

Sexual Misconduct Appellate Officer Training

Office of Equal Opportunity & Title IX

Spring 2025



Agenda



- Overview
- Prohibited Conduct
- Complaint Process
- Adjudication Process
- Evidence
- Consent
- Disciplinary Action
- Additional Provisions

Overview of Title IX

Overview of 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."*

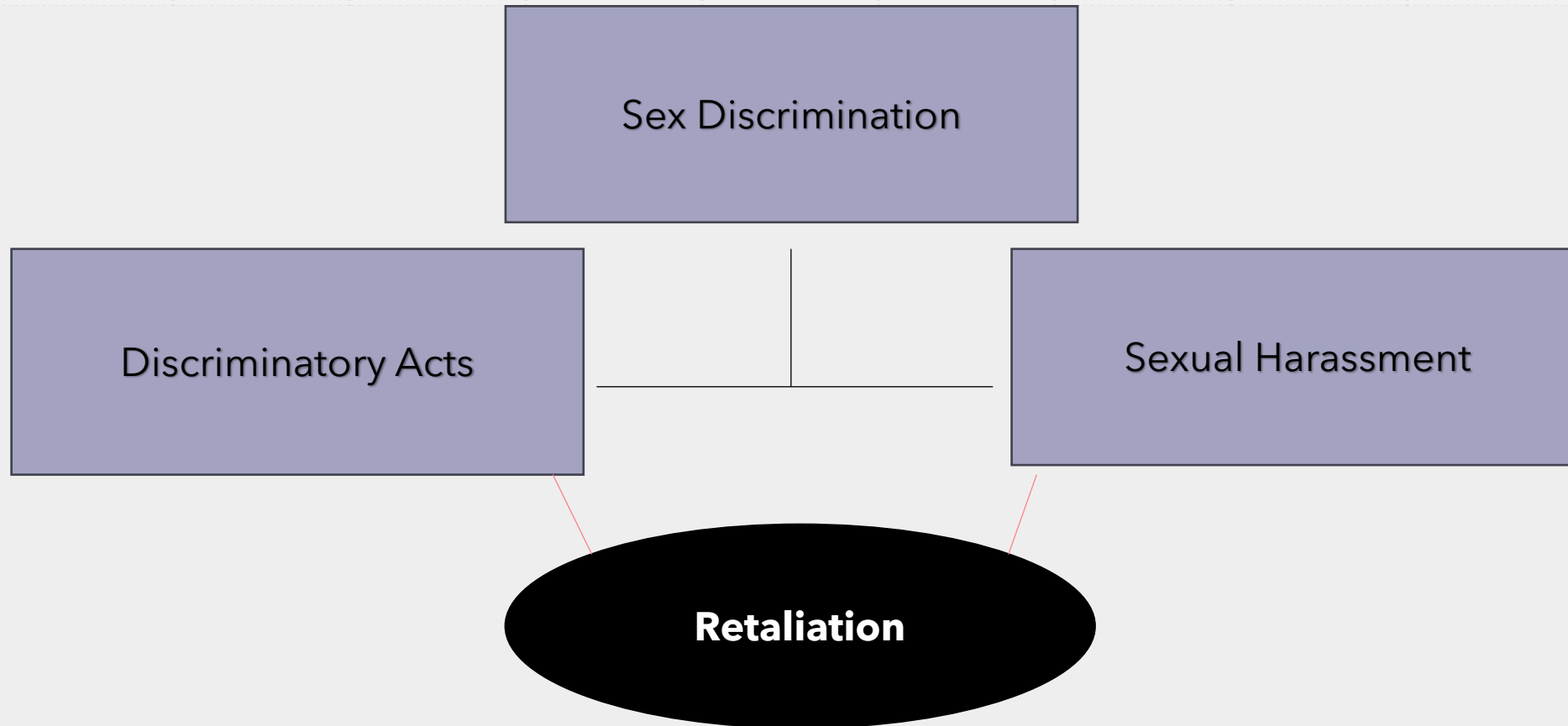
Title IX of the Education Amendments of 1972
Implementing Regulations at:
20 U.S.C. §1681 & 34 C.F.R Part 106



Responsible Employees

- Includes any administrator, supervisor, faculty member, or other person in a position of authority
- Includes student employees in a supervisory, advisory, or managerial role, such as TAs, GAs, RAs, student managers, and SOAR leaders
- Must promptly and fully report complaints of or information regarding sexual misconduct to the Title IX Coordinator
- Includes any type of sexual misconduct
- University is considered officially on notice and Title IX Coordinator must take action
- Responsible employees cannot be considered confidential employees

What is Sex Discrimination?



USG Sexual Misconduct Policy 6.7

Title IX Sexual Misconduct



Non-Title IX Sexual Misconduct



Title IX Sexual Harassment

Conduct on the basis of sex that satisfies one or more of the following:

- Any employee conditioning education benefits on participation in unwelcome sexual contact (i.e. quid pro quo); or
- 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
- Sexual assault (as defined by the Clery Act), dating violence, domestic violence, or stalking as defined in VAWA.

Comparing Jurisdiction

Title IX Sexual Misconduct

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

Non-Title IX Sexual Misconduct

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

Prohibited Conduct



USG BOR 6.7 Sexual Misconduct Policy

1. Sexual Harassment
2. Dating Violence
3. Domestic Violence
4. Nonconsensual Sexual Contact
5. Nonconsensual Penetration
6. Stalking
7. Sexual Exploitation

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 the threat of such abuse
- Existence of a covered relationship based on the totality of the circumstances, including the length of the relationship, type of relationship, and frequency of interaction between the persons involved in the relationship.

Domestic Violence

Violence committed by

- a current or former spouse or intimate partner
- a person with who shares a child
- a person who is cohabitating with, or has cohabitated with, the alleged victim
- a person similarly situated to a spouse of the alleged victim

Stalking

Engaging in a course of conduct directed at a specific person that would cause a reasonable person to fear for their 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 of sexual exploitation may include, but are not limited to, the following:

- Non-consensual photos, video, or audio of sexual activity;
- Non-consensual distribution of photo, video, or audio of sexual activity, even if the sexual activity or capturing of the activity was consensual;
- Intentional observation of nonconsenting individuals who are partially undressed, naked, or engaged in sexual acts;
- Intentionally and inappropriately exposing one's breasts, buttocks, groin, or genitals in non-consensual circumstances; and/or

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 (for example, genitalia, groin, breasts, or buttocks)
- touching a person with one's own intimate parts
- forcing a person to touch their 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 or status in a course, program, or activity;
- A basis for employment or educational decisions; or
- Is sufficiently severe, persistent, or pervasive to interfere with one's work or educational performance creating an intimidating, hostile, or offensive work or learning environment, or interfering with or limiting one's ability to participate in or to benefit from an institutional program or activity.

Overview of Complaint Process

Formal Complaint/Request for Investigation

Title IX Sexual Misconduct

- Required by the Regs
- Written document/email from the Complainant or signed by the coordinator alleging sexual harassment against a Respondent and requesting a formal investigation

Non-Title IX Sexual Misconduct

- Not required by the Regs
- Practice at some institutions is to allow Complainant the same opportunity to request a formal investigation

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 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 have the opportunity to object; institution makes final determination

Title IX Formal Complaint Dismissal

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
- ❑ Respondent is no longer enrolled or employed at the institution
- ❑ Specific circumstances prevent the gathering of evidence sufficient to reach a determination

The Formal Adjudication Process

Investigation & Resolution Process

01

Notice of Investigation sent to both parties

02

Interviews of Complainant, Respondent, and witnesses

03

Evidence gathered

04

Investigation report prepared and shared with both parties

05

Parties have time to review and respond

06

Investigation report sent to decision maker

07

Formal hearing scheduled and held if required

08

Appeal options available as appropriate

Access to Information

- ❑ Parties have the right to review the investigation report prior to its finalization
- ❑ Parties have a right to receive a copy of all directly related information
- ❑ Procedurally, this can occur simultaneously or at different times
- ❑ Parties must be allowed at least 10 calendar days to review

The Investigation Report

- ❑ Must fairly summarize relevant evidence
- ❑ Must include an objective evaluation of the information (inculpatory and exculpatory)
- ❑ Final report must be provided to the parties at least 10 calendar days prior to the hearing

Live Hearing

- ❑ The regulations mandate 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
- ❑ Due process considerations
 - Cross examination
 - Relevancy determinations
- ❑ Must be audio recorded

Decision Maker

- ❑ Student Respondent - heard by a panel of faculty and/or staff
- ❑ Employee Respondent - may be a single administrative decision maker or a panel
- ❑ Serves as a neutral decision-maker
- ❑ Makes a final determination of responsibility
- ❑ Makes a final determination regarding sanctions/disciplinary action and other administrative action that may be appropriate
- ❑ Must articulate determinations in a written decision

Hearing Officer

- ❑ Considered a decision-maker in that they must be trained and impartial, but they do not decide responsibility or sanctions
- ❑ Responsible for facilitating the hearing process
 - Scheduling
 - Pre-hearing meetings
 - Conducts the hearing
- ❑ Responsible for determining issues of relevancy

Advisors

Title IX Sexual Misconduct

- ❑ Parties have the right to an advisor of their choice
- ❑ Provide advice, counsel, and support to a party
- ❑ If not selected by party, one will be provided by the University prior to hearing
- ❑ Copied on investigation report
- ❑ Performs cross examination of other party and other witnesses

Non-Title IX Sexual Misconduct

- ❑ Parties have the right to an advisor of their choice
- ❑ Provide advice, counsel, and support to a party
- ❑ May not actively participate in the hearing process
- ❑ May be copied on investigation report, with party's permission

Hearing Logistics

- Parties must receive notice of hearing at least 10 days prior to the hearing
 - Final investigation report and evidence
 - Notice of hearing date, time, and modality
 - Notice of decision-maker(s)
- 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
- Have available all directly related information
- May establish rules of decorum
- All hearings must be audio recorded

The Written Decision

Provided to all parties simultaneously and must include

- ✓ The allegations
- ✓ The procedural steps from the complaint through determination
- ✓ Findings of fact supporting the determination
- ✓ Determinations regarding responsibility and sanctions, along with the supporting evidence and rationale
- ✓ Information on the appeals process

Appeals

Parties have institutional appeal opportunities

Grounds for appeal:

- New information
- Procedural Error
 - ex. Bias or conflict of interest of Title IX personnel
- Finding inconsistent with the weight of the information

And may apply to the USG for Discretionary Review

Expectations of Appellate Officers

- Be a neutral decision maker who gives a fair and unbiased review of the matter
- Adhere to current policy provisions
 - Definition and standards
 - Procedural rights
- Reasonably prompt review of the matter
 - Communication with the involved parties
 - Communication with the Title IX Coordinator

Evidentiary Considerations

Standard of Evidence

Decisions regarding alleged misconduct are based on a **preponderance of the evidence**

- ❑ The burden of proof and the burden of gathering evidence is on the institution
- ❑ Parties are permitted to present evidence and call witnesses to advance their claims and defenses
 - May include fact or expert witnesses
 - May include Investigator

Relevancy Determinations During Title IX Hearings

- ❑ Parties may be asked to submit questions ahead of time, but cannot be required to do so
- ❑ Prior to any question being answered, relevancy must be determined
- ❑ Must provide the reason for excluding the question or evidence (stated aloud for the audio recording)
- ❑ Not required to permit a rebuttal

Assessing Relevancy

Relevant

- Relevant information relates to the incident at issues
- Relevant information provides sufficient value in making the overall determination
- Relevant information has value in proving or disproving a fact at issue

Irrelevant

- Questions and information regarding the Complainant's sexual history or sexual predisposition unless to prove
 - Someone 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

Types of Evidence

- **Documentary** evidence (supportive writings or documents)
- **Electronic** evidence (photos, text messages, videos)
- **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)
- **Impact Statements** (typically only relevant in sanctioning)

Weighing Evidence

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

Weighing Evidence

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

Weighing Evidence

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

Credibility

- 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 absolute truthfulness
 - Memory errors do not necessarily destroy a witness' credibility, nor does some evasion or misleading
 - Refrain from focusing on irrelevant inaccuracies and inconsistencies
- Logic/Consistency
- Corroborating evidence

Consent

Consent

Words or actions that show a knowing and voluntary willingness to engage in mutually agreed-upon sexual activity.

- Silence or an absence of resistance does not imply consent
- Past consent ≠ Present consent
- The scope of consent matters
- Can be invalidated by force, intimidation, incapacitation, or withdrawal
- Consent can be withdrawn at any time by a party by using clear words or actions.

Incapacitation

The physical and/or mental inability to make informed, rational judgments.

Can result from mental disability, sleep or any state of unconsciousness, involuntary physical restraint, status as a minor under the age of 16, or from intentional or unintentional taking of alcohol and/or other drugs.

Whether someone is incapacitated is to be judged from the perspective of an objectively reasonable person.

Consent Analysis

When one analyzes whether or not non-consensual sexual contact occurred, there are three questions that need to be asked:

1. Did sexual contact occur between the parties? If no, there is no policy violation. If yes,
2. Was consent given? If no, there is a policy violation. If yes,
3. Was the consent valid? If yes, there is no policy violation. If no, there is a policy violation.
 - a. Was the Complainant of legal age to consent?
 - b. Was force, intimidation, or coercion utilized to engage in the sexual activity?
 - c. Was the Complainant incapacitated?
 - i. If the Complainant was incapacitated, was the Respondent aware of the Complainant's incapacitation or would a reasonable person have been aware?

Disciplinary Action

Disciplinary Action

In determining the severity of sanctions or corrective actions the following should be considered:

- the frequency, severity, and/or nature of the offense;
- history of past conduct;
- an offender's willingness to accept responsibility;
- previous institutional response to similar conduct;
- strength of the evidence;
- and the wellbeing of the university community.

The institution will determine disciplinary action and issue notice of the same, as outlined above.

Additional Provisions

Retaliation

- ❑ Who is protected: Reporters, Complainants, Witnesses, Respondents, even those who choose not to participate
- ❑ What is protected: Intimidation, threats, coercion, discrimination
 - Ex. Negative inference against party for not participating in the process
 - 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

7 year records retention mandate:

- ✓ Reports (supportive measures, why not deliberately indifferent, measures taken to restore and preserve equal access)
- ✓ Investigations (determinations, recording of hearing, sanctions, and remedies implemented)
- ✓ Appeals
- ✓ Informal Resolutions
- ✓ Training materials

Thank you!

Georgia Southern University

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