



## TITLE IX/VAWA APPEALS TRAINING

Kathryn Nash  
Emily Mawer

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### TELL US ABOUT YOURSELF

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

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

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### AGENDA

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



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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/Hearing Panel
- Complainant/Reporting Party/accuser/victim/survivor
- Respondent/Responding Party/accused/alleged perpetrator



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## TERMINOLOGY

- Complainant
  - An individual who is alleged to be the victim of conduct that could constitute sexual harassment
- Respondent
  - An individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment

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## THE LEGAL LANDSCAPE



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**SESSION OVERVIEW** 

- Title IX
- Clery Act
- Violence Against Women Reauthorization Act
- Defining Sexual Misconduct
- Interaction with Other Laws
- Risks of Non-Compliance
- Training Requirements
- Recordkeeping Requirements



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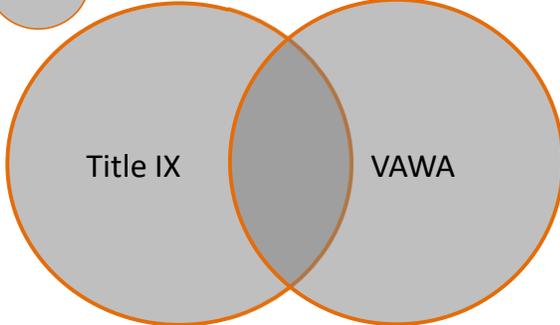
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**LEGAL OBLIGATIONS** 

Other Conduct



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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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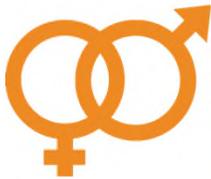
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**DISCRIMINATION  
"ON THE BASIS OF SEX"** 

- Includes:
  - Sexual harassment
  - Differential treatment



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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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**WHEN INSTITUTIONS MUST RESPOND UNDER TITLE IX** 

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

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**WHEN INSTITUTIONS MUST RESPOND UNDER TITLE IX** 

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

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**WHEN INSTITUTIONS MUST RESPOND UNDER TITLE IX** 

- 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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**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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**THE LEGAL LANDSCAPE** 

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



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**OCR'S ENFORCEMENT AND GUIDANCE** 

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



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**CLERY ACT**



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



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**VIOLENCE AGAINST WOMEN  
REAUTHORIZATION ACT (VAWA)**



- Extends Clery crimes to include VAWA crimes: domestic violence, dating violence, and stalking
- Requires discipline procedures for addressing sexual misconduct
- Requires education programs to promote awareness
- Codified parts of 2011 Dear Colleague Letter on Title IX

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**DEFINING SEXUAL MISCONDUCT**



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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
  - VAWA crimes

quid pro quo

hostile environment

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

quid pro quo

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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

hostile environment

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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** 

- VAWA Crimes
  - Sexual assault
  - 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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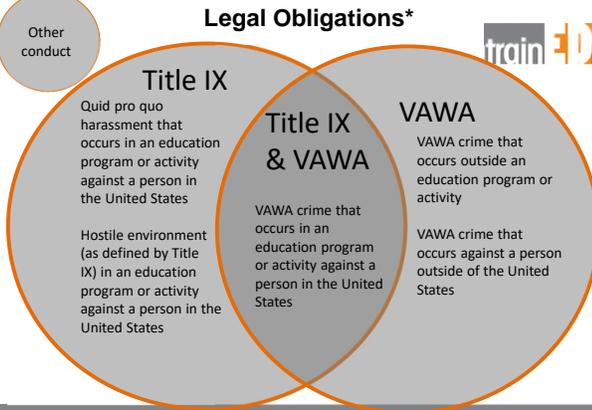
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**Legal Obligations\*** 



**Other conduct**

**Title IX**  
 Quid pro quo harassment that occurs in an education program or activity against a person in the United States  
 Hostile environment (as defined by Title IX) in an education program or activity against a person in the United States

**Title IX & VAWA**  
 VAWA crime that occurs in an education program or activity against a person in the United States

**VAWA**  
 VAWA crime that occurs outside an education program or activity  
 VAWA crime that occurs against a person outside of the United States

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**INTERACTION WITH OTHER LAWS** 

- FERPA: Family Educational Rights and Privacy Act
- Disability accommodation laws
- 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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## RISKS OF NON-COMPLIANCE

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



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## TRAINING REQUIREMENTS

- Train Title IX Coordinator, investigator, decision-maker, or facilitator of informal resolution process on
  - Definition of sexual harassment
  - Scope of the institution's education program or activity
  - How to conduct investigation and grievance process, including hearings, appeals, and informal resolution processes, and how to serve impartially, including by avoiding prejudgment of the facts at 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, or facilitator of informal resolution process on (cont.)
  - 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** 

- 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
- 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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**CHANGES TO TITLE IX** 

- August 14, 2020: 2020 Title IX regulations went into effect
- 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

Lathrop GPM,  39

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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
- July 20, 2021: Q & A and Public Hearing Transcript
- August 24, 2021: DOE letter regarding regulation provision concerning statements of parties/witnesses who do not submit to cross-examination
- April 2022: Proposed Rules Expected

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**CHANGES TO TITLE IX** 

- DOE's Change to Cross-Examination Rule
  - Department issued letter stating that it would no longer enforce the provision in the 2020 regulations stating that decision-maker(s) cannot rely on statements from a party or witness who does not submit to cross-examination at the live hearing
  - The Department based its decision on a federal court ruling that vacated the provision

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**Q & A**



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**train** 

## OVERVIEW OF PROCESS



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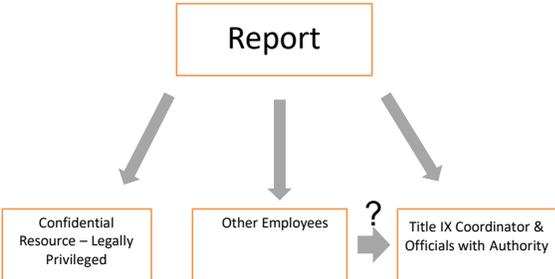
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## RESPONDING TO A REPORT

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## RESPONDING TO A REPORT

**train** 

- Title IX Coordinator can delegate intake duties to others, but:
  - Avoid conflicts
  - Oversee training
  - Determine appropriate process
  - Ensure process is user-friendly
  - Make roles and responsibilities clear
  - Oversee process to ensure compliance and effectiveness



Lathrop GPM,  45

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**RESPONDING TO A REPORT** 

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



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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** 

- 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 importance of preserving evidence (VAWA)
  - Notify complainant of right to contact law enforcement (or not to) and seek medical treatment; offer institution's assistance (VAWA)
  - Provide complainant with written notice of rights (VAWA)



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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

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**RESPONDING TO A REPORT –  
SUPPORTIVE/INTERIM MEASURES**




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

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**RESPONDING TO A REPORT**




- Other obligations:
  - Assess immediate safety and well-being for parties and campus
    - Consider whether emergency removal is necessary
  - Notify campus security, if necessary
  - Enter into crime log (if crime)
  - Assess for timely warning

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**RESPONDING TO A FORMAL COMPLAINT** 

- Formal complaint
  - VAWA: No specific requirements
  - Title IX:
    - Document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the recipient investigate the allegation of sexual harassment
    - At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed
    - Where the Title IX Coordinator signs a formal complaint, the Title IX Coordinator is not a complainant or otherwise a party, and must comply with the requirements to be free from conflicts and bias



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**RESPONDING TO A FORMAL COMPLAINT** 

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

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**RESPONDING TO A FORMAL COMPLAINT** 

- Upon formal complaint, provide written notice to both parties, including (cont.):
  - 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

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**RESPONDING TO A FORMAL COMPLAINT** 

- Determine whether parties have advisors 
- Require advisors to sign advisor agreement (optional) 
- Consider whether informal resolution is appropriate 

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**RESPONDING TO A FORMAL COMPLAINT—INFORMAL RESOLUTION** 

- VAWA: No specific requirements
- Title IX:
  - Any time prior to determination, may facilitate informal resolution process, such as mediation, if
    - Provide parties with detailed written notice
    - Obtain parties' voluntary written consent to informal process
  - May not offer informal resolution unless a formal complaint is filed
  - May not offer or facilitate informal resolution to resolve allegations that an employee sexually harassed a student

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**RESPONDING TO A FORMAL COMPLAINT —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

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### FORMAL GRIEVANCE PROCESS — CONSOLIDATION OF FORMAL COMPLAINTS



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

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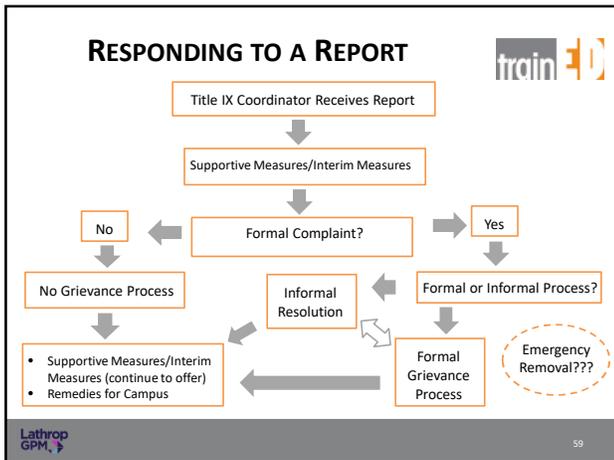
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### FORMAL GRIEVANCE PROCESS



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



Lathrop GPM, 60

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### FORMAL GRIEVANCE PROCESS



- Must treat complainants and respondents equitably by
  - Providing remedies to a complainant where a determination of responsibility for sexual harassment has been made
    - 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
  - Following grievance process that complies with applicable regulations before imposing disciplinary sanctions or other actions that are not supportive measures

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### FORMAL GRIEVANCE PROCESS



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

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### FORMAL GRIEVANCE PROCESS



- Burden of proof and gathering evidence is on the institution, not on the parties
- May not restrict ability of either party to discuss the allegations or to gather and present relevant evidence




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**FORMAL GRIEVANCE PROCESS** 

- Policy must:
  - Describe range of possible sanctions and remedies or list the possible sanctions and remedies (VAWA requires a list of all possible sanctions)
  - Describe range of supportive measures available to both parties
  - Describe appeal bases and procedures

Lathrop GPM,  64

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**FORMAL GRIEVANCE PROCESS — TIME FRAMES** 

- Reasonably prompt time frames
  - Including time frames for filing and resolving appeals and informal resolution processes
  - Temporary delay or extension of time frames 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 time frames are set by the regulations (Title IX)
  - Must provide timely notice of meetings



Lathrop GPM,  65

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**FORMAL GRIEVANCE PROCESS— EQUAL RIGHTS FOR 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 (Title IX and VAWA)
  - 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



Lathrop GPM,  66

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**FORMAL GRIEVANCE PROCESS —  
ADVISORS**



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

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**FORMAL GRIEVANCE PROCESS —  
CRIMINAL PROCESS**



- Grievance process is separate from criminal investigation
- Different standards of proof
- Different investigation “powers”
- May not dissuade complainant from going to police in cases involving allegations of criminal conduct—should encourage reporting to police
- May temporarily delay for initial police investigation
  - Prior guidance said police evidence-gathering stage typically takes 7-10 days
  - Must resume when notified that police are done gathering evidence
  - May not delay for criminal prosecution
- Cooperation with law enforcement (MOU, use of report)

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**FORMAL GRIEVANCE PROCESS—  
DUAL ROLES UNDER TITLE IX**



- 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

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**FORMAL GRIEVANCE PROCESS—  
ROLE OF INVESTIGATOR**




- Identify factual issues
- Give parties opportunity for input
- Compile investigation materials for hearing panel and parties
- Credibility and/or make recommendations?
  - Can offer recommendations regarding responsibility but ultimate determination must be made by separate adjudicator (Title IX)

Lathrop GPM, > 70

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**FORMAL GRIEVANCE PROCESS—  
EVIDENTIARY ISSUES**



- 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, > 71

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**FORMAL GRIEVANCE PROCESS—  
EVIDENTIARY ISSUES**



- 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
  - The mere fact of a current or previous consensual dating or sexual relationship between the two parties does not itself imply consent or preclude a finding of sexual violence

Lathrop GPM, > 72

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**FORMAL GRIEVANCE PROCESS—  
PROVIDING INFORMATION TO THE PARTIES** 

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

Lathrop GPM,  73

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**FORMAL GRIEVANCE PROCESS—EVIDENCE  
PROVIDED TO DECISION-MAKER(S)** 

- What evidence will the decision-maker(s) consider?
  - Investigation report and attachments
  - Parties’ response statements
    - Title IX: Parties must be given an opportunity to submit a written response to the directly related evidence and to the investigation report
    - VAWA: Not required, but permissible
  - Recordings of party and witness interviews (?)
  - Live hearing (required under Title IX)

Lathrop GPM,  74

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**FORMAL GRIEVANCE PROCESS—  
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

Lathrop GPM,  75

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**FORMAL GRIEVANCE PROCESS—  
LIVE 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

Lathrop GPM, > 76

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**FORMAL GRIEVANCE PROCESS—  
LIVE HEARING**



- Cross-examination:
  - Party or witness who does not appear at the hearing or refuses to answer questions at the hearing
    - ~~Cannot rely on any statements from a party or witness who does not submit to cross-examination~~
    - Decision-maker(s) may still rely on previous statements from party/witness who is absent or refuses to answer one or more questions
    - Decision-maker(s) cannot draw an inference about the determination regarding responsibility based solely on a party's or witness's absence from the live hearing or refusal to answer cross-examination or other questions

Lathrop GPM, > 77

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**FORMAL GRIEVANCE PROCESS—  
LIVE HEARING**



- Cross-examination:
  - 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, > 78

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### FORMAL GRIEVANCE PROCESS— LIVE HEARING



- 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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### FORMAL GRIEVANCE PROCESS— LIVE HEARING



- Some procedural rules are prohibited
  - Cannot prohibit a party from conferring with his or her advisor during the hearing
  - 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, as long as applied equally to both parties

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### FORMAL GRIEVANCE PROCESS— STANDARD OF PROOF



- Standard of proof:
  - Preponderance:
    - Must decide either that:
      - It was “more likely than not” that the Respondent violated the institution’s sexual misconduct policy OR
      - That there was insufficient evidence to establish that it was “more likely than not” that the Respondent violated the institution’s sexual misconduct policy
  - Clear and convincing:
    - Must decide either that:
      - It was “highly probable” that the Respondent violated the institution’s misconduct policy OR
      - That there was insufficient evidence to establish that it was “highly probable” that the Respondent violated the institution’s sexual misconduct policy

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### FORMAL GRIEVANCE PROCESS— NOTICE OF DETERMINATION



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

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### FORMAL GRIEVANCE PROCESS



- Any provisions, rules, or practices other than those required by the regulations that an institution adopts as part of its grievance process must apply equally to both parties




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### RECORDKEEPING REQUIREMENTS



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

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**RECORDKEEPING** 

- Reports and complaints
- Notice to respondent of complaint
- Communications with parties and other correspondence relating to investigation (including documentation of verbal in-person/phone conversations)
- No-contact orders and other interim measures (offered and whether accepted or declined) for both parties
- Investigator's notes
- Party and witness statements, if applicable
- Recordings of interviews or interview notes
- Other evidence received (text messages, pictures, emails, etc.)
- Investigation report or summary
- Adjudicator or hearing panel notes
- **Notice of determination**
- **Appeal records**
- **Names of all involved in process (parties, witnesses, investigators, adjudicators, appeal officers)**
- **Training records – relating to investigators, adjudicators, appeal officers, and other involved officials, as well as training received by parties**
- Records relating to complaints of retaliation or violation of interim measures or sanctions
- Start and stop dates of investigation suspension
- Records relating to other complaints involving same parties

Lathrop GPM,  85

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**Q & A** 



Lathrop GPM,  86

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**THE EFFECTS OF TRAUMA & CULTURE**



Lathrop GPM,  87

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### CASE STUDY



When assessing the credibility of the complainant, which of the following might cause you to find the complainant less credible:

1. An anonymous third party submitted the initial report and when the Coordinator first reached out to complainant, complainant declined to meet with the Coordinator
2. A witness says that complainant was able to reschedule an exam due to the stress of the complaint resolution process
3. Complainant has an attorney advisor
4. The police investigated the incident but did not press charges

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### CASE STUDY



When assessing the credibility of the respondent, which of the following might cause you to find the respondent less credible:

1. Respondent declined to provide any suggested witnesses as part of the investigation
2. Respondent sent complainant a text message a few days after the alleged assault that said "I'm sorry for what happened"
3. A witness recounts a conversation with respondent where respondent's account of the sexual encounter differed in some ways from what respondent told the investigator
4. Respondent has an attorney advisor

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### SESSION OVERVIEW



- Rape Myths
- Secondary Victimization
- Common Victim Responses
- Neurobiology of Sexual Assault
- Serving Impartially




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## RAPE MYTHS

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

Lathrop GPM,  91

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## SECONDARY VICTIMIZATION

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



Lathrop GPM,  92

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## SECONDARY VICTIMIZATION

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



Lathrop GPM,  93

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## COMMON VICTIM RESPONSES



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



Lathrop GPM, > 94

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## NEUROBIOLOGY OF SEXUAL ASSAULT



The Neurobiology of Sexual Assault

Lathrop GPM, > 95

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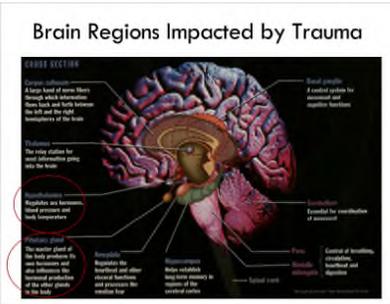
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## NEUROBIOLOGY OF SEXUAL ASSAULT



### Brain Regions Impacted by Trauma



Lathrop GPM, > 96

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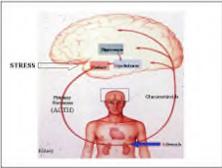
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**NEUROBIOLOGY OF SEXUAL ASSAULT** 

**Brain-Body Regions Impacted by Trauma**

**HPA Axis**

Balances body following stress by releasing of various hormones/chemicals



SOURCE: Southwick et al., 2005

Lathrop GPM,  97

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**NEUROBIOLOGY OF SEXUAL ASSAULT** 

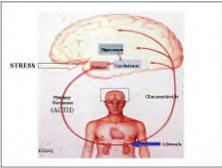
**Brain-Body Regions Impacted by Trauma**

**Catecholamines:** Fight or flight response

**Cortisol:** Energy available

**Opioids:** Prevent pain

**Oxytocin:** Promotes good feelings



SOURCE: Southwick et al., 2005

Lathrop GPM,  98

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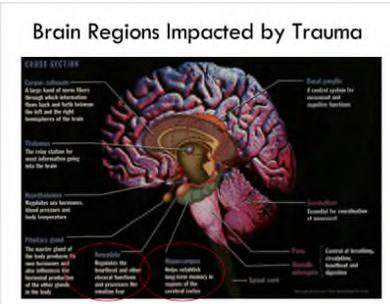
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**NEUROBIOLOGY OF SEXUAL ASSAULT** 

**Brain Regions Impacted by Trauma**



**FOURTH VENTRICLE**

- Fourth ventricle:** A large hole of cerebrospinal fluid through which information flows back and forth between the left and the right hemispheres of the brain.
- Thalamus:** The central station for most information going into the brain.
- Hypothalamus:** Regulates all hormones. Most pituitary and limbic system.
- Primary cortex:** The outermost part of the brain performs its functions and also influences the internal functions of the other parts of the brain.
- Association cortex:** Regulates the internal functions of the other parts of the brain and processes the sensory data.
- Basal ganglia:** A small portion for automatic and motor functions.
- Brain stem:** Essential for coordination of movement.
- Brain stem:** Consists of midbrain, pons, and medulla.
- Brain stem:** Consists of midbrain, pons, and medulla.

Lathrop GPM,  99

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**NEUROBIOLOGY OF SEXUAL ASSAULT** 

**Memory Processes Impacted by Trauma**

**Hippocampus** processes information into memories

Encoding = Organizing sensory information

Consolidation = Grouping information into memories and storing them

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

**Both structures are VERY sensitive to hormonal fluctuations**



SOURCE: Southwick et al., 2005

Lathrop GPM,  100

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**NEUROBIOLOGY OF SEXUAL ASSAULT** 

**Like These . . .**

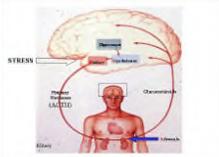
**Catecholamines:** Fight or flight response

**Cortisol:** Energy available

**Opioids:** Prevent pain

**Oxytocin:** Promotes good feelings

**THESE HORMONES IMPAIR MEMORY CONSOLIDATION**



SOURCE: Southwick et al., 2005

Lathrop GPM,  101

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**NEUROBIOLOGY OF SEXUAL ASSAULT** 

**What Happens During A Sexual Assault**



SOURCE: Banks, 2002; Southwick et al., 2003

Lathrop GPM,  102

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**NEUROBIOLOGY OF SEXUAL ASSAULT** 

What Happens During A Sexual Assault

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

SOURCE: Banks, 2002; Southwick et al., 2005

Lathrop GPM  103

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**NEUROBIOLOGY OF SEXUAL ASSAULT** 

What Happens During A Sexual Assault

Amygdala Detects Threat → Activates Hypothalamus → HPA Axis Kicks In Hormonal Flood

Can Trigger a Complete "Shut Down" in the Body

SOURCE: Banks, 2002; Southwick et al., 2005

Lathrop GPM  104

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**NEUROBIOLOGY OF SEXUAL ASSAULT** 

Tonic Immobility (TI)

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

SOURCE: Foa et al., 2007; Gellano et al., 1993; Heitl et al., 2005

Lathrop GPM  105

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**COMMON BEHAVIORS DURING ASSAULT**



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

Lathrop GPM,  106

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**MEMORY**

What Happens During A Sexual Assault

Lathrop GPM,  107

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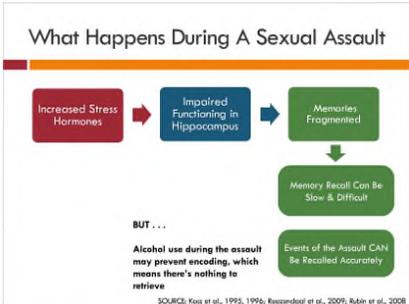
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**MEMORY**

What Happens During A Sexual Assault



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graph TD
    A[Increased Stress Hormones] --> B[Impaired Functioning in Hippocampus]
    B --> C[Memories Fragmented]
    C --> D[Memory Recall Can Be Slow & Difficult]
    E[Events of the Assault CAN Be Recolled Accurately]
    F[Alcohol use during the assault may prevent encoding, which means there's nothing to retrieve]
  
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**BUT...**  
Alcohol use during the assault may prevent encoding, which means there's nothing to retrieve

SOURCE: Koss et al., 1995, 1996; Roeschdorf et al., 2009; Rubin et al., 2008

Lathrop GPM,  108

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**IMPACT OF TRAUMA ON MEMORY** 



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

Lathrop GPM,  109

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**IMPACT OF CULTURE** 

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



Lathrop GPM,  110

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**TRAUMA-INFORMED APPROACH GONE WRONG** 

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



Lathrop GPM,  111

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### TAKE AWAY



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

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### SERVING IMPARTIALLY



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

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### SERVING IMPARTIALLY



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




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### COMMUNICATION



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

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### SOURCES OF INFORMATION



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

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### Q & A




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## APPEAL PROCESS



Lathrop GPM, >

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## SESSION OVERVIEW

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



Lathrop GPM, >

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## LEGAL REQUIREMENTS



Lathrop GPM, >

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**LEGAL REQUIREMENTS—  
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
- List available bases in policy

Lathrop GPM, ▶ 121

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**LEGAL REQUIREMENTS—  
APPEALS UNDER TITLE IX** 

- Notify other party in writing when an appeal is filed
- Implement appeal procedures equally for both parties
- Give both parties reasonable, equal opportunity to submit written statement in support of, or challenging, the outcome
- Appeal officer must be different than Title IX Coordinator, investigator and decision-maker that reached the determination regarding responsibility or dismissal

Lathrop GPM, ▶ 122

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**LEGAL REQUIREMENTS—  
APPEALS UNDER TITLE IX** 

- Appeal officer must not have conflict of interest or bias
  - For or against complainants or respondents generally
  - For or against an individual complainant or respondent
- Written decision describing result of appeal and rationale
- Simultaneous delivery of result to parties

Lathrop GPM, ▶ 123

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**LEGAL REQUIREMENTS—  
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
  - Provide rationale for result and sanctions

Lathrop GPM, > 124

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**BASES FOR APPEAL** 



Lathrop GPM, > 125

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**MANDATORY BASES FOR APPEAL  
UNDER TITLE IX** 

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

Lathrop GPM, > 126

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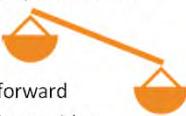
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**MANDATORY BASES FOR APPEAL UNDER TITLE IX** 

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



Lathrop GPM,  127

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**MANDATORY BASES FOR APPEAL UNDER TITLE IX** 

- 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

Lathrop GPM,  128

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**ADDITIONAL BASES FOR APPEAL** 

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

Lathrop GPM,  129

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**ADDITIONAL BASES FOR APPEAL** 

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

Lathrop GPM, > 130

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**PROCESS AND TIME FRAMES** 



Lathrop GPM, > 131

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**APPEAL PROCESS—DETERMINATION AS TO BASES FOR APPEAL** 

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

Lathrop GPM, > 132

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### APPEAL PROCESS—WRITTEN NOTICE OF FILING OF APPEAL



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

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### APPEAL PROCESS—COMPILE APPEAL FILE



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

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### APPEAL PROCESS—DETERMINATION



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

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**TIME FRAMES** 

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



Lathrop GPM, > 136

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**DELIBERATE AND MAKE DETERMINATION** 



Lathrop GPM, > 137

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**DETERMINE ISSUE(S) ON APPEAL** 

- Appeal of dismissal
- Appeal of final determination

Lathrop GPM, > 138

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**REVIEW APPEAL FILE** 

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



Lathrop GPM, > 139

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**MAKE DETERMINATION – PROCEDURAL IRREGULARITY** 



Lathrop GPM, > 140

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**MAKE DETERMINATION— PROCEDURAL IRREGULARITY** 

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

Lathrop GPM, > 141

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**CASE STUDY** 

- Sarah brought a complaint of sexual assault against Lisa. After an investigation and hearing, the hearing panel found insufficient evidence that Lisa violated the policy. Sarah appealed, arguing that the hearing panel erred in ignoring Instagram messages from Lisa's friend, Ben.
- In the messages, Ben stated that Lisa admitted that she did not ask for Sarah's consent on the night in question. Ben did not appear at the hearing and the hearing panel concluded that they could not consider the messages from Ben unless Ben was subject to cross examination.

Lathrop GPM,  142

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**CASE STUDY** 

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

Lathrop GPM,  143

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**CASE STUDY** 

- Cross-examination:
  - Party or witness who does not appear at the hearing or refuses to answer questions at the hearing
    - ~~Cannot rely on any statements from a party or witness who does not submit to cross-examination~~
    - Decision-maker(s) may still rely on previous statements from party/witness who is absent or refuses to answer one or more questions
    - Decision-maker(s) cannot draw an inference about the determination regarding responsibility based solely on a party's or witness's absence from the live hearing or refusal to answer cross-examination or other questions

Lathrop GPM,  144

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**CASE STUDY**



- Chelsea filed a sexual harassment complaint against Lucas. During the investigation Lucas submitted a photo showing him and Chelsea hugging during the timeframe of Chelsea’s harassment allegations. The investigator included the photo in the directly related evidence, but did not include the photo as part of the investigation report.
- At the hearing, Lucas’s advisor tried to refer to the photo during the cross examination of Chelsea. The hearing panel stated that the evidence is limited to what is in the investigation report and did not allow Lucas’s advisor to ask the question referring to the photo.
- Lucas was found responsible for sexual harassment and was suspended for a semester. Lucas appealed, arguing that it was a procedural error for the hearing panel to exclude his advisor’s question about the photo.

Lathrop GPM, > 145

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**CASE STUDY**



- Was there a procedural irregularity?
  - Why or why not?
- If so, did it affect the outcome of the matter?
  - Why or why not?
- If so, what are the next steps?

Lathrop GPM, > 146

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**MAKE DETERMINATION –  
NEW EVIDENCE**




Lathrop GPM, > 147

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**DELIBERATE AND MAKE DETERMINATION—NEW EVIDENCE** 

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

Lathrop GPM,  148

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**CASE STUDY** 

- Tony brought a formal complaint of dating violence against Beth. Tony alleged that Beth hit him in his dorm room during an argument. After an investigation and hearing, the hearing panel found Beth not responsible, finding that there was insufficient evidence to determine it was more likely than not that the alleged conduct occurred.

Lathrop GPM,  149

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**CASE STUDY** 

- Tony files an appeal, stating that after the hearing panel issued its decision, Beth exchanged relevant Snapchat messages with a friend. Tony submits screenshots of the messages, which include the following statements from Beth:
  - “I won! No title ix!”
  - “I’m suuuuper lucky. Totally thought I was gonna get kicked out.”
- Tony states that the hearing panel’s decision may have been different if they had seen Beth’s Snapchat messages.

Lathrop GPM,  150

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### CASE STUDY



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

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### MAKE DETERMINATION – CONFLICT OF INTEREST/BIAS




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### DELIBERATE AND MAKE DETERMINATION— CONFLICT OF INTEREST/BIAS



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

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**CASE STUDY**



- In the appeal above involving Chelsea and Lucas, Lucas stated another basis for his appeal. He argued that the investigator was biased against male respondents generally. He stated in his appeal that in 2018, the investigator tweeted: “#BelieveWomen”
- Lucas argued that the investigator believed Chelsea right away and that the investigation was biased against him.

Lathrop GPM,  154

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**CASE STUDY**



- Was the investigator biased?
  - What information do you need?
  - Bias?
  - Why or why not?
- If so, did it affect the outcome?
  - Why or why not?
- What if it was the decision-maker who posted the tweet?
- Does it depend on when Lucas discovered the text?

Lathrop GPM,  155

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**MAKE DETERMINATION –  
INAPPROPRIATE SANCTION**





Lathrop GPM,  156

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**DELIBERATE AND MAKE DETERMINATION—  
INAPPROPRIATE SANCTION** 

- Permissive basis for appeal?
- Review policy
  - E.g., was the sanction excessively severe or grossly inadequate?
- Consider limited consultation with Title IX Coordinator (e.g., what sanctions have been issued in similar cases?)

Lathrop GPM, > 157

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**DETERMINE NEXT STEPS** 

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

Lathrop GPM, > 158

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**Q & A**



Lathrop GPM, > 159

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## NOTICE OF OUTCOME OF APPEAL



Lathrop GPM,  160

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## NOTICE OF OUTCOME OF APPEAL

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

Lathrop GPM,  161

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## NOTICE OF OUTCOME OF APPEAL

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

Lathrop GPM,  162

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**NOTICE OF OUTCOME OF APPEAL—  
ELEMENTS**



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



Lathrop GPM, > 163

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**NOTICE OF OUTCOME OF APPEAL—  
ELEMENTS**



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



Lathrop GPM, > 164

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**NOTICE OF OUTCOME OF APPEAL—  
ELEMENTS**




- Result/decision
  - Conclusion regarding whether the applicable basis for appeal has been established
- Rationale for the result as to each basis for appeal and each element of the bases for appeal
  - E.g., why was there a procedural error?
  - Why did it affect the outcome?

Lathrop GPM, > 165

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**NOTICE OF OUTCOME OF APPEAL—  
ELEMENTS**




- Changes to sanctions and rationale
  - E.g., why was the sanction not grossly inadequate?
- Next steps (if applicable)
- If appeal is denied, statement that results are final

Lathrop GPM, > 166

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**NOTICE OF OUTCOME OF APPEAL—  
DELIVERY**




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

Lathrop GPM, > 167

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**NOTICE OF OUTCOME OF APPEAL—  
FERPA**



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

Lathrop GPM, > 168

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**NOTICE OF OUTCOME OF APPEAL—  
IMPLEMENTATION** 

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

Lathrop GPM, > 169

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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



Lathrop GPM, > 170

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**Q & A** 



Lathrop GPM, > 171

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**UPCOMING TRAININGS** 

- February 23, 2022
  - Title IX/VAWA Investigator Training
- Date TBD
  - Trauma Informed Training for First Responders, Confidential Resources, and Campus Security

Lathrop GPM, ▶ 172

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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

Lathrop GPM, ▶ 173

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