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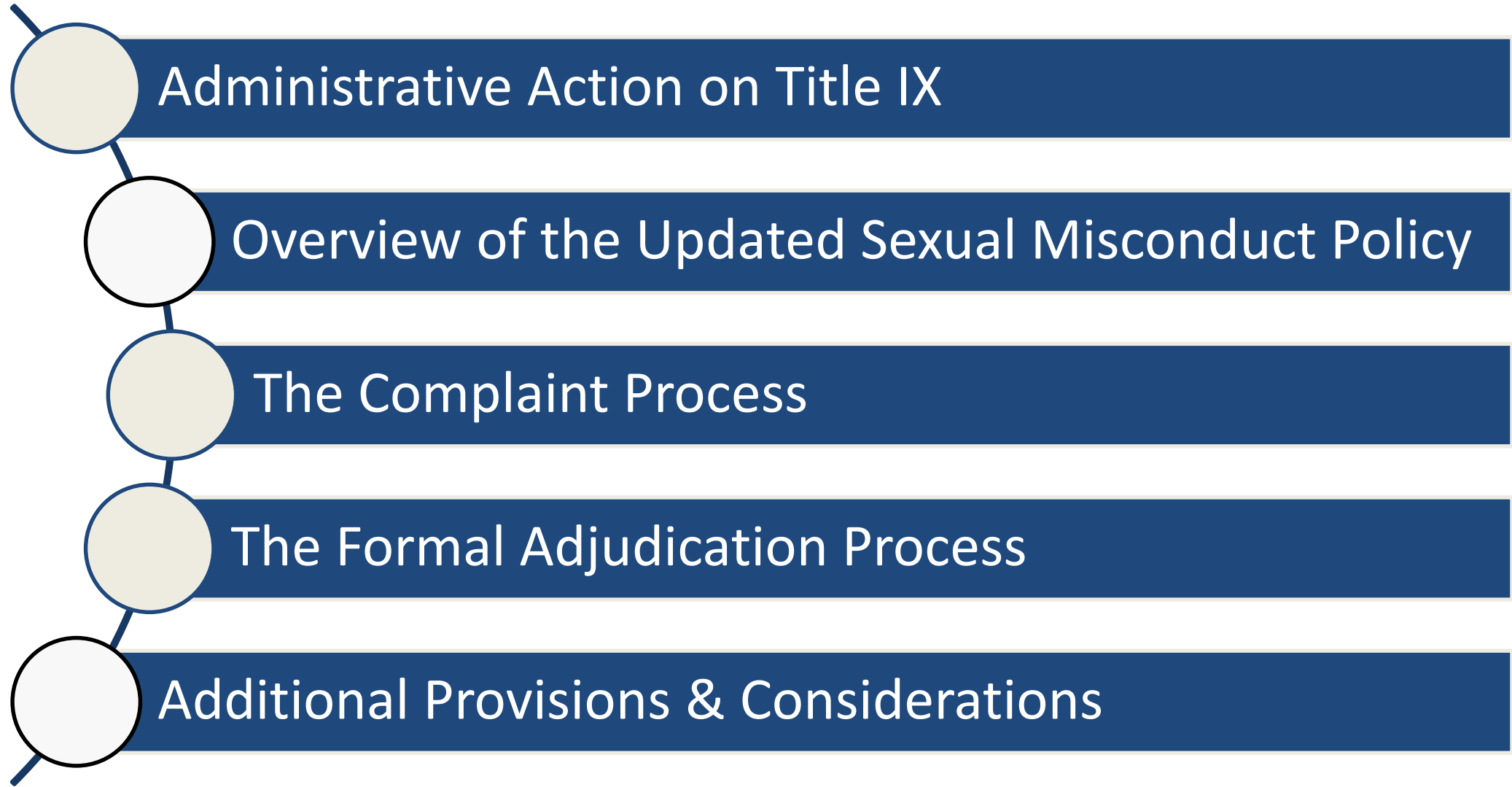
# **Hearing Panelist Refresher Training**

**Fall 2020**

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Legal Counsel





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# **Overview of Title IX**

# Title IX

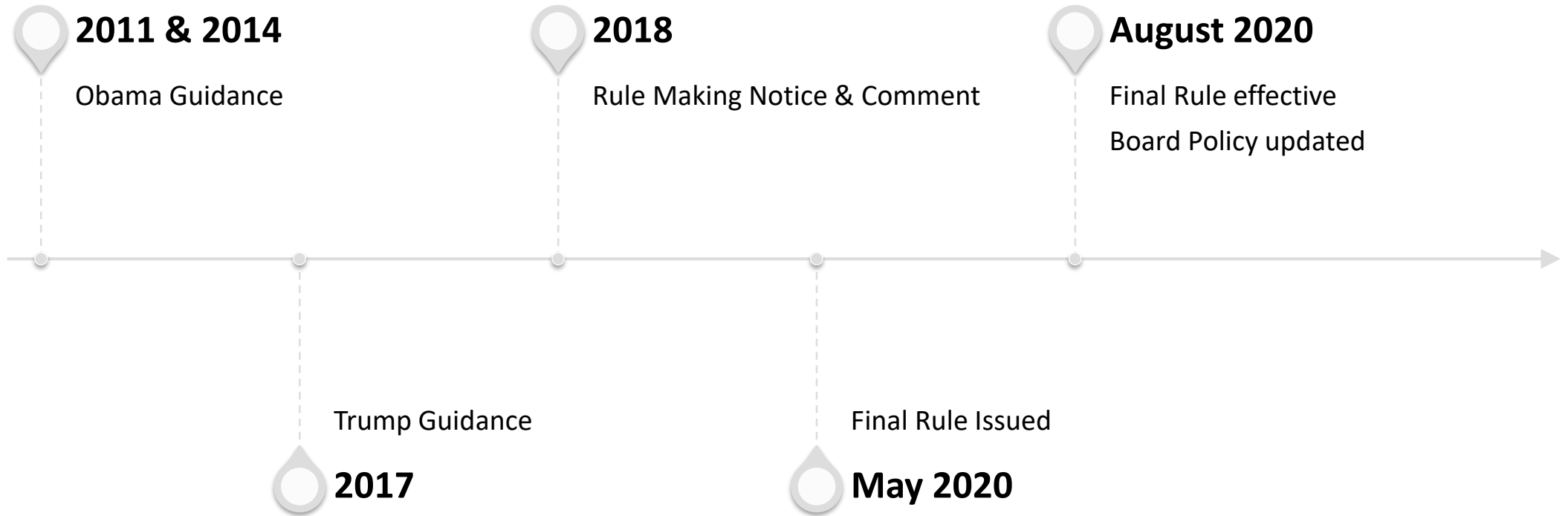
The law states that:

"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..."

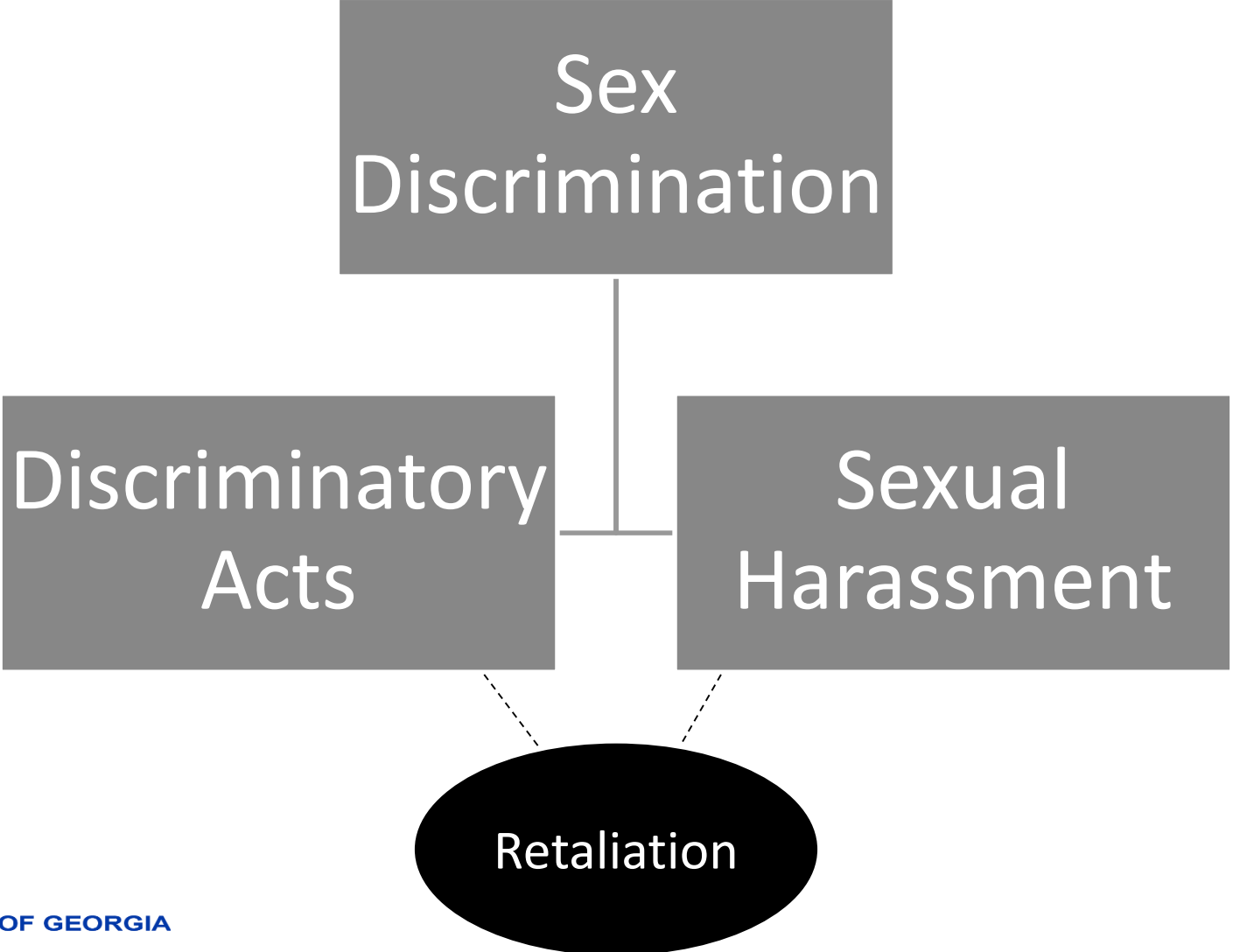
—United States Code



# 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**



# 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



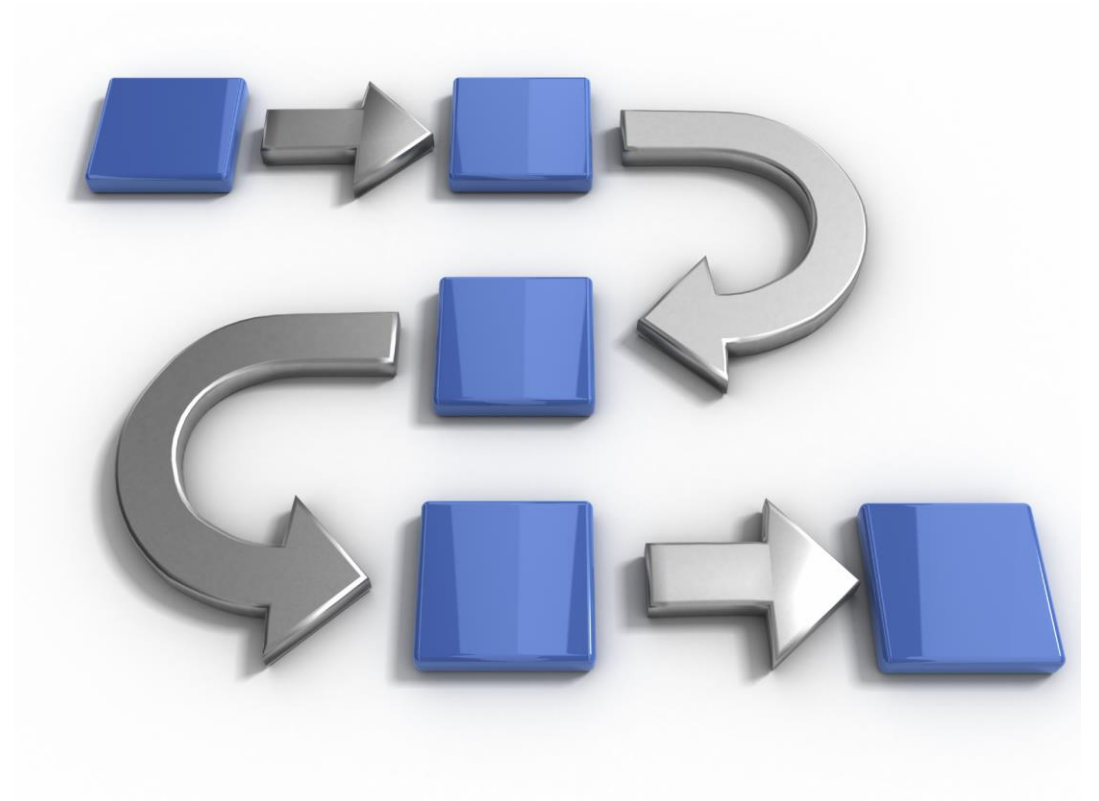


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# **Overview of Complaint Process**

# Pre-Hearing Complaint Process

- A report of misconduct has been made
- The Complainant or the Title IX Coordinator has initiated the formal investigation process
- Notice of the investigation has been sent to the parties
- The assigned investigator(s) have made preliminary determinations
- The parties and the institution have been unable to reach an informal resolution



# 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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# **The Formal Adjudication Process**

# 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
- Institutions can establish rules of decorum



# The USG 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 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

# Hearing Officer or Hearing Chair

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



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# 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

# 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

# Evidentiary Considerations

- The burden of proof AND burden of gathering evidence is on the institution
- Parties are permitted to present evidence and call witnesses to advance their claims and defenses
  - In Title IX Hearings that may include fact or expert witnesses
  - Permitted to establish the weight given to certain types of evidence

# Relevancy Determinations During Title IX Hearings

- Prior to any question being answered, relevancy must be determined
- Must provide the reason for excluding the question or evidence
- Not required to permit a rebuttal



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# Assessing Relevancy

## Relevant

- Relevant information relates to the incident at issue
- Relevant information provides sufficient value in making the overall determination

## Irrelevant

- Questions and information regarding the Complainant's sexual history or sexual predisposition unless to prove
  - Someone else other than the Respondent committed the alleged misconduct
  - Consent between the parties

# Other Evidentiary Exclusions

- Legally privileged information is protected
- A party's treatment records cannot be used without their voluntary, written consent
- Duplicative evidence may be deemed irrelevant
- If an individual does not submit to cross examination, at a Title IX hearing, their statements cannot be relied upon

# 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**

# 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

# 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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