

Appellate Officer Training

Equity and Compliance Programs
Spring 2023

Overview

In this training, we will learn about:

- Title IX and Georgia Tech's Sexual Misconduct Policy
- The Formal Grievance/ Hearing Process
- The Appellate Process
 - Appellate Officer Responsibilities
 - Avoiding prejudgment, bias and conflict of interest
- Practice Scenario

Title IX Administration in Equity & Compliance Programs



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Content Warning

The presentation content contains scenarios, topics and descriptions that may be offensive or triggering.



What is Title IX ?

37 words...

Title IX of the Education Amendments of 1972

“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 educational program or activity receiving federal financial assistance. . . . ”



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

What is Title IX sexual harassment? Conduct on the basis of sex that is:

Quid pro quo harassment

Hostile environment harassment

Sexual Assault

Dating/Domestic Violence

Stalking

Georgia Tech's Sexual Misconduct Policy

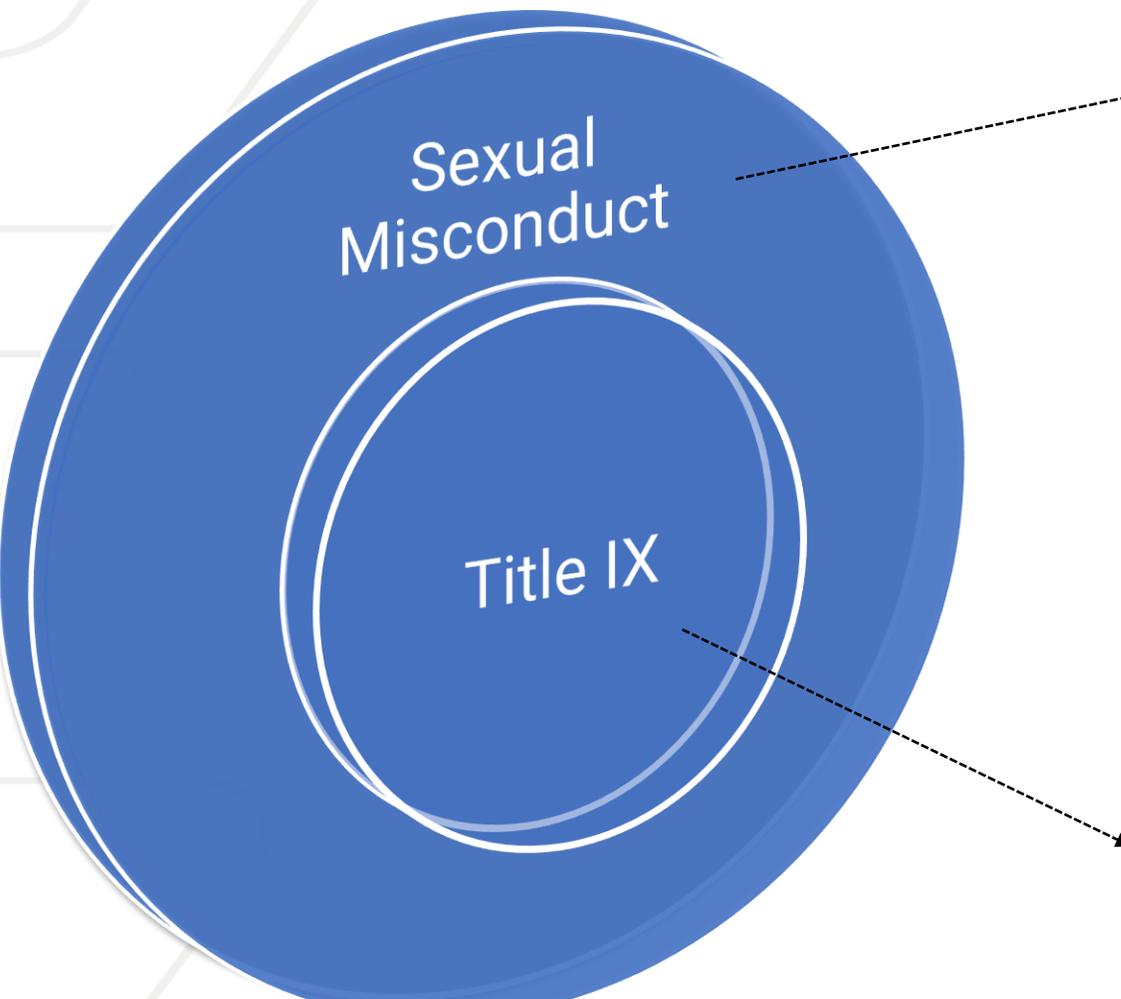
Prohibits Sexual Misconduct, an **Umbrella term** for any unwanted sexual attention, contact, or activity that occurs without consent such as:

- Dating Violence and Domestic Violence;
- Nonconsensual Sexual Contact;
- Nonconsensual Sexual Penetration;
- Sexual Exploitation;
- Stalking;
- Sexual Harassment (*student on student, other than student on student*)



<https://policylibrary.gatech.edu/student-life/sexual-misconduct>

Comparing Title IX & Sexual Misconduct



Sexual Misconduct

- Prohibited Conduct as defined in the Georgia Tech Sexual Misconduct Policy
- Includes conduct that occurs on or off campus
 - Accused must be a current GT Student or Employee

Title IX

- Prohibited Conduct defined as Title IX Sexual Harassment
- Includes conduct that occurs in an Institution's educational program or activity
 - Must occur in the United States
 - Complaining party must be participating or attempting to participate in an education program or activity at Georgia Tech
- Georgia Tech must have substantial control over the accused

The Grievance Process

Formal Grievance Process



Equity and Compliance Programs

Supportive measures are available to all parties throughout the duration of this process.

Report received

Outreach to impacted individual with offer of support services/information on additional reporting/grievance options

Initial meeting with ECP Staff

Individual declines to meet/does not respond

Support services requested are reviewed and implemented.

Case closed

Assessment

If complaint doesn't meet policy requirements, it may be dismissed or referred for review under other Institute policy.

Formal complaint filed

No formal complaint filed, resources/services provided.

Complaint reviewed

Case closed

Respondent notified of allegations/investigation and offered resources

Investigation Period

Investigator assigned to question parties, witnesses, gather evidence

Draft summary of relevant information is shared with named parties.

Opportunity for informal resolution

Investigator finalizes report after consideration of feedback/responses from parties.

Final report sent to all parties.

Adjudication Period

Hearing scheduled

Final report sent to decision-makers

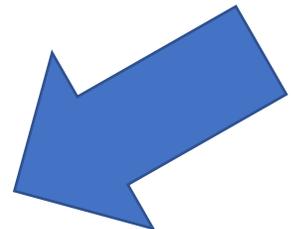
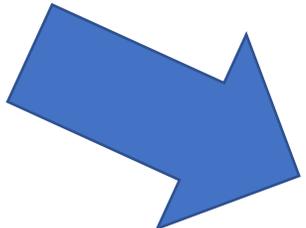
Opportunity to appeal

If no appeal, decision is final and case closed.

Decision

First level of appeal

Second level of appeal: President/Designee



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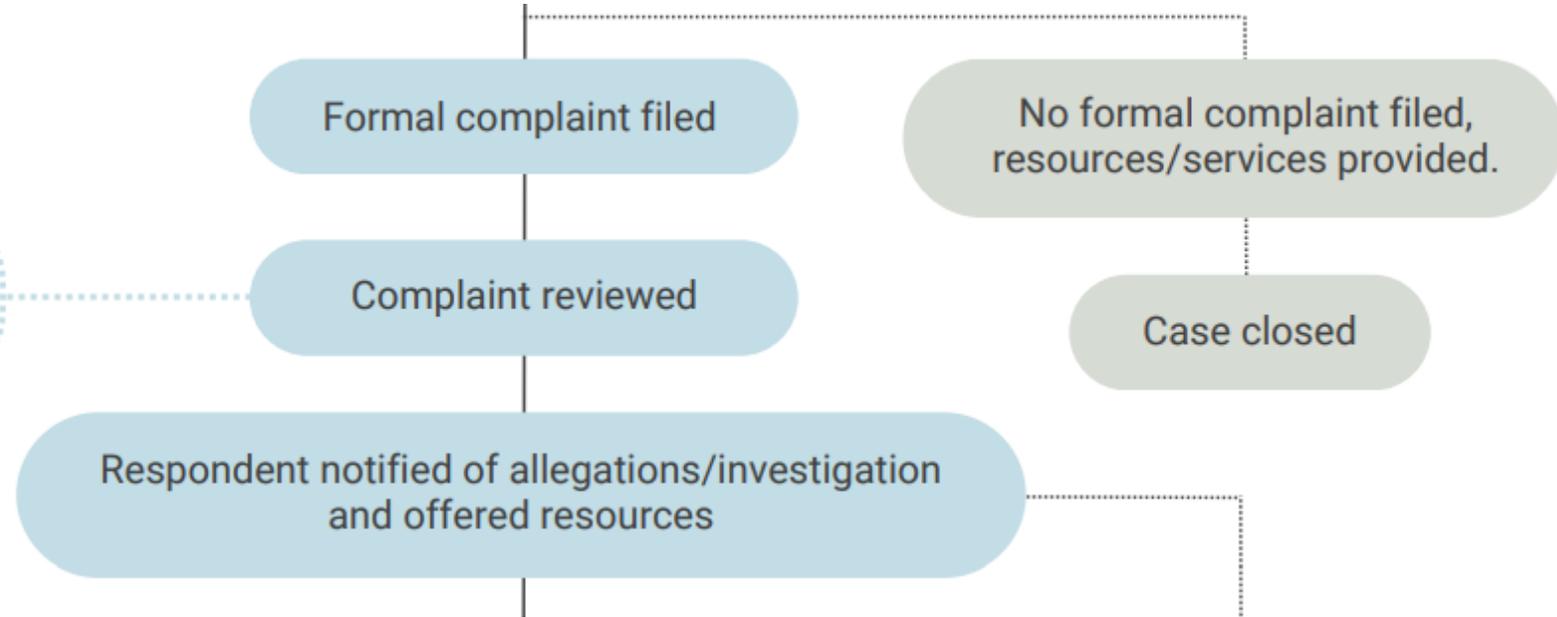
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President/Designee

The Appeal Process

Primary Functions of an Appellate Officer

- Be a neutral decision maker who gives a fair and unbiased review of the matter
- Be familiar with the GT Sexual Misconduct Policy and Formal Grievance process
- Review the information provided in appeals packet
- Catch errors and ensure that the underlying investigation and adjudication process was fair and thorough.



Appeal Process

The Institute must offer both parties an appeal from a determination regarding responsibility – Responsible/Not Responsible

- Offered to Complainant
- Offered to Respondent

The party seeking appeal must submit the appeal

- In writing
- within 5 business days of the written decision issued to the parties

34 CFR 106.45(b)(8)

Student Appeals

Appeal submitted to the Office of Student Integrity for processing

1st Level:

- Associate Vice President/Dean of Students or Designee
- Decision issued within a "reasonable time period," typically 10 business days

2nd Level:

ONLY FOR MATTERS THAT RESULTED IN/COULD HAVE RESULTED IN SUSPENSION OR EXPULSION

- Must be submitted within 5 business days of issuance of appellate decision
- To the President or Designee
- Designee is normally the Vice President for Student Engagement and Well-Being but can be others in case of conflict or unavailability
- Decision issued within a "reasonable time period," typically 10 business days.
- This represents the final Institutional Decision.
- Sanctions, if imposed and upheld, take effect

3rd Level:

- Discretionary appeal to BOR

Employee Appeals

Appeal submitted to Hearing Coordinator – Human Resources ("HC_HR") for Processing.

- HC-HR notifies non-appealing party of appeal and provides copy of appeal to non-appealing party
- Non-appealing party is given 5 business days to submit a response

Staff

Faculty

1st Level:

Chief Human Resources Officer

1st Level:

Provost

Appellate decision shall be simultaneously issued in writing to the Complainant and the Respondent within a reasonable period, usually not exceeding twenty (20) business days, with a copy to the Title IX Coordinator.

2nd Level:

President

- Appeal must be submitted to HC-HR w/i 5 business days of 1st Level decision
- HC-HR notifies non-appealing party of appeal and provides copy of appeal to non-appealing party
- Non-appealing party is given 5 business days to submit a response

- President's decision shall be simultaneously issued in writing to the parties within a reasonable period, usually not exceeding twenty (20) business days, with a copy to the Title IX Coordinator.
- Final Decision of the Institute

3rd Level:

- Discretionary appeal to BOR

Appeal Packet (Student)

- Academic/Non-Academic Routing Slip
- Includes general information such as the student's name, the date the appeal was sent out, the date the appeal is due, whether the student has disciplinary history, reasons for the appeal, and a section for the appellate officer's decision.
- Student's Appeal to the Dean
- Incident Report
- A brief summary of the case
- Hearing Packet
- Student's Disciplinary History (if applicable)



Appeal Packet (Employees)

- Includes general information such as the Employee's name, the date the appeal was sent out, the date the appeal is due
- Employee's Appeal
- Incident Report
- A brief summary of the case
- Hearing Packet
- Employee's Disciplinary History (if applicable)



3 Bases for Appeals

1. **New information** or evidence that was not available at the time of the original hearing
2. **Procedural Error** that may have substantially impacted fairness or the outcome
3. **Finding inconsistent** with weight of information

**Appeals are not a do-over. There are limited bases on which a party can appeal.

(1) Grounds for Appeal: New Information/ Evidence

- Evidence or information that was **not known or knowable** to the person appealing **during the time of the investigation (or hearing)**; and
- That could affect the outcome of the matter ("**new information that is sufficient to alter the decision**")
- Could include evidence not found by investigator

Appeal officers should determine:

- (1) Was this information **not reasonably available at the time** of the hearing?
- (2) Would the new information be **sufficient to alter the decision**?

(2) Grounds for Appeal: Procedural Error

Procedural error within the **hearing process** that may have **substantially impacted** the fairness of the hearing (or appeal).

The procedural error must be material, meaning it had the potential to impact the outcome.

Examples:

- A failure to follow the Institute's procedures;
- A failure to objectively evaluate all relevant evidence, including inculpatory or exculpatory evidence;
- A determination regarding what evidence was excluded as irrelevant -- Did the Decision Maker improperly exclude any hearing questions that could have impacted the outcome?
- Conflict of interest or bias -- Was the decision tainted by a conflict of interest or bias on the part of the Title IX Coordinator, Conduct Officer, investigator(s), and/ or decision makers(s).

(3) Grounds for Appeal: Finding is inconsistent

- The finding was inconsistent with the **weight of the information**.
- This is one of the most commonly used basis for an appeal.

Appellate officers should:

- (1) Examine the information the appellant provides that addresses why the finding is inconsistent; and
- (2) Keep in mind the appeals process is designed to ensure the investigation and adjudication process was fair and thorough and is not an opportunity to second guess a decision, absent material error.

slido



The Complainant has submitted an appeal and contends that the investigator failed to interview two out of the ten witnesses who have knowledge of the alleged prohibited conduct.

Does this appeal have a legitimate basis?

① Start presenting to display the poll results on this slide.

What are your next steps?

Appeals are:

- a review of the record only
- no new meeting with the Respondent or any Complainant is required

Appellate Decision Maker's Options:

- (1) **Affirm** the original sanction and finding
- (2) **Affirm** the original finding but **issue a new sanction** of greater or lesser severity
- (3) **Remand** the case back to any lower decision maker/investigator to correct a procedural or factual defect
- (4) **Reverse or dismiss** the case if there was a procedural or factual defect that cannot be remedied by remand.

When may you remand?

Appeals granted for **procedural error** or **new evidence** should be remanded back to the original investigator and/or decision-maker (hearing panel or adjudicator) for reconsideration.

Appellate Decision Maker should:

- Provide rationale and specific instructions defining the scope of the issues.
- Include instructions for returning the case to the appellate Decision Maker, if appropriate (e.g., revised findings)
- Appeal Decision Maker makes a final determination.

When may you order a new hearing?

In rare cases where a procedural error cannot be cured (as in cases of bias) the appellate decision maker may order a new hearing.

- May prescribe a new decision-maker
- Decisions from any new hearing may be appealed

Note: Where an appeal results in reinstatement of privileges for a Respondent, all reasonable attempts should be made to restore the Respondent to his or her prior status.

Avoiding prejudice, bias and conflict of interest

Serving Impartially

- Impartiality is essential to the sexual misconduct grievance process. To serve impartially means to:
 - ❖ **Avoid prejudging** the facts at issue;
 - ❖ Be free from actual, perceived or potential **conflicts of interest**; and
 - ❖ Recognize and **avoid bias** that can cause prejudgments and lead to improper decisions.
 - ❖ Bias/ Conflict of Interest for or against Complainants or Respondents generally or for or against an individual Complainant or Respondent.

Avoid Prejudgment of the Facts at Issue

- Prejudgment refers to forming an opinion about a situation or person before knowing or considering all the facts. It often occurs when allegations involve sexual conduct, sexual history, and alcohol or other drug use.
- Sex stereotypes often lead to prejudgment and are to be avoided. An example of a sex stereotype is a belief men cannot be sexually assaulted.

What is a Conflict of Interest?

- When an individual has a material connection to a dispute, or the parties involved, such that a reasonable person would question the individual's ability to be impartial
- May be based on prior or existing relationships, professional interest, financial interest, prior involvement, and/or nature of position

What happens when an appeal officer has a conflict?

When does a Conflict of Interest Disqualify You?

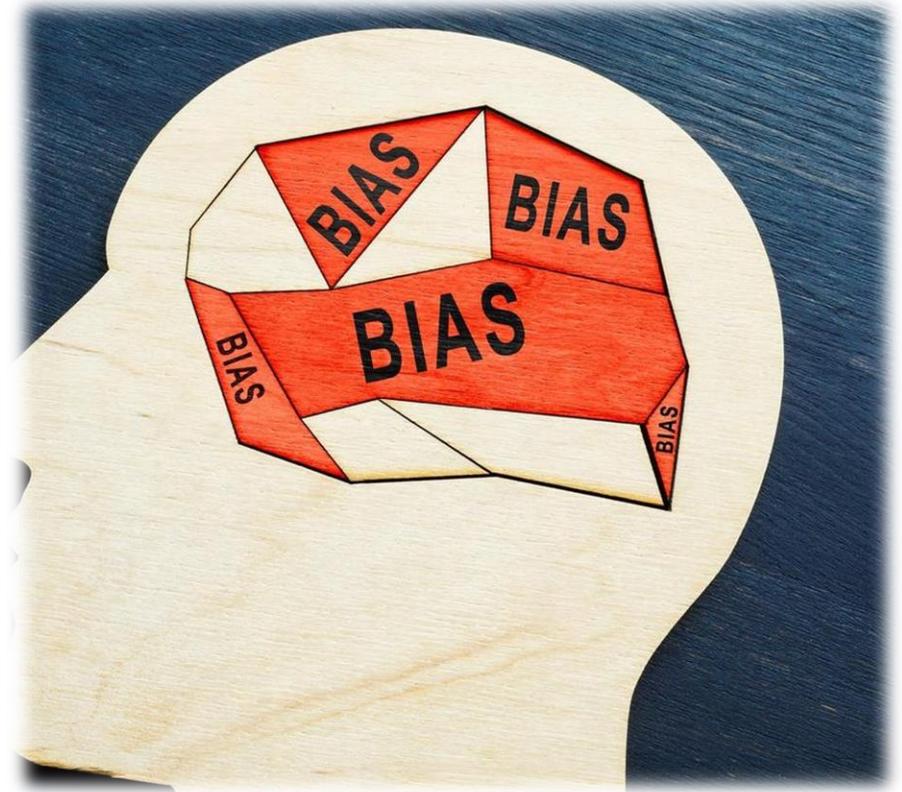
- When it prevents you from being able to impartially participate.
- An appeal officer with a conflict should not hear the appeal.
- All perceived, actual, or potential conflicts of interest should be immediately disclosed to the Hearing Coordinator and Title IX Coordinator.

What is Bias in the TIX Context?

Bias/ Conflict of Interest for or against Complainants or Respondents **generally** or for or against an **individual** Complainant or Respondent.

"Bias" is a prejudice or tendency of belief in favor of or against someone. It is based on stereotypes and not actual knowledge of the individual or a particular circumstance.

Biases are harmful because they can lead to prejudgments and discriminatory practices.



Recognizing Bias

- Biases are often “**implicit**,” meaning we have attitudes towards people or associate stereotypes with them without our conscious knowledge. You cannot rely on sex stereotypes – typical notions of what men or women do or do not do – when serving on a hearing panel or acting as an appellate decision maker.
- Understanding bias is particularly important in the Title IX/Sexual Misconduct context because:
 - Most evidence is circumstantial rather than direct
 - There are stigmas associated with sex, alcohol, and drugs
 - Improper sex-based bias prevents reliable outcomes
 - There are also potential biases related to economic status, gender, race/ethnicity, and academic standing

Drafting Appeal Decisions

What should appellate decision makers be considering when reviewing and drafting appeal decisions?

- Understand the applicable grounds for appeal
- Have an open mind (objectively make a determination as to whether the grounds for appeal have been established)
- Address all claims raised (each point) and articulate why they did/did not necessitate the outcome requested (ex., new hearing, or the findings be overturned)
- Be guided by applicable policy and facts

Sexual Harassment Cases are Confidential

- Sexual harassment cases should be treated as confidential by the Institute, with information shared only as necessary

As an appellate Decision Maker, you must maintain the confidentiality of the process and not disclose information to any third-party except as the process itself requires

- Records containing student information are subject to FERPA protection
- The Title IX regulations contain an express preemption, permitting FERPA-protected material to be used only as required by Title IX itself

Appellate Scenario

Respondent Jones appeals a finding that she violated the GT Sexual Misconduct Policy by repeatedly grabbing and massaging the buttocks of Complainant Smith without their consent. Respondent Jones instead contends that she did not touch Complainant Smith.

Respondent Jones appeals the finding on the following grounds:

- Respondent Jones states that there is new evidence available from Witness Miguel. Respondent Jones contends that Witness Miguel was “off the grid” on a backpacking trip in Europe at the time of the investigation and hearing. Respondent Jones further explains that Witness Miguel was the only other witness in the room at the time and will testify that she did not grab or massage the buttocks of Complainant Smith.
- Respondent Jones states that the hearing officer had a conflict of interest because she is the faculty advisor for an RSO that Complainant Smith participates in.

Appellate Officer Tips

- Be thorough in your decision letters, address all grounds of the appeal and explain the reason behind your decisions
- Do not hesitate to give our office a call for any questions you may have regarding process

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