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Combined Sexual Misconduct and DVDVS Investigator Training Class

Presented by DSA Associates:

Cathy Cocks

Beth Devonshire

Adrienne Murray

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

Virtual Course Agenda;

5 Days (1/2 days): August 3-7, 2020

11am-5pm EASTERN Time

Breaks: 12:30pm-12:45pm and 2:15-2:30pm

Day 1-Monday, August 3: Legal: Title IX and the Clery Act and the Definitions

- Overview of New Regs T9
- The Clery Act for Title IX Practitioners
- Role of Title IX Personnel
- Breakouts: Key Implications of the Laws to Investigative Function

Day 2, Tuesday, August 4: Understanding the Elements and Dynamics of the Offenses

- Sexual Harassment
- Sexual Assault: Rape, Fondling, Incest and Statutory Rape
- Domestic Violence
- Dating Violence
- Stalking
- Breakouts all day (Key Considerations in Investigations Related to Type of Offense)

Day 3 – Wednesday, August 5-Process Considerations

- Complete Remaining Day 3 Items
- Review and Reflection
- Special Considerations
- Intake and Supportive Measures
- Breakout-Group Work (Case Studies)

Day 4 - Thursday, August 6: Process Stages

- Review and Reflection
- Consent and the Role of Alcohol and Other Drugs
- Investigative Strategy and Evidence Collection
- Interviewing
- Breakout-Group Work (Practical Applications in Interviewing)

Day 5 – Day 5: Friday, August 7: Case Evaluation

- Review and Reflection
- Credibility and Relevancy
- Resolutions and Outcomes
- Final Activity



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 1st 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 45th 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.



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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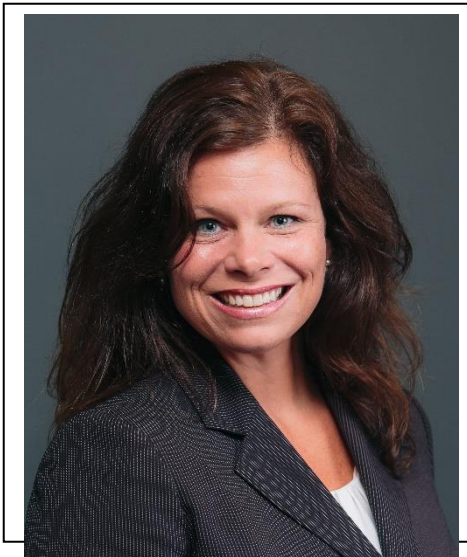
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Act compliance audits; assessments of Title IX compliance; Behavioral Intervention Team and Student Conduct Assessments and Training; and a host of other services related to security, safety and compliance for institutions of higher education.



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



**Major Changes and Requirements in Title IX
New Regs Overview**

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How We Got Here

- Title IX prohibits discrimination on the basis of sex
- ED and the courts have interpreted Title IX to prohibit sexual harassment (including sexual assault)
- Among other things, colleges and universities must investigate allegations of sexual harassment and take appropriate disciplinary action **WHEN CERTAIN CONDITIONS ARE MET**
- Cannot proceed unless those conditions are met

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How We Got Here (Cont.)

- Obama-era ED guidance focused on protecting complainants
 - The 2011 “Dear Colleague” letter
 - Mandatory “preponderance of the evidence” standard
- Trump/Devos-era ED has focused on the due process rights of the respondent
 - Rescinded Obama-era guidance
 - Issued informal guidance (including 2017 Q&A)
 - Engaged in formal rulemaking process

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Pending Litigation



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What Some Members of Congress are Saying:

Not only will this new rule make it harder for victims to come forward and receive help to stay in school, but it will also unduly hinder many schools from responding effectively to many incidents of sexual violence. As such, it is unsurprising that the American public overwhelmingly opposes this rule. When the Department first announced its proposed rule in November 2018, students, school officials, civil rights advocates, and government officials submitted nearly 125,000 comments in response, the vast majority of which strongly opposed the proposal. Still, the Department chose to flout the will of the people and move forward with its plans.

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Major Changes Under New Regs



- Jurisdiction
- Definitions
- Responsible employees
- Duty to respond
- Report vs signed formal complaints
- Role of advisor of choice
- Supportive measures
- Separation of duties
- Live hearings
- Notice requirements

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1. Definition of Sexual Harassment under Title IX

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

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

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1. Definition of Sexual Harassment under Title IX



Impact educational program or activities



Occurred in the context of educational program or activities



Control over the Respondent



In the United States




Hand-off to what?

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1. Definition of Sexual Harassment under Title IX




- Not just for students anymore
- Expectation that recipients handle any formal complaint that occurs through education program or activity in the United States through the grievance process


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2. Dismissal of Formal Complaints



Must Dismiss:
Behavior does not constitute sexual harassment
Did not occur in educational program or activity, 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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3. Consolidation of Complaints

Multiple Respondents


More than one complaint against one or more respondents


One party against another party


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4. Supportive Measures

 Non-disciplinary

 Both parties

 Academic, housing and athletic impact

 No contact orders

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5. Emergency Removal

- Individualized safety and risk analysis
- Immediate threat to physical harm
- Notice and opportunity to challenge

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6. 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	Updates as needed	Other: Accommodations Retaliation Police too!	

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7. Investigations and Evidence Gathering



- Burden of proof
- Witnesses and facts
- “Gag orders”
- Advisor
- Notice
- Inspect evidence
- Investigative report

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8. Informal Resolution



Notice



Voluntary



Not allowed for
employee/student

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9. Evidentiary Standard

<p>Clear and Convincing</p> <ul style="list-style-type: none"> ▪ Substantially more likely than not to have occurred ▪ High probability that a particular fact is true ▪ Higher than preponderance, but not as high as “beyond a reasonable doubt” 	<p>Preponderance of the Evidence</p> <ul style="list-style-type: none"> ▪ More likely than not ▪ 50% and a feather
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10. Hearings



Live hearing



Cross-examination

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10. Live Hearing

- Required element for all post-secondary grievance procedures
- “Single investigator” now prohibited
- In person or virtual
- Must be recorded or transcribed, with recording or transcript available to parties for inspection and review

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10. Cross-Examination

Advisor

Relevancy

Participation

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10ish. . . Decision-Maker’s Written Determination

- Decision-maker(s) must issue written determination that
 - Identifies allegations
 - Describes procedural steps
 - Includes findings of fact
 - Includes conclusions applying facts to code of conduct
 - Includes rationale for conclusion regarding each allegation
 - Describes appeal procedures



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10ish...Appeals

- MUST have**
 - Procedure...
 - New evidence...
 - Conflict or bias... that impacted outcome
- Additional grounds permitted**
- Appeal decision-maker must have had no other role**
- Must be done in a reasonably prompt time frame**

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10ish...Publication of Training Materials




- Institutions must publish on their website all materials used to train
 - Title IX coordinators
 - Title IX investigators
 - Title IX decision-makers
 - Any person who facilitates informal resolutions

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And then don't forget to add the Clery Requirements!

As you redevelop your institutional policies and procedures related to Title IX, remember, half the Clery Act contains requirements related to institutional disclosures, training, and procedures you must have in place when responding to a report of sexual assault, dating violence, domestic violence and stalking.



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Key Action Items

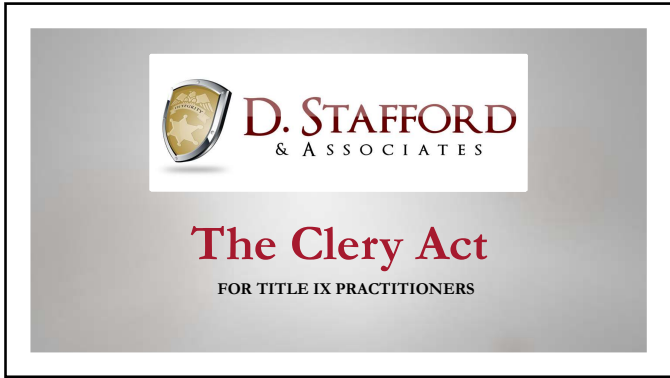
- Finalize policy
- How to handle complaints outside scope of Title IX
- Develop/update hearing procedures
- Update all training materials
- Train all Title IX personnel
- Prepare to train all employees & students

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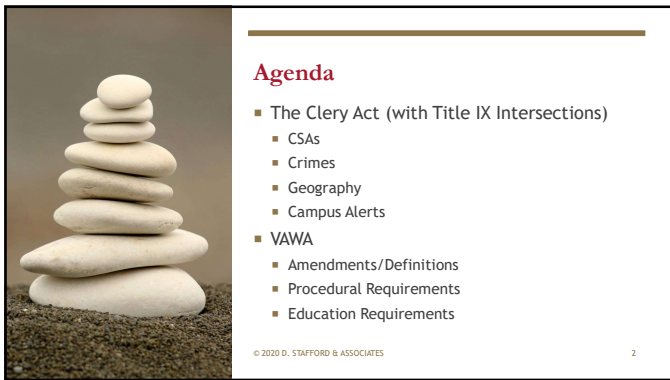
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1



2



3

Key Requirements (part 2)

- Provide Educational Programs and Campaigns on Dating/Domestic Violence, Sexual Assault, & Stalking
- Have Procedures for Institutional Disciplinary Action for DV/DV/SA/S
- If you have a campus police or security department: Publish Daily Crime Log
- If you have residential facilities: Fire Log, Fire Safety Report, Missing Persons Procedures

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Gettysburg College

2019 - 2020 Academic Year Annual Security and Fire Safety Report

Prepared by the Department of Public Safety
Includes Crime Statistics for Calendar Years (CYs) 2016, 2017 & 2018

COUNTING CRIME STATISTICS

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Three Part Test

1. Was the crime reported to a Campus Security Authority?
2. Is the crime a Clery Act crime?
3. Did the crime occur on or within the institution's reportable Clery geography?

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Campus Security Authorities (CSA)

Campus
police/security

Security
responsibility


Individual or
organization
where crimes
should be reported

An official with
responsibility for
student and
campus activities

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Who is never a CSA?



Professional Counselors

Licensed, professional counselors. Includes individuals who are unlicensed and uncertified but acting under the supervision of an exempt counselor, e.g., a graduate student doing an internship.



Pastoral Counselors

NOTE: These positions are exempt only when acting within the scope of their duties as a counselor or trainee.

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REPORT



**CSA
FUNCTION**

A CSA'S FUNCTION IS TO REPORT ALLEGATIONS OF CLERY ACT CRIMES MADE IN GOOD FAITH.


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Reporting Considerations

Title IX—"Officials with authority to institute corrective action on behalf of the institution" Clery Act--CSAs

- Title IX Coordinator
- Official(s) who can institute corrective measures on behalf of the school
- Any other person who is designated by the institution as a person who shall report
- Campus police department responsible for security
- individuals to whom crimes should be reported
- "officials with significant responsibility for student and campus activities"
- Local law enforcement



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COUNTING CRIME STATISTICS: CLERY CRIMES

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(See the Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act)						
Calendar Years (CY) 2016 – 2018						
Criminal Offense or Primary Crimes (Crimes Reported By Hierarchy)	Calendar Year	On Campus (Including Residential)	Non-Campus	Public Property	Totals	On Campus (Residential Only)
Murder & Non-Fatal Manslaughter	2016	0	0	0	0	0
	2017	0	0	0	0	0
	2018	0	0	0	0	0
Manslaughter by Negligence	2016	0	0	0	0	0
	2017	0	0	0	0	0
	2018	0	0	0	0	0
Rape	2016	11	2	0	13	11
	2017	25	2	0	27	18
	2018	14	2	0	16	10
Forcible Fondling	2016	11	1	0	12	8
	2017	4	1	0	5	4
	2018	0	0	0	0	0
Incest	2016	0	0	0	0	0
	2017	0	0	0	0	0
	2018	0	0	0	0	0
Statutory Rape	2016	0	0	0	0	0
	2017	0	0	0	0	0
	2018	0	0	0	0	0
Robbery	2016	0	0	0	0	0
	2017	0	0	0	0	0
	2018	0	0	0	0	0
Aggravated Assault	2016	4	0	0	4	4
	2017	3	0	0	3	3
	2018	3	0	0	3	3
Burglary	2016	32	3	0	35	33
	2017	7	1	0	8	7
	2018	3	1	0	4	3
Motor Vehicle Theft	2016	0	0	0	0	0
	2017	0	0	0	0	0
	2018	0	0	0	0	0

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11

Three Part Test

1. Was the crime reported to a Campus Security Authority?
2. Is the crime a Clery Act crime?
3. Did the crime occur on or within the institution's reportable Clery geography?

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Clery Crime Categories

- Primary Crimes
- Hate Crimes
- Arrests and Referrals for Drug, Liquor and Weapon Violations
- Dating Violence, Domestic Violence and Stalking Incidents (VAWA Crimes)

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Clery Reportable Crime Categories

- Murder/Non-negligent Manslaughter*
- Negligent Manslaughter*
- Sex Assault*
 - Rape
 - Fondling
 - Incest
 - Statutory Rape)
- Robbery*
- Aggravated Assault*
- Burglary*
- Motor Vehicle Theft*
- Arson*
- Arrests and Disciplinary Referrals for:
 - Liquor
 - Drugs
 - Weapons
- Domestic Violence
- Dating Violence
- Stalking
- Hate Crimes for *, plus
 - Larceny-Theft
 - Simple Assault
 - Intimidation
 - Destruction/Damage/Vandalism of Property

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Counting Clery Crimes

If a crime is reported (and otherwise meets the three-part test) it is counted.

- Includes attempts
- Includes cases a DA would reject
- Includes cases of "not responsible"
- Does NOT include every conduct code violation

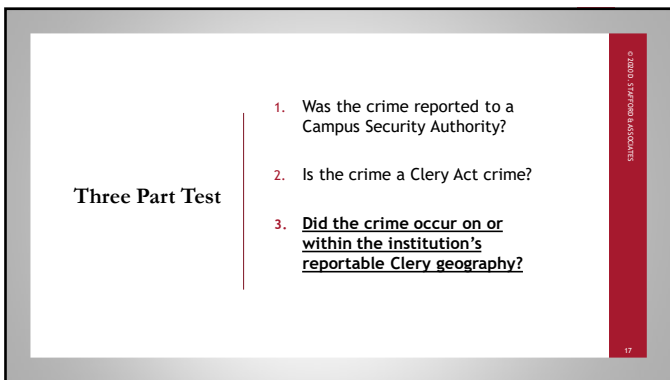
It is not the word used but the facts of the case that determine how it gets counted

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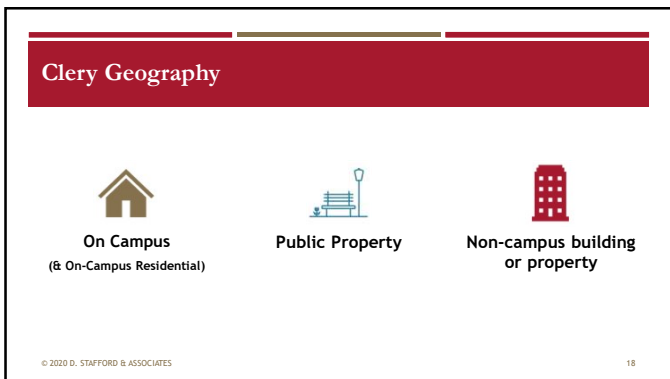
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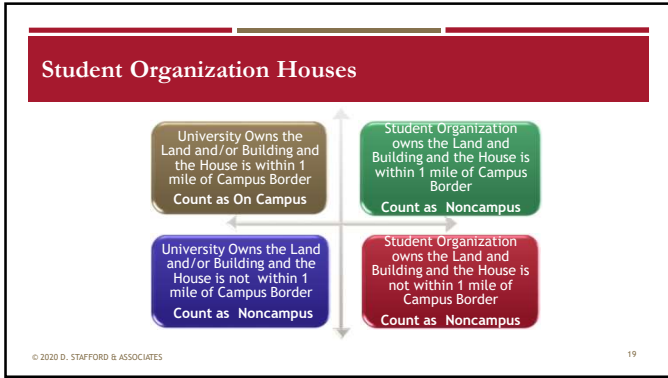
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Impact of Location & Party

- 2020 Title IX Regulations
 - Conduct that occurs within its 'education program or activity'
 - Against a person within the United States
 - School must have exercised substantial control over both the respondent and the context in which the sexual harassment occurs
 - Also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution
- Clery Act
 - On campus; on public property within or immediately adjacent to and accessible from the campus; in or on non-campus buildings or property that your institution (or a recognized student organization) owns/controls
 - May include some study abroad programs
 - For VAWA crimes, must use processes even if occurs off-campus

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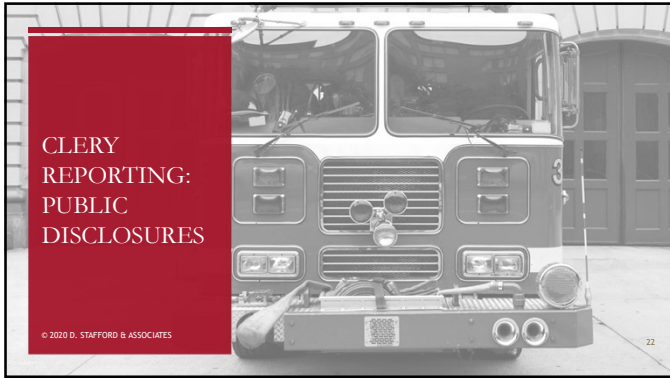
Geography versus Jurisdiction

Geography is the defined physical area in which the Clery Act attaches. A crime **MUST** occur within the institution's physical Clery geography to be captured.

Jurisdiction generally describes authority to apply law to a certain area and/or to certain persons. For example, under Title IX, an act may not physically occur on campus, but if it occurs within certain programs between certain people, Title IX attaches.

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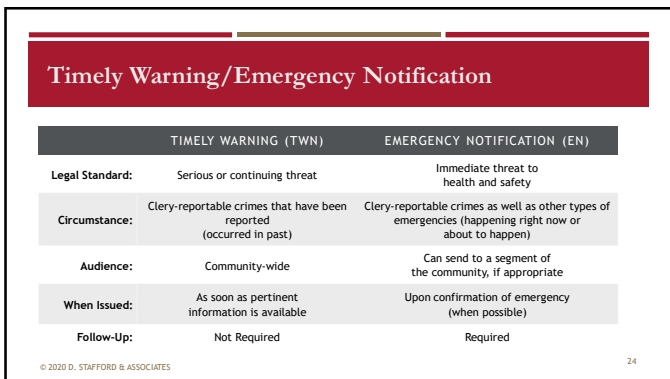
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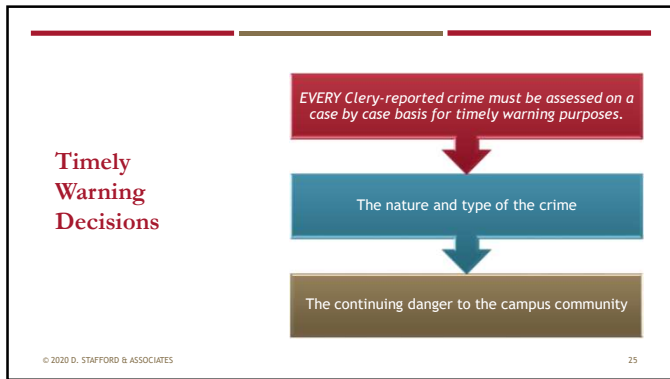
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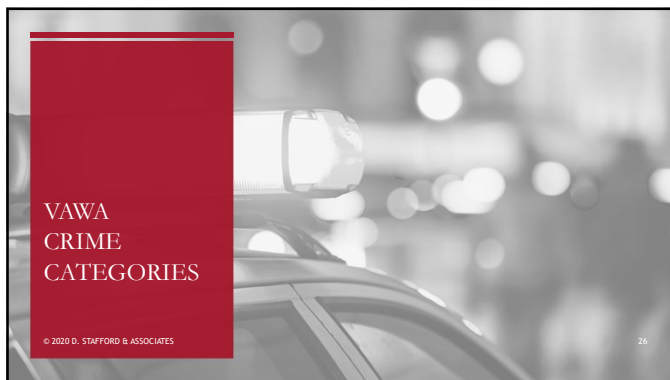
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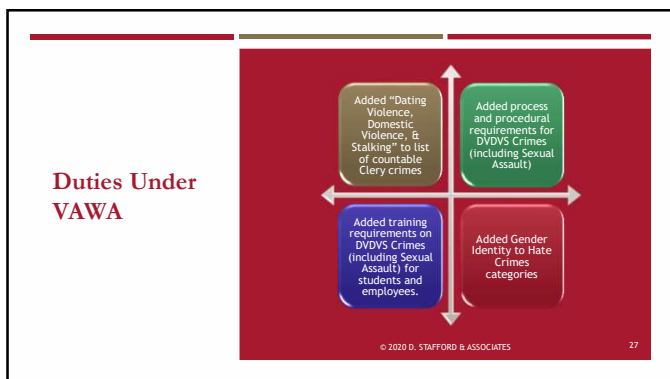
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Clery Crime Categories

- Primary Crimes
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- Arrests and Referrals for Drug, Liquor and Weapon Violations
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Rape 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. This definition includes any gender of victim or respondent.

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Fondling The touching of the private body parts of another person for the purpose of sexual gratification without consent of the victim, including instances where the victim is incapable of giving consent b/c of his/her age or temporary or permanent mental or physical incapacity.

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Consent

- The Clery Act does not require any particular definition of consent
- ASR must include definition of consent as defined by jurisdiction (state law)
- Institution should have a definition in their institutional sexual misconduct policy

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Sexual Assault

INCEST
Non-forcible sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law

STATUTORY RAPE
Non-forcible sexual intercourse with a person who is under the statutory age of consent

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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 occurred OR
- 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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What is a "Crime of Violence?"

- According to Section 16 of title 18 of the United States Code, the term "crime of violence" means
 - an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
 - any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

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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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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
- Suffer substantial emotional distress

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Stalking (related definitions)

- a) **Course of conduct** means two or more acts, including, but not limited to, acts 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.
- b) **Reasonable person** means a reasonable person under similar circumstances and with similar identities to the victim.
- c) **Substantial emotional distress** means significant mental suffering or anguish that may, but does not necessarily, require medical or other professional treatment or counseling.

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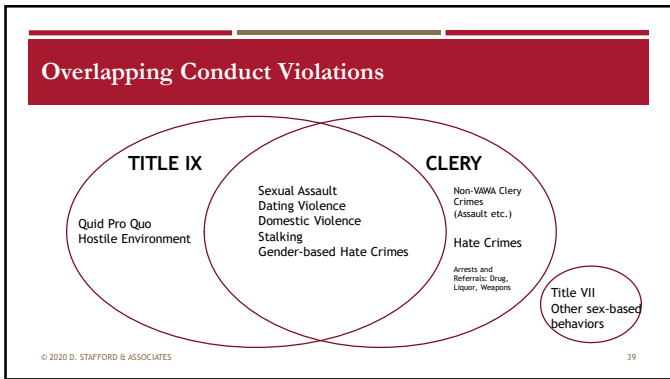
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Discussion: What's Missing?

- Are there sex-based offenses that are not included here but should be included in our conduct codes?
- Are there other behaviors that are sex-based that are not included here but should be included in our conduct codes?

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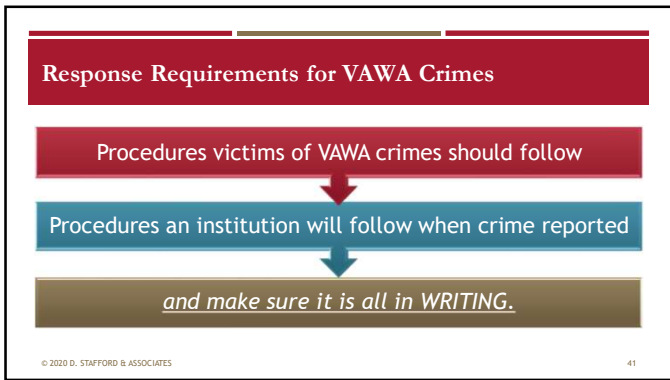
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Written Explanation of Student or Employee's Rights

(b)(11)(vii) "When a student or employee reports to the institution that the student or employee has been a victim of dating violence, domestic violence, sexual assault, or stalking, whether the offense occurred on or off campus, the institution will provide the student or employee a written explanation of the student's or employee's rights and options, as described in paragraphs (b)(11)(ii) through (vi) of this section. . . "

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Written Explanation of Rights and Options

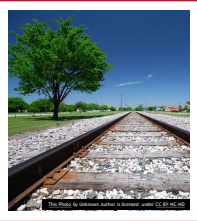


- The importance of preserving evidence** that may assist in proving that the alleged criminal offense occurred or may be helpful in obtaining a protection order
 - Not required but recommended: Where to obtain forensic exams, contact info, does not require police report and can have exam now, decide later
- How and to whom the alleged offense should be reported**
 - List any person or organization that can assist the victim
 - Recommended: Also include community organizations

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Written Explanation of Rights and Options




- Notification of the victim's option to**
 - Notify proper law enforcement authorities, including on-campus and local police;
 - Be assisted by campus authorities in notifying law enforcement authorities if the victim so chooses; and
 - Decline to notify such authorities
- The rights of victims and the institution's responsibilities for**
 - orders of protection,
 - "no contact" orders,
 - restraining orders, or
 - similar lawful orders issued by a criminal, civil, tribal, or institutional

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Written Explanation of Rights and Options




- To students AND employees about existing:**
 - Counseling
 - Health
 - Mental Health
 - Victim Advocacy
 - Legal Assistance
 - Visa and Immigration Assistance
 - Student Financial Aid
 - Other services available for victims
- Options for, available assistance in, and how to request changes to (if requested and reasonably available)**
 - Academic, Living, Transportation, Working

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Written Explanation of Rights and Options



- 7. **Confidentiality**
 - Publicly available recordkeeping has no personally identifying information about the victim. (not required for respondent but best practice in most cases)
 - Accommodations and protective measures are confidential (to the extent they can be without impairing the ability to provide them)
- 8. **Disciplinary Procedures**
 - An explanation of the procedures for institutional disciplinary action in cases of alleged dating violence, domestic violence, sexual assault, or stalking, as required by paragraph (k)

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Response to “Actual Knowledge”

- **2020 Title IX Regulations**
 - Contact the Complainant
 - Offer and/or implement supportive measures
 - Explain the process for filing a formal complaint
- **Clery Act**
 - Written explanation of victim’s rights and options including:
 - procedures to follow (preserve evidence, where report)
 - information about confidentiality
 - existing counseling, mental health, assistance etc.
 - access to law enforcement and no contacts etc.
 - changes to academic, living, transportation and working situations, institutional procedures
 - process for Institutional disciplinary process
 - Assess for Timely Warning Notice OR Emergency Notification

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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 under Clery

NO



TALKING

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Advisor Requirement

- Advisor - individual who provides support, guidance, or advice
- Do not limit the choice of advisor
- May restrict participation if apply equally
- Provide timely notice of meetings
- May form a pool of people
- Can remove a disruptive advisor
- Could allow them to serve as a proxy
- Don't have to delay for them (but encouraged to be reasonable)

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Advisor Requirement






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Standard of Evidence



- **2020 Title IX Regulations**
 - Either the preponderance of the evidence standard or the clear and convincing standard but must be the same for all sexual misconduct
- **Clery Act**
 - Any standard of evidence ... must include in policy
 - Would not prohibit using different standards for different groups

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2020 Title IX Regulations

- Can offer, but may not require
- Not allowed for “employee on student” sexual harassment
- Party may withdraw up to a point

Clery Act

- Written information about procedures the institution will follow for VAWA offense (does not differentiate between formal vs informal)

Informal Resolutions

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Formal Complaint Rights

2020 Title IX Regulations

- Treat equitably with goal to restore/preserve access to education; due process for respondent;
- Include presumption of not responsible;
- Include any discipline for false statements
- reasonably prompt time-frames*;
- Describe the range of sanctions;
- Describe range of supportive measures


Clery Act

- 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)



2020 Title IX Regulations

Requires live hearing with cross examination by advisor



Clery Act

Clery is silent regarding live hearing

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Written Determination

Title IX

- Identification of the allegations
- Procedural steps taken from receipt through determination
 - notifications to the parties
 - interviews with parties and witnesses
 - site visits
 - methods used to gather other evidence
 - hearings held
- Findings of fact supporting the determination
- Conclusions regarding the application of code of conduct to the facts
- Result (responsibility, rationale, sanctions, remedies for each allegation)
- Appeals procedures
- When results become final (post appeal)

Clery Act

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

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Clery Requirements for Officials



training

- Training must be described in ASR
- Annual
- Should include (at a minimum):
 - Relevant evidence and how it should be used
 - Proper interview techniques
 - Basic procedural rules for conducting a proceeding
 - Avoiding actual/perceived conflicts
- Can be in person or electronic (webinar or video)

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Bias Free and Training for "Officials"

Title IX ("Title IX Personnel")

- Training for all on...
 - definition of sexual harassment in § 106.30
 - the scope of the recipient's education program or activity
 - how to conduct an investigation and grievance process
 - how to serve impartially, including by avoiding prejudgment of the facts
- Decision Makers
 - training on any technology and on issues of relevance
- Investigators
 - relevance to create an investigative report that fairly summarizes
- Training materials must not rely on sex stereotypes

Clery ("Officials")

- Annual training on
 - the issues related to dating violence, domestic violence, sexual assault and stalking and on
 - how to conduct an investigation and hearing process that protects the safety of the victims and promotes accountability

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Appeals

<p>2020 Title IX Regulations</p> <ul style="list-style-type: none"> • Must offer both parties an appeal • Based on specific grounds 	<p>Clery Act</p> <ul style="list-style-type: none"> • 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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Recordkeeping

<p>2020 Title IX Regulations</p> <ul style="list-style-type: none"> • 7 years 	<p>Clery Act</p> <ul style="list-style-type: none"> • 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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VAWA Education Requirements



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Education and Prevention under Clery

- Annual training for conducting "officials" (Investigators, Adjudicators, Appeals)
- Primary Prevention and Awareness Programs for all incoming students and new employees
- Ongoing Prevention and Awareness Campaigns for ALL students and employees
- CSA Training and "Super" CSA Training

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Primary Prevention Best Practices

"Programming, initiatives, and strategies intended to stop dating violence...stalking... before they occur through the promotion of positive and healthy behaviors that foster healthy, mutually respectful relationships and sexuality, encourage safe bystander intervention, and seek to change behavior and social norms in a health and safe directions."


- Not required that all students take or attend (but mandate encouraged)
- Must show "good faith effort" to reach them with "active notification"
- Format and timeframe encouraging maximum attendance
- Equally important to prevent perpetration as it is to prevent victimization

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Primary Prevention & Awareness

"The institution's primary prevention and awareness programs for all incoming students and new employees, which must include..."



- Statement prohibiting dating DVDVSAS
- Definitions of DVDVSAS
- Definition of consent
- Safe and positive options for bystander intervention;
- Information on risk reduction

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Ongoing Prevention & Awareness

"Ongoing prevention and awareness campaigns for students and employees...must provide the same information as the primary awareness and prevention programs"



- Deeper dives
- Sustained over time
- Promote services
- Range of strategies/audiences
 - Social media, email, posters, ads
 - Take Back the Night
 - Sports teams, Greek, dorms
 - Student fairs or campus events
 - DV program for supervisors

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CSA Training (Recommendations, Not Requirements)



- Role of a CSA
- Provide Reporting materials
 - Map of Clery geography
 - Definitions of Clery crimes
 - Forms for documenting and reporting
- Importance of documentation
- Need for timely reporting
- "Super CSAs?"
- Personally Identifiable Information

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Title IX Personnel – Title IX Coordinator

- Accepts reports, determines jurisdiction, and if Title IX, offers supportive measures to Complainant and explains process, including the option to file a Formal Complaint
- Accepts or signs Formal Complaints
- Coordinates each investigation and offers supportive measures to the Respondent
- Drafts all Title IX related notice documents
- Assigns Investigators for each investigation, if applicable
- Assigns the advisor of the institution's choice for the live hearing if a party does not have one
- Oversees the live hearing procedures, but does not make any decisions regarding the outcome of the allegations

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Title IX Personnel – Decision-maker

- Emergency Removal/Administrative Leave decision maker, hearing bodies, and appeal officers (both for emergency removal and administrative) are all considered "decision-makers"
- Decision-makers can only serve one role within a case
- Emergency Removal/Administrative Leave
 - Makes the determination if a removal or leave is necessary
- Hearing
 - Reviews the investigation report and evidence
 - Manages the hearing (Asks questions of the parties and manages cross-examination by the advisors, including determining relevancy of questions)
 - Issues notice of findings including allegations, procedural steps, findings of fact, conclusion/application, rationale for each allegation (determination, sanctions, remedies), appeal procedures
- Appeal
 - Hears the appeal of a removal or leave (it cannot be the same person who initiated the removal/leave)
 - Hears the appeal of the hearing (it should not be the same person who heard the removal/leave appeal)

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Title IX Personnel – Investigators and Advisors

- **Investigators**
 - Interviews both parties and witnesses
 - Gathers evidence
 - Write the preliminary and final investigative reports
- **Advisors**
 - Chosen by the party; can have throughout the process but not required until live hearing
 - Receives evidence and investigation report
 - Conduct cross-examination at the hearing
 - If a party does not have an advisor at the live hearing, the institution must provide one (of the institution's choice)

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**Understanding the Elements
and Dynamics of the Offenses**

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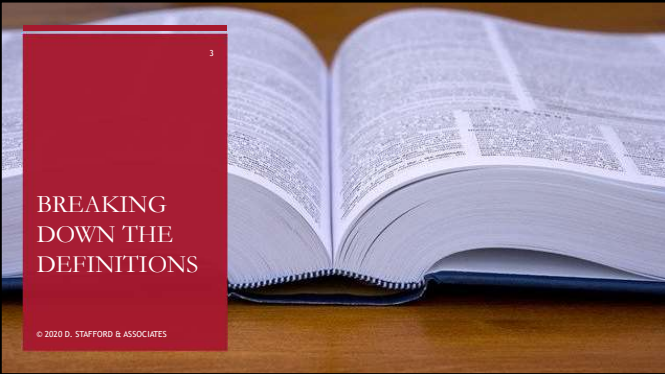


Agenda

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

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**BREAKING
DOWN THE
DEFINITIONS**

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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)(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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Understanding the Elements

 Elements Actions Conditions	 Additional info Clarifiers Exceptions
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Roles in the Process

Investigator

- Evidence for each element
- Evidence of any exceptions

Roles in the Process

Decision-maker

- Weight the evidence provided
- "Reasonable person" standard

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The “Elements”

- What evidence **MUST** be collected to show the definition was met?
- How do we get that evidence?

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Elements of Sexual Harassment

- Is it conduct on the basis of sex?
- Was it unwelcome?
- Was it Sexual Harassment?
 - Quid Pro Quo
 - Hostile Environment
 - 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 CRIMES

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All 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




 "This for That" Harassment

 When favorable professional or educational treatment is conditioned on a sexual activity

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Power Dynamics

-  Faculty/student
-  Supervisor/supervisee
-  Coach/athlete

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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

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

- FOR TITLE IX: MUST be an employee
- For Non-Title IX:
 - Perceived power of the Respondent?
 - Does the respondent have said power?

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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

- "implied from the circumstances"
- "whether the 'bargain' proposed ... is communicated expressly or impliedly"

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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/student records, reputation, access, status

- How was it conditioned/communicated?

- Implied, stated, written

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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

- Less proof needed that it was unwelcome
- Does not need to be severe and pervasive

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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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Prong 1 Case Study

Michael complains to the Title IX Coordinator 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 that 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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Group Discussion



Breakout groups

Each group will be assigned a breakout room

Identify a reporter who will present back to the larger group



15 minutes of group discussion



Reporting out

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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?

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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REPORT OUT

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PRONG 2: Hostile Environment +

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**

-  Hostile Environment +
-  First Amendment protections
-  Not a "zero tolerance" standard

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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 +

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

- Not the same as Title VII "hostile environment" or 2001 Guidance "hostile environment"
- Hostile Environment +
 - Adds the "and"
 - Adds "equal access"

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PRONG 2: Hostile Environment +

FIRST AMENDMENT ISSUES

- "Does not punish verbal conduct in a manner that chills and restricts speech and academic freedom"
- "Not held responsible for controlling every stray, offensive remark"
- Only "verbal conduct so serious that it loses First Amendment protection and denies equal access"

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PRONG 2: Hostile Environment +

NOT ALL UNWELCOME SEXUAL CONDUCT COUNTS

- Not a "zero tolerance" policy banning sexual harassment"
- Captures physical and verbal conduct serious enough to warrant the label "abuse"
- School children regularly engage in "insults, banter, teasing, shoving, pushing, and gender-specific conduct that is upsetting" but may not be severe and pervasive.

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Hostile Environment +

NO INTENT REQUIREMENT IN DAVIS STANDARD

- “By not imposing an “intent” element into the sexual harassment definition, § 106.30 517 makes clear that sexual harassment under any part of the § 106.30 definition cannot be excused by trying to blame the victim or rationalize the perpetrator’s behavior, tactics pointed to by commenters (and supported by research) as common reasons why victims (particularly women) have often faced dismissiveness, shame, or ridicule when reporting sex-based violence to authorities.”

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PRONG 2: Hostile Environment +



Sex

Gender-based



Unwelcome



Conduct

Severe
Pervasive
Objectively offensive
Reasonable person



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 Identity, Gender Expression, Sexual Orientation

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Gender-based Harassment

- Acts of verbal, nonverbal, or physical aggression, intimidation, or hostility based on sex or sex-stereotyping, but not involving conduct of a sexual nature
- “Includes unwelcome conduct devoid of sexual content that targets a particular sex”

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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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Hostile Environment +

PERVASIVE

- May “provide supportive measures ...even where the harassment is not pervasive”
- Disseminating “revenge porn” or conspiring to sexually harass people ... may be pervasive particularly where ... conduct involves widespread dissemination of offensive material or multiple people agreeing to potentially victimize others

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Hostile Environment +

INVESTIGATION OF PERVASIVE

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

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Hostile Environment +

OBJECTIVELY OFFENSIVE/REASONABLE PERSON

- “Whether, standing in the shoes of the complainant, the conduct would be offensive”
- “Turns on both subjectivity (i.e., whether the conduct is unwelcome, according to the complainant) and objectivity (i.e., “objectively offensive)”
- “Different people may reach different conclusions about similar conduct”

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Hostile Environment +

INVESTIGATING OBJECTIVELY OFFENSIVE?

- Not for the investigator - but for the decision-maker to determine
- Must confirm, however, that it was offensive to the Complainant

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Hostile Environment +

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: Case Study

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Pat reports 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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Group Discussion



Breakout groups

Each group will be assigned a breakout room

Identify a reporter who will present back to the larger group



15 minutes of group discussion



Reporting out

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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?

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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.

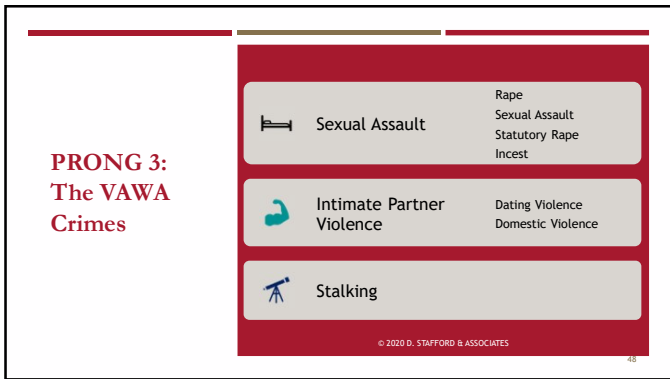
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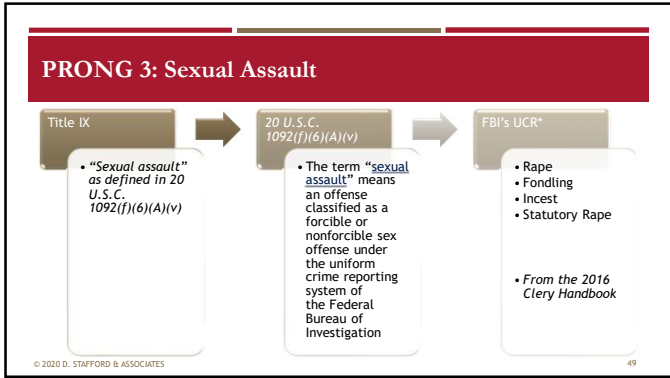
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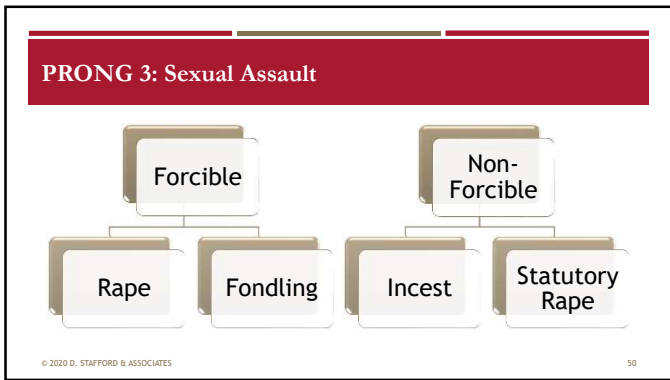
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PRONG 3: Sexual Assault (1 & 2)

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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PRONG 3: Sexual Assault



Sex act



Without consent

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Definitions - 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

- Penetration type(s)
- Clothing and clothing removal
- Birth control

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Element Two - 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
- Misinterpreted behaviors
- Power differentials (real or perceived)

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Element Two – Consent (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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Definition - 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
 - Administration of a date rape drug
 - Touching a non-private body part with the perpetrator’s private body part

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Definition - 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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Definition - 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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Definition - STATUTORY RAPE

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

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Intimate Partner Violence

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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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PRONG 3: Intimate Partner Violence

“dating violence” as defined in 34 U.S.C. 12291(a)(10), “domestic violence” as defined in 34 U.S.C. 12291(a)(8)

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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

Cross-claims

Primary aggressor

Interviews

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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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Group Discussion



Breakout groups

Each group will be assigned a breakout room

Identify a reporter who will present back to the larger group



30 minutes of group discussion



Reporting out

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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

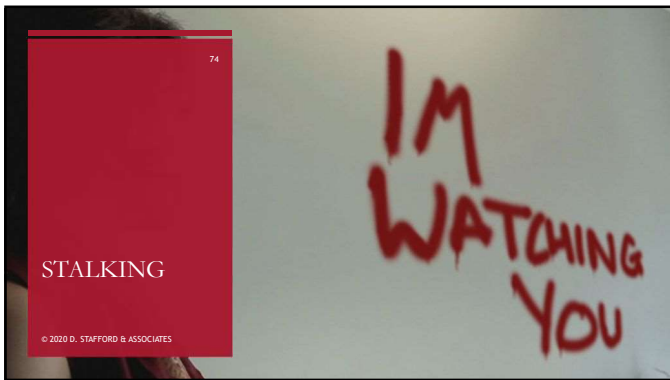
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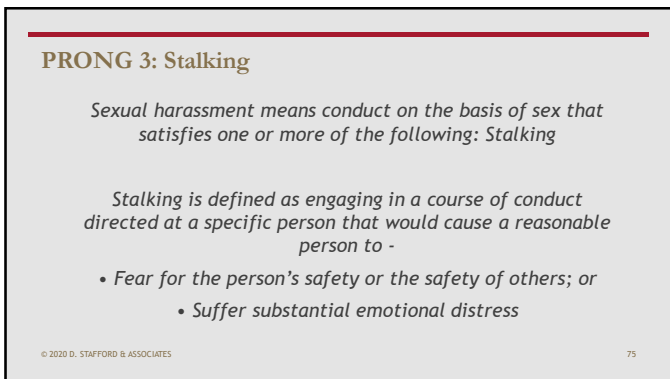
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Defining Stalking

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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Breaking Down the Definition

Acts of stalking behavior

Directed at a specific person

Two or more acts

Fear or emotional distress

Reasonable person

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Defining Stalking

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.”

“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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Defining Stalking

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.”

- “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.”
 - Who: stalker or third party
 - How: any action, method device or means
 - What: follows, monitors, observers, surveils, threatens or communicates

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Defining Stalking

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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- Specific Person: “to or about a person or interferes with a person’s property”

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Defining Stalking

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.”

- Is the victim:
 - afraid for their safety
 - afraid for the safety of others or
 - suffering substantial emotional distress
- If not, would a reasonable person in the victim’s position experience any of these effects?

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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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Defining Stalking

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.”

- Reasonable person means a reasonable person under similar circumstances and with similar identities to the victim

▶ Reasonable college student
▶ The complainant’s perspective

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Defining Stalking

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.”

- Reasonable person means a reasonable person under similar circumstances and with similar identities to the victim

▶ Totality of the circumstances
▶ Eggshell/bowling ball complainants

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STALKING - SPECIAL CONSIDERATIONS

- Stalking and Interpersonal Violence
- Stalking and disability considerations
- Stalking under Title IX

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Sanctioning and Remediating Stalking

- Motivation
 - Revenge
 - Fear
 - Joke
 - Power
- Impact
 - Severity
 - Work/school
 - Reputation
 - Emotional distress

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Prong 3: Case Study

Sam reports 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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Group Discussion



Breakout groups

Each group will be assigned a breakout room

Identify a reporter who will present back to the larger group



15 minutes of group discussion



Reporting out

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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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REPORT OUT



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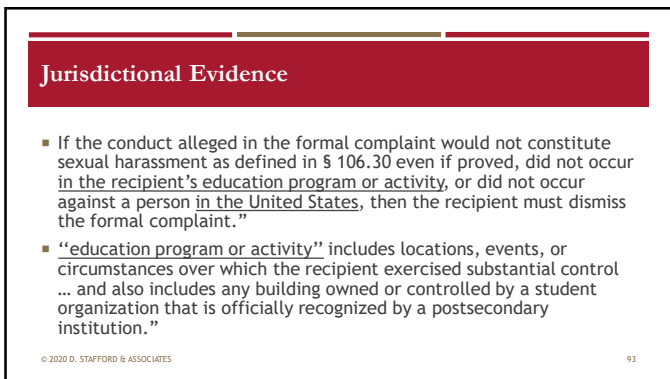
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Party Evidence

- “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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Retaliation

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Bias or Conflict of Interest

ON APPEAL: “The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter.”

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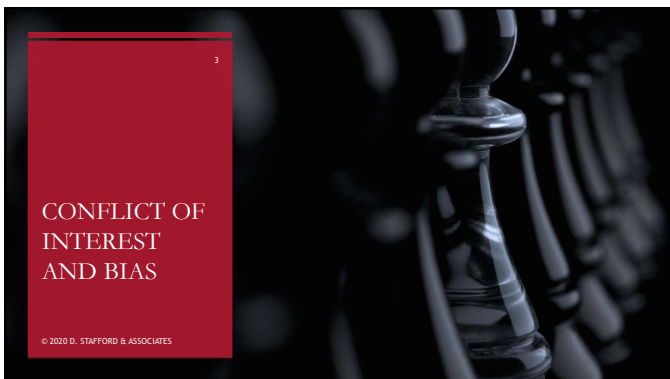
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3

Conflicts of Interest

Roles on campus Past employment Volunteering Social media presence

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Recognizing Bias

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Discussion: Bias

What is the difference between *implicit bias* and *explicit bias*?

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Bias

Parties Race Gender Sexual orientation Disabilities

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Bias

Personal experience Personal identity Social identity Theoretical perspective

Professional identity Religious perspective Political perspective

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Intersectionality

Race and ethnicity Immigrants Gender Sexual orientation Disabilities

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Considerations

- Low reporting
- Who is reporting?
- More reports of stranger rape than acquaintance rape
- More likely to report when a different race

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Barriers to Reporting

- Race
- Sexual Orientation
- Disabilities

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Impact on Reporting

- Race
- Sexual Orientation
- Disability

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Discussion:
What are potential biases with each of the parties?

- Complainant
- Respondent
- Witnesses

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What are biases with each of the parties?

Complainant


Respondent

Witnesses


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Race



Historical context



Stereotypes

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Gender

Perception Impact on credibility

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Gender Identity and Sexual Orientation

Higher risk

Fewer reports

Lack of understanding

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Disability

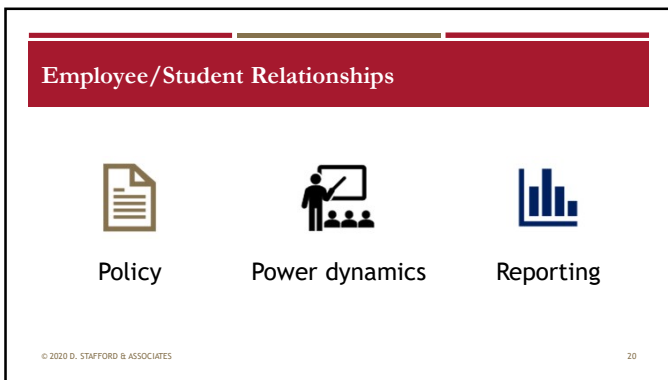
Limited data is available Neuro processing implications Stereotypes Accessibility Accommodations

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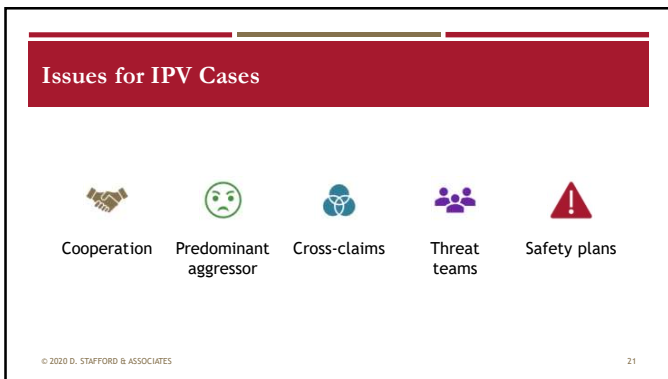
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Issues for Stalking Cases

- Recognize behaviors
- Duration
- Frequency
- Safety plan

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Retaliation

- Identify behaviors
- Which policy?
- Remedies
- What qualifies?

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UNDERSTANDING STRESS AND TRAUMA

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Keep in Mind

Application Neutral Fact-finder

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Comparison

Stress Trauma

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 **NEUROBIOLOGY**


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Impact on Memory



Details




Time and Context


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Response



Reflex




Habit

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Interviewing



Consistent application



Ask clarifying questions



Avoid bias

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Intake and Supportive Measures

1



Agenda

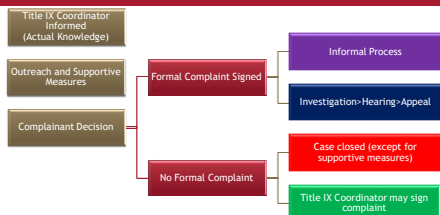
- Review Title IX and Clery Regulations
- Contacting the Complainant
- Contacting the Respondent

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Title IX Case Flowchart



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3

3



4

Actual Knowledge

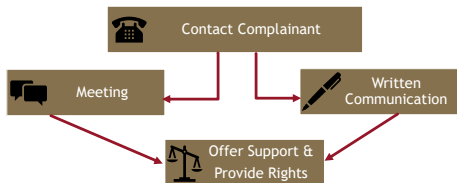
- Title IX
 - "Actual knowledge means notice of sexual harassment or allegations of sexual harassment to a recipient's Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient, or to any employee of an elementary and secondary school."
- Clery
 - Campus police, security, or official with significant responsibility for student and campus activities
 - "Official" is any person who has the authority and the duty to take action or respond to particular issues on behalf of the institution

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5

Actual Knowledge - Next Steps



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Terminology

Clery

- Accommodations
 - Victim
- Protective Measures
 - Victim
- Support Services
 - Victim
 - Accused (can but not required)
 - Employees

Title IX

- Supportive Measures (2020 Title IX Regulations)
 - Complainant
 - Respondent

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2020 Title IX Regulations - Supportive Measures

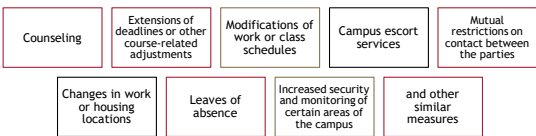
- Non-disciplinary, non-punitive individualized services
- Offered as appropriate, as reasonably available, and without fee or charge
- To the complainant and/or the respondent
- Before or after the filing of a formal complaint or where no formal complaint has been filed
- Designed to restore or preserve equal access to the recipient's education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the recipient's educational environment, or deter sexual harassment
- The recipient must maintain as confidential any supportive measures provided to the complainant or respondent, to the extent that maintaining such confidentiality would not impair the ability of the recipient to provide the supportive measures
- The Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures

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8

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2020 Title IX Regulations - Supportive Measures

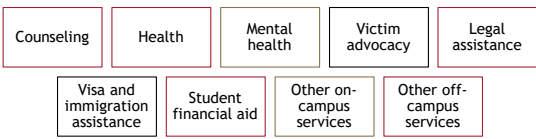


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Clery Support Services and Resources



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Clery Accommodations and Protective Measures



Clery Accommodations



Clery Protective Measures

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Title IX Formal Complaint



Filed/Signed



Alleging sexual harassment



Requesting an investigation (or informal option)

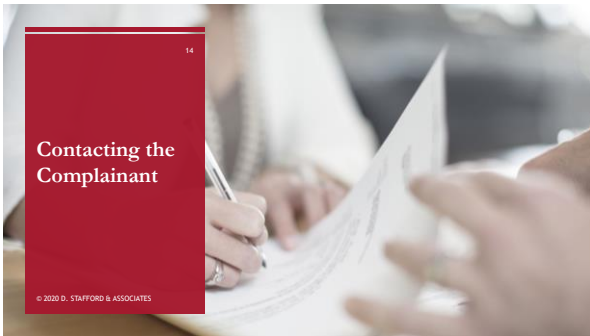
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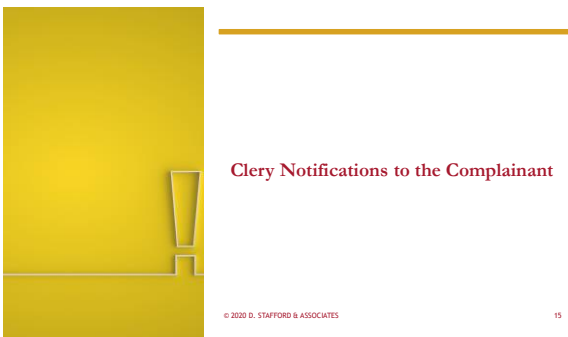
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What is the Difference?



Confidentiality



Privacy

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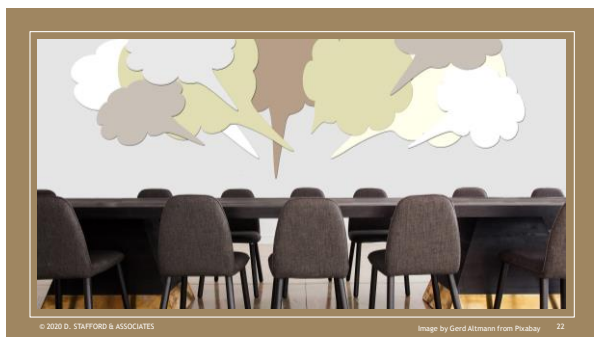
Follow-Up Steps



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Follow-Up Steps



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- When is touching ok?
- When is sexual touching ok?
- How do you know if you have consent?
- How do you know when consent is withdrawn?

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Affirmative Consent

Yes means Yes!



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§106.30 Definitions – Consent

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

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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

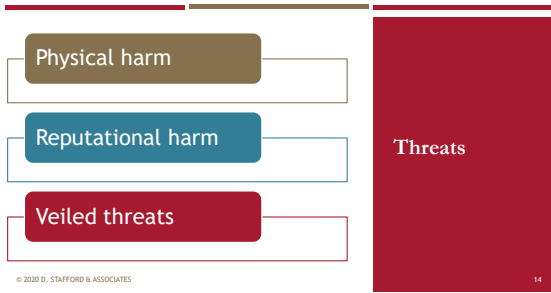


Verbal

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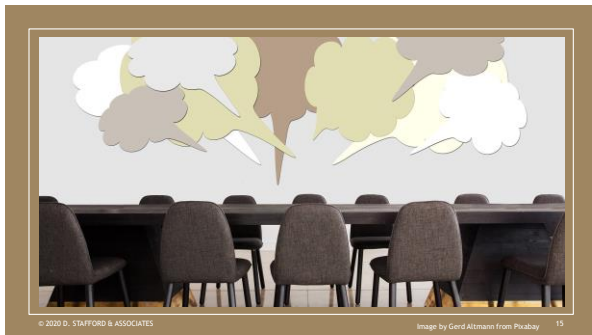
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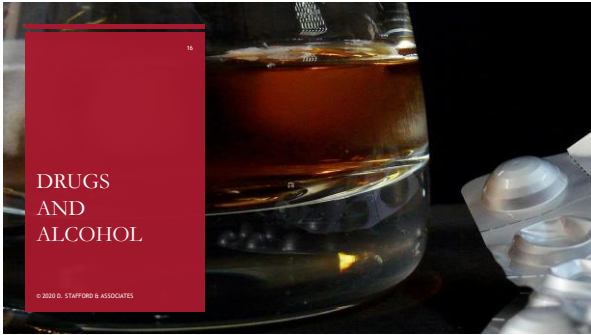
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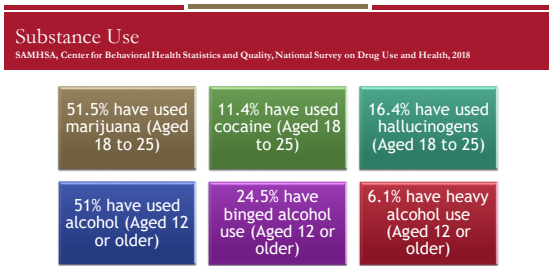
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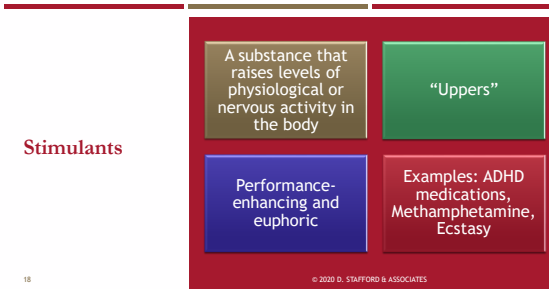
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Depressants

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



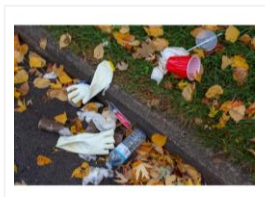
1.5 OZ 80 PROOF

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What is a Drink in College?



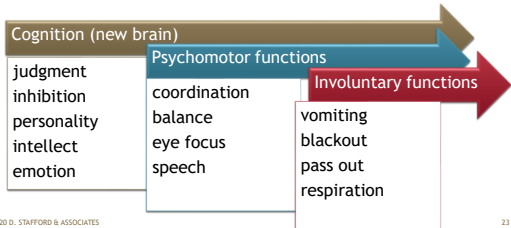
- Water bottle
- Boxed wine
- Solo cups

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Impact of Alcohol Consumption Levels

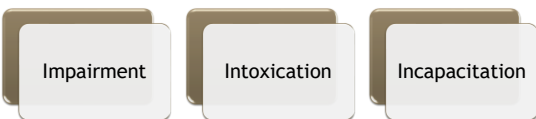


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Levels of Consumption



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Impairment

- The state of being diminished or weakened due to the consumption of alcohol.
- Alcohol is a nervous system depressant.
- Impairment begins as soon as alcohol enters the bloodstream.
- Impairment increases with consumption of alcohol.

Question: Can two initially IMPAIRED people legally have sexual intercourse?

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Intoxication



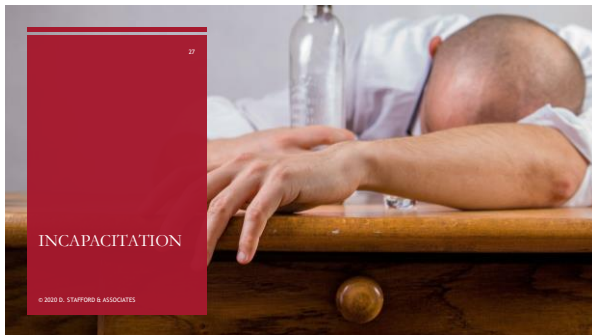
- An act or instance of inebriation; drunkenness.
- Intoxication is legally met when an individual's blood alcohol level reaches .08 or greater.

Question: Can two INTOXICATED people legally have sexual intercourse?

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INCAPACITATION

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Incapacitation

- Physical and mental impairment
- Temporary or permanent
- Decisions and judgement
- Unconscious, sleep, blackout

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Incapacitation – Not Alcohol Related



Physical



Mental

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Incapacitation



Unconscious



Sleep



Blackout

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Incapacitation Questions

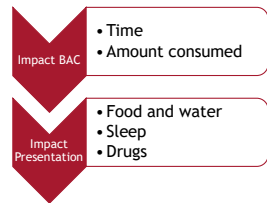
- Were any parties or witnesses INCAPACITATED?
- Were any parties or witnesses IMPAIRED to a degree that it would impact memory and actions?
- Were any parties impaired during the interview to a degree that it would impact recall and judgement?

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Incapacitation



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Blood Alcohol Content



Number of drinks



Body weight



Time

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Incapacitation

- Smell
- Slurred speech
- Bloodshot eyes
- Cannot stand
- Cannot walk
- In and out of consciousness
- Blackout
- Vomiting
- Behavior

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- 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?

Incapacitation

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Two-Step Determination

Was the Complainant Incapacitated?

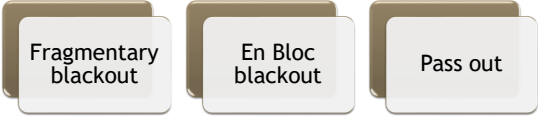
Did the Respondent (or would a reasonable person) know?

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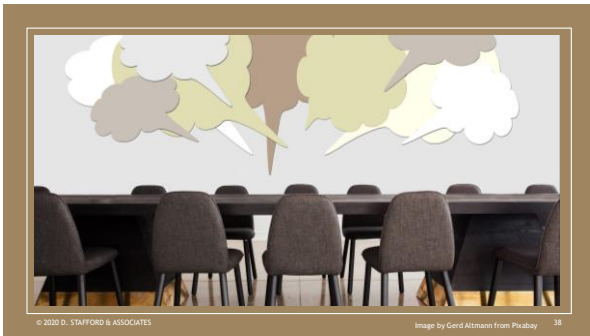
Blackout v. Pass Out



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Evidence Collection and the Investigatory Process

1



Agenda

- Investigators
- Developing an Investigative Strategy
- Breaking Down the Definitions
- Evidence Collection

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INVESTIGATORS

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QUALITIES OF GREAT INVESTIGATORS

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Investigation Case Management



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DEVELOPING AN INVESTIGATIVE STRATEGY

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Investigative Strategy

- Scope
- Methodology
- Challenges
- Pre-Work
- Roadmap

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Scope



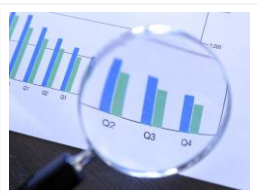
- Notice of Allegation
- Notice of Investigation
- Policy Definitions
- Rights of the Parties

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Methodology (and who does what?)



- Liaisons
- Logistics
- Internal Communications

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Challenges: Evidence Considerations



- Testimonial Evidence
- Non-Testimonial Evidence

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Challenges: Other



What issues could come up given the facts of the case?

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Pre-Work



- Draft Questions
- Initial Evidence Collection

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Investigation Roadmap

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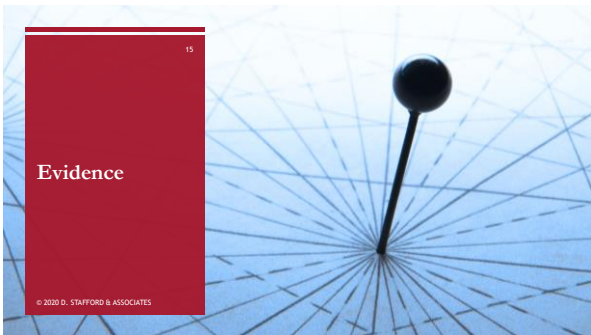


Retaliation

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Evidence

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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

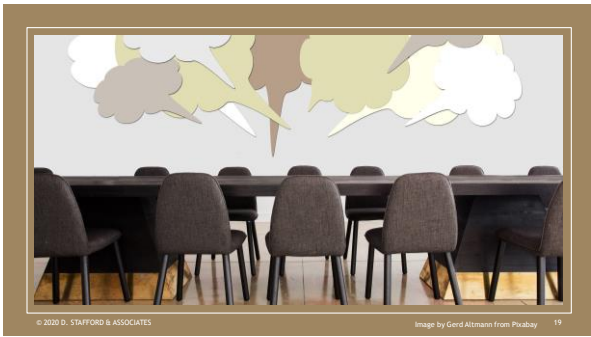


Party "directory information"

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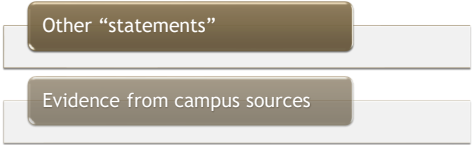
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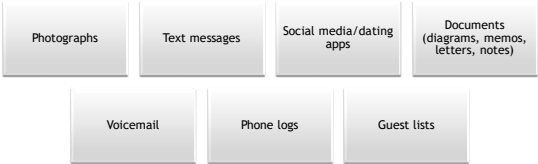
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Initial Evidence Collection



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Other Sources of Evidence



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Floorplans



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Diagrams



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Investigation Timeline



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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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The Regs on Evidence

- Any evidence obtained
 - directly related to the allegations
 - 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 a party can meaningfully respond

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Evidence Collection

Everything Collected

Directly Related

Relevant

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Everything BUT...

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

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"Directly Related": in the comments

- "interpreted using their plain and ordinary meaning"
- We note that "directly related" in § 106.45(b)(5)(vi) aligns with requirements in FERPA, 20 U.S.C. 1232g(a)(4)(A)(i). ("information directly related to a student.")
- "directly related" may sometimes encompass a broader universe of evidence than evidence that is "relevant."

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Agenda

- Interviewing Basics
- The DSA Interview Outline
- Stress, Trauma, and the Interview
- Sample Questions

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What are Interviews



PART OF EVIDENCE
(TESTIMONIAL)



CONVERSATION



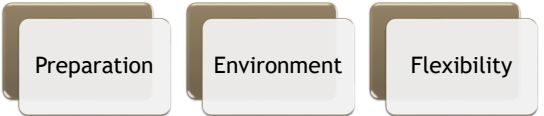
STRUCTURED

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Interview Golden Rules



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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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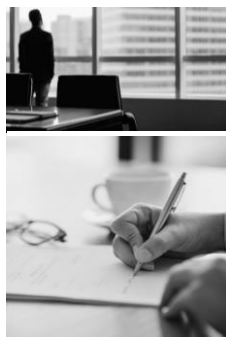
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The DSA Interview Outline


- 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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Interrupting

Two questions at once

Not listening for the answer

Avoiding the hard questions

Lost focus on elements

**Interviewing
Bad Habits**

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STRESS,
TRAUMA, AND
THE
INTERVIEW



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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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Witness Interviews

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

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**RESPONDENT -
POTENTIAL
DEFENSES**

- ① Victim consented and is now lying (Regret? Guilt?).
- 🍷 Victim consented but does not remember due to intoxication.
- 👉 The sexual misconduct did not occur (victim was mistaken).
- 👤 The sexual misconduct occurred but a different assailant.

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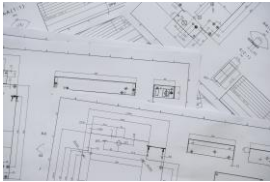


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Physical Space



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Sensory



SMELLS TEMPERATURE TOUCH SOUNDS LIGHT TASTE

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Harassment Questions



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Elements of the Policy Violations

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

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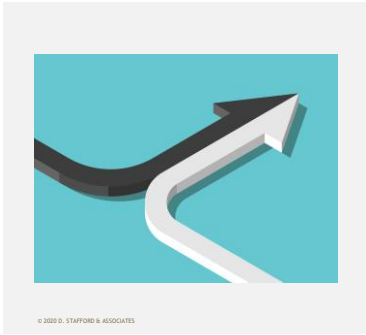
Consent



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QUESTIONING
THE PARTIES

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Credibility and Relevancy

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Agenda

- Detecting deception
- Credibility checklist
- Relevancy

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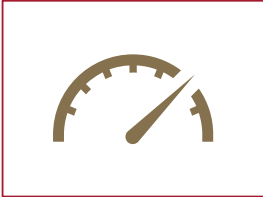
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Deception



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

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Credibility Checklist

Truthfulness	Past behaviors	Post-assaultive behaviors	Corroborating evidence	Ability to perceive
Ability to remember	Plausibility	Demeanor	Motivation	Bias

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Truthfulness

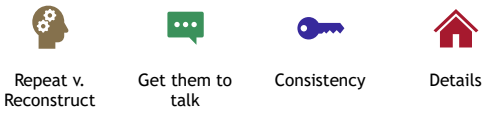


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Truthfulness

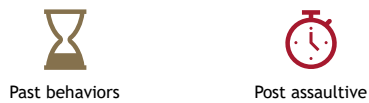


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Past and Post Behaviors

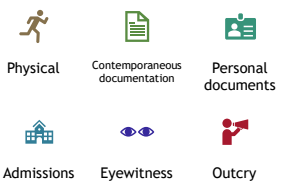


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Corroborating Evidence



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Ability to Perceive

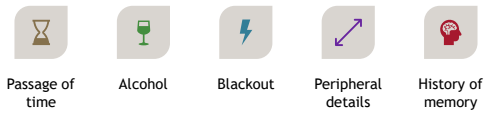


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Ability to Remember



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Plausibility



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Demeanor

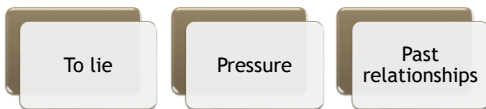


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Motivation



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Bias



Personal preference



Impartiality



Internal Biases

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Confirmation Bias • Confirmed preconceived opinion	Bias
Availability Bias • Most important to the memory immediately recalled	
Hindsight Bias • See things as more predictable than they were	
Foresight Bias • Ability to predict future events	
Gender Bias • More likely to believe one gender over another	
Race • More likely to believe one race over another	

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Other Factors that Impact Credibility



Memory and trauma

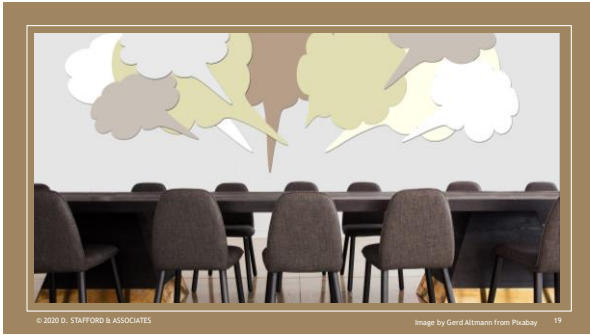


Cross-cultural issues

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Relevancy



Decision-maker determines



Built-in pause



Cannot be pre-screened

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What Does Relevancy Mean?

- Directly related to the issue and helps prove or disprove the issue AND fact must be material to an issue in the case
- Makes something more/less true or more/less false
- The tendency to make a fact more or less probable than the fact would be without the evidence
- Questions are irrelevant when they are not related to the issue at hand

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Other Ways to Put It...

The evidence does not need to be conclusive

The evidence constitutes a link in the chain of proof

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

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Relevancy Exceptions

"Questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the complainant's prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent."

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Resolutions and Outcomes

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Agenda

- Informal resolution
- Formal resolution
- Sanctions and remedies
- Appeals

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We are Here...



Intake



Investigation



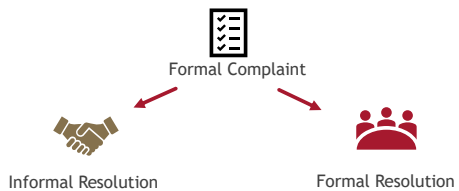
Resolution

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Resolution Options



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§106.45(b)(9) – Informal Resolution

“However, at any time prior to reaching a determination regarding responsibility the recipient may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication...”

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Informal Resolution



Notice



Voluntary



Not allowed for Employee Respondent/Student Complainant

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Informal Resolutions – Conduct Conferences



Both parties must agree



Acceptance of Responsibility



Sanctions

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Informal Resolution Recordkeeping Considerations

Records subject to subpoena

What happens if it becomes a formal resolution?

Incomplete requirements

Required record keeping





Is it considered "conduct history?"

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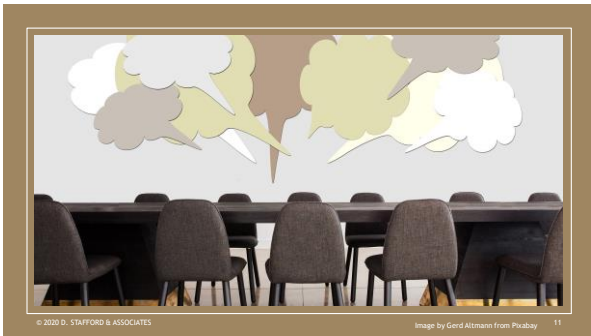
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Informal Resolution

-  Mediation
 -  Restorative Justice
 -  Educational efforts
 -  Other
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Single Adjudicator Model



“Combining the investigative and adjudicative functions in a single individual may decrease the accuracy of the determination regarding responsibility, because individuals who perform both roles may have confirmation bias and other prejudices that taint the proceedings, whereas separating those functions helps prevent bias and prejudice from impacting the outcome.”

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Formal Resolution – Considerations

- Scheduling
- Decision maker(s)
- Advisors
- In person or virtual

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Live Hearings



- Must provide for a live hearing
- At the request of either party, the recipient must provide for a live hearing to occur with the parties located in separate rooms with technology enabling the decision-maker(s) and parties to simultaneously see and hear the party or the witness answering questions
- Must create an audio recording or transcript and make available.

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Advisors



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

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Cross Examination



"At the live hearing, the decision-maker(s) must permit each party's advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility. Such cross-examination at the live hearing must be conducted directly, orally, and in real time by the party's advisor of choice and never by a party personally..."

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Relevancy



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

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Relevancy

- Prior sexual history
- Privileged information
- Duplicative
- Why are you asking the question?

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Participation



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

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Formal Resolution – Making a Finding

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

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Disciplinary Sanctions and Remedies



Sanctions



Remedies

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Formal Resolution – Disciplinary Sanctions

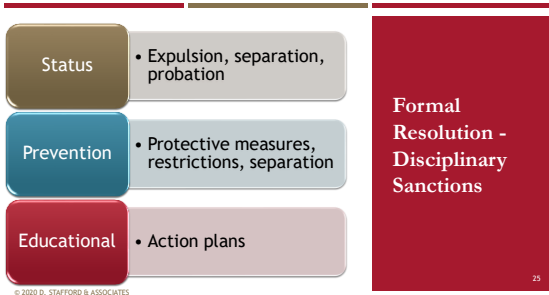
A recipient may impose disciplinary sanctions upon a respondent after a grievance process that complies with § 106.45.

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

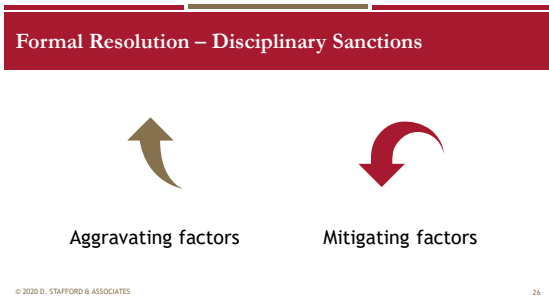
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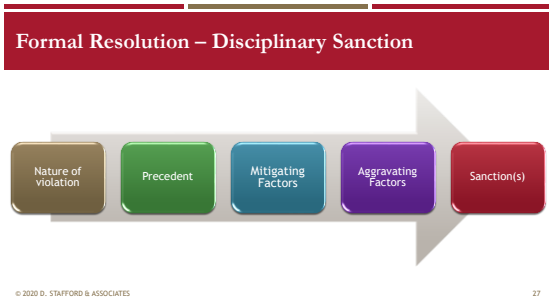
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Formal Resolution – Remedies



Make permanent supportive measures



One-sided no contact orders



Restrictions from locations



Restrictions from activities

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Written Outcome

- Allegations
- Procedural steps
- Findings of fact
- Conclusion/application
- Rationale for each allegation (determination, sanctions, remedies)
- Appeal procedures

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Live Hearing Recording or Transcript



Recording

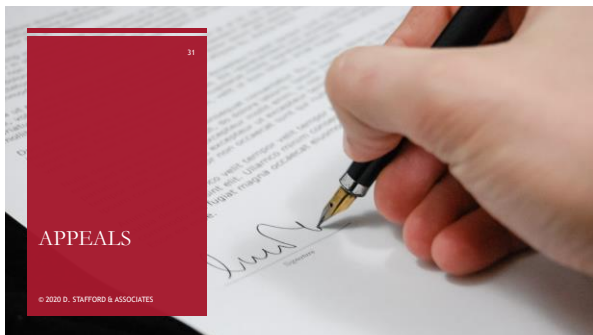


Transcript

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Appeals

- Must offer
- Three bases
 - Procedure
 - New evidence
 - Conflict or bias
- Additional grounds permitted
- No other role for appeal officer

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Appeals

- Notification
- Comply with appeal standards
- Equal opportunity to respond
- Issue written decision with rationale and simultaneously

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When is the Decision Final?

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