSH)

Forms of harassment on the basis of sex that do not fall within the Final Rule's definition of sexual harassment and/or jurisdictional scope.

Schools may decide for themselves how to handle OSH cases.

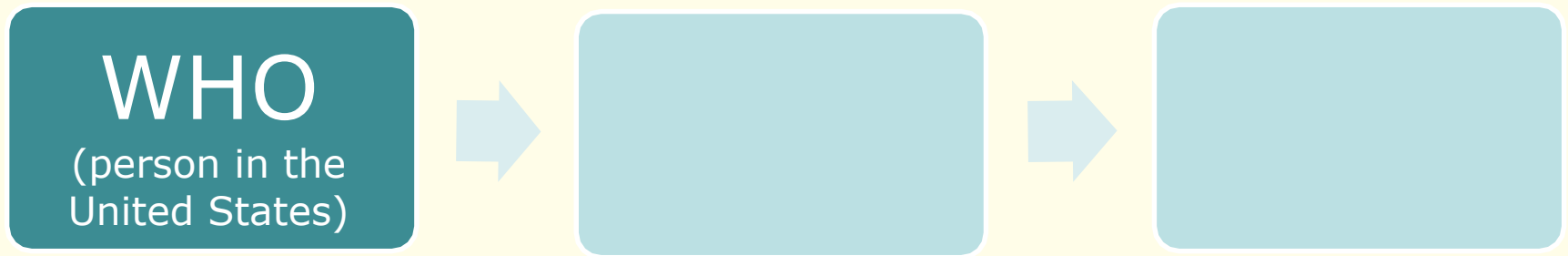
WAS THE COMPLAINANT IN THE U.S. AT THE
TIME OF THE INCIDENT?

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.



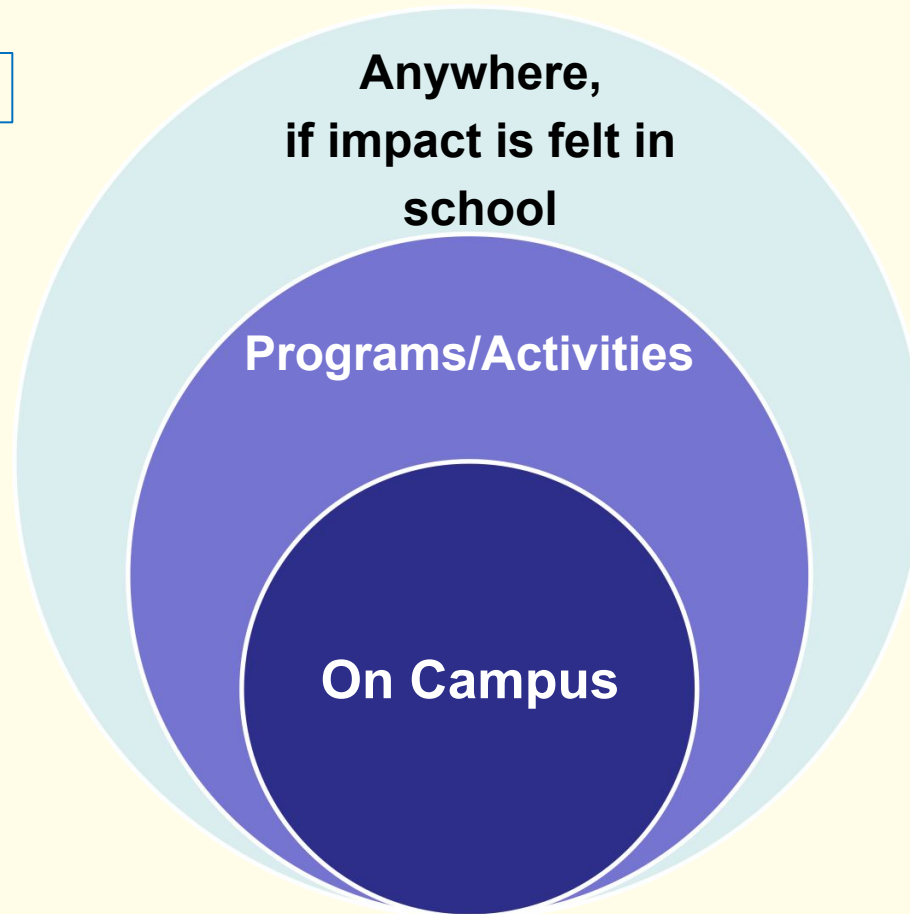
If the complainant was not in the United States at the time of the incident...

the school must dismiss that portion of the formal complaint *as a Title IX matter*.



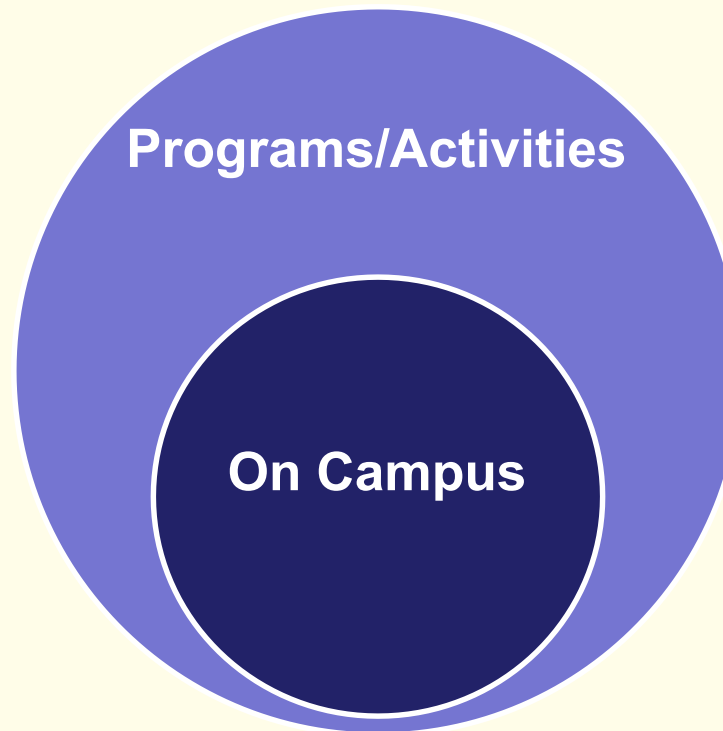
WHERE DID THE INCIDENT(S) TAKE PLACE?

Obama Era

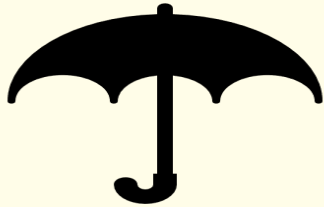


WHERE DID THE INCIDENT(S) TAKE PLACE?

New Rule



Substantial Control over Context (Where)

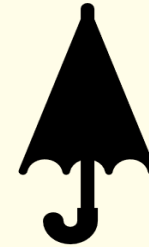


Your education programs & activities

Locations Residence
halls Classrooms
Campus grounds Greek
houses

Events
School sporting events School
festivals

Circumstances Athletics
Extracurriculars
Clinics/Internships



Everything Else

- Private off-campus housing
- Off-campus bars or restaurants
- Off-campus parties
- Personal travel

Where do e-interactions take place?



- Physical Location of Parties
- Hardware
- Platform/Network
- Event/Activity

E-INTERACTIONS POP



- Working from home on a school-issued laptop, a professor sends pornography to colleague
HARDWARE PLATFORM/NETWORK
- Students are listening to a Zoom lecture from home on personal devices. One sends another a harassing note in the private chat.
PLATFORM/NETWORK EVENT/ACTIVITY
- A student uses an iPhone to send nude photos of their ex to three friends. One of the friends is on campus.
PHYSICAL LOCATION

Did this e-interaction take place in our education program or activity?



One student keeps texting another explicit messages despite being asked to stop.

Physical Location of Parties? Both off campus

Hardware?

Both using personal cell phones

Platform/Network?

Both on cellular or home networks

Event/Activity?

Always happens late at night



If the incident did not take place within the school's education program or activity...

the school must dismiss that portion of the formal complaint *as a Title IX matter*.



WHAT TYPE OF CONDUCT OCCURRED?

- ① Sexual Assault
Dating and Domestic
Violence Stalking

**Clery Act Conduct,
VAWA Act Definitions**

- ② A school employee conditioning the provision of an aid, benefit, or service on participation in unwelcome sexual conduct

Quid Pro Quo

Unwelcome conduct*

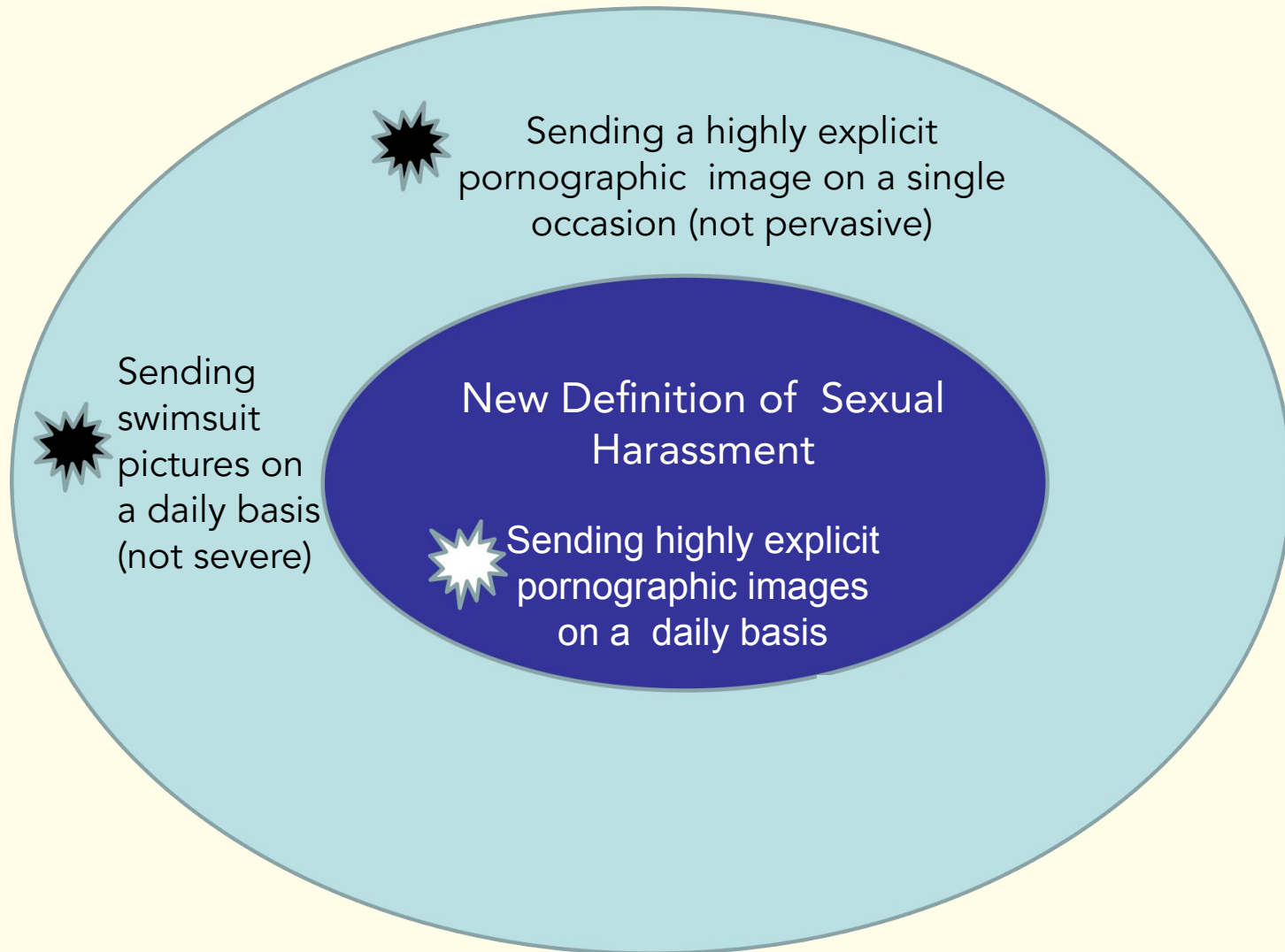
Level 4 Expressive Conduct

- ③ (Expressive: verbal, written, electronic, body language)
* determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the school's education program or activity

WHAT CONSTITUTES SEXUAL HARASSMENT?

OBAMA ERA: "Unwelcome conduct of a sexual nature," that includes "unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature."

FINAL RULE: "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 school's education program or activity"





The school must dismiss the formal complaint with regard to that conduct* for purposes of sexual harassment under Title IX.

* Complaint could be dismissed in part



MANDATORY DISMISSAL POP



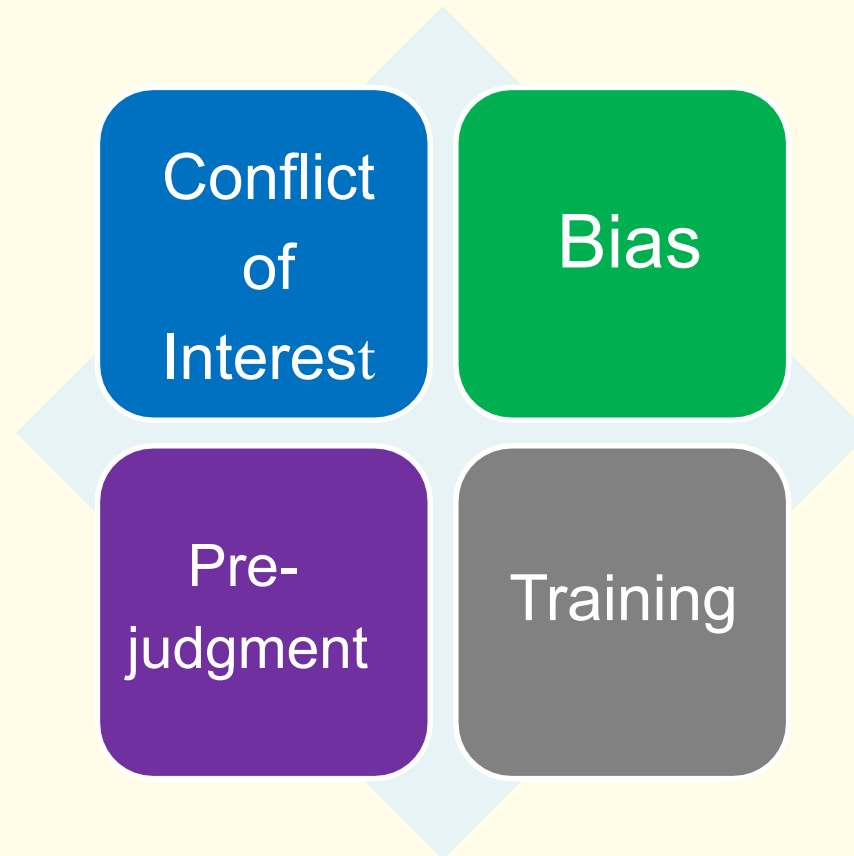
- Complainant sexually assaulted by fellow student at his off-campus apartment. **DISMISS**
- Complainant propositioned by professor and offered higher grade at University's study abroad program in Luxembourg. **DISMISS**
- Student in clinical nursing program sexually harassed by patient at hospital. **KEEP**
- Student pushed to the ground on athletic field by angry boyfriend – just one occasion. **KEEP**
- Professor tells student that he is her type and she could give him the climax of his life. **DISMISS**



Top Ten Things to Know about Investigations under the New Rule

1. Impartiality is important.
2. The investigator does not adjudicate.
3. Parties are entitled to notice of all interviews.
4. An advisor may be present at all meetings.
5. The school has the burden of collecting evidence.
6. Parties may freely gather and present evidence.
7. Parties may freely discuss the allegations.
8. Parties may inspect and review evidence.
9. The report summarizes relevant evidence.
10. Investigators may be questioned.

1 Impartiality is important.



Conflict of Interest

- Could the outcome of this case impact me one way or another? (i.e. Do I have a dog in this fight?)
- Relationship – party or witness
- Reputation
- Interest – financial, programmatic

BIAS

"Believe women."

"When you've taught as long as I have, you know students lie."

"Athletes have been given a sense of entitlement to do whatever they want."

"Typical fraternity house atmosphere."

PRE-JUDGEMENT

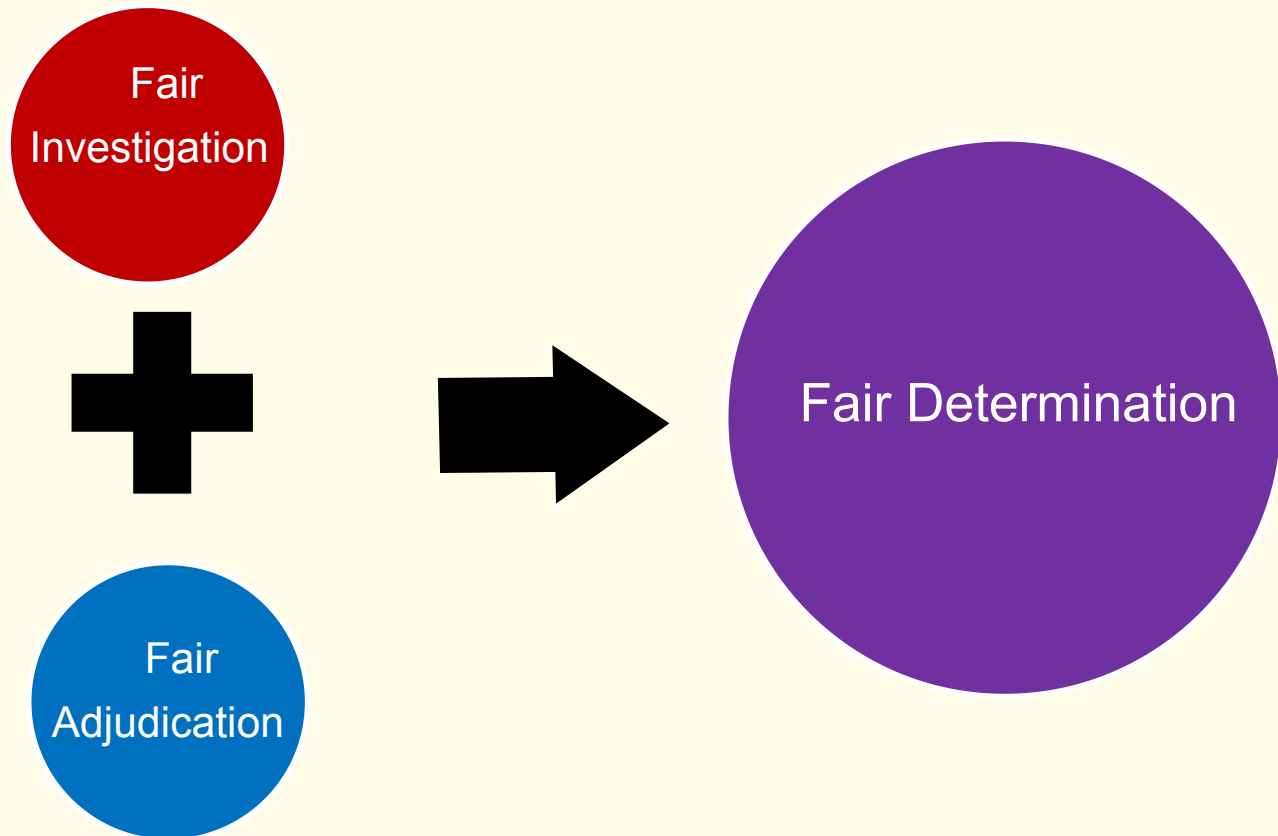
Classic “two drunk kids” case.

“I had one almost exactly like this last year.”

Be open to the possibility of
alternative explanations
(The Warehouse Door)

***Respondent presumed not responsible until a
determination of responsibility is made.

2 No “single investigator” model



Raul showed us texts and time-stamped photos that were consistent with his account of what happened. Paul gave a different timeline every time we spoke to him and said he had accidentally deleted all his texts. Raul's account is more credible.

The parties most likely had sex prior to going out for pizza. Connor was confident that they had sex prior to leaving the apartment Julia wasn't sure about that, but said her memory wasn't very clear.

3 Adequate Notice



Initial Notice:

Identity of parties involved
Alleged conduct at issue
Date and location



Meeting Notices:

Date, time location
Participants
Purpose



In writing. Sufficient time to prepare to participate.
Duty to supplement initial notice.

4

An Advisor May Be Present

You Must...

Allow each party to use their advisor of choice

Allow the advisor to be present at all meetings, interviews, etc.

Have the advisors conduct the live questioning at the hearing

Ensure that each party has an advisor at the hearing

You May...

Limit each party to one advisor

Place limits on the advisor's role

Require that questions be relevant, respectful, and non-abusive

Provide an advisor of your choice

5 The School has the burden of collecting evidence

Party: I guess there must be a police report, because I called the police that night.

Investigator: Great. If you can get a copy, we will definitely include it in our report.

Investigator: Great. We would like to get that. Do you remember the name of the officer?

5 The School has the burden of collecting evidence, but...

The school (including you the investigator) cannot

Access

Consider

Disclose

Or otherwise use

a party's records that are made by a physician, psychiatrist, psychologist, etc. without voluntary written consent to do so for the grievance process.

6

Parties may freely gather and collect evidence

Party:

Here – I asked all my friends who were there to write down what they saw and sign the statement.

Investigator:

We need to be the ones to collect evidence. If you hear someone is a witness, just give us their name, and we'll take it from there.

Investigator:

Thanks. Do you have phone numbers for these people?

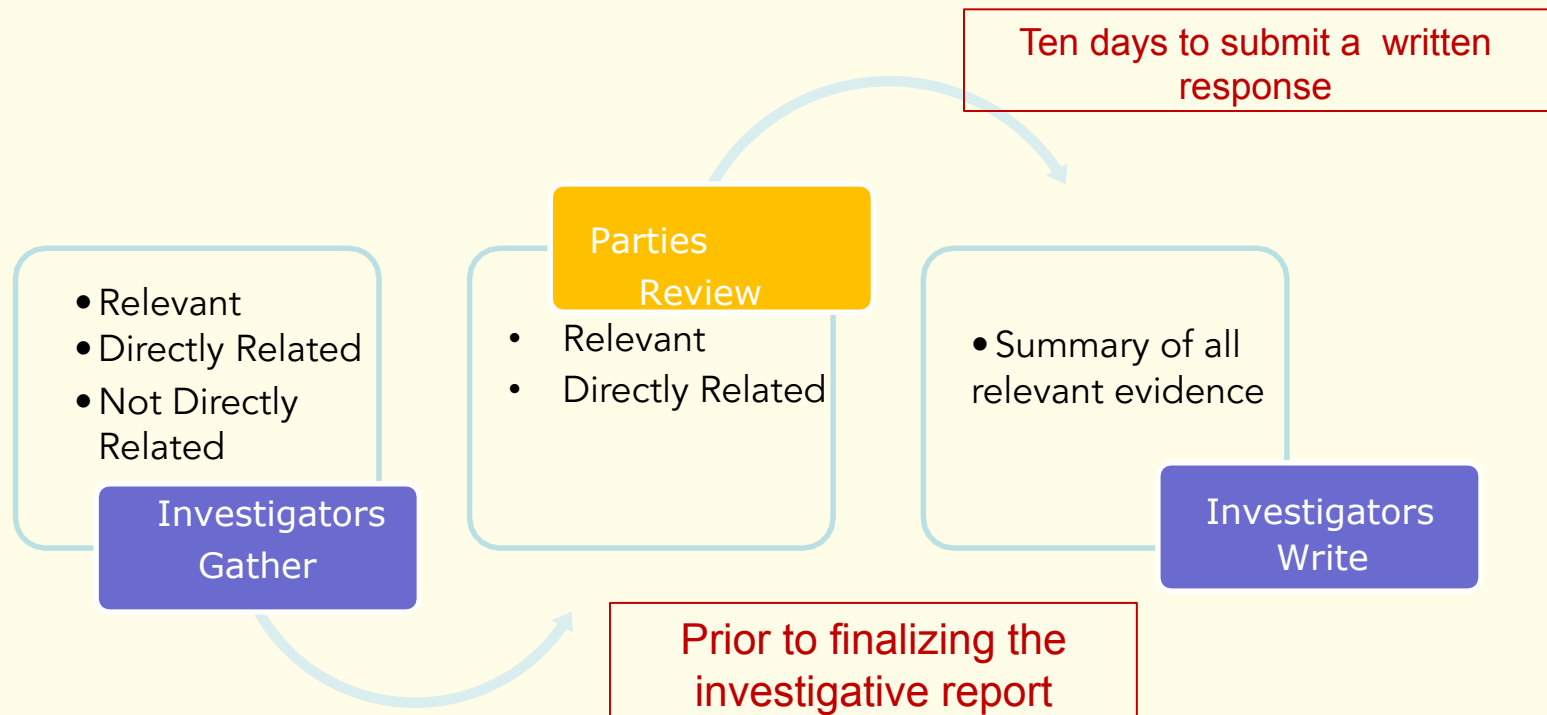
7 Parties may freely discuss the allegations

Party: I'm going to get together with my friend to compare our memories of that night.

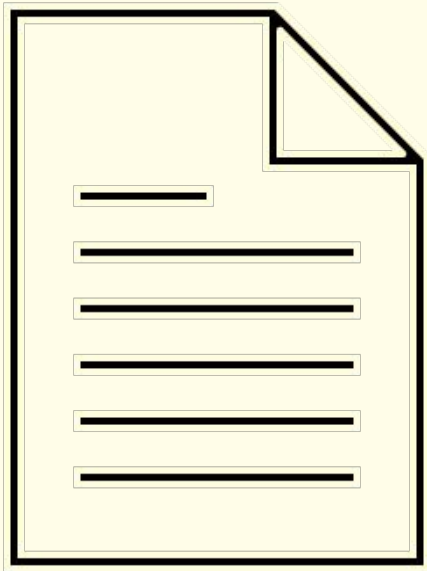
Investigator: Don't do that. It could interfere with your independent recollections. Don't talk to your friend about the investigation at all.

Investigator: You're free to do that if you choose. Just be aware that you and your friend could each be asked if you discussed your testimony in advance.

8 Parties may review the evidence



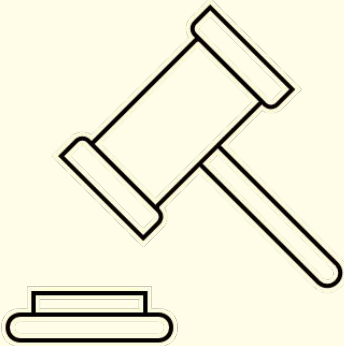
9 The Investigative Report



The report fairly summarizes the relevant evidence.

At least 10 days prior to the hearing, send the report to each party (and advisor)

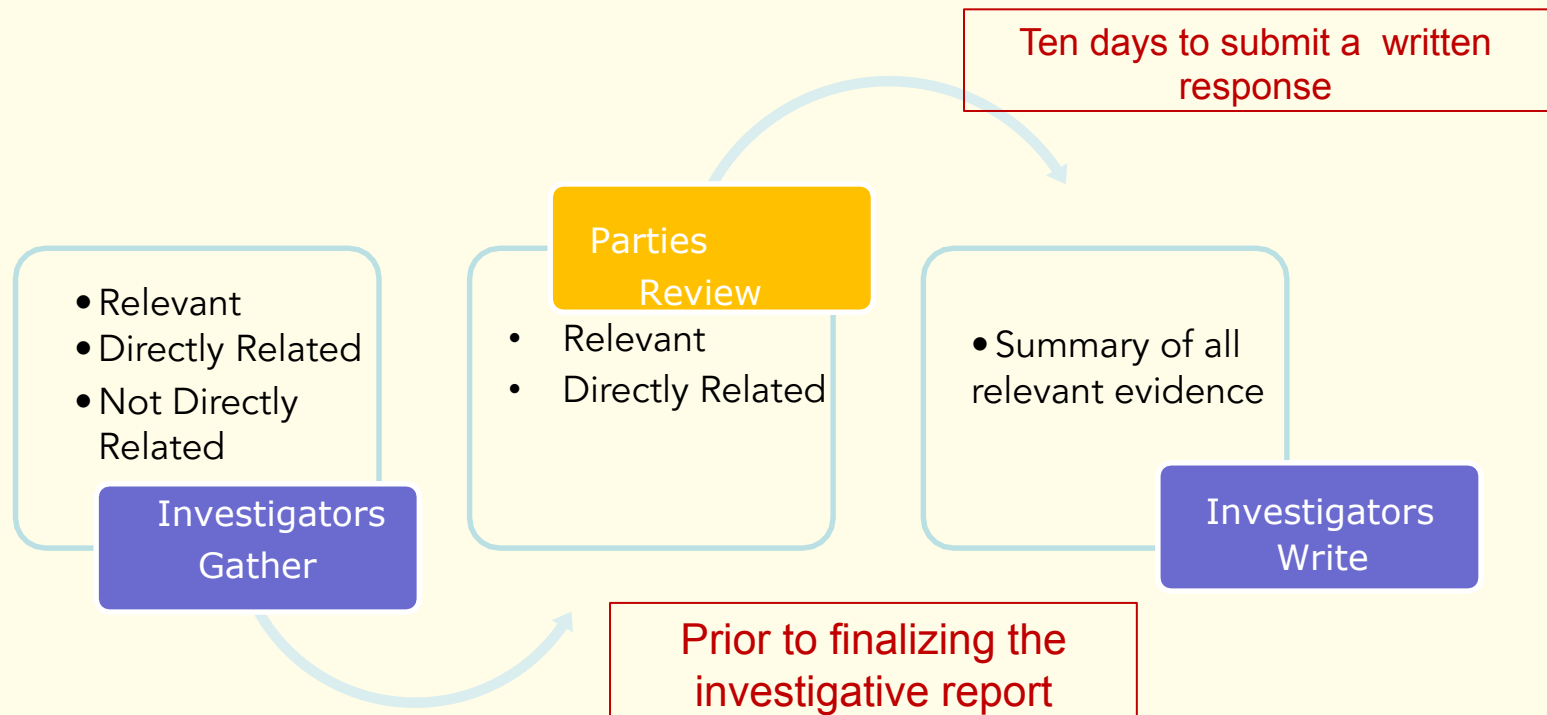
** Check with coordinator re: uniquely sensitive information

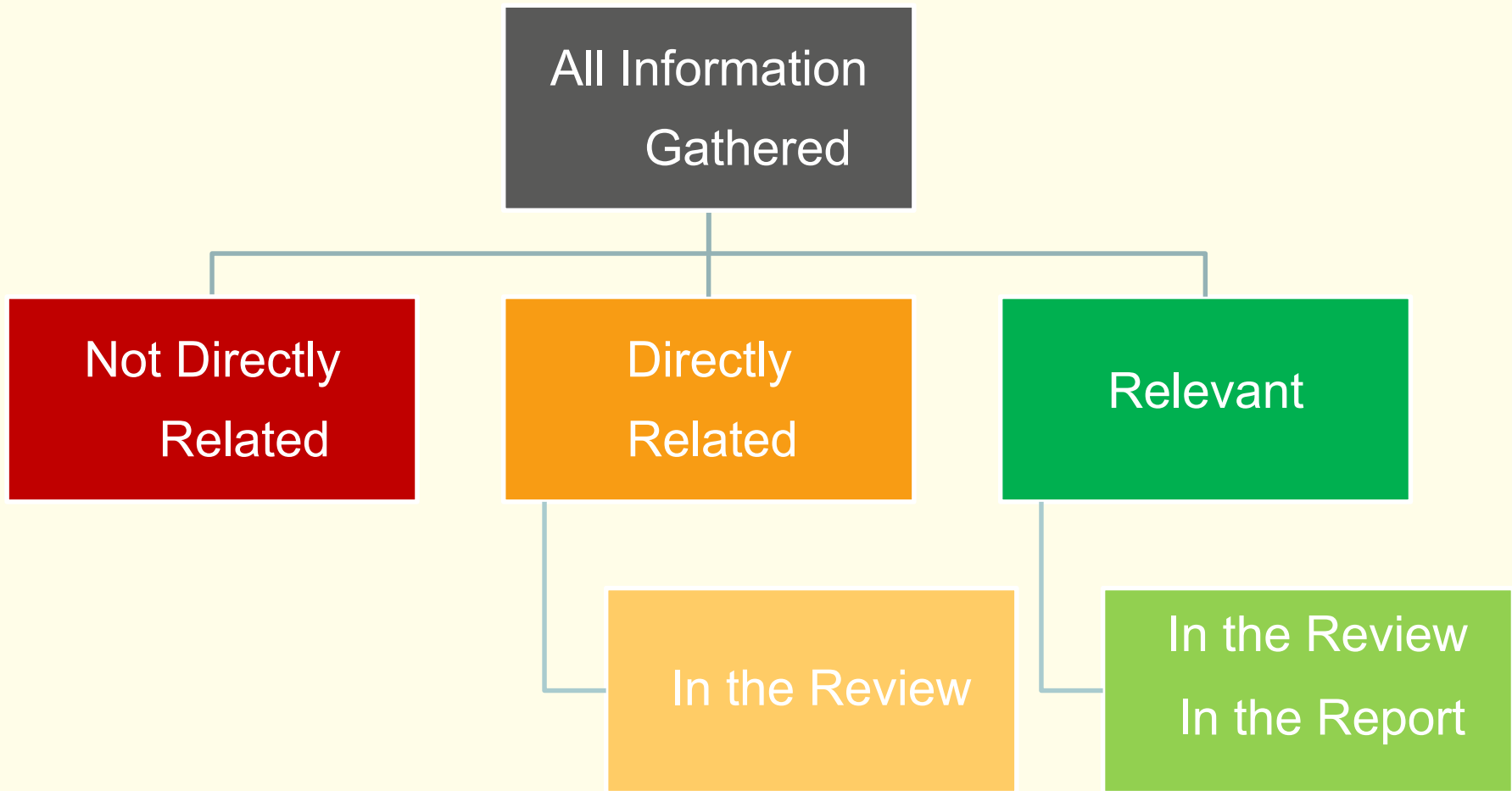


- Hearings may be virtual, but they must be live, i.e. everyone can see and hear one another in real time.
- Investigators must attend.
- The decision maker(s) may ask questions of the investigators.
- The parties' advisors may ask questions of the investigators.

- The complainant gave you a list of 10 possible witnesses. Why did you only interview 5 of them?
- Did you check university security cameras for footage related to the incident?
- How long did you spend interviewing the complainant and how long did you spend interviewing the respondent?
- Why didn't you include the parties' texts of March 15 in the investigative report?
- Why did you include the parties' texts of March 15 in the investigative report?

8 Parties may review the evidence





Intent of the rule is to provide the parties with access to information.

Philosophy:

Increased Access = Increased Fairness

Bad outcome 1: Party is surprised at hearing by information not shared with them previously.

Bad outcome 2: Party never had a chance to see information that could have impacted the outcome of the case if they had only had a chance to explain its relevance.

- Be as thorough as possible in the investigation and interviews.
- Ask “exhausting” questions:

Is there anything else?

Have you looked carefully on your phone for additional information?

Please notify us right away if anything else comes to you.

- Err on the side of including information in the review of “directly related” material.

Good question...

Relevant

Evidence, whether inculpatory or exculpatory, on which the school will rely in reaching a determination regarding responsibility

Directly Related

Information or evidence that has a clear relationship to the allegations at issue but is not necessary to reach a determination regarding responsibility

Not Directly Related

Information or evidence that has no clear relationship to the allegations at issue

Complainant: When Kai was touching me, I said, "I don't think we should do this." **Relevant**

Respondent: When I was touching Rush, Rush said "that feels amazing." **Relevant**

Respondent: This process is even more stressful because my mom is going through breast cancer right now. **Not Directly Related**

The parties' Lyft receipts from the night of the incident. **Directly Related**

Complainant's therapy records (made by counselor employed by school but complainant has not consented to their release). **Not Directly Related**

Text messages between the Complainant and Respondent on the day following the incident. **Directly Related**



Questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant



1. Offered to prove that someone other than respondent committed the conduct

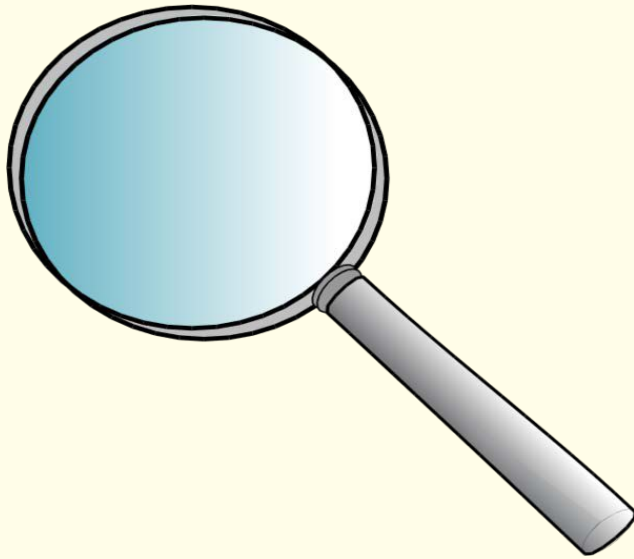


2. Concern specific incidents of prior sexual behavior with respondent and offered to prove consent



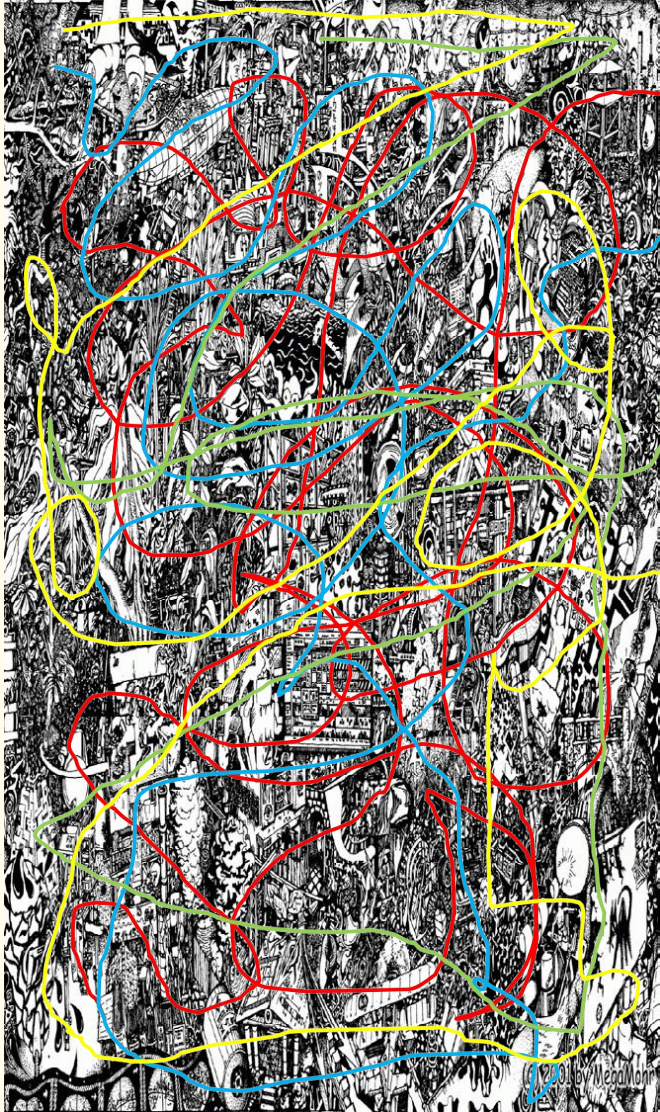
Questions/evidence about respondent's sexual predisposition or prior sexual behavior may be relevant

The Investigation Plan and Process



- Focus on learning, refrain from assuming
- Active listening
- Assess credibility
- Search for corroboration
- Gather and organize the most robust set of facts
- Create reliable documentation

- Frame/plan investigation
- Gather evidence
- Create report
- Provide conclusions and/or recommendations on responsibility and/or sanctions (as applicable)
- Provide subsequent testimony (as applicable)



Clear list of policy violations at issue based on alleged conduct

Clear timeline of incident(s) with any areas of dispute or ambiguity noted

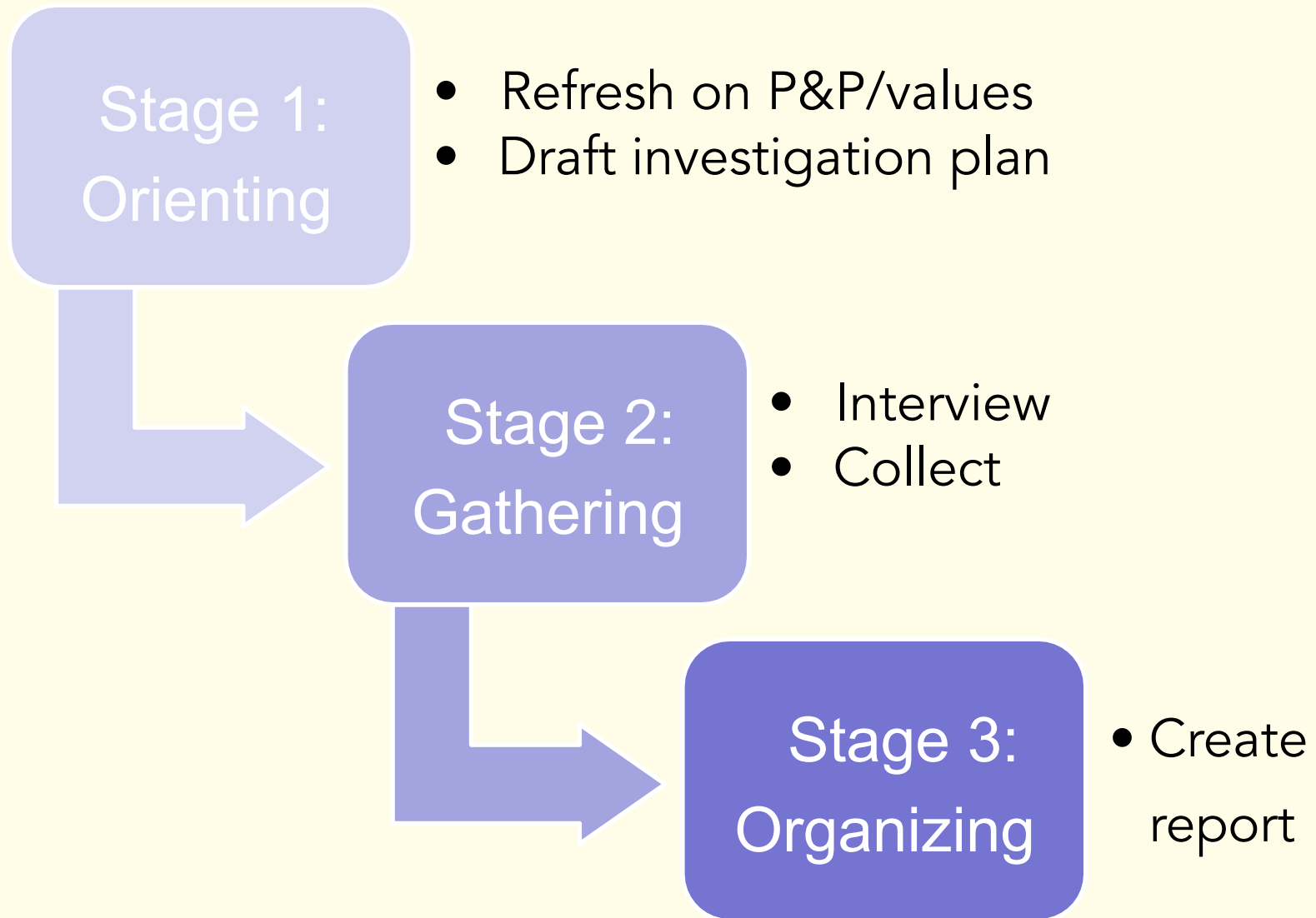
Clear narrative of events delineating undisputed and disputed facts

Clear description of corroborating evidence or lack thereof

In other words...

Making order out of chaos and painting as clear a picture as possible

The Three Stages of Investigation



Stage 1: Orienting

- Refresh on P&P/values
- Draft investigation plan

□ Re-sensitize yourself to the issues of objectivity, trauma, etc.

□ Review key aspects of P&P such as definitions

*** get your investigator hat on ***

Stage 1: Orienting



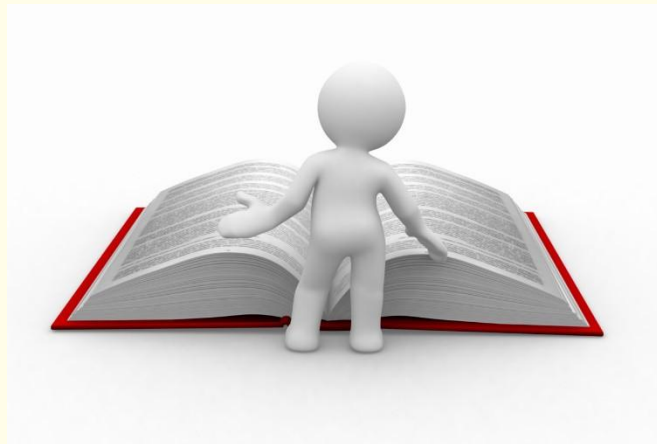
- Single or multiple incidents?
- Single or multiple perpetrators?
- Single or multiple forms of misconduct??
- Post-assault harassment or retaliatory conduct?
- Relevant prohibited conduct and definitions?



Critical Importance of Prohibited Conduct Definitions

Policy violation determination central to investigation and adjudication

Relevant definitions must be studied and referred to often and must guide investigator/adjudicator actions



1. Start with the Official Definition

“Offensive Sexual Touching” is the intentional sexual touching, without consent, of another person’s intimate parts (including, but not limited to, genitalia, groin, breast, buttocks, or mouth), whether clothed or unclothed, or the intentional sexual touching, without consent, of another person with one’s intimate parts, or for purposes of sexual gratification, using force to cause another person to touch his/her own or another person’s intimate parts. Offensive Sexual Touching may be committed using one’s own body, a part thereof, or an object.

Stage 1:
Orienting

2. Identify the Elements

1. ☐ Intentional touching
2. ☐ Without consent
3. ☐ Of another person's intimate parts
(intimate part:)
or
3. ☐ With respondent's intimate parts
(intimate part:)
or
3. ☐ For purposes of sexual gratification
☐ Using force
☐ To cause another person to touch their own or
another person's intimate parts
(intimate part:)

3. Determine Whether Each Required Element is Present

1. ☐ Intentional touching
2. ☐ Without consent
3. ☐ Of another person's intimate parts
(intimate part: **breasts**)

or

3. ☐ With respondent's intimate parts
(intimate part:)

or

3. ☐ For purposes of sexual gratification
- ☐ Using force
- ☐ To cause another person to touch their own or another person's intimate parts
(intimate part:)

Stage 1: Orienting

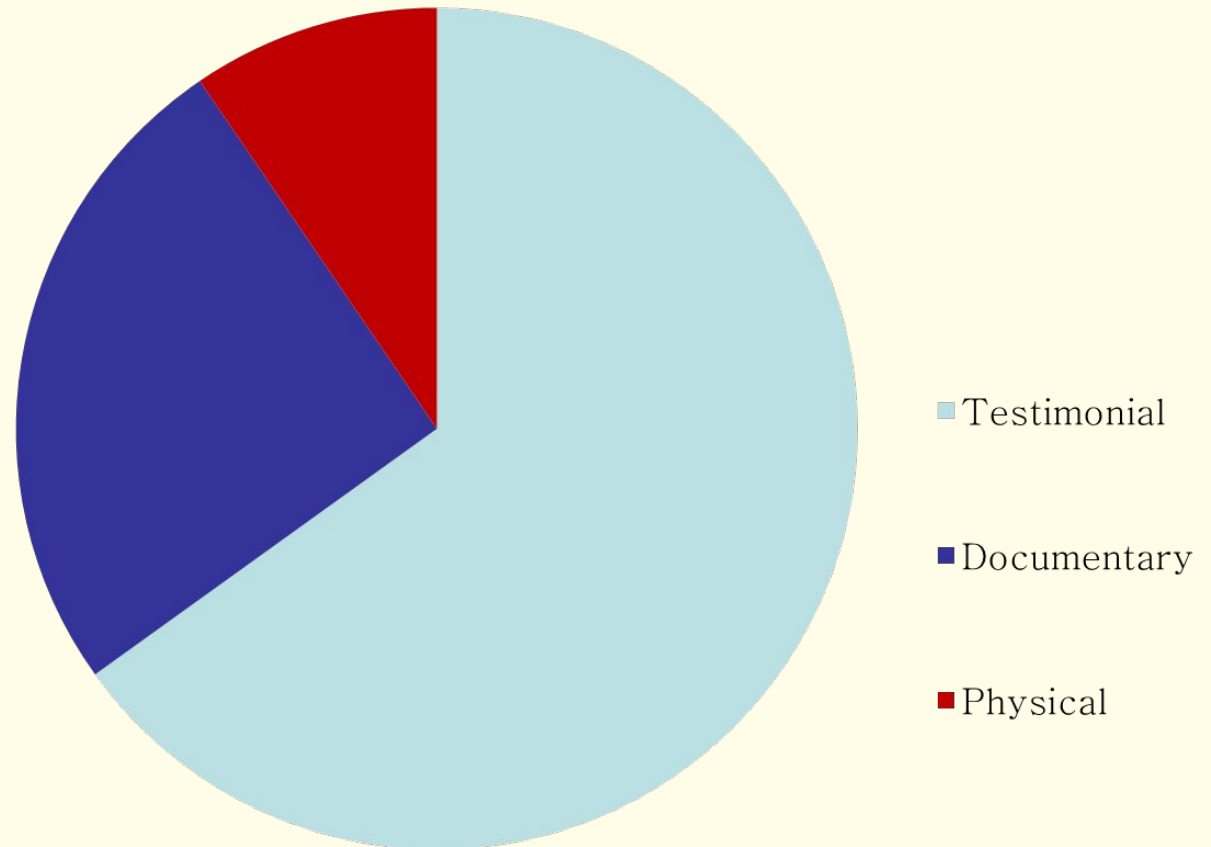
Establish a preliminary timeline for the investigation:

- Interviewing parties
- Interviewing witnesses
- Drafting statements
- Verifying statements
- Gathering/obtaining documentation
- Drafting a report

Stage 1: Orienting

- Log the receipt of information, evidence, and other materials as it is obtained in the course of the investigation
- Log unsuccessful searches for evidence
- Log delays
- Log communications with witnesses
- Log procedural communications with administrators, attorneys, etc.

Stage 2:
Gathering





Corroboration = confirmation
from another source

What information/source
could confirm or rebut each
aspect of a party's
statement?

Stage 2:
Gathering

- Police reports
- Campus security reports
- Hospital/medical reports
- Security video tapes
- Social media posts
- University records
- Building entry/exit logs
- Photographs & videos
- Diary/journal entries
- Character evidence
- Texts, voicemails, & emails



Stage 2: Gathering



Stage 2: Gathering



- Keep private (not just content, but occurrence)
- Hold in-person
- Allow presence of advisor
- Consider a partner if possible
- Draft an outline

Stage 2: Gathering

- Develop rapport to put the individual at ease
- Explain your role – neutral, no conclusions have been reached
- Be sensitive to fears, embarrassment & confusion
- Be objective, straightforward and matter-of-fact
- Be prepared to answer questions about confidentiality/privacy/information security (or refer them to the Title IX Coordinator!)

Meeting with a Complainant

- Option to withdraw complaint in writing
- Advisor options
- Mediation
- Adjudication/questioning
- Expulsion for lying in investigation
- Confidentiality
 - w/r/t Respondent
 - w/r/t parents
 - w/r/t others
- Retaliation

Meeting with a Respondent

- Participation – mandatory or voluntary
- Requested delay
- Confidentiality
 - Coach
 - Parents
- Protection of sibling
- Friends being dragged in
- Retention of/need for a lawyer
- Potential threats of retaliation

Stage 2: Gathering

Considerations

- Partner/Assistant
- Recording
- Write-up of interview immediately afterwards
- Reviewing interview write-up with interviewee

Accuracy is key in your notes

- Demarcate exact quotes
- Do not include analysis/conclusions
- Note areas of agreement/disagreement

Remember

- Potentially for an external audience



Broad collection of data



Careful clarification of
answers

=

Information you need

Stage 2: Gathering

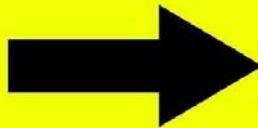


- Allow time for the interview to wander
- **Don't take charge immediately.** Allow the witness to narrate without interruption. Clarify what you need to when their narration is complete. If the flow is interrupted, use open-ended questions to get it restarted.
- Use specific, precise, closed questions to get a precise answer when one is needed.
- **Do not be accusatory or judgmental.** Minimize negative reaction cues.

Stage 2: Gathering

- Would you be willing to tell me more about...?
- How did you feel about...?
- What did you do after...?
- What happened then?
- What did you mean when you said...?
- Can you tell me more about that?
- How did you become involved in...?
- What is your understanding of...?

USEFUL STUFF



Stage 2: Gathering

Avoid:
Compound
Questions
Legal Terms



Examples:

- Did you give a clear answer or did you just leave it open ended?
- Have you ever been through an adversarial adjudication process before?

Stage 2: Gathering

Do:
Ask how interviewee is defining words.
Push beyond euphemisms. Exhaust, i.e. "anything else?"

Examples:

- You said he acted "crazy." In what sense?
- When you said she "wanted to get with you," what did you mean by that?
- Is there anything we haven't covered about the time in the park that you think would be helpful for me to know?

Stage 2:
Gathering

Do not:
Editorialize
Comment



Examples:

- Ugh – you must have been disgusted.
- This is so typical of Kappa Alphas.
- Something similar happened to me when I was about your age...

Stage 2: Gathering

Do:
Think about the elements of definitions. Ask key questions directly.

Examples:

- Did you intentionally touch her breasts?
- How many text messages did you send?
- What signals did you get which indicated your conduct was welcomed?

Stage 2: Gathering

- Who else should we talk to?
- Have you spoken/texted with anyone about this or posted anything about this online?
- How have you been affected by this?
- How did you communicate what you wanted to responding party?
- How did you know your actions were ok with the reporting party?
- What motive would others have to accuse/lie?

Stage 2: Gathering

- At the beginning of EVERY interview:
 - ☐ Brief explanation of investigatory process/purpose
 - ☐ Objective and unbiased
 - ☐ Collecting information; not making decision
 - ☐ Explain that information will be shared

- At the end of EVERY interview:
 - ☐ Ask for documents
 - ☐ "Is there anything else you want me to know?"

 - ☐ Invite follow-up
 - ☐ No retaliation (against you/by you)

Stage 2: Gathering

- General demeanor
- Opportunity/capacity to observe event
- Consistency with other evidence (including prior statements)
- Willingness to lie/be truthful about other things
- Stake in the outcome/motive to lie
- Plausibility/Improbability of account
- Specificity v. vagueness
- Willingness to share texts, etc.
- Corroborating evidence
- Effects of trauma

Stage 2: Gathering

- Individual is inconsistent in own report
 - ☐ Trauma or fear?
 - ☐ Lying?
 - ☐ Ask!
- Individual is inconsistent with other evidence
 - ☐ Outlier?
 - ☐ Coached testimony?
 - ☐ Ask!

Stage 2: Gathering

- What is the relationship with each party and with other witnesses?
- Consider:
 - ☐ Witness with an axe to grind?
 - ☐ Witness who wants to protect?
 - ☐ Witness who loves the spotlight?
 - ☐ Witness who doesn't want to be involved?
 - ☐ Witness who has a ideological bias?

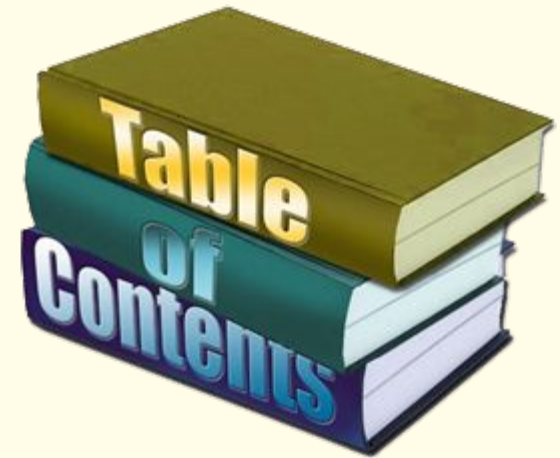
- Create a witness statement that includes all relevant information and leaves out information that is privileged or not directly related.
- Consider sharing the statement with the witness for confirmation
- Consider following up with other key witnesses to ask for response
- Determine what key facts are in dispute.
- Consider whether another source of information could shed light on those facts.



Stage 3: Organizing

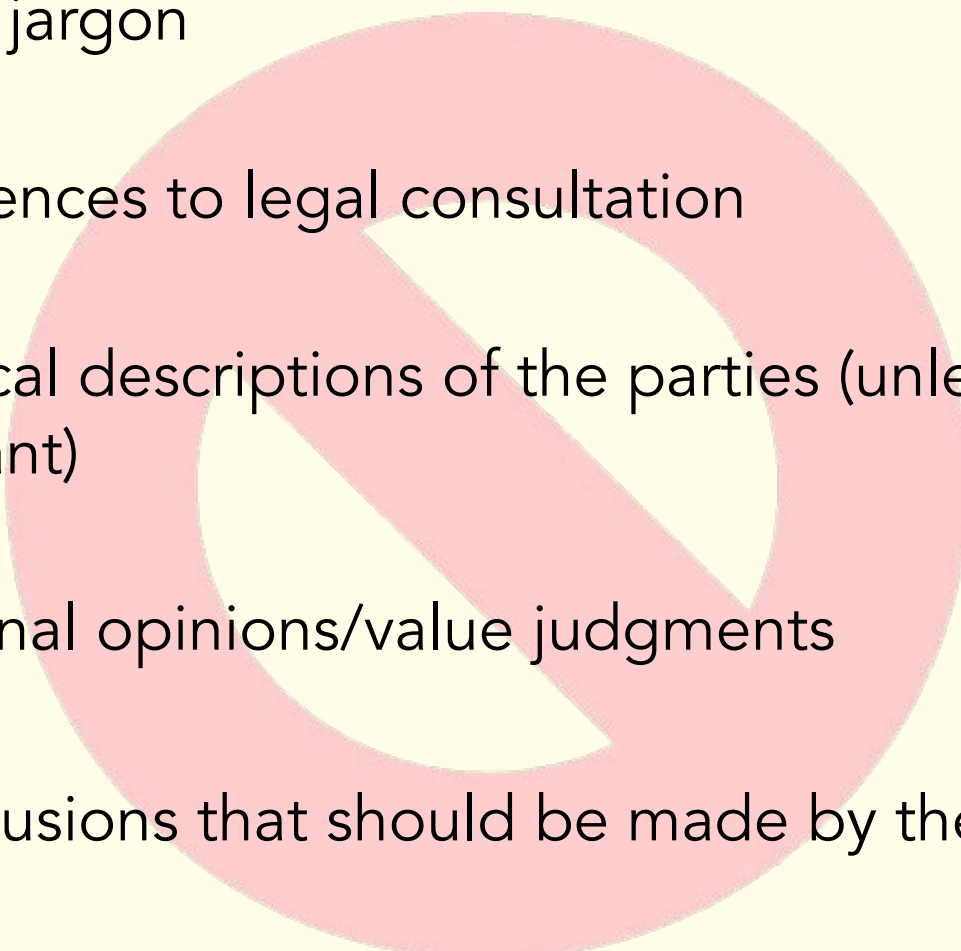
- Start with deep understanding of institution- specific report procedure, practices, and guidance
- Don't reinvent the wheel! (best of samples & templates)

- Executive Summary
- Allegations/Response (jurisdictional exclusions)
- Applicable policies/definitions
- Investigative Process
- Statements and credibility context
- Description of other evidence (attach) and how it corroborates or undercuts parties' statements



- Go back to your investigation plan
- Make use of timelines/other graphics
- Remember what you are investigating
 - the specific conduct prohibited by Title IX
- Carefully review the elements of each definition – Make sure each one is addressed by the content of the report
- Write for someone who knows NOTHING about the parties, the issues and the situation
- Proofread – no typos, spelling errors, assumptions, unexplained jargon
- Ultimately writing for a reader later in the process



- 
- Legal jargon
 - References to legal consultation
 - Physical descriptions of the parties (unless directly relevant)
 - Personal opinions/value judgments
 - Conclusions that should be made by the adjudicators

Your Parker Poe Title IX Team



For Title IX assistance, contact Team Lead Josh Whitlock at joshwhitlock@parkerpoe.com or 704-335-6622