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Title IX/VAWA Sexual Harassment and Sexual Misconduct Training Series

Training for Hearing Officers and Decision-Makers

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Presenters




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Agenda

- 1 Introduction and Training Goals
- 2 Legal Updates and Requirements
- 3 The Formal Grievance Process
- 4 Trauma informed
- 5 Decision-Making Phases
 - Prepare for hearing
 - Conduct hearing
 - Make Determination
 - Sanctions and remedies
 - Draft notice of determination
 - Appeals
- 6 Case Study throughout

Intro

Legal

Process

Trauma Informed


Decision Making

Case Study

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Introduction

- Welcome
- About us
- About you
- About the work we all do
- Breaks!




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Training Goals: Going Beyond What is Required by Title IX and VAWA


- Training Requirements for Decision-Makers:
 - Definition of sexual harassment
 - Institution's Policies and Procedures
 - Scope of your programs/activities
 - How to conduct an investigation and grievance process, including hearings and appeals
 - How to serve impartially and without bias and without prejudice
 - Relevant evidence and how it should be used during a proceeding
 - Proper techniques for questioning witnesses
 - Issues of relevance to draft reports that fairly summarize evidence*
 - Conducting hearings that protect complainant's safety and promote accountability (impact of trauma)*
 - Technology to be used at any hearing

Maintain training records (7 years) and post on website
**VAWA only*



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Legal Updates



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Legal Updates

- Final Regs – effective August 2020
- July 20, 2021 Q&A
- LGBTQ guidance
- *Victim Rights Law Center et al. v. Cardona et al.*, Civil Action No. 20-11104-WGY, 2021 WL 3185743 (D. Mass.)
- **OCR Letter to Students, Educators, and other Stakeholders re *Victim Rights Law Center et al. v. Cardona* (August 24, 2021)**
- Notice and Comment for Final Regs – May 2022

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Legal Requirements – Title IX (20 U.S.C. § 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”

and

On May 6, 2020, the Department of Education released new Title IX regulations, with mandatory implementation date of August 14, 2020

- Apply to all institutions that receive federal funds, including financial assistance
- Cover students, employees, and third parties
- Include all forms of discrimination based on sex such as sexual harassment and differential treatment
- Enforced by the Office for Civil Rights and courts

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Legal Requirements – Violence Against Women Act (“VAWA”)

- Amended Clery Act through the Campus Sexual Violence Act (“SaVE Act”) provision, Section 304
- Added domestic violence, dating violence, and stalking to the Clery crimes (which already included sexual assault)
- Requires adoption of institutional policies and procedures to address and prevent campus sexual violence
- Requires training of institutional personnel and students
- Requires prevention and awareness programs
- Clery Act Enforcement

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General Title IX Regulations & VAWA Requirements

“Recipients” of federal funds must:

- Disseminate a policy that includes a Notice of Nondiscrimination
- Designate a Title IX Coordinator
- Adopt, publish, and follow grievance procedures that are equitable, prompt, and effective and provide for adequate, thorough, reliable, fair, and impartial investigations and adjudications
- Take action to address and prevent sex-based discrimination
- Train individuals serving in specified roles

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Other Applicable Laws

- Family Educational Rights and Privacy Act (FERPA)
 - Exceptions under Title IX and VAWA for files shared during the process that permit disclosure of materials the laws require to be shared
 - Remedies are not shared except as necessary to enforce them (Title IX exception is for sharing the fact remedies were provided but not the details)
- Title VII
- Disability and Accommodations
- Mandatory reporting laws requiring the reporting of child abuse and neglect
- State laws

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Legal Requirements: The Fundamental Obligation

Under **Title IX**, an institution is obligated to respond when: it has **“actual knowledge”** of **“sexual harassment”** involving a person who is participating or attempting to participate in an **“education program or activity”** of the institution and when the sexual harassment is directed against a person **in the United States**

VAWA:

- Allegation of sexual assault, dating violence, domestic violence, or stalking
- Involving student or employee
- Regardless of location and participation in program/activity

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Title IX Response:

- Actual Knowledge
- Sexual Harassment
- Education Program or Activity
- In the United States

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Title IX Response:

- Actual Knowledge
- Sexual Harassment
- Education Program or Activity
- In the United States

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Legal Requirements: Actual Knowledge and Officials with Authority

“means notice of sexual harassment or allegations of sexual harassment to a recipient’s Title IX Coordinator or any official of the university who has the authority to institute corrective measures on behalf of the recipient”

- Notice need not be in the form of a Formal Complaint
- Constructive notice or vicarious liability “are insufficient to constitute actual knowledge”
- Mere ability or obligation (by policy) to report sexual harassment does not make you an official with authority
- Having been trained to report sexual harassment does not make you an official with authority

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Title IX Response:

- Actual Knowledge
- Sexual Harassment
- Education Program or Activity
- In the United States

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Legal Requirements: Title IX Sexual Harassment Defined

Conduct on the basis of sex that satisfies one or more of the following:

- Quid pro quo:** an employee conditions an aid, benefit, or service of recipient on an individual's participation in unwelcome sexual conduct;
- Hostile environment:** 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; or
- "sexual assault," "dating violence," "domestic violence," or "stalking"**

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Legal Requirements: Title IX Sexual Harassment Defined

Sexual Assault: any sexual act direct against another person, without the consent of the victim, including instances where the victim is incapable of giving consent. This includes:

- Rape:** carnal knowledge of a person, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity.
- Sodomy:** oral or anal sexual intercourse with another person, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity.

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Legal Requirements: Title IX Sexual Harassment Defined

Sexual Assault (cont.):

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

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Legal Requirements: Title IX Sexual Harassment Defined

- **Dating violence:** any act of violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim and where the existence of such a relationship is determined based on a consideration of the length, type, and frequency of interactions between the persons involved in the relationship.
- **Domestic violence:** a felony or misdemeanor crime of violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction receiving grant monies, or by any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of the jurisdiction.

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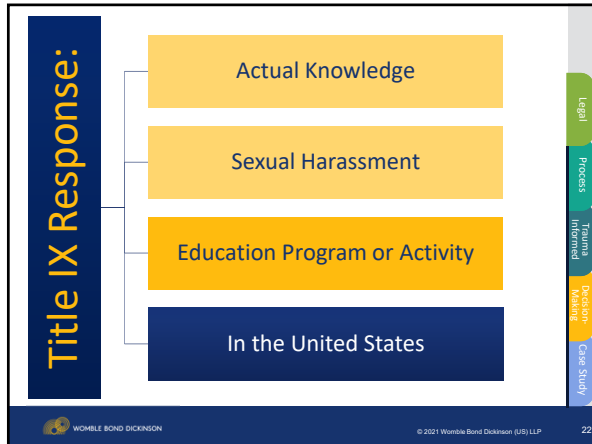
Legal Requirements: Title IX Sexual Harassment Defined

- **Stalking:** 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
- **Course of conduct:** 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
- **Reasonable person:** a reasonable person under similar circumstances and with similar identities to the Complainant
- **Substantial emotional distress:** significant mental suffering or anguish that may but does not necessarily require medical or other professional treatment or counseling

* The VAWA crimes as defined in the Clery Act

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Legal Requirements: Education Program or Activity

- Locations, events, or circumstances over which the recipient exercised **substantial control** over both the respondent and the context in which the sexual harassment occurs
 - On campus or
 - Off campus, when:
 - Part of the recipient's operations
 - Occurs at any building owned or controlled by an officially recognized student organization (e.g., fraternities and sororities)



Legal Requirements: Response to Sexual Harassment

If recipient has actual knowledge, Recipient/Title IX Coordinator must:

- Respond promptly in a manner that is not *deliberately indifferent*, meaning the response cannot be clearly unreasonable in the known circumstances
- Follow the Title IX Regulations "Grievance Process"
- Promptly contact the Complainant to discuss availability of *supportive measures*
- Consider Complainant's wishes with respect to the supportive measures
- Inform Complainant of availability of supportive measures regardless of whether a formal complaint is filed
- Explain the process of filing a Formal Complaint
- Provide written notice of rights and options for allegations of sexual assault, dating violence, domestic violence, and stalking (VAWA)
- Notify Complainant of right to report to law enforcement and offer assistance (VAWA)

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Legal Requirements: Response to Sexual Harassment

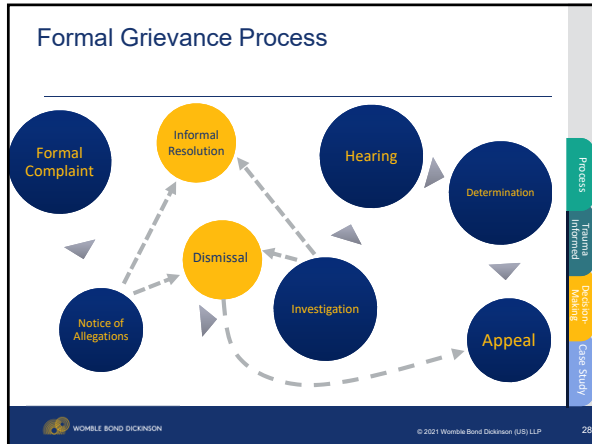
Framework:

- Title IX:** actual knowledge, sexual harassment, in education program or activity, directed against someone in the US
- VAWA:** sexual assault, dating violence, domestic violence, or stalking; involving a student or employee; regardless of participation in program/activity
 - Some cases will involve both
- Others could be neither (e.g., hostile environment-type sexual harassment that is not severe, pervasive, or objectively offensive) and are governed by your Policies

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The Grievance Process

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Reports vs. Formal Complaints

Some process begins upon the receipt of information containing allegations of sexual harassment, a "report"

- Often made to others outside the Title IX team
 - Faculty, staff, employees, and student employees ("Responsible employees" under your policy?)
 - Confidential resources
 - Friends, fellow students, and family members
- Title IX Coordinator or designee determines the required (and equitable) response and promptly contacts Complainant

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Title IX "Formal Complaint" Initiates Grievance Process

Formal Complaint under Title IX (but not required by VAWA):

1. Document;
2. Filed by a Complainant (or parent/guardian with legal right to do so) or signed by the Title IX Coordinator;
3. Alleging Sexual Harassment against a Respondent; **and**
4. Requesting an investigation of an allegation of Sexual Harassment

Important!

- Cannot be filed anonymously
- Can be filed in person, by mail, email using Title IX Coordinator's contact information or any other method designated (e.g., online reporting form)
- Must have digital signature or other confirmation for Complainant
- Title IX Coordinator who signs a Formal Complaint is not a "party"
- Complainant's identity, if known, must be disclosed to Respondent (in contrast to a "report")
- Complainant must be participating/attempting to participate in program or activity
- No statute of limitations
- **Consolidation of Formal Complaints permitted for cases arising out of same facts or circumstances**

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Supportive/Interim Measures

Non-disciplinary, non-punitive, individualized services offered, as appropriate, as reasonably available, and without fee or charge to the Complainant or Respondent before or after the filing of a Formal Complaint or where none has been filed.

- Designed to restore or preserve equal access to the recipient's program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the recipient's education environment, or deter sexual harassment
- Must maintain as confidential to the extent that doing so would not impair the ability to provide them
- Also known as "interim measures" for sexual assault and VAWA crimes
- *If the action is listed your policy as a sanction, it is likely disciplinary or punitive*

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Supportive/Interim Measures

Title IX Regulations, they may include:

- Mutual no contact orders—**most common**
- Counseling and other health resources
- Extensions of deadlines or other course-related adjustments
- Modifications of work or class schedules
- Campus escort services
- Changes in work or housing locations
- Changes to parking or transportation
- Leaves of absence
- Increased security or monitoring of certain areas of the campus
- Or other similar measures chosen by recipient
 - Or third parties who can provide services (MOUs)
- **Must consider Complainant's desires for the options**

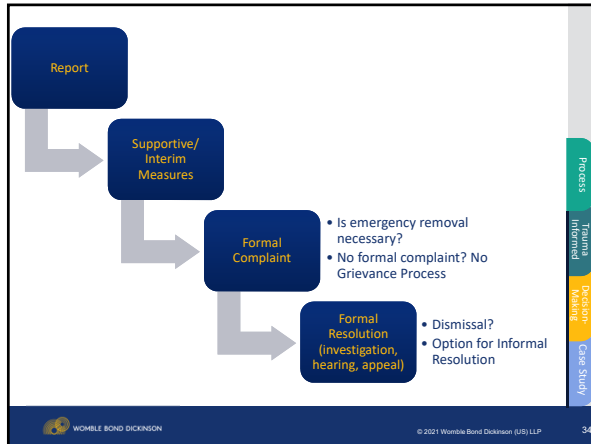
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Emergency Removal/Administrative Leave

Emergency removal process is permitted, when:

- after an individualized safety and risk analysis, recipient determines there is an immediate threat to the physical health or safety of any students or other individuals arising from the allegations of sexual harassment
 - Must provide Respondent notice and opportunity to immediately challenge decision
- A recipient may place a non-student employee on administrative leave during the pendency of a grievance process.

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Formal Grievance Process

Basic Requirements:

- No bias or conflicts of interest (as to party type generally or individuals)
 - Training required for all roles!
- Treat parties equitably
 - Participation in process and submission of evidence
 - Advisors and limits to participation (cannot limit cross-examination)
 - Access to directly related and relevant evidence
- Follow Grievance Process before imposing sanctions or other non-supportive measures
- Remedies designed to restore or preserve access to education or activity (need not be non-disciplinary or non-punitive) – occurs after a determination of responsibility

Vertical sidebar labels: Process, Training Informed, Decision Making, Case Study. Footer: WORBLE BOND DICKINSON, © 2021 Worble Bond Dickinson (US) LLP, 35.

Formal Grievance Process

Basic Requirements (cont.):

- Describe range of supportive measures
- Remedies are often extensions of supportive/interim measures
Complainant received during process
- Presumption of not responsible
- State the standard of evidence and use the same one for all Formal Complaints regardless of who the parties are
 - Preponderance or clear and convincing
- Cannot seek to collect information protected by legally recognized privilege unless the privilege has been waived
- Same for medical treatment records unless voluntary, written consent

Vertical sidebar labels: Process, Training Informed, Decision Making, Case Study. Footer: WORBLE BOND DICKINSON, © 2021 Worble Bond Dickinson (US) LLP, 36.

Formal Grievance Process

Basic Requirements (cont.):

- Reasonably prompt timeframes (temporary delays for good cause)
 - For each phase of the process (some are specified in the Regs)
 - With written notice to the parties citing reasons for delay and upon resuming investigation
 - Good cause includes: absence of party, advisor or witness unavailable; language assistance/disability accommodation; or concurrent law enforcement activity (brief, for fact gathering, not criminal prosecution)
- Objective evaluation of all evidence, inculpatory and exculpatory
 - Credibility determinations cannot be based on status as Complainant, Respondent, or witness
- Describe range of sanctions and remedies
- Procedures and grounds for appeals
- Plus any provisions, rules, or practices adopted by institution**

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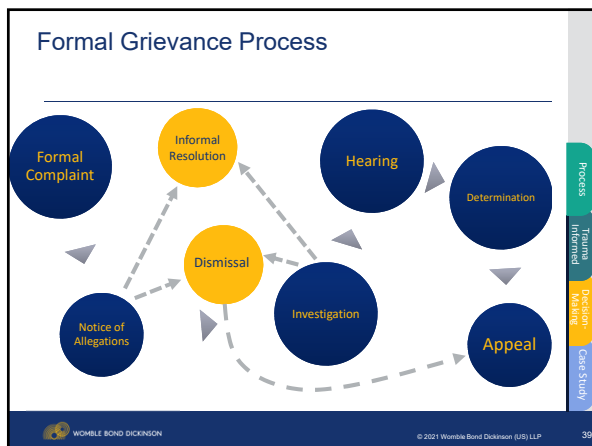
Formal Grievance Process — Dismissals

Two types:

- Mandatory dismissal of Title IX Formal Complaint, when:
 - the allegation, even if proved, would not need meet sexual harassment definition,
 - did not occur in education program or activity, or
 - did not occur against a person in the U.S.
- Discretionary dismissal (*at any time*), if:
 - Complainant provides written notice to Title IX Coordinator of withdrawal of Formal Complaint or allegations
 - Respondent no longer enrolled in or employed by recipient
 - specific circumstances prevent recipient from gathering sufficient evidence to reach a determination as to the Formal Complaint

In either case, recipient must promptly send a written notice of dismissal and the specific reasons for it, simultaneously to the parties (appealable)

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The Decision-Making Process

Decision Making
Case Study

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Whose responsibility is it?

The **burden of proof** and the **burden of gathering evidence** sufficient to reach a determination regarding responsibility rests on the recipient and not on the parties.

Decision Making
Case Study

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Understanding Roles — Title IX Coordinator

High level, directly or through designee:

- Coordinating the recipient's response to discrimination on the basis of sex, including sexual harassment and misconduct
- Ensuring process is free from known or reported conflicts of interest or bias
- Responding to reports alleging sexual harassment
- Determining the appropriate process
- Overseeing the grievance process
- Ensuring the process is user-friendly
- Coordinating the effective implementation of supportive/interim measures
- Overseeing training requirements
- Separating roles and responsibilities
- Ensuring process is compliant and effective

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Case Study

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Understanding Roles — Title IX Coordinator

Ground level, upon receipt of a report/complaint:

- Receipt of report and/or formal complaint
- Meeting with Complainant
- Safety and risk analysis (Complainant and community)
 - Removal process, if applicable (very rare)
- Written notice of rights to Complainant and preservation of evidence (VAWA compliant)
- Notification of right to contact law enforcement (and note differences)
- Notification of right to obtain medical treatment
- Supportive/Interim measures
- Evaluate availability of informal resolution
- Evaluate potential grounds for dismissal
- Decision to move forward with an investigation
- Determination of which policy/process will be followed

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Understanding Roles — Investigator's Work

- Undertake a **thorough search for relevant facts and evidence** pertaining to a particular case, while operating **under the constraints** of conducting and concluding the investigation under designated, reasonably prompt timeframes and without powers of subpoena."
- Such conditions limit the extensiveness or comprehensiveness of the efforts to gather evidence while reasonably expecting you to gather evidence that is available
- Culminating with the Final Investigative Report and investigation file
 - Summary of "directly related" evidence (must be available at the hearing)
 - Final report containing relevant evidence
 - With copies of both to the parties and advisors for review and response
- *For VAWA: only access to information used by decision-makers*

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"Directly Related" and Relevant Evidence

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Case Study

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Understanding Roles — Staying in Your Lane

Recipient's Role	Hearing Officer's Role
<ul style="list-style-type: none"> Complying with legal obligations Establishing and overseeing grievance process (bias and conflict free) Intake Notice of rights Dismissals and removal Clery/timely warnings/ASR Supportive/Interim measures Providing support resources Establishing advisor parameters Conducting compliant investigation Extending case deadlines Coordinating hearing process 	<ul style="list-style-type: none"> Participating in required trainings Identifying conflicts or bias concerns Reviewing investigative report and responses Preparing for the hearing Conducting hearing Asking questions of parties and witnesses Making relevancy and evidentiary rulings Making credibility determinations Making a finding Determining sanctions?

Decision Maker Case Study

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Understanding Roles — Coordination Between Decision-Maker and Title IX Coordinator

- Who will:
 - Decide when the case events, such as the hearing, will occur
 - Decide who participates in the hearing
 - Communicate with the parties, including issuing timely notice of meetings to the parties for pre-hearing, hearing, or related events
 - Communicate/arrange for witness participation
 - Pre-hearing
 - Decisions about delay for good cause and send notices of delay
 - Responsibility for technology during the hearing
 - Prepare opening scripts or remarks for the hearing
 - Ensure compliance with timeframes in policy and required by Title IX

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Understanding Roles — Title IX Dividing Lines

- Title IX Coordinator can be an investigator but cannot be a decision-maker
 - Can make recommendations regarding findings
- Investigator cannot be a decision-maker (no single investigator model)
 - Can make recommendations regarding findings
- BUT decision-maker, regardless of recommendations, must independently and objectively evaluate the relevant evidence (no deferential treatment)

Decision Maker Case Study

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Understanding Bias and Conflicts of Interest

- Case-by-case examination of the "particular facts"
- Recipients are encouraged to "apply an objective (whether a reasonable person would believe bias exists), common sense approach to evaluating whether a particular person serving in a Title IX role is biased."
- If someone has a material connection to a dispute, or the parties involved, and a reasonable person would question that person's ability to be impartial
- **Could be** based on a number of factors or connections, including prior or existing relationships, past advocacy (survivor or respondent groups), prior interactions or involvement, professional experience and activities, areas of study, the decision-maker's position on campus, or financial and reputational interests of employee that aligns with the institution
 - "assuming that all self-professed feminists, or self-described survivors, are biased against men, or that a male is incapable of being sensitive to women, or that prior work as a victim advocate, or as a defense attorney, renders the person biased for or against complainants or respondents is unreasonable"
- Cannot make decisions based on characteristics of the parties—must be based on the facts of the case

Process
Investigation
Reports
Decision-making
Enforcement

Title IX Legal Requirements — Hearings

- Live hearing, in-person or virtual (with security measures)
- At the request of either party, hearing to take place with **parties** in separate rooms with technology enabling the decision-makers to simultaneously **see and hear the person answering questions**
- Parties entitled to an advisor of their choice
 - advisor role can be limited (to asking questions)
 - if party does not have advisor or advisor does not attend the hearing, institution must provide without charge (if party refuses, loses the right)
 - no requirement that institution-provided advisor be an attorney or have experience or training ("read" party's questions)
 - not required to be free from bias or conflicts
- Party can also be accompanied by others if "required by law" (e.g., language assistance or disability)

Decision Making
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Title IX Legal Requirements — Hearings

- Providing for cross-examination:
 - of parties and witnesses by allowing each party's advisor of choice to ask "all relevant questions and follow-up questions," including those challenging credibility
 - conducted directly, orally, and in real time by the party's advisor and never by the party personally
- **If party or witness does not submit to cross-examination (including those who provide testimony but directly or indirectly fail or refuse to answer any question posed by advisor), then their statements cannot be considered by the decision-maker**
 - ~~Regardless of the reason, even death~~
 - ~~All statements that are not the alleged harassment, including reports, records, text messages and communications, and accounts~~
- Institution cannot require party or witness to participate, although the reason for not participating may be important (threat? safety? retaliation?)
- **Decision-maker cannot draw inference "solely" based on lack of participation or testimony**

Decision Making
Case Study

Title IX Legal Requirements — Hearings

- Before a question can be answered, the hearing officer must determine whether it is relevant and explain any decision to exclude a question that is not relevant:
 - Mechanics: question posed, pause, hearing officer makes relevancy determination, and, if permitted, question answered
 - Can decide that duplicative questions are not relevant
 - Questions that assume facts not in evidence, are prejudicial, or appear misleading are to be permitted, if relevant
- Can permit discussion about the relevancy determination
 - otherwise the parties can address it through an appeal
- Must create an audio recording, audiovisual recording, or transcript of the live hearing and make it available to the parties for review and inspection

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Trauma Informed

Trauma Informed Decision Making Case Study

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Trauma Informed Education

Experience and research reveal:

- Sexual assault on campus often involves people who know each other
- Complainants frequently blame themselves
- Complainants commonly delay in reporting or do not report
- Cases often involve friendship groups
- Different people respond to trauma differently
- Alcohol is frequently involved
- Appearing to display symptoms of trauma does not mean that trauma was suffered

Trauma Informed Decision Making Case Study

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Neurobiology of Sexual Assault

The Neurobiology of Sexual Assault

Rebecca Campbell, Ph.D.
Professor of Psychology, University of Pennsylvania

Health Media Search

Go to the end, last page or use the navigation of sexual assault

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Neurobiology of Sexual Assault

The Neurobiology of Sexual Assault

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Neurobiology of Sexual Assault:
Trauma and Impact on the Brain

Brain Regions Impacted by Trauma

CORPUS CALLOSUM
A large band of nerve fibers connects the left and the right hemispheres of the brain.

THALAMUS
The major station for most information going into the brain.

HYPOTHALAMUS
Regulates the hormones, food, pressure and body temperature.

PITUITARY GLAND
The master gland of the body produces the hormones and also influences the hormonal production of the other glands in the body.

AMYGDALA
Regulates the heartbeat and other neural functions and processes the emotions.

HIPPOCAMPUS
Helps establish long-term memory in regions of the cerebral cortex.

SPINAL CORD

BASAL GANGLIA
A control system for movement and cognitive functions.

PONS
Control of breathing, heartbeat, blood flow and digestion.

MEDULLA OBLONGATA

CEREBELLUM
Essential for coordination of movement.

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Neurobiology of Sexual Assault: Trauma and Impact on Memory

Memory Processes Impacted by Trauma

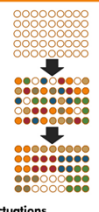
Hippocampus processes information into memories

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

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

Both structures are VERY sensitive to hormonal fluctuations

SOURCE: Southwick et al., 2005



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Trauma Informed | Decision Making | Case Study

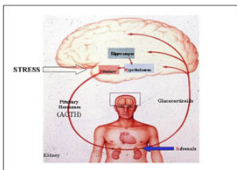
Neurobiology of Sexual Assault: Trauma and Impact on Memory

Like These . . .

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

THESE HORMONES IMPAIR MEMORY CONSOLIDATION

SOURCE: Southwick et al., 2005



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Neurobiology of Sexual Assault: How Does This Play Out in Sexual Assault?

What Happens During A Sexual Assault

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

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



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Trauma Informed | Decision Making | Case Study

Neurobiology of Sexual Assault: How Does This Play Out in Sexual Assault?

What Happens During A Sexual Assault

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

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

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Neurobiology of Sexual Assault: How Does This Play Out in Sexual Assault?

What Happens During A Sexual Assault

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graph TD
    A[Amygdala Detects Threat] --> B[Activates Hypothalamus]
    B --> C[HPA Axis Kicks In Hormonal Flood]
    C --> D[Can Trigger a Complete "Shut Down" in the Body]
  
```

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

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Neurobiology of Sexual Assault: How Does This Play Out in Sexual Assault?

Tonic Immobility (TI)

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

SOURCE: Foa et al., 2007; Calton et al., 1993; Heldt et al., 2005

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Recap

- Flight/Flee – Try to run or get away from the threatening situation
- Fight – Body tries to fight back against the traumatic event
- Limits Rational Thought Process
- Flat Affect
- Freeze – Unable to move or fight back

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Neurobiology of Sexual Assault: What Happens in Terms of Memory?

What Happens During A Sexual Assault

The Neurobiology of Sexual Assault
 Rebecca Campbell, Ph.D.
 Rutgers State University

Think it over... what about the function of stress? Let's not get up on the wrong side of the neurobiology of stress and its relationship about happening for the rest of time of the memory and capture process.

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Neurobiology of Sexual Assault: What Happens in Terms of Memory?

What Happens During A Sexual Assault

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  graph TD
    A[Increased Stress Hormones] --> B[Impaired Functioning in Hippocampus]
    B --> C[Memories Fragmented]
    C --> D[Memory Recall Can Be Slow & Difficult]
    D --> E[Events of the Assault CAN Be Recalled Accurately]
  
```

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

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

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Neurobiology of Sexual Assault: What Does This Mean For Practitioners?

- Neurobiological changes may result in flat affect or perceived “strange” emotions
- Neurobiological changes may impact memory consolidation and recall
 - Slowed recall
 - Disorganized and fragmented
 - Memory piecemeal
 - If alcohol was involved the memory may not be retrievable

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Related Concepts to Consider

- Secondary Victimization
 - “the victim-blaming attitudes, behaviors, and practices that exacerbate sexual assault survivors’ trauma” or cause them to relive it
 - “made them feel guilty, depressed, anxious, distrustful of others, and reluctant to seek further help”
 - questions about decision-making, alcohol consumption, sending mixed signals, or appearance/clothing
- Use of sensory information to help recall memory affected by experiencing trauma
 - Asking about what the person could see, smell, taste, feel, or hear

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Thank You

Womble Bond Dickinson gratefully acknowledges the U.S. Department of Justice, Office of Justice Programs, National Institute of Justice, for allowing us to reproduce, in part or in whole, Dr. Rebecca Campbell’s *The Neurobiology of Sexual Assault*. The opinions, findings, and conclusions or recommendations expressed in this video 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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The Decision-Making Phases

Decision Making
Case Study

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Decision-Making Phases

- 1) Prepare for hearing
- 2) Conduct hearing
- 3) Make Determination
- 4) Sanctions and remedies
- 5) Draft notice of determination
- 6) Appeals

Decision Making
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Decision-Making Phases

- 1) Prepare for hearing
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Decision-making Phases: Prepare for Hearing

Preparation (Procedural):

- Complete decision-maker training
- Complete institution-specific training on policies and hearing technology
 - Know who will have what technology responsibilities during the hearing
- Understand the roles and procedural rules of order for the hearing
 - Know who the hearing participants are and each person's role
 - Hearing panel? Single hearing officer? Chair?
 - Know the hearing mechanics: opening and closing statements? Direct exam? Investigator testify?
 - Who will make relevancy determinations and what are the expectations or requirements?
 - Who is charged with enforcing procedural rules?
 - Who coordinates witnesses and testimony?
 - Who pushes hearing along from one action to the next?
 - Time limits?

Decision Maker Case Study

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Decision-making Phases: Prepare for Hearing

Preparation (Procedural):

- Know decorum requirements imposed by institution, such as
 - Participants required to be respectful and professional
 - One person speaks at a time
 - Do not interrupt testimony or hearing officer
 - No additional recordings
 - Wait for hearing officer to rule before answering questions
- Cross-examination to be respectful, non-abusive, and cannot be used to intimidate party or witness
- Parties are permitted to consult with advisor during hearing (Title IX requirement)
- Roles of advisors

Decision Maker Case Study

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Decision-making Phases: Prepare for Hearing

Preparation (Procedural):

- Will the hearing be a "closed record"
- Know if there are limits to the evidence to be presented
 - Only "directly related" evidence collected by the investigator?
 - Only evidence contained in the investigative report?
 - Permitted to present new evidence at the hearing?
- Who is responsible for having all "directly related evidence" available to use at the hearing
- What is the process, if any, for deciding party objections about directly related evidence not included in the final report
- How are decisions about who testifies, in what order made
- Pre-hearing conference?

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Decision-making Phases: Prepare for Hearing — Prehearing Conferences

- Not required by the Regs
- Can be in-person/virtual with party and advisor
- Cover the procedural basics
 - Use of technology
 - Roles: hearing officers, parties, advisors, witnesses, investigator, and hearing coordinator
 - Decorum
 - Cross-examination
 - Conflicts
 - Privacy/Confidentiality/Limits to use of information
- Scope of and procedures for introduction of evidence
- Preview of cross-examination questions or other evidence?
- Confirm participation in hearing
- Find out if the party has an advisor or will need one (required for cross)
- Best person to convene the conference? (not the hearing chair?)

Decision Making Case Study

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Decision-making Phases: Prepare for Hearing

Preparation (Substantive):

- Review file, which should include:
 - Notice of investigation
 - Final Investigative Report and exhibits ("directly related evidence"?)
 - Party responses (and anticipate arguments for hearing)
 - Policies and definitions—know the elements
 - Pertinent pre-hearing conference information
- Review file....
- Determine what factual questions need to be decided
 - Evaluate all related, existing evidence
 - Identify consistencies and inconsistencies in material information
 - Identify information gaps and sources to fill them
- Determine what witnesses you want to question
- Draft questions (and confer with other panelists and/or counsel)

Decision Making Case Study

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Decision-making Phases: Prepare for Hearing

Preparation (Substantive):

Relevant evidence:

- "The final regulations do not define relevance, and the ordinary meaning of the word should be understood and applied."
- "focus investigations and adjudications on **evidence** pertinent to **proving whether facts material** to the **allegations** under investigation **are more or less likely to be true** (i.e., on what is relevant)."

Decision Making Case Study

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Decision-making Phases: Prepare for Hearing

Preparation (Substantive):

- Know your Policy on the "suppression provision" of the Regs that was vacated by the *Cardona* court and :
 - "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.
- OCR affirmed that "a decision-maker at a postsecondary institution may now consider statements made by parties or witnesses that are otherwise permitted under the regulations, even if those parties or witnesses do not participate in cross-examination at the live hearing, in reaching a determination regarding responsibility."

Decision Making
Cross-Exam

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Decision-making Phases: Prepare for Hearing — Opening Script

- The basics:
 - Date and time
 - Parties
 - Closed hearing
 - Note the recording (confirm they are not? Pan the room?)
 - Purpose of the hearing
- Explain hearing officer or panel's role
- Rules of decorum (see previous slide)
- Policy against retaliation
- Confirm review of contents of investigative report and role of the report in the hearing (do not need to repeat the information)

Decision Making
Cross-Exam

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Decision-making Phases: Prepare for Hearing — Opening Script

- Describe hearing procedures and order
 - Openings; direct/narrative; questions of parties and witnesses; closings?
 - Investigator testimony?
 - Advisors and hearing officer(s) to ask questions
 - Opportunity for party to explain relevancy of some questions (or is the decision final)
 - Roles of advisors
 - Scope of evidence at hearing
 - Time limits
 - Breaks
 - Amnesty

Decision Making
Cross-Exam

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Decision-making Phases: Prepare for Hearing — Opening Script for Testimony

Prior to any party or witness testimony:

- Script transitions for each phase of the hearing
- State who they are or ask that they identify themselves
- Advise of recording and confirm that they are not
- Explain who will ask them questions and the process (pause before answering)
- Explain that may be difficult questions about sensitive matters
- Ask them not to read anything into the questions
- Tell them they can ask for a break, if needed
- Tell them to let you know if any question is unclear, confusing, or difficult to understand
- For witnesses, instruct them to keep information confidential
- Reminder of any amnesty provision
- Ask for their commitment to tell the truth

Decision Making Case Study

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Decision-making Phases: Prepare for Hearing — Closing Script for Testimony

Prior to any party or witness being dismissed:

- **Ask the parties if they have any further questions for the witness**
- Reminders about confidentiality and retaliation
- Thank witnesses for their time

Decision Making Case Study

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Decision-making Phases: Prepare for Hearing — Closing Script for Hearing

- Hearing concluded
- If applicable, provide information related to the next phase (sanctions?)
- Communicate any additional deadlines
- Explain your next steps
- Reminder about retaliation policy
- Contact appropriate officials with any further questions about the process
 - Hearing coordinator
 - Title IX Coordinator

Decision Making Case Study

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Case Study





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Case study

Case Study

The Title IX Coordinator has received notification from the University's online reporting system. Celia alleges that Ryan had sexual intercourse with her and had her perform oral sex on him while she was blacked out.

On August 17, 2021, Celia submitted a complaint alleging that Ryan sexually assaulted her. In her complaint, Celia alleged that Ryan had vaginal sex with her and had her perform nonconsensual oral sex on him on May 8, 2021.




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Case study

Case Study

Excerpt from Amended Notice of Allegations:



Celia submitted a formal complaint of alleged nonconsensual sexual penetration (vaginal and oral) with her and nonconsensual fondling of her breasts and Ryan's penis in her room in the University's apartment complex.

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Case study

Case Study: Definition of Sexual Assault

- The term “**sexual assault**” includes the following actual or attempted acts:
 - **Rape (except Statutory Rape):** The carnal knowledge of a person, without the consent of the victim, including instances where the victim is incapable of giving consent because of their age or because of their temporary or permanent mental or physical incapacity.

Case study

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Case Study: Definition of Sexual Assault (cont.)

- **Sodomy:** Oral or anal sexual intercourse with another person, without the consent of the victim, including instances where the victim is incapable of giving consent because of their age or because of their temporary or permanent mental or physical incapacity.
- **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 their age or because of their temporary or permanent mental or physical incapacity.

Case study

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Case Study: Definition of Consent

- Sexual activity of any kind requires “consent,” which consists of the following:
 - Consent means clear and voluntary agreement between participants to engage in the specific act.
 - Consent requires a clear “yes,” verbal or otherwise; it cannot be inferred from the absence of a “no.”
 - Consent must be ongoing throughout a sexual encounter and can be revoked at any time.
 - Consent to some sexual acts does not necessarily imply consent to others.
 - Past consent does not mean ongoing or future consent.

Case study

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Case Study: Definition of Consent (cont.)

- Consent cannot be obtained by pressure, threats, coercion or force of any kind, whether mental or physical. Consent means actually agreeing to the specific sexual activity, rather than merely submitting as a result of pressure, threats, coercion or force of any kind, whether mental or physical.
- Consent cannot be obtained from an individual who is under the legal age of consent.
- Consent to engage in sexual activity with one person does not imply consent to engage in sexual activity with another.

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Case Study: Definition of Consent and Incapacitation

- Consent cannot be obtained from someone who is unconscious, asleep, physically helpless, or **incapacitated** (including, but not limited to, mentally incapacitated). A person is **incapacitated** when they are unable to make a rational decision because the person lacks the ability to understand their decision. A person who is **incapacitated** is unable to consent to sexual activity. A person can become **incapacitated** as a result of physical or mental disability, involuntary physical constraint, being asleep or unconscious, or consumption of alcohol or other drugs. A person can consume alcohol and/or drugs without becoming **incapacitated**. A person who engages in sexual activity with someone that person knows or reasonably should know is **incapacitated** does not have consent and will be found responsible for a Policy violation.

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Case Study: Definition of Retaliation

- The term "retaliation" means intimidating, threatening, coercing, harassing, taking adverse employment or educational action against, otherwise discriminating against an individual in any way, and/or interfering with any right or privilege secured by Title IX or its implementing regulations, including through online communications and activities such as social media, because the individual made a report or complaint under this Policy or these Procedures, participated in any way in the investigation or resolution of such a report or complaint, opposed conduct that they reasonably believed to be prohibited under this Policy, these Procedures, or applicable law regarding discrimination or harassment, or exercised any right or responsibility under this Policy or these Procedures.

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Case Study: Definition of Retaliation (cont.)

- Retaliation includes conduct that is reasonably likely to deter an individual from making a complaint or report under this Policy or from participating in the investigation or resolution of a complaint or report, or from opposing conduct that they reasonably believe to be prohibited under this Policy, these Procedures, or applicable law regarding discrimination or harassment.

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Case Study

Review the Final Investigative Report and Party Responses

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So . . .

- **What issues will you have to ultimately decide in this case?**
- **Who do you want to hear from at the hearing?**



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Decision-Making Phases

- 1) Prepare for hearing
- 2) **Conduct hearing**
- 3) Make Determination
- 4) Sanctions and remedies
- 5) Draft notice of determination
- 6) Appeals

Decision Making Case Study

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Decision-Making Phases: Conduct Hearing

Suggested practices:

- Follow your scripts
- Follow your institution's processes and procedures for the phases of the hearing absent unusual circumstances
- Ensure whomever you might need is reachable (Title IX Coordinator, counsel, back-up advisors, IT assistance)
- Be consistent in procedures and in-hearing decisions:
 - Relevancy determinations
 - Use of evidence
 - Breaks
 - Your manner and demeanor
 - Any latitude to parties or advisors should be equal
- ***If you are concerned about what to do in the moment, pause the proceedings to seek assistance***

Decision Making Case Study

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Decision-Making Phases: Conduct Hearing — Questions by Advisors and Relevancy

Follow the same process for each question:

- Question asked
- Witness must pause (you will have to remind them)
- Determine and communicate whether the question is relevant and can be answered
 - "The basic test for relevance is whether the question posed is probative of the question of responsibility. In determining whether a question is relevant, the Department explains that the decision-maker must focus on evidence pertinent to proving whether facts material to the allegations under investigation are more or less likely to be true."
 - If relevant, use consistent form: e.g., "you can answer," "please answer," "go ahead," or "OK" (notify parties/witnesses/advisors)

Decision Making Case Study

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Decision-Making Phases: Conduct Hearing — Questions by Advisors and Relevancy

Can exclude/deem the question not relevant (must articulate reasons) if:

- Harassing
- Duplicative/repetitive
- Irrelevant (remember that you can later decide the appropriate weight)
 - **Form language:** "it is sufficient, for example, for a decision-maker to explain that a question is irrelevant because... the question asks about a detail that is not probative of any material fact concerning the allegations."
 - Know whether you are permitted to allow each party to weigh-in on the issue (**recommended**)
- Regs deem them irrelevant/prohibit them:
 - Regarding prior sexual behavior or predisposition of Complainant (unless offered to prove consent or to show someone other than respondent committed the alleged conduct)
 - **Form language:** "it is sufficient, for example, for a decision-maker to explain that a question is irrelevant because the question calls for prior sexual behavior information without meeting one of the two exceptions."
- Regs prohibit them
 - Privileged records or medical/treatment records without consent or written authorization

Decision Maker
Case Study

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Decision-Making Phases: Conduct Hearing — Questions by Advisors and Relevancy

The Regs do not permit you to categorically exclude questions that:

- Are compound
- "Assume facts not in evidence"
- Lack foundation
- Are unreliable or hearsay
- Are unclear
- Are prejudicial
- Hearsay

But:

- You are charged with assigning the appropriate weight to the evidence

Decision Maker
Case Study

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Decision-Making Phases: Conduct Hearing — Convey Impartiality

Beyond **being** impartial and not prejudging, take steps to help **communicate** your impartiality :

- Avoid confusion: explain and establish your role clearly and early and return to it as needed throughout the hearing
 - Remember, you are not a judge and this is not a courtroom
- Demonstrate impartiality through neutral language
 - Do not use conclusory language about contested or unknown facts
 - Do not appear to take sides or even agree with the party/witness account
 - Use terms "account" or "experience," not "story" or "version"
- Maintain your calm demeanor
 - Do not react or supply energy to the information received or generally (words or expressions/body language)
 - Stay engaged, visually and verbally (as appropriate)

Decision Maker
Case Study

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Decision-Making Phases: Conduct Hearing — Asking Questions

In advance, determine the critical issues:

- What do I need to know
- Why do I need to know it
- How do I obtain the information

Decision Making Case Study

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Decision-Making Phases: Conduct Hearing — Asking Questions

- Better to use open-ended questions, whenever possible
- Listen carefully to the answers to know what follow-up questions are necessary
- Be careful about relying on party responses to poorly worded questions by advisors on critical issues
- Seek details to close information gaps
- Seek clarity for information or evidence that is vague or non-specific
- Know the difference between information that is necessary and information that might satisfy curiosity (problematic)
- Understand the source of the information (personal knowledge v. hearsay)
- Be very careful about relying on demeanor

Decision Making Case Study

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Live Hearing

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Case Study



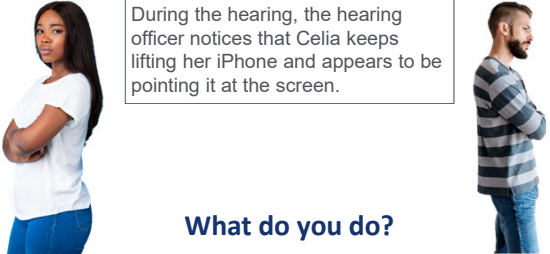
After you complete the opening scripts, the hearing begins with opening statements. Celia, as the Complainant, goes first. You let her know that she can begin but Celia's advisor starts to deliver the opening statement.

What should you do?

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Case Study



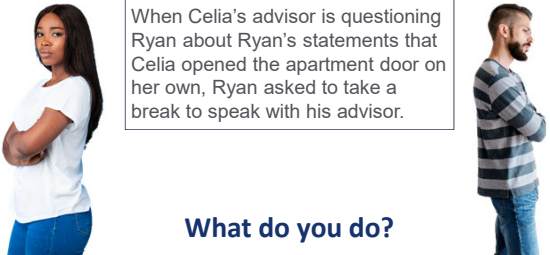
During the hearing, the hearing officer notices that Celia keeps lifting her iPhone and appears to be pointing it at the screen.

What do you do?

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Case Study



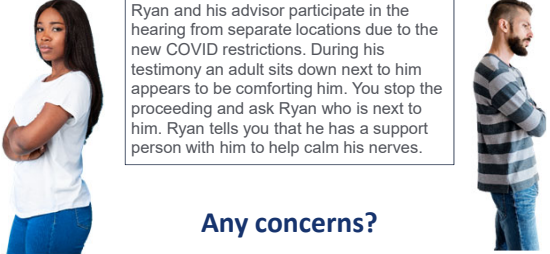
When Celia's advisor is questioning Ryan about Ryan's statements that Celia opened the apartment door on her own, Ryan asked to take a break to speak with his advisor.

What do you do?

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Case Study



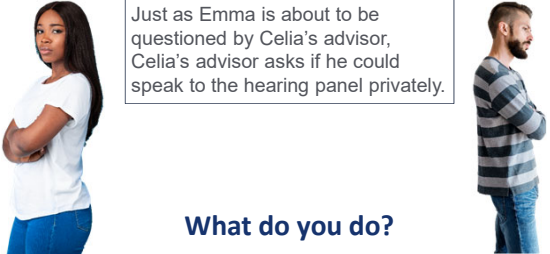
Ryan and his advisor participate in the hearing from separate locations due to the new COVID restrictions. During his testimony an adult sits down next to him appears to be comforting him. You stop the proceeding and ask Ryan who is next to him. Ryan tells you that he has a support person with him to help calm his nerves.

Any concerns?

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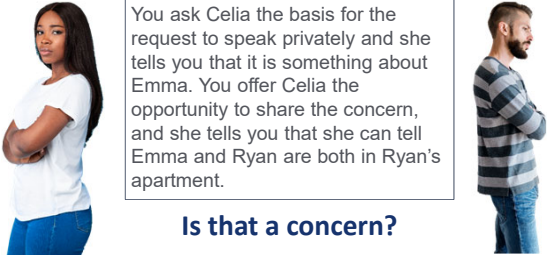
Just as Emma is about to be questioned by Celia's advisor, Celia's advisor asks if he could speak to the hearing panel privately.

What do you do?

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Case Study




You ask Celia the basis for the request to speak privately and she tells you that it is something about Emma. You offer Celia the opportunity to share the concern, and she tells you that she can tell Emma and Ryan are both in Ryan's apartment.

Is that a concern?


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When it's Sophie's turn to answer questions, she tells you that she prepared a written statement she would like to read.




She should probably read it before the questioning begins, right?

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During Bryce's questioning, Celia's advisor asks him for more information about his interview statements that Ryan had a reputation for sleeping with band members. Ryan slams his hand on his desk and yells at the advisor to stop.




What do you do?

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Bryce tells you that he is not willing to answer any more questions.



What do you do?

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Decision-Making Phases

- 1) Prepare for hearing
- 2) Conduct hearing
- 3) Making Determinations**
- 4) Sanctions and remedies
- 5) Draft notice of determination
- 6) Appeals

Decision Making Case Study 118

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Phase: Decision-Making — Making Determinations

Fundamentals:

- Are you making the decision alone or with others?
 - Know the mechanics of your deliberations
 - What records, if any for the deliberations
- Following the hearing, determine whether additional information or investigation is needed
 - How is that decided
 - What process is in place
 - With whom would you confer

Decision Making Case Study 119

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Phase: Decision-Making — Making Determinations

Fundamentals:

- Burden of proof is on the institution, not on the parties
- Presumption of not responsible
- ***Must objectively evaluate and weigh all relevant evidence necessary to independently reach a determination regarding responsibility and, if applicable, any appropriate remedies or sanctions***

Decision Making Case Study 120

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Phase: Decision-Making — Making Determinations

Breadth of potential relevant evidence:

- Statements, accounts, and testimony (direct and indirect)
- Texts, chats, and other electronic messages/communications
- Photos and videos
- Voicemails
- Recordings
- Emails
- Social media posts
- Surveillance video
- Access data: Wi-Fi, key card
- Police report
- Medical and treatment records (must have a written waiver)
- Employment/student records
- Diagrams, maps, and drawings

Decision Making
Cross-Examination

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Phase: Decision-Making — Making Determinations

Evidence that is always **irrelevant** under **Title IX**:

- Complainant's sexual predisposition or prior sexual behavior (unless one of the two exceptions apply)
- Medical, psychological, or treatment records (without voluntary, written consent)
- Information protected by legally recognized privilege without a waiver
- ~~Party or witness statements that have not been the subject of cross-examination at a live hearing~~
- *Know your current policy*
- *This applies broadly, including to not answering just one question posed by the advisor (intentionally or unintentionally)*

Decision Making
Cross-Examination

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Phase: Decision-Making — Making Determinations

For Title IX, cannot categorically exclude evidence, including:

- Lie detector results
- Expert reports
- Medical records, including rape kits (but must have written consent)
- Character evidence
- Prior bad acts
- Witness statements submitted by party or their advisor
- *Unduly prejudicial/evidence "whose probative value is substantially outweighed by the danger of unfair prejudice"*

BUT: you are permitted to assign the proper weight to such evidence

Decision Making
Cross-Examination

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Phase: Decision-Making — Making Determinations

Keep in mind what must be decided:

- Make a decision about whether the policy was violated
- For sexual harassment: determine what conduct occurred and whether it was welcomed or unwelcomed
- For sexual contact: what conduct occurred and was it with consent or without consent
- Using the applicable **standard of evidence**
- With rationale for finding on each allegation
- Sanctions (institution-specific)
- Remedies (institution-specific)

Decision Making Case Study

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Phase: Decision-Making — Making Determinations

Standard of evidence:

Preponderance: more likely than not that respondent violated the policy (50% and a feather) or insufficient evidence to conclude it is more likely than not

Clear and convincing: “highly probable” that respondent violated the policy or insufficient evidence to conclude it is “highly probable”

- Under Title IX, must apply the same **standard of evidence** to all Formal Complaints of sexual harassment

Decision Making Case Study

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Phase: Decision-Making — Making Determinations

Determine **weight** to be given to relevant evidence:

- Regs require consideration of both inculpatory and exculpatory—what does that mean?
 - Weigh evidence that supports the finding/conclusion
 - Weigh certain evidence that does not support the finding/conclusion—acknowledge and address it (including witness or party statements)
- Will need to explain factors for some evidence “outweighing” other evidence—what are the reasons?
- Employ common sense – does the evidence make sense?
 - On its own and in reference to other evidence
- Matters that feel like one person’s word versus another’s? How do you evaluate **credibility?**

Decision Making Case Study

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Phase: Decision-Making — Making Determinations

Credibility:

- Credibility cannot be based on status (complainant, respondent, or witness)
- Is there corroborating evidence and information
 - Objective documentation
 - Contemporaneous accounts and information
- Is it based on firsthand knowledge—how did the person obtain the information
- Is the information “plausible”? Common sense?
- How strong is their recollection or confidence in the accuracy of the information
- Was the person forthcoming with the material information

Decision Making Case Study

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Phase: Decision-Making — Making Determinations

Credibility (cont.):

- Does the person have a reason to not be truthful about that information
 - In both directions: self-serving statements and statements against interest (if the fact is harmful to the person but they disclose it anyway)
- Relationship of person providing information to each of the parties
- Other factors impacting believability?
 - Prior bad acts or pattern of this conduct
 - Substantially similar and distinct conduct? Allegations or determinations?
 - Timing?
- **Demeanor? (risky)**

Decision Making Case Study

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Make your Determination About Whether the Policy Was Violated and Provide Rationale

Case Study

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Decision-Making Phases

- 1) Prepare for hearing
- 2) Conduct hearing
- 3) Make Determination
- 4) Sanctions and remedies**
- 5) Draft notice of determination
- 6) Appeals

Decision Making Case Study 130

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Phase: Decision-Making — Sanctions and Remedies

- Know your role
- Separate the finding on responsibility from the sanctions and remedies
 - If credibility is part of the sanctions determination, whomever makes credibility determinations should decide sanctions
- Know your process
 - Based solely on the investigation and hearing files?
 - Parties to submit impact statements?
- Sanctions and remedies should align with the determination
 - "close evidentiary calls" do not warrant lesser sanctions
 - evidentiary standard should not be raised because of the severity of the sanctions
- Designed to stop the discriminatory conduct, prevent its recurrence, and address its effects

Decision Making Case Study 131

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Phase: Decision-Making — Sanctions and Remedies

- Range of possible sanctions should be listed in your policy (required by VAWA)
 - Requires the sanctions to be specific, including the type and length of suspension and reinstatement requirements
 - Sanctions must be included in notice of determination
 - Any information relied upon by decision-makers must be available to parties
- Sanctions must be included in the singular Notice of Determination (Title IX)

Decision Making Case Study 132

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Phase: Decision-Making — Sanctions and Remedies

Potential Considerations for Sanctions:

- The specific misconduct at issue
- The circumstances accompanying any lack of consent (e.g., force, additional violence, threat, coercion, intentional incapacitation, etc.);
- Respondent's state of mind (bias-motivated, reckless, negligent, etc.);
- Respondent's prior disciplinary history;
- The safety of the University community; or
- Impact or mitigation statement by one or both parties

Decision Making Case Study

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Phase: Decision-Making — Sanctions and Remedies

Common sanctions options:

- Reprimand/warning;
- Changing the Respondent's academic or employment schedule;
- Disciplinary probation;
- Revocation of honors or awards;
- Loss of privileges;
- Imposition of conditions of employment;
- Restricting access to facilities or activities, including student activities and campus organizations;
- Mandatory training;
- Service hours;

Decision Making Case Study

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Phase: Decision-Making — Sanctions and Remedies

Sanctions Options (cont.):

- Alcohol and/or drug assessment or counseling;
- Issuing a "no contact" order to the Respondent or requiring that an existing order remain in place
- Moving the Respondent's residence on campus;
- Dismissal, termination, or restriction from employment;
- Ineligibility for hire or rehire;
- Removal from student housing;
- Demotion or other removal from a management, supervisory, or leadership role(s);
- A full or partial ban from campus (either limited time or indefinite);
- Transcript notations;

Decision Making Case Study

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Phase: Decision-Making — Sanctions and Remedies

Sanctions Options (cont.):

- Deferred suspension;
- Restriction from sponsored or affiliated events;
- Pay reduction;
- Loss of raise;
- Loss of supervision or oversight duties;
- Referral for further sanctioning pursuant to applicable policies and/or procedures;
- Employment record notations;
- Suspension;
- Expulsion; and
- Revocation of degree.

Decision Making
Campus Security

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Phase: Decision-Making — Remedies

Remedies:

- Often resemble supportive measures and extend them when the Respondent is not suspended/expelled but are disciplinary
- Restore Complainant's access to education programs and activities
- Benefit the community
- Common Remedies:
 - No contact order (directed to Respondent)
 - Academic/employment support, services, flexibility, and adjustments necessary (backward and forward looking)
 - Counseling and medical services
 - Loss of privileges or participation for Respondent
 - Limited access to campus or facilities for Respondent
 - Campus escorts
 - For the community: trainings, surveys (e.g. Greek life), and education

Decision Making
Campus Security

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Decision-Making Phases

- 1) Prepare for hearing
- 2) Conduct hearing
- 3) Make Determination
- 4) Sanctions and remedies
- 5) Draft notice of determination
- 6) Appeals

Decision Making
Campus Security

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Phase: Decision-Making — Draft Notice of Determination

Title IX and VAWA require a written Notice of Determination (policy determines whether it is required for non-Title IX sexual harassment)

Format of Notice of Determination (which aligns with Regs):

- Summary of allegations
- Summary of procedures
- Policy Provisions Section
- Findings of Fact
- Decision
- Rationale for the Decision
- Sanctions, Rationale, and Remedies
- Appeal Process

Decision Making Case Study

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Phase: Decision-Making — Draft Notice of Determination

Title IX requires that it include:

- **Identification of allegations potentially constituting sexual harassment**
 - Summarize the allegations contained in the Formal Complaint
 - All allegations, for both parties, in a factual and concise manner
- **Description of the procedural steps from formal complaint through determination, including all:**
 - **notifications to parties,**
 - **interviews with parties and witnesses,**
 - **site visits,**
 - **methods used to gather other evidence,**
 - **any hearing held**
- Include information about who was present and their roles

Decision Making Case Study

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Phase: Decision-Making — Draft Notice of Determination

Policy Provision Section:

- Identify the policies at issue
- Include applicable definitions
 - Regarding conduct (e.g., sexual assault, consent, incapacitation) and the elements
 - Standard of proof
 - Burden of proof
 - Presumption of not responsible
 - Retaliation, if applicable

Decision Making Case Study

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Phase: Decision-Making — Draft Notice of Determination

- Findings of fact supporting the determination
- Conclusions regarding application of policy to the facts
- Statement of, and rationale for, the result as to each allegation, including determination regarding responsibility, sanctions, and whether remedies designed to restore or preserve equal access to education program/activity to complainant

In practice:

- Discuss of all the material facts;
- Apply the policy definition and standard of proof to the facts;
- To reach conclusions that are;
- Explained through the evidence available: how it was *weighed*, and how it supports, or does not support, the outcome (including credibility)

Decision Making Case Study

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Phase: Decision-Making — Draft Notice of Determination

Findings and Rationale (cont.)

- Sanctions and rationale
 - And procedure for failing to abide by them
- Remedies provided
 - Notify Complainant of the remedies
 - Notify Respondent of whether remedies (generally) have been provided (Title IX provides this FERPA exception) but not the details
 - For VAWA, there is no FERPA exception to permit disclosure of information about remedies that do not involve the Respondent (like no contact orders)

Decision Making Case Study

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Phase: Decision-Making — Draft Notice of Determination

- Procedures and basis for appeal
 - Explain the process, general requirements, roles, and the timeframes
 - Permissible grounds for appeal
 - How to file it
 - On what timeline
 - To be decided by whom (by name, title, or otherwise)
- Plus any other grounds listed in the policy

Decision Making Case Study

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Phase: Decision-Making—Draft Notice of Determination

Delivery of the Notice of Determination (Title IX):

- Know in advance who is responsible for delivering the notice to the parties
- Must be a written notice
- Must be provided to the parties simultaneously

VAWA crimes:

- Simultaneous notice, when the decision becomes final
 - AND for any change to the results prior to it becoming final

Effective Date (Title IX Regs):

- Final at conclusion of appeal or, if no appeal is filed, on the date on which the appeal would no longer be considered timely

Decision Making Case Study

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Decision-Making Phases

- 1) Prepare for hearing
- 2) Conduct hearing
- 3) Make Determination
- 4) Sanctions and remedies
- 5) Draft notice of determination
- 6) Appeals

Decision Making Case Study

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Phase: Decision-Making — Appeals

- Must be offered to both parties
- Appeal bases must include:
 - Procedural irregularity that affected the outcome
 - New evidence that was not reasonably available at the time the determination regarding responsibility (or dismissal) was made, that could affect the outcome
 - Title IX Coordinator, Investigator, 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
- Plus any other grounds listed in the policy

Decision Making Case Study

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Phase: Decision-Making — Appeals

Additional Requirements (Title IX):

- Notify the other party in writing when an appeal is filed and implement appeal procedures equally for both parties
- Decision-maker for appeal cannot be:
 - Decision-maker on the determination of responsibility or dismissal
 - Investigator who investigated
 - Title IX Coordinator
- Comply with prohibitions on bias and conflict of interest
- Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome
- Issue a written decision describing the result of the appeal and the rationale
- Provide the written decision simultaneously to the parties

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Phase: Decision-Making — Appeals

VAWA:

- No appeal requirement but, if provided, it must be offered equally to the parties with the same procedural protections as provided throughout the process

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Recordkeeping — Title IX

Must maintain certain records for seven years, including:

- For each sexual harassment investigation including any determination regarding responsibility and any audio or audiovisual recording or transcript required by the Regulations, any disciplinary sanctions imposed on the Respondent, and any remedies provided to the complainant designed to restore or preserve equal access to the education program or activity
- Any appeal and the result
- Informal resolution
- Supportive measures
- Training materials for Title IX Coordinators, Investigators, decision-makers, and those who facilitate informal resolution (and post on website)
- Actions taken in response to a report or formal complaint sufficient to document why the response was not deliberately indifferent

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Upcoming Training in the Series

- October 21, 2021: Title IX Hearing Advisor Training
- **Trainings available on demand:**
 - Title IX/VAWA Investigator Training
 - Title IX Hearing Officer and Decision-Maker Training

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