



**D. STAFFORD**  
& ASSOCIATES

# **Combined Sexual Misconduct and DVDVS Investigator Training Class**

**Presented by DSA Associates:**

**Cathy Cocks**

**Beth Devonshire**

**Adrienne Murray**

**Ann Todd**

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## Sexual Misconduct/DVDVS Investigations

(Virtual Course)

### Overview of Course Schedule

**All Classes will run from 11:00am to 5:00pm (Eastern) with a lunch break from 1:30pm to 2:15pm. Fifteen-minute breaks will also be given throughout the day.**

#### **Day 1 Legal Landscape**

- Overview of the Laws
- Serving Impartially
- Concurrent Investigations

#### **Day 2 Understanding the Elements and Dynamics of the Offenses**

- Sexual Harassment
- Sexual Assault - Rape/Fondling
- Sexual Assault - Incest/Statutory Rape
- Domestic Violence/Dating Violence
- Stalking

#### **Day 3 Investigation Preparation**

- Title IX Investigations A to Z
- Investigative Strategy and Evidence Collection
- Unwelcomeness, Consent, and Incapacitation

#### **Day 4 Interviewing**

- Stress, Trauma, and Memory
- Interviewing
- Assessing Credibility

#### **Day 5 Reports and Relevancy**

- Reports
- Determining Relevancy
- Case Study
- Week in Review Q and A



**Combined Course: Investigation of Sexual Misconduct and Dating Violence, Domestic Violence and Stalking**

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## Dolores Stafford, President & CEO



Ms. Stafford was the Chief of Police at The George Washington University in Washington, DC from 1992-2010. During her distinguished 26 year career in the law enforcement and security industry, she worked in Campus Law Enforcement for 23 years at Bucknell University, Butler University, and most recently, at the George Washington University, where she served as Chief of Police of a 176 member police department for 18 years. Chief Stafford retired from active law enforcement on May 5, 2010. She has a Bachelor's Degree in Criminal Justice from Mansfield University and has a Master's of Science Degree in Education from Bucknell University. Chief Stafford is a Certified Litigation Specialist.

As one of the nation's premier campus police chiefs, she is a much sought after speaker, consultant, educator, expert witness, and instructor on campus security, campus safety and law enforcement related issues and on compliance with the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (The Clery Act) and the security and safety requirements of the HEOA.

Chief Stafford has won numerous accolades for her 26 years of service in the law enforcement field. She won the "Breaking the Glass Ceiling" award in 2002 in honor of her ongoing contributions to improving the law enforcement profession. In 2004, Stafford was honored by the European Association for Campus Security for her expertise and achievements in campus security. Campus Safety Magazine awarded her their 1<sup>st</sup> Annual Campus Safety Director of the Year Award for 2006. In June 2008, Chief Stafford was presented with the Distinguished Young Alumni Award by her alma mater, Mansfield University in Pennsylvania.

She has been a member of the International Association of Campus Law Enforcement Administrators (IACLEA) since 1990 and she served on the Board of Directors from 2000-2005. She served as the Chair of the IACLEA Accreditation Commission from 2005-2008 and she served as the 45<sup>th</sup> President of the International Association of Campus Law Enforcement Administrators in 2003-2004, she was the first female to hold that office.

Chief Stafford has been a keynote speaker and has conducted presentations on the Clery Act for various organizations, including IACLEA, NACUBO, American Council on Education (ACE); the Stetson Law Conference, Security on Campus Inc, and other video/teleconference training companies.

She was a member of the IACLEA Government Relations Committee from 1995 to 2010 and was the Committee Chair from 1998 to 2000. Chief Stafford has testified at several congressional hearings, one at the request of the U.S. House of Representatives in July of 1997 and two at the request of the U.S. Senate in March of 1998 and July of 2015. Chief Stafford was selected to represent IACLEA as the primary negotiator during the 1999 and 2009 Negotiated Rule Making processes sponsored by the Department of



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Education regarding the development of final rules for the implementation of the Clery Act. She is a nationally recognized expert on compliance with the Clery Act.

Chief Stafford has been a featured speaker in many other areas of security and safety for the American Council on Education (ACE); American Association of State Colleges and Universities (AASCU); National Association of Student Personnel Administrators (NASPA), the National Association of College and University Business Officers (NACUBO); University Risk Management and Insurance Association (URMIA); Stetson University College of Law; and the International Association of Campus Law Enforcement Administrators (IACLEA).

Chief Stafford led the GW Police Department as the agency became an internationally accredited law enforcement agency with the Commission of Law Enforcement Accreditation (CALEA) in March of 2006 and the agency was successfully reaccredited in March of 2009. The agency subsequently achieved accreditation with the International Association of Campus Law Enforcement Administrators in May of 2007. She was chosen to become an assessor for CALEA in March 2006 and she is currently an IACLEA assessor, and as such, she has completed numerous on site assessments for those organizations.

She has published more than a dozen articles in various professional journals and magazines. She was one of the lead authors of the International Association of Campus Law Enforcement Administrator's [Blueprint for Safer Campuses: An Overview of the Virginia Tech Tragedy and Implications for Campus Safety](#). This document, unveiled at a press conference sponsored by the Woodrow Wilson School at Princeton University on April 18, 2008, is a roadmap for campus safety and security. The Blueprint for Safer Campuses outlines the guiding principles for campus safety and security worldwide.



## Catherine Cocks, 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 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.

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



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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 Clergy 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.



## 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.

## INVESTIGATION CLASS ACRONYMS

- ASR:** Annual Security Report (often used as a reference to the Annual Security Report and/or the Annual Security and Fire Safety Report) that must be published by each institution of higher education.
- CSA:** Campus Security Authority—Individuals on each campus who have been identified by the Department of Education as persons who are required to report crimes that they become aware of to the Reporting Structure at each institution.
- DCL:** Dear Colleague Letter—this is a formal name of the method of communication from the Department of Education to college campuses. It is like naming their official “memo” to campuses.
- FERPA:** Family Educational Rights and Privacy Act—governs the confidentiality of student records.
- FNE:** Forensic Nurse Examiners
- GO:** General Order—some departments describe their operating procedures as general orders
- HEOA:** Higher Education Opportunity Act—the broader law that contains the Clery Act language and the fire safety and missing person language that is in the law but not contained within the “Clery Act” portion of the law.
- HIPAA:** Health Insurance and Privacy and Portability Act—governs privacy of medical records.
- MOU:** Memorandum of Understanding—an official agreement developed between agencies.
- NIBRS:** National Incident-Based Reporting System. 1 of 2 crime reporting systems developed by the FBI, but not the system that you are required to use for Clery Reporting—the only portion of this system that is used for Clery Act purposes are the 4 forcible and 2 non-forcible sex offense definitions.
- OCR:** Office of Civil Rights—the unit of the Department of Education that oversees Title IX Compliance.
- PD:** Police Department
- PS:** Public Safety
- PNG:** Persona-non-Grata—process used by some campuses not keep students from entering certain areas of the campus or the entire campus (administrative process) versus legal bar notice or trespass warning.
- SACC:** Sexual Assault Crisis Center, also known as Women’s Center.
- SANE:** Sexual Assault Nurse Examiner

**SART:** Sexual Assault Response Team

**SOP:** Standard Operating Procedures—some departments describe their operating procedures as Standard Operating Procedures. Some call them General Orders, etc...

**SWA:** Senior Women's Administrator (Athletics)

**TWN:** Timely Warning Notice

**UCR:** Uniformed Crime Report. This is 1 of 2 crime statistics reporting systems developed by the FBI. Institutions are required to use UCR Standards for counting and classifying crimes for reporting the Clery statistics.

**VAWA:** Violence Against Women Act



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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 Clerly 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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**Agenda**

- Title IX for Investigators
- Title VII for Investigators
- The Clery Act for Investigators

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### Definitions: Parties/Witnesses



- Complainant
- Respondent
- Witnesses

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### Definitions: Title IX Personnel



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

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### Definition of Sexual Harassment



**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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### 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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### Sexual Harassment



Impact educational program or activities



Occurred in the context of educational program or activities (Online)



Control over the Respondent



In the United States

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### Retaliation

- Cannot intimidate, threaten, coerce, or discriminate others
- MAY use the same grievance procedure
- 1<sup>st</sup> Amendment considerations
- Potential violation considerations
  - Are alcohol-related offenses retaliatory?
  - False reports are not retaliatory

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## Formal Complaint



Signed formal complaint



Complainant or Title IX Coordinator



Complainant **MUST** be participating at the time of filing

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## Dismissal of Formal Complaints



**Must Dismiss**

Behavior does not constitute sexual harassment  
Did not occur in educational program or activity or not in the United States



**May Dismiss**

Complainant withdraws formal complaint  
Respondent no longer enrolled/employed  
Insufficient evidence



**Notification and appeal**

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## Consolidation of Complaints



Multiple Respondents

More than one complaint against one or more Respondents

One party against another party

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## Notice Requirements



Grievance process	Sufficient details and sufficient time to prepare	Identities of the parties, alleged conduct	Date and location of incident
Presumed not responsible	Advisor of choice	False statements	Additional allegations

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## Investigations and Evidence Gathering



- Burden of proof
- Witnesses and facts
- No restrictions on discussing allegations

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## Advisors



### Investigation

- May accompany party to investigation meetings
- Receives preliminary and investigative reports
- Who fills this role?

### Hearing

- Institutions must provide an advisor if a party does not have one at hearing
- Conducts cross examination of witnesses and opposing party
- Who fills this role?

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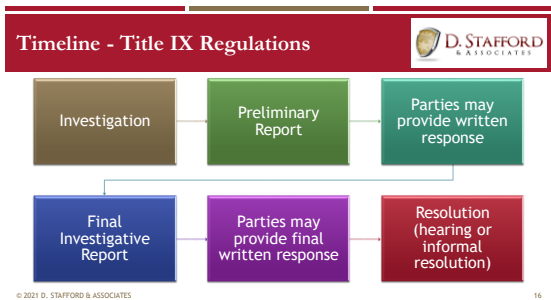
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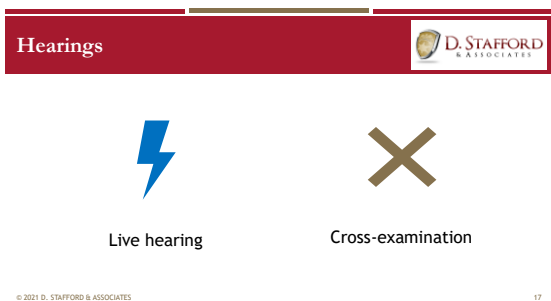
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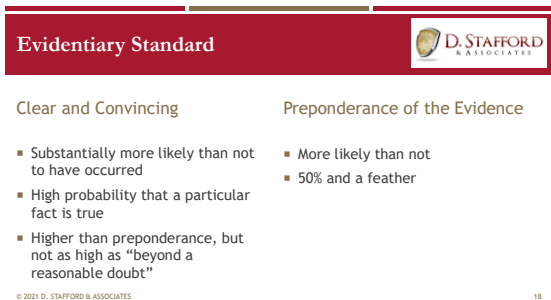
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# Training



Definition



Scope of program or activity



Investigation



Impartiality



Investigative Report

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# Recordkeeping (Seven Years)



Case Materials



Training materials

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**Investigators in the Case Law:**

**Rossley v. Drake University, No. 19-1392 (8<sup>th</sup> Cir. 2020)**

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*"We conclude, however, that whatever the deficiencies in Sirna's investigation, they did not result in findings so devoid of substantive content as to be unworthy of credence. As pointed out earlier, for example, Sirna's decision not to interview certain witnesses was based on her belief that such an effort might prove to be duplicative of her other interviews. Likewise, the alleged deficiencies did not rise to the level of the 'clear procedural irregularities'."*

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*Title VII prohibits employment discrimination based on race, color, religion, sex, and national origin*

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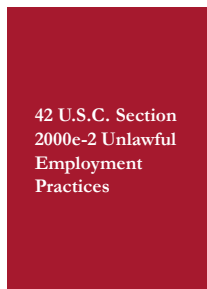
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- Section 703 (a) Employer practices
  - It shall be an unlawful employment practice for an employer-
    1. to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
    2. to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

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29 CFR § 1604.11 EEOC Guidelines



1. Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment; OR

Harassment on the basis of sex violates Title VII. Unwelcome conduct of a sexual nature that:

2. Submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or

3. Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment

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Basis of Sex



Pregnancy-related protections

Sexual orientation/Gender identity (Bostock)

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Sexual Harassment Examples



Unwelcome sexual advances	Requests for sexual favors
Verbal or physical harassment of a sexual nature	Offensive comments based on sex

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## Unwelcome Conduct



"in the sense that the employee did not solicit or incite it, and in the sense that the employee regarded the conduct as undesirable or offensive." Henson v. City of Dundee, 682 F.2d at 903

Totality of the circumstances

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## Reasonable Person



More than petty slights



Conduct applications

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## Retaliation

- Right to be free of discrimination
- "Protected activity"
- Participation is protected

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**Employer Liable Unless They Can Show:**

- 1) Reasonably tried to prevent and correct harassing behavior;
- 2) Employee unreasonably failed to take advantage of preventative or corrective measures

This includes conduct of non-employees as well



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**Additional Considerations**



Prevention



Quid Pro Quo impacts

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**Investigators in the Case Law:**

**Menaker v. Hofstra University, 935 F.3d 20, 35 (2nd Cir. 2019).**

*(1) Where a university (a) takes an adverse employment action against an employee, (b) in response to allegations of sexual misconduct, (c) following a clearly irregular investigative or adjudicative process, (d) amid criticism for reacting inadequately to allegations of sexual misconduct by members of one sex, these circumstances support a prima facie case of sex discrimination.*

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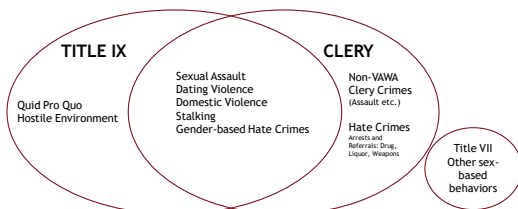
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**Overlapping Conduct Violations**



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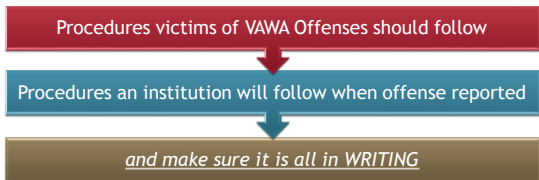
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**Response Requirements for VAWA Offenses**



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## Written Explanation of Rights and Options



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## Clery Requirements for Disciplinary Proceedings



- Anticipated timelines (“reasonably prompt”)
- Decision-making process
- How to and options for filing a school complaint (with contact info)
- How school determines which process to use
- Who makes decisions
- Include employee procedures
- Use procedures regardless of Clery geography

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## Advisors



- Support, guidance, or advice
- Cannot limit
- May restrict participation
- Timely notice of meetings
- Pools can be used
- Remove as needed
- Proxy
- Do not have to delay

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### Standard of Evidence



- Any standard of evidence ... must be included in policy
- Would not prohibit using different standards for different groups

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### Formal Complaint Rights



- Prompt, fair, and impartial investigation and resolution
- Anticipated timeframes
- List all possible sanctions for each offense (employees and students)
- Consistent with policy and transparent
- Not required to list all protective measures

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### Formal (Live Hearing)



Clery is silent regarding live hearing

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### Written Determination



- Result (include any sanctions and rationale for results and sanction)
- Appeal procedures
- Any change to the result
- When such results become final

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### Clery Training Requirements (Officials)



- Relevant evidence and how it should be used
- Proper interview techniques
- Basic procedural rules for conducting a proceeding
- Avoiding actual/perceived conflicts
- The issues related to dating violence, domestic violence, sexual assault, and stalking
- How to conduct an investigation and hearing process that protects the safety of the victims and promotes accountability

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### Recordkeeping



- Retain all records used in compiling ASR for three years from the latest publication of the report to which they apply (in effect 7 years)

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# Appeals



- Not required (but must provide notice, if allowed, along with appeal procedures)
- Simultaneous written decision describing result, sanction, any changes to the result, when it becomes final

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	Timely Warning	Emergency Notification
<b>Legal Standard:</b>	Potential ongoing or serious threat	Immediate threat to health and safety
<b>Circumstances:</b>	Clery-reportable crimes that have been reported (occurred in past)	Clery-reportable crimes as well as other types of emergencies (happening right now or about to happen)
<b>Audience:</b>	Community-wide	Can send to a segment of the community, if appropriate
<b>When Issued:</b>	As soon as pertinent information is available	Upon confirmation of emergency (when possible)
<b>Follow-Up:</b>	Not Required	Required

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LEGAL IMPACT ON INVESTIGATIVE FUNCTION

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Serving Impartially

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### Agenda

- The Regulations
- Prejudgment
- Conflict of Interest and Bias

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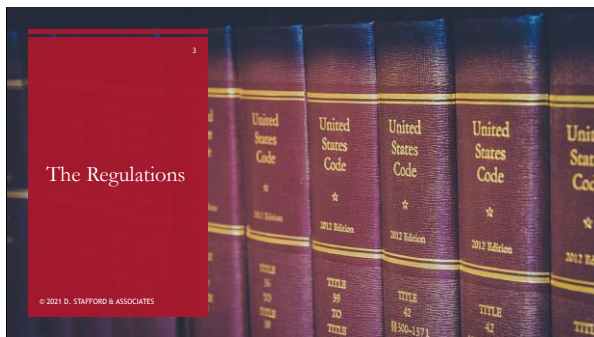
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## Conflict of Interest or Bias



Generally



Individually

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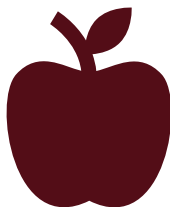
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TRAINING  
BIAS  
RELEVANCY

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## Serve Impartially - AVOID



Prejudgment  
of facts

Conflict of  
Interest

Bias

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## Procedural Challenges



During Investigation/Hearing



Basis of Appeal

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## Prejudgment of Facts



“Hear the case before you decide it...”

Judge Alfred P. Murrah

...However, you do not hear the case

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Your job is to gather the facts . . .



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Prejudgment of Facts 



Open mind



Listen



Objective



Neutral

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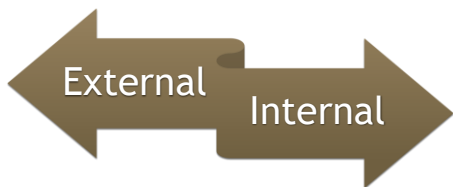
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-   
Roles on campus
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Past employment
-   
Volunteering
-   
Social media presence

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## REPRESENTATION MATTERS



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<b>Confirmation Bias</b>	Confirmed preconceived opinion	<b>Investigator Bias</b>
<b>Availability Bias</b>	Most important to the memory immediately recalled	
<b>Hindsight Bias</b>	See things as more predictable than they were	
<b>Foresight Bias</b>	Ability to predict future events	
<b>Identity Bias</b>	More likely to believe one group over another	
<b>Personal Experience Bias</b>	Believe similar experience (or disbelieve the dissimilar)	

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**Bias** 

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

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**Identity Bias** 

**Bias, Data, Impact**

- Gender Identity
- Sexual Orientation
- BIPOC
- National Origin
- Differently-abled

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### Case Scenario 1



During the course of investigating an allegation of dating violence involving two students, you discover that the Complainant had reached out to the President of the institution to discuss the respondent's behavior as the President is the Respondent's uncle. The Complainant tells you that she showed pictures of her injuries from when the Respondent strangled her and text messages in which the Respondent threatened to kill her. The President told the Complainant that he would talk to the Respondent. The President did not tell anyone about the conversation with the Complainant.

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### Case Scenario 2



You are investigating a case of sexual harassment filed against Betty, a faculty member. While having lunch with your colleague Sam, Sam mentions to you that Betty has started to send them sexual text messages and that they do not know what to do about it. Sam says that they were telling you as "you are trained on this stuff" and will know what to do. What do you do?

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### Case Scenario 3



You have been assigned to co-investigate a claim of sexual assault involving two students. One of the students is a person of color and one of the students is white. During the course of your investigation, your co-investigator makes a series of “racist jokes.” What do you do?

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### Case Scenario 4



You were recently interviewed by the student newspaper regarding your role as an investigator. You self-disclose that you are a survivor of sexual assault and this is why you do this work. Shortly after the article is released, a respondent for the case in which you have been investigating requests a new investigator based on your conflict of interest/bias.

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### Case Scenario 5



You were recently assigned to investigate an allegation of dating violence. The complainant is identified as having a hearing impairment. Are there additional issues in which you need to consider?

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## Case Scenario 6



You were recently assigned to investigate an allegation of sexual assault involving a student who is transitioning from male to female. Are there additional issues in which you need to consider?

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# Concurrent Investigations

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## Agenda

- Roles and Regulatory Considerations
- Distinction in Processes
- Other Considerations

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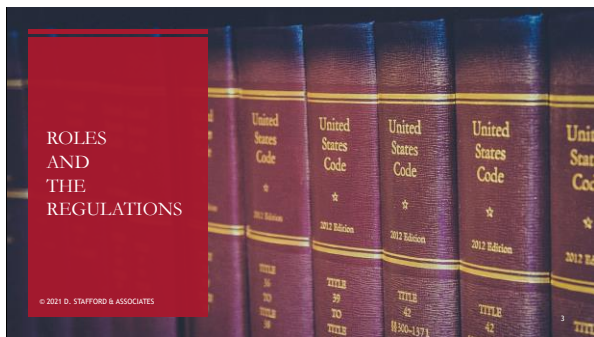
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## Investigative Processes



Title IX/Conduct Personnel  
Violations of Policy



Law Enforcement Personnel  
Violations of Law

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## Authority and Function



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## Differences



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### Response to a Report - Criminal Investigations




- Responding officer
  - Medical attention offered
  - Forensic evidence collection offered
  - Safety of scene and parties secured
  - Arrest if probable cause
  - Initial report drafted
  - Chain of Command notified
- Officer/Detective/Investigator
  - Evidence gathered
  - Investigation until probable cause
  - District Attorney communication

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### First Responders



- Show understanding, patience, and respect for dignity
- Express sympathy and interest in their well-being
- Attempt to establish trust and rapport
- Provide officer/investigator of the same sex if desired and available
- Contact an advocate as soon as possible
- Explain roles and steps throughout the process
- Limit repetitive questioning
- Help transitions through introductions

International Association of Chiefs of Police. (2006) Investigating Sexual Assaults Model Policy. Retrieved from <https://www.encyclo.org/Library/DocumentLibrary/handler.jspx?id=93>

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### Additional Personnel



- Victim Advocate
- Forensic Nurse Examiner (FNE)/Sexual Assault Nurse Examiner (SANE)
- Institutional Personnel
- Campus Response Team
- Threat Assessment Team
- Other

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### Notice



“[t]he Department reiterates that a § 106.45 grievance process occurs independently of any criminal investigation that may occur concurrently, and the recipient’s obligation to inform the parties of the allegations under investigation is a necessary procedural benefit for both parties . . . .”  
(Fed. Reg. 30280)



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### Deadlines and Delays



Deadlines



Delays

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Public Safety as Title IX Investigator



Clothing



Weapon



Location



Conflict

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Should sworn police be conducting Title IX investigations?

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GROUP DISCUSSION

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Sharing Information 



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Records 



FERPA



Law Enforcement Records

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## Understanding the Elements and Dynamics of the Offenses

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### Agenda

- Breaking Down the Definitions
- Sexual Harassment
- Sexual Assault
- Intimate Partner Violence
- Stalking
- Additional Elements for Title IX Cases

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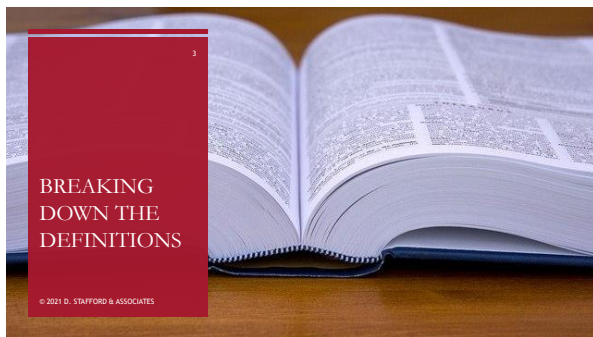
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## Sexual Harassment under Title IX

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)(iv), "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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## Understanding the Elements



### Elements

- Actions
- Conditions



### Additional info

- Clarifiers
- Exceptions

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Investigator  
• Evidence for each element  
• Evidence of any exceptions

### Decision-maker

- Weigh the evidence provided
- "Reasonable person" standard

## Roles in the Process

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## The "Elements"



What specific evidence would indicate sexual harassment?



How do we obtain evidence?

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## Elements of Sexual Harassment



- A. Is it conduct on the basis of sex?
- B. Was it unwelcome?
- C. Does it constitute Sexual Harassment?
  1. Quid Pro Quo
  2. Hostile Environment
  3. Sexual Assault, Dating Violence, Domestic Violence, or Stalking

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Sexual Harassment Under Title IX



PRONG 1: QUID PRO QUO  
PRONG 2: HOSTILE ENVIRONMENT+  
PRONG 3: VAWA OFFENSES

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Title IX - MUST Be Sex-Based



*“Sexual harassment means conduct on the basis of sex that satisfies one or more of the following. . .”*

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PRONG 1: Quid Pro Quo

*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*

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**PRONG 1: Quid Pro Quo**



Sex or gender-based



Employee



CONDITIONING  
aid, benefit or  
service



UNWELCOME  
conduct (or  
threat of  
conduct)

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**PRONG 1: Quid Pro Quo**



- **What was the aid, benefit, or service?**
  - **Education:** admission, grades, awards, housing, access, membership, resources, support
  - **Employment:** hiring/firing, salary, benefits, promotions, location, privileges
  - **Other:** participation, movement, personnel/education records, reputation, access, status
- **How was it conditioned/communicated?**
  - Implied, stated, written

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**PRONG 1: Quid Pro Quo**



- **What was the conduct?**
  - **Verbal/written:** Jokes, sexual language, participation in discussion
  - **Physical:** Kissing, massaging, pinching, sexual touching, physical relationship, voyeurism
- **Did the conduct occur?**
  - Consent vs. Submit

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## Power Dynamics



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### Prong 1: Case Study

Michael confides in another coach that he engaged in sexual activity with his soccer coach, Bob. He says it began consensually, but when he asked for it to stop, Coach Bob told him if he didn't continue to engage in the sexual activity, he would ensure he "never played again."

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

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### Assignment

1. Discuss the elements that make up the offense of Quid Pro Quo Sexual Harassment.
2. Discuss the specifics of the complaint that you are investigating.
3. What types of evidence will you seek to meet the elements?
4. What evidence could be provided that would demonstrate the elements have not been met?

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### Questions

You can send questions to the chat while you work, and we will discuss them in the reporting out phase.

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PRONG 2: Hostile Environment + (The Davis Standard)

*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*

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PRONG 2: The Davis Standard



Davis v. Monroe County Board of Education, 526 U.S. 629 (1999).

Holding that “funding recipients are properly held liable in damages only where they are deliberately indifferent to sexual harassment, of which they have actual knowledge, that is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school.”

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PRONG 2: Hostile Environment +



Sex  
Gender-based



Unwelcome



Conduct  
Severe  
Pervasive  
Objectively offensive



Impact on  
education (or  
employment)

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## Hostile Environment +



### ON THE BASIS OF SEX

- Physical touching
- Comments of a gender or sexual nature
- Motivated by complainant's gender or sexuality
- Sex Stereotyping
- Pregnancy, childbirth, related medical conditions
- Gender-based harassment
- Gender Identity, Gender Expression, Sexual Orientation

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## Hostile Environment+



### INVESTIGATING UNWELCOME

- Unpack "consent" definition
- Behaviors that by their nature are "unwelcome"
- What was communicated between parties?
- Coercion, threats, intimidation
- Who instigated?
- Did the Complainant participate?

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## Hostile Environment+



### INVESTIGATION OF SEVERE

- Characteristics of Complainant and Respondent
- Witnesses, public nature
- Direct vs. second-hand
- Degrading, crude
- Threats
- Physical actions, touching

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**INVESTIGATION OF PERVERSIVE**

- Number of incidents (dates, times)
- Number of witnesses, recipients, participants
- Different types of behaviors

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**OBJECTIVELY OFFENSIVE/REASONABLE PERSON**

- “Turns on both subjectivity (i.e., whether the conduct is unwelcome, according to the complainant) and objectivity (i.e., ‘objectively offensive’).”
- “Whether, standing in the shoes of the complainant, the conduct would be offensive”
- The investigator conducts the subjective analysis while the decision-maker conducts the objective analysis

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**EFFECTIVELY DENIES ... EQUAL ACCESS ... EDUCATION PROGRAM**

- “Does not require that a Complainant has already suffered loss of education before being able to report”
- Harassment “so undermines and detracts from the victims’ educational experience” that it effectively denies...
- Does not require certain manifestations of trauma
- Can’t turn away a Complainant who is “high-functioning,” “not showing particular symptoms,” or “not traumatized enough”
- No requirement for “tangible adverse action or psychological harm”

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## Hostile Environment +



### INVESTIGATING EFFECTIVELY DENIES...

- Skipping class to avoid a harasser
- A decline in a student's grade point average
- Difficulty concentrating in class
- Dropped out of school
- Failed a class
- Had a panic attack
- Reached a "breaking point"

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## PRONG 2: Hostile Environment +



### FIRST AMENDMENT ISSUES



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## PRONG 2: Hostile Environment +



### NOT ALL UNWELCOME SEXUAL CONDUCT COUNTS



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NO INTENT REQUIREMENT IN DAVIS STANDARD



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Prong 2: Case Study

Pat reports to the Title IX Coordinator feeling uncomfortable in class because of “sexually harassing” comments and behaviors of other students.

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

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Assignment

1. Discuss the elements that make up the offense of Hostile Environment Sexual Harassment.
2. Discuss the specifics of the complaint that you are investigating.
3. What types of evidence will you seek to meet the elements?
4. What evidence could be provided that would demonstrate the elements have not been met?

Questions

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**PRONG 3:  
The VAWA  
Offenses**

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

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**PRONG 3:  
Sexual Assault**

- An offense that meets the definition of rape, fondling, incest, or statutory rape as used in the FBI's Uniform Crime Reporting (UCR) program. Per the National Incident-Based Reporting System User Manual from the FBI UCR Program, a sex offense is "any sexual act directed against another person, without the consent of the victim, including instances where the victim is incapable of giving consent."

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## Rape



*Rape is the penetration, no matter how slight, of the vagina or anus, with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim.*

- Clery count includes "attempts" at rape as a count of rape
  - Sex act must include penetration - non penetration (for example oral sex on an unconscious male) is not rape but would still be sexual assault under the fondling definition
- Not every criminal sexual act falls under Title IX but may under a different institutional policy
  - Administration of a date rape drug
  - Touching a non-private body part with the perpetrator's private body part

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## Fondling



*Fondling is the touching of the private body parts of another person for the purpose of sexual gratification, without the consent of the victim.*

Schools may determine...

- which body parts are considered "private"
- whether the touching must occur underneath or over a victim's clothing.

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## Incest



*Incest is sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law.*

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## Statutory Rape



*Statutory Rape is sexual intercourse with a person who is under the statutory age of consent.*

*Q: What is the age of consent in your state?*

*What if you have campuses in more than one state? Do your policies reflect that?*

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## PRONG 3: Sexual Assault (1 & 2)

*Rape is the penetration, no matter how slight, of the vagina or anus, with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim.*

*Fondling is the touching of the private body parts of another person for the purpose of sexual gratification, without the consent of the victim.*

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## Sexual Assault



### ■ Sex Act without consent

- "Sex Act"
  - Non-Consensual Sexual Penetration (rape)
  - Non-Consensual Sexual Contact (fondling)
- "Consent"
  - "Informed and reciprocal", "mutually understandable"
  - Absence of physical force, threats, intimidation, coercion
  - Never present for incapacitated persons

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## Element One - Sex Act



### Sex Act

- What were the actual sexual behaviors?
- Must get specifics
- Clarify slang or other terms

### Without Consent

- Communication between parties
- Physical response
- Language/behavior indicating consent
- Language/behavior indicating no consent
- Capacity of parties to provide/assess consent

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## Element Two - Consent



### Force

- Physical or verbal resistance
- Threats (or perceived threats), coercion, intimidation
- Power differentials (real or perceived)

### Incapacitation

- Alcohol or drug consumption
- Decision-making ability of the parties
- Awareness of consequences
- Ability to make informed judgments
- Capacity to appreciate the nature and the quality of the act

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### PRONG 3: Intimate Partner Violence

**Dating Violence:** Violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim.

**Domestic Violence:** A felony or misdemeanor crime of violence committed by a current or former spouse or intimate partner of the victim. . .

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### Dating Violence



- Violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim.
- The existence of such a relationship shall be based on the reporting party's statement and with consideration of the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.
- For the purposes of this definition -
  - Dating violence includes, but is not limited to, sexual or physical abuse or the threat of such abuse.
  - Dating violence does not include acts covered under the definition of domestic violence.

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### Domestic Violence



- A felony or misdemeanor crime of violence committed by
  - A current or former spouse or intimate partner of the victim
  - By a person with whom the victim shares a child in common
  - By a person who is cohabitating with, or has cohabitated with the victim, as a spouse or intimate partner
  - By a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction in which the crime of violence occurredOR
  - By any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of the jurisdiction in which the crime of violence occurred

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## Important Considerations



Unique



Cycle of violence



Power and control

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Lack of cooperation

Fear/Intimidation

Cross-claims

Interview  
Considerations

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## Primary Aggressor



Past behaviors?

Self Defense?

Who is afraid?

Body language of each?

Witnesses?

What does the scene look like?

Excited utterances?

What are the extent of the injuries?

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### Prong 3: Case Study

Alex reports that they have recently broken up with a partner who was verbally and physically abusive to them. The partner, Jordan, is alleged to have assaulted Alex by hitting them and damaging their vehicle during an altercation in an on-campus parking lot. Alex and Jordan are both employees who work in the same department on campus and until the recent breakup, lived together in an off-campus apartment. Alex has requested that the College intervene because they feel “unsafe” and “worried about what will happen next.”

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**Assignment**

1. Discuss the elements that make up the offense of Domestic Violence.
2. Discuss the specifics of the complaint that you are investigating.
3. What types of evidence will you seek to meet the elements?
4. What evidence could be provided that would demonstrate the elements have not been met?

**Questions**

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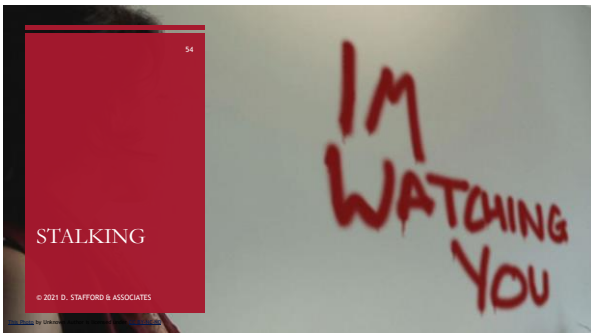
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### PRONG 3: Stalking

Stalking is defined as engaging in a course of conduct directed at a specific person that would cause a reasonable person to -

- Fear for the person's safety or the safety of others; or
- Suffer substantial emotional distress

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### Course of Conduct



*“Course of conduct means two or more acts, including, but not limited to, acts in which the stalker directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person's property.”*

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### Breaking Down the Definition



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# SUBSTANTIAL EMOTIONAL DISTRESS

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- Difficulty eating or sleeping
- Anxiety or nervousness
- Nightmares
- Drug or alcohol use
- Headaches/illness
- School/work impacted
- Irritability, anger, shock, or confusion
- Fear response/hypervigilance
- Changing routines
- Depression

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## STALKING - SPECIAL CONSIDERATIONS

Stalking	and Intimate Partner Violence
Stalking	and disability considerations
Stalking	under Title IX

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### Prong 3: Case Study

Sam reports to their faculty member that a previous lab partner has been repeatedly texting, calling, and showing up after Sam rebuffed her requests to be more than lab partners. Sam says that they have asked repeatedly for the behavior to stop, but the previous lab partner “just won’t stop” and that Sam can’t concentrate and does not want to go to lab any longer.

**STALKING:** “engaging in a course of conduct directed at a specific person that would cause a reasonable person to fear for the person’s safety or the safety of others; or to suffer substantial emotional distress.”

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Assignment

1. Discuss the elements that make up the offense of Stalking.
2. Discuss the specifics of the complaint that you are investigating.
3. What types of evidence will you seek to meet the elements?
4. What evidence could be provided that would demonstrate the elements have not been met?

Questions

You can send questions to the chat while you work, and we will discuss them in the reporting out phase.

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## Jurisdictional Evidence



- If the conduct alleged in the formal complaint would not constitute sexual harassment as defined in § 106.30 even if proved, did not occur in the recipient's education program or activity, or did not occur against a person in the United States, then the recipient must dismiss the formal complaint."
- "education program or activity includes locations, events, or circumstances over which the recipient exercised substantial control ... and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution."

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## Party Status



- “At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed.”
- “locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context. . .”

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## Additional Issues



Other Violations

Climate Issues

Supportive Measures

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# Investigations A to Z

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## Agenda

- The Title IX Coordinator
- The Formal Title IX Process
- Non-Title IX Investigations

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## The Title IX Coordinator

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## Title IX Coordinator - The 2020 Regulations



- Must designate and authorize at least one employee to coordinate its efforts to comply with its responsibilities under this part, which the employee must be referred to as the “Title IX Coordinator”
  - Name or title, office address, electronic mail address, and telephone number of the Title IX Coordinator to applicants, employees, unions
  - Receive reports any time (including non-business hours) of sex discrimination in person, by mail, by telephone, or by electronic mail, or by any other means that results in the Title IX Coordinator receiving the person’s verbal or written report
  - Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures

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## Title IX Coordination



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## Title IX Coordination



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## Title IX Determinations



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## Actual Knowledge



“Actual knowledge means notice of sexual harassment or allegations of sexual harassment to a recipient’s Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient, or to any employee of an elementary and secondary school.”

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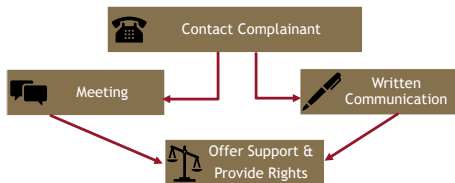
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## Actual Knowledge - Next Steps



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## 2020 Title IX Regulations - Supportive Measures



- Non-disciplinary, non-punitive individualized services
- Offered as appropriate, as reasonably available, and without fee or charge
- To the Complainant and/or the Respondent
- Before or after the filing of a formal complaint or where no formal complaint has been filed
- Designed to restore or preserve equal access without unreasonably burdening the other party
- Must maintain as confidential to the extent it would not impair the ability to provide

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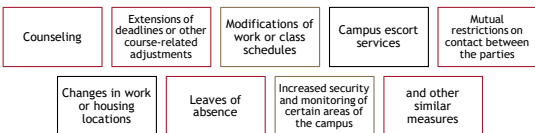
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## 2020 Title IX Regulations - Supportive Measures



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## Title IX Formal Complaint



Filed/Signed



Alleging sexual harassment



Requesting an investigation (or informal option)

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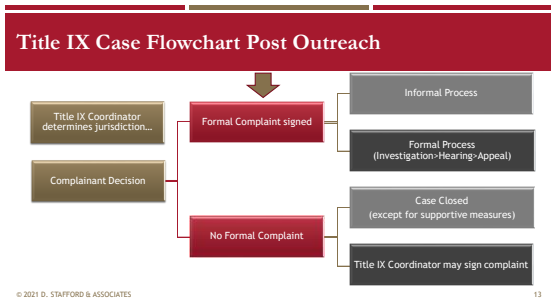
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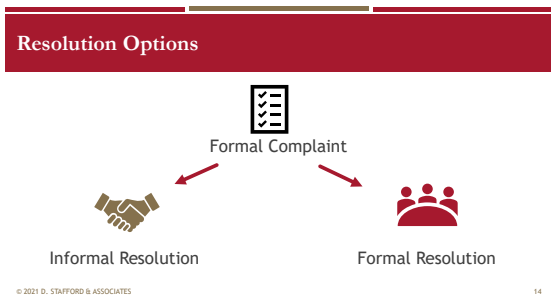
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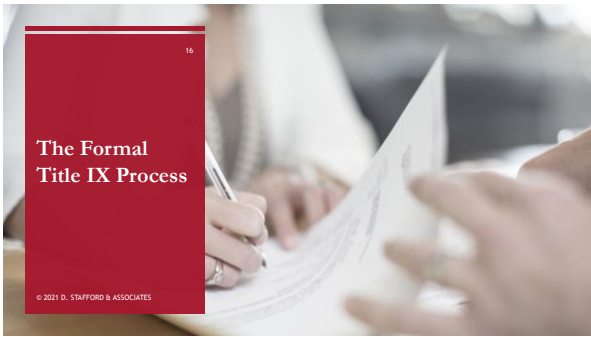
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## Formal Process



Notice



Assign to Investigator



Investigation

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### Notice of Allegation

- Sufficient details known at the time including
  - the identities of the parties involved if known
  - the conduct allegedly constituting sexual harassment
  - the date and location if known
- Statement that the respondent is presumed not responsible
- Determination regarding responsibility is made at the conclusion of the grievance process
- May have an advisor of their choice, who may be, but is not required to be, an attorney
- May inspect and review evidence
- Inform the parties of any provision in code of conduct that prohibits knowingly making false statements or knowingly submitting false information

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### Amended Notice

- (ii) If, in the course of an investigation, the recipient decides to investigate allegations about the complainant or respondent that are not included in the notice ... the recipient must provide notice of the additional allegations to the parties whose identities are known.
- Also amend if...
  - Date wrong
  - Location wrong
  - Additional complainant

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### Notice of Investigation/ Interview/ Meetings

- Date, time, location of meeting
  - Participants at the meeting
  - Purpose of meetings
  - With sufficient time for the party to prepare
- Best Practice to also include:
- Name of Investigator(s)
  - How to allege bias/conflict of interest

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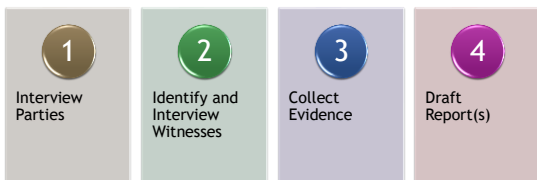
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### Basic Investigator Role



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## Logistical Decisions

WHO SENDS NOTICE?

WHO SCHEDULES?

HOW ARE STEPS DOCUMENTED?

WHO COLLECTS INSTITUTIONAL EVIDENCE?

WHO SENDS EVIDENCE/REPORT?

WHO DETERMINES DEADLINES?

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## Title IX Investigations



Burden of proof

Burden on institution

Cannot restrict ability of parties to discuss the allegations

Cannot restrict parties to gather/present relevant evidence

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## Investigations in the Regulations



Fact witnesses

Expert witnesses

Inculpatory evidence

Exculpatory evidence

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## Inspect and Review Evidence



*“Provide both parties an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint, including the evidence upon which the recipient does not intend to rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence whether obtained from a party or other source, so that each party can meaningfully respond to the evidence prior to conclusion of the investigation.”*

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## Inspect and Review Stage



Send to party and advisor



Provide at least 10 days to review



Allow submission of written response



Investigator must “consider” written response prior to completion of report

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## Investigative Report



*“Create an investigative report that fairly summarizes relevant evidence”*

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## Inspect and Review Stage



Send to party and advisor



At least 10 days before hearing



Allow review and written response

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### Other Types of Investigations



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**Possible Differences** 

Jurisdiction	Definitions	Policy
Adjudication Process	Report	Timeline

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**Likely Similarities** 

		
INTERVIEWS	EVIDENCE COLLECTION	ADVISORS

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## Evidence Collection and the Investigatory Process

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### Agenda

- Developing an Investigative Strategy
- Evidence Collection

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## Investigative Strategy

- Scope
- Methodology
- Pre-Work
- Challenges

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## Scope



- Notice of Allegation
- Notice of Investigation
- Policy Definitions
- Rights of the Parties

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## Methodology (and who does what?)



- Liaisons
- Logistics
- Internal Communications

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- Review Complaint
- Research
- Draft Questions
- Initial Evidence Collection

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### Challenges

*What challenges could you face?*

*What can we do to prepare?*

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### Investigation Roadmap



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## Types of Evidence



Real Evidence



Demonstrative



Documentary



Testimonial

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## Ability to Utilize Evidence



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## Research



Websites



Organizations



Calendars



Schedules



Party "directory information"

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## Initial Evidence Collection



Other "statements"

Evidence from campus sources

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## Other Sources of Evidence



Photographs

Text messages

Social media/dating apps

Documents (diagrams, memos, letters, notes)

Voice mail

Phone logs

Guest lists

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## Floorplans



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## Diagrams



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## Investigation Timeline



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## Unwelcomeness, Consent, and Incapacitation

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### Agenda

- Unwelcome
- Consent
- Drugs, Alcohol, and Incapacitation

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## Definitions



- Sexual Harassment– “unwelcome conduct”
- Sexual Assault- “without consent”

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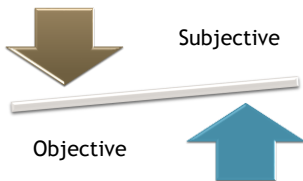
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## Unwelcome Conduct



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When Does Conduct Become Unwelcome? 

- Invited 
- Uninvited but welcome 
- Offensive but tolerated 
- Flatly rejected 

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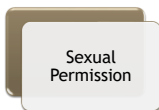
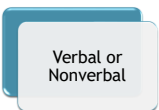
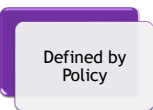
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Consent 

-  Sexual Permission
-  Verbal or Nonverbal
-  Defined by Policy

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### Consent - Title IX and the Clery Act



- Both require a definition of consent
- Neither require a particular definition of consent

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### Common Key Elements



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

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**Consent Is Absent When...** 

**Force**

- Physical
- Coercion
- Intimidation
- Threat

**Incapacitation**

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**Physical Force** 

**Holding down**   **Forced to touch**   **How much?**

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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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Physical harm

Reputational harm

Veiled threats

## Threats

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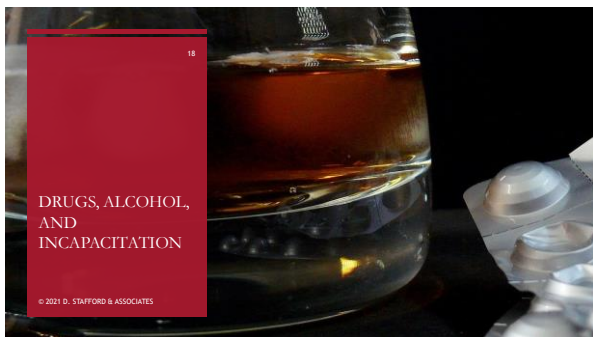
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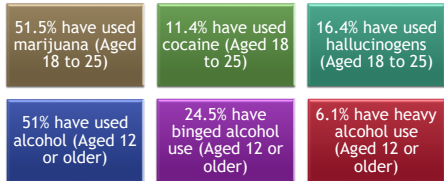
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**Substance Use**  
 SAMHSA, Center for Behavioral Health Statistics and Quality, National Survey on Drug Use and Health, 2018

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**Substance Use and Sex**



“...analysis of SHIFT survey data showed that two-thirds of sexually active students who had had sex in the prior three months reported some substance use prior to or during sex”

Jennifer S. Hirsch & Shamus Khan. "Sexual Citizens: A Landmark Study of Sex, Power, and Assault on Campus."  
 SHIFT survey = Alexander Wamboldt et al., "Wine Nights, 'Bro-Dinners,' and Jungle Juice: Disaggregating Practices of Undergraduate Binge-Drinking." Journal of Drug Issues, 2019, 49(4): 643-67.

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**Stimulants**

A substance that raises levels of physiological or nervous activity in the body	"Uppers"
Performance-enhancing and euphoric	Examples: ADHD medications, Methamphetamine, Ecstasy

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Depressants

Inhibit the function of the central nervous system	"Downers"
Relaxing, decreased inhibitions	Examples: "benzos," sleeping pills, marijuana

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Other Drugs



Hallucinogens



Opioids

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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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### What is a Drink in College?



- Water bottle
- Boxed wine
- Solo cups

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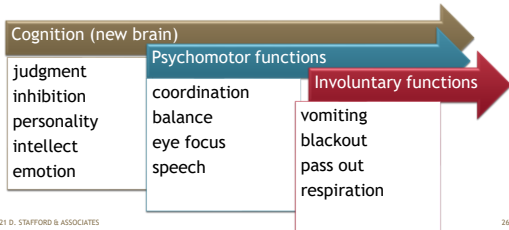
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### Impact of Alcohol Consumption Levels



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### Blood Alcohol Content



Number of drinks



Body weight



Time

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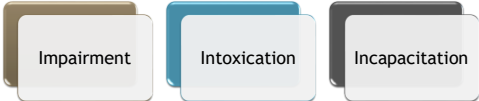
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## Levels of Consumption




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### Impairment

- The state of being diminished or weakened due to the consumption of alcohol
- Begins as soon as alcohol enters the bloodstream
- Increases with consumption of alcohol

**Question: Is it a violation of policy if two IMPAIRED people have sexual intercourse?**

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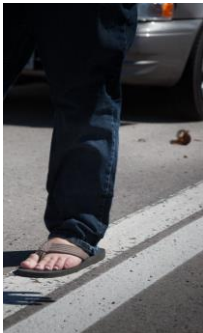
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### Intoxication

- An act or instance of inebriation; drunkenness
- Intoxication is legally met when an individual's blood alcohol level reaches .08 or greater

**Question: Is it a violation of policy if two INTOXICATED people have sexual intercourse?**

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### Incapacitation

- So impaired as to be incapable of giving consent
- Lacking the capacity to consent
- If a person cannot understand the nature of the proposed act or cannot understand they have a right to refuse or are otherwise unaware that the activity is occurring

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### Incapacitation

- Lack the ability to determine:
  - Who is having sex with them?
  - When are they having sex?
  - Where are they having sex?
  - What is the sexual act?
  - Whether they can say no.

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### Incapacitation Causes



Alcohol



Drugs



Disability



Other

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## Incapacitation Results



- Lacking understanding
- Physically helpless
- Blackout
- Unconscious

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## Two-Step Determination



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

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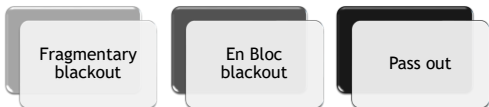
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Blackout v. Pass Out



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**Agenda**

- Understanding Stress and Trauma
  - During the Traumatic Event: Neurobiology
  - After the Traumatic Event: Memory
  - Long-Term Response: Impact
- Stress, Trauma, and the Interview

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**UNDERSTANDING STRESS AND TRAUMA**

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### Let's Talk Stress and Anxiety

- » What makes you stressed/anxious?
- » How does your **body** respond when you are stressed/anxious?
- » How does your **mind** respond?



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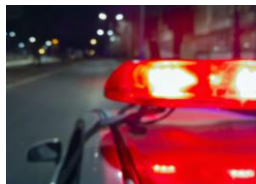
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### What is Trauma?



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### Comparison



Stress



Trauma

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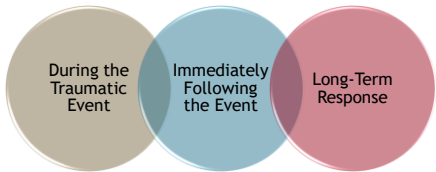
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## Impact of Trauma



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**DURING THE TRAUMATIC EVENT:**

**NEUROBIOLOGY**



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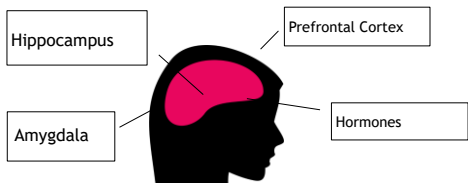
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## The Limbic System and Stress



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## The Body's Response to Fear



- **Heart** - pumps harder, beats faster (strength, blood flow to brain and muscles)
- **Lungs** - deep, quick breaths - oxygen to brain improving alertness, may cause dry mouth (sensory)
- **Muscles** - sugar is released for strength (but see tensing and eventual tremors)
- **Prefrontal cortex** - shuts down as it takes too long to "process" danger
- **Eyes** - dilate (lets in more light and improves eyesight)
- **Stomach** - digestion slows/stops (divert energy to need for survival); also impacted by hormones
- **Skin** - sweating (cools body, releases scent, improve friction)

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## Degraded Prefrontal Cortex



Alcohol



Age



Prolonged stress exposure

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## Response



Reflex



Habit

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IMMEDIATELY  
AFTER THE  
TRAUMATIC  
EVENT:  
  
MEMORY



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Memory 



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Memory Encoding 



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# Trauma Memory Encoding



Sensory



Emotional



Flashbulb memories

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LONG TERM RESPONSE:  
IMPACT



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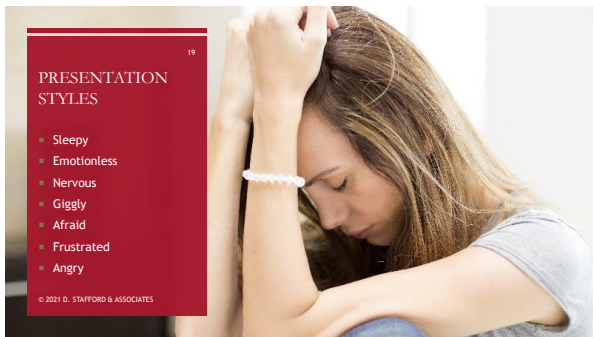
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### Post-Traumatic Response

- Self-mutilation
- Eating disorders
- Promiscuity/disinterest in sex
- Substance use/abuse
- Depression
- Counterintuitive behaviors
- Suicide attempts/completions
- Sleep disorders



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**Re-traumatization** 



Safety and Wellbeing



Maintain privacy and confidentiality



Kept up to date



Empathy and respect

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**Question Format** 



Tone



Phrasing



Open-ended



Safe



Judgment-free

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**Interview Techniques**

- Clarify linear information
- Use sensory prompts
- Ask for feelings and emotions
- Understand statement variations

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**Impartial Investigations**

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- Consistent application
- Ask clarifying questions
- Avoid bias

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**Agenda**

- Interviewing Basics
- The Interview
- Sample Questions

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**What are Interviews?**



Part of Evidence (Testimonial)



Conversation



Structured

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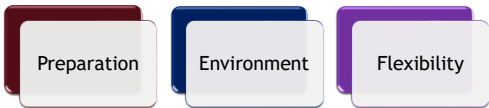
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# Interview Golden Rules



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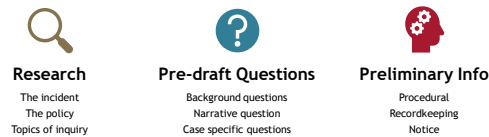
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# Interview Preparation



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Flexibility



*I pledge to...*  
Be open-minded  
Consider different theories of a case  
Roll with the surprises  
Adapt to the room

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**The DSA Interview Outline**

- Preliminaries
- Background
- Narrative
- Clarification
- Case Questions
- Closing

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**PRELIMINARIES:  
You Do The Talking**



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**BACKGROUND:  
Build the Rapport**



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**NARRATIVE:  
The Big Question**



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**CLARIFICATION:  
Filling In The Holes**



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**CASE QUESTIONS:  
The Pre-Drafted  
Must Asks**



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**CLOSING:  
Loose Ends**



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**EVALUATION**

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**Interviewing Bad Habits**

- Interrupting
- Asking two questions at once
- Not listening for the answer
- Avoiding the hard questions
- Losing focus on elements

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**Witness Interviews**

- Follow same interview structure
- Assess credibility
- Confidentiality/ Privacy
- How do they "know"?

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**RESPONDENT -  
POTENTIAL  
RESPONSES**

-  Complainant consented and is now lying (Regret? Guilt?).
-  Complainant consented but does not remember due to intoxication.
-  The sexual misconduct did not occur (Complainant was mistaken).
-  The sexual misconduct occurred but a different Respondent.

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**Harassment Questions**



-   
Act
-   
Consent
-   
Impact
-   
Witnesses
-   
Evidence

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# Consent



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# Physical Space



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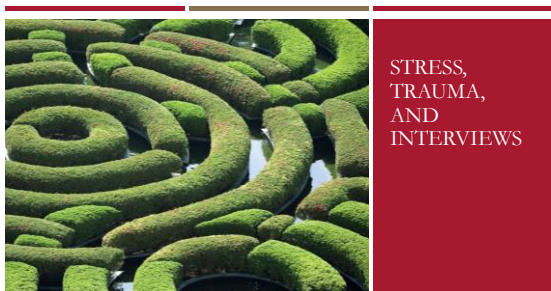
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**Agenda**

- What Is Credibility?
  - Credibility of the Story
  - Credibility of the Storyteller
- What Doesn't Impact Credibility?
- Investigator Credibility
- Detecting Deception

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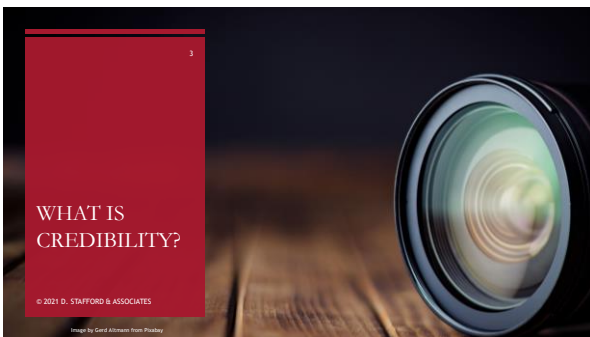
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**WHAT IS CREDIBILITY?**

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Image by Gerd Altmann from Pixabay

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**The Credibility of the Story** 



- Corroborating evidence
- Plausibility
- Motivation

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**Corroborating Evidence** 

-  Physical
-  Contemporaneous Documentation
-  Personal Documents
-  Admissions
-  Eyewitness
-  Outcry

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**Plausibility** 

-  Possible
-  Believable

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### Motivation



- Afraid
- Pressured
- Revenge
- History

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### The Credibility of the Storyteller



- Ability to Perceive
- Ability to Remember
- Bias

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### Ability to Perceive



- Distance
- Knowledge
- Credentials
- Competence

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## Ability to Remember



Passage of Time



Alcohol



Trauma



Peripheral Details



History of Memory

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## Bias



Past Relationship



Identity



Internal Biases

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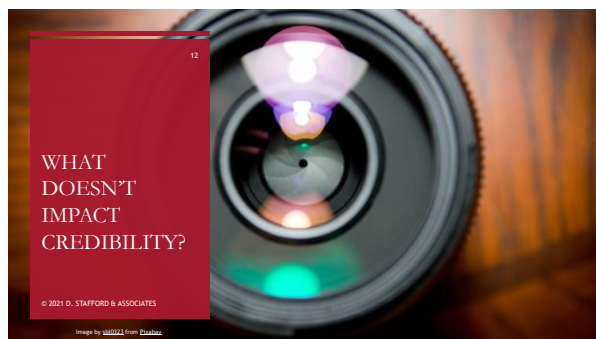
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### Do These Impact Credibility?



- Past Behaviors
- Post-Incident Behavior
- Character
- Interview Demeanor
- Identity

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### Past Behaviors



- Discipline
- Related Behaviors
- History with Party
- Mental Health
- Substance Use
- Sexual History

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### Post Incident Behaviors



- Mental Health Issues
- Substance Abuse
- Retaliatory Behaviors
- Business as Usual
- Counterintuitive Behaviors

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# Identity



Religion



Race, Gender



Disability



Upbringing



Sexual Orientation



Affiliation

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## INVESTIGATOR CREDIBILITY

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<b>Confirmation Bias</b> • Confirmed preconceived opinion	<b>Investigator Bias</b>
<b>Availability Bias</b> • Most important to the memory immediately recalled	
<b>Hindsight Bias</b> • See things as more predictable than they were	
<b>Foresight Bias</b> • Ability to predict future events	
<b>Identity Bias</b> • More likely to believe one group over another	
<b>Personal Experience Bias</b> • Believe similar experience (or disbelieve the dissimilar)	

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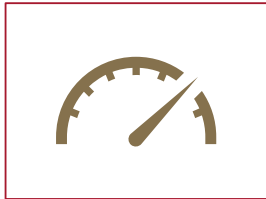
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**Deception** 



What is the percentage of people who cannot go 10 minutes without lying??

How good is our ability to detect lying?

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**Truthfulness** 



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Truthfulness 



Repeat v.  
Reconstruct



Consistency



Details

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## Reports and Relevancy

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### Agenda

- Title IX Requirements
- Reports
- Determining Relevancy

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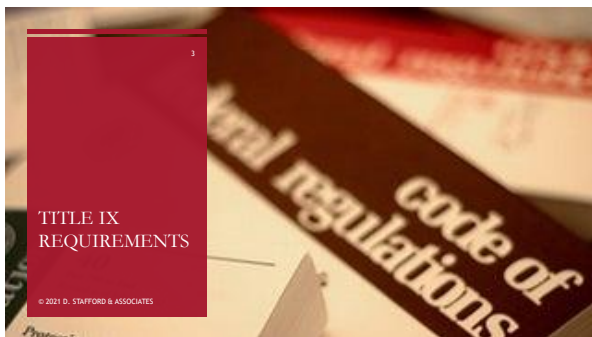
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## Evidence Review



“provide both parties an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint, including the evidence upon which the recipient does not intend to rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence whether obtained from a party or other source, so that each party can meaningfully respond to the evidence prior to conclusion of the investigation”



IMAGE BY JERRY GÓRECKI FROM PIXABAY

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REPORTS

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## Major Case Documents



### Pre-Investigation

### Investigation

### Decision



Formal Complaint



Notice of Investigation



Preliminary Report



Final Investigative Report



Written Determination

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## Versions of the Report



### Investigators



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## Preliminary Report



- Scope
- Methodology
- Evidence Obtained

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## Preliminary Report Components



### Scope

Alleged behavior  
Alleged policy violation(s)



### Methodology

Procedural steps (Notifications, interviews,  
methods used to gather evidence)

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## Preliminary Report Components - Evidence



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## Inspect and Review Stage



Send to party and advisor



Provide at least 10 days to review



Allow submission of written response



Investigator must "consider" written response prior to completion of report

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## Final Investigative Report



- Scope (from Preliminary Report)
- Methodology (Edited)
- Evidence Obtained (from Preliminary Report and any additional)
- Summary of Evidence (new)

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## Final Investigative Report Components - Evidence



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## Inspect and Review Stage



Send to party and advisor



At least 10 days before hearing



Allow review and written response

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## Versions of the Report



Preliminary Report

Scope  
Methodology  
Evidence Obtained



Final Report

Scope  
Methodology (edited)  
Evidence Obtained  
Summary of Evidence



Written Determination

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

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Resolution Types



Hearing



Informal Resolution

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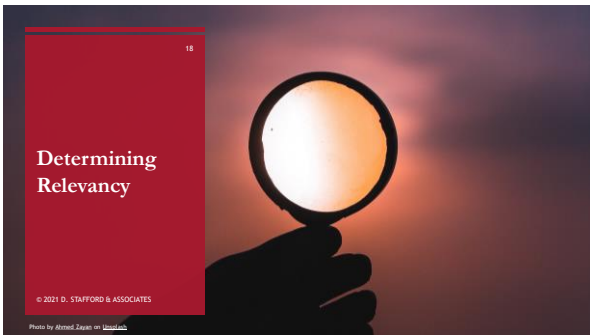
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## When is Evidence Relevant?



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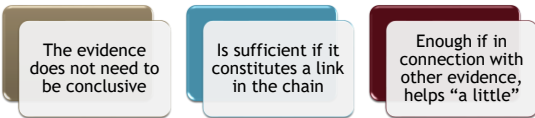
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## Key Relevancy Points



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## How Could These Be Relevant?



Admissions



Eyewitness



Communications

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How Could These Be Relevant?



Background



Charts



Floorplans

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How Could These Be Relevant?



Research



Expert Testimony

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What About...



Character and Character  
Traits

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## NOT RELEVANT (from the Title IX Regulations)



### 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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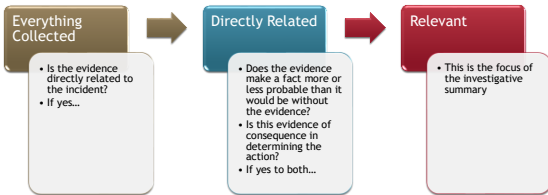
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## Relevancy Workflow



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