UNIVERSITY SYSTEM OF GEORGIA

Appellate Decision Makers Refresher Training

Fall 2020

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- Administrative Action on Title IX
- Overview of the Updated Sexual Misconduct Policy
- The Complaint Process
- The Formal Adjudication Process
- Additional Provisions & Considerations

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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

2011 & 2014

Obama Guidance

2017

Trump Guidance

2018

Rule Making Notice & Comment

May 2020

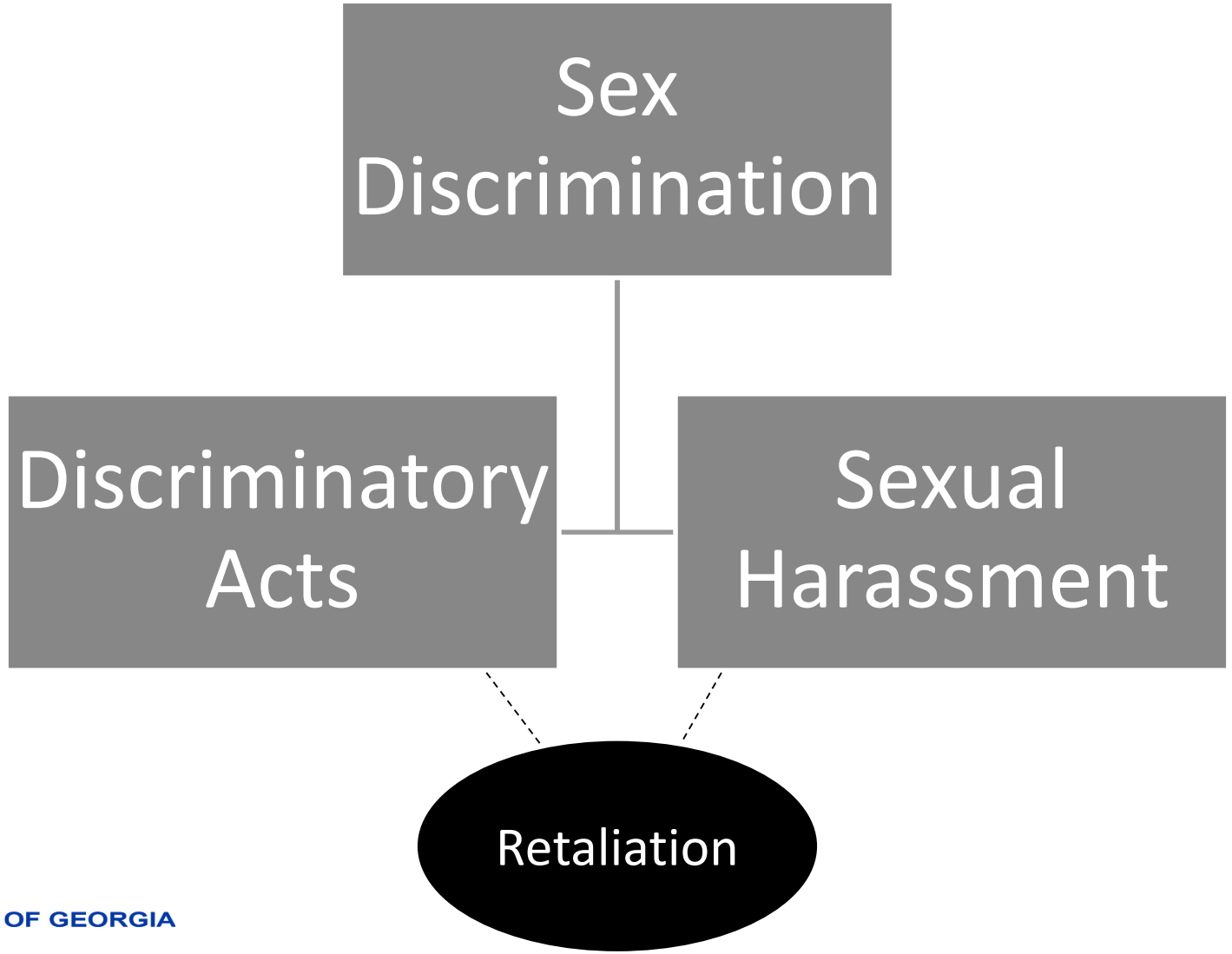
Final Rule Issued

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

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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

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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
- Timeframe for Completion
- Role of Advisors
- The Employee Adjudication Process
- 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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Understanding the Role of an Appellate 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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Expectations of Appellate Decision-Makers

- Be a neutral decision maker who gives a fair and unbiased review of the matter

- Adhere to current policy provisions
  - Definitions and standards
  - Procedural rights

- Reasonably prompt review of the matter
  - Communication with the involved parties
  - Communication with the Title IX Coordinator

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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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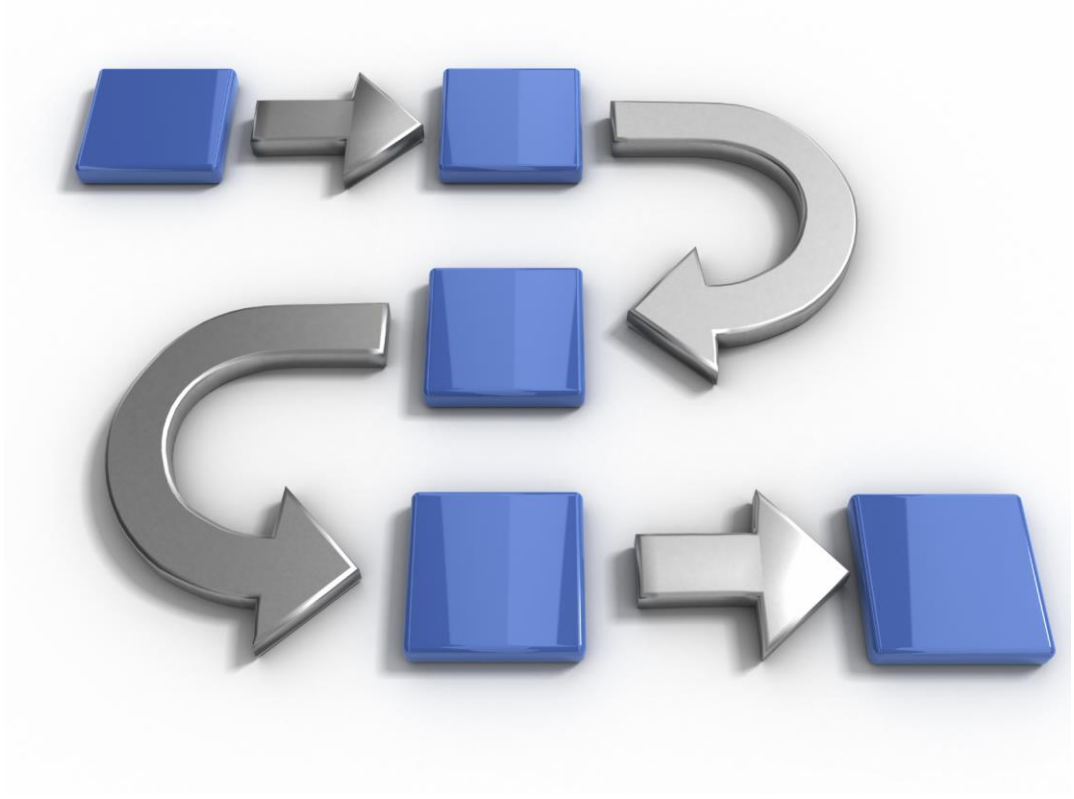
Overview of the Complaint Process

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

USG Complaint Process

- A report of misconduct has been made
- The Complainant or the Title IX Coordinator has initiated the formal investigation process
  - Formal Complaint under Title IX
  - Sexual Misconduct Complaint
- Notice of the investigation has been sent to the parties



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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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

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

Student 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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Formal Adjudication

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 single decision-maker or panel
- Sexual Misconduct matters not informally resolved will be resolved according to established institutional procedures
  - Institutions may choose to offer a hearing or utilize single decision-maker

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

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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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