

**JacksonLewis**

# **Conducting a Title IX Sexual Harassment Investigation**

**Academic Year 2021-22**



# Agenda

1. Where We Are: Context and Framework
2. Ten Key Legal Requirements
3. The Investigation Plan and Process
4. New Approach to Investigative Reports

## 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.



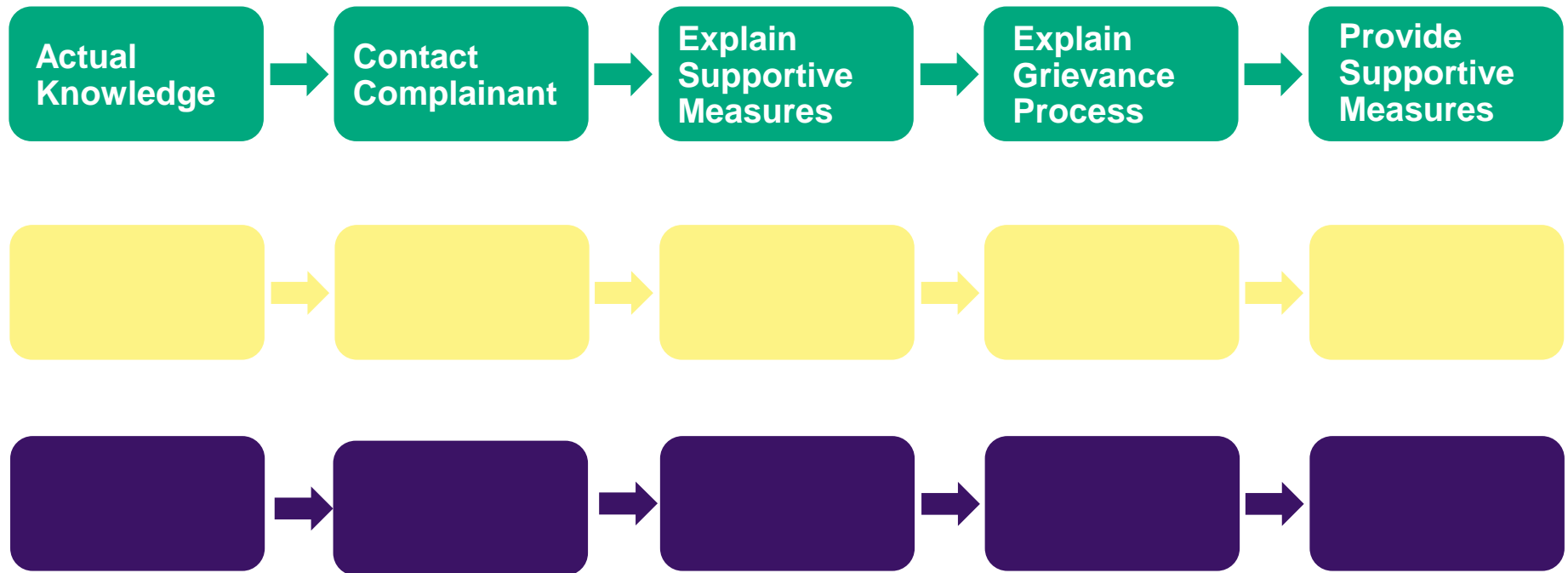
## Title IX's purpose is to remove barriers.

- Prohibitions or Limitations on Participation Based on Sex
- Inequitable support of Men's and Women's Athletics
- Pregnancy Discrimination
- Sexual Harassment
  - Sexual Assault
  - Stalking
  - Domestic/Dating Violence
  - Verbal/expressive





# Coordinator Flow Chart



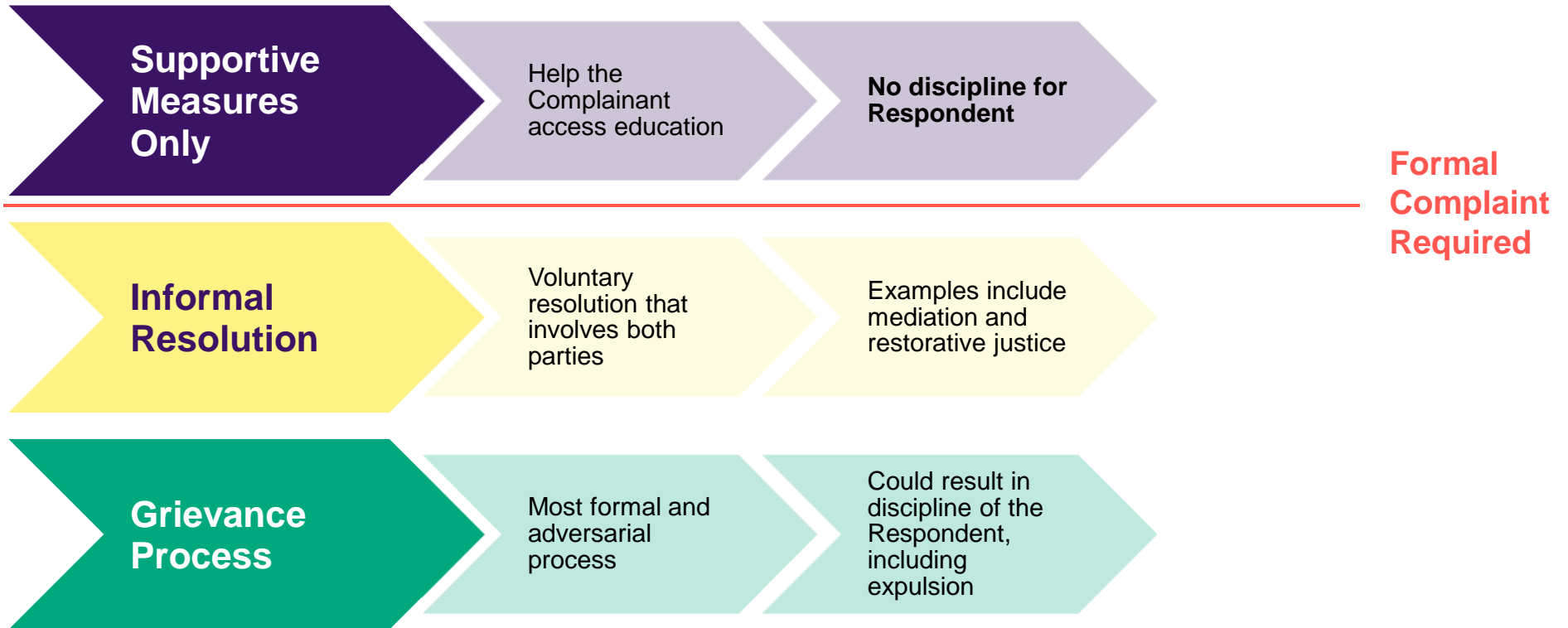
# Mandatory (Initial) Response to a Report

## 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 Formal 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.



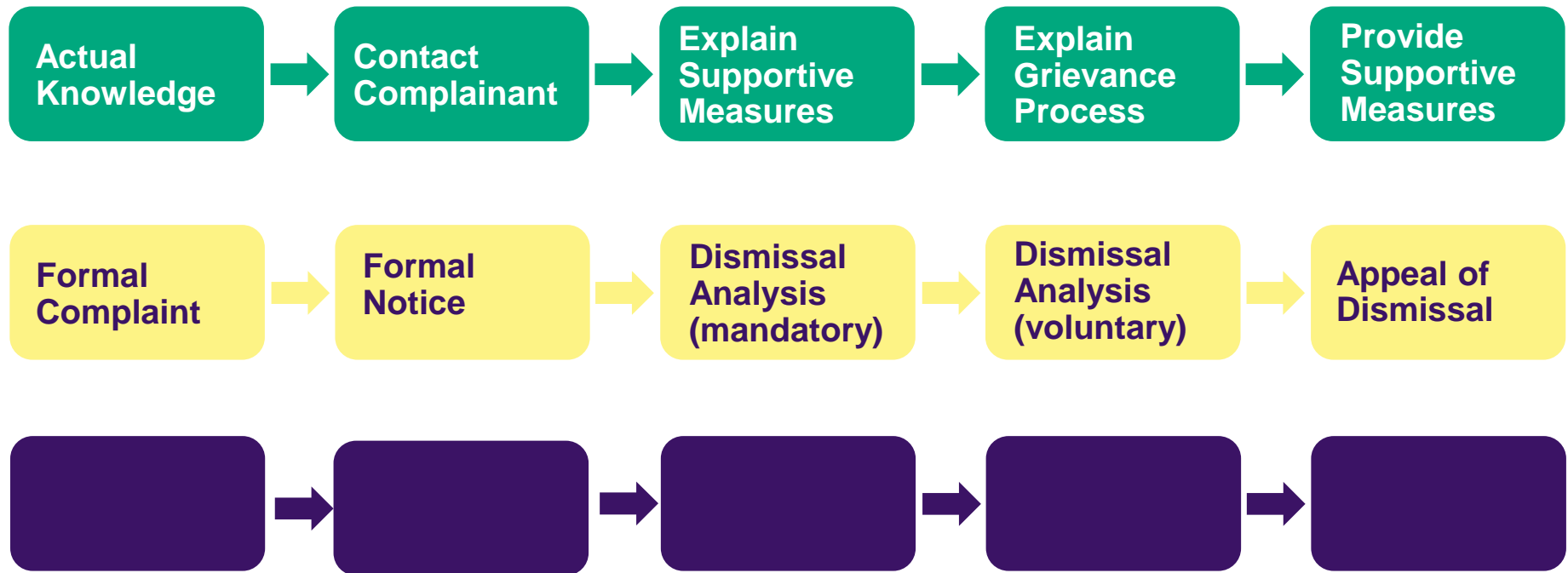
# Three Possible Paths



**\*\*The decision of which path to take is driven primarily by the Complainant.\*\***



# Coordinator Flow Chart



## Formal Notice to All Parties

- Explanation of grievance process and informal resolution
- Sufficient details of allegations (who, what, when, where)\*
- Presumption of non-responsibility; determination made at conclusion of process
- May have an advisor of choice who may be an attorney
- May inspect and review evidence
- Note any “false statement” rule in code of conduct
  - Materially false statement made in bad faith
  - By itself, an adverse determination does not support a charge of making false statements

\*If additional allegations will be investigated, supplemental notice must be given

No  
Surprises

## 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 2020 Regulations.



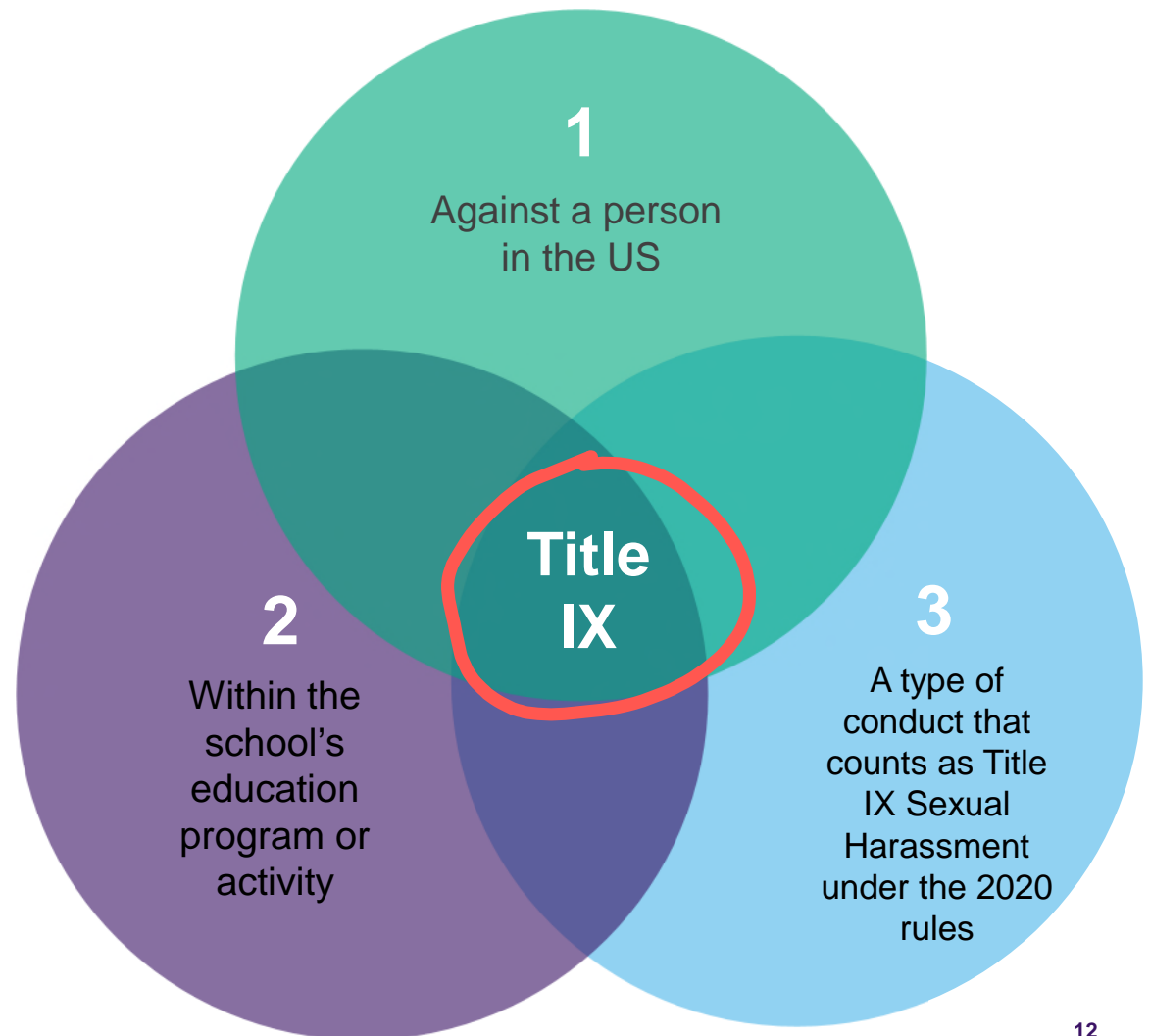
### **Other Sexual Harassment (OSH)**

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.**

## Mandatory Dismissal (& Referral?)

- If a Formal Complaint lacks any one of three key elements, it must be dismissed as a Title IX matter
- The conduct may be investigated and disciplined as a violation of some other rule as the school sees fit



# Within the School's Education Program or Activity



**Substantial  
Control  
Over  
Context**

## Locations

Residence halls  
Classrooms  
Campus grounds  
Greek houses

## Events

School sporting events  
School festivals

## Circumstances

Athletics  
Extracurriculars  
Clinics/Internships



**No  
Substantial  
Control  
Over  
Context**

Private off-campus housing

Off-campus bars or restaurants

Off-campus parties

Personal travel

# Conduct that “counts” as Title IX Sexual Harassment under the 2020 Regulations

## Three Categories

1. Sexual Assault  
Dating and Domestic Violence  
Stalking



Clery Act Conduct

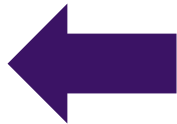
2. A school employee conditioning the provision of an aid, benefit, or service on participation in unwelcome sexual conduct

Quid Pro Quo

3. Unwelcome expressive\* conduct determined by a reasonable person to be so **severe**, **pervasive**, and **objectively offensive** that it **effectively denies equal access** to the school’s education program or activity

Level 4 Expressive Conduct

\* Expressive: *verbal, written, electronic, body language*



## Title IX Regs

Sexual Harassment can be disciplined only after a **formal grievance process**, including

- Official investigation, and
- Hearing

## School Procedures

Sexual Harassment can be disciplined **as the school sees fit**, including:

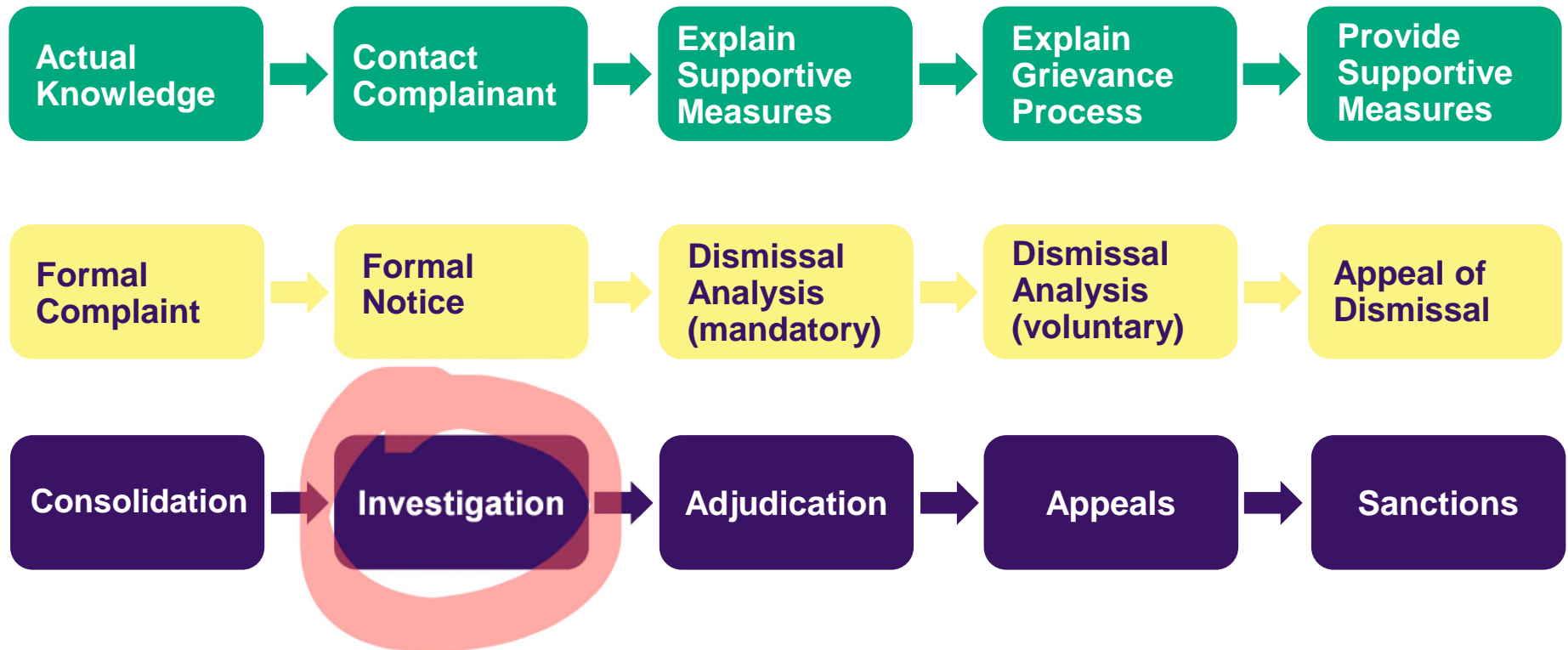
- After an official investigation and hearing  
OR
- Some other process



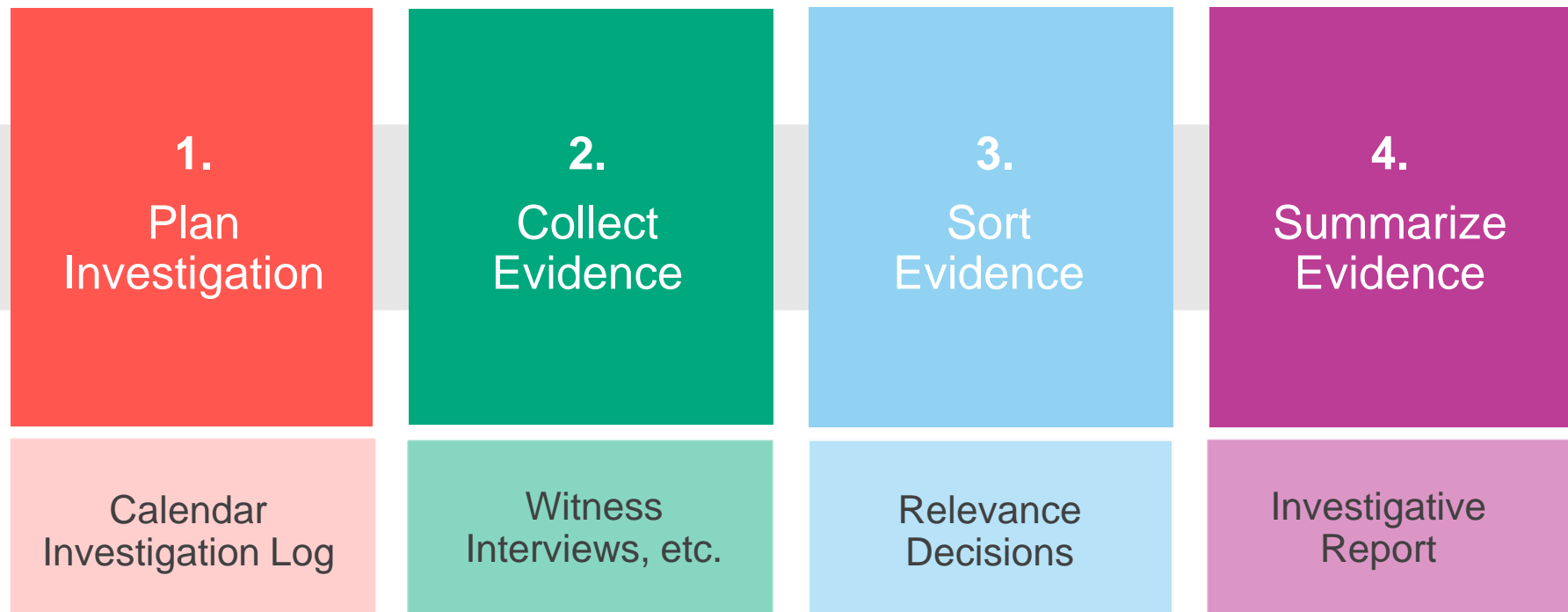
## Sexual Harassment cases are formally investigated under 3 circumstances:

- 1 It has been determined that the allegations, if true, would constitute Title IX Sexual Harassment (TIXSH).
- 2 It has been determined that the allegations, if true, are “Other Sexual Harassment” and do not constitute TIXSH, BUT the institution’s policies and procedures call for investigation of this type of alleged incident.
- 3 A determination as to whether the allegations, if true, would constitute TIXSH or OSH has yet to be made. Under this circumstance, an investigation may be necessary to determine whether the alleged conduct qualifies as TIXSH or OSH.

# Coordinator Flow Chart



# The Investigator's Role



# **Ten Key Requirements Of Title IX Sexual Harassment Investigations Under the Law**

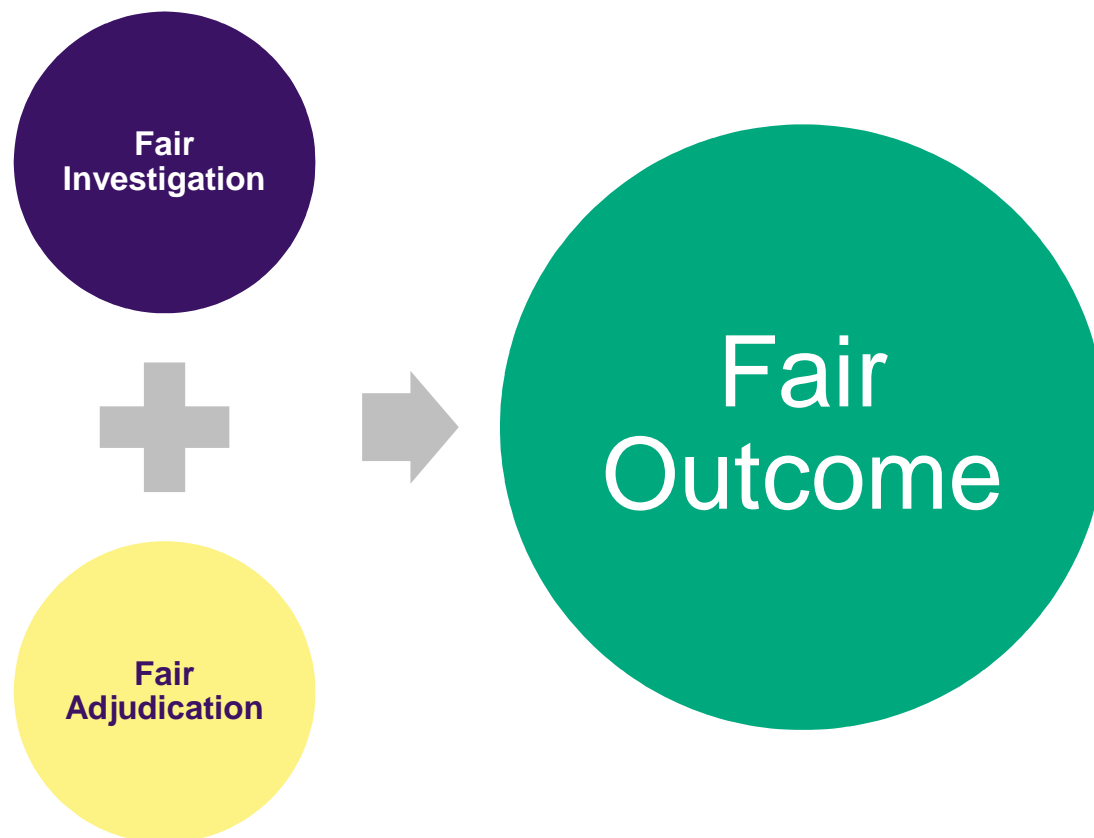


## 10 Key Legal Requirements

1. Investigators are not the decision-makers.
2. Parties are entitled to notice of all interviews.
3. An advisor may be present at all meetings.
4. New notice is required for new allegations.
5. It is the school's (*i.e.* your) job to collect evidence.
6. Parties may freely gather and present evidence.
7. Parties may freely discuss the allegations.
8. Parties may inspect and review relevant and directly-related evidence.
9. The investigative report fairly summarizes relevant evidence.
10. Investigators may be questioned at the hearing.



## Investigators are not the decision-makers





# 2

## Parties are entitled to notice of all investigative interviews

- The notice **must** be in writing
- The notice **must** include
  - Date
  - Time
  - Location
  - Participants
  - Purpose
- The party **must** have “sufficient time to prepare to participate”
  - **At least** 24 hours recommended
- Practice tips
  - The notice should be a standardized form
  - Email has significant advantages
  - Communicate directly, but copy the Title IX Coordinator





## An advisor may be present at all meetings

The School Must...	The School May...
Send evidence and the investigative report to advisors	Send all other communications to the party only
Allow the advisor to be present at all meetings, interviews, etc.	Communicate notice to the party only and rely on the party to notify their advisor
Treat the parties and their advisors equally	Apply (equal) restrictions to the role of the advisors

- Most advisors (including attorneys) play a constructive role
- Clear, written expectations for advisors create the right foundation
- Have a plan for the rare problematic advisor

# All-Purpose Plan for Dealing with Problematic Advisors

## Take Charge • Expect Testing • Don't Argue

- Know the rules for advisors and have two copies of them.
- Run the meeting.
- If the advisor tests for a boundary, show them there is a boundary.
- “I’d like to draw your attention to (provision). Please (follow that rule).”
- “I’d like to again ask you to (follow the rule). If (this) continues, I will have to stop the interview and continue it at another time.”
- “Due to continued (rule violations), I am going to stop the interview at this time. The Title IX Coordinator will be in touch about next steps.”



# 4

## New notice is required for new allegations

- As the investigator, make sure you have a copy of the initial notice
- The notice should contain:
  - Identities of the parties involved
  - The conduct allegedly constituting Sexual Harassment
  - The date and location of the alleged incident
- Be aware of any new incidents, new parties, new types of Sexual Harassment, new dates, new locations
  - Information from Complainant
  - Information from witness
  - Information from Respondent
  - Information from non-testimonial evidence
- Notify the Title IX Coordinator promptly
- Get a copy of the new notice
- Repeat

# New Notice Potentially Required?



A Complainant tells you that prior to sexually assaulting her, her boyfriend repeatedly slapped her.

**YES**

Potential New Form of Conduct

A Respondent tells you that he didn't sexually harass the Complainant, but the Complainant did sexually harass him.

**YES**

Potential New Respondent

In reviewing social media posts received by the Complainant, you see that the Respondent's friends followed her lead in sending harassing correspondence.

**YES**

Potential New Respondents

A Complainant who says she was sexually assaulted at a fraternity house provides more details about the incident, including that the assault occurred in the basement.

**NO**

Initial Notice Sufficient

A new witness is identified and reveals that he has video footage of the Complainant and Respondent at the party where the incident allegedly took place.

**NO**

Initial Notice Sufficient



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## It is the School's (*i.e.* your) job to collect 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 the report.

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



# 6

## Parties may freely gather and present 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 think~~ someone is a witness, ~~just~~ give us his or her name, and we'll take it from there.

**Investigator:** Thanks. Do you have phone numbers for these people?



## Parties may freely discuss the allegations

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

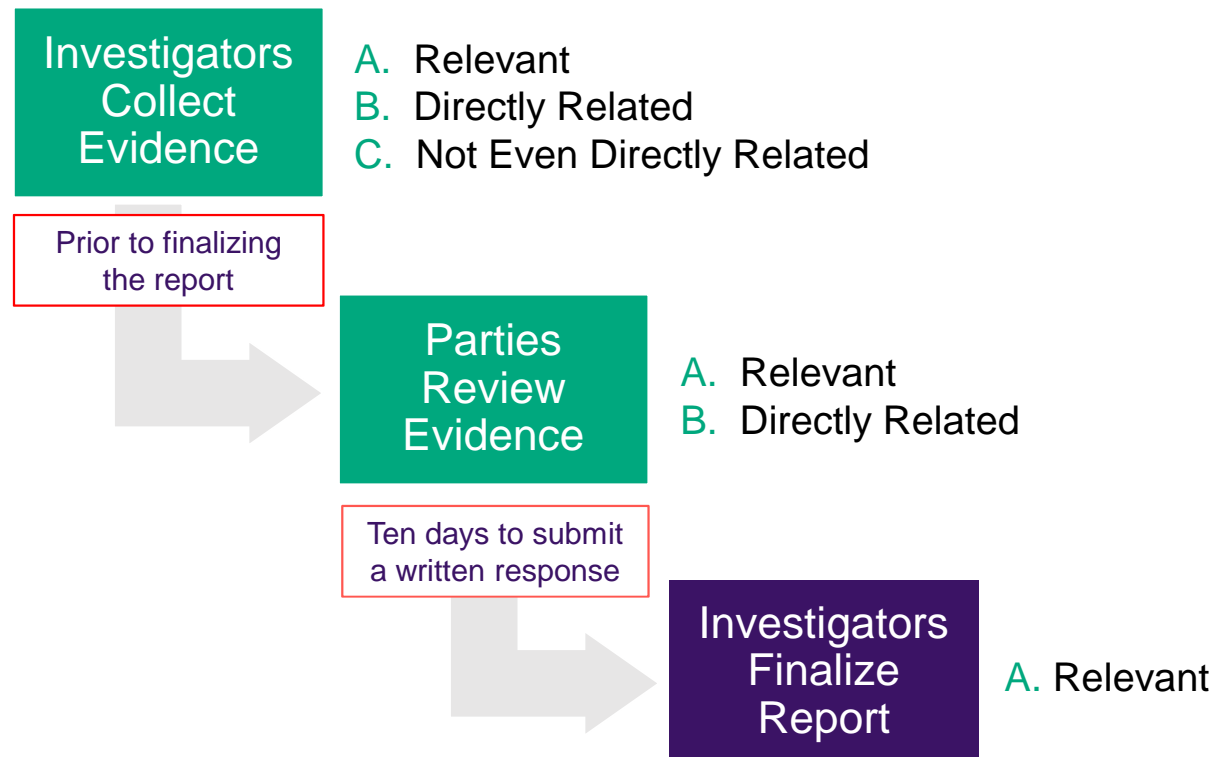
**Investigator:** Don't do that. It could interfere with your independent recollections. Don't talk to your friend about the investigation at all.

**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.



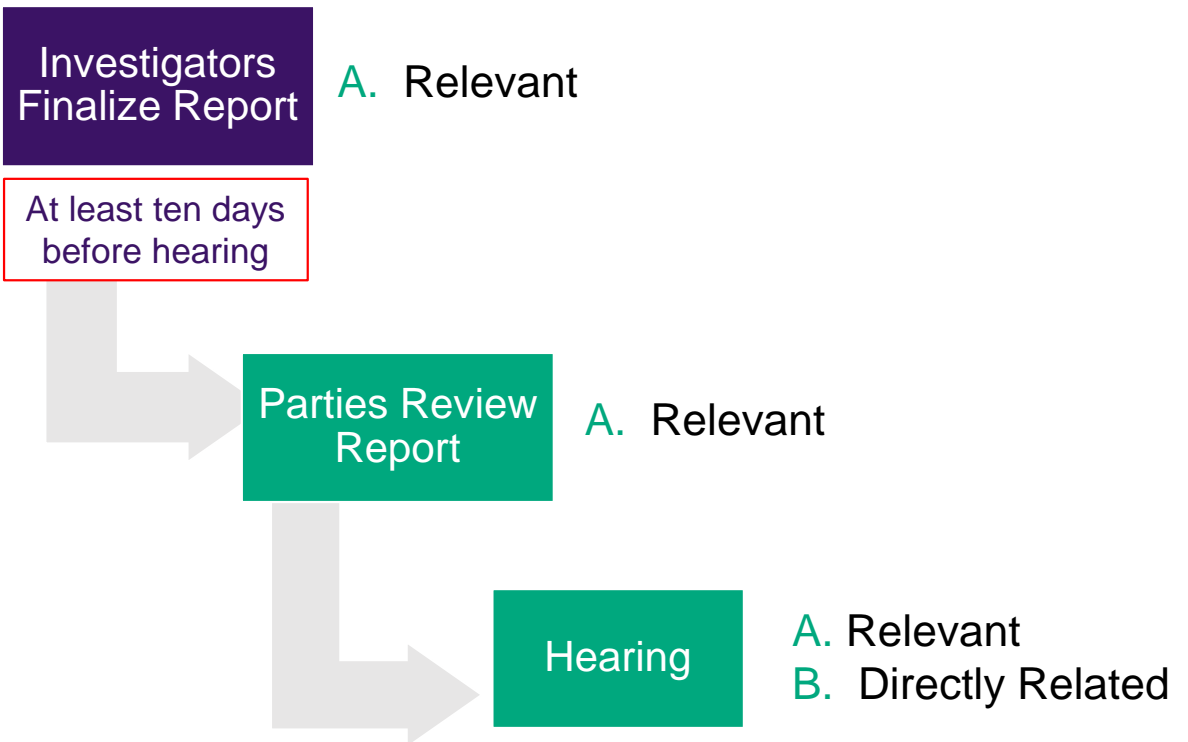
# 8

## Parties may inspect and review relevant and directly-related evidence



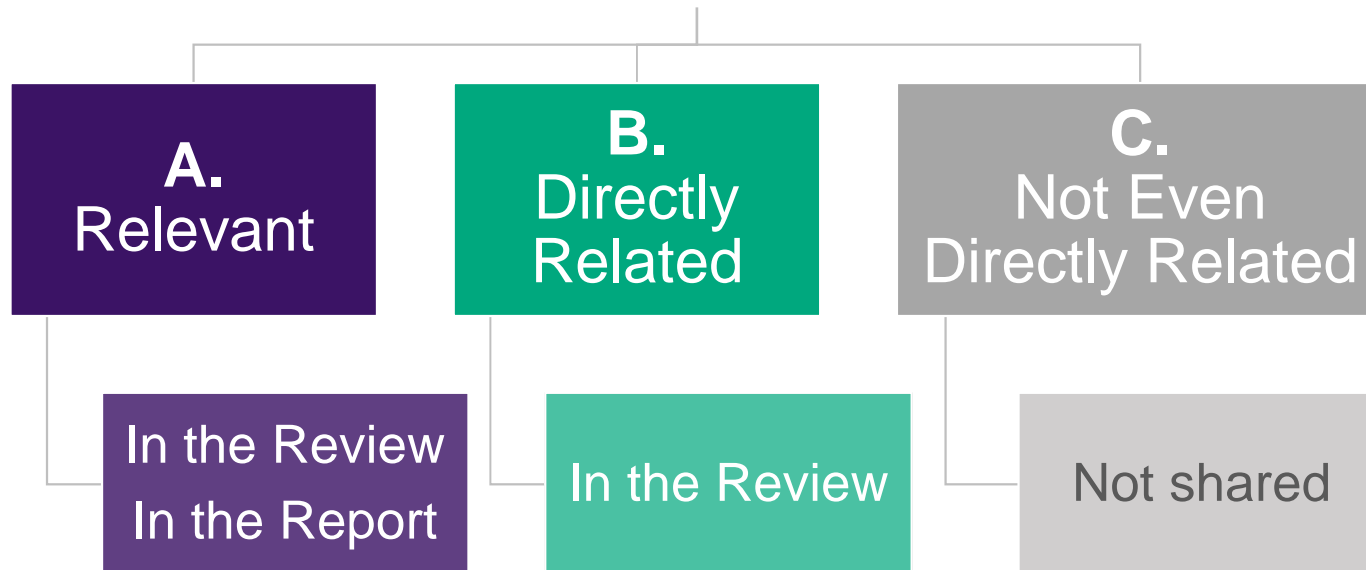


## The investigative report fairly summarizes relevant evidence



# Sorting Evidence

## All Evidence Gathered





10

## Investigators may be questioned at the hearing

- Hearings may be virtual, but they must be live, *i.e.* everyone can see and hear one another in real time.
- Investigators should be prepared to attend the hearing if called as witnesses.
- At the hearing, both the decision-maker(s) and the parties' advisors may ask questions of the investigators.

## Example Questions

- The Complainant gave you a list of ten possible witnesses. Why did you only interview five of them?
- Did you check university security cameras for footage related to the incident?
- How long did you spend interviewing each party?
- 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?

## Tips for Success

- Review your notes and investigation log prior to the hearing.
- Answer directly and non-defensively.
- Remember that your role is to collect and organize evidence, not to draw conclusions or make determinations.
- Remain objective and unbiased.

# The Investigation Plan and Process

# Purpose of Investigation

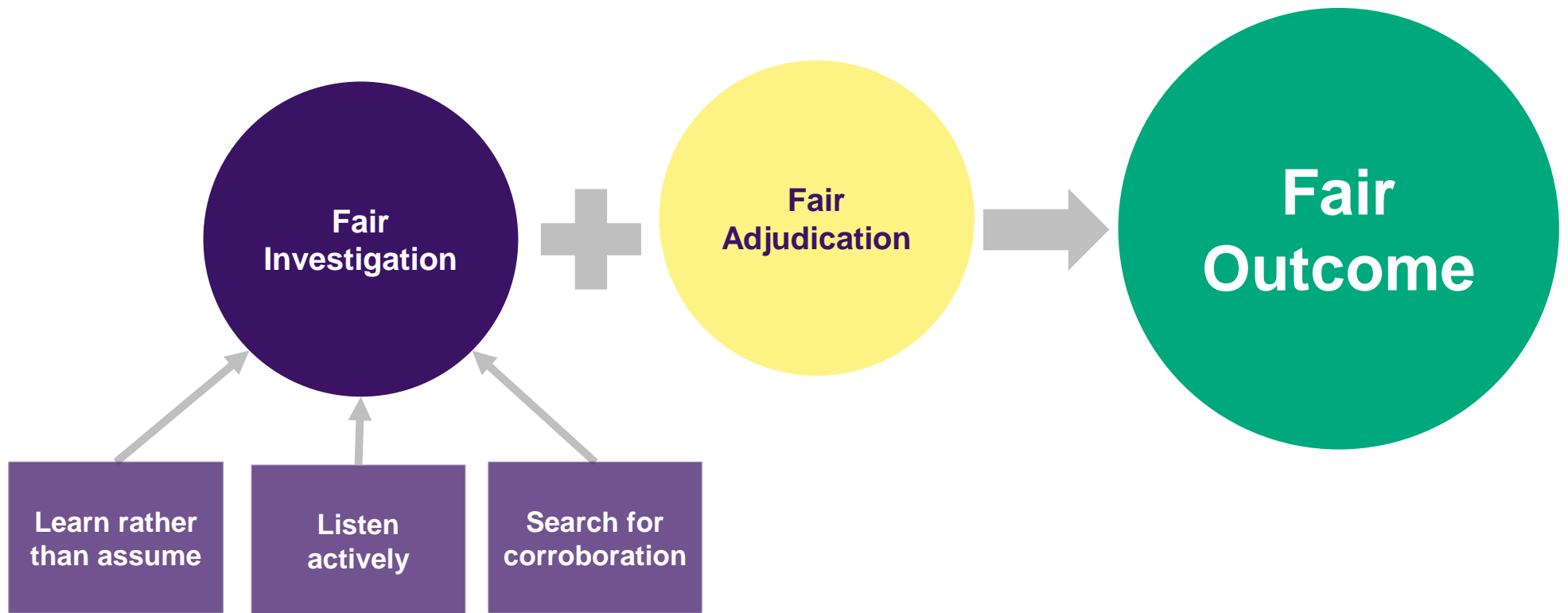
To collect, sort, and summarize evidence

so  
that

the decision-maker can determine whether the Respondent should be held responsible for the alleged conduct



# Two Separate Roles





An abstract, colorful background on the left side of the slide, featuring a dense pattern of various colors (red, blue, yellow, green, purple) and shapes. Several colored arrows (red, blue, purple, yellow) originate from this area and point towards the text on the right. A blue arrow points to the first item, a purple arrow to the second, a yellow arrow to the third, and a red arrow to the fourth. There are also some horizontal lines in blue and yellow extending from the abstract area.

## What do adjudicators need?

- Clear list of policy violations at issue based on alleged conduct
- Clear sense of each party's narrative/perspective
- Clarity on which facts are disputed and which facts are undisputed
- Clear understanding of what evidence was collected and what evidence (if any) was unavailable

# Inculpatory and Exculpatory Evidence

## Inculpatory

Evidence that tends to establish or support the assertion that the Respondent **did** commit the alleged conduct

**Example:** A screenshot of a Snapchat message sent from Respondent to Complainant 3 days after the incident saying, “Hey, I’m really sorry about Saturday night. I had way more than I’ve ever had to drink, and I shouldn’t have forced myself on you.”

## Exculpatory

Evidence that tends to establish or support the assertion that the Respondent **did not** commit the alleged conduct

**Example:** A screenshot of a Snapchat message sent from Complainant to Respondent the day after the incident saying, “Heyyy, I can’t stop thinking about the party yesterday. I know I said I wanted to have sex, but I just don’t feel like myself now and hate that what we had feels like a one-night stand.”

# The Four Stages of Investigation

STAGE 1

**Plan**

- ✓ Refresh on procedures, policies, and values
- ✓ Create investigation plan, calendar, and log

STAGE 2

**Collect  
Evidence**

- ✓ Interview Complainant, Respondent, and other witnesses
- ✓ Collect other forms of evidence

STAGE 3

**Sort  
Evidence**

- ✓ Classify evidence as relevant, directly related, or not directly related
- ✓ Provide evidence to parties and consider their responses

STAGE 4

**Summarize  
Evidence**

- ✓ Create report
- ✓ Provide report to parties and decision-makers

## STAGE 1

# Plan

### Procedures

Review your school's Title IX grievance process, paying particular attention to the aspects of the process for which you are responsible.

### Policies

To the extent the prohibited conduct has been identified, review your school's definition of that conduct and list the elements.

### Values

Remind yourself of:

- Your role (to gather information)
- Your attitude (objective, neutral, fair)
- Your goal (organized, thorough collection)
- The humanity of the parties (trauma, anxiety)

## Critical Importance of Prohibited Conduct Definitions

**Whether the Respondent's  
conduct violated school  
policy is the central issue.**

**Relevant definitions should  
be referred to often  
and guide investigator and  
adjudicator actions.**



## Start With the Official Definition

### Fondling

The touching of the private body parts of another person for the purpose of sexual gratification, forcibly and/or against that person's will or not forcibly or against the person's will in instances where the victim is incapable of giving consent because of their youth or because of their temporary or permanent mental or physical incapacity.

## Identify the Elements

1.  Touching
  2.  private body parts of another person  
(private part(s): \_\_\_\_\_)
  3.  For the purpose of sexual gratification
  4.  Forcibly and/or against that person's will
- Or
4.  Where the victim is incapable of giving consent because of their youth
- Or
4.  Where the victim is incapable of giving consent because of their temporary or permanent mental or physical incapacity

## Start With the Official Definition

### Stalking

Engaging in a course of conduct based on sex directed at a specific person that would cause a reasonable person to fear for their safety or the safety of others or suffer substantial emotional distress.



## Identify the Elements

### Stalking

1.  Engaged in course of conduct based on sex

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---

2.  Directed at a specific person

3.  That would cause a reasonable person to:

**A.**  
 Fear for their  
safety

*Or*

**B.**  
 Fear for the  
safety of others

*Or*

**C.**  
 Suffer substantial  
emotional distress

## Create Investigation Plan & Calendar

### Plan

- ✓ Number of Complainants
- ✓ Number of Respondents
- ✓ Form(s) of misconduct
- ✓ Number of incidents
- ✓ Seriousness and complexity of case
- ✓ Estimated number of witnesses

} Estimate time needed to complete collection and sorting of evidence

### Calendar

- +10 days (required) for parties to review & respond to evidence
- +5? days (discretionary) to finalize investigative report
- + more time for parties to review and respond if additions made?
- +10 days (required) for parties to review report prior to hearing

Share tentative calendar with Title IX Coordinator to set target date for hearing

## Your Investigation Log

- What:** A simple record of your investigatory activities, from the day you get the case until the day you send out the investigative report
- Where:** Your school's project management software or OneNote, Excel, or whatever program works for you
- Who:** Mostly just for your own reference, but this is a work document that could be viewed by others

What should be logged?	Formal Notices	Communications with Witnesses	Receipt/Collection of Evidence
	Meetings & Interviews	Delays	Unsuccessful Searches for Evidence

## Sample Investigation Log: Smith/Jones Case

Date	Activities	Evidence Notes
3/15/21	Met with TIXC. Set up case file and drafted plan. Left voicemail messages for Complainant Smith and Respondent Jones.	
3/16/21	Talked to Smith and set interview for 3/23/21. Sent notice via email. Left second voicemail for Jones.	
3/17/21	Reached out to witnesses named in complaint: Garcia, Croley, Mader via email. Sent email to Jones.	
3/18/21	Heard back from Jones via phone. Set interview for 3/24/21. Sent notice. Phone interview with Mader.	Mader to email photos.
3/19/21	Checked with G. Gilroy in Campus PD re security footage of Bishop Hall. No dice. No cameras inside or out.	
3/22/21	Emailed Mader photo reminder. Phone interview with Garcia. Received packet of print outs from Jones.	Packet from Jones in bottom right file drawer
3/23/21	Zoom interview with Smith. Learned from TIXC that Croley is out on medical leave; unavailable until 3/29/21.	Recording of interview stored in BaseCamp case folder

## Sample Update Email: Smith/Jones Case

**From:** Sarah Ford Neorr  
**Sent:** Friday, March 19, 2021 5:12 PM  
**To:** Title IX Coordinator  
**Subject:** Smith/Jones update of 3/19/21

*I've made contact with both Smith and Jones. Based on my initial review, I think that I can circulate the evidence to the parties by April 5. Should be safe to shoot for a hearing in early May. FYI, Smith mentioned she is going to call you – she needs help identifying an advisor.*

---

**Subject:** Smith/Jones update of 3/26/21

*Per our call, Jones has an attorney, and we had to push that interview to 3/31 to accommodate scheduling conflicts. Can you help me get in touch with Professor Croley when she comes back from medical leave on 3/29/21?*

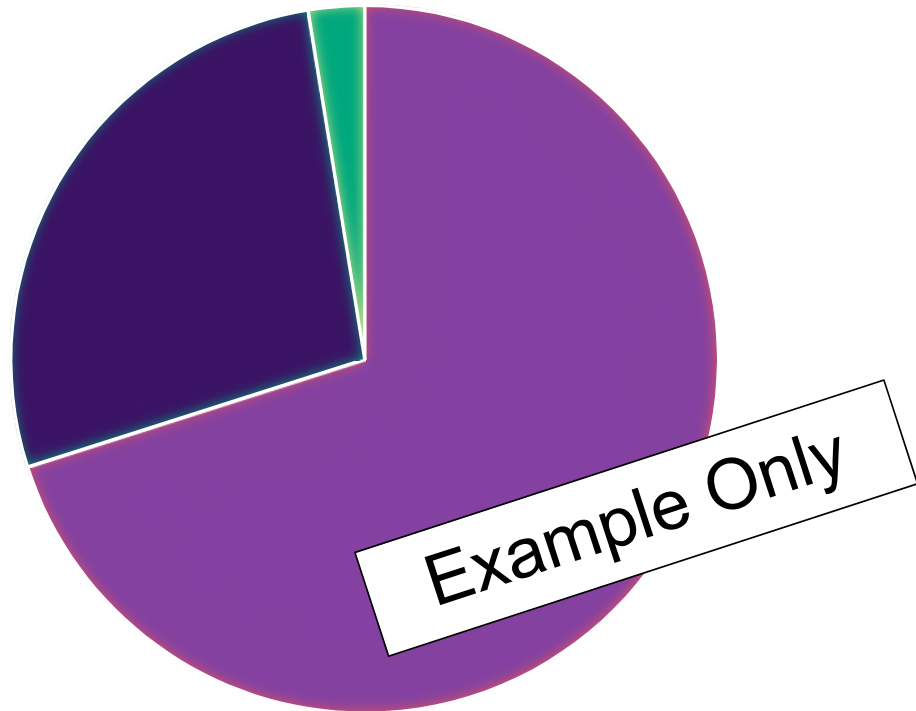
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**Subject:** Smith/Jones update of 4/2/21

*Jones interview completed. Still on track to have the evidence ready to go out this coming Monday. Parties' responses will be due 4/14. Does the evidence get sent out by me or you?*

## Forms of Evidence

■ Testimonial ■ Documentary ■ Physical



STAGE 2

**Collect  
Evidence**

## Types of Documentary Evidence

Police reports and Campus security reports	Social media posts
Hospital/medical reports	Photographs and videos
Academic and attendance records	Journal and diary entries
Security video tapes	Disciplinary records
Building entry/exit logs	Texts, emails, and voicemails

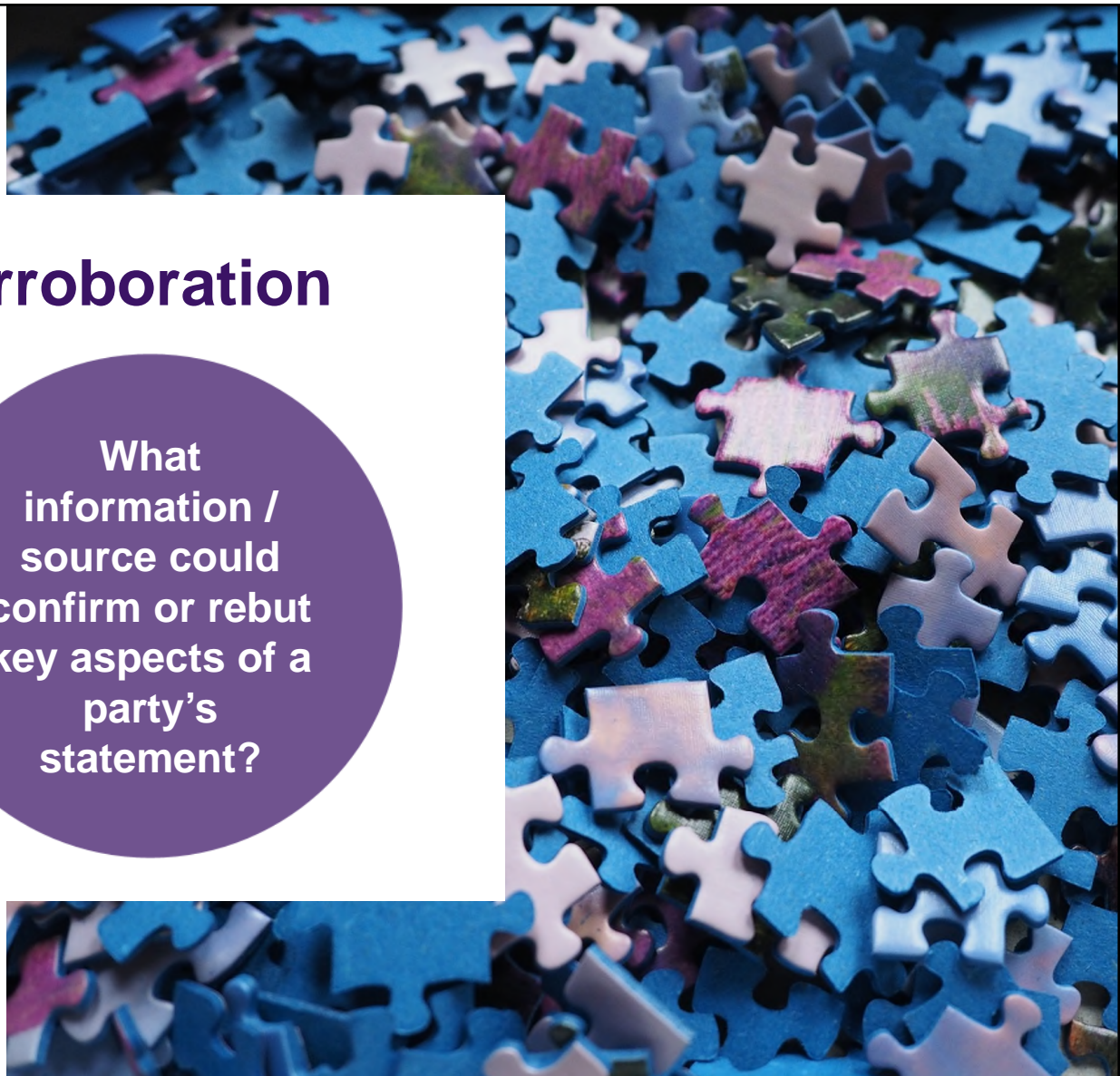
STAGE 2

## Collect Evidence

# The Importance of Corroboration

**Corroboration  
=  
confirmation  
from another  
source**

**What  
information /  
source could  
confirm or rebut  
key aspects of a  
party's  
statement?**





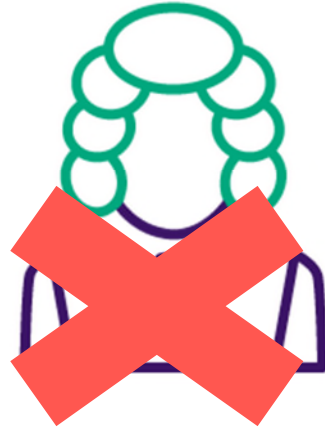
STAGE 2

Collect  
Evidence

# Interviewing



## Your Interviewing Persona



Anticipate fear,  
embarrassment, and  
confusion

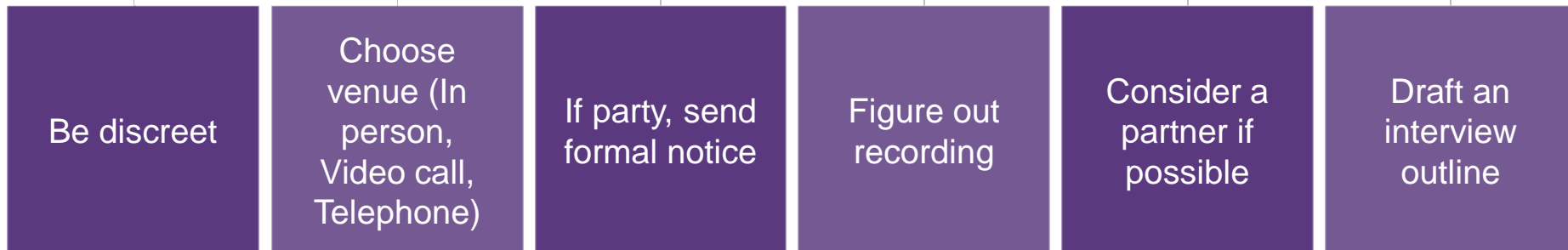
Develop rapport to put the  
interviewee at ease

**Notes on Tone**

Ask tough questions directly,  
but without hostility

Be calm and matter-of-fact  
about explicit content

# Setting Up an Interview



## Your Interview Outline

- Enough detail to free your mind, but not an exact script
- List (with checkboxes!) the information you need to convey
- Include the elements of the policy violation(s) and brainstorm questions to explore each one
- Think about what the adjudicators would want or need to know

## List the Information You Need to Convey



Note if you are recording interview and state that interviewee may not record interview



Describe your role – neutral, objective, and just collecting information



Assure that no conclusions have been made and that adjudicators will decide



Discuss confidentiality and what will be shared with whom



Address importance of truthfulness and school's policy on false statements



Explain school's amnesty policy



Ask for documents and invite future follow up



Remind of prohibition against retaliation (2 ways)



If party, remind of resources and support



Ask if the interviewee has questions and be prepared to answer common ones

## **Small Group Discussion**

List three questions you have been asked and the answer you gave (or wish you had given!). If you're new, list three questions you worry about being asked. Share with the group.

## **Practice Tip**

Keep a “bank” of common questions and effective responses.

## Include the elements of the policy violation(s) and brainstorm questions to explore each one

### Level 4 Sexual Harassment

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

#### Dig deep into details of the conduct

What *exactly* was said/done?

How many occasions?

How frequently?

What was the context?

How did you respond?

#### And the impact of the conduct

Was it offensive to you? If so, how?

Did it impact you? If so, how?

How did school go for you after the incident? Any effect on your grades? Attendance? Ability to focus?

How (if at all) would your experience at school have been different if this never had happened?



Think about  
what the  
adjudicators  
would want or  
need to know

Opportunity/capacity to observe event

Consistency with other evidence (including prior statements)

Stake in the outcome/motive to lie

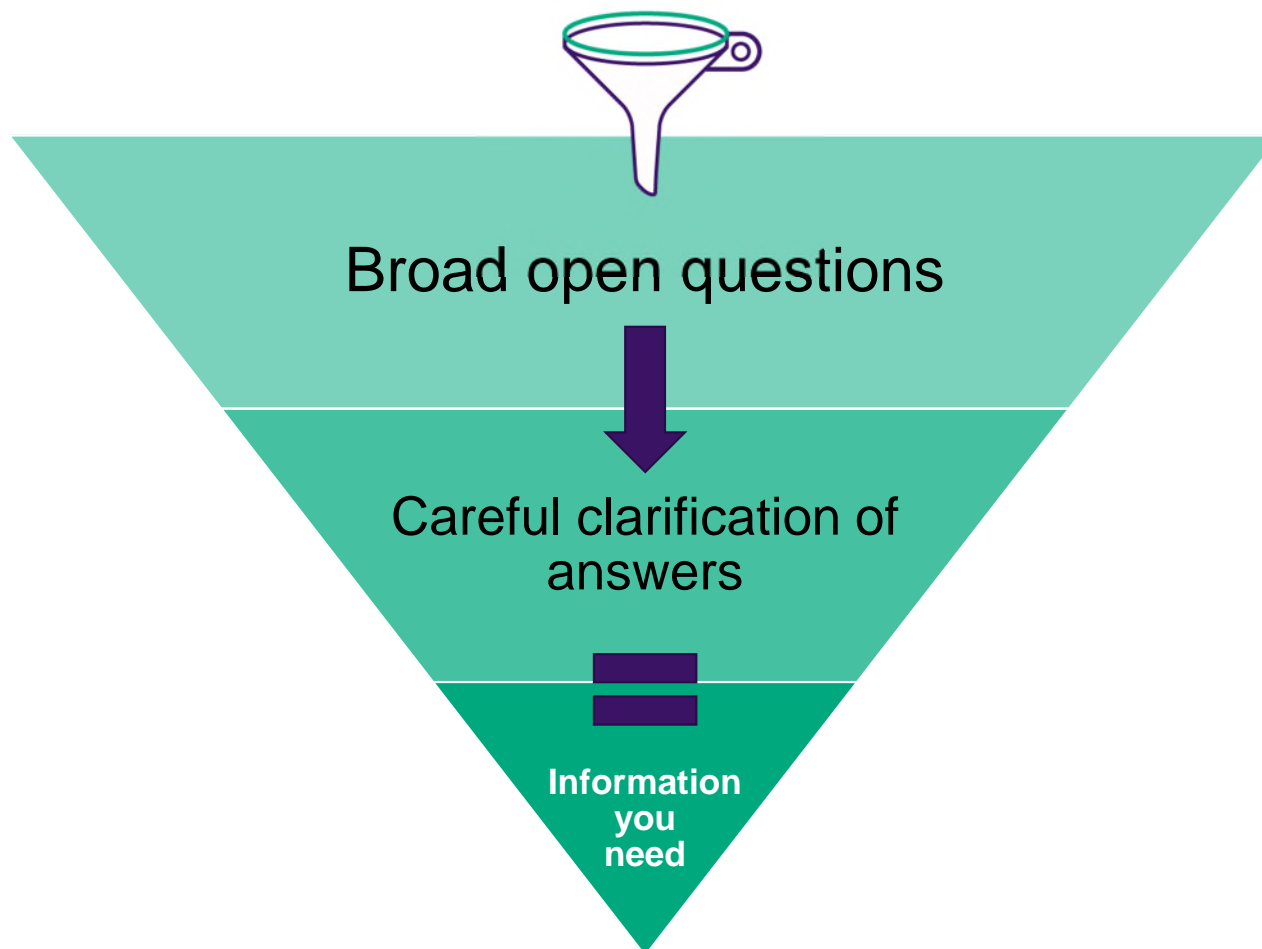
Plausibility/Improbability of account

Specificity v. vagueness

Willingness to share texts, etc.

Corroborating evidence

## Asking Questions: The Interview Funnel



## Helping the Funnel Flow



**DO**

Allow time for the interview to wander.

**DO  
NOT**

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.

**DO**

Ask open-ended questions to obtain detailed information. Also, use specific, precise, closed questions to get a precise answer when appropriate.

**DO  
NOT**

Be accusatory or judgmental. Minimize negative reaction cues.

## Useful Open Questions

**Let's talk about** what you remember from that night...

**How** did you feel about...?

**What** did you do after...?

**What** happened next?

**What** did you mean when you said...?

You mentioned that... can you **tell me more** about that?

**How** did you become involved in...?

**What** is your understanding of...?

## How to Ask Questions



### Ask how interviewee is defining words

You said the Respondent acted “crazy.” In what sense?

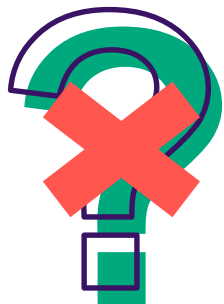
### Push beyond euphemisms

When you said you could tell that the Complainant “wanted to get with” you, what did you mean by that?

### “Exhaust” each topic

Is there anything we haven’t covered about the time in the park that you think would be helpful for me to know?

## How **NOT** to Ask Questions



### Avoid compound questions

Did you give a clear answer or did you just leave it open ended?

### Avoid unfamiliar words and legal terminology

Have you ever been through an adversarial adjudication process before?

### Avoid editorializing and personal comments

Ugh – that is just nasty.

This is so typical of Kappa Alphas.

Something similar happened to me when I was about your age...

## Handy Questions & Statements to Include



Who else should we talk to?

Have you spoken/texted with anyone about this or posted anything about this online?

Have you been affected by this? If so, how?

How did you communicate what you wanted to [the Respondent]?

How did you know your actions were ok with [the Complainant]?

Why do you think [name's] version of this is different?

If I ask a question that is confusing, just let me know.

It's okay to say that you don't know how to answer a question, or that you can't remember clearly.

How confident are you about that – a little confident, somewhat confident, or totally confident?



# Interviewing the Parties



## Big-Picture Take-Aways

1. Being “neutral” doesn’t mean you can’t sympathize with legitimate concerns or compellingly articulate the school’s values.
2. Try to perceive the underlying concern that motivates questions or comments and to address that underlying concern.
3. If someone expresses skepticism or worries about bias, take the opportunity to address those issues head-on and to reiterate the school’s commitment to fairness.

# From Oral Interview to Written Document

## Notes v. Transcription v. Recording

- Two person team
- Voice-to-Text Technology
- Recording

## The Write Up – Some Recommendations

- Write-up of interview immediately afterwards
- Third person v. first person
- Prioritize information that relates to elements
- Focus on key areas where facts are disputed
- Review interview write-up with interviewee
  - Importance of documenting any changes!

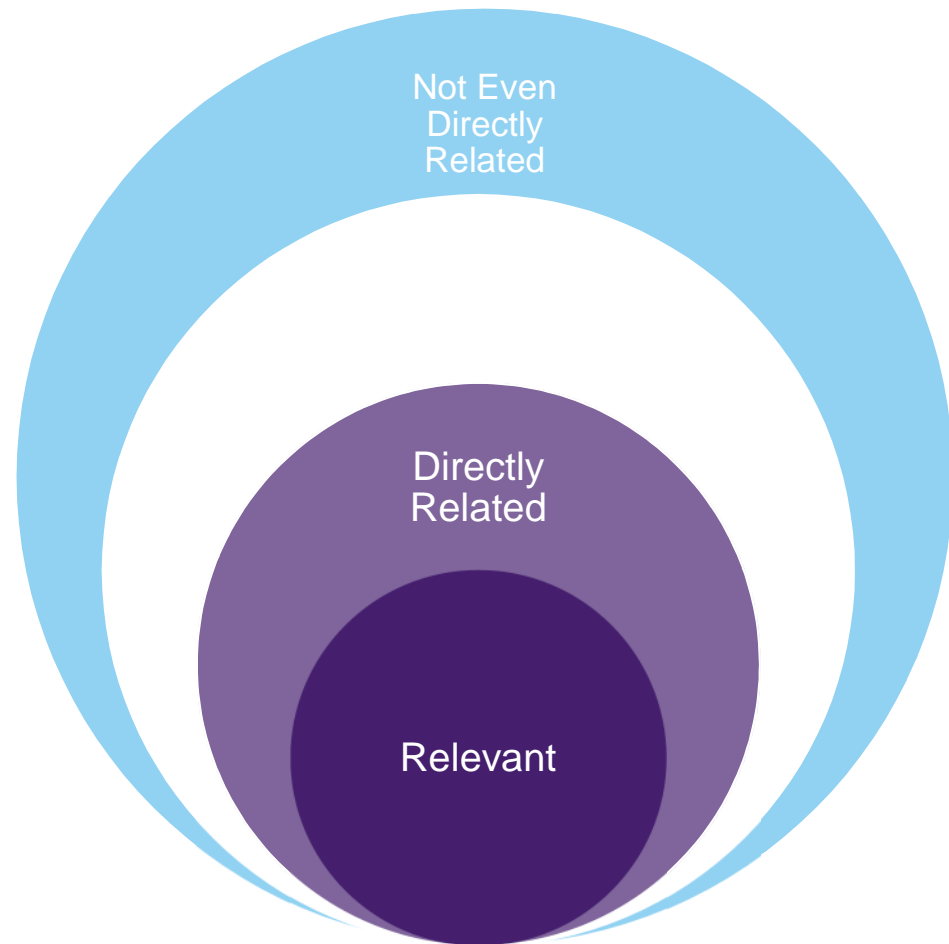
## The Ideal Product

A first-person statement that:

1. Clearly and concisely tells the story
2. From the perspective of the party or witness
3. With particular focus on disputed facts and the elements of the alleged policy violation(s)
4. Without including privileged or irrelevant information

STAGE 3

# Sort Evidence



## What do those terms mean? Good question...

### Relevant

Information that makes a material fact more or less likely to be true. A material fact is of consequence to the decision at hand: Whether the Respondent should be held responsible for the alleged conduct

### Directly related

Information that has a clear relationship to the allegations at issue but does not make a material fact more or less likely to be true

### Not even directly related

Information that has no or only an indirect relationship to the allegations at issue

## Example

Complainant alleges that following their break up, Respondent relentlessly called, emailed, and texted him, threatening to accuse him of sexual assault and/or harm herself if he did not meet with her to discuss their relationship. Complainant says that Respondent stations herself to intercept him on campus between classes, has followed him in her car on at least two occasions, and has contacted a woman he is casually dating with disturbing messages.

Relevant

Complainant's and Respondent's class schedules

Directly related

Complainant and Respondent dated for approximately eight months before breaking up

Not even directly related

The woman that the Complainant is casually dating is on academic probation

## Example: Identifying material facts

A Complainant says that he was stripped naked and sexually abused after passing out at a party around 2am. One of the Respondents says he is not responsible – he left the party before midnight.

**Material fact** at issue:

The Respondent was still at the party at 2am.

**Relevant information** makes the material fact more or less likely to be true:

- Photos of Respondent at the party
- The Respondent's ATM receipts for the night of the party
- Security camera footage of the exterior of the building where the party took place
- Witness statements from people at the party
- Witness statements from Respondent's roommates
- The Respondent's text messages on the night of the party

## General Principles of Sorting Evidence

Intent of the rules is to provide the parties with access to all the **relevant** evidence

- Philosophy: **Increased Access = Increased Fairness**
- No party should be surprised at a hearing with information that was known to the investigators but not shared with them

Parties should have access to the “**directly related**” evidence just in case

- There may be legitimate disagreements about what is relevant
- Allowing the parties to review directly-related evidence (and having the directly-related evidence available at the hearing) gives each party a chance to argue that the information **is** relevant

Schools cannot decide to categorically exclude certain types of evidence

- Character evidence, lie detector tests, expert witnesses, prior disciplinary history, etc.
- May be deemed not relevant on a case by case basis

## Two Kinds of Evidence are Off Limits

- Don't 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.
- Don't require, allow, rely upon, or otherwise use or seek disclosure of **information protected under a legally recognized privilege** unless the privilege has been waived.



## One Kind of Evidence is Automatically Not Relevant



### THE RAPE SHIELD RULE

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

#### Exceptions:

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

In contrast, questions/evidence about **Respondent's** sexual predisposition or prior sexual behavior *may* be relevant.

# Is the Evidence Relevant?

## QUIZ

Complainant alleges that the Respondent penetrated her with his fingers while she was incapacitated. Respondent's friend shows you all the Instagram posts Complainant made throughout that evening.

**YES**  
Material Fact:  
Incapacitation

Employee Complainant alleges that the Respondent, his supervisor, has been sexually harassing him. Respondent provides information that she recently put the Complainant on a performance improvement plan.

**YES**  
Material Fact:  
Motivation to lie

Complainant alleges that the Respondent circulated a topless photo of her with the caption "Dumb Cow" to other members of their sorority. She provides a screenshot showing that the Respondent previously circulated an unflattering picture of another student with the caption "Fat Bitch."

**YES**  
Material Fact:  
Pattern

Complainant alleges that Respondent intentionally smacks and grabs his genitals when they are on the practice field. A third player on the team tells you that both Complainant and Respondent smoke marijuana.

**NO**

Complainant alleges that Respondent stalked her last semester, causing her significant fear and distress. Respondent asks to see Complainant's grades because he suspects (correctly) that she made a 4.0.

**YES**  
Material Fact:  
Distress

## How is the Evidence Shared

Sent to party **and** advisor (if they have one)

- Directly related
- Relevant
  - Including witness statements

Check in with Title IX Coordinator before sending

- Need for advisor NDAs?

Software to protect from easy forwarding/posting

# **A New Approach to Investigative Reports**



STAGE 4

**Summarize  
Evidence**

# **The Investigative Report**

## Minimize Conclusion Drawing in the Report

Raul showed us texts and time-stamped photos that were consistent with his timeline of the weekend. Ashton gave two different timelines of the weekend 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. Lily thought it was afterwards, but said her memory wasn't very clear.



## NOT in the Investigation Report

- 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



## A New and Easier Approach! The Sustained Excellence Method

An investigative report has to meet two standards.

One is imposed by law: The school must “create an investigative report that fairly summarizes the evidence.”

The other is practical. The report should give the adjudicators (and the parties) a good understanding of the case so that they can hit the ground running, focus on the thorny issues, and make the tough decisions.

Investigators aren't really supposed to be in the business of drawing conclusions, weighing evidence, or determining whether witnesses are credible.

And there's no requirement that the report be some kind of narrative or legal brief.

So minimize writing – with the important exception of the witness statements – and make the report a compendium of simple forms and lists.



## Investigative Report Table of Contents

**Section 1** Key Data Sheet

**Section 2** Description of the procedural steps

**Section 3** Party and witness statements

**Section 4** Description of other evidence (attach or provide link), including the source and date received

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**Section 1: Investigative Report Key Data Sheet**

Date of report	April 21, 2021
Title IX Coordinator	Josh Whitlock
Investigator(s)	Sarah Ford Neorr and Laura Ahrens
Complainant(s)	Madison Smith, Student, Class of 2023
Respondent(s)	Jamie Jones, Student, Class of 2022
Allegation(s)	Stalking
Date(s) of alleged Incident(s)	January 31, 2021



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**Section 2: Investigative Report Procedural Description (p. 1 of 3)**

<b>PROCEDURAL STEP</b>	<b>DATE/ADDITIONAL INFORMATION</b>	<b>DOCUMENTS (IF ANY)</b>
Date of Formal Complaint	March 1, 2021	Tab 2.1
Notice of Allegations provided to parties	March 4, 2021	Tab 2.2
Amended notice	N/A	
Initial dismissal analysis	Completed March 8, 2021	
Initial dismissal result	Dismissed in part and referred to student conduct	Tab 2.3
Dismissal notice to parties	March 8, 2021	Tab 2.4
Dismissal appeal	Filed by Complainant on March 10, 2021	Tab 2.5
Dismissal appeal result	Denied by S. Friedfel on March 12, 2021	Tab 2.6

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**Section 2: Investigative Report Procedural Description (p. 2 of 3)**

PROCEDURAL STEP	DATE/ADDITIONAL INFORMATION	DOCUMENTS (IF ANY)
Interviews	Madison Smith – March 19, 2021	Tab 2.7
	Jamie Jones – March 24, 2021	Tab 2.8
	Carmen Escobedo – March 22, 2021	
	Akela Appleberry – March 22, 2021	
	Jonathan Irving – March 25, 2021	
Site visit(s)	N/A	
Other methods used to gather evidence	Parties/witnesses asked for electronic communications and social media posts	Tab 2.9
	Residence hall security camera footage requested from campus police	Tab 2.10

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**Section 2: Investigative Report Procedural Description (p. 3 of 3)**

PROCEDURAL STEP	DATE/ADDITIONAL INFORMATION	DOCUMENTS (IF ANY)
Relevant/DR evidence provided to parties	March 31, 2021	
Responses (due in 10 days)	Received from Jamie Jones on April 9, 2021	Tab 2.11
	No response received from Madison Smith as of April 10, 2021	
Investigative Report provided to parties (at least 10 days before hearing)	Posted to SecureView on April 21, 2021	
Responses to Investigative Report	Received from Jamie Jones on April 24, 2021	Tab 2.12
	Received from Madison Smith on April 26, 2021	Tab 2.13



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**Section 3: Party and Witness Statements**

The investigator(s) drafted each of the following party and/or witness statements after interviewing that individual. As evidenced by the party or witness signature at the bottom of each statement, each individual has reviewed their corresponding statement and confirmed its accuracy.

- Carmen Escobedo.....Tab 3.1
- Akela Appleberry .....Tab 3.2
- Jonathan Irving.....Tab 3.3

## Tab 3.2

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### Section 3: Party and Witness Statements

#### Witness Statement of Akela Appleberry

*My name is Akela Appleberry, and I am a senior at Jackson Lewis University. On the evening of January 31, 2021, I was on duty at the “bell desk” of Stoddard Hall. The job of the bell desk attendant is to supervise the lobby and make sure that only residents and their guests go into the residential areas.*

*At around 10:00pm, Madison Smith came in. A girl that I didn’t know seemed to be following her. Madison seemed pretty nervous, almost on edge. I thought that because she looked pale and was shaking slightly. She seemed to run toward Stoddard Hall and had a hard time swiping her student ID card to enter. The girl following her stuck her hand out and caught the door so she could enter behind Madison. I saw Madison walking quickly toward the elevators and hit the “up” button multiple times. Before she got in the elevator, I asked Madison if she was ok. She didn’t answer me, but she saw the girl behind her and she said loudly, “stop following me, you’re creeping me out and there’s a reason I haven’t responded to the 50 texts you sent in the past 2 days. I don’t even know how you got my number.” I thought that was strange, so I asked the girl to show me her student ID. She looked between Madison and me multiple times before she turned and ran out of Stoddard Hall.*

Reviewed and signed: *Akela Appleberry*

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**Section 4: Description of Other Relevant Evidence**

This section contains a description of other relevant evidence (in addition to the party and witness statements) deemed relevant by the investigator and, where applicable, it contains that relevant evidence itself (i.e., copies of relevant documents etc.).

This section also contains, compiled under Tabs 4.6 – 4.12, evidence that the investigator(s) deemed to be directly related to the allegations, but not relevant.

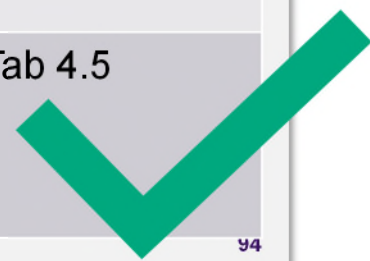
Finally, Tab 4.13 contains a description of potentially directly related and/or relevant evidence that either does not exist, could not be located, or that the parties and/or witnesses declined to provide.



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**Section 4: Description of Other Relevant Evidence**

ITEM	SOURCE	DATE RECEIVED	DOCUMENTS (IF ANY)
Text messages between Madison Smith and Jamie Jones (from January 31, 2021 to February 15, 2021)	Madison Smith	3/22/2021	Tab 4.1
Text messages between Madison Smith and Jamie Jones (from January 31, 2021 to February 20, 2021)	Jamie Jones	3/24/2021	Tab 4.2
WhatsApp messages between Jamie Jones and Jonathan Irving (from February 1, 2021 to February 3, 2021)	Jonathan Irving	3/26/2021	Tab 4.3
Facebook Messenger messages between Madison Smith and Carmen Escobedo	Madison Smith	3/22/2021	Tab 4.4
Security camera footage from exterior of Stoddard Hall Clip 1: January 31, 2021, 9:52pm – 9:54pm Clip 2: February 1, 2021, 12:21am – 12:23am <a href="#">SecureViewLink</a>	Campus Police	3/17/2021	Tab 4.5



Naturally limits conclusion  
drawing and facilitates  
relevance distinctions

Consistency

**Advantages of the  
Sustained  
Excellence Method**

Ease

Quality

JacksonLewis

Thank **you.**

# Your Jackson Lewis Title IX Team



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