Title IX/VAWA Appeals Training

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1

1



Kathryn Nash



Pamela Kovacs

2

2

Tell Us About Yourself

How many appeals of Title IX/VAWA matters have you participated in?

a. Not applicable (I have a different role in the process)
b. None
c. Less than 10
d. 10 or more

3

3

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Agenda

- Introduction and Legal Landscape
- Overview of the Process
- Serving Impartially
- Appeal Process
  - Legal requirements
  - Bases for appeal
  - Process and time frames
  - Deliberate and make determination
  - Case studies
  - Notice of outcome of appeal



4

4

Terminology

- ED = Department of Education
- Recipient = Institutions covered by Title IX
- OCR = Department of Education's Office for Civil Rights
- VAWA = Violence Against Women Reauthorization Act
- FERPA = Family Educational Rights and Privacy Act
- DOJ = Department of Justice
- CSA = Campus Security Authority
- Investigation/Grievance Procedures/Complaint Procedures
- Adjudicator/Decision-Maker
- Complainant/Reporting Party/Accuser/Victim/Survivor
- Respondent/Responding Party/Accused/Alleged Perpetrator

5

5

Legal Overview



6

6

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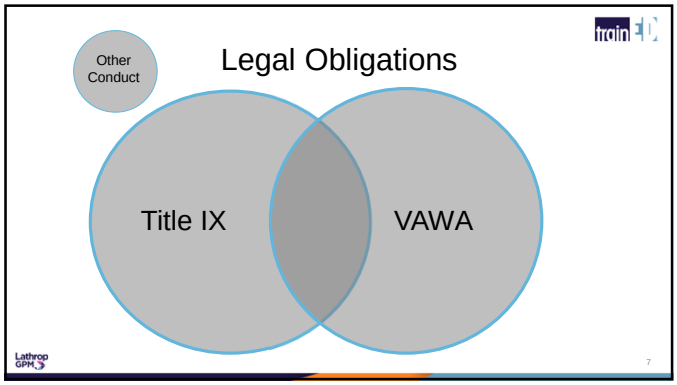

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Title IX

"No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving Federal financial assistance"

20 U.S.C. § 1681

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8

Who Must Comply With Title IX?

- Institutions that receive federal funds
  - Students
  - Employees
  - Third Parties
    - Visitors
    - Vendors



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Discrimination “on the Basis of Sex”

- Includes:
  - Sexual harassment
  - Differential treatment

10

10

When an Institution Must Respond

- Institution has actual knowledge of
- Sexual harassment
- In an education program or activity of the institution
- Against a person in the United States



11

11

When an Institution Must Respond

- Actual knowledge
  - Notice of sexual harassment or allegations of sexual harassment to the Title IX Coordinator or an official who has authority to institute corrective measures on behalf of the institution
    - Notice includes, but is not limited to, a report of sexual harassment to the Title IX Coordinator
  - Vicarious liability and constructive notice are insufficient
  - Standard not met if the only official with actual knowledge is the respondent

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When an Institution Must Respond

- Actual knowledge (cont.)
  - The following does not qualify an individual as having the authority to institute corrective measures
    - Mere ability or obligation to report sexual harassment
    - Ability or obligation to inform a student about how to report
    - Being trained in how to report

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When an Institution Must Respond

- Education program or activity
  - Locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs
    - Includes all incidents of sexual harassment occurring on an institution's campus
    - Also includes off-campus conduct if
      - Occurs as part of the institution's "operations"
      - Institution exercised substantial control over the respondent and the context of alleged sexual harassment
      - Occurs at an off-campus building owned or controlled by a student organization officially recognized by the postsecondary institution (e.g., fraternities and sororities)

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14

How an Institution Must Respond

- Must respond promptly in a manner that is not deliberately indifferent
- Deliberately indifferent = response is clearly unreasonable in light of the known circumstances
- Follow grievance process outlined in the regulations



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The Legal Landscape

- All schools receiving federal funds must:
  - Publish Notice of Nondiscrimination
  - Designate a Title IX Coordinator
  - Disseminate policy prohibiting sex discrimination
  - Adopt and publish fair and equitable grievance procedures
  - Follow a legally compliant grievance process
  - Offer supportive measures to a complainant and respondent
  - Train individuals with heightened responsibilities
  - Train students and employees

16

16

Clery Act

- Provide accurate, timely, and complete information
- Regarding certain types of crimes/incidents
- Occurring on or adjacent to campus
- To promote campus safety and consumer protection



17

17

Violence Against Women Reauthorization Act (VAWA)

- Extends Clery crimes to include VAWA crimes: domestic violence, dating violence, and stalking
- Requires discipline procedures for addressing sexual assault and VAWA crimes
- Requires education programs for students and employees to promote awareness
- Applies regardless of location of alleged conduct (on or off campus; in or out of the education program or activity; in or out of the U.S.)

18

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Defining Sexual Misconduct

19

19

Title IX—Sexual Harassment

- Conduct *on the basis of sex* that satisfies one or more of the following:
  - Quid pro quo
  - Hostile environment
  - Sexual assault and VAWA crimes



20

20

Title IX – Sexual Harassment

- Quid pro quo:
  - Employee conditions aid, benefit, or service of the institution on an individual's participation in unwelcome sexual conduct
  - Examples:
    - Supervisor conditioning promotion on participation in sexual advance
    - Professor conditioning grade on participation in sexual advance



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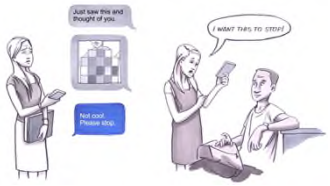
Title IX – Sexual Harassment

- Hostile Environment:
  - Unwelcome conduct (on the basis of sex) determined by a reasonable person to be *so severe, pervasive, **and** objectively offensive* that it effectively denies a person equal access to the institution's education program or activity



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Title IX – Sexual Harassment

- Examples: Multiple incidents of the following conduct may constitute hostile environment sexual harassment
  - Unwelcome sexual flirtations, advances, or propositions
  - Requests for sexual favors
  - Verbal abuse of a sexual nature, obscene language, off-color jokes, sexual innuendo, and gossip about sexual relations
  - The display of derogatory or sexually suggestive posters, cartoons, drawings, objects, notes, letters, photos, emails, or text messages
  - Visual conduct such as leering or making gestures
  - Sexually suggestive comments about an individual's body or body parts, or sexually degrading words to describe an individual

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Title IX – Sexual Harassment

- Examples: Multiple incidents of the following conduct may constitute hostile environment sexual harassment
  - Unwelcome touching of a sexual nature such as patting, caressing, pinching, or brushing against another's body
  - Unwelcome verbal or physical conduct against an individual related to the individual's gender identity or the individual's conformity or failure to conform to gender stereotypes
  - Cyber harassment, including but not limited to disseminating information, photos, or videos of a sexual nature without consent
  - Videotaping or taking photographs of a sexual nature without consent

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Title IX—Sexual Harassment

- Sexual Assault
- VAWA Crimes
  - Dating violence
  - Domestic violence
  - Stalking
- As defined in Clery



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25

Title IX—Sexual Harassment

- **Sexual Assault:**
  - Any actual or attempted sexual contact, including penetration and contact with any object, with another person without that person's consent
    - Sexual contact = contact with intimate body part (genital area, groin, inner thigh, buttocks, breast)
  - VAWA regulations define as conduct meeting FBI definitions of:
    - Rape
    - Fondling
    - Incest
    - Statutory rape

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Title IX—Sexual Harassment

- **Sexual Assault:**
  - ***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, or by a sex-related object without the consent of the victim, including instances in which the victim is incapable of giving consent because of temporary or permanent mental or physical incapacity (including due to the influence of drugs or alcohol) or because of age. Physical resistance is not required on the part of the victim to demonstrate lack of consent.

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Title IX—Sexual Harassment

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

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28

Title IX—Sexual Harassment

- **Sexual Assault:**
  - ***Incest*:** Nonforcible sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law.
  - ***Statutory Rape*:** Nonforcible sexual intercourse with a person who is under the statutory age of consent.

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Consent

- No particular definition of consent with respect to sexual assault is required under Title IX or VAWA

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Title IX—Sexual Harassment: VAWA Crimes

- **Domestic Violence:** a felony or misdemeanor crime committed by current/former spouse or intimate partner of the victim under domestic or family violence laws of the jurisdiction
- **Dating Violence:** violence by a person with whom victim has/had a social relationship of a romantic or intimate nature (determined by reporting party's perspective and length, type, and frequency of interaction)
- **Stalking:** course of conduct directed at a specific person that would cause a reasonable person to fear for safety or suffer substantial emotional distress





31

31

Title IX—Sexual Harassment

- Any person may be a complainant or respondent
- Legal and policy protections apply regardless of the sex, gender, gender identity, gender expression, or sexual orientation of either party
- Parties may be of the same sex or different sexes

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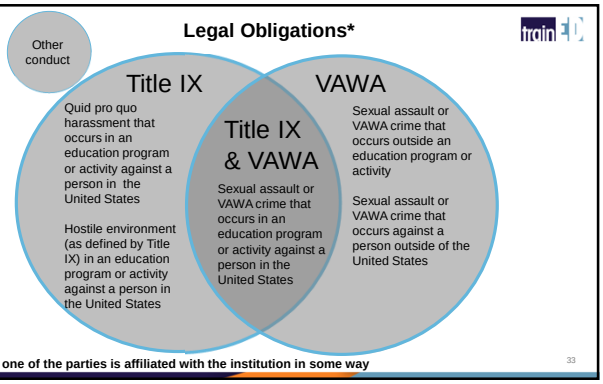

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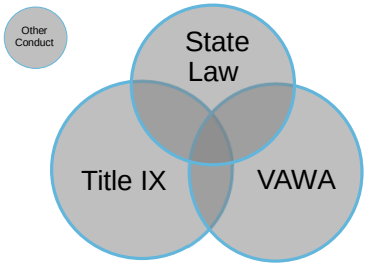
Interaction with Other Laws – State Laws



* See Minnesota Campus Sexual Misconduct Law Training for trainED's training on Minnesota law.

34

34

Interaction with Other Laws

- FERPA: Family Educational Rights and Privacy Act
  - Limits disclosure of student education records
  - Several exceptions permit disclosure
    - In Title IX cases, exception permits school to disclose to both parties all directly related evidence, all information in the investigation report and attachments that goes to the decisionmaker, and statement of, and rationale for, the final results of any disciplinary proceedings or appeals, including sanctions and whether remedies will be provided
      - Required by Title IX
      - Does not include what the remedies are
    - In cases involving sexual assault/VAWA crime, exception permits school to disclose to the parties any information provided to the decisionmakers and the final results of the disciplinary proceedings, including *all* sanctions



35

35

Interaction with Other Laws

- Mandatory reporting laws: state-specific laws requiring school employees to report child abuse
  - Mandatory reporters may include teachers, coaches, administrators, or others who interact with minors or who supervise those who interact with minors
  - Must report if know or reasonably suspect abuse or neglect of a child
  - Report to police or county department



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Risks of Non-Compliance

- OCR/DOJ enforcement
- Clery Act enforcement
- Lawsuits
  - Private right of action under Title IX, breach of contract, interference with contract, negligence, negligence *per se*, negligent supervision, intentional infliction of emotional distress, defamation, violation of right to due process at public schools, invasion of privacy/violation of confidentiality
- Public relations



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37

37

Training Requirements

- Train Title IX Coordinator, investigator, decisionmaker, or facilitator of informal resolution process on
  - Definition of sexual harassment
  - Scope of the institution's education program or activity
  - How to conduct investigation and grievance process, including hearings, appeals, and informal resolution processes, and how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias
  - Issues related to sexual assault, domestic violence, dating violence, and stalking (annually)
  - How to conduct an investigation and hearing that protects the safety of complainants and promotes accountability (effects of trauma) (annually)
  - Institution's policies and procedures

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38

38

Training Requirements

- Decisionmakers must also receive training on
  - Technology to be used at a live hearing
  - Issues of relevance of questions and evidence, including when questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant
- Training materials must not rely on sex stereotypes and must promote impartial investigations and adjudications
- Training materials must be publicly available on institution's website

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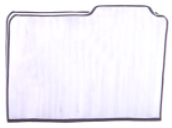
Recordkeeping Requirements

- Title IX – for 7 years, must maintain:
  - Investigation and adjudication records
  - Training materials for investigators, decisionmakers, coordinators, and persons designated to facilitate informal resolution process
  - Any actions taken (including supportive measures) in response to a report of sexual harassment



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Recordkeeping Requirements

- Examples of appeal officer's records:
  - Appeal file
  - Communications regarding appeal (caution!)
  - Appeal officer's notes (caution!)
  - Notice of outcome of appeal
  - Training records – relating to appeal officers

41

41

Overview of Process

42

42

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Responding to a Report



43

43

Employee Reporting Obligations

- Recommended approach:
  - All non-confidential employees report potential sexual harassment to Title IX Coordinator
  - If unsure whether to report, ask Title IX Coordinator for guidance without sharing identifiable information

44

44

Responding to a Report

- Title IX:
  - Institution has actual knowledge of
  - Sexual harassment (as defined by regulations)
  - In an education program or activity of the institution
  - Against a person in the United States
- VAWA:
  - Allegations of sexual assault, domestic violence, dating violence, or stalking
  - Applies regardless of location of alleged conduct (on or off campus; in or out of the education program of activity; in or out of the U.S.)

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Responding to a Report

- Title IX Coordinator must promptly contact complainant (with or without formal complaint)
  - Inform complainant of the availability of supportive measures with or without the filing of a formal complaint
  - Consider complainant's wishes with respect to supportive measures
  - Explain the process for filing a formal complaint
  - Notify complainant of right to report to law enforcement and offer help with report (VAWA)
  - Provide complainant with written notice of rights (VAWA)



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46

46

Responding to a Report—Supportive Measures

- Offered to complainant and respondent
- Must be non-disciplinary, non-punitive
- Must be without fee or charge to the complainant or respondent
- Available before or after the filing of a formal complaint or where no formal complaint is filed
- Designed to restore or preserve equal access to recipient's education program or activity without unreasonably burdening the other party
- Including measures designed to protect safety of all parties or the educational environment, or deter sexual harassment
- Must maintain as confidential as long as confidentiality does not impair ability of the institution to provide measures

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47

Supportive Measures

- Examples
  - Mutual restrictions on contact between the parties
  - Change academic or extracurricular activities, living, transportation, dining, and working situations
  - Access to resources, such as victim advocacy, housing assistance, academic support, counseling, disability services, health and mental health services, legal assistance, visa and immigration assistance, campus escort services, increased security, and student financial aid
- If school does not offer these services, enter into MOU with local victim services provider, if possible

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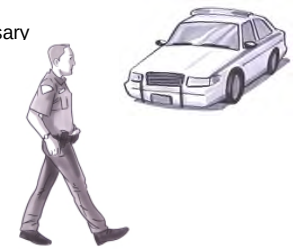
Responding to a Report

- Other obligations:
  - Notify campus security, if necessary
  - Clery report, if necessary



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49

49

Responding to a Report

- Report vs. Formal Complaint
  - Report
    - Initiates obligation to respond, including offering supportive measures
    - Complainant's identity may be kept confidential from respondent
  - Formal Complaint
    - Initiates grievance process
    - Cannot be filed anonymously
      - Requires complainant's physical or digital signature or otherwise indicates that the complainant is the person filing the complaint
      - Title IX Coordinator can sign a complaint
      - Grievance process requires that complainant's identity be disclosed to respondent, if known

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50

Responding to a Formal Complaint

- Take steps discussed in prior section regarding responding to a report (if not yet taken)
  - Treat complainant and respondent equitably
  - Offer and coordinate supportive measures
  - Notify complainant of right to report to law enforcement and offer help with report (VAWA)
  - Provide written notice of rights (VAWA)
  - Notify campus security, if necessary
  - Clery report, if necessary

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Responding to a Formal Complaint

- Upon formal complaint, provide written notice to known parties, including:
  - Notice of grievance process, including any informal resolution process
  - Notice of the allegations, including sufficient details known at the time and with sufficient time to prepare response before initial interview
    - Identities of the parties involved, if known
    - Conduct allegedly constituting sexual harassment
    - Date and location of the alleged incident, if known
  - Statements regarding various rights
  - Provide notice of *additional* allegations about the complainant or respondent that arise during process
- Initiate grievance procedures or informal resolution process (if appropriate)

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52

52

Grievance Procedure

- The process the school uses to resolve sexual harassment complaints. This includes the fact-gathering investigation and the decision-making process the school uses to determine:
  - Whether or not the conduct occurred using
    - Preponderance of the evidence standard ("more likely than not") or
    - Clear and convincing evidence standard ("highly probable"); and
  - If the conduct occurred, what actions the school will take to eliminate the hostile environment, prevent its recurrence, and remedy its effects, which may include:
    - Imposing sanctions on the respondent;
    - Providing remedies for the complainant; and
    - Addressing the campus community

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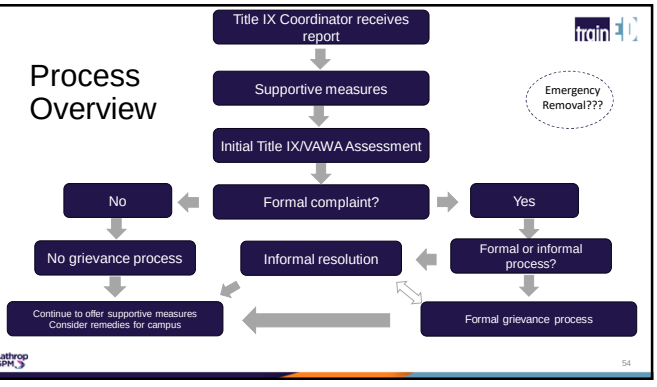
Process Overview



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Role of Investigator in Formal Grievance Process

- Identify factual issues
- Give parties opportunity for input
- Compile investigation materials for decisionmakers and parties
- Credibility and/or make recommendations?
  - Can offer recommendations regarding responsibility but ultimate determination must be made by separate adjudicator (Title IX)
- Role does not include:
  - Adjudication of complaint
  - Providing support or advocacy to either party
  - Serving as a confidential resource



55

55

Formal Grievance Process

- Objective evaluation of all relevant evidence
  - Inculpatory and exculpatory evidence
  - Credibility determinations may not be based on status as complainant, respondent, or witness
- No conflicts of interest or bias as Title IX Coordinator, investigator, decisionmaker, or facilitator of informal resolution process
  - For or against complainants or respondents generally
  - For or against an individual complainant or respondent
- Presumption of non-responsibility

56

56

Formal Grievance Process—Dismissal of Formal Complaint

- Mandatory dismissal under Title IX
  - Must dismiss formal complaint if alleged conduct
    - even if proved, would not constitute sexual harassment
    - did not occur in the institution's education program or activity or
    - did not occur against a person in the United States
  - Such dismissal does not preclude action under another provision of institution's code of conduct
- Discretionary dismissal under Title IX
  - May dismiss formal complaint if at any time during the investigation or hearing
    - complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the formal complaint or any allegations, therein
    - respondent is no longer enrolled or employed by the institution or
    - specific circumstances prevent the recipient from gathering sufficient evidence to reach a determination as to the formal complaint or allegations therein

57

57

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Formal Grievance Process—Consolidation of Formal Complaints

- Title IX: An institution may consolidate formal complaints as to allegations of sexual harassment against more than one respondent, or by more than one complainant against one or more respondents, or by one party against the other party, where the *allegations of sexual harassment arise out of the same facts or circumstances*
- VAWA: No specific guidance

58

58

Criminal Process

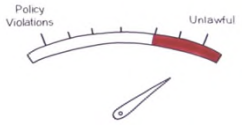
- Institution's formal grievance process is separate from criminal process
- Institution may not dissuade complainant from going to police in cases involving allegations of criminal conduct—should encourage reporting to police
- May temporarily delay for initial police investigation
  - Prior guidance said police evidence-gathering stage typically takes 7-10 days
  - Must resume when notified that police are done gathering evidence
- May not delay for criminal prosecution

59

59

Differences Between Criminal and Institutional Investigations

- Different standards of proof
  - Probable cause vs. beyond reasonable doubt vs. preponderance of evidence vs. clear and convincing
- Different investigation "powers"
  - Subpoena powers vs. disciplinary actions
- Timing of processes
- Cooperating with law enforcement
  - Memorandum of Understanding
  - Use of police report



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Impermissible Evidence

- Privileged information, unless individual holding privilege has waived it (e.g., doctor-patient privilege, attorney-client privilege, victim advocate privilege)
- Treatment records, unless individual has provided written consent
- Prior sexual history/conduct (see next slide)

61

61

Impermissible Evidence

- Prior Sexual History/Conduct
  - Complainant's prior sexual history is not relevant unless an exception applies
    - Such questions and evidence are offered to prove someone other than respondent committed the alleged conduct or
    - 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

62

62

Investigation—Providing Information to the Parties

- Parties must be provided:
  - VAWA:
    - Information used in the decision-making process – access required
  - Title IX :
    - Any evidence obtained that is ***directly related*** to the allegations – must send hard copy or electronic format to parties and advisors
    - Investigation report that fairly summarizes relevant evidence – must send hard copy or electronic format to parties and advisors
    - Opportunity to submit written response to each

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Formal Grievance Process—Advisors

- Parties have a right to an advisor of their choice
- May be, but not required to be, an attorney
- Advisors have right to receive copies/electronic access to of all directly related evidence (Title IX only)
- Advisors have right to receive copies/electronic access to investigation report
- Advisors may cross-examine parties and witnesses at live hearing (Title IX only)
- Institution must provide if none (Title IX only)
  - Limited role
- May otherwise limit extent of advisor's participation in the process (must apply equally)

64

64

Legal Requirements for Live Hearing

- General requirements under Title IX
  - Must provide live hearing
  - Permit each party's advisor to ask the other party and witnesses "all relevant questions and follow-up questions," including those challenging credibility
    - Cross-examination must be conducted directly, orally, and in real time by the party's advisor, never by the party personally
  - If party does not have advisor, institution must provide one for cross-examination
  - Institution can otherwise place restrictions on advisors' participation in the proceedings

65

65

Legal Requirements – School-Appointed Advisors

- Can request that the parties inform school in advance whether they have an advisor
  - If party does not have an advisor at the hearing, still required to provide an advisor even if party stated that they would have one
  - May want to have an advisor for each party on standby so that delaying the hearing is not necessary
- School-appointed advisor
  - Role is limited to relaying a party's questions
  - No particular skills, qualifications, or training is required
  - Does not need to be neutral or avoid conflicts of interest
  - If a party refuses to work with an assigned advisor – the party forfeits their right to cross-examination

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Legal Requirements – Attendance at Hearing

- Parties may be accompanied only by their advisors and other persons for reasons "required by law"
  - Institution must keep confidential the complainant, respondent, and any witness except as may be permitted by FERPA, as required by law, or to carry out the grievance process
    - Limits institution's ability to authorize the parties to be accompanied to the hearing by individuals other than their advisors
  - A person assisting a party with a disability, or a language interpreter, may attend because presence is required by law and/or necessary to conduct the hearing

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67

Legal Requirements – Cross-Examination

- Party or witness who does not appear at the hearing or refuses to answer questions at the hearing
  - Decisionmaker may still rely on previous statements from party/witness who is absent or refuses to answer one or more questions
    - Consider weight to be given to statements
    - Consider allowing party or advisor to share questions they would have asked a party or witness who is absent or will not submit to cross-examination
  - Decisionmaker should not draw an inference about the determination regarding responsibility based solely on a party's or witness's absence from the live hearing or refusal to answer cross-examination or other questions

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68

Legal Requirements – Cross-Examination

- Party or witness who does not appear at the hearing
  - Advisor may conduct questioning on behalf of party even if party is not present
    - If institution-appointed advisor, party needs to provide questions in advance
  - If one party does something to wrongfully procure absence of a party or witness, that is likely retaliation and the school must remedy
  - School also cannot coerce unwilling participant
    - Be careful with any requirement that a student or employee cooperate with grievance process
    - Discipline for not attending hearing may constitute retaliation

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Legal Requirements – Relevancy Determinations

- Hearing panel may hear arguments regarding relevancy of a question on the spot or may tell parties to reserve arguments for appeal (incorrect relevancy determination could be an alleged procedural error on appeal)
- Must allow question if relevant, even if misleading or assumes facts not in evidence
- Can establish rule that duplicative questions are not relevant
- Exclude questions with caution

70

70

Relevant Evidence

- Decision-making process involves objective evaluation of all relevant evidence
- Relevant: related to the allegations under investigation
- Questions are relevant when they seek evidence that may aid in showing whether the alleged conduct occurred
- Evidence is relevant when it may aid a decisionmaker in determining whether the conduct occurred

71

71

Legal Requirements – Other Procedural Rules

- May establish additional rules that apply equally to both parties
  - Questioning must be respectful, non-abusive, not intimidating
  - Limit evidence at hearing to evidence that was gathered or presented as part of the investigation (or otherwise prior to the hearing)
  - Whether investigator may be called as a witness
  - Process for making objections to the relevance of questions and evidence
  - Other procedures at the hearing
    - Opening statements by parties or advisors
    - Closing statements by parties or advisors
  - Reasonable time limitations on hearings

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Legal Requirements – Other Procedural Rules

- Some procedural rules are prohibited
  - Cannot prohibit a party from conferring with their advisor during the hearing
    - Likely can prohibit conferring when a question is pending
    - Could also discourage from conferring when a question is pending by warning that such conduct will be considered when weighing the party's credibility
  - Cannot prohibit character evidence, lie detector test results, evidence that is unduly prejudicial, or evidence of prior bad acts
    - Decisionmaker may determine how much weight to give such evidence

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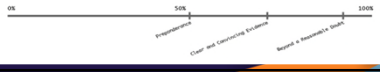
73

Determination—Finding

- Standard of proof
  - "Preponderance of the evidence" or "clear and convincing" (not "beyond a reasonable doubt")
  - Burden is on the school to conduct an investigation that gathers sufficient evidence to determine whether sexual harassment occurred
  - Presumption of non-responsibility that would need to be overcome
  - Decisionmaker must ultimately decide whether it was more likely than not that a policy violation has occurred (preponderance) or whether it is highly probable that a policy violation has occurred (clear and convincing)



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Formal Grievance Process—Notice of Determination

- Identification of the allegations potentially constituting sexual harassment
- Procedural steps since complaint
  - Notices to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, hearings held
- Findings of fact
- Conclusion regarding application of code of conduct to the facts
- Statement of and rationale for the result as to each allegation
  - Determination of responsibility
  - Any disciplinary sanctions imposed on respondent
  - *Whether* remedies will be provided to complainant
- Appeal information
- Simultaneous delivery to the parties
- Becomes final either the date the parties receive the written determination of the appeal or the date on which an appeal would no longer be timely

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Serving Impartially

76

76

Session Overview

- Rape Myths
- Secondary Victimization
- Common Victim Responses
- Neurobiology of Sexual Assault
- How to Serve Impartially
  - Working with complainant
  - Working with respondent



77

77

Rape Myths

Myth	Reality
Rape is primarily sexually motivated	Rape combines elements of power, anger and sexuality
Rapists are usually strangers	Most perpetrators are known to the victim
The victim did something to cause the rape	No behavior warrants being raped; under no circumstances can the victim be blamed
Acquaintance rape is not as traumatic	There are no differences in victim psychological symptoms between acquaintance and stranger rape

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Secondary Victimization

- Secondary victimization:
  - The attitudes, beliefs, and behaviors that victims experience as victim blaming and insensitive
  - It exacerbates their trauma, and it makes them feel like what they're experiencing is a second rape — hence the term "secondary victimization"



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Secondary Victimization

- Examples of behaviors:
  - Discouraging the victim from making the report
  - Telling victim it's not serious enough to pursue
  - Asking about dress, behavior, or what they might have done to provoke the assault
- Psychological impact on victims:
  - Blamed
  - Depressed
  - Anxious
  - Violated
  - Reluctant to seek help



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Common Victim Responses

- Initial denial of incident
- No reporting/delayed reporting
- Maintaining contact with perpetrator
- Fight, flight, or freeze

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Neurobiology of Sexual Assault

The Neurobiology of Sexual Assault

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Neurobiology of Sexual Assault

Brain Regions Impacted by Trauma



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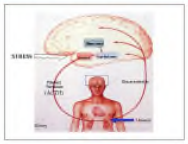
Neurobiology of Sexual Assault

Brain-Body Regions Impacted by Trauma

HPA Axis

Balances body following stress by releasing of various hormones/chemicals



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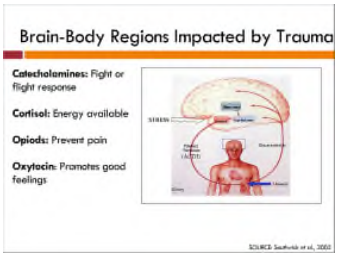

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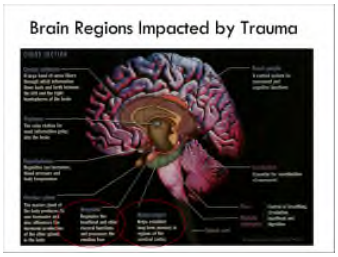

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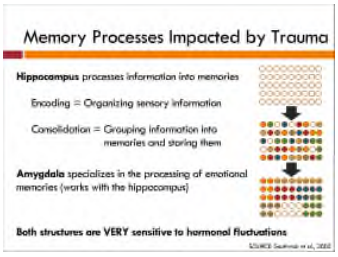

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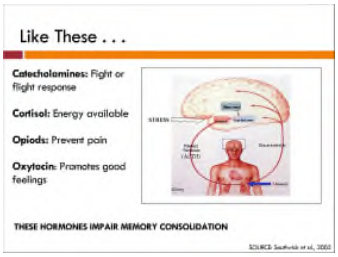

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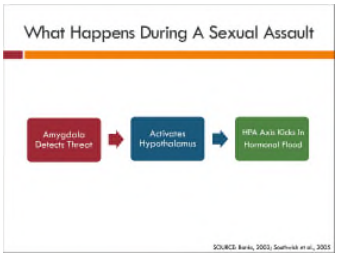

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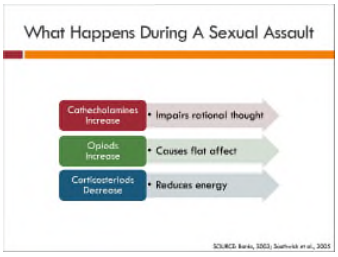

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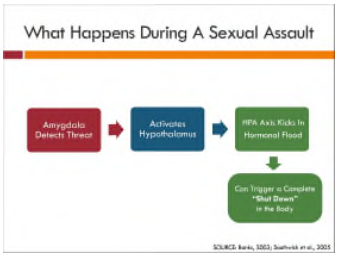

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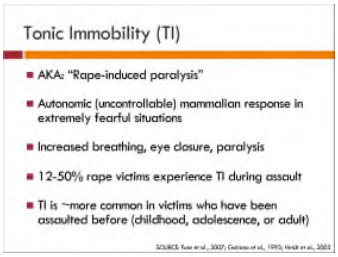

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Common Behaviors During Assault

- Impaired rational thought
- Flat affect
- Reduced energy
- Flight
- Fight
- Freeze

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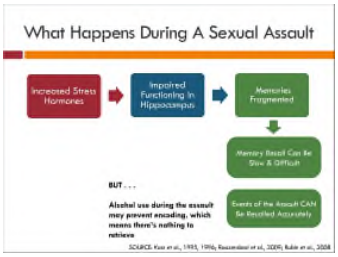
Memory

What Happens During A Sexual Assault

94

94

Memory



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Impact of Trauma on Memory

- Memories accurately stored
- Memory recall slow
- Fragmented account
- Concentration difficult
- Alcohol exception—may impact storage and accuracy of memories



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Impact of Culture

- Cultural background is one of many factors that may impact the way that complainant, respondent, and witnesses react to the incident and present during the investigation interviews
- Different cultural backgrounds will influence individuals in different ways
- Be aware of and sensitive to possible cultural influences
- Incorporate training as appropriate



97

97

Trauma-Informed Approach Gone Wrong

- University of Mississippi lawsuit based in part on its training materials
  - Victims sometimes withhold facts and lie about details
  - Victims lie about anything that casts doubt on their account of the event
  - When complainants withhold exculpatory details or lie to an investigator or the hearing panel, the lies should be considered a side effect of an assault
- A trauma-informed approach should not unfairly favor the complainant or prejudice the decisionmaker against the respondent

98

98

Take Away

- Do not automatically draw negative inference based on a behavior that may be a response to trauma
- If an individual exhibits behaviors associated with trauma, it does not automatically mean that individual experienced trauma
- A response consistent or inconsistent with a typical trauma response should not in and of itself be outcome determinative

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Serving Impartially

- Avoid prejudgment of the facts at issue
- Avoid conflicts of interest
- Avoid bias
- Do not rely on sex stereotypes in making determination



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Serving Impartially

- Differentiate from other roles within institution
- Separate support/advocacy services from investigation/adjudication/appeal process
- Conflation of roles can:
  - Impact thorough assessment of the facts
  - Create distrust/confusion for parties
  - Give appearance of bias/lack of impartiality

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Communication

- Identify contact person who will coordinate with multiple departments/people on complainant's/respondent's behalf
- Ensure regular and timely communications to both parties regarding: next steps, expectations, timing, and delays
- Ensure that parties have notice of all meetings
- Document all communications, including phone calls
- Use sensitive and informed tone and content, both to the parties and among team members

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Sources of Information

- NIJ Presentation by Rebecca Campbell
- trainED gratefully acknowledges the U.S. Department of Justice, Office of Justice Programs, and National Institute of Justice for allowing us to reproduce, in part or in whole, the recording of The Neurobiology of Sexual Assault. The opinions, findings, and conclusions or recommendations expressed in this recording are those of the speaker(s) and do not necessarily represent the official position or policies of the U.S. Department of Justice.

103

103

Appeal Process

104

104

Session Overview

- Legal Requirements
- Bases for Appeal
- Process and Time Frames
- Deliberate and Make Determination
- Case Studies
- Notice of Outcome of Appeal



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Legal Requirements

106

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Appeals Under Title IX

- Must be offered to both parties
  - From a determination regarding responsibility
  - From an institution's dismissal of a formal complaint or any allegations therein

107

107

Appeals Under Title IX

- Requirements
  - Notify other party in writing when an appeal is filed
  - Appeal officer is different than Title IX Coordinator, investigator, and decisionmaker at hearing
  - No conflict of interest or bias
  - Give both parties reasonable, equal opportunity to submit written statement in support of, or challenging, the outcome
  - Written decision describing result of appeal and rationale
  - Simultaneous delivery of result to parties

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Appeals Under VAWA

- Not required, but if offered, must do so equally
- Transparency, equality, notice requirements from main process will apply to appeals
- Examples include:
  - Right to advisor
  - Notice of meetings
  - Access to information used by appeals panel/individual
  - Simultaneous notice of outcome

109

109

Bases for Appeal

110

110

Mandatory Bases for Appeal Under Title IX

- Procedural irregularity that affected the outcome of the matter
- Examples:
  - Failure to follow procedures outlined in policy
  - Failure to afford equal rights outlined in policy
  - Incorrect relevancy determination by decisionmaker
  - Witness or evidence improperly excluded from investigation or decision-making process
  - Basis for dismissal of complaint not met

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Mandatory Bases for Appeal Under Title IX

- New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter
- Examples:
  - Previously unknown witness comes forward
  - Police investigation uncovers surveillance video
  - Text message sent after the conclusion of the process

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Mandatory Bases for Appeal Under Title IX

- The Title IX Coordinator, investigator, or decisionmaker 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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Additional Bases for Appeal

- Under Title IX, any other bases for appeal must be offered equally to both parties
- Recommend requiring that any additional bases for appeal must have affected the outcome of the matter

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Additional Bases for Appeal

- Examples:
  - Inadequate or excessive sanction or remedy
    - High standard recommended, e.g., "excessively severe" or "grossly inadequate"
    - Successful appeal would only change the sanction, not the outcome
  - Review of the outcome
    - Caution!
    - Determine standard of review (e.g., arbitrary or capricious)

115

115

Process and Time Frames

116

116

Appeal Process—Determination as to Bases for Appeal

- Consider whether Title IX Coordinator has initial role in determining whether a permissible basis for appeal has been stated
  - If the appeal fails to state a qualifying basis for appeal, the Title IX Coordinator provides written simultaneous notice to the parties that an appeal was filed that did not state a qualifying basis for appeal and therefore, the institution will not consider the appeal
  - If the appeal states a qualifying basis for appeal, the Title IX Coordinator issues written notice to the other party that an appeal has been filed

117

117

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Appeal Process—Written Notice of Filing of Appeal

- Give non-appealing party option to submit written statement in support of or challenging the outcome
- Notify both parties of:
  - Qualifying basis for appeal
  - Who will decide the appeal
  - Process for objecting to appeal officer
  - Time frames for appeal

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118

118

Appeal Process—Compile Appeal File

- Compile appeal file
  - Only include items necessary to decide issues on appeal
  - Examples of what may be included
    - Written appeal statements from the parties
    - Notice of determination
    - Adjudication file (in whole or in part)
      - Investigation report
      - Hearing recording/transcript
      - Other evidence
    - New evidence
    - Institution's policy
- VAWA: Must provide parties with access to the appeal file
- Title IX: No specific requirement

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119

119

Appeal Process—Determination

- Appeal officer determines issue on appeal
- Review appeal file
- Make determination
- Consider power to remand vs. change decision
- Consider limited consultation with Title IX Coordinator
- Issue notice of outcome of appeal

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120

120

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Time Frames

- Under Title IX an institution's grievance process must include reasonably prompt time frames for conclusion of the grievance process, including reasonably prompt time frames for filing and resolving appeals

121

121

Deliberate and Make Determination

122

122

Determine Issue on Appeal

- Appeal of dismissal
- Appeal of final determination

123

123

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Review Appeal File

- Only consider information in the appeal file
- Do not discuss case with adjudicator or investigator
- Do not have any contact with the parties
- Contact Title IX Coordinator if more information is needed to make determination

124

124

Make Determination—Procedural Irregularity

- Identify alleged procedural irregularity
- Review applicable policy provisions
- Review relevant evidence from appeal file
  - Consider whether additional information is needed to make a decision
- If procedural irregularity occurred, determine whether it affected the outcome of the matter

125

125

Case Study: Haddie/Damian

Haddie made a formal complaint against Damian, a fellow student, alleging Sexual Assault on May 1, 2026 and Sexual Assault and Sexual Exploitation on May 3, 2026. After an investigation and a live hearing, the hearing panel found sufficient evidence to determine it is more likely than not that Damian engaged in Sexual Assault on May 3 but insufficient evidence to determine it is more likely than not that he engaged in Sexual Assault on May 1 or Sexual Exploitation on May 3. Damian appealed, arguing that there was a procedural irregularity because the investigator failed to interview a witness Damian had identified during the investigation.

126

126

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Case Study: Haddie/Damian

Specifically, Damian told the investigator to interview his roommate Chris, who came home while Damian and Haddie were together on the evening of May 1. Damian's account is that he and Haddie stopped engaging in sexual contact because Chris came home. Haddie's account is that she told Damian, before Chris arrived, that she had to go home because she had work in the morning. The investigator did not interview Chris, but Chris was called as a witness at the hearing. Chris's account during the hearing was that when he came home, Damian and Haddie were hanging out and talking in the living room and that he did not see them do anything else.

Damian argues that the failure to interview Chris during the investigation was a procedural irregularity because he and his advisor were unable to review Chris's account before the hearing, prepare to question Chris, or meaningfully respond to his account.

Lathrop GPM 127

127

Case Study: Haddie/Damian

- Was there a procedural irregularity?
  - What information do you need to make your decision?
- If yes, did it affect the outcome of the matter?
  - Why or why not?
- If so, what are the next steps?

Lathrop GPM 128

128

Case Study: Haddie/Damian

Haddie *also* appeals the hearing panel's decision. She argues that there was a procedural irregularity during the hearing because the hearing panel determined that several questions that her advisor tried to ask Damian were repetitive and therefore irrelevant. Specifically, her advisor tried to ask Damian questions about his account that Haddie turned her body to help Damian unclasp her bra on May 3. The hearing panel told Haddie's advisor that these questions were not relevant because Damian had already answered questions at the hearing about him removing her bra on May 3.

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129

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Case Study: Haddie/Damian

Haddie argues that the questions were not repetitive because they asked for new details that had not been covered. She also argues that being repetitive is not a valid reason to find a question irrelevant. Haddie points out that the panel found the parties' accounts conflicting about whether she consented to Damian removing her bra and decided there was not enough evidence outside their accounts to tip the scales. She argues that her advisor's questions were her only chance to test Damian's credibility on the exact points the panel relied on, and that if the questions had been allowed, the outcome could have been different.

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130

130

Case Study: Haddie/Damian

- Was there a procedural irregularity?
- What information do you need to make your decision?
- If yes, did it affect the outcome of the matter?
  - Why or why not?
- If so, what are the next steps?

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131

131

Deliberate and Make Determination—New Evidence

- Review new evidence
- Was it reasonably available at the time the determination was made?
- If not, could it affect the outcome of the matter?

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132

132

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Case Study: Coach Jackie

A member of the women's volleyball team, Francesca, filed a formal complaint against her coach, Jackie, alleging that Coach Jackie engaged in sexual harassment by making sexual comments and jokes on the bus to games and touching her hips and torso in a way that made her uncomfortable at practice. Another member of the team, Nicole, participated as a witness during the investigation and hearing. Nicole's account was that she saw Coach Jackie place her hands on Francesca's hips during practice and that, after Coach Jackie made a comment to Francesca about how her butt looks in spandex, Francesca told Nicole about the comment almost immediately afterward.

The hearing panel finds Coach Jackie responsible for Title IX Sexual Harassment.

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133

133

Case Study: Coach Jackie

Coach Jackie appeals. She states that right after the hearing, another member of the volleyball team, Sarah, sent her a screenshot of a text message with Nicole, Francesca, and Georgia, another member of the volleyball team. Jackie states that she did not know about the text message until she received it and that it is evidence that Nicole must have lied during the investigation and hearing because she wanted a new coach.



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134

134

Case Study: Coach Jackie

- What is the new evidence?
  - Was it reasonably available at the time the determination was made?
- Why or why not?
  - If not, could it affect the outcome?
- Why or why not?
  - If so, what is the next step?

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135

135

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Deliberate and Make Determination—Conflict of Interest/Bias

- Did the official have a conflict of interest or bias?
- Did it affect the outcome of the matter?

136

136

Case Study: Jordan/Marcus

Jordan made a formal complaint against Marcus, a fellow student, alleging that Marcus had sex with Jordan after Jordan said no. Before the hearing, the University gave the parties the names of the hearing panel members. Neither party objected to any of the panel members. After the hearing, the hearing panel found sufficient evidence to determine it is more likely than not that Marcus engaged in sexual assault.

Marcus appealed, arguing that the chair of the hearing panel had a conflict of interest or bias against him individually because he is a man and against respondents generally. Marcus states that after the hearing, he searched the chair's name online and learned that he worked for several years prosecuting sexual assault offenses.

137

137

Case Study: Jordan/Marcus

Marcus states that he also found several of the chair's public social media posts, including one that said, "Male perpetrators of sexual violence on college campuses too often walk away with no consequences," and another sharing an article about campus sexual assault with the comment, "When will colleges finally hold these men accountable?" Marcus argues that the chair's background as a prosecutor means he is trained to see respondents as "guilty," and that his social media posts show that he believes male students accused of sexual assault are responsible before reviewing the evidence. Marcus argues that this bias affected the outcome because the hearing panel's decision was based in part on its finding that Marcus's account during his interviews and the hearing were internally inconsistent.

138

138

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Case Study: Jordan/Marcus

- Was the hearing panel member biased?
- If so, did it affect the outcome?
  - Why or why not?
- If so, what is the next step?

139

Determine Next Steps

- Consider whether appeal officers have authority to change the decision or just to remand
- Possible next steps following successful appeals
  - Additional investigation
  - New investigation with new investigator
  - Additional response statements
  - Additional limited hearing
  - New hearing with new hearing panel
  - Different sanctions

140

Notice of Outcome of Appeal

141

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Notice of Outcome of Appeal

- Must issue a written decision describing the results of the appeal and the rationale for the result
- Must provide the written decision simultaneously to both parties

142

142

Notice of Outcome of Appeal

- Recommended elements:
  - Summary of complaint/allegations
  - Summary of process/procedural steps
  - Summary of appeal
  - Relevant policy provisions (e.g., bases for appeal)
  - Result/decision
  - Rationale for the result/decision
  - Any changes to sanctions/remedies and rationale
  - Next steps (if applicable)

143

143

Notice of Outcome of Appeal—Elements

- Summary of complaint/allegations
  - Recap allegations in the complaint
  - Reference policy provisions for alleged prohibited conduct
  - Use neutral language
- Procedural steps since complaint
  - Investigation
  - Hearing(s)/adjudication
  - Notice of determination
  - Reference policy provisions setting forth the process

144

144

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Notice of Outcome of Appeal—Elements

- Summary of appeal
  - Bases for appeal/argument
  - Title IX Coordinator's determination that basis is permissible under the policy
    - Include policy provision
  - Response from non-appealing party
  - Evidence reviewed/considered

145

145

Notice of Outcome of Appeal—Elements

- Result/decision
  - Conclusion regarding whether the applicable basis for appeal has been established
- Rationale for the result as to each basis for appeal and each element of the bases for appeal
  - E.g., why was there a procedural error?
  - Why did it affect the outcome?
- Next steps (if applicable)
- If appeal is denied, statement that results are final

146

146

Notice of Outcome of Appeal—Delivery

- Must be in writing
- Must be delivered simultaneously
  - Email
  - In-person meetings to deliver hard copies of written notice
- Best practice: Let parties know ahead of time when decision will be delivered

147

147

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Notice of Outcome of Appeal—FERPA

- FERPA Exception – compliance with requirements for disciplinary proceedings—including the inclusion of the rationale for the result and the sanctions—does not violate FERPA

148

148

Notice of Outcome of Appeal—Implementation

- Title IX
  - Determination regarding responsibility becomes final either on the date that the recipient provides the parties the written determination of the result of the appeal (if an appeal is filed) or the date on which an appeal would no longer be considered timely (if an appeal is not filed)

149

149

Additional Required Post-Determination Notices

- For sexual assault and VAWA crimes, your institution must provide simultaneous notice to both parties of—
  - Any change to the results that occurs prior to the time that such results become final
  - When such results become final

150

150

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Q & A



151

151

On Demand Trainings

- **Available on-demand:**
  - Annual Training for New Title IX Coordinators and Deputy Coordinators
  - Annual Training for Advanced Title IX Coordinators and Deputy Coordinators
  - Title IX/VAWA Investigator Training
  - Conducting a Live Hearing Under Title IX/VAWA
  - Title IX/VAWA Appeal Officer Training
  - Trauma-Informed Training for First Responders, Confidential Resources, and Campus Security
  - Non-Hearing Adjudicator Training
  - Informal Resolution Training
  - Exploring Alternative Non-Hearing Options for Resolving Complaints of Sex Discrimination
  - Notice of Allegations: Strategies of Drafting, Amending, and Avoiding Common Mistakes
  - Minnesota Campus Sexual Misconduct Law Training

152

152

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