

JacksonLewis

Hearings

Making the Tough Calls with Consistency and Fairness

Academic Year 2021-22



Agenda

1. Where we are: Context and Framework
2. Before the Hearing
3. The Hearing
4. After the Hearing
5. Choose Your Own Legal Destiny:
An Adjudication Adventure

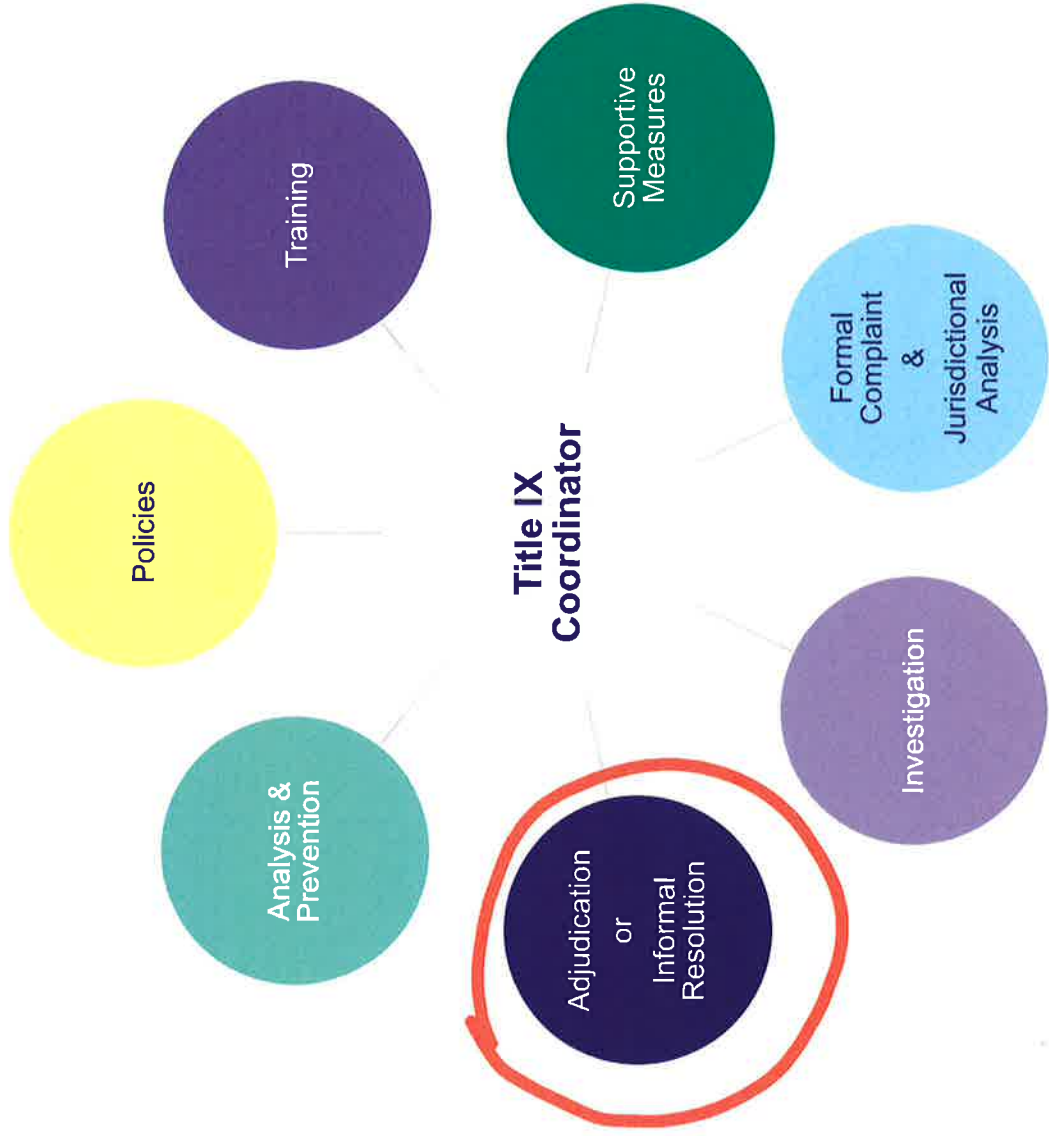
TITLE IX

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.

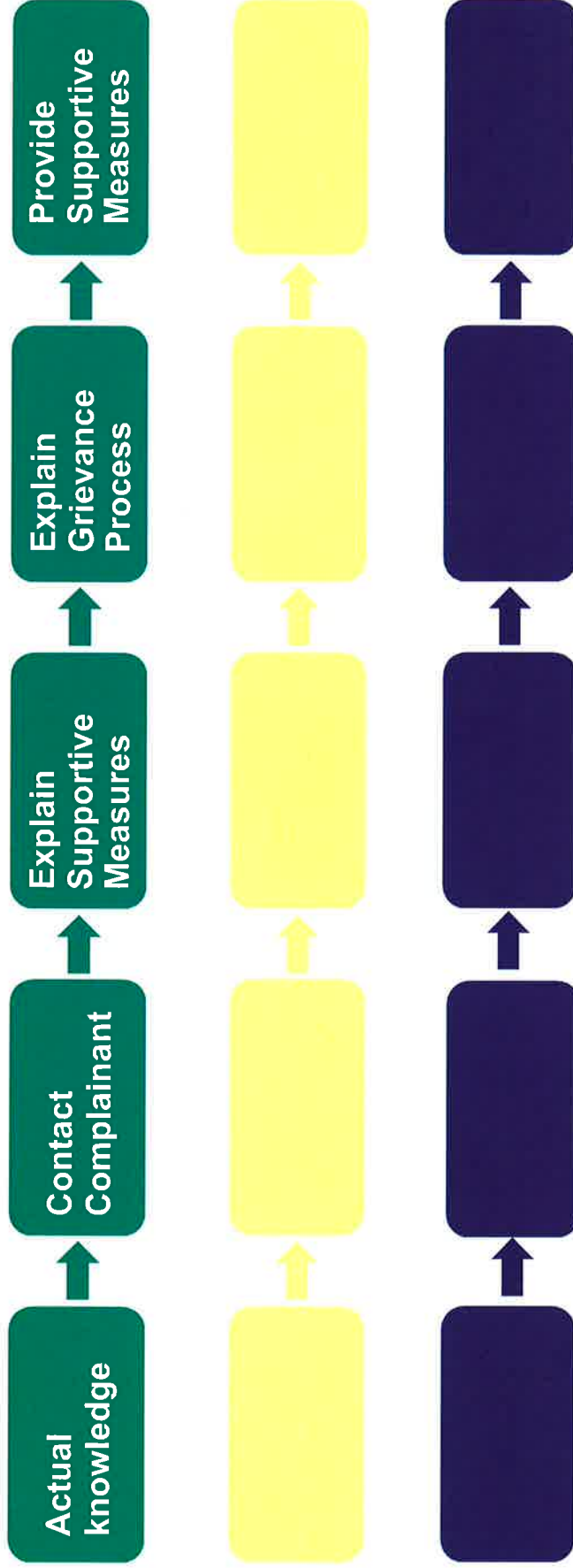
Title IX's purpose is to remove barriers.

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





Coordinator Flow Chart – Phase One

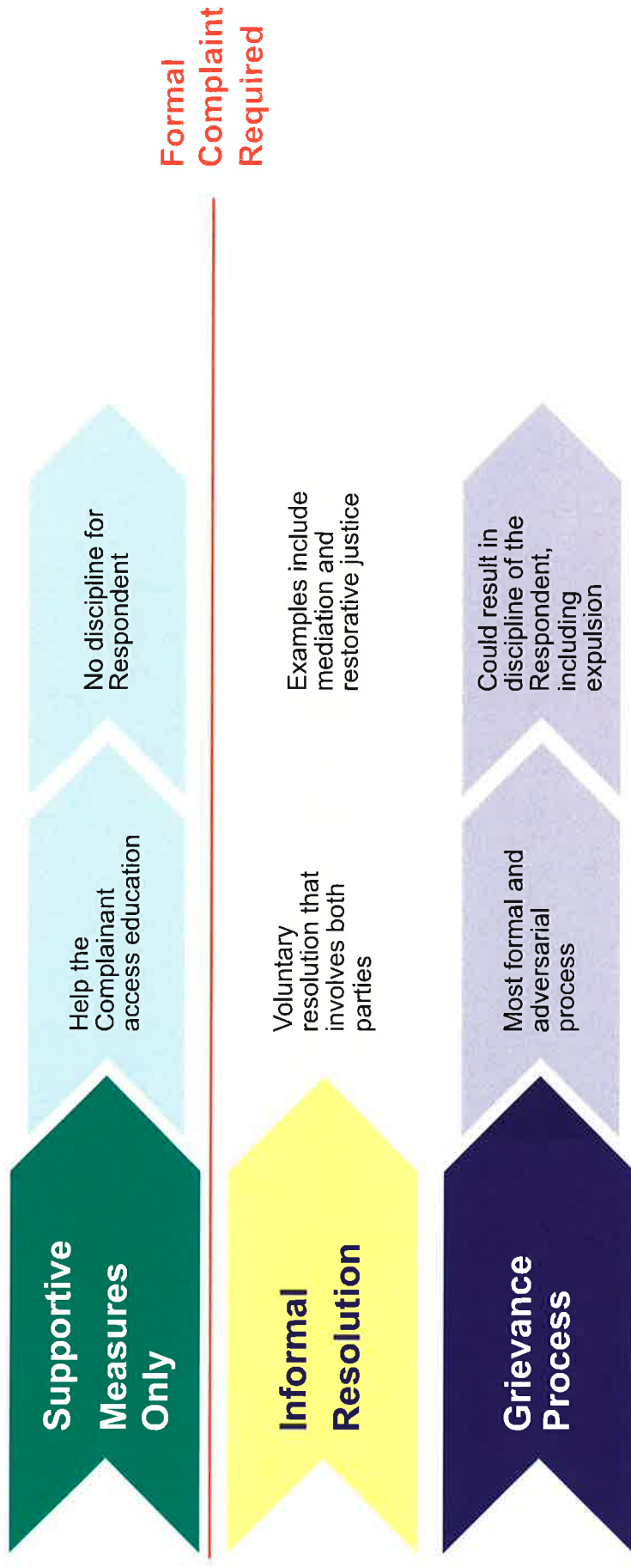


Mandatory (Initial) Response to a Report

The Title IX Coordinator Must Promptly:

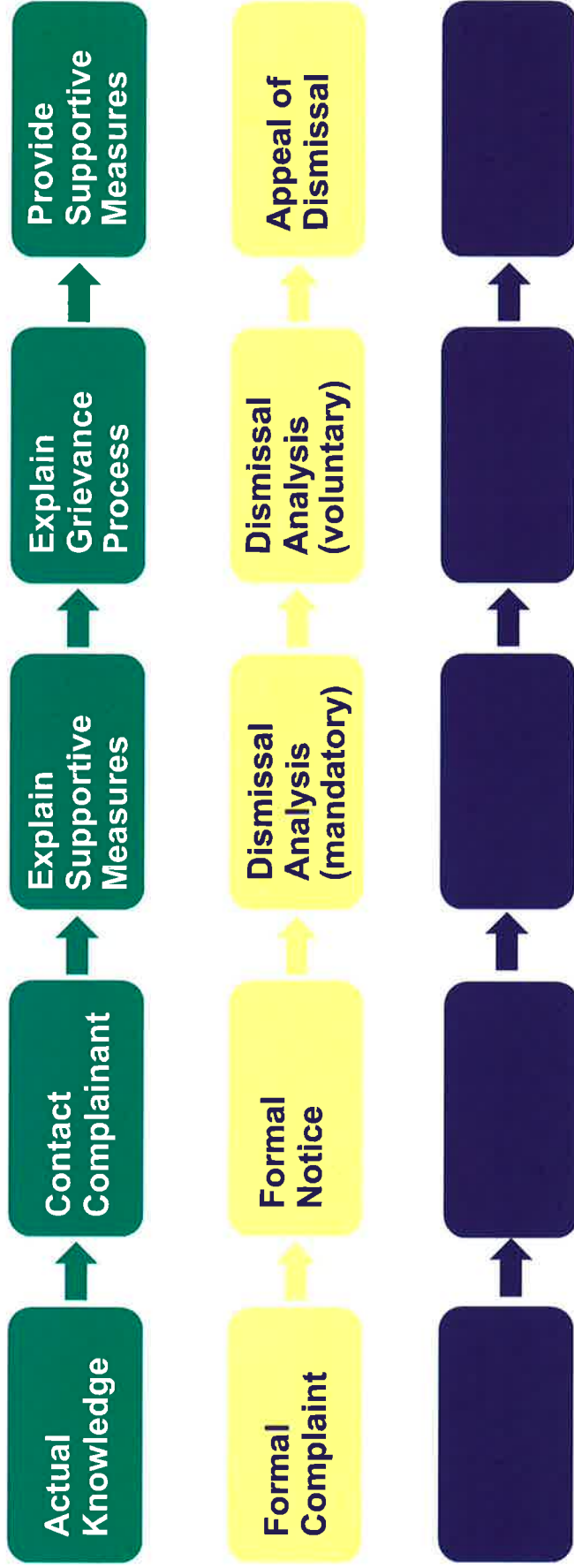
- 1** Contact the Complainant to discuss the availability of supportive measures,
- 2** Inform the Complainant that supportive measures are available whether they file a Formal Complaint or not,
- 3** Consider the Complainant's wishes with respect to supportive measures, and
- 4** Explain the process 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 – Phase Two



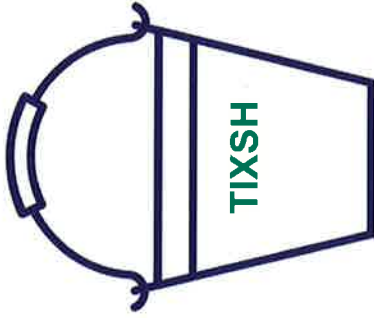
Formal Notice to All Parties

- 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

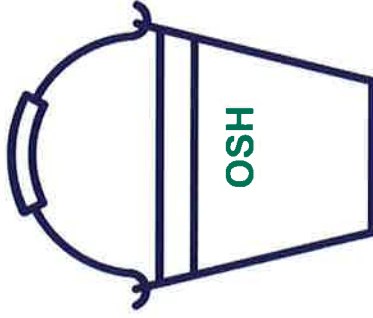
No
Surprises

Sorting Complaints into 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.

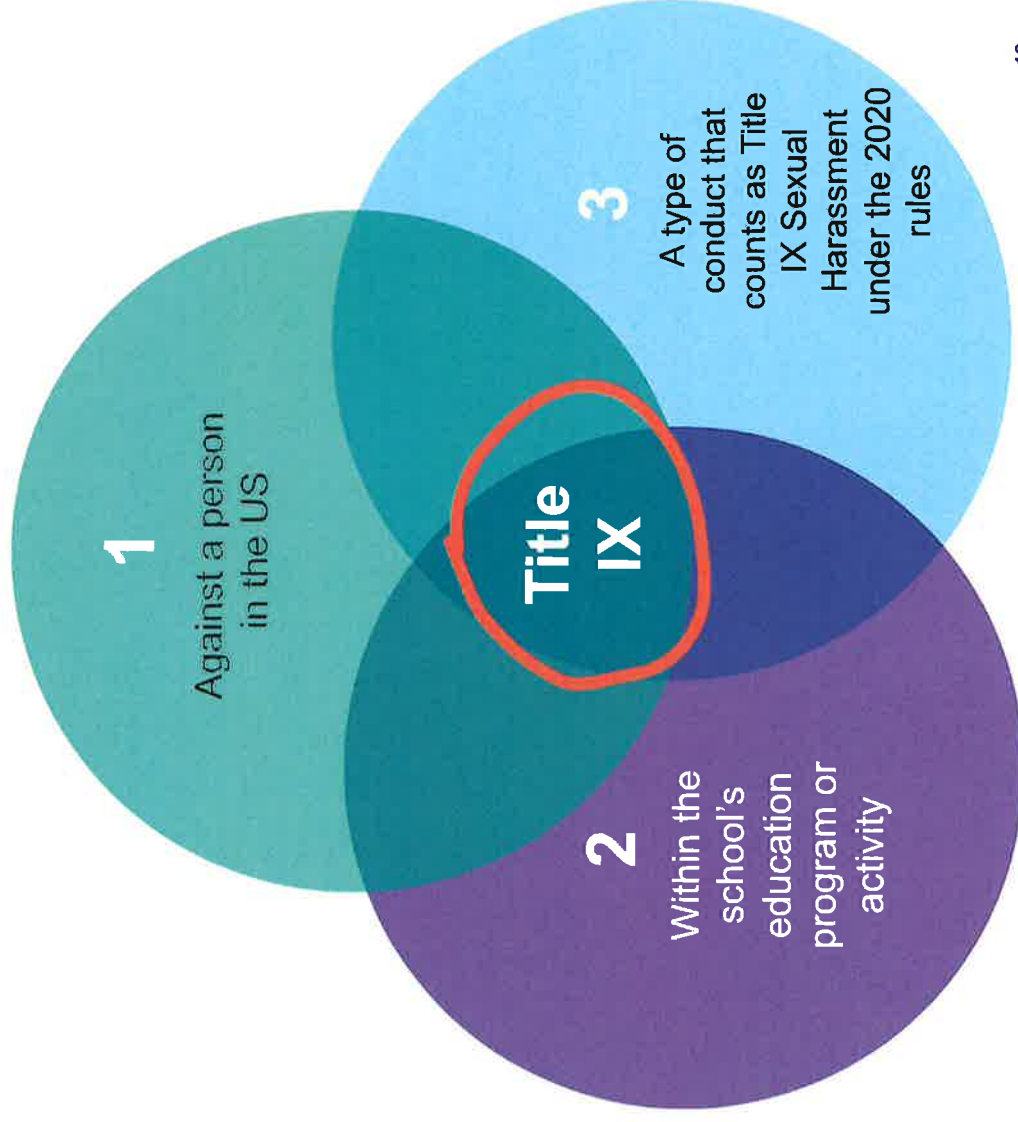


Other Sexual Harassment (OSH)

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.

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 Rules

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

Sexual Harassment can be disciplined only after a **formal grievance process**, including an official investigation and hearing

Other

Sexual Harassment can be disciplined

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

In the school's discretion

Cases are adjudicated in accordance with the Title IX Grievance Procedures if...

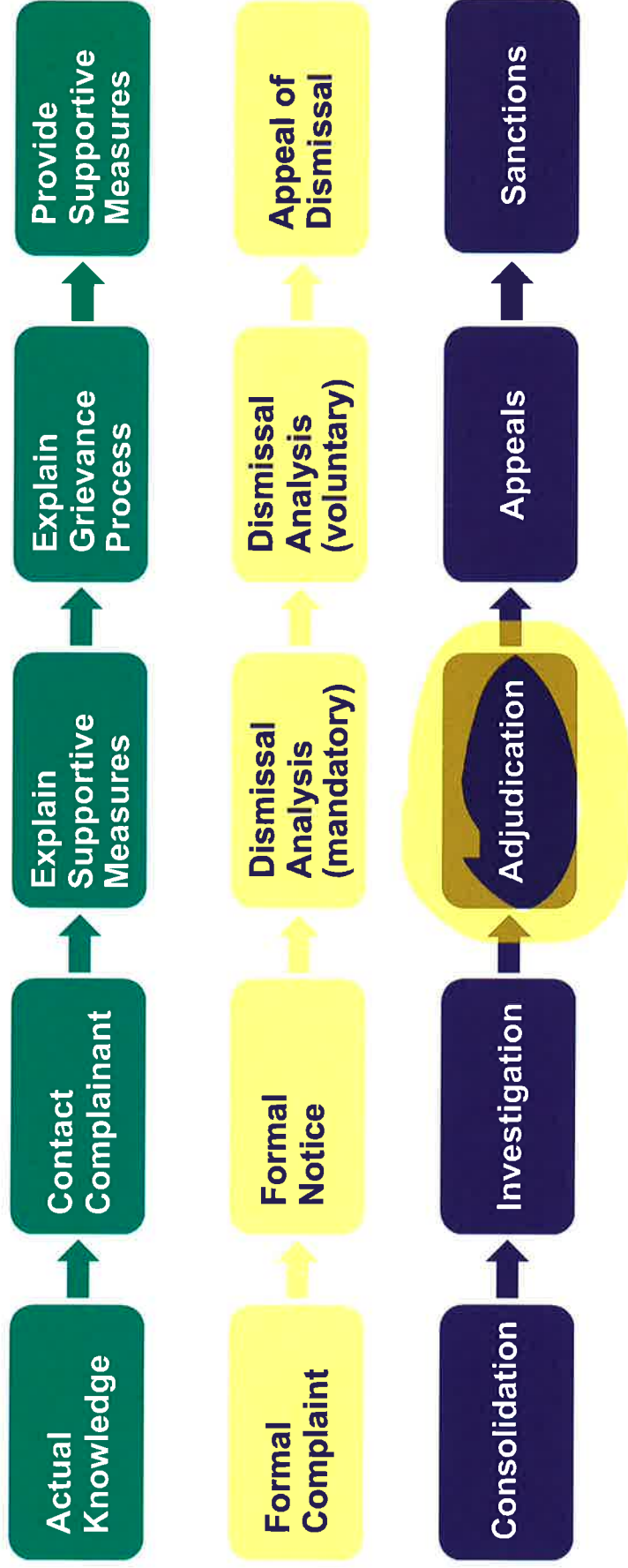
- It has been determined that the allegations, if true, would constitute Title IX Sexual Harassment (TIXSH).
- It has been determined that the allegations, if true, are “Other Sexual Harassment” and do not constitute TIXSH, but the institution’s policies and procedures call for adjudication of this type of alleged incident in accordance with the TIXSH procedures.

Example:

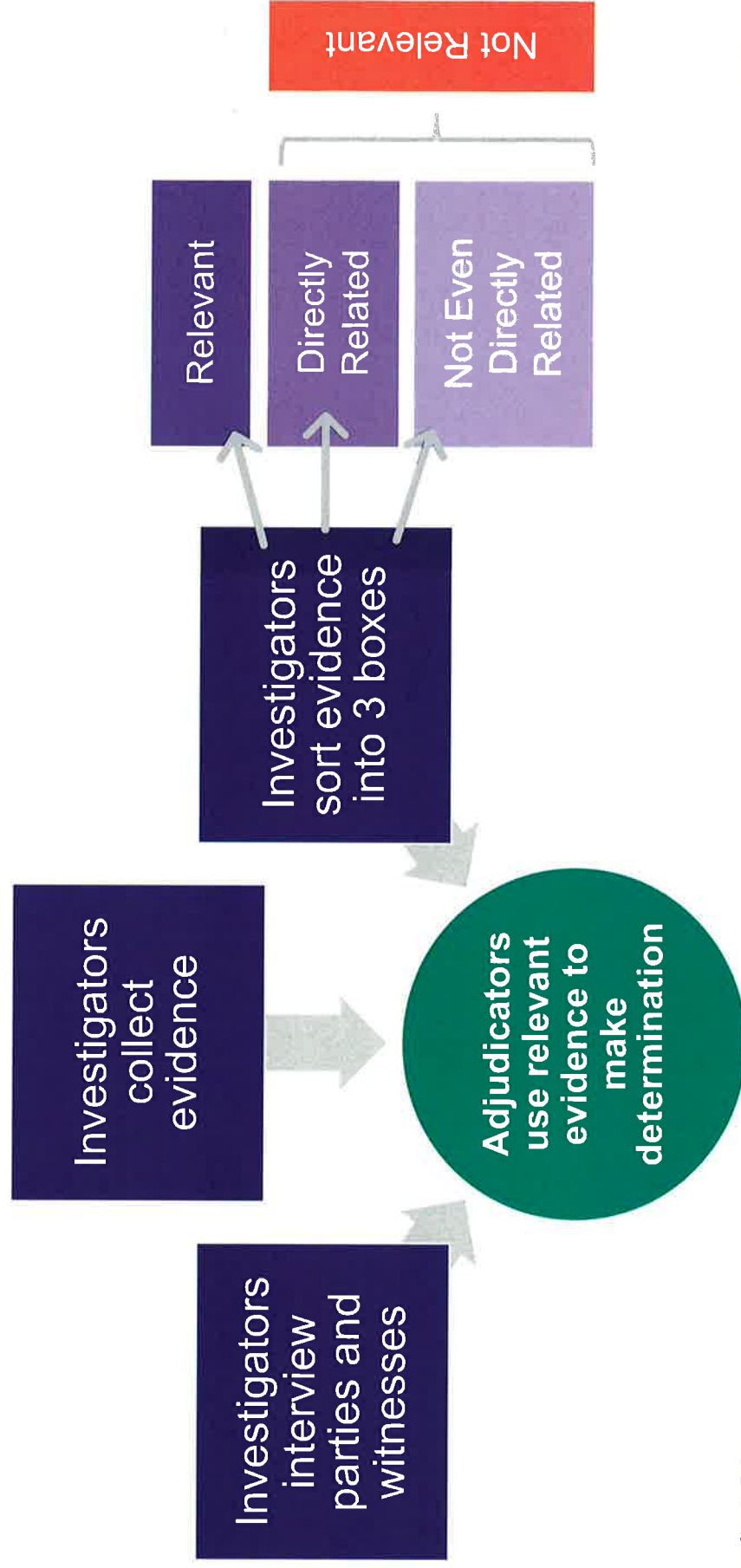
Sexual assault that takes place in a residence hall is TIXSH.

School **may** decide to handle sexual assaults that take place in off-campus apartments in accordance with the TIXSH procedures or not.

Coordinator Flow Chart – Phase 3



The Investigation/Adjudication Relationship



The Decision Maker's Role

Pre-Hearing

Prepare
Schedule

Hearing

Ask Questions
Rule on Questions

Post-Hearing

Decide Case
Issue Determination

Your PRE-HEARING Responsibilities

Prepare • Schedule

Pre-
Hearing

What does it mean to be judicious?

Impartial

Discrete

Serious

Rational

Pre-
Hearing

Three Mandatory Bases of Appeal

Unhappy
when having
to be
overruled on
appeal

1

New Evidence

2

Bias or Conflict

3

Procedural Irregularity

Pre-Hearing Preparation

- 1 Re-engage core traits
- 2 Review your school's hearing procedures and precise definitions for misconduct at issue
- 3 Review Investigative Report
 - Identify critical issues
 - Determine what questions need to be asked

Don't conduct your own investigation!

**Pre-
Hearing**



Investigators
Gather
Evidence

- A. Relevant
- B. Directly Related
- C. Not Even Directly Related

Parties
Review
Evidence

- A. Relevant
- B. Directly Related

Investigators
Finalize
Report

Relevant

Parties
Review
Report

Hearing

Investigative Report Table of Contents

Section 1 Key Data Sheet

Section 2 Description of the procedural steps taken

Section 3 Party and witness statements

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

Reminder: Do Not Defer to Conclusions Drawn 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.

Emily's ~~constant manipulations~~ ~~finally drove Jacob to the breaking point~~ at the end of the first semester, and he was hospitalized after suffering two panic attacks.

Pre-
Hearing

Scheduling



Attendance Checklist

Parties

Each party's advisor

Other support personnel, if allowed, e.g. disability services

Decision Maker(s)

Institutional advisors such as school attorney or Title IX Coordinator

Witnesses (just during their own testimony)

Investigators (as witnesses)

Pre- Hearing

Scheduling a Hearing

1

Determine who needs to be there

- Option A: All witnesses in the report
- Option B: All witnesses requested by you/parties

2

Pre-hearing communication

Either all together or in writing

3

Logistics

- Virtual or in-person
- If in person, separate rooms?
- At least 10 days after delivery of Inv. Report
- Within case deadline (+ time for determination)



Pre- Hearing

When is it reasonable to delay?

- Technical/logistical barriers?
- Academic/disability accommodations?
- Concurrent criminal investigation?
- Party cannot attend?
- Witness cannot attend?
- Advisor cannot attend?
- **Hearing officer under water - no**

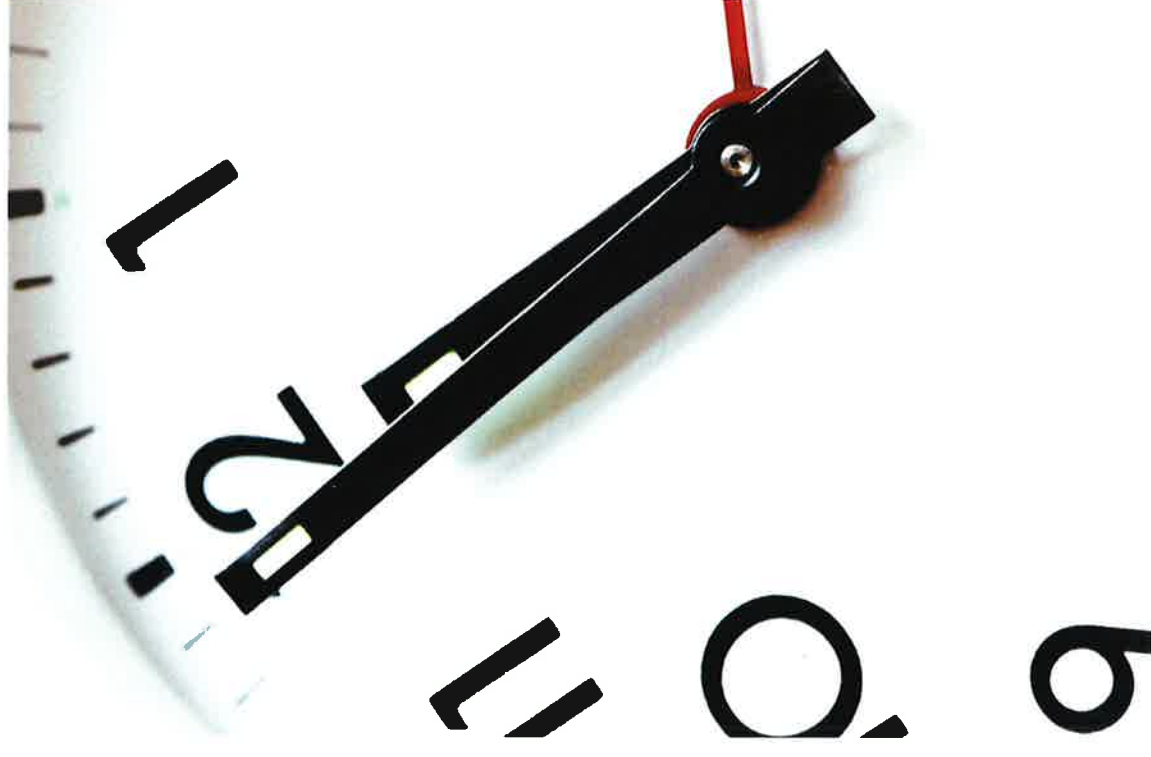
Jackson Lewis P.C.



How long will the hearing last?

The challenge is to balance parties' right to present case fully with need for reasonable limitations.

1. Schedule start AND end time
2. Right to cross examine is not unlimited
3. Time will vary case by case
4. Good internal **rule of thumb** =
 - 30 min for each key witness
 - 15 min for each minor witness
5. Give witnesses specific time to appear



Virtual Hearings

Key: Prepare in Advance

Security and Separation

- How parties will log on (passwords, etc.)
- What to do if hearing is interrupted

Settings

- How to “host”
- How to mute/unmute participants
- How to limit and save “chat”
- How to record
- How to share screen

Consider...

- Tech Handout for all participants
- Practice session
- Having IT on standby

Your HEARING Responsibilities:

Asking & Ruling on Questions

Hearing

Hearings under the 2020 Regulations

Live Meetings

In-person OR virtual

Parties must be able to see and hear in real time

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

School must create an audio or audiovisual recording or transcript

- Available to parties for review
- Saved for 7 years

Live Questioning

About What

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

How

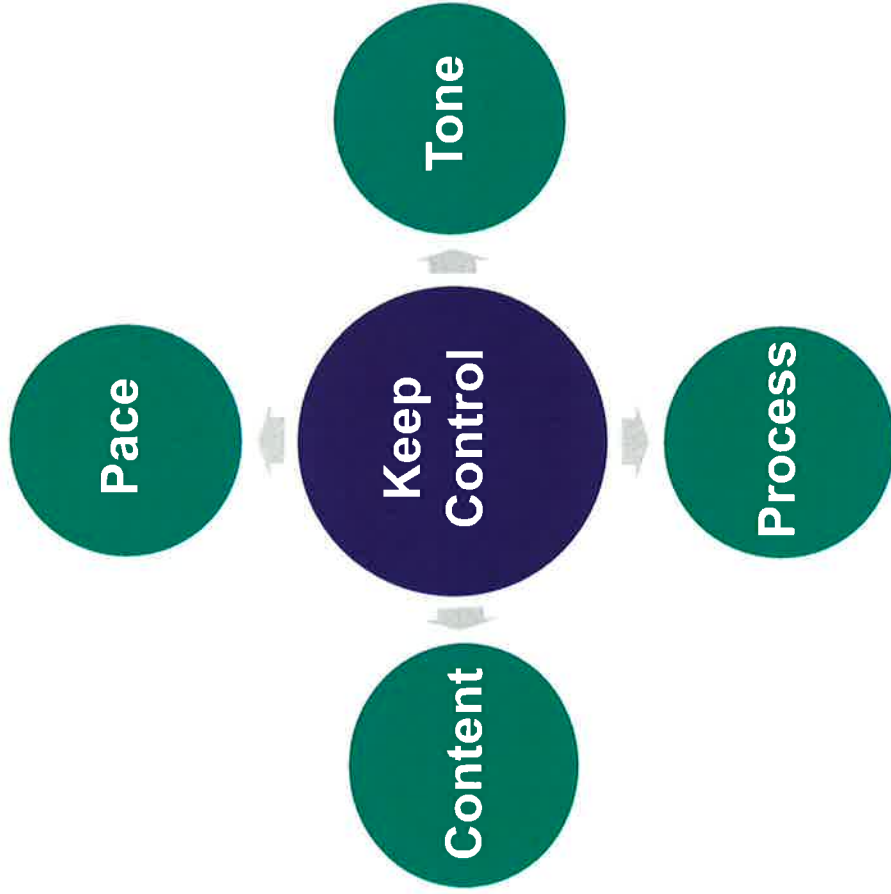
Directly, orally, in real time

By Whom

By decision makers AND/OR each party's advisor of choice (or by appointment), but never the parties personally

Hearing

What does it mean to preside?



Hearing

What is the hearing “program”?

Intro

Welcome and Values
Procedure and Ground Rules

Witnesses

Questioning by Decision Maker
Questioning by Advisors (Complainant's, then Respondent's)

Closing Statements

Complainant
Respondent

Introductory Script

- **Introduce yourself**
 - Your role is to preside, weigh evidence against standard, make a determination
 - No determination made yet
 - Role will be carried out fairly and impartially
- **Decorum – professional and respectful**
 - Outbursts/harassing conduct/other interruptions not tolerated
- **Technology**
 - No private recording
 - If virtual, mute microphone when not speaking, etc.
- **Questioning**
 - Order (decision maker first)
 - Advisors (witnesses, please wait for relevance ruling before answering)
 - Arguments as to relevancy rulings?

Hearing

Calling and Questioning Witnesses

Sample Order of Witnesses

1. Complainant(s)
2. Respondent(s)
3. Third Party Witnesses
 - As “called” by parties
 - Scheduling dictates
 - “Chronologically”
4. Investigators

Sample Order of Questioning

1. Decision Maker
 2. Party who called the witness
 3. Other Party
- (If both or neither, Complainant’s advisor goes first, followed by Respondent’s advisor)

Hearing

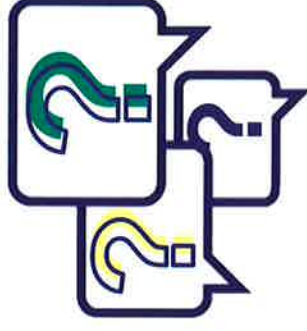
Gatekeeping at the Hearing



Evidence the
investigators saw as
RELEVANT



Evidence the
investigators saw as
DIRECTLY RELATED



Questions asked
by the advisors
WILL BE A MIX

Hearing

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

Relevant Evidence May Be....

Inculpatory

OR

Exculpatory

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.”

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.”

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:

Whether 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

Hearing

Example

Complainant alleges that Respondent, a student employee at the campus gym, relentlessly followed her throughout the building when she tried to work out and continuously commented on her body and asked her to go out even after she expressed her discomfort. Complainant alleges that Respondent used his status as a gym employee to access her locker, look through her things, and hide love notes and small gifts in her clothing.

Relevant

Gym employees have access to a master code that unlocks all lockers.

Directly related

Respondent and Complainant first met when they had a class together last semester.

Not even directly related

Respondent was fired from his previous campus job for missing shifts without providing notice.

Hearing

Relevancy* Pop Quiz

QUIZ

Respondent: When I was touching Rush, Rush said “that feels amazing.”

Complainant: I’ve always wanted to be a doctor, and I’m planning to go to med school.

Respondent: We studied chemistry for about two hours before deciding to take a break.

Complainant: We ate dinner at Subway before going to Kai’s room.

Respondent: This process is even more stressful because my mom is going through breast cancer right now.

Complainant: The next day, Kai called me to apologize for what happened.

Relevant

Not Even Directly Related

Directly Related

Directly Related

Not Even Directly Related

Relevant

* Caution – Highly Context Dependent

Secret Tips to Make Your Job Easier

1. Ask questions yourself.
2. Think about what questions are likely and request (but don't require) that questions be submitted in advance.
3. Take your time and call a recess if necessary.
4. Err on the side of including evidence.
5. Be familiar with the types of irrelevant evidence and use a prepared list of rulings.

Hearing

Ruling on Questions

Advisor
poses
question

You decide
on the spot
if the
question is
relevant

You provide
reason if
you decide
to exclude
question

You
entertain
arguments
?

From prepared
list!

Hearing

The 3 Types of Irrelevant Evidence



Hearing

Three Sub-Categories of Blocked Information

Some information that we classify as “irrelevant” may be highly relevant, but is nevertheless blocked under the regulations.

Privileged

- Medical & psychological records
- Other legally recognized privileges

Partially Shielded

- Complainant’s sexual history

Barred

- Any statement by anyone who is not available to be questioned (regardless of the reason why)

An August 24, 2021 letter from the U.S. Department of Education removed the prohibition on statements not subject to cross-examination.

Please see the following for additional details:

[Written summary](#)

[Video update](#)

1. Privileged Information: Medical Records

Records made or maintained in connection with party's treatment

By physician, psychiatrist, or other professional

Cannot be accessed, considered, disclosed, or otherwise used

Without the party's **voluntary, written** consent to do so **for the grievance process**

Other Legal Privileges

- Attorney-Client
- Clergy-Communicant
- Marital Confidence
- Privilege against self incrimination

Hearing

2. Partially Shielded: The Rape Shield Rule



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

1. They are offered to prove that someone other than Respondent committed the conduct
2. They concern specific incidents of prior sexual behavior with Respondent and offered to prove consent

Unless...

Questions/evidence about **Respondent's** sexual predisposition or prior sexual behavior **may** be relevant.

The Rape Shield Rule: Examples

To Complainant:

Isn't it true that before you went out with Respondent, you already had slept with three other members of the band?

Irrelevant
under the Rape
Shield Rule

To Complainant:

You said you were surprised when Respondent started kissing you backstage, but isn't it true that the two of you had sex backstage earlier in the week?

Allowed
under Rape Shield
Rule Exception

To Respondent:

Isn't it true that on numerous other occasions you have invited someone backstage and then tried to initiate sex?

Allowed
under Rape Shield
Rule

3. Barred Information

“If a party or witness does not submit to cross-examination at the live hearing, the decision-maker may reach a decision based on the evidence presented at the hearing. If a party or witness in a proceeding does not submit to cross-examination at the live hearing, the decision-maker may reach a decision based on the evidence presented at the hearing. If a party or witness in a proceeding does not submit to cross-examination at the live hearing, the decision-maker may reach a decision based on the evidence presented at the hearing.”

An August 24, 2021 letter from the U.S. Department of Education removed the prohibition on statements not subject to cross-examination.

Please see the following for additional details:

[Written summary](#)

[Video update](#)

Witness generates report in course of work, but is not present at hearing.
Witness wants damaging statement to be barred and refuses to submit to cross-examination for that reason.

Menu of Relevancy Rulings

I am going to disallow the question/answer as irrelevant because...

- It does not make a material fact more or less likely
- It is duplicative
- The information is privileged
- That information is protected by the rape shield rule

Your POST-HEARING Responsibilities

**Decide the Case & Issue
Determination**

Components of the Written Determination

- I. Identification of the allegations
- II. Description of the procedural steps for the entire case
- III. Findings of fact
- IV. Application of school rules to the facts
- V. Statement of result as to each allegation
- VI. Procedures for either party to appeal

I. Identification of the allegations

Jackson Lewis University
Title IX Office

Section 1: Investigative Report Key Data Sheet

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



Jackson Lewis University
Title IX Office

Written Determination

I. Identification of the Allegations

This case concerns an allegation of stalking brought by Complainant Madison Smith against Respondent Jamie Jones.

Post-Hearing

II. Description of the procedural steps for the entire case

Jackson Lewis University
Title IX Office

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

PROCEDURAL STEP	DATE/ADDITIONAL INFORMATION	DOCUMENTS (IF ANY)
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



Jackson Lewis University
Title IX Office

Written Determination

II. Description of Procedural Steps

The Complaint was filed by Madison Smith on March 1, 2021. A Notice of Complaint was sent to Jamie Jones on March 4, 2021. The dismissal analysis was completed on March 8, 2021. The allegations were dismissed in part and referred to student conduct. A Notice of ...

Jackson Lewis University
Title IX Office

Written Determination

III. Findings of Fact

We find these facts by a preponderance of the evidence **OR** clear and convincing evidence:

- Complainant Smith and Respondent Jones broke up on or about Christmas Day, 2020.
- Respondent Jones sent Complainant Smith approximately 600 text messages during the month of January 2021.
- These texts made Complainant Smith uncomfortable, and she did not respond to them.

Post-Hearing

How do you make findings of fact?

Identify the question:

How many text messages did Respondent send Complainant in January 2021?

Identify the pieces of evidence that shed light on the question:

- Complainant's testimony
- Respondent's testimony
- Cell phone records

Assign weight to each piece of evidence:

- Reliability

Set the scale to the right setting

Compare the stacks of evidence against each other

Assigning Weight to Evidence

Question: How many text messages did Respondent send Complainant in January 2021?

Complainant's Testimony

"Gosh, I don't know. It felt constant."

Complainant's Testimony

"Gosh, I don't know. It felt constant."

Respondent's Testimony

"Definitely very few. I would estimate between 5 and 10 to get my stuff back."

Respondent's Testimony

Definitely very few. I would estimate between 5 and 10 to get my stuff back."

Documentary Evidence

Printout of text messages dated Jan. 1 – 31, 2021

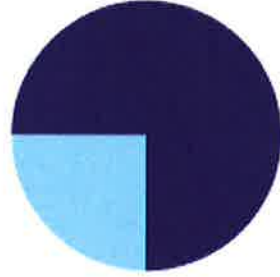
Documentary Evidence

Printout of text messages dated Jan. 1 – 31, 2021 shows 603 texts from Respondent

Standards of Proof: How to Read the Scale



Beyond a Reasonable Doubt



Clear and Convincing



Preponderance of the Evidence (More than 50%)



Reasonable Cause

■ Level of doubt
■ Level of certainty

The Scale Operates Differently Under Different Standards

Preponderance of the Evidence

The party with the majority of the evidence prevails even if the margin is very narrow.

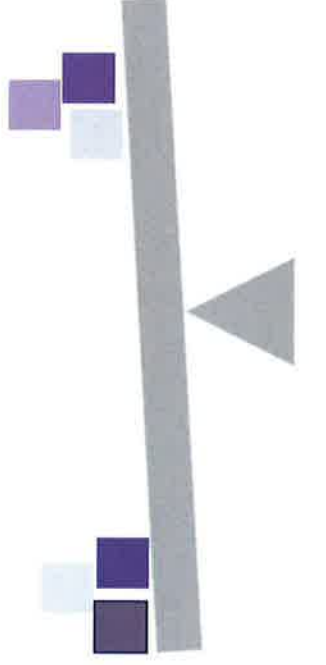


Clear and Convincing

The Complainant must have clear and convincing evidence in order to prevail.



Why It Matters



The evidence on this scale tilts slightly toward Complainant.

Preponderance of the Evidence

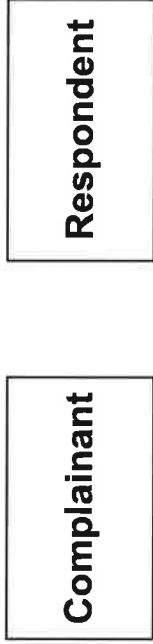
Under a preponderance of the evidence standard, Complainant prevails with regard to this because Complainant has the greater weight of evidence

Clear and Convincing

Under a clear and convincing standard, Respondent prevails with regard to this fact because the Complainant's evidence doesn't reach the clear and convincing threshold.

Comparing the Stacks of Evidence to One Another

How many text messages did Respondent send Complainant in January 2021?



Printout of text messages Jan. 1-31, 2021

"Gosh, I don't know. It felt constant."

Definitely very few. I would estimate between 5 and 10 to get my stuff back."

Post- Hearing

IV. Application of school rules to the facts

- 1 List alleged violations of your school policy, reference the official definition of the conduct, and identify the elements
- 2 Using the facts from the Findings of Fact session, determine whether each element is met.

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 his/her safety or the safety of others or suffer substantial emotional distress.

Identify the Elements

Stalking

- Engaged in course of conduct based on sex

- Directed at a specific person
- That would cause a reasonable person to:

A. <input type="checkbox"/> Fear for their safety	Or	B. <input type="checkbox"/> Fear for the safety of others	Or	C. <input type="checkbox"/> Suffer substantial emotional distress
---	----	---	----	---

Elements of Stalking

1. Engaged in course of conduct
 - Respondent sent Complainant over 600 texts in month following break up.
 - Respondent followed Complainant after history class on four occasions.
2. Directed at a specific person (specific person: _____)
3. That would cause a reasonable person to:
 - A. Fear for their safetyOr
 - B. Fear for the safety of othersOr
 - C. Suffer substantial emotional distress

Post-Hearing

IV. Application of school rules to the facts

Jackson Lewis University
Title IX Office
Written Determination

IV. Application of School Rules

Under the Jackson Lewis University Title IX Sexual Harassment Policy, the facts above meet the definition of Stalking because Respondent Jones

- Engaged in a course of conduct by sending Complainant over 600 text messages in the months after the parties break up and following Complainant after class on at least 4 separate occasions.
- Directed at a specific person, Complainant Smith (cont.)

Post- Hearing

V. Statement of result as to each allegation

Jackson Lewis University
Title IX Office

Written Determination

V. Statement of Result

Stalking

Responsibility Determination: Our determination is to hold Respondent Jamie Jones responsible for stalking.

Rationale: Respondent Jones engaged in a course of conduct directed at Complainant Smith that caused her to suffer substantial emotional distress.

Sanction: Respondent Jones will be suspended for one semester (Fall 2022).

Remedies: Complainant Smith will be eligible for appropriate supportive measures, as determined by the Title IX Coordinator, through Spring 2023.

Jackson Lewis University
Title IX Office

Written Determination

VI. Right of Appeal

Both Complainant and Respondent may appeal this determination on any of the following bases:

- Procedural irregularity
- New information not reasonably available previously
- Conflict of interest or bias

To appeal, please send _____ to _____ by _____
(document) (person) (deadline)

Sanctioning

- Can be issued by decision maker OR referred to Student Conduct (student Respondent) or Human Resources (employee Respondent)
 - Greater expertise
 - Greater consistency
- Sanctioning decision must be included in determination, so consider timing if referring to Student Conduct or Human Resources

Considerations in Sanctioning

Generally speaking, similar cases should have similar outcomes

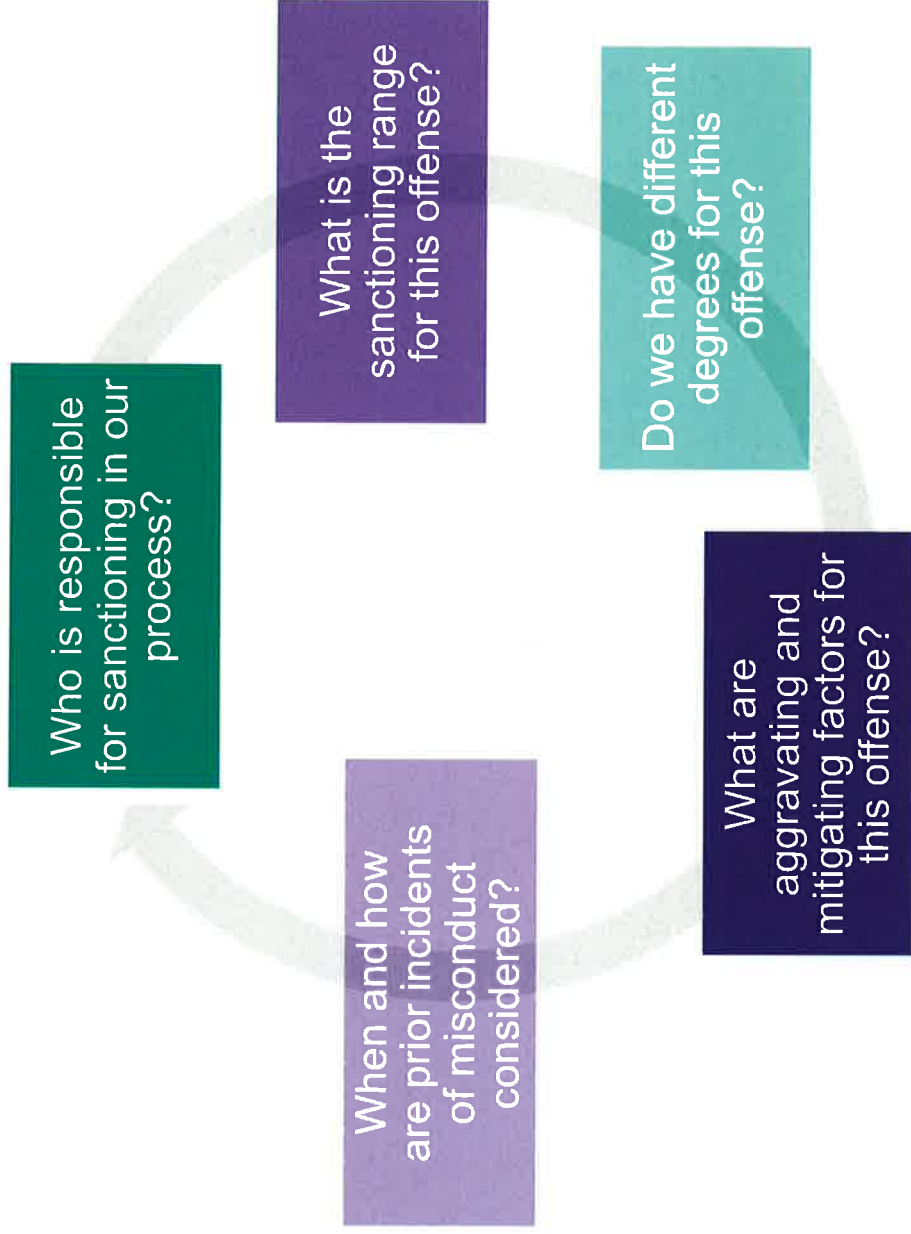
To accomplish this, the institution should:

- Publish a list of possible sanctions (required)
- Create “degrees” to reflect varying severity?
 - *E.g.*, for sexual assault, penetration may be a degree boundary
- Establish a possible sanctioning range for each offense, but retain flexibility for unanticipated circumstances?
- Provide list of mitigating and aggravating factors?
 - *E.g.*, for stalking, continuing after being told to stop may be aggravating factor
- Tell hearing officers how/whether to consider prior history of misconduct in accordance with standard procedures

SMALL GROUP DISCUSSION

Sanctioning

For each offense...



Choose Your Own Path An Adjudication Adventure



Getting Ready

The Title IX Coordinator informs you that you've been selected as the lead hearing officer for a new case and emails you the Investigative Report. He tells you that the case involves dating violence allegations between two students, Archer and Zion. Each party has made allegations of dating violence against the other. In essence, both parties are Complainants and both parties are Respondents. You have just reviewed your school's policies and procedures, as well as the definition of dating violence.

Your next step is to. . .

Getting Ready



Put the report in a safe place so that you can find it easily on the date of the hearing. No need to read about the case in advance – that's what the hearing is for.



Carefully read the entire report and draft all the questions you would want to ask the parties and witnesses before making any determinations of responsibility.



Carefully read the draft report but refrain from drafting questions for the parties and witnesses. Posing questions is the job of the advisors.






Scheduling Witnesses

The investigators determined that one identified witness, Archer's roommate Avery, provided information that was directly related to the allegations, but not relevant. Therefore, Avery's witness statement was provided in the "directly related" section of the evidence packet. Archer disagrees with the investigators that Avery's information is not relevant. In advance of the hearing, Archer requests that Avery be put on the schedule. Zion protests and says that the investigators got it right – Avery's information is not relevant.

You decide that you will. . .

Scheduling Witnesses

-  Deny Archer's request to have Avery testify at the hearing. The investigators already decided that Avery's information is not relevant, and it is not efficient for you to revisit that decision.
-  Grant Archer's request because the parties are allowed to freely gather and present evidence, and that includes witnesses, so you have no choice.
-  C. Look closely at Avery's statement to determine if Avery has relevant information. This is your decision to make, and there is no easy, automatic answer.



Late-Breaking Development

Three days before the hearing, Zion emails you and the investigator. Zion explains that when he was talking with some other students in the residence hall last night, a girl named Zoe volunteered that she once saw Archer slap Zion in the laundry room. Zion asks that Zoe be added to the witness list so that she can share what she saw at the fast-upcoming hearing. The investigator responds (to you only) that Zoe's information certainly appears relevant to the allegations.

You reply to Zion that. . .

Late-Breaking Development



Because Zoe's information appears relevant, you will add her to the witness list and send her a notice for the upcoming hearing.



Because Zoe's information appears relevant, you will postpone the hearing so that she can be interviewed and all parties put on notice of the new information.



Despite the fact that Zoe's information appears relevant, it is too late to add her to the upcoming hearing, but Zion is free to raise the issue on appeal if he does not prevail in the case.



Hearing Logistics

The hearing is tomorrow. Although the plan was for everyone to be in the same large room, Zion is now expressing discomfort about being near Archer and wishes to participate via video conference. Zion's advisor offers that he and Zion can Zoom in from his office across campus. Archer protests that everyone should be in the same room. Archer argues that the new proposed arrangement is unfair because Zion's advisor will be able to do more off-camera coaching.

You decide to . . .

Hearing Logistics



Deny Zion's request to participate remotely because, absent exceptional circumstances, it is better for everyone to be present in the same manner.



Grant Zion's request to participate remotely so that Zion and Avery don't have to be in the same room, but ask that Zion's advisor be present in person.



Grant Zion's request to appear remotely.



Unexpected Advisor

The hearing is today. When Archer and his advisor arrive, you are surprised to see that the advisor is not the same person who has been serving as Archer's advisor until now. The new advisor explains that she is an attorney who has just been retained by Archer's family and that she will be taking over from the geography professor who was serving as Archer's advisor previously.

You respond by . . .

Unexpected Advisor



Welcoming Archer's new advisor and introducing yourself. After all, each party is entitled to be accompanied by an advisor of their choice.



Greeting Archer's new advisor and delaying the hearing by one hour so that the Title IX Coordinator can get her assent to the rules and to the school's non-disclosure agreement.



Telling Archer and the new advisor that once an advisor for a case has been selected, no changes can be made, and Archer will need to stick with the geography professor.



Tough Questions

The hearing is progressing, and it is becoming apparent that Archer and Zion know a lot about each other. When it is time for Archer to be questioned, Zion's advisor says, "Archer, isn't it true that after you got into a physical altercation with a date last summer, your psychologist wrote in your chart that you were a danger to yourself and others?"

Time for an on-the-spot relevance decision!
You. . .

Tough Questions



Allow questions about the psychologist's notes, but block questions about what happened with the date last summer as irrelevant.



Block questions about the psychologist's notes, but allow questions about what happened with the date last summer.



Allow both questions.



Block both questions.



Tough Questions Continued

When you disallow the question about the psychologist's notes, Zion's advisor objects. He says that they are not seeking to introduce the counseling records themselves, and that the *content* of the records can be discussed because Archer freely disclosed it to Zion and others, therefore waiving any privilege. He asks you to reconsider your decision to disallow that part of the question.

You respond. . . .

Tough Questions Continued



That when you make a decision about whether a question is allowable, that decision is final, and any objections can only be made on appeal.



That you will consider Zion's objection and ask for Archer to weigh in, too. After listening, you change your mind and allow Zion's question about the psychologist's note.



That you will consider the arguments of both sides. You subsequently reaffirm your original decision to block the question about the psychologist's note.

Gatekeeping

One of the pieces of evidence is a two-minute video of Zane that shows the interaction between Zion and Zane at the hearing. The video is available on the website. Investigators are interested in questions about the video to play the video. Questions to be kept out because Zane is not there to answer questions about it.

An August 24, 2021 letter from the U.S. Department of Education removed the prohibition on statements not subject to cross-examination.

Please see the following for additional details:

[Written summary](#)

[Video update](#)

After listening to both sides, you...

Gatekeeping

A.

Allow the video, but note that it may be accorded lesser weight because Zane is the only student who was filmed, why it starts



Allow Zane to present



Disallow Zane to present because he is not prepared

An August 24, 2021 letter from the U.S. Department of Education removed the prohibition on statements not subject to cross-examination.

Please see the following for additional details:

- [Written summary](#)
- [Video update](#)

Reluctant Witness

Aidan, a friend of Archer's, testifies that he saw Archer at a party. Archer made belittling comments while he was eating at the party. When Archer had any drinks at the party, he refused to answer. And Archer refused to answer personal questions prior to the party, Aidan refuses to answer those questions, as well.

An August 24, 2021 letter from the U.S. Department of Education removed the prohibition on statements not subject to cross-examination.

Please see the following for additional details:

[Written summary](#)

[Video update](#)

Time for you to intervene. You...

Reluctant Witness



Explain to Aidan that if he refuses to answer questions about drug and alcohol consumption, you will naturally conclude that substance use was taking place.



Explain to Aidan that if he chooses not to answer some questions, then none of his statements will be able to stay on the record and his testimony will be disregarded completely.



An August 24, 2021 letter from the U.S. Department of Education removed the prohibition on statements not subject to cross-examination.

Please see the following for additional details:
[Written summary](#)
[Video update](#)

Explain to Aidan that if he chooses not to answer some questions, then none of his statements will be able to stay on the record and his testimony will be disregarded completely.



A Killer Question

When Zion is speaking at the hearing, you notice a major inconsistency between what Zion is saying now and what Zion told the investigators. The inconsistency and what it suggests about Zion's credibility is so significant that unless there is a convincing explanation for it, you think it could determine the outcome of the case. Archer's advisor is wrapping up her questions, and the glaring problem doesn't seem to have occurred to her or Archer.

When Archer's advisor says she has finished, you...

A Killer Question

A.

Ask Zion about the inconsistency yourself. It is a major issue and you want to hear if Zion has any explanation for it.



Move the hearing along and disregard the inconsistency since Archer didn't catch it. You are supposed to be objective and neutral. If you highlight Zion's inconsistency, it will appear that you are taking Archer's side.



Move the hearing along in a neutral way, but make a note to yourself that Zion's credibility has been called into question.



A Late Question

Following the hearing, you and the other two hearing panelists sit down to discuss the case and come to a decision. As you are going through the evidence, Dr. Chalmers says, “I wish I had thought to ask Archer about these ambiguous texts. They can really be read to have two totally different meanings.” You look at the texts in question and see that Dr. Chalmers is right. Depending on which interpretation you adopt, the whole case could come out differently.

You suggest that...

A Late Question



That since you aren't sure what the texts mean, you disregard them entirely.



That since you aren't sure what the texts mean, you take your best guess based on context, Archer's other answers, etc.



Email Archer and Archer's advisor with a follow-up question about the texts.



Tell both parties and their advisors that you need to briefly reconvene the hearing the next day to ask a few follow-up questions.

Weighing the Evidence

Zion's side of the case is supported by Zion, three other witnesses, and Zane's video. Archer's side of the case is supported by Archer, six other witnesses, and Archer's text messages.

When you look at it like that, you realize that you must...



Weighing the Evidence

A.

Assign each piece of evidence a weight depending on its relevance and reliability.



Find in favor of Archer because they each have one piece of non-testimonial evidence, but Archer has six witnesses as opposed to three for Zion.



Find in favor of Zion because actual video footage is more important than testimony and other forms of evidence.



Determining Responsibility

When you weigh all the evidence, you conclude that both Archer and Zion have engaged in acts of dating violence, but that Archer has done so more frequently and with greater severity.

Now that it is time to determine who should be held responsible, you issue a determination that...

Determining Responsibility

A.

Both are responsible for dating violence because both engaged in conduct that meets the definition of dating violence.



Archer is responsible and Zion is not responsible because Archer bears a higher degree of blame for the situation.



Neither is responsible because they each treated the other badly and therefore there is no real victim.



Sanctions

You have decided that both Archer and Zion violated the school's prohibition on dating violence. Under your school's procedures, the hearing officer(s) also decide the sanctions. You consider the list of possible sanctions, which ranges from a formal reprimand and disciplinary probation to expulsion.

Your sanctioning decision is to...

Sanctions



Suspend both Archer and Zion for two semesters. Title IX requires that they receive the same sanction since they were found responsible for the same policy violation.



Expel Archer and suspend Zion for one semester because those sanctions best line up with the level of culpability of each Respondent.



Expel both Archer and Zion because all dating violence is worthy of expulsion, regardless of degree.



Post-Script

The next time you see your department Chair, you mention that the hearing is over. She knows you were handling a dating violence case between Archer and Zion – their troubles became pretty common knowledge in the months leading up to the hearing. “Oh my gosh,” she says. “That must have been intense. How did it all turn out?”

You reply ...

Post-Script



By giving her the highlights of the hearing and explaining your rationale for the two different sanctions. You can talk to her because she is your boss, but you remind her that the information is confidential.



By stating that both students were found responsible, Archer was expelled, and Zion was suspended for one semester. Given the confidentiality rules, that's all you can tell her.



By saying that you're not sure what you're allowed to say about the case and need to check with the Title IX Coordinator.

REASSURING WORDS FROM THE 2020 REGULATIONS

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.

Thank you.

JacksonLewis


Your Jackson Lewis Title IX Team



Joshua D.
Whitlock



Sarah Ford
Neorr



Carol R.
Ashley




Susan D.
Friedfel



Monica H.
Khetarpal



Crystal L.
Tyler



Nicholas A.
Simpson



Laura A.
Ahrens

To get in touch with the team,
please contact **Josh Whitlock**.
Josh.Whitlock@JacksonLewis.com
(980) 465-7242

Legal Disclaimer

Thank you for licensing our 2021-2022 Title IX Video Training Series (the "Series"). Your use of the Series is not a substitute for legal advice from an experienced attorney licensed to practice in your jurisdiction. The Series is being licensed to you as an aid to your consultation with outside legal counsel or in-house legal staff and experienced professionals. By making the Series available to you, we are not providing you with legal, accounting, or other professional advice or making recommendations regarding legal rights, duties, defenses, or strategies. Statutes, rules, regulations, administrative agency interpretations, and case law change and vary from court to court, agency to agency, state to state, and jurisdiction to jurisdiction. Understanding of the law is evolving rapidly in this area. This Series is our best attempt to summarize the current state of the law and is subject to change. If you are using the Series to develop policies or to make decisions, you should consider all appropriate facts and legal, operational, and business risks and consult with an experienced and knowledgeable attorney before taking any definitive actions. The focus of the Series is on addressing complaints of Sexual Harassment, as that term is defined under Title IX of the Education Amendments Act of 1972 and its implementing regulations ("Title IX"). Other federal, state, and local laws may apply but are outside of the scope of the Series. The examples used in the Series are fictional and any similarity to actual situations is unintentional. Title IX applies equally to all people of all genders, gender identities, and sexual orientations; any single example used in this Series is used for that purpose only. Portions of the Series may qualify as "attorney advertising" in some jurisdictions. Jackson Lewis, however, intends for it to be used only for educational and informational purposes.

No Unauthorized Use

The Series is licensed to you on a non-exclusive basis for your use. By purchasing and/or receiving the Series you agree to accept this limited license and become a licensee of proprietary Jackson Lewis-owned materials and accept all terms and conditions of this license and agree to abide by all provisions. No other rights are provided, and all other rights are reserved. The Series is proprietary and is licensed to the licensee only for the licensee's use. This license permits the licensee to use the Series personally and/or internally to the licensee's school for training purposes only. The Series may be used to train your Title IX team and thus is subject to 34 CFR Part 106.45(b)(10), requiring all written training materials to be posted publicly on your school's website. No other public display, sharing, or publication of the Series by a licensee/purchaser is permitted. You are not authorized to copy or adapt the Series, including both the recorded video component and the full set of written slides, without explicit written permission from Jackson Lewis, and no one may remove this license language from any version of the Series materials. Licensees will receive a link to the full set of written slides from Jackson Lewis. That link, and that link only, may be posted to the licensee's website for purposes of permitting public access of the written materials for review/inspection, only. Should any licensee post or permit someone to post any portion of the Series, including both the recorded video component and the full set of written slides, to a public website outside of the authorized link to the written slides, Jackson Lewis will send a letter instructing the licensee to immediately remove the content from the public website upon penalty of copyright violation. The Series may not be used for any commercial purpose except by Jackson Lewis.



DECISION MAKERS MODULE • QUIZ

Relevancy

Each of the text blocks below contains a statement made by the Complainant or the Respondent in a new sexual assault case.

For each statement, try to determine if it is Relevant, Directly Related, or Not Even Directly Related.

Hearing

Relevancy* Pop Quiz

QUIZ

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

Complainant: I've always wanted to be a doctor, and I'm planning to go to med school.

Respondent: We studied chemistry for about two hours before deciding to take a break.

Complainant: We ate dinner at Subway before going to Kai's room.

Respondent: This process is even more stressful because my mom is going through breast cancer right now.

Complainant: The next day, Kai called me to apologize for what happened.

* Caution – Highly Context Dependent

Relevancy* Pop Quiz

QUIZ

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

Relevant

Complainant: I've always wanted to be a doctor, and I'm planning to go to med school.

Not Even Directly Related

Respondent: We studied chemistry for about two hours before deciding to take a break.

Directly Related

Complainant: We ate dinner at Subway before going to Kai's room.

Directly Related

Respondent: This process is even more stressful because my mom is going through breast cancer right now.

Not Even Directly Related

Complainant: The next day, Kai called me to apologize for what happened.

Relevant

* Caution – Highly Context Dependent