



**UNIVERSITY SYSTEM OF GEORGIA**

# **USG New Sexual Misconduct & Title IX Investigator Training**

**Na'Tasha Webb-Prather**

System Director for Equity & Investigations  
Legal Counsel

**Brandi Williams**

Equity Compliance Investigator & Trainer



# UNIVERSITY SYSTEM OF GEORGIA

- Title IX Overview
- USG Sexual Misconduct Policy
- Force-Incapacity-Consent Construct
- Formal Investigation Process
- Case Studies

# Who's Here in the Room?

- What's your day job?
- What do you believe it means to be an Investigator?
- Does anyone have prior experience serving on panels or as an investigator?



# Primary Function of the Investigator

- Be a neutral fact finder
  - Hear the facts and circumstances of an alleged policy violation
  - Gather additional relevant information
- Determine whether the evidence supports a charge of a policy violation
- Communicate findings in a clear and concise manner





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# **Title IX Overview**

# Title IX

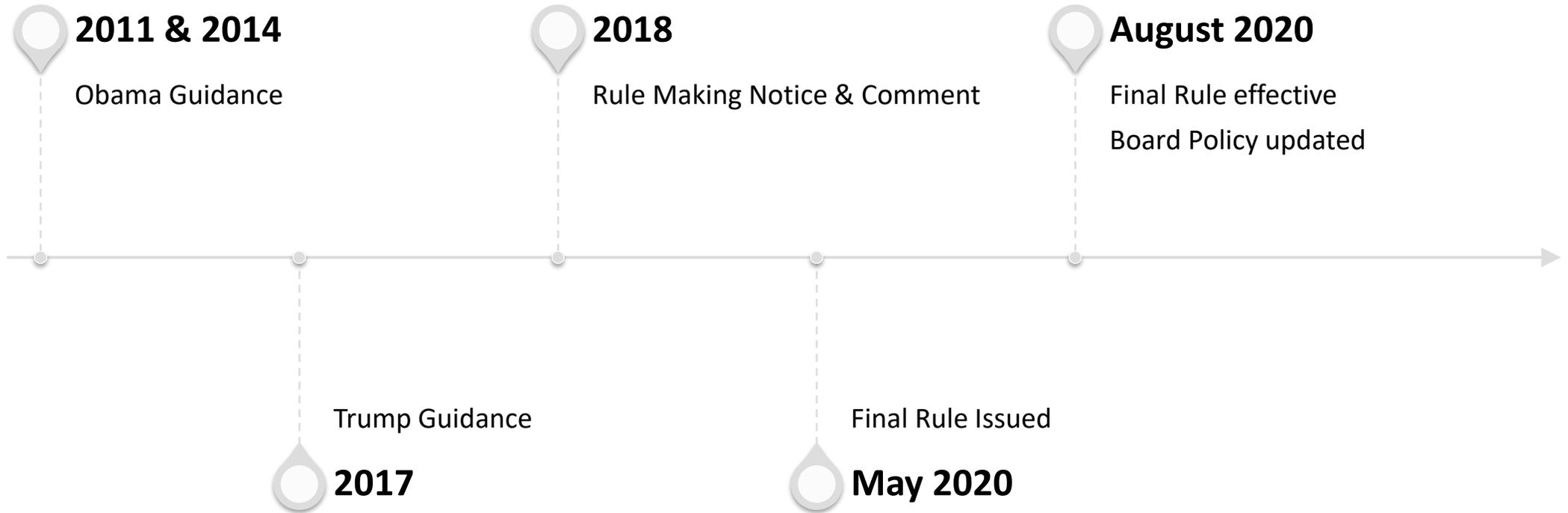
The law states that:

"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..."

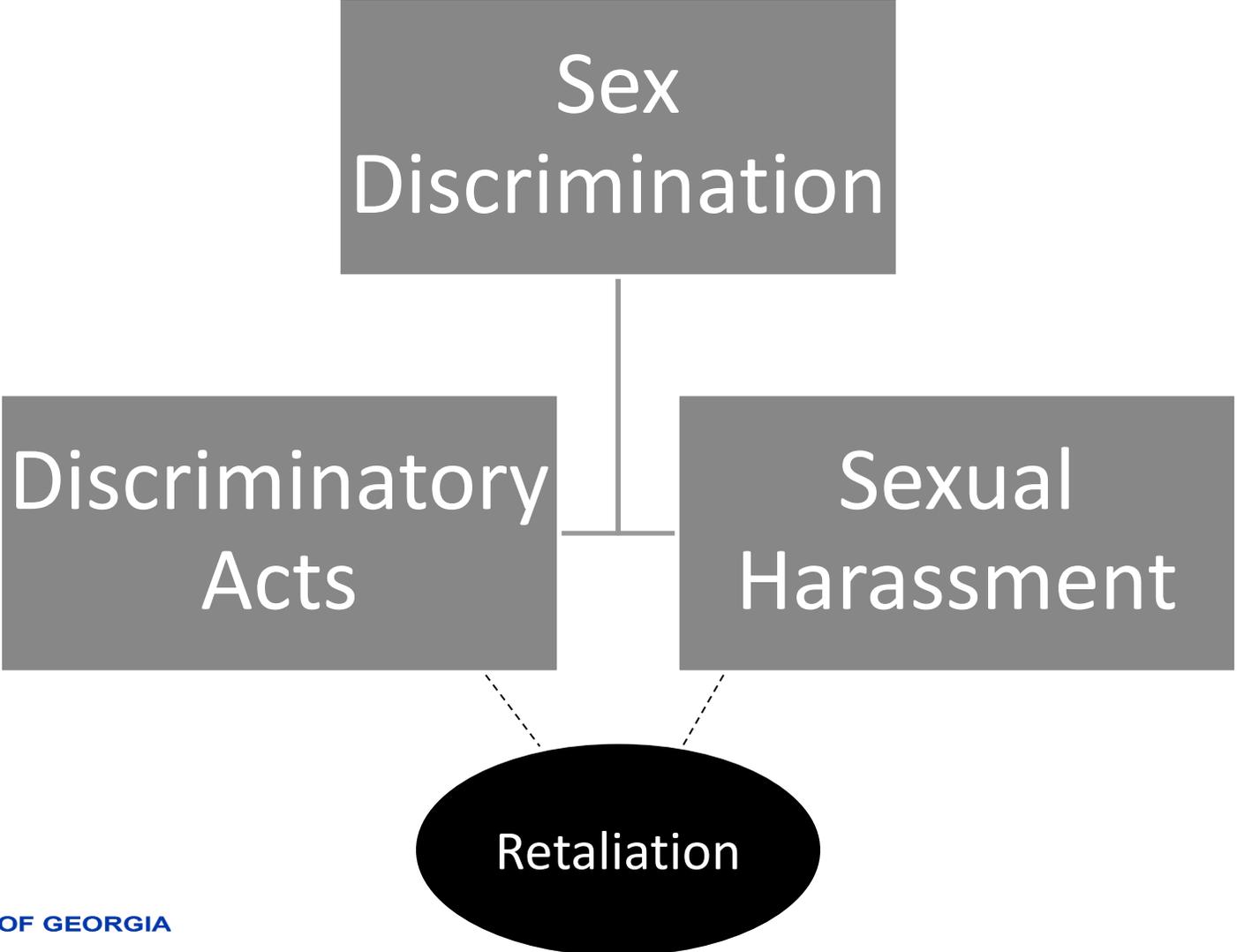
—United States Code



# Administrative Action on Title IX



# What is Sex Discrimination?



# 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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# **System Wide Sexual Misconduct Policy**

# Sexual Misconduct Policy

Title IX

Other Sexually  
Based Behavior



# Key Categories of Prohibited Conduct

Sexual  
Misconduct

Dating Violence

Domestic Violence

Sexual Exploitation

Sexual Harassment

Stalking

Nonconsensual Sexual Contact

Nonconsensual Sexual Penetration





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# **USG Prohibited Conduct Definitions**

# 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



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# **Understanding The Force-Incapacity-Consent Construct**

# Overview of the Construct

1. Was **force** used by the Respondent to engage in the sexual activity?
2. Was the Complainant **Incapacitated**?
  - a) Did the Respondent know OR
  - b) Should the Respondent have known that the Complainant was incapacitated?
3. What **clear words or actions** by the Complainant gave the Respondent indication that the **sexual activity was mutually agreed upon**?
4. Was the Complainant's consent **withdrawn** during the sexual activity?

# Consent

- **Words or actions** that show a **knowing** and **voluntary willingness** to engage in a **mutually agreed upon sexual activity**
- Past consent ≠ Present consent
- The scope of consent matters
- Can be invalidated by: force, intimidation, incapacitation, or withdrawal



# Force

- Was force used by the Respondent to engage in the sexual activity?
- Because consent must be voluntary (an act of free will) consent cannot be obtained through use of force
- Types of Force to consider:
  - Physical violence -- hitting, restraint, pushing, kicking, etc.
  - Threats -- anything that gets the other person to do something they wouldn't ordinarily have done absent the threat

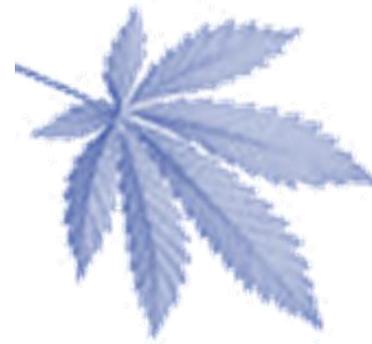
# Force Continued

- **Intimidation** - an implied threat that menaces and/or causes reasonable fear
- **Coercion** – the application of an unreasonable amount of pressure for sexual access
  - Consider:
    - Frequency
    - Intensity
    - Duration
    - Isolation

# Force Analysis

- Did the Respondent utilize force or intimidation to engage in the sexual activity with the Complainant?
  - If yes = violation of policy
  - If no = Move on with the analysis

# Consent and the Role of Alcohol and Drugs



# Incapacitation

- Physical and/or mental inability to make informed, rational judgments
  - Could the Complainant make rational, reasonable decisions ?
  - Could the Complainant appreciate the situation and address it consciously?
- More than mere intoxication or drunkenness



# Determining Incapacitation

- Incapacitation is a determination that will be made after the incident in light of all the facts available
- Assessing incapacitation is very fact dependent analysis of the incident in question
- Various forms of incapacity
  - Alcohol or other drugs
  - Mental/cognitive impairment
  - Injury
  - Sleep

# Two-Part Incapacitation Analysis

## Part One

- Was the Complainant incapacitated?

**Subjective analysis** based on the facts surrounding the incident

## Part Two

- Did the Respondent know of the Complainant's incapacity?
  - Or would a Reasonable Person have known?

**Objective analysis** based on the facts surrounding the incident

# Common Factors that Impact the Effect of Alcohol

- Rate of consumption
- Strength of drink
- Food in the stomach
- Body Weight
- Body Type – body fat percentage
- Gender
- Enzymes, hormones, water in body
- Medications
- Illness & dehydration
- Fatigue
- Caffeine
- Genetics

# Possible Signs of Incapacitation

- Lack of control over physical movements
  - Ex. Inability to dress or walk without assistance
- Lack of awareness of circumstances or surroundings
- Inability to communicate coherently
- Vomiting
- Total or intermittent unconsciousness



# Respondent's Awareness

- The Respondent [or a Reasonable Person] must have been aware of the Complainant's incapacity
- The Respondent's own intoxication does not negate their obligation to comply with policy standards

# Incapacitation Analysis

- If the Complainant was not incapacitated, move on to the 3<sup>rd</sup> question.
- If the Complainant was incapacitated, but:
  - The Respondent did not know it = analysis fails. Move on to the 3<sup>rd</sup> question.
  - The Respondent should not have known it = analysis fails. Move on to 3<sup>rd</sup> question.
- If the Complainant was incapacitated, and:
  - The Respondent actually knew it = violation of policy
  - The Respondent should have known it = violation of policy

# Consent

What clear words or actions by the Complainant gave the Respondent permission for the specific sexual activity that took place?



# Consent Is...

- Informed (knowing)
- Voluntary (freely given)
- Active (not passive)
- Clear words or actions
- Indicates permission to engage in mutually agreed upon (sexual) activity

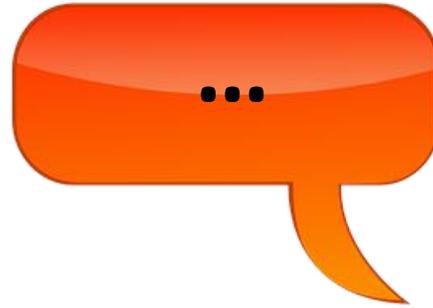
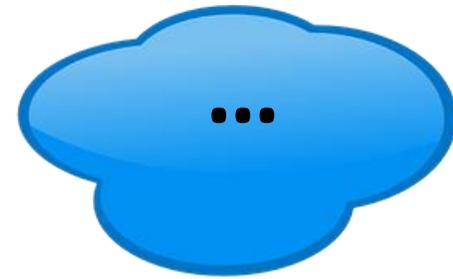
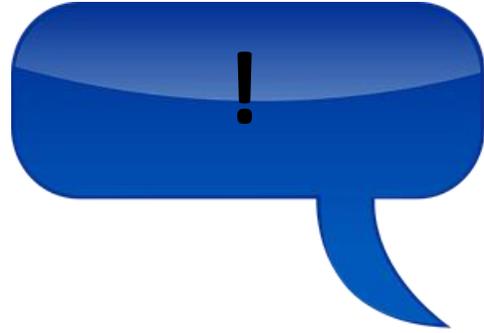
# Rules to Remember

- No means no, but nothing also means no  
Silence and passivity do not equal permission
- To be valid, consent must be given prior to or contemporaneously with the sexual activity
- Consent can be withdrawn at any time

# Withdrawal

- Remember consent can be withdrawn at any time
- The person withdrawing consent is expected to clearly communicate with words or actions they are withdrawing consent
- Other person is required to cease sexual activity until consent is regained







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Overview of Investigator Responsibilities

Title IX Investigation Overview

Weighing & Evaluating Information

Writing the Investigation Report



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# **Investigator Roles & Responsibilities**

# Role of the Investigator

- Fair and unbiased review of matter
- Follow the Policy
  - Standard of proof
  - Avoid burden shifting
- Make a preliminary determination regarding the violation(s) and possibly recommend sanction(s)



# Recognize and Avoid Your Own Bias

- Role of Alcohol
- Own experiences...
- Student-Athletes
- Fraternity/Sorority Life
- International Students
- Sex/Gender
- Gender Identity
- Race
- Ethnicity
- Nature of the Violation
- Religion or religious beliefs
- Academic Field of Study/Major
- Politics
- Attitude
- Others?



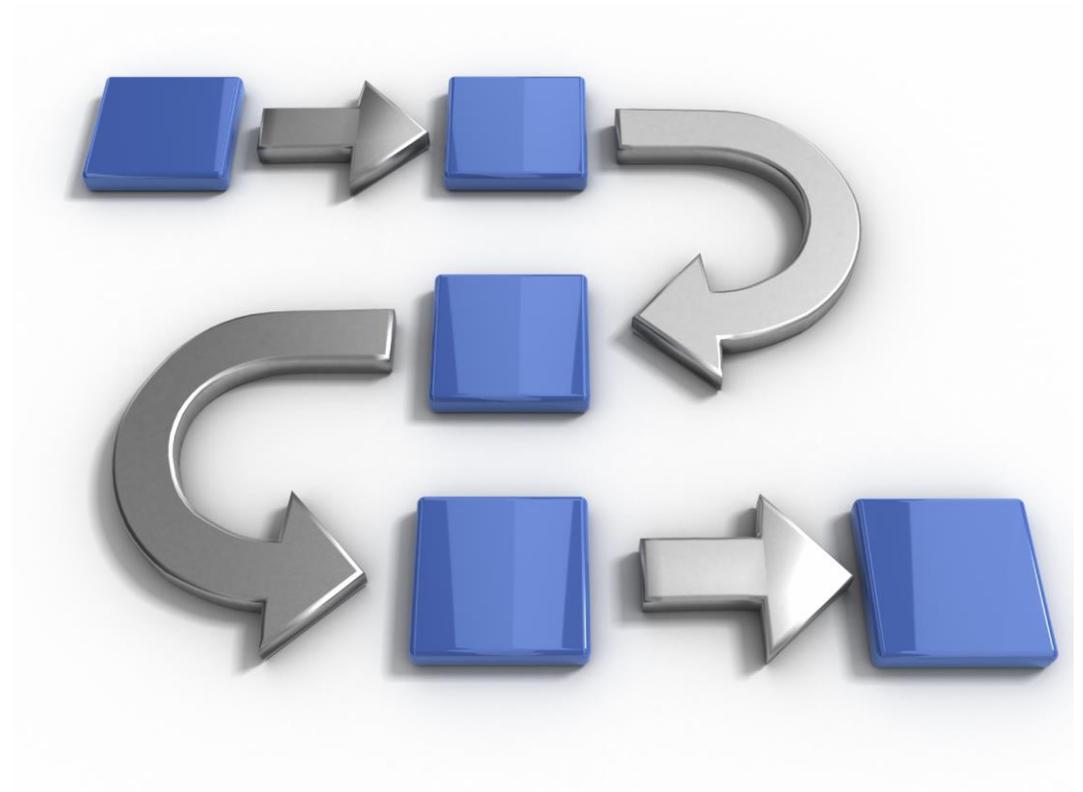


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# **Title IX Investigation Overview**

# Steps in the Investigation Process

- Report is made
- Intake by Title IX Coordinator
- Filing of a Formal Complaint
- Assignment to the Investigator
- Development of an Investigation Plan
- Fact Gathering
- Analysis of Information & Report Writing
- Case Resolution/Adjudication



# Complaint Intake

- Typically handled by the Title IX Coordinator
- Determination that the alleged conduct falls within the Sexual Misconduct Policy
- May determine which process to follow
- Identification of the involved parties
- **IS NOT THE INVESTIGATION**



# Interim Measures

- May be implemented at any point by the Title IX Coordinator
- Must be available to both parties
- Must be implemented in an equitable manner designed to protect the parties and/or the campus community
- **\*Require approval of System Director**

## Examples

Housing changes  
No Contact Directive  
Class changes  
Employment schedule or location changes  
Administrative Leave  
Interim Suspension\*

# 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

# Developing an Investigation Plan

- Review the Complaint Intake and any available information
- Review the Sexual Misconduct Policy
- Review relevant investigation procedures
- Determine order of interviews
- Gather preliminary evidence
- Develop preliminary questions

# Key Aspects in the Investigation Process

- Written notice to parties
  - Pending investigation
  - Possible charges
  - Possible sanctions
  - Available support resources
  - Identify the assigned investigator
- Opportunity for written response



# Key Aspects in the Investigation Process

- Parties' right to an Advisor
  - May be an attorney
  - Purpose: provide advice and counsel
- Parties' right to remain silent or otherwise not participate
  - Non-response = general denial
  - Non-response  $\neq$  adverse inference

# Fact Gathering

Provided  
Evidence

Interviews

Additional  
Evidence



# Interview Strategies

- Set a professional non-accusatory tone
- Introduce yourself and outline your role
- Acknowledge what emotions they may be experiencing
- Review the amnesty and retaliation policies
- Outline an expectation of truthfulness
- Discuss confidentiality
- Reminder that there may be follow-up interviews

# Retaliation and Amnesty Policies

## Anti-Retaliation Policy

- Applies to students and employees equally
- Individuals involved in the investigation should be free from any adverse action due to their participation

## Amnesty Policy

- Only applies to students
- Designed to foster candor during investigations
- Personal usage of drugs or alcohol will not be held against them in disciplinary matters



# Effective Questioning

- Questions should be used to determine:
  - Who
  - What
  - When
  - Where
  - How
- Be mindful of how a question could be perceived and develop them with caution



# Effective Questioning

## What are your goals?

- Learn the facts
- Establish a timeline
- Determine what is more likely than not to have occurred [if possible]

## What are NOT your goals?

- Satisfying your curiosity
- Answering every unknown to get the “Truth”

# Effective Questioning Tips

- Prepare preliminary/guiding questions in advance
- Ask open-ended questions to start the conversation
  - What are you able to remember about...?
  - Tell me more about....
  - Help me understand your thoughts when....
- LISTEN, ask follow-up questions at the end
  - Targeted and specific questions
- If you get stuck conduct a recap

# Additional Interviewing Tips

- Don't be afraid of silence
- Don't be afraid to ask for clarification
- Take breaks if necessary
- Maintain your professionalism at all times

# How to Deal With...

## A Challenging/Reluctant Participant

- Address their concerns
- Remain calm and professional
- Explain the advantages of cooperating

## A Lying Participant

- Ask them to reconcile inconsistent statements
- Try to determine motivation for lying [fearful, protecting a friend, embarrassed etc.]

# Note-Taking

- Handwritten or electronic record of the interview
  - Remember you are creating a publicly available record
  - Try to include verbatim statements
- Include the date and names of all those present



# Note-Taking Considerations

- Use of audio recordings
- Sending an interview summary for the participant to review and edit

**Tip:** Schedule time after an interview to review and type narrative summary

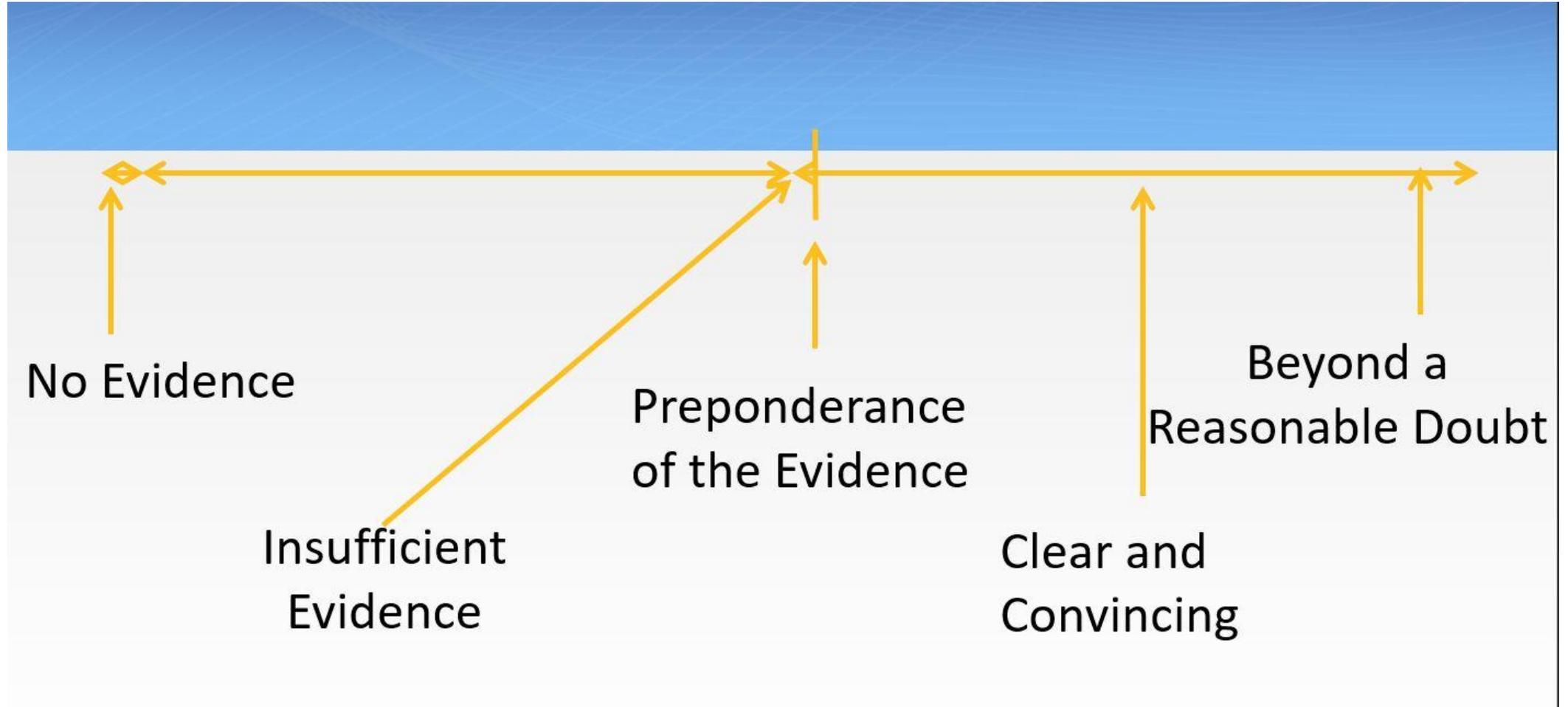
# Evidence Gathering

- Think of all the places and sources of information
  - Involved parties, witnesses, physical locations, social media etc.
  - Be timely
- Document who provided what and when
- Consider verifying the evidence provided
  - Phone numbers, social media accounts, etc.

# Understanding Evidence

- **Formal rules of evidence do not apply.** If the information is considered **relevant** to prove or disprove a fact at issue, it **should be admitted**. If **credible**, it **should be considered**
- Evidence is any kind of information presented with the intent to prove what took place
- Certain types of evidence may be relevant to the credibility of the witness, but not to the charges

# Understanding Evidence Thresholds



# Types of Evidence

- **Documentary** evidence (supportive writings or documents)
- **Electronic** evidence (photos, text messages, videos)
- **Real** evidence (physical object)
- **Direct** or testimonial evidence (personal observation or experience)
- **Circumstantial** Evidence (not eyewitness, but compelling)
- **Hearsay** Evidence (statement made outside the hearing, but presented as important information)
- **Character** Evidence (generally of little value or relevance)

# Weighing Evidence

- Weighing evidence means assessing the impact of the information
- The following factors impact the assessment:
  - Relevance
  - Reliability
  - Persuasiveness
  - Bias



# Weighing Evidence: Impact Factors

- **Relevance**

- Must relate to the incident at issue and be of sufficient value in the overall determination
- Must be offered by an individual with actual knowledge of the event

- **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

# Weighing Evidence: Impact Factors

- **Reliability**

- Information that can be trusted
- Comes from individuals who are able to have assumed the role they claimed to have or those with actual training or experience to support their claim of expertise

- **Persuasiveness**

- Induces others to believe through understanding; tries to convince
- Must be believable, consistent, and establishes a dependable narrative
- **Note:** be mindful of the rehearsed narrative

# Weighing Evidence: Impact Factors

- **Bias**

- Understand who the person is and their relationship to the parties and incident at issue
- Bias can manifest in multiple ways:
  - Towards the parties
  - Towards the incident
  - Towards the process



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# Credibility

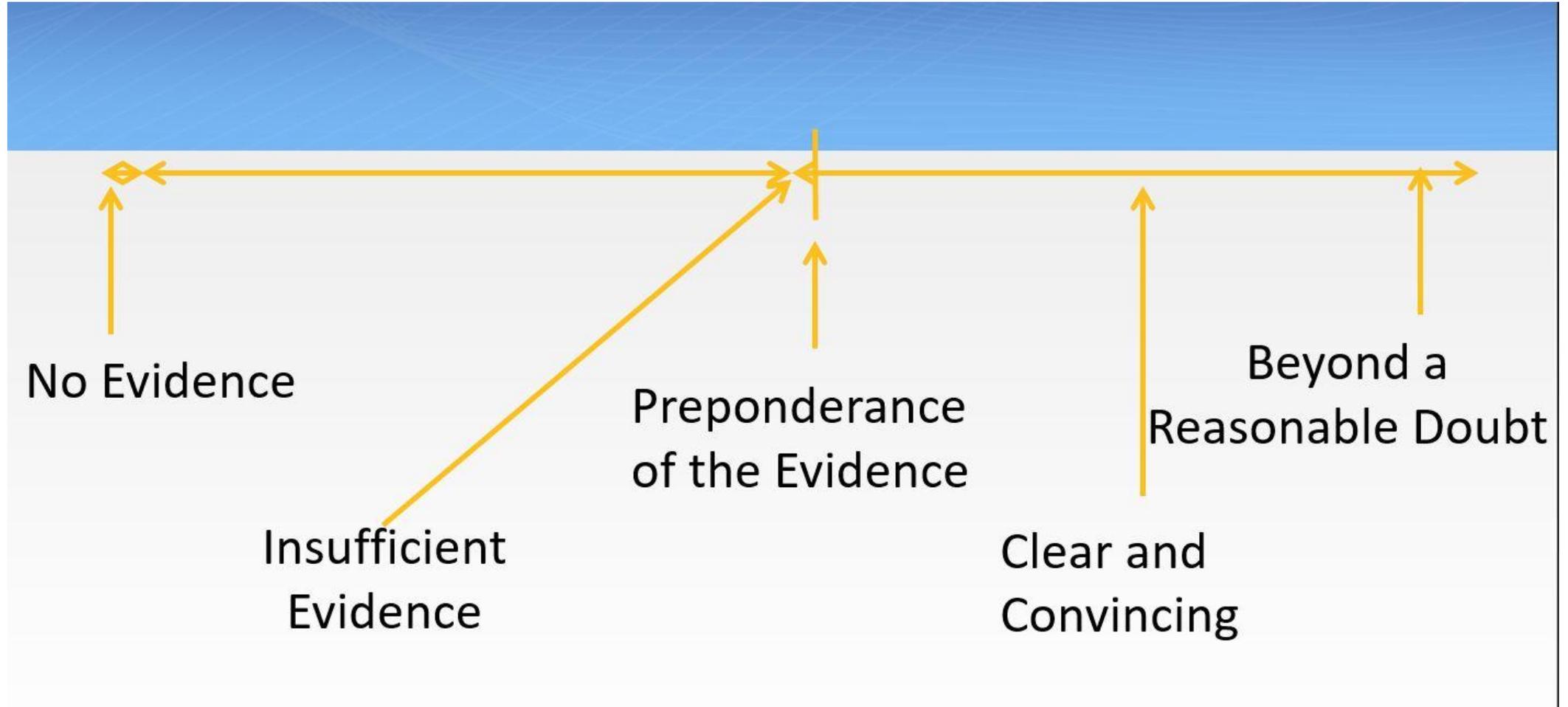
- “To assess credibility is to assess overall the **extent to which you can rely** on a witness’ testimony to be accurate and helpful in your understanding of the case”
  - Credible is not synonymous with the absolute truth
  - Memory errors do not necessarily destroy a witness’ credibility, nor does some evasion or misleading
  - Refrain from focusing on irrelevant inaccuracies and inconsistencies
- Potential Assessment Factors
  - Demeanor
  - Non-cooperation
  - Logic/Consistency
  - Corroborating evidence

# 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



# Understanding Evidence Thresholds



# Avoid Common Pitfalls

- Interview each party and witness separately\*
- Apply the correct policy
- Maintain your sensibilities
  - Difficult parties
  - Attorneys





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# **Writing the Investigation Report**

# The Investigation Report

- Executive Summary
- Relevant Policy Provisions
- Information Gathered During the Investigation
- An Analysis of the Information Gathered
- Recommendations for Informal Resolution OR Conclusion
- Investigation Timeline
- Necessary Attachments



# Basic Formatting

- University Letterhead
- Date
- Title of Document
- Investigator Name(s)
- Names of the Involved Parties

Office of Title IX

14 March 2018



**PERSONAL AND CONFIDENTIAL**

**INVESTIGATION REPORT**  
**Alleged Conduct Violations by Respondent's Name**

**Investigator:** Na'Tasha Webb-Prather

**Date of Incident:** Between March 4, 2018 and March 5, 2018

**Start of Investigation:** March 14, 2018



# Executive Summary

- Big picture investigation information
  - Who reported the incident?
  - To whom did they report?
  - When did they report?
  - Who was assigned to investigate?
  - How was the investigation conducted?
  - What were the overall findings of the investigation?
- Noteworthy occurrences

# Relevant Policy Provisions

- Copy and paste verbatim RELEVANT portions
- Footnote link to full policy or provide as attachment



# Information Gathered During The Investigation

- Narrative summaries of information NOT transcriptions
  - Laid out in a logical manner
  - Limit witness portions to information relevant to analysis
- Include quotes where deemed appropriate
- Adopt one writing style
- Discuss individuals not interviewed

# Information Gathered During The Investigation

- Discuss individuals not interviewed
- Discuss any other evidence gathered and the source even failed attempts
- **TIP:** Schedule time after each interview to begin writing narrative summary



# Investigative Findings/Analysis

- A synthesis of the information gathered in light of our policy
- Walk through the policy violation
- Remember: You're a **NEUTRAL** fact-finder
  - Include not only corroborating information but also exculpatory information
- Credibility Assessments



# Walking Through Policy Violations

## Nonconsensual Sexual Contact

- Was there physical contact of a sexual nature?
- Was there consent?
- Was the consent invalid because of:
  - Force
  - Intimidation or Coercion
  - Incapacitation
- Was the consent withdrawn?

# Walking Through Policy Violations

## Incapacitation

- Part One = Subjective Test
  - Physical and/or mental inability to make informed decisions
  - SOME Signs: unconsciousness, lack of control of physical movements, inability to communicate clearly
- Part Two = Objective Test
  - Judged from a Reasonable Person's perspective

# Recommendations for Informal Resolution/ Conclusion

- Short and sweet
- Based on the totality of the evidence a preponderance of the evidence supports/does not support a charge of (insert policy violation)
- Remember: NOT ISSUING FINDINGS OF RESPONSIBILITY
- Broad range of sanctions at play



# Determining Appropriate Sanctions

- “Must be made as a proportionate response to the violation.”
- Should prevent the recurrence of sexual misconduct
- Should remedy the effects of the sexual misconduct



# Common Sanctions

- Warning
  - Probation
  - Loss of Privileges
  - Counseling
  - No Contact
  - Residence Hall Relocation, Suspension or Expulsion
  - Limited Access to Campus
  - Service Hours
  - Online Education
  - Alcohol & Drug Assessment and Counseling
  - Termination
  - Suspension\*
  - Expulsion\*
- \*Must be supported by **substantial evidence** at the hearing

# Understanding Substantial Evidence

- Required to suspend or expel a student
- **MUST** be able to clearly state what evidence exists to support the finding
- Cannot be merely a feeling!



# Investigation Timeline

- Procedural History
- Key dates and events throughout the process
- Does not have to be a narrative

Investigation Timeline

December 7, 2017	Initial meeting with the Complainant
December 8, 2017	Meeting with the Respondent [Respondent requests to reschedule initial meeting due to illness]
December 8, 2017	Meeting with Witness 1
December 8, 2017	Meeting with Witness 2 [via phone]
December 8, 2017	Meeting with Resident Hall Director
December 11, 2017	Initial meeting with the Respondent
December 11, 2017	Meeting with Witness 3
December 11, 2017	Meeting with Witness 4
December 18, 2017	Notice to parties that investigation will resume once classes begin for the Spring 2018 semester
December 25, 2017 until January 1, 2018	University closed for the holidays
January 10, 2018	University classes resume
January 16, 2018	Meeting with Witness 5

# Necessary Attachments

- Documentary Evidence

**List of Attachments**

- Written Statements

Attachment 1	Pictures taken by Investigator Webb-Prather of Witness 1's apartment on December 10, 2017
Attachment 2	<u>SnapChat</u> messages between the Complainant and Respondent
Attachment 3	University Sexual Misconduct Policy

- Optional: Full Policy



# Optional Aspects of the Investigative Report

- Incident Timeline
- Incapacitation Timeline
- Chart of Involved Parties
- Disputed v. Undisputed Facts



# Key Aspects in the Investigation Process

- Parties right to review and respond to the investigation report
  - Provide adequate and equitable time
- Sharing the final investigation report
  - The parties (and advisor\*)
  - Hearing Panel

# Things to Avoid

- Merely transcribing interviews
- Writing a one-sided report
- Steering or otherwise influencing the hearing proceedings
- Assuming reader knowledge





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# **The Resolution/Adjudication Process**

# Informal Resolution

- Available throughout the investigation process
- The nature of the incident permits a less formal approach
- The institution determines that informal resolution is in the best interest of the parties and the campus community
- Both parties AND the institution have to agree to the terms
- Handled by the Title IX Coordinator



# 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

# 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

## Title IX Hearings

- Advisors required to conduct cross examination
- Relevancy determinations must be made before a question may be answered
- If an individual does not submit to cross examination panelists may not rely on their statements

## Sexual Misconduct Hearings

- Hearing Panelist or Officer performs all questioning
- Relevancy determinations are made before and during the hearing
- Panelists permitted to rely on statements provided during the hearing and in the investigation report



# Typical Order of a Hearing

- Opening by Decision Maker
- Opening statements by both parties
- Questioning of the Complainant
  - By the hearing panel or chair
  - By other party (through their advisor or hearing panel/chair)
- Questioning of the Respondent
  - By the hearing panel or chair
  - By other party (through their advisor or hearing panel/chair)
- Questioning of any Witnesses
  - By the hearing panel or chair
  - By other party (through their advisor or hearing panel/chair)
- Closing statements by both parties
- Closing by Decision Maker

# 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 Considerations**

# 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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