

JacksonLewis

CULINARY INSTITUTE OF AMERICA

Hearings: Making the Tough Calls

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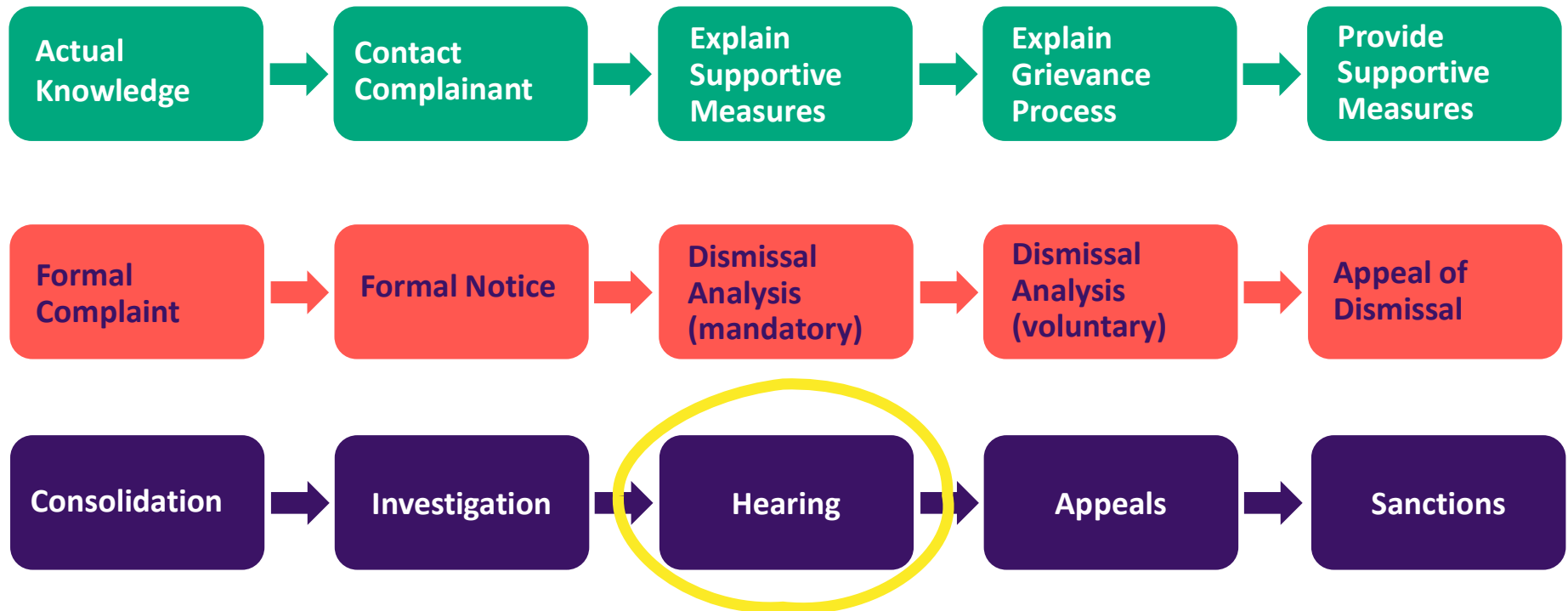
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Agenda

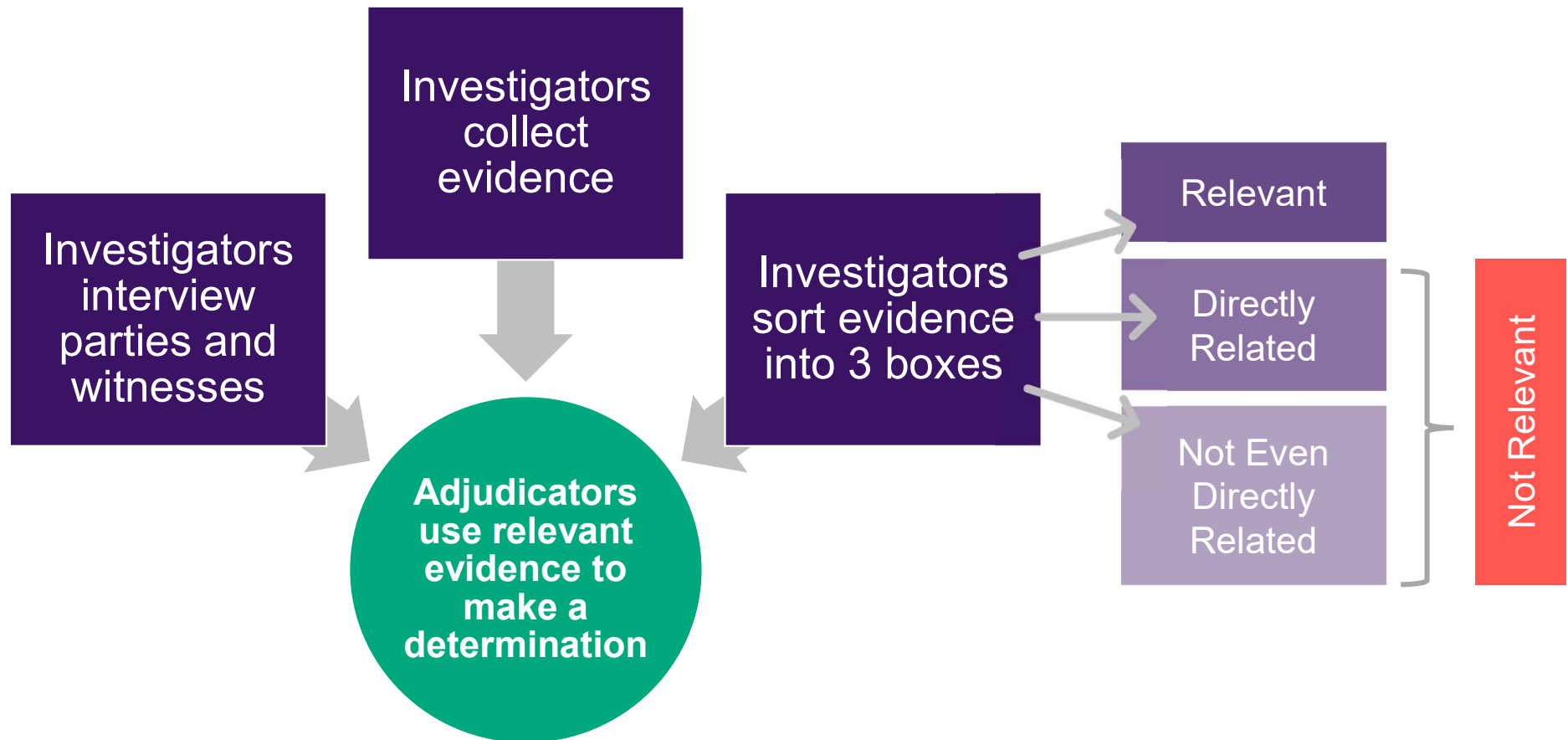
- **Before the Hearing**
- **During the Hearing**
- **After the Hearing**

Title IX Flow Chart



Remember: A lot often happens before we reach a Hearing, try to situate the Hearing within the larger process

The Investigation/Adjudication Relationship



The Decision Maker's Role

Pre-Hearing

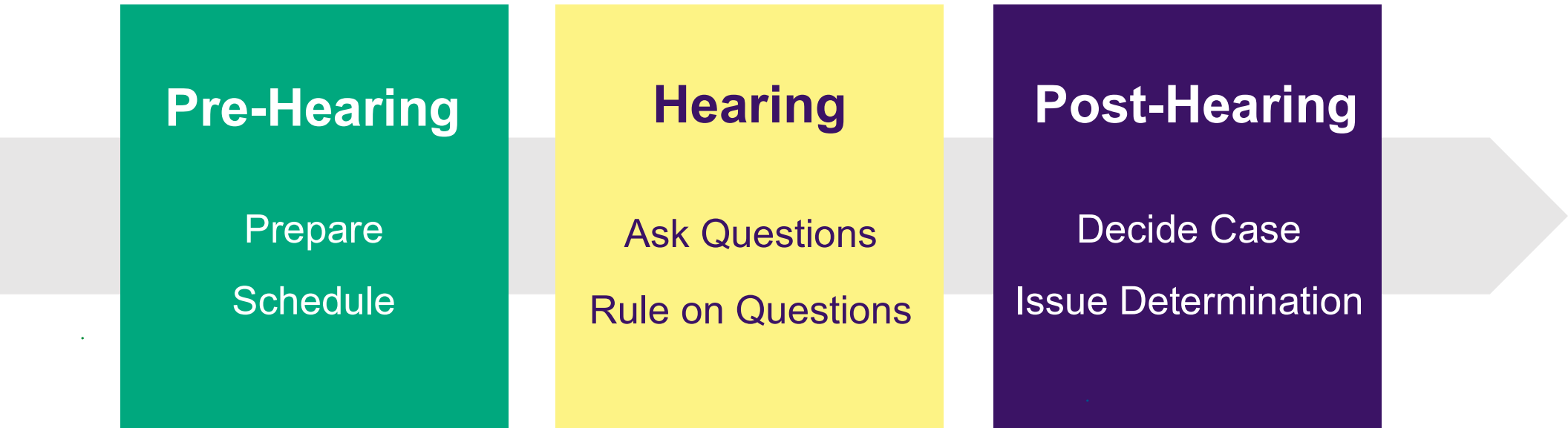
Prepare
Schedule

Hearing

Ask Questions
Rule on Questions

Post-Hearing

Decide Case
Issue Determination



Before the Hearing

Three Mandatory Bases of Appeal

Not ideal
when having
to be
overruled on
appeal

1

New Evidence

2

Bias or Conflict

3

Procedural Irregularity

Pre-Hearing Preparation

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

Don't conduct your own investigation!

Reminder:
Review Investigation Report, but 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.

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

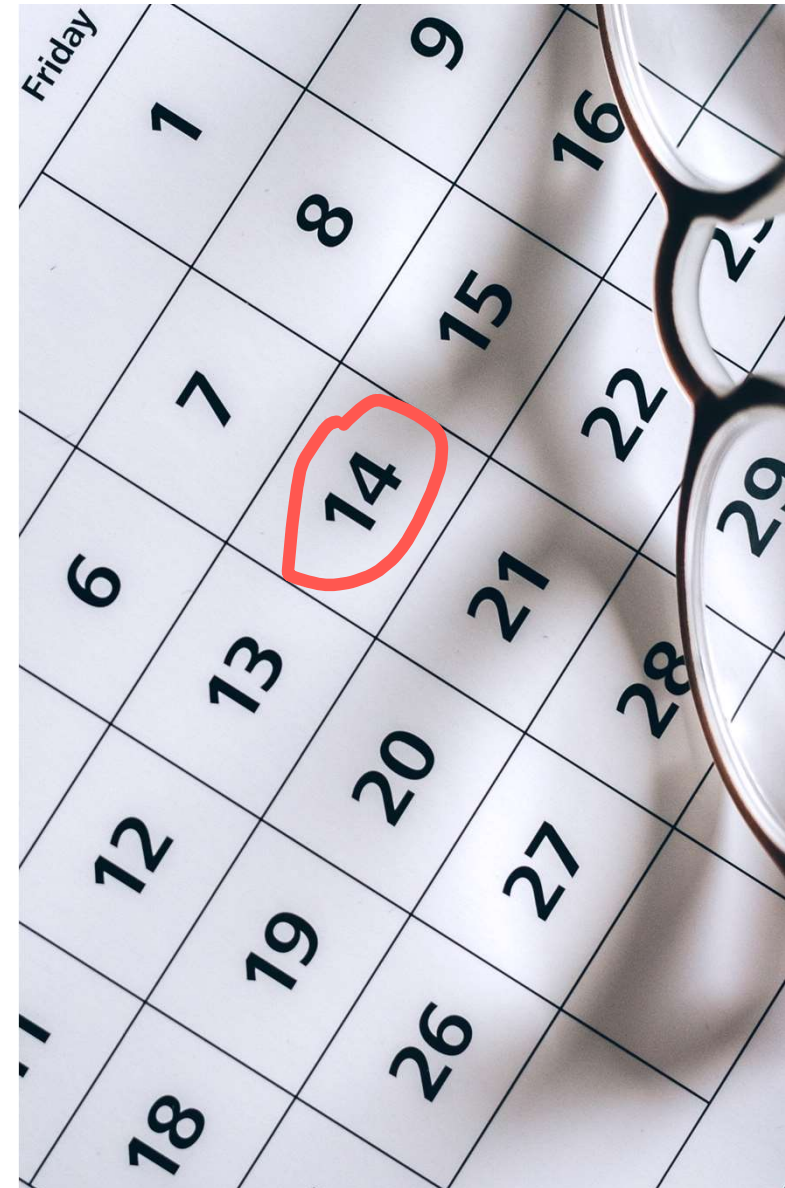
Pre-hearing communication

Either all together or in writing

3

Logistics

- Virtual or in-person
- If in person, separate rooms?
- At least 10 days after delivery of Investigation Report



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



Pre-Hearing

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 (CIA audio recording)
- How to share screen

Consider...

- Tech handout/instructions for all participants
- Practice session
- Having IT on standby

During the 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, but never the parties personally

Hearing

What is the hearing “program”?

Intro

Welcome and Values
Procedure and Ground Rules

Witnesses

Questioning by Decision Maker
Questioning by Advisors

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
 - If virtual, nobody else present
- **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)

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)

Decision Maker: Gatekeeper 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

Example: Handling Types of Evidence at Hearing

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.

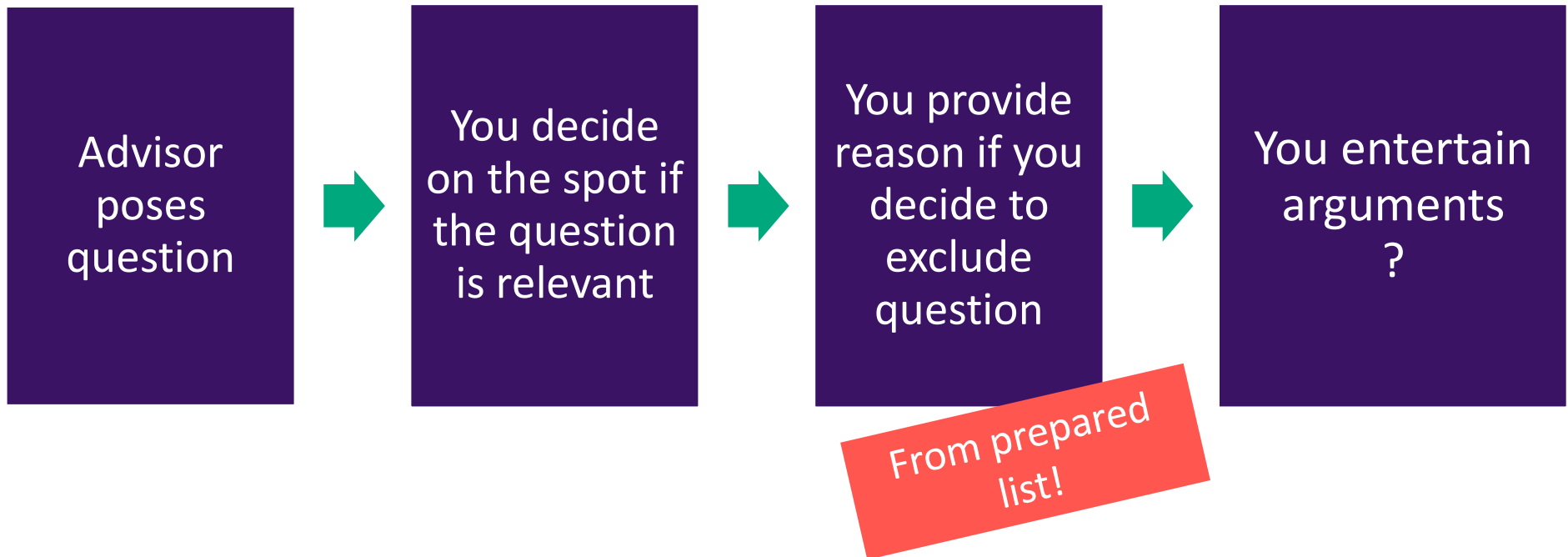
Not even directly related

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

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

Ruling on Questions



Hearing

The 3 Types of Irrelevant Evidence

Does not make a
material fact more or
less likely

Duplicative

Blocked by the Rules

Privileged

Partially Shielded

Barred

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 or disposition

Barred (THIS EVIDENCE IS NO LONGER BARRED)

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

Relevancy Rulings Options

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
- ☐ The information is protected under the rape shield rule
- ☐ ~~That statement is barred because the witness is not subject to cross examination~~

After the Hearing

Components of the Written Determination

CIA Policy: Determination to be issued within 10 business days of the Hearing

- 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

CIA Title IX Office

Section 1: Investigative Report Key Data Sheet

Date of report	<u>April 21, 2022</u>
Title IX Coordinator	<u>Joanna Smith</u>
Investigator(s)	<u>Susan Friedfel 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, 2022</u>



CIA 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

CIA 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, 2022	Tab 2.1
Notice of Allegations provided to parties	March 4, 2022	Tab 2.2
Amended notice	N/A	
Initial dismissal analysis	Completed March 8, 2022	
Initial dismissal result	Dismissed in part and referred to student conduct	Tab 2.3
Dismissal notice to parties	March 8, 2022	Tab 2.4
Dismissal appeal	Filed by Complainant on March 10, 2022	Tab 2.5
Dismissal appeal result	Denied by Joanna Smith on March 12, 2022	Tab 2.6



CIA Title IX Office

Written Determination

II. Description of Procedural Steps

The Complaint was filed by Madison Smith on March 1, 2022.. A Notice of Complaint was sent to Jamie Jones on March 4, 2022. The dismissal analysis was completed on March 8, 2022. The allegations were dismissed in part and referred to student conduct. A Notice of ...

III. Findings of fact

CIA
Title IX Office

Written Determination

III. Findings of Fact

We find these facts by a preponderance of the evidence:

- Complainant Smith and Respondent Jones broke up on or about Christmas Day, 2021.
- Respondent Jones sent Complainant Smith approximately 600 text messages during the month of January 2022.
- These texts made Complainant Smith uncomfortable, and she did not respond to them.

How do you make findings of fact?

Identify the question:

How many text messages did Respondent send Complainant in January 2022?

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 2022?

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, 2022



Documentary Evidence

Printout of text messages dated Jan. 1 – 31, 2022 shows 603 texts from Respondent

Credibility judgments: Rest on an individual's demeanor, the plausibility and consistency of their testimony, and its reliability in light of any conflicting testimony/evidence

IV. Application of school rules to the facts

- 1 List alleged violations of CIA 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

IV. Application of school rules to the facts

This section: Conclusions regarding which section(s) of the CIA Policy has or has not violated

CIA
Title IX Office
Written Determination

IV. Application of School Rules

Under the CIA 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.)

V. Statement of result as to each allegation

CIA
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.

CIA
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 that affected the outcome of the matter;
- New evidence not reasonably available at the time of the determination regarding responsibility or dismissal that could have affected the outcome of the matter; or
- The Title IX Coordinator, Investigator(s), or Hearing Officer had a conflict of interest or bias for or against an individual party, or for or against complainants or respondents in general, that affected the outcome of the matter.

To appeal, please submit [an appeal in writing](#) to [Joanna Smith \(TIX Coordinator\)](#) within [5 business days of receipt of the Hearing Officer's decision](#).

Note: The non-appealing party is given the opportunity to submit a written response to the appeal (not to exceed 10 pages) within 5 business days

Sanctioning

- CIA Policy: Sanctions Decision-Maker differs depending on the Respondent:
 - **Students** – Dean of Student Affairs
 - **Faculty** – Academic School Dean or Branch Campus Academic Director
 - **Academic Administrators** – Vice President of Academic Affairs
 - **All other employees** – Department Head in consultation with Human Resources
- Sanctions Decision-Maker will notify the Hearing Officer as to the sanction(s) and rationale(s)
- Hearing Officer will include the sanction(s) and rationale(s) in the written hearing determination

Considerations in Sanctioning

Generally speaking, similar cases should have similar outcomes

To accomplish this, the CIA should:

- Publish a list of possible sanctions (required)
- Create “degrees” to reflect varying severity?
- Establish a possible sanctioning range for each offense, but retain flexibility for unanticipated circumstances?
- Provide list of mitigating and aggravating factors?
- Tell hearing officers how/whether to consider prior history of misconduct in accordance with standard procedures

Appeals under the CIA Policy:

- Appeals Officer may accept or modify the original decision
 - Appeals Officer must be someone not previously involved in the process
 - **New York: Panel of 3** persons for cases of student appeals of alleged Sexual Assault, Domestic Violence, Dating Violence or Stalking
 - At least 2 panel members must agree on any outcome
- Appeals are confined to review of (1) the written determination and record of the hearing, and (2) documentation regarding the grounds for appeal

Appeals under the CIA Policy:

- **Procedural Error:** Appeals Officer/Panel may return the original Complaint to the Hearing Officer to reconvene to remedy the error
 - **Error cannot be remedied?** Appeals Officer may order new hearing by new Hearing Officer appointed by the Title IX Coordinator
- Appeals Officer/Panel may suspend sanctions imposed by the Hearing Officer during the appeal process or new hearing
- **Written decision on appeal:** Appeals Officer/Panel will issue a written decision to all parties within **21 business days** from receipt of the appeal

Questions?

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