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# USG New Sexual Misconduct & Title IX Hearing Panelist Training

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- Title IX Overview
- USG Investigation and Resolution Process
- USG Prohibited Conduct Definitions and Consent
- Evaluating Evidence and Decision-Making
- Case Studies

# Who's Here in the Room?

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

# Primary Function of the Hearing Panel

- Be a neutral decision maker
  - Hear the facts and circumstances of an alleged policy violation
  - Review the information provided
- Determine whether a policy violation has occurred
- Decide whether/what sanctions and remedial actions are appropriate

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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

**2011 & 2014**

Obama Guidance

**2017**

Trump Guidance

**2018**

Rule Making Notice & Comment

**May 2020**

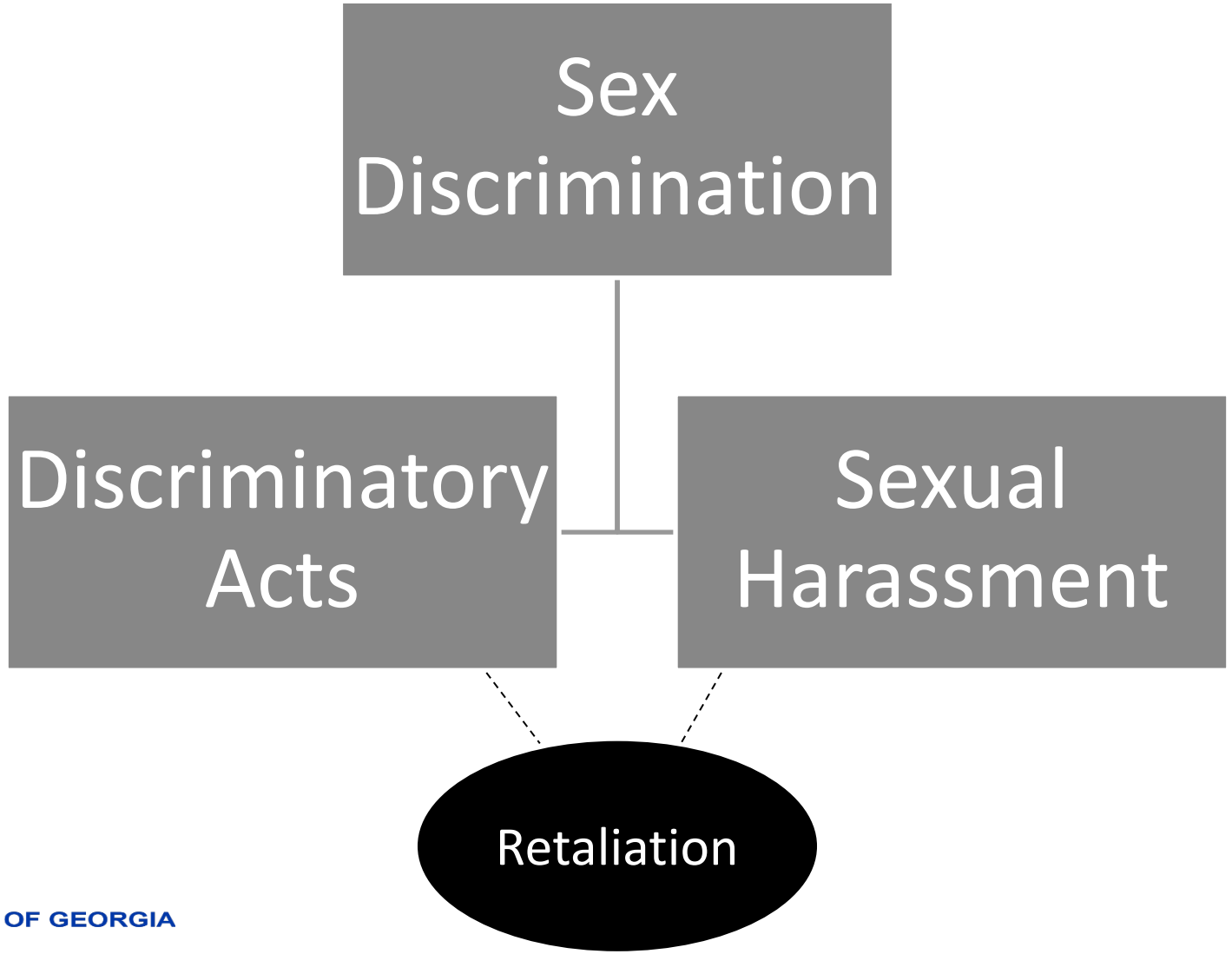
Final Rule Issued

**August 2020**

Final Rule effective

Board Policy updated

# What is Sex Discrimination?



# 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

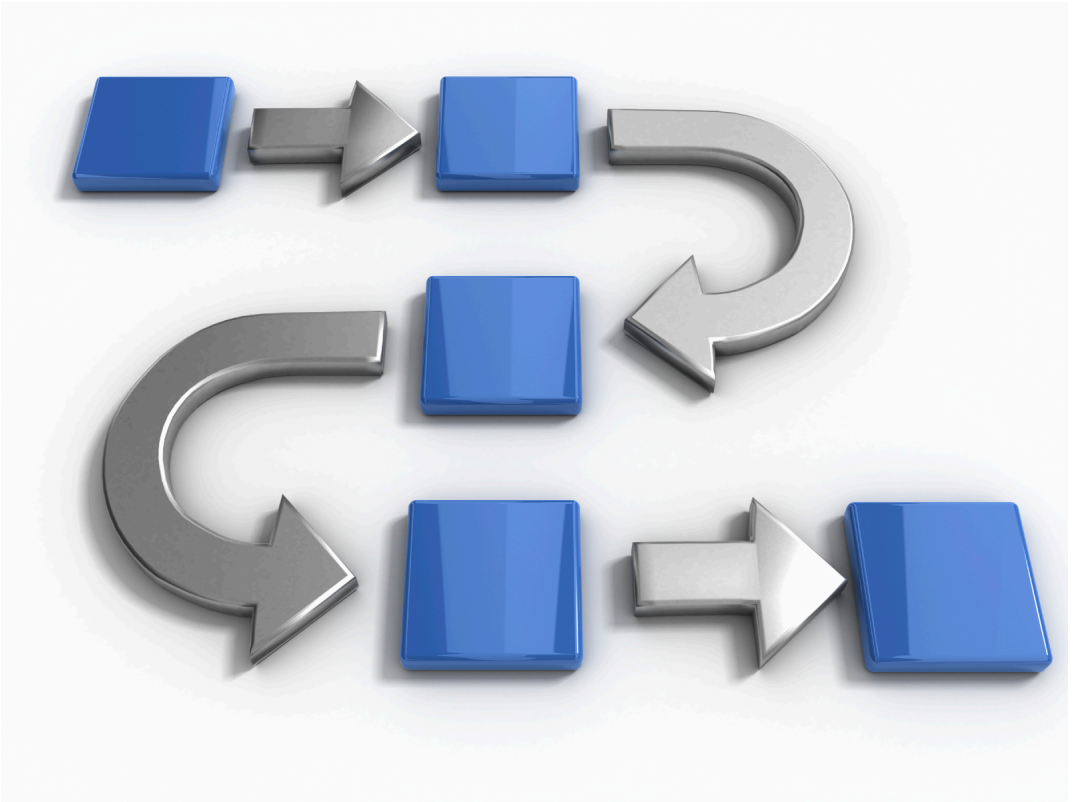
## Other Sexually Based Behavior

# Key Categories of Prohibited Conduct

| | |
|---|---|
| Sexual Misconduct | Dating Violence |
| | Domestic Violence |
| | Sexual Exploitation |
| | Sexual Harassment |
| | Stalking |
| | Nonconsensual Sexual Contact |
| | Nonconsensual Sexual Penetration |

# Pre-Hearing Complaint Process

- A report of misconduct has been made
- The Complainant or the Title IX Coordinator has initiated the formal investigation process
- Notice of the investigation has been sent to the parties
- The assigned investigator(s) have made preliminary determinations
- The parties and the institution have been unable to reach an informal resolution



# **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

# 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

## 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

# Hearing Panel Roles & Responsibilities

# Role of Hearing Panel

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

# Hearing Panel Roles

- Chair or Hearing Officer
  - Designated leader of the Hearing
  - Should be the voice of the Hearing Panel (unless Hearing Officer is utilized)
  - May make determinations of relevancy

- Other Panel Members
  - Active listening participants who come to their own logical and reasoned decision

# 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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# 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 (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

# 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

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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 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

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# Evaluation of Evidence and Decision-Making Skills

# 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

- Ask open-ended questions to start the conversation
- LISTEN, ask follow-up questions at the end
- Don't be afraid of silence
- Don't be afraid to ask for clarification
- Take breaks if necessary
- Maintain your professionalism at all times

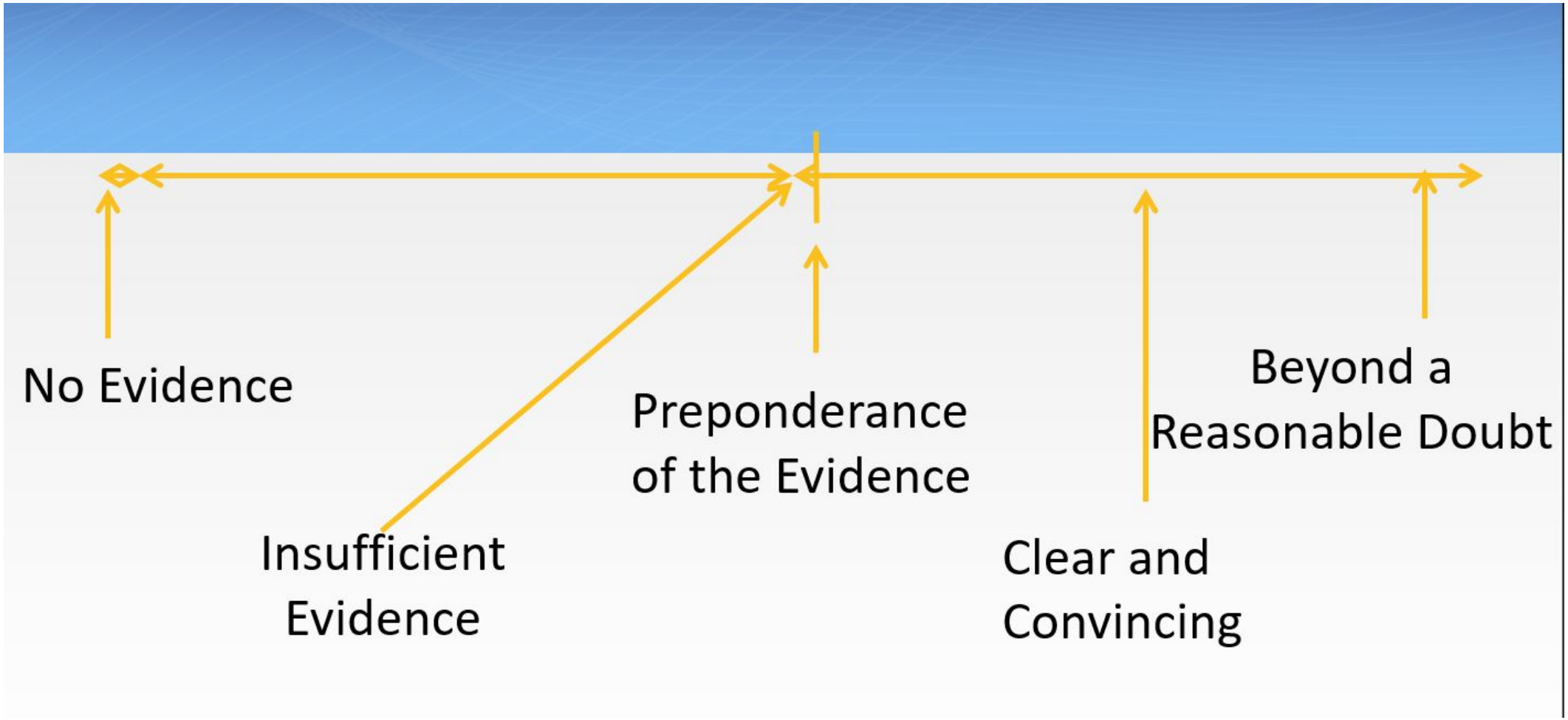
# Understanding Evidence

- **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

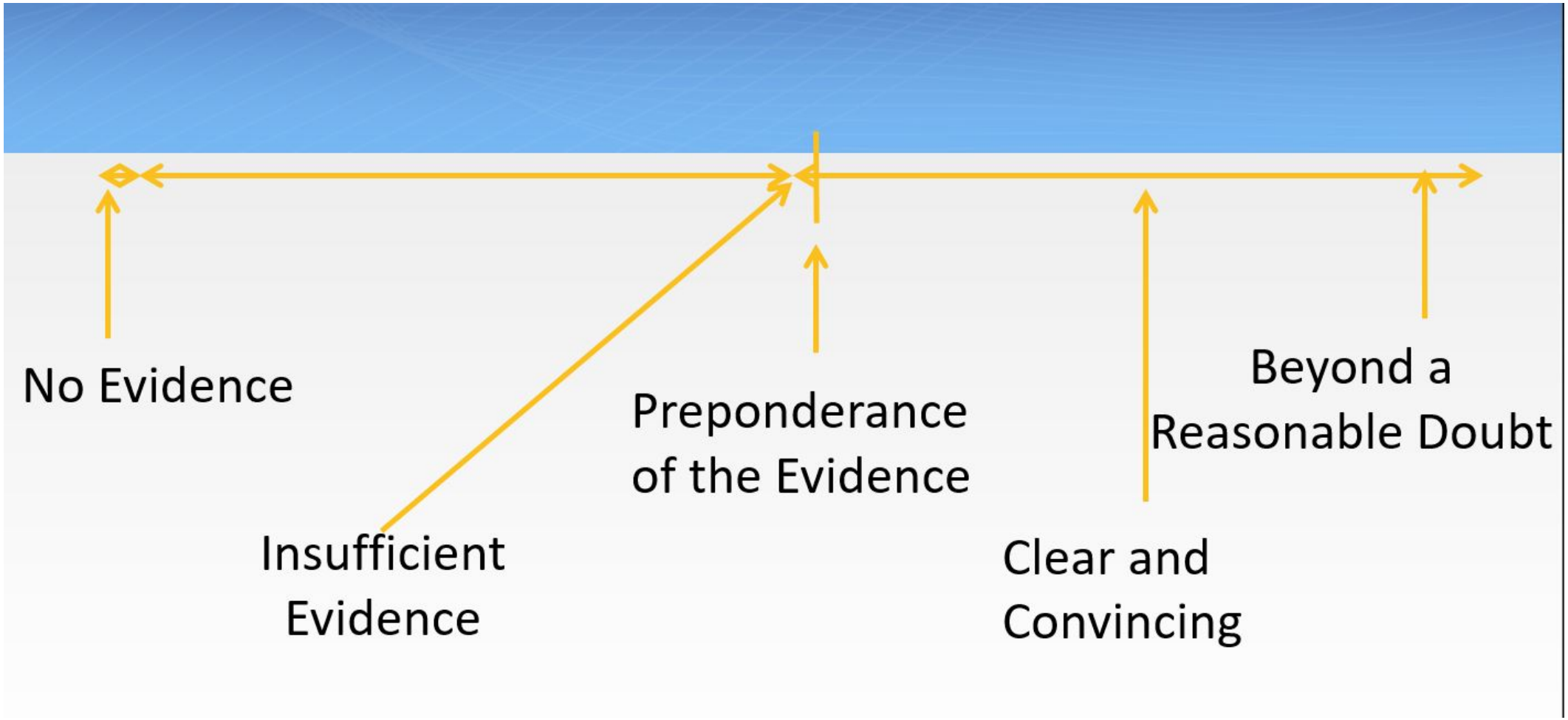
- "To assess credibility is to assess overall the **extent to which you can rely** on a witness' testimony to be accurate and helpful in your understanding of the case"
  - Credible is not synonymous with the absolute truth
  - Memory errors do not necessarily destroy a witness' credibility, nor does some evasion or misleading
  - Refrain from focusing on irrelevant inaccuracies and inconsistencies

- <u>Potential Assessment Factors</u>
  - 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



# 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 Student Sanctions

- Warning
- Probation
- Loss of Privileges
- Counseling
- No Contact Directives
- Residence Hall Relocation, Suspension or Expulsion
- Limited Access to Campus
- Service Hours
- Online Education
- Alcohol & Drug Assessment and Counseling
- Discretionary Sanctions
- Suspension*
- Expulsion*

*Must be supported by **substantial evidence** at the hearing

# Understanding Substantial Evidence

- Required to suspend or expel a student
- Panel MUST be able to clearly state what evidence exists that a reasonable person might accept to support their decision

# Deliberations & Decision-Making

- Private deliberations with only the panelists
- Not required to make a unanimous decision
- Required to issue a written decision of findings
  - Summarize evidence supporting the decision
  - Explain the substantial evidence to support sanction of suspension or expulsion

# **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 Considerations

# 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
  - As panelists you should be familiar with any technology utilized
- All directly related information will be available
- Institutions will establish rules of decorum which everyone is expected to adhere to
- All hearings must be recorded

# Things to Keep in Mind

## Before the Hearing

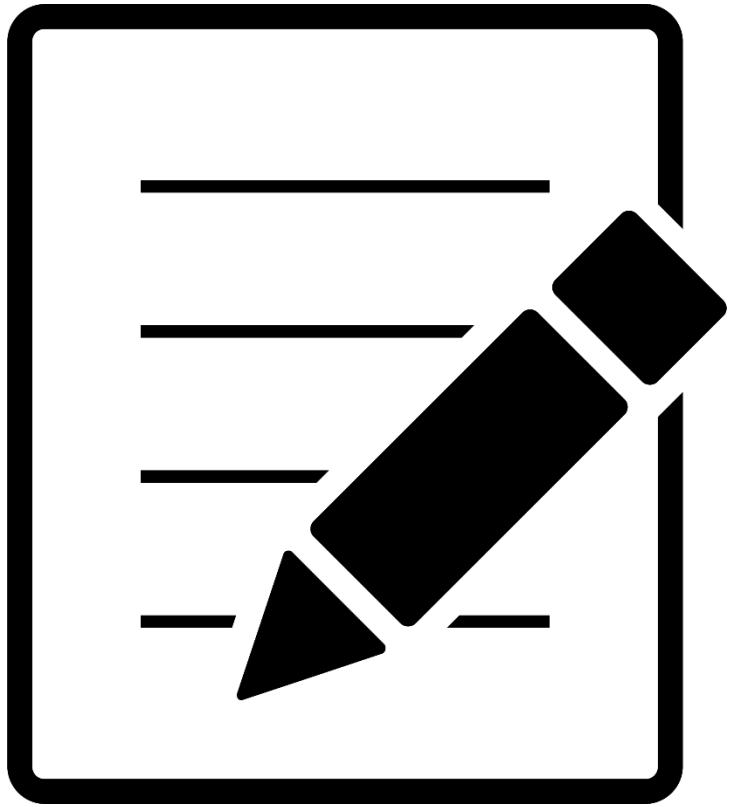
- Review all available materials:
  - Sexual Misconduct Policy
  - Investigative Report
  - Supplemental documentation
- Determine whether you are participating in a Title IX or Sexual Misconduct Hearing
- Prepare questions in advance

## During the Hearing

- Be patient
- Listen
- Don't draw conclusions until all evidence and testimony are presented
- Be mindful of the seriousness of the situation

# The Investigative Report

- Summary of Allegations
- Identifies Applicable Policies and Procedures
- Statement and Explanation of the Evidentiary Standard
- Describe/Explain Evidence Obtained & Reviewed
- Investigative Findings



# **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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