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Constructing the Live Hearing Process

Presented by:

**Beth Devonshire, Cathy Cocks,
Adrienne Murray and/or Ann Todd**
Associates

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Constructing the Hearing Process Agenda

Module 1: The Law and the Hearing Process

Module 2: Hearing Preparation

Module 3: The Hearing

Module 4: Findings and Appeals



TITLE IX

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ISSUANCE OF CERTIFICATES FOR COMPLETION OF DSA/NACCOP CLASSES

To receive a certificate for classes held by D. Stafford & Associates, LLC or the National Association of Clerly Compliance Officers and Professionals (NACCOP), attendees must attend the majority of the class. This includes in-person classes and virtual classes. DSA and NACCOP understands that attendees may need to miss class for a legitimate reason for longer periods of time or may need to leave the room during a class for a few minutes to take a phone call or attend to other business. That said, our general rule of thumb for our 4 and 5 day classes is that if an attendee misses more than 1 hour of class time, they will not be issued a certificate of completion for the class. If the class is a 1, 2 or 3 day class, the amount of time that can be missed may be less, as classes of those lengths are more condensed.

For virtual classes, because we can't see all of the attendees all of the time like we can in an in-person class (based on the attendee controlling whether they have their camera turned on or not), the criteria for receipt of a certificate is determined based on missed class time (no more than 1 hour or less, depending on the length of the class) and participation in the Attendance Polls that will be launched throughout each day of class. Attendance polls are left up for approximately 5 minutes and the instructor notifies the attendees that a poll is being launched before doing so, to ensure that everyone who is there can/will respond to the poll. If there is an issue with responding to the attendance poll, the attendee would need to **immediately notify the Administrative Support person** in the course via the chat function in the zoom platform. That way we can immediately resolve any issues and give the attendee credit for being in attendance for the poll. Notifying us hours or days after having an issue with not being able to complete the attendance poll will not allow us to give the attendee credit for being in class during the poll.

Our classes qualify for credit toward a Master's Degree at New England College (and regardless if you decide to seek credit or not, but accreditation requirements mandate that we follow the same standards for all class attendees), so we have strict attendance standards that we follow for issuance of a certificate, which equates to verification that the participant attended the complete class. For DSA and NACCOP, issuance of a Certificate of Completion is verification of that fact.

If the attendee missed class for a legitimate reason, that doesn't mean that an attendee wasn't there for much of the class and that they didn't benefit from that attendance. It just means that based on the missed time and/or attendance polls (in virtual classes only), we aren't able to issue you a certificate of completion.

If an attendee has to miss time in class, the instructions attendees receive before the class provide instructions for notifying the Administrative Support person about the time that will be missed **IN ADVANCE**, so we can jointly identify what blocks of instruction will be missed, and the DSA/NACCOP team will then work with the attendee to see if we can get them in a future class module to make up that material, which would result in us being able to issue the attendee a certificate. We provide this service and opportunity at no additional cost, as we want each attendee to finish the class and get a certificate of completion. Effective communication by each attendee is the key to this option.



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Catherine Cocks, M.A.
Consultant, Student Affairs, Title IX, and
Equity Compliance Services



Ms. Cocks has been a higher education professional for over thirty years. Her work with D. Stafford & Associates focuses on Title IX investigations and training; assessment of student affairs policies, practices and services; and behavioral threat assessment. Cathy was the Director of Community Standards for the University of Connecticut for 14 years where she managed the student conduct process, which included managing all Title IX cases involving student respondents and chaired the University's student threat assessment team. Prior to that, she held several positions within Residential Life at the University of Connecticut and Roger Williams University.

She is a faculty member for the Association for Student Conduct Administration's (ASCA) Donald D. Gehring Academy teaching on subjects such as ethics, governance, threat assessment, media relations, and higher education trends. She was an affiliated faculty

member for many years in the University of Connecticut's Higher Education and Student Affairs Master's program teaching "The Law, Ethics, and Decision-Making in Student Affairs."

Cathy has co-authored the "Philosophy of Student Conduct" chapter in the 2nd edition of "Student Conduct Practice" (2020) and was a member of the writing team for CAS Standards' Cross-functional Framework for Identifying and Responding to Behavioral Concerns.

Cathy is a Past President of ASCA. She has also served as a Circuit representative, co-chair of the Public Policy and Legislative Issues Committee, and as a member of the ASCA Expectations of Members Task Force. Cathy has served in a variety of leadership roles in NASPA Region I.

She was the 2015 recipient of ASCA's Donald D. Gehring Award. She is a past recipient of the NASPA Region I Mid-Level Student Affairs Professional Award and the NASPA Region I Continuous Service Award.

She earned her Master's degree in Higher Education Administration from the University of Connecticut and Bachelor's degree in Communications/Media from Fitchburg State University.



Beth Devonshire, Consultant
Equity Compliance and
Title IX/Civil Rights Training



Beth Devonshire, Esq., has been an Associate with DSA since 2012 and she became a full-time consultant in August of 2018. She was the Associate Dean of Students at UMass Boston from November 2016 to July 2018. In that role, Beth administered the student conduct system, chaired the CARE and BIT Teams, served as the Deputy Title IX Coordinator, oversaw the U-Access (an office dedicated to assisting students who are dealing with a multitude of issues such as food insecurity, homelessness, emancipation from foster care, and chronic poverty), and acted as a liaison with the various constituencies around the University. Additionally, Beth was responsible drafting the policies and procedures related to students. Prior to that, Beth was the Director of Student Conduct at Bridgewater State University and the Director of Community Standards Stonehill College. Before beginning her career in Higher Education, Beth served as a clerk for the Justices of the Superior

Court, and in various positions for the Massachusetts House of Representatives. Beth has also presented extensively on Title IX including presentations to Colleges, State Wide Organizations, Regional Conferences, and at the OCR Title IX Conference in March of 2011.

Additionally, Beth has given multiple presentations on other legislation and legal issues effecting higher education, including FERPA, Clery and Alcohol and Other Drug Prevention. Beth is the former National Knowledge Community Public Policy Liaison for NASPA, and also the former Massachusetts Public Policy Liaison for MA NASPA. Beth also served as the Director of the Legislative Committee for The Association for Student Conduct Administrators (ASCA) for two years. In those roles, Beth was charged with keeping abreast of proposed and passed legislation and cases impacting higher education and communicating those changes to the membership.

Before beginning her career in Higher Education, Beth served as a clerk for the Justices of the Superior Court from 2006-2007. Prior to that, Beth worked at the Massachusetts State House as Deputy Attorney for House Ways and Means, Chief of Staff for the Committee on Election Laws and as a Researcher for the Committee on Local Affairs.



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Adrienne Meador Murray, Executive Director of Training and Compliance Activities



Adrienne Meador Murray began her career in municipal law enforcement as a civilian employee with the City of Richmond Police Department (Virginia). She graduated from the Virginia Commonwealth University Police Training Academy and began her career as a sworn police officer for the University of Richmond (UR) Police Department (Virginia). At UR, Murray progressed through the ranks from a night shift patrol officer to Operations Lieutenant (overseeing criminal investigations, crime prevention and patrol) over the span of a decade before becoming the Chief of Police at Davidson College in North Carolina. Most recently, Murray served as Chief of Police at Trinity Washington University (in Washington, D.C.). In January 2014, Murray joined the National Association of Clergy Compliance Officers & Professionals (NACCOP) and D. Stafford & Associates where she currently serves as Executive Director of Training and Compliance Activities after having been affiliated with D. Stafford & Associates as a part-time Associate since 2012.

As the Executive Director, Equity Compliance and Civil Rights Services, Murray builds on her 17-year career in law enforcement in which she became a nationally recognized expert in the field of best practice postsecondary institutional response to the sexual victimization of college women in the United States and in Canada. She is also a trained civil rights investigator and is well respected throughout the country for her ability to aid institutions in understating how to do best practice criminal and civil rights investigations concurrently. She is well known for her work in having provided support, advocacy and criminal investigative services for victims of sexual assault, stalking and intimate partner violence and is a sought-out speaker and investigator. She has expertise in the construction of best practice law enforcement standard operating procedures and training police officers to respond in best practice and trauma-informed ways to victims of sexual assault and intimate partner violence. In her current role, Murray coordinates curriculum development and instruction for national classes, including basic and advanced sexual misconduct investigation classes; an investigation of dating violence, domestic violence and stalking class; and a Title IX Coordinator/Investigator class offered through D. Stafford & Associates. To date, Murray has trained more than 3,500 criminal and civil rights investigators throughout the U.S.

Drawing on her experiences as a trained criminal and civil rights investigator, Murray also oversees independent investigations of complex sexual misconduct cases; conducts audits of Title IX/VAWA Compliance; drafts institutional sexual misconduct policies and procedures; and conducts campus-based



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trainings pertaining to the resolution of sexual misconduct offenses on college and university campuses. Murray frequently presents at regional and national conferences on topics such as the *Sexual Victimization of College Women*, *Understanding Consent and Incapacitation*, and *Responding to Sexual Assault on Campus: Clery Act and Title IX Implications*. Murray also conducts provincially specific sexual misconduct trainings throughout Canada.

Murray is a graduate of the University of Richmond, where she received her Bachelor's Degree in Applied Studies in Human Resource Management and of New England College, where she received her Master's Degree in Campus Public Safety Administration. Murray is also a graduate of the 235th session of the prestigious FBI National Academy where she was awarded a graduate certificate in Criminal Justice from the University of Virginia. She has authored numerous journal articles.



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Devonshire currently serves as an Associate for D. Stafford & Associates, a highly reputable consulting firm specializing in delivering on organizational, physical security, vulnerability and arming assessments; Clery Act compliance audits; assessments of Title IX compliance; Behavioral Intervention Team and Student Conduct Assessments and Training; and a host of other services related to security, safety and compliance for institutions of higher education.



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Ann Todd

Consultant, Equity Compliance and Civil Rights Investigations



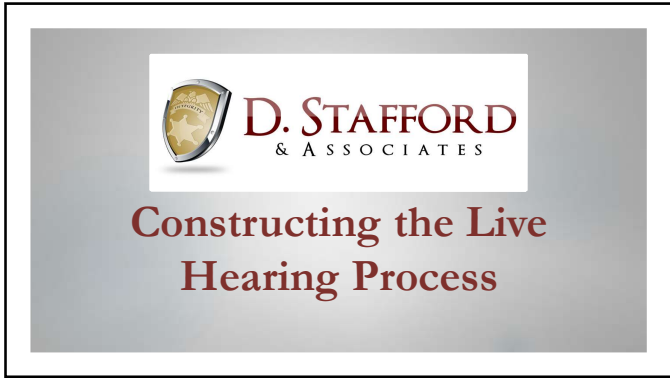
Ann Todd, Esq is a seasoned civil rights investigator in higher education for D. Stafford & Associates (DSA). Ms. Todd is a graduate of Davidson College with a degree in psychology and holds a JD from the University of Nebraska. Prior to joining DSA, she practiced law in Charlotte, NC, specializing in employment and civil rights and worked for a number of non-profit organizations. She returned to her alma mater (Davidson College) in 2008 and worked there through March of 2016 serving as the Assistant Director of Human Resources with the responsibility of managing employee relations and the learning and development function.

Ms. Todd joined the DSA in 2015 and currently serves as the Consultant, Equity Compliance and Civil Rights Investigations. She is the Senior Investigator for the DSA Title IX Investigation Team. She conducts external investigations on behalf of colleges and universities, specializing in investigating student allegations of sex discrimination, sexual assault, intimate partner violence, and stalking. Additionally, she brings a strong Human Resources

background to investigating a range of employee misconduct—from performance issues to discrimination.

In addition to conducting investigations, Ms. Todd is a frequent speaker and consultant on Title IX investigations, conducting 20-30 courses every year on best practices for investigating sex discrimination and sex crimes on campus. She works with schools to draft policies and processes that provide equity and fairness to all parties involved and is adept at facilitating discussions with institutions to ensure the end product represents the values of the campus community.

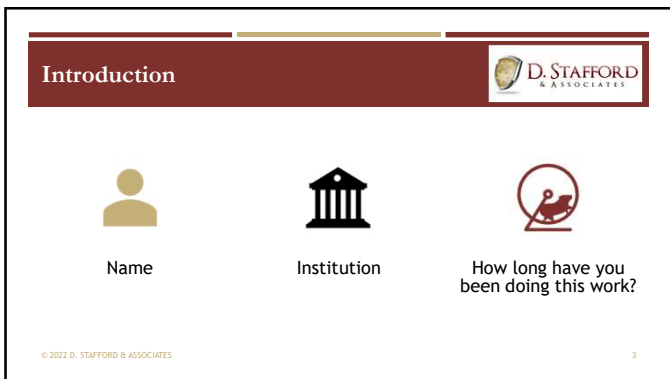
Ms. Todd is a member of the NC Bar and a Certified Clery Compliance Officer through the National Association of Clery Compliance Officers and Professionals (NACCOP). She is also a certified 360 facilitator through the Center for Creative Leadership. She lives in Davidson, NC where she volunteers on a number of local and town boards.



1



2



3

Attorneys





- Not your attorney
- Consult with YOUR legal counsel
- NOT designed as exclusive training for Decision-makers

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4

4

Course Logistics



- Daily Polls
- Camera
- Certificates
- Breaks
- Interact

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5

5

The Laws



- Title IX of the Education Amendments of 1972
- Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (1990)
 - Violence Against Women Reauthorization Act of 2013
- Title VII of the Civil Rights Act of 1964

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6

6

Training Requirements - Title IX



- All Title IX Personnel:
 - Definition of sexual harassment
 - Scope of the recipient's education program or activity*
 - How to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, as applicable
 - How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias
- Decision-makers: *
 - 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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7

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Training Requirements under VAWA



- VAWA REGULATIONS: "Officials" are trained annually:
 - Issues related to dating violence, domestic violence, sexual assault, and stalking
 - How to conduct a hearing process that protects the safety of the victims and promotes accountability
- CLERY HANDBOOK CLARIFICATIONS:
 - Relevant evidence and how it should be used during a proceeding
 - Proper techniques for questioning witnesses
 - Basic procedural rules for conducting a proceeding
 - Avoiding actual and perceived conflicts of interest

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8

8



The Law and the Hearing Process

The 2020 Title IX Regulations and Formal Resolutions

9



Agenda

- Title IX Overview
 - Code and Regulations
 - Case Law
- The Title IX Grievance Process
 - Definitions
 - Jurisdiction
 - Resolution Processes
 - Hearing Basics
- Bias/Conflict of Interest

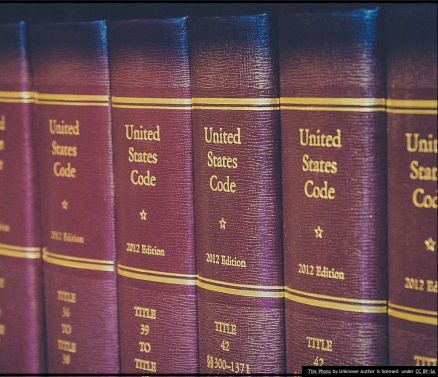
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10

Title IX Overview

- United States Code
 - Title 20—Education
 - Section 1681

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11

Interpreting Laws





Law



Regulations



Substantive guidance



Case law

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12

Law - Federal

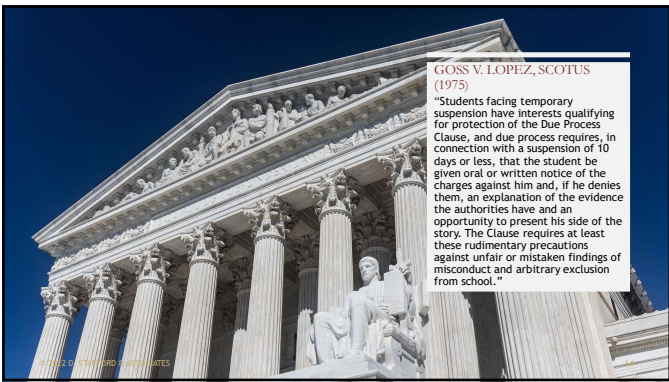


Statute	Overview
Title IX 20 USCA § 1681	No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance...

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13

13



GOSS V. LOPEZ, SCOTUS (1975)

"Students facing temporary suspension have interests qualifying for protection of the Due Process Clause, and due process requires, in connection with a suspension of 10 days or less, that the student be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story. The Clause requires at least these rudimentary precautions against unfair or mistaken findings of misconduct and arbitrary exclusion from school."

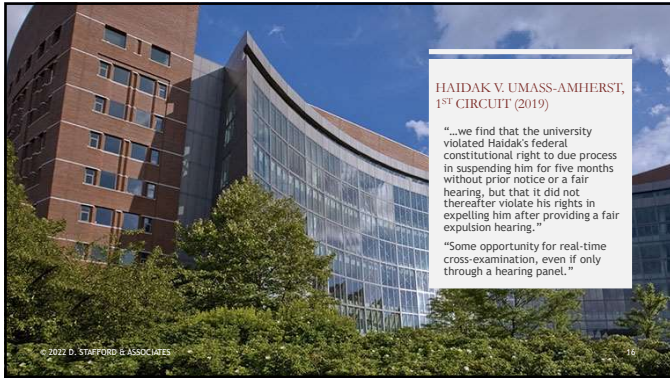
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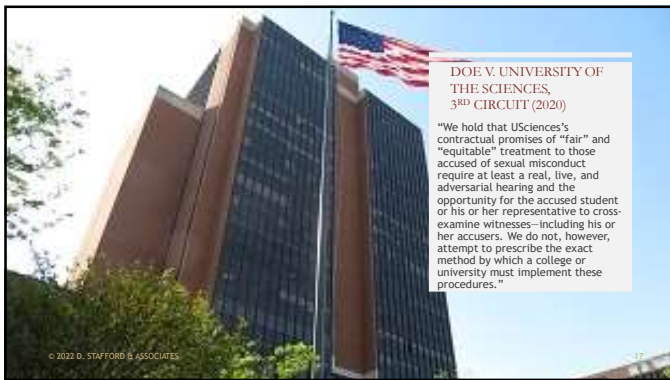
DOE V. BAUM, 6TH CIRCUIT (2018)

"...if a public university has to choose between competing narratives to resolve a case, the university must give the accused student or his agent an opportunity to cross-examine the accuser and adverse witnesses in the presence of a neutral fact-finder."

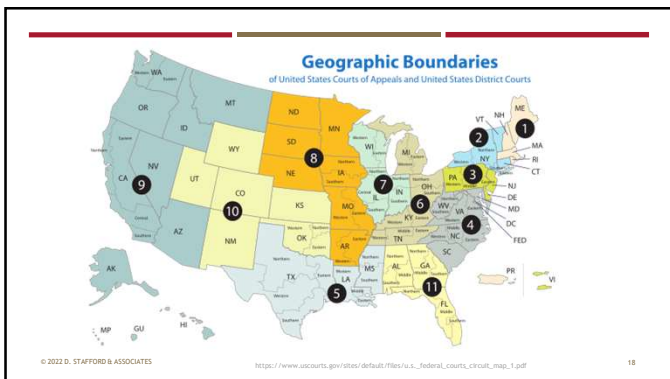
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16



17



18

The Regulations





- Code of Federal Regulations (Regulations)
 - 34 CFR Part 106
- Federal Register (Regulations and Preamble)
 - 85 Fed. Reg. 30026 (May 19, 2020).
 - Preamble: 30026
 - Regulations: 30572

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19

19

20

THE TITLE IX GRIEVANCE PROCESS

(2020 REGS)

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20

Definitions: Parties/Witnesses





Complainant

Respondent

Witnesses

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21

21

Definitions: Key Terms





Actual Knowledge

Formal Complaint

Supportive Measures

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Definitions: Title IX Personnel





Title IX Coordinator

Investigator

Decision-Maker

Informal Resolution Facilitator

Missing Advisor

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23

New Regulations

For it to be covered under Title IX, it must meet:

- New Definitions
- Jurisdiction of person
- Jurisdiction of activity



If it does NOT meet these requirements...

- Mandatory dismissal
- Can go to different resolution process

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24

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Definition of Sexual Harassment under Title IX



Sexual harassment means conduct on the basis of sex that satisfies one or more of the following:

1. An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;

2. Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity;

3. "Sexual assault" as defined in 20 U.S.C. 1092(f)(6)(A)(v), "dating violence" as defined in 34 U.S.C. 12291(a)(10), "domestic violence" as defined in 34 U.S.C. 12291(a)(8), or "stalking" as defined in 34 U.S.C. 12291(a)(30).

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PRONG 1: Quid Pro Quo



 Must be an employee (not volunteer, visitor, student)

 "This for that" harassment

 When favorable professional or educational treatment is conditioned on a sexual activity

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PRONG 2: Hostile Environment+
(The *Davis* Standard)



 Not the same Title VII "hostile environment" or 2001 Guidance

 First Amendment protections

 Not a zero tolerance policy

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PRONG 3: The VAWA Offenses



 Sexual Assault	Rape Fondling Incest Statutory Rape
 Intimate Partner Violence	Dating Violence Domestic Violence
 Stalking	

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28

28

§106.30 Definitions -
CONSENT

*The Assistant Secretary
will not require recipients to
adopt a particular definition
of consent with respect to
sexual assault*



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Jurisdiction of Person



 "At the time of filing a formal complaint...the complainant must be participating in or attempting to participate in the education program or activity"

 The institution must exercise control over the Respondent

 All regulations apply to students and employees

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30

30

Jurisdiction of Activity

- Behavior must occur as part of the “education program or activity”
- Locations, events, or circumstances over which the recipient exercised substantial control over the context in which the sexual harassment occurs
- And any building owned or controlled by a student organization that is officially recognized
- Must occur in the United States (including US territories)

31

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31

Mandatory Dismissal

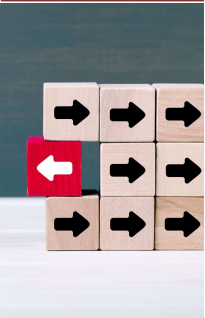
- Recipient must dismiss complaint if allegations do not meet Title IX definition of sexual harassment
- Dismissal does not preclude action under the college's or university's code of conduct



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32

32



Non-Title IX Cases

Where do they go?

Student Code of Conduct

Employee Guide

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33

33

Clery Requirements

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- Include in ALL policies that address:
 - Dating violence
 - Domestic Violence
 - Sexual Assault
 - Stalking
- Procedures for schools
- Rights and Options for Complainants

34

Other Considerations

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First Amendment



Retaliation



Bias/Conflict of Interest



State Laws

35

Three Primary Stages

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Intake

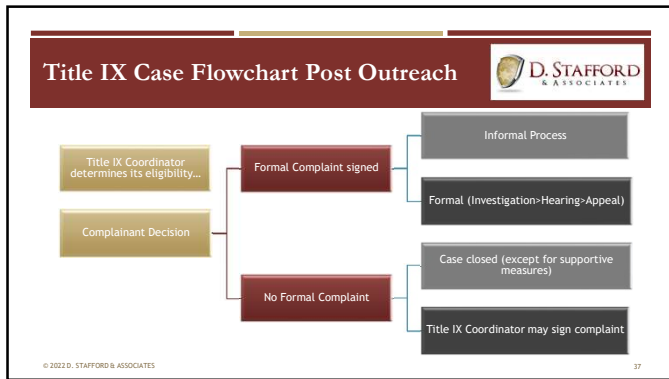


Investigation

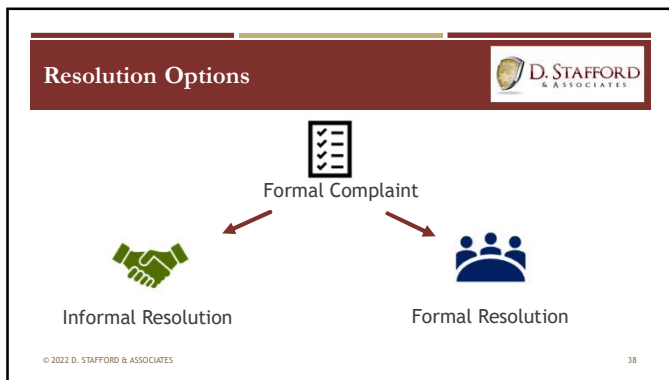


Resolution

36



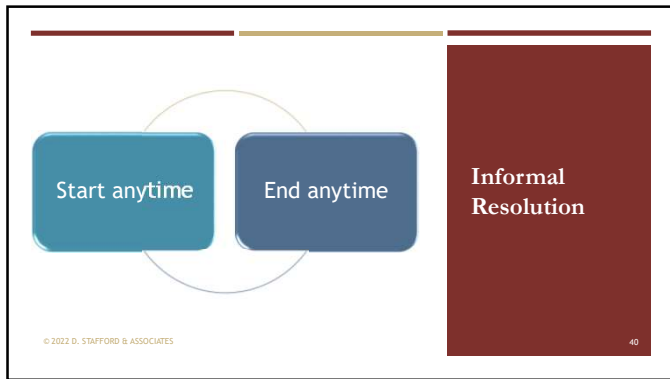
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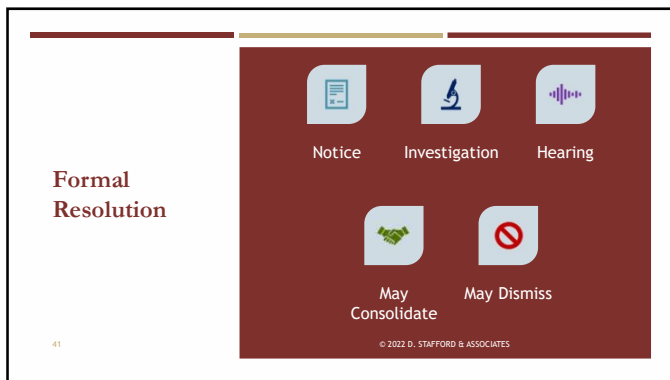
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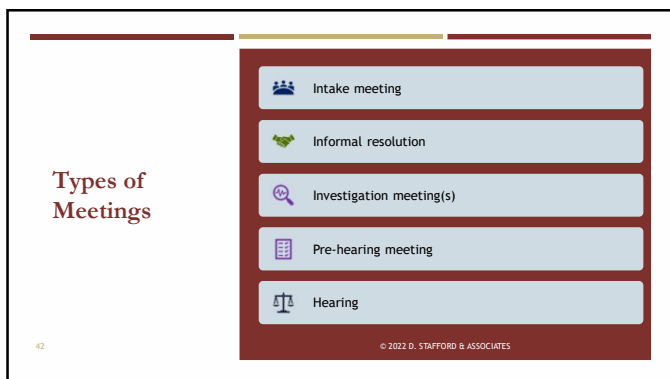
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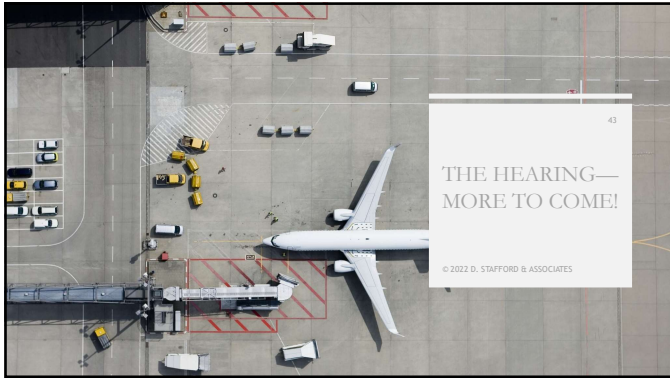
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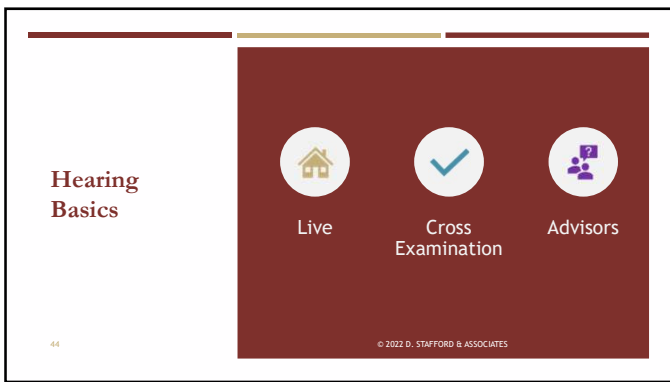
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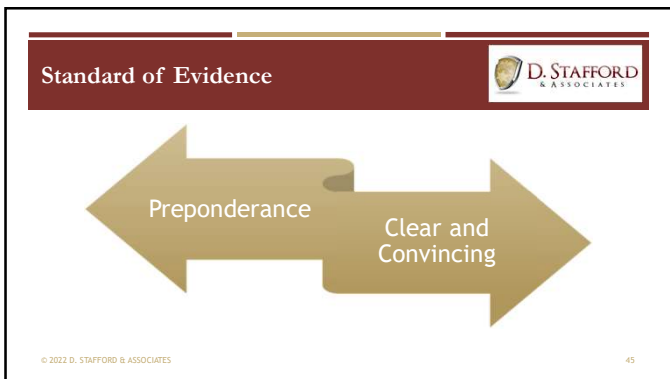
42



43



44



45

Conclusions

Sanctions/Remedies

Written Determination

Options for Appeal

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46

46

Recordkeeping (seven years)

Case Materials

Training materials

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47

BIAS AND CONFLICT OF INTEREST

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48

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Conflicts of Interest




Roles on campus


Past employment


Volunteering


Interactions with parties

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49

Recognizing Bias



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Bias - *From Regs*

- Bias against Complainants or Respondents
- Bias against THIS Complainant or Respondent
- Sex Stereotyping

51

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Bias

Parties

Race

Gender

Gender identity

Sexual orientation

Nationality

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52

Bias

Personal experience

Personal identity

Social identity

Theoretical perspective

Professional identity

Religious perspective

Political perspective

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REPRESENTATION MATTERS

Title IX Coordinator

Deputy

Investigator

Investigator

Board Chair

Board Member

Board Member

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54

54

How to address




Training


Acknowledgements


Party-identified
Conflict


Decision-maker-
identified Conflict

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19



1



2



3

Three Primary Stages




Intake


Investigation


Resolution

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Actual Knowledge - Next Steps




Contact Complainant


Meeting


Written Communication


Offer Support & Provide Rights

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Title IX Assessment

Title IX Definition

Eligible Complainant

Education Activity or Program

Wishes of the Complainant

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Non-Title IX Cases

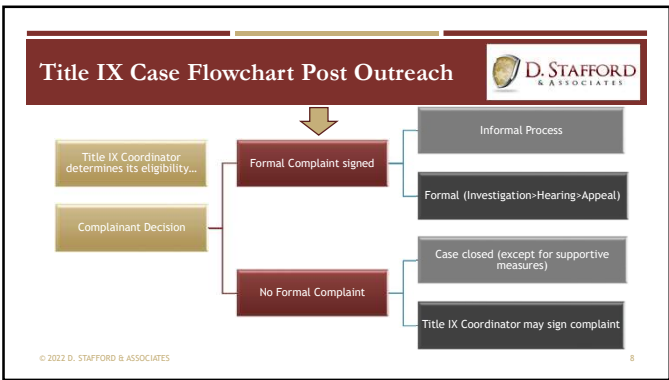
 Student Code of Conduct

 Employee Guide

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Formal Process



 Notice

 Assign to Investigator

 Investigation

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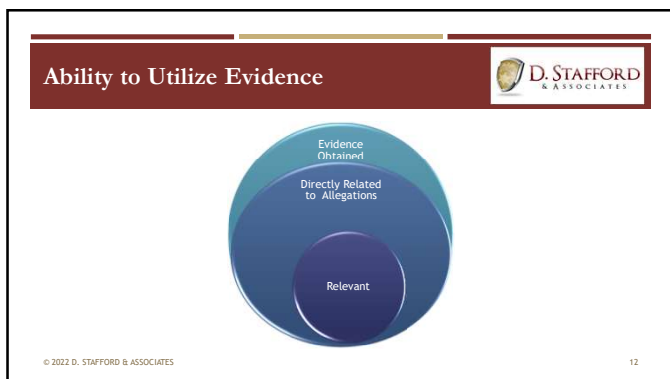
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10



11



12

Versions of the Report





Preliminary Report:

- Scope
- Methodology
- Evidence Obtained



Final Report:

- Scope
- Methodology (edited)
- Evidence Obtained
- Summary of Relevant Evidence



Written Determination:

- Scope
- Methodology (edited),
- Summary of Evidence (edited),
- Results (including rationale, sanctions, remedies)

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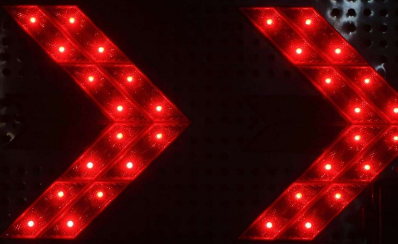
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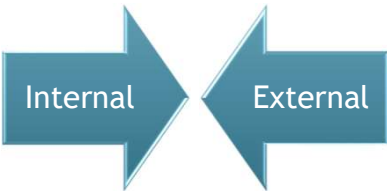
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CHOOSING YOUR PERSONNEL

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Choosing your Decision-makers

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Decision-makers



Panel vs. Individual

Numbers

Chair?

Consensus or Vote?

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Decision-maker Management




No previous role


Requests for removal for bias/conflict

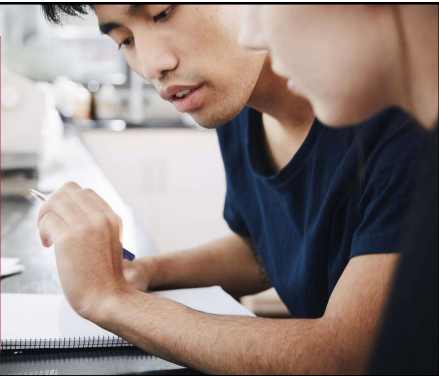
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ADVISORS OF CHOICE

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Advisor

“If a party does not have an advisor present at the live hearing, the recipient must provide without fee or charge to that party, an advisor of the recipient’s choice, who may be, but is not required to be, an attorney, to conduct cross-examination on behalf of that party.”

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Advisors of Choice

Attorney

Friend

Parent

Employee

Roommate

Fraternity Brother

Sorority Sister

Professor

Advisor

Victim Advocacy

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Advisor

1) Cross-examination of Other Party and Witnesses

2) No Training Required (Recommended if appointed)

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Relevant Questions on Cross





- Each party's advisor asks of other party and witnesses "all relevant questions and follow-up questions, including those challenging credibility."
- "Only relevant cross-examination and other questions may be asked of a party or witness."

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Cross-examination – The Preamble



The Department clarifies here that conducting cross-examination consists simply of posing questions intended to advance the asking party's perspective with respect to the specific allegations at issue . . . (Fed. Reg. 30319)

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Institution-Appointed Advisor



When required

Who to appoint

How to train

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Hearing - LIVE

Cross-examination - directly, orally, and in real time

Option for separate rooms with technology to hear/see or virtual

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From the Regs...

“...enabling the decision-maker(s) and parties to simultaneously see and hear the party or the witness answering questions”

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Hearing Space Needs

Decision-maker(s)

Parties and Advisors

- Complainant & Advisor
- Respondent & Advisor

Witness (when called)

Other

- Title IX Coordinator
- Interpreters or support persons

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Other Location Considerations

Waiting room for witness

Question submission

Process for recording

Space for private conference

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Record of Hearing





Audio

Video

Transcript

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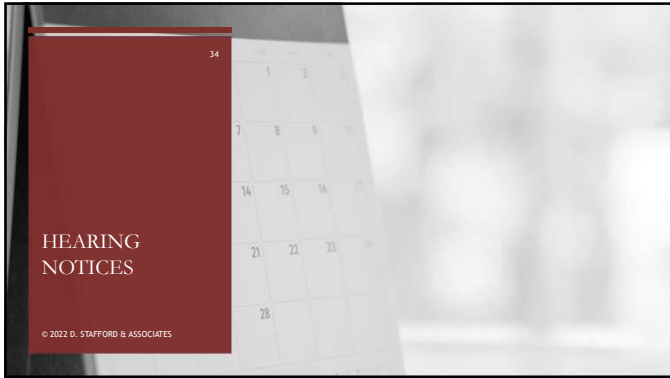
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In person vs. virtual options

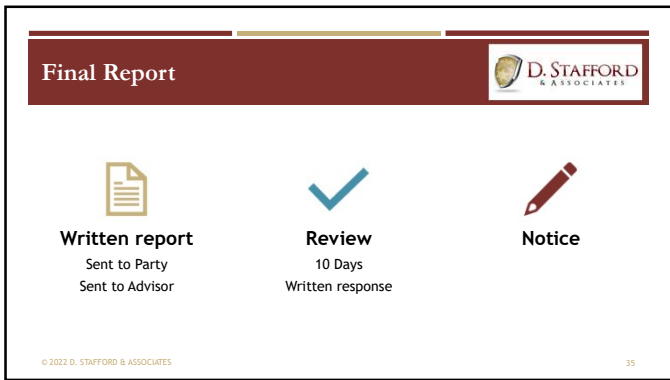
What are the pros and cons of the different hearing options?

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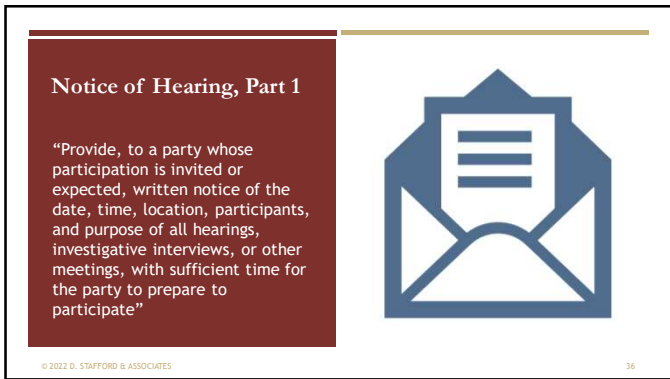
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Notice of Hearing, Part 2

"At the request of either party, the recipient must provide for the live hearing to occur with the parties located in separate rooms with technology enabling the decision-maker(s) and parties to simultaneously see and hear the party or the witness answering questions"



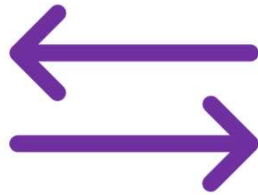
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Notice of Hearing, Part 3

Name and contact information for Decision-makers with options for stating bias or conflict of interest



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Notice of Hearing, Part 4

Options to request accommodation or interpretive services for the hearing



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Timing Considerations

01

Parties have ten days to provide written response to report

02

Decision-maker reviews report prior to hearing

03

Hearing

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Appoint alternate decision-maker if conflict



Change from in-person to virtual



Extensions due to accommodation etc.

Additional
Timing
Considerations

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HEARING
PREPARATION

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Live Hearings – Institution Specific



This is incredibly helpful!

Pre-hearing Meeting

Rules of Decorum

Hearing Script

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Rules and Process (from the Regs)

Recipients may adopt rules that govern the conduct and decorum of participants at live hearings so long as such rules comply with these final regulations and apply equally to both parties.

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Who does what?

Does your Title IX Coordinator manage the logistics of the hearing process or is it delegated to a hearing officer?

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Prehearing Tasks

Attendance Confirmation

Scheduling

Action Items

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Preparing the Parties

- Hearing format
- Vetting of questions for relevancy
- Irrelevant questions (rape shield/privilege)
- Impact of attendance
- Impact of participation
- Role of advisor
- Appointed advisor

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Decision-maker Pre-work

Review report

Review allegations

Review policy

Draft relevant questions

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Decision-maker Determinations on Evidence

Unrelated

Related but not relevant

Relevant but not admissible

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Decision-maker Predrafted Questions

Credibility

Corroboration

Clarifications

Admissions

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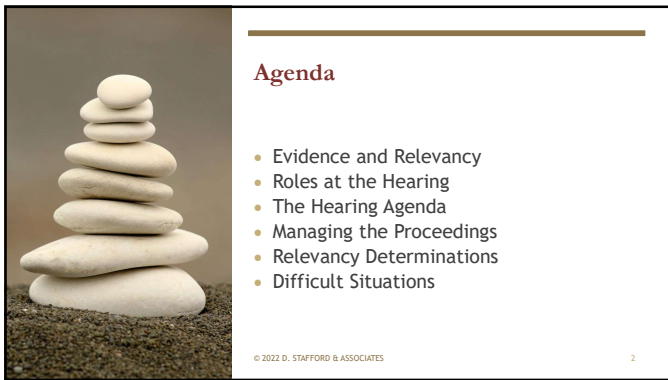
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1



2



3

Types of Evidence




Real evidence


Demonstrative


Documentary


Testimonial

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Statements




Investigator Interviews


Written Statements


Formal Complaint


Other

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Other Sources of Evidence



Photographs

Text messages

Social media/dating apps

Documents (diagrams, memos, letters, notes)

Vocemail

Phone logs

Guest lists

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Evidence

Inculpatory

Evidence demonstrating culpability for an act

Exculpatory

Evidence tending to excuse, justify, or absolve the act

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Versions of the Report

Preliminary Report:

Scope
Methodology
Evidence Obtained

Final Report:

Scope
Methodology (edited)
Evidence Obtained
Summary of Relevant Evidence

Written Determination:

Scope
Methodology (edited),
Summary of Evidence (edited),
Results (including rationale, sanctions, remedies)

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Evidence Collection

Everything Collected

Directly Related

Relevant

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The Regs on Relevancy



Relevant Evidence In Investigation



Relevant Questions At Hearing

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What Does Relevancy Mean?





- Directly related to the issue and helps prove or disprove the issue
- Fact must be material to an issue in the case
- Makes something more/less true or more/less false

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Other Ways to Put It...



The evidence does not need to be conclusive

The evidence constitutes a link in the chain of proof

The evidence, in connection with other evidence, helps "a little"

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Relevancy Examples


Admissions


Eyewitness


Credibility

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Relevancy Examples


Background


Charts


Floorplans

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Relevancy Examples


Research


Character and
Character Traits


Expert Testimony

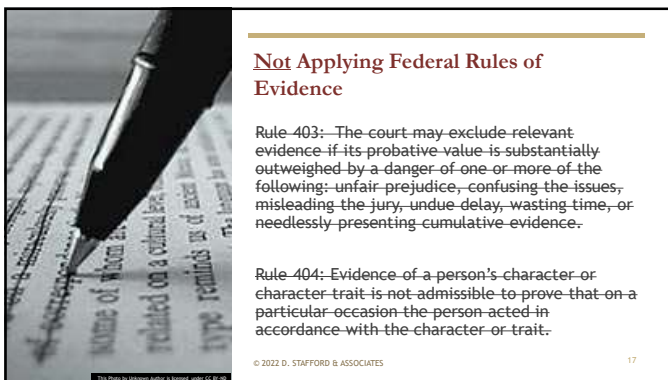
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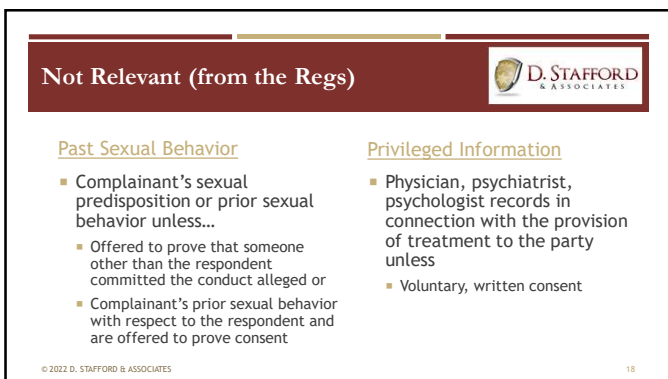
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Not Relevant





Repetitive



Related By Not Relevant

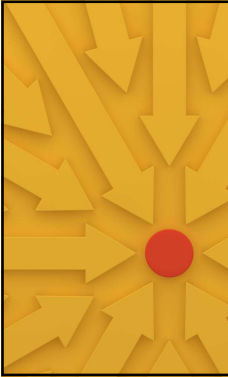


New Evidence - Is It Relevant?

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STAYING ON POINT

- Allegation
- Definitions
- Summary of Relevant Evidence

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ROLES AT THE HEARING

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Role of the Decision-maker




Relevancy Determinations



Credibility Assessment



Make Finding



Written Determination

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Are they **WITNESSES** and/or do they **ATTEND**?

- Title IX Coordinator
- Investigator(s)

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Recording



Introductions



Order of Questioning



Witness Management



Assigning If Advisor Absent



Enforcing Rules of Decorum

Tasks at the Hearing

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Other Persons in Attendance

	General Counsel	Advise on process?
	Stenographer	Only needed if not recording
	Accommodation	Interpreter or mandated support person
	2 nd Advisor	Is a support person allowed? Union rep?

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THE HEARING AGENDA

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Hearing/Cross Purpose from the Preamble

- *“to reach factually reliable determinations”*
- *“goal of a fair, truth-seeking process”*
- *“truth-seeking function of cross-examination”*

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From the Preamble...

The Department reiterates, however, that the essential function of cross-examination is not to embarrass, blame, humiliate, or emotionally berate a party, but rather to ask questions that probe a party's narrative in order to give the decisionmaker the fullest view possible of the evidence relevant to the allegations at issue.

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Mandatory Components




Complainant Cross-Examination


Respondent Cross-Examination


Witness Cross-Examination

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Relevancy Determination





“Before a complainant, respondent, or witness answers a cross-examination or other question, the decision-maker(s) must first determine whether the question is relevant and explain any decision to exclude a question as not relevant.”

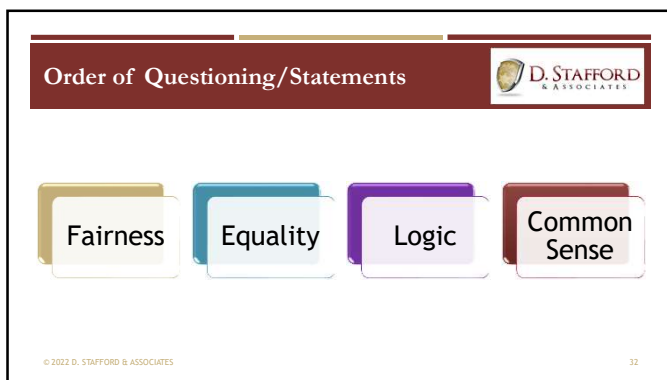
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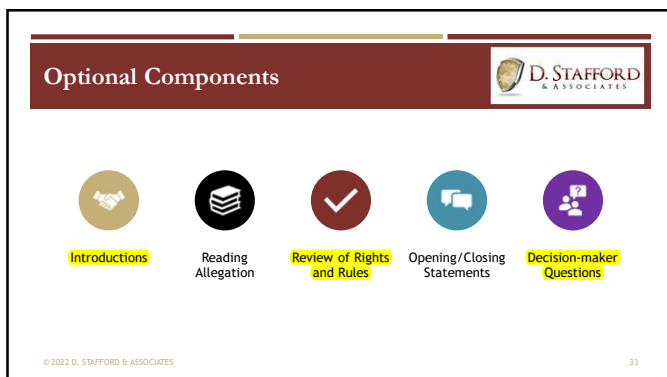
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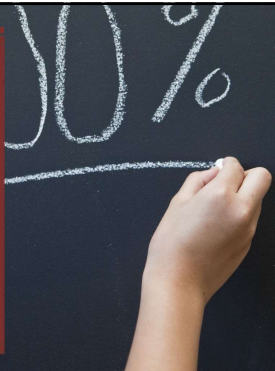


Decision-maker Questions ... from the Regs

"The degree to which any inaccuracy, inconsistency, or implausibility in a narrative provided by a party or witness should affect a determination regarding responsibility is a matter to be decided by the decision-maker, after having the opportunity to ask questions of parties and witnesses, and to observe how parties and witnesses answer the questions posed by the other party."

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RELEVANCY DETERMINATIONS

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☒
Past sexual history

☒
Privileged information

☒
Repetitive question

☒
New information

☒
Not probative of material fact

Relevancy and Admissibility Determinations

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Not a lengthy or complicated explanation



Logic and common sense



Shows neutrality



May trigger appeal ("procedural irregularity")

Reason for Relevancy Determination

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"New Evidence" at the Hearing



APPEAL GROUND: "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"



Allow



Disallow



Stop Hearing

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Discussion

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- Should you allow a Party to explain why a question is relevant?

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Decision-maker Questions *from the Regs*



- *Permit the decision-maker on the decision-maker's own initiative to ask questions and elicit testimony from parties and witnesses, as part of the recipient's burden to reach a determination regarding responsibility based on objective evaluation of all relevant evidence including inculpatory and exculpatory evidence*
- *Thus, the skill of a party's advisor is not the only factor in bringing evidence to light for a decision-maker's consideration*

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Decision-maker Questions



Statement of Accuracy

Credibility

Clarity

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DIFFICULT SITUATIONS

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Party Issues

DISRUPTIVE

EMOTIONAL

INAPPROPRIATE QUESTION

NOT PARTICIPATING

NO SHOW

REQUEST FOR INFORMAL

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Participation

“If a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility.”

August 24, 2021 Letter to Stakeholders from DOE ceasing enforcement of this part because of decision in *Victim Rights Law Center et al. v. Cardona*.

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Attendance

“The 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.”

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Advisor Issues

Disruptive

Refusal to cross

Inappropriate cross

Relationship with party

Relationship with case

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Removal of an Advisor (Regulations)...

"If a party's advisor of choice refuses to comply with a recipient's rules of decorum (for example, by insisting on yelling at the other party), the recipient may require the party to use a different advisor"

"If an advisor that the recipient provides refuses to comply with a recipient's rules of decorum, the recipient may provide that party with a different advisor to conduct cross-examination on behalf of that party"

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Decision-maker Issues (Appeal Grounds)

Procedural Error

New Evidence

Bias/Conflict

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Situational issues




Safety


Disability


Length


Phrasing

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Cathy likes to have your parties in an area that you know so that they can be helped if they go into crisis mode, i.e. a classroom on campus

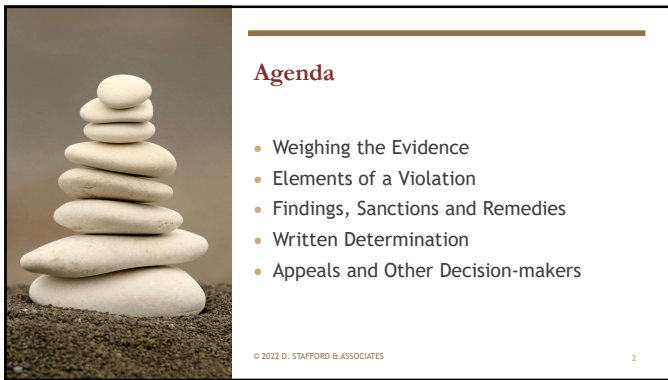
If the length of a hearing is long, that might be an investigation issue



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1



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From the Regs...

"must objectively evaluate all relevant evidence (inculpatory and exculpatory) but retains discretion, to which the Department will defer, with respect to how persuasive a decisionmaker finds particular evidence to be"

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Perponderance of the evidence that a policy viotaiion occured/did not occur

Fact Considerations





Weight



Credibility

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Cannot Rely On...





- Privileged information
- Prior sexual history (unless exception)
- Statements by party/witness not subjected to cross
- Sex stereotyping

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Highlighted statement no longer in effect

Weight/Relevance

Character

Prior bad acts

Pre/post behavior

Hearsay

Opinion

New evidence

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Always be mindful of past bad behavior and its relevancy, if relevant then does it

We don't weigh hearsay since it is coming from third fourth party accounts

Opinions - where is the information coming from, what is their knowledge about the situation, but how is their judgement impaired (alcohol, drugs, feelings towards the parties)

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- Specific details
- Inherent plausibility
- Internal consistency
- Corroborative evidence

Assessing
Credibility
from the Regs

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Credibility

Perception

Memory

Deception

Motivation

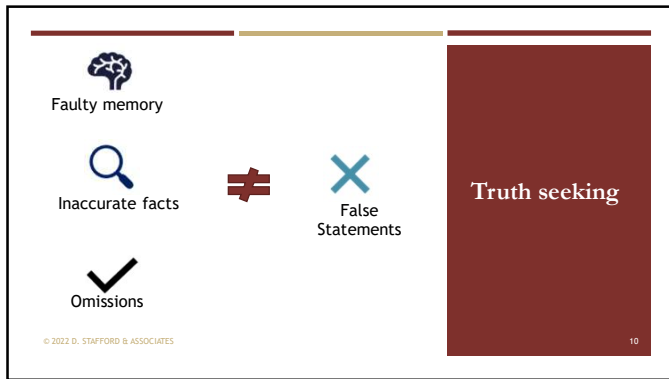
Bias

Plausibility

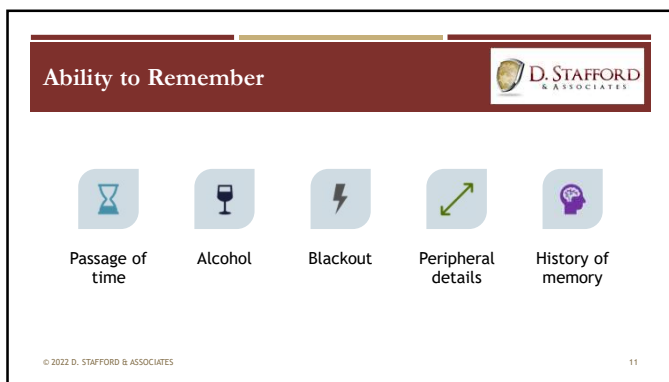
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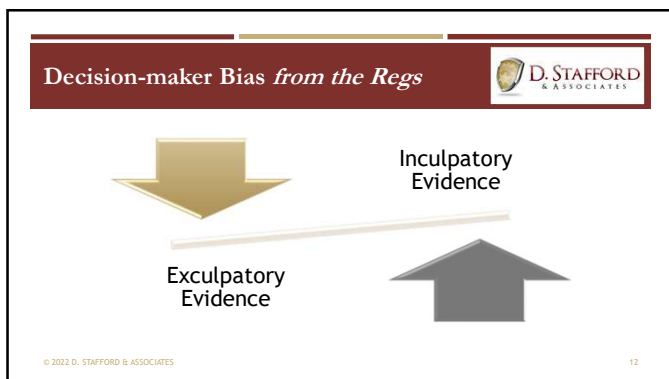
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Stress, Trauma and Memory







Stress

Trauma

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Response







Reflex

Habit

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Impact on Memory







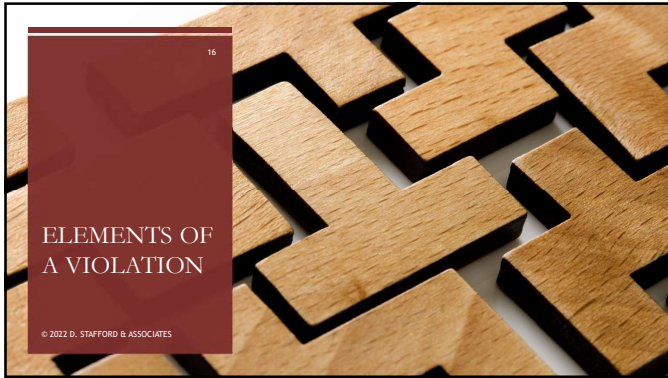
Details

Time and Context

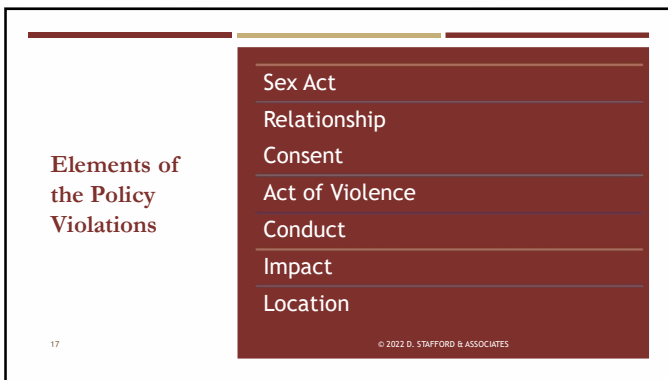
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Key Elements

Mutually agreed upon

Informed and freely given

Initiator responsibility

Positions of power

Silence and prior relationships

Verbal consent

Withdrawal

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Physical Force

Holding down

Forced to touch

Level of violence

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Coercion

Frequency +	Intensity +	Duration +	Isolation
?	Now	5 minutes?	Library
Twice	?	?	Bar
Fifty times	?	2 days?	?

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Intimidation

Physical

Verbal

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Physical harm

Reputational harm

Veiled threats

Threats

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What is a Drink?

12 oz Beer

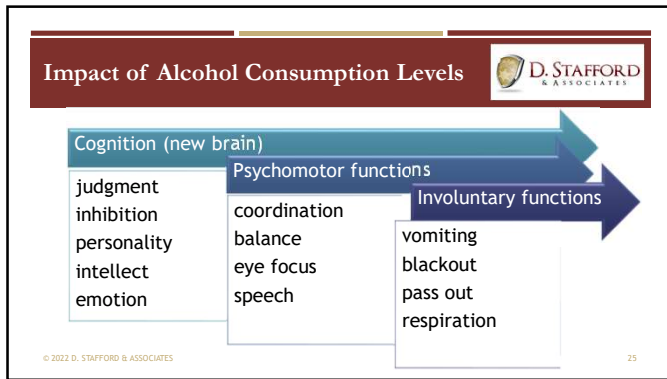
4-5 oz of Wine

1.5 oz 80 Proof

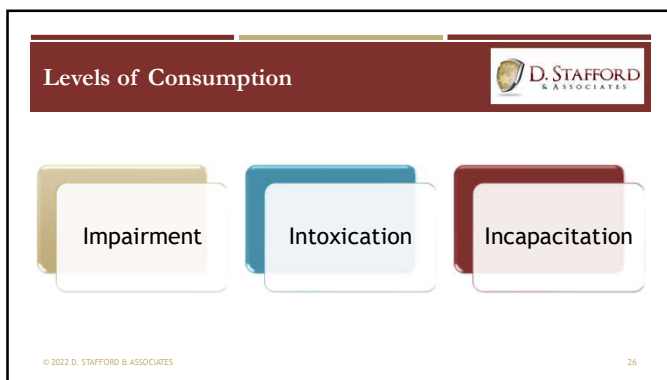
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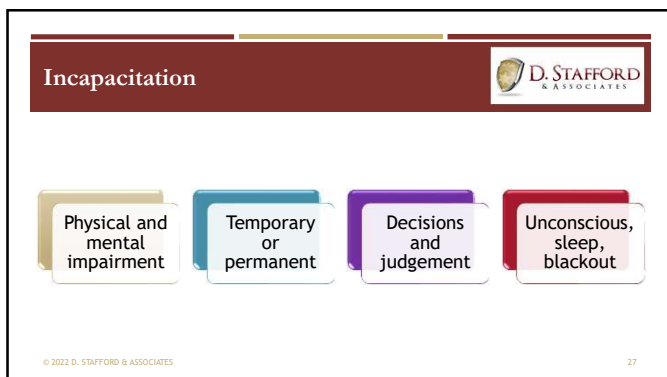
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Two-Step Determination

Was the Complainant incapacitated?

Did the Respondent (or would a reasonable person) know?

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FINDINGS,
SANCTIONS &
REMEDIES

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Formal Resolution – Making a Finding



Policy language -
Alleged violations



Weighing the
evidence



Determined
behaviors



Standard of
evidence

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Disciplinary Sanctions and Remedies



Sanctions



Remedies

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Formal Resolution – Disciplinary Sanctions

A recipient may impose disciplinary sanctions upon a respondent after a grievance process that complies with § 106.45.

“The Department does not prescribe whether disciplinary sanctions must be imposed, nor restrict recipient’s discretion in that regard. As the Supreme Court noted, Federal courts should not second guess schools’ disciplinary decision, and the Department likewise believes that disciplinary decisions are best left to the sound discretion of recipients.”

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Formal Resolution - Disciplinary Sanctions

Status

- Expulsion, separation, probation

Prevention

- Protective measures, restrictions, separation

Educational

- Action plans

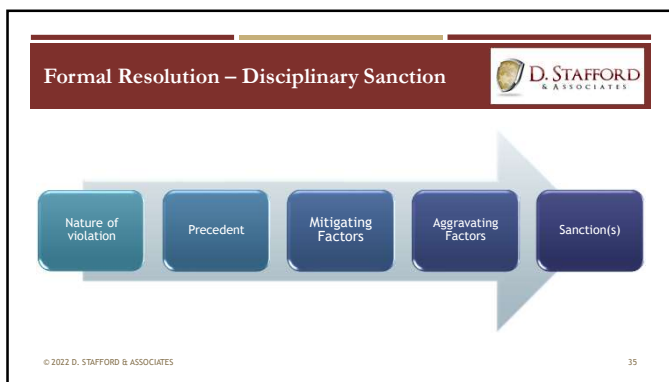
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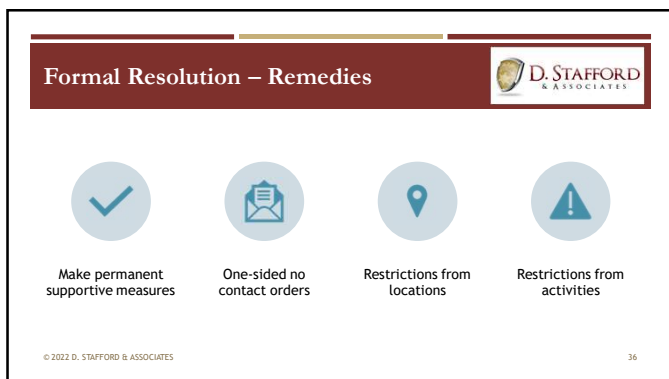
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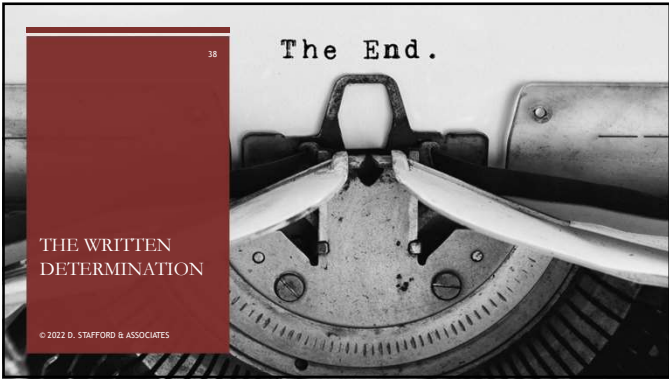
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Determination Regarding Responsibility

Allegations
Procedural steps
Findings of fact
Conclusion/application
Rationale
Appeal procedures

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Written
Determination
Considerations

IN

- Relevant information
- Hearing or report

OUT

- Bias
- Sex stereotyping
- Inadmissible information

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APPEALS AND
OTHER
DECISION-
MAKERS

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Other Decision-Maker

Appellate Decision-maker

Appeal of Case Dismissal

Appeal of Emergency Removal

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Title IX Required Appellate Grounds

1. Procedural irregularity that affected the outcome of the matter;
2. 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; and
3. The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter.

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43

43

Appeals



Grounds apply to appeal of finding and of dismissal

Additional grounds permitted

Decision-maker can have no other role

Reasonably prompt time frame

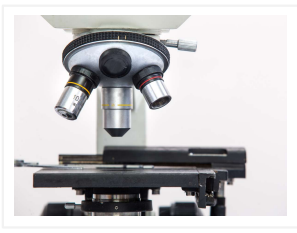
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44

44

Appeals





 Notification

 Equal opportunity to respond

 Written determination

 Provided simultaneously to parties

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45

45

Role of Appellate Decision-Maker



Follow the Appellate Basis



Not A Substitute of Judgement



Respect the Credibility of Previous Decision-maker

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46

46

ADDITIONAL CONCERNS

Run a fair, thorough, and impartial process

Let your morale compass guide you

Do what your policy says you will do

Do what the regulations tell you to do

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47

47



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48

48

16