



**UNIVERSITY SYSTEM OF GEORGIA**

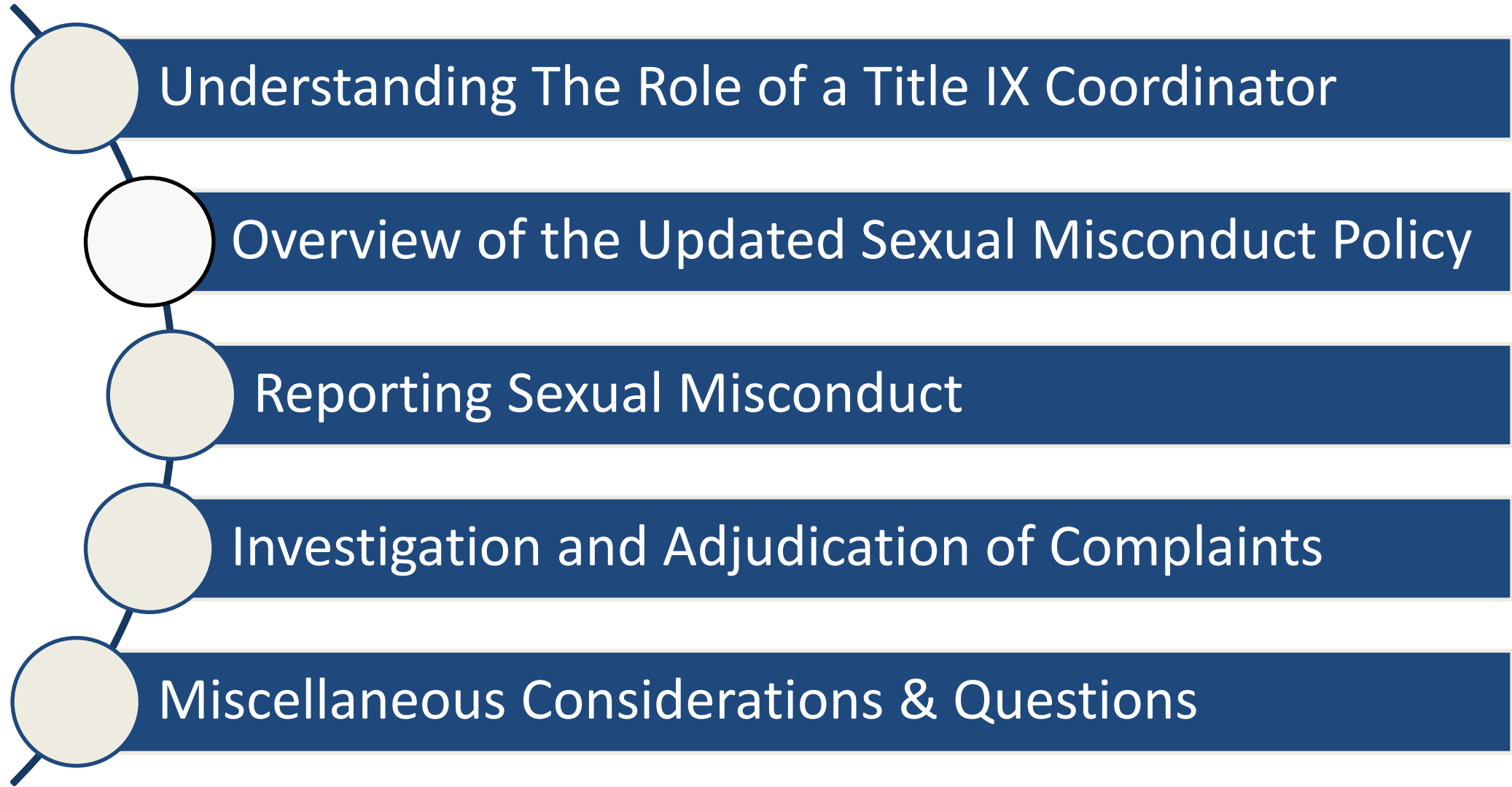
# **Title IX Coordinator Training**

## **Fall 2020**

**Na'Tasha Webb-Prather**

System Director for Equity & Investigations

Legal Counsel



# 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.



# The Role of a Title IX Coordinator



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- Oversee and coordinate **all** Title IX responsibilities on your campus
  - Compliance
  - Prevention & Awareness
  - Training
  - Investigations
  - Data Collection & Reporting

# The Role of a Title IX Coordinator

Serve as an impartial representative of the institution:

- Ensure involved parties are treated equitably throughout the process
- Avoid prejudging the facts of a matter prior to the conclusion of the process
- Avoid conflicts of interest and bias
  - Recuse yourself and others as necessary



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# **Overview of Updated Sexual Misconduct Policy**

# 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, Interim measures





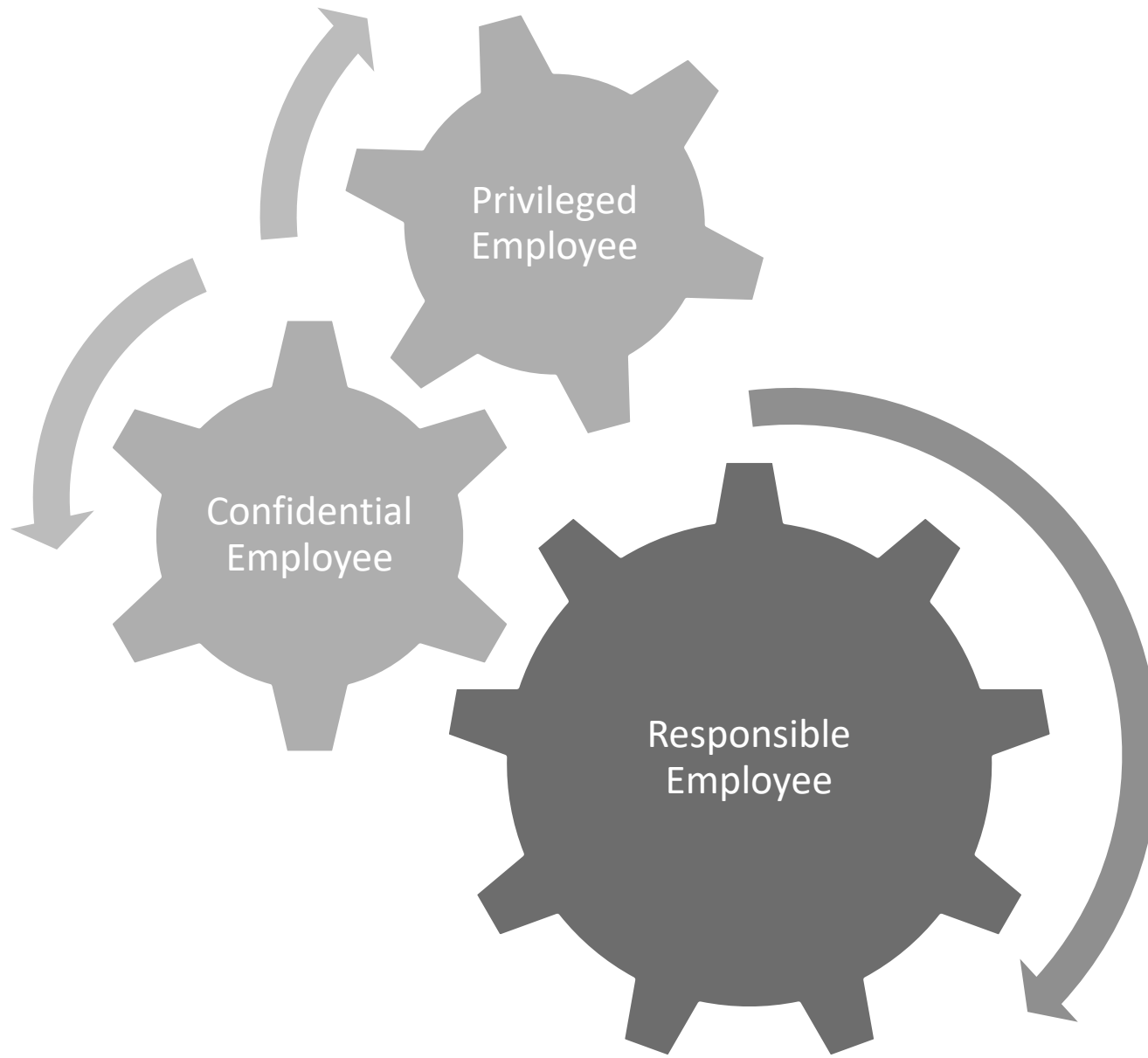


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# **Reporting Prohibited Conduct**

# Effective Date

- According to the Department of Education the Final Rule is proactive from August 14, 2020, and will be enforced as such
- Board Policy effective August 11, 2020
  - Allegations reported and occurring before: Previous policy
  - Allegations reported and occurring after: Current policy



# 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

# Key Categories of Prohibited Conduct

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Sexual  
Misconduct

Dating Violence

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Domestic Violence

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Sexual Exploitation

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Sexual Harassment [Under Title IX & Title VII]

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Stalking

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Nonconsensual Sexual Contact

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Nonconsensual Sexual Penetration

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# 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**



# 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

# 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

# Jurisdiction

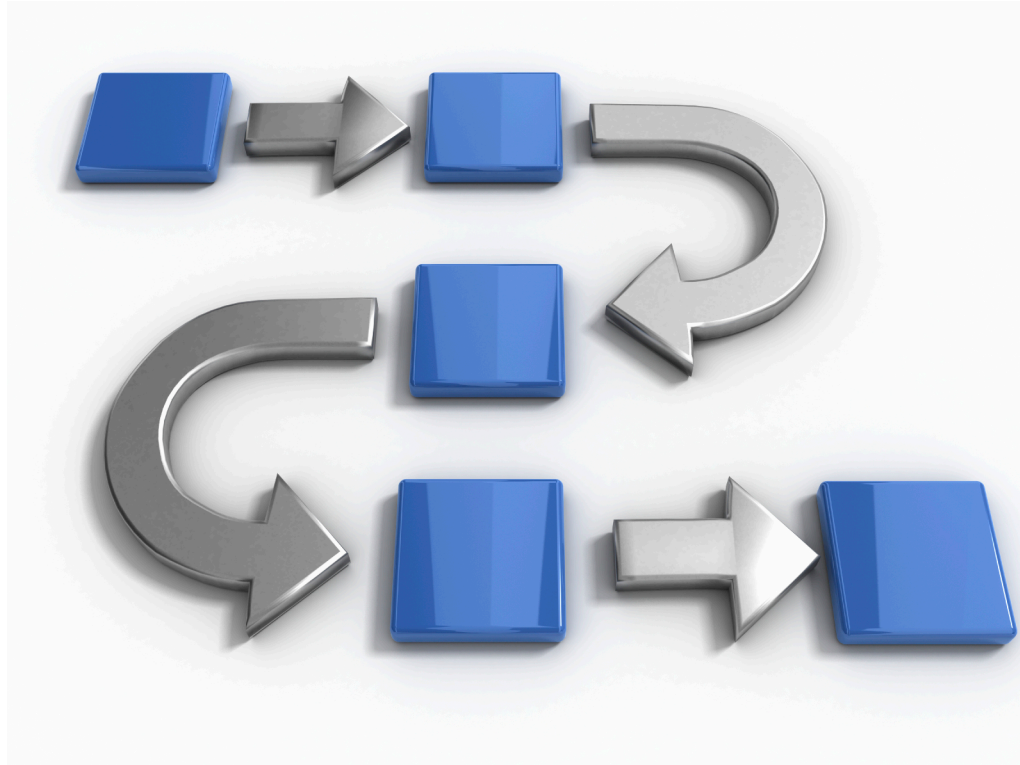
## Title IX

- 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

# Required Response to a Report § 106.44(a)



Title IX Coordinator must promptly contact the Complainant to discuss:

- Availability and consideration of supportive measures
- Process for filing a complaint

# 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

# Emergency Removal § 106.44(c)&(d)

## Interim Suspension

- Individualized safety and risk analysis that determines an immediate threat to physical health or safety to students
- Notice required pre and post removal with opportunity to respond or challenge
- Requires approval from the System Director

## Administrative Leave

- Individualized safety and risk analysis
- Notice required post removal with opportunity to challenge
- System Office notice and consult permissible



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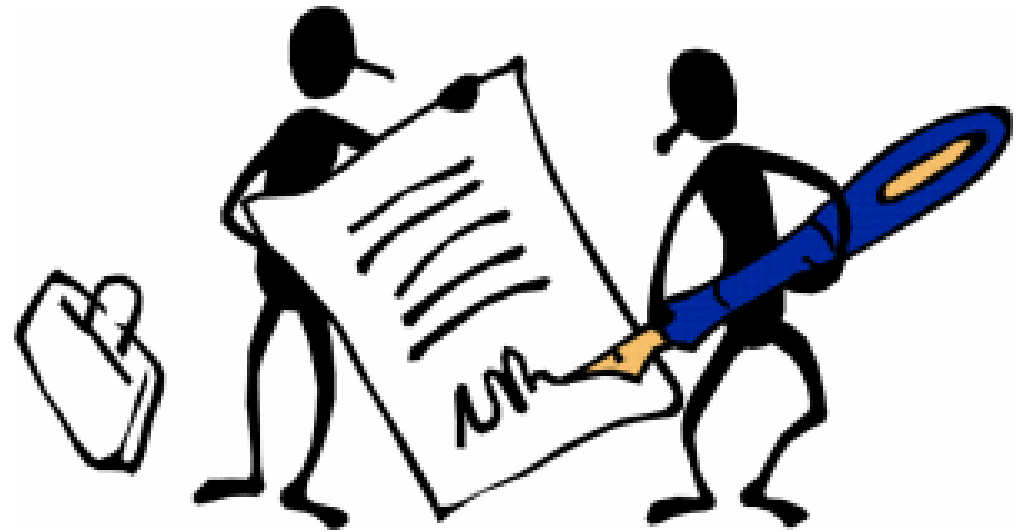
# **Complaints of Sexual Misconduct**

# 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 determine whether it is a complaint under Sexual Misconduct or other conduct provisions
- 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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# Notice of Complaint § 106.45(b)(2)

- In writing to parties' institution email\*
- Must include:
  - Alleged conduct constituting Sexual Misconduct
  - Identities of the parties involved (if known)
  - Date and location of incident (if known)
  - Presumption that the Respondent is not responsible
  - Final determinations of responsibility are made at the conclusion of the grievance process
  - Notice of the right to an advisor

# Notice of Complaint § 106.45(b)(2)

Must include:

- Notice of right to inspect and review evidence
- Prohibition against false statements
- Prohibition against retaliation
- Copy or link to Sexual Misconduct Policy and accompanying procedures

**Notice must be supplemented as necessary**

# 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

# Additional Noteworthy Provisions

## 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

# Formal Complaint Dismissal § 106.45(b)(3)

## Required

- Conduct alleged would not constitute Sexual Harassment as defined, even if proved
- Outside the institution's education program or activity
- Outside of the United States

## Permissive

- Complainant notifies in writing desire to withdraw the complaint
- The Respondent is no longer enrolled or employed at the institution
- Specific circumstances prevent the gathering evidence sufficient to reach a determination

# USG Complaint Dismissal

- Any Sexual Misconduct complaint may be dismissed if:
  - The alleged conduct, even if proved, would not constitute Sexual Misconduct
  - The Complainant requests in writing to withdraw
  - The Respondent is no longer enrolled or employed
  - There are circumstances that prevent the gathering of sufficient evidence to reach a determination
- Must provide written notice to both parties with opportunity to appeal





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# **The Investigation Process**

# Expectations of Coordinators

- Assign neutral investigators
- Periodic status updates to stay abreast of the investigation status
- Ensure adherence to current policy provisions
  - Procedural rights
  - Ensure objective evaluation of relevant evidence
  - Timelines
- Notify System Director as needed

# 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

# 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

# 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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# 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



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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



# Additional Considerations

- What methods of informal resolution are available at your institution?
- Title IX Coordinators may continue facilitating the informal resolution process
- **Note:** Anyone who facilitates informal resolution must receive appropriate training



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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

# Hearing Officer

- Considered a decision-maker
- Responsible for facilitating the hearing process
  - Scheduling
  - Selection of panel members
  - Any pre-meetings with parties
  - Conducts the hearing
- Responsible for determining issues of relevancy



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# Hearing Panel or Single-Decision Maker

- Serves as a neutral decision-maker
- Makes a final determination of responsibility
- Makes a final determination regarding sanctions and other administrative action that may be appropriate
- Must articulate determinations in a written decision

# Advisors § 106.45(b)(6)

## Title IX

- Provide advice, counsel, and support to a party
- Perform cross examination of other party and other witnesses

**\*Note:** Institution required to provide if party does not have their own

## Sexual Misconduct

- Provide advice, counsel, and support to a party
- May not actively participate in the hearing process
- May provide written questions to the Hearing Panel to read aloud



# Notice of Hearing

- At least 10 days prior to the hearing parties must receive:
  - The finalized investigation report
  - Notice of the hearing date, time, and modality
  - Notice of decision-maker(s)
- **Recommended:** Engage institutional advisor



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# Hearing Logistics

- At the request of either party, the parties must be permitted to be in separate rooms
- Hearings may be conducted in-person or via videoconferencing
  - Ensure decision-makers receive training on how to use technology
- Have available all directly related information
- Institutions permitted to establish rules of decorum
- All hearings must be recorded

# Standard of Evidence

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



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# 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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# **Additional Provisions**

# Record Keeping § 106.45(b)(10)

- 7-year records retention mandate:
  - Reports [supportive measures, why not deliberately indifferent and what measures taken to restore or preserve equal access]
  - Investigations [determinations, recording of hearing, sanctions and remedies implemented]
  - Appeals
  - Informal resolutions [results]
  - Training materials



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# Training Considerations

- **§106.45(b)(10)D** All materials used to train Title IX Coordinators, investigators, decision-makers, and anyone who facilitates an informal resolution process must be publicly available on your website
- Ensure materials do not include or rely on sex stereotypes
- Promote neutrality and fairness throughout the administrative process



# Website Considerations

- **§106.8(b)** Mandates notification and dissemination of applicable policies and procedures
  - Title IX Coordinator contact information
  - Reporting options
  - Notice of updated policies and procedures
  - Title IX Coordinator and/or Assistant Secretary can field questions
  - Reporting and resolving other alleged Title IX violations



