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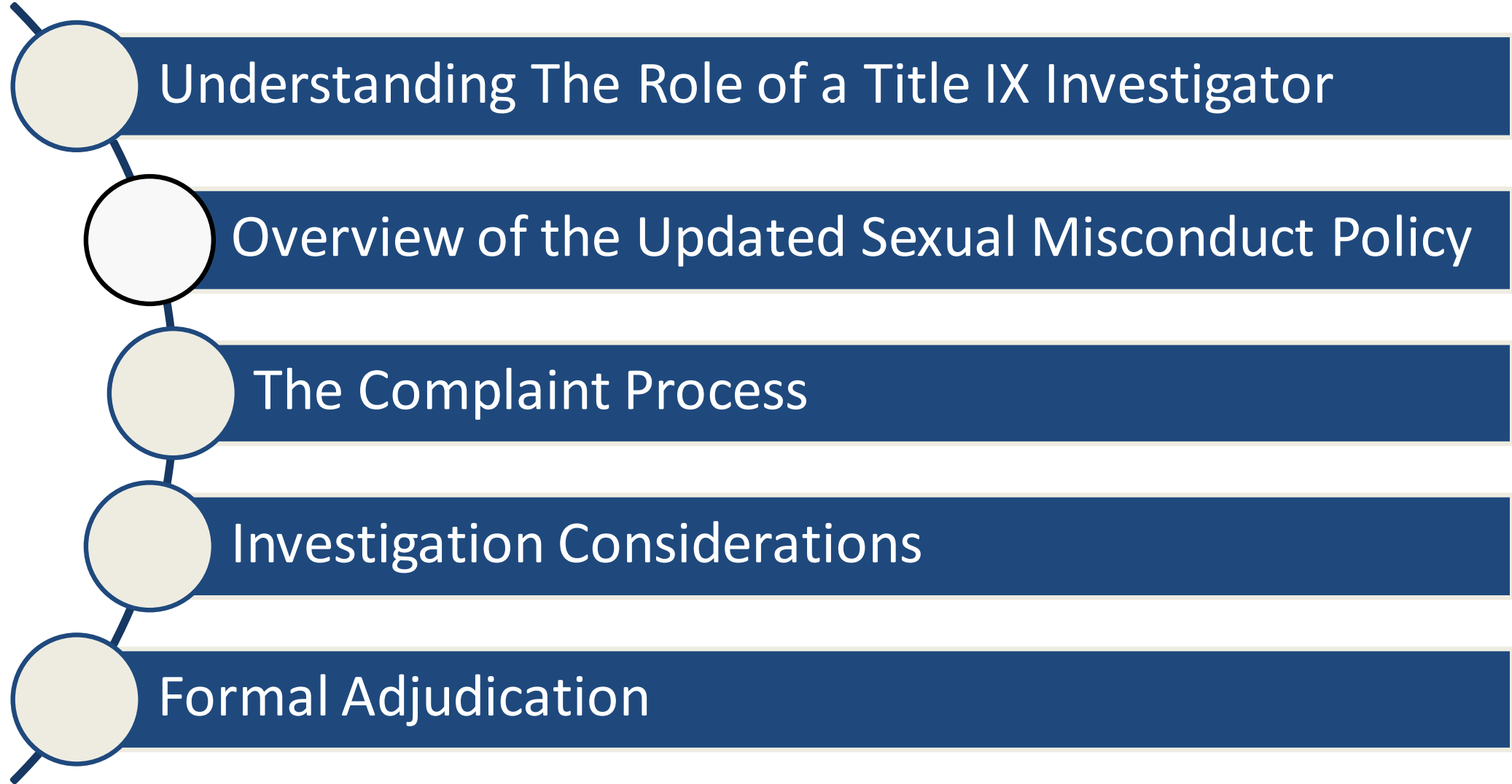
# **Title IX Investigator Refresher Training**

## **Fall 2020**

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Legal Counsel





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# **Understanding the Role of an Investigator**

# Role of the Investigator

- A neutral institutional fact finder and gatherer
  - Fair and unbiased review of matter
- Follow the Policy
  - Standard of proof
  - Avoid burden shifting
- Make a preliminary determination regarding the charge(s) and recommendations for the parties to consider





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# **Overview of Title IX**

# Title IX

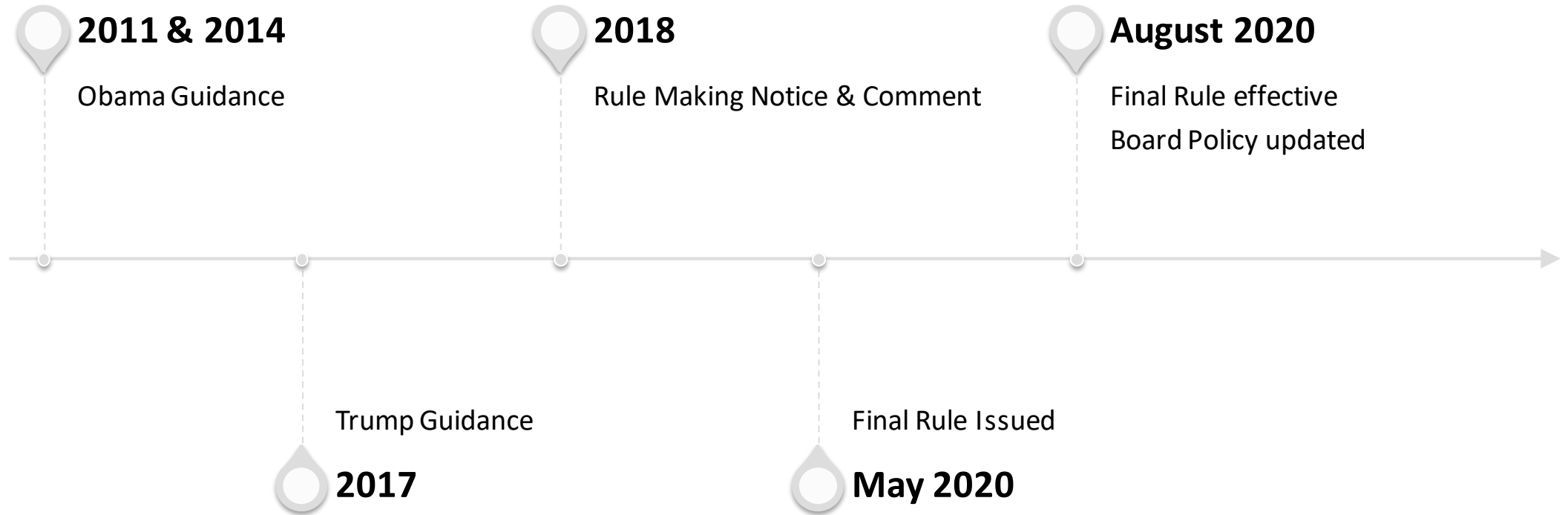
The law states that:

"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..."

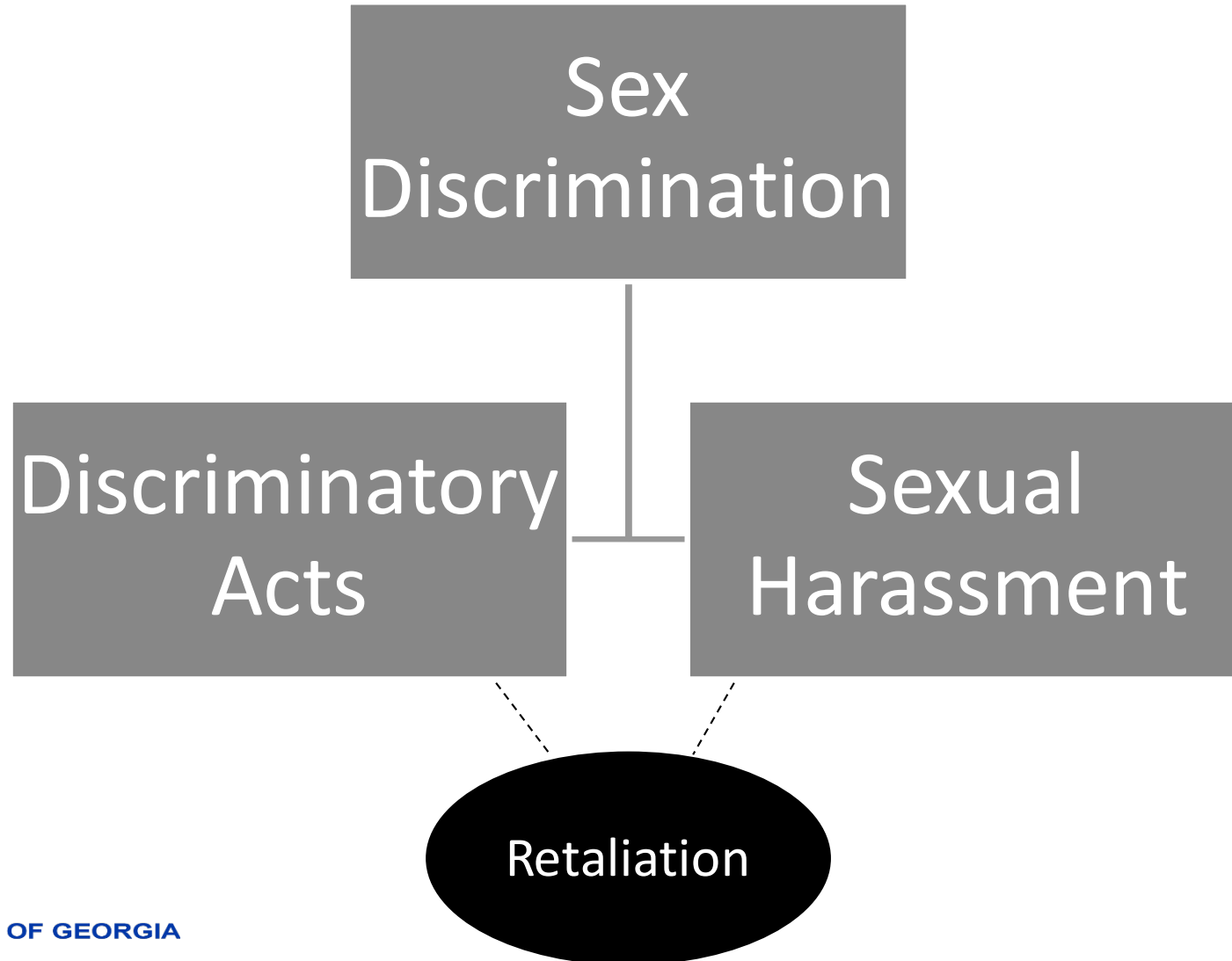
—United States Code



# Administrative Action on Title IX



# What is Sex Discrimination?





# What is Required under the Final Rule?

A recipient with **actual knowledge** of **sexual harassment** in an **education program or activity of the recipient** against a person **in the United States**, must respond promptly in a manner that is not deliberately indifferent.



## Title IX Sexual Harassment §106.30

- Conduct on the basis of sex that satisfies one or more of the following:
  - (i) An **employee** conditioning education benefits on participation in unwelcome sexual conduct (i.e quid pro quo); or
  - (ii) **Unwelcome conduct that a reasonable person would determine is so severe, pervasive, AND objectively offensive that it effectively denies a person equal access to the school's education program or activity;** or
  - (iii) Sexual assault (as defined in the Clery Act), dating violence, domestic violence, or stalking as defined in VAWA

# Title IX Jurisdiction

- Institution's program or activity in the United States
  - Institution property
  - Institution sponsored or affiliated events [**substantial control** is key]
  - Buildings owned or controlled by officially recognized student organizations



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# **Updated Sexual Misconduct Policy**

# Sexual Misconduct Policy

Title IX

Other Sexually  
Based Behavior



# What Has Changed?

- Definitions of Prohibited Conduct
- Title IX Jurisdiction
- Provisions on Retaliation, Amnesty, False Statements
- Role of Advisors
- Adjudication Process
- Timeframe for Completion
- More...



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# What Has Remained the Same?

- Scope of Sexual Misconduct
- Jurisdictional reach of Sexual Misconduct
- Responsible/Confidential/Privileged Employee designations
- Definition of consent and incapacitation
- Standard of evidence
- System Office oversight
- Support services and Interim measures





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# **Prohibited Conduct: Definitions & Jurisdiction**



# Key Categories of Prohibited Conduct

Sexual  
Misconduct

Dating Violence

Domestic Violence

Sexual Exploitation

Sexual Harassment

Stalking

Nonconsensual Sexual Contact

Nonconsensual Sexual Penetration



# Dating Violence

**Violence** committed by a person who is or has been in a **social relationship of a romantic or intimate nature** with the alleged victim.

- Includes sexual or physical abuse
- Includes threats of such abuse
- The existence of a covered relationship is based on the totality of the circumstances

# Domestic Violence

**Violence** committed by:

- a current **spouse**, former spouse or **intimate partner**
- a person whom **shares a child**
- a person who is **cohabiting** with or cohabitated with the alleged victim

# Stalking

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**.

- Can be direct actions or through third parties
- Could include the use of devices or other methods
- Includes following, monitoring, observing, surveilling, threatening, communicating to or about a person, or interfering with a person's property

# Sexual Exploitation

**Taking non-consensual or abusive sexual advantage** of another for **one's own advantage or benefit**, or for the benefit or advantage of anyone other than the one being exploited.

Examples include:

- Non-consensual photos, videos, or audio of sexual activity
- Non-consensual distribution of photo, video, or audio of sexual activity, even if the sexual activity was consensual
- Intentionally and inappropriately exposing one's breast, buttocks, groin, or genitals in non-consensual circumstances

# Nonconsensual Sexual Contact

Any **physical contact** with another person of a **sexual nature without the person's consent**.

Includes:

- Touching of another's intimate parts (genitalia, groin, breasts, buttocks)
- Touching a person with one's own intimate parts; or
- Forcing a person to touch his or her own or another person's intimate parts

# Nonconsensual Sexual Penetration

Any **penetration** of another's body parts without the person's consent.

Includes:

- Penetration of the vagina, anus, or mouth by a penis, object, tongue, finger, or other body part
- Contact between the mouth of one person and the genitals or anus of another person

# Sexual Harassment (Student on Student)

Unwelcome verbal, nonverbal, or physical conduct based on sex (including gender stereotypes), **determined by a Reasonable Person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to participate in or to benefit from an institutional education program or activity in violation of Title IX.**





# Sexual Harassment (Other)

**Unwelcome verbal, nonverbal, or physical conduct**, based on sex (including gender stereotypes) that may be any of the following:

- Implicitly or explicitly a **term or condition** of employment status in a course program or activity
- **A basis for** employment or education decisions; OR
- Sufficiently severe, persistent, or pervasive to interfere with one's work or educational performance creating an **intimidating, hostile, or offensive** work environment
- Note: Behavior may rise to the level of a Title IX violation

# Comparing Jurisdiction

## Title IX

- Institution's program or activity the United States
  - Institution property
  - Institution sponsored or affiliated events [**substantial control** is key]
  - Buildings owned or controlled by officially recognized student organizations

## Sexual Misconduct

- Institution property
- Institution-sponsored or affiliated events
- Off campus as defined by the institution policies
- Domestic or abroad



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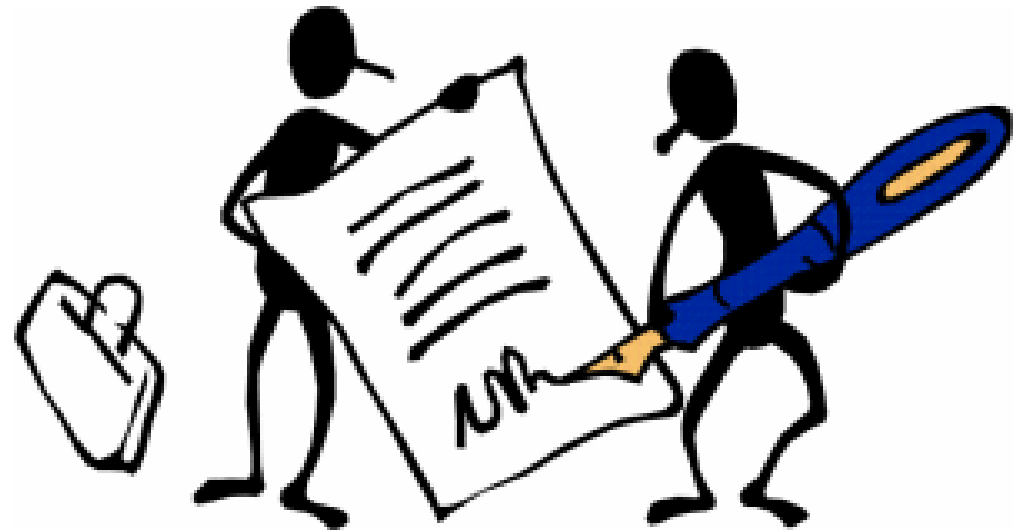
# **The Complaint Process**

# Formal Complaint § 106.30

- A document filed by a Complainant OR signed by the Title IX Coordinator
- Alleges Sexual Harassment (Title IX)
- Requests an investigation
- **Note:** must be filed while the Complainant is participating in or attempting to participate in an education program or activity

# Title IX Coordinator Initiated Complaints

- TIXC does NOT become the Complainant
- When to sign? (Permissible)
  - Multiple reports against the same Respondent
  - Violent behavior or use of a weapon
- **Caution:** Be mindful of bias and conflicts of interest claims



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# Complaint Process

- If not a Formal Complaint under Title IX may be a complaint under Sexual Misconduct
- **Recommended:** Confirm with the Complainant (in writing) that they wish to investigate their claims
- Once a complaint is filed the timeframe for completion begins

# Complaint Consolidation

- Permissible consolidation when allegations arise out of the same facts or circumstances:
  - Against more than one Respondent
  - By more than one Complainant against one or more Respondents
  - Cross complaints
- Parties must have the opportunity to object; institution makes final determination



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# Support Services & Interim Measures §106.30

- Non-disciplinary, non-punitive individualized services must be offered to the Complainant
  - USG policy requires offering support services to Respondents as well
- Offered upon receiving a report [no Formal Complaint is required]
- Ex: counseling, modifications to work or class schedules, mutual no contact directives





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# **The Investigation Process**

# Evidentiary Considerations §106.45(b)(5)

- The burden of proof AND burden of gathering evidence is on the institution
- Information protected by legal privilege, may not be accessed, disclosed or relied upon unless a waiver is obtained
- Questions and evidence regarding the Complainant's sexual predisposition or prior sexual behavior are not relevant, UNLESS used to prove:
  - Someone other than the Respondent committed the conduct OR
  - Offered to prove consent between the parties

# Standard of Evidence

Decisions regarding student and employee alleged misconduct are based on a preponderance of the evidence



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# Advisors

## Title IX Complaints

- Parties have a right to an advisor of their choice
- Advisor may accompany party to all meetings and hearings
- Provided a copy of the investigation report and directly related information
- All communication will be between the institution and the party

## Sexual Misconduct Complaints

- Parties have a right to an advisor of their choice
- Advisor may accompany party to all meetings and hearings
- All communication will be between the institution and the party

## False Statements

Updated standard to cover false statements knowingly made to an institution official

## Amnesty

Updated to explicitly only apply to information regarding student consumption of drugs or alcohol



# Retaliation §106.71

- **Who is protected:** Reporters, Complainants, Witnesses, Respondents, even those who choose to not participate
- **What is protected:** Intimidation, threats, coercion, discrimination
  - Ex. Charging individuals for code of conduct violations that arise out of the same facts or circumstances
  - Ex. Not keeping the identity of the Complainant, Respondent, or any witnesses confidential

# The Investigation Report §106.45(5)(vii)

- Must fairly summarize relevant evidence
- An objective evaluation of the information [inculpatory and exculpatory]
  - Credibility assessments cannot be based on a person's status
- Sample report sections still apply
- Final report provided to the parties at least 10 days calendar days prior to the hearing

# Access to Information § 106.45(b)(5)(vi)

- Parties have a right to review the investigation report prior to its finalization
- Parties have a right to receive a copy of all directly related information
- Procedurally can occur simultaneously or at different times
- 10 calendar days to review



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# **Informal Resolution**

# Considerations

- The institution is a party to the informal resolution
  - Informal resolution is appropriate
  - The terms of the informal resolution are appropriate
- Parties must engage in the process voluntary
- Parties may end the informal resolution process any time prior to reaching the terms

# Informal Resolution under Title IX §106.45(b)(9)

- Not permissible for student allegations against employees
- A Formal Complaint must be filed
- The parties have received notice and explanation of the process and consequences of informal resolution
- The parties have voluntarily agreed to engage in the process





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# **Formal Adjudication**

# Live Hearing §106.45(b)(6)

- The Final Rule mandates a bifurcated process
- Final determinations of responsibility and sanctions are made by decision-makers
  - CANNOT be the Title IX Coordinator or assigned investigator
- New due process considerations
  - Cross examination
  - Relevancy determinations
  - Impact of party or witness refusal to submit to cross-examination



# Adjudication Processes

## Students

- All matters not informally resolved will be heard by a Hearing Panel
- Hearing Panels comprised of trained faculty and staff

## Employees

- Title IX matters not informally resolved will be heard by a designated decision-maker
  - Single decision-maker OR panel
- Sexual Misconduct matters not informally resolved will be resolved according to previously established procedures
  - Institutions may choose to offer a hearing

# The Written Decision §106.45(b)(7)

- Provided to both parties simultaneously must include:
  - The allegations
  - The procedural steps from the complaint through determination
  - Findings of fact supporting the determination
  - Determinations regarding responsibility, sanctions (and remedies) along with the supporting evidence and rationale
  - Information on the appeals process

# Appeals

- Parties will continue to have both institutional level and Board level appeal opportunities
- Grounds for an appeal:
  - New information
  - Procedural Error
    - Ex. Bias or conflict of interest of Title IX personnel
  - Finding inconsistent with the weight of the information



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