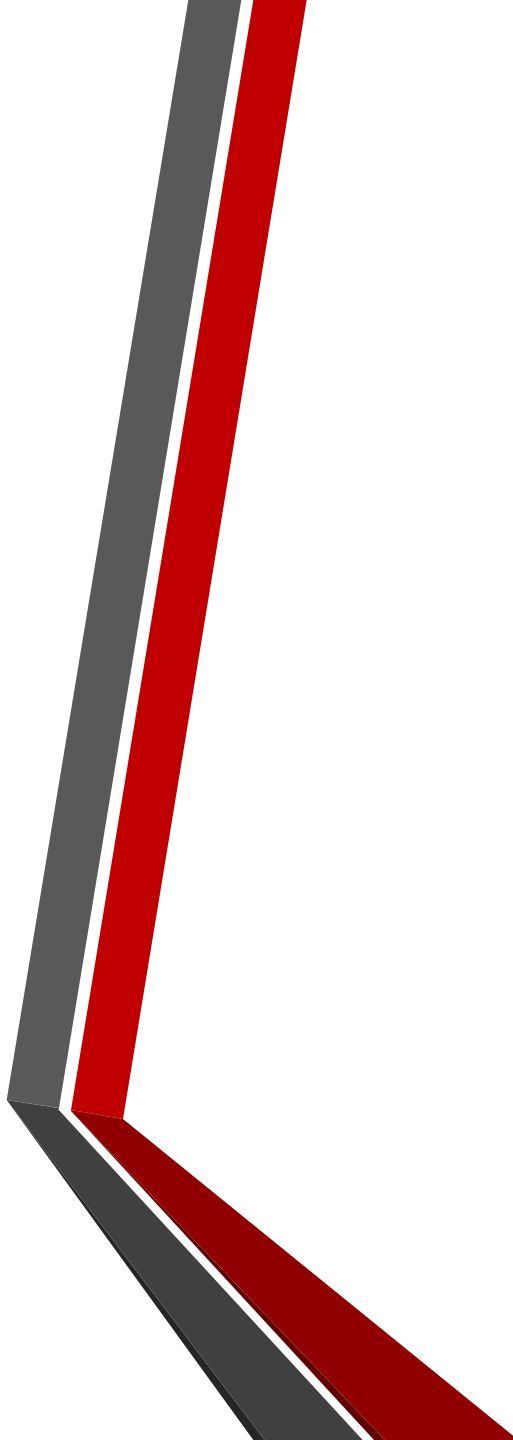
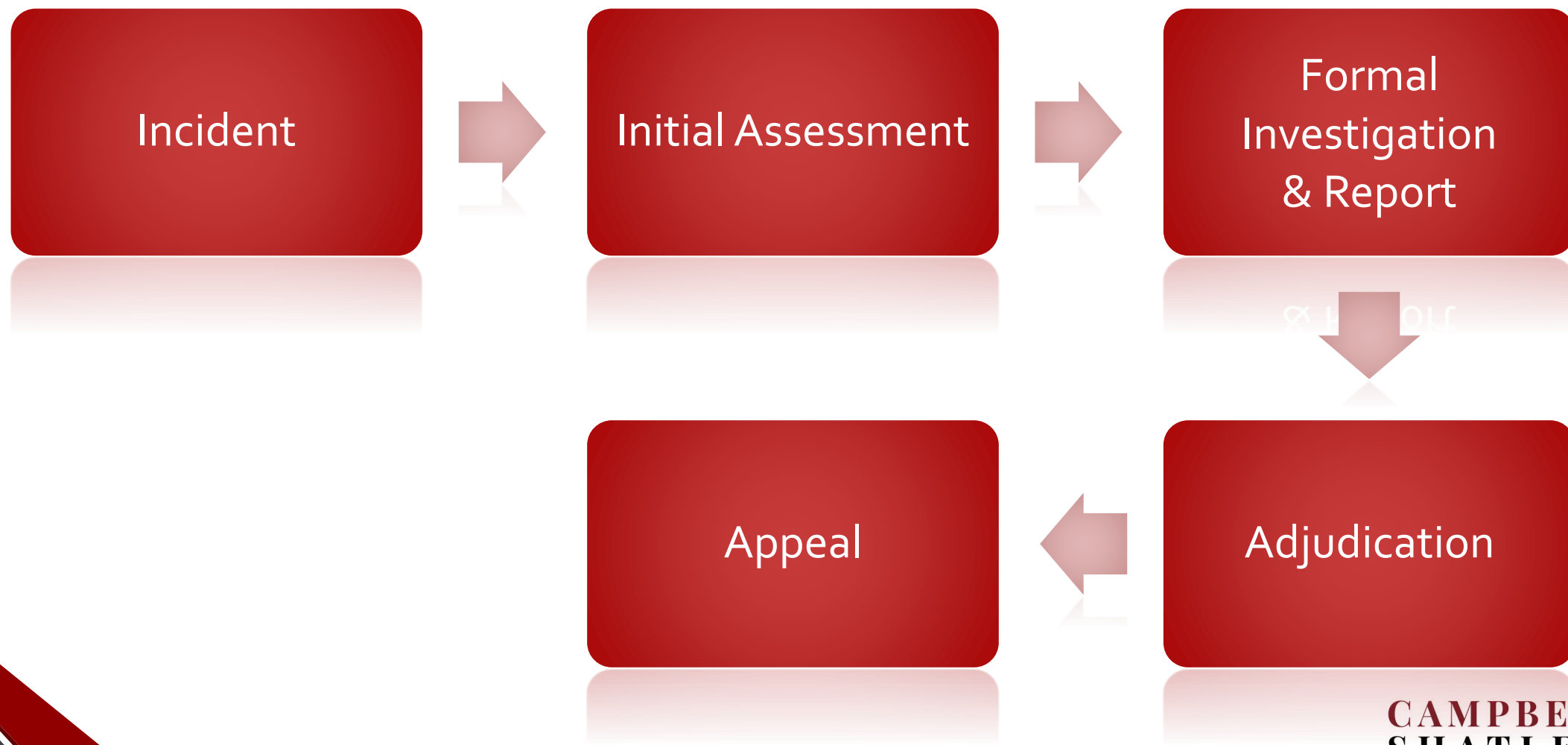




PART 2

INVESTIGATIONS

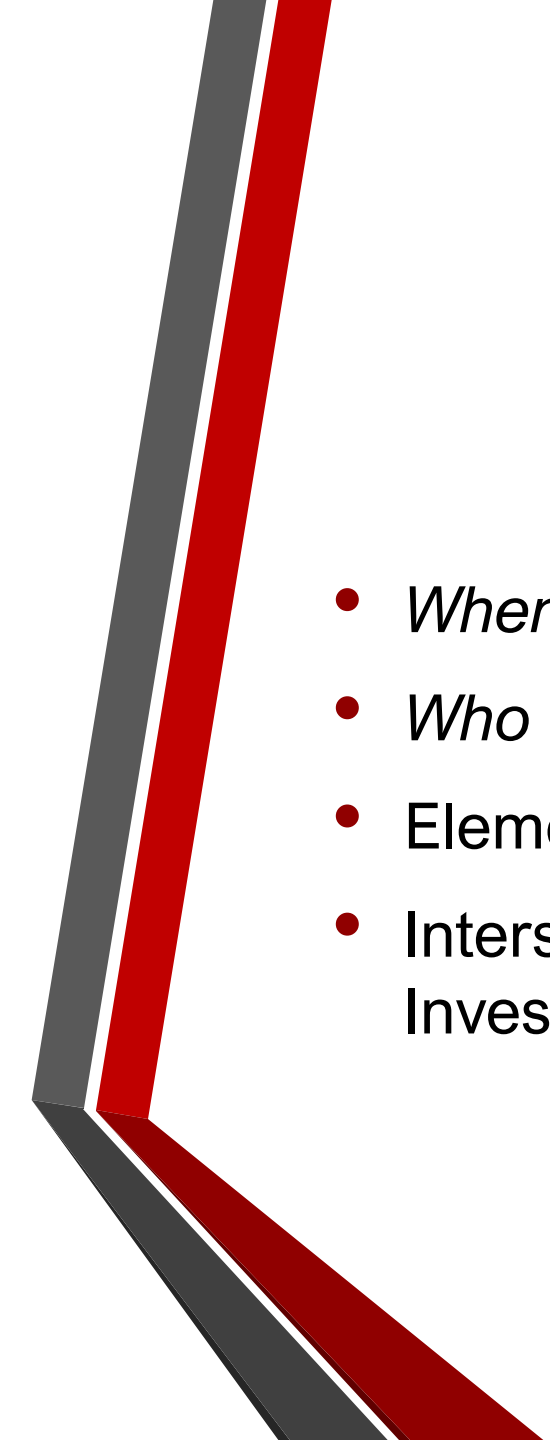
THE PROCESS





Goal of the Investigation

To reach a determination as to whether a Respondent violated one or more Board policies prohibiting sexual harassment.



OVERVIEW

- *When* to investigate?
- *Who* investigates?
- Elements of an Investigation
- Intersections with Criminal Investigations/Proceedings
- Conducting the Investigation
- Collecting & Analyzing Evidence/Relevance
- Advisors
- Written Investigative Report

WHEN TO INVESTIGATE

- After the receipt of a Formal Complaint by the Title IX Coordinator.
- Title IX Coordinator appoints a trained investigator & provides written notice to the parties about rights and responsibilities during the investigation.



WHEN TO INVESTIGATE

- Do the allegations as stated (i.e. if true) constitute a violation of Board policy?
 - Including whether the alleged conduct occurred in an education program or activity, located within the US, of which the District has actual knowledge.
 - If yes, does Complainant want to pursue a formal investigation?
 - If yes, investigate.
 - If no, are the allegations of the type that the District must investigate regardless of Complainant's wishes?
 - Requires Title IX Coordinator to submit complaint.

MORGAN AND JORDAN

- The Formal Complaint
- Morgan's written complaint states:

“Jordan followed me after the football game, grabbed me, wouldn't let me leave, and kissed me even after I told Jordan no. Jordan did it again after I pushed Jordan away.”

WHEN TO INVESTIGATE

- Factors to consider if a Complainant does not want an investigation:
 - The more serious the conduct, the higher need to investigate (e.g., one instance of rape).
 - The more frequent the conduct, the higher the need to investigate (e.g., widespread behavior against multiple victims).

FORMAL COMPLAINTS

- May only be initiated/submitted by Complainant, Complainant's Parent, or Title IX Coordinator.
- Should include:
 - Name and address of Complainant
 - Description of alleged sexual harassment
 - Request to investigate
 - Signature of Complainant

*Practice Tip: Districts should use a standard template for the Complaint form.

WHO INVESTIGATES

- Who?
 - Title IX Coordinator cannot conduct the investigation but still oversees the process.*
 - Title IX Coordinator must be completely informed of any complaints.
 - Conflicts of interest? Title IX Coordinator must choose a neutral investigator.

*For districts that have two Title IX Coordinators: one coordinator may serve as an investigator so long as they do not act in any other capacity for that complaint/investigation.

WHO INVESTIGATES

- Who?
 - School administrators, district administrators, contracted parties (lawyer) may all serve as investigators.
 - For student investigations – usually school administrator
 - For employee investigations – usually district administration or outside party
- All investigators must be trained

MORGAN AND JORDAN

- Who should investigate Morgan's complaint?
 - a. Title IX Coordinator
 - b. Assistant principal
 - c. Assistant Student Services Director
 - d. Media Coordinator



GENERAL EQUITABLE PRINCIPLES

Evidence must be
evaluated objectively.

Both parties have
opportunity to have
Advisor present in any
meeting, interview, or
decision-making process.

Supportive measures
should be offered to both
parties.

Respondent is presumed
not responsible for
alleged conduct.

Written notice of any
meeting, interview, or
hearing must be
provided to parties.

Burden of proof and
gathering of evidence
rests on the District.

ELEMENTS OF INVESTIGATION

- Purpose: A fact-finding process to determine:
 - 1) whether the Respondent violated Board policies prohibiting sexual harassment; and if so,
 - 2) what steps the District will take to end the sexual harassment/violence, eliminate the hostile environment, and prevent recurrence.
- Investigations must be prompt, thorough and equitable.
- Investigation may include (but is not limited to):
 - Conducting interviews with the parties and witnesses.
 - Reviewing law enforcement investigation documents.
 - Reviewing student and/or personnel files.
 - Gathering and examining relevant documents and evidence.



INTERSECTION WITH CRIMINAL INVESTIGATIONS

- State law requires the district to report any sexual assault or abuse to law enforcement.
- The District should inform alleged victim of their right to make a criminal report and not dissuade an alleged victim from making a criminal report.
- Evidence obtained in a criminal investigation may be used by the District as source of fact-finding.



INTERSECTION WITH CRIMINAL INVESTIGATIONS

- The District **may not** wait for the conclusion of a criminal investigation to act under Title IX.
- However, the District may need to [slightly] delay an investigation during the law enforcement/ criminal investigation.
 - If the District does delay, the District still must offer supportive measures to the parties.
 - The District should update the parties on the status of the matter during any delay.



INTERSECTION WITH CRIMINAL INVESTIGATIONS

- OCR Advice: The District should seek a Memorandum of Understanding (MOU) with local law enforcement regarding concurrent criminal and Title IX investigations.
 - The MOU must allow the District to meet its Title IX requirements.
 - The MOU must also recognize student FERPA-based rights (i.e., no sharing of student information from the District to law enforcement unless properly subpoenaed or otherwise allowed by law).

CONDUCTING THE INVESTIGATION

- Investigations must be prompt, thorough, and equitable.
- The District aims to bring all investigations to resolution within **30 business days** from the date the Title IX Coordinator determines an investigation should commence.
- Extensions of this timeframe allowed for "good cause":
 - Complexity or number of allegations;
 - Severity and extent of alleged misconduct;
 - Number of parties, witnesses, and other evidence involved;
 - Availability of the parties;
 - A request by a party to delay an investigation;
 - Effect of a concurrent criminal investigation or proceeding;
 - Intervening holidays, breaks, or other closures;
 - Good faith efforts to reach a resolution; or
 - Other unforeseen circumstances.

Investigation Hack #1

- At the beginning of the investigation, create a system to organize evidence to assist in final report, including:
 - A list of potential witnesses
 - An inventory document for all evidence collected, including:
 - Documents
 - Audio/Video Recordings
 - Messages
 - Other artifacts from the investigation
 - Note taking document
 - Document summarizing witness interviews
 - Create two timelines:
 - Investigation procedure timeline
 - Timeline of events relative to the complaint

MORGAN & JORDAN

- How do you begin to organize this investigation
 - Potential witnesses
 - Morgan
 - Jordan
 - Taylor (Morgan's friend who she sent a text message to)
 - Casey (possible eye witness)
 - Staff at the stadium event
 - Jordan's witnesses?
 - Other students?
 - Written evidence
 - Text messages between Morgan and Taylor
 - Messages between Morgan and Jordan?
 - Other evidence
 - Video surveillance?

CONDUCTING THE INVESTIGATION

- Conducting Interviews
 - Typically, the Complainant, Respondent, & any witnesses
 - A party's Advisor may be present during their interview
 - Written Notice to the parties
- Recordings
 - Interviews may be recorded by the District
 - Should you use AI recording/transcribing services?
- **Parties may refuse to participate – even students.**

WITNESS INTERVIEWS

You have interviewed Morgan and Jordan during your investigation. You left two voicemails for Casey to schedule an interview but have not heard back. You were scheduled to meet with Taylor last week but received an email that she had a test and needed to reschedule and that they were going on a trip out of state for a week after that.

How should the investigator proceed?

CONDUCTING THE INVESTIGATION

- Advisors:
 - During investigation
 - Role limited to advice, guidance, and support for a party
 - May be present at all stages of investigation but may not participate/advocate in the interview
 - Must maintain privacy of records shared
 - Expected to refrain from interfering with investigation
 - Discipline:
 - One warning
 - Advisor who continues to disrupt or overstep limits of role will be asked to leave
 - Title IX Coordinator will determine whether they may return or be replaced



Interview Best Practices

Interview Best Practices

- Take your time and be thorough. (Time, interviews, seriousness of the matter builds pressure.)
 - Always get the WWWHW
- Be thorough in who you speak to and what you ask them. Do not solely rely on written statements from witnesses.
- Do not be afraid to conduct follow-up interviews with the parties/ witnesses (i.e., interview same person more than once)
- Do not make promises to parties about the potential findings of your investigation or whether someone will have to testify at a hearing.

Investigation Hack #2

Summarize interview notes immediately after the meeting. It may help some people to dictate the notes into your phone recorder and then transcribe later.

Witness/Party Interviews

- Interview witnesses separately
- Ask a lot of questions
 - Start broad and make questions narrower – don't lead a witness (until you need to)
 - "Tell me what happened yesterday" v. "I know what happened yesterday, and want to hear it in your own words"
 - Come back to clarify, multiple times if necessary
 - Ask specific question to clarify and test credibility
- Using a prepared list of questions is fine – **but don't be afraid to deviate from the list.**
 - Ask follow-up questions (again, deviate from the list of prepared questions)

MORGAN & JORDAN

- Jordan's interview:
 - Jordan says the relationship had been “complicated” and that the two had discussed getting back together.
- What's your next question?
 - When did you have these discussions?
 - How? Text? In person, etc.?

Investigation Hack #3 – Witness Interviews

- Be a blank slate: never assume you know anything!
 - When interviewing the parties, always corroborate what they put in writing (ex. the formal complaint document); what they told the Title IX Coordinator, and what they told other witnesses.
 - This tests credibility and is a regular interview technique to gain further information.

The Respondent Interview

- Give the Respondent the opportunity to tell his/her side and to respond to all allegations
 - Don't "beat around the bush" with questions that are too broad
 - ex. "Tell me what happened on April 5th"
 - Instead: "It is alleged on April 5th you approached the complainant and.... Tell me what happened?"
- Be upfront with the Respondent on the allegations and other important evidence
 - Know what to release and what to hold back
 - Hold back facts to determine if Respondent can corroborate them

Respondent Interview

- Do not be afraid to ask the hard questions (ask leading questions when necessary)
 - Did you/employee have a sexual relationship with the Complainant?
 - Did you ask the Complainant to have sex with you?
- Do not let assumptions stop you from asking a question?

HYPOTHESIS: Teacher Accused of Sexually Harassing Student Via Disappearing Text Messages

- Have you sent personal text messages to any of your students? Have you texted with any students?
- Are your text messages personal or class related?
- Which students? When? How many times? (Break this down by each student.)
- (Assume Employee doesn't mention the student in question.) Have you ever exchanged text messages with Jamie Fisher?

Employee Accused of Texting with a Student; Allegation that the Text May Have Been Inappropriate

- Jamie has provided screen shots of the following text messages? Did you send these messages?
 - Why would you send Jamie text messages about . . . ?
 - Why would you send Jamie text messages late at night?
 - Have you had any physical/romantic contact with Jamie?
 - Have you met with Jamie outside of class?
 - Other than sending Jamie text messages outside of class, any other contact outside of school?
 - May I see whether these messages are on your phone? Now?

MORGAN & JORDAN

Getting the Evidence

- Do you have additional text messages between you and Morgan?
 - **Can you show me your phone? Show me the text messages?**
 - Well, when did you discuss getting back together?
 - If you're not going to allow me to see these photos, I am going to think there is something you are hiding and that concerns me.
- Do you have messages between you and your witnesses/friends about this complaint?

Collection and Preservation of Evidence

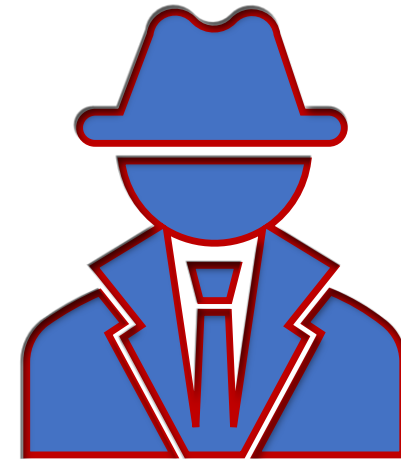
- Collect and preserve all evidence in an investigation.
 - E-mails, text messages, videos, recordings
 - Employee Documents – contracts, evaluations, personnel file material
 - Written Statements – **dated, signed, sealed and delivered!**
 - Focuses on Who, What, When, Where, How, and Why
 - Interview Notes (yes – your notes)
 - Everything!!!!!!
- Consider that all evidence will be turned over to the parties.

Hack #4 – DON'T LET THIS BE YOU



EVIDENCE

Investigator should objectively evaluate all physical, documentary, or other evidence as appropriate and available.

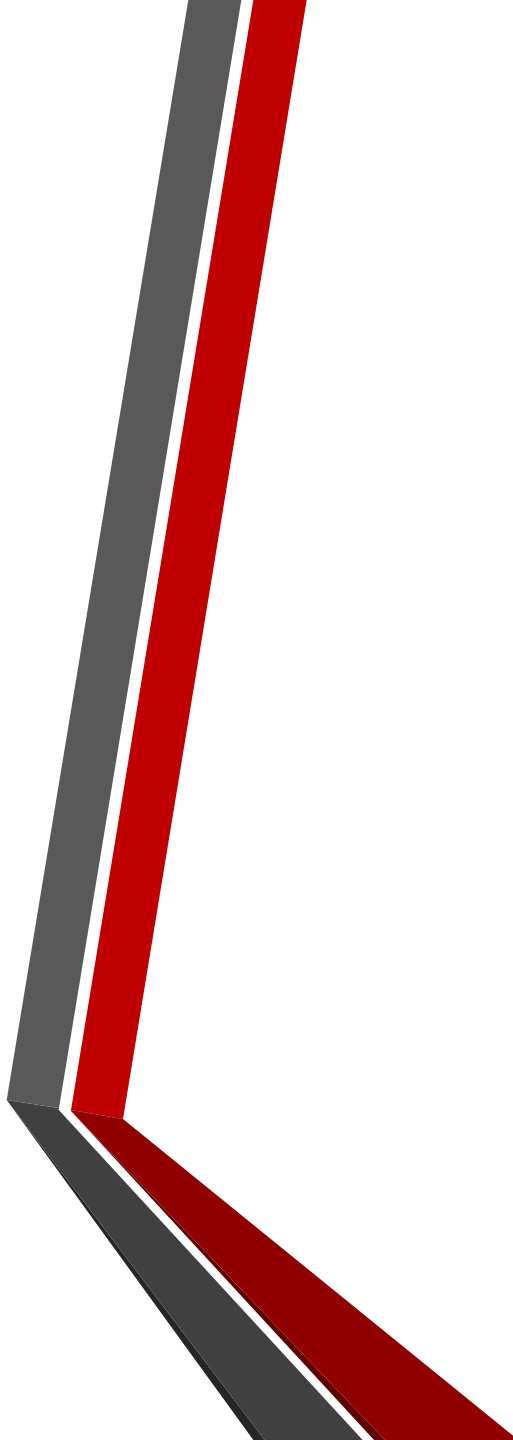


STANDARDS OF EVIDENCE

Standard of Evidence	Level of Proof
Beyond a Reasonable Doubt	Highest standard of evidence; used in criminal law; facts of the case lead to only one reasonable conclusion
Clear and Convincing	Hybrid; proof that a particular fact or event was highly and substantially more likely than not to have occurred
Preponderance of Evidence	Civil standard; proof that a fact or event was <u>more likely than not</u> to have occurred

EVIDENCE

- No person acting on behalf of the District may rely upon or otherwise use questions or evidence that seek disclosure of information protected under a legally recognized privilege, unless the privilege is waived.
 - Attorney-Client
 - Healthcare Provider-Patient (G.S. 8-53, -53.3, -53.5, -53.13)
 - Agents of rape crisis centers and domestic violence programs-Victim (G.S. 8-53.12)



Evidence is generally considered relevant if it has value
in proving or disproving a fact at issue:

Alleged policy violation

A party or witness' credibility

The investigator makes initial relevance "decisions"
by including a summary of evidence in the
investigation report

But relevance is ultimately up to the decision-maker,
who is not bound by the investigator's judgment

MORGAN & JORDAN

ISSUES OF RELEVANCY

- The Investigator interviews one of the witnesses, Taylor. At the end of the interview, Taylor reads back through their text messages with Morgan, on the evening after the incident. **Are these text messages relevant? What should the investigator do?**
- During an investigation, Morgan shows the Investigator copies of text messages Jordan sent the days and morning before the alleged incident that have since been deleted by Jordan. **Are these text messages relevant? What should the investigator do?**
- In your interview with Jordan, Jordan states Morgan voluntarily followed Jordan toward the equipment area. **What can the investigator do to investigate this assertion?**

WHAT IS CREDIBILITY?

- Credibility assessment may not be based on a person's status as a Complainant, Respondent, or Witness
- Accuracy and reliability of information
- Primary factors: corroboration and consistency
- Avoid too much focus on irrelevant inconsistencies
- Source + content + plausibility

MORGAN & JORDAN – CREDIBILITY

- What credibility considerations are legitimate, and which are not?
- Who has credibility issues? Morgan or Jordan?
 - Jordan told a friend he “messed up”
 - No support for the couple trying to get back together
 - Morgan’s post on social media (“sometimes you have to stop protecting those that hurt you”)
- Does their previous sexual relationship have any impact on their credibility?
 - Does Jordan raising the previous relationship tarnish his credibility?

INVESTIGATIVE REPORT

- At the conclusion of the Investigation, Investigator must provide all parties equal opportunity to review evidence obtained during the investigation that is directly related to the allegations – **even evidence upon which the District does not intend to rely.**
- Parties may submit written responses to the Investigator regarding the evidence obtained (generally a 10-day timeline).
- The Investigator must receive and consider the parties written responses, including whether to conduct further interviews, prior to the submission of the Investigative Report.
- Investigator submits the Investigative Report to the parties that "fairly summarizes relevant evidence," including a summary of the allegations and responses; a summary of investigative steps taken; and a summary of the evidence relevant to a determination.

INVESTIGATIVE REPORT CONTENT

1. Summary of Allegations/Response
2. Summary of Procedure, including investigative steps
3. Cite the Standard of Review
4. Summary of Evidence
 - a. Summary of testimony/interviews – include credibility
 - b. List and explanation of documentary evidence
5. Analysis of the evidence
6. Conclusion
7. Recommendations on responsibility and, if relevant, disciplinary action (optional)

MORGAN & JORDAN – THE REPORT

- Whether Jordan grabbed Morgan's wrist;
- Whether Jordan prevented Morgan from leaving;
- Whether Morgan verbally communicated a lack of consent before the first kiss;
- Whether the first kiss was consensual;
- Whether Jordan attempted a second kiss after Morgan objected;
- The significance, if any, of the parties' prior consensual sexual relationship;
- Whether Jordan's post-incident text message is evidence of consciousness of wrongdoing;
- Whether Alex's testimony corroborates Morgan's account;
- Whether the social-media post affects Morgan's credibility; and
- Whether Sam's interaction with Morgan constitutes retaliation.

REPORT ANALYSIS

Hack #5

Apply the language in policy to the findings

- What is "sexual harassment" and do your findings support a conclusion the Respondent violated the policy

*Ex. Board policy states that sexual harassment is defined as. . . .
I find the Respondent's actions of. . .constitute sexual harassment under board policy and Title IX. Therefore, it is more likely than not that the Respondent's actions violate Title IX and Board policy.*

INVESTIGATIVE REPORT CONCLUSION

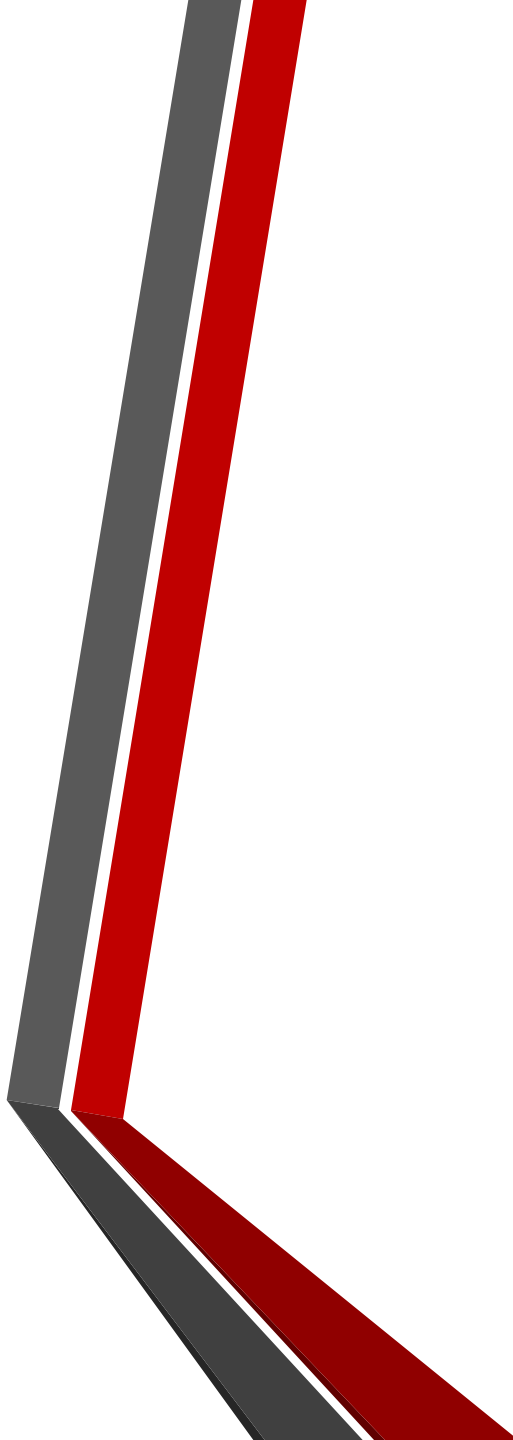
- Typically, there is going to be a menu of options that will be available to the investigator in finalizing their report:
 - Option 1: Respondent committed some or all of the alleged sexual violence/misconduct.
 - Option 2: Respondent did not commit any of the alleged sexual violence/misconduct.
 - Option 3: Evidence is inconclusive (In other words: "I can't figure out who is being truthful.")
 - May prevent a remedy but does not prevent the District supporting the Complainant.

RECOMMENDATIONS

- Recommend discipline or referral to appropriate disciplinary person/body, if appropriate
 - Ex. This Investigation Report should be referred to the Decision-Maker to make a final determination.
 - Ex. Although I made a finding that the Respondent did not violate Title IX, the Respondent's actions violate the student code of conduct and the Respondent should be referred to the principal for appropriate consideration of discipline.
- Recommend other potential supportive/safety measures
 - No-contact order
 - Counseling

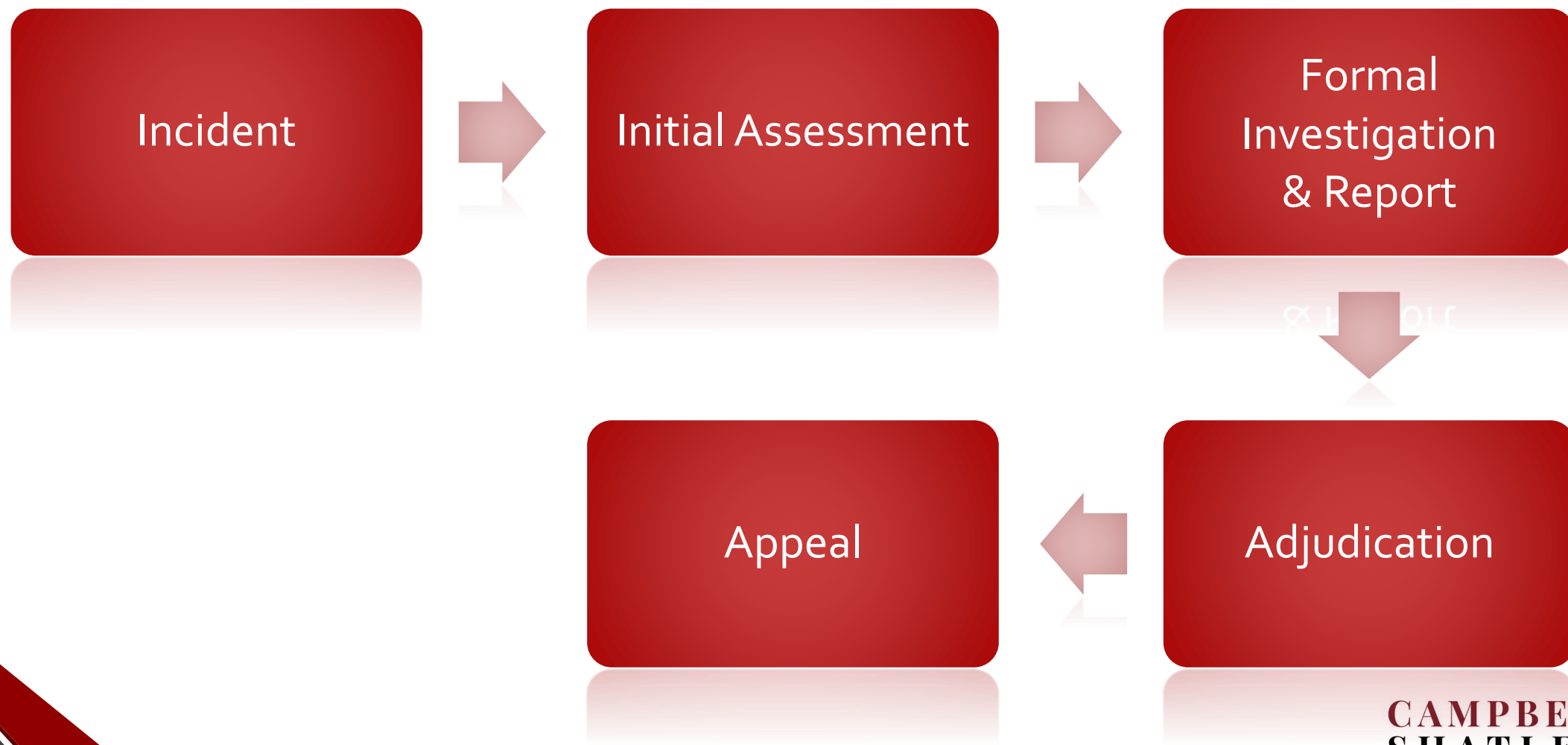
POST REPORT

- Provide a copy of the report to the parties, and their advisors, and parents.
- Provide the parties 10 more days to provide a written response to the report, along with the party's initial questions (see Adjudication section).
- Investigator provides report, evidence and written responses and questions to the decision-maker.



Adjudications

THE PROCESS





DECISION-MAKERS

Decision-makers have no side other than the integrity of the process. And decision-makers represent the District's process.

Remember that the burden of proof and the burden of gathering evidence sufficient to reach a determination rests on the District, not on the parties.

BEFORE ADJUDICATION – QUESTIONS

- Superintendent or designee is the Decision-Maker (D-M)
- D-M shall take any written questions provided in the responses to the appropriate party or witness.
 - Questions about complainant's sexual predisposition or prior sexual behavior is not relevant unless proved to demonstrate someone other than Respondent committed the alleged conduct
 - D-M must explain why any questions are excluded
 - Provide each party with the answers to those questions.
 - If necessary, provide additional time for follow-up questions.

ADJUDICATION

- D-M reviews all evidence, investigation report, and party responses and questions.
- D-M make determinations regarding:
 - Responsibility;
 - Any disciplinary action or recommended disciplinary action;
 - Supportive or other appropriate measures
- Determination must be an objective evaluation of the evidence using the evidentiary standard adopted in policy (e.g. preponderance of evidence).



Decision-maker should author the written determination. (Who reviews?)



Written determination should be provided to parties simultaneously.



Determination becomes final either on the date the District provides the parties with the appeal result, or if an appeal is not filed, the date on which an appeal would not be timely.



FERPA cannot be construed to conflict with or prevent compliance with Title IX.

DETERMINATION
OF
RESPONSIBILITY:
LOGISTICS

WRITTEN DECISION

- D-M issues written decision and sends to both parties
 - identification of the allegations potentially constituting sexual harassment under board policy;
 - a description of the procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held;
 - findings of fact supporting the determination;
 - conclusions regarding the application of board policy and/or the Code of Student Conduct or expected standards of employee behavior to the facts including whether, the respondent engaged in prohibited sexual harassment or other proscribed conduct;

WRITTEN DECISION

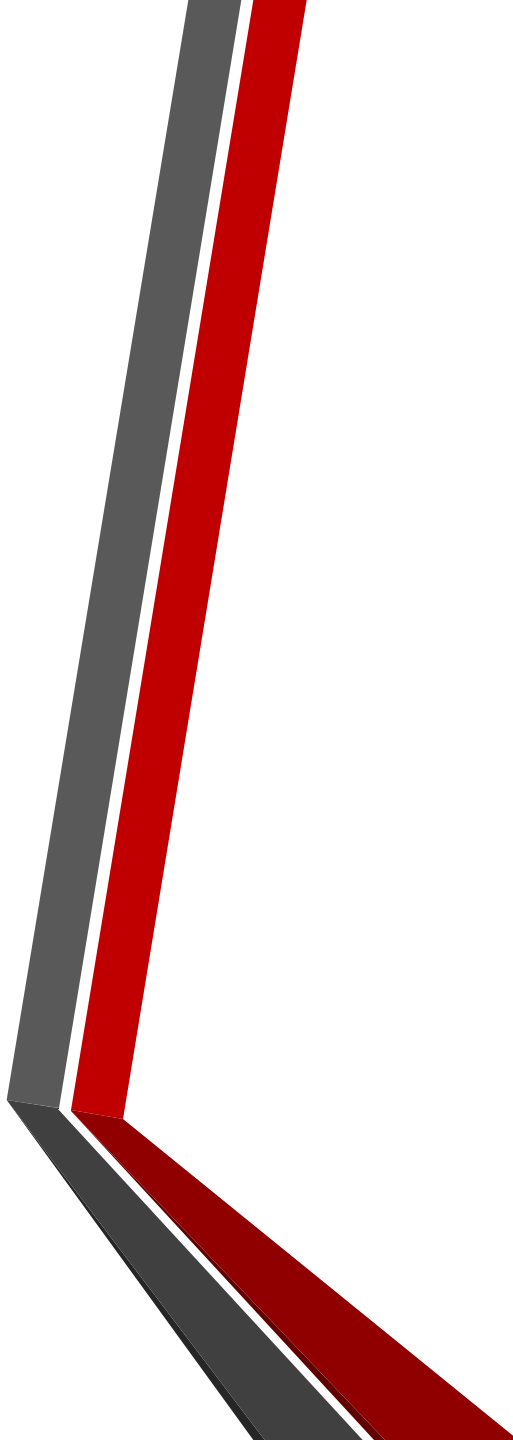
- D-M issues written decision and sends to both parties
 - a statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions imposed on the respondent (which may be a recommendation to the board for discipline that is beyond the authority of the superintendent or other decision-maker), and whether remedies designed to restore or preserve equal access to the school system's education program and activities will be provided to the complainant;
 - the procedures and permissible bases for the complainant and respondent to appeal; and
 - any other notices that are required to accompany the decision under state law, such as when the superintendent imposes a long-term suspension or recommends dismissal of an employee.

COMMON SANCTIONS

- Warning
- Probation
- Loss of privileges
- Counseling
- No contact
- Limited access to campus
- Service hours
- Online education
- Alcohol and drug assessment
- Suspension
- Expulsion
- Termination

MORGAN & JORDAN – THE DECISION

- What facts have been established?
- What facts remain disputed?
- What evidence is more persuasive?
- Does the evidence establish that the conduct occurred?
- Was there consent?
- Does the conduct meet the applicable Title IX definition?
- Does the conduct constitute sexual harassment under the school's policy even if it does not constitute Title IX sexual harassment?
- What standard of evidence applies?
- What findings should be made?
- What information should be considered in determining sanctions or remedies?



APPEALS

APPEAL

- Either party may appeal to the Board of Education; and may appeal the responsibility determination and/or disciplinary sanction
- No hearing unless a hearing is otherwise required by law [or your policy]
 - Teacher dismissal hearing
 - Long-term suspension hearing
- Must provide notice to both parties when appeal is filed.
- Must provide both parties a chance to submit a written statement supporting or challenging the initial decision.
 - NCSBA policy = 10 days after notice of appeal to submit statements

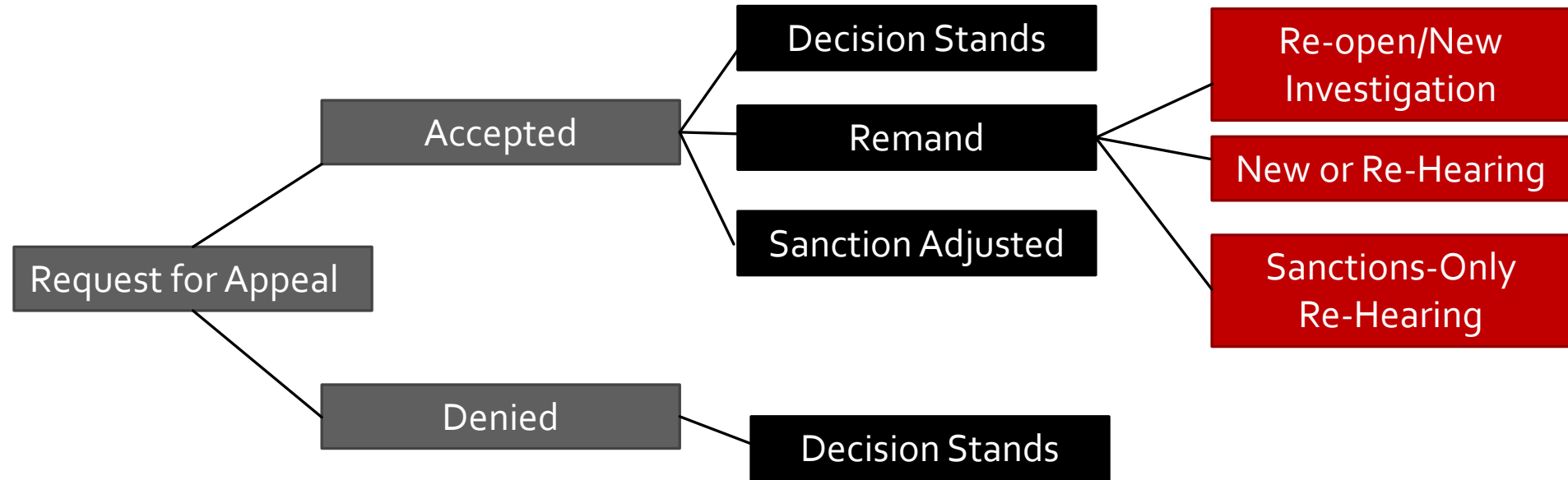
APPEAL

- Grounds for appeal
 - Procedural irregularity that affected the outcome;
 - New evidence that was not reasonably available at the time the determination was made that could have affected the outcome; and/or
 - The Title IX Coordinator, investigator, or decision-maker had a conflict of interest or bias that affected the outcome.
 - Disciplinary Sanction is inappropriate or unreasonable

APPEAL

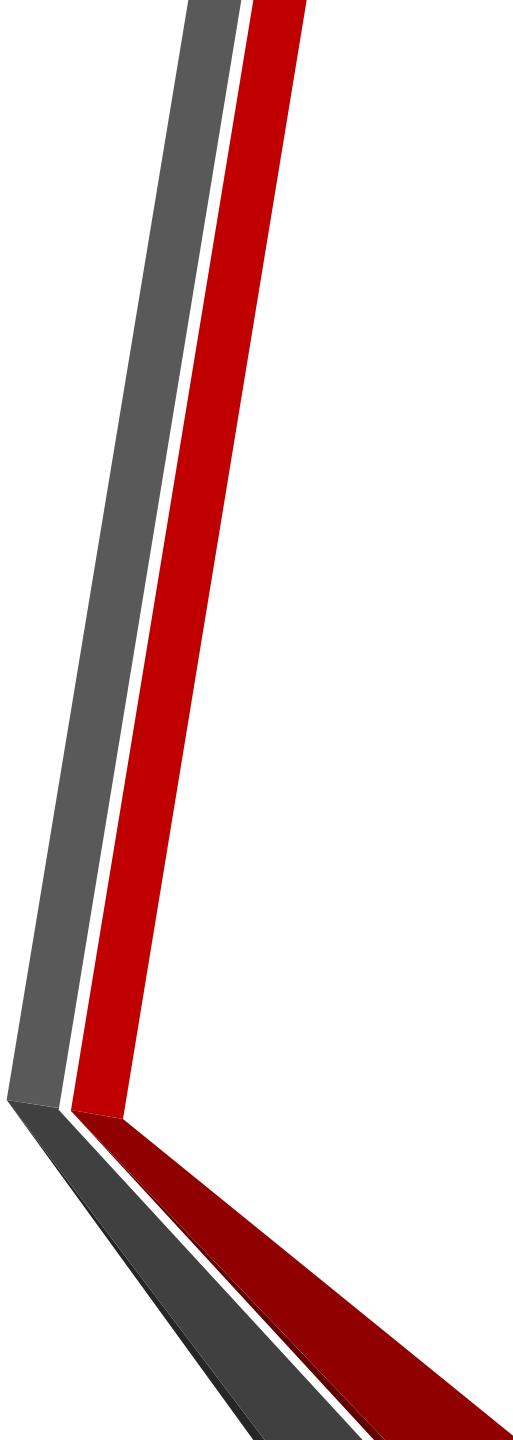
- Board determines whether the grounds for the appeal have been substantiated
- Board provides written decision within 30 days after receiving the appeal unless good cause delay
- Board's decision is final, unless it remands the matter back for further investigation

APPEAL PROCESS



MORGAN & JORDAN - FINALE

- Do you believe Jordan violated the Board's Title IX policy?
- **Reasonable decision-makers may disagree about the ultimate factual findings while still following a fair and legally compliant process.**



THANK YOU!
QUESTIONS?