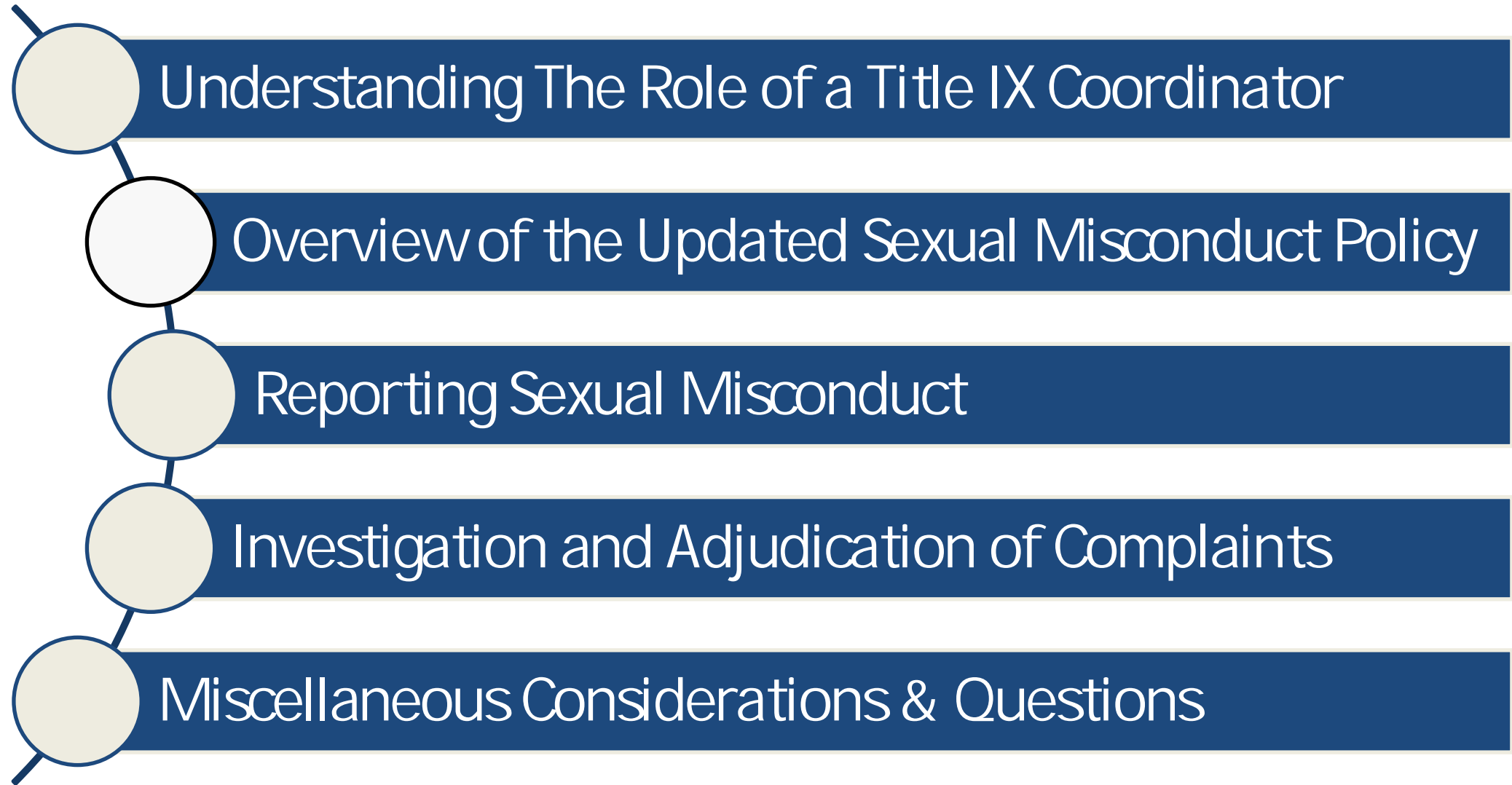




# Title IX Coordinator Training Fall 2020

Na'Tasha Webb-Prather



# What is Required under the Final Rule







# Overview of Updated Sexual Misconduct Policy



# What Has Remained the Same?

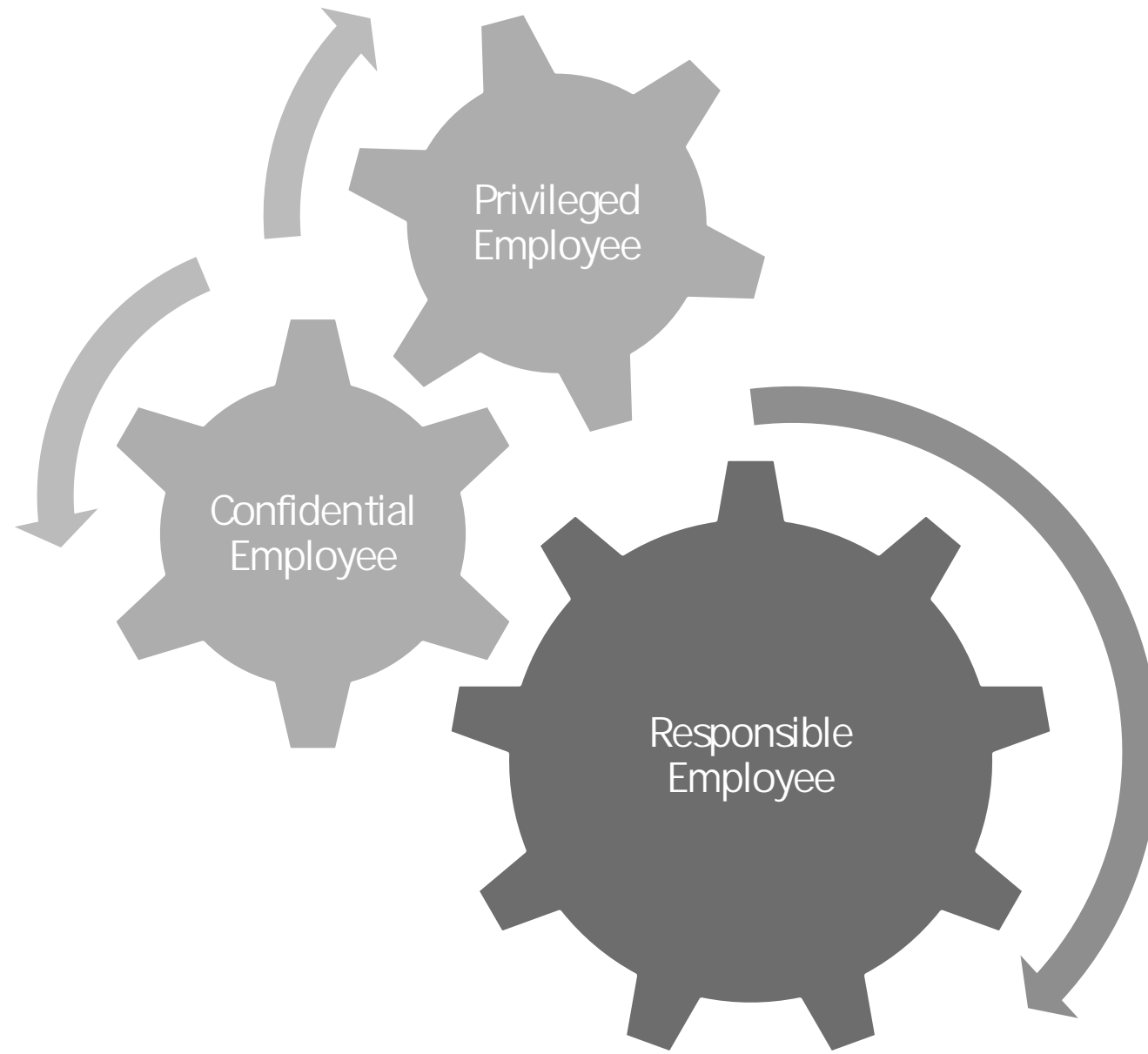
- Scope of Sexual Misconduct
- Jurisdictional reach of Sexual Misconduct
- Responsible/Confidential/Privileged Employee designations
- Definition of consent and incapacitation
- Standard of evidence
- System Office oversight
- Support services, Interim measures





# Reporting Prohibited Conduct





# 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

# Key Categories of Prohibited Conduct





# 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



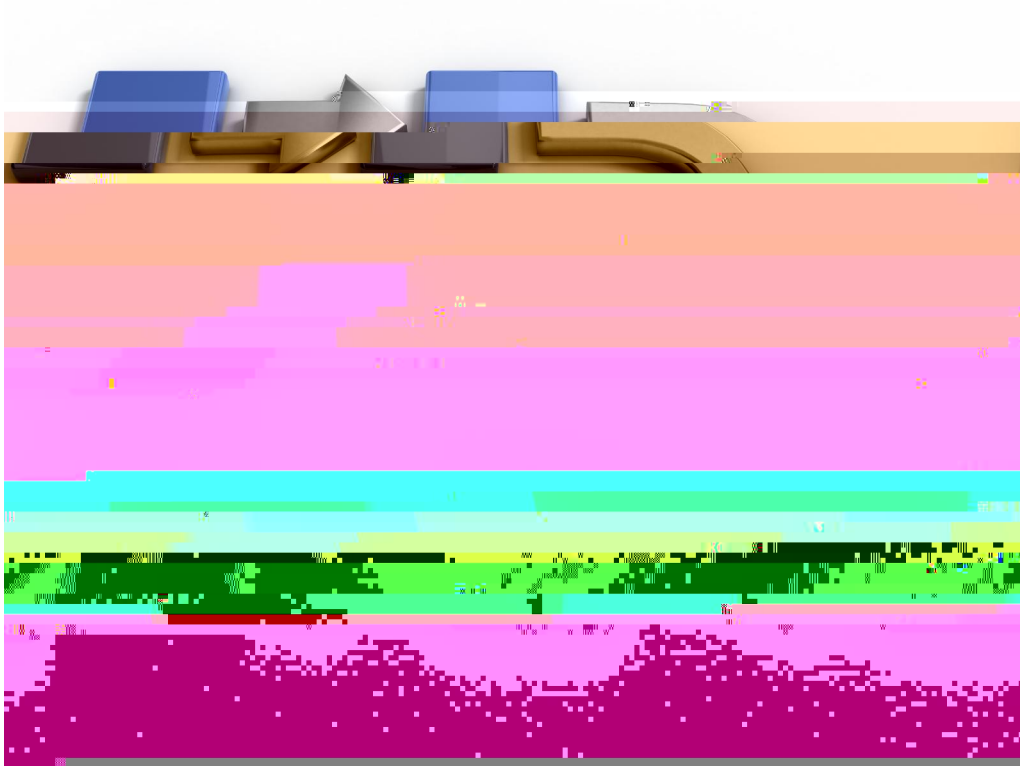
# Nonconsensual Sexual Penetration

Any penetration of another's body parts without the person's consent.

Includes:



# 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

## 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



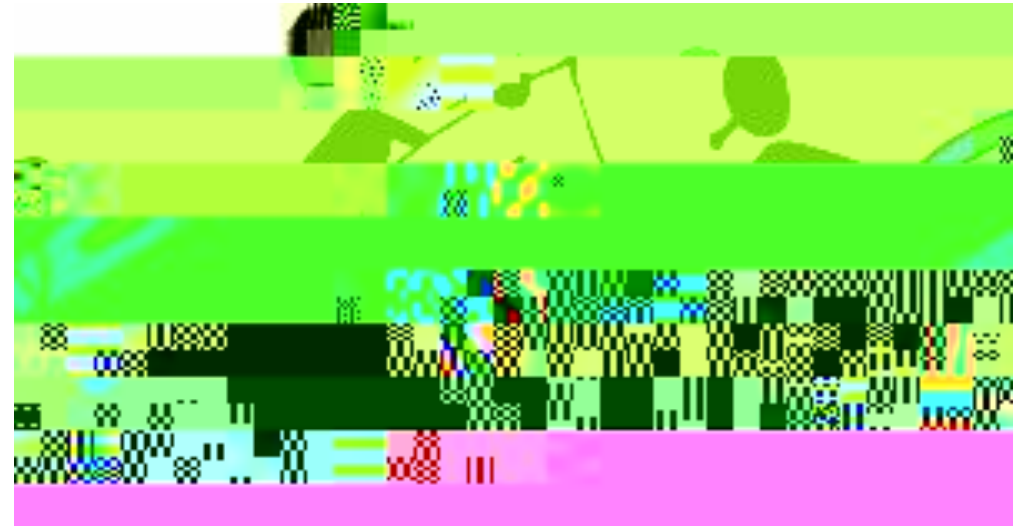
# Complaints of Sexual Misconduct

# 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







# 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

# 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.c

# Additional Noteworthy Provisions

## False Statements

Updated standard to cover false statements knowingly made to an institution official

# 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





# 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

# 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

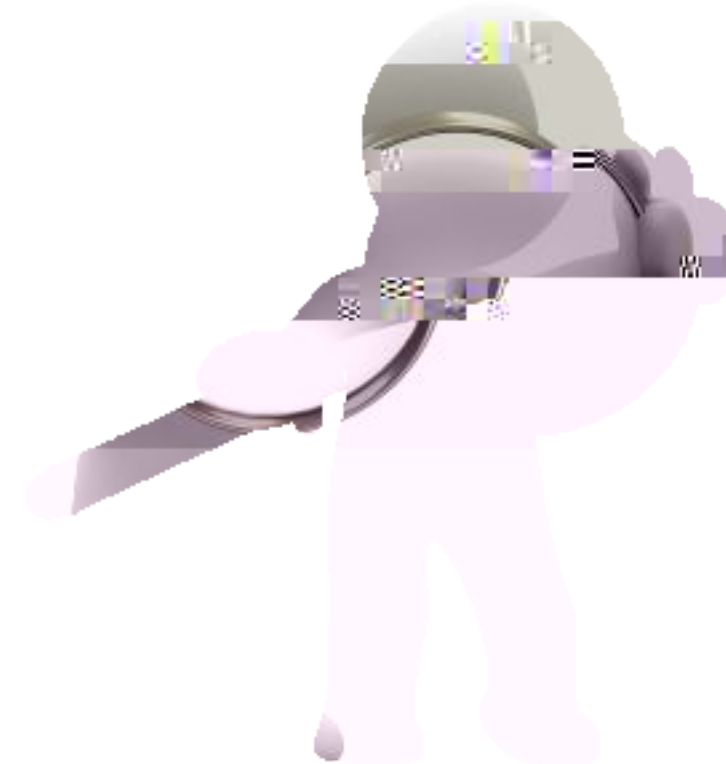
## Sexual Misconduct Complaints

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# 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



# Informal Resolution







# 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



# 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
- New due process considerations
  - Cross examination
  - Relevancy determinations
  -



# 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

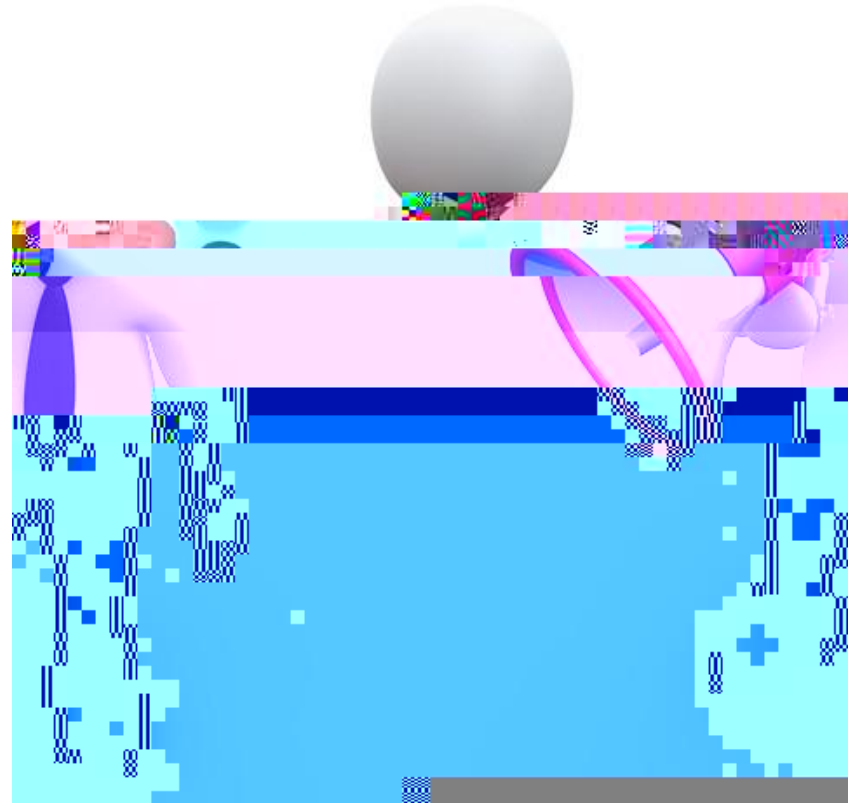
## Sexual Misconduct

- 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

# Appeals

- Parties will continue to have both institutional level and Board level appeal opportunities
- Grounds for an appeal:
  - New information
  - Procedural Error
    - Ex. Bias or conflict of interest of Title IX personnel
  - Finding inconsistent with the weight of the information



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# Additional Provisions

# 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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# 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

