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## Polling Access




**Option One**  
Use this QR code

**Option Two**  
(T) Rebeccadupre730 to 22333

**Option Three**

- ▶ Go to Pollev.com on any browser
- ▶ Accept or dismiss cookies
- ▶ Enter **rebeccadupre730** as the Username
- ▶ Skip when asked to enter your name



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4

What is the first word you think of when you hear "Title VI"?

Start the presentation to see live content. For screen share software, share the entire screen. Get help at [pollev.com/app](https://pollev.com/app)

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When poll is active, respond at [pollev.com/thlaw411](https://pollev.com/thlaw411)

Text **THLAW411** to **22333** once to join

### How many race discrimination (including race harassment) cases have you worked on?

None

1-5

5-10

Too many to count!

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**Why Are We Here?**



IDENTIFY DISCRIMINATION  
BASED ON RACE, COLOR, AND  
NATIONAL ORIGIN



UNDERSTAND AND PRACTICE  
HOW TO INVESTIGATE AND  
MAKE DECISIONS



ANSWER YOUR QUESTIONS

**T&H**

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**Why Are We Here?**

- "All forms of bullying harm kids, but biased-based harassment—when the underlying cause or motivation is prejudice—causes specific, increased harm."
- "Black children, in particular, bear the disproportionate burden of racially motivated peer harassment in school."
- "Black children comprised about 15 percent of the US public school population but 35.5 percent of those who reported being harassed or bullied on the basis of race, color, or national origin"

Committee for Children, "When Bullying is Racially Motivated: Recognizing It for What It is and Supporting Kids to Be Anti-Racist Upstanders" (Nov. 2, 2020).  
<https://www.cfchildren.org/blog/2020/11/when-bullying-is-racially-motivated-recognizing-it-for-what-it-is-and-supporting-kids-to-be-anti-racist-upstanders/>

**T&H**

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**Why Are We Here?**

- “Bullying behaviors motivated by racial bias harm the physical, psychological, and academic health of their victims.”
- “Race-based harassment and bullying places youth of color at greater risk for depression, substance use, and truancy.”
- “Kids who are the victims of peers’ bias-based language—such as being called names—are four times as likely as those who don’t have this experience to feel sad, and about three times as likely to lose friends and avoid school and activities.”

Committee for Children, “When Bullying Is Racially Motivated: Recognizing It for What It Is and Supporting Kids to Be Anti-Racist Upstanders” (Nov. 2, 2020), <https://www.cfchildren.org/blog/2020/11/when-bullying-is-racially-motivated-recognizing-it-for-what-it-is-and-supporting-kids-to-be-anti-racist-upstanders/>



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**Whom can you contact with questions about unlawful discrimination, harassment, and retaliation under Title VI?**

Camie C. Pratt  
Office of Student Protections & Title IX (OSP)

**You may also contact the U.S. Department of Education’s Office for Civil Rights, Chicago Office**  
at 312-730-1560 or [ocr.Chicago@ed.gov](mailto:ocr.Chicago@ed.gov)



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**Law, Policy, and Regulations Foundations**



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### Title IV and Title VI

Titles IV and VI of the Civil Rights Act of 1964 prohibit discrimination in public schools based on race, color, and national origin

Harassment by a student, employee, or other member of the District community can be discrimination by the District if there is not an adequate response



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### Board Policy 102.8A

- Comprehensive Non-Discrimination, Harassment, Sexual Harassment, Sexual Misconduct and Retaliation
- Prohibits discrimination on race, ethnicity, ethnic group identification, ancestry, nationality, national origin, religion, and color, among other protected categories



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### Race or ethnicity includes

- Hairstyles historically associated with race, ethnicity
- Hair texture, including, but not limited to, protective hairstyles such as braids, locks, and twists



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**Discrimination**

Treating an individual less favorably because of their actual or perceived membership in one or more of the Protected Categories.



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**Racial Discrimination:**

- Distinction, exclusion, restriction, preference, or adverse act
- Based on race, color, community, or national or ethnic origin
- Nullifies or impairs the recognition, enjoyment or exercise of a right to an equitable educational experience and fundamental freedoms in the social, cultural, political, and linguistic aspects of school or school and district life




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**Types of Discrimination**

- Different Treatment (Intentional)
- Disparate Impact
- Harassment



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**Different Treatment**

- Taking action, at least in part, because of actual or perceived race, color, or national origin
- Can be proven with direct, circumstantial, or statistical evidence



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**Different Treatment**

- Did an official or representative (agent or employee) of a recipient treat someone differently in a way that interfered with or limited the ability of a student to participate in or benefit from a program or activity of the recipient?
- Did the different treatment occur in the course of authorized or assigned duties or responsibilities of the agent or employee?
- Was the different treatment based on race color, or national origin?
- Did the context or circumstances of the incident provide a legitimate, non-discriminatory, non-pretexual basis for the different treatment?



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**Different Treatment**

**Examples**

Disproportionate discipline based on a student's Protected Class	Denying privileges or opportunities, such as the opportunity to form a club or to participate in extracurricular activities, to students based on a student's Protected Class
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**Different Treatment**

**Examples**

Assigning students of a particular Protected Class to an inadequate or less adequate building, facility, bus, program, class, project, teacher, activity, school, or grouping of any kind	Denying access to facilities based on a student's Protected Class, including access to written and spoken language
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**Disparate Impact**

- Practices that have a discriminatory effect on protected classes, even if not intentional
- Disproportionate adverse effect on protected classes



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**Disparate Impact**

- Is there a facially neutral policy or practice that produces an adverse impact on students based on race, color, or national origin when compared to other students?
- Is the policy or practice necessary to meet an important educational goal? Consider both the importance of the goal and the tightness of the fit between the goal and the policy or practice employed to achieve it.
- If the answer is no, discrimination occurred



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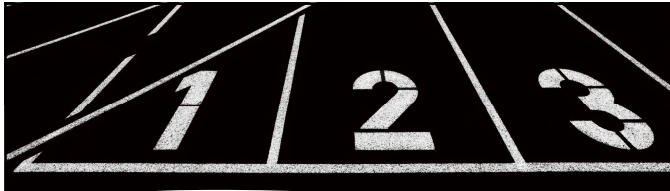
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**Disparate Impact**

- Are there comparably effective alternative policies or practices that would meet the stated educational goal with less of a discriminatory effect on the disproportionately affected racial group?
- Or, is the identified justification a pretext for discrimination?
- If the answer to either question is yes, discrimination occurred. If not, there is not likely sufficient evidence of discrimination.



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**Unwelcome Conduct Examples**

- Bullying
- Intimidation
- Offensive Jokes
- Slurs
- Epithets
- Name Calling
- Assaults
- Threats
- Touching
- Ridicule
- Mockery
- Insults
- Put-Downs
- Offensive Objects
- Offensive Pictures
- Electronic messages



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**Harassment**

- Prohibited harassment is unwelcome conduct on the basis of race.
- Some harassment (that which is severe or persistent, for example) may be "hostile environment" harassment that automatically warrant discipline.
- All harassment can and should be addressed using the range of measures available to educators, from educational conversations to social-emotional learning to discipline and beyond.




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**Harassment Can Be:**

- Verbal
- Nonverbal
- Visual
- Physical



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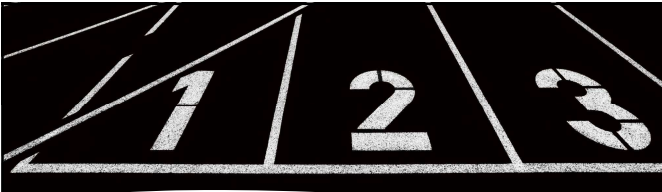
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**Harassment**

- Unwelcome conduct
- Based on race, color, or national origin
- Sufficiently severe, persistent, or pervasive to interfere with an individual's ability to participate or benefit from the school district's program/adversely affect the enjoyment of some aspect of the educational program by a reasonable person, of the same age and race, color, or national origin of the victim, under the same circumstances

A school district can be found to have violated Title VI if it has effectively caused, encouraged, accepted, tolerated, or failed to correct a hostile environment of which it had knowledge or should have had knowledge



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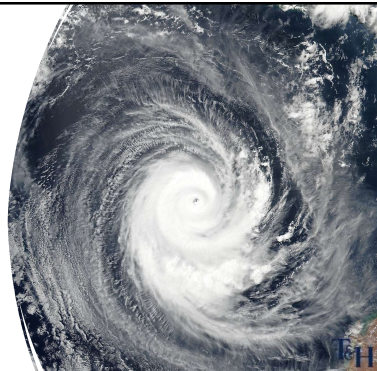

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**Severity**

- Consider nature and location of incidents, size of educational institution
- Incidents of lesser severity or a smaller number of incidents can create a racially hostile environment in a smaller locality

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**Pervasiveness**

- Widespread
- Multiple incidents
- Even something that is not "severe" could lead to a finding of "hostile environment harassment" if pervasive enough

T&H

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**Effect**

- Consider how the environment would affect a reasonable person of the same age and race, color, or national origin as the person alleged to have been subjected to conduct that could be race discrimination or harassment
- An event that occurs in a public place will be received differently than the same event in a private, local place

T&H

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**Harassment**

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Harassment need not include intent or harm, be directed at a specific person, or involve repeated incidents. In most cases, must consist of more than casual or isolated racial comments or slurs

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Look at a sliding scale considering the severity and the pervasiveness or persistence of the events to determine whether something should be labeled as "hostile environment" harassment and what consequences should be imposed

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For "hostile environment" harassment, look at whether the harassment is sufficient to adversely affect the enjoyment of some aspect of the educational program or activity

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A single highly charged incident could be enough to be "hostile environment" harassment (e.g., the "N" word directed at a student)

T&H

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**Target**

It does not matter whether incidents of harassment are directed at a particular student or other person



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**Retaliation:**

- Adverse action
- For making a report or complaint or for participating, aiding, or refusing to participate in processes related to a report or complaint



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**Adverse Action Examples**

- Discipline
- Denial of access to a service or benefit
- Threats
- Coercion
- Discrimination
- Harassment
- Charges for conduct violations

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### Examples - Retaliation

- An employee respondent or someone related to them giving a student lower grades
- Friends of a respondent bullying the complainant because of the report
- A school prohibiting a parent from property for repeatedly raising concerns with discrimination



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### Test Yourself

Over the course of a school year, school employees at a junior high school received reports of several incidents of anti-Semitic conduct at the school. Anti-Semitic graffiti, including swastikas, was scrawled on the stalls of the school bathroom. At the same school, a teacher caught two ninth-graders trying to force two seventh-graders to give them money. The ninth-graders told the seventh-graders, "You Jews have all of the money, give us some." The seventh-graders were not actually Jewish. At the same school, a group of eighth-grade students repeatedly called a Jewish student "Drew the dirty Jew."



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When poll is active, respond at [pollev.com/thlaw411](https://pollev.com/thlaw411)  
Text THLAW411 to 223333 once to join

### What type of discrimination is alleged?

- Different Treatment
- Disparate Impact
- Harassment
- Retaliation

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**Which of the following should the investigator not seek?**

- Have there been similar past instances of misconduct?
- What was the impact on the students who reported the conduct?
- What was the impact on the Jewish students in the community?
- Was the conduct just "teasing" or was it "severe" ?
- How have the alleged harassers responded to responses to similar conduct in the past?

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**Test Yourself**

A district's code of conduct specifies three different categories of offenses, ranging from Level 1, or minor behavior offenses, to Level 3, which covers the most serious conduct. The code of conduct gives school officials the discretion to select among a range of penalties identified for each category of offense. A parent reports that her eighth-grade son, who is African-American, was referred to the office at his school and received a one-day in-school suspension for "use of profane or vulgar language" – a Level 1 offense – during a class period. The disciplinary sanction imposed was within the permissible range for Level 1 offenses. The student has had no previous discipline incidents. A white student at the same school and with a similar disciplinary history also committed a Level 1 offense: "inappropriate display of affection" while on the school bus. While the parent of the white student was called, the student received no additional disciplinary sanction.



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When poll is active, respond at [polllev.com/thlaw411](https://polllev.com/thlaw411)  
Text THLAW411 to 22333 once to join

### What additional information should the investigator seek?

- Is the different treatment necessary to meet an important educational goal?
- Is there a legitimate, non-discriminatory, non-pretextual reason for the difference?
- Is the conduct severe or pervasive?
- Is the conduct sufficient adverse?

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### Test Yourself

A White student told a Black student they "don't sound Black." When the Black student reported the conduct and an administrator imposed consequences, the White student told all the other White students in the class they had better avoid the Black student because they "will report anything you say wrong as racism." All the White students began avoiding the Black student, who reported being sad and not wanting to come to school.



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When poll is active, respond at [polllev.com/thlaw411](https://polllev.com/thlaw411)  
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### What type of discrimination is alleged?

- Different Treatment
- Disparate Impact
- Harassment
- Retaliation

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When poll is active, respond at [pollev.com/thlaw411](https://pollev.com/thlaw411)  
Text THLAW411 to 223333 once to join

### What information should the investigator seek?

- Whether the White student intended to punish the Black student for making a report?
- Whether the other White students had other reasons for excluding the Black student?
- Whether the administrator followed the correct grievance procedure before implementing discipline for the original report?
- Whether the Black student was actually dissuaded from filing a report or complaint because of the White students' actions?

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### Test Yourself

A middle school has a "zero tolerance" tardiness policy. Students who are more than five minutes tardy to class are always referred to the principal's office at a particular school, where they are required to remain for the rest of the class period regardless of their reason for being tardy. The school also imposes an automatic one-day suspension when a student is recorded as being tardy five times in the same semester. Additional tardiness results in longer suspensions and a meeting with a truancy officer. Asian-American students complain to their counselors that they are missing a lot of class because of the "zero tolerance" policy because of office referrals and suspensions for repeated tardiness.



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Text THLAW411 to 223333 once to join

### What type of discrimination is alleged?

- Different Treatment
- Disparate Impact
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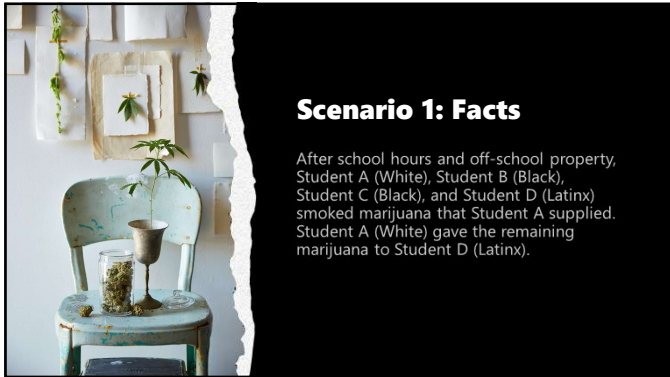
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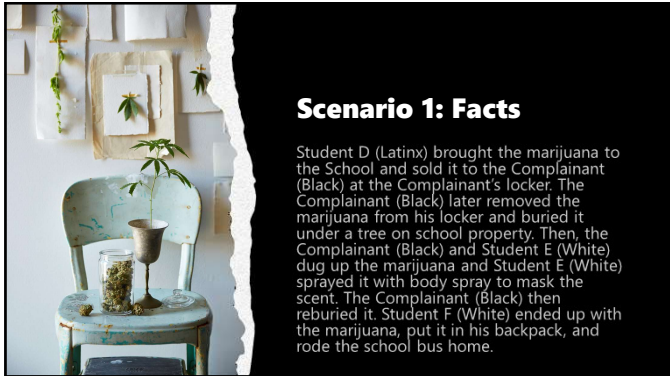
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**Scenario 1: Facts**

The Complainant's mother has complained that the discipline imposed on their student was too harsh compared to the other students and believes it was based on race.

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When poll is active, respond at [polllev.com/thlaw411](https://polllev.com/thlaw411)  
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- Different Treatment
- Different Impact
- Harassment
- Retaliation

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Text **THLAW411** to **223333** once to join

**Can the students be disciplined for their off-campus conduct?**

- No, parents are responsible for student conduct outside of school
- Yes, because there were other students involved
- Yes, if there was a sufficient effect on the school environment
- Yes, schools have responsibility for students wherever located

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**Board Policy 102.8A**


Sets forth the "jurisdiction" for the District's prohibition on non-discrimination

Dictionary  
Definitions from [Oxford Languages](#) · [Learn more](#)

 **juris·dic·tion**

*noun*

the official power to make legal decisions and judgments.  
"federal courts had no jurisdiction over the case"



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**On School Property**

- On school grounds
- On property owned, leased, or controlled by the District
- On District transportation to and from District-sponsored events or activities



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**On or Off School Property**

- At District-sponsored activities or events
- When using District technology

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**Off District Property**

- Does the conduct "affect a Substantial District Interest"?
  - A criminal offense
  - A danger or threat to the health or safety of self or others
  - A situation that significantly interferes with the rights, property, or achievements of self or others, significantly breaches the peace, or causes social disorder
  - A situation that is detrimental to the educational interests of the District



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**DISCUSS**

Discuss the factors for each student's conduct

Who, What, When, Where, Why

Does the District have jurisdiction?

Report back!



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**Scenario 1: Discipline**

Student A (White): 5-days of OSS  
 Student B (Black): No discipline  
 Student C (White): No discipline  
 Student D (Hispanic): Expulsion  
 Complainant (Black): Expulsion  
 Student E (White): In-School Timeout  
 Student F (White): 3-days of OSS upon agreement to drug treatment program

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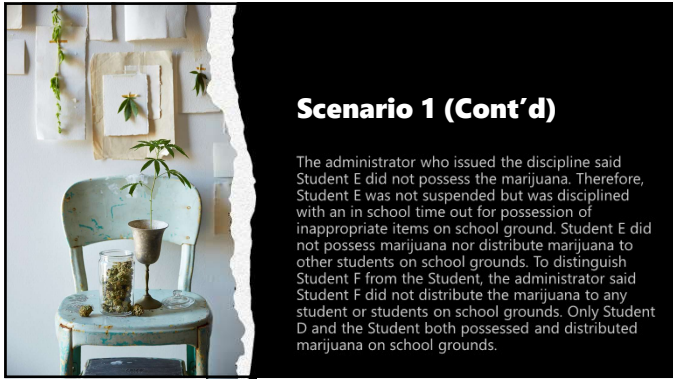
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**Scenario 1 (Cont'd)**

The administrator who issued the discipline said Student E did not possess the marijuana. Therefore, Student E was not suspended but was disciplined with an in school time out for possession of inappropriate items on school ground. Student E did not possess marijuana nor distribute marijuana to other students on school grounds. To distinguish Student F from the Student, the administrator said Student F did not distribute the marijuana to any student or students on school grounds. Only Student D and the Student both possessed and distributed marijuana on school grounds.

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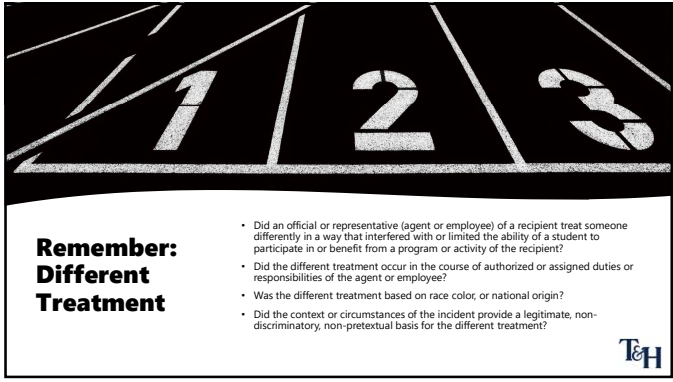
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**Remember: Different Treatment**

- Did an official or representative (agent or employee) of a recipient treat someone differently in a way that interfered with or limited the ability of a student to participate in or benefit from a program or activity of the recipient?
- Did the different treatment occur in the course of authorized or assigned duties or responsibilities of the agent or employee?
- Was the different treatment based on race color, or national origin?
- Did the context or circumstances of the incident provide a legitimate, non-discriminatory, non-pretextual basis for the different treatment?

T&H

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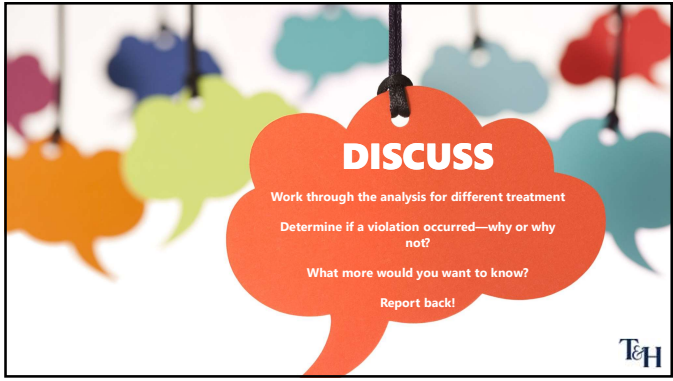
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**DISCUSS**

Work through the analysis for different treatment

Determine if a violation occurred—why or why not?

What more would you want to know?

Report back!

T&H

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**Let's Talk About Harassment**

T&H

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**Remember: Harassment**

- Unwelcome conduct
- Based on race, color, or national origin
- Sufficiently severe, persistent, or pervasive to interfere with an individual's ability to participate or benefit from the school district's program/adversely affect the enjoyment of some aspect of the educational program by a reasonable person, of the same age and race, color, or national origin of the victim, under the same circumstances

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T&H

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When poll is active, respond at [pollev.com/thlaw411](https://pollev.com/thlaw411)

**A parent reports that a white student called a black student the "n word" one time**

Harassment      Not Harassment

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When poll is active, respond at [pollev.com/thlaw411](https://pollev.com/thlaw411)

**A non-Asian student calls an Asian-American student "yellow" and "squinty"**

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Harassment                      Not Harassment

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When poll is active, respond at [pollev.com/thlaw411](https://pollev.com/thlaw411)

**A teacher tells the class Coronavirus started in China; there is a Chinese-American student in the class**

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Harassment                      Not Harassment

Start the presentation to see live content. For screen share software, share the entire screen. Get help at [pollev.com/app](https://pollev.com/app)

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When poll is active, respond at [pollev.com/thlaw411](https://pollev.com/thlaw411)

**A teacher tells the class Chinese students are more likely to spread Coronavirus; there are no Chinese or Chinese American students in the class**

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Harassment                      Not Harassment

Start the presentation to see live content. For screen share software, share the entire screen. Get help at [pollev.com/app](https://pollev.com/app)

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When poll is active, respond at [pollev.com/thlaw411](https://pollev.com/thlaw411)

**A student attempted to dress as a "Rastafarian" on Halloween, showing up to school with tanning cream heavily darkening their face**

Start the presentation to see live content. For screen share software, share the entire screen. Get help at [pollev.com/app](https://pollev.com/app)

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When poll is active, respond at [pollev.com/thlaw411](https://pollev.com/thlaw411)

**A teacher tells a Black student trying out for debate that they are "not polished" and "too militant"**

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Harassment                      Not Harassment

Start the presentation to see live content. For screen share software, share the entire screen. Get help at [pollev.com/app](https://pollev.com/app)

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When poll is active, respond at [pollev.com/thlaw411](https://pollev.com/thlaw411)

**A non-Muslim student asks a Muslim student in a hijab "What's your nationality." The Muslim student was born in the United States.**

Start the presentation to see live content. For screen share software, share the entire screen. Get help at [pollev.com/app](https://pollev.com/app)

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**Students of many races come up with nicknames for female students based on the relative darkness of their skin, such as "Honey" for a light-skinned student and "Volcano" for a dark skinned student.**

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Harassment                      Not Harassment

Start the presentation to see live content. For screen share software, share the entire screen. Get help at [poll@tc.com](mailto:poll@tc.com)

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**Special Rules About Speech**

T&H

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**The Buzz Editorial: "Immigration"**

- "I'll even bet that if I took a stroll through the Canal district in San Rafael that I would find a lot of people that would answer a question of mine with 'que?', meaning that they don't speak English and don't know what the heck I'm talking about."
- "Seems to me that the only reason why they can't speak English is because they are illegal."
- "40% of all immigrants in America live in California ... because Mexico is right across the border, comprende?"

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**The Buzz Editorial:  
"Immigration"**

- "If they can't legally work, they have to make money illegal way [sic]. This might include drug dealing, robbery, or even welfare. Others prefer to work with manual labor while being paid under the table tax free."
- "If a person looks suspicious then just stop them and ask a few questions, and if they answer 'que?', detain them and see if they are legal."
- "Others seem to think that there should be a huge wall along the Mexican/U.S. border."
- "Criminals usually flee here in order to escape their punishment."

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When poll is active, respond at [polllev.com/thlaw411](https://polllev.com/thlaw411)  
Text **THLAW411** to **223333** once to join

**Can the school discipline the student's speech?**

- Yes, the speech was in a school newspaper
- Yes, the school's speech is harassment toward Latinx students
- Yes, the editorial communicated the student's viewpoint in a disrespectful and unsophisticated manner
- No, the editorial included no direct provocation or racial epithets and so was not likely to create a disruption

Start the presentation to see live content. For screen share software, share the entire screen. Get help at [polllev.com/app](https://polllev.com/app)

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**School Speech**

Hazelwood School District v. Kuhlmeier (1988)

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**Speech Rights of Student Journalist Act, 105 ILCS 80/10**

Except as otherwise provided in Section 15 of this Act, a student journalist has the right to exercise freedom of speech and of the press in school-sponsored media.... Subject to Section 15 of this Act, the appropriate student journalist is responsible for determining the news, opinion, feature, and advertising content of school-sponsored media.



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**Speech Rights of Student Journalist Act, 105 ILCS 80/15**

**Exceptions**

- Libel
- Slander
- Obscenity
- Unwarranted invasion of privacy
- Violation of federal or State law
- Incites students to commit an unlawful act, violate school policies, or materially and substantially disrupt the orderly operations of the school



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**Smith v. Novato Unified School Dist. (Cal. App. 2007)**

- High school student and his father sued school district, alleging violations of student's constitutional and statutory rights to free speech, based on district's response to student's opinion editorial that was published in school's student newspaper.
- Construing a law similar to Illinois', the court found that the opinion editorial was not speech likely to incite disruption of the orderly operation of the high school.
- "[A] school may not prohibit student speech simply because it presents controversial ideas and opponents of the speech are likely to cause disruption. Schools may only prohibit speech that incites disruption, either because it specifically calls for a disturbance or because the manner of expression (as opposed to the content of the ideas) is so inflammatory that the speech itself provokes the disturbance."



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**Personal, On Campus Speech**

-  "vulgar speech" (*Bethel v. Fraser* 1986)
-  "promotes illegal drug use" (*Morse* 2007)
-  "reasonably foreseeable" "materially and substantially disruption" to the learning environment or school operations" (*Tinker*)

**T&H**

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**CNN.com / LAW CENTER**

**Teen sues over 'Redneck' T-shirt banned by school**

June 26, 2001 Posted 11:12 AM EDT (1512 GMT)

**NEWARK, New Jersey (Reuters)** -- Tom Sypniewski thought his "redneck" T-shirt was funny, but school officials deemed it offensive, ordered him to remove it and are now being sued for allegedly violating his free speech rights.

Sypniewski, 19, wore the shirt, which listed comic Jeff Foxworthy's "Top 10 Reasons You Might Be A Redneck Sports Fan," to Warren Hills Regional High School on March 22 and was told to remove it. He refused and was suspended for three days, losing an appeal to the Board of Education in April.

District school officials in Washington, a small town in rural western New Jersey, said in a news release the shirt "portrayed a message of racial stereotyping" and violated the dress code. It said the shirt could have inflamed students, given the school's two-year history of racial tensions.

Sypniewski, who recently graduated, denied he is a racist or that the shirt carried a racist message.

**T&H**

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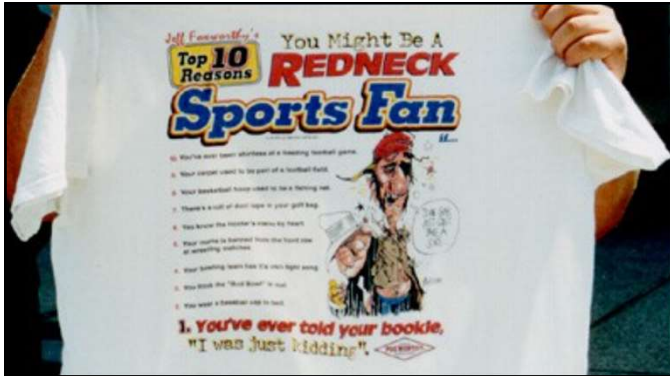
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When poll is active, respond at [pollev.com/thlaw411](https://pollev.com/thlaw411)  
Text THLAW411 to 22333 once to join

**Can the school discipline the student for the "Redneck" shirt?**

- Yes, the word "redneck" is likely to incite violence in light of the racial troubles at the school
- Yes, the word "redneck" could be offensive and harassing to minority students
- No, mere association with items and activities that have caused racial unrest is not sufficient
- No, the speech is political speech that can never be punished

Start the presentation to see live content. For screen share software, share the entire screen. Get help at [pollev.com/app](https://pollev.com/app)

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**Sypniewski v. Warren Hills Bd. of Educ. (3d Cir. 2002)**

- School's enforcement of racial harassment policy to prohibit students from wearing T-shirt that contained the term "redneck" likely violated the First Amendment
- This was true despite the school's history of racial tension and disruption arising from wearing of Confederate flag, absent evidence that term "redneck" itself had history of causing disruption or evidence that term was linked either to Confederate flag or to group of students that referred to themselves by name "Hicks" and shared common belief in their prejudices against others



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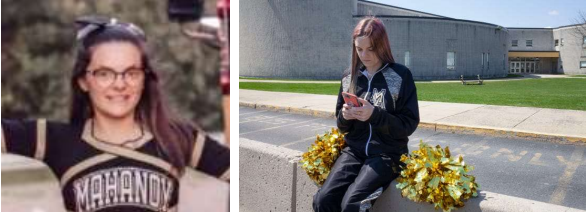
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**Off-Campus Speech**

*MAHANNOY AREA SCH. DIST. V. B.L. (U.S. 2021)*

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### Three “Features” of Off-Campus Speech

The Court mentioned three features of off-campus speech that reduce a school’s ability to regulate such speech. Those factors are:

1. When students are off campus, a school will rarely stand in the role of parents (in loco parentis) as they do when students are in school.
2. Because regulations of off-campus speech are 24 hours a day, seven days a week, courts must be more skeptical of a school’s efforts to regulate off-campus speech, for doing so may mean the student can never engage in that speech at all.
3. The school itself has an interest in protecting unpopular student speech, especially when it occurs off campus, because of the important role schools play in protecting the “marketplace of ideas” that is the foundation of our democracy.



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### The Mahanoy Test – Tinker Plus

- Adopted *Tinker* test (material and substantial disruption)
- What’s the “plus”?
  - For disruption, some clear examples provided
  - A “nexus-not-nexus” test for everything else?
  - Certain speech may be off limits

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### A “Nexus-not-Nexus” Test

In reaching that determination, the Supreme Court noted that B.L.’s speech occurred off-campus, outside of school time, via a personal device, and to a limited audience of her private circle of Snapchat friends

The student did not identify the school or target any school community member with vulgar or abusive language



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**Certain Speech Off Limits?**

"When it comes to political or religious speech that occurs outside school or a school program or activity, the school will have a heavy burden to justify intervention."



T&H

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**ACLU**

PRESS RELEASES >

**ACLU Files Amicus Brief Urging Court to Uphold Students' Free Speech Rights**

September 17, 2021 9:00 am



Me and the boys bout to exterminate the Jews

T&H

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**ACLU**

PRESS RELEASES >

**ACLU Files Amicus Brief Urging Court to Uphold Students' Free Speech Rights**

September 17, 2021 9:00 am

The case, *CLG v. Scott Siegfried, et al.*, involves an offensive snap a young person posted on Snapchat from a local thrift store on a Friday night. The snap included a photograph of the student and three friends, including one person wearing a World War II hat, with an anti-Semitic caption, stating "Me and the boys bout to exterminate the Jews." Within hours, the student took down the snap and apologized for it. The school expelled the student in response. The school did not claim that the snap constituted bullying or harassment, but argued that it could punish the student to the same extent that it could discipline students for in school speech that has the potential to disrupt the school environment.

T&H

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When poll is active, respond at [polllev.com/thlaw411](https://polllev.com/thlaw411)  
Text THLAW411 to 22333 once to join

### Is C.G.'s speech protected?

Yes, because the speech targets Jewish students who are members of a protected class

Yes, because the speech is not protected by the First Amendment

No, the Mahanoy standard does not allow it

Start the presentation to see live content. For screen share software, share the entire screen. Get help at [polllev.com/app](https://polllev.com/app)

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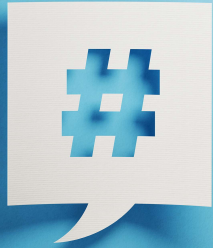
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### C.G. v. Seigfried (10<sup>th</sup> Cir. 2022)

- The student did not identify the school in the posts
- The student did not target any individual member of the school community
- The posts did not include weapons, specific threats



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### Mahanoy Takeaways

- ✓ Focus on the nexus/disruption duo with special protection for political and religious speech
- ✓ Update policies and procedures (SCOCs, AUPs, athletic codes) to limit overbreadth and provide sufficient notice of the types of speech that may warrant discipline off campus
- ✓ Apply rules evenhandedly—don't disfavor viewpoints
- ✓ Provide guidelines and training to administrators on the front lines
- ✓ Call counsel when considering discipline



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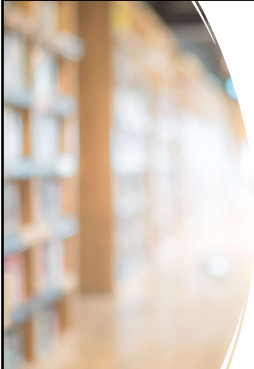
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**Lessons From Post-Mahanoy Cases**

- True threats are still fair game
- So are violent or severe harassment based on a protected status aimed at particular students, school officials, or others in the school community
- Even despicable off campus speech may be off limits if it does not identify the school or target specific students or officials



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**Evaluating the Complaint**



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**Evaluation**

- Evaluation is the process by which you identify the allegations in the complaint that need to be investigated
- Jurisdiction may also need to be considered
- Occurs before a notice of allegations or investigation



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### Evaluation Questions

What are the questions you are answering in evaluation?

- Is there an allegation of discrimination based on race?
  - > Think back to the examples we discussed above
  - > Probe for "anything else"
- Do you have jurisdiction?
- If so, what details do we need to know to write an NOA?

An intake meeting with the reporting party may be warranted if different than the complainant



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### Intake Basics

<b>01</b> With any meeting or interview, introduce yourself and explain your role	<b>02</b> Provide information about the process (consider written notices)	<b>03</b> Build rapport and consider comfort
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### Intake Questions

- Who
- What
- When
- Where
- Why
- How



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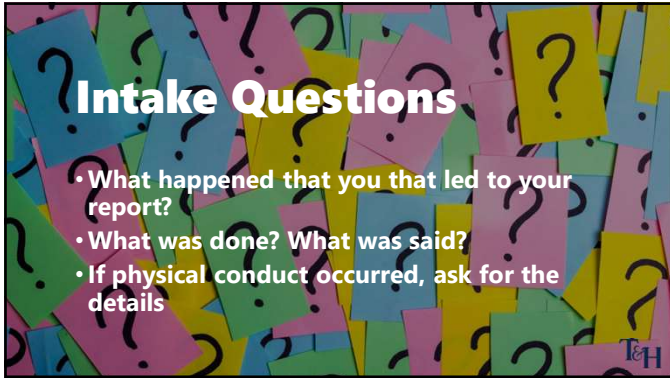
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A slide with a background of colorful question marks. The title "Intake Questions" is in white. The list items are in white text on a dark background.

**Intake Questions**

- What happened that you that led to your report?
- What was done? What was said?
- If physical conduct occurred, ask for the details

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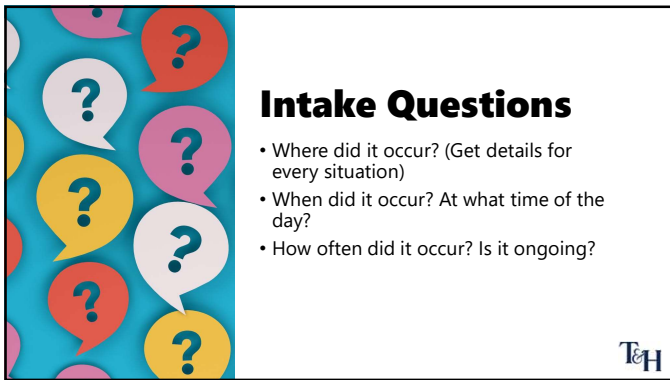
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A slide with a blue background and colorful speech bubbles containing question marks. The title "Intake Questions" is in bold black. The list items are in black text.

**Intake Questions**

- Where did it occur? (Get details for every situation)
- When did it occur? At what time of the day?
- How often did it occur? Is it ongoing?

T&H

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A slide with a yellow background and a large white exclamation mark. The title "Intake Questions" is in bold black. The list items are in black text.

**Intake Questions**

- Are you alleging any other violations of policy, harassment, other discrimination, or otherwise?
- Go over what happened—ask "Anything else?"

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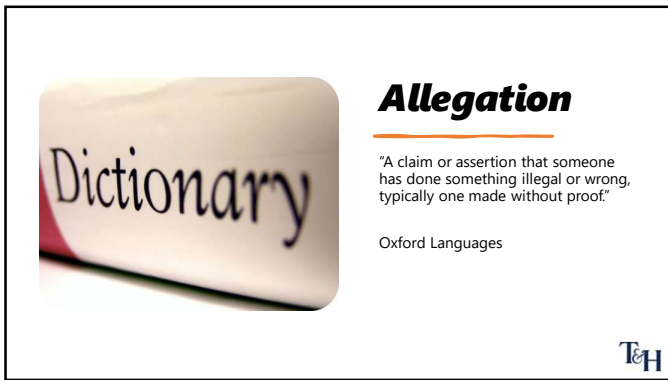
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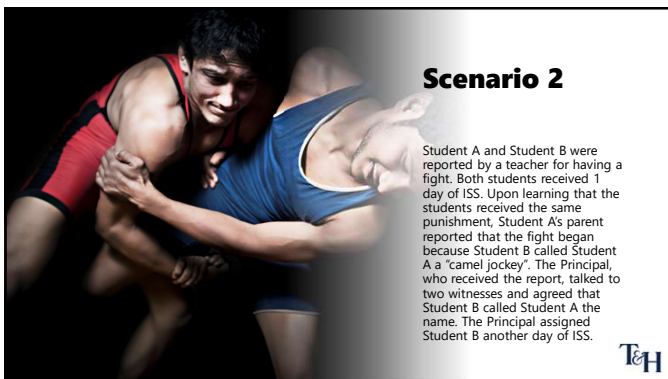
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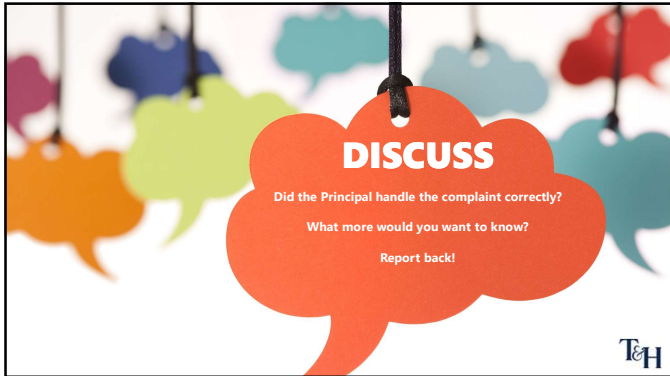
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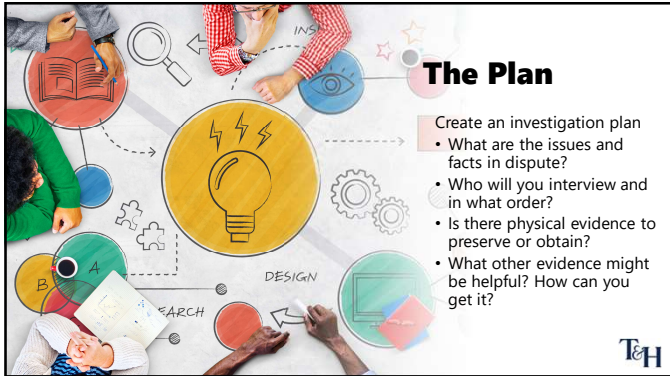
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### Relevant Evidence



- Does this evidence apply or relate to a disputed "fact" in this matter?
- If so, does it have a tendency to make the fact more or less probable?
- Answer should be "yes" to both for relevance to exist



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### Types of Evidence

Recognize and understand the different types of evidence:

- Direct Evidence
- Circumstantial Evidence
- Statistical Evidence
- Hearsay

Rumor and innuendo are not competent evidence and cannot support an investigative finding

That said, rumor & innuendo could possibly lead to further investigative leads!

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### Case Study

A student (Carson) reports that a student in their friend group (Robin) called Carson dirty, asked why they did not wash their skin, and commented that their skin looked like feces

Robin says they did not make the statements

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**Issues in Dispute**

- What issues are in dispute?
- What evidence might be relevant?
- With whom might you want to speak?

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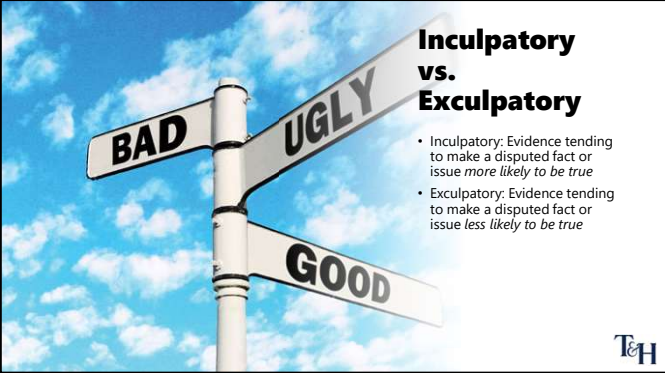
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**Inculpatory vs. Exculpatory**

- Inculpatory: Evidence tending to make a disputed fact or issue *more likely to be true*
- Exculpatory: Evidence tending to make a disputed fact or issue *less likely to be true*

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**Case Study**

- Carson produces a TikTok video in which Robin was using racial epithets
- Robin's friend, Frankie, says Robin has lots of friends of different races and would never say anything like that to anyone



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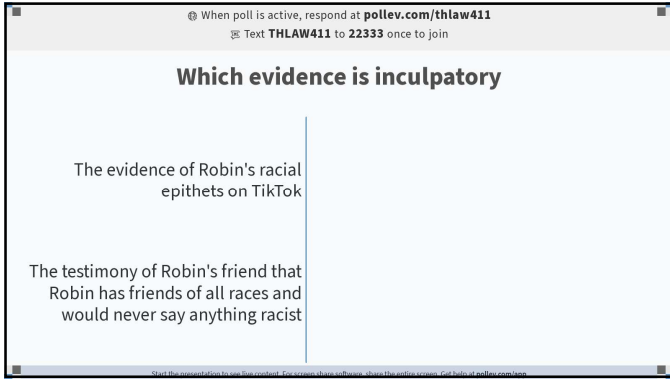
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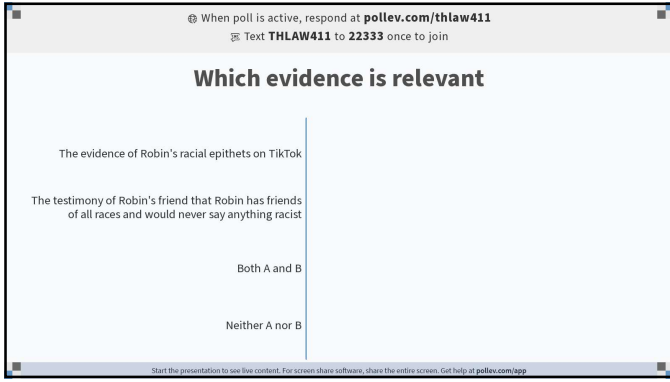
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**Rank the evidence in order of the weight on the question of whether Robin made the alleged statements to Carson**

Evidence Robin used racial epithets on TikTok unrelated to Carson	
Testimony of Robin's friend that Robin has friends of all races and would never say anything racist	
Copies of electronic communications in which Robin made the alleged statements to Robin	
A witness's testimony that they heard Robin make the alleged statements to Carson	
A witness's testimony that a friend told them they heard Robin make the alleged statements to Carson	

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**Who Will Investigators Interview?**

- Complainant
- Respondent
- Witnesses
- Administrators, teachers, school personnel
- Student witnesses
- Authors or recipients of relevant evidence
- Persons identified by Complainant and Respondent

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**Gathering Evidence**

- It's your job to **promptly** identify and preserve likely sources of evidence
  - ❖ Paper Documents
  - ❖ Hard Drive
  - ❖ Audio or Video Recordings
  - ❖ Photographs
  - ❖ Email
  - ❖ Text messages
  - ❖ Social media (posts and comments)

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**Preparing for Interviews**

Determine logical order of interviews

- > Typically interview CP first, then witnesses, then RP
- > Sometimes will interview witnesses first (e.g., employee witnesses)
- > Often will interview CP and RP (and some witnesses) multiple times
- > Follow up can be conducted by email

T&H

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**Preparing for Interviews**

Determine location of interviews

- > Consider privacy, neutral location, impact of conducting interviews on campus
- > If objection to location, try to accommodate the objection

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**Preparing for Interviews**

- Prepare opening statement
- Organize evidence you may need for the interview
- Prepare questions or outline of key subjects to address and check off to avoid missing issues

T&H

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**Interview Tips for Investigators**

- ✓ Let the witness tell his or her story
- ✓ Start with open-ended questions
- ✓ Ask for the particulars—the 5Ws and H
  - ❖ Who? What? Where? When? Why? How?
- ✓ Follow up with more directed questions
- ✓ Consider trauma in questioning



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**Types of Questions**

- Open-ended, narrative, or descriptive
- Closed or narrow
- Reflective
- Leading



T&H

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**Reliability of Evidence**



T&H

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**What is Reliability?**

In the investigative process, reliability refers to the process of weighing the accuracy and veracity of evidence

Sometimes referred to as "credibility"



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**Relevant vs. Reliability**

Reliability goes to weight – it can impact how much the scale is tipped – a feather or an elephant.



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**Case Study**

A student (Carson) reports that a student in their friend group (Robin) called Carson dirty, asked why they did not wash their skin, and commented that their skin looked like feces. Robin says they did not make the statements



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I hear this a lot: "But it's 'they said, they said,' what am I supposed to do?" 133



**T&H**

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When poll is active, respond at [polllev.com/thlaw411](https://polllev.com/thlaw411)  
Text **THLAW411** to **223333** once to join

**In a case that is truly "they said, they said" what is the outcome (using preponderance of the evidence)**

The educational institution cannot even investigate because there is no evidence

There must be a finding of "sufficient evidence" (in favor of the complainant)

There must be a finding of "insufficient evidence" (in favor of the respondent)

There must be a finding of "inconclusive" (neither for nor against either party)

Start the presentation to see live content. For screen share software, share the entire screen. Get help at [polllev.com/app](https://polllev.com/app)

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**Reliable ≠ Truthful**

- Just because you don't find someone or something reliable does not mean it's not true or is a lie
- We all remember experiences differently and have different perspectives that shape how we view incidents
- An individual's experience is always valid, but that experience may or may not be sufficient to establish the fact or issue in dispute

**T&H**

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**Corroboration or Inconsistent**

- Corroborating and inconsistent evidence can be the "star witness" in cases
- Ask parties and witnesses for any evidence they think would support their position or contradict the other position



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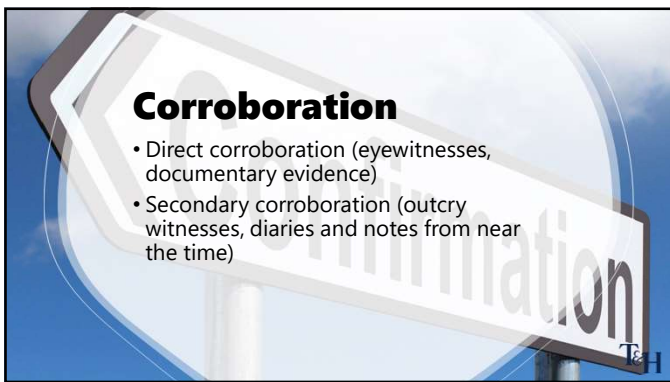
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**Corroboration**

- Direct corroboration (eyewitnesses, documentary evidence)
- Secondary corroboration (outcry witnesses, diaries and notes from near the time)

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**Consistency**

- Too little
  - There is a difference between "normal" discrepancies and concerning ones
  - There is a difference between irrelevant discrepancies and relevant ones
  - Use repetition with witnesses regarding details that matter to identify relevant, concerning inconsistencies
- Too much
  - Are the details *too* similar?
  - Does the testimony seem rehearsed/memorized? Why might it sound that way?



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### Case Study

Carson produced a text message from Robin in which Robin says: "I'm so sorry for saying that yesterday."

- There is a dispute about when that message was sent as compared to the alleged incident.



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### Case Study

- Carson says Robin sent the message the evening after one of the taunting incidents.
- Robin says the message was sent days before, on a Friday, and was about Carson getting a bad grade on a test.
  - The text message was sent at 10 pm and Robin has basketball practice every morning at 5:30 am on weekdays, so said they would not have been awake that late.
  - Carson's teacher verified that Carson failed a test the Friday before the photograph incident.



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**Which position is best supported by the reliable evidence?**

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Carson (the text was sent the same day as the photograph incident)

Robin (the text was sent the Friday before)



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**Memory**

- Consider whether inconsistencies are major or minor
- Consider impacts of
  - Alcohol or other intoxicants
  - Time
  - Outside Influence (e.g., Others' Recollections)
  - Trauma



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**Plausibility**

- Does the statement make sense?
- Are there more likely alternatives based on the evidence?



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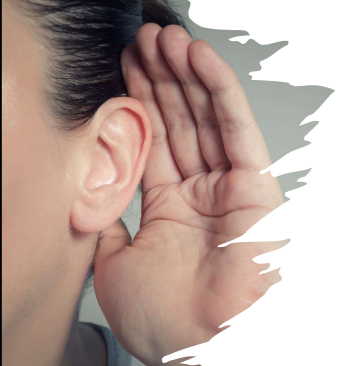
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**Case Study**

- Carson says two witnesses (Wei and Wynn) were around when some of the comments were made
- Carson reported that the comments were made at a normal tone of voice
- None of the witnesses reported seeing or hearing the alleged comments



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**Is it inherently plausible that the witnesses would not have heard the comments?**

Yes No

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**Source Opportunity**

How did the witness learn the information?

- > If it was firsthand, could the individual have seen/heard what they claim from where they were?
- > If they obtained the information from someone else, who? How did that person obtain the information? Could that individual have seen/heard what they claim from where they were?

**T&H**

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**Case Study**

When the investigator is interviewing Wei, Wei says they believe Robin made the comments to Carson as alleged

**T&H**

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**Which of these makes Wei's statement less reliable?**

Wei says they only believe it happened because Carson told Witness #1 a week later

Wei said they were not in earshot during the incidents in question

Wei has been friends with Carson and Robin for years

Wei says that Robin did the same thing to Witness #1 last year, but Carson was found not responsible

None of the above

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**Source Motive**

• Did the witness have reason to lie (or, more likely, embellish)?

- Friendships
- Negative History
- Impact on Witness (consider amnesty)

**MOTIVE**



T&H

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**Consider the Source**

- Corroboration can enhance reliability
- Consider the source of corroboration (same considerations)
  - Friendships
  - Negative History
  - Impact on Witness

T&H

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**Case Study**

- Carson reports that they barely even know Robin
- Robin says Carson has been flirting with Robin a lot lately, but that Robin recently told Carson that they like someone else—Wei
- Wei confirms that there is a mutual crush between Wei and Robin, but doesn't know anything about any history between Carson and Robin
- Wynn refuses to answer any questions at all, but obliquely refers to "drama" between Carson and Robin in the past



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**What factual finding will you make about whether Carson and Robin had a past relationship that impacted the report?**

Insufficient evidence

Sufficient evidence

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What About Source Status?

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**Rank these witnesses in order of believability (most believable to least believable)**

- A nun
- A teacher
- An administrator
- A star athlete
- A person with a disciplinary or criminal record
- A police officer

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**Case Study**

During the interview, Carson cannot recall certain details of the incident, such as the sequence of events, who was present at the time the incidents occurred, or who Carson talked to after.

**T&H**

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**Which of the following is not relevant to deciding the impact of Carson's lack of recall on reliability of their account?**

- The students were drinking alcohol at the time of the incident
- When asked about these topics, Carson began to have shifty eyes, fidgety behavior, and nervous blinking
- Although Carson had been previously composed, when asked about these topics the complainant's neck became extremely flushed and they began perspiring noticeably
- The details Carson can't recall are not significant to the overall findings when the evidence is taken in its totality
- None of the above—they're all relevant to assessing Carson's credibility

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**Demeanor**

- **Demeanor is almost always an unreliable factor**
  - We all react to trauma and experiences differently. There is no *one way* to behave. (Remember Camus's *The Stranger*)
  - The investigation process is stressful
- What might be relevant? (Though almost never dispositive)
  - Changes in demeanor during the process
  - Evasiveness
  - Defensiveness
  - Rationalization

Timony, James P., "Demeanor Credibility," *Catholic University Law Review* Vol. 49 (2000), <https://scholarship.law.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1388&context=law>



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**Demeanor**

What to do when you notice body language, micro-expressions, gesticulations, etc.

- Ask questions about the reaction
- How the witness explains their reasons for their demeanor is likely more important than the demeanor itself



**BODY LANGUAGE**



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**Impartiality**



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**Bias**

Do not get sucked into biased thinking

- Bias for or against complainants (victim blaming) or respondents (assuming responsibility)
- Culture, background, religion, etc. can impact how a person perceives behavior



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**Case Study**

- Carson does not report racial taunting by Robin for months
- When asked, Carson explains that in their culture assimilation is important and "rocking the boat" is discouraged




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**Should you hold Carson's non-report against them (as exculpatory evidence)?**

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Yes No

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**Culture & Bias**



Consider how a party or witness's culture, background, religion, or other factors may impact behavior during the process

- Culture can impact what is reported and when
- Culture can also impact how a person responds to behavior (e.g., unwelcomeness may not be shown)



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**Avoiding Partiality**

- Start from a place of believing **all** your parties and witnesses
- An attitude of disbelief can lead someone to want to figure out what you need to hear in order to believe them
- Don't make yourself an issue



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**Consequences**

If a team member inappropriately applies pre-existing assumptions that amount to bias in the process of evaluating reliability, such bias may provide a basis for a party to appeal



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**Barriers to Impartiality**

- Bias towards members of a certain group – both positive and negative
- Previous experience with the individual – both positive and negative
- Inability to identify trauma-based responses and behaviors
- Inability to separate personal morals/beliefs from the situation
- False belief that witness corroboration is needed to establish reliability
- Limited information
- Interviewee fears sharing the information

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**Serving Impartially: Biases**

- Biases based on a witness's race, color, religious beliefs, national origin, sexual orientation, gender identity, gender, and/or economic circumstance must be left at the door
- Consider more innocuous biases – does the respondent remind you of a family member or friend?
  - If you are unaware of this bias, you may end up giving more weight to the respondent's testimony.

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**Serving Impartially: Biases**

- Confirmation biases: tendency to look for evidence that confirms what you already believe and overlooking what you do not believe
- Do not make assessments too soon. You must consider the entire picture.
  - Investigators, wait for all evidence to be gathered. Decision makers, wait until you review all evidence and questions/testimony.

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## Don't Rush to Judge

A critical feature of a fair grievance process is that personnel refrain from drawing conclusions or making assumptions about either party's reliability or truthfulness **until conclusion of the grievance process**



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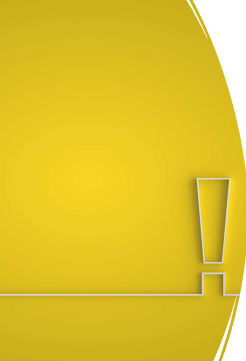
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## I Can't Decide!

- It's possible that you will find both sides equally credible—but unlikely when you really look at the factors discussed today
- What if you do?



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When poll is active, respond at [pollev.com/thlaw411](https://pollev.com/thlaw411)  
Text **THLAW411** to **22333** once to join

### A 50/50 decision leads to a finding of...

Insufficient evidence to support the allegation (a finding for the Respondent)
Sufficient evidence to support the allegation (a finding for the Complainant)
Inconclusive (a finding neither for or against either party)

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**Justify Your Choice**  
Explain in writing reasons for reliability determination

T&H

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**Bad Example**  
*I believed the respondent's version of events over the complainant's.*

T&H

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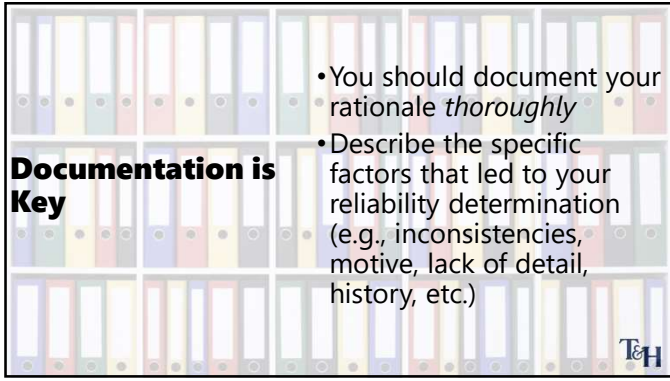
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**Documentation is Key**

- You should document your rationale *thoroughly*
- Describe the specific factors that led to your reliability determination (e.g., inconsistencies, motive, lack of detail, history, etc.)

T&H

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**Bad Example**

*I found the respondent more credible. They were much more emotional than the complainant, and I believe people often lie about other people's actions when things don't go their way.*

T&H

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**Trauma**

- Effects of trauma should not be used to diminish or heighten reliability
- Avoid using evidence of trauma to "fill in gaps" in a case
- Being "trauma informed" is not being "trauma lenient"

T&H

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**Good Example**

*When asked about the delay in reporting, the complainant described the extreme negative emotional impact the behavior had on them and that they did not want to relive the incident by telling someone about it. It was only after being able to open up to a trusted adult outside of the school that the complainant felt they could report. I did not find the timing of the report determinative in reaching my conclusion, on the one hand, and I did not weigh the delay in reporting against the complainant, on the other.*

T&H

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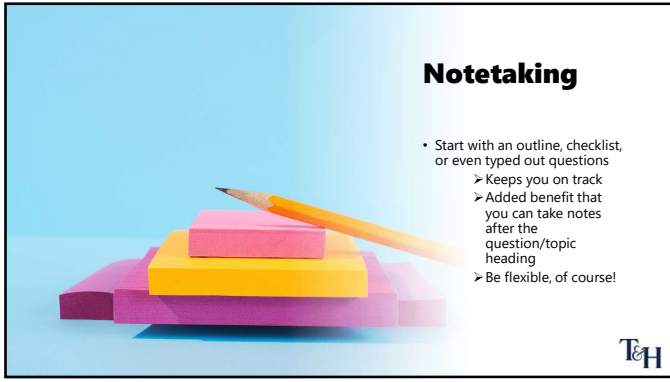
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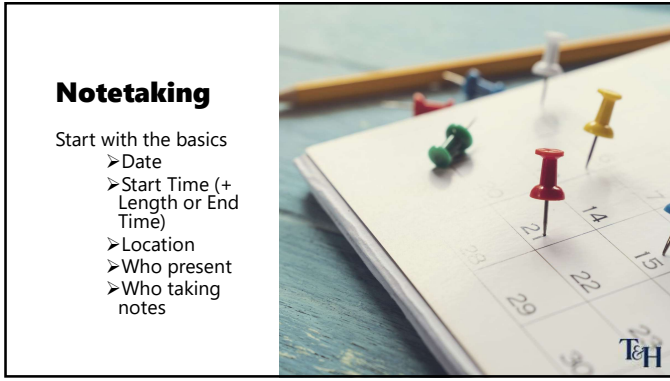
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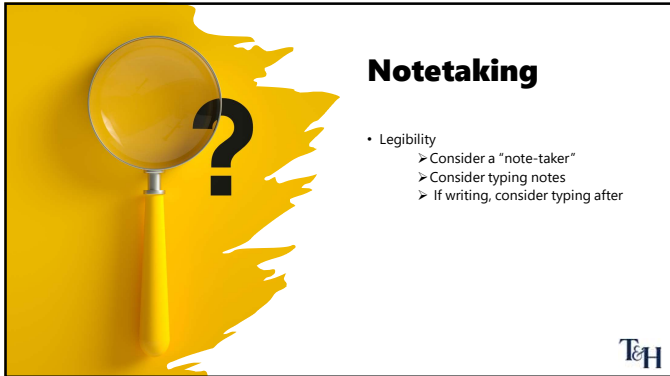
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**Notetaking**

- Legibility
  - Consider a "note-taker"
  - Consider typing notes
  - If writing, consider typing after

T&H

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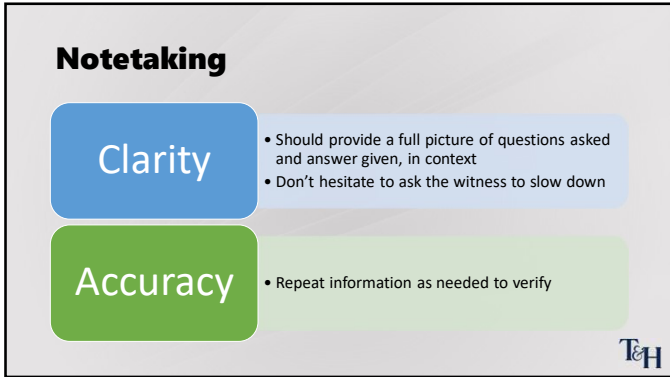
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**Notetaking**

**Clarity**

- Should provide a full picture of questions asked and answer given, in context
- Don't hesitate to ask the witness to slow down

**Accuracy**

- Repeat information as needed to verify

T&H

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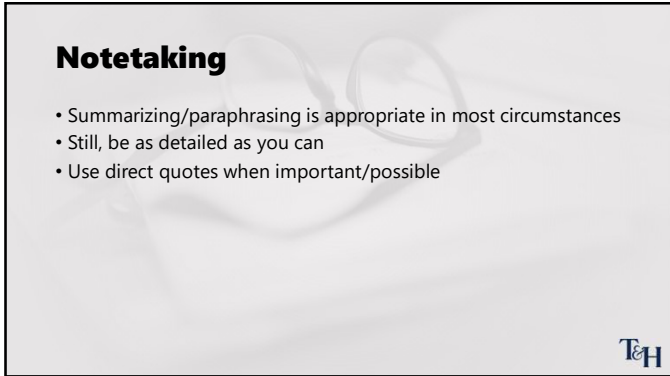
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**Notetaking**

- Summarizing/paraphrasing is appropriate in most circumstances
- Still, be as detailed as you can
- Use direct quotes when important/possible

T&H

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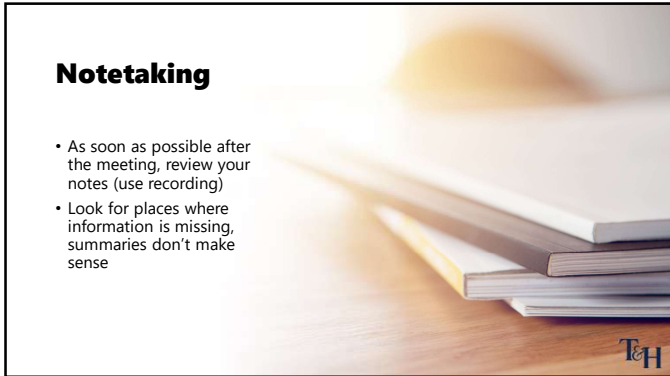
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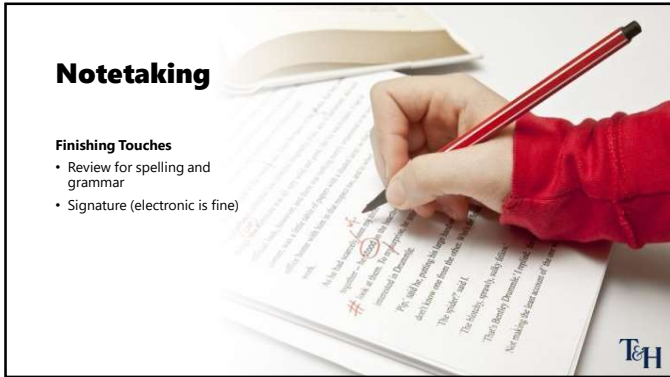
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To: Principal  
From: Assistant Principal  
Re: Incident at School Today  
Dear Principal,  
I wanted to make sure you know about an incident that happened at school today. A student, Ryan, came in with Ryan's parent to report receiving a threat from another student, Cameron. Ryan showed a text message thread between the two. In the final text, Cameron said "You better stop or I'm going to make you stop." Ryan's parent says this was a threat to harm Ryan and wants Cameron expelled. I spoke to Cameron and Cameron said that Ryan has been making microaggressions to Cameron for years, things like calling Cameron a monkey and making monkey noises at Cameron. Ryan also reportedly uses the N word with Cameron (with the soft "a"), like when they are singing songs. Because of the threat, Cameron received three days of OSS. I also told the counselors at the school to meet with both students once a week to make sure things are ok between them.

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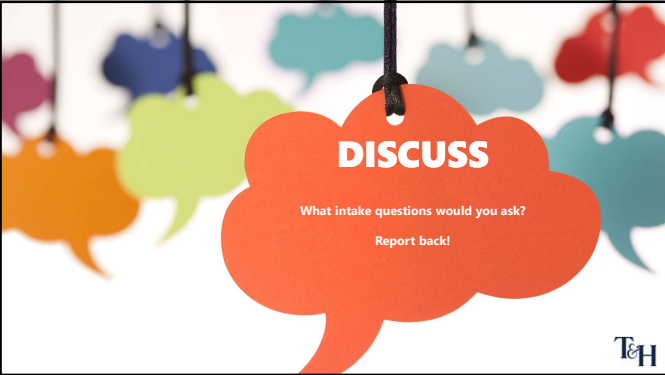
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**DISCUSS**  
What intake questions would you ask?  
Report back!

T&H

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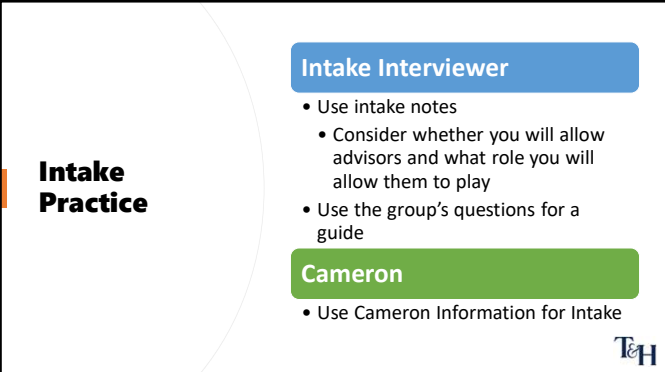
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**Intake Practice**

**Intake Interviewer**

- Use intake notes
- Consider whether you will allow advisors and what role you will allow them to play
- Use the group's questions for a guide

**Cameron**

- Use Cameron Information for Intake

T&H

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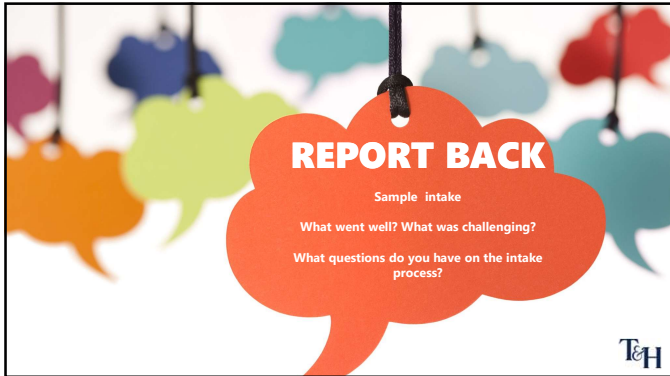
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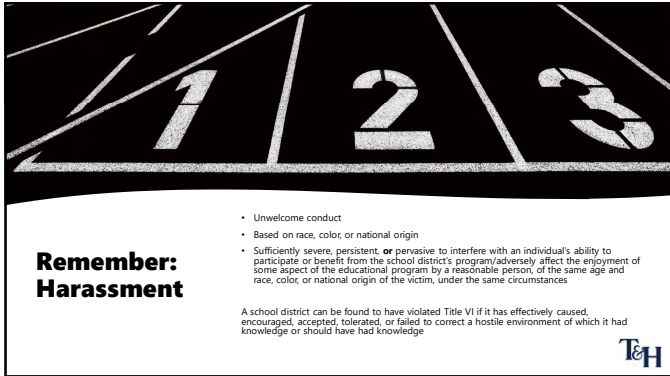
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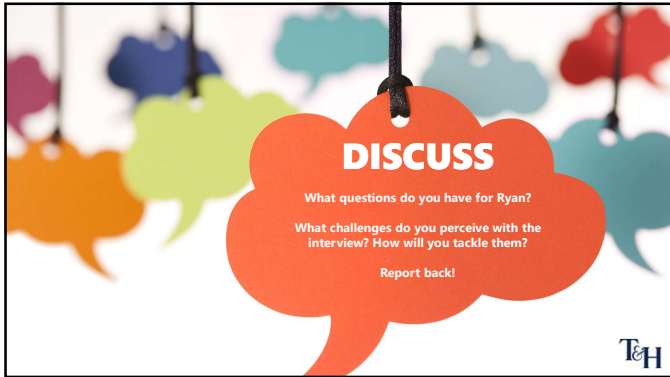
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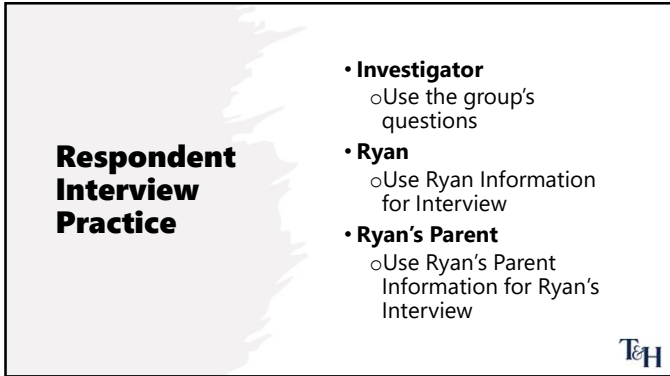
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**Additional Facts**

Wyatt confirms that Cameron has reported concerns with Ryan using words like "n\*gga" and "gangster" when singing songs, but it was like a comment made in passing or like rolling his eyes at Wyatt about it when Ryan did it. Wyatt was on the bus when Cameron spoke to the bus driver, but only heard snippets of what was said. Wyatt heard the words "bugging me" and "stupid things" but wasn't really in a great position to hear it all because the bus was loud. Ryan and Cameron both say things like "n\*gga," "gangster," and "homey" all the time. It's sort of how they talk to each other.



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**Additional Facts**

Honestly, a ton of kids use words like that around the school when they're talking to each other. Wyatt doesn't use those terms because their parent has told them they'd better never hear words like that out of their mouth and Wyatt knows they mean it. Wyatt hasn't ever told anyone about it because what would the school do? They must already know about it, it happens all the time



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**Additional Facts**

According to the bus driver, Cameron said they needed a break from Ryan on the bus, but didn't say why. So the bus driver told Cameron to sit at the front of the bus. The bus driver denies being told anything was based on race. When asked specifically if Cameron said, "Ryan keeps saying all this stupid racist stuff to me and it's really bugging me, can you do something to make it stop," the bus driver adamantly denied that Cameron said "racist" but the rest sounds correct.



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**Review & Discuss**

Review the sample report

What elements are familiar to you from your practice? What is new?

What would your finding be based on the evidence? Why?

T&H

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**Writing Exercise**

- Prepare a (rough) summary of the evidence from Cameron and Ryan
- Be ready to describe your findings and explain why you reached them

T&H

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**QUESTIONS?**

Thank you!

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