

# Welcome to the Training, Your Honor:

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Holding Hearings and Making Determinations  
under the New Rule

Fall 2020



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 Adjudications  
under the New Rule  
-BREAK -
- IV. Running a Hearing Scenario

*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

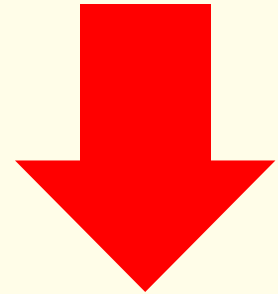




**It did not change the law.**

- 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





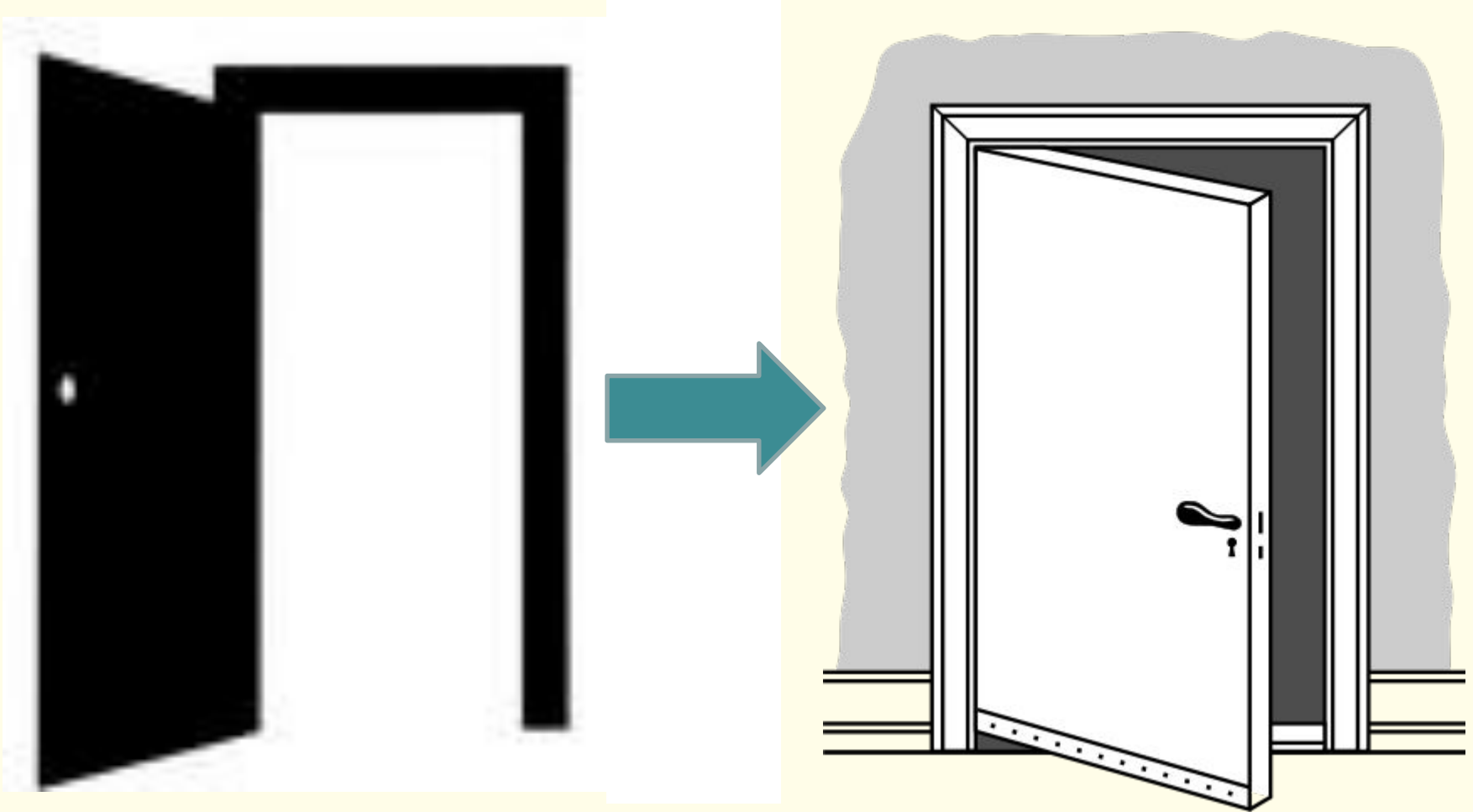


The Title IX Coordinator must promptly:

- 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**

# Grievance Initiation: A Shrinking Scope





## 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)

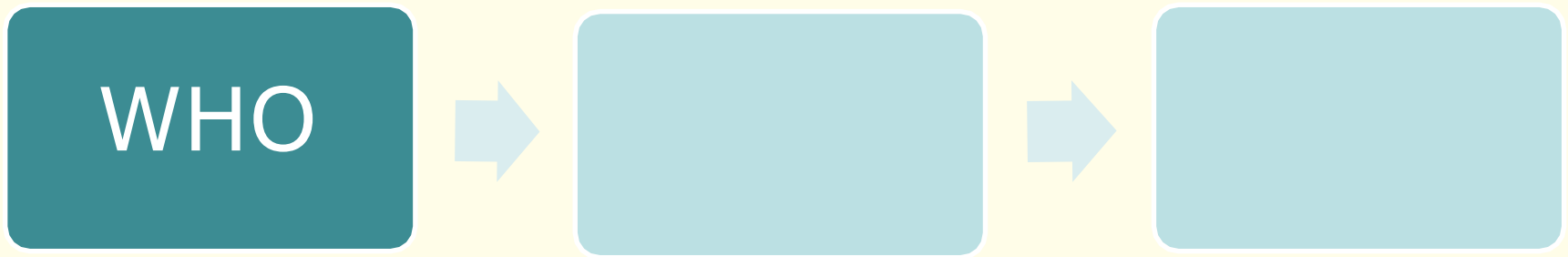
Forms of harassment on the basis of sex that do not fall within the Final Rule's definition of sexual harassment and/or jurisdictional scope.

Schools may decide for themselves how to handle OSH cases.

## TIME FOR A DISMISSAL ANALYSIS



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



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...

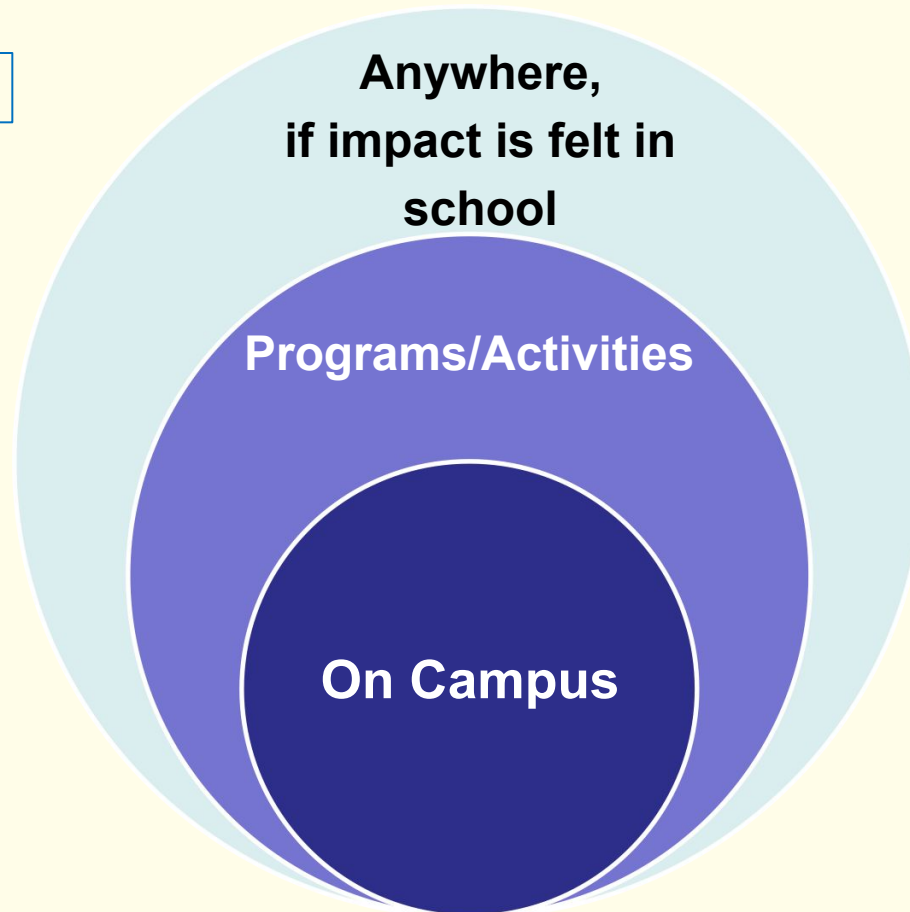
the school must dismiss that portion of the formal complaint *as a Title IX matter.*





## WHERE DID THE INCIDENT(S) TAKE PLACE?

Obama Era



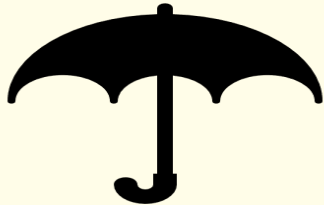
## WHERE DID THE INCIDENT(S) TAKE PLACE?

Final 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 in our education program or activity?



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

## 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

## 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



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\*

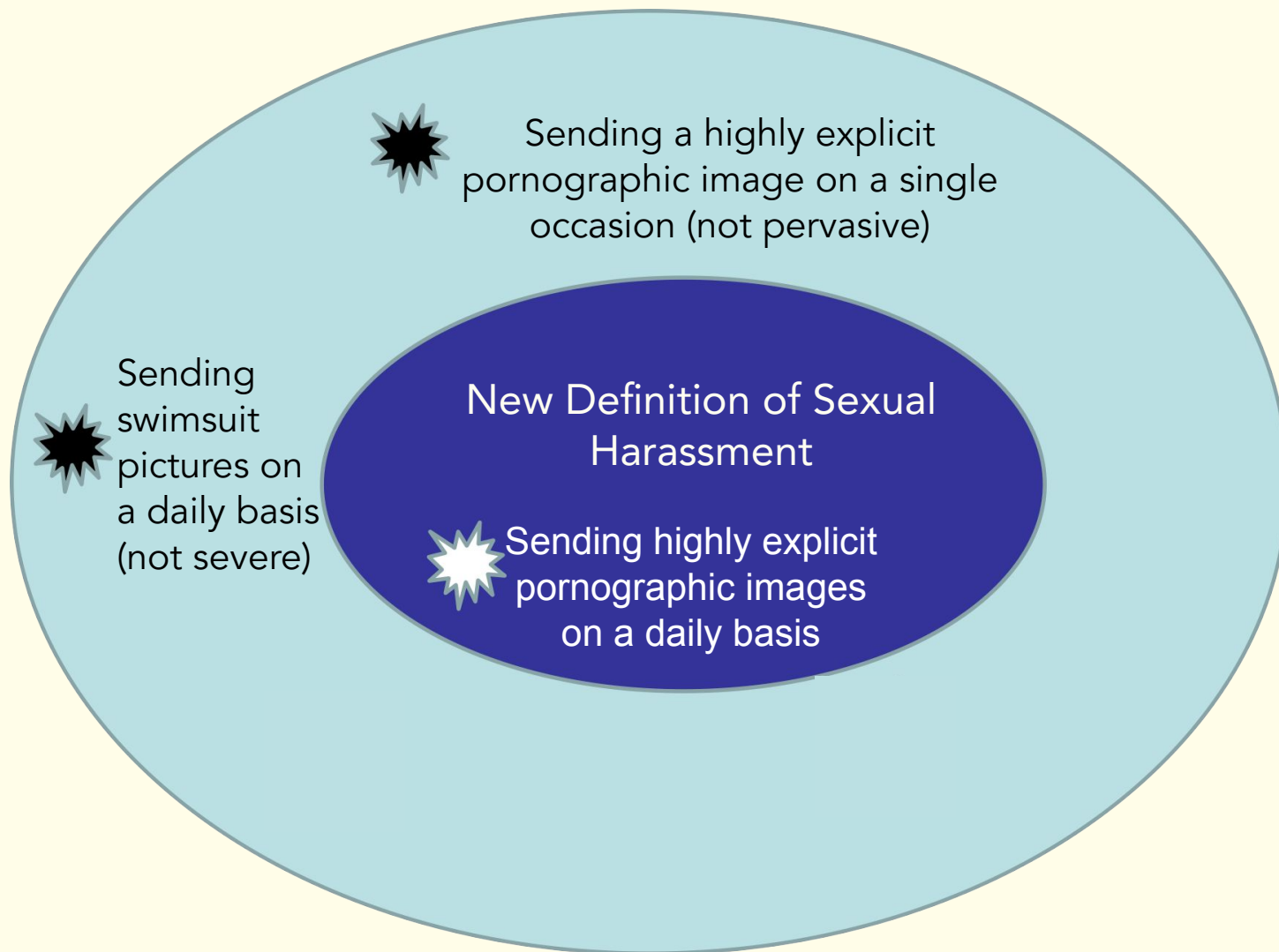
**Level 4 Expressive Conduct**

- 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"

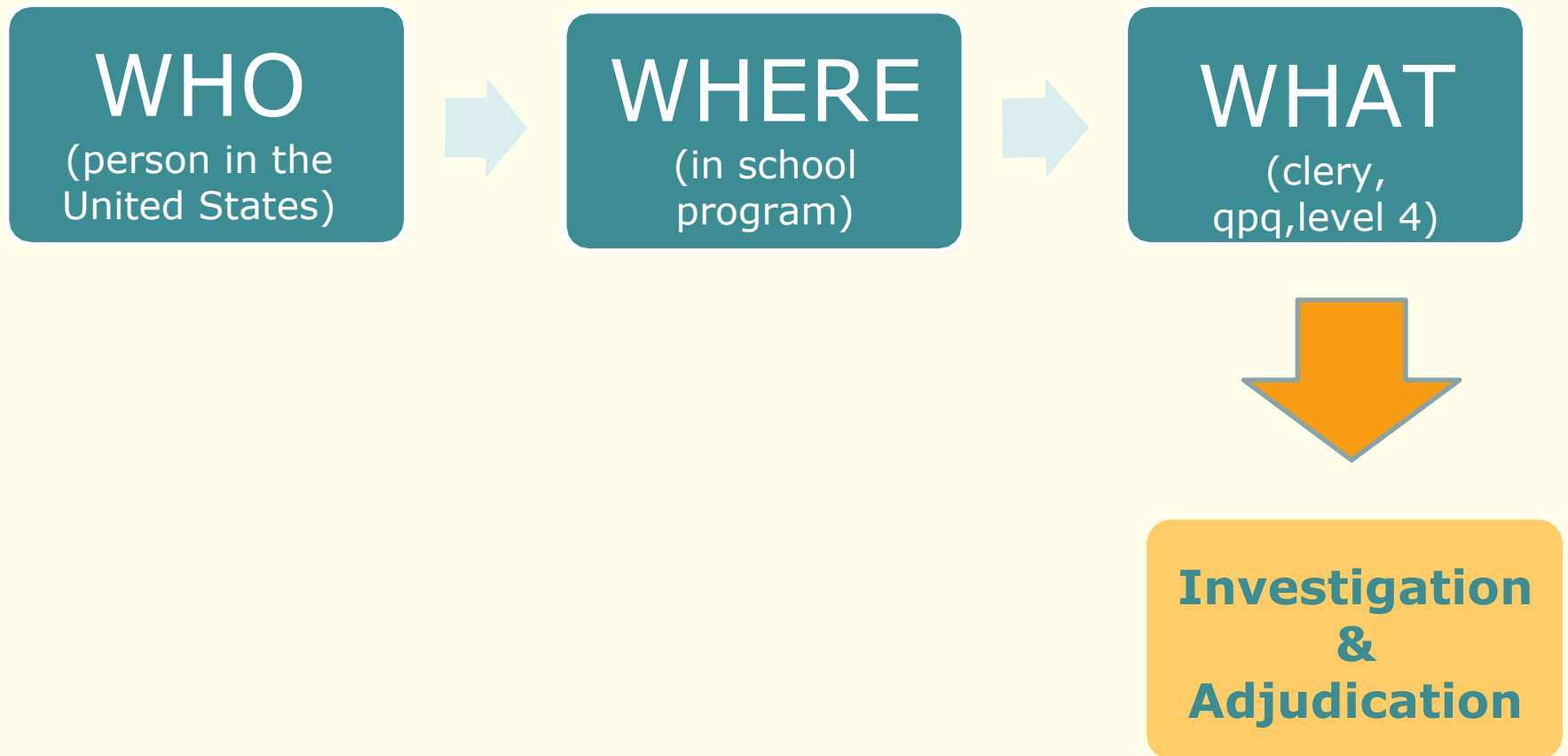
FINAL RULE: "Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the school's education program or activity"





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**



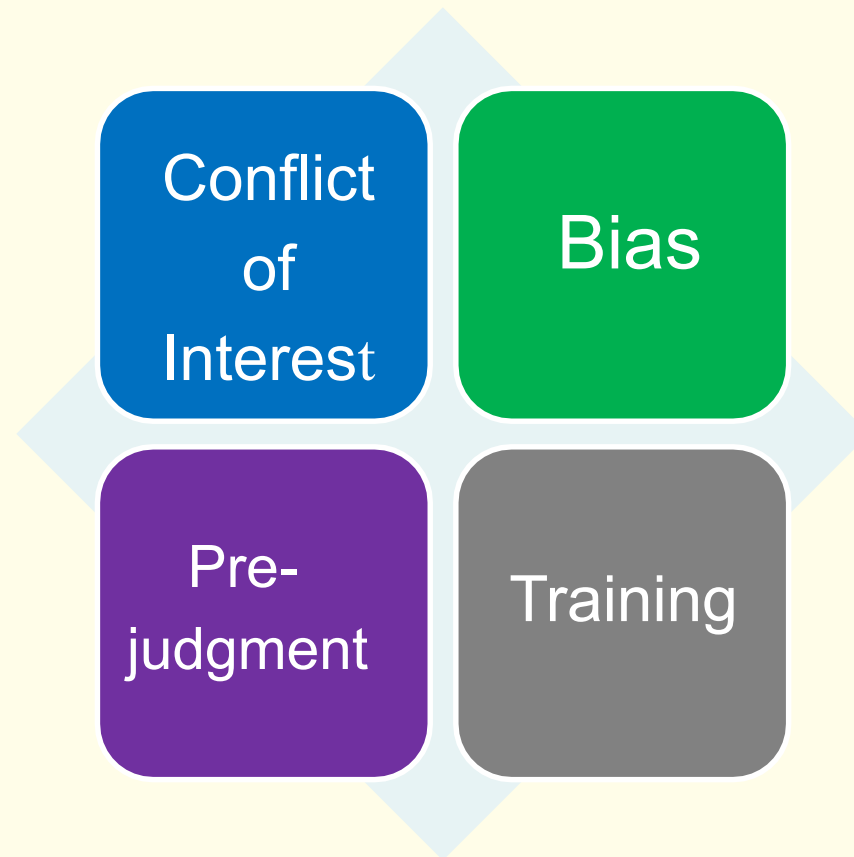
# Top Ten Things to Know about Adjudications under the New Rule



1. Impartiality is important.
2. Parties will review the evidence in advance.
3. The report summarizes relevant evidence.
4. The investigator does not adjudicate.
5. “Live” means seeing and hearing in real time.
6. Live hearings allow for live questioning.
7. You will make on-the-spot relevancy rulings.
8. Some information is shielded from questions.
9. The standard of proof will matter.
10. The written determination is extensive.

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

"It's high time that we 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."

"One frivolous accusation can ruin a young man's life."

## PRE-JUDGEMENT

Classic “two drunk kids” case.

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

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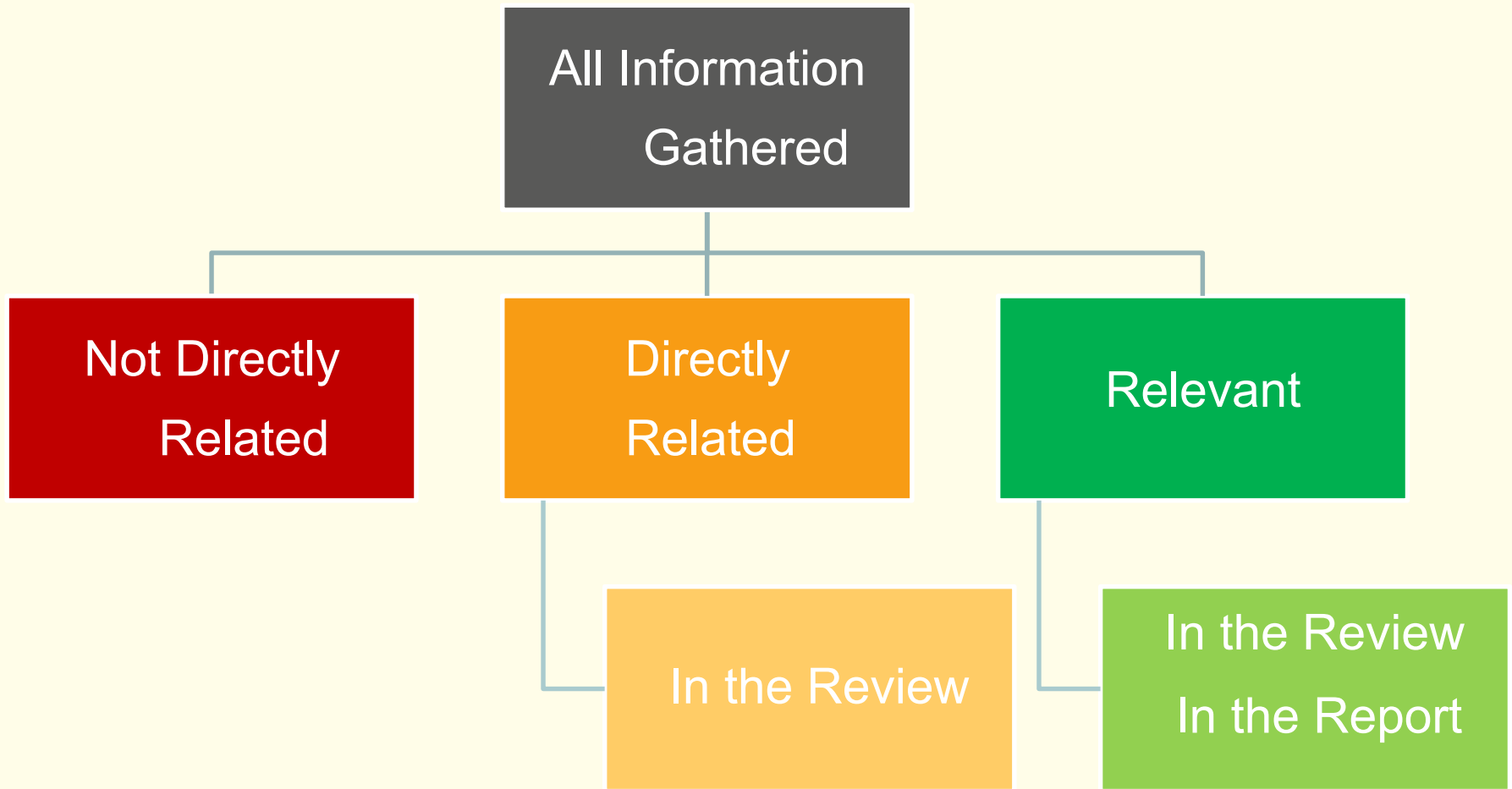
Be open to the possibility of  
alternative explanations  
(The Warehouse Door)

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

2

Parties will review the evidence in advance.





## 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**

Complainant: My uncle abused me when I was little, so this has brought up a lot of painful memories. **Not Directly Related**

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

The parties’ texts to one another prior to the incident. **Directly Related**

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

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

Philosophy:

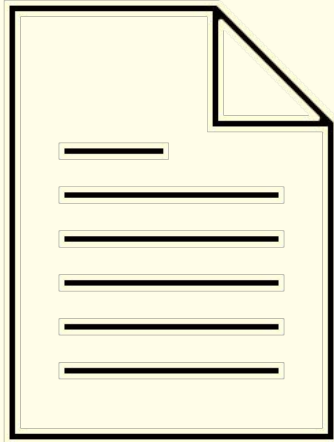
Increased Access = Increased Fairness

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

3

The Investigative Report fairly summarizes relevant evidence.



Evidence the  
investigators  
saw as relevant

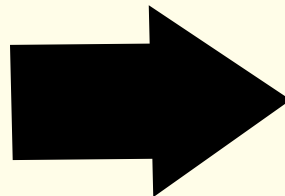
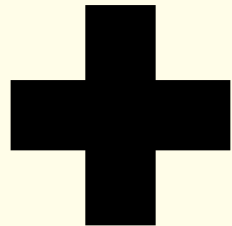


Evidence the  
investigators saw  
as directly related

4

No “single investigator” model

Fair  
Investigation



Fair  
Adjudication

Fair Determination

Investigators should minimize judgments.

Regardless, they are yours to make.

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.

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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.

## 5

## Live means seeing and hearing in real time

The parties must be able to see and hear the proceedings in real time.

The hearing may be virtual.

At either party's request, the parties may be in separate rooms.

The school must create an audio *or* audiovisual recording *or* transcript and make it available to the parties for review.

## 6

Live hearings allow for live questioning

**What**

All relevant questions and follow-up questions, including those challenging credibility

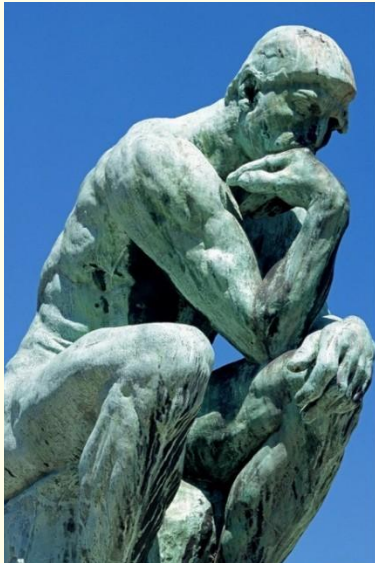
**How**

Directly, orally, in real time

**Who**

The party's advisor of choice (or by appointment) and never a party personally

## Is cross examination a positive development for the Title IX process?



### Advocates for Respondents

Yes! Before being found responsible, a respondent should have due process, and that means confronting the accuser.

### Advocates for Complainants

No! This will chill reporting and re-traumatize victims who come forward.

### Advocates for Schools

Sigh. This highly adversarial process will exacerbate inequalities, increase attorney participation, and be difficult to manage.



# 7

You will make on-the-spot relevancy rulings

Allowed:

Relevant questions

Irrelevant questions

Not allowed:

= Duplicative questions

= Shielded information

How does this work in an actual hearing?

1. Advisor poses question
2. Hearing officer decides if it is allowed
3. Witness answers question

1. Request questions in advance.
2. Think about what questions are likely.
3. Ask questions yourself.
4. Take your time. Call a recess.
5. Err on the side of including evidence.

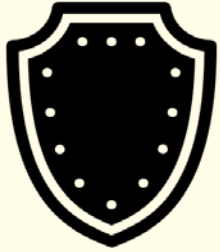
## 8

Some information is shielded.

Some information that we classify as “irrelevant” may be highly shielded by public policy.

We sometimes call this information “privileged.”

- Attorney-client communications
- Medical & psychological records
- “Rape shield” information



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

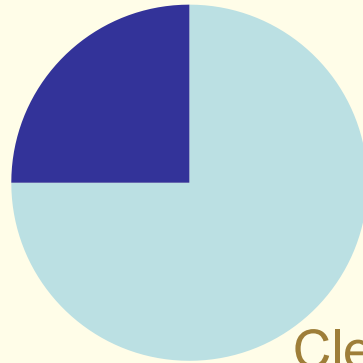


Questions/evidence about respondent's sexual predisposition or prior sexual behavior may be relevant

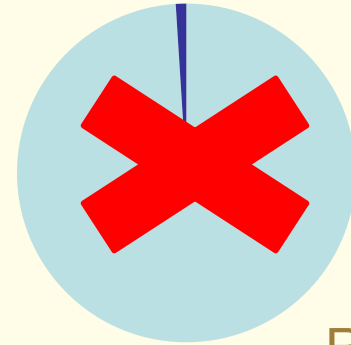


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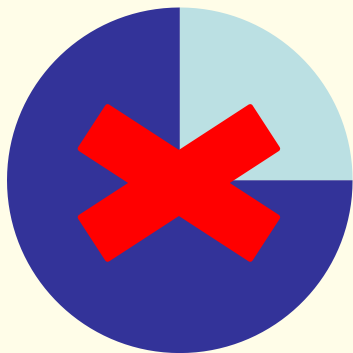
## Standards of Proof



Clear and  
Convincing



Beyond a  
Reasonable  
Doubt

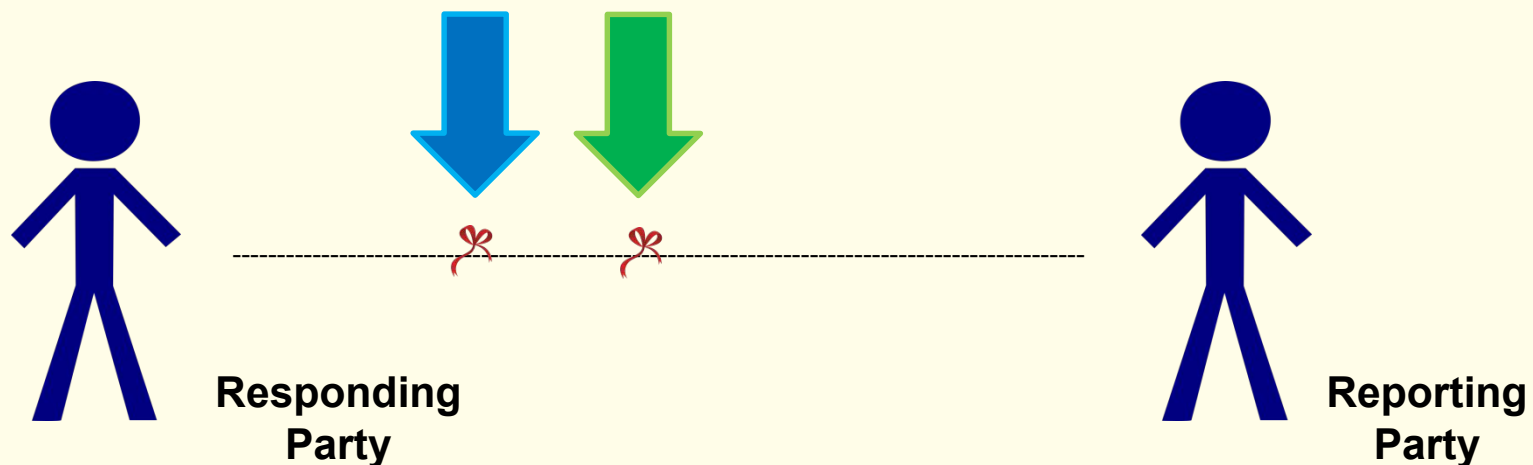


Reasonable Cause

Preponderance of the  
Evidence

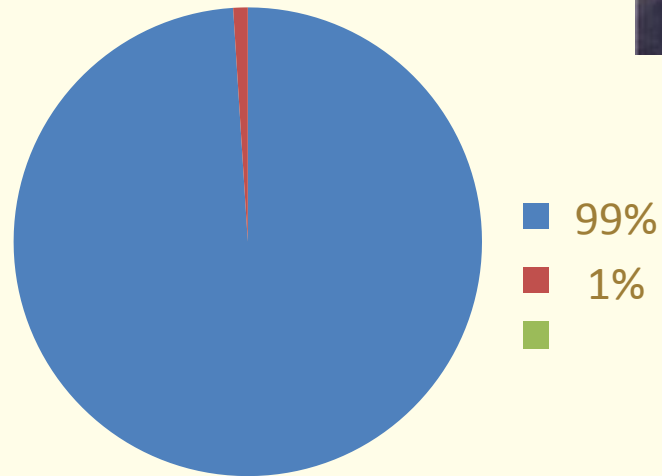
Preponderance of the evidence – neutral. The party with the better case prevails even if the margin is very narrow.

Clear and Convincing – weighted in favor of Responding Party. It's not enough for the Reporting Party to have the better case. He/she must have a clear and convincing case.



# Standard of Proof – Why it Matters

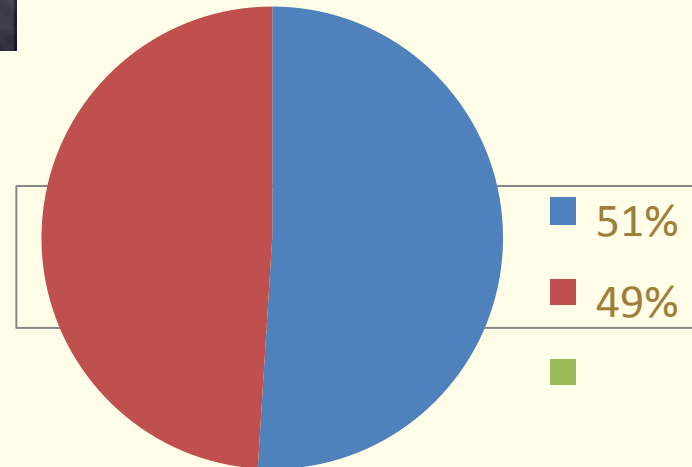
Criminal Trial:  
Beyond a  
Reasonable Doubt



**NOT GUILTY**



Civil Trial:  
Preponderance of  
the Evidence



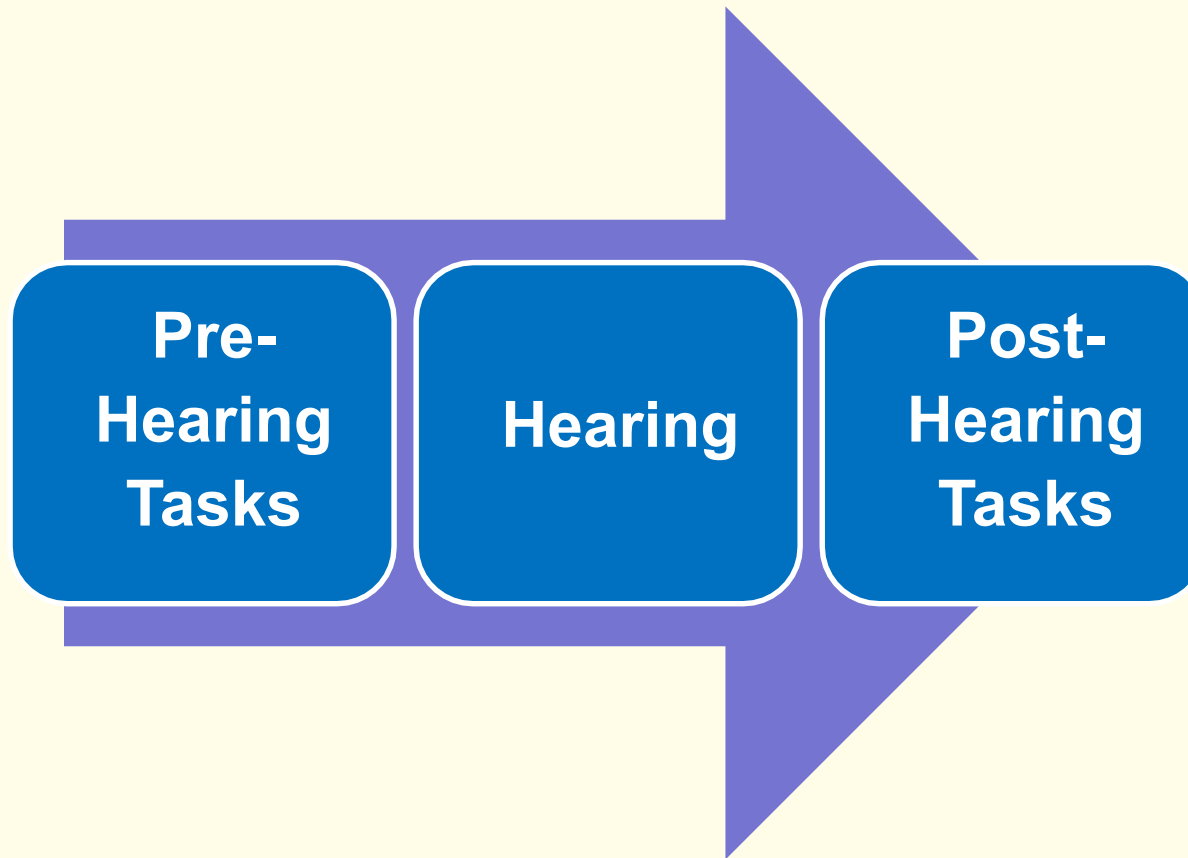
**RESPONSIBLE**

## 10

## The written determination is extensive


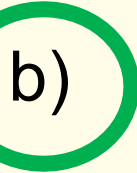

1. Identification of the allegations
2. Description of the procedural steps
3. Findings of fact
4. Conclusions regarding application of school rules to the facts
5. Statement of result as to each allegation
  - Determination of responsibility
  - Rationale
  - Disciplinary sanctions
  - Remedies to be provided to complainant
6. Procedures for either party to appeal






You receive a voicemail from the Title IX Coordinator that you've been selected as the lead hearing officer for a new case. Two days later, an Investigative Report and file of additional "directly related" evidence arrive via FedEx. A glance at the executive summary of the report tells you that this is a student-on-student case of offensive sexual touching.


Your first move is to. . .

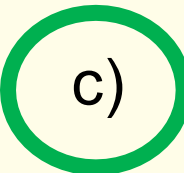
-  Send a scheduling notice of hearing to the parties – the clock is ticking.
-  b) Check the names of the parties and witnesses to make sure you do not have a conflict of interest.
-  Call Dr. Jackson, the lead investigator, to get his take on the case before you dive into the written material.

You work with the Title IX Coordinator to issue a hearing notice, making sure that the parties and their advisors will have at least ten days to review the investigative report.

Now it's time for you to prepare. You look at your calendar to see when you can schedule time to. . .

 Review the investigative report thoroughly. It contains all the relevant evidence and you don't want to taint your perception with extraneous material.

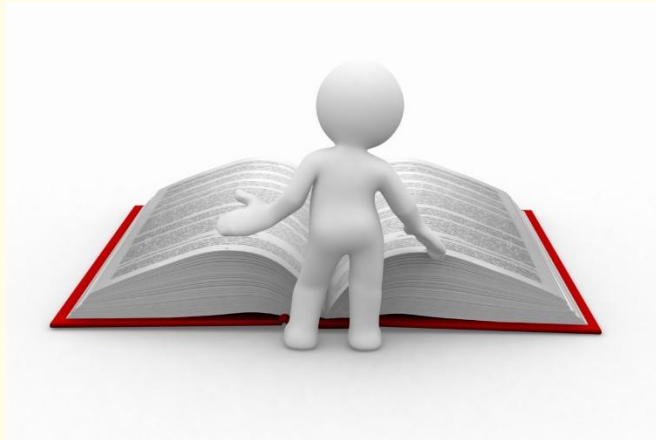
 Review the investigative report and the "directly related" evidence - the entire body of case materials, no more and no less.

 c) Review the investigative report, the "directly related" evidence, and the school's Title IX policy and procedures, including conduct 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



## First, 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.

## Second, 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:            )

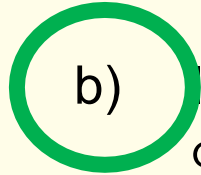


As you read, some questions occur to you...areas of ambiguity in the evidence about the parties' relationship and the socially-distanced art installation they attended before the offensive sexual touching allegedly occurred.

You decide to. . .



Make a list of all the areas of ambiguity and draft questions for each. No such thing as being too thorough.



b) Identify any areas of ambiguity that go directly to elements of the alleged wrongdoing and draft questions to resolve those areas only. No one wants the hearing to last six hours.



c) Call the Director of the Art Museum to get answers to your questions about the event. Then draft questions about the event. Then draft questions for the remaining areas of ambiguity so that the hearing can be both thorough and efficient.

It is the day of the hearing, which will take place via Zoom and is scheduled to begin at 1:00pm.

At 10:00am you receive an email from the Respondent. His father, who was serving as his advisor, was in a car accident on the way to work and has been hospitalized in serious but stable condition. The Respondent says he would like to go ahead and get the hearing over with today. He doesn't have any questions to ask, anyway.

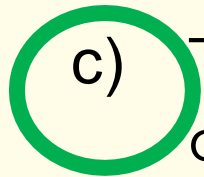
Should you...



Tell the Respondent that that the Title IX Coordinator will arrange for someone from the school's advisor pool to attend the 1:00pm hearing as his advisor.




Carefully explain to the Respondent that he can go forward without an advisor if he so chooses, but caution him that he will not be able to ask any questions without an advisor to pose them.

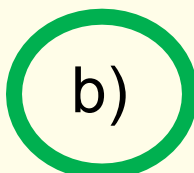



c) Tell the Respondent that under the circumstances, you would prefer to postpone the hearing for a week and that if he does not choose a new advisor, one will be assigned.

Two weeks have passed and the day of the hearing arrives (again). At 1:00pm, you open the Zoom meeting. Both parties and their advisors are present, but something is wrong with the Complainant's camera. You can hear her perfectly, but the window where her face should be just shows a black screen. After 20 minutes of unsuccessful attempts to fix the problem, the Complainant asks if she can just participate by audio. The Respondent indicates that he is fine with that.

You...

 Ask both parties to send you a quick email confirming that they consent to participate in the hearing with the Complainant on audio only.

 b) Reluctantly postpone the hearing a second time and tell the parties to be on the lookout for a new scheduling notice.

 Explain that you are concerned about the imbalance created if one party is on audio only, but offer to go forward with both parties on audio only (assuming they both consent).

The day of the hearing arrives yet again, and this time the technology works without a hitch. By this time everyone knows who you are, but you introduce yourself again and remind everyone that you are there to conduct a fair hearing.

Based on the volume of evidence and the number of witnesses, you think it could be difficult to complete the hearing by the end of the day. Given that time is short, you...

- ❌ Dispense with your introductory script in favor of handling issues as they arise. Per school policy, the first witness is the lead investigator, so you ask Dr. Jackson to describe the investigation process.
- ❌ Dispense with your introductory script with one exception - instructing all participants that they are not to record the hearing - and then move forward with Dr. Jackson.
- ③ c) Resign yourself to a two-day hearing and launch into a long script of rules, cautions, and reminders.





Your opening remarks are your opportunity to:


- Establish control
- Set a formal, professional tone
- Emphasize important rules
- Build a useful record that reflects the care with which the school (and you personally) are approaching the case

After Dr. Jackson speaks, you ask why he and Ms. Feldman did not interview Curtis Nault, a student that both parties identified as having been present at the art installation they attended immediately prior to the alleged incident. Dr. Jackson responds that three other students who were present were interviewed, and all had very similar accounts, so the investigators did not think it was necessary to interview Curtis. Later, the Respondent's advisor - who is now an attorney - asks Dr. Jackson, "Isn't Curtis Nault someone with relevant information?"

You say...


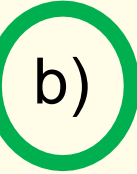

a) "That seems a little duplicative of my previous question, Ms. Walters. I'll allow it, but please focus on covering new ground."

 "Allowed."

 "That question is barred as irrelevant because it is duplicative of a question posed previously."

When it is the Complainant's turn to speak, she says, "I would like to begin by reading this note that the Respondent put under my door the day after he violated me. The note says, "Lis, so sorry about last night. I'm not that kind of guy and I hope you can forgive me."

You can see that everyone else in the Zoom room is as shocked as you are. There was nothing about this note in the investigation report. You hear the Respondent whisper to his advisor, "I forgot I wrote that, but it was about something else."

-  Allow the note to become part of the body of evidence. The Respondent will have a chance to explain and his advisor will have an opportunity to ask questions.
-  b) Ask the Complainant why she didn't show the note to the investigators. When she says, "I just forgot," you bar the note from admission.
-  Call a recess and postpone the rest of the hearing for three days so that the Respondent can have time to prepare a response.

The Respondent is accused of touching the Complainant's breasts when she was too incapacitated by alcohol consumption to consent. The Respondent's attorney asks her, "I understand that just last week you participated in a wet t-shirt contest at a fraternity house and the judges repeatedly brushed their hands and arms across the contestants nipples 'accidentally.' Are you planning to file charges against any of them?"

Before the Complainant answers, you say...

a) "Irrelevant - please do not answer the question."



"Allowable." You realize that the alleged conduct - intentional touching of breasts, arguably without consent - described in the question is the same as the alleged conduct at issue in the case.



"I'll allow it, but proceed carefully, Ms. Walters, so that this line of questioning does not become harassing."

During the investigation, the investigators interviewed a student named Ramona McGuire who stated that the Respondent had fondled her breasts without her consent when she was half asleep after an all-night study session. Ramona was expected to attend the hearing, but is seriously ill with Covid-19 and is not able to be present. In her closing statement, the Complainant asks you to keep in mind that this is not the first time the Respondent has been accused of taking advantage of girls who are not fully conscious.



When you consider all the evidence following the hearing, you decide to"

- ☒ a) Completely disregard Ramona's statement because she was not present at the hearing.
- ☐ b) Take Ramona's statement into consideration because it is relevant and her absence from the hearing was unavoidable.
- ☐ c) Take Ramona's statement into consideration, but give it lesser weight because she did not have to answer questions about it.

Your school is using a “preponderance of the evidence” standard. When you look at the elements, the weight of the evidence indicates that the Respondent intentionally touched the Complainant’s breasts. The issue of consent is much murkier, though. The complainant argues that although she said yes to the touching, she was too drunk to legally consent. But the evidence does not necessarily indicate that she was impaired. There is some evidence that she was impaired, but there is more evidence that she was not impaired.

You decide to...


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


*or*

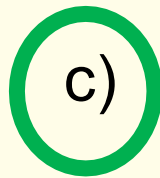
3. ☐ With respondent's intimate parts  
(intimate part:      )

*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:      )

 Find the Respondent responsible because 2 out of 3 elements have been established by a preponderance of the evidence.

 Find the Respondent responsible but give the lowest allowable sanction because of the lack of certainty around the consent element.

 c) Find the Respondent not responsible because each element must be established by a preponderance of the evidence, and one element has not been.

Department of Education personnel won't second guess your responsibility determination just because they would have come to a different conclusion. Assuming you followed the required procedures, your decision is entitled to deference.

## Your Parker Poe Title IX Team



For Title IX assistance, contact Team Lead Josh Whitlock at [joshwhitlock@parkerpoe.com](mailto:joshwhitlock@parkerpoe.com) or 704-335-6622