Annual Training for Advanced Title IX Coordinators and Deputy Coordinators

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Agenda

- Legal Overview
- Updating Sexual Misconduct Policy and Procedures
- Overseeing the Complaint Process
  - Pre-Investigation
  - Investigation
  - Adjudication
  - Post-Adjudication

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Terminology

- DOE = 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/Decision-Maker
- Complainant/Reporting Party/accuser/ victim/survivor
- Respondent/Responding Party/ accused/alleged perpetrator

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Training Requirements

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

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Training Requirements

- Train Title IX Coordinator, investigator, decision-maker, facilitator of informal resolution process, and individuals responsible for appeals on
  - Relevant evidence and how it should be used during a proceeding (annual)
  - Proper techniques for questioning witnesses (annual)
  - Basic procedural rules for conducting a proceeding (annual)
  - Avoiding actual and perceived conflicts of interest (annual)
  - Institution's policies and procedures

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Training Requirements

- Decision-makers must also receive training on
  - Technology to be used at a live hearing
  - Issues of relevance of questions and evidence, including when questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant

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Training Requirements

- Investigators must also receive training on
  - Issues of relevance to create an investigative report that fairly summarizes relevant evidence
- Training materials must not rely on sex stereotypes and must promote impartial investigations and adjudications
- Training materials must be publicly available on institution's website

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SESSION 1: LEGAL OVERVIEW

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Session Overview

- Title IX and OCR Guidance
- Clery Act
- Violence Against Women Act
- Other Laws

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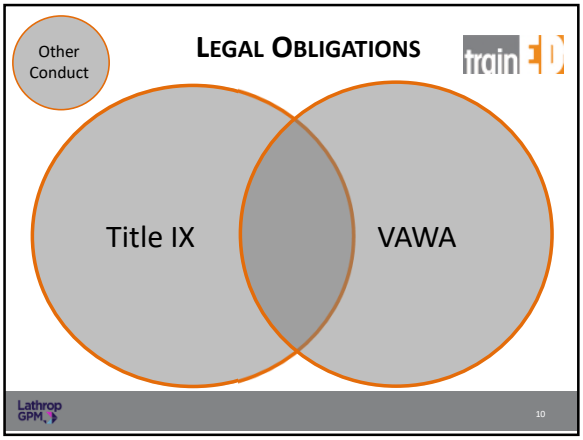
Legal Obligations



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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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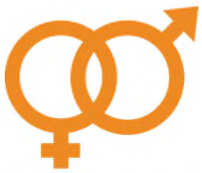
Discrimination "on the Basis of Sex"

- Includes:
  - Sexual harassment
  - Differential treatment



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How Institutions Must Respond under Title IX

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

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Title IX Requirements

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

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OCR's Enforcement and Guidance

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

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Title IX Coordinator Guidance

- Key points:*
  - Independence and seniority of Title IX Coordinator
  - Notice of Nondiscrimination
  - Website and prominent link from homepage
  - Training
  - Annual climate surveys
  - Recordkeeping
  - Information collection and reporting
  - Responsibilities besides sexual harassment

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*2015 DCL on Title IX Coordinators

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Title IX Coordinator Guidance

- Areas of responsibility besides sexual harassment:*
  - Recruitment, admissions, and counseling
  - Financial assistance
  - Athletics
    - Student interests and abilities
    - Athletic benefits and opportunities
    - Athletic financial assistance
  - Pregnant and parenting students
  - Discipline
  - Employment

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*2015 Title IX Resource Guide

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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

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VAWA CHANGES TO CLERY

- Additional Clery crimes
  - Domestic violence
  - Dating violence
  - Stalking
- Additional policy statements
  - Procedures following a VAWA crime or sexual assault
  - Prevention and awareness programs
- Other changes
  - Hate crimes include "national origin" and "gender identity" motivated crimes
- Codified parts of 2011 Dear Colleague Letter

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CLERY FINES

- Fine for each Clery Act violation is $59,017
- In September 2020, the University of California, Berkeley announced it would pay $2.35 million to DOE for misclassifying crimes (most of which were liquor, drug, and weapons violations)
- In June 2020, the University of North Carolina at Chapel Hill reached a $1.5 million settlement with the DOE for Clery Act violations, including in the areas of reporting crime statistics, defining Clery geography, issuing warnings, and including required information in their annual security reports
- In 2019 the DOE issued a $4.5 million fine – the largest in history – against Michigan State University
- University of Saint Thomas, Houston fined $172,000 in 2017 for failure to include required policy statements and under-reporting of crime statistics among other violations

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VAWA Regulations

- Requires policy addressing:
  - Procedures complainants should follow
  - Disciplinary procedures
  - Confidentiality
  - Notifications to students, employees, and complainants
  - Right to advisor of choice (including attorney)
  - Right to have notice of meetings with parties
  - Right to have access to information used in formal/informal disciplinary meetings
  - Rationale must be included in Notice of Determination
  - Training for individuals with heightened responsibilities
  - Training for students and employees

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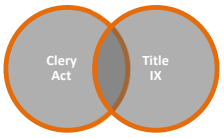
Interaction Between Title IX & Clery



- Clery is about the reporting of crimes (broader than sexual misconduct), regardless of investigation
- Title IX is about the investigation of reports of sexual harassment, including sexual assault and VAWA crimes

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Interaction Between Title IX & VAWA

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

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When Institutions Must Respond under Title IX

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

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Title IX—Actual Knowledge

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

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Title IX—Actual Knowledge

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

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TITLE IX—SEXUAL HARASSMENT

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

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TITLE IX—SEXUAL HARASSMENT

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

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TITLE IX—SEXUAL HARASSMENT

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

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TITLE IX—SEXUAL HARASSMENT

- Hostile environment harassment
  - Reasonable person: perspective of a reasonable person in the shoes of the complainant
    - Consider ages, abilities, and relative positions of authority of the individuals involved
  - Effectively denies a person equal access
    - Equal access has been denied – not that a person's total or entire educational access has been denied
    - No specific type of reaction is necessary to conclude that severe, pervasive, objectively offensive sexual harassment has denied a complainant "equal access"
    - Analysis is whether a reasonable person in the complainant's position would be effectively denied *equal* access to education compared to a similarly situated person who is not suffering the alleged sexual harassment

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TITLE IX—SEXUAL HARASSMENT

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

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TITLE IX—SEXUAL HARASSMENT

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

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TITLE IX—SEXUAL HARASSMENT

- Sexual Assault
- VAWA Crimes
  - Dating violence
  - Domestic violence
  - Stalking
- As defined in Clery
- Consent: No particular definition of consent with respect to sexual assault is required

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TITLE IX—SEXUAL HARASSMENT

- **VAWA Crimes—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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TITLE IX—SEXUAL HARASSMENT

- **VAWA Crimes—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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TITLE IX—SEXUAL HARASSMENT

- **VAWA Crimes:**
  - **Domestic Violence:** committed by current/former spouse, intimate partner, co-parent, cohabitant, or others protected under domestic or family violence law
  - **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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TITLE IX – EDUCATION PROGRAM OR ACTIVITY

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

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Title IX – Education Program or Activity

- Education program or activity (cont.)
  - Consider whether recipient funded, promoted, or sponsored the event or circumstance
  - No single factor is determinative
  - Clery Act geography is not co-extensive with scope of education program or activity

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Determining Title IX vs. Non-Title IX Matters

- Factors to consider
  - Type of alleged conduct – sexual harassment?
  - Location and context of alleged conduct
    - within education program or activity?
    - against a person in the United States?
  - Relationship between parties and institution

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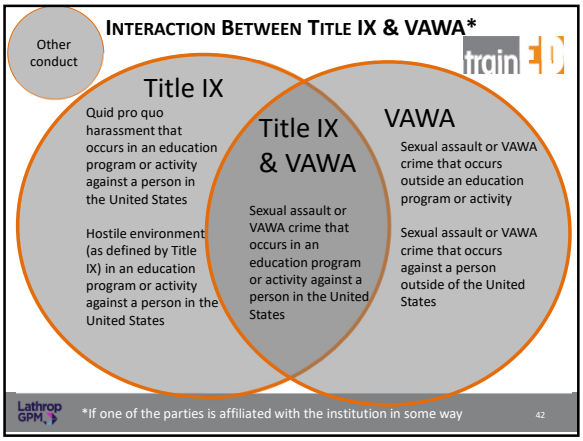
Interaction Between Title IX & VAWA*



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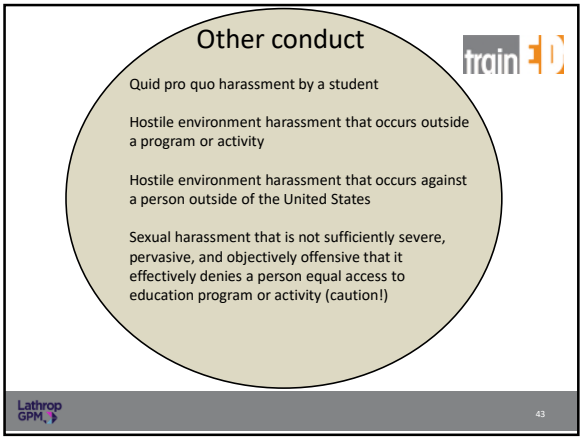

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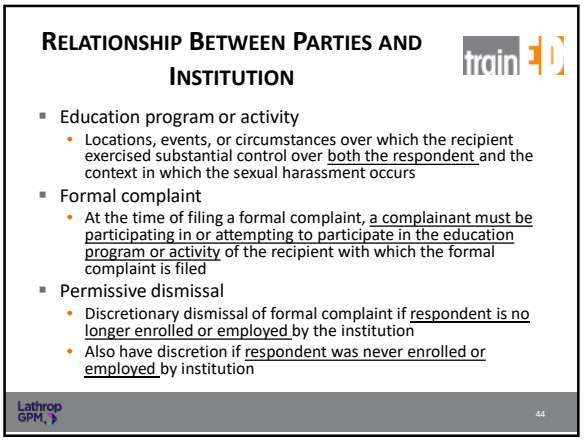

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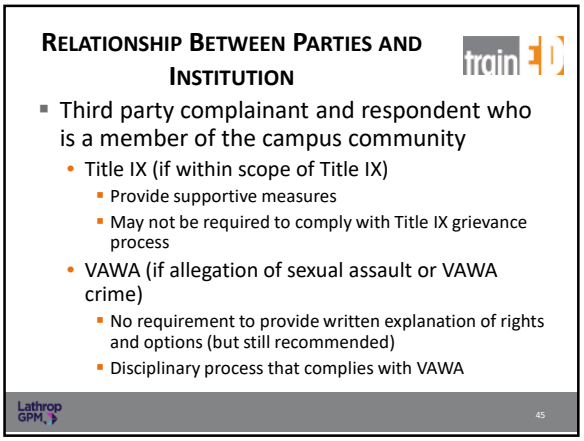

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Relationship Between Parties and Institution

- Complainant who is a member of the campus community and third party respondent
  - Title IX (if within scope of Title IX)
    - Provide supportive measures
    - Generally not required to comply with Title IX grievance process
  - VAWA (if allegation of sexual assault or VAWA crime)
    - Provide a written explanation of student or employee's rights and options
    - Could take action (no trespass) without disciplinary process
    - If engaging in a disciplinary process, comply with VAWA requirements

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Non-Title IX and Non-VAWA Cases

- Flexibility to determine whether and how to respond to alleged conduct
- Factors to consider
  - State law
  - Expectations of community

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Lessons Learned from Litigation

- In February 2021, a judge ordered the Rhode Island School of Design to pay a former student $2.5 million. The judge found that the institution was negligent by failing to take reasonable steps to provide safe housing to the former student when she attended a study abroad program in Ireland.
- Lesson: Even if a circumstance falls outside of Title IX, the institution may still be liable through other claims.

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Lessons Learned from Litigation

- In February 2021, a judge denied a motion to dismiss a "pre-assault claim" brought by a student against Niagara University. The student alleged that the perpetrator of her assault was part of the swim team – a group that had a known history of sexual harassment.
- Lesson: Respond to potential patterns of harassing conduct

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Interaction with Other Laws

- FERPA: Family Educational Rights and Privacy Act
- State mandatory reporting laws
- Title VII/State anti-discrimination laws
- State student safety laws

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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
    - In Title IX cases, exception permits school to disclose to both parties all directly related evidence, all information in the investigation report and attachments that goes to the decision-maker, and statement of, and rationale for, the final results of any disciplinary proceedings or appeals, including sanctions and whether remedies will be provided
      - Required by Title IX
      - Does not include what the remedies are
    - In cases involving sexual assault/VAWA crime, exception permits school to disclose to the parties any information provided to the decision-makers and the final results of the disciplinary proceedings, including *all* sanctions

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Interaction with Other Laws—Accommodations

- Provide reasonable accommodations to an individual with a disability who requests an accommodation necessary to ensure an equal opportunity to participate in the complaint resolution process.

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Changes to Title IX

- March 8, 2021: Executive Order
  - President Biden called for a review of regulations, including the 2020 Title IX regulations
- June 7 – 11, 2021: Virtual public hearing
  - 600 individuals spoke at the hearing
  - DOE also accepted written comments

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Changes to Title IX

- June 22, 2021: Public Notice: DOE interprets Title IX to prohibit discrimination based on sexual orientation and gender identity
  - Effective June 22, 2021
  - Relying on *Bostock v. Clayton County*
- June 23, 2021: Dear Educator Letter
  - Links to public notice, fact sheet, other resources
  - Anticipates issuing a Notice of Proposed Rulemaking and a Q&A
- May 2022: Proposed Rules Expected

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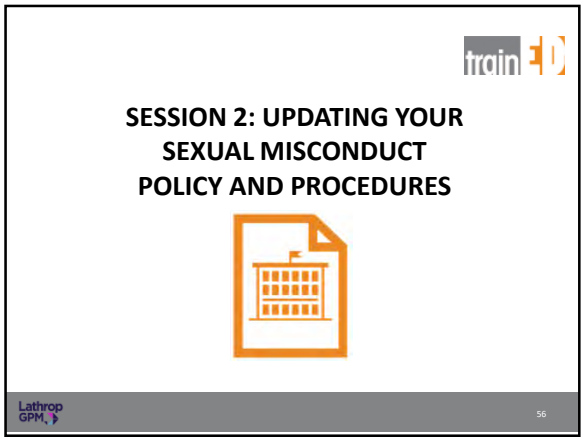

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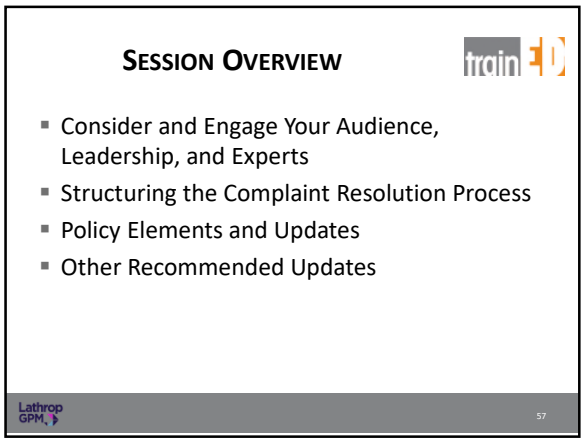

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Consider and Engage Your Community

- Consider your audience
- Engage experts
- Develop and execute a communication plan
- Educate your community

Lathrop GPM 58

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Structuring the Complaint Resolution Process

Lathrop GPM 59

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Structuring the Complaint Resolution Process

- Process options
  - One process: Use the same procedures for all sexual misconduct cases (including live hearings)
  - Hybrid: Use the same procedures for all Title IX and VAWA cases (including live hearings) and a separate process for non-Title IX/non-VAWA cases
  - Separate processes: Create separate procedures for Title IX, VAWA, and non-Title IX/non-VAWA cases

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Same Procedures for Title IX and VAWA

- Pros
  - Clarity on the process that applies to allegations of sexual misconduct
  - Less risk of due process litigation
- Cons
  - Chilling effect of live hearing in all cases
  - Cost of additional procedural requirements, including hearings
  - Cannot explain hearing process as legally required in all cases
  - Potential FERPA issues with information sharing in non-Title IX cases

Lathrop GPM 61

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Separate Procedures for Title IX and VAWA

- Pros
  - Fewer hearings (less chilling effect; less administrative burden/cost)
  - Clear FERPA exceptions for each process
  - Can rely on legal requirements for each process (not requiring additional process beyond legal obligations)
- Cons
  - More analysis needed to determine what process will apply
    - Complications when additional facts arise and in cases with multiple allegations
  - Confusing for parties
  - Risk of due process litigation seeking a hearing requirement

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Other Considerations

- If using a non-hearing process for sexual misconduct cases that do not fall within Title IX, consider discontinuing the use of hearings in other student conduct matters that involve two parties

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Determining Which Process Applies

- Analyze when report or complaint is received and throughout the process
- Who determines which process applies
  - Title IX Coordinator (with assistance from investigator)
  - Another individual?
- If separate Title IX and VAWA procedures, follow same investigation process regardless of Title IX or VAWA up until information sharing stage
  - Title IX: Copy of directly related evidence
  - VAWA: Access to evidence that will be shared with the decision-maker
- When in doubt, err on side of following Title IX process

Lathrop GPM 64

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Policy Elements and Updates

Lathrop GPM 65

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Policy Elements & Updates

- Policy Content
  - Introduction
  - Scope
  - Notice of Non-Discrimination
  - Definitions
    - Complainant
    - Respondent
    - Report
    - Formal Complaint
    - Program or Activity
    - Sexual Misconduct

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Policy Elements & Updates

- Policy Content (cont.)
  - Definitions (cont.)
    - Sexual Harassment
      - Title IX Sexual Harassment
      - Non-Title IX Sexual Harassment
    - Dating Violence
    - Domestic Violence
    - Stalking
    - Sexual Exploitation

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Policy Elements & Updates

- Policy Content (cont.)
  - Definitions (cont.)
    - Sexual Assault
      - Consent
      - Incapacitation
      - Coercion
    - Retaliation and Interference with Process

Lathrop GPM 68

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Policy Elements & Updates

- Policy Content (cont.)
  - Responsibilities of the Title IX Coordinator and Team
  - Training
  - Resources and Supportive/Interim Measures
    - Offered to both parties

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Policy Elements & Updates

- Policy Content (cont.)
  - Process for Reporting and Filing a Formal Complaint
    - Confidentiality
    - Anonymous Reports
    - Reporting to Law Enforcement
    - Employee Reporting Obligations
    - Mandatory Reporting Obligations for Minors

Lathrop GPM 70

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Comply with Legal Requirements: Title IX/VAWA

- Policy Content (cont.)
  - Complaint Process
    - Title IX Process vs. VAWA Process vs. Process for Other Sexual Misconduct
    - Reasonably Prompt Timeframes
    - Officials Conducting Process
      - No Conflict of Interest/Bias (for/against complainants/respondents generally or individually)
      - Training
      - Dual Roles

Lathrop GPM 71

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Comply with Legal Requirements: Title IX/VAWA

- Policy Content (cont.)
  - Complaint Process (cont.)
    - Equal Rights of Parties
      - Presumption of Non-Responsibility
      - Advisors
      - Supportive/Interim Measures
      - Required Notices
      - Identify Witnesses/Evidence
        - » Remove restriction on character witnesses/evidence
      - Right to Appeal (Title IX)
      - Access to Evidence (Title IX/VAWA)
      - Review Report (Title IX)
      - Submit Responses (Title IX)

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COMPLY WITH LEGAL REQUIREMENTS: TITLE IX/VAWA

- Policy Content (cont.)
  - Complaint Process (cont.)
    - Initial Meeting with Complainant
    - Formal Complaint
      - Consolidation of Complaints
      - Dismissal of Complaints
    - Emergency Removal
    - Administrative Leave
    - No-Contact Orders/Harassment Restraining Orders/Protective Orders
    - Informal Resolution
      - Notice requirements
    - Notice of Allegations (to both parties; sufficient time & details)

Lathrop GPM 73

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COMPLY WITH LEGAL REQUIREMENTS: TITLE IX/VAWA

- Policy Content (cont.)
  - Complaint Process (cont.)
    - Investigation
      - Notice of Meetings (participants, purpose, etc.)
      - No gag orders/prohibition of parallel investigations
      - Allow parties to suggest questions to be asked of the other party and witnesses
      - Advisors
      - Review of Directly Related Evidence and Response (Title IX only)
      - Investigation Report and Response

Lathrop GPM 74

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COMPLY WITH LEGAL REQUIREMENTS: TITLE IX/VAWA

- Policy Content (cont.)
  - Complaint Process (cont.)
    - Adjudication
      - Hearing required for Title IX
        - » Rules of procedure
        - » Availability of directly related evidence
        - » Witnesses
        - » Cross-examination
        - » Advisors (including school-appointed advisors)
        - » Recording/Transcript

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COMPLY WITH LEGAL REQUIREMENTS: TITLE IX/VAWA

- Policy Content (cont.)
  - Complaint Process (cont.)
    - Adjudication (cont.)
      - Standard of evidence
      - Relevant Evidence
        - » Treatment Records
        - » Privileged Information
        - » Prior Sexual History
      - Notice of Determination
      - Sanctions
      - Remedies
    - Appeal (required under Title IX)
      - From Determination
      - From Dismissal
      - Bases for Appeal
      - Notice of Appeal and Opportunity to Respond
  - Recordkeeping

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ADDITIONAL RECOMMENDED UPDATES

- Reasonable accommodations
- Expectation to act in good faith and be truthful
- Statute of limitations
- Amnesty
- Attempt
- Consensual relationships
- Flexibility
- Close of evidence
- Record interviews
- Non-punitive requirements even if no finding of responsibility
- Version of policy to apply

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ADDITIONAL RECOMMENDED UPDATES

- Handling of related complaints
  - Violation of interim measure – no contact directive
  - Retaliation
  - Violation of sanction
  - Ineffective sanction
  - Violation of obligation to act in good faith and/or be truthful
  - Non-disclosure agreement

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Additional Recommended Updates

- Evidentiary Issues
  - Lie detector test results
  - Character evidence/witnesses
  - Witness statements obtained by others
  - Medical evidence
  - Expert reports/witnesses
  - Prior policy violation by respondent
  - Allegations of similar misconduct

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Additional Recommended Updates—Templates

- Create templates for notices and other documents used in the grievance process, including:
  - Notification of rights of complainant
  - Notice of allegations
  - Notice of informal resolution
  - Notice of delay
  - Notice of meetings
  - Notice of determination
  - Advisor agreement
  - Non-disclosure agreement
  - Hearing procedures

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SESSION 3: OVERSEEING THE COMPLAINT PROCESS

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Session Overview

- Role of Title IX Coordinator & Team
- Responding to a Report
- Informal Resolution
- Investigation
- Hearing
- Determination
- Appeals

Lathrop GPM 82

82

Role of Title IX Coordinator During Complaint Process

- Conduct intake meeting
- Assess report/complaint
- Determine which process applies (if multiple)
- Determine who will provide ongoing communication with the parties throughout the complaint process
  - Notify parties of delays and reason for delays
  - Notify parties of their own and other party's meetings
- Ensure that parties receive adequate notice of any new allegations
- Ensure advisor agreements are signed (if any)
- Ensure non-disclosure agreements are signed by parties and advisors (if any)
- Conduct informal resolution?

Lathrop GPM 83

83

Role of Title IX Coordinator During Complaint Process

- Oversee process to ensure compliance with policy and designated time frames
- Investigate?
  - Beware of conflicts when filling multiple roles
- Review investigation report, party responses, and rebuttals
  - Redact impermissible content
  - Evaluate whether further investigation is necessary
- Cannot adjudicate or decide appeal (Title IX)

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Dual Roles

- Title IX requires independent decision-maker
  - Title IX Coordinator and decision-maker must be different individuals
  - Investigator and decision-maker must be different individuals
  - Title IX Coordinator and investigator may offer recommendations regarding findings and/or conclusions on responsibility, but decision-maker has independent obligation to objectively evaluate relevant evidence and cannot simply defer to recommendations
- Title IX Coordinator may act as investigator

Lathrop GPM 85

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Role of Title IX Team

- Serve impartially
  - Avoid prejudgment of the facts
  - Presumption of non-responsibility
  - Avoid/disclose conflicts of interest/bias
    - For or against complainants or respondents individually or generally
  - Make determination of responsibility at the conclusion of the grievance process

Lathrop GPM 86

86

Equal Rights of the Parties

- Interview/hear from both parties
- Equal opportunity for parties
  - Identify/present fact witnesses and evidence, including inculpatory and exculpatory evidence
  - Access to evidence (if any) (Title IX and VAWA)
    - Must allow *access* for sexual assault/VAWA
    - Must provide *copy* for Title IX
  - Right to an advisor (may be attorney) (Title IX and VAWA)
    - May limit extent of participation (must apply equally)
    - If party has no advisor, school will provide for cross-examination
  - Participate in pre-hearing meeting (if any)
  - Identify/present character or expert witnesses (if any)
  - Written notice of
    - Meetings
    - Allegations
    - Informal Complaint Process
  - Written simultaneous notices of outcome

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CASE STUDY—TENNIS TEAM

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CASE STUDY-TENNIS TEAM

- On April 22, 2021, Jim, the institution's assistant tennis coach, sends you an email. He tells you that there have been some issues on the women's tennis team involving a member of the team bullying a freshman teammate. Jim says that from what he has been told by the freshman, the older member of the team made some comments about the freshman's appearance and started a rumor about the freshman and her boyfriend. Jim tells you that he addressed the issue at a team meeting recently, including going over the athletic department's anti-bullying policy, but he recalled something from his training about checking in with the Title IX Coordinator as well and wanted to see if there was something else he should be doing. Jim did not provide you with the names of any of the athletes.
- How do you respond to Jim?

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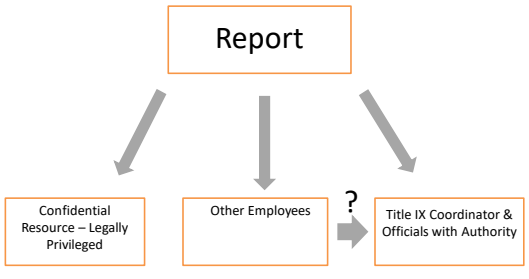
RESPONDING TO A REPORT



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Responding to a Report

- Types of report recipients:
  - Title IX Coordinator and officials with authority to institute corrective measures on behalf of the institution
  - Confidential Resources
    - Professional and pastoral counselors
    - Others with state-law privilege
    - Not required to report any information*
  - Other Employees: Institution may designate reporting obligation:
    - Designate semi-confidential resources?
    - Designate employees who are required to report
    - Designate employees who are not required to report?

*NOTE: These individuals may have other reporting requirements under Clery Act and/or state law

Lathrop GPM 91

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Duties of Confidential Resources

- Discuss reporting options and rights - Title IX Coordinator, law enforcement, campus security
  - Offer to assist with reporting
  - Discuss school's prevention of and response to retaliation
- Discuss/offer support services and interim measures
- Disclose institution's limited ability to respond if request for confidentiality
- Discuss the importance of preserving evidence
- State law may require reporting of non-identifying information

Lathrop GPM 92

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Duties of Other Employees Who Are Required to Report

- If possible, before information revealed disclose:
  - Additional reporting requirement
  - Option to report to school and request confidentiality (school will consider but not guarantee)
  - Option for complainant to disclose to a confidential resource
- Only share information with individuals responsible for handling the institution's response (e.g., Title IX Coordinator, Deputy)

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Duties of Employees Who Are Not Required to Report

- Ask person reporting if they want the information shared with the Title IX Coordinator
- Only share information with individuals responsible for handling the institution's response (e.g., Title IX Coordinator, Deputy)

Lathrop GPM 94

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Case Study-Tennis Team

- You tell Jim that under the institution's policy, he is required to report what he knows about the situation to you. You offer to have a call or meeting later that day.
- Jim responds that he has told you what he knows and that he thinks the situation has probably been resolved by the team meeting, but he'll let you know if anything additional occurs.
- How do you respond?

Lathrop GPM 95

95

Responding to a Report

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

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CASE STUDY-TENNIS TEAM

- You inform Jim that he needs to share the name of the freshman team member, as well as the name of the other team member.
- Jim tells you that he did not realize he would need to do so and he thinks the freshman team member will feel betrayed if he shares her name.
- How do you respond?

Lathrop GPM 97

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CASE STUDY—JACOB/OLIVIA

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CASE STUDY—JACOB/OLIVIA

- On April 28, 2021, you receive a formal complaint regarding an unrelated matter from Jacob Jacobson.

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CASE STUDY—JACOB/OLIVIA

Sexual Misconduct Complaint Form

COMPLAINANT NAME: Jacob Jacobson
ADDRESS: 1234 Off-Campus Drive
DATE OF REPORT OF ALLEGED POLICY VIOLATION: April 28, 2021
RESPONDENT NAME: Olivia Olive
ADDRESS: 999 Dorm Room Lane

ALLEGATIONS:
All semester, Olivia has been hitting on me and making me uncomfortable. I tried to tell her I have a girlfriend, but she just kept flirting and talking about us hooking up.
Olivia sent me a Snapchat message with a picture of her in her underwear and asked me to send her something.
On April 10, 2021, at a party off-campus, Olivia was getting handsy with me. I was not okay with that. I decided to go back to my place and Olivia came with me. I blacked out, but Olivia told me that she gave me a blow job. I was too drunk to consent.

Lathrop GPM 100

100

CASE STUDY—JACOB/OLIVIA

- Your institution has different processes for handling complaints of sexual misconduct depending on whether the complaint falls within Title IX.
- What information in Jacob's complaint helps you determine what process applies?
- Do you need additional information?

Lathrop GPM 101

101

DETERMINING TITLE IX VS. NON-TITLE IX MATTERS

- Factors to consider
  - Type of alleged conduct – sexual harassment?
  - Location and context of alleged conduct
    - within education program or activity?
    - against a person in the United States?
  - Relationship between parties and institution

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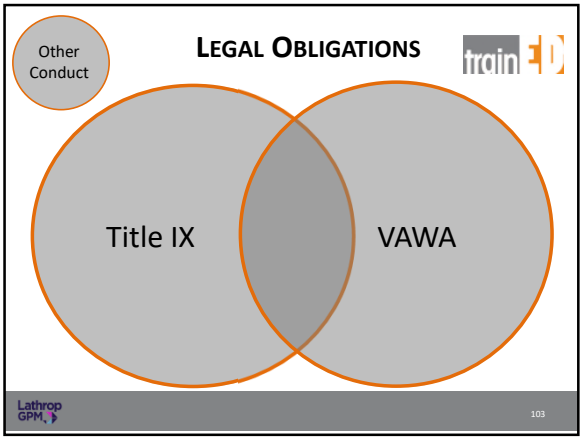

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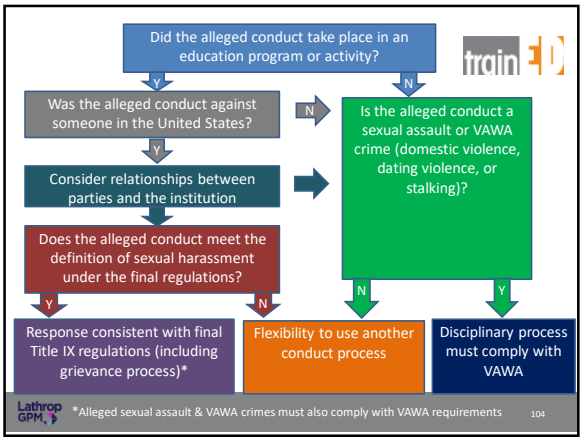

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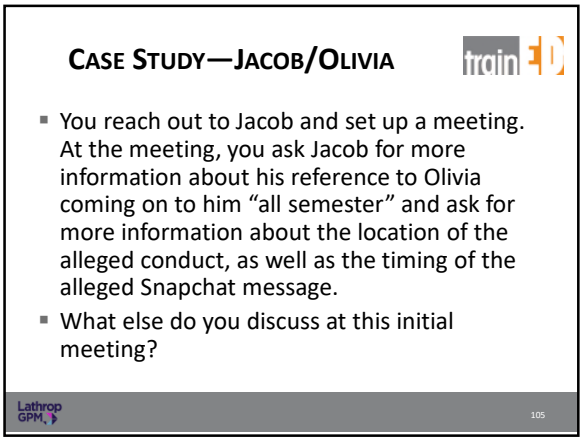

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RESPONDING TO A REPORT

- Response must treat complainant and respondent equitably by
  - Offering supportive measures to a complaint (with or without formal complaint)
  - Following a grievance process that complies with the regulations before imposing any disciplinary sanctions or other actions that are not supportive measures against a respondent

Lathrop GPM 106

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RESPONDING TO A REPORT

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

Lathrop GPM 107

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RESPONDING TO A REPORT

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

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Responding to a Report – Supportive/Interim Measures

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

Lathrop GPM 109

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Responding to a Report – Supportive/Interim Measures

- 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

Lathrop GPM 110

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Responding to a Report

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

Lathrop GPM 111

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Responding to a Report—Requests for Confidentiality or No Action

- Recommended Approach:
  - Factors to consider
    - Seriousness of the alleged harassment
    - Increased risk of additional violence by the respondent
      - Other complaints about the same respondent
      - History of violence from arrests/records from prior school
      - Respondent threatened further violence
    - Increased risk of additional violence under similar circumstances
      - Pattern of perpetration at a given location or with a certain group
    - Whether sexual violence was perpetrated with a weapon
    - Age of the complainant
    - Whether school has other means to obtain evidence (security footage, eye witness or physical evidence)
      - Notice will still need to identify parties involved
    - Rights of the accused individual to receive information about the accuser and the allegations if a formal proceeding with sanctions may result

Lathrop GPM 112

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Responding to a Report—Requests for Confidentiality or No Action

- Recommended Approach:
  - If the school determines it *can* honor the request for confidentiality/no action
    - Continue to offer supportive measures
  - If the school determines it *cannot* honor the request for confidentiality/no action
    - Inform the complainant prior to proceeding
    - Continue to offer supportive measures
    - Title IX Coordinator signs formal complaint and begins process

Lathrop GPM 113

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Responding to a Report – Written Notification of Rights

- Written notification to complainants about—
  - Options for, available assistance in, and how to request changes to academic, living, transportation, and working situations, if so requested by the complainant and if such accommodations are reasonably available, regardless of whether the complainant chooses to report the crime to campus police or local law enforcement

Lathrop GPM 114

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Responding to a Report – Written Notification of Rights

- Written notification to complainants about (cont.)—
  - Possible sanctions and protective measures
  - Procedures individual should follow
  - Disciplinary procedures
  - Confidentiality
  - Existing resources for counseling, etc.
  - Supportive/interim measures

Lathrop GPM 115

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Responding to a Report – Written Notification of Rights

- Inform complainants that school officials will take steps to prevent all forms of retaliation and take strong responsive action if it occurs

Lathrop GPM 116

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Case Study—Jacob/Olivia

- Jacob tells you that Olivia coming on to him occurred both on campus and off campus. He also says he was at his off-campus apartment when he received the Snapchat message and he assumes Olivia sent it from her on-campus dorm room. The party on April 10 took place off-campus, but Jacob tells you the name of the apartment building and, although off-campus, that building is owned by the institution. Finally, the alleged sexual contact took place at Jacob's apartment off campus.
- Does this matter fall within Title IX?

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CASE STUDY—TENNIS TEAM

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CASE STUDY-TENNIS TEAM

- Turning back to the situation with the tennis team, you meet with the freshman team member/complainant, Steph. Steph tells you that another member of the team has been making comments about how large her breasts are and started a rumor about her sex life with her boyfriend. Steph tells you that the team meeting a few weeks ago seems to have helped and she has not heard any comments since then. Steph says she is worried about the comments starting again, but she does not want to make a big deal out of it.
- What are your options for responding to Steph's report?

119

CASE STUDY-TENNIS TEAM

- You discuss the possibility that you as the Title IX Coordinator could sign the formal complaint.
- Steph responds that she is not interested in participating in a process, even if you sign the formal complaint.
- Could you proceed with a process without Steph?

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CASE STUDY-TENNIS TEAM

- Could you have a conversation with the respondent, Kristin, about the report?
- What precautions would you want to take prior to or as part of that conversation?

121

CASE STUDY-TENNIS TEAM

- Is this an appropriate case for informal resolution?

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INFORMAL RESOLUTION

- VAWA: No specific requirement
- Title IX:
  - Any time prior to determination, may facilitate informal resolution process, such as mediation, if
    - Provide parties with written notice disclosing
      - Allegations
      - Requirements of the informal resolution process including circumstances when it precludes the parties from resuming a formal complaint for the same allegations
        - Provided, however, that at any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint
      - Consequences resulting from participating in the informal resolution process, including records that are maintained and could be shared
  - Obtain parties' voluntary written consent to informal process

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INFORMAL RESOLUTION

- May not offer informal resolution unless a formal complaint is filed
- May never require the parties to participate in an informal resolution process
- May not condition enrollment/continuing enrollment, employment/continuing employment, or enjoyment of any other right on waiver of the right to an investigation and adjudication of formal complaint
- May not offer or facilitate informal resolution to resolve allegations that an employee sexually harassed a student

Lathrop GPM 124

124

INFORMAL RESOLUTION

- Factors to consider
  - Nature of alleged incident
  - Other allegations against same respondent
  - What sanctions would be necessary if the allegation is true
  - Whether complainant is willing to fully participate in a formal process
  - Whether institution could proceed with a formal process without complainant

Lathrop GPM 125

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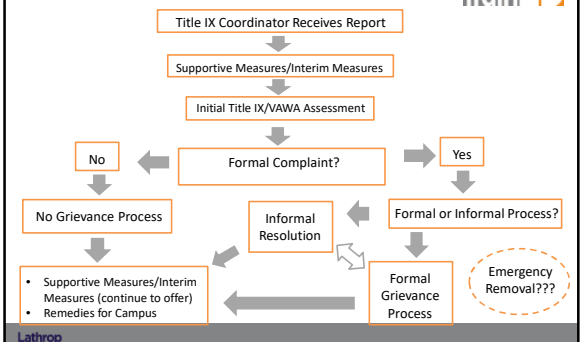
RESPONDING TO A REPORT



Lathrop GPM 126

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Case Study-Tennis Team

- You raise the possibility of informal resolution with Steph. You tell Steph that in order to pursue informal resolution under the institution's policy, she must file a formal complaint.
- Steph says she thinks informal resolution could be a good solution, but she would never want to go forward with a formal investigation. She agrees to sign a formal complaint but reiterates that she is not willing to move forward with a formal process if they are unable to resolve her complaint through informal resolution.
- How do you respond?

Lathrop GPM 127

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Case Study-Tennis Team

- Steph signs a formal complaint, and you provide Steph with a copy of the notice of allegations.
- What is the next step?

Lathrop GPM 128

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Notice of Allegations

- Upon formal complaint, provide written notice to known parties, including:
  - Notice of grievance process, including any informal resolution process
  - Notice of the allegations, including sufficient details known at the time and with sufficient time to prepare response before initial interview
    - Identities of the parties involved, if known
    - Conduct allegedly constituting sexual harassment
    - Date and location of the alleged incident, if known

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Notice of Allegations

- Upon formal complaint, provide written notice to both parties, including:
  - Statements that:
    - Respondent is presumed not responsible
    - Determination of responsibility is made at conclusion of grievance process
    - Right to advisor of choice who may be but is not required to be an attorney
    - Parties may inspect and review evidence *as permitted in sexual misconduct policy*
    - Inform parties of any policy provision that prohibits knowingly making false statements or knowingly submitting false information during the grievance process
- Provide notice of *additional* allegations about the complainant or respondent that arise during process

Lathrop GPM 130

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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 hearings, investigative interviews, or other meetings with a party, 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

Lathrop GPM 131

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Case Study-Tennis Team

- You send the respondent, Kristin, a notice of a meeting the next day and the reason for the meeting. You attach a mutual no-contact directive, including some provisions specific to tennis team practices and other events, and a notice of her rights.
- You also send Steph the mutual no-contact directive.
- You meet with Kristin the next day to provide her with a written notice of allegations and to discuss the no-contact directive and notice of rights.
- You inform Kristin that Steph would like to pursue informal resolution. Kristin tells you she would also like to try informal resolution.
- What do you do next?

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CASE STUDY-TENNIS TEAM

- You provide the parties with the notice regarding the informal resolution process and obtain the parties' voluntary written consent to the informal resolution process.
- You schedule a meeting with Steph, followed by a meeting with Kristin the next day.
- What should you think about in preparation for the meetings?

Lathrop GPM 133

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INFORMAL RESOLUTION

- Issues to consider when using informal resolution process
  - Is there an admission from the respondent?
  - Will this be a final resolution?
  - What information will be shared during the informal process?
  - Can the resolution be used in future discipline decisions?
  - What records will be maintained and could be shared?
  - What action is necessary to stop the harassment, prevent its recurrence, and address its effects?

Lathrop GPM 134

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CASE STUDY-TENNIS TEAM

- What might the proposed informal resolution between Steph and Kristin look like?
  - Would Complainant retain the ability to bring a formal complaint if more comments occurred in the future?
  - Is Respondent admitting to engaging in the alleged conduct?
  - What other requirements will the resolution impose?
    - Consider remedies and sanctions options listed in the policy

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CASE STUDY—PARENT CALL

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CASE STUDY—PARENT CALL

- You receive a call from a student's parents regarding an unrelated matter. The parents inform you that their daughter, a sophomore at the institution, is getting a restraining order against her ex-boyfriend, also a sophomore at the institution. The parents tell you that the relationship ended poorly and they are concerned for their daughter's safety on campus. They ask you what the institution intends to do to protect their daughter.
- What should you do?

137

RESPONDING TO FORMAL COMPLAINT—EMERGENCY REMOVAL

- Institution may remove a respondent from the education program or activity on an emergency basis if institution:
  - Undertakes an individualized safety and risk analysis;
  - Determines that an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal; and
  - Provides the respondent with notice and an opportunity to challenge the decision immediately following the removal
- Non-student employees may be placed on administrative leave during grievance process
- Provision does not modify any rights under the IDEA, Section 504 of the Rehabilitation Act, or the ADA

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CASE STUDY—JACOB/OLIVIA

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CASE STUDY—JACOB/OLIVIA

- Turning back to the complaint resolution process between Jacob and Olivia, you have received Jacob's formal complaint, conducted your initial meeting with Jacob, and obtained additional information from Jacob needed to (1) determine whether the complaint falls within Title IX and (2) draft the notice of allegations.
- You provide Olivia with a notice of meeting, mutual no contact directive, and notice of her rights. At the initial meeting, you provide Olivia with the notice of allegations and discuss the process.
- You also provide the mutual no contact directive and the notice of allegations to Jacob.

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CASE STUDY—JACOB/OLIVIA

Excerpt from Notice of Allegations

On April 28, 2021, a formal complaint of alleged sexual misconduct was submitted by Jacob Jacobson to the Title IX Coordinator alleging conduct by Olivia Olive. In the formal complaint, Jacob alleged that:

- Throughout the Spring 2021 semester, in various locations, including her dorm room, Olivia engaged in unwelcome conduct on the basis of sex by making sexual propositions to Jacob.
- In February 2021, from her dorm room, Olivia engaged in unwelcome conduct on the basis of sex by sending Jacob sexually suggestive Snapchat messages.
- On April 10, 2021, at an off-campus apartment owned by the University on Third Street, Olivia engaged in unwelcome conduct on the basis of sex by touching Jacob.
- On April 10, 2021, at Jacob's off-campus apartment, Olivia engaged in non-consensual sexual penetration with Jacob.

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CASE STUDY—JACOB/OLIVIA

- You appoint Sarah Smith as the investigator for this matter and notify the parties. The notification states that, according to the Policy, if either party has an objection to the appointed investigator, they can submit a request for removal of the investigator to you.

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CASE STUDY—JACOB/OLIVIA

- Jacob contacts you the next day. He sends you multiple screenshots of Twitter and Facebook posts by the investigator from several years ago. The posts include commentary about the Me Too movement, including several posts where the investigator used the hashtag #believewomen.
- Jacob tells you that the posts indicate that the investigator is biased against males and will not believe him as a male harassed and assaulted by a female. Jacob requests that you replace the investigator with a neutral individual.
- How do your respond?

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CONFLICTS OF INTEREST

- VAWA: a prompt, fair, and impartial proceeding is conducted by officials who do not have a conflict of interest or bias for or against the accuser or the accused
- Title IX: no conflicts of interest or bias as Title IX Coordinator, investigator, decision-maker, facilitator of informal resolution process, or individual responsible for appeals
  - For or against complainants or respondents generally
  - For or against an individual complainant or respondent
- Disclose and manage conflicts of interest
- Consider appearance of bias based on public profile (articles, social media, past professional roles, etc.)
- Have a process for requesting disqualification of Title IX Coordinator, investigator, adjudicator, informal resolution process facilitator, or individual responsible for appeals

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CASE STUDY—JACOB/OLIVIA

- You appoint a new investigator and provide the parties with an additional opportunity to request removal of the new investigator. Neither party makes a request.
- The investigator is beginning to schedule interviews. Now what should you do?

Lathrop GPM 145

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CASE STUDY—JACOB/OLIVIA

- Following the initial interview with Jacob, the investigator calls you.
- The investigator tells you that Jacob said that there might be security cameras at the apartment where the party took place on April 10.
- What do you do?

Lathrop GPM 146

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CASE STUDY—JACOB/OLIVIA

- The investigator calls you back the next day to let you know that she contacted Campus Safety regarding the security cameras, but the footage is only retained for 21 days before being deleted and accordingly is no longer available.
- The investigator asks what she can do to address this in her investigation report.
- How do you respond?

Lathrop GPM 147

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CASE STUDY—JACOB/OLIVIA

- The investigator also says that Jacob raised multiple incidents of alleged conduct by Olivia that were not in his complaint or the notice of allegations.
- Specifically, Jacob said that Olivia started hitting on Jacob in January 2021 and suggesting that they hookup. Jacob also said that Olivia brought up hooking up casually while they were at coffee shop on campus. Jacob said that over the course of the semester, Olivia got increasingly touchy with him and at one point in February, sat in his lap in a friend's dorm room. In addition, Jacob alleged Olivia sent him an additional sexual Snapchat message as well as text messages. Jacob said that Olivia's behavior made him really uncomfortable and that he eventually started to avoid their mutual friend group and places he thought he might see her.
- What do you do next?

Lathrop GPM 148

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CASE STUDY—JACOB/OLIVIA

- Also during the call with the investigator, the investigator tells you that Jacob alleged that Olivia has made his two roommates uncomfortable because she is always talking about sex. The investigator says that during his interview, Jacob said:
  - Tom and Ethan sometimes don't hang out with the group because of Olivia talking about sex
  - Tom and Ethan asked Jacob not to have Olivia over to their place when they are going to be around
  - Olivia gets very touchy with Tom and Ethan and it really bugs them
  - Jacob and his friends often have a group chat going on Snapchat and both Tom and Ethan have left a chat previously when Olivia makes sexual comments as part of the chat.
- What do you do with this information?

Lathrop GPM 149

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CASE STUDY—JACOB/OLIVIA

- You meet with Jacob to discuss the new allegations and additional potential complainants. Jacob tells you he does want to include the additional allegations in his complaint. You ask Jacob for more details, including dates and locations, of that additional conduct.
- What do you do next?

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Notice of Allegations

- Provide notice of *additional* allegations about the complainant or respondent that arise during process
  - Including sufficient details known at the time:
    - Identities of the parties involved, if known
    - Conduct allegedly constituting sexual harassment
    - Date and location of the alleged incident, if known
  - With sufficient time to prepare response before initial interview

Lathrop GPM 151

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Case Study—Jacob/Olivia

- You schedule a meeting with Tom and a separate meeting with Ethan.
- At the meeting with Tom, Tom confirms that he will sometimes avoid social situations where Olivia is going to be there because she likes to make jokes about sex. Tom says that she has never specifically made a joke about him, but she is touchy with him sometimes. When asked what he meant by touchy, Tom says that Olivia sometimes hugs him and would also put her hand on his thigh if sitting next to him. Tom also says that she just brings up sex a lot and sometimes it makes him uncomfortable to be around her.
- You discuss the policy, the institution's process, and available interim measures, including a no-contact directive. Tom declines resources and interim measures and says that he does not want to bring a complaint against Olivia.

Lathrop GPM 152

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Case Study—Jacob/Olivia

- Similarly, at the meeting with Ethan, Ethan says that Olivia talks about sex a lot, including sharing details of her past sexual encounters. Ethan says that he just does not like being around that all the time, so he sometimes makes other plans to avoid seeing her when she is with their friend group.
- You discuss the policy, the institution's process, and available interim measures, including a no-contact directive. Ethan declines resources and interim measures and says that he does not want to bring a complaint against Olivia.

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CASE STUDY—JACOB/OLIVIA

- What are your options for next steps following your meetings with Tom and Ethan?

Lathrop GPM 154

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CASE STUDY—JACOB/OLIVIA

- You follow up with both Tom and Ethan a few days later. You discuss with each the possibility of signing a complaint on their behalf.
- Both Tom and Ethan state that a complaint is not necessary and that they are not willing to participate in a complaint resolution process. Both say that they have found other ways to deal with Olivia's behavior and that they hope that Jacob's complaint will be a wakeup call for her.

Lathrop GPM 155

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CASE STUDY—JACOB/OLIVIA

- You decide not to move forward with a formal complaint against Olivia on Tom's and Ethan's behalf.
- If you had decided to move forward, or if Tom or Ethan filed their own formal complaint, would you have consolidated it with the complaint resolution process for Jacob's complaint against Olivia?

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CONSOLIDATION OF FORMAL COMPLAINTS

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

Lathrop GPM 157

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CASE STUDY—JACOB/OLIVIA

- Even though you are not moving forward with a complaint on behalf of Tom or Ethan, should Tom and Ethan be interviewed as part of the investigation into Jacob's complaint?

Lathrop GPM 158

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CASE STUDY—JACOB/OLIVIA

- You issue an amended notice of allegations to Jacob and Olivia.

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CASE STUDY—JACOB/OLIVIA

Excerpt from amended notice of allegations

On April 28, 2021, a formal complaint of alleged sexual misconduct was submitted by Jacob Jacobson to the Title IX Coordinator alleging conduct by Olivia Olive. In the formal complaint, Jacob alleged that:

- Throughout the Spring 2021 semester, in various on-campus locations, including her dorm room and a coffee shop in February 2021, Olivia engaged in unwelcome conduct on the basis of sex by making sexual propositions to Jacob.
- In February 2021, in various on-campus locations, including her dorm room, Olivia engaged in unwelcome conduct on the basis of sex by touching Jacob.
- In late February 2021, from her dorm room, Olivia engaged in unwelcome conduct on the basis of sex by sending Jacob sexually suggestive Snapchat messages.
- On March 12, 2021, through text messages, Olivia engaged in unwelcome conduct on the basis of sex by making sexual propositions to Jacob.
- In late March 2021, from her dorm room, Olivia engaged in unwelcome conduct on the basis of sex by sending Jacob sexually suggestive Snapchat messages.
- In late March 2021, in a friend's dorm room, Olivia engaged in unwelcome conduct on the basis of sex by making a sexual proposition to Jacob and touching Jacob.
- In early April 2021, through Snapchat messages, Olivia engaged in unwelcome conduct on the basis of sex by making a sexual proposition to Jacob.
- On April 10, 2021, at an off-campus apartment owned by the University on Third Street, Olivia engaged in non-consensual sexual contact with Jacob.
- On April 10, 2021, at Jacob's off-campus apartment, Olivia engaged in non-consensual sexual penetration with Jacob.

Lathrop GPM 160

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CASE STUDY—JACOB/OLIVIA

- The investigator forwards you an email from Olivia's attorney advisor. In response to the investigator's request to schedule an interview with Olivia, Olivia's advisor stated that the institution is in violation of federal law because it has not provided Olivia with notice of the conduct she is alleged to have engaged in. The advisor states that Olivia will not submit to an interview until this has been remedied.
- What do you do?

Lathrop GPM 161

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ADVISORS

- VAWA requires:
  - Proceeding must "provide the accuser and the accused with the same opportunities to have others present during any institutional disciplinary proceeding, including the **opportunity to be accompanied to any related meeting** or proceeding by the advisor of their choice"
- Title IX requires:
  - Allow advisor of choice, who may be but is not required to be an attorney
    - May establish equal restrictions on advisors' participation

Lathrop GPM 162

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ADVISORS

- Advisors, particularly attorney advisors, have become increasingly common participants
- Tips for addressing disruptive advisors:
  - Inform parties about restrictions on advisors in advance
    - "Potted plant"
    - No direct communication (orally or in writing) with Title IX Coordinator, Deputy Coordinator(s), Investigator,(s) Adjudicator(s), Appeal Officer(s)
    - Must keep information confidential
    - Rules at the hearing
  - Signed advisor agreements – acknowledge role and restrictions
  - Be prepared to enforce the agreement parameters
  - Hold the party responsible for the advisor's actions
  - Don't be afraid to consider pausing the process if the advisor continues to be disruptive
  - Institutions may remove or dismiss advisors who become disruptive or who do not abide by the restrictions on their participation
  - Be consistent

Lathrop GPM 163

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CASE STUDY—JACOB/OLIVIA

- You respond to Olivia to remind her of the rules regarding advisors communicating with school officials and provide her with a copy of the advisor agreement for her advisor to sign. You also explain the policy on the notice of allegations.
- Olivia responds that the institution is in violation of Title IX and her due process rights. She says that she will file a complaint with the Department of Education and is also considering a lawsuit if the institution does not provide her the exact allegations that have been made against her.
- How do you respond?

Lathrop GPM 164

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CASE STUDY—JACOB/OLIVIA

- You reiterate to Olivia that the institution has provided her with the notice required under the law and explain that she will be made aware of additional details during the process and will have multiple opportunities to respond.
- Olivia responds that she continues to object to the lack of notice, but she will submit to an interview under protest.
- You let the investigator know that she can proceed with scheduling an interview with Olivia.

Lathrop GPM 165

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CASE STUDY—JACOB/OLIVIA

- The investigator calls you during her initial interview with Olivia. The investigator says that Olivia's attorney advisor spoke at the beginning of the meeting and said: "Now that we are on the record, I want to be clear that Olivia objects to this interview taking place prior to Olivia being provided the notice to which she is entitled under federal law. Olivia has not been made aware of the conduct of which she has been accused, a clear violation of Olivia's rights under the law and the institution's policy."
- What do you tell the investigator?

Lathrop GPM 166

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CASE STUDY—JACOB/OLIVIA

- The investigator calls you again during her initial interview with Olivia. The investigator says that Olivia's attorney advisor jumped in during the interview and asked the investigator to clarify a question.
- What do you tell the investigator?

Lathrop GPM 167

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CASE STUDY—JACOB/OLIVIA

- The investigator calls again about 15 minutes later. She tells you that despite multiple reminders, Olivia's advisor kept addressing her directly and interrupting the interview. The investigator says that she decided to end the interview early due to the continued interruptions.
- What do you do next?

Lathrop GPM 168

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CASE STUDY—JACOB/OLIVIA

- You decide not to disqualify Olivia's advisor but give Olivia a warning regarding continued violations of the advisor agreement.
- The investigator schedules a time for the remainder of Olivia's interview.
- You issue a notice of meeting to Jacob regarding the interview.

Lathrop GPM 169

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CASE STUDY—JACOB/OLIVIA

- The investigator calls you following Olivia's interview. The investigator says that Olivia suggested that the investigator interview Jacob's girlfriend, who is not a member of the institution community, to ask her about the pressure she put on Jacob to bring his complaint.
- The investigator tells you during Jacob's initial interview, when the investigator asked if Jacob had talked to anyone about the incident on April 10, Jacob stated that after they got back together, he talked to his girlfriend about it. When asked if he and his girlfriend discussed anything else during that conversation, Jacob stated that they talked about whether he should go to Title IX.
- The investigator asks whether she should interview Jacob's girlfriend.
- Should the investigator reach out to Jacob's girlfriend?

Lathrop GPM 170

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CASE STUDY—JACOB/OLIVIA

- You tell the investigator to reach out to Jacob's girlfriend to schedule an interview. The investigator calls you a week later to let you know that she has sent Jacob's girlfriend several emails, but she has not responded.
- What do you do next?

Lathrop GPM 171

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CASE STUDY—POLICE REPORT

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CASE STUDY—POLICE REPORT

- You have another unrelated complaint resolution process that is also in the investigation phase. The matter involves a sexual assault allegation and the complainant filed a police report.
- Pursuant to a request from the detective, you instructed the investigator to briefly pause the investigation. Although the investigator was able to resume the investigation about two weeks later, the investigator informs you that the delay means he will not finish the investigation in the time frame set forth by the Policy.
- What do you do?

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NOTICE OF DELAY

- Reasonably prompt timeframes
  - Including timeframes for filing and resolving appeals and informal resolution processes
  - Temporary delay or extension of timeframes for good cause, which may include
    - Absence of parties, a party's advisor, or witnesses
    - Concurrent law enforcement activity
    - Need for language assistance or accommodations of disability
  - Must provide written notice to parties of the delay or extension and the reason for it
  - Some timeframes are set by the regulations (Title IX)

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CASE STUDY—POLICE REPORT

- After the investigator in the matter with the police report has completed the investigation and the directly-related evidence review, the investigator contacts you. The next step is for the parties to review the final investigation report. The investigator says that the complainant reached out to let him know that the police are still working on the police report, including conducting some DNA testing from a rape kit the complainant had completed two days after the alleged assault.
- You confirm with the police that they are not yet able to release a police report.
- Do you pause the process for the police report?
- What additional information would help with your decision?

Lathrop GPM 175

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CASE STUDY—POLICE REPORT

- You talk to the investigator and they tell you that the respondent denies ever having sexual contact with complainant. The investigator says that there is some key card access data that suggests that respondent was in another building around the time of the assault, but he was alone and there are not any witnesses to corroborate where he was at the time.
- Do you pause the process to wait for the police report?

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CASE STUDY—JACOB/OLIVIA

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CASE STUDY—JACOB/OLIVIA

- Turning back to the complaint resolution process between Jacob and Olivia, the investigator calls you after Olivia's follow-up interview. The investigator says that she asked Olivia about Jacob's allegation that she sent him a Snapchat message with a picture of her in her underwear. The investigator tells you that Olivia explained that she sent that after Jacob sent her a text message saying she looked hot in a particular item of clothing. Olivia provided the investigator with a copy of the text message, which the investigator had not previously been aware of.
- The investigator was anticipating being finished with interviews after Olivia's follow-up interview and is wondering how to handle this new information.
- How do you respond?

Lathrop GPM 178

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CASE STUDY—JACOB/OLIVIA

- The investigator calls to tell you she has completed all of her interviews and has a draft of the investigation report.
- What should you do next?

Lathrop GPM 179

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CASE STUDY—JACOB/OLIVIA

- You notify the parties of the close of evidence date.
- The investigator would like your help determining how to produce the "directly related" evidence.
  - How will she provide copies of the evidence that came up in the interviews with the parties and witnesses?
  - How will the parties' and witnesses' information be protected?

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PROVIDE "DIRECTLY RELATED" EVIDENCE TO PARTIES *

- *Prior to completion of investigation report*, must provide equal opportunity to inspect and review any evidence obtained that is *directly related to the allegations*
  - Includes evidence upon which the institution does not intend to rely in reaching a determination and inculpatory or exculpatory evidence whether obtained from a party or other source
  - Must send to party and party's advisor in hard copy or electronic format
  - Party must be given at least 10 days to submit a written response
- Investigator must consider that written response before completing investigation report
- Must make all that evidence available at any hearing

Lathrop GPM *Title IX Only 181

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PROVIDE "DIRECTLY RELATED" EVIDENCE TO PARTIES *

- Types of evidence that must be provided to parties:
  - Documents collected from the parties
    - Text messages
    - Emails
    - Social media posts and messages
    - Photos and videos
  - Other evidence
    - Police reports
    - Security footage
    - Wifi access point records
  - Party and witness interviews

Lathrop GPM *Title IX Only 182

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PROVIDE "DIRECTLY RELATED" EVIDENCE TO PARTIES *

- Sexual history = include if directly related
  - Protections related to complainant's prior sexual history do not apply at this stage
  - Still analyze whether such evidence is "directly related to the allegations"
- Privileged information = only with waiver of privilege
- Treatment records = only with written consent

Lathrop GPM *Title IX Only 183

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PROVIDE "DIRECTLY RELATED" EVIDENCE TO PARTIES *

- Privileged information
  - Do not require, allow, rely upon, otherwise use questions or evidence that constitute or seek disclosure of, information protected under a legally recognized privilege, unless person holding such privilege has waived the privilege
- Treatment records
  - Institution cannot access, consider, disclose, or otherwise use a party's records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional's or paraprofessional's capacity, or assisting in that capacity, and which are made and maintained in connection with the provision of treatment to the party, unless the school obtains that party's voluntary, written consent to do so.

Lathrop GPM *Title IX Only 184

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PROVIDE "DIRECTLY RELATED" EVIDENCE TO PARTIES *

- May permit or require the investigator to redact information that is not directly related to the allegations (or that is otherwise barred from use under the final regulations)
  - Redactions are limited to information not directly related or that is otherwise specifically barred
  - May not redact other information, such as confidential, sensitive, or prejudicial information, if it is directly related to the allegations

Lathrop GPM *Title IX Only 185

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PROVIDE "DIRECTLY RELATED" EVIDENCE TO PARTIES *

- Maintain records of any information withheld and the rationale for doing so
- Investigator and Title IX Coordinator should both be involved in determination of what is directly related

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PROVIDE "DIRECTLY RELATED" EVIDENCE TO PARTIES *

- Ensuring privacy
  - May require parties and advisors to:
    - Use the evidence (and investigation report) only for purposes of the grievance process and
    - Require them not to further disseminate or disclose these materials
  - May use a non-disclosure agreement
  - May use digital encryption or other practices to address privacy concerns

Lathrop GPM *Title IX Only 187

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CASE STUDY—JACOB/OLIVIA

- The investigator is wondering whether to include the following in "directly-related" evidence:
  - Jacob's statements in his interview that his roommates would not hang out with their group of friends if Olivia was going to be there because she "doesn't shut up about sex."
  - Jacob says that Tom has a hard time expressing himself because he is autistic.
  - Jacob provided text messages he exchanged with his girlfriend. He says the below text message exchange show that his girlfriend was aware that Olivia made him uncomfortable at times.
    - Charlotte: wud?
    - Jacob: I'm watching a movie in Olivia's room
    - Charlotte: with who?
    - Jacob: Just me and her
    - Charlotte: y are u alone w her. u said she was making things awk
    - Jacob: i know. Felt weird saying no, I'm gonna leave right after the movie
  - During her interview, Olivia says that Jacob told her that he suffers from depression. Olivia says that Jacob told her that he is on medication and he generally handles it pretty well. Olivia says that knowing about Jacob's depression led her to go back to his apartment with him on April 10 because his girlfriend had just broken up with him and Olivia was worried about him being alone.

Lathrop GPM 188

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CASE STUDY—JACOB/OLIVIA

- Both parties and their advisors sign non-disclosure agreements.
- The investigator provides the parties and advisors with copies of the directly related evidence and gives them 10 days to submit a written response.

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CASE STUDY—JACOB/OLIVIA

- During the response period, Jacob reaches out to you. Jacob says that he heard from Olivia's roommate that she told her roommate about the text message he sent Olivia regarding her looking hot in a particular outfit. Jacob said this is a violation of the no contact directive and the non-disclosure agreement.
- How do you respond?

Lathrop GPM 190

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CASE STUDY—JACOB/OLIVIA

- Both Jacob and Olivia submit responses to the directly related evidence.
- In Olivia's response, she states:
  - "In Jacob's transcript, Jacob said that he does not hook up with people he is not in a relationship with, but I know that he messed around with Taylor Tayson last year when he and his girlfriend were on a break even though he wasn't dating Taylor."
- Is this prior sexual history?

Lathrop GPM 191

191

PRIOR SEXUAL HISTORY

- Complainant's sexual behavior or predisposition are not relevant unless:
  - 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

Lathrop GPM 192

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CASE STUDY—JACOB/OLIVIA

- What if it was something that was relevant (not prior sexual history) that came up for the first time in a party's response to the directly-related evidence? What would your options be for handling that new information?

Lathrop GPM 193

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PROVIDE "DIRECTLY RELATED" EVIDENCE TO PARTIES *

- Steps following parties' review
  - Review parties' responses
  - Consult with investigator to decide whether any additional action is needed
  - Investigator should consider parties' viewpoints about whether the evidence directly related to the allegations is relevant and therefore whether to include it in the investigation report
  - May provide a copy of each party's written response to the other party, but that is not required

Lathrop GPM *Title IX Only 194

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INVESTIGATION REPORT

- Must create investigative report that fairly summarizes ***relevant*** evidence
- Complainant's sexual behavior or predisposition are not relevant *unless*:
  - 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
- Investigator should not include any information about the complainant's sexual history in the investigation report, unless it falls under one of these exceptions.

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CASE STUDY—JACOB/OLIVIA

- The investigator is working on the final investigation report. She calls to ask you about whether to include the following evidence in the investigation report:
  - Jacob's statements in his interview that his roommates would not hang out with their group of friends if Olivia was going to be there because she "doesn't shut up about sex."
  - Jacob provided text messages he exchanged with his girlfriend. He says the below text message exchange show that his girlfriend was aware that Olivia made him uncomfortable at times.
    - Charlotte: wud?
    - Jacob: I'm watching a movie in Olivia's room
    - Charlotte: with who?
    - Jacob: Just me and her
    - Charlotte: y are u alone w her. u said she was making things awk
    - Jacob: i know. Felt weird saying no, I'm gonna leave right after the movie
  - During her interview, Olivia says that Jacob told her that he suffers from depression. Olivia says that Jacob told her that he is on medication and he generally handles it pretty well. Olivia says that knowing about Jacob's depression led her to go back to his apartment with him on April 10 because his girlfriend had just broken up with him and Olivia was worried about him being alone.

Lathrop GPM 196

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CASE STUDY—JACOB/OLIVIA

- The investigator sends you her final investigation report.
- What is your next step?

Lathrop GPM 197

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INVESTIGATION REPORT

- Parties must be provided:
  - VAWA: information used in the decision-making process – access required
  - Title IX:
    - Investigation report:
      - Copy to parties and advisors required
      - Must be provided at least 10 days prior to live hearing
    - Opportunity to submit written response

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CASE STUDY—JACOB/OLIVIA

- You provide copies of the investigation report and attachments to the parties. Your policy provides the parties with 5 days to submit written responses to the report.

Lathrop GPM 199

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CASE STUDY—POLICE REPORT

Lathrop GPM 200

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CASE STUDY—POLICE REPORT

- The spring semester is winding down. You receive a call from the respondent in the matter involving the police report. The respondent tells you that he is not planning to reenroll at the institution in the fall or at any point in the future.
- He says he will not be participating in the complaint resolution process further and that the institution should dismiss the complaint against him in light of his decision.
- How do you respond?

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DISMISSAL OF FORMAL COMPLAINT

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

Lathrop GPM 202

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DISMISSAL OF FORMAL COMPLAINT

- Notice of Dismissal: Upon dismissal (mandatory or discretionary), institution must promptly send written notice of dismissal and reasons for the dismissal simultaneously to the parties

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CASE STUDY— JACOB/OLIVIA

Lathrop GPM 204

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CASE STUDY—JACOB/OLIVIA

- In the process involving Jacob and Olivia, you set a date for the hearing, appoint a hearing panel, and provide notice of the hearing to the parties, including the rules of procedure for the hearing. You give the parties an opportunity to object to the members of the panel.
- Olivia objects to one of the members of the panel – Tony, an employee in IT at the institution. Olivia says that Tony has no experience in handling allegations of sexual misconduct as an employee in IT and should be replaced with someone with appropriate experience.
- How do you respond?

Lathrop GPM 205

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CASE STUDY—JACOB/OLIVIA

- You are preparing the adjudication file for the hearing panel. You plan to include the investigation report and attachments.
- Should you include the directly related evidence?
- Should you include the parties' responses to the directly related evidence?
- Should you include the parties' responses to the investigation report?

Lathrop GPM 206

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LIVE HEARING

- General requirements under Title IX
  - Must provide live hearing
  - Permit each party's advisor to ask the other party and witnesses "all relevant questions and follow-up questions"
  - If party does not have advisor, institution must provide one for cross-examination
  - If a party or witness does not submit to cross-examination at hearing, their statements cannot be considered by decision-maker(s)

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Decision-Maker(s)

- May have single decision-maker or a panel of decision-makers
- If a panel of decision-makers, may appoint one decision-maker to make relevancy determinations at the hearing
- May appoint Title IX Coordinator or another individual who is not a decision-maker to enforce procedural rules at the hearing
  - Decision-maker(s) must still determine relevancy issues

Lathrop GPM 208

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Preparation 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 decision-maker and parties to simultaneously see and hear the party or witness answering questions
    - Witness cannot demand to be in a separate room, unless that witness alleges they are also a victim of respondent (institution can permit witness to be in a separate room upon request)
  - 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

Lathrop GPM 209

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Preparation for Hearing

- Decision-maker(s) should review adjudication file
- Decision-maker(s) identify ultimate questions that will need to be decided
  - Consider questions or topics that may come up and any anticipated relevancy issues
- Decision-maker(s) determine which witnesses they anticipate needing to rely on to make their determination
  - Request that these witnesses make themselves available for cross-examination at the hearing
- Parties identify additional witnesses
  - Request that these witnesses make themselves available for cross-examination at the hearing

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Attendance at Hearing

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

Lathrop GPM 211

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Hearing: School-Appointed Advisors

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

Lathrop GPM 212

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Hearing: Relevancy Determinations

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

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HEARING: CROSS-EXAMINATION

- Party or witness who does not appear at the hearing
  - Cannot rely on any statements from a party or witness who does not submit to cross-examination
    - Failure to answer one question constitutes a failure to submit to cross-examination (unless question came from decision-maker)
    - Still applies even if disability or death is the reason the person did not submit to cross-examination
  - Statements that cannot be considered include statements in investigation report or any other source (police report, medical exam, text messages, witness accounts, etc.)

Lathrop GPM 214

214

HEARING: CROSS-EXAMINATION

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

Lathrop GPM 215

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HEARING: OTHER PROCEDURAL RULES

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

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HEARING: 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
    - Decision-maker may determine how much weight to give such evidence

Lathrop GPM 217

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CASE STUDY—JACOB/OLIVIA

- After the hearing panel reviews the adjudication file, you meet with the panel to decide which witnesses are important to their decision.
- Besides the witnesses requested by the panel, how many additional witnesses will the parties be allowed to call at the hearing?

Lathrop GPM 218

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CASE STUDY—JACOB/OLIVIA

- You notify the parties of the list of witnesses the hearing panel has requested be available. You inform the parties that they have 3 days to provide you with the names of up to two additional witnesses each.

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CASE STUDY—JACOB/OLIVIA

- Prior to the live hearing, Jacob reaches out to you. He is very nervous about participating in the live hearing and is wondering if he is required to attend.
- How do you respond?

Lathrop GPM 220

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CASE STUDY—JACOB/OLIVIA

- Jacob says he will think about it and get back to you. If Jacob decides not to participate in the live hearing, what do you do?

Lathrop GPM 221

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CASE STUDY—JACOB/OLIVIA

- The next day, Jacob says that he wants his statements to be considered, so he will submit to cross examination. He asks what else he is required to do at the hearing.
- How do you respond?

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CASE STUDY—JACOB/OLIVIA

- A few days later, after considering his options, Jacob lets you know that he plans to attend the full hearing and will decide how much to participate on the day.

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CASE STUDY—JACOB/OLIVIA

- At the live hearing, a witness, Callie, responded to a question by saying that she did not think the question was relevant.
- How should the hearing panel respond?

Lathrop GPM 224

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CASE STUDY—JACOB/OLIVIA

- The hearing panel had requested that Charlotte, Tom, and Ethan appear at the hearing as witnesses, but all three refused to participate.
- What should you do?

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CASE STUDY—JACOB/OLIVIA

- A week after the hearing, the hearing panel comes back with a determination finding that Olivia is responsible for Title IX Sexual Harassment (hostile environment harassment), and for Sexual Assault for touching Jacob's butt without consent, but not responsible for Sexual Assault for performing oral sex on Jacob without consent.
- The hearing panel is not sure that suspension is an appropriate sanction and would like to know what the other options are for sanctions.
- How do you respond?

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SANCTIONS AND REMEDIES

- Consider who will decide the sanctions and how
  - Consider limited role of Title IX Coordinator
- Policy must list *all* possible sanctions
  - The list of sanctions must be specific, including the type and length of suspensions and any requirements that must be met for reinstatement
- Policy must describe the range of remedies
  - Title IX Coordinator is responsible for effective implementation of any remedies
  - Remedies must be designed to restore or preserve equal access to the institution's education program or activity
  - May include the same individualized services as "supportive measures"
  - Do not need to be "non-disciplinary" or "non-punitive" and do not need to avoid burdening the respondent
  - Consider remedies for broader student population

Lathrop GPM 227

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NOTICE OF DETERMINATION

- Identification of the allegations potentially constituting sexual harassment
- Procedural steps since complaint
  - Notices to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, hearings held
- Findings of fact
- Conclusion regarding application of code of conduct to the facts
- Statement of and rationale for the result as to each allegation
  - Determination of responsibility
  - Any disciplinary sanctions imposed on respondent
  - *Whether* remedies will be provided to complainant
- Appeal information
- Simultaneous delivery to the parties

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Notice of Determination

- Becomes final either the date the parties receive the written determination of the appeal or the date on which an appeal would no longer be timely
- Sanctions may not be imposed until determination is final

Lathrop GPM 229

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Case Study—Jacob/Olivia

- After receiving the notice of determination, Olivia submits an appeal statement arguing that the text messages exchanged between her and Jacob that she submitted as part of the investigation clearly show that her conduct was welcome. Olivia says the determination finding her responsible for sexual harassment should be overturned.
- What do you do?

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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 decision-maker 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 decision-maker at hearing
  - No conflict of interest or bias
  - Individuals responsible for appeal must receive training
  - 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

Lathrop GPM 232

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Appeals Under VAWA

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

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Additional Required Post-Determination Notices

- For sexual assault and VAWA crimes, your institution must provide simultaneous notice to both parties of—
  - Any change to the results that occurs prior to the time that such results become final
  - When such results become final
- For Title IX, your institution must provide concurrent written notice of—
  - The outcome of any appeal

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RECORDKEEPING

- For 7 years, must maintain:
  - Investigation and adjudication
    - Any determination regarding responsibility
    - Any audio or audiovisual recording or transcript of the hearing
    - Any disciplinary sanctions imposed
    - Any remedies provided to complainant
    - Any appeal and result
    - Any informal resolution and the result
  - Training materials for investigators, decision-makers, coordinators, and persons designated to facilitate informal resolution process

Lathrop GPM 235

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RECORDKEEPING

- For 7 years, must maintain (cont.):
  - Any actions taken (including supportive measures) in response to a report of sexual harassment
    - Basis for conclusion that response was not deliberately indifferent
    - Measures were designed to restore or preserve equal access to educational programs and activities
    - If supportive measures were not provided, document the reasons why such a response was not clearly unreasonable in light of known circumstances
- Recordkeeping does not prevent inclusion of additional details or explanations later

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UPCOMING TRAININGS

- Trainings for individuals with heightened responsibility:
- 07/21/21: Title IX/VAWA Investigator Training
- 08/2/21: Annual Training for New Title IX Coordinators and Deputy Coordinators
- 8/3/21: Annual Training for Advanced Title IX Coordinators and Deputy Coordinators
- 8/4/21: Annual Title IX/VAWA Investigator Training

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ON DEMAND TRAININGS

- **Available on-demand:**
  - Annual Training for New Title IX Coordinators and Deputy Coordinators
  - Title IX/VAWA Investigator Training
  - Annual Training for Advanced Title IX Coordinators and Deputy Coordinators
  - Title IX/VAWA Hearing Panel Training
  - Trauma-Informed Training for First Responders, Confidential Resources, and Campus Security
  - Title IX/VAWA Appeal Officer Training
  - VAWA Adjudicator Training
  - Conducting a Grievance Process Under the New Title IX Regulations
  - Title IX Update: Final Regulations

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