



**CCCU TITLE IX TRAINING:  
PART TWO**

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**AGENDA** 

- Determining Title IX vs. Non-Title IX Matters
- Structuring a Title IX vs. Non-Title IX Complaint Resolution Process
- Directly Related Evidence 
- Live Hearings   


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**TERMINOLOGY** 

- DOE = Department of Education
- Recipient = Institutions covered by Title IX
- OCR = Department of Education's Office for Civil Rights
- VAWA = Violence Against Women Reauthorization Act
- FERPA = Family Educational Rights and Privacy Act

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**DETERMINING TITLE IX vs. NON-TITLE IX MATTERS**



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**DETERMINING TITLE IX vs. NON-TITLE IX MATTERS**



- Factors to consider
  - Location of alleged conduct
  - Type of alleged conduct
  - Individuals involved and their status with the institution

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**LOCATION OF ALLEGED CONDUCT**



- Education program or activity
  - Locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs
    - Includes all incidents of sexual harassment occurring on an institution's campus
    - Also includes off-campus conduct if
      - Occurs as part of the institution's "operations"
      - Institution exercised substantial control over the respondent and the context of alleged sexual harassment
      - Occurs at an off-campus building owned or controlled by a student organization officially recognized by the postsecondary institution (e.g., fraternities and sororities)

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**LOCATION OF ALLEGED CONDUCT** 

- Education program or activity (cont.)
  - Consider whether recipient funded, promoted, or sponsored the event or circumstance
  - No single factor is determinative
  - Clery Act geography is not co-extensive with scope of education program or activity
- Against a person in the United States

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**LOCATION OF ALLEGED CONDUCT** 

- Example locations of Title IX matters
  - Campus housing
  - Fraternity or sorority house
  - Off-campus institution-sponsored event
    - Dance
    - Orientation retreat
    - Service trips
    - Alumni event
    - Away game?

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**LOCATION OF ALLEGED CONDUCT** 

- Example locations of Non-Title IX matters
  - Off-campus housing\*
  - Off-campus conduct over summer or school breaks\*
  - Study abroad trip (outside of US)

\*Unless specific circumstances make it part of the education program or activity

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**TYPE OF ALLEGED CONDUCT** 

- Title IX sexual harassment
  - Employee conditions aid, benefit, or service of the institution on an individual's participation in unwelcome sexual conduct (quid pro quo by an employee)
  - 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 institution's education program or activity (hostile environment)
  - Sexual assault, dating violence, domestic violence, or stalking, as defined in Clery

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**TYPE OF ALLEGED CONDUCT** 

- Hostile environment harassment
  - 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 institution's education program or activity
  - Preamble recognizes that "only serious situations" will fall under this definition

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**TYPE OF ALLEGED CONDUCT** 

- Hostile environment harassment
  - Reasonable person: perspective of a reasonable person in the shoes of the complainant
    - Consider ages, abilities, and relative positions of authority of the individuals involved
  - Effectively denies a person equal access
    - Equal access has been denied – not that a person's total or entire educational access has been denied
    - No specific type of reaction is necessary to conclude that severe, pervasive, objectively offensive sexual harassment has denied a complainant "equal access"
    - Analysis is whether a reasonable person in the complainant's position would be effectively denied *equal* access to education compared to a similarly situated person who is not suffering the alleged sexual harassment

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**TYPE OF ALLEGED CONDUCT** 

- **Examples of Title IX conduct**
  - Quid pro quo harassment based on sex by an employee
    - Supervisor conditioning promotion on participation in sexual advance
    - Professor conditioning grade on participation in sexual advance
  - Severe, pervasive, and objectively offensive harassment based on sex, such as:
    - Multiple text messages and other comments based on sex
    - Multiple incidents of unwelcome kissing and other unwelcome touching
    - Multiple incidents of gossip about sexual relations
  - VAWA crime (sexual assault, domestic violence, dating violence, stalking)

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**TYPE OF ALLEGED CONDUCT** 

- **Examples of Non-Title IX conduct**
  - Quid pro quo harassment by a student
    - Captain of a sports team conditioning a benefit on participation in a sexual advance
  - Single incident of harassment based on sex (clearly not pervasive)
    - Single unwelcome kiss
    - Single comment about an individual's body
    - Single sexual joke
  - Harassment based on sex that is not so severe, pervasive, and objectively offensive that it denies a person equal access to the institution's education program or activity (*caution!*)
  - Rare cases of stalking that are not based on sex
    - Student following star quarterback

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**INDIVIDUALS INVOLVED** 

- **Complainant**
  - Must receive a formal complaint before initiating Title IX grievance process
  - At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed
- **Respondent**
  - Discretionary dismissal of formal complaint if respondent is no longer enrolled or employed by the institution
  - Also have discretion to dismiss if respondent was never enrolled or employed by institution (caution if applicant)

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**INDIVIDUALS INVOLVED** 

- Examples of Title IX matters
  - Complainant
    - Student
    - Employee
    - Applicant for admission or employment
    - Alumnus/alumna interested in participating in alumni events
    - Guest at sporting event?
    - Visitor to campus with no affiliation with institution?
  - Respondent
    - Student
    - Employee
    - Applicant for admission?
    - Applicant for employment?

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**INDIVIDUALS INVOLVED** 

- Examples of Non-Title IX matters
  - Complainant
    - Former student with no intent to re-enroll or participate in institution events
    - Former employee
  - Respondent
    - Non-student/non-employee (unless circumstances weigh in favor of providing Title IX process)

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**STRUCTURING A TITLE IX VS. NON-TITLE IX COMPLAINT RESOLUTION PROCESS** 



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**LEGAL OBLIGATIONS** 

- Title IX
  - Sexual harassment (as defined by regulations)
  - In an education program or activity
  - Against a person in the United States
- VAWA
  - Allegations of sexual assault, domestic violence, dating violence, or stalking
  - Applies regardless of location of alleged conduct (on or off campus; in or out of the education program of activity; in or out of the U.S.)

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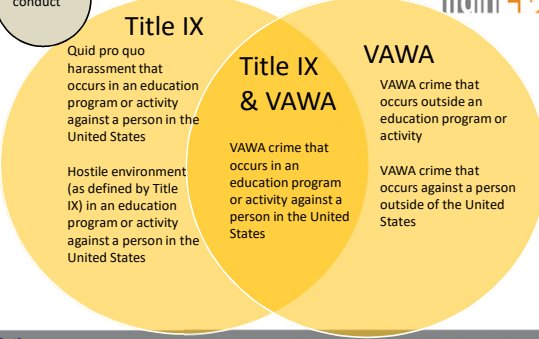
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**Legal Obligations\*** 




**Other conduct**

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

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

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

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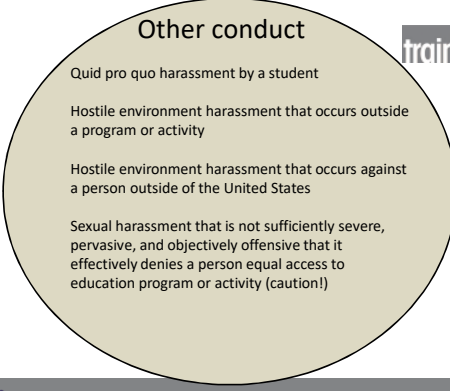
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**Other conduct** 




Quid pro quo harassment by a student

Hostile environment harassment that occurs outside a program or activity

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

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

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**TITLE IX RESPONSE REQUIREMENTS** 

- Response must treat complainant and respondent equitably by
  - Offering supportive measures to a complainant (with or without formal complaint)
  - Following a grievance process that complies with the regulations before imposing any disciplinary sanctions or other actions that are not supportive measures against a respondent

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**VAWA REQUIREMENTS** 

- Provide student or employee reporting to be a victim of VAWA crime a written explanation of their rights and options
- Disciplinary process must include
  - Prompt, fair, and impartial process
  - Officials who receive annual training
  - Right to an advisor of choice
  - Simultaneous notification of the result, any appeal rights, any change to the result, and when such result becomes final
  - Reasonably prompt timeframes designated in the policy
    - Extension of timeframes for good cause with written notice to the parties
  - Timely notice of meetings
  - Timely and equal access to the parties of any information that will be used in disciplinary meetings
  - Conducted by officials without conflict of interest or bias

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**VAWA REQUIREMENTS** 

- Title IX grievance process complies with most VAWA requirements
- Additional VAWA requirements
  - Officials who receive annual training
  - Timely notice of meetings to the other party

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### NON-TITLE IX AND NON-VAWA CASES



- Flexibility to determine whether and how to respond to alleged conduct
- Factors to consider
  - State law
  - Expectations of community

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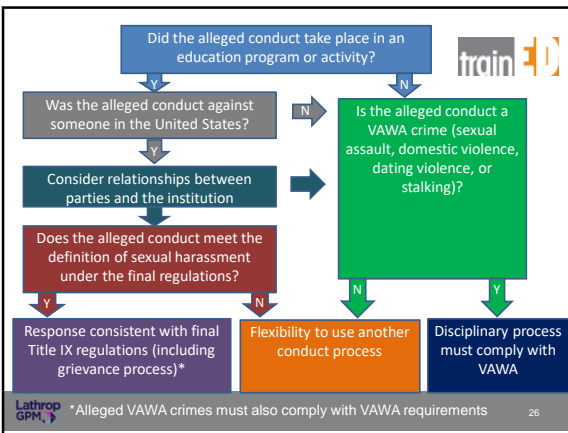
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### RELATIONSHIP BETWEEN PARTIES AND INSTITUTION



- 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
- Formal complaint
  - At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed
- Permissive dismissal
  - Discretionary dismissal of formal complaint if respondent is no longer enrolled or employed by the institution
  - Also have discretion if respondent was never enrolled or employed by institution

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**CASES INVOLVING THIRD PARTIES** 

- Third party complainant and respondent who is a member of the campus community
  - Title IX (if within scope of Title IX)
    - Provide supportive measures
    - May not be required to comply with Title IX grievance process
  - VAWA (if allegation of VAWA crime)
    - No requirement to provide written explanation of rights and options (but still recommended)
    - Disciplinary process that complies with VAWA

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**CASES INVOLVING THIRD PARTIES** 

- Complainant who is a member of the campus community and third party respondent
  - Title IX (if within scope of Title IX)
    - Provide supportive measures
    - Generally not required to comply with Title IX grievance process
  - VAWA (if allegation of VAWA crime)
    - Provide a written explanation of student or employee's rights and options
    - Could take action (no trespass) without disciplinary process
    - If engaging in a disciplinary process, comply with VAWA requirements

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**STRUCTURING THE COMPLAINT RESOLUTION PROCESS** 

- Process options
  - One process: Use the same procedures for all sexual misconduct cases (including live hearings)
  - Hybrid: Use the same procedures for all Title IX and VAWA cases (including live hearings) and a separate process for non-Title IX/non-VAWA cases
  - Separate processes: Create separate procedures for Title IX, VAWA, and non-Title IX/non-VAWA cases

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**SAME PROCEDURES FOR TITLE IX AND VAWA** 

- Pros
  - Clarity on the process that applies to allegations of sexual misconduct
  - Less risk of due process litigation
- Cons
  - Chilling effect of live hearing in all cases
  - Cost of additional procedural requirements, including hearings
  - Cannot explain hearing process as legally required in all cases
  - Potential FERPA issues with information sharing in non-Title IX cases

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**SEPARATE PROCEDURES FOR TITLE IX AND VAWA** 

- Pros
  - Fewer hearings (less chilling effect; less administrative burden/cost)
  - Clear FERPA exceptions for each process
  - Can rely on legal requirements for each process (not requiring additional process beyond legal obligations)
- Cons
  - More analysis needed to determine what process will apply
    - Complications when additional facts arise and in cases with multiple allegations
  - Confusing for parties
  - Risk of due process litigation seeking a hearing requirement

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**OTHER CONSIDERATIONS** 

- If using a non-hearing process for sexual misconduct cases that do not fall within Title IX, consider discontinuing the use of hearings in other student conduct matters that involve two parties

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**DETERMINING WHICH PROCESS APPLIES** 

- Analyze when report or complaint is received and throughout the process
  - Mandatory dismissal from Title IX
    - Alleged conduct even if proven would not constitute sexual harassment
    - Alleged conduct did not occur in the education program or activity
    - Alleged conduct did not occur against a person in the United States
  - Discretionary dismissal from Title IX
    - Complainant requests withdrawal of complaint in writing
    - Respondent is no longer enrolled or employed by the institution
    - Specific circumstances prevent the institution from gathering sufficient evidence to reach a determination

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**DETERMINING WHICH PROCESS APPLIES** 

- Who determines which process applies
  - Title IX Coordinator (with assistance from investigator)
  - Another individual?
- If separate Title IX and VAWA procedures, follow same investigation process regardless of Title IX or VAWA up until information sharing stage
  - Title IX: Copy of directly related evidence
  - VAWA: Access to evidence that will be shared with the decision-maker
- When in doubt, err on side of following Title IX process

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**DIRECTLY RELATED EVIDENCE** 



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**OPPORTUNITY TO REVIEW AND RESPOND TO DIRECTLY RELATED EVIDENCE** 

- General requirements
  - *Prior to completion of investigation report, must provide equal opportunity to inspect and review any evidence obtained that is directly related to the allegations*
  - Party must be given at least 10 days to submit a written response
  - Investigator must consider that written response before completing investigation report
  - Must make all that evidence available at any hearing

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**OPPORTUNITY TO REVIEW AND RESPOND TO DIRECTLY RELATED EVIDENCE** 

- Purpose of requirement
  - Address alleged incidents of institutions withholding information from parties
  - Parties should be aware of the existence of all directly related evidence so as to argue about whether it is relevant

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**DIRECTLY RELATED EVIDENCE** 

- What is “evidence”?
  - Documents collected from the parties
    - Text messages
    - Emails
    - Social media posts and messages
    - Photos and videos
  - Other evidence
    - Police reports
    - Security footage
    - Wifi access point records

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**DIRECTLY RELATED EVIDENCE** 

- What is “evidence”? (cont.)
  - Party and witness interviews?
    - If institution audio records interviews
      - Transcripts of recorded interviews with evidence that is not directly related to allegations redacted
      - Copies of recordings (consider how to remove evidence that is not directly related to allegations)
    - If institution does not record interviews
      - Summaries of directly related evidence from interviews (potentially reviewed by parties and witnesses if that is part of the process)
  - Does not include investigator notes

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**DIRECTLY RELATED EVIDENCE** 

- Directly-related should be interpreted using plain and ordinary meaning
- Includes inculpatory or exculpatory evidence whether obtained from a party or other source
- Universe of evidence is not screened for relevance – may sometimes encompass a broader universe of evidence than evidence that is relevant
- Investigator must gather evidence directly related to the allegations whether or not the recipient intends to rely on such evidence
  - For example, where evidence is directly related to the allegations but the investigator does not believe the evidence to be credible and does not intend to rely on it or include it in the investigation report

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**DIRECTLY RELATED EVIDENCE** 

- Sexual history = include if directly related
  - Protections related to complainant’s prior sexual history do not apply at this stage
  - Still analyze whether such evidence is “directly related to the allegations”
- Privileged information = only with waiver of privilege
- Treatment records = only with written consent

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**DIRECTLY RELATED EVIDENCE** 

- May permit or require the investigator to redact information that is not directly related to the allegations (or that is otherwise barred from use under the final regulations)
  - Redactions are limited to information not directly related or that is otherwise specifically barred
  - May not redact other information, such as confidential, sensitive, or prejudicial information, if it is directly related to the allegations

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**DIRECTLY RELATED EVIDENCE** 

- Maintain records of any information withheld and the rationale for doing so
- May offer process where a log of information that is not produced is provided to the parties to allow them to dispute whether the information is directly related to the allegations (but not required to offer such a process)
- Investigator and Title IX Coordinator should both be involved in determination of what is directly related

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**OPPORTUNITY TO REVIEW AND RESPOND TO DIRECTLY RELATED EVIDENCE** 

- Ensuring privacy
  - May require parties and advisors to:
    - Use the evidence (and investigation report) only for purposes of the grievance process and
    - Require them not to further disseminate or disclose these materials
  - May use a non-disclosure agreement
  - May use digital encryption or other practices to address privacy concerns

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**OPPORTUNITY TO REVIEW AND RESPOND TO DIRECTLY RELATED EVIDENCE** 

- Close of evidence
  - Recommended approach:
    - Require all parties to submit any evidence that they would like the investigator to consider prior to when the parties' time to inspect and review evidence begins
    - Allow additional evidence after review period in limited circumstances
    - If additional evidence is accepted, provide opportunity to review additional directly related evidence (but no additional opportunity to respond at this stage)
    - Other opportunities to respond
      - Parties will receive investigation report summarizing relevant evidence and have opportunity to respond
      - Parties will receive an opportunity to inspect and review all directly related evidence at any hearing and to refer to such evidence during the hearing

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**OPPORTUNITY TO REVIEW AND RESPOND TO DIRECTLY RELATED EVIDENCE** 

- Steps following review
  - Investigator should consider parties' viewpoints about whether the evidence directly related to the allegations is relevant and therefore whether to include it in the investigation report
  - May provide a copy of each party's written response to the other party, but that is not required

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**LIVE HEARINGS** 



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**LIVE HEARINGS**



- General requirements
  - Must provide live hearing
  - Permit each party's advisor to ask the other party and witnesses "all relevant questions and follow-up questions"
    - Includes questions challenging credibility
    - Must be conducted "directly, orally and in real time"
    - Questions asked by party's advisor and never by a party personally
  - Must provide, without fee or charge to that party, a party without an advisor at the hearing "an advisor of the recipient's choice who may but is not required to be an attorney to conduct cross-examination on behalf of that party"
  - Must create audio or audiovisual recording or transcript of any live hearing held and make it available to the parties for inspection and review
    - Parties do not have a right to a copy of the recording or transcript

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**DECISION-MAKER(S)**



- May have single decision-maker or a panel of decision-makers
- If a panel of decision-makers, may appoint one decision-maker to make relevancy determinations at the hearing
- May appoint Title IX Coordinator or another individual who is not a decision-maker to enforce procedural rules at the hearing
  - Decision-maker(s) must still determine relevancy issues

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**PREPARATION FOR HEARING**



- Determine hearing format and arrange technology
  - May conduct with all parties physically present in the same location
    - At the request of either party, institution must provide for live hearing to occur with the parties located in separate rooms with technology enabling the decision-maker and parties to simultaneously see and hear the party or witness answering questions
    - Witness cannot demand to be in a separate room, unless that witness alleges they are also a victim of respondent (institution can permit witness to be in a separate room upon request)
  - May conduct virtually (for all parties, witnesses, and other participants), with technology enabling participants simultaneously to see and hear each other
    - Video is required; phone is insufficient

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**PREPARATION FOR HEARING** 

- Decision-maker(s) should review complaint, notice to parties, and investigation report
  - Consider whether decision-makers will review parties' responses to directly-related evidence
  - Consider whether decision-makers will review parties' responses to investigation report
- Identify ultimate questions that will need to be decided
  - Consider questions or topics that may come up and any anticipated relevancy issues

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**PREPARATION FOR HEARING** 

- Determine which witnesses will be present for the hearing
  - Recommended approach
    - Decision-maker(s) identify witnesses who are relevant to decision (based on investigation report and other information reviewed)
    - All of those witnesses are available for cross-examination at the hearing
    - Parties may call limited number of witnesses beyond that (with flexibility to modify in unusual circumstances)
    - All witnesses must have been previously identified during the investigation (even if investigator declined to interview that witness)

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**PREPARATION FOR HEARING** 

- Encourage parties to submit cross-examination questions in advance
  - Decision-maker(s) review questions and determine whether any will be screened out for relevance
  - Purpose is to expedite hearing
  - No consequence for not submitting questions in advance or only submitting some questions in advance
  - Even for questions submitted in advance, allow advisors to ask questions as part of normal process and explain reasons for excluding any questions

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**ATTENDANCE AT HEARING** 

- Parties may be accompanied only by their advisors and other persons for reasons “required by law”
  - Institution must keep confidential the complainant, respondent, and any witness except as may be permitted by FERPA, as required by law, or to carry out the grievance process
    - Limits institution’s ability to authorize the parties to be accompanied to the hearing by individuals other than their advisors
  - A person assisting a party with a disability, or a language interpreter, may attend because presence is required by law and/or necessary to conduct the hearing

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**SCHOOL-APPOINTED ADVISORS** 

- Can request that the parties inform school in advance whether they have an advisor
  - If party does not have an advisor at the hearing, still required to provide an advisor even if party stated that they would have one
  - May want to have an advisor for each party on standby so that delaying the hearing is not necessary
- School-appointed advisor
  - Role is limited to relaying a party’s questions
  - No particular skills, qualifications, or training is required
  - Does not need to be neutral or avoid conflicts of interest
  - If a party refuses to work with an assigned advisor – the party forfeits his or her right to cross examination

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**RELEVANCY** 

- Decision-maker may hear arguments regarding relevancy of a question on the spot or may tell parties to reserve arguments for appeal (incorrect relevancy determination could be an alleged procedural error on appeal)
- Must allow question if relevant, even if misleading or assumes facts not in evidence
- Can establish rule that duplicative questions are not relevant
- Exclude questions with caution

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**CROSS-EXAMINATION** 

- Party or witness who does not appear at the hearing
  - Cannot rely on any statements from a party or witness who does not submit to cross-examination
    - Failure to answer one question constitutes a failure to submit to cross-examination (unless question came from decision-maker)
    - Still applies even if disability or death is the reason the person did not submit to cross-examination
  - Statements that cannot be considered include statements in investigation report or any other source (police report, medical exam, text messages, witness accounts, etc.)

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**CROSS-EXAMINATION** 

- Party or witness who does not appear at the hearing
  - Advisor may conduct cross-examination on behalf of party even if party is not present
  - If one party does something to wrongfully procure absence of a party or witness, that is likely retaliation and the school must remedy
  - School also cannot coerce unwilling participant
    - Be careful with any requirement that a student or employee cooperate with grievance process
    - Discipline for not attending hearing may constitute retaliation

Lathrop GPM,  59

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**OTHER PROCEDURAL RULES** 

- May establish additional rules that apply equally to both parties
  - Cross-examination must be respectful, non-abusive, not intimidating
  - Limit evidence at hearing to evidence that was gathered or presented as part of the investigation (or otherwise prior to the hearing)
  - Whether investigator may be called as a witness
  - Process for making objections to the relevance of questions and evidence
  - Other procedures at the hearing
    - Opening statements by parties or advisors
    - Closing statements by parties or advisors
  - Reasonable time limitations on hearings

Lathrop GPM,  60

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**OTHER PROCEDURAL RULES** 

- Some procedural rules are prohibited
  - Cannot prohibit a party from conferring with his or her advisor during the hearing
    - Likely can prohibit conferring when a question is pending
    - Could also discourage from conferring when a question is pending by warning that such conduct will be considered when weighing the party's credibility
  - Cannot prohibit character evidence, lie detector test results, evidence that is unduly prejudicial, or evidence of prior bad acts
    - Decision-maker may determine how much weight to give such evidence

Lathrop GPM,  61

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**Q & A**   


Lathrop GPM,  62

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**UPCOMING TRAININGS** 

- **Trainings for individuals with heightened responsibility:**
  - 7/27/20: Annual Training for Advanced Title IX Coordinators and Deputy Coordinators
  - 7/28/20: Title IX/VAWA Investigator Training
  - 8/3/20: Annual Training for New Title IX Coordinators and Deputy Coordinators
  - 8/4/20: Annual Training for Advanced Title IX Coordinators and Deputy Coordinators
  - 8/5/20: Title IX/VAWA Investigator Training
  - 8/11/20: Title IX/VAWA Hearing Panel Training
  - 8/13/20: Adjudicator Training for Non-Title IX Cases

Lathrop GPM,  63

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**ON DEMAND TRAININGS** 

- **Available on-demand:**
  - Annual Trauma Informed Training for Investigators and Adjudicators
  - Annual Training for NEW Title IX Coordinators and Deputy Coordinators
  - Annual Training for ADVANCED Title IX Coordinators and Deputy Coordinators
  - Title IX/VAWA Hearing Panel Training
  - Trauma Informed Training for First Responders, Confidential Resources, and Campus Security
  - Making Your Sexual Misconduct Policy a 10
  - Title IX/VAWA Training for Chief Academic Officers
  - Title IX/VAWA Panel Discussion for Coaches and Athletic Directors
  - Compliance Update: New VAWA Guidance
  - Senior Leadership Training
  - Transgender Students and Employees Training
  - Minnesota Law Update: Title IX Coordinator Overview of Legal Requirements
  - Confidential Resources Training
  - Attorneys Serving as Advisors
  - Panel Discussion on Interviewing Survivors of Sexual Assault
  - Fundamentals of FERPA

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**ON DEMAND TRAININGS** 

- **Available on-demand:**
  - Drafting Your Notice of Determination
  - Post-VAWA Annual Security Report Drafting
  - Additional Requirements Under Minnesota's Campus Sexual Assault Law
  - Drafting Effective and Compliant Investigation Reports
  - Title IX Coordinator Training: Duties Beyond Sexual Assault
  - Title IX/VAWA Training for Adjudicators
  - Title IX/VAWA Investigator Training
  - Train the Trainer: Title IX/VAWA Training for Coaches and Athletic Directors
  - Panel Discussion on Title IX Recordkeeping Requirements and Best Practices
  - Complying with the NCAA Sexual Violence Policy – Part 1
  - Complying with the NCAA Sexual Violence Policy – Part 2
  - Unique Challenges in Responding to Allegations of Domestic Violence, Dating Violence, and Stalking
- **Prevention programs for students & employees—customizable online modules**

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**THANK YOU** 



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