Title IX Appeal Officer Training

October 9, 2020
How did we get here?
Within the actual knowledge of the TIXC or an official with the authority to institute corrective measures

Directed against a person in the United States

Within the educational program or activity

- Quid pro quo harassment by an employee
- Unwelcome conduct that is severe, pervasive, and objectively offensive denying access to the program or activity
- Sexual assault, stalking, dating violence, domestic violence

Title IX Response Obligation Arises: Supportive Measures, Triage
Response Obligations

Once the institution has **actual knowledge** the Title IX Coordinator **must**:

1. promptly contact the complainant to discuss the availability of supportive measures

2. consider the complainant’s wishes with respect to supportive measures,

3. inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and

4. explain to the complainant the process for filing a formal complaint.

§ 106.44(a)
§106.45 Grievance Process

Obligations Arise

Complainant is participating in, or attempting to participate in, your Programs or Activities at time of Formal Complaint

Formal Complaint from Complainant or TIXC
Formal Complaint

A Formal Complaint

(1) filed by a complainant or signed by the Title IX Coordinator,

(2) alleging sexual harassment against a respondent, and

(3) requesting that the recipient investigate the allegation of sexual harassment.

is required to initiate the grievance process.

§ 106.30
Overview of Formal Complaints and the requirements of §106.45

THE GRIEVANCE PROCESS
Outline of the Process

Notice of allegations → Investigation → Live Hearing & Determination → Appeal

Consolidation → Informal Resolution → Dismissals
Rights of the Parties

- Receive written notices (i.e. notice of allegations, notice of interviews & meetings)
- Be accompanied by an advisor of choice
- Discuss the allegations under investigation
- Present witnesses & evidence (inculpatory & exculpatory)

Source: 106.45(b)(5)
*Throughout the grievance process*
Investigation

The institution **must investigate** allegations of in a **Formal Complaint**

- *Remember: Formal Complaints request that the “recipient investigate the allegation of sexual harassment.”*

§ 106.30
Investigation

- All evidence gathered
- Evidence directly related to the allegations in the formal complaint
  - (Evidence sent to parties/advisors)
- Relevant evidence
  - (Evidence included in the Investigative Report)
The Hearing

• Live

• With Cross-Examination
  ▪ Advisor asks other party and witnesses relevant questions and follow-up questions, including those challenging credibility
  ▪ If a party or witness does not submit to cross-examination at the live hearing, then the decision-maker cannot rely on ANY statement of that party or witness in reaching a determination regarding responsibility

• Results in a written determination of responsibility
Relevance Determinations

**relevant** | \ 're-lə-vənt \ adj.

**a:** having significant and demonstrable bearing on the matter at hand

**b:** affording evidence tending to prove or disprove the matter at issue or under discussion

// relevant testimony
Relevance Determinations

- The following evidence is always considered “irrelevant” (or otherwise not admissible):
  - Any party’s medical, psychological, and similar treatment records without the party’s voluntary, written consent;
  - Any information protected by a legally recognized privilege without waiver;
  - Complainant’s sexual predisposition or prior sexual behavior (subject to two exceptions); and
  - Party or witness statements that have not been subjected to cross-examination at a live hearing.

85 FR 30293 n. 1147
Written Determination - Key Elements

1. Identification of the allegations alleged to constitute sexual harassment as defined in § 106.30;

2. The procedural steps taken from receipt of the formal complaint through the determination regarding responsibility;

3. Findings of fact supporting the determination;

4. Conclusions regarding the application of the recipient’s code of conduct to the facts;

5. The decision-maker’s rationale for the result of each allegation, including rationale for the determination regarding responsibility;

6. Any disciplinary sanctions the recipient imposes on the respondent, and whether the recipient will provide remedies to the complainant; and

7. Information regarding the appeals process. § 106.45(b)(7)(ii)
After the Hearing & Notice of Decision

APPEALS
Mandatory & Equal Appeal Rights

• Institutions must offer both parties an appeal from a determination regarding responsibility and from a dismissal of a formal complaint or any allegations therein (whether or not it is a mandatory or discretionary dismissal).

• Parties must have an equal opportunity to appeal §106.45(b)(8)(i)-(ii)
Requirements for Appeals

Requirements for Appeals:

• Notify the other party in writing when an appeal is filed and implement appeal procedures equally for both parties;

• Ensure that the decision-maker(s) for the appeal is not the same person as the decision-maker(s) that reached the determination regarding responsibility or dismissal, the investigator(s), or the Title IX Coordinator;

• Ensure that the decision-maker(s) for the appeal complies with the standards set forth in paragraph (b)(1)(iii) of this section [re: bias & conflicts of interest];

• Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome [of the hearing];

• Issue a written decision describing the result of the appeal and the rationale for the result; and

• Provide the written decision simultaneously to both parties.

§106.45(b)(8)(iii)
Grounds for Appeal

• Mandatory bases for appeal:
  ▪ **Procedural irregularity** that affected the outcome of the matter;
  ▪ **New evidence** that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; and
  ▪ The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter.

• A recipient may offer additional bases (*CMU: sanctions imposed are disproportionate to the finding of responsibility*).

§ 106.45(b)(8)(i)-(ii)
Procedural Irregularity

Examples

• Failure to follow the § 106.45 grievance process

• Erroneous relevance determination

• Failure to objectively evaluate all relevant evidence (including inculpatory & exculpatory evidence)
Dismissal of Formal Complaints

Example - Dismissal because the misconduct alleged does not meet the definition of sexual harassment. Complainant might appeal that dismissal, asserting:

• newly discovered evidence demonstrates that the misconduct in fact does meet the definition of sexual harassment, or

• procedural irregularity on the basis that the alleged conduct in fact does meet the definition of sexual harassment and thus mandatory dismissal was inappropriate
The Analysis

• First, do sufficient grounds exist for at least one basis of appeal (i.e., procedural irregularity, new evidence, bias/conflict, disproportionate sanction)?

• Second, is there merit to the appeal (e.g. there was a procedural irregularity)?

• Third, if yes, was the outcome affected (or, if new evidence, could it have been)?
Written Determination

• Appeal Officer must issue a written decision describing the result of the appeal and the rationale for the result
  ▪ The regulations require “reasoned written decisions describing the appeal results.” 85 FR 30397.

• Written decision must be issued simultaneously to both parties.

§106.45(b)(8)(iii)