

Title IX Investigator Training

NJIT

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1.0

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Introductions



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Welcome!

Give a thumbs up if you...

- * Have never done a Title IX/sexual violence investigation before.

- * Are familiar with the new Title IX

Final Rule?

Type in the chat 1-2 words to describe how you feel about serving in the role of a Title IX Investigator.

The Clery Act



*The Jeanne Clery Disclosure of Campus Security and Crime Statistics Act (Clery Act), 20 U.S.C. § 1092(f), was enacted in 1990

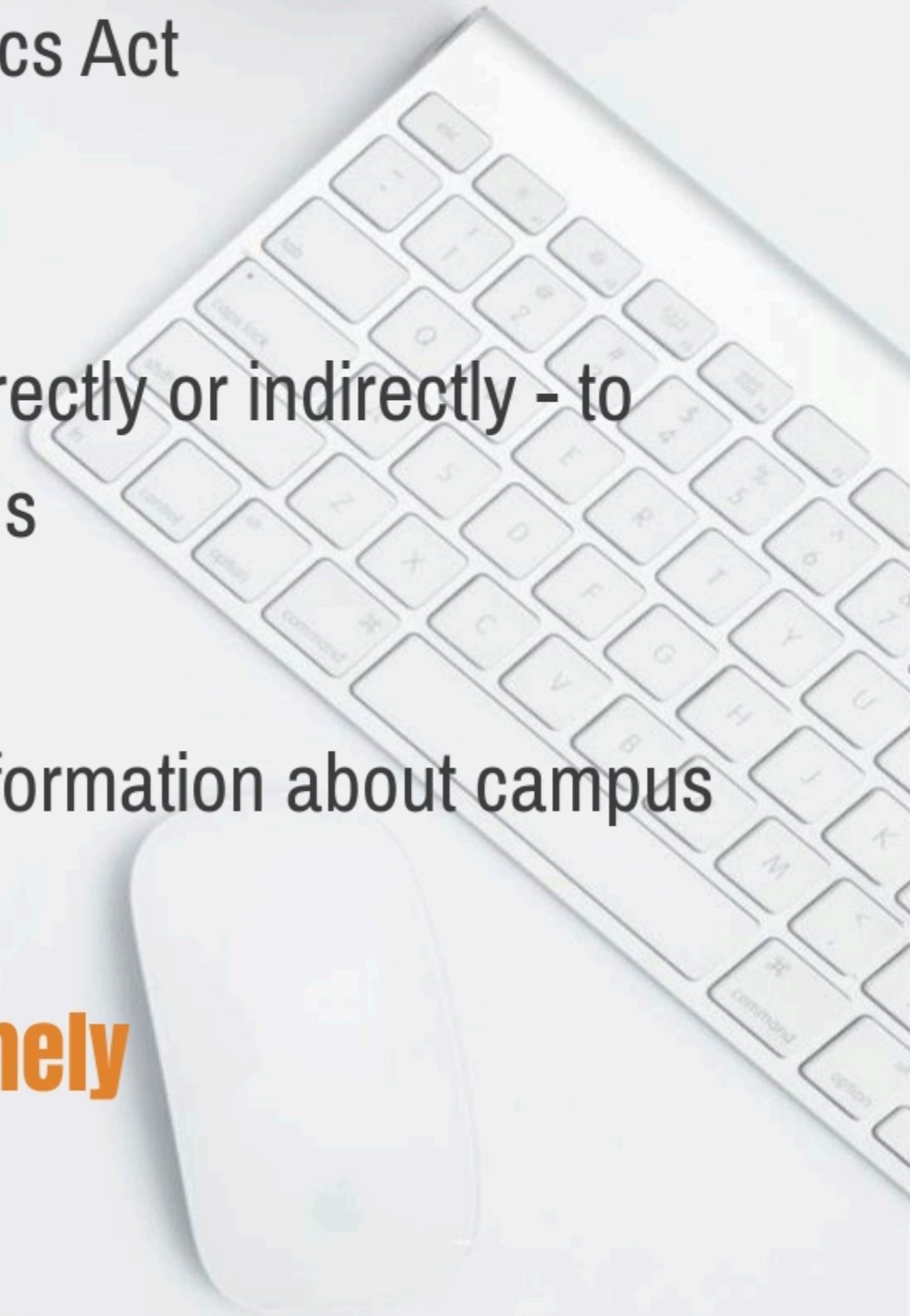
*Requires schools that receive federal financial assistance - either directly or indirectly - to maintain and publish information about crime on or near their campus

*Purpose = to provide students, their families, and employees with information about campus safety to better inform future decisions that is...

➤ **Accurate**

➤ **complete**

➤ **Timely**



2011 "Dear Colleague"
Letter

2001 Revised Sexual Harassment Guidance

2013 Reauthorization of
VAWA

*2014 Q&A

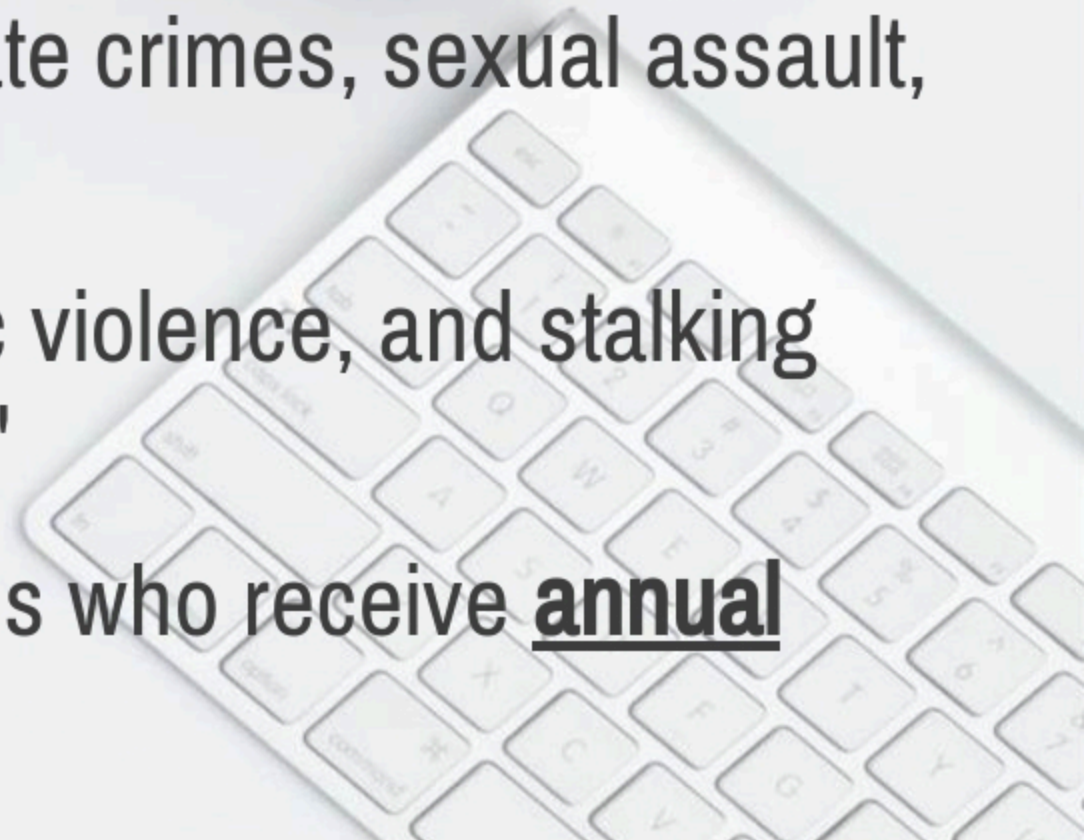
*2017 (Q&A) --> Rescinded 2014, 2011 letters

*2018 - Release of NPRM

2020 New Title IX
Final Rule

Violence Against Women Act

- *Places additional reporting requirements on campuses for certain hate crimes, sexual assault, dating violence, domestic violence, and stalking.
- *Disciplinary procedures for sexual assault, dating violence, domestic violence, and stalking must provide "prompt, fair, and impartial investigation and resolution"
- *Proceedings (including investigations) must be conducted by persons who receive **annual training** on issues related to these crimes/violations
- *Both parties are entitled to the same opportunity to be accompanied by an **advisor of their choice**
- *Both parties shall be simultaneously informed in writing of:
 - Outcome
 - Appeals procedures
 - Any change to the results that occurs prior to final resolution
 - When results become final



Title IX

Title IX of the Education Amendments of 1972 prohibits discrimination based on sex in the educational programs and activities that receive Federal financial assistance



Understanding Title IX

- * Prohibits discrimination on the basis of sex and certain forms of Sexual Harassment (although limited in scope)
- * Protects all individuals associated with the IHE, including students, faculty, staff, & third parties
- * Places obligations on institutions regardless of any law enforcement action **College Process** \neq **Criminal Process**
- * The school must provide appropriate supportive measures to address safety and well-being of the Reporter, regardless of whether a Formal Complaint is signed, and is encouraged to do the same for the Respondent.
- * Under New Jersey State Law, if the institution knows or reasonably should have known about sexual harassment (including sexual violence), we should take necessary steps to:

- ***Eliminate the harassment***
- ***Prevent its occurrence***
- ***Address its effects***

TITLE IX JURISDICTION

The alleged conduct must...



**Constitute
Sexual
Harassment**



**Occur against a
person in the
United States**



**Occur within the
institution's
Education Program
or Activity**



TITLE IX

Discrimination on the basis of sex & Sexual Harassment

Conduct on the basis of sex that satisfies one or more of the following:

The following behaviors as defined by Clery & VAWA:



Sexual Assault

Rape, Fondling, Incest, & Statutory Rape



Stalking



Dating Violence



Domestic Violence



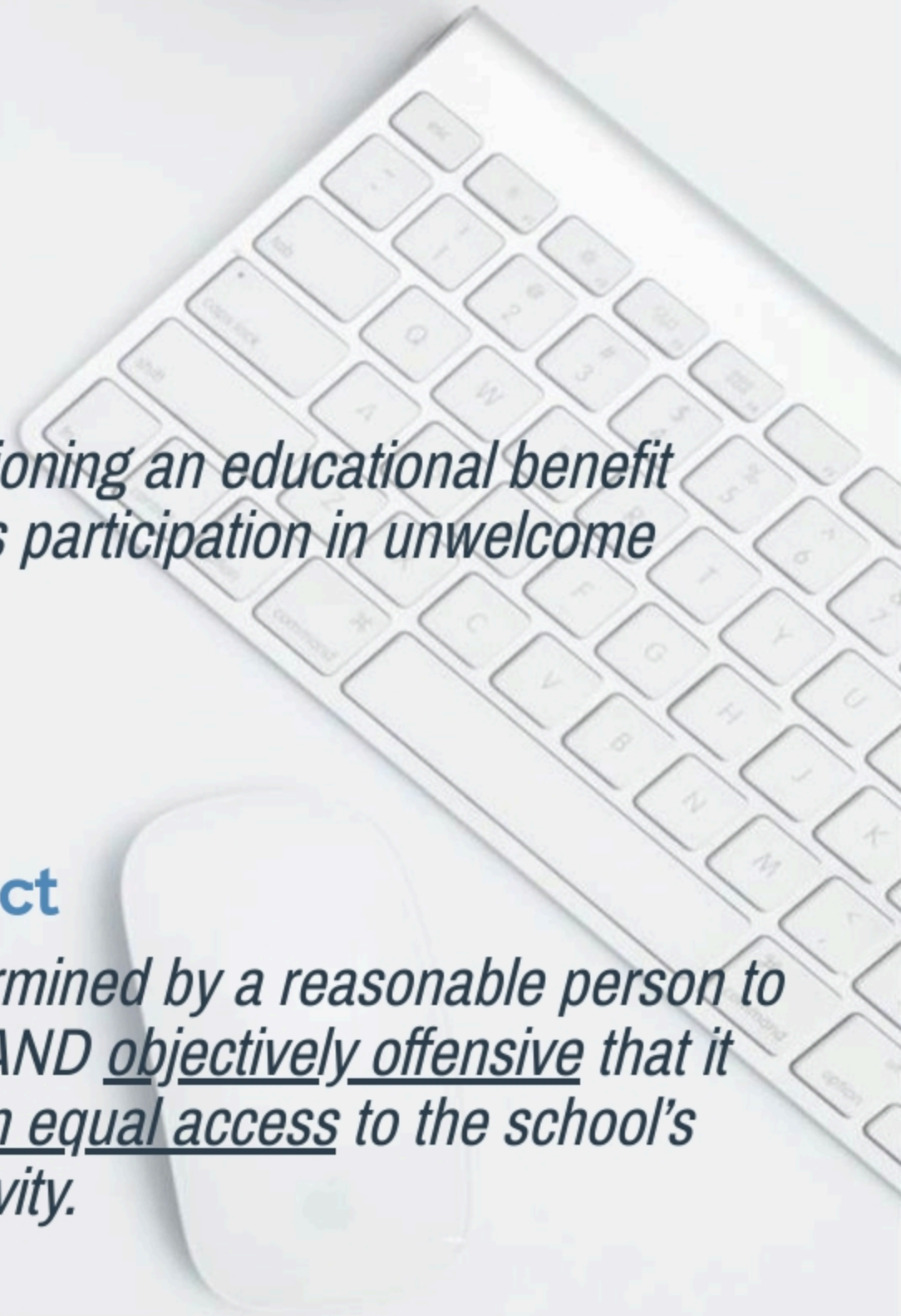
Quid Pro Quo

A school employee conditioning an educational benefit or service upon a person's participation in unwelcome sexual conduct.



Unwelcome 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 school's education program or activity.*



TITLE IX

Education Program or Activity

NJIT's education program or activity includes all of NJIT's operations, including:

- 1) locations, events, or circumstances over which NJIT exercises substantial control over both the Respondent and the context in which conduct occurs; and
- 2) any building owned or controlled by a student organization that is officially recognized by NJIT.

IMPORTANT CONCEPTS

POLICY
DEFINITIONS

Consent -



is a mutual and voluntary agreement to engage in a sexual activity, which is informed and freely given.

- ✓ Consent to any sexual act or prior consensual sexual activity between or with any party **does not** necessarily constitute consent to any other sexual act, nor does it imply consent to engage in sexual activity with another person.
- ✓ If an individual is mentally or physically incapacitated or impaired so that the individual cannot understand the fact, nature, or extent of the sexual situation, there is no consent, including whether the incapacity is due to alcohol or drug ingestion, sleep, unconsciousness, or because of an intellectual or other disability that prevents the individual from having the capacity to give consent.
- ✓ Consent may be initially given but withdrawn at any time.
- ✓ Silence does not constitute consent.

Consent cannot be given when it is the result of intimidation, force, or threat of harm. When consent is withdrawn or can no longer be given, sexual activity must stop immediately.

Incapacitation -

is the inability, temporarily or permanently, to give consent because the individual is mentally and/or physically helpless, either voluntarily or involuntarily.

Persons who meet any of the following criteria or conditions are incapacitated & are incapable of giving consent:



Sleeping



Passed out, unconscious, or otherwise unaware that the sexual activity is occurring



Under the age of consent or under a certain age in relation to the other party to the sexual activity or due to a disability, do not have the mental capacity to consent

Incapacitation due to alcohol or drug use is a state beyond "mere" intoxication or even being drunk. It involves impairment that is so severe that it interferes with an individual's capacity to make informed and knowing decisions. Impairment must be significant enough to render an individual unable to understand the fact, nature, or extent of the sexual activity

Incapacitation - (Cont.)

Alcohol related incapacity results from a level of alcohol ingestion that is more severe than that required to produce the minimum levels of influence, impairment, intoxication, inebriation, or drunkenness.

Such a person's state of incapacity is a subjective determination that is based on all of the facts available because persons reach incapacitation at different points and as a result of different stimuli.

Indicators of incapacitation may include, but are not limited to:

- ✗ Inability to communicate
- ✗ Lack of control over physical movements
- ✗ Lack of awareness of circumstances
- ✗ Combativeness or emotional volatility

"Black out"
≠
Incapacitation



An incapacitated person can also experience a blackout state during which the person has limited ability to form or retain memories, but is conscious and may appear to be functioning "normally," such as exhibiting verbal or non-verbal expressions that under normal circumstances between two individuals acting with full capacity might reasonably be interpreted as conveying consent.

Incapacitation - (Cont.)

Because that person does not have the capacity to consent, despite those expressions, consent is lacking.

It is especially important, therefore, that anyone engaging in sexual activity be aware of their own & the other person's level of intoxication due to Alcohol and/or Drug use, and capacity to give/receive consent.

The relevant standard that will be applied is whether the Respondent knew, or a sober reasonable person in the same position should have known, that the other party was Incapacitated and therefore could not consent to the sexual activity.

Reasonable Person -

A hypothetical person in society who exercises average care, skill, and judgment in conduct and who serves as a comparative standard for determining liability.

Basically... would a reasonable person, in a similar situation, react or engage in similar behavior to what is in question?



Reference- <https://legal-dictionary.thefreedictionary.com/Reasonable+person+standard>

Who's involved in Title IX cases?

- * Title IX Coordinator
- * Lead Investigator
- * Co-investigator
- * Reporting party
Victim/Survivor
("Complainant")
 - * May or may not be the same as the reporting party

- * Accused student or Employee ("Respondent")
 - * Has equal rights as Complainant throughout process
- * Witnesses
- * Decision-Maker
- * Appeal Officer(s)
- * Advisors

Role of Investigators

- * Investigators are independent parties with no vested interest in the case
- * Role is to gather information and compile a report that fairly summarizes all relevant evidence.

LEAD INVESTIGATOR

- * Schedules all appointments
- * Takes lead in questioning parties & witnesses
- * Sends summaries to parties & witnesses
- * Writes final investigative report
- * Maintains records

CO-INVESTIGATOR

- * Attends & takes detailed notes in all interviews
- * Assists with questioning parties & witnesses
- * Transcribes notes and forwards handwritten and electronic copies to lead investigator
- * Assists with writing final report
- * Assists lead investigator with other tasks, as necessary

Advisors

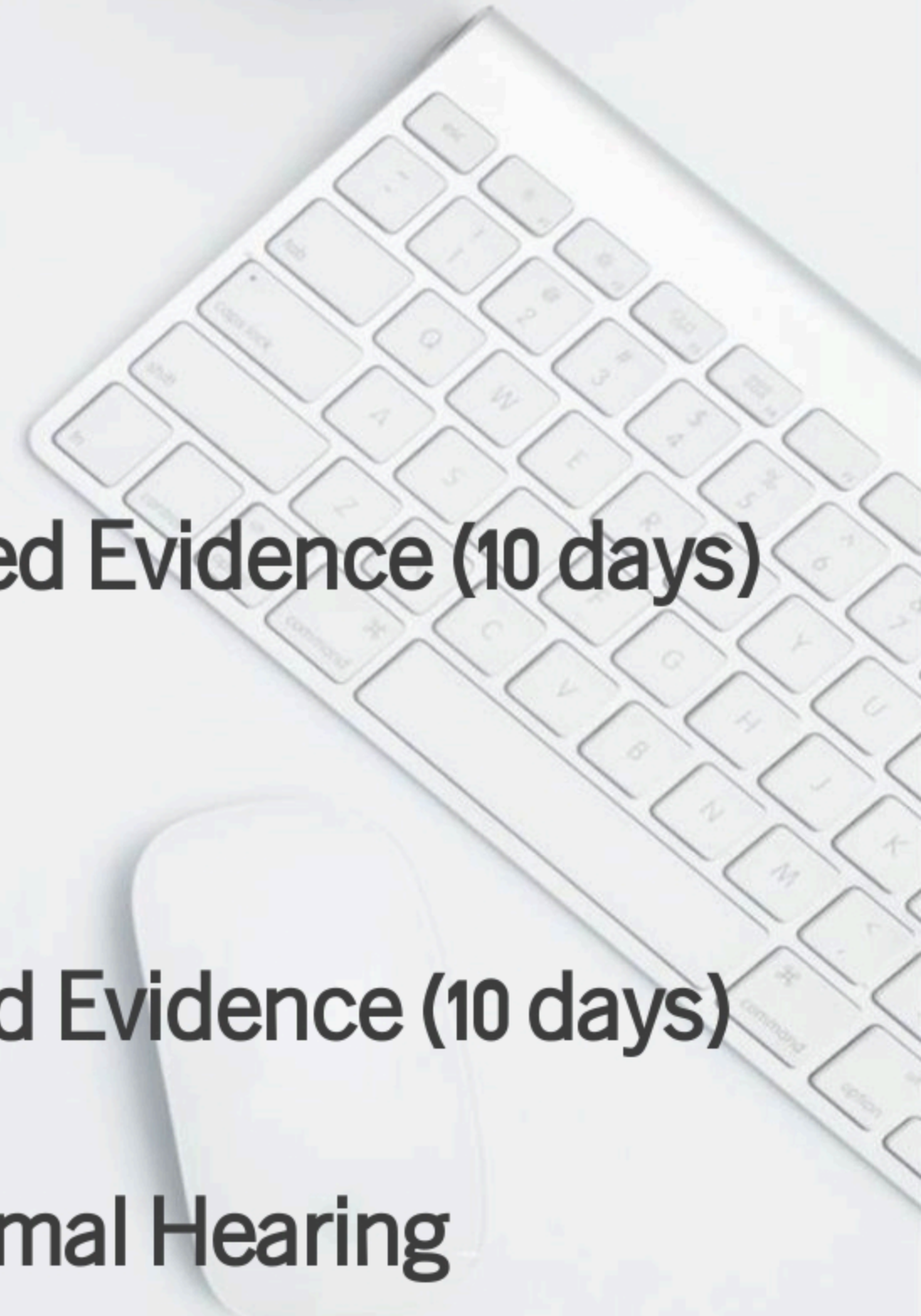
NJIT

- * All parties are allowed to have an advisor of their choosing present during any meeting or proceeding.
- * Advisor may be but need not be an attorney.
- * The advisor's function is solely to observe, provide support, and provide guidance or advice to the party (outside of the proceeding).
- * Failure to comply with these mandates may result in the advisor being removed from, or prohibited from attending, any investigatory meetings and/or hearing.
- * The advisor must meet with Title IX Coordinator (or designee) in advance of any participation in any meeting or proceedings to understand the expectations of the role, privacy, & appropriate decorum.

NOTE:

- * *"A recipient may not limit the choice or presence of an advisor" (p. 992).*
- * *"Any rules a recipient adopts for its grievance process other than rules required under § 106.45 to apply equally to both parties" (p. 997).*

Overview of Investigation



-  Receipt of Formal Complaint
-  Notice of Investigation
-  Evidence Collection
-  Preliminary Inspection & Comment of All Directly Related Evidence (10 days)
-  Finalization of Investigative Report
-  Secondary Inspection & Comment of All Directly Related Evidence (10 days)
-  Shared with parties, Advisors, & Decision-Maker for Formal Hearing

Develop an investigative plan



Notice of Investigation

NJIT's notification of investigation will include:

- *a description of the resolution process, including formal and informal resolution;
- *the allegations of Prohibited Conduct, including sufficient details known at the time;
- *the potential policy violations at issue;
- *a statement that the Respondent is presumed not responsible for the disclosed conduct and that a determination regarding responsibility is made at the conclusion of the formal resolution process;
- *the name of the assigned investigator and an opportunity to object to the investigator on the basis of bias or conflict of interest;
- *notice that the party may have an advisor of their choice, who may be but is not required to be an attorney, and that if the party does not have an advisor present at the live hearing, NJIT will provide them an advisor for cross-examination;
- *notice that the parties & advisors may inspect and review evidence directly related to the allegations at the conclusion of the investigation phase;
- *a statement about preservation of evidence; and
- *the prohibition against retaliation.

Including the:

- *identities of the parties
- *alleged conduct involved
- *date & location at which the alleged conduct occurred

Communications

- * Ensure active & regular communication with Reporter and Respondent regarding procedure and what can be expected.
- * In all communications, be sure to be...
 - *Sensitive*
 - *Courteous*
 - *Professional*
- * Maintain a working list of contact information for all relevant parties.
- * Document ALL communications.

When in doubt,
document it
out!

Developing an Investigative Plan

- * Make list of parties & witnesses and order of interviews
- * Make list of other possible sources of evidence
 - i.e. Texts, Videos, Social Media, swipe access, etc.
- * Outline questions beforehand
 - TIP: Outlines are helpful, but be sure to remain flexible
- * Use checklists to ensure that all possible sources of evidence are considered

This plan should be dynamic & evolve throughout the investigation



Relevant Interviews

* Parties:

- Reporter
- Respondent

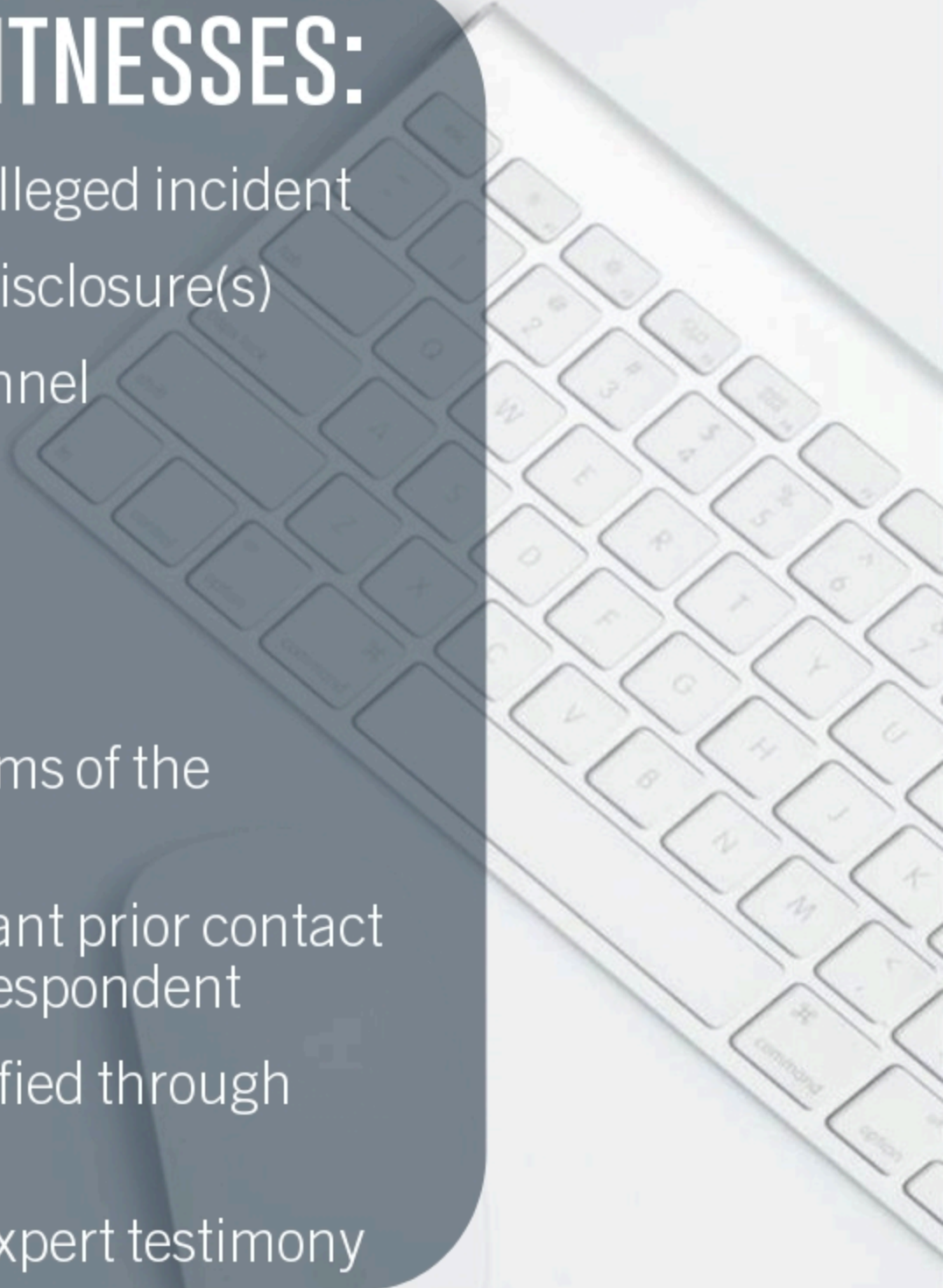
* Witnesses

- Fact witnesses
- Expert witnesses

* Anyone else?



POSSIBLE WITNESSES:

- * Any witnesses to the alleged incident
 - * Any witnesses to the disclosure(s)
 - * First responder personnel
 - Hospital
 - Police
 - Campus
 - * Any other alleged victims of the Respondent
 - * Any witnesses to relevant prior contact between Reporter & Respondent
 - * Other witnesses identified through interviews
 - * Witnesses to provide expert testimony
- 

Preparing for the Interview

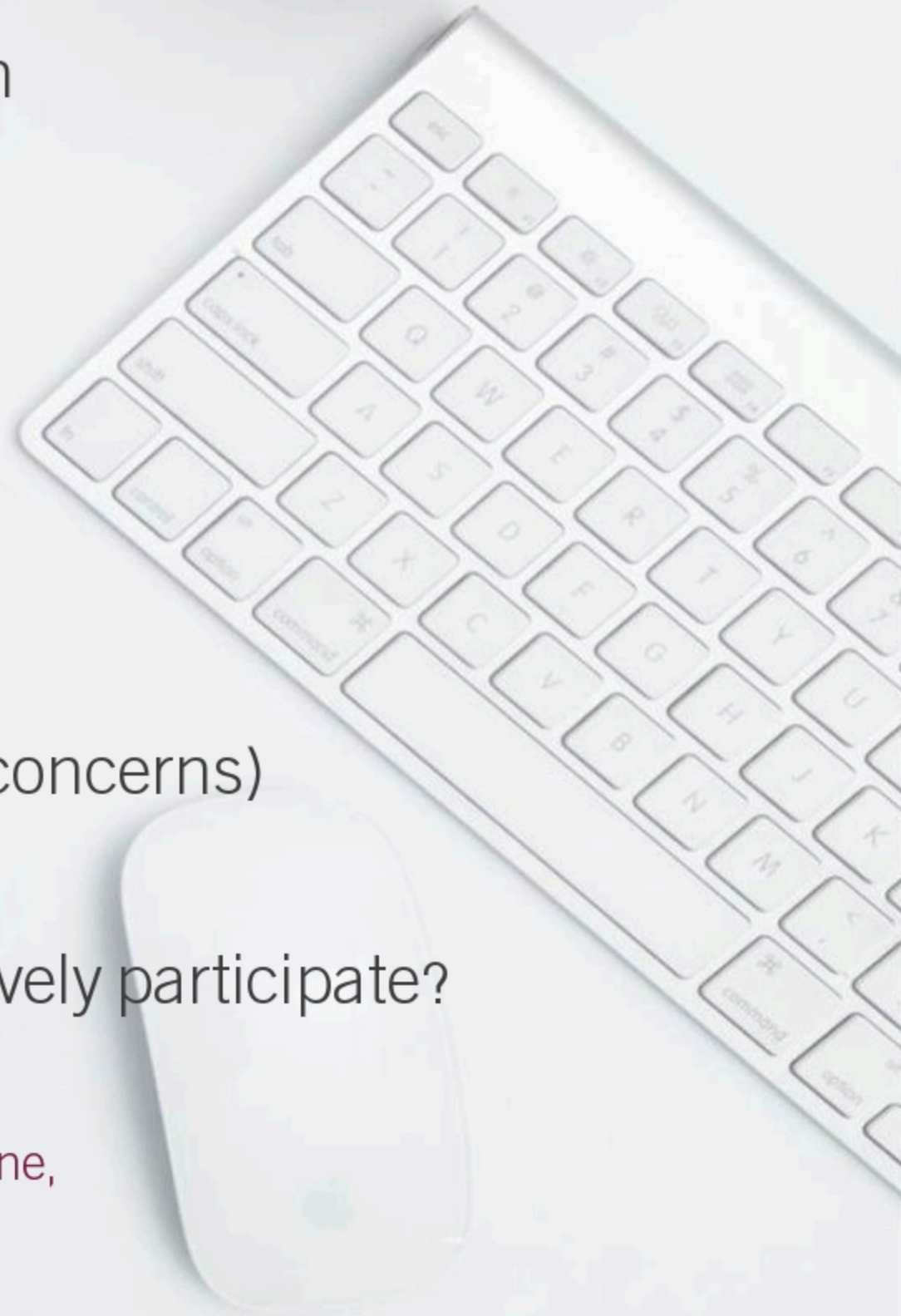
* Investigator(s) should determine:

- the methods they'll utilize to document the statement collection
- who will be leading the meeting
- what questions will be asked, how, and when
- ways to communicate amongst themselves if needed
- how/when they'll request clarification

* Important logistics to consider:

- Where & when will the interview take place? (consider privacy concerns)
- Where will everyone sit/participate?
- Does the party/witness require any accommodations to effectively participate?
- What is the anticipated length of the meeting?

TIP: Consider intentionally incorporating pauses into the meeting, especially if it's a lengthy one, to allow interviewees & Investigator(s) a chance to collect themselves and organize their thoughts.



Interview Spaces (In-Person)

* Need to have a space that is:

- Private
- Quiet
- Ensure confidentiality

* Consider:

- Neutral setting
- Accessibility or safety concerns?
- Actual/perceived power

* Offer the ability to easily take notes

* Make sure you are closest to the door and have access to the phone in case of an emergency.





"Soft Interview Room"

Constructed in collaboration between the Offices of Title IX and AVI through the provision of dedicated grant funding.

Interview Spaces (Virtually)

* Need to have a space that is:

- Private
- Quiet with minimal distractions
- Ensure confidentiality

* Utilize a platform that is reliable & you are familiar with

* Have a backup plan & communicate that to the party/witness prior to the interview in case technology fails

* Consider how you may:

- review process documents
- share documents/evidence with them during the meeting if needed
- their statement for review (if applicable)
- obtain signatures (if applicable)

Examples:

- *Zoom
- *Skype
- *Google Hangouts
- *Facetime
- *Go To Meeting



○ Introductions

- * Thank the party or witness (and the Advisor, if any) for coming in.
- * Try to relax the person by engaging in some conversation before you start.
- * Explain that...

Do not underestimate the power of rapport

- You have been asked by the College to meet with all parties involved in the incident to collect relevant information regarding the allegations and to create a report that fairly summarizes it all.
- You will be taking notes for the purpose of gathering accurate information and that you will be sending them a summary statement of the interview so accuracy can be determined.
- You will not be recording the interview and will not permit any other party to record the

○ Introductions

* Explain that...

- They have the right to participate in as little/much of the investigation as they wish
- You will keep information private and confidential to the extent possible.
- There are Retaliation and Amnesty policies in place, which can offer protection

* Reassure them that information will be used to compile the investigation report & they will get to review all evidence directly related to the allegations -- no surprises.

* Be empathetic and kind, and employ trauma informed approaches ---> BOTH parties need this!!

* **Consider conducive location/seating arrangement for the particular meeting.**

Recommended Practices

- * Have the person start from the beginning & tell you exactly what happened from their point of view.

- * Recognize that it may be difficult for the person to provide details about what happened.

TIP: Avoid interrupting their statement, make marks in margins/highlight areas you want clarity on, then follow-up when they are finished sharing

- * Follow up on any statements that require additional details.

- * Use open-ended nonjudgmental questions to get more information like...

- * Then what happened?

- * Talk to me a little bit about...

- * Can you help me reconcile this?

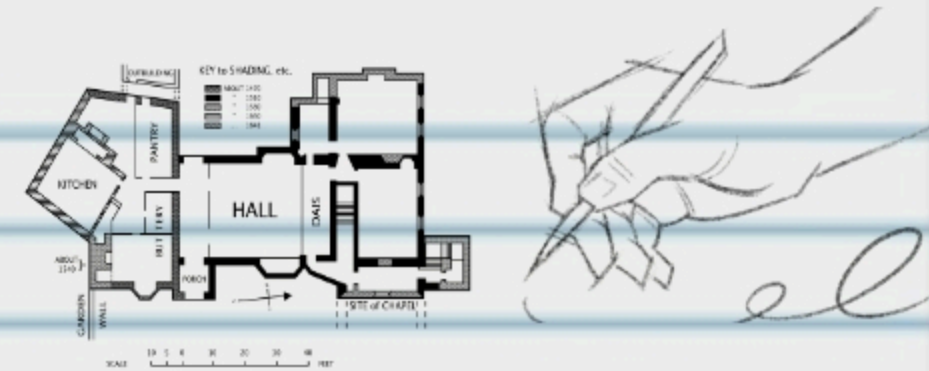
- * Can you help me understand?

- * Ask if there are any individuals who may have observed the incident or may have knowledge of it - including fact & expert witnesses.



Recommended Practices

- * Get specific information about locations ---> Ask each party to sketch out layouts if appropriate



- * Inquire about texts, pictures, videos, journals, communications, voice mails, or any other documents that may be helpful with the case. May also ask if there are any medical records they will share.

TIP: Think outside the box with where you may obtain relevant information

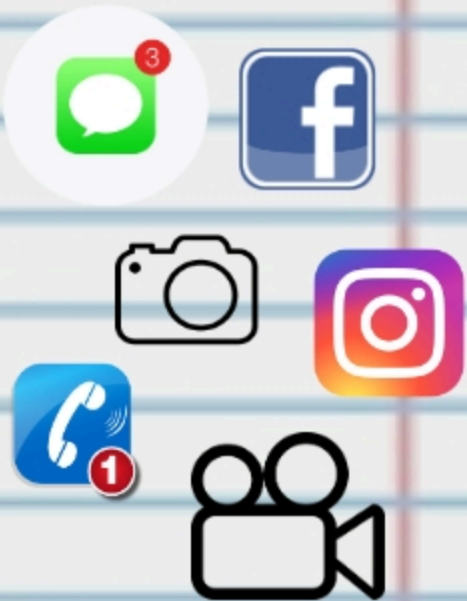
- * Discuss Supportive Measures and Advisor options & their role.

- * Review terms of any ban letters and/or no-contact directives.

- * Review what to expect for next steps & best ways to communicate questions/concerns along the way.

NJIT

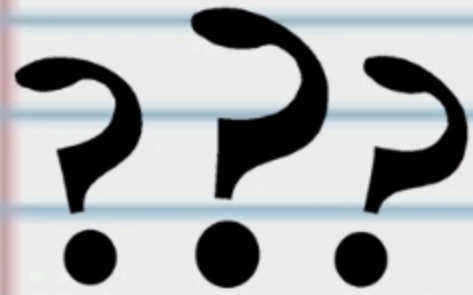
Written consent from the party is required to use this type of information



Documenting Interviews

- * Plan out documentation practices among investigators
- * Take detailed notes of interviews
 - Details are essential to assessing corroboration.
 - This is the best record you have of the complaint.
 - Documentation is crucial to showing that you did a thorough, unbiased investigation.
- * Date ALL notes and include who attended each meeting/interview.
- * Review notes before the end of the interview so you can clarify anything that is unclear.
- * Objectively document any evasion or refusal to answer or participate.
- * Use verbatim quotes where possible - particularly when documenting graphic descriptions
- * Can write down questions they ask and your responses - as well as questions you ask, and their responses.

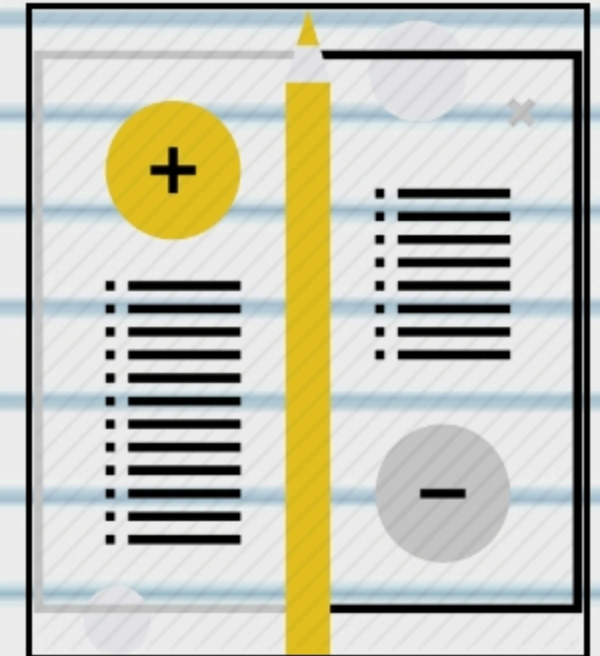
After Interview Steps



* List unanswered questions or information that needs clarification.

* Make a list of information that would substantiate the claim and see if the information collected substantiates or refutes the claim

- What is contested? What areas of conflict still exist?



* Determine additional information you need and see if you can gather that information.

- i.e. Looking at swipe access, police video tape, etc.

- i.e. Document what you've explored and the outcome of that search



Privacy

* Inform all parties that...

- the information will be shared with College personnel involved in process.
- the information may be shared with Title IX, Student Conduct and/or law enforcement
- the information will **not** be shared with others beyond the "need to know" circle.

* Request that the contents of the interview be kept private, but ultimately cannot limit

This goes for ALL parties involved, as well as their respective Advisors - helps protect the integrity of the investigation

"This provision applies to discussion of "the allegations under investigation" and not to the evidence subject to the parties' inspection and review under § 106.45(b)(5)(vi)" (p. 991)



FERPA & Privacy

You must maintain privacy of **ALL** parties~!

*The Family Educational Rights and Privacy Act (FERPA) is a Federal law that protects the privacy of student education records. The law applies to all schools that receive funds under an applicable program of the U.S. Department of Education

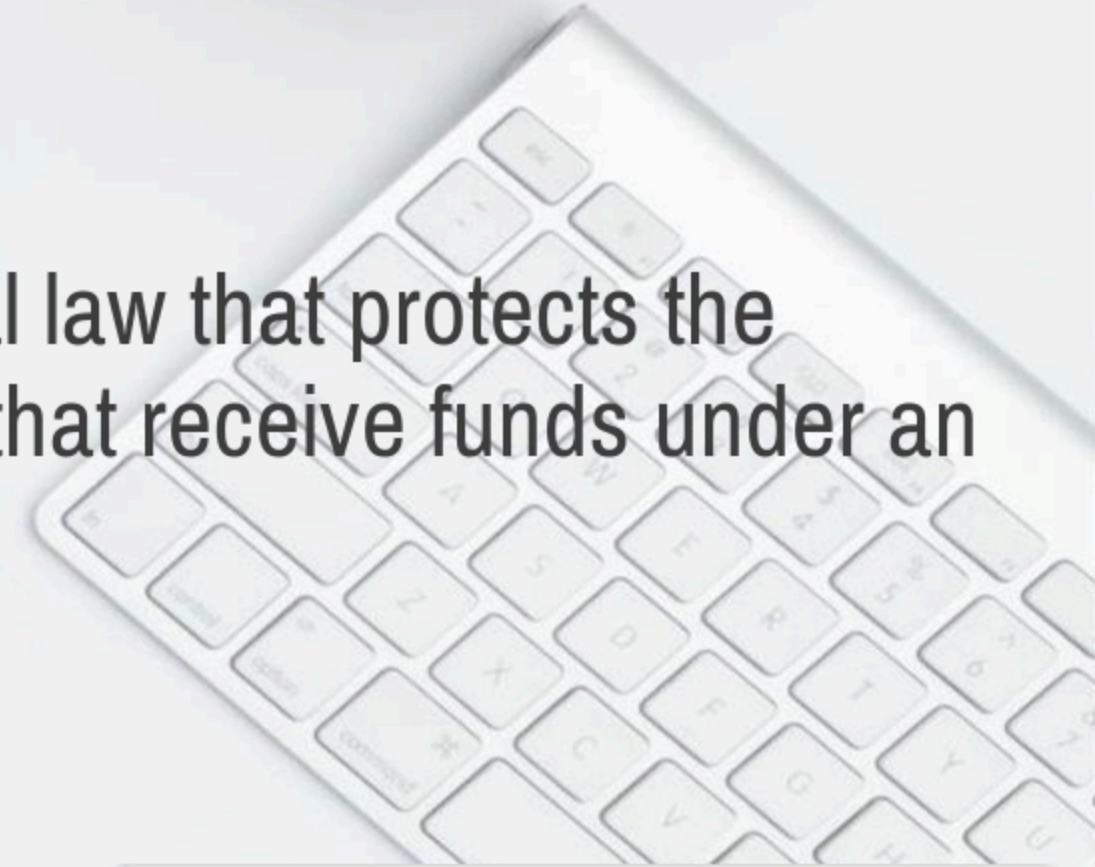
*Under this law...

- *Reporter is allowed to know sanction of Respondent
- *College can not disclose any student records to parents, staff, faculty, etc. without written permission from the Reporter and/or Respondent



FERPA

Family Educational Rights and
Privacy Act



Knock knock
Who's there? ~FERPA

FERPA who?


Sorry, I can't tell you
that....

someecards
user card



Building a Timeline

- * Create a timeline of events of the incident.
- * Create a timeline of the relationship between the parties.
- * Identify witnesses to each event.
- * Identify any other evidence relevant to each event.
- * Note where there is agreement/disagreement as to events.
- * Maintain a chronology of the investigation



Don't forget to include info regarding:

- Relevant prior contact
- Other witnesses
- Disclosures
- etc.

Dates & times of all:

*Communications (phone, email, in-person, etc.)

*Attempts at outreach/scheduling

*Interviews


*Requests for/receipt of evidence

*Sharing of evidence for inspection/review

*Consultations w/ other offices & staff

*Request /decisions regarding delays

*Other key events

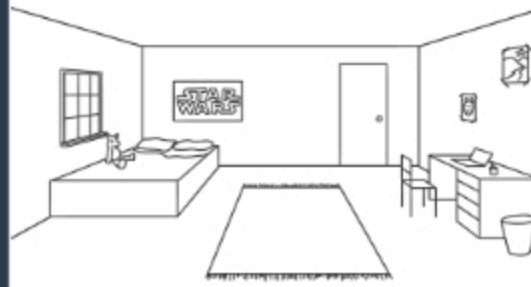


When in doubt, document it out!

Gathering Physical Evidence



- * Injuries (photographs, medical records)
- * Communication records (ie. phone, email, voicemail, text, social media, etc.)
- * Security monitoring video
- * Visitor logs
- * Clothing; Bedding; other tangible objects



- * Photographs of scene
- * School records
- * 911 tape; Police records
- * Forensic evidence such as DNA
- * Diagram of scene



Note
Forensic evidence must be reviewed by a trained forensic examiner

On-Going Considerations

- * Privacy of information obtained over the course of the investigation
- * Assessment of possible threat/risk - is emergency removal needed?
- * Evolving needs of parties & the implementation of Supportive Measures
- * Whether the information obtained warrants a mandatory or discretionary dismissal under Title IX
- * Avoiding the prejudgment of information along with any conflicts of interest or bias

NJIT
Dismissing entirely or
forward onto Student
Conduct?

Review & Response



1 Both parties will be interviewed & asked to share any relevant information/documentation regarding the allegations & identify relevant witnesses.

Anyone who is interviewed *should* have the chance to review/request edits to their documented statement to ensure its accuracy & completeness.

2 Relevant fact & expert witnesses are interviewed as deemed appropriate.

3 Once the Investigator(s) has completed interviews & the gathering of evidence, all evidence directly related to the allegations in the Formal Complaint obtained as part of the investigation will be shared with the parties & their Advisors **electronically** for their review & comment.

Such as via Google Drive, OneHub, One Drive, etc.

4 Parties have ten days to review & respond to the evidence.

May allow parties to submit add. info & respond to other evidence provided by a party/witness.

5 Investigator(s) takes into consideration the parties' responses, engages in any additional investigative steps (as needed), and then determines what evidence is relevant.

6 Investigator compiles the investigation report by fairly summarizing ONLY the relevant evidence pertaining to the allegations in the Formal Complaint.

Separation of Relevant vs. Directly Related Evidence (DRE)

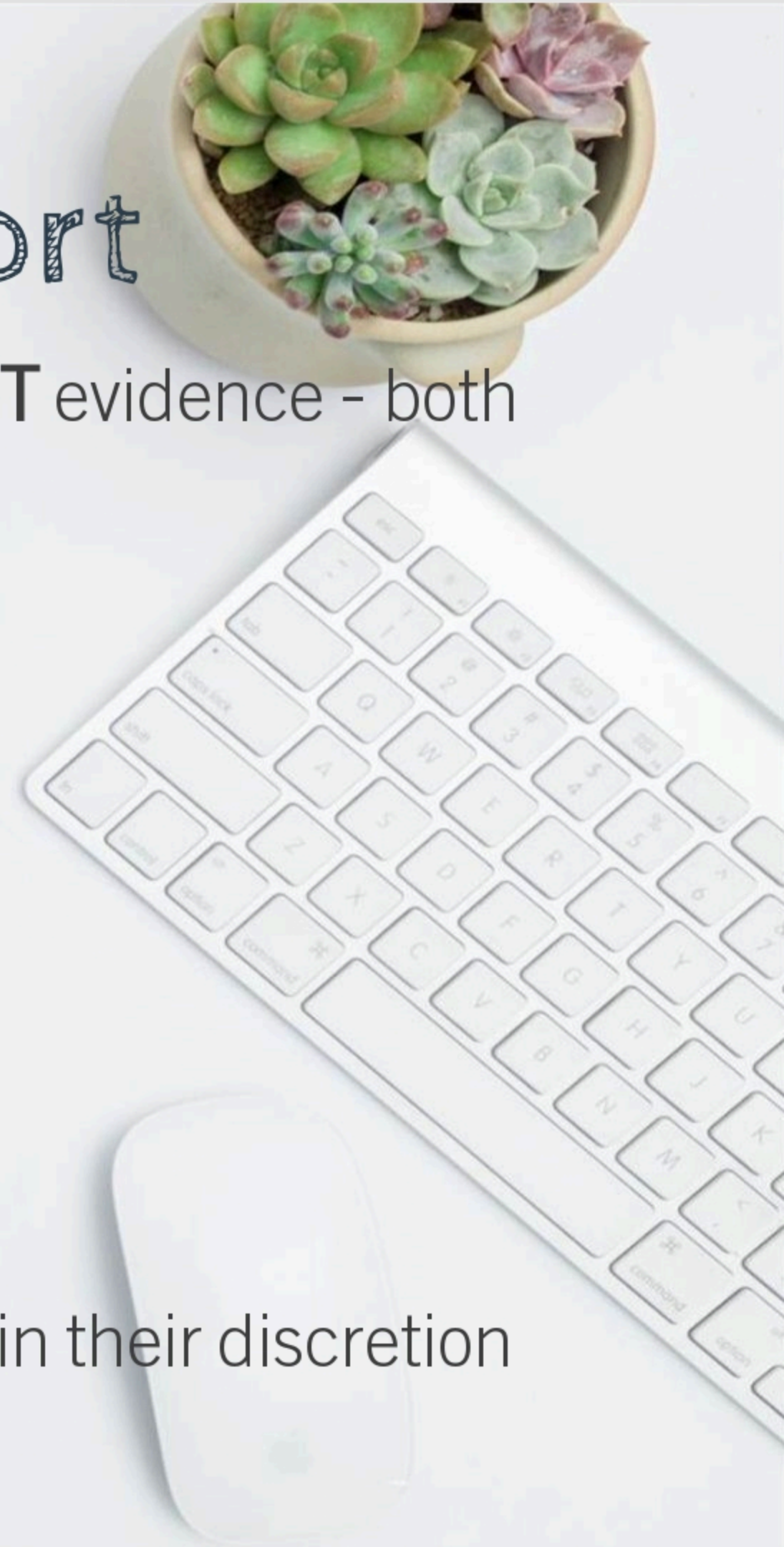
7 Investigation report & separate DRE document sent to parties & their Advisors. Parties have ten days to review & respond to the evidence.

8 The investigator(s) considers the parties' viewpoints about whether such DRE is also relevant, and on that basis decide whether to summarize that evidence in the investigative report. The investigation report is then finalized as the Investigator(s) deems appropriate.

9 The finalized investigation report & separate DRE document is sent to the parties, their Advisors, and the designated Decision-Maker.

Contents of Investigative Report

- * The investigative report must fairly summarize all **RELEVANT** evidence - both inculpatory & exculpatory.
- * Typically will include (as applicable):
 - * an investigative timeline;
 - * the Reporter's statement;
 - * the Respondent's statement;
 - * each witness' statement;
 - * timeline of alleged incident;
 - * any supplemental documentation obtained; and
 - * a summary of any other information the Investigator(s) in their discretion deems relevant.



Relevant vs. Directly Related

"The Department notes that the universe of evidence given to the parties for inspection and review under § 106.45(b)(5)(vi) must consist of all evidence directly related to the allegations; determinations as to whether evidence is "relevant" are made when finalizing the investigative report, pursuant to § 106.45(b)(5)(vii) (requiring creation of an investigative report that "fairly summarizes all relevant evidence")." (p. 1041)

"The Department declines to define certain terms in this provision such as "upon request," "relevant," or "evidence directly related to the allegations," as these terms should be interpreted using their plain and ordinary meaning." (p. 1017)

Relevant Evidence

NJIT "information that tends to make a material fact at issue more or less probable and the fact is of consequence in determining the action."

Evidence is relevant when it tends to prove or disprove an issue in the complaint.

Only "relevant" evidence can be subject to the decision-maker's objective evaluation in reaching a determination, and relevant evidence must be considered, subject to the rape shield and legally recognized privilege exceptions contained in the final regulations.

Directly Related Evidence

Evidence that is connected to the complaint, but is neither inculpatory (tending to prove a violation) nor exculpatory (tending to disprove a violation).

Irrelevant Information



Privileged Information

NJIT cannot access, consider, disclose, or otherwise use a party's records that are made or maintained by a physician, psychiatrist, psychologist, attorney, clergy member, or other recognized professional or paraprofessional acting or assisting in that capacity, and which are maintained in connection with the provision of services to the party, *unless* that party gives their voluntary, written consent to do so.

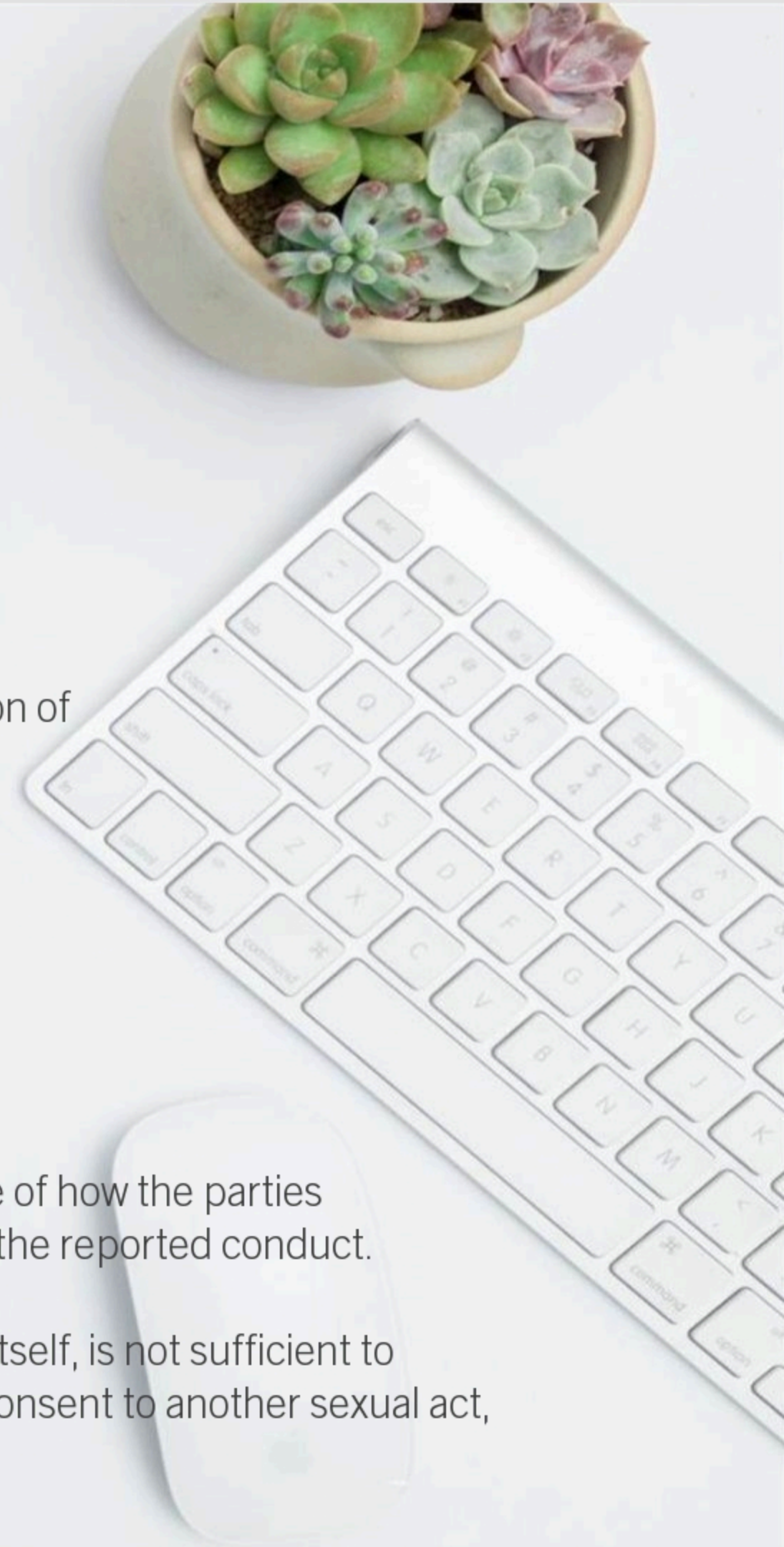
In those instances, the relevant information from the records must be shared with the other party.

Prior Sexual History of the Reporter

The sexual history of the Complainant is not relevant, except in two circumstances:

- (1) to show that someone other than Respondent committed the conduct; and,
- (2) where the Respondent alleges the sexual contact was consensual, evidence of the manner and nature of how the parties communicated consent in the past may be relevant in assessing whether consent was communicated in the reported conduct.

As set forth in the consent definition, the mere fact of a current or previous dating or sexual relationship, by itself, is not sufficient to constitute consent and, even in the context of a relationship, consent to one sexual act does not constitute consent to another sexual act, and consent on one occasion does not constitute consent on a subsequent occasion.





Evidentiary Considerations

- * Types of evidence
- * Burden of proof ---> Preponderance of evidence
- * Relevance
- * Character evidence
- * Other crimes evidence
- * Victim's sexual history (rape shield)

Timeline of Cases

* Ideally, cases will be resolved within 90 days of parties receiving notice of investigation



Contact Me



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