

Conducting a Live Hearing Under Title IX/VAWA

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Tell Us About Yourself

How many hearings of Title IX 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

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Agenda

- Introduction and Legal Landscape
- Defining Sex Discrimination
- Overview of the Process
- Working with the Parties
- The Hearing and Decision-Making Process
- Weighing Evidence and Assessing Credibility
- Appeals

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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
- CSA = Campus Security Authority
- Investigation/Grievance Procedures/Complaint Procedures
- Adjudicator/Decisionmaker
- Complainant/Reporting Party/Accuser/Victim/Survivor
- Respondent/Responding Party/Accused/Alleged Perpetrator

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The Legal Landscape



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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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Who Must Comply With Title IX?

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



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Title IX Updates


- 2020 regulations effective August 14, 2020
- New regulations effective August 1, 2024
 - Injunctions in place in:
 - Statewide: Alabama, Alaska, Arkansas, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, Wyoming, and
 - Institution Specific : any institution attended by members of Young America's Foundation and Female Athletes United, and children of members of Moms for Liberty (impacts nearly 700 institutions)

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Title IX Updates

Which regulations apply?



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graph TD; A["Institution covered by injunction"] --> B["Apply 2020 regulations"]; C["No injunction"] --> D["Conduct alleged to have occurred before August 1, 2024"]; C --> E["Conduct alleged to have occurred on or after August 1, 2024"]; D --> F["Apply 2020 regulations"]; E --> G["Apply 2024 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
 - Offer supportive measures to a complainant and respondent
 - Follow a legally compliant grievance process
 - Train individuals with heightened responsibilities
 - Train students and employees

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When an Institution Must Respond to a Report

2020 Regulations	2024 Regulations
Institution has actual knowledge of	Institution has knowledge of
Sexual harassment	Sex discrimination
In an education program or activity	In an education program or activity
Against a person in the United States	In the United States

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Education Program or Activity

2020 Regulations	2024 Regulations
<ul style="list-style-type: none">• On campus• Off-campus if:<ul style="list-style-type: none">• Part of institution's operations• Institution exercised substantial control over the respondent and the context.• Building owned/controlled by a student organization	<ul style="list-style-type: none">• Building owned/controlled by student organization• Under institution's disciplinary authority• Obligation to respond even when some conduct alleged to be contributing to the hostile environment occurred outside of the education program or activity



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How an Institution Must Respond




2020 Regulations	2024 Regulations
<ul style="list-style-type: none">• Must respond promptly in a manner that is not deliberately indifferent• Follow grievance process outlined in regulations	<ul style="list-style-type: none">• Take action to promptly and effectively<ul style="list-style-type: none">• End any sex discrimination in institution's program or activity• Prevent its recurrence and• Remedy its effects• Follow grievance procedure outlined in regulations



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OCR's Enforcement and Guidance

- OCR's Role:
 - Issue guidance
 - Compliance reviews
 - Resolution agreements






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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

• Fine for each Clery Act violation is \$69,733



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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 to promote awareness
- Codified parts of 2011 Dear Colleague Letter on Title IX

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Defining Sex Discrimination

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Title IX Regulations

- 2020: Sexual harassment
- 2024: Sex discrimination (including both sex-based harassment and non-harassment sex discrimination)

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Scope of Title IX Regulations	2020	2024
Differential treatment		✓
Failure to provide modification to student for pregnancy or related condition		✓
Retaliation		✓
Quid pro quo harassment	✓	✓
Hostile environment harassment	✓	✓

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Scope of Title IX Regulations	2020	2024
Sexual assault	✓	✓
Domestic violence	✓	✓
Dating violence	✓	✓
Stalking	✓	✓

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2024 Regulations: Differential Treatment

- Conduct on the basis of sex that excludes an individual from participation, denies the individual the benefits of, treats the individual less favorably, or otherwise adversely affects a term or condition of an individual's employment, education, living environment, or participation in a program or activity
- Examples:
 - Giving prohibited consideration to an individual's sex in deciding whether to offer an applicant a job interview or an employee a promotion;
 - Requiring that members of a particular sex meet higher standards for advancement or promotion;
 - Denying a student the opportunity to participate in an educational activity because of his or her sex

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2024 Regulations: Reasonable Modifications for Student's Pregnancy and Related Conditions

- Institution must make reasonable modifications to institution policies, practices, or procedures for a student's pregnancy or related condition as necessary to prevent Sex Discrimination and ensure equal access to the institution's education program or activity
 - Reasonable modifications are based on a student's individualized needs
 - Modifications that would fundamentally alter the nature of the education program or activity are not reasonable
- Failure to make reasonable modifications is a form of sex discrimination

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2024 Regulations: Retaliation

- Intimidation, threats, coercion, or discrimination against any person
- By institution, a student, or an employee or other person authorized by institution to provide aid, benefit, or service under education program or activity
- Covers only those actions taken for:
 - The purpose of interfering with Title IX rights, or
 - Because the person participated in the Title IX process

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2020 & 2024 Regulations: Quid Pro Quo Harassment

- An individual conditions aid, benefit, or service of the institution on an individual's participation in unwelcome sexual conduct
 - 2020: Must be an employee conditioning the aid, benefit, or service
 - 2024: Could be a student or an employee if that person is authorized to provide an aid, benefit, or service
- Conditioning could be explicit or implied
- Examples
 - Supervisor conditioning promotion on participation in sexual advance
 - Professor conditioning grade on participation in sexual advance



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2020 & 2024 Regulations: Hostile Environment

- Unwelcome conduct on the basis of sex that...
- 2020 Regulations: is 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
- 2024 Regulations: Based on the totality of the circumstances, is *subjectively* and *objectively offensive* and is so *severe or pervasive* that it limits or denies a person's ability to participate in or benefit from the institution's education program or activity

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Hostile Environment Harassment

- Examples: 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

*multiple incidents required for 2020 regulations

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Hostile Environment Harassment

- Examples: 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



*multiple incidents required for 2020 regulations

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2020 & 2024 Regulations: Sexual Assault

- **Rape:** The carnal knowledge of a person, 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.
- **Sodomy:** Oral or anal sexual intercourse with another person, 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.
- **Sexual Assault With An Object:** To use an object or instrument to unlawfully penetrate, however slightly, the genital or anal opening of the body of another person, 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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2020 & 2024 Regulations: 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.
- **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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2020 & 2024 Regulations: Domestic Violence

- Felony or misdemeanor crime committed by:
 - 2020 Regulations: a current or former spouse or intimate partner of the victim
 - 2024 Regulations: a person who -
 - Is a current or former spouse or intimate partner of the victim, or person similarly situated to a spouse of the victim
 - Is cohabitating or has cohabitated with the victim as a spouse or intimate partner
 - Shares a child in common with the victim or
 - Commits acts against a youth or adult victim who is protected from those acts under the family or domestic violence laws of the jurisdiction

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2020 & 2024 Regulations

- **Dating Violence:** 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 fear for safety or substantial emotional distress



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Title IX – Sexual Harassment

- Male/Female
- Female/Male
- Female/Female
- Male/Male



- Gender Identity

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Interaction with Other Laws

- FERPA: Family Educational Rights and Privacy Act
 - Limits disclosure of student education records
 - Several exceptions permit disclosure to both parties and advisors under Title IX and VAWA
 - Caution! If action or process that results in disclosure of student education records is not required by the law, Title IX's/VAWA's FERPA exception does not apply






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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 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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Title IX Training Requirements

2020 Regulations	2024 Regulations
<ul style="list-style-type: none">• Definition of sexual harassment• Scope of institution's education program or activity• How to conduct hearing• How to serve impartially, including by avoiding prejudgment of the facts at interest, conflicts of interest, and bias• Institutions policies and procedures	<ul style="list-style-type: none">• Required content for all employees• Institution's obligations to respond to sex discrimination• Institution's grievance procedures• How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias• Meaning and application of the term "relevant" and types of impermissible evidence

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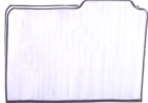
VAWA Training Requirements

- Persons with heightened responsibility in process (Title IX Coordinator, investigator, decisionmaker, etc.)
 - Annual training on issues related to domestic violence, dating violence, sexual assault, and stalking and on how to conduct an investigation and hearing process that protects the safety of victims and promotes accountability
- Incoming students and new employees
 - Primary prevention and awareness program on required topics
- Ongoing prevention and awareness campaigns available for all students and employees

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Recordkeeping Requirements

- Title IX – for 7 years, must maintain:
 - Grievance procedure 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:
 - 2020 Regulations: sexual harassment
 - 2024 Regulations: sex discrimination



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Recordkeeping Requirements


- Examples of decisionmaker's records:
 - Party and witness statements, if applicable
 - Recordings of interviews or interview notes
 - Other evidence received (text messages, pictures, etc.)
 - Investigation report
 - Decisionmaker notes
 - Recordings of decisionmaker meetings, if applicable
 - Recording of live hearing, if applicable
 - Notice of determination
 - Training records – relating to decisionmakers

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2024 Regulations: Pregnancy or Related Conditions

- Employee notification requirement
 - When student informs **any employee** about the student's pregnancy or related conditions, employee must
 - Provide them with Title IX Coordinator's contact information; and
 - Inform them that the Title IX Coordinator can coordinate specific actions to prevent sex discrimination and ensure equal access
 - Exception: If employee reasonably believes Title IX Coordinator has been notified
- Institution must notify the student of the institution's obligations toward them



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Overview of Process

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2024 Regulations: Employee Reporting Obligations

- Most non-confidential employees must report information about possible sex discrimination to the Title IX Coordinator
- Narrow category of non-confidential employees in non-student facing roles must either:
 - Report information to Title IX Coordinator or
 - Provide contact information of Title IX Coordinator and information about how to make a complaint of sex discrimination to any person who provided information
- Confirm obligation under your institution's policy

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2024 Regulations: Employee Reporting Obligations

- Student-employees may have reporting obligations
 - Factors to consider:
 - Whether primary relationship with institution is as student or employee
 - Context for how reportable information was learned
 - Other relevant factors
 - Confirm obligation under your institution's policy

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2024 Regulations: Employee Reporting Obligations



- Obligation triggered by employee:
 - Witnessing conduct
 - Receiving a report of conduct
 - Receiving information from another source (applications, interviews, personal statements, academic paper, other)

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Employee Reporting Obligations



- Recommended approach regardless of applicable regulations:
 - All non-confidential employees report potential sex discrimination/sexual harassment to Title IX Coordinator
 - If unsure whether to report, ask Title IX Coordinator for guidance without sharing identifiable information

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Responding to a Report



- Title IX Coordinator must promptly contact complainant
 - Offer and coordinate supportive measures
 - Notify complainant of the grievance procedures
 - 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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Supportive Measures

- Must not unreasonably burden either party
- Must be designed to protect the safety of the parties or the educational environment or to provide support during grievance procedures
- May not be imposed for punitive or disciplinary reasons
- Must be without fee or charge to the complainant or respondent
- Available to complainant upon report; available to respondent if/when made aware or report or complaint
- Must keep confidential; only share to extent necessary

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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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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
 - Complaint/Formal Complaint
 - Initiates grievance process
 - Cannot be filed anonymously
 - Grievance process requires that complainant's identity be disclosed to respondent, if known

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How an Institution Must Respond to Complaint

- Notify respondent of grievance procedures and informal resolution process (if available and appropriate)
- 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
- Initiate grievance procedures or informal resolution process

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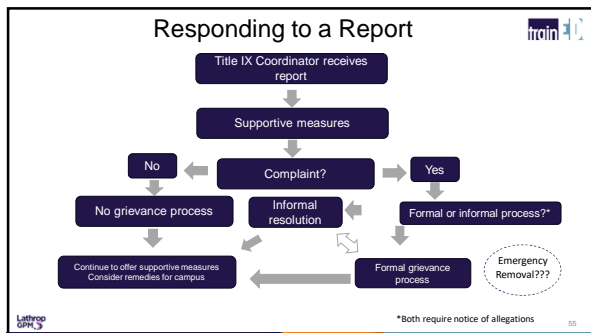
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Grievance Procedure

- The process the school uses to resolve sex discrimination/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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Role of Investigator

- Identify factual issues
- Give parties opportunity for input
- Compile investigation materials for decisionmaker and parties
- Make determination?
 - 2020 Regulations: Single investigator model prohibited, but investigator may make recommendations
 - 2024 Regulations: Single investigator model permitted
 - Recommendation: Keep roles separate
- Role does not include:
 - Providing support or advocacy to either party
 - Serving as a confidential employee
 - Adjudication of complaint (unless also serving as decisionmaker)



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Conflicts of Interest and Bias

- Title IX Coordinator, investigator, decisionmaker, or facilitator of informal resolution process may not have conflict of interest or bias
 - For or against complainants or respondents generally
 - For or against an individual complainant or respondent

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Consolidation of Complaints

- May consolidate complaints with more than one complainant or respondent, or by one party against another
- When the allegations arise out of the same facts or circumstances
- If consolidating allegations that involve different procedural requirements, use applicable process that provides the most rights to the parties
- Caution – no FERPA exception for consolidation

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Dismissal of Complaint

- Institution *may* dismiss prior to adjudication under certain limited circumstances
- Some permitted circumstances differ between 2020 and 2024 Regulations

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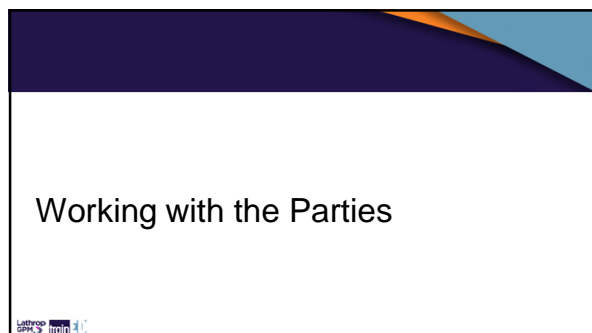
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Differences Between Criminal and Institutional Investigations

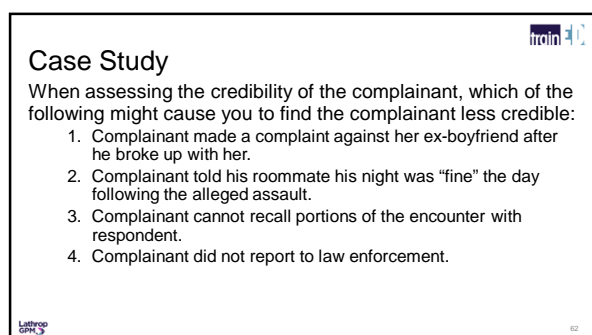
- Different standards of proof
 - Probable cause vs. beyond reasonable doubt vs. preponderance of evidence vs. clear and convincing
- Different investigation "powers"
 - Subpoena powers vs. disciplinary actions
- Timing of processes
- Cooperating with law enforcement
 - Memorandum of Understanding
 -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

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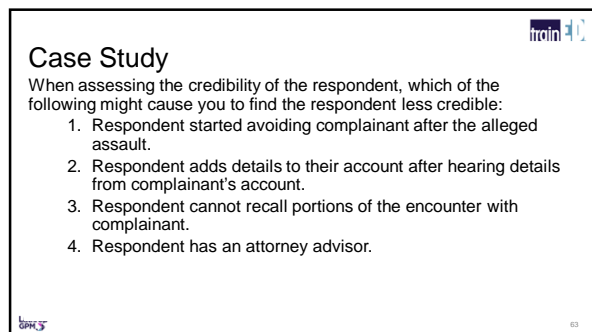
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Session Overview

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



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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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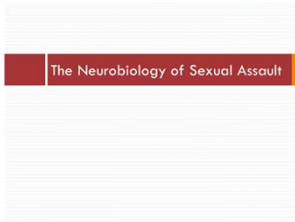
Common Victim Responses

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

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Neurobiology of Sexual Assault

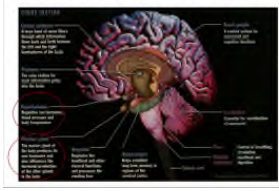


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Neurobiology of Sexual Assault

Brain Regions Impacted by Trauma



A diagram of a human brain with various regions highlighted in different colors and labeled with text. The labels include: 'Hypothalamus: Controls body temperature, hunger, thirst, and sexual behavior'; 'Pituitary Gland: Releases hormones that control other glands in the endocrine system'; 'Adrenal Glands: Release hormones that help the body respond to stress'; 'Amygdala: Processes emotions, especially fear and anger'; 'Hippocampus: Involved in learning and memory'; 'Cerebellum: Controls balance, coordination, and fine motor skills'; 'Brainstem: Controls basic life functions like breathing and heart rate'; 'Frontal Cortex: Involved in decision-making, planning, and social behavior'; 'Temporal Cortex: Involved in memory and language processing'; 'Occipital Cortex: Processes visual information'; 'Parietal Cortex: Processes sensory information from the body'; 'Cerebral Cortex: The largest part of the brain, responsible for higher-level functions like thinking, reasoning, and language.

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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



A diagram showing the HPA axis. It starts with the hypothalamus in the brain, which sends signals to the pituitary gland. The pituitary gland then sends signals to the adrenal glands, which release hormones into the bloodstream. The diagram also shows a human figure with arrows indicating the flow of hormones from the brain to the body.

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Neurobiology of Sexual Assault


Brain-Body Regions Impacted by Trauma

Catecholamines: Fight or flight response

Cortisol: Energy available

Opioids: Prevent pain

Oxytocin: Promotes good feelings

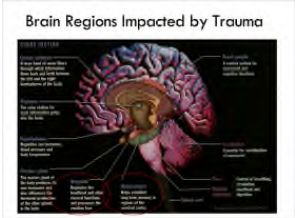


A diagram showing the HPA axis. It starts with the hypothalamus in the brain, which sends signals to the pituitary gland. The pituitary gland then sends signals to the adrenal glands, which release hormones into the bloodstream. The diagram also shows a human figure with arrows indicating the flow of hormones from the brain to the body.

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Neurobiology of Sexual Assault



Brain Regions Impacted by Trauma

HEAD REGION

- A traumatic event can affect the brain, leading to changes in the way it processes information.
- The brain is the control center of the body, and it is responsible for all of our thoughts, feelings, and actions.
- Trauma can affect the brain in a number of ways, including:
- Disrupting the brain's normal functioning.
- Causing the brain to react differently to stressors.
- Making it harder to remember things.
- Making it harder to control emotions.
- Making it harder to focus.
- Making it harder to sleep.
- Making it harder to have healthy relationships.

TRUNK REGION

- Trauma can affect the body's stress response system, leading to changes in the way it reacts to stressors.
- The stress response system is responsible for releasing hormones that help the body deal with stress.
- Trauma can cause the stress response system to become overactive, leading to symptoms such as:
- Increased heart rate.
- Increased blood pressure.
- Increased breathing rate.
- Increased sweating.
- Increased alertness.
- Increased energy.
- Increased focus.
- Increased motivation.
- Increased determination.
- Increased resilience.
- Increased ability to cope with stress.

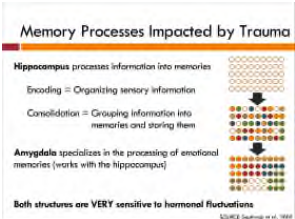
FEET REGION

- Trauma can affect the way the body moves, leading to changes in the way it reacts to stressors.
- The body's movement system is responsible for controlling the body's muscles and joints.
- Trauma can cause the movement system to become overactive, leading to symptoms such as:
- Increased muscle tension.
- Increased joint pain.
- Increased stiffness.
- Increased difficulty moving.
- Increased difficulty standing.
- Increased difficulty walking.
- Increased difficulty running.
- Increased difficulty jumping.
- Increased difficulty climbing.
- Increased difficulty balancing.
- Increased difficulty staying on one's feet.

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Neurobiology of Sexual Assault



Memory Processes Impacted by Trauma

Hippocampus processes information into memories

- Encoding = Organizing sensory information
- Consolidation = Grouping information into memories and storing them


Amygdala specializes in the processing of emotional memories (works with the hippocampus)

Both structures are VERY sensitive to hormonal fluctuations

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Neurobiology of Sexual Assault



Like These . . .

- Catecholamines:** Fight or flight response
- Cortisol:** Energy available
- Opioids:** Prevent pain
- Oxytocin:** Promotes good feelings

THESE HORMONES IMPAIR MEMORY CONSOLIDATION

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Neurobiology of Sexual Assault

What Happens During A Sexual Assault

```
graph LR; A[Amygdala Detects Threat] --> B[Activates Hypothalamus]; B --> C[HPA Axis Kicks In (Hormonal Flood)];
```

SOURCE: Barak, 2003; Sahawneh et al., 2003

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Neurobiology of Sexual Assault

What Happens During A Sexual Assault

- Catecholamines Increase - Impairs rational thought
- Opioids Increase - Causes flat affect
- Corticosteroids Decrease - Reduces energy

SOURCE: Barak, 2003; Sahawneh et al., 2003

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Neurobiology of Sexual Assault

What Happens During A Sexual Assault

```
graph TD; A[Amygdala Detects Threat] --> B[Activates Hypothalamus]; B --> C[HPA Axis Kicks In (Hormonal Flood)]; C --> D[Can Trigger or Conserve "Fight/Flight" in the Body];
```

SOURCE: Barak, 2003; Sahawneh et al., 2003

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Neurobiology of Sexual Assault

Tonic Immobility (TI)

- AKA: "Rape-induced paralysis"
- Autonomic (uncontrollable) mammalian response in extremely fearful situations
- Increased breathing, eye closure, paralysis
- 12-50% rape victims experience TI during assault
- TI is ~more common in victims who have been assaulted before (childhood, adolescence, or adult)

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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

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Memory

What Happens During A Sexual Assault

Increased Stress Hormones → Impaired Functioning in Hippocampus → Memories Fragmented

Memory Recall Can Be Slow & Difficult

BUT...
Alcohol use during the assault may prevent encoding, which means there's nothing to retrieve

Source of the Assault CAM May Be Inaccurate

SCARF, Krause et al., 1993, 1995; Buchanan et al., 2001; Kubo et al., 2004

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Memory

Case Study: Memory Fragmentation

- 25 year-old woman
- Raped by a friend's brother at 4th July party
- Filed police report
- Detective interview was when it all went to hell

"He wouldn't let me, wouldn't let me get up after we were called together. Trying to kick me, trying to get me to remember. I wanted to say, 'hold on, give me a chance to speak.' He had been, 'society of me.'"

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Memory

Case Study: Memory Fragmentation

"We talked it through. And I didn't feel rattled and freaked out. The same I was incoherent and he just let it roll. He was patient.

I felt like I was piecing it together, like a puzzle, we were putting together a puzzle together.

And drinking coffee."

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Memory

Case Study: Memory Fragmentation

1. So, why did you do that? (give her the coffee)
2. It helps. Not the coffee so much, just the moment to let it all come together in their heads.
3. What do you mean?
4. I don't know why it's like that, I've just noticed that over the years. If you give them a few minutes to breathe. It starts to make more sense. I don't know why, it just does.

→ **MEMORY CONSOLIDATION**
A DOCUMENTED NEUROBIOLOGICAL CONDITION

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Memory

Case Study: Memory Fragmentation

1. Were you worried that if you gave her some time, she'd just make something up?
2. Nah, not really. I mean, some victims lie, but most don't. Besides, if they're lying, we'll catch 'em at it eventually. I think it's just hard for victims to talk about and we just need to have a little patience.


→ **MEMORY CONSOLIDATION**
A DOCUMENTED NEUROBIOLOGICAL CONDITION

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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



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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

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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
- Avoid appearing to agree with either party's account



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Serving Impartially

- Set boundaries
 - Make objective role clear up front
 - Not counseling or advocacy services
 - Differentiate from your other roles within institution
 - Know how to respond when coming close to line
 - Point to Title IX Coordinator for resources

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Serving Impartially


- Separate support/advocacy services from investigation/adjudication 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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Serving Impartially 


- Allow sufficient time for exploration of the issues as needed
- Explain hearing process and agenda
- Allow questions about the hearing process
- Afford equal opportunity to participate in hearing (cross-examination, opening/closing statements, presentation of other evidence)
- Be transparent about how information will be used
- Ensure parties are fully aware of the prohibition against retaliation




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Serving Impartially — Working with Complainant 


- Recognize the impact of trauma on memory
- Memory may be impaired by alcohol
- Use “account” or “experience” rather than “story”
- Avoid secondary victimization



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Serving Impartially — Working with Respondent 

- Recognize stress involved with being accused of sexual misconduct
 - May be defensive
 - May be nervous or uncomfortable
- Memory may be impaired by alcohol



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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.

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Process Following Investigation

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2020 Title IX Process Requirements

- 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
- Must hold **live hearing** with opportunity for cross examination

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2024 Grievance Procedures

Section 106.45 General Grievance Procedures (Postsecondary and K-12 institutions) <i>Apply to all employee-only matters, all K-12 matters, and all complaints of non-harassment discrimination</i>	Section 106.46 Heightened Grievance Procedures (Postsecondary institutions only) <i>Apply to complaints of sex-based harassment involving a student party</i>
<ul style="list-style-type: none">• Differential treatment• Failure to provide reasonable modifications for pregnancy and related conditions• Retaliation	Sex-based harassment at post-secondary institution where at least one party is a student*
Sex-based harassment between employees*	
Sex-based harassment in K-12	

*VAWA may impose additional requirements in post-secondary environment if sexual assault, dating violence, domestic violence, or stalking

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2024 Title IX Process Requirements

- Parties have right to **access and respond** to all **relevant and not impermissible evidence**
- If credibility is at issue:
 - Under Heightened Grievance Procedures, parties have right to propose questions to be asked at individual meetings or at a **live hearing**

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2024 Regulations: When Credibility Is in Dispute

- Determination relies on testimonial evidence, including when decisionmaker has to choose between competing narratives to resolve case
- Credibility is not in dispute if
 - Respondent admits to facts at issue
 - Evidence other than complainant's statements leads to outcome (e.g., security footage)

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Live Hearing & Decision-Making Process

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Legal Requirements for Live Hearing

2020 Regulations	2024 Regulations
<ul style="list-style-type: none">• Must permit each party's advisor to ask the other party and witnesses "all relevant questions and follow-up questions" including those challenging credibility• If party does not have advisor, institution must provide one for cross-examination	<ul style="list-style-type: none">• Must allow each party to propose questions the party wants asked of any party or witness and have those questions asked by the decisionmaker or the party's advisor• If advisor will ask questions, institution must provide advisor for any party who does not have one

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Legal Requirements for Live Hearing

- Cross-examination must never be conducted by the party personally
- Institution can place restrictions on advisors' participation in the proceedings
 - Exception: Cross-examination under 2020 Regulations
 - Exception: Cross-examination if institution allows advisor questioning under 2024 Regulations

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Legal Requirements – School-Appointed Advisors

- If advisors conduct questioning - 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 his or her 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"
 - 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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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 cannot draw an inference about the determination regarding responsibility based solely on a party's or witness's absence from the live hearing or refusal to answer cross-examination or other questions

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Legal Requirements – Cross-Examination

- Party or witness who does not appear at the hearing
 - Advisor or decisionmaker* may conduct questioning on behalf of party even if party is not present
 - If decisionmaker or 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
 - Unwilling participant
 - 2020 Regulations: Be careful with any requirement that a student or employee cooperate with grievance process; discipline for not attending hearing may constitute retaliation
 - 2024 Regulations: May require employee to participate as a witness in a hearing; cannot require a student to participate

Lathrop GPM 3 *2024 Regulations 110

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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
- 2024: Do not allow unclear or harassing questions
 - Party must have opportunity to clarify or revise a question if unclear or harassing
- Exclude questions with caution

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Legal Requirements – Other Procedural Rules

- May establish additional rules that apply equally to both parties
 - If advisors conduct questioning, 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)
 - 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 his or her 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

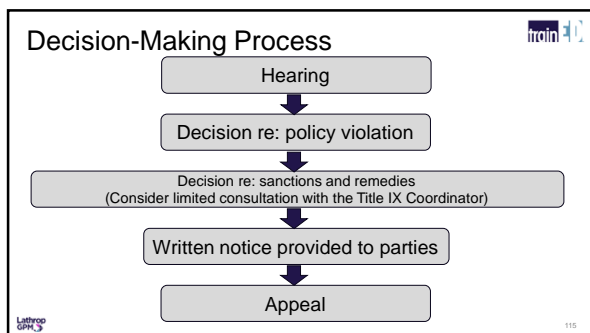
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Stages of Decision-Making Process

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- ### Stages of Decision-Making Process
- Stage 1: Prepare for hearing
 - Stage 2: Conduct hearing
 - Stage 3: Deliberate and make determination
 - Stage 4: Determine sanctions and remedies
 - Stage 5: Draft notice of determination

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Stage One: Prepare for Hearing

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Stage One: Prepare for Hearing - Decisionmaker

- May have single decisionmaker or a panel of decisionmakers
- If a panel of decisionmakers, may appoint one decisionmaker to make relevancy determinations at the hearing
- May appoint Title IX Coordinator or another individual who is not a decisionmaker to enforce procedural rules at the hearing
 - Decisionmaker must still determine relevancy issues

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Stage One: Prepare for Hearing

- Communication with Others
 - Limit communication with Title IX Coordinator to procedural issues
 - Do not communicate with investigator outside of hearing
 - Do not communicate with parties, witnesses, or advisors outside of hearing

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Stage One: Prepare for Hearing

- Determine hearing format and arrange technology
 - May conduct with all parties physically present in the same location
 - At the request of either party, institution must provide for live hearing to occur with the parties located in separate rooms with technology enabling the hearing panel and parties to simultaneously see and hear the party or witness answering questions

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Stage One: Prepare for Hearing

- Determine hearing format and arrange technology (cont.)
 - May conduct virtually (for all parties, witnesses, and other participants), with technology enabling participants simultaneously to see and hear each other
 - Video is required; phone is insufficient

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**Stage One: Prepare for Hearing—
Schedule Hearing**

- Begin scheduling hearing during review of evidence stage
- Notify all witnesses that their presence may be requested to check availability

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**Stage One: Prepare for Hearing—
Notice of Meetings**

- Title IX: Written notice to the party whose participation is invited or expected of the
 - Date
 - Time
 - Location
 - Participants
 - Purpose
- of all meetings or proceedings with sufficient time for the party to prepare to participate
- VAWA: Timely notice to the other party of meetings that are part of the disciplinary process

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Stage One: Prepare for Hearing

- Pre-hearing meeting with parties
 - Best for Title IX Coordinator to handle
 - Discuss procedure for hearing
 - Discuss parameters for evidence to be presented
 - Discuss role of advisors

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Stage One: Prepare for Hearing

- Hearing panel reviews adjudication file
 - Ensure that parties have access to same information as panel
- Analyze issues for hearing (work together if multiple decisionmakers)
 - Identify ultimate questions that will need to be decided
 - Review institution's policy and how it defines relevant terms
 - Determine whether any additional information is needed to make the decision
 - Identify witnesses to ask if additional information is needed or if credibility is at issue
 - **CAUTION:** Don't base credibility on demeanor
 - Consider questions or topics that may come up and any anticipated relevancy issues

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Stage One: Prepare for Hearing

- Determine logistics for hearing
 - Determine who will chair the hearing
 - Determine who provides list of witnesses requested by hearing panel to parties
 - Determine who will request that witnesses make themselves available for the hearing (including those identified by hearing panel and parties)
 - Determine whether investigator will be called as a witness
 - Determine order of witnesses
 - Ensure that all evidence provided to parties during review phase is available for use at the hearing
 - 2020: Directly related evidence
 - 2024: Relevant and not otherwise impermissible evidence
 - Set up technology needed for hearing

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Stage One: Prepare for Hearing

- Prepare script of opening remarks
 - Provide general explanation of reason for hearing
 - Explain hearing panel's role in the complaint process
 - Confirm hearing panel has reviewed investigation report

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Stage One: Prepare for Hearing

- Prepare script of opening remarks
 - Explain hearing process to parties:
 - Process for hearing panel and advisors (if applicable) to ask questions
 - Advise party and advisor on advisor's role
 - Parameters for permitted questions
 - Discuss what type of evidence may be considered (relevant)
 - Instruct parties they do not need to repeat information included in the investigation report
 - Process for presenting arguments
 - Time limitations

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Stage One: Prepare for Hearing

- Prepare script to use before each party/witness testifies
 - Confirm that no one else is in the room (if virtual hearing)
 - Inform parties and witness of recording and its use
 - Explain possible uses of party's/witness's statements
 - Explain that the hearing panel may need to ask difficult, detailed questions
 - Ask parties not to read into questions
 - Tell parties/witness if question unclear, let hearing panel know
 - Tell parties/witness okay to ask for break and pre-determine breaks
 - Instruct witness regarding confidentiality
 - Assure/warn parties/witness regarding policy prohibiting retaliation
 - Advise parties/witness on alcohol or other policy waiver
 - Obtain commitment to tell truth

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Stage One: Prepare for Hearing

- Prepare script to use prior to dismissing each party/witness who testifies
 - Ask parties if any more questions for this witness
 - Remind witness of instructions regarding confidentiality
 - Remind regarding policy prohibiting retaliation

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Stage One: Prepare for Hearing

- Prepare script of closing remarks
 - Remind regarding policy prohibiting retaliation
 - Explain that questions related to the process or resources should be directed to the Title IX Coordinator

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Stage One: Prepare for Hearing

- Consider reviewing redacted excerpts of other hearings as part of training and preparation for hearing
- Consider holding a mock hearing to practice procedures and maintaining control during testimony and questioning

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Case Study

- On September 23, 2024, Ellie Ellison made a complaint of sexual assault against Grant Grayson.

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Case Study

- The Title IX Coordinator contacts you to ask you to be a member of the hearing panel for a Title IX matter. The Title IX Coordinator informs you that the parties are Ellie Ellison and Grant Grayson.
- Ellie was a student-worker in your department at the institution last year. You occasionally interacted with her but have not seen her since last spring.
- What should you do?

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Case Study

Review adjudication file and determine what questions you have for the hearing

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Case Study

- The Title IX Coordinator reaches out to the witnesses: Macie, Cody, and Julie. The Title IX Coordinator lets them know that a live hearing will be taking place and asks for their availability. Julie responds, "I would really prefer not to participate. I already met with an investigator and I'm not comfortable participating further. Do I have to?"
- Is Julie required to participate?

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Case Study

- Ellie emails the Title IX Coordinator a week before the live hearing. Ellie says that she would like her cousin to be her advisor at the live hearing, but her cousin can only attend the first hour of the hearing and has a conflict for the rest of the day. Ellie asks if the hearing will take more than one hour and, if so, if the institution can reschedule the hearing.
- How should the Title IX Coordinator respond?

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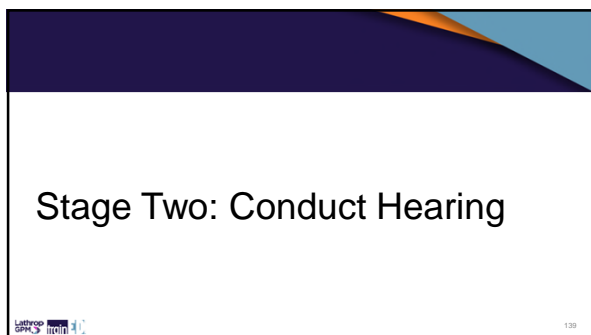
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Case Study

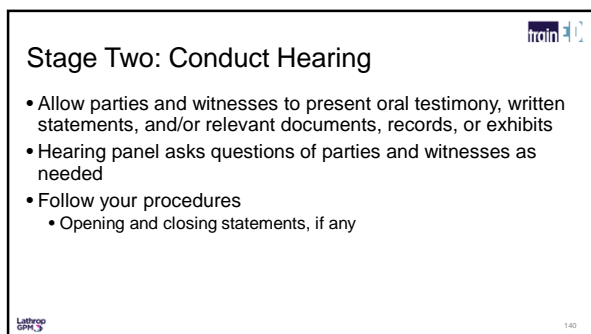
- The day before the live hearing, you run into the investigator on campus. The investigator says, "Hi, I heard the hearing is tomorrow. You feeling ready to go?"
- How do you respond?

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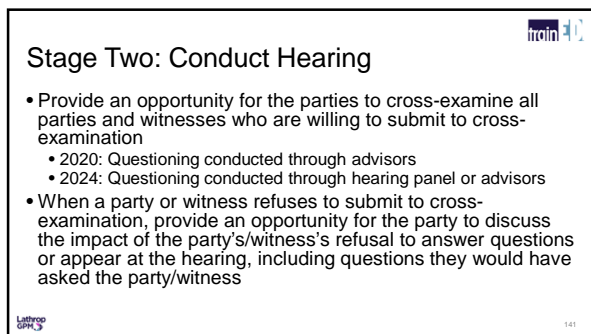
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Stage Two: Conduct Hearing

- Hearing panel questioning of parties and witnesses
 - Ask clarifying questions as needed
 - Limit questions to those needed to make your decision (avoid questions out of curiosity)
 - Distinguish between personal knowledge and hearsay
 - Review checklist of issues – confirm addressed

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Stage Two: Conduct Hearing

- Avoid 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)

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Stage Two: Conduct Hearing

- Prior Sexual History/Conduct
 - 2020 Regulations: 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

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Stage Two: Conduct Hearing

- Prior Sexual History/Conduct
 - 2024 Regulations: Complainant's sexual interests or prior sexual conduct are not relevant, unless an exception applies
 - Evidence about the complainant's prior sexual conduct is offered to prove that someone other than the respondent committed the alleged conduct or
 - It is evidence about specific incidents of the complainant's prior sexual conduct with the respondent that is offered to prove consent to the alleged sex-based harassment

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Stage Two: Conduct Hearing

- Instruct parties and witnesses to pause after each question to allow time for relevancy determination
- Potential reasons to exclude a question:
 - Redundant
 - Harassing
 - Prior sexual history/conduct without exception
 - Irrelevant
- Provide reasoning when excluding a question
- Exclude questions with caution
- Recommendation: allow advisors or parties to briefly articulate why a question is relevant or not relevant

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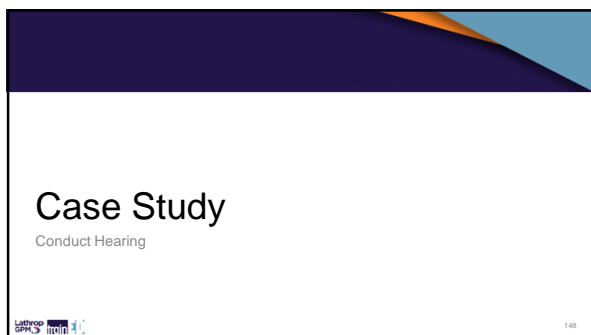
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Stage Two: Conduct Hearing

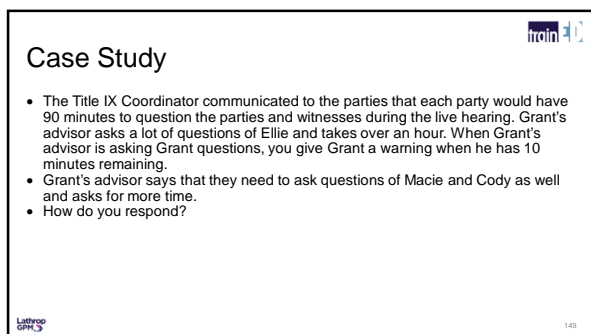
- Wait to make final decision on responsibility and sanctions (rather than making the decision immediately after hearing)
 - Notice must include explanation of how information and evidence was weighed and how it supports the result and sanctions

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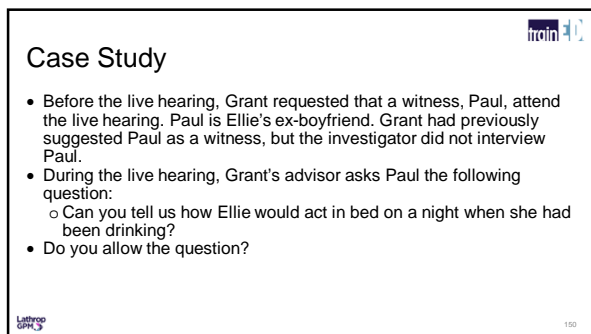
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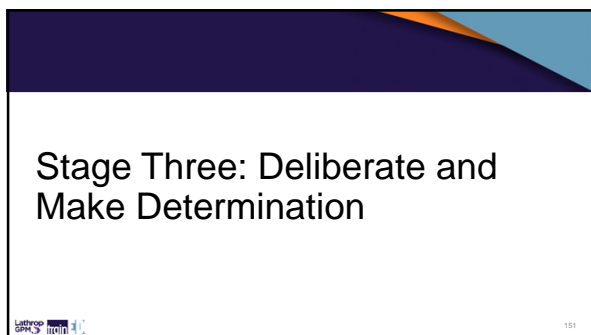
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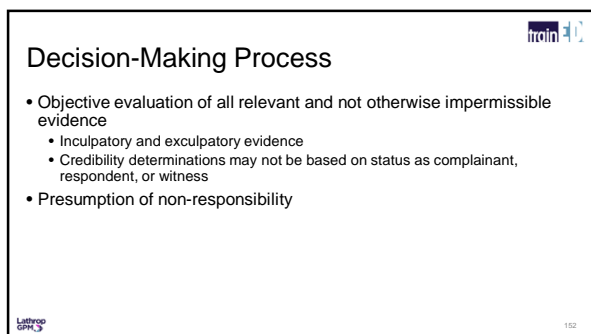
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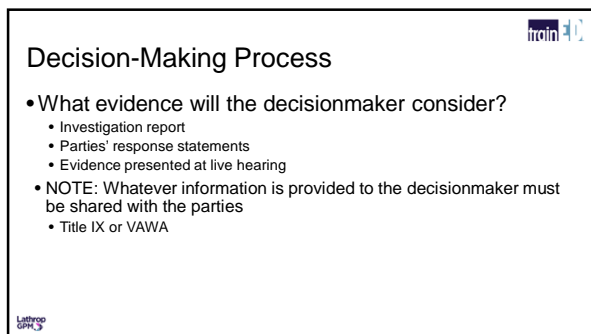
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Evidentiary Issues

- Always consider relevance and weight of 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
- Do not consider impermissible evidence

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Evidentiary Issues


- Types of evidence
 - Statements from parties and witnesses contained in investigation report
 - Evidence from live hearing
 - *Caution* – do not rely on party or witness's demeanor
 - Character evidence
 - Physical evidence (texts, video, security access information, etc.)
 - Medical information (including mental health records)
 - Only with waiver/consent
 - Consider need for expert guidance in understanding and interpreting information
 - Polygraph/lie detector test results

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Evidentiary Issues

- Prior bad acts/pattern evidence:
 - Allegation v. policy violation
 - Determine relevance and weight of evidence
 - May be relevant in fact-finding *and/or* sanction determination
 - Consider timing and process for requesting and providing access to the decisionmaker and the parties




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Weighing Evidence / Assessing Credibility

- Is information the witness provided accurate based on other evidence?
- How did the witness learn the facts?
- How well did he or she recall facts?
- How forthcoming was the witness?
- Did the witness seem honest and sincere? (*caution*)
- What are the possible motives for being less than truthful?
- What is the witness's relationship to the complainant and respondent?
- Are there other factors that bear on the believability of the witness?



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Dealing with Inculpatory & Exculpatory Evidence

- Consider **all** relevant evidence provided
 - Do not cherry-pick evidence that supports your conclusion
 - Do not ignore contrary evidence
- If evidence supporting both conclusions exists:
 - Is some evidence stronger than other evidence? If so, why?
 - Do you find one party more credible than the other party? If so, why?
 - If a witness's statement is contrary to your conclusion, why do you not believe the witness?

Lathrop GPM 158

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Be Consistent




- Doe v. Washington & Lee University
 - Hearing board credited complainant's "personal rule" that she does not have sexual intercourse with someone with whom she is not interested in having a relationship, but she is willing to engage in oral sex
 - Hearing board found respondent's testimony that he felt weird receiving oral sex from a friend but was fine to engage in sexual intercourse to be a source of inconsistency and incredibility
 - Court found that a reasonable jury could find gender bias based on this differing treatment of the parties' testimony

Lathrop GPM 159

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Judging Credibility




- Cautions about judging credibility based on demeanor:
 - Remember trauma-informed training
 - Parties and witnesses may be nervous or uncomfortable
 - Parties and witnesses may be defensive, especially when subjected to cross-examination
- Focus on evidence presented
 - What evidence is consistent with complainant's and respondent's accounts?
 - What evidence is inconsistent with complainant's and respondent's accounts?



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Determination

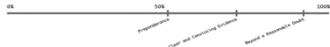


- Finding re: what conduct occurred
- Finding re: policy violation
- Sanctions (if any)
- Remedies (if any)
- Written Notice



161

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 sex discrimination/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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Determination—Finding


- Preponderance:
 - Must decide either that:
 - It was "more likely than not" that the respondent violated the institution's policy OR
 - That there was insufficient evidence to establish that it was "more likely than not" that the respondent violated the institution's policy
- Clear and convincing:
 - Must decide either that:
 - It was "highly probable" that the respondent violated the institution's policy OR
 - That there was insufficient evidence to establish that it was "highly probable" that the respondent violated the institution's policy

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Determination—Sanctions and Remedies

- Consider who will decide the sanctions and how
 - Consider limited role of Title IX Coordinator
- Any information provided to individual(s) who determine sanctions must also be provided to the parties
- Policy must list *all* possible sanctions and describe the range of remedies (VAWA)



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Determination—Sanctions and Remedies

- Possible Sanctions
 - No contact order
 - Suspension or Expulsion
 - Transcript notations?
 - Disclosure to other institutions?
 - Separate disciplinary file?
 - Change in class schedule/living arrangements
 - Mandatory training/counseling
 - Limitations on access to campus facilities
 - Limitations on campus activities
 - Community service
 - Delay of degree conferral
 - Temporary or permanent revocation of degree

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Determination—Sanctions and Remedies

- Sanctions when student **not** suspended or expelled
 - Make inquiries to determine whether restrictions need to be made to:
 - living arrangements
 - class schedules
 - use of facilities
 - co-curricular activities
 - campus events
 - Allow for Title IX Coordinator or other designee to modify or clarify
 - General no contact directive → limit use of facilities to specific time
 - Consider restrictions when respondent graduates or withdraws, but complainant is still a student

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Determination—Sanctions and Remedies

- Remedies means measures provided, as appropriate, to a complainant or any other person identified as having had their equal access to the education program or activity limited or denied by sex discrimination/sexual harassment
 - Designed to restore or preserve access to education program or activity after determination that sex discrimination/sexual harassment occurred
- Consider remedies for broader student population
 - Proactive measures to prevent sexual harassment/sex discrimination, such as trainings
 - Developing effective written materials to educate students on policy and resources
 - Encourage students to report

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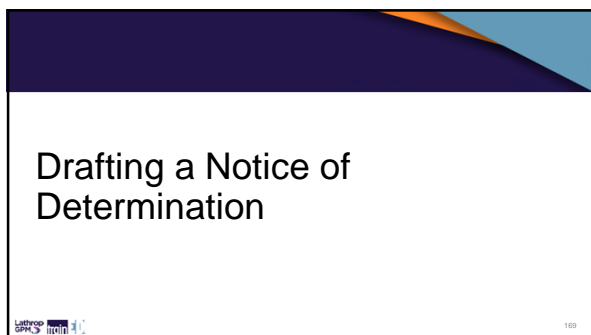
167

Case Study

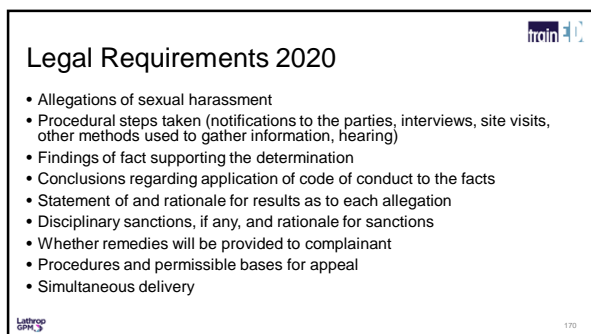
Determine whether a policy violation occurred and rationale for your decision

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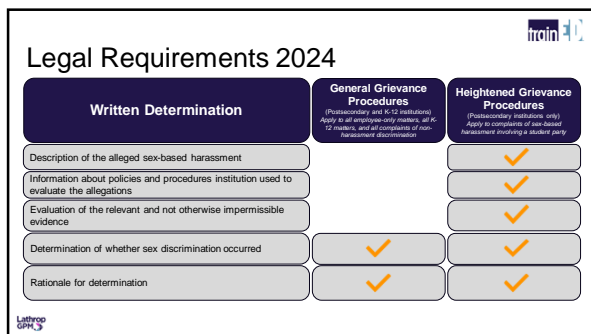
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Legal Requirements 2024

Written Determination	General Grievance Procedures <small>(Postsecondary and K-12 institutions) Apply to all employee-only matters, all K-12 matters, and all complaints of non-employment discrimination</small>	Heightened Grievance Procedures <small>(Postsecondary institutions only) Apply to complaints of sex-based harassment involving a student party</small>
Any disciplinary sanctions	✓ must notify complainant	✓
Whether remedies will be provided		✓
Procedures and permissible bases for complainant and respondent to appeal (if applicable)	✓ (if applicable)	✓
Simultaneous delivery	✓	✓

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Notice of Determination—Elements

- Contents and level of detail may vary depending on applicable legal requirements
- Summary of complaint(s)/allegations
 - Recap allegations in the complaint
 - Use neutral language
- Procedural steps since complaint
 - Notices to the parties
 - Interviews with parties and witnesses
 - Site visits
 - Methods used to gather other evidence
 - 2024 Regulations: Process for assessing credibility (if any)
 - Reference policy provisions setting forth the process



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Notice of Determination—Elements

- Relevant policy provisions
 - Definition of relevant prohibited conduct
 - Elements of the offense
 - Consider other relevant definitions (e.g., consent, incapacitation, coercion, welcomeness)
 - Burden of proof

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Notice of Determination—Elements



- Findings of fact supporting the determination
 - Specify whether testimony/evidence came from the investigation or from another portion of the process
 - Double-check recording when quoting from decisionmaker meetings (if any)
- Result/decision
 - Conclusion regarding application of policy definition to the facts



175

Notice of Determination—Elements



- Rationale for the result as to each allegation
 - Must include explanation of how information and evidence was weighed and how it supports the result
 - Explain how standard of evidence was applied




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Notice of Determination—Elements


- Written notice should address all relevant evidence provided, including evidence that is contrary to your conclusion
 - What evidence supports your conclusion?
 - What evidence is contrary to your conclusion?
 - Why is the evidence that supports your conclusion stronger?
- Explain credibility determinations
 - Why do you find one party more credible than the other?
 - If a witness's statement is contrary to your conclusion, why do you not believe the witness?
- The reader should be able to tell that you considered all relevant evidence in making your decision




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 **Notice of Determination—Elements**



- Sanctions (if any)
 - Also provide the rationale for the sanctions
 - Build in ability for Title IX Coordinator to modify/clarify sanctions and address future right to appeal
- State whether any remedies will be provided




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 **Notice of Determination—Elements**

- Appeal process
 - To whom appeals should be sent
 - Required format of request for appeal
 - Timing/deadline for appeal
 - Bases for appeal
 - Who will decide the appeal
 - Overview of process







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 **Notice of Determination—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



180

Notice of Determination—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



181




Notice of Determination—Implementation

- Determination regarding responsibility becomes final either on the date that the institution provides the parties with the written determination of any appeal or if no party appeals, date on which appeal would no longer be timely



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Appeals



183

Appeals Under Title IX

- Must be offered to both parties
 - From a determination regarding responsibility
 - From a recipient's dismissal of a formal complaint or any allegations therein
- Required bases:
 - Procedural irregularity that affected the outcome of the matter;
 - 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;
 - 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;
 - May offer an appeal equally to both parties on additional bases

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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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Q & A





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Upcoming Trainings 

- Title IX/VAWA Appeal Officer Training on October 10, 2024
- Other trainings available on demand

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2024 Title IX/VAWA Hearing Panel Training

Handout 1

Complaint

On September 23, 2024, Ellie Ellison made a complaint of sexual assault against Grant Grayson.

Complaint Form

COMPLAINANT NAME: Ellie Ellison

ADDRESS: 1234 Main Street

DATE OF ALLEGED POLICY VIOLATION: September 20, 2024

DATE OF COMPLAINT: September 23, 2024

RESPONDENT NAME: Grant Grayson

ADDRESS: 999 On Campus Ave. #5

ALLEGATIONS:

Last Friday I went to a party at an apartment on campus. My friend Macie invited me because she's been talking to a guy who lives there. I ended up getting really drunk and started looking for a place to pass out. I barely knew anyone at the party, but I saw Grant who I've talked to a few times in chemistry class. I don't remember much from our conversation, but I remember him saying I could crash in his room and I remember following him. I don't even remember laying down. The next thing I remember is waking up with my clothes off and Grant on top of me. My memory is really spotty but I know that we had sex while I was super drunk. The next morning I woke up and left the room while Grant was still sleeping.

I understand that by signing this complaint, I am seeking to initiate the formal grievance process in regards to the above allegations and am requesting that the University investigate and make a determination about the alleged conduct.

X *Ellie Ellison*

2024 Title IX/VAWA Hearing Panel Training

Handout 2

Excerpt of Notice of Allegations

On September 23, 2024, a complaint of alleged sexual assault was submitted by Ellie Ellison to the Title IX Coordinator alleging conduct by Grant Grayson. Ellie alleges that on the night of September 20, 2024, in Grant's on-campus apartment, Grant engaged in nonconsensual sexual penetration of Ellie.

2024 Title IX/VAWA Hearing Panel Training

Handout 3

Excerpt of Amended Notice of Allegations

On September 23, 2024, a complaint of alleged sexual assault was submitted by Ellie Ellison to the Title IX Coordinator alleging conduct by Grant Grayson. This Amended Notice of Allegations includes information from Ellie's interview with the investigator. Ellie alleges that on the night of September 20, 2024, in Grant's on-campus apartment, Grant engaged in nonconsensual sexual contact in the form of (1) touching of Ellie's intimate body parts and (2) sexual penetration of Ellie.

2024 Title IX/VAWA Hearing Panel Training

Handout 4

Excerpt of Policy Definitions

Sexual Assault

Sexual Assault is any actual or attempted sexual contact, including penetration and contact with any object, with another person without that person's consent. As used in this Policy, sexual contact includes intentional contact by the accused with the victim's genital area, groin, inner thigh, buttocks, or breasts, whether clothed or unclothed; touching another with any of these body parts, whether clothed or unclothed; coerced touching by the victim of another's genital area, groin, inner thigh, buttocks, or breasts, whether clothed or unclothed; or forcing another to touch oneself with or on any of these body parts.

Consent

Consent means words or overt actions by a person in advance clearly communicating a freely given present agreement to participate in a particular sexual contact or activity. Words or overt actions clearly communicate consent when a reasonable person in the circumstances would believe those words or actions indicate a willingness to participate in a mutually agreed-upon sexual contact or activity. Although consent does not need to be verbal, verbal communication is the most reliable form of asking for and obtaining consent. It is the responsibility of the person initiating the specific sexual contact or activity to obtain consent for that contact or activity.

The definition of consent is subject to the following:

- Consent to one form of sexual contact or activity does not, by itself, constitute consent to any other forms of sexual contact or activity.
- Consent can be withdrawn at any time. When consent is withdrawn, the sexual contact or activity for which consent was initially provided must stop.
- Consent is active, not passive. Silence or the absence of resistance or saying "no," in and of themselves, cannot be interpreted as consent.
- Whether an individual actively and willingly participates in conduct may be a factor in determining whether there was consent.
- Previous relationships or previous consents do not, by themselves, constitute consent to future sexual contact or activity. In cases of prior relationships, the manner and nature of

prior communications between the parties and the context of the relationship may be factors in determining whether there was consent.

- An existing sexual, romantic, or marital relationship does not, by itself, constitute consent.
- Prior sexual activity with other individuals does not imply consent.
- Consent cannot be procured, expressly or implicitly, by use of force, intimidation, threats, or **coercion**.
- An individual known to be—or who should be known to be—**incapacitated** cannot consent to sexual contact or activity initiated by another individual.
- Use of alcohol or other drugs will never function to excuse behavior that violates this Policy.
- Consent can only be given if one is of legal age. In this state, the legal age of consent is 16.

Incapacitation

Incapacitation is the physical and/or mental inability to understand the fact, nature, or extent of the sexual situation. Incapacitation may result from mental or physical disability, sleep, unconsciousness, involuntary physical restraint, or from the influence of drugs or alcohol. With respect to incapacitation due to the ingestion of alcohol or other drugs, incapacitation requires more than being under the influence of alcohol or other drugs; a person is not incapacitated just because they have been drinking or using other drugs. Where alcohol and other drugs are involved, incapacitation is determined based on the facts and circumstances of the particular situation, looking at whether the individual was able to understand the fact, nature, or extent of the sexual situation; whether the individual was able to communicate decisions regarding consent, non-consent, or the withdrawal of consent; and whether such condition was known or reasonably should have been known to the respondent or a reasonable, sober person in the respondent's position.

Use of drugs or alcohol by the respondent is not a defense against allegations of Sex Discrimination. Regardless of their own level of intoxication, individuals who are initiating sexual contact are always responsible for obtaining consent before proceeding with sexual activity.

2024 Title IX/VAWA Hearing Panel Training

Handout 5

Investigation Report Excerpt

Background

Ellie and Grant agree that in the Fall 2024 semester, they had an Organic Chemistry class together. Ellie stated that she and Grant “talked a few times during class” but that she had not interacted with Grant outside of class prior to the party on September 20, 2024. When asked to describe their conversations during class, Ellie said, “It was really just about class and the start of the semester.” Grant stated that he and Ellie had talked during class a few times. When asked to describe their conversations, Grant stated, “I don’t know, I think I would like make jokes and she would laugh at them. Our conversations just always had kind of a friendly vibe, you know?”

The Party on September 20, 2024

Ellie and Grant agree that Grant and his roommates had a party at his on-campus apartment on September 20, 2024 and that Ellie attended the party.

Ellie’s Account

Ellie stated that on September 20, her friend Macie invited her to a party. Ellie stated that her friend has been “talking to a guy” that lives in the apartment. Ellie stated that Macie picked her up and drove her to the party.

When asked what time she arrived at the party, Ellie stated, “probably around 9:00, I don’t know for sure.” Ellie stated that everyone was drinking at the party. When asked what she had to drink, Ellie stated, “I started with a beer, maybe two. Then I think I had a shot of something, I didn’t pour it so I don’t know what. And then I think I had a couple of White Claws. That’s probably it.” When asked if that was all while she was at the party, Ellie stated, “Yeah, I didn’t drink at all before going.”

When asked what she did at the party, Ellie stated that she spent some time with Macie and then Macie went to hang out with Jake, who also lived at the apartment. Ellie stated, “then I saw Julie who lives on my floor, so I was with her for a bit.”

Ellie stated that she was getting really drunk and started looking for a place to “pass out.” When asked what time this was, Ellie stated, “I don’t know for sure. I think it was maybe after

midnight, but not long after. I had maybe been at the party for like three hours. I was drinking the whole time until I started to feel really drunk.” When asked what she meant by feeling really drunk, Ellie stated, “I was having a hard time walking. I remember holding the walls and furniture to help while I was looking for somewhere to lay down.” When asked how she would rate herself on a scale of 0 (sober) to 10 (passed out from drinking) when she was looking for a place to lay down, Ellie stated, “probably an 8 or 9.” When asked what made her say 8 or 9, Ellie stated, “I really needed to lay down. I was having a hard time standing and I felt pretty sick.”

Ellie stated that she could not find Macie and she “barely knew anyone there,” but she saw Grant and knew he lived at the apartment. Ellie stated, “I don’t really remember what I said, but I remember Grant said I could crash in his room and I remember following him.” When asked if Grant took her to his room, Ellie stated, “Yeah.” When asked if she had any physical contact with Grant while they walked to his room, Ellie stated, “Yeah, I think I stumbled and he put his arm around me to lead me there.”

Grant’s Account

Grant stated that he and his roommates, Jake and Cody, had a party at their apartment on September 20. When asked what time he first saw Ellie at the party, Grant stated, “I couldn’t tell you specifically. We didn’t really hang out at the party, but I saw she was there, I think with a friend.” When asked if he was drinking at the party, Grant stated, “Yeah, we all were.” When asked what he had to drink, Grant stated, “I had a shot of tequila with my roommates before everyone came over and then I had a few beers during the party.” When asked for more detail about the beers, Grant stated, “People just brought like six packs and stuff. I think I had maybe two cans, could be three. I wasn’t paying that much attention to it. But not a ton, I wasn’t super drunk or anything.”

Grant stated that at one point during the party, Ellie came up to him and asked if he could help her find a place to “crash” because she was too drunk to go home. Grant stated that he told Ellie she could lay down in his room and he would sleep on the couch. Grant stated he led Ellie to his room. When asked if Ellie seemed intoxicated, Grant stated, “she said she was. That was why she needed to lay down.” When asked if he noticed anything in particular that suggested Ellie was intoxicated, Grant stated, “I don’t know, I guess she put her arm around me when we walked to her room, I don’t know if that was related but we hadn’t really touched each other before that.” When asked how he would rate Ellie on a scale of 0 (sober) to 10 (passed out from drinking) when she was looking for a place to lay down, Grant stated, “Pass out like, just pass out? She fell asleep pretty fast when she laid down, but I don’t know if that is passing out. I don’t know how to answer that.” When asked about Ellie’s account that she was having trouble standing before going to his room, Grant stated, “Yeah, she wanted to lay down, that was why

she came up to me.” When asked about Ellie’s account that she stumbled and Grant put his arm around her, Grant stated, “No, she didn’t trip, she just put her arm around me when I walked past her to head to my room.”

When asked how he would rate himself on a scale of 0 (sober) to 10 (passed out from drinking) when he was first talking to Ellie, Grant stated, “I guess a 3. I was drinking, but not much.”

Witness Account

Macie’s Account

Macie stated that she and Ellie went to a party at an apartment on campus where her friend Jake lived. When asked what happened when they arrived, Macie stated that she and Ellie hung out for a bit before Macie went to find Jake. When asked if she saw Ellie again that night, Macie stated, “no and I really hate saying that, but I hung out with Jake and some of his teammates for a while and then Jake and I went to his room. I thought she’d just hang out and maybe find some people to go back to her dorm with cause there were other people that lived where she lived but I didn’t really give it that much thought and I’ve told her I’m so sorry I didn’t.”

Cody’s Account

Cody stated that he and his roommates had a party at their apartment on the night of September 20. When asked if he saw Ellie at the party, Cody stated, “Yeah, I wasn’t hanging out with her but our apartment is small so I saw pretty much everyone who was there.” When asked if he noticed whether Ellie was drinking, Cody stated, “Yeah, for sure. I think she had a drink in her hand every time I saw her and it seemed like she was pretty drunk at one point. She needed to go lay down and sleep it off.” When asked what made it seem like she was pretty drunk, Cody stated that he was next to Grant when Ellie asked him if she could lay down somewhere. Cody stated, “she sort of leaned on a chair and was kind of bobbing her head and said she needed to lay down. It looked like she was having a hard time staying standing. Grant said right away she could sleep in his room and he put his arm around her and walked her over there.”

When asked how he would rate Ellie on a scale of 0 (sober) to 10 (passed out from drinking) when she was looking for a place to lay down, Cody stated, “an 8 I guess.” When asked why he said 8, Cody stated, “she seemed kinda close to passing out. I’m sure she did as soon as she got to Grant’s room.”

When asked if he was drinking that night, Cody stated, “Yeah, I had a couple of beers, but I was taking it easy. My parents were visiting that weekend and wanted to have lunch the next day, so yeah.” When asked if Grant was drinking, Cody stated, “Yeah.” When asked what he saw Grant

drinking, Cody stated, “most people had beers, I think he did too. I couldn’t tell you other than that.” When asked if Grant seemed intoxicated, Cody stated, “yeah, a little. He was louder than normal, I could tell he’d been drinking.” When asked how he would rate Grant on a scale of 0 (sober) to 10 (passed out from drinking) when he took Ellie to his room, Cody stated, “5 or 6 maybe, I’d say he was drunk, but he wasn’t like passing out.”

Julie’s Account

Julie stated that she went to a party at her cousin Jake’s apartment on the night of September 20. When asked what she did at the party, Julie stated, “Just hung out. I said hi to Jake right when I got there and then just said hi to other people I know from school.” When asked who the others she said hi to were, Julie named several individuals, including Ellie. When asked how long she was with Ellie, Julie stated, “we talked for, I don’t know, 20 minutes maybe. We were just talking about some dumb drama some of the girls in our hall were having.” When asked whether Ellie was drinking, Julie stated, “Yes, she had a can of something in her hand and I think she got a second while we were talking.” When asked if she seemed intoxicated, Julie stated, “Definitely. She was way more talkative than I’ve ever seen her. And she kept grabbing my arm and kind of leaning on me while we talked.” When asked how she would rate Ellie on a scale of 0 (sober) to 10 (passed out from drinking) when she was talking to her, Julie stated, “a 6 to 7.” When asked why she said 6 to 7, Julie stated, “she was drunk definitely, I don’t know, she was one of the drunker people at the party.”

When asked if Julie was drinking at the party, Julie stated, “No, I had to drive home so I didn’t drink at all.” When asked if she saw Jake’s roommates at the party, Julie stated, “I don’t think so. I don’t really know his roommates but I don’t think I talked to them.”

The Parties’ Interaction in Grant’s Room

Ellie’s Account

When asked what happened when she got to Grant’s room, Ellie stated, “Honestly, I barely remember. I don’t even remember laying down. I just know that I woke up with my clothes off and Grant on top of me in the bed. And it was just happening.” When asked what she meant by Grant was on top of her in the bed, Ellie stated, “he was having sex with me. It was like I was outside my body, I just couldn’t do anything. I remember being like, ‘is this happening?’ I sort of have a memory of him taking off my underwear, but then he was just doing it.” When asked if she verbally asked Grant “is this happening?”, Ellie stated, “No, that’s just what I was thinking.” When asked if she said anything to Grant, Ellie stated, “I don’t remember, I don’t think so. My

memory is just super spotty.” When asked if she remembered whether Grant said anything to her, Ellie stated, “Nothing.”

When asked what happened next, Ellie stated, “The next thing I remember is waking up and Grant was still sleeping so I left. I found Macie in the kitchen of the apartment and told her I wasn’t feeling well and we needed to go and we drove back to my dorm.” When asked where she and Grant were when she woke up, Ellie stated, “in the bed.” When asked what she was wearing when she woke up, Ellie stated, “I wasn’t wearing anything. My dress and bra and underwear were on the ground next to the bed, so I put them on quick before leaving the room.”

Grant’s Account

Grant stated that after he led Ellie to his room, “I was leaving to go back out to the party and then Ellie asked if I would stay for her a little bit.” Grant stated, “She said I could lay down next to her, so I did and I ended up falling asleep for a while.”

Grant stated, “I woke up cause she was like kissing my neck and her leg was on top of my legs. I think I was asleep for a while before that. I turned my head and we started making out.”¹ Grant stated that Ellie then got on top of him and straddled him. Grant stated, “she took off her dress and bra and we were touching each other and I like checked in to see if this was all okay and she said yes.”² When asked what she was wearing after she removed her dress and bra, Grant stated, “just her underwear.” When asked what he meant by touching each other, Grant stated, “we were rubbing each other’s chests I guess.” When asked if by chest he meant that he was rubbing Ellie’s breasts, Grant stated, “yes.”³ When asked what words or actions from Ellie indicated she consented to Grant touching her breasts, Grant stated, “she was touching me too and she took off her clothes.” When asked for more detail about when he checked in, Grant stated, “I said, ‘is this okay,’ and she said yes.” When asked when that took place, Grant stated, “after she took off her

¹ When presented with Grant’s account that she kissed his neck and they started making out, Ellie stated, “the first thing I remember is him on top of me, there wasn’t any kissing. I was feeling so sick when I went to his room, I didn’t want to make out or hook up with him.”

² When presented with Grant’s account that she got on top of him and removed her dress and bra, Ellie stated, “I don’t have a memory of how I ended up naked other than Grant taking off my underwear. I think he must have taken my other clothes off.” When asked about his account of asking Ellie if this was all okay and her responding yes, Ellie stated, “I don’t remember any conversation with him. And he didn’t tell me anything about that when we were messaging the next day. This is the first time I heard that.”

³ When asked about Grant’s account that he rubbed her breasts, Ellie stated, “I’m sure he did, it makes me sick that I couldn’t consent and he was just molesting me.”

clothes.” When asked if it was before or after Grant touched her breasts, Grant stated, “I’m not sure.”

Grant stated that they rolled over so that he was on top and he took off his shirt. Grant stated, “she started unzipping my pants and then I took them off.”⁴ Grant stated, “and then she took off her underwear.” When presented with Ellie’s account that Grant took off Ellie’s underwear, Grant stated, “she took them off, but then they were like down toward her ankles and she was like laying on her side in bed and I reached up and pulled them off.” Grant stated that they kept kissing and touching and then had sex. When asked how the sex began, Grant stated, “I was on top and we were both naked and kissing and then we just started having sex.” When asked if there was any conversation around the sex, Grant stated, “not really, we didn’t really talk.” When asked what words or actions from Ellie indicated that she consented to the sexual intercourse, Grant stated, “she initiated, I was asleep and she started kissing me. And then it just went from there.”

When asked how he would rate Ellie on a scale of 0 (sober) to 10 (passed out from drinking) when he woke up and she was kissing his neck, Grant stated, “0, or I guess, I don’t know if she was technically sober cause she had been drinking, but at that point it wasn’t anything. Like she was good, we both slept for a while before that so it wasn’t an issue at that point.”

Grant stated that after the intercourse, he fell asleep. Grant stated that when he woke up late the next morning, Ellie had already left the apartment.

September 21, 2024

Ellie’s Account

Ellie stated that Macie drove her back to Ellie’s dorm. When asked if she and Macie talked at all in the kitchen at Grant’s apartment or in the car, Ellie stated, “I think I just said I was really sick because I drank too much. I think she could probably tell something was wrong, but I didn’t want to talk about it right then, but then later I did.”

When asked if she has had any contact with Grant since leaving his room, Ellie stated, “Yeah, I messaged him when I got back to my room that day, just like saying that I didn’t remember much. But he said that it was all me, like saying that I was the one that was on him. And he said he didn’t remember whether he used a condom so then I started really freaking out. I called

⁴ When presented with Grant’s account that Ellie unzipped his pants, Ellie stated, “I was laying down sick in bed. Just, no, no, that wouldn’t happen. And even if it did, I mean, I was so drunk, he should have known better. He just went with it and took advantage.”

Macie and told her what happened. I was realizing I was raped and so worried about getting an STD or getting pregnant. It was awful knowing I couldn't even remember what happened.”

Ellie provided screenshots of the following exchange with Grant:

Ellie 9/21 1:44 PM⁵

Last nights kinda a blur
I remember walking to your room
Next thing I know 🍆

Grant 9/21 2:27 PM

IIRC I woke up to you all over me
Then you started pulling our clothes off

Ellie 9/21 2:36 PM

?
I don't remember any of that
🙄
Did u at least use a condom???

Grant 9/21 2:58 PM

I don't remember
It was the middle of the night

When asked about her conversation with Macie, Ellie stated, “I told her what I remembered and that I was so drunk and she said I should go get an exam and a Plan B pill. So she drove me to the hospital and I was basically there the rest of the day.”

Grant's Account

Grant stated that he was hanging out at his apartment with his roommates on September 21 when Ellie texted him. Grant provided the same screenshots Ellie provided of their exchange on September 21. When asked what he thought when Ellie texted him that the night was a blur,

⁵ When asked what the emoji in her message meant, Ellie stated, “it means penis, I was trying to keep it casual cause I just wanted to know what happened.”

Grant stated, “I don’t know, it was the middle of the night, it’s kind of a blur for me too. I didn’t realize at the time that she was trying to say I took advantage of her but I just tried to tell her what I remember, which is that she was the one pushing things forward. I was sleeping and she started things.”

Macie’s Account

Macie stated that both Ellie and her spent the night at Jake and Grant’s apartment that night. Macie stated she was getting some water in the kitchen in the morning and Ellie came out of Grant’s room. Macie stated, “I didn’t know that she slept there, so I was just like, ‘oh hi.’” Macie stated that Ellie told her that she was feeling sick, so they left. When asked if she noticed anything about Ellie when she saw her that morning, Ellie stated, “I mean, she looked like she didn’t feel good. I thought she might have had way too much to drink so I just wanted to get her back to her room.”

Macie stated that she dropped Ellie off at her dorm and then Macie drove back to her apartment. Macie stated that Ellie called later that day. Macie stated, “She said she hooked up with Grant but it was sort of a blur and she couldn’t remember all of it. She was super worried because she didn’t know if he used a condom, or I think she said that he didn’t know if he used a condom. And she was really scared about that. I told her she should get an exam for STIs and go get a morning after pill.” Macie stated that Ellie agreed and so I picked her up and took her to the hospital.”

Other Evidence

Ellie provided a copy of the exam summary she received from the hospital on September 21. The summary includes the following notes: “Patient reported sexual intercourse in the early hours of September 21 after excessive alcohol consumption. Patient does not recall the encounter. Perpetrator sent message to patient stating he did not wear a condom.” The summary indicates that Ellie was tested for a number of STIs and prescribed a Plan B pill. The summary indicates that Ellie had a small bruise on her hip and that no other injuries were noted by the medical staff.

2024 Title IX/VAWA Hearing Panel Training

Handout 6

Excerpts from Party Statements in Response to the Evidence and Investigation Report

Excerpt from Ellie's Written Response Statement

Grant knew I was drunk. He said I asked for help and yet he assaulted me. I don't remember doing anything that he says I did, but even if I did, he knew I was too drunk to consent. I couldn't have known what I was doing but he took advantage.

Excerpt from Grant's Written Response Statement

What's clear from the report is that Ellie was the one in control that night. I was going to sleep on the couch, but she asked me to stay. I was asleep and she started kissing me. We were making out and she got on top and took off her clothes. She started taking my pants off. It was all her.

2024 Title IX/VAWA Hearing Panel Training

Handout 7

Excerpts from Adjudicator Outline

Review Policy definitions in handout #4

For each element, indicate whether there is sufficient evidence (“SE”) or insufficient evidence (“IE”) to determine that it is more likely than not that the element is met.

Ellie’s Allegation of Sexual Assault

What conduct occurred?

- Grant touching Ellie’s breasts?SE IE
- Grant and Ellie having sexual intercourse?SE IE

Was the conduct that occurred sexual contact as defined by the Policy?

- Grant touching Ellie’s breasts?SE IE
- Grant and Ellie having sexual intercourse?SE IE

Did Grant initiate the sexual contact that you find occurred?

- Grant touching Ellie’s breasts?SE IE
- Grant and Ellie having sexual intercourse?SE IE

If Grant initiated the sexual contact that you find occurred, was Ellie incapacitated as defined by the Policy?.....SE IE

If Ellie was not incapacitated as defined by the Policy, did Grant initiate the sexual contact without Ellie’s consent?

- Grant touching Ellie’s breasts?SE IE
- Grant and Ellie having sexual intercourse?SE IE

Do you find Grant responsible for Sexual Assault?..... Yes No

Rationale for finding:

Sanctions for Grant (if applicable):

Rationale for sanctions:

2024 Title IX/VAWA Hearing Panel Training

Handout 8

Notice of Determination Excerpt:

Based on the evidence in the adjudication file and presented at the live hearing, and the Policy regarding sexual assault, the Hearing Panel finds insufficient evidence to determine it is more likely than not that Grant engaged in sexual assault of Ellie, as discussed below.

Analysis of Allegation of Sexual Assault

Ellie alleged that Grant engaged in nonconsensual contact with her breasts and nonconsensual sexual penetration in his room on the night of September 20, 2024. Under the Policy, Sexual Assault is any actual or attempted sexual contact, including penetration and contact with any object, with another person without that person's consent. Sexual contact includes intentional contact by the accused with the victim's genital area, groin, inner thigh, buttocks, or breasts, whether clothed or unclothed; touching another with any of these body parts, whether clothed or unclothed; coerced touching by the victim of another's genital area, groin, inner thigh, buttocks, or breasts, whether clothed or unclothed; or forcing another to touch oneself with or on any of these body parts. It is the responsibility of the person initiating the specific sexual contact or activity to obtain consent for that contact or activity. Accordingly, the Panel must determine (1) whether any sexual contact occurred; (2) whether Grant initiated that sexual contact; and (3) whether Grant obtained Ellie's consent for any sexual contact he initiated.

The parties agree that Grant touched Ellie's breasts and that they had sexual intercourse on the night of September 20. Accordingly, the Panel finds sufficient evidence to determine it is more likely than not that conduct occurred. The Panel further finds that both of those constitute sexual contact as defined by the Policy.

The Panel next considers whether Grant initiated the sexual contact. Ellie did not recall Grant touching her breasts; Grant stated that he rubbed Ellie's breasts. Accordingly, based on the parties' accounts, the Panel finds sufficient evidence to determine it is more likely than not that Grant initiated the contact with Ellie's breasts. As to the sexual intercourse, Ellie's account did not include how the intercourse started, but she stated that Grant was on top of her when they were having sex. Grant stated that he was on top and they started having sex. Accordingly, based on the parties' accounts, the Panel also finds sufficient evidence to determine it is more likely than not that Grant initiated the sexual intercourse.

Having found that Grant initiated sexual contact with Ellie, the Panel must determine whether Grant obtained Ellie's consent. The Panel first considers whether Ellie was incapacitated as defined by the Policy at the time of the sexual contact. The parties agree that Ellie was drinking alcohol on the night of September 20. Under the Policy, however, a person is not incapacitated just because they have been drinking or using other drugs. Where alcohol and other drugs are involved, incapacitation is determined based on the facts and circumstances of the particular situation, looking at whether the individual was able to understand the fact, nature, or extent of the sexual situation; whether the individual was able to communicate decisions regarding consent, non-consent, or the withdrawal of consent; and whether such condition was known or reasonably should have been known to the respondent or a reasonable, sober person in the respondent's position.

The Panel notes that there is evidence that Ellie was highly intoxicated when she went to Grant's room that night. The parties agree that Ellie had been drinking that night and that she wanted a place to lay down due to her intoxication. The parties' accounts differ in some ways regarding their interaction as they went into Grant's room. Ellie stated she was having a hard time standing and stumbled and Grant put his arm around her; Grant stated Ellie put his arm around him as they walked to his room. But ultimately both agree she was intoxicated. Witness accounts also indicate Ellie was intoxicated at that point in the night. Cody stated that Ellie "seemed kinda close to passing out" and seemed to be having a hard time staying standing. Julie stated that Ellie was one of the drunker people at the party and was grabbing Julie's arm and leaning on her when they were talking.

Due to the passage of time between those observations and the sexual contact, however, the Panel does not find this evidence of Ellie's intoxication to be dispositive as to whether she was incapacitated as defined by the Policy *at the time of the sexual contact* with Grant. Ellie stated that she woke up to the sexual contact, indicating that some time had passed from the time she went into Grant's room to the sexual contact. When asked by the Panel at the live hearing how much time had passed, Ellie stated, "I have no idea. It was still dark, so like, night, but I don't know." Grant stated that he had been asleep for a while when he woke up to Ellie kissing his neck. Grant also stated that he and Ellie had both sobered up by the time they woke up.

As to what happened when they woke up, Ellie stated that she "barely remember[ed]" what happened when she was in Grant's room. Ellie stated that she woke up with her clothes off and Grant on top of her having sex with her. Accordingly, Ellie's account, if true, suggests that she was unable to understand the fact, nature, or extent of the sexual situation and unable to communicate decisions regarding consent at the time the sexual contact began. In contrast, Grant stated that he woke up to Ellie kissing her neck and the parties made out. Grant stated that Ellie

then got on top of him, removed her clothed, touched his check and responded “yes” when he asked if this was all okay. Grant further stated that Ellie started unzipping his pants and removed her own underwear. Accordingly, Grant’s account, if true, indicates that Ellie was initiating sexual contact, advancing the encounter, and responded to his question. Grant’s account, if true, therefore indicates that Ellie was taking actions suggesting she was able to understand the fact, nature, or extent of the sexual situation and was able to communicate decisions regarding consent.

In light of the differences between the parties’ accounts as to Ellie’s ability to consent at the time of the sexual encounter, the Panel considered the outside evidence but did not find evidence sufficient to conclude that it is more likely than not that Ellie was incapacitated as defined by the Policy. In coming to this conclusion, the Panel considered the witness accounts from the party, but, as noted above, there was a passage of time between the witnesses observing Ellie and the sexual contact. Accordingly, the Panel does not find those witness accounts to be sufficient to tip the scale between the parties’ accounts. The Panel also considered the text messages the parties exchanged on September 21. Each party’s messages are generally consistent with that party’s account – including Ellie’s account that she did not remember much of the encounter and Grant’s account that he woke up to Ellie initiating contact and taking clothes off. Accordingly, the Panel does not find those messages sufficient to tip the scale between the parties’ accounts.

In sum, considering the presumption of non-responsibility that applies to Grant, the Panel finds insufficient evidence to determine it is more likely than not that Ellie was incapacitated as defined by the Policy. That is not to say that Ellie was not incapacitated, but only that there is insufficient evidence to determine it is more likely than not that Ellie’s condition was known or reasonably should have been known to Grant or a reasonable, sober person in Grant’s position.

Having found insufficient evidence to determine it is more likely than not that Ellie was incapacitated as defined by the Policy, the Panel must determine whether Ellie consented to the sexual contact. Under the Policy, consent means words or overt actions by a person in advance clearly communicating a freely given present agreement to participate in a particular sexual contact or activity. Words or overt actions clearly communicate consent when a reasonable person in the circumstances would believe those words or actions indicate a willingness to participate in a mutually agreed-upon sexual contact or activity.

Beginning with the contact with Ellie’s breasts, Ellie’s account did not include Grant rubbing her breasts and accordingly it is unclear whether, based on Ellie’s account, Ellie consented to Grant touching her breasts. Grant stated that Ellie was kissing his neck and they began making out. Grant stated that Ellie then got on top of him and took off her dress and bra. Grant stated that parties were then rubbing each other’s chests. Accordingly, Grant’s account, if true, indicates that Ellie

engaged in overt actions which a reasonable person in the circumstances would believe indicated a willingness to participate in contact with her breasts, including getting on top of Grant and removing her dress and bra. In light of the differences in the parties' accounts, the Panel considered the evidence outside of the parties' accounts but did not find evidence sufficient to tip the scales to meet the preponderance of the evidence standard. Considering the presumption of non-responsibility that applies to Grant, the Panel finds insufficient evidence to determine it is more likely than not that Ellie did not consent to Grant touching her breasts.

As to the sexual intercourse, again, Ellie's account does not include what occurred prior to the sexual intercourse and accordingly it is unclear whether, based on Ellie's account, Ellie consented to Grant engaging in sexual intercourse with her. Grant stated that Ellie started unzipping his pants and then took off her underwear. Accordingly, Grant's account, if true, indicates that Ellie engaged in overt actions which a reasonable person in the circumstances would believe indicated a willingness to participate in sexual intercourse, including assisting in removing Grant's pants and pulling down her own underwear. In light of the differences in the parties' accounts, the Panel considered the evidence outside of the parties' accounts but did not find evidence sufficient to tip the scales to meet the preponderance of the evidence standard. Considering the presumption of non-responsibility that applies to Grant, the Panel finds insufficient evidence to determine it is more likely than not that Ellie did not consent to sexual intercourse with Grant.

In sum, the Panel finds insufficient evidence to determine it is more likely than not that Grant engaged in sexual assault.