

Virtual Certified Investigator Training Level 2



INTRO/ HOUSEKEEPING

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PRACTITIONERS



INSTITUTIONAL
COMPLIANCE SOLUTIONS

Overview, Definitions, and Requirements Under Title IX





THE LAW

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.





Required Grievance Process Training Title IX Coordinators, Investigators, Decision-Makers, & Informal Resolution Facilitators

- Definition of Sexual Harassment**

- Scope of Education Program/Activity**

- Investigation/Grievance Process**

 - Hearings
 - Appeals
 - Informal Resolution Processes
- How to Serve Impartially**
 - Avoiding Prejudgment of the Facts
 - Conflicts of Interest/Bias

- Decision Makers**
 - Technology at Hearing
 - Relevant Evidence/Questions

- Investigators**
 - Investigative Report Writing
 - Fairly Summarize Relevant Evidence



Sexual Harassment

- **Conduct on the basis of sex that satisfies one or more of the following:**
 - **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;**
 - **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**
 - **"Sexual Assault," "Dating Violence," "Domestic Violence" or "Stalking" as defined in the Clery Act.**

SEXUAL ASSAULT

Sexual Assault: An offense that meets the definition of rape, fondling, incest or statutory rape as used in the FBI's Crime Reporting system.

A sex offense is any sexual act directed against another person, without the consent of the victim, including instances where the victim is incapable of giving consent.

Rape: The penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim.

Fondling: The touching of the private body parts of another person for the purpose of sexual gratification, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental incapacity.

Incest: Sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law.

Statutory Rape: Sexual intercourse with a person who is under the statutory age of consent.

A person with long dark hair and a pink headband is holding a piece of torn cardboard with the words "NO IS NO!" written on it in red and black marker. The person is wearing a white long-sleeved shirt. The background is a soft, out-of-focus outdoor setting.



Consent

Consent:

- The Assistant Secretary will not require recipients to adopt a particular definition of consent with respect to sexual assault.

What does this mean?

- Create/use a definition of consent that makes sense to you and your campus. Make sure you can 1) explain it and 2) apply it.
- Make sure to include situations where consent cannot be obtained/given (ie. coercion, incapacitation) and clearly define those situations.



Dating Violence

Dating Violence: Violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim. The existence of such a relationship shall be based upon the reporting party's statement with 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.

Dating violence includes, but is not limited to, sexual or physical abuse or the threat of such abuse.

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Domestic Violence

Domestic Violence: A felony or misdemeanor crime 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 in which the crime of violence occurred; or**
- **by any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of the jurisdiction in which the crime of violence occurred.**

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STALKING

Stalking: Engaging in a course of conduct directed at a specific person that would cause a reasonable person to

- (1) Fear for the person's safety or the safety of others; or
- (2) Suffer substantial emotional distress.

For purposes of this definition:

Course of conduct means two or more acts, including, but not limited to, acts in which the stalker directly, indirectly, or through third parties, by any action, method device, or means follows, monitors, observes, surveils, threatens, or communicates to or about, a person, or interferes with a person's property.

Substantial emotional distress means significant mental suffering or anguish that may, but does not necessarily, require medical or other professional treatment or counseling.

Reasonable person means a reasonable person under similar circumstances and with similar identities to the victim.



JURISDICTION

Education Program or Activity

- **Locations, events, or circumstances (operations) over which the institution exercised substantial control**
 - **over both the respondent AND the context in which the sexual harassment occurs**
- **Includes any building owned or controlled by student organization that is OFFICIALLY RECOGNIZED by institution**
- **Includes online sexual harassment but it must be analyzed to determine if it occurs in education program or activity**
- **Does not create or apply a geographic test, does not draw a line between “off campus” and “on campus,” and does not create a distinction between sexual harassment occurring in person versus online.**

Jurisdiction Continued

- No single factor to determine exercise of substantial control
- Distinguishable from Clery definitions of non-campus building or property
- May require organization to abide by Title IX policies and procedures
- May have to bifurcate conduct

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Formal Complaint

- Document (paper, email, or online submission)
 - Signed by Complainant (digital signature is okay) or Title IX Coordinator
 - Alleging sexual harassment, against the respondent AND requesting that institution investigate.
- Complainant must be participating in, or attempting to participate in an education program or activity of the institution/district with which the formal complaint is filed.

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DISMISSAL OF A FORMAL COMPLAINT

MUST Dismiss if:

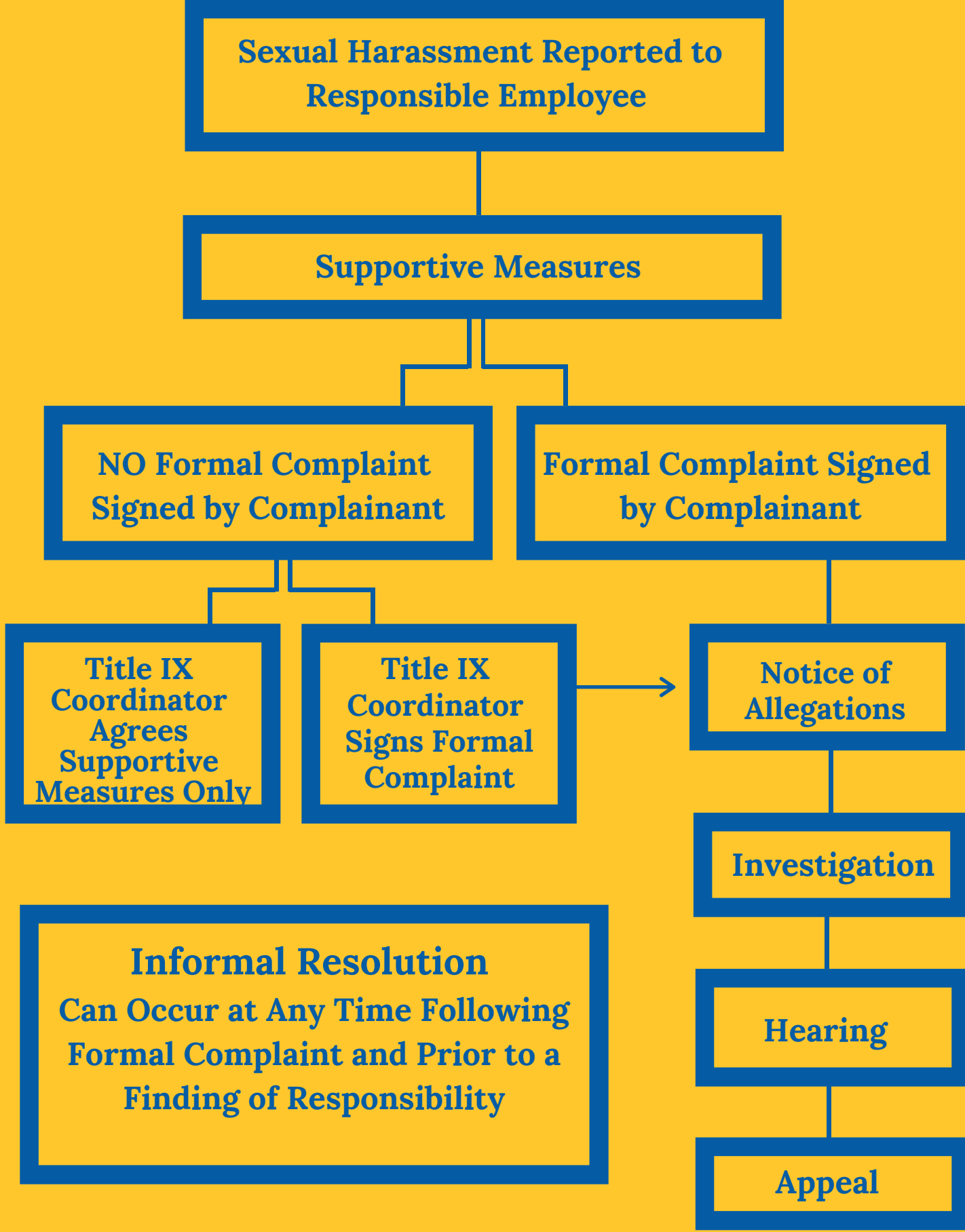
- Would not constitute sexual harassment as defined in regulations
- Did not occur in education program or activity
- Did not occur against a person in the U.S.
 - *May act under another provision of code of conduct

May Dismiss if:

- Complainant notifies Title IX Coordinator in writing that Complainant would like to withdraw formal complainant or allegations
- Respondent is no longer enrolled or employed by institution
- Specific circumstances prevent the institution from gathering evidence sufficient to reach a determination

*Must promptly send written notice of dismissal and reasons for dismissal simultaneously to parties

General Process Flow Chart



*A Formal Complaint MUST be dismissed if it does NOT meet definition of Sexual Harassment, occur in education program or activity, or in the U.S.

*A Formal Complaint MAY be dismissed at request of Complainant, if Respondent no longer at institution or institution is prevented from gathering evidence.





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Questions?

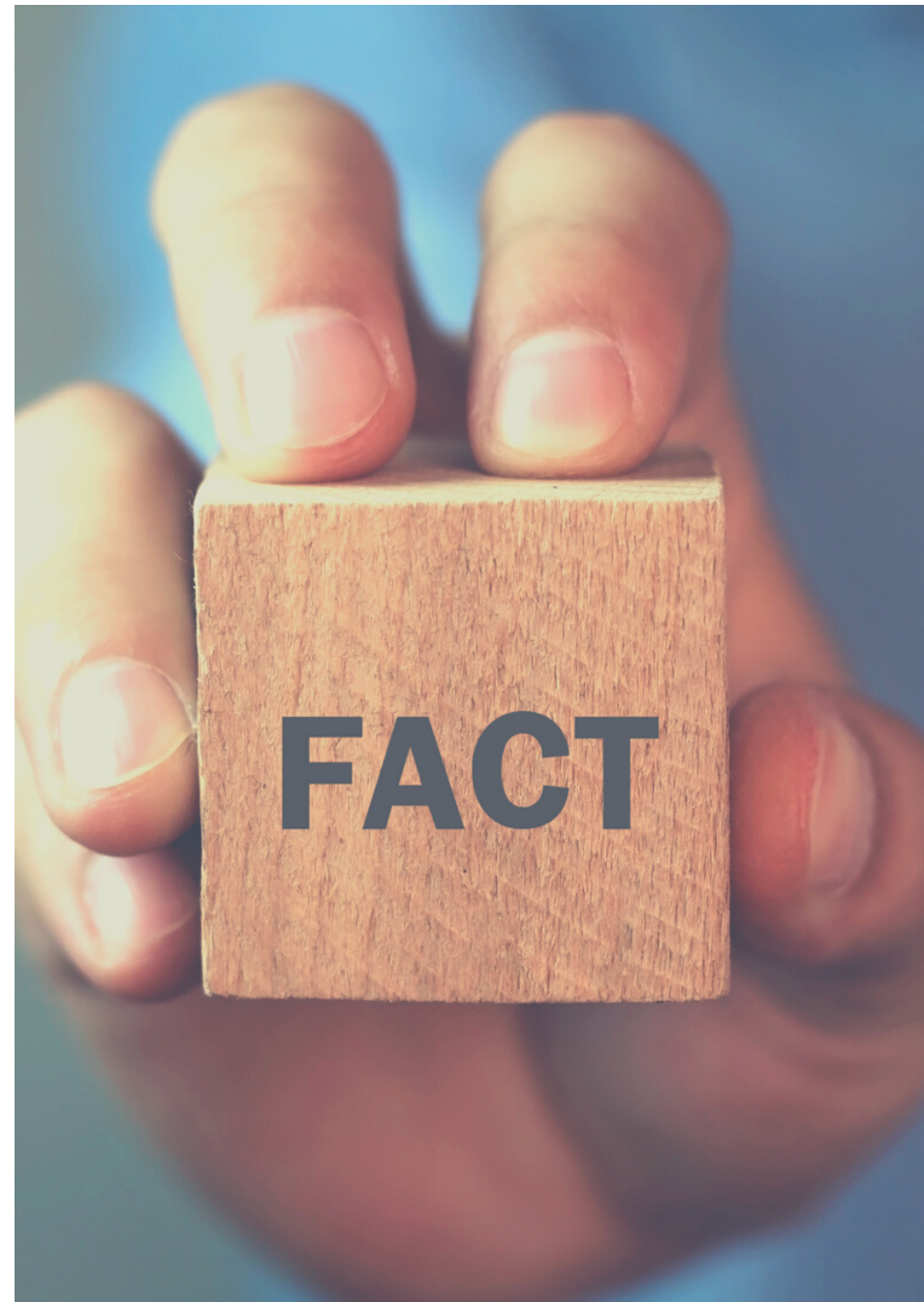
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The Investigation and Report Writing Process



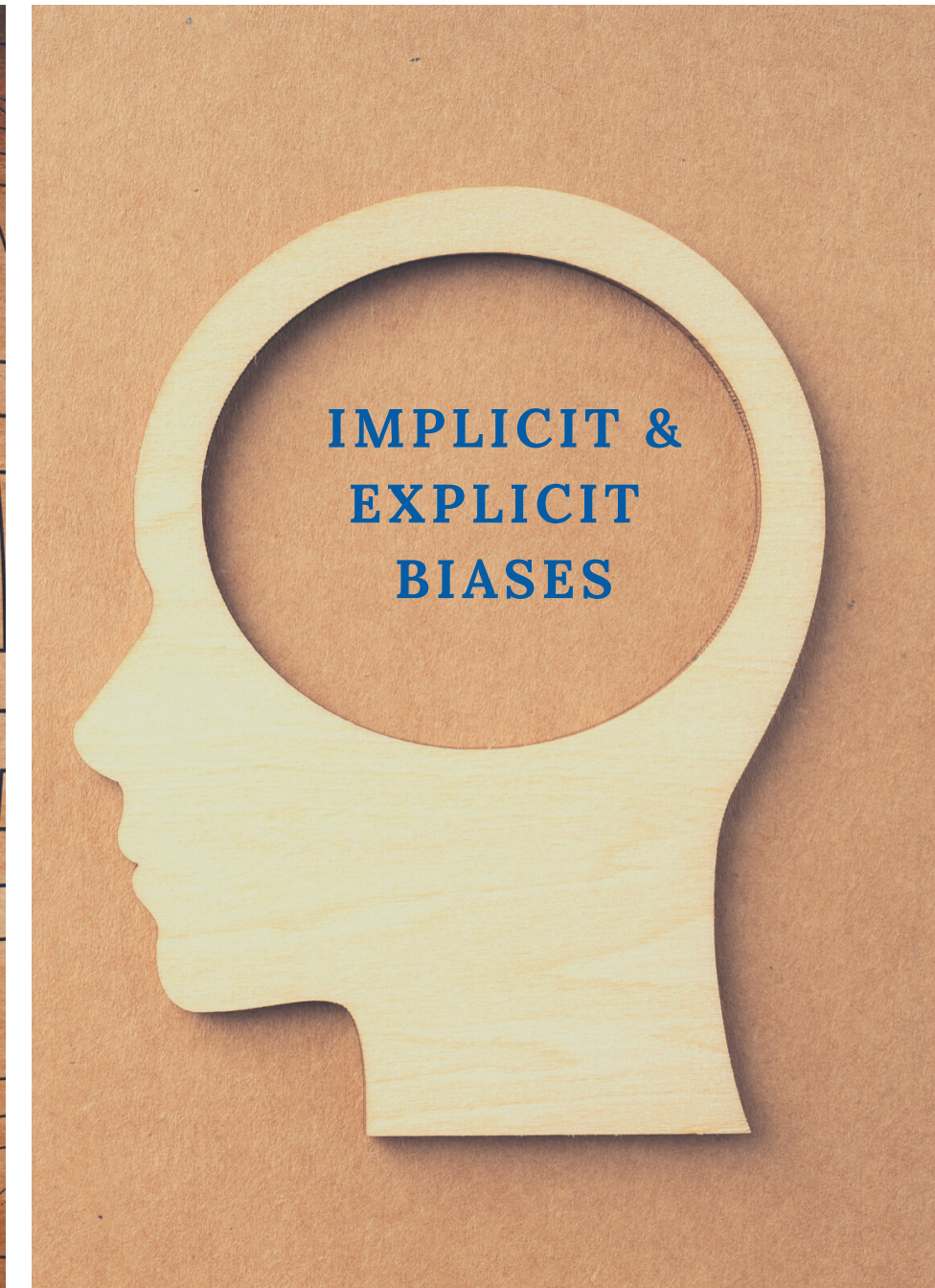
SERVING AS AN IMPARTIAL INVESTIGATOR



**AVOID PRE-JUDGMENT
OF FACTS**



**CONFLICTS OF
INTEREST**



BIASES

INVESTIGATIVE TIMELINE

1

INVESTIGATE

- Notice of Allegations
- Notice of all interviews with sufficient time to prepare

2

OPPORTUNITY
TO INSPECT
AND REVIEW
EVIDENCE
AND PROVIDE
WRITTEN
RESPONSE

10 days

3

INVESTIGATIVE
REPORT

4

OPPORTUNITY
TO REVIEW
FINAL REPORT
AND PROVIDE
WRITTEN
RESPONSE

10 days

5

HEARING

6

APPEAL

An hourglass with blue sand is positioned in the center-left of the slide. To its left, a calendar with a red cover is partially visible, showing dates like 9, 16, 23, 30, 10, 17, 24, and 31. The background is a light blue gradient.

REASONABLY PROMPT TIME FRAME

- Defined by the institution
- Must include 10 day periods as designated for review of evidence and review of investigative report
- Must address situations that justify short-term delays or extensions
 - Delays caused solely by administrative needs are insufficient
- Ability to choose calendar vs. business days

Notice of Allegations

- Sent "upon receipt of Formal Complaint"
- With "sufficient time" for a party to prepare for an interview
- Flexible to allow time to inquire with complainant about details regarding the allegations that should be included in written notice of allegations but were omitted from Formal Complaint.



Notice of Allegations Checklist

- Notice of Grievance Process; Including Informal
- Allegations Potentially Constituting Sexual Harassment
 - Identities of the Parties
 - Conduct Constituting Sexual Harassment
 - Date of Incident
 - Location of Incident
- Statement: Respondent Presumed Not Responsible/Responsibility Determined After Process
- Right to Advisor of Choice
- Code of Conduct Provision Prohibiting False Statements or False Information in Process

Written Notice of Investigative Interviews, Meetings and Hearings with Time to Prepare

- Include:
 - Date
 - Time
 - Nature of meeting/interview
- *DOE: permits both parties meaningful opportunity to advance their respective interests*





Investigation

- Interviews
- Collect Evidence
- Document Evidence
- Organize Evidence
- Evaluate Evidence as "related to the allegations vs. not related to the allegations"



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Witnesses (for all parties)

Fact Witnesses

Expert Witnesses

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**ASK AN
EXPERT**



Inspection and Review of Evidence "Directly Related to the Allegations"

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- Inculpatory and/or Exculpatory
- Parties must have opportunity to review and respond to the evidence (inculpatory and exculpatory) that relates to the allegations without the investigator having screened out evidence related to the allegations that the investigator does not believe to be relevant
- Greater than some courts have determined is required under constitutional due process
- Terms NOT defined
 - relevant, upon request, evidence directly related to the allegations
 - Directly related may be more broad than relevant





REPORT MUST

- **Fairly summarize relevant evidence (Core Purpose)**
- Be provided to parties AND advisors
- Hard copy or electronic

Evaluating Evidence



Must be able to...

- Evaluate, credit or assign weight to types of relevant, admissible evidence

Must: "objectively evaluate all RELEVANT evidence."

Focus on evidence pertinent to proving whether facts material to the allegations under investigation are more or less likely to be true.

Not Relevant:

- evidence about a Complainant's prior sexual history unless they are offered to prove that someone other than Respondent committed the sexual harassment, or if the questions and evidence concern specific incidents of the Complainant's prior sexual behavior with the respondent and are offered to prove consent
- any party's medical, psychological, and similar records unless the party has given voluntary, written consent
- information protected by any legally recognized privilege

May NOT adopt rules excluding certain types of relevant evidence (e.g. lie detector results, or rape kits)

Relevance



A hand is shown holding a large, light blue puzzle piece. The hand is positioned on the left side of the frame, with the thumb and index finger gripping the piece. The background is a light blue gradient. A vertical blue bar is located on the right side of the image, partially overlapping the hand and the puzzle piece.

RELEVANCY

- Regulations do not prescribe rules governing how admissible, relevant evidence must be evaluated for weight or credibility.
- Institutions have discretion to adopt and apply rules about evaluation of evidence.
 - Rules must apply to both parties.
 - Ex: weight or credibility given to prior bad acts so long as applied equally to complainants and respondents.
 - Rules should be reflected in training materials and provided on website.

RELEVANCE

- *"Relevance is the standard that these final regulations require, and any evidentiary rules that a recipient chooses must respect this standard of relevance. For example, a recipient may not adopt a rule excluding relevant evidence because such relevant evidence may be unduly prejudicial, concern prior bad acts, or constitute character evidence."*

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RELEVANT

Types of Evidence



DIRECT EVIDENCE

Does not require any reasoning or inference to arrive at the conclusion to be drawn from the evidence

- Look outside and see it raining

CIRCUMSTANTIAL EVIDENCE

Requires an inference be made between the evidence and the conclusion to draw from it

- Hear pitter patter on roof, see the wet ground, etc.

Both direct and circumstantial evidence can be credible.

ASSIGNING WEIGHT TO INFORMATION PROVIDED BY WITNESSES



EYEWITNESS



**FRIEND WHO PARTY
DISCLOSED TO NEXT
DAY**



**NURSE/MEDICAL
PROFESSIONAL**

ASSIGNING WEIGHT TO EVIDENCE



VIDEO



SOCIAL MEDIA



**JOURNAL/
WRITTEN INFORMATION**



Findings/ Conclusions?

- Not prohibited by Department
- HOWEVER- "decision-maker is under independent obligation to objectively evaluate relevant evidence, and thus cannot simply defer to the recommendations made by the investigator in the investigative report."



Concerns About Review of Report from Regulations

- Rigid Time Frames
- Self Doubt
- Overly burdensome with negligible benefits
- Not required in criminal/civil context

Department of Education Says...

re: purpose of review



Due Process and Fundamental Fairness

Theme for Department throughout regulations- especially in report and review section.

Burden of Gathering Evidence Remains on Institution

Not on the parties

Meaningful Opportunity for Parties to Understand What Institution Deems Relevant

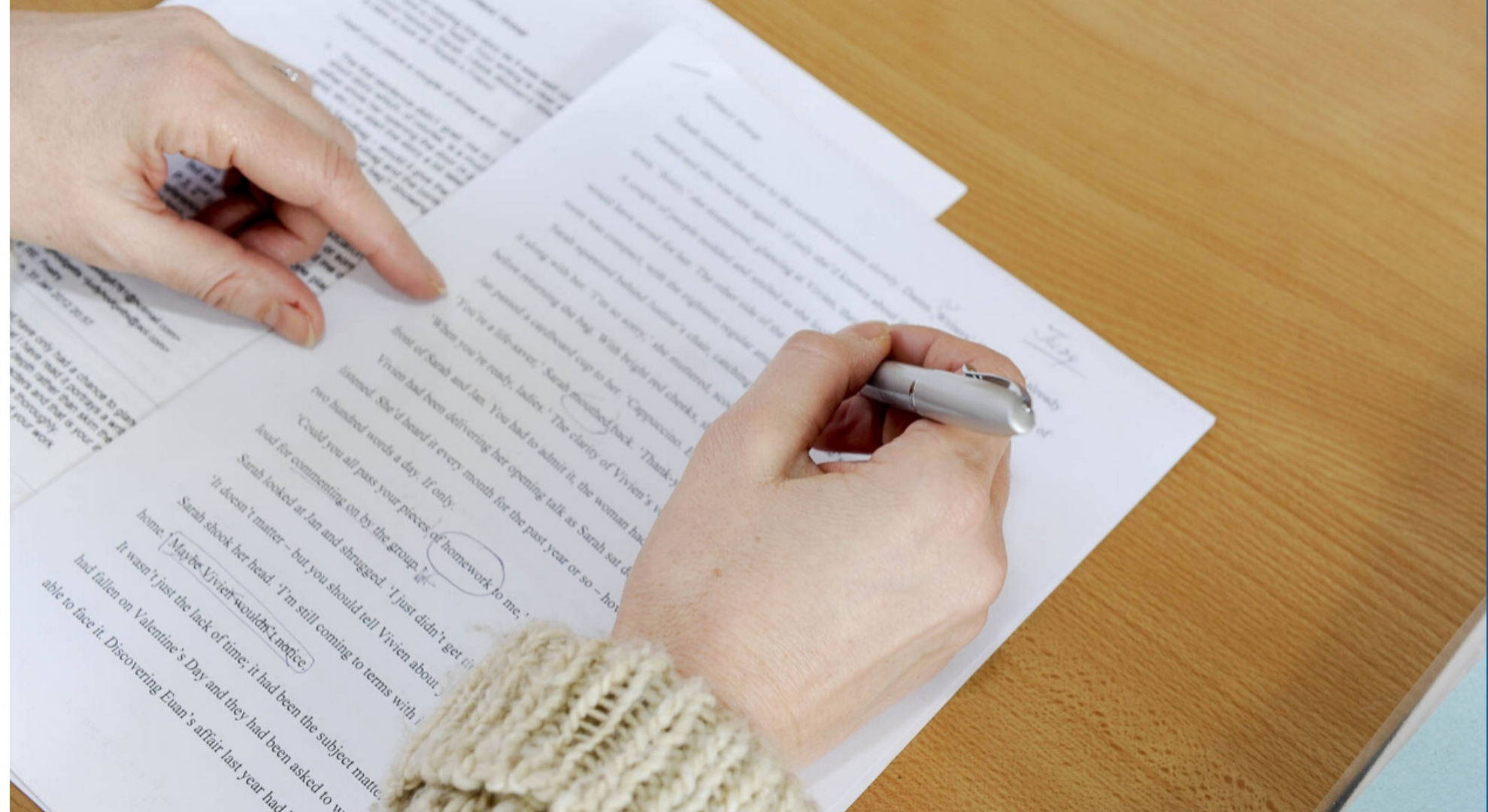
So that parties can advance their own interests for consideration by the decision-maker(s)

Written Responses



- Institutions "may give the parties the opportunity to provide additional information or context in their written response to the investigative report to remedy any asymmetrical information delivery..."
- This is NOT considered "new evidence" for purposes of appeal.
- Discretion to choose whether to provide a copy of each party's written response to the other party to allow them to prepare of the hearing-
 - however must apply decision equally to both parties.
- Recommended: at least document what was received and when it was received. Include in information to go to the decision-maker at the hearing

Amending Report After Review and Pre: Hearing



No requirement to amend report

- Department is "confident that even without explicit regulatory requirements, best practices and respect for fundamental fairness will inform recipients' choices and practices with regard to amending and supplementing the report."
- "Recipients enjoy discretion with respect to whether and how to amend and supplement the investigative report as long as such rules and practices apply equally to both parties."

"The final regulations give the parties ample opportunity to challenge relevancy determinations"

- The investigator is obligated to gather evidence directly related to the allegations whether or not the recipient intends to rely on such evidence (for instance, where evidence is directly related to the allegations but the recipient's investigator does not believe the evidence to be credible and thus does not intend to rely on it). **The parties may then inspect and review the evidence directly related to the allegations and provide written response.**
- The investigator must **take into consideration the parties' responses** and then determine what evidence is relevant and summarize the relevant evidence in the investigative report.
- **The parties then have equal opportunity to review the investigative report; if a party disagrees with an investigator's determination about relevance, the party can make that argument in the party's written response to the investigative report and to the decision-maker at any hearing held.**
- The decision-maker is obligated to objectively evaluate all relevant evidence and the **parties have the opportunity to argue about what is relevant (and about the persuasiveness of relevant evidence).**



Role of Investigator in Hearing?

- Not specified in regulations
- Witness?
- Presenter on behalf of institution?
- No role at all?





Investigation Flow Chart







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Questions?

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Report Writing: Organizing, Summarizing, Analyzing



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Make the Life of a Decision- Maker Easier!

- **Include necessary process dates and information in your report so they can insert into their Notice of Determination**



Decision-Maker

Determination Regarding Responsibility Checklist

- Identification of the Allegations

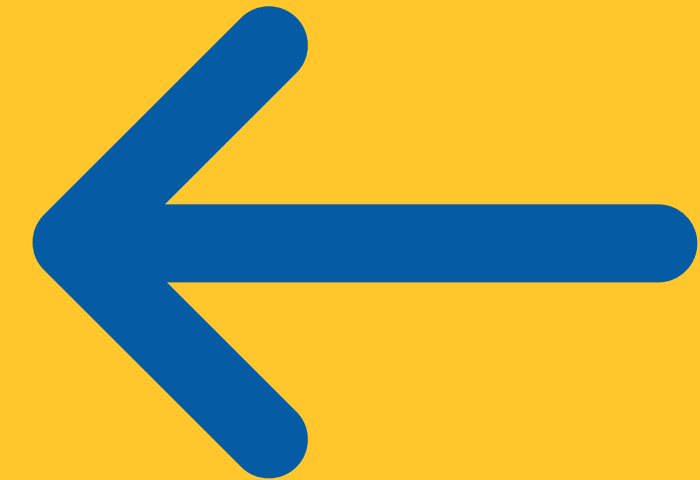
- Description of Procedural Steps Taken
 - Notifications to the Parties
 - Interviews with Parties and Witnesses
 - Site Visits
 - Methods Used to Gather Other Evidence
 - Hearings Held

- Findings of Fact Supporting Determination

- Conclusions Regarding the Application of the Code of Conduct to the Facts

- Result of Each Allegation Including Rationale
 - Determination Regarding Responsibility
 - Disciplinary Sanctions
 - Whether Remedies Designed to Restore or Preserve Equal Access to Education Program or Activity Provided to the Complainant

- Procedures and Permissible Bases for Appeal



Requirement:

Fairly

Summarize

RELEVANT

Evidence...

Note: Include "summary of relevant evidence" in your report



Summary

OF
RELEVANT
EVIDENCE

Type of Sexual Harassment

- Conduct on the basis of sex
 - quid pro quo
 - severe, pervasive AND objectively offensive
 - Sexual assault, domestic violence, dating violence, retaliation



Jurisdiction/ Education Program or Activity

- Summarize why there is jurisdiction and it falls within the scope of the Institution's Education Program/Activity
 - Complainant participating in or attempting to participate in education program or activity
 - Location and substantial control over respondent and context in which sexual harassment occurs



Party Information

- Who are they?
 - Student, faculty, staff etc.
- How do they know the other party?
- Summary of the information/ statement provided
- Summary of the relevant evidence provided
 - Text messages, DM's, screenshots photos, etc.
- Clear understanding of what is considered not relevant and why-include vs. not include?



Witness Information

- Who identified the individual as a witness
- Status as student, faculty, staff, other
- How they know the parties (biases)
- Summary of the information provided
 - Text messages, DM's, screenshots photos, etc.
- Direct vs. Indirect witness
- Expert vs. Fact



Witness

SUMMARY OF OTHER RELEVANT INFORMATION GATHERED BY INVESTIGATOR



VIDEO



ACCESS DATA



**OTHER (SOCIAL MEDIA,
APPLICATIONS, CLASS
SCHEDULES, ETC.)**

MODIFICATIONS TO EVIDENCE AFTER RECEIVING WRITTEN RESPONSE TO EVIDENCE RELATED TO THE ALLEGATIONS

- Reason/explanation for modification or decision of evidence that is related to allegations
- Follow up on any of the suggestions/comments in the written response

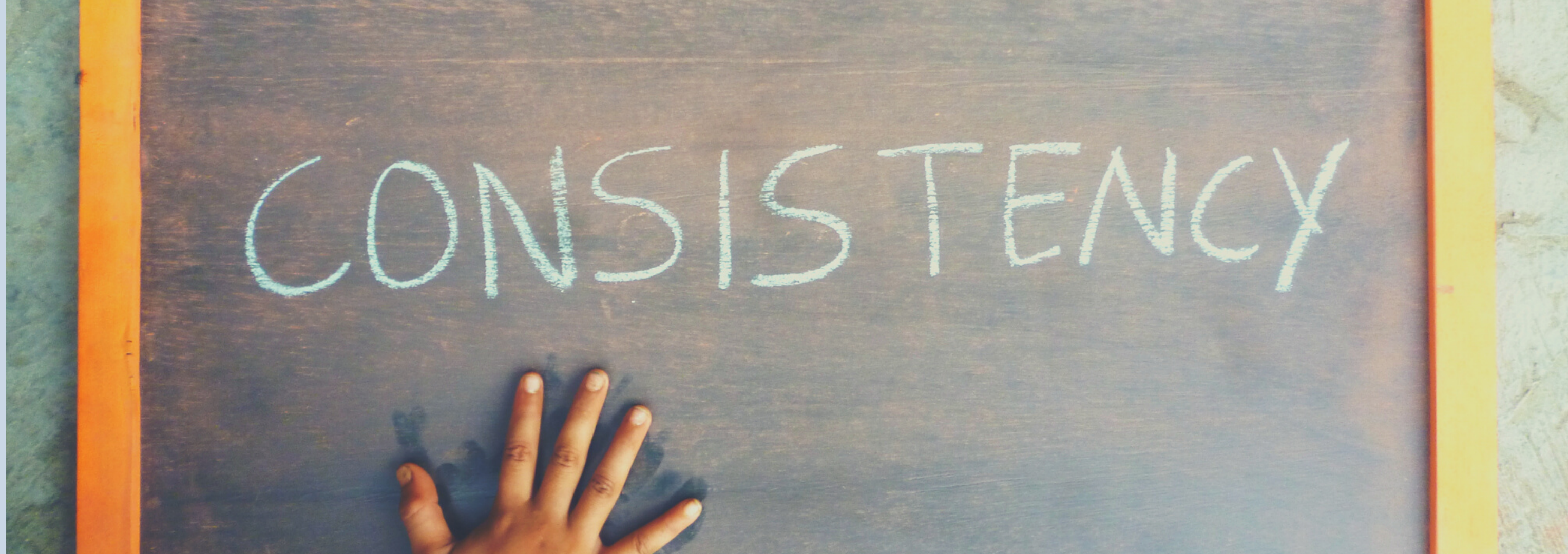
TIMELINES

Events:

- Start to end
- Date and/or hour/minute

Process:

- Reported to Individual with Authority (Responsible Employee)
- Formal Complaint
- Notice of Allegations
- Notice of meetings/interviews
- Date of meetings/interviews
- Date information/evidence obtained (video, access etc.)
- Date evidence provided to parties and advisors for initial review
- Date written response received/10 days expired
- Date of any follow up after receiving written response
- Date investigative report provided to parties and advisors



Consistencies vs. Inconsistencies

- With each party/witness statement
- Between the parties/witnesses
- With the evidence collected



Analysis / Finding / Conclusion?

- Not required, not prohibited
- If done, include
 - Burden/standard of proof
 - Direct connection to each element of definition in policy and why it is sufficient/insufficient to meet burden
 - Facts to support conclusion for each element
 - Weight assigned to evidence
 - Credibility? (cannot be based on role as complainant vs. respondent)
 - Consistencies vs. inconsistencies
 - Biases of the parties/witnesses



Case Studies / Practice



Dating Violence

Conduct on the basis of sex that satisfies:

Dating Violence: Violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim. The existence of such a relationship shall be based upon the reporting party's statement with consideration of the following factors:

(i) The length of the relationship

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Dating violence includes, but is not limited to, sexual or physical abuse or the threat of such abuse.

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Report Instructions-

- **No PRESSURE**
- **THIS IS PRACTICE**

