



GRAND RIVER | SOLUTIONS

# May 2020 Title IX Final Regulations

Jody Shipper

## Meet Your Facilitator



**Jody Shipper, J.D.**

Co-Founder and Managing Director

Jody Shipper is a nationally-recognized subject-matter expert with more than 20 years of experience in Title IX and related fields. She is known for her insight into best-in-class programming, policies, and community outreach aimed at addressing sexual misconduct on campus. She lectures extensively at universities and conferences throughout the U.S. on Title IX, VAWA, harassment, and implementation of best and emerging practices. Jody received her J.D. from the University of California, Hastings College of Law and her bachelor's degree from Georgetown University's School of Foreign Service.



# About Us

Grand River Solutions provides Title IX, equity, and Clery Act consulting services. Together, our experts have decades of direct, on-campus experience at both small and large, public and private institutions. This practical expertise derived from years of hands-on experience enables our team to offer customized solutions unique to your educational institution's needs. Grand River has a suite of creative, cost-effective and compliant solutions to help schools meet their needs in innovative ways.

# Agenda

01

Regulatory Overview

05

Formal Resolution

02

The Investigator,  
Coordinator, Hearing Officer  
& Appeals Officer

06

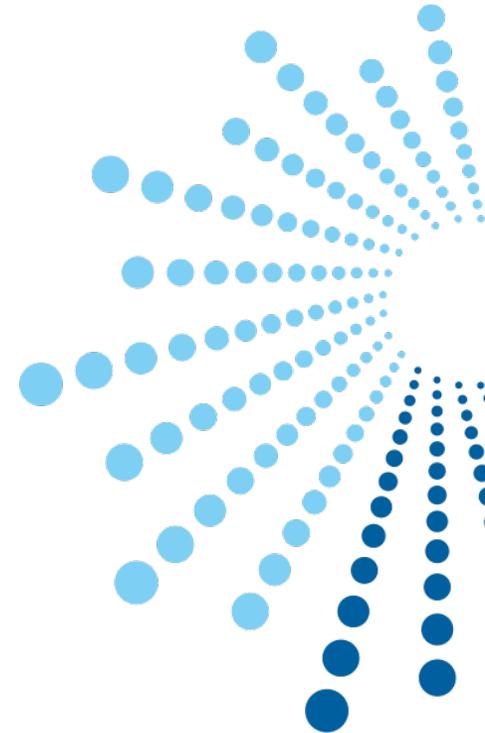
Hearings

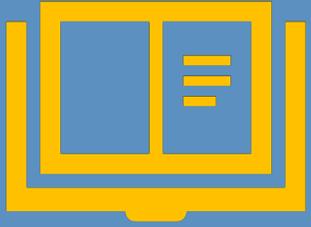
03

Someone Made A Complaint

04

The Procedural Requirements  
of an Informal/Alternative  
Resolution

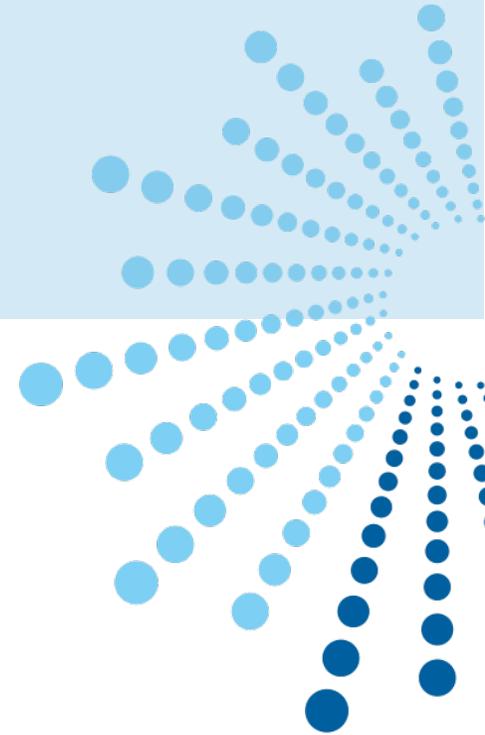




# Regulations What is Covered?

01

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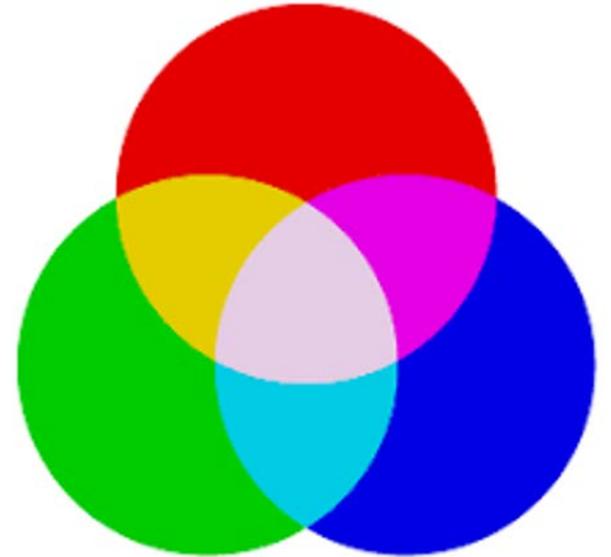
# The May 2020 Title IX Regulations Cover A Narrow Scope of Title IX

- Sex Discrimination
- Gender Discrimination
- Athletics opportunities
- Retaliation

Conduct  
Constituting Sexual  
Harassment as  
Defined in  
§ 106.30

# What (Mis)Conduct is Covered by the New Regulations?

- Sexual Harassment
  - Hostile Environment
- Quid Pro Quo (by an employee)
- Sexual Assault
- Dating Violence
- Domestic Violence
- Stalking



NOT defined in regulations

Defined in regulations

Only THESE get the new processes

## **BUT WAIT, THERE'S MORE!**

### **1. Definition:**

Does this meet the definition?

**If yes, continue. If no, not IX**

### **2. Location:**

On campus, within the United States;

In building owned/controlled by a recognized student org., in the U.S.;

Part of a program or activity, and within the United States.

**If yes to one of the above, continue. If no, not IX**

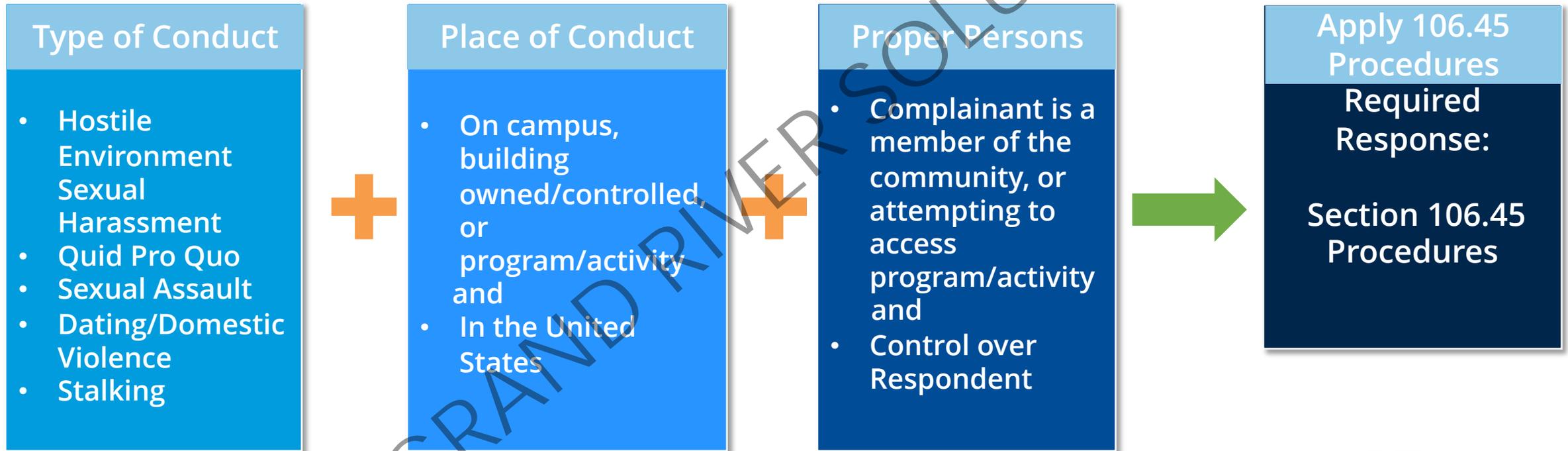
### **3. The institution has substantial control over the respondent**

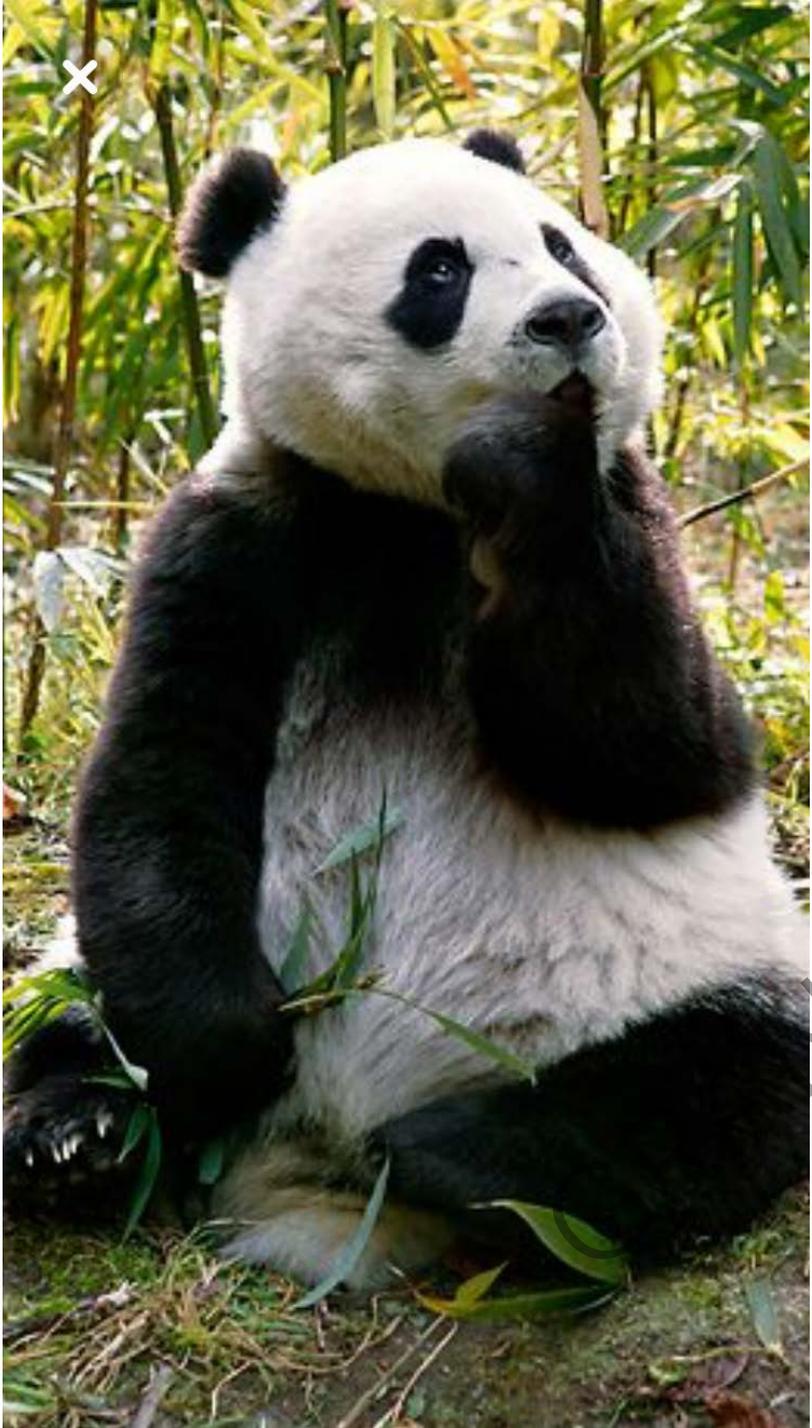
**If yes, continue. If no, not IX**

### **4. Complainant is accessing or attempting to access a university program or activity, in the U.S.**

**If yes, use New Title IX Process**

# Title IX Application May 2020 Regulations





What are the § 106.30  
Definitions?

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# Definition of Sexual Harassment

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

- (1) An **employee** of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;
- (2) Unwelcome conduct determined by a reasonable person to be so **severe, pervasive,** and **objectively offensive** that it **effectively denies** a person equal access to the recipient's education program or activity; or
- (3) "**Sexual assault**" as defined in 20 U.S.C. 1092(f)(6)(A)(v), "**dating violence**" as defined in 34 U.S.C. 12291(a)(10), "**domestic violence**" as defined in 34 U.S.C. 12291(a)(8), or "**stalking**" as defined in 34 U.S.C. 12291(a)(30).

# Definition of Sexual Harassment Quid Pro Quo

An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;

Meaning: You do this for me, I'll do that for you. Quid Pro Quo

Not covered here: A student leader tells another student, "If you won't go out with me, I'll make sure you never get into the glee club."



# Definition of Sexual Harassment Hostile Environment

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

Comments, emails, posters, actions, gestures, physical contact, images, anything that might create a hostile environment

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# What is Severe and Pervasive?

Severe: How much does it take?

Pervasive: How many times?



# Objectively Offensive

Sexual harassment has an objective, and a subjective, element

**OBJECTIVELY**, a reasonable person in a similar position would agree that it is offensive

**OBJECTIVELY**, a reasonable person in a similar position would agree that it is severe and pervasive

**SUBJECTIVELY**, the complainant found it to be unwelcome

# Effectively Denies *Equal Access* to a Program or Activity

- It was harder to feel really comfortable there
- I found it really annoying
- Their mere presence upset me too much to study
- I no longer felt safe enough to go to class

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# Sexual Assault Definitions

## 20 U.S.C. 1092(f)(6)(A)(v) – Federal Definitions

- Sex Offenses Forcible and Non-Forcible
  - Forcible:
    - Rape, Sodomy, Sexual Assault with an Object, Non-Consensual Fondling
  - Non-Forcible: Incest, Statutory Rape

# Domestic Violence, On the Basis of Sex

Includes felony or misdemeanor crimes of violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction receiving grant monies, or by any other person against an adult or youth victim who is protected from that person.

# Dating Violence

Violence committed by a person (A) who is or has been in a social relationship of a romantic or intimate nature with the victim; and (B) where the existence of such a relationship shall be determined based on a consideration of the following factors: (i) The length of the relationship. (ii) The type of relationship (iii) The frequency of interaction between the persons involved in the relationship.

# Stalking, On the Basis of Sex

Engaging in a course of conduct directed at a specific person that would cause a reasonable person to (A) fear for his or her safety or the safety of others; or (B) suffer substantial emotional distress.

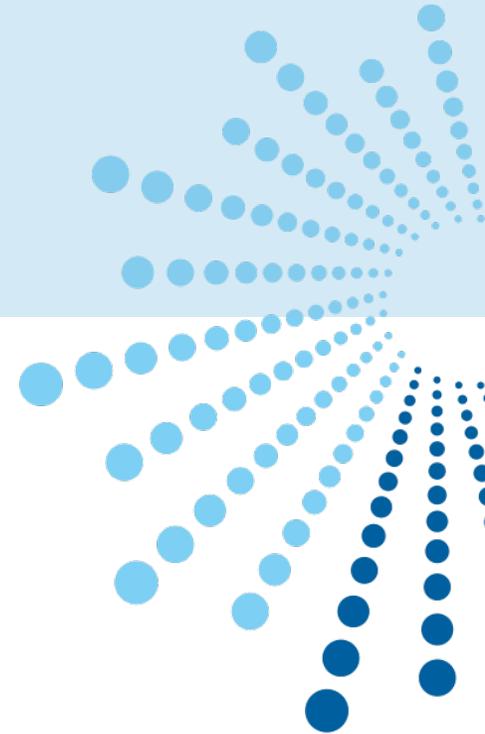
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# The Investigator, Coordinator, Hearing Officer, Appeals Officer

02

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# All Who Carry Out a Role



Must be trained in accordance with the requirements in the regulations



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

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# Avoiding Prejudgment

Practical application of these concepts in investigations...

Do not rely on cultural "rape myths"

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

Do not rely on gender-specific research data or theories

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

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



# Impartiality and Bias



Past personal or professional experience



Common sense approach to evaluating whether a particular person is biased



No generalizations

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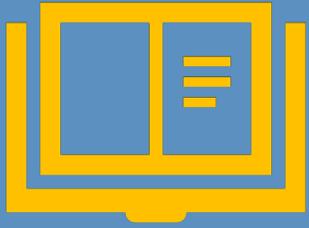
# Impartiality

## Avoiding Prejudgment, Bias, and Conflicts of Interest

### Bottom line:

- Follow facts of every individual case
- Investigate in a consistent manner
- Must allow challenges for conflict of interest



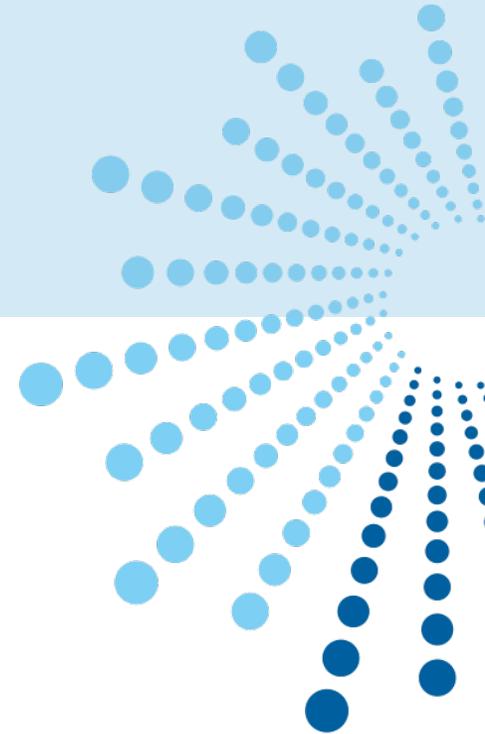


# Someone Made A Complaint!

Information Comes In, What Do You Do?

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# Mandatory Response to Each Report



- All reports, or those within scope of the Regs?
- What about responsible employees?

# Title IX Coordinator Must Discuss:

Discuss/implement support measures

Can have support without filing formal complaint

Options for resolution and how to file

# Mandatory Response Under VAWA

## Not the Same

- ❖ The importance of preserving evidence
- ❖ Right to notify law enforcement or decline
- ❖ Information about existing counseling, health, mental health, victim advocacy, legal assistance, visa and immigration assistance, student financial aid, and other services available for victims
- ❖ Options for, available assistance in, and how to request changes to academic, living, transportation, and working situations or protective measures.
- ❖ An explanation of the procedures for disciplinary action
- ❖ The standard of evidence that will be used
- ❖ Possible sanctions and protective measures
- ❖ Procedures will be implemented by college or university officials who have received training
- ❖ Right to an advisor of their choice
- ❖ Simultaneous notification in writing of the outcome and any appeals

# Not Punitive

- No default
- Case by case
- Document the connection to preserving equal access
- Document reason for any requested measures not implemented

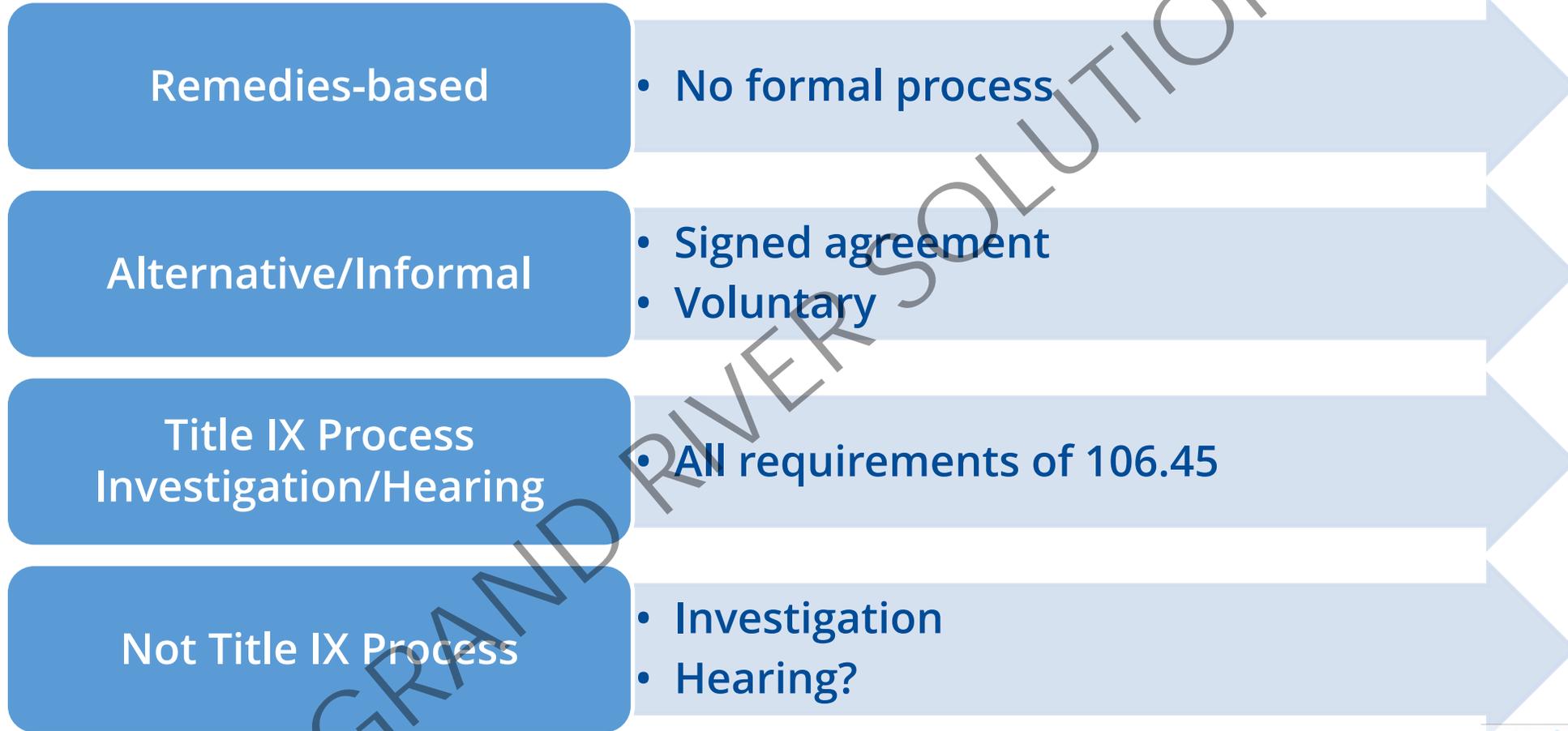


# Emergency Removal of Student

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



# Options on How to Proceed



*What do we do about misconduct that does not fall within this narrow scope, Jody?*

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**Apply other applicable  
institutional policy or  
procedures.**

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# Supportive Measures

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# Interim Support

Interim, not  
forever

Interim also  
includes “before  
investigation”

Equal access

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# Interim Support for a Complainant

To restore or preserve EQUAL access

Confidential to extent possible

Upon filing of report (notice)

No fee

Non-disciplinary/not punitive

Individualized



# Interim Support for a Respondent

After complaint is filed

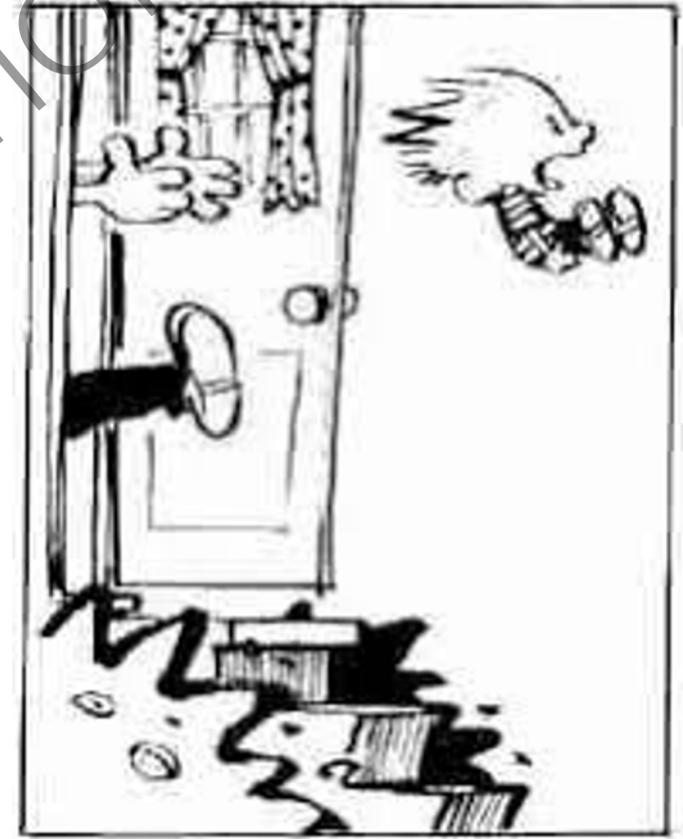


- Non-disciplinary
- Non-punitive
- Individualized

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# Emergency Removal of Student

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





# The Procedural Requirements of an Informal/Alternative Resolution

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# Notice Requirements

- The specific allegation and the specific conduct that is alleged to have occurred.
- The requirements of the informal resolution process including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations.
- Any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared.
- A statement indicating that the decision to accept a complaint does not presume that the conduct at issue has occurred, and that the Respondent is presumed not responsible, unless and until, at the conclusion of the formal investigation and adjudication processes, there is a determination of responsibility.
- An explanation that each party may be accompanied by an Advisor (add any others who may accompany, such as support person) of their choice, who may be a parent, friend, or attorney.
- The date and time of the initial meeting with the Title IX Coordinator, with a minimum of (how many days) notice

# Informal Resolution



Request in writing



Title IX Coordinator may determine not appropriate



At any time before conclusion of hearing



Voluntary



Completes the process – cannot have a do-over

# WHAT TO DO IF:

- \* Complainant has Supportive Measures, wants nothing more?
- \* Complainant wants resolution, but not Informal Resolution

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So Do We Have to Investigate Now?



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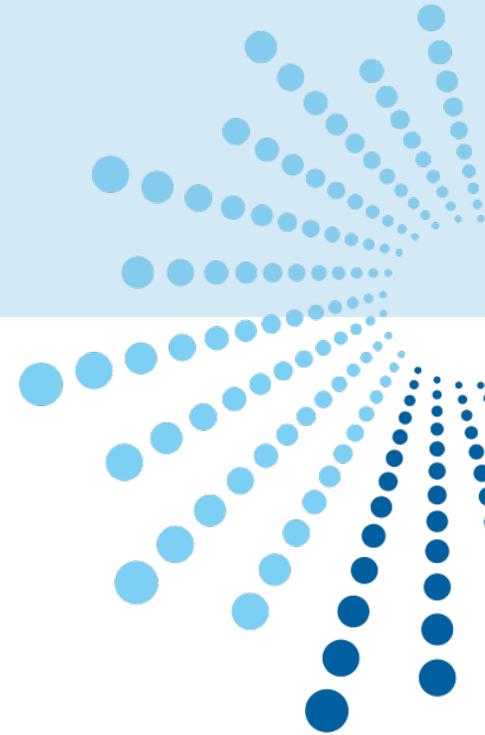


# Formal Resolution

## The Investigation

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# Formal Complaint Required



# Mandatory Investigation

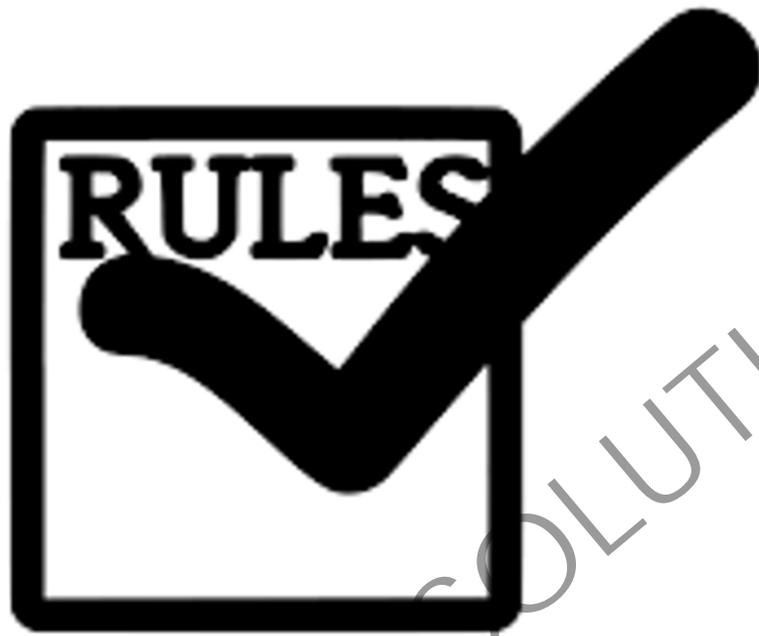
Complaint filed, SIGNED,  
requests investigation

Coordinator SIGNS, starts  
investigation

If Coordinator signs,  
institution is not the  
Complainant

But Do You  
START the  
Investigation?

- Does it meet the elements? If not, can you DISMISS?
- Can you decline to accept a Formal Complaint?
- Possible pre-investigation to identify respondent
- No investigation without formal notice



# Overview of Formal Resolution Process

# Overview of Investigation

- Notice
- Trained investigator collects information
- Investigator shares evidence “directly related” to allegations with parties
- **Parties have 10 days to respond**
- Investigator creates summary of “relevant” evidence and shares with parties
- **Parties have 10 days to respond**



# Dismissing Complaints

## MANDATORY

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

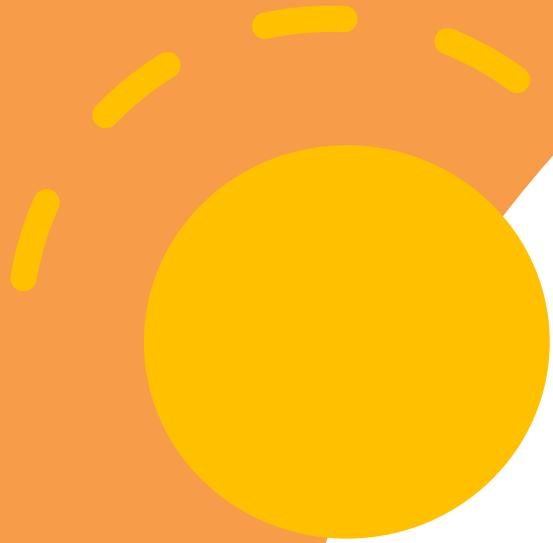
## DISCRETIONARY

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



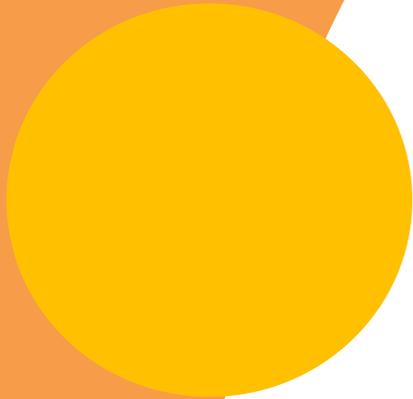
# Notice Requirements

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



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# Equal Opportunity to Present Evidence



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# Written Notification of Meetings and Sufficient Time to Prepare



# Evidence Review

- Parties must have equal opportunity to inspect and review evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint
- 10 days to provide a written response

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# “Directly Related” and “Relevant Evidence”

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# Can You Have a General Rule About Evidence In Title IX Investigations?

**NO**

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# Directly Related Evidence

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

Logical connection between the evidence and facts at issue

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

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



Evidence  
That Will  
Not Be  
Considered

- Rape Shield  
Protections
- Privileged  
Information

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## Summary of Relevant Evidence Report

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

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That report will be shared with the parties and advisor and they will have 10 days to comment

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New Evidence?

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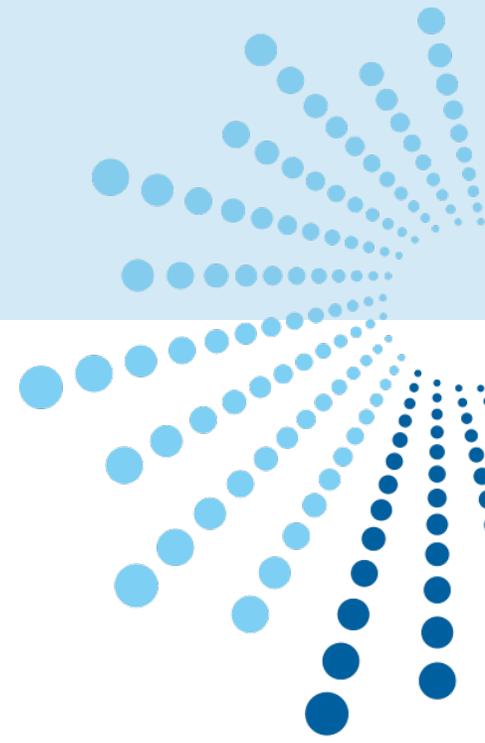
Adding to Report?

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# Hearings!

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# Purpose of the Hearing

Why does it matter?

Review and  
Assess  
Facts



Make  
Findings of  
Fact



Determine  
Responsibility  
/ Findings of  
Responsibility



Determine  
Sanction  
and  
Remedy

# The Essential Elements of All Hearings

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Clear Procedures

---

Due/Fair Process

---

Fair, Equitable, and Neutral

---

Consistency

---

Trauma Informed

---

Well Trained Personnel

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# Procedural Requirements for Hearings

Must be live, but can be conducted remotely

No Compelling participation

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

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

Decision maker determines relevancy of questions and evidence offered

Exclusion of Evidence if no cross examination

Written decision must be issued that includes finding and sanction

# You Need to Determine:

## The Process

- Pre-hearing process, submission of evidence, opening statements, other statements, closing statements, findings, impact statements, etc.

## The Players

- The roles of all participants

## The Evidence

- Relevancy, exclusions, timing of submission, how to submit, and WHO DECIDES?

## The Outcome

- Deliberations; Notice; manner and method communicated.

# Other Considerations

## A Panel?

- Number of panelists?
- Can you have a panel of one?
- Must finding be unanimous?
- Internal, external, or some combination?



# The Players

## Advisor/Support Folks

- Roles
- Participations
- Communicating their role
- Enforcing their role

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# Other Decisions

- Will you include Opening, Closing, or Impact Statements? NOT required, but you need to decide.
- How will questioning take place?
- How will questions be submitted?
- Will there be any restrictions on questions that can be asked, such as due to relevancy, already asked and answered, unduly harassing?
- If done remotely, how will the technology be set up?
- If in person, room set-up and who is in the room?

# Cross Examination

## Who does It?

- Must be conducted by the advisor
- If party does not appear or does not participate, advisor can appear and cross
- If party does not have an advisor, institution must provide one

# Cross Examination

## Permissible Questions

- Questions must be relevant
- Not relevant
  - Duplicative questions
  - Questions that attempt to elicit information about
    - Complainants prior sexual history
    - Privileged information

# Decorum at the Hearing

- ❖ A recipient may adopt rules of order or decorum to forbid badgering a witness, and may fairly deem repetition of the same question to be irrelevant
- ❖ a postsecondary institution recipient may adopt reasonable rules of order and decorum to govern the conduct of live hearings
- ❖ Schools “retain flexibility to adopt rules of decorum that prohibit any party advisor or decision-maker from questioning witnesses in an abusive, intimidating, or disrespectful manner.”

# Cross Examination

## Impact of Not Appearing



Exclusion of all statements of that party

Exception- DOE Blog



What if a party or witness appears, but does not answer all questions

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# What Determinations?

- ❖ Factual Determinations
- ❖ Analyze whether the conduct that happened constitutes a violation of the school's policies

# Understanding Relevance & Understanding Special Categories of Evidence



# Types of Evidence

Online information

Gut instinct

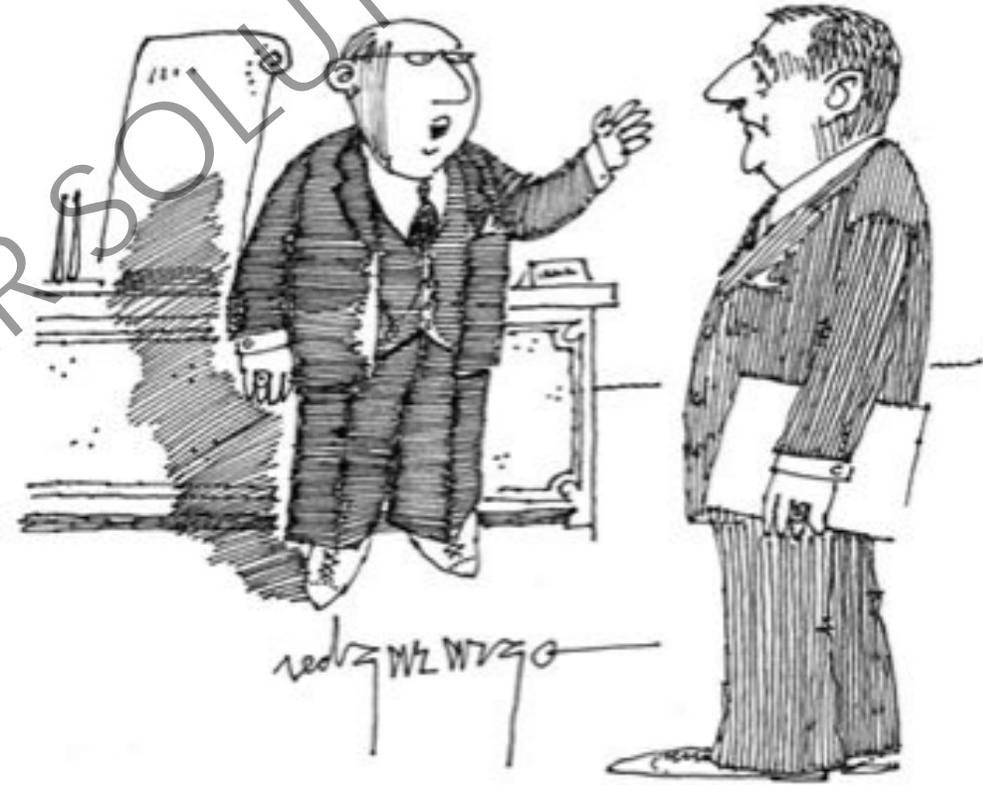
Direct vs. circumstantial

Hearsay

Relevance

Common sense

"WHILE DOING THE RESEARCH, KEEP IN MIND THERE ARE ONLY TWO KINDS OF FACTS... THOSE THAT SUPPORT MY POSITION... AND INCONCLUSIVE."



# Evidentiary Issues

---

- Character evidence
- Impact statements
- Credibility
- Medical information
- Past conduct of complainant, respondent
- Past sexual activity between complainant and respondent
- Dating or domestic violence – past history



**EVIDENCE**

Logical connection between the evidence and facts at issue

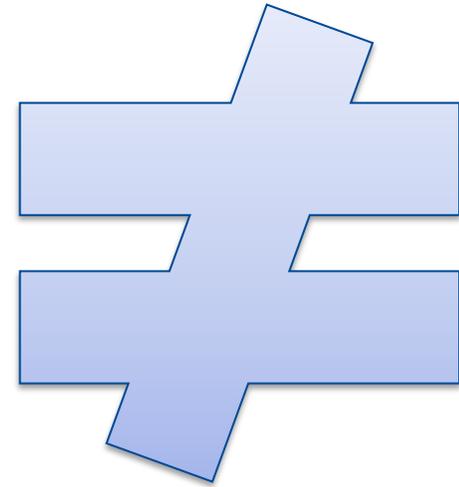
Assists in coming to the conclusion – it is “of consequence”

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



# Relevance Is Not . . .

- Strength of the evidence
- Believability of the evidence
- Based on type of evidence: circumstantial, direct
- Based on complicated rules of court



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# Is This Relevant?

Transcript

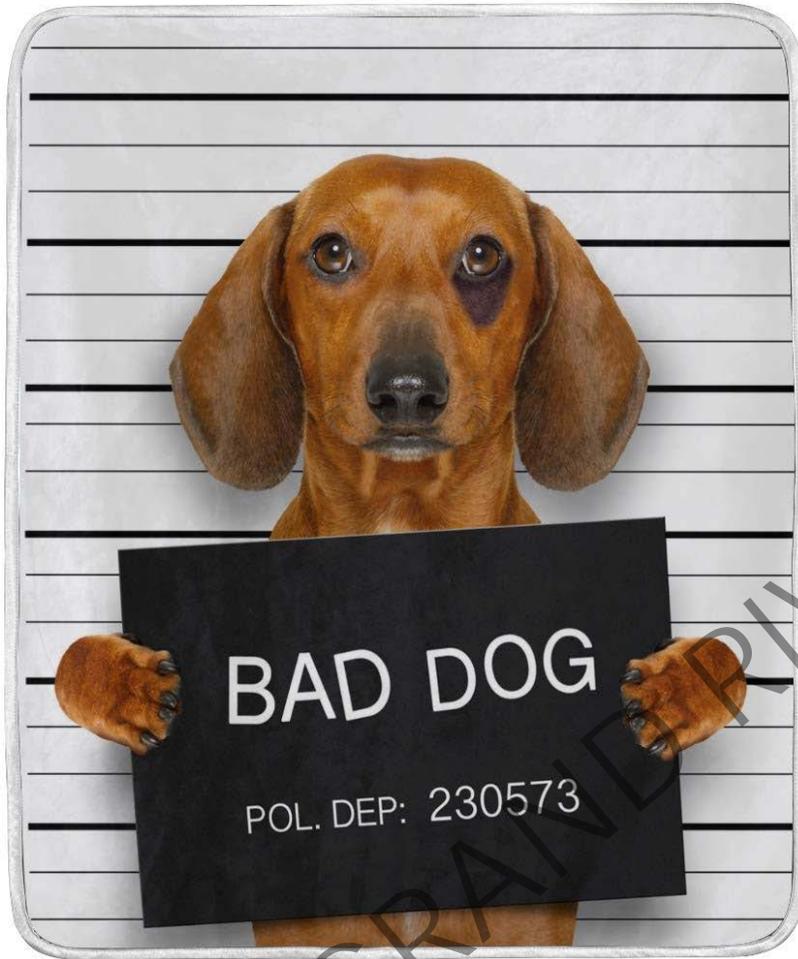
Letter from aunt that the complainant or respondent has always been nice kid

Polygraph exam

Photos of respondent making crude gestures

Photos of complainant drinking alcohol at a party





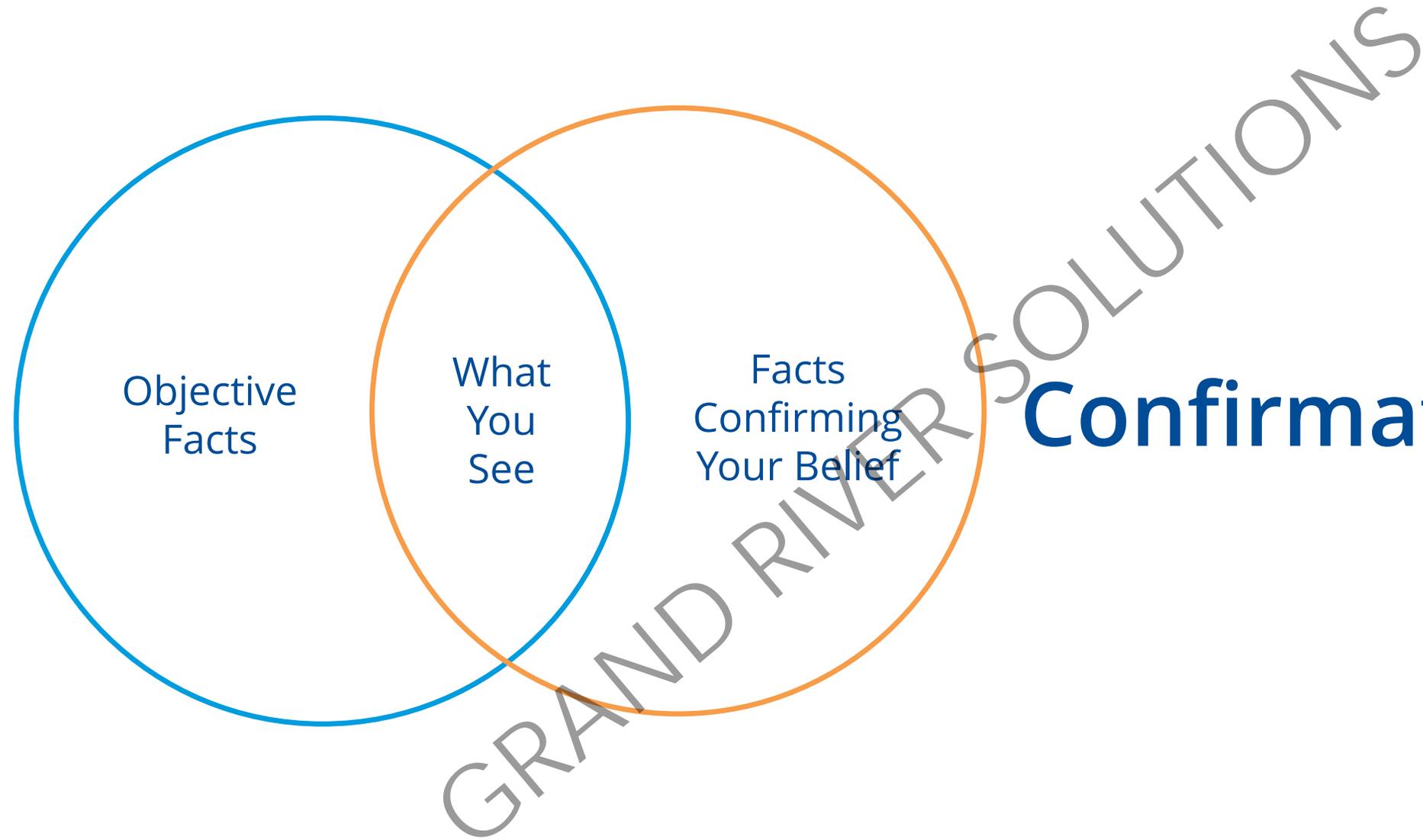
## What is "Character" evidence?

# Weighing Evidence & Making A Determination



# Affinity Bias





# Confirmation Bias

# Other Forms of Bias

Adultification Bias

The Halo Effect / Horns Effect

Beauty Bias

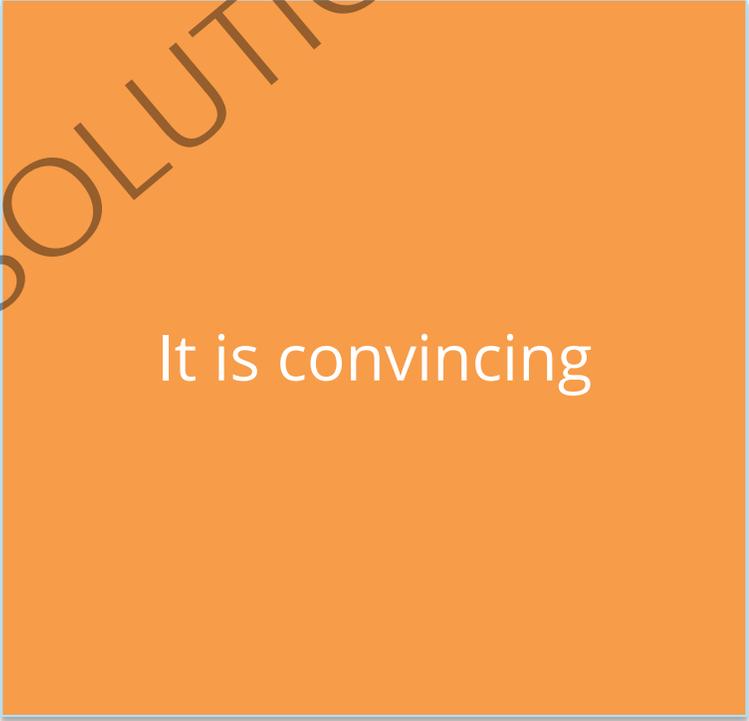
Height = Leadership, Strength

Stereotype threat

Inattentional Bias / Examiner's Bias



# Credible, or Reliable?



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# Credibility Versus Reliability

## Reliable evidence:

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

## Credibility:

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

# Being Convinced

It Is True, or Biased Conclusion?

**A credible witness may give  
unreliable testimony**

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# I Just *KNOW* They Are Not Telling the Truth

- Bias
- Can you really spot a liar?
- Understanding clues that are culturally different from your own

HOW TO  
SPOT A  
LIAR



# Required Content of Report

# Final Report

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



# Applying Preponderance of the Evidence

- More likely than not
- Does not mean 100% true or accurate
- A finding = There was sufficient reliable, credible evidence to support a factual finding, by a preponderance of the evidence



# Policy Analysis

- Break down the policy into elements
- Organize the facts by the element to which they relate
- Apply standard of proof



## EXAMPLE

# Elements of this definition of sexual harassment

- 1) Unwelcome conduct
- 2) Severe
- 3) Pervasive
- 4) Objectively offensive
- 5) Effective denial of equal access to school's education program or activity

Is there evidence that Complainant was incapacitated, and that Respondent knew that, or that we believe Respondent should have known that? If yes, answer the following questions:

- Does the evidence support that Complainant consumed alcohol/drugs prior to or during the incident under investigation? **If yes, continue.**
- Does the evidence support that Complainant showed any of the following signs of incapacitation (not exclusive)
  - Slurring words, stumbling, passing out, blacking out, delayed response time, falling, etc. If yes, continue..
  - What facts suggest impaired *capacity* to consent: list of symptoms alone not sufficient
  - Discussion: Blackouts – whether a blackout, alone, is evidence of lack of capacity to consent
- Does the evidence show that the Respondent, knew--as a fact—that the Complainant was experiencing this incapacity?
  - **If yes, you may find a policy violation. If not, ask the next question.**
- Would a *reasonable* person, in the position of the Respondent, have known of the Complainant's incapacity? If so, you should be done with your analysis and may find the Respondent in violation of policy. If not, move on to the third question.

# Communicate Findings

**With sanctions (if any).  
One communication to  
parties, not two**

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# Appeals: Mandatory Grounds

(A) Procedural irregularity that affected the outcome of the matter;

(B) New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; and/or

(C) The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter.

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Appealing  
sanctions?

Other grounds for  
appeal?

Your discretion

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# Questions?



## Email Us

[Jody@grandriversolutions.com](mailto:Jody@grandriversolutions.com)  
[info@grandriversolutions.com](mailto:info@grandriversolutions.com)

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