

CSU

The California State University

OFFICE OF THE CHANCELLOR

WELCOME!

2023 TITLE IX & DHR
ANNUAL CONFERENCE

DAY 1 - JULY 25, 2023





WELCOME & INTRODUCTIONS

Laura Anson

**Sr. Systemwide Director for DHR/Whistleblower/Equal Opportunity
Compliance Services**

9:00 a.m. – 9:15 a.m.



PLAN FOR MOVING FORWARD

Leora Freedman

Vice Chancellor for Human Resources

Sue McCarthy

Sr. Systemwide Title IX Compliance Officer & Sr. Director, SW Title IX Compliance Services

9:15 a.m. – 10:15 a.m.



DISCUSSION OF AUDIT RESULTS & Q/A

Leora Freedman

Vice Chancellor for Human Resources

10:30 a.m. – 11:30 a.m.

California State Auditor Report



Chapters and Themes

Chapter 1

The Chancellor's Office Has Not Ensured That Campuses Adequately and Consistently Investigate Allegations of Sexual Harassment

Chapter 2

The Chancellor's Office Has Not Always Ensured That Campuses Address Sexual Harassment Through Discipline and Corrective Actions

Chapter 3

The Chancellor's Office Must Take a More Active Approach to Preventing and Addressing Sexual Harassment



Recommendations

Timeframes

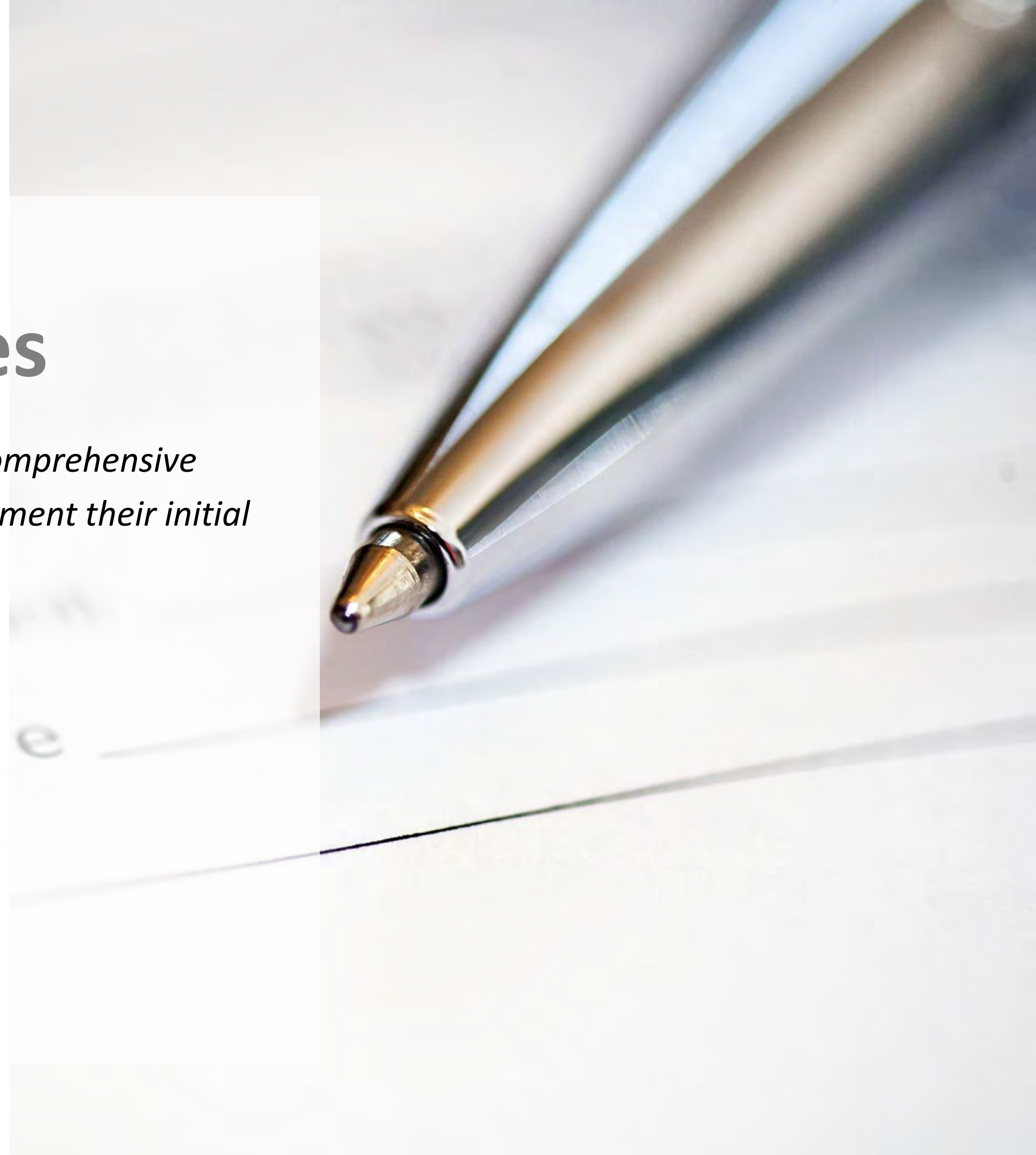
Over the next three years

- July 2024 (majority of recommendations)
- January 2025
- July 2026 (case management system)



Initial Assessment and Investigation Procedures

The Chancellor's Office should create clearer and more comprehensive expectations for how campuses should perform and document their initial assessments of allegations.



Initial Assessment & Investigation Procedures:

- Require campuses to determine whether a respondent has been the subject of multiple or prior reports of misconduct.
- Clarify how to assess the benefits and risks of conducting or not conducting an investigation when there are challenges with or ambiguities about a complainant's desire or ability to participate.
- Provide guidance about attempting to identify or contacting any potential complainants mentioned or discovered during the intake and initial assessment process and about evaluating the likelihood that an investigation could reveal new allegations, context, or information.
- Specify that if a campus decides not to conduct an investigation because a complaint fails to allege a sexual harassment policy violation, the campus must explain why there are clear indications that the alleged conduct, even if true, could not reasonably meet CSU's definition of sexual harassment.
- Require a thorough, documented rationale for campuses' decisions about whether to conduct an investigation that addresses, at a minimum, any applicable factors listed above and any other relevant factors in CSU's policy.

Initial Assessment and Investigation Procedures

The Chancellor's Office should establish more specific expectations for how investigators should structure their analyses of evidence and their determinations in sexual harassment investigation reports.



Initial Assessment & Investigation Procedures:

- Specifics about how investigators should perform and document credibility evaluations.
- A requirement that before investigators assess whether alleged conduct violated policy, they must document an assessment of each allegation that establishes whether the alleged conduct likely occurred and that these assessments consider all relevant conduct for which the investigator has identified evidence.
- A requirement that investigators document analysis specific to each relevant component of CSU's sexual harassment definition that addresses whether conduct met or did not meet the particular component of the definition.
- A requirement that an investigators' analyses and final determinations about whether conduct violated the policy take into account the cumulative effect of all relevant conduct found to have likely occurred.

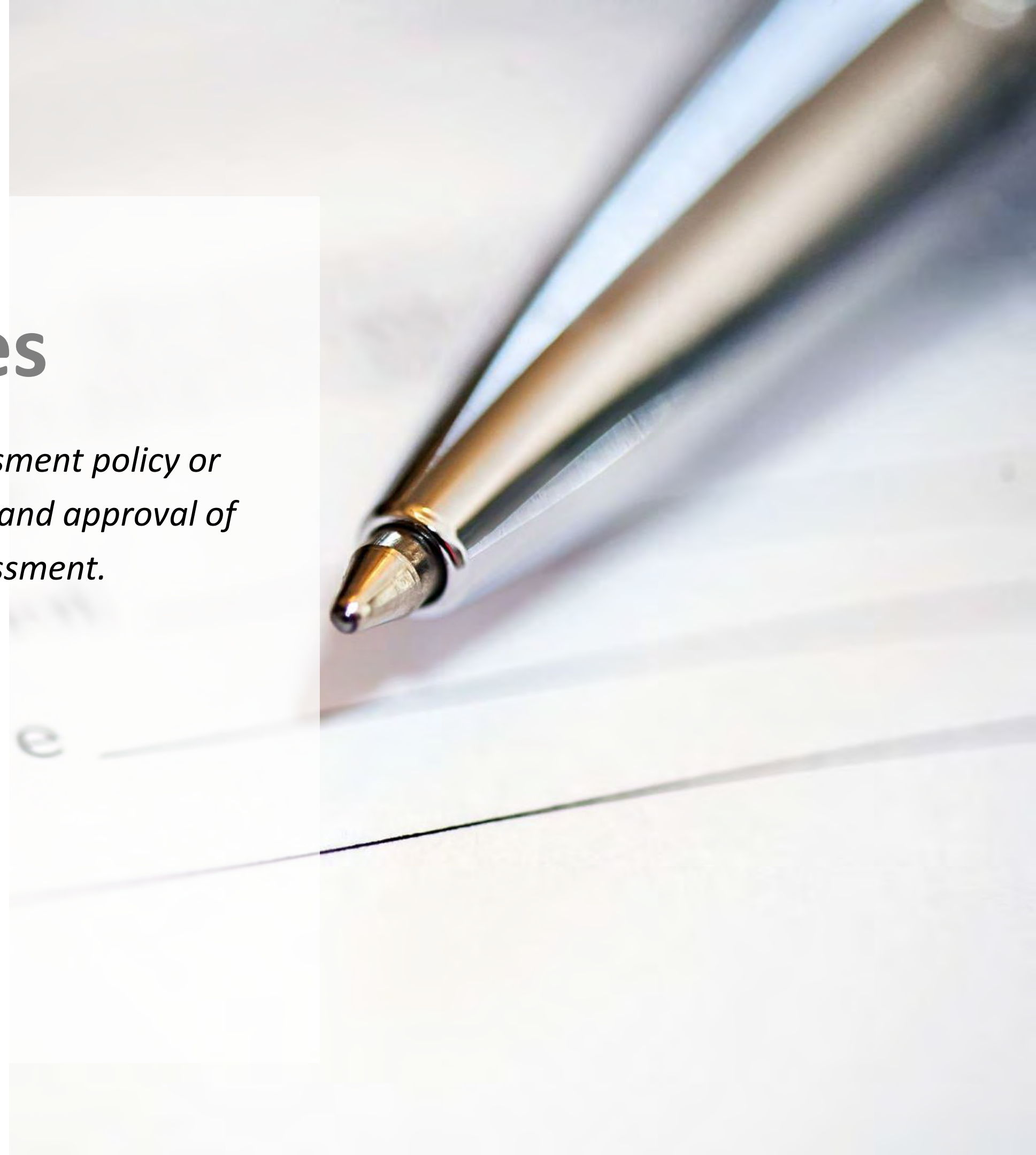
Initial Assessment and Investigation Procedures

The Chancellor's Office should create and disseminate written guidance that provides a framework for how investigators should interpret each component of CSU's sexual harassment definition and how they should determine whether alleged conduct meets that definition.



Initial Assessment and Investigation Procedures

The Chancellor's Office should amend CSU's sexual harassment policy or create other procedures to require a documented review and approval of the analyses and outcomes of each report of sexual harassment.

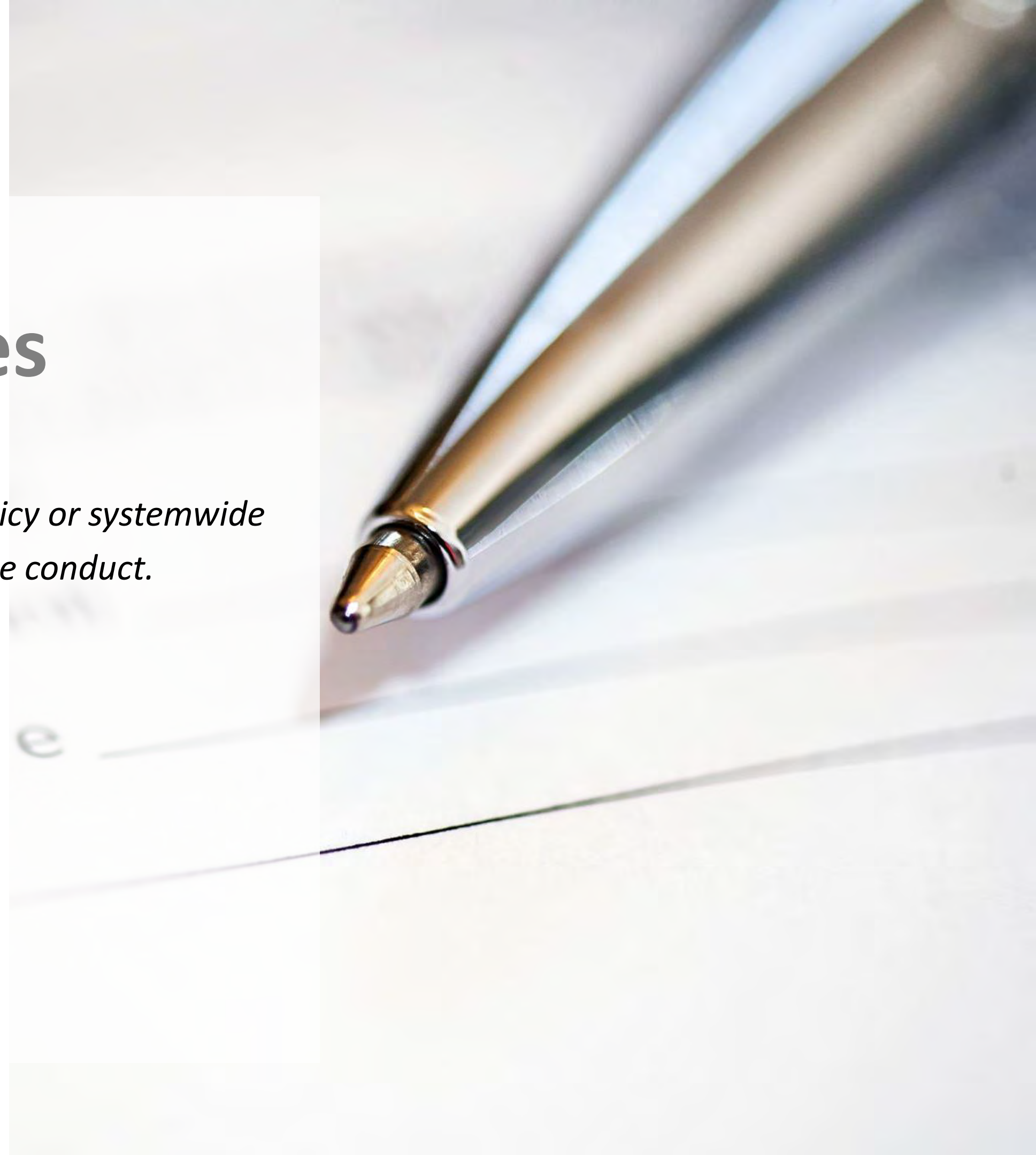


Initial Assessment & Investigation Procedures:

- Unless resource constraints or other good causes exist, the campus Title IX coordinator should assign each case to another staff member or investigator.
- The coordinator should then document his or her review of each case, including certification that the case's resolution—such as the initial assessment or the investigation and related report, as applicable—aligns with policy requirements.
- For exceptions such as cases that the Title IX coordinator handles directly, another qualified reviewer should document his or her review and approval of the analyses and outcomes.

Initial Assessment and Investigation Procedures

The Chancellor's Office should establish a systemwide policy or systemwide procedures for addressing unprofessional or inappropriate conduct.



Initial Assessment and Investigation Procedures

The Chancellor's Office should provide additional guidance related to the Informal Resolution process.



Timeliness of Investigation and Discipline Process

The Chancellor's Office should require all campuses to track key dates and timeline extensions related to reports of sexual harassment in a consistent manner. (July 2024)



Timeliness of Investigation and Discipline Process

- *The Chancellor's Office should identify a solution for ascertaining that campuses have adequate resources for conducting formal investigations. (July 2024)*



Timeliness of Investigation and Discipline Process

- *The Chancellor's Office should amend CSU's sexual harassment policy to include specific requirements for campuses to provide regular status updates to complainants and respondents unless those parties request not to receive them. (January 2025)*



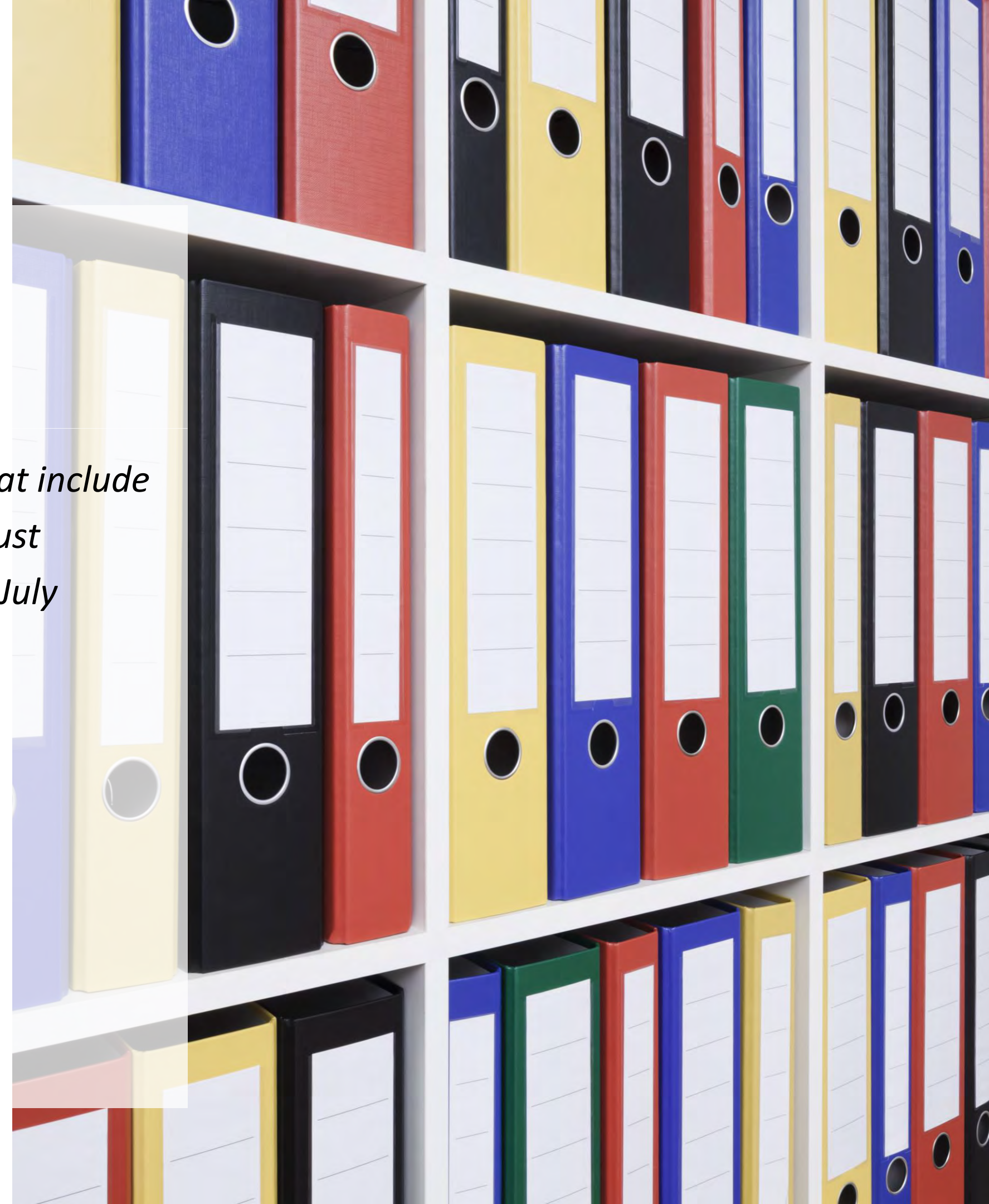
Timeliness of Investigation and Discipline Process

The Chancellor's Office should provide guidance to campuses about best practices for initiating, carrying out, and documenting timely disciplinary or corrective actions after a finding of sexual harassment. (July 2024)



Case File Documentation

The Chancellor's Office should develop procedures or guidelines that include a specific list of documents that the campus Title IX coordinator must maintain in a sexual harassment case file before closing the case. (July 2024)



Case File Documentation:

- Documentation of the campus's initial assessment of allegations and its rationale for whether or not to conduct an investigation.
- Any evidence relevant to the allegations and documentation of all interview notes or transcripts.
- If applicable, an informal resolution agreement signed by all parties and documentation of the agreed-upon outcomes.
- Any significant correspondence between Title IX staff and the parties, from the report stage through case closure, including emails and notices of allegations, investigation, extension, and outcome.
- If applicable, the preliminary investigation report or review of evidence and the final investigation report.
- Evidence of and specific details about the disciplinary or corrective actions that the campus took to resolve the case.

Case File Documentation

The Chancellor's Office should require that all campuses use the same electronic case management system to securely maintain sexual harassment data and case files and ensure that all campuses' case management systems are also accessible to systemwide Title IX staff. (July 2026)



Case File Documentation

The Chancellor's Office should develop and disseminate guidance for consistently tracking data in each campus's system, including requiring that each system include the same fields for entering relevant data such as key dates and corrective actions taken.

(July 2026)



Systemwide Data and Oversight

The Chancellor's Office should establish a process for regularly collecting and analyzing sexual harassment data from all campuses. (July 2024)



Systemwide Data and Oversight

The Chancellor's Office should create a policy—such as an attachment to its sexual harassment policy—for conducting regular compliance reviews of its campus Title IX offices to determine whether they are complying with relevant portions of federal law, state law, CSU policy, and best practices for preventing, detecting, and addressing sexual harassment and related misconduct. (July 2024)



Systemwide Data and Oversight

The Chancellor's Office should make revisions to its systemwide prevention policy or otherwise provide written guidance to campuses reflecting comprehensive best practices for preventing, detecting, and addressing sexual harassment.

(January 2025)



Systemwide Data and Oversight:

- How campuses should maintain accessible options for reporting sexual harassment.
- How campuses can widely disseminate information about their sexual harassment reporting options and related processes through methods such as campus-wide emails, social media platforms, on-campus postings, and student handbooks.
- How campuses can develop and distribute streamlined informational materials that explain key aspects of their processes related to sexual harassment.
- How campuses can monitor whether students and employees have completed required training.
- How campuses can most effectively make use of climate surveys through steps such as surveying both students and employees, designing surveys to assess the effectiveness of their sexual harassment prevention and education efforts, and establishing a documented process for taking action in response to survey findings.

Letters of Recommendation

The Chancellor's Office should amend its policy for letters of recommendation to prohibit official positive references for all employees or former employees with findings of sexual harassment, including those who have received less severe discipline than termination, such as suspension or demotion. (July 2024)



INTAKE & INITIAL ASSESSMENT

Ruth Jones

University Counsel

Alex Pursley

Associate Director, Systemwide Title IX

1:30 p.m. – 2:30 p.m.



Intake and Initial Assessment

RUTH JONES, UNIVERSITY COUNSEL – CIVIL RIGHTS

ALEX PURSLEY, ASSOCIATE DIRECTOR – SYSTEMWIDE TITLE IX

TITLE IX AND DHR ANNUAL CONFERENCE

JULY 25, 2023



01

Initial
Assessment of a
Complaint

02

Planning an
Intake Meeting

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Complainant's
Request Not to
Investigate

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The Preliminary
Inquiry

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Assessing
Whether the
Complaint
Should be
Investigated

06

Putting it into
Practice:
Discussion of
Hypothetical

Today's Session

Initial Assessment of a Complaint

- Review written submission (if available)
 - To the extent you can from the information provided, identify factual allegations and any potential corresponding policy definitions (i.e., do not solely rely on what the Complainant identifies)
 - Example: Allegation of “inappropriate touching” – possible policy definitions include:
 - Sexual Assault – Fondling, Sexual Misconduct, Sexual Harassment
 - You will not be able to make the determination until after intake – we do not yet have sufficient factual information
 - Send appropriate outreach (and follow-up)
- Is an intake meeting required?
 - In what circumstances would an intake not be required?
- Is a preliminary inquiry necessary?
 - Keep in mind, you may not be able to determine this until after the intake

**Clery
Requirements**

- Clery Report
- Timely
Warning

Planning an Intake Meeting

CONSIDERATIONS

What is the purpose of intake?

- Assessing complainant needs
- Explaining options and processes
- Set reasonable expectations and clarify misconceptions
- Clarifying factual allegations

Who conducts intake?

Immediate safety and well-being, including medical needs

Explaining confidentiality, privacy, and “need to know”

PLANNING FOR THE CONVERSATION

Safety and well-being

Right to file a criminal complaint

Preservation of evidence

Supportive measures

Resource referral

Barriers to proceeding

Balancing complainant’s agency with campus safety and Title IX obligations

REPORTING TO LAW ENFORCEMENT

“Complainants will be informed during the intake meeting of their right to make a criminal complaint with university police or other appropriate law enforcement.

The Title IX Coordinator/DHR Administrator will offer to assist the Complainant and will assure them that filing a criminal complaint will not unreasonably delay the campus investigation.”

SUPPORTIVE MEASURES

“The Title IX Coordinator/DHR Administrator will describe and offer Supportive Measures to Complainants during the initial assessment (even if the Complaint is ultimately not investigated), and to Respondents during the initial meeting.”

TIPS FOR PREPARATION – CONDUCTING AN EFFECTIVE INTAKE

- ❖ Refresh on your trauma-informed techniques
- ❖ No need for a “script,” but a key points sheet can be helpful
- ❖ Gather resource brochures and arrange in an organized (and discreet) package
- ❖ Depending on the report, can your campus advocate be available/on-call in case the complainant wishes to engage with them?
- ❖ Always plan to leave time for questions



THE INTAKE ENVIRONMENT

- Consider not only the meeting space, but also the waiting area
- Colors - Cool colors (i.e., blue, green, purple) have a calming effect
- Neutral/calming artwork (nature, landscapes, waterscapes, etc.), plants
- Extend yourself to greet the individual (and their advisor, if present) in the waiting area and show them to the meeting space
- Privacy – “Is it ok if I close the door for privacy?” Proximity to waiting area?
A sound machine outside the door?
- Is it possible to remove barriers such as a desk between you and the complainant, while also maintaining adequate space?
- Where possible, offer for the individual to choose where to sit
- Availability of tissues, water, snacks, small fidget items – point out early on and invite the person to help themselves at any time
- Address option for breaks at the outset – offer again throughout

Clarifying the Factual Allegations

Who, What, Where, When

What does the complainant allege that the respondent did?

“Created a toxic environment” “Harassed me”

What specifically is the respondent alleged to have said and/or done?

“Tell me in detail...”

“Is there anything else that happened?”

Clarifying alleged adverse action for discrimination and retaliation – the “what happened to complainant because of respondent’s conduct?”

What did **respondent** do or say to cause the adverse action?

Protected status – nexus – insufficient to say “I fall within [x] protected status and [y] happened” – what is the connection? Why does complainant believe it occurred because of their protected status? Did the respondent make comments? Do they have information about differential treatment?



After the Intake Meeting



Plan to send a follow-up e-mail – do not expect that the complainant will remember everything



What to do when the complainant wants to “think about it”?



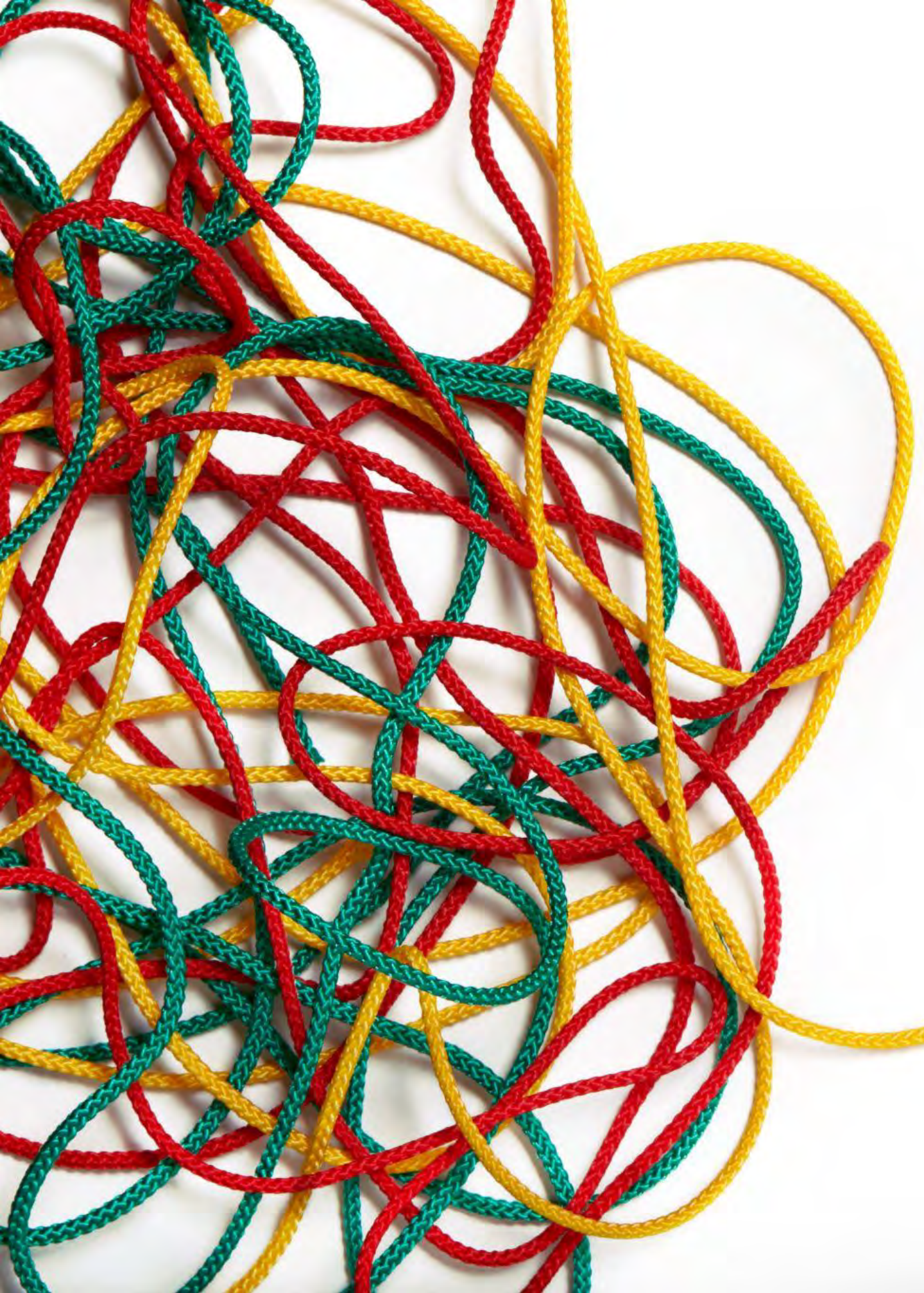
Implementing Supportive Measures



Assessing for pattern



Administrative Leave/Emergency Removal/Interim Suspension Consideration



Untangling the Allegations

- Complainants tend **not** to use “magic words” such as “adverse action,” “disparate treatment,” “affirmative consent”
 - “You said that respondent did [xyz] – how did that affect you? What was the consequence of that for you?”
 - “Are you aware of any other employees in your area who were treated differently to you?”
- Consider whether there are aspects of the report that fall within the Nondiscrimination Policy and some that do not
- Consider creating a list of the alleged factual occurrences
- Consider creating a chart that breaks down the elements of the potential prohibited conduct – ask: **if the factual allegations were proven, would they meet the elements of this definition?**

A REMINDER...

Intake is not just for complainants – although it will happen later, conduct an intake meeting with the respondent too

The respondent should have an opportunity to meet with you, learn about the process, and to ask questions before they are expected to provide a statement

COMPLAINANT'S REQUEST NOT TO INVESTIGATE



Balancing the Complainant's Request with Community Safety

There are multiple or prior reports of misconduct against the Respondent.

The Respondent poses an imminent threat to the campus community, which may include violence, threats of violence, use of a weapon, physical restraints, or engaged in battery.

There is a power imbalance between the Complainant and Respondent.

The Complainant reasonably believes that they will be less safe if their name is disclosed or an investigation is conducted.

The Title IX Coordinator/DHR Administrator anticipates that it will be possible to conduct a thorough investigation and obtain relevant evidence without the Complainant's cooperation.

If the Complainant is an **Employee**, the campus will also consider its obligation to maintain a safe work environment in determining whether an investigation is necessary.

Other Factors
to Consider
When
Evaluating
Requests Not
to Investigate

What is the severity of the conduct alleged?

What evidence is currently available?
What additional evidence may be available during an investigation?

What is the possible other evidence if the Complainant does not participate in the investigation?

What is the status of the potential parties, e.g., are they the same class, housing unit, share courses?

PRELIMINARY INQUIRY

“The Title IX Coordinator/DHR Administrator will determine whether to open an investigation after making a preliminary inquiry into the allegations. An investigation may not be warranted where the reported information is insufficient. These determinations will be documented in writing by the Title IX Coordinator/DHR Administrator and maintained in accordance with systemwide records retention policies.”

Preliminary Inquiry vs. Investigation

PRELIMINARY INQUIRY

To ascertain if there are sufficient factual allegations to conduct an investigation

Initiated after a complaint or report is filed and before notice of allegations or investigation is initiated

Should not include credibility assessments

Should not include interviewing the respondent

Generally, should not include witness interviews

No specific policy procedural requirements

INVESTIGATION

To gather evidence for factual and policy findings by either the investigator or hearing officer

Initiated after the notice of allegations is issued

Includes credibility assessments

Includes Respondent interview

Includes witness interview summaries

Specific procedural requirements e.g., evidence review

Assessing Whether the Complaint Should be Investigated

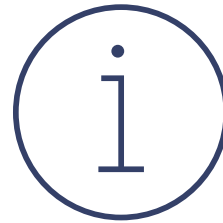
- What are the proposed policy violations?
- Only one possible policy violation is necessary to initiate an investigation but consider all policy violations possible based on the factual allegations
- Consider both the policy violations raised by the Complainant and others that may be applicable based on the factual allegations
- What does the Complainant allege that each Respondent did or said that caused the policy harm, e.g., for discrimination what did the proposed Respondent do or say to cause the adverse action?
- Is Respondent's alleged conduct protected by the First Amendment or Academic Freedom?
- Has the Complaint requested no investigation?
- If the factual allegations are true, would the conduct constitute a policy violation?
 - If you need to determine credibility, an investigation is necessary
 - If you need to hear the "other side" from the Respondent than an investigation is necessary

The Decision to Not Investigate

- Is a Track 1 dismissal (and possible referral) required?
- Determination that the complaint fails to allege a violation of the Nondiscrimination Policy
 - The Title IX Coordinator/DHR Administrator will notify the complainant **in writing** that the complaint will not be investigated without further information
 - Timeframe: Within **10 working days** of the date of the intake or receipt of written request for investigation (whichever is later)
 - The Title IX Coordinator/DHR Administrator will refer the Complaint to another campus office if appropriate and will notify the Complainant of any referral – is a referral appropriate?
 - The Title IX Coordinator/DHR Administrator will retain a record of the Complaint, the written determination and any referrals made to another campus office.



Communicate with the intended referral office ahead of time



Gather information about when and how they intend to respond to the referral – document

Example: HR confirmed that upon receipt of the referral notification, the Employee Relations Manager will contact the complainant via email with 48 hours to set-up a meeting to further discuss their concerns



Provide a brief explanation in the notice of no investigate as to why the referral is appropriate

Example: While they do not fall within the scope of the Nondiscrimination Policy, it is appropriate that your concerns regarding your interactions with Dwight Schrute be reviewed by Human Resources as the office that addresses employee relations matters. Therefore, this office is referring your complaint to Human Resources for further review and assessment



Preferable to provide a name for the referral in the notice of no investigation rather than simply a department

Example: Toby Flenderson, Employee Relations Manager with Human Resources will be contacting you to set up a meeting to further discuss your concerns

The Successful Referral



Follow Up and Record Keeping

RECORD KEEPING

- Your efforts to contact the Complainant
- Notes from intake meeting, including points covered
- Supportive measures – decision and rationale pertaining to reasonableness
- Assessment as to pattern
- Decision to move forward or to not move forward – rationale – factors considered
- Decision-maker → Factors considered → Action → Communication
- If you win the lottery tomorrow, will your records tell the story without you?



Which Track?

1

If a Title IX complaint, start at Track 1 → Assess for proceeding under Track 1 or dismissal/referral

2

If not Track 1, consider Track 2

3

If not Track 2, consider Track 3



If not Track 3, consider other appropriate referral → HR, Faculty Affairs, Student Conduct, etc.

Scope of the Investigation

- Consider all possible policy violations
 - Including prohibited conduct from Track 1 and Track 2/3 in the Notice of Investigation
 - Helpful to inform both parties at the outset that if additional information is provided during the investigation, such information will be assessed to determine if additional forms of prohibited conduct should be investigated and that the parties will be notified via a revised NOI
- Pay equity discrimination allegations/Fair Pay Act
- Discrimination and Unprofessional Conduct – single investigation or separate?
- Additional considerations:
 - California Public Safety Officers Procedural Bill of Rights Act (POBR)
 - Disability accommodations – allegation of failure to accommodate



Hypothetical

Kelly, who is a woman, works in University Advancement as a Development Director. She has been in this role for four years. The four other Development Directors in Kelly's office and Kelly's supervisor, are all men. Kelly's colleagues like to engage in what they call "practical jokes" with each other. Kelly is but one target of these pranks. As one of these "jokes," they recently left a witch's hat on Kelly's desk in October (Kelly thinks it might have been on Halloween). They also have an on-going "joke," where they say, "Not again, Kelly," anytime Kelly speaks up during a meeting. Kelly's supervisor, Michael, joins in with this too.

Kelly also tells you that while she routinely receives "Meets Expectations" performance evaluations, she feels that the substantive content of her evaluations make light of her contributions and that this may have recently affected her unsuccessful application for the position of Associate Vice President for University Advancement. Kelly's colleague Jim was promoted instead, which Kelly attributes to Jim being "buddies" with Michael and because Jim is a man.

Kelly says that she wants to file a sexual harassment complaint against Michael and her four other co-workers – Jim, Oscar, Kevin, and Stanley.

The logo for The California State University, featuring the letters 'CSU' in white on a red square background.

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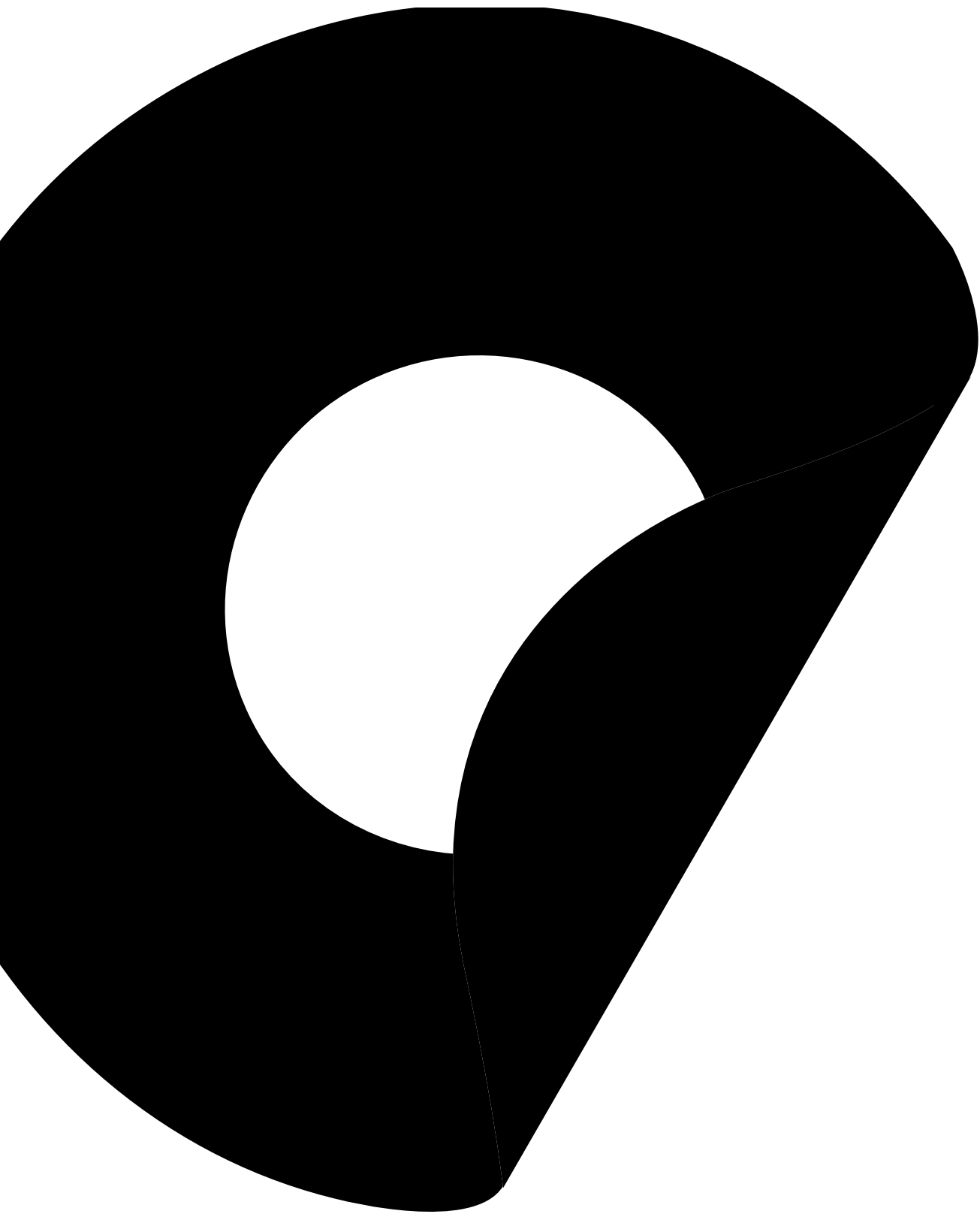
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ADVANCED DHR HARASSMENT INVESTIGATIONS

Jack Morse

Oppenheimer Investigations Group, LLP

2:30 p.m. – 3:30 p.m.



Investigator Training

For California State University

July 25, 2023

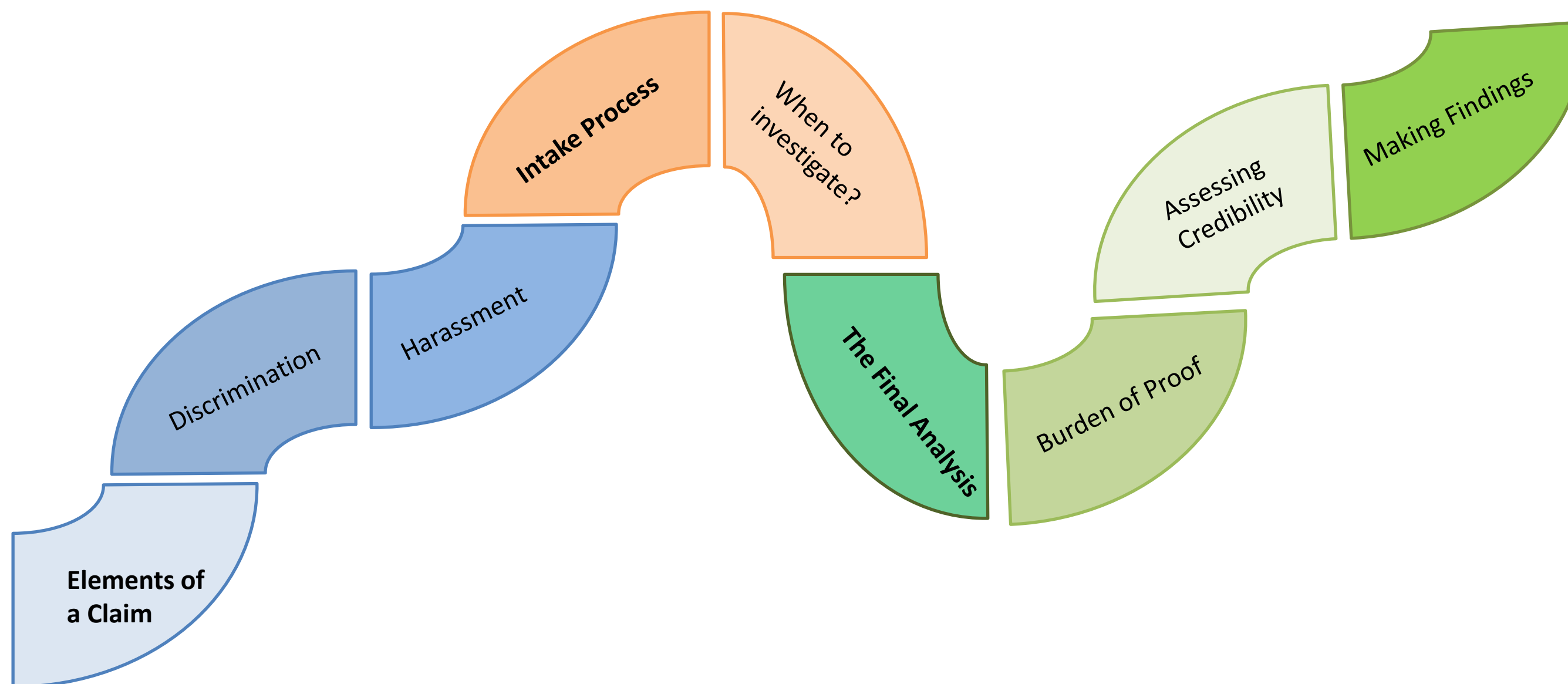
T. Jack Morse, Jr.

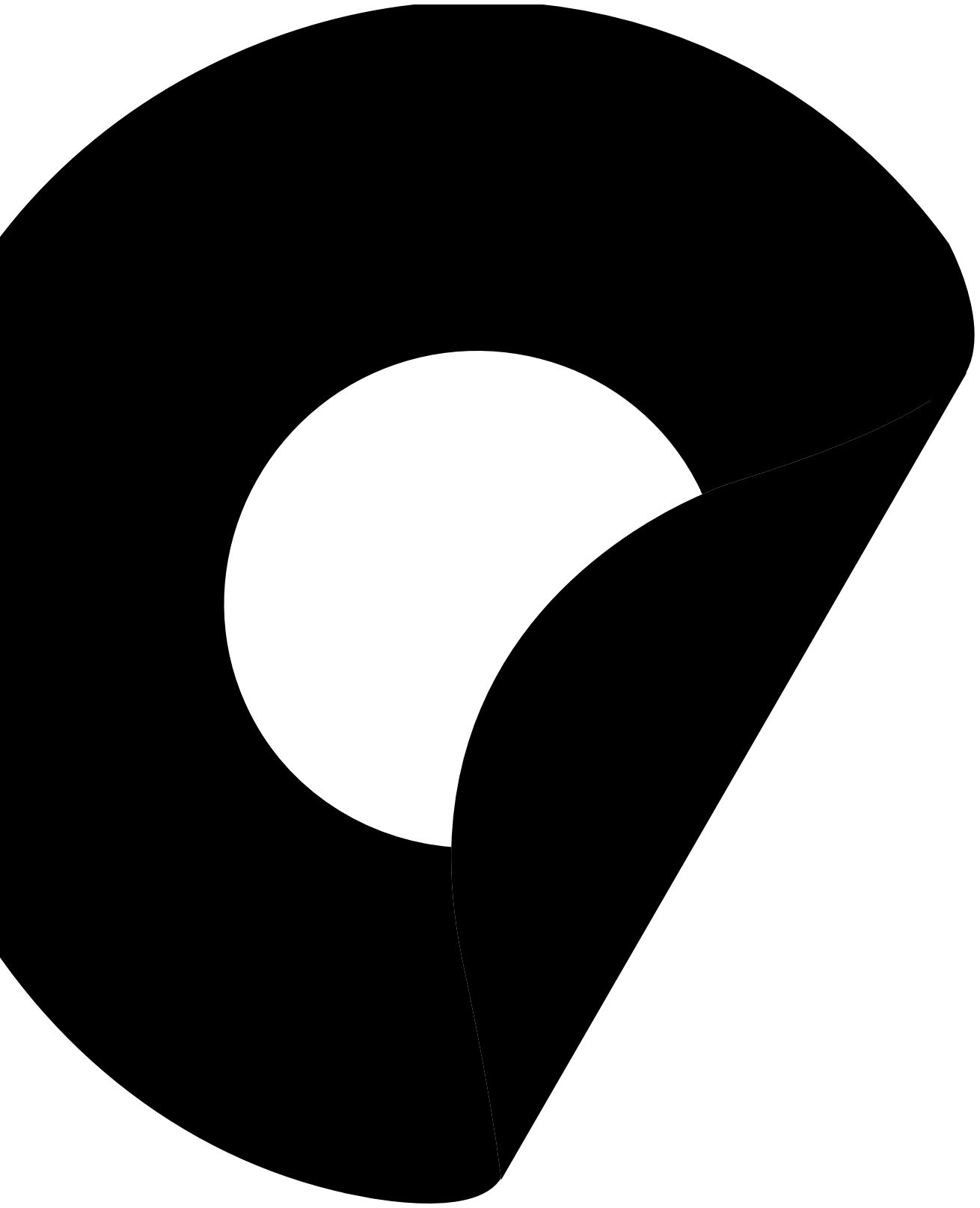
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Agenda: A Roadmap





Elements of a Claim: Discrimination



Discrimination

What is Discrimination?

- An **adverse action**
- against a Complainant
- **because of their Protected Status**





Adverse Action

What is an Adverse Action?

- Action engaged in by the Respondent
- That has a substantial and material adverse effect
- On the Complainant's ability to participate in a CSU program, activity, or employment

Note:

- Minor or trivial actions or conduct not reasonably likely to do more than anger or upset the Complainant do not count

Examples Protected Status:

- **Race/Ethnicity/Nationality**
- **Age**
- **Disability (physical and mental)**
- **Religion**
- **Gender**
- **Gender identity**
- **Sexual orientation**





Gender-based harassment

Does NOT include sexual harassment

- Gender-based harassment involves behaving in an unwelcome manner toward someone because of their gender, gender identity, etc.
- Sexual harassment means sexually-based conduct, including:
 - Rape
 - Fondling
 - Dating violence and Domestic violence
 - Quid pro quo: Conditioning a CSU benefit or service on a person's participation in unwelcome sexual conduct
 - ❖ These cases are investigated differently!



Hypothetical

Complainant student is listed on the class roster as Mark, but on the first day of class Complainant told professor she identifies as female and prefers to be called Marsha. She states that afterward, Respondent professor never called on her during the entire class, but called on other students.

Discrimination?

- Protected status?
- Was the professor's action due to the student's protected class?
- Adverse action against Complainant?

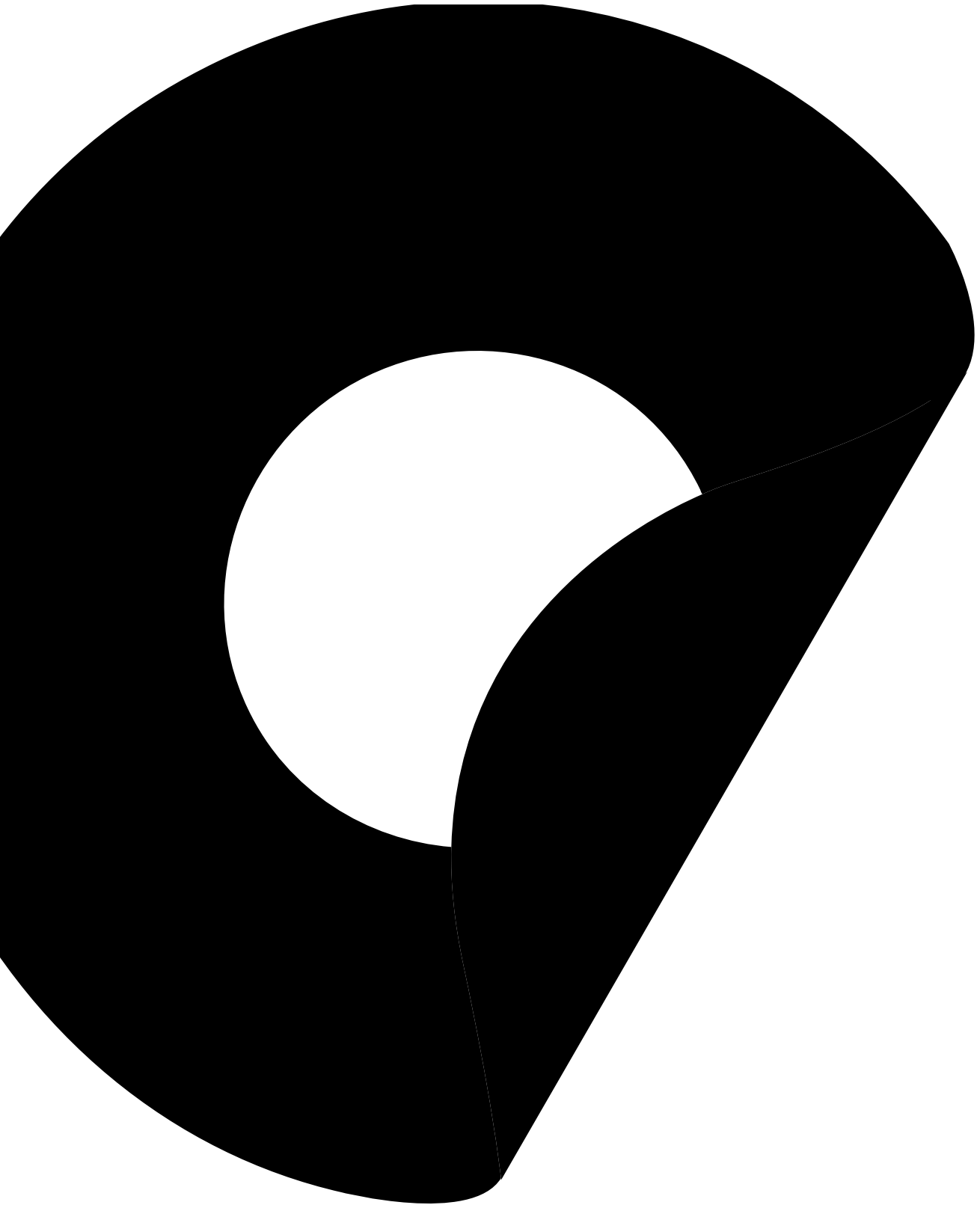


Hypothetical

Complainant student is listed on the class roster as Mark, but on the first day of class Complainant told professor she identifies as female and prefers to be called Marsha. She states that afterward, Respondent professor never called on her during the entire semester. Professor called on all other students, but not her.

Is this Discrimination?

- Adverse action against Complainant?
- Did it affect Complainant's ability to participate in a CSU educational program?



Elements of a Claim: Harassment



Harassment

What is Harassment?

- **Verbal, nonverbal, or physical** conduct
- That is **unwelcome**
- And engaged in because of a Complainant's **Protected Status**





Harassing Conduct

Verbal

- Slurs
- Epithets
- Derogatory comments

Non-Verbal

- Gestures
- Cartoons
- Drawings
- Symbols

Physical Conduct

- Blocking movement
- Battery
- Physical interference with work environment

Conditions When Harassment can Occur

A Complainant submitting to (or rejecting) the conduct is (explicitly or implicitly) a basis for:

- Decisions that adversely affect or threaten employment, or which are being presented as a term or condition of the Complainant's employment; or
- Decisions that affect or threaten the Complainant's academic status or progress, or access to benefits and services, honors, programs, or activities available at or through CSU.



Hypothetical

Complainant, a female Muslim student, states that on the first day of class, the professor said that if she wanted a good grade, she should “stop wearing whatever she had on her head” (her hijab).

- Is this *conduct*?
- Is it *unwelcome*?
- Due to protected status?
- Is it *harassment*?



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Another Condition When Harassment can Occur

- The conduct is so severe or pervasive
- that a reasonable person, under similar circumstances, with a similar identity,
- would believe the conduct created an intimidating, hostile or offensive work (or educational) environment
- that denies or substantially limits an individual's ability to participate in (or benefit from) CSU employment or educational services, activities, or privileges.
- Does not matter if Respondent intended to create such an environment.



Severe *or* Pervasive

- The conduct does not have to be both – can be one or the other

Pervasive:

- Spread throughout
- E.g., conduct repeated over the course of weeks or months

Severe:

- harsh; unnecessarily extreme
- *Can* be a single instance
- But note: Single, isolated incidents will typically be insufficient to rise to the level of harassment.



Reasonable Person Standard

Who is the Reasonable Person? Someone who:

- Is the same protected status as complainant (regarding religion, race/ethnicity, etc.)
- Is confronting similar circumstances (the conduct in question)
- Ask yourself: Would a *reasonable* person with the same protected status as the complainant find the conduct intimidating, hostile, or offensive?





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Intimidating, Hostile, Offensive

Next step: Would a Reasonable Person consider the conduct to be:

- So intimidating, hostile or offensive
- that it creates a work (or educational) environment
- that denies or substantially limits an individual's ability to participate in (or benefit from) CSU employment or educational services, activities, or privileges.

Intimidating, Hostile, or Offensive conduct alone is not enough!



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Hypothetical

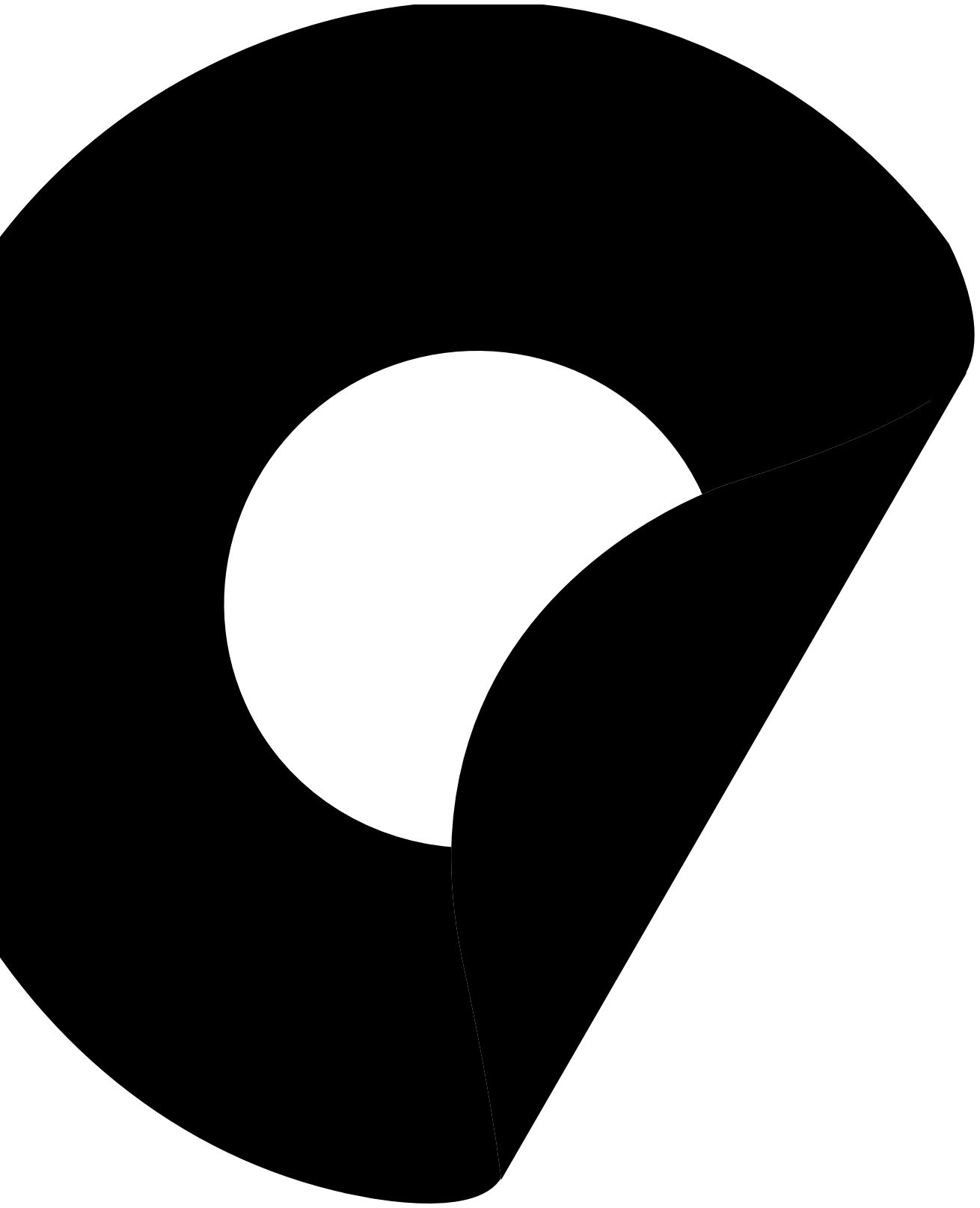
Complainant is a paraplegic student who uses a wheelchair for mobility. She states that last Tuesday, when she was late for class, the Professor joked that she must have gotten a flat tire. Complainant found the comment to be so offensive that she has been unable to eat and is only sleeping a few hours a night. She has also been unable to concentrate, and so failed a test as a result.

Harassment?



Hypo continued

- Was the conduct severe or pervasive?
 - Only happened one time
 - But Complainant failed a test!
- Would a **reasonable person** believe the conduct created such an offensive environment that their ability to participate in CSU educational services was substantially limited?
 - Who is the reasonable person in this context?



The Intake Process: Triage



Intake

Not all complaints have to be investigated.

- Which ones should *not* be investigated?
- If, on its face, a complaint would not equate to a policy violation, then no need to investigate.
- Point the Complainant in another direction:
 - For students: refer to student conduct office or Dean of Students
 - For employees: refer to Human Resources/Faculty Affairs



Intake: Getting the Details

- Drill down and get the **details**:
 - Complainant may not initially provide enough information
 - Ask targeted questions that cover each element of the allegation
- **Quantify things**
 - What do you mean by “often”, “several” or “all the time?”



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Hypothetical

Complainant is a Mexican student who states that last semester, the Professor made offensive, stereotypical, and deprecating statements and jokes about Hispanics. Professor also commented disparagingly about students who spoke Spanish during breaks.

Complainant found the comments to be offensive and insulting.

Do you investigate?



Hypo continued

- What is the potential policy violation?
 - Harassment or Discrimination?
- What is the protected class?
- Was the conduct severe or pervasive?
 - We don't know!
 - ASK:
 - WHAT was the disparaging comment?
 - HOW often did he say such things?
 - What effect or ramifications did the conduct have for the student?



Hypo continued again

Q: What did the professor say?

- A: One time I was late to class, and the professor said I must be on “Mexican time”
- Q: What else did he say?
- A: “One time, he asked me how often I ate tacos.”
- Q: Anything else?
- A: “Not really. I can’t think of anything else.”
- Q: Your written complaint mentioned you speaking Spanish?
- A: “Oh yeah. My friend and I were speaking Spanish on a break and he told us to keep it down a little.”

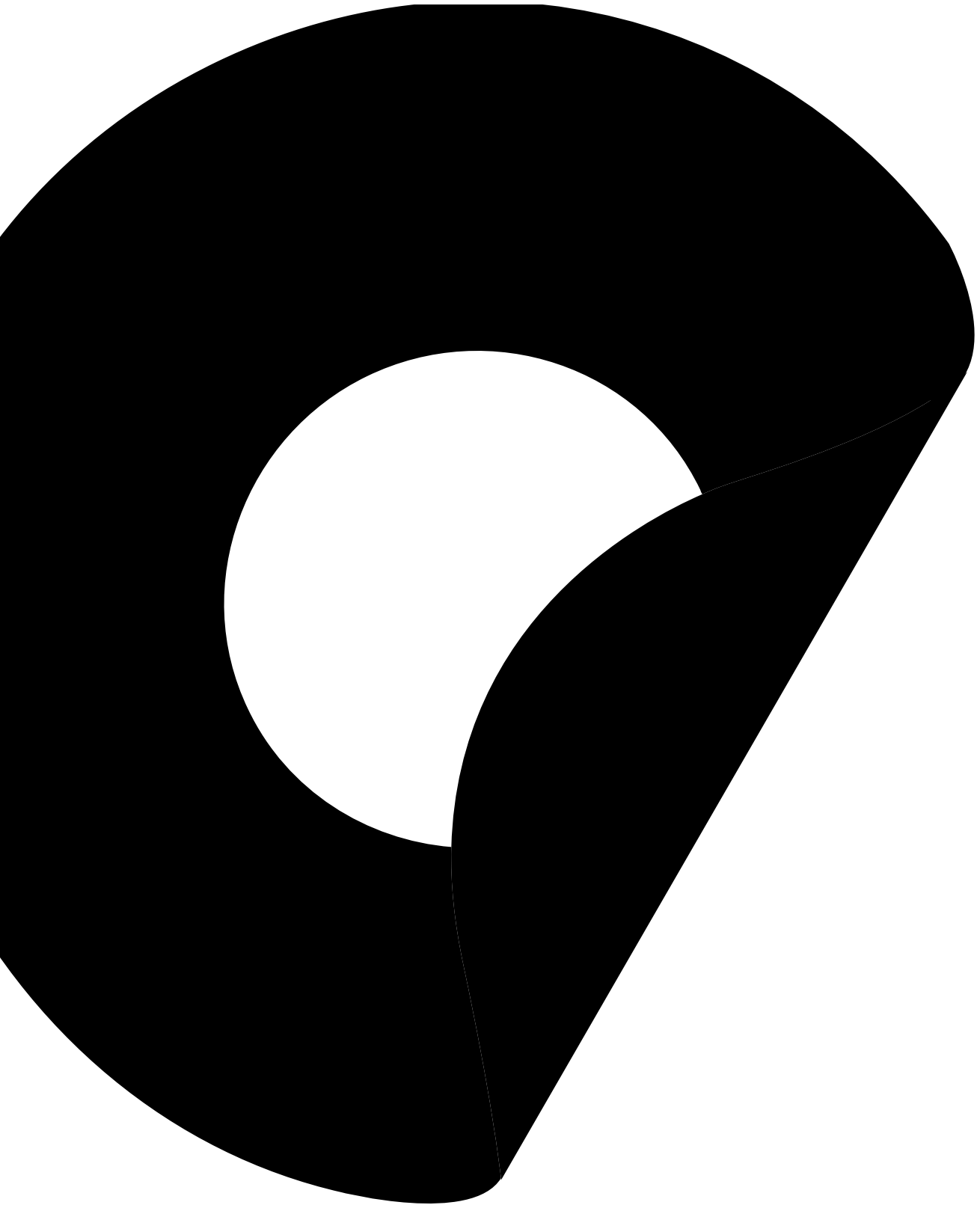


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Hypo Continued Yet Again

- Based on those answers, is the conduct severe?
- Pervasive?
- Would a reasonable person believe the conduct created such an offensive environment that their ability to participate in CSU educational services was substantially limited?

Do you investigate?



The Final Analysis



Burden of Proof

What is it?

- Preponderance of the Evidence
- “the greater weight of the evidence”
- “the evidence on one side outweighs, or is more than, the evidence on the other”
- Anything more than 50%



Applying the BOP

Weigh the Evidence

- Interview statements from witnesses (including complainant and respondent)
 - Interview anyone with relevant information that may affect the finding!
- Documents (emails, texts, other correspondence, photos)
- Video (cell phone, security footage)
- Ask yourself: Is there evidence to support a finding that this more likely than not occurred?
- NOTE: Finding may be based on circumstantial evidence!



Types of Findings

- Findings about **contested conduct** (e.g. harassment)
- Findings about **motive** when **conduct is uncontested** (e.g., Did Respondent decline to promote Complainant due to age?)
- Findings about **contested conduct *and* motive** (e.g. Did Respondent ignore Complainant and fail to call on Complainant in class? If so, was this due to Complainant's physical disability?)



Contested Conduct

Analyze the evidence using Credibility Factors:

- Witness corroboration (or lack of it)
- Consistent/inconsistent statements
- Opportunity or capacity to observe
- Past history and pattern of conduct
- Plausibility
- Motive to lie or fabricate



Credibility Factors

- **Corroboration/Lack of Corroboration:**
 - Is there witness testimony or physical evidence that corroborates the party's testimony?
 - Did a party or witness document the incident in writing?
- **Consistency/Lack of Consistency:** Has the witness been consistent over time?
 - Are witness statements internally consistent?
- **Capacity to Observe:** Did the witness observe the events firsthand?
 - How far away was she?
 - Did she hear about the event secondhand?



Credibility Factors

- **Past History and Pattern of Conduct:**
 - Has the Respondent engaged in similar actions previously?
 - (Helpful in he said / she said scenarios)
- **Inherent Plausibility:**
 - Is the statement believable on its face? Does it make sense?
 - Could it have occurred as reported?
- **Motive to Lie or Fabricate:**
 - Did the person have a reason to lie? (Respondents might always)
 - Does the person have a bias, interest, or other motive?



Credibility Factors: More to Consider

- The fact that witness provided a “specific and detailed account”
- The fact that a witness gave a balanced, even-handed account (i.e., not slanted towards complainant or respondent)
- The fact that respondent admitted something that would place them in a poor light



Uncontested Conduct

(e.g., claim of discrimination)

- Often this involves an employment decision rather than how a respondent behaved toward a complainant
- The question is what motivated the decision
 - For example, why did Complainant, who is homosexual, not get promoted?
- Facts not at issue, so Complainant credibility is not really at issue

Ask yourself: Is there evidence that the decision was more likely than not based upon a non-discriminatory reason? Look for:

- Documentation of performance issues
- Data



Hypothetical

Maria complains her co-worker (Fred), does not like her because she is Latina. She says that he does the following to harass her:

- **Parks in her preferred parking space ALL THE TIME.**
- **Refers to her as “chica” in a sarcastic tone of voice.**



Scenario #1

You interview Fred.

- Fred admits parking in the parking space but says he has nowhere else to park.
- Fred says he does refer to Maria as “chica” but he did not do so sarcastically. Instead, he was trying to be friendly and relate to her.



So...

- What are the factual disputes?
 - None!
- So, is a credibility determination helpful?
 - No, because they largely agree on the facts
 - The investigator needs to determine the reason why Fred parked in Maria's spot and called her "chica"
 - Factors such as opportunity to observe and consistent/inconsistent statements are unlikely to reveal motive



Scenario #2

You interview Fred and he says he does not park in Maria's space and never called her "chica." She must be mistaken.

- Would a credibility analysis help?
- YES
 - Witnesses may corroborate where Fred parked and what he said.
 - Was it plausible that he never parked there if parking was limited?



Making Findings: Writing the Analysis

- Explain why you are making your finding: **SHOW YOUR WORK!**
 - Do **NOT** just repeat facts!
 - Cite Witness statements, Documents, Data that support your conclusion
- Acknowledge contrary evidence, then refute it.
- E.g., “While respondent said he did not even know the Complainant, six witnesses said that he made racially offensive remarks about her.”



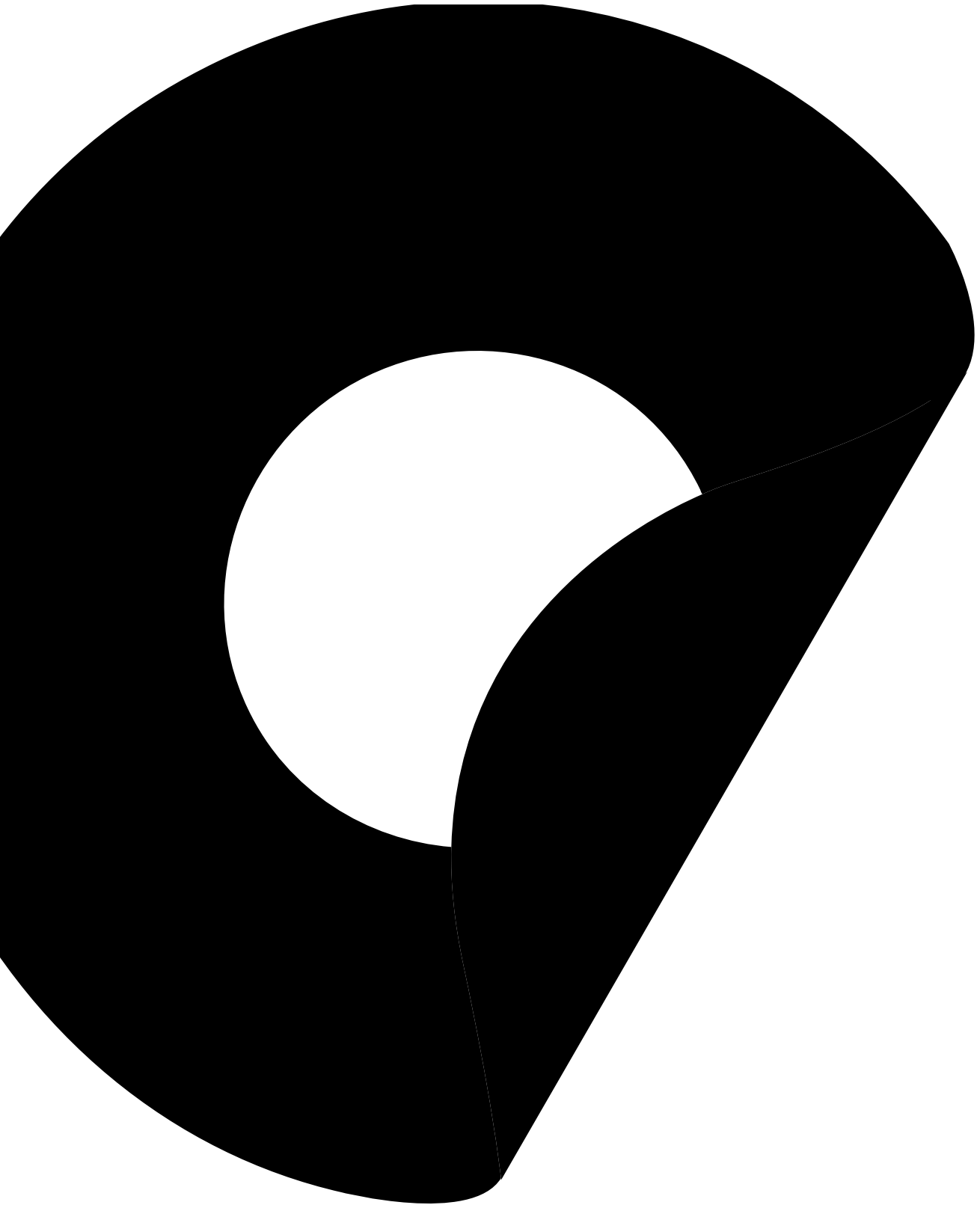
Structure of a Typical Finding

- Begin with a clear and unequivocal finding.
 - "SUSTAINED. A preponderance of the evidence supports a finding that Professor X discriminated against Student Y by
- 1-2 sentences summarizing what C alleged.
- 1-2 sentences summarizing R's response to the allegation.
- 1 paragraph of contrary facts you considered.
- 2 paragraphs of compelling facts that support your finding.
- 1 sentence to close the finding. ("Thus, a preponderance of the evidence supports a finding that")



Practice Tips: Findings

- Don't restate all the facts you gathered
 - Cite only the most compelling and relevant evidence.
- Do not cite information that does not add to your analysis.
 - E.g., don't mention witnesses who were not present or who did not recall the incident.
- Focus on the Preponderance of the Evidence:
 - You are deciding what "more likely than not" occurred
 - There can be some doubt – this is not a criminal trial!
- Make the hard calls—that is the investigator's job.
 - The finding is Sustained or Not Sustained – NEVER "inconclusive"



The Final Example



Finding

- Begin with a clear, unequivocal finding:

Sustained. A preponderance of the evidence supports a finding that Professor X harassed Student Y by repeatedly calling her the N-word during ten one-on-one meetings between the two.



Analysis

- Include evidence **contrary** to your finding:

Professor X denied Student Y's allegations and said he was the "least racist person you'll ever meet." In addition, there were no other witnesses with firsthand knowledge of the incidents. Further, three witnesses said Complainant had a tendency to lie about other matters.



More Analysis

- Cite compelling facts that **support** your finding:

Professor X's denials that he made racist remarks, while vehement, were insufficient to overcome contrary evidence. Of 10 witnesses, all of whom are Professor X's students, nine of them said that Professor X habitually made racist or discriminatory comments. The consistent narrative that these witnesses offered about Professor X's capacity and tendency to make racially-charged remarks lends plausibility to their assertions, and outweighs the perspective provided by student 10, the lone student who said she never heard Professor X say anything racist.



More Analysis

- Be sure to cover all the **elements** of the claim:

Evidence shows that Professor X's conduct was so pervasive and offensive that Student Y was reasonably and substantially limited in her ability to benefit from CSU educational services. Student Y stated that she was so offended by Professor X's comments that she had trouble sleeping at night, could not concentrate in class, and she eventually stopped showing up for the one-on-one meetings. Other students of Color reported similar reactions to other comments Professor X made, thus underscoring the reasonableness of Student Y's reaction.



Closing Sentence

- Restates the first:

Accordingly, a preponderance of the evidence supports a finding that Professor X harassed Student Y by repeatedly calling her the N-word during ten one-on-one meetings between the two.



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Questions?





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THANK YOU!
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And by the way, this presentation has been designed using images from Vectorjuice and Freepik.com



INFORMAL RESOLUTION

Sarah Clegg

Interim Systemwide Title IX Assistant Director

Gloria Godinez

Interim Assistant VP of Equal Opportunity & Dispute Resolution | Chico State

3:45 p.m. – 4:45 p.m.

SARAH CLEGG
INTERIM ASSISTANT DIRECTOR,
SYSTEMWIDE TITLE IX



GLORIA GODINEZ
INTERIM ASSISTANT VICE PRESIDENT OF
EQUAL OPPORTUNITY AND DISPUTE
RESOLUTION
CALIFORNIA STATE UNIVERSITY, CHICO



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REVIEW ISSUES TO CONSIDER
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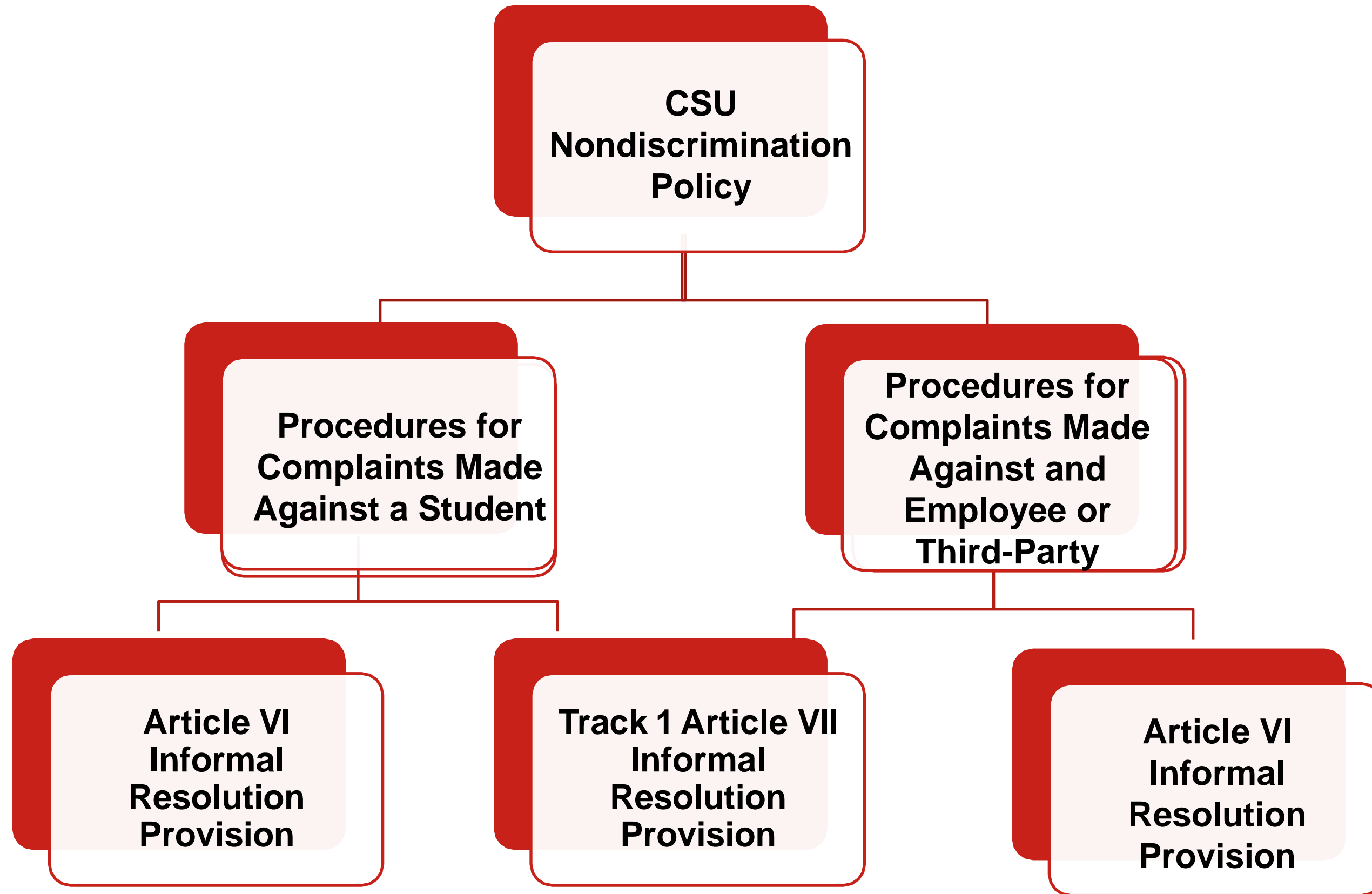
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- (i) Provides to the parties a written notice disclosing: the allegations, the requirements of the informal resolution process including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations, provided, however, that at any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint, and any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared; See TX Transcript Notation and Information sharing Requirements
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- Option is available any time before determination of responsibility
- Parties must receive written notice of agreement to engage in informal resolution
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- Prior to signing any agreement, the Title IX/DHR Administrator must consult the student conduct administrator
- Any agreement must be in writing, signed by the Parties and the Title IX Coordinator/DHR Administrator
- Any agreed upon remedies or discipline have the same effect as remedies or discipline after hearing or investigation
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STEPS IN THE INFORMAL RESOLUTION PROCESS



Identification of applicable Track and applicable informal resolution provision



Provide notice to the parties



Secure signed consent to engage in informal resolution from each party.



Discussion of proposed resolution agreement terms



Review terms and consult with HR or Student Conduct



Secure agreement signatures



- Assess the nature and/or severity of allegations to determine if informal resolution is appropriate
- Continually assess the possibility of an informal resolution so that if there is no agreement, the formal process is not unduly delayed



ISSUES TO CONSIDER

When should informal resolution be available? Think about these questions when determining whether to allow for informal resolution:

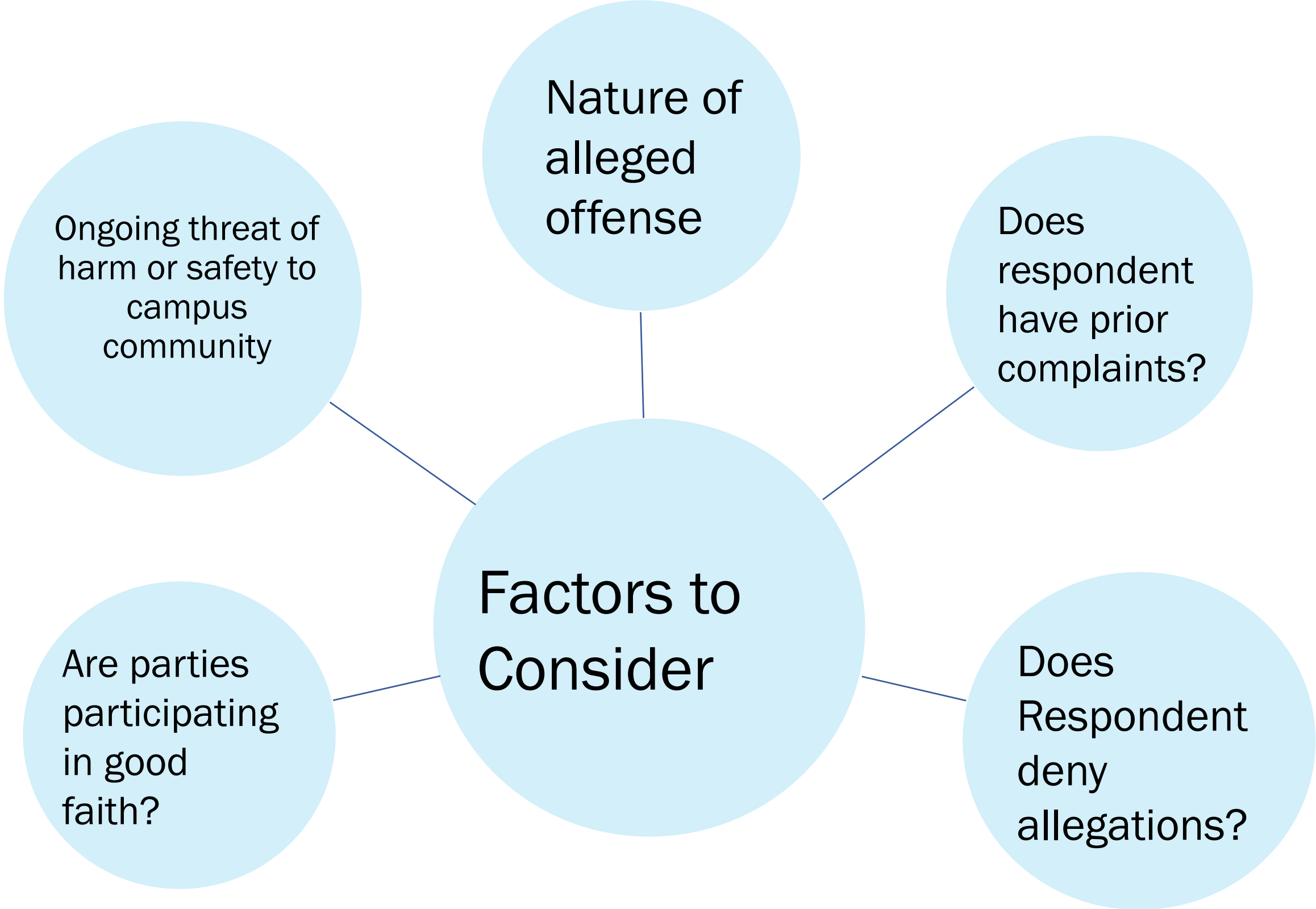
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- What is the risk if there is a failure to comply with a no- contact directive?

Hypothetical



- Complainant (student) files formal complaint alleging sexual harassment and gender discrimination.
- Complainant and Respondent are in the same Business Marketing class. She is the only female student in the small working group she shares with Respondent.
- She alleges that Respondent (student) is condescending and belittling, often excludes her from group texts and emails. She alleges that he refers to her as “sweetheart” and “honey” both in private and in front of the group. He has also allegedly made comments such as “Women don’t typically have the aptitude for business. Traditionally, women do much better in roles like teacher and nurse.”
- Complainant further alleges that Respondent has sent private messages to her in which he makes comments about her appearance (“lookin’ hot today mama...”) (If that shirt was cut any lower we’d all get quite a show ;)”
- Complainant states that Respondent’s behavior has made her feel unsafe. She is unable to focus on her work and has skipped several classes to avoid him. She does not want an investigation because she doesn’t want him “to get into trouble” but would like to explore an informal resolution
- Respondent is notified of complaint. He meets with Title IX Coordinator, who shares Complainant’s wish to attempt an informal resolution. Respondent denies all of the allegations but states that he will engage in the IR process “to get it over with.”

INFORMAL RESOLUTION IS NOT FOR ALL SITUATIONS





CASE STUDY



Informal Resolution-Restorative Justice Case:

- Employee reported to TIX that Student-Complainant shared she was “taken advantage of” by another student.
- Complainant asks to meet with TIX in response to outreach/resource letter sent to her.
- Initial meeting with Complainant reveals:
 - o Complainant needs help connecting with counseling.
 - o Complainant is a student athlete.
 - o Respondent is a student athlete.
 - o The student athlete group socializes frequently.
 - o Six months earlier, on Complainant’s birthday, she went out with friends, and, according to her, she was “incredibly drunk” and blacked out.
 - o Complainant recalls only walking to a friend’s home with Respondent and two others; after arriving, she and Respondent took off their clothes and Respondent said, “I want to fuck you.” She recalls thinking “I don’t want to have sex with him,” but does not recall responding or anything else.
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 - o Sometime later, Complainant sees Respondent making out with a drunk female at another athletic group party.
 - o Later still, Complainant was intoxicated at another party and asked Respondent about the night of her birthday, and he responds, “We didn’t talk before, why would we talk now?”
 - o Complainant is unsure if she wants an investigation.
- About a month later, Complainant states she wants to file a complaint. Determined to be a Track 2 matter.
- Because the parties are in the same athletic group, Complainant is offered a no contact directive, at which point she states she does not need one and would not be opposed to having a conversation with Respondent if he approached her.
- Notice of Investigation issued to both parties.
- Respondent is interviewed and interested in informal resolution.
- Complainant is contacted and is interested in informal.
- Non-investigator contacts both parties separately to explain informal resolution process in detail.
- o Complainant expresses desire for Respondent to hear what he has to say and indicates it would perhaps help her to hear what he has to say since she does not remember what happened that night.
- o Respondent and Complainant are informed about restorative justice practices, including face to face process to address the harm.
- Both parties sign agreement to engage in informal resolution.

- o Several preparatory meetings held with both parties (two in person and one phone call with Respondent; two with Complainant), including an intake/assessment to gauge their readiness to engage in a restorative meeting (in-person or shuttle), identify support systems, the harms caused and needs of Complainant, brainstorm potential ways to address the harms and needs.
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THANK YOU!

SARAH CLEGG –

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GLORIA GODINEZ

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INFORMAL RESOLUTION

Sarah Clegg

Interim Systemwide Title IX Assistant Director

Gloria Godinez

Interim Assistant VP of Equal Opportunity & Dispute Resolution | Chico State

3:45 p.m. – 4:45 p.m.

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2023 ANNUAL TITLE IX & DHR CONFERENCE



SARAH CLEGG
INTERIM ASSISTANT DIRECTOR,
SYSTEMWIDE TITLE IX



GLORIA GODINEZ
INTERIM ASSISTANT VICE PRESIDENT OF
EQUAL OPPORTUNITY AND DISPUTE
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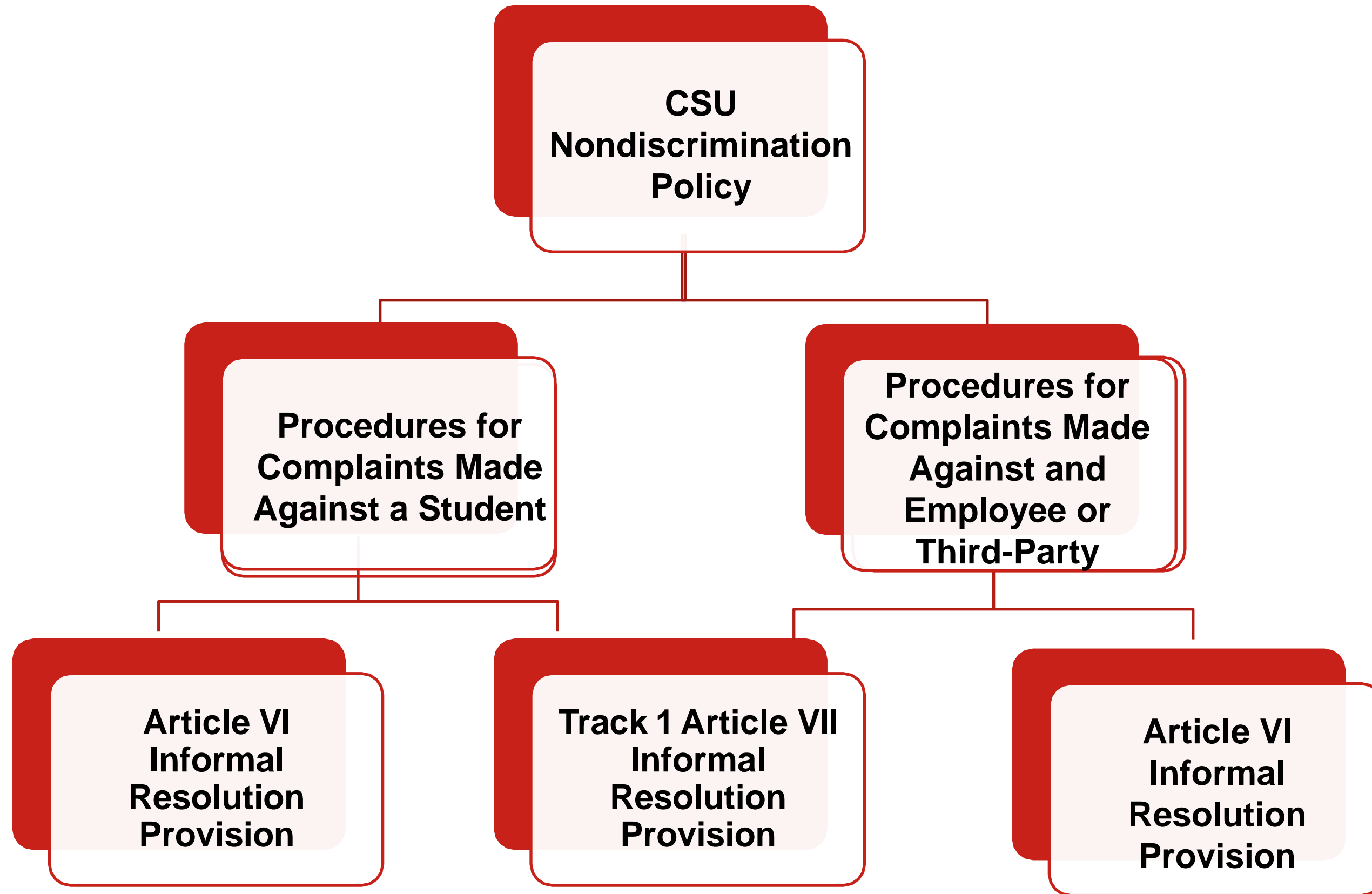
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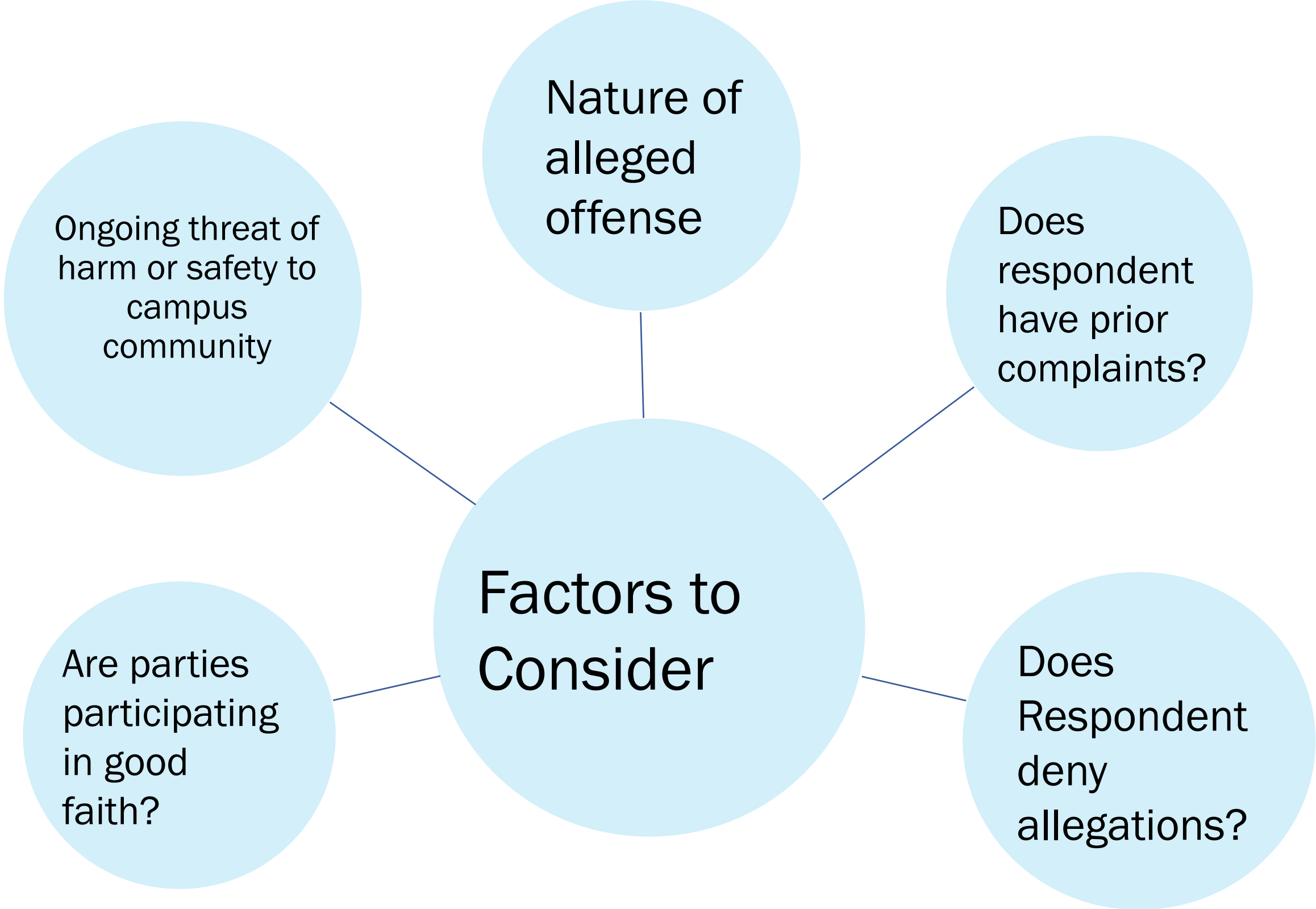
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