



# TITLE IX: FINDING THE EFFICIENCIES

(aka – the water flows downhill)

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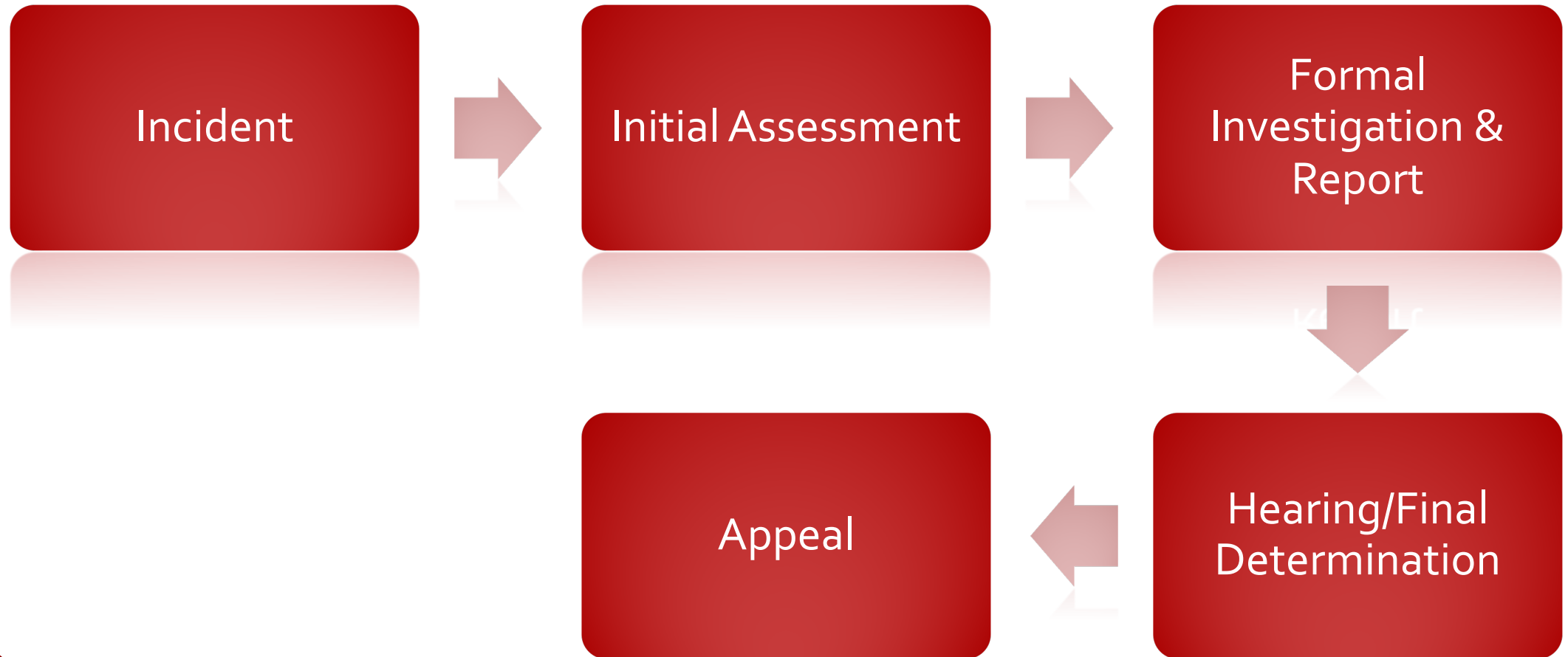
# TITLE IX'S FINAL RULE

- November 29, 2018 – Secretary DeVos announces intention to restructure Title IX
- November 29 – January 30 – Public comment period
- May 6, 2020 – Final Title IX rules announced
- August 14, 2020 – Effective/implementation date

# The Inefficiencies!

- Potential of long process
- The involvement of a lot of staff
- Potential of waiting to discipline student (for minor misconduct) until Title IX process is complete
  - Inability to take immediate action where some may be warranted?
- Live hearings?
  - Wait, really?

# THE PROCESS



# COVERED GROUPS

- What groups are covered under Title IX?
  - Student-on-Student
  - Employee-on-Student
  - Employee-on-Employee
  - Applicants for admission and employment
  - Student organizations
  - Third parties participating in an education program or activity
- Sex, gender, orientation are not determinative factors of whether something is sexual harassment



Inefficiency:  
Time

# COVERED CONDUCT?

- Allegations of *sexual harassment* that occur in an *education program or activity* located within the United States and of which the recipient has *actual knowledge*.
- If a person alleges misconduct that fits in the above description, institutions have a duty to respond. The Title IX Final Rule sets out your legal obligations in responding to such allegations.

# SEXUAL HARASSMENT DEFINITION

- Quid pro quo harassment – conditioning the provision of an aid, benefit, or service of the school on a person’s participation in unwelcome sexual conduct
- Unwelcome conduct that a reasonable person would find so **severe, pervasive, and objectively offensive** that it effectively denies a person equal access to the school’s education program or activity, including conduct based on sex stereotyping
- Sexual assault, as defined in federal law, or dating violence, domestic violence, or stalking as defined in federal law



# SEXUAL HARASSMENT DEFINITION

Does *quid pro quo* harassment need to be severe, pervasive, and objectively offensive?

- No. Only the “unwelcome conduct” prong of the sexual harassment definition must be severe, pervasive, and objectively offensive.

# SCOPE: EDUCATION PROGRAM OR ACTIVITY

- “Education Program or Activity”
  - All locations, events or circumstances over which the district exercised substantial control over both the Respondent and the context in which the harassment occurs
  - Includes: Field trips, virtual learning, school buses, athletic events

# First Efficiency

- Dispose of Complaints that do not meet the definition of sexual harassment and/or did not occur during school program/activity, etc.
- DOE guidance was specific about the fact Title IX is not meant to:
  - Discourage speech in which a person is entitled to make;
  - Meant to address stray comments
- If alleged conduct is not “sexual harassment:”
  - Refer to school-based or CO administration for handling
  - Title IX Coordinator must close the case and take all procedural steps before closure and at closure.

# TRAINING ALL EMPLOYEES FOR EFFICIENCY

- Who is the Title IX Coordinator?
- REPORT allegations of sexual harassment/misconduct
- All employees should know where to direct students or employees who want to make a Title IX report or complaint.

# CLOSING A REPORT OR COMPLAINT

## MANDATORY

- Allegations, even if proven, would not constitute a violation of Title IX Policy
- Alleged sexual harassment did not occur in an education program or activity or in the U.S.

## PERMISSIVE

- Complainant requests withdrawal of formal complaint
- Respondent is no longer enrolled or employed by the district
- District is prevented from gathering sufficient evidence

# HYPOTHETICAL

- A male student sends sexually explicit text messages to a female student using his personal cell phone and school-issued laptop. Both students are participating in “remote” learning due to the 2020 pandemic and the social media exchanges occur during class time and outside of school hours. The female student initially responds but then starts to feel uncomfortable and tells the male student to stop texting her.
- The female student reports the male student’s conduct to her teacher one week later. The teacher remembers that one month ago, two other female students reported similar behavior about the same male student, and he goes to the Assistant Principal for advice on how to handle the matter.
- **What should the Assistant Principal do?**
- **Does this situation occur in an education program or activity under Title IX?**
- **Does it rise to the TIX definition of Sexual Harassment?**

MISCONDUCT  
THAT  
MAY BE IN  
OTHER  
BOARD  
POLICIES

- Bullying/Cyberbullying
- Hazing
- Threatening Physical Harm
- Discrimination and Harassment in the Workplace

# HYPOTHETICAL

- Shortly after enrolling at a new high school, a female student had a brief romance with another student. After the couple broke up, other students began routinely calling the new student sexually charged names, spreading rumors about her sexual behavior, and sending her threatening text messages. One of the student's teachers and an athletic coach witnessed the name calling and identified it as hazing that new students sometimes experience. They also noticed the new student's anxiety and declining class participation.
- **How should the school attempt to resolve the situation?**





# Inefficiency: People

# ESSENTIAL TITLE IX PERSONNEL

- Title IX Coordinator
- Investigators
- Advisors
- Decision-makers
- Appeal decision-makers
- Informal Resolution Facilitators

# BIAS, CONFLICTS OF INTEREST, AND RECUSALS

- Bias can represent any variable that improperly influences a finding and/or sanction
- There are many forms of bias and prejudice that can impact decisions and sanctions:
  - Pre-determined outcome
  - Partisan approach by investigators in questioning, findings, or report
  - Partisan approach by decision-maker in questioning, findings, or sanction
  - Intervention by senior-level officials
  - Improper application of policies or procedures
  - Confirmation bias
  - Implicit bias
  - Animus of any kind

# TITLE IX COORDINATOR

- Coordinate the district's duty to PREVENT / INVESTIGATE / REMEDY
  - ensure policy / grievance procedures are updated
  - ensure notices are given to staff and students
  - ensure formal complaints are investigated
  - ensure appropriate steps to prevent immediate harm
  - ensure investigators are appointed and trained
  - ensure decision-makers are appointed and trained
  - ensure that appeals officers are appointed and trained
  - ensure proper record keeping
  - ensure proper interaction with law enforcement

# MAINTAINING RECORDS

- Reports and Formal complaints, including the basis for why the institutional response was not deliberately indifferent;
- Any actions taken in response to the report or formal complaint, including any supportive measures implemented;
  - If supportive measures were not provided, reasons for why that was not clearly unreasonable in light of the known circumstances and
  - Records must show measures taken are designed to restore or preserve equal access to education programs and activities
- Investigation records, such as investigator notes, documentary evidence collected, and the investigative report;
- Written determinations, sanctions, and remedies;
- Any recordings or transcripts from any live hearings;
- Appeals;
- Informal resolutions; and
- Training materials.

# Second Efficiency - Key Personnel

- Find the most organized, empathetic administrator to be the Title IX Coordinator.
- A TIX Coordinator should be someone who:
  - Can guide (push) the process quickly;
  - Who will listen;
  - Who knows (or will learn) the rules;
  - Who can act quickly before a principal makes a mistake;
  - Who can talk to parents and employees about the process; and
  - Who can make decisions.



## ACTING v. INVESTIGATING

- Title IX Coordinator's Immediate Steps (within three days of report):
  - Communicate with individual who reported conduct/complainant
  - Notify Principal and if necessary, HR
  - Offer and implement supportive measures
  - Share district policy and procedure and explain formal grievance process
  - Determine whether allegations fall within Title IX Policy
  - Document, document, document!

# WHEN TO ACT

- When a district has “actual knowledge” of possible sexual harassment, it must undertake immediate and appropriate steps to offer supportive measures and determine if an investigation is required or requested.
- The district will be deemed to have actual knowledge if the Title IX Coordinator or any school employee has notice of allegations of sexual harassment.
- District must not be “deliberately indifferent.”



# WHEN TO ACT

- Other sources of notice:
  - Community: social media, print/television, community members.
  - “Credible reports” of sexual harassment, particularly a pattern of acts against multiple students.
  - “Widespread, openly practiced, or well-known” among students/employees.

# Third Efficiency – Listening and Talking

- The Title IX Coordinator will meet with the complainant/parents before the filing of a formal complaint.
- Talk about the process
  - What will happen if you file a formal complaint
  - What will/may happen if you do not file a formal complaint
- Don't lead them one way or another, but make sure the parent understands the entire process, including the timeliness

# HYPOTHETICAL

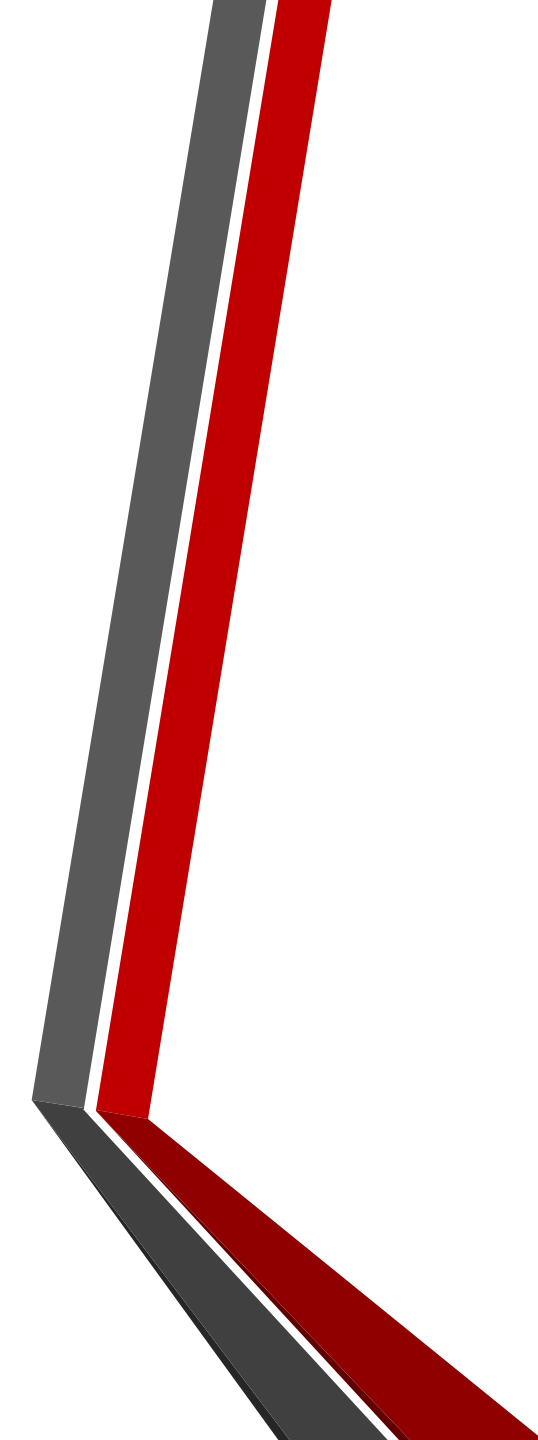
Mr. Doe is a high school teacher. After class one of Mr. Doe's students approaches him and begins to explain that another student in the classroom has repeatedly made sexual comments to her in his classroom, during swim practice and through snapchat online after school that make her feel uncomfortable and bullied. She asks Mr. Doe to keep this information confidential because the swim team has a big meet coming up.

**What should the Title IX Coordinator do in this situation?**

# HYPOTHETICAL

- A Principal learns that a male student has complained that a female student has been sending sexually explicit text messages to him. The male student reported that the text messages make him feel uncomfortable and he doesn't want to come to class because the female student is in the same class.
- The Principal talks to the female student, who admits the conduct, and the Principal suspends the female student for two school days.
- One week later, the male student's parent contacts the Principal and states the school has not done enough under Title IX to remedy the situation. The parent wants to file a Formal Complaint on behalf of her son.

**As the Principal, what should you do? Title IX Coordinator?**



# Inefficiency: Discipline Awaits

# Fourth Efficiency – Emergency Removal

- The principal wants to just suspend the student, but . . .
- Carve out any other code of conduct violations (but be cautious)
- Use Emergency Removal for students who pose a threat
- Use supportive measures for the other situations

# EMERGENCY REMOVAL

- District is permitted to remove a Respondent from school on an emergency basis, provided the district's threat assessment team:
  - Undertakes an individualized safety and risk analysis;
  - Determines the Respondent poses an immediate health or safety threat to any person arising from the allegations; and
  - Provides the Respondent with notice and an opportunity to challenge the decision immediately following the removal.
- District is permitted to place an Employee-Respondent on administrative leave during the pendency of its grievance process.

# HYPOTHETICAL

Last Friday three teachers all met up at a local bar/restaurant after chaperoning a school dance. On Monday morning one of the teachers called out sick from work. On Tuesday, the same teacher contacted the district's Title IX Coordinator and reported that they were sexually assaulted by another teacher in the group late into the evening on Friday in the school parking lot. The teacher indicated that a report was made with local law enforcement.

**How should the school district respond to the report?  
Can/should the teacher accused of misconduct be removed from their duties?**



# Fifth Efficiency Informal Resolution

- Who will facilitate?
  - Hint: get a good one.
- Work hard to get to the win-win.
- Dispose of “easy” cases.
- Should discipline be a subject of resolution?
  - Reserve the right to discipline

# INFORMAL RESOLUTION

- Informal resolution may not be used for a student's allegations against a district employee.
- Voluntary – parties must provide written consent.
- Independent, neutral person facilitates informal resolution (not the Title IX Coordinator).
- Process may end at any time prior to resolution agreement.



# Investigations

When there is no where else to go, go investigate

# Second Efficiency Revisited: Investigators

- Find someone who can focus on the investigation and attempt to wrap it up quickly
- Know which investigation can be finished quickly, and which ones that can be extended for weeks or a couple of months.
- How does a principal do this?

# ELEMENTS OF INVESTIGATION

- Purpose: A fact-finding process to determine
  - 1) whether the Respondent violated district 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 its recurrence.
- 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.

# CONDUCTING THE INVESTIGATION

- Investigations must be prompt, thorough, and equitable.
- NCSBA Model Policy: District aims to bring all investigations to resolution within **90 business days** from the date the Title IX Coordinator determines an investigation should commence.
- Extensions of this timeframe allowed for “good cause”:

# CONDUCTING THE INVESTIGATION

- Conducting Interviews
  - Typically the Complainant, Respondent, and any witnesses
  - A party's Advisor may be present during an interview
  - Written Notice
- Recordings
  - Interviews may be recorded by the district
- What if a party or a witness refuses to participate?
- Follow-up Interviews

# Second Efficiency Revisited: ADVISORS

- Advisors during investigations
  - 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



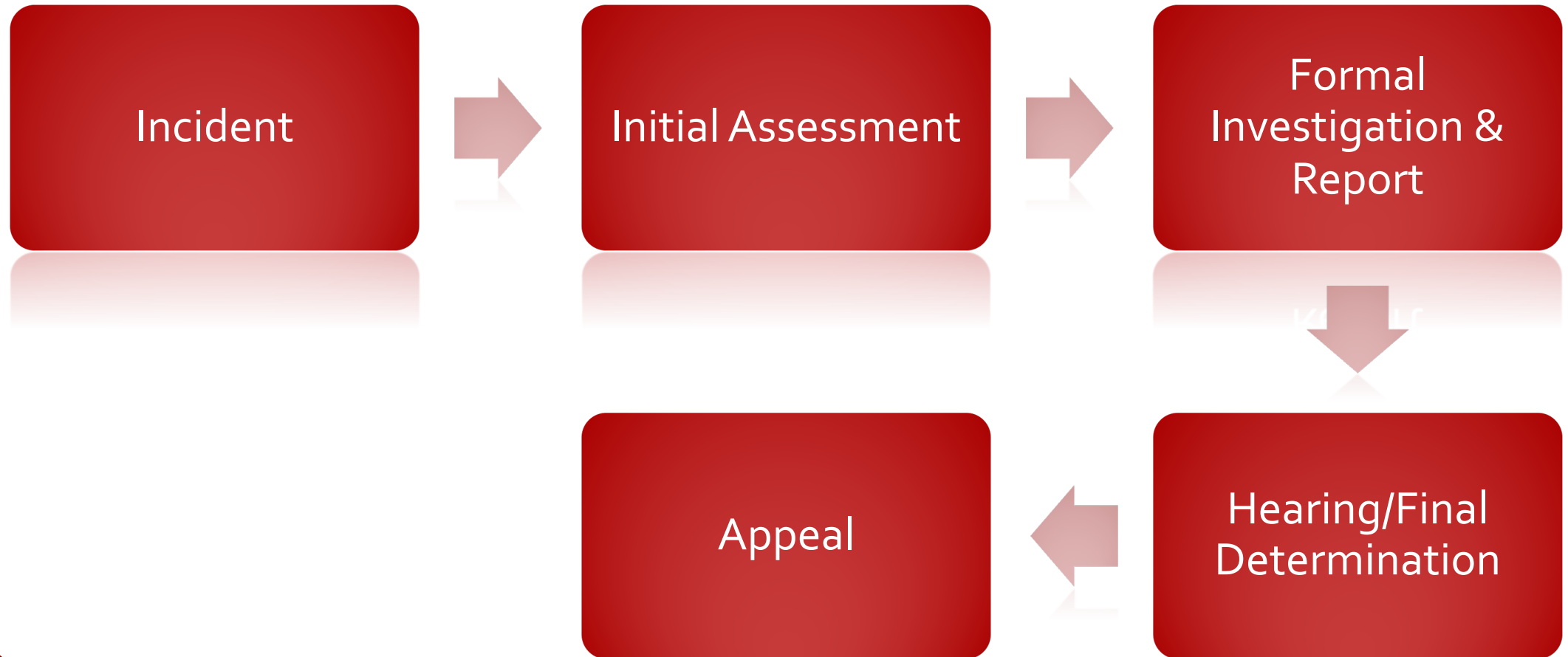
# HYPOTHETICAL – ADVISORS

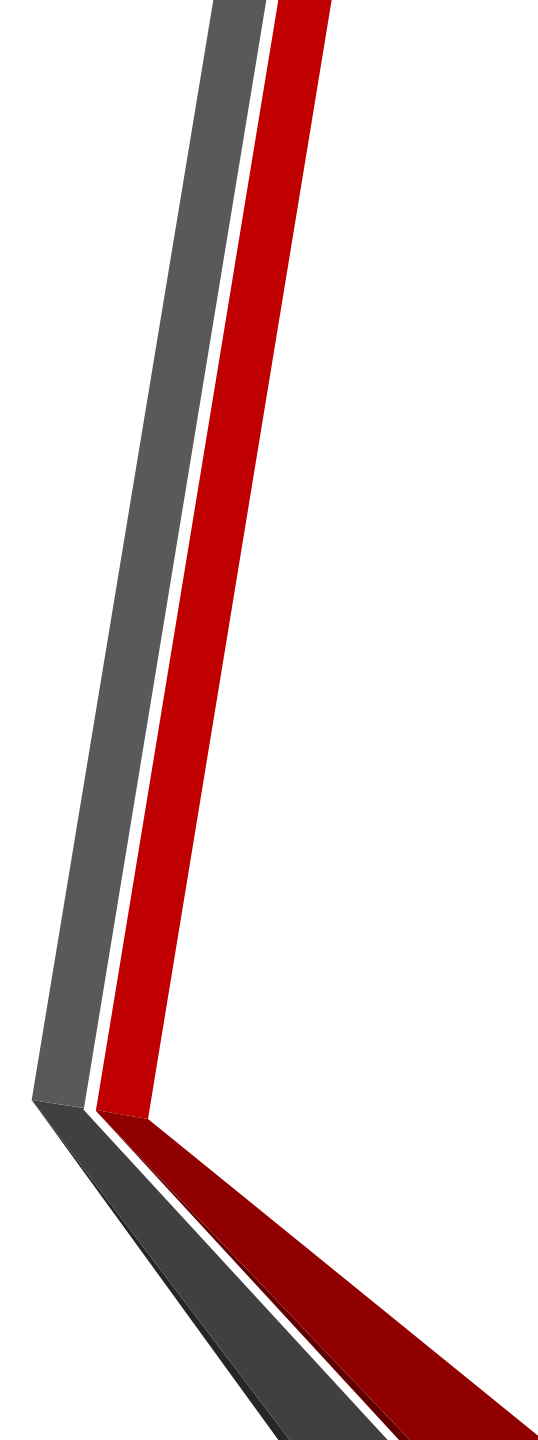
- The school district's investigator is preparing to interview the Complainant during a Title IX investigation. The investigator receives an email from the Complainant's parent that she would like her neighbor to serve as her Advisor. The Title IX Coordinator receives an email from the Respondent requesting that the school district appoint an attorney to serve as his Advisor during the investigation.
- **Can the Complainant's neighbor serve as an Advisor during the interview?**
- **Does the school district have to appoint an attorney to serve as the Respondent's Advisor?**

# HYPOTHETICALS

- The Investigator interviews one of the witnesses to the alleged incident identified by the Respondent. At the end of the interview the Witness reads back through their text messages with the Respondent on the evening of the incident. **Are these text messages relevant? What should the investigator do?**
- During an investigation, the Complainant shows the Investigator copies of social media posts made by the Respondent on the evening of the alleged incident that have since been deleted by the Respondent. **Are these posts relevant? What should the investigator do?**

# THE PROCESS





# Inefficiency – The Hearing & Bad Decision Making

# Sixth Efficiency – To Hear or Not to Hear

- What does a hearing look like?
- Other alternatives –
  - Meeting with the decision maker
  - Written questions/responses
- With or without a hearing
  - Parties have opportunity to submit to the decision-maker written, relevant questions the party wants asked of any other party or witness.
  - Decision-maker must provide each party with the answers and allow for additional, limited follow-up questions from each party.

# DECISION MAKER SKILLS – This ain't 'Law & Order'

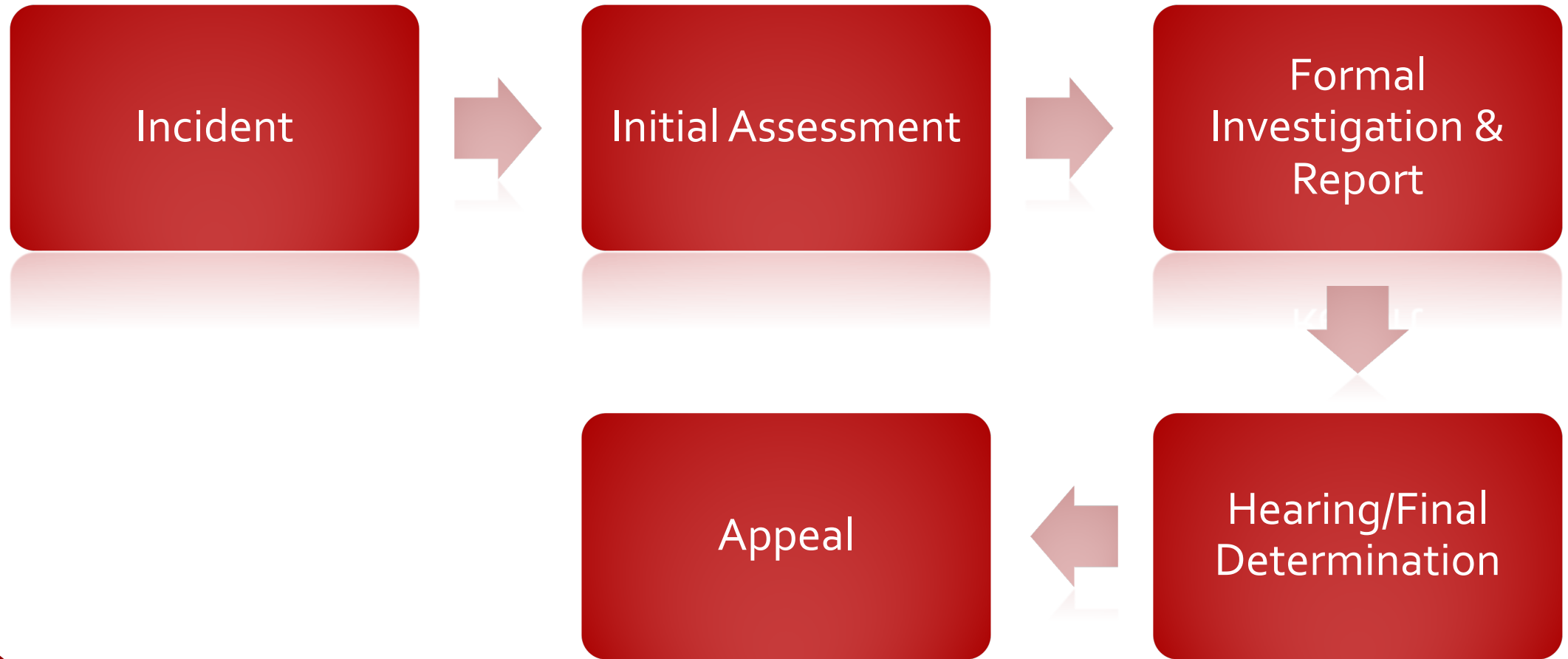
- Goal is to ensure you understand information contained in the Investigation Report:
  - Relevant facts about what happened
  - Any related events
  - Any corroborating information
- Use questions to elicit details, eliminate vagueness, or fill in the gaps
- Your goal is not:
  - Satisfying your curiosity
  - Chasing the rabbit into Wonderland
- Do not expect a “Gotcha” moment.

## ASKING GOOD QUESTIONS

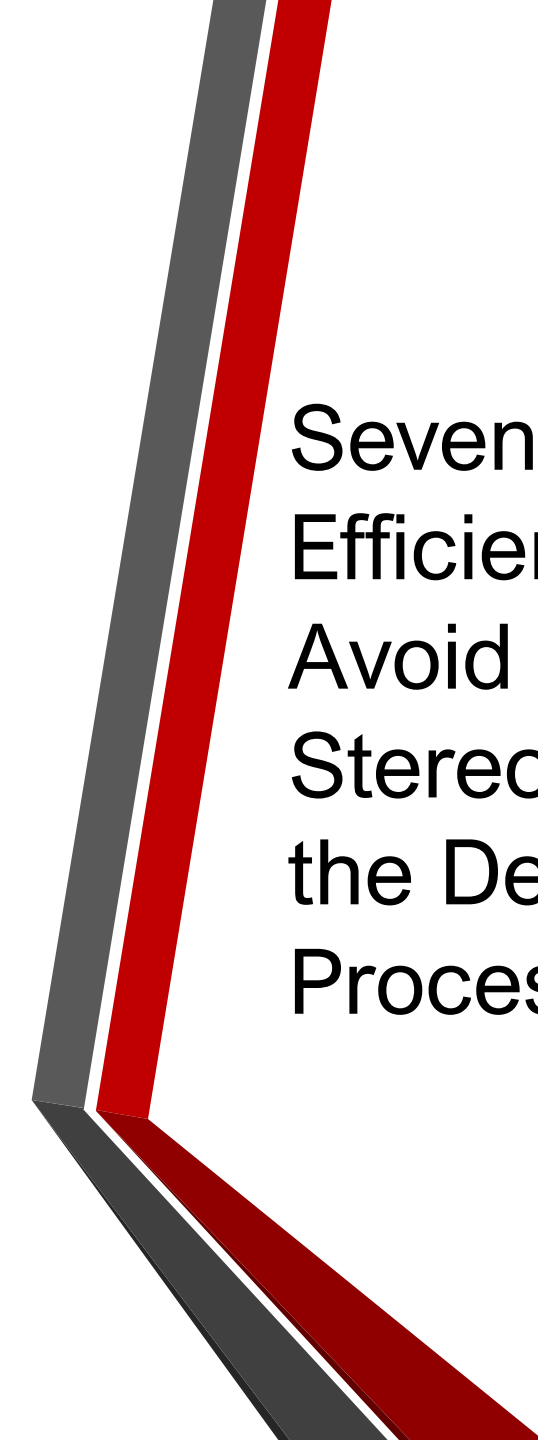
- Generally use open-ended questions (tell us... who, what, how...)
- Try to avoid close-ended questions (did you... were you...)
- Don't ask compound questions
- Don't ask multiple choice questions
- Avoid suggesting an answer in your question



# THE PROCESS





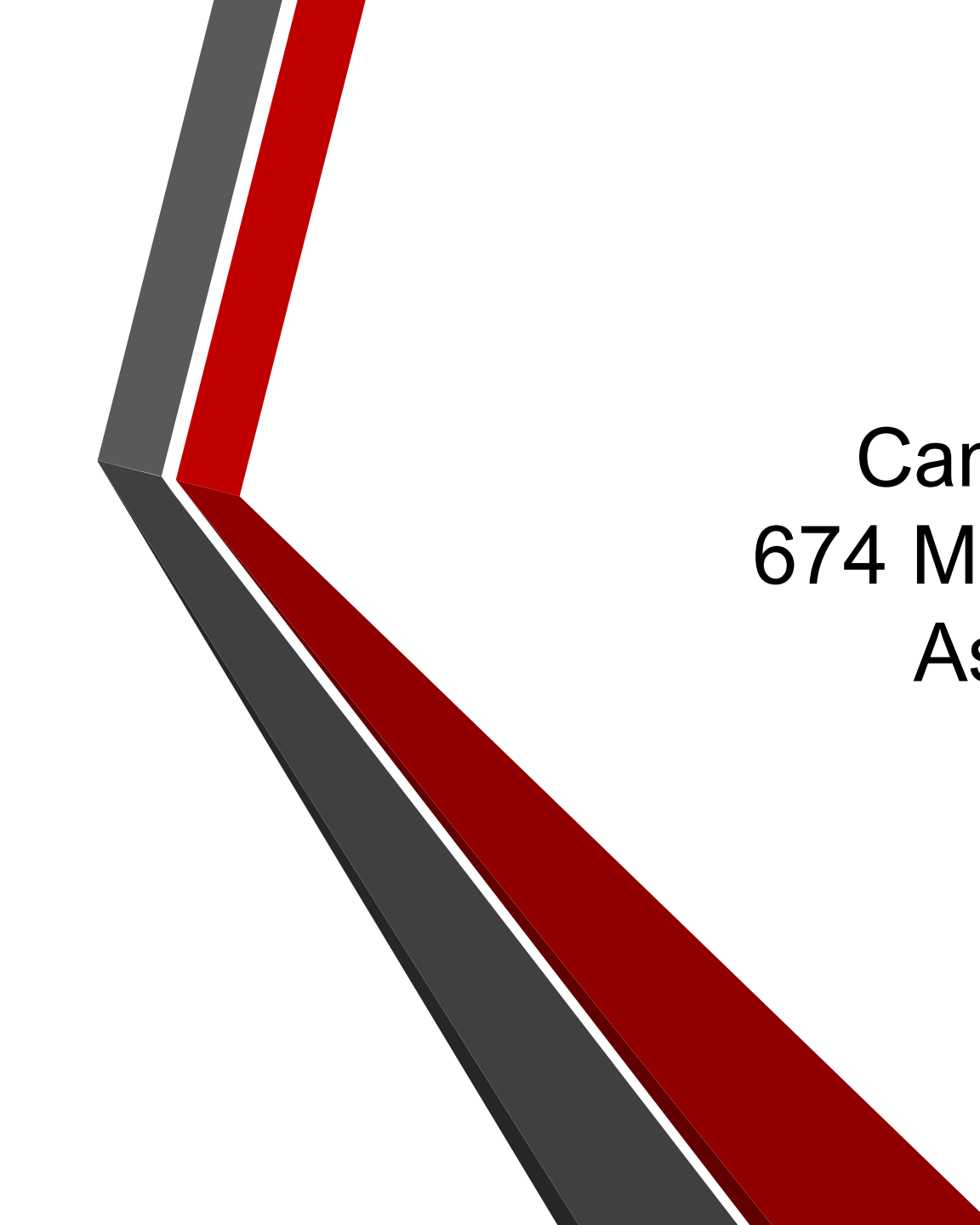


## Seventh Efficiency: Avoid Stereotypes in the Decision Process

- Clothing
  - “Just look at what she was wearing.”
- Appearance
  - “She is so unattractive. I don’t believe anyone would do that to her.”
- Flirting behavior
  - “She’s always flirting, what did she expect?”
- Male accuser
  - “He should have realized she meant it as a compliment.”
- Sexual orientation of accuser
  - “He came out of the closet and told everyone – he should have expected people would act like this.”

# ANALYZING INFORMATION

- First, narrow to the contested facts, and then make a credibility analysis by the standard of proof for each.
- Then, weigh the overall credibility based on the sum total of each contested fact.
- When you write the final, written determination, focus on what facts, opinion, and/or circumstantial evidence supports your conclusion. Offer a cogent and detailed rationale.



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