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WEBINAR

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Title IX: How to Prepare an Investigative Report that is Equitable, Impartial, Thorough, & Compliant

November 5, 2020

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Today's Moderator



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What will we discuss today?

- Title IX regulations and key definitions
- Investigation process and investigative report
- Best practices for conducting an investigation impartially

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Title IX

• **Investigative**

Report

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The statute, the final rule, what it all means

WHERE ARE WE TODAY?

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The 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

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The Final Regulations

- Final rule released by the Department of Education informally on its website on May 6, 2020
 - (2000+ double-spaced pages)
- Published in the Federal Register on May 19, 2020 (34 CFR Part 106)
 - (550+ tight single-spaced pages)
- Effective date: **August 14, 2020**

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The Foundation: Principle #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.

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Title IX Obligations Arises: Supportive Measures, Triage

Directed against a person in the United States

Within the educational program or activity

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Scope and Jurisdiction

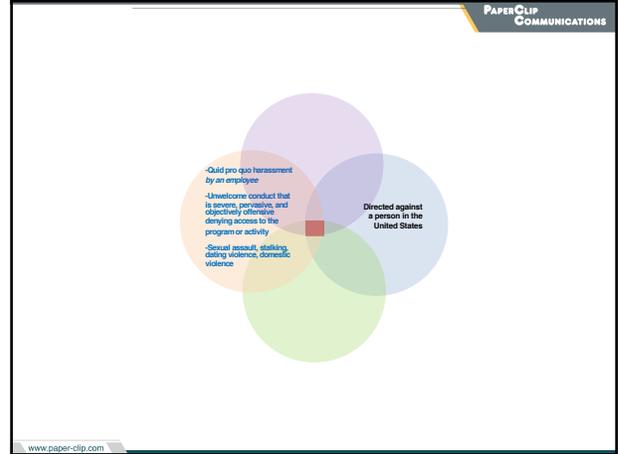
TITLE IX COVERED CONDUCT

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Scope: Sexual Harassment

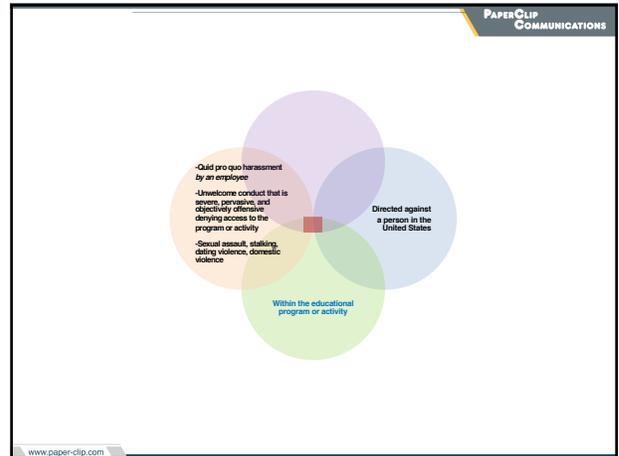
Sexual Harassment means: conduct *on the basis of sex* that satisfies one or more of the following –

- (i) 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;
- (ii) 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
- (iii) "**sexual assault**" as defined 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)

§ 106.30

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Jurisdiction

"Education program or activity" is:

All operations of the institution, including . . .

- "[L]ocations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs, and . . . any building owned or controlled by a student organization that is officially recognized by a postsecondary institution."
- **Applies to employees**, including employee on employee conduct

§ 106.44(a)

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Actual Knowledge Triggers Obligation to Respond

*"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 the authority to institute corrective measures** on behalf of the recipient..."*

§ 106.30

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What Constitutes Notice?

- "Notice results whenever . . . any Title IX Coordinator, or any official with authority: **Witnesses** sexual harassment; **hears about** sexual harassment or sexual harassment allegations from a complainant . . . or third party; **receives a written or verbal complaint** about sexual harassment or sexual harassment allegations; or **by any other means.**" 85 FR 30040
- "'Notice' . . . includes, but is not limited to, a report of sexual harassment to the Title IX Coordinator" § 106.30(a)

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Notice*

Response**

*Notice includes a Report
** The response obligation is the same

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Title IX Response Obligation Arises

- Within the actual knowledge of the TDC or an official with the authority to institute corrective measures
- Directed against a person in the United States
- Within the educational program or activity
- 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

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Response Obligations

Actual Knowledge -- What now?

To a report:

- Offer of supportive measures
- Explain formal complaint process

To a formal complaint:

- Investigation followed by
- Live hearing/compliant grievance process

Unless facts require or permit dismissal

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The Foundation: Principle #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.

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The start of the grievance procedure

INVESTIGATIONS AND INVESTIGATIVE REPORTS

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Investigation

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

- Remember: *Formal Complaints request that the "recipient investigate the allegation of sexual harassment."*

§ 106.30

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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)

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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.

§ 106.45(b)(5)(iii)

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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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Step One: Gathering Evidence

- The Investigator must gather **all available 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.

85 FR 30292

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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)

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Step One: Gathering Evidence

- Each party must have an equal opportunity to **present witnesses**, which includes both fact witnesses and expert witnesses.
- Similarly, each party must have an equal opportunity to present **inculpatory and exculpatory** evidence.

§ 106.45(b)(5)(ii).

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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”

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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.

§ 106.45(b)(5)(i)

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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

§ 106.45(b)(5)(vi)

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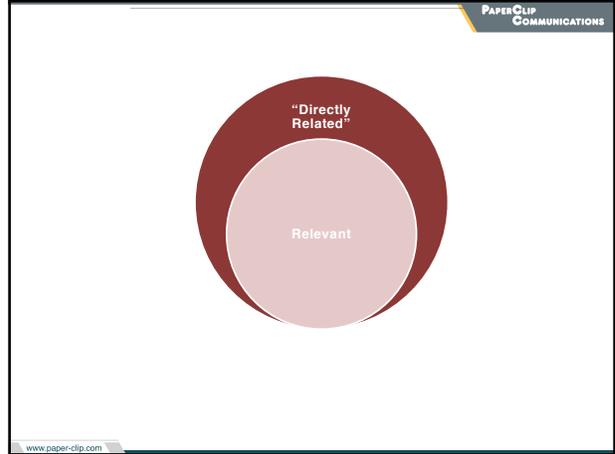
Step Two: Review of and Response to Evidence

- 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

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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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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)

§ 106.45(b)(5)(vii)

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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.**”

85 FR 30310

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Step Three: The Investigative Report

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graph TD
    A[All evidence gathered] --> B[Evidence directly related to the allegations in the formal complaint]
    B --> C[Relevant evidence]
    B --- B1["(Evidence sent to parties/advisors)"]
    C --- C1["(Evidence included in the Investigative Report)"]
  
```

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What is Relevant Evidence?

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

85 FR 30247 n. 1018

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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).**”

85 FR 30294

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What is Relevant Evidence?

rel-e-vant | \ 're-lə-vent \ 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

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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

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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.

85 FR 30293 n. 1147

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“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.

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“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.*”

85 FR 30353

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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[.]”

85 FR 30304

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Investigators’ requirement

CONDUCTING THE INVESTIGATION IMPARTIALLY

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Bias/Conflict of Interests

- “A recipient must ensure that Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, receive training on . . . how to **serve impartially**, including **by avoiding prejudice of the facts at issue, conflicts of interest, and bias.**”
- Investigators “may not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent.”

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Bias: what does it mean?

“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[.]”

85 FR 30248.

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Bias: what does it mean?

- 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. 85 FR 30238-40.
- 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. 85 FR 30084.

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Impermissible Bias

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



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What is not defined as bias?

1. Outcomes of the grievance procedure

The Department cautions parties and recipients from concluding bias based **solely on the outcome of the grievance procedure**.

“[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 FR 30252

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What is not defined as bias?

2. Title IX Coordinator Signs Formal Complaint

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

The Department has clarified that this **does not place the Title IX Coordinator in a position adverse to the respondent** because the decision is made on behalf of the recipient and not in support of the complainant or in opposition of the respondent.

85 FR 30372

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What is not defined as bias?

3. Professional/Personal Experiences or affiliations

Not *per se* bias; exercise caution not to apply "generalizations that might unreasonably conclude that bias exists":

- All "self-professed feminists" or "self-described survivors" as biased against men
 - A male is incapable of being sensitive to women
 - History of working in a field of sexual violence
- Prior work as a victim advocate = biased against respondents
- Prior work as a defense attorney = biased in favor of respondents
 - Solely being a male or female
 - Supporting women's or men's rights
- Having a personal or negative experience with men or women

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But consider . . .

Whether a Title IX personnel has a bias and/or conflict of interest is determined on a **case-by-case basis**, and any combination of the experiences or affiliations on the prior slide **may** constitute bias and/or conflict of interest, depending on the circumstances

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Conflicts of Interest: What are they?

The Department also declines to define conflict of interest and instead, leaves it in the discretion of the recipient.

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Conflicts of Interest: What are they?

- It is **not** a conflict of interest for the **Title IX Coordinator** to serve as the **investigator**.
- However, **it is** a conflict of interest for the **investigator and/or the Title IX Coordinator** to serve as the **decision-maker or appeal decision-maker**.

85 FR 30367

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Conflicts of Interest: What are they?

- It is **not** a conflict of interest for a **recipient to fill Title IX personnel positions with its own employees**
 - Recipients are not required to use outside, unaffiliated Title IX personnel. 85 FR 30252.
 - 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 FR 30491-92.
 - Even a student leader of the recipient may serve in a Title IX role. 85 FR 30253.

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Serving Impartially

Avoid prejudice of the facts at issue, conflicts of interest, and bias
&
Don't rely on sex stereotypes

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Avoiding Prejudgment of the Facts at Issue

- Cannot **pass judgment** on the allegations presented by either party or witnesses
- Cannot **jump to any conclusions** without fully investigating the allegations and gathering all of the relevant facts and evidence from all parties involved.

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Avoiding Prejudgment of the Facts at Issue

Regulations necessitate a broad prohibition on *sex stereotypes*

Decisions *must* be based on individualized facts, and not on stereotypical notions of what “men” and “women” do or not do

85 FR 30254

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Avoiding Prejudgment of the Facts at Issue

- The Department **permits** institutions to apply **trauma-informed practices**, so long as it does not violate the requirement to serve impartiality and without bias
- It is possible, “albeit challenging,” to apply trauma-informed practices in an impartial, non-biased manner
- Any trauma-informed techniques must be applied equally to all genders

85 FR 30256, 30323

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Avoiding Prejudgment of the Facts at Issue

- Any and all stereotypes about men and women must be checked at the Title IX door.
 - Leave behind any prior experiences, whether that be from past Title IX proceedings or personal experiences.
- Approach the allegations (of both parties) with neutrality at the outset
- Treat both parties equally and provide an equal opportunity to present evidence, witnesses, and their versions of the story.

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Avoiding Prejudgment of the Facts at Issue

Bottom Line: The fact that an individual is “male”, “female”, or “non-binary” should not, and cannot, have any bearing on the credibility of the party or witness or how Title IX personnel approach the situation.

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Now it's time for the Q&A.

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Q&A Session

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