

# Title IX Conduct Panel Training





# Training Areas of Focus

- Training Goals:
  - Understand legal changes
  - Understand distinctions from the regular conduct panel process
  - Emphasize the need for impartial investigations and adjudications
- Topics:
  - Legal context of the federal regulations
  - Key definitions
  - Hearing process and logistics
  - Live cross examination and credibility
  - Relevancy determinations
  - Role of advisors
  - Witness involvement
  - Written decision requirement

- Title IX requires (20 USC § 1681)

“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 . . .”

- Implemented through 2020 Title IX DOE Federal regulations (i.e., “regs”)

- Additional guidance documents provided by the DOE to help explain regs
- Key guidance:
  - 2021 Notice of Interpretation on Discrimination Based on Sexual Orientation and Gender Identity in Light of *Bostock v. Clayton County*
  - 2001 Revised Sexual Harassment Guidance
  - 1997 Sexual Harassment Guidance
  - Additional Dear Colleague topic letters -- Bullying & Hazing

- Prohibited Title IX conduct:
  - Sexual Harassment
  - Sexual Assault
  - Dating Violence
  - Domestic Violence
  - Stalking
- Must occur:
  - On campus
  - Off campus where TCU has substantial control over respondent and the conduct
  - Off campus in buildings owned by or controlled by a recognized student organization



# Big Picture Considerations

- Sexual harassment definition
- Required investigations
- Live hearing
- Cross examination by party's advisor only
- Informal resolutions
- Preponderance of the evidence standard
- Formal complaint initiation





# Key Definitions

- Sexual Harassment ( § 106.44(a)):
  - Unwelcome conduct that a reasonable person determines is so severe, pervasive, **and** objectively offensive that it effectively denies a student or employee equal access to TCU’s education program or activity.
  - *Quid pro quo* (“this for that”) which is conditioning some benefit in exchange for unwelcomed sexual conduct
  - Sexual assault
  - Dating violence
  - Stalking

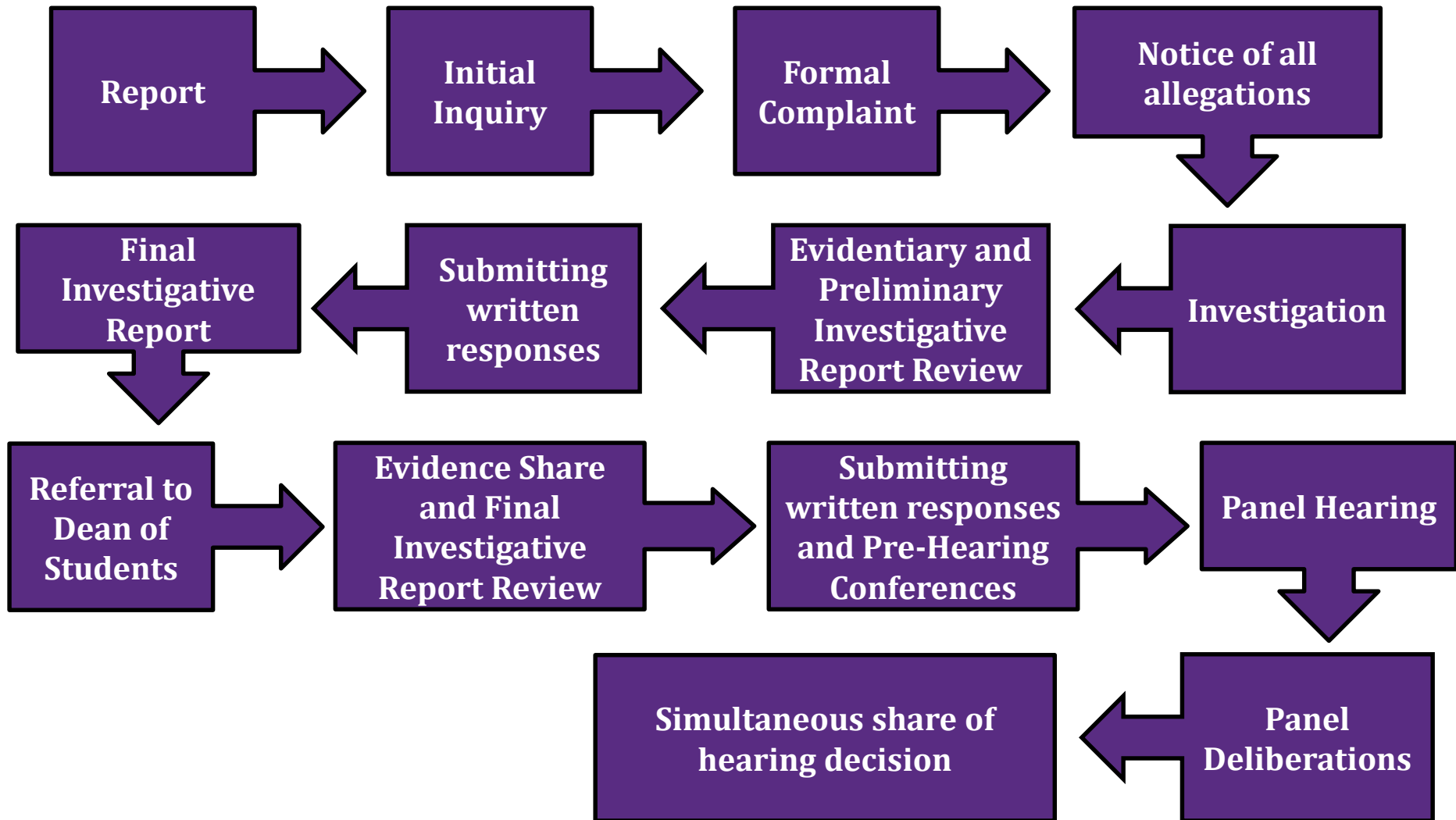
- Education Program or Activity  
( § 106.44(a)):
  - Locations, events, or circumstances over which TCU exercised substantial control over both the respondent and the context in which the sexual harassment occurs
  - Also includes buildings owned or controlled by a student organization officially recognized by TCU



- **Relevant:**
  - Black’s Law Dictionary: “Logically connected and tending to prove or disprove a matter in issue; having probative value – that is, rationally tending to persuade people of the probability or possibility of some alleged fact”
- **Preponderance of the Evidence:**
  - Black’s Law Dictionary: “The greater weight of the evidence; superior evidentiary weight, that though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue than the other”
  - Preamble to the regs: “A preponderance of the evidence standard of evidence is understood to mean concluding that a fact is more likely than not to be true.”



# Resolution Process Overview





# Title IX Hearing Panel Highlights

- Hearing logistics
  - Live
  - Recorded or transcript
  - Separate rooms permitted
  - Use of technology permitted
  - Confidentiality is essential



# Title IX Hearing Panel Highlights

- Flow of the hearing
  - Resolution of party evidentiary responses/concerns
  - Opening statements
  - Direct and cross examination of parties
  - Direct and cross examination of witnesses
  - Closing statements
  - Parties and advisors excused
  - Panel deliberation



# Title IX Hearing Panel Topics

- Cross examination
  - Must be conducted live
  - Conducted by advisors
  - Method for discerning truth
  - Assists with testing credibility
  - No inference regarding responsibility based solely on party's refusal to answer questions (34 C.F.R. § 106.45(b)(6)(i))



# Title IX Hearing Panel Topics

- Relevancy
  - “Only relevant cross-examination and other questions may be asked of a party or witness.” (34 C.F.R. § 106.45(b)(6)(i))
  - Panel Chair relevancy determination required for every question
  - Panel Chair must provide rationale
  - All relevant questions are permissible during cross-examination



# Title IX Hearing Panel Topics

- Relevancy determination considerations
  - Does it help determine if an allegation is more likely to be true than not true?
  - This is not a matter of legal, evidentiary standards
  - Must include inculpatory and exculpatory evidence
  - Evidence of prior or subsequent misconduct is not prohibited
  - Reviewing for “consistency, accuracy, memory, and credibility”
  - Be mindful of “implausibility, inconsistency, unreliability, ulterior motives, and lack of credibility”





# Title IX Hearing Panel Topics

- Irrelevant information
  - Information which is protected by a legally recognized privilege, unless waived (34 C.F.R. § 106.45(b)(1)(x))
  - Treatment records of a party, unless voluntarily waived in writing (34 C.F.R. § 106.45(b)(5)(i))



# Title IX Hearing Panel Topics

- Irrelevant information (cont.)
  - **Complainant**'s prior sexual history
  - BUT Complainant's prior sexual history is permitted if (34 C.F.R. § 106.45(b)(6)(i)):
    - Offered to prove someone else committed the alleged conduct
    - Offered to prove consent, and the questions or evidence include specific incidents of complainant's prior sexual behavior with respect to the respondent



# Title IX Hearing Panel Topics

- Direct panel questioning
  - Permitted to ensure consideration of all relevant evidence
  - Utilize neutral, open-ended questions:
    - Tell me more about that . . .
    - Could you describe for me what happened on the night of September 5<sup>th</sup> in your own words. . .
    - Help me understand . . .
  - Discuss prior to hearing



# Title IX Hearing Panel Topics

- Role of advisors
  - Conduct cross examination of opposing party and of witnesses
  - Parties can choose their own advisor
  - TCU required to provide an advisor at no cost to party
  - Can be an attorney
  - Advisor will be assigned to a party if they attend hearing alone
  - Can challenge relevancy determinations by Panel Chair



# Title IX Hearing Panel Topics

- Absent party
  - From pre-hearing evidentiary review process
  - From the hearing
  - Absent witness
  - No inference regarding responsibility permitted based solely on a party's absence (34 C.F.R. § 106.45(b)(6)(i))
  - Role of an advisor when their party is absent from the hearing
  - Neither the party nor their advisor appear at the hearing



## Title IX Hearing Panel Topics

- Making a determination
  - Presume respondent is not responsible
  - Keep an open mind
  - Consider relevant evidence only
  - Focus on evidence credibility and weight
  - Ensure no bias or prejudice
  - Reasonable inferences permissible
  - Utilize the preponderance of the evidence standard
  - Evidence, not impact



# Title IX Hearing Panel Topics

- Written hearing decision
  - Clear and unambiguous
  - Tell the story of the case
  - Neutral tone
  - Clear party references
  - Simultaneous sharing





# Title IX Hearing Panel Topics

- Written deliberation report must include (34 C.F.R. § 106.45(b)(7)(ii)):
  - Identification of the allegations
  - Description of procedural steps in case
  - Panel conclusions regarding the applicability of TCU Code of Conduct to the case facts
  - Determination of responsibility for each allegation with rationale
  - Imposed outcomes (sanctions)
  - Whether remedies will be provided



# Title IX Hearing Panel Topics

- Written deliberation report must include (34 C.F.R. § 106.45(b)(7)(ii)) (cont.):
  - Factual findings that support responsibility determination and all panel conclusions
  - Panel excluded information with rationale
  - Appeal procedures and bases

- Panel considerations
  - Hearing decorum
  - Professionalism
  - Objectivity & Neutrality
  - Evidentiary standard
  - Consider relevant evidence only
  - Carefully consider direct questions



# Final Reminders

- What evidence can the panel consider?
  - All materials shared with the panel prior to the hearing...
    - **Minus** any evidence excluded by Panel Chair at the beginning of or during the hearing
  - Party or witness statements given during the live hearing
  - Party or witness answers given to direct panel questions during the live hearing
  - Party or witness answers given to cross examination questions during the live hearing
  - Other evidence
- Remember: No inference regarding responsibility based solely on party's refusal to answer questions (34 C.F.R. § 106.45(b)(6)(i))

Questions?