



Welcome to the Training, Your Honor:

Holding Hearings and Making Determinations under the New Rule

Disclaimer

Portions of this presentation may qualify as “attorney advertising” in some jurisdictions. Parker Poe, however, intends for it to be used only for educational and information purposes.

The law is changing rapidly in this area. This presentation is our best attempt to summarize the current state of the law and is subject to change.

For Title IX assistance, contact Josh Whitlock at joshwhitlock@parkerpoe.com or 704.335.6622.

Session Agenda

- 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

TITLE IX

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.

Title IX's Purpose

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



The 2011 and 2014 Guidance



Focused attention and resources on the problem of sexual harassment

Raised concerns that Respondents were being treated unfairly

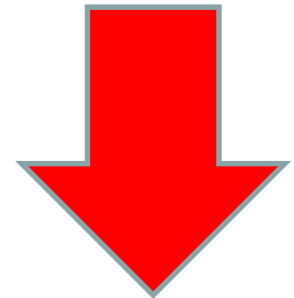


It did not change the law.

The Final Rule is More than Guidance

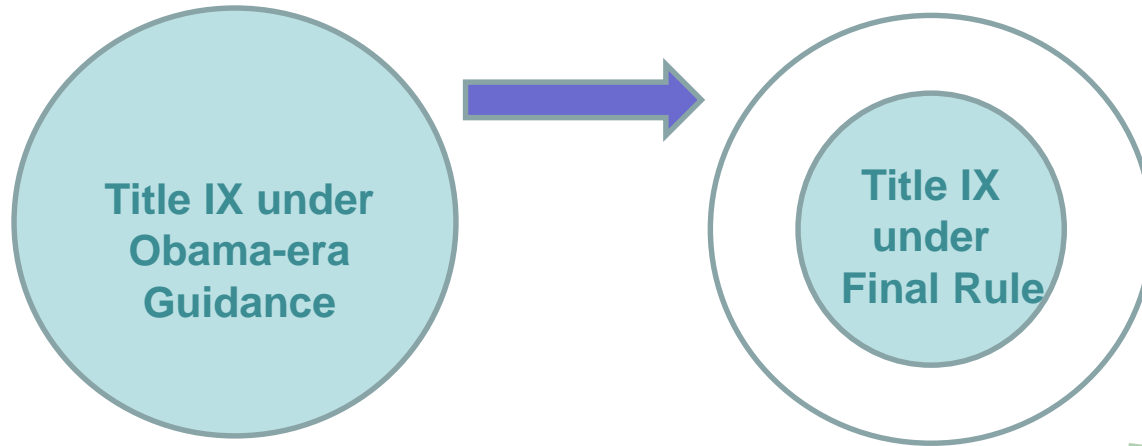
- The Title IX process is now legally mandated.
- A Final Rule is not easily made or unmade.

Final Rule released: May 6, 2020



Compliance deadline: August 14, 2020

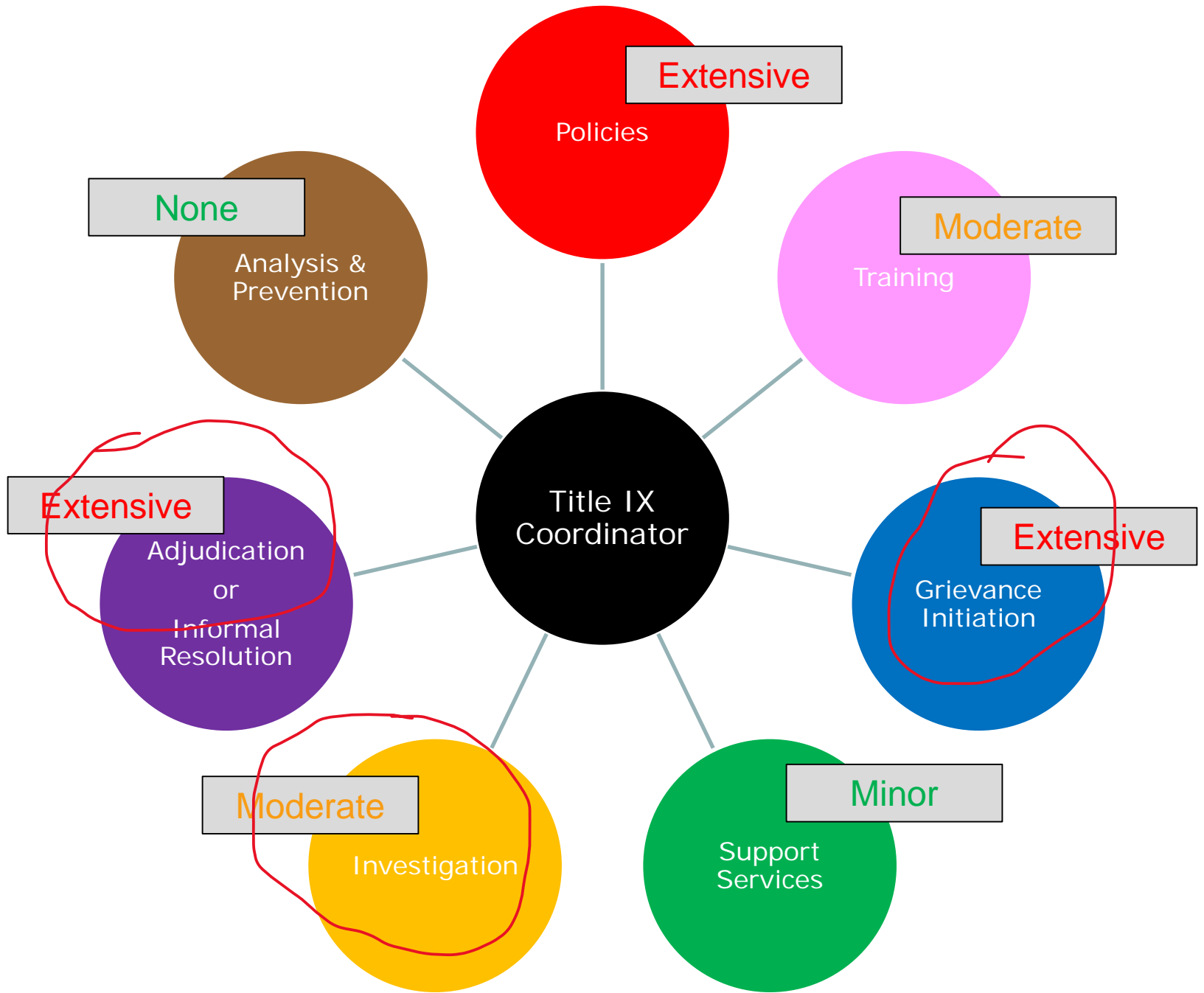
Overarching Goals of Final Rule



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

2. Recalibrate the procedural balance between complainants and respondents





Mandatory Response to a Report

Document

The Title IX Coordinator must promptly:

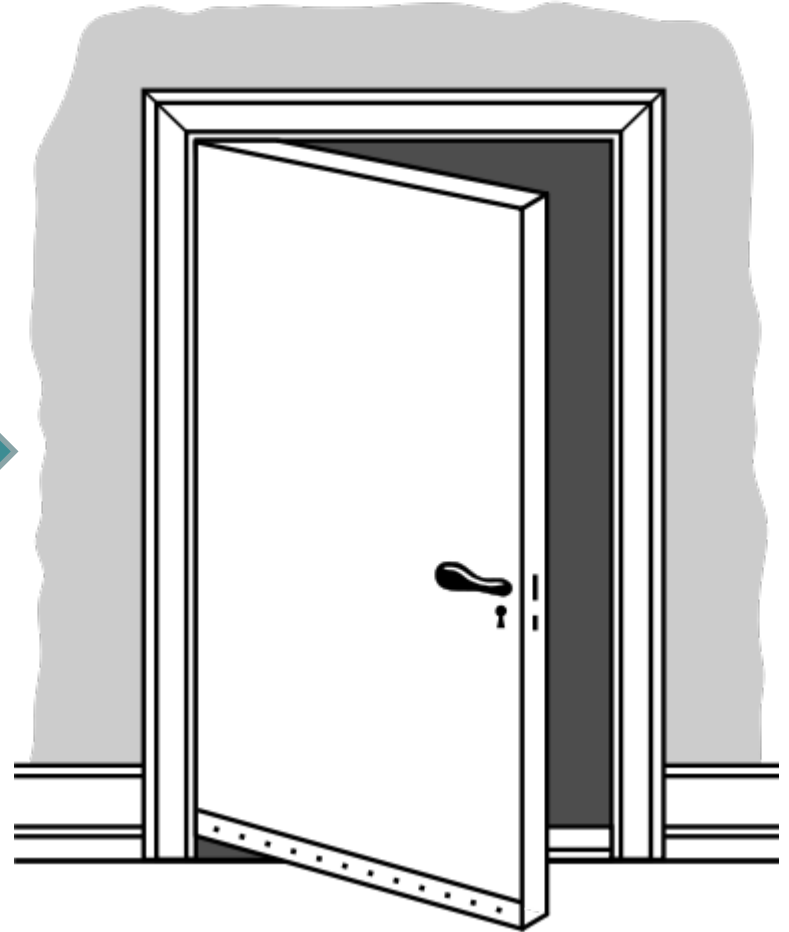
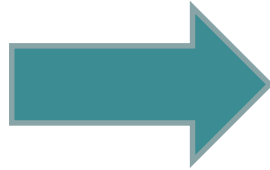
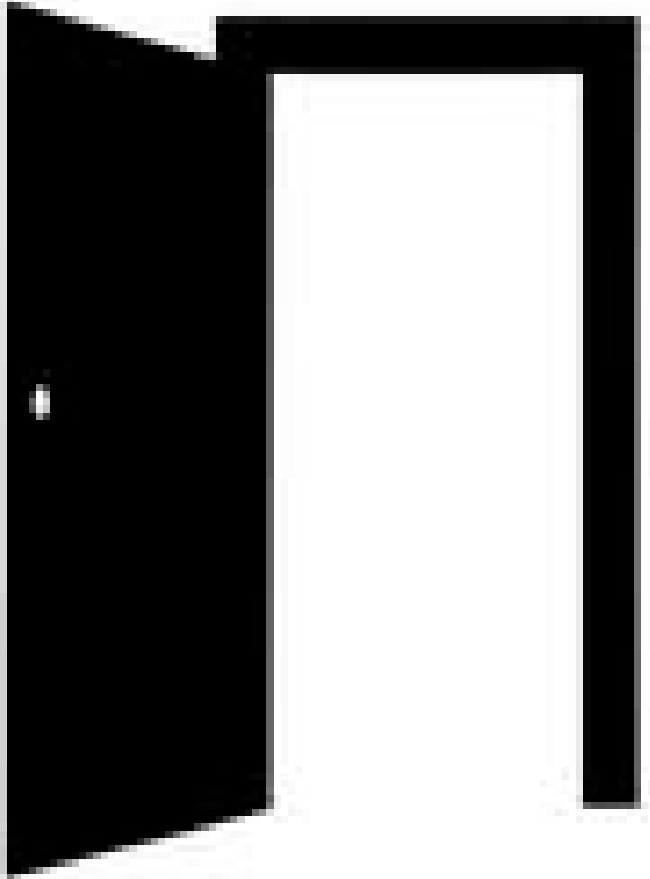
1 Contact the Complainant to discuss the availability of supportive measures,

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, and

4 Explain the process for filing a formal complaint, the grievance process, and any informal resolution options.

GRIEVANCE INITIATION: A SHRINKING SCOPE



TWO BUCKETS



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.

IF A FORMAL COMPLAINT IS FILED... TIME FOR A DISMISSAL ANALYSIS



1. **Who** is the complainant?
Was the complainant “a person in the United States?”
2. **Where** did the incident(s) take place?
3. **What** type of conduct occurred?

DISMISSAL ANALYSIS



THRESHOLD QUESTION 1:

WAS THE COMPLAINT IN THE US 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.*

MANDATORY DISMISSAL



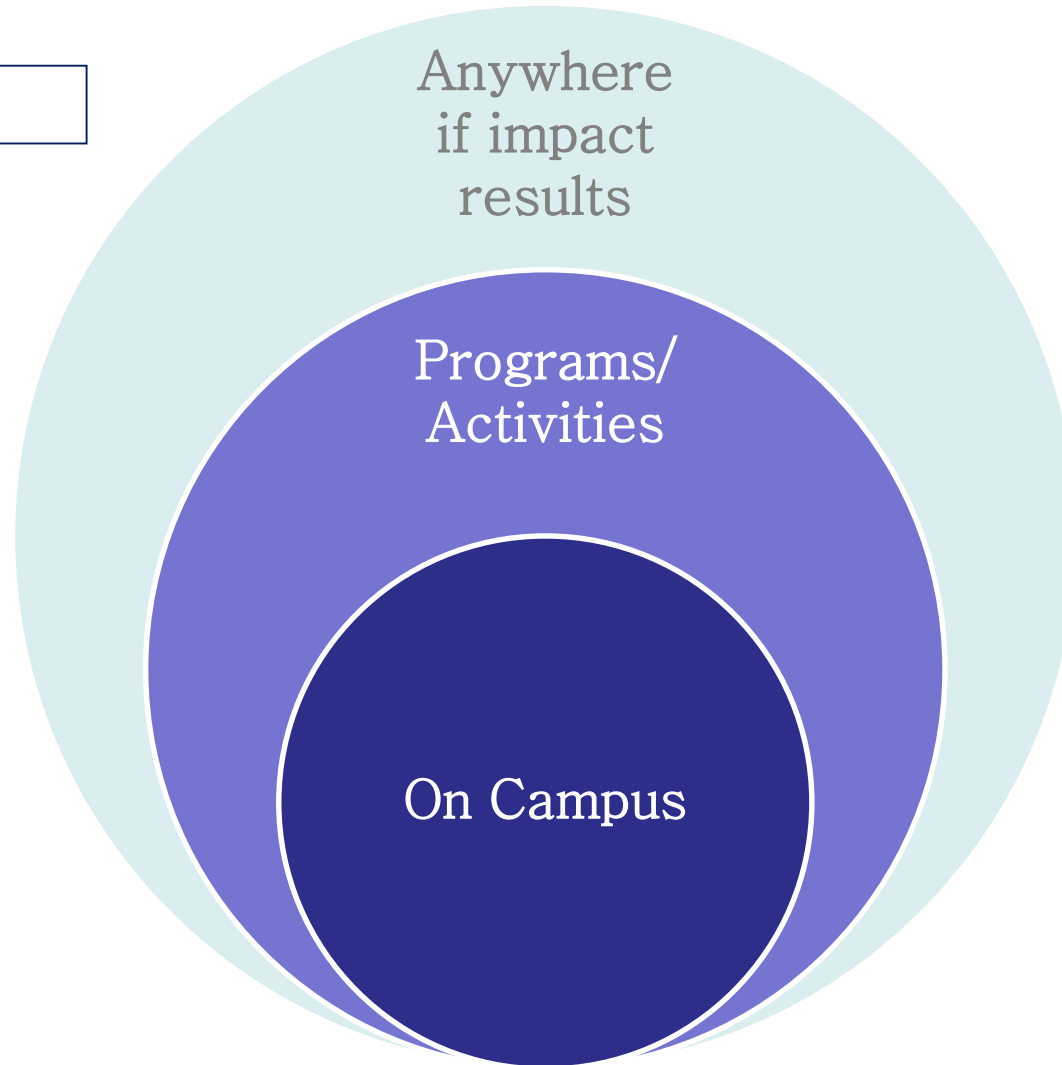
If the complainant was not “a person in the United States” at the time of the incident, the incident is not Title IX Sexual Harassment (TIXSH), and the school must dismiss the formal complaint as a Title IX matter.

DISMISSAL ANALYSIS



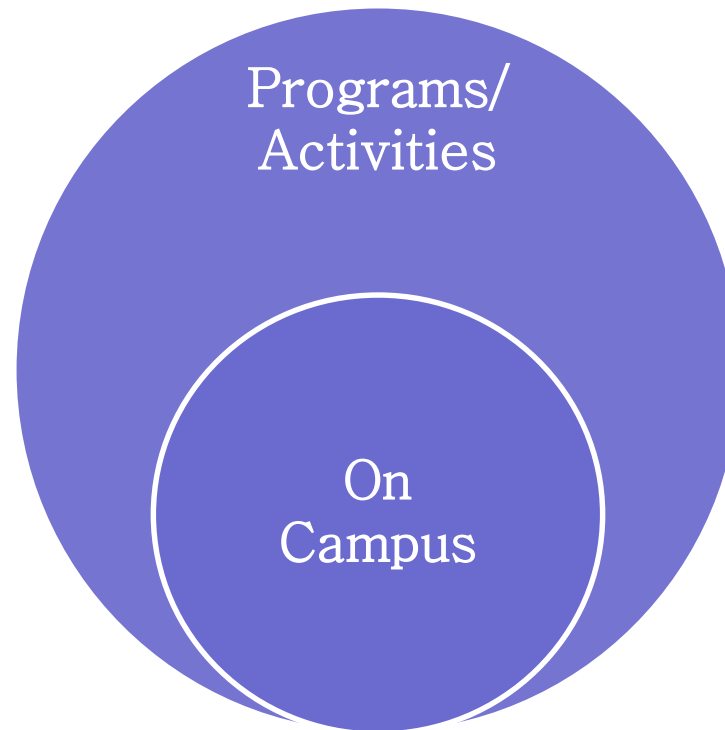
THRESHOLD QUESTION 2: WHERE DID THE INCIDENT(S) TAKE PLACE?

Obama Era

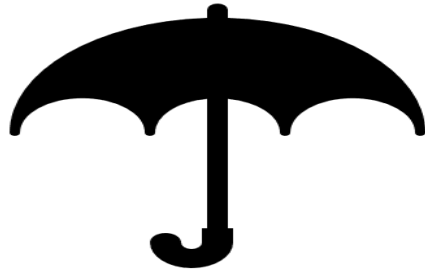


THRESHOLD QUESTION 2: WHERE DID THE INCIDENT(S) TAKE PLACE?

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

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.

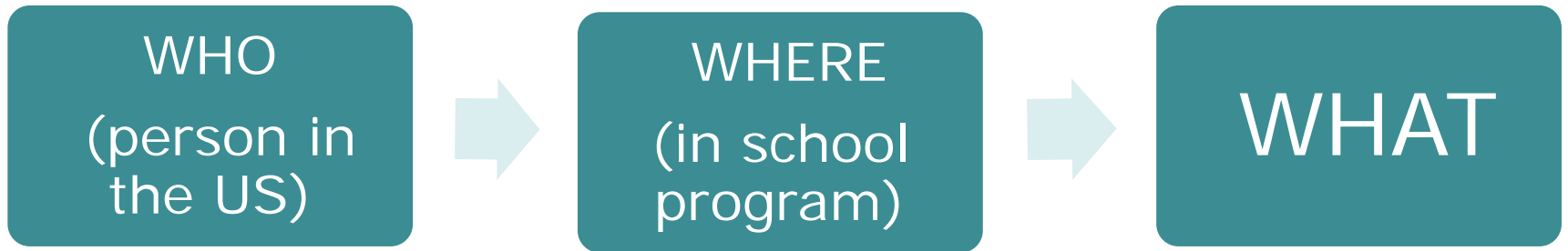
* Physical location

MANDATORY DISMISSAL



If the incident did not take place within the school's program or activity, the incident is not Title IX Sexual Harassment (TIXSH), and the school must dismiss the formal complaint as a Title IX matter.

DISMISSAL ANALYSIS



THRESHOLD QUESTION 3: WHAT TYPE OF CONDUCT OCCURRED?

1

Sexual Assault
Dating and Domestic Violence
Stalking

Clery Act, 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

3

Unwelcome conduct (Expressive: verbal, written, body language)*

Level 4
Expressive Harassment

* 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?

“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.”

“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”



Sending a highly explicit pornographic image on a single occasion (not pervasive)



Sending swimsuit pictures on a daily basis (not severe)

New Definition of Sexual Harassment



Sending highly explicit pornographic images on a daily basis

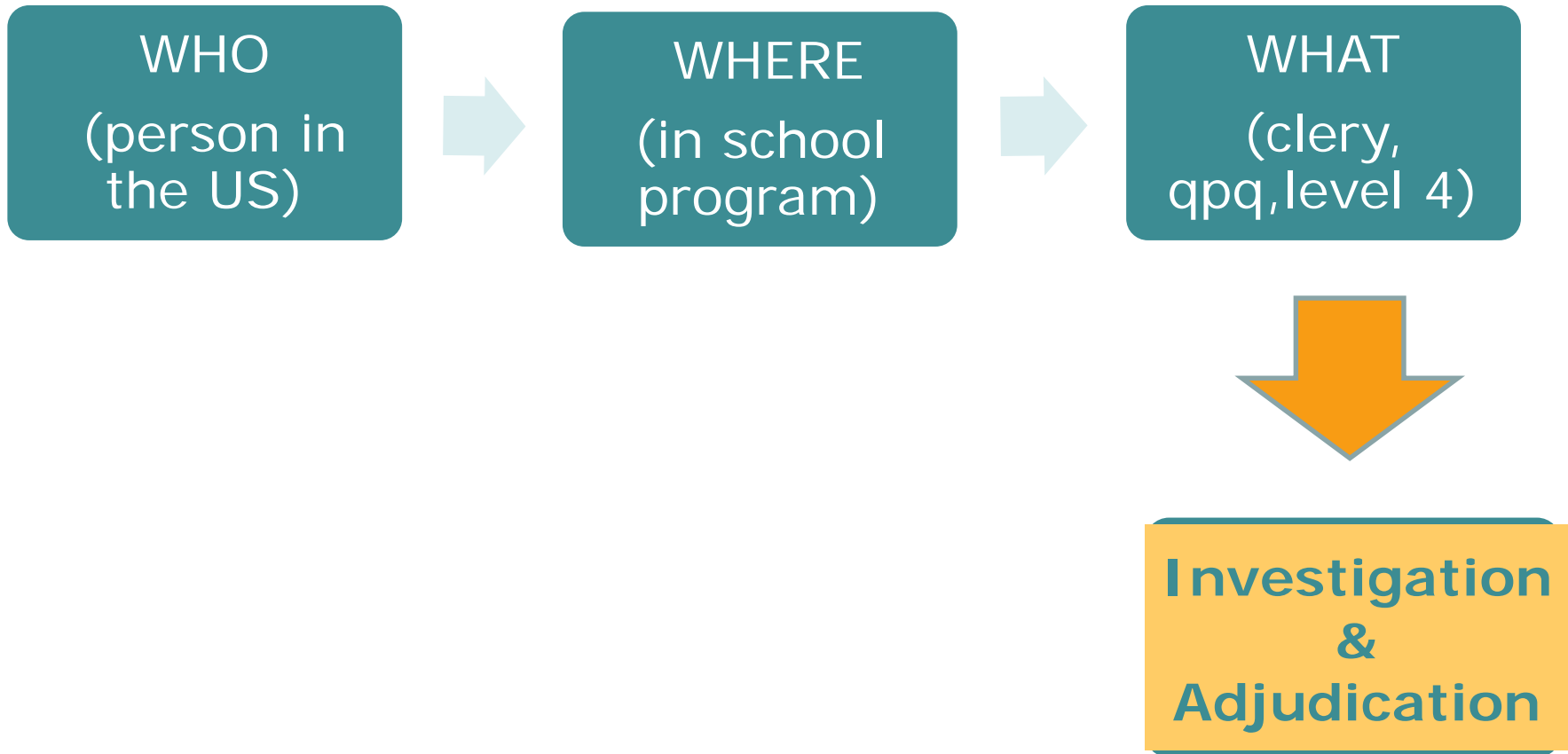
MANDATORY DISMISSAL

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



DISMISSAL ANALYSIS



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

The Adjudication Top Ten

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-judgment

Classic “two drunk kids” case.

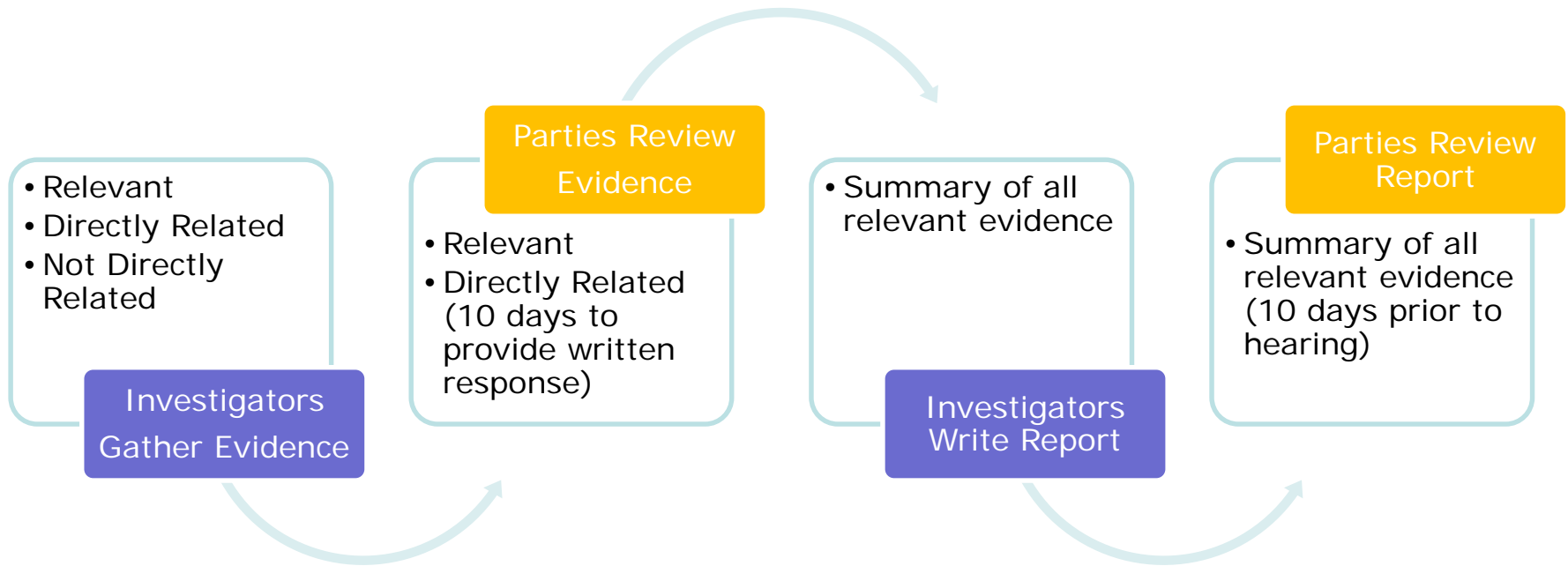
“I had one almost exactly like this last year.”

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

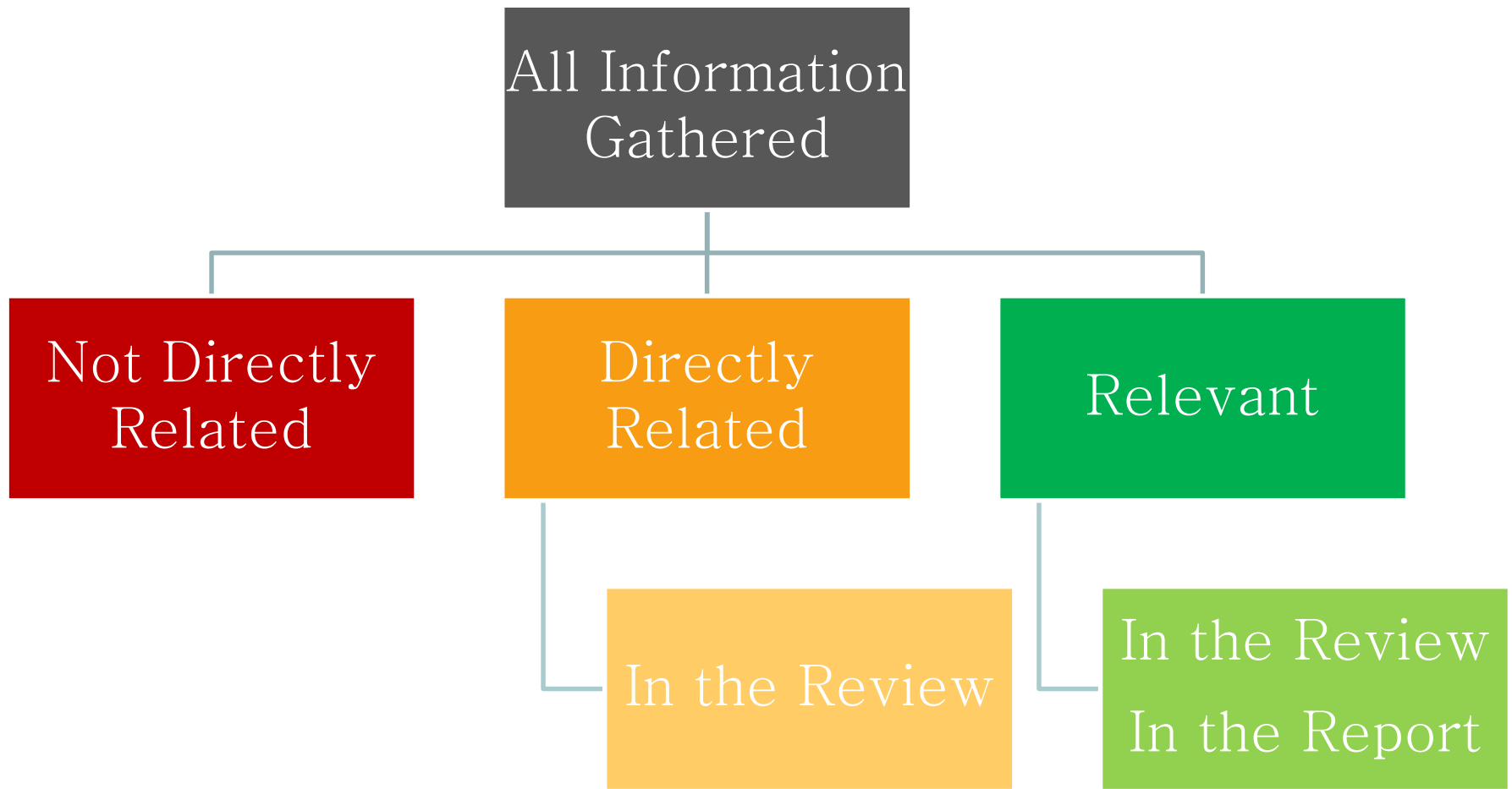
***Respondent presumed not responsible until a determination of responsibility is made.

2

Parties will review the evidence in advance.



Sorting Information



What do those terms mean? 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

Just Examples

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

General Principles of Evidence Review

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

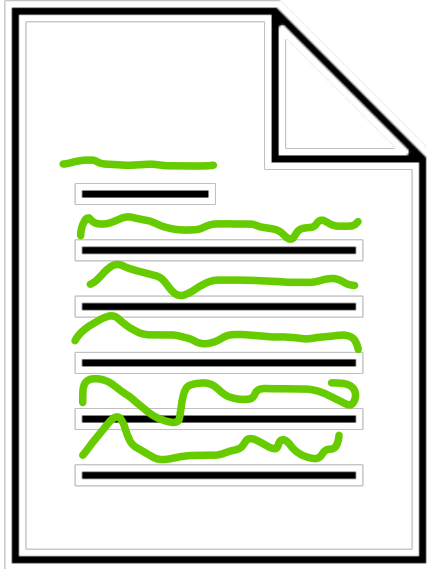
Increased Access = Increased Fairness

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.



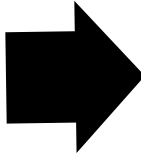
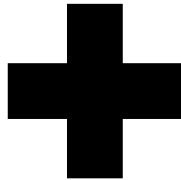
Evidence the investigators saw as relevant



Evidence the investigators saw as directly related

4

No “single investigator” model



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.~~

~~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

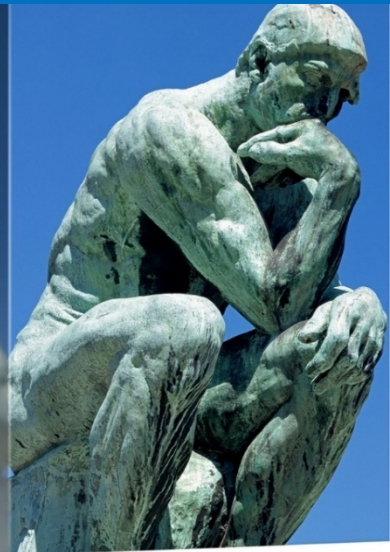
How

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

Not allowed: Irrelevant questions
= 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.

Secret Tips to Make Your Job Easier

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

8

Some information is shielded.

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

We sometimes call this information “privileged.”

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

Rape Shield Rules



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



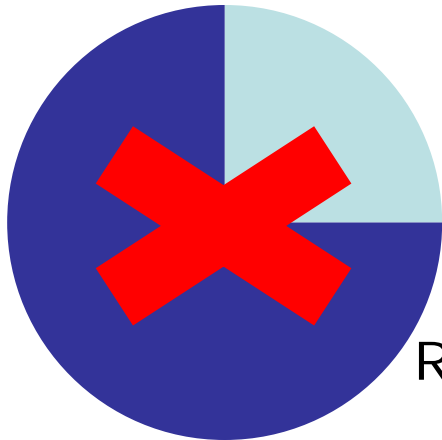
2. Concern specific incidents of prior sexual behavior with respondent and offered to prove consent



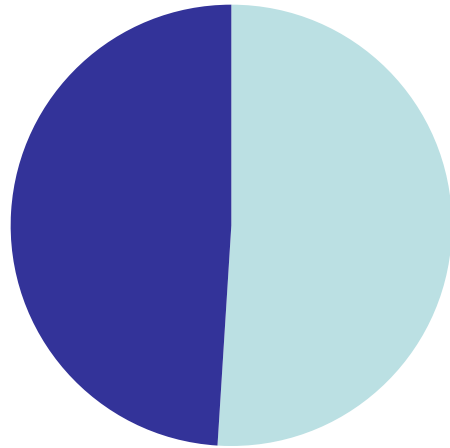
Questions/evidence about respondent's sexual predisposition or prior sexual behavior may be relevant

9

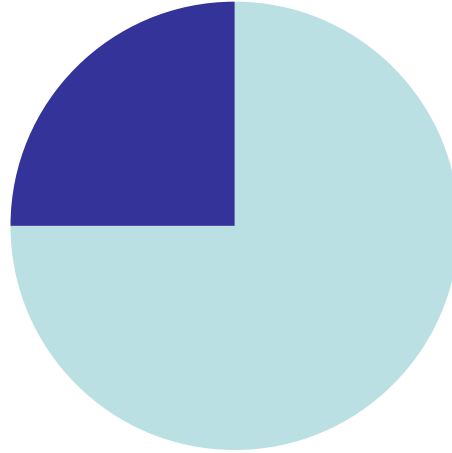
Standards of Proof



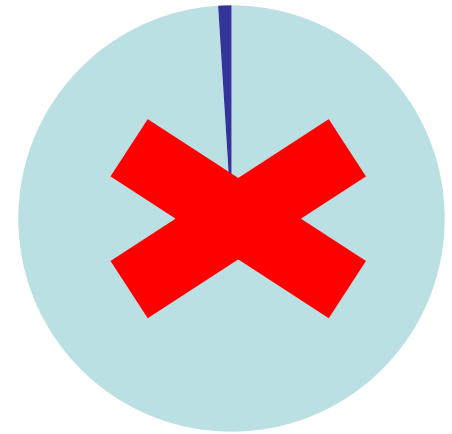
Reasonable Cause



Preponderance of the Evidence



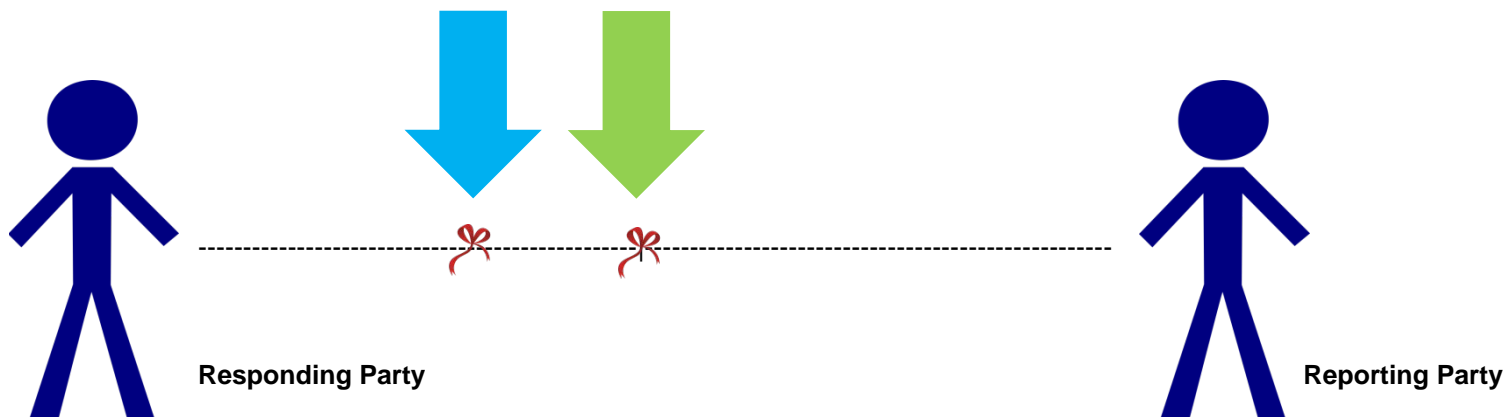
Clear and Convincing



Beyond a Reasonable Doubt

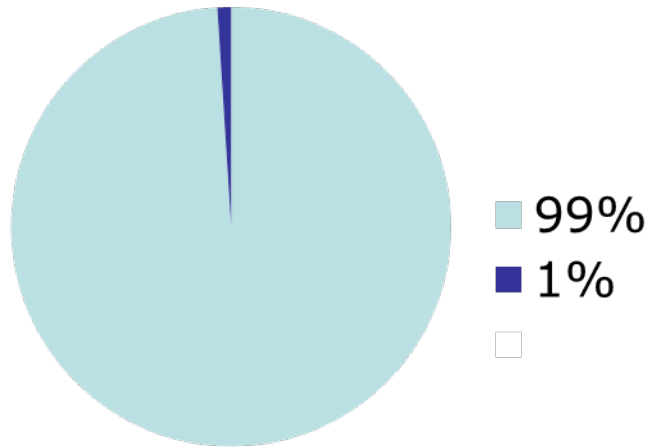
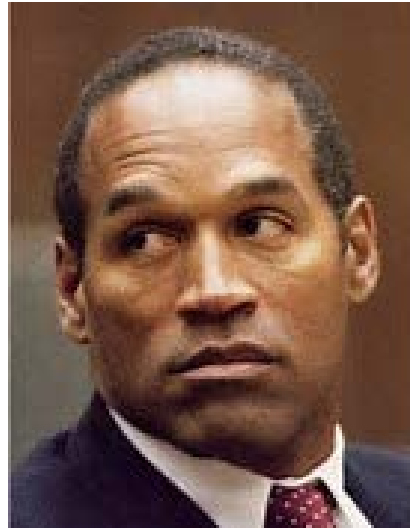
Preponderance of the evidence – neutral. The party with the better case prevails even if the margin is very narrow.

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.



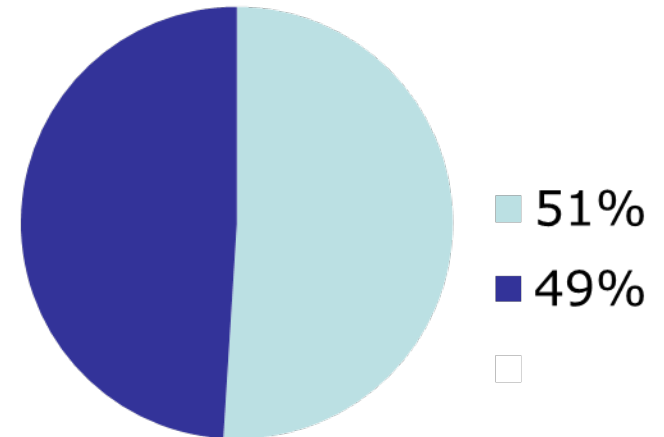
Standard of Proof – Why It Matters

**Criminal Trial:
Beyond a
Reasonable
Doubt**



NOT GUILTY

**Civil Trial:
Preponderance of
the Evidence**

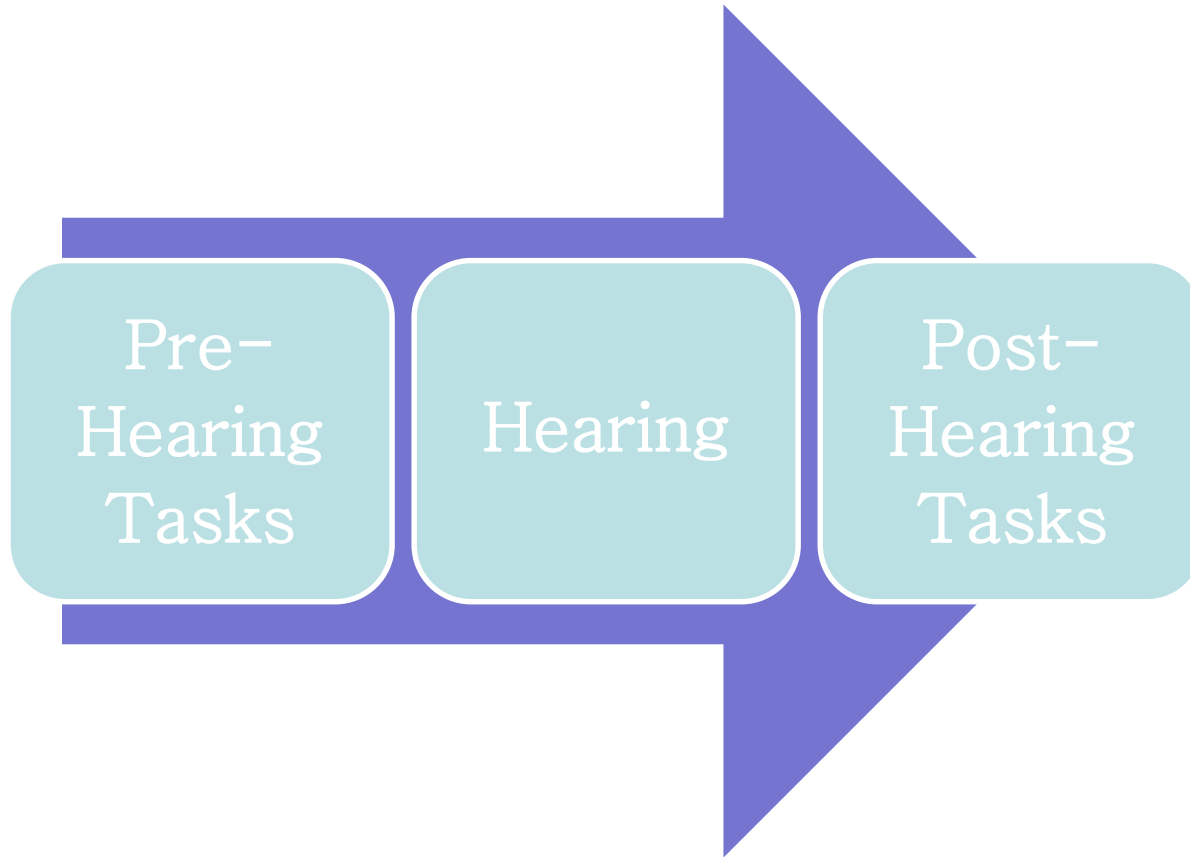


RESPONSIBLE

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

Running a Hearing





Case Assignment


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 Fed Ex. 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 . . .

Case Assignment

 A. 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.

 C. Call Dr. Jackson, the lead investigator, to get his take on the case before you dive into the written material.

Preparation

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 . . .

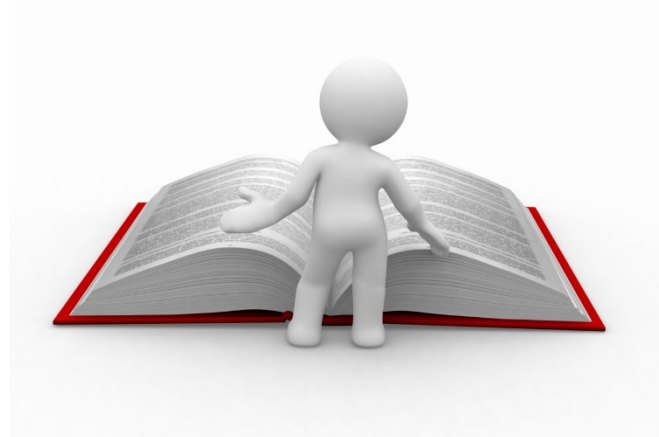
Preparation

- ✘ 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: _____)


Drafting Questions


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 . . .

Drafting Questions

 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.


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


Unexpected Development


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. . .

Unexpected Development

 Tell the Respondent 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.

Technical Difficulties

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. . .

Technical Difficulties

✘ 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).

Opening Remarks

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. . .

Opening Remarks

❌ 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.

Ⓢ C. Resign yourself to a two-day hearing and launch into a long script of rules, cautions, and reminders.



Abbreviated Sample Opening

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

Gatekeeping I

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...

Gatekeeping I

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.”


Surprise Evidence

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."

Surprise Evidence

 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.

Gatekeeping II

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. . .

Surprise Evidence

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.”


Availability for Questioning


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.

Availability for Questioning

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.

 Take Ramona's statement into consideration because it is relevant and her absence from the hearing was unavoidable.

 Take Ramona's statement into consideration, but give it lesser weight because she did not have to answer questions about it.

Standard of Evidence

Your school has begun using a “clear and convincing” standard. When you look at the elements, you see clear and convincing evidence 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 strongly indicate that she was impaired. Maybe it is more likely than not that she was impaired, but the evidence that she was impaired is not clear and convincing. You decide to. . .

Elements of the Alleged Policy Violation

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: _____)

Standard of Proof

-  Find the Respondent responsible because 2 out of 3 elements have been established by clear and convincing evidence. (And the third has 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 clear and convincing evidence, and one element has not been.

Reassuring Words from the Final Rule

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 or 704-335-6622