

May 2020 Final Title IX Regulations

Jody Shipper

Meet Your Facilitator

J S

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THE UNIVERSITY OF MICHIGAN



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.



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03

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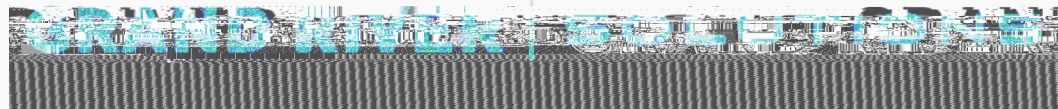
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Hearing, Deliberations, & Appeal

Regulatory Overview

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01



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

- o Sex Discrimination
- o Achievement Awards
- o Athletics
- o Benefits
- o Financial Aid
- o Leaves of absence and re-entry policies
- o Opportunities to join groups
- o Pay rates
- o Recruitment
- o Retention Rates
- o Safety
- o Screening Exams
- o Sign-on Bonuses
- o Student and Employee Benefits
- o Thesis Approvals
- o Vocational or College Counseling
- o Research opportunities

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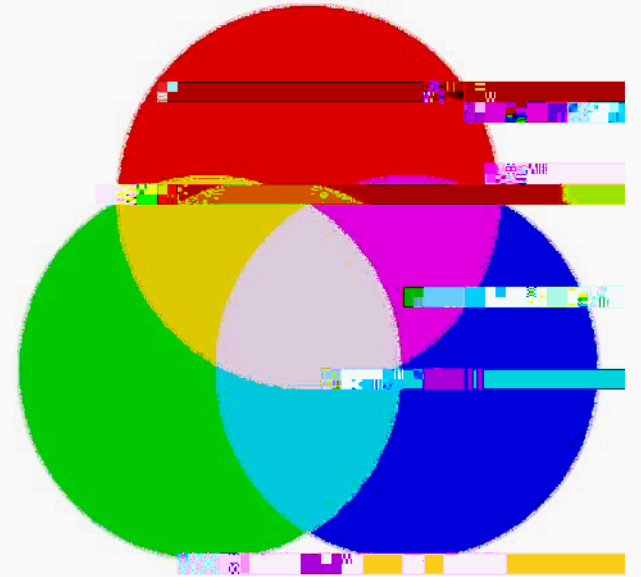
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What (Mis)Conduct is Covered by the New Regulations? Processes?

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Definition of Sexual Harassment



Definition of Sexual Harassment

Quid Pro Quo

What is Severe and Pervasive?

Severe: How much does it take?

Pervasive: How many times?

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Objectively Offensive

OBJECTIVELY, a reasonable person in a similar position would agree that it is severe, pervasive, and offensive based on totality of circumstances, from perspective of a



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

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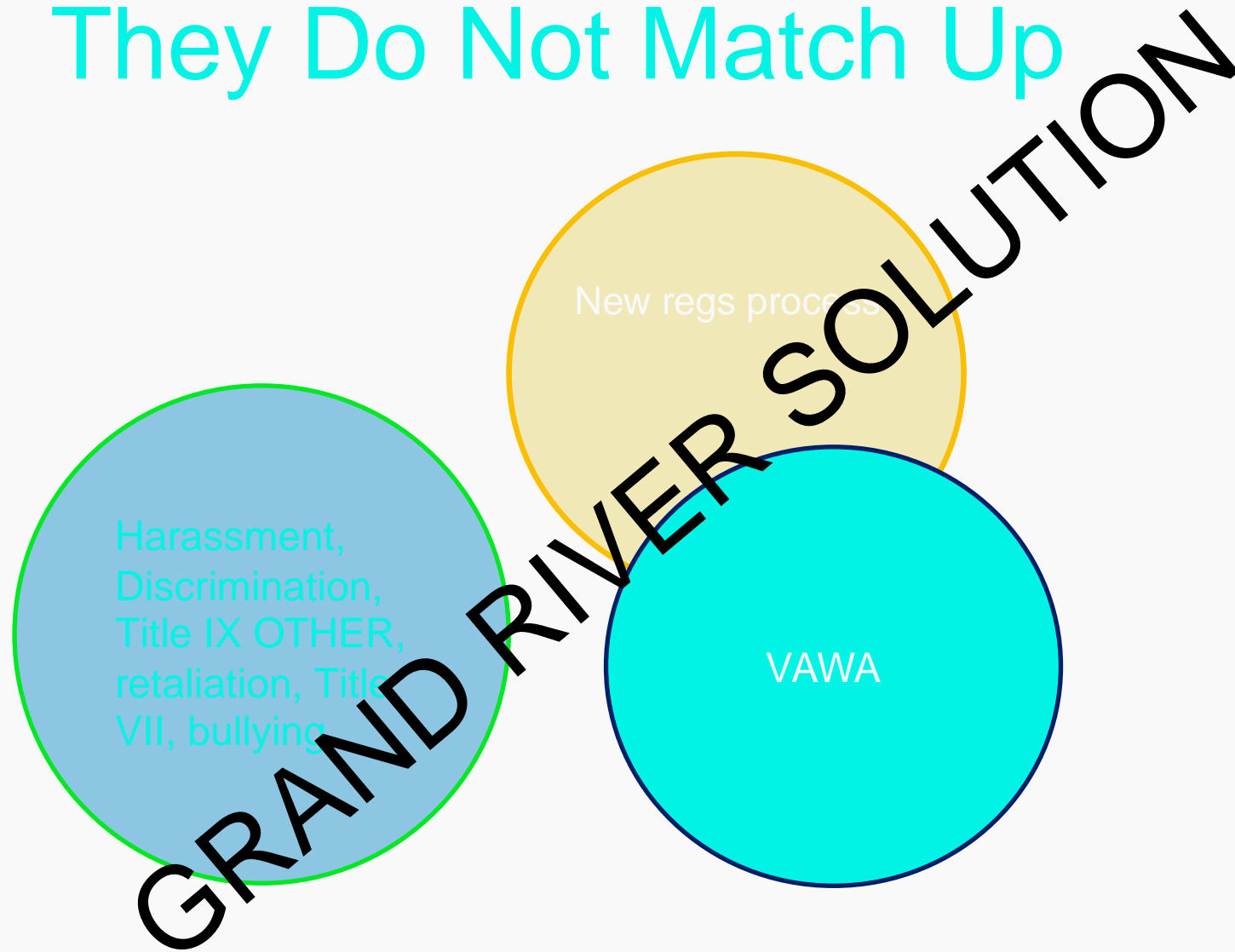
Dating Violence

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Note: They Do Not Match Up



All Who Carry Out a Role



Must be trained in accordance with the requirements in the regulations

Avoiding Prejudgment

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Impartiality and Bias

- ! Past personal or professional experience
- ! Common sense approach to evaluating whether a particular person serving in a Title IX role is biased
- ! No generalizations

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Someone Made a Complaint!

Mandatory Response to Each Report



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

Title IX Coordinator Must Discuss:

Rights, resources, options

Discuss support measures

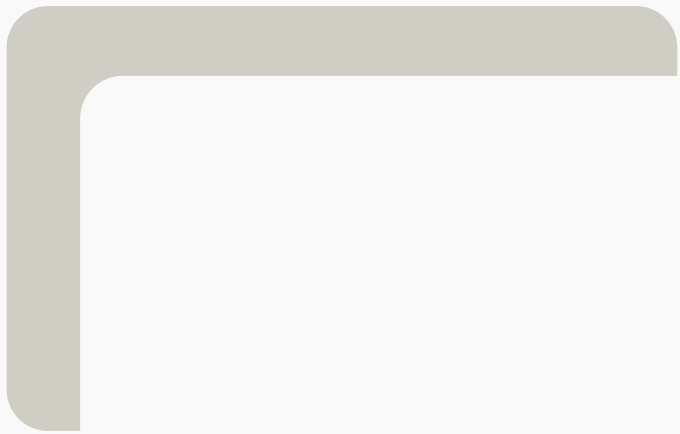
Can have support without filing formal complaint

Options for resolution and how to File

What the process will look like (optional step)

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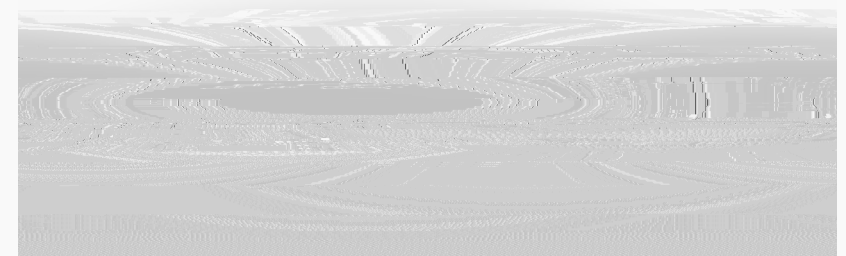
Supportive Measures



Not Punitive

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

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Emergency Removal of Student

- ! High threshold
- ! Not a determination of responsibility
- ! Whether or not grievance is underway
- !

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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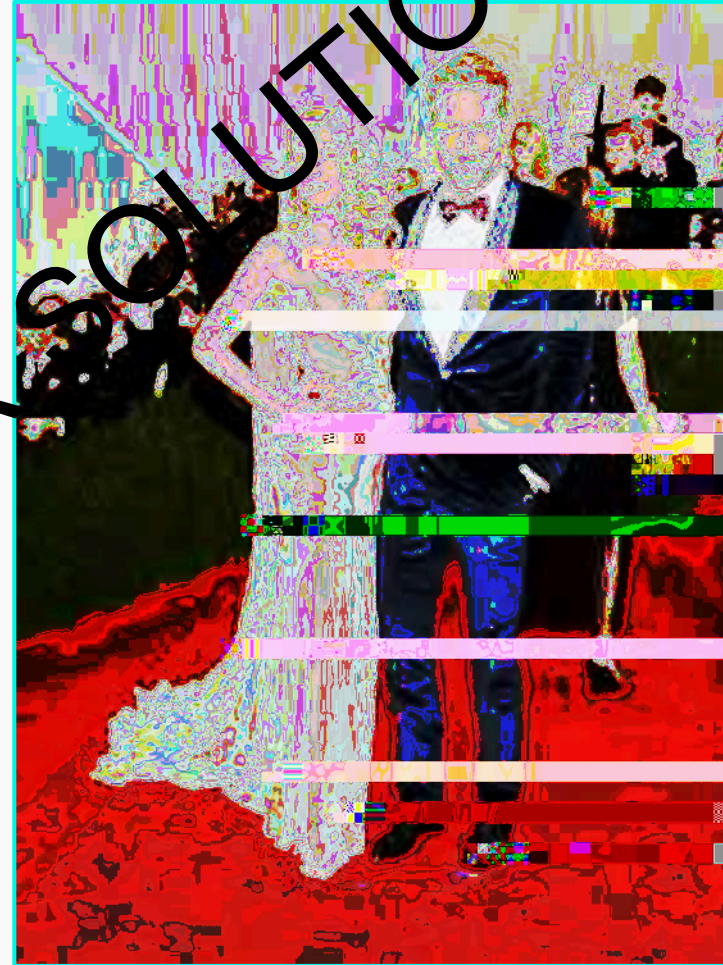
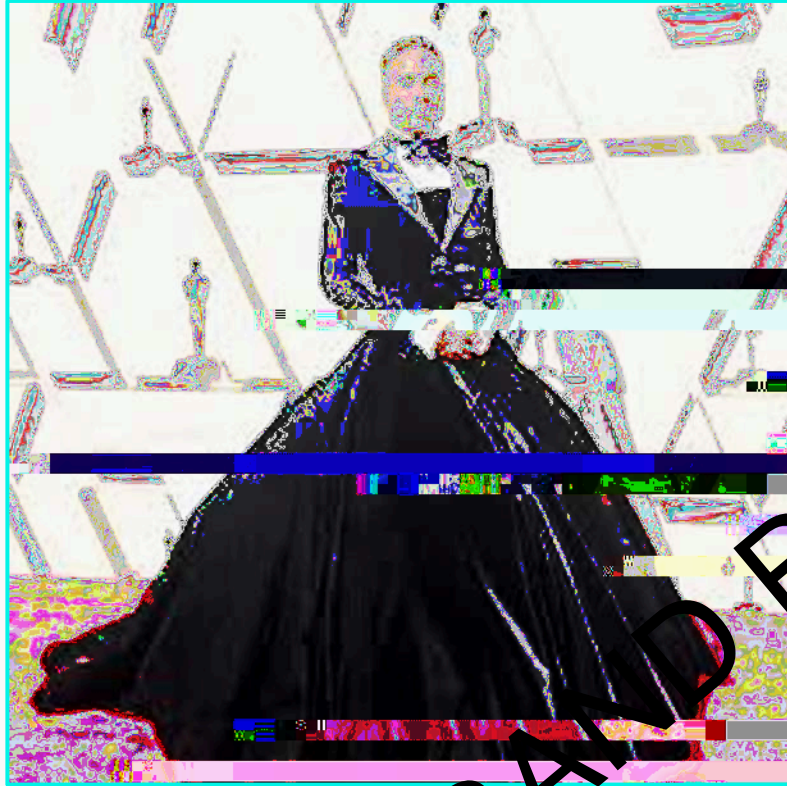
Actual Knowledge

Mandatory
Investigation
Requires
Formal
Complaint

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- ! Complaint filed, SIGNED, requests investigation
- ! Coordinator files, SIGNS, starts investigation

Complaint . . . or FORMAL Complaint?



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Dismissing Complaints

MANDATORY

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

DISCRETIONARY

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

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But where does
the case go now,
Jody?

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Notice Requirements

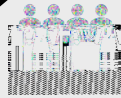
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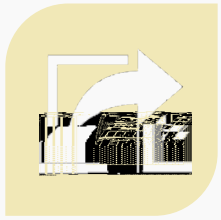
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The Procedural Requirements of the Investigation

Procedural requirements for Investigations



Notice TO BOTH PARTIES



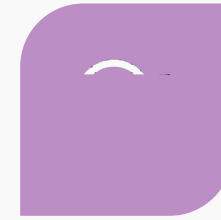
Equal opportunity to present evidence



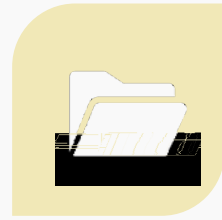
An advisor of choice



Written notification of meetings, etc., and sufficient time to prepare



Opportunity to review ALL evidence, and 10 days to submit a written response to the evidence prior to completion of the report



Report summarizing relevant evidence and 10 day review of report prior to hearing

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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 [MCL 15.106.30](#),
 - ! 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



Evidence Review

Investigative Report and Review

- ! After reviewing and considering the comments on the evidence, the investigator will generate a report that summarizes the relevant evidence.
- ! That report will be shared with the parties and they will have 10 more days to comment.

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ÒDirectly RelatedÓ and
ÒReleva (e)82e82eÓ

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Directly Related Evidence

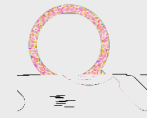
- ! Regulations do not define "Directly Related" Evidence
- ! Preamble states it should be interpreted using its plain and ordinary meaning.
- ! Term is broader than:
 - ! "all relevant evidence" as otherwise used in Title IX regulations, and
 - ! "any information that will be used during informal and formal disciplinary meetings and hearings" as used in Clery Act

Who Decides?

- ! Department emphasizes repeatedly in Preamble that investigators have discretion to determine relevance
 - ! Subject to parties' right to argue upon review of "directly related" evidence that certain information not included in investigative report is relevant and should be given more weight
- !

Essential steps of an investigation

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Notice of formal investigation



Initial Interviews

Evidence Collection

Report writing

The Process: Developing an Investigative Strategy

Receive Report

Develop a timeline

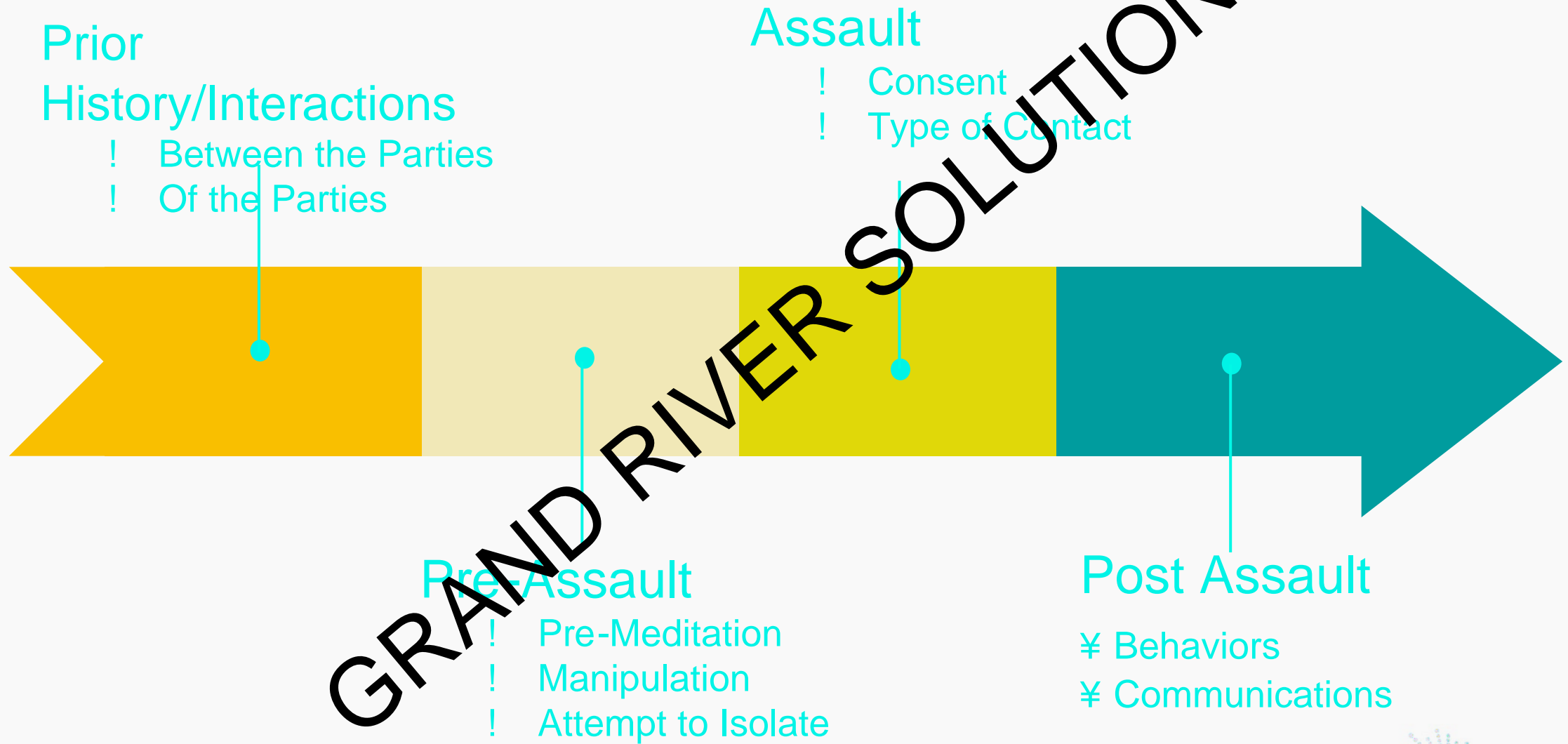
Identify Witnesses

Identify Potential Evidence

Develop Strategy to Collect Evidence

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Investigation Timeline



Identify and Interview Parties/Witnesses

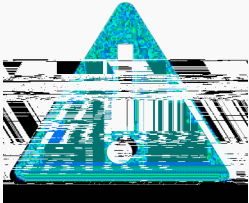
Interview Objectives

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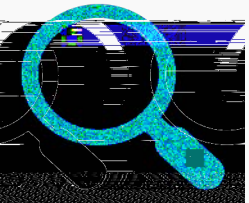
Build rapport

- Build trust
- Empower
- Listen



Physical and Emotional Safety of the Victim/Respondent

- Safety of the Community



Police/Campus

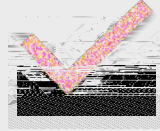
- Medical care
- Supportive action

Text Messages

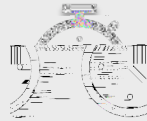
- Photographs
- Names and contact info for witnesses

Prior to the Interview

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Secure an appropriate meeting location



Allow for enough time to conclude the meeting



Prepare yourself for the meeting



If interviewing a party, inform them of their right to have an advisor present.

Set Expectations

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What they should expect of you

- ¥ That you are neutral
- ¥ That you will listen, what they are saying is important to you
- ¥ That you will keep the information they share private
- ¥ What you will do with recording/notes
- ¥ That you may have to ask difficult questions

What you expect of them

- ¥ Honesty
- ¥ That they will seek clarity if needed (give them permission to do so)
- ¥ That they won't guess or fill in blanks

Investigative Interviews



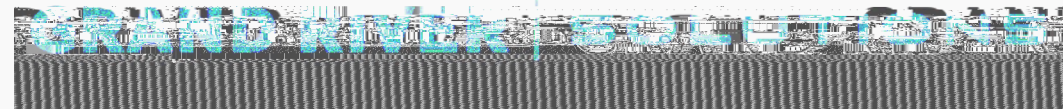
Start by eliciting a narrative

The Investigation Report

Narrowed Jurisdiction and Expansive Procedural Requirements

08

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The Investigation Report

- ! Must summarize the relevant evidence.
- ! The Department is clear that it takes no position on such elements beyond what is required in these final regulations; namely, that the investigative report must fairly summarize relevant evidence.

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Investigative Report: Form

- ! Develop or adopt a template and use it

Investigative Report Content: Overview

In this section, provide a very brief overview of the case. Include:

- ! the names of the parties,
- ! the applicable policy(ies)
- ! the prohibited conduct alleged,
- ! the date, time, and location of the conduct,
- ! a brief description of the alleged misconduct

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Investigative Report Content: Identification of the Investigators

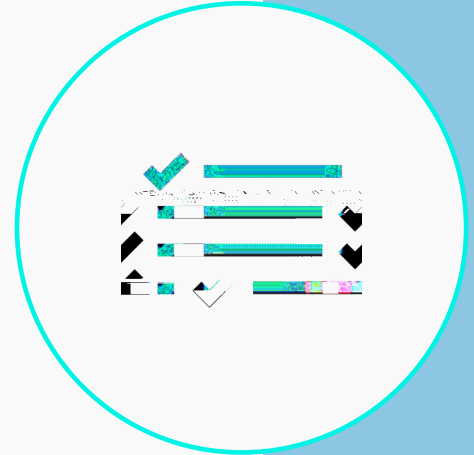
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Investigative Report Content: Objective of the Investigation and the Report

- ! This is a statement that sets forth the objective of the investigation, and
- ! The objective of the report

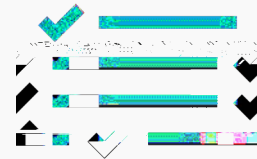
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Investigative Report Content: List the Witnesses

- ! List those who were interviewed
- ! List those who were not interviewed
- ! Simple list
- ! Detailed list

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Example of a Detailed List:

Witness Name	Witness identified by:	Information offered
John Doe	Reporting Party	Mr. Doe is the Reporting Party's best friend. He was with the Reporting Party the night of the reported incident.
Jane Doe	Investigators	Jane Doe is the Responding Party's roommate. It is believed that she saw the Reporting Party leave the Responding Party's residence immediately following the reported incident.



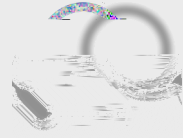
Investigative Report Content: Evidence Collected

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The final Title IX regulations require that all evidence obtained as part of the investigation that is directly related to the allegations in the formal complaint be shared with the parties and made available at any hearing to give each party equal opportunity to refer to such evidence during the hearing including for the purposes of cross-examination.

In this section, list the Evidence or Refer to Appendices.





Appendices



Examples of Appendices

Appendix A: witness testimony only (e.g., transcripts, statements summaries, etc.);

Appendix B: relevant documentary evidence (e.g., text messages, SANE reports, photographs, etc.);

Appendix C: the remaining evidence deemed irrelevant, but directly related to the allegations in the formal complaint;

Appendix D: the procedural timeline.

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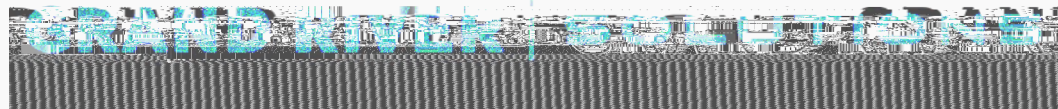
Investigative Report Content: Summary of the Evidence

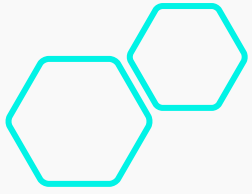
In this section, include a summary of all relevant evidence. This section can be organized in several ways. It is important that, however organized, the evidence is summarized clearly and accurately, and without opinion or bias. In this section, the writer

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Pre-Hearing Tasks

09





Logistics

Scheduling participants

Reserving space

Provision of accommodations

Requests for delays;
accommodations

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The Parties and their Advisors, and the Witnesses

Pre-hearing instructions

- ¥ Via conference or meeting
- ¥ In writing

Set expectations

- ¥ Format
- ¥ Roles of the parties
- ¥ Participation
- ¥ Evidence
- ¥ Decorum
- ¥ Impact of not following rules

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The Decision Maker(s)

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Review evidence and report

Review applicable policy and procedures

Preliminary analysis of the evidence

Determine areas for further exploration

Develop questions of your own

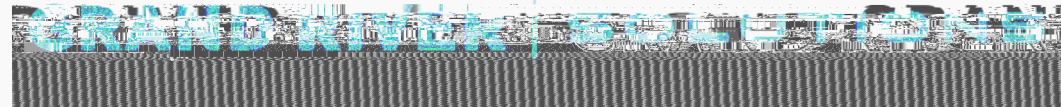
Anticipate and prepare for the party's questions

Anticipate challenges or issues

The Hearing

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10



Procedural Requirements for Hearings

The Essential Elements of All Hearings

Clear Procedures

Due/Fair Process

Fair, Equitable, and Neutral

Consistency

Trauma Informed

Well-Trained Personnel

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Clear Procedures

The Process

¥ Pre-hearing process, submission of evidence, opening statements, other statements, closing statements, findings,

The Players

¥ The roles of all participants

The Evidence

¥ Relevancy, Exclusions, Timing of submission, how to submit, who decides, etc.

The Outcome

¥ Deliberations; Notice; manner and method communicated.

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Logistics of the Hearing

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What do we
need to do
with all of
this?

Space



Technology

Clear & Comprehensive
Procedures

Considerations for the Physical Space

- ! Room location and set-up
 - ! Entrances, exits, and proximity
- ! Privacy screens & partitions
- ! Technology
- ! Hallway control
- ! Space for extra visitors

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Remote Participation

- ! In whole or in part?
- ! Communication considerations
 - ! Chat function or emails
- ! Private consultation between parties and advisors
 - ! Use of breakout rooms
 - ! Communication considerations
- ! Practice runs
- ! Connectivity Considerations

Other Considerations

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Roles and Responsibilities

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Role of the Advisor



Review evidence and report

Review applicable policy and procedures

Determine key elements of policy

Facts most favorable to advisee

by asking questions
Foundauestptung questi?

Hearing Participants

Complainant

Respondent

Advisor

Adjudicator(s) or Panelist(s)

Investigator

Witnesses

Hearing Coordinator/Officer

!"#\$%\$&'()*+,"

Administrative Staff

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Who is
NOT
in the
Hearing?

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General Counsel

Parents

Student newspaper

Interested faculty

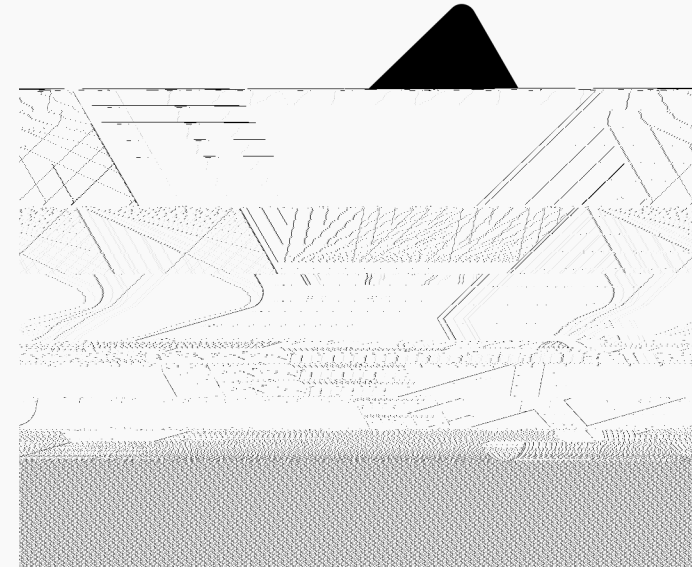
Title IX Coordinator

The Players

Hearing Advisors

- ! Will conduct cross examination
- ! Roles
- ! Training/Qualifications
- ! Communicating their role
- ! Enforcing their role

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The Players

Support Person

- ! Optional
- ! Silent
- ! Roles
- ! Communicating their role
- ! Enforcing their

The Players

The Coordinator/Chair

- ! Oversees the Process
- ! Maintains order/decorum
- ! Supports the panel
- ! Makes rulings
- ! Writes the decision
- ! Trained

The Players

The Decision Maker

- ! May be Hearing Chair or on panel
- ! Determines whether policy was violated
- ! Cannot be investigator, TIX Coordinator, or Appeals Officer

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Opening Instructions by the Chair

- ! Set the stage
- ! Reiterate charges
- ! Reiterate rules and expectations
- ! Reiterate logistics for the day

This should be scripted and used consistently.

GRAND RIVER SOLUTION



Opening Statements

- ! Permitted, but not required
- ! Policy should include purpose and scope
- ! If permitted, consider
 - ! Requiring submission prior to hearing
 - ! Word limit
 - ! Time limit


GRAND RIVER SOLUTION



Testimony

Procedures should be clear about:

- ! Order of/parties and witnesses
 - ! Could simply leave this up to the decision maker
- ! Order of examination
 - ! Questioning by the decision maker
 - !




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

GRAND RIVER SOLUTION





Cross Examination

Permissible Questions

- ! Questions must be relevant
- ! Not relevant
 - ! Duplicative questions
 - ! Questions that attempt to elicit info



Cross Examination Role of the Decision Maker

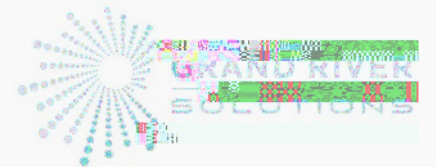
- ! Rulings by Decision Maker required
 - ! Explanation only required where question not permitted

GRAND RIVER SOLUTION

Cross Examination Role of the Decision Maker

- ! Rulings by Decision Maker required
 - ! Explanation only required where question not permitted

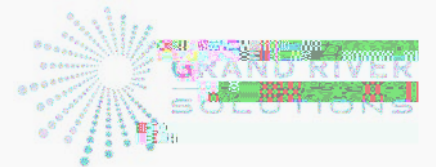
GRAND RIVER SOLUTION





Closing Statements

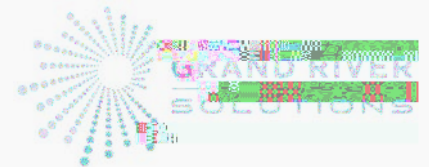
- ! Permitted, but not required
- ! Policy should include purpose and scope
- ! If permitted, consider
 - ! Time limit
 - ! Submission in writing after the hearing



Common Challenges

- ! Non- appearance by a party or witness
- ! Non- appearance by an advisor
- ! Party or witness appears but declines to answer some (or all) questions
- ! Disruptions
- ! Maintaining Decorum

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Tips for Increasing Efficiency

!"

Be prepared

!#

Have an experienced chair

!\$

Have back up plans for technology issues

!%

Require pre-hearing written submissions

¥ of opening statements

¥ of questions in

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Deliberations



Weighing the Evidence & Making A Determination

- 1) Evaluate the evidence collected to determine what factually is more likely to have occurred, and then
- 2) Analyze whether the conduct that happened constitutes a violation of the school's policies

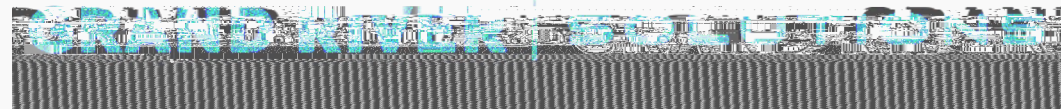
GRAND RIVER SOLUTION



Evaluating Evidence

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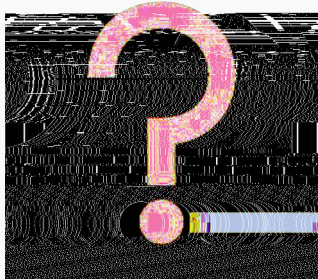
Evidence

ÒSomething (including testimony, documents, tangible objects) that tends to prove or disprove the

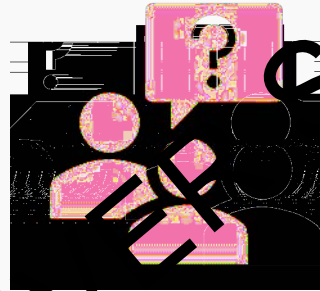
Types of Evidence

Assessing Authenticity

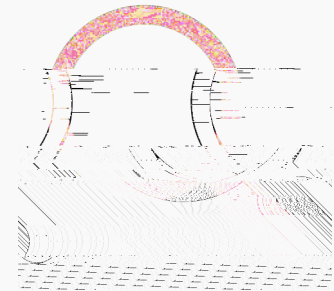
Investigating the products of the Investigation



Never assume that an item of evidence is authentic.



Ask questions, request proof.



Investigate the authenticity if necessary.

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What Impacts How We Assess Others

- " I saw a woman kick a vending machine. Wow, she is angry. Who would do that?
- " Me? I kicked the vending machine because I'm stressed and my kid is hungry and I'm running late, and who wouldn't kick the vending machine?
- " Confusing type of person and situation

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Confirmation Bias

Other Forms of Bias

- 1 Adultification Bias
- 1 The Halo Effect / Horns Effect
- 1 Beauty Bias
- 1 Height = Leadership, Strength
- 1 Stereotype threat
- 1 Inattentional Bias / Examiner's Bias

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Reliable, 4ee21



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 :

¥ 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.

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Credibility: Old Style

- " Corroboration
- " Inconsistencies
- " Insufficient explanation of inconsistencies
- " The logic of person's narrative
- " Inherent plausibility
- " Demeanor

"

It Is True, or Biased Conclusion?

A credible witness may give

- " Bias
- " Can you really spot a liar?
- "

Policy Analysis

!

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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 finding, by a preponderance of the evidence, that the policy was violated



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