Non-Hearing Adjudicator Training

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Kathryn Nash



Pamela Kovacs

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Tell Us About Yourself

How many adjudications of discrimination or sexual misconduct matters have you participated in?

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

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Agenda

- Introduction and Legal Landscape
- Defining Sexual Misconduct
- Overview of the Process
- Assessing the Parties' Accounts
- The Decision-Making Process
- Drafting a Notice of Determination
- Appeals



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Terminology

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

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The Legal Landscape



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Session Overview

- Nondiscrimination Laws
- 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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Nondiscrimination Laws

- Title IX of the Education Amendments of 1972
  - Prohibits sex discrimination in education
- Title IV of the Civil Rights Act of 1964
  - Prohibits race, color, and national origin discrimination in education
- Title VII
  - Prohibits race, color, religion, sex, and national origin discrimination in employment
- Americans with Disabilities Act / §504 of the Rehabilitation Act
  - Prohibits disability discrimination in employment/education/public spaces
- Other state and federal anti-discrimination laws
  - Prohibit discrimination against other protected classes

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Nondiscrimination Laws

- Two types of discrimination:
  - **Differential treatment**: someone in a position of authority treating an individual differently on the basis of the individual's protected class in a way that has an adverse effect
  - **Discriminatory harassment**: conduct based on an individual's protected class status, when such conduct would be determined by a reasonable person to be so severe or pervasive that it substantially and unreasonably interferes with an individual's employment or education, or creates an intimidating, hostile, or offensive employment or educational environment ("hostile environment" harassment)

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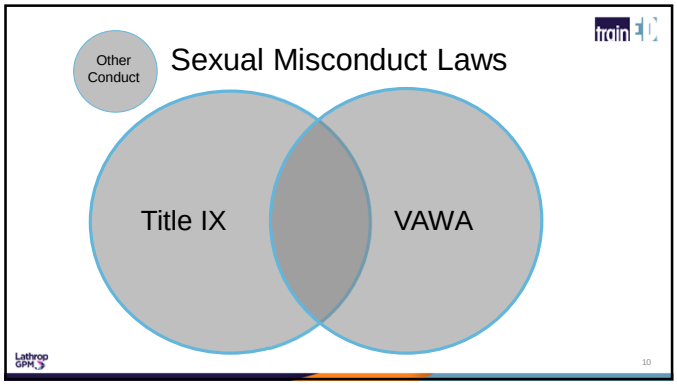

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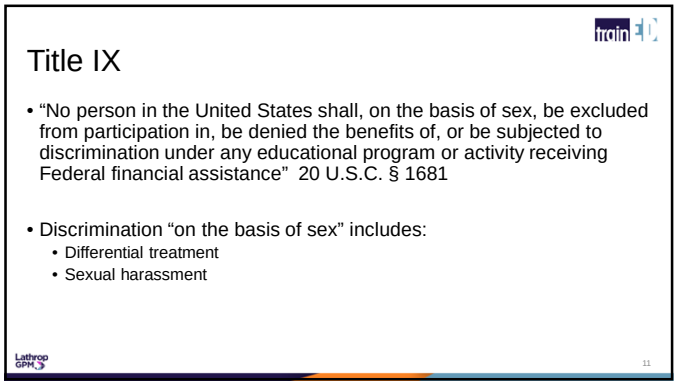

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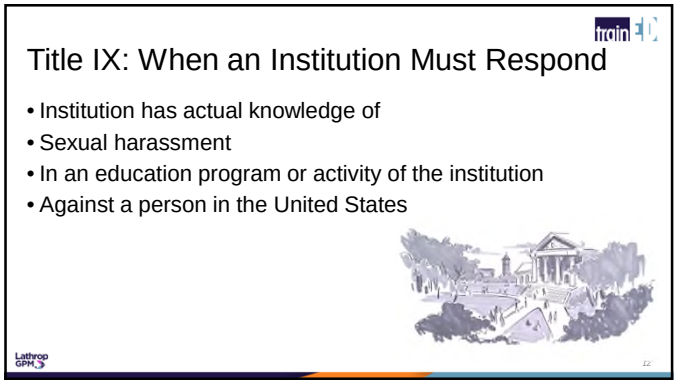

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Title IX: How an Institution Must Respond

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



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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 fair and equitable grievance procedures
  - Follow a legally compliant grievance process
  - Offer supportive measures to a complainant and respondent
  - Train individuals with heightened responsibilities

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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 assault and VAWA crimes
- Requires education programs to promote awareness
- Codified parts of 2011 Dear Colleague Letter on Title IX
- Applies regardless of location of alleged conduct (on or off campus; in or out of the education program or activity; in or out of the U.S.)

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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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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
  - Due process considerations (public institutions)

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Defining Sexual Misconduct

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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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Sexual Harassment

- Quid pro quo:
  - Employee/individual 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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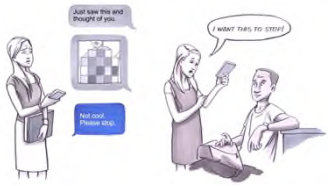
Title IX Sexual Harassment

- 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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Non-Title IX Sexual Harassment

- Review your institution's definition
- Example:
  - Hostile Environment:
    - Unwelcome conduct on the basis of sex determined by a reasonable person to be so severe or pervasive that it substantially and unreasonably interferes with an individual's employment or education, or creates an intimidating, hostile, or offensive employment or educational environment

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Sexual Harassment

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

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Sexual Harassment

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

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Sexual Harassment

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



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Sexual Assault

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

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Sexual Harassment

- **Sexual Assault:**
  - ***Rape***: Penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, or by a sex-related object without the consent of the victim, including instances in which the victim is incapable of giving consent because of temporary or permanent mental or physical incapacity (including due to the influence of drugs or alcohol) or because of age. Physical resistance is not required on the part of the victim to demonstrate lack of consent.

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Sexual Harassment

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

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Sexual Harassment

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

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Consent

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

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VAWA Crimes—Domestic Violence

- A felony or misdemeanor crime committed by a current or former spouse or intimate partner of the victim under the domestic or family violence laws of the jurisdiction



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VAWA Crimes—Dating Violence

- Violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim
  - Where the existence of such a relationship shall be determined based on **the reporting party's statement and** with consideration of—
    - The length of the relationship
    - The type of relationship
    - The frequency of interaction between the persons involved in the relationship

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VAWA Crimes—Dating Violence

- Dating violence includes, but is not limited to, sexual or physical abuse or the threat of such abuse
- Dating violence does not include acts covered under the definition of domestic violence

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VAWA Crimes—Stalking

- Engaging in a course of conduct directed at a specific person that would cause a reasonable person to—
  - Fear for his or her safety or the safety of others; or
  - Suffer substantial emotional distress



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VAWA Crimes—Stalking

- For purposes of this definition—
  - ***Course of conduct*** means two or more acts, including, but not limited to, acts in which the stalker directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about a person or interferes with a person's property

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VAWA Crimes—Stalking

- For purposes of this definition—
  - ***Reasonable person*** means a reasonable person under similar circumstances and with similar identities to the victim
  - ***Substantial emotional*** distress means significant mental suffering or anguish that may, but does not necessarily, require medical or other professional treatment or counseling

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Sexual Misconduct

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

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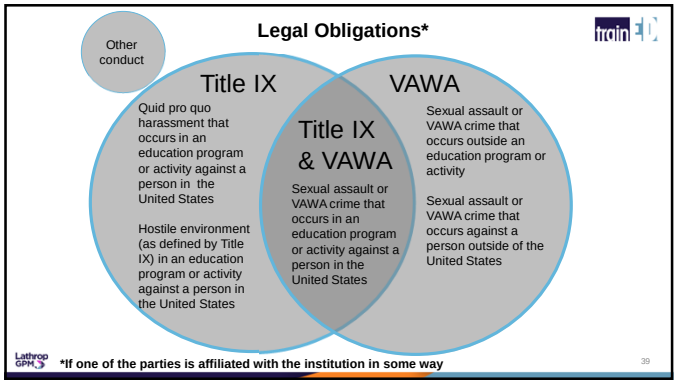

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Other conduct

Quid pro quo harassment by a student

Hostile environment harassment that occurs outside a program or activity

Hostile environment harassment that occurs against a person outside of the United States

Sexual harassment that is not sufficiently severe, pervasive, and objectively offensive that it effectively denies a person equal access to education program or activity (caution!)

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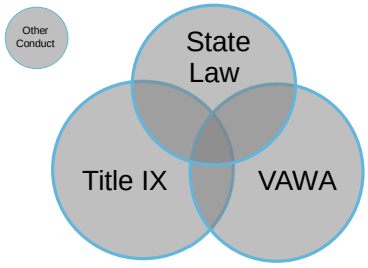
Interaction with Other Laws – State Laws



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

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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 decisionmaker, and statement of, and rationale for, the final results of any disciplinary proceedings or appeals, including sanctions and whether remedies will be provided
      - Required by Title IX
      - Does not include what the remedies are
    - In cases involving sexual assault/VAWA crime, exception permits school to disclose to the parties any information provided to the decisionmakers and the final results of the disciplinary proceedings, including *all* sanctions



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Interaction with Other Laws

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



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Risks of Non-Compliance

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

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Training Requirements

- VAWA: Requires annual training for officials involved in the grievance process on:
  - Issues related to sexual assault, domestic violence, dating violence, and stalking
  - How to conduct grievance process that protects the safety of complainants and promotes accountability (effects of trauma)
- State law
- Institution's policies and procedures

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Recordkeeping

- Title IX: Must maintain records for 7 years
  - Recommend for all matters falling under sexual misconduct policy
- Clery/VAWA:
  - Crime Statistics and Annual Security Report
  - No record-keeping requirement for grievance process records
- State law

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Recordkeeping

- Examples of decisionmaker's records:
  - Adjudication file
    - Investigation report and attachments
    - Party responses to the investigation report, if applicable
    - Party rebuttal statements, if applicable
    - Party and witness statements, if applicable
    - Recordings/transcripts of interviews or interview notes, if applicable
    - Other evidence received (text messages, pictures, etc.)
  - Decisionmaker notes (caution!)
  - Recordings/transcripts of decisionmaker meetings, if applicable
  - Notice of determination
  - Training records – relating to decisionmakers

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Overview of Process

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Responding to a Report



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Employee Reporting Obligations

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

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Responding to a Report

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



*Title IX Requirement

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Responding to a Report—Supportive Measures

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

*Title IX Requirement

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Supportive Measures

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

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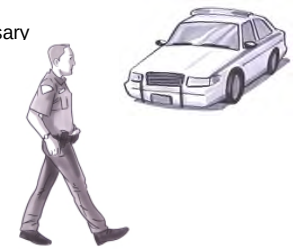
Responding to a Report

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



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Responding to a Report

- Report vs. Formal Complaint
  - Report
    - Initiates obligation to respond, including offering supportive measures
    - Complainant's identity may be kept confidential from respondent
  - 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

*Title IX Requirement

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How an Institution Must Respond to Formal Complaint

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

*Title IX Requirement

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Grievance Procedure

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

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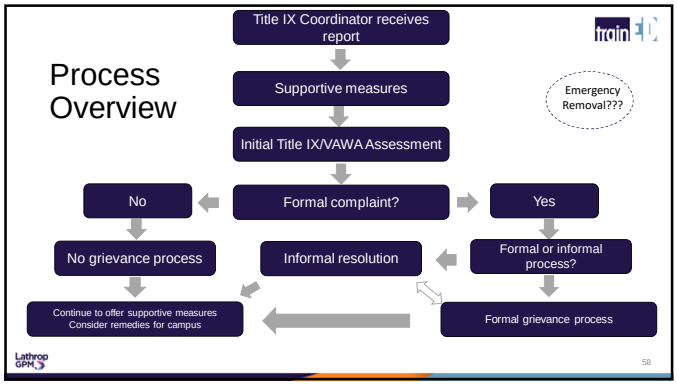

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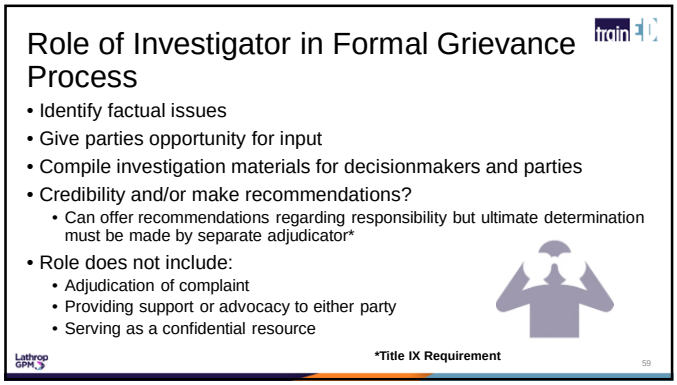

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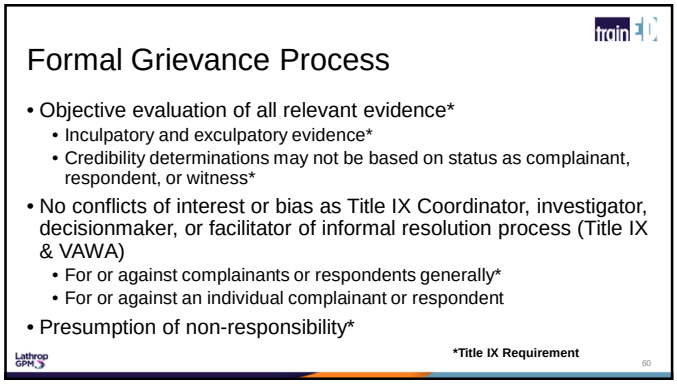

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Formal Grievance Process: Dual Roles

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

*Title IX Requirement

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Formal Grievance Process—Other Requirements

- 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*

*Title IX Requirement

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Formal Grievance Process—Advisors

- Parties have a right to an advisor of their choice (VAWA & Title IX)
  - May be, but not required to be, an attorney
  - May otherwise limit extent of advisor's participation in the process (must apply equally)

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Formal Grievance Process—Timeframes

- Reasonably prompt timeframes (Title IX & VAWA)
  - 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



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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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Formal Grievance Process—Dismissal of Formal Complaint

- Mandatory dismissal (Title IX only)*
  - 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*
  - May dismiss formal complaint if at any time during the investigation or hearing
    - complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the formal complaint or any allegations, therein
    - respondent is no longer enrolled or employed by the institution or
    - specific circumstances prevent the recipient from gathering sufficient evidence to reach a determination as to the formal complaint or allegations therein

***Title IX Requirement**

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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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Criminal Process

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

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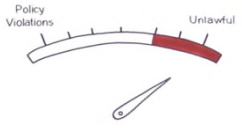
Differences Between Criminal and Institutional Processes

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



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Assessing the Parties' Accounts

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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. Complainant repeatedly asks the investigator to repeat the investigator's questions.
  2. Complainant did not break up with Respondent until five months after the alleged assault.

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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 initially says she does not remember the interaction with Complainant but in a follow-up interview, provides specific details about the interaction.
  2. Respondent suggests a witness who he says can corroborate his account, but the witness declines to be interviewed.

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Session Overview

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



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Rape Myths

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

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Secondary Victimization

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



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Secondary Victimization

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



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Common Victim Responses

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

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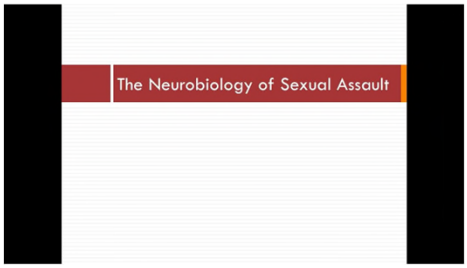
Neurobiology of Sexual Assault



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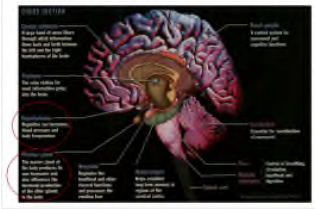
Neurobiology of Sexual Assault

Brain Regions Impacted by Trauma



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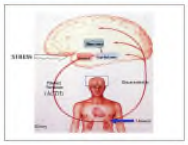
Neurobiology of Sexual Assault

Brain-Body Regions Impacted by Trauma

HPA Axis

Balances body following stress by releasing of various hormones/chemicals



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Neurobiology of Sexual Assault

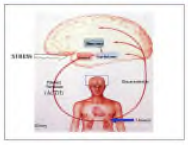
Brain-Body Regions Impacted by Trauma

Catecholamines: Fight or flight response

Cortisol: Energy available

Opiods: Prevent pain

Oxytocin: Promotes good feelings



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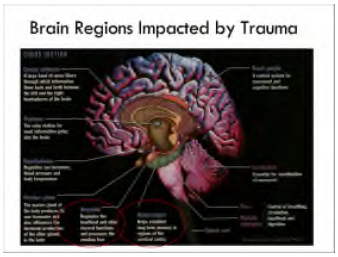

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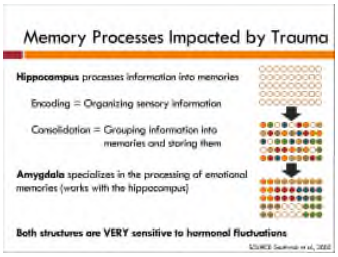

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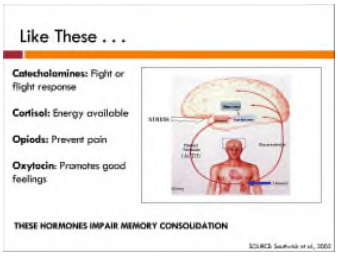

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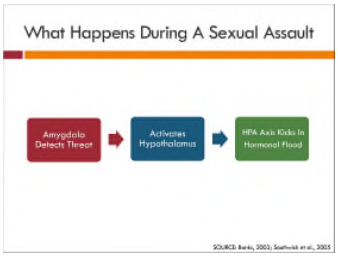

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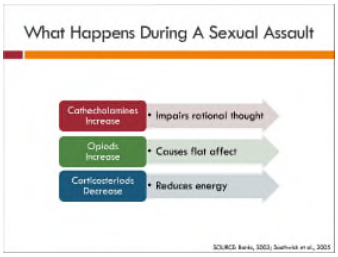
Neurobiology of Sexual Assault



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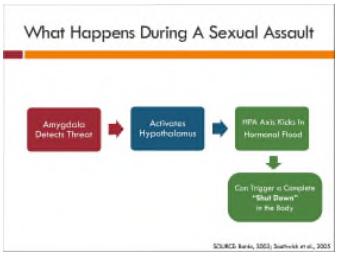
Neurobiology of Sexual Assault



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Neurobiology of Sexual Assault

Tonic Immobility (TI)

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

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Common Behaviors During Assault

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

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Memory



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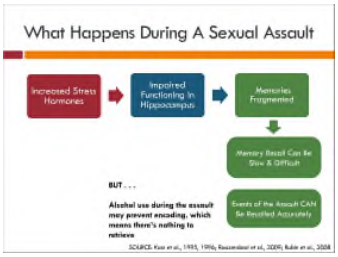
Memory



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Memory

Case Study: Memory Fragmentation

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

"He wouldn't let up, pounding me with question after question after question. Trying to trick me, trying to get me to mess up. I wanted to say, 'Hold on, give me a minute to think'. No, he kept coming at me."

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Memory

Case Study: Memory Fragmentation

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

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

And drinking coffee."

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Memory

Case Study: Memory Fragmentation

I: So, why did you do that? (give her the coffee)

R: It helps. Not the coffee so much, just the moment to let it all come together in their heads.

I: What do you mean?

R: I don't know why it's like that, I've just noticed that over the years. If you give them a few minutes to breathe . . . . it starts to make more sense. I don't know why, it just does.

MEMORY CONSOLIDATION
A DOCUMENTED NEUROBIOLOGICAL CONDITION

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Memory

Case Study: Memory Fragmentation

I: Were you worried that if you gave her some time, she'd just make something up?

R: Nah, not really. I mean, some victims lie, but most don't. Besides, if they're lying, we'll catch 'em at it eventually. I think it's just hard for victims to talk about and we just need to have a little patience.

MEMORY CONSOLIDATION
A DOCUMENTED NEUROBIOLOGICAL CONDITION

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Impact of Trauma on Memory

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



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Impact of Culture

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



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Trauma-Informed Approach Gone Wrong

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

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Take Away

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

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Serving Impartially

- Avoid prejudgment of the facts at issue
- Avoid conflicts of interest
- Avoid bias
- Avoid appearing to agree with either party's account



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Serving Impartially

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

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Serving Impartially

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

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Serving Impartially — Assessing Complainant's Account

- Recognize the impact of trauma on memory
- Memory may be impaired by alcohol
- Use impartial language
- Avoid secondary victimization

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Serving Impartially — Assessing Respondent's Account

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

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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 (caution!)
- Use sensitive and informed tone and content, both in written determination and among team members

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Lesson Learned From Litigation

- In April 2026, a court denied Virginia Tech's motion for summary judgment regarding the plaintiff's Title IX claim. The male plaintiff had been found responsible for violations of the University's Sexual Harassment policy through the University's complaint resolution process.
- Court found plaintiff's claim of gender bias raised a genuine issue of material fact where University (1) imposed a sanction for the male respondent to read "Man Enough: Undefining My Masculinity"; (2) hearing officer had made social media posts about holding men accountable and men not understanding consent; and (3) hearing officer provided deposition testimony regarding counteracting implicit male bias, men struggling with concept of consent, and a patriarchal society.
- Lesson Learned: Adjudicators need to ensure that they are remaining neutral and avoid sex-based comments both in complaint resolution processes and in the public sphere.

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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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Decision-Making Process

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Decision-Making Process

- Objective evaluation of all relevant and not otherwise impermissible evidence
  - Inculpatory and exculpatory evidence*
  - Credibility determinations may not be based on status as complainant, respondent, or witness*
- Presumption of non-responsibility*

*Title IX Requirement

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Decision-Making Process

- What evidence will the decisionmaker consider?
  - Adjudication file
    - Investigation report and attachments
    - Parties' response statements?
    - Parties' rebuttal statements?
    - Interview recordings/transcripts/summaries?
    - Disciplinary records? (more to come)

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Decision-Making Process:

- Access to information
  - Provide timely and equal access to the complainant, the respondent, and appropriate officials to any information that will be used during informal and formal disciplinary meetings and hearings (VAWA)
    - Investigation report and attachments
    - Anything else in the adjudication file
    - Opportunity to submit a written response not required under VAWA, but recommended
  - Your institution's policy might also provide access to the report in cases that fall outside Title IX and VAWA (Caution! – FERPA)

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Decision-Making Process

- Initial review of adjudication file
  - Ensure that parties have access to same information as adjudicator if VAWA applies
  - Analyze issues for determination
  - Identify ultimate questions that will need to be decided
    - Review institution's policy and how it defines relevant terms
    - Determine whether any additional information is needed to make the decision (Caution!)

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Decision-Making Process

- Communication with Others
  - Limit communication with Title IX Coordinator to procedural issues
  - Do not communicate with parties, witnesses, or advisors
  - Limit communication with investigator
    - Unless necessary to ask for follow up investigation or clarification
    - Any communications with investigator should be made in writing and should be made available to the parties

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Decision-Making Process

- If investigator also acts as decision-maker:
  - Clearly separate and distinguish fact-gathering stage and decision-making stage
  - Thoughtfully determine what "information" is being used during the decision-making stage

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Evidentiary Issues

- Always consider relevance and weight of evidence
  - Relevant: related to the allegations under investigation
  - Evidence is relevant when it may aid a decisionmaker in determining whether the conduct occurred

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Evidentiary Issues

- Types of evidence
  - Statements from parties and witnesses contained in investigation report
  - Character evidence
  - Physical evidence (texts, video, security access information, etc.)
  - Polygraph/lie detector test results

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Evidentiary Issues

- Do not consider impermissible evidence*
  - Privileged information, unless individual holding privilege has waived it (e.g., doctor-patient privilege, attorney-client privilege, victim advocate privilege)
  - Treatment records, unless individual has provided written consent
    - Consider need for expert guidance in understanding and interpreting information
  - Prior sexual history/conduct (see next slide)



*Title IX Requirement

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Evidentiary Issues

- Prior Sexual History/Conduct
  - Complainant's prior sexual history is not relevant unless an exception applies*
    - Such questions and evidence are offered to prove someone other than respondent committed the alleged conduct or
    - The questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent

*Title IX Requirement

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Evidentiary Issues

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



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Weighing Evidence / Assessing Credibility

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



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Dealing with Inculpatory & Exculpatory Evidence

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

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Case Study: Riley/Madison

- You're weighing the evidence in a different case involving Riley and Madison. In the case, Riley alleged that Madison coerced her into sexual activity in Madison's bedroom at Madison's off-campus apartment.
- In her initial interview, Riley said that after they went into Madison's bedroom, Madison closed the bedroom door, pushed in the button on the doorknob, and jiggled the handle to make sure it was locked. Riley said that Madison told her, "Now nobody's going to bother us."
- Riley told the investigator that she felt trapped and fearful alone in the room with Madison, which is one reason she felt like she had to go along with the sexual activity even though she didn't want to.
- Later in the investigation, the investigator asked Riley a follow-up question about the bedroom door being locked. Riley said, "Actually, I take that back. Madison's bedroom door doesn't have a lock."
- How does this affect your assessment of Riley's credibility?

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Judging Credibility

- Cautions about judging credibility:
  - Remember trauma-informed training
  - Parties and witnesses may be nervous or uncomfortable
  - Parties and witnesses may be defensive
- Focus on evidence presented
  - What evidence is consistent with complainant's and respondent's accounts?
  - What evidence is inconsistent with complainant's and respondent's accounts?

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Determination

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



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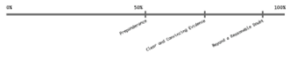
Determination—Finding

- Standard of proof
  - "Preponderance of the evidence" or "clear and convincing" (not "beyond a reasonable doubt")*
  - Use same standard of proof for all formal complaints of sexual harassment*
  - Burden is on the school to gather sufficient evidence to reach a fair, impartial determination*
  - Presumption of non-responsibility that would need to be overcome*
  - Decisionmaker(s) must ultimately decide whether it was more likely than not that a policy violation has occurred (preponderance) or whether it is highly probable that a policy violation has occurred (clear and convincing)



*Title IX Requirement

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Determination—Finding

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

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Case Study

Review complaint and notices of allegations

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Case Study: Haddie/Damian

- On May 6, 2026, Haddie Haderson made a complaint of sexual misconduct against Damian Daniels.

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Case Study: Haddie/Damian

Sexual Misconduct Complaint Form

COMPLAINANT NAME: Haddie Haderson
DATE OF ALLEGED POLICY VIOLATION: May 1–2, 2026
DATE OF COMPLAINT: May 6, 2026
RESPONDENT NAME: Damian Daniels

ALLEGATIONS:

I went on a few dates with Damian Daniels earlier this semester. We were getting along well, but then he started to pressure me physically and ultimately took advantage of me when I was drunk. On Friday, May 1, I went to his place to watch a show and when he tried to put his hand up my shirt, I told him I didn't want to do that type of thing yet. But he wouldn't take no for an answer. Then the next night we were at a party together and I got super drunk. He brought me back to my apartment and the next thing I knew we were both naked and he was having sex with me. The night is a total blur. I was way too drunk to consent.

I understand that by signing this formal complaint, I am seeking to initiate the formal grievance process and/or informal resolution process in regards to the above allegations and am requesting that the University investigate the allegations.

X Haddie Haderson

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Case Study: Haddie/Damian

Excerpt of Notice of Allegations

On May 6, 2026, a formal complaint of alleged sexual misconduct was made by Haddie Haderson ("Haddie" or "Complainant") against Damian Daniels ("Damian" or "Respondent") under the University's Sexual Misconduct Policy.

Haddie alleged that:

- On May 1, 2026, at Damian's off-campus residence, Damian engaged in nonconsensual sexual contact in the form of touching Haddie's intimate body parts.
- On May 2, 2026, at Haddie's off-campus residence, Damian engaged in nonconsensual sexual penetration of Haddie.

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Case Study: Haddie/Damian

Excerpt of Amended Notice of Allegations

On May 6, 2026, a formal complaint of alleged sexual misconduct was made by Haddie Haderson ("Haddie" or "Complainant") against Damian Daniels ("Damian" or "Respondent") under the University's Sexual Misconduct Policy.

Based on the May 6, 2026 formal complaint and additional information from Haddie, it is alleged that:

- On May 1, 2026, at Damian's off-campus residence, Damian engaged in nonconsensual sexual contact in the form of touching Haddie's intimate body parts.
- On **May 3**, 2026, at Haddie's off-campus residence, Damian engaged in nonconsensual sexual penetration of Haddie **and took nonconsensual or abusive sexual advantage of Haddie in the form of removing Haddie's clothing without consent**.

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Case Study

Review relevant policy definitions

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Case Study: Sexual Assault

Sexual Assault: is any actual or attempted sexual contact, including contact with an object, with another person without that person's consent. As used in this Policy, sexual contact includes intentional contact by the accused with the victim's genital area, groin, inner thigh, buttocks, or breasts, whether clothed or unclothed; touching another with any of these body parts, whether clothed or unclothed; coerced touching by the victim of another's genital area, groin, inner thigh, buttocks, or breasts, whether clothed or unclothed; or forcing another to touch oneself with or on any of these body parts. Sexual Assault includes but is not limited to an offense that meets any of the following definitions:

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Case Study: Sexual Assault

- Rape: the penetration, no matter how slight, of the vagina or anus with any body part or object, oral penetration by a sex organ of another person, or oral contact with the sex organ of another person, without the consent of the victim.
- Fondling: the touching of the intimate parts (including the genital area, groin, inner thigh, buttocks, or breast) of another person for the purpose of sexual gratification, without the consent of the victim.
- Incest: sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law.
- Statutory rape: sexual intercourse with a person who is under the statutory age of consent; in this state, the legal age of consent is 18.

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Case Study: Sexual Assault

While Title IX requires that the alleged conduct occurs in a University program or activity against a person in the United States, the University also prohibits Sexual Assault that did not occur in the University's education program or activity or against a person in the United States, but may nevertheless (1) have continuing adverse effects on campus, University property, or in a University program or activity, (2) substantially and unreasonably interfere with a community member's employment, education, or environment on campus, University property, or in a University program or activity, or (3) create a hostile environment for community members on campus, University property, or in a University program or activity.

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Case Study: Consent

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

The definition of consent is subject to the following:

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Case Study: Consent

- Consent can only be given if one is of legal age. In this state, the legal age of consent is 18.
- Consent to one form of sexual contact or activity does not, by itself, constitute consent to any other forms of sexual contact or activity.
- Consent can be withdrawn at any time. When consent is withdrawn, the sexual contact or activity for which consent was initially provided must stop.
- Consent is active, not passive. Silence or the absence of resistance or saying “no,” in and of themselves, cannot be interpreted as consent.
- Whether an individual actively and willingly participates in conduct may be a factor in determining whether there was consent.

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Case Study: Consent

- Previous relationships or previous consent do not, by themselves, constitute consent to future sexual contact or activity. In cases of prior relationships, the manner and nature of prior communications between the parties and the context of the relationship may be factors in determining whether there was consent.
- An existing sexual, romantic, or marital relationship does not, by itself, constitute consent.
- Prior sexual contact or activity with other individuals does not imply consent.
- Consent cannot be procured, expressly or implicitly, by use of force, intimidation, threats, or coercion, as that term is defined by this Policy.
- An individual known to be—or who should be known to be—incapacitated, as defined by this Policy, cannot consent to sexual contact or activity initiated by another individual.
- Use of alcohol or other drugs will never function to excuse behavior that violates this Policy.

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Case Study: Incapacitation

Incapacitation is the physical and/or mental inability to understand the fact, nature, or extent of the sexual situation. Incapacitation may result from mental or physical disability, sleep, unconsciousness, involuntary physical restraint, or from the influence of drugs or alcohol. With respect to incapacitation due to the ingestion of alcohol or other drugs, incapacitation requires more than being under the influence of alcohol or other drugs; a person is not incapacitated just because they have been drinking or using other drugs.

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Case Study: Incapacitation

Where alcohol and other drugs are involved, incapacitation is determined based on the facts and circumstances of the particular situation, looking at whether the individual was able to understand the fact, nature, or extent of the sexual situation; whether the individual was able to communicate decisions regarding consent, non-consent, or the withdrawal of consent; and whether such condition was known or reasonably should have been known to the accused or a reasonable, sober person in the accused's position. Use of drugs or alcohol by the accused is not a defense against allegations of Sexual Misconduct and does not diminish personal responsibility.

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Case Study: Coercion

Coercion is conduct or intimidation that would compel an individual to do something against their will by (1) the use of physical force, (2) threats of severely damaging consequences or (3) pressure that would cause a reasonable person to fear severely damaging consequences. Coercion is more than an effort to persuade or attract another person to engage in sexual contact or activity. Coercion differs from seductive behavior based on the degree and type of pressure someone uses to obtain consent from another.

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Case Study: Sexual Exploitation

Sexual Exploitation: occurs when a person takes nonconsensual or abusive sexual advantage of another for anyone's advantage or benefit other than the person being exploited. Examples of Sexual Exploitation include, but are not limited to:

- Intentional and repeated invasion of sexual privacy without consent (e.g., walking into the other person's room or private space without consent);
- Prostituting another person;
- Nonconsensual taking of photographs/images, video recording, and/or audio recording of a sexual activity;
- Nonconsensual distribution of photographs/images, video recording, audio recording, or live-streaming of a sexual activity;
- Intentionally allowing third parties to observe sexual activities or view another's intimate body parts, in a place where that person would have a reasonable expectation of privacy, without consent;

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Case Study: Sexual Exploitation

- Engaging in nonconsensual voyeurism;
- Knowingly transmitting a sexually transmitted disease or sexually transmitted infection to another person without that person's knowledge and consent;
- Intentional removal or attempted removal of clothing that exposes an individual's bra, underwear, or intimate body part, or that is otherwise sexual in nature, without consent;
- Exposing one's intimate body parts in nonconsensual circumstances;
- Inducing another to expose his/her intimate body parts in nonconsensual circumstances;

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Case Study: Sexual Exploitation

- Ejaculating on another person without consent;
- Distributing or displaying pornography to another in nonconsensual or unwelcomed circumstances;
- Nonconsensual distribution of sexual images;
- Sexual extortion;
- Nonconsensual dissemination of a deepfake depicting intimate parts or sexual acts;
- Sex trafficking.

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Case Study

Review adjudication file and complete adjudicator outline

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Determination—Sanctions and Remedies

- Consider who will decide the sanctions and how
  - Consider limited role of Title IX Coordinator
- Any information provided to individual(s) who determine sanctions must also be provided to the parties (VAWA)
- Policy must list *all* possible sanctions and describe the range of remedies (VAWA)
  - The list of sanctions must be specific, including the type and length of suspensions and any requirements that must be met for reinstatement (VAWA)
- Sanctions must be included in notice of determination (Title IX and VAWA)



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Determination—Sanctions and Remedies

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

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Determination—Sanctions and Remedies

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

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Determination—Sanctions and Remedies

- 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 regulations before imposing disciplinary sanctions or other actions that are not supportive measures
- Consider remedies for broader student population

***Title IX Requirement**

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Determination—Sanctions and Remedies

- Remedies for complainant
  - Changing living arrangements
  - Escorts
  - Separation from respondent
  - Counseling services
  - Medical services
  - Academic support services/accommodations
  - Allowing course withdrawal without penalty
  - Reviewing disciplinary actions against complainant to determine if harassment contributed
  - Reviewing academic issues to determine if harassment contributed
  - Financial aid and/or immigration assistance

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Determination—Sanctions and Remedies

- Remedies for broader student population in some cases:
  - Proactive measures to prevent sexual harassment and violence, such as trainings
  - Developing effective written materials to educate students on policy and resources
  - Encourage students to report
- Periodic "climate checks" and review of issues (e.g., related to a particular department, athletic team, student group, or event?)
- Regulations only require a range of all protective measures for sexual misconduct in policy

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Case Study

Determine sanctions and rationale for your decision

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Case Study: Sanctions

- You have found Damian responsible for a policy violation. How will you determine the appropriate sanctions?

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Drafting a Notice of Determination

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Legal Requirements

- VAWA: Institution must provide simultaneous notification, in writing, to both complainant and respondent, of:
  - The result of any institutional disciplinary proceeding that arises from an allegation of dating violence, domestic violence, sexual assault, or stalking;
  - Appeal procedures, if available;
  - Any change to the result; and
  - When such results become final
- "Result"
  - Any initial, interim, and final decision
  - Must include sanctions
  - Must include the rationale for the result and the sanctions

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Notice of Determination—Elements

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



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Notice of Determination—Elements

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

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Notice of Determination—Elements

- Findings of fact supporting the determination
  - Specify whether testimony/evidence came from the investigation or from another portion of the process
- Result/decision
  - Conclusion regarding application of policy definition to the facts



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Notice of Determination—Elements

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

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Notice of Determination—Elements

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

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Notice of Determination—Elements

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

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Notice of Determination—Elements

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



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Notice of Determination—Delivery

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

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Notice of Determination—FERPA

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

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Notice of Determination—Implementation

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

*Title IX Requirement

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Case Study

Review notice of determination

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Appeals

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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 decisionmaker had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter;
  - May offer an appeal equally to both parties on additional bases

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Appeals Under 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 appeal panel/individual
  - Simultaneous notice of outcome

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Q & A



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Upcoming Trainings

- October 8, 2026 – Title IX/VAWA Appeal Officer Training
- Other trainings available on demand

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