
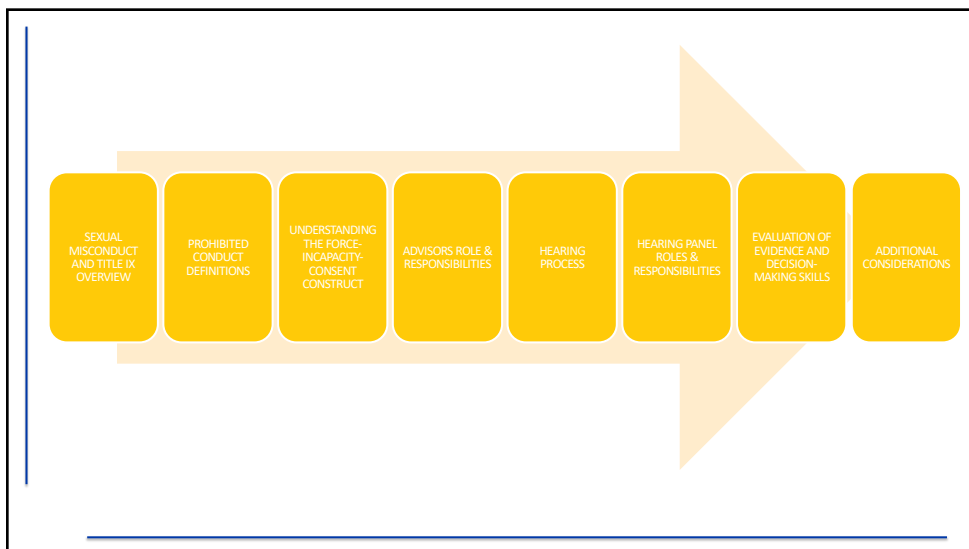


**Sexual Misconduct & Title IX  
Hearing Panelist Training**

Karin D. Vinson  
Title IX and Compliance Coordinator



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## Sexual Misconduct and Title IX Overview

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### Title IX Sex-Based Discrimination and Harassment

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. 20 U.S.C. § 1681 & 34 C.F.R. Part 106 (1972)

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## The Law- Title IX Issues

### Sex-Based Discrimination

- Program Equity
- Recruitment, Admissions, & Access
- Pregnancy
- Athletics
- Employment, Recruitment, & Hiring
- Extra-curricular Activities
- Housing
- Access to Course Offerings
- Salaries & Benefits
- Financial Assistance
- Facilities
- Funding
- Sex, Sexual Orientation, & Gender Identity

### Sexual Harassment

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

### Retaliation

- No recipient or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by title IX

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## Jurisdiction

### Sexual Misconduct

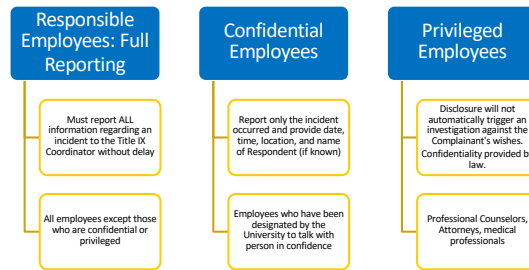
- Institution property
- FVSU-sponsored or affiliated events, or
- Off campus

### Title IX

- FVSU property,
- At FVSU-sponsored or affiliated event were the university exercises substantial control over both the Respondent and the context, or
- In buildings owned or controlled by a student organization that is officially recognized by FVSU

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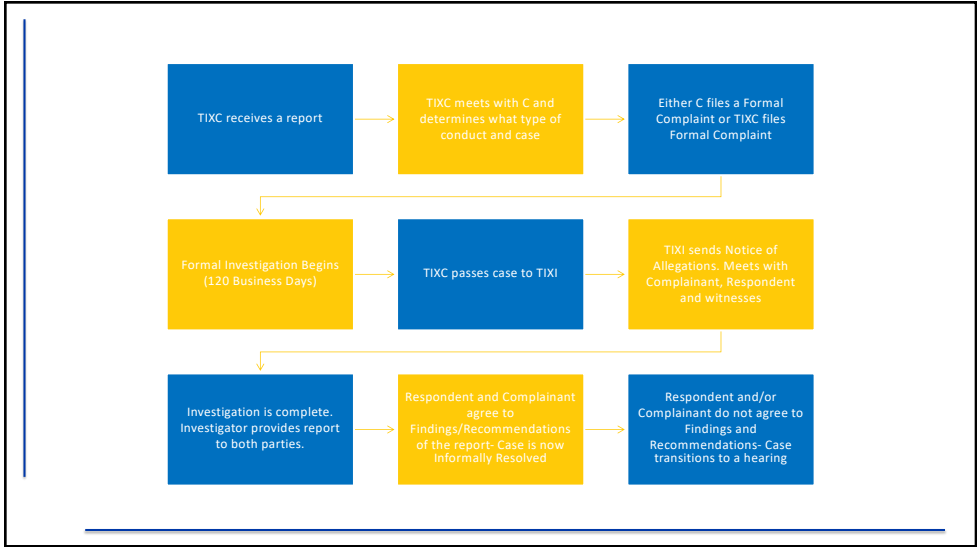
## Reporting responsibilities



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## Formal Complaint Process

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# Prohibited Conduct Definitions

## Sexual misconduct



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## Sexual Assault

Any sexual act directed against another person, without the consent of the Complainant including instances where the Complainant is incapable of giving consent.

- Rape
- sodomy
- Sexual assault with an object
- Fondling
- Incest
- Statutory rape

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## 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

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## 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
- a person similarly situated to a spouse of the complainant under the domestic or family violence laws Georgia;
- By any other person against an adult or youth complainant who is protected from that person's acts under the domestic or family violence laws of Georgia
- To categorize an incident as domestic violence, the relationship between the respondent and the complainant must be more than just two people living together as roommates. The people cohabitating must be current or former spouses or have an intimate relationship.

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## 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

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## 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

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## 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

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## 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

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## Title IX Sexual Harassment

Sexual harassment to include any of the three types of misconduct on the basis of sex:

1. An **Employee** conditioning the provision of aid, benefit, or service of the institution on an individual's participation in unwelcome sexual conduct (i.e. quid pro quo); or
2. 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
3. Sexual assault (as defined in the Clery Act), dating violence, domestic violence, or stalking as defined in VAWA

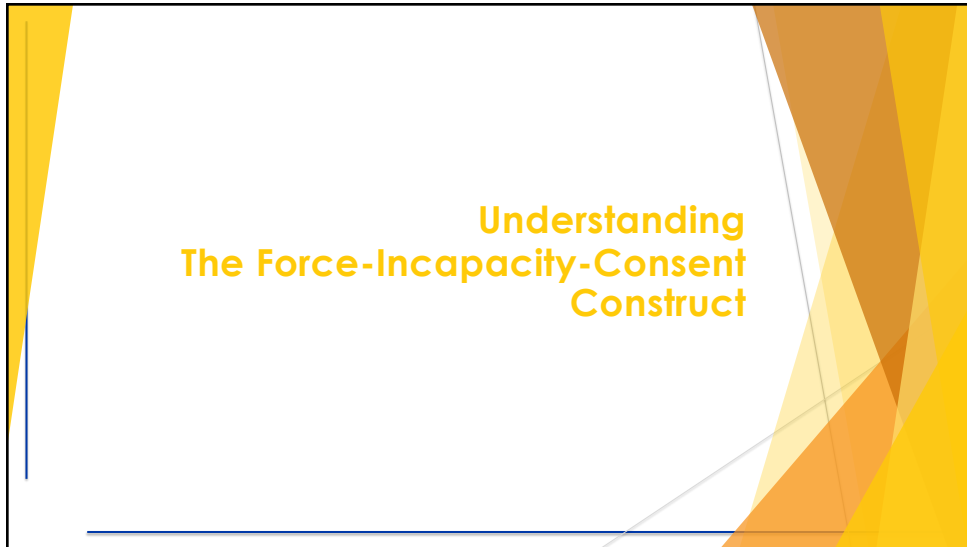
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## Retaliation

No recipient or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title IX or this part, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under this part...

Intimidation, threats, coercion, or discrimination, including charges against an individual for code of conduct violations that do not involve sex discrimination or sexual harassment, but arise out of the same facts or circumstances as a report or complaint of sex discrimination, or a report or formal complaint of sexual harassment, for the purpose of interfering with any right or privilege secured by Title IX or this part, constitutes retaliation.

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## Understanding The Force-Incapacity-Consent Construct

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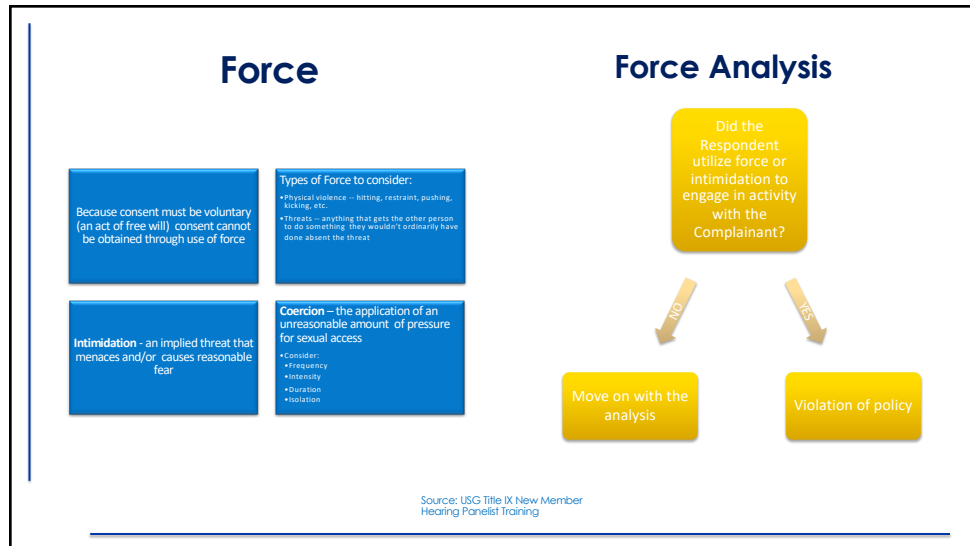
### Overview of the Construct

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?

Source: USG Title IX New Member Hearing Panelist Training

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## Incapacitation- Question #2

**Definition:**

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

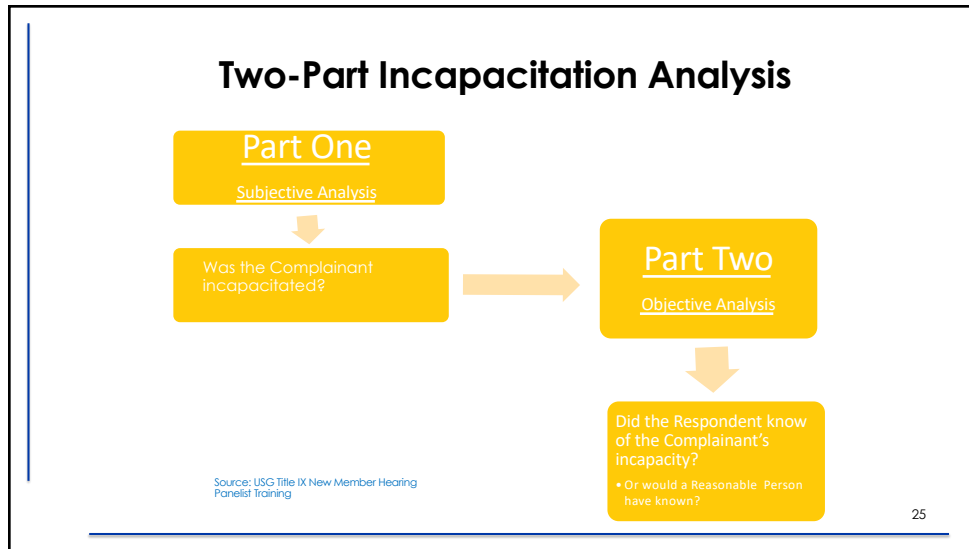
**Determining Incapacitation:**

Incapacitation is a determination that will be made after the incident in light of all the facts available

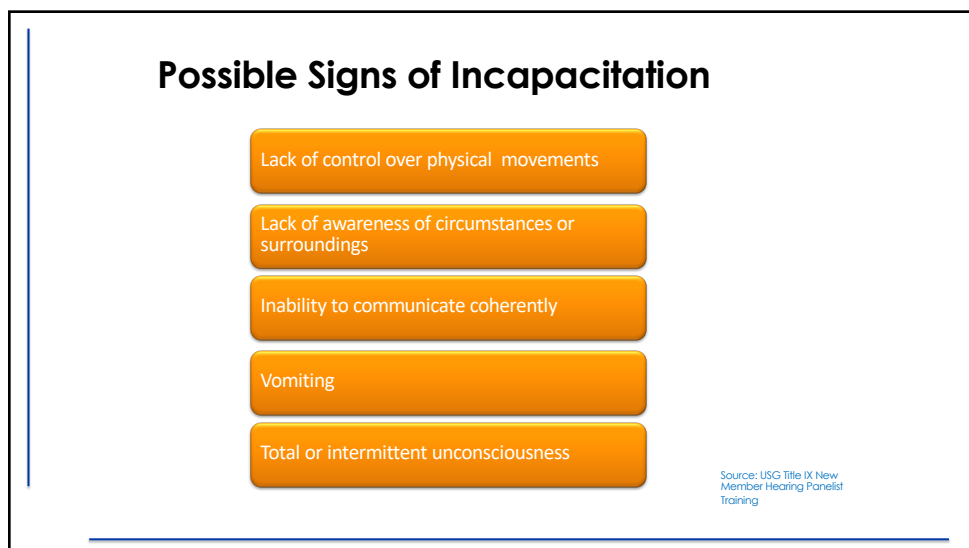
- Assessing incapacitation is very fact dependent analysis of the incident in question
- Various forms of incapacity
  - Alcohol or other drugs
  - Mental/cognitive impairment
  - Injury
  - Sleep

Source: USG Title IX New Member Hearing Panelist Training

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## Incapacitation Analysis

- If the Complainant was not incapacitated, move on to the 3<sup>rd</sup> question.
- If the Complainant was incapacitated, but:
  - The Respondent did not know it = analysis fails. Move on to the 3<sup>rd</sup> question.
  - The Respondent should not have know it = analysis fails. Move on to the 3<sup>rd</sup> question.
- If the Complainant was incapacitated, and:
  - The Respondent actually knew it = violation of policy
  - The Respondent should have known it = violation policy

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## Consent- Questions #3 and #4

- **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
- No means "No". Silence means does not equal permission.
- Consent must be given prior to or contemporaneously with the sexual activity.
- Consent can be withdrawn at any time. It has to be clearly communicated.

Source: USG Title IX New Member Hearing Panelist Training

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## Advisor's Role and Responsibility

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### Title IX Advisors

- Parties have a right to an advisor of their choice that can provide advice, counsel, and support
  - FVSU will provide party with an advisor if party does not have their own
- Advisor may accompany party to all meetings and hearings
- All communication will be between the institution and the party
  - Shall be provided a copy of the initial investigation report and directly related information
  - May be provided a copy of all other communication with the party's permission
- May not actively participate in the process
  - Perform cross examination of other party and other witnesses

### Sexual Misconduct Advisors

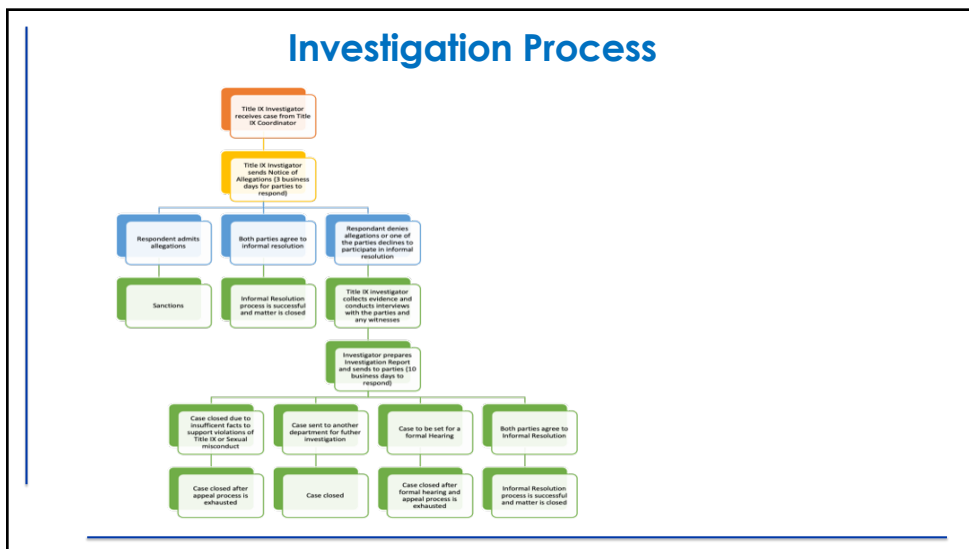
- Parties have a right to an advisor of their choice that can provide advice, counsel, and support
  - FVSU is not required to provide party with an advisor if party does not have their own
- Advisor may accompany party to all meetings and hearings
- May not actively participate in the process
- All communication will be between the institution and the party
  - With the party's permission, the advisor may be provided a copy of all communications.

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# Hearing Process

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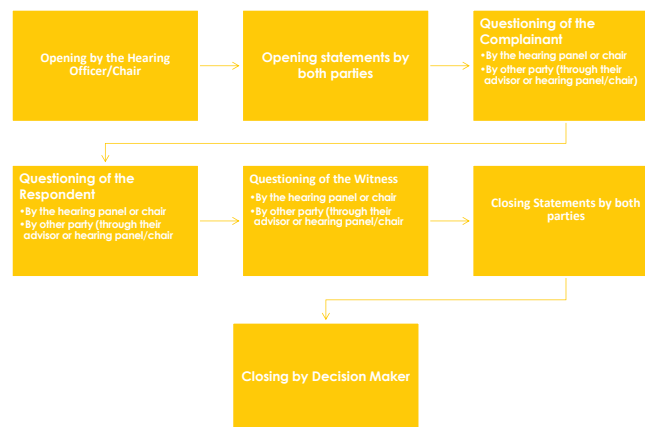
## Live Hearing §106.45(b)(6)

- Final determinations of responsibility and sanctions are made by decision-makers (that is YOU)
  - CANNOT be the Title IX Coordinator or assigned investigator
- Institutions can establish rules of decorum

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## Typical Order of a Hearing



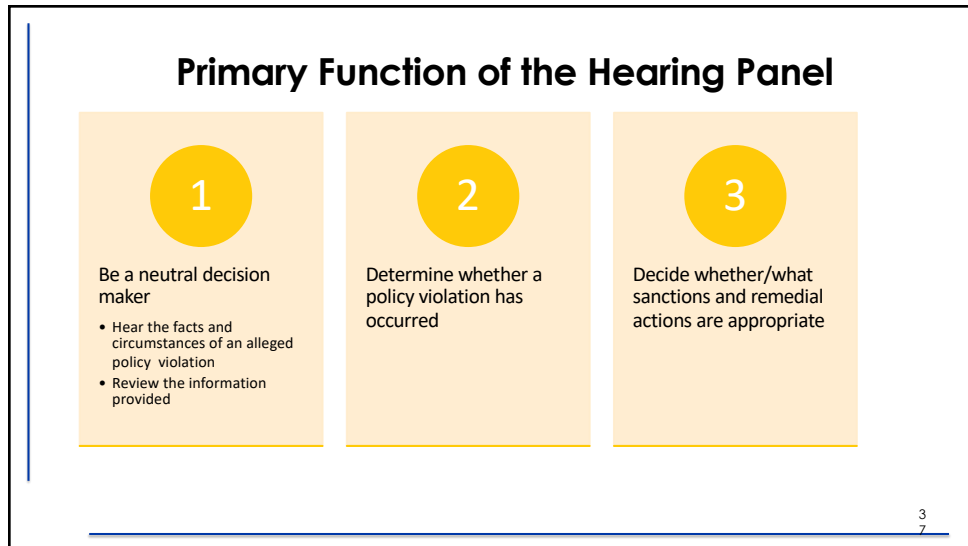
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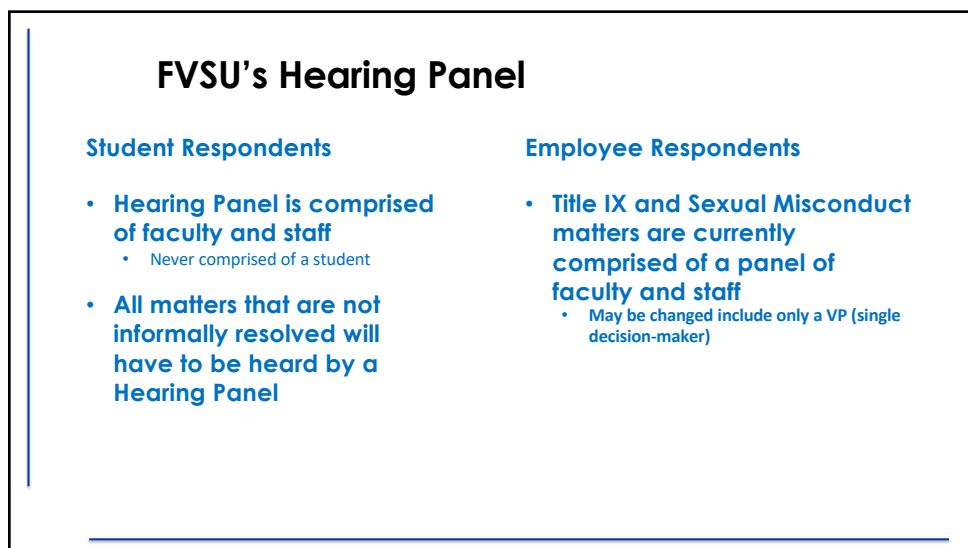
Title IX Hearings	Sexual Misconduct Hearings
<ul style="list-style-type: none"><li>• Advisors required to conduct cross examination</li><li>• Relevancy determinations must be made before a question may be answered</li><li>• If an individual does not submit to cross examination panelists shall not draw an adverse inference against the party or witness based solely on their absence from the hearing</li><li>• Questions and evidence about the Complainant's sexual predisposition or prior sexual behavior, shall be deemed irrelevant, unless such questions and evidence are offered to prove that someone other than the Respondent committed the alleged conduct or consent between the parties during the alleged incident.</li></ul>	<ul style="list-style-type: none"><li>• Hearing Panelist or Officer performs all questioning<ul style="list-style-type: none"><li>• Questions are submitted beforehand</li></ul></li><li>• Relevancy determinations are made before and during the hearing</li><li>• Panelists permitted to rely on statements provided during the hearing and in the investigation report</li></ul>



## Hearing Panel Roles & Responsibilities



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## Hearing Panel Roles

- Hearing Panel is comprised of three people
- Chair
  - Hearing Officer
  - Designated leader of the Hearing
    - May make determinations of relevancy
- Other Panel Members
  - Active listening participants who come to their own logical and reasoned decision
  - Hearing Officer may confer with the panel members

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## Evaluation of Evidence and Decision-Making Skills

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## Burden of Proof

The burden of proof and burden of gathering evidence is on FVSU.

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## 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)

Source: USG Title IX New Member Hearing Panelist Training

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## Weighing Evidence

- Weighing evidence means assessing the impact of the information
- The following factors impact the assessment:
  - Relevance
  - Reliability
  - Persuasiveness
  - Bias

Source: USG Title IX New Member Hearing Panelist Training

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## Understanding Evidence

- Relevant evidence= any information offered to prove or disprove a fact at issue or what took place.
  - The evidence must be credible.
  - Formal rules of evidence do not apply.
- Certain types of evidence may be relevant to the credibility of the witness, but not to the charges
- Decision maker will make the determination of if evidence is relevant
  - [I]t is sufficient, for example, for a decision-maker to explain that a question is irrelevant because the question calls for prior sexual behavior information without meeting one of the two exceptions, or because the question asks about a detail that is not probative of any material fact concerning the allegations.” – 85 Fed. Reg. 30343 (May 19, 2020)

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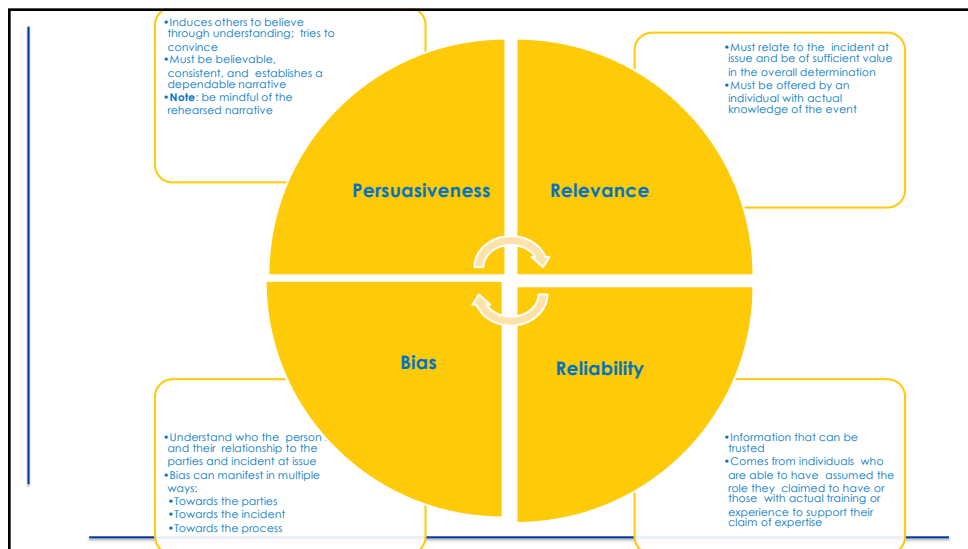
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## Credibility

- “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
- Potential Assessment Factors
  - Demeanor
  - Non-cooperation
  - Logic/Consistency
  - Corroborating evidence

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## 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

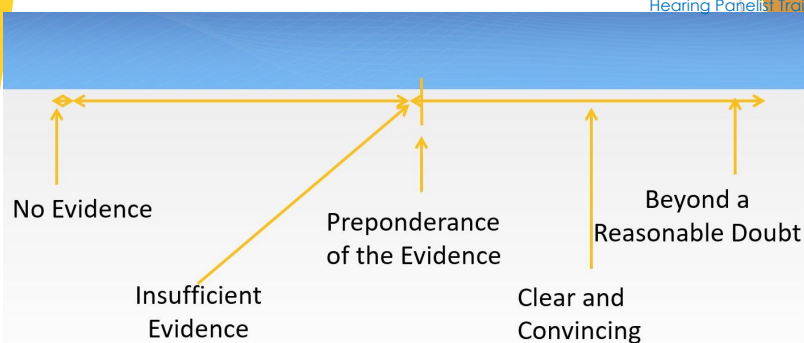
Source: USG Title IX New Member Hearing Panelist Training

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## Understanding Evidence Thresholds

Source: USG Title IX New Member Hearing Panelist Training



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<b>Determining Appropriate Sanctions</b>	<b>Understanding Substantial Evidence</b>
<p>“Must be made as a proportionate response to the violation.”</p>	<p>Required to suspend or expel a student</p>
<p>Should prevent the recurrence of sexual misconduct</p>	<p>Panel <b>MUST</b> be able to clearly state what evidence exists that a reasonable person might accept to support their decision</p>
<p>Should remedy the effects of the sexual misconduct</p>	

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<b>Common Student Sanctions</b>	
<ul style="list-style-type: none"> <li>• <b>Service Hours</b></li> <li>• <b>Online Education</b></li> <li>• <b>Alcohol &amp; Drug Assessment and Counseling</b></li> <li>• <b>Discretionary Sanctions</b></li> <li>• <b>Suspension*</b></li> <li>• <b>Expulsion*</b></li> </ul>	<ul style="list-style-type: none"> <li>• <b>Warning</b></li> <li>• <b>Probation</b></li> <li>• <b>Loss of Privileges</b></li> <li>• <b>Counseling</b></li> <li>• <b>No Contact Directives</b></li> <li>• <b>Residence Hall Relocation, Suspension or Expulsion</b></li> <li>• <b>Limited Access to Campus</b></li> </ul>
<p>*Must be supported by substantial evidence at the hearing</p>	

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## 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

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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

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## Additional Considerations

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## Appeals

- 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
  - Students appeal to Vice President of Student Affairs

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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
  - As panelists you should be familiar with any technology utilized
    - Student Conduct Coordinator handles the logistics of the hearing
- 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

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## 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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## **Resources**

- FVSU Student Sexual Misconduct Policy
- USG Title IX New Member Hearing Panelist Training -2021
- Title IX

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**Title IX Office  
Contact  
information**

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**478-825-4284 or 478-662-6901**

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