

Leading and Strategizing as a New Title IX Coordinator Bootcamp

Sexual Harassment Grievance Process – Part II: From Investigation to Appeals

Session Four – Wednesday, February 23, 2022

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Disclaimer

The information provided in this training does not, and is not intended to, constitute legal advice; instead, all information, content, and materials available during this training are for training and general informational purposes only.

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CHAT

Refresh & Reset

Please use your “raise hand” emoji to be called upon or use the Chat to respond:

What is one valuable lesson that most resonated with you from our last session or what is one thing you’re hoping to learn today?

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IMPRESSIONS

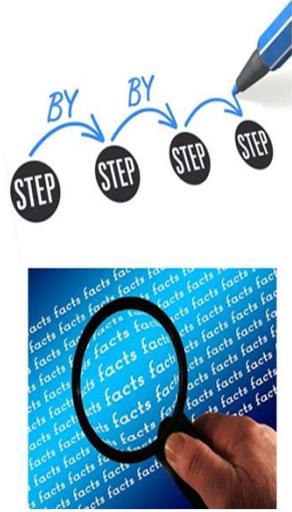
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The Investigative Process

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10-Step Investigative Process §106.45(b)(5)



1. Title IX Coordinator assigns an investigator to investigate the allegations.
2. Notice of Allegations sent to Parties. §106.45(b)(2)
3. Investigation begins

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CHAT



What does it mean to "investigate?"

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RESOURCE

Samples

- Pre-Planning Checklist**
- Investigation Timeline**
- Communication Log**
- Formal Investigation Checklist**

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4. Investigator requests and conducts interviews with the complainant, respondent, and witnesses.
 - Interviews may be conducted virtually!
5. Investigator requests and obtains physical evidence.
6. The parties have equal opportunity to present witnesses and evidence.
 - The investigator may independently identify and interview witnesses and obtain evidence other than offered by the parties.

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7. The investigator creates the "Investigative File," which contains the information "directly related to" the allegations raised in the formal complaint. §106.45(b)(5)(vi)
8. "Investigative File" sent to parties and their advisor for review and response (provide at least 10 days).
 - Party written responses are attached to the Investigative File and shared with other party and their advisor.

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9. Investigator drafts an "Investigative Report" that fairly summarizes the relevant evidence and sends it to the parties and their advisors for review and response (provide at least 10 days).
 - Parties may submit a written response to the Investigative Report, which will be shared with the other party and their advisor and attached to the Investigative Report. §106.45(b)(5)(vii).
10. Investigator returns the case to the Title IX Coordinator for next steps.

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■ Ongoing Assessment Considerations

- Jurisdiction
 - Dismissal (Mandatory or Permissive)
- Emergency Removal
- Informal Resolution
- Support Measures
- Case Updates

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■ Investigator Testimony

Investigator likely presents and/or testifies at the Hearing.



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■ The Live-Hearing §106.45(b)(6)

The Final Regulations require a live-hearing that provides...

- The decision-maker(s) the opportunity to ask questions of the parties and witnesses, and
- An opportunity for each party's advisor to cross-examine the other party and witnesses...

...before a finding of responsibility or non-responsibility is made, and any disciplinary sanctions issued by the institution. §106.45(b)(6), (7)

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■ 10-Step Hearing Process

1. Assignment of hearing facilitator.
2. Appointment of decision-maker(s).



Hearing Panel



Single Hearing Officer

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3. Notice of Hearing. At least 10 days before the hearing, the parties will receive a Notice of Hearing that includes:
 - a. The date, time, and location of the hearing
 - b. Purpose of the hearing
 - c. Requirement of an advisor to conduct cross-examination.
 - d. The participants (including the witnesses who will be made available to testify) in the hearing.
 - e. The names of the members of the Hearing Panel.
 - f. The Hearing Rules and Procedures,
 - g. Inform/remind about the availability of informal resolution (if applicable and available)
 - h. Potential or range of disciplinary sanctions/remedies that could result from a determination of responsibility

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4. Advisors required. Each party must have an advisor, who may or may not be an attorney, at the hearing to conduct cross-examination on behalf of the party. §106.45(b)(2)(B).

- School may not limit the choice or presence of an advisor for either party. §106.45(b)(2)(B).
- If a party does not choose an advisor, the institution must provide an advisor for the party, free of charge, throughout the hearing process, who may or may not be an attorney.
- May impose restrictions on advisor role.

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5. Decision-Maker(s) Preparation. The decision-maker(s) will review the Investigative File and Investigative Report before the hearing.
6. Witness Notice to Testify. Witnesses should receive a written invitation to testify hearing and provide a date/time for their testimony.

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7. Hearing Logistics.

- *Live Hearing*. The hearing must be live. Live hearings can occur with parties in same room, separate rooms or separate physical or geographic locations. §106.45(b)(6)(i)
- *Technology*. Technology used must enable the parties and decisionmaker(s) to simultaneously see and hear one another and any testifying witnesses. §106.45(b)(6)(i)
- *Audio Recording*. Must record the hearing and provide the recording or transcript to the parties to review. §106.45(b)(6)(i)

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8. The Live-Hearing. The decision-maker(s) facilitate the live-hearing in accordance with the institution's Hearing Rules & Procedures (that comply with the 2020 Final Regulations and institution's policy), such as:
- Cross-examination conducted directly, orally, and in real time by Advisors and never a party.
 - Ensuring Rape Shield protections and other legally recognized privileges (unless waived)
 - Adherence to *Victims' Rights Law Center, et al v. Cardona* and OCR's August 24, 2021, DCL instead of §106.45(b)(6)(i).

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9. After the Hearing. Following the close of the decision-maker(s) determines responsibility using applicable standard of proof.
- The decision-maker(s) draft a written decision supporting responsibility determination.
 - If a finding of responsibility, the decision-maker(s) may issue disciplinary sanctions (respondent) and remedies (complainant).
 - Notice of Outcome contemporaneously delivered to the parties.

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10. Notice of Outcome:

- a. Identification of the allegations potentially constituting sexual harassment under §106.30.
- b. A description of the procedural steps taken from the receipt of the formal complaint through the responsibility determination.
- c. Findings of fact supporting the determination.
- d. Conclusions regarding the application of the policy to the facts.
- e. A statement of, and rationale for, the result as to each allegation.
- f. Disciplinary sanctions/remedies (if applicable).
- g. The procedures and permissible bases for appeal.

§106.45(b)(7)(ii)(A)-(F)

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QUESTIONS?

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■ Appeals §106.45(b)(8), (9)

An institution must offer both parties an appeal from:

- A determination regarding responsibility.
- A dismissal of part or all of a formal complaint.

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■ Grounds for Appeal

- a. Procedural irregularity that affected the outcome;
- b. New evidence that was not reasonably available at the time the dismissal or determination regarding responsibility was made and that could affect the outcome; and/or
- c. The Title IX Coordinator, investigator(s), and/or hearing panelists had a conflict of interest or bias for or against complainants or respondents generally or the individual Complainant or Respondent that affected the outcome.

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■ 5-Step Appeal Process

1. Written Notice of Appeal. An institution must notify the parties in writing when an appeal is filed.
2. Implement appeal procedures equally for both parties.
3. Ensure that the decision-maker(s) for the appeal is trained per §106.45(b)(1)(iii) and impartial (i.e., no prior involvement with the case).

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4. Provide both parties a reasonable, equal opportunity to submit a written statement in support of or challenging the responsibility determination or dismissal;
5. Issue a written decision with the rationale for the decision and simultaneously deliver it to the parties.

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■ **Post – Determination** §106.45(b)(7)(iv)

- Title IX Coordinator is responsible for effective implementation of any remedies. §106.45(b)(7)(iv).
- Title IX Coordinator coordinates the implementation of a disciplinary sanction (if applicable).
- Title IX Coordinator implements on-going (non-punitive) supportive measures, as necessary.

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 A graphic with a background of overlapping papers and folders. On the left, a dark blue square contains the text 'GROUP DISCUSSION' and a white speech bubble icon. To the right, a white rectangle contains the text 'Best Practices in Implementation of Sanctions and Remedies'.

**GROUP
DISCUSSION**

**Best Practices in
Implementation
of Sanctions and
Remedies**

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