Title IX/Sexual Misconduct Hearing Panelist and Advisor Training

Presented by:
Alisha Carter Harris, M.S. Interim Title IX Coordinator

Danielle Lynch, J.D, MSCM, CAAP
Equal Opportunity & Compliance Investigator

Reona Blankumsee, M.S. Equal Opportunity & Compliance Investigator

Kendra Brown Stewart, J.D. Assistant Title IX Coordinator

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Content Advisory

The content and discussion in this course will necessarily engage with sex- and gender-based harassment, discrimination, violence, and associated sensitive topics that can evoke strong emotional responses.

This training may provide examples that emulate the language and vocabulary that Title IX practitioners may encounter in their roles including slang, profanity, and other graphic or offensive language. It is not used gratuitously, and no offense is intended.

Title IX Compliance Overview



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Title IX and Equity

- Title IX is a sex and gender equity law
- Equity refers to the understanding that not all individuals have access to the same resources and opportunities
  - Equity focuses on providing support and resources to reduce disparities in access to the education program
  - Title IX seeks to remedy the inequities created by sexual harassment and sex discrimination
- Ensuring that each complaint is heard by one or more unbiased Decision-makers supports is essential for providing an equitable grievance process

Essential Compliance Elements

The requirements to **Stop, Prevent, and Remedy** guide the institution's equity and compliance work

1

STOP discriminatory conduct

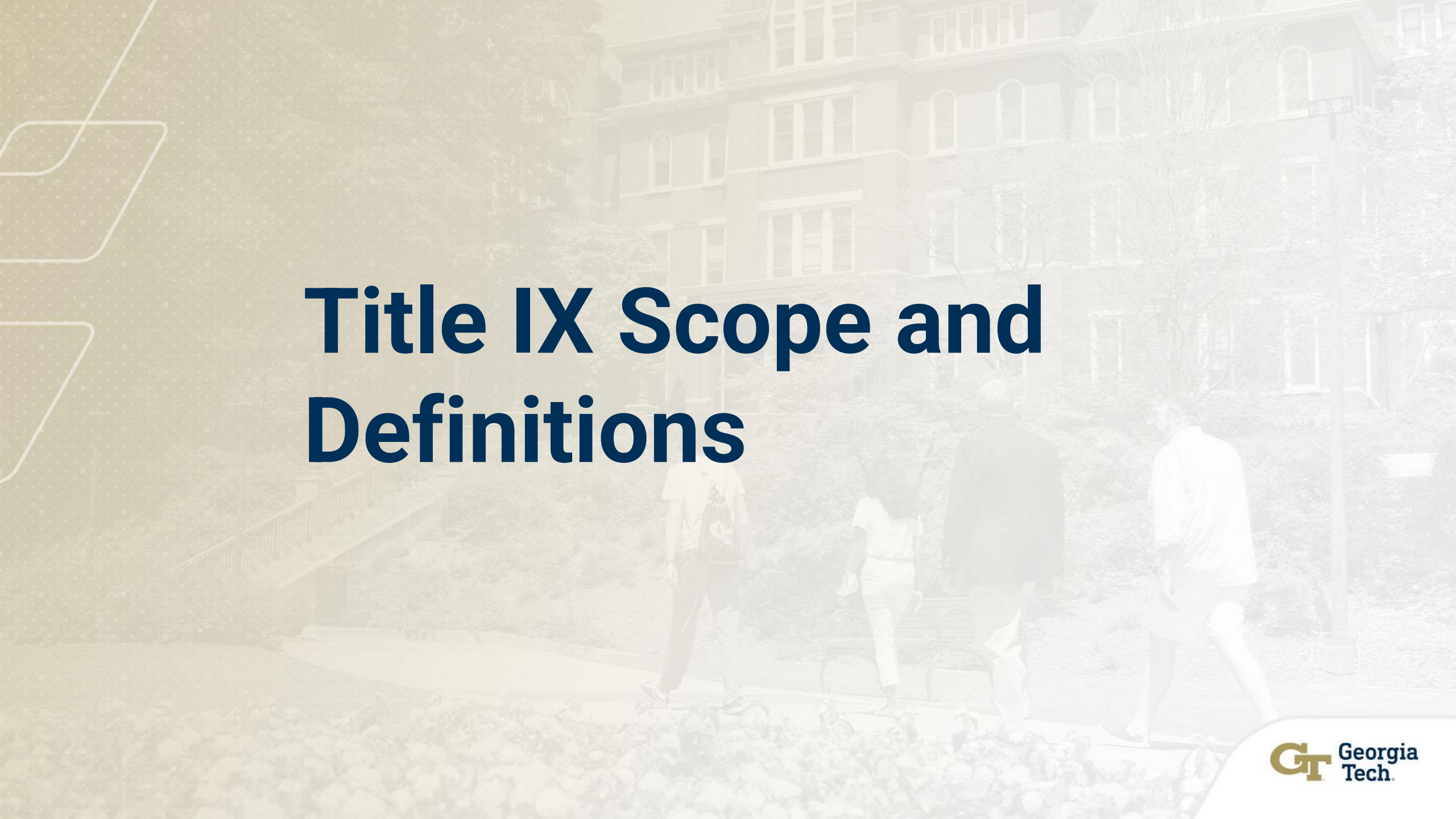
2

PREVENT recurrence, on both individual and institutional levels

3

REMEDY the effects of discrimination, for both the individual and the community

Title IX Scope and Definitions



Applicability

- Education program or activity in the United States
- Control over the Respondent
- Control over the context of the alleged behavior
- Applies to both student and employee complaints



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Sexual Misconduct Definitions

Title IX Sexual Harassment

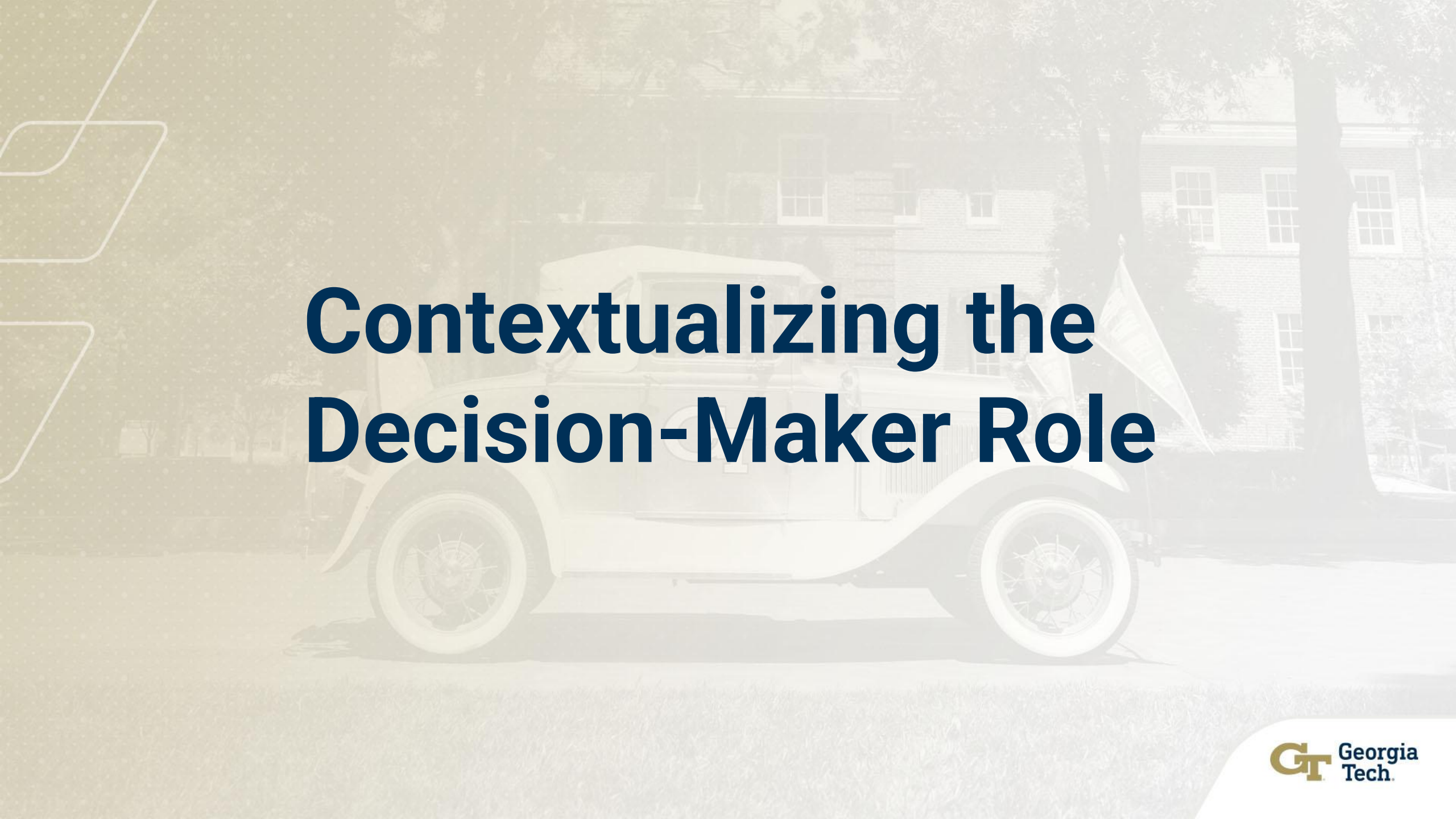
- Quid Pro Quo
- Hostile Environment
- Sexual Assault
- Dating Violence
- Domestic Violence
- Stalking

Other Related Definitions

- Retaliation
- Nonconsensual Sexual Penetration
- Nonconsensual Sexual Contact
- Sexual Exploitation

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Contextualizing the Decision-Maker Role



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1 INCIDENT

- Complaint/ Notice to TIXC

2 INITIAL ASSESSMENT

- Jurisdiction
- Dismissal
- Supportive Measures
- Emergency Removal
- Referral to Another Process
- Informal/Formal Resolution

3 FORMAL INVESTIGATION

- NOIA
- Interviews
- Evidence Collection
- Draft Report
- Share Draft & Evidence
- Review/ Comment
- Final Report

4 HEARING

- Questioning
- Credibility Assessment
- Determination and Rationale
- Sanctions
- Remedies

5 APPEAL

- Appeal Grounds
- Determination and Rationale

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Title IX Grievance Process Overview

Prompt Resolution

- Complete without undue delay
- Title IX regulations do not define “prompt”
  - 60-90 business days is a good guide
- Grievance process may take longer than expected
  - Anticipate, mitigate, and document delays
  - Communicate with parties regarding delays

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Decision-Making Under Title IX

- Decision-maker (DM) could be a single person or a panel (typically three)
  - Institutional community members (typically faculty or staff) or external contractors
- All institutions must hold a live hearing
  - DM can ask relevant questions
  - Advisors can ask relevant questions on behalf of parties
- TIXC and Investigator may not serve as Decision-maker

Decision-Maker Mission and Role

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Decision-Making Oversight

Title IX Coordinator

- Oversees process and serves as resource
- Facilitates scheduling and communication
- Ensures sanction compliance
- Implements remedies
- Provides institutional memory and precedent information
- Trains and appoints Decision-makers
- Maintains institutional records

Decision-Maker(s)

- Facilitates Decision-making process, including questioning
- Determines relevance
- Assesses credibility
- Makes a finding of fact
- Determines whether policy was violated
- Assigns sanctions (if applicable)
- Writes determination rationale

Decision-Maker Role and Responsibilities

- Decision-makers have **no side**, other than the **integrity of the process**
- DM must have a thorough understanding of:
  - Institutional policy and procedures, including the investigation process
  - Whether the determination is for an alleged incident(s), a pattern, or a culture/climate complaint, and what findings are necessary based on that footing
  - Best practices for asking relevant questions
  - Decision-making procedures and management
  - Evidence: how to weigh it and apply it to institutional policy by the standard of evidence
  - How to analyze credibility
  - How to make determinations, decide sanctions/remedies, and write a rationale

Due Process

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Due Process in Procedure

- Consistent, thorough, and procedurally sound review of all allegations
- Substantial compliance with written policies and procedures
- Policies and procedures afford sufficient rights and protections to satisfy mandates of all applicable laws
  - Clear, written notice of the allegations
  - Opportunity to present witnesses and evidence and be heard by the Decision-maker

Due Process in Decision-Making

A decision must:

- Be appropriately impartial and fair (both finding and sanction)
- Be neither arbitrary nor capricious
- Be based on a fundamentally fair rule or policy
- Be made in good faith (i.e., without malice, ill-will, conflict, or bias)
- Have a rational relationship to (be substantially based upon, and a reasonable conclusion from) the evidence

Due Process in the Grievance Process

Rights of the parties during the Title IX grievance process:

- Present witnesses, including expert witnesses
- Present all inculpatory and exculpatory evidence
- Discuss the allegations under investigation without restriction
- Gather and present relevant evidence without restriction, including expert sources
- Be accompanied by and confer with Advisor of choice
- Written notice of the date, time, location, participants, and purpose of investigation interviews or other meetings, with sufficient time to prepare

Due Process in the Grievance Process

Rights of the parties during the Title IX grievance process, continued:

- Inspect and review directly related evidence and investigation report
- Conduct cross-examination, if desired, through the Advisor
- Right to explanation of any ruling that a question is not relevant
- See/hear all evidence the DM may rely upon in their decision
  - Right to review and comment on that evidence to the DM
- Access to recording of any hearing
- Receive a written rationale explaining the basis for the DM's decision
- Appeal

Notice of Allegations

- The Notice of Allegations ("NOA") is critical to fundamental fairness and due process
- The NOA lists the rights of the parties in the grievance process, in addition to:
  - Known details of allegations, such as identities of the parties
  - A description of the alleged conduct and relevant policy provisions
  - The date and location of the alleged conduct
  - Information about grievance procedures
  - Any Informal Resolution options
  - Presumption of non-responsibility
  - Prohibition on retaliation and false statements
- May need to update NOA during process

Conflicts of Interest and Bias



Conflicts of Interest and Bias

- Decision-makers must **not have a conflict of interest or bias** for or against the following:
  - Complainants, generally
  - Respondents, generally
  - The parties involved with a complaint
  - Subject matter or details of the complaint itself
- Consider a perception of a conflict or bias, even if none exists in fact
  - Not required, but TIXC may choose to substitute a DM based on perception alone

What's the Difference?

Conflict of Interest

- Refers to situations in which:
  - An actual (or perceived) clash,
  - Between the DM's role and
  - A current or previous relationship/situation with one of the parties
  - That prevents neutrality or objectivity

Example: A Residence Life Director serving as DM for a complaint filed by one of their Resident Assistants

Bias

- Refers to prejudice for or against **a person or group,** or an unwillingness/inability to be influenced by factual evidence
  - A preference or tendency to like or dislike
  - Implicit or explicit
  - Can be intentional, but generally unintentional or at least unconscious

Example: A DM who believes Respondents cannot be trusted to tell the truth

Identifying and Correcting Bias

Strategies to mitigate bias:

- Consider hearing panels vs. individual DM
- Ask panel members to review each other's questions in advance
- Comply with institutional policy and procedure
- Identify evidentiary gaps and seek relevant evidence to fill gap
- Review rationale as part of all panel members' responsibilities
- Ensure TIXC reviews the rationale
- Be conscious of own biases
  - Counteract them and ensure they do not influence decisions

DM Skills and Practical Application



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Working with Advisors

- Parties have the right to be accompanied by an Advisor of their choice
  - Could be an attorney, but need not be
- Parties may request that the institution provide an Advisor for hearing
  - Institution may choose to appoint earlier in process
- DM may establish equitable ground rules for participation if they do not interfere with any party rights
- Set and communicate reasonable expectations for Advisor participation

Initial Materials Review

- DMs should take time to review all available documentation and evidence prior to making a determination
- Review should consist of:
  - Complaint
  - NOIA
  - Applicable policies
  - Relevant and not otherwise impermissible evidence
  - Investigation report

Materials Review

- **Review the materials multiple times**, focusing on areas of consistency and inconsistency
- **Consistency review:** note all areas of information consistency/alignment
  - No additional verification or questioning is likely needed on these issues
  - Begin to identify pieces of evidence that address the various policy elements
- **Inconsistency review:** identify information inconsistencies/disparities
  - DM compiles any remaining questions
  - DM identifies the pieces of evidence that address the various policy elements
  - DM's primary focus is resolving contested facts where possible

Policy Elements and Procedures

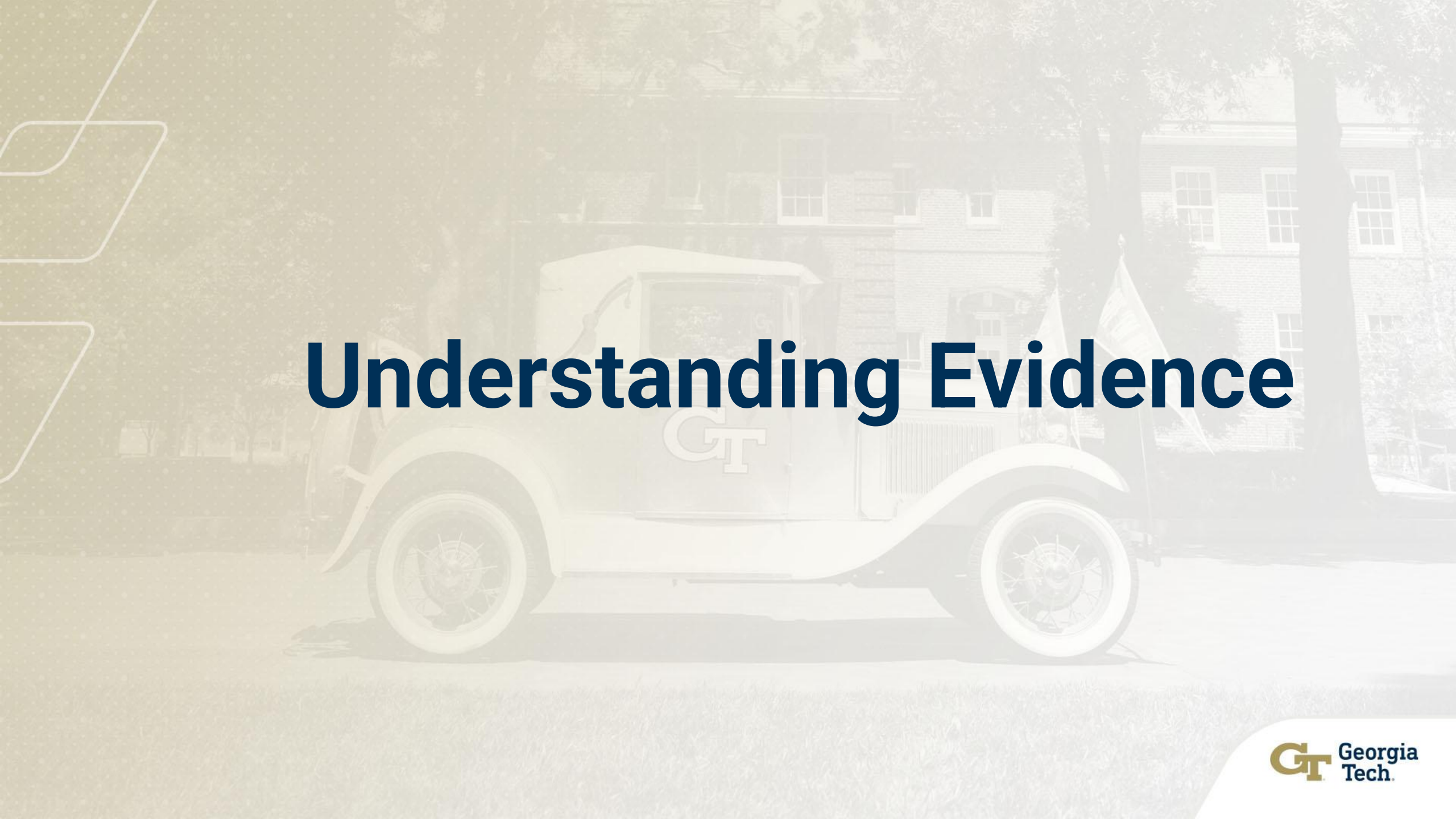
Policy

- What policies are alleged to have been violated?
- What are the elements of those policies?
- DMs will weigh and apply relevant evidence to determine whether a policy violation occurred

Procedures

- Review decision-making procedures to refresh previous training
- Note any procedural questions to ask the TIXC/legal counsel

Understanding Evidence



Understanding Evidence

DM must evaluate all relevant evidence

- **Evidence** is any kind of information presented to help determine what occurred
- **Relevant evidence** is evidence that tends to prove or disprove the underlying allegations
- **Directly related evidence** is connected to the complaint, but is neither inculpatory nor exculpatory



Types of Evidence

Documentary Evidence	Supportive writings or documents
Electronic Evidence	Photos, text messages, and videos
Real Evidence	Physical objects
Direct or Testimonial Evidence	Personal observation or experience
Circumstantial Evidence	Not eyewitness, but compelling
Hearsay Evidence	Statement from outside the interview presented as truthful
Character Evidence	Evidence of a person's character or character traits

Relevance

- Evidence is generally considered **relevant** when it helps determine:
  - Whether the Respondent violated policy, and/or
  - The credibility of any evidence, including a party or witness statement
- The Investigator initially evaluates relevance, but the DM ultimately decides
- All relevant evidence must be objectively evaluated and considered
  - **Inculpatory:** tending to suggest a finding of responsible
  - **Exculpatory:** tending to suggest a finding of not responsible
- In the decision-making phase parties may dispute the Investigator's initial relevance determinations

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Privileged and Medical Information

A party must provide permission to obtain and/or include:

- Evidence protected under a legally recognized privilege
- Records made or maintained by:
  - Physician
  - Psychiatrist
  - Psychologist



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Relevant Evidence Exclusions

- Evidence of the **Complainant's sexual predisposition** is never relevant
- Evidence of the **Complainant's prior sexual behavior** is not relevant except:
  - If offered to prove that someone other than the Respondent committed the alleged conduct; or
  - Specific incidents of the Complainant's prior sexual behavior with respect to the Respondent offered to prove consent
- Exclusions apply even if admitted/introduced by the Complainant
- Exclusions does **not** apply to Respondent's prior sexual behavior or predisposition, which are admissible if relevant

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Credibility Assessments

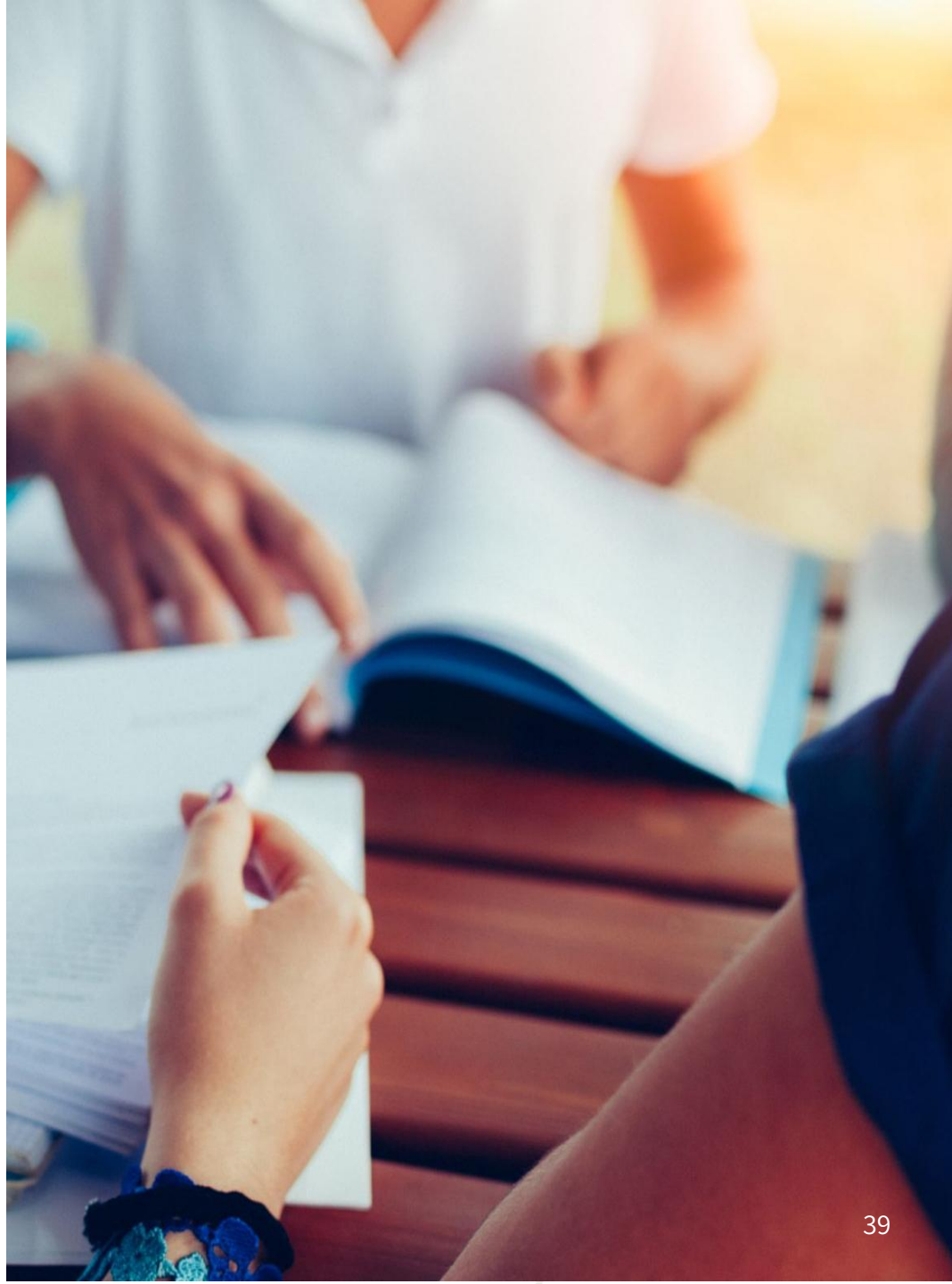
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Credibility Considerations

- Assessing and determining credibility is an important DM role
- Credibility is often a function of **corroboration and consistency**
- Credibility does **not** necessarily equate to honesty or truthfulness:
  - Believability does not equal truthfulness
- Credibility impacts the **reliability of evidence and its weight**
- Specific credibility issues that a DM may consider:
  - Relationships between the parties and witnesses
  - Whether a witness was exposed to information (e.g., in the case of a parent or Advisor) that may have influenced their testimony

Party and Witness Credibility

- **Credibility** impacts likeliness
  - Would a reasonable person do the same?
  - Are there more likely alternatives?
- **Credibility Assessment** involves evaluating whether evidence is believable and reliable
  - Refrain from focusing on irrelevant inaccuracies and inconsistencies
- **Note:** Memory errors alone do not necessarily diminish witness credibility, nor does some evasion



Credibility Factors

Corroboration

- Aligned testimony and/or physical evidence

Inherent Plausibility

- “Does this make sense?”
- Be careful of bias influencing your sense of “logical”

Motive to Falsify

- Do they have a reason to lie?

Past Record

- Is there a history of similar behavior?

Demeanor

- Do they seem to be lying or telling the truth?



Consent

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Definition: Consent

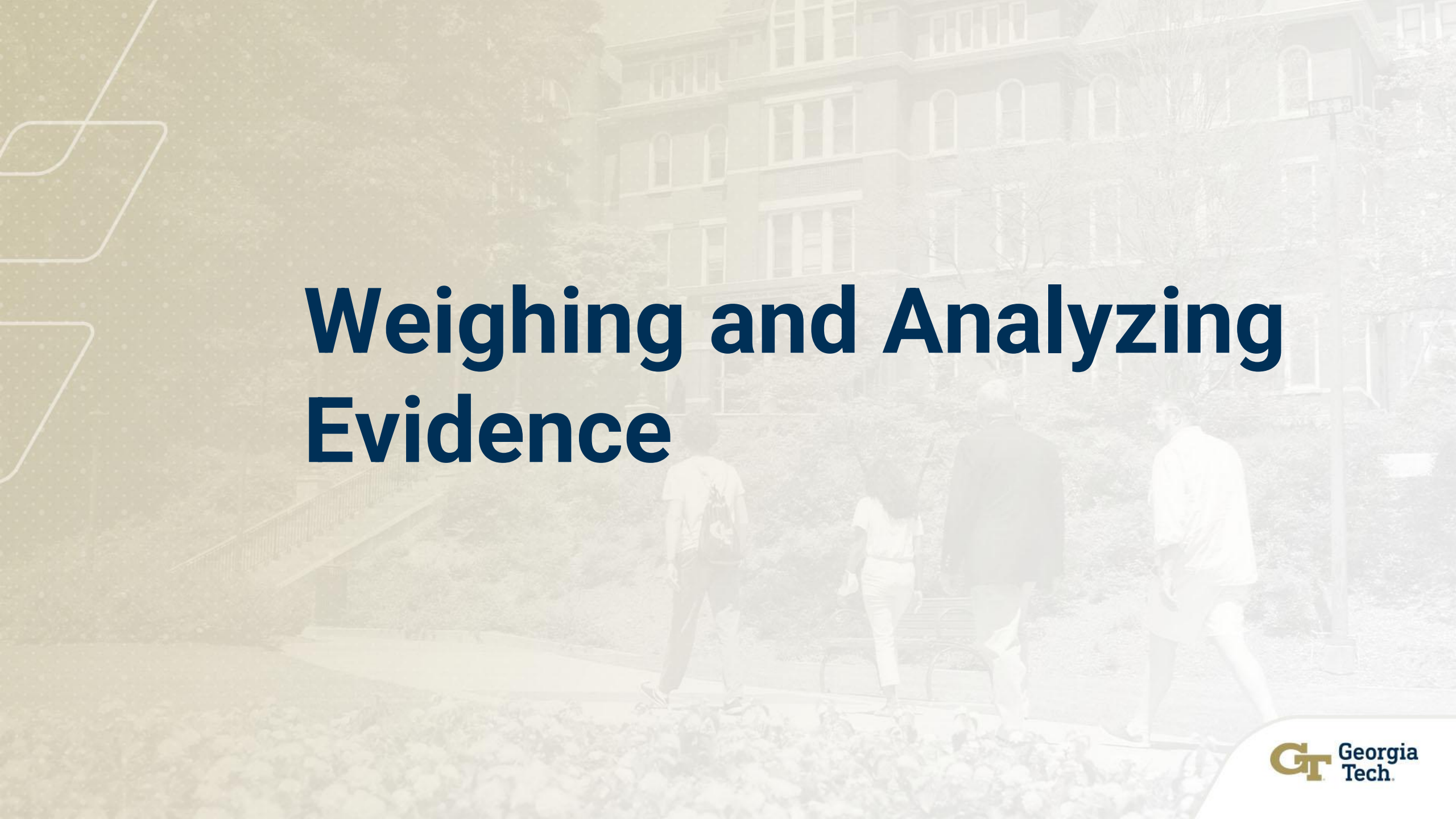
- **Consent** is not defined by the Title IX regulations, but institutions are required by law to provide a definition (some states prescribe a definition applicable in that state)
- Georgia Tech's Definition:
  - **Words** or **actions** that show a **knowing** and **voluntary willingness** to engage in **mutually agreed-upon sexual activity**. Consent cannot be gained by force, intimidation or coercion; by ignoring or acting in spite of objections of another; or by taking advantage of the incapacitation of another where the respondent knows or reasonably should have known of such incapacitation. Minors under the age of 16 cannot legally consent under Georgia law.
  - Consent is also absent when the activity in question exceeds the scope of consent previously given. Past consent does not imply present or future consent. Silence or an absence of resistance does not imply consent.
  - Consent can be withdrawn at any time by a party by using clear words or actions.

The ATIXA Consent Construct

1. **Force:** Did the Respondent use force to obtain sexual or intimate access?
2. **Incapacity:** Was the Complainant incapacitated?
   a. If so, did the Respondent know, or
   b. Should the Respondent have known that the Complainant was incapacitated
3. **Consent:** What clear words or actions by the Complainant gave the Respondent permission for each specific sexual or intimate act that took place as it took place?

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Weighing and Analyzing Evidence



Applying Facts to Policy

- DM must presume the Respondent is not in violation unless and until the standard of evidence is met
- The DM analyzes facts against each policy element to determine whether the Respondent violated policy
  - Written rationale will have to cite to specific evidence supporting conclusion
- Assess credibility of evidence and evidentiary weight
  - Assess statements as factual, opinion-based, or circumstantial
- Apply evidentiary standard to determine if policy has been violated
- Based only upon evidence in the investigation report or presented at the hearing

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DM Questioning Goals

- May ask questions to ensure a **comprehensive** understanding of information and evidence gathered during the investigation:
  - Including asking additional questions about relevant evidence regarding what happened during the incident(s)
  - DM does not have to ask questions but must have the opportunity to do so
    - If necessary to assess credibility, DM should ask
- **DM should use questions to:**
  - Resolve conflicting information as it relates to the policy elements
  - Elicit details, eliminate vagueness, fill in gaps

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Step One: Parsing the Policy

A key part of weighing and analyzing evidence is identifying the elements of each policy provision:

- **Stalking:**
  - Engaging in a course of conduct,
  - On the basis of sex,
  - Directed at the Complainant,
  - That would cause a reasonable person to:
    - Fear for their safety or the safety of others; or
    - Suffer substantial emotional distress

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Step Two: Applying Facts to Policy

Map relevant and credible facts to the applicable policy element

Policy Element:

- Engaging in a course of conduct

Facts:

- Complainant asserts Respondent followed Complainant to an off-campus party on October 1
- Respondent came to Complainant's residence hall room three times between October 5 and October 12
- Respondent denies following Complainant on October 1
- Witness corroborates Respondent knocked on Complainant's door several times in one week

Step Two: Applying Facts to Policy

Map relevant and credible facts to the applicable policy element

Policy Element:

- Directed at the Complainant:
  - That would cause a reasonable person to **fear for their safety**

Facts:

- Complainant alleged Respondent pounded on his door and yelled until an RA told her to leave
- Complainant alleged Respondent sent texts suggesting she was following him, and he should fear her
- Respondent produced texts that do not support Complainant's characterization
- RA witness asserts "pounded on her door and yelled" is an exaggeration

Making Findings, the Final Determination, and Sanctioning



Written Determinations

Finding

Whether the conduct occurred, by the standard of evidence

Final Determination

Whether the conduct proven to have occurred violates policy

Making a Finding and Final Determination

- Finding(s) must be based upon information gathered during the investigation and decision-making phases only
  - No outside information should influence decision-making
- Separate the **determination** from the **sanction**:
  - Do not use impact-based rationales for policy violation findings and determinations
  - Use impact-based rationales for sanctions only
    - Impact is **not** relevant to the policy violation question
  - Same with prior misconduct, unless a pattern is alleged/proven
- Institutions can identify a separate individual to determine sanctions **OR** permit the DM to determine sanctions, if any

Written Determinations

Written Determination

- Authored by Decision-maker(s)
- TIXC/Legal counsel reviews
- TIXC communicates to the parties simultaneously in writing
  - No FERPA concerns

Finality

- On the date the Recipient provides a written appeal determination
  - OR the date when an appeal would no longer be timely

Written Determination Elements

- Applicable policy
- Procedural steps from complaint through determination
- Statement of and rationale for the result of each specific allegation
- Finding and Final Determination
- Sanctions imposed (if any) and rationale for chosen sanctions or deviation from precedent
- Whether remedies will be provided to Complainant
- Procedures and bases for appeal

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Sanctions and Remedies

Sanctions

- Only implemented after a determination of responsibility
- Nexus between sanctions and misconduct
- Goal: stop, prevent, and remedy
- TIXC does not issue sanctions but oversees the process
- TIXC assures sanction compliance
  - Failure to comply could lead to discipline

Remedies

- May be implemented before or after a determination
- TIXC determines remedies that are equitable and not clearly unreasonable given the circumstances
- Goal: preserve or restore access to education program and activity
- TIXC ensures remedies are implemented for both Complainant and community

Determining Sanctions

- Primary purpose should stop, prevent, and remedy the discrimination
  - Each sanction should have a rationale
- DM may consider:
  - Nature and severity of the conduct, including the circumstances surrounding the violation
    - Aggravating or mitigating circumstances
    - Precedent, prior misconduct, proven pattern (if alleged), acceptance of responsibility, collateral violations, or multiple violations
  - The Respondent's disciplinary history
  - The need for sanctions or other responsive actions to stop, prevent, and remedy the discrimination, harassment, and/or retaliation
  - The impact on the parties
  - Any other information deemed relevant by the Decision-maker(s)

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Decision-Maker Notes and Drafts

- Decision-making creates opportunities to generate paperwork and paper trails
- Be judicious with notetaking, annotating, draft writing, and communication
- Anticipate that the parties could see DM work product:
  - Student FERPA inspection and review rights
  - Employee rights to personnel records
  - Litigation
- TIXC should provide guidance and clear expectations about saving work product, including personal notes

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Questions?

Contact us!
Kendra Brown Stewart: kendra.brown@gatech.edu
Alisha Carter Harris: aharris380@gatech.edu
Reona Blankumsee: reona.blankumsee@gatech.edu
Danielle Lynch: dlynch39@gatech.edu

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