Title IX Training

August 12-13, 2020
Agenda

Part I: Final Regulations Update & Training Framework

Part II: Title IX-Covered Conduct, including, but not limited to:
  • The definition of sexual harassment
  • The scope of WVU’s education programs and activities

Part III: Responding to Allegations, including but not limited to:
  • Actual Knowledge, Official with Authority, Supportive Measures, Reports v. Formal Complaint, Dismissals, Emergency Removals

Part IV: How to Serve Your Role Impartially, including, but not limited to:
  • Avoiding prejudgment of facts, conflicts of interest, and bias
  *This applies to: Title IX Coordinators, investigators, decision makers, appellate officers, facilitators of informal resolution
Agenda

Part V: Conducting Investigations, including, but not limited to:
  • Nuts & Bolts (How to conduct an investigation)
  • Creating an investigation report fairly summarizing relevant evidence

Part VI: Conducting Hearing, including, but not limited to:
  • Nuts & Bolts (How to conduct a hearing)
  • Understanding technology to be used at a live hearing
  • Understanding issues of relevance related to questions and evidence
  • Preparing a written determination

Part VII: Conducting Appeals, including, but not limited to:
  • Nuts & Bolts (How to conduct an appeal process)
  • Understanding issues of relevance related to questions and evidence
  • Preparing a written appeal determination

Part VIII: Informal Resolution
PART I
FINAL REGULATIONS UPDATE
Title IX Statute

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.

-- 20 U.S.C. § 1681
Final Regulations

• Final rule released by ED informally on its website on May 6, 2020

• Published in the Federal Register on May 19, 2020 (34 CFR Part 106)

• OCR Blog: [https://www2.ed.gov/about/offices/list/ocr/blog/index.html](https://www2.ed.gov/about/offices/list/ocr/blog/index.html)

• Effective date: August 14, 2020

• Just announced: does not apply retroactively.
Required Training – Who?

- Title IX Coordinators
- Investigators
- Hearing decision-makers
- Appellate officers
- Facilitators of informal resolution processes
Required Training – What?

- The Title IX definition of sexual harassment.

- The scope of institution’s education programs and activities.

- How to conduct an investigation/grievance process/appeal.

- Issues of relevance (including as to questions and evidence at the hearing).

- How to prepare an investigative report (including how to fairly summarize relevant evidence), a written determination of responsibility, and an appeal determination.

- How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest and bias.
Setting Framework #1 for Today’s Training

If you have actual knowledge of sexual harassment that occurred in your education program or activity against a person in the United States, then you must respond promptly in a manner that is not deliberately indifferent, which includes the provision of appropriate supportive measures.

*all underlined terms should be read as defined in the new regulations*
Setting Framework #2 for Today’s Training

If you receive a **formal complaint** of **sexual harassment** signed by a complainant who is **participating in or attempting to participate in** your **education program or activity**, then you must follow a **grievance process** that complies with Section 106.45.

*all underlined terms should be read as defined in the new regulations*
Now let’s walk through those concepts & definitions …
PART II

TITLE IX-COVERED CONDUCT
Sexual Harassment – Section 106.30

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

- 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;

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

Sexual Harassment – Section 106.30

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

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;

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


***

At WVU, these will be collectively referred to as “Title IX Sexual Harassment”, which under the revisions to BOG Rule 1.6 will be defined as “Sexual Harassment (Quid Pro Quo)”, “Sexual Harassment (Hostile Environment)”, “Sexual Assault”, “Domestic Misconduct”, and “Stalking” that occurs within Title IX jurisdiction

See BOG Rule 1.6

“stalking” as defined in 34 U.S.C. 12291(a)(30)
Sexual harassment means conduct on the basis of sex where …

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

***

At WVU, this is referred to as Sexual Harassment (Quid Pro Quo).

See BOG Rule 1.6
Sexual Harassment – Section 106.30

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

- Employee
- Conditioning the Provision of
- Aid, Benefit, or Service of the School
- Unwelcome sexual conduct
Sexual Harassment – Section 106.30

Sexual harassment also means conduct on the basis of sex that is 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

***

At WVU, this is referred to as Sexual Harassment (Hostile Environment).

See BOG Rule 1.6
Sexual Harassment – Section 106.30

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.

- Unwelcome Conduct
- Reasonable Person
- Severe, Pervasive, and Objectively Offensive
- Effectively Denies Equal Access
- Education Program or Activity
Sexual Harassment – Section 106.30

Sexual harassment means conduct on the basis of sex that constitutes…

“sexual assault” as defined 20 U.S.C. 1092(f)(6)(A)(v),
“dating violence” as defined in 34 U.S.C. 1229(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)

***
At WVU, these are referred to as Sexual Assault, Dating Violence, Domestic Violence, and Stalking. See BOG Rule 1.6
“Sexual assault” as defined 20 U.S.C. 1092(f)(6)(A)(v),
“dating violence” as defined in 34 U.S.C. 1229(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)

☐ Sexual Assault
☐ Dating Violence
☐ Domestic Violence
☐ Stalking
Sexual assault

The term “sexual assault” means an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation. (1092(f)(6)(A)(v)).

- Essentially, this means any sexual act directed against another person, without the consent of the victim, including instances where the victim is incapable of giving consent. (e.g., rape, sodomy, sexual assault with an object, fondling, incest, statutory rape).

WVU covers these concepts as follows:

Sexual Assault means Sexual Intercourse or Sexual Contact that occurs without Consent. Sexual Assault will also include “Sexual Intercourse” between persons who are related to each other within the degrees wherein marriage is prohibited by law.

- “Sexual Contact” means any (i) intentional touching, either directly, through clothing, or with an object, of the breasts, buttocks, anus or any part of the sex organs of another person; or (ii) intentional touching of any part of another person’s body by the actor’s sex organs.

- “Sexual Intercourse” is defined as anal, oral, or vaginal penetration, however slight, by an inanimate object or another’s body part.
Consent
(As defined by WVU)
BOG Rule 1.6

WVU defines consent as:
• agreement, approval, or permission
• as to some act or purpose
• given knowingly, willingly, and voluntarily
• by a competent person.

WVU also notes that:
• Silence, by itself, cannot constitute Consent.
• Consent to one sexual act does not constitute or imply consent to a different sexual act.
• Previous consent cannot imply consent to future sexual acts.
• Consent is required regardless of the parties’ relationship status or sexual history together.
Consent
(As defined by WVU)
BOG Rule 1.6

A person lacks the ability to Consent where there is Incapacity to Consent

Incapacity to Consent means a person is:
- either less than sixteen years old;
- mentally incapacitated;
- physically unable to resist; or
- is so intoxicated as to be incapacitated* (i.e., unable to knowingly and intentionally make decisions for him or herself).

*Intoxication from alcohol or drug use, alone, does not bar Consent.

Incapacitation negates Consent when the alleged perpetrator knows, or a reasonable person, under the circumstances, should know, that the alleged victim is incapacitated.
Consent
(As defined by WVU)
BOG Rule 1.6

* A person lacks the ability to Consent where there is Forcible Compulsion

Forcible Compulsion means:

• physical force that overcomes such earnest resistance as might reasonably be expected under the circumstances;

or

• threat or intimidation, expressed or implied, placing a person in fear of immediate death or bodily injury to himself or herself or another person or in fear that he or she or another person will be kidnapped;

or

• threat or intimidation, express or implied, that the aggressor will retaliate or cause damage to the victim’s reputation if the victim does not give into the aggressor’s sexual advances
Dating Violence

Dating violence means:

- any act of violence

- committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim; and

- where the existence of such a relationship is determined based on a consideration of the length, type, and frequency of interactions between the persons involved in the relationship.
Domestic Violence

**Domestic violence** means a felony or misdemeanor crime of violence committed by:

- a current or former spouse or intimate partner of the victim,
- a person with whom the victim shares a child in common,
- a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner,
- a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction receiving grant monies, or
- any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of the jurisdiction.
Stalking means:

- engaging in a course of conduct
- directed at a specific person
- that would cause a reasonable person to fear for his or her safety or the safety of others or suffer substantial emotional distress
# Sexual Harassment At WVU

## Title IX Sexual Harassment
- Sexual Harassment
- Sexual Assault
- Dating Violence
- Domestic Violence
- or Stalking

that occurs within Title IX jurisdiction

## Sexual Harassment (Non-Title IX)
- Sexual Harassment
- Sexual Assault
- Dating Violence
- Domestic Violence
- or Stalking

which is not covered by Title IX jurisdiction
Title IX Jurisdiction

Alleged conduct occurred:
In a University education program or activity

AND

within the United States
Education Program or Activity - Section 106.44(a)

All operations of the institution, including . . .

✓ Locations, events, or circumstances
✓ Whether on campus or off campus
✓ Over which the institution exercised substantial control over both the respondent and the context in which the sexual harassment occurs.

It also includes:

✓ Any building
✓ Owned or controlled by
✓ An officially recognized student org., e.g., fraternity or sorority houses
Substantial Control?

• “no single factor is determinative to conclude whether a recipient exercised substantial control over the respondent and the context in which the harassment occurred, or whether an incident occurred as part of ‘all of the operations of’ a school, college, or university.”

Off campus?

• Sexual harassment that occurs in buildings owned or controlled by officially recognized student organizations, including fraternities and sororities, fall within the scope of an institution’s Title IX obligations even if they are located off campus.

• Title IX applies to online sexual harassment if the postsecondary institution exercised “substantial control” over the “context” of the harassment, such as where a student uses a personal device to perpetrate online sexual harassment during class time.
Against a Person in the United States - 106.44(a)

This refers to location of the incident NOT citizenship or legal residency
In other words …

✓ “Against a person in the United States” means:
  ▪ Title IX does not apply to sexual harassment that occurs outside of the United States (i.e., no “extraterritoriality”), even if the harassment occurs in the context of a study abroad program.

✓ But Title IX protects every individual in the United States against discrimination, regardless of citizenship or legal residency, meaning:
  ▪ International students or foreign students studying in the United States are entitled to the same protections under Title IX as any other individuals.
Q&As and Hypotheticals
PART III
RESPONDING TO ALLEGATIONS
Putting Definitions into Framework #1

If you have actual knowledge of sexual harassment that occurred in your education program or activity against a person in the United States, then you must respond promptly in a manner that is not deliberately indifferent, which includes the provision of appropriate supportive measures.

*all underlined terms should be read as defined in the new regulations*
Putting Definitions into Framework #2

If you receive a formal complaint of sexual harassment signed by a complainant who is participating in or attempting to participate in your education program or activity, then you must follow a grievance process that complies with Section 106.45.

*all underlined terms should be read as defined in the new regulations*
“Deliberately Indifferent”

An institution is “deliberately indifferent” if its response to sexual harassment is clearly unreasonable in light of the known circumstances.

• Whether an institution acted with deliberate indifference is a fact-specific inquiry that ties to the University’s “actual knowledge”.

• Institutions have flexibility to tailor their response to sexual harassment to unique circumstances, but must always incorporate § 106.44’s requirements in their response.
Actual Knowledge Via a Report

- **What:** In person, by mail, by telephone, or by electronic mail, or by any other means that results in the Title IX Coordinator receiving the person’s verbal or written report.

- **Who:** Any person may “report” (whether or not the person reporting is the person alleged to be the victim of conduct)

- **When:** Such a report may be made at any time, including during non-business hours.

- **Action Items:** WVU must publish the Title IX Coordinator’s contact information (office address, office email, telephone, any other means)
Actual Knowledge

Once the institution has actual knowledge through a Report the Title IX Coordinator must take certain steps (discussed on future slides).

Source: Section 106.30

*BUT NOTE:* Actual knowledge is broader than a Report … I.e., the University has an obligation to act, in some circumstances, even without a “Report” or a “Formal Complaint”.

**Actual Knowledge** means:
- notice of
- sexual harassment or allegations of sexual harassment
- to the University’s Title IX Coordinator or any official of the University who has the authority to institute corrective measures on behalf of an institution.
# How WVU Gets “Actual Knowledge”

<table>
<thead>
<tr>
<th>Title IX Coordinator</th>
<th>“Any Other Means” Online Reporting</th>
<th>Officials With Authority at WVU</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>James Goins Jr.</strong></td>
<td></td>
<td><strong>Responsible Employees</strong></td>
</tr>
<tr>
<td>304-293-8386</td>
<td><a href="https://wvu.qualtrics.com/jfe/form/SV_0lKdeIgf4QeEUxT">https://wvu.qualtrics.com/jfe/form/SV_0lKdeIgf4QeEUxT</a></td>
<td>Those employees in a leadership or supervisory position, or who have significant responsibility for the welfare of students or employees. Specifically, this term includes: Title IX Coordinator; Deputy Title IX Coordinators; University Police Officers; Senior Administrators in Residence Life, Student Life, and Athletics; University Senior Administrators, including Senior Administrators within each College or School; Resident Assistants; Faculty; and Athletic Team Coaches and their Staff</td>
</tr>
<tr>
<td>1085 Van Voorhis Road</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Suite 250</td>
<td></td>
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</tbody>
</table>
Responding to Actual Knowledge of TIX Sexual Harassment …

First, should be reported to Title IX Coordinator.

Then, **the Title IX Coordinator** must:

1. promptly contact the complainant to discuss the availability of supportive measures,

2. consider the complainant’s wishes with respect to supportive measures,

3. inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and

4. explain to the complainant the process for filing a formal complaint.”

**Source § 106.44(a)**
Within the actual knowledge of the TIXC or an official with the authority to institute corrective measures

- Quid pro quo harassment by an employee
- Unwelcome conduct that is severe, pervasive, and objectively offensive denying access to the program or activity
- Sexual assault, stalking, dating violence, domestic violence

Directed against a person in the United States

Within the educational program or activity

Title IX Response Obligation Arises:
Supportive Measures, Triage
Responding to Actual Knowledge …

To understand these four steps

1. promptly contact the complainant to discuss the availability of supportive measures;

2. consider the complainant’s wishes with respect to supportive measures;

3. inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and

4. explain to the complainant the process for filing a formal complaint.

We must define these terms

- Complainant
- Supportive Measures
- Formal Complaint
Responding to Actual Knowledge …

To understand these four steps

1. promptly contact the complainant to discuss the availability of supportive measures;

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- Formal Complaint
## Understanding Terms - Parties

<table>
<thead>
<tr>
<th>Complainant</th>
<th>Respondent</th>
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</thead>
<tbody>
<tr>
<td>Complainant means any individual who has reported being or is alleged to be the victim of conduct that could constitute covered sexual harassment as defined under Title IX.</td>
<td>Respondent means any individual who has reported being or is alleged to be the perpetrator of conduct that could constitute covered sexual harassment as defined under Title IX.</td>
</tr>
</tbody>
</table>
Responding to Actual Knowledge …

To understand these four steps

1. promptly contact the complainant to discuss the availability of supportive measures;

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4. explain to the complainant the process for filing a formal complaint.

We must define these terms

- Complainant
- Supportive Measures
- Formal Complaint
## Understanding Terms - Supportive Measures

<table>
<thead>
<tr>
<th>Must be:</th>
<th>Should be designed to:</th>
</tr>
</thead>
<tbody>
<tr>
<td>✓ non-disciplinary</td>
<td>✓ Restore or preserve equal access to education or activity</td>
</tr>
<tr>
<td>✓ non-punitive</td>
<td>✓ without <em>unreasonably</em> burdening the other party</td>
</tr>
<tr>
<td>✓ individualized services</td>
<td>✓ Including measures designed to protect the safety of all parties or the school’s educational environment</td>
</tr>
<tr>
<td>✓ offered as appropriate</td>
<td></td>
</tr>
<tr>
<td>✓ offered as reasonably available</td>
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</tr>
<tr>
<td>✓ without fee or charge</td>
<td></td>
</tr>
<tr>
<td>✓ to <em>either</em> party</td>
<td></td>
</tr>
<tr>
<td>✓ regardless of whether a formal complaint is filed</td>
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</tr>
</tbody>
</table>
Supportive Measures - Flexibility

The Title IX regulations do not contain explicit requirements for supportive measures.

Instead the regulations provide institutions with flexibility to craft supportive measures based on the unique circumstances of each report of sexual harassment.

The range of supportive measures offered will vary from case to case and institution to institution.

Supportive measures may include, but are not limited to

- Counseling
- extensions of deadlines or other course-related adjustments
- modifications of work or class schedules
- campus escort services
- restrictions on contact between the parties (no contact orders)
- changes in work or housing locations
- leaves of absence
- increased security and monitoring of certain areas of the campus
Supportive Measures – Context

To Whom

must offer supportive measures
to both the complainant and the respondent.

When

must consider supportive measures
every time sexual harassment is reported and the University has actual knowledge, even in the absence of a formal complaint.
Supportive Measures - Records

<table>
<thead>
<tr>
<th>Must maintain as <strong>confidential:</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>• any supportive measures provided to the complainant or respondent</td>
</tr>
<tr>
<td>• to the extent that maintaining such confidentiality would not impair the ability of the recipient to provide the supportive measures.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Must create and maintain:</th>
</tr>
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<tbody>
<tr>
<td>• for a period of <strong>seven</strong> years</td>
</tr>
<tr>
<td>• records of any actions, <strong>including supportive measures</strong>, taken in response to a report or formal complaint of sexual harassment.</td>
</tr>
</tbody>
</table>
Responding to Actual Knowledge …

To understand these four steps

1. promptly contact the complainant to discuss the availability of supportive measures;

2. consider the complainant’s wishes with respect to supportive measures;

3. inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and

4. explain to the complainant the process for filing a formal complaint.

We must define these terms

• Complainant

• Supportive Measures

• Formal Complaint
# Understanding Terms - Formal Complaint

## Filed/Signed By

- a document (including an electronic submission) filed by a complainant with a signature or other indication that the complainant is the person filing the formal complaint

  **OR**

- signed by the Title IX Coordinator

## Alleging/Requesting

- Alleging Title IX-defined **sexual harassment** against a respondent about conduct within WVU’s education program or activity

  **AND**

- requesting initiation of Title IX procedures
### Formal Complaint Signed by the Title IX Coordinator

<table>
<thead>
<tr>
<th>Factors to Consider</th>
<th>Making the Decision</th>
<th>Potential Impact</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Must take into account the complainant’s wishes regarding how the school should respond to the complainant’s allegations.</strong></td>
<td><strong>Should not be an automatic result that occurs any time you have notice that a complainant was allegedly sexual harassed.</strong></td>
<td><strong>A formal grievance process without a participating complainant may become more difficult in light of the requirements in §§106.45(c)(3)(vii), which instructs institutions to disregard statements or witnesses who do not submit to cross-examination.</strong></td>
</tr>
<tr>
<td><strong>May take into account a variety of factors, including pattern of alleged misconduct by a particular respondent, whether complainant’s allegations involved violence, use of weapons, or similar factors.</strong></td>
<td><strong>Should be reached thoughtfully and intentionally by the Title IX Coordinator.</strong></td>
<td></td>
</tr>
<tr>
<td></td>
<td><strong>Should do so against the complainant’s wishes only if “not clearly unreasonable in light of known circumstances.” [30045].</strong></td>
<td></td>
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</table>

**Factors to Consider**

- Must take into account the complainant’s wishes regarding how the school should respond to the complainant’s allegations.
- May take into account a variety of factors, including pattern of alleged misconduct by a particular respondent, whether complainant’s allegations involved violence, use of weapons, or similar factors.

**Making the Decision**

- Should not be an automatic result that occurs any time you have notice that a complainant was allegedly sexual harassed.
- Should be reached thoughtfully and intentionally by the Title IX Coordinator.
- Should do so against the complainant’s wishes only if “not clearly unreasonable in light of known circumstances.” [30045].

**Potential Impact**

- A formal grievance process without a participating complainant may become more difficult in light of the requirements in §§106.45(c)(3)(vii), which instructs institutions to disregard statements or witnesses who do not submit to cross-examination.
# Formal Complaint by the Complainant

<table>
<thead>
<tr>
<th>At the time of filing</th>
<th>Impact?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Complainant</td>
<td>Graduated from one program but intends to apply to a different program.</td>
</tr>
<tr>
<td>Must be participating in or attempting to participate</td>
<td>Graduated but intends to remain involved with alumni programs and activities.</td>
</tr>
<tr>
<td>in WVU’s education program or activity</td>
<td>On a leave of absence but is still be enrolled as a student even while on LOA, or may intend to re-apply after a LOA.</td>
</tr>
</tbody>
</table>

- Left school because of sexual harassment, but expresses a desire to re-enroll if the school appropriately responds to the sexual harassment.

**Source:** 85 Fed. Reg. 30138
Responding to Actual Knowledge …

To understand these four steps:

1. promptly contact the complainant to discuss the availability of supportive measures;
2. consider the complainant’s wishes with respect to supportive measures;
3. inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and
4. explain to the complainant the process for filing a formal complaint.

We must define these terms:

- Complainant
- Supportive Measures
- Formal Complaint
Putting Definitions into Framework #1

If you have **actual knowledge** of sexual harassment that occurred in your education program or activity against a person in the United States, then you must respond promptly in a manner that is not deliberately indifferent, which includes the provision of appropriate **supportive measures**.

*all underlined terms should be read as defined in the new regulations*
If you receive a **formal complaint** of sexual harassment signed by a **complainant who is participating in or attempting to participate in your education program or activity**, then you must follow a **grievance process that complies with Section 106.45**.

*all underlined terms should be read as defined in the new regulations*
So we know …

• there must be a formal complaint to trigger a school’s Title IX grievance process.

• but what if the formal complaint filed does not meet the definition of, or jurisdictional scope of, Title IX Sexual Harassment?

• Let’s discuss the concept of dismissal …
## Dismissal of Formal Complaint – Sec. 106.45(b)(3)

**Mandatory**

Conduct alleged in formal complaint:
1. would not constitute sexual harassment even if proved.
2. did not occur in your education program or activity.
3. did not occur against a person in the United States.

**Permissive**

1. Complainant notifies the TIXC in writing that they would like to withdraw the formal complaint or the allegations therein.
2. Respondent is no longer enrolled or employed.
3. Specific circumstances prevent recipient from gathering evidence sufficient to reach a determination.
### When could this occur?

- Upon receipt of formal complaint?
- After initial interview?
- During investigation, but before hearing?

### Next steps = KEEP RECORDS

- Must promptly send written notice of dismissal and reasons simultaneously to parties (Section 106.45(b)(3)(iii))
- Must provide appeal option to both parties (Section 106.45(b)(8))
- May take action under another University policy policies (Section 106.45(b)(3)(i)) 
  *Notably, the jurisdiction of other University policies may extend further than Title IX.*
One more concept before another Q&A break
“[I]n situations where a respondent poses an immediate threat to the physical health and safety of any individual before an investigation into sexual harassment allegations concludes (or where no grievance process is pending), a recipient may remove the respondent from the recipient’s education programs or activities.”

Emergency Removal/Administrative Leave

• You may employ an emergency removal process if there is an immediate threat to the physical health or safety of any students or other individuals arising from the allegations of sexual harassment.

• You may place a non-student on administrative leave during the pendency of a grievance process.

§ 106.44(c), (d)
### Emergency Removal Process - Checklist

<table>
<thead>
<tr>
<th>Prior to Removal</th>
<th>Individualized Safety and Risk Analysis</th>
<th>Immediate Threat to Physical Health or Safety</th>
</tr>
</thead>
<tbody>
<tr>
<td>Must conduct an individualized safety and risk analysis and Must determine that removal is justified due to an immediate threat to the physical health or safety of any student or other individual.</td>
<td>Must be “more than a generalized, hypothetical, or speculative belief that the respondent may pose a risk to someone’s physical health or safety.” (30233). Cannot be based: - general assumptions about sex - research that purports to profile characteristics of sex offense perpetrators - statistical data about the frequency infrequency of false or unfounded sexual misconduct allegations.</td>
<td>Note the word <strong>physical</strong>. Emotional and mental well-being may be addressed via supportive measures (30225). Includes respondent’s threat of self-harm (when threat arises from sexual harassment allegations) (30228).</td>
</tr>
</tbody>
</table>
# Emergency Removal Process - Checklist

<table>
<thead>
<tr>
<th>Understanding the Process</th>
<th>Key Reminder 34 C.F.R. 106.44(c.)</th>
<th>Key Reminder (85 F. R. 30232)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>How?</strong></td>
<td>“This provision may not be construed to modify any rights under the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act of 1973, or the Americans with Disabilities Act.”</td>
<td>“The purpose of an emergency removal is to protect the physical health or safety of any student or other individual to whom the respondent poses an immediate threat, arising from allegations of sexual harassment, <strong>not to impose an interim suspension or expulsion on a respondent</strong>, or penalize a respondent by suspending the respondent from, for instance, playing on a sports team or holding a student government position, while a grievance process is pending.”</td>
</tr>
</tbody>
</table>

- You have flexibility to decide **how** to conduct the individualized safety and risk analysis.
- You have flexibility to decide **who** will conduct the analysis (e.g., provide specialized training to employees or convene an interdisciplinary threat assessment team).

85 F.R. 30233
## Emergency Removal Process - Checklist

<table>
<thead>
<tr>
<th>After Removal</th>
<th>When?</th>
<th>What?</th>
</tr>
</thead>
<tbody>
<tr>
<td>§ 106.44(c), 85 FR 30183.</td>
<td>• immediately following removal</td>
<td>• must provide respondent with notice of the emergency removal decision and • must provide respondent with an opportunity to challenge the emergency removal decision</td>
</tr>
</tbody>
</table>

Note: “§ 106.44(c) does not require a recipient to provide the respondent with any pre-deprivation notice or opportunity to be heard, so requiring post-deprivation due process protections ‘immediately’ after the deprivation ensures that a respondent's interest in access to education is appropriately balanced against the recipient's interest in quickly addressing an emergency situation . . . .” 85 F.R. 30229-30.
Administrative Leave Process - Checklist

- “Administrative leave” is generally understood as temporary separation from a person’s job, with or without pay and benefits intact based on the recipient’s discretion and requirements of state law. 85 FR 30236. “[T]hese final regulations do not dictate whether administrative leave during the pendency of an investigation under § 106.45 must be with pay (or benefits) or without pay (or benefits).” 85 F.R. 30236.

- The regulations do not specify conditions justifying administrative leave so that recipients may have flexibility to decide when administrative leave is appropriate. 85 FR 30236.

- If State law allows or requires, an accused employee may be placed on “reassignment to home” or alternative assignment, during the pendency of an investigation under § 106.45 into sexual harassment allegations against the employee. 85 FR 30236.
Student Employees - Checklist

☐ Placing a student-employee-respondent on administrative leave may be permissible as a supportive measure for a complainant (for instance, to maintain the complainant’s equal educational access and/or to protect the complainant’s safety or deter sexual harassment) as long as that action meets the conditions that a supportive measure is not punitive, disciplinary, or unreasonably burdensome to the respondent. 85 FR 30236.

☐ A recipient’s decision to place a student-employee respondent on administrative leave as part of a non-deliberately indifferent response to a report of sexual harassment will be evaluated based on whether such a response is clearly unreasonable in light of the known circumstances. 85 FR 30236-30237.
Q&As and Hypotheticals
The Heart of the New Regulations – The Grievance Process

If you receive a formal complaint of sexual harassment signed by a complainant who is participating in or attempting to participate in your education program or activity, then you must follow a grievance process that complies with Section 106.45.

*all underlined terms should be read as defined in the new regulations*
§106.45
Grievance Process Obligations Arise

Complainant is participating in, or attempting to participate in, your Programs or Activities at time of Formal Complaint

Formal Complaint from Complainant or TIXC
Coming Up ...

Part V: Conducting Investigations, including, but not limited to:
- Nuts & Bolts (How to conduct an investigation)
- Creating an investigation report fairly summarizing relevant evidence

Part VI: Conducting Hearing, including, but not limited to:
- Nuts & Bolts (How to conduct a hearing)
- Understanding technology to be used at a live hearing
- Understanding issues of relevance related to questions and evidence
- Preparing a written determination

Part VII: Conducting Appeals, including, but not limited to:
- Nuts & Bolts (How to conduct an appeal process)
- Understanding issues of relevance related to questions and evidence
- Preparing a written appeal determination

Part VIII: Informal Resolution
But first …
PART IV
HOW TO SERVE YOUR ROLE IMPARTIALLY
The Importance of Impartiality

An impartial process before unbiased officials ultimately promotes accurate, reliable outcomes, which effectuate the purpose of Title IX to provide individuals with effective protection from discriminatory practices.

What does it mean to be impartial?

<table>
<thead>
<tr>
<th>Any individual designated as</th>
<th>Must not have a</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Title IX Coordinator</td>
<td>• conflict of interest OR bias</td>
</tr>
<tr>
<td>• Investigator,</td>
<td>• for OR against</td>
</tr>
<tr>
<td>• Decision-maker</td>
<td>• complainants or respondents generally OR an individual complainant or respondent</td>
</tr>
<tr>
<td>• Appellate officer</td>
<td></td>
</tr>
<tr>
<td>• Facilitator of an informal resolution process</td>
<td></td>
</tr>
</tbody>
</table>

*This list does not include Advisors. 85 Fed. Reg 30254 n.1041

Also means that you cannot prejudge the facts, addressed in later slides*
How to Serve Without Bias
At its core impermissible bias is …

Making a decision based on the characteristics* of the parties, rather than based on the facts.

*This includes any protected characteristic, not only sex. 85 Fed. Reg. 30084
Identifying Bias (Step 1)

- To evaluate whether a particular person serving in a Title IX role is biased requires:
  - An examination of the **particular facts** of a situation
  - **Taking an objective** (whether a reasonable person would believe bias exists), **common sense approach**.
Identifying Bias (Step 2)

<table>
<thead>
<tr>
<th>We know it includes</th>
<th>We also know it includes:</th>
<th>We also know it includes:</th>
<th>*Investigators</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Being for OR against complainants or respondents generally</td>
<td>• Treating a party differently on the basis of the party’s sex or stereotypes about how men or women behave with respect to sexual violence</td>
<td>• Ignoring, blaming, or punishing a party due to stereotypes about the party</td>
<td>*Investigators</td>
</tr>
<tr>
<td>• Being for OR against an individual complainant or respondent</td>
<td>85 Fed.Reg. 30238-40</td>
<td>85 Fed. Reg. 30496</td>
<td>While it is not <em>per se</em> non-compliant with the regulations, consider whether investigators should refrain from making credibility determinations in their investigative reports.</td>
</tr>
</tbody>
</table>

*Remember, the decision-maker is under an independent obligation to objectively evaluate relevant evidence, and thus cannot simply defer to recommendations made in the report.*
What is NOT defined as bias?

- “[T]he mere fact that a certain number of outcomes result in determinations of responsibility, or non-responsibility, does not necessarily indicate or imply bias on the part of Title IX personnel.”
  85 Fed. Reg. 30252

- When a Title IX Coordinator signs a formal complaint, it does not render the Coordinator biased or pose a conflict of interest.
  85 Fed. Reg. 30372

- The prior professional experience of a person whom a recipient would like to have in a Title IX role need not disqualify the person from obtaining the requisite training to serve impartially in a Title IX role.
  85 Fed. Reg. 30252
How to Avoid Conflicts of Interest
The Department also declines to define conflict of interest and instead, leaves it in the discretion of the recipient.
It is **not** a conflict of interest for...

A recipient to:

- ✓ fill Title IX personnel positions with its **own** employees
- ✓ have a co-worker from the same office as the hearing officer serve as an investigator

- Any recipient, irrespective of size, may use existing employees to fill Title IX roles, “as long as these employees do not have a conflict of interest or bias and receive the requisite training[..]” 85 Fed. Reg. 30491-92.

- Not required to use outside, unaffiliated Title IX personnel. 85 Fed. Reg. 30252.

- Even a student leader of the recipient may serve in a Title IX role. 85 Fed. Reg. 30253.

- Different individuals from the same office serve separate Title IX roles
Conflict of Interest: Who can serve which function?

Title IX Coordinator ...
- Investigator ✔
- Informal resolution facilitator ✔
- Decision-maker or appeal decision-maker ✗

Investigator ...
- Title IX Coordinator ✔
- Informal resolution facilitator ✔
- Decision-maker or appeal decision-maker ✗
Conflict of Interest: Who can serve which function?

Hearing decision-maker…

- Investigator ✗
- Title IX Coordinator ✗
- Appeal decision-maker ✗

Appeal decision-maker …

- Investigator ✗
- Title IX Coordinator ✗
- Hearing decision-maker ✗
Be Transparent

Although prior professional experiences and affiliations do not automatically trigger a conflict of interest, whether a Title IX personnel has a conflict of interest will be a case-by-case determination. So, be transparent.

- Disclose (to TIX Coordinator) any prior professional experiences and affiliations
- Explain why you believe such experiences do not create a conflict
- If substantive, consider disclosing to parties and providing them the opportunity to object.

*If Title IX personnel feel that they do have a conflict of interest, and are incapable of acting in an impartial manner, they should step down from their role in that particular grievance process immediately.
How to Avoid Prejudgment of Facts
# Avoiding Prejudgment of the Facts at Issue

<table>
<thead>
<tr>
<th>✗ Do not <strong>pass judgment</strong> on the allegations presented by either party or witnesses</th>
<th>✔ Base all decisions on individualized facts, and not on stereotypical notions of what “men” and “women” do or not do. 85 FR 30254.</th>
</tr>
</thead>
<tbody>
<tr>
<td>✗ Title IX Coordinators (and other personnel, e.g., investigators) <strong>may not “believe”</strong> one party or the other.</td>
<td>✔ Avoid any and all stereotypes.</td>
</tr>
<tr>
<td>✗ Do not <strong>jump to any conclusions</strong> without fully investigating the allegations and gathering all of the relevant facts and evidence from all parties involved.</td>
<td>✔ Approach the allegations of both parties with neutrality.</td>
</tr>
<tr>
<td>✔ Treat both parties equally and provide an equal opportunity to present evidence, witnesses, and their versions of the story.</td>
<td></td>
</tr>
</tbody>
</table>
Q&As and Hypotheticals
PART V
CONDUCTING AN INVESTIGATION
Conducting an Investigation

1) We have a formal complaint (as defined above).

2) It has not been dismissed.

3) Ok - what are the new rules of the road for investigations?
Investigation – The Basics

✔ Trained Investigator(s)
☐ Written Notice of Allegations (update if necessary)
☐ Written Notice of Any Investigative Interview(s)
☐ Burden on Institution/Investigator to Collect Evidence
☐ Cannot Access Medical/Mental Health Records w/o voluntary, written consent
☐ Both Parties = Equal Advisor Rights (can be an attorney)
☐ Both Parties = Right to Present Witnesses/Evidence (including “experts”) 
☐ Both Parties = Right to Inspect & Review Any Evidence “Directly Related” (Pre-Rpt)
☐ Both Parties = Meaningful Opportunity to Respond to Evidence (Pre-Report)
☐ Investigative Report = Fairly Summarize Relevant Evidence
☐ Both Parties = Right to Review & Respond to Investigative Report (Pre-Hearing)
☐ Retain Records for 7 years
Written Notice of Allegations

Source: 106.45(b)(2)(B)

*Update as needed throughout the investigation*

- **To Whom?**
  - “parties who are known”

- **What to Include?**
  - Identities of parties involved in incident
  - Conduct allegedly constituting sexual harassment
  - Date and location of alleged incident
  - Statement that respondent is presumed not responsible; determination regarding responsibility will be made at conclusion of process
  - Right to an advisor
  - Right to inspect and review
  - Statement of policy re false allegations

- **When to Send?**
  - “With sufficient time to prepare a response before any initial interview”.
Written Notice of Interview

Source: 106.45(b)(5)

*Throughout the investigation*

- **To Whom?**
  - The interviewee/party
  - Any identified advisor for that party

- **What to Include?**
  - Date & Location of interview
  - Purpose of Interview

- **When to Send?**
  - With “sufficient” lead time
Burden on Institution to Collect Evidence & Medical/Mental Health Records

Source: 106.45(b)(5)

*Throughout the investigation*

- Burden to gather evidence?
  - Burden is not on the parties
  - Burden is on institution
  - What if party does not cooperate?

- You have the burden, but what if you want to access medical records or mental health records?
  - Need party’s voluntary, written consent
  - What if incapacitation an issue, and there are medical records with BAC information? You cannot get these without voluntary, written consent. See 85 Fed. Reg. 30294.
Parties’ Rights During the Investigation

Source: 106.45(b)(5)

*Throughout the investigation*

- Receive written notices (mentioned on other slides)
- May have Advisor present, who may be attorney
- No “gag orders”
- Must be allowed to present witnesses & evidence
- Must allow parties to “present” expert witnesses?
  - What does “present” mean?
  - If party wants to “present” toxicologist, medical expert, security expert, trauma expert, lie detector test/expert, etc., do we have to consider every one?
What? Both parties can “inspect and review” any evidence obtained during investigation that is “directly related” to allegations. This includes evidence upon which you do not intend to rely in reaching a determination.

When? Must provide this to each party (and their advisor) at least 10 days before completion of any report.


Next Steps: Parties must have “meaningful” opportunity to respond. 85 Fed. Reg. 30303.
Opportunity to Respond

Per WVU policy:
• the Parties will be given ten (10) days
• to submit a written response
• the written response will be considered prior to completion of the final investigation report.

If additional investigation is necessary and justified after the written responses are received, the University may investigate further and the parties will be given an additional ten (10) days to respond to any supplemental investigation materials.

Inspection & Review: Any Evidence “Directly Related” (continued)

Source: 106.45(b)(5)

*Throughout the investigation*
Right to Review: Investigative Report

Source: 106.45(b)(5)

*Throughout the investigation*

- **What?** Both parties can “review”
- **When?** Must send this to each party (and their advisor) at least 10 days before the hearing.
- **Next Steps:** Parties must have the opportunity to respond.
  - Can we limit nature of response?
  - Do we have to act on the response? [30310].
  - Do we exchange responses?
  - Append them to the final report?
Investigation – Advanced Steps

- Planning
- Setting the Stage for Interviews
- Questioning at Interview
- Evidentiary Issues for Report
- Report Drafting
Planning

***
Remember you must conclude in a reasonably prompt timeframe.
Source: 106.45(b)(1)(v)

• Review
  - Formal Complaint
  - Notice of Allegations
  - Any statements/documents provided
  - Policy & Procedure

• Identify the objective criteria
  - Elements of alleged conduct, etc.
  - Avoid hypothesizing

• Outline
  - Witness order (be flexible)
  - Proposed questions (be flexible)
  - Investigation deadlines
Setting the Stage

***

Remember you will need to give **advanced notice** of any meeting or interview

Source: 106.45(b)(5)

- Thank the witness for coming
- Introduce yourself as a neutral investigator
- Maintain good eye contact
- Be mindful of your tone (calm & professional)
- Build rapport to ease anxiety (remain natural)
- Review expectation of truthfulness
- Review WVU’s prohibition on retaliation
- Review difference between privacy v. confidentiality
- State that you will be taking notes or recording
- State whether they are permitted to take notes or record (**not advised**)
- State if/when they will be permitted to review your interview notes
Questioning

*Goal*
collect all facts necessary for decision-maker to reach decision

*Final product*
report that fairly summarizes all relevant evidence

- Be intentional and unbiased in your questioning; you are not an advocate for either side
- Be aware of your voice & body language
- Ask questions in a fair, open manner
- Clarify unclear or confusing statements
- Resolve ambiguities, contradictions
- Address holes in statements
- Make sure record is complete
- Document any refusals
### Questioning - More Tips

<table>
<thead>
<tr>
<th><strong>Good Techniques</strong></th>
<th><strong>Avoid</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>• Ask essential questions - who, what, when, where, how and why</td>
<td>• Accusing a witness</td>
</tr>
<tr>
<td>• Ask clear questions. Precision matters.</td>
<td>• Leading a witness</td>
</tr>
<tr>
<td>• Ask open-ended questions</td>
<td>• Asking “multiple choice” questions</td>
</tr>
<tr>
<td>• Follow-up on evasive answers</td>
<td>• Interrupting a witness</td>
</tr>
<tr>
<td>• Use responses as basis for follow up</td>
<td>• Using legal terminology</td>
</tr>
<tr>
<td>• Ask if they have documents/materials</td>
<td>• Rushing to fill the silence</td>
</tr>
<tr>
<td>• Inquire into inconsistencies</td>
<td>• Becoming emotional (angry, upset)</td>
</tr>
<tr>
<td>• Watch facial expressions and body language of the witness</td>
<td>• Agreeing or disagreeing with a witness</td>
</tr>
<tr>
<td></td>
<td>• Condescending or blaming a witness</td>
</tr>
</tbody>
</table>
Questioning

***

Any trauma-informed techniques must not violate the requirement to serve impartiality and without bias and must be applied equally to all genders.

85 Fed. Reg 30256, 30323

You can be empathetic in tone, but you must remain neutral & impartial:

- Tell me more about …
- Help me understand …
- What do you recall about … sight/sound/smell, etc.
- What were your thoughts when …
- What was your response when …

Tips:
- Be prepared for a non-linear account
- Allow time to respond
- Allow breaks
Note-Taking Tips

✔ Do
• Be accurate & specific
• Include the date, time and place of each interview
• Include who was present at each interview
• Note any instructions provided. Ideally these instructions are identical from one interview to the next
• Note the invitation to provide docs/materials
• Note the invitation to identify witnesses
• Include any objective observations of witness reactions
• Identify where notes reflect verbatim responses
• Note any refusals to respond
• If drafting interview memo, do so as soon as possible

✖ Don’t
• Include your own reactions
• Exaggerate witness statements or reactions
• Make determinations about responsibility
What is Relevant Evidence?

- The regulations do not define “relevant”
- The regulations tell us to:
  - apply the “ordinary meaning of relevance.”
  - Include inculpatory and exculpatory evidence.

What is Inculpatory and Exculpatory Evidence?

- Inculpatory evidence indicates respondent was likely responsible for alleged violation
- Exculpatory evidence indicates respondent was likely not responsible
Evidentiary Issues

Issues of Relevance

* The goal of the investigation is to draft an investigative report that fairly summarizes all relevant evidence

- With limited exceptions, the investigative report cannot exclude relevant evidence solely because it may be:
  - unduly prejudicial
  - prior bad acts
  - character evidence

- Exceptions
  - Privileged Information - (106.45(b)(1)(x))
  - Medical, Psychological, Psychiatric or similar treatment records - (106.45(b)(5)(i))
  - Rape Shield - (106.45(b)(6)(i))
Investigative Report

*Note
In a **consolidated investigation** that involves multiple complainants, multiple respondents, or both, a recipient may issue a **single investigative report**.


---

**No set format, but good practices:**

✅ **Include**
- Summary of allegations
- Policy provisions potentially implicated
- Timeline of investigative process
- Description of the procedural steps taken
- Summary of relevant evidence
- Summary documents collected/reviewed
- Summary of witnesses interviewed
- Any unsuccessful efforts to interview
- Any unsuccessful efforts to obtain documents
- Attach parties’ required responses

✖ **Do not include**
- Determination of responsibility (Decision-maker’s role)

*While not per se non-compliant, Investigators should consider whether to refrain from making “credibility determinations” in their investigative reports.*
The Investigative Report

- All evidence gathered
- Evidence directly related to the allegations in the formal complaint (Evidence sent to parties/advisors)
- Relevant evidence (Evidence included in the Investigative Report)
Q&As and Hypotheticals
PART VI

CONDUCTING A HEARING
• So …

• We received a formal complaint (that was not dismissed).

• We conducted an investigation compliant with § 106.45(b)(2) and (b)(5), including creating a report and providing it to the parties.

• What now?
For postsecondary institutions, like WVU, the grievance process must provide for a live hearing*.

Source: 106.45(b)(6)(i)
What does “live” mean?

*In essence, live participation where

- You can hear one another in real-time
- You can see one another in real-time
- Allows for oral questioning
- No telephonic appearances

- May be conducted with all parties physically present in the same geographic location

OR

- At the school’s discretion, any or all parties, witnesses, and other participants may appear at the live hearing virtually, with technology enabling participants simultaneously to see and hear each other.

OR

- At the request of either party, the school must provide for the live hearing to occur with the parties located in separate rooms with technology enabling the decision-maker(s) and parties to simultaneously see and hear the party or the witness answering questions.
Technology

- WVU will provide separate training on the technology to be used.

- Must create an audio or audiovisual recording, or transcript, of hearing. The recording or transcript must be made available to the parties for inspection and review. “Inspection and review” does not obligate an institution to send the parties a copy of the recording or transcript. 85 Fed. Reg. 30392.

- Must provide access to evidence at hearing, per Section 106.45(b)(5)(vi)
Live Hearing – More Nuts & Bolts

- Trained Decision-Makers
- Live (as described on prior slide)
- Available Technology (as described on prior slide)
- Pre-Hearing Process (you have some flexibility)
- Decorum at Hearing (you have some flexibility)
- Structure of Live Hearing (you have some flexibility)
- Role of Advisors
- Role of Decision-Makers
- Cross-Examination & Relevancy
- Written Determination
- Recording or Transcript
- Retain Records for 7 years
Pre-Hearing Process

“Any rules a recipient adopts to use in the grievance process, other than those necessary to comply with § 106.45, must apply equally to both parties.

WVU may hold a Pre-hearing Meeting with the Parties:

The Code Administrator will meet with the Parties:

- to discuss the hearing procedures;
- ensure both the Complainant and Respondent have an advisor in advance of the hearing; and
- explain that can request that the hearing occur in separate locations, but decision maker and Parties must “see and hear” the party/witnesses answering questions.
WVU mandates that Parties and their Advisors must:

- not be disruptive;
- follow reasonable instructions regarding hearing decorum; and
- abide by the instructions of the Decision-Maker.

“[A]ny rules a recipient adopts to use in the grievance process, other than those necessary to comply with § 106.45, must apply equally to both parties.”
Reminder:

- “[A]ny rules a recipient adopts to use in the grievance process, other than those necessary to comply with § 106.45, must apply equally to both parties.”

Structure of Hearings
Role of Advisors

- Parties have the right to be accompanied to any related meeting or proceeding by the advisor of their choice, who may be, but is not required to be, an attorney.

- WVU may not limit the choice or presence of advisor for either the complainant or respondent in any meeting or grievance proceeding.

- WVU may establish restrictions regarding the extent to which the advisor may participate in the proceedings, as long as the restrictions apply equally to both parties.

- WVU could, but does not have to, provide the advisor for entirety of grievance process.
Role of Advisors

At Hearings

- At the hearing, advisor must conduct **cross-examination** on behalf of party. 34 CFR § 106.45(b)(6)(i).

- Whether advisors also may conduct **direct examination** is left institution’s discretion, but any rule to this effect must apply equally to both parties. 85 Fed. Reg. 30342.

- *If the party does not have an advisor at the live hearing, then WVU must provide an advisor of its choice to conduct cross-examination on behalf of that party.*

- The regulations **do not** prelude rule regarding advance notice from parties about intent to bring an advisor of choice to the hearing. 85 Fed. Reg. 30342.
Role of Advisors

Cross-Examination


- Cross “on behalf of that party” is satisfied where the advisor poses questions on a party’s behalf.

- Party cannot “fire” an assigned advisor during the hearing.

- If advisor of choice refuses to comply with a recipient’s rules of decorum → institution may provide that party with an assigned advisor to conduct cross.

- If assigned advisor refuses to comply with a recipient’s rules of decorum → institution must provide that party with a different assigned advisor to conduct cross.
Role of Decision Maker

- Oversee the hearing
- Ensure the hearing follows WVU procedures
- Ensure the hearing complies with 106.45(b)(1)
- Make relevancy determinations at the hearing
  - Objectively evaluate all relevant evidence
  - Inculpatory & exculpatory
- Make determination of responsibility
  - Independent determination regarding responsibility
  - Cannot give deference to an investigation report
- Prepare written determination
- Issue written determination to parties simultaneously
Cross-Examination

The Basics

At the live hearing, the decision-maker(s) must
- permit each party’s advisor
- to ask the other party and any witnesses
- all relevant questions and follow-up questions, including those challenging credibility

Such cross-examination at the live hearing, must be conducted:
- directly
- orally
- in real time
- by the party’s advisor of choice

If a party does not have an advisor present at the live hearing, WVU must provide:
- at WVU’s own expense
- an advisor of its choice to conduct cross-examination on behalf of that party
**Cross-Examination Mechanics**

* Before a party or witness answers a question, the decision-maker(s) must first determine whether the question is relevant and explain any decision to exclude a question as not relevant.

**Question:**
Advisor asks the question.

**PAUSE**

**Ruling:**
Decision-maker determines whether question is relevant.

If not relevant, decision-maker must explain reasoning to exclude question.

If relevant, question must be answered.
Cross-Examination
Mechanics: Ruling on the Relevancy of a Question

• At the hearing, the decision-maker will serve as the gatekeeper, making relevance determinations after each question.

• The decision-maker may apply “logic and common sense” to reach any conclusions but must explain their rationale.

• No “lengthy or complicated explanation” is necessary.
Relevancy

Only relevant cross-examination and other questions may be asked of a party or witness.

• “Ordinary meaning of relevance should be applied throughout the grievance process.” 85 Fed. Reg. 30247, n. 1018.

• Relevant evidence must include both inculpatory and exculpatory evidence. 85 Fed. Reg. 30314.

• Decision-maker must determine whether it is relevant. 34 CFR § 106.45(b)(6)(i).
Relevancy

The Title IX regulations require an objective evaluation of relevant evidence.

May not universally exclude:
- undue/unfair prejudice 85 FR 30294
- character or prior bad acts evidence. 85 FR 30248
- certain types of relevant evidence (e.g. lie detector test results, or rape kits). 85 FR 30294

Decision-maker may consider the weight & credibility
- Ex. Where a cross-examination question is relevant, but concerns a party’s character, the decision-maker must consider the evidence, but may proceed to objectively evaluate it by analyzing whether the evidence warrants a high or low level of weight or credibility.

**BUT** evaluation must treat the parties equally by not, for instance, automatically assigning higher weight to exculpatory character evidence than to inculpatory character evidence or vice versa.
The following evidence is deemed **not relevant** at the live hearing:

- Evidence protected by the rape shield provision (as discussed in slides)

- “Hearsay” (as defined in slides)

*Remember you need a waiver for privileged information (106.45(b)(1)(x)) **and** voluntary, written consent for medical, psychological, psychiatric or similar treatment records (106.45(b)(5)(i)).*
**Rape Shield**

- Deems all questions and evidence of a complainant’s sexual predisposition irrelevant, with no exceptions. See 85 Fed. Reg. 30352.
  - No definition in regulations or preamble
  - Advisory comment to Fed. R. Evidence 412 defines sexual predisposition as “the victim’s mode of dress, speech, or life-style.”

- Prohibits questions or evidence about a complainant’s prior sexual behavior, with two exceptions. See 34 CFR § 106.45(b)(6).
  - No definition in final regulations or preamble.
  - Advisory comments to Fed. R. Evid. 412 explains that sexual behavior “connotes all activities that involve actual physical conduct, i.e., sexual intercourse and sexual contact, or that imply sexual intercourse or sexual contact.”

Decision-makers must be trained on issues of relevance, including the application of the rape shield protections. 34 CFR 106.45(b)(1)(iii).
## Evidence of prior sexual behavior is permitted if …

<table>
<thead>
<tr>
<th>Exception 1</th>
<th>Exception 2</th>
</tr>
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<tbody>
<tr>
<td>Offered to prove someone other than the respondent committed the alleged offense.</td>
<td>It is specifically about the complainant and the respondent and is offered to prove consent.</td>
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- “When a respondent has evidence that someone else committed the alleged sexual harassment, a respondent must have opportunity to pursue that defense, or else a determination reached by the decision-maker may be an erroneous outcome, mistakenly identifying the nature of sexual harassment occurring in the recipient’s education program or activity.” 85 Fed. Reg. 30353.

- Does not admit complainant’s sexual behavior with anyone other than the respondent.

- Questions or evidence could be offered by either party, or by the investigator, or solicited on the decision-maker’s own initiative.

- The scope of this exception to the rape shield provision will turn, in part, on the definition of “consent” adopted by WVU.
If a party or witness does not submit to cross-examination at the live hearing, then the decision-maker cannot rely on any statement of that party or witness in reaching a determination regarding responsibility. 34 CFR § 106.45(b)(6)(i).

To “submit to cross-examination” means answering cross-examination questions that are relevant.

But, decision-makers cannot draw an inference as to responsibility based on a party or witness’s refusal to answer. Id.
The hearsay prohibition (discussed on the prior slide) does not apply if the respondent’s statement, itself, constitutes the sexual harassment at issue.

• **Why?** The verbal conduct does not constitute the making of a factual assertion to prove or disprove the allegations of sexual harassment because the statement itself is the sexual harassment.

• **Source:** This “exception,” is not expressly discussed in the final regulations; it was published on the Department’s blog following release of the regulations.
Cross-Examination

Effect of Failure to Appear

Remember
“No recipient or other person may intimidate, threaten, coerce, or discriminate against any individual . . . because the individual has . . . refused to participate in any manner in an investigation, proceeding, or hearing under this part.”
Source 106.71

The decision-maker(s) cannot draw an inference about the determination regarding responsibility based solely on a party’s or witness’s absence from the live hearing or refusal to answer cross-examination or other questions.

Potential Scenario 1:
Where one party appears at the hearing and the other party does not, the non-appearing party’s advisor may appear and conduct cross-examination even when the party whom they are advising does not appear.

Potential Scenario 2:
Where one party and their advisor both do not appear, an advisor provided by WVU must still cross-examine the appearing party “on behalf of” the non-appearing party, resulting in consideration of the appearing party’s “statements”
Q&As and Hypotheticals
Important considerations:

- The Respondent must be presumed not responsible for the alleged conduct until the determination regarding responsibility is made. §106.45(b)(1)(iv).

- Outcome must be based on an objective evaluation of all relevant evidence—including both inculpatory and exculpatory—and not taking into account the relative “skill” of the parties’ advisors. §106.45(b)(1)(ii); 85 FR 30332

- Credibility determinations may not be based on a person’s status as a Complainant, Respondent, or witness. §106.45(b)(1)(ii).

- WVU’s Standard = Preponderance of the Evidence
Decision-Maker’s Written Determination

To promote transparency and impartiality in the Title IX grievance process, the decision-maker must issue a written determination regarding responsibility.

Source 106.45(b)(7)
Written Determination - Key Elements

1. Identification of the allegations alleged to constitute sexual harassment as defined in § 106.30;

2. The procedural steps taken from receipt of the formal complaint through the determination regarding responsibility;

3. Findings of fact supporting the determination;

4. Conclusions regarding the application of the recipient’s code of conduct to the facts;

5. The decision-maker’s rationale for the result of each allegation, including rationale for the determination regarding responsibility;

6. Any disciplinary sanctions the recipient imposes on the respondent and whether the recipient will provide remedies to the complainant; and

7. Information regarding the appeals process.

Source 106.45(b)(7)(ii)
Nothing in the regulations mandate how to phrase the information in the written notice.

WVU is free to employ age-appropriate methods, common sense, and good judgment in choosing how to convey the information required to be included in the written notice.

Good practice to create standardized form with room to add in the specifics and details.
Written Determination must demonstrate steps taken from the receipt of the formal complaint through the determination, e.g.,

- When the parties received notification
- Who performed the investigation
- Who was interviewed (parties and witnesses) & when
- Site visits, if any
- Methods used to gather other evidence (noting any issues)
- Process undertaken for inspect/review stage
- Process undertaken for report dissemination
- describe “the investigator’s timeline” and explain investigative steps with sufficient specificity to further the purpose of promoting transparency

You may include

- procedural steps taken to address certain threats to fair and equitable treatment of parties in the grievance process.

Source: 106.45(b), 106.45(b)(5)(iv), 85 FR 30243
This part of the written determination:

✔ Must address:
  ▪ the facts that support the determination of responsibility or no responsibility as to each allegation (pursuant to applicable burden of proof).

✖ But need not address*:
  ▪ evaluation of contradictory facts
  ▪ exculpatory evidence
  ▪ *all* evidence presented at a hearing, or
  ▪ how credibility determinations were reached.

*Why?* The written determination also requires the decision-maker to explain the rationale for the result reached, and that rationale is to be based on an objective evaluation of the evidence, so the Department declined to also require the written determination to address evaluation of other facts and evidence that do not support the rationale behind the result reached. 85 FR 30389.
Conclusions regarding the application of the recipient’s code of conduct to the facts

§ 106.45(b)(7)(ii)(D)

This part of the written determination requirement should explain how the conduct under investigation “matches up” against particular portions of a recipient’s code of conduct. 85 Fed. Reg. 30391

The Department does not specify what this “match-up” should look like in written form, but notes that this may come into play when issues of consent are central to the determination.

If there are any other situations where you exercise your discretion and apply policies and procedures not otherwise required under Title IX, those must be addressed in this section.
The decision-maker is obligated to objectively evaluate all relevant evidence, including inculpatory and exculpatory evidence (and to avoid credibility inferences based on a person’s status as a complainant, respondent, or witness), under § 106.45(b)(1)(ii).

The written determination must include explanations of the reasons why objective evaluation of the evidence supports findings of facts and conclusions based on those facts. 85 FR 30389

*Recall, WVU applies preponderance of the evidence.
Sanction

- The sanction represents part of the recipient’s response to addressing sexual harassment, and the victim should know how the sexual harassment which the victim suffered, was addressed. 85 FR 30425, n. 1576.

- A recipient is required to maintain for a period of 7 years records of any disciplinary sanctions imposed on the respondent and any remedies provided to the complainant designed to restore or preserve equal access to the recipient’s education program or activity. 34 CFR §106.45 (b)(10)(ii).
Remedies

- Remedy is designed to restore or preserve equal access to the recipient’s education program or activity and is provided by the recipient to the complainant.

- May include the same services described as supportive measures. But unlike supportive measures, remedies may burden the respondent, or be punitive or disciplinary.

Nature of remedy not included.

- Even where the no-contact order constitutes both a sanction and a remedy, the written determination would only list the measure insofar as it constitutes a sanction, preserving as much confidentiality as possible around the particular nature of a complainant’s remedies.”
Information regarding the Appeals Process

Include

• How to submit an appeal
• Timing for submitting an appeal
• Appropriate bases for an appeal

*Note: The decision-maker on appeal cannot be the Title IX Coordinator, the investigator, or the decision-maker that reached the determination regarding responsibility. 106.45(b)(7)(ii)(F)
Written Determination – When it is Official

Must provide the written determination to the parties simultaneously.

The determination regarding responsibility becomes final either on the date that the recipient provides the parties with the written determination of the result of the appeal, if an appeal is filed, or if an appeal is not filed, the date on which an appeal would no longer be considered timely. 106.45(b)(7)(iii)
Q&As and Hypotheticals
PART VII
CONDUCTING AN APPEAL
Mandatory & Equal Appeal Rights

• Institutions must offer both parties an appeal from a determination regarding responsibility and from an institution’s dismissal of a formal complaint or any allegations therein (whether or not it is a mandatory or discretionary dismissal). §106.45(b)(8)(i)

• You may allow for appeal of sanctions, but do not have to do so.

• Parties must have an equal opportunity to appeal any dismissal decision.
WVU Grounds for Appeal

- Procedural irregularity that affected the outcome of the matter

- New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; and

- The Title IX Coordinator, investigator(s), or Decision-Maker had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter.
WVU Appeal Timing

**Timing of an Appeal.**
- If the Respondent is found not responsible and no Notice of Sanctions is issued, the Parties will have five (5) days from the Notice of Outcome to appeal. If the Respondent is found responsible, then the Parties will have five (5) days from the Notice of Sanctions to appeal both the outcome and the sanctions.

**Appeal Responses.**
- If an Appeal is filed, the other Party will receive a copy of the Appeal and will have five (5) calendar days to respond. Thus, both Parties will have an opportunity to submit a written statement in support of, or challenging the outcome.
WVU Appeal Timing

**Finality**
- The determination regarding responsibility becomes final either on the date that the University provides the Parties with the Determination of Appeal, if an appeal is filed, or if an appeal is not filed, the date on which an appeal would no longer be considered timely.

**Appeal Process**
- Typically, the appellate officer will decide the appeal in thirty (30) calendar days.
Appeals - Requirements of Appeal - 106.45(b)(8)(iii)

- notify the other party, in writing, when an appeal is filed and implement appeal procedures equally for both parties;
- ensure that the decision-maker for the appeal is not the same person as the decision-maker that reached the initial determination, the investigator, or the Title IX Coordinator;
- ensure that the decision-maker for the appeal is free from bias, conflicts of interest, and trained to serve impartially;
- provide both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome;
- issue a written decision describing the result of the appeal and the rationale for the result; and
- provide the written decision simultaneously to both parties.
Appeals: Understanding Relevancy of Evidence

• The decision-maker’s only evidentiary threshold for admissibility or exclusion of questions and evidence is whether the question or evidence is relevant, as opposed to the myriad of evidentiary rules under the Federal Rules of Evidence. 85 Fed. Reg. 30343

• The decision-maker may apply “logic and common sense” to reach any conclusions but must explain his or her rationale (for example, why prior sexual behavior may, or may not, have been relevant; or irrelevance of information barred under rape shield protections).
PART VII
INFORMAL RESOLUTION
Informal Resolution - 106.45(b)(9)

WVU may not

- offer an informal resolution process unless a formal complaint is filed.
- require waiver of the right to an investigation and adjudication.
- require the parties to participate in an informal resolution process.
- offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student.

WVU may facilitate

- an informal resolution process
- at any time prior to reaching a determination regarding responsibility
- assuming certain requirements at met (next slide)
Informal Resolution - 106.45(b)(9)

Before facilitating informal resolution, WVU must:

✓ **Provide** to both parties a written notice disclosing
  
  ☐ the allegations,
  
  ☐ the requirements of the informal resolution process including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations, provided, however, that at any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint, and

  ☐ any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared.

✓ **Obtain** the parties’ voluntary, written consent
Methods Of Informal Resolution

• “The Department believes an explicit definition of ‘informal resolution’ in the final regulations is unnecessary. Informal resolution may encompass a broad range of conflict resolution strategies, including, but not limited to, arbitration, mediation, or restorative justice. Defining this concept may have the unintended effect of limiting parties’ freedom to choose the resolution option that is best for them, and recipient flexibility to craft resolution processes that serve the unique educational needs of their communities.” 85 F.R. 30401.

• “[I]nformal resolutions . . . may result in disciplinary measures designed to punish the respondent . . . .” 85 F.R. 30401.
Confidentiality Associated With Informal Resolution

• “[T]he recipient . . . [must] . . . [p]rovide[] to the parties a written notice disclosing . . . any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared . . . .” 34 C.F.R. § 106.45(b)(9)(i).

• “Section 106.45(b)(9)(i) provides that the written notice given to both parties before entering an informal resolution process must indicate what records would be maintained or could be shared in that process. Importantly, records that could potentially be kept confidential could include the written notice itself, which would not become a public record. The Department leaves it to the discretion of recipients to make these determinations. The Department believes this requirement effectively puts both parties on notice as to the confidentiality and privacy implications of participating in informal resolution. Recipients remain free to exercise their judgment in determining the confidentiality parameters of the informal resolution process they offer to parties.” 85 F.R. 30402.
Informal Resolutions

• “With respect to recipients’ potential legal liability where the respondent acknowledges commission of Title IX sexual harassment (or other violation of recipient’s policy) during an informal resolution process, yet the agreement reached allows the respondent to remain on campus and the respondent commits Title IX sexual harassment (or violates the recipient’s policy) again, the Department believes that recipients should have the flexibility and discretion to determine under what circumstances respondents should be suspended or expelled from campus as a disciplinary sanction, whether that follows from an informal resolution or after a determination of responsibility under the formal grievance process. Recipients may take into account legal obligations unrelated to Title IX, and relevant Title IX case law under which Federal courts have considered a recipient’s duty not to be deliberately indifferent by exposing potential victims to repeat misconduct of a respondent, when considering what sanctions to impose against a particular respondent.” 85 F.R. 30407.
We covered a lot.

Other questions?