

13 Jan 22



**D. STAFFORD**  
& ASSOCIATES

# Title IX Overview

**Presented by:**

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## 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 Clerical 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.



**Adrienne Meador Murray, Executive Director,**  
**Equity Compliance and Civil Rights Services**



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 serves as the Director of Training and Compliance Activities and D. Stafford & Associates (DSA) where she currently serves as Executive Director, Equity

Compliance and Civil Rights Services 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 for DSA, 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



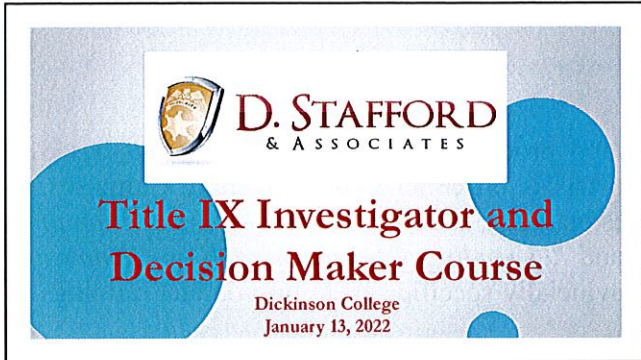
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Compliance; drafts institutional sexual misconduct policies and procedures; and conducts campus-based trainings pertaining to the resolution of sexual misconduct offenses on college and university campuses. Murray frequently presents at regional and 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.



**D. STAFFORD & ASSOCIATES**

# Title IX Investigator and Decision Maker Course

Dickinson College  
January 13, 2022

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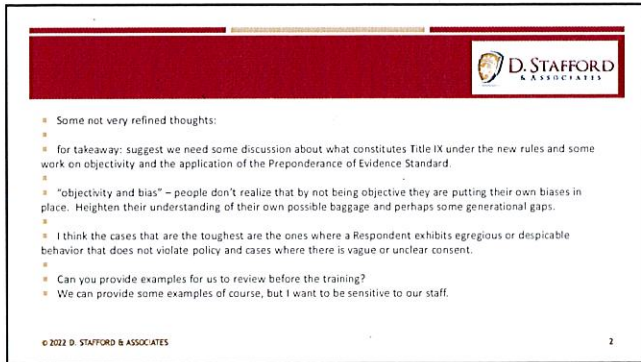
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- Some not very refined thoughts:
- for takeaway: suggest we need some discussion about what constitutes Title IX under the new rules and some work on objectivity and the application of the Preponderance of Evidence Standard.
- "objectivity and bias" – people don't realize that by not being objective they are putting their own biases in place. Heighten their understanding of their own possible baggage and perhaps some generational gaps.
- I think the cases that are the toughest are the ones where a Respondent exhibits egregious or despicable behavior that does not violate policy and cases where there is vague or unclear consent.
- Can you provide examples for us to review before the training?
- We can provide some examples of course, but I want to be sensitive to our staff.

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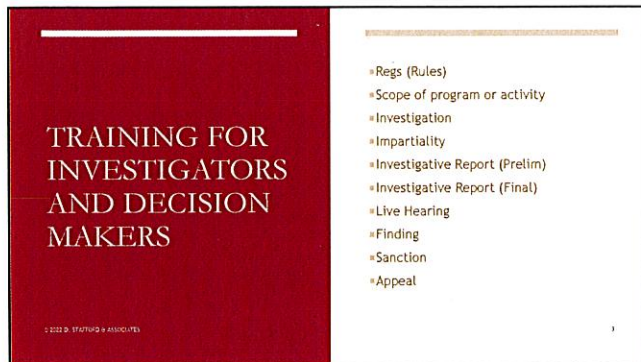
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## TRAINING FOR INVESTIGATORS AND DECISION MAKERS

- » Regs (Rules)
- » Scope of program or activity
- » Investigation
- » Impartiality
- » Investigative Report (Prelim)
- » Investigative Report (Final)
- » Live Hearing
- » Finding
- » Sanction
- » Appeal

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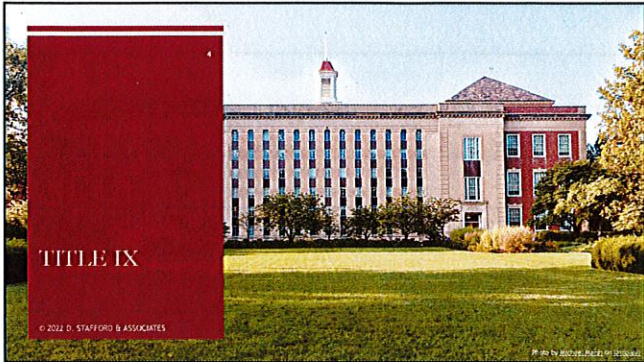
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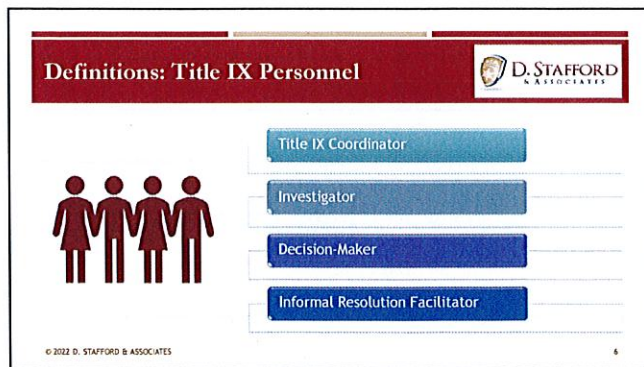
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## Definitions: Advisor



- Parties may have an advisor of choice
- Can be accompanied to any related meeting or proceeding by the advisor of their choice
- Can't limit the choice of advisor
- Institutions may establish equally applied restrictions regarding the extent to which the advisor may participate in the proceedings

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## Definitions: Key Terms



Actual Knowledge

Formal Complaint

Supportive Measures

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## Report vs. Formal Complaint



Report



Formal Complaint

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**Definition of Sexual Harassment** 

*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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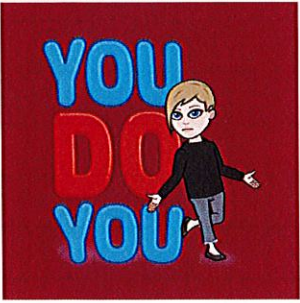
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**Definitions - Consent**



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

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**Retaliation**

- Cannot intimidate, threaten, coerce, or discriminate others
- MAY use the same grievance procedure
- First Amendment considerations

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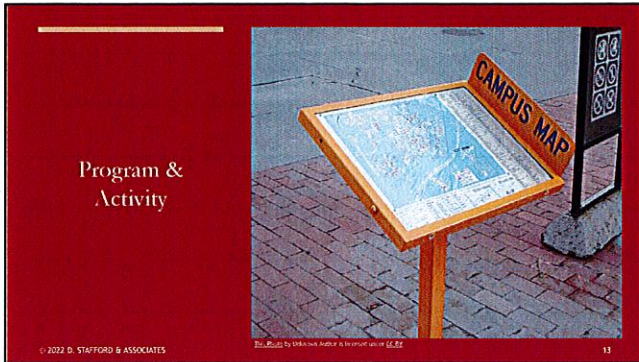
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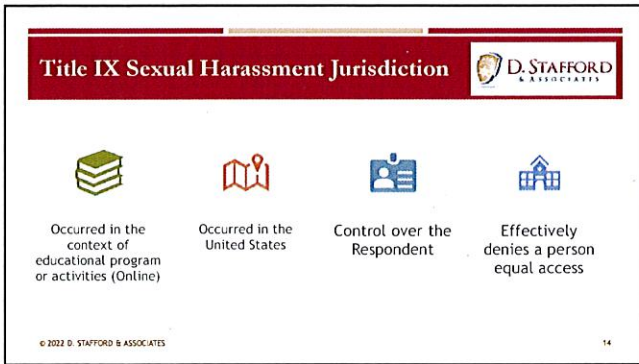
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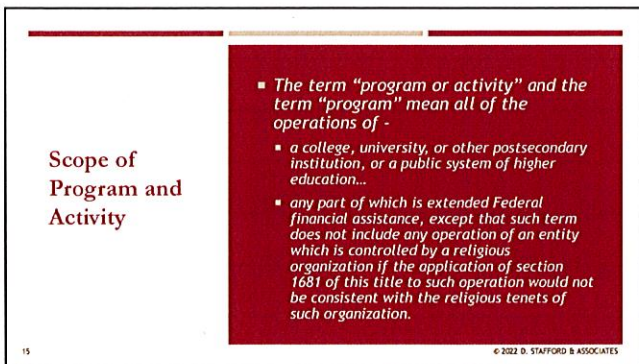
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**Jurisdiction of Person** 

-  "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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**POLICY REVIEW:**  
Scope of Program and Activity

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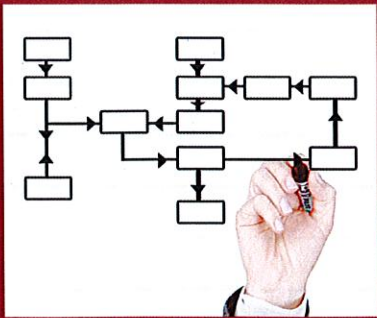
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**Process**



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**Formal Complaint** 



Signed formal complaint



Complainant or Title IX Coordinator



Complainant **MUST** be participating in the education activity at the time of filing

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**Dismissal of Formal Complaints** 



**Must Dismiss**

Behavior does not constitute sexual harassment  
Did not occur in educational program or activity or not in the United States



**May Dismiss**

Complainant withdraws formal complaint  
Respondent no longer enrolled/employed  
Insufficient evidence

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**Notice Requirements** 

Grievance process	Sufficient details and sufficient time to prepare	Identities of the parties, alleged conduct	Date and location of incident
Presumed not responsible	Advisor of choice	False statements	Additional allegations

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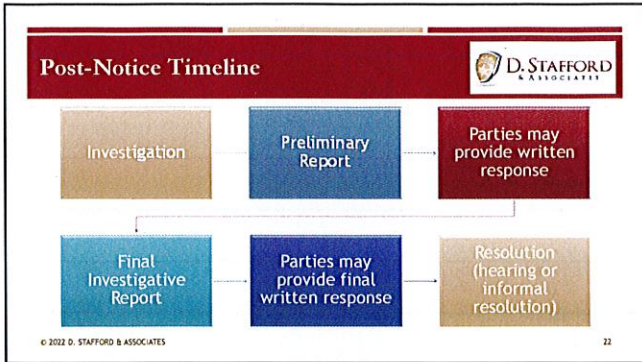
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**Investigations and Evidence Gathering**

- Burden of proof on the recipient
- Equal opportunity to present witnesses and facts
- No restrictions on discussing allegations

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**Advisors**

<p><b>Investigation</b></p> <ul style="list-style-type: none"> <li>■ May accompany party to investigation meetings</li> <li>■ Receives preliminary and investigative reports</li> </ul>	<p><b>Hearing</b></p> <ul style="list-style-type: none"> <li>■ Institutions must provide an advisor if a party does not have one at hearing</li> <li>■ Conducts cross examination of witnesses and opposing party</li> </ul>
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**Hearings** 



Live hearing



Cross-examination

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**Written Determination** 

- Determination regarding responsibility
  - Written by decision-maker(s)
  - Issued after the hearing
  - Contains steps, findings, sanctions, and remedies



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**Appeals** 

- Must offer both parties an appeal from a determination regarding responsibility or from a dismissal of a formal complaint.
- Basis of an appeal:
  - Procedural irregularity that **affected** the outcome of the matter
  - New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that **could affect** the outcome of the matter
  - The Title IX Coordinator, investigator(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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**Evidentiary Standard** 

<p><b>Clear and Convincing</b></p> <ul style="list-style-type: none"> <li>▪ Substantially more likely than not to have occurred</li> <li>▪ High probability that a particular fact is true</li> <li>▪ Higher than preponderance, but not as high as "beyond a reasonable doubt"</li> </ul>	<p><b>Preponderance of the Evidence</b></p> <ul style="list-style-type: none"> <li>▪ More likely than not</li> <li>▪ 50% and a feather</li> </ul>
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**Recordkeeping (Seven Years)** 

 <p>Case Materials</p>	 <p>Training materials</p>
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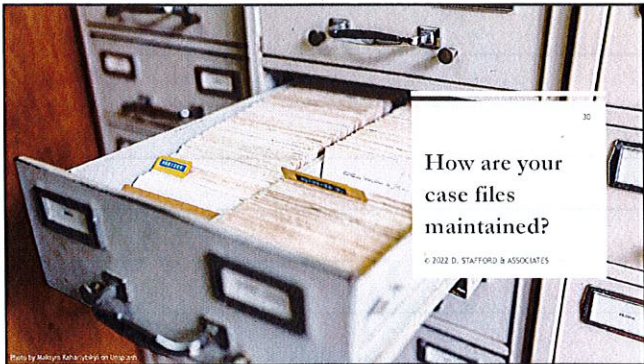
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**How are your case files maintained?**

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**Clery Training Requirements (Officials)** 



- Relevant evidence and how it should be used
- Proper interview techniques
- Basic procedural rules for conducting a proceeding
- Avoiding actual/perceived conflicts
- The issues related to dating violence, domestic violence, sexual assault, and stalking
- How to conduct an investigation and hearing process that protects the safety of the victims and promotes accountability

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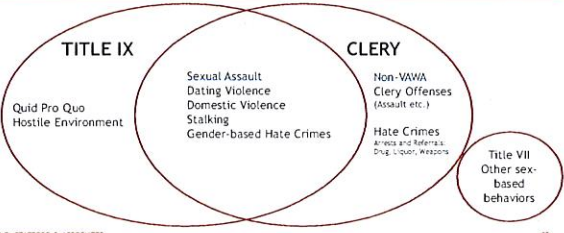
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**Overlapping Conduct Allegations** 



**TITLE IX**  
Quid Pro Quo  
Hostile Environment

**CLERY**  
Sexual Assault  
Dating Violence  
Domestic Violence  
Stalking  
Gender-based Hate Crimes  
Non-VAWA Clery Offenses (Assault, etc.)  
Hate Crimes (Armed and Dangerous, Drug, Alcohol, Weapons)

**Title VII**  
Other sex-based behaviors

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**VAWA Offenses**



Rape    Fondling    Incest    Statutory Rape

Dating Violence    Domestic Violence    Stalking

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**Response Requirements for VAWA Offenses** 

Procedures victims of VAWA Offenses should follow

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Procedures an institution will follow when offense reported

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*and it must be in WRITING*

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**Written Explanation of Rights and Options** 

Preserve evidence	Reporting options, including law enforcement	Institutional responsibilities	Services
Accommodations	Confidentiality	Disciplinary procedures	

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**Recordkeeping** 



- Retain all records used in compiling ASR for three years from the latest publication of the report to which they apply (in effect 7 years)

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**Retaliation**

- Right to be free of discrimination
- "Protected activity"
- Participation is protected

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**OFFENSE  
DEFINITIONS  
AND  
ELEMENTS**

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**Elements of Sexual Harassment**

- A. Is it conduct on the basis of sex?
- B. Was it unwelcome?
- C. Does it constitute Sexual Harassment?
  1. Quid Pro Quo
  2. Hostile Environment
  3. VAWA Offenses-Sexual Assault, Dating Violence, Domestic Violence, or Stalking

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**Sexual Harassment Under Title IX**





PRONG 1: QUID PRO QUO



PRONG 2: HOSTILE ENVIRONMENT\*



PRONG 3: VAWA OFFENSES

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**QUIDPROQUO**

QUID PRO QUO This for that.

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## PRONG 1: Quid Pro Quo

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*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*

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### PRONG 1: Quid Pro Quo




Sex or gender-based



Employee



CONDITIONING aid, benefit, or service



UNWELCOME conduct (or threat of conduct)

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### PRONG 1: Quid Pro Quo

- What was the aid, benefit, or service?
  - Education: admission, grades, awards, housing, access, membership, resources, support
  - Employment: hiring/firing, salary, benefits, promotions, location, privileges
  - Other: participation, movement, personnel/education records, reputation, access, status
- How was it conditioned/communicated?
  - Implied, stated, written

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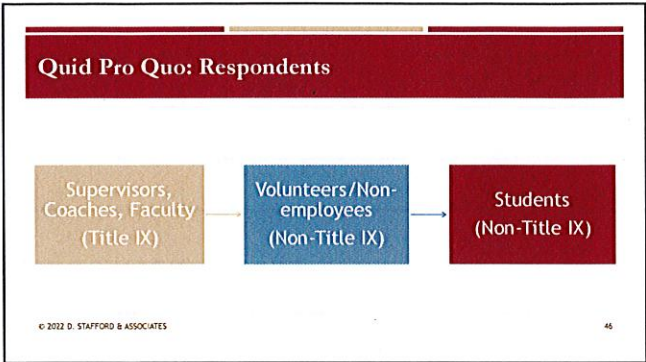
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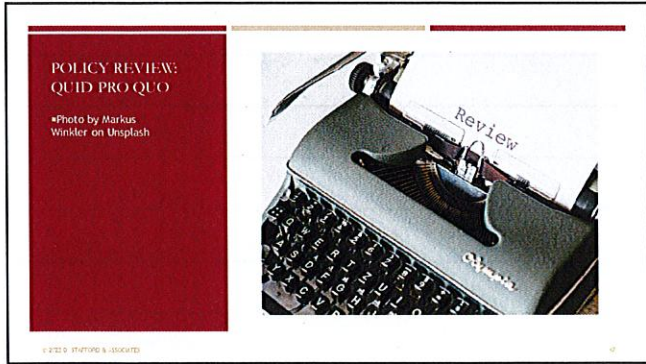
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## PRONG 2: Hostile Environment+ (The *Davis* Standard)

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*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.*

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### PRONG 2: The *Davis* Standard

Davis v. Monroe County Board of Education, 526 U.S. 629 (1999).

*Holding that “funding recipients are properly held liable in damages only where they are deliberately indifferent to sexual harassment, of which they have actual knowledge, that is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school.”*

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### Hostile Environment+

Sex  
Gender-based

Unwelcome

Conduct  
Severe  
Pervasive  
Objectively offensive

Impact on  
education (or  
employment)

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# Hostile Environment+

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**ON THE BASIS OF SEX**

- Physical touching
- Comments of a gender or sexual nature
- Motivated by complainant's gender or sexuality
- Sex stereotyping
- Pregnancy, childbirth, related medical conditions
- Gender-based harassment
- Gender Identity, Gender Expression, Sexual Orientation

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# Hostile Environment+

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**UNWELCOME**

- Unpack "consent" definition
- Behaviors that by their nature are "unwelcome"
- What was communicated between parties?
- Coercion, threats, intimidation
- Who initiated?
- Did the complainant participate?

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# Hostile Environment+

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**SEVERE**

- Characteristics of complainant and respondent
- Witnesses, public nature
- Direct vs. second-hand
- Degrading, crude
- Threats
- Physical actions, touching

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**Hostile Environment+**

**PERVASIVE**

- Number of incidents (dates, times)
- Number of witnesses, recipients, participants
- Different types of behaviors

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**Hostile Environment+**

**OBJECTIVELY OFFENSIVE/REASONABLE PERSON**

- "Turns on both subjectivity (i.e., whether the conduct is unwelcome, according to the complainant) and objectivity (i.e., 'objectively offensive')"
- "Whether, standing in the shoes of the complainant, the conduct would be offensive"
- The investigator conducts the subjective analysis while the decision-maker conducts the objective analysis

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**Hostile Environment+**

**EFFECTIVELY DENIES ... EQUAL ACCESS ... EDUCATION PROGRAM**

- "Does not require that a complainant has already suffered loss of education before being able to report"
- Harassment "so undermines and detracts from the victim's educational experience" that it effectively denies...
- Does not require certain manifestations of trauma
- Can't turn away a complainant who is "high-functioning," "not showing particular symptoms," or "not traumatized enough"
- No requirement for "tangible adverse action or psychological harm"

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## Hostile Environment+

**EFFECTIVELY DENIES**

- Skipping class to avoid a harasser
- A decline in a student's grade point average
- Difficulty concentrating in class
- Dropped out of school
- Failed a class
- Had a panic attack
- Reached a "breaking point"

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### Sexual Harassment+: Definition Considerations

- 📄 Definition vs. Interpretation
- 🗣️ First Amendment issues
- ✍️ "Below the line" unwelcome conduct
- 💡 No intent requirement

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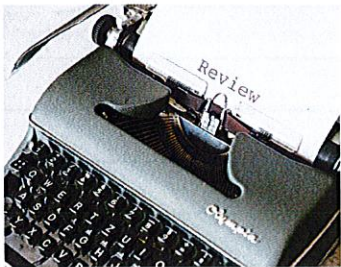
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**POLICY REVIEW:  
HOSTILE  
ENVIRONMENT**

#Photo by Markus Winkler on Unsplash



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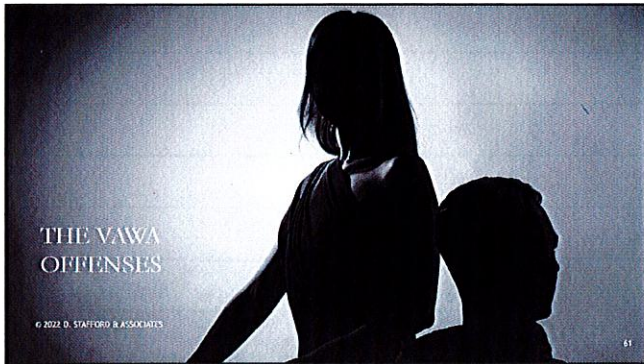
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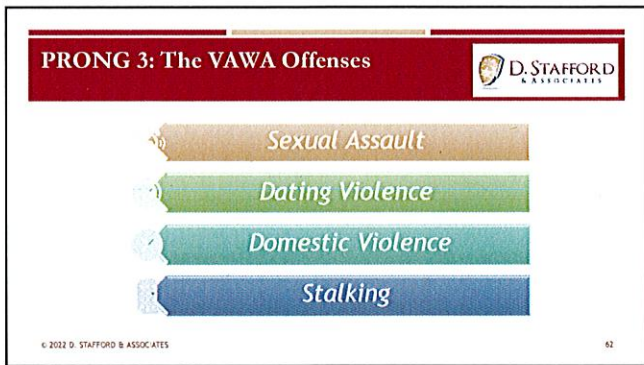
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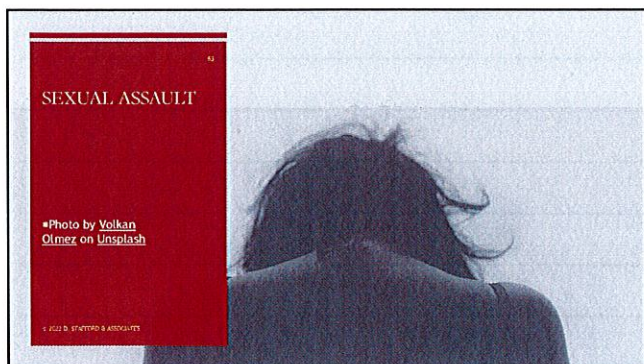
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**Rape - Clery** 

*Rape: The penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim*

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**Sex Offenses - NIBRS** 

*Any sexual act directed against another person, without the consent of the victim, including instances where the victim is incapable of giving consent.*

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

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**Dating Violence (Title IX) - 34 U.S.C. 12291(a)(10)** 

*The term "dating violence" means violence committed by a person -*

- (A) who is or has been in a social relationship of a romantic or intimate nature with the victim; and*
- (B) where the existence of such a relationship shall be determined based on a consideration of the following factors:*
  - (i) The length of the relationship.*
  - (ii) The type of relationship.*
  - (iii) The frequency of interaction between the persons involved in the relationship.*

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## Dating Violence – Clery Act

Violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim.

- The existence of such a relationship shall be based on the reporting party's statement and with consideration of the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.
- For the purposes of this definition -
  - Dating violence includes, but is not limited to, sexual or physical abuse or the threat of such abuse.
  - Dating violence does not include acts covered under the definition of domestic violence.

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## Domestic Violence (Title IX) - 34 U.S.C. 12291(a)(8)



The term "domestic violence" includes felony or misdemeanor crimes 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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## Domestic Violence – Clery Act

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 in which the crime of violence occurred 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 in which the crime of violence occurred

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## Stalking (Title IX) - 34 U.S.C. 12291(a)(30)



The term "stalking" means engaging in a course of conduct directed at a specific person that would cause a reasonable person to -

- (A) fear for his or her safety or the safety of others; or
- (B) suffer substantial emotional distress.

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## Additional Clery Act Definitions



(ii) For the purposes of this definition -

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

(B) **Reasonable person** means a reasonable person under similar circumstances and with similar identities to the victim.

(C) **Substantial emotional distress** means significant mental suffering or anguish that may, but does not necessarily, require medical or other professional treatment or counseling.

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## Substantial Emotional Distress



Difficulty eating or sleeping	Anxiety or nervousness	Nightmares	Drug or alcohol use	Headaches/illness
School/work impacted	Irritability, anger, shock, or confusion	Fear response/hypervigilance	Changing routines	Depression

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## What is a “Crime of Violence?”

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According to Section 16 of Title 18 of the United States Code, the term “crime of violence” means

*an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or*

*any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.*

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## POLICY REVIEW: INTIMATE PARTNER VIOLENCE

Photo by Markus Winkler on Unsplash

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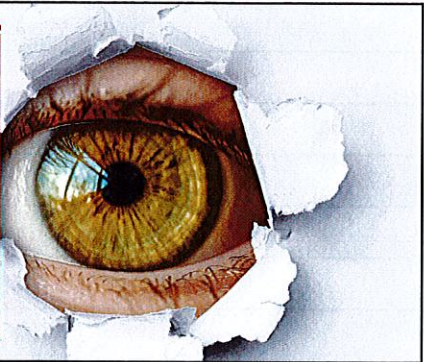
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## STALKING

Image by Tumisu from Pixabay

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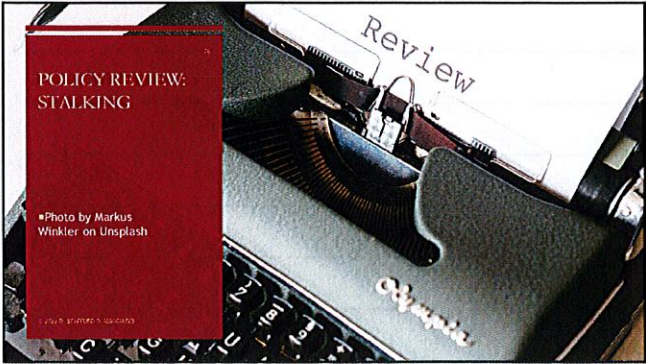
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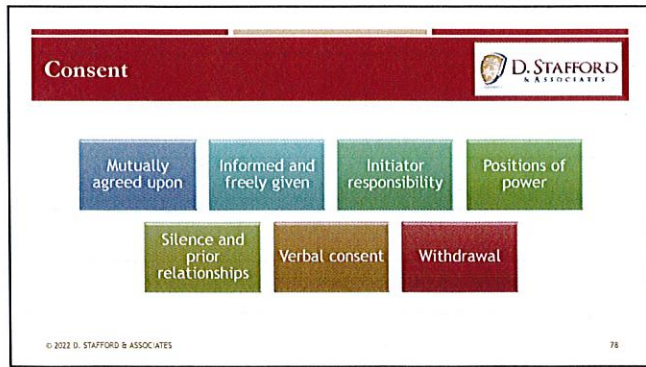
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Consent cannot be given due to...

Force

Incapacitation

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Force

Physical Coercion Intimidation Threat

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Incapacitation

*Incapacitation is the physical and/or mental inability, whether temporary or permanent, of an individual to make rational, reasonable decisions, or judgments regarding one's well-being or welfare.*

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**Incapacitation Causes** 

 Alcohol    
  Drugs    
  Disability    
  Other

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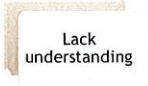
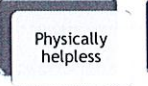
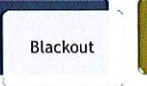
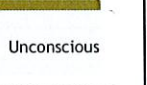
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**Incapacitation Results** 

 Lack understanding    
  Physically helpless    
  Blackout    
  Unconscious

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**TWO-STEP DETERMINATION**

Was the complainant incapacitated?

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

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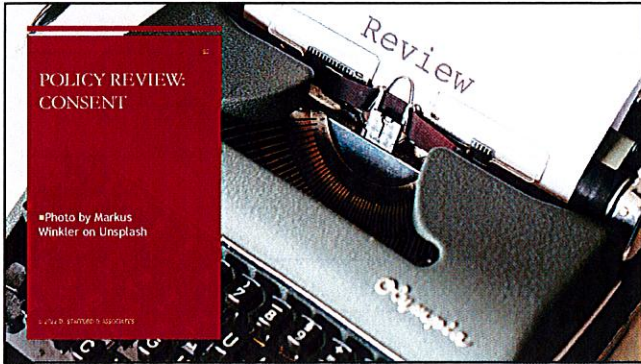
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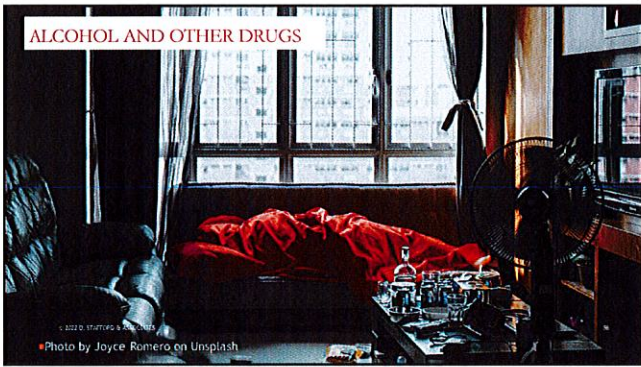
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**Impairment**

- The state of being diminished or weakened due to the consumption of alcohol
- Begins as soon as alcohol enters the bloodstream
- Increases with consumption of alcohol

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**Intoxication**

- An act or instance of inebriation, drunkenness
- Intoxication is legally met when an individual's blood alcohol level reaches .08 or greater



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- So impaired as to be incapable of giving consent
- Lacking the capacity to consent
- If a person cannot understand the nature of the proposed act or cannot understand they have a right to refuse or are otherwise unaware that the activity is occurring

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**Context Clues**

- Smell
- Slurred speech
- Bloodshot eyes
- Cannot stand
- Cannot walk
- In and out of consciousness
- Blackout
- Vomiting
- Behavior

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**Blackouts**

**Fragmentary Blackout**

- Also known as “grayout” or “brownout”
- Gaps in memory with some level of recollection

**En Bloc Blackout**

- No recollection of events

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How do you talk to the parties about alcohol/drug use?



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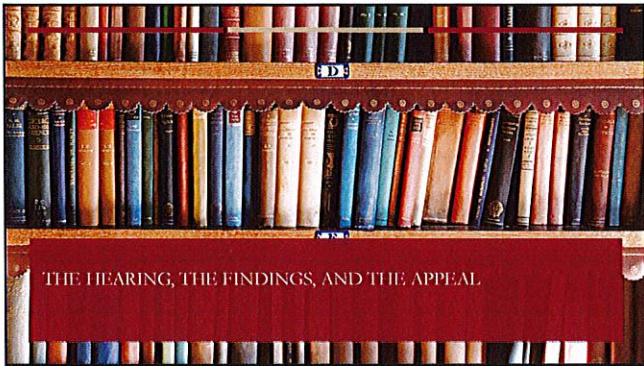
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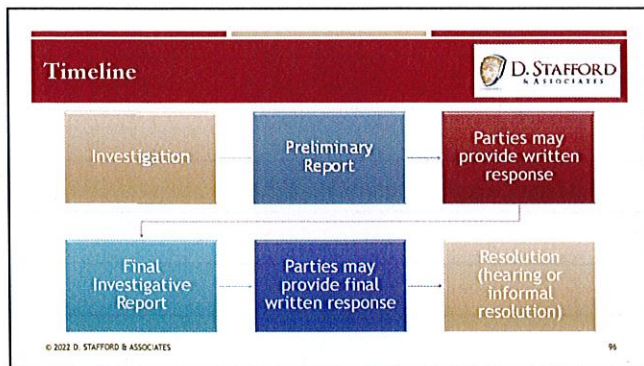
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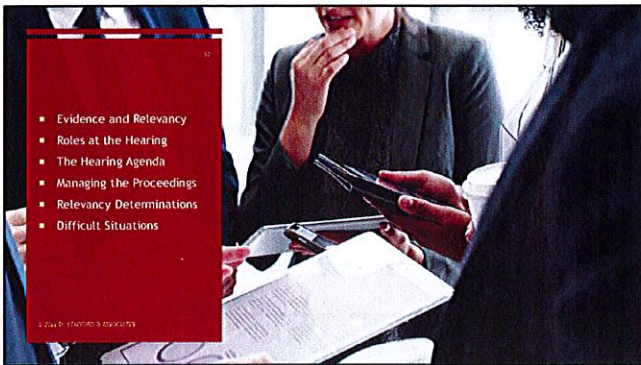
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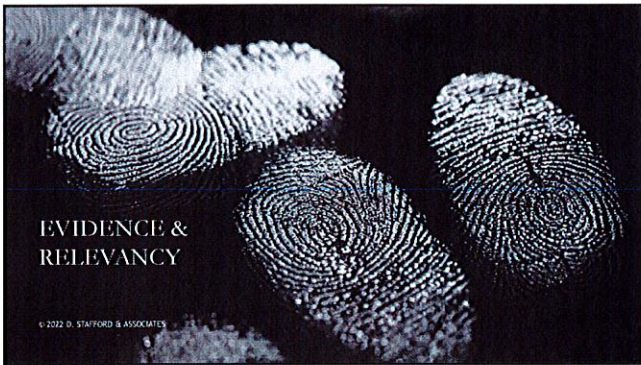
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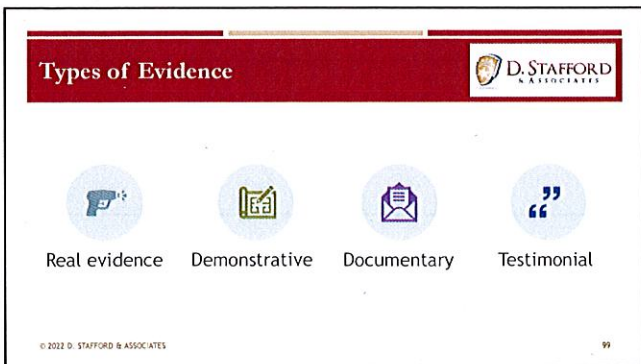
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**Statements** 



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)

Voicemail

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

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**Evidence Collection** 



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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...**

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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**

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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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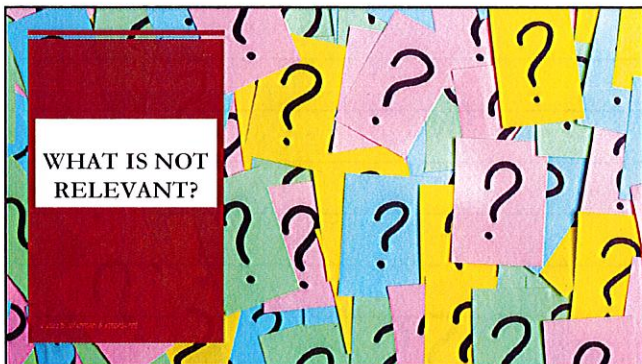
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WHAT IS NOT RELEVANT?



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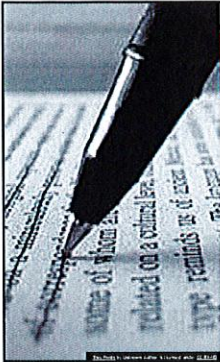
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**Rule 403:** The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

**Rule 404:** Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.

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Not Relevant (from the Regs)


Past Sexual Behavior

- Complainant's sexual predisposition or prior sexual behavior unless...
  - Offered to prove that someone other than the respondent committed the conduct alleged or
  - Complainant's prior sexual behavior with respect to the respondent and are offered to prove consent

Privileged Information

- Physician, psychiatrist, psychologist records in connection with the provision of treatment to the party unless
  - Voluntary, written consent

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Not Relevant




Repetitive



Related By Not Relevant



New Evidence - Is It Relevant?

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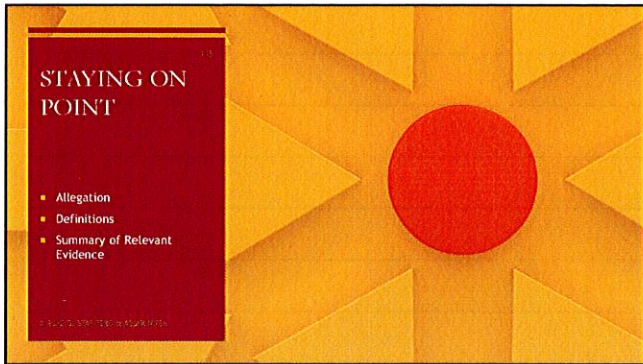
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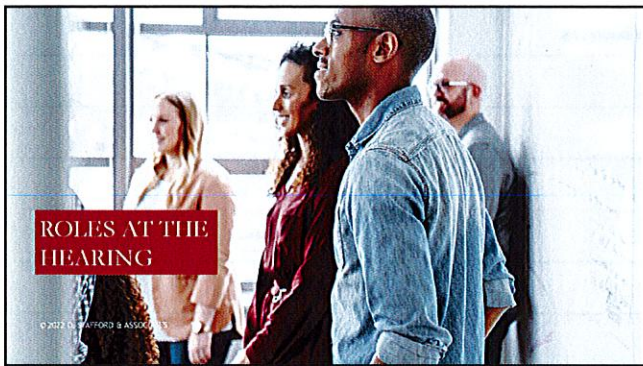
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**Are they WITNESSES and/or do they ATTEND?**

- Title IX Coordinator
- Investigator(s)

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**Tasks at the Hearing** 

Recording	Introductions	Order of Questioning
Witness Management	Assigning If Advisor Absent	Enforcing Rules of Decorum

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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 <sup>nd</sup> Advisor	• Is a support person allowed? Union rep?

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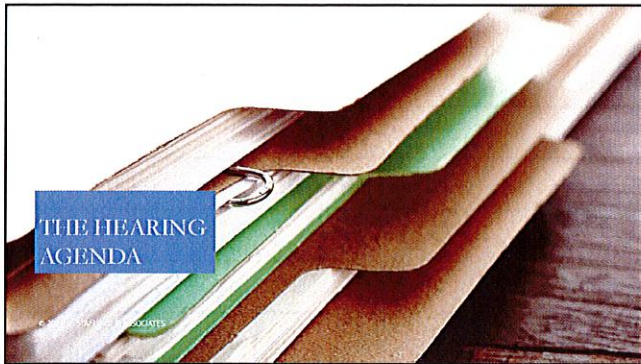
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Hearing/Cross Purpose from the Preamble 



- *“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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**Questioning by the Advisors**

**Question**

- By Advisor

**Relevancy Determination**

- By Decision-Maker

**Answer**

- By Party or Witness

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**Order of Questioning/Statements** 

Fairness Equality Logic Common Sense

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**Optional Components** 







Introductions    Reading Allegation    Review of Rights and Rules    Opening/Closing Statements    Decision-maker Questions

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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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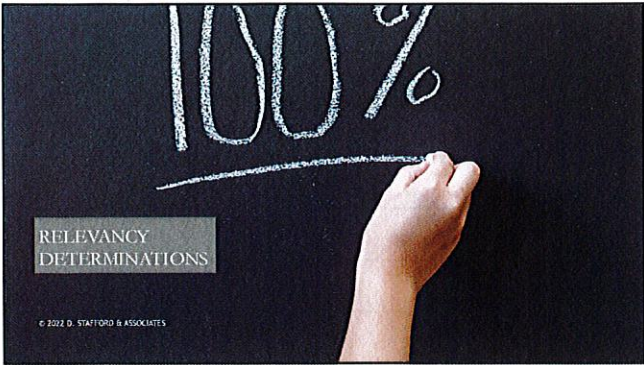
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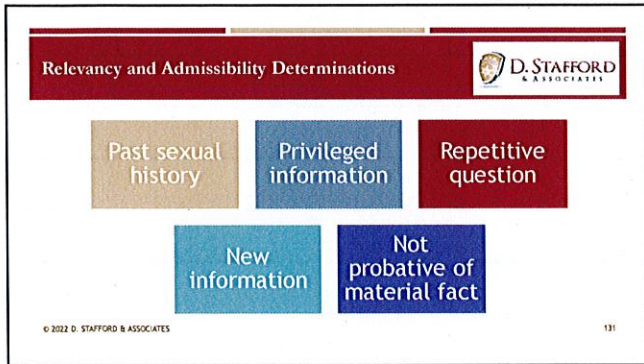
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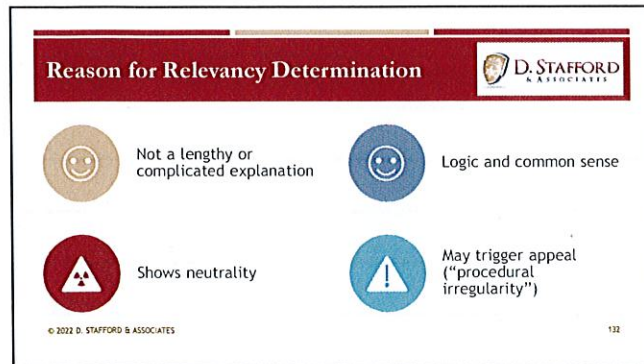
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**“New Evidence” at the Hearing** 


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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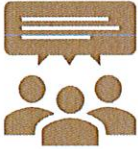
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**Decision-maker Questions from the Regs** 



- *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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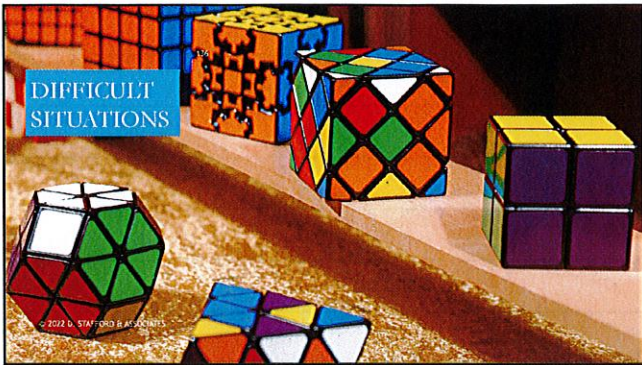
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Party Issues

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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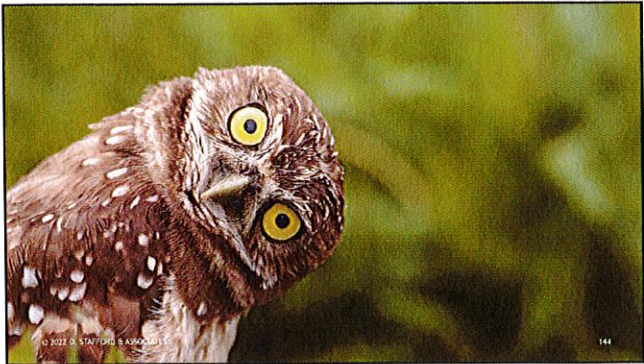
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