UNIVERSITY SYSTEM OF GEORGIA

Title IX Coordinator Training

Fall 2020

Na'Tasha Webb-Prather
System Director for Equity & Investigations
Legal Counsel

- Understanding The Role of a Title IX Coordinator
- Overview of the Updated Sexual Misconduct Policy
- Reporting Sexual Misconduct
- Investigation and Adjudication of Complaints
- Miscellaneous Considerations & Questions

UNIVERSITY SYSTEM OF GEORGIA

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

2011 & 2014

Obama Guidance

2017

Trump Guidance

2018

Rule Making Notice & Comment

May 2020

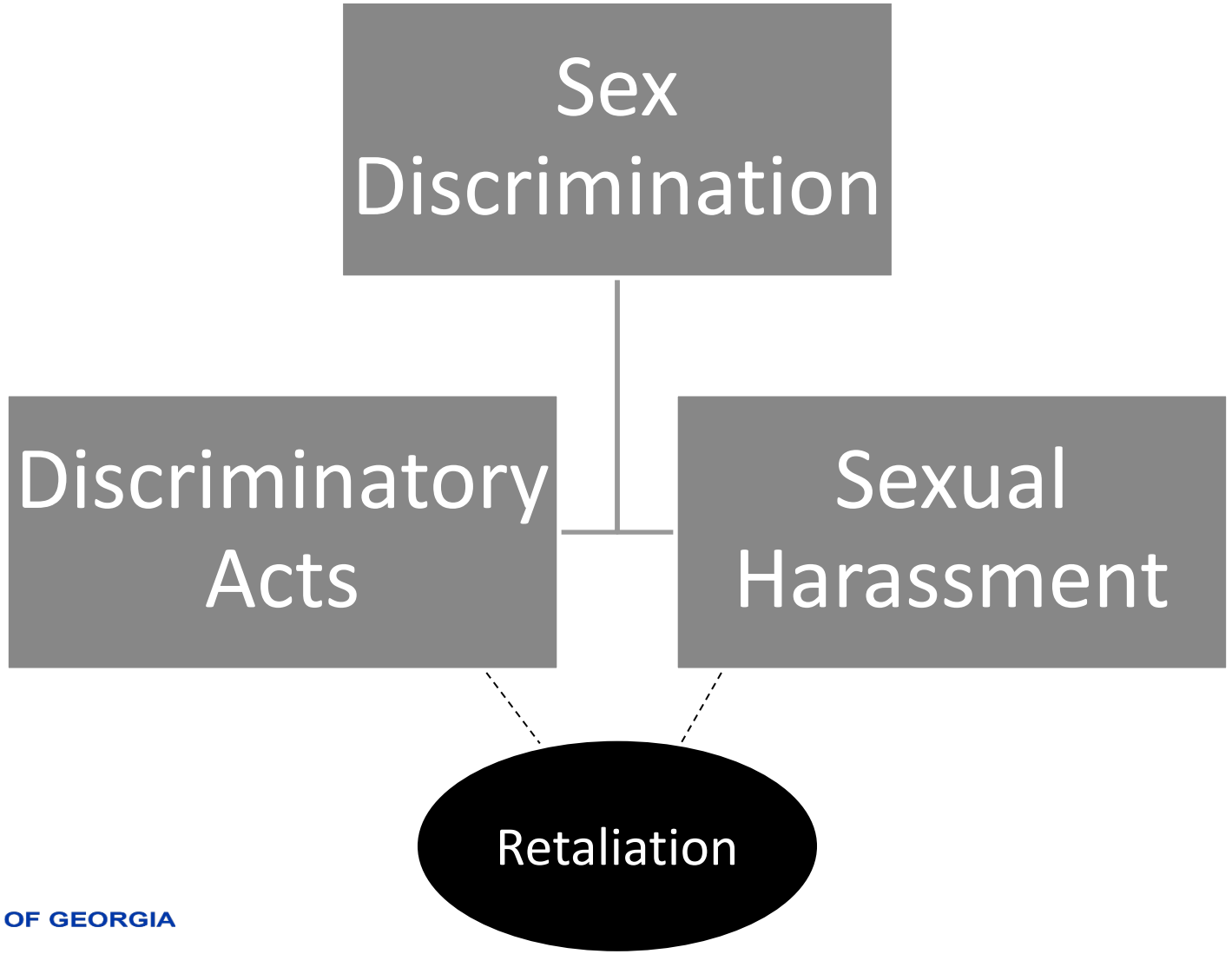
Final Rule Issued

August 2020

Final Rule effective

Board Policy updated

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

This Photo by Unknown Author is licensed under CC BY-ND

The Role of a Title IX Coordinator

This Photo by Unknown Author is licensed under CC BY

- 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

UNIVERSITY SYSTEM OF GEORGIA

Overview of 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…

This Photo by Unknown Author is licensed under CC BY-SA

What Has Remained the Same?

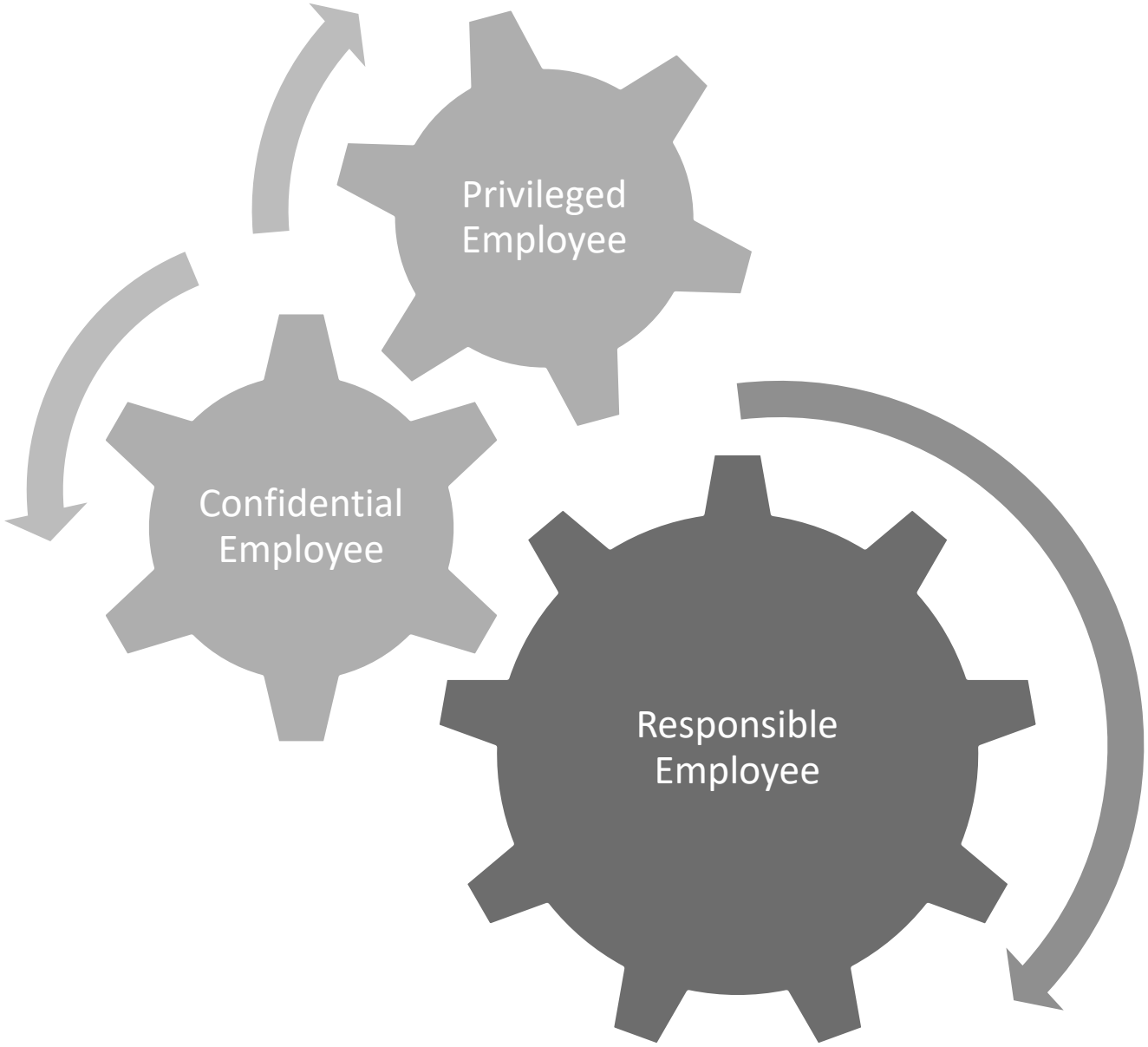
- Scope of Sexual Misconduct
- Jurisdictional reach of Sexual Misconduct
- Responsible/Confidential/Privileged Employee designations
- Definition of consent and incapacitation
- Standard of evidence
- System Office oversight
- Support services, Interim measures

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


Privileged Employee
Confidential Employee
Responsible Employee

Key Categories of Prohibited Conduct

Sexual Misconduct	Dating Violence
	Domestic Violence
	Sexual Exploitation
	Sexual Harassment [Under Title IX & Title VII]
	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

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

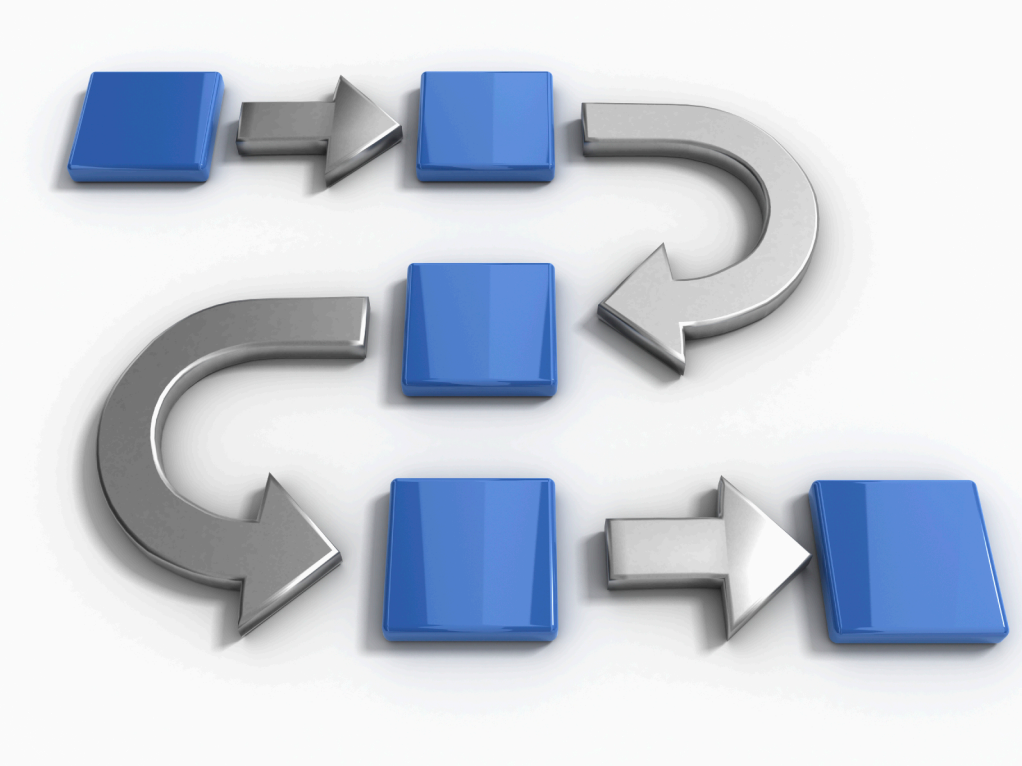
Sexual Misconduct

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

UNIVERSITY SYSTEM OF GEORGIA

Complaints of Sexual Misconduct

Required Response to a Report §106.44(a)

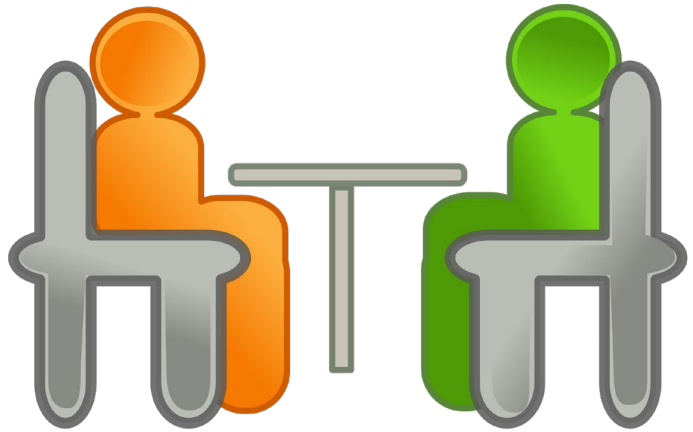


Title IX Coordinator must promptly contact the Complainant to discuss:

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

Complaint Intake Procedures

- Initial meeting with Complainant to gather preliminary facts of allegation
- Explain investigation, informal resolution, and adjudication processes
- Provide resources, answer any questions
- Initial assessment of allegations
- Notify System Director
- Assign an investigator to investigate the 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

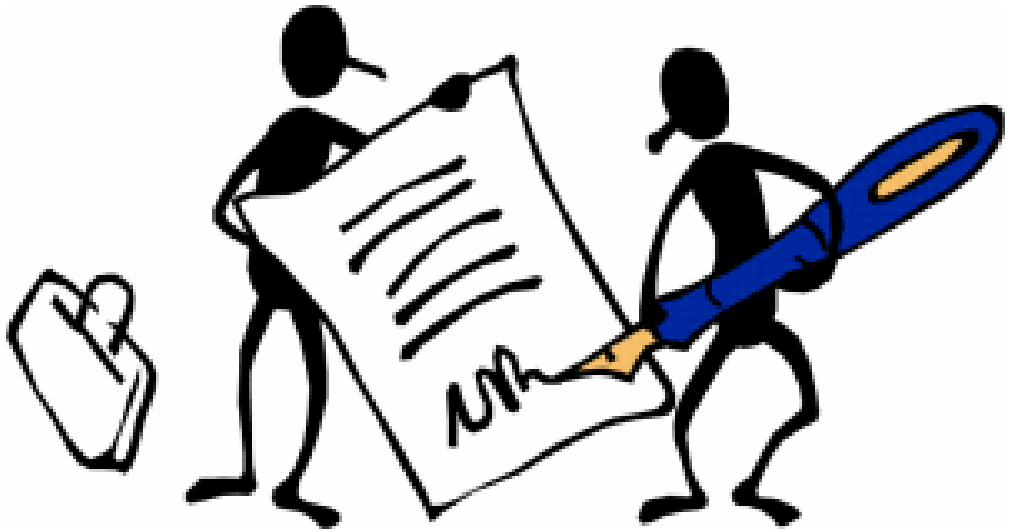
- Individualized safety and risk analysis
- Notice required post removal with opportunity to challenge
- System Office notice and consult permissible

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



This Photo by Unknown Author is licensed under CC BY-SA

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

This Photo by Unknown Author is licensed under CC BY-SA

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

UNIVERSITY SYSTEM OF GEORGIA

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

Investigation Considerations

- Any party or witness can elect not to participate
  - A non-response = a general denial
  - Non-response ≠ adverse inference
- Any party has a right to an advisor, including an attorney
- The parties may explore informal resolution with university approval

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

This Photo by Unknown Author is licensed under CC BY-NC-ND

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

UNIVERSITY SYSTEM OF GEORGIA

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 3rd question.
- If the Complainant was incapacitated, but:
  - The Respondent did not know it = analysis fails. Move on to the 3rd question.
  - The Respondent should not have known it = analysis fails. Move on to 3rd 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

UNIVERSITY SYSTEM OF GEORGIA

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 voluntary 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

UNIVERSITY SYSTEM OF GEORGIA

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
  - Informal resolution not permissible for student allegations against an employee
- 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

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

This Photo by Unknown Author is licensed under CC BY-SA-NC

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

This Photo by Unknown Author is licensed under CC BY-NC-ND

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

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

This Photo by Unknown Author is licensed under CC BY-SA-NC

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

This Photo by Unknown Author is licensed under CC BY-NC

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

This Photo by Unknown Author is licensed under CC BY-NC-ND

UNIVERSITY SYSTEM OF GEORGIA

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

This Photo by Unknown Author is licensed under CC BY-SA-NC

Periodic Data Submission

- Student involved [Complainant or Respondent] Sexual Misconduct Policy violations
- Excel spreadsheet provided by System Director
- Periodic 1:1touch base calls to discuss Title IX matters

<u>Spring & Summer Deadlines</u>

March 26

April 30

May 28

June 25

July 30

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