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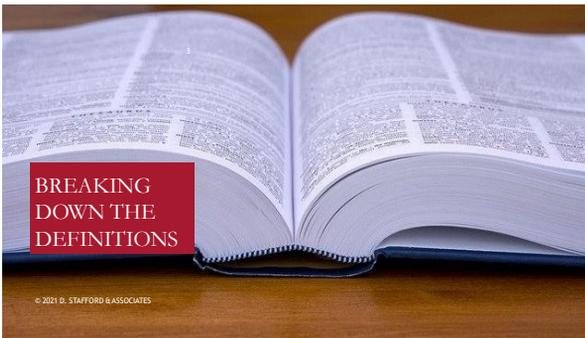
Agenda

- Elements of the Offenses
- Developing an Investigative Strategy
- Evidence Collection
- Evaluating Welcomeness and Consent

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Sexual Harassment under Title IX

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

1. An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;
2. Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity;
3. "Sexual assault" as defined in 20 U.S.C. 1092(f)(6)(A)(v), "dating violence" as defined in 34 U.S.C. 12291(a)(10), "domestic violence" as defined in 34 U.S.C. 12291(a)(8), or "stalking" as defined in 34 U.S.C. 12291(a)(30).

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Understanding the Elements



Elements

Actions
Conditions



Additional info

Clarifiers
Exceptions

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Investigator

- Evidence for each element
- Evidence of any exceptions

Decision-maker

- Weigh the evidence provided
- "Reasonable person" standard

Roles in the Process

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What specific evidence would indicate sexual harassment?

How do we obtain evidence?

The
"Elements"

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Elements of Sexual Harassment

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

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Sexual Harassment Under Title IX



PRONG 1: QUID PRO QUO



PRONG 2: HOSTILE ENVIRONMENT+



PRONG 3: VAWA OFFENSES

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“Sexual harassment means conduct on the basis of sex that satisfies one or more of the following. . .”

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

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PRONG 1: Quid Pro Quo



Sex or gender-based



Employee



CONDITIONING
aid, benefit or
service



UNWELCOME
conduct (or
threat of
conduct)

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PRONG 1: Quid Pro Quo

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

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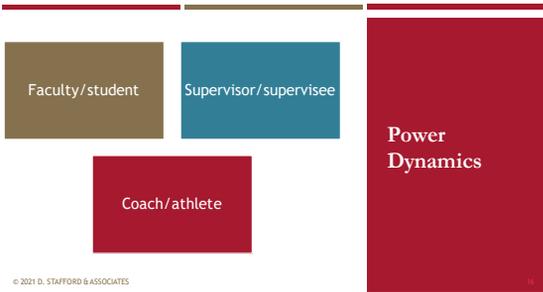
PRONG 1: Quid Pro Quo

- **What was the conduct?**
 - **Verbal/written:** Jokes, sexual language, participation in discussion
 - **Physical:** Kissing, massaging, pinching, sexual touching, physical relationship, voyeurism
- **Did the conduct occur?**
 - Consent vs. Submit

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Michael confides in another coach that he engaged in sexual activity with his soccer coach, Bob. He says it began consensually, but when he asked for it to stop, Coach Bob told him if he didn't continue to engage in the sexual activity, he would ensure he "never played again."

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

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

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

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PRONG 2: The *Davis* Standard

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

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

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PRONG 2: Hostile Environment +



Sex
Gender-based



Unwelcome



Conduct
Severe
Pervasive
Objectively offensive



Impact on
education (or
employment)

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Hostile Environment +

ON THE BASIS OF SEX

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

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Hostile Environment+

INVESTIGATING UNWELCOME

- Unpack “consent” definition
- Behaviors that by their nature are “unwelcome”
- What was communicated between parties?
- Coercion, threats, intimidation
- Who instigated?
- Did the Complainant participate?

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Hostile Environment+

INVESTIGATION OF SEVERE

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

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Hostile Environment +

INVESTIGATION OF PERVASIVE

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

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Hostile Environment +

OBJECTIVELY OFFENSIVE/REASONABLE PERSON

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

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Hostile Environment +

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

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

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Hostile Environment +

INVESTIGATING EFFECTIVELY DENIES...

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

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PRONG 2: Hostile Environment +



FIRST AMENDMENT ISSUES



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PRONG 2: Hostile Environment +



NOT ALL UNWELCOME SEXUAL CONDUCT COUNTS



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Hostile Environment +

NO INTENT REQUIREMENT IN DAVIS STANDARD



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Pat reports to the Title IX Coordinator feeling uncomfortable in class because of "sexually harassing" comments and behaviors of other students.

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

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<p>Sexual Assault</p> <ul style="list-style-type: none"> • Rape • Sexual Assault • Statutory Rape • Incest 	<p>PRONG 3: The VAWA Offenses</p>
<p>Intimate Partner Violence</p> <ul style="list-style-type: none"> • Dating Violence • Domestic Violence 	
<p>Stalking</p>	

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PRONG 3: Sexual Assault

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- An offense that meets the definition of rape, fondling, incest, or statutory rape as used in the FBI's Uniform Crime Reporting (UCR) program. Per the National Incident-Based Reporting System User Manual from the FBI UCR Program, a sex offense is "any sexual act directed against another person, without the consent of the victim, including instances where the victim is incapable of giving consent."

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Rape

Rape is 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.

- Clery count includes "attempts" at rape as a count of rape
- Sex act must include penetration - non penetration (for example oral sex on an unconscious male) is not rape but would still be sexual assault under the fondling definition
- Not every criminal sexual act falls under Title IX but may under a different institutional policy
 - Administration of a date rape drug
 - Touching a non-private body part with the perpetrator's private body part

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Fondling

Fondling is the touching of the private body parts of another person for the purpose of sexual gratification, without the consent of the victim.

Schools may determine...

- which body parts are considered "private"
- whether the touching must occur underneath or over a victim's clothing.

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Incest

Incest is sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law.

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Statutory Rape

Statutory Rape is sexual intercourse with a person who is under the statutory age of consent.

Q: What is the age of consent in your state?

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Sexual Assault-Rape and Fondling

- Sex Act without consent
 - "Sex Act"
 - Non-Consensual Sexual Penetration (rape)
 - Non-Consensual Sexual Contact (fondling)
 - "Consent"
 - "Informed and reciprocal", "mutually understandable"
 - Absence of physical force, threats, intimidation, coercion
 - Never present for incapacitated persons

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Element One - Sex Act



Sex Act

- What were the actual sexual behaviors?
- Must get specifics
- Clarify slang or other terms

Without Consent

- Communication between parties
- Physical response
- Language/behavior indicating consent
- Language/behavior indicating no consent
- Capacity of parties to provide/assess consent

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Element Two - Consent



Force

- Physical or verbal resistance
- Threats (or perceived threats), coercion, intimidation
- Power differentials (real or perceived)

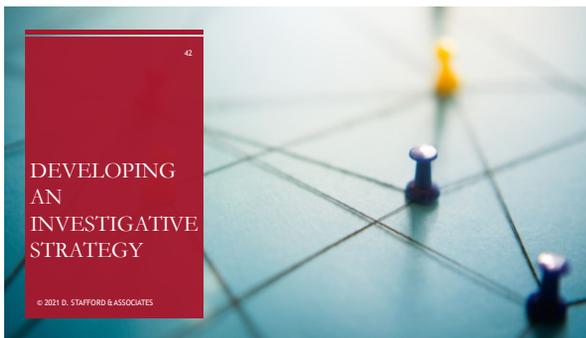
Incapacitation

- Alcohol or drug consumption
- Decision-making ability of the parties
- Awareness of consequences
- Ability to make informed judgments
- Capacity to appreciate the nature and the quality of the act

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Investigative Strategy

- Scope
- Methodology
- Pre-Work
- Challenges

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Scope



- Notice of Allegation
- Notice of Investigation
- Policy Definitions
- Rights of the Parties

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Methodology (and who does what?)



- Liaisons
- Logistics
- Internal Communications

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- Review Complaint
- Research
- Draft Questions
- Initial Evidence Collection

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Challenges

What challenges could you face?

What can we do to prepare?

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Investigation Roadmap



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Types of Evidence



Real Evidence



Demonstrative



Documentary



Testimonial

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Ability to Utilize Evidence



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Research



Websites



Organizations



Calendars



Schedules



Party "directory information"

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Initial Evidence Collection



Other "statements"

Evidence from campus sources

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Other Sources of Evidence



Photographs

Text messages

Social media/dating apps

Documents (diagrams, memos, letters, notes)

Voice mail

Phone logs

Guest lists

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Floorplans



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Diagrams



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Investigation Timeline



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Definitions



- Sexual Harassment– “unwelcome conduct”
- Sexual Assault- “without consent”

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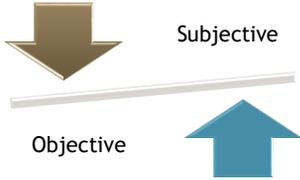
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Unwelcome Conduct

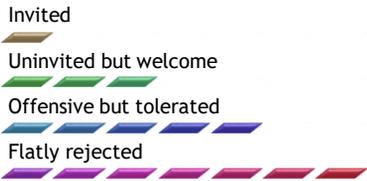


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When Does Conduct Become Unwelcome



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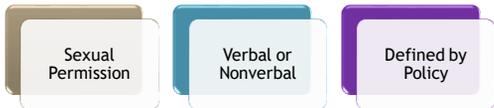
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Consent



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Consent - Title IX and the Clery Act

- Both require a definition of consent
- Neither require a particular definition of consent

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Common Key Elements



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Consent Is Absent When...

Force

- Physical
- Coercion
- Intimidation
- Threat

Incapacitation

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Physical Force

Holding down

Forced to touch

How much?

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Coercion

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

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Intimidation



Physical



Verbal

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Physical harm



Reputational harm

Veiled threats

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