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# Title IX Training 2021

# Meet Your Title IX Staff

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**Asha Reynolds**  
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# Title IX Sexual Harassment and Related Conduct Policy & ED Regulations Require Training on:

1. issues of relevance;
2. the definitions in the Policy;
3. the scope of the university's Programs or Activities;
4. how to conduct an investigation; and
5. how to serve impartially, including by avoiding prejudice of the facts at issue, conflicts of interest, and bias.

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# Relevant Evidence

# What is Relevant Evidence?

rel·e·vant | \ 're-lə-vənt \ adj.

**a:** having significant and demonstrable bearing on the matter at hand

**b:** affording evidence tending to prove or disprove the matter at issue or under discussion // relevant testimony

# What is Relevant Evidence?

“The final regulations do not define relevance, and the **ordinary meaning** of the word should be understood and applied.”

# Purpose of Requirement to Summarize Relevant Evidence

“The requirement for recipients to summarize and evaluate relevant evidence, . . . appropriately directs recipients to focus investigations and adjudications on evidence pertinent to proving whether facts material to the allegations under investigation are more or less likely to be true (i.e., on what is relevant).”

# Prohibition on Exclusion of Relevant Evidence

## May not:

- Adopt an “undue/unfair prejudice” rule. 85 FR 30294
- Adopt a rule prohibiting character, prior bad acts, evidence. 85 FR 30248
- Exclude certain types of relevant evidence (e.g. lie detector test results, or rape kits). 85 FR 30294



# What is not relevant?

- The following is considered **per se not relevant** (or otherwise excluded):
  - Complainant's prior sexual behavior (subject to two exceptions) or predisposition;
  - Any party's medical, psychological, and similar treatment records without the party's voluntary, written consent; and
  - Any information protected by a legally recognized privilege, unless waived.

# “Rape Shield” Provision

Questions and evidence about the complainant’s **sexual predisposition** or prior **sexual behavior** are not relevant, *unless* such questions and evidence . . .

1. Are offered to prove that someone other than the respondent committed the conduct alleged by the complainant; or
2. Concern specific incidents of the complainant’s prior sexual behavior with respect to the respondent and are offered to prove consent.

# “Rape Shield” Provision

“[Q]uestions and evidence subject to the rape shield protections are ‘not relevant,’ and therefore the rape shield protections apply wherever the issue is whether evidence is relevant or not. [The regulation] requires review and inspection of the evidence ‘directly related to the allegations’ that universe of evidence is not screened for relevance, but rather is measured by whether it is ‘directly related to the allegations.’ However, the investigative report must summarize ‘relevant’ evidence, and thus **at that point the rape shield protections would apply to preclude inclusion in the investigative report of irrelevant evidence.**”

# Challenges to Investigator's Relevancy Determinations

“A party who believes the investigator reached the wrong conclusion about the relevance of the evidence **may argue** again to the decision-maker (i.e., as part of the party’s response to the investigative report, and/or at a live hearing) about whether the evidence is actually relevant[.]”

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# Policy Definitions

# Sexual Harassment

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

- A. A university employee conditions the provision of an aid, benefit, or service on an individual's participation in unwelcome sexual conduct;
- B. 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 university's Programs or Activities;

# Sexual Assault

**Sexual Assault: formally defined in 20 U.S.C. § 1092(f)(6)(A)(v), means any sexual act directed against another person, without the consent of the victim, including instances where the victim is incapable of giving consent (such as incapacitation, age, family relation to the other party, or intellectual or other disability). Sexual Assault can be committed by or against individuals of any sex or gender and can occur between individuals of the same sex/gender or different sexes/genders. The university will rely on the definition of sexual assault provided in the federal Uniform Crime Reporting system, which includes the following:**

- i. sexual intercourse with another person, including oral or anal sexual intercourse, or the use of an object or instrument to unlawfully penetrate, however slightly, the genital or anal opening of the body of another person, without consent of the victim, including instances where the victim is incapable of giving consent because of their age or because of their temporary or permanent mental or physical incapacity;
- ii. touching of the private body parts of another person for the purpose of sexual gratification, without the consent of the victim, including instances where the victim is incapable of giving consent because of their age or because of their temporary or permanent mental or physical incapacity;
- iii. sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law;  
or
- iv. sexual intercourse with a person who is under the statutory age of consent.

(Virginia = 18yrs old unless all individuals engaging are between 15-17; DC = under 16 years old cannot consent to engage in activity with someone 4 years older)

# Dating & Domestic Violence

**Dating Violence:** formally defined in 34 U.S.C. § 12291(a)(1), 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:** formally defined in 34 U.S.C. § 12291(a)(8), means a felony or misdemeanor crime of violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction receiving grant monies, or by any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of the jurisdiction.

**Violence:** Violence means, in the context of Dating Violence and Domestic Violence, the use of, or threatened use of, physical force with intent, effect, or reasonable likelihood of causing pain, harm, injury or damage to any person or property.



# Stalking

**Stalking:** formally as defined in 34 U.S.C. 12291(a)(30), means engaging in a course of conduct directed at a specific person that would cause a reasonable person to fear for their safety or the safety of others or suffer substantial emotional distress

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

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

# Consent and Coercion

**Consent:** requires voluntary and freely given agreement, through words and/or actions, to engage in mutually-agreed upon sexual activity. Consent cannot be obtained through force, where there is a reasonable belief of the threat of force, or when the other person is incapable of providing consent, including because of Incapacitation. In evaluating whether Consent has been freely sought and given, the university will consider the presence of any force, threat of force, or coercion; whether the Complainant had the capacity to give consent; and whether the communication (through words and/or actions) between the parties would be interpreted by a reasonable person (under similar circumstances and with similar identities) as a willingness to engage in a particular sexual act.

**Coercion:** Coercion means overcoming resistance or unwillingness by actual or threatened violence or undue pressure. The totality of the circumstances of the alleged Coercion will be considered including, but not limited to, the frequency, intensity, and duration of the alleged coercive behavior and whether the Complainant was isolated from others during the alleged incident.

See Appendix A of the Policy for additional definitions

# Incapacitation

**Incapacitation:** the inability, temporarily or permanently, to give Consent because the individual is mentally and/or physically impaired, either voluntarily or involuntarily, or the individual is unconscious, asleep or otherwise unaware that the sexual activity is occurring. In addition, an individual is incapacitated if they demonstrate that they are unaware at the time of the incident of where they are, how they got there, or why or how they became engaged in a sexual interaction. When alcohol or other drugs are involved, Incapacitation is a state of drunkenness, intoxication or impairment that is so severe that it interferes with a person's capacity to make informed and knowing decisions. In evaluating Consent in cases of reported Incapacitation, the university asks two questions:

(1) Did the Respondent know that the Complainant was incapacitated? and if not,

(2) Would an unimpaired, reasonable person in a similar set of circumstances as the Respondent have known that the Complainant was incapacitated? If the answer to either of these questions is "yes," there was no Consent.

See Appendix A of the Policy for additional definitions

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# Scope & Jurisdiction

# Scope & Jurisdiction

“At the time a Formal Complaint is filed, the Complainant must be participating in or attempting to participate in the university’s Programs or Activities in order for the Formal Complaint to trigger the resolution processes provided under this Policy. If at the time a Formal Complaint is filed the Complainant is not participating or attempting to participate in the university’s Programs or Activities, the Title IX Coordinator has the discretion to determine whether the Complaint may be investigated and adjudicated according to the procedures provided for in this Policy.”

“The Title IX Coordinator also has discretion to file a Formal Complaint about reported Sexual Harassment even if the Complainant chooses not to participate in the process and/or does not wish to file a report. When making this decision, the Title IX Coordinator will balance the wishes of the Complainant with the university’s responsibility to investigate.”

## - Title IX Sexual Harassment & Related Conduct Policy

Under the 2020 Policy, a formal complaint is required to trigger alternative resolution and/or a formal resolution.

# Scope & Jurisdiction

## Mandatory Dismissal of Formal Complaints

Formal complaint must be dismissed for TIX purposes if allegations do not meet elements of Sexual Harassment, did not occur in the University's programs or activities, or did not occur against a person in the United States.

**However**, the Title IX Coordinator has discretion to proceed under the procedures outlined in the Policy if: (1) There is close proximity between reported conduct and university community; (2) There is sufficient nexus between the reported conduct and the university's programs or activities, (3) The reported conduct has alleged continuing adverse effects or creates a hostile environment on campus or in the university's programs or activities.

# Scope & Jurisdiction

## Discretionary Dismissal

- Cp notifies Title IX Coordinator in writing that they wish to withdraw the formal complaint
- The Respondent is not enrolled or employed by the university
- Specific circumstances prevent the university from gathering evidence sufficient to reach a determination

After Dismissal → Both parties are notified and have the opportunity to appeal the decision.

# GW-Specific Procedures

## The process:

- Report/intake, offer supportive measures
- Formal complaint
- Investigation
- Hearing
- Determination/Notice of Outcome
- Appeal



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# The Investigation

# Investigation

**The University must investigate allegations in a Formal Complaint.**

- Remember: Formal Complaints request that the “recipient investigate the allegation of sexual harassment.”

# Notice of Meetings

- Parties must be given written notice of the date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings where the party's participation in such meetings is invited or expected.
- The written notice to the parties of such meetings must be provided with sufficient time for the party to prepare to participate.

§ 106.45(b)(5)(v)

# Right to Discuss Investigation

The institution may **not restrict** either party's ability to:

- (1) discuss the allegations under investigation or
- (2) gather and present relevant evidence.

# Advisors' Participation

Both parties must have the same opportunity to be **accompanied** by the advisor of their choice to any meeting or proceeding during the investigation process.

The institution may **not** limit the **presence or choice** of an advisor at any meeting.

§ 106.45(b)(5)(iv)

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THE INVESTIGATION

**Step One:** Gathering Evidence

# At GW: Investigation Steps

- Fact gathering: Investigator meets separately with parties and witnesses and gathers other relevant documents and information.
  - *Duration: approx. 50 business days.*

# Step One: Gathering Evidence

- The Investigator must gather **all evidence sufficient to reach a determination regarding responsibility.**
- The investigator should:
  - undertake a thorough search,
  - for relevant facts and evidence,
  - while operating under the constraints of completing the investigation under designated, reasonably prompt timeframes
  - and without powers of subpoena.



# Step One: Gathering Evidence

- The burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rests on the recipient and not on the parties. § 106.45(b)(5)(i)
- *Investigator, not parties, has the burden to gather relevant information, though parties have the opportunity to provide any evidence they think is relevant § 106.45(b)(5)(i)*

# Step One: Gathering Evidence

- **Must provide equitable opportunities to all parties, including:**
  - Opportunity to be accompanied to all meetings, conferences, and hearings by an advisor of choice
  - Opportunity to participate, or not, in any portion of the investigation

# Step One: Gathering Evidence

“Cannot require, allow, rely upon, other use . . . Evidence that constitute[s] or seek[s] disclosure of, information protected under a **legally recognized privilege**, unless the person holding such privilege has waived the privilege”

# Step One: Gathering Evidence

- **Cannot** access, consider, disclose, or otherwise use a party's records made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional's or paraprofessional's capacity, or assisting in that capacity, and which are made and maintained in connection with the provision of treatment to the party. . .
- **Unless** the party provides voluntary, written consent.

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THE INVESTIGATION

**Step Two:** Review of and  
Response to Evidence

# Step Two: Review of and Response to Evidence

- Both parties (and advisors) must be given equal opportunity to **inspect and review** any evidence obtained during the investigation that is **directly related** to the allegations in the formal complaint
- Evidence must be sent to each party, and their advisors (if any), in an electronic format or hard copy

# Step Two: Review of and Response to Evidence

- **Evidence that must be shared includes:**
  - evidence upon which recipient does not intend to rely in reaching a responsibility determination
  - Inculpatory & exculpatory evidence, whether obtained from a party or other source
- ***Note: all of the evidence that subject to review and response must be made available at the hearing***



**“Directly Related”**

**Relevant**



## Step Two: Review of and Response to Evidence

- Parties must have at least 10 days to respond in writing to the “directly related” evidence (if they so choose) to:
  - Clarify ambiguities or correcting where the party believes the investigator did not understand
  - **Assert which evidence is “relevant” and should therefore be included in the Investigative Report**
- The investigator must consider any written responses before finalizing the investigative report

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THE INVESTIGATION

**Step Three:** The Investigative  
Report

# Step Three: The Investigative Report

After the parties have had the opportunity to inspect, review, and respond to the evidence, the Investigator must –

- Create an investigative report that fairly summarizes relevant evidence and,
- At least 10 days prior to a hearing, send the report to each party and their advisor (if any) for their review and written responses.
  - (Hard copy or electronic format)

# Step Three: The Investigative Report

Creating an investigative report that “fairly summarizes relevant evidence” does not require making credibility determinations, proposing findings, or recommending an outcome.

# Step Three: The Investigative Report

“[T]hese final regulations do not prescribe the contents of the investigative report other than specifying its core purpose of summarizing relevant evidence.”

# Step Three: 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)

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# Conflicts of Interest, Bias, and Impartiality

# Conflicts of Interest

- DOE also declined to adopt a per se rule.
- It is a conflict of interest for the Investigator to serve as the decision-maker or Appeals Officer (though a Title IX Coordinator can serve as an investigator).
- “A recipient must ensure that Title IX Coordinators, investigators, decisionmakers, and any person who facilitates an informal resolution process, receive training on . . . how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias.”



# Impartiality

- Avoid pre-judgment of issues and do not rely on sex stereotypes.
- Trauma informed techniques may be used but must apply equally to all genders.
- Treat both parties equally throughout the process (including providing access to supportive measures). Allow both parties to present evidence, witnesses, and facts equally.

# Bias

**“Whether bias exists requires examination of the particular facts of a situation . . . . and the Department encourages recipients to apply an objective (whether a reasonable person would believe bias exists), common sense approach to evaluating whether a particular person serving in a Title IX role is biased[.]”**

- Fundamentally about making a decision based on something about the characteristics of the parties, instead of based on the facts.
- 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.
- Treating any individual differently on the basis of an individual’s protected characteristic, including sex, race, ethnicity, sexual orientation, gender identity, disability or immigration status, financial ability, socioeconomic status, or other characteristic.

# Bias is not...

1. The Title IX Coordinator signs a formal complaint.
2. Professional and Personal Experiences (do not constitute per se bias).
3. Bias should not be concluded based solely on the outcome of the formal resolution process.

**\*\*Bias and conflict of interest are determined on a case-by-case basis\*\***