



# Title IX & Discrimination Advisor Workshop

*Supporting Students & Employees Through the Formal  
Complaint Process*

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# Title IX of the Education Amendments Act of 1972

*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.*

Title IX is published in the United States Code at [20 U.S.C. §1681-1688](#).

**1 in 5 women & 1 in 16 men experience attempted or completed sexual assault in college**

**26.4% of female & 6.8% of male undergraduate students experience rape or sexual assault through physical force, violence, or incapacitation**

**35% of Black & 56% of Native American women experience sexual violence in their lifetime**

**33% of women, 10% of men, and 50% of transgender individuals are victims of dating violence in college**



**46.4% of lesbian, 74.9% of bisexual and 43.3% of heterosexual women experience sexual violence other than rape during their lifetimes**

**38.6% & 23.6% of international students experience sexual harassment and sexual assault, respectively while in college**

**Of Asian and Pacific Islander women, 23% experience some form of sexual violence, 10% experience completed or attempted rape during their lifetimes**

**23.1% of TQGN college students have been sexually assaulted**

**62% of women experience sexual harassment in college**

**73% of LGBTQ college students have been sexually harassed**

**1 in 3 female undergraduates with a disability experience sexual assault in college**

# So Where Are We Today?

**May 6, 2020**

Release of *The Final Rule* for non-discrimination on the basis of sex. Institutions given until August 14, 2020 to update policies for compliance.

**June 23, 2022**

Release of the *Notice of Proposed Rulemaking* for 60-day public comment. Finalization expected by May-June 2024.



# The Highlight Reel

## Final Rule

- Improved notice to the Respondent
- Restricted definition of sexual harassment
- Actual notice to the TIX Coordinator
- Jurisdiction only in the United States & on-campus by participating students or employees
- Choice of burden of proof
- Cross-examination during the live hearing
- No single investigator/ decision-maker model
- Supportive measures for both parties
- Institution of a prescribed appeals process

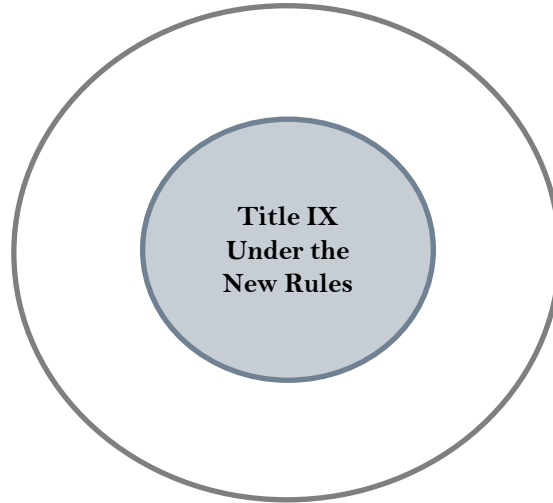
## Proposed Amendments

- Prohibitions for all forms of sex discrimination
- Expanded definition of sexual harassment
- Strengthened protections for LGBTQI+ and pregnant or parenting students and employees
- Different expectations for reporting
- Jurisdiction outside the United States & off-campus and after a Complainant has left
- Preponderance of evidence standard the norm
- Mandate for a live hearing and cross-examination eliminated
- Informal resolution without a formal complaint
- Access to all the relevant evidence or an investigative report

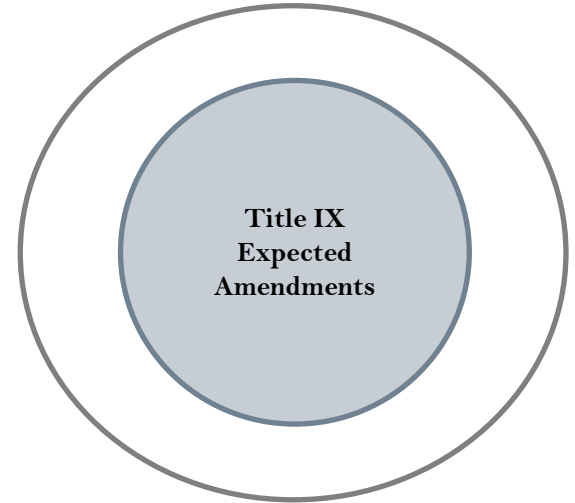
# What Does This Mean For Title IX Processes?



**Flexible Process**



**Prescribed & Limited Process**



**Prescribed & Flexible Process**

# Discretionary Areas

*Standard of proof:* W&M uses  
“preponderance of the evidence”

Addressing misconduct that falls outside  
Title IX’s scope

Adopting rules of procedure and rules of  
decorum for the hearing process

Using virtual hearings





## What Triggers Our Response Obligations?

*§ 106.44(a) – When the University has actual knowledge of sexual harassment in an education program or activity of the University against a person in the United States, it must respond promptly in a manner that is not deliberately indifferent.*





## What Constitutes Actual Knowledge?

*§ 106.30(a) - “Actual knowledge means notice of sexual harassment or allegations of sexual harassment to a recipient’s Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient.”*

# Definitions of Sexual Harassment

§106.30: Conduct *on the basis of sex* that satisfies one or more of the following:

*Quid Pro Quo Sexual Harassment*: An employee of the University conditioning the provision of an aid, benefit, or service of the University on an individual's participation in unwelcome sexual conduct;

*Hostile environment*: 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 assault*” as defined in 20 U.S.C. 1092(f)(6)(A)(v), “*dating violence*” as defined in 34 U.S.C. 12291(a)(10), “*domestic violence*” as defined in 34 U.S.C. 12291(a)(8), or “*stalking*” as defined in 34 U.S.C. 12291(a)(30).



## **Some Examples**

**A professor tells a student she'll give them an "A" if they'll sleep with her**

**A student repeatedly sends another student graphic pornography using a University-owned computer**

**A student engages in sexual intercourse with another student, while that student was too intoxicated to consent**

**A coach continues to misgender a student despite repeated requests to use their chosen pronouns**



## Where Does the Alleged Conduct Have to Occur?

*§ 106.44(a): Education program or activity includes locations, events, or circumstances over which the University exercised substantial control over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by the University.*

*§106.8(d): “Application outside the United States. The requirements of paragraph (c) of this section apply only to sex discrimination occurring against a person in the United States.”*

## §106.45(b)(3)(i): Mandatory Dismissal

*Is the conduct sexual harassment as defined in §106.30?*

*Did the conduct occur in an education program or activity of the University?*

*Did the conduct occur within the United States?*

If the answer to any of those questions is “no,” the complaint **must be dismissed** from the Title IX process



# Is it Title IX Sexual Misconduct?

- Nonconsensual sexual contact between two students in an off-campus apartment.
  - **NO.** Not “in the education program or activity.”
- Professor makes lewd comments to student in class on one occasion.
  - **NO.** Not “severe, pervasive, and objectively offensive.”
- Nonconsensual sexual intercourse between two students in a study abroad program.
  - **NO.** Not “in the United States.”
- Nonconsensual sexual intercourse between two students in a dorm room.
  - **YES.**

# The 6 Stages of the Formal Resolution Process



# Stakeholders

## Complainant

- individual who is alleged to be the **victim** of conduct that could constitute sexual harassment

## Respondent

- individual who has been reported to be the **perpetrator** of conduct that could constitute sexual harassment

## Advisor

- individual who advises a Complainant or Respondent during the formal grievance process in a supportive and non-participatory role with the exception of cross-examination

## Witness

- individual who has actual knowledge (observed or third party) of the complaint

## Investigator

- trained individual who serves as information gatherer for a summary report

## Silent Supporter

- individual who provides emotional and social support for a Complainant or Respondent but does not participate directly in any part of the process



# Key Requirements

- Must treat parties equitably
- Objective evaluation of all relevant evidence
- Determination Official/Hearing Panel must be impartial
- Presume that the Respondent is not responsible
- University bears the burden of proof (preponderance of the evidence)
- Apply the same burden of proof (preponderance of the evidence) to students and employees
- Create an investigative report that fairly summarizes relevant evidence
- Engage in a determination process--*live hearing is Title IX required*
- Allow an advisor or provide an advisor for the hearing
- Provide for an appeal



# Respect for the Rights of the Parties

- Other conduct cases typically do not involve an injured party – typical conduct cases involve the university and a student
- In sexual harassment and discrimination cases, however, we are seeking not only to determine whether to hold a student responsible for violating our policies, but also whether another student has had their rights violated so that we may remedy this violation
- We respect both parties' rights equitably by providing them simultaneous notifications, equal opportunity to provide evidence, and to attend meetings with an advisor of their choice



# Due Process

- **adequate notice of expectations, charges, incriminating information**
- **an opportunity to be heard**
- **a fundamentally fair process**
- *freedom from arbitrary and capricious actions*
- *process that is appropriate for the level of sanctions faced by the student or employee*



# Requirements of the Determination Conference

**Direct Questioning:** Each party's advisor may ask their party, the other party, and any witnesses relevant and follow-up questions

- Questions submitted in advance for relevance review
- Direct questioning is never done by a party personally

**May Be Virtual:** W&M will use the Zoom platform for all live hearings

**Advisors:** Parties may have an advisor of their choice. If a party does not have an advisor, W&M **must provide an advisor to conduct direct questioning** on behalf of that party.

**Recorded:** W&M **must create a recording or transcript of any live hearing** and make it available to the parties for inspection and review.

# Supporting the Resolution Process

## Initial Report Assessment

### Report Received & Initial Assessment

The **Civil Rights Review Team** assesses reports for potential ongoing threat, identifies interim measures to prevent further harassment or potential retaliation, and determines the course of action for responding to the report.

The typical process involves a willing, participating reporting party; however, there are circumstances in which the process may be necessary without a reporting party's involvement.

*The Title IX Coordinator and campus partners may act even in the absence of a named Complainant.*

# Supporting the Resolution Process

Filing of the  
Formal  
Complaint

Investigation  
Authorization

## Formal Complaint Filed & Investigation Authorization

The **Civil Rights Review Team** evaluates the formal complaint for investigation against the Title IX and/or Discrimination Policies.

If an investigation is authorized, the following will occur in order:

- Parties will receive a *Notification of Investigation (NOI)*
- Parties will be invited to a Pre-Investigation Process Meeting
- Parties will transition to the investigator(s)

# Supporting the Resolution Process

## Investigation

The investigation starts with:

- Notification
- Rights and options of each party, including the right to an advisor of their choice
- Responsibility of the Respondent not to retaliate against the Complainant
- Assignment of an institutionally-trained advisor

Individual meetings with the parties & advisors

Investigation (evidence collection, interviews, report writing, response to the evidence)

Report distribution & transition back to the TIXC

Investigation

# Supporting the Resolution Process

## Determination and Rationale

Determination

*Administrative Determination:* The Determination Official issues a written finding of whether a policy violation occurred and the rationale for this decision based on the materials submitted by the investigators and the parties' responses to the report.

Sanctions

*Conference Determination:* The Determination Official convenes an in-person conference with the parties to resolve issues of credibility, facts, investigation process and/or gather additional information from witnesses, including parties.

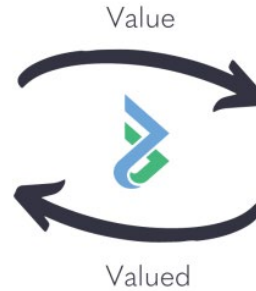
*Sanctions for students are determined in collaboration with the Dean of Students and sanctions for employees are determined via the Hearing Panel.*



# Role of the Advisor



ADVISOR



ADVISEE

# Introduction: An Advisor shall

- Inform the party as what to expect and how to prepare for each phase of the process
- Provide emotional support to the party while maintaining appropriate professional objectivity
- Encourage truthful and candid responses to investigators' questions
- Read the investigation report and any response drafted or submitted by the parties, and provide input and advice for the party's response
- Help the party access referrals to campus and community resources
- Communicate with or ask questions of administrative personnel as necessary



# Introduction: An Advisor shall not

- Develop the narrative or “story” for the party
- Advocate for or against responsibility for a policy violation
- Condone the party providing false or misleading information to an investigator, or the Determination Official
- Offer predictions as to how likely a particular finding/result is or what sanctions the DO & DOSO or HP are likely to administer
  - *The advisor can explain ranges and minimum sanctions as defined in procedure and explain mitigating and aggravating factors applicable to sanctioning decisions*
- Criticize a decision made by the university to the party or persons aligned with the party
- Write or substantially edit an appeal for their party





# Familiarize Yourself with the Subject Matter and the Policies & Procedures

In most cases, you will have little information available prior to the initial meeting with the Title IX Coordinator other than the NOI.


*You are copied on the NOI; however, you may not want to read it until AFTER your first meeting.*

Waiting to read anything about the case allows you to *objectively* hear your advisee's account and ask to review any supporting documentation without appearing to be judgmental.

We recommend that you read the policies, procedures, & Advisor Guide to refresh your memory of the process before every case.

Review the Policy definitions of the conduct alleged, and if applicable, the definitions and examples of consent and incapacitation.

*Remember that some sexual misconduct falls under the Discrimination Policy--refer to the NOI.*



# Effective Advising: *Contact & Check-Ins*

- Share your preferred means of contact with your party (email or telephone calls—text message is not recommended unless through Teams).
- Encourage the party to contact you as far in advance as possible.
- Discuss whether you are available after hours or on weekends.
- Check in with the party periodically (agree on a preferred interval—weekly, every two weeks, after each stage).

*Friendly Reminder...the Initial Meeting builds rapport & sets the tone!*

Determine a first meeting space & time that considers well the alleged conduct and any party information you are aware of.

**Plan for reticence & emotionality**—formal processes are hard and it may take time for your advisee to trust and open up.

## Effective Advising: *Role of the Advisor*

- As an advisor, your role is to offer the party support throughout the process and to keep the individual informed of their rights, responsibilities, and options.
- Let the party know that you have no role in the decision-making.
- You are not there to obtain a particular result in the process or to prove/disprove the allegation on behalf of the party.
- You can offer suggestions as to how the party can best comport themselves and best prepare for each phase in order to put themselves in the best position to obtain the most favorable possible outcome.

*Helpful  
Hint...encourage  
candor and  
truthfulness.*

The investigators want to hear your party's story as best they can recall. Emotion, forgetting, and need for pause are expected and perfectly okay!

# Effective Advising: *Questions & Confidentiality*

- Encourage your party to keep confidential the process to maintain the integrity of the investigation and preserve the accounts of those involved.
- Let the party know the limits of your ability to keep confidential your conversations. Inform them in advance where a report is mandatory to maintain trust and rapport.
- Ensure your party understands that the investigation is a deliberative process and that there is no presumption of responsibility.
- Attending the initial Process Meeting with the Title IX Coordinator with your party will allow good understanding of what to expect at each process stage and how to forward questions to OC&E staff.
- Advisors are expected to answer general procedural questions and may act as an intermediary for questions between the TIXC and their party.

## *Policy Reminder...*

*You must report threats of harm to self or others.*

*You must report other Title IX violations the party may disclose.*

*You cannot allow the party to provide false information in the process.*

Report threats of harm to WMPD and TIX violations and false information to the TIXC.

# Effective Advising: *Investigation Preparation*

- Ask your party to disclose what they know about the allegations and events included in the NOI if they are comfortable doing so. Help the party organize this information into a clear and cohesive story.
  - Encourage them to use the *Statement Template* provided by the investigators.
- Hold a pre-investigative interview session with your advisee to prepare them for investigative interview. Remind them of the following:
  - Interviews are recorded so anything said will become a part of the record and share with the other party.
  - Parties may provide witness names to the investigators
  - Parties can have a Silent Supporter in any meeting/interview
  - Parties can supply evidence (e.g., texts, Snaps, posts, emails, pictures, videos, documents) related to the allegations and events.
  - Ready information and evidence can expedite an investigation.

*Friendly Reminder...  
Parties should  
refrain from deleting  
anything until the  
case is resolved.*

We never know the relevance of a picture, post, or text until an investigation is conducted.



# Effective Advising: Respondent Retaliation

- Caution the Respondent from creating social media posts about the Complainant, Witnesses, or the investigative process or engaging in any electronic comment that could be perceived as negative, inflammatory, or retaliatory.
- No strict 'gag order' on either party but W&M could consider even the appearance of attempting to influence or intimidate through public or private comments online or through third parties to be retaliation.
- W&M could view parties attempting to intimidate other parties or witnesses with their physical presence or intentionally contacting the other party in violation of a no contact order as retaliation.
- Even if the underlying allegation is not determined a violation of policy, the university can find a respondent responsible for retaliation, and the consequences could be severe.

## *Policy*

*Reminder...W&M has a zero tolerance policy for retaliation.*

A Respondent can be found responsible for retaliation even in instances where underlying allegations are not deemed to be a violation of policy.

# Additional Considerations

## Begin to prepare the party emotionally

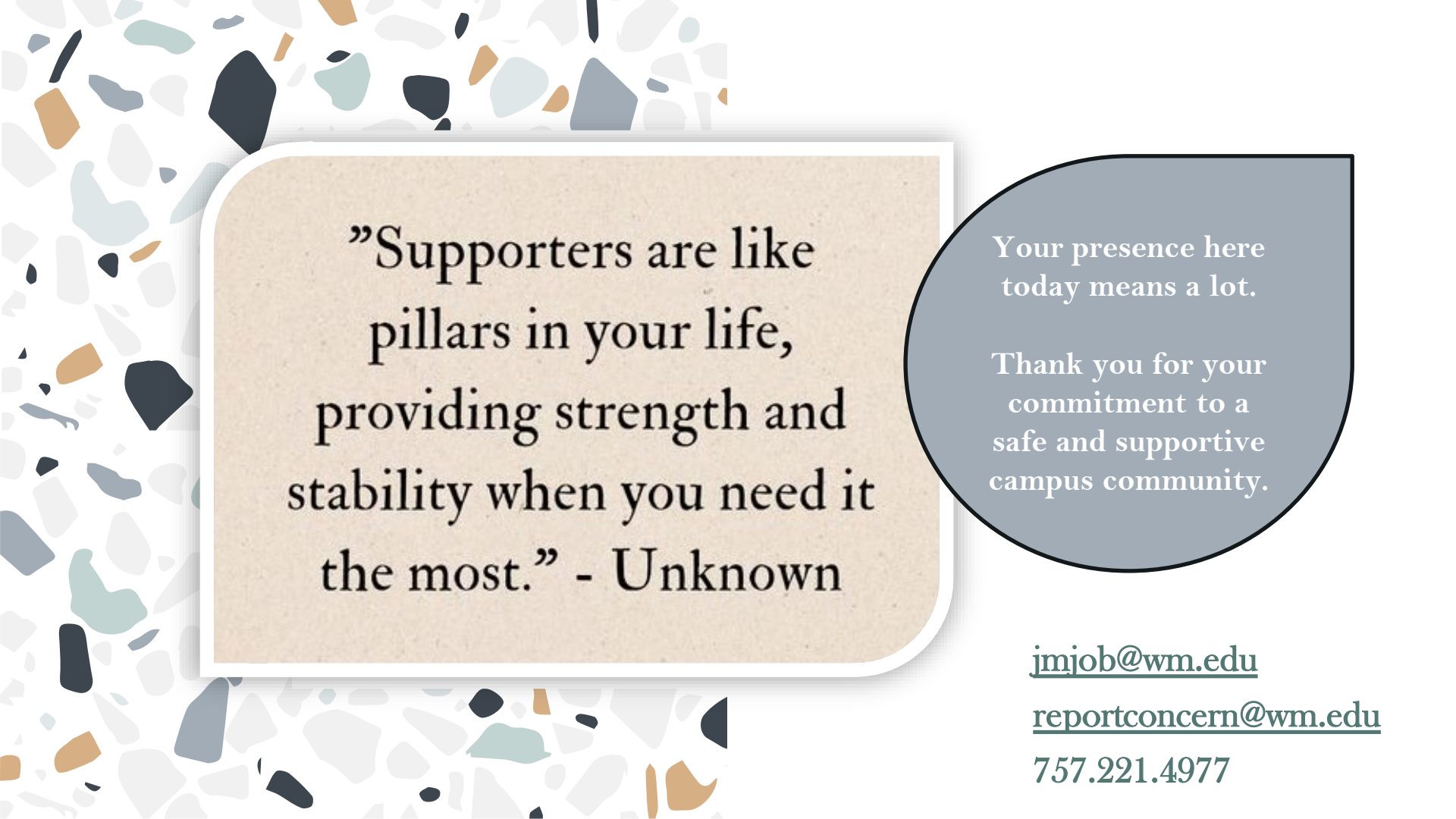
- Help the party understand appropriately that these matters are very serious and involve potentially serious consequences. If the matters being investigated have prescribed minimum sanctions such as suspension, inform the party of this. Ask the party what other emotional supports are available such as friends, parents, a mentor, counselor, etc.

## Help address questions that arise

- Check the Procedure and talk to the Title IX Coordinator to help the party get the answers that they need.

## Prepare for the review of the investigation report

- This is an intense process in a relatively short timeframe, and for many parties it will be very helpful if you can make yourself available during this period. You can communicate with the Title IX Coordinator to help plan for this and plan around any obstacles such as anticipated trips or absences.



”Supporters are like  
pillars in your life,  
providing strength and  
stability when you need it  
the most.” - Unknown

Your presence here  
today means a lot.

Thank you for your  
commitment to a  
safe and supportive  
campus community.

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