



D. STAFFORD
& ASSOCIATES

Sexual Misconduct Decision Maker Class

Presented by:

**A D. Stafford & Associates
Title IX Team Member**

D. Stafford & Associates, LLC, 179 Rehoboth Avenue, #1121, Rehoboth Beach, DE 19971
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Once an institution is a member, individual membership is \$50.00. You can sign up your entire Clergy Compliance Committee for membership!

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Decision-Maker

- **Title IX for Decision-Makers**
 - Statute
 - Scope and Application
 - Person-Related Definitions
 - Parental, Family, or Marital Status; Pregnancy or Related Conditions (§ 106.40)
 - Response to Sex Discrimination (§ 106.44)
 - Grievance Procedures for Sex Discrimination (§ 106.45)
 - Grievance Procedures for Sex-Based Harassment Involving Students (§ 106.46)
 - Serving Impartially
- **Sex-Based Harassment**
 - Sample Definitions
 - Unwelcome Conduct & Consent
- **The Hearing Process**
 - Pre-Hearing Activity
 - The Hearing
 - The Deliberation
 - The Written Outcome
 - The Appeal



TITLE IX

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ISSUANCE OF CERTIFICATES FOR COMPLETION

To receive a certificate, attendees must attend the majority of the class and have paid class invoice in full. This applies to both in-person classes and virtual classes. We understand 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. If an attendee misses a significant amount of the class (depending on the length of the class) or they miss an attendance poll, they will not be issued a certificate of completion for the class.

Attendees should report each absence using the online form provided (each class has its own unique form that is sent to all attendees via email prior to class). Attendees should complete the form twice for each absence: once to record their departure, and again to record their return. Attendees should complete the form immediately before leaving class and as soon as practicable upon their return. If an attendee signs out but does not sign back in, they will be marked absent for the remainder of the day.

The criteria for receiving a certificate is determined based on missed class time 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 to ensure that everyone who is present can respond to the poll. If an attendee is unable to respond to the attendance poll, the attendee would need to **immediately post "I am here"** in the chat feature within the Zoom platform. That way we can give the attendee credit for being in attendance for that specific poll. Notifying us after the attendance poll has been closed will not allow us to give the attendee credit for being in class during the poll.

Some of our classes may qualify for credit toward a Master's Degree at New England College (and regardless if you decide to seek credit or not, 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. For DSA & NACCOP, issuance of a Certificate of Completion is verification of attendance.



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Adrienne Meador Murray, Vice President, Equity Compliance and Civil Rights Services



In January 2014, Adrienne Meador Murray joined D. Stafford & Associates where she currently serves as the Vice President, Equity Compliance and Civil Rights Services after having been affiliated with D. Stafford & Associates as a part-time Associate since 2012 and the National Association of Clery Compliance Officers & Professionals (NACCOP) where she currently serves as Director of Training and Compliance Activities. 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.).

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.



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



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

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

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

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

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

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

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



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Ann Todd
Consultant, Equity Compliance and Civil Rights Investigations



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

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

In addition to conducting investigations, Ms. Todd is a frequent speaker and consultant on Title IX investigations, conducting 20-30 courses every year on best practices for investigating sex discrimination and sex crimes on campus. She works with schools to draft policies and processes that provide equity and fairness to



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all parties involved and is adept at facilitating discussions with institutions to ensure the end product represents the values of the campus community.

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



NACCOP Title IX & Equity Alliance

The Alliance is a dedicated affinity group through which Title IX and Equity Professionals, and the practitioners who support and/or supervise them, can benefit from NACCOP's expertise in complying with the Clery Act, Title IX, and other civil rights laws that affect their work.

BENEFITS OF JOINING THE ALLIANCE

- **Access to NACCOP's annual 9 on IX webinar series at no additional cost (a \$710 value)**
 - These 60-minute succinct webinars will offer legal insight and practical guidance on Title IX topics from experts who have served or are currently serving as active practitioners on college and university campuses.
- **Alliance-Exclusive Professional Development Opportunities such as the Title IX & Equity Open House Discussion Series**
 - An Alliance-exclusive virtual open house will be held bi-monthly (every other month, 6 sessions annually) to engage with experts from NACCOP's partner organization, D. Stafford & Associates, as well as other invited guests, to discuss current trends and issues. Each open house will focus on a specific topic for discussion and participants will be encouraged to engage in the conversation.
- **Access to Alliance-Exclusive Whitepapers regarding Title VI, VII, and IX**
- **Connect and collaborate with other Title IX and Equity Professionals via an Alliance-restricted Listserv**
- **Discounted Professional Development Opportunities**
 - Coffee and Conversations webinar series and individual webinars focused on Title IX & Equity compliance issues
- **A 50% discount on the Title IX Notice Document Library developed by NACCOP's Partner Organization, D. Stafford & Associates (a \$335 value)**

Join the Alliance

Eligible individuals must have Institutional, Professional, or Committee Membership with NACCOP.

Cost: \$425 for 1 year subscription

(The first year of enrollment will be pro-rated to match the NACCOP membership expiration date.)

Request to Join: <https://naccop.memberclicks.net/join-the-alliance>

Questions? Contact us at info@naccop.org or 302-344-1068.

DECISION-MAKER TRAINING



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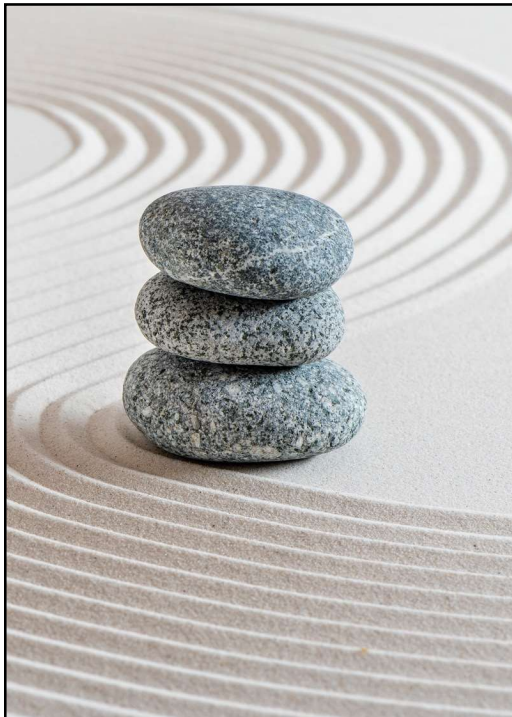
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TITLE IX FOR DECISION-MAKERS



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AGENDA

- Statute
- Scope and Application
- Person-Related Definitions
- Parental, Family, or Marital Status; Pregnancy or Related Conditions (§ 106.40)
- Response to Sex Discrimination (§ 106.44)
- Grievance Procedures for Sex Discrimination (§ 106.45)
- Grievance Procedures for Sex-Based Harassment Involving Students (§ 106.46)
- Serving Impartially

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FEDERAL LAW



Statutes

20 U.S.C.D.
§1681-1688



Regulatory Guidance

34 C.F.R. § 106



Sub-Regulatory Guidance

DCLs
Preamble to Regs
Executive Orders
OCR Website



Case Law

Circuit courts
District courts

STATUTE

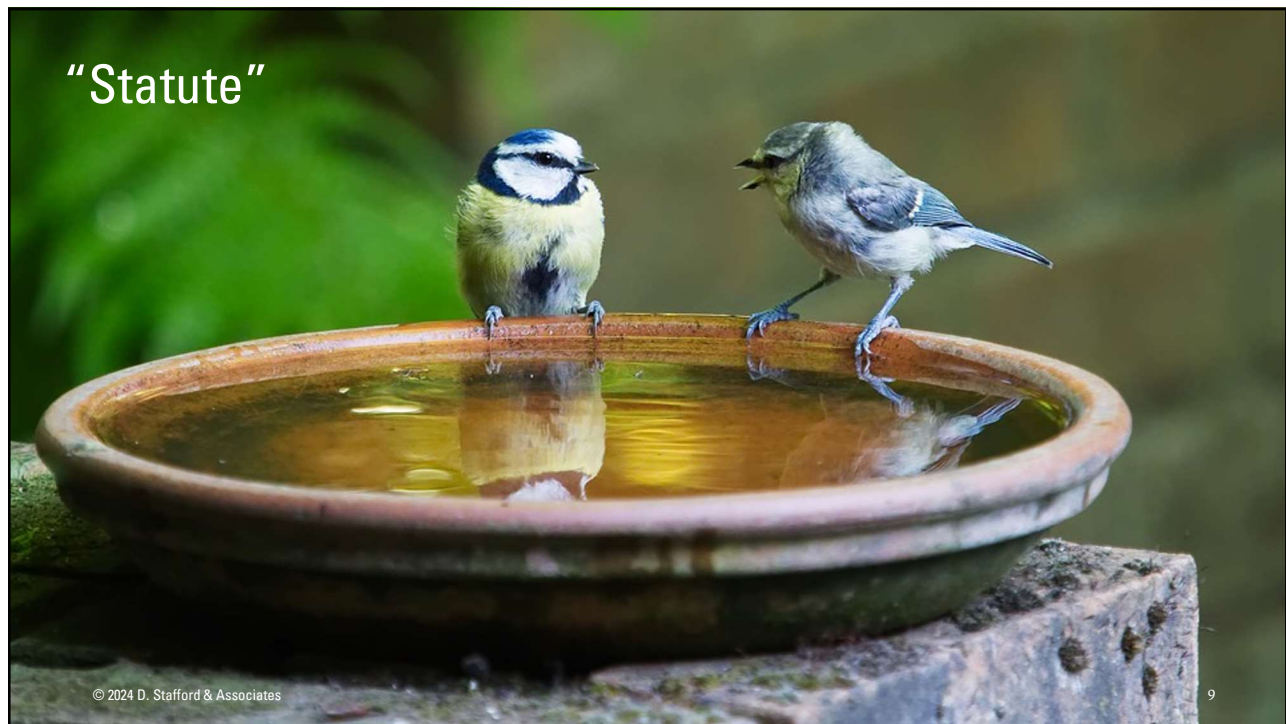


TITLE IX, EDUCATION AMENDMENTS OF 1972, 20 U.S.C. § 1681

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.

§ 1681(a) - EXCEPTIONS

- Admission policies
- Institutions changing from single-sex status
- Religious institutions
- Military services or merchant marines
- Public traditional single-sex institutions
- Social fraternities or sororities
- Voluntary youth organizations
- Boy or girl conferences
- Father-son/mother-daughter activities
- “Beauty” pageants



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SCOPE AND APPLICATION



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§ 106.10 - Scope

Discrimination on the basis of sex includes discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity.

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§ 106.11 - APPLICATION

- Sex discrimination in education program or activity
- Sex-based hostile environment even when some contributing conduct occurred off-campus
- Conduct that is subject to the “disciplinary authority”

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Sex Discrimination



Sex-Based Harassment

- Sexual Assault
- Dating/Domestic Violence
- Stalking
- Hostile Environment
- Quid Pro Quo

Sex Discrimination

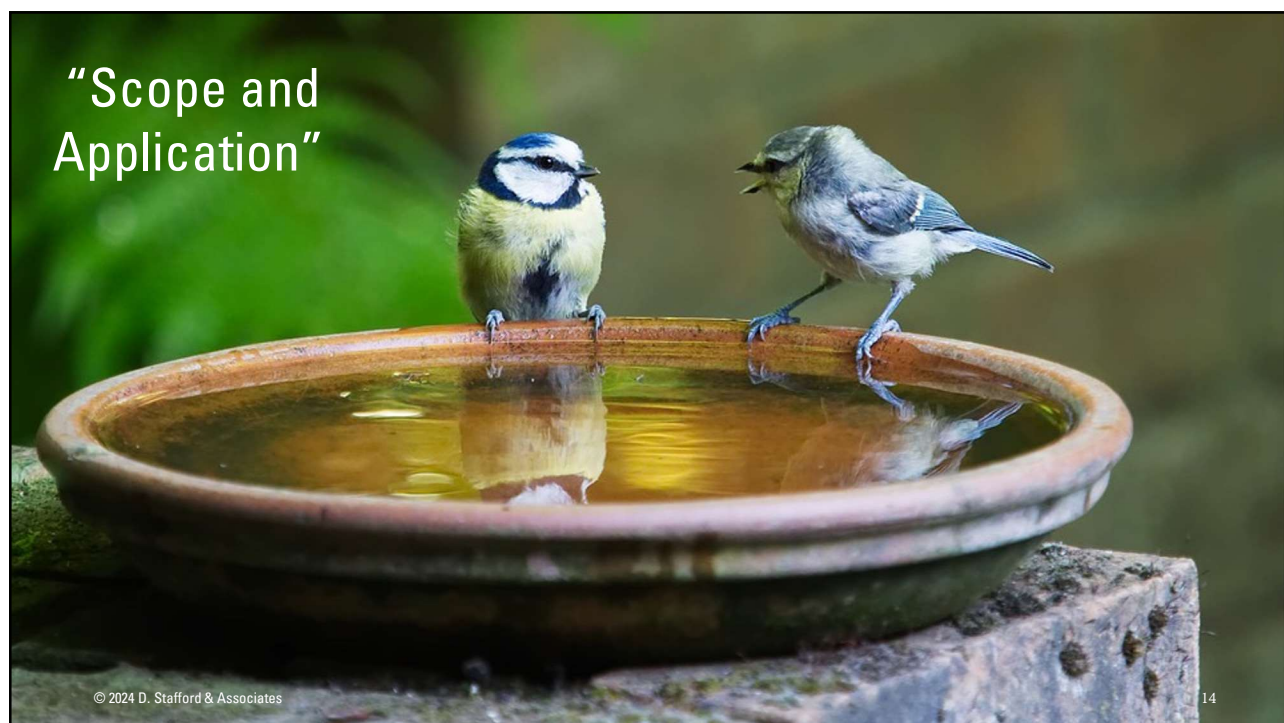
- Sex stereotypes
- Sex characteristics
- Pregnancy or related conditions
- Sexual orientation
- Gender identity

Applies in . . .

Admission, Employment, Educational Programs, and Activities

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PERSON-RELATED DEFINITIONS



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§ 106.2 - DEFINITIONS: PARTIES

Complainant

- A student or employee who is alleged to have been subjected to conduct that could constitute sex discrimination or
- Non-student/employee who is alleged to have been subjected to conduct that could constitute sex discrimination and was participating/attempting to participate at the time of the alleged sex discrimination

Respondent

- A person who is alleged to have violated the recipient's prohibition on sex discrimination

Party

- A complainant or respondent

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§ 106.2 - DEFINITIONS: STUDENT-RELATED

Admission

- Selection for part - time, full-time, special, associate, transfer, exchange, or any other enrollment, membership, or matriculation in or at an education program or activity operated by a recipient.

Student

- A person who has gained admission.

Student with a disability

- A student who is an individual with a disability as defined in the Rehabilitation Act of 1973 or a child with a disability as defined in the Individuals with Disabilities Education Act

TITLE IX PERSONNEL

Title IX
Coordinator

Investigator

Decision-
maker

Informal
Resolution
Facilitator

TITLE IX - ADVISOR OF CHOICE



May be but is not
required to be an
attorney



May accompany
to any meeting or
proceeding



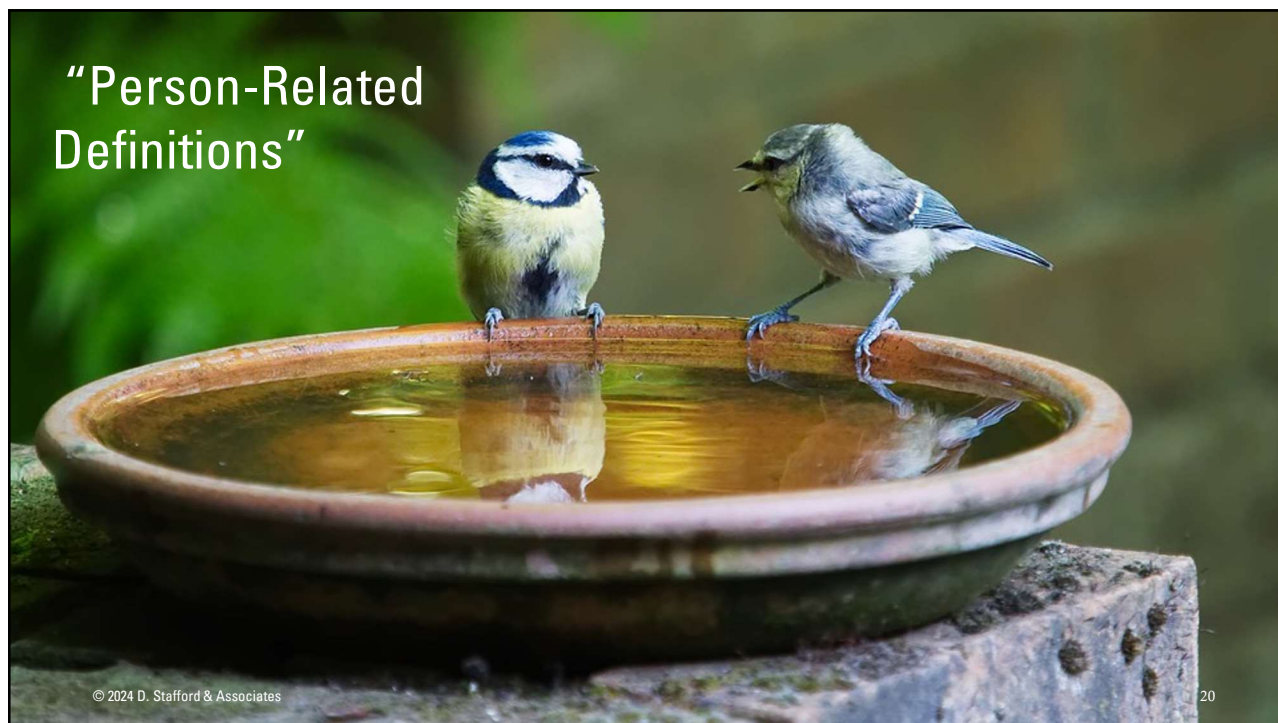
Institution may
restrict
participation



Receives access to
evidence and
investigative
report

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"Person-Related Definitions"



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PARENTAL, FAMILY, OR MARITAL STATUS; PREGNANCY OR RELATED CONDITIONS (§ 106.40)



§ 106.2 - DEFINITIONS: PARENT AND PREGNANCY

Parental Status

A person who, with respect to another person who is under the age of 18 or who is 18 or older but is incapable of self-care because of a physical or mental disability, is:

- A biological parent (biological, adoptive, foster, or stepparent);
- A legal custodian or guardian;
- In loco parentis with respect to such a person; or
- Actively seeking legal custody, guardianship, visitation, or adoption of such a person.

Pregnancy or Related Conditions

- Pregnancy, childbirth, termination of pregnancy, or lactation;
- Medical conditions related to pregnancy, childbirth, termination of pregnancy, or lactation; or
- Recovery from pregnancy, childbirth, termination of pregnancy, lactation, or related medical conditions.

§ 106.40 - PARENTAL, FAMILY, OR MARITAL STATUS; PREGNANCY OR RELATED CONDITIONS (STUDENTS)

No policies, practices, or
procedures treating a
student's current, potential,
or past parental, family, or
marital status differently
§ 106.40(a)

No discrimination against
students on the basis of
pregnancy or related
conditions
§ 106.40(b)(1)

§ 106.40(b)(2) - RESPONSIBILITY TO PROVIDE TITLE IX COORDINATOR CONTACT AND OTHER INFORMATION



Provide the Title IX
Coordinator's contact
information



Inform the person that the Title
IX Coordinator can coordinate
specific actions

§ 106.40(b)(3) - SPECIFIC ACTIONS

Information about the institution's obligations

Reasonable modifications

Provide voluntary access to separate and comparable portion of program or activity

Voluntary leaves of absence

Lactation space

Limitation on supporting documentation


§ 106.40(b)(4-5) - COMPARABLE TREATMENT AND CERTIFICATIONS

Must treat in the same manner and under the same policies as any other temporary medical conditions


Must not require a certification from a healthcare provider or any other person that the student is physically able to participate



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**RESPONSE TO SEX DISCRIMINATION
(§ 106.44)**



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§ 106.44(a) - GENERAL (RESPONSE)

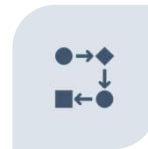
If knowledge of conduct that reasonably may constitute sex discrimination



Promptly



Effectively



Compliantly

§ 106.44(c)(2)(ii) - NOTIFICATION REQUIREMENT

(A) Notify the Title IX Coordinator when the employee has information about conduct that reasonably may constitute sex discrimination under Title IX

or

(B) Provide the contact information of the Title IX Coordinator and information about how to make a complaint of sex discrimination...

For K-12: All employees, except confidential employees, must notify the Title IX Coordinator.

REPORTING REQUIREMENTS

2001 Guidance

Responsible Employees: Employee with authority to take action; given the duty of reporting misconduct; or student would reasonably believe has this authority

2020 Regulations

Officials with Authority to institute corrective measures

2024 Regulations

Employees with authority to take corrective action or responsibility for administrative leadership, teaching, or advising.
(BUT ALL NON-CONFIDENTIAL MUST DO SOMETHING!)

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§ 106.44(c)(2) - NOTIFICATION REQUIREMENTS

Type of Employee	Notify Title IX	Provide Title IX contact and how make complaint
Confidential Employee	No	Yes (and more!)
Category 1: Employee with ability to institute corrective measures OR responsible for administrative leadership, teaching, or advising	Yes	
Category 2: All other employees	Either or (SCHOOL DECIDES)	

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STUDENT EMPLOYEE REPORTING REQUIREMENTS

“A postsecondary institution must reasonably determine and specify whether and under what circumstances a person who is both a student and an employee is subject to [the reporting requirements]...”

§ 106.44(c)(3)

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§ 106.2 - CONFIDENTIAL EMPLOYEES DEFINED

Privileged
(in role)

Designated
(when providing services)

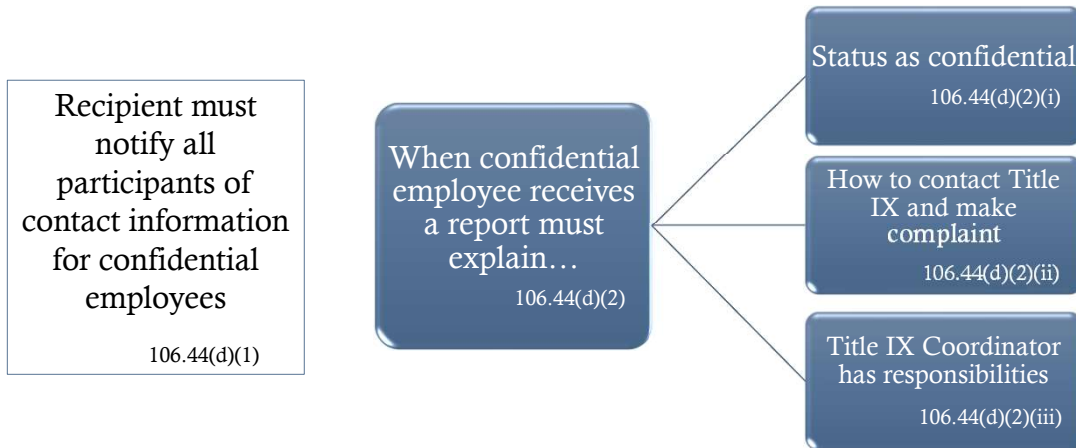
Human-subjects research
on sex discrimination

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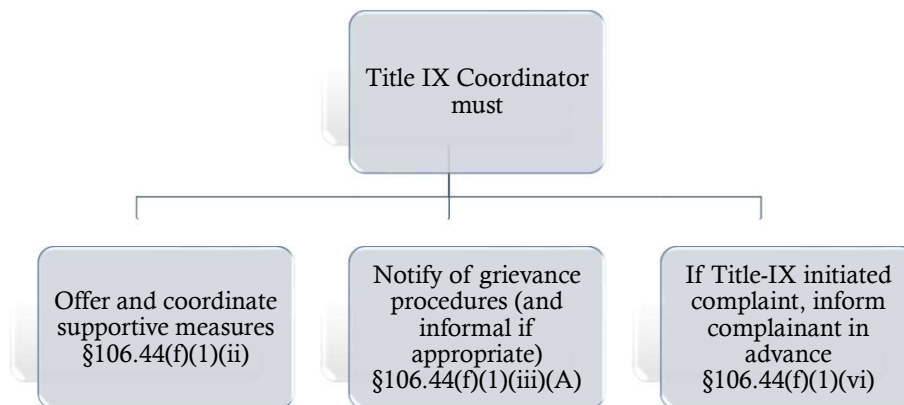
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§ 106.44(d) - CONFIDENTIAL EMPLOYEE REQUIREMENTS



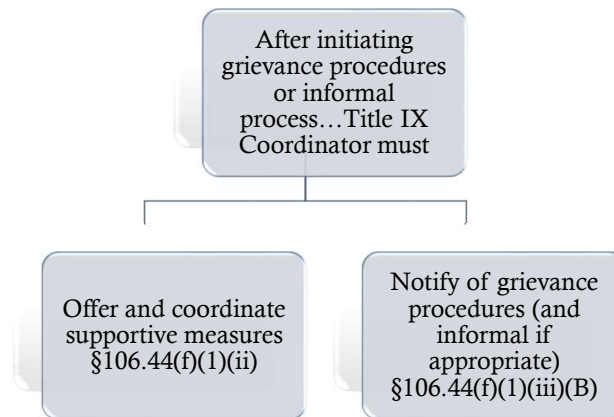
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TITLE IX COORDINATOR OUTREACH DUTIES TO COMPLAINANT



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TITLE IX COORDINATOR OUTREACH DUTIES TO RESPONDENT



§ 106.44(f)(1) - Title IX Coordinator Requirements



Treat both parties equitably
106.44(f)(1)(i)



If requested, initiate grievance procedures or informal process
106.44(f)(1)(iv)



Determine if need to initiate grievance procedures in absence of complaint
106.44(f)(1)(v)



Take other appropriate prompt and effective steps
106.44(f)(1)(vii)

§ 106.44(f)(1)(v) - TITLE IX-INITIATED COMPLAINTS

In the absence of a complaint or the withdrawal of any or all of the allegations in a complaint, and in the absence or termination of an informal resolution process, determine whether to initiate a complaint of sex discrimination

(A) To make this fact-specific determination, the Title IX Coordinator must consider, at a minimum, the following factors:

EIGHT FACTORS TO CONSIDER

Complainant's
request

Safety
concerns

Risk of
additional acts

Severity of
allegation

Age and
relationship

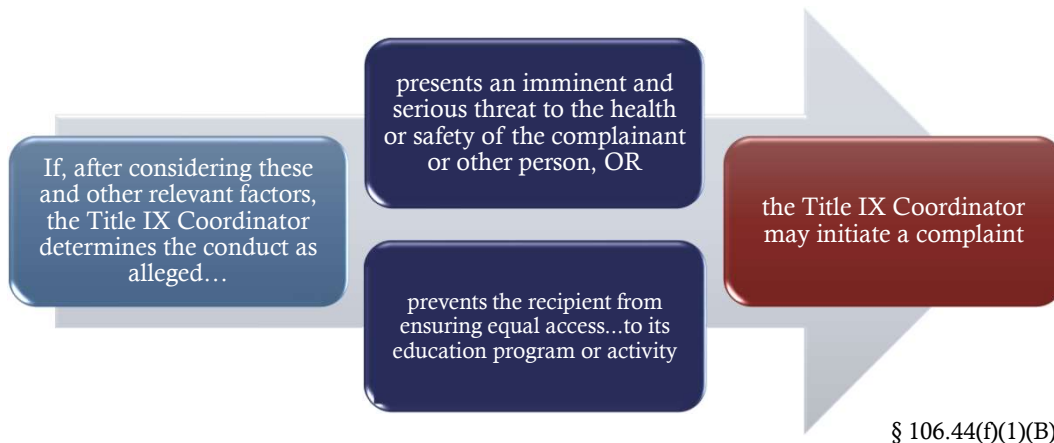
Scope and
pattern

Evidence

Alternatives to
resolve

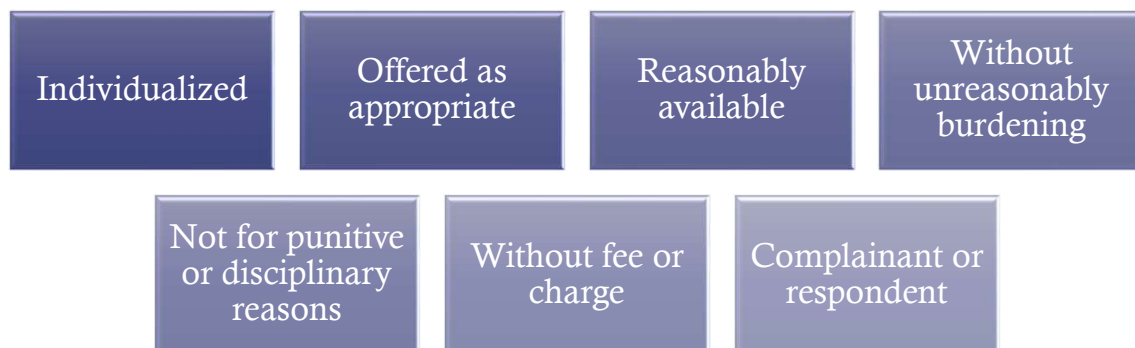
§ 106.44(f)(1)(v)(A)

THRESHOLD DETERMINATION



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§ 106.2 - SUPPORTIVE MEASURES DEFINITION



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SUPPORTIVE MEASURE GOALS

Restore or preserve
party access to
program or activity

Provide support
during process

§ 106.2

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LEAVE OPTIONS



Emergency removal



Administrative leave

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§ 106.44(h) - EMERGENCY REMOVAL



Imminent and serious threat to the health or safety of any persons



Arises from the allegations



Provide notice and opportunity to challenge immediately following the removal



Cannot modify any rights under IDEA, Section 504, or the ADA

ADDITIONAL RESPONSE REQUIREMENTS



Monitor for Barriers to reporting
§ 106.44(b)(1)



Take steps to Remove Barriers
§ 106.44(b)(1)




Response to disclosures at Public Awareness Events
§ 106.44(e)




Prohibited Disclosures of PII
§ 106.44(j)



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**GRIEVANCE
PROCEDURES FOR
SEX
DISCRIMINATION
(§ 106.45)**



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§ 106.45(a)(2) - COMPLAINT

Sex Discrimination other than Sex-Based Harassment

- Complainant
- Parent or other
- Title IX Coordinator
- Any student or employee
- Other person participating

Sex-Based Harassment

- Complainant
- Parent or other legal representative
- Title IX Coordinator

§ 106.45(b) - BASIC REQUIREMENTS FOR GRIEVANCE PROCEDURES

Treat complainants and respondents equitably

Free of bias and conflict of interest

Presumption of not responsible

Reasonably prompt timeframes with extensions for good cause

Reasonable steps to protect privacy

Objective evaluation of all evidence that is relevant

Exclude certain evidence as impermissible

Articulate consistent principles for applying grievance procedures

§ 106.45(c)(2) – Additional Allegations



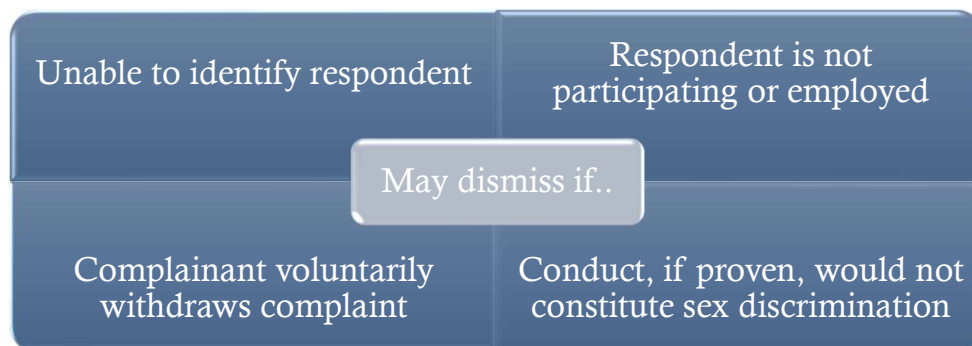
If the institution decides to investigate additional allegations, it must provide notice to the parties whose identities are known.

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§ 106.45(d)(1)(i-iv) - DISMISSAL OF A COMPLAINT

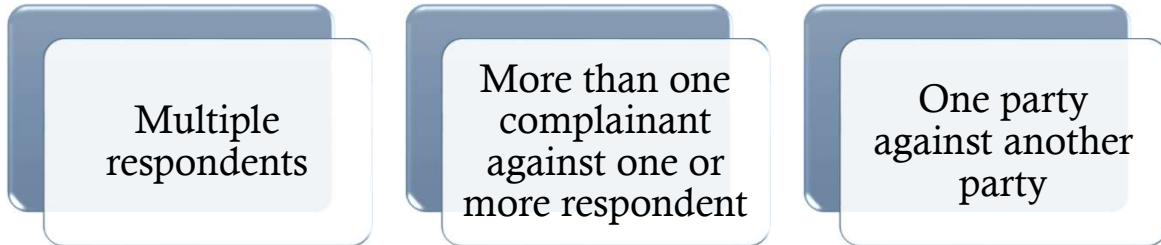


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§ 106.45(e) – CONSOLIDATION OF COMPLAINTS



PROTECTING THE PRIVACY OF PERSONS

§ 106.44(j)

- Must not disclose personally identifiable information obtained except...
 - With prior written consent
 - To carry out the purposes of this part

§ 106.45(b)(5)

- Take reasonable steps to protect the privacy of the parties and witnesses
- Steps cannot restrict the ability of the parties to:
 - Obtain and present evidence, including by speaking to witnesses
 - Consult with their family members, confidential resources, or advisors
 - Otherwise prepare for or participate in the grievance procedures

PROTECTING THE PRIVACY OF INFORMATION

§ 106.44(k)(3)

- Before the initiation of an informal process, provide notice that explains...
 - What information will maintain
 - How the institution could disclose for use in grievance procedures

§ 106.45(f)(4)(iii)

- Take reasonable steps to prevent and address the parties' unauthorized disclosure of information and evidence solely through the grievance procedures

§ 106.46(e)(6)(iii)

- Parties' and their advisors' unauthorized disclosure

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MINIMUM REQUIREMENTS UNDER § 106.45



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§ 106.45(f) - COMPLAINT INVESTIGATION



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ADMISSIBILITY OF WITNESSES

Always admissible



Fact Witness

§ 106.45(f)(2)

Discretionary admissibility



Expert

§ 106.46(e)(4)



Character

Preamble

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§ 106.45(f)(4) - Access to evidence



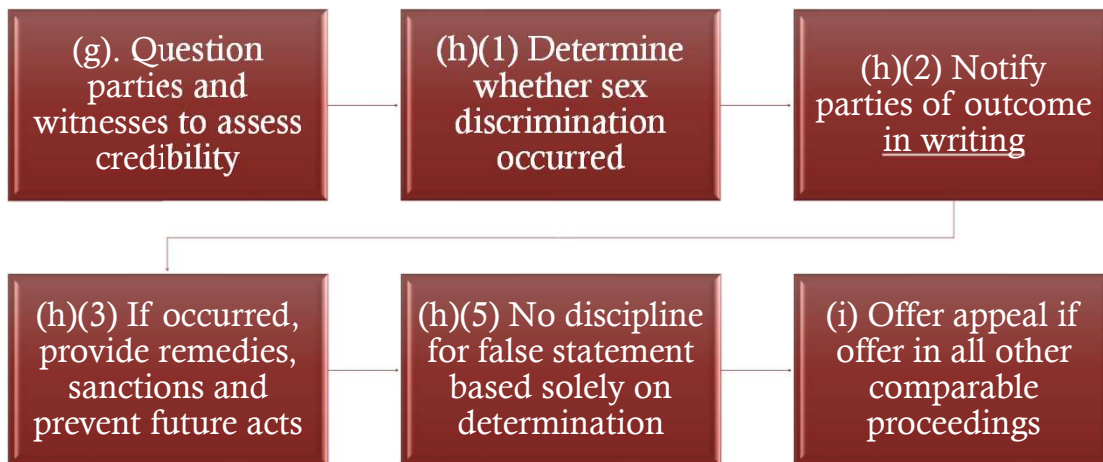
Evidence Option



Description Option

59

§ 106.45(g)-(h) - DECISION-MAKERS



60

§ 106.45(h)(1) – STANDARD OF PROOF

Preponderance of
the evidence

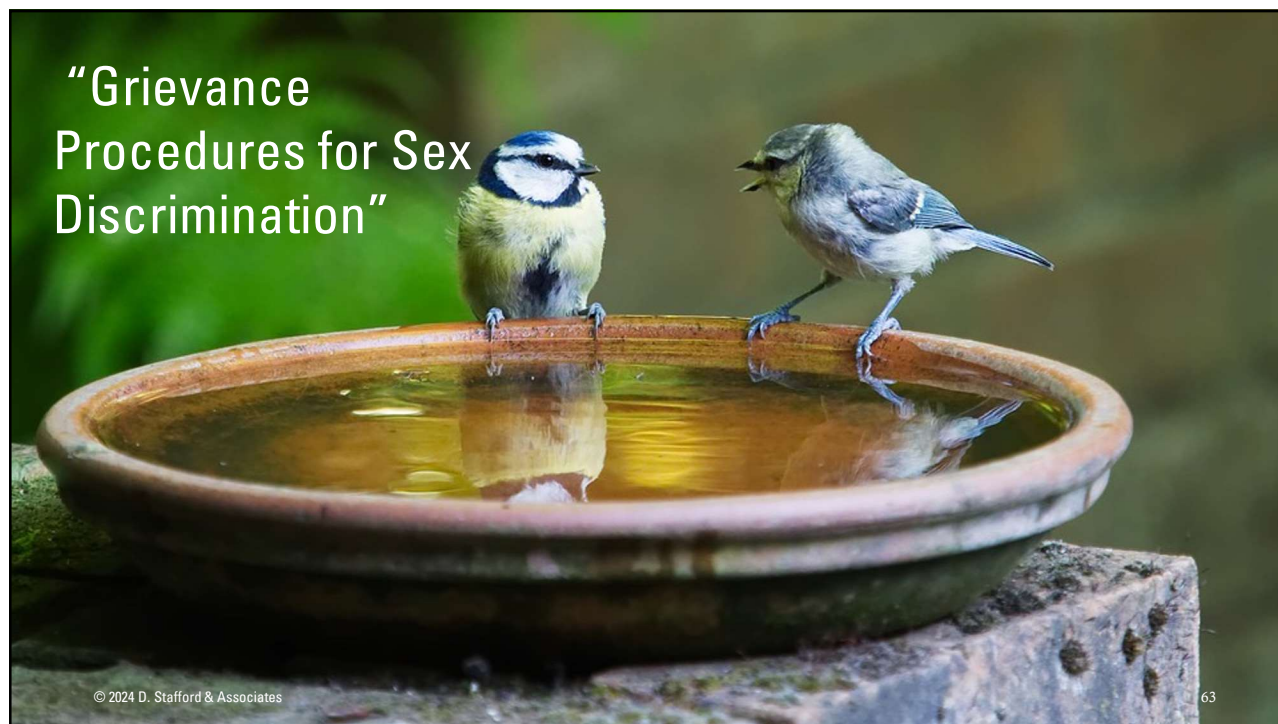


Unless use clear and
convincing in all
other proceedings
then MAY

WRITTEN DETERMINATION

Notify the parties in writing of the determination whether sex discrimination occurred under Title IX or this part including the rationale for such determination, and the procedures and permissible bases for the complainant and respondent to appeal, if applicable

§ 106.45(h)(2)



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**GRIEVANCE
PROCEDURES FOR
SEX-BASED
HARASSMENT
INVOLVING
STUDENTS
 (§ 106.46)**

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§ 106.46(b) - STUDENT EMPLOYEES

“When a complainant or a respondent is both a student and an employee...must make a fact-specific inquiry to determine whether the requirements of this section apply.”

TWO GRIEVANCE PROCEDURES

Procedure A (106.45)

- Sex discrimination
- Employee on employee sex-based harassment
- K-12 complaints
- Retaliation

Procedure B (106.46)

- Sex-based harassment involving student complainants or student respondents at postsecondary institutions

COMPARING NOTICE

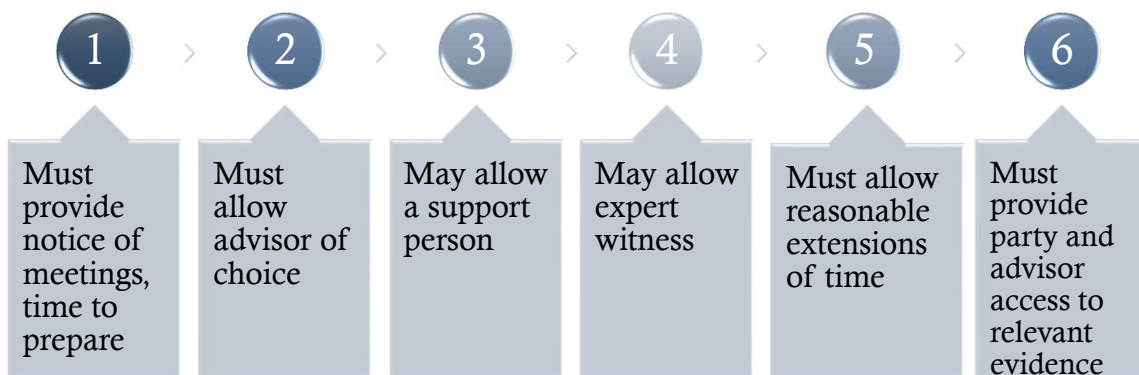
	§106.45(c) not required to be in writing	§106.46(c) required to be in writing
Grievance Procedures	YES	YES
“Sufficient information” (parties, conduct, date, location)	YES	YES
Statement that retaliation prohibited	YES	YES
Access to relevant evidence	YES	YES
Respondent is presumed not responsible		YES
Right to advisor of choice		YES
Prohibition on false statements		YES

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§ 106.46(e) COMPLAINT INVESTIGATION



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ADVISOR OF CHOICE



May be but is
not required to
be an attorney
106.46(e)(2)



May accompany
to any meeting
or proceeding
106.46(e)(2)



Institution may
restrict
participation
106.46(e)(2)



Receives access
to relevant
evidence
106.46(f)(ii)(B)



May conduct
cross-
examination at
hearing if
allowed
106.46(1)(f)(ii)(B)

§ 106.46(e)(6)(i) - Access to evidence



Evidence Option



Investigative Report Option

REVIEW AND RESPOND TO EVIDENCE

A postsecondary institution must provide the parties with a reasonable opportunity to review and respond to the evidence or the investigative report...

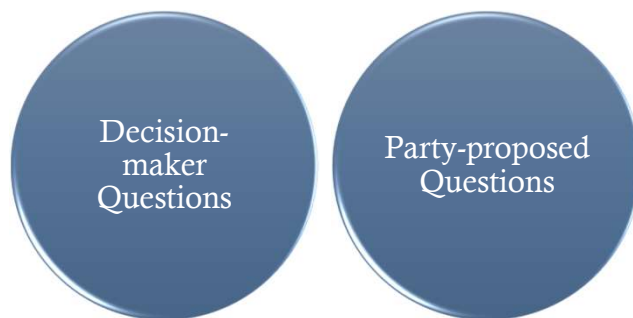
§ 106.46(e)(6)(ii)

71

ASSESSING CREDIBILITY

72

§ 106.46(f)(1) - PROCESS FOR QUESTIONING PARTIES AND WITNESSES



73

FORMATS FOR CREDIBILITY ASSESSMENT



Individual meetings
§106.46(f)(1)(i)



Hearing with decision-maker asking proposed questions
§106.46(f)(1)(ii)(A)



Hearing with cross-examination by advisors
§106.46(f)(1)(ii)(B)

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§ 106.46(f)(1)(i) - NON-HEARING OPTION

- Must hold individual meetings with the complainant, respondent, and any witnesses
- The investigator or decision-maker may ask relevant and permissible questions
- Each party may propose relevant and permissible questions to be asked by the investigator or decision-maker
- Provide each party with the recording or transcript with an opportunity to propose follow-up questions
- There could be several rounds of meetings

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§ 106.46(f)(1)(ii) - HEARING OPTION

- The decision-maker may ask relevant and permissible questions
- Each party may propose relevant and permissible questions to be asked by the decision-maker
- No questions may be asked directly by a party
- If the institution uses advisor-conducted questioning and a party does not have an advisor, the institution must provide one without charge (cannot be a confidential employee)

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LIVE HEARING

The decision-maker must determine whether a proposed question is relevant ... prior to the question being posed and must explain any decision to exclude a question as not relevant or otherwise impermissible.

... must not permit questions that are unclear or harassing

... must give a party an opportunity to clarify or revise a question that ... is unclear or harassing

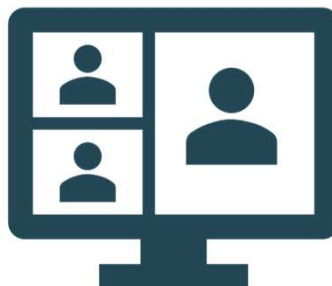
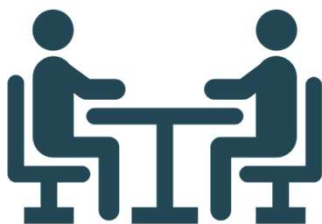
... may also adopt and apply other reasonable rules regarding decorum, provided they apply equally to the parties.

§ 106.46(f)(3)

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§ 106.46(g) - LIVE HEARING PROCEDURES



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§ 106.46(g) - LIVE HEARING PROCEDURES



Audio



Video



Transcript

§ 106.46(h) - DETERMINATION REGARDING RESPONSIBILITY

Description of alleged sex-based harassment

Policies and procedures used to evaluate allegations

Evaluation of evidence and determination

Disciplinary sanctions or remedies if sex-based harassment occurred

Appeal procedures

§ 106.46(i) - APPEALS

Must offer the parties an appeal from a determination whether sex-based harassment occurred and from a ... dismissal of a complaint or any allegation therein, on the following bases:

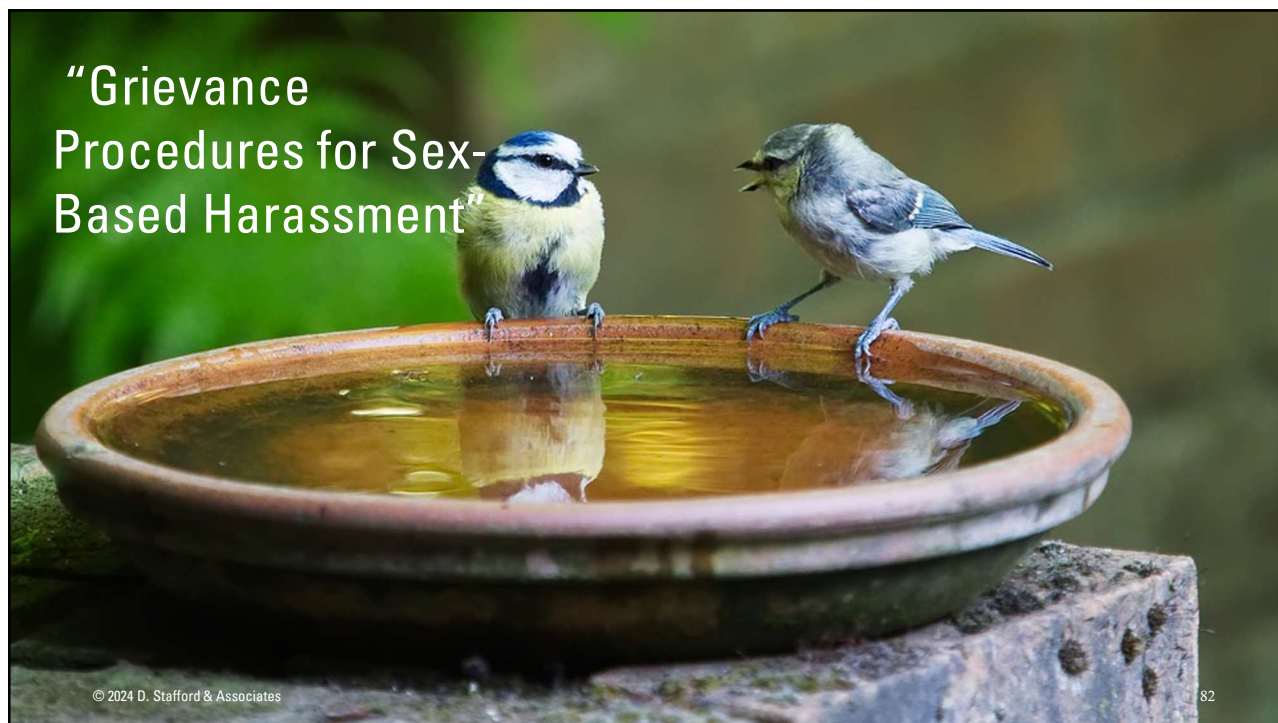
Procedural irregularity that would change the determination of whether sex-based harassment occurred

New evidence that would change the outcome of the matter and that was not reasonably available at the time the determination of whether sex-based harassment occurred or dismissal was made

Title IX Coordinator, investigator, or decision-maker had a conflict of interest or bias that would change the outcome

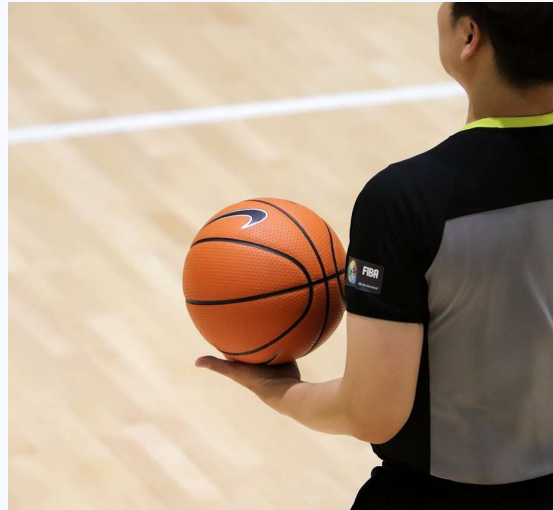
81

"Grievance
Procedures for Sex-
Based Harassment"



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SERVING IMPARTIALLY



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CREDIBILITY OF THE PROCESS



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CONFLICT OF INTEREST OR BIAS

Generally



Individually



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Conflict of interest

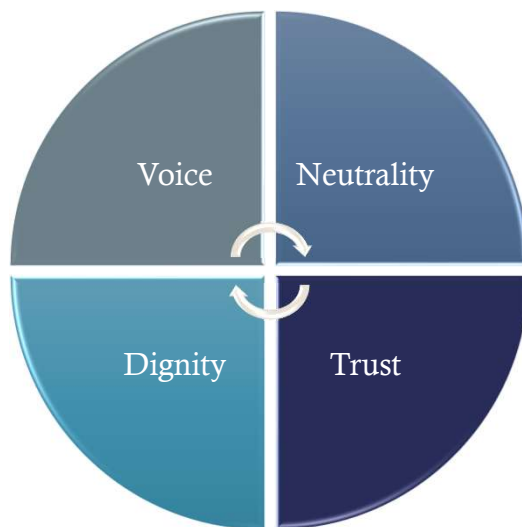
A situation where a person has multiple interests and one interest could compromise the person's judgment or decision-making

Bias

Prejudices in favor or against a person or group compared with another

86

PROCEDURAL FAIRNESS

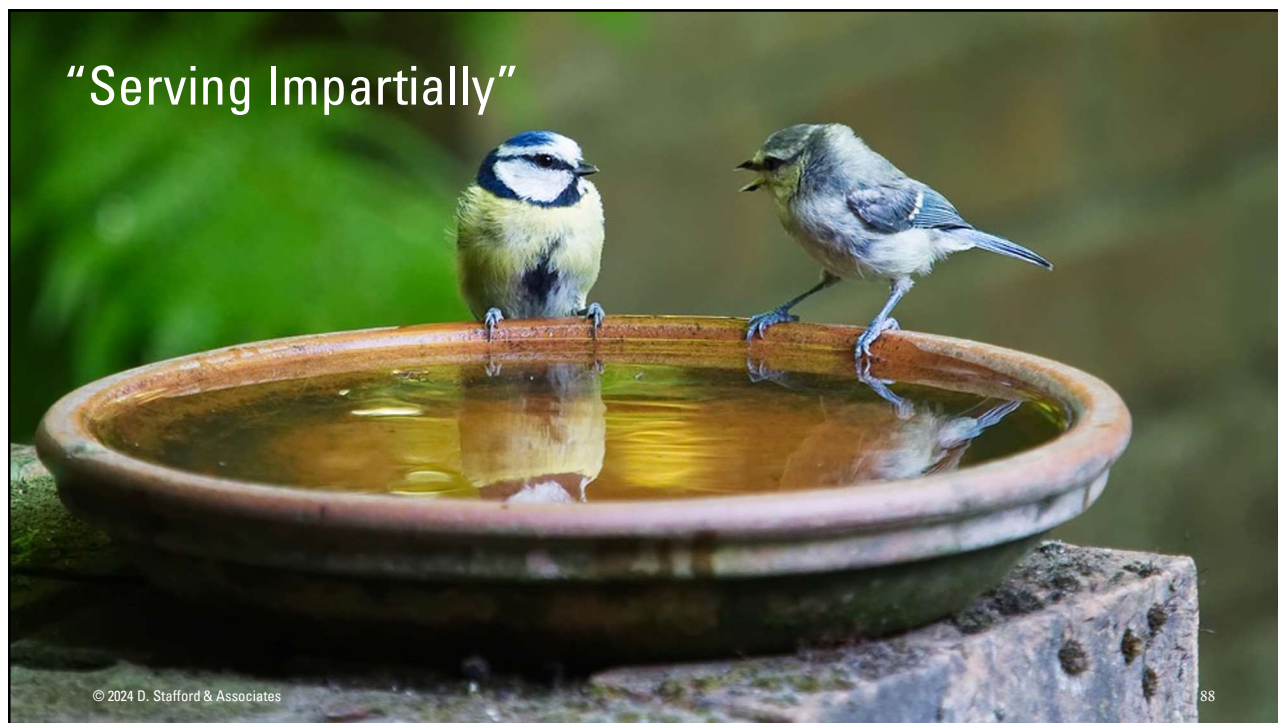


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“Serving Impartially”



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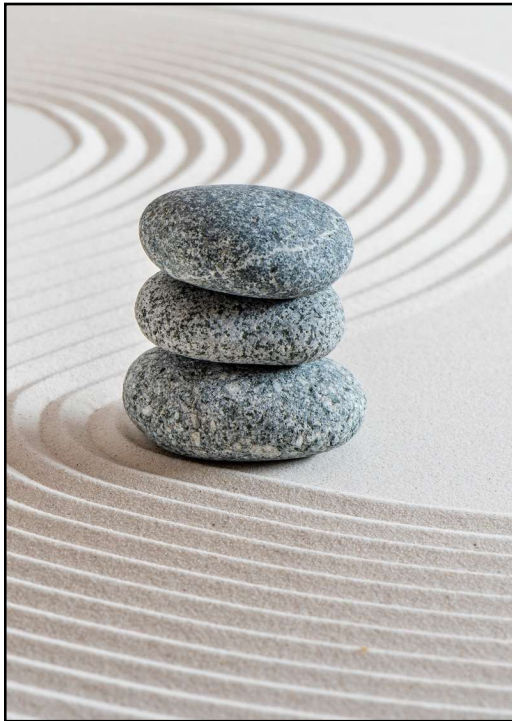
89



SEX-BASED HARASSMENT



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AGENDA

- Sex-Based Harassment Definitions
- Unwelcome Conduct & Consent

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D. STAFFORD
& ASSOCIATES

SEX-BASED HARASSMENT DEFINITIONS

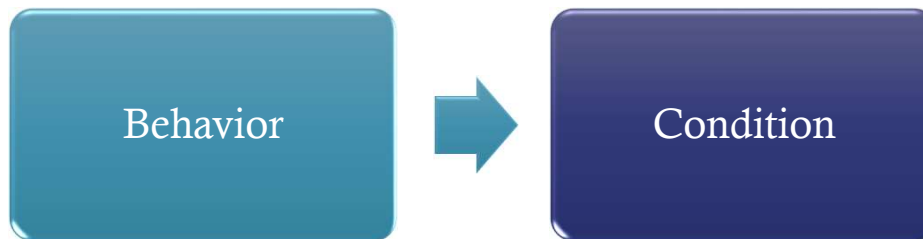
A black and white photograph of a person with long dark hair, wearing a white long-sleeved shirt with lace cuffs. They are covering their face with both hands, with their fingers interlaced, suggesting a state of distress, anxiety, or being overwhelmed.

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UNDERSTANDING THE ELEMENTS



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DECISION-MAKER'S PATH

- What was the conduct?
 - Was the conduct on the basis of sex?
 - Was the conduct unwelcome or without consent?
- Does the conduct meet the definition of a violation of institutional policy?

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§ 106.2 – SEX-BASED HARASSMENT

Sex-based harassment prohibited by this part is a form of sex discrimination and means sexual harassment and other harassment on the basis of sex, including on the bases described in § 106.10, that is:

1. *Quid pro quo*

2. *Hostile Environment*

3. *Specific offenses*

RECOMMENDED LANGUAGE

Sex-based harassment prohibited by this part is a form of sex discrimination and means sexual harassment and other harassment on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity, that is:

1. *Quid pro quo*

2. *Hostile Environment*

3. *Specific offenses*

QUID PRO QUO HARASSMENT



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QUID PRO QUO HARASSMENT

An employee, agent, or other person authorized by the recipient to provide an aid, benefit, or service under the recipient's education program or activity explicitly or impliedly conditioning the provision of such an aid, benefit, or service on a person's participation in unwelcome sexual conduct.

§ 106.2

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QUID PRO QUO NOTES



Unwelcome



Explicit and
implicit



Aid, benefit, or
service



Employee, agent,
or other person

QUID PRO QUO DETERMINATION

Respondent

- What is the institutional role of the respondent?
- What is the relationship to the complainant?
- What, if any, perceived or actual power exists?

Aid, Benefit, or Service

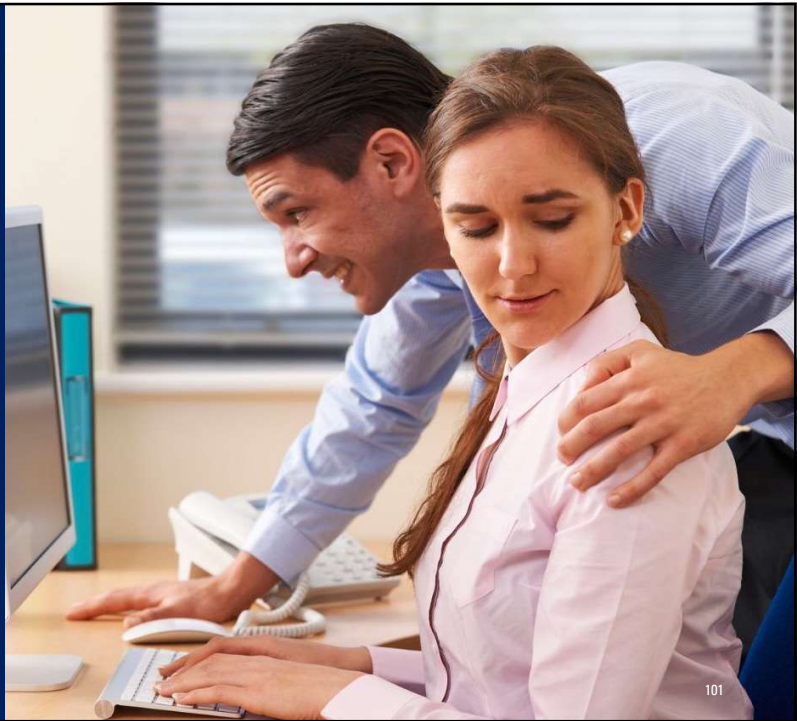
- What was offered?
- How was it communicated?

Sexual Conduct

- What was the conduct requested?
- Was it sex-based?
- How was it unwelcome?
- How was it communicated?

HOSTILE ENVIRONMENT HARASSMENT

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HOSTILE ENVIRONMENT HARASSMENT

Unwelcome sex-based conduct that, based on the totality of the circumstances, is subjectively and objectively offensive and is so severe or pervasive that it limits or denies a person's ability to participate in or benefit from the recipient's education program or activity (i.e., creates a hostile environment)...

§ 106.2

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HOSTILE ENVIRONMENT NOTES



Jurisdiction



Beyond Sexual Harassment

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HOSTILE ENVIRONMENT CONSIDERATIONS



Degree affected
educational
access



Type, frequency,
duration



Parties' ages,
roles, previous
interactions,
other factors




Location and
context in which
occurred




Other sex-based
harassment in
educational
setting

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HOSTILE ENVIRONMENT DETERMINATION



```
graph LR; A[Unwelcome] --> B[Sex-based]; B --> C[Totality of Circumstances]; C --> D[Subjective and Objective]; D --> E[Severe or Pervasive]; E --> F[Limits or Denies];
```

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SEXUAL ASSAULT

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SEXUAL ASSAULT

Sexual assault meaning an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation.

§ 106.2

UNIFORM CRIME REPORTING PROGRAM (UCR)

- **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 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
- **Sexual Assault With An Object** - To use an object or instrument to unlawfully penetrate, however slightly, the genital or anal opening of the body of 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

UNIFORM CRIME REPORTING PROGRAM (UCR)

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

FBI, Uniform Crime Reporting Program:
National Incident-Based Reporting System (2018)

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OCR CORRESPONDENCE WITH NACCOP

The 2024 Title IX regulations define sexual assault as “an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation” 34 C.F.R. § 106.2. The preamble to the 2024 Title IX regulations notes that the definition of sexual assault in the 2024 Title IX regulations mirrors the Clery Act’s statutory definition of sexual assault. 89 FR 33519. Nothing in the 2024 Title IX regulations prohibits a recipient, including a postsecondary institution, from using the definitions of rape, fondling, incest, and statutory rape from Appendix A of the Department’s Clery Act regulations to define sexual assault under Title IX and recipients may find it useful to consult these definitions.

- OCR Correspondence with NACCOP, May 23, 2024

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CLERY DEFINITIONS OF SEXUAL ASSAULT

- **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. This offense includes the rape of both males and females.
- **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 age or because of temporary or permanent mental 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.

34 CFR 668 Appendix A

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SEXUAL ASSAULT DETERMINATION

What was the sexual behavior?

Who was the initiator?

What, if any, were the words or actions to indicate consent?

- Is there an issue of incapacitation or force?

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STALKING

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STALKING



Engaging in a course of conduct directed at a specific person that would cause a reasonable person to:

- (A) Fear for the person's safety or the safety of others; or*
- (B) Suffer substantial emotional distress.*

§ 106.2

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STALKING DETERMINATION



What was the course of
conduct?



What was the
frequency?



What was the impact?

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INTIMATE PARTNER VIOLENCE

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DATING VIOLENCE

Violence committed by a person:

- (A) Who is or has been in a social relationship of a romantic or intimate nature with the Complainant; and*
- (B) Where the existence of such a relationship shall be determined based on a consideration of the following factors:*
 - (1) The length of the relationship;*
 - (2) The type of relationship; and*
 - (3) The frequency of interaction between the persons involved in the relationship.*

§ 106.2

DOMESTIC VIOLENCE

Felony or misdemeanor crimes committed by a person who:

- (A) Is a current or former spouse or intimate partner of the victim under the family or domestic violence laws of the jurisdiction of the recipient, or a person similarly situated to a spouse of the victim;*
- (B) Is cohabitating, or has cohabitated, with the victim as a spouse or intimate partner;*
- (C) Shares a child in common with the victim; or*
- (D) Commits acts against a youth or adult victim who is protected from those acts under the family or domestic violence laws of the jurisdiction.*

§ 106.2

INTIMATE PARTNER VIOLENCE DETERMINATION

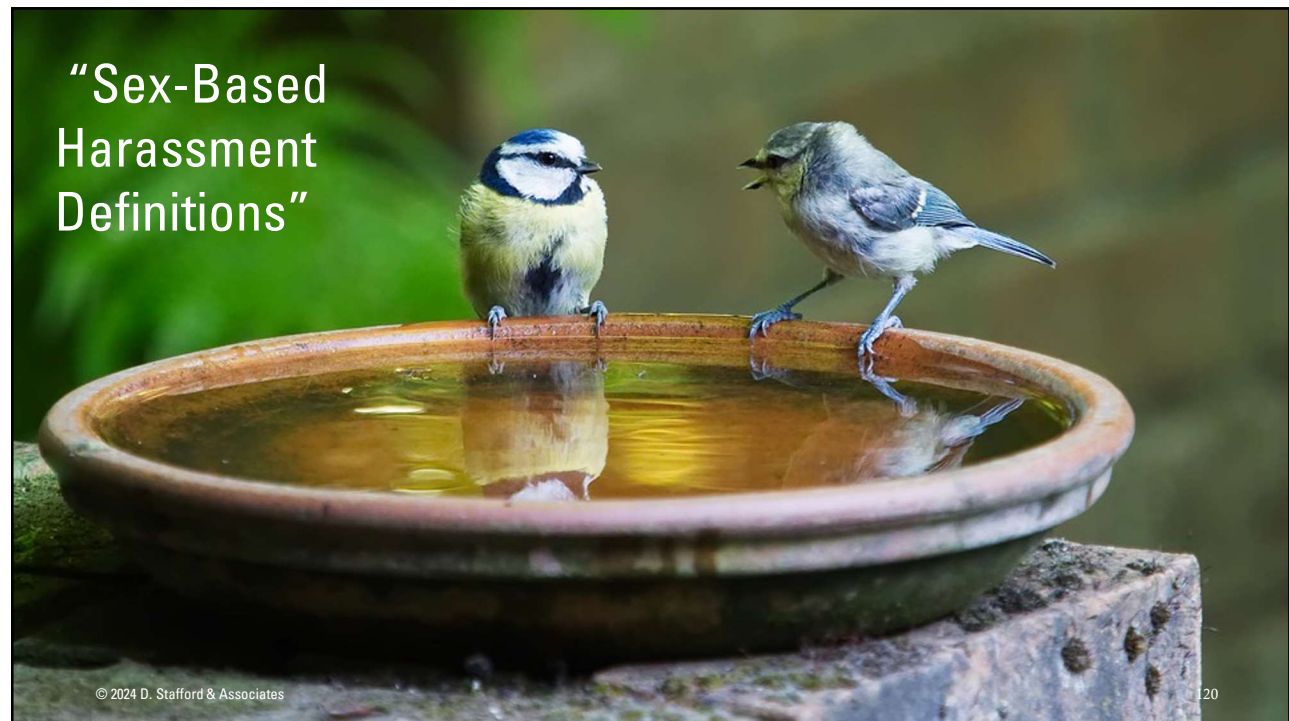
Parties

- Type of relationship
- Length of the relationship
- Frequency of interaction between the persons

Behaviors

- Type of violence
- Possible patterns of behaviors
- Other behaviors that may fall under other policy definitions

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UNWELCOME CONDUCT & CONSENT



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“Unwelcome conduct”
vs. “without consent”

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UNWELCOME CONDUCT



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WHEN DOES CONDUCT BECOME UNWELCOME?

Invited



Uninvited but welcome



Offensive but tolerated



Flatly rejected

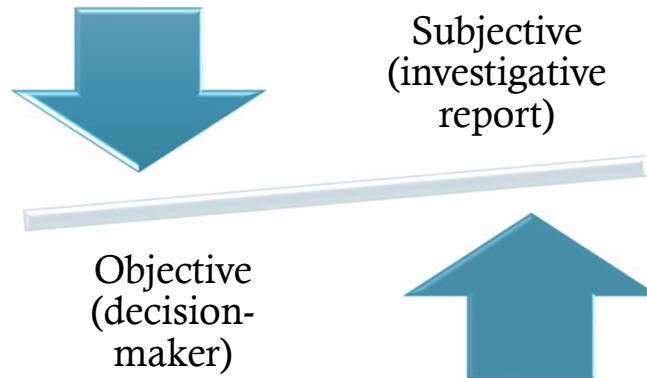


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TESTING FOR UNWELCOMENESS

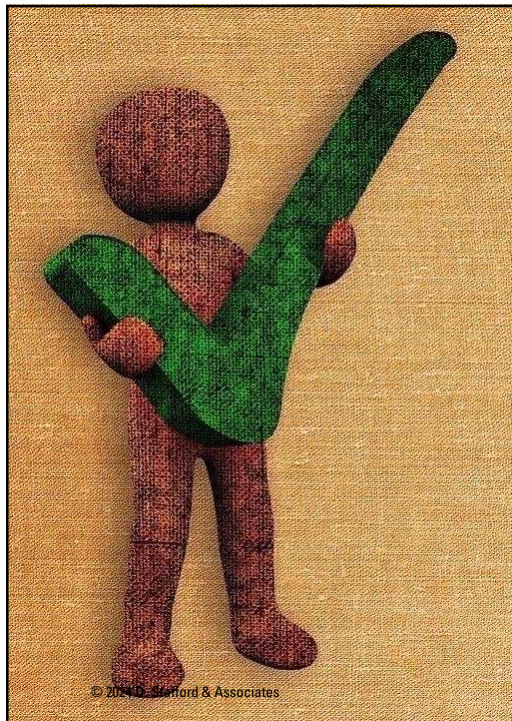


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CONSENT



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NOTE ON CONSENT

The Assistant Secretary will not require a recipient to adopt a particular definition of consent, where that term is applicable with respect to sex-based harassment.

§ 106.2

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& ASSOCIATES

CONSENT

Sexual
Permission

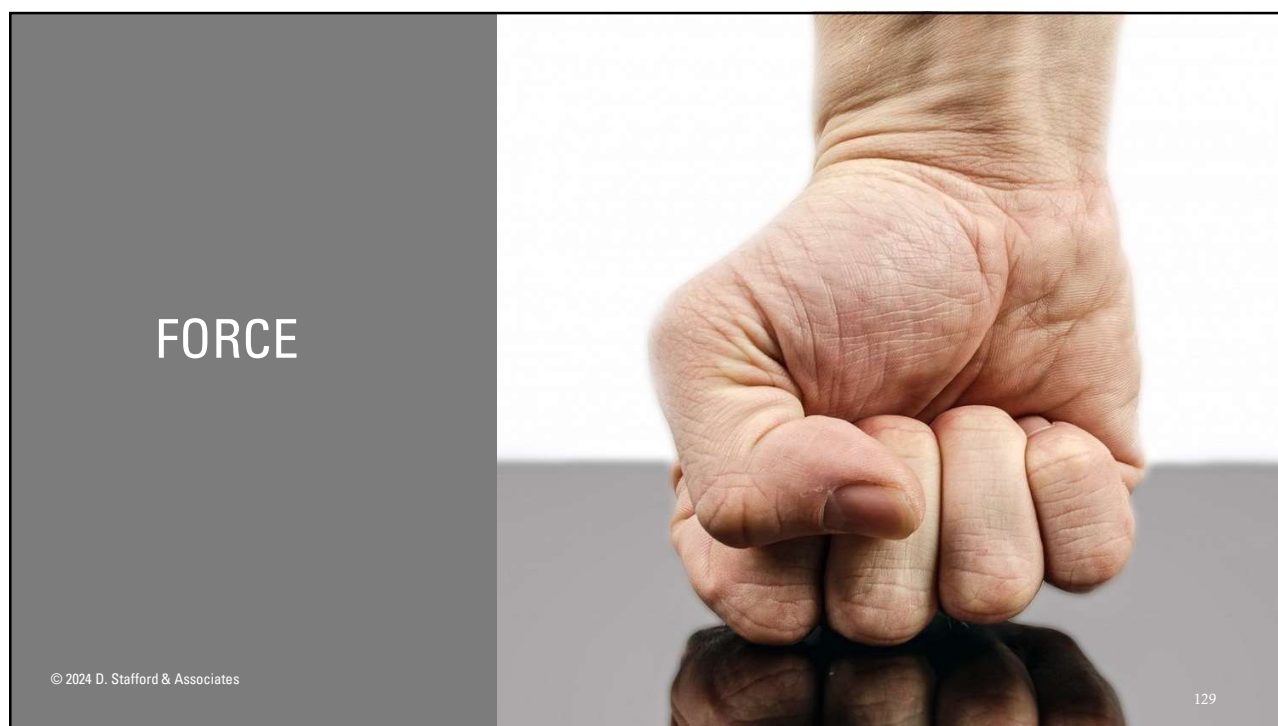
Verbal or
Nonverbal

Absent if force
or incapacitation

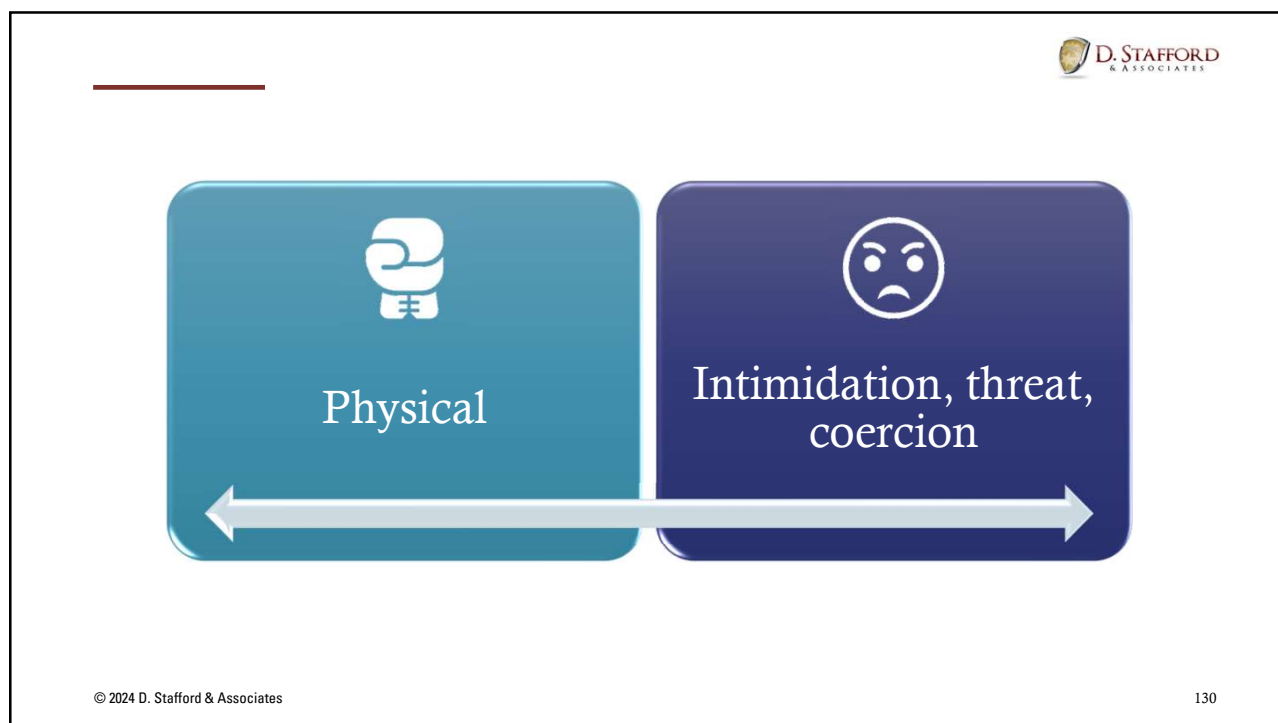
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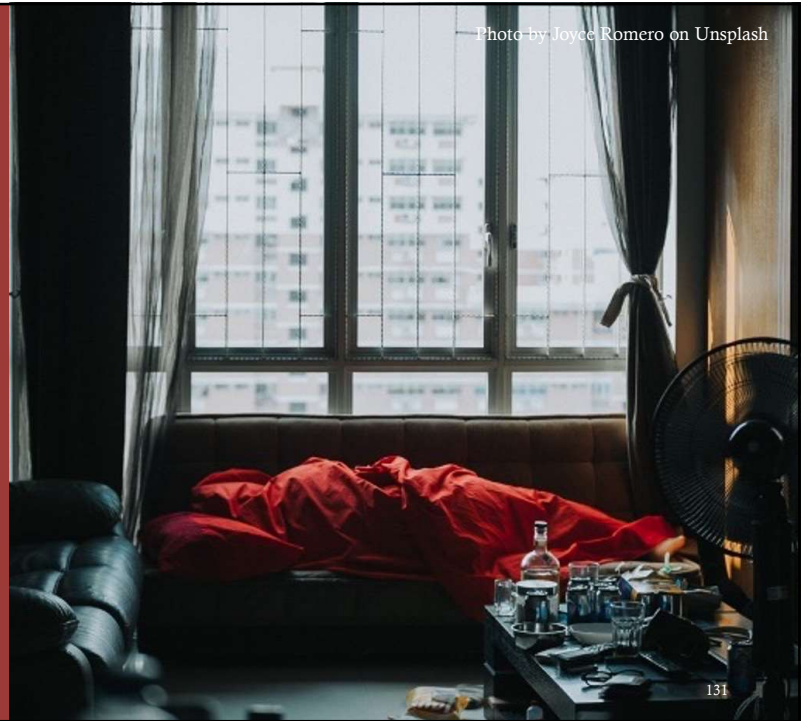


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INCAPACITATION

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Photo by Joyce Romero on Unsplash



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INCAPACITATION - SAMPLE DEFINITION

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.



Alcohol



Drugs



Disability



Other

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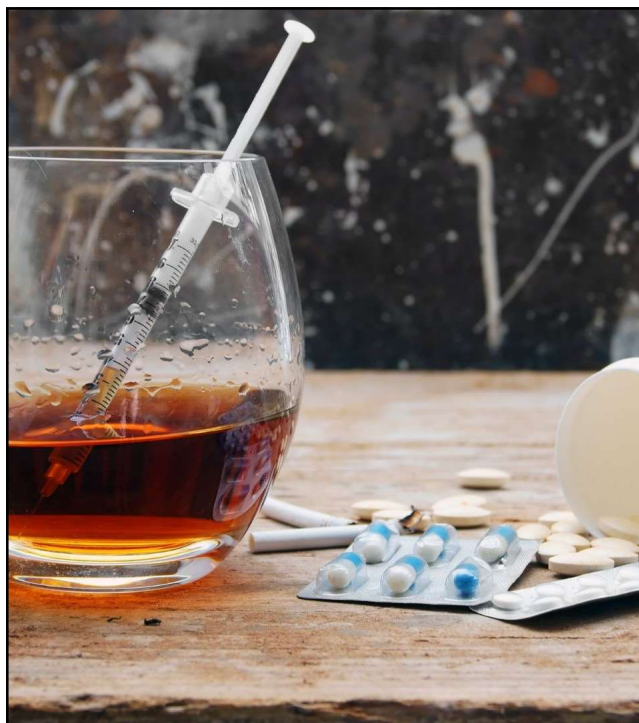
TWO-STEP DETERMINATION

Was the
complainant
incapacitated?



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

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ALCOHOL &
OTHER DRUGS

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SUBSTANCE USE AND SEX

“...analysis of SHIFT survey data showed that two-thirds of sexually active students who had sex in the prior three months reported some substance use prior to or during sex.”

Jennifer S. Hirsch & Shamus Khan. “Sexual Citizens: A Landmark Study of Sex, Power, and Assault on Campus.”

SHIFT survey = Alexander Wamboldt et al., “Wine Nights, ‘Bro-Dinners,’ and Jungle Juice: Disaggregating Practices of Undergraduate Binge Drinking,” *Journal of Drug Issues*, 2019, 49(4): 643–67.

Levels of Alcohol/Drug Consumption



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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INCAPACITATION

- 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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BLACKOUTS

Fragmentary Blackout

Also known as
“grayout” or
“brownout”

Gaps in memory with
some level of
recollection

En Bloc Blackout

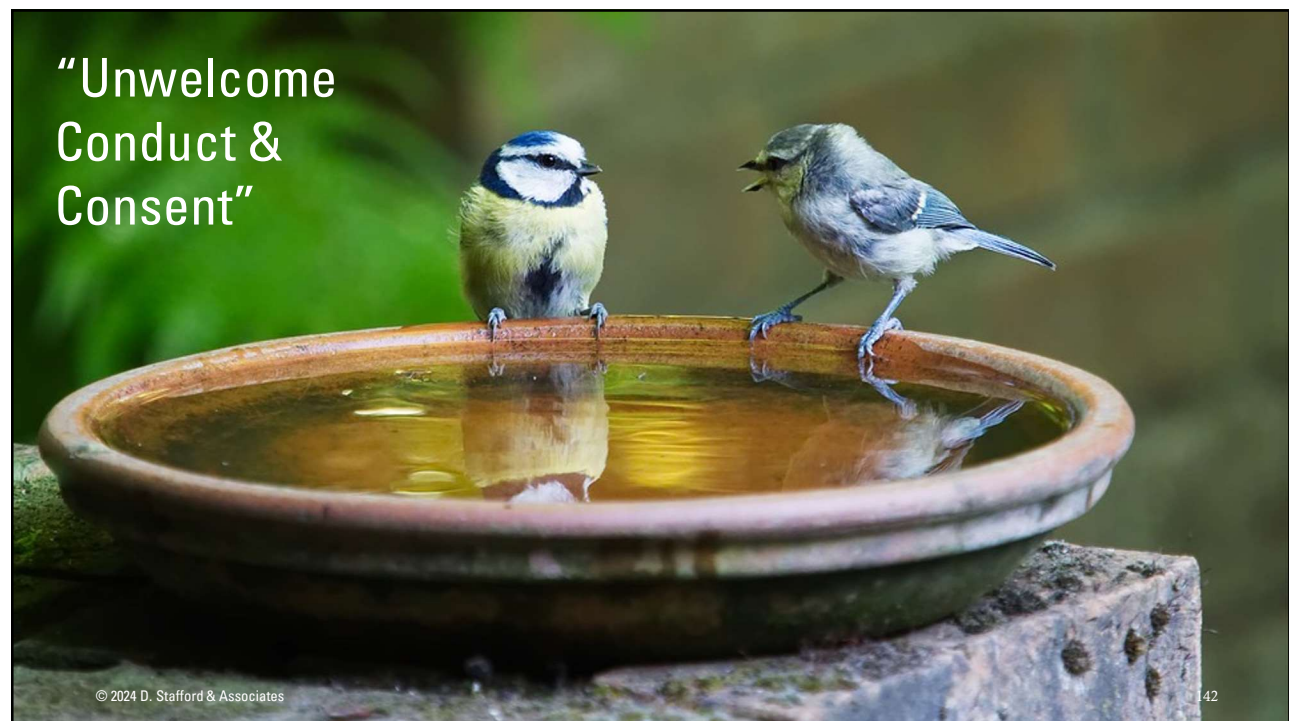
No recollection of
events

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INCAPACITATION DETERMINATION



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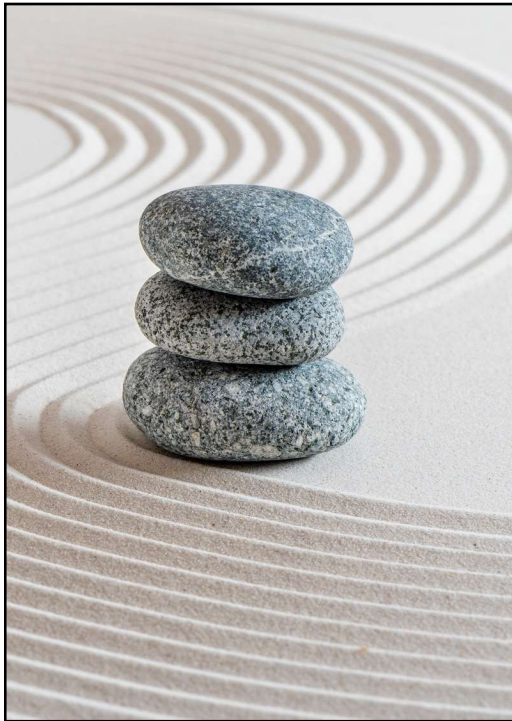
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THE HEARING PROCESS

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AGENDA

- Pre-Hearing Activity
- The Hearing
- The Deliberation
- The Written Outcome
- The Appeal

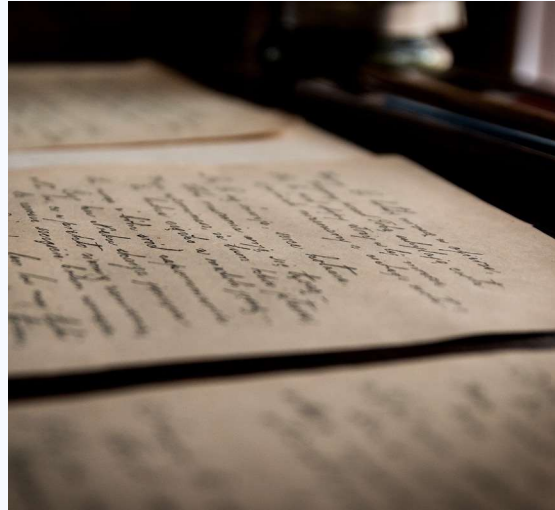
145

A photograph of a control room or mission management center. It features several rows of green and white computer consoles with multiple monitors. In the background, a large screen displays a world map, and other smaller screens show various data and images. The room is well-lit with overhead lights.

PRE-HEARING ACTIVITY

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HEARING NOTICE & INVESTIGATIVE REPORT



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RECOMMENDED HEARING NOTICE



Date, time, location, and names of decision-makers



Reiterate details from notice (parties, alleged behavior and allegations)



Investigative report

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INVESTIGATIVE REPORT



Must accurately summarize the relevant evidence



Parties must be provided an opportunity to respond prior to the live hearing, during the live hearing, or both prior to and during the hearing

HEARING DECISION- MAKER PREPARATION



PRE-HEARING PREP



Review notice of
allegation and
complaint



Review policy
and procedures



Review final
investigative
report

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PRE-HEARING PREP



Review party
responses

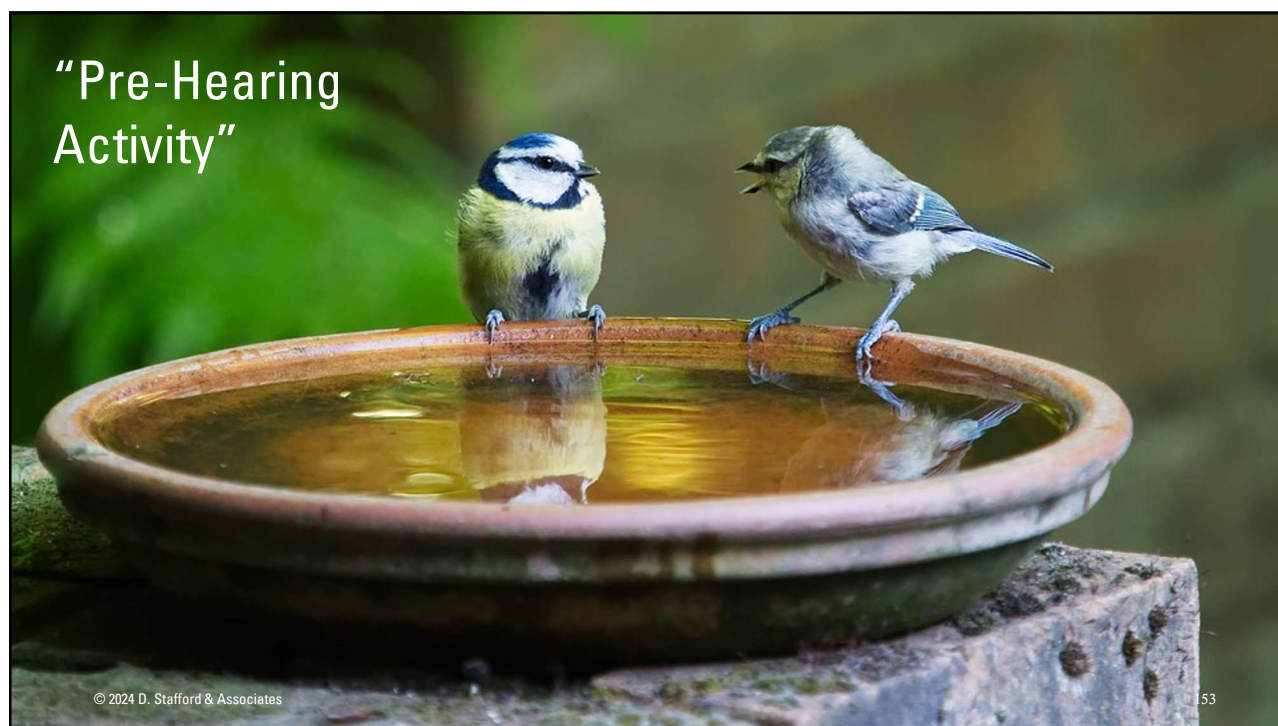


Develop
clarifying
questions related
to relevant
evidence
summary

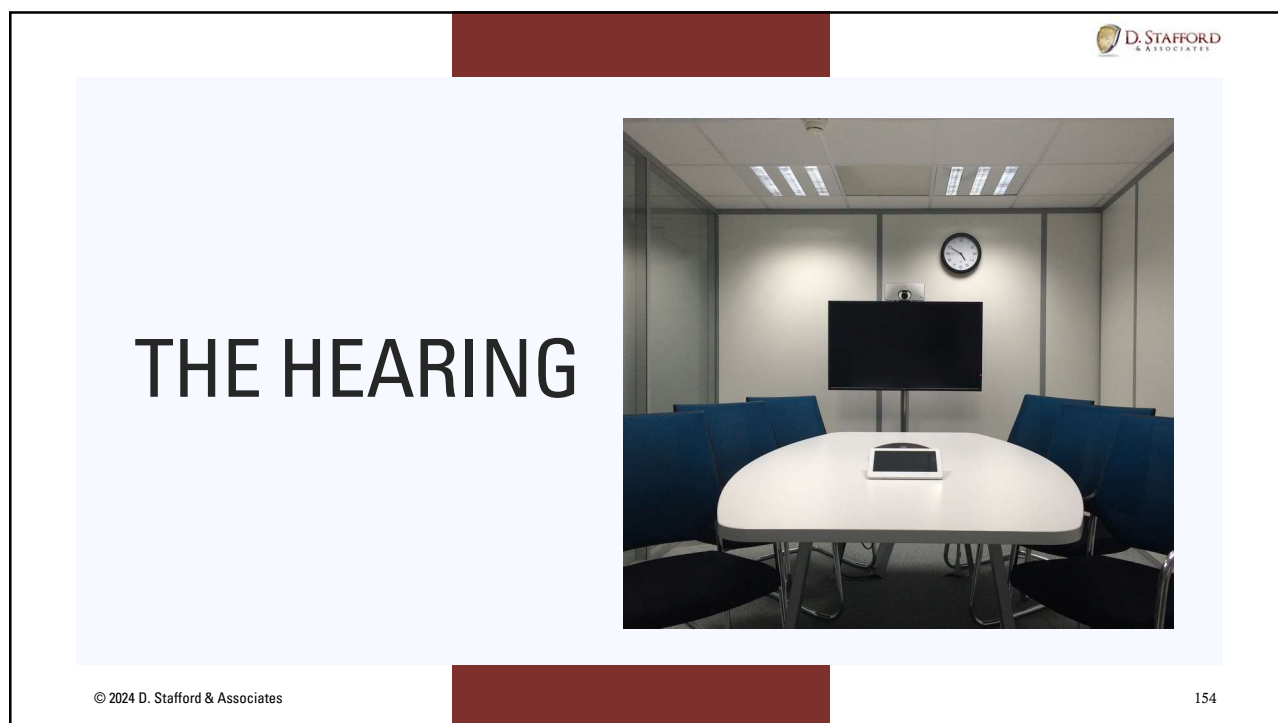


Identify
potential
challenges and
responses

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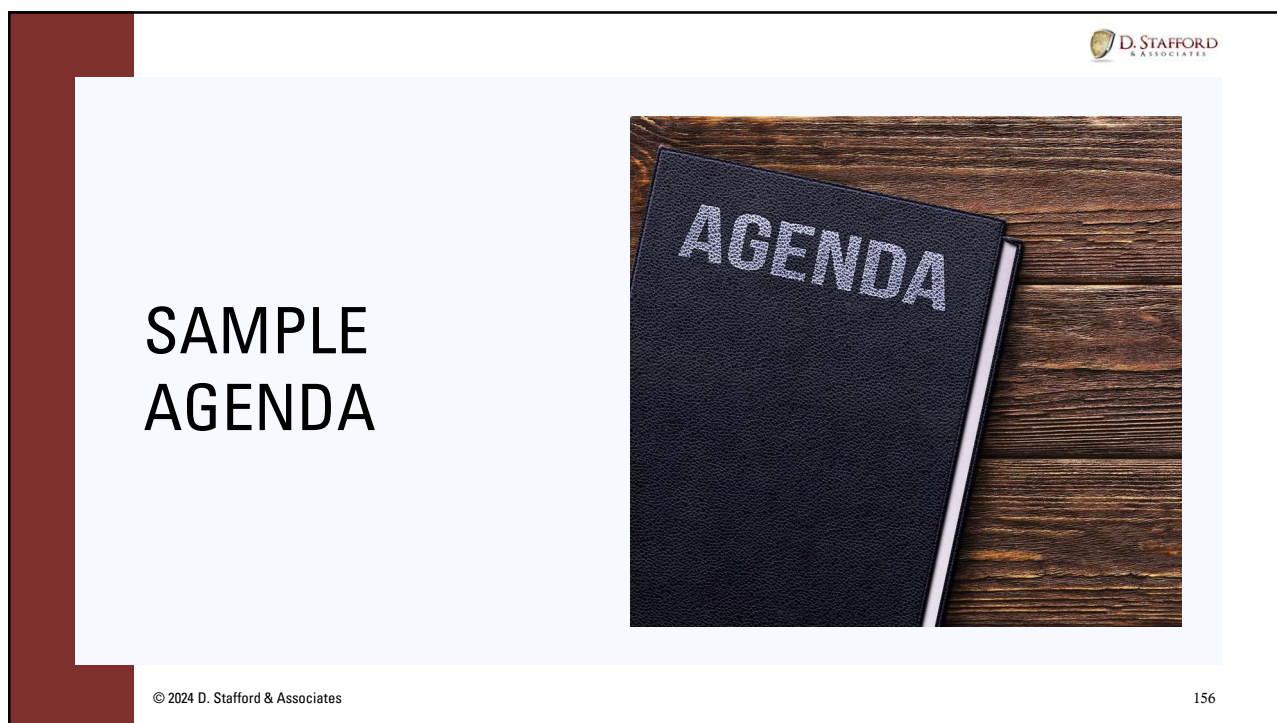
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SAMPLE AGENDA

1. Opening (Chair)
2. Purpose of the Hearing (Chair)
3. Review of the Hearing Process (Chair)
4. Questioning
5. Concluding Remarks (Chair)


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1. OPENING


- Convening date and case identifier
- Hearing is being recorded
- Introductions



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2. PURPOSE OF THE HEARING


- Administrative hearing to determine if a policy violation was committed
- Decision-maker's role
- Not a court of law
- Behavior statement
- Acknowledgement of documents
- New evidence statement
- No determination of responsibility

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3. REVIEW OF THE HEARING PROCESS

- Virtual logistics, if applicable
- Advisor's role
- Order of questioning
- Review relevancy of question determination process

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4. QUESTIONING

- Determine the order of questioning
- Example:
 - Questions asked of the complainant (decision-maker and then proposed by the respondent)
 - Questions asked of the respondent (decision-maker and then proposed by the complainant)
 - Questions asked of the witnesses (decision-maker and then the parties' proposed questions)

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DECISION-MAKER QUESTIONS



Statement of
Accuracy



Credibility



Clarity

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OPTION: PROPOSED QUESTIONS BY PARTIES

Question by party directed to decision-maker

Relevancy determination by decision-maker

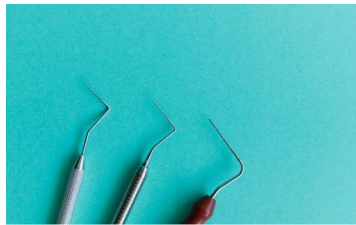
Decision-maker asks the question to the answering party

OPTION: CROSS-EXAMINATION BY ADVISORS

Question by advisor

Relevancy determination by decision-maker

Answer by party or witness



IRRELEVANT QUESTIONS

- Past sexual history
- Privileged information
- Repetitive question
- Not probative of material fact

RELEVANCY DETERMINATIONS



Use logic and common
sense



Maintain a neutral,
objective position



A lengthy or
complicated explanation
is not needed

5. CONCLUDING REMARKS

- Explain that the decision-maker(s) will deliberate in private
- Explain that the parties will receive the written decision
- Explain if there are sanctions, they will arrive with the written decision or be decided by someone else
- Dismiss the participants

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HEARING MANAGEMENT ISSUES



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PARTICIPATION

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REFUSAL TO RESPOND TO QUESTIONS

A decision-maker may choose to place less or no weight upon statements by a party or witness who refuses to respond to questions deemed relevant and not impermissible. The decision-maker must not draw an inference about whether sex-based harassment occurred based solely on a party's or witness's refusal to respond to such questions.

§ 106.46(f)(4)

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DISRUPTIONS

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DISRUPTION EXAMPLES

Emotions

Intimidation

Technical issues

Not following
instructions

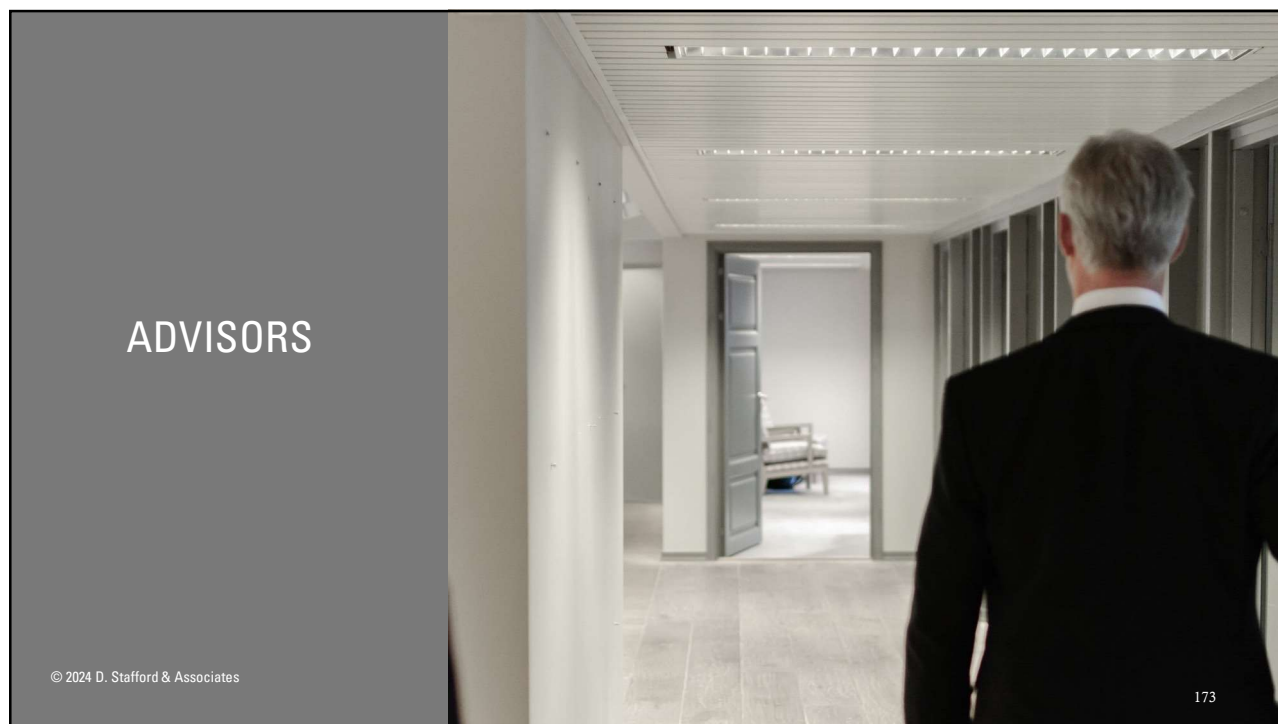
Lateness

Unpreparedness


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POTENTIAL ADVISOR ISSUES

Relationship with party	Relationship with case
Disruptive	Inappropriate cross-examination

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NEW EVIDENCE

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DECISION-MAKER CONSIDERATIONS

What does the policy state?

- Review your policy!

Is it truly new evidence?

- Evidence that has recently become known
- Evidence that has recently come into existence
- New is not withheld evidence

Why was it not available?

- Example: Requested by the party during the investigation but not produced (e.g., logs, records)
- Example: Witness's identity not previously known

Could it affect the outcome?

- Relevancy - Does it help to prove or disprove the allegation(s)?

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RELEVANCY



THE TERM “RELEVANT”

Relevant means related to the allegations of sex discrimination under investigation as part of the grievance procedures under § 106.45, and if applicable § 106.46.

Questions are relevant when they seek evidence that may aid in showing whether the alleged sex discrimination occurred, and evidence is relevant when it may aid a decisionmaker in determining whether the alleged sex discrimination occurred.

KEY RELEVANCY POINTS

1

The evidence does not need to be conclusive

2

Is sufficient if it constitutes a link in the chain

3

Enough if in connection with other evidence, helps “a little”

§ 106.45(b)(7) - RELEVANT AND NOT OTHERWISE IMPERMISSIBLE EVIDENCE



Privileged information



Physician/psychologist records



Complainant's sexual interest or prior sexual conduct

“Relevancy”



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& ASSOCIATES

WEIGHING THE
EVIDENCE



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EVALUATORS OF EVIDENCE

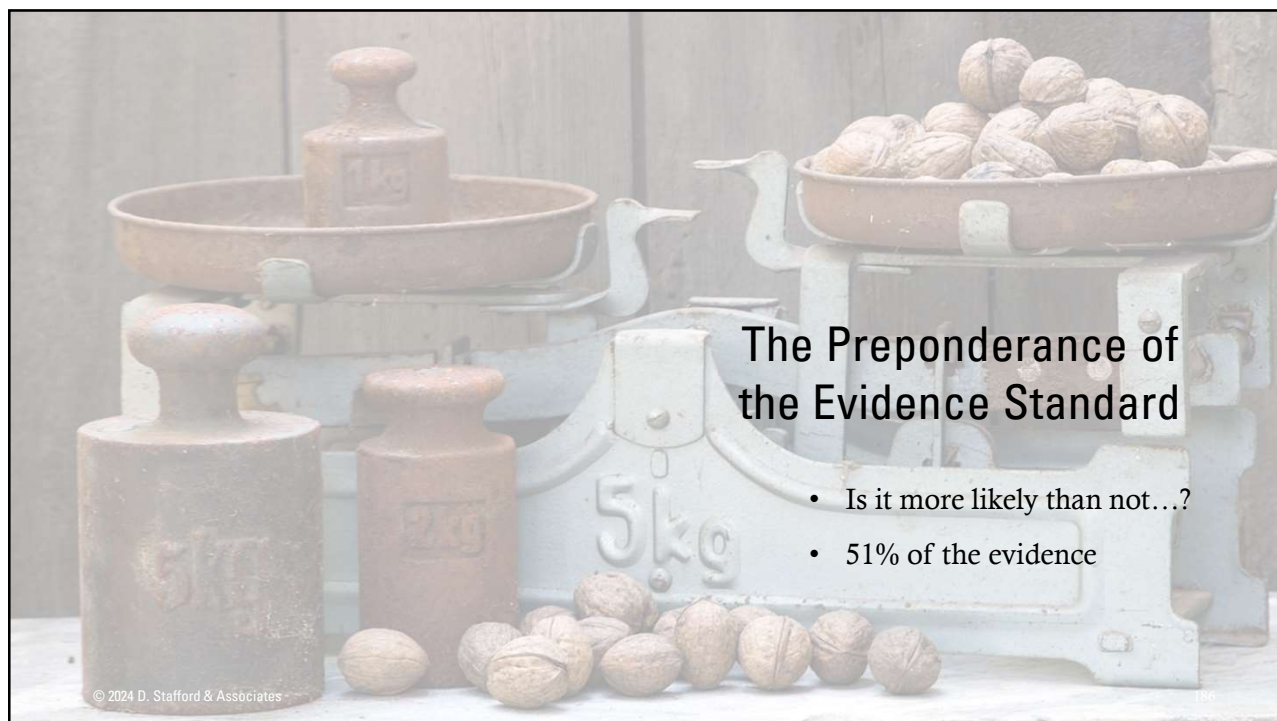
Investigators

- Develop lines of questioning
- Determine additional witnesses and evidence needed
- Utilize evidence around credibility
- Identify relevant evidence

Decision-makers

- Review the investigator's summary of relevant evidence
- Assess the credibility of the parties and witnesses to the extent credibility is in dispute and relevant

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CREDIBILITY

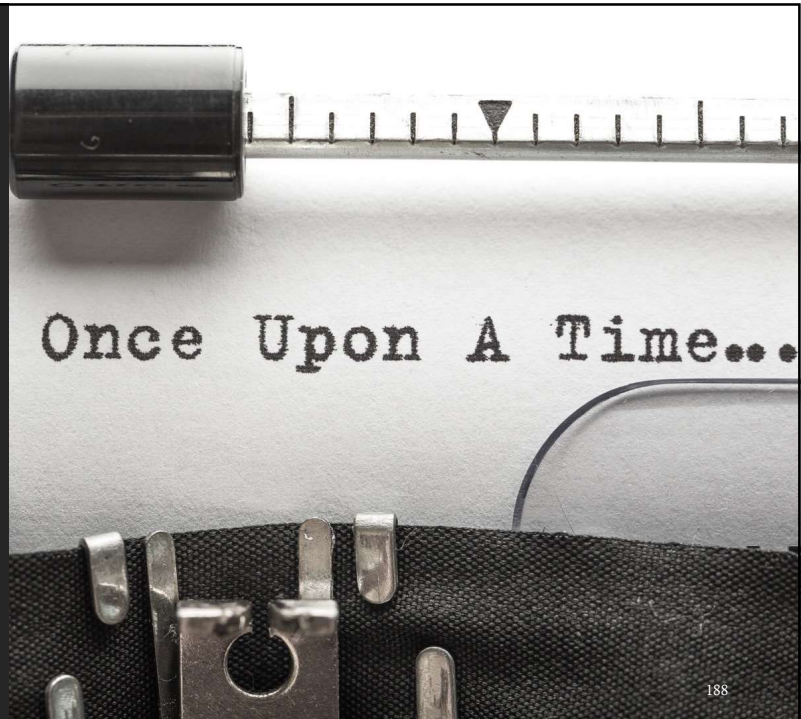


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CREDIBILITY OF THE STORY



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CORROBORATING EVIDENCE



Physical



Contemporaneous
Documentation



Personal
Documents



Admissions



Eyewitness



Outcry

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PLAUSIBILITY



Possible



Believable

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CREDIBILITY OF THE STORYTELLER

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MOTIVATION



Afraid

Pressured

Revenge

History

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BIAS



Past Relationship



Identity



Internal Biases

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ABILITY TO PERCEIVE

Distance

Knowledge

Credentials

Competence

194

ABILITY TO REMEMBER



Passage of
Time



Alcohol



Trauma



Peripheral
Details



History of
Memory

195

WHAT MAY NOT
IMPACT
CREDIBILITY?

196

DO THESE IMPACT CREDIBILITY?

<input type="checkbox"/>	Past Behaviors	<input type="text"/>
<input type="checkbox"/>	Post-Incident Behavior	<input type="text"/>
<input type="checkbox"/>	Character	<input type="text"/>
<input type="checkbox"/>	Interview Demeanor	<input type="text"/>
<input type="checkbox"/>	Identity	<input type="text"/>

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DECEPTION







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Why are we so poor at detecting deception?

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EXAMINING TRUTHFULNESS

 Repeat v. Reconstruct
  Get them to talk
  Consistency
  Details

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DID THEY ANSWER THE QUESTION?

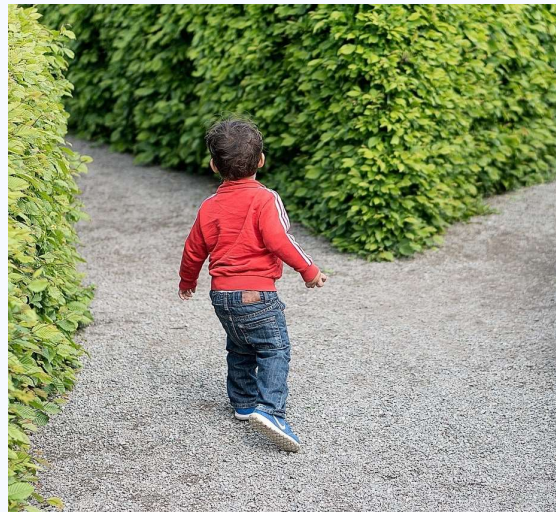
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THE DECISION

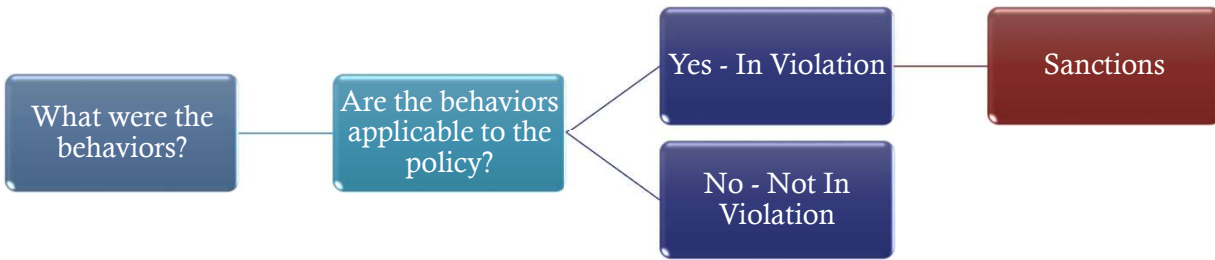


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DECISION-MAKING STEPS

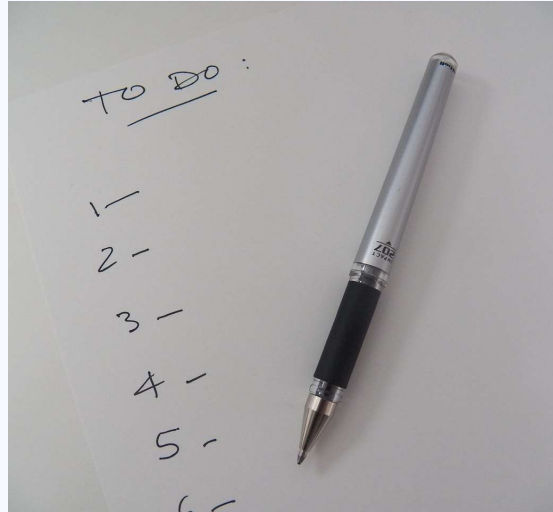


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SANCTIONS



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SANCTIONS AND REMEDIES



Disciplinary Sanctions
*“consequences ... following a
determination”*



Remedies
“Restore or preserve access”

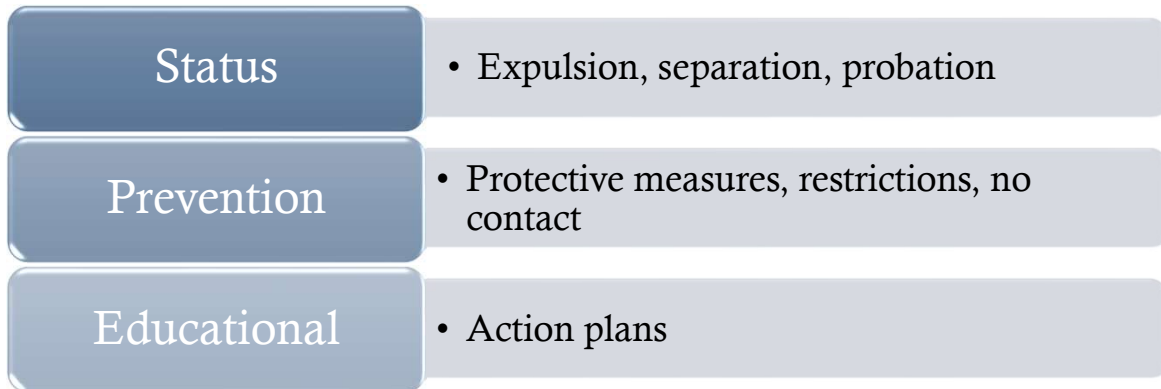
§ 106.2

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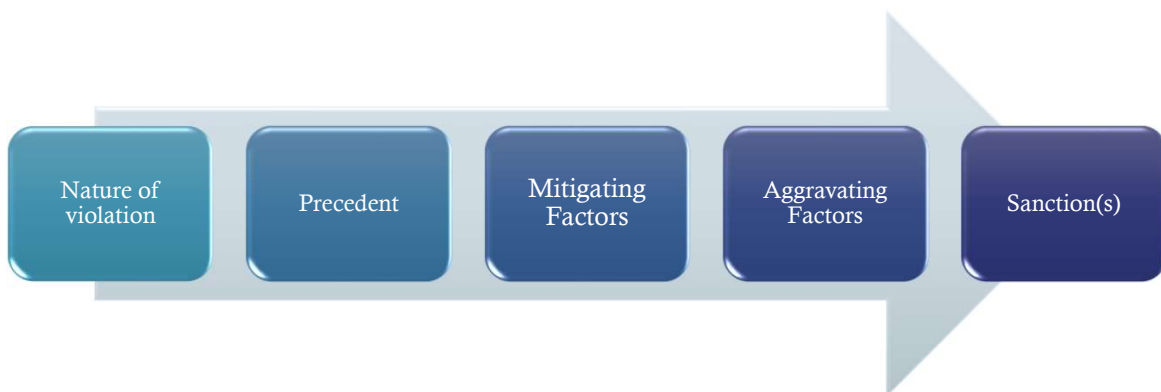
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TYPES OF SANCTIONS

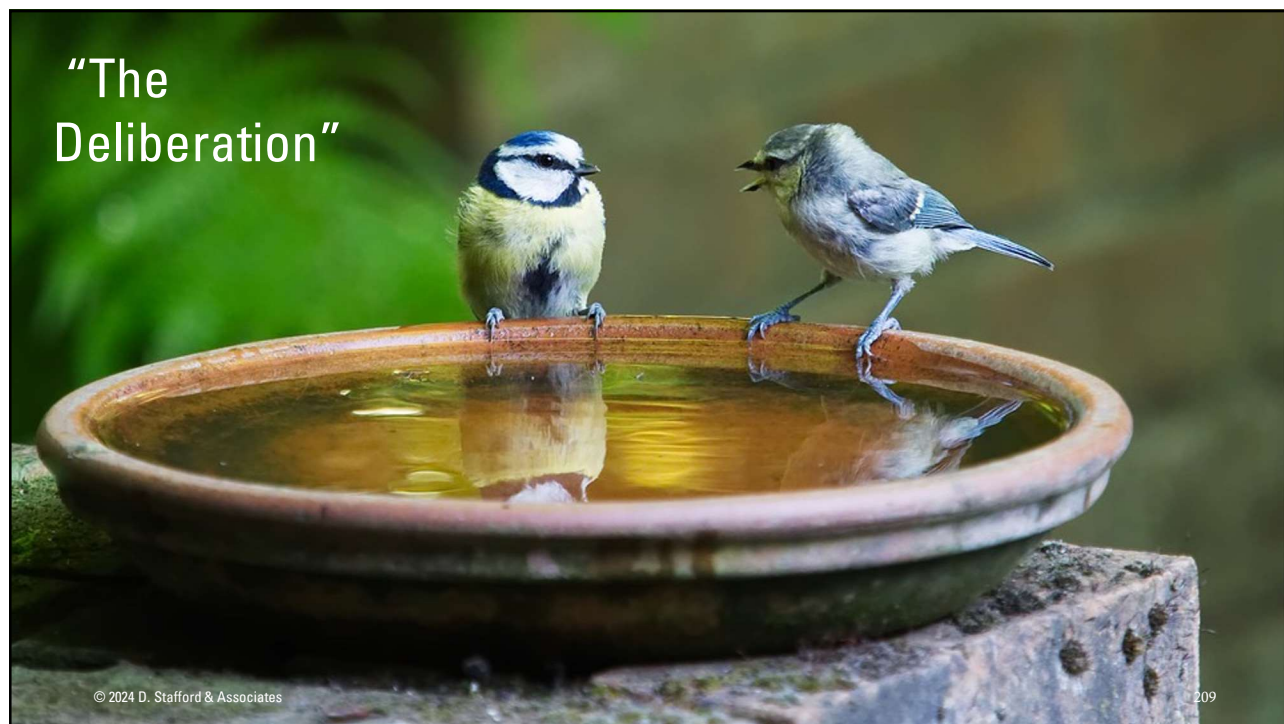


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SANCTION DEVELOPMENT



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§ 106.46(h) - DETERMINATION REGARDING RESPONSIBILITY

Description of alleged sex-based harassment

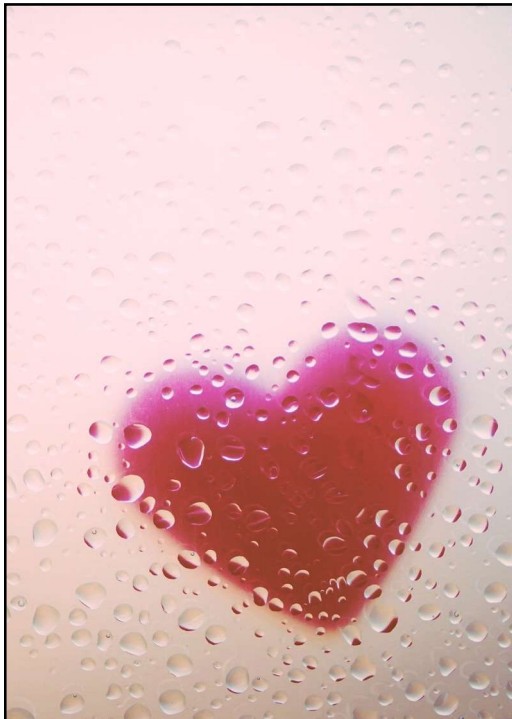
Policies and procedures used to evaluate allegations

Evaluation of evidence and determination

Disciplinary sanctions or remedies if sex-based harassment occurred

Appeal procedures

211



HEART OF THE OUTCOME LETTER

- Findings of fact
 - What were the behaviors?
- Conclusions regarding the application of the policy
 - Are the behaviors applicable to the policy?
- Statement regarding responsibility and rationale for each allegation
 - Why is it or is not a policy violation?

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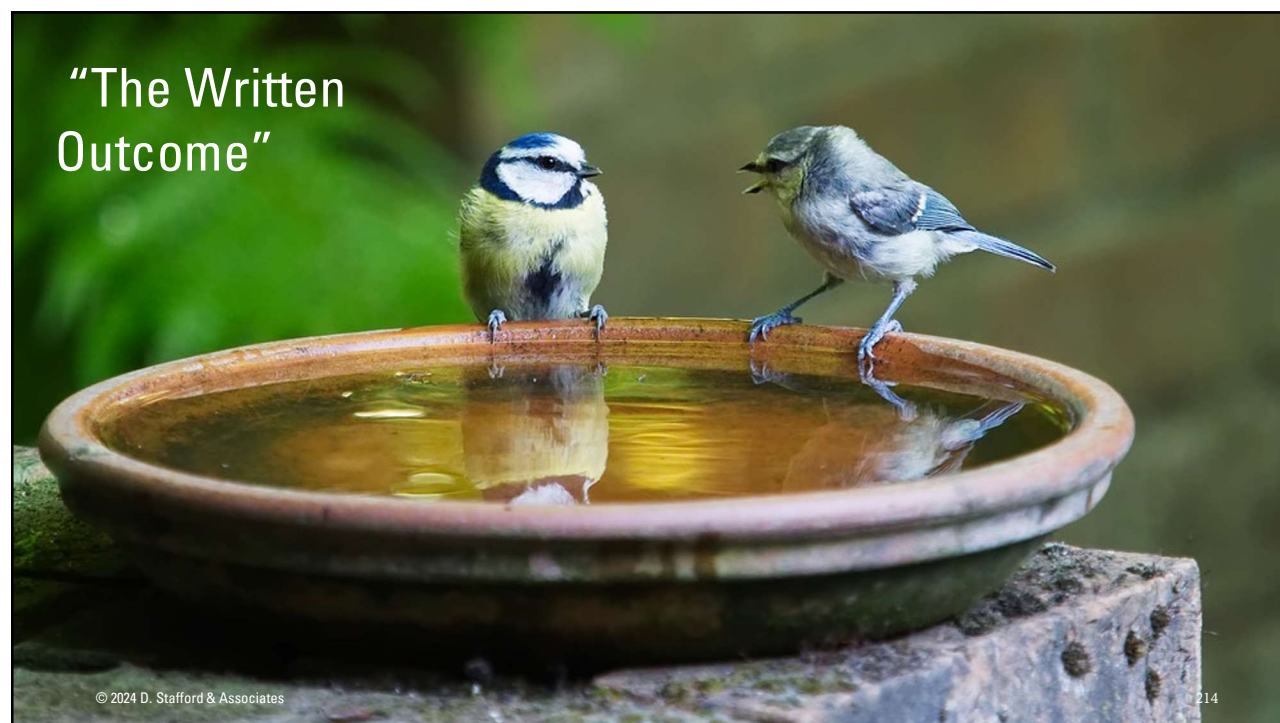
NOTIFICATION - TITLE IX REGULATIONS



Parties must be notified
simultaneously



Becomes final on the date of an appeal
decision notification or the date on
which an appeal would no longer be
considered timely



THE APPEAL



215

TYPES OF APPEALS*

Dismissal

Determination Regarding
Responsibility

*An emergency removal allows for a “challenge” by the Respondent; it is not an appeal.

216

APPEAL GROUNDS



Procedural irregularity that **would change the outcome**



New evidence that **would change the outcome**



Conflict of interest or bias that **would change the outcome**



Does your policy allow for additional grounds?

217

PROCEDURAL IRREGULARITY

Was there a procedural error?

What was the alleged error?
What does the policy say?
Was it an error?
What should have happened?

Would it change the outcome?

Did this error limit the full consideration of all relevant information?
Would it change the outcome?

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NEW EVIDENCE

Is this new evidence?

Is it relevant evidence?
Was the party aware of its potential existence?
How was it not reasonably available?
When was it introduced?



Would it change the outcome?

How does this evidence affect the decision?
Does this lead to further questions?
Would it change the outcome?

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CONFLICT OF INTEREST

Was there a conflict of interest or bias?

What is the alleged conflict or bias?
What is the evidence that there was a conflict or a bias?
Was it previously raised?
Is it an actual conflict or bias?



Would it change the outcome?

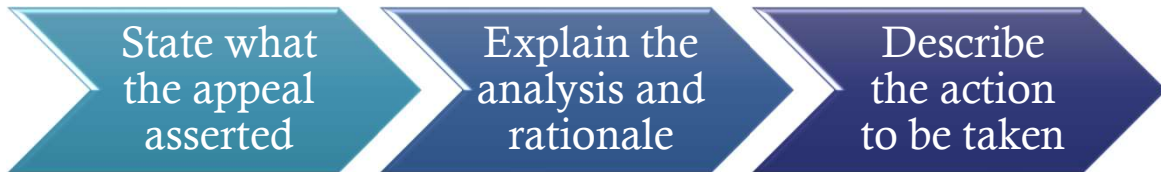
Would it change the outcome?

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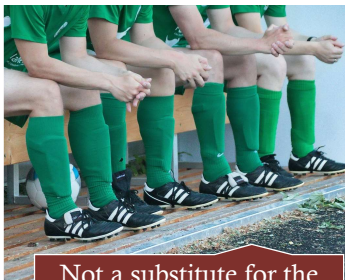
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THE APPEAL DECISION LETTER



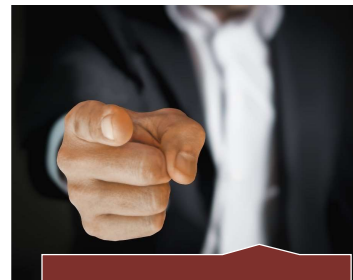
KEY POINTS TO REMEMBER ABOUT APPEALS



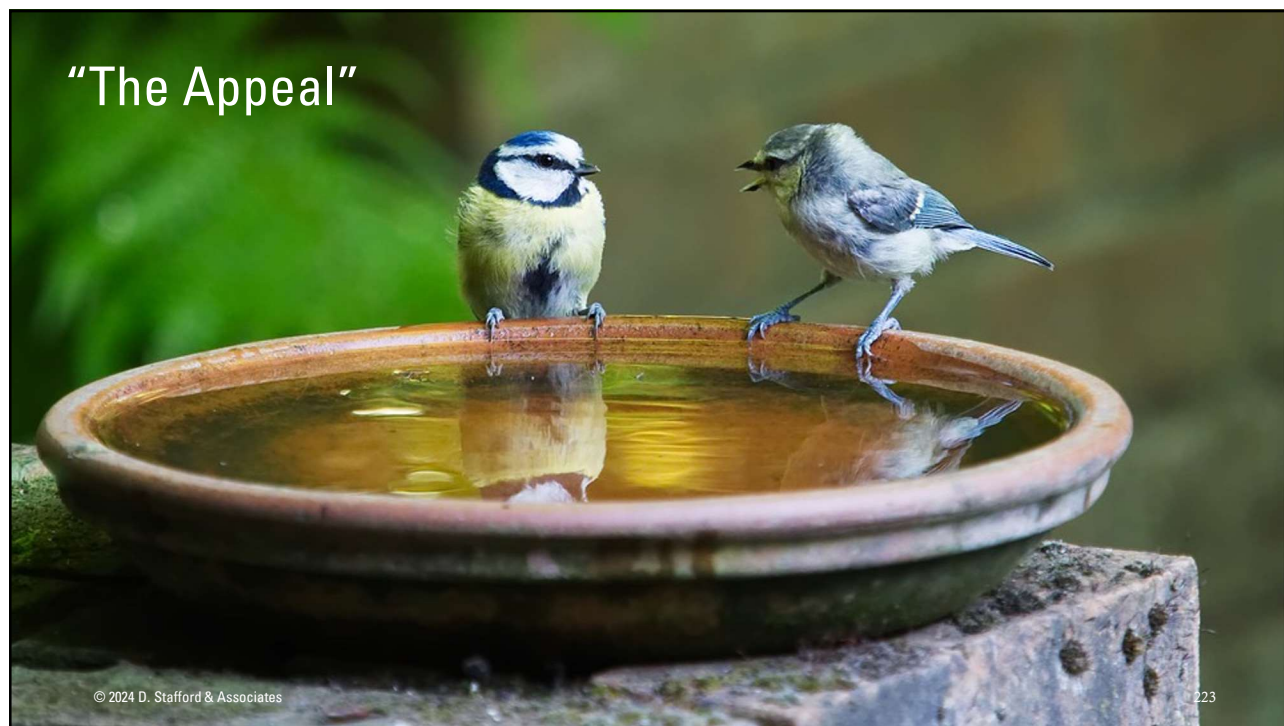
Not a substitute for the
decision-maker's
judgment



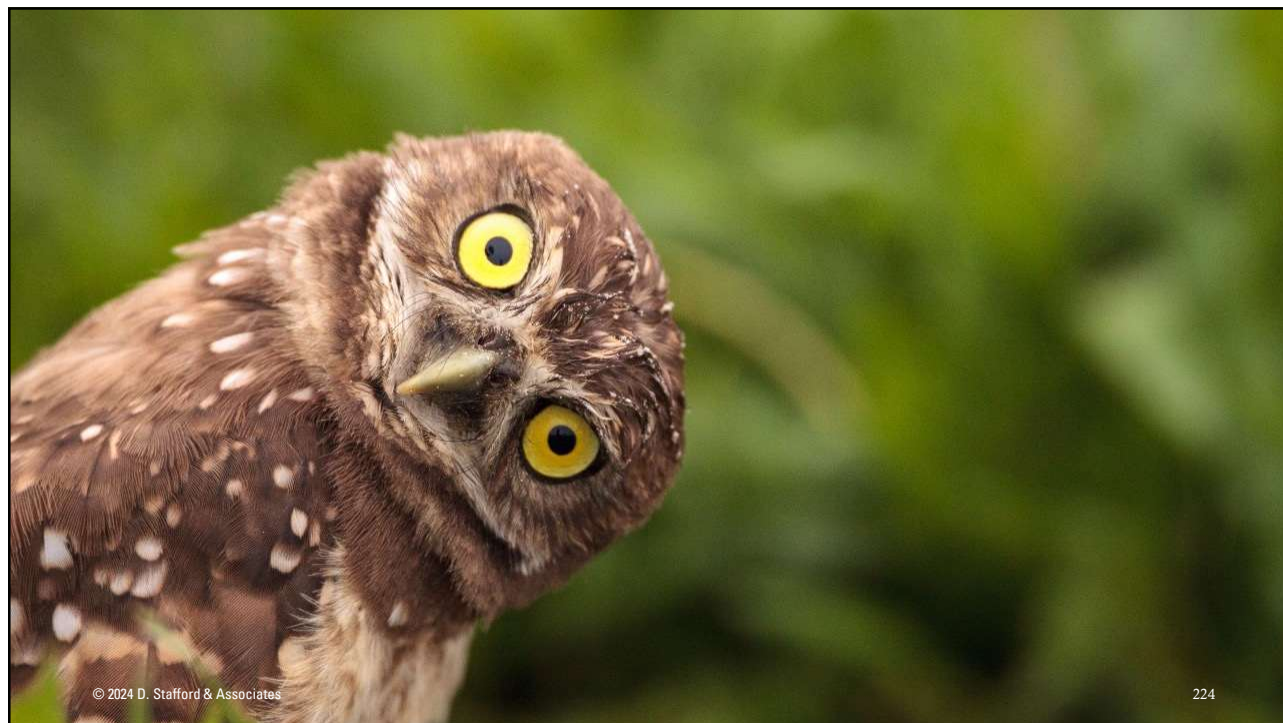
Not political decisions



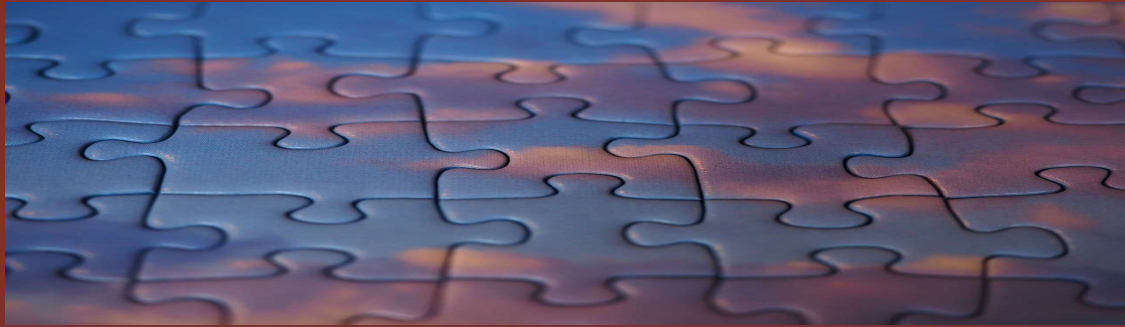
Not personal to you



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THANK YOU





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