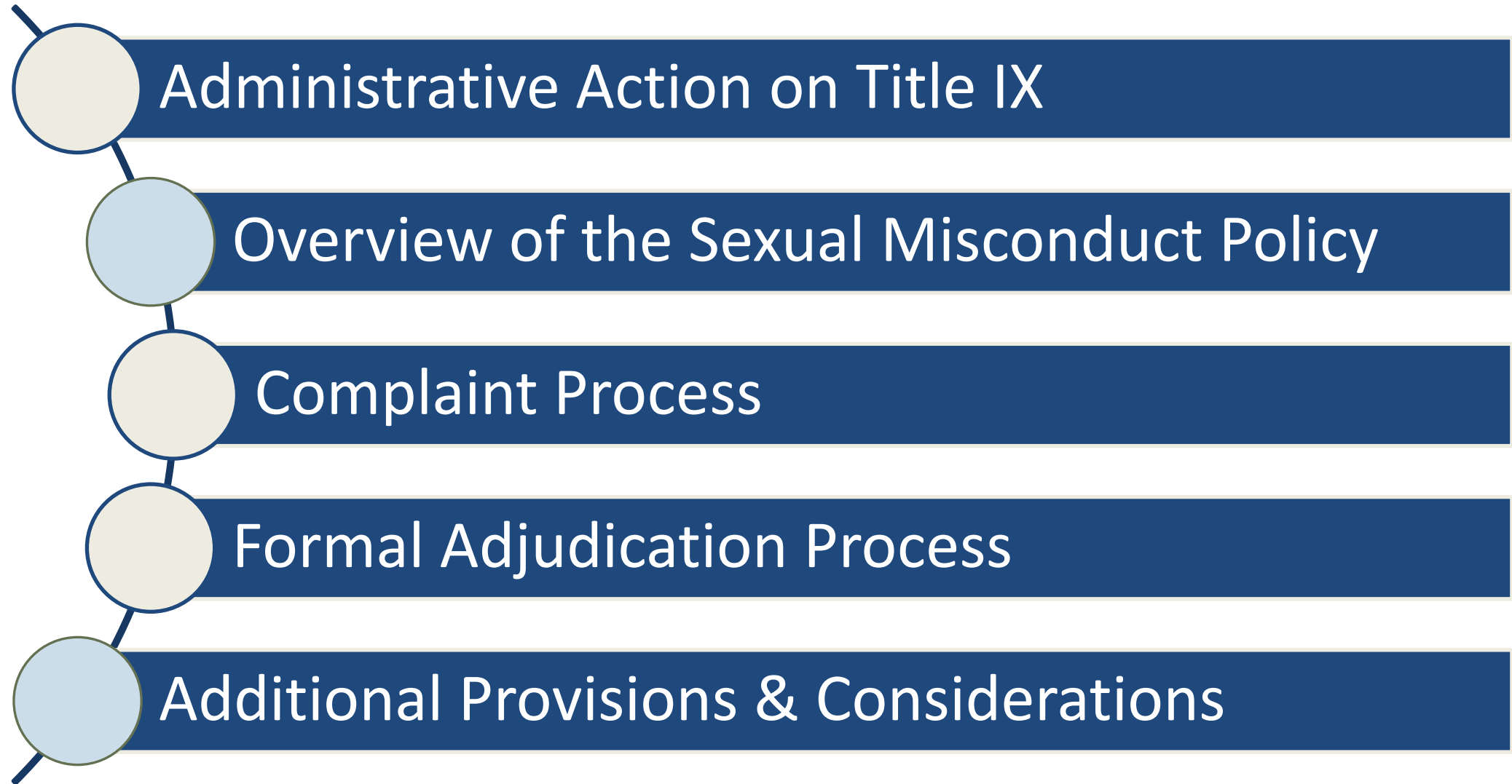


# Appellate Decision Makers

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Sarah Secoy  
Title IX Coordinator  
Columbus State University



# Title IX

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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

# What is Required under the Final Rule?

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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

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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

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- 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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# Sexual Misconduct Policy

```
graph TD; A[Sexual Misconduct Policy] --> B[Title IX]; A --> C[Other Sexually Based Behavior]
```

Title IX

Other Sexually  
Based Behavior

# Understanding the Role of an Appellate Decision Maker

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# Appeals

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Parties will 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

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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

# Prohibited Conduct: Definitions & Jurisdiction

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# Key Categories of Prohibited Conduct

## Sexual Misconduct

Dating Violence

Domestic Violence

Sexual Exploitation

Sexual Harassment

Stalking

Nonconsensual Sexual Contact

Nonconsensual Sexual Penetration

# Dating Violence

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**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

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**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

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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

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**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

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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

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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)

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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)

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**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

## Sexual Misconduct

- 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

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

# Overview of the Complaint Process

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# Formal Complaint §106.30

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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

# Complaint Process

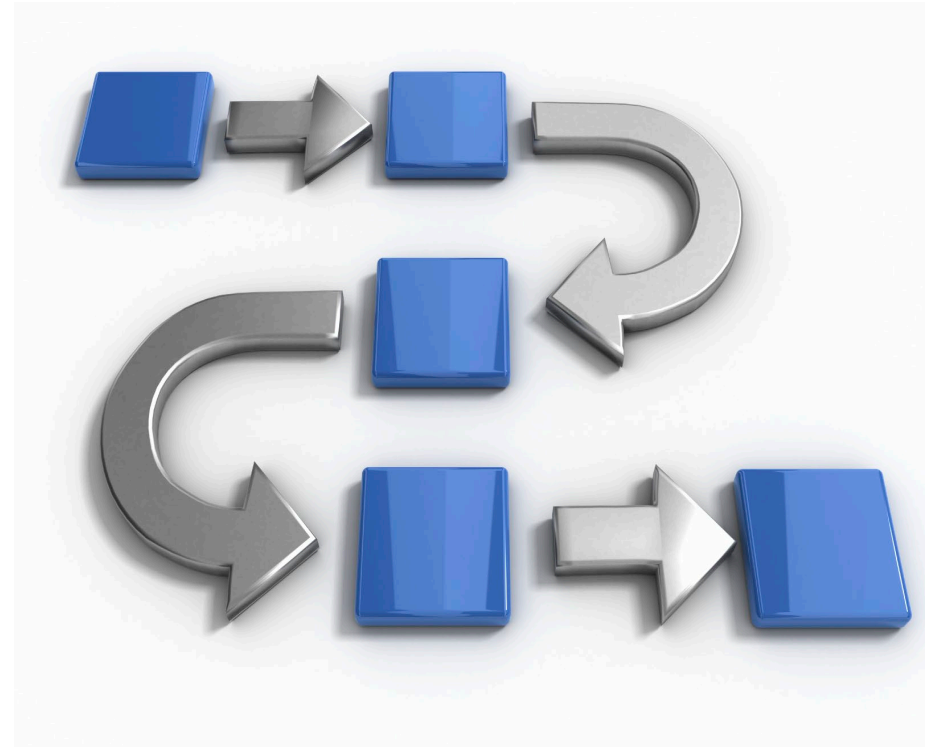
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A report of misconduct has been made

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

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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)

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## 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

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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

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# Advisors

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## 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)

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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)

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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)

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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



# Formal Adjudication

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# Adjudication Processes

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## 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

# Hearing Officer

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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

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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)

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## 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

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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

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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

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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)

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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

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**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)

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## 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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# Questions?

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