Constructing the Live Hearing Process

Presented by:

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Associates

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Construction the Hearing Process Agenda

Day 1

Module 1: The Law and the Hearing Process

- Title IX Overview
  - Code and Regulations
  - Case Law
- The Title IX Grievance Process
  - Definitions
  - Jurisdiction
  - Resolution Processes
  - Hearing Basics
- Conflict of Interest and Bias

Module 2: Hearing Preparation

- Policy vs. Procedure
- Steps of the Formal Process
- Choosing your Personnel
- Choosing your Hearing Format
- Hearing Notices
- Hearing Preparation
- Q and A

Day 2

Module 3: The Hearing

- Evidence and Relevancy
- Role of the Personnel
- The Hearing agenda
- Relevancy determinations
- Difficult situations
- Case Studies

Module 4: Findings and Appeals

- Weighing the Evidence
- Elements of a violation
- Sanctions and Remedies
- Written Determination
- Appeals and Other Decision-makers
- Case Studies
- Q and A

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TITLE IX

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ISSUANCE OF CERTIFICATES FOR COMPLETION OF DSA/NACCOP CLASSES

To receive a certificate for classes held by D. Stafford & Associates, LLC or the National Association of Clery Compliance Officers and Professionals (NACCOP), attendees must attend the majority of the class. This includes in-person classes and virtual classes. DSA and NACCOP understands that attendees may need to miss class for a legitimate reason for longer periods of time or may need to leave the room during a class for a few minutes to take a phone call or attend to other business. That said, our general rule of thumb for our 4 and 5 day classes is that if an attendee misses more than 1 hour of class time, they will not be issued a certificate of completion for the class. If the class is a 1, 2 or 3 day class, the amount of time that can be missed may be less, as classes of those lengths are more condensed.

For virtual classes, because we can't see all of the attendees all of the time like we can in an in-person class (based on the attendee controlling whether they have their camera turned on or not), the criteria for receipt of a certificate is determined based on missed class time (no more than 1 hour or less, depending on the length of the class) and participation in the Attendance Polls that will be launched throughout each day of class. Attendance polls are left up for approximately 5 minutes and the instructor notifies the attendees that a poll is being launched before doing so, to ensure that everyone who is there can/will respond to the poll. If there is an issue with responding to the attendance poll, the attendee would need to **immediately notify the Administrative Support person** in the course via the chat function in the zoom platform. That way we can immediately resolve any issues and give the attendee credit for being in attendance for the poll. Notifying us hours or days after having an issue with not being able to complete the attendance poll will not allow us to give the attendee credit for being in class during the poll.

Our classes qualify for credit toward a Master's Degree at New England College (and regardless if you decide to seek credit or not, but accreditation requirements mandate that we follow the same standards for all class attendees), so we have strict attendance standards that we follow for issuance of a certificate, which equates to verification that the participant attended the complete class. For DSA and NACCOP, issuance of a Certificate of Completion is verification of that fact.

If the attendee missed class for a legitimate reason, that doesn't mean that an attendee wasn't there for much of the class and that they didn't benefit from that attendance. It just means that based on the missed time and/or attendance polls (in virtual classes only), we aren't able to issue you a certificate of completion.

If an attendee has to miss time in class, the instructions attendees receive before the class provide instructions for notifying the Administrative Support person about the time that will be missed **IN ADVANCE**, so we can jointly identify what blocks of instruction will be missed, and the DSA/NACCOP team will then work with the attendee to see if we can get them in a future class module to make up that material, which would result in us being able to issue the attendee a certificate. We provide this service and opportunity at no additional cost, as we want each attendee to finish the class and get a certificate of completion. Effective communication by each attendee is the key to this option.

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Catherine Cocks, M.A.
Consultant, Student Affairs, Title IX, and Equity Compliance Services



Ms. Cocks has been a higher education professional for over thirty years. Her work with D. Stafford & Associates focuses on Title IX investigations and training; assessment of student affairs policies, practices and services; and behavioral threat assessment. Cathy was the Director of Community Standards for the University of Connecticut for 14 years where she managed the student conduct process, which included managing all Title IX cases involving student respondents and chaired the University's student threat assessment team. Prior to that, she held several positions within Residential Life at the University of Connecticut and Roger Williams University.

She is a faculty member for the Association for Student Conduct Administration's (ASCA) Donald D. Gehring Academy teaching on subjects such as ethics, governance, threat assessment, media relations, and higher education trends. She was an affiliated faculty member for many years in the University of Connecticut's Higher Education and Student Affairs Master's program teaching "The Law, Ethics, and Decision-Making in Student Affairs."

Cathy has co-authored the "Philosophy of Student Conduct" chapter in the 2nd edition of "Student Conduct Practice" (2020) and was a member of the writing team for CAS Standards' Cross-functional Framework for Identifying and Responding to Behavioral Concerns.

Cathy is a Past President of ASCA. She has also served as a Circuit representative, co-chair of the Public Policy and Legislative Issues Committee, and as a member of the ASCA Expectations of Members Task Force. Cathy has served in a variety of leadership roles in NASPA Region I.

She was the 2015 recipient of ASCA's Donald D. Gehring Award. She is a past recipient of the NASPA Region I Mid-Level Student Affairs Professional Award and the NASPA Region I Continuous Service Award.

She earned her Master's degree in Higher Education Administration from the University of Connecticut and Bachelor's degree in Communications/Media from Fitchburg State University.

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Beth Devonshire, Consultant
Equity Compliance and
Title IX/Civil Rights Training



Beth Devonshire, Esq., has been an Associate with DSA since 2012 and she became a full-time consultant in August of 2018. She was the Associate Dean of Students at UMass Boston from November 2016 to July 2018. In that role, Beth administered the student conduct system, chaired the CARE and BIT Teams, served as the Deputy Title IX Coordinator, oversaw the U-Access (an office dedicated to assisting students who are dealing with a multitude of issues such as food insecurity, homelessness, emancipation from foster care, and chronic poverty), and acted as a liaison with the various constituencies around the University. Additionally, Beth was responsible drafting the policies and procedures related to students. Prior to that, Beth was the Director of Student Conduct at Bridgewater State University and the Director of Community Standards Stonehill College. Before beginning her career in Higher Education, Beth served as a clerk for the Justices of the Superior Court, and in various positions for the Massachusetts House of Representatives. Beth has also presented extensively on Title IX including presentations to Colleges, State Wide Organizations, Regional Conferences, and at the OCR Title IX Conference in March of 2011.

Additionally, Beth has given multiple presentations on other legislation and legal issues effecting higher education, including FERPA, Clery and Alcohol and Other Drug Prevention. Beth is the former National Knowledge Community Public Policy Liaison for NASPA, and also the former Massachusetts Public Policy Liaison for MA NASPA. Beth also served as the Director of the Legislative Committee for The Association for Student Conduct Administrators (ASCA) for two years. In those roles, Beth was charged with keeping abreast of proposed and passed legislation and cases impacting higher education and communicating those changes to the membership.

Before beginning her career in Higher Education, Beth served as a clerk for the Justices of the Superior Court from 2006-2007. Prior to that, Beth worked at the Massachusetts State House as Deputy Attorney for House Ways and Means, Chief of Staff for the Committee on Election Laws and as a Researcher for the Committee on Local Affairs.

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Devonshire currently serves as an Associate for D. Stafford & Associates, a highly reputable consulting firm specializing in delivering on organizational, physical security, vulnerability and arming assessments; Clery Act compliance audits; assessments of Title IX compliance; Behavioral Intervention Team and Student Conduct Assessments and Training; and a host of other services related to security, safety and compliance for institutions of higher education.

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Adrienne Meador Murray, Executive Director of Training and Compliance Activities



Adrienne Meador Murray began her career in municipal law enforcement as a civilian employee with the City of Richmond Police Department (Virginia). She graduated from the Virginia Commonwealth University Police Training Academy and began her career as a sworn police officer for the University of Richmond (UR) Police Department (Virginia). At UR, Murray progressed through the ranks from a night shift patrol officer to Operations Lieutenant (overseeing criminal investigations, crime prevention and patrol) over the span of a decade before becoming the Chief of Police at Davidson College in North Carolina. Most recently, Murray served as Chief of Police at Trinity Washington University (in Washington, D.C.). In January 2014, Murray joined the National Association of Clery Compliance Officers & Professionals (NACCOP) and D. Stafford & Associates where she currently serves as Executive Director of Training and Compliance Activities after having been affiliated with D. Stafford & Associates as a part-time Associate since 2012.

As the Executive Director, Equity Compliance and Civil Rights Services, Murray builds on her 17-year career in law enforcement in which she became a nationally recognized expert in the field of best practice postsecondary institutional response to the sexual victimization of college women in the United States and in Canada. She is also a trained civil rights investigator and is well respected throughout the country for her ability to aid institutions in understating how to do best practice criminal and civil rights investigations concurrently. She is well known for her work in having provided support, advocacy and criminal investigative services for victims of sexual assault, stalking and intimate partner violence and is a sought-out speaker and investigator. She has expertise in the construction of best practice law enforcement standard operating procedures and training police officers to respond in best practice and trauma-informed ways to victims of sexual assault and intimate partner violence. In her current role, Murray coordinates curriculum development and instruction for national classes, including basic and advanced sexual misconduct investigation classes; an investigation of dating violence, domestic violence and stalking class; and a Title IX Coordinator/Investigator class offered through D. Stafford & Associates. To date, Murray has trained more than 3,500 criminal and civil rights investigators throughout the U.S.

Drawing on her experiences as a trained criminal and civil rights investigator, Murray also oversees independent investigations of complex sexual misconduct cases; conducts audits of Title IX/VAWA Compliance; drafts institutional sexual misconduct policies and procedures; and conducts campus-based

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trainings pertaining to the resolution of sexual misconduct offenses on college and university campuses. Murray frequently presents at regional and national conferences on topics such as the *Sexual Victimization of College Women*, *Understanding Consent and Incapacitation*, and *Responding to Sexual Assault on Campus: Clery Act and Title IX Implications*. Murray also conducts provincially specific sexual misconduct trainings throughout Canada.

Murray is a graduate of the University of Richmond, where she received her Bachelor's Degree in Applied Studies in Human Resource Management and of New England College, where she received her Master's Degree in Campus Public Safety Administration. Murray is also a graduate of the 235th session of the prestigious FBI National Academy where she was awarded a graduate certificate in Criminal Justice from the University of Virginia. She has authored numerous journal articles.

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Ann Todd
Consultant, Equity Compliance and Civil Rights Investigations



Ann Todd, Esq is a seasoned civil rights investigator in higher education for D. Stafford & Associates (DSA). Ms. Todd is a graduate of Davidson College with a degree in psychology and holds a JD from the University of Nebraska. Prior to joining DSA, she practiced law in Charlotte, NC, specializing in employment and civil rights and worked for a number of non-profit organizations. She returned to her alma mater (Davidson College) in 2008 and worked there through March of 2016 serving as the Assistant Director of Human Resources with the responsibility of managing employee relations and the learning and development function.

Ms. Todd joined the DSA in 2015 and currently serves as the Consultant, Equity Compliance and Civil Rights Investigations. She is the Senior Investigator for the DSA Title IX Investigation Team. She conducts external investigations on behalf of colleges and universities, specializing in investigating student allegations of sex discrimination, sexual assault, intimate partner violence, and stalking. Additionally, she brings a strong Human Resources background to investigating a range of employee misconduct—from performance issues to discrimination.

In addition to conducting investigations, Ms. Todd is a frequent speaker and consultant on Title IX investigations, conducting 20-30 courses every year on best practices for investigating sex discrimination and sex crimes on campus. She works with schools to draft policies and processes that provide equity and fairness to all parties involved and is adept at facilitating discussions with institutions to ensure the end product represents the values of the campus community.

Ms. Todd is a member of the NC Bar and a Certified Clery Compliance Officer through the National Association of Clery Compliance Officers and Professionals (NACCOP). She is also a certified 360 facilitator through the Center for Creative Leadership. She lives in Davidson, NC where she volunteers on a number of local and town boards.

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Constructing the Live Hearing Process

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COURSE AGENDA

- Module 1: The Law and the Hearing Process
- Module 2: Hearing Preparation
- Module 3: The Hearing
- Module 4: Findings and Appeals

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Introduction

Name

Institution

How long have you been doing this work?

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Attorneys



- Not your attorney
- Consult with YOUR legal counsel

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Course Logistics

- Daily Polls
- Camera
- Certificates
- Breaks
- Interact

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The Laws

- **Title IX** of the Education Amendments of 1972
- Jeanne **Clery** Disclosure of Campus Security Policy and Campus Crime Statistics Act (1990)
  - Violence Against Women Reauthorization Act of 2013
- **Title VII** of the Civil Rights Act of 1964

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Training Requirements - Title IX

- **All Title IX Personnel:**
  - Definition of sexual harassment
  - Scope of the recipient's education program or activity*
  - How to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, as applicable
  - How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias
- **Decision-makers:***
  - Technology to be used at a live hearing*
  - Issues of relevance of questions and evidence, including when questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant

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Training Requirements under VAWA

- **VAWA REGULATIONS: "Officials" are trained annually:**
  - Issues related to dating violence, domestic violence, sexual assault and stalking
  - How to conduct a hearing process that protects the safety of the victims and promotes accountability
- **CLERY HANDBOOK CLARIFICATIONS:**
  - Relevant evidence and how it should be used during a proceeding
  - Proper techniques for questioning witnesses
  - Basic procedural rules for conducting a proceeding
  - Avoiding actual and perceived conflicts of interest

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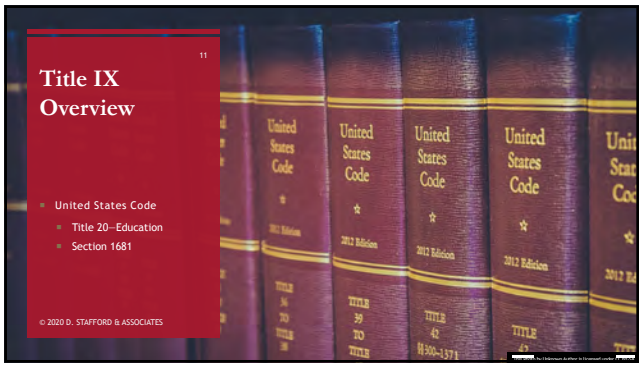


Agenda

- Title IX Overview
  - Code and Regulations
  - Case Law
- The Title IX Grievance Process
  - Definitions
  - Jurisdiction
  - Resolution Processes
  - Hearing Basics
- Bias/Conflict of Interest

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Interpreting Laws



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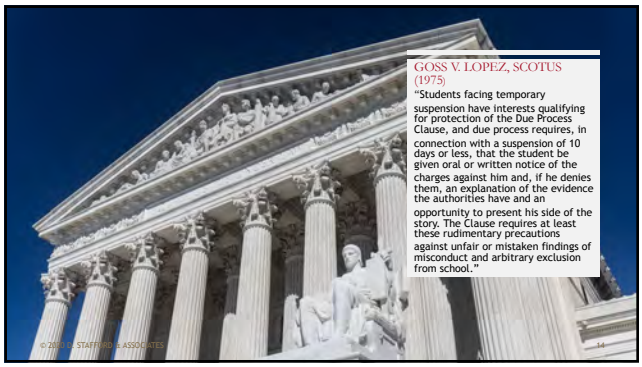
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Law - Federal

Statute	Overview
Title IX 20 USCA § 1681	No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, except that:

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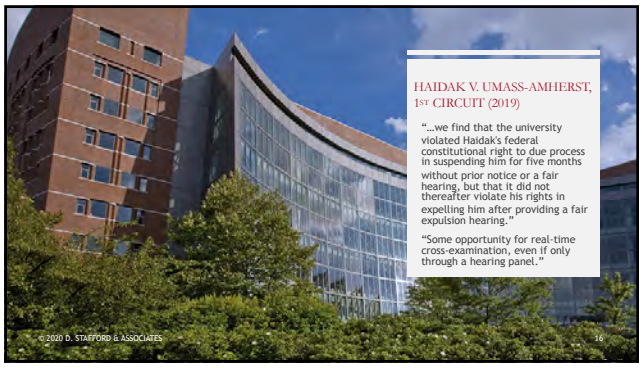
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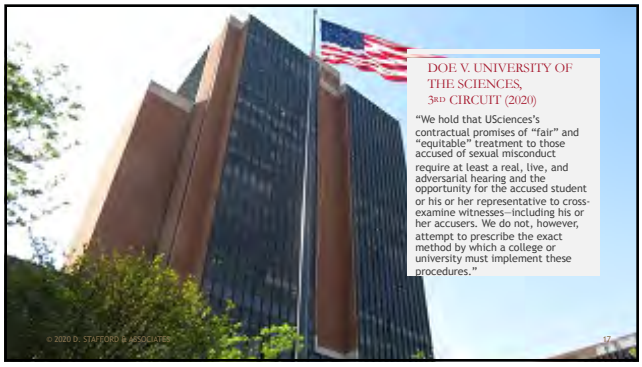
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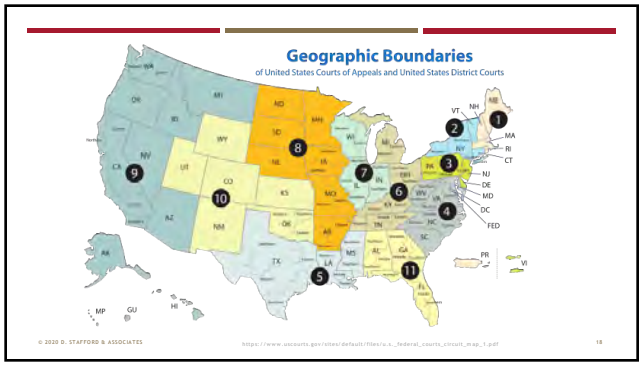
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HAIDAK V. UMASS-AMHERST, 1ST CIRCUIT (2019)
"...we find that the university violated Haidak's federal constitutional right to due process in suspending him for five months without prior notice or a fair hearing, but that it did not thereafter violate his rights in expelling him after providing a fair expulsion hearing."
"Some opportunity for real-time cross-examination, even if only through a hearing panel."
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DOE V. UNIVERSITY OF THE SCIENCES, 3RD CIRCUIT (2020)
"We hold that USciences's contractual promises of "fair" and "equitable" treatment to those accused of sexual misconduct require at least a real, live, and adversarial hearing and the opportunity for the accused student or his or her representative to cross-examine witnesses—including his or her accusers. We do not, however, attempt to prescribe the exact method by which a college or university must implement these procedures."
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Geographic Boundaries
of United States Courts of Appeals and United States District Courts
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https://www.uscourts.gov/sites/default/files/u.s._federal_courts_circuit_map_1.pdf
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The Regulations



- Code of Federal Regulations (Regulations)
  - 34 CFR Part 106
- Federal Register (Regulations and Preamble)
  - 85 Fed. Reg. 30026 (May 19, 2020).
    - Preamble: 30026
    - Regulations: 30572

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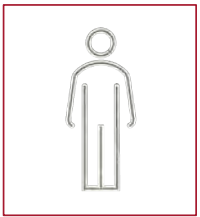
THE TITLE IX GRIEVANCE PROCESS

(2020 REGS)

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Definitions: Parties/Witnesses



- Complainant
- Respondent
- Witnesses

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Definitions: Key Terms



- Actual Knowledge
- Formal Complaint
- Supportive Measures

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Definitions: Title IX Personnel



- Title IX Coordinator
- Investigator
- Decision-Maker
- Informal Resolution Facilitator

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New Regulations

For it to be covered under Title IX, it must meet:
- New Definitions
- Jurisdiction of person
- Jurisdiction of activity

If it does NOT meet these requirements…
- Mandatory dismissal
- Can go to different resolution process

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Definition of Sexual Harassment under Title IX

Sexual harassment means conduct on the basis of sex that satisfies one or more of the following:

1. *An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;*
2. *Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity;*
3. *"Sexual assault" as defined in 20 U.S.C. 1092(f)(6)(A)(v), "dating violence" as defined in 34 U.S.C. 12291(a)(10), "domestic violence" as defined in 34 U.S.C. 12291(a)(8), or "stalking" as defined in 34 U.S.C. 12291(a)(30).*

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PRONG 1: Quid Pro Quo

- Must be an employee (not volunteer, visitor, student)
- "This for that" harassment
- When favorable professional or educational treatment is conditioned on a sexual activity

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PRONG 2: Hostile Environment+ (The *Davis* Standard)

- Not the same Title VII "hostile environment" or 2001 Guidance
- First Amendment protections
- Not a zero tolerance policy

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PRONG 3: The VAWA Offenses

Sexual Assault	Rape Fondling Incest Statutory Rape
Intimate Partner Violence	Dating Violence Domestic Violence
Stalking	

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§106.30 Definitions - CONSENT

The Assistant Secretary will not require recipients to adopt a particular definition of consent with respect to sexual assault



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Jurisdiction of Person

- *"At the time of filing a formal complaint…the complainant must be participating in or attempting to participate in the education program or activity"*
- The institution must exercise control over the Respondent
- All regulations apply to students and employees

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Jurisdiction of Activity

- Behavior must occur as part of the "education program or activity"
  - Locations, events, or circumstances over which the recipient exercised substantial control over the context in which the sexual harassment occurs
  - And any building owned or controlled by a student organization that is officially recognized
- Must occur in the United States (including US territories)

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Mandatory Dismissal

- Recipient must dismiss complaint if allegations do not meet Title IX definition of sexual harassment
- Dismissal does not preclude action under the college's or university's code of conduct

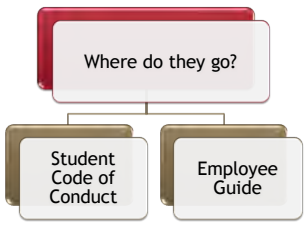


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Non-Title IX Cases



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Clery Requirements

- Include in ALL policies that address:
  - Dating violence
  - Domestic Violence
  - Sexual Assault
  - Stalking
- Procedures for schools
- Rights and Options for Complainants

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Other Considerations


First Amendment


Retaliation


Bias/Conflict of Interest


State Laws

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Three Primary Stages


Intake

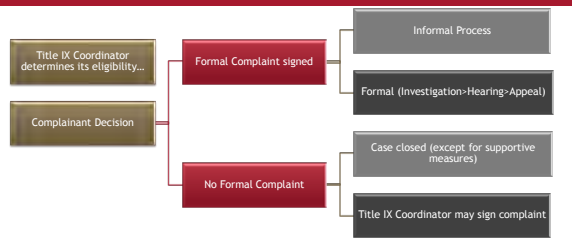

Investigation


Resolution

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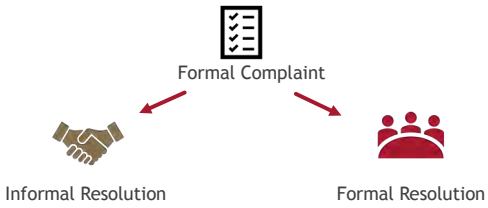
Title IX Case Flowchart Post Outreach



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Resolution Options



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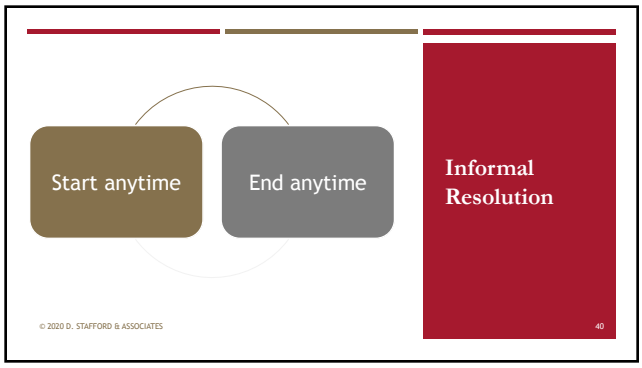
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Informal Resolution

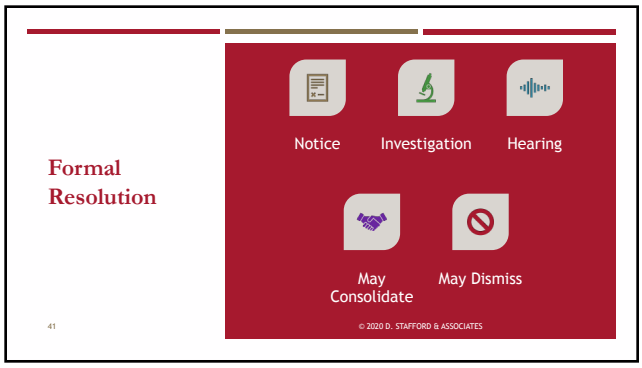


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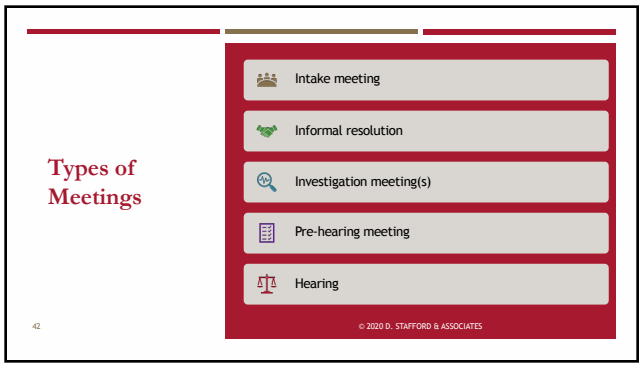
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Start anytime
End anytime
Informal Resolution
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Formal Resolution
Notice
Investigation
Hearing
May Consolidate
May Dismiss
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Types of Meetings
Intake meeting
Informal resolution
Investigation meeting(s)
Pre-hearing meeting
Hearing
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Hearing Basics

Live

Cross Examination

Advisors

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Standard of Evidence

Preponderance

Clear and Convincing

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Conclusions

- Sanctions/Remedies
- Written Determination
- Options for Appeal

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Recordkeeping (seven years)

- Case Materials
- Training materials

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Conflicts of Interest


Roles on campus


Past employment


Volunteering


Interactions with parties

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Recognizing Bias



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Bias - *From Regs*

- Bias against Complainants or Respondents
- Bias against THIS Complainant or Respondent
- Sex Stereotyping

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Bias

- Parties
- Race
- Gender
- Gender identity
- Sexual orientation
- Nationality

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Bias

- Personal experience
- Personal identity
- Social identity
- Theoretical perspective
- Professional identity
- Religious perspective
- Political perspective

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REPRESENTATION MATTERS



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How to address

Training

Acknowledgements

Party-identified Conflict

Decision-maker-identified Conflict

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Hearing Preparation

Prework and planning before the big day

1



Agenda

- Policy vs. Procedure
- Steps of the Formal Process
- Choosing Your Personnel
- "Advisors of Choice"
- Choosing Your Format
- Hearing Notices
- Hearing Preparation

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3

POLICIES VS. PROCEDURES

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Policy vs Procedure

Policy

What are the rules, why they exist, when they apply

Internal Procedures

Step by step actions for the staff

External Process Information

Information through a notice letter or information sheet explaining the process and steps for the involved parties

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Example

Policy statement

- Prior to completion of the investigative report, the Respondent and Complainant, and their respective advisors, if any, will be provided a copy of the evidence in an electronic format or a hard copy. The parties will have 10 calendar days to submit a written response

Internal procedure

- All documents considered evidence should be converted and merged into one pdf.
- The pdf should be watermarked for each party, and security settings should be set to prohibit editing.
- A transfer link is sent to the parties simultaneously via email.

External process information

- "Prior to the completion of the report, you and your advisor, if applicable, will receive a Dropbox link to access a copy of the evidence. You will have until [DATE] to review the evidence and provide a written response to the investigator. To provide the written response, use the following link: [submission link]."

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Example

Policy statement

- Either party may request, no later than seven calendar days prior to the hearing, for the hearing to occur with the parties located in separate rooms with technology enabling the hearing body and parties to simultaneously see and hear the party or the witness answering questions.

Internal procedure

- Notify both parties of the request for a virtual hearing.
- Book the space and technology.
- Send login information to the hearing officer and parties.
- Include an instruction sheet on using the technology.

External process information

- "Either the Complainant or Respondent may request to have the parties located in separate rooms and the hearing will be held using Zoom technology. If you wish to utilize this option, you must notify [NAME] at [EMAIL] no later than [DATE]."

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Three Primary Stages

Intake

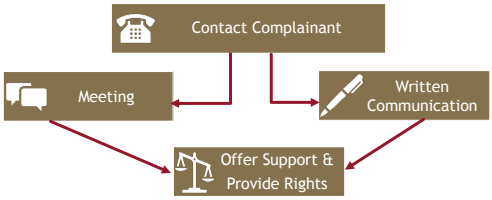
Investigation

Resolution

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Actual Knowledge - Next Steps

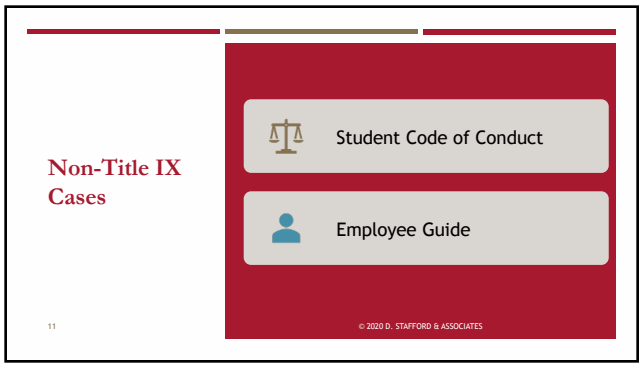


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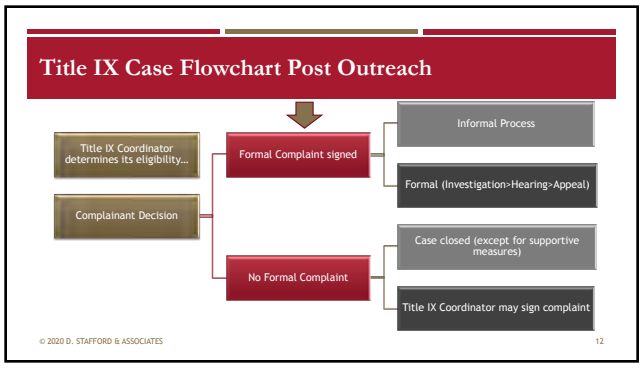
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Title IX Definition
Eligible Complainant
Education Activity or Program
Wishes of the Complainant
Title IX Assessment
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Non-Title IX Cases
Student Code of Conduct
Employee Guide
11
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Title IX Case Flowchart Post Outreach
Title IX Coordinator determines its eligibility…
Complainant Decision
Formal Complaint signed
No Formal Complaint
Informal Process
Formal (Investigation>Hearing>Appeal)
Case closed (except for supportive measures)
Title IX Coordinator may sign complaint
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Formal Process

Notice

Assign to Investigator

Investigation

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Bias/Conflict of Interest Check In

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Investigation Steps

1. Interview Parties
2. Identify and Interview Witnesses
3. Collect Evidence
4. Draft Report

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Ability to Utilize Evidence



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Versions of the Report

Preliminary Report:

Scope

Methodology

Evidence Obtained

Final Report:

Scope

Methodology (edited)

Evidence Obtained

Summary of Relevant Evidence

Written Determination:

Scope

Methodology (edited),

Summary of Evidence (edited),

Results (including rationale, sanctions, remedies)

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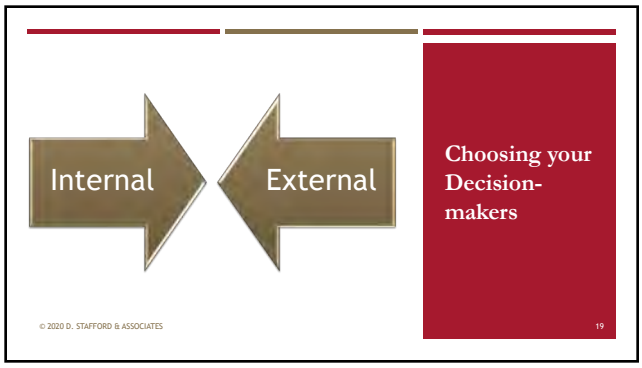
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CHOOSING YOUR PERSONNEL

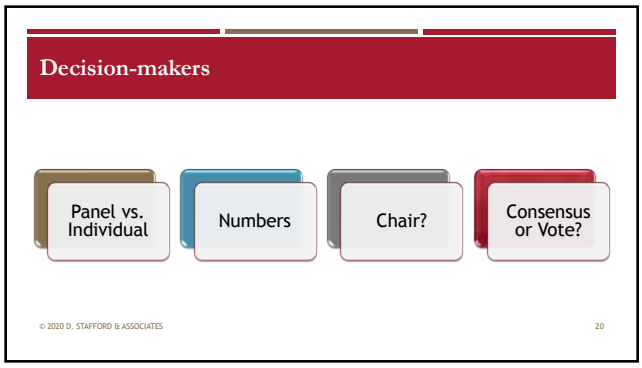


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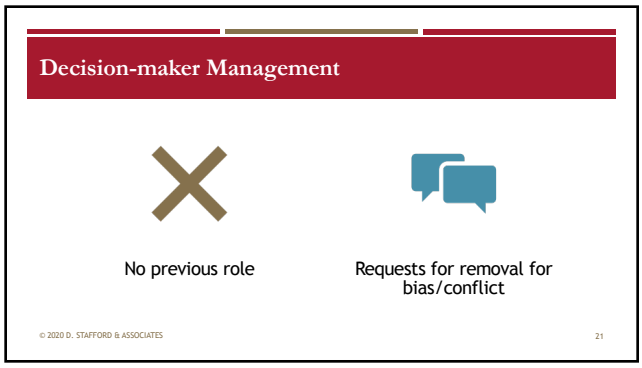
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Internal
External
Choosing your Decision-makers
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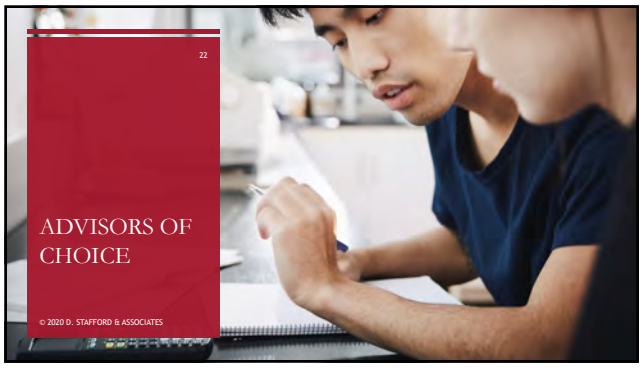
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Decision-makers
Panel vs. Individual
Numbers
Chair?
Consensus or Vote?
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Decision-maker Management
No previous role
Requests for removal for bias/conflict
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Advisor



"If a party does not have an advisor present at the live hearing, the recipient must provide without fee or charge to that party, an advisor of the recipient's choice, who may be, but is not required to be, an attorney, to conduct cross-examination on behalf of that party."

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Advisors of Choice

Attorney	Friend		Parent	Employee	
	Roommate	Fraternity Brother	Sorority Sister	Professor	Advisor	Victim Advocacy

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Advisor

1) Cross-examination of Other Party and Witnesses

2) No Training Required (Recommended if appointed)

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Relevant Questions on Cross



- Each party's advisor asks of other party and witnesses "all relevant questions and follow-up questions, including those challenging credibility."
- "Only relevant cross-examination and other questions may be asked of a party or witness."

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Cross-examination – The Preamble

The Department clarifies here that conducting cross-examination consists simply of posing questions intended to advance the asking party's perspective with respect to the specific allegations at issue . . . (Fed. Reg. 30319)

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Institution-Appointed Advisor

When required

Who to appoint

How to train

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When to Appoint

Investigation stage

Preliminary Report

Final Report

Hearing

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Appointed Advisor Role



Party-drafted questions

Other role

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Hearing - LIVE

Cross-examination - directly, orally, and in real time

Option for separate rooms with technology to hear/see or virtual

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From the Regs…

"…enabling the decision-maker(s) and parties to simultaneously see and hear the party or the witness answering questions"

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Hearing Space Needs

- Decision-maker(s)
- Parties and Advisors
  - Complainant & Advisor
  - Respondent & Advisor
- Witness (when called)
- Other
  - Title IX Coordinator
  - Interpreters or support persons

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Other Location Considerations

- Waiting room for witness
- Question submission
- Process for recording
- Space for private conference

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Record of Hearing



Audio



Video



Transcript

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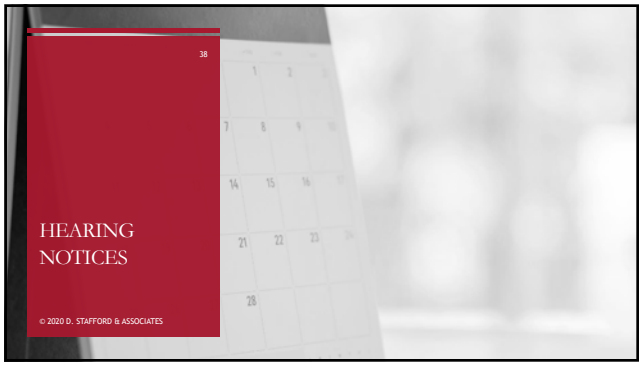
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In person vs. virtual options

What are the pros and cons of the different hearing options?

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Final Report

Written report
Sent to Party
Sent to Advisor

Review
10 Days
Written response

Notice

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Notice of Hearing, Part 1

"Provide, to a party whose participation is invited or expected, written notice of the date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings, with sufficient time for the party to prepare to participate"



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Notice of Hearing, Part 2

"At the request of either party, the recipient must provide for the live hearing to occur with the parties located in separate rooms with technology enabling the decision-maker(s) and parties to simultaneously see and hear the party or the witness answering questions"

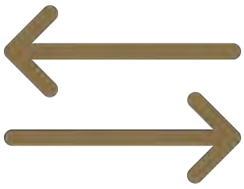


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Notice of Hearing, Part 3

Name and contact information for Decision-makers with options for stating bias or conflict of interest



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Notice of Hearing, Part 4

Options to request accommodation or interpretive services for the hearing



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Timing Considerations

01 Parties have ten days to provide written response to report

02 Decision-maker reviews report prior to hearing

03 Hearing

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- Appoint alternate decision-maker if conflict
- Change from in-person to virtual
- Extensions due to accommodation etc.

Additional Timing Considerations

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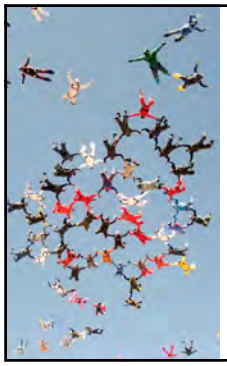
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Live Hearings – Institution Specific

- Pre-hearing Meeting
- Rules of Decorum
- Hearing Script

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Rules and Process (from the Regs)

Recipients may adopt rules that govern the conduct and decorum of participants at live hearings so long as such rules comply with these final regulations and apply equally to both parties

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Who does what?

Does your Title IX Coordinator manage the logistics of the hearing process or is it delegated to a hearing officer?

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Prehearing Tasks



Attendance Confirmation



Scheduling



Action Items

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Preparing the Parties



- Hearing format
- Vetting of questions for relevancy
- Irrelevant questions (rape shield/privilege)
- Impact of attendance
- Impact of participation
- Role of advisor
- Appointed advisor

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Decision-maker Pre-work

Review report

Review allegations

Review policy

Draft relevant questions

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Decision-maker Determinations on Evidence



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Decision-maker Predrafted Questions

- Credibility
- Corroboration
- Clarifications
- Admissions

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Welcome to the Show

The Hearing, the Findings, and the Appeal

1



Agenda

- Evidence and Relevancy
- Roles at the Hearing
- The Hearing Agenda
- Managing the Proceedings
- Relevancy Determinations
- Difficult Situations

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EVIDENCE & RELEVANCY

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Types of Evidence


Real evidence


Demonstrative


Documentary


Testimonial

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Statements


Investigator Interviews


Written Statements


Formal Complaint


Other

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Other Sources of Evidence

- Photographs
- Text messages
- Social media/dating apps
- Documents (diagrams, memos, letters, notes)
- Voicemail
- Phone logs
- Guest lists

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Evidence

Inculpatory
Evidence demonstrating culpability for an act

Exculpatory
Evidence tending to excuse, justify, or absolve the act

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Versions of the Report

Preliminary Report:
Scope
Methodology
Evidence Obtained

Final Report:
Scope
Methodology (edited)
Evidence Obtained
Summary of Relevant Evidence

Written Determination:
Scope
Methodology (edited),
Summary of Evidence (edited),
Results (including rationale, sanctions, remedies)

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Evidence Collection

Everything Collected
Directly Related
Relevant

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The Regs on Relevancy



Relevant Evidence In Investigation



Relevant Questions At Hearing

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What Does Relevancy Mean?



- Directly related to the issue and helps prove or disprove the issue
- Fact must be material to an issue in the case
- Makes something more/less true or more/less false

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Other Ways to Put It…

The evidence does not need to be conclusive

The evidence constitutes a link in the chain of proof

The evidence, in connection with other evidence, helps "a little"

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Relevancy Examples



Admissions



Eyewitness



Credibility

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Relevancy Examples



Background



Charts



Floorplans

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Relevant Examples



Research



Character and Character Traits

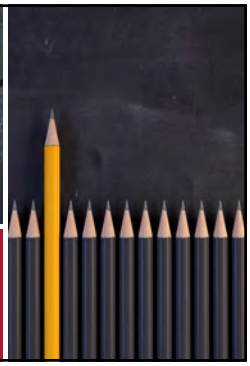


Expert Testimony

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WHAT IS NOT RELEVANT?

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Not Applying Federal Rules of Evidence

~~Rule 403: The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.~~

~~Rule 404: Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.~~

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Not Relevant (from the Regs)

Past Sexual Behavior

- Complainant's sexual predisposition or prior sexual behavior unless…
  - Offered to prove that someone other than the respondent committed the conduct alleged or
  - Complainant's prior sexual behavior with respect to the respondent and are offered to prove consent

Privileged Information

- Physician, psychiatrist, psychologist records in connection with the provision of treatment to the party unless
  - Voluntary, written consent

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Not Relevant

Repetitive

Related By Not Relevant

New Evidence - Is It Relevant?

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STAYING ON POINT

- Allegation
- Definitions
- Summary of Relevant Evidence

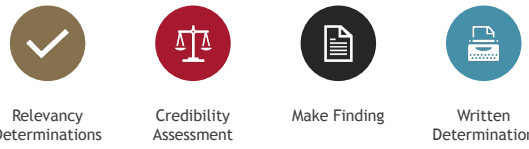
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Role of the Decision-maker



Relevancy Determinations | Credibility Assessment | Make Finding | Written Determination

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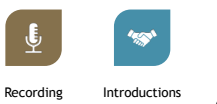
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- Complainant/Respondent
- Title IX Coordinator
- Investigator

Other Roles

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Recording | Introductions | Order of Questioning

Witness Management | Assigning If Advisor Absent | Enforcing Rules of Decorum

Tasks at the Hearing

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Other Persons in Attendance

General Counsel	Advise on process?
Stenographer	Only needed if not recording
Accommodation	Interpreter or mandated support person
2nd Advisor	Is a support person allowed? Union rep?

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Hearing/Cross Purpose from the Preamble



- *"to reach factually reliable determinations"*
- *"goal of a fair, truth-seeking process"*
- *"truth-seeking function of cross-examination"*

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From the Preamble…

The Department reiterates, however, that the essential function of cross-examination is not to embarrass, blame, humiliate, or emotionally berate a party, but rather to ask questions that probe a party's narrative in order to give the decisionmaker the fullest view possible of the evidence relevant to the allegations at issue.

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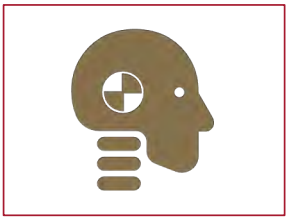
Mandatory Components

- Complainant Cross-Examination
- Respondent Cross-Examination
- Witness Cross-Examination

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Relevancy Determination



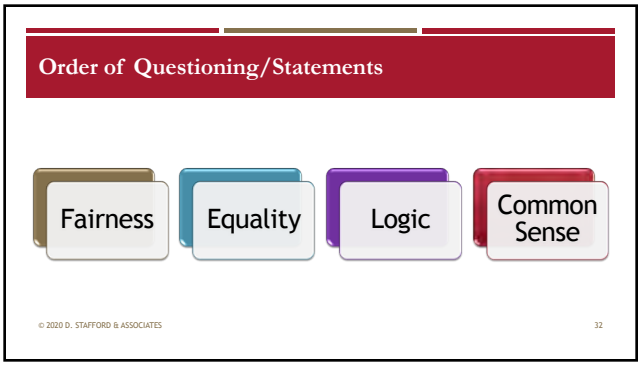
"Before a complainant, respondent, or witness answers a cross-examination or other question, the decision-maker(s) must first determine whether the question is relevant and explain any decision to exclude a question as not relevant."

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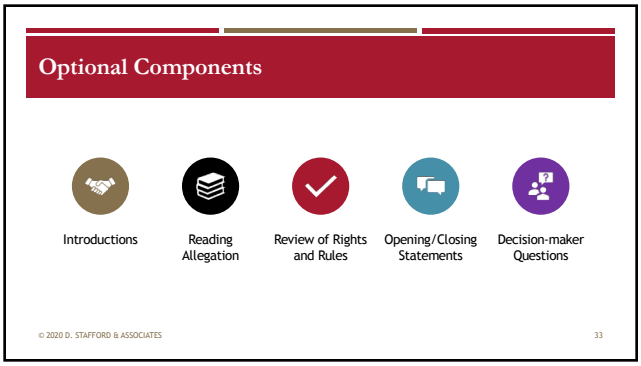
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Question
• By Advisor
Relevancy Determination
• By Decision-Maker
Answer
• By Party or Witness
Questioning by the Advisors
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Order of Questioning/Statements
Fairness
Equality
Logic
Common Sense
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32


Optional Components
Introductions
Reading Allegation
Review of Rights and Rules
Opening/Closing Statements
Decision-maker Questions
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Decision-maker Questions
… from the Regs

"The degree to which any inaccuracy, inconsistency, or implausibility in a narrative provided by a party or witness should affect a determination regarding responsibility is a matter to be decided by the decision-maker, after having the opportunity to ask questions of parties and witnesses, and to observe how parties and witnesses answer the questions posed by the other party."

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☒ Past sexual history

☒ Privileged information

☒ Repetitive question

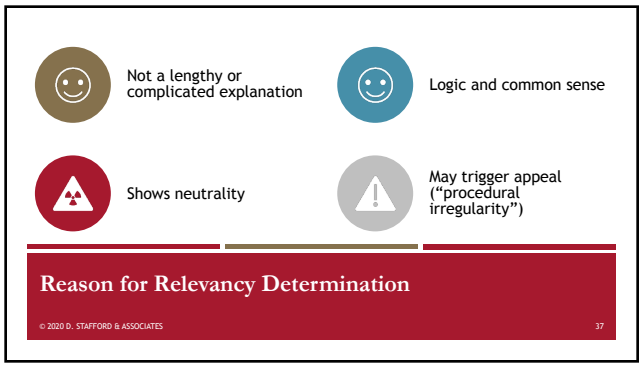
☒ New information

☒ Not probative of material fact

Relevancy and Admissibility Determinations

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Not a lengthy or complicated explanation
Logic and common sense
Shows neutrality
May trigger appeal ("procedural irregularity")
Reason for Relevancy Determination
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"New Evidence" at the Hearing
APPEAL GROUND: "New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter"
Allow
Disallow
Stop Hearing
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Discussion
Should you allow a Party to explain why a question is relevant?
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Decision-maker Questions *from the Regs*



- *Permit the decision-maker on the decision-maker's own initiative to ask questions and elicit testimony from parties and witnesses, as part of the recipient's burden to reach a determination regarding responsibility based on objective evaluation of all relevant evidence including inculpatory and exculpatory evidence*
- *Thus, the skill of a party's advisor is not the only factor in bringing evidence to light for a decision-maker's consideration*

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Decision-maker Questions



Statement of Accuracy



Credibility



Clarity

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Party Issues



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Participation



"If a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility."

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Attendance



"The decision-maker(s) cannot draw an inference about the determination regarding responsibility based solely on a party's or witness's absence from the live hearing or refusal to answer cross - examination or other questions."

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Advisor Issues

- Disruptive
- Refusal to cross
- Inappropriate cross
- Relationship with party
- Relationship with case

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Removal of an Advisor (Regulations)…

"If a party's advisor of choice refuses to comply with a recipient's rules of decorum (for example, by insisting on yelling at the other party), the recipient may require the party to use a different advisor"

"If an advisor that the recipient provides refuses to comply with a recipient's rules of decorum, the recipient may provide that party with a different advisor to conduct cross-examination on behalf of that party"

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Decision-maker Issues (Appeal Grounds)


Procedural Error


New Evidence


Bias/Conflict

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Situational issues

Safety

Disability

Length

Phrasing

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Findings and Appeals

1



Agenda

- Weighing the Evidence
- Elements of a Violation
- Findings, Sanctions and Remedies
- Written Determination
- Appeals and Other Decision-makers

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WEIGHING THE EVIDENCE

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From the Regs…

"must objectively evaluate all relevant evidence (inculpatory and exculpatory) but retains discretion, to which the Department will defer, with respect to how persuasive a decisionmaker finds particular evidence to be"

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Fact Considerations

Weight

Credibility

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Cannot Rely On…

- Privileged information
- Prior sexual history (unless exception)
- Statements by party/witness not subjected to cross
- Sex stereotyping

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Weight/Relevance



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- Specific details
- Inherent plausibility
- Internal consistency
- Corroborative evidence

Assessing Credibility *from the Regs*

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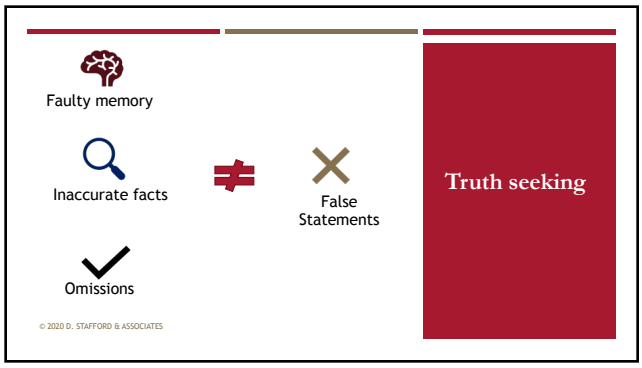
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Credibility

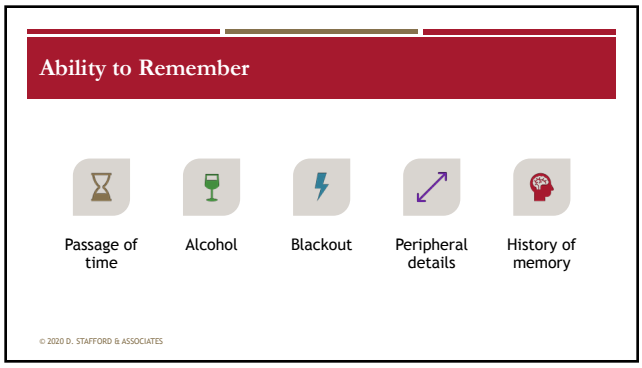
- Perception
- Memory
- Deception
- Motivation
- Bias
- Plausibility

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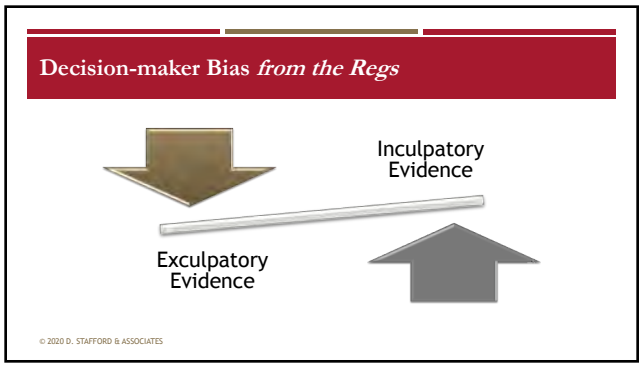
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Faulty memory
Inaccurate facts
Omissions
False Statements
Truth seeking
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Ability to Remember
Passage of time
Alcohol
Blackout
Peripheral details
History of memory
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Decision-maker Bias from the Regs
Inculpatory Evidence
Exculpatory Evidence
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Stress, Trauma and Memory



Stress



Trauma

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Response



Reflex



Habit

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Impact on Memory



Details



Time and Context

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Elements of the Policy Violations

- Sex Act
- Relationship
- Consent
- Act of Violence
- Conduct
- Impact
- Location

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Consent

- Consent cues
- Force, Coercion, Intimidation, Threats
- Incapacitation
- Policy definition

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Key Elements

- Mutually agreed upon
- Informed and freely given
- Initiator responsibility
- Positions of power
- Silence and prior relationships
- Verbal consent
- Withdrawal

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Physical Force

- Holding down
- Forced to touch
- Level of violence

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Coercion

Frequency +	Intensity +	Duration +	Isolation
?	Now	5 minutes?	Library
Twice	?	?	Bar
Fifty times	?	2 days?	?

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Intimidation



Physical



Verbal

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Threats

- Physical harm
- Reputational harm
- Veiled threats

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What is a Drink?



12 oz Beer



4-5 oz of Wine

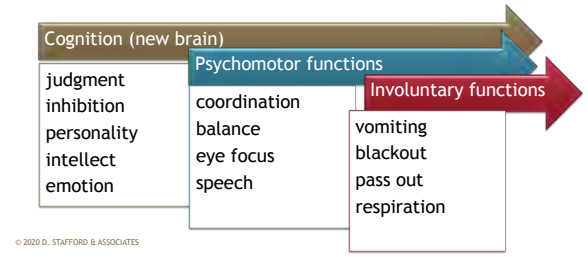


1.5 oz 80 Proof

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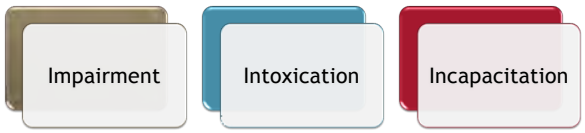
Impact of Alcohol Consumption Levels



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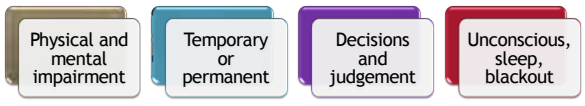
Levels of Consumption



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Incapacitation



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Two-Step Determination

- Was the Complainant incapacitated?
- Did the Respondent (or would a reasonable person) know?

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Formal Resolution – Making a Finding

- Policy language - Alleged violations
- Weighing the evidence
- Determined behaviors
- Standard of evidence

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Disciplinary Sanctions and Remedies



Sanctions



Remedies

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Formal Resolution – Disciplinary Sanctions

A recipient may impose disciplinary sanctions upon a respondent after a grievance process that complies with § 106.45.

"The Department does not prescribe whether disciplinary sanctions must be imposed, nor restrict recipient's discretion in that regard. As the Supreme Court noted, Federal courts should not second guess schools' disciplinary decision, and the Department likewise believes that disciplinary decisions are best left to the sound discretion of recipients."

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Formal Resolution - Disciplinary Sanctions

Status	• Expulsion, separation, probation
Prevention	• Protective measures, restrictions, separation
Educational	• Action plans

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Formal Resolution – Disciplinary Sanctions

Aggravating factors

Mitigating factors

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Formal Resolution – Disciplinary Sanction



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Formal Resolution – Remedies

Make permanent supportive measures

One-sided no contact orders

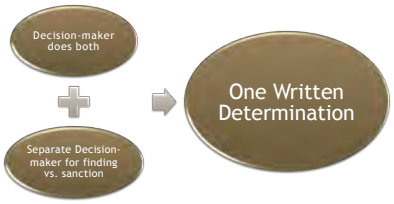
Restrictions from locations

Restrictions from activities

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Options for Making Findings



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Determination Regarding Responsibility

- Allegations
- Procedural steps
- Findings of fact
- Conclusion/application
- Rationale
- Appeal procedures

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Written Determination Considerations

IN

- Relevant information
- Hearing or report

OUT

- Bias
- Sex stereotyping
- Inadmissible information

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Other Decision-Maker

- Appellate Decision-maker
- Appeal of Case Dismissal
- Appeal of Emergency Removal

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Title IX Required Appellate Grounds

1. Procedural irregularity that affected the outcome of the matter;
2. New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; and
3. The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter.

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Appeals

- Grounds apply to appeal of finding and of dismissal
- Additional grounds permitted
- Decision-maker can have no other role
- Reasonably prompt time frame

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Appeals



- Notification
- Equal opportunity to respond
- Written determination
- Provided simultaneously to parties

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Role of Appellate Decision-Maker

Follow the Appellate Basis

Not A Substitute of Judgement

Respect the Credibility of Previous Decision-maker

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ADDITIONAL CONCERNS

- Run a fair, thorough, and impartial process
- Let your morale compass guide you
- Do what your policy says you will do
- Do what the regulations tell you to do

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TITLE IX HEARING SCRIPT

Everyone has their own style. This script is to provide guidance on the hearing and the key areas that need to be covered. The italicized portions of the script are examples as to how to word these statements. They do not need to be read verbatim.

OPENING

Good morning/afternoon, I am [NAME/TITLE/ROLE]. This hearing has convened on DATE to review the case CASE IDENTIFIER. Please note that today's hearing is being recorded and either party may review the recording upon request.

INTRODUCTIONS

At this time I would ask that everyone present introduce themselves and their role in today's hearing."

- Decision-maker(s)
- Complainant
- Complainant Advisor
- Respondent
- Respondent Advisor
- Other
    - Title IX Coordinator
    - Support person(s)
    - Interpreters
    - Stenographer (if not recorded)
    - General Counsel
    - Technology Staff (ideally outside room or only on call or Zoom)

STATEMENT OF RIGHTS AND PROCESS

I will now go over the rights of the parties in the hearing and the process.

1) *Other than the parties, their advisors, the decision-makers and _____, no other persons will be permitted into the hearing except for witnesses. Each witness invited to the hearing will be allowed in only for their interview.*
2) *FOR ZOOM: We are using waiting rooms and only persons that have been invited to the hearing will be admitted from the waiting room.*
3) *This is an administrative hearing—it is not a court of law. Judicial rules of evidence do not apply. Questions will be asked by the decision-maker and the advisors will be allowed to cross examine the other party and witnesses.*

4) *The Decision-makers have been given a copy of the report and have reviewed it. They will be asking for you to confirm the accuracy of your statements in the report and may ask follow-up questions from the summary of relevant evidence.*
5) *Only relevant evidence will be considered in making a finding of responsibility and the decision-makers will not rely on any evidence in making a finding of responsibility that is not permissible either by policy or by law.*
6) *This is a formal administrative hearing and rules of decorum will apply. We expect professionalism and respect for all parties and participants. Failure to follow these rules will result in your removal.*
7) *The decision-maker has made no predetermination of responsibility. At the conclusion of the hearing, after weighing relevant evidence, the decision-makers will make a finding of responsibility based on the (insert standard of evidence).*
8) *This determination will be provided to both parties within _____ days of the hearing.*

I will now address a few items to the parties.

1) *FOR ZOOM: Must keep camera on for us to see you for the duration of the hearing unless prompted to do otherwise by the decision-maker. What you choose to listen to or watch is up to you although we ask your advisor be able to hear to full testimony. If you decide to mute the hearing at any point, your advisor is responsible for letting you know when to rejoin.*
2) *FOR IN PERSON: If at any point you do not want to hear a party or witness, you may choose to step out for the duration of that portion by letting the decision-maker know. Your advisor is responsible for letting you know when to rejoin.*
3) *Order of questioning—Complainant, Respondent and then Witnesses. The Decision-maker will start with questions and then the party's advisor will be allowed to cross. The Decision-maker may ask additional follow up questions after cross-examination. No additional cross will be allowed except at the discretion of the decision-maker.*
4) *During cross examination, each question must be reviewed by the decision-maker prior to you answering the question. The decision-maker will prompt you when you may answer the question.*
5) *You may refuse to answer a question on cross-examination and the Decision-maker will not make a determination regarding responsibility solely on your refusal to answer a question. However, refusing to answer a question may limit the Decision-maker in their ability to rely on other statements you have made.*
6) *As a reminder, the University prohibits false information in the Student Code of Conduct. Information presented is expected to be truthful and complete.*

Finally, the last items are for the advisors.

1) *Your role is to ask the cross-examination questions. Your questions should be the questions that come from the party. You are to have no other role in the process. You may not advise the party on how to respond, interrupt either party or respond on their behalf.*
2) *FOR ZOOM: If you need to take a break and talk privately, you may do so by letting the decision-maker know and then muting yourself or requesting to be put in a breakout room. While this will be permitted, excessive requests that unduly delay the process will not be allowed.*

3) *FOR IN PERSON: If you need to take a break or talk privately, you may do so by letting the decision-maker know. While this will be permitted, excessive requests that unduly delay the process will not be allowed.*
4) *You may only ask relevant questions. These are questions regarding the facts outlined in the "Summary of Relevant Evidence" in the Investigative Report.*
5) *If your party pre-submitted questions, we will provide those that have been approved for relevancy to you to ask at the appointed time.*
6) *New evidence, not in the investigative report, will generally not be allowed unless it was not reasonably available at the time of the investigation and only at the discretion of the Decision-maker.*
7) *All cross-examination questions will be reviewed first by the Decision-maker who will review the question to determine if it is relevant and will explain any decision to exclude a question as not relevant.*
8) *Any questions or evidence about privileged information such as medical or psychological records is not permitted without written waiver.*
9) *Questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant unless an exception applies. Do not ask a question along those lines unless you know an exception applies.*
10) *Questions must be asked in a respectful manner at all times. Failure to adhere to these rules will result in a warning. If the behavior continues, the advisor will be removed and a new advisor will be appointed by the University.*

ORDER OF QUESTIONING

(Witnesses may appear in the order they are available or in the order preferred by the Decision-maker).

1) Complainant
   i. by Decision-maker
   ii. by Respondent Advisor
   iii. by Decision-maker

2) Respondent
   i. by Decision-maker
   ii. by Complainant Advisor
   iii. by Decision-maker

3) Complainant Witnesses:
   i. by Decision-maker
   ii. by Respondent Advisor
   iii. by Complainant Advisor
   iv. by Decision-maker

4) Respondent Witnesses:
   i. by Decision-maker
   ii. by Complainant Advisor
   iii. by Respondent Advisor
   iv. by Decision-maker

5) Other Witnesses:
   (alternate advisor who starts)
   i. by Decision-maker
   ii. by Advisor
   iii. by Advisor
   iv. by Decision-maker

DECISION-MAKER QUESTIONS –CONFIRMATION OF ACCURACY

- **Confirmation of Accuracy of statements and investigative interview.**

    1) *Have you read through the summary of your investigative interview?*
    2) *Do you have any corrections or changes to what you stated in your interview or in your written statement?*
    3) *Is it a fair and accurate representation of the truth as provided in your interview(s) with the investigators?*

- **Confirmation of Accuracy of evidence (walk through each type of evidence)**

    1) *What evidence was provided by you to the Investigators?*
    2) *Are these emails/letters/texts a fair and accurate copy of the communication?*

ADVISOR CROSS EXAMINATION OF THE PARTIES

- **Cross Examination**
    - *(If have pre-vetted questions) The Respondent/Complainant voluntarily submitted questions that have been approved for relevancy. The Advisor may ask any of those questions at this time.*
    - *Does the Respondent/Complainant, through the advisor, wish to ask any additional questions of the witness?*
    - If yes. *The Advisor may submit the first question for determination of relevancy.*
    - Advisor asks question.
        - *The question is relevant, and the witness may answer the question*
        - *The question is not relevant ____(refer to list of reasons below)_____*
        - *I do not understand the relevancy of that question. Will you please clarify how or why it is relevant, otherwise we will disregard the question.*

DECISION-MAKER EXAMINATION OF THE PARTIES AND EVIDENCE

- **Direct Examination**
    1) Questions about statements
    2) Clarifications about where a party/witness learned of something.
    3) Questions regarding credibility

Relevancy

- **Past Sexual History of Complainant:** *That question is not relevant per the policy and the Title IX Regulations. If you can show why an exception applies, you may explain that, otherwise that question is not permitted, and any further questions of this type may result in the advisor being removed.*
    - **From the Regs…**Questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant
        - **Exceptions:** unless such questions and evidence about the complainant's prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or
        - if the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent.

- **Privileged Information:** *That information is privileged and not considered not relevant per the policy and the Title IX Regulations.*
    - **From the Regs…**Cannot access, consider, disclose, or otherwise use a party's records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional's or paraprofessional's capacity, or assisting in that capacity, and which are made and maintained in connection with the provision of treatment to the party
        - **Exception:** unless the recipient obtains that party's voluntary, written consent to do so for a grievance process under this section

- **Repetitive question:** *You have already asked that question/pursued that topic.*
    - **From the Preamble…** nothing in the final regulations precludes a recipient from adopting and enforcing (so long as it is applied clearly, consistently, and equally to the parties a rule that deems duplicative questions to be irrelevant

- **New information:** *That information is not in the investigative report and has not been previously raised. Why is that information only being shared now?*

- **Not relevant:** *That information is not probative of any material fact concerning the allegations. Can you explain why that topic is relevant?*